DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 South Potomac Street Centennial, Colorado 80112	
PEOPLE OF THE STATE OF COLORADO **vs.** **SIR MARIO OWENS**	▲ COURT USE ONLY ▲ Case Number: 06CR705 Div: SR
P.C. ORDER (SO) No. 18 **Re: SOPC-163**	

THIS MATTER comes before the court on SOPC-163, Sir Mario Owens's Petition pursuant to § 16-12-201, *et seq.*, C.R.S., and Crim. P. 32.2.

Attached to this Order are four appendices.[1] Appendix One is an alphabetized list of persons named in this Order together with a short description of each person's involvement in this case. Appendix Two is a timeline of important events. Appendix Three is a list of abbreviations used in this Order. Appendix Four is the Crim. P. 35(c) Order entered in *People v. Sir Mario Owens*, Arapahoe County case 05CR2945.

[1] Due to the complexity of this matter, both in terms of the number of persons involved as well as the length of time this case has been pending, the court encourages the reader to utilize the appendices.

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I. Introduction

A. Factual Background

Around dusk on July 4, 2004, Sir Mario Owens (Owens) shot and killed Gregory Vann (Vann). Robert Ray (Ray) shot and injured Elvin Bell (Bell) and Javad Marshall-Fields (Marshall-Fields). The shootings occurred in and near a parking lot at Lowry Park in Aurora.[2] People had gathered at the park for a barbeque and rap contest promoted and sponsored by Vann and Marshall-Fields. Vann and Bell were brothers, and Vann and Marshall-Fields were good friends. Vann died at the scene. Bell and Marshall-Fields were wounded and taken to area hospitals.

An Aurora Police Department (APD) officer interviewed Bell, who described Vann's shooter as a 6' tall, light-skinned black male, 19-20 years old, wearing a white shirt, jean shorts, and a white hat. Bell described the getaway driver as a darker-skinned black male, 20 years old, wearing a white t-shirt. Detective Thomas Welton (Welton) interviewed Marshall-Fields, who described Vann's shooter as 6' 1", 180 lbs. with braids and wearing a white shirt, jean shorts, and a white hat. He did not provide a description of the getaway driver. According to Bell and Marshall-Fields, the shooter fled in a gold-colored Suburban, which was driven by someone else.

At the time, Ray was married to Latoya Sailor (Sailor) who, along with other young women, went to the barbeque and rap contest. Ray arrived later. He was drunk, driving his Suburban on the lawn, playing rap music on his car radio so

[2] A more detailed description of the Lowry Park facts can be found in the Crim. P. 35(c) order in Owens's Lowry Park case, Arapahoe County case 05CR2945, which is attached to this Order as Appendix Four.

loudly as to interfere with the rap contest, and generally interacting with people in offensive and obnoxious ways.

Sailor called Owens and asked him to come to the park. She told him that Ray was drunk, "acting a fool," and she feared that the crowd was about to physically attack him. Sailor believed that Owens – Ray's closest friend – would protect Ray.

After the rap contest ended, Sailor and the other young women attempted to drive out of the parking lot. Their path was impeded by pedestrians who were standing around in the parking lot. The pedestrians were asked to move and the situation escalated. Ray got into a verbal confrontation with several people. This exchange, coupled with Ray's earlier conduct, caused tempers to flare. Some in the crowd flipped their middle fingers at Ray. Many were loud and confrontational. Ray continued to verbally threaten people, and he and Owens lifted their shirts to show the guns in their waistbands.

Shortly before the shootings, Sailor and the young women drove out of the park. Owens then shot and killed Vann. Vann was shot twice. The second shot was delivered after Vann had fallen to the ground. Owens then ran to Ray's Suburban to escape, but Marshall-Fields, Bell, and possibly others attempted to detain him. Ray shot and wounded both Bell and Marshall-Fields as they tried to prevent Owens from leaving with Ray in the Suburban. Ray and Owens then left hurriedly in the Suburban, drove over the lawn, and possibly had a passing, minor collision with another vehicle.

Police arrived shortly thereafter. The scene was chaotic, hard to control, and exacerbated because Aurora officers were trying to identify possible witnesses while Denver officers were trying to clear the park. The police received minimal cooperation from the people who were present. Most refused to talk to the police.

Many were hostile and insulting. Some even had physical altercations with the police. No one at the scene identified either shooter by name. But some of the people present spoke to the police, and Jeremy Green (Green) accompanied them to their station where he was interviewed.

After she left the park, Sailor found Ray and Owens in the home she and Ray shared. According to Sailor, Ray was very upset with Owens over the shootings. Ray anticipated that he would be quickly identified as the driver of the Suburban. In an emotional state, Ray berated Owens, indicating that it was not necessary to shoot Vann because those who were closing in on Ray and Owens were not armed.

Later that night, Sailor, Ray, and Owens cleaned blood off the Suburban and hid the Suburban in a garage belonging to Ray's sister-in-law, Brandi Taylor (B. Taylor). After pouring bleach on the clothes worn by Ray and Owens, Sailor disposed of the clothes by throwing them into one or more dumpsters. Ray directed Percy Carter, Sr. (Carter, Sr.) to dispose of the guns that he and Owens used that night. Owens cut off his braids in order to change his appearance. Carter Sr. and his girlfriend rented two motel rooms. Ray, Sailor, Owens, and Owens's girlfriend, Cashmier Jones (Jones), spent the night in the motel rooms that had been registered to Carter, Sr. and his girlfriend. The next day, the four moved to the home of Ray's other sister-in-law and stayed there for a couple of days. Then Owens and Jones drove to Shreveport, Louisiana, where they stayed with Owens's relatives. Owens was from Shreveport and had a large, extended family in the area. Owens remained in Shreveport until late fall 2004. The guns, clothing, and Suburban were never recovered.

Askari Martin (A. Martin) surfaced as an eyewitness when he returned to Lowry Park on the morning of July 5 to retrieve his vehicle. While speaking with

a detective, he identified Ray as the driver of the Suburban. On July 13, Marshall-Fields identified Ray in a photo lineup, and on July 20, the prosecution charged Ray as an accessory to Vann's murder. Ray posted a $25,000 bond and was released.

The prosecution provided discovery to Ray's attorney. Ray obtained a copy of the discovery from his attorney. Ray, Owens, and Sailor reviewed the discovery and identified Marshall-Fields and A. Martin as the only witnesses who could identify Ray as the driver of the Suburban. According to the discovery, the identity of the person who killed Vann was unknown. Owens and Ray viewed Marshall-Fields and A. Martin as snitches because of their cooperation with the police. They resolved to stop the witnesses from testifying against Ray.

The court originally scheduled Ray's jury trial for April 25, 2005, and a pretrial motions hearing for February 24, 2005. The prosecution subpoenaed Marshall-Fields and A. Martin for the motions hearing. While waiting for the hearing to start, both Marshall-Fields and A. Martin were subjected to intense staring by Ray and people who had accompanied him to court. Owens, who had not yet been identified, did not come to court. Due to the continuance of the motions hearing, a new trial date was set for June 27.

A. Martin was concerned for his safety if he testified against Ray. So after the February 24 hearing, he sought out Ray in the courthouse parking lot and promised he would not appear for trial. Prior to the February 24 motions hearing, Ray had solicited Jamar Johnson (Johnson) to kill both Marshall-Fields and A. Martin for $10,000. Johnson knew Ray had the capability to pay because Ray was running a successful cocaine distribution ring. After the encounter with A. Martin in the courthouse parking lot, Ray told Johnson he only needed Marshall-Fields killed. Johnson never accepted or rejected Ray's offer.

Marshall-Fields recovered from his wounds and returned to Colorado State University in the fall of 2004 to complete his senior year. At some point during the second semester, Ray or one of his associates warned Marshall-Fields that he should not testify. During the same time period, Sailor saw Marshall-Fields at a club in Denver. Sailor later reported this to Owens who admonished her for not alerting either Ray or him immediately because they were trying to determine where Marshall-Fields lived.

After his graduation in May 2005, Marshall-Fields lived with Wolfe in Aurora and worked at a moving company with his friend, Brent Harrison (Harrison).

On Friday, June 17, 2005, the prosecution and defense announced that they were ready for the June 27 trial in Ray's Lowry Park case. The next day, Marshall-Fields went for a drink with his friends, Tom Goodish (Goodish) and Harrison. Marshall-Fields was visibly nervous. When his friends asked why, he said he was very worried about Ray and the upcoming trial. Goodish described Marshall-Fields's behavior as almost paranoid. Marshall-Fields had dinner later that evening with his girlfriend, Vivian Wolfe (Wolfe), and her parents at her parents' house. During dinner, Marshall-Fields was nervous and expressed concern about the ramifications of testifying. Everyone assured him it would soon be over and that everything would be okay.

On Sunday, June 19, 2005, Marshall-Fields and Harrison went to a Father's Day barbecue at a neighborhood park. Ray and his childhood friend from Chicago, Checados Todd (Todd), also attended the barbecue. Ray called Sailor while she was at the barbecue and asked her if Marshall-Fields was there. Sailor told Ray that Marshall-Fields was there. Sailor saw Perish Carter (Carter) in a parking lot near the park but never saw Ray, Owens, or Todd.

Ray and Marshall-Fields walked past each other while at the barbeque and Marshall-Fields became visibly nervous. He and Harrison immediately left in Marshall-Fields's late model, gold Monte Carlo and drove to Marshall-Fields's apartment.

Johnson was also at the barbecue and saw Ray walk past Marshall-Fields. Shortly thereafter, Ray approached Johnson and asked him to contact Marshall-Fields, *via* Harrison, and offer Marshall-Fields $10,000 not to testify. Again, Johnson neither accepted nor rejected the solicitation. During this conversation, Ray said that because no one had accepted his $10,000 offer to kill Marshall-Fields, he would have to do it himself.

Ray and Todd soon left the barbecue and drove to Marshall-Fields's apartment complex where they found the Monte Carlo. They then left the complex and drove to T's Barbershop. Ray had purchased the barbershop in early 2005 and used it as a distribution point for his cocaine business. Owens and Carter assisted with the cocaine business. Owens sold cocaine on a regular basis and also distributed it, per Ray's directions, to other sellers. Carter acted primarily as a street-seller.

At the barbershop, Ray changed cars and drove Todd, Owens, and Carter back to Marshall-Fields's apartment complex. They again located the Monte Carlo and watched it while discussing what Ray could do about the witness. They eventually left the complex without seeing Marshall-Fields.

That evening, Marshall-Fields, Wolfe, and Harrison, met a couple who lived in the same apartment complex at Gibby's Sports Bar, a neighborhood restaurant and bar. Marshall-Fields, Wolfe, and Harrison drove to Gibby's in the Monte Carlo.

Ray, Owens, Carter, and Todd, soon pulled into the Gibby's parking lot and spotted the Monte Carlo. They remained in Ray's car and discussed what to do. Ultimately, they decided to send Carter into Gibby's to convince Marshall-Fields not to testify. Gibby's surveillance video shows Carter approaching Marshall-Fields and then leaving. Upon returning to Ray's car, Carter reported that he had told Marshall-Fields that people were looking for him because he was a snitch. Carter then stated that he believed Marshall-Fields was still going to testify.

After being confronted by Carter, Marshall-Fields became highly agitated and told his friends they had to leave immediately. They followed him out into the parking lot where he told the group that a stranger had just threatened him. The group stood in the parking lot as Marshall-Fields frantically scanned the area looking for the man who had threatened him.

Marshall-Fields, Wolfe, Harrison, and the other couple returned to Marshall-Fields's apartment complex. Then they all got into Marshall-Fields's Monte Carlo. After dropping Harrison off at a bowling alley, the two couples drove to Alan Baxter's (Baxter) house because Marshall-Fields needed to talk to someone he trusted. He was still upset and told Baxter about the incident at Gibby's. Although he was frightened, Marshall-Fields indicated he still intended to testify at the trial.

Eventually, the two couples left Baxter's house and went home to their respective apartments. Later that night, Marshall-Fields called his only sister, Maisha Pollard (Pollard), in California and told her about the Gibby's incident. She described his fear as intense and suggested he come to California immediately. He declined and reiterated his intent to stay and testify.

The next day was Monday, June 20, 2005 – one week to the day before Ray's Lowry Park trial was scheduled to start. Marshall-Fields and Wolfe arranged to go to dinner with Harrison and Stephanie Kopp (Kopp) that evening.

Marshall-Fields and Wolfe went to Kopp's apartment intending to pick her up for dinner. At the last minute, Kopp decided to drive her own car and said she would follow Marshall-Fields. Marshall-Fields and Wolfe left Kopp's apartment intending to pick up Harrison outside of Harrison's apartment building. As it turned out, Kopp was not directly behind Marshall-Fields's car because she stopped at the dumpster to dispose of some trash.

After Marshall-Fields turned his Monte Carlo onto Dayton Street, Owens and Carter passed him on the left. Owens fired multiple rounds into the side of the car killing Marshall-Fields and Wolfe before fleeing. When she turned onto Dayton Street, Kopp saw Marshall-Fields's Monte Carlo stopped in the middle of the street at an odd angle. Kopp alerted Harrison on her cell phone. Harrison ran to the car and found it riddled with bullet holes.

After the shooting, Owens and Carter went to Carter, Sr.'s house where Ray was waiting with Todd. While en route, Owens used the cellphone walkie-talkie function to report to Ray that everything had been "tooken care of." The walkie-talkie function automatically activated the speaker function on Ray's cellphone and Todd overheard the report. After a short stay, Owens and Carter left Carter, Sr.'s house apparently to return the car used in the shooting. Carter had "rented" the car from a crack addict.

The next day, Ray, Owens, Carter, and Todd were at T's Barbershop. While there, they moved a duffle bag full of guns from the barbershop to an apartment just down the alley. The apartment belonged to Rickey Carter (R. Carter), a barber at the shop who also sold cocaine for Ray. R. Carter gave the group his key and did not accompany them. Later that day, R. Carter went to his apartment and discovered several guns in the duffle bag hidden in his closet. He later moved the guns to the trunk of his car. Not long after, R. Carter was arrested on a parole

violation. During his incarceration, an unknown man repeatedly called his girlfriend, Marlena Taylor, on R. Carter's cell phone and ordered her to return the "babies" immediately. R. Carter told her the guns were in his trunk and urged her to return them immediately. Marlena Taylor took the guns to a secluded location and left the guns in an empty camper shell. She then told the unidentified caller where the guns were located and waited to see who retrieved the guns. After waiting and not seeing anyone come to get the guns, she left. She later received a phone call indicating that the guns had been retrieved, and the calls stopped. The police never recovered the weapons used in the Dayton Street homicides.

Ray was arrested on an Adams County probation violation on June 26, 2005. Shortly after Ray's arrest, Owens once again went to live with his extended family in Shreveport, Louisiana. While he was in Louisiana, the police identified Owens as a shooter at Lowry Park and a warrant was issued for his arrest. On September 30, 2005, Owens was charged with the first-degree murder of Vann and the attempted murders of Bell and Marshall-Fields at Lowry Park.[3] On November 6, 2005, Owens was arrested in Shreveport on local charges and held on both the Colorado warrant and the local charges.

B. Procedural Background

Ray was charged with being an accessory to the first-degree murder of Vann at Lowry Park.[4] The jury trial in Ray's Lowry Park case started on October 16, 2006. On November 3, the jury found Ray guilty of a number of charges, including the attempted murders of Marshall-Fields and Bell. The jury acquitted him of the murder of Vann. On February 8, 2007, the court sentenced Ray to 108 years in prison. Ray appealed and his conviction was affirmed. *People v. Ray*, No.

[3] Arapahoe County case 05CR2945.
[4] Arapahoe County case 04CR1805.

07CA0561, 2015 WL 339316 (Colo. App. Jan. 22, 2015) (not published pursuant to C.A.R. 35(f)), *cert. granted*, No. 15SC268, 2016 WL 4631927 (Colo. Sept. 6, 2016).

The jury trial in Owens's Lowry Park case started on January 8, 2007. Daniel King (King), Laurie Rose Kepros (Kepros), and Jason Middleton (Middleton) represented Owens at trial. Following a 10-day jury trial, the jury found Owens guilty of, among other charges, the first-degree murder of Vann and, as a complicitor, the attempted murders of Marshall-Fields and Bell. On April 3, the court sentenced Owens to life without parole plus 64 years. Owens appealed and his convictions were affirmed in *People v. Owens*, No. 07CA0895, 2012 WL 3031232 (Colo. App. July 26, 2012) (not published pursuant to C.A.R. 35(f)), *cert. denied*, No. 12SC0810, 2013 WL 4426399 (Colo. Aug. 19, 2013). This court denied his Crim. P. 35(c) petition on May 16, 2017.

On March 8, 2006, a grand jury indicted Owens,[5] Ray,[6] and Carter[7] for the murders of Marshall-Fields and Wolfe, as well as numerous other charges, including conspiracy to commit murder. Shortly after the grand jury returned the indictments, the prosecution indicated it was considering seeking the death penalty against all three defendants. The court appointed the public defender to represent Owens and he was represented by the same team of attorneys who had represented him in his Lowry Park trial.

On February 20, 2007, the prosecution announced it was seeking the death penalty for Owens and Ray for the Dayton Street homicides. The court severed the cases for trial but kept Owens's and Ray's cases consolidated for pretrial motions.

[5] Arapahoe County case 06CR705.
[6] Arapahoe County case 06CR697.
[7] Arapahoe County case 06CR713.

Both Owens and Ray waived their right to a speedy trial because of the complexity of the anticipated motions. Throughout most of 2007, the court conducted joint pretrial motions hearings for Owens and Ray. On May 9, the prosecution announced it was not seeking the death penalty against Carter because he was diagnosed as mildly mentally retarded. All parties agreed Owens's trial would go first, followed by Ray's trial, and then Carter's trial.

The court originally scheduled Owens's trial to begin on January 14, 2008, but the trial was continued to March 3 at the request of Owens's trial team. The court denied Owens's February 4 motion to again continue the trial. On February 15, the court ruled that the jury would be composed of 12 jurors plus eight alternates. The first jury panel reported on March 5. The court and one attorney from each party greeted the panels. Owens did not attend the panel introductions. The court read a prepared statement to the panels, which included an introduction of the case, an explanation of the death penalty trial and sentencing process, and a request to complete the multi-page questionnaire. Both the introduction and the questionnaire were the product of hearings where both parties suggested changes.

Based on a review of the questionnaires, the prosecution and defense stipulated to excusing certain jurors for cause or hardship. Individual *voir dire* commenced on March 10 and continued to April 5. At the suggestion of the court and with the agreement of both parties, the individual *voir dire* sessions were closed to the public. Owens, his trial team, and the prosecutors were present for every individual juror questioning session. The court and attorneys examined hundreds of potential jurors, and 110 potential jurors were deemed qualified. General *voir dire* was held on April 7. After both parties exercised their peremptory challenges, 20 jurors were selected.

On April 8, the attorneys made their opening statements in the guilt phase of the trial.[8] They began presenting evidence the next day. The prosecution rested on May 1 and the defense rested on May 6. Owens elected not to testify. The court allowed the defense to reopen its case when the APD discovered it had been holding one of Ray's cars since shortly after the Dayton Street homicides. On May 9, the court instructed the jury, and the parties delivered their closing arguments. On May 14, the jury returned verdicts of guilty on all but one charge.

Phase one of the sentencing hearing, where the prosecution was required to prove at least one of the alleged aggravating factors beyond a reasonable doubt, began on May 19 with introductory instructions and the prosecution's opening statement. The five alleged statutory aggravating factors were:

1. prior conviction;
2. party to an agreement to kill;
3. avoid/prevent lawful arrest/prosecution;
4. kill two or more persons in same criminal episode; and
5. kill more than one person in more than one criminal episode.

The next day, May 20, phase one concluded with final instructions and the prosecution's closing argument. Owens's trial team did not make an opening statement or a closing argument. Later that day, the jury returned a verdict and

[8] Throughout this Order and consistent with the record, the court uses the following designations:
guilt phase: proceeding where Owens's guilt was determined;
sentencing hearing: proceeding where Owens's sentence was determined (includes all four steps of the capital sentencing process);
phase one of the sentencing hearing: covers step one (aggravating factors);
phase two of the sentencing hearing: covers steps two through four (mitigation, rebuttal to mitigation, weighing, aggravating circumstances, and rebuttal to aggravating circumstances).

found that the prosecution had proven all five of the alleged aggravating factors beyond a reasonable doubt.

Phase two of the sentencing hearing began on May 21 with introductory instructions and opening statements. During this phase, the defense presented mitigation evidence, and the prosecution presented both rebuttal to mitigation and aggravating circumstances evidence. This phase continued through June 12, when the defense introduced rebuttal evidence to the prosecution's aggravating circumstances evidence. Owens elected not to testify during the sentencing hearing and also elected not to exercise his right of allocution. Phase two concluded on June 13, a Friday, with final instructions and closing arguments. Late that afternoon, the jury started deliberations to weigh the mitigation against the aggravation and to decide whether to impose the death penalty. On June 16, the jury returned verdicts of death against Owens for the murders of Marshall-Fields and Wolfe.

The court originally set sentencing for September 2; however, on July 29, the court continued sentencing to December 8 and set a deadline of September 5 for filing post-trial motions. Owens did not file a motion for new trial by that date. On October 3, the parties stipulated that sentencing could go forward without a pre-sentence investigation report.

On November 13, the court granted the Office of Alternate Defense Counsel (OADC) access to the court file for a conflicts check. This was done so the court could appoint post-conviction counsel for Owens without delay if he elected to pursue post-conviction review with new counsel pursuant to C.R.S. § 16-12-205(1).

Prior to sentencing, the court held an evidentiary hearing on SO-297, in which Owens moved the court to hold the Unitary Review Statute (URS), § 16-12-

201 to 210, unconstitutional. With the exception of § 16-12-205(5),[9] the court denied the motion. The prosecution and defense agreed that § 16-12-205(5) was unconstitutional because it precluded the ineffectiveness of post-conviction counsel from being a basis for relief.

Due to some post-verdict investigation, the court allowed Owens to file a motion for new trial on December 5. After hearing arguments, the court denied the motion on December 8. That same day, the court sentenced Owens to death on count one, murder in the first degree (Marshall-Fields) and on count two, murder in the first degree (Wolfe). The sentences were entered after the court found that the jury's verdicts of death were not contrary to the weight of the evidence. C.R.S. § 18-1.3-1201(2)(c). The court also sentenced Owens to a total of 65 years in prison on associated charges and those sentences were imposed consecutive to each other and to counts one and two. The court immediately stayed the death sentences pursuant to Crim. P. 32.2(b)(1) and scheduled the URS advisement hearing for December 15.

In anticipation of the URS advisement hearing, the court appointed Alternate Defense Counsel (ADC) Patrick Ridley (Ridley) to act as advisory counsel and assist Owens with the various decisions he would have to make under the URS. To better prepare for the December 15 advisement hearing, Ridley requested, and was granted, access to the discovery and court record.

On December 15, the court began the advisement hearing pursuant to C.R.S. § 16-12-204(2) and advised Owens of the options available to him for pursuing both post-conviction relief and a direct appeal. The court also advised him of the time limitations applicable to both post-conviction and direct appeal proceedings.

[9] The November 20, 2008, Minute Order incorrectly references § 16-12-205(4), instead of § 16-12-205(5), as the provision that was found to be unconstitutional.

Owens was represented by his trial team and had access to Ridley. Ridley requested a one-month continuance. The court granted a brief continuance and continued the advisement hearing to December 19 to allow additional time for Ridley and Owens to confer.

On December 19, after the advisement was completed, Owens elected to pursue his post-conviction remedies and challenge the effectiveness of his trial team. The court discharged Owens's trial team and appointed post-conviction counsel. Owens elected to pursue his direct appeal with the Office of the State Public Defender (State PDO). The court appointed direct appeal counsel in the person of Kathleen Lord (Lord), who was the Chief of the State PDO's Appellate Division. Because Lord had previously entered her appearance in this case, the court considered her part of Owens's trial team and appointed her as direct appeal counsel pursuant to C.R.S. § 16-12-203(6).

The appointment of post-conviction counsel on December 19 meant the post-conviction petition was due 150 days later. Crim. P. 32.2(b)(3)(V). Post-conviction counsel moved for an extension of the deadline to December 18, 2009. The court granted the motion based on a finding that there were extraordinary circumstances that could not have been foreseen and prevented. Subsequently, the court extended this deadline numerous times in accordance with *People v. Owens*, 228 P.3d 969, 972 (Colo. 2010).

On January 24, 2009, Lord filed a Notice of Appeal in the Colorado Court of Appeals on the non-capital counts of conviction. The Colorado Court of Appeals dismissed the appeal in *People v. Owens*, 219 P.3d 379 (Colo. App. 2009).

Pursuant to a prosecution motion, the court addressed the issue of Lord's potential conflict with Owens on July 15, 2009. The court found the potential conflict derived from Owens's decision to challenge the effectiveness of his trial

team. When Owens declined to waive the potential conflict, the court discharged Lord. Shortly thereafter, the court appointed ADC Mark Larranaga, ADC Ingrid DeFranco, and ADC Keyonyu O'Connell as new direct appeal counsel (collectively, the Larranaga team). The Larranaga team also represented Owens on the direct appeal of his Lowry Park convictions.

Pursuant to a notice filed by Owens's post-conviction counsel, the court addressed the Larranaga team's alleged potential conflict with Owens on August 25, 2014, September 10, 2014, and September 15, 2014. The court appointed Ridley to advise Owens. The court found the alleged potential conflict derived from the Larranaga team's representation of Owens in the direct appeal of his Lowry Park case. On August 25, 2014, Owens's post-conviction counsel in his Lowry Park case represented to the court that it was reasonably probable that they would pursue ineffective assistance of counsel claims against the Larranaga team in Owens's Crim. P. 35(c) motion in his Lowry Park case. When Owens declined to waive the potential conflict, the court discharged the Larranaga team. Shortly thereafter, the court appointed ADC Suzanne Elliott, ADC Lila Silverstein, ADC Todd Mair, and ADC Jennifer Rentrope as Owens's third direct appeal counsel team.

II. Conflicts of Interest[10]

A. Witness-Client Conflicts of Interest

1. Parties' Positions

Owens contends he was deprived of his Sixth Amendment right to effective and conflict-free counsel because his trial team suffered numerous conflicts of

[10] The structure of this Order generally follows the Table of Contents in SOPC-163. The court generally adopted Owens's headings in order to assist the reader in tracking Owens's multiplicitous claims. However, the court disclaims the argumentative tone of many of the headings.

interest that adversely affected the team's representation of him. According to Owens, his trial team was conflicted because eight of the government's witnesses were represented by public defenders in Adams, Boulder, Denver, and Arapahoe Counties. Owens contends his trial team owed conflicting duties of loyalty to him and to the witnesses. Owens argues the conflicting duties of loyalties precluded his trial team from pursuing important impeachment information, from utilizing that information for more effective cross-examinations, and from adequately investigating alternate suspects. Owens also insists that both his trial team and the prosecution ignored their duties to him and to the court to disclose the conflicts, which deprived him and the court of the opportunity to address the conflicts.

The prosecution responds that Owens's trial team was not conflicted from representing him because the State PDO's conflicts of interest policy (policy) anticipated and avoided the very conflict issues now raised by Owens. As such, the prosecution argues that Owens's trial team was not obligated to advise Owens or the court. The prosecution also argues that because the purported conflicts were not raised prior to or at trial, Owens must now prove that the purported conflicts affected the outcome of the trial.

2. Summary of the State PDO's Conflicts of Interest Policy and Practices During the 2005-2008 Time Period

a. Introduction

The State PDO is created by C.R.S. §§ 21-1-101 to 106 which requires the State PDO to represent all indigent citizens facing potential sentences of either jail or prison. C.R.S. § 21-1-103.

The State PDO is composed of an administrative office in Denver, 21 regional offices, and an appellate division. The State Public Defender is appointed by the public defender commission pursuant to § 21-1-101(3). The State Public

Defender was David Kaplan (Kaplan) until November 2006 when Douglas Wilson (D. Wilson) was appointed.

Assisting the State Public Defender are Chief Deputy Public Defenders (CDPD) and Chief Trial Deputies (CTD). The CDPDs direct policy and provide guidance to the regional offices on a variety of topics, including administration and ethics. During the relevant time period, the CDPD responsible for all ethical issues was CDPD Frances Brown (Brown). The State Public Defender and the CDPDs do not maintain a client caseload. The CTDs represent capital defendants and assist on other complex cases.

The State Public Defender selects one of the Deputy Public Defenders (DPD), known as the office head, to manage each regional office. During the pertinent time period, over 400 DPDs staffed the regional offices. They carried very heavy caseloads.[11]

Capital defense teams generally consist of a CTD, an experienced DPD from the regional office, and a DPD from the appellate division. In November 2005, Kaplan assigned D. Wilson, a CTD at the time, and King, a DPD in the Arapahoe regional public defender's office (PDO), to represent Owens. Kaplan selected King from the Arapahoe PDO because he was an effective trial attorney and had some capital experience, albeit as the second chair. He also assigned Middleton from the appellate division as the motions and jury instructions attorney due to his experience in capital litigation.

D. Wilson worked on Owens's Lowry Park and Dayton Street cases until September 2006 when he accepted appointment as the State Public Defender. During the time D. Wilson and King worked together, D. Wilson was in charge of

[11] D. Wilson testified he is responsible for 400 DPDs and 100,000 cases.

mitigation and King was in charge of the Lowry Park trial. Shortly after D. Wilson's appointment as State Public Defender, he promoted King to CTD, which required King to move his office to the State PDO in Denver. King also moved into the lead counsel position on Owens's cases. D. Wilson selected Kepros from the Arapahoe PDO to join King and Middleton. D. Wilson was familiar with Kepros's skill and work ethic and considered her one of the most capable trial attorneys available in the public defender system.

b. Policy re: Capital Cases[12]

As a matter of policy, the State PDO requires the regional offices to seek appointment for the most culpable defendant whenever a case involves multiple defendants. The State PDO also requires the regional offices to seek appointment in the most serious cases and to stay on the most serious cases whenever potential conflict issues arise. Due to these policies, the State PDO will always seek appointment in a capital case for the most culpable defendant. The State PDO's position is that in Colorado it has the most experience in capital litigation and that the costs of capital litigation are so prohibitive that the State PDO is often the only financially adequate option for a capital defendant.

The State PDO and each regional office take their responsibilities in capital cases seriously. The State PDO is primed to allocate both staff and resources to any regional office appointed to a capital case.

Conflicts of interest are normally resolved within each regional office *via* a conflicts check that is limited to that regional office's clients. In capital cases,

[12] Owens argues his trial team was ineffective because the team, together with the State PDO, failed to institute or follow procedures to identify and resolve conflicts of interest. Owens further argues neither his team nor the State PDO took any precautions to avoid conflicts of interest or to screen conflicted DPDs. As described by the court herein, the State PDO maintained a written policy for handling conflicts of interest and followed that policy in this case.

conflicts of interest receive more attention and are more likely to be resolved by the State PDO instead of by the regional PDO.

c. Written Conflicts of Interest Policy

The State PDO has maintained a written conflicts of interest policy since approximately 1993. During Brown's tenure, there was a written policy dated October 2000. She supplemented that policy with memos and lectures whenever the appellate courts issued significant ethics opinions. In addition to Brown's updates, the State PDO required DPDs to attend annual conferences where ethics updates were routinely provided.

After the 2008 version of the Colorado Rules of Professional Conduct was issued, Brown updated and revised the written conflicts of interest policy. The revised policy became effective on January 1, 2009. The written policy regarding one client becoming a witness against another client did not change. According to Brown, no change was necessary because the 2000 policy was drafted and implemented to conform with Colo. RPC 1.7 and 1.9, and those rules were not substantially changed in the 2008 revision.

d. Duties of Loyalty

Under the State PDO conflicts of interest policy, each DPD has a duty of loyalty to zealously represent his/her current clients. As used here, current clients are those with whom the DPD regularly appears in court. They are clients for whom the DPD would file and argue substantive motions, engage in plea negotiations and/or take the case to trial, and represent at sentencing. A current client enjoys a confidential attorney-client relationship with his/her DPD.

Each DPD also owes a continuing duty of loyalty to each of his/her former clients. With regard to this duty specifically, the State PDO designed its conflicts of interest policy to conform, *inter alia*, to Colo. RPC 1.9(c)(1), which precludes

each DPD from using information relating to his/her representation of a former client to the former client's disadvantage. Brown and others referred to this duty as the duty "to do no harm."

Within a regional office, each DPD also owes a duty "to do no harm" to other DPDs' current and former clients, which means that a DPD cannot use information from another DPD's current or former client to that client's disadvantage. Information, as used by Brown, means confidential information, or information that is not within the public realm.

e. Current Clients of a Regional Office[13]

Whenever a current client of a regional office is a witness against another current client of the same regional office, the conflicts of interest policy mandates withdrawal from one of the cases. The policy allows the office to analyze the cases to determine if the office can remain on the most serious case with the most culpable defendant. Even where a conflict is not initially discernible, the policy requires withdrawal because, in the State PDO's view, a conflict is inevitable.

The withdrawing DPD's client becomes a former client. The remaining client is known as the surviving client.

After withdrawal has occurred, an ethical screening device is put in place within the regional office.[14] The screening device precludes access to the former client's closed file without approval from the office head. It also precludes the withdrawing DPD from discussing the former client's case with anyone. Under the policy, the withdrawing DPD is supposed to issue a memo to the regional office

[13] The court's analysis on witness-client conflicts of interest presumes that Owens's trial team practiced out of the Arapahoe PDO. In reality, King moved his office to the State PDO around November 2006. Middleton's office was always in the State PDO. Only Kepros had an office in the Arapahoe PDO.

[14] Owens argues investigators and other support staff were not subject to the ethical screening device. Per the policy, the device applies to all employees of the State PDO.

informing the staff of the withdrawal with a reminder that s/he cannot discuss the former client's case with anyone. While the written memo is rarely issued, the withdrawing DPD adheres to the screening device to prevent conflicts of interest.

Similarly, the ethical screening device precludes the DPD for the surviving client from seeking information about the former client from the closed file or from the DPD who withdrew. This allows the DPD for the surviving client to avoid any imputation of a conflict because s/he does not have access to confidential information about the former client.

f. Former Clients of a Regional Office

When a former client of a regional office becomes a witness against a current client of the same regional office, the DPD for the current client owes a duty of loyalty to the current client to zealously represent that client as well as a duty of loyalty to the former client "to do no harm." According to the policy, the concurrent duties of loyalty do not normally result in a conflict of interest because the DPD for the current client generally does not possess confidential information from a former client that is relevant to the current client's case and might materially advance the current client's interests.

To determine if the DPD must withdraw from the current client's case, the policy utilizes Colo. RPC 1.9. Under the policy and Colo. RPC 1.9, the DPD is allowed to remain on the current client's case if the current and former clients' cases are not the same or substantially related. The cases are not substantially related if the current client's DPD does not have confidential information about the former client that will materially advance the current client's case. In this scenario, the DPD can zealously represent the current client while also honoring the duty to the former client not to use confidential information to disadvantage the former client.

On the other hand, if the DPD possesses confidential information from a former client that is relevant to the current client's case and that would also materially advance the current client's interests, the DPD is required to withdraw. By withdrawing, the DPD preserves the current client's right to conflict-free counsel and the DPD complies with the duty of loyalty to the former client not to use confidential information to that client's disadvantage.

The duty of loyalty not to harm a former client is therefore not mutually exclusive to the duty to zealously represent a current client. Likewise, the duty of loyalty to the former client does not preclude the current client's DPD from vigorously cross-examining the former client as long as the DPD does not have any of the former client's confidential information.

The policy also allows the DPD for the current client to determine if anything else about the former client's representation precludes him/her from zealously representing the current client pursuant to Colo. RPC 1.7(a)(2). If so, then the policy requires the DPD to withdraw and to ask the court to appoint ADC.

g. Current and Former Clients of Different Regional Offices

The State PDO views each regional office as a separate firm for purposes of resolving conflicts. DPDs may share their client's confidences with other DPDs in the same regional office in order to take advantage of the accumulated expertise and knowledge within each regional office. But the policy generally precludes DPDs in one regional office from sharing client confidences with DPDs in other regional offices. There is one exception – if a client has multiple cases in multiple jurisdictions, the policy allows the client's DPDs to discuss the client's

confidential information for the purpose of reaching a disposition that covers all of the jurisdictions involved.[15]

Pursuant to the policy, if one regional office's client is a witness against a different regional office's client, neither regional office is required to withdraw because confidential information cannot be shared among regional offices and thus there is no conflict of interest.

h. Courtesy Duty Court Appearances

In addition to their normal caseloads, each DPD in the Arapahoe PDO is assigned, on a rotating basis, to handle the high volume of initial appearances in duty court for recent arrestees. The duty DPD appears with all of the recent arrestees unless private counsel appears. Consequently, the duty DPD handles many cases in a very short period of time. Duty DPDs routinely address bonds and mandatory protection orders, and will set future court appearances. Duty DPDs will, at times, even make bond arguments on behalf of codefendants at these duty court appearances. In the court's view, these short, limited appearances by the duty DPD are best described as courtesy appearances.

Most DPD clients are in custody when the PDO is appointed, and most of them are unable to make bond. Thus, in practice, it is rare for the duty DPD to be assisting a recent arrestee who is already being represented by the PDO.

Courtesy appearances usually occur before the court formally appoints the regional PDO on the case and before any type of conflicts check has occurred. Yet the duty DPD must represent each person with the level of competence and diligence required by the Colorado Rules of Professional Conduct. *See, e.g.*, Colo. RPC 1.1; Colo. RPC 1.3. The circumstances of each case and the practices of the

[15] Owens argues the ethical screening device is inapposite in this situation because confidential client information is shared between the regional offices.

individual judge determine whether the court formally appoints the regional PDO at the initial appearance.

The duty DPD owes a duty "to do no harm" to all of the recent arrestees s/he appeared with in duty court, regardless of whether their cases land on the DPD's regular caseload.

The State PDO views courtesy appearances as important to the criminal justice system. The duty DPD can argue bond, put the government on notice that the citizen is represented, and identify evidentiary or constitutional issues at an early stage. But courtesy appearances often occur before the regional office or the duty DPD has the opportunity to determine whether there are any conflict issues arising out of the recent arrestee's case.

On those occasions where a particular case or arrestee has such notoriety that the duty DPD immediately recognizes a conflict, the duty DPD alerts the court of the conflict but still provides limited assistance, such as arguing bond. Under the policy, when conflicts are identified, DPDs should file a Notice of Withdrawal, but in practice, they do not always file the notice, especially if the DPD only made a courtesy appearance on behalf of the recent arrestee.[16]

So that conflicts can be avoided, the State PDO policy encourages duty DPDs to avoid substantive confidential conversations with the arrestee until the questions of conflicts and indigency are resolved.

i. Conflicts Avoidance in Capital Cases

The State PDO designed its conflicts of interest policy to ensure that a capital defendant's trial team can continue representing the capital defendant even if a former or current client is a witness against the capital defendant. The policy

[16] This practice differs among and within each regional office.

requires all regional offices to withdraw from any current client's case and to decline the appointment to any putative client's case whenever a potential conflict arises between that client and the capital defendant. Under this policy, the regional offices seek to withdraw at the first indication of any potential conflict and usually without any in-depth examination of the circumstances giving rise to the potential conflict. These anticipatory withdrawals often occur before there is a determination of whether there is any actual conflict and sometimes occur even before the court appoints the regional office to the capital case. Such anticipatory withdrawals are also done to ensure that the regional office is in a conflict-free position to accept appointment in a potential capital case.[17]

j. Notice of Withdrawal and Client Input

DPDs withdraw from representing clients by filing a pre-printed Notice of Withdrawal with the court. Although Crim. P. 44(d) requires the DPD to give notice to the client so the client has an opportunity to object, the State PDO prefers that the DPDs utilize the form. The form lists a number of non-specific reasons for withdrawal. As a matter of practice, the DPD checks the box for the most appropriate reason for the withdrawal without elaborating.[18] The State PDO adopted this practice to ensure that no confidential information is disclosed when a DPD withdraws from representing a client.

One of the reasons listed on the form is "witness-client conflict." In situations where a current client is a witness against another current client, the

[17] Owens argues his trial team was ineffective because DPDs representing potential witnesses against Owens withdrew from representing their clients before a conflict of interest existed. Owens asserts the withdrawals violated § 21-1-101, which requires the public defender system to represent indigent defendants absent a conflict of interest. Owens lacks standing to raise this argument because he was not harmed when other DPDs withdrew from representing clients who were witnesses against him.

[18] Sometimes the DPD will add a cryptic explanation, such as "per state office."

DPDs will not discuss the reasons for withdrawing with either client. The State PDO's rationale is that by withdrawing, the DPD avoids a conflict so there is no need to confer with the client. According to Brown, a DPD would confer with a client when the office wants to remain on the client's case and it is necessary to secure a conflict waiver.[19]

k. Summary of the Arapahoe PDO's Conflicts Policies and Practices for this Case

James O'Connor (O'Connor) was the Arapahoe regional office head during the entire relevant time period. O'Connor immediately recognized that the Dayton Street homicides were linked to the Lowry Park shootings and, therefore, that the case had the potential of becoming a capital case. Shortly after the Dayton Street homicides, O'Connor spoke to Harvey Steinberg (Steinberg),[20] the private attorney for Ray's Lowry Park case. Steinberg told O'Connor that he would not continue representing Ray if the prosecution sought the death penalty and that Ray had an alibi for the Dayton Street homicides. With this information and in keeping with the policy to seek appointment in a capital case, O'Connor instructed his staff to be on the alert for any cases that might conflict with the Arapahoe PDO accepting appointment to represent Ray. At that time, in July and August of 2005, O'Connor was unaware of Owens's alleged involvement. Pursuant to O'Connor's directive, and with Brown's approval, the Arapahoe PDO withdrew from representing several clients during the ensuing months. Many of these withdrawals were anticipatory withdrawals done before an anticipated appointment of the

[19] According to James O'Connor, the office head of the Arapahoe PDO, the DPD for the surviving client should inform the surviving client that another DPD withdrew from representing another client because of that client's involvement in the surviving client's case. The DPD for the surviving client should tell the surviving client both the name of the DPD who withdrew and the name of the other client.

[20] At that time, Ray was charged as an accessory to the Lowry Park shootings.

Arapahoe PDO to represent Ray.[21] Consequently, withdrawals occurred without any determination that there was a conflict.

O'Connor learned of Owens's involvement in September 2005 when Owens was charged as a principal in the Lowry Park shootings. Consequently, the focus of the Arapahoe PDO's conflicts practice switched from Ray, who was still represented by Steinberg,[22] to Owens. To that end, O'Connor directed his staff to ensure that conflicts of any kind did not preclude the office from accepting appointment to represent Owens. In an abundance of caution, other regional offices were also instructed to withdraw from representing clients who were witnesses against Owens.

On November 23, 2005, the court appointed the Arapahoe PDO to represent Owens in the Lowry Park case. When Owens was indicted for the Dayton Street case,[23] the court appointed the Arapahoe PDO on that case as well.

At that time, the office manager completed a written conflicts check of all endorsed witnesses. The check was limited to clients of the Arapahoe PDO.

King, Kepros, and Middleton did not participate in any conflicts of interest or withdrawal decisions. O'Connor and Brown, with occasional input from D. Wilson, made those decisions without consulting the trial team. The decisions were generally made with little or no analysis as to the existence of a conflict because O'Connor and Brown wanted the Arapahoe PDO to be able to accept and maintain appointment to represent Ray or Owens without any question of a conflict.

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[21] The Arapahoe PDO was never appointed to represent Ray.

[22] Steinberg withdrew in March 2006 when the grand jury indicted Ray for the Dayton Street homicides.

[23] The indictment was returned on March 8, 2006.

l. The Colorado Supreme Court's View of the State PDO's Conflicts of Interest Policy and Ethical Screening Device[24]

The Colorado Supreme Court relied on the State PDO's adherence to its conflicts of interest policy and to its ethical screening device when it reversed the trial court's pretrial order disqualifying Shari's DPDs. *People v. Shari*, 204 P.3d 453 (Colo. 2009).[25] The *Shari* court faulted the trial court for failing to rely on the ethical screening device as an effective tool used to prevent the unauthorized dissemination of a client's confidential information. *Id.* at 459-60.

The Colorado Supreme Court in *Shari* addressed conflicts of interest arising within the statewide public defender system.[26] Two DPDs in the Jefferson PDO represented the defendant. *Id.* at 455-56. At the same time, a DPD in the Denver PDO represented a government witness against the defendant. *Id*. at 456. In addition, other DPDs in the Jefferson PDO and in other regional offices previously represented two other government witnesses against the defendant. *Id.*

During the relevant time period, the State PDO operated pursuant to the ethical screening device described in its conflicts of interest policy. The screening device prohibited DPDs from 1) accessing closed files of former clients, 2) using any confidential information from a former client to that former client's disadvantage, and 3) sharing clients' confidential information between regional offices within the public defender system. *Id.* at 456-57. The defendant's DPDs in

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[24] The Colorado Supreme Court did not address the State PDO's conflicts of interest policy in *West v. People*, 341 P.3d 520 (Colo. 2015).

[25] For the reader's benefit, the court provides the full citation the first time it cites a source under each Roman Numeral of the Table of Contents.

[26] In *Rodriguez v. District Court*, 719 P.2d 699 (Colo. 1986), the Colorado Supreme Court addressed a conflict of interest caused by the representation of the defendant and a witness by the same regional PDO.

Shari were therefore screened from learning and using confidential information from the other clients that could be used to the other clients' disadvantage.

As to the Denver DPD's simultaneous representation of Levy, a witness against Shari, the Colorado Supreme Court found that "the Denver public defender who handled the Levy case . . . is in no way involved in the Shari case, and neither [of Shari's DPDs in Jefferson County] had any involvement in Levy's case [in Denver]." *Id.* at 458. As to the former representation of two witnesses, it found that "none of the individual public defenders involved in representing these 'former clients' is involved in the Shari case, and neither [of Shari's DPDs in Jefferson County] participated in any of the prior cases." *Id.* Based on those findings, the Colorado Supreme Court held that there was no conflict of interest because "there [was] no reason to think that either [of Shari's public defenders] obtained any confidential, material information." *Id.*

Relying on the adherence to the conflicts of interest policy and the ethical screening device, the Colorado Supreme Court found there was no conflict of interest and vacated the trial court's order disqualifying Shari's DPDs. *Id.* at 462; *see also People v. Nozolino*, 298 P.3d 915, 921 (Colo. 2013) (trial court's order disqualifying public defender was reversed in part because the conflicted DPD was screened from the case and was not supervising the other DPDs representing the defendant); *People v. Chavez*, 139 P.3d 649, 654-55 (Colo. 2006) (whether prosecutor's office employed a properly drafted screening device was relevant to issue of disqualification of entire office).

m. Other Courts' Views on Ethical Screening Devices

Other courts have also relied on the efficacy of screening devices. *See, e.g.*, *Smith v. Whatcott*, 757 F.2d 1098, 1101-02 (10th Cir. 1985) (to be valid, proper screening procedures must have been established before disqualifying event

occurred); *United States v. Judge*, 625 F. Supp. 901, 903 (D. Haw. 1986) (court found measures taken by Federal Public Defender's office to screen counsel from information involving former client were adequate to prevent any misuse of that client's confidential information in defense of current client).

3. Principles of Law

a. Sixth Amendment Right to Counsel

The Sixth Amendment to the United States Constitution provides that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defen[s]e." U.S. Const. amend. VI; *see also* Colo. Const. art. II, § 16; C.R.S. § 18-1-403. "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy [this] constitutional command." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). The constitutional right to counsel, therefore, "has long been recognized" as "the right to the effective assistance of counsel." *United States v. Cronic*, 466 U.S. 648, 654 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). "Where a constitutional right to counsel exists, [the] Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981).

b. *Cuyler v. Sullivan*

The two-pronged test announced in *Strickland* generally governs post-conviction ineffective assistance of counsel claims. 466 U.S. at 687. There are certain exceptions, however, and when the alleged ineffectiveness is based on conflicts of interest stemming from multiple representation,[27] *Cuyler v. Sullivan*, 446 U.S. 335 (1980), applies.[28]

[27] Multiple representation encompasses representation of codefendants by an attorney regardless of whether the codefendants are tried simultaneously (multiple simultaneous representation) or

Strickland[29] requires the defendant to "show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Id.* at 687. To prove prejudice, "[t]he 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." *Id.* at 694.

In *Cuyler*, two attorneys represented three codefendants in their separate trials. 446 U.S. at 337. Sullivan did not object during trial but later claimed his attorneys labored under a conflict that denied him the right to the effective assistance of counsel under the Sixth Amendment. *Id.* at 337-38. The United States Supreme Court held that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348.[30] "Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Id.* at 349-50. Under *Cuyler*, prejudice is presumed when the defendant demonstrates "that a conflict of interest actually affected the adequacy of his representation." *Id.*

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separately (multiple serial representation). *See Beets v. Scott*, 65 F.3d 1258, 1265 n.8 (5th Cir. 1995).

[28] *See also Armstrong v. People*, 701 P.2d 17, 19 (Colo. 1985) (applied *Cuyler* to multiple representation conflict of interest where an attorney represented a husband and wife who were charged with several offenses in connection with an armed robbery).

[29] In *Strickland*, the capital defendant claimed his counsel was ineffective for failing to investigate mitigation evidence, including character and mental health evidence. 466 U.S. at 675. Defense counsel did not investigate mitigation evidence because he believed any evidence he uncovered of his client's character and mental health would have been more harmful than helpful to his client. *Id.* at 673.

[30] The Court in *Mickens v. Taylor*, 535 U.S. 162, 173 (2002), substitutes "significantly" for "adversely" when describing the *Cuyler* standard.

Conflicts of interest exist in countless forms throughout the practice of law. The United States Supreme Court in *Cuyler* analyzed only one type of conflict – multiple representation. Multiple representation does not exist in this case. According to Owens, other types of conflicts exist, specifically in the form of his trial team's (and other DPDs') simultaneous and successive representation of government witnesses.[31]

c. Simultaneous Representation of a Government Witness

In January 2015, the Colorado Supreme Court announced *West v. People*, 341 P.3d 520 (Colo. 2015), which is a joint opinion addressing conflicts of interest alleged by West and Cano. In *West*, the Colorado Supreme Court, relying primarily on Fourth Circuit precedent, applied *Cuyler* to conflicts created by simultaneous representation of the defendant and a government witness. *West v. People*, 341 P.3d 520, 531 (Colo. 2015).

West was charged with, *inter alia*, sexual assault on a child. *Id.* at 524. The victim's mother (witness) testified against West. *Id.* The Mesa PDO represented West at the same time that the El Paso PDO represented the witness on unrelated charges. *Id.* An investigator for the Mesa PDO requested the witness's file from the El Paso PDO. *Id.* at 530-31. While it is not clear from the opinion that the request was fulfilled in violation of the State PDO's ethical screening device, the Colorado Supreme Court concluded that the Mesa PDO "undeniably had access to" the witness's confidential information in the El Paso PDO's file. *Id.* at 531. The Colorado Supreme Court viewed that situation as "inherently conducive to and productive of divided loyalties." *Id.* (quoting *People v. Castro*, 657 P.2d 932, 945

[31] Owens also alleges advocate-witness conflicts of interest and an inherent conflict of interest. *See* parts II.B and II.C of this Order, respectively.

(Colo. 1983)[32]). According to the Colorado Supreme Court, the Mesa PDO had a potential imputed conflict in representing West because the El Paso PDO simultaneously represented the witness. *Id*. Because the Mesa PDO's representation of West and the El Paso PDO's representation of the witness was simultaneous, the Colorado Supreme Court held that the potential imputed conflict must be analyzed under *Cuyler* and remanded the case for that determination. *Id.*

Cano was charged in Adams County with first-degree murder. *Id.* at 524-25. Although he did not actually testify at trial, the prosecution had endorsed Aguilar as a witness against Cano. *Id.* Aguilar faced unrelated charges in Adams County and was also represented by the Adams PDO. *Id.* at 524. While different attorneys represented Cano and Aguilar, they were represented simultaneously by the Adams PDO. Based on its finding that the DPDs in the Adams PDO "routinely consulted each other on cases and worked in close proximity to one another," the Colorado Supreme Court "presume[d] that Cano's public defenders . . . had access to confidential material about Aguilar, and vice versa." *Id.* at 531. Thus, the Adams PDO had a potential conflict in representing Cano and Aguilar simultaneously. The case was remanded so that the potential conflict could be analyzed under *Cuyler*.[33] *Id.*

The Colorado Court of Appeals has applied *Cuyler* to conflicts of interest stemming from an attorney's simultaneous representation of the defendant and a

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[32] *Castro* was overruled on other grounds.

[33] The Colorado Supreme Court distinguished direct and imputed conflicts of interest, but that distinction did not affect its analysis. *West*, 341 P.3d at 531 n.10 ("[W]e express no opinion regarding which ethics rule applies to these public defenders—Colo. RPC 1.10 (the general imputation rule) or Colo. RPC 1.11 (the special conflicts of interest rule for government employees)."). *But see Nozolino*, 298 P.3d at 919 n.1 (conflict of one DPD is not imputed to another DPD under Colo. RPC 1.11 cmt. 2).

government witness. *People v. Miera*, 183 P.3d 672, 673-74 (Colo. App. 2008). In that case, an attorney had simultaneously represented Miera and D.R. who were each charged with sexually assaulting the same victim but at different times and in different cases. *Id.* at 673. After five months of simultaneously representing Miera and D.R., the attorney withdrew from D.R.'s case. *Id.* D.R. testified at trial against Miera. *Id.* at 674.

Miera involves conflicts based upon the simultaneous and successive representation of the defendant and a government witness. The Colorado Court of Appeals viewed the scenario as more akin to simultaneous than to successive representation, noting that the victim was the same, D.R. testified against Miera, and the attorney simultaneously represented Miera and D.R. for five months. *Id.* at 676. Applying *Cuyler*, the Colorado Court of Appeals concluded that the attorney suffered an actual conflict of interest that adversely affected his performance in representing Miera. *Id.* at 677-78.

d. Successive Representation of a Government Witness

Whether *Cuyler* applies to conflicts of interest stemming from an attorney's successive representation of a defendant and a government witness is an "open question." *Mickens v. Taylor*, 535 U.S. 162, 176 (2002).

Mickens was convicted of murder and sentenced to death. *Id.* at 164. At the time of the murder, Mickens's victim faced charges in a juvenile case and was represented by the attorney who was appointed to represent Mickens. *Id.*

While *Cuyler* involved simultaneous representation, *Mickens* involved successive representation. Despite the difference, the parties in *Mickens* assumed *Cuyler* applied. *Id.* at 174. In *Mickens*, Justice Scalia observed that assuming *Cuyler* applied was "not unreasonable" in light of the way Circuit Courts were "unblinkingly" applying *Cuyler* to all types of conflicts. *Id.* (quoting *Beets*, 65

F.3d at 1266). To date, the United States Supreme Court has not resolved whether *Cuyler* applies to conflicts arising from successive representation of a government witness and the defendant.

Nor has the Colorado Supreme Court, which acknowledged the unresolved question in *Dunlap v. People*, 173 P.3d 1054, 1073 n.24 (Colo. 2007), stating, "[i]n this case, the parties' briefs assume *Cuyler* applies . . . . We therefore decide the issue on the assumption that *Cuyler* applies." Similarly, the Colorado Supreme Court wrote in *West*, "[b]ecause the parties have not briefed the issue, we assume, without deciding, that the [*Cuyler*] standard applies to alleged conflicts arising from successive representation."[34] 341 P.3d at 530.

As the Colorado Supreme Court noted in *West*, "[w]hether [*Cuyler*] should be extended to cases of successive representation remains, as far as the jurisprudence of the [United States Supreme] Court is concerned, an open question." 341 P.3d at 530 (alteration in *West*) (quoting *Mickens*, 535 U.S. at 176). Federal circuit courts have reached divergent conclusions, but the majority applies *Cuyler* in cases of successive representation. *Mickens*, 535 U.S. at 174.

While recognizing that the applicability of *Cuyler* may be an "open question," this court will apply *Cuyler* to the alleged successive representation conflicts of interest.

e. Standard for Post-Conviction Ineffective Assistance of Counsel Claims Based on Witness-Client Conflicts of Interest

"A defendant seeking post-conviction relief based on ineffective assistance of counsel resulting from an attorney's alleged conflict 'must demonstrate that an

[34] In this case, the prosecution does not concede that *Cuyler* applies to successive representation conflicts of interest.

actual conflict of interest adversely affected his [attorney]'s performance.'" *West*, 341 P.3d at 526 (quoting *Cuyler*, 446 U.S. at 348).

"[T]he [*Cuyler*] standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." *Id.* at 528 (quoting *Mickens*, 535 U.S. at 172 n.5). The defendant must show that an actual conflict of interest adversely affected his attorney's performance by a preponderance of the evidence. *Id.* at 534.

Prior to *West*, the Colorado appellate courts generally referenced the ethical rules in deciding whether a conflict of interest existed. *See, e.g.*, *People v. Delgadillo*, 275 P.3d 772, 775 (Colo. App. 2012) (citing Colo. RPC 1.7); *People v. Curren*, 228 P.3d 253, 259 (Colo. App. 2009) (consulting Colo. RPC 1.7); *Miera*, 183 P.3d at 676 (citing Colo. RPC 1.7). *See also* C.R.S. § 21-2-103(1.5)(c) ("[A] 'conflict of interest' may include . . . circumstances identified in the Colorado rules of professional conduct . . . ."); *United States v. Sablan*, 176 F.Supp.2d 1086, 1089-90 (D. Colo. 2001) (court sought guidance from the applicable standards of ethical conduct to resolve an alleged conflict of interest). But the Colorado Supreme Court clarified in *West* that "[a]n attorney's ethical obligations do not dictate the scope of the Sixth Amendment right to conflict-free counsel." 341 P.3d at 531 n.10. Instead, the defendant must show "that his [attorney] actively represented conflicting interests" to establish a conflict of interest. *Id.* at 530 (emphasis omitted) (quoting *Mickens*, 535 U.S. at 175).

In *West*, the Colorado Supreme Court found that,

> [T]o show an adverse effect, a defendant must (1) identify a plausible alternative defense strategy or tactic that counsel could have pursued, (2) show that the alternative strategy or tactic was objectively reasonable under the facts known to counsel at the time of the

> strategic decision, and (3) establish that counsel's failure to pursue the strategy or tactic was linked to the actual conflict.

Id. at 533.

Prong one is proven if there is "record evidence that clearly indicates counsel possessed sufficient information to merit considering an alternative strategy or tactic." *Id*. The defendant makes this showing by "identify[ing] unpursued strategies and tactics that were obviously in the defendant's interest under the circumstances." *Id.*

Prong two is proven when the "plausible alternative that counsel might have pursued . . . was objectively reasonable under the facts known to counsel at the time of the strategic decision." *Id*. Whether the plausible alternative was objectively reasonable depends on, *inter alia*:

- the charge(s) against the defendant;
- the evidence;
- the information that the defendant communicated to the attorney and upon which the attorney based his/her decisions;
- the attorney's ethical obligations;
- the likelihood that pursuing the alternative strategy would damage the defendant's credibility and jeopardize his chances for future Crim. P. 35(c) relief; and
- the alternative strategy's viability given all of the above.

Id. The court should not be tempted to "contemplate whether the alternative strategy was subjectively reasonable to the lawyer" and should not evaluate "the lawyer's performance under the 'highly deferential' standard spelled out in *Strickland*." *Id*. (quoting *United States v. Nicholson*, 611 F.3d 191, 207 (4th Cir. 2010)).

The purpose of prong two is two-fold: 1) it "promotes conflict-free counsel by eliminating a defendant's forced reliance on the attorney's subjective assessment of his representation," and 2) it "ensures the finality of verdicts because it shields attorneys against more tenuous claims of ineffective assistance of counsel where the alternative strategy or tactic would have proved unwise, illogical, or otherwise undesirable under the factual circumstances." *Id*.

Prong three "can be proved in two ways: first, by showing that the alternative strategy or tactic was 'inherently in conflict with . . . the attorney's other loyalties or interests'; or, second, by showing that the alternative strategy or tactic was 'not undertaken *due to* those other loyalties or interests.'" *Id*. at 534 (emphasis in *West*) (quoting *Nicholson*, 611 F.3d at 212).

"An alternative strategy or tactic is 'inherently in conflict with counsel's other loyalties or interests' if the two are 'inconsistent with each other.'" *Id*. (quoting *Nicholson*, 611 F.3d at 213). When evaluating whether an inherent conflict exists, the court should not consider "counsel's subjective belief that he forewent the alternative strategy for reasons unrelated to the conflict." *Id.*

If no inherent conflict of interest exists, prong three may be satisfied if "the alternative strategy or tactic was not pursued *due to* the attorney's other loyalties or interests." *Id*. (emphasis in original). The "record evidence should strongly indicate that counsel's failure to pursue the alternative strategy resulted from a 'struggle to serve two masters.'" *Id*. (quoting *Cuyler*, 446 U.S. at 349).

4. *West* Analysis

a. Conflict of Interest

To demonstrate a conflict of interest, Owens must show "that his [trial team] actively represented conflicting interests." *Id*. at 530 (emphasis omitted) (quoting *Mickens*, 535 U.S. at 175).

Aside from Owens's trial team, at least 10 DPDs testified during the post-conviction hearing. Eight of those DPDs appeared with or represented a witness who was endorsed to testify against Owens. All of the DPDs, including Owens's trial team, acknowledged their ethical responsibilities under the Colorado Rules of Professional Conduct and the State PDO's conflicts of interest policy. Without exception, the DPDs testified that they adhered to the ethical screening device and did not share any confidential information about their clients with Owens's trial team while the team represented Owens.

Owens's trial team did not attempt to access and did not access the public defender case files for any endorsed witnesses. The team did not ask for or obtain permission from any office head to access closed files for any endorsed witnesses. Likewise, neither King nor Kepros accessed any Arapahoe DPDs' computer files other than Owens's. Owens elicited a great deal of testimony during the post-conviction hearing from various DPDs concerning their access to the shared drive on the public defender computer network and to open physical case files within each regional office. The consensus was that the shared drive was used to store motions and trial preparation materials while confidential and privileged information was usually stored in each client's physical file. In short, Owens's trial team did not attempt to learn any confidential information about any endorsed witnesses from the witnesses' case files.

Two of the alleged conflicts of interest deserve additional explanation because they are purported direct conflicts of interest. First, before Kepros began representing Owens, she learned confidential information about Gregory Strickland (Strickland) from DPD Jeffrey Walsh (Walsh), Strickland's Arapahoe DPD. Kepros did not share that information with King or Middleton. According to Kepros, possessing information about Strickland did not impede her investigation

or cross-examination of Strickland because she did not use the information she learned from Walsh in her investigation or cross-examination of Strickland. Second, King appeared with Strickland in duty court, and he represented Carter, Sr. in an unrelated case. King either never learned confidential information from Strickland or Carter, Sr., or he had forgotten it before he began representing Owens. As a result, he had no confidential information about Strickland or Carter, Sr. to utilize while representing Owens. King testified during the post-conviction hearing that his appearances with Strickland and Carter, Sr. did not impede his investigation of those witnesses.

Like the Colorado Supreme Court, this court finds it appropriate to rely on the State PDO's adherence to its conflicts of interest policy and ethical screening device.[35] Unlike *West*, in this case there is no evidentiary basis in this record to presume that Owens's trial team acquired confidential information about endorsed witnesses from other DPDs. In fact, the evidence shows that the witnesses' DPDs and Owens's trial team adhered to the Colorado Rules of Professional Conduct and the State PDO's conflicts of interest policy. Accordingly, the court finds Owens's trial team did not "actively represent conflicting interests." *West*, 341 P.3d at 530 (emphasis omitted) (quoting *Mickens*, 535 U.S. at 175).

[35] *See Shari*, 204 P.3d at 459 ("We also note that any concerns regarding the communication of confidential information from the public defenders who previously represented the prosecution's witnesses to [the defendant's deputy public defenders] are assuaged by the screening policy . . . in effect throughout the Public Defender's Office.").

b. Adverse Effect

i. Client Management Concerning Purported Conflicts of Interest

(a) Parties' Positions

Owens contends he was deprived of his Sixth Amendment right to effective and conflict-free counsel because his trial team mishandled the purported conflicts of interest involving the eight witnesses described below. Owens also argues his trial team did not appropriately analyze the purported conflicts of interest under the Colorado Rules of Professional Conduct.

The prosecution responds that Owens is not entitled to relief because Owens's trial team was not conflicted from representing him.

(b) Findings of Fact

As to the eight witnesses discussed below, Owens's trial team did not:

- advise Owens of the purported conflicts of interest;
- seek independent counsel to advise Owens of the purported conflicts of interest;
- advise the trial court of the purported conflicts of interest;
- seek Owens's informed consent to remain his trial counsel in light of the purported conflicts of interest; or
- move to withdraw from representing Owens on account of the purported conflicts of interest.

(c) Analysis

In *Cano*, *West*'s companion case, the Adams PDO simultaneously represented Cano (defendant) and Aguilar (endorsed witness). *Id*. at 524. There was evidence in the record supporting a theory that Aguilar was an alternate suspect in Cano's case. *Id*. at 525. Portraying Aguilar as an alternate suspect

would be the type of "plausible alternative defense strategy or tactic" contemplated by prong one of *West*. *Id*. at 524. Advising a client of a purported conflict of interest is not a matter of trial strategy. Nor is seeking independent counsel to advise the client, advising the trial court, seeking informed consent or a waiver, or moving to withdraw. In Owens's situation, communicating with the client regarding the potential witness conflicts was a matter of client management. *See* Colo. RPC 1.7; Colo. RPC 1.8; Colo. RPC 1.9; Colo. RPC 1.10; Colo. RPC 1.11.

(d) Conclusion

Because advising a client or the court of purported conflicts of interest was not associated with a "defense strategy or tactic" as contemplated by *West*, Owens is not entitled to relief under *West*. *See* 341 P.3d at 533 (prong one is proven if there is "record evidence that clearly indicates counsel possessed sufficient information to merit considering an alternative strategy or tactic.").

ii. Witnesses Who Were Clients of the Public Defender's Office

(a) Gregory Strickland

(i) Parties' Positions

Owens contends he was deprived of his Sixth Amendment right to effective and conflict-free counsel because his trial team was adversely affected by the following circumstances, which, according to Owens, gave rise to a conflict of interest:

- King's one-time appearance with Strickland prior to King's representation of Owens;
- Kepros's possession of confidential information about Strickland;
- the Adams PDO's representation of Strickland;
- the Arapahoe PDO's representation of Strickland; and

- the Denver PDO's representation of Strickland.

The prosecution responds that there is no evidence that the alleged conflicts of interest adversely affected the trial team's performance in representing Owens. The prosecution points out that the Adams, Arapahoe, and Denver PDOs withdrew from representing Strickland shortly after learning he was a cooperating witness against Owens.

(ii) General Background

Detective Gretchen Fronapfel (Fronapfel), the lead detective on the Dayton Street cases, interviewed Strickland on December 30, 2005. He told Fronapfel that he had been housed with Carter in December 2005 at the Arapahoe County Detention Facility (ACDF). Strickland told Fronapfel that Carter said he and Owens killed Marshall-Fields and Wolfe at the direction of Ray because Marshall-Fields was going to testify in Ray's Lowry Park trial.

The prosecution endorsed Strickland as a witness for the Lowry Park trial on January 13, 2006.[36] On January 18, the prosecution filed a notice of potential conflicts in the Lowry Park case. Owens's trial team filed a response that vigorously contested the purported conflicts of interest. The Lowry Park trial court determined that there were no conflicts. There was no mention of Strickland in either the notice or the response. The parties mentioned the Lowry Park notice and response to the Dayton Street trial court at a motions hearing on May 18, 2006.[37] Owens's trial team took the position that there were no conflicts of interest, and the prosecution agreed. There was no mention of Strickland at this hearing.

[36] Strickland did not testify.

[37] The court heard joint pretrial motions throughout 2006 and 2007. Owens, Ray, Carter, their counsel, and the prosecution were present at the joint hearings.

Strickland testified before the grand jury on January 27, 2006. He told the grand jury what Carter had told him. He also told the grand jury that he came forward because of his concern for the victims' mothers whom he had seen on television asking for help identifying the suspects in the Dayton Street homicides. He testified that when he initially came forward he was not seeking any consideration from the prosecution on his pending cases in exchange for his cooperation.

At the time of his interview and his grand jury testimony, Strickland faced serious criminal charges in Adams, Arapahoe, and Denver Counties including aggravated robbery, assault, and menacing with a deadly weapon by a previously convicted felon.[38] Different DPDs represented Strickland in each county.

Strickland did not tell any of his DPDs about his intent to cooperate with the police in the ongoing investigation of the Dayton Street homicides. When his cooperation became known, the State PDO directed his DPDs to withdraw. ADC Steven Barnes (Barnes) was appointed to represent Strickland in Adams County.

Strickland entered a global disposition that required him to enter guilty pleas in Arapahoe, Denver, and Adams Counties, with all sentences to be concurrent with Adams County. Strickland's Adams County plea was to aggravated robbery. He faced four to 16 years, but the prosecutor agreed to ask for no more than 10. At the providency hearing, the Adams County sentencing judge acknowledged Strickland's cooperation and, although the prosecutor argued for a 10-year sentence, the judge sentenced Strickland to eight.

Strickland eventually testified against Owens, Ray, and Carter in each of their Dayton Street trials.

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[38] Adams County prosecutors also charged Strickland with a misdemeanor in case 04M3680.

(iii) Purported Conflicts of Interest

(a) Daniel King

Strickland had two cases in Arapahoe County. In 2004, he was charged with making a false statement to a pawnbroker and theft.[39] In 2005, he was charged with aggravated robbery and felony menacing.[40] On January 3, 2005, King appeared with Strickland at his initial appearance on the aggravated robbery case as part of King's duty-week responsibilities. King requested a personal recognizance bond for Strickland and, as part of his bond argument, claimed that Strickland had an alibi because he was wearing an ankle monitor that showed he was at home at the time of the alleged offense. The source of the information about the alibi is unknown, but it appears that it came from Strickland. King has no memory of appearing with Strickland, and he has no memory of the source of the alibi information.[41] King had no further contact with Strickland until he examined him at a pretrial evidentiary hearing in this case on August 30, 2007.

At some point in late 2007, King learned of his appearance with Strickland. He was satisfied that there was no conflict, but out of an abundance of caution, he reassigned responsibility for Strickland's cross-examination to Kepros. King did not feel prohibited from cross-examining Strickland at trial or impeaching him with his felony convictions.

Kepros learned from her review of Strickland's cases that King appeared with Strickland in January 2005. She does not recall if she ordered the transcript from the bond hearing but has no memory of reading it prior to the trial in the Dayton Street case.

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[39] Arapahoe County case 04CR1051.
[40] Arapahoe County case 05CR8.
[41] At that time, King's caseload was approximately 100 open cases.

King never shared any confidential information from Strickland with anyone, including Kepros or Middleton. In King's view, his prior appearance with Strickland did not create a conflict of interest. As such, he never discussed his prior appearance with Strickland with Owens and never obtained Owens's consent to remain on his trial team. According to King, his one-time appearance with Strickland did not impede the trial team's pretrial investigation of Strickland and did not handicap the trial team's representation of Owens.

(b) Laurie Kepros

Kepros began representing Owens in September 2006. At that time, she was aware that Strickland was Walsh's former client. She recalled discussing Strickland with Walsh sometime before she began representing Owens. Kepros did not tell King, Middleton, Owens, or the court that Walsh had shared confidential information with her about Strickland. During the post-conviction hearing, Kepros did not disclose the confidential information she learned from Walsh. While the law allows a trial court to look at the surrounding circumstances of a representation to ferret out the type of information a client typically would have shared with an attorney, it does not allow a trial court to breach the attorney-client privilege absent a waiver. Although their conversation remains confidential, according to Kepros, it was the type of brainstorming session that occurred regularly among the DPDs in the Arapahoe PDO. The services Walsh rendered to Strickland give some indication of what Strickland would normally have confided to his attorney, but there is no way to determine what Walsh told Kepros.

In Kepros's view, possessing Strickland's confidential information did not impede her investigation or cross-examination of Strickland or hinder her representation of Owens in any way.

Kepros did not have contact with Strickland prior to June 13, 2007, when she cross-examined him at a pretrial motions hearing in this case. She cross-examined him on a number of topics, including the inconsistencies in his renditions of what Carter told him about the Dayton Street homicides, his motivations for coming forward, and his possibly impaired memory due to a head wound.

In December 2007, King assigned Kepros to cross-examine Strickland at trial but did not explain the reason for the reassignment. He gave her a notebook of discovery pertaining to Strickland, which Kepros described as sparse.

As Kepros prepared to cross-examine Strickland in this trial, she learned a number of other DPDs in the Arapahoe PDO had prepared cross-examination materials for Strickland because the prosecution had endorsed him in a number of other homicide trials. In addition to the Dayton Street cases, Strickland was an endorsed witness in the homicide cases against Tenarro Banks (Banks),[42] Ricardo Samuels (Samuels),[43] Quentin Sauls (Sauls),[44] and Christopher Taylor (C.

[42] Denver case 05CR4700. Strickland initially claimed he was present for the shooting but later recanted.

[43] Arapahoe County case 05CR926. Walsh was also lead counsel for Samuels. The prosecution endorsed Strickland as a witness and claimed the Arapahoe PDO was conflicted due to Walsh's prior representation of Strickland. Walsh advised the court that the cases were not substantially related because he did not have any confidential factual information from Strickland that was relevant to Samuels's case. The trial court found no conflict but discussed the matter with Samuels and obtained a waiver of any conflict. The Colorado Court of Appeals affirmed the trial court's ruling in *People v. Samuels*, 228 P.3d 229, 238-41 (Colo. 2009). While preparing for Samuels's trial, Walsh assigned Strickland's cross-examination to his co-counsel. Although Walsh believed he could legally and ethically cross-examine Strickland, Walsh did not want to be subject to a post-conviction petition asserting he had a conflict. Walsh did not disclose any of Strickland's confidential information to his co-counsel. In Walsh's view, his prior representation of Strickland did not impede his representation of Samuels.

[44] Arapahoe County case 07CR2775. The prosecution dismissed the charges against Sauls on November 21, 2008, just 11 days before trial was scheduled to begin.

Taylor).[45] Strickland did not testify in all of these cases but when he did, he generally testified as a witness who had obtained inculpatory information from someone with whom he was incarcerated. Over time, Kepros and the other DPDs shared their Strickland materials with each other with the permission of all clients involved, including Owens, in order to prepare to cross-examine Strickland. The shared materials did not contain any confidential information from Strickland. Utilizing those materials and other information Kepros collected, she cross-examined Strickland at trial on April 25, 2008.

(c) Adams PDO

In 2005, Strickland was charged in Adams County with aggravated robbery.[46] DPD Matthew Connell (Connell) represented Strickland from June 7, 2005, to January 18, 2006. Connell discussed Strickland's cases with his counterparts in the Denver and Arapahoe PDOs. The purpose of these discussions was to explore the possibility of a global disposition with plea agreements in all three jurisdictions. It is likely that one or more of the DPDs shared Strickland's confidential information during these discussions.

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[45] Arapahoe County case 05CR1909. C. Taylor's case was commonly referred to as the Aurora Mall shooting case. Strickland was also a cooperating witness against C. Taylor. DPD Christopher Baumann (Baumann) was lead counsel for C. Taylor. The prosecution argued there was a conflict due to Baumann's two prior appearances with Strickland. Baumann's co-counsel, DPD Tina Fang (Fang), argued to the court that Baumann had only appeared with Strickland twice and that the Arapahoe PDO had taken precautions to protect Strickland's confidential information by creating an ethical screen. Fang also argued that the ethical screen precluded any finding of a substantial relationship between the cases. The court agreed and found there was no conflict. Despite its finding, the court discussed the matter with C. Taylor and obtained his waiver of any conflict. In keeping with the ethical screen, Baumann and Fang never accessed Strickland's public defender files. C. Taylor's case went to trial, but Strickland did not testify. In Baumann's view, his prior appearances with Strickland did not impede his representation of C. Taylor.

[46] Adams County case 05CR983.

Before court on January 13, 2006, Strickland told Connell for the first time that he had provided information to law enforcement about homicide cases in Arapahoe County.[47] After speaking with Strickland, Connell called O'Connor. Having obtained Strickland's permission, Connell told O'Connor that Strickland asked Connell to use his cooperation to his advantage in plea negotiations with the Adams County prosecutor. O'Connor advised Connell to contact the State PDO. O'Connor did not inform Owens's team that Strickland wanted to use his cooperation to negotiate a better plea agreement with Adams County prosecutor, Michael Heinz (Heinz).

After speaking with O'Connor, Connell notified the court that he could not continue to represent Strickland without consulting the State PDO. He explained at a bench conference that he recently learned Strickland was cooperating on two Arapahoe County cases, and he requested a short continuance to determine if withdrawal was necessary. The court granted a continuance to January 18. It appears from the January 13 and 18 transcripts that Connell called the State PDO and spoke to Brown. After consulting with D. Wilson, Brown advised Connell to withdraw from Strickland's case.

On January 18, Strickland and Connell returned to court, and Connell advised the court that withdrawal was necessary. Connell explained that Strickland was going to be a witness against multiple homicide defendants in Arapahoe County. The court granted the motion to withdraw and appointed Barnes to represent Strickland.

Connell did not use Strickland's cooperation in plea negotiations with Heinz. Nor did he share any confidential information regarding Strickland with anyone on

[47] This was the same day the prosecution endorsed Strickland as a witness in the Lowry Park case.

Owens's trial team. The State PDO's ethical screening device precluded Connell from discussing Strickland with DPDs in other regional offices with the exception of other DPDs who were also representing Strickland and negotiating a global disposition on his behalf.

Pursuant to plea negotiations with Barnes, Heinz offered Strickland four to 16 years with no mandatory minimum sentence in exchange for Strickland's guilty plea to aggravated robbery. Heinz agreed not to argue for more than 10 years. At Strickland's providency hearing on April 7, 2006, the sentencing judge recognized Strickland's cooperation:

> THE COURT: Have there been any threats by anyone to force you to enter this plea?
>
> [STRICKLAND]: No, sir.
>
> THE COURT: Any promises other than the promise that the other counts of the information in this case will be dismissed? Are there any other cases in Adams County?
>
> MR. HEINZ: No, Your Honor.
>
> THE COURT: Okay. In exchange for certain cooperation that you are going to perform in other cases, the district attorney has agreed that they will argue for no more than ten years, but the sentence is open so that I can at least listen to you, your attorney, the district attorney and I will make a decision as to what the sentence would be. Any other promises?
>
> MR. HEINZ: No, Your Honor.
>
> MR. BARNES: No, Your Honor.
>
> THE COURT: Do you understand that Mr. Strickland?
>
> [STRICKLAND]: Yes, I understand.

SOPC.EX.D-413 (Plea Hrg Tr. 6:10-25; 7:1-4 (Apr. 7, 2006)).

> THE COURT: I had a discussion with your attorney and the District Attorney and the Aurora Police Department

> on this case. We are going to set it over for sentencing for about a week.

SOPC.EX.D-413 (Plea Hrg Tr. 7:18-21 (Apr. 7, 2006)). Strickland was sentenced to eight years.

(d) Arapahoe PDO

Various Arapahoe DPDs appeared with Strickland on his Arapahoe County cases until January 25, 2005, when Walsh was assigned to represent Strickland. In 2005, Walsh asked DPD Christopher Baumann (Baumann) to join him in representing Strickland because it appeared one of Strickland's cases was going to trial. Walsh cannot recall if he ever shared any confidential information concerning Strickland with Baumann.

Walsh communicated with Strickland's DPDs in Adams and Denver Counties in an effort to reach a global plea disposition for Strickland. It is likely that one or more of the DPDs shared Strickland's confidential information during these discussions. Walsh did not use Strickland's cooperation while negotiating a plea agreement with prosecutors in Arapahoe County.

Shortly after Connell alerted O'Connor and the State PDO on January 13, 2006, that Strickland was cooperating with the prosecution in Arapahoe County, the State PDO or O'Connor instructed Walsh to withdraw from Strickland's cases. On January 31, 2006, Walsh notified the court that Strickland needed ADC. The court appointed ADC Elizabeth Barnacle (Barnacle) and scheduled her appearance for February 3. On February 3, Barnacle appeared but Strickland did not. The matter was reset to February 6 when Strickland appeared, along with Walsh and Barnacle, and the court granted Walsh's motion to withdraw.

On February 6, Walsh sent an email advising the Arapahoe PDO, including Owens's trial team, that he withdrew from representing Strickland and that he was precluded from discussing Strickland's cases with anyone in the office. He sent

the email pursuant to the ethical screening device in the State PDO's conflicts of interest policy. Following his withdrawal, he did not discuss Strickland with Owens's trial team. Additionally, the Arapahoe PDO sealed both of Strickland's files. Thus, the files were accessible only with permission from O'Connor, and Owens's trial team never sought O'Connor's permission to access Strickland's case files.

Strickland's Arapahoe County cases were resolved on April 18, 2006. ADC Gregory Graf (Graf), who worked with Barnacle, appeared with Strickland when he entered a guilty plea to possession of a weapon by a previous offender. The court sentenced Strickland to a stipulated 15 months in prison, concurrent with his Adams County sentence. Arapahoe County prosecutors dismissed the other charges in Strickland's cases. Strickland's plea agreement required him to testify truthfully in this case.

(e) Denver PDO

In 2004, Strickland was charged with assault in Denver.[48] DPD Michael Boyce (Boyce) represented Strickland in that case from October 20, 2005, to February 17, 2006. During that time, Boyce was in contact with Strickland's Arapahoe and Adams DPDs in an effort to negotiate a global plea agreement. It is likely that one or more of the DPDs shared Strickland's confidential information during these discussions. Boyce did not use Strickland's cooperation in his plea negotiations with the Denver prosecutor because he was unaware that Strickland was a cooperating witness.

Boyce learned of Connell's withdrawal while reviewing Strickland's Adams County court file. That prompted him to call Brown at the State PDO. Brown

[48] Denver case 04CR3402.

directed him to withdraw, which he did on February 17, 2006. The court appointed ADC Scott Reisch (Reisch) to represent Strickland.

The State PDO's ethical screening device precluded Boyce from discussing Strickland with DPDs in other regional offices, with the exception of other DPDs who were also representing Strickland. According to Boyce, he did not provide any of Strickland's confidential information to Owens's trial team.

On September 29, 2006, Strickland resolved his Denver case by pleading guilty to second-degree assault. The prosecutor dismissed the other charges. On November 30, Strickland was sentenced to six years concurrent with Adams County.

(iv) *West* Adverse Effect Analysis

To establish an adverse effect, Owens must:

> (1) identify a plausible alternative defense strategy or tactic that counsel could have pursued, (2) show that the alternative strategy or tactic was objectively reasonable under the facts known to counsel at the time of the strategic decision, and (3) establish that counsel's failure to pursue the strategy or tactic was linked to the actual conflict.

West, 341 P.3d at 533. Owens argues the various conflicts of interest outlined above adversely affected his trial team's performance in the following ways:

(a) Conduct a Pretrial Interview of Strickland

Owens's trial team did not interview Strickland before trial. Shortly after Strickland provided information implicating Owens, the prosecution took measures to ensure Strickland's safety. The prosecution facilitated Strickland's transport to another detention facility and did not disclose Strickland's whereabouts to Owens's trial team. The court eventually precluded Owens's trial team from

independently contacting protected witnesses, including Strickland, and implemented a process by which the trial team could contact protected witnesses *via* the prosecution. Owens's trial team did not avail itself of that process to contact the majority of protected witnesses, including Strickland. The trial team's decision not to interview Strickland was not related to the purported conflicts of interest. *See id*. at 534 (prong three "can be proved in two ways: first, by showing that the alternative strategy or tactic was 'inherently in conflict with . . . the attorney's other loyalties or interests'; or, second, by showing that the alternative strategy or tactic was 'not undertaken *due to* those other loyalties or interests.'" (quoting *Nicholson*, 611 F.3d at 212) (emphasis in *West*)).

(b) Impeach Strickland with False Alibi

Owens's trial team did not impeach Strickland with his, according to Owens, false alibi for his aggravated robbery case. At Strickland's bond hearing in duty court, King argued for a personal recognizance bond based on information that Strickland had an alibi vis-à-vis an ankle monitor. King did not investigate the legitimacy of Strickland's alibi because he was not assigned to represent Strickland. Thus, King did not know if Strickland's alibi was false. King has no memory of appearing with Strickland in January 2005. At Owens's request, the court reviewed the police reports during the post-conviction proceedings for Strickland's aggravated robbery case.[49] The reports reflect that Strickland's ankle monitor showed that he was in or near his residence at the time of the robbery. The reports also reflect that Strickland told his probation officer that he could remove the ankle monitor at any time. But Strickland's claim that he had the

[49] The reports are attached to SOPC-191 as Appendix B.

ability to remove the monitor does not necessarily render his alibi false.[50] Because King had no memory of Strickland[51] and because King did not know whether Strickland's alibi was false, the record does not clearly indicate that Owens's trial team had sufficient information to consider cross-examining Strickland with his allegedly false alibi. *See id*. at 533 (prong one is satisfied if there is "record evidence that clearly indicates counsel possessed sufficient information to merit considering an alternative strategy or tactic.").

(c) Interview Strickland's DPDs

Owens's trial team did not investigate Strickland *via* Strickland's DPDs. King acknowledged he was not prohibited from interviewing Strickland's DPDs, but he did not do so because Strickland's DPDs were screened from talking about Strickland with him and were likely to assert the attorney-client privilege to avoid such inquiry.[52] Because Strickland's DPDs had an ethical obligation not to discuss Strickland with Owens's trial team, interviewing Strickland's DPDs was not an objectively reasonable strategy. *See id*. (prong two is satisfied if the "plausible alternative that counsel might have pursued . . . was objectively reasonable under the facts known to counsel at the time of the strategic decision.").

(d) Call Connell as a Witness

Owens's trial team did not call Connell as a witness at trial. Following the Dayton Street homicides, Strickland saw the victims' mothers on television pleading for help to identify who killed their children. Strickland, who had previously suffered a gunshot wound, felt sympathy for the victims' mothers. Strickland testified at trial that his sympathy for the victims' mothers motivated

[50] Walsh intended to assert an alibi defense based on the ankle monitor evidence at Strickland's trial.

[51] Given the nature of duty court, the court credits King's lack of memory of Strickland.

[52] King interviewed Barnes, Strickland's court-appointed attorney in Adams County.

him to become a cooperating witness in the Dayton Street cases. On January 13, 2006, Strickland told Connell that he was a cooperating witness in Arapahoe County. Strickland urged Connell to use his cooperation to negotiate a favorable plea agreement with the Adams County prosecutor.

Owens contends his trial team should have called Connell to cast doubt on Strickland's altruistic motivations. But if called to testify at trial, Connell would have invoked the attorney-client privilege, and at that time, the record was insufficient to support an argument that Strickland waived his privilege with Connell. Under those circumstances, the trial court would not have compelled Connell to testify.

Additionally, Connell's testimony was not necessary to cast doubt on Strickland's altruistic motivations. At trial, Strickland testified that his plea offer improved after Fronapfel appeared on his behalf in Adams County, including that:

- prior to December 30, 2005, his offer had been to plead guilty to aggravated robbery in Adams County with a sentencing range of 10 to 32 years;
- Fronapfel appeared on his behalf in Adams County;
- following Fronapfel's appearance, the plea offer improved to four to 16 years and the prosecutor would request 10 years; and
- he pleaded guilty to aggravated robbery in Adams County and was sentenced to eight years in prison.

Guilt Phase Tr. 6-128 (May 25, 2008 p.m.). Strickland's testimony shows he sought and received a significant benefit on his own cases in return for his cooperation in the Dayton Street cases.

Because the court could not have compelled Connell to testify and because Connell's testimony was not necessary, calling Connell as a witness at trial was not

an objectively reasonable strategy for Owens's trial team to have pursued. *See West*, 341 P.3d at 533 (prong two is satisfied if the "plausible alternative that counsel might have pursued . . . was objectively reasonable under the facts known to counsel at the time of the strategic decision.").

(e) Assign Cross-Examination of Strickland to Kepros/ Provide Work Product to Kepros

King, as lead counsel, assigned Kepros to cross-examine Strickland at trial. Owens argues King should have cross-examined Strickland himself. King and Kepros each examined Strickland once during pretrial motions hearings. Kepros cross-examined him on June 13, 2007. At issue was the admissibility of the statements Carter made in Strickland's presence while they were incarcerated at the ACDF in December 2005. Kepros cross-examined Strickland about Carter's statements and attacked Strickland's credibility with his criminal history, his cooperation against other defendants in high-profile cases, and the gunshot wound he suffered. Kepros's 60-page cross-examination indicates she was familiar with Strickland, his role in this case, and where he was vulnerable to impeachment.

After the June 13 hearing, Strickland alleged that Owens made threatening gestures and mouthed threatening words to him while he was testifying. Owens's trial team called Strickland to testify on August 30, 2007, regarding the June 13 incident. On that date, King examined Strickland concerning the June 13 incident only.

In December 2007, King was seriously considering assigning Kepros to cross-examine Strickland at trial. During the post-conviction hearing, King testified that he learned of his prior appearance with Strickland sometime in late 2007 and assigned Kepros to cross-examine Strickland at trial out of an abundance of caution and to avoid an appearance of impropriety. When King assigned

Strickland to Kepros, he did not explain why and no exhibits reflect his reasoning. While it is possible King assigned Strickland to Kepros because of his prior appearance with Strickland, it is equally, if not more, likely that he assigned Strickland to Kepros in an attempt to balance their workloads for the trial on the merits. Five witnesses emerged during pretrial motions hearings as particularly important. Those witnesses were Sailor, Johnson, Dexter Harris (Harris), Todd, and Strickland. King handled the cross-examinations of Sailor, Johnson, Harris, and Todd at both pretrial motions hearings and at trial.

Kepros was more familiar with Strickland; she had primary responsibility for the guilt stage of the trial; and King was to cross-examine the other four particularly important witnesses at trial. It was not an objectively reasonable alternative strategy for King to cross-examine Strickland at trial. *See id.* (prong two is satisfied if the "plausible alternative that counsel might have pursued . . . was objectively reasonable under the facts known to counsel at the time of the strategic decision.").

Owens also argues King should have given Kepros the report of his interview of Barnes when he assigned Strickland's cross-examination to her. King gave Kepros a small notebook with some relevant discovery materials but it did not include the report of his interview of Barnes in August 2006. King testified that he did not withhold the report from Kepros and that she could have accessed it in the file. Like the trial team's decision not to advise Owens or the court of purported conflicts of interest, King's failure to provide Kepros with the report was not a "defense strategy or tactic" contemplated by *West*. *Id.*

(f) Impeach Strickland with His Adams County Plea Agreement

Owens's trial team did not impeach Strickland at trial with the transcript of his Adams County providency hearing, which reflects the Adams County judge's understanding that the prosecutor was asking for no more than 10 years in exchange for Strickland's cooperation in other cases. Owens's trial team did not read the transcript prior to cross-examining him. Thus, the team's failure to impeach Strickland with the transcript was not related to the purported conflict of interest. *See id*. at 534 (prong three "can be proved in two ways: first, by showing that the alternative strategy or tactic was 'inherently in conflict with . . . the attorney's other loyalties or interests'; or, second, by showing that the alternative strategy or tactic was 'not undertaken *due to* those other loyalties or interests.'" (quoting *Nicholson*, 611 F.3d at 212) (emphasis in *West*)).

(g) Cross-Examine Strickland Regarding Felonious Conduct and Perjury

Owens argues that his trial team should have cross-examined Strickland about his allegedly fabricated alibi in his aggravated robbery case in order to expose Strickland to various felony charges. *See* part II.A.4.b.ii(a)(iv)(b) of this Order. By causing King to support his bond argument with Strickland's purported alibi, Owens asserts that Strickland committed murder by perjury, C.R.S. § 18-3-102(1)(c); perjury, C.R.S. § 18-8-502(1); and attempt to influence a public servant, C.R.S. § 18-8-306. There is some evidence supporting Owens's assertion that Strickland's alibi was false. The arrest affidavit indicates that a carjacking victim had identified Strickland and said Strickland was present with a black gun at the carjacking. SOPC-191, App. B. However, the victim did not appear to be a strong witness, and it was unlikely that Strickland would be prosecuted for those crimes.

Because it was unlikely Strickland would be prosecuted, it was not objectively reasonable for Owens's trial team to cross-examine Strickland about those purported felony charges. *See* Colo. RPC 3.4(e) ("[I]n trial, [a lawyer shall not] allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . . ."); *see also West*, 341 P.3d at 533 (court may consider the attorney's ethical obligations to determine if the alternative strategy was objectively reasonable).

(h) Use Favorable Information from Kepros, Strickland's DPDs, and O'Connor

Owens asserts that his trial team did not use purportedly favorable information from Kepros, Walsh, Baumann, Connell, and O'Connor to advance his interests.

There is no evidence that the information Kepros had about Strickland was favorable to Owens. Strickland's DPDs adhered to the State PDO's conflicts of interest policy and did not discuss Strickland with Owens's trial team. If Owens's trial team had attempted to interview Strickland's DPDs, they would have asserted the attorney-client privilege and would have declined to provide any information about Strickland. O'Connor was performing an administrative function when he discussed Strickland with Connell. O'Connor would not have given any information he learned from Connell to Owens's trial team. Under these circumstances, it was not objectively reasonable for Owens's trial team to use information from Kepros, Strickland's DPDs, or O'Connor because the information was either not favorable to Owens or was not accessible to the trial team. *See West*, 341 P.3d at 533 (the plausible alternative must have been "objectively reasonable under the facts known to counsel at the time of the strategic decision.").

(i) Access the Collective Knowledge of the Arapahoe PDO

Owens's trial team did not access and use "the collective knowledge and experience of the attorneys and staff" of the Arapahoe PDO.

The conflicts of interest policy did not entirely prevent the DPDs who withdrew from representing witnesses from discussing Owens's cases with his trial team. Those DPDs could brainstorm or strategize with the trial team so long as the topic did not involve confidential information from the DPDs' former client.

In addition, the policy recognizes that sharing confidential information with others in a regional office in order to provide the best defense for a client may be necessary, but it does not encourage DPDs to share client confidences:

> In most situations, access to the collective knowledge and experience of the attorneys and staff of any regional office is integral to the preparation of the best defense for a Public Defender client. Therefore it is recognized that client information, including confidences, is disseminated among the employees of a single regional office when necessary to prepare a client's case.

SOPC.EX.D-2, p. 16-17. It was impractical for Owens's trial team to utilize the collective knowledge of the Arapahoe PDO because Owens's cases were complex. There were two incidents, three codefendants, hundreds of witnesses, and over 30,000 pages of discovery. Further complicating the situation was the Witness Protection Program. There were nuanced orders precluding disclosure of certain information about the case. Given the volume of the case and the nuanced protective orders, it was not objectively reasonable for Owens's trial team to discuss an issue with Arapahoe PDO staff while ensuring compliance with the numerous protective orders in the case. *See West*, 341 P.3d at 533 (the plausible

alternative must have been "objectively reasonable under the facts known to counsel at the time of the strategic decision.").

(j) Suggest Alternative Source of Strickland's Information

Owens asserts that his trial team should have suggested in cross-examination or in argument that Strickland obtained his knowledge of the Dayton Street facts from Walsh, Strickland's Arapahoe DPD, and not from Carter. Owens's trial team did not suggest to the jury that the source of Strickland's information was Walsh. Because King, Kepros, and Walsh were Arapahoe DPDs, Owens presumes that there was a good faith basis for assuming that King and Kepros shared information about Owens and the Dayton Street homicides with Walsh. Owens further presumes that there was a good faith basis for assuming that Walsh shared such information with Strickland, causing Strickland to have information that allowed him to become a cooperating witness against Owens. Advancing that theory to the jury to explain how Strickland acquired information about the Dayton Street homicides was not an objectively reasonable strategy because no evidence supports that theory. *See id*. (the plausible alternative must have been "objectively reasonable under the facts known to counsel at the time of the strategic decision.").

(k) Call Witnesses to Rebut Strickland's Allegations that Owens Made Gestures

Owens's trial team did not rebut Strickland's testimony at trial that Owens made threatening gestures to Strickland while Strickland testified during a pretrial motions hearing. According to Owens, his trial team should have called witnesses to rebut Strickland's testimony, including King. King advised the court shortly after the incident that he did not observe Owens make any gestures. Following the motions hearing, King advised Owens that King could testify, but that his

testimony may give rise to a conflict of interest. King and Owens agreed King should remain as trial counsel. King was entitled to rely on Owens's input. *See Mickens v. Taylor*, 240 F.3d 348, 362 (4th Cir. 2001) (defense attorney was entitled to rely on information from his client to make strategic decision).

Owens's trial team did not call other witnesses who were available to, according to Owens, rebut Strickland's allegations. Aside from King, the potential witnesses were Ray's attorney and the courtroom deputies. Shortly after Strickland made the allegations, Ray's attorney advised the court that he was looking at Owens when Owens allegedly made the gestures and that he did not see Owens make any such gestures. The testimony from Ray's attorney would have rebutted Strickland's allegations, but, given his status as the codefendant's attorney, the jury may have viewed his testimony as biased in favor of Owens. Several courtroom deputies testified about this incident at a subsequent pretrial motions hearing. One deputy testified she could not observe Owens's hands from her vantage point and that she did not see Owens mouth anything to Strickland. Another deputy testified that he was not in the courtroom the entire time Strickland testified. Because the testimony of the courtroom deputies would not have rebutted Strickland's allegations and because the testimony of Ray's attorney may have been perceived as biased, calling those witnesses was not an objectively reasonable strategy under the circumstances. *See West*, 341 P.3d at 533 (prong two is satisfied if the "plausible alternative that counsel might have pursued . . . was objectively reasonable under the facts known to counsel at the time of the strategic decision.").

(v) Conclusion

The court concludes Owens was not deprived of his constitutional right to effective and conflict-free counsel because none of the purported conflicts of

interest described above adversely affected the performance of Owens's trial team. *See id*. at 526 ("A defendant seeking post-conviction relief based on ineffective assistance of counsel resulting from an attorney's alleged conflict 'must demonstrate that an actual conflict of interest adversely affected his [attorney]'s performance.'" (quoting *Cuyler*, 446 U.S. at 348)).

(b) Jon Martin

(i) Parties' Positions

Owens contends he was deprived of his Sixth Amendment right to effective and conflict-free counsel because his trial team was adversely affected by Baumann's representation of Jon Martin (J. Martin), which, according to Owens, created a conflict of interest.

The prosecution responds that Baumann's representation of J. Martin did not adversely affect the trial team's representation of Owens.

(ii) General Background

J. Martin attended the Lowry Park event with Johnson, and he may have been armed at the time. While Johnson told the police Owens was the shooter, J. Martin denied witnessing the shootings and did not identify the shooter or the driver of the Suburban. Sailor initially named J. Martin as a possible suspect in the shootings, but she later recanted. There were also unspecified rumors that he was involved in the shootings. The police viewed him as a suspect for a limited time but never developed any incriminating evidence against him.

During her opening statement in Owens's Lowry Park trial, Kepros told the jury that the APD inadequately investigated the case. She pointed to J. Martin's status as an alternate suspect as an example of the deficiencies in the investigation.

J. Martin was not a cooperative witness with law enforcement. The prosecution endorsed J. Martin in the Lowry Park and Dayton Street cases but he did not testify in either trial.

Kepros interviewed J. Martin on October 25, 2007, while he was incarcerated. He told Kepros that he was present in 2005 when Ray solicited Johnson to kill Marshall-Fields. According to J. Martin, Owens was also present for this conversation and offered to do the killing for free. J. Martin claimed to have been housed with Ray shortly before the interview. According to J. Martin, Ray's monetary offer to Marshall-Fields not to testify was "100%" for Owens's benefit so that he would not be identified as a Lowry Park shooter. J. Martin told Kepros that Ray and Owens were large volume drug dealers and were armed "24/7." He described Ray's relationship with Owens as "white on rice."

(iii) Purported Conflict of Interest[53]

In Arapahoe County, J. Martin accumulated three felony cases during the relevant time period. In 2006, he was charged with robbery and motor vehicle theft.[54] Arapahoe DPD Beth Turner (Turner) represented J. Martin on that case. J. Martin pleaded guilty on September 27, 2006, to attempted motor vehicle theft and received a deferred judgment.

[53] J. Martin also had Boulder County case 03CR2119. The Boulder PDO represented J. Martin from February 6, 2004, through March 5, 2008. Among other charges, J. Martin was charged with felony menacing, which involved a 9 mm pistol. J. Martin pleaded guilty on January 13, 2005, and the trial court sentenced him on November 1, 2005. Evidence presented by Owens regarding J. Martin's Boulder County case consists of the court file. SOPC.EX.D-1258. No testimony concerning this case was elicited. The court finds this record is insufficient to determine whether Owens is entitled to relief based on the Boulder PDO's representation of J. Martin.

[54] Arapahoe County case 06CR2420.

The prosecution endorsed J. Martin in the Dayton Street case on February 15, 2007. Kepros acknowledged a conflict check might not have been done at the time of the endorsement.[55]

The Arapahoe PDO was reappointed to represent J. Martin on March 19, 2007, after he was arrested on a complaint to revoke his deferred judgment.

On April 21, 2007, J. Martin was charged with burglary, kidnapping, and two misdemeanors.[56] Baumann entered his appearance on behalf of J. Martin on April 23, almost three months after Owens's Lowry Park trial. Baumann was not aware that J. Martin had been referenced as a possible alternate suspect by Owens's Lowry Park trial team. Baumann negotiated a plea agreement and on May 24, J. Martin pleaded guilty to kidnapping. The court sentenced J. Martin to intensive supervised probation with some suspended jail time. On that date, Baumann advised the court that J. Martin intended to admit the violation of his deferred judgment.

On May 31, 2007, J. Martin was charged with sexual assault, burglary, kidnapping, motor vehicle theft, and several misdemeanors.[57]

Although Baumann was his primary DPD, numerous other DPDs covered J. Martin's cases for Baumann at various times. No member of Owens's trial team appeared on J. Martin's behalf.

In the fall of 2007, Kepros realized J. Martin was an endorsed witness in this case and notified Baumann. Kepros, not knowing of Baumann's representation of J. Martin until that time, did not consult J. Martin's PDO files prior to her

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[55] The prosecution misspelled J. Martin's first name on DA-20, the February 15, 2007, notice of endorsement. On the endorsement, the prosecution spelled his name "John" but the correct spelling is Jonathan or Jon. The misspelling may have caused an erroneous conflicts check.

[56] Arapahoe County case 07CR1218.

[57] Arapahoe County case 07CR1668.

realization that J. Martin was represented by Baumann, and did not do so after her realization because she recognized the potential conflict and honored the ethical screening device which prevented her from doing so.

On October 12, 2007, Baumann withdrew from all three cases, but he does not recall the reason. O'Connor signed the notices of withdrawal, which cite a witness-client conflict.

Subsequent to withdrawing, Baumann did not send an email notifying Arapahoe PDO staff that he was screened from discussing J. Martin's cases. Baumann does not recall being instructed to keep J. Martin's information confidential. According to Baumann, he would not have needed such a directive because he recognized he was ethically obligated to do so. In Baumann's view, the ethical rules precluded him from sharing J. Martin's confidential information with anyone, including Owens's trial team. Owens's trial team did not ask for permission to access and therefore did not access J. Martin's case file.

(iv) *West* Adverse Effect Analysis

(a) Portray J. Martin as an Alternate Suspect

Owens's trial team did not portray J. Martin as an alternate suspect for the Lowry Park shootings despite the following evidence available prior to trial:

- J. Martin was at Lowry Park and may have been armed;
- Johnson told Fronapfel that he heard J. Martin was the shooter;
- Sailor reported hearing J. Martin was the shooter;
- J. Martin matched a description of the shooter (6' 1'' with braids);
- a witness reported seeing J. Martin fire a gun;
- J. Martin wore a checkered shirt and a witness reported that the shooter was wearing a checkered shirt;

- two months after the shooting, J. Martin was arrested with a .380 caliber handgun, the same caliber weapon that killed Vann;
- J. Martin was present when Ray offered Johnson $10,000 to kill Marshall-Fields;
- J. Martin sold drugs for Ray;
- Ray showed J. Martin the discovery from the Lowry Park case, which had J. Martin's name in it; and
- law enforcement put J. Martin's photo into a lineup and issued an Attempt to Locate for J. Martin in September 2005.[58]

According to Owens, J. Martin was also an alternate suspect for the Dayton Street homicides because if J. Martin killed Vann, he would have had a motive to kill Marshall-Fields.

In October 2007, Kepros interviewed J. Martin while he was incarcerated. Some of the information from J. Martin was particularly damning to Owens, including that Owens told Ray he would kill Marshall-Fields for free and that Ray's $10,000 offer to Marshall-Fields not to testify was 100% for Owens's benefit so that Owens would not be identified as the Lowry Park shooter. Other harmful information from J. Martin included:

- the close relationship between Ray and Owens;
- Ray and Owens were always armed; and
- Ray and Owens were large volume drug dealers.

J. Martin also told Kepros that he fled to his car when guns were drawn at Lowry Park and that he did not witness the shooting of Vann.

[58] SOPC-300.

The evidence suggesting J. Martin was an alternate suspect for the Lowry Park shootings was weak and unconvincing. It would not have withstood the strong evidence implicating Owens, including Johnson's steadfast identification of Owens as the Lowry Park shooter, Sailor's testimony regarding (1) the circumstances leading to the shooting, (2) Ray's berating of Owens for having shot Vann, and (3) the myriad of cover-up activity and the substantial corroborating evidence. It also would not have outweighed the risk of the jury learning that Ray's bribe to Marshall-Fields was to protect Owens, which inherently suggests Owens killed Vann. Portraying J. Martin as an alternate suspect for either the Lowry Park shootings or the Dayton Street homicides was not an objectively reasonable strategy for Owens's trial team to have pursued. *See West*, 341 P.3d at 533 (prong two is satisfied if the "plausible alternative that counsel might have pursued . . . was objectively reasonable under the facts known to counsel at the time of the strategic decision.").

(b) Discuss J. Martin as an Alternate Suspect with Owens

Owens's trial team did not discuss with Owens whether it should pursue J. Martin as an alternate suspect. While choosing a theory of defense is a strategic decision, discussing it with a client is not. Owens's trial team's failure to discuss the viability of J. Martin as an alternate suspect with Owens was not a "defense strategy or tactic" as contemplated by *West*. *See id*. (prong one is proven if there is "record evidence that clearly indicates counsel possessed sufficient information to merit considering an alternative strategy or tactic."). Additionally, "[o]n issues of trial strategy, defense counsel is 'captain of the ship.'" *People v. Bergerud*, 223 P.3d 686, 693 (Colo. 2010) (quoting *Arko v. People*, 183 P.3d 555, 558 (Colo. 2008)).

(c) Seek Release of J. Martin's File/Ask for Permission to Interview J. Martin

Owens's trial team did not ask Baumann to release J. Martin's file for purposes of investigating J. Martin as an alternate suspect. Kepros adhered to the State PDO conflicts of interest policy and did not access J. Martin's file in the Arapahoe PDO. Asking Baumann to release J. Martin's file would have been futile. Baumann would have adhered to the State PDO's conflicts of interest policy, including the ethical screening device. Baumann did not and would not have discussed J. Martin with Owens's trial team. Because Baumann would have followed the conflicts of interest policy and would have asserted the attorney-client privilege, it was not objectively reasonable for Owens's trial team to ask Baumann for his file on J. Martin. *See West*, 341 P.3d at 533 (prong two is satisfied if the "plausible alternative that counsel might have pursued . . . was objectively reasonable under the facts known to counsel at the time of the strategic decision.").

Nor did the team ask for Baumann's permission to interview J. Martin. Asking Baumann for permission was unnecessary given Baumann's withdrawal, and Kepros, in fact, interviewed J. Martin on October 25, 2007, two weeks after Baumann's withdrawal. *See id*. (prong two is satisfied if the "plausible alternative that counsel might have pursued . . . was objectively reasonable under the facts known to counsel at the time of the strategic decision.").

(v) Conclusion

The court concludes Owens was not deprived of his constitutional right to effective and conflict-free counsel because Baumann's representation of J. Martin did not adversely affect the performance of Owens's trial team. *See id*. at 526 ("A defendant seeking post-conviction relief based on ineffective assistance of counsel resulting from an attorney's alleged conflict 'must demonstrate that an actual

conflict of interest adversely affected his [attorney]'s performance.'" (quoting *Cuyler*, 446 U.S. at 348)).

(c) Percy Carter, Sr.

(i) Parties' Positions

Owens contends he was deprived of his Sixth Amendment right to effective and conflict-free counsel because his trial team was adversely affected by King's and the Arapahoe PDO's representation of Carter, Sr., which, according to Owens, created a conflict of interest.

The prosecution argues Owens is estopped from making this argument because when the prosecution raised this issue with the Lowry Park trial court, Owens took the position there was no conflict.

(ii) General Background

Ray regarded Carter, Sr. as his stepfather even though Ray's mother and Carter, Sr. never married. Carter, Sr. and his girlfriend rented motel rooms so that Owens and Ray could hide out after the Lowry Park shootings in rooms where they were not registered, and Carter, Sr. disposed of their guns. Ray, Owens, and Carter met at his house shortly after the killing of Marshall-Fields and Wolfe.

In 2003, Carter, Sr. was convicted of drug distribution in Arapahoe County.[59] In 2005, he was again facing charges for drug distribution in Arapahoe County.[60] On December 22, 2005, he was charged as an accessory to first-degree murder for his involvement in the Lowry Park shootings.[61] Carter, Sr. was never charged in connection with the Dayton Street homicides.

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[59] Arapahoe County case 03CR3123.
[60] Arapahoe County case 05CR2773.
[61] Arapahoe County case 05CR3806.

Carter, Sr. never cooperated with the police on either the Lowry Park or the Dayton Street cases. The prosecution subpoenaed him to testify before the grand jury but cancelled the subpoena when his attorney informed the prosecution that he would invoke his Fifth Amendment rights. The prosecution endorsed him for the Lowry Park trial but never called him. He was not endorsed for the Dayton Street trial.

(iii) Purported Conflicts of Interest[62]

(a) Daniel King

The prosecution charged Carter, Sr. in his 2003 drug case with illegal distribution of narcotics. He also faced a special offender charge because he had a revolver and a shotgun on him at the time of the distribution. The incident leading to these charges occurred on November 4, 2003. The court appointed the Arapahoe PDO on November 5. Several DPDs, including O'Connor and King, appeared with Carter, Sr. during the ensuing months. King appeared with him on April 19, 2004, when he entered a guilty plea to drug distribution and was sentenced to probation. Pursuant to the plea agreement, the trial court ordered that the revolver and shotgun be forfeited and destroyed. King did not appear with Carter, Sr. again.

On January 9, 2006, the prosecution filed a Notice of Potential Conflicts in Lowry Park and raised King's representation of Carter, Sr. as a potential conflict of interest. Owens's trial team responded asserting that there was no conflict. On January 18, 2006, the Lowry Park trial court ruled there was no conflict yet sought Carter, Sr.'s waiver of any potential conflict. The trial court also ordered King not

[62] In SOPC-163, Owens does not reference Carter, Sr.'s Arapahoe County case 04CR1841. The Arapahoe PDO represented Carter, Sr. on that case from July 19, 2004, until he entered a guilty plea on May 17, 2005. No member of Owens's trial team appeared for Carter, Sr. on that case.

to cross-examine Carter, Sr. at trial. The order precluding King from cross-examining Carter, Sr. was somewhat academic because Carter, Sr. was not one of King's assigned witnesses. Owens was present during this hearing, but neither the court nor his trial team asked him to waive any potential conflict. During that hearing, King recalled Carter, Sr. but did not recall any confidential information about Carter, Sr. or his case.

King's prior representation of Carter, Sr. was briefly mentioned at a May 18, 2006, pretrial motions hearing in this case. Both parties noted the Lowry Park trial court had determined there was no conflict, and Owens's trial team maintained there was still no conflict.

Although the Lowry Park trial court prohibited King from cross-examining Carter, Sr., it did not prohibit King from investigating Carter, Sr. as an alternate suspect. There was a dispute within the team about whether Carter, Sr. was a *bona fide* alternate suspect. In King's view, the evidence of Carter, Sr. being an alternate suspect in either case was weak, but the evidence was somewhat stronger in the Dayton Street case. Kepros thought an alternate suspect investigation should be pursued for both cases but deferred to King as lead counsel. It was also her view that there was no time to pursue an alternate suspect investigation for the Lowry Park case due to the greater urgency of other pretrial matters. As a result, the team did not try to interview Carter, Sr. or his attorney.[63] According to King and Kepros, the representation of Carter, Sr. did not inhibit them from investigating Carter, Sr. as an alternate suspect and did not impede their representation of Owens in any way. Neither Kepros nor King discussed King's

[63] On November 23, 2005, the court appointed ADC Neil Silver to represent Carter, Sr.

prior representation of Carter, Sr. with Owens because neither viewed it as a conflict.

(b) Arapahoe PDO

On September 15, 2005, the prosecution filed drug distribution and special offender charges against Carter, Sr. An Arapahoe DPD appeared with Carter, Sr. for the first time on that case on October 12. At that time, the court set the case for a November 23 preliminary hearing. On November 8, the Arapahoe PDO filed a Notice of Withdrawal and cited a witness-client conflict. On November 23, the court appointed ADC Neil Silver (Silver). None of Owens's trial team participated in the decision to withdraw from Carter, Sr.'s 2005 drug case. On December 22, the prosecution filed Carter, Sr.'s Lowry Park accessory case, and the court appointed Silver to represent him on that case as well.

Carter, Sr. went to trial on the 2005 drug case with Silver and was convicted on August 29, 2006. On November 9, the court sentenced him to 30 years in prison. On that same date, he admitted the probation violation in his 2003 drug case and was sentenced to six years consecutive to the sentence on his 2005 drug case.

On July 9, 2007, with Silver as his counsel, Carter, Sr. entered a guilty plea in the Lowry Park accessory case and was sentenced to four years in prison concurrent to his 30-year sentence for his 2005 drug case.

Owens's trial team did not receive any confidential information about Carter, Sr. regarding either case from any Arapahoe DPD. The trial team also did not ask for permission to access and did not access Carter, Sr.'s PDO files.

(iv) *West* Adverse Effect Analysis

(a) Conduct a Pretrial Interview of Carter, Sr.

Owens's trial team did not interview Carter, Sr. The prosecution subpoenaed Carter, Sr. to testify before the grand jury but Carter, Sr. asserted his Fifth Amendment right to remain silent and did not testify. The prosecution sought Carter, Sr.'s cooperation against Owens but he refused to provide any information. It is unlikely that Silver would have advised Carter, Sr. to answer questions from anyone, especially from Owens's trial team, about the circumstances of the Lowry Park shootings or the Dayton Street homicides. It is also unlikely that Carter, Sr. would have independently agreed to be interviewed. Because attempting to interview Carter, Sr. would have been futile, doing so was not an objectively reasonable strategy for Owens's trial team to have pursued. *See West*, 341 P.3d at 533 (prong two is satisfied if the "plausible alternative that counsel might have pursued . . . was objectively reasonable under the facts known to counsel at the time of the strategic decision.").

(b) Investigate Carter, Sr. as an Impeachment Witness of Sailor

Owens's trial team did not investigate Carter, Sr. as a potential impeachment witness of Sailor. Owens speculates that because of Carter, Sr.'s involvement in the Lowry Park shootings and his close connection to Ray and Owens, he may have been able to impeach some of Sailor's statements. But to obtain impeachment information on Sailor from Carter, Sr. meant Owens's trial team would have had to interview Carter, Sr. As discussed above, interviewing Carter, Sr. was not objectively reasonable. *See* part II.A.4.b.ii(c)(iv)(a) of this Order. Likewise, given Carter, Sr.'s uncooperative nature, expecting him to testify at trial

was also not objectively reasonable. Finally, given Carter, Sr.'s criminal record, his illegal conduct on behalf of Ray and Owens, and his relationship with them, an experienced criminal defense attorney would not have considered him to be a potentially credible impeachment witness. *See West*, 341 P.3d at 533 (prong two is satisfied if the "plausible alternative that counsel might have pursued . . . was objectively reasonable under the facts known to counsel at the time of the strategic decision.").

(c) Investigate Carter, Sr. as an Alternate Suspect and Portray Him as an Alternate Suspect at Trial

Owens's trial team did not investigate Carter, Sr. as an alternate suspect for the Dayton Street homicides and did not portray him as an alternate suspect at trial. Owens suggests that the following evidence supports the theory that Carter, Sr. was an alternate suspect:

- according to Sailor, Carter, Sr. discarded the guns used at Lowry Park;
- Carter, Sr. was in the drug business with Ray;
- Carter, Sr. admitted to flying someone in from Chicago to kill Marshall-Fields; and
- Carter, Sr. told an inmate, James Nash (Nash), that Ray was the Dayton Street driver and the shooter, and that Carter was the passenger in the car.[64]

Endorsing an alternate suspect defense based on that evidence was not viable for several reasons. First, Marshall-Fields could not have known that Carter, Sr. disposed of the Lowry Park guns. Carter Sr. would have known this. The Dayton

[64] SOPC-300.

Street jury would have realized it as well. Thus, the fact that Carter Sr. disposed of the guns provides no logical motivation for Carter, Sr. to kill Marshall-Fields.

Second, the evidence that Carter, Sr. brought in a hitman from Chicago to kill Marshall-Fields does not suggest Carter, Sr. committed the Dayton Street homicides.

Third, Carter, Sr.'s drug dealing established his close ties with the family drug business that, at the time of the homicides, was headed by Ray with Owens as his first assistant. Carter, Sr. suffered convictions in 2004 and 2006 for possession of drugs with the intent to distribute. He had rented motel rooms for Ray and Owens on the night of the Lowry Park shootings in an attempt to prevent their arrests, and he disposed of the guns Ray and Owens used in the Lowry Park shootings. Carter, Sr. also opened his home to Ray, Owens, and Carter after the Dayton Street homicides. That evidence establishes a close connection between Carter, Sr. and Owens, and a history that did not involve Carter Sr. committing violent acts, but did involve his lending support following the violent acts of Owens and Ray. Implicating Carter, Sr. in the Dayton Street homicides would have further risked implicating Owens in the conspiracy to kill Marshall-Fields, which contradicted Owens's trial team's strategy of distancing Owens from the homicides.

Fourth Carter, Sr.'s statements to Nash that Ray and Carter were in the car on the night of June 20, 2005, are not evidence that Carter, Sr. was an alternate suspect. He did not identify himself as an occupant of the car and, because Ray's alibi evidence was strong, the statement might have indirectly supported the prosecution's theory that Carter was one of the car's occupants along with Owens.

Under those circumstances, investigating and portraying Carter, Sr. as an alternate suspect for the Dayton Street homicides was not objectively reasonable.

See West, 341 P.3d at 533 (prong two is satisfied if the "plausible alternative that counsel might have pursued . . . was objectively reasonable under the facts known to counsel at the time of the strategic decision.").

(d) Investigate Carter, Sr.'s Whereabouts on June 20, 2005

Owens's trial team did not investigate Carter, Sr.'s whereabouts on June 20, 2005. According to Owens, the purpose of investigating Carter, Sr.'s whereabouts on June 20, 2005, was not to implicate Carter, Sr. but was to verify or disprove Todd's presence at Carter, Sr.'s home that evening. Because the focus was not on Carter, Sr., pursuing this line of investigation was not "inherently in conflict" with any duty of loyalty Owens's trial team owed to Carter, Sr. There is also no evidence showing Owens's trial team did not investigate Carter, Sr.'s whereabouts on June 20, 2005, "due to" any duty of loyalty Owens's trial team owed to Carter, Sr. *See id*. at 534 (prong three "can be proved in two ways: first, by showing that the alternative strategy or tactic was 'inherently in conflict with . . . the attorney's other loyalties or interests'; or, second, by showing that the alternative strategy or tactic was 'not undertaken *due to* those other loyalties or interests.'" (quoting *Nicholson*, 611 F.3d at 212) (emphasis in *West*)).

(e) Interview James Nash

Owens's trial team did not interview Nash. According to Nash, he and Carter, Sr. were incarcerated together in 2006. On September 21, 2006, Nash reported to Fronapfel that Carter, Sr. made various statements about wanting to kill Marshall-Fields's mother:

- the lady all over the news had to be stopped or quieted down;
- people would forget about the case if the victim's mother was killed;
- the lady needs to go; and

- the lady needs to be eliminated.

Nash also told Fronapfel that Carter, Sr. said that the boy was still going to testify so they killed him, which was an apparent reference to Marshall-Fields.

After Nash spoke to Fronapfel, he entered the Witness Protection Program. The prosecution facilitated moving Nash to an out-of-state correctional facility and did not disclose his location to Owens's trial team. Court orders precluded Owens's trial team from contacting Nash unless an interview was arranged through the prosecution. Owens's trial team did not make arrangements with the prosecution to interview the majority of the protected witnesses, including Nash. Owens's trial team's decision not to interview Nash was not related to King's or the Arapahoe PDO's prior representation of Carter, Sr. *See id*. (prong three "can be proved in two ways: first, by showing that the alternative strategy or tactic was 'inherently in conflict with . . . the attorney's other loyalties or interests'; or, second, by showing that the alternative strategy or tactic was 'not undertaken *due to* those other loyalties or interests.'" (quoting *Nicholson*, 611 F.3d at 212) (emphasis in *West*)).

(v) Conclusion

The court concludes Owens was not deprived of his constitutional right to effective and conflict-free counsel because neither King's representation of Carter, Sr. nor the Arapahoe PDO's courtesy appearances with Carter, Sr. adversely affected the performance of Owens's trial team. *See id*. at 526 ("A defendant seeking post-conviction relief based on ineffective assistance of counsel resulting from an attorney's alleged conflict 'must demonstrate that an actual conflict of interest adversely affected his [attorney]'s performance.'" (quoting *Cuyler*, 446 U.S. at 348)).

(d) Perish Carter[65]

(i) Parties' Positions

Owens contends he was deprived of his Sixth Amendment right to effective and conflict-free counsel because his trial team was adversely affected by the Denver, Adams, and Arapahoe PDOs' representation of Carter, which, according to Owens, created a conflict of interest.

The prosecution responds there was no conflict because Carter's Denver cases were resolved long before the Lowry Park shootings and the Arapahoe PDO appeared only twice in Carter's Dayton Street accessory case over a three-day period before withdrawing. The prosecution also responds that the evidence at trial precluded any meaningful effort to show Carter acted alone in the Dayton Street homicides.

(ii) General Background

Carter participated in Ray's drug distribution business as a street-seller. According to Strickland, Carter obtained the car used for the Dayton Street homicides from a drug addict.

Carter told Strickland that he and Owens killed Marshall-Fields because Marshall-Fields was going to testify against Ray in his Lowry Park trial. Carter also told Strickland that he confronted Marshall-Fields in Gibby's the day before Marshall-Fields was killed.

The grand jury indicted Carter along with Ray and Owens on March 8, 2006. The court appointed ADC Randolph Canney (Canney) and ADC Cynthia Sheehan (Sheehan) to represent him. Canney and Sheehan presented evidence, which the prosecution did not contest, regarding Carter's mental health. On May 9, 2007, the

[65] The court denied Owens an evidentiary hearing on this claim.

prosecution announced it was no longer seeking the death penalty against Carter. Carter was eventually determined competent to stand trial. On June 10, 2010, the jury acquitted him of the murder charges but convicted him of conspiracy to commit murder and two other charges, including intimidating Marshall-Fields at Gibby's. On August 26, he was sentenced to 70 years in prison, and the sentence was ordered to run consecutively to any other sentence previously imposed. At the sentencing hearing, the prosecution dismissed the original witness intimidation case.

The prosecution endorsed Carter in both of Owens's cases. Prior to the trials, Carter asserted his right to remain silent and was never called to testify by either party.

(iii) Purported Conflicts of Interest

(a) Denver PDO

The Denver PDO represented Carter on a burglary charge and several menacing charges stemming from a September 19, 2003, incident.[66] Carter was arrested on that date and remained in custody. On December 18, 2003, Carter entered a guilty plea to second-degree burglary. On January 29, 2004, the court sentenced Carter to three years in prison.

The court also appointed the Denver PDO to represent Carter on assault and escape charges arising from an incident in court during the sentencing hearing in his burglary case.[67] On July 1, 2004, the court sentenced Carter to one year in prison for his escape case consecutive to the sentence in his burglary case. He was not at Lowry Park on July 4, 2004.

[66] Denver case 03CR4496.
[67] Denver case 04CR1135.

There is no evidence that Owens's trial team received confidential information from Carter's Denver DPDs.

(b) Adams PDO

On May 31, 2005, Adams County prosecutors charged Carter with various felonies that ranged from menacing to attempted murder.[68] The charges pertained to a May 16, 2005, domestic violence incident involving Carter's girlfriend. Carter was arrested on September 10, 2005. The Adams PDO first appeared at Carter's initial appearance on October 19, 2005. On that date, the court set the matter for a preliminary hearing on November 16. On November 14, the Adams PDO filed a Notice to Withdraw and cited a witness-client conflict as the reason. The court granted the request to withdraw on November 16 and appointed ADC Leslee Barnicle (Barnicle). Barnicle and Sheehan negotiated a plea to second-degree assault. Carter pled on October 11, 2007, and on November 21, was sentenced to 15 years in prison consecutive to his Denver sentence.

There is no evidence that Owens's trial team learned any confidential information about Carter from the Adams PDO.

(c) Arapahoe PDO

The Arapahoe PDO represented Carter on charges stemming from a September 13, 2003, incident. On November 26, 2003, Carter was charged with kidnapping and several other offenses.[69] Little happened until May 24, 2004, when Carter pleaded guilty to attempted kidnapping and was sentenced to two years in prison.

On August 22, 2005, Carter was charged in Arapahoe County with bribery and witness intimidation stemming from his confrontation of Marshall-Fields at

[68] Adams County case 05CR1630.
[69] Arapahoe County case 03CR2998.

Gibby's on June 19, 2005.[70] Carter was arrested on September 10 and appeared in court with a DPD from the Arapahoe PDO on September 12. The court set the matter for the filing of charges on September 15. Before the September 15 hearing, the Arapahoe PDO notified the court that it could not represent Carter because of a witness-client conflict. On September 15, the court appointed ADC Philip Smith (Smith) to represent Carter. The Arapahoe PDO filed a formal Notice of Withdrawal the next day. That case was never prosecuted because the charges merged into Carter's indictment for the Dayton Street homicides.

After Carter's indictment on March 8, 2006, the court appointed Canney and Sheehan to represent him.

Owens did not present any evidence showing that his trial team obtained any confidential information about Carter from any DPD in the Arapahoe PDO or that his trial team accessed Carter's PDO files.

(iv) *West* Adverse Effect Analysis

(a) Investigate Carter as an Alternate Suspect and Portray Him as an Alternate Suspect at Trial

Owens's trial team did not portray Carter as an alternate suspect for the Dayton Street homicides. Owens argues there was credible evidence supporting the theory that Carter acted alone in the Dayton Street homicides, including:

- Carter's statements to Strickland that put himself at the crime scene;
- Carter threatened Marshall-Fields at Gibby's the night before Marshall-Fields was killed;

[70] Arapahoe County case 05CR2564.

- Carter told an inmate that he and Chi from Chicago committed the murders;
- Carter's close ties with Ray; and
- Carter's history of violence.

While that evidence was available to Owens's trial team, there was also Owens's DNA in a baseball cap found at the scene of the homicides, Carter's statements to Strickland implicating himself and Owens, and Todd's testimony that Owens told Ray it was "tooken care of" on the night of the homicides. In light of the evidence that circumstantially implicated Owens, it was not objectively reasonable for Owens's trial team to have argued that Carter acted alone or to portray Carter as an alternate suspect. *See West*, 341 P.3d at 533 (prong two is satisfied if the "plausible alternative that counsel might have pursued . . . was objectively reasonable under the facts known to counsel at the time of the strategic decision.").

(b) Present Evidence Showing Carter had a Motive and Opportunity to Falsely Incriminate Owens

Owens's trial team did not elicit Carter's statements from Strickland that Carter intended to kill Owens for getting Ray into trouble. According to Strickland, Carter believed Owens got Ray into trouble when he killed Vann at Lowry Park. Owens argues his trial team should have presented that information to show that Carter was motivated to falsely incriminate Owens for the Dayton Street homicides. Had Owens's trial team presented this defense, it would have had to argue that Carter planted the baseball cap with Owens's DNA in it at the scene of the crime. Then it would have had to discount Owens's "tooken care of," "wrong place, wrong time," and "bitches get it, too" remarks, in a way consistent

with the theory that Carter acted alone. The totality of the evidence presented at trial, including evidence of Carter's intellectual disability, rendered that argument implausible. *See id.* ("[T]o show an adverse effect, a defendant must (1) identify a plausible alternative defense strategy or tactic that counsel could have pursued . . . .").

Making that argument also would have required Owens to emphasize Carter's opinion that Owens was the Lowry Park shooter. Offering Carter's opinion of Owens's guilt was obviously not in Owens's interest. *See id.* (prong one is satisfied if the "unpursued strategies and tactics . . . were obviously in the defendant's interest under the circumstances.").

(c) Argue in Mitigation that Owens was a Complicitor

In its mitigation case, Owens's trial team did not argue that Owens was a complicitor to Carter and that Carter did the actual shooting on Dayton Street. On May 14, 2008, the jury found Owens guilty as a principal of first-degree murder for killing Marshall-Fields and Wolfe. Arguing Owens was a complicitor would have contradicted the jury's verdict. Owens's trial team would have lost credibility with the jury by failing to acknowledge and respect its guilty verdicts. Because the jury had convicted Owens as a principal, it was not objectively reasonable for Owens's trial team to have argued in mitigation that he was a complicitor. *See id.* (prong two is satisfied if the "plausible alternative that counsel might have pursued . . . was objectively reasonable under the facts known to counsel at the time of the strategic decision.").

(d) Respond to Evidence that Owens Manipulated Carter

Owens's trial team did not respond to the prosecution's argument that Owens manipulated Carter. Owens argues his trial team should have presented Carter's criminal history, which showed that Carter had the capacity to independently commit violent crimes. Because Carter's criminal history was not admitted during the trial or sentencing hearing, Owens's trial team did not have a good faith basis to include it in its closing argument. Nor does Owens suggest any evidentiary basis that would have allowed for the admission of Carter's criminal history. Without an evidentiary basis to admit Carter's criminal history, Owens's trial team could not have used it to respond to the prosecution's argument. *See id.* (prong two is satisfied if the "plausible alternative that counsel might have pursued . . . was objectively reasonable under the facts known to counsel at the time of the strategic decision.").

(v) Conclusion

The court concludes Owens was not deprived of his constitutional right to effective and conflict-free counsel because the Denver, Adams, and Arapahoe PDOs' representation of Carter did not adversely affect the performance of Owens's trial team. *See West*, 341 P.3d at 526 ("A defendant seeking post-conviction relief based on ineffective assistance of counsel resulting from an attorney's alleged conflict 'must demonstrate that an actual conflict of interest adversely affected his [attorney]'s performance.'" (quoting *Cuyler*, 446 U.S. at 348)).

(e) Latoya Sailor[71]

(i) Parties' Positions

Owens contends he was deprived of his Sixth Amendment right to effective and conflict-free counsel because his trial team was adversely affected by DPD Justin Bogan's (Bogan) two appearances with Sailor, which, according to Owens, created a conflict of interest.

The prosecution acknowledges Sailor's accessory case was related to Owens's Lowry Park case but argues Bogan's involvement in that case and Sailor's drug case was so minimal as to preclude a finding of any conflict.

(ii) General Background

Sailor is Ray's ex-wife. She was near Lowry Park on July 4, 2004, when the shootings occurred. Later that evening, she witnessed Ray berate Owens for shooting Vann. She also assisted in hiding the Suburban, and she disposed of the clothes that Ray and Owens wore during the shootings. That night she, Ray, Owens, and Owens's girlfriend hid in motel rooms rented by Carter, Sr.

Sailor testified at trial about the statements Owens made about his involvement in the Dayton Street homicides. She also testified at the sentencing hearing.

(iii) Purported Conflict of Interest

The APD stopped a car in which Sailor was a backseat passenger on August 11, 2005, and arrested her for possession of narcotics. She was charged in Arapahoe County with possession of narcotics and as a special offender because she was in possession of a handgun when arrested.[72] Sailor first appeared in court

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[71] Sailor was previously known as Sailor-Ray because she was married to Ray. They are now divorced.

[72] Arapahoe County case 05CR2455.

on that case on August 15, 2005. Bogan appeared with her because it was his duty week for initial appearances. At the time of her appearance, the prosecution had already filed accessory charges against her for her involvement in the Lowry Park shootings.[73] The court appointed Bogan to represent Sailor on both cases. The appointment was done before a conflicts check or an indigency determination was accomplished. Bogan immediately recognized the conflict and alerted the court that he could not accept the appointment.

Bogan also appeared with Sailor on August 18 for the filing of charges. He reminded the court of Sailor's need for ADC. The court set the matter for appearance of ADC on August 25. On that date, the court allowed Bogan to withdraw, and the court appointed ADC Sean McDermott (McDermott) to represent Sailor on both cases.

Bogan's practice was not to discuss confidential case-specific matters with recent arrestees during duty week. Bogan was particularly cautious not to discuss confidential matters with Sailor because he already knew there was a potential conflict. Thus, Bogan did not have any confidential information from Sailor to share with Owens's trial team. Neither Sailor nor Bogan recalls these court appearances.

On December 14, 2005, Sailor entered a guilty plea to the Lowry Park accessory charge. The guilty plea was pursuant to a plea agreement that required her to cooperate with the prosecution and provide truthful testimony. In accordance with the plea agreement, the prosecution dismissed the drug charges. She was given a four-year deferred judgment.

[73] Arapahoe County case 05CR2447.

Owens's trial team did not ask for permission to access Sailor's PDO files and therefore did not access Sailor's PDO files.

(iv) *West* Adverse Effect Analysis

(a) Investigate the Circumstances of Sailor's Cases

Owens argues his trial team did not investigate the circumstances of Sailor's cases and as a result, did not expose her untruthfulness or her motives for testifying. Owens does not specify how his trial team should have investigated Sailor's cases. The prosecution disclosed the discovery in Sailor's cases to Owens's trial team, which included Sailor's plea agreement. At trial, Sailor admitted her involvement as an accessory in the Lowry Park shootings. King also questioned her about the facts of her drug case. In her closing argument, Kepros questioned Sailor's motives and her truthfulness. Kepros argued that Sailor's cooperation was influenced by her relationship with Ray and that Sailor was willing to lie. In short, there is no evidence that Owens's trial team failed to investigate the circumstances of Sailor's cases. Because Owens's trial team addressed Sailor's motives and untruthfulness at trial, any lack of investigation was not related to Bogan's appearances with Sailor. *See West*, 341 P.3d at 534 (prong three "can be proved in two ways: first, by showing that the alternative strategy or tactic was 'inherently in conflict with . . . the attorney's other loyalties or interests'; or, second, by showing that the alternative strategy or tactic was 'not undertaken *due to* those other loyalties or interests.'" (quoting *Nicholson*, 611 F.3d at 212) (emphasis in *West*)).

(b) Fully Discredit Sailor[74]

Owens argues his trial team did not fully discredit Sailor. As a result, she was not exposed to numerous other felonies, including murder by perjury, C.R.S. § 18-3-102(1)(c); perjury, C.R.S. § 18-8-502(1); and attempt to influence a public servant, C.R.S. § 18-8-306. Owens does not articulate how Sailor committed these crimes. Because Owens's trial team did not have evidence to support a suggestion that Sailor committed those crimes, it was not objectively reasonable to do so under Colo. RPC 3.4(e). Colo. RPC 3.4(e) ("[I]n trial, [a lawyer shall not] allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . . ."); *see West*, 341 P.3d at 533 (court may consider the attorney's ethical obligations to determine if the alternative strategy was objectively reasonable).

(v) Conclusion

The court concludes Owens was not deprived of his constitutional right to effective and conflict-free counsel because Bogan's courtesy appearances with Sailor did not adversely affect the performance of Owens's trial team. *See West*, 341 P.3d at 526 ("A defendant seeking post-conviction relief based on ineffective assistance of counsel resulting from an attorney's alleged conflict 'must demonstrate that an actual conflict of interest adversely affected his [attorney]'s performance.'" (quoting *Cuyler*, 446 U.S. at 348)).

[74] Owens also argues his trial team did not expose Sailor to any contempt of court citations. Owens did not expand on this argument in SOPC-163, and the court is unaware of any circumstances giving rise to a contempt of court citation for Sailor.

(f) Jamar Johnson

(i) Parties' Positions

Owens contends he was deprived of his Sixth Amendment right to effective and conflict-free counsel because his trial team was adversely affected by the Arapahoe and Boulder PDOs' appearances with Johnson, which, according to Owens, created a conflict of interest.

The prosecution points out that a Boulder DPD appeared with Johnson one time in 2005 and withdrew at the next court date because of an unrelated conflict.

(ii) General Background

Johnson was present at Lowry Park on July 4, 2004. He witnessed Owens shoot and kill Vann, and he saw Ray shoot Marshall-Fields and Bell while they were trying to stop Owens from fleeing in Ray's Suburban. During the following year, Ray solicited Johnson twice to kill Marshall-Fields for $10,000. The day before the Dayton Street homicides, Ray asked Johnson if he could arrange to bribe Marshall-Fields in order to keep him from testifying.

When interviewed by Fronapfel on August 4, 2005, Johnson denied having any knowledge of either incident. In January 2006, as part of plea negotiations on his Arapahoe County case, Johnson told Fronapfel what he knew. Pursuant to his plea agreements in Boulder and Arapahoe Counties, Johnson agreed to testify in this case and in the Lowry Park case. He testified at both trials.

(iii) Purported Conflicts of Interest

(a) Boulder PDO

In Boulder County, Johnson was charged on December 15, 2003, with attempted first-degree murder and second-degree assault.[75] Johnson retained

[75] Boulder County case 03CR2118.

Joseph Lazzara (Lazzara) to represent him. Lazzara assisted Johnson in resolving the charges with a plea agreement. On June 3, 2004, Johnson pleaded guilty to a reduced charge of menacing, and the court sentenced him to supervised probation.

On August 8, 2005, a complaint to revoke Johnson's probation resulted in his arrest and incarceration at the Boulder County Jail. DPD Yasmin Forouzandeh (Forouzandeh) appeared with Johnson on August 9 for his initial advisement on the probation violation. That advisement occurred during her normal duty rotation for initial appearances. It was her practice not to discuss confidential information with new arrestees until a conflicts check was completed. According to Forouzandeh, she did not provide any information about Johnson to Owens's trial team. Johnson's case was reset to September 1 to allow for the conflicts check.

On September 1, Forouzandeh filed a Notice of Withdrawal that stated Johnson was a potential witness in a homicide case. The court appointed ADC Christopher Braddock (Braddock) that same day. Forouzandeh does not recall where the withdrawal information came from or what homicide case was referenced. Forouzandeh did not appear with Johnson after August 9.

Johnson next appeared in court on September 16 with Braddock, who remained on the case until December 12 when Lazzara re-entered. Lazzara subsequently negotiated a plea agreement. On February 9, 2006, pursuant to the plea agreement, Johnson admitted the probation violation and the court modified his sentence to unsupervised probation. Johnson's cooperation in this case and the Lowry Park case was an important factor in resolving his Boulder County probation revocation.

(b) Arapahoe PDO

On May 27, 2005, Arapahoe County prosecutors charged Johnson with felony theft.[76] Johnson appeared in court on July 14, and the court scheduled his next appearance for August 9. On August 3, the prosecution added charges of robbery, burglary, and conspiracy to commit robbery and burglary. When Johnson failed to appear on August 9, the court issued a warrant with a $100,000 bond. On that date, the court learned Johnson was in custody in Boulder and reset the matter for appearance of counsel on August 19. On August 19, Bogan appeared with Johnson and advised the court that there was a conflict. Pursuant to his practice, Bogan did not discuss confidential information with Johnson and thus did not share any information about Johnson with Owens's trial team. The court set the matter for appearance of counsel by ADC on August 25. On August 25, a Notice of Withdrawal was filed stating withdrawal was sought at the direction of the State PDO. The court appointed Braddock, who represented Johnson until Lazzara entered his appearance on November 28, 2005.

Lazzara's plea negotiations eventually resulted in Johnson submitting to an interview by Fronapfel on January 24, 2006, during which Johnson disclosed information he knew about the Lowry Park shootings and the Dayton Street homicides. On February 3, Johnson pled guilty to felony theft and received a deferred judgment. On that same date, he testified before the grand jury. The agreement required Johnson to testify in Lowry Park and this case.

Owens's trial team did not ask for permission to access and therefore did not access Johnson's PDO file.

[76] Arapahoe County case 05CR1550.

(iv) *West* Adverse Effect Analysis

(a) Investigate Johnson as an Alternate Suspect

According to Owens, his trial team considered Johnson as a possible alternate suspect for the Lowry Park shootings, but did not investigate Johnson for that purpose. Owens contends several pieces of evidence support a theory that Johnson was an alternate suspect. SOPC-300, p. 4-5. But the totality of the identification evidence against Owens was strong, and there was no identification evidence implicating Johnson. First, Johnson and Owens were not strangers so Johnson's identification of Owens as a Lowry Park shooter was not questionable on grounds of misidentification. It would have to be attacked as deliberate fabrication. Second, other witnesses gave detailed descriptions of a shooter that matched Owens. Third, Sailor testified that Owens did not respond as Ray berated him for shooting Vann rather than shooting into the air. Ray's accusation and Owens's lack of denial would be strong evidence of identification. In light of the evidence corroborating Johnson's identification, investigating Johnson as an alternate suspect was not objectively reasonable. *See West*, 341 P.3d at 533 (prong two is satisfied if the "plausible alternative that counsel might have pursued . . . was objectively reasonable under the facts known to counsel at the time of the strategic decision.").

(b) Investigate Johnson's Credibility

Owens argues his trial team did not investigate Johnson's credibility. Owens does not expand on this argument. At trial, Owens's trial team cross-examined Johnson about:

- his initial reluctance to cooperate in the investigations of the Lowry Park shootings and Dayton Street homicides;

- his observations at Lowry Park and various circumstances, which cast doubt on his identification of Owens as a shooter;
- his Boulder County felony conviction;
- his Arapahoe County felony conviction;
- the circumstances of his incarceration, primarily the $100,000 bond; and
- his awareness of the prosecution's ability to revoke his probation.

Based on the cross-examination, it appears Owens's trial team not only investigated Johnson's credibility, but also challenged Johnson's credibility at trial. Any lack of investigation was not related to the Arapahoe or Boulder PDOs' appearances with Johnson. *See id.* at 534 (prong three "can be proved in two ways: first, by showing that the alternative strategy or tactic was 'inherently in conflict with . . . the attorney's other loyalties or interests'; or, second, by showing that the alternative strategy or tactic was 'not undertaken *due to* those other loyalties or interests.'" (quoting *Nicholson*, 611 F.3d at 212) (emphasis in *West*)).

(c) Conduct a Pretrial Interview of Johnson

Owens's trial team did not interview Johnson before trial. Within two months of Johnson's grand jury testimony, Johnson entered the Witness Protection Program and moved out of state. The prosecution did not disclose Johnson's whereabouts to Owens's trial team. Owens's trial team also did not attempt to interview Johnson through the process implemented by the court that required the trial team to contact the prosecution to arrange an interview. As with other protected witnesses, Owens's trial team did not avail itself of that process to contact Johnson. The decision not to interview Johnson was not related to the Arapahoe or Boulder PDOs' appearances with Johnson. *See id.* (prong three "can be proved in two ways: first, by showing that the alternative strategy or tactic was

'inherently in conflict with . . . the attorney's other loyalties or interests'; or, second, by showing that the alternative strategy or tactic was 'not undertaken *due to* those other loyalties or interests.'" (quoting *Nicholson*, 611 F.3d at 212) (emphasis in *West*)).

(v) Conclusion

The court concludes Owens was not deprived of his constitutional right to effective and conflict-free counsel because the Arapahoe and Boulder PDOs' courtesy appearances with Johnson did not adversely affect the performance of Owens's trial team. *See id.* at 526 ("A defendant seeking post-conviction relief based on ineffective assistance of counsel resulting from an attorney's alleged conflict 'must demonstrate that an actual conflict of interest adversely affected his [attorney]'s performance.'" (quoting *Cuyler*, 446 U.S. at 348)).

(g) Brent Harrison[77]

(i) Parties' Positions

Owens contends he was deprived of his Sixth Amendment right to effective and conflict-free counsel because his trial team was adversely affected by the Denver PDO's representation of Harrison, which, according to Owens, created a conflict of interest.

The prosecution responds that Owens's trial team had no divided loyalties that prevented it from investigating Harrison as an alternate suspect.

(ii) General Background

Harrison and Marshall-Fields were friends and also worked together. Harrison and Marshall-Fields were at the Father's Day barbecue together on June 19, 2005. They left when Marshall-Fields realized Ray was there. Later that day,

[77] The court denied Owens an evidentiary hearing on this claim.

Harrison went to Gibby's with Marshall-Fields. Although Harrison did not see Carter confront Marshall-Fields, he saw how upset Marshall-Fields became and he saw Marshall-Fields immediately leave the restaurant to look for the person who had confronted him. When Marshall-Fields stated he wanted to go to his uncle's house, Harrison asked Marshall-Fields to drop him off at a bowling alley. The remainder of the group went to Marshall-Fields's uncle's house.

The next day, June 20, 2005, Marshall-Fields met Harrison after work and they ran some errands together. They planned to go to dinner together that evening with their girlfriends. It was agreed that Marshall-Fields, Wolfe, and Kopp would pick up Harrison. Harrison was waiting for them when the homicides occurred. Kopp, who had been following Marshall-Fields and Wolfe in her own car, alerted Harrison *via* cell phone. Harrison immediately ran to Marshall-Fields's car and discovered it riddled with bullet holes. Harrison testified at trial.

(iii) Purported Conflict of Interest

In 2004, Harrison was charged in Denver with criminal mischief.[78] The Denver PDO represented Harrison from October 26, 2004, to November 22, 2004, when the charges were resolved with a misdemeanor guilty plea and a probationary sentence that required restitution.

On December 12, 2005, the court issued an arrest warrant for failure to appear on a scheduled review date. The warrant remained outstanding until May 15, 2007, when a Denver prosecutor moved to vacate the warrant and to close the case. The court granted the motion the same day.[79]

[78] Denver case 04CR3551.

[79] The prosecution's motion states: "Further prosecution of this matter is not in the interest of judicial efficiency or the greater pursuit of justice." SOPC.EX.D-1260.

Owens presented no evidence indicating the Denver PDO provided any confidential information about Harrison to Owens's trial team.

(iv) *West* Adverse Effect Analysis – Investigate Harrison as an Alternate Suspect/Cross-Examine Harrison on His Possible Involvement in the Dayton Street Homicides

Owens argues his trial team did not investigate Harrison as an alternate suspect.[80] As a result, Owens's trial team did not learn about a suspected burglary in Fort Collins in which Marshall-Fields and "Brent" were suspects. Owens does not describe how Harrison's purported involvement in a suspected burglary is evidence of Harrison being an alternate suspect for the Dayton Street homicides.

Owens's trial team did not cross-examine Harrison about his possible involvement in the Dayton Street homicides. According to Owens, his trial team should have done so because law enforcement:

- threatened Harrison with prosecution;
- collected Harrison's DNA;
- sought Harrison's phone records; and
- investigated the connections between Harrison and Ray.

Immediately after the Dayton Street homicides, law enforcement followed various leads, including investigating people associated with Marshall-Fields. Cross-examining Harrison about law enforcement's investigation of him would have been immediately rebutted with Fronapfel's testimony about the nature of the investigation in the days following the Dayton Street homicides. Owens also relies on friends of Marshall-Fields who were suspicious of Harrison's involvement, but

[80] Owens's trial team was not aware of the grand jury's interest in indicting Harrison for the Dayton Street homicides.

those friends did not have evidence beyond their suspicions that Harrison was involved, and their suspicions would not have been admissible. With no evidence of Harrison's involvement in the Dayton Street homicides, cross-examining Harrison about it was not an objectively reasonable strategy for Owens's trial counsel to have pursued. *See West*, 341 P.3d at 533 (prong two is satisfied if the "plausible alternative that counsel might have pursued . . . was objectively reasonable under the facts known to counsel at the time of the strategic decision.").

(v) Conclusion

The court concludes Owens was not deprived of his constitutional right to effective and conflict-free counsel because the Denver PDO's prior representation of Harrison did not adversely affect the performance of Owens's trial team. *See id.* at 526 ("A defendant seeking post-conviction relief based on ineffective assistance of counsel resulting from an attorney's alleged conflict 'must demonstrate that an actual conflict of interest adversely affected his [attorney]'s performance.'" (quoting *Cuyler*, 446 U.S. at 348)).

(h) James Nash

(i) Parties' Positions

Owens contends he was deprived of his Sixth Amendment right to effective and conflict-free counsel because his trial team was adversely affected by the Adams and Arapahoe PDOs' representation of Nash, which, according to Owens, created a conflict of interest.

The prosecution responds that the Arapahoe and Adams PDOs' representation of Nash did not create any conflicted duties of loyalty for Owens's trial team.

(ii) General Background

In 2005, Nash was charged in Adams and Arapahoe Counties with five cases involving kidnapping or aggravated robbery.

On September 21, 2006, Fronapfel interviewed Nash because she learned he might have information about the Lowry Park shootings and the Dayton Street homicides. Nash did not alert any of his DPDs about this interview. Nash claimed he obtained incriminating information about the cases from Carter, Sr. while they were incarcerated together. The prosecution endorsed Nash as a witness in this case. When he refused to testify at a pretrial hearing, the prosecution struck his endorsement and did not call him to testify at trial.

Owens called Nash as a witness in the post-conviction hearing, but Nash refused to provide any meaningful testimony.

(iii) Purported Conflicts of Interest

(a) Adams PDO

Beginning on August 17, 2005, the Adams PDO represented Nash on two cases.[81] After the prosecution endorsed Nash, the Adams PDO filed Notices to Withdraw from his cases on October 4, 2006, citing Nash's knowledge about the Aurora Mall shooting. There was no mention of this case or the Lowry Park case. The court granted the motion that day and appointed ADC Albert Cordero (Cordero) for Nash. Cordero negotiated a disposition, and on October 12, 2007, Nash pleaded guilty to aggravated robbery. All other charges were dismissed. The court sentenced Nash to 10 years concurrent to his Arapahoe County sentence.

Owens's trial team did not learn any confidential information about Nash from any DPD in the Adams PDO.

[81] Adams County cases 05CR2260 and 05CR2340.

(b) Arapahoe PDO

Nash faced three armed robbery cases in Arapahoe County.[82] Numerous DPDs appeared with Nash on his cases until May 2006 when DPD Timothy O'Keefe (O'Keefe) was assigned to represent him. In early October 2006, O'Keefe notified the court that he was conflicted from representing Nash. O'Keefe filed a motion to withdraw and notice of withdrawal in all three cases. The notices listed "Chris Taylor 05CR1909" as the reason for the withdrawal. On October 11, 2006, the court granted O'Keefe's motions to withdraw and appointed ADC to represent Nash.

With the assistance of ADC, on August 2, 2007, Nash entered guilty pleas in each case to one count of aggravated robbery. The court sentenced him to 10 years for each case. The sentences were concurrent. It is unknown whether Nash's cooperation against Owens was a factor in reaching the plea agreements.

Owens's trial team never learned any confidential information from the various Arapahoe DPDs who represented Nash and did not have access to Nash's PDO files.

(iv) *West* Adverse Effect Analysis – Conduct a Pretrial Interview of Nash

Owens's trial team did not interview Nash prior to trial. Interviewing him was not objectively reasonable for the following reasons:

First, Nash's credibility was suspect. Nash and Carter, Sr. were incarcerated together in 2006. On September 21, 2006, Nash gave the following information to Fronapfel, which he claimed came from Carter, Sr.:

- Carter, Sr. rented two motel rooms after the incident at Lowry Park;

[82] Arapahoe County cases 05CR2187, 05CR3190, and 05CR3214.

- Carter, Sr. knew Ray did the shootings at Lowry Park and that Ray brought Carter, Sr. the guns that were used;
- Carter, Sr. knew that the witness was offered $10,000 not to testify;
- Carter, Sr. knew that the witness was still going to testify so they killed him; and
- Carter, Sr. believed that the girl was not supposed to be killed.

In December 2005, Carter, Sr. was charged as an accessory to the Lowry Park shootings. The grand jury indicted Ray, Owens, and Carter in March 2006. All of the information that Nash provided to Fronapfel had been reported by the media.

Nash also told Fronapfel that Carter, Sr. asked him to contact Maurice Ray, Ray's brother, when Nash was released on bond. He was to instruct Maurice Ray to find the guns, make sure they had been moved, and put the guns into the sewer. Nash also told Fronapfel that Carter, Sr. said the car used during the Lowry Park shootings was in storage. Because neither the Suburban nor the guns had been recovered at that time (and still have not been recovered), Nash's statements were reasonable inferences based on information reported in the media.

Nash also claimed that Carter, Sr. made various statements about an intention killing one of the victims' mothers. The victims' mothers used the media to ask the public for its assistance in identifying who killed their children. They made speeches, gave press conferences, and posted photos of their children in public areas asking for help. Under the circumstances, Nash's report that Carter, Sr. discussed killing one of the victims' mothers was also a reasonable inference based on the information reported in the media.

Although Nash denied getting any information from the newspapers, the information he offered was public information or was a reasonable inference that

anyone might have made based on the information available to the public. In short, the information from Nash was not new or unique, and the reliability and accuracy of the information was questionable.

Second, Nash's information did not suggest that Carter, Sr. was an alternate suspect in the Dayton Street homicides. *See* part II.A.4.b.ii(c)(iv)(c) of this Order. Rather, as Owens admits, Nash's information would have inferentially implicated Owens in the conspiracy to kill Marshall-Fields.

Third, Nash refused to testify at a pretrial motions hearing and refused to answer any substantive questions during the post-conviction hearing. It is likely he would have refused to testify at trial as well.

Under the facts known to Owens's trial team prior to trial, it was not objectively reasonable to interview Nash. The prosecution was not going to call Nash and his testimony would have been harmful to Owens had the defense called him. *See West*, 341 P.3d at 533 (prong two is satisfied if the "plausible alternative that counsel might have pursued . . . was objectively reasonable under the facts known to counsel at the time of the strategic decision.").

Owens's trial team's decision not to interview Nash was not related to the Adams or Arapahoe PDOs' prior representation of Nash. *See id.* at 534 (prong three "can be proved in two ways: first, by showing that the alternative strategy or tactic was 'inherently in conflict with . . . the attorney's other loyalties or interests'; or, second, by showing that the alternative strategy or tactic was 'not undertaken *due to* those other loyalties or interests.'" (emphasis in *West*) (quoting *Nicholson*, 611 F.3d at 212)); *see also* part II.A.4.b.ii(c)(iv)(e) of this Order.

(v) Conclusion

The court concludes Owens was not deprived of his constitutional right to effective and conflict-free counsel because the Adams and Arapahoe PDOs'

representation of Nash did not adversely affect the performance of Owens's trial team. *See West*, 341 P.3d at 526 ("A defendant seeking post-conviction relief based on ineffective assistance of counsel resulting from an attorney's alleged conflict 'must demonstrate that an actual conflict of interest adversely affected his [attorney]'s performance.'" (quoting *Cuyler*, 446 U.S. at 348)).

5. Conclusion

The measures taken by the Arapahoe PDO and other regional PDOs concerning the purported conflicts of interest were taken solely for Owens's benefit. There was no evidence that Owens's trial team "struggle[d] to serve two masters." *West*, 341 P.3d at 534 (quoting *Cuyler*, 446 U.S. at 349). The purported conflicts of interest did not adversely affect the performance of Owens's trial team and did not prejudice his defense. Owens's claims amount to only a "mere theoretical division of loyalties," not to actual conflicts of interest. *Mickens*, 535 U.S. at 171. Based on the foregoing analysis, the court concludes Owens was not denied his Sixth Amendment right to effective and conflict-free counsel. Accordingly, Owens's petition to reverse his conviction and vacate his sentence based on the purported conflicts of interest described above is **Denied**.

B. Advocate-Witness Conflicts of Interest

1. Parties' Positions

Owens argues King was the only witness to two courtroom incidents where Strickland and Sailor alleged that Owens threatened them while they were testifying during pretrial hearings. After each incident, King argued Owens had not threatened the witnesses. Owens contends the credibility of Sailor and Strickland was so critical that King should have withdrawn from representing him to become a witness to impeach Sailor's and Strickland's testimony. According to

Owens, King failed to discuss the matter with him, which denied him the opportunity to make an informed decision whether to keep King on his trial team.

The prosecution responds that King's testimony would not have been impactful because King had not seen Owens's alleged conduct and King's bias would have been exploited on cross-examination. The prosecution also responds that because the incidents happened in court, there were numerous alternative witnesses available, which meant King was not a necessary witness.

2. Principles of Law

Colo. RPC 3.7(a) prohibits an attorney from acting as an advocate and as a witness in the same proceeding.[83] The rule is intended to protect the interests of the client. *People v. Hagos*, 250 P.3d 596, 609 (Colo. App. 2009). A conflict arises under that rule when the attorney is "likely to be a necessary witness." Colo. RPC 3.7(a). Determining whether an attorney is a necessary witness involves considering the nature of the case with emphasis on: 1) the subject of the attorney's testimony, 2) the weight that the attorney's testimony might have in resolving a disputed issue, and 3) the availability of other witnesses or documentary evidence that might independently establish the relevant issues. *Fognani v. Young*, 115 P.3d 1268, 1274 (Colo. 2005).

The Colorado Court of Appeals has noted that "[t]he unpredictable nature of jury trials and the ebb and flow of strategy and tactics render it impossible conclusively to determine in advance whose testimony will actually be likely or necessary." *Hagos*, 250 P.3d at 610. And the Colorado Supreme Court in *Fognani*

[83] Owens asserts that *Cuyler* applies to advocate-witness conflicts of interest. To support his position, Owens provided *People v. Deanda*, No. 07CA0515, 2009 WL 2883409 (Colo. App. Sept. 10, 2009) to the court in SOPC-204. In *Deanda*, a division of the Colorado Court of Appeals applied *Cuyler* to an alleged advocate-witness conflict of interest and utilized Colo. RPC 3.7 to determine whether there was a conflict.

recognized that any attorney who testifies in a former client's case will be subject to impeachment for self-interest. 115 P.3d at 1274.

Even when a court determines the attorney's testimony is necessary, disqualification or withdrawal is not automatically required. Colo. RPC 3.7(a) lists three limited exceptions to the dual role prohibition. The third exception involves considering whether "disqualification of the lawyer would work substantial hardship on the client." Colo. RPC 3.7(a)(3). In deciding whether disqualification is necessary, the trial court must consider all relevant factors, including: 1) the nature of the case, 2) the substantial hardship that disqualification may cause to the client, giving weight to the stage in the proceedings, 3) the time at which the attorney became aware of the likelihood of his/her testimony, and 4) whether the client has secured alternative representation. *Fognani*, 115 P.3d at 1275. The *Fognani* court noted that if the need for the attorney's testimony developed from an unexpected event during litigation, substantial hardship could be found. *Id*. The length of time the client and attorney have been associated can also be considered in determining substantial hardship. *Id*. at 1276. If the relationship is long-standing and continuing, a finding of substantial hardship becomes more likely. *Id.*

3. Advocate-Witness Incidents in this Case

a. Gregory Strickland

i. Parties' Positions

Owens contends King was the only person who could testify that Owens did not make threatening gestures toward and did not mouth threats to Strickland during a pretrial hearing. According to Owens, there was an advocate-witness conflict of interest because if King testified, he would be disqualified as Owens's

trial counsel, and if he did not testify, Owens would be forced to forgo impeachment of Strickland on a very important issue.[84]

The prosecution responds that King was not a necessary witness because there were others present in the courtroom at the time of the alleged incidents who could have testified.

ii. Findings of Fact

On June 13, 2007, the prosecution called Strickland to testify at a joint pretrial motions hearing, which meant there were eight to 11 attorneys in the well of the courtroom at the time of the incident. Given the presence of Ray, Owens, and Carter, many deputy sheriffs were also present.

Because Strickland was in custody, he was handcuffed and shackled as he entered the courtroom. A deputy sheriff escorted him into the courtroom and accompanied him to the witness stand. According to Strickland, while he was walking to the witness stand he saw Owens hold his thumb and forefinger in the form of a gun under the counsel table and simulate pulling the trigger while mouthing "pow, pow, pow." He also claimed he heard Owens say the word "bitch" to King. At the time, Strickland did not alert anyone in the courtroom to the incident, and no one in the courtroom indicated they saw it. After the hearing, Strickland reported the alleged incident to a sheriff's deputy.

Strickland later told the prosecution what had allegedly happened. When the prosecution notified Owens's trial team of its intent to ask Strickland about the incident at trial, Owens's trial team moved to suppress the incident. During an evidentiary hearing on the motion, Strickland and some of the courtroom deputies testified. The deputy assigned to watch Owens during the June 13 hearing testified

[84] Owens argues King's impeachment of Strickland on this point would have discredited all of Strickland's testimony.

that she was stationed behind Owens and did not see him make gestures or mouth words. No other deputy testified that s/he saw or heard Owens threaten Strickland during court. The deputy to whom Strickland said he initially complained testified that no complaint was made. During King's argument, he represented that Owens had not said the word "bitch" to him. He also argued that it was physically impossible for Strickland to see Owens's hands under the table. The court denied the motion to suppress.

Prior to trial in this case, King and Owens discussed the incident and considered whether King should withdraw so that he could testify and contradict Strickland's testimony. King discussed the advocate-witness rule with Owens. King and Owens agreed that King should remain on the trial team instead of withdrawing in order to testify and impeach Strickland.

At trial, the prosecution elicited testimony from Strickland about Owens's gestures and hearing Owens say "bitch" to King. The prosecution also asked Strickland to identify King at counsel table. Owens's trial team did not call any witnesses to contradict Strickland. The incident was not presented at the sentencing hearing, and the prosecution did not identify it as an aggravating circumstance or as rebuttal to mitigation. Rather, the prosecution used it to impeach a defense expert who had been called to present mitigation on Owens's behalf.[85]

iii. Analysis

Under Colo. RPC 3.7, an advocate-witness conflict of interest arises when the attorney becomes a necessary witness.

[85] The court instructed the jury pursuant to Phase Two Final Instruction No. 1 during the sentencing hearing that it could consider all the evidence presented during the guilt phase.

To determine whether King was a necessary witness, this court must first consider the subject of King's anticipated testimony. *Fognani*, 115 P.3d at 1274. King would have testified that Owens did not use the word "bitch" in reference to Strickland. This was impeachment on a minor point, namely, the use of profanity. King would not have been able to refute the threatening hand gestures and mouthed, but not verbalized, threats that Strickland claimed had occurred because King was not looking at Owens.

Next, the court must consider the weight King's testimony might have had in resolving Strickland's allegations. *See id.* Owens contends the weight of King's testimony would have been significant enough to discredit all of Strickland's testimony. The facts do not support that contention. Given the limited nature of what King could testify about and his role as Owens's former defense counsel, the weight of his testimony would not have been significant.

The court must also consider whether there were other witnesses available. *See id.* There were several sheriff's deputies in the courtroom when the incident allegedly occurred, and although they might say that they were not in a position to see what Owens did, the fact that no one saw the gestures, coupled with a deputy sheriff contradicting Strickland's claim that he reported it, would have been sufficient impeachment.

Based on the foregoing analysis, the court concludes King was not a necessary witness under Colo. RPC 3.7.

Owens does not address whether King could have avoided withdrawal due to hardship if the court determined that he was a necessary witness. Judicial interpretation of Colo. RPC 3.7's hardship exception recognizes that a long-standing relationship between the client and attorney may allow an attorney to remain on the case even when s/he is deemed a necessary witness. *See id*. at 1276.

Owens could have established hardship because King had been Owens's attorney since November 2005 and had already gone to trial with him in the Lowry Park case, which was slated to play a significant role in this case. In addition, the incident occurred in the course of pretrial litigation and was not anticipated. This was not a *Fognani* situation where the attorney took over the case knowing he was a necessary and material witness. *Id*. at 1275.

Most importantly, King discussed the advocate-witness rule with Owens, and Owens decided he wanted King to remain on his case. King agreed with his decision. Given the complexity of the case and the length of time King had been representing Owens, any argument that King was conflicted because he was a necessary witness is not persuasive.

iv. Conclusion

The court concludes King did not suffer an advocate-witness conflict of interest because he was not a necessary witness and because Owens would have suffered a hardship if King had withdrawn. In addition, King discussed the situation with Owens, who agreed King should remain on the trial team.

Accordingly, Owens's petition to vacate his conviction and sentence based on the purported advocate-witness conflict of interest is **Denied**.

b. Latoya Sailor

i. Parties' Positions

Owens argues King suffered a conflict of interest when Sailor claimed Owens threatened her while she was testifying during a pretrial motions hearing because, according to Owens, King was the only witness available to impeach Sailor's claim. Owens further contends the failure of his trial team to discuss this situation with him precluded both him and the court from giving due consideration to his options.

The prosecution responds that this incident happened in open court with numerous potential witnesses present. The prosecution points out that one of Ray's attorneys made a contemporaneous record that he was looking at Owens at the time of the alleged incident and did not see what Sailor described.

ii. Findings of Fact

On August 20, 2007, Sailor testified at a joint motions hearing. During her testimony, while answering a question from the prosecution, Sailor suddenly shouted to Owens: "You lie. Shut up. Can you please tell him don't mouth nothing my way. Sir Mario telling you you lying. You know you're lying." Pretrial Hrg Tr. 191:13-15 (Aug. 20, 2007). Shortly after this outburst, Owens started to say he had not done anything but the court interrupted and cautioned Owens's trial team to ensure there was no interaction between the witness and Owens. None of the attorneys or deputy sheriffs present in the courtroom indicated s/he had seen the alleged incident. The hearing continued without further incident.

At the end of the hearing, King made a record rebutting the inference from the court's cautionary instruction that a threat had actually been made. In doing so, King pointed out he had been sitting next to Owens and had not seen or heard him say anything. He also pointed out that numerous deputies and attorneys in the courtroom had not seen Owens do anything. The court noted it had not seen Owens do anything and had given the caution only to preclude interaction between Owens and Sailor. ADC Michael Root (Root), Ray's lead counsel, stated he had been looking directly at Owens when Sailor claimed the incident occurred and Owens had not done anything.

King did not discuss the advocate-witness rule with Owens after this incident because King did not view it as a conflict of interest.

Sailor described the incident at the sentencing hearing and characterized it as a threat. The prosecution designated the incident as an aggravating circumstance.[86] Although Owens's trial team called Root at the sentencing hearing, he was not asked about this incident. The trial team did not call any witnesses to contradict Sailor's testimony about the incident.

iii. Analysis

King had been representing Owens for nearly two years when Sailor claimed Owens threatened her during a pretrial motions hearing. Owens went to trial on his Lowry Park case with King as his lead counsel, and King was preparing for trial in this case when Sailor claimed Owens threatened her. Thus, King and Owens had a long-standing relationship, and if King was replaced as Owens's lead trial counsel prior to the trial in this case, Owens would have suffered a substantial hardship. Colo. RPC 3.7(a)(3); *Fognani*, 115 P.3d at 1276. For that reason, even if King were to be considered a necessary witness, there was no advocate-witness conflict of interest under Colo. RPC 3.7.

Given that there was no advocate-witness conflict of interest, there was no need for King to discuss the advocate-witness rule with Owens. Moreover, King had discussed a similar incident involving Strickland with Owens, and Owens agreed that King should stay on the case as Owens's lead counsel.

iv. Conclusion

The court concludes King did not suffer an advocate-witness conflict of interest because Owens would have suffered a substantial hardship if King had withdrawn. Accordingly, Owens's petition to vacate his conviction and sentence based on the purported advocate-witness conflict of interest is **Denied**.

[86] Phase Two Final Instruction No. 27.

4. Conclusion

The court concludes Owens failed to establish that his Sixth Amendment right to effective and conflict-free counsel was violated due to the alleged advocate-witness conflicts of interest. Accordingly, Owens's request to vacate his conviction and sentence based upon the alleged advocate-witness conflicts of interest is **Denied**.

C. Inherent Conflict of Interest

1. Parties' Positions

Owens's trial team represented him in both Lowry Park and Dayton Street, and his team was aware that the prosecution intended to use Owens's conviction in the Lowry Park case as an aggravating factor in the Dayton Street sentencing hearing. According to Owens, the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines)[87] imposed a duty on his trial team to investigate the constitutionality of his Lowry Park conviction and to attempt to suppress that conviction in the Dayton Street sentencing hearing if the conviction was legally flawed. Owens argues his Lowry Park conviction was legally flawed. His argument relies on a motion to continue the trial filed by his trial team in the Lowry Park case on the eve of trial, which asserted the trial team was unprepared and would be ineffective if the court did not grant a continuance. Owens contends that those circumstances required his trial team to move to suppress his Lowry Park conviction in this case. According to Owens, Colorado law precluded his trial team from investigating or litigating claims of the team's own ineffectiveness in Lowry Park. That tension between the

[87] Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. 2003), officially published in 31 Hofstra L. Rev. 913 (2003), *available at* http://ambar.org/2003Guidelines (ABA Guidelines).

ABA Guidelines and Colorado precedent, Owens argues, gives rise to what Owens calls an inherent conflict of interest.

Owens also contends his trial team was conflicted from deciding whether to attack the Lowry Park conviction because making that decision would involve an evaluation of the team's own performance. Owens does not fully articulate this conflict in SOPC-163. In the conflicts of interest section of SOPC-163 and his supplemental brief on conflicts of interest (SOPC-192), he characterizes his trial team's participation in forfeiting his right to attack his Lowry Park conviction as an adverse effect of the purported conflict between the ABA Guidelines and Colorado law. SOPC-163 at 108; SOPC-192 at 33. In the ineffective assistance section of SOPC-163, however, he claims, "[c]ounsel were conflicted in even making a decision to forgo collaterally attacking the prior convictions." SOPC-163 at 590. During oral argument on this issue, Owens's post-conviction counsel suggested this was a separate conflict of interest. Although not styled as a conflict of interest in SOPC-163, the court will nevertheless conduct a conflict of interest analysis on this claim.

Owens also contends that his trial team was inherently conflicted due to the team's professional and personal interest in continuing to represent Owens on his Dayton Street case.

Owens describes numerous ways in which the alleged inherent conflict of interest adversely affected his trial team's representation of him, most notably that the team did not move to suppress the conviction as an aggravating factor in the Dayton Street sentencing hearing. In Owens's view, his trial team forfeited his right to challenge his Lowry Park conviction, which gravely affected his appellate and *habeas* rights in Dayton Street. He also argues the decision not to challenge the Lowry Park conviction deprived him and the court of the opportunity to

evaluate the conflict and precluded him from deciding whether he wished to continue with the trial team.

The prosecution responds that Owens's argument is premised on an unfounded presumption of success had the trial team attempted to suppress Owens's Lowry Park conviction. The prosecution argues that presuming success is highly suspect in light of the Colorado Court of Appeals decision in *People v. Owens*, No. 07CA0895, 2012 WL 3031232 (Colo. App. July 26, 2012) (not published pursuant to C.A.R. 35(f)), *cert. denied*, No. 12SC0810, 2013 WL 4426399 (Colo. Aug. 19, 2013), which concluded that the trial court's denial of the motion to continue was not an abuse of discretion.

2. Findings of Fact

King, Kepros, and Middleton represented Owens in his Lowry Park case. Owens suffered a conviction for a class one felony in that case. The prosecution sought admission of the Lowry Park shootings evidence as *res gestae* during the guilt phase of the Dayton Street case. The prosecution also sought admission of Owens's class one felony conviction as an aggravating factor in the sentencing hearing of the Dayton Street case.

Middleton and King believed that it was very important for the team to remain as Owens's trial team in the Dayton Street trial because the team, in their view, provided Owens the best opportunity for success. For this and other reasons not relevant here, the trial team decided not to move to suppress Owens's Lowry Park conviction in the Dayton Street homicides sentencing hearing.

At the post-conviction hearing, King testified that he recalled discussing this situation with Owens in general terms. King did not remember the specifics of the conversation and did not believe he asked for Owens's input on whether the trial team should move to suppress his Lowry Park conviction. King did not obtain a

waiver from Owens concerning the team's decision to forgo a motion to suppress the Lowry Park conviction. In Middleton's view, a waiver was not necessary because the team's decision not to move to suppress the Lowry Park conviction avoided a conflict of interest. King agreed with Middleton's analysis. *See* part V.E.2.d of this Order. Given no conflict, neither King nor Middleton saw any need to disclose the issue to the court.

No member of the trial team ever considered any personal or professional embarrassment in its evaluation of whether to move to suppress the Lowry Park conviction as an aggravating factor. Nor does this court believe that this was ever a consideration. Experienced attorneys know that in almost every Colorado case in which a jury trial results in a murder conviction, the performance of trial counsel will be challenged. Whether that challenge occurs in a motion to suppress or in a Crim. P. 35(c) petition was not of any personal or professional consequence.

3. Principles of Law

The ABA Guidelines recommend that predicate convictions be investigated and challenged if there are grounds to do so. ABA Guidelines 10.7, cmt p. 115. But the guidelines are not "inexorable commands with which all capital defense counsel 'must fully comply.'" *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (quoting *Van Hook v. Anderson*, 560 F.3d 523, 526 (6th Cir. 2009) (further quotation and internal punctuation omitted)). Nor are they the "prevailing professional norms" by which attorney performance for Sixth Amendment purposes is measured. *Strickland*, 466 U.S. at 688 ("Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice . . . , are guides to determining what is reasonable, but they are only guides."); *see Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (ABA Guidelines are "guides to determining what is reasonable." (quoting *Strickland*, 466 U.S. at 688)); *State v.*

Hausner, 280 P.3d 604, 630 (Ariz. 2012) ("The ABA Guidelines are, under our Criminal Rules, guidelines and not requirements."); *In re Reno*, 283 P.3d 1181, 1212 (Cal. 2012) (The ABA Guidelines "are not congruent with constitutional standards for effective legal representation."); *Mendoza v. State*, 87 So.3d 644, 653 (Fla. 2011) ("The ABA Guidelines are not a set of rules constitutionally mandated under the Sixth Amendment and that govern the Court's *Strickland* analysis."); *see also Van Hook*, 558 U.S. at 13-14 (Alito, J., concurring) (emphasizing his understanding "that the [majority] opinion in no way suggests that the [ABA Guidelines] . . . have special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment"). *But see People v. Ray*, 252 P.3d 1042, 1049 (Colo. 2011) (quoting § 10.15.1(E)(4) of the ABA Guidelines to pronounce that "[p]ost-conviction counsel in a death penalty case must 'continue an aggressive investigation of all aspects of the case.'").

Rather, the ABA Guidelines are a template for counsel's representation of a capital defendant and a resource that, in this court's opinion, capital defense counsel would be ill advised not to consult. But the guidelines are not an exhaustive recitation of what capital defense counsel must do to satisfy a capital defendant's Sixth Amendment right to effective assistance of counsel. As recognized by the United States Supreme Court in *Strickland*, such an exhaustive list is impractical given the idiosyncratic nature of capital cases.

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract

> counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

466 U.S. at 688-89 (internal citations omitted). Per *Strickland*, failing to comply with the ABA Guidelines does not render capital defense counsel *per se* ineffective under the Sixth Amendment. *Id.*

Colorado law precludes an attorney from investigating and litigating his/her own performance. *Murphy v. People*, 863 P.2d 301, 304-05 (Colo. 1993); *see also Delgadillo*, 275 P.3d at 778 (inherent conflict of interest occurred when attorney was "trying to simultaneously respond to questioning from the court and the prosecutor, justify his earlier advice to defendant, and remain a zealous advocate.").

In *Murphy*, the district court re-appointed the defendant's trial attorney to represent the defendant for purposes of post-conviction proceedings. By doing so, "the district court created a situation where appointed counsel was forced to litigate against himself, clearly causing an impermissible conflict of interest." *Murphy*, 863 P.2d at 304. The Colorado Supreme Court cited Colo. RPC 1.7 which at the time provided that an attorney "shall not represent a client if the representation of that client may be materially limited by the . . . lawyer's own interests[.]" *Id.* at 304 n.13.[88]

[88] The current version of Colo. RPC 1.7 is similar: "a lawyer shall not represent a client if . . . there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer." Colo. RPC 1.7(a)(2).

Colo. RPC 1.7 does not preclude an attorney from representing a client solely on the basis of a personal interest; rather, there must be a significant risk that the personal interest will materially limit the attorney's representation of the client. The commentary explains the concept of material limitation on the attorney's ability to represent the client as follows:

> The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Colo. RPC 1.7 cmt. 8.

4. Analysis

Owens's first contention is that the ABA Guidelines and Colorado law were inherently in conflict. The ABA Guidelines are only guidelines for defense counsel's representation of a capital defendant, not the performance standards that govern a court's *Strickland* analysis. *See, e.g.*, *Van Hook*, 558 U.S. at 8. Thus, there was no binding authority that obligated Owens's trial team to investigate and move to suppress his Lowry Park conviction. The issue must be determined based upon whether the decision fell below the standard of professional competence. The efficacy of the trial team's decision not to seek the appointment of independent counsel to investigate its performance in the Lowry Park trial is evaluated in part V.E.2.d of this Order.

Owens's second contention is that his trial team was conflicted from deciding whether to move to suppress his Lowry Park conviction based on the team's performance in the Lowry Park trial because making that decision

necessarily entailed an evaluation of the team's performance, which was prohibited by Colorado law. Under *Murphy*, the trial team was prohibited from investigating its own performance to develop grounds for a suppression motion; however, it could have sought the appointment of independent counsel to conduct that investigation. If independent counsel had developed grounds to move to suppress the conviction, then independent counsel also could have litigated any suppression motion. Seeking the appointment of independent counsel would not have given rise to a conflict of interest.

Nor did the trial team's decision to forgo filing the suppression motion give rise to such a conflict. The trial team knew that every aspect of their performance in the Lowry Park case would be challenged by successor counsel in a Crim. P. 35(c) motion.

Because neither option gave rise to a conflict of interest, the trial team was not conflicted from deciding whether to move to suppress the Lowry Park conviction.

Neither party has provided the court with, nor has the court found, a reported case that addresses whether there is an inherent conflict of interest when a trial attorney fails to move to suppress a prior conviction that is an aggravating factor in a capital sentencing hearing when the trial attorney previously represented the defendant in the trial giving rise to the prior conviction. The court is aware that in *Dunlap* the same set of trial attorneys represented Nathan Dunlap (Dunlap) in his Burger King trial and in his Chuck E. Cheese trial. 173 P.3d 1054. The prosecution used Dunlap's Burger King conviction as an aggravating factor in the Chuck E. Cheese sentencing hearing. *Id.* at 1093. Dunlap's attorneys did not attempt to suppress his Burger King conviction in the Chuck E. Cheese case, yet

the Colorado Supreme Court deemed Dunlap's attorneys to be effective. *Id.* at 1099.

Last, Owens argued during the post-conviction hearing that his trial team was inherently conflicted because the team's professional and personal interests to remain as Owens's trial team in the Dayton Street case motivated the team's failure to attack the Lowry Park conviction.[89] This court does not view the trial team's desire to remain as counsel for Owens as a personal interest that could give rise to a conflict of interest. Likewise, the court does not view the team's belief that it could provide the best representation for Owens as an interest that could give rise to a conflict of interest under Colo. RPC 1.7. Owens has not provided the court with any authority that considers counsel's desire to stay on a case a personal conflict of interest, and this court is not aware of any such authority.

5. Conclusion

The court concludes there was no inherent conflict of interest. The ABA Guidelines are not law. *Strickland*, 466 U.S. at 688 ("Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice . . . , are guides to determining what is reasonable, but they are only guides."). The court also concludes that no conflict of interest affected Owens's trial team in deciding whether to move to suppress Owens's Lowry Park conviction in the Dayton Street sentencing hearing. The court also concludes the trial team's desire to continue representing Owens did not give rise to an inherent conflict of interest. Accordingly, Owens's petition to vacate his

[89] Owens conceded during the post-conviction hearing that his trial team's decision not to move to suppress the Lowry Park conviction was not motivated by its desire to preserve its reputation, because the trial team recognized that its effectiveness would be subject to attack at some future point in time.

conviction and sentence based on the alleged inherent conflict of interest is **Denied**.

D. Actual Ineffective Assistance

1. Parties' Positions

Owens contends he was deprived of his Sixth Amendment right to effective assistance of counsel because his trial team failed to inform him of the purported conflicts of interest discussed above.

The prosecution responds that Owens's trial team did not have a duty to inform Owens because there were no conflicts of interest.

2. Findings of Fact

In King's view, his prior appearances with and representation of witnesses endorsed to testify against Owens did not give rise to a conflict of interest. Likewise, he did not view other DPDs' appearances with and representation of endorsed witnesses as giving rise to a conflict of interest. King testified during the post-conviction hearing that none of the purported conflicts of interest impeded his investigation of any witnesses or hindered his representation of Owens. Because King did not identify a conflict of interest, he did not advise Owens of the purported conflicts or seek Owens's consent to remain as his trial counsel.

Kepros testified similarly. She could not identify any decision she made while representing Owens that was influenced by the purported conflicts of interest.

3. Principles of Law

As noted in *Strickland*, the defendant's attorney must "consult with the defendant on important decisions and . . . keep the defendant informed of important developments in the course of the prosecution." *Id.*

The defendant is relieved of the burden of proving prejudice when an ineffective assistance of counsel claim is based on conflicts of interest, but under *Strickland*, the defendant must show "that the deficient performance prejudiced the defense." *Id.* at 687. To prove prejudice, "[t]he 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." *Id.* at 694. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* at 697.

"Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." *Nix v. Whiteside*, 475 U.S. 157, 165 (1986). "An attorney's ethical obligations do not dictate the scope of the Sixth Amendment right to conflict-free counsel." *West*, 341 P.3d at 531 n.10.

4. Analysis

To prevail under *Strickland*, Owens must "show that there is a reasonable probability that, but for [his trial team's failure to advise him of the purported conflicts of interest], the result of the proceeding would have been different." 466 U.S. at 694.

Owens's argument presumes that his trial team would have been discharged if Owens had been advised of the purported conflicts of interest. There is no evidence supporting that presumption.

Owens's argument also presumes that there is a reasonable probability that the outcome of his trial or sentencing hearing would have been different if he had a different trial team. There is also no evidence supporting that presumption. Just

like Owens's trial team, a different trial team would have been confronted with the same convincing evidence of Owens's guilt, including:

- Johnson's identification of Owens as the Lowry Park shooter, which established Owens's motive to kill Marshall-Fields;
- Johnson's testimony that, when Ray offered him $10,000 to kill Marshall-Fields, Owens interjected that he would do it for free;
- Owens's possession of "Stop Snitchin" t-shirts, with "R.I.P" on the back, a month after the Dayton Street homicides;
- Owens's DNA in a baseball cap found at the scene of the crime;
- Sailor's testimony that Owens told her that "the girl" was killed because she was in the "wrong place, wrong time."
- Strickland's testimony about Carter's admissions that he and Owens committed the Dayton Street homicides; and
- Todd's testimony that he heard Owens report to Ray that everything was "tooken care of."

5. Conclusion

The court concludes there was not "a reasonable probability that, but for [Owens's trial team's failure to inform him of the purported conflicts of interest], the result of the proceeding would have been different." *Id*. Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's failure to advise him of purported conflicts of interest is **Denied**.

E. Public's Interest in Integrity of Capital Proceedings

Owens contends that his trial team's handling of the numerous alleged conflicts of interest compromised the public's interest in the integrity of the judicial system. The court evaluated those alleged conflicts of interest and concluded that Owens's trial team was not burdened by any conflicts of interest

while it represented Owens. *See* parts II.A.4.b.ii, II.B, and II.C of this Order. For that reason, the court concludes the public's interest in the integrity of the judicial system was not compromised in this case. Accordingly, Owens's petition to vacate his conviction and sentence based on his argument that the public's interest in the integrity of the judicial system was compromised in this case is **Denied**.

F. Prosecution's Duty to Alert Court of Conflicts of Interest

1. Parties' Positions

Owens contends the prosecution failed to advise the court that it endorsed several clients of the public defender's office as witnesses against Owens, which gave rise to numerous conflicts of interest for Owens's trial team. He argues this failure deprived him and the court of the opportunity to consider the conflicts of interest on an individual basis and deprived him of the opportunity to make an informed decision whether to continue with his trial team.

The prosecution responds that in January 2006 it raised certain conflicts of interest in the Lowry Park case based on the Arapahoe PDO's representation of certain endorsed witnesses. The prosecution also responds that Owens's trial team maintained there were no conflicts when potential conflicts were discussed in this case on May 18, 2006. Last, the prosecution asserts that it was not aware of any apparent conflicts in this case and therefore was not obligated to bring any conflicts to the court's attention.

2. Findings of Fact

On January 9, 2006, the prosecution filed a notice of potential conflicts in Lowry Park and referenced Carter, Ray,[90] and Carter, Sr. as clients of the Arapahoe PDO who were potential witnesses against Owens. The notice also advised the

[90] Ray was never a client of the Arapahoe PDO.

Lowry Park trial court that Carter and Ray were under grand jury investigation for the Dayton Street homicides. The prosecution deliberately did not file a motion to disqualify Owens's trial team because it was unsure whether there were any conflicts of interest. It filed the notice because it was concerned that the Lowry Park trial court and the Arapahoe PDO were unaware that Carter, Ray, and Carter, Sr. were former or current clients of the Arapahoe PDO. Owens's trial team filed a written response and argued there were no conflicts.

On January 18, 2006, the Lowry Park trial court held a hearing on the notice and found there were no conflicts because the witnesses' cases were not substantially related to the Lowry Park case. The Lowry Park trial court was also satisfied that the State PDO's ethical screening device ensured that any confidential information shared by the witnesses with their DPDs would be unavailable to Owens's trial team. However, the Lowry Park trial court was particularly sensitive to King's prior representation of Carter, Sr. so King was ordered not to share Carter, Sr.'s confidential information with his co-counsel and was precluded from cross-examining Carter, Sr. in the Lowry Park trial. King was not precluded from making pretrial decisions regarding Carter, Sr. Owens's trial team was also reminded that it had an obligation to bring conflicts to the court's attention. No other conflicts were raised during the Lowry Park case by either party, and none of the witnesses listed in the notice testified at either trial.

On May 18, 2006, the prosecution raised King's prior representation of Carter, Sr. as a potential conflict of interest in this case. The parties agreed that the Lowry Park trial court determined there was no conflict of interest and Owens's trial team maintained its position that there were no conflicts.

The prosecution did not file a notice of potential conflicts in this case for a number of reasons. First, it filed the notice in the Lowry Park case because Carter, Sr.'s Lowry Park accessory case was related to Owens's Lowry Park case.

Second, the Lowry Park notice was necessary to alert that court that Ray and Carter were under grand jury investigation for the Dayton Street homicides. If indictments were returned, their cases would be substantially related to Owens's Lowry Park case.

Third, the Arapahoe PDO took the position throughout 2006 and 2007 in several other homicide cases that its former clients who were endorsed witnesses against its current clients did not present a conflict. Those trial courts agreed. For example, the prosecutors in the C. Taylor and Samuels cases unsuccessfully moved to disqualify the Arapahoe PDO based on the Arapahoe PDO's prior representation of Strickland. The trial courts found the Arapahoe PDO was not conflicted from representing C. Taylor or Samuels due to its prior representation of Strickland. Although the trial courts obtained waivers from C. Taylor and Samuels, the courts did not place any restrictions on how the Arapahoe PDO investigated or cross-examined Strickland.

Fourth, the prosecution relied on the Colorado Rules of Professional Conduct, which places primary responsibility for raising conflicts on defense counsel. Owens's trial team acknowledged that responsibility several times in open court.

Fifth, according to the prosecution, it was not aware of any conflicts of interest in this case.

Last, by the time the trial was set in this case, the prosecution was convinced that the law on conflicts had evolved to the point where prior representation of an endorsed witness was not sufficient grounds for disqualification. For these

reasons, the prosecution was conservative in its handling of conflict issues in this case.

3. Principles of Law

When conflicts of interest "become apparent" to the prosecution, it has a duty to inform the court. *United States v. Tatum*, 943 F.2d 370, 379-80 (4th Cir. 1991). The Tenth Circuit relied on *Tatum* in *United States v. McKeighan*, 685 F.3d 956, 966-67 (10th Cir. 2012), and concluded the prosecution has a duty to inform the trial court when it is aware of conflicts of interest.

In *McKeighan*, the defendant argued that the government violated his Sixth Amendment right to counsel of his choice. 685 F.3d at 965. When the defendant retained an out-of-state attorney, the prosecution sought documentation concerning the source of funds for the retainer paid to the out-of-state attorney. *Id*. at 962. The government was interested in the retainer because the defendant reported to pretrial services that he was indigent. *Id*. at 961. The government filed an *ex parte* pleading informing the court of the potential conflict of interest. *Id*. Due to the government's investigation into the retainer, local counsel sponsoring the out-of-state attorney withdrew from the defendant's case. *Id*. at 962. Facing three grand jury subpoenas concerning his retainer, the out-of-state attorney withdrew as well. *Id*. at 972.

The Tenth Circuit Court in *McKeighan* ruled that the government has a duty to inform the trial court when it is aware of a conflict of interest. *Id.* at 966. It reasoned that part of the government's role as an administrator of justice in criminal prosecutions is to alert the court to conflicts because it "facilitates the administration of justice by helping to avoid lengthy delays or retrials that could occur when conflicts render defense counsel's representation ineffective." *Id.* at 967. It also noted that the government could gain an unfair advantage by allowing

an undisclosed conflict to restrict defense counsel's effectiveness. *Id.* The *McKeighan* Court concluded that the government met its duty by informing the trial court of the conflict. *Id.* at 969.

Based on *Tatum* and *McKeighan*, the prosecution is obligated to inform the trial court when it is aware of any conflicts of interest.

4. Analysis

Recognizing its obligation to inform the court of apparent conflicts, the prosecution filed a notice of conflicts in the Lowry Park case in January 2006. Owens's trial team vigorously and successfully argued that there were no conflicts. The Arapahoe PDO successfully defended motions to disqualify in other high-profile homicide cases as well. The prosecution filed motions to disqualify the Arapahoe PDO in two unrelated homicide cases because Strickland, a former client of the Arapahoe PDO, was an endorsed witness in those cases. Like the Lowry Park trial court, the trial courts in the other cases relied on the efficacy of the ethical screening device and the controlling precedent in *People v. Frisco*, 119 P.3d 1093 (Colo. 2005), to determine that a conflict did not exist.

After three unsuccessful attempts to disqualify the Arapahoe PDO and after further evaluating *Frisco*, the prosecution concluded it should not raise a conflict in this case based solely on the Arapahoe PDO's prior representation of an endorsed witness. Under *Frisco*, a potential conflict based on a former client becoming a witness against a current client requires some indication that the clients' cases are substantially related and that the clients' interests are materially adverse. 119 P.3d at 1096. Cases are substantially related when they involve the same transaction or legal dispute or when "there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." *Id.* The

court must consider "the likelihood that the attorney would have been exposed to confidential client information relevant to the prior matter, as well as the likelihood that such confidential material will be relevant to the later representation." *Id.* Such a determination is made by considering the charges in each case, the nature of the former client's testimony, and the nature of the services provided to the former client. *See id.*

Given this legal template, it is difficult to determine whether cases are substantially related because attorney-client communications might be the deciding factor. Determining if there is a conflict is particularly difficult for the prosecution because it is evaluating the situation from an adversarial posture. Sometimes a conflict is apparent. *See Cuyler*, 446 U.S. at 348 (simultaneous representation of codefendants). Such obvious circumstances were not present in this case.

The requirement that the conflict be apparent is a necessary and substantial limitation on the prosecution. Without that limitation, the prosecution would have a license to manufacture a conflict that could form the basis for disqualifying defense counsel. *See* Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 Am. J. Crim. L. 323, 353 (1989) (skepticism arises whenever a prosecutor raises a conflict issue for defense counsel because of the prosecutor's adversarial role). Indeed, in this case, the public defenders were concerned that the prosecution might move to disqualify the Arapahoe PDO based on a conflict of interest.

While it was apparent that the Arapahoe PDO had represented some of the prosecution's endorsed witnesses, it was not apparent that there was a conflict of interest. First, to raise an apparent conflict, the prosecution would have needed some indication that the ethical screening device was compromised and that Owens's trial team learned confidential factual information about a witness. It had

no such evidence and it would have been unreasonable for the prosecution to assume that the ethical screening device was compromised in light of the trial courts' rulings in the Lowry Park, C. Taylor, and Samuels cases that the ethical screening device had successfully prevented contamination of the trial teams in those cases. Next, during the conflicts litigation in this case, the Arapahoe PDO acknowledged that its DPDs were primarily responsible for raising conflicts and would do so if and when a conflict arose. Last, the conflict issue was raised by the prosecution in this case several months after it was raised in Lowry Park, and Owens's trial team maintained that there were still no conflicts. These circumstances did not give rise to an apparent conflict of interest. Thus, the prosecution was not obligated to put the court on notice.

5. Conclusion

The court concludes that the prosecution did not violate its obligation to alert the court to apparent conflicts of interest.

Accordingly, Owens's petition to vacate his conviction and sentence based on his argument that the prosecution failed to adhere to its duty to inform the court of apparent conflicts of interest is **Denied**.

III. Continued Representation by Counsel of Choice[91]

A. Parties' Positions

Owens argues D. Wilson's departure from his trial team in October 2006 violated Owens's constitutional and procedural rights. Owens contends D. Wilson's representation of him for almost a year established Owens's constitutional right to continued representation by D. Wilson and that D. Wilson violated that right when he stopped representing him. Owens further contends D.

[91] The court denied Owens an evidentiary hearing on this claim.

Wilson did not comply with the procedural requirements for withdrawal thereby depriving Owens of the opportunity to be informed and to object. Last, Owens claims D. Wilson's appointment as the State Public Defender constituted a personal conflict of interest and that D. Wilson's exit from the team constituted ineffective assistance of counsel.

The prosecution responds that D. Wilson's departure from Owens's trial team was an administrative change in attorneys and did not violate Owens's constitutional or procedural rights. The prosecution also contends D. Wilson did not leave the trial team due to a conflict of interest and that his departure did not constitute ineffective assistance of counsel.

B. Findings of Fact

State Public Defender Kaplan assigned D. Wilson, King, and Middleton to represent Owens in the Lowry Park case because the State PDO anticipated that the prosecution would seek the death penalty in this case. When appointed, D. Wilson and King were working on a capital case in Alamosa County. D. Wilson had been assigned to several capital cases and this was King's second capital case, but neither had taken a capital case to trial and sentencing. Middleton was a motions and appellate attorney with substantial experience in capital cases and had taken a capital case to trial in Texas.

Shortly after they were appointed to represent Owens, D. Wilson began working on mitigation while King began investigating the facts and preparing for trial. At some point in 2006, Kaplan announced his intent to resign. D. Wilson applied for Kaplan's position and the State Public Defender Commission appointed him to replace Kaplan. D. Wilson assumed his new responsibilities on November 6, 2006.

On October 19, 2006, King informed the Lowry Park trial court that Kepros was joining the trial team and that D. Wilson was departing in order to fulfill his duties as State Public Defender. The trial court acknowledged that D. Wilson had been appointed as State Public Defender, and Owens did not voice an objection.

On November 28, 2006, Kepros and DPD Andrea Manning (Manning)[92] entered their appearances in the Dayton Street case and the trial judge noted that it was due to D. Wilson's departure.

When King assumed his role as lead counsel, he requested D. Wilson's work product on mitigation but never received anything of substance. D. Wilson did not prepare a transfer memorandum. King tried to meet with D. Wilson and learn what information and investigative leads he had developed, but except for one brief encounter, D. Wilson's administrative responsibilities precluded him from spending meaningful time with King. As lead counsel, King began investigating mitigation while Kepros took over the factual investigation and trial preparation for the guilt phase of the trial.

After D. Wilson's promotion, King, Kepros, and Middleton became Owens's trial team for both his Lowry Park and Dayton Street cases. Before Owens's Lowry Park trial, his team filed and litigated approximately 50 pretrial motions. The team also responded to and objected to numerous prosecution motions. The team represented Owens in the 16-day jury trial and litigated numerous motions during trial. During that time, Owens never objected to King's role as lead counsel or to D. Wilson's departure.

Owens's Lowry Park jury trial started on January 8, 2007. On January 2, King and the team moved for a continuance based on a motion filed on December

[92] Manning was from the State PDO Appellate Section and only remained on Owens's trial team a short time.

27, 2006. The essence of the argument was that more time was needed to properly prepare for trial. During the argument, the trial team pointed out that Kepros had only been involved in the case since October. The court denied the motion.

On January 30, 2007, the Lowry Park jury found Owens guilty of, among other charges, the first-degree murder of Vann and the attempted murders of Marshall-Fields and Bell. On April 3, 2007, the court sentenced Owens to life without parole plus 64 years. Owens filed a Notice of Appeal on May 10, 2007. In the appeal, Owens did not claim as error D. Wilson's departure from his trial team. Owens's appellate attorneys argued, *inter alia*, that the trial court had abused its discretion in denying the motion to continue, but the Colorado Court of Appeals did not agree and affirmed the trial court's denial of the motion. *People v. Owens*, No. 07CA0895, 2012 WL 3031232 (Colo. App. July 26, 2012) (not published pursuant to C.A.R. 35(f)), *cert. denied*, No. 12SC0810, 2013 WL 4426399 (Colo. Aug. 19, 2013).[93]

In this case, after D. Wilson left, the trial team filed and litigated approximately 261 pretrial motions, filed and litigated approximately 18 post-trial motions, and contested approximately 100 pretrial motions filed by the prosecution. Individual *voir dire* of hundreds of potential jurors began on March 10, 2008, and the jury returned its final verdict on June 16. During the guilt phase, the defense contested the prosecution's evidence and called 16 witnesses, including experts in DNA, paint transfer, and crime scene reconstruction. During the sentencing hearing, the defense put on a multi-week mitigation case and vigorously

[93] In his petition for certiorari, Owens claimed the Colorado Court of Appeals erred when it affirmed the trial court's denial of Owens's motion to continue the Lowry Park trial. In support, Owens relied on D. Wilson's departure from his team and the loss of his team's lead investigator. Pet. for Writ of Cert. at 26-29, *Owens v. People*, (No. 12SC0810), 2013 WL 4426399. There is no reference in Owens's petition for certiorari to D. Wilson's departure being a deprivation of Owens's counsel of choice.

contested the prosecution's aggravation. Not once during this time did Owens object to King as lead counsel or to D. Wilson's departure.

C. Principles of Law

Under the Fifth, Sixth, and Fourteenth Amendments, an indigent defendant in state court criminal proceedings has a constitutional right to appointment of counsel because s/he lacks both the skill and knowledge to prepare a proper defense. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). An indigent defendant does not, however, have a right to demand a particular attorney. *People v. Arguello*, 772 P.2d 87, 92 (Colo. 1989).

Once appointed, the attorney-client relationship is no less inviolable than if counsel had been retained. *People v. Harlan*, 54 P.3d 871, 878 (Colo. 2002) (quotation omitted). Indeed, an indigent defendant has a presumptive right to continued representation by counsel of choice. *Id.* The relationship continues until there is a factual and legal basis for terminating the relationship. *Williams v. Dist. Court*, 700 P.2d 549, 555 (Colo. 1985).

The United States Supreme Court addressed a defendant's right to continued representation by counsel of choice in *Morris v. Slappy*, 461 U.S. 1 (1983). Slappy and his deputy public defender, Goldfine, established an attorney-client relationship. *Morris v. Slappy*, 461 U.S. 1, 5 (1963). Goldfine represented Slappy at the preliminary hearing and conducted an extensive pretrial investigation. *Id.* One week before trial, Goldfine had to undergo emergency surgery, which made him unavailable to represent Slappy at trial. *Id.* The public defender's office substituted another deputy public defender to represent Slappy six days before the scheduled trial. *Id.* The replacement attorney was a senior trial attorney who immediately began preparing Slappy's case. *Id.* Slappy moved to continue his trial to allow his replacement attorney additional time to prepare, but not to ensure

continued representation by Goldfine. *Id.* at 6. On the first day of his trial, Slappy told the trial court that he was satisfied with his replacement attorney, but on the third day of trial, he indicated that he wanted to be represented by Goldfine. *Id.* at 8.

In Slappy's *habeas corpus* claim, he alleged the "[t]rial court abused its discretion by failing to order a substitution of counsel after [the defendant and replacement counsel became] embroiled in irreconcilable conflict." *Id.* at 4.

Following the denial of Slappy's *habeas corpus* petition, the Ninth Circuit Court of Appeals reviewed the case and found that the trial court,

> [H]aving failed to inquire about the probable length of Goldfine's absence, could not have weighed respondent's interest in continued representation by Goldfine against the state's interest in proceeding with the scheduled trial. The Court of Appeals concluded that the trial court's failure to conduct this balancing test ignored respondent's Sixth Amendment right to a "meaningful attorney-client relationship" and hence violated respondent's right to counsel.

Id. at 11.

In reversing the Court of Appeals and reinstating the conviction, the United States Supreme Court noted,

> The Court of Appeals' conclusion that the Sixth Amendment right to counsel "would be without substance if it did not include the right to a *meaningful attorney-client relationship*," 649 F.2d, at 720 (emphasis added), is without basis in the law. No authority was cited for this novel ingredient of the Sixth Amendment guarantee of counsel, and of course none could be. No court could possibly guarantee that a defendant will develop the kind of rapport with his attorney—privately retained or provided by the public—that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel. Accordingly, we reject the claim that the

> Sixth Amendment guarantees a "meaningful relationship" between an accused and his counsel.

Id. at 13-14.[94]

D. Analysis

Owens argues D. Wilson's departure violated his constitutional right to counsel and was not done in accordance with Crim. P. 44 thereby depriving him of any opportunity to be advised of his right to object. He also contends D. Wilson suffered a conflict of interest because of his personal interests in pursuing appointment as the State Public Defender.

The court will initially address two threshold matters. First, the court clarifies the procedural context of this issue. Owens argues in SOPC-163 that his constitutional right to continued counsel of choice was violated in his Lowry Park case. He is also seeking to vacate his conviction in his Dayton Street case based on D. Wilson's departure from his trial team after filing a direct appeal of his Lowry Park convictions in which he did not challenge D. Wilson's departure. But because a petitioner can raise constitutional error in a post-conviction proceeding even though the same issue could have been raised on appeal, the court will address the issue despite its unusual procedural context. *People v. Rodriguez*, 914 P.2d 230, 253 (Colo. 1996).

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[94] In SOPC-163, Owens discusses his relationship with D. Wilson and describes it as one of trust. Owens also points out his family knew and trusted D. Wilson. However, Owens did not present any evidence about his relationship with D. Wilson. In this court's view, Owens discusses his relationship with D. Wilson in an effort to establish Owens's preference to continued representation by D. Wilson, not to argue he was denied a meaningful attorney-client relationship. If, however, Owens intends to make such an argument, this court is not persuaded, because the Supreme Court in *Morris* unequivocally held the Sixth Amendment right to counsel does not include a right to a "meaningful attorney-client relationship." 461 U.S. at 14; *see also Arguello*, 772 P.2d at 92 (quoting *Morris* for the proposition that right to counsel does not include right to meaningful attorney-client relationship).

Second, the court addresses Owens's premise that D. Wilson withdrew from representing him. D. Wilson did not withdraw in the classic sense. Rather, a state commission appointed D. Wilson as the State Public Defender, and he left Owens's trial team to manage the State PDO. Under C.R.S. § 21-1-102(3), every deputy public defender serves at the pleasure of the State Public Defender. In keeping with the PDO's protocol for capital cases, D. Wilson elevated King to a CTD, substituted King for himself on the team, and assigned Kepros to fill King's role as second chair. These changes were administrative necessities and were accomplished without violating Owens's right to counsel.

With these issues clarified, the court analyzes whether D. Wilson's departure from Owens's trial team violated Owens's constitutional or procedural rights.

The record does not support Owens's claims that he was not consulted about D. Wilson's departure from the team. Owens was present when records were made in both cases about D. Wilson's departure and the necessity for Kepros's substitution. It can reasonably be inferred that Owens was aware of and apprised of the circumstances involving D. Wilson's departure.

The records in both the Lowry Park and the Dayton Street cases are devoid of any evidence that Owens ever objected to D. Wilson's departure or to King assuming the role of lead counsel. Owens did not mention to either court that he did not understand why D. Wilson was no longer working on his cases or that he was dissatisfied with King or Kepros. Notably, he was also present on January 2, 2007, when King argued for a continuance of the trial because Kepros had only recently been assigned to the case. The record reflects Owens cooperated fully with his defense team through two trials and a sentencing hearing that involved intense litigation for over 18 months after D. Wilson's departure. On this record, the fact that Owens now claims for the first time that he would have objected to D.

Wilson's departure, if consulted, has the appearance of a contrived argument. *See Morris*, 461 U.S. at 13 (asserting right to continued representation by counsel of choice 11 days after replacement deputy was assigned and only two days after expressing satisfaction with replacement deputy was insufficient to establish denial of right to continued representation by counsel of choice).

As the prosecution noted, Owens's argument is premised primarily on disqualification cases where the defendant wanted to keep his/her appointed attorney notwithstanding a potential conflict. This case does not involve disqualification. In the court's view, the legal template for disqualification motions, which involves judicial balancing of several competing interests, is not applicable here. A balancing test of interrelated competing interests is not required when one deputy public defender has to leave a defense team and is replaced by another due to illness, departure from the Public Defender's office or, as in this case, promotion or similar administrative necessity. *See Morris*, 461 U.S. at 13-14 (when considering whether defendant's right to continued representation by counsel of choice was violated, the Court did not discuss any balancing test).

Owens next argues that D. Wilson left his trial team due to a personal conflict of interest. Owens contends D. Wilson was conflicted because his personal interests in accepting the appointment as State Public Defender materially limited his ability to represent Owens. Referencing Colo. RPC 1.7(a)(2), Owens claims D. Wilson's departure is proof that he knew he had an actual conflict. The court disagrees. First, the rule addresses personal interests that are innate to the case such as when a transactional attorney's conduct becomes an issue in the case or when an attorney who is currently engaged in litigation has employment discussions with the firm representing the opposing party. Colo. RPC 1.7 cmt. 10.

In those examples, the attorney's conduct has created a personal interest that may impede the attorney's ability to vigorously represent the client.

In this case, D. Wilson sought and obtained appointment as the State Public Defender. Contrary to Owens's claim, D. Wilson's departure from the trial team was not an acknowledgment that there was a conflict. Rather, it was necessitated by his assuming responsibility for running a multi-million dollar governmental agency with hundreds of employees that provides critical services to indigent citizens. Accordingly, the court finds Owens's claim that D. Wilson had a personal conflict of interest is without merit.

Owens also alleges that his trial team's failure to advise him or to obtain his consent for D. Wilson's departure amounted to ineffective assistance of counsel. In light of the court's finding that D. Wilson did not leave the team due to a conflict of interest, Owens's trial team had no duty to obtain his informed consent. Colo. RPC 1.7 cmt. 8. Not doing so under these circumstances was not deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984).

Last, Owens contends that D. Wilson did not comply with the procedural requirements for withdrawal under Crim. P. 44 and thereby deprived him of the opportunity to discuss the matter and to object. As noted previously, D. Wilson did not withdraw from representing Owens in the sense contemplated by the rule. Thus, Crim. P. 44 is inapplicable.

E. Conclusion

Nearly six years elapsed between D. Wilson's departure from Owens's trial team and the filing of SOPC-163. At no time during those six years did Owens voice any objection to the court about D. Wilson's departure or King's substitution as lead counsel. Owens has failed to establish that D. Wilson's departure from his trial team violated his constitutional or procedural rights.

Because D. Wilson did not withdraw from Owens's trial team due to a conflict of interest, D. Wilson was not obligated to obtain Owens's informed consent prior to leaving the team. Thus, Owens failed to establish ineffective assistance of counsel under *Strickland*.

Accordingly, Owens's petition to vacate his conviction and sentence based on D. Wilson's departure from his trial team is **Denied**.

IV. Government Misconduct

A. General Statement of Parties' Positions

Owens contends the prosecution engaged in a pattern of deliberate and negligent misconduct that deprived him of his constitutional rights to due process.

In response, the prosecution denies Owens's claims and contends Owens cannot meet the legal standard of materiality for any of his government misconduct claims.

B. General Principles of Law

The Fourteenth Amendment prohibits the government from depriving its citizens of "life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1; *see also* Colo. Const. art. II, § 25 ("No person shall be deprived of life, liberty or property, without due process of law."). "We are dealing with the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution. Our construction of that Clause will apply equally to the comparable Clause in the Fourteenth Amendment applicable to trials in state courts." *United States v. Agurs*, 427 U.S. 97, 107 (1976).

Because non-structural, constitutional due process analysis has developed over time and the legal standard has been articulated differently by different appellate courts, this court quotes articulations of the standard in a variety of ways in the following sections. The court is aware, however, that due process analysis in

this area might be guided by a single standard. That is the standard of the outcome determinative *Bagley* approach, which is often described as a reasonable probability that, absent the misconduct, the result would have been different.

> [T]he [United States Supreme] Court has come to describe this standard, most particularly in the context of a failure to disclose favorable evidence, as a reasonable probability that the result would otherwise have been different. *See Bagley*, 473 U.S. at 678–83, 105 S.Ct. 3375 (recounting history of various reformulations and adopting *Strickland* standard as sufficiently flexible for all failure to disclose cases); *see also Kyles*, 514 U.S. at 432–37, 115 S.Ct. 1555 (clarifying the contours of that standard). While the Supreme Court has made abundantly clear that it does not intend its use of the term "reasonable probability" to require a showing that the defendant would more likely than not have received a different result, it has also made clear that it does intend to require a demonstration of greater harm than would be sufficient for reversal under the *Kotteakos* harmless-error standard for federal nonconstitutional error, *Kyles*, 514 U.S. at 436, 115 S.Ct. 1555, and necessarily therefore, under the *Chapman* constitutional harmless-error standard, *see Strickler*, 527 U.S. at 291, 119 S.Ct. 1936 (finding a "reasonable *possibility*," although not a "reasonable *probability*," of a different result)(emphasis in original); *see also id.* at 300, 119 S.Ct. 1936 (Souter, J., concurring in part and dissenting in part) (suggesting that the constitutional materiality standard be distinguished from the *Chapman/Fahy* "reasonable possibility" standard by use of the term "significant possibility" rather than "reasonable probability").

Krutsinger v. People, 219 P.3d 1054, 1060 (Colo. 2009).

The court is also mindful that, "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

C. False Testimony and Failure to Disclose Evidence Showing Testimony was False

1. Parties' Positions

Owens alleges the prosecution knowingly solicited and failed to correct the false testimony of four witnesses: Sailor, Johnson, Strickland, and Detective Thomas Wilson (T. Wilson). Owens further alleges the prosecution failed to disclose evidence that would have shown that these witnesses testified falsely.

In the prosecution's view, none of the witnesses testified falsely. The prosecution also argues that it did not withhold any evidence that would have demonstrated that a witness testified falsely.

2. Principles of Law

Any conviction based on false testimony raises Fourteenth Amendment due process concerns. *Mooney v. Holohan*, 294 U.S. 103 (1935). To determine whether Owens was deprived of his Fourteenth Amendment right to due process because (1) the prosecution solicited or failed to correct testimony known to be false, and/or (2) the prosecution failed to disclose evidence showing a witness's testimony was false, this court must decide: (a) whether the testimony was actually false, and (b) whether the prosecution knew or should have known that it was false. If so, the court must then decide whether the false testimony "could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)).

The government failed to correct testimony it knew was false in *Napue v. Illinois*, 360 U.S. 264 (1959). The government secured the cooperation of Hamer, Napue's codefendant, by promising to recommend a reduction of his sentence if he

testified against Napue.[95] *Napue v. Illinois*, 360 U.S. 264, 266 (1959). At trial, Hamer acknowledged that a public defender told him he "was going to do what he could," but said that no one on behalf of the government promised him anything in exchange for his testimony against Napue. *Id.* at 268. The prosecutor did not correct Hamer's testimony.

The United States Supreme Court noted the distinction between the facts in *Napue*, where the government failed to correct false testimony, and the facts in *Mooney*, where the government knowingly solicited false testimony, and determined that both scenarios can potentially deprive defendants of due process. *Id*. at 269. The Court disapproved of the government's failure to correct Hamer's testimony by declaring, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.*

In *Napue*, Hamer's motivation to testify was suspect. His credibility was an issue. False testimony can be material if it relates to the credibility of a witness or to the defendant's culpability because "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Id*.

The United States Supreme Court reaffirmed this principle in *Giglio* where the prosecutor who brought the case before the grand jury promised not to prosecute Giglio's co-conspirator in exchange for his testimony against Giglio. That prosecutor failed to inform the prosecutor who tried Giglio's case of the promise made to the co-conspirator. *Giglio*, 405 U.S. at 150-51. At trial, the co-conspirator testified that the government did not promise him anything in exchange

[95] Prior to Napue's arrest, Hamer had been convicted and sentenced to 199 years for his role in the murder.

for his testimony and that he believed the government could still prosecute him as a co-conspirator. *Id*. at 151. As in *Napue*, the prosecutor did not correct the false testimony.[96] *Id*.

When more than one prosecutor is involved in a case, *Giglio* attributes the knowledge of each individual prosecutor to the others. *Id.* at 154.

> [W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

Id (internal citations omitted).

There can also be due process violations when the prosecution did not know but should have known certain information. *DeLuzio v. People*, 494 P.2d 589, 592 (Colo. 1972). DeLuzio was the mastermind and getaway driver of a jewelry store robbery. *Id.* at 590-91. The police caught the actual robbers before they got to DeLuzio's car. *Id.* at 591. Their testimony was essential to convict DeLuzio. *Id.* Unbeknownst to the trial prosecutor, the chief deputy district attorney and chief

[96] The government's case against Giglio rested almost entirely on the co-conspirator's testimony. *Giglio*, 405 U.S. at 154. The co-conspirator's credibility was "an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility." *Id.* at 155. The prosecution suggests that a defendant's due process rights are not violated unless the witness who testified falsely: 1) is the defendant's co-conspirator or codefendant and 2) cooperated with the prosecution in order to avoid or minimize potential negative consequences for his/her own involvement in the crime. In his Reply to SOPC-163, Owens cites several Circuit Court cases where the witness who testified falsely was neither a co-conspirator nor a codefendant, yet the court found that the government violated the defendant's due process rights. It is this court's view that the witness's relationship to the defendant and the witness's motivation are not elemental to a due process claim.

district attorney investigator had promised these witnesses reduced charges and leniency. *Id.* at 592. The witnesses testified falsely that they were given no deal. *Id.* A "due process violation occurred, because the [trial prosecutor] should have known of the agreement. Certainly, knowledge of the chief deputy and of the chief investigator for the district attorney is knowledge to the entire office." *Id.* at 592.

Not all law enforcement knowledge is imputed to the prosecutor. The Colorado Court of Appeals in *People v. Gillings*, 568 P.2d 92, 95 (Colo. App. 1977), declined to impute to the district attorney knowledge of a sheriff who functioned as a jailor. Crim. P. 16 is of some import. Crim. P. 16(I)(a)(2) covers *Brady* information, including impeachment information. And Crim. P. 16(I)(a)(3) extends the prosecutor's obligation to those police officers who "participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported" to the prosecutor.

The rule is consistent with *Strickler v. Greene*, 527 U.S. 263 (1999), where the United States Supreme Court charged the prosecution with knowledge of an eyewitness's written statements and a detective's notes from the witness's interview.

Allegations of due process violations based on false testimony are often accompanied by allegations that the prosecution failed to disclose evidence. In cases where the prosecution solicited or failed to correct false testimony, it is also often asserted that the prosecution did not disclose the very evidence that would have proved that the testimony was false. The claims go hand-in-hand, and according to *Giglio*, allegations of false testimony and allegations of nondisclosure of evidence that would have shown a witness testified falsely are subject to the three-part test in *Napue*.

It is important to distinguish between undisclosed evidence that would have proved a witness's testimony was false and undisclosed evidence that was materially favorable to the defendant. Claims that the prosecution failed to disclose evidence showing a witness testified falsely are subject to the *Napue* standard – a standard less stringent than the standard in *Brady v. Maryland*, 373 U.S. 83 (1963), which governs claims that the prosecution failed to disclose materially favorable evidence.[97]

The Colorado Court of Appeals acknowledged this distinction when it held that, "[w]here previously undisclosed evidence shows testimony was perjured, courts must evaluate the effect such new evidence might have had on the jury." *People v. Medina*, 260 P.3d 42, 49 (Colo. App. 2010).

Thus, to determine whether the prosecution deprived Owens of his Fourteenth Amendment due process rights by soliciting or failing to correct testimony known to be false, or by failing to disclose evidence showing a witness's testimony was false, this court must decide: 1) whether the testimony was actually false, and 2) whether the prosecution knew or should have known the testimony was false. If those factors are satisfied, the court must also decide: 3) whether the

[97] *See also Agurs*, 427 U.S. at 103 (evidence known to the prosecution and unknown to the defense that demonstrated the prosecution knew or should have known testimony was false is material if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."); *Rosencrantz v. Lafler*, 568 F.3d 577, 584 (6th Cir. 2009) (when the violation involves a claim that false testimony was offered "the materiality assessment is less stringent than that for more general *Brady* withholding of evidence claims."); *United States v. Vozzella*, 124 F.3d 389, 392 (2nd Cir. 1997) ("[W]e believe that where undisclosed *Brady* material undermines the credibility of specific evidence that the government otherwise knew or should have known to be false, the standard of materiality applicable to the first *Brady* category applies. In such circumstances, the failure to disclose is part and parcel of the presentation of false evidence to the jury . . . ."); *United States v. Arnold*, 117 F.3d 1308, 1315 (11th Cir. 1997) ("The standard of materiality is less stringent, however, when the prosecutor knowingly uses perjured testimony or fails to correct testimony he or she learns to be false.").

false testimony could in any reasonable likelihood have affected the judgment of the jury. *Napue*, 360 U.S. at 271.

The Colorado Supreme Court in *DeLuzio* considered the affect the witnesses' false testimony may have had on the outcome of the trial; thus, it assessed the false testimony cumulatively.[98]

3. Alleged Instances of False Testimony and Failure to Disclose Evidence Showing Testimony was False

a. Latoya Sailor

i. Timing of Cooperation

(a) Parties' Positions

Owens contends that Sailor's testimony concerning when she became a cooperating witness was false. Owens argues Sailor's testimony was false because she told the jury she waited until after Owens was arrested to come forward to agree to an interview with Fronapfel. Owens contends that this was false because Sailor was willing to share information with the prosecution and police before Owens's arrest, as evidenced by her having authorized her attorney to engage in plea negotiations before Owens's arrest.

The prosecution responds that Sailor's testimony was truthful and that it did not have a duty to disclose that it was negotiating with McDermott prior to Owens's arrest.

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[98] Owens relies on *Jackson v. Brown*, 513 F.3d 1057, 1075 (9th Cir. 2008), for the proposition that this court must assess the cumulative materiality of all of the alleged false testimony presented at his trial. Yet he does not analyze cumulative materiality in SOPC-163 and instead focuses on the materiality of each individual witness's false testimony. The prosecution does not address cumulative materiality in its Response to SOPC-163. Even though *Jackson* is not binding on this court, the concept of addressing the cumulative materiality of the false testimony resonates with this court in light of *Kyles*'s pronouncement that the materiality of undisclosed evidence is judged cumulatively. *Kyles v. Whitley*, 514 U.S. 419, 436 (1995).

(b) Findings of Fact

Owens asserted various discovery violations in SOPC-120. He claimed the prosecution repeatedly failed to disclose discoverable material to his trial team. The prosecution's failure to disclose its negotiations with McDermott prior to Owens's arrest was one of the alleged discovery violations in SOPC-120. As to that claim, the court found that the prosecution violated its discovery obligations. P.C. Order (SO) No. 5, p. 5. Owens sought an order requiring the prosecution to disclose its entire file to his post-conviction counsel. After an evidentiary hearing, the trial court denied the motion in P.C. Order (SO) No. 5. The court did not address whether Sailor testified falsely because Owens reserved that issue for his post-conviction petition.

The APD arrested Sailor on August 11, 2005. She was the passenger in a vehicle driven by someone else, and a search of the car produced drugs tucked into the seat where Sailor had been sitting. She was charged with drug distribution and as a special offender for being in possession of a weapon.[99] The court set her bond at $100,000. Later that day, Fronapfel approached her in the jail. Sailor emphatically told Fronapfel that she had nothing to say. Sailor has repeatedly claimed and apparently believed that the police planted the drugs in the car in order to coerce her into becoming a cooperating witness on the Lowry Park and Dayton Street cases. At the time of her arrest, Ray was in jail awaiting trial on his Lowry Park accessory charge, and Owens was hiding out of state.

[99] Arapahoe County case 05CR2455.

On August 17, Sailor was charged with being an accessory to the Lowry Park shootings and the court set her bond at $150,000.[100] On August 25, the court appointed McDermott to represent her on both cases.

On or before September 26, Deputy District Attorney (DDA) John Hower (Hower) told McDermott there was a race to the courthouse, which McDermott took to mean that the prosecution was looking for cooperating witnesses in its case against Ray. After her drug and gun case was bound over to district court, Sailor told McDermott she wanted to cooperate with the prosecution.[101] In McDermott's opinion, Sailor's decision to cooperate was influenced by her concerns about her exposure to jail or prison and for the welfare of her son. At the trial, Sailor maintained that she was not worried about going to prison and always wanted to come forward, even before she was arrested. Wolfe's mother had given her Fronapfel's business card at the courthouse in the late summer of 2005 and urged her to call the number on the card and to come forward with any information she knew.

McDermott discussed Sailor's potential cooperation against Owens with DDA Jennifer Lundin (Lundin) on October 13. Although McDermott does not recall the details of the conversation, Lundin sent an email to her fellow prosecutors on October 13 stating that McDermott asked her what type of protection would be available if Sailor cooperated. Lundin also noted that, according to McDermott, Sailor was particularly concerned about Owens being at large.

[100] Arapahoe County case 05CR2447.

[101] Sailor waived her attorney-client privilege in 2011. *See* n.102.

McDermott met with Lundin on October 18 and reiterated that Sailor was concerned about Owens. He did not provide any specifics of Sailor's information to Lundin because Sailor had not yet authorized him to do so.

Also in mid-October, McDermott retained private investigator Heather Cohen (Cohen) to assist him on Sailor's cases. McDermott had never done a proffer. Cohen identified Carrie Clein (Clein), who agreed to assist. Clein had experience with proffers as part of plea negotiations in Arapahoe County.

McDermott and Cohen met with Sailor in the ACDF on October 19 and 25 and debriefed her in detail about the Lowry Park shootings and the Dayton Street homicides. Cohen took notes and prepared written reports. McDermott explained that he needed to provide a skeletal proffer of her information to the prosecution and, in return, expected a plea offer that might include dismissal of some charges and a possible bond reduction. Sailor authorized him to provide the skeletal proffer.

On October 27, McDermott and Cohen met with members of the prosecution team, a victim-witness advocate, Fronapfel, and Sergeant Kevin Kenney (Kenney). The meeting lasted over two hours.

With Sailor's permission, McDermott outlined topics of Sailor's knowledge of the Lowry Park shootings and Dayton Street homicides, but did not provide specifics because Sailor had authorized only a skeletal proffer. The prosecution did not consider the skeletal proffer to be an actual proffer because McDermott did not disclose specifically what Sailor's testimony would be. When the prosecution suggested that dismissal of Sailor's charges was a possibility in return for her full cooperation, McDermott was convinced the prosecution viewed her as highly valuable.

McDermott advised the prosecutors that Sailor was conflicted about cooperating and did not want Owens and Ray to face the death penalty. But although Sailor was opposed to the death penalty, she did not condition her testimony on the prosecution's agreement not to seek the death penalty against Ray or Owens.

Sailor's safety was also a topic of conversation. The victim-witness advocate explained how the prosecution could ensure Sailor's safety after her release from custody. McDermott stated that Sailor was very concerned about the Department of Human Services (DHS) becoming involved and possibly removing her young son. During this meeting, Fronapfel gave McDermott a list of questions for McDermott to ask Sailor.

Fronapfel took notes during the October 27 meeting, but the prosecution did not disclose Fronapfel's notes.[102]

McDermott met with Sailor on October 31 and explained what had occurred at his October 27 meeting with the prosecution. McDermott asked Sailor for answers to Fronapfel's questions. In his opinion, she understood that he intended to share her answers with the police and she gave no indication she wanted him to stop negotiating. Sailor told McDermott she was concerned about rumors within the jail that Marshall-Fields's relatives were going to retaliate against her for Marshall-Fields's murder.

On November 3, McDermott met with Hower, DDA Ann Tomsic (Tomsic), a victim-witness advocate, T. Wilson, and a district attorney investigator for

[102] Cohen also took notes during this meeting. Because Owens's trial team was not aware of these meetings, it never asked McDermott for his file and thus was not privy to Cohen's notes. McDermott provided Cohen's notes to Owens's post-conviction counsel in 2011 when SOPC-120 was filed and litigated. At that time, Sailor waived her attorney-client privilege with McDermott, and he provided his file to both post-conviction counsel and the prosecution.

approximately two hours. One of the first subjects was Sailor's fear of Marshall-Fields's relatives. McDermott also repeated the topics he had covered on October 27, because Hower had not been at that meeting. McDermott provided Sailor's answers to Fronapfel's questions and some specifics of Sailor's knowledge. McDermott considered this a verbal proffer. The prosecution told McDermott that it wanted a written proffer, and McDermott committed to preparing one in the near future. The prosecution was anxious to have Sailor's cooperation and to hear from her personally. As Ray's wife, her testimony needed to be voluntary to overcome the spousal privilege.[103]

Fronapfel took notes during the November 3 meeting. The prosecution disclosed Fronapfel's one page of notes, but the notes are undated.

Later on November 3, McDermott met with Sailor and told her what had happened at the meeting. He also told her the court would probably continue the November 4 arraignment in her drug case to November 16, which was the scheduled date for the preliminary hearing in her accessory case. He explained that he had not reached a plea agreement with the prosecution and that he would begin working on a written proffer.

On November 5, McDermott and Cohen met with Hower at Clein's home to obtain Clein's assistance with the proffer in the hope of finalizing the plea agreement. The safety of Sailor and her son was discussed, and it was noted that Owens was still at large. Hower cautioned that no one should disclose Sailor's cooperation. Hower also indicated his intent to facilitate moving Sailor and her son out of Colorado after her plea agreement was disclosed in court.

[103] C.R.S. § 13-90-107(1)(a)(I)-(II).

McDermott showed Hower a draft proffer letter and Hower suggested that it be split into two letters – one for Lowry Park and one for Dayton Street. Hower also offered to provide a reverse proffer. Clein advised this would be helpful in preparing a complete proffer. In McDermott's view, there was no implication in Hower's suggestion of a reverse proffer that the prosecution was trying to feed information to Sailor.

Hower indicated dismissal of all charges was not possible because it could have an adverse impact on Sailor's credibility in front of the juries. He suggested a deferred judgment to the accessory case and dismissal of the drug case. At the end of this meeting, McDermott believed they had an agreement in principle that required two written proffers and a debriefing of Sailor before being finalized.

The prosecution did not disclose any information about the November 5 meeting. Fronapfel had not been present.

In Tomsic's view, the October 27, November 3, and November 5 meetings were not proffer meetings but merely part of the negotiation process. According to Tomsic, the information McDermott gave to the prosecution during these meetings was not discoverable because, while Crim. P. 16 obligates the prosecution to disclose witness statements, McDermott's recitation of Sailor's information did not qualify as a witness statement. Tomsic also takes the view that the fact that the meetings occurred was not discoverable.

Owens was arrested in the early morning hours of November 6 in Shreveport, Louisiana.

On November 7, Sailor told a friend that her attorney had been speaking to the prosecutors but that she had not spoken to the prosecutors or to law enforcement. She also told her friend that she expected to be going home to her

son. The prosecution disclosed the audio recording of this telephone call between Sailor and her friend.

According to Tomsic, McDermott contacted the prosecution on November 7 or 8 to schedule a meeting with the prosecution, Fronapfel, and Sailor, but it is unknown whether McDermott's contact was triggered by contact from Sailor or something else. McDermott's billing records show entries on both November 7 and 8 for discussions with the prosecution. No witness recalled the substance of these discussions. The parties eventually settled on November 16 for the meeting because Sailor was scheduled for court on that date.

T. Wilson interviewed Owens in Louisiana on November 8 and confronted Owens about Ray getting upset with him for not just shooting into the air at Lowry Park. Fronapfel's undisclosed notes from the October 27 meeting refer to a conversation between Ray and Owens after the Lowry Park shootings. That information does not appear in Fronapfel's November 3 notes. Similarly, Cohen's notes from the October 27 meeting reflect that Sailor could provide information about a conversation, presumably between Ray and Owens, after the Lowry Park shootings.

During the post-conviction hearing, neither the prosecution nor Owens explained how T. Wilson learned this information, but the prosecution surmised that T. Wilson learned it from Teresa Riley (Riley). This court reviewed the statements Riley made to law enforcement prior to Owens's arrest and found no indication that Riley provided any information about Ray getting upset with Owens for not just shooting into the air at Lowry Park. This court finds that Fronapfel received the information from McDermott on October 27 or November 3 and shared it with T. Wilson who used it to question Owens on November 8.

On November 15, McDermott authorized Hower to tell the court that McDermott did not object to continuing the hearings scheduled in Sailor's drug and accessory cases for the next day because plea negotiations were ongoing, and on November 16, the court continued Sailor's cases to December 14.

After the November 16 hearing, McDermott and Cohen met with Hower, Tomsic, Fronapfel, T. Wilson, Kenney, and a district attorney investigator. Sailor was not present. At McDermott's direction and with Sailor's permission, Cohen provided a detailed verbal proffer. During the meeting, McDermott told the prosecutors that Sailor no longer required witness protection.

During the post-conviction hearing, there was a great deal of confusion concerning Fronapfel's five pages of undated notes in SOPC.EX.D-625A.[104] These notes were in discovery. Owens argued Fronapfel took the notes during the November 3 meeting. The prosecution argued that the notes were from the November 16 meeting.[105] Fronapfel struggled to resolve the dispute during her testimony but ultimately decided that the notes were from the November 16 meeting. The court agrees. This court has thoroughly reviewed all of the notes and reports from the October and November meetings and specifically compared Cohen's report from McDermott's October 19 and 25 meetings with Sailor

[104] The confusion is caused in part because two sets of Fronapfel's notes are sequentially Bates-stamped for discovery 8341 (SOPC.EX.D-625) and 8342-8346 (SOPC.EX.D-625A). Neither set is dated. According to Fronapfel, she took the notes Bates-stamped 8341 during her second meeting with McDermott on November 3, and she took the notes Bates-stamped 8342-8346 on November 16. The court surmises that these two sets of notes, although taken more than two weeks apart, are sequentially Bates-stamped because Fronapfel was out of the country from November 4 until November 14. It is probable that Fronapfel submitted both sets of notes to the prosecution and that the prosecution placed them in discovery at the same time.

[105] Referring to Fronapfel's November 16 notes in its response, the prosecution stated, "[b]ased upon contemporaneous notes taken by Det. Fronapfel, McDermott and Cohen met with Hower, Tomsic, Fronapfel, Det. Wilson, and Inv. 'Mike' from the DA's office." Resp. to SOPC-163 at 188. Curiously, Fronapfel's notes in SOPC.EX.D-625A, which the prosecution insisted were from the November 16 meeting, do not have a list of the attendees.

(SOPC.EX.D-204) to Fronapfel's notes in SOPC.EX.D-625A. Fronapfel's notes roughly track the order of Cohen's report. The court infers that Cohen utilized her report to provide the verbal proffer on November 16. Because Cohen was providing the verbal proffer, it is unlikely that she would be taking notes on the things that she, herself, was saying during the meeting. This court finds that Fronapfel's notes in SOPC.EX.D-625A are from the November 16 meeting.

On November 22, McDermott provided two proffer letters to the prosecution, and Sailor submitted to an all-day debriefing with Fronapfel. This was the first time that she, herself, ever spoke to the police about Lowry Park or Dayton Street. The prosecution disclosed Fronapfel's notes, her report, and the recording of the debriefing. The Lowry Park proffer letter was disclosed immediately and the Dayton Street proffer letter was disclosed shortly after the grand jury returned the indictment on March 8, 2006.

On December 14, Sailor pled guilty to accessory to murder and received a four-year deferred judgment. Her drug case was dismissed. Sailor testified in front of the grand jury later that day. She was released from custody following her grand jury testimony and remained in the Denver area until sometime in January 2006 when she and her son entered the Witness Protection Program and left Colorado. The prosecution disclosed Sailor's plea agreement and her grand jury testimony.

Sailor testified several times prior to trial in this case. She consistently testified that she was afraid of Owens and that she did not talk to Fronapfel until after he was arrested. *See, e.g.*, SOPC.EX.P-53 and SOPC.EX.P-54. At trial, Sailor testified:

> Q Were you aware that if you were willing to share information that you had that you might get some kind of a break on your case or cases; was that –

A When I was in custody.[106]

Q Did . . . you have [that] thought in your head? Did you know that?

A Actually, I didn't, because I never talked to anybody the whole time I was in jail. I never talked to a DA or a police officer. I had a suppress – Robert told me to get a suppression to where no one could speak to me. I told my attorney to get a suppression; I didn't want to talk to anyone. So I did.

Q So no one came and tried to talk to you?

A No.

Q Did you ever consider saying something, Hey, I know things?

A Well, yeah. I mean, I wanted to, but there were reasons why I didn't.

Q What were those?

A For one, when I first got to jail, I was scared about everybody saying that I'm a snitch and this and that, you know what I'm saying. But my main reason why I did not say anything is because my son is at Rose's house, Robert's mom. And Sir Mario had not been caught yet, you know what I'm saying. For me to give up information, the information that I know, and my son is out here, and I know people are going to die, I'm not putting my son in no jeopardy. And I don't put past nothing what someone would do to my child, especially if I'm telling them about some murders. So I wasn't saying nothing.

Q In November of 2005, did you ask Mr. McDermott to contact the district attorney and let us know that you wanted to talk?

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[106] The context of Sailor's testimony is that she is referring to her time in jail before the November 22 proffer.

A Yes, I did.

Q You had been in jail for some three months. What had happened to cause you to now contact Mr. McDermott and ask him to contact –

A I was in my room reading a book and my celly came in there and told me they got the other guy. And as soon as I found out they got the other guy, I was on it. I was ready to talk. There was no one left out there that could hurt my son or do anything. Well, I was just scared of him, period, him doing something. So now that they had him, I could talk to the people and let them know what I knew.

Q Who's the other guy, the "him"?

A Sir Mario.

Q After letting -- after contacting your attorney, then, in fact, were you interviewed on November 22 by Detective Fronapfel and Sergeant Kenney?

A Yes.

Q Is that over at the district attorney's office interview room?

A Yes, yes.

Guilt Phase Tr. 21:6-25; 22:1-25; 23:1-21 (Apr. 16, 2008 p.m.).

Sailor testified similarly during Owens's sentencing hearing.

Q I believe you've testified before that one reason you never came forward and agreed to an interview with Detective Fronapfel was fear, correct?

A Not fear for me, fear for my son.

Q Where was your son at the time?

A Robert's mom had him.

Q Were you afraid that Robert would do something?

A Huh-uh.

Q Who were you afraid of?

A I didn't want to tell. I didn't want to be no snitch and then Rio go doing something to my son. I didn't want my son caught up in that shit I got caught up in. My son don't have to pay for that.

Q Was it Rio that you were afraid of?

A Yes, it was.

Q And is that why you waited until after his arrest before having your lawyer contact Detective Fronapfel?

A Yes, that is why.

Phase Two Tr. 93:10-25; 94:1-2 (June 5, 2008 a.m.).

At the post-conviction hearing, Sailor maintained that she had always given truthful testimony about her fear of Owens, her decision to come forward, and the timing and reasons for that decision. Sailor testified that she never told the prosecution or Fronapfel that she testified falsely in any of the numerous hearings and trials in which she testified.

Sailor also testified during the post-conviction hearing that the safety and welfare of her son were more important than a plea agreement on her cases and more important than moving out of state. She testified that she took a plea deal on her cases in order to get out of jail and care for her son. She also conveyed her belief that she waited until Owens was arrested before cooperating with the prosecution.

(c) Analysis

On August 11, 2005, Sailor was arrested with a gun in the back seat of a car in which she was a passenger. Drugs were found and she believed that the police had planted the drugs in order to coerce her to become a witness against Ray. She was also charged as an accessory to the Lowry Park shootings, and her bonds totaled $250,000. She was concerned about her son's current and future welfare in

light of her incarceration. Her son was with Ray's mother while she was in jail and she was afraid of Owens, who was at large. According to Sailor, the drugs were not hers, and she was hopeful that the drug case would not be bound over. After the preliminary hearing, when the charges in her drug case were bound over, she authorized McDermott to explore a plea bargain.

On October 27 or November 3, she authorized McDermott to reveal first general and then specific information concerning the testimony that she could provide to the prosecution. At his meetings with the prosecution on October 27 and November 3, McDermott told the prosecutors that he would have to obtain Sailor's consent before revealing specific information. After the November 3 meeting, McDermott visited Sailor in the jail. On October 31, she authorized him to provide information to the prosecution and that information was tendered on November 3. When McDermott revealed specific information on November 5, the prosecution knew, or reasonably should have known, that McDermott had obtained authorization from Sailor. Owens was not arrested until November 6.

Sailor's trial and guilt phase testimony on this point was not deliberately false. She did not actually talk to anyone associated with the prosecution until after Owens was arrested, and the day after Owens's arrest, she told a friend that she had not cooperated with the government. She believes that she waited until Owens was arrested before cooperating with the prosecution.

But the fact is that before Owens's arrest, Sailor had authorized McDermott to reveal specific information about her knowledge and she never directed that he refrain from giving her information to the prosecution until after Owens was arrested. Nor did she ever tell McDermott that she would not cooperate until after Owens was arrested.

The prosecution knew, or reasonably should have known, that, although she did not actually do so, Sailor was willing to come forward and share her information before Owens's arrest. The prosecutors themselves were present at various meetings with McDermott. When Sailor's testimony implied that she was not willing to come forward until after learning that Owens had been arrested, there was no legal justification for the prosecution's failure to either correct the false impression or reveal the true facts to the defense. *See Napue*, 360 U.S. at 270 (the prosecution has a duty to correct false testimony).

(d) Conclusion

The prosecution allowed a false impression created by Sailor's testimony to go uncorrected at trial. This will be considered in determining whether all false or misleading testimony, cumulatively, "could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271). *See* part IV.C.4 of this Order.

ii. Fear of Owens

(a) Parties' Positions

Owens contends Sailor testified falsely when she told the jury she did not come forward until Owens was arrested because she was afraid of him. Owens argues Sailor's testimony was false because she was not actually afraid of Owens. According to Owens, the prosecution knew Sailor was not afraid of Owens because Sailor authorized McDermott to negotiate with the prosecution prior to Owens's arrest, which indicated she was not afraid of Owens.

The prosecution responds that Sailor's testimony was not false because she was actually afraid of Owens while she was in jail.

(b) Findings of Fact

The court incorporates its findings of fact in part IV.C.3.a.i(b) of this Order.

(c) Analysis

McDermott acknowledged and Sailor confirmed that her primary motivation to become a cooperating witness was to be released from jail so she could care for her son. At trial, Sailor expressed concern for her son's safety had she become a cooperating witness prior to Owens's arrest.

During Sailor's guilt phase testimony, she indicated she was afraid of Owens. She testified that she did not talk to Fronapfel until after Owens's arrest because she was concerned that if she gave information before he was arrested she would be putting her son in jeopardy. She reiterated during her sentencing hearing testimony that she was afraid of Owens on behalf of her son. During the post-conviction hearing, Sailor testified that she wanted to get out of jail in order to be with her son but was also afraid of Owens.

Various facts corroborate Sailor's concern about becoming a cooperating witness while Owens remained at large:

- On August 11, 2005, when Sailor was arrested, Sailor saw Fronapfel in the jail and emphatically told Fronapfel she had nothing to say.
- On October 13, Lundin sent an email advising the prosecution team that McDermott asked whether the prosecution could provide Sailor with witness protection because Sailor was concerned that Owens was still at large.
- On October 27, a victim-witness advocate attended the meeting between McDermott and the prosecution to answer any questions McDermott had about witness protection for Sailor.
- On November 5, McDermott told Hower that Sailor was concerned for her own and her son's safety because Owens was still at large.

- On November 16, McDermott advised the prosecution that Sailor no longer needed witness protection due to Owens's arrest.
- Sailor knew that Owens played an active role in attempting to intimidate witnesses into failing or refusing to come forward in the Lowry Park cases.
- Sailor knew that Owens had murdered a witness to keep him from testifying.
- Owens had threatened Sailor with his remark that "bitches get it, too."

Sailor's desire to get out of jail and her fear of Owens were not mutually exclusive. The court considers Sailor's testimony credible on this point and finds she did not testify falsely when she told the jury she did not come forward prior to Owens's arrest because she was afraid of Owens.

(d) Conclusion

The court finds Sailor did not testify falsely when she told the jury that she did not talk to Fronapfel until after Owens was arrested because of her fear of him. The court also finds that the prosecution did not withhold information that would have shown that Sailor testified falsely on this point. Accordingly, Owens's claim that Sailor testified falsely about her fear of Owens is **Denied**.

iii. Terms of Plea Agreement

(a) Parties' Positions

Owens contends Sailor testified falsely when she told the jury that all of the terms and conditions of her plea agreement were reduced to writing. Owens argues Sailor's testimony was false because absent from Sailor's written plea agreement are the prosecution's purported promises that the DHS would not become involved with her family and that she and her son could move out of the state after she was sentenced.

The prosecution responds that it did not promise Sailor that it would intercede with the DHS. The prosecution also responds that its promise to move Sailor out of state was made in conjunction with witness protection and relocation plans, not as a condition of her plea agreement.

(b) Findings of Fact

During the meeting on October 27, 2005, McDermott advised the prosecution that Sailor was concerned about the DHS becoming involved and possibly removing her young son. McDermott had first mentioned DHS to Sailor. He was concerned that Sailor might need the agency's assistance to retrieve her son from Ray's mother if Ray's mother learned Sailor was cooperating with the prosecution. McDermott testified during the evidentiary hearing on SOPC-120 that preventing the DHS involvement was not a prerequisite to Sailor becoming a cooperating witness but that Sailor's reuniting with her son was, in his opinion, a driving force behind Sailor's cooperation. According to McDermott and Sailor, the prosecution did not threaten the DHS involvement in order to compel Sailor to cooperate.

During McDermott's meeting with Hower on November 5, Hower indicated his intent to move Sailor and her son out of Colorado after Sailor's plea agreement was approved by the court. Sailor's plea agreement did not address Sailor and her son moving out of Colorado or the involvement of the DHS.

The prosecution disclosed Sailor's plea agreement. At trial, Sailor testified:

> Q And was a disposition of your cases worked out between yourself and the district attorney; in other words, a plea bargain?
>
> A Yes.
>
> Q And were all those -- I'm not going to go into all of those -- but were all the parts of that plea bargain put in writing?

A Yes.

Q Okay.

So you understood what all parts of it were?

A Yes.

Guilt Phase Tr. 23:22-25; 24:1-8 (Apr. 16, 2008 p.m.).

(c) Analysis

The prosecution concedes that it promised Sailor witness protection but contends that moving her out of state was part of the relocation plans for Sailor if she in fact cooperated. It was not a separate promise negotiated as part of her plea agreement that needed to be reduced to writing. The court agrees that moving Sailor out of state was part of the mechanics of witness protection. It was not a benefit conferred upon her for becoming a cooperating witness, and it was not a condition of her plea agreement. As such, it did not need to be reduced to writing. Thus, Sailor did not testify falsely when she told the jury that all of the terms and conditions of her plea agreement were reduced to writing.

Sailor's entry into the Witness Protection Program was not a secret. The prosecution disclosed receipts and other documentation confirming Sailor's status as a protected witness. The parties litigated pretrial motions concerning witness protection, and Owens's trial team specifically sought to exclude evidence of witness protection from the trial. Thus, the prosecution did not withhold information that would have demonstrated Sailor's testimony was false.

McDermott brought up the DHS's potential intervention because he was concerned with Sailor's ability to retrieve her son from Ray's mother after Sailor's release from custody. According to McDermott and Sailor, the prosecution never threatened DHS involvement and never promised Sailor that DHS would not become involved. According to McDermott, a promise from the prosecution to prevent DHS involvement was not a prerequisite to Sailor becoming a cooperating

witness. There is no evidentiary support for Owens's allegation that the prosecution promised Sailor it would prevent DHS from becoming involved with her and her son.

(d) Conclusion

The court finds Sailor did not testify falsely when she told the jury all of the terms of her plea agreement were reduced to writing. The court also finds the prosecution adequately disclosed Sailor's plea agreement. Accordingly, Owens's claim that Sailor testified falsely about her plea agreement is **Denied**.

iv. Call to McDermott

(a) Parties' Positions

Owens contends Sailor testified falsely that she called McDermott when she learned of Owens's arrest. Owens argues Sailor's testimony was false because no phone or billing records reflect a phone call from Sailor to McDermott shortly after Owens was arrested.

The prosecution disputes that Sailor testified falsely about her contact with McDermott shortly after Owens's arrest.

(b) Findings of Fact

Prior to trial, Owens's trial team had access to Sailor's phone records from the ACDF from her arrest on August 11 until her release on December 15. There is no record of a call to McDermott on or around the date of Owens's arrest and McDermott's billing records do not reflect a phone call from Sailor. But McDermott acknowledged he did not always bill for client phone calls and the jail did not always make a record of calls to numbers that are registered as attorney's numbers. According to Tomsic, McDermott reached out to the prosecution on November 7 or 8 to schedule a meeting between the prosecution, Fronapfel, and

Sailor, but it is unknown whether McDermott's contact was triggered by contact from Sailor or something else.

When asked at trial if she instructed her attorney in November 2005 to inform the district attorney she was ready to become a cooperating witness, Sailor responded in the affirmative:

> Q In November of 2005, did you ask Mr. McDermott to contact the district attorney and let us know that you wanted to talk?
>
> A Yes, I did.
>
> Q You had been in jail for some three months. What had happened to cause you to now contact Mr. McDermott and ask him to contact –
>
> A I was in my room reading a book and my celly came in there and told me they got the other guy. And as soon as I found out they got the other guy, I was on it. I was ready to talk. There was no one left out there that could hurt my son or do anything. Well, I was just scared of him, period, him doing something. So now that they had him, I could talk to the people and let them know what I knew.
>
> Q Who's the other guy, the "him"?
>
> A Sir Mario.
>
> Q After letting -- after contacting your attorney, then, in fact, were you interviewed on November 22 by Detective Fronapfel and Sergeant Kenney?
>
> A Yes.
>
> Q Is that over at the district attorney's office interview room?
>
> A Yes, yes.

Guilt Phase Tr. 22:19-25; 23:1-21 (Apr. 16, 2008 p.m.).

The prosecution emphasized this point during its closing argument: "[a]s soon as Latoya learned that Owens had been arrested, next thing she does is call her attorney and say, set up an appointment, I want to talk to the DA." Guilt Phase Tr. 203:4-7 (May 9, 2008).

During the post-conviction hearing, Sailor maintained that she called McDermott the same day she learned of Owens's arrest.

(c) Analysis

Owens's evidence consists of Sailor's jail records and McDermott's billing records, neither of which reflect a phone call from Sailor to McDermott during the relevant time period. But Sailor never told the jury she called McDermott immediately upon learning of Owens's arrest. She testified, "[a]nd as soon as I found out they got [Owens], I was on it. I was ready to talk." Guilt Phase Tr. 23:4-6 (Apr. 16, 2008 p.m.). She also testified that she asked her attorney in November to contact the prosecution because she was ready to talk. *Id.* at 22:19-23. In closing argument, the prosecution inferred[107] that she called her attorney upon learning of Owens's arrest, but that was not her trial testimony. Thus, Owens's argument fails, because it appears to be based on the prosecution's closing argument, and not Sailor's testimony.

(d) Conclusion

Sailor did not testify at trial that she called McDermott upon learning of Owens's arrest. Accordingly, Owens's claim that Sailor testified falsely about calling McDermott after she learned of Owens's arrest is **Denied**.

[107] The prosecution points out that Sailor testified during pretrial motions hearings that she made such a phone call. While this may account for the inference that gave rise to the comment in closing argument, the issue here is whether Sailor testified falsely at the trial.

b. Jamar Johnson

i. Parties' Positions

Owens argues Johnson testified falsely about his motivation to become a cooperating witness. Owens asserts that Fronapfel's threat to charge Johnson as a conspirator for the Dayton Street homicides and Johnson's grand jury subpoena, which contained an advisement of rights, as proof that the prosecution viewed Johnson as a participant in the Dayton Street homicides. Owens contends the prosecution and Johnson had a tacit agreement that allowed Johnson to avoid liability and punishment for his involvement in the Dayton Street homicides. Owens argues the tacit agreement motivated Johnson to testify against Owens. Owens also argues that the prosecution should have disclosed the components of the tacit agreement because it would have proved that Johnson's testimony about his motivation to cooperate was false.

The prosecution responds that Owens misconstrues Johnson's testimony about his motivation to cooperate and the prosecution's interpretation of that motivation. The prosecution points out that it disclosed the audio recording of the interview during which Fronapfel threatened Johnson and that it disclosed Johnson's grand jury testimony during which he acknowledged that his grand jury subpoena had an advisement of rights.

ii. Findings of Fact

In December 2003, Johnson was charged with three felonies in Boulder County for his involvement in a shooting incident.[108] He pled guilty to felony menacing and the court sentenced him to probation on July 22, 2004. While still on probation in May 2005, Johnson was charged with felony theft in Arapahoe

[108] Boulder County case 03CR2118.

County.[109] On August 3, 2005, the prosecution in Arapahoe County added robbery and burglary counts to the theft complaint. On August 4, Johnson was arrested in Boulder County for an alleged probation violation based on committing a new law violation (the Arapahoe County case), failing to report contact with law enforcement, and failing to comply with his restitution payment schedule. SOPC.EX.D-46. Johnson's probation officer filed the complaint to revoke probation on August 8, and the court advised Johnson on the complaint on August 9.

Fronapfel interviewed Johnson about the Lowry Park and Dayton Street cases on August 4 while he was in the Boulder County Jail. No attorney was present with Johnson during this interview.

During the interview, Fronapfel told him that she had a hammer over his head, and, if necessary, she intended to use it. She was referring to the fact that the Arapahoe County prosecutors increased the charges against him from theft to robbery and burglary, and she referenced potential charges of conspiracy to the Dayton Street homicides. Fronapfel omitted the latter reference from her report. According to Fronapfel, she made these threats because she believed Johnson was not being truthful with her. Fronapfel used this interview technique in an attempt to convince Johnson it was in his best interests to cooperate.

The prosecution disclosed Fronapfel's notes and report of this interview. Fronapfel recorded the interview on microcassette and noted such in her report, but the prosecution did not disclose the recording until shortly before Johnson testified in the Lowry Park trial. Some parts of the audio were inaudible.

[109] Arapahoe County case 05CR1550.

Johnson appeared in court in Boulder County on August 9. The Boulder prosecutor unsuccessfully argued for a bond increase due to Johnson's connections to Ray and characterized Johnson as a suspect in the Dayton Street homicides. The prosecution did not disclose the transcript of that bond hearing prior to trial.

By late November 2005, Lazzara entered his appearance on both of Johnson's cases. The Arapahoe County prosecutors told Lazzara that they believed Johnson had significant information about the Lowry Park and Dayton Street cases. On January 20, 2006, Hower sent Lazzara an email asking if Johnson would be willing to submit to a police interview. In the email, Hower signaled the prosecution's willingness to negotiate a plea agreement with Johnson on his Arapahoe County case if he submitted to an interview with law enforcement prior to testifying before the grand jury. Hower advised Lazzara that the prosecution was going to issue a grand jury subpoena to Johnson, who would be transported from Boulder to testify before the grand jury in Arapahoe County. It appears this email was the catalyst for Lazzara to begin plea negotiations with Arapahoe County prosecutors. The prosecution did not disclose the email or Johnson's grand jury subpoena. King did not cross-examine Johnson at trial about the grand jury subpoena.

On February 3, Johnson pleaded guilty to theft in his Arapahoe County case in return for a four-year deferred judgment. The prosecution dismissed the robbery and burglary charges. Johnson's Boulder County case was soon resolved, and the court resentenced Johnson to unsupervised probation concurrent to his Arapahoe County sentence.

Johnson testified before the grand jury on February 3. He acknowledged that his grand jury subpoena contained an advisement of rights and that he had received a reduced charge in return for his cooperation. The prosecution provided

Johnson's grand jury testimony to Owens's trial team after the grand jury returned the indictments on March 8, 2006.

During Owens's Lowry Park and Dayton Street trials, Johnson told the jury that he cooperated with the prosecution because he was in custody on the increased Arapahoe County charges and wanted to get out of custody. In the Dayton Street trial, the prosecution asked Johnson: "[b]ut for the fact that you were being held in custody and were looking at a possible conviction for robbery and burglary, theft, but for that, would you have ever volunteered to share what you knew about July 4th and about the 11 months up to June 20th?" Guilt Phase Tr. 63:11-15 (Apr. 21, 2008 a.m.). Johnson answered, "no." *Id.* at 63:16.[110]

King had limited time to review the audio from the August 4 interview before cross-examining Johnson in the Lowry Park trial. The recording was difficult to understand and many portions were inaudible. King was able to hear Fronapfel tell Johnson that there was a hammer over his head because of the increased charges in Arapahoe County, but he could not hear Fronapfel's threats to charge Johnson with conspiracy in the Dayton Street case. Consequently, in both trials, King questioned Johnson on the premise that Fronapfel's use of the word hammer was a reference to a possible 12-year sentence in Arapahoe County because he was on probation when he committed the robbery and not on Fronapfel's threats to charge Johnson with conspiracy to commit murder.

During the post-conviction hearing, King testified that had the prosecution disclosed the email exchange between Lazzara and Hower, King would have

[110] The prosecution posed a similar question to Johnson during the Lowry Park trial: "Mr. Johnson, but for the fact that you picked up that felony case in Arapahoe County, knowing yourself as you do, would you ever have come forward on your own to the police or the district attorney what you had seen?" Johnson answered "no." Lowry Park Trial Tr. 133:16-21 (Jan. 17, 2007).

interviewed Lazzara, subpoenaed Johnson's Boulder County Jail records to determine if Lazzara visited Johnson, and sought discovery on Johnson's negotiations with the prosecution. Most importantly, according to King, he would have used Fronapfel's threat to have Johnson charged with conspiracy for the Dayton Street homicides to expose the falsity of the addendum to Johnson's plea agreement in which the prosecution stated it was unaware of any evidence linking Johnson to the Dayton Street homicides. King opined that this impeachment material on Johnson might have changed the verdict in the Lowry Park trial. At the Dayton Street trial, King's intent was to minimize the impact of Johnson's testimony. He was not particularly concerned with attacking Johnson's credibility because, according to King, the court instructed the jury that Owens was guilty of the Lowry Park shootings,[111] and the evidence in that case was based primarily on Johnson's testimony.

iii. Analysis

At trial, Johnson admitted he became a cooperating witness because he was in jail, unable to post bond, faced serious felony charges, and was offered a favorable plea deal on his cases if he cooperated. Johnson acknowledged that he had self-serving motives to cooperate against Owens.

Johnson testified during the post-conviction hearing that, although Fronapfel's threats were harsh, he did not feel threatened because he knew he bore no culpability in either the Lowry Park shootings or Dayton Street homicides.

[111] The court disagrees with King's view of the jury instructions, because the court instructed the jury that it would "determine, as to each victim, whether the prosecution has proven beyond a reasonable doubt that . . . (a) The defendant, Sir Mario Owens (b) was previously convicted in this state, (c) of a Class 1 felony involving violence to wit: Murder in the First Degree After Deliberation as alleged in [Owens's Lowry Park case] in Arapahoe County, Colorado." Phase One Final Instruction No. 14. Thus, the court did not instruct the jury that Owens had suffered a conviction in Lowry Park.

There is very little evidence connecting Johnson to either homicide, and no evidence suggesting any reasonable likelihood of conviction. The evidence supports a conclusion that Johnson was not motivated to cooperate by Fronapfel's threat of charging him with conspiracy for the Dayton Street homicides. Fronapfel threatened Johnson on August 4, 2005, but he did not become a cooperating witness until January 24, 2006. Johnson terminated the August 4 interview. Had Johnson taken Fronapfel's Dayton Street threats seriously and been motivated by them, it is likely that he would have explored becoming a cooperating witness earlier.

Owens has failed to prove that Johnson was motivated to cooperate against Owens by Fronapfel's threats.

Owens next argues that the prosecution's failure to disclose Johnson's grand jury subpoena was government misconduct because it contained an advisement of rights. Owens analogizes Johnson's state court grand jury subpoena to a federal court grand jury target subpoena. Federal grand jury target subpoenas include an advisement of rights so that the government can use the target's testimony against the target in future criminal proceedings. Pursuant to C.R.S. § 16-5-204(4), a Colorado prosecutor is precluded from using any witness's grand jury testimony in any criminal proceeding if an advisement of rights is omitted from the witness's subpoena. So, Colorado grand jury subpoenas generally include an advisement of rights. The fact that Johnson's state court grand jury subpoena included an advisement of rights does not indicate that he was a target of the grand jury investigation. The targets were Ray, Owens, and Carter.

iv. Conclusion

Owens has failed to prove that Johnson testified falsely concerning his motivation to cooperate against Owens. Accordingly, Owens's claim that Johnson testified falsely is **Denied**.

c. Gregory Strickland

i. Parties' Positions

Owens claims that Strickland falsely testified at trial that his Adams County plea agreement was not contingent on his cooperation in this case and that he had not received any benefits in exchange for his cooperation. Owens contends the prosecution knew that Strickland's Adams County plea agreement required him to testify against Owens yet failed to disclose that evidence.

The prosecution responds that Strickland acknowledged receiving an improved plea offer in his Adams County case due to Fronapfel's efforts. The prosecution considers its disclosures sufficient, which included plea and sentencing information for Strickland's pending cases, his original plea offer in Adams County, and the improved offers.

ii. Findings of Fact

On December 30, 2005, Fronapfel interviewed Strickland and recorded the interview. Strickland's DPDs were unaware of the interview. At that time, Strickland was facing serious felony charges in Adams, Denver, and Arapahoe Counties.[112] Strickland told Fronapfel about Carter's inculpatory statements. He stated that his only motivation for relaying his information about Dayton Street was to assist the victims' mothers. Despite his pending charges, he did not request

[112] Adams County case 05CR983; Denver case 04CR3402; and Arapahoe County cases 05CR8 and 04CR1051.

any assistance with those cases. Fronapfel told him she would make his information known to the Arapahoe County prosecutors.

Before court in Adams County on January 13, 2006, Strickland told Connell that he was cooperating with the police on homicide cases in Arapahoe County and asked him to use his cooperation to negotiate a better plea agreement. The Adams County prosecutor had offered a guilty plea to one of the aggravated robberies with a range of 10 to 32 years. At least 10 years would have been mandatory because aggravated robbery was a crime of violence. Connell moved to withdraw on January 18, and the court appointed Barnes to represent Strickland.

Strickland also asked Barnes to use his cooperation to negotiate a better plea agreement. Barnes urged Fronapfel to call Heinz to inform him of Strickland's cooperation and sent Heinz a letter urging him to call Fronapfel to discuss Strickland's cooperation.

By March 17, Heinz modified his offer to Barnes by decreasing the range to 10 to 16 years with a mandatory minimum of 10 years.

Fronapfel attended Strickland's March 30 court date when he rejected the 10 to 16 year offer. Barnes asked Fronapfel to speak to Heinz. Fronapfel urged Heinz that the 10-year mandatory prison sentence was too harsh because Strickland did not ask for assistance when he first came forward and was cooperating on four homicide investigations.[113]

Shortly after that discussion, Heinz, Barnes, and Fronapfel met with Judge Harlan Bockman (Bockman) in his chambers. Fronapfel told Bockman that Strickland had provided extraordinary assistance in several pending homicide cases, including the Dayton Street case, and that his information had been accurate

[113] In early March 2006, Strickland disclosed important information about two other pending APD homicide investigations.

and reliable. Strickland was not present. Heinz and Barnes told Bockman that Strickland's cooperation was linked to an improved plea agreement. The plea agreement required Heinz to accept a guilty plea to a charge that did not involve a crime of violence, to dismiss the other pending charges, to forgo filing the similar act evidence of other carjacking incidents as additional charges, to change the sentencing range to four to 16 years, and to argue for no more than 10 years. Strickland accepted this offer.

On April 7, Bockman accepted Strickland's plea of guilty to one count of aggravated robbery with a simulated weapon. Bockman pointed out that Strickland's cooperation was a factor in his plea agreement during the following colloquy:

> THE COURT: Have there been any threats by anyone to force you to enter this plea?
>
> [STRICKLAND]: No, sir.
>
> THE COURT: Any promises other than the promise that the other counts of the information in this case will be dismissed? Are there any other cases in Adams County?
>
> MR. HEINZ: No, Your Honor.
>
> THE COURT: Okay. In exchange for certain cooperation that you are going to perform in other cases, the district attorney has agreed that they will argue for no more than ten years, but the sentence is open so that I can at least listen to you, your attorney, the district attorney, and I will make a decision as to what the sentence would be. Any other promises?
>
> MR. HEINZ: No, Your Honor.
>
> MR. BARNES: No, Your Honor.
>
> THE COURT: Do you understand that Mr. Strickland?

> [STRICKLAND]: Yes, I understand.

SOPC.EX.D-413 (Plea Hrg Tr. 6:10-25; 7:1-4 (Apr. 7, 2006)).

> THE COURT: I had a discussion with your attorney and the District Attorney and the Aurora Police Department on this case. We are going to set it over for sentencing for about a week.

Id. at 7:18-21.

On April 20, Fronapfel was present for Strickland's sentencing hearing but did not address Bockman. Barnes reminded Bockman of Strickland's cooperation. Heinz requested a sentence of 10 years. When Strickland was given an opportunity to allocute, he said:

> [STRICKLAND]: Yes, I would just like to say that I really didn't do what I did for no -- I really did it for the family because the families were truly hurt by what happened or whatever. I just did whatever I did for the family.

SOPC.EX.P-10 (Sent. Hrg Tr. 6:22-25; 7:1 (Apr. 20, 2006)).

Bockman considered Strickland's cooperation in determining the appropriate sentence.

> Obviously the Court is aware of certain mitigating factors in this case concerning the actions of Mr. Strickland, and I have to take that into consideration, and will take that into consideration. At the same time, I have to take into consideration the defendant's prior conduct, and also the severity of the case that's before the Court.
>
> Under the circumstances, I do not feel under any circumstance that the defendant should or could be granted probation in the situation of the sentence to be imposed. As I have indicated, *I will take into consideration the cooperation that Mr. Strickland has given certain police departments*.

Id. at 9:7-19 (emphasis added). Bockman sentenced Strickland to eight years.

Fronapfel later told the Arapahoe County prosecutors about her intervention for Strickland in Adams County, including her interactions with Barnes, Heinz, and Bockman. At the prosecutors' direction, Fronapfel prepared a report on June 1 about her intervention between March 1 and May 31, 2006. Fronapfel's report was disclosed and detailed the following:

- Strickland's request to serve his prison time outside of Colorado;
- Fronapfel's meeting with Heinz and how she told him that she thought his requirement for a minimum 10-year sentence was too harsh in light of Strickland's cooperation on multiple homicide cases;
- Heinz reduced the sentencing range and dropped the mandatory minimum prison term;
- Fronapfel's meeting with Bockman, Heinz, and Barnes in chambers;
- Strickland's post-sentencing request to serve his sentence in boot camp; and
- Strickland's request on May 31, 2006, to be moved to another DOC facility because Carter was in the same facility.

SOPC.EX.P-4.

Owens's trial team filed SO-4 asking for discovery of any promises, inducements, benefits, payments, and/or threats the prosecution made to witnesses. In its response to SO-4, the prosecution informed Owens's trial team that it had notified the prosecutors in Adams and Denver about Strickland's status as a witness in this case.

Strickland testified at trial on April 25, 2008. During cross-examination, he admitted to having four pending cases in three jurisdictions when he contacted Fronapfel. The charging documents for all four cases were admitted into evidence. Strickland acknowledged that the offer in Adams County at the time he began

cooperating with Fronapfel was 10 to 32 years with a 10-year mandatory minimum prison sentence. Strickland testified that he had not asked Fronapfel for help on his pending cases before disclosing the information he learned from Carter. He also testified that in early March 2006, he voluntarily provided Fronapfel with information on other homicide investigations.

Strickland admitted that he saw Fronapfel in the Adams County courtroom on March 30 when he refused the 10 to 32 year offer. He testified that he did not speak to Fronapfel and did not know that she had spoken to Heinz or to Bockman on his behalf. He was also unaware that Heinz agreed to drop the mandatory minimum sentence requirement after listening to her presentation to Bockman. When Barnes outlined the new plea agreement and explained that it allowed Strickland to avoid the mandatory minimum sentence and made him eligible for probation, Strickland accepted it.

During redirect examination, Strickland maintained his position that none of his plea agreements were contingent on his providing information against Owens and that he did not receive any benefits for testifying against Owens.

> Q Mr. Strickland, was any of your plea agreements in any of the cases that you've discussed with defense counsel ever contingent upon your providing information against Sir Mario Owens?
>
> A No, ma'am.

Guilt Phase Tr. 95:20-24 (Apr. 25, 2008 p.m.).

On recross-examination, Strickland acknowledged that Fronapfel convinced Heinz to modify the plea offer so that Strickland would not be facing a mandatory minimum prison sentence.

During her testimony in the post-conviction hearing, Kepros viewed Strickland's alleged false testimony about the terms of his Adams County plea

agreement as significant impeachment material. She believed a variety of investigatory leads would have surfaced if the prosecution had provided Strickland's plea transcript. Kepros testified that she would have interviewed Barnes in an attempt to learn the unwritten terms and conditions of Strickland's plea agreement.[114] Kepros also testified she would have called Bockman as a witness to impeach Strickland and would have investigated whether Strickland previously worked as an informant for law enforcement.

iii. Analysis

At the providency hearing, Bockman was of the view that Strickland's Adams County plea agreement required cooperation that he was going to perform in other cases. Neither the attorneys nor Strickland corrected that impression. Because it was Fronapfel who spoke to Heinz and then addressed Bockman in chambers urging leniency, it seems clear that the judge contemplated Strickland's cooperation in the Ray, Owens, and Carter cases. While it may be that the reduction was given in consideration for Strickland's past cooperation, the uncorrected providency hearing record indicates that the agreement required future cooperation. Neither Heinz nor Bockman was called at the post-trial hearing. It is clear that Strickland was given a significant concession because of his cooperation in these cases and, based upon the providency transcript, this court finds that the Adams County plea agreement required Strickland's cooperation in this prosecution.[115] Thus, the following redirect testimony was false.

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[114] King interviewed Barnes on August 23, 2006.

[115] This court is mindful that at sentencing Bockman referred to the "cooperation that Mr. Strickland has given certain police departments." SOPC.EX.P-10 (Sent. Hrg Tr. 9:18-19 (Apr. 20, 2006) (emphasis added)). The court finds that neither Fronapfel nor Strickland gave knowingly false testimony on this point. Each may have believed that Heinz's offer was solely in consideration of Strickland's past cooperation. But the burden of proof is a preponderance of

> Q Mr. Strickland, was any of your plea agreements in any of the cases that you've discussed with defense counsel ever contingent upon your providing information against Sir Mario Owens?
>
> A No, ma'am.

Guilt Phase Tr. 95:20-24 (Apr. 25, 2008 p.m.).

iv. Conclusion

Strickland's false testimony is relevant to whether all of the false testimony, considered cumulatively, "could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271). *See* part IV.C.4 of this Order.

d. Thomas Wilson[116]

i. Parties' Positions

Owens claims T. Wilson testified falsely concerning the number of suspects identified by the APD for the Lowry Park shootings and about when he identified Owens as a suspect in the Lowry Park shootings. Owens also argues the prosecution failed to disclose the Special Bulletin, Versadex Report, and a Person Hardcopy that show T. Wilson's testimony was false.

The prosecution responds that Owens's argument misconstrues T. Wilson's testimony and that T. Wilson's answers may have been inaccurate but were not false.

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the evidence, and Bockman's uncorrected understanding at the time he took Strickland's plea appears to be the most persuasive evidence on the question of what the plea agreement required.

[116] The court denied Owens an evidentiary hearing on this claim.

ii. Findings of Fact

T. Wilson was the lead detective on the Lowry Park shootings. He testified in this case that law enforcement believed that the driver and the shooter were the two suspects in the Lowry Park shootings.

On the night of the Lowry Park shootings, T. Wilson received suspect descriptions and vehicle descriptions from officers on scene. The officers led T. Wilson to believe there were two suspects and one getaway vehicle. Because the scene was chaotic, the descriptions of the suspects were numerous and inconsistent. From these varying descriptions, T. Wilson hurriedly compiled three suspect descriptions for a Special Bulletin. None of the descriptions in the bulletin pertained to any single person. The descriptions of the getaway vehicle were consistent. He entered that description into the Special Bulletin and distributed it to the officers on the street. T. Wilson's primary purpose in issuing the Special Bulletin was to ensure that patrol officers were forewarned should they encounter the suspects' vehicle. The Special Bulletin did not alter T. Wilson's belief that there were two suspects for the Lowry Park shootings.

T. Wilson did not provide the Special Bulletin to the prosecutors because he did not consider it to be part of the investigation.[117] Thus, it was not disclosed. In T. Wilson's view, the Special Bulletin was an emergency measure issued primarily to ensure officer safety in the event that officers encountered the getaway vehicle.

The Versadex Report is a compilation of some, but not all, of the information from the investigative reports for a particular case. The investigative reports come primarily from the patrol officers and the detectives who are actively investigating a case. Officers generate reports for a particular case at varying times

[117] This court does not agree with his conclusion. But the issue in this part of the Order is whether those documents would provide evidence that T. Wilson testified falsely.

depending on schedules and the demands of a particular workday. Once generated, the reports are sent to the APD records department where clerks select certain information from the reports to enter into the system that generates a Versadex Report for that particular case. The report is updated every time the records department receives a new report. Because the reporting officers do not generate their investigative reports chronologically, the records department may input information from an older report that contradicts information from a more recent report.

The Lowry Park Versadex Report admitted into evidence during the post-conviction hearings in this case (SOPC.EX.D-451) is undated. It lists the three victims with their identifying information and seven suspects. The first five suspects are not identified by name but include physical descriptions, and some of the descriptions also include clothing descriptions. There is no other identifying information provided for those five suspects. Owens is listed as Suspect 6, and Carter, Sr. is listed as Suspect 7. Their information includes identifying information, physical descriptions, addresses, and other personal information.

The report also lists the names of 12 witnesses and eight subjects. Most of the witnesses and subjects are listed with names and contact information. A subject in a Versadex Report is someone with some relation to the case. Here, the subjects range from one of the victims' cousins to the emergency room nurse who attended to one of the victims. The report also lists vehicles that have some connection to the case.

T. Wilson did not provide the Versadex Report to the prosecution, because he did not view it as an investigative report. T. Wilson testified that Versadex Reports are primarily used for administrative purposes, such as crime statistics, and have no investigative value. A reader would not know the content of the officers'

reports, but only what the clerk in the records department selected to input for administrative purposes. T. Wilson always believed there were two suspects in the Lowry Park shootings. His belief was based on his investigation and the reports he received from other officers. The Versadex Report's listing of seven suspects did not inform or alter his belief.

According to T. Wilson, the Lowry Park Versadex Report lists Owens as Suspect 6, but neither the source nor the timing of this designation is known. The report has more identifying information on Owens than on the five unnamed suspects, because the Versadex system auto-populates the report with the person's prior APD record. Both Owens and Carter, Sr. had prior records with the APD.

Kepros noted she had seen Versadex Reports in discovery in other cases. T. Wilson acknowledged that some detectives may provide the Versadex Report to the prosecution, but he does not.

T. Wilson ran a special computerized inquiry known as a Person Hardcopy on Owens on July 21, 2004. He does not recall why he ran this inquiry. The report contains all of the identifying information on Owens available in the APD's system. It contains information such as a history of his addresses, the names of family members, his employment status, descriptions of his tattoos, and his street moniker. It also contains a Related Persons section, where Carter and Maurice Ray are listed. There is no information about why the APD considered these people to be Owens's associates. In July 2004, neither Carter's[118] nor Maurice Ray's names were significant to T. Wilson. T. Wilson did not provide the Person Hardcopy to the prosecution and therefore it was not disclosed.

[118] Carter was incarcerated at the time of the Lowry Park shootings.

iii. Analysis[119]

This court must decide whether T. Wilson testified falsely when he told the jury that: 1) there were only two suspects for the Lowry Park shootings, and 2) Owens was not one of those suspects, at least not in T. Wilson's mind, until after the Dayton Street homicides.

Owens relies primarily on the Special Bulletin and the Versadex Report to demonstrate T. Wilson's testimony concerning the number of suspects for the Lowry Park shootings was false. The three suspect descriptions in the Special Bulletin evidence nothing more than a chaotic crime scene. And the Versadex Report contains administrative information inputted by data entry clerks and has no investigative significance. Neither the Special Bulletin nor the Versadex Report demonstrates that T. Wilson believed there were more than two suspects for the Lowry Park shootings.

Owens also contends the Versadex Report and the Person Hardcopy from July 21, 2004, demonstrate T. Wilson's testimony that Owens was not a suspect in the Lowry Park shootings until after the Dayton Street homicides was false. But Owens's name could have been entered into the Versadex Report after the Dayton Street homicides.

The July 21, 2004, Person Hardcopy demonstrates that T. Wilson wanted some information on Owens, but does not indicate that he considered Owens a

[119] Owens also argues there was government misconduct because the police suppressed or failed to collect the identities of the witnesses who provided the descriptions in the Versadex Report. The argument ignores the emergency nature that existed when the information was collected. The patrol officers who first responded tried to collect this information shortly after numerous shots had been fired in a section of the park occupied by approximately 100 people who panicked and ran because of repeated gunshots. It also ignores the law that the police are not obligated to preserve evidence that is not apparently exculpatory. *California v. Trombetta*, 467 U.S. 479, 489 (1984).

suspect. In short, the Person Hardcopy does not provide proof that T. Wilson testified falsely when he said that Owens was not viewed as a suspect until after the Dayton Street homicides.

iv. Conclusion

T. Wilson did not testify falsely about the number of suspects for the Lowry Park shootings or about when he identified Owens as a suspect for the Lowry Park shootings. The court also finds the prosecution did not withhold documents that would have proven T. Wilson testified falsely. Accordingly, Owens's claim that T. Wilson testified falsely is **Denied**.

4. Cumulative Materiality of Instances of False Testimony and Failure to Disclose Evidence Showing Testimony was False

a. False Testimony Known to the Prosecution

i. Latoya Sailor[120]

Owens has not shown that there is a reasonable probability that Sailor's false or misleading testimony could have affected the verdict in this case. There are three primary reasons why Sailor's false or misleading testimony about the timing of her willingness to cooperate could not have affected the outcome of the trial. First, she was a credible, broadly corroborated witness. Had the misleading impression about the timing of her cooperation been properly corrected, it would not have significantly affected her overall credibility. Secondly, while the facts would have demonstrated that she was willing to negotiate a plea before Owens was arrested, those facts would not have significantly lessened the depth of her fear of him. The reason she gave for her unwillingness to come forward before Owens's arrest was her fear of what Owens might do to her and especially to her

[120] *See* part IV.C.3.a.i of this Order.

son. Her son was living with Ray's mother while Sailor was incarcerated. McDermott, in his negotiations, addressed the safety issue and substantially resolved that concern before a significant proffer was made. He had secured an agreement that Sailor and her son would be relocated out of state before Sailor's cooperation was disclosed. And the fact that her demand for relocation was withdrawn once Owens was arrested substantiated the depth of her fear of him. It strongly suggested that her fear was alleviated by his arrest. Thus, while in truth, she was willing to cooperate before his arrest, the evidence concerning the negotiations would not have significantly affected the jury's perception of how deeply she feared him. Third, the case against Owens was strong and not primarily dependent upon the jury's assessment of Sailor's credibility.

The case was tried before a different judge and this court did not have the benefit of assessing her credibility first hand, yet the record suggests that Sailor was a knowledgeable, credible witness. She was more closely connected to Ray and Owens than any other witness and had firsthand knowledge of the events surrounding both Lowry Park and Dayton Street, and the efforts of those involved to avoid detection. She made it clear to Fronapfel and to the prosecution that she did not want either Ray or Owens to suffer the death penalty. She readily acknowledged her own part in the events and in helping Ray and Owens avoid detection. Her descriptions of events were generally borne out and seldom contradicted by corroborative evidence.

Sailor's credibility was tested in the crucible of vigorous, if not scathing, cross-examination. Despite her volatility, she generally handled the attacks with apparent forthrightness and honesty. For example,

- she was accused of lying about Owens's incriminating statements, and she admitted that she has no problem with lying in some circumstances;
- she was questioned about testifying against a family member in Michigan who was charged with killing a baby;
- she admitted that she destroyed evidence after the Lowry Park shootings;
- she discussed her gang affiliations and admitted that she had claimed to be a Gangster Disciple since she was 14 years old;
- she admitted that her family, who was affiliated with the Vice Lords, had raised her to be a gang member but that she preferred the Disciples to the Vice Lords because her friends were Disciples;
- she admitted to possessing a gun when arrested;
- she admitted that she had been an accessory to the murders;
- she admitted that a former boyfriend was a drug dealer and that she sometimes assisted him;
- she admitted that she regularly used illegal drugs; and
- she admitted lying to her husband about whom his sister was dating.

Additionally, this is not a case that hangs upon the credibility of only Sailor or only one or two witnesses. When the court considers the entirety of Sailor's testimony, the fact that Sailor provided information to McDermott and authorized him to provide it to the prosecution before Owens was arrested would not have significantly affected Sailor's credibility.

Before leaving this analysis, however, the court notes that the question must be given additional consideration on the issue of the penalty phase of the case.

There was ample evidence to support the jury's decision that death was the appropriate penalty. Owens surveilled, stalked, and murdered Marshall-Fields to prevent him from testifying against Ray. He murdered Marshall-Fields in furtherance of a conspiracy with Ray and Carter. He murdered Wolfe because she was with Marshall-Fields – she was in the "wrong place, wrong time." Guilt Phase Tr. 134:22 (Apr. 16, 2008 a.m.). He had murdered before. He showed little or no remorse. Indeed, he commented that the murders would dissuade others in the community from cooperating with law enforcement. Before killing Marshall-Fields he had said, "Snitches, shit, they need to die." *Id.* at 36:8. Afterwards, he indicated that people might now think twice about snitching, *id.* at 134:8-13, and purchased "STOP SNITCHIN" t-shirts with "R.I.P." on the back. He made his money as a gun-toting drug dealer – both before and after the murders.

But at the final stage, a juror's decision to impose death is one of individual conscience and judgment. One factor that may play a role is future dangerousness. Because Sailor knew Owens better than any witness outside his family, her fear of him may have been significant in the eyes of a juror. Knowing that he had murdered a witness before, and indirectly threatened her should she cooperate with the police,[121] she legitimately feared him as a danger to her son as well has herself. The jury had seen her break down emotionally twice. On April 15, 2008, after testifying for most of the day, she left the courtroom *via* the entrance to the back hallway and sat on some steps. The jury was being escorted through the same hallway for a break. Her bead bracelet broke, beads scattered, and jurors saw her as she began crying and becoming emotional. Then, on the afternoon of April 16,

[121] Sailor testified Owens had told her, "Bitches get it, too." Guilt Phase Tr. 6:20 (Apr. 16, 2008, p.m.).

2008, an improper[122] question by King precipitated the following emotional reaction:

> Q The truth of the matter is that you're lying --
>
> A Okay.
>
> Q -- and that he never said those statements, did he?
>
> A You know what, this is your job to do this. Rio knows. I know. Robert knows. He killed them kids, and we know he did. So what, he ain't come straight out and tell me, "I killed them kids." It all points to him. I was around him the whole time.
>
> THE COURT: Ms. Sailor, Ms. Sailor.
>
> Next question.
>
> Q (By Mr. King) So you're saying he didn't make those statements, you just knew?
>
> A Yes, he did make them statements.
>
> Q You have no problem with telling – not telling the truth, do you?
>
> A No, I got no problem.
>
> Q You got no problem with lying to people?

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[122] "In this jurisdiction it is improper for a lawyer to use any form of the word 'lie' in characterizing for a jury a witness's testimony or his truthfulness. *See Domingo-Gomez v. People*, 125 P.3d 1043, 1050-51 (Colo. 2005). As we have recently made abundantly clear, such usage is disapproved for a number of reasons. It is prohibited not only because it poses a risk of communicating the lawyer's personal opinion about the veracity of a witness and implying that the lawyer is privy to information not before the jury, but also simply because the word "lie" is an inflammatory term, likely (whether or not actually designed) to evoke strong and negative emotional reactions against the witness." *Crider v. People*, 186 P.3d 39, 41 (Colo. 2008). *See also Liggett v. People*, 135 P.3d 725, 732-33 (2006) (a witness may not be asked to opine on the veracity of another witness by means of "were they lying" types of questions).

A But I ain't going to just lie to get somebody sent to jail for life or in prison. I'm not going to do that.

Q You're not?

A And I sure won't sit up here and lie for Rio, and never talk to my family. And you need to stop making it seem like that.

(The witness is yelling.)

You need to quit defending somebody who's guilty, and you know he's guilty. You need to quit that.

THE COURT: Ms. Sailor. Ms. Sailor, stop.

Next question.

Q (By Mr. King) Yes. You said -- you've said something like that under oath very similar to that before, when you testified in Michigan against your cousin?

A I didn't testify against my cousin. I never said nothing wrong towards my cousin.

Q Let's talk about that.

A I got subpoenaed by a district attorney, and you ass hole for bringing that up. Because he don't bring my family stuff up he's -- oh my.

THE COURT: Ms. Sailor.

A Oh, God. Oh, God. Oh, God. Oh, God.

THE COURT: I think we should take a break.

A Yeah. He's a guilty ass person. You know he guilty.

THE COURT: Ladies and gentlemen, we're going to take a break till 10 minutes after 4.

Guilt Phase Tr. 135:3-25; 136:1-25; 137:1-7 (Apr. 16, 2008 p.m.).

After the break, the trial court instructed the jury:

> THE COURT: [W]ith regard to Ms. Sailor's opinion about the guilt or the innocence of anyone involved in this matter, that is not evidence. Jury is instructed to disregard it.

Guilt Phase Tr. 165:25; 166:1-3 (Apr. 16, 2008 p.m.).

During the break the trial court had noted, in connection with a ruling on a defense motion for a mistrial, that:

> Anyone who studies this record from when Mr. King began his cross will see long diatribes by Ms. Sailor, and that -- those two opinions that she expressed were yet another part of her diatribes. In the end, it goes to her credibility, which the jury will have to assess.

Guilt Phase Tr. 163:12-18 (Apr. 16, 2008 p.m.).

This court has given serious consideration to Sailor's outbursts. The court has concerns that, to the degree that a juror may have attributed her outbursts to her fear of Owens, Sailor's emotional affect might have contributed to the juror's assessment of Owens's future dangerousness. Sailor knew Owens well. Her view of his dangerousness could have been one of the things that the jury would consider in assessing future dangerousness. Knowing that, despite her fear of him, Sailor had authorized her attorney to share information with the prosecution before Owens's arrest would have been relevant to the jury's perception of the depth, or lack of depth, of Sailor's fear for her own and her son's safety.

But the record also shows that before Owens was arrested, McDermott had conveyed to the prosecution that Sailor was afraid of Owens and arrangements were already being considered for her protection and her son's. McDermott's statement to the prosecution that there was no longer a need to relocate Sailor out

of state after Owens's arrest further buttressed the gravity of her fear and the degree to which it was alleviated by his arrest.

From this court's review of the record, the trial court's perception appears quite apt. And as to this particular outburst, it appears that the jury would attribute it to the fact that King had, in essence, called her a liar in open court and to the stress of her lengthy, repeated, and intense examinations in several cases and particularly in the case before it.

Thus, when the totality of the relevant circumstances is considered, this court determines that Owens has not shown a reasonable probability that the result of either the guilt phase or sentencing hearing would have been different had the prosecution disclosed that discussions with McDermott preceded Owens's arrest.

ii. Gregory Strickland[123]

Strickland's false testimony about his plea agreement being contingent on his cooperation in the Dayton Street cases could not have affected the outcome of the trial. While Strickland testified that his Adams County plea agreement was not contingent on his cooperation in this case and that he received no benefits in exchange for his cooperation, he admitted that Fronapfel was responsible for the major changes in his plea offer resulting in a sentence of eight years. The jury learned that Strickland benefited from his cooperation against Owens and they learned the full extent of the benefit he received. Moreover, the cross-examination of Strickland was thorough and effective. The jury learned about the extensive trouble he was in, the number of cases in which he had given information to the police, and the fact that he had provided false or exaggerated information to the police in other, serious cases.

[123] *See* part IV.C.3.c of this Order.

b. Analysis of Cumulative Materiality

Owens's contention that Sailor and Strickland testified falsely relates to the jury's assessment of those witnesses' credibility. "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt." *Napue*, 360 U.S. at 269 (quoting *People v. Savvides*, 136 N.E.2d 853, 854 (N.Y. 1956)).

This court must determine whether the alleged false testimony, considered cumulatively, "could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271).

Aside from Owens's DNA on the baseball cap found at the scene of the Dayton Street homicides, the prosecution's case rested on witness testimony. No witness was individually more important to the prosecution's case than Sailor. Sailor described Ray's close relationship with Owens, detailed Ray's and Owens's involvement in the Lowry Park shootings, described their determination to prevent witnesses from testifying at Ray's Lowry Park trial, and recounted Owens's inculpatory statements about the Dayton Street homicides. Strickland revealed Carter's admission of guilt and implication of Owens for the Dayton Street homicides. Establishing and maintaining the credibility of these witnesses was important to the prosecution. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." *Napue*, 360 U.S. at 269.

Owens's trial team zealously attacked the truthfulness and reliability of Sailor and Strickland. The team brought out that Sailor faced four felony charges and that Strickland faced felony charges in three counties when they became cooperating witnesses. The team explored each witness's bias and incentive to testify by exposing the favorable terms of each witness's plea agreement. Owens's

trial team impeached Sailor and Strickland with their prior criminal histories, arguably inconsistent prior statements or omissions, and in other areas. The effect of exposing the instances of Sailor's and Strickland's false or inaccurate testimony would not have been significant compared to the topics on which these witnesses were impeached at trial.

Exposing Sailor's and Strickland's false or inaccurate testimony would not have caused the jury to entirely discount their testimony. This is not a case that hangs upon the credibility of only one or two witnesses. Evidence of Owens's guilt came from many sources. Owens's DNA was recovered from a cap left at the scene of the murders. Todd heard Owens announce that the problem with Marshall-Fields had been "tooken care of." Johnson heard Owens say that he would kill Marshall-Fields for free. Owens was arrested with "Stop snitchin" t-shirts and the receipt for the t-shirts was in his wallet. Todd testified about the efforts to intimidate Marshall-Fields at Gibby's, including the discussion that Owens and Ray should remain in the car, and about Owens's participation in the surveillance done to determine where Marshall-Fields lived and what car Marshall-Fields drove.

5. Conclusion

The court concludes the cumulative effect of Sailor's and Strickland's false testimony could not in any reasonable likelihood have affected the judgment of the jury with respect to guilt or sentence. Accordingly, Owens's claims that the prosecution solicited false testimony, failed to correct false testimony, and failed to disclose evidence that proved some witnesses' testimony was false are **Denied**.

D. Nondisclosure of Materially Favorable Evidence, and Failure to Preserve and Destruction of Evidence

1. Parties' Positions

Owens contends the prosecution withheld, failed to preserve, or destroyed materially favorable evidence that his trial team could have used to further impeach witnesses at trial.

The prosecution disputes that any of the undisclosed evidence was materially favorable to Owens.

2. Principles of Law

a. Nondisclosure of Materially Favorable Evidence

"The prosecution's affirmative duty to disclose evidence favorable to a defendant . . . is . . . most prominently associated with [the United States Supreme] Court's decision in *Brady v. Maryland*." *Kyles v. Whitley*, 514 U.S. 419, 432 (1995).[124] However, *Brady* did not create a general constitutional right to discovery in a criminal case. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). The oft-cited *Brady* holding "that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution" continues to guide courts in determining whether the government's failure to disclose evidence is a due process violation entitling the defendant to relief. 373 U.S. at 87. As the United States Supreme Court reiterated in *Strickler*, "[t]here are three components of a true *Brady* violation: [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is

[124] Colorado codified *Brady* in its procedural rules and its death penalty statute. *See* Crim. P. 16(I)(a)(2); Crim. P. 32.1(d)(5); C.R.S. § 18-1.3-1201(3).

impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." 527 U.S. at 281-82.

Evidence is favorable to the accused if it "would tend to exculpate [the defendant] or reduce the penalty," *Brady*, 373 U.S. at 88, or if "the defense might have used [the evidence] to impeach the Government's witnesses by showing bias or interest." *United States v. Bagley*, 473 U.S. 667, 676 (1985). The United States Supreme Court "disavow[s] any difference between exculpatory and impeachment evidence for *Brady* purposes." *Kyles*, 514 U.S. at 433.

Due process does not demand that the government employ an open file policy with respect to discovery. *Id*. at 437. The United States Supreme Court has "rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel." *Agurs*, 427 U.S. at 111. Thus, there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defendant of all police investigatory work on a case." *Id.* at 109 (quoting *Moore v. Illinois*, 408 U.S. 786, 795 (1972)).

Despite these long-standing limitations on the prosecution's discovery obligations, the prosecution, "which alone can know [what evidence] is undisclosed," bears the burden of disclosing to the accused all materially favorable evidence. *Kyles*, 514 U.S. at 437. In *Kyles*, the government argued it should not be held accountable for failing to disclose evidence known only to police investigators and not to the prosecutor. *Id*. at 438. The United States Supreme Court rejected that argument and held that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Id.* at 437.[125] Also, neither the moral

[125] Crim. P. 16 is not limited to favorable evidence and is therefore broader than the principle set forth in *Kyles*. Crim. P. 16(I)(a)(3) extends the prosecution's disclosure obligations to "material

culpability nor the character of the prosecutor is determinative of whether the government suppressed materially favorable evidence. *Agurs*, 427 U.S. at 110-11. "Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id*. at 108. "But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *Bagley*, 473 U.S. at 675-76 (quoting *Agurs*, 427 U.S. at 108).

"[S]howing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more." *Kyles*, 514 U.S. at 437; *see also Agurs*, 427 U.S. at 109-10 ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."). Analyzing materiality of undisclosed evidence is a fact-intense inquiry. *See Kyles*, 514 U.S. at 423-28 (wherein the recitation of facts spans six pages of the opinion). After all, "[a] fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial."[126] *Agurs*, 427 U.S. at 104. "[E]vidence is material only if there is a reasonable probability that,

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and information in the possession or control of members of his or her staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his or her office."

[126] In capital cases, the outcome of the trial includes both the guilt phase and sentencing hearing of a trial. For example, the government in *Brady* suppressed a witness's statement, which included the witness's confession to the murder. The United States Supreme Court vacated only the defendant's death sentence and did not disturb his conviction because under the circumstances of the case the witness's statement was material only to the defendant's sentence, not to his guilt or innocence. *Brady*, 373 U.S. at 88-91.

had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682.[127] "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in . . . absence [of the undisclosed evidence] he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434.

b. Failure to Preserve and Destruction of Evidence

Not only does the Fourteenth Amendment require the government to disclose all materially favorable evidence to the accused, it also requires the government to preserve certain evidence.[128] "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." *California v. Trombetta*, 467 U.S. 479, 488 (1984); *People v. Greathouse*, 742 P.2d 334, 338 (Colo. 1987). The government violates the defendant's due process rights when it destroys evidence that 1) "possess[es] an exculpatory value that was apparent before the evidence was destroyed" and 2) is "of such a nature that the

[127] "The *Bagley* materiality standard is couched in terms appropriate for use in appellate review. It does, however, provide general guidance to trial courts as to the degree of importance that evidence must possess in order to be considered material." *People v. District Court*, 790 P.2d 332, 338 (Colo. 1990).

[128] The prosecution argues the material at issue must be "evidence" and cites *People v. Casias*, 59 P.3d 853 (Colo. 2002), and *People v. Ortega*, 672 P.2d 215 (Colo. App. 1983), in support. The Colorado Supreme Court in *Casias* found the trial court erred when it imposed sanctions on the prosecution for failing to preserve unintelligible audio recordings. 59 P.3d at 856. In *Ortega*, the Colorado Court of Appeals found the prosecution had no duty to preserve photographs that were not developable. 672 P.2d at 219. The court agrees with the prosecution's argument. The material allegedly destroyed by the government must have some evidentiary value to establish a claim for destruction of evidence.

defendant would be unable to obtain comparable evidence by other reasonably available means." *Trombetta*, 467 U.S. at 489.

Some evidence is only potentially useful. Unlike the analysis concerning the nondisclosure of materially favorable evidence, the good or bad faith of the government is relevant when potentially useful evidence is destroyed or discarded. *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988). A defendant who fails to satisfy the *Trombetta* standard may still prevail if the government violated its duty to preserve "potentially useful evidence." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *People v. Wyman*, 788 P.2d 1278, 1279-80 (Colo. 1990). Potentially useful evidence is "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Youngblood*, 488 U.S. at 57. "Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58.

"The court should first determine whether the exculpatory value [of the evidence] satisfies the *Trombetta* standard." *People v. Eagen*, 892 P.2d 426, 429 (Colo. App. 1994). If the defendant cannot satisfy *Trombetta*, the court should determine whether *Youngblood* is satisfied. *Id.*

3. Alleged Instances of Nondisclosure of Materially Favorable Evidence, Failure to Preserve, and Destruction of Evidence

a. Prosecution's Inaccurate and Misleading Assurances[129]

Owens contends that the prosecution's assurances to his trial team, the court, and the jury that it complied with its discovery obligations were inaccurate and misleading.[130]

[129] The court denied Owens an evidentiary hearing on this claim.

The prosecution generally disputes whether its assurances were related to discovery and contends that its assurances were not inaccurate, misleading, or false. The prosecution does not address whether this is a proper claim for relief.

While there would be ethical and contempt remedies for such misconduct, and they would be significant to a *Youngblood* showing of bad faith, inaccurate or misleading assurances do not constitute an actionable basis for post-conviction due process relief absent a *Trombetta* or *Youngblood* showing. Owens cites *Strickler*, 527 U.S. 263 and *People v. Lincoln*, 161 P.3d 1274 (Colo. 2007) in support of his position. In *Strickler*, the prosecutor's assurances were relevant to whether the defendant established cause to overcome a procedural default in order to have his *Brady* claim heard in federal court. *Strickler*, 527 U.S. at 283. In *Lincoln*, the prosecutors' assurances were relevant to whether there was cause to disqualify the district attorney's office. 161 P.3d at 1281.

Neither *Strickler* nor *Lincoln* creates an independent claim for relief based on the prosecution's assurances.

b. Latoya Sailor

i. Negotiations and Notes of Statements

(a) Parties' Positions

Owens argues the prosecution failed to disclose that it was negotiating a plea agreement with Sailor prior to Owens's arrest. Owens also argues the prosecution failed to disclose Fronapfel's October 27, 2005, meeting notes that have the notation: "Chi-Chi also in car."[131]

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[130] It is not clear from SOPC-163 whether Owens intended to state a claim for relief on this basis.

[131] Chi Chi is Todd's nickname.

The prosecution responds that it was not obligated to disclose its negotiations with Sailor because the negotiations occurred prior to reaching a formal agreement and prior to Sailor actually speaking to Fronapfel. The prosecution defends its decision not to disclose its negotiations with Sailor because of a court order that precluded the prosecution from addressing witness protection during trial unless Owens's trial team opened the door. Regarding Fronapfel's October 27 notes, the prosecution asserts Fronapfel's notation about Chi Chi had no value to Owens because Fronapfel did not make that notation during the October 27 meeting.

(b) Findings of Fact

The court incorporates its findings on the related false testimony claim. *See* part IV.C.3.a of this Order.

McDermott met with various members of the prosecution team on October 27, November 3, November 5, and November 16, 2005. Three of those meetings preceded Owens's November 6 arrest and all four preceded the date Fronapfel interviewed Sailor, which was November 22, 2005. Fronapfel took notes at the meetings on October 27, November 3, and November 16. The prosecution disclosed Fronapfel's November 3 and November 16 notes, but both sets of notes were undated. Fronapfel's notes from the October 27 meeting were dated but not disclosed.

Fronapfel's October 27 notes are an outline, based on McDermott's oral summary, of topics as to which Sailor could provide information and evidence concerning the Lowry Park shootings and Dayton Street homicides. At the bottom of Fronapfel's notes is the notation "Chi-Chi also in car."[132] Sailor's suspicion that

[132] During the post-conviction hearing, Owens and the prosecution disputed whether Fronapfel made this notation during the October 27 meeting with McDermott. The dispute was whether

Todd may have been in the car with Owens and Carter at the Dayton Street homicides was disclosed in conjunction with Fronapfel's November 22 interview of Sailor.

In SOPC-98, Owens sought disclosure of McDermott's negotiations with the prosecution prior to Owens's arrest, including his representations of what she would say. The motion was supported by an affidavit from McDermott. The prosecution responded that Sailor had not personally made any statements before November 22 and that any negotiations with her attorney prior to that date were subject to the work product privilege. When the court ordered the prosecution to produce its notes regarding the meetings with McDermott prior to Owens's arrest, the prosecution disclosed Fronapfel's notes and a series of emails between the prosecutors and McDermott.

McDermott relayed Sailor's suspicion that Chi Chi was in the car to the prosecution during the October 27 meeting or whether Fronapfel made that notation at some point after the meeting. Fronapfel testified she made the notation after the meeting and that the notation reflects something that she had to do. According to Fronapfel, her notes are oftentimes incomplete and contain her own thoughts or to do lists. Sometimes she will go back and amend her notes. The prosecution argues this note has no value to Owens because Fronapfel made the note after the October 27 meeting. When Fronapfel made the notation is irrelevant. If the prosecution had disclosed the notes, Owens's trial team would have properly assumed Fronapfel made the notation during the October 27 meeting and could have investigated the notation. *See Kyles*, 514 U.S. at 450-51 (discussing weight as opposed to favorable tendency of undisclosed evidence).

(c) Analysis[133]

At trial, Sailor truthfully testified she did not talk to the police before Owens's arrest. But she had authorized McDermott to initiate plea negotiations and McDermott had three negotiation meetings with the prosecution before Owens was arrested. Sailor's trial testimony was susceptible to the reasonable inference that she would not cooperate with or provide information to the prosecution before Owens's arrest. So the occurrence of these client-authorized pre-arrest negotiations was favorable impeachment evidence.

Because Fronapfel's October 27 notes were not disclosed, her November 3 and November 16 notes were disclosed but not dated, and the prosecution did not otherwise alert the defense to the pre-arrest meetings, the prosecution failed to comply with its disclosure obligations.

The prosecution contends the court's pretrial order precluding the prosecution from raising the subject of witness protection unless the defense opened the door excused the prosecution from revealing its negotiations with Sailor because the negotiations included witness protection and relocation plans. The argument is without merit. No reasonable, experienced prosecutor would believe that an *in limine* order relieved him or her of their *Brady* obligations absent an express court order made after the court had been appraised of the facts.

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[133] Owens also argues the prosecution failed to disclose Sailor's opposition to the death penalty. Owens suggests Sailor's opposition shows McDermott was negotiating on Sailor's behalf to help Ray avoid the death penalty. However, Sailor also opposed the death penalty for Owens. McDermott testified during the post-conviction hearing that he informed the prosecution early in their negotiations that Sailor opposed the death penalty for Ray and Owens. The prosecution did not disclose Sailor's opposition to the death penalty until May 16, 2008, which was after her testimony in the trial but before her testimony in phase two of the sentencing hearing. SOPC.EX.P-125. The exhibit includes an email from McDermott to Hower in which McDermott advised that Sailor "does not want either of the capital defendants to die." Thus, King could not have exposed a bias Sailor had against Owens because she opposed the death penalty for Owens as well.

The prosecution also contends it was relieved of any obligation to disclose its initial negotiation meetings with McDermott because the prosecution did not consider the information McDermott provided during those meetings to be a proffer. According to the prosecution, there was no proffer because McDermott provided no specific information. The evidentiary value to Owens does not turn on whether the information from McDermott was a proffer. It arises from the fact that information was being disclosed, which came from Sailor, under circumstances where the prosecution should have realized that she authorized the disclosure.

Fronapfel's note about Chi Chi in the car is also favorable evidence to Owens. Owens's trial team attempted to paint Todd as a hitman who Ray brought from Chicago to kill Marshall-Fields. Whether the note reflects information from Sailor (through McDermott), or simply Fronapfel's own musings arising from the October 27 meeting, there is potentially exculpatory value in a note from the lead detective that might imply that Todd was in the car from which the fatal shots were fired.

But the defense was given complete disclosure of Sailor's November 22 recorded interview with Fronapfel and her grand jury testimony. On both of those occasions, Sailor discussed her suspicion that Todd was in the car when the murders occurred. In short, the prosecution suppressed the fact that negotiations occurred before Owens's arrest, but the information McDermott provided to the prosecution during the meetings was not suppressed.

(d) Conclusion

The prosecution failed to disclose McDermott's negotiations with the prosecution prior to Owens's arrest, which was favorable evidence to Owens. Although the prosecution suppressed Fronapfel's October 27 notes, it did not suppress Sailor's suspicion that Chi Chi was in the car. In light of these findings,

the court concludes the evidence of Sailor's negotiations with the prosecution prior to Owens's arrest is relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. *See* part IV.D.4 of this Order.

ii. Connection to Michigan Homicide

(a) Parties' Positions

Owens argues the prosecution failed to disclose that Sailor was a person of interest in a Michigan homicide investigation. Owens also argues the prosecution did not disclose that Michigan detectives confronted Sailor at the Denver International Airport on October 24, 2006, after she testified at Ray's Lowry Park trial.

The prosecution did not respond to this claim.

(b) Findings of Fact

On September 27, 2006, Fronapfel received an email from Detective Gregory Griffin (Griffin) of the Grand Rapids, Michigan Police Department.[134] During the post-conviction hearing, Griffin testified that he was looking to interview Sailor in connection with a cold case homicide. Sailor's ex-boyfriend was a suspect. He was cleared when DNA evidence led to another individual who subsequently pled guilty. While their suspicions proved to be unfounded, at the time the Michigan authorities suspected that the ex-boyfriend may have fronted drugs to a lower level dealer and then killed him when he did not pay. They thought that Sailor might have been with him at the time of the murder. They interviewed the ex-boyfriend who claimed that Sailor could assist in supplying him with an alibi. They correctly suspected that Sailor knew of the ex-boyfriend's drug

[134] The email reads in pertinent part: "We have recently discovered that [the suspect] had his girlfriend at the time along for the ride at the time of the murder. Further, we believe that she may be the person that our victim received the dope from. As you may have perceived we believe Sailor was with [the suspect] at the time of this murder." SOPC.EX.D-242,

dealing and may have assisted him with a delivery to the victim, but they viewed her as a witness, not a suspect.

Fronapfel agreed to arrange a meeting between Griffin and Sailor when Sailor would be in Denver on October 24, 2006, to testify in Ray's Lowry Park trial. Sailor was in the Witness Protection Program and district attorney investigators were responsible for her safety, so Fronapfel turned the matter over to the investigators. Thus, Fronapfel told the prosecution's office about the meeting, but she did not share the e-mail with it. Sailor was given no advance notice of the meeting.

After Sailor testified, the investigators drove her to the airport and escorted her to the gate area where Griffin and another detective were waiting. After brief introductions, the district attorney investigators stood off to the side where they could keep an eye on Sailor but could not hear the conversation. The investigators did not observe any emotional reaction from Sailor during the meeting. After the meeting, the investigators observed Sailor board her airplane.

Griffin met with Sailor again at her protected location. At Griffin's request, Sailor took a polygraph. She did not verify her ex-boyfriend's alibi but acknowledged she had delivered drugs to the victim for her former boyfriend and that her ex-boyfriend provided her with marijuana and powder cocaine. After the interview, Griffin considered her cooperative and still viewed her as a witness, not a suspect.

Griffin never contacted Sailor, Fronapfel, or the district attorney investigators again. Neither Fronapfel nor the district attorney investigators asked Griffin what Sailor had told him.

Fronapfel testified that she often assists out-of-state law enforcement agencies because she would expect similar assistance. She did not view it as

having any impact on the Lowry Park or Dayton Street cases. Fronapfel may have mentioned Griffin's request to the prosecutors but did not give the prosecutors the email from Griffin or prepare a report about her contact with Griffin. The district attorney investigators did not prepare a report about it because they also viewed it as an assist for another law enforcement agency on an unrelated case.

Because neither Fronapfel nor the district attorney investigators mentioned the matter to the prosecutors, the prosecutors did not disclose it.

(c) Analysis

The prosecution was obligated to disclose any exculpatory material in Fronapfel's possession. *See Strickler*, 527 U.S. at 275 n.12 (prosecution is responsible for disclosing material in the possession of the detective); Crim. P. 16(I)(a)(3) (extends the prosecutor's discovery obligations "to material and information in the possession or control of . . . any others who have participated in the investigation . . . of the case and who either regularly report, or with reference to the particular case have reported" to the prosecutor's office). But it was not responsible to disclose information known to the Michigan authorities that was not communicated to Fronapfel or the prosecution's investigators. Although Sailor's ex-boyfriend had not been involved in the Michigan homicide, Fronapfel had information that the Michigan authorities suspected that he committed the murder and that Sailor had witnessed it. Fronapfel should have but did not disclose this information to the prosecution, and therefore the prosecution did not disclose any evidence concerning the Michigan homicide investigation to Owens's trial team.

(d) Conclusion

The court finds the prosecution failed to disclose Sailor's contacts with the Michigan homicide detectives, which, at the time, appeared to be favorable evidence to Owens. In light of these findings, the court concludes the evidence is

relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. *See* part IV.D.4 of this Order.

iii. Requests for Consideration and Promise of Car[135]

(a) Parties' Positions

Owens contends the prosecution failed to disclose that Sailor made repeated requests for monetary consideration from the prosecution in exchange for her cooperation.

The prosecution did not respond to this claim.

(b) Findings of Fact

After her release from jail on December 14, 2005, Sailor remained in the Denver metropolitan area for several weeks. She was no longer concerned for her or her son's safety because Owens was in custody. Sometime in January 2006, Sailor encountered unidentified young men, who commented about her cooperation with the police. She considered their comments threatening and requested protection. The prosecution placed Sailor and her son into the Witness Protection Program on January 20, 2006, and immediately moved them out of state to an undisclosed location.

Sailor had been completely dependent on Ray and his family for all aspects of her daily support prior to her arrest. Given the emergency nature of her placement in witness protection, Sailor left most of her personal property behind. She also did not have a job in her new location. She depended on government financial support to purchase kitchenware, put a deposit on an apartment, repair a car, and pay bills that had gone to collection agencies. Sailor requested help from

[135] In SOPC-289, Owens moved to supplement and amend SOPC-163 with a claim that the prosecution withheld the fact that it caused authorities in Michigan to vacate several warrants for Sailor and to dismiss a criminal case against her. The court denied SOPC-289 but allowed Owens to present additional evidence on this claim.

the prosecution with these various expenses, and the prosecution assisted her with some, but not all, of them. Sailor and McDermott became frustrated with the prosecution because they believed that the funds provided were neither adequate nor timely.

McDermott and Sailor contacted the district attorney's victim-witness advocate and the prosecutors at various times with different requests for assistance. McDermott sent emails to the prosecution at various times from July 2006 to June 2008 seeking funds for Sailor, and a response usually came from the victim-witness advocate. At times, Hower would respond denying or reducing the requested amount. The prosecution did not disclose these emails. In January 2007, Sailor wrote a letter to the prosecution asking for assistance. She noted that she was five months pregnant and that her pregnancy was high risk. The prosecution disclosed this letter.

Prior to trial, the court ruled the prosecution could not inquire about witness protection during direct examination of protected witnesses. The court also ruled that if Owens's trial team asked questions on cross-examination about witness protection, the court would allow the prosecution to make further inquiry on redirect examination.

During the trial, the court ruled that Owens's trial team opened the door to witness protection evidence during its cross-examination of Lundin on April 15, 2008. Sailor testified after Lundin. Hower asked Sailor about her placement in the Witness Protection Program. On cross, King did not inquire about the Witness Protection Program.

In the spring of 2008, McDermott's and Sailor's frustration with the prosecution's responses caused McDermott to request a meeting with Carol Chambers (Chambers), the elected District Attorney, about the lack of assistance.

In early May, after Sailor testified at the guilt phase but before she testified in the sentencing hearing, McDermott requested a date for a meeting with Chambers in conjunction with Sailor's return to testify during the sentencing hearing. Included in McDermott's emails were requests for assistance with an overdue electricity bill, a deposit for a new apartment, and money for a moving truck. McDermott and Chambers eventually agreed that a meeting would occur after Sailor testified at the sentencing hearing. The meeting was scheduled on the same day as her testimony to ensure that she could arrive in and depart from Colorado on the same day.

McDermott testified during the post-conviction hearing that he did not view the scheduling of the meeting after Sailor's testimony as any sort of a threat that the prosecution expected Sailor to testify in a certain way in exchange for additional financial assistance. He based his view on the fact that despite Sailor's multi-year frustration with the prosecution's handling of her requests for assistance, she never indicated she would refuse to cooperate. Indeed, her frustration was a matter of public record after she and McDermott contributed to an October 2, 2007, newspaper article that was highly critical of the prosecution and the lack of assistance provided to Sailor.[136] Despite this public complaint, Sailor always made herself available to both parties.

On June 5, 2008, Sailor testified at the sentencing hearing. After her testimony, she met with McDermott and Chambers. The trial prosecutors were not present. Chambers acknowledged how difficult the relocation process had been and promised to give Sailor a car. Sailor had not requested a car, but transportation was a major concern for her. The particulars were not discussed at the meeting.

[136] SOPC.EX.D-1434.

After the meeting, Sailor returned to her protected location and discovered she had lost her cell phone. She requested assistance with obtaining a new one, and the victim-witness advocate immediately sent her a $100 gift card.

The sentencing hearing concluded on June 16, 2008. On June 27, Sailor told McDermott that two men were reportedly asking about her at her apartment complex. She was particularly frightened because one of the men was described as having dreadlocks, which she associated with people from Louisiana where Owens grew up, had family, and fled to after both the Lowry Park shootings and the Dayton Street homicides. McDermott alerted the district attorney's victim-witness advocate who arranged to move Sailor and her son to a hotel. Two district attorney investigators went to Sailor's location to provide security, and Sailor and her son were eventually relocated.

After Owens's trial ended, the investigators gave Sailor a car. While transferring the car to Sailor, the prosecution learned that she had several outstanding traffic warrants and a pending possession of marijuana case. Those matters precluded her from reinstating her driver's license. The prosecution worked with Michigan authorities to clear the warrants so that Sailor could get her license. After the traffic warrants were vacated and the marijuana case was dismissed, the prosecution gave Sailor the car, paid the transfer taxes, paid for six months of insurance, and paid a fee that allowed Sailor to reinstate her license. Sailor testified during the post-conviction hearing that she was aware that the outstanding matters had to be resolved before she could get her driver's license. She also testified that she did not know whether the prosecution facilitated the resolution of those matters.

During the summer of 2008 after Owens's trial concluded, the prosecution disclosed all of the monetary assistance it had provided to Sailor, including information about the car.

The amount of money paid to Sailor by the prosecution was the subject of an evidentiary hearing on July 22, 2011. An exhibit introduced during the hearing shows that Sailor received $4,833.75[137] in 2008.

According to Sailor, the prosecution did not bribe her with a car. Likewise, she did not exchange her testimony for the car. Sailor felt that the prosecution should have given her much more than a car. Sailor did not agree to testify in order to get money or things from the Witness Protection Program. She understood that the program could not provide her with the lifestyle she enjoyed with Ray.

(c) Analysis

The evidence of Sailor's requests for assistance and the prosecution's responses to her requests was favorable to Owens, because King could have used it to suggest Sailor's bias in favor of the prosecution, a financial motivation to testify, and/or an expectation of financial assistance from the government. The timing of Sailor's and McDermott's meeting with Chambers about the car was also potentially favorable evidence.

The prosecution's assistance with vacating Sailor's warrants and getting Sailor's marijuana case dismissed is not relevant to this analysis. The defense could not have cross-examined Sailor about it because the prosecution neither contemplated nor provided this assistance until after Owens's trial ended.

[137] It is unknown whether the value of the car, the car insurance, and other related expenses are included in this figure.

The prosecution disclosed an accounting of the financial assistance it provided to Sailor as well as supporting documentation for the assistance. Specifically, the prosecution disclosed receipts, the Requests for Payment, which the prosecution submitted to the Colorado Witness Protection Board for reimbursement of funds expended for witness protection purposes, and a summary of all money expended on Sailor. While the prosecution did not disclose its correspondence with McDermott, it disclosed Sailor's January 2007 letter in which Sailor pleaded for assistance. The undisclosed correspondence shows that the prosecution denied some of Sailor's requests and granted others. These denials were apparently the catalyst for the newspaper article, which detailed McDermott's efforts and frustrations in trying to obtain funds from the prosecution. Hence, Owens's trial team was on notice that Sailor was asking for money while in witness protection.

The prosecution should have disclosed McDermott's and Sailor's meeting with Chambers, which was arranged prior to and occurred after Sailor testified at the sentencing hearing. The prosecution also should have disclosed Chambers's promise to give Sailor a car.[138] While it is unclear whether the prosecutors were aware of the scheduled meeting with Chambers or her commitment to provide a car, the prosecution is presumed to have known. *See Giglio*, 405 U.S. at 154 (a promise made by one prosecutor is attributable to another prosecutor).

(d) Conclusion

The prosecution sufficiently disclosed Sailor's requests for assistance but failed to disclose its promise to give Sailor a car, which was favorable evidence. In light of these findings, the court concludes that Chambers's promise to give Sailor

[138] The promise was made after Sailor testified but before the sentencing hearing ended.

a car is relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. *See* part IV.D.4 of this Order.

iv. Informal Immunity Agreement

In SOPC-215, Motion to Amend SOPC-163, Owens asserts that McDermott informed Owens's post-conviction counsel on March 1, 2013, that McDermott entered into an informal immunity agreement on Sailor's behalf with the prosecution prior to Sailor's debriefing on November 22, 2005. The prosecution denies entering into an informal immunity agreement. Owens did not elicit testimony from McDermott about this issue during the post-conviction hearing even though the court gave him leave to do so in P.C. Order (SO) No. 13. Because no evidence was presented to establish an informal immunity agreement, there is no evidentiary basis on which the court can analyze Owens's claim in SOPC-215.

c. Jamar Johnson

i. Glendale Incident

(a) Parties' Positions

Owens argues the prosecution failed to disclose that the police contacted Johnson about a shooting at a bar in Glendale in March 2006 while he was on probation.

The prosecution asserts it had no knowledge of this incident prior to September 2012 and was therefore not obligated to disclose it.

(b) Findings of Fact

Johnson was assigned to Arapahoe County Probation Officer Julie Crowell (Crowell). Crowell was assigned to oversee Johnson's Arapahoe County deferred judgment supervision and Boulder County probationary sentence. The first time Crowell met Johnson was on February 16, 2006. She went over the standard terms and conditions of his supervision including that he must report all police contacts

to her, including traffic tickets. Crowell knew that Johnson was awaiting placement in the Witness Protection Program because the district attorney's office asked her to facilitate an expedited interstate placement for him. When that request was denied on February 28, she contacted Hower. She spoke to Hower again on March 10 when he came to her office and explained that the indictment was public and listed Johnson as a witness. Hower explained this development meant Johnson had to be moved out of state as quickly as possible.

On March 12, Johnson and his friend were at the Cherry Street Bar & Grill in Glendale. As they were leaving the bar, someone shot Johnson's friend. At the time of the shooting, two off-duty Glendale police officers were providing security at the bar. Both officers witnessed the shooting. One officer pursued the shooter, and the other ran after Johnson and the victim, who were running away from a second round of shots.

After a verbal debriefing, Johnson gave the officer a written statement but used the name Jay Johnston and gave an incorrect date of birth. In his verbal statement, Johnson told the officer that he knew the shooter and that he and the shooter had the same first name, Jamar. During Johnson's encounter with the officer, he told the officer he was going into the Witness Protection Program and would be leaving Colorado shortly.

When the victim refused to cooperate with the officer, Johnson yelled at him to tell the officer what he knew. During the officer's interview of the victim, Johnson kept walking away toward some people he apparently knew in an adjacent parking lot. The officer repeatedly told Johnson to return, which he did.

The next day, Hower called the Glendale detective assigned to the shooting and asked about the incident. After the detective explained the incident, Hower told the detective that Johnson was on probation and should not have been at the

bar. Hower did not ask for any type of consideration for Johnson. Hower subsequently notified Johnson's attorney, who contacted the detective. A few days later, Johnson gave a detailed interview to the detective. Neither the on-scene officer nor the detective ever considered charging Johnson for providing false information about his name and date of birth. They both characterized Johnson as a helpful and cooperative witness.

In mid-March, Crowell was notified that the Glendale Police Department had contacted Johnson. She called the Glendale detective and learned Johnson was a witness to a shooting. Then she contacted Hower about the incident. Hower did not ask Crowell for any consideration for Johnson. That same day, Johnson came to her office, and she issued him the necessary interstate travel agreement so he could leave the state. Johnson did not tell her about the shooting or his contact with the police. Although her notes did not reflect it, Crowell would have discussed the situation with Johnson even though she did not consider the incident or his failure to report it to be a violation of his probation.

The prosecution did not disclose any evidence of this incident.

King testified at the post-conviction hearing that the team would have requested transcripts from Johnson's Boulder County case in order to find out why his probation was not revoked based on the Glendale incident. King testified the team would have learned from the transcripts that Johnson also cooperated against his codefendant in Boulder County. The team would have investigated the veracity of the information Johnson provided against his codefendant in Boulder County. With this information, King would have cast Johnson as a government agent at trial, and if the team determined his information was unreliable, it would have impeached Johnson accordingly.

(c) Analysis

When the Glendale shooting incident occurred in March 2006, Johnson was serving an unsupervised probationary sentence for his Boulder County case, and he was under deferred judgment supervision for his Arapahoe County case. By going to the bar, providing a false name and date of birth, and failing to report his contact with the police to his probation officer, Johnson may have violated the terms and conditions of his supervision and probation. This evidence was favorable because Owens's trial team could have investigated why Johnson's probation in Boulder County and his deferred judgment in Arapahoe County were not revoked. The team might also have investigated why the police did not consider filing something with the prosecution so that a decision could be made of whether to charge Johnson with providing false information to a law enforcement officer. The team would have used this information to show Johnson received additional leniency after he entered plea agreements on both of his cases. The evidence that Johnson seemingly violated the terms and conditions of his probation, was not charged with providing false information, and was not subjected to a probation revocation was favorable evidence to Owens because his trial team could have used it to impeach Johnson at trial.

The prosecution asserts it was unaware of the incident until September 2012. Testimony at the post-conviction hearing demonstrated otherwise. According to the Glendale detective, he spoke with Hower the day after the shooting. Hower relayed certain information to Johnson's attorney, which prompted Johnson to submit to an interview by the detective. Crowell also contacted Hower about Johnson's connection to the shooting. Despite Hower's knowledge, the prosecution did not disclose this impeachment information.

(d) Conclusion

Johnson's contact with the police at a bar in Glendale while being supervised by a probation officer was favorable evidence to Owens and the prosecution suppressed this evidence. In light of these findings, the court concludes the evidence is relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. *See* part IV.D.4 of this Order.

ii. Traffic Ticket

(a) Parties' Positions

Owens contends the prosecution failed to disclose the circumstances surrounding Johnson's traffic ticket, including that the prosecution converted the driving offense from a mandatory jail sentence to a fine and that it did not violate his deferred judgment.

The prosecution's position is that the disclosure of Johnson's traffic ticket was sufficient.

(b) Findings of Fact

On March 24, 2006, the APD issued Johnson a citation for driving under restraint.[139] The citation required Johnson to appear in court on May 24. Shortly after March 24, Johnson entered the Witness Protection Program and moved out of the state. On March 27, Johnson faxed the ticket to Fronapfel. Fronapfel contacted the county court supervising prosecutor and asked the prosecutor to continue the May 24 court date because Johnson was in the Witness Protection Program and living out of state. She did not request any consideration for Johnson on the ticket and had no further involvement with the ticket. The prosecution disclosed a Blackstone report reflecting Johnson's ticket.

[139] Arapahoe County case 06T2650.

Johnson called Crowell on April 20 and told her that his driver's license had been suspended while he was incarcerated in 2005. He also told her about the traffic ticket. Crowell did not consider his failure to timely report the ticket to be a violation of his probation. Crowell subsequently called Hower and informed him of the ticket. Hower assured her that he would take care of the situation when Johnson returned to Colorado. According to Crowell, Hower never tried to influence her decisions on Johnson's probation performance. On May 4, Johnson's supervision was transferred to a probation officer in his new location, and Crowell did not discuss Johnson's ticket with Hower again.

DDA Jacob Edson (Edson) was the county court supervisor from April to November 2006. As the county court supervisor, he supervised the resolution of traffic citations. According to Edson, the prosecution's practice in mid-2006 was to review the defendant's Department of Motor Vehicles (DMV) record and Blackstone report to determine an appropriate disposition. The status of the defendant's driving privileges was important as well as the amount of time it took the defendant to reinstate his/her license. County court prosecutors typically did not consider the defendant's probationary status on misdemeanor or felony cases. They might have considered the defendant's failures to appear, but the failures to appear typically would not change the prosecutor's plea offer.

Johnson's license was revoked on October 16, 2005. He was cited on March 24, 2006, and he reinstated his license on March 27. Johnson's DMV record showed a speeding ticket in October 2004. Johnson did not appear for two hearings, but Lazzara appeared both times. On both occasions, the court stayed Johnson's warrant. According to Edson, staying warrants was a regular practice of the county court at the time. On these facts, Edson testified that an acceptable disposition for Johnson would have been a plea to a traffic infraction related to a

driver's license. On October 5, 2006, Johnson pleaded guilty to permitting an unauthorized person to drive. The court sentenced him to pay a fine and court costs. The driving under restraint charge was dismissed.

(c) Analysis

According to Owens, the impeachment value of Johnson's traffic ticket is not derived from the ticket itself but from the prosecution's handling of the ticket. Johnson's probation officer did not consider Johnson's ticket to be a violation of his probation, and according to Edson, a defendant's probationary status and failures to appear did not factor into a county court prosecutor's plea offer. Edson also testified that a reasonable disposition for Johnson's traffic ticket would have been a guilty plea to a traffic offense related to his driver's license. Because Johnson pleaded guilty to a traffic citation related to his driver's license, there is no evidence that Johnson received any benefit on his traffic ticket. Thus, the prosecution's handling of the ticket was not favorable evidence.

(d) Conclusion

The circumstances surrounding Johnson's traffic ticket were not favorable to Owens. Thus, it is not relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence based on the prosecution's handling of Johnson's traffic ticket is **Denied**.

iii. Termination of Out-of-State Probation[140]

(a) Parties' Positions

Owens contends the prosecution failed to disclose that Johnson's out-of-state probation officer filed a violation report after Johnson absconded from probation.

[140] SOPC-298, Motion to Supplement and Amend SOPC-163.

Owens also contends the exculpatory nature of that evidence was apparent before the prosecution destroyed it in violation of *Trombetta*.

The prosecution does not dispute that it failed to disclose the circumstances of the termination of Johnson's out-of-state probation.

(b) Findings of Fact

Johnson entered the Witness Protection Program in March 2006 and moved out of Colorado shortly thereafter. At that time, the Arapahoe County Probation Department was overseeing Johnson's unsupervised probation out of Boulder County as well as his deferred judgment out of Arapahoe County. When Johnson moved, his probation was transferred to the out-of-state jurisdiction *via* the Interstate Compact for Adult Offender Supervision (ICAOS). The out-of-state jurisdiction assigned probation officer Teretha Singletary (Singletary) to supervise Johnson's probation.

Sara Schaefer (Schaefer), a victim-witness advocate for the prosecution, communicated with Singletary throughout 2007 to coordinate Johnson's travel to Colorado for pretrial motions hearings. Singletary was cooperative, but her tone changed when Schaefer reached out to her in February 2008. Singletary reported that Johnson had not been in her office since September 2007 and that he had absconded from probation. Singletary also reported that she attempted to locate Johnson on several occasions to no avail so she filed a violation report with ICAOS and closed Johnson's file.

Schaefer relayed that information *via* email to the prosecution team. Based on her communications with Hower, Schaefer asked the prosecution's paralegal, to have Johnson served with an out-of-state witness petition ordering Johnson to appear in Colorado to testify at Owens's trial in this case. During the post-

conviction hearing, Schaefer did not recall whether a complaint to revoke Johnson's probation was ever filed in Colorado or in his out-of-state location.

Hower testified at the post-conviction hearing that he does not recall knowing that Johnson absconded from probation in his out-of-state location or that Singletary reported filing a violation report. Hower is not aware of any complaint to revoke Johnson's probation being filed by any jurisdiction. Hower testified that he must have known the information from Singletary because he was a recipient of Schaefer's email. Hower did not investigate the circumstances of Johnson's probation through Singletary, Arapahoe County Probation, or the ICAOS.

None of the foregoing information was disclosed.

At trial, the prosecution queried Johnson about probationary sentences and deferred judgments:

> Q What's your understanding of what a deferred judgment is? What does that mean?
>
> A If I do all my things that I am supposed to do, the law will defer. It will go away after four years.
>
> Q Okay. And when you say do all the things you are supposed to do, you mean -- are you under the supervision of the Probation Department?
>
> A Yes.
>
> Q Do you have regular conditions of probation that you must follow?
>
> A Yes.

Guilt Phase Tr. 16:1-11 (Apr. 21, 2008 a.m.).

(c) Analysis

(i) Undisclosed Evidence

Owens's trial team could have used the information from Singletary to impeach Johnson at trial by showing that Johnson received additional benefits in

that, despite his lack of compliance with probation, his probation and deferred judgment were not revoked. Thus, the information from Singletary was favorable evidence to Owens.

The prosecution concedes that it failed to disclose the information from Singletary. The fact that the prosecution never received a complaint to revoke Johnson's probation does not excuse its failure to disclose that Johnson failed to comply with the terms and conditions of his probation or that Singletary filed a violation report with the ICAOS.

(ii) Destruction of Evidence

Contrary to Owens's assertion, the prosecution did not destroy Singletary's communication to Schaefer. Rather, it lacks memory of Singletary's communication. Owens did not provide any legal authority holding that a lack of memory is the equivalent of destruction of evidence or that a lack of memory satisfies the first prong of *Trombetta*. 467 U.S. at 489 (the evidence must "possesses an exculpatory value that was apparent before the evidence was destroyed.").

(d) Conclusion

The prosecution suppressed Johnson's lack of compliance with his out-of-state probation, which was favorable evidence to Owens. Thus, the court concludes the evidence is relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. *See* part IV.D.4 of this Order.

The prosecution did not destroy the information from Singletary about Johnson's status on probation. Accordingly, Owens's petition to vacate his conviction and sentence based on the prosecution's lack of memory of the information from Singletary is **Denied**.

iv. Communications Between Arapahoe County and Boulder County Prosecutors[141]

(a) Parties' Positions

Owens contends the prosecution did not disclose that it asked the Boulder County District Attorney's office for leniency on Johnson's probation revocation in exchange for his cooperation.

The prosecution does not dispute that it communicated with the Boulder County prosecutor about Johnson but denies its purpose was to request leniency for Johnson.

(b) Findings of Fact

Owens's trial team filed SO-4 asking for discovery of any promises, inducements, benefits, payments, and/or threats the prosecution made to witnesses. The prosecution's response to SO-4 states that the prosecution contacted the Boulder County prosecutor on Johnson's case and advised the prosecutor of Johnson's status as a witness in this case.

Owens's post-conviction counsel subpoenaed Johnson's case file from the Boulder District Attorney's office. There is an undated handwritten note in the file that names Hower, Lundin, and Fronapfel, and includes phone numbers for Hower and Lundin. It also contains other case identifying information such as "6/20 double murder, witness in murder, D – Robert Ray." SOPC.EX.D-1668.

The following is a combined timeline for Johnson's Arapahoe County and Boulder County cases:

- November 4, 2005 – the following notes appear on the Boulder District Attorney's file jacket: defendant appeared with attorney;

[141] SOPC-298, Motion to Supplement and Amend SOPC-163.

defendant's case in Arapahoe set for 1/06; probation violation 2/3/06 8:15 a.m.

- November 29, 2005 – a motions hearing was set in Johnson's Arapahoe County case on February 1, 2006.
- December 19, 2005 – Johnson's Boulder County probation violation hearing was reset for 2/9/06.
- Undated – the following notes appear on the Boulder District Attorney's file jacket: reset for 2/9/06 at 8:15 a.m., Hower's cell phone number, call before hearing, and call after 2/3/06.
- January 24, 2006 – Fronapfel interviewed Johnson.
- January 31, 2006 – the February 1 motions hearing was vacated.
- February 3, 2006 – Johnson testified in front of the grand jury and Johnson's plea hearing was held in Arapahoe County.

Although court records do not indicate the date when the February 3 plea hearing was scheduled, it was scheduled at the earliest when Johnson became a cooperating witness against Owens on January 24. It was more likely scheduled on January 31 when the February 1 hearing was vacated. Thus, the note on the Boulder County District Attorney's file jacket of "call after 2/3/06" was likely made after January 24.

Hower testified during the post-conviction hearing about his practice of notifying a prosecutor in another jurisdiction that a defendant in the other jurisdiction is a cooperating witness against a defendant Hower is prosecuting. Hower explained that he is careful not to ask the prosecutor for a specific benefit for the witness but expects the prosecutor to consider the witness's cooperation. Hower's practice of contacting other prosecutors was not disclosed.

Johnson was originally charged in Boulder County with attempted murder, a class two felony. After he pled guilty to felony menacing, he was sentenced to two years supervised probation. He violated his probation when he committed a law violation in Arapahoe County. He admitted the probation violation, and by stipulation on February 9, 2006, was resentenced to two years unsupervised probation.

Regarding his Boulder County case, Johnson was cross-examined at trial about:

- being charged with felony menacing, which involved threatening someone with a gun;
- suffering a felony conviction;
- getting sentenced to probation;
- violating his probation by committing another felony; and
- being resentenced to probation.

Guilt Phase Tr. 132-134 (Apr. 21, 2008 a.m.). Specifically, Johnson testified on cross-examination:

> Q You were put back on probation, right?
>
> A Yes.
>
> Q You were not forced to go to the penitentiary?
>
> A No.
>
> Q It was kind of like they restarted your probation all over again from the beginning --
>
> A Yep.
>
> Q -- as if something had never happened?
>
> A Yeah.

Id. at 138:22-25; 139:1-5.

(c) Analysis

The prosecution contacted the Boulder County District Attorney's office after Johnson's February 3 Arapahoe County plea hearing and before his February 9 Boulder County probation revocation hearing. The prosecution communicated Johnson's cooperation to the Boulder County prosecutor with the hope and expectation that some benefit would be conferred on Johnson. Owens's trial team could have used that evidence to further impeach Johnson.

The prosecution did not disclose that it communicated with the Boulder County prosecutor concerning Johnson's case.

(d) Conclusion

The prosecution suppressed its communications with the Boulder County prosecutor concerning Johnson's probation, which was favorable evidence to Owens. In light of these findings, the court concludes the evidence is relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. *See* part IV.D.4 of this Order.

v. Waffle House Shooting[142]

(a) Parties' Positions

Owens contends the prosecution did not disclose that Johnson was involved in a shooting at a Waffle House after he left Colorado.

The prosecution did not respond to this claim.

(b) Findings of Fact

Johnson entered the Witness Protection Program and left Colorado in late-March 2006. Sometime in the spring of 2006, a shooting involving several Bloods

[142] SOPC-312, Motion to Supplement the Record with New Evidence.

and Crips occurred at a Waffle House in the Denver metro area. Johnson was present when the shooting occurred but left immediately.

On January 17, 2007, Fronapfel interviewed Johnson about the Waffle House shooting. Johnson admitted he was associated with the Bloods. He did not identify the shooter(s). Fronapfel wrote a report but it was not disclosed.

J. Martin testified during the post-conviction hearing that Johnson and Jamar Dickey (Dickey) were the shooters. He also testified that 9 mm and .45 caliber guns were used at the Waffle House shooting. According to J. Martin, Johnson was concerned that he would be charged for the Waffle House incident.

(c) Analysis

Owens's trial team could have used Johnson's admission that he was associated with the Bloods to generally impeach his testimony. While a theory of admissibility may not be readily apparent, it is also possible that Owens's trial team may have found a way to use Johnson's presence at the Waffle House during a gang-related shooting to impeach his testimony. Thus, the evidence was favorable to Owens.

Because the prosecution is charged with Fronapfel's information, it should have disclosed that Johnson admitted his association with the Bloods and was present for a shooting at a Waffle House during the spring of 2006. *See* Crim. P. 16(I)(a)(3) (the prosecutor's discovery obligations apply "to material and information in the possession or control of . . . any others who have participated in the investigation . . . of the case and who either regularly report, or with reference to the particular case have reported" to the prosecutor's office).

(d) Conclusion

Johnson's gang involvement and presence at a shooting in Colorado when he was in witness protection was favorable evidence, which the prosecution failed to

disclose. In light of these findings, the court concludes the evidence is relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. *See* part IV.D.4 of this Order.

vi. Prosecutorial Pressure to Secure Johnson's Cooperation

Attached to SOPC-289, Motion to Supplement and Amend SOPC-163, as Appendix J are two emails from Hower to the prosecution team concerning Johnson. Owens did not introduce those emails into evidence during the post-conviction hearing and did not elicit testimony from Hower concerning those emails. Thus, there is no evidentiary basis on which the court can analyze Owens's claim that the prosecution failed to disclose that it pressured Johnson into becoming a cooperating witness against Owens.

d. Gregory Strickland

i. Prior Informant

(a) Parties' Positions

Owens argues that the prosecution did not disclose that Strickland was an informant on other cases before he became a cooperating witness against Owens.

The prosecution responds that Owens's argument misconstrues a pretrial order and that it made sufficient disclosures to allow Owens's trial team to investigate Strickland's background.

(b) Findings of Fact

Owens's trial team filed SO-53 seeking an order requiring the prosecution to disclose the extent and nature of cooperation by certain witnesses, including Strickland, with any state or federal law enforcement agency. Owens's trial team was trying to determine whether the witnesses were previously informants and whether they had any pending cases at the time they became cooperating witnesses

in this case. Owens's trial team sought disclosure of all cases in which the witness was a defendant, a witness, or a victim. The prosecution contested the motion arguing that it would have to survey every local and federal law enforcement agency and review numerous statewide court records to meet such an obligation. The court denied the motion but ordered the prosecution to make certain disclosures if it became aware of a witness's cooperation with law enforcement on another case.

Kepros identified various investigatory leads she would have pursued had she learned Strickland was a witness in the following five cases prior to becoming a witness against Owens.

(i) Chauncey Stewart

Evidence presented at the post-conviction hearing suggested Strickland may have been an endorsed witness in Chauncey Stewart's (Stewart) Denver case.[143] Owens did not present any evidence suggesting Strickland was an informant against Stewart. Lundin prosecuted Stewart for probation violations but had no contact with Strickland and was unaware of Strickland's connection to Stewart's case.

(ii) Faraji Abdalla

Strickland may have been endorsed as a witness against his friend, Faraji Abdalla (Abdalla).[144] Strickland testified at the post-conviction hearing that he was contacted in a stolen car by Denver police and the police told him he would be released if he implicated more important suspects in car theft cases, so he gave

[143] Denver case 02JD2296. On April 8, 2003, Stewart entered a guilty plea in that case, and supervision of his probation was transferred to Arapahoe County. Stewart entered a guilty plea in Arapahoe County case 03JD576 on March 14, 2003.

[144] Denver case 04CR4820.

Abdalla's name to the police. Strickland never testified against Abdalla. Owens did not present any evidence that Strickland was an informant against Abdalla.

(iii) Shamone Holmes

Strickland may have been endorsed as a witness against Shamone Holmes (Holmes).[145] At the post-conviction hearing, Strickland acknowledged that he knew Holmes but did not know if he was an endorsed witness against Holmes. Strickland never testified against Holmes. Lundin prosecuted Holmes but had no contact with Strickland and did not recall his involvement in the case. Owens did not present any evidence that Strickland was an informant against Holmes.

(iv) Eugene Mycroft

Strickland was an endorsed witness against Eugene Mycroft (Mycroft).[146] Strickland witnessed Mycroft assault another inmate while they were housed in the same pod at the ACDF. The transcript of Mycroft's preliminary hearing confirms that Strickland was a percipient witness to the assault, not an informant.[147] Strickland did not testify against Mycroft, because Mycroft pleaded guilty. Lundin prosecuted Mycroft but had no contact with Strickland and did not recall his involvement in the case.

Mycroft testified during the post-conviction hearing that the discovery for his case listed Strickland as a witness. In Mycroft's view, Strickland's cooperation with the investigation made him an informant. According to Mycroft, the inmate culture required him to alert the other inmates in the ACDF that Strickland was an informant so that other inmates would not share confidences about their cases with Strickland. Because Mycroft violated the administrative regulations of the jail by

[145] Arapahoe County case 05CR309.
[146] Arapahoe County case 05CR2985.
[147] SOPC.EX.D-402, pp. 22-24.

committing the assault, he was removed from the general population and placed in administrative segregation. Mycroft testified that despite his segregation he was able to alert approximately 50 inmates that Strickland was an informant. During the post-conviction hearing, Strickland testified that he was never considered an informant inside the ACDF until his cooperation in this case became known sometime in 2006.

(v) Tenarro Banks

In September or October 2005, Strickland was caught with a shank in the ACDF and was placed in administrative segregation. While in administrative segregation on October 14, 2005, Strickland sent a kite to the Denver Police Department claiming he was present when Banks committed a murder in Denver. The next day a Denver detective interviewed Strickland. According to Strickland, the Denver detective assured him that if he cooperated, he would not be charged or disciplined for having the shank. Strickland implicated Banks in the homicide, and was never charged or disciplined for the shank. On October 17, 2005, homicide charges were lodged against Banks.[148]

On August 28, 2007, Strickland testified in Banks's trial that the Denver detective forced him to say that he had firsthand knowledge of the murder even though he told the detective that he did not. That trial resulted in a mistrial for an unrelated reason. When Strickland was called at Banks's second trial, he did not give meaningful testimony. Banks was convicted.

The prosecution disclosed Strickland's involvement in the Banks case in February 2008. The prosecution learned of Strickland's involvement in the Banks case when a defense motion was filed in another unrelated homicide case seeking

[148] Denver case 05CR4700.

to preclude Strickland's testimony based on his admission in the Banks case that he fabricated information. The prosecution disclosed the motion and the transcript of Strickland's testimony. The transcript shows Strickland admitted that his statement to the police was false because he said he was present for the murder when he was not.

Strickland admitted at the trial in this case that he was an informant in the Banks case because he was seeking to trade his information for a benefit from the police. Guilt Phase Tr. 83:24-25; 84:1-16 (Apr. 25, 2008 p.m.). He also admitted to providing false information in the Banks case. *Id*. at 84:17-25.

(vi) Blackstone Reports

The prosecution disclosed two Blackstone reports on Strickland.[149] Strickland's initial Blackstone report was disclosed on February 10, 2006, and listed the Stewart, Abdalla, and Banks case numbers on the last page.[150] The second Blackstone report was disclosed on November 19, 2007, and listed the Mycroft and Holmes case numbers on the last page.[151] Kepros testified during the post-conviction hearing that she knew how to interpret a Blackstone report except for the last page. However, the prosecution's response to SO-53 contained a list of cases in which the individual was endorsed as a witness.

(c) Analysis

Strickland denied during his post-conviction testimony that he was an informant against Stewart, Holmes, Mycroft, or Abdalla. Lundin could not recall

[149] The Blackstone report is a statewide list of case numbers for the person named in the report. The first page is a list of cases in which the person is named as the defendant. The following pages provide additional details for each case where the person is named as a defendant. The last page of the Blackstone report contains a list of all case numbers in which the person is involved as a defendant, a victim, or a witness.

[150] SOPC.EX.D-1346 and SOPC.EX.D-579.

[151] SOPC.EX.D-578.

Strickland from the Stewart, Holmes, or Mycroft cases because she never had any contact with him and did not know whether Strickland was an informant against those defendants. Her lack of contact or knowledge of Strickland is corroborated by the circumstances of each case. In Stewart's case, Lundin was only dealing with probation violation matters that would not involve witnesses from the underlying case. In Holmes's case, she appeared once for a bond argument. In Mycroft's case, she conducted a preliminary hearing and the case resolved during her second appearance. Owens presented no evidence showing Strickland was an informant in the Abdalla case. In light of this record, Strickland was a percipient witness in the cases against Stewart, Abdalla, Holmes, and Mycroft. His status as a percipient witness in four cases is not favorable evidence to Owens.

Strickland admitted he was an informant against Banks. He acknowledged that he supplied false information implicating Banks in a Denver homicide in order to avoid being charged or disciplined for having a shank inside the ACDF. That Strickland was an informant before he cooperated in this case is favorable evidence for Owens because it would impeach Strickland's claim that he acted out of concern for the victims' mothers.

The prosecution disclosed Strickland's Blackstone reports, which included the case numbers of all five cases. The prosecution also disclosed a defense motion filed in another case, which sought to prevent Strickland from testifying on account of Strickland having provided false information against Banks. Attached to that motion was Strickland's testimony at the Banks trial, which showed that Strickland falsified information to gain a benefit from the police. In light of this evidentiary record, the prosecution sufficiently disclosed impeachment information of Strickland concerning the Banks case.

The court is not persuaded by Owens's argument that the prosecution engaged in misconduct by not disclosing Strickland's Blackstone reports in sufficient time to allow his trial team to investigate Strickland. The initial Blackstone report for Strickland was disclosed on February 10, 2006. The second report was disclosed on November 19, 2007. Kepros did not know how to decipher the information on the last page of the Blackstone reports where these five case numbers were listed but the prosecution is not responsible for Kepros's lack of familiarity with the information in the Blackstone reports. Moreover, Kepros's lack of familiarity did not appear to hamper her cross-examination of Strickland. Strickland admitted on cross-examination that he traded false information to avoid punishment for having a shank in the ACDF.

(d) Conclusion

Strickland's role as a percipient witness in four cases was not favorable evidence to Owens. The prosecution timely disclosed that Strickland was an informant against Banks. In light of these findings, the court concludes the evidence is not relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence based on Strickland's role as a witness in five other cases is **Denied**.

ii. Communications Between the Arapahoe County Prosecutors and Others About Strickland[152]

Pursuant to SOPC-279, the prosecution disclosed three documents concerning Strickland to Owens's post-conviction counsel.[153] As a result of the disclosure, Owens sought to amend or supplement SOPC-163 with an undisclosed evidence claim. SOPC-289. The court denied the motion to amend but allowed

[152] SOPC-289, Motion to Supplement and Amend SOPC-163.

[153] These documents are attached to SOPC-289 as Appendices K, L, and M.

Owens to present additional evidence on his claim of undisclosed evidence. Minute Order (Feb. 24, 2015).

Owens did not introduce those documents into evidence during the post-conviction hearing and did not elicit testimony from Hower, Strickland, or anyone else concerning the documents. Thus, there is no evidentiary basis on which the court can analyze Owens's claim in SOPC-289.

e. Dexter Harris

i. Overview/Findings of Fact

Owens makes numerous claims of government misconduct pertaining to undisclosed information about Harris. As best as this court can determine, Owens claims the prosecution failed to disclose:

- that it promised Harris a sentence to probation in his Aurora case in exchange for his cooperation in this case;
- that Harris was a paid confidential informant for the APD and that the APD gave him an alias to use as a confidential informant;[154]
- that the prosecution labeled Harris as a chronic offender during its 1990 prosecution of him for aggravated robbery;
- that Harris obtained the inculpatory information he attributed to Ray from newspapers and other media reports; and
- that the APD terminated a 2006 car theft and drug possession investigation of Harris because of his cooperation in this case.

Owens uncovered additional information regarding Harris during the post-conviction hearing, which caused Owens to raise additional claims of government misconduct pursuant to C.R.S. § 16-12-209 in six motions to supplement or amend

[154] This claim is also the subject of SOPC-277, Motion to Supplement SOPC-163.

SOPC-163. The motions to supplement are confusing because the added claims often overlap with the claims in SOPC-163 or with claims in other motions to supplement. As best as this court can determine, the claims contained in the motions to supplement, which do not overlap with claims in SOPC-163, are as follows:

- the prosecution failed to disclose that Harris assisted the APD in unrelated homicide cases (SOPC-262 and SOPC-289);
- the prosecution failed to disclose that it assisted Harris with his Denver drug and Aurora cases (SOPC-273 and SOPC-289); and
- the prosecution failed to disclose that it supported Harris financially from March to November 2008 (SOPC-289).

Attached to SOPC-289 are Appendices A through M. Appendices A through G relate to Harris. Owens did not introduce the appendices related to Harris into evidence during the post-conviction hearing and did not elicit testimony from any witnesses about the appendices. Thus, there is no evidentiary basis on which to consider Appendices A through G.

Resolution of the government misconduct claims pertaining to Harris requires an understanding of the chronology of Harris's criminal cases, of his involvement with the police and the prosecution throughout this case, and of the chronology and nature of the prosecution's disclosures regarding Harris during the trial and the post-conviction hearing. The chronology is as follows:

(a) 2005-2006

In 2005, Harris was on bond in Denver for drug charges.[155] On June 10, 2006, Harris was arrested on an Aurora warrant for domestic violence.[156] He was brought to the ACDF on June 13 and was housed with Ray.

During a hearing in this case on June 28, the court ordered the prosecution to disclose any payments from the government to witnesses. The prosecution assured the court and Owens's trial team that all such payments would be disclosed.

On July 16, Harris wrote a letter to the district attorney's office stating he had information on a murder involving Ray and an attempted murder involving David Grier (Grier). Ray, Grier, and Harris were housed in the same pod at that time.

On July 19, Harris was brought from the jail to the district attorney's office where Fronapfel interviewed him. Detective Chuck Mehl (Mehl) was also present. Before providing information to Fronapfel, Harris requested a personal recognizance bond because he was concerned for his safety if he had to return to the pod occupied by Ray and Grier. Fronapfel and the prosecution shared his concern so Hower contacted the Aurora City Attorney's Office and Harris's wife to determine if they would agree to Harris being released on a personal recognizance bond. Pursuant to Hower's practice, he likely discussed Harris's potential cooperation in this case with the Aurora prosecutor. After Hower obtained the necessary permissions for the personal recognizance bond, Harris provided information to Fronapfel about this case, including that Ray told Harris the following:

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[155] Denver case 05CR3324.
[156] Aurora case J71710.

- he operated a crack distribution network and owned a barbershop that was used for crack distribution;
- he was involved in two shootings;
- he was the driver when his passenger shot at someone in what sounded to Harris like a drive-by shooting;
- he shot at someone or something during the first shooting;
- he arranged for the killing of a man who was injured in the first shooting because the man was willing to testify about the first shooting;
- he arranged for an alibi by being seen on a video camera at the time of the killings;
- he had to wait for notification that the murders had been accomplished but when notified he could not discuss the details because there was another person present; and
- he had to wait with his cohorts for the person who was present for the notification to leave before they could celebrate the murders.

Harris told Fronapfel that his impression from Ray's comments was that the woman was killed because she was in the wrong place at the wrong time. During this interview, the detectives repeatedly told Harris that they could not make him any promises in exchange for the information he provided. The transcript of the interview and Fronapfel's report were disclosed.

At the conclusion of Harris's interview pertaining to the Dayton Street homicides, Mehl interviewed him about the Grier attempted murder. The prosecution did not disclose the transcript of that portion of the interview or Mehl's report.

Although Harris was granted a personal recognizance bond on his Aurora case on July 19, he was not released. Instead, he was taken the next day to the Aurora Municipal Court where he entered a guilty plea to battery and was sentenced to probation.[157] Following his guilty plea, Harris was transported to the Denver County Jail on an outstanding warrant in his Denver drug case.

Harris appeared in court on his Denver drug case on August 4, and told the court that he was a witness in Arapahoe County. The prosecutor said she would confirm Harris's status with the prosecutors in Arapahoe County. On August 11, Harris pleaded guilty to possession with intent to distribute, a class four felony. As part of the plea agreement, the prosecutor waived the two-felony rule; thus, Harris was eligible for probation.[158] The waiver of the two-felony rule was contingent upon Harris returning for his scheduled sentencing on October 5. The prosecutor also agreed to a personal recognizance bond that allowed Harris to be released that day. The plea agreement did not mention Harris's cooperation against Owens.

It is likely that Hower and the Denver prosecutor discussed Harris's cooperation. Hower's usual practice was to talk to a prosecutor handling a case against one of Hower's cooperating witnesses. Were there such a conversation, it may have occurred between August 4 and August 11. The beneficial plea agreement and personal recognizance bond suggest that there was contact between Hower and the Denver prosecutor that was not disclosed.

After his release on August 11, the prosecution put Harris in the Witness Protection Program. The prosecution paid for Harris to stay in a hotel and paid for

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[157] This plea agreement may be the result of Harris informing Hower the day before that he was willing to enter a guilty plea in the Aurora domestic violence case in exchange for probation.

[158] Pursuant to C.R.S. § 18-1.3-201(4)(a)(I), a defendant with two prior felony convictions is ineligible for probation unless the prosecutor, with approval of the court, agrees to waive the prohibition.

his meals. The cost of the hotel was $1,264 and the cost of his meals was $285.89. SOPC-EX.D-1594. This arrangement continued until September 21, the day before he was arrested on an Aurora probation violation warrant. These expenditures were disclosed.

During his July 19 interview, Harris informed Fronapfel that he wanted to work with the APD narcotics unit. Fronapfel notified Officer David Gallegos (Gallegos) of Harris's request. Gallegos was assigned to the gang unit at that time and was assisting Fronapfel with this case due to suspected gang involvement in the Lowry Park shootings. Gallegos recalled signing Harris up as a confidential informant but could not recall using Harris in any undercover narcotics operations.[159] Per the APD's policy, all confidential informants are signed up through the narcotics unit. Harris selected Marcus Atkins as his informant name.[160]

At some point on or before August 25, Gallegos alerted Mehl that Harris had information on a homicide that occurred in April 2006 at 1032 Dayton Street.[161] Mehl was the lead detective on that homicide investigation. On August 25, Mehl and Detective Joel Emeson (Emeson) interviewed Harris. Harris explained that a man in his pod confessed to committing the 1032 Dayton homicide. Harris did not know the name of the man but picked the primary suspect out of a lineup. Mehl did not offer and Harris did not request a benefit for his information. Mehl submitted the 1032 Dayton homicide investigation for filing of charges, but the case was rejected for unknown reasons. Harris's involvement in the investigation

[159] The APD purged its confidential informant records for Harris in February 2011 due to inactivity.

[160] Per Gallegos, whenever the APD designates someone as an informant that person must select an alias name to protect her/his true identity.

[161] This homicide is not related to the killing of Marshall-Fields and Wolfe.

of the 1032 Dayton homicide was not disclosed. The prosecution's decision not to authorize charges was also not disclosed.

On August 30, Gallegos witnessed the payment of $200 cash to Harris under the name Marcus Atkins.[162] The payment documentation[163] reflects that Harris was paid $200 for information provided to the Major Crimes Unit (MCU), but it does not indicate if it was for his information on the Dayton Street homicides, the Grier attempted murder, or the 1032 Dayton homicide. Based on the documentation, Gallegos was confident he witnessed the payment but otherwise had no memory of the payment.[164] Harris believed he received the money because he was a protected witness. The prosecutors were unaware that Harris was a confidential informant, that he assumed an alias, or that he was paid $200. Accordingly, none of this information was disclosed.

In early September, Harris's probation officer for his Aurora case sought to revoke his probation. On September 22, Harris was arrested at his hotel. On September 25, he was released on a personal recognizance bond. It is unclear to the court whether this bond was granted for his September 22 arrest.

On October 5, Harris failed to appear on his Denver drug case for sentencing.

By November 17, Harris was in jail because he violated his Aurora probation again and because he failed to appear for his Denver sentencing. Having missed his sentencing, Harris, per the plea agreement, forfeited the waiver of the two-felony rule.

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[162] Although the APD informant file for Harris was purged in February 2011, there were two financial records found in the APD's financial records that reflect this payment.

[163] SOPC.EX.D-1373.

[164] The APD procedure requires the payment of money to a confidential informant by one officer to be witnessed by another officer.

While in jail on November 17, Harris was transported to the district attorney's office and spoke to Fronapfel.[165] Fronapfel took notes during the meeting but could not recall the purpose of the meeting or what was actually discussed.[166] Fronapfel's notes were not disclosed. The notes contain the following references:

- Harris's knowledge of a possible gang-related double homicide in Denver involving two women who were stabbed to death;
- a person Harris knew as "Lil Dread";
- the killing of Broncos football player Darrent Williams;
- Harris's employment at the Haselden construction company;
- Harris's Aurora Probation Officer being Mary Chappell;
- Harris's witness protection being based on more than the Ray case;
- a reference to Hower's name;
- a reference to probation being concurrent with Denver that read: "Probation con-current [sic] w/Denver.";
- Harris being a student at Everest College;
- Harris being subpoenaed in the Ray case;
- the Grier case with a parenthetical reference to Miller;[167]
- the 1032 Dayton homicide with a parenthetical reference to lineups and to Emeson;

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[165] Owens argues there were numerous undisclosed meetings between Harris and the prosecutors or the police. Other than Harris's testimony that he thinks he met with Fronapfel three or four times after July 19, 2006, and a document indicating there might have been another meeting with Harris on September 17, 2006, at the district attorney's office, Owens presented no other evidence that there were several undisclosed meetings.

[166] SOPC.EX.D-826.

[167] This is an apparent reference to Detective Warren Miller who was the lead investigator of the Grier attempted murder investigation.

- a reference to Mehl's name; and
- that Harris was wired for a buy at a barbershop with a reference to Gallegos's name.

A week later on November 25, Harris wrote a letter to Hower.[168] The letter was disclosed. In the letter, Harris wrote about the following:

- he had assisted the police and the district attorney's office on three separate homicides;
- he had assisted the APD with drug stings and investigations, including wearing a wire;
- due to a misunderstanding between municipal probation and county probation, the Witness Protection Program abandoned him;
- the Witness Protection Program did not view him as an important witness because the program was unaware of his assistance on murder cases in addition to the Ray case and was also unaware of the other assistance he had provided to the APD;
- all he ever wanted was to do the right thing, probation in the Aurora and Denver cases, and protection;
- he has not been in any more trouble;
- he wants what was promised to him;
- Fronapfel is doing all she can;
- Emerson will help him;[169]
- he would be very grateful if Hower would speak to someone in the Denver District Attorney's office on his behalf; and

[168] SOPC.EX.P-72.

[169] This is an apparent reference to Emeson.

- he hopes to be of further assistance to Hower and the district attorney's office in the future.

Harris testified in this case at a pretrial motions hearing on December 22. The following topics were addressed:

- he had tried to provide information to the police approximately 18 months prior to July 19, 2006, on an unrelated matter, but the police never responded;
- he had two felony convictions;
- whether his Illinois theft conviction would be a felony in Colorado;
- while providing his information to Fronapfel on July 19, he had no expectation of assistance with his pending Denver drug case;
- his plea agreement in the Denver drug case included a waiver of the two-felony rule and a personal recognizance bond;
- his plea agreement in the Denver drug case included his acknowledgement that by failing to appear for sentencing on the Denver drug case, he lost the possibility of a probationary sentence based on a waiver of the two-felony rule;
- his acknowledgement that he is not always a truthful person but tries to be truthful when speaking to the police;
- he had never been a compensated informant for any law enforcement agency;
- when he first spoke to Fronapfel on July 19, she told him that she could not make him any promises but said she would make his cooperation known to the prosecutor in the Aurora case;
- he spoke to Fronapfel three or four times but only once about what Ray told him;

- his request for a personal recognizance bond on July 19 was not a precondition to disclosing his information about what Ray and Grier told him;
- he had not seen any newspaper articles about the Dayton Street homicides; and
- the only newspaper article he was aware of was an article Ray cut out of another inmate's newspaper, and he never read the article.

Mot. Hrg Tr. 39-68 (Dec. 22, 2006).

(b) 2007

Having failed to appear on October 5, 2006, for sentencing on his Denver drug case, Harris was arrested and brought before the court on January 5, 2007.

On January 7, Harris wrote another letter to the prosecution seeking assistance from Hower with his Denver drug case. Harris asked Hower to recommend that he be considered for drug treatment while on probation or in community corrections. Fronapfel responded to this letter on January 26 indicating she would ask Hower to help Harris. Although initially sentenced to community corrections, Harris was ultimately sentenced on March 23 to two years in the DOC with two years of parole.

The court issued Order (SO) No. 4 pertaining to SO-53 on February 2. The court denied the motion but required the prosecution to disclose whether any of the nine witnesses listed in the motion, including Harris, was a professional informant. According to the Order, a professional informant was a person who regularly cooperated with law enforcement with the expectation of receiving something in return. The Order further stated that if the prosecution became aware of this type of information it should be disclosed immediately, but the prosecution was not

required to conduct a statewide search for informant information on the listed witnesses.

On February 28, Harris was taken to Aurora Municipal Court on his pending probation violation. Harris admitted the violation. Fronapfel was subpoenaed by Harris's attorney and advised the judge of Harris's cooperation in this case. He was sentenced to 423 days in jail, but the jail sentence was suspended on condition that he successfully complete his probation. Fronapfel's assistance was disclosed.[170]

On May 1, Harris wrote another letter to the prosecution stating that he had information on other homicide cases. This letter was disclosed.

On June 11 during a pretrial hearing and while serving his prison sentence in the Denver drug case, Harris testified as follows:

- he met with Fronapfel on several occasions;
- he denied that Fronapfel promised him on July 19, 2006, that Hower would assist him with the Denver drug case;
- he insisted on a personal recognizance bond when he first spoke to the police on July 19, 2006, because he was concerned for his safety;
- he waited approximately 40 minutes for the personal recognizance bond to be approved before disclosing his information about Ray;
- Hower was only present on July 19, 2006, to arrange the personal recognizance bond;
- he received assistance from the Witness Protection Program in the form of a free hotel room that he lost when arrested in September 2006 for a probation violation on his Aurora case;

[170] SOPC.EX.D-1568.

- he acknowledged that his November 22, 2006, January 7, 2007, and May 1, 2007, letters to the prosecution sought assistance with his Denver drug case and his Aurora case;
- he acknowledged Fronapfel's January 26, 2007, letter wherein she stated she would ask Hower to help in Harris's Denver drug case;
- he acknowledged his May 1, 2007, letter to Fronapfel wherein he stated he had information on a double homicide in Denver and on the murder of Darrent Williams;
- he did not know if the prosecution or the police provided favorable information to the Denver court before his sentence was imposed;
- he acknowledged Fronapfel appeared at his sentencing hearing for the Aurora case and informed the judge of his cooperation;
- the Denver prosecutor waived the two-felony rule so Harris would be eligible for probation;
- he failed to appear for sentencing in his Denver drug case, which resulted in a prison sentence;
- he acknowledged his time in prison for his Arapahoe County 1990 case;
- he had six felony convictions, including an Illinois theft conviction;
- he was a drug addict;
- he became a member of the Gangster Disciples street gang in Chicago because family members were already in the gang;
- he did not know anyone named Rio, but Ray had mentioned the name; and
- he was an informant for Fronapfel on this case and four other homicide cases.

Mot. Hrg Tr. 80-148 (June 11, 2007).

(c) 2008

Harris remained in prison on his Denver drug case until early March 2008 when he was released on parole. When he was released, he told the prosecution that he did not have any money. The prosecution paid for a hotel room and gave him grocery store gift cards for food. Harris registered at the hotel under his confidential informant name. This arrangement lasted from March 19 to November 12. The expenditures totaled $7,801.69 for the hotel and $3,029.78 for the gift cards. SOPC.EX.D-1594. These expenditures for Harris were not disclosed.

On March 19, Harris appeared before the Aurora Municipal Court on a probation violation. The judge intended to impose the 423-day jail sentence but changed his mind when Fronapfel advised the court of Harris's cooperation in this case. The court suspended the jail sentence for another year on the condition of Harris's continued cooperation with the prosecution in this case. Fronapfel disclosed her intervention in a report that was disclosed shortly before trial. Harris never successfully completed his probationary sentence.

The prosecution called Harris to testify at trial on April 30. He testified about the information he received from Ray while they were housed together in the ACDF during the summer of 2006. The following topics of impeachment were addressed during Harris's cross-examination:

- he was on parole;
- he was a domestic violence offender;
- he used the information he learned from Ray to negotiate his release from jail on a personal recognizance bond;

- when he was released on a personal recognizance bond in 2006, the prosecution paid for his hotel and food for approximately three weeks;
- he had pending criminal charges in Denver and Aurora when he cooperated in this case;
- he had multiple felony convictions and some involved violence;
- the Denver prosecutor could have but did not file habitual charges for his pending Denver drug case;
- he provided information on multiple homicide investigations;
- he made undercover drug purchases for the APD;
- Hower spoke to the Denver prosecutor about Harris's drug case;
- Fronapfel spoke to the Aurora municipal judge about his cooperation; and
- he benefitted from Hower's and Fronapfel's efforts.

Guilt Phase Tr. 90-135 (Apr. 30, 2008 a.m.).

On May 6, the prosecution called Harris to testify in its rebuttal case. The prosecution called Harris to rebut Phillip Huntington's (Huntington) testimony. Huntington testified that Carter told him that Todd was paid $10,000 to commit the murders. Harris testified that Ray told him that he and his cohorts could not celebrate until the person who was present when Ray received notice of the murders left. Guilt Phase Tr. 117:19-25; 118; 119:1-23 (May 6, 2008 a.m.). According to Todd, Todd himself was that person.

Shortly after the witness protection funds stopped in November, Harris was charged with an aggravated robbery that eventually resulted in a lengthy prison sentence.

(d) 2009

On April 2, 2009, Fronapfel advised the Aurora Municipal Court judge that Harris had been cooperative but was serving a lengthy prison sentence. Based on that information, and possibly by consideration of C.R.S. § 18-1.3-501(1)(c) (misdemeanor sentences should generally be concurrent if the defendant is serving a prison sentence), the court imposed the 423 days in jail, ordered it to run concurrent to Harris's prison sentence, and closed the case.[171]

(e) 2014

Harris testified during the post-conviction hearing that:

- he might have been high when he came to court to testify at trial in 2008;
- while he was out of custody in 2008, he was not high every day but he was a drug addict;
- he participated in no more than two undercover operations for the APD and one involved a barbershop;[172]
- the undercover operation at the barbershop was unsuccessful;
- he was given $200 but does not recall what the money was spent on;
- he received the $200 from the Witness Protection Program;
- he received $200 as part of witness protection and not as an inducement for his testimony in this case;
- he did not recall ever being asked by any prosecutor if he was working with the APD;

[171] SOPC.EX.D-1566.

[172] This barbershop was not T's Barbershop.

- he asked Fronapfel on July 19, 2006, to refer him to the narcotics unit and someone from that unit contacted him, and the person who contacted him might have been Gallegos;
- while in jail in 2006, his wife told him that the police told her they were investigating him for a stolen car and a drug case and there was the possibility of filing career criminal charges against him;
- he asked Fronapfel on July 19, 2006, to look into a possible investigation of his involvement with a stolen car and a drug case and she never told him such investigations existed;
- he started using drugs as soon as he was released from jail in August 2006;
- he signed a receipt for $200 using the name Marcus Atkins;
- the name Marcus Atkins was given to him by the Witness Protection Program;
- he does not recall if the prosecution promised that his Denver probation would be concurrent to his probation in Aurora;
- he provided information on the 1032 Dayton case and participated in an undercover narcotics purchase at a barbershop;
- he would have testified even if his requests for assistance on July 19, 2006, were denied;
- his trial testimony was truthful;
- during his July 19, 2006, interview, he commented that Ray's statement about having a videotape as an alibi was not in any newspapers;

- during his interviews with post-conviction counsel, Harris expressed concern that some of his information may have come from newspaper articles shown to him during the interview;
- upon reflection, he was concerned with the accuracy of his trial testimony because this is a death penalty case;
- after further reflection, he was convinced that his information did not come from newspaper articles;
- during his interviews with post-conviction counsel, he felt like they went over the same topics repeatedly as if post-conviction counsel were trying to convince him that his trial testimony had been influenced by his drug usage and that he was a professional informant;
- he did not recall telling post-conviction counsel that his Ray information came from newspaper articles or that he was paid $200 for his Ray information, but if he made those statements, he was incorrect;
- he did not ask the prosecutors to arrange for concurrent probation;
- when he provided information to the APD on the various homicides, he did not view himself as a confidential informant;
- when he was wired for the undercover buy, he was acting as an undercover informant;
- he was not paid $200 for the undercover buy because it was unsuccessful;
- he did not see or hear reports on the television or radio about Ray's involvement in homicides;
- when he was interviewed by Fronapfel on July 19, 2006, he was still in withdrawal from his drug addiction;

- after July 19, 2006, he was never charged with stealing a car or drug possession and was never told by the police or prosecutors that he was being considered for career criminal charges;
- while out of custody, he did not tell any prosecutor or police officer that he was using drugs;
- when Harris met with prosecutors or police officers, he was not visibly impaired from drug usage;
- when Harris came to court to testify, no one asked him if he was high on drugs; and
- his drug use did not affect the truthfulness of his testimony.

PC Hrg Tr. 22-216 (Sept. 29, 2014).

Mehl testified during the post-conviction hearing that Harris's information was included in the affidavit he submitted to the prosecution seeking charges against the primary suspect for the 1032 Dayton homicide. The prosecution refused to file charges. According to Mehl, the case had a number of problems, but Harris's information was not one of them. Mehl considered Harris to be a witness in the 1032 Dayton homicide case and not a confidential informant.

Likewise, Mehl considered Harris to be a witness in the Grier case. Mehl testified that Harris's information on Grier was not disclosed to the prosecutors or Owens's trial team. Mehl explained that Harris's information on Grier was included in the affidavit submitted to the prosecution seeking charges against Grier. Mehl added that Grier was charged and eventually entered a guilty plea.

On October 9, Hower testified that his practice was to notify a prosecutor in another jurisdiction, who had a pending case against a cooperating witness in a case Hower was prosecuting, of the witness's cooperation. According to Hower, his purpose was to allow the prosecutor to consider the witness's cooperation when

resolving the case, but he was always careful not to ask for any benefit. He did not disclose this practice. Hower also testified that when he called the Aurora City Attorney's office for Harris on July 19, 2006, to ask if the prosecutor would agree to a personal recognizance bond, he probably advised the prosecutor that Harris was cooperating in this case. According to Hower, he would not have suggested that any other type of benefit should be granted to Harris because of his cooperation. Hower testified he was confident that he also contacted the prosecutor in Harris's Denver drug case and advised her of Harris's cooperation.

(f) 2015

Owens recalled Harris to testify on a motion to supplement SOPC-163 in the post-conviction hearing on March 6, 2015. Harris testified as follows:

- when asked at trial about being placed in a hotel by the government, his answers were based on his 2006 experience even though he did not know if the attorney was limiting his question to 2006;
- he was employed from March to November 2008 but remained in the hotel while he tried to find a permanent residence;
- the assistance provided to him by the prosecution was not a condition for his continued cooperation or for his trial testimony;
- he did not recall Fronapfel or Hower promising that he would be sentenced to probation on his Denver drug case or that his Aurora probation would run concurrent to any probationary sentence he received in Denver;
- he did not cooperate in this case to avoid being jailed;
- he never asked Fronapfel to intercede with the Aurora municipal judge;

- his cooperation in this case was not contingent on Fronapfel convincing the Aurora judge on February 28, 2007, to suspend the 423-day jail sentence.

Hower testified that he has very strong feelings about disclosing discovery to the defense in every case. In his view, impeachment evidence includes any request a witness makes for a benefit. He was not asked why he failed to disclose his practice of alerting prosecutors in other jurisdictions about cooperating witnesses who had pending cases.

ii. Promise of Probation

(a) Parties' Positions

Owens contends the prosecution did not disclose that it promised Harris probation for his Denver drug case and that it would run concurrent to his probation on his Aurora case.

The prosecution responds that Owens's trial team was aware Harris received this additional benefit because Harris was cross-examined about it at trial.

(b) Findings of Fact

The findings of fact in part IV.D.3.e.i of this Order are incorporated herein as though fully set forth.

(c) Analysis

Fronapfel's note, which reads "Probation con-current [sic] w/Denver," is favorable evidence only if Harris was actually promised a probationary sentence. Owens argues Fronapfel's note contains an inference that Harris was promised probation in either his Denver drug case or his Aurora case or possibly both. The inference is strained because a logical reading of the note is that someone promised Harris probation for his Aurora case and that it would be concurrent to his Denver probation. Harris testified during the post-conviction hearing that he did not recall

if the prosecution promised that his Denver probation would be concurrent to his Aurora probation. Later in his testimony, he said he did not recall such a promise but was sure that he did not request probation on his Denver case. Other than Harris's inconclusive testimony, Owens did not present any evidence that Hower or Fronapfel promised Harris that he would be sentenced to probation on his Aurora case and that it would run concurrent to any probationary sentence he received in his Denver drug case. Additionally, there is no evidence that Harris asked for probation in exchange for his cooperation in this case. It is especially significant that Harris never claimed in his letters that Hower or Fronapfel promised him probation. Certainly if such a promise was made, one would expect Harris to demand that the promise be honored.

The fact that Harris came close to obtaining concurrent probation in his Aurora and Denver cases also does not mean that he was promised probation. Harris was placed on probation in his Aurora case following his July 20, 2006, guilty plea. He appeared in Denver on August 11 and learned he would be eligible for probation in that case. Unbeknownst to Harris, Hower may have affected the Denver prosecutor's decision by telling the prosecutor of Harris's cooperation. But there is no evidence that Hower requested a probationary sentence for Harris in order to fulfill a promise or otherwise.

Fronapfel and Harris do not recall the November 17, 2006, meeting, and Fronapfel does not recall why she wrote "Hower" or "concurrent probation with Denver." She does not recall why the meeting was held at the district attorney's office. According to Hower, he should have been notified of such a meeting but does not recall ever being notified and denies that he was present. Harris's November 25, 2006, letter, only eight days after the meeting, does not indicate

Hower was present. Based on this record, it would not be reasonable to infer that Hower promised Harris probation for his Aurora case.

(d) Conclusion

The court finds the prosecution did not promise Harris probation. Thus, the evidence is not favorable to Owens. In light of this finding, the court concludes the evidence is not relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence based on his argument that the prosecution promised Harris probation is **Denied**.

iii. Paid Informant

(a) Parties' Positions

Owens contends the prosecution did not disclose that Harris was a paid informant for the APD and provided unreliable information.

The prosecution responds that Owens's trial team was aware of Harris's assistance with other APD investigations.

(b) Findings of Fact

The findings of fact in part IV.D.3.e.i of this Order are incorporated herein as though fully set forth.

(c) Analysis

After July 19, 2006, Harris became a confidential informant and was paid $200 by the APD for the information he provided to the MCU. This information is favorable because Owens's trial team could have used it to impeach Harris's claim that he was a cooperating witness who came forward without an expectation of favor or gain.

Owens did not prove that Harris provided unreliable information to the APD or that the prosecution declined to file charges in the 1032 Dayton homicide case

due to concerns with Harris's information. There is also no evidence that Harris's failed undercover narcotics operation at the barbershop was due to unreliable information from Harris. Thus, these instances are not favorable to Owens.

Harris put the prosecution on notice of his continuing cooperation with the APD when he wrote in his November 25, 2006, letter that he assisted the APD in three separate homicide investigations. Pursuant to Order (SO) No. 4, the prosecution was required to disclose whether Harris was a professional informant. According to the Order, a professional informant was a person who regularly cooperated with law enforcement with the expectation of receiving something in return. Harris's letter should have prompted the prosecution to inquire of the APD about Harris's status. *See Kyles*, 514 U.S. at 437 ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police"). The prosecution did not inquire of the APD and thus failed to disclose that Harris was an APD informant and was paid $200 for providing information.

(d) Conclusion

Owens has not shown that Harris provided unreliable information to the APD. The court finds Harris's status as a paid confidential informant for the APD was favorable evidence, which the prosecution failed to disclose. In light of these findings, the court concludes the evidence is relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. *See* part IV.D.4 of this Order.

iv. Arapahoe County Case 90CR404 and the Chronic Offender Program

(a) Parties' Positions

Owens contends the prosecution failed to disclose its file for Harris's 1990 case,[173] which shows that the prosecution considered Harris to be a career criminal.

The prosecution did not respond to this claim in writing but contested the evidence during the post-conviction hearing.

(b) Findings of Fact

Harris's criminal history stretches back to 1979. From 1979 to 1984, Harris had numerous police contacts in Chicago for suspected involvement in crimes ranging from driving with a suspended license to armed robbery and aggravated assault. He was convicted in Illinois in 1981 of unlawful use of a weapon, and he was convicted in 1984 of theft from a person. In Colorado, Harris had 57 police contacts from 1986 to November 2007. The contacts were for suspected involvement in crimes such as false reporting, burglary, armed robbery, and assault. Harris was convicted in 1988 of assault and in 1990 of armed robbery and two other felonies. Harris's criminal records also list 23 aliases, eight false social security numbers, and seven false dates of birth. The prosecution disclosed these records.

By 1990, Harris's criminal history was so aggravated that the prosecution designated him as a chronic offender and sought an aggravated prison sentence of 25 years for the aggravated robbery conviction in his 1990 case. Designation as a chronic offender meant the district attorney's office would aggressively prosecute the defendant and seek the maximum sentence. Harris's criminal record was

[173] Arapahoe County case 90CR404.

documented in the district attorney's file for his 1990 case. The case file shows Hower was involved in Harris's case because he was in charge of the chronic offender program at that time. It is unclear whether Hower prosecuted Harris or if he directed the assigned prosecutor to pursue the maximum sentence. After a bench trial, Harris was found guilty of aggravated robbery and sentenced to 18 years in prison. He was released from prison sometime in 2005.

(c) Analysis

It is not clear how it would be admissible that the prosecution, more than two decades earlier, had considered Harris a chronic offender. But if a viable theory of admissibility could be found, this would be favorable evidence. Owens's trial team could then have used this information to demonstrate the prosecution's willingness to rely on a witness with a lengthy and serious criminal history.

The prosecution did not disclose its file for Harris's 1990 case or otherwise inform Owens's trial team that it considered Harris a chronic offender in 1990.

(d) Conclusion

The court concludes the prosecution's characterization of Harris as a chronic offender, were it admissible evidence, would be favorable evidence. In light of these findings, the court concludes it is relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. *See* part IV.D.4 of this Order.

v. Newspaper Articles as the Source of Information

(a) Parties' Positions

Owens contends the prosecution failed to disclose that Harris obtained the information he testified at trial about from newspaper articles and other media reports.

The prosecution did not respond to this claim in writing but contested the claim during the post-conviction hearing.

(b) Findings of Fact

The findings of fact in part IV.D.3.e.i of this Order are incorporated herein as though fully set forth.

(c) Analysis

Harris testified during a motions hearing on December 22, 2006, that he did not obtain information about this case from newspaper articles. Harris maintained that position until he began meeting with Owens's post-conviction counsel. Harris testified during the post-conviction hearings that post-conviction counsel's repeated suggestions that he may have obtained the information from newspapers caused him to begin to question himself about the source of his information. He explained that he is aware of the seriousness of this case and would not want to be responsible for a man being punished for something he had not done. Harris testified that after additional reflection on the issue he was convinced that his information came from Ray. He also reiterated his testimony from pretrial hearings that he never read any newspaper articles about Ray's case.

Harris was questioned extensively during the post-conviction evidentiary hearing. Owens's post-conviction counsel could not verify that Harris had read any newspaper articles about the Dayton Street homicides before becoming a cooperating witness in this case. Nor was there anything about his drug-addicted lifestyle at that time that suggested that he was regularly reading newspapers. Owens failed to prove that Harris obtained information from newspapers.

(d) Conclusion

Owens failed to prove that Harris obtained the inculpatory information attributable to Ray from newspaper articles. Thus, the court concludes it is not relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence

based on his argument that Harris acquired information from newspaper articles is **Denied**.

vi. No-File on Car Theft, Narcotics Investigations, and Drug Use

(a) Parties' Positions

Owens contends the prosecution did not disclose that:

- the APD was investigating Harris for car theft and possession of narcotics when Harris became a cooperating witness in this case;
- the APD was considering filing career criminal charges against him;
- the prosecution quashed or otherwise interfered with these investigations; and
- Harris was using drugs after his release from prison in March 2008 while he was staying in a hotel paid for by the prosecution and while he was testifying in this case.

The prosecution contested these allegations during the post-conviction hearing.

(b) Findings of Fact

While incarcerated in the ACDF, Harris's telephone conversations were recorded but were not disclosed. During one recorded phone call, Harris's wife told him that police officers recently told her that they were investigating Harris for a stolen car and drug possession and were considering filing career criminal charges against him. This caused Harris to ask Fronapfel on July 19, 2006, to find out if he was being investigated for these crimes. Fronapfel checked and found no pending investigations. It is unclear whether Fronapfel ever told Harris that she did not find any pending investigations. Harris testified during the post-conviction hearing that Fronapfel did not confirm whether he was being investigated so he

took that to mean that there were no such investigations. Owens did not present any information indicating there were such pending investigations of Harris in 2006.[174]

Harris told post-conviction counsel that he used alcohol and cocaine after his release on parole in 2008 and during his testimony at trial. Harris testified during the post-conviction hearing that he was not high every day during this time period. He also testified that he never told any police officer or any prosecutor that he was using drugs.

Harris testified that he felt post-conviction counsel repeatedly asked him about being high during his trial testimony in an effort to convince him that he must have been high. According to Harris, his drug use did not affect the truthfulness of his trial testimony.

(c) Analysis

Owens presented evidence showing that Harris was using drugs around the time he testified in this case. The evidence consisted of Harris's post-conviction testimony that he may have been high when he testified at trial. Harris's post-conviction testimony that he never told a police officer or prosecutor in 2008 that he was using drugs was unrebutted.

Likewise, Owens did not prove that Harris was being investigated for car theft or drug possession in 2006. He also failed to prove the prosecution quashed any investigation of Harris concerning those matters.

(d) Conclusion

Owens failed to prove that the prosecution knew Harris was using narcotics in 2008, that there were pending investigations of Harris in 2006, or that the

[174] Owens's argument is premised on the truthfulness of Harris's wife's statements about what the police said to her. Owens did not present any evidence to corroborate her statements.

prosecution or police quashed any such investigations. Thus, the court concludes none of this evidence is relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence is **Denied**.

vii. Cooperation with Other Aurora Homicide Investigations[175]

(a) Parties' Positions

Owens contends that the prosecution did not disclose that Harris provided information on two Aurora homicide investigations in addition to providing information concerning the Dayton Street homicides.

The prosecution contested this claim during the post-conviction hearing.

(b) Findings of Fact

The findings of fact in part IV.D.3.e.i of this Order are incorporated herein as though fully set forth.

(c) Analysis

The evidence that Harris provided assistance to the APD on the Grier attempted homicide and the 1032 Dayton homicide is favorable, because Owens's trial team could have used it to show the extent of Harris's relationship with the APD.

It is a reasonable inference that Fronapfel was aware that Harris had some connection to the 1032 Dayton homicide investigation based on her November 17, 2006 notes. Thus, the prosecution was responsible for disclosing Fronapfel's information but did not do so. *See* Crim. P. 16(I)(a)(3) (the prosecutor's discovery obligations apply "to material and information in the possession or control of . . .

[175] SOPC-262, Motion to Supplement SOPC-163, and SOPC-289, Motion to Supplement and Amend SOPC-163.

any others who have participated in the investigation . . . of the case and who either regularly report, or with reference to the particular case have reported" to the prosecutor's office).

(d) Conclusion

The court finds Harris's cooperation on two other APD homicide investigations was favorable evidence to Owens. The court further finds that the prosecution failed to disclose Harris's cooperation in those cases. In light of these findings, the court concludes the evidence is relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. *See* part IV.D.4 of this Order.

viii. Assistance with Denver and Aurora Cases[176]

(a) Parties' Positions

Owens contends that the prosecution did not disclose that it interceded for Harris in his pending criminal cases.

The prosecution responds that it disclosed the essence of its assistance to Harris on his pending criminal cases.

(b) Findings of Fact

The findings of fact in part IV.D.3.e.i of this Order are incorporated herein as though fully set forth.

(c) Analysis

The evidence that Hower advised the prosecutors in Harris's pending criminal cases of his cooperation in this case is favorable evidence because it could have been used to impeach Harris by showing bias or interests.

[176] SOPC-273, Motion to Supplement SOPC-163, and SOPC-289, Motion to Supplement and Amend SOPC-163.

Owens also argues that Hower's undisclosed conversations with the Denver and Aurora prosecutors were favorable because it shows there was a tacit agreement between Hower and Harris on July 19, 2006, to obtain probation for him in the Denver drug case. The evidence does not support this argument.

Owens relies on *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009). The facts and circumstances of *Workman* are distinguishable. In *Workman*, there was strong corroborating evidence to support the recanting witness's claim that he and the prosecutor had a tacit agreement that after the trial the prosecutor would support the witness's parole application. The prosecutor elicited testimony from the witness that no benefits had been sought or offered. *Douglas v. Workman*, 560 F.3d 1156, 1163 (10th Cir. 2009). On cross-examination, the witness denied having any expectation that the prosecutor would support his parole application. *Id.* The day after the jury returned its death verdict, the prosecutor wrote a letter supporting the witness's parole application. *Id.* at 1165. The Circuit Court found that during a pretrial meeting the prosecutor and witness reached a tacit agreement that the prosecutor would write a letter after trial supporting the witness's application for parole. *Id.* at 1182-86. The undisclosed tacit agreement was particularly prejudicial in that case because the witness was the only eyewitness to the murder. *Id.* at 1183. According to *Workman*, the prosecution is obligated to disclose tacit agreements that involve a potential or actual benefit to a witness. *Id.* at 1185. In contrast to *Workman*'s wealth of circumstantial evidence that there was a tacit agreement between the prosecutor and witness, there is no evidence of a tacit agreement between Hower and Harris.

First, there is no evidence that Hower promised Harris that he would be sentenced to probation in his Denver drug case during their first meeting on July 19, 2006. That interview was recorded, and the transcript of that interview does

not support a finding that Hower and Harris reached a tacit agreement. Second, Hower's contact with the Denver prosecutor does not demonstrate there was a tacit agreement. Third, Harris sought assistance in his November 25, 2006, and January 7, 2007, letters to Hower but did not mention any tacit understanding or promise of probation. Harris would have mentioned the tacit understanding in his letters asking Hower to intercede if there had been a tacit agreement. Fourth, neither Hower nor Harris testified during the post-conviction hearing that they had a tacit agreement. Accordingly, there is no evidentiary basis to determine the favorability of such evidence.

The prosecution did not disclose Hower's practice of alerting prosecutors in other jurisdictions of a witness's cooperation or that he followed this practice by alerting the Aurora and Denver prosecutors of Harris's cooperation.[177]

(d) Conclusion

The court finds that Hower's contact with the prosecutors on Harris's Denver and Aurora cases was favorable evidence, which the prosecution failed to disclose. In light of these findings, the court concludes the evidence is relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. *See* part IV.D.4 of this Order.

ix. Financial Assistance[178]

(a) Parties' Positions

Owens contends the prosecution failed to disclose that Harris received financial assistance from the Witness Protection Program in 2008.

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[177] The prosecution asserted in its response to SOPC-289 that Hower disclosed this information on May 16, 2007. The prosecution did not introduce any evidence during the post-conviction hearing to support its assertion. Neither the transcript nor the minute order for that date supports the assertion.

[178] SOPC-289, Motion to Supplement and Amend SOPC-163.

The prosecution concedes that the financial assistance it provided to Harris in 2008 was not disclosed until after the trial concluded. The prosecution asserts that it provided financial assistance to Harris in order to ensure his safety.

(b) Findings of Fact

The findings of fact in part IV.D.3.e.i of this Order are incorporated herein as though fully set forth.[179]

(c) Analysis

The prosecution spent over $10,000 to house and feed Harris in 2008. That is favorable evidence because it suggests that Harris was obligated to the prosecution. This obligation could have been used to impeach Harris's bias and interest because it suggests he was motivated to satisfy the prosecution.

The prosecution conceded that the 2008 financial assistance was not disclosed in a timely manner.

(d) Conclusion

The court finds the prosecution failed to disclose the financial assistance it provided to Harris in 2008, which was favorable evidence to Owens. In light of these findings, the court concludes the evidence is relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. *See* part IV.D.4 of this Order.

[179] Attached to SOPC-289 as Appendix A is an email from a victim-witness advocate informing the prosecution team that Harris was approved for $20 per diem. Owens did not introduce this email into evidence during the post-conviction hearing and did not elicit testimony from Hower, Harris, or the victim-witness advocate about this email. Thus, there is no evidentiary basis on which the court can consider this email.

f. Brent Harrison

i. Incident in Fort Collins[180]

(a) Parties' Positions

Owens contends the prosecution failed to disclose that Harrison was involved in a burglary in Fort Collins in May 2005.

The prosecution responds that it was not aware of the alleged burglary incident and therefore was not obligated to disclose it.

(b) Findings of Fact

Shortly after the Dayton Street homicides, Fronapfel contacted the Colorado State University Police Department and the Fort Collins Police Department. She inquired about any reports of threats made to Marshall-Fields. She did not inquire about an alleged burglary involving Marshall-Fields or Harrison in May 2005.

During the post-conviction hearing, Fronapfel testified that she was aware of an alleged burglary in Fort Collins in which Marshall-Fields and Harrison were suspects. She did not testify she was aware of the alleged burglary prior to Owens's trial. Later in her testimony, Fronapfel clarified that she learned of Harrison's purported involvement in an alleged burglary in Fort Collins after Owens subpoenaed the Fort Collins Police Department in 2009 for records associated with the alleged burglary. Likewise, T. Wilson was unaware of the alleged burglary prior to Owens's Dayton Street trial.

Owens did not present any evidence during the post-conviction hearing concerning the facts of the alleged burglary.

[180] SOPC-272, Consolidated Motion to Amend SOPC-163 to Include an Additional Claim for Post-Conviction Relief.

(c) Analysis

Neither Fronapfel nor T. Wilson was aware of Harrison's purported involvement in an alleged burglary in Fort Collins in May 2005, and there is no evidence proving that the prosecution was aware of the incident.

(d) Conclusion

The court finds the prosecution did not suppress evidence of Harrison's purported involvement in an alleged burglary. In light of that finding, the court concludes the evidence is not relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence based on his argument that the prosecution failed to disclose information concerning Harrison is **Denied**.

ii. Assistance on Denver Case[181]

(a) Parties' Positions

Owens contends the prosecution failed to disclose that Harrison asked the prosecution to assist him with vacating his warrant and dismissing his probation violation in his Denver case.

The prosecution responds that it disclosed to the defense its contact with the Denver prosecutor on Harrison's case and disclosed that Harrison's case had been dismissed.

(b) Findings of Fact

On September 18, 2006, a victim-witness advocate sent an email to the prosecution team asking whether Harrison's warrant in his Denver case had been handled:

> [Harrison] also mentioned that Jan [Lishman] told him that she took care of something with his Denver case and

[181] SOPC-289, Motion to Supplement and Amend SOPC-163.

> "it was handled". He said his dad checked and he how [sic] has a warrant on that case. He wants to know why it wasn't handled like Jan said it was. Anyone know anything about this?

SOPC.EX.D-1563. Hower's response to that email was not admitted into evidence during the post-conviction hearing.

On May 15, 2007, Harrison's warrant was vacated and his probation was terminated. Hower's May 16, 2007, memo to Owens's trial team about Harrison's Denver case was not admitted into evidence.

During the post-conviction hearing, Harrison recalled being charged with criminal mischief in Denver but did not recall having a warrant on that case. Harrison also did not recall talking with Hower or a victim-witness advocate concerning the warrant or the dismissal of his Denver case.

(c) Analysis

The victim-witness advocate's email to the prosecution team about Harrison's Denver case indicates that Harrison expected the prosecution to resolve that case on his behalf. That evidence was favorable to Owens because his trial team could have shown Harrison was biased in favor of the prosecution.

Although the prosecution disclosed its communications with the Denver prosecutor, disclosed that Harrison's warrant was vacated, and disclosed that his probation was terminated, it did not disclose that Harrison asked for or expected assistance from the prosecution.

(d) Conclusion

The court finds Harrison's expectation of assistance on his Denver case was favorable evidence that the prosecution failed to disclose. In light of these findings, the court concludes the evidence is relevant to the court's assessment of

the cumulative materiality of the undisclosed evidence. *See* part IV.D.4 of this Order.

g. Checados Todd[182]

i. Parties' Positions

Owens claims the prosecution failed to disclose that law enforcement threatened to prosecute Todd to induce his cooperation and his attendance at a pretrial motions hearing.

The prosecution did not respond.

ii. Findings of Fact

Todd, Ray's childhood friend from Chicago, was contacted by law enforcement in Chicago on April 18, 2006. Todd provided a lengthy statement to Fronapfel and Cook County State's Attorney's Investigator Dan Brannigan (Brannigan).[183] At the start of the interview, Fronapfel reminded Todd that they had just talked about being honest and not lying. Todd stated he recalled the conversation. Because this exchange occurred before the recording device was turned on, there is no transcript of that part of the conversation. Toward the end of the interview, Fronapfel and Brannigan told Todd that he would be subpoenaed to testify before the grand jury. When they explained that the government would pay for his travel expenses, Todd asked if he could bring his girlfriend and was told that the government would not pay for her expenses. Fronapfel asked him if he intended to appear, and he responded that he did not have a choice.

Todd was interviewed two days later on April 20 by Brannigan and district attorney investigators Mike Heylin (Heylin) and Kelly Eliassen (Eliassen).[184]

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[182] SOPC-309, Motion to Supplement and/or Amend SOPC-163.
[183] SOPC.EX.D-478.
[184] SOPC.EX.D-683.

On June 12, D. Wilson and John Gonglach (Gonglach) interviewed Todd.[185] After going over the events from June 2005, Todd told D. Wilson and Gonglach that the Aurora police invited him to Colorado for more interviews. Todd stated that someone from the prosecutor's office arranged travel for him, his girlfriend, and his son, but he had to cancel the trip because his mother needed help with the family's restaurants. He noted that the trip was not rescheduled. Todd showed D. Wilson and Gonglach the grand jury subpoena the police left with him. D. Wilson explained that it was a target subpoena. Todd was surprised and noted that no one told him he was getting that type of subpoena. Todd said he was led to believe that it was his choice whether he wanted to go to Colorado. Todd also told D. Wilson and Gonglach that he realized the police were accusing him of being involved with the Dayton Street homicides.

During his lengthy pretrial testimony on June 13, 2007, Todd was referred several times to his April 18, 2006, recorded interview with Fronapfel and Brannigan. Todd did not testify that law enforcement threatened to prosecute him for the Dayton Street homicides.

During Todd's cross-examination at trial on April 17, 2008, King established that:

- Law enforcement told Todd repeatedly during the April 18 and April 20, 2006, interviews that people were trying to pin a double murder on him.
- Todd became worried about the situation when the police gave him a grand jury target subpoena because he believed it meant that he was a target of the murder investigation.

[185] SOPC.EX.D-1420.

Guilt Phase Tr. 124-128 (Apr. 17, 2008 a.m.).

Owens's post-conviction counsel interviewed Todd on March 20, 2013. Todd did not say he was threatened with prosecution for the Dayton Street homicides.

On March 2, 2015, Todd testified that the officers who interviewed him on April 18, 2006, threatened to prosecute him for the Dayton Street homicides if he did not cooperate. According to Todd, that threat was made before the recorder was turned on. He also testified that when he subsequently missed a plane for Denver, Brannigan told him that if he missed another plane he would be prosecuted for murder. The next time his flight for Denver was scheduled, Brannigan drove him to the airport.

Fronapfel, Heylin, and Eliassen were not asked about threatening Todd with prosecution for the Dayton Street homicides during their post-conviction hearing testimony. Brannigan did not testify.

iii. Analysis

If law enforcement had threatened to prosecute Todd for the Dayton Street homicides, that evidence would be favorable to Owens. But this court finds that they did not. The first time Todd claimed he was threatened was during his post-conviction testimony in 2015, nine years after the threats were allegedly made. In light of numerous contacts with law enforcement, his interview with Owens's trial team, and his pretrial and trial testimony, the absence of any prior mention of threats is remarkable. Todd told D. Wilson and Gonglach that he knew the police viewed him as a suspect, but even when being interviewed by such experienced professionals, he never indicated that law enforcement had threatened to prosecute him. It is also telling that D. Wilson and Gonglach suggested to Todd that the

police served him with a grand jury target subpoena, yet Todd never mentioned threats.[186]

Todd had asked Fronapfel if he could bring his girlfriend to Colorado when he was needed for interviews or testimony. His request does not suggest that he viewed the police with antagonism or that he was concerned about being charged with murder. Additionally, he also told D. Wilson and Gonglach that he had intended to go to Colorado with his girlfriend and his son but had to cancel the trip due to work commitments – those are not the actions of a witness who was threatened into cooperation. Fronapfel probably told Todd that others were attempting to blame him for the Dayton Street homicides and probably emphasized the importance of being totally truthful, and Chicago investigator Brannigan may have seemed threatening when Todd missed his flight, but this court does not find Todd's post-conviction testimony to be sufficient for this court to credit Todd's allegations that law enforcement threatened to prosecute him.

iv. Conclusion

The court finds that law enforcement did not threaten to charge Todd for the Dayton Street homicides. In light of that finding, the court concludes the evidence is not relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence based on law enforcement's alleged threats against Todd is **Denied**.

[186] Owens's post-conviction counsel were apparently unaware of the alleged threat to prosecute Todd because post-conviction counsel did not address it with Todd during his post-conviction testimony. If Todd had alleged such misconduct previously, Owens would have included the claim in SOPC-163. The issue was not raised until after Todd's post-conviction testimony. It is also noteworthy that post-conviction counsel did not ask Fronapfel or Heylin about these serious allegations of police misconduct. Nothing in SOPC-309 suggests that Todd previously disclosed these threats.

h. Witness Protection Files[187]

i. Parties' Positions

Owens argues the prosecution did not disclose its witness protection files, which show that protected witnesses requested and received financial assistance from the prosecution.

The prosecution contested these claims during the post-conviction hearing.

ii. Findings of Fact

The prosecution implemented a practice for handling witness protection matters prior to trial in this case. The practice evolved over time but never became a formal written policy.

For this case, certain investigators and victim-witness advocates were designated to assist protected witnesses with their various needs and requests. Pursuant to the practice, witness protection documentation was locked in the chief investigator's credenza. The documentation was considered confidential and was accessible only to the elected District Attorney and to the designated investigators. The witness protection files generally contained emails with witnesses' requests for assistance, documentation for disbursement of funds and requests for reimbursement, Witness Assistance Questionnaires, Relocation Agreements, travel itineraries, and tactical plans for transporting witnesses, which included hotel locations.

Pursuant to the practice, investigators and victim-witness advocates were not allowed to discuss any substantive information about the case or the witnesses' involvement in the case with a witness.

[187] SOPC-311, Motion to Supplement and Amend SOPC-163.

According to Heylin, this practice was already in place when C.R.S. § 24-33.5-106.5(2)(a) went into effect on March 5, 2007.[188] The statute requires any prosecutor to keep witness protection files confidential and prohibits disclosure in discovery unless the files are subjected to an *in camera* review by a court that determines disclosure is necessary. The unauthorized disclosure of such files is a class one misdemeanor. § 24-33.5-106.5(2)(b).

Heylin explained that the district attorney investigators, even before the statute went into effect, broadly defined what was confidential because this case involved the death of a witness due in part to the Lowry Park discovery being given to Ray. Thus, the witness protection documentation generated before the statute became effective was kept confidential and not disclosed. According to Heylin, the investigators were also concerned that disclosure could subject them to criminal prosecution after the statute was enacted. Pursuant to the practice and standard discovery procedures within the office, the amount of money expended for each witness was disclosed in summary fashion in discovery.

The investigators involved in this case knew there was a provision in the statute for an *in camera* review but never employed it. It is unclear when the prosecutors on this case became aware of these files. An email from Heylin to Hower in May 2010 saying, "we never release anything from our 'witness protection' files" suggests Hower was aware of the files at that time. SOPC.EX.D-1695.

The prosecution voluntarily disclosed the existence of the witness protection files on February 20, 2015, and took the position that the documents should not be disclosed because the prosecutors did not have access to the files and because the

[188] The statute was enacted as part of the Javad Marshall-Fields and Vivian Wolfe witness protection program that became effective on March 5, 2007. § 24-33.5-106.

documents contained work product information. The court reviewed the documents *in camera* and ordered the prosecution to disclose the 1,161 pages with limited redactions of protected witnesses' locations. The prosecution disclosed the redacted documents on April 9, 2015.

According to Owens, 33 of the 1,161 pages contain materially favorable evidence that should have been disclosed. The 33 pages were admitted into evidence as SOPC.EX.D-1695. The undisclosed information in those pages pertains to R. Carter, Harris, Marlena Taylor, and Sailor and is summarized as follows:

- On the day before he was scheduled to testify at trial, R. Carter requested money from the prosecution so he could rent an apartment in his out-of-state location. The prosecution provided the financial assistance after he testified.
- In March 2008, the designated victim-witness advocate for Harris wrote that she suspected he had been out hustling in 2006 while staying in a hotel paid for by the prosecution. She also wrote that only the investigators should interact with Harris going forward because Harris constantly lied to her and gave her the runaround.
- In June 2008, the investigator assigned to Harris voiced concerns about Harris not complying with his parole conditions and not making sufficient efforts to become financially independent. The investigator characterized Harris as being on the dole.
- In October 2008, the Assistant District Attorney denied a request for grocery money for Harris and noted that Harris had taken advantage of the system and that he had never been threatened.

- In December 2007, Marlena Taylor requested and received $310 from the prosecution for the cost of transferring her cosmetology license to her out-of-state location ($110) and to purchase Christmas gifts for her children ($200).
- Prior to her trial testimony, Marlena Taylor requested and received financial assistance from the prosecution to purchase salon products for her new business, household expenses, a utility deposit, and rent that totaled $3,454.75.
- In 2006, Hower advised the victim-witness advocate assisting Sailor that whether Sailor's additional requests for financial assistance were granted would depend on how she was behaving at the time.
- In April 2008, Sailor requested funds from the prosecution to purchase Nike clothing and expensive sneakers for her son. After her testimony in the sentencing hearing, the prosecution wired Sailor $250 and gave her a $100 prepaid cell phone.

SOPC.EX.D-1695.

iii. Analysis

When the prosecution provides funds to a witness who testifies in support of the prosecution's case, it is favorable evidence to the defendant. Such is the case here. The witness protection files include requests from witnesses for assistance and the prosecution's assessment of the requests, which could have been used to suggest to the jury that some witnesses were requesting funds for assistance that did not relate to their safety. Additionally, the opinions of the prosecutors, investigators, and victim-witness advocates about certain witnesses were also favorable to Owens.

The prosecution withheld the existence of the witness protection files until late in the post-conviction proceedings. The prosecution should have either submitted the files to the court prior to trial for an *in camera* review pursuant to § 24-33.5-106.5(2)(a) or alerted the defense to the existence of the files so that the defense could consider making such a request. By using the statutory procedure, the prosecution could have safeguarded the witness protection information while satisfying its discovery obligations.

iv. Conclusion

The court finds the witness protection files contained favorable evidence to Owens. The court also finds the prosecution failed to disclose the existence of the files. In light of these findings, the court concludes the evidence is relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. *See* part IV.D.4 of this Order.

i. Special Bulletin and Versadex Report

i. Parties' Positions

Owens claims the prosecution failed to disclose certain APD reports that listed three to five unknown suspects for the Lowry Park shootings.

The prosecution responds that Owens's argument misconstrues the purposes of the undisclosed reports and that the reports were not discoverable under either Crim. P. 16 or *Brady*.

ii. Findings of Fact

By way of procedural background, the court addressed SOPC-120 in July 2011, which sought an order requiring the prosecution to disclose its entire file to Owens's post-conviction counsel because of the prosecution's alleged pattern of nondisclosure of discoverable material. One of the issues in that motion was the

nondisclosure of the Special Bulletin and the Versadex Report.[189] After an evidentiary hearing and argument on the motion, the court ruled that the reports were not discoverable. On August 4, 2011, the court issued P.C. Order (SO) No. 5 and confirmed its conclusion that the items were not discoverable.

The court incorporates its findings of fact in part IV.C.3.d.ii of this Order as though fully set forth herein.

Kepros testified that she would have used these reports at trial to establish that the police believed there were a number of alternate suspects for the Lowry Park shootings. In her view, this information would have made the theory of misidentification for the Lowry Park case stronger. In the alternative, if the police had testified the descriptions were unreliable, Kepros could have attacked the integrity of its investigation.

iii. Analysis

The Special Bulletin and the Versadex Report have no investigative value. The descriptions in the Special Bulletin were compiled from descriptions obtained by officers who were first to arrive at a chaotic crime scene. The officers were responsible for trying to identify witnesses who could describe the suspects and the getaway car while simultaneously securing a large crime scene and controlling a large crowd panicked by numerous gunshots. Furthermore, T. Wilson did not intend the Special Bulletin to be used for investigation. Rather, its primary purpose was officer safety.

Due to the methodology of data input used for the Versadex Report, it has less investigative value than the Special Bulletin. Three facts show it was of minimal impeachment value. First, T. Wilson's investigation was impeached when

[189] The parties sometimes refer to the Versadex Report as the Case Filing Report. Because the witnesses refer to it as the Versadex Report, the court will use the same terminology.

he admitted Owens's picture was on the yearbook page he acquired from Overland High School while he was attempting to identify Ray as the driver of the Suburban. Second, the details of why Owens's name was entered into the Versadex Report are unknown. It is unknown who entered his name, when his name was entered, or why it was entered. It is plausible that Owens's name was entered into the Versadex Report after he was charged with the Lowry Park shootings in September 2005. Third, the report has no investigative purpose. Its purpose is to capture certain discreet data from investigative reports for statistical or other administrative purposes.

Due to the emergency nature of the Special Bulletin and the administrative purposes of the Versadex Report, Owens's trial team could not have used these documents to attack the integrity of the APD or the thoroughness of the APD's investigation. Thus, these reports were not favorable to Owens.

Owens also argues the Special Bulletin and Versadex Report were favorable evidence because his trial team would have used the documents to challenge Johnson's account of the Lowry Park shootings. Johnson's identification of Owens as the Lowry Park shooter was not a stranger-on-stranger identification.[190] Johnson knew Owens so the existence of additional suspect descriptions would not have impeached Johnson's eyewitness testimony. Thus, the Special Bulletin and Versadex Report were not favorable evidence to Owens.

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[190] *See United States v. Wade*, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent-not due to the brutalities of ancient criminal procedure.'" (quoting The Case of Sacco and Vanzetti 30 (1927)).

iv. Conclusion

The court finds the Special Bulletin and Versadex Report did not contain favorable evidence. In light of this finding, the court concludes the evidence is not relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence based on the nondisclosure of the Special Bulletin and Versadex Report is **Denied**.

j. Charts Connecting Suspects, Informants, and Witnesses[191]

k. Surveillance of T's Barbershop

i. Parties' Positions

Owens contends the prosecution suppressed much of the surveillance captured by a camera positioned behind T's Barbershop. Ray owned the barbershop in 2005. Owens also contends the prosecution misrepresented the duration of the surveillance, failed to disclose the surveillance in a timely fashion, and failed to timely inform his trial team that the APD deleted some of the surveillance. Last, he contends the APD destroyed the original computer hard drive on which the surveillance was stored shortly after his trial in this case concluded.

The prosecution responds that Owens's arguments are based on allegations that have no evidentiary support. According to the prosecution, Owens misconstrues the evidence to support a nefarious purpose on the prosecution's and the APD's part. The prosecution also contends it is not required by Crim. P. 16 or *Brady* to disclose the background data of electronic surveillance unless that data constitutes physical evidence of a crime, such as in sexual exploitation cases.

[191] Owens withdrew this claim in SOPC-177.

ii. Findings of Fact

The surveillance captured by the camera installed behind T's Barbershop in 2005 was the subject of extensive post-conviction litigation.[192] The court held evidentiary hearings on this topic throughout 2010[193] and found that the camera was not operating from June 16 to June 22, 2005, because it had been taken down for repair. The court also found that the history of the camera and the computer hard drive that stored the surveillance was checkered. Due to this extensive litigation, the post-conviction hearing on this issue was limited to new evidence. Because little new evidence was introduced, the court's findings are based primarily on the evidence presented at the hearings in 2010.[194]

T's Barbershop was an important location in this case. Ray purchased the barbershop in the spring of 2005. He operated it as a barbershop but also made it the distribution center for his cocaine business. Ray had a recording studio in the back of the barbershop. Ray and Owens frequented the barbershop. R. Carter worked there as a barber and also sold drugs he obtained from Ray or Owens. On June 20, 2005, Todd saw Owens and Carter leave from the back of the barbershop in an unfamiliar car before the murders occurred. The next day, Ray and Owens hid guns they had stored in the recording studio in R. Carter's apartment just down the alley from the barbershop.

From January to May 2005, before Ray purchased T's Barbershop, T. Wilson conducted intermittent physical surveillance of that location. At the time, he was investigating a homicide, and the owner of the barbershop, Tyjuan Bennett

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[192] SOPC-82, SOPC-103, SOPC-104, and SOPC-120.

[193] The court took testimony or otherwise addressed this issue on May 14, June 14, June 25, July 20, July 23, August 20, September 10, and September 21, 2010.

[194] At the parties' request, the court took judicial notice of the motions filed and evidentiary hearings conducted prior to the filing of SOPC-163.

(Bennett), was a suspect. The purpose of T. Wilson's surveillance was to identify persons and vehicles of interest and to determine if those persons had any outstanding arrest warrants. During his surveillance, T. Wilson parked near the barbershop in a position that allowed him to watch people come and go from the front of the barbershop. If he observed a person or vehicle of interest, he would note the person or license plate number. He recognized several people and vehicles but did not recall noticing Ray. At the time, T. Wilson was not looking for Ray or his associates. T. Wilson did not utilize any video surveillance of T's Barbershop for his investigation of Bennett.

On May 3, 2005, Officer Michael Simmons (Simmons), an officer in the APD's narcotics unit, contacted the telephone company in an effort to begin the process of installing a surveillance camera on a pole behind T's Barbershop. The camera was installed on May 5. This was the first time the APD had used this type of surveillance equipment. Simmons was responsible for the installation and maintenance of the camera. Simmons believed this camera was installed to monitor narcotics trafficking in the area of the barbershop, likely at the bar on the corner, but he could not recall who initially requested the installation of the camera. On May 17, Simmons met with the electric company to finish installing the camera. Simmons connected the camera to a computer at the APD so that detectives and officers could monitor activity behind the barbershop in real time.

From its installation, the camera had numerous intermittent problems. For example, Simmons's notes reflect he conducted troubleshooting on the camera on May 19. These problems caused Simmons to have the camera removed for repairs on June 16. He worked on the camera until June 22 when he had it reinstalled. Thus, the camera was not operational on June 20 when the Dayton Street

homicides occurred. Due to the intermittent problems with the camera, no surveillance was recorded before Simmons reinstalled the camera on June 22.

The surveillance could be saved on the computer's hard drive.[195] In addition, the camera had a zoom capability that allowed detectives and officers to capture close-up, still photographs of cars, license plates, and people who came and went behind the barbershop. These photographs could also be saved on the computer's hard drive.

Shortly after the Dayton Street homicides, Kenney, who was in charge of the MCU,[196] learned of the camera and contacted the narcotics unit to find out if any surveillance had been captured around the time of the Dayton Street homicides. Kenney and Fronapfel were disappointed to learn from Simmons that the camera had not been operational on June 20 and 21. At some point after June 20, Kenney asked Simmons to have control of the camera transferred to the MCU. To make the change, Simmons connected the camera to a computer in the MCU office to allow the MCU detectives to observe the back of the barbershop in real time.

Simmons maintained records regarding the surveillance cameras. His records reflect that he installed a camera in early May 2005 behind T's Barbershop for an MCU homicide investigation and that the camera was under Kenney's control. But it is unknown whether Simmons prepared these records when he first installed the camera or if he prepared them when he transferred control of the camera to the MCU. Either way, the court credits Kenney's and Fronapfel's testimony that they were unaware of the camera prior to the Dayton Street homicides.

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[195] This court's understanding is that the camera transmitted a certain amount of frames per second to a computer at the APD. Those frames, not continuous video, were stored on a computer hard drive. When viewed continuously, the frames resemble a video.

[196] Fronapfel and T. Wilson were assigned to the MCU.

On June 23, Kenney decided he and the MCU detectives should start monitoring the camera *via* the computer in the MCU office. Kenney did not schedule anyone to monitor the camera during the nighttime hours or on the weekends.

Neither Kenney nor the detectives had prior experience with this type of surveillance equipment. Kenney thought the computer was automatically saving the surveillance to the computer's hard drive, but it was not. The early operational problems with the camera continued after the MCU was given control of it. At times, the camera would turn into its container and capture nothing but the inside of its container.[197] These complications caused T. Wilson to ask for a second camera to be installed on July 21, 2005, that monitored the front of the barbershop. The MCU stopped all camera surveillance of the barbershop in November 2005.

On July 19, a month after the Dayton Street homicides, a detective was not continuously monitoring the computer, but at one point that day, Kenney looked at the feed and saw Owens leave the barbershop and get into a black Camaro owned by Ray. Kenney had Detective Thomas Sobieski (Sobieski) arrange for patrol officers to stop Owens. The stop occurred a short distance from the barbershop and was not within the purview of the camera. The officers identified Owens and arrested him on an outstanding warrant. The officers seized the car and searched it. The search resulted in the seizure of incriminating circumstantial evidence including t-shirts that had "STOP SNITCHIN" on the front and "R.I.P." on the back.[198]

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[197] According to Simmons, the default position for the camera was to face the inside of its container. The camera would revert to its default position if there was a power outage at the pole or if the computer at the APD was restarted.

[198] *See* Trial Exh. DA-752, DA-753, and DA-754.

Fronapfel first told the prosecutors about the camera during grand jury proceedings in early 2006. The APD was hesitant to disclose the fact that the surveillance camera existed because it classified the surveillance as "Intel."

With prompting from Tomsic, Fronapfel prepared a report on February 9, 2006, explaining that the MCU learned of the camera after the Dayton Street homicides and that the detectives had to learn how to operate the camera. She listed photos of cars that were taken and noted to whom the cars were registered, including the car that Owens was driving on July 19 when he was arrested. She stated the photos had been placed into notebooks and noted that she had provided the prosecution with four discs of the surveillance. On the discs was surveillance captured on four days between June 27 and August 1, 2005. Surveillance from July 19 was not disclosed. Included in the surveillance was a photo of a gold Dodge Intrepid registered to Percy Carter, Jr. (Carter, Jr.), Carter's brother.[199]

The prosecution disclosed Fronapfel's report along with black and white copies of the surveillance photos, the registrations for some of the cars, and a DVD with surveillance purportedly captured on June 27, July 2, July 20, and August 10. Although Owens's trial team was on notice *via* Fronapfel's report that the notebooks existed, it did not ask the prosecution or the APD for the notebooks to be put into discovery.

In Tomsic's opinion, the prosecution was obligated to disclose the entirety of the surveillance. On February 15, 2006, Hower asked Fronapfel to clarify what surveillance had been captured, what dates the surveillance was captured, whether it was ongoing, etc. In Fronapfel's response, she noted:

- there was surveillance from June 23 to October;

[199] Also in discovery was a traffic ticket issued to Carter, Jr. in 2001, which indicated he was driving a gold Dodge Intrepid at that time.

- that the camera experienced technical problems;
- that she had three notebooks with information obtained from the surveillance; and
- that the cameras were installed because the prior owner of the barbershop was a suspect in an unrelated homicide.[200]

Fronapfel concluded her response by noting her willingness to prepare a report and provide whatever information the prosecution might need. Hower's and Fronapfel's email correspondence was not disclosed prior to trial.

Ben Wood (Wood), an investigator for Owens's post-conviction counsel, viewed the surveillance, which was provided on DVD 26. Per Fronapfel's report, DVD 26 was supposed to include surveillance from June 27, July 2, July 20, and August 10. According to Wood, DVD 26 only contains surveillance from one of those dates.

In Fronapfel's opinion, the only investigative lead the APD gained from the surveillance of T's Barbershop was the stop of Owens. In the summer of 2005, Fronapfel ran license plate searches on vehicles she viewed on the surveillance in an effort to identify suspects for the Dayton Street homicides, associates of Ray, or other witnesses. She recalled seeing Sailor, Ray, and Owens on the surveillance. Fronapfel characterized the information in the three notebooks as "Intel" that the MCU provided to the narcotics unit. No photos, license registrations, or reports in the three notebooks were copied specifically for disclosure in this case. However, there are some documents in the notebooks that were disclosed prior to trial.

Owens's trial team received a Surveillance Media memorandum from the prosecution dated May 16, 2006, concerning the hard drive on which all of the

[200] Fronapfel's understanding contradicted T. Wilson's testimony that he did not use the surveillance from the pole behind T's Barbershop to investigate Bennett.

surveillance had been saved. The memorandum described the size of the data, explained the type of software needed to access the data, and advised that it would cost $200 for duplication. The memorandum mistakenly noted that the front and rear cameras had been operational from July 21 to November 24, 2005, even though the rear camera was operational as early as June 23. At a pretrial hearing on Owens's motion to suppress the APD's search of the Camaro, Kenney testified that he viewed Owens get into the Camaro and drive away from the barbershop *via* the surveillance. In addition, a set of Fronapfel's notes disclosed prior to Owens's trial had the notation "Chi-Chi – 6/24 on cameras 2:44 pm Arrive @ BBShop Silver Suburban."

At the post-conviction hearing, Tomsic testified that she viewed parts of the surveillance on the hard drive. Although she noticed there were gaps in the surveillance, she did not advise Owens's trial team that there were gaps. During her review, she did not investigate whether Owens leaving the barbershop on July 19 in a black Camaro was captured and thus did not advise Owens's trial team that surveillance from that date was not on the hard drive. She acknowledged that the MCU learned of the surveillance in June 2005 but did not inform the prosecution that it existed until early 2006. She also acknowledged that the prosecution compelled the APD to disclose the surveillance and that there was a delay in disclosure of the hard drive from February 2006 to May 2006. Tomsic believed the delay was mostly caused by the prosecution's and the APD's unfamiliarity with this type of technology, how to duplicate it, and how to disclose it in discovery.

After reviewing the memorandum from the prosecution, Owens's trial team decided not to obtain the hard drive because, per the memo, the camera was not operational before July 21, 2005. According to Owens's trial team, nothing in the photos or registration information provided with Fronapfel's report indicated

anything significant had been captured during the surveillance. The prosecution did not discover its error on the memorandum until after the trial was completed. After trial, the prosecution disclosed a directory of the files on the hard drive that shows that the rear camera captured surveillance as early as June 23.

The post-conviction litigation on this issue revealed a number of misunderstandings regarding the camera, the computer to which the camera was connected, and the operation of both the camera and the computer. The MCU detectives who monitored the computer were not familiar with how the camera and computer interacted. Contrary to Kenney's belief, the surveillance was not automatically saved to the computer's hard drive. A detective had to activate the record mode before the surveillance was saved. Kenney was under the impression that there was not enough space on the hard drive to continuously record the surveillance. He believed that anything not relevant to the Dayton Street homicides investigation had to be deleted to preserve space on the hard drive. Kenney, and perhaps other detectives, routinely deleted surveillance that, in their opinion, did not have any evidentiary value, such as surveillance recorded during the night and on weekends. Additionally, the surveillance was probably deleted whenever the camera malfunctioned and turned into its container. No one knows precisely what surveillance was deleted or who deleted it because logs of deletions were not maintained. The dates and times when the particular detectives monitored the surveillance is unknown.

During the post-conviction proceedings in this case, Owens's post-conviction counsel requested the original computer hard drive from the prosecution. The prosecution facilitated the request and provided post-conviction counsel with what the prosecution believed to be the original hard drive. Owens retained a forensic computer expert to examine the hard drive. The expert

determined that the hard drive was a copy of the original hard drive, not an image of it. An image includes background data of the files and programs whereas a copy does not.[201] Owens's expert could not retrieve any deleted files from the hard drive because it did not contain the necessary background data to allow retrieval of deleted files. Post-conviction proceedings subsequently revealed that the original hard drive failed and was replaced in the summer of 2008 after Owens's Dayton Street trial ended. Per the APD's policy, the original hard drive was destroyed pursuant to its standard retention and destruction policies. Only a copy was preserved.

Wood testified during the post-conviction hearing that the following events are not on the hard drive:

- a police stop on June 27;
- a police stop of R. Carter on June 28; and
- Owens leaving the barbershop in the Camaro on July 19.

He also testified that a silver Suburban appears on the surveillance on June 24 at 2:44 p.m., but he could not identify the driver as Todd or anyone else. According to Wood, the gaps in the surveillance footage are inconsistent.

Kepros was aware of the camera and recalled seeing copies of pictures of cars but did not know the camera's location. Owens's trial team did not pay a lot of attention to the surveillance because the prosecution's memorandum advised that the camera became operational on July 21, 2005, which was a month after the Dayton Street homicides.

Upon learning the camera was capturing surveillance on June 23, Kepros testified that the arrest of Owens on July 19 was a significant event that could have

[201] The expert reportedly determined there was evidence that the background data may have been modified at some unknown point.

been investigated *via* the surveillance. Kepros would have used the circumstances of Kenney failing to record Owens leaving the barbershop to show the APD's inept investigation. According to Kepros, the omission of that incident and numerous other deletions without any record of the deletions could have also been used to attack the integrity of the APD's investigation. She would have considered seeking sanctions against the prosecution for its alleged discovery violation. The integrity of the investigation could have been further attacked if Owens's trial team had known there was documentation showing the camera was installed in May by the MCU, and no surveillance was retained from that date through June 22. According to Kepros, the lack of surveillance during the period from May 5 to June 22 deprived the trial team of the opportunity to develop evidence of possible alternate suspects, specifically with regard to whether Todd was at T's Barbershop on June 24 as reflected in Fronapfel's notes. Kepros testified that the trial team would have investigated the circumstances of the camera's history, and depending on what that investigation developed, would have decided whether to make the camera and the APD's handling of it a focus of the defense or whether to use it to argue residual doubt during the sentencing hearing.

iii. Analysis

Owens argues that the partial nondisclosure of the surveillance of T's Barbershop precluded his trial team from challenging the integrity of the APD's investigation and the credibility of the prosecution. His argument is two-fold. First, he argues the prosecution suppressed materially favorable evidence in violation of *Brady*. Second, he argues the prosecution destroyed evidence in violation of *Trombetta* and *Youngblood*. The court will consider the *Brady* claims followed by the *Trombetta* and *Youngblood* claims.

(a) Undisclosed Evidence

(i) Duration of Surveillance

Owens's first *Brady* claim concerning the surveillance of T's Barbershop is that the prosecution failed to disclose the duration of the surveillance when it put a memorandum into discovery that erroneously listed the beginning date of the surveillance as July 21 instead of June 23. Owens's trial team relied on the prosecution's memorandum when it decided not to ask the prosecution to duplicate the surveillance. Thus, it did not review the surveillance prior to trial. Because the team did not review the surveillance, it did not learn that a gold Dodge Intrepid registered to Carter, Jr. was at the barbershop. According to Owens, the gold Dodge Intrepid is important because Harrison reported seeing a gold Dodge Intrepid at Gibby's on June 19 and at Marshall-Fields's apartment complex on June 20. The surveillance of Carter, Jr.'s gold Dodge Intrepid at the barbershop is favorable to Owens because his trial team could have used it to portray Carter, Jr. as an alternate suspect at trial.

If Owens's trial team had the correct dates of when the rear camera was installed, it is likely that it would have discovered the checkered history of the camera. Owens's trial team could have used the checkered history to attack the integrity of the APD's investigation by depicting the APD's handling of the camera as inept or worse. It could have impeached the prosecution's and the APD's integrity by showing the jury that:

- the prosecution misrepresented the date that the surveillance began;
- Fronapfel's report which stated the MCU began monitoring T's Barbershop after June 20 contradicted Simmons's records which showed a camera was installed for the MCU in early May; and

- the APD deleted surveillance from June 28 and July 19 when important events at the barbershop should have been captured by the surveillance camera.

Thus, the actual duration of the surveillance was favorable evidence for Owens.

The prosecution argues that it was only required to disclose recorded sounds or images that were relevant to the investigation under Crim. P. 16(I)(a)(1)(VI), which requires the prosecution to disclose "[a]ll tapes and transcripts of any electronic surveillance (including wiretaps) of conversations involving the accused, any codefendant or witness in the case." The prosecution's argument contradicts its actions. Prior to trial, the prosecution provided:

- Fronapfel's report, which described the MCU's involvement with the camera, identified certain cars, and explained the APD's investigation of those cars as well as numerous pictures taken by the camera;
- DVD 26, which purported to have the surveillance captured from four dates in July and August 2005 on it;
- DVD 26, which also included images of a Dodge Intrepid; and
- documentation of the existence of the hard drive.

The prosecution's disclosures indicate it viewed the surveillance as discoverable. But the date the camera was installed and the date the rear camera became operational were effectively suppressed due to the error in the prosecution's memorandum. Owens's trial team's reliance on the prosecution's error prevented the team from learning that some surveillance had been deleted and that the APD's handling of the camera was inept. However, Owens's trial team was not deprived of evidence that the surveillance camera captured a gold Dodge Intrepid because that vehicle appears on DVD 26, which was disclosed.

The court finds the prosecution suppressed the duration of the surveillance, which was favorable evidence to Owens. Thus, the court concludes the evidence is relevant to the court's assessment of the cumulative materiality of undisclosed evidence. *See* part IV.D.4 of this Order.

(ii) Fact that Surveillance was Deleted

Owens's second *Brady* claim stems from the prosecution's failure to inform his trial team that Kenney deleted some of the surveillance of T's Barbershop. It is favorable evidence to Owens that Kenney, and possibly other MCU detectives, deleted portions of the surveillance of T's Barbershop. Owens's trial team could have used this information to impeach the integrity of the APD by showing:

- the APD failed to comply with its duties to maintain all evidence collected and to disclose the evidence to the defense;
- the APD had a general lack of understanding of the operation of the camera;
- the APD had no protocol or policy in place for deleting portions of the surveillance; and that
- no records were kept of the deletions.

The team also could have called into question the integrity of the prosecution, because Lundin testified on behalf of the prosecution that all discoverable evidence had been provided to the defense. Showing that the APD deleted surveillance contradicts Lundin's testimony. Evidence that the APD deleted some of the surveillance was favorable evidence to Owens.

The prosecution withheld that Kenney, and possibly other MCU detectives, deleted some of the surveillance of T's Barbershop. Thus, the prosecution suppressed this information.

The court finds the fact that surveillance was deleted was favorable to Owens and suppressed by the prosecution. Thus, the court concludes the evidence is relevant to the court's assessment of the cumulative materiality of undisclosed evidence. *See* part IV.D.4 of this Order.

(iii) Notebooks

Owens third *Brady* claim stems from the prosecution's failure to disclose three notebooks in which the APD compiled information from its surveillance of T's Barbershop. Fronapfel's purpose in compiling information collected from the surveillance of T's Barbershop was for purposes of "Intel." There are photos or reports in the notebooks related to three individuals[202] who were relevant either to the Lowry Park shootings or the Dayton Street homicides. According to Fronapfel, none of those photos or reports derived from the surveillance of T's Barbershop. Thus, the notebooks did not contain favorable evidence to Owens.

Because the notebooks did not contain favorable evidence, the court concludes the evidence is not relevant to the court's assessment of the cumulative materiality of undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence based on the nondisclosure of the notebooks is **Denied**.

(b) Destruction of and Failure to Preserve Evidence

(i) Deleted Surveillance

Owens suggests that the APD deleted exculpatory evidence when it deleted portions of the surveillance and destroyed the original hard drive. The exculpatory nature of the surveillance of the back of T's Barbershop that was deleted is speculative. According to Kenney, he deleted portions of the surveillance that, in his opinion, were not relevant to the investigation of the Dayton Street homicides.

[202] Those individuals are Kendra Williams, Markeeta Ray, and William Veasley.

Neither Kenney nor anyone else could recount which portions of the surveillance were deleted or were not recorded. According to Owens, the deleted surveillance might have contradicted testimony at trial. But it is equally plausible that it would have corroborated testimony at trial. The court can only consider the events that are known to have taken place at the barbershop that the camera would have captured.

On June 28, 2005, officers contacted R. Carter in the alley behind T's Barbershop. There is no surveillance of this incident. It is unknown whether the surveillance on that date was not recorded or was deleted. Owens presented no evidence during the post-conviction hearing showing the exculpatory value of the surveillance of the APD's contact with R. Carter. Thus, the exculpatory value of the surveillance of that incident was not apparent before it was destroyed.

On July 19, 2005, Kenney saw Owens leave the barbershop in Ray's Camaro *via* the live feed. The surveillance of Owens leaving the barbershop no longer exists. The surveillance of that incident has no exculpatory value because Owens was stopped in the Camaro within minutes of the barbershop and the stop was not within the purview of the camera. The chain of communication leading to that stop showed that the alert came from Kenney, who was monitoring the camera at that time. Nothing about Kenney viewing the surveillance or Owens being stopped was exculpatory in nature. Nor was the exculpatory nature, if any, of the surveillance on July 19 apparent to Kenney before it was deleted.

Owens also argues that the lack of surveillance to corroborate or refute some of the witnesses' trial testimony was exculpatory. He suggests that his trial team could have argued that the absence of corroborating evidence of the following constitutes reasonable doubt:

- Sailor's testimony that Owens was Ray's "second-in-command";

- Sailor's, R. Carter's, and Todd's testimony that Owens was involved with hiding guns in R. Carter's apartment on June 21, 2005;
- Todd's testimony that Owens and Carter left T's Barbershop in an unfamiliar car on June 20, 2005; and
- the prosecution's theory that Owens went "on the low" after June 20.

As to Sailor's testimony that Owens was Ray's second-in-command, Owens presented no evidence that the surveillance would not have shown such a relationship existed. R. Carter corroborated Sailor's account of Owens's relationship with Ray. Owens's trial team could not have successfully argued that the lack of corroborating evidence from the surveillance created reasonable doubt.

As to the testimony concerning events on June 20 and 21, those claims are without merit because the surveillance camera was not operational on those dates.

Owens also argues that if he appeared on the surveillance after June 20, it would have refuted the prosecution's theory that he went "on the low." Owens presented no evidence that he would have been seen on the surveillance after June 20. Based on the speculative nature of Owens's argument, it was not apparent that the surveillance had exculpatory value, if any, before it was destroyed.

Owens also argues the APD failed to preserve the surveillance footage. His argument raises the question of whether the APD would have wanted the surveillance from May to July 2005. Owens suggests the surveillance would have revealed exculpatory evidence, but he ignores the likelihood that it could have revealed much more damaging inculpatory evidence. The surveillance could have been very important to the APD's investigation, because it could have established a link between and among Owens, Ray, Carter, and the barbershop. It also could have corroborated Todd's and R. Carter's testimony about events at the barbershop, such as Owens and Carter leaving on June 20 in an unfamiliar car, Ray

and Owens taking a duffle bag of guns from the barbershop on June 21, and Ray and Owens hiding a duffle bag of guns in R. Carter's apartment on June 21. Because of the potential for inculpatory evidence and because Kenney deleted portions of the surveillance to preserve storage space on the computer's hard drive, he did not delete the surveillance in bad faith. *See Youngblood*, 488 U.S. at 58 (holding that unless the defendant "can show bad faith on the part of the police, failure to preserve [the] potentially useful evidence does not constitute a denial of due process of law.").

(ii) Destroyed Hard Drive

The prosecution conceded that the original hard drive was destroyed pursuant to the APD's standard retention and destruction policies in June 2008. Before the APD destroyed the hard drive, it made a copy of it. In 2005, no one at the APD had a sophisticated understanding of the hard drive. No one knew that certain background data was lost when the original hard drive was copied. The background data that was lost has no apparent exculpatory value. And the exculpatory value, if any, was not apparent when the original hard drive was destroyed.

As Kepros noted, if the trial team had known that surveillance was deleted and the original hard drive was destroyed, the team would have questioned the integrity of the APD's investigation. Indeed, it seems highly probable that the trial team would have combined the incorrect dates in the prosecution's memorandum and the failure to preserve the surveillance, if any was captured, of Owens on July 19 to argue the prosecution was covering up the APD's inept investigation. Such evidence might have raised questions in the jurors' minds about the integrity of both the investigation and the prosecution.

Likewise, the APD destroyed the original hard drive pursuant to its standard retention and destruction policies. Neither Kenney nor Fronapfel knew the original hard drive was destroyed until Owens's forensic computer expert determined the hard drive was not the original. Thus, the APD did not destroy the original hard drive in bad faith. *See Youngblood*, 488 U.S. at 58 (holding that unless the defendant "can show bad faith on the part of the police, failure to preserve [the] potentially useful evidence does not constitute a denial of due process of law."). Moreover, because of the APD's interest in capturing the surveillance as well as the fact that the MCU did not request or control the camera until after the Dayton Street homicides, it is highly unlikely the APD intentionally destroyed the original hard drive or any of the surveillance in order to deprive Owens of exculpatory evidence. Owens presented no evidence to suggest otherwise.

iv. Conclusion

The court finds that the prosecution's suppression of the duration of the surveillance and of the fact that surveillance was deleted was favorable evidence. In light of these findings, the court concludes the evidence is relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. *See* part IV.D.4 of this Order.

The court finds there was no apparent exculpatory value in the surveillance or the hard drive before it was deleted or destroyed. In light of these findings, Owens's claim under *Trombetta* is **Denied**. The court also finds the APD did not delete surveillance or destroy the hard drive in bad faith. Thus, Owens's claim under *Youngblood* is **Denied**.

l. Failure to Preserve Cell Phone Records[203]

m. Use of Confidential Informants

i. Jimilah Arnold

(a) Parties' Positions

Owens claims Jimilah Arnold's (Arnold) status as a confidential informant was favorable evidence that the prosecution did not disclose.

The prosecution disputes whether Arnold was a confidential informant.

(b) Findings of Fact

Arnold did not testify against Owens in either of his cases despite having been endorsed by the prosecution.

Gallegos contacted Arnold in the Adams County Detention Facility on July 7, 2005. Arnold specifically asked to speak with Gallegos because he had arrested her in 2004. T. Wilson accompanied Gallegos to the interview. Both Gallegos and T. Wilson knew Arnold and believed she was knowledgeable of the criminal community in Aurora.

Based on the July 7 interview, T. Wilson was convinced that Arnold knew Ray, his family, and his associates, and T. Wilson viewed her as a possible informant who might be able to obtain incriminating information from Ray's family. Arnold was willing to become a confidential informant. In return, she wanted a reduction of her 10 to 12 day jail sentence but did not want any money. T. Wilson was concerned with using Arnold as a confidential informant because she had previously agreed to be an informant on another case and had not followed through on that commitment. In T. Wilson's view, Arnold's information was secondhand and was not new to him. He never corroborated her information.

[203] SOPC-309, Motion to Supplement and/or Amend SOPC-163. Owens withdrew this claim in the Supplement to SOPC-309.

Gallegos told Arnold that he would return with the necessary documents for signing her up as a confidential informant. Gallegos believed he signed up Arnold as an informant for purposes of her safety shortly after he met with her on July 7.[204] T. Wilson and Gallegos wanted to make her an informant in order to provide her with confidentiality because under the APD's policy, the name of an informant cannot be disclosed without a court order, not even to a prosecutor. T. Wilson told her he would return the next day with Fronapfel who would have questions for her about the Dayton Street homicides.

After this interview, T. Wilson relayed Arnold's information to Fronapfel. Fronapfel's notes of her conversation with T. Wilson were disclosed.

T. Wilson and Fronapfel interviewed Arnold on July 8. Arnold confirmed that she would become an informant and asked Fronapfel to seek a reduction of her jail sentence. Fronapfel told her she would speak to the prosecutor. Fronapfel also told Arnold that she could earn some money if her information resulted in an arrest for the Dayton Street homicides. In Fronapfel's estimation, Arnold did not have any information that Fronapfel did not already know. With a few exceptions, she had no firsthand knowledge of the Lowry Park shootings or the Dayton Street homicides. Fronapfel's notes of the July 8 interview were disclosed.

After the July 8 interview, Arnold was to complete her jail sentence and contact the APD to start her work as an informant. Neither Fronapfel nor T. Wilson heard from her again. Arnold contacted Gallegos in the fall of 2005 and told him that she had heard Sailor was being threatened. That was the extent of Arnold's cooperation in this case. Arnold also relayed similar information to Fronapfel during a recorded phone call, the date of which is unknown.

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[204] Owens did not introduce any exhibits proving Arnold was signed up as a confidential informant for the APD.

During the post-conviction hearing, Fronapfel testified that:

- the Narcotics Unit is in charge of confidential informants;
- as a member of the MCU, she did not control confidential informants or money paid to confidential informants;
- she did not know if Arnold was assigned a confidential informant number;
- she did not know if the APD paid Arnold any money for the information she provided on the Dayton Street homicides;
- she did not know if Arnold wore a wire to collect information concerning the Dayton Street homicides; and
- she did not ask Gallegos to pay Arnold any money.

According to Wood, Owens's post-conviction counsel's investigator, there was no information in discovery prior to trial indicating Arnold was a confidential informant. According to Kepros, if the trial team had learned of Arnold's status as a confidential informant, the team would have interviewed her, investigated her prior roles as a confidential informant, and tried to determine whether the information she previously provided to law enforcement was credible.

(c) Analysis

During the post-conviction hearing, Owens did not prove how Arnold's purported status as a confidential informant was favorable to him. The fact that the APD signed up Arnold as a confidential informant but never used her in that capacity is not favorable evidence to Owens, especially in light of the fact that Arnold did not testify at trial.

(d) Conclusion

The court finds no evidence showing that Arnold was a confidential informant. Thus, the court concludes the evidence is not relevant to the court's

assessment of the cumulative materiality of the undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence based on Arnold's purported status as a confidential informant is **Denied**.

ii. SOPC-56[205]

(a) Parties' Positions

Owens contends SOPC-56's status as a confidential informant was favorable evidence that the prosecution did not disclose.

The prosecution responds that it put Owens's trial team on notice that the APD intended to use SOPC-56 as a confidential informant.

(b) Findings of Fact

On June 30, 2005, Detective Hershel Stowell (Stowell) interviewed SOPC-56 while in custody on a parole violation. Stowell recorded the interview and placed the DVD and audio recording of the interview in property at the APD. Stowell listed these recordings on a property sheet that was disclosed.

Fronapfel interviewed SOPC-56 the next day. Also present were Stowell, a district attorney investigator, and an FBI agent. Fronapfel recorded the interview and placed three cassette tapes of the interview in property at the APD. Fronapfel listed the audio recording on a property sheet that was disclosed. Fronapfel's notes from her interview of SOPC-56 were also disclosed.

Stowell prepared a report regarding both interviews of SOPC-56. In his report, Stowell noted that SOPC-56 provided the same information to Fronapfel on July 1 that SOPC-56 provided on June 30. Stowell's report was disclosed.

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[205] Owens filed SOPC-56 on September 23, 2009, seeking disclosure of transcripts of the APD's interviews with a certain individual. The prosecution responded on November 2, 2009. The identity of the individual who was the subject of SOPC-56 has been redacted from all exhibits admitted into evidence during the post-conviction hearing per court order and at the request of the FBI. The parties and this court refer to the individual who is the subject of SOPC-56 as SOPC-56.

Following these interviews, the APD asked SOPC-56 to work as an informant, and SOPC-56 agreed to do so. Because SOPC-56 was on parole at the time, the APD had to obtain authorization from SOPC-56's parole officer. On July 1, 2005, SOPC-56's parole officer gave the necessary authorization. The prosecution disclosed the authorization letter from the parole officer. Because SOPC-56 was already an FBI informant, the APD was also required to obtain its authorization. The FBI refused the APD's request.

Shortly after July 1, 2005, SOPC-56 was released from jail. SOPC-56 contacted Fronapfel one time by phone. After that, SOPC-56 never contacted the APD again.

Before the grand jury returned the indictment against Owens, the prosecution decided not to call SOPC-56 as a witness in this case. The prosecution returned SOPC-56's recorded interviews to the APD without putting the recordings into discovery. The prosecution endorsed SOPC-56 in early 2007 and never struck the endorsement. The prosecution withheld that it did not intend to call SOPC-56 as a witness and that it had returned the recorded interviews to the APD.

After Owens's post-conviction counsel discovered SOPC-56's recorded interviews, the court reviewed transcripts *in camera* for both the June 30 and the July 1 interviews for exculpatory information. Following the *in camera* review, the court ordered certain disclosures be made to Owens's post-conviction counsel because of the exculpatory nature of the information provided to the APD by SOPC-56. Minute Order (Oct. 26, 2009).

(c) Analysis

As a threshold matter, SOPC-56 was not a confidential informant for the APD on the Dayton Street case. The APD never used SOPC-56 as a confidential informant because the FBI denied its request to do so. Additional evidence that the

APD did not regard SOPC-56 as a confidential informant is that Stowell did not redact SOPC-56's name from his report. Per the APD's policy, the names of confidential informants must be redacted before given to the prosecution for distribution in discovery. Thus, Stowell treated SOPC-56 as a witness, not as a confidential informant. Owens failed to establish the favorability of the APD's attempted use of SOPC-56 as a confidential informant.

(d) Conclusion

The court finds SOPC-56 was not a confidential informant for the APD on the Dayton Street case. Because SOPC-56 was not a confidential informant, the court finds the prosecution did not misrepresent SOPC-56's role in this case. In light of these findings, the court concludes the evidence is not relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence based on SOPC-56's purported status as a confidential informant is **Denied**.

iii. Tetrick Brewer

(a) Parties' Positions

Owens argues Tetrick Brewer's (Brewer) status as a confidential informant was favorable evidence that the prosecution did not disclose.

The prosecution did not respond to this claim except to argue that Owens failed to identify what information from Brewer was favorable.

(b) Findings of Fact

Brewer was not an endorsed witness in this case and did not testify at trial.

On July 28, 2005, Gallegos contacted Brewer. At that time, Fronapfel was attempting to identify J-5. Gallegos found out that Brewer reportedly knew J-5's name and showed him a photographic lineup with Johnson's photo. Brewer identified J-5 as Johnson. Gallegos prepared a report about the lineup but only

referenced Brewer as a CI. To Gallegos, a cooperating individual is someone who is cooperating with the police and who does not want their identity disclosed. A confidential informant is someone who is actively engaged with the police in an investigation and does not want their identity revealed. The prosecution disclosed Gallegos's report.

Gallegos notified Fronapfel and she interviewed Brewer on August 2. Brewer provided information about the Lowry Park shootings to Fronapfel. He described a fight at the park. He stated the man who lost the fight went to his car and retrieved a gun that he used to shoot the winner of the fight. He also stated a brown Suburban left the park after the shooting. As it turned out, Brewer was not at Lowry Park on July 4, 2004. Brewer learned the information he relayed to Fronapfel from a woman who was reportedly at Lowry Park when the shootings occurred. Law enforcement never located or interviewed that woman.

Brewer also told Fronapfel he was at the June 19, 2005, Father's Day barbecue. He knew what Marshall-Fields looked like and saw him at the barbecue. Brewer also saw Johnson at the barbecue and noted that Johnson was hanging out with members of the Bloods street gang. According to Brewer, Johnson was the leader of the Montbello Bloods street gang. Fronapfel took notes but did not prepare a report of the interview. The prosecution did not disclose Fronapfel's notes so the only information in discovery about Brewer was Gallegos's report in which he referred to Brewer as a CI.

(c) Analysis

Brewer was a cooperating individual, not a confidential informant. Thus, the court does not afford his information more credibility than information provided by other witnesses in this case. In fact, Brewer's information was less

reliable because it was secondhand and unverified. Thus, Brewer's status as a cooperating individual was not favorable evidence to Owens.

(d) Conclusion

The court finds Brewer was not a confidential informant for the APD. In light of this finding, the court concludes the evidence is not relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence based on Brewer's purported status as a confidential informant is **Denied**.

n. Police Recordings, Records, Notes, and Investigative Pursuits

i. Notes and Transcripts of Recorded Calls[206]

ii. Audio Recordings

(a) Jimilah Arnold

(i) Parties' Positions

Owens contends the prosecution did not put the audio recordings of the APD's interviews of Arnold into discovery.

The prosecution disputes whether the information provided by Arnold was exculpatory.

(ii) Findings of Fact

As discussed above, Arnold provided information to law enforcement during two interviews and one telephone call. The court incorporates its factual findings set forth in part IV.D.3.m.i(b) of this Order. Some additional factual findings are necessary to resolve the undisclosed audio recording claims.

By way of background, the prosecution's standard procedure for disclosing media in the Lowry Park and Dayton Street cases involved using a Notice

[206] Owens withdrew this claim in SOPC-177.

Discovering Existence of Evidence form that listed the available media. The prosecution's paralegal was responsible for issuing these notices. The paralegal tracked the media by sequentially numbering the type of media disclosed. For example, a notice for "DVD 38" meant the thirty-eighth DVD was available and a notice for "CD 89, 90" meant the eighty-ninth and ninetieth CDs were available. Each notice advised that the media could be obtained from the prosecution or from the APD upon request. Consequently, it was not unusual for the defense investigator to contact the prosecution's paralegal and request assistance in obtaining media items. The paralegal would assist by either making a copy of the item or by explaining how to obtain it from the APD.

The prosecution put the APD property reports in discovery as an additional method of putting the trial team on notice that certain items of media were available. Each property report described the media item and noted the form of the media. For example, the entry "audio tape – Brandi Taylor (phone call)" meant that law enforcement had spoken to B. Taylor on the phone and had recorded the conversation. An entry "DVD – Jimilah Arnold" meant law enforcement had spoken to Arnold and recorded the conversation on a DVD. The APD property unit assigned each item of evidence for this case a control number and recorded the control number on the APD property report.

Gallegos and T. Wilson recorded their July 7, 2005, interview of Arnold and placed the recording into property at the APD. Owens's trial team received the APD property report listing the July 7 audio recording. Following the July 7 interview, T. Wilson relayed certain information from Arnold to Fronapfel. Owens's trial team also received Fronapfel's notes from her conversation with T. Wilson. Fronapfel recorded her July 8 interview of Arnold as well. Owens's trial

team received the APD property report listing the audio recording of the July 8 interview as well as Fronapfel's notes from the July 8 interview.

Owens's trial team's Evidence Control Log has entries for the July 7 and 8 interviews of Arnold as well as Fronapfel's phone call with Arnold. The interviews are identified by the APD control number.

During the July 7 interview, Arnold told Gallegos and T. Wilson that she worked with Carter, Jr. Arnold reported that shortly after the Dayton Street homicides, Carter, Jr. came to work upset because he believed Ray was involved in the murders of Marshall-Fields and Wolfe because Marshall-Fields was going to testify against Ray in his Lowry Park trial. Arnold also told Gallegos and T. Wilson about a conversation she had with Christopher Vaughn (Vaughn) during which he repeatedly said "I plead the Fifth" regarding his knowledge of the Dayton Street homicides.

On July 8, Arnold confirmed to Fronapfel what she had told T. Wilson and Gallegos the previous day. She also claimed to know people affiliated with the Gangster Disciples street gang. She listed people she believed were affiliated with the gang, and she did not include Owens on her list. She apparently knew these people through the father of her child.[207]

Arnold relayed similar information to Fronapfel during a recorded phone call, the date of which is unknown. The prosecution gave notice of the recording in the form of a property report.

In Kepros's view, the undisclosed recorded interviews of Arnold provided a wealth of investigative information that was exculpatory in nature. She viewed

[207] Vaughn's younger brother is the father of Arnold's child. Vaughn's younger brother testified in the grand jury that Owens was not affiliated with the Gangster Disciples but was affiliated with the Crips. The prosecution disclosed that grand jury testimony.

Arnold's withholding of Owens's name from her list of Gangster Disciples and Arnold's report of Vaughn repeatedly saying "I plead the Fifth" during a discussion of the Dayton Street homicides as particularly exculpatory.

(iii) Analysis

The information Arnold gave to law enforcement that the prosecution failed to disclose is generally favorable evidence. Even though it did not necessarily shift culpability for the Dayton Street homicides away from Owens, it tended to implicate Ray and was therefore at least arguably favorable to Owens. Arnold's information implicated Ray because it was her understanding from Carter, Jr. that Carter, Jr. believed Ray was responsible for the Dayton Street homicides. Additionally, Arnold did not include Owens in the list of Gangster Disciples she identified, and Owens's lack of affiliation with that gang would be favorable evidence. Arnold's information about Vaughn "pleading the Fifth" is marginally favorable to Owens, because using that phrase repeatedly could be perceived as an admission of guilt. According to Arnold, Vaughn used that phrase to simply indicate he did not want to discuss the Dayton Street homicides. At minimum, Owens's trial team could have used that information to investigate Vaughn as an alternate suspect.

The prosecution concedes it failed to turn over the audio recordings of Arnold's interviews. While Owens's trial team did not have the audio recordings of Arnold's statements, the team had Fronapfel's notes from her conversation with T. Wilson after his July 7 interview of Arnold as well as Fronapfel's notes from her July 8 interview of Arnold. Much of the allegedly important information from Arnold appears in Fronapfel's notes. They include details of Arnold's conversation with Carter, Jr.; Arnold's lack of identification of Owens as a Gangster Disciple; and Arnold's account of Vaughn telling Arnold "I plead the

Fifth." Therefore, Owens's trial team had the substance of Arnold's information. Thus, the prosecution did not suppress any favorable information from Arnold.

(iv) Conclusion

The court finds the prosecution did not disclose the audio recordings of Arnold's interviews. However, Owens was not deprived of any favorable information from Arnold because the prosecution disclosed Fronapfel's notes of her interview of Arnold and of her debriefing of T. Wilson. In light of these findings, the court concludes the evidence is not relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence based on the nondisclosure of the audio recordings of Arnold's interviews is **Denied**.

(b) SOPC-56

(i) Parties' Positions

Owens contends the prosecution failed to disclose the APD's recorded interviews of SOPC-56.

The prosecution responds that Owens has failed to specify what is exculpatory in the undisclosed recordings.

(ii) Findings of Fact

Due to the related nature of Owens's claims concerning SOPC-56, the court incorporates its findings of fact set forth in part IV.D.3.m.ii(b) of this Order.

SOPC-56 was not a percipient witness to the Lowry Park shootings or the Dayton Street homicides. All of his information was secondhand. Fronapfel and the prosecution tried to corroborate SOPC-56's information through the grand jury testimony of others who had knowledge of these cases, but none of his information was corroborated by the persons whom SOPC-56 identified as his sources.

SOPC-56 was in jail during the Lowry Park shootings. He obtained information about the Lowry Park shootings from someone named Alonzo and from a barber who worked the middle barber chair at T's Barbershop.

SOPC-56's information about the Dayton Street homicides came from the same barber. The barber told SOPC-56 that Face,[208] Little Percy (Carter, Jr.), and Ray Ray (Dumas Brown)[209] committed the Dayton Street homicides. SOPC-56 gave Fronapfel a description of Face and told her two places where she might be able to find him. SOPC-56 also gave Fronapfel the names of other individuals who may have information about the Dayton Street homicides. According to Fronapfel, SOPC-56's information about Ray Ray's involvement in the Dayton Street homicides was unreliable because Ray Ray was in prison on June 20, 2005. Fronapfel testified during the post-conviction hearing that SOPC-56's information did not track with the direction of the investigation so she did not follow up on most of the information she received from SOPC-56.

SOPC-56 identified R. Carter as the barber working in the middle chair. But according to R. Carter, he worked the first chair. R. Carter denied having any conversation with SOPC-56.

Law enforcement identified the barber working in the middle chair as a William Veasley (Veasley). Veasley testified before the grand jury and denied any conversation with SOPC-56.

SOPC-56 claimed he attended the June 19, 2005, Father's Day barbecue and saw Marshall-Fields. SOPC-56 estimated there were approximately 500 people at the barbecue.

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[208] The court does not know Face's real name.

[209] Dumas Brown is Ray's brother.

After SOPC-56 was released from custody, SOPC-56 contacted Fronapfel one time by telephone. Fronapfel recorded the interview, but the recording was not disclosed.

The prosecution decided not to use SOPC-56 as a witness and returned the recordings of the interviews to the APD without disclosing the recordings.

Kepros acknowledged that the trial team was aware of SOPC-56 but did not attempt to interview SOPC-56. In her view, the recorded interviews had a wealth of information that Stowell omitted in his report. She viewed the undisclosed information as exculpatory. For example, Kepros noted the defense could have called SOPC-56 to show that Owens was not at the Father's Day barbecue. Kepros also viewed SOPC-56's claim to have sold guns to Lil' P (Carter) as an investigative lead that could have been developed to assist in Owens's defense. Likewise, Kepros viewed SOPC-56's information that Little Percy, Face, and Ray Ray were responsible for the Dayton Street homicides as important exculpatory information for Owens. However, Stowell included all of this information in his summary report, which was disclosed in discovery.

Wood testified that there was a notation in discovery indicating the APD had prepared a transcript of an interview with SOPC-56 but that the transcript was not in discovery. He also testified the prosecution did not ask the court for permission to withhold SOPC-56's name during the pendency of the case.

(iii) Analysis

Even though the purported sources of SOPC-56's information about the Lowry Park shootings and the Dayton Street homicides would not confirm his information, SOPC-56's information was favorable to Owens because it showed other people were responsible for the Dayton Street homicides.

Per Stowell's report, Owens's trial team was aware that the APD had interviewed SOPC-56 on June 30 and July 1. The report did not indicate that the interviews were recorded, but a property sheet[210] reflects one recorded interview. Another property report reflects another interview of SOPC-56 on July 11, 2005, which is Fronapfel's phone call with SOPC-56. Despite these disclosures, the prosecution did not disclose the recordings. However, the prosecution did not suppress the substance of SOPC-56's information. Owens's trial team was aware from Stowell's report that SOPC-56 reported being told that Little Percy, Face, and Ray Ray were responsible for the Dayton Street homicides. Stowell assumed Ray Ray was a reference to Ray and noted that in his report. As it turned out, Ray Ray is Ray's brother, Dumas Brown (D. Brown), who was in prison at the time of the Dayton Street homicides. Owens's trial team was also aware from the follow-up investigation that none of SOPC-56's secondhand information had been verified by the APD. Owens failed to articulate what favorable information was in the recordings that was omitted from Stowell's report and Fronapfel's notes.

(iv) Conclusion

The court finds the prosecution failed to disclose the audio recordings of SOPC-56's interviews. However, Owens was not deprived of the substance of SOPC-56's information because the prosecution disclosed Stowell's report. In light of these findings, the court concludes the evidence is not relevant to the court's assessment of the cumulative materiality of the undisclosed evidence.

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[210] The prosecution previously notified Owens's trial team that any recording noted on a property report would be made available upon request. The trial team never requested a copy of the June 30 recording. Owens claims that SO-49 was a request for SOPC-56's recorded interviews. The motion was not a request for the recording of SOPC-56's June 30, 2005, interview but rather sought an order requiring the prosecution to put in writing any and all contacts of any type with any and all witnesses. The court denied that motion.

Accordingly, Owens's petition to vacate his conviction and sentence based on the nondisclosure of the audio recordings of SOPC-56's interviews is **Denied**.

(c) Brandi Taylor

(i) Parties' Positions

Owens claims the prosecution failed to disclose the audio recording of Fronapfel's interview of B. Taylor on February 4, 2006.

The prosecution asserts that it disclosed the recording.

(ii) Findings of Fact

B. Taylor is married to Ray's brother, D. Brown. Fronapfel interviewed B. Taylor over the phone on August 22, 2005. B. Taylor told Fronapfel that someone told her that the shooters involved in the Dayton Street homicides had gotten out of their car at the scene of the shooting. She also told Fronapfel that someone told her that there was a group of girls standing on the corner at the time of the shooting and that one of the girls was Ray's girlfriend. She could not recall the name of the person who told her this information and could not recall the name of Ray's girlfriend.

On February 4, 2006, Fronapfel called B. Taylor as a follow-up to her prior interview. B. Taylor again could not remember the name of the person who told her the information about what happened at the scene of the Dayton Street homicides. B. Taylor clarified that the person she had referred to as Ray's girlfriend was not Sailor.

Toward the end of the conversation, B. Taylor told Fronapfel about an outstanding misdemeanor warrant. Fronapfel told B. Taylor that she talked to the court several times. Fronapfel also told B. Taylor that the court was extending the warrant but that it was not going to disappear. At the end of the conversation, Fronapfel said she had "no problem taking care of that." SOPC.EX.D-524.

Despite telling B. Taylor she would take care of the warrant, Fronapfel only advised the court that B. Taylor was in the Witness Protection Program and that it was unsafe for B. Taylor to return to Colorado. Because B. Taylor was arrested on that warrant while she was in Colorado to testify against Ray, Fronapfel did not cause the warrant to disappear.

Fronapfel recorded the February 4, 2006, interview and noted the recording on a property sheet that the prosecution disclosed. However, the prosecution did not disclose the recording.

The prosecution endorsed B. Taylor, and she testified at this trial.

In Kepros's view, the trial team could have used the information from B. Taylor to demonstrate the inadequacy of the APD's investigation. According to Kepros, the defense could have showed the jury that Fronapfel delayed six months before following up with B. Taylor, a witness who had information contrary to the prosecution's theory of what happened at the scene of the shooting. According to Kepros, the six-month delay ensured B. Taylor's lack of memory and prejudiced Owens's defense.

(iii) Analysis

The information B. Taylor provided to Fronapfel during the follow-up interview was not favorable to Owens. Information that the shooters got out of their car at the crime scene or that Ray's girlfriend was at the crime scene was not favorable to Owens. In addition, it was substantially the same information she provided to Fronapfel during the initial interview, which was disclosed.

Fronapfel's six-month delay in following up with B. Taylor was favorable to Owens because his trial team could have used the delay to question the adequacy of Fronapfel's investigation of the Dayton Street homicides. However, the APD property sheet reflected that Fronapfel's February 4, 2006, interview of B. Taylor

was disclosed. Thus, Owens's trial team was not deprived of the fact that Fronapfel delayed six months before doing a follow up interview.

The fact that Fronapfel was going to call the court and ask for B. Taylor's warrant to be extended was also favorable evidence to Owens because his trial team could have used it to show B. Taylor was receiving a benefit in the form of having her warrant continued several times. The prosecution suppressed that Fronapfel was assisting B. Taylor with her warrant.

(iv) Conclusion

The court finds Fronapfel's assistance to B. Taylor was favorable to Owens, which the prosecution failed to disclose. In light of these findings, the court concludes the evidence is relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. *See* part IV.D.4 of this Order.

(d) Miguel Taylor

(i) Parties' Positions

Owens claims the prosecution failed to disclose a recorded interview of Miguel Taylor.

The prosecution contends Owens failed to specify how the information from Miguel Taylor was favorable.

(ii) Findings of Fact

Miguel Taylor, Marshall-Fields's close friend, assisted Marshall-Fields and Vann at Lowry Park with the rap contest, but he did not witness the shootings. He was out of town on June 20, 2005, and learned of the Dayton Street homicides from Pollard, Marshall-Fields's sister. He was initially reluctant to cooperate with the police until Pollard convinced him to do so. The prosecution disclosed his grand jury testimony and endorsed him, but he did not testify at either trial.

Miguel Taylor called Fronapfel on July 11, 2005, and discussed what he knew about the Lowry Park shootings. He told Fronapfel that he had not seen the shootings but spoke to Marshall-Fields afterwards. Marshall-Fields told Miguel Taylor, "some fool little brother [was] shooting over there." Miguel Taylor said he did not know Ray and did not know if Ray was at Lowry Park that night. Later, Marshall-Fields told Miguel Taylor that Sailor was Ray's wife. According to Miguel Taylor, Marshall-Fields had made this determination from seeing her with Ray at court hearings. During this interview, Miguel Taylor stated Harrison and Marshall-Fields were close friends and that Harrison hung out a lot with Marshall-Fields in Fort Collins.

Fronapfel recorded the interview, but the recording did not capture the entire interview. Fronapfel's report together with her notes and the APD property sheet listing the recording were disclosed.

According to Kepros, the information in the recording that was not included in Fronapfel's report or notes was critical information that would have assisted the trial team in developing a theory that Ray was the shooter at Lowry Park because Ray's older brothers lived in the area whereas Owens's brother did not.

Kepros also found Miguel Taylor's reference to Harrison hanging out with Marshall-Fields in Fort Collins important because of a burglary incident in Fort Collins in the week prior to Marshall-Fields's graduation allegedly involving Marshall-Fields and Harrison. In Kepros's view, she could have developed a theory that made Harrison a possible alternate suspect for the Dayton Street homicides.

Kepros also viewed the lack of the recording as a lost opportunity to develop impeachment information for Miguel Taylor by comparing his recorded interview with his grand jury testimony and the report of his July 11 interview.

(iii) Analysis

Miguel Taylor did not testify at the post-conviction hearing. Thus, Miguel Taylor was not asked who he believed Marshall-Fields was referring to when he used the phrase "some fool little brother." Kepros interpreted that language literally. According to Kepros, that language implicates Ray as the Lowry Park shooter because Ray had older brothers who lived in the area. However, "little brother" is more likely an ambiguous colloquial reference to an unknown young male instead of a reference to Ray. The court rejects Kepros's view of that language because it was too ambiguous to be favorable evidence to Owens.

Miguel Taylor also described Marshall-Fields's friendship with Harrison by noting that Harrison often hung out with Marshall-Fields in Fort Collins. Placing Harrison in Fort Collins was important to establish his connection to the burglary allegedly committed by Marshall-Fields and Harrison. However, Fronapfel's notes, which were disclosed, indicate Harrison and Marshall-Fields hung out in Fort Collins. Thus, that information from Miguel Taylor was not suppressed.

(iv) Conclusion

The court finds Miguel Taylor's account of Marshall-Fields's statement was not favorable evidence. The court also finds that although Miguel Taylor's statement connecting Harrison to Fort Collins was favorable, it was not suppressed. In light of these findings, the court concludes the evidence is not relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence based on the nondisclosure of the audio recording of Miguel Taylor's interview is **Denied**.

(e) Dallis Rogers and Jerrick Carter

(i) Parties' Positions

Owens claims the prosecution failed to disclose the recorded interviews of Dallis Rogers (D. Rogers) and Jerrick Carter (J. Carter).

The prosecution contends Owens failed to specify that the information from D. Rogers and J. Carter was exculpatory.

(ii) Findings of Fact

D. Rogers and J. Carter were friends with Johnson who accompanied him to the June 19, 2005, Father's Day barbecue. Fronapfel interviewed D. Rogers on August 10, 2005, and J. Carter on August 13, 2005. She recorded both interviews and noted the recordings on a property sheet that the prosecution disclosed. The notation for the D. Rogers and J. Carter recordings stated that Fronapfel had not made a copy of these recordings. Around that time, Fronapfel recorded several interviews on microcassette. She often did not duplicate those recordings because of the poor sound quality and because of the difficulty of copying audio from microcassette to another form of media. Owens's trial team noted the recordings on its Evidence Control Log and requested copies of these recordings, but the prosecution did not comply with the request. The prosecution disclosed Fronapfel's report and notes from both interviews.

D. Rogers and J. Carter confirmed that they went to and left the Father's Day barbecue with Johnson. D. Rogers and J. Carter both told Fronapfel that Johnson did not mention having any problems at the barbecue. J. Carter told Fronapfel that he spent some time with Johnson after the barbecue and that Johnson drove him and his pregnant fiancée to the hospital later that evening for the birth of their child.

The prosecution endorsed both D. Rogers and J. Carter for the Dayton Street trial but neither testified. Fronapfel stated in both reports that the purpose of her contact with D. Rogers and J. Carter was to confirm Johnson was at the Father's Day barbecue.

(iii) Analysis

Owens failed to specify how the information Fronapfel learned from D. Rogers and J. Carter was favorable to him. Fronapfel's purpose in speaking to D. Rogers and J. Carter was to confirm Johnson was at the Father's Day barbecue, a fact that was not disputed at trial. J. Carter's account of Johnson's whereabouts after the barbecue on the evening of June 19 corroborated Johnson's account of his whereabouts. This record is insufficient for the court to find that the information from J. Carter and D. Rogers in the audio recordings was favorable evidence to Owens.

(iv) Conclusion

The court finds the information D. Rogers and J. Carter provided to Fronapfel was not favorable evidence. In light of this finding, the court concludes the evidence is not relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence based on the nondisclosure of the audio recordings of the interviews of D. Rogers and J. Carter is **Denied**.

(f) William Hunt

(i) Parties' Positions

Owens claims the prosecution failed to disclose the recorded interview of William Hunt (Hunt).

The prosecution contends Hunt did not provide any information that was favorable to Owens.

(ii) Findings of Fact

On September 6, 2005, Hunt was incarcerated in the ACDF on suicide watch. He asked to speak with a sergeant. He informed the sergeant that he had information about the cases involving Ray. The sergeant advised Hunt that he would let the appropriate authorities know. The sergeant prepared a report of his contact with Hunt, and that report was disclosed.

Fronapfel interviewed Hunt later that day. He told her that he obtained information from Ray while they shared a cell. Hunt's information suggested that he and Ray discussed the Lowry Park shootings and the Dayton Street homicides. For example, Hunt knew:

- Ray was worried about his wife who was in jail;
- Ray wanted to post his wife's bond because he was worried she might cooperate with the police;
- Ray had given a large amount of money to his attorney who had refunded some of it; and[211]
- three people were shot on July 4, 2004, and two more people were shot on June 20, 2005, but only one was a witness to the July 4 shootings.

According to Hunt, Ray told him that Ray's "homeboy from Chicago" was responsible for the July 4 shootings. Hunt also told Fronapfel that Ray had flown back and forth between Denver and Chicago as part of his drug distribution business and that he distributed Mexican cocaine. Based on his conversations with Ray, Hunt believed Ray was responsible for 11 or 12 murders in Chicago.

[211] The evidence at trial from Sailor was that she had taken a large amount of money to Ray's attorney who had then given some of it back to her over time.

During the interview, Hunt told Fronapfel he was currently in jail for setting himself on fire. He claimed to have an IQ of 142 and to speak five languages. He also claimed he had written all of the rules for a prison in Mississippi. He advised Fronapfel that he was currently taking psychotropic medications. In Fronapfel's opinion, there were indications during the interview that he had trouble focusing on what he was saying. He repeatedly asked Fronapfel to have the prosecution help him get to the Colorado Mental Health Institute at Pueblo (CMHIP) because he needed help. At one point, he told Fronapfel that he would not tell her everything Ray had told him because he wanted to get an attorney and speak to the district attorney about going to the CMHIP. Hunt also asked if he could return to Ray's cell so he could get additional information. Fronapfel explained that he could not return to Ray's cell because he could not act as a government agent.

The prosecution disclosed Fronapfel's notes, the sergeant's report, and the property sheet reflecting the audio recording of the interview but did not provide the audio recording. Owens's trial team noted the recording on its Evidence Control Log and requested a copy, but the prosecution did not comply with that request.

Hunt's information that a "homeboy from Chicago" committed the murders is not in Fronapfel's notes. However, her notes reflect, "'homeboy' was the shooter." During the post-conviction hearing, Fronapfel testified that Carter is from Chicago.

Hunt reported that Sailor was driving a 1993 Pontiac Bonneville and a 1997 Chevrolet Silverado. Fronapfel testified Sailor drove these vehicles during the relevant time period. Hunt's account of the vehicles Sailor was driving is also not in Fronapfel's notes.

Kepros viewed Hunt as a credible witness because his interview indicated he knew a lot of personal information about Ray that he could only have gotten from Ray. She also thought Ray might have felt comfortable speaking to Hunt because Hunt's mental condition might have caused everyone, including law enforcement, to disregard what he said. Under these circumstances, Kepros viewed Hunt's reference to someone from Chicago being the shooter as very important because Carter reportedly said something similar to Strickland. Regarding Hunt's mental condition, Kepros acknowledged that the trial team would have investigated it but noted the prosecution had called Strickland and Sailor, who both admitted to having mental health challenges.

The prosecution endorsed Hunt as a witness in the Dayton Street trial, but he did not testify.

(iii) Analysis

Hunt had mental health challenges that likely would have rendered him incredible and his information unreliable. Hunt was in jail for setting himself on fire and asked several times to be transferred to the CMHIP so that he could get help. When the totality of Fronapfel's interview of Hunt is considered, the information from Hunt was not favorable evidence to Owens.

(iv) Conclusion

The court finds Hunt's information was not favorable to Owens. Thus, the court concludes the evidence is not relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence based on the nondisclosure of the audio recording of Hunt's interview is **Denied**.

(g) Amber Phillips

(i) Parties' Positions

Owens claims the prosecution suppressed an audio recording of an interview of Amber Phillips (Phillips).

The prosecution contends Phillips did not provide any evidence that was favorable to Owens.

(ii) Findings of Fact

Fronapfel interviewed Phillips sometime in September 2005. Phillips told Fronapfel:

- she knew Ray from high school, but they had not gone to the same school;
- she used to date Ray's brother;
- she met Johnson in August 2004, and they discussed the shooting of Vann at Lowry Park;
- during her discussion with Johnson, he told her that he and Vann were friends;
- Johnson's nickname was J-5;
- Johnson and J. Martin were friends; and
- she had never seen Ray and Johnson together.

Fronapfel made several attempts to follow up with Phillips, but her attempts were unsuccessful. Fronapfel recorded her interview of Phillips and noted the recording on a property sheet. The prosecution disclosed Fronapfel's notes and the property sheet but not the recording.

Phillips testified before the grand jury on January 12, 2006, and the prosecution disclosed her testimony. Phillips testified that Dickey told her about

the Dayton Street homicides. The prosecution endorsed Phillips, but she did not testify at trial.

(iii) Analysis

Owens failed to establish how the information Fronapfel learned from Phillips was favorable. Phillips told Fronapfel how she knew various people associated with the Lowry Park shootings and Dayton Street homicides. She did not give Fronapfel any information that was exculpatory in nature or any information Owens could have used to impeach any witness at trial. This record is insufficient to support a finding that Phillips provided evidence that was favorable to Owens.

(iv) Conclusion

The court finds the information Phillips provided to law enforcement was not favorable to Owens. Thus, the court concludes the evidence is not relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence based on the nondisclosure of the audio recording of the interview of Phillips is **Denied**.

iii. Criminal History Records Searches[212]

iv. Data Searches of Motor Vehicle Records[213]

(a) Parties' Positions

Owens argues the prosecution failed to disclose some of the motor vehicle record searches done by the APD.

The prosecution responds that Owens does not specify how the record searches were favorable.

[212] Owens withdrew this claim in SOPC-177.

[213] The court denied Owens an evidentiary hearing on this claim.

(b) Findings of Fact

Owens's post-conviction counsel reviewed the APD's entire investigative file for the Dayton Street homicides and Lowry Park shootings and discovered various motor vehicle record searches that the prosecution did not disclose. For example, there were record searches for cars registered to Ray and his family members, for cars registered to Sailor, and for cars associated with people described as possible suspects for the Lowry Park shootings.

As a result of this review, Owens filed SOPC-120 and claimed that the prosecution committed a discovery violation by failing to disclose the vehicle record searches. The court held an evidentiary hearing on the motion and found the claim was unsubstantiated.

(c) Analysis

The police and other law enforcement agencies have access to certain databases that compile confidential information from citizens. Due to the confidential nature of the information, access to these databases is restricted to law enforcement. Dissemination of information from the databases is also restricted. The National Crime Information Center (NCIC) and the Colorado Crime Information Center (CCIC) are examples of databases with restrictions on access and dissemination. Information from these types of databases that is required to be disclosed in discovery includes arrest records of the defendant, a codefendant, and any person the prosecution intends to call as a witness. Crim. P. 16(I)(a)(1)(V). Searches of motor vehicle records are not required to be disclosed.

(d) Conclusion

The court finds the APD's searches of motor vehicle records was not favorable evidence to Owens. Thus, the court concludes the evidence is not relevant to the court's assessment of the cumulative materiality of the undisclosed

evidence. Accordingly, Owens's petition to vacate his conviction and sentence based on the prosecution's failure to disclose the APD's searches of motor vehicle records is **Denied**.

v. Initial Interview of Harrison

(a) Parties' Positions

Owens claims the prosecution withheld the report of the initial interview of Harrison at the scene of the Dayton Street homicides.

The prosecution concedes that it failed to disclose this report but argues that Harrison's other interviews and his grand jury testimony, which were disclosed, had substantially the same information as the undisclosed report.

(b) Findings of Fact

Harrison was waiting for Marshall-Fields and Wolfe to pick him up when Kopp called and told him about the shooting. Harrison ran from his apartment building to Marshall-Fields's car and became distraught when he found it riddled with bullet holes.

Shortly after the shooting, Officers Eric Bond (Bond) and Tyler Riessland (Riessland) responded to the scene of the Dayton Street homicides. Riessland began interviewing Harrison, who was in a highly emotional state. Bond began interviewing Kopp. Bond interrupted Riessland's interview to ask Harrison a number of questions. Both officers prepared reports of their interviews and provided the reports to the prosecution. The prosecution put Bond's report in discovery but for unknown reasons did not include Riessland's report. In Bond's report, he noted that Riessland's report should be reviewed for information from Harrison's interview.

After the on-scene interviews were completed, Riessland drove Harrison and Kopp to the police station where Sobieski interviewed them. Sobieski prepared a report of his interview, and his report was disclosed.

On July 15, 2005, Fronapfel interviewed Harrison and the prosecution disclosed her report of that interview.

On December 16, 2005, Harrison testified before the grand jury, and the prosecution disclosed his testimony.

On February 29, 2008, DDA Emily Warren (Warren) interviewed Harrison, and the prosecution disclosed Warren's notes of the interview.

King cross-examined Harrison at trial. King utilized Sobieski's and Fronapfel's reports to impeach Harrison with statements inconsistent with his testimony.

At the post-conviction hearing, Kepros viewed the undisclosed Riessland report as significant because Harrison told Riessland shortly after the shooting that "he knew something" but did not otherwise elaborate. In Kepros's view, this nondisclosure deprived Owens's trial team of the opportunity to investigate what Harrison said "he knew."

Riessland's report also reflects that Marshall-Fields told Harrison that the man who shot him at Lowry Park and the man's girlfriend were at the barbecue on June 19, 2005. Kepros viewed this as important information because it would have supported a defense theory that Ray shot Vann at Lowry Park. The Sobieski and Fronapfel interview reports, Harrison's grand jury testimony, and Warren's notes, in one form or another, referenced Marshall-Fields telling Harrison that the man who shot him was at the barbecue.

(c) Analysis

Marshall-Fields's statement to Harrison included in Riessland's report that the man who shot him at Lowry Park was at the June 19, 2005, barbecue is favorable to Owens because when read together with Marshall-Fields's statement to law enforcement immediately after the Lowry Park shootings, it suggests that Ray shot Vann.

The prosecution concedes that it failed to disclose this report. While the prosecution failed to disclose this report, the prosecution disclosed four other documents that reflect Harrison's report that Marshall-Fields saw the man who shot him and the man's girlfriend at the Father's Day barbecue. Thus, Owens's trial team was not deprived of this information.

(d) Conclusion

The court finds that although the prosecution failed to disclose Riessland's report of his interview of Harrison, Owens was not deprived of any favorable information. In light of these findings, the court concludes the evidence is not relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence based on the nondisclosure of Riessland's report is **Denied**.

vi. Records and Handwritten Investigators' Notes[214]

vii. District Attorney and Investigator Notes Regarding Riean Cazenave

(a) Parties' Positions[215]

Owens contends the prosecution failed to provide notes taken by Lundin when she spoke to a person at Marshall-Fields's funeral who implicated Riean Cazenave (Cazenave) in the Dayton Street homicides.

The prosecution points out that Owens's trial team litigated this issue in both of his cases and was satisfied with the response from the prosecution and the record made by Lundin.

(b) Findings of Fact

While attending Marshall-Fields's funeral, Craig Silverman (Silverman), a defense attorney, approached Lundin and told her a man who was also at the funeral wanted to give her information about the Dayton Street homicides. The man identified himself to Lundin as Adam. The man told Lundin that Adam was not his real name. He refused to speak with Lundin because a district attorney investigator was also present so Lundin asked the investigator to leave. Lundin wrote down "Adam" on a funeral card but did not take any other notes. Adam told her that he learned from a friend that Cazenave killed Marshall-Fields because of a dispute over an ex-girlfriend. Lundin asked Adam not to give her any more information at that time and to call her the next day. Adam never called Lundin. Lundin passed this information on to Fronapfel and T. Wilson for further investigation.

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[214] Owens withdrew this claim in SOPC-181.

[215] The court denied Owens an evidentiary hearing on this claim.

Owens's trial team requested additional discovery of Lundin's interview of Adam in both the Lowry Park and Dayton Street cases. To comply with the request, Lundin made a record in both cases detailing her interaction with Adam. During a Lowry Park pretrial hearing, King asked Lundin one question before indicating to the court that Lundin's record fulfilled his request for discovery. A short time later during a pretrial motions hearing in this case and at the request of the court, Lundin made a substantially similar record. Owens's trial team did not ask Lundin any follow-up questions or indicate any dissatisfaction with the state of the record.

(c) Analysis

Adam's statements to Lundin implicated Cazenave for the Dayton Street homicides. Evidence identifying an alternate suspect is favorable evidence to the defendant; thus, the information from Adam was favorable to Owens.

The prosecution did not suppress any statements made by Adam to Lundin. To the contrary, Lundin detailed her interview with Adam on the record in both the Lowry Park and Dayton Street cases. She described how she was contacted and by whom, what information she received, and what she did with the information. In recounting the conversation, Lundin stated she did not take notes beyond writing down "Adam." Because the prosecution investigator was not privy to her conversation with Adam, there were no notes available to disclose.

(d) Conclusion

The court finds the prosecution did not suppress any information about Cazenave. In light of these findings, the court concludes the evidence is not relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence based on Lundin's contact with Adam is **Denied**.

viii. Notes Concerning Connection Between J. Martin and Carter[216]

o. Prosecution's Use of Subpoenas[217]

i. Parties' Positions

Owens argues the prosecution was obligated to disclose copies of the subpoenas it utilized to compel the attendance of certain out-of-state witnesses because the subpoenas conferred immunity from arrest and from service of process on the witnesses.

The prosecution responds by describing why the immunity granted to out-of-state witnesses is not a benefit.

ii. Findings of Fact

The prosecution compelled the attendance of witnesses residing out of state for various pretrial hearings and for trial by utilizing out-of-state witness subpoenas pursuant to C.R.S. §§ 16-9-201 to 204. The court authorized the out-of-state witness subpoenas requested by the prosecution. Each subpoena advises the witness of the following:

> If a person comes into this state in obedience to a summons directing him to attend and testify in this state, he shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

§ 16-9-204(1).

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[216] Owens withdrew this claim in SOPC-181.

[217] The court denied Owens an evidentiary hearing on this claim.

iii. Analysis

Owens argues the statutory grant of immunity in an out-of-state witness subpoena is favorable evidence because the immunity is relevant to each witness's motives and bias. Owens surmises that an out-of-state witness may have believed that by coming into Colorado under process that he or she was immune not only from arrest and service of process, but also from prosecution for past criminal behavior and even prior incidents of perjury. Owens failed to prove that any witness viewed the advisement in the out-of-state witness subpoena in such a way. Moreover, Owens does not cite any authority that deems the immunity conferred upon out-of-state witnesses as a benefit that must be disclosed.

The statutory immunity conferred upon out-of-state witnesses is not a benefit. First, the General Assembly grants the immunity to out-of-state witnesses under § 16-9-204(1). The prosecution does not grant the immunity. Second, the statute grants immunity to all out-of-state witnesses whether subpoenaed by the prosecution or defense. Third, the statute limits the immunity to arrest and service of process in connection with matters that arose prior to the witness entering Colorado to testify. It does not confer immunity from prosecution for either past crimes or crimes committed while the witness is in Colorado due to the subpoena. Fourth, parties seek authorization for out-of-state witness subpoenas on an *ex parte* basis. If the state legislature considered this type of immunity a benefit, parties could not obtain the subpoenas *ex parte*. Fifth, unlike Crim. P. 17(c) with respect to subpoenas *duces tecum*, neither Crim. P. 16 nor § 16-9-204 requires the party issuing testimonial subpoenas to give notice to the opposing party. Last, there is a significant distinction between the immunity conferred upon an out-of-state witness and the immunity conferred upon a witness who refuses to testify. *Compare* §§ 16-9-201 to 204 *with* C.R.S. § 13-90-118. For these reasons, the

statutory immunity conferred upon an out-of-state witness compelled to appear in court is not a benefit to the witness and is therefore not favorable evidence to Owens.

iv. Conclusion

The court finds the prosecution's use of subpoenas was not favorable evidence to Owens. In light of this finding, the court concludes the evidence is not relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. Accordingly, Owens's petition to vacate his conviction and sentence based on the prosecution's use of subpoenas is **Denied**.

p. Grand Jury's Request to Indict Harrison[218]

i. Parties' Positions

Owens contends the prosecution did not disclose that the grand jury attempted to indict Harrison as a co-conspirator with Owens, Ray, and Carter.

The prosecution responds that under its ethical and statutory obligations, it could not pursue an indictment of Harrison because there was no probable cause to support a conspiracy charge against him. The prosecution also responds that any alleged misconduct on its part was rendered harmless by the petit jury's verdict of guilt.

ii. Findings of Fact

On December 7, 2005, the prosecution empaneled a grand jury to investigate the Dayton Street homicides. The investigation continued to March 7, 2006, when the prosecutors proposed separate indictments for Owens, Ray, and Carter. On March 8, a grand juror asked Hower if the grand jury could add another person to the indictments. During the colloquy between Hower and the grand juror, Hower

[218] The court denied Owens an evidentiary hearing on this claim.

cautioned the juror not to disclose the jury's secret deliberations and asked the juror to identify the person and the proposed charge. The juror indicated the grand jury wished to indict Harrison for conspiracy. Hower responded that there was no need for additional instructions because it was the same conspiracy as charged in the prosecution's indictments. He went on to explain that the prosecutors did not believe there was sufficient probable cause to charge Harrison as a co-conspirator.

Hower advised the grand jury that it could return such a charge if it wished, but the prosecutors would not sign it. Hower also advised the grand jury that the prosecutors could draft a separate count for Harrison but would not add his name to the conspiracy charge in the proposed indictments. When asked about the consequences of the prosecutor not signing the indictment, Hower explained the grand jury could ask the judge to appoint a special prosecutor to pursue the indictment against Harrison.

After further deliberations, the grand jury returned the three proposed indictments on March 8, 2006, before the grand jury's supervising judge. The grand jury also delivered a note to the judge that read: "We, the grand jury, are of the opinion that Brent Harrison facilitated the murders of Javad Marshall-Fields and Vivian Wolfe." After the supervising judge made the note part of the record, Hower advised the judge that the prosecution believed there was insufficient evidence and would not sign an indictment for such a charge. There was no colloquy between the supervising judge and the grand jury on this topic.

On June 15, 2006, Owens's trial team filed SO-13[219] seeking an *in camera* review of the colloquy between the prosecutors and the grand jury to determine whether any misconduct had occurred. The prosecution opposed the motion. In

[219] Similar motions were filed by Ray (RR-27) and Carter (PC-3).

Order (SO) No. 2, the court ordered the prosecution to provide the colloquy for an *in camera* review. The court conducted the review, found no misconduct, and denied the motion in Consolidated Order No. Two.

iii. Analysis

Owens argues that the prosecution failed to disclose its response to the grand jury's request to indict Harrison, which was a benefit the prosecution conferred upon Harrison. Owens contends Harrison's credibility and the prosecution's integrity were not subjected to impeachment on this topic. The fact that the grand jury thought Harrison was involved in the homicides is favorable evidence to Owens because it raised questions about Harrison's credibility. Additionally, the prosecution's refusal to sign such a charge is favorable because it allowed Harrison to avoid the charge.

The prosecution provided the grand jury colloquy to the court for an *in camera* review.[220] The court ordered the disclosure in response to Owens's trial team's assertion that the court should conduct the review to determine if prosecutorial misconduct occurred during the grand jury proceedings. If misconduct occurred, the motion requested disclosure of the transcript. After conducting the *in camera* review, the court found no misconduct had occurred. Relying on *People v. District Court*, 610 P.2d 490, 494 (Colo. 1980), which held that clear examples of misconduct are required before colloquy is disclosed, the court denied the motion for disclosure. The court did not view the colloquy between Hower and the grand jury regarding the jury's desire to charge Harrison as misconduct.

[220] The colloquy was designated Court Exh. 9 and was sealed until further order of court.

When the prosecution is conflicted between its *Brady* obligations and maintaining the confidentiality of certain records, the defendant's rights are adequately protected if the court conducts an *in camera* review of the records and discloses any exculpatory information found in the confidential files. *Pennsylvania v. Ritchie*, 480 U.S. 39, 57-60 (1987); *People ex rel. A.D.T.*, 232 P.3d 313, 316 (Colo. App. 2010). The trial court reviewed the grand jury colloquy for prosecutorial misconduct, not for *Brady* material. It is the prosecution's responsibility to identify and disclose *Brady* material. *Ritchie*, 480 U.S. at 59. As such, the trial court's review of the material does not relieve the prosecution of its *Brady* obligation unless it asks the court to conduct an *in camera* review for *Brady* material. Having failed to do so, the prosecution suppressed that information.

iv. Conclusion

The court finds the grand jury's attempt to indict Harrison was favorable evidence to Owens, which the prosecution failed to disclose. Thus, the court concludes the evidence is relevant to the court's assessment of the cumulative materiality of the undisclosed evidence. *See* part IV.D.4 of this Order.

4. Cumulative Materiality: Undisclosed Materially Favorable Evidence, Unpreserved Evidence, and Destroyed Evidence[221]

a. Principles of Law

"[F]avorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles*, 514 U.S. at 433 (quoting *Bagley*, 473 U.S. at 682). The

[221] Owens argues the court must consider the materiality of the undisclosed evidence together with the materiality of the evidence the prosecution destroyed or failed to preserve. However, the court did not find that the prosecution destroyed or failed to preserve any evidence.

"touchstone of materiality is a 'reasonable probability' of a different result." *Id*. at 434. "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id*. (quoting *Bagley*, 473 U.S. at 678). Therefore, the controlling question is "whether in its absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id*.

The court must first consider the undisclosed evidence item by item by assessing the tendency and force of each item. *Id.* at 436 n.10. Then all suppressed evidenced favorable to the accused must be considered collectively to determine cumulative materiality. *Id.* at 436.

In *Kyles*, the United States Supreme Court considered the undisclosed evidence in the context of the evidence presented at trial and assessed the effect it would have had at trial by evaluating whether:

- the value of the witnesses' testimony or physical evidence would have been reduced;
- the witnesses' trial testimony or physical evidence would have been corroborated or contradicted;
- the strength of each party's case would have been increased or diminished;
- the jury's assessment of the testimony and physical evidence would have changed;
- the undisclosed evidence would have given rise to a stronger or new defense argument;
- the defense may have used the undisclosed evidence to attack the probative value of the physical evidence; and

- the defense may have used the undisclosed evidence to attack the thoroughness and good faith of the investigation.

Id. at 441-51. In short, the tendency and force of the undisclosed evidence turns on the impact the undisclosed evidence would have had at trial. *Id*. at 434.

b. Favorable Evidence that was Suppressed by the Prosecution

In this case, there were several pieces of favorable evidence withheld from Owens. Following *Kyles*, to determine materiality, the court evaluates "the tendency and force of the undisclosed evidence item by item." *Id*. at 436 n.10. Then the court evaluates the cumulative effect of all such evidence at part IV.D.4.c of this Order. *See id*.

i. Latoya Sailor

(a) Negotiations[222]

At trial, the prosecution emphasized Sailor's unwillingness to become a cooperating witness before Owens was arrested. Evidence that the prosecution and Sailor's attorney were engaged in plea negotiations prior to Owens's arrest undermines the prosecution's position. Because the negotiations involved Sailor providing information and cooperation in the prosecutions of Owens, Ray, and Carter, the negotiations indicate that Sailor, despite her fear of Owens, became willing to cooperate while Owens remained at large. The prosecution should have revealed that the negotiations began before Owens's arrest. This would have allowed the defense to expose that, in reality, Sailor's fear of Owens was not so great that it kept her from authorizing her attorney to negotiate. But the force of the undisclosed evidence is mixed. It would have had little impact on the question of her credibility as to Owens's guilt. Her credibility was thoroughly vetted by

[222] *See* part IV.D.3.b.i of this Order.

exposing her involvement in serious crimes, her strong incentives to negotiate a release from jail for her benefit and that of her son (who was in the care of Ray's mother), her witness protection benefits, and her generous plea bargain. Thus, any inconsistency or exaggeration of her level of fear would have had little additional impeachment value with respect to Owens's guilt.

This court also concludes, although it is more difficult to evaluate, that had this evidence been disclosed, it would not have affected the jury's decision on the question of the appropriate penalty. Step four of the sentencing hearing involves a deeply personal analysis by each juror that has subjective as well as objective components. Among the factors which the jurors weigh are considerations of future dangerousness. Sailor knew Owens well. Her fear that he might engage in ruthless conduct against her young son, coupled with her emotional outburst in the courtroom, could have had an emotional effect on the jury. But it is the level of her fear that is at the heart of this emotional effect, not the timing of her willingness to authorize plea bargaining. Evidence of the plea bargaining process would have demonstrated that McDermott negotiated Sailor's release from jail and her out-of-state placement with her son before a detailed proffer was made, and that the witness protection/relocation demand was withdrawn after Owens was arrested. Thus, impeaching Sailor about the date she first became willing to authorize plea negotiations would not have significantly diminished the jury's perception of the depth of her fear of Owens.

(b) Connection to Michigan Homicide[223]

As a threshold matter, it is not clear that Fronapfel's information would have led to any usable, exculpatory information. Sailor's ex-boyfriend was not involved

[223] *See* part IV.D.3.b.ii of this Order.

in the Michigan homicide and Sailor did not witness it. Nor is it clear to what degree the Michigan authorities would have cooperated in any in-depth defense investigation.

Owens argues the importance of Sailor's encounter with the Michigan detectives is that it occurred the day she testified in Ray's Lowry Park trial, which was the first trial in which Sailor testified. Owens contends the prosecution allowed Griffin to confront Sailor in an effort to intimidate her into testifying differently in Owens's Lowry Park trial and the Dayton Street trials because her testimony in Ray's Lowry Park trial was consistent with Ray's theory of self-defense.[224] There is no evidentiary support for this argument because there is no evidence the prosecutors knew that the Michigan homicide detectives contacted Sailor. Both Fronapfel and the district attorney investigators viewed their interaction with Griffin as nothing more than an assist to a fellow law enforcement agency and did not inform the prosecutors about the Michigan investigation. Even if the prosecution was dissatisfied with Sailor's testimony, Owens did not present any evidence that the prosecution summoned Griffin to Denver to confront Sailor in an effort to intimidate her. Sailor testified during the post-conviction hearing that this situation did not affect her testimony.

The lack of interaction between Griffin and the prosecution after Griffin's interviews of Sailor also indicates that the prosecution was not attempting to intimidate Sailor through Griffin. No one associated with the prosecution asked Griffin what he learned from Sailor. Nor did they ask Sailor what she told Griffin. Notwithstanding the tone of Griffin's initial email to Fronapfel, Griffin testified

[224] She also testified in this case that Owens and Ray were surrounded at Lowry Park on three sides by a large group of young people who were yelling and cursing at them as the crowd advanced toward them.

that he was not investigating Sailor as a suspect. Griffin told Sailor shortly after introducing himself that he considered her a witness and that they were only trying to verify her former boyfriend's purported alibi. Sailor was not intimidated by the encounter. She told Fronapfel the next day that she was surprised the detectives followed her because she thought no one was allowed to know where she lived but that she was not worried about it.

Next, Owens argues his trial team could have used this evidence to counteract the sympathetic light in which the prosecution cast Sailor. Sailor's testimony did not cast her in a sympathetic light. She admitted to being a street gang affiliate since the age of 14, carrying a gun on a regular basis, and assisting with Ray's drug distribution ring. She admitted to disposing of evidence after the Lowry Park shootings, espousing a philosophy that snitches should die, instructing Carter to leave the area, telling Owens to get rid of the guns used in the Dayton Street homicides, and doing nothing to prevent the murders while suspecting that Ray had targeted Marshall-Fields. Thus, there was substantial evidence making Sailor unsympathetic even without evidence about the Michigan homicide.

Last, Owens argues King could have used Sailor's admission to Griffin that she delivered and used powder cocaine to impeach Sailor's claim that she was not distributing or in possession of cocaine when she was arrested in August 2005 and to impeach her claim that the police had planted the drugs in the car. At trial, Sailor admitted that she assisted Ray in his drug distribution business and told the jury how Ray regularly used a cash-counting machine that counted tens of thousands of dollars. She also described delivering a large amount of cash to Ray's attorney after his arrest in order to prevent the police from seizing the money. She acknowledged that she collected drug money owed to Owens and Ray

after June 20, 2005. She admitted to carrying a gun at the time of her arrest.[225] In light of Sailor's admissions at trial about her use of marijuana and her connection to Ray's drug distribution business, any additional impeachment on the topics of drugs and her drug use would have been cumulative.

(c) Promise of Car[226]

Sailor always maintained that she would abide by her plea agreement and testify against Ray, Owens, and Carter. According to McDermott, she did not use her availability to testify as leverage in the ongoing dispute over witness protection funds, and the prosecution never used payments as leverage to ensure Sailor's availability to testify. Impeaching Sailor about receiving an additional substantial benefit such as a car would not have further impeached her testimony.

(d) Tendency and Force Analysis

Sailor withstood numerous scathing attacks on cross-examination at trial and during the sentencing hearing. For example,

- she was accused of lying about Owens's incriminating statements and admitted that, in many circumstances, she has no problem with lying;
- she was questioned about testifying against a family member in Michigan who was charged with killing a baby;
- she was accused of being a suspect in the killing of the baby in Michigan;
- she admitted that she destroyed evidence after the Lowry Park shootings;

[225] Sailor claimed that she carried the gun for protection. But the jury could have believed that she carried the gun because she was in the drug distribution business.
[226] *See* part IV.D.3.b.iii of this Order.

- she discussed her gang affiliations and admitted that she had claimed to be a Gangster Disciple since she was 14 years old; and
- she admitted that her family, who was affiliated with the Vice Lords street gang, had raised her to be a gang member but that she preferred the Gangster Disciples to the Vice Lords because her friends were Disciples.

In spite of the vigorous impeachment of Sailor, she appears to have been an inherently credible witness. Her credibility was derived in part from her specific knowledge of the circumstances of the Lowry Park shootings and Dayton Street homicides. Even though she did not know all of the details, she knew enough to be considered truthful. Some of her testimony was corroborated by other witnesses and other evidence. For example, Sailor testified that Owens indirectly admitted to her that he killed Marshall-Fields and Wolfe, and a baseball cap with Owens's DNA in it was found at the scene of the crime.

Sailor's credibility also derived from her demeanor. She answered every question from both parties, and even though she was volatile at times, her volatility appeared to be genuine and directly related to the situation.

Sailor's credibility, despite substantial attacks against it, diminishes the prejudicial impact of the undisclosed evidence. In light of the credibility of Sailor's testimony and the vigorous impeachment of Sailor at trial, the jury would not have discredited Sailor's testimony concerning the facts if it learned that she authorized McDermott to engage in plea negotiations with the prosecution prior to Owens's arrest, was interviewed by Griffin about an out-of-state homicide, or was promised a car.[227] While the undisclosed evidence may have been helpful to

[227] Although Sailor testified before Chambers promised her a car, Sailor was subject to recall by the trial team because phase two of the sentencing hearing had not yet concluded.

Owens at trial, he must establish more than helpfulness to sustain a claim of constitutional error. *See Agurs*, 427 U.S. at 109-10 ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.").

ii. Jamar Johnson

(a) Glendale Incident[228]

Had Owens's trial team attempted to impeach Johnson with his police contact in Glendale, the Glendale officer, the Glendale detective, and Johnson's probation officer could have testified that:

- Johnson and the victim ran from an active shooter but obeyed the police officer's commands to stop;
- Johnson truthfully told the Glendale officer that he was entering the Witness Protection Program and would be leaving Colorado;
- Johnson attempted to persuade the victim to cooperate with the police;
- Johnson submitted to a second interview with the detective shortly after the incident;
- neither the Glendale detective nor the officer considered citing Johnson for providing false information; rather, they considered him a cooperative witness; and
- Johnson's probation officer did not consider Johnson's contact with the police or his presence at the bar to be a probation violation.

Owens argues that evidence of Johnson's interaction with the police in Glendale would have shown Johnson's character for untruthfulness and his

[228] *See* part IV.D.3.c.i of this Order.

willingness to provide false information to law enforcement. Johnson acknowledged at trial that he was untruthful about matters of much more relevant consequence. He admitted that he lied to Fronapfel when he told her in August 2005 that he did not know Rio.[229] Johnson also acknowledged he was untruthful when he told Fronapfel he did not know any information about the Dayton Street homicides even though Ray had solicited him twice to kill Marshall-Fields. Thus, the evidence that Johnson provided false identification information to Glendale officers would have been cumulative to the impeachment of Johnson at trial.

Owens also argues the evidence that Johnson's probation was not revoked and that he was not charged with providing false information to law enforcement shows he received leniency on his cases. At trial, Johnson discussed his Boulder felony conviction, his Arapahoe County charges, and the leniency he received on those much more serious cases. Thus, the evidence that Johnson's probation was not revoked and that he did not face additional charges for providing false information to law enforcement would have been cumulative to the impeachment of Johnson at trial and of little, if any, additional value.

(b) Termination of Out-of-State Probation[230]

Johnson testified at trial that he had been convicted of felony menacing and was sentenced to probation. Johnson's testimony gave the jury the impression that he was complying with the terms and conditions of his probation. The jury did not learn that Johnson failed to comply with the terms and conditions of his probation or that Singletary filed a violation report with the ICAOS and closed the case. Knowing that he was in violation of probation may have motivated Johnson to continue cooperating with the prosecution to avoid revocation of his probation. If

[229] Rio is Owens's nickname.
[230] *See* part IV.D.3.c.iii of this Order.

his probation had been revoked, Johnson knew that he would face a substantial prison sentence. The jury also did not learn that Johnson was not complying with Singletary's supervision from September 2007 to February 2008. Thus, Owens's trial team could have shown that his continued cooperation with the prosecution was conferring significant benefits to Johnson because revocation would have exposed him to a significant prison sentence. However, this undisclosed evidence is of little additional impeachment value compared to the impeachment value of the favorable plea agreements Johnson received on his cases.

(c) Communications Between Arapahoe County and Boulder County Prosecutors[231]

The leniency Johnson received on his Boulder County case was developed on cross-examination at trial. Johnson admitted he was resentenced to probation on his Boulder County case after he admitted violating his probation. He acknowledged he did not have to go to prison and that he was resentenced as though "something had never happened." Guilt Phase Tr. 139:4 (Apr. 21, 2008 a.m.). While the court and the parties may recognize some advantage to unsupervised probation over probation supervised jointly by another probation department, that nuance would not have added any value to the impeachment of Johnson.

(d) Waffle House Shooting[232]

Johnson testified at trial that he was complying with the terms and conditions of his supervised probation after he entered the Witness Protection Program in 2006. Owens's trial team could have implied that Johnson was somehow involved in a gang-related shooting at a Waffle House after he became a

[231] *See* part IV.D.3.c.iv of this Order.
[232] *See* part IV.D.3.c.v of this Order.

protected witness and that he was associated with the Bloods. According to Owens, this impeachment might have caused the jury to believe that Johnson did not need or want witness protection because the Bloods provided him with the protection he needed. Eliciting that testimony from Johnson would have opened the door to the prosecution asking Johnson why he entered the Witness Protection Program and asking Johnson about the circumstances of his relocation. The impact of the prosecution's rehabilitative evidence would have outweighed any evidence of Johnson's gang involvement.

(e) Tendency and Force Analysis

Johnson admitted at trial that he cooperated in this case in exchange for leniency on his cases in Boulder and Arapahoe Counties. He testified that he became a cooperating witness only because he was in jail with a high bond. He acknowledged that he pleaded guilty to felony menacing involving a firearm in Boulder and that he was on probation for that case when he was at Lowry Park. He testified that he was sentenced to a deferred judgment in Arapahoe County and resentenced to probation in Boulder County after he cooperated in this case.

Other witnesses at trial corroborated many important aspects of Johnson's testimony. For example,

- Sailor, Strickland, and Harris corroborated that Ray arranged to have Marshall-Fields killed because he was going to testify against Ray;
- Sailor corroborated that Ray held the gun under his arm when he shot at Lowry Park;
- Sailor and Fronapfel corroborated that Marshall-Fields was injured at Lowry Park; and
- Todd corroborated that Ray and Marshall-Fields saw each other at the Father's Day barbecue.

The substantial corroboration of Johnson's testimony, and the fact that much of his testimony was helpful to Owens's unsuccessful defense strategy with regard to the Lowry Park shootings, shows the inherent credibility of his information, and diminishes the prejudicial impact of the undisclosed evidence.

In light of the inherent credibility of Johnson's testimony and the vigorous impeachment of Johnson on cross-examination at trial, the jury would not have discredited Johnson if it learned:

- that Johnson was at a bar in Glendale when a shooting occurred;
- the circumstances of the termination of Johnson's out-of-state probation;
- that Hower discussed Johnson's cooperation with a prosecutor in Boulder County, which likely resulted in Johnson being resentenced to unsupervised probation; and
- that Johnson was at a Waffle House when a gang-related shooting occurred.

While the undisclosed evidence may have been helpful to Owens at trial, he must establish more than helpfulness to sustain a claim of constitutional error. *See Agurs*, 427 U.S. at 109-10 ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.").

iii. Dexter Harris

(a) Paid Informant[233]

Owens's trial team was unaware that Gallegos signed up Harris as a confidential informant for the APD for the purpose of giving information to the

[233] *See* part IV.D.3.e.iii of this Order.

MCU. The team was also unaware that Gallegos assigned Harris an alias to conceal his identity, that he was paid $200 for information, and they were not given police reports indicating that he participated in an undercover capacity in an unsuccessful narcotics operation at a barbershop.

Despite the lack of disclosure on this topic, Owens's trial team was aware that Harris wanted to work for the APD as an informant because in his initial interview on July 19, 2006, he told Fronapfel that he wanted to work as an informant on narcotics cases. The trial team was also aware that Harris worked as an informant because in his November 25, 2006, letter to Hower, Harris claimed to have worked as an informant while wearing a wire. And during his June 11, 2007, testimony, Harris claimed that he was Fronapfel's informant for five homicide investigations. At trial, he was questioned about these topics including participating in undercover narcotics operations for the APD.

Owens's trial team could have used Harris's $200 payment to further impeach him at trial, but the impeachment would not have been impactful. The purpose behind paying Harris the $200 is ambiguous. There is no evidence that Harris was paid for the information he provided in this case. Harris believes that he received the money as part of witness protection. At trial, Harris admitted that he was a confidential informant for the APD so evidence that he was paid $200 would have been cumulative impeachment. Likewise, the APD's assignment of an alias to Harris would have been cumulative impeachment, and questioning why Harris was assigned an alias would have allowed the prosecution to present evidence explaining that aliases are used as an added layer of safety for informants.

(b) Arapahoe County Case 90CR404 and the Chronic Offender Program[234]

Owens's trial team had an abundance of information showing Harris was a career criminal, including a Blackstone report showing that he had suffered numerous felony convictions. Owens's trial team portrayed Harris to the jury as a violent career criminal who became an informant and traded information for his own benefit. Harris testified at trial that he had six felony convictions, that he had recently been released from prison and was on parole, and that he had served a lengthy prison sentence for the violent crime of second-degree assault in 1987. He also acknowledged that when he came forward in this case, he was facing a prison sentence in his Denver drug case that could have been substantially increased by the filing of habitual charges. Owens's trial team vigorously attacked Harris's claim that he provided information in this case because he did not approve of people like Ray who would hurt someone simply because the person was a witness. Because Harris was portrayed as a career criminal who was trying to obtain a benefit on his pending charges by informing on others, the undisclosed evidence that Hower had labeled Harris as a chronic offender 18 years before trial would have been cumulative impeachment with little, if any, additional value.

(c) Cooperation with Other Aurora Homicide Investigations[235]

Owens's trial team cross-examined Harris about his cooperation with the APD on other homicide investigations. Impeaching Harris with his assistance in one more homicide investigation would have been cumulative impeachment. If Owens's trial team had impeached Harris about his cooperation on the 1032

[234] *See* part IV.D.3.e.iv of this Order.
[235] *See* part IV.D.3.e.vii of this Order.

Dayton homicide investigation, the prosecution would have called Mehl to bolster Harris's credibility concerning the reliability of his information on that case.

(d) Assistance with Denver and Aurora Cases[236]

The prosecution did not disclose that Hower spoke to the prosecutors on Harris's Denver drug case and Aurora case in the summer of 2006 about his cooperation. While Hower's notice to the Denver prosecutor had an obvious effect, there is no evidence that Hower's notice to the Aurora prosecutor had any effect. This lack of disclosure is troubling and shows the prosecution's lack of sensitivity to its discovery obligations. But Harris admitted at trial that Hower and Fronapfel interceded in his criminal cases. The fact that Harris sought cooperation from Hower for his Denver drug case and that Harris received assistance from Fronapfel in 2007 and 2008 were topics of cross-examination at trial. Thus, the jury was aware that Harris sought and obtained assistance in exchange for his cooperation. Because Harris admitted that Hower and Fronapfel interceded in his criminal cases, the undisclosed evidence would have been cumulative impeachment.

(e) Financial Assistance[237]

Prior to testifying at trial, the prosecution spent approximately $2,400 to house and feed Harris. The amount expended does not suggest that Harris was staying at a luxurious hotel or enjoying high-priced meals. At trial, Harris was cross-examined about this financial assistance. While only the 2006 expenditures were referenced, the fact that his testimony could have been influenced by financial assistance was established. Harris testified during the post-conviction hearing that his cooperation in this case was not contingent on the prosecution

[236] *See* part IV.D.3.e.viii of this Order.
[237] *See* part IV.D.3.e.ix of this Order.

housing and feeding him. Showing that Harris depended on the prosecution for his housing and food during trial was of little impeachment value. Had Owens's trial team pursued this line of questioning, the prosecution would have emphasized that it provided such assistance to ensure Harris's safety. Any marginal benefit of impeaching Harris on this point would likely have been outweighed by opening the door to testimony about Harris's need for witness protection.

(f) Tendency and Force Analysis

At trial, Owens's trial team portrayed Harris as a career criminal who cooperated with the prosecution for his own benefit. The jury was aware that Harris:

- requested assistance from the prosecution and law enforcement on his pending criminal cases;
- benefitted when Hower and Fronapfel intervened in his pending prosecutions;
- used the information he learned from Ray to negotiate his release on a personal recognizance bond;
- had six felony convictions;
- received financial assistance from the prosecution in the form of housing and food after his release from jail; and
- participated in undercover drug investigations for the APD as a narcotics informant.

The impact of the undisclosed evidence would have been further diminished because other witnesses corroborated several important points of Harris's testimony, including:

- Todd corroborated that Ray was alerted to the murders and that no celebration of the murders occurred while he was present;

- Sailor corroborated that Ray had an alibi for the Dayton Street homicides;
- Sailor, Johnson, and Strickland corroborated that Ray arranged to have Marshall-Fields killed because he was going to testify against Ray;
- Sailor, Johnson, and Fronapfel corroborated that Marshall-Fields was injured at the first shooting; and
- Sailor corroborated that the killing of Wolfe was not planned.

The corroboration of Harris's testimony shows the inherent credibility of his information and even further diminishes the prejudicial impact of the undisclosed evidence.

In light of the inherent credibility of Harris's testimony and the vigorous impeachment of Harris on cross-examination at trial, the jury would not have discredited Harris if it learned that he:

- was paid $200 for providing information to the MCU;
- was labeled as a chronic offender in 1990;
- assisted the APD with two other homicide investigations;
- benefitted from the prosecution's intervention in his criminal cases; and
- received additional witness protection funds from the prosecution.

While the undisclosed evidence may have been minimally helpful to Owens at trial, he must establish more than helpfulness to sustain a claim of constitutional error. *See Agurs*, 427 U.S. at 109-10 ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.").

iv. Brent Harrison[238]

Harrison testified as a percipient witness to events that occurred leading up to Marshall-Fields's death. He did not have evidence that directly implicated Owens. Harrison's expectation that the prosecution would resolve his Denver case would not have demonstrated that he was motivated to testify against Owens or that he was biased in favor of the prosecution.

v. Witness Protection Files[239]

(a) Rickey Carter

R. Carter provided significant corroborating evidence at trial. He testified that Owens was involved in moving a bag of guns to R. Carter's apartment on the day after the Dayton Street homicides. R. Carter admitted that he was a career criminal who participated in Ray's drug distribution ring while on parole. Other witnesses corroborated some of his testimony. For example, Todd and Sailor corroborated R. Carter's testimony that Ray and Owens hid guns in his apartment the day after the murders, and Marlena Taylor corroborated his testimony when she testified that, while R. Carter was in jail, repeated phone calls from an unknown male frightened her into returning the guns.

R. Carter's requests for financial assistance were borne of his own safety concerns. The modest amounts R. Carter requested, such as $449 for monthly rent and $150 for a security deposit, do not suggest that he was trying to take advantage of the Witness Protection Program. Impeaching R. Carter with such information would have had little value. As an initial matter, the documentation did not exist until June 2008. Had Owens's trial team asked R. Carter about the undisclosed costs, the prosecution would have delved into R. Carter's fear of Owens and the

[238] *See* part IV.D.3.f.ii of this Order.
[239] *See* part IV.D.3.h of this Order.

need for witness protection in this case. Balancing the impeachment of R. Carter for the modest sums expended to relocate him against emphasizing his fear of Owens strongly suggests that this type of impeachment would not have been impactful to the jury.

(b) Dexter Harris

The undisclosed files pertaining to Harris suggest that he was viewed by members of the prosecution team as someone who was difficult to manage. Sandy Salkeld (Salkeld), the victim-witness advocate assigned to Harris, remarked in a March 2008 email to the prosecution team that Harris was constantly lying to her. Salkeld clarified during the post-conviction hearing that her remarks were based solely on Harris not complying in 2006 with the investigator's instructions on where to stay while he was in witness protection. SOPC.EX.P-386.

If Owens's trial team had impeached Harris with this evidence, the prosecution would have responded by asking Harris why he did not stay where he was told to stay. Harris most likely would have responded that he was concerned for his safety.

Owens's trial team examined Harris twice during pretrial motions hearings. The team was aware that Harris was a street-wise criminal, acutely sensitive to the danger he was in by cooperating in this case. This line of questioning would have allowed the prosecution to address witness protection issues unique to Harris, including calling Salkeld to establish that her comments were borne of frustration with Harris.

King had the opportunity to cross-examine Harris and to attack his credibility (*see* part IV.D.4.b.iii(f) of this Order), and many significant points of Harris's testimony were corroborated by other witnesses or evidence at trial. Todd corroborated Harris's testimony that Ray was alerted to the murders and that no

celebration of the murders occurred while Todd was present. Sailor and the surveillance video corroborated Harris's testimony that Ray was on the liquor store surveillance camera at the time of the murder. Johnson and Sailor corroborated Harris's testimony that Ray had Marshall-Fields killed because he was going to testify.

The prosecution investigator's comments about Harris being on the dole and the Assistant District Attorney's comments about Harris taking advantage of the system without having been threatened were made after Harris testified on April 30 and June 5, 2008. The comments were made on July 3 and October 29, 2008. Thus, that impeachment information was not available for Owens's trial team to have used at trial.

(c) Marlena Taylor

Marlena Taylor, R. Carter's girlfriend, was a minor witness at trial. She testified that she was genuinely frightened of the unidentified men who repeatedly called while R. Carter was in jail and demanded that she return the guns given to R. Carter. The prosecution paid to relocate her family for safety reasons. If Owens's trial team had explored the funds expended on Marlena Taylor, the prosecution would have been able to explore the significant fear that motivated her to uproot her family and move out of Colorado. The prosecution would have shown that the expenses assisted her in becoming financially independent in her protected location. In short, she depended on the prosecution's financial assistance because of her fear. Any attempt to impeach Marlena Taylor on this topic would have emphasized her fear and would not have resonated with the jury.

(d) Latoya Sailor

Hower's comment in May 2006 that whether Sailor's requests for additional funds would be granted would depend on the reasonableness of her requests and

her behavior is evidence of the prosecution's difficulty in managing Sailor, and not of her credibility.

Sailor testified on June 5, 2008, during the sentencing hearing. On June 12, the prosecution sent her a $100 gift card to replace her lost cell phone. On June 13, the prosecution wired her $250. The implicit rationale for replacing Sailor's phone was that Sailor and the prosecution needed to be in contact to ensure her safety. If Owens's trial team asked Sailor why she needed a cell phone, Sailor would have discussed her safety and the need for witness protection.[240] Impeaching Sailor with her requests for financial assistance from the prosecution likely would have resulted in Sailor describing the circumstances of her relocation and her fear of people who appeared to her to be Owens's associates.

Owens's argument about the impeachment value of undisclosed financial assistance for Sailor misses the reality of what his trial team confronted with Sailor as a witness. Sailor was a difficult and sometimes volatile witness, and she was unequivocal on two points. First, the prosecution had not given her the necessary financial support to successfully relocate. Second, she never wanted to leave Colorado but had to do so only because of her cooperation in these cases. Thus, asking her about the financial assistance she received because of being a protected witness would have allowed her to reiterate her perceived need for witness protection.

[240] The other items regarding Sailor did not exist at the time of her testimony.

vi. Surveillance of T's Barbershop[241]

(a) Undisclosed Evidence

(i) Duration of Surveillance

There is no evidence that the prosecution deliberately misrepresented the dates of the surveillance of T's Barbershop. If Owens's trial team had exposed the prosecution's error at trial, the jury would have perceived it as an error and would have understood that Owens was not deprived of any favorable evidence as a result of the error.

The jury also would have learned the circumstances surrounding the camera from the APD's perspective, specifically that the surveillance of T's Barbershop was the first time the APD used that type of technology. Witnesses from the APD would have testified that two cameras were used to capture surveillance of T's Barbershop, that the rear camera was operational on June 23, and that the front camera was operational on July 21. The jury would have determined that the date the surveillance began on the front camera, instead of the rear camera, was erroneously included on the prosecution's memo. Other witnesses from the APD would have testified that no surveillance was recorded until June 23 because of the various problems with the camera. Kenney and Fronapfel would have testified the MCU did not initially request installation of the camera.

Because the APD was unfamiliar with the technology and experienced intermittent problems with the surveillance, the jury would have afforded the APD wide latitude concerning its handling of the surveillance.

[241] *See* part IV.D.3.k of this Order.

(ii) Fact that Surveillance was Deleted

The APD lacked a rudimentary understanding of the operation of the camera and the storage of the surveillance. Its mistakes were reasonably understandable. The deleted portions of surveillance would not have been important to the jury. If Owens had attacked the integrity of the APD about its handling of the surveillance, the jury would have learned that the APD was using this type of technology for the first time, they lacked basic knowledge about surveillance technology, and Kenney deleted surveillance in order to preserve space on the computer's hard drive. Kenney would have testified that the deleted portions of the surveillance captured nothing of evidentiary value. Owens was not deprived of all of the surveillance because the prosecution disclosed the camera's existence and some of its pictures as well as some of the car registrations. Thus, the effectiveness of any attack Owens's trial team would have mounted against the integrity of the APD investigation would have been mitigated by the officers' testimony.

Owens also contends his trial team would have asked the court to sanction the prosecution and to instruct the jury that the prosecution destroyed evidence. Owens asserts that the court would have precluded the prosecution from admitting evidence at trial of events at T's Barbershop that could have been captured by the surveillance camera, such as Todd's testimony that he saw Owens and Carter leave the barbershop in an unfamiliar car on June 20 and R. Carter's testimony that a bag of guns was moved to his apartment on June 21. Owens also asserts that the court would have given the jury an adverse inference instruction. Trial courts are afforded broad discretion to give adverse inference instructions when they deem such a sanction to be appropriate. *Aloi v. Union Pac. R.R. Corp.*, 129 P.3d 999, 1002 (Colo. 2006). Whether the court would have suppressed the evidence or would have given such an instruction is speculative. In the view of this court, it is

unlikely that the trial court would have done either. The evidence that no camera was operating on June 20 or 21 was unrebutted. Because there was never any footage from those dates, no footage from those dates could have been deleted and there would be no rational basis for suppressing testimony about things that happened on those dates. Because the record does not suggest bad faith or extreme negligence on the part of the APD, it is unlikely that the trial court would have deemed an adverse inference instruction appropriate. But if one had been given, it likely would have suggested that the jury could take an adverse inference if it deemed the actions of the APD to have been done in bad faith. It is unlikely that the jury would have found any such bad faith.

vii. Audio Recording of Fronapfel's Interview of B. Taylor[242]

The assistance Fronapfel provided to B. Taylor in the form of continuing her municipal warrant was minimal. Fronapfel did not cause the warrant or the charges to disappear. Thus, the jury's credibility assessments of B. Taylor and Fronapfel would not have changed in light of this evidence.

viii. Grand Jury's Request to Indict Harrison[243]

The grand jury's request to indict Harrison is a reflection of the grand jury's opinion that Harrison had some culpable involvement in the Dayton Street homicides. Had Owens's trial team confronted Harrison with this information at trial, it would have exposed Owens to the fact that a grand jury had considered the case, indicted Owens, and viewed Harrison as Owens's co-conspirator. The prosecution's decision not to pursue Harrison could have been viewed as an exercise of conservative, ethical judgment by the same people that decided that

[242] *See* part IV.D.3.n.ii(c) of this Order.
[243] *See* part IV.D.3.p of this Order.

Owens should be prosecuted. A prosecutor has an ethical obligation to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." Colo. RPC 3.8(a). Raising the subject with Harrison might have opened the door to allowing an explanation of the prosecutor's ethical duty. There would be a grave risk that any such inquiry would have damaged Owens's case, especially in light of the fact that Harrison did not implicate Owens for the Dayton Street homicides.

c. Analysis of Cumulative Materiality

The only physical evidence connecting Owens to the Dayton Street homicides was the New York Yankees baseball cap with his DNA in it that was found at the crime scene. None of the undisclosed evidence would have undermined the DNA evidence.

The prosecution presented a convincing case that Owens killed Marshall-Fields and Wolfe. Testimony from Sailor, Harris, Johnson, Strickland, and Todd not only established Owens's motive to kill Marshall-Fields but also provided insight about the circumstances of the homicides. These witnesses were each independently and unknowingly corroborated by each other and by other witness's testimony on various important facts. *Graham v. People*, 705 P.2d 505, 509 (Colo. 1985) (testimony contained inherent features of credibility because the witness corroborated details testified to by other witnesses).

All of the undisclosed evidence is impeachment-type evidence that Owens's trial team could have used to impeach a witness, the APD's investigation, or the prosecution's integrity. At trial, Owens's trial team impeached witnesses with their criminal history, suggested witnesses were biased in favor of the prosecution, and brought to light inconsistencies in the witness's testimony. Owens's trial team

impeached the witnesses on salient points, which carried greater impeachment value than any of the undisclosed evidence.

For these reasons, there is no reasonable probability that the outcome of the trial or sentencing hearing would have been different if all of the undisclosed evidence had been known to Owens's trial team. *See Bagley*, 473 U.S. at 682 ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."). The undisclosed evidence did not violate Owens's right to a fair trial and did not undermine confidence in the outcome of his trial or sentencing hearing. *Kyles*, 514 U.S. at 434 (the controlling question is "whether in its absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

5. Conclusion

Based on the court's findings that none of the undisclosed evidence would have affected the outcome of Owens's trial, Owens's petition to vacate his conviction and sentence based on the government's alleged failures to disclose materially favorable evidence is **Denied**.

E. Cumulative Materiality: False Testimony, Nondisclosure of Materially Favorable Evidence, Failure to Preserve Evidence, and Destruction of Evidence

Based on the court's findings that neither the false testimony nor the undisclosed evidence would have had an impact on the outcome of Owens's trial, Owens's petition to vacate his conviction and sentence based on the cumulative materiality of the alleged government misconduct is **Denied**.

F. Prosecution's Closing Arguments

1. General Statement of Parties' Positions

According to Owens, the prosecution violated his constitutional rights to due process and to a fair trial by an impartial jury as well as his constitutional right to heightened reliability in his sentencing hearing several times throughout its closing and rebuttal arguments. Owens raises 27 instances[244] of improper arguments and generally contends that the prosecution misled the jury as to the law and facts and improperly appealed to the jurors' emotions.

The prosecution responds that none of its arguments were improper and asserts that Owens distorts the prosecution's arguments by quoting the arguments out of context.

2. General Principles of Law

Every individual has a constitutional right to trial by an impartial jury. U.S. Const. amend. VI; Colo. Const. art. II, § 16. "This right includes the right to have an impartial jury decide the accused's guilt or innocence solely on the basis of the evidence properly introduced at trial." *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005). Closing arguments are not evidence. *People v. Rodriguez*, 914 P.2d 230, 278 (Colo. 1996). However, "[a] jury that has been misled by [the prosecutor's] improper argument cannot be considered impartial." *Domingo-*

[244] On appeal, the defendant in *People* v. *Rodriguez*, 794 P.2d 965, 972 (Colo. 1990), claimed 23 instances of improper prosecutorial sentencing hearing closing arguments. In post-conviction proceedings, he claimed 27 instances of improper prosecutorial guilt phase closing arguments. *People v. Rodriguez*, 914 P.2d 230, 278 n.49 (Colo. 1996). Although the Colorado Supreme Court in the *Rodriguez* cases deemed a few of the arguments improper, most arguments were not, and none were so egregious to warrant reversal of the defendants' convictions or sentences. *Rodriguez*, 914 P.2d at 303; *Rodriguez*, 794 P.2d at 991. After studying Owens's claims in conjunction with the *Rodriguez* opinions, this court views Owens's claims of improper closing argument as somewhat formulaic but will nevertheless address the claims.

Gomez, 125 P.3d at 1048. The prosecutor's duty to refrain from improper argument, therefore, has constitutional underpinnings. *See id.*

When a prosecutor allegedly violates this duty, the court engages in a two-step analysis to determine if the defendant is entitled to relief. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). First, the court determines whether the prosecutor's conduct was improper based on the totality of the circumstances. *Id.* Prosecutors may argue the facts admitted into evidence and any reasonable inferences drawn therefrom. *Domingo-Gomez*, 125 P.3d at 1048. Prosecutors may also refer to the instructions of law but must not express a personal opinion or make inflammatory remarks that might appeal to the passions or prejudices of the jury. *Id.* at 1048, 1050. "[A]rguments delivered in the heat of trial are not always perfectly scripted . . . [so] reviewing courts accord prosecutors the benefit of the doubt where remarks are ambiguous or simply inartful." *People v. McBride*, 228 P.3d 216, 221 (Colo. App. 2009) (internal citations and quotations omitted). In rebuttal arguments, a prosecutor is "allowed considerable latitude in responding to defense counsel's arguments." *People v. Salyer*, 80 P.3d 831, 839 (Colo. App. 2003); *see also People v. Vialpando*, 804 P.2d 219, 225 (Colo. App. 1990) ("A prosecutor is afforded considerable latitude in the right to reply to an argument by opposing counsel."); *Hafer v. People*, 492 P.2d 847, 851 (Colo. 1972) ("Provoked argument is permissible.").

If the closing argument was improper, the court proceeds to the second step and considers whether the improper argument warrants reversal of the defendant's conviction or sentence. *Wend*, 235 P.3d at 1096. The court makes this determination according to the standard that is appropriate for the kind of improper argument that the court is considering.

In death penalty cases, the prosecutor's improper closing arguments are analyzed as constitutional error. *People v. Dunlap*, 975 P.2d 723, 759-63 (Colo. 1999); *Rodriguez*, 914 P.2d at 278-80. Based on this precedent and because this is a death penalty case, the court presumes the errors alleged by Owens are of constitutional magnitude. There are two categories of constitutional error: structural errors and trial errors. Owens does not claim structural error.

Trial errors are those errors "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented." *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991). Trial errors, particularly with respect to a prosecutor's closing argument, include "[i]mpermissible comment on a defendant's exercise of a specific constitutional right." *Crider v. People*, 186 P.3d 39, 42 (Colo. 2008); *see also Chapman v. California*, 386 U.S. 18, 24-25 (1967) (the right not to testify); *People v. Rodgers*, 756 P.2d 980, 985 (Colo. 1988) (the right to be tried by a jury), *overruled on other grounds by People v. Miller*, 113 P.3d 743, 748-49 (Colo. 2005); *People v. Taylor*, 159 P.3d 730, 740 (Colo. App. 2006) (the right to post-arrest silence).

In *Miller*, the Colorado Supreme Court found that whether the defense objected to the prosecutor's alleged improper statement typically dictates the applicable standard of review. 113 P.3d at 748-50.[245] However, *Miller* was not a death penalty case. In death penalty cases, Colorado applies the constitutional error standard even when the defense did not make a contemporaneous objection.

[245] *But see Miller*, 113 P.3d at 752-53 (Bender, J., concurring) ("Except in a limited class of cases subject to the Federal Rules of Criminal Procedure, the [United States] Supreme Court has consistently held that a higher standard of review is required for errors of constitutional dimension and has applied the constitutional harmless error standard of review to all trial errors, regardless of whether an objection to such errors was contemporaneously lodged at trial.").

"[B]ecause death is a punishment qualitatively unlike any other, and there is a corresponding need for reliability in the sentencing proceeding, we have elected to examine the record of the closing arguments as if there had been contemporaneous objections." *Rodriguez*, 914 P.2d at 278 n.50 (quoting *People v. Rodriguez*, 794 P.2d 965, 972 (Colo. 1990)). "For purposes of fairness and consistency," the court reviews "contentions . . . of prosecutorial misconduct as if contemporaneous objections had been made." *Id.*; *see Rodriguez v. Zavaras*, 42 F.Supp.2d 1059, 1125 (D. Colo. 1999) (adopting the Colorado Supreme Court's approach); *Dunlap*, 975 P.2d at 760 n.40 (reviewing claims of prosecutorial misconduct during closing arguments as though contemporaneous objections had been made). Although *Miller* post-dates *Rodriguez* and *Dunlap*, because this is a death penalty case, the court will apply the harmless beyond a reasonable doubt standard.[246] A trial error is constitutionally harmless when the court finds the error harmless beyond a reasonable doubt. *Miller*, 113 P.3d at 748. "If there is a reasonable possibility that the defendant could have been prejudiced the error cannot be harmless beyond a reasonable doubt." *Rodgers*, 756 P.2d at 984 (quoting *Leonardo v. People*, 728 P.2d 1252, 1257 (Colo. 1986)).

Pursuant to *McBride*, the cumulative nature of the improprieties of the prosecution's closing arguments must also be evaluated.

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[246] The Colorado Supreme Court in *Rodriguez*, 914 P.2d at 278 n.50, relied on *Rodgers*, 756 P.2d 980, and *People v. Davis*, 794 P.2d 159 (Colo. 1990) *rev'd on other grounds by People v. Miller*, 113 P.3d 743 (Colo. 2005), for this proposition. Both *Rodgers* and *Davis* applied the harmless beyond a reasonable doubt standard to errors of constitutional dimension when no contemporaneous objection was made. In *Miller*, the Colorado Supreme Court overturned its holdings in *Rodgers* and *Davis*. *Miller*, 113 P.3d at 748. According to *Miller*, the plain error standard of review governs constitutional trial errors to which no contemporaneous objection was made. *Id.* at 752. Because *Miller* was not a death penalty case, this court presumes that the *Rodriguez* approach, despite the fact that its authoritative support has been overturned, remains applicable to death penalty cases.

3. Alleged Improper Arguments in this Case[247]

a. Guilt Phase Closing Arguments

i. "Do Your Duty" Argument

(a) Parties' Positions

Owens contends Tomsic and Warren improperly compared Marshall-Fields's sense of duty to the criminal justice system, as demonstrated by his willingness to testify against Ray despite the threats he received, to the jury's obligation to the criminal justice system, which included finding Owens guilty.

The prosecution responds that asking the jury to bring justice on behalf of Marshall-Fields was not improper because it was merely urging the jury to follow the law.

(b) Findings of Fact

On May 9, 2008, Tomsic made a guilt phase closing argument on behalf of the prosecution, Kepros responded on behalf of Owens, and Warren made a rebuttal argument. Tomsic concluded her closing argument by discussing Marshall-Fields's desire to seek justice for the death of Vann. She told the jury, "[a]ll Javad Marshall-Fields wanted was a chance to come and sit in that witness

[247] Because there were eight closing arguments, the court sets forth the transcript citations in the following table:

Phase/Argument	**Attorney**	**Transcript**	**Page**
Guilt Phase			
Closing	Tomsic	May 9, 2008	51-86
Response	Kepros	May 9, 2008	93-167
Rebuttal	Warren	May 9, 2008	171-206
Phase One			
Closing	Tomsic	May 20, 2008 a.m.	46-64
Phase Two			
Closing	Hower	June 13, 2008 a.m.	57-118
Response	King	June 13, 2008 p.m.	6-67
Rebuttal	Tomsic	June 13, 2008 p.m.	67-74
Surrebuttal	King	June 13, 2008 p.m.	75-77

stand." Guilt Phase Tr. 86:15-16 (May 9, 2008). The court overruled an objection based on emotional appeal, and Tomsic concluded by arguing Marshall-Fields was denied the opportunity:

> To sit in that witness chair and describe under oath what he saw in terms of the murder of his friend Greg Vann. He wanted to come here and see justice, that opportunity was denied to him.
>
> Members of the jury, the People of the State of Colorado are asking you to now bring that justice.

Id. at 86:19-24.

Warren revisited this theme during her rebuttal argument.

> Javad Marshall-Fields and Vivian Wolfe were murdered because Javad was fulfilling his obligation to the criminal justice system and it is time now for you all to fulfill your obligation to the criminal justice system by finding Sir Mario Owens guilty, not because to do otherwise would let him get away with murder, which is what he wanted in the first place, not because two promising young lives were cut short. It is your obligation to find Mr. Owens guilty of murder because the evidence in this case in fact has proven beyond a reasonable doubt that he is guilty.

Id. at 206:13-22.

(c) Principles of Law

"It is improper for a prosecutor to suggest that a jury has a civic duty to convict." *Wilson v. Sirmons*, 536 F.3d 1064, 1120 (10th Cir. 2008) (quoting *Thornburg v. Mullin*, 422 F.3d 1113, 1134 (10th Cir. 2005)). In addition, "exhort[ing] the jury to do its job" is improper. *United States v. Young*, 470 U.S. 1, 18 (1985) (internal quotations omitted). "[T]hat kind of pressure . . . has no place in the administration of criminal justice." *Id.* "Prosecutors may not pressure jurors by suggesting that guilty verdicts are necessary to do justice for a sympathetic victim." *McBride*, 228 P.3d at 223. In *McBride*, the prosecutor asked

the jury to "do justice for other strangers," which the Attorney General conceded was an ill-advised argument. *Id.* The Colorado Court of Appeals condemned the prosecutor's plea to the jury to do justice on behalf of the victim and the victim's family. *Id.*

(d) Analysis

Like the prosecutor in *McBride*, Tomsic introduced the idea that the jury must bring justice on behalf of Marshall-Fields by finding Owens guilty because Marshall-Fields was prevented from bringing justice on behalf of Vann. In doing so, she cast Marshall-Fields in a sympathetic light. Unlike the government in *McBride*, the prosecution here stands by its closing arguments. The essence of Tomsic's argument was that because Marshall-Fields could not bring justice on behalf of Vann, the jury must bring justice on behalf of Marshall-Fields. Under *McBride*, Tomsic's argument was improper.

Under *McBride*, the court must take into consideration the context of Tomsic's argument. Immediately before Tomsic improperly asked the jury to bring the justice that Marshall-Fields was denied from bringing, her argument was interrupted with an objection. She was nearing the conclusion of her argument and may have been distracted by the objection. In Warren's rebuttal argument, she expanded on Tomsic's theme by asking the jury to bring justice and fulfill its obligation by finding Owens guilty because the evidence proved beyond a reasonable doubt that he was guilty. Warren's rebuttal argument clarified Tomsic's remark. The court also cannot ignore that the guilt phase closing arguments were almost 150 transcript pages whereas Tomsic's improper remark constitutes just eight lines of one transcript page. Because there is no reasonable possibility Tomsic's argument could have prejudiced Owens, the error was harmless beyond a reasonable doubt.

Warren urged the jury "to fulfill [its] obligation to the criminal justice system by finding Sir Mario Owens guilty . . . because the evidence in this case in fact has proven beyond a reasonable doubt that he is guilty." Guilt Phase Tr. 206:15-22 (May 9, 2008). This urging was not improper. Urging the jury to fulfill its obligation to find the defendant guilty because the evidence proves he is guilty is not synonymous with suggesting that the jury has a civic duty to convict the defendant. Under *Young*, Warren's argument was proper.

(e) Conclusion

Although Tomsic made an improper argument to the jury, Warren cured the impropriety when she asked the jury to find Owens guilty because the evidence proved he was guilty beyond a reasonable doubt. Accordingly, Owens's petition to vacate his conviction based on Tomsic's request that the jury bring the justice that Marshall-Fields was denied from bringing on behalf of Vann is **Denied**.

ii. Appeal to Emotion and Sympathy

(a) Parties' Positions

Owens contends Tomsic and Warren improperly appealed to the emotions and sympathy of the jurors by commenting on the character and future plans of the victims and by characterizing the crime as one that "shocks the conscience" and "will affect forever the lives of more than one person." *Id*. at 201:24; 172:2-3.

The prosecution responds that it may discuss the facts of a case in closing argument even though the facts evoke emotion and sympathy.

(b) Findings of Fact

Tomsic made various comments about the victims in this case during her guilt phase closing argument. Referring to the eye contact between Marshall-Fields and Ray at the Father's Day barbecue, she said, "Javad can't tell us about that." *Id*. 68:23. Tomsic went on to discuss the future of Marshall-Fields and

Wolfe by telling the jury, "[a]ll Vivian Wolfe wanted was the life of future and promise, that she was going to be living in Virginia with the man that she loved. All Javad Marshall-Fields wanted was a chance to come and sit in that witness stand." *Id.* at 86:13-16. The court overruled an objection based on emotional appeal, and Tomsic continued: "[t]o sit in that witness chair and describe under oath what he saw in terms of the murder of his friend Greg Vann. He wanted to come here and see justice, that opportunity was denied to him." *Id.* at 86:19-22. Continuing with this theme in her rebuttal argument, Warren characterized Wolfe as "a smart, outspoken young lady who was murdered" and referred to Marshall-Fields and Wolfe as "two promising young lives . . . cut short." *Id.* at 179:8-9; 206:19-20.

Warren began her rebuttal argument by thanking the jurors for their time, dedication, and attention to the trial. She continued:

> It goes without saying that the decisions that are made in this case will affect forever the lives of more than one person, and as a result, the diligence for which you pursue your obligations as jurors, is very much appreciated not only by myself, the entire prosecution team, but by every officer of this court, I am sure.

Id. at 172:1-6.

While pointing out that one of the witnesses was uncomfortable with the crime committed by Owens, Warren said, "[t]hat is a crime that shocks the conscience." *Id.* at 201:23-24. The court overruled an objection and Warren continued, "[e]ven the conscience of someone like Dexter Harris, two-time convicted felon." *Id.* at 202:2-3.

(c) Principles of Law

"[I]t is impermissible for a prosecutor to use arguments calculated to inflame the passions or prejudice of the jury." *Dunlap*, 975 P.2d at 758. "The fact that the

manner in which the homicides were committed evokes sympathy for the victims or disgust at the brutality of the killings is inherent in the crime itself. It is not a result of any wrongdoing on the part of the prosecution." *Id.* at 761. Further, no death sentence should "turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." *People v. Davis*, 794 P.2d 159, 198 (Colo. 1990) (quoting *Booth v. Maryland*, 482 U.S. 496, 507 (1987)), *rev'd on other grounds by Miller*, 113 P.3d at 748-49.

Colorado courts must "presume that jurors follow the instructions that they receive." *People v. Flockhart*, 304 P.3d 227, 235 (Colo. 2013). However, the jury instructions do not always cure the prejudice inflicted upon the defendant as the result of an improper prosecutorial closing argument. The Colorado Supreme Court has considered "repeated and emotionally charged expressions of the prosecutor's personal opinion that the defendant and his wife lied in their sworn testimony before the jury." *Wilson v. People*, 743 P.2d 415, 420 (Colo. 1987). No physical evidence tied the defendant in *Wilson* to the crime so witness "credibility was of critical significance to the resolution of this case." *Id.* Discussing whether a jury instruction cured the impropriety, the Colorado Supreme Court said:

> We recognize that the court instructed the jury that it was their responsibility as jurors to determine the credibility of witnesses. It would defy common sense, however, to believe that this instruction was sufficient to neutralize the impact of the prosecutor's improper remarks during summation. Although jurors are obviously aware that the arguments of counsel are not evidence, we cannot ignore the fact that jurors do pay heed to the arguments of counsel in arriving at a result.

Id. at 420-21. In *Wilson*, the jury instruction was insufficient to negate the prejudicial effect of the prosecutor's closing argument. *Id.* at 421.

In other circumstances, a specific curative instruction given to the jury immediately following the prosecutor's improper remark is sufficient to alleviate any prejudice to the defendant. *See Domingo-Gomez*, 125 P.3d at 1054. In comparison to the prosecutor's remarks in *Wilson*, the prosecutor's remarks in *Domingo-Gomez* were "significantly [less] egregious" and did not warrant reversal of the defendant's conviction. *Id.* at 1053 n.5, 1055. Thus, depending on the nature of the improper prosecutorial conduct and type of remedial instruction given to the jury, a jury instruction may limit or negate the prejudicial effect on the defendant.[248]

(d) Analysis

The manner in which the Dayton Street homicides were committed evokes sympathy for the victims. Marshall-Fields and Wolfe were college graduates embarking upon their adulthood with plans to live and work in Virginia. By all accounts, Marshall-Fields and Wolfe were developing into contributing members of society. Discussing those facts does not render the prosecution's arguments improper.

Warren's remarks that this case will affect more than one person and that this case shocks the conscience were innocuous. Equally innocuous was Tomsic's statement that Marshall-Fields could not testify concerning his encounter with Ray at the Father's Day barbecue. None of these statements were calculated to inflame the passions or prejudices of the jurors and were therefore not improper.

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[248] *Dunlap* also sheds some light on this issue. When analyzing whether the trial court abused its discretion by admitting a photo of Dunlap's smoking gun tattoo, the Colorado Supreme Court, after doing a CRE 401 and 403 analysis, concluded: "its prejudicial effect was limited by the trial court's instruction that the jury only consider the tattoo for purposes of rebutting the subsection (4)(k) 'not a continuing threat to society' mitigator." *Dunlap*, 975 P.2d at 744. The Colorado Supreme Court found the trial court did not abuse its discretion in admitting a photo of Dunlap's tattoo. *Id.*

Moreover, in light of the court's instruction to the jury that "[n]either sympathy nor prejudice should influence [its] decision" and the court's presumption that the jury followed the instructions, there is no reasonable possibility that Owens could have been prejudiced by these statements. Guilt Phase Instruction No. 1;[249] *see Flockhart*, 304 P.3d at 235 (courts must "presume that jurors follow the instructions that they receive."). Accordingly, even if these portions of the arguments could be perceived as erroneous, any perceived error would be harmless beyond a reasonable doubt.

(e) Conclusion

The court concludes Tomsic and Warren did not improperly appeal to the emotions of the jury by describing the characteristics of the victims. Accordingly, Owens's petition to vacate his conviction based on Tomsic's and Warren's comments about the victims in this case is **Denied**.

iii. Bolstering and Invoking Offices of the Court

(a) Parties' Positions

Owens contends Warren improperly bolstered the evidence when she told the jury that prosecutors take an oath to uphold the constitution. Owens also contends Warren improperly aligned the prosecution with the court when she argued to the jury that the trial judge determined each piece of evidence was relevant to the case.

The prosecution contends it was not improper to argue that prosecutors take an oath to uphold the constitution in order to rebut Owens's argument that the

[249] In the record, the guilt phase instructions are labeled in the following format: Instruction No. 1. For purposes of clarity, the court modifies this label to Guilt Phase Instruction No. 1 in order to distinguish the guilt phase instructions from the sentencing phase one and phase two final instructions.

prosecution had abused its power. The prosecution does not address Owens's second contention concerning the trial court's role as gatekeeper of the evidence.

(b) Findings of Fact

Kepros began her guilt phase closing argument by laying out the defense theme as "[e]vidence ignored, evidence overstated, evidence for sale." Guilt Phase Tr. 93:24-25 (May 9, 2008).

Warren attempted to undermine that theme by describing the role of the prosecution in the criminal justice system. Specifically, Warren told the jury:

> We have awesome power over people. It is the prosecutor who gets to make a decision about whether or not to make any type of an offer to a defendant who has been charged with a crime. It's a prosecutor who gets to decide whether or not to charge someone with a crime. That's why we take that oath to uphold the constitution, because that's an incredible amount of power that we have over people's lives. Ms. Kepros has characterized what the prosecution has done in this case as evidence ignored, evidence overstated and evidence for sale.

Id. at 172:16-25. Warren went on to describe how the prosecution disclosed its last-minute discovery of Ray's Camaro to the defense and to the court. *Id.* at 173:1-18.

Later in her rebuttal argument, Warren told the jury, "[b]ecause in a trial only relevant evidence is admissible. Judge Rafferty, he makes those decisions, right? So the evidence that came in legally was all relevant or it wouldn't have come in." *Id.* at 175:8-11.

(c) Principles of Law

When discussing the likelihood that a jury might afford more weight to a prosecutor's argument than to a defense attorney's argument, the Colorado Supreme Court said:

> Prosecutors have a higher ethical responsibility than other lawyers because of their dual role as both the sovereign's representative in the courtroom and as advocates for justice. Because the prosecutor represents the State and the People of Colorado, their argument is likely to have significant persuasive force with the jury. For that reason, the possibility that the jury will give greater weight to the prosecutor's arguments because of the prestige associated with the office and the presumed fact-finding capabilities available to the office is a matter of special concern. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. The prosecutor must therefore scrupulously avoid comments that could mislead or prejudice the jury. The prosecutor's actions during a criminal trial must always comport with the sovereign's goal that justice be done in every case and not necessarily that the prosecution win.

Domingo-Gomez, 125 P.3d at 1049 (internal citations and quotations omitted).

Prosecutors must not express a personal opinion concerning the guilt of the accused during closing arguments because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Young*, 470 U.S. at 18-19.

(d) Analysis

Prosecutors are allowed considerable liberty to rebut arguments made by the defense. The statements at issue here were not made in the prosecution's initial argument. All were made in rebuttal to Kepros's implication that the prosecution had ignored, overstated, and purchased evidence in order to make its case. Warren attempted to rebut the attack on the prosecution's integrity and boost the reliability of the prosecution's evidence by telling the jury that prosecutors take an "oath to

uphold the constitution." Guilt Phase Tr. 172:21 (May 9, 2008). In saying this, Warren did not express her personal opinion concerning Owens's guilt and did not imply she had additional information beyond that introduced into evidence. She merely informed the jury that prosecutors do not have free reign. To rebut Kepros's argument, Warren explained how the prosecution complied with its constitutional obligations by disclosing that it had located the Camaro. Warren did not exceed the considerable latitude that this court must afford prosecutors in making rebuttal arguments. *See Salyer*, 80 P.3d at 839 (prosecutors are entitled to "considerable latitude in responding to defense counsel's arguments").

Warren implied that the trial court deemed all of the evidence admitted during the trial to be legally relevant. This portion of the argument was ill advised. Trial courts seldom determine relevance *sua sponte* and it is not factually accurate to suggest that the court made a ruling on every item of evidence that came before the jury. Nor should juries consider the evidentiary rulings of the trial judge except when they have been instructed that certain evidence is to be disregarded or considered only for a limited purpose. The jury was instructed not to draw any conclusions from the attorney's objections or the trial court's rulings on those objections. Guilt Phase Instruction No. 1. And the argument was made in rebuttal. Additionally, Warren did not argue that the trial court had deemed the prosecution's evidence to be reliable or persuasive.

(e) Conclusion

The court concludes Warren did not improperly bolster the reliability of the prosecution's evidence. While she improperly characterized or commented upon the role of the court, the error was harmless beyond a reasonable doubt. Accordingly, Owens's petition to vacate his conviction based on Warren's rebuttal

argument that the prosecution takes an oath to uphold the constitution and that the trial judge is the gatekeeper of the evidence is **Denied**.

iv. Denigrating Defense Counsel

(a) Parties' Positions

Owens claims Warren improperly denigrated Kepros's argument by referring to it as a red herring.

The prosecution responds that it properly rebutted Kepros's closing argument and did not denigrate Kepros as a person.

(b) Findings of Fact

On multiple occasions during her guilt phase rebuttal argument, Warren characterized certain portions of Kepros's closing argument as a red herring. In the first instance, Warren said, "[s]ome of the questions that Ms. Kepros asked really are a red herring." Guilt Phase Tr. 176:19-20 (May 9, 2008). Warren later referred to a defense expert's testimony about Ray's Camaro as a red herring. *Id.* at 194:20-21. She then explained to the jury that "[a] red herring is . . . an argument technique, . . . basically a deliberate attempt to try and shift the subject of the argument." *Id.* at 194:25; 195:1-3.

(c) Principles of Law

"Remarks made to denigrate defense counsel constitute professional misconduct." *People v. Sandoval-Candelaria*, 328 P.3d 193, 202 (Colo. App. 2011), *rev'd on other grounds*, 321 P.3d 487 (Colo. 2014). Characterizing defense counsel's argument as a smoke screen was not improper in *People v. Kenny*, 30 P.3d 734, 741 (Colo. App. 2000).

(d) Analysis

Warren responded to Kepros's argument by answering the rhetorical questions Kepros posed to the jury about the quality of the Dayton Street

investigation. Warren also responded by discussing a defense expert's testimony concerning the Camaro. She pointed out that according to one witness, the debris left at the scene was not from Ray's Camaro. Warren's characterization of Kepros's arguments as a red herring was not improper. Prosecutors are entitled to "considerable latitude in responding to defense counsel's arguments." *Salyer*, 80 P.3d at 839. As in *Kenny* where the prosecutor's characterization of defense counsel's argument as a smoke screen did not warrant reversal, Warren's characterization of Kepros's argument as a red herring is harmless beyond a reasonable doubt and does not warrant reversal of Owens's conviction. 30 P.3d at 741.

(e) Conclusion

The court concludes Warren did not denigrate Kepros as a person or improperly denigrate her arguments. Accordingly, Owens's petition to vacate his conviction based on Warren's characterization of Kepros's closing argument as a red herring is **Denied**.

v. Misstating the Law

(a) Parties' Positions

Owens contends Warren misstated the law during her rebuttal closing argument when she told the jury that it did not have to consider the lesser included offenses and that the court instructs the jury on lesser included offenses "[i]f there's any argument, no matter how unreasonable by which a jury could conclude that the person committed the lesser, but not the greater." Guilt Phase Tr. 185:25; 186:1-3 (May 9, 2008).

The prosecution responds that it did not misstate the law when it told the jury that it did not have to consider the lesser included offenses if it convicted

Owens of the greater offense. The prosecution does not respond to Owens's contention that it misstated the test for instructing on a lesser included offense.

(b) Findings of Fact

Kepros touched on lesser included offenses during her closing argument by telling the jury, "Mr. Owens has pled not guilty to this crime. Notwithstanding that, the law does include these lesser offenses and that's why you have to consider these." *Id*. at 144:5-7.

Warren commented on lesser included offenses twice during her rebuttal closing argument. First, she told the jury:

> Ms. Kepros talks a little bit about these lesser included offenses, says you have to consider them. It's not exactly correct. If you find Mr. Owens guilty of first-degree murder, and according to the law of the lesser included offenses, he has[][250] necessarily committed the other crimes.

Id. at 184:23-25; 185:1-3. After explaining how lesser included offenses play into a trial, Warren also told the jury:

> If Mr. Owens committed a first-degree murder by definition, he's committed all the rest of those other crimes. That's what lesser included means. If you find him guilty of first-degree murder, those lessers get ignored. Frankly, those lessers have to be given to you by law[] [i]f there's any argument, no matter how unreasonable by which a jury could conclude that the person committed the lesser, but not the greater[.] [I]n this case the reality is that Mr. Owens committed two counts of first-degree murder and a count of conspiracy to commit first-degree murder. He committed those lessers only because he committed the greater offense.

[250] From the context, the court concludes Warren meant "has," not "hasn't," which is what appears in the original transcript.

> So as far as the lessers are concerned, that's not what he's guilty of.

Id. at 185:21-25; 186:1-8.

The court gave the standard lesser-included instruction. Guilt Phase Instruction No. 20.

(c) Principles of Law

"[I]t is improper for counsel to misstate or misinterpret the law during closing argument." *People v. Rodriguez*, 794 P.2d 965, 977 (Colo. 1990).

The defendant is entitled to an instruction on a lesser included offense when there is "a rational basis in the evidence to support a verdict acquitting [the defendant] of a greater offense . . . and convicting [the defendant] of the lesser offense." *People v. Bartowsheski*, 661 P.2d 235, 242 (Colo. 1983).

A prosecutor should refrain from informing the jury which party requested instructions on lesser included offenses. *See People v. Carrier*, 791 P.2d 1204, 1205 (Colo. App. 1990) (prosecutor's comment informing jury that defendant requested instructions on lesser included offenses did not warrant reversal because court offered immediate and effective curative instruction).

(d) Analysis

Kepros and Warren contradicted each other with respect to the role that lesser included offenses play in the jury's deliberations. Kepros told the jury it had to consider the lesser included offenses, and Warren told the jury it did not. Owens does not provide any authority holding that a jury must deliberate on the lesser included offenses when it convicts the defendant of the greater offense, and this court is not aware of any such authority. Warren's argument that the jury can ignore lesser included offenses if it convicted Owens of the greater offense was not a misstatement of the law and was therefore not improper.

Warren misstated the law when she argued that the court instructs the jury on lesser included offenses "[i]f there's any argument, no matter how unreasonable by which a jury could conclude that the person committed the lesser, but not the greater." Guilt Phase Tr. 185:25; 186:1-3 (May 9, 2008). The court instructs on lesser included offenses if there is "a rational basis in the evidence to support a verdict acquitting [the defendant] of a greater offense . . . and convicting [the defendant] of the lesser offense." *Bartowsheski*, 661 P.2d at 242. Warren's misstatement of the law was improper. But Warren did not tell the jury which party requested the lesser included offense instructions and, under the facts of the case, the disputed issue was identity, and not the degree of homicide. There is no reasonable possibility Warren's misstatement of the law prejudiced Owens and thus the error is harmless beyond a reasonable doubt.

(e) Conclusion

The court concludes Warren did not misstate the law concerning the jury's approach to lesser included offenses but misstated the law concerning when instructions on lesser included offenses are given. The court concludes the misstatement was harmless beyond a reasonable doubt. Accordingly, Owens's petition to vacate his conviction based on Warren's rebuttal argument about lesser included offenses is **Denied**.

vi. Misstating the Evidence and Appeal to Sympathy

(a) Parties' Positions

Owens contends Tomsic misstated the evidence when she told the jury both A. Martin and Marshall-Fields could identify Ray and Owens as the Lowry Park shooters. He also contends Warren misled the jury by telling it that the government lacked resources to do forensic testing on all of the evidence. Owens

believes Tomsic improperly appealed to the emotions of the jury by referring to Sailor as a domestic violence victim.

The prosecution does not respond to Owens's first contention that its statement about A. Martin and Marshall-Fields identifying Ray and Owens was a misstatement of the evidence. In response to Owens's second contention, the prosecution claims it was rebutting Kepros's argument that the prosecution failed to test certain evidence. Last, the prosecution responds that it appropriately characterized Sailor as a domestic violence victim because Sailor testified that Ray gave her a black eye shortly before the Dayton Street homicides.

(b) Findings of Fact

At trial, A. Martin testified:

> Q Now, did you also know an individual by the name of Sir Mario Owens?
>
> A Yes.
>
> . . . .
>
> Q Now, on July the 4th, 2004, do you recall seeing Sir Mario Owens at any point?
>
> A No.

Guilt Phase Tr. 31:9-11; 33:1-3 (Apr. 10, 2008 a.m.).

In her guilt phase closing argument, Tomsic described how Ray and Owens identified Marshall-Fields and A. Martin as witnesses to the Lowry Park shootings *via* the discovery Ray's attorney received from the prosecution on Ray's Lowry Park accessory case:

> Now, of course Askari Martin had gone to Overland so the question was, well, wait a minute, Sir Mario Owens is on the same [Overland High School yearbook] page, why isn't Askari Martin identifying Sir Mario Owens? Now, turns out [A. Martin] didn't actually see [Owens] there [on July 4th] . . . .

Guilt Phase Tr. 64:10-15 (May 9, 2008). Tomsic then played T. Wilson's interview of Owens on November 8, 2005, in Louisiana. *Id.* at 64:22. During the interview, Owens pointed out to T. Wilson that his photo was on the same page of the Overland High School yearbook as Ray's photo. Owens asked T. Wilson why A. Martin did not identify him when A. Martin identified Ray if A. Martin was looking at the yearbook page. T. Wilson clarified with Owens that he did not bring the yearbook page to A. Martin.

After the interview was played, Tomsic told the jury, "[T. Wilson]'s talking about the same interaction, the same beginning of a conspiracy where the problems are identified. Javad Marshall-Fields and Askari Martin are able to identify them." *Id*. at 64:23-25; 65:1-2. Tomsic went on to describe Ray's efforts to intimidate A. Martin and the bribes Ray tried to offer Marshall-Fields *via* Johnson. *Id.* at 65:5-25; 66:1-25; 67:1.

On the issue of forensic testing of evidence, Kepros pointed out during her closing argument that the prosecution ordered forensic testing on some items of evidence but not others. Specifically, Kepros argued:

> It's their job to prove who did the crime. They have the resources, they have the Colorado Bureau of Investigation, they have the ability to go get reference samples from suspects. And if they don't use those resources, it's because they choose not to. And if they choose not to, and that lack of evidence gives rise to your reasonable doubt, they have not proven their case.

Id. at 114:12-18. In rebuttal, Warren recognized that "[w]e live in a CSI world" and went on to explain why the blood on Vann's shirt was not tested. *Id*. at 181:19. In her explanation, Warren said, "I mean, could a test be done, sure. Do you really think the prosecution has unlimited resources to test things like this? Of course not." *Id.* at 182:24-25; 183:1-2.

While discussing the importance of certain witnesses in this case, Tomsic told the jury, "Latoya Ray and Robert Ray are having some problems. She's been a victim of domestic violence. He's hit her in the face, she's got a shiner. Probably happened at least one, if not two days before this." *Id.* at 74:3-6. At trial, Sailor testified:

> Q And in situations where you and Robert have gotten into fights, he can have quite a temper sometimes; is that fair?
>
> A Yes.
>
> Q He's hit you before?
>
> A Yes.

Guilt Phase Tr. 20:7-12 (Apr. 15, 2008 p.m.).

(c) Principles of Law

It is improper for a prosecutor to argue facts not admitted into evidence. *People v. Davis*, 280 P.3d 51, 53-55 (Colo. App. 2011).

(d) Analysis

During her guilt phase closing argument, Tomsic described how Ray and Owens concluded that Marshall-Fields and A. Martin were witnesses to the Lowry Park shootings. She was not recounting A. Martin's testimony. In fact, just prior to making this statement, Tomsic told the jury that A. Martin did not see Owens at Lowry Park. When read in context, Tomsic did not misstate the evidence.

Both parties addressed the forensic testing of evidence and the lack thereof during closing arguments. Kepros attacked the integrity of the investigation into this case and argued that the government purposefully did not test certain items of physical evidence. In rebuttal, Warren asked and then answered the question, "Do you really think the prosecution has unlimited resources to test things like this? Of course not." Guilt Phase Tr. 182:24-25; 183:1-2 (May 9, 2008). Warren's

statement was a logical response to Kepros's argument that falls within the considerable latitude afforded to prosecutors during rebuttal closing arguments. *See Salyer*, 80 P.3d at 839 (prosecutors are entitled to "considerable latitude in responding to defense counsel's arguments").

At trial, Sailor testified Ray had hit her on more than one occasion. Warren's inference that Sailor was a victim of domestic violence was reasonably based upon admitted evidence and was proper. *Domingo-Gomez*, 125 P.3d at 1048. It was not an unfair appeal to the sympathy of the jurors.

(e) Conclusion

The court concludes Tomsic's and Warren's guilt phase closing arguments were not improper. Accordingly, Owens's petition to vacate his conviction is **Denied**.

vii. Cumulative Effect of Improprieties in Guilt Phase Closing Arguments

The court determined that the prosecution made three improper arguments in the preceding parts of this Order. First, Tomsic improperly urged the jury to bring justice on behalf of Marshall-Fields because he could not bring justice on behalf of Vann.[251] Second, Warren misstated the standard the court uses to determine whether to instruct the jury on lesser included offenses.[252] Finally, in rebutting the Kepros's argument that the prosecution offered unreliable evidence, Warren improperly implied that the court had ruled that all of the evidence was relevant.[253] The court found there was no reasonable possibility that any of these improprieties could have prejudiced Owens and that the errors were harmless beyond a

[251] *See* part IV.F.3.a.i of this Order.
[252] *See* part IV.F.3.a.v of this Order.
[253] *See* part IV.F.3.a.iii of this Order.

reasonable doubt. *See Rodgers*, 756 P.2d at 984 (error is harmless beyond a reasonable doubt if there is no reasonable possibility that the defendant could have been prejudiced); *see also Rodriguez*, 914 P.2d at 278 n.50 (applying the harmless beyond a reasonable doubt standard to claims of prosecutorial misconduct in closing arguments in capital cases).

However, the court must also decide if there is a reasonable possibility that the cumulative effect of the improper arguments could have prejudiced Owens. It is evident that neither Tomsic nor Warren intentionally or deliberately misled the jury about the facts, law, or anything else. Tomsic and Warren delivered their guilt phase closing arguments in the heat of trial. They delivered their arguments after four weeks of individual *voir dire* and six weeks of trial.

The improper arguments are more akin to ambiguous or inartful arguments than to arguments that were intended to mislead or did, in fact, mislead the jury. Two of the three were made in rebuttal and the other was made immediately after an objection and was later corrected in the rebuttal argument. There is no reasonable possibility that the cumulative effect of the improper arguments could have prejudiced Owens. *See Rodgers*, 756 P.2d at 984 (error is harmless beyond a reasonable doubt if there is no reasonable possibility that the defendant could have been prejudiced). Thus, the court concludes the improprieties were harmless beyond a reasonable doubt. *See Rodriguez*, 914 P.2d at 278 n.50 (applying the harmless beyond a reasonable doubt standard to claims of prosecutorial misconduct in closing arguments in capital cases). Accordingly, Owens's claim that he was denied his constitutional right to an impartial jury based on the cumulative effect of the prosecution's improper guilt phase closing arguments is **Denied**.

b. Sentencing Phase One Closing Argument

i. Misstating the Law Concerning Eligibility

(a) Parties' Positions

Owens contends Tomsic misstated the law when she advised the jury during her phase one closing argument that Owens was eligible for the death penalty if the jury found the prosecution proved an aggravating factor beyond a reasonable doubt.

The prosecution concedes it misstated the law but disputes that it prejudiced Owens.

(b) Findings of Fact

During her phase one closing argument, Tomsic told the jury, "[i]f any one aggravating factor, again, or more, is proven, then we can move on to the consideration of the death penalty. If not, then the verdict is a life sentence." Phase One Tr. 47:8-12 (May 20, 2008 a.m.). She later told the jury, "[a]t this stage, we are simply asking you to make a determination that the defendant is eligible." *Id.* at 63:20-22.

The court instructed the jury on the steps of the sentencing hearing before Tomsic delivered her closing argument. Specifically, the court instructed the jury, "[i]f all jurors unanimously agree that the same one or more of these aggravating factors have been proven beyond a reasonable doubt, then the sentencing hearing will continue." Phase One Final Instruction No. 12.[254]

During its phase one deliberations, the jury asked twice for the flowchart depicting the steps of the sentencing hearing, which the court and the parties had

[254] The jury instructions for phase one of the sentencing hearing are labeled in the following format: First Phase Final Instruction No. 1. For clarity, the court modifies the label to Phase One Final Instruction No. 1.

used as a demonstrative aid during jury selection. Phase One Tr. 130:16-18 (May 19, 2008 a.m.); Phase One Tr. 95:7-9 (May 20, 2008 a.m.). Because it was a demonstrative exhibit, the court denied the jury's requests. Phase One Tr. 131:1-2 (May 19, 2008 a.m.); Phase One Tr. 96:12-20 (May 20, 2008 a.m.).

(c) Principles of Law

In Colorado, "the eligibility phase continues through step three, when the jury weighs mitigating evidence against statutory aggravators." *Dunlap*, 975 P.2d at 739.

(d) Analysis

The prosecution concedes it improperly told the jury that Owens was eligible for the death penalty if the prosecution proved an aggravating factor beyond a reasonable doubt. Finding that an aggravating factor was proven beyond a reasonable doubt would allow the process to continue to the next step of the sentencing hearing, but eligibility is not determined unless and until steps two and three are completed.

The court and the parties used a flowchart during individual *voir dire* to guide jurors through the complex four-step sentencing hearing process. The jury's request to have the flowchart during its deliberations does not show that the jury was uncertain of the sentencing hearing process or that it was misled by Tomsic's misstatement of the law. Additionally, the court instructed the jury that the sentencing hearing would continue if it unanimously found an aggravating factor beyond a reasonable doubt. Phase One Final Instruction No. 12. The jury instruction was sufficient to clarify and correct Tomsic's misstatement of the law. Moreover, even if a juror had been confused into thinking that completion of step one would make Owens eligible for death, the misapprehension would have been corrected as soon as the process moved to step two. The jurors understood that, at

step one, they were being asked to determine whether one or more aggravating factors had been unanimously proven beyond a reasonable doubt. The court recognizes that jurors pay attention to arguments of counsel, but in this case, it is clear that the jurors heeded the instructions of law especially in light of the complexity of the applicable law. The court read the instructions to the jury and provided a hard copy of the instructions to each juror before the jury retired for deliberations. With no evidence to suggest otherwise, the jury is presumed to have followed the instructions. Because there is no reasonable possibility Tomsic's statement concerning Owens's eligibility for the death penalty could have prejudiced Owens, the error is harmless beyond a reasonable doubt.

(e) Conclusion

The court concludes Tomsic's misstatement of the law was harmless beyond a reasonable doubt. Accordingly, Owens's petition to vacate his sentence based on Tomsic's misstatement of the law concerning Owens's eligibility for the death penalty is **Denied**.

ii. Misstating the Law Concerning Phase One

(a) Parties' Positions

Owens contends Tomsic misstated the law when she told the jury that phase one of the sentencing hearing constituted "a little bit of fine-tuning" of the verdicts in the trial. Owens contends Tomsic's statements were improper because: 1) she discounted the constitutional significance of the narrowing process, 2) she implied any defendant convicted of first-degree murder after deliberation is eligible for the death penalty, and 3) she diminished the jury's sense of responsibility for its sentence.

The prosecution responds that it did not misstate the law when it argued to the jury that the prosecution had already presented evidence during the guilt phase that would prove the aggravating factors.

(b) Findings of Fact

During her phase one closing argument, Tomsic told the jury, "[s]ome of the aggravators require specific findings concerning the defendant's particular involvement, and many of the aggravating factors have been established beyond a reasonable doubt based on your verdicts in this case. But the law essentially requires you to sort of reexamine and reaffirm those findings." Phase One Tr. 47:22-25; 48:1-4 (May 20, 2008 a.m.).

Tomsic also explained some of the history and the purpose of a death penalty sentencing hearing:

> So listening to the instructions on these aggravating factors, you may be saying, well, haven't we already said that? Didn't we already do this? Well, ask a lawyer a straight question and what's the answer you get? "Yes and no." And I think the best way to understand these additional determinations that we're asking you to make is to understand the context and history from which they come, and that's actually the 8th Amendment of the United States Constitution. We're talking about the cruel-and-unusual-punishment clause. That part of the constitution prevents the use of the death penalty against an individual who had only a minor role in the situation.
>
> And so these aggravating factors, while asking you to look at things that you may have already decided, is going to ask you to take sort of an additional step, a little-bit of a fine-tuning, to satisfy the 8th Amendment and be assured about the degree of the defendant's personal involvement.

Id. at 49:10-25; 50:1-6 (May 20, 2008 a.m.).

Tomsic returned to the idea of fine-tuning by telling the jury, "[w]e are again talking about that fine-tuning, that tweaking that's required by the 8th Amendment; what was the defendant's role in this situation." *Id.* at 57:9-12.

(c) Principles of Law

"[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985).

(d) Analysis

Throughout her phase one closing argument, Tomsic argued to the jury that much of the evidence that proved Owens's guilt also proved the aggravating factors. She explained that the jury could use the evidence it heard during the guilt phase to find that the prosecution had proved the aggravating factors beyond a reasonable doubt. In her explanation, she distinguished the guilt phase from phase one of the sentencing hearing.[255] She described how the Eighth Amendment requires the prosecution to prove aggravating factors for an added layer of assurance that the death penalty is an appropriate punishment for the defendant. She explained how the focus of phase one is on the defendant's personal involvement in the crime. She used the colloquial phrase "fine-tuning" to distinguish the guilt phase from phase one of the sentencing hearing and to inform the jury that even though much of the evidence from the guilt phase proved the aggravating factors, there was a constitutionally significant reason for phase one and that phase one was not a repeat of the guilt phase.

[255] During phase one of the sentencing hearing, the prosecution called T. Wilson as a witness and introduced into evidence the complaint and information and the mittimus from Owens's Lowry Park case. Beyond that, the prosecution relied on the testimony, exhibits, and evidence introduced during the guilt phase. Phase One Tr. 114:22-25; 115:1-2 (May 19, 2008 a.m.).

The effect of Tomsic's argument was not that the jury's responsibilities were diminished at phase one of the sentencing hearing, but that the Eighth Amendment demands heightened reliability in death penalty cases. Tomsic emphasized the constitutional significance of the sentencing hearing and did not imply that every defendant convicted of first-degree murder was eligible for the death penalty. Having been through individual *voir dire*, general *voir dire*, the guilt phase, and phase one, the jury knew that not all defendants convicted of first-degree murder are eligible for the death penalty. Tomsic's argument did not violate *Caldwell*. Tomsic's statements were not improper.

(e) Conclusion

The court concludes Tomsic did not misstate the law concerning phase one in the sentencing hearing. Nor did she diminish or minimize the importance of phase one. Accordingly, Owens's petition to have his sentence vacated based on Tomsic's phase one argument is **Denied**.

iii. Misstating the Law Concerning Aggravators

(a) Parties' Positions

Owens contends Tomsic misstated the law about the relationship between Aggravating Factor No. 1 (prior conviction of class one felony) and Aggravating Factor No. 5 (intentionally killed more than one person in more than one criminal episode) because she told the jury that the proof for Aggravating Factor No. 1 "goes a long way" toward proving Aggravating Factor No. 5.

The prosecution responds that its argument about the evidence of Aggravating Factor No. 1 proving part of Aggravating Factor No. 5 was not a misstatement of the law.

(b) Findings of Fact

During Tomsic's phase one closing argument, she told the jury:

> The second part of instruction No. 15 deals with Aggravating Factors 4 and 5. Aggravating Factors 4 and 5 are essentially body counts; that is, No. 4, did you kill two or more people in the commission of the crime? That's the June 20, Javad Marshall-Fields, Vivian Wolfe. And No. 5, have you killed more than one person in more than one criminal episode? Sort of a repeat killer idea.
>
> What this requires is that the evidence proved beyond a reasonable doubt that it is Sir Mario Owens himself that is the killer, and not some person with whom he had an agreement or was complicit with.

Phase One Tr. 51:3-16 (May 20, 2008 a.m.).

Later in her argument, she told the jury: "Now, the fact that the defendant has been convicted of first-degree murder and that is first-degree murder involving intent and deliberation goes a long way in telling you that the defendant, in fact, intentionally killed Greg Vann." *Id.* at 57:4-9. But before making this remark she had said:

> Brings us to the murder of Gregory Vann. The prior conviction will kind of stand by itself. It doesn't require these special findings or particular findings in Instruction No. 15. I would just indicate to you that you heard repeatedly through the trial when you heard about evidence about the murder of Greg Vann or Lowry Park, that you were told that it was for a limited purpose. That limitation is now gone. You may consider that evidence as evidence that the defendant committed this murder and that he has been convicted of it.
>
> You may also consider it as to Aggravating Factor No. 5, that the defendant is sort of a repeat killer, that he has killed more than one person in more than one criminal episode.

Id. at 55:17-25; 56:1-8.

And shortly thereafter, she told the jury "[b]ut you don't have to just rely on that other jury's verdict. You have evidence that was presented in the course of

this trial." Id. at 57:13-16. Tomsic went on to summarize what evidence proved Owens killed Vann and concluded this portion of her argument by saying:

> Sir Mario Owens intentionally killed Greg Vann.
>
> Aggravating Factor No. 5 then, essentially, puts those situations together. It requires that the defendant, Sir Mario, Owens, intentionally killed more than one person, specifically, Greg Vann, on July the 4th of 2004, and that he killed Javad Marshall-Fields and/or Vivian Wolfe on June the 20th of 2005 in more than one criminal episode.
>
> Again, that instruction 15 applies to Aggravating Factors 4 and 5, and that the People have to prove beyond a reasonable doubt that it is Sir Mario Owens himself and not someone with whom he's complicit that killed Javad Marshall-Fields, Vivian Wolfe, and/or Greg Vann. Sir Mario Owens killed intentionally all of these three people.

Id. at 59:11-25;60:1-4.

(c) Principles of Law

In a capital sentencing hearing, the prosecution must prove each aggravating factor beyond a reasonable doubt. § 18-1.3-1201(1)(d).

In this case, the first aggravating factor the prosecution sought to prove was that Owens "was previously convicted in this state of a class 1 or 2 felony involving violence as specified in [C.R.S. §] 18-1.3-406." § 18-1.3-1201(5)(b). The fifth aggravating factor the prosecution sought to prove was that Owens "intentionally killed more than one person in more than one criminal episode." § 18-1.3-1201(5)(p).

(d) Analysis

Contrary to Owens's position, Tomsic did not advise the jury to disregard Aggravating Factor No. 5 as though it was a duplicate of Aggravating Factor No. 1.

The prosecution was required to prove Aggravating Factor No. 5 with evidence presented in the Dayton Street case. Proof of the Lowry Park verdict proved Aggravating Factor No. 1 but not Aggravating Factor No. 5.

Tomsic's argument regarding Aggravating Factor No. 5 was less than artful. But, when read as a whole, she was not arguing that the documents showing the Lowry Park conviction proved that Owens intentionally killed Vann, or that those documents relieved the prosecution of its burden to prove all elements of Aggravating Factor No. 5. She was arguing that (1) the Lowry Park evidence produced during the Dayton Street guilt phase could now be considered for all purposes, and she outlined that evidence and asserted that it demonstrated that Owens, himself, intentionally killed Vann at Lowry Park; (2) that same evidence also supported Aggravating Factor No. 1 by demonstrating that it was Owens whom the Lowry Park jury had convicted; and (3) the Dayton Street evidence also demonstrated that Owens had intentionally killed Marshall-Fields and Wolfe.

Tomsic specifically told the jury twice that the prosecution had to prove Owens, not someone with whom he was complicit, intentionally killed Vann, Marshall-Fields, and Wolfe. She summarized some of the testimony and evidence that, from the prosecution's perspective, proved that it was Owens, himself, who killed Vann and thus, that Owens killed more than one person in more than one criminal episode. Her statement that Aggravating Factor No. 1 "goes a long way" toward proving Aggravating Factor No. 5, although not artful, was not a misstatement of the law when considered in context of her entire argument and therefore was not improper.

(e) Conclusion

The court concludes Tomsic did not misstate the law. Accordingly, Owens's petition to vacate his sentence based on Tomsic's explanation of the relationship between Aggravating Factor No. 1 and Aggravating Factor No. 5 is **Denied**.

c. Sentencing Phase Two Closing Arguments

i. Basing Argument on Societal Issues and Dehumanizing Owens

(a) Parties' Positions

Owens contends Hower improperly based his phase two closing arguments on societal issues and dehumanized him by referring to him as a murderer and as a predator.

The prosecution responds that its statements were an accurate reflection of the evidence presented, and when considered in context, the statements were not improper.

(b) Findings of Fact

Near the conclusion of his phase two closing argument, Hower told the jury:

> [E]ach of the aggravating factors that I've talked to you about so far apply equally to both Javad and Vivian, to their murders. You may consider all those when you're considering the appropriate sentence for both Javad and Vivian, but there's one, and any one of them, as I pointed out, any one of them by itself, sufficient to make *this murderer* eligible for the death penalty.

Phase Two Tr. 93:6-12 (June 13, 2008 a.m.) (emphasis added).

Shortly thereafter, Hower continued:

> [O]ur criminal justice system is our last line of defense. It is the final barrier, if you will, between us and those who choose to prey upon us. Between our families and those who choose to rape, rob, murder and the killing of a

> witness, a citizen witness to a crime strikes a very deadly blow right at the heart of our criminal justice system.

Id. at 93:17-23.

Hower went on to describe the role citizen witnesses play in the criminal justice system and argue that without witnesses, the system could not function. *Id.* at 93:23-25; 94:1-25; 95:1-16. Hower then brought his argument full circle, referred back to the "final barrier," and likened his societal argument to this case:

> [I]f witnesses to crimes are killed to prevent their testimony, if then other citizens won't come forward because of fear they'll be killed, that last line of defense, that last barrier, it is gone and we no longer live under the rule of law, we live under the code of the street; you snitch, you die.
>
> So when you're considering – and when you're considering the weight to be given to this aggravator, you may also consider the specific problems that you learned about that, the murder of the citizen witness doing his duty, Javad Marshall-Fields, the problems that created in this case by the fact that the defendant murdered Javad to silence him to avoid his own arrest, prosecution, conviction and punishment for Greg's murder.

Id. at 95:17-25; 96:1-5.

(c) Principles of Law

"[R]eferring to a defendant as any type of animal is improper . . . ." *People v. Smith*, 856 P.2d 26, 29 (Colo. App. 1992), *rev'd on other grounds by* 872 P.2d 685 (Colo. 1994). In *Smith*, the prosecutor compared the defendant to a lion stalking its prey. *Id.* The Colorado Court of Appeals found this comparison improper but held that it did not rise to the level of plain error. *Id.*

The Colorado Supreme Court found plain error in *Harris v. People*, 888 P.2d 259 (Colo. 1995). In *Harris*, the prosecutor delivered his closing argument on the day that the United States announced military action against Iraq had commenced.

Harris v. People, 888 P.2d 259, 261 (Colo. 1995). He discussed the Persian Gulf War and compared the defendant to Saddam Hussein. *Id.* at 261-63. The prosecutor's characterization of the defendant as a thug and a bully who deserved punishment like Saddam Hussein was improper because it diverted the jury's attention away from determining the critical issue of witness credibility. *Id.* at 266-67. The prosecutor's repeated remarks, the temporal context of his remarks, and the critical role of witness credibility caused the Colorado Supreme Court to find plain error. *Id.* at 268.

"[A]rguments urging a jury to convict [the defendant] in order to carry out the wishes of the community are improper." *People v. Clemons*, 89 P.3d 479, 483 (Colo. App. 2003).

(d) Analysis

The jury had just convicted Owens for the murders of Marshall-Fields and Wolfe before Hower referred to Owens as a murderer. The jury had also found that Owens killed Vann when it determined that Owens had killed more than one person in more than one criminal episode. In context, Hower was using the term "murderer" to refer to a person who had been convicted of murder. He was attempting to distinguish this convicted murderer from other convicted murderers for whom the death penalty is not appropriate. Hower's remark did not dehumanize Owens and was therefore not improper.

The prosecutor in *Smith* directly compared the defendant to a lion. Hower did not refer to Owens, specifically, as a predator. Hower made this statement in the context of how the killing of a witness affects the criminal justice system. He did not divert the jury's attention away from the critical issues in the case. Hower's argument was not improper.

Hower urged the jury to sentence Owens to death because Owens impeded the criminal justice system when he killed an individual whose testimony was vital to the functioning of the criminal justice system. Hower encouraged the jury to consider the broad implications that the killing of a witness had on the system and to consider the potential witnesses who were hesitant to cooperate with law enforcement and to testify at trial due to the nature of the Dayton Street case. Hower did not argue that the jury should sentence Owens to death to protect the community. Unlike the prosecutor in *Harris*, Hower's argument on this point was brief and did not divert the jury's attention away from the issues it had to decide. Hower's argument was not improper.

(e) Conclusion

The court concludes Hower did not dehumanize Owens and did not improperly urge the jury to sentence Owens to death in order to protect the community. Accordingly, Owens's petition to vacate his sentence is **Denied**.

ii. Comment on Failure to Testify

(a) Parties' Positions

Owens contends Hower and Tomsic improperly commented on his right to remain silent during their phase two closing arguments.

The prosecution responds that the statements Owens alleges were improper do not relate to Owens's right to remain silent.

(b) Findings of Fact

Many of Owens's friends and family members testified in mitigation that they would maintain their relationship with Owens if the jury sentenced him to life in prison. Hower acknowledged this testimony during his phase two closing argument and then asked the jury, "[a]nd did you hear from anyone that Rio wants

to have a relationship with them? Is that something he wants?" Phase Two Tr. 75:21-22 (June 13, 2008 a.m.).

Hower also argued:

> There is an argument, and you've heard some people in the jury selection process, I'm not sure if it was any of you, but the thought that maybe life in prison is actually worse than the death penalty, it's actually worse to live life in prison than to be executed, well, we know that Mr. Owens murdered – after Mr. Owens murdered Greg, he preferred to kill again rather than go to prison. Have you seen any evidence that he's among the few who possibly would prefer death to prison? That is not a consideration you should be making in determining what is the appropriate penalty.

Id. at 108:19-25; 109:1-4.

Hower addressed Owens's lack of remorse by posing several rhetorical questions to the jury. Hower asked: "has he shown anything that indicates he has any appreciation, any guilt, any remorse for what he has done and the unbearable anguish he has inflicted on so many[?]" *Id.* at 113:14-17. He went on to ask more questions:

> Are we dealing with somebody that actually has some capacity for remorse or improvement? If you give him a life sentence in prison on top of what he's already doing, now suddenly he's going to start reflecting and again reflecting and feeling remorse? There needed to be some evidence of that.

Id. at 113:20-25.

Tomsic revisited the concept of remorse in her phase two rebuttal argument and argued "[a]nd what you have seen in this courtroom over the last several months is a killer with no remorse." Phase Two Tr. 68:25; 69:1 (June 13, 2008 p.m.). Tomsic concluded her rebuttal argument by telling the jury, "[f]or all of

these reasons and the fact that he is unlikely to ever show remorse or be redeemed are all reasons that the death penalty is appropriate and righteous in this case. Because mercy for the merciless is not just." *Id.* at 74:21-25.

(c) Principles of Law

"[T]he Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615 (1965). "The basic question is whether the prosecutor's comment in context was calculated to direct the attention of the jury to the failure to testify." *People v. Ray*, 109 P.3d 996, 1003 (Colo. App. 2004).

In *Griffin*, during closing arguments, the prosecutor listed all of the details only the defendant would know about how the victim was killed and then remarked that the defendant would not take the stand to tell his side of the story. 380 U.S. at 611. The United States Supreme Court reversed the defendant's conviction and death sentence because the prosecutor improperly commented on the defendant's Fifth Amendment right to remain silent. *Id.* at 615.

(d) Analysis

Hower did not address Owens's right to remain silent when he posed rhetorical questions to the jury concerning Owens's desire to maintain relationships with his family and friends if he was sentenced to life in prison. Hower said, "[a]nd did you hear from *anyone* that Rio wants to have a relationship with them? Is that something he wants?" Phase Two Tr. 75:21-22 (June 13, 2008 a.m.) (emphasis added). In context, Hower was asking the jury to recall whether any of Owens's mitigation witnesses testified that Owens wanted to maintain relationships with his family and friends. Hower's second question was a follow

up to his first. Unlike the prosecutor in *Griffin*, Hower did not implicate Owens's right to remain silent by posing these rhetorical questions to the jury. Hower's rhetorical questions about Owens's desire to maintain relationships with his family and friends were not "calculated to direct the attention of the jury to the failure to testify," and were therefore not improper. *Ray*, 109 P.3d at 1003.

Next, Hower argued that Owens killed Marshall-Fields after he killed Vann, and therefore Owens preferred to kill again rather than go to prison. Then Hower asked if there was any evidence that Owens preferred the death penalty over life in prison. Hower posed the rhetorical question to the jury to complete his argument that Owens deserved punishment beyond that which he received for the Lowry Park shootings. There may be legitimate questions about the relevance of Owens's personal punishment preference, but Hower's comment that there was no evidence about Owens's sentencing preference were not "calculated to direct the attention of the jury to the failure to testify." *Id.* Accordingly, Hower's argument, if inartful, was not improper.

Last, Hower's statement that "[t]here needed to be some evidence of [Owens's remorse]" was the closest a prosecutor came to commenting on Owens's right to remain silent. This was an isolated statement within a lengthy closing argument. But again, Hower was not commenting on Owens's failure to provide such evidence at the trial or suggest that the jury should sentence Owens to death because of his silence. Phase Two Tr. 113:24-25 (June 13, 2008 a.m.). Significant evidence had been elicited during trial to the effect that Owens never showed remorse for these killings. Hower's and Tomsic's remarks concerning Owens's lack of remorse did not imply that Owens failed to testify about his feelings of remorse and did not imply he should have done so. Tomsic's argument was within the considerable latitude afforded under *Salyer* to rebut King's closing argument.

80 P.3d at 839 (prosecutors are entitled to "considerable latitude in responding to defense counsel's arguments"). Thus, the arguments did not implicate Owens's right to remain silent. Additionally, the arguments were based on evidence presented at trial, including testimony from Sailor and others who indicated Owens lacked remorse for the Lowry Park shootings and the Dayton Street homicides. Thus, these remarks were not improper.

(e) Conclusion

The court concludes Hower and Tomsic did not address Owens's right not to testify. Accordingly, Owens's petition to vacate his sentence based on Hower's and Tomsic's phase two closing arguments is **Denied**.

iii. Introducing Improper Element into Deliberations

(a) Parties' Positions

Owens contends Hower improperly suggested to the jury that Owens might prefer the death penalty without any evidentiary support of Owens's preference.

The prosecution asserts it was properly rebutting the view that a death sentence may be preferable to a life sentence because life in prison could be considered by some to be a harsher punishment.

(b) Findings of Fact

Hower addressed the severity of the death penalty versus a life sentence in connection with the view that life in prison may be a harsher punishment than the death penalty. He told the jury,

> There is an argument, and you've heard some people in the jury selection process, I'm not sure if it was any of you, but the thought that maybe life in prison is actually worse than the death penalty, it's actually worse to live life in prison than to be executed, well, we know that Mr. Owens murdered – after Mr. Owens murdered Greg, he preferred to kill again rather than go to prison. Have you seen any evidence that he's among the few who possibly

> would prefer death to prison? That is not a consideration you should be making in determining what is the appropriate penalty.

Phase Two Tr. 108:19-25; 109:1-4 (June 13, 2008 a.m.).

(c) Principles of Law

It is improper for a prosecutor to argue facts not admitted into evidence. *Davis*, 280 P.3d at 53-55.

(d) Analysis

Hower did not suggest that Owens preferred the death penalty or that the jury should sentence Owens to death because he preferred the death penalty. He argued that Owens, by committing the Dayton Street homicides, demonstrated that he would rather kill than go to prison – not that he would rather be killed than go to prison. Even if Hower's argument were construed as though he suggested that the jury should sentence Owens to death because he preferred the death penalty, there is no reasonable possibility it could have prejudiced Owens. Hower immediately told the jury that it should not consider Owens's preference in determining the appropriate sentence; thus, any purported impropriety is harmless beyond a reasonable doubt.

(e) Conclusion

The court concludes that Hower did not improperly introduce Owens's sentencing preference into the jury's deliberations. Accordingly, Owens's petition to vacate his sentence based on Hower's argument that a death sentence may be preferable to a life sentence is **Denied**.

iv. Encouraging Retaliatory Sentencing Decision

(a) Parties' Positions

Owens contends Hower improperly encouraged the jury to retaliate against Owens by sentencing him to death. According to Owens, Hower encouraged

retaliatory sentencing by arguing that Owens was a snitch when, as a teenager, he identified the suspect of a murder yet, as an adult, believed that snitches should die.

The prosecution acknowledges it made an inartful off-the-cuff remark but disputes that it encouraged the jury to sentence Owens to death in retaliation for previously identifying the suspect of a murder.

(b) Findings of Fact

Hower expanded on some of the topics of the prosecution's guilt phase arguments during his phase two closing argument, including Tomsic's contention that Owens had a "stop-snitching mental[it]y[.]" Guilt Phase Tr. 62:5 (May 9, 2008). Continuing with this theme, Hower argued:

> Without this four-step process, that's this four-step process that we are in right now and you've heard so much about, that's part of our criminal justice system, it's part of our rules of law that we all try to live by. It's not part of the defendant's code of the street. The code of the street is much less complicated. It's embodied by two golden rules, if you will; stop snitching, rest in peace. Be a snitch, you die. And the motto that Mr. Owens apparently believes in so fervently that he adorned his body with it. Live by it, play by it, die by it. And as we have seen, Mr. Owens indeed chose to live by it. He chose to play by it. And over and over and over again he chose to make other people die by it.

Phase Two Tr. 70:14-25; 71:1 (June 13, 2008 a.m.). Later in his argument, Hower discussed a couple of the mitigation witnesses who testified that they wanted to maintain a relationship with Owens if the jury sentenced him to life in prison. Hower responded to this testimony by arguing the witnesses testified about their memories of Owens and did not testify about their relationships with Owens. While specifically discussing Nissan Williams (N. Williams), Hower told the jury:

> [T]here's a certain irony in this situation with Nissan Williams and this defendant, if you think about it. The

> day Nissan shot and killed DeShawn and ran home, the police came, the defendant talked to the police. The defendant gave the police a statement. He said he saw the shooting. He identified Nissan as the shooter. Isn't that his definition of a snitch?

Id. at 76:24-25; 77:1-5.

(c) Principles of Law

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

(d) Analysis

Owens witnessed a homicide when he was a teenager. The police interviewed him, and he identified the shooter. By identifying the shooter, Owens was a cooperating witness against the suspect. Marshall-Fields was a cooperating witness against Ray for the Lowry Park shootings, and Owens considered him a snitch. Hower's comment on the irony was made while discussing the mitigation witnesses who commented upon Owens as a youth. In context, it appears to have been an attempt to suggest that the boy these witnesses remembered (someone who would honestly cooperate with the police) was quite different than the man he became (someone who would consider such cooperation to be snitching). Hower made the comparison while pointing out that Owens's mitigation witnesses testified about their memories of their relationships with him and not their current relationships with him. Hower did not revisit this issue and did not make it a theme of his argument.

Owens has pieced together different portions of Hower's arguments in his attempt to substantiate this claim. Hower did not explicitly ask the jury to sentence Owens to death because Owens was once a cooperating witness and was part of a culture that believed cooperating witnesses should be killed. Nor, when considered

in context, can Hower's argument reasonably be read that way. Hower's discussion of these topics was disjointed and did not have the prejudicial effect argued by Owens. Because there is no reasonable possibility that Hower's argument could have prejudiced Owens, it was harmless beyond a reasonable doubt.

(e) Conclusion

The court concludes Hower's comparison of Owens and Marshall-Fields as cooperating witnesses was harmless beyond a reasonable doubt. Accordingly, Owens's petition to vacate his sentence is **Denied**.

v. "Us Against Them" Argument Appealing to Passion, Prejudice, and Fear, and Identifying Jurors with Victims

(a) Parties' Positions

Owens contends Hower and Tomsic improperly urged the jury to identify with Marshall-Fields in terms of the fear Marshall-Fields felt prior to his death and in terms of the duty to the criminal justice system Marshall-Fields was going to fulfill by testifying in Ray's Lowry Park trial. Owens also contends the prosecution used an "us against them" approach that improperly inflamed the passions and prejudices of the jury.[256]

The prosecution contends it properly reminded the jury of its responsibility in this case.

[256] Owens articulates numerous claims within this section of SOPC-163. The court rejects as duplicitous Owens's claim that the prosecution based its closing argument on societal issues by describing the effect the killing of a witness had on the cooperation of other witnesses in this case. *See* part IV.F.3.c.i of this Order. Likewise, the court rejects Owens's claim that the prosecution urged the jury to sentence Owens to death because the jury had a duty to do so. *See* part IV.F.3.a.i of this Order.

(b) Findings of Fact

During his phase two closing argument, Hower discussed the role of Marshall-Fields as a witness in conjunction with the role of the jury.[257]

> [T]he duty that you have been performing for three months, three months now, and it is a very awesome duty, a very responsible duty you have been doing and we all thank you very much for that. But none of you ever volunteered, none of you ever asked to be in this situation of having to make such a choice. You didn't ask to do that. Like Javad, you were drafted into performing a duty for our criminal justice system, for our community in making sure our criminal justice system works. And like Javad, you actually had a choice. Everyone knows how to get out of jury duty, that's hardly top secret. You only had to answer questions a certain way. You know you would have been thanked and excused. And for the past three months, you would have been reading about this case in the newspaper instead of disrupting your lives the way you've had to.
>
> But like Javad, you know citizenship means more than just living within the geographical boundaries on a map, and enjoying the benefits of citizenship brings with it responsibilities and duties and some of them are difficult. Like Javad, he got tagged with a difficult one. You chose, like him, not to shirk that duty.
>
> And your duty now is to complete this four-step process in reaching your decision. So we need to talk about this four-step process a little bit more.[258]

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[257] In support of this claim, Owens also cites certain remarks made by Tomsic earlier in her closing argument. Those remarks, although somewhat related to the remarks cited here, do not add substance to Owens's claim and are disjointed from the bulk of the objectionable arguments.

[258] Owens contends that Hower misstated the law in his remark that it was the jury's duty to complete the four-step process. Owens contends it was a misstatement of the law because the jury would not be required to complete the four-step process if it found the mitigating factors substantially outweighed the aggravating factors. Hower made this statement while describing

Phase Two Tr. 71:12-25; 72:1-10 (June 13, 2008 a.m.).

Later in his phase two closing argument, Hower told the jury:

> If someone commits a serious crime, like murder, and doesn't want to get caught, doesn't want to serve life in prison, in other words, doesn't want the criminal justice system to work, who should be eliminated? Not the police officers, not the detectives, others can be put on the case. Not the DAs, there's lots of DAs. Not the judge, with all due respect, we have other judges. Not even the jurors. We can send out additional summons[es]. Everyone else can be replaced. Might slow things down a bit, but the wheels of justice will continue to turn.
>
> But take out the witness, citizen witness, the only one who can tell the cops who did it, the only one who can come in here to a courtroom and sit up there and tell a panel of citizens from the community, the jury, what they saw, what they know, what they heard and who did it, take out that witness, and by so doing, put the fear of death in any other witness so that they won't come forward, system collapses immediately. There would be no arrest, there would be no trial, there would be no punishment, there would be no justice.

Id. at 94:11-25; 95:1-5.

In her phase two rebuttal argument, Tomsic compared the community at large to Owens by telling the jury:

> The defense has talked about mitigation and there is no burden of proof on mitigation. You get to decide how much weight to apply to anything that you have heard. The defendant comes in and says bad neighborhood, bad schools, bad parents, bad genes, bad brain, bad friends,

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the jury's duty in the sentencing hearing. He did not mislead the jury as to its role and responsibility in this case. Further, given the bifurcated nature of the sentencing hearing and the specificity of the jury instructions, the court finds no reasonable possibility Owens could have been prejudiced by Hower's remark.

bad role models. Is that really what you heard? They accuse Mr. Hower of [] dehumanizing the defendant. But isn't that really what the defense is doing?

When we talk about people just being a product of their environment, it dehumanizes us all. Because people are more than that. People are self-determining creatures. Sir Mario Owens at some point in his life made the decision not to put the napkin in his lap any more. He decided to reject his family's values. Or at least the family values of the majority of his family. He looked out into his world and he made some decisions about what he values, what he likes and what he wanted to be.

And he looked at his drug dealing, gang-banging cousins and he liked the toughness of them. He admired that. He followed that. He choose [sic] them as heroes. And he emulated them. But that tells us who Sir Mario Owens is. Those are his choices. It may initially be somewhat of a veneer to act tough, to be cool.

And sure if we were talking about the way he flipped his cigarette or t-shirt he wore, yeah, that would be cool masculinity. But what we are seeing from Sir Mario Owens is a lifetime of anti-social behavior. A lifetime of criminality. This defendant has been selling drugs since he was 13 years old. He was doing it down in Shreveport, Louisiana. He didn't need Robert Ray's influence. He gets up to Aurora and even commented to Dr. Pinto that, yeah, the gangs up here aren't nothing what they are in Shreveport.

He just brought the mean streets of Shreveport, Louisiana with him and he did it by choice. And his affinity for Robert Ray is a couple birds of a feather flocking together. It is a couple of people that looked out at their world and said, I am going to be a drug dealer. I am going to be tough. I am going to pull down 90 grand a

> year and not pay taxes on it.[259] Where the rest of us are looking around at the white house with the picket fence and saying I want a family. I want kids. I want a job. I want respect. He wants beer [sic]. He wants to take advantage of people with their inability to control their drug addictions, even though he knows exactly what it looks like. That's who Sir Mario Owens is.

Phase Two Tr. 69:25; 70:1-25; 71:1-19 (June 13, 2008 p.m.).

(c) Principles of Law

"In a capital sentencing proceeding, . . . it is not necessarily improper for the prosecutor to urge the jurors to place themselves in the victim's shoes." *Rodriguez*, 794 P.2d at 973-74. In capital sentencing proceedings, if the jury finds the prosecution proved at least one aggravating factor beyond a reasonable doubt and finds the mitigating factors did not substantially outweigh the aggravating factors, the jury must "make a factual and moral assessment of whether death was the appropriate punishment for the offense." *Id.* at 974. To make this assessment, "it is proper for the jury to consider the circumstances of the offense itself. In order to do so, it is germane for the jury to make the assessment from the viewpoint of the victim." *Id.* "As long as the argument does not bring in extrinsic matters, is confined to evidence adduced during the trial and reasonable inferences therefrom, and is not presented in an inflammatory manner, it is not objectionable." *Id.*

(d) Analysis

By listing jurors, as well as prosecutors, detectives, and the judge as non-essential participants in a jury trial, Hower's argument was not calculated to cause

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[259] Owens claims Tomsic's remark that Owens was not going to pay taxes on the "90 grand a year" was improper, because it was beyond the scope of the evidence. The remark was isolated and not prejudicial.

the jury to identify with the fear and anxiety that Marshall-Fields experienced following the Lowry Park shootings. Hower was contrasting the replaceable participants in the trial with Marshall-Fields, a participant who could not be replaced. The purpose was to explain that Owens impeded the criminal justice system by killing a witness. Hower's purpose was not to conjure up fear in the jurors and was not improper.

Hower also compared the circumstances of the jurors to the circumstances Marshall-Fields faced in the days and weeks leading up to the Dayton Street homicides. First, Hower described the duty Marshall-Fields felt he owed to the criminal justice system to testify against Ray and the duty the jurors owed to this country to serve as a juror. Next, Hower described how Marshall-Fields and the jurors chose to perform their duties and that despite his fear, Marshall-Fields intended to testify against Ray and despite the jurors' knowing how to avoid jury duty, they chose to serve. Last, Hower told the jury that Marshall-Fields intended to do the right thing by choosing to cooperate in the Lowry Park case even though it was a difficult responsibility. Likewise, Hower suggested the jurors were doing the right thing by accepting the difficult responsibility of serving on the jury.

Ordinarily, a golden rule claim is raised when the prosecutor has specifically asked the jury to consider the circumstances of the crime from the perspective of the victim. Although doing so is proper in capital sentencing proceedings, Hower used this only as an indirect tactic. He did not ask the jury to step into the shoes of Marshall-Fields at the time of the offense but to appreciate his sense of duty in light of their own. Hower's argument was not improper.

Tomsic responded to Owens's mitigation evidence that he grew up in a bad environment by arguing Owens chose the lifestyle of a criminal by joining a gang and selling drugs. Tomsic argued Owens rejected his family's values, such as

having a family and a job. The thrust of Tomsic's argument was that the negative aspects of the environment in which Owens was raised should not be given much weight, because Owens made deliberate choices to lead the life of a criminal. By highlighting the choices confronting Owens and arguing Owens made the wrong choices, Tomsic relied on evidence in the record and did not inflame the prejudices of the jury. Tomsic was rebutting Owens's mitigation evidence, and therefore, her argument was not improper. *See Salyer*, 80 P.3d at 839 (prosecutors are entitled to "considerable latitude in responding to defense counsel's arguments").

(e) Conclusion

The court concludes Hower's and Tomsic's phase two arguments were not improper and do not warrant reversal of Owens's sentence. Accordingly, Owens's petition to vacate his sentence is **Denied**.

vi. Improperly Dehumanizing Owens

(a) Parties' Positions

Owens contends Hower dehumanized Owens by telling the jury that Owens lacked a conscience, by telling the jury he was unable to experience emotions, and by calling him the Grim Reaper.

The prosecution responds that it was drawing reasonable inferences from the evidence when it argued to the jury that Owens had no conscience and could not feel remorse, pity, or compassion. The prosecution also responds that Hower compared Owens to the Grim Reaper but did not call him the Grim Reaper.

(b) Findings of Fact

Hower described the fear exhibited by Marshall-Fields in the days prior to the Dayton Street homicides by telling the jury:

> Those last 24 hours, death was no longer an abstract concept as it is for most young people, they understand it exists, but it ain't never gonna happen to me, but the

> defendant, after all, had sent an emissary to Javad to tell him the Grim Reaper was on his way. And Javad believed it. They're coming for me, they're going to kill me.

Phase Two Tr. 68:15-21 (June 13, 2008 a.m.).

Hower responded to Owens's mitigation evidence introduced through an expert witness that Owens had difficulty expressing his emotions by arguing:

> So this defendant murdered Javad to silence him and to send his message. Remember what he wanted that message to be? Niggas gonna see Javad get sprayed, mother fuckers gonna shut their mouths and stop snitching on people. Killing Javad would send a message. And he murdered Vivian because, as he explained so dismissively, so derogatorily and without a shred or hint of remorse or conscience, murdered Vivian because the bitch was in the wrong place at the wrong time. As if he was talking about stepping on a bug.
>
> And Dr. Pinto testified here and she suggested that such a statement as that, is really just part of that mask of cool masculinity. And if we were able to understand all the challenges and the risks and the psychological influences and issues that Mr. Owens faced growing up, bad streets, absent, crack-addicted father, mysterious head injury that no one ever noticed or diagnosed, but if we understood all those things and we, like Dr. Pinto, would understand that saying, the bitch was in the wrong place at the wrong time, doesn't really mean that he doesn't have any remorse, it doesn't really mean that he has no conscience, we would understand, as she does, he simply has difficulty expressing his emotions. Remember, difficulty expressing his emotions?
>
> Did she not listen to his interview with Detective Wilson in Shreveport in November of 2005? This defendant has no difficulty expressing emotions that he actually feels, anger, hatred, self-pity. This defendant only has

> difficulty expressing emotions he cannot feel and does not feel, remorse, pity, compassion.

Id. at 69:1-25; 70:1-3. Later in his argument, Hower questioned, "[a]re we dealing with somebody that actually has some capacity for remorse or improvement?" *Id.* at 113:20-21. Hower posed this question to the jury while arguing that sentencing Owens to another life sentence would not be punishment because Owens was already serving a life sentence for the Lowry Park shootings.

(c) Principles of Law

During the sentencing hearing closing arguments in *Rodriguez*, the prosecutor described the defendant as "warped", "perverted", and "evil." 794 P.2d at 978. The prosecutor told the jury the defendant "lacks any humanity" and "does not have that spark of humanity we all must have to live." *Id.* The prosecutor also argued, "[t]here is not even a spark of redeeming feature for this defendant." *Id.* The Colorado Supreme Court viewed the comments as part of the prosecutor's theme that the defendant was unlikely to be rehabilitated, lacked mercy, and was a danger to society. *Id.* According to the Colorado Supreme Court, the prosecutor's remarks were supported by the record and were therefore not improper. *Id.*

In Rodriguez's *habeas* proceedings, the federal district court found the prosecutor's remarks were inappropriate yet reasonable inferences from the evidence introduced at trial. *Rodriguez*, 42 F.Supp.2d at 1136. The federal district court concluded the statements did not rise to constitutional error. *Id.*

(d) Analysis

In response to testimony from Owens's mitigation expert, Hower attempted to persuade the jury that Owens was not incapable of expressing his emotions but that he could not express emotions that he did not feel, including remorse, pity, and compassion. Hower's theme was that Owens was unlikely to show remorse for his crimes in the future because he had shown no remorse thus far. By pursuing this

line of argument, Hower did not dehumanize Owens. He portrayed Owens as a man who could express the emotions he possessed, and lacked the ability to express others – remorse, pity, and compassion – only because he did not possess those emotions. The argument was grounded in reasonable inferences from the evidence and was not improper.

Hower neither referred to Owens as the Grim Reaper nor analogized Owens to the Grim Reaper. The remark arose while he was describing Marshall-Fields's fear in the days leading up to the Dayton Street homicides. Specifically, Hower described how Marshall-Fields's fear escalated after Carter approached him in Gibby's. Carter threatened that Marshall-Fields would be killed because he intended to testify against Ray. The record supports Hower's argument. Unlike the prosecutor in *Rodriguez* who called the defendant evil three times and bluntly told the jury that the defendant lacks any humanity, Hower's reference that "the Grim Reaper was on his way" referred to Carter's threat that Marshall-Fields had been marked for death. The remark was made only once and was a characterization of Carter's threat, not of Owens. Hower's argument was not improper.

(e) Conclusion

The court concludes that Hower did not dehumanize Owens during his phase two argument. Accordingly, Owens's petition to vacate his sentence based on his argument that Hower improperly dehumanized Owens is **Denied**.

vii. Arguing Against Individualized Sentencing and Appealing to Emotions

(a) Parties' Positions

Owens contends Hower improperly referred to Edward Montour (Montour), which caused the jury to base its sentencing decision on its emotional reaction to

Montour having killed a prison guard while serving a life sentence instead of its assessment of Owens as an individual.

The prosecution responds that it was countering Owens's mitigation evidence that he had no propensity for future dangerousness.

(b) Findings of Fact

Owens showed the jury the prison conditions he would experience if the jury sentenced him to life in prison.[260] He presented this evidence to show the jury that the maximum-security prison conditions constituted sufficient punishment for his crimes and that the death penalty was unnecessary to prevent him from committing future crimes. This evidence was relevant to the statutory mitigating factor that Owens was not a continuing threat to society. Phase Two Final Instruction No. 21; § 18-1.3-1201(4)(k).

In his phase two closing argument, Hower addressed prison conditions and pointed out that the DOC controls housing for inmates.

> You remember in the list of mitigators talks about the fact that, well, he's going to be held as CSP for good. Makes it sound like they don't have to put him anyplace else, they can keep him there at CSP for all of a life sentence if that's what he is given.
>
> You heard Dennis Burbank, you heard Bill Zalman, you saw the video, you know that's not the way it works. They made it very clear. Their actual goal, and it's a good goal, is to try to get people who are at CSP in ad-seg out of there as soon as possible to the lowest possible security level facility that they can. That's the whole idea of the behavior-driven, compliance-driven, quality-of-life program that they have. It's to get these guys who get there because of bad behavior and get them to turn

[260] Owens presented a video of the conditions at the Colorado State Penitentiary where inmates on death row are housed. Sent. Hrg Exh. SO-405.

> around, get them out of there. That's what they do. That's their goal. They review them very frequently to do that and they get them out of there. There's almost nobody that stays there for years and years and years.
>
> He mentioned one exception, but there are those that did not. Those with first-degree murder and life without parole convictions got out of CSP, if they were ever there, went to as low as a Level 3 security facility, such as Limon.
>
> You may recall Edward Montour was serving a life-without-parole sentence for murder, beat a prison staff member to death.

Phase Two Tr. 82:2-25; 83:1-2 (June 13, 2008 a.m.).

(c) Principles of Law

In a capital sentencing proceeding, the defendant may designate certain statutory mitigating factors. One such mitigating factor is that "[t]he defendant is not a continuing threat to society." § 18-1.3-1201(4)(k). The prosecution is entitled to rebut the defendant's mitigation evidence. § 18-1.3-1201(1)(b). Proper rebuttal to the defendant's mitigation evidence includes arguing "about the safety of prisoners and guards at the prison if the defendant is given life." *Rodriguez*, 794 P.2d at 976.

In *Jurek v. Texas*, 428 U.S. 262 (1976), the United States Supreme Court decided whether a portion of Texas's death penalty statute was constitutional. The challenged portion of the statute required the jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" if not sentenced to death. *Jurek v. Texas*, 428 U.S. 262, 272 (1976). Recognizing the inherent difficulty in predicting future behavior, the United States Supreme Court described several contexts in which trial courts routinely consider a defendant's future behavior. Given a trial court's

ability to do so, the United States Supreme Court found a jury could do so as well. *Id.* at 274-76. In reaching this conclusion, the United States Supreme Court said, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Id.* at 276.

(d) Analysis

Owens's reliance on *Jurek* is misplaced. *Jurek*'s declaration that the jury consider all possible relevant information about the defendant was in reference to the jury's ability to consider the defendant's future dangerousness. *Id.* It did not address the propriety of the prosecutor's closing argument.

In responding to Owens's evidence of prison conditions, Hower should have confined his argument to Owens's behavior. The point Hower was trying to make was that the prison's classification system has not been foolproof. The DOC classification system might fail to recognize Owens's dangerousness. People have been put into less secure settings and then committed violent crimes. Hower's reference to Montour's case was brief. He referred to Montour while pointing out that the DOC might not always house Owens in a maximum-security facility because it is the DOC's intent to transition prisoners to lower security facilities if appropriate. The essence of Hower's argument was that Owens might be a danger to other prisoners and guards in a lower level security facility. Hower did not cause the jury to sentence Owens to death based on Montour's conduct and did not appeal to the jurors' emotions. Thus, the error was harmless beyond a reasonable doubt because there is no reasonable possibility Hower's brief reference to Montour could have prejudiced Owens.

(e) Conclusion

The court concludes Hower's improper reference to Montour was harmless beyond a reasonable doubt. Accordingly, Owens's petition to vacate his sentence based on Hower's reference to Montour is **Denied**.

viii. Arguing Against Individualized Sentencing and Arguing Mitigation Evidence as Aggravation

(a) Parties' Positions

Owens contends Tomsic transformed his mitigation evidence into aggravation by comparing Owens to his siblings, and she diverted the jury from its constitutional duty to assess Owens as an individual when she pointed out Owens, his half-sister, and his brother were raised together in the same law-abiding family.

The prosecution responds that its argument was proper rebuttal to Owens's closing argument and mitigation evidence that Owens was raised in a negative environment.

(b) Findings of Fact

In his phase two closing argument, King argued to the jury, "the truth of the matter is we are all the product of our genes, our environment and our upbringing." Phase Two Tr. 20:16-18 (June 13, 2008 p.m.). In rebuttal, Tomsic argued Owens's mitigation evidence should not be afforded much weight because Owens's siblings were raised in the same environment. Specifically, Tomsic argued, "[y]ou know, we can talk about his environment and say bad parents, bad neighborhood, bad school, bad genes and then you can take a look at his brother and sister and say raised in the same environment." *Id.* at 71:20-23. Tomsic went on to tell the jury, "[s]o these young people are raised in the same environment law abiding family people." *Id.* at 72:1-2.

(c) Principles of Law

Regarding sentencing in capital cases, the United States Supreme Court has said, "an individualized decision is essential." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). "The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases." *Id.*

(d) Analysis

Reasonable rebuttal of defense counsel's closing argument does not constitute improperly transforming mitigating evidence to aggravating. Tomsic did not ask the jury to sentence Owens to death because of the environment in which he was raised. Tomsic rebutted King's argument and asked the jury not to afford much weight to this part of Owens's mitigation evidence. Under *Salyer*, the prosecutor has considerable latitude in responding to defense counsel's closing argument. 80 P.3d at 839. Tomsic's argument was not improper. In addition, the court instructed the jury in Phase Two Final Instruction Nos. 21 and 22 that the jury could not consider any mitigation evidence as aggravation. With no evidence to suggest otherwise, the jury is presumed to have followed the instructions.

It was reasonable for Tomsic to infer that both of Owens's siblings were law-abiding citizens. Aside from his brother's one brief encounter with law enforcement that resulted in a citation for speeding, there is no other criminal history for Owens's siblings in the record. From this lack of evidence, Tomsic's argument was a reasonable inference. Tomsic did not urge the jury to disregard its duty to make an individualized sentencing decision for Owens when she implied his siblings were law-abiding citizens. Tomsic rebutted King's argument by pointing out that Owens's siblings were raised in the same environment yet were

law-abiding citizens. Tomsic's argument was reasonable rebuttal and was not improper.

(e) Conclusion

The court concludes Tomsic did not cause the jury to consider mitigation as aggravation or to disregard the constitutional principle of individualized sentencing. Accordingly, Owens's petition to vacate his sentence based on Tomsic's rebuttal argument is **Denied**.

ix. Arguing Mitigation as Aggravation, Appealing to Emotion

(a) Parties' Positions

Owens contends Tomsic encouraged jurors to consider mitigation evidence as aggravation evidence in violation of the jury instructions. Owens further contends the prosecution improperly appealed to the jurors' emotions.[261]

The prosecution generally disputes Owens's claims.

(b) Findings of Fact

In Phase Two Final Instruction No. 22, the court instructed the jury that it "may not in any fashion consider these [mitigating] factors as a reason(s) in favor of a death sentence."

Tomsic argued in her phase two rebuttal argument:

> The defense has talked about mitigation and there is no burden of proof on mitigation. You get to decide how much weight to apply to anything that you have heard. The defense comes in and says bad neighborhood, bad schools, bad parents, bad genes, bad brain, bad friends,

[261] Owens also contends the prosecution encouraged the jurors to identify with the prosecution by using phrases such as "us all" and "the rest of us." Phase Two Tr. 70:9; 71:13 (June 13, 2008 p.m.). Owens's contention is conclusory, unsupported by any argument, and duplicative to a prior claim that the court addressed in part IV.F.3.c.v of this Order.

> bad role models. Is that really what you heard? They accuse Mr. Hower of the [sic] dehumanizing the defendant. But isn't that really what the defense is doing[?]
>
> When we talk about people just being a product of their environment, it dehumanizes us all. Because people are more than that. People are self-determining creatures.

Phase Two Tr. 69:25; 70:1-10 (June 13, 2008 p.m.).

(c) Principles of Law

"[T]he district court can summarily dismiss claims inadequately presented to it." *Rodriguez*, 914 P.2d at 251. Specifically, "[a] trial court may . . . deny a postconviction motion without a hearing if the claims are bare and conclusory and lack supporting factual allegations." *People v. Vieyra*, 169 P.3d 205, 209 (Colo. App. 2007).

(d) Analysis

Here, Owens makes conclusory allegations. He does not articulate how Tomsic "encouraged jurors to use mitigation evidence as aggravation." SOPC-163 at 373. He does not articulate how Tomsic's remark "that the defense argument 'dehumanizes us all' was . . . an attempt to encourage jurors to identify with the prosecution." *Id.* He does not articulate how Tomsic's use of the phase "the rest of us" encouraged jurors to identify with the prosecution. *Id.* at 374. He does not articulate how Tomsic appealed to the emotions of the jurors. *Id.*

(e) Conclusion

This claim is conclusory and has not been inadequately presented. Owens's petition to vacate his sentence based on his conclusory allegations is **Denied**.

x. Further Appeal to Passions and Emotions

(a) Parties' Positions

Owens contends Hower improperly appealed to the jurors' emotions by telling the jury that the victims' mothers realize better than anyone else that sentencing Owens to death will not bring back the victims.

The prosecution confesses that it addressed an anti-death penalty argument but contends that its argument did not appeal to the emotions of the jurors.

(b) Findings of Fact

Hower discussed various anti-death penalty arguments during his phase two closing argument including the argument that sentencing the defendant to death will not bring back the victims.

> I want to talk about step four again. That's where I would suggest to you we're going to get, even though each of you has told us that you believe that it is necessary and it is appropriate to have a death penalty for some murderers and for some murders. You have no doubt heard many of the anti-death penalty arguments and some maybe trouble you somewhat. You know some of these arguments are going to be made here, but I suspect some of these thoughts may be rattling around with you and I want to try to discuss those and put them in the correct context.
>
> Executing the killer won't bring back the victim. Absolutely true. Absolutely meaningless. Of course it won't bring back Javad. It won't bring back Vivian. And no one on Earth realizes that better than Christine and Rhonda. They gave birth to them. They raised them. They nurtured them and they helped them become who they were when the defendant murdered them.
>
> And Christine and Rhonda know what they have lost and they know nothing any of us can do will ever reunite them with their children. That has to wait for another event that we have nothing to do with.

> Executing the defendant won't bring them back, so do not do it for them. Giving this defendant the death penalty won't bring back Javad and Vivian, nor will giving him two more life sentences bring back Little Mario. We haven't been going through this sentencing hearing for the last month to try to work miracles and bring back the dead, we're here to determine the appropriate punishment under the law for these murders and this murderer.

Phase Two Tr. 103:4-25; 104:1-7 (June 13, 2008 a.m.).

Revisiting this issue later and telling the jury why it cannot consider its sympathy for the victims' families when rendering its verdict, Hower said, "[g]ive Mr. Owens the death penalty and Christine will still be torn by a desperate need to sleep, but a terror that the nightmare comes back." *Id.* at 117:1-3. He continued, "[d]o you remember about [Christine], go back to the nightmare, remember, somebody is chasing Vivian. Somebody is after her daughter and she can't save her." *Id.* at 117:4-6.

(c) Principles of Law

The court incorporates part IV.F.3.a.ii(c) of this Order as though fully set forth herein.

(d) Analysis

Anticipating that Owens's trial team would make certain anti-death penalty arguments, Hower confronted one by arguing to the jury that it was irrelevant to the punishment question that nothing could bring Marshall-Fields or Wolfe back to life. Hower emphasized this point by telling the jury that the victims' mothers realized this fact as well. He went on to tell the jury that bringing back the victims was not possible and was not the purpose of the sentencing hearing. He told the jury that the purpose was to determine the appropriate punishment for Owens under the law. Hower's references to the victims' mothers were part of his broad

argument that the death penalty should be a viable punishment for Owens even though sentencing him to death would not restore the lives of the victims. Hower implicitly urged the jury to sentence Owens to death based on the evidence and explicitly advised the jury not to base its sentencing decision on its sympathy for the victims' families. Thus, Hower did not improperly appeal to the emotions of the jurors.

(e) Conclusion

The court concludes Hower did not improperly appeal to the emotions of the jurors. Accordingly, Owens's petition to vacate his sentence is **Denied**.

xi. Misstating the Law and Argument Not Based on Evidence

(a) Parties' Positions

Owens contends Hower:

- misstated the law because there was at least one aggravating factor associated with the Lowry Park shootings;
- improperly expressed his personal opinion without evidentiary support when he told the jury that the murder of Vann at Lowry Park was a non-aggravated homicide;
- made an improper proportionality argument when he compared the Lowry Park shootings to the Dayton Street homicides; and
- improperly attempted to arouse the jurors' sympathy and passions by discussing Owens's role in the Gibby's intimidation incident.

The prosecution responds that its arguments were not improper when considered in the context of the entire phase two closing argument.

(b) Findings of Fact

Hower explained why different crimes carry different penalties in his phase two closing argument. He asserted that the differences are driven by the community's value system – the higher the value of the thing taken, the greater the penalty. He then set apart non-aggravated homicide, which carries a life in prison sentence, from aggravated homicide where the death penalty is a possible punishment. He went on to tell the jury,

> What we as a civilized society value the most are the lives of our citizens. That's why we make the deliberate and intentional murder, the taking of the life of just one of our citizens with no aggravating factors whatsoever, the very worst crime there is. No other aggravation, it is the worst crime there is deserving of the automatic and severe penalty of life in prison. The severity of the penalty demonstrates the value that is attached to that which has been taken.
>
> That's when there's no aggravation. That's when there's nothing else. That's when it's something like a raucous at a park that happened on July 4, but when we must determine the punishment on a murderer who has already taken the life of one of our citizens, who then conspires, plots, plans and deliberately and intentionally takes the lives of two more of our citizens, who strikes a blow at the very heart and sole [sic] of the criminal justice system that we all rely on by taking the life of a citizen witness who was merely doing his duty, now what punishment? Now what punishment demonstrates the values we put on our citizens' lives, on our citizen witnesses' lives, on our very criminal justice system that we depend upon? We get the same thing as non-aggravated one-time killer? If so, punishment is no greater. What does that say about how much we value the lives of our citizens, our witnesses and the rule of law?
>
> Ladies and gentlemen, I suggest it is because we place such a high value on life, on our civilized system of

> justice, it's because we attach such a high value that we cannot attach anything less than the ultimate penalty on those who would take it away from us. To do less would denigrate, to do less would devalue those lives.

Phase Two Tr. 106:12-25; 107:1-17 (June 13, 2008 a.m.). Continuing with this theme, Hower later argued to the jury:

> What's the appropriate punishment now? I suggest when he killed Greg and then felt no remorse whatsoever, went about his business selling drugs, doing what he did, when he spent no time whatsoever reflecting on what he had done to Greg Vann other than to try to figure out how to avoid getting punished for it, when he conspired, plotted, planned and carried out a murder, when he manipulated a retarded person into helping him with his murder plans when after the murder of Javad and Vivian, to show some remorse, does he show anything aside from what he said, you've heard it many times, he goes out and buys . . . these despicable t-shirts. Can you believe there are stores that sell them?
>
> When he continues to sell his poison on the streets, when he tries to get an assault rifle, when he continues to threaten witnesses against him, I submit having already forfeited his right to live free, he's now forfeited his right to live.

Id. at 114:16-25; 115:1-8.

(c) Principles of Law

The Colorado Supreme Court considered the propriety of the prosecutor's sentencing hearing closing remarks to the jury in *Dunlap*, including:

> Dunlap challenges the following remarks: (1) in commenting upon Dunlap's prior crimes, the People stated, "It's hard to believe that a person can be that bad, that evil. The death penalty isn't for everyone."; (2) the prosecution paraphrased the testimony of a policeman who said he had never seen anything like the Chuck E Cheese's murder scene in all of his years as a policeman,

> and then remarked, "There's only one Chuck E Cheese ...."; and (3) in asking the jury to return death verdicts, the People queried, "We ask you because if not now, when? If not this, what? If not him, who?

975 P.2d at 760 n.41. Dunlap argued the prosecutor expressed his personal opinion that Dunlap deserved the death penalty. Rejecting Dunlap's claim, the Colorado Supreme Court concluded it is proper for prosecutors in sentencing hearing closing arguments to argue in favor of a death sentence by distinguishing it from non-aggravated homicides. *Id.* at 760.

> The prosecutor was arguing that the gravity of Dunlap's crime distinguished it factually and morally from other murders to such an extent that death was the appropriate penalty. We find no error in these comments.

Id.

(d) Analysis

Hower characterized Vann's death as a non-aggravated homicide, meaning there were no aggravating factors associated with it that would justify the death penalty. Stating there were no aggravating factors associated with the Lowry Park case is not a statement of the law. It was a statement applying the law to the facts from the perspective of the prosecution. Just as it was the prosecution's judgment that the Dayton Street homicides were aggravated homicides, it was the prosecution's judgment that the Lowry Park case was not an aggravated homicide. Telling the jury as much was not a misstatement of the law.

Hower argued that Vann's death in the Lowry Park shootings was a non-aggravated homicide in order to distinguish the Dayton Street homicides. Per *Dunlap*, Hower's distinction was proper because he based his argument on the evidence in the record. There was ample evidence supporting Hower's argument distinguishing Dayton Street from Lowry Park. Hower's characterization of

Vann's death at Lowry Park as a non-aggravated homicide was evidence-based and not an expression of his personal belief.

Hower argued that the punishment for a crime depends on the context in which the crime was committed and that the context of the Dayton Street homicides was aggravated compared to the context of the Lowry Park shootings,[262] on both factual and moral grounds. Factually, he described Owens as "a murderer who has already taken the life of one of our citizens, who then conspires, plots, plans and deliberately and intentionally takes the lives of two more of our citizens." Phase Two Tr. 106:24-25; 107:1-2 (June 13, 2008 a.m.). The record supports Hower's description. Morally, Hower described the Dayton Street homicides as "a blow at the very heart and [soul] of the criminal justice system that we all rely on" and argued that Owens took "the life of a citizen witness who was merely doing his duty." *Id.* at 107:2-5. As in *Dunlap*, Hower "was arguing that the gravity of [Owens's] crime distinguished it factually and morally from other murders to such an extent that death was the appropriate penalty." 975 P.2d at 760. Pursuant to *Dunlap*, there was no error in Hower's argument.

Owens further contends Hower "attempt[ed] to arouse the jury's sympathy and passions by portraying Owens as a person of such low character that he would take advantage of his friend's mental deficits and Carter as a hapless and sympathetic victim." SOPC-163 at 376. Hower argued that Owens manipulated Carter into helping him carry out his plan to murder Marshall-Fields. Owens contends that the evidence in the record shows that he did not manipulate Carter in

[262] Owens's reliance on the court's orders on SO-174 and DA-47 SO in Order (SO) No. 10 is misplaced. Contrary to Owens's position, the court did not address whether counsel could make proportionality arguments in closing. Rather, it prohibited Owens's trial team from introducing evidence purportedly showing the disproportionality of the death penalty. The court finds Order (SO) No. 10 does not apply here.

his plans to murder Marshall-Fields. Yet Owens concedes that he suggested that Carter go into Gibby's to threaten and attempt to intimidate Marshall-Fields. Several witnesses testified that Carter had an intellectual disability. Some witnesses characterized Carter as slow. Hower's inference that Owens was able to manipulate Carter because of his intellectual disability was grounded in the evidence and was not an attempt to garner sympathy for Carter. At no time did Hower or the prosecution portray Carter as a victim. The prosecution's theme was that Ray, Owens, and Carter conspired to kill Marshall-Fields and killed him a week before he was scheduled to testify against Ray. Hower's statement was not an improper appeal to the sympathy and passions of the jury.

(e) Conclusion

The court concludes Hower did not misstate the law or improperly appeal to the emotions of the jurors. Accordingly, Owens's petition to vacate his sentence based on Hower's phase two closing argument is **Denied**.

xii. Arguing Improper Weighing Factor

(a) Parties' Positions

Owens contends Hower improperly caused the jury to consider aggravating circumstances evidence as aggravating factor evidence when he urged the jury to assign greater weight to Aggravating Factor No. 3 based on the inconveniences that law enforcement faced in contacting and following up with witnesses. Owens further contends the prosecution improperly introduced the issue of cost into the jury's deliberations.

The prosecution asserts it properly suggested the facts the jury should consider when weighing the aggravating factors against the mitigating factors.

(b) Findings of Fact

To rebut Owens's mitigation evidence, the prosecution attempted to elicit testimony from Fronapfel about the impact the killing of a citizen witness had on the investigation of the Lowry Park shootings and the Dayton Street homicides. Kepros objected and there was a lengthy colloquy between the parties and the court outside the presence of the jury concerning the admissibility of this evidence. Hower conceded it would not have been admissible to prove the aggravating factors but argued that it was relevant to the weight of the aggravating factors. According to Hower, it was relevant because the jury would have to weigh the aggravating factors against the mitigating factors in step three of the deliberation process. Kepros maintained her position that the evidence was aggravating circumstances evidence that was not relevant to weighing. After considering the arguments of both parties, the court found it was relevant to the weight of the aggravating and mitigating factors and overruled Kepros's objection.

Several of the jury instructions shed light on this issue. In Phase Two Final Instruction No. 24, the court listed the aggravating circumstances by witness. Under Fronapfel, two aggravating circumstances appear – the note written by Owens and Owens's tattoos.

In Phase Two Final Instruction Nos. 19 and 23, the court instructed the jury that each juror must decide how much weight to afford the aggravating and mitigating factors. In Phase Two Final Instruction No. 26, the court described the differences between aggravating factors and circumstances and described which evidence the jury could consider at each step. The court also reiterated its earlier limiting instruction by telling the jury that it could only consider the aggravating circumstances evidence during step four.

In connection with his argument on Aggravating Factor No. 3 that Owens killed Marshall-Fields to prevent arrest or prosecution, Hower urged the jury to consider the impact that the killing of Marshall-Fields had on law enforcement's ability to contact or remain in contact with witnesses who had moved out of Colorado. The first problem Hower discussed was that witnesses were hesitant to cooperate with law enforcement.

> So when you're considering – and when you're considering the weight to be given to this aggravator, you may also consider the specific problems that you learned about that, the murder of the citizen witness doing his duty, Javad Marshall-Fields, the problems that created in this case by the fact that the defendant murdered Javad to silence him to avoid his own arrest, prosecution, conviction and punishment for Greg's murder.

Phase Two Tr. 95:23-25; 96:1-5 (June 13, 2008 a.m.). The second problem Hower discussed was that some witnesses entered the Witness Protection Program and moved out of Colorado.

> How has it impacted this case? A total of nine witnesses and their families, totalling 26 people, had to be placed into witness protection and moved out of the state of Colorado, thereby greatly increasing the difficulty Detective Fronapfel has, other police have in trying to keep them in contact, talk to them when they need to find out something new. It becomes very ponderous, very difficult. It has an impact.

Id. at 98:10-17.

(c) Principles of Law

Section 18-1.3-1201(2) provides as follows:

> (a) After hearing all the evidence and arguments of the prosecuting attorney and the defendant, the jury shall deliberate and render a verdict based upon the following considerations:

> (I) Whether at least one aggravating factor has been proved as enumerated in subsection (5) of this section;
>
> (II) Whether sufficient mitigating factors exist which outweigh any aggravating factor or factors found to exist . . . .

Additionally, pursuant to § 18-1.3-1201(1)(b),

> All admissible evidence presented by either the prosecuting attorney or the defendant that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant, including . . . any matters relating to any of the aggravating or mitigating factors enumerated in subsections (4) and (5) of this section . . . may be presented.

(d) Analysis

Hower relied on the court's ruling that Fronapfel's testimony was relevant to the weight of the aggravating factors in order to urge the jury to consider her testimony in connection with step three. Hower did not cause the jury to consider aggravating circumstances evidence while weighing the aggravating and mitigating factors, because this evidence was not aggravating circumstances evidence. This court concludes that the trial court's ruling was appropriate, that the evidence was relevant to the weight of Aggravating Factor No. 3, and that it was not aggravating circumstances evidence. Additionally, Phase Two Final Instruction No. 24 listed all of the aggravating circumstances evidence introduced by the prosecution and did not include this evidence. Evidence that the court deems relevant to the aggravating factors may be presented during the sentencing hearing. § 18-1.3-1201(1)(b). Therefore, Hower's argument was not improper.

Hower did not directly raise the issue of costs. He limited his argument to the difficulty experienced by law enforcement in trying to contact witnesses who

moved out of Colorado. Thus, there was no impropriety with this portion of Hower's argument.

(e) Conclusion

The court concludes Hower's argument was not improper. Accordingly, Owens's petition to vacate his sentence based on Hower's phase two closing argument is **Denied**.

xiii. Improper Use of Victim Impact Evidence

(a) Parties' Positions

Owens contends Hower improperly caused the jury to consider aggravating circumstances evidence while weighing the aggravating and mitigating factors when he argued that Owens caused exponential harm as opposed to double harm when he killed Marshall-Fields and Wolfe.

The prosecution responds that its argument was proper because the harm caused by the Dayton Street homicides was relevant to the weight the jury should attach to Aggravating Factor No. 4 – killing two or more persons in one criminal episode.

(b) Findings of Fact

Hower touched on each of the aggravating factors during his phase two closing argument by summarizing the facts associated with each aggravating factor. His purpose was to demonstrate the weight associated with each aggravating factor. As discussed in part IV.F.3.c.xii of this Order, the court ruled during the sentencing hearing that both parties were allowed to introduce evidence that was relevant to the weight of the aggravating and mitigating factors. Relying on that order with respect to Aggravating Factor No. 4, Hower argued to the jury:

> [O]ne of those aggravators that applies equally to Javad and to Vivian, that the defendant intentionally killed two

> or more people in one criminal episode. This one aggravator doesn't require much explanation, does it?
>
> You've seen, you've heard for yourselves that unbearable pain and grief caused by just one murder. The devastation caused when one life suddenly, unexpectedly destroyed, the effect it has on the families. Never had a chance to say good-bye, say they loved them. The loss to the community when one promising life is taken, multiply it by two. The harm done by two murders, I suggest, is not just doubled, it's increased [exponentially]. . . . That's a heavy, heavy factor, to kill two people, not just one.

Phase Two Tr. 90:3-16 (June 13, 2008 a.m.). In Phase Two Final Instruction No. 28, the court instructed the jury, "[i]n reaching your decision on punishment, you may consider evidence relating to . . . the impact of the crimes on the victims[']families." The court also instructed the jury that it "may consider this evidence only at Step Four in determining an appropriate punishment." Phase Two Final Instruction No. 28.

(c) Principles of Law

"Evidence regarding the impact of a capital murder on the victim's family members is relevant in the penalty phase of the defendant's trial. Such evidence allows the jury to consider 'the human cost of the crime of which the defendant stands convicted.'" *Dunlap*, 975 P.2d at 744-45 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

Pursuant to § 18-1.3-1201(1)(b):

> All admissible evidence presented by either the prosecuting attorney or the defendant that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant, including . . . any matters relating to . . . the impact of the crimes on the victim's family may be presented.

(d) Analysis

The level of harm created by the Dayton Street homicides was relevant in the sentencing hearing for two purposes. It was relevant to the weight of Aggravating Factor No. 4, which the jury would consider in step three when it weighed the aggravating factors against the mitigating factors. It was also relevant to the jury's determination of punishment in step four. As discussed above, this court finds the trial court's ruling to be appropriate. Pursuant to that ruling, the parties could introduce evidence during phase two that was relevant to the weight of either the aggravating or mitigating factors. It necessarily follows that the parties could use this evidence in closing arguments. Thus, it was not improper for Hower to argue that the jury should assign more weight to Aggravating Factor No. 4 because of the heightened impact of killing Marshall-Fields and Wolfe. His suggestion that the impact was exponential was phrased as a mere suggestion and was not unreasonable.

(e) Conclusion

The court concludes Hower did not improperly argue victim impact evidence. Accordingly, Owens's petition to vacate his sentence based on Hower's argument that Owens caused exponential harm by killing two people is **Denied**.

xiv. Excessive Focus on Victim Characteristics

(a) Parties' Positions

Owens contends Hower injected irrelevant considerations into the jury's sentencing decision by excessively focusing on the characteristics of the victims.[263]

[263] Owens cites pages 57-58, 61-62, 72, and 115-116 of the June 13, 2008 a.m. transcript to support his argument. The court reviewed those pages of the transcript and found that Hower discussed the personal characteristics of Marshall-Fields and Wolfe only on pages 115-116.

The prosecution responds that its argument was not improper because it is appropriate for the jury to consider the characteristics of the victims during its deliberations.

(b) Findings of Fact

Near the conclusion of Hower's phase two closing argument, he reminded the jury of the personal characteristics of Marshall-Fields and Wolfe:

> Yong Wolfe, Maisha Pollard, Marion Fields, Charles Jamison, Allen Baxter, Mike Prosser, Sylvia Marshall, Christine, Rhonda, what they told you about the personal characteristics about Javad and Vivian and the impact their murders have had on them, I submit none of you are likely to ever forget the way they described the personal characteristics of Javad and Vivian, their exuberance, their vitality, their promise, the joy and inspiration they brought to everybody around them, their zest for life, their lost potential to our community and our society is enormous. What contributions those two young people [would] have made if the defendant had permitted them to live.

Phase Two Tr. 115:17-25; 116:1-3 (June 13, 2008 a.m.).

(c) Principles of Law

Pursuant to § 18-1.3-1201(1)(b):

> All admissible evidence presented by either the prosecuting attorney or the defendant that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant, including . . . any matters relating to the personal characteristics of the victim . . . may be presented.

(d) Analysis

Per § 18-1.3-1201(1)(b), the personal characteristics of the victims are relevant and admissible during a capital sentencing hearing and appropriate for the jury to consider during its deliberations. The portion of the transcript to which

Owens objects spans 12 lines of the nearly 60 pages of Hower's phase two closing argument. Hower did not excessively focus on the victims' personal characteristics.

(e) Conclusion

The court concludes Hower did not excessively focus on Marshall-Fields and Wolfe during his closing argument. Accordingly, Owens's petition to vacate his sentence based on Hower's description of the victims' characteristics is **Denied**.

xv. Arguing for Death Based on Uncharged Juvenile Acts

(a) Parties' Positions

Owens contends Tomsic improperly urged the jury to consider his uncharged and unadjudicated juvenile acts when deciding the appropriate punishment.

The prosecution responds that it was properly rebutting the mitigation evidence introduced by Owens concerning the environment in which he was raised.

(b) Findings of Fact

In her phase two rebuttal argument, Tomsic questioned whether Owens's mitigation evidence should be afforded much weight by arguing:

> The defense has talked about mitigation and there is no burden of proof on mitigation. You get to decide how much weight to apply to anything that you have heard. The defense comes in and says bad neighborhood, bad schools, bad parents, bad genes, bad brain, bad friends, bad role models. Is that really what you heard?

Phase Two Tr. 69:25; 70:1-5 (June 13, 2008 p.m.). Next, Tomsic argued Owens was not a creature of his environment. Rather, he chose his lifestyle. *Id.* at 70:8-25. Then she continued,

> But what we are seeing from Sir Mario Owens is a lifetime of anti-social behavior. A lifetime of criminality. This defendant has been selling drugs since he was 13 years old. He was doing it down in Shreveport, Louisiana.

Id. 70:25; 71:1-4.

(c) Principles of Law

Evidence that may be presented during a capital sentencing hearing includes that which "the court deems relevant to the nature of the crime, and the character, background, and history of the defendant." § 18-1.3-1201(1)(b).

(d) Analysis

A theme of Owens's mitigation evidence was that his parents raised him in a negative environment, that he did not have positive male role models, and that he did not attend good schools. King argued that Owens was not deserving of the death penalty because the environment in which he was raised was bad and was beyond his control. Tomsic responded that Owens made deliberate choices and was in control of his future. The thrust of Tomsic's argument was that the jury should not afford much weight to this mitigation evidence. In support of her argument, Tomsic told the jury Owens "has been selling drugs since he was 13 years old[,]" implying that Owens chose to act unlawfully as a juvenile. The brief reference was not a plea to the jury to sentence Owens to death because of his behavior as a juvenile. Tomsic's statement falls within the considerable latitude afforded to prosecutors during rebuttal closing arguments. *See Salyer*, 80 P.3d at 839 (prosecutors are entitled to "considerable latitude in responding to defense counsel's arguments").

(e) Conclusion

The court concludes Tomsic's rebuttal argument was not improper. Accordingly, Owens's petition to vacate his sentence based on Tomsic's argument that Owens sold drugs at a young age is **Denied**.

xvi. Misstating the Evidence and Appeal to Passion

(a) Parties' Positions

Owens contends Tomsic misstated evidence when she argued that Owens got a certain tattoo after the Dayton Street homicides. Owens also contends Tomsic improperly appealed to the passions of the jurors by discussing Owens's tattoos.

The prosecution responds that the evidence regarding when Owens acquired a certain tattoo is inconclusive and that its argument was not an appeal to the passions of the jurors.

(b) Findings of Fact

Trial Exh. P-765 is a photograph of a large tattoo across the top of Owens's back with the words "Live…Play…Die By It" inscribed inside a bullet. That photograph was admitted into evidence during the sentencing hearing.

The court reviewed all of the testimony cited by Owens and the prosecution on this issue. Most witnesses did not know when Owens got the tattoo. The testimony of Owens's friend, Demarcus Hall (Hall), and Owens's brother, Sir Derrius Owens (S.D. Owens), is contradictory. Hall testified that he saw Owens in August 2005 but did not see the bullet tattoo at that time. Phase Two Tr. 125:11-16 (May 22, 2008 a.m.). S.D. Owens testified Owens got the bullet tattoo before 2005. Phase Two Tr. 96:7-22 (June 4, 2008 a.m.).

Relying on the testimony of Hall, Tomsic told the jury:

> Counsel urges you to believe that the defendant, if given a life sentence, will have an opportunity at redemption.

> But redemption must be sought. Redemption requires a recognition of the wrongfulness of your acts. It requires remorse.
>
> And what you have seen in this courtroom over the last several months is a killer with no remorse. He kills and kills again. He kills again and then goes outside to buy shirts to celebrate it. He had the receipts for those shirts in his wallet when he was stopped on July 17. He bought those Stop Snitching shirts after the murder. He bought them on July 18. He is celebrating what he has done. In fact, he is so proud of what he has done, he is adorning his body with enormous bullet tattoos saying live by it, play by it, die by it.
>
> This is a man with no remorse.

Phase Two Tr. 68:20-25; 69:1-10 (June 13, 2008 p.m.).

(c) Principles of Law

In *Dunlap*, the prosecutor remarked during the sentencing hearing closing argument: "Crazy Horse as a moniker for Nathan Dunlap seems to fit, because he wears that today. Roll up his left sleeve and you'll see it today as boldly and as clearly as if he was waving those four scalps from his hand." 975 P.2d at 760 n.43. The Colorado Supreme Court "disapprove[d] of the prosecution's remarks comparing Dunlap to Crazy Horse and painting the image of Dunlap waving the scalps of his victims in his hands. The People's use of the 'Crazy Horse' tattoo . . . was a highly inappropriate appeal to passion and prejudice." *Id.* at 761. The Colorado Supreme Court found the prosecutor's remarks were an "impermissibly impassioned expression of anger." *Id.* (internal quotations omitted). Yet "the Crazy Horse reference, although improper, was harmless beyond a reasonable doubt when viewed in the context of the entire record." *Id.*

(d) Analysis

The evidence of when Owens got the bullet tattoo is contradictory and inconclusive. Hall testified he did not see the tattoo when he saw Owens in August 2005, which would indicate that Owens did not have the tattoo prior to June 2005. On the other hand, S.D. Owens testified Owens had the tattoo before 2005. Sailor and other witnesses also testified they did not know when Owens got the tattoo. Tomsic's argument was grounded in admitted evidence – Hall's testimony. The fact that this evidence is inconsistent with other admitted evidence does not render the argument improper.

Owens also contends Tomsic appealed to the passions of the jurors by claiming that Owens's tattoo was a sign of his lack of remorse. In support, Owens relies on *Dunlap* where the Colorado Supreme Court found the prosecutor's remarks concerning Dunlap's Crazy Horse tattoo to be improper. Owens's reliance on *Dunlap* is unpersuasive on factual and legal grounds. Tomsic's remark that Owens "is adorning his body with enormous bullet tattoos saying live by it, play by it, die by it" is significantly less egregious than the prosecutor's remarks in *Dunlap*. Tomsic's remark was a statement about the evidence, not an impassioned comparison of Owens to an inflammatory interpretation of the character depicted. Tomsic's remark did not exceed the considerable latitude afforded by the law. She was responding to King's closing argument that Owens was redeemable. *See Salyer*, 80 P.3d at 839 (prosecutors are entitled to "considerable latitude in responding to defense counsel's arguments"). Tomsic's argument was not improper.

(e) Conclusion

The court concludes Tomsic did not misstate the evidence and did not appeal to the passions of the jurors when she argued that Owens's tattoo demonstrated his

lack of remorse for the Dayton Street homicides. Accordingly, Owens's petition to vacate his sentence based on Tomsic's remarks about Owens's tattoo is **Denied**.

xvii. Misstating Law Concerning Role of Mitigation

(a) Parties' Positions

Owens contends Tomsic mischaracterized the role mitigation plays in a sentencing hearing when she told the jury that the purpose of mitigation is to explain the crime.

The prosecution responds that Owens misquoted the prosecutor on one occasion in order to make this argument but does not respond to Owens's other allegations.

(b) Findings of Fact

In this case, the court advised the jury in Phase Two Final Instruction No. 21 that,

> [m]itigating factors are circumstances which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or which in any other way, alone or together with other such circumstances, may support for any individual juror a penalty of life imprisonment instead of the death penalty.

While discussing Owens's mitigation evidence, Tomsic told the jury, "so [Owens and his siblings] are raised in the same environment law abiding family people. So his environment really does not explain how he has come to be here." Phase Two Tr. 72:1-3 (June 13, 2008 p.m.). Tomsic also told the jury, "ADD does not explain the defendant's behavior in this case." *Id.* at 73:12-13.[264]

[264] Owens also claims Hower told the jury "that Owens's 'chronic use of marijuana had to have cause[d]' the crimes in order to constitute mitigation." Owens cites the June 13, 2008, transcript

(c) Principles of Law

Mitigation is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604. Mitigation evidence need not have a nexus to the crime. *Tennard v. Dretke*, 542 U.S. 274, 287 (2004). In *Rodriguez*, the Colorado Supreme Court approved of a jury instruction defining mitigation as evidence that does "not constitute a justification or excuse for the offense in question, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability." 794 P.2d at 987 (emphasis omitted).

(d) Analysis

In her rebuttal argument, Tomsic told the jury that neither Owens's environment nor his Attention Deficit Disorder explained his behavior in this case. The purpose of mitigation is not to explain the defendant's behavior but is to persuade the jury that there is a basis for sentencing the defendant to life in prison instead of death. Thus, Tomsic's argument would be improper had she not been responding to the portion of King's argument in which he, too, blurred the distinction. In his phase two closing argument, King told the jury, "[w]hat this mitigation evidence might be or might show is what we were talking about before when I was talking about a reason why or maybe some part of an explanation of how this could happen." Phase Two Tr. 20:13-16 (June 13, 2008 p.m.).

Despite these arguably improper statements, the jury was properly instructed in Phase Two Final Instruction No. 21 about the role of mitigating evidence. With no evidence to suggest otherwise, the jury is presumed to have followed the

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at page 85. The language quoted by Owens does not appear at this citation. Thus, the court does not consider this claim.

instructions. Thus, there is no reasonable possibility that Tomsic's mischaracterization of Owens's mitigation evidence could have prejudiced him.

(e) Conclusion

The court concludes Tomsic's misstatement about the role of mitigation evidence in a capital sentencing hearing was harmless beyond a reasonable doubt. Accordingly, Owens's petition to vacate his sentence based on Tomsic's argument that Owens's mitigation did not explain the Dayton Street homicides is **Denied**.

d. Cumulative Effect of Improprieties in Sentencing Closing Arguments

Of the twenty claims Owens made concerning the prosecution's sentencing hearing closing arguments, the prosecution made four improper arguments. The court found in the preceding sections of this Order that the individual improprieties were harmless beyond a reasonable doubt and do not justify reversal of Owens's sentence. The court must also consider whether there is a reasonable possibility that the cumulative effect of the improper arguments could have prejudiced Owens.

Tomsic misstated the law applicable to the sentencing hearing when she told the jury that Owens was eligible for the death penalty if it found at least one aggravating factor beyond a reasonable doubt[265] and when she told the jury that Owens's mitigation evidence did not explain his criminal behavior.[266] The jury instructions cured Tomsic's misstatements of the law and negated any prejudice Owens may have suffered. *See Domingo-Gomez*, 125 P.3d at 1054 (the specific curative instruction given to the jury immediately following the prosecutor's improper remark was sufficient to alleviate any prejudice to the defendant).

[265] *See* part IV.F.3.b.i of this Order.
[266] *See* part IV.F.3.c.xvii of this Order.

While Hower did not misstate the law, he inartfully, and perhaps improperly highlighted the irony between Owens's and Marshall-Fields's experiences of witnessing a murder and becoming cooperating witnesses[267] and improperly referred to the Montour case while discussing whether Owens would be a continuing threat to society.[268] Hower's improper statements were passing thoughts in a lengthy phase two closing argument. He did not divert the jury's attention away from the ultimate issue in the case, which was the jury's determination of the appropriate sentence for Owens.

While the arguments were impassioned and zealous, the court concludes there is no reasonable possibility that the cumulative effect of Hower's and Tomsic's improper arguments could have prejudiced Owens; thus, the court further concludes these errors, when viewed cumulatively, were harmless beyond a reasonable doubt. *See Rodgers*, 756 P.2d at 984 (error is harmless beyond a reasonable doubt if there is no reasonable possibility that the defendant could have been prejudiced); *see also Rodriguez*, 914 P.2d at 278 n.50 (applying the harmless beyond a reasonable doubt standard to claims of prosecutorial misconduct in closing arguments in capital cases). Accordingly, Owens's claim that he was denied his right to an impartial jury based on the cumulative effect of the prosecution's improper phase two closing arguments is **Denied**.

G. Unlawful Compensation

1. Parties' Positions

Owens argues his Dayton Street trial was fundamentally unfair because the deputy district attorneys prosecuting his case had an unlawful financial interest in the outcome of the guilt phase and sentencing hearing. Owens contends Chambers

[267] *See* part IV.F.3.c.iv of this Order.
[268] *See* part IV.F.3.c.vii of this Order.

created this unlawful financial interest by paying bonuses to the deputy district attorneys prosecuting his case.

The prosecution responds that Owens failed to establish how the bonuses affected the discretionary decisions made by the prosecutors and failed to establish how those decisions deprived Owens of a fair trial.

2. Findings of Fact

Chambers paid each deputy district attorney prosecuting Owens the following compensation in addition to his/her salary:

	2006	2007	2008	2009
Hower	$1,000	$1,000	$1,200	$2,500
Tomsic	$1,000	$500	$1,200	$2,500
Warren[269]	$250	$750	$1,200	$1,500

Chambers authorized payment of bonuses at the end of each calendar year based in part on the remaining balance in the wage and salary line item of the office's fiscal budget. Chambers decided which employees deserved bonuses as well as the amount of the bonus for each employee. There was no written policy. Doris Houser-Williams (Houser-Williams), the Chief Financial Officer for the district attorney's office during the relevant time period, was unaware of any eligibility criteria employed by Chambers other than that employees who had worked for the office less than one year were not eligible. Houser-Williams understood that Chambers intended the bonus to be a reward for work previously accomplished by an employee, not as an incentive for upcoming work.

[269] Beginning in 2007, Warren worked in the Special Victims Unit (SVU) and received an additional $1,000 for every 6 months she worked in the SVU. All deputy district attorneys assigned to the SVU received the additional compensation. The additional compensation is generally considered hazard pay.

3. Principles of Law

A district attorney occupies a powerful and vital role in the judicial system. "A district attorney prosecutes criminal cases on behalf of the state and the counties within her district." *People v. Perez*, 238 P.3d 665, 669 (Colo. 2010). "The duty of a prosecutor 'is not that it shall win a case, but that justice shall be done.'" *Id.* at 670 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). "A district attorney . . . is a judicial officer sworn to uphold the constitution and obligated to refrain from invalid conduct creating an atmosphere prejudicial to the substantial rights of the defendants." *De Gesualdo v. People*, 364 P.2d 374, 378 (Colo. 1961). Thus, "[o]verzealous advocacy that undermines the quest for impartial justice by defying ethical standards cannot be permitted." *Domingo-Gomez*, 125 P.3d at 1048.

"Colorado generally requires that its district attorneys prosecute criminal cases." *Lincoln*, 161 P.3d at 1278. The disqualification statute, C.R.S. § 20-1-107, "is designed to ensure that district attorneys can perform their public duty as mandated by the Colorado Constitution." *Id.* The statute "is designed to authorize the disqualification of a district attorney and to allow for the appointment of a special prosecutor only when the district attorney has an interest in the litigation apart from his professional responsibility of upholding the law." *People ex rel. N.R.*, 139 P.3d 671, 676 (Colo. 2006) (quoting *People v. District Court*, 538 P.2d 887, 889 (Colo. 1975)). The district attorney should not be disqualified unless "the court finds that the district attorney has a personal or financial interest or special circumstances exist that render it unlikely that the defendant would receive a fair trial." § 20-1-107(2).

"[A] court may properly disqualify a district attorney who has some involvement in the defendant's case that would 'impair that office's ability to

prosecute the case fairly.'" *People v. Palomo*, 31 P.3d 879, 882 (Colo. 2001) (quoting *People ex rel. Sandstrom v. District Court*, 884 P.2d 707, 710 (Colo. 1994)). Likewise, the Colorado Supreme Court held in *Perez* that "a district attorney's or her office's financial interest is a statutorily authorized basis for disqualification only if the financial interest would render it unlikely that the defendant would receive a fair trial." 238 P.3d at 667.

The defendant's post-conviction attorneys in *Dunlap* attempted to disqualify the district attorney's office for the purposes of the Crim. P. 35(c) hearing. The district court refused to disqualify the prosecution, and the defendant appealed. In reviewing this claimed error, the Colorado Supreme Court applied the same standard with the benefit of a hindsight review of the Crim. P. 35(c) hearing finding "[t]here is nothing in the record to indicate that Dunlap did not receive a fair 35(c) hearing." *Dunlap v. People*, 173 P.3d 1054, 1095 (Colo. 2007). Based on *Dunlap*, this court rejects Owens's contention that he need not demonstrate that he was deprived of a fair trial due to the prosecutors' alleged financial interest in the outcome of his case.

Accordingly, it is the defendant's burden to establish facts showing that the prosecutor's interest in the litigation would render it unlikely that the defendant would receive a fair trial. *Perez*, 238 P.3d at 667. "When one seeks to disqualify a prosecuting attorney . . . it is incumbent on him to establish facts from which the trial court may reasonably conclude that the accused will probably not receive a fair trial to which he is entitled." *Wheeler v. District Court*, 504 P.2d 1094, 1096 (1973). "[A] showing of mere partiality is not sufficient." *People v. C.V.*, 64 P.3d 272, 275 (Colo. 2003). Rather, "to demonstrate that a personal interest would render it unlikely that the defendant would receive a fair trial, [the Colorado Supreme Court] held that 'allegations of interest must show a concern in the

outcome of the matter such that the district attorney will either reap some benefit or suffer some disadvantage.'" *Perez*, 238 P.3d at 670-71 (quoting *C.V.*, 64 P.3d at 275).

Whether a defendant will receive a fair trial is the most important inquiry in the trial court's decision to disqualify a district attorney. *People v. Loper*, 241 P.3d 543, 546 (Colo. 2010). To prove this "there must be actual facts and evidence in the record supporting the contention, not mere hypothetical information." *Id.* It is clear that the record must support an allegation that the defendant would not receive a fair trial. *Dunlap*, 173 P.3d at 1095. The mere possibility of inclusion of trial statistics in some future bonus calculation is insufficient to meet the standard of evidence required to disqualify a prosecutor under § 20-1-107. *Loper*, 241 P.3d at 546.

4. Analysis

It is undisputed that each deputy district attorney who prosecuted Owens received a bonus from 2006 to 2009. The fact that bonuses were received without more does not entitle Owens to the relief he seeks. Owens must demonstrate that the prosecutors' financial interest rendered his trial and sentencing hearing unfair. During the post-conviction hearing, Owens did not establish a connection between the bonuses paid to the deputy district attorneys prosecuting his case and the fairness of his trial and sentencing hearing. Neither Chambers nor the deputy district attorneys testified on this issue. Thus, Owens's claim lacks the facts and evidence required to support his allegation that he was deprived of a fair trial.

5. Conclusion

Because there is nothing in the record to indicate that Owens did not receive a fair guilt phase or sentencing hearing, Owens's contention that his conviction and

sentence must be vacated because the deputy district attorneys had a financial interest in the outcome of his guilt phase and sentencing hearing is **Denied**.

H. Grand Jury Process[270]

1. Parties' Positions

Owens argues that the prosecution interfered with the grand jury process in a way that curtailed the grand jury's independence and resulted in an indictment that must be vacated, thereby requiring his conviction and sentence to be vacated. Owens asserts three main arguments: 1) while it is permissible for the prosecution to invite a target of a grand jury investigation to testify, it was impermissible and misleading to inform the grand jury of this process; 2) the prosecution erred by explaining to the grand jury that it would not sign an indictment for Harrison; and 3) the prosecution misled the grand jury into thinking it was powerless to investigate by stating that it would recall the grand jury if more evidence was discovered.

In response, the prosecution generally asserts that Owens failed to show that the errors he alleges prejudiced him. The prosecution further argues that Owens's claim on this issue is barred because a petit jury verdict nullifies any errors by the prosecution during the grand jury process.

2. Findings of Fact

The prosecution presented this case to the grand jury in late 2005 and early 2006. The grand jury returned the indictment on March 8, 2006. The matter proceeded to jury trial, and the petit jury found Owens guilty and sentenced him to death.

[270] The court denied Owens an evidentiary hearing on this claim.

3. Principles of Law

Grand juries are responsible for investigating a crime and determining whether probable cause exists to indict a suspect. *Losavio v. Robb*, 579 P.2d 1152, 1154 (Colo. 1978). When the prosecution employs the grand jury process, the prosecution cannot charge a defendant or set the case for trial unless the grand jury has returned a valid indictment. *People ex rel. Bonfils v. District Court*, 66 P. 1068, 1070 (Colo. 1901).

The district attorney has a duty to advise the grand jury. *People v. Lewis*, 516 P.2d 416, 418 (Colo. 1973). The prosecutor must refrain from inappropriate conduct that would influence the grand jury and could result in a wrongful conviction. *Wheeler*, 504 P.2d at 1094-96. Prosecutorial misconduct during grand jury proceedings results in the dismissal of the indictment where the misconduct could have affected the decision of the grand jury in indicting a particular defendant. *People v. Bergen*, 883 P.2d 532, 543 (Colo. App. 1994). To establish error for reversal, a defendant must show that s/he was prejudiced by the prosecution's errors. *Id.*

4. Analysis

The court will first address whether the alleged issues with the grand jury are moot because a jury verdict was reached. Then the court will address Owens's three individual arguments on the merits.

Any errors committed by the prosecution during the grand jury process are rendered moot because the petit jury found Owens guilty beyond a reasonable doubt for the Dayton Street homicides. Error which may have occurred due to technical violations during the testimony stage of a grand jury proceeding are "rendered harmless by the trial jury's verdict finding the defendant guilty of the offense," because the verdict demonstrates that there was probable cause to charge

a defendant with the crime for which s/he was convicted. *People v. Tyler*, 802 P.2d 1153, 1154 (Colo. App. 1990). Here, the alleged errors of the prosecution are, at best, technical violations. Accordingly, the alleged errors are harmless in light of the jury's verdict.

Even if there were defects in the grand jury's findings due to the prosecution's alleged errors, such findings did not prejudice Owens and do not require dismissal of the verdict. Generally, "[p]rosecutorial misconduct during grand jury proceedings can result in dismissal if actual prejudice accrues to the defendant or the misconduct compromises the structural integrity of the grand jury proceedings to such a degree as to allow for the presumption of prejudice." *Bergen*, 883 P.2d at 543. Dismissal of the indictment is required if the prosecution's errors "could . . . have affected the decision by the grand jury." *Id.* Dismissal of the indictment is appropriate "if it is established that the violation substantially influenced the grand jury's decision to indict," or if there is "grave doubt" that the decision to indict was free from the influence of the violations. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988) (quoting *United States v. Mechanik*, 475 U.S. 66, 76-79 (1986)). Here, the allegations of error do not rise to the level of prejudice and did not influence the grand jury to indict Owens.

The court will address Owens's claims on the merits.

First, the prosecution did not abuse the grand jury process by inviting the targets to testify or by informing the grand jury of the invitations. The target of a grand jury investigation cannot be compelled to testify. *Chavez v. Martinez*, 538 U.S. 760, 767-68 (2003). However, any party, including a target, is free to voluntarily appear and testify. C.R.S. § 16-5-204; *see also Bergen*, 883 P.2d at 539-40. While it would have been an abuse of process for the prosecution to have

subpoenaed the targets to testify in front of the grand jury, the prosecution did not abuse the grand jury process by issuing an invitation to the targets to testify. And alerting the grand jury that it invited the targets to testify did not interfere with the grand jury's subpoena power. By doing so, the prosecution did not leave the grand jury with the impression that it did not have the power to subpoena witnesses. The prosecution did not indicate to the grand jury that it could not subpoena its own witnesses. It simply informed the grand jury that it had issued an invitation to the targets of the investigation, and that the targets had the option to testify, but that it was voluntary. The prosecution's advice to the grand jury aligns with the case law and in no way curtailed the grand jury's independence in issuing subpoenas. In the court's opinion, Owens was not prejudiced by this process.

Second, the prosecution did not abuse the grand jury process by refusing to indict Harrison, and the prosecution's refusal to do so did not have any bearing on Owens's indictment. Per Crim. P. 7(a)(2)(IV), a valid indictment must be signed by both the grand jury foreperson and the prosecutor. A district attorney in Colorado may bring charges either by filing a complaint or information or by presenting a grand jury indictment to the court. *Dresner v. County Court*, 540 P.2d 1085, 1086 (Colo. 1975). In short, the district attorney exercises discretion whether to prosecute a particular defendant and Crim. P. 7 recognizes the discretionary power of the district attorney to refuse to sign an indictment. *Id.* at 1087. Here, it was not improper for the district attorney to refuse to sign an indictment where, in the district attorney's view, there was insufficient evidence to support an indictment. The prosecution was ethically prohibited from signing an indictment that it did not believe was supported by probable cause. Further, any statements made by the prosecution to the grand jury regarding Harrison did not influence the indictment of Owens. None of the prosecution's statements related to

Owens and Owens does not contend that an indictment of Harrison would have caused the grand jury to reconsider or refuse to indict him. Therefore, Owens was not prejudiced by the prosecution's handling of the grand jury's intent to indict Harrison.

Third, the prosecution's closing remarks to the grand jury were not improper. Owens challenges the remark that the grand jury could be recalled if the prosecution discovered additional evidence. Because the prosecution made these statements after the indictment was returned, the statements could not have "substantially influenced the grand jury's decision to indict." *Bank of Nova Scotia*, 487 U.S. at 256. Therefore, these statements do not require invalidation of the indictment.

Last, Owens argues the prosecution's actions constitute outrageous governmental conduct. Outrageous governmental conduct is generally a legal defense that may warrant dismissal of a criminal case if the conduct has "violated fundamental fairness and is shocking to the universal sense of justice." *People v. Auld*, 815 P.2d 956, 957 (Colo. App. 1991). Here, the prosecution's conduct was not improper and would not have influenced the grand jury's decision to indict Owens. The alleged errors are not shocking to the universal sense of justice and do not violate fundamental fairness. The indictment was fairly rendered by the grand jury, and the alleged outrageous governmental conduct did not prejudice or affect Owens's indictment.

5. Conclusion

The court concludes that any errors committed by the prosecution in the grand jury process were rendered moot when the petit jury found Owens guilty beyond a reasonable doubt. The court also concludes the prosecution did not abuse the grand jury process and that none of the alleged errors prejudiced Owens or

influenced his indictment. Accordingly, Owens's request to vacate his conviction and sentence based on abuse of grand jury process is **Denied**.

I. Outrageous Government Conduct[271]

1. Parties' Positions

Owens argues the cumulative effect of the alleged prosecutorial misconduct constitutes outrageous governmental conduct, which requires the court to exercise its supervisory powers to vacate his convictions and death sentences.

The prosecution did not respond to this argument.

2. Principles of Law

Colorado recognized the due process claim of outrageous governmental conduct over three decades ago in *Bailey v. People*, 630 P.2d 1062, 1068 (Colo. 1981). Governmental conduct is considered outrageous if it "violate[s] fundamental fairness and is shocking to the universal sense of justice." *Auld*, 815 P.2d at 957. To determine whether there is outrageous governmental conduct, the trial court reviews the totality of the facts in the case. *People in Interest of M.N.*, 761 P.2d 1124, 1129 (Colo. 1988). The trial court may invoke its supervisory powers to dismiss a criminal case upon finding outrageous governmental conduct absent a due process violation. *Auld*, 815 P.2d at 957.

Auld is the seminal case on outrageous governmental conduct in Colorado, and the only Colorado appellate case in which dismissal was found to be an appropriate sanction.[272] In *Auld*, the La Plata County District Attorney and Sheriff's office, using grant money, implemented a scheme to uncover suspected criminal behavior of an attorney and induce him to inform on his clients. The

[271] The court denied Owens an evidentiary hearing on this claim.

[272] Owens relies heavily on two cases that are not binding on this court: *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008), and *United States v. Fitzgerald*, 615 F.Supp.2d 1156 (S.D. Cal. 2009).

district attorney filed a fictitious complaint against an undercover police officer using an alias. When the undercover officer appeared in court, he made several untruthful statements to the judge who advised him of the charges and his rights. He used cash to pay the targeted attorney's retainer and asked the attorney if the remainder of the fee could be paid by giving something in trade. The attorney replied that he was not interested in cocaine but was interested in a gun at a black market price. The undercover officer provided guns, including an Uzi semiautomatic rifle and later arrested the attorney for theft by receiving and possession of a dangerous weapon. After the attorney's arrest, the district attorney offered to dismiss the charges if the attorney provided information about other people, including some of the attorney's current and former clients, but the attorney refused to do so. The attorney moved to dismiss the charges against him and prevailed.

The trial court dismissed the charges "based on [the] alleged outrageous governmental conduct that had implicated the court in law enforcement activities." *Id.* at 958. The Colorado Court of Appeals affirmed, concluding that "the trial court correctly determined that the conduct of the [prosecution and law enforcement], in compromising the judicial branch, thereby making it an unknowing accomplice to undercover prosecution activities, was so outrageous that appropriate sanctions are required[,]" *id.* at 959, and that "dismissal of the case is an appropriate remedy." *Id.*

Dismissal of charges was not appropriate in a host of other cases, several of which involved law enforcement encouraging defendants to violate the law. *See People in Interest of M.N.*, 761 P.2d 1124 (undercover officer encouraged juvenile to purchase drugs and commit other crimes); *People v. Vega*, 870 P.2d 549 (Colo. App. 1993) (law enforcement authorities arranged for cocaine to be delivered into

the state); *People v. Aponte*, 867 P.2d 183 (Colo. App. 1993) (in undercover investigation of drug trafficking, law enforcement made 20-30 phone calls to defendant, visited him in California, and gave him gifts). Nor was dismissal warranted in cases that involved law enforcement infringing on the defendant's constitutional rights. *See People v. Cowart*, 244 P.3d 1199 (Colo. 2010) (law enforcement elicited statements from defendant in violation of his Fifth and Sixth Amendment rights); *Bailey*, 630 P.2d 1062 (Colorado Bureau of Investigation agents posed as professional criminals); *People v. Medina*, 51 P.3d 1006 (Colo. App. 2001) (law enforcement violated defendant's Fifth Amendment rights).

3. Analysis

Owens's outrageous governmental conduct claims do not rise to the level of *Auld*. Owens's claims do not involve deliberate perjury and similarly serious ethical violations of a type that compromise the integrity of the court process.

Here, Owens consolidates his government misconduct claims in support of his outrageous governmental conduct claim.[273] This court analyzed each of the alleged instances of misconduct in the preceding sections of this Order and determined that Owens was not entitled to relief. In this case, there is no government conduct which is "shocking to the universal sense of justice." *Auld*, 815 P.2d at 957.

4. Conclusion

The court concludes Owens's allegations of prosecutorial misconduct do not constitute outrageous governmental conduct. Accordingly, Owens's petition to

[273] Those claims include that the prosecution solicited or failed to correct false testimony, failed to disclose materially favorable evidence, destroyed evidence, mishandled conflicts of interest, improperly vouched for witnesses, and made inappropriate remarks in closing arguments.

vacate his conviction and sentence based on alleged outrageous governmental conduct is **Denied**.

V. Ineffective Assistance of Counsel[274]

A. General Statement of Parties' Positions[275]

Owens generally contends that his trial team did not properly prepare for trial and did not present a coherent defense. He asserts that, but for his trial team's deficient performance, at least one juror would have voted differently in either the guilt phase or the sentencing hearing.

For the majority of Owens's ineffective assistance of counsel claims, the prosecution responds that it does not concede that the claims were adequately pled and argues that the claims require an assessment of trial counsel's thought processes. The prosecution reserved its right to respond until after Owens presented his evidence. That request was denied in P.C. Order (SO) No. 13.

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[274] Due to the length of part V of this Order regarding Owens's claims of ineffective assistance of counsel, the court provides the full citation the first time it cites a source under each of the major subsections in part V of this Order.

[275] Owens's post-conviction counsel acknowledged in SOPC-253, that from their viewpoint, "[t]he topic of [ineffective assistance of counsel (IAC)] is enormous and potentially overwhelming. This category contains 17 specific claims of IAC, and an overarching claim for cumulative IAC. Each of the 17 claims includes a variety of claims, topics, subtopics, sub-sub topics (and so on), which by [post-conviction counsel]'s count totals 230 topics. . . . Of the 230 topics, 77 will require testimony from lay witnesses, whereas the bulk of topics in the IAC category will only require testimony from trial counsel and the *Strickland* experts. These topics are factually dependent on numerous (approximating 1,000 or more) individual instances of deficient performance and prejudice." Unlike pleadings and presentations before appellate courts, there are no rules governing the length of pleadings or presentations under Crim. P. 32.2. Judge Kane may have accurately observed that, "[i]t is more effective when, . . . , the parties and the court can focus their efforts on those claims which are indeed arguable." *Dunlap v. Zavaras*, No. 08-CV-0256, 2010 WL 3341533, at *3 n.4 (D. Colo. Aug. 24, 2010). But absent rules that require post-conviction counsel to choose their best issues and limit their presentations, counsel cannot be faulted in a capital case for raising every issue which they feel may be arguable.

Although the prosecution did not substantively respond to Owens's claims, it contested Owens's evidence on the claims and made a closing argument at the end of the post-conviction hearing.

Because the prosecution did not respond to most of Owens's individual claims, the court indicates the prosecution's position under "Parties' Positions" only when the prosecution provided a substantive response.

B. Overview

1. Owens's Trial Team

King was licensed to practice law in 1995 and was a public defender for almost 13 years before the trial in this case. During that time, he tried hundreds of jury trials including approximately 20 homicide trials. King was assigned to Owens's Lowry Park case shortly after Owens's arrest on November 6, 2005. He was assigned to Owens's Dayton Street case on March 8, 2006, when Owens was indicted. He was promoted to Chief Trial Deputy in late 2006. In that capacity, King focused on complex and capital litigation. In this case, King's primary responsibilities were to investigate, prepare, and present Owens's mitigation evidence. According to King, his actions during trial were always based on the information available to him and on whether the evidence was admissible.

Kepros joined Owens's trial team in October 2006. She was licensed to practice law in 1999 and began working as a public defender in 2000. Prior to the trial in this case, she had tried two homicide cases to a jury. Kepros was selected to represent Owens because of her work ethic, litigation skills, and diligence. She was primarily responsible for much of the fact investigation and presentation of the guilt phase of the trial but also for some of the mitigation investigation and presentation.

While King and Kepros investigated and litigated this case, Middleton drafted a majority of the motions and participated in the jury instruction conferences. Middleton was licensed to practice law in Texas in 1993. While in Texas, Middleton was the second chair on a capital case.[276] Since moving to Colorado in 1995, Middleton worked as a private criminal defense attorney and as an appellate public defender. As an appellate public defender, Middleton represented Dunlap on his post-conviction appeal.

Owens's trial team filed almost 300 motions and responded to numerous prosecution motions prior to the trial in this case. At trial, the trial team pursued an actual innocence defense. It attacked the credibility of the prosecution's witnesses, and it questioned the integrity of the APD's investigations of both the Lowry Park shootings and Dayton Street homicides. The trial team called approximately 15 witnesses to testify during the guilt phase, including a DNA expert, an expert on paint transfer, and an expert on crime scene reconstruction. They called approximately 45 witnesses to testify during the sentencing hearing.

King, Kepros, and Middleton testified at length during the post-conviction proceedings. Their combined testimony lasted approximately eight weeks. King testified on 14 days.[277] Ten of those days were dedicated to Owens's ineffective assistance of counsel claims. King did not review his files prior to testifying. Throughout his testimony, it became evident that King did not have a strong memory of many of the decisions he made while representing Owens. His memory was often refreshed with transcripts and other documents.[278]

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[276] The death penalty was withdrawn shortly before trial.

[277] Kepros testified on 22 days, and Middleton testified on six days. Investigators John Gonglach, Shoshanna Bitz, and Michelle Lapidow also testified.

[278] This situation was not unique to King. Documents were often used to refresh Kepros's and Middleton's recollections as well.

King testified on December 3, 2014, that Owens's death sentence was a painful and emotional experience for him. King testified on 10 different days from October 24 to December 3. Throughout that time, he was preparing for trial in *People v. Holmes*, a death penalty case involving a mass shooting at an Aurora movie theater. King stated that his memory about the preparation for and the trial of this case was very poor. He believed that his lack of memory was an emotional defense mechanism due to the trauma he suffered from Owens's cases and he felt that the post-conviction proceedings made it more of an unpleasant situation.

King met with Owens's post-conviction counsel several times in anticipation of his testimony at the post-conviction hearing and told them repeatedly that he could not recall his thought processes for the numerous issues post-conviction counsel were raising.

2. Owens's Advisory Witness and *Strickland* Expert

In the post-conviction proceedings, Sharlene Reynolds (Reynolds) participated as a fact witness, a *Strickland* expert, and, at times, a member of Owens's post-conviction counsel. She had practiced criminal defense and capital criminal defense law for 21 years before she testified in this case. She began her career in the Arapahoe PDO and later transferred to the Denver PDO where she was the office head for 10 years. In 1998, Reynolds was promoted to CTD at the State PDO. She was in the State PDO until June 2006 when she retired.

Reynolds represented several capital defendants during her career. In most cases, she convinced the prosecution to withdraw its notice of intent to seek the death penalty or had sufficient success during the guilt phase so that the death penalty was not litigated. She represented one capital defendant throughout the guilt phase and sentencing hearing, but the three-judge panel declined to sentence her client to death.

Reynolds taught regularly in various areas of capital criminal defense, primarily regarding *voir dire*. She had testified as a *Strickland* expert once before she testified in this case. Although she had never tried a capital case in Arapahoe County, she was familiar with the prevailing professional norms for capital defense counsel in Colorado in 2008.

Reynolds acknowledged that Owens's trial team investigated the case, prepared the case, and presented a case both on the merits and during the sentencing hearing. Yet she opined that in spite of the trial team's efforts, the trial team performed deficiently in many areas of representation.

Before she retired, Reynolds participated in a conversation with Kaplan and D. Wilson about the staffing of Owens's cases. Although Kaplan and D. Wilson made the staffing decisions, they asked Reynolds for her input. Reynolds had reservations about King's capability to represent a capital defendant. In particular, she did not believe King had the extraordinary work ethic required to handle a capital case.

Owens's post-conviction counsel introduced Reynolds as an advisory witness at the beginning of the post-conviction hearing. PC Hrg Tr. 38:19-21 (Nov. 26, 2012). The court pointed out that she had already been presented and received as a *Strickland* expert. The court observed that advisory witnesses typically fulfill an investigative role. Reynolds described herself as a testifying expert as opposed to a consulting expert, but she acknowledged that she assisted post-conviction counsel in limited areas of questioning. The trial court noted that at times during the hearing, the trial court observed Reynolds assist Owens's post-conviction counsel with documents or questions while post-conviction counsel was examining a witness.

In this case, Reynolds gave fact testimony regarding the selection of the trial team and her opinion of the selection of King as lead counsel; she served as member of post-conviction counsel by assisting them in developing evidence; and she served as a *Strickland* expert in which capacity she relied, in part, on evidence that she had helped develop. Reynolds's various roles create concerns about her ability to serve as a neutral expert, and they may have negatively affected the objectivity and therefore the reliability of her expert opinions, many of which did not seem reasonable.

C. General Principles of Law

Under the United States and Colorado Constitutions, a criminal defendant has a constitutional right to the assistance of counsel. U.S. Const. amend. VI; Colo. Const. art. II, §16. "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Accordingly, "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003).

Under *Strickland*, the overarching test for effective assistance of counsel is whether the defendant's attorney has subjected the prosecution's case to meaningful adversarial testing. 466 U.S. at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."). A true adversarial trial is not free of counsel's errors but is nevertheless reliable. *Fisher v. Gibson*, 282 F.3d 1283, 1291 (10th Cir. 2002).

When relief is sought based on a claim of ineffectiveness, the defendant must "state with particularity the grounds upon which the defendant intends to rely." C.R.S. § 16-12-206(1)(b). Failure to state claims with specificity can result in a summary denial of the claim. *People v. Rodriguez*, 914 P.2d 230, 300-01 (Colo. 1996) (a vague and unsupported claim of ineffective assistance will be denied). The defendant must also satisfy the two-prong *Strickland* test. 466 U.S. at 687. "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

First, "the defendant must show that counsel's performance was deficient." *Strickland*, 466 U.S. at 687. The defendant bears the burden of proving his counsel's performance was deficient by a preponderance of the evidence. *Dunlap v. People*, 173 P.3d 1054, 1061 (Colo. 2007). "A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Then the court must "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id*. In making this assessment, a court must presume "that counsel's conduct falls within the wide range of reasonable professional assistance" and must make every effort "to eliminate the distorting effects of hindsight." *Id*. at 689.

Second, the defendant must demonstrate that the deficient performance resulted in prejudice to the defense. *Id*. at 687. There is prejudice when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. "The likelihood of a different result must be substantial, not just conceivable."

Harrington v. Richter, 562 U.S. 86, 112 (2011). The United States Supreme Court has observed that a "verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696.

When evaluating a defendant's claim of ineffectiveness, "there is no reason for a court . . . to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id*. at 697. If it is easier to dispose of an ineffectiveness claim on a lack of prejudice, courts are encouraged to do so. *See id*.

D. Failure to Investigate and to Present Favorable Evidence

1. Parties' Positions

Owens contends that his trial team failed to conduct an adequate investigation, failed to exercise reasonable professional judgment in deciding not to pursue particular investigative avenues, and failed to present available exculpatory evidence.

2. Principles of Law

The defendant in *Strickland* claimed that his trial counsel had not conducted a professionally reasonable investigation for his sentencing hearing. *Id*. at 675. The United States Supreme Court held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id*. at 691. The Court added that "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*; *see also Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (failing to conduct pretrial discovery is unreasonable).

Regarding trial counsel's investigative decisions, the Court observed that it is important to examine the information trial counsel obtained from the defendant because "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. "[I]nquiry into trial counsel's conversations with the defendant may be critical in order to properly assess trial counsel's investigative decisions [and] other litigation decisions." *Id.*; *see also Rodriguez*, 914 P.2d at 295 (defendant cannot complain of lack of investigation based on information defendant withheld).

In Colorado, "[a] defendant is entitled to a pretrial investigation sufficient to reveal potential defenses and the facts relevant to guilt or penalty." *Davis v. People*, 871 P.2d 769, 773 (Colo. 1994). Disagreement on trial strategy will not support an ineffectiveness claim. *Id*. Likewise, an attorney's decision not to interview certain witnesses and to rely on other sources of information will not support a claim of ineffectiveness if the attorney's decisions are the result of reasonable professional judgment. *Id*. Examples of deficient performance may include the failure to conduct a mitigation investigation, the failure to do investigative follow-up on an obvious lead, and the failure to investigate the prosecution's aggravation evidence. *Dunlap*, 173 P.3d at 1065.

3. Specific Instances of Alleged Deficient Performance

a. Deficient Performance in Investigating, Confronting, and Presenting Evidence Concerning Lowry Park in the Dayton Street Trial

i. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to investigate and present numerous witnesses whose testimony would have either excluded

Owens as the person who killed Vann or, at a minimum, created reasonable doubt that Owens killed Vann.

ii. Identity of the Person Who Shot Vann

(a) Witnesses Identifying Ray as Vann's Killer

The prosecution presented a substantial amount of evidence about the Lowry Park shootings during the Dayton Street trial. King and Kepros disagreed about how to confront the evidence concerning the Lowry Park shootings.

King testified during the post-conviction hearing that he was concerned about losing credibility with the jury during the sentencing hearing if the trial team pursued a misidentification defense for the Lowry Park shootings in the Dayton Street trial. Yet in King's opinion, it was necessary to contest the evidence on the identity of who shot Vann because Vann's shooting supported two of the aggravating factors. However, King testified that contesting Owens's identity as the shooter was difficult because the team had pursued a self-defense theory at the Lowry Park trial.

Kepros testified at the post-conviction hearing that when she joined Owens's trial team in October 2006, the decision had already been made to pursue self-defense during the Lowry Park trial. She thought misidentification was stronger, but she had not reviewed the case enough to insist on misidentification as the primary defense. Kepros acknowledged that there were more problems with a misidentification defense than with self-defense. For example, presenting evidence that Ray shot Vann would expose Owens to culpability as a complicitor. She also acknowledged that Sailor's testimony and the video from Lowry Park showed that Ray and Owens were in danger of being attacked by a large and angry mob.

Kepros prepared a chart of witnesses who told the police that Ray shot Vann. The witnesses on her chart were not called to testify at the Dayton Street

trial, and from Kepros's viewpoint, there was no tactical reason for not calling those witnesses. Kepros acknowledged that there was evidence that Owens shot Vann. She acknowledged that Marshall-Fields's description of the man who killed Vann matched Owens's description. She also acknowledged that Marshall-Fields's description of Owens was corroborated by the video from Lowry Park.

Nevertheless, Kepros believed a misidentification defense should have been pursued at the Dayton Street trial. She was not concerned by the prospect of losing credibility with the jury over the misidentification defense when the jury learned Owens had been convicted of killing Vann.

King made a tactical decision not to pursue a misidentification at Lowry Park defense because he anticipated that the jury would learn in the sentencing hearing that Owens had been convicted of killing Vann. The tactical decision not to call those witnesses was a reasonable professional decision that was within trial counsel's discretion.[279] *See Richter*, 562 U.S. at 106 ("Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach." (quotation omitted)).

The trial team's disagreement over which defense to pursue does not support a claim of deficient performance. Rather, the disagreement over tactics confirms the United States Supreme Court's observation in *Strickland* that even the best

[279] This court considered the propriety of King's decision to adopt a defense of Ray/self-defense strategy when it reviewed the evidence for Owens's Crim. P. 35(c) petition in his Lowry Park case. On the issue of the propriety of that strategic choice, the argument made here is substantially similar to the argument presented in that petition. This court's Order in that case is attached as Appendix Four. The propriety of this choice was considered at pp. 16-20 of that Order and those pages are hereby incorporated herein. Of course, when making his tactical decision in this case, King was aware that defense of Ray/self-defense had not succeeded in the Lowry Park case.

criminal defense attorneys will not agree on how best to defend a particular client. 466 U.S. at 689.

(i) Jahmon Gaines and Michael McPherson

Owens contends his trial team was ineffective because it did not interview Jahmon Gaines (Gaines) and Michael McPherson (McPherson) during its pretrial investigation or call Gaines or McPherson to testify at trial. According to Owens, if the team had interviewed Gaines and McPherson, it would have learned that both individuals saw Ray shoot Vann at Lowry Park. Owens argues his team should have called Gaines and McPherson as witnesses to contradict Johnson's testimony that Owens shot Vann.

(a) Findings of Fact

According to King, the trial team did not interview Gaines or McPherson because there was so much other investigation that needed to be done.

Based on Kepros's initial review of the case, she favored a misidentification defense in part because Gaines told the APD that Ray shot Vann.

(b) Analysis

Because Owens did not call Gaines or McPherson to testify at the post-conviction hearing, the court is unable to reasonably ascertain whether their trial testimony would have been materially favorable to Owens. *See People v. Barefield*, 804 P.2d 1342, 1345 (Colo. App. 1990) (finding that the defendant failed to support his claim that his trial counsel negligently failed to call witnesses at trial when the "defendant failed to call those witnesses to ascertain what their testimony would have been").

(ii) Askari Martin

Owens contends that his trial team was ineffective because it failed to utilize A. Martin's identification of Ray as Vann's shooter to contradict Johnson's testimony that Owens shot Vann.

(a) Findings of Fact

The day after the Lowry Park shootings, A. Martin told the APD that Rob, who he knew from high school, shot Vann. He also told the APD that he knew Owens from high school and that he did not see Owens at Lowry Park on July 4, 2004. The report of this interview was in discovery.

During his trial testimony in this case on April 10, 2008, A. Martin was asked about his identification of Ray. He testified that he did not recall the details of the shootings or his identification of Ray as Vann's shooter.

(b) Analysis

At the post-conviction hearing, Owens did not call A. Martin as a witness and did not ask any member of the trial team about the team's pretrial preparation regarding A. Martin's identification of Ray as Vann's shooter. Due to the lack of supportive evidence, the court is unable to reasonably ascertain whether A. Martin's trial testimony would have been materially favorable to Owens. *See id.*

(iii) Jamar Dickey

Owens contends his trial team was ineffective because it did not call Dickey to testify at his Dayton Street trial that Dickey told the APD in 2005 that Ray killed Vann.

(a) Findings of Fact

On July 4, 2004, Dickey told the APD that he did not witness the shooting at Lowry Park, and then on August 2, 2005, he told the APD that he saw Ray shoot Vann at Lowry Park. When he testified before the grand jury, Dickey said he was

unsure whether Ray shot Vann. When he testified at the Lowry Park trials for Ray and Owens, Dickey said he was unsure whether he saw Ray shoot Vann. He testified at Owens's Lowry Park trial that he was too far away to be sure about whether Ray shot Vann. Owens's trial team did not call Dickey to testify at the Dayton Street trial.

Dickey testified during the post-conviction hearing that he and Vann were close friends and he wanted to kill whoever shot Vann. Dickey also testified that he did not kill Ray because he was never sure enough that Ray killed Vann. Dickey testified that before testifying at Ray's Lowry Park trial, unknown persons shot at his car and two unidentified men tried to break into his apartment. He believed that these attacks were due to his involvement in these cases.

During the post-conviction hearing, Kepros noted that the trial team tried to interview Dickey before the Lowry Park trial, but he refused to be interviewed. Kepros's charts of witnesses who told the police that Ray was Vann's shooter included Dickey.

(b) Analysis

The fact that Kepros wanted to call Dickey to testify during the Dayton Street trial demonstrates that the team was aware that Dickey previously identified Ray as the individual who killed Vann. Because Dickey testified before the grand jury, at Ray's Lowry Park trial, and at Owens's Lowry Park trial that he was not sure whether Ray killed Vann, the trial team's decision not to interview Dickey or call Dickey to testify at trial was a reasonable decision under *Strickland*.

(iv) Miguel Taylor

Owens contends that his team was ineffective because it did not call Miguel Taylor to testify at trial. According to Owens, Miguel Taylor told Clarence Vann that he saw Ray shoot Vann at Lowry Park.

(a) Findings of Fact

Kepros testified during the post-conviction hearing that she was aware of Miguel Taylor's information and wanted to utilize him at the Dayton Street trial. She did not call him to testify because she and King disagreed about pursuing a misidentification defense for the Lowry Park shootings in the Dayton Street trial.

(b) Analysis

Because Owens did not call Miguel Taylor or Clarence Vann to testify at the post-conviction hearing, the court is unable to reasonably ascertain whether his trial testimony would have been materially favorable to Owens. *See Barefield*, 804 P.2d at 1345 (finding that the defendant failed to support his claim that his trial counsel negligently failed to call witnesses at trial when the "defendant failed to call those witnesses to ascertain what their testimony would have been").

(v) People told by Marshall-Fields that Ray was the Lowry Park Shooter

(a) Brent Harrison[280]

(b) Maisha Pollard

Owens argues that his trial team was ineffective because it failed to call Pollard, Marshall-Fields's sister, to testify at trial. According to Owens, Pollard would have testified that Marshall-Fields told her that he saw the man who shot him at the Father's Day barbecue on June 19, 2005. However, Pollard testified to those facts at trial on April 25, 2008. The prosecution elicited Pollard's testimony in support of its theory that Ray shot Marshall-Fields. Ray was at the Father's Day barbecue, and multiple witnesses testified at trial that Ray and Marshall-Fields saw each other at the barbecue.

[280] Owens withdrew this claim in SOPC-293.

Because Pollard testified about Marshall-Fields's statements and because the testimony from other witnesses suggested that Marshall-Fields identified Ray as the person who shot him, there was no reason for the trial team to call Pollard to testify during the trial.

(c) Winona Bartlemay[281]

(d) Leon Mickling, Sr.

Owens argues that his trial team was ineffective for not calling Leon Mickling, Sr. (Mickling), Marshall-Fields's friend, to testify that Marshall-Fields identified Ray as being involved with the Lowry Park shootings and that Marshall-Fields had told Mickling that Ray was causing him problems.

Owens did not call Mickling to testify at the post-conviction hearing and did not ask King or Kepros about Mickling. However, Kepros's list of investigative leads shows that the trial team was aware of Mickling's information.

Owens's argument that Mickling should have been called to suggest that Ray shot Vann is based on the misidentification theory that King decided not to pursue during the Dayton Street trial. Owens did not call Mickling to testify at the post-conviction hearing, and the court is unable to reasonably ascertain whether his trial testimony would have been materially favorable to Owens. *See id.*

(e) Miguel Taylor

Owens contends that his trial team was ineffective because it did not call Miguel Taylor to testify that Miguel Taylor was with Marshall-Fields on two occasions when Ray and Owens were present and that Marshall-Fields did not identify Owens on either occasion as the person who shot Vann.

[281] Owens withdrew this claim in SOPC-293.

Because Owens did not call Miguel Taylor to testify at the post-conviction hearing, the court is unable to reasonably ascertain whether his trial testimony would have been materially favorable to Owens. *See id.*

(vi) Conclusion

Portraying Ray as the person who killed Vann would have exposed Owens to complicitor liability for the first-degree murder of Vann, and thus Owens would have faced the same charges for the Lowry Park shootings. The trial team's decision not to pursue a defense designed to convince the Dayton Street jury that Ray killed Vann was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

(b) Evidence Pointing to J. Martin and Johnson as Alternate Suspects

(i) Parties' Positions

Owens contends his team was ineffective because it failed to present evidence suggesting that J. Martin and Johnson were alternate suspects for the Lowry Park shootings thereby creating motivation for one or both of them to kill Marshall-Fields. First, Owens claims that his team's failure to call Marcus Baker (Baker) was deficient performance because Baker told the APD on July 4, 2004, that the shooter was built like J. Martin and wore a checkered shirt similar to the one J. Martin wore that evening. Next, Owens argues that his team failed to ask Sailor about her initial belief that J. Martin shot Vann. Last, Owens complains that his team did not present evidence that J. Martin and Johnson possessed handguns of the same caliber as the handguns used to kill Vann.

(ii) Baker's Identification of J. Martin as the Lowry Park Shooter

(a) Findings of Fact

Owens called Baker to testify at the post-conviction hearing. Baker testified that he did not recall what he saw at Lowry Park on July 4, 2004. He also testified that he had consumed one to two six-packs of beer, consumed a couple of shots of brandy, and smoked marijuana on July 4. Baker was interviewed by the APD on July 5. Baker testified that, although he was intoxicated on July 4 and July 5, he was confident that what he told the police was accurate. In his APD interview, Baker said the shooter wore a checkered shirt. He did not know the shooter's name but had seen him around. During the interview, Baker was allowed to call someone, whom he refused to identify, to find out the name of the person he saw shooting. The unidentified person told him the name was J. Martin. Baker testified that he had never seen a picture of J. Martin so he did not know if the person he saw shooting was J. Martin.

Kepros prepared extensive witness charts for the Dayton Street trial. Her witness chart included J. Martin as someone the trial team should subpoena for trial and Baker as someone the trial team should not subpoena. During her testimony at the post-conviction hearing, Kepros recalled reviewing Baker's APD interview that named J. Martin as a Lowry Park shooter. The trial team did not interview Baker.

However, Kepros interviewed J. Martin on October 25, 2007. She did not ask J. Martin if he shot Vann. J. Martin told Kepros that when Ray offered $20,000 to ensure that Marshall-Fields did not testify, Johnson said he would kill Marshall-Fields for $10,000, and Owens said he would do it for free. SOPC.EX.P-7.

King decided not to retry the Lowry Park shootings during the Dayton Street trial. King testified during the post-conviction hearing that one of the primary reasons for his decision was that many of the descriptions of the Lowry Park shooter matched Owens. Under these circumstances, King decided not to portray J. Martin as an alternate suspect.

(b) Analysis

The trial team was aware that Baker witnessed the Lowry Park shootings and that, with the help of an unidentified person, Baker identified the shooter as J. Martin. There were reliability concerns with Baker because he was admittedly intoxicated during the Lowry Park shootings and during his interview with the APD. There were evidentiary challenges to admitting his testimony given that he relied on an unidentified person to identify J. Martin. Kepros's witness chart suggests that the team considered whether to call Baker as a witness, but the trial team ultimately decided not to subpoena him for trial. Because of the reliability and admissibility problems with Baker's anticipated testimony, the trial team's decisions not to interview Baker and not to call Baker to testify at trial were reasonable decisions under *Strickland*.

(iii) Sailor's Belief that J. Martin Killed Vann

(a) Findings of Fact

Owens's trial team interviewed Sailor on August 16, 2006. The transcript of that interview reflects that Sailor told Owens's trial team that she did not see J. Martin with a gun that night but assumed he was shooting. SOPC.EX.D-249 (Transcript of August 16, 2006, Interview) 128:9-24 (Aug. 16, 2006).

During her opening statements in the Dayton Street trial, Kepros told the jury that it would hear testimony that some people reported J. Martin as the shooter at Lowry Park. She based her opening statements on Sailor's and Johnson's

interviews. King felt it was important to present evidence that J. Martin was a possible shooter at Lowry Park in order to support Kepros's opening statement. To this end, King asked Sailor if she had once said that J. Martin shot Vann. Sailor testified that Johnson and J. Martin were present at Lowry Park, that she had previously stated that J. Martin shot Vann but she no longer believed that to be true, and that she did not know if Johnson or J. Martin had guns at Lowry Park because she did not know them well enough to know something like that. Guilt Phase Tr. 47:5-25; 48:1-8 (Apr. 16, 2008 p.m.). When Sailor testified that she could not recall whether J. Martin had a gun at Lowry Park, King did not use the interview of Sailor on August 16, 2006, to impeach her.

Sailor testified during the post-conviction hearing that she did not know if J. Martin was armed on July 4, 2004, and that she did not see him shooting. As for telling Owens's trial team in August 2006 that J. Martin had a gun at Lowry Park, Sailor explained that she repeated what Ray told her and what other people told her during that interview. She also explained that her comment that J. Martin had a gun at Lowry Park was based on a reference to J. Martin that she saw in Ray's discovery for the Lowry Park case.

(b) Analysis

Owens's trial team was aware of evidence that suggested J. Martin was a possible alternate suspect for the Lowry Park shootings. During cross-examination, Sailor testified at trial that she initially believed J. Martin killed Vann but no longer held that belief. Despite his trial team's efforts on cross-examination, Owens faults his trial team for failing to confront Sailor with the transcript of her prior interview. She had acknowledged that she originally thought that J. Martin killed Vann and had never said that she witnessed the shooting.

King provided as much support *via* Sailor as was appropriate for Kepros's opening statement. In cross-examining Sailor, supporting one particular assertion in Kepros's opening statement was far less important than using the cross-examination to develop substantial evidence supporting the theory of defense. Pursuing this line of inquiry further with Sailor would likely have resulted in additional damaging evidence. For example, Sailor might have testified, as she did at the post-conviction hearing, that her belief that J. Martin had a gun at Lowry Park was based in part on Ray telling her that the caliber of the bullets described in the discovery was inconsistent with the guns he and Owens had at Lowry Park. Avoiding this line of inquiry to prevent the development of damaging evidence was reasonable under *Strickland*.

(iv) J. Martin's and Johnson's Possession of Guns

(a) Findings of Fact

During J. Martin's post-conviction testimony, he admitted that he was carrying a gun at Lowry Park on July 4, 2004, but he could not recall what type of gun he was carrying. According to J. Martin, he did not fire his gun at Lowry Park. He testified that the gun he was carrying was not the .380 caliber semiautomatic handgun that he was arrested with in Denver on September 6, 2004. The prosecution called Alan Hammond (Hammond), a firearms expert, to testify at the post-conviction hearing. Based on his analysis, Hammond confirmed that J. Martin's .380 caliber handgun did not fire the .380 caliber bullets recovered from the Lowry Park crime scene.

Hammond also testified to rebut Owens's theory that Johnson may have been the Lowry Park shooter because Johnson was known to possess a 9 mm handgun before July 4, 2004. In December 2003, Johnson was involved in a

shooting in Boulder. When he turned himself in, a fired 9 mm shell casing was found in his pocket. That shell casing matched other evidence recovered from the crime scene in Boulder. SOPC.EX.D-1549. Hammond compared the 9 mm shell casing recovered from Johnson against the 9 mm bullet fragment recovered from the Lowry Park crime scene and determined that they were not fired by the same gun.

Hammond did the same comparison with the 9 mm handgun recovered from J. Martin in Denver in September 2005 and determined that the gun did not fire the bullets found at Lowry Park.

Kepros was aware prior to trial that Johnson and Sailor told the APD about rumors that J. Martin was the Lowry Park shooter. With this background, Kepros prepared a file on J. Martin as an alternate suspect, which totaled 283 pages. The file indicates that Kepros reviewed J. Martin's Boulder and Denver cases.

(b) Analysis

The prosecution had significant rebuttal evidence available to show that J. Martin's and Johnson's guns were not used at Lowry Park – Hammond's testimony that neither J. Martin's guns nor the gun that fired the jacketed bullet found in Johnson's pocket fired the bullets that killed Vann. The trial team's decision not to present evidence about J. Martin's and Johnson's guns was reasonable under *Strickland*.

(v) Conclusion

The trial team's decision not to present additional evidence that J. Martin or Johnson was an alternate suspect was within the wide range of professionally competent assistance to which Owens was entitled. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

(c) Other Neutral Identification Witnesses

(i) Stacy Hicks

Owens contends that his trial team was ineffective because it did not interview Stacy Hicks (Hicks) or call him to testify at trial. According to Owens, if Hicks had testified, he would have told the jury that Owens was not a shooter at Lowry Park.

(a) Findings of Fact

Hicks was at Lowry Park when Vann was killed and was interviewed by the APD shortly thereafter. SOPC.EX.D-1106. During that interview, Hicks indicated that he witnessed an argument between a heavyset black male wearing peach-colored shorts and another other man, who was a shorter, thin black male not wearing a shirt. According to Hicks, the shorter man may have been associated with an older Suburban that pulled into the parking lot before the argument started. When the arguing stopped, Hicks saw the smaller man walk toward the Suburban. Hicks then saw another black man come from the Suburban and fire a gun. He described this man as 6' tall, 155 lbs., and wearing a white baseball cap and white sports jersey.

Hicks was interviewed again on January 27, 2006. During that interview, Hicks stated that it was dark and that the event was shutting down when he arrived at Lowry Park. Unlike what he told the on-scene officer, Hicks recalled that the man who was wearing bright orange shorts was not wearing a shirt and was acting as if he wanted to fight. Hicks stated that it was calm for about five minutes when the two men separated and then he heard people yelling "get their heads" just before the shooting started. Although he could not see who was shooting, he saw a Suburban jump the curb and cut across the grass. Hicks was shown a lineup with a

photo of Ray and was shown a second lineup with a photo of Owens. He did not identify either Ray or Owens as a shooter.

During his post-conviction testimony, Hicks stated that he attended the event at Lowry Park and was in the parking lot when he heard a verbal argument break out between two men. Hicks described one man as short and wearing neon shorts but no shirt. He described the other man as light-skinned, approximately 6' tall with poofy long hair. While standing near his car, Hicks saw a crowd gather near a Suburban where the two men were arguing. He recalled that the argument was heated. He saw the light-skinned man walk toward the Suburban. He was too far away to see what happened when he heard gunshots. At the sound of gunfire, he ran away until he was told that someone had been shot. He ran back to find Vann and Marshall-Fields had been shot. Hicks testified that he did not see anyone with a gun, did not see anyone shooting, and was too far away to be able to identify anyone as a shooter.

Kepros testified during the post-conviction hearing that there were 13 witnesses, including Hicks, who were interviewed by the APD at Lowry Park after Vann was killed. She requested that the trial team interview all 13 witnesses.[282] Kepros testified that there was no tactical reason not to interview all 13 witnesses. She wanted to interview the witnesses to show the varying descriptions of the person who killed Vann. Kepros acknowledged that some of the descriptions matched Owens or Ray. She also acknowledged that five of the witnesses on the list, including Hicks, were subsequently interviewed by the APD or were called to testify before the grand jury.

[282] According to Kepros, the trial team interviewed only one of those witnesses (J. Martin) prior to the Dayton Street trial. However, the trial team interviewed Brooke Howard (SOPC.EX.P-245); Ashley Brown (SOPC.EX.P-246); and Jeremy Green (SOPC.EX.P-249) prior to the Lowry Park trial.

(b) Analysis

Owens's trial team was aware that Hicks might have witnessed the Lowry Park shootings. When he was interviewed at Lowry Park, Hicks described the shooter as a black male who was 6' tall, weighed 155 lbs., and was wearing a white baseball cap and a white sports jersey. Owens was wearing a white t-shirt, and Ray was wearing a white sports jersey at Lowry Park. Both Ray and Owens are approximately 6' tall. Therefore, calling Hicks to support a misidentification defense would have been perilous because the jury might have interpreted Hicks's description as describing Owens. And presenting evidence that Hicks's description matched Ray would have been similarly damaging because it would have exposed Owens to complicitor liability for the murder of Vann and for the attempted murders of Marshall-Fields and Bell.

Contrary to Owens's claim, Hicks would not have testified at trial that Owens was not at Lowry Park. Accordingly, the trial team's decision not to call Hicks as witness was a reasonable decision under *Strickland*.

(ii) Rashad Mayes

Owens claims his trial team was ineffective because it did not call Rashad Mayes (Mayes) to testify at trial. According to Owens, Mayes would have testified that a man wearing a Philadelphia 76ers jersey was the only shooter at Lowry Park.

(a) Findings of Fact

Mayes testified during the post-conviction hearing that he did not see the shooting at Lowry Park and could not identify anyone who was carrying a gun that evening. When shown the APD reports of his interview, he testified that the reports did not refresh his memory. Mayes denied that he made the statements attributed to him in the reports. Mayes testified that he did not know if he was trying to be accurate when he spoke to the officers because he did not recall his

state of mind at that time. Mayes testified that he was drinking and partying at Lowry Park.

APD Officer Gerald Medina (Medina) testified during the post-conviction hearing that he interviewed Mayes at Lowry Park. SOPC.EX.D-1066. Mayes told Medina that he saw a fight break out and that he saw a man wearing a Philadelphia 76ers jersey sitting on the hood of a gold Suburban start shooting. Mayes told Medina that he heard four to six shots. Mayes said he saw the shooter get into the Suburban and drive it through the park to get away. Medina did not know whether Mayes was high or intoxicated when he interviewed him.

APD Officer Sean Mitchell (Mitchell) also interviewed Mayes at Lowry Park. SOPC.EX.D-1067.[283] Mayes told Mitchell that he saw a man go to a tan Suburban, retrieve a gun, return to the argument, and shoot the victim five to six times at close range. According to Mayes, the shooter was a light-skinned black male, 19 to 20 years old, 6' tall with a slim build, and wore a red, white, and blue jersey and a red and white hat.

As the lead detective on the Lowry Park case, T. Wilson gathered all of the on-scene interviews and reviewed the interviews for investigative leads. During the trial in this case, T. Wilson recalled reviewing Mayes's interviews. He did not show Mayes a photo lineup. T. Wilson testified during the post-conviction hearing that he searched for Mayes after the Lowry Park shootings with the intent to interview him, but he could not locate Mayes even though Mayes had an outstanding warrant at that time.

[283] Even though Mitchell was not called to testify at the post-conviction hearing, his report was admitted into evidence. Pursuant to C.R.S. § 16-10-201, the court considered it substantive evidence because Mayes denied that he provided the information in the report.

Fronapfel testified during the post-conviction hearing that the Lowry Park video shows Ray wearing a white baseball cap with lettering and a white jersey with "Sixers" on the front. SOPC.EX.D-1570. The back of the jersey did not have any lettering or numbers.

(b) Analysis

Because the calling of a witness is a tactical decision and the court does not know the trial team's thought processes regarding calling Mayes as a witness, the court cannot fairly assess whether not calling Mayes constituted deficient performance. *See Davis*, 871 P.2d at 773 ("Whether to call a particular witness is a tactical decision, and, thus, a matter of discretion for trial counsel.").

And given the unusual nature of Mayes's testimony at the post-conviction hearing, the court cannot speculate as to what Mayes would have said many years ago at trial. If he had testified as he did at the post-conviction hearing, Medina's and Mitchell's interviews could have been used as impeachment and substantive evidence pursuant to C.R.S. § 16-10-201.

If the court assumes that Medina's and Mitchell's interviews of Mayes would have been admitted as substantive evidence at trial, then the jury would have received evidence suggesting that Ray shot Vann. Substantial evidence demonstrated that Owens and Ray were together and supporting one another. The forensic evidence established that Vann and Bell were shot with different caliber guns and therefore, presumably, by different shooters. Evidence suggesting that Ray shot either Vann or Bell would have been damaging to Owens because it would have exposed Owens as a complicitor for the murder of Vann and the attempted murders of Marshall-Fields and Bell.

Also problematic is whether the trial team would have been able to locate and subpoena Mayes. Although cooperative at the scene, Mayes soon became

uncooperative. He made it clear at the post-conviction hearing that he did not want to be involved with this situation. It is speculative to assume Owens's trial team would have been able to secure Mayes's appearance at trial and difficult to see how he would have been of significant assistance to the defense.

The trial team's decision not to call Mayes was a reasonable decision under *Strickland* notwithstanding the lack of evidence on the trial team's thought processes regarding Mayes. The likelihood that Mayes's testimony would have been damaging to Owens, and the uncertainty about whether Mayes could have been served with a trial subpoena support giving little serious consideration to calling Mayes as a defense witness.

(iii) Rashika Kelly

Owens claims his trial team was ineffective for not calling Rashika Kelly (Kelly) as a witness. According to Owens, Kelly would have identified Ray as the man who killed Vann.

(a) Findings of Fact

The APD interviewed Kelly at Lowry Park after the shootings. She reported that she observed a fight breaking out, and she described one of the men involved in the fight as a black male in his late teens or early twenties with short hair. She reported that the man wore a sports team baseball cap and a red, white, and blue basketball jersey, which was either a Clippers or a Sixers jersey. She also said that when she heard gunshots, she immediately dove to the ground and was unable to see who was shooting or how the shooting occurred. SOPC.EX.D-1071.

Kepros testified during the post-conviction hearing that she wanted to interview Kelly in an effort to develop a theme of inadequate police investigation in the Lowry Park case. Kepros made a request that an investigator interview Kelly. However, Kelly was not interviewed. Kepros acknowledged that she knew

Kelly testified before the grand jury. Despite this, Kepros believed the trial team should have investigated why T. Wilson did not re-interview Kelly.

(b) Analysis

Kelly was interviewed shortly after the Lowry Park shootings. She reported that she immediately dove to the ground when she heard gunshots and could not see who was shooting or how the shooting occurred. While her description of one of the men involved in the fight matched Ray, her testimony on that point would have been cumulative to Sailor's testimony. When shown the video from Lowry Park, Sailor identified Ray wearing a red, white, and blue basketball jersey and lifting up his shirt to show the crowd that he was armed. Thus, Kelly's testimony would not have supported a misidentification defense.

Owens did not call Kelly to testify at the post-conviction hearing. Thus, Owens failed to prove that his trial team's failure to call Kelly as a witness was deficient performance. *See Barefield*, 804 P.2d at 1345 (finding that the defendant failed to support his claim that his trial counsel negligently failed to call witnesses at trial when the "defendant failed to call those witnesses to ascertain what their testimony would have been").

(iv) Frank Rogers

Owens claims his trial team was ineffective because it did not call Frank Rogers (F. Rogers) to testify at trial. According to Owens, F. Rogers would have testified that the shooter at Lowry Park was black, had an Afro hairstyle, and wore a jersey with "27" on it.

(a) Findings of Fact

The APD interviewed F. Rogers on July 4, 2004, following the Lowry Park shootings. F. Rogers reported that he had observed three black males fighting in an alleyway near 12th and Clinton. According to F. Rogers, one of the men had an

Afro and was wearing a white and black jersey with "27" on it. SOPC.EX.D-1062.[284]

T. Wilson testified during the post-conviction hearing that he did not conduct a follow-up interview with F. Rogers because he viewed the incident described by Rogers as separate and unrelated to the Lowry Park shootings. T. Wilson explained that the location of the fight described by F. Rogers was in an alley near a 7-Eleven located one block north of Lowry Park.

(b) Analysis

Based on the information that he provided, it appears that F. Rogers did not witness the Lowry Park shootings. Thus, the trial team's failure to interview F. Rogers and call him to testify at trial was not deficient performance. Additionally, Owens did not call F. Rogers to testify during the post-conviction hearing. *See Barefield*, 804 P.2d at 1345 (finding that the defendant failed to support his claim that his trial counsel negligently failed to call witnesses at trial when the "defendant failed to call those witnesses to ascertain what their testimony would have been").

(v) Cherie Crawford

Owens claims his team was ineffective because it did not call Cherie Crawford (Crawford) to testify at trial. Owens did not call any witness to testify about this claim at the post-conviction hearing, and the court is unable to reasonably ascertain that this trial testimony would have been materially favorable to Owens. Thus, he has failed to prove that his trial team's failure to call Crawford was deficient performance. *See id.*

[284] F. Rogers's APD interview is SOPC.EX.D-1062 and although admitted into evidence, the court did not consider it to be substantive evidence because F. Rogers was not called to testify during the post-conviction hearing.

(vi) Armando Taylor

Owens contends his trial team's failure to call Armando Taylor (A. Taylor) to testify at trial was deficient performance. Owens did not call any witness to testify about this claim at the post-conviction hearing, and the court is unable to reasonably ascertain that this trial testimony would have been materially favorable to Owens. Thus, he has failed to prove that his trial team's failure to call this witness was deficient performance. *See id.*

(vii) Jennifer Newton

Owens contends his trial team was ineffective because it did not call Jennifer Newton (Newton) to testify at trial. According to Owens, Newton would have testified that one of the suspects wore an orange shirt and that the other suspect was 250 lbs. and had taken off his shirt.

(a) Findings of Fact

APD Officer Mike Hanifin (Hanifin) testified at the post-conviction hearing that he interviewed Newton and Dickey at Lowry Park. SOPC.EX.D-1063. Newton and Dickey told him that they saw a fight break out and that they ran from the park in order to get away from the fight. Hanifin noted in his report that he suspected Newton and Dickey might have additional information about who was fighting and about who shot Vann.

Fronapfel testified at the post-conviction hearing that she interviewed Newton over the phone on August 22, 2005. SOPC.EX.D-716; SOPC.EX-D-1097A. At that time, Newton told Fronapfel that she ran away when she heard gunshots but stopped when she heard Dickey scream. She said that when she heard Dickey, she ran back and found Vann on the ground, held his hand, and prayed for him until he died. Newton also told Fronapfel that one of the men

involved in the fight wore an orange or yellow sweater that he took off. Newton described this person as heavy set and weighing approximately 250 lbs.

Newton testified at the post-conviction hearing that she went to Lowry Park with her boyfriend, Dickey. Newton testified that she did not speak to an APD officer at the park. She testified that later that evening, police officers came to her parents' home and spoke to Dickey but did not speak to her. According to Newton, she did not see any shots fired because she was walking toward her car after fighting with Dickey and remained in the car until he joined her.

During the post-conviction hearing, Newton testified that she has been interviewed numerous times about the shootings at Lowry Park. She did not recall being interviewed by Fronapfel over the phone and did not recall giving Fronapfel any information about the Lowry Park shootings. She pointed out that Dickey and others influenced much of what she knew about the Lowry Park shootings. As a result, she was not sure of what information she knew independently of what others told her. However, Newton was sure that she never saw anyone with a gun and never saw anyone shooting at Lowry Park. Newton testified that she did not hold Vann's hand while he was dying and denied telling Fronapfel that she had held his hand. Newton added that Dickey told her that he told officers that he held Vann's hand until Vann died.

Kepros testified that the trial team did not interview Newton and did not call her to testify because she was not an important witness.

(b) Analysis

Newton was interviewed many times and talked to many people about what she saw at Lowry Park. As a result, she lost an independent memory of what she saw, except that she did not see anyone with a gun and did not see anyone shooting a gun. The trial team viewed Newton as an unimportant witness, and nothing

presented in the post-conviction hearing indicates that the trial team's evaluation was wrong. In neither the interview on July 4, 2004, nor the interview on August 22, 2005, did Newton identify the person who shot Vann. And she was adamant at the post-conviction hearing that she did not witness the shooting. Any evidentiary value of her testimony at trial would only have been realized by impeaching her with Fronapfel's report. However, the evidentiary value would have been weakened by Newton's testimony that what she told Fronapfel in 2005 was strongly influenced by what Dickey and others told her. For example, Dickey told Newton that he held Vann's hand when officers interviewed Dickey shortly after the Lowry Park shootings. The trial team's decision not to call Newton to testify at trial was a reasonable decision under *Strickland*.

(viii) Bertino Gordon

Owens contends his trial team's failure to call Bertino Gordon (Gordon) to testify at the trial in this case constitutes deficient performance. Owens did not call any witnesses to testify during the post-conviction hearing to support this claim. Given the state of the record on this claim, Owens failed to prove that his trial team performed deficiently for not calling Gordon to testify at trial. *See Barefield*, 804 P.2d at 1345 (finding that the defendant failed to support his claim that his trial counsel negligently failed to call witnesses at trial when the "defendant failed to call those witnesses to ascertain what their testimony would have been").

(ix) Additional Witnesses

Owens argues that his trial team was ineffective because it did not review the APD's investigative files for the Lowry Park shootings. According to Owens, a document in the APD's files listed five suspect descriptions for the Lowry Park shootings that did not match Owens.

(a) Findings of Fact

The court incorporates the findings of fact set forth in part IV.C.3.d.ii of this Order as though fully set forth herein.

(b) Analysis

As an initial matter, Owens claims that it is well known among the defense bar that the APD detectives maintain a "brown file" that contains information not disclosed to the defense. Owens did not present any evidence to support that allegation.

Owens also claims that his trial team should have known that it was the prosecution's policy not to review the entire APD investigative file, and therefore, his team should have sought access to the APD investigative file. According to Owens, his trial team would have discovered the Versadex Report. T. Wilson explained that the Versadex report for this case reflects descriptions of five suspects.[285] According to T. Wilson, the APD records department enters suspect descriptions into the Versadex system based on investigative reports, which are disclosed in discovery. Because the suspect descriptions were in discovery, it was not necessary for Owens's trial team to review the APD's investigative file in order to locate the suspect descriptions reflected in the Versadex Report. In short, Owens failed to prove that his trial team's decision not to ask the court for permission to review the APD's investigative file constitutes deficient performance under *Strickland*. Owens also failed to prove that his trial team's failure to attempt to identify and interview the unidentified witnesses who gave the suspect descriptions was deficient under *Strickland*.

[285] SOPC.EX.D-451.

(d) Conclusion

As King noted during his post-conviction testimony, pursuing a misidentification defense would have allowed the prosecution to emphasize the significant number of witnesses, including Marshall-Fields, who gave a description of the shooter that closely resembled Owens. Accordingly, the court concludes that the trial team's decision not to pursue a defense designed to convince the Dayton Street jury that Owens did not kill Vann based on various witnesses who gave differing descriptions of the Lowry Park shooter was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

iii. Impeachment of Prosecution Witnesses and Theory

(a) Parties' Positions

Owens argues that his trial team was ineffective because it did not present evidence that Owens's motorcycle was not found at Lowry Park after the shootings.[286]

(b) Findings of Fact

Reynolds opined that the trial team performed deficiently when it did not present evidence that the APD did not locate Owens's motorcycle at Lowry Park. Reynolds acknowledged that Ray testified during his Lowry Park trial that he and Owens arrived at Lowry Park at different times on motorcycles. She also acknowledged that Ray testified that he and Owens rode the motorcycles to Carter, Sr.'s home before returning to Lowry Park together in the Suburban.

[286] In SOPC-163, Owens's claim is broad, yet he presented evidence only with respect to his motorcycle. Thus, the court confines its analysis to the trial team's failure to present evidence concerning the whereabouts of Owens's motorcycle after the Lowry Park shootings.

(c) Analysis

Based on Reynolds's account of Ray's testimony at his Lowry Park trial, it appears that Owens's trial team did not have a good faith basis to affirmatively argue that Owens left Lowry Park on his motorcycle instead of in the Suburban. An argument based on the failure of the police to locate the motorcycle would necessarily have been a weak one – something like, "from the evidence you have been given, because the police never located the motorcycle, it would be possible that Owens did not leave in the Suburban, but left on the same motorcycle he came on." Forgoing such a weak argument was reasonable. *See id*. at 689-90 (a court "must indulge a strong presumption" that counsel "made all significant decisions in the exercise of reasonable professional judgment."); *see also Richter*, 562 U.S. at 109 ("There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" (quotation omitted)).

(d) Conclusion

The court concludes that the trial team's decision not to present evidence of law enforcement's failure to ascertain the whereabouts of Owens's motorcycle following the Lowry Park shootings was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

b. Deficient Performance in Investigating, Confronting, and Presenting Evidence Concerning the Dayton Street Homicides in the Dayton Street Trial

i. Parties' Positions

Owens contends that his team was ineffective because it did not develop and utilize the available evidence to undermine the prosecution's theory that Owens killed Marshall-Fields and Wolfe.

ii. Events Leading up to the Dayton Street Homicides[287]

iii. Failure to Impeach and Present Favorable Evidence

(a) Latoya Sailor[288]

(i) Parties' Positions

Owens contends his trial team was ineffective because it did not utilize available evidence to demonstrate that Sailor's trial testimony was false that Ray accused Owens after the Lowry Park shootings of needlessly shooting his gun. Owens also contends his trial team was ineffective because it failed to impeach Sailor's credibility.

[287] Owens struck this portion of his petition in his Second Addendum to Crim. P. 32.2 Petition: Notice of Errata.

[288] In SOPC-293, Owens withdrew claims pertaining to Sailor about Vandy Harper, a telephone call to Marshall-Fields, and the BB gun.

(ii) Overview[289]

As part of its investigation, on August 16, 2006, the trial team conducted an extensive interview of Sailor at her attorney's office.

As part of its defense case at trial, Owens's team called Stowell to testify. Stowell had assisted with the Dayton Street investigation. In the course of that investigation, Stowell learned that the U.S. Attorney's Office had decided to prosecute Sailor for possession of crack cocaine, stemming from her August 2005 arrest.

Owens's trial team also called Root to explain that Arapahoe County prosecutors have the reputation of entering into favorable plea agreements in exchange for information. He explained that only the prosecution can confer immunity on a witness. He also explained the increased sentencing range for those convicted as a special offender. Sailor faced that consequence due to being armed when the drugs were discovered. Root explained how an accessory to murder charge is significantly less serious than a murder charge and explained the benefits of a deferred judgment. He testified that when a defendant, like Sailor, is granted a

[289] In his petition, Owens describes 44 areas where his trial team performed deficiently with regard to Sailor because his trial team did not impeach her credibility with available evidence. Because Owens presented almost all of his claims in conclusory fashion and because several of his claims overlap, the court categorized the claims in an effort to avoid duplication and to address the claims in a logical fashion. The court does not address some of the claims because of a lack of evidence in the record to support those claims. Those claims include the working relationship between Carter and Ray, Sailor's fear of A. Martin and Johnson, and that Sailor desperately sought the discovery from the Lowry Park case. Additionally, the court does not consider Owens's claim that his trial team should have impeached Sailor with the fact that she was threatened with federal drug and gun charges if she did not cooperate in this case. The trial team called Stowell to testify that he learned during his investigation of the Dayton Street homicides that the U.S. Attorney's Office was going to charge Sailor based on her possession of cocaine on August 11, 2005. The trial team's decision to call Stowell rather than to question Sailor about this topic was a reasonable decision.

deferred judgment for an accessory to murder charge, the defendant has received an extraordinarily favorable disposition.

Through Stowell and Root, the trial team proved that Sailor had received extraordinary assistance from the prosecution. The evidence suggested that the prosecution not only dismissed her special offender drug case but also assisted her in avoiding potential federal drug charges. The evidence also showed that she received a deferred judgment for an accessory to first-degree murder charge. Not only did this evidence attack Sailor's credibility, it also supported Kepros's opening statement that the prosecution presented evidence that was for sale.

King testified at the post-conviction hearing that he viewed Sailor as a very difficult witness. Because she seemed capable of saying anything regarding Owens, his strategy was to handle her with "kid gloves," limit her time on the witness stand, and try to make her appear to be an untruthful witness. King limited his cross-examination to questions for which he had a transcript with her answers under oath. He testified that by the start of this trial, he had Sailor's November 22, 2005, APD interview; his August 16, 2006, interview of her; the transcript of her grand jury testimony; the transcript of her testimony at the proof evident hearing in this case; and the transcripts of her testimony at Ray's and Owens's Lowry Park trials.[290]

Prior to trial, King compiled Sailor's inconsistent statements. His cross-examination notes for Sailor consisted of 62 pages. There were many topics in his cross-examination notes that he did not ask Sailor about. In King's view, a fair inference from this lack of inquiry about particular topics is that he decided not to pursue that particular topic at the time.

[290] The court presumes that King also had the transcript of Sailor's pretrial testimony on August 20, 2007.

During meetings with post-conviction counsel and during the post-conviction hearing, King was often asked why he did not pursue certain topics with Sailor on cross-examination, and King often answered that he did not know why he did not pursue those topics. According to King, when he answered that he did not know why, the more accurate answer would have been that he did not recall. King testified that he did not recall any of his decision making with respect to Sailor's cross-examination. He also testified that he would not have used many of the instances listed by Owens in his petition to impeach Sailor.

(iii) Owens's Adoptive Admission

Owens contends King was ineffective because he failed to utilize available evidence to attempt to convince the court to exclude Sailor's testimony about Ray's statements. He contends that available evidence would have persuaded the trial judge that Sailor's statements were false and inadmissible.

(a) Findings of Fact

Ray made a statement to Owens in Sailor's home shortly after the Lowry Park shootings. He berated Owens, saying that it was not necessary to shoot Vann. In Order (SO) No. 11, the trial court ruled that the statements were not admissible as an excited utterance.

During Sailor's direct examination at trial on April 15, 2008, Hower asked her about Ray's demeanor shortly before Ray made those statements in an effort to establish that Ray was excited when he made the statements. King objected and the court ruled that Hower could try to establish the foundation for an excited utterance by questioning Sailor. Guilt Phase Tr. 142:11-25; 143:1-24 (Apr. 15, 2008 a.m.). Sailor testified that Ray was scared, upset, and yelling as he and Owens sat in the kitchen of her home shortly after the Lowry Park shootings. Sailor knew Ray was scared because he was crying and upset. *Id*. at 142:8-10;

144:2-4. According to Sailor, Ray broke the glass top of the kitchen table with his fist while he was yelling at Owens. *Id*. at 144:11-16.

After Hower questioned Sailor, the court heard argument from both parties and maintained its ruling that Ray's statements were not admissible as an excited utterance. *Id*. at 147-154.

Hower then sought admission of Ray's statements as an adoptive admission because Owens had not responded to Ray's statement that there was no need to shoot. *Id*. at 154:22-24. King objected and argued there was no evidence to support a conclusion that Owens's silence was an adoption of Ray's statements. *Id*. at 155:11-25; 156:1-3. King argued that Owens's antagonistic relationship with Sailor may have caused him not to respond. *Id*. at 156:15-20. King also argued that the trial team had relied on pretrial rulings in preparing its defense. *Id*. at 157:11-16. King asked for an opportunity to research the issue because the trial team was surprised by the prosecution's switch to adoptive admission. *Id*. The court granted the request. *Id*. at 157:17-18.

After the recess, Middleton presented case law and argued that the evidence did not qualify as an adoptive admission. Middleton's argument caused the court to allow Sailor to be examined outside the presence of the jury to determine whether Owens was under some type of emotional impediment that prevented him from responding to Ray's statement. Guilt Phase Tr. 14:2-6 (Apr. 15, 2008 p.m.). After considering Sailor's testimony, the court ruled that Ray's statement was admissible as an adoptive admission by virtue of Owens's silence. *Id*. at 22:10-20. Sailor then testified that Ray was yelling at Owens asking him why he shot his gun and why he had not shot in the air. *Id*. at 24:9-16. Sailor also testified that Owens did not say anything in response to Ray and added that he did not appear to be frightened by Ray. *Id*. at 25:3-8.

(b) Analysis

According to Owens, the evidence available to show the trial judge that Sailor's proffered testimony would be false included: 1) Ray's testimony at his Lowry Park trial that he did not know if Owens was shooting at Lowry Park; 2) Sailor's prior statement that Ray and Owens were not shooting at Lowry Park; and 3) Ray's statement to Sailor that neither his nor Owens's guns matched the gun described in the Lowry Park discovery as the gun used to kill Vann.

The evidence Owens identifies is not persuasive. First, Ray's Lowry Park testimony and his statement about the discovery were self-serving hearsay. While the judge might have considered them, *see* CRE 104(a), their weight would have been discounted. Second, Sailor was leaving Lowry Park when she heard gunshots. She was not an eyewitness to the Lowry Park shootings and her statement would have had limited substantive weight. Last, Ray's statement that Owens's gun did not match the weapon fired at Lowry Park does not impeach Owens's silence.

During pretrial litigation, Owens's trial team successfully moved to preclude Ray's statements from the trial. King objected when the prosecution changed its theory of admissibility, and Middleton made a cogent argument that convinced the court to hold a hearing outside the presence of the jury. The trial team was not ineffective under *Strickland* with respect to Owens's adoptive admission.

(iv) Recorded Phone Calls

Owens argues that his trial team was ineffective because it did not review all of the recorded phone calls involving Sailor. According to Owens, the phone calls contained impeachment evidence that the trial team could have used to impeach her credibility.

(a) Findings of Fact

Sailor testified on cross-examination at trial that:

- she made calls from the jail and knew that the calls were being recorded. Sailor acknowledged that during a call she said that the police were looking into whether her gun was used in the Dayton Street homicides. Guilt Phase Tr. 111:17-23; 113:13-23 (Apr. 16, 2008 p.m.).
- during a jail phone call, she told Ray's mother that she had to protect her paperwork because she was told that other inmates would try to go through her stuff to learn about her case and then use the information to make something up to tell the prosecutors. *Id*. at 116:5-20.
- she learned during a phone call on November 7, 2005, that members of Marshall-Fields's family intended to kill or kidnap either her or Ray's mother, who was watching her son. *Id*. at 120:9-22.

Sailor testified at the post-conviction hearing that:

- after Ray was arrested, she and Ray spoke on the phone in code, discussed who was cooperating with the police, discussed the evidence against him, and discussed what incriminating evidence needed to be removed from their home. Sailor recalled that Ray cautioned her not to mention Owens's name during these calls.
- during the call on July 26, 2005, Sailor explained that she did not use the word "hospital" as depicted in Owens's transcript for this call.
- she did not say "Brent" but instead said "Breath" during a recorded phone call. Sailor explained that she was referring to Owens by the nickname "Breath."

- she did not say “white boy” during a recorded phone call as code for a drug transaction. Sailor clarified that it was probably a reference to the time after Ray’s arrest when she worked as an escort to support herself.
- she was not having an affair with Johnson subsequent to the Dayton Street homicides. Sailor testified that during a recorded phone call she was not referring to Johnson but rather to Jamal with whom she was having an affair at the time.

King testified during the post-conviction hearing that he would have reviewed all of Sailor’s recorded jail phone calls and interviewed Sailor about the phone calls if he had had sufficient time to do so prior to trial. King noted that Kepros had reviewed some of Sailor’s recordings. In King’s opinion, regardless of what Sailor might say in an interview, she was capable of saying something entirely different on the witness stand. King acknowledged that if the transcripts prepared by the defense of Sailor’s calls were inaccurate, any cross-examination based on inaccuracies would be embarrassing and damage his credibility with the jury.

(b) Analysis

King was very cautious when cross-examining Sailor and wanted to use only her sworn testimony for impeachment. King’s approach was validated by post-conviction counsel’s efforts during the post-conviction hearing to impeach Sailor with her recorded phone calls. The transcripts of the recorded phone calls had misinterpretations of the words that allegedly would have impeached Sailor. King voiced this very concern – embarrassment in front of the jury due to inaccuracies – at the post-conviction hearing.

Owens's post-conviction counsel spent a substantial amount of time reviewing all of Sailor's recorded phone calls and still could not identify significant impeachment material in the calls. King and his team did not have the luxury of time that Owens's post-conviction counsel enjoyed. Hence, a claim of deficient performance based on King not taking the time necessary to review all of Sailor's recorded phone calls fails. *See Richter*, 562 U.S. at 107 ("Counsel [is] entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.").

King and Kepros listened to some of Sailor's phone calls and used some of the calls during Sailor's cross-examination. King showed that Sailor regularly carried a gun and that her gun was examined as a possible murder weapon in the Dayton Street case. King used a recorded phone call between Sailor and Ray's mother to depict the culture inside the jail as one where an inmate will go through another inmate's discovery to learn about the case. Then, with details gleaned from the discovery, the inmate will claim to have a jailhouse confession that the inmate can use to trade for a benefit from the prosecution. This was particularly important evidence to impeach Strickland's and Harris's testimony about Carter's and Ray's jailhouse confessions. And knowing there was a possibility that the jury would hear victim impact testimony from the victims' families at the sentencing hearing, King used a phone call to suggest that Marshall-Fields's family was seeking revenge and intended to possibly kill or kidnap Sailor and others. King made tactically sound use of information from the recordings.

Unused phone calls between Sailor and Ray showed that they used code words and tried to figure out who was cooperating with the government. Those phone calls could have been used to show Sailor's continued involvement in crime with Ray. However, King was able to make the same point by using other

evidence. On cross-examination, Sailor acknowledged that she told Carter to leave town, that she gave Owens $1,000 cash to help him leave town, and that she told Owens that R. Carter was going to tell the police about the bag of guns stored in R. Carter's apartment. This impeachment was much more impactful than Ray and Sailor using code words to talk about drugs. It showed that Sailor was trying to cover up their involvement in the Dayton Street homicides.

King's failure to review all of Sailor's recorded phone calls was not ineffective under *Strickland*.

(v) Infant Homicide in Michigan

Owens claims that his trial team was ineffective because they did not call Sailor's family members, a former friend, and an unidentified law professor from Grand Rapids, Michigan, to testify that Sailor was known to lie.

(a) Findings of Fact

Sailor testified on cross-examination at trial that she did not testify in Michigan against her cousin but she admitted to being subpoenaed by the district attorney. Guilt Phase Tr. 136:13-18 (Apr. 16, 2008 p.m.). Sailor added that King was an "asshole" for bringing up her family. *Id*. at 136:20-23. Sailor repeated the phrase "Oh God" four times before stating that Owens was a "guilty ass person" and that King knew Owens was guilty. *Id*. at 136:25; 137:3-4.

During a recess, the court asked King to explain his theory for admissibility of the evidence. After hearing arguments from both parties, the court ruled that King could not use extrinsic evidence but could use Sailor's prior statements to impeach her. *Id*. at 148-159.

After the recess, Sailor's cross-examination resumed and she admitted that she testified in Michigan in 2001 against her cousin whose baby died due to abuse.

Id. at 166:9-12. Sailor denied telling her cellmate that she had dropped the baby by accident. *Id*. at 168:2-11.

Sailor testified that she passed three polygraph tests regarding the Michigan case. *Id*. at 169:5-7; 172:6-14. When confronted by King with the inconclusive results, Sailor testified that the results of the polygraph may have been inconclusive, but she was told that she passed. Sailor also testified that the police in Michigan would say the results were inconclusive because they were trying to make a case. *Id*. at 169:1-7; 170:22-25; 171:1-11; 172:2-14.

King testified during the post-conviction hearing about traveling to Michigan with Gonglach to obtain evidence that could be used to portray Sailor as an unreliable witness. Their investigation revealed that Sailor was a suspect in the death of her cousin's baby. Sailor's cousin was charged with child abuse resulting in death based in part on Sailor's information. Sailor testified for the prosecution at trial, and the jury acquitted Sailor's cousin. While in Michigan, King learned that Sailor had allegedly admitted to her cousin and to her cellmate that she killed the baby.

King testified that some of Sailor's family members testified in her cousin's trial and described Sailor as a chronic liar. He tried to interview the family members who testified in the Michigan trial, but they refused to speak to him. King tried to order the transcripts from the Michigan trial but did not have them by the time of this trial. King acknowledged that the lack of transcripts from the Michigan case became less significant when the trial court ruled that extrinsic evidence was inadmissible. King testified that he would not have called Sailor's family members from Michigan to testify in this trial because he did not have transcripts of their testimony in Michigan and because they refused to speak with him.

King wanted to use Sailor's involvement in that case to discredit her credibility. He had subpoenaed Sailor's cousin's defense attorney and that attorney's investigator to testify at this trial.

King called Sailor's cousin, Ray's mother, and B. Taylor to testify about Sailor's reputation of being untruthful.

(b) Analysis

King traveled to Michigan and obtained as much information as he could about the situation. Despite his efforts, he was only able to interview Sailor's cousin's defense attorney and investigator.

King's cross-examination on this topic was appropriate. He attacked Sailor's credibility on a number of important points. Prior to the court precluding the evidence, King was able to show the jury that Sailor had previously testified against a family member in a murder case. This impeached her testimony that she did not want to testify against Owens because he was family.

King confronted Sailor with having to take a polygraph in the Michigan case, suggesting that the police viewed her as a suspect. When Sailor responded that she had been exonerated by passing three polygraph examinations, King forced her to retract that claim and to admit that the result of one polygraph examination was inconclusive. Confirming King's assessment that she was capable of saying anything, Sailor explained the inconclusive result as a manipulation of the results by the local police. King effectively demonstrated that Sailor was giving false testimony under oath when he forced her to change her testimony about not testifying against her cousin and on her claim of having passed three polygraph examinations.

Through his cross-examination, King showed that Sailor would testify falsely and when confronted with uncomfortable facts, become enraged, yell

profanities, and try to make someone else, such as King or Owens, look bad. In summary, King conducted a cross-examination that could have left the impression that Sailor would say anything to avoid responsibility.

Owens also argues that King should have used available case law to convince the court that evidence from the Michigan case could be introduced into evidence. The argument is, at best, speculative. While it is unknown how the court would have ruled based on the proffered case law, it does not seem probable that the trial court would have admitted the extrinsic Michigan evidence for impeachment purposes.

Owens next argues King's performance was deficient because King did not call Sailor's Michigan family members and the unidentified law professor to testify about her reputation for dishonesty in Michigan. But Sailor's family members refused to speak to King, he did not have their transcripts, and Owens did not call the unidentified law professor during the post-conviction hearing.

In the court's view, King pursued an effective tactic with the Michigan case evidence. He exposed Sailor as someone who would say or do anything to avoid responsibility. He called Sailor's cousin, who testified that Sailor was known within her own family to be an untruthful person. Sailor's in-laws corroborated Sailor's cousin's testimony. Hence, King was able to show that Sailor had a reputation for untruthfulness in her family of origin and in Ray's family. The record on this topic shows that King's approach to Sailor's cross-examination was not ineffective under *Strickland*.

(vi) Participation in the Lowry Park Shootings

Owens argues that King was ineffective because he failed to cross-examine Sailor about her inconsistent statements regarding what she did with the clothes

worn by Owens and Ray at Lowry Park and about her admission of being an accessory to the Lowry Park shootings.

(a) Findings of Fact

On direct examination at trial, Sailor testified that:

- after the Lowry Park shootings, Ray and Owens returned to Sailor's home where they took off the clothes they were wearing at Lowry Park. Sailor and Ray had to convince Owens to remove his clothes. Owens said he would do it because someone might identify him from his clothes. Guilt Phase Tr. 26:24-25; 27; 28; 29; 30:1-24 (Apr. 15, 2008 p.m.).
- she put a bag of Ray's and Owens's clothes in the trunk of her car. *Id*. at 31:12-25; 32:1-2.
- she threw bleach on Ray's and Owens's clothes before throwing the clothes away in various dumpsters. *Id*. at 38:12-19; 39:4-12.
- after June 20, 2005, Davinia Ray (D. Ray), Ray's sister-in-law, wanted the gold Suburban moved from her home, and Sailor was willing to move it because Owens refused to move it himself. Sailor further testified that Ray told her to let Owens move the Suburban, which he did. Guilt Phase Tr. 147:5-25; 148:1 (Apr. 16, 2008 a.m.).

On cross-examination at trial, Sailor testified that:

- a crowd of young men who had been drinking refused to move out of the way when she and her girlfriends tried to leave the parking lot at Lowry Park. Ray told her to run over the group of young men. This led to a verbal argument between Ray and the group of young men. Guilt Phase Tr. 57-59 (Apr. 16, 2008 p.m.).

- Ray and Owens were up against a large crowd of people as the argument escalated. When the crowd moved closer to Ray and Owens, Sailor and her girlfriends were able to drive out of the parking lot. *Id*. at 59:20-25; 60.
- she and her girlfriends stopped the car and watched the confrontation in the park escalate even more. People were yelling at Ray and Owens as they backed up toward the Suburban surrounded on three sides by the advancing crowd. *Id*. at 61:18-25; 62:1-25; 63:1-4.
- she believed the crowd was getting ready to attack Ray and Owens. She was not concerned that people in the crowd had guns because they were not, in her mind, part of the criminal world that she, Ray, and Owens belonged to. *Id*. at 63:12-24; 64:15-25; 65:1.
- even though Ray and Owens lifted their shirts to show that they were armed, the crowd kept advancing and acted as if it intended to attack them. There was pushing and shoving going on. *Id*. at 66:15-25; 67:4-19.
- after the events at Lowry Park, Sailor convinced Owens to change his clothes, she took his and Ray's clothes, poured bleach on the clothes, and dumped the clothes in some dumpsters. *Id*. at 69:9-20.
- she helped hide the Suburban and was willing to move it to another hiding place. *Id*. at 82:22-25; 83:1-8.
- she and Ray had stated that A. Martin did not have to snitch. She also testified that she, Ray, and Owens said Marshall-Fields could have told the police that he did not see anything. *Id*. at 88:24-25; 89.

- she was guilty of being an accessory to murder because she destroyed Ray's and Owens's clothes and helped hide the Suburban. *Id*. at 123:3-9.

King testified during the post-conviction hearing that he believed the more Sailor was involved in the Lowry Park shootings the more it would erode her credibility.

(b) Analysis

Sailor's statements regarding her involvement in disposing of the clothing worn by Ray and Owens at Lowry Park were covered on direct and cross-examination. King covered the topic twice during cross-examination. And Sailor volunteered that she was an accessory to the Lowry Park shootings.

Sailor was on direct examination for approximately eight hours. King's desire to limit this volatile, unpredictable witness's time on the witness stand more than justifies his tactical decision not to ask her about topics already covered favorably on direct. Additionally, King had prepared 62 pages of material for Sailor's cross-examination and testified that if he did not ask her about a particular topic, it would be safe to assume that he decided not to pursue that topic.

Owens's argument is focused on Sailor's purported inconsistent statements about what she did with the clothing and on her admission that she was an accessory to murder.

King's vigorous cross-examination attacked Sailor's credibility by establishing her involvement in the cover-up of the Lowry Park shootings. He showed that she:

- convinced Owens to take off the clothes he wore at Lowry Park because she knew the clothes contained incriminating evidence;
- helped hide the Suburban and helped keep it hidden;

- poured bleach on Owens's and Ray's clothing;
- disposed of Owens's and Ray's clothing;
- viewed A. Martin and Marshall-Fields as snitches because they could have told the police they saw nothing at Lowry Park; and
- described herself as being part of a criminal world who carried guns.

King also used her testimony to support the theories of defense. For example, King wanted to establish a self-defense theory for Owens's actions at Lowry Park and used Sailor's cross-examination for that purpose. King's cross-examination suggested that Owens and Ray were acting in self-defense when they were accosted by a large, threatening crowd that did not back down when guns were displayed. In Sailor's view, the crowd was getting ready to attack Ray and Owens as the crowd backed them up toward the Suburban.

King struck an appropriate balance between damaging Sailor's credibility with her Lowry Park involvement and leaving himself room to use her to support a self-defense theory for the Lowry Park shootings. His performance was not ineffective under *Strickland*.

(vii) Participation in the Dayton Street Homicides

Owens contends that King was ineffective because he did not fully develop Sailor's role as an accessory to the Dayton Street homicides to further attack her credibility.

(a) Findings of Fact

On direct examination at trial, Sailor testified that:

- on June 21, 2005, she and Ray went to the barbershop where they were joined by Owens, Todd, and Carter. R. Carter was also present. Owens took a big black duffle bag down the alley toward R. Carter's

apartment and returned a short time later without the bag. Guilt Phase Tr. 108:2-25; 109:1-25; 110:1-24 (Apr. 16, 2008 a.m.).

- R. Carter told her after the Dayton Street homicides that he was nervous because he was on parole and the police wanted to talk to him. She told R. Carter that he did not have to speak to the police. She told Owens that R. Carter was nervous about the police. She asked Owens if he had removed the guns from R. Carter's apartment, and he said that he had removed the guns. *Id*. at 116:4-25; 117:1-17.
- she told Carter that he should leave the area, and she heard Owens tell the same thing to Carter. *Id*. at 141:17-20; 142:1-17.
- after June 20, 2005, she brought Owens $1,000 to allow him to leave the area. Guilt Phase Tr. 10:4-18 (Apr. 16, 2008 p.m.).

On cross-examination at trial, Sailor testified that:

- she told Carter he should leave town, and Owens may have said the same thing to him. *Id*. at 84; 85:1-23.
- she told R. Carter in the summer of 2005 that he did not have to speak to the police, and she told Owens to do something about the guns. *Id*. at 90:6-16.

(b) Analysis

Sailor's involvement in the Dayton Street homicides was developed primarily on direct examination. Sailor testified that she knew Owens hid guns in R. Carter's apartment and that she alerted Owens that R. Carter was nervous about being questioned about the guns. Sailor alerted Owens so that the guns were no longer in the apartment. Sailor also testified that she urged R. Carter not to cooperate with the police, told Carter that he should leave town, and gave Owens $1,000 so that he could leave town. Additionally, Sailor made no effort to

cooperate until months after the Dayton Street homicides. Taken together, this evidence shows Sailor was a willing accessory to the Dayton Street homicides. King's strategy to reiterate only the strongest points about Sailor's participation in the Dayton Street homicides effectively prevented Sailor from volunteering additional damaging evidence against Owens. King's cross-examination of Sailor on this topic was not ineffective under *Strickland*.

(viii) Minimizing Ray's Involvement

Owens claims King was ineffective because he failed to expose Sailor's efforts to minimize Ray's involvement in the Lowry Park shootings and the Dayton Street homicides.

(a) Findings of Fact

Fronapfel interviewed Sailor on November 22, 2005. Sailor told Fronapfel that "Robert said that, he said he took his gun and he shot like, like this. He said he shot through his arm through the air and I guess the dude by that time Rio was hitting the guy." SOPC.EX.P-68.

On direct examination at trial, Sailor testified that "Robert told me that there was a kid hanging onto Sir Mario's shirt and Sir Mario was trying to beat him with the gun off of him and the kid just wouldn't move. So Robert said he put his gun under his arm and he fired one time and he fell." Guilt Phase Tr. 28:19-23 (Apr. 16, 2008 a.m.).

Regarding once having said that Ray shot in the air at Lowry Park, Sailor testified at the post-conviction hearing that she tried to disclose everything she knew when she was first interviewed by the APD. According to Sailor, she never tried to protect Ray by minimizing his role in these cases.

When asked why she did not include Ray in her initial description of what happened at Gibby's on June 19, 2005, Sailor testified that she did not know he

was present. She explained that her information about the Gibby's incident came from what she learned in court on July 25, 2005, and what she subsequently learned from Owens and Carter when she confronted them after court.

King testified during the post-conviction hearing that he did not recall knowing that Sailor once said that Ray shot in the air at Lowry Park and, therefore, did not use it to impeach her trial testimony that Ray shot under his arm. King noted that he preferred the under-the-arm version because it seemed to be an unbelievable story.

(b) Analysis

King established at trial that Sailor was in love with Ray and viewed Owens as her rival for Ray's attention. King exposed Sailor's loyalty to Ray without exposing Owens to additional damaging evidence. King confirmed various pieces of information with Sailor that inculpated Ray while leaving the other information alone because the information also inculpated Owens.

Owens contends that King should have confronted Sailor with her inconsistent statements about how Ray described shooting his gun at Lowry Park. However, Sailor's statements were not particularly inconsistent. She told Fronapfel that Ray "said he shot through his arm through the air." At trial, Sailor testified that Ray said "he put his gun under his arm and he fired one time." More importantly, in King's view, Sailor's testimony that Ray said that he fired his gun under his arm seemed unbelievable. If King had impeached Sailor with her prior description that Ray had shot "through his arm through the air," King would have replaced an unbelievable story with an arguably more believable one. If, as here, an attorney's goal is to portray a witness as untruthful, few tactics can be more effective than having the witness tell an unbelievable story to the jury.

Owens also complains that King did not impeach Sailor for leaving Ray out of her rendition of the Gibby's incident during her APD interview on November 22, 2005. At the post-conviction hearing, Sailor explained that she did not deliberately omit Ray. According to Sailor, she was unaware of Ray's involvement because all her information about Gibby's came from Owens and Carter. Thus, if King had tried to show that she deliberately omitted Ray from the Gibby's incident, it would have allowed the prosecution to revisit Owens's inculpatory reaction when Sailor confronted Owens and Carter about the incident.

When examined in its entirety, Sailor did not make a concerted effort to minimize Ray's involvement. Hence, any effort to try to show such an effort *via* cross-examination ran the dual risks of appearing disingenuous and allowing her to volunteer additional damaging evidence against Owens.

Accordingly, King's approach to Sailor's cross-examination regarding Ray's involvement in the Dayton Street homicides was not ineffective under *Strickland*.

(ix) "Stop Snitchin" T-Shirts

Owens contends that King was ineffective because he did not adequately cross-examine Sailor on her inconsistent statement about who bought the "Stop snitchin" t-shirts found in the car Owens was driving when he was arrested on July 19, 2005. He also faults King for not questioning Sailor about a recorded phone call with Ray during which she described the t-shirts as "real tight."

(a) Findings of Fact

On direct examination at trial, Sailor testified that she probably bought t-shirts similar to the t-shirts that were seized from the car Owens was driving on July 19, 2005. Guilt Phase Tr. 136:6-25; 137:1-25; 138:1 (Apr. 16, 2008 a.m.). On cross-examination, she said that she may have bought the t-shirts found in the car Owens was driving. Guilt Phase Tr. 82:17-21 (Apr. 16, 2008 p.m.). Sailor

testified that she viewed A. Martin and Marshall-Fields as snitches. Guilt Phase Tr. 35:9-12; 39:13-14 (Apr. 16, 2008 a.m.).

King recalled during his post-conviction testimony that Sailor testified at trial that Owens bought the "Stop snitchin" t-shirts found in the car Owens was driving on July 19, 2005. King acknowledged that he was unaware of a July 4, 2005, recorded phone conversation between Sailor and Ray during which Sailor described the t-shirts as being "real tight." In King's opinion, this was not a strong point of impeachment given that a receipt for the t-shirts was found in Owens's wallet after Owens was arrested.

(b) Analysis

Owens's complaint on this topic appears to be that King failed to show the jury that Sailor favored the "Stop Snitchin" culture. Owens did not explain how Sailor's embrace of the "Stop Snitchin" culture would have assisted in his defense.

Moreover, Sailor acknowledged that she embraced the "Stop Snitchin" culture. Sailor admitted that she might have purchased such t-shirts, and she admitted that she, Ray, and Owens viewed Marshall-Fields as a snitch. Her comment that the t-shirts were "real tight," would have been, at best, cumulative. She had already acknowledged that she approved of and supported the culture. Additional efforts to reinforce Sailor's approval of the "Stop Snitchin" culture would have risked allowing the prosecution to further reinforce Owens's embrace of the culture. King's tactical decisions on this topic were not ineffective under *Strickland*.

(x) Todd as Alternate Suspect for Dayton Street Homicides

Owens contends King was ineffective because he failed to attack Sailor's credibility based on issues pertaining to Todd. Owens claims King did not

impeach Sailor with inconsistent statements about how and when she met Todd, about hiding Todd's nickname from the police, about Todd's presence at all of Ray's pretrial hearings, and Todd's contact with her after he returned to Chicago.

(a) Findings of Fact

On direct examination at trial, Sailor testified that:

- she thought she had seen Todd when she and Ray visited Chicago in May 2005. Guilt Phase Tr. 72:18-25 (Apr. 16, 2008 a.m.).
- she probably did not go to court with Ray on June 17, 2005, because of her black eye. *Id*. at 88:1-9.

On cross-examination at trial, Sailor testified that:

- she did not meet Todd until he came to Colorado. Ray introduced Todd to her as Chi Chi. Guilt Phase Tr. 76:2-25; 77:1-8 (Apr. 16, 2008 p.m.).

At the post-conviction hearing, Sailor testified that:

- when she and Ray were in Chicago in the spring of 2005, she accompanied Ray to meet Todd, but she did not physically meet Todd. Ray spoke to Todd on the front porch while she remained in the car.
- Todd's nicknames were unimportant to her at the time, and she did not recall the nickname Ray used for Todd. Sailor said she used the nickname "Chi Chi" and believed the nickname "Scooter" was Todd's street name. Sailor denied trying to hide Todd's identity from the APD by calling him "Chi Chi."
- she did not recall if Todd attended any of Ray's Lowry Park pretrial hearings. She added that she did not know if Todd went to court with Ray on June 17, 2005, because she was not there. Sailor explained

that she decided not to go to court that day because Ray had just given her a black eye and she did not want to cause any problems for him.

- Todd called her after he returned to Chicago to ask if Ray was in jail. According to Sailor, he only called her once.
- Todd was not important to her. When she told the APD that Todd was involved in the Dayton Street homicides, she was basing that information on the efforts made by Ray and his mother to get Todd back to Chicago shortly after June 20, 2005. Sailor pointed out that Ray, Owens, and Carter never told her Todd was involved in the murders. She denied implicating Todd to deflect blame from Ray.

During his post-conviction testimony, King explained that the trial team did not want to formally designate Todd as an alternate suspect, which would require proof of Todd's connection to the Dayton Street homicides.[291] The team wanted to portray Todd as a hitman from Chicago who Ray brought to Colorado to kill Marshall-Fields. In accordance with that theory, the team wanted to place Todd in the shooter's car. King testified that Sailor's failure to report that Todd attended pretrial hearings with Ray was not a strong point of impeachment.

(b) Analysis

Owens contends that Sailor was not being truthful about when and how she met Todd. Owens does not articulate why this is important, and he did not present evidence indicating that Sailor was untruthful about when and how she met Todd.

Owens argues that King should have pursued why Sailor told the police that Todd was called Chi Chi when she knew his real nickname was Scooter. Sailor

[291] Motive and opportunity alone do not support an alternate suspect defense. There must be proof that the alternate suspect committed some act directly connecting him or her to the crime. *People v. Salazar*, 272 P.3d 1067, 1073 (Colo. 2012).

heard both nicknames while Todd was in Colorado. Sailor did not tell the APD that Todd's nickname was Chi Chi in order to prevent the police from locating Todd. After all, Sailor told the APD that Chi Chi left Colorado with the help of Ray's mother shortly after the Dayton Street homicides. Sailor testified at the post-conviction hearing that she was neither trying to hide Todd nor use him to deflect blame from Ray. As King observed during his post-conviction testimony, exploring Todd's nicknames with Sailor was not a fruitful area of impeachment.

As for Sailor's failure to tell the APD that Todd attended Ray's pretrial hearings, Sailor did not recall during the post-conviction hearing if Todd accompanied them to court. She speculated that Todd might have accompanied Ray on June 17, 2005, because she did not go to court that day. Given Sailor's lack of memory, impeaching Sailor regarding her failure to report that Todd attended Ray's pretrial hearings would not have been a fruitful area of impeachment.

As to Owens's complaint that King failed to confront Sailor about her contact with Todd after he left Colorado, Sailor testified at the post-conviction hearing that Todd contacted her one time to find out if Ray was in jail. Thus, there was very little impeachment value in Todd's contact with Sailor after he left Colorado.

King's cross-examination of Sailor with regard to Todd was not ineffective under *Strickland*.

(xi) June 20, 2005, Barbecue

Owens claims King was ineffective because he did not impeach Sailor about knowing that Marshall-Fields was going to be killed and holding a barbecue at her house to establish an alibi.

(a) Findings of Fact

Fronapfel interviewed Sailor about the Dayton Street homicides on November 22, 2005. SOPC.EX.P-67. During that interview, Sailor was asked if she was surprised that Ray had an alibi. She responded,

> Um, um...I was very surprised I said cause just like if I stayed...me and my home…my people...I know my people doing something and I be like, well, shoot, they can't connect me. I...I was there. I was there. I, I made sure I was there, you know that's like seeing on the News something, but just because I...I wasn't there though.

Id.

On direct examination at trial, Sailor testified that she hosted a barbecue for her friends on the afternoon of June 20, 2005. Sailor explained that she hosted the barbecue spontaneously because she was lonely and had a black eye. Guilt Phase Tr. 89:10-23 (Apr. 16, 2008 a.m.).

Sailor testified at the post-conviction hearing that she hosted the barbecue because Ray was abusive and had given her a black eye. She only invited her female friends because she needed their support. Sailor denied that she hosted the barbecue because she knew something bad was going to happen that day.

King did not have a tactical reason for not using Sailor's statements from the November 22, 2005, interview to impeach her.

(b) Analysis

Owens argues that King should have confronted Sailor in order to show that she held the barbecue to create an alibi for herself. This topic would not have been a fruitful area of impeachment for at least three reasons. First, had Sailor testified that she had a premonition about Marshall-Fields's death, it would have only made Owens and Ray look more culpable. Sailor's premonition would have been based on whatever they were doing and saying in the days before Marshall-Fields was

killed. Second, the alibi did not cover the time when the murders occurred. Sailor testified that the barbecue ended before Marshall-Fields and Wolfe were murdered. Third, Sailor testified at trial and during the post-conviction hearing that she hosted the barbecue to gain support from her friends and family after Ray had given her a black eye.

King knew about Sailor's APD interview where she said, "I know my people doing something and I be like, well, shoot, they can't connect me." SOPC.EX.P-67. King testified that if he knew about a topic of impeachment before trial and did not ask Sailor about it, he probably decided not to pursue it during cross-examination. King's decision not to pursue this line of inquiry with Sailor was not ineffective under *Strickland*.

(xii) Testimony Regarding Steinberg

Owens claims King was ineffective because he did not use available evidence to impeach Sailor about what she claimed Steinberg had told her.

(a) Findings of Fact

On direct examination at trial, Sailor testified that Steinberg asked her who Carter was, and after hearing her explanation, Steinberg gave a non-verbal indication that Carter should leave the area. Guilt Phase Tr. 139:15-25; 140:1-7 (Apr. 16, 2008 a.m.). On cross-examination, Sailor testified that she gave approximately $48,000 to Steinberg to hold for her and Ray, or as a retainer. Guilt Phase Tr. 86:5-16 (Apr. 16, 2008 p.m.). Sailor reiterated during her post-conviction testimony that Steinberg told her to tell Carter to leave the area.

Steinberg invoked Colo. RPC 1.6, the attorney-client privilege, and the work product privilege to avoid answering questions when he was called to testify during the post-conviction hearing. Despite his objections, the court ordered Steinberg to answer some questions. Steinberg represented Ray in the Lowry Park

case until murder charges were filed. He also represented Ray on a case involving a felony violation of a bail bond condition and a case involving carrying a concealed weapon. Steinberg testified that he did not like Sailor and would not allow her to be present when he and Ray discussed Ray's cases. Steinberg testified that Sailor was generally with Ray whenever he came to court. When asked whether he had met with Sailor, Steinberg raised the work product privilege and refused to answer. Steinberg confirmed that he would have invoked the rules of confidentiality and the privileges if he had been called to testify at trial.

King testified that Steinberg was not contacted regarding Sailor's allegations about suggesting that she should tell Carter to leave town.

(b) Analysis

Owens's argument that his trial team should have called Steinberg to impeach Sailor does not take into account the fact that Steinberg would have invoked Colo. RPC 1.6, the attorney-client privilege, and the work product privilege to avoid testifying at trial. Steinberg was shielded from answering a majority of the questions posed to him during the post-conviction hearing. As a result, none of Steinberg's testimony impeached Sailor. For these reasons, the trial team's decision not to call Steinberg as a witness was not ineffective under *Strickland*.

(xiii) Involvement in Drug Distribution

Owens claims King was ineffective because he did not attack Sailor's credibility by using audiotapes to show that she was heavily involved in Ray's drug distribution business before and after Ray's arrest.

(a) Findings of Fact

Sailor testified at trial that she was arrested on August 11, 2005, for drug possession, and she alleged that an APD officer planted cocaine in the backseat

where she was sitting. Guilt Phase Tr. 15:19-20 (Apr. 16, 2008 p.m.). Sailor further testified that she admitted to the officer that she was in possession of marijuana and a gun. *Id*. at 17:19-25. Sailor explained that she carried a gun for her protection. *Id*. at 54:1-4. She also explained that the cocaine was not hers because she would not have had a large uncut rock of cocaine if she was a drug dealer. When shown pictures of the cocaine seized from her, Sailor admitted that it was broken down as if ready for distribution. *Id*. at 106:16-21; 110:4-7.

Sailor testified at the post-conviction hearing that she occasionally helped Ray with his drug distribution business. According to Sailor, she was not considered his partner and everyone knew Owens was Ray's partner. Sailor admitted that she collected drug money owed to Ray and Owens after Ray went to jail in June 2005.

Officer Steve Ficco (Ficco) testified at trial that:

- he conducted a traffic stop on August 11, 2005, and Sailor was in the backseat of the car. Guilt Phase Tr. 99:4-25 (Apr. 30, 2008 p.m.).
- he did an inventory search of the car and found a plastic baggie with an off-white rock-like substance between the seat cushions in the backseat, and he arrested Sailor. *Id*. at 101:23-25; 102; 103.
- when arrested, Sailor volunteered that she had a loaded gun in her purse, which he determined to be a .380 caliber semiautomatic handgun. *Id*. at 104:22-25; 105:1-16.
- when asked, Sailor gave him a package of marijuana that she had in her clothing, and she was calm and cooperative throughout their interaction. *Id*. at 106:5-23.
- he did not plant the baggie in the backseat. *Id*. at 106:24-25; 107:1-2.

- the baggie was located directly behind where Sailor was sitting. *Id*. at 107:24-25; 108:1-2.

King testified that he did not use the trial team's interview of Sailor to show that she was heavily involved in Ray's drug distribution business. King agreed that trying to show Sailor's involvement in Ray's drug business could have opened the door to evidence of Owens's involvement. King could not recall if that was his reason for not pursuing this topic. King acknowledged that he had made a contemporaneous objection at trial to the prosecution asking Sailor about Ray's drug distribution business. King objected because there was a court order precluding this type of evidence based on his pretrial motion *in limine*.

(b) Analysis

The evidence introduced at trial suggested Sailor was distributing cocaine on August 11, 2005. Sailor admitted that the cocaine in the baggie was prepared for distribution. Ficco testified that he did not plant the cocaine in the backseat of the car, and the cocaine was located directly behind where Sailor was sitting. According to Ficco, Sailor did not act surprised by the baggie and was cooperative to the point of volunteering that she was carrying a loaded handgun. There was a sufficient evidentiary basis to argue that Sailor was distributing cocaine while armed. That evidentiary basis was developed without eliciting damaging evidence about Owens's involvement in drug distribution. Further inquiry into Sailor's drug distribution activities could have opened the door to Owens's drug distribution activities. For example, if King had questioned her further on her drug dealing, she would probably have testified that she collected drug money owed to Owens and Ray after Ray was arrested. King's cross-examination of Sailor regarding her involvement in Ray's drug distribution business was not ineffective under *Strickland*.

(xiv) Owens's Presence at the Father's Day Barbecue

Owens contends King was ineffective because he did not confront Sailor with her conflicting statements about whether Owens was present at the Father's Day barbecue on June 19, 2005.

(a) Findings of Fact

Sailor testified on August 17, 2006, that she did not see Owens at the Father's Day barbecue on June 19, 2005. At trial, Sailor testified that she saw Carter at the barbecue and was unsure but thought she also saw Owens. Guilt Phase Tr. 79:13-22 (Apr. 16, 2008 a.m.). Sailor testified at the post-conviction hearing that, when she testified at trial, she could not recall whether Owens was at the Father's Day barbecue.

King testified that it would have been helpful to impeach Sailor's trial testimony about Owens possibly being present at the Father's Day barbecue.

(b) Analysis

Owens's complaint is that King did not confront Sailor with her pretrial testimony that she did not see Owens at the barbecue. Sailor never definitively testified at trial that Owens was present at the barbecue. Rather, the totality of Sailor's trial testimony on this topic indicated that she was unsure if Owens was present. Confronting Sailor on this topic would have shown that Sailor could not definitively recall if Owens was at the barbecue. It would not have had any significant impeachment value. Thus, King's failure to cross-examine Sailor about Owens's presence at the Father's Day barbecue was not ineffective under *Strickland*.

(xv) Motivation to Testify

Owens claims that King did not adequately demonstrate that Sailor's true motivation for cooperating with the police was not to assist the victims' families but rather to protect herself. He also argues that King did not confront Sailor with her efforts after the Dayton Street homicides to identify people who were cooperating with the police and to hide incriminating evidence. Owens also contends that King should have exploited the fact that the prosecution gave Sailor informal immunity for her testimony about her involvement in Ray's drug distribution business.

(a) Findings of Fact

On direct examination at trial, Sailor testified that:

- she was fearful for her son while she was in jail because Ray's mother was caring for her son and because Owens had not been arrested. Guilt Phase Tr. 22:4-11 (Apr. 16, 2008 p.m.).
- she cooperated pursuant to a plea agreement, which required her to plead guilty to being an accessory to Vann's murder while her drug case was dismissed. *Id*. at 24:1-19.
- the charges stemming from her arrest in August 2005 for cocaine possession while in possession of a gun carried mandatory penalties of eight to 24 years. Sailor also testified that she was facing 10 to 30 years in prison. *Id*. at 98:6-8; 99:21-25; 100:1-7.

On cross-examination at trial, Sailor testified that:

- she accepted the plea agreement because she needed to be released from jail in order to care for her son. *Id*. at 124:5-13.
- she received a four-year deferred judgment sentence. *Id*. at 126:20-22.

- even though she disliked the addendum to the plea agreement that required her to testify and that allowed the prosecution to revoke her deferred judgment if she did not comply, she accepted the agreement to be with her son. *Id*. at 131:1-21.

Sailor testified at the post-conviction hearing that:

- she was worried about R. Carter cooperating with the police and disclosing that the guns were hidden at his apartment so she notified Owens that R. Carter might inform the police that the guns were in his apartment.
- she removed incriminating evidence from her home after Ray was arrested, and she urged Carter to get rid of the car that was used in the murders.
- she discussed with Ray's sister the names of people whom she suspected were cooperating with the police in order to warn Ray's sister not to speak to the people who were cooperating.

During his post-conviction testimony, King acknowledged it would have been helpful to impeach Sailor's claim at trial that she always wanted to come forward in this case.

(b) Analysis

King cross-examined Sailor in such a way that exposed her self-interest in becoming a cooperating witness. King was justifiably wary of Sailor and had to be careful not to provide her with an opportunity to volunteer damaging evidence. King crafted a cross-examination that covered numerous points highlighting Sailor's selfish motivation for cooperating against Owens. King's cross-examination exposed Sailor as someone who received extraordinary benefits and

had strong incentives to testify in a manner that would please the prosecution. For example, Sailor admitted the following:

- she avoided prison with a plea agreement;
- she received a deferred judgment for the charge of accessory to murder;
- her special offender drug charge was dismissed; and
- she accepted the plea agreement and agreed to cooperate to obtain her release from jail in order to care for her son.

Owens complains that King did not confront Sailor with her efforts to discover who was cooperating with the police. But he did establish that she was trying to cover-up the Dayton Street homicides prior to her August 11, 2005, arrest. She admitted that she told Carter to leave town, gave Owens $1,000 to leave town, and alerted Owens that R. Carter was possibly going to disclose that the guns were hidden at his apartment.

Likewise, impeaching Sailor on the grounds that she hid incriminating evidence would have been cumulative impeachment. She testified that she gave $48,000 cash to Steinberg to prevent the police from finding and seizing the money.

King did not impeach Sailor with the informal immunity the prosecution conferred on her in exchange for her testimony about Ray's drug distribution.[292] However, King elicited that Sailor was facing 10 to 30 years in prison due to the special offender drug charge and that the charge was dismissed as part of her plea agreement. Dismissing such a serious charge was much more impactful than receiving informal immunity. There was also a substantial risk that asking Sailor

[292] Hower gave Sailor informal immunity just before her August 20, 2007, testimony. Pretrial Hrg Tr. 157:10-16; 161:10-25; 162:1-10; 164:23-25; 165:1-25; 166:1-10 (Aug. 20, 2007).

about informal immunity concerning her activities for Ray's drug ring might have led to Sailor testifying about Owens's significant position in Ray's drug ring.

King's cross-examination of Sailor suggested that she was motivated to become a cooperating witness against Owens for her own benefit. Sailor was impeached on many of the topics Owens alleges that King omitted from his cross-examination. Owens failed to prove that King's cross-examination of Sailor was ineffective under *Strickland*.

(xvi) Called Victims' Mothers "Bitches"

Owens claims King was ineffective because he did not use the incident between Sailor and Vann's mother to show that Sailor was part of a conspiracy to murder Marshall-Fields. According to Owens, the jury would have inferred that anyone who would accost a murder victim's mother in this manner would engage in violence toward a witness. Owens also claims King was ineffective because he did not impeach Sailor with recorded phone calls wherein she referred to the victims' mothers as "bitches."

(a) Findings of Fact

Vann's mother testified during the sentencing hearing about an incident in the hallway of the courthouse after a pretrial hearing. She testified that Sailor bumped into her and called her a "bitch." During her post-conviction testimony, Sailor explained that she called Vann's mother a "bitch" in reaction to the woman bumping into her. Sailor further explained that she knew Vann's mother before July 4, 2004, and Sailor did not like her. Sailor added that she was remorseful for having used that term for Vann's mother.

Likewise, Sailor acknowledged that during a recorded phone call with Ray, she called Wolfe's mother a "bitch." She explained the name-calling as a reaction to an incident in the courthouse. According to Sailor, Wolfe's mother walked

toward Sailor in a courthouse hallway with pictures and said something to the effect that her baby was gone. Sailor thought Wolfe's mother was trying to set her up because a photographer was standing nearby. Sailor did not say anything to Wolfe's mother as Sailor rushed into the courtroom. Later, while explaining the incident to Ray during a recorded phone call, Sailor called Wolfe's mother a "bitch." Sailor testified that she referred to Wolfe's mother as a "bitch" when she talked to Ray because she wanted to remain close to Ray and therefore did not want to let Ray know that she felt sympathy for the victims' families. Sailor also testified that she does not use that term in a derogatory sense because she uses it for everyone.

King testified during the post-conviction hearing that he had not listened to all of the recorded phone calls between Ray and Sailor and thus did not know that Sailor talked to Ray about the victims' mothers. In King's opinion, asking a witness like Sailor about incidents of name-calling could be dangerous.

(b) Analysis

Vann's mother testified during the sentencing hearing about Sailor's reaction after they bumped into each other. Hence, Sailor's actions were put before the jury without the risk of eliciting testimony from Sailor. If Sailor had been asked about the incident at trial, she might have pointed out that she knew Vann's mother, did not like her, and then gone on to explain why she did not like Vann's mother. The jury might have viewed Sailor's testimony about why she did not like Vann's mother as an effort by King to attack a murder victim's mother. This is not how King wanted the jury to view his actions. He considered his credibility to be key – especially on the penalty issue. King's cautious approach on this topic was a reasonable tactical choice.

Cross-examining Sailor on this topic could have negatively affected her credibility because it would have suggested that she was insincere when she claimed to have been motivated to cooperate out of her concern for the victims' families. However, if King had explored Sailor's use of profanity toward the victims' mothers at trial, Sailor's response might have done the defense more harm than good. Sailor did not like Vann's mother, and she thought Wolfe's mother was trying to set her up to be photographed in the courthouse. Sailor used profanity while talking about the victims' mothers in order to convince Ray that she was not sympathetic to the victims' families. And Sailor used that term to describe many of the people she knew. Given her use of profanity toward King and Owens during her testimony, it is likely that some of the jurors would have accepted her explanations. Under these circumstances, not confronting Sailor about her use of profanity was not ineffective under *Strickland*.

(xvii) Suppressed Evidence About Sailor's Willingness to Cooperate with the Police

Owens claims that King was ineffective because King did not discover a number of impeachment items that were suppressed by the prosecution. Owens claims that if King had reviewed the entire APD investigative file prior to trial, one or more of these incidents would have been discovered and could have been used to further attack Sailor's credibility.

(a) Findings of Fact

The court incorporates the findings of fact set forth in part IV.C.3.a.i(b) of this Order.

(b) Analysis

In his government misconduct claims, Owens contends that evidence of the following incidents was suppressed by the prosecution: 1) that Sailor engaged in

plea negotiations through her attorney with the prosecution prior to Owens's arrest; 2) that Sailor requested financial assistance from the prosecution around the time that she testified at trial; and 3) that she was confronted in October 2006 after her testimony in Ray's Lowry Park trial by homicide detectives from Michigan about a homicide involving her ex-boyfriend, who was a drug dealer. The record in these post-conviction proceedings shows that the prosecution did not disclose evidence of these incidents to Owens's trial team.

Leading up to trial, the prosecution assured Owens's trial team that all discoverable material was disclosed. During the post-conviction hearing on Owens's government misconduct claims, King and Kepros testified that they did not have time to seek authority from the court and to review the entire APD investigative file prior to trial.[293] Instead, the trial team relied on the prosecution's numerous and continuous assurances that all discoverable material was disclosed. The team's decision to rely on these representations was a reasonable professional judgment.

In summary, the trial team's reliance on the prosecution's representations that it was complying with its discovery obligations was not ineffective under *Strickland*.

(xviii) Conclusion

Owens has failed to prove that his trial team performed deficiently when it failed to impeach Sailor with available evidence. In general, the points raised by Owens were either raised or made moot by Sailor's direct and cross-examination at trial and it was appropriate for King to consider the necessity of being cautious

[293] Moreover, the fact that Owens's post-conviction counsel was able to obtain a court order allowing counsel to review the APD's file does not mean that the trial team would have been successful on the same claim in pretrial litigation.

with this volatile witness. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance."). The court also concludes that Owens failed to prove that he was prejudiced by the manner in which his team addressed Sailor's credibility. *See id.* at 694 ("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."). Accordingly, Owens's motion to vacate his conviction and sentence based on his trial team's failure to impeach Sailor with certain available evidence is **Denied**.

(b) Jamar Johnson

(i) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to confront Johnson on cross-examination with readily available evidence that would have severely damaged Johnson's credibility.

(ii) Overview

Johnson was uncooperative when Fronapfel interviewed him in the Boulder County jail on August 4, 2005. He was cooperative on January 24, 2006, when Fronapfel conducted another interview with Johnson's attorney present. Then, on February 3, 2006, pursuant to a very favorable plea agreement, serious Arapahoe County charges were dismissed and Johnson received a four-year deferred judgment to felony theft.[294] The plea agreement addendum required Johnson to make himself available to the prosecution and to testify when needed. He testified before the grand jury on February 3. Then, on February 9, he admitted violating his Boulder County probation and was resentenced to unsupervised probation

[294] Arapahoe County case 05CR1550.

pursuant to a plea agreement. Johnson next testified on July 5, 2006, at the preliminary hearing for Owens's Lowry Park case. Johnson testified at Ray's Lowry Park trial on October 20, 2006, and at Owens's Lowry Park trial on January 17, 2007. He testified at a pretrial motions hearing in this case on June 12, 2007, and he testified at this trial on April 21, 2008.

During his post-conviction testimony, King explained that prior to Owens's Lowry Park trial, he gathered all the information available on Johnson into a trial notebook. That notebook totaled over 460 pages. According to King, the bulk of the pages came from discovery because he did little independent investigation of Johnson. King skimmed this material and reduced it to approximately 80 pages of cross-examination notes. His discussions with Owens did not influence his decision-making process with respect to Johnson. King pointed out that his notes were not finalized before Johnson testified at trial. King relied primarily on his cross-examination of Johnson from the Lowry Park trial to cross-examine Johnson in this trial.

Reynolds opined that King's performance was deficient because he used his Lowry Park cross-examination notes for his cross-examination of Johnson in this trial and his strategy for Johnson was based on the trial team's inadequate investigation of Johnson. Reynolds acknowledged that King covered many topics with Johnson that impacted Johnson's credibility but maintained that King's cross-examination of Johnson could have been better.

The topics identified by Owens that King did not adequately impeach Johnson on are as follows:

(iii) Testimony that Owens Emptied his Clip

Owens argues that King was ineffective because he did not confront Johnson with available evidence that demonstrated Johnson's testimony was false when he

testified that Owens emptied his clip into Vann. Specifically, Owens claims that Johnson was not confronted with the forensic pathologist's report showing Vann was only shot two times or with Johnson's prior testimony that Vann was shot eight times.

(a) Findings of Fact

Johnson testified on direct examination at trial that:

- he saw Vann punch Owens in the mouth and saw Owens pull out a gun and shoot Vann. The punch did not knock Owens down, and Vann had no weapon on him. Owens stood over Vann and shot him a second time and continued to shoot him until his gun began clicking. Guilt Phase Tr. 84:12-18; 89:1-23; 90:25; 91:1-4; 91:12-21 (Apr. 21, 2008 a.m.).
- he was approximately 10 feet away when Owens shot Vann. *Id*. at 103:9-16.

Johnson testified on cross-examination at trial that:

- he knew Owens's gun was empty because he heard it make repeated clicking sounds. *Id*. at 131:25; 132:1-2.

Johnson testified at the post-conviction hearing that:

- on January 24, 2006, he told Fronapfel that Owens shot Vann two to three times. On February 3, 2006, before the grand jury, he testified that Owens shot Vann eight times while standing over him.
- that Owens stood over Vann and emptied his clip.

King testified at the post-conviction hearing that:

- he believed that testimony about emptying a clip is impactful testimony to the extent it is believable. He recalled Johnson's grand jury testimony about Owens firing eight shots into Vann.

- he did not confront Johnson with the forensic pathologist's finding that Vann was only shot twice or with the fact that Johnson had stated on more than one occasion that Owens shot Vann two or three times.
- he argued at the Lowry Park trial that the crime scene evidence did not support an explanation that Owens missed Vann six times, but he did not present this point at this trial.
- impeaching Johnson on this topic would have allowed the prosecution to rehabilitate Johnson with several of Johnson's other statements and testimony, which would have given Johnson an opportunity to explain what he meant by the phrase "emptying his clip." King believed it was better not to confront Johnson on this topic because the forensic pathologist's testimony that Vann was shot only twice was all the evidence needed to argue that Johnson's testimony was false.

(b) Analysis

Johnson never used the phrase "emptied his clip" during his trial testimony. Johnson testified that he heard Owens's gun clicking as Owens stood over Vann, which implied that Owens's gun was empty. As King pointed out, the pathologist's testimony that Vann suffered only two gunshot wounds demonstrated that Johnson's testimony was false. Thus, impeaching Johnson with the forensic pathologist's report was not necessary.

The trial team did not emphasize the discrepancy between Johnson's testimony and the forensic pathologist's findings because the discrepancy was evident and because King had decided not to retry the Lowry Park shootings in the Dayton Street trial. King made that decision because he knew that in the sentencing hearing, the prosecution would prove Aggravating Factor No. 1 – that Owens had been convicted of murdering Vann. In King's view, the trial team

would have lost credibility with the jury in the sentencing hearing if it had vigorously contested the Lowry Park evidence during the guilt phase in this trial.

Furthermore, confronting Johnson with inconsistent statements about how many times Owens shot Vann would have given the prosecution the opportunity to reiterate that Owens kept pulling the trigger until his gun was empty. For these reasons, King's handling of Johnson's cross-examination about what he observed at Lowry Park was not ineffective under *Strickland*.

(iv) Version of Events at Lowry Park

Owens argues that King was ineffective because he did not confront Johnson with his implausible version of the Lowry Park shootings.

(a) Findings of Fact

Johnson testified on direct examination at trial that:

- he went to the parking lot where he saw Sailor arguing with some men. Then Ray started arguing with the men over someone having hit Sailor. Guilt Phase Tr. 77:7-23 (Apr. 21, 2008 a.m.).
- he saw Vann punch Owens in the mouth, and Owens pulled out a gun and shot Vann. The punch did not knock Owens down, and Vann had no weapon on him. According to Johnson, Owens stood over Vann and shot him a second time and continued to shoot him until Owens's gun began clicking. *Id*. at 84:12-18; 89:1-23; 90:25; 91:1-4; 91:12-21.
- Owens then ran to the passenger side of the Suburban where Marshall-Fields and Bell fought with him, trying to get him out of the Suburban. As they were fighting with Owens, Ray shot them both while hiding the gun under his left armpit. *Id*. at 93:3-9; 104:17-22.
- Owens then got in the Suburban, and Ray drove the Suburban across the grass and out of the park. *Id*. at 93:10-13.

- at Lowry Park, Ray wore a white basketball jersey with gray and blue colors and Owens wore shorts. Owens wore his hair in braids. *Id*. at 97:13-25; 98:1-22.

Johnson testified on cross-examination at trial that:

- he went to the parking lot because there was a disturbance, and he found Ray angry and yelling at a group of Vann's friends. Ray was yelling at them about an incident involving Sailor. The group, including Marshall-Fields and Bell, surrounded the Lincoln Towncar occupied by Sailor and her friends. *Id*. at 119:1-10; 120:1-23.
- Owens was in the general area while Ray and the group of men argued, but Owens did not participate in the argument. *Id*. at 120:24-25; 121:1-7.
- Vann was primarily yelling at his agitated group of friends to calm down, but both sides continued arguing. *Id*. at 121:11-25; 122:1-10.
- Ray was the one causing the problem, and Johnson had not seen Owens drinking or acting as if he was intoxicated that evening. *Id*. at 124:14-22.
- as he retreated, Ray continued to argue with Vann, who was supported by a crowd consisting of approximately 20 people, including Marshall-Fields and Bell. According to Johnson, it was Ray and Owens versus an angry crowd of approximately 20 people. *Id*. at 124:23-25; 125; 126:1-7.
- the crowd surrounded Owens and Ray, forcing them to back up toward the Suburban. Johnson further testified that he saw Vann run up and punch Owens in the face. *Id*. at 126:23-25; 127:1-19.

- Marshall-Fields and Bell caught Owens at the passenger door of the Suburban and started punching him in an effort to prevent him from getting into the vehicle. While Marshall-Fields and Bell were fighting with Owens, Ray shot them both as Ray held the gun under his arm. *Id*. at 130:8-25; 131:1-16.

Johnson testified at the post-conviction hearing that:

- there were two sets of shots. Between the sets, he ran to his car that was parked two spaces from the Suburban. He ducked down near his car but kept his eyes on Owens. Johnson saw Owens empty his clip while standing over Vann. Then Johnson saw Owens run to the passenger door of the Suburban where two men tried to stop him. Johnson saw Ray come around the back of the Suburban and walk by the two men fighting with Owens. Johnson saw Ray shoot the men while hiding the gun under his armpit. Ray then got in the Suburban and drove away with Owens.

(b) Analysis

Owens contends it was deficient performance not to confront Johnson with the implausible aspects of his version of events at Lowry Park.

Other witnesses and trial evidence corroborated the main points of Johnson's version of events. Sailor confirmed Johnson's testimony that she got into a confrontation with a group of young men in the parking lot and that Ray inserted himself into the argument. Sailor, by relating Ray's statements and Owens's lack of response, confirmed Johnson's testimony that Owens shot Vann. Marshall-Fields's description of Vann's shooter corroborated Johnson's description of Owens. Sailor corroborated Johnson's testimony that Ray shot Marshall-Fields and Bell while they were fighting with Owens by holding the gun under his armpit.

A. Martin corroborated Johnson's testimony that Ray drove the Suburban across the grass and out of the park after the shootings. Sailor's testimony and the Lowry Park video confirmed Johnson's description of Ray's and Owens's clothing.

Even if portions of Johnson's version of events were implausible, King's strategy was to utilize Johnson's version of events to establish that Owens acted in self-defense. During Johnson's cross-examination, King went into great detail about the large crowd threatening Owens and Ray as they backed toward the Suburban and Vann running out of that crowd to punch Owens. It would have contradicted King's strategy to use Johnson's version to set up self-defense and then attack it as implausible. King's performance fell within the wide latitude afforded to trial counsel in making these types of decisions. *See Richter*, 562 U.S. at 106 ("Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach." (quoting *Strickland*, 466 U.S. at 689)).

King anticipated that the jury would eventually learn of Owens's conviction for killing Vann, and King developed the self-defense strategy as a way to explain Owens's actions while maintaining King's credibility with the jury for the sentencing hearing. Under these circumstances, King's cross-examination of Johnson was not ineffective under *Strickland*.

(v) Access to Firearms and Lack of Probation Violation

Owens claims that King was ineffective because he failed to confront Johnson with Johnson's possession of guns similar to the guns used to kill Marshall-Fields and Wolfe, and he failed to point out to the jury that Johnson's Boulder probation was not revoked for weapon possession.

(a) Findings of Fact

Johnson testified on direct examination at trial that:

- he was on probation in Boulder County at the time the Arapahoe County charges were brought, and his Arapahoe County plea agreement did not address his Boulder County case. Guilt Phase Tr. 16:25; 17:1-16 (Apr. 21, 2008 a.m.).
- he was arrested in August 2005 for violating his Boulder County probation. *Id*. at 59:15-23.

Johnson testified on cross-examination at trial that:

- his first felony conviction was for menacing when he threatened someone with a gun in Boulder County, and he was sentenced to probation. His Boulder County probation could be revoked if he committed another crime, which happened when he was charged with theft in Arapahoe County. Johnson acknowledged that the prosecution in Arapahoe County added burglary and robbery charges. *Id*. at 132:3-25; 133:1-2.
- on July 4, 2004, he was not allowed to have a gun because it would have violated his Boulder County probation. *Id*. at 133:3-10.
- he was issued a summons for the theft charge, and the summons was canceled when the charges were increased to burglary and robbery with a $100,000 bond, which he could not post. *Id*. at 133:11-25; 134:1-16.
- between his Arapahoe charges and his Boulder probation violation, he was in a real bind. As a result of this pressure, his attorney worked out an agreement with the prosecution that required him to testify in return for a deferred sentence on the Arapahoe theft charge and the

Boulder probation violation going away. Johnson acknowledged that his agreement with the prosecution allowed him to avoid prison and to get out of jail. He also acknowledged that his deferred judgment meant that if he complied with his supervision, the felony theft charge would be removed from his record. *Id*. at 137:19-25; 138; 139.

Johnson testified at the post-conviction hearing that:

- he was pressured into cooperating with the police and the prosecution in this case.
- Johnson admitted that he took a .45 caliber handgun from a woman known as Brittany and returned it to Ray after learning that it was Ray's gun. Johnson was on probation at the time and prohibited from possessing any firearms. Johnson admitted that he did not tell Fronapfel about this incident until she confronted him about it on September 5, 2006. Johnson also admitted that he had a 9 mm gun in December 2003 that was involved in the Boulder menacing case. When he was arrested on December 17, 2003, in Boulder for the menacing charge, the police found a shell casing in Johnson's pocket.
- he left Lowry Park the night of the shootings without speaking to the police because he wanted to avoid being a witness.

King testified at the post-conviction hearing that:

- he had the Boulder police report on Johnson's 2003 menacing case in his trial notebooks, but it was not referenced in his cross-examination notes. He also had Fronapfel's interview of Johnson about returning a .45 caliber firearm to Ray, but it was not referenced in his cross-examination notes.

- he did not obtain the court file or the transcript for Johnson's guilty plea in the Boulder case, which showed Johnson was required to cooperate in the prosecution of Johnson's codefendant. King acknowledged that while this would have been useful cross-examination, he had Johnson admit that his Boulder probation violation case went away. King suspected that Johnson's Boulder probation violation was resolved due to Johnson's cooperation in this case but did not obtain a transcript for Johnson's admission of the violation. He would have obtained that transcript if he knew the prosecution had interceded in the case.
- he filed a standard pretrial *Giglio* motion and was never told of Hower's practice of calling other prosecutors to alert them about witnesses cooperating with him.
- he did not have a tactical reason for not investigating Johnson's Boulder case more thoroughly except to note that he was absorbed in investigating and preparing the mitigation case. King added that time constraints were a big factor in deciding what issues should be investigated, and he did not have time to investigate collateral matters.
- he recalled the Boulder discovery referenced Johnson claiming that he gave away the 9 mm firearm he used in that incident to an unidentified person. He did not investigate the firearm even though Johnson was a possible alternate suspect in the Dayton Street homicides. King conceded that because the firearm was unavailable, there was no forensic testing available to link it to the 9 mm used to kill Marshall-Fields and Wolfe.

- he was aware of Johnson holding a .45 caliber firearm for Ray at some point in time but did not confront Johnson with this evidence. King also had Johnson's transcript from Ray's Lowry Park trial wherein Johnson testified that he went to his car to retrieve his gun at Lowry Park, and King did not confront Johnson with this evidence.

(b) Analysis

At trial, Johnson admitted he was pressured into cooperating in this case, and but for the pressure, he would not have revealed his information. He acknowledged that his Boulder probation precluded him from possessing a firearm and could be revoked if he possessed one or committed another crime. He did both. Johnson acknowledged that his probation violation case in Boulder ultimately went away due to his cooperation in this case. Far from being deficient, King established that Johnson was a person who used firearms, was pressured into testifying, had strong incentives for testifying in a way that would please the prosecution, and was handsomely rewarded for his testimony. This was a reasonable professional judgment that was well within the wide latitude afforded trial counsel in making tactical decisions. *See Richter*, 562 U.S. at 106 ("Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach." (quoting *Strickland*, 466 U.S. at 689)).

King was aware that Johnson had a 9 mm in December 2003 and had held a .45 caliber that belonged to Ray. With respect to the 9 mm, the court incorporates part V.D.3.a.ii(b)(iv) of this Order. In that part of the Order, the court relied on Hammond's testimony that the 9 mm used in Boulder in December 2003 did not match the 9 mm used at Lowry Park. With respect to the .45 caliber, there is no

evidence that it was used in the Dayton Street homicides because it has never been subjected to a forensic examination.

Owens complains that King was ineffective because he failed to obtain either Johnson's Boulder court file or the transcript for Johnson's Boulder guilty plea, which showed that Johnson was required to cooperate against a codefendant as part of his plea agreement. Just before Johnson began his testimony, King successfully argued for leave to ask Johnson about the extraordinary pressure brought upon him to cooperate. He was given a $100,000 bond for stealing a cell phone. After having Johnson admit the pressure, King took Johnson through the plea agreement that generously rewarded him with a deferred judgment. This testimony strongly supported the defense theory that the prosecution had purchased the testimony it was relying on. King's cross-examination was not ineffective under *Strickland*.

(vi) Alternate Suspect

Owens contends King was ineffective because he failed to use available evidence to create a defense that suggested Johnson did not reject Ray's offer of $10,000 to kill Marshall-Fields.

(a) Findings of Fact

Johnson testified on direct examination at trial that:

- he was an associate of Owens and Ray, and he would occasionally socialize with them. He was closer to Ray. Guilt Phase Tr. 21:11-17; 22:16-17 (Apr. 21, 2008 a.m.).
- he had a conversation with Ray at a gas station in January or February of 2005. Ray said that A. Martin and Marshall-Fields were witnesses in his case and asked Johnson what he knew about them. Ray told Johnson he was going to offer each of them $10,000 not to testify.

Then Ray offered Johnson $10,000 to kill them. Johnson told Ray that he would not do it. *Id*. at 27:20-25; 28:1-24; 29:15-25; 35:22-25; 36:1-6; 37:15-25; 38:1-11; 39:15-24.

- the next time he and Ray discussed the witnesses was during March or April 2005 at Club Vinyl, and the last time it was discussed was at the Father's Day barbecue. *Id*. at 31:9-25; 32:1-2; 34:6-20.
- at Club Vinyl, Ray again offered $10,000 to kill Marshall-Fields, and Ray stated that he was no longer worried about A. Martin. *Id*. at 40:8-25; 41:1-8.
- he recalled that no one said anything as Ray and Marshall-Fields passed each other at the Father's Day barbecue. He saw Marshall-Fields and Harrison leave in a Monte Carlo. After they left, Ray said that he was going to take matters into his own hands because Marshall-Fields was still going to testify and then Ray renewed his offer of $10,000 to have Marshall-Fields killed. *Id*. at 49:12-23; 50:2-5; 52:16-25; 53:1-6.
- Ray left shortly after Marshall-Fields and subsequently called Johnson and told Johnson to tell Harrison that he would pay Marshall-Fields $5,000 now and another $5,000 later if Marshall-Fields did not go to court. Johnson stated that he forgot to contact Harrison. *Id*. at 53:10-25; 54:1-20.

Johnson testified on cross-examination at trial that:

- Owens was not present for Johnson's three conversations with Ray about the Lowry Park witnesses. *Id*. at 140:2-25; 141:1-15.
- Owens was not with Ray at the Father's Day barbecue, and Marshall-Fields was with a man named Brent. Johnson further testified that

while Marshall-Fields was at the barbecue, Ray never spoke to Marshall-Fields or called out his name. *Id*. at 141:14-25; 142:1-15.

- Johnson never notified the police about his three conversations with Ray about the Lowry Park witnesses until he was in jail and had to strike a deal with the prosecution. *Id*. at 142:16-23.

King testified at the post-conviction hearing that:

- he wanted to ask Johnson about Ray offering Johnson $10,000 to kill the Lowry Park witnesses but forgot to do so. King acknowledged that Johnson's admission that he went to the barbershop after June 20, 2005, at Ray's request, could have been used to suggest that Ray paid him for the murders. King acknowledged that he was able to establish that Owens was not present when Johnson and Ray discussed the offer of $10,000 to kill the witnesses and that Ray never mentioned Owens during these conversations.
- he recalled that Johnson testified before the grand jury that Ray called him and told him to contact Harrison and offer Marshall-Fields $10,000 not to testify. King acknowledged that he should have impeached the police investigation for failing to obtain the phone records to corroborate Johnson's testimony. He viewed the phone records as a collateral matter and noted that there was no time available for investigating such issues.
- Johnson told Fronapfel on January 24, 2006, that he slept at his grandmother's house on June 20, 2005. He did not tell Fronapfel that he went to Schuylor Pearson's (Pearson) house before going home to sleep.

Johnson testified at the post-conviction hearing that:

- he told Fronapfel on January 24, 2006, that on June 19, 2005, he agreed to pass on Ray's offer of a $10,000 bribe for Marshall-Fields to Harrison. He testified that because he did not know Harrison's last name, phone number, or address, he had to get Harrison's phone number from a woman who worked with Harrison at a jersey store. Johnson also confirmed that he told Fronapfel that he started partying that night and forgot to call the woman. As a result, he never passed the bribe offer on to Harrison.
- he and Ray discussed killing the witnesses three times – in a parking lot, at Club Vinyl, and at the Father's Day barbecue. Johnson testified that it was apparent to him from Fronapfel's questions on January 24, 2006, that she did not know about Ray soliciting him to kill the witnesses.
- he did not know if Pearson had provided an alibi for him for June 20, 2005.
- on June 20, 2005, Johnson was at his friend's sister's house and from there went to sleep at his grandmother's house. His grandmother woke him up and asked if he knew the people on the television who were killed. He recognized the car on the television as Marshall-Fields's car.
- on June 21, 2005, he went to a friend's house where a group of people gathered and talked about the murders. Johnson suspected that Ray was responsible for the murders and that Owens was also involved.
- Johnson was afraid to cooperate because he thought Owens would kill him.

- he recalled that one or two days after the murders, Ray called him over to the barbershop, and they hung out with other people. He identified Todd as one of the people present at the barbershop.

Dickey testified at the post-conviction hearing that:

- he did not see Johnson shoot anyone and was never concerned with Johnson's involvement in what happened at Lowry Park.

(b) Analysis

King tried to suggest that Todd was an alternate suspect for the Dayton Street homicides. King's strategy was to place Todd in the shooter's car and suggest that Todd was the Chicago hitman who was paid $10,000 by Ray to kill Marshall-Fields. The evidence that Todd was an alternate suspect for the Dayton Street homicides was much stronger than the evidence that Johnson was an alternate suspect. In keeping with the defense theme that the prosecution purchased evidence for this case, King presented Johnson to the jury as a witness whose testimony was the result of governmental pressure and favorable treatment in two felony cases instead of portraying him as an alternate suspect.

Owens makes seven assertions concerning King's failure to present evidence suggesting Johnson was an alternate suspect for the Dayton Street homicides. First, Owens asserts that King failed to present evidence that Johnson agreed to facilitate Ray's offer to bribe Marshall-Fields not to testify. Johnson testified at trial that he agreed to pass along Ray's offer and forgot to do so. Because the jury was aware of Johnson's involvement in the bribe offer, there was no need for King to confront him on this topic.

Second, Owens asserts that King failed to present evidence that Johnson told Ray to give him the $10,000 and "I'll go do his work." Johnson admitted during the post-conviction hearing that he made those statements to Ray. However,

Johnson clarified that the "work" he was agreeing to do for Ray was relaying the bribe offer to Marshall-Fields. Johnson testified he was not agreeing to kill Marshall-Fields in exchange for $10,000.

Third, Owens asserts King failed to present evidence that Johnson had given conflicting accounts about where Ray had made the $10,000 bribe offer to him. On cross-examination at trial, King asked Johnson about Johnson's conversations with Ray between the Lowry Park shootings and Dayton Street homicides. Johnson admitted that he had talked to Ray at three locations: at a 7-Eleven, near a club, and at the Father's Day barbecue on June 19. With respect to these conversations and Johnson's phone conversation with Ray on June 19, King confirmed with Johnson that Owens was not present for any of the conversations Johnson had with Ray. King's purpose was to distance Owens from Ray's conversations with Johnson about bribing Marshall-Fields. Distancing Owens from Ray's conversations with Johnson was more beneficial to Owens than impeaching Johnson about where his conversations with Ray took place.

Fourth, Owens asserts that King failed to obtain Johnson's phone records to determine whether the records corroborated Johnson's testimony that Ray and Johnson discussed the bribe over the phone on June 19. Johnson testified at trial that the only time Ray called him was on June 19, 2005, when Ray asked Johnson to pass his bribe offer on to Marshall-Fields *via* Harrison. King testified at the post-conviction hearing that he viewed obtaining the phone records as a collateral matter. Whether Ray and Johnson spoke on the phone or in person was irrelevant to King's reasonable strategy of establishing that Owens was not present when Ray spoke to Johnson.

Fifth, Owens asserts that King failed to confront Johnson with how Johnson knew that Marshall-Fields's car was a gold Monte Carlo since Johnson did not

know Marshall-Fields. Johnson testified at trial that he saw Marshall-Fields visibly react to seeing Ray and leave the Father's Day barbecue in a gold Monte Carlo. Owens did not present any evidence that King could have used to impeach Johnson's testimony about how he knew the model of Marshall-Fields's car.

Sixth, Owens asserts that King failed to call Dickey to testify that he told the police that Johnson was involved in the Lowry Park shootings. When Dickey was asked at the post-conviction hearing about Johnson's involvement in the Lowry Park shootings, Dickey testified that he did not see Johnson shoot anyone at Lowry Park.

Seventh, Owens asserts that King did not present evidence indicating that Johnson could not provide a verifiable account for Johnson's whereabouts on the night of June 20, 2005. During his testimony at the post-conviction hearing, King acknowledged that he was aware that Johnson told Fronapfel that he slept at his grandmother's house on the night of June 20. However, King was unaware that Johnson had given differing accounts of where he was that night. King was also unaware that Pearson had told Pearson's probation officer that he was with Johnson on the night of the Dayton Street homicides. If King had confronted Johnson about his whereabouts on the night of June 20, King risked the prosecution presenting Pearson's testimony that he was with Johnson that night. Hence, Owens failed to prove that if King had confronted Johnson at trial he would have been unable to provide a verifiable account of his whereabouts.

Here, King developed a reasonable strategy for this trial, and Owens's assertions that King failed to present evidence suggesting Johnson as an alternate suspect ran counter to King's strategy. Thus, King did not render ineffective assistance of counsel under *Strickland* with respect to his decision not to cast Johnson as an alternate suspect.

(vii) Criminal Conduct

Owens argues King was ineffective because he did not present all of the available evidence about Johnson's criminal conduct.

(a) Findings of Fact

Owens presented evidence during the post-conviction hearing, which suggested that Johnson was involved in the following shooting incidents:

September 30, 2004 – Pearson shot

Johnson testified during the post-conviction hearing that in September 2004, at the request of J. Martin, he took Pearson to the hospital because Pearson had been shot. Johnson added that he was not present when Pearson was shot, but J. Martin was present.

King testified that a police report was in discovery about J. Martin shooting Pearson in 2004. King did not recall reviewing it and did not reference it in his cross-examination notes. King did not have Pearson interviewed.

October 17, 2004 – Dickey shot at an IHOP

David Cernich (Cernich) testified during the post-conviction hearing. Cernich was working as an off-duty officer at a hospital on October 17, 2004, when Dickey came in with a gunshot wound. Cernich learned that Dickey had been shot at an IHOP and that Johnson had been present at the IHOP when Dickey was shot. Johnson gave Cernich a description of the shooter.

J. Martin testified during the post-conviction hearing that he recalled a shooting incident that occurred in 2004 at an IHOP where Johnson was shooting at someone.

March 12, 2006 – Michael Ealy (M. Ealy) shot at Cherry Street Bar & Grill

Johnson testified during the post-conviction hearing that he was at the Cherry Street Bar and Grill on March 12, 2006, when his friend, M. Ealy, was shot

as they were leaving the bar. Johnson completed a witness statement on scene. Johnson used the name "Jay Johnston" on the statement to avoid being involved. Johnson contacted the police within a short time after the incident and fully cooperated.

Michael Valdez (Valdez) testified at the post-conviction hearing that he is a detective with the Glendale Police Department (GPD), and he was assigned to investigate the shooting that occurred at the Cherry Street Bar & Grill on March 12, 2006. Johnson witnessed the shooting, and he wrote his correct name and date of birth on a slip of paper and gave it to an officer. However, when Johnson completed a written statement, he provided a false name and false date of birth. The police knew Johnson's name because they made a system-wide query that night. Johnson was helpful at the scene and convinced M. Ealy to cooperate with the police. Within days of the incident, Johnson appeared at the GPD and provided additional helpful information to Valdez. Valdez testified that giving false identification to the police can be a crime, but he did not consider charging Johnson.

King testified that he was aware of Johnson's involvement in a shooting near Cherry Creek, but it was not referenced in his cross-examination notes.

April 12, 2006 – Waffle House shooting

J. Martin testified during the post-conviction hearing that he recalled an incident involving Johnson at a Waffle House that occurred sometime in 2006. According to J. Martin, he went to the Waffle House with his friends. At the Waffle House, Dickey hit someone and the other person's friends pulled out guns, which caused Dickey and Johnson to start shooting at them. J. Martin recalled that a 9 mm and a .45 caliber were involved in this incident. According to J. Martin, Johnson told J. Martin that he was worried about being charged for this incident.

Fronapfel testified at the post-conviction hearing that another APD detective asked her to interview Johnson about a shooting that occurred on April 12, 2006, at a Waffle House. She interviewed Johnson on January 17, 2007, after he testified at Owens's Lowry Park trial.[295] Johnson told Fronapfel that he and a couple of friends went to the Waffle House in the early morning hours. Upon arrival, Johnson saw a fight going on between a member of the Crips and a member of the Bloods. During the fight, a member of the Bloods started shooting, and Johnson and his friends ran to their car and left. Fronapfel did not ask him if he was armed or if he fired a weapon. She also did not ask him why he was in Colorado on April 12, 2006. She prepared a report of the interview and provided it to the lead detective for the Waffle House incident. She did not provide a copy of the report to the prosecutors in this case, and it was not disclosed to Owens's trial team.

Fronapfel researched the APD files and found that an incident report for the Waffle House shooting was never filed.

April 23, 2006 – Quincy Ealy (Q. Ealy) shot at an IHOP

Q. Ealy testified at the post-conviction hearing that Johnson was present when Q. Ealy was shot at an IHOP in April 2006.

Fronapfel found an incident report for a shooting at an IHOP on April 23, 2006. Johnson's name was not mentioned in the report.

Relevant Testimony

Johnson testified on direct examination at trial that he was charged in Arapahoe County in May 2005 for theft of a cell phone and that charges of burglary and robbery were added in September 2005. Guilt Phase Tr. 14:3-25; 15

[295] The disclosure of this report to Owens's post-conviction counsel caused Owens to file SOPC-312, which sought to amend or supplement SOPC-163 with a claim for outrageous government conduct based on the non-disclosure of Fronapfel's report.

(Apr. 21, 2008 a.m.). Johnson testified on cross-examination at trial that his first felony conviction was for menacing in Boulder County in December 2003. *Id*. at 132:3-25; 133:1-2.

King testified that he would have impeached Johnson with Johnson's criminal activity subsequent to Johnson's Arapahoe County plea agreement if he would have known about Johnson's criminal activity. King also testified that Kepros made tactical decisions regarding preparation for the guilt phase because he was focused on investigating and developing the mitigation case. He added that time constraints were the primary determinant for what could and could not be investigated.

(b) Analysis[296]

Johnson was present during four shootings between 2004 and 2006. At the scene of the shooting at the Cherry Street Bar & Grill, Johnson provided a false name and false date of birth on the written statement he provided to the police. However, the detective knew Johnson's identity. And Johnson provided a full statement to the detective within a few days of the incident. The detective never considered charging Johnson with providing false information.

The other evidence that Johnson was engaged in criminal activity during any of the incidents described above is J. Martin's testimony that Johnson fired a gun at an IHOP in 2004 and at a Waffle House in 2006. Owens does not explain what the theory of admissibility would have been at trial for J. Martin's testimony about Johnson's criminal conduct. Johnson admitted at trial that he had been charged with theft, robbery, and burglary in Arapahoe County and with menacing in Boulder County. Thus, the jury was aware that Johnson was engaged in criminal

[296] Owens provided only conclusory allegations on this claim.

conduct. Here, Johnson's involvement in the shooting incidents was of questionable relevance and admissibility. King's decision not to present additional evidence about Johnson's criminal conduct or cross-examine him regarding the shooting incidents was not ineffective under *Strickland*.

(viii) Miscellaneous Topics

(a) Evasive on Who Accompanied Him to Lowry Park

Owens argues that King was ineffective because he did not cross-examine Johnson about who went with Johnson to Lowry Park. Owens claims Johnson was evasive about who accompanied him to Lowry Park during his interview on August 4, 2005. Johnson testified at trial that Gaines and his friend named Mike accompanied him to Lowry Park. Guilt Phase Tr. 67:22-25; 68:1-17 (Apr. 21, 2008 a.m.). Johnson admitted that he gave Fronapfel false information about Lowry Park on August 4, 2005, because he did not want to be involved in the investigation. *Id*. at 61:3-12. Thus, King's failure to cross-examine Johnson about who went with him to Lowry Park was not ineffective under *Strickland*.

(b) Romantic Involvement with Sailor and Contact with Sailor After June 20, 2005

Owens claims King was ineffective because he did not expose that Johnson was romantically involved with Sailor and contacted her within days after the Dayton Street homicides. Both Sailor and Johnson deny that they ever had a romantic relationship. Owens based this claim on a recorded phone call. Sailor explained during her post-conviction testimony that her statement on the recording was misinterpreted by post-conviction counsel. She testified that she was having an affair with Jamal, not Jamar. Thus, the failure to cross-examine Johnson on this topic was not ineffective under *Strickland*.

(c) Involvement with Ray's Drug Distribution

Owens contends King was ineffective because King failed to confront Johnson about his involvement with Ray's drug distribution business. Confronting Johnson about his involvement with Ray's drug distribution business might have opened to the door to damaging evidence about Owens's involvement with Ray's drug distribution business. Prior to trial, Owens's trial team obtained an order precluding such evidence at the guilt phase. When Hower questioned Sailor about Ray's drug distribution at trial, King objected and cited the pretrial order precluding such evidence, which convinced the court to preclude such testimony. King's efforts to preclude testimony about Owens's involvement with Ray's drug distribution business were not ineffective under *Strickland*.

(d) Threatened by Fronapfel with Murder Charges

Owens claims King was ineffective because he did not cross-examine Johnson about Fronapfel's August 4, 2005, threats of charging him as a co-conspirator for the deaths of Marshall-Fields and Wolfe. Johnson admitted at trial that he became a cooperating witness because he was in custody and was charged with robbery, burglary, and theft. Guilt Phase Tr. 63:11-16 (Apr. 21, 2008 a.m.). During King's cross-examination of Johnson, King established that Johnson knew he was in a difficult situation when Fronapfel told him he had a "big hammer" over his head. *Id*. at 137:19-25; 138; 139. In addition, Johnson testified during the post-conviction hearing that he did not feel threatened by Fronapfel's threats to charge him as a co-conspirator because he knew that he was not culpable for the Dayton Street homicides. Thus, King's failure to cross-examine Johnson about being threatened by Fronapfel was not ineffective under *Strickland*.

(e) Tendency to Lie Under Oath

Owens claims King was ineffective because he did not use available evidence to show that Johnson had a tendency to lie under oath. As support, Owens cites to Johnson's allegedly false testimony to the grand jury, his allegedly false testimony about not being armed at Lowry Park, and his alleged encouragement and escalation of the Lowry Park confrontation.

Owens did not present any evidence during the post-conviction hearing to support the claim that there was available evidence to show Johnson testified falsely during the grand jury proceedings.

As for Johnson's claim that he did not have a gun at Lowry Park, Johnson testified in Ray's Lowry Park trial that he went to his car to get a gun when the confrontation began at Lowry Park. Johnson explained during the post-conviction hearing that his testimony in Ray's Lowry Park trial did not mean that he had a gun at Lowry Park. He also testified that he could not recall if he had a gun at Lowry Park or if he had a gun in his car while he was at Lowry Park.

As for escalating and encouraging the Lowry Park confrontation, the evidence offered by Owens to support this claim was Dickey's testimony. Dickey testified that he saw Johnson and Vann arguing at Lowry Park. Dickey also testified that he was able to calm things down because Johnson and Vann were both good friends of his.

King's failure to cross-examine Johnson about his tendency to lie under oath was not ineffective under *Strickland*.

(ix) Conclusion

The court concludes that Owens failed to prove that his trial team performed deficiently when it failed to impeach Johnson with available evidence. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or

omissions [of counsel] were outside the wide range of professionally competent assistance."). The court also concludes that Owens failed to prove that he was prejudiced by the manner in which his team addressed Johnson's credibility. *See id*. at 694 ("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."). Accordingly, Owens's motion to vacate his conviction and sentence based on his trial team's failure to impeach Johnson with certain available evidence is **Denied**.

(c) Checados Todd

(i) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to confront Todd with various inconsistent statements about his claimed lack of involvement in the Dayton Street homicides and by their failure to challenge his whereabouts at and around the time of the Dayton Street homicides.

(ii) Overview

Fronapfel and Cook County State's Attorney Investigator Brannigan interviewed Todd about the Dayton Street homicides on April 18, 2006. Eliassen and Heylin interviewed Todd's girlfriend, Alicia Humphries (Humphries), on April 19. Eliassen, Heylin, and Brannigan interviewed Todd again on April 20. Gonglach and D. Wilson interviewed Todd and Humphries on June 12.

Todd testified at Owens's Lowry Park preliminary hearing on July 10, 2006. The next day, Fronapfel and Todd drove around the south metro area together and visited various locations relevant to the Lowry Park and Dayton Street cases. Fronapfel asked Todd numerous questions during that drive around. Todd testified at a pretrial hearing in this case on June 13, 2007, and during the guilt phase on April 18, 2008. He testified at the post-conviction hearing on March 2, 2015.

King's trial notebook for Todd contained the reports of all of Todd's interviews, his criminal history, the defense interview of his girlfriend, the transcript of Todd's testimony in 2006, and the transcript of his testimony in 2007. King reviewed the materials, which consisted of hundreds of pages and prepared 18 pages of cross-examination notes. According to King, his notes were incomplete when Todd testified at trial.

King testified that he approached his cross-examination of Todd carefully because he had not interviewed Todd and he wanted to avoid giving the court any reason to preclude his efforts to establish Todd as an alternate suspect. King viewed Todd as a viable alternate suspect but wanted to avoid litigating and possibly losing the issue.[297] He testified that his approach was to present evidence to suggest that Todd was a hitman from Chicago who Ray brought to Colorado to kill Marshall-Fields. King added that whatever Owens said to him had no influence on his decision-making process for the trial.

Owens claims King failed to impeach Todd on the following topics:

(iii) Reasons for Coming to Colorado

Owens contends that King was ineffective because he did not use available evidence to confront Todd about his varying reasons for visiting Colorado.

(a) Findings of Fact

Todd told Fronapfel on April 18, 2006, that he traveled to Colorado to attend Ray's wedding reception and to console Ray for the loss of Ray's baby. SOPC.EX.D-478.

[297] King testified he thought he could have met the *Mulligan* standard that requires evidence that the alternate suspect committed some act connecting him or her to the crime. *People v. Mulligan*, 568 P.2d 449, 456 (Colo. 1977); *see also People v. Elmarr*, 351 P.3d 431, 440 (Colo. 2015) (*Mulligan* requires more than mere motive or opportunity to allow alternate suspect evidence).

Todd testified on direct examination at trial that:

- before he visited Colorado, he had talked to Ray about moving to Colorado. He wanted to check it out before deciding whether to move. Guilt Phase Tr. 31:12-18 (Apr. 17, 2008 a.m.).
- he did not attend Ray's wedding while he was in Colorado but did attend a family barbecue at Ray's house where he saw Ray's family members that he knew when Ray's family used to live in Chicago. *Id.* at 37:21-25; 38:3-16.

On cross-examination at trial, Todd testified that:

- his reasons for visiting Colorado were to evaluate whether he should move to Colorado, to offer sympathy for the loss of Ray's baby, and because he missed Ray's wedding. He attended a reception at Ray's house within a day or two of his arrival in Colorado but there was no wedding ceremony. *Id.* at 108:4-23.
- Ray pointed out the witness to him at the Father's Day barbecue, and Ray showed him the complex where the witness presumably lived. *Id.* at 127:16-25; 128:1-5.
- he was in Colorado when the murders occurred, and while he was in Colorado, Ray paid for everything. In addition to buying Todd's plane ticket, Ray gave Todd a place to stay, bought all of his food, bought him clothes, and gave him a cell phone to use. *Id.* at 131:4-25; 132:1-10.

Throughout Todd's guilt phase testimony, the event he attended at Ray's house shortly after he arrived in Colorado was referred to as a reception, party, and barbecue.

Todd testified during the post-conviction hearing that shortly after he arrived in Colorado, he attended a family barbecue at Ray's house and clarified that it was not a wedding reception.

(b) Analysis

Todd's reasons for visiting Colorado were covered on direct and cross-examination during the guilt phase. There was no need for King to cross-examine Todd further about why Todd visited Colorado, especially in light of the fact that when Todd told Fronapfel that he attended Ray's wedding reception, he was referring to a family barbecue at Ray's house that was held to celebrate Ray's marriage. Impeaching Todd on his description of the family gathering would not have had any impeachment value.

While Todd did not always give the same reason for visiting Colorado, his reasons were not mutually exclusive. Visiting Colorado to console Ray after the loss of Ray's baby, to celebrate Ray's marriage, and to decide if he wanted to move to Colorado were all valid reasons.

The primary purpose of King's cross-examination of Todd was to give support to the suggestion that Ray hired Todd to kill Marshall-Fields. Todd admitted on cross-examination that Ray paid for everything and that Ray pointed out the witness to Todd at the Father's Day barbecue.

Thus, King's failure to further cross-examine Todd about his reasons for coming to Colorado was not ineffective under *Strickland*.

(iv) The Nickname Chi Chi

Owens contends King was ineffective because he did not present evidence showing that Todd used the name Chi Chi in an effort to conceal his identity. According to Owens, King should have asked Todd about concealing his nickname in order to suggest that Todd was involved in illegal activity.

(a) Findings of Fact

When Fronapfel interviewed Todd on April 18, 2006, he told her that Carter called him Chi Chi because Carter could not pronounce his name. When Todd was interviewed two days later, he said that Owens called him Chi Chi because Owens could not pronounce his name. Then on June 13, 2007, Todd testified that Owens called him Chi Chi.

Todd testified on cross-examination at trial that his nickname while growing up was Scooter and that Ray knew him by that nickname. Guilt Phase Tr. 106:25; 107:1-5 (Apr. 17, 2008 a.m.).

Huntington was housed in the ACDF with Carter for three to four weeks in October 2005. Guilt Phase Tr. 10:13-25; 11:1-11 (May 5, 2008). Huntington testified at trial that Carter told him about killing people who were witnesses to a prior shooting because they were going to testify. *Id.* at 14:8-23. Huntington also testified that Carter told him that someone named "Chi" from Chicago was paid $10,000 for committing the murders. *Id.* at 14:24-25; 15:1-15, 23-25; 16:1-6.

Todd testified during the post-conviction hearing that Owens called him Chi Chi because Owens could not pronounce Todd's first name.

King had all of Todd's statements and testimony about who called him Chi Chi in his cross-examination notes for Todd. King did not recall during the post-conviction hearing whether he considered Todd's inconsistent statements about who gave him the nickname Chi Chi as evidence that Todd was an alternate suspect. King viewed Todd's nickname as an unproductive area of impeachment because Sailor corroborated Todd's testimony that Owens called Todd by the nickname Chi Chi.

(b) Analysis

Owens's trial team called Huntington to testify at trial. Huntington told the jury that, according to Carter, someone named "Chi" from Chicago killed the witness and was paid $10,000 for committing the murder. The implication was that Carter was describing Todd. Hence, the question of who gave Todd the nickname Chi Chi was superfluous. Thus, King's decision to forgo cross-examining Todd about who gave him the nickname Chi Chi was not ineffective under *Strickland*.

(v) Length of Stay in Colorado

Owens contends King was ineffective because he did not use Fronapfel's questioning of Todd about how long Todd stayed in Colorado to show that Todd was trying to conceal his involvement in the Dayton Street homicides.

(a) Findings of Fact

Todd told Fronapfel on April 18, 2006, that he stayed in Colorado for three days. SOPC.EX.D-478, p. 15. He also told her that he intended to stay in Colorado for no more than three or four days. *Id.* at 115. During the interview, Fronapfel confronted Todd with his travel itinerary, which showed that he was originally scheduled to be in Colorado from June 3 to June 19 and that he actually returned to Chicago on June 22. *Id.* at 21. Todd acknowledged that those dates were correct.

Todd testified during the guilt phase that he arrived in Colorado on June 3, 2005. Guilt Phase Tr. 107:22-23 (Apr. 17, 2008 a.m.). He also testified that he was supposed to return to Chicago on June 19. *Id.* at 132:23-35; 133:1.

During the post-conviction hearing, Todd explained that he originally intended to stay in Colorado for three days. According to Todd, that was why he told Fronapfel he was in Colorado for three days.

(b) Analysis

According to Owens, Todd's statement to Fronapfel that he stayed in Colorado for three days indicates that Todd was attempting to hide his involvement in the Dayton Street homicides. According to Todd, he misunderstood Fronapfel's question when he told her that he was in Colorado for only three days. His explanation is reasonable given that he told Fronapfel later in the interview that he intended to stay in Colorado for three days and acknowledged that he returned to Chicago on June 22. Moreover, during the guilt phase, Todd did not try to conceal that he was in Colorado when the Dayton Street homicides occurred. He testified that he was in Colorado for almost three weeks, including on the night of the Dayton Street homicides. Thus, King's failure to impeach Todd with his statement to Fronapfel that he stayed in Colorado for three days was not ineffective under *Strickland*.

(vi) Knowledge of Ray's Charges

Owens contends that King was ineffective because he did not highlight Todd's initial claims to the police that he did not know the nature of Ray's Lowry Park charges. According to Owens, Todd's claims together with his admission that he went to court with Ray is evidence of Todd's consciousness of guilt. Owens further contends that King should have highlighted that Todd went to court with Ray in order to suggest that Todd went to court to identify Marshall-Fields.

(a) Findings of Fact

Todd testified on direct examination during the guilt phase that:

- Ray told him that Ray had a court case that involved a shooter getting into his car and that there was a witness who could identify Ray. Ray told him that he had offered money to the witness but the witness had

refused to talk to him. Guilt Phase Tr. 39; 12-25; 40; 41 (Apr. 17, 2008 a.m.).

- he went to court with Ray. *Id.* at 59:15-25; 60:1-5.

Fronapfel testified during the post-conviction hearing that she collected surveillance photos from the courthouse surveillance camera from the dates that Ray appeared in court on his Lowry Park case. She testified that the photos were of poor quality. Thus, she never identified Todd in the photos and never showed the photos to Todd. But Todd testified during the post-conviction hearing that he admitted going to court with Ray after he was shown photos of himself from a courthouse surveillance camera.

During the post-conviction hearing, Todd recalled going to court with Ray. He also recalled that Owens and Carter went to court with them but that Sailor did not go to court. Todd reiterated that Ray never gave him details about the Lowry Park case except to say that a guy, who Ray never identified, got into his car after an incident. Todd testified that most of his knowledge about the Lowry Park case came from Fronapfel asking him questions.

(b) Analysis

The essence of Owens's contention seems to be that King did not confront Todd with Todd's alleged concealment of the fact that he went to court with Ray to identify Marshall-Fields. But Todd testified during the guilt phase that he went to court with Ray; thus, the jurors were given information from which they could have inferred that Todd went to court in order to identify Marshall-Fields. Moreover, if King had revisited this topic with Todd on cross-examination, Todd might have testified, as he did during the post-conviction hearing, that Owens and Carter also went to court. The evidence already established that Todd went to court with Ray and further pursuing this line of questioning could have resulted in

the jury believing that Owens went to court in order to identify Marshall-Fields. King's cross-examination of Todd was not ineffective under *Strickland*.

(vii) Owens's Presence During Surveillance of Victim's Location

Owens contends King was ineffective because he did not cross-examine Todd about Todd's statements that Ray, Owens, and Carter followed Marshall-Fields's car and surveilled Marshall-Fields's apartment complex during the weekend before Marshall-Fields was killed.

(a) Findings of Fact

Todd's testified on direct examination during the guilt phase that:

- while Ray was showing him around Denver, Ray noticed a gold two-door Monte Carlo in an apartment complex parking lot and commented that it looked like the witness's car. Guilt Phase Tr. 42:13-18; 52:10-16 (Apr. 17, 2008 a.m.).
- after seeing the witness's car, Ray and Todd went to the barbershop, picked up Owens and Carter, and returned to the apartment complex. Owens and Carter recognized the Monte Carlo as the witness's car. *Id.* at 52; 20-25; 53; 54; 55:1-13.
- they waited, hoping that the witness would come outside so that Ray could talk to him. While waiting, Ray and Owens discussed whether the witness lived in the apartment complex. They left after approximately 15 to 20 minutes because the witness did not come outside. *Id.* at 55:15-25; 56:1-20.
- he went to the Father's Day barbecue with Ray. After leaving the Father's Day barbecue, he went with Ray, Owens, and Carter to

Gibby's. They saw the witness's car in the parking lot. *Id.* at 67:23-25; 68:1-20; 70:1-20; 71:15-19; 73:25; 74:1.

- while parked outside Gibby's, Owens suggested that Carter should go inside and tell the witness that Owens was going to kill him and his family if he testified. Carter was selected to threaten the witness because the witness knew Owens and Ray but not Carter. *Id.* at 72:22-24; 73:24-25; 74:1-2; 74:6-9.
- Carter went into Gibby's and was inside for approximately 15 minutes. When Carter returned, Carter said the witness did not respond to Carter's threats. *Id.* at 75:16-25; 76:1-23.
- the witness, three women, and two men left Gibby's approximately five minutes after Carter left Gibby's. The witness and the people he was with got in their cars and drove away. One of the cars was the gold Monte Carlo. Ray did not follow the Monte Carlo. *Id.* at 77:3-25; 78:1-10.

Todd testified on cross-examination that:

- Owens was not present when Ray initially pointed out the witness's car and where Ray suspected the witness lived. *Id.* at 110:13-23; 111:6- 25.

Todd testified during the post-conviction hearing that he did not recall telling Fronapfel on April 18, 2006, that the witness was followed on the Saturday and Sunday before the witness was killed or that Todd, along with Ray, Owens, and Carter, surveilled the witness's apartment complex late at night. Todd also testified that Fronapfel's report was erroneous because he never told her that the witness had been followed. Todd confirmed that Fronapfel's report about his

rendition of the conversation among Ray, Owens, Carter, and Todd as they sat in the Gibby's parking lot was accurate.

(b) Analysis

Owens argues King performed deficiently because he did not confront Todd with his April 18, 2006, statement that Todd participated in surveilling the witness's car on multiple occasions and surveilled the witness's apartment complex late at night. Owens argues King should have cross-examined Todd on these points in order to shift blame for the Dayton Street homicides from Owens to Todd. Todd's statements not only implicate Todd but also implicate Owens. The evidence had already established that Todd was present when Marshall-Fields's car and apartment complex were being surveilled.

King's failure to cross-examine Todd about Todd telling Fronapfel that he surveilled the witness's apartment complex and car together with Ray, Owens, and Carter was not ineffective under *Strickland*.

(viii) Father's Day Barbecue

Owens contends King was ineffective because he did not cross-examine Todd about the contradictory statements Todd made regarding the Father's Day barbecue.

(a) Findings of Fact

Todd testified on direct examination during the guilt phase that:

- Ray took him to a picnic in a park on Father's Day. While there, Ray called out to the witness. The witness did not respond to Ray and kept walking. Guilt Phase Tr. 64:13-25; 65:1-5 (Apr. 17, 2008 a.m.).
- he and Ray were later joined by Owens and Carter at the barbecue. He did not recall meeting anyone at the park named Johnson or J-5. *Id.* at 66:2-6, 12-16.

Todd testified on cross-examination during the guilt phase that:

- he saw the witness twice – once at the barbecue and once at Gibby's. However, he never got a good look at the witness's face because the witness was always too far away. *Id.* at 112:6-14.
- Owens and Carter were not at the barbecue when he and Ray saw the witness. *Id.* at 115:9-14.

During the post-conviction hearing, Todd admitted that he initially denied going to the Father's Day barbecue when Fronapfel interviewed him on April 18, 2006. Todd explained that he initially denied going to the barbecue because Ray had told him that they were going to the park to play a softball game. Todd testified that Owens and Carter were already at the barbecue when he and Ray arrived. Todd denied that he told Fronapfel on July 11, 2006, that he went with Ray, Owens, and Carter to the Father's Day barbecue.

(b) Analysis

Owens argues that King should have confronted Todd with the fact that Todd initially denied being at the Father's Day barbecue and that Todd later admitted being at the barbecue but said that he never got out of the car. Owens claims that because Todd changed his story when confronted by Fronapfel, Todd's contradictory statements show that he was trying to shift the blame away from himself to others.

King's approach to cross-examining Todd about the Father's Day barbecue was to minimize Owens's presence at the barbecue. Todd testified on cross-examination at trial that Owens was not present when Ray called out to the witness. Eliciting this information was a reasonable approach, and King's decision to forgo impeaching Todd with Todd's inconsistent statements about the Father's Day barbecue was not ineffective under *Strickland*.

(ix) Whereabouts on June 20, 2005

Owens contends King was ineffective because he did not investigate Todd's whereabouts at the time of the Dayton Street homicides and did not cross-examine Todd with Todd's inconsistent statements about the events that evening.

(a) Findings of Fact

Todd testified on direct examination during the guilt phase that:

- while he was at the barbershop on June 20, 2005, Ray asked him to wait for a shipment of women's hair dryers. Guilt Phase Tr. 79:22-24; 80:6-20; 84:8-15 (Apr. 17, 2008 a.m.).
- before Ray and Sailor left the barbershop on June 20, 2005, Ray told Todd that Ray would meet him later at Carter, Sr.'s house and that Ray would give him directions to the house over the walkie-talkie function on their phones. He stayed at the barbershop for two to three hours until Ray contacted him. The barbershop was still open when he left. *Id.* at 84:16-25; 85:1; 86:3-5; 86:14-20, 23-25; 87:1, 23-25.
- it was starting to get dark by the time he reached Carter, Sr.'s house. *Id.* at 87:6-10, 20-22; 88:1-11; 90:9-14.
- while he was at Carter, Sr.'s house, he watched the news. *Id.* at 98:4-8, 15-16.

Todd testified on cross-examination that:

- Ray left the barbershop in the afternoon on June 20, 2005. He did not recall testifying previously that Ray left around 5:00 p.m.[298] *Id.* at 119:1-9.

[298] On June 10, 2006, Todd testified that Owens and Carter left the barbershop in the Park Avenue at approximately 5:00 p.m. Pretrial Hrg Tr. 132:4-25 (July 10, 2006). He also testified

- Ray was gone a couple of hours before he chirped Todd on the walkie-talkie phone. *Id.* at 119:13-19.
- after Ray left the barbershop, Todd was alone in the barbershop office, watched the surveillance screens, and waited for the shipment to arrive. *Id.* at 119:20-25; 120:1-5.

King testified during the post-conviction hearing that he did not investigate whether anything was delivered to the barbershop on June 20, 2005, because of a lack of time. He also testified that, due to time constraints, the trial team did not investigate Todd's whereabouts at the time of the murders and did not interview the barbers to determine if they could corroborate Todd's story.

At the post-conviction hearing, Todd denied that he was involved in the murders of Marshall-Fields and Wolfe. Todd maintained that he did not know what time the murders occurred but knew he was at Carter, Sr.'s house when the murders occurred. Todd explained that on April 18, 2006, when he told Fronapfel that he was with Ray and not with Owens and Carter at the time of the murders, it was because Ray was at Carter, Sr.'s house when he arrived. Todd also explained that on April 18, 2006, when he told Fronapfel that Ray was with Sailor at the time of the murders, it was based on seeing them leave the barbershop together earlier that afternoon.

Todd did not recall telling Fronapfel that he waited at the barbershop for a candy machine to be repaired or restocked.

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that he arrived at Carter, Sr.'s house at approximately 8:00 p.m., when it was getting dark. *Id.* at 135:5-17.

Todd acknowledged that he testified at trial that he was waiting for hair dryers and that there were barbers present at the same time. However, Todd did not believe hair dryers were delivered that day.

Todd estimated that Owens and Carter left the barbershop at approximately 2:00 p.m., shortly after Ray and Sailor left. Todd acknowledged that in his second police interview on April 20, 2006, he also said they left around 2:00 p.m. Todd recalled that it was getting dark outside by the time he left the barbershop and was dark by the time he reached Carter, Sr.'s house.

(b) Analysis

Owens faults King for failing to investigate whether a delivery was made to the barbershop on June 20, 2005. Documentation of a delivery would have been contrary to King's approach to Todd's cross-examination, which was to demonstrate the lack of corroborative evidence of Todd's whereabouts on June 20, 2005.

According to Owens, King should have cross-examined Todd with Todd's inconsistent statements about his whereabouts on June 20, 2005. Instead of using Todd's inconsistent statements to impeach Todd, King designed his cross-examination to show that there was no corroborating evidence for Todd's whereabouts on June 20, 2005. Todd's story seemed to be that he was alone at the barbershop for several hours while watching surveillance cameras and waiting for a delivery. The credibility of the story was questionable. Impeaching Todd with his prior inconsistent statements would have led to the possibility that the prosecution would bolster Todd's credibility during redirect examination by pointing out all of Todd's prior consistent statements. *See People v. Eppens*, 979 P.2d 14, 19 (Colo. 1999) (prior consistent statements are admissible when offered to refute an allegation of improper influence or motive).

Thus, King's failures do not amount to ineffective assistance of counsel under *Strickland*.

(x) Activities on June 21, 2005

Owens contends King was ineffective because he did not confront Todd with Todd's statement that he went to Carter, Sr.'s house on the day after the Dayton Street homicides. Owens also contends King was ineffective because he did not show that Todd denied being at the barbershop on the day after the Dayton Street homicides until he was confronted with evidence demonstrating that he was at the barbershop that day.

(a) Findings of Fact

When Fronapfel interviewed Todd on April 18, 2006, Todd told her that on the day before he left Colorado, which was the day after the Dayton Street homicides, he went to Carter, Sr.'s house to play pool. He said he hung out at Carter, Sr.'s house and then went to Ray's house to pack his bag and to sleep. Then Fronapfel directly asked Todd whether he went to the barbershop that day. She told him that she knew the answer to her question. Todd admitted that he went to the barbershop that day, and he explained that he went to the barbershop with Ray to close the barbershop before they went to Carter, Sr.'s house. Shortly thereafter, Fronapfel asked Todd whether anything had happened with a duffle bag while he was at the barbershop. Todd denied knowing anything about a duffle bag. Toward the end of the interview, Fronapfel revisited the topic about the duffle bag. Todd acknowledged seeing the duffle bag and told her that there were probably drugs, money, and guns in the bag. He said that Owens and Carter took the bag to a barber's apartment. Todd also said that Ray had previously shown him a big gun that Ray kept in the bag. SOPC.EX.D-478.

Todd testified on direct examination during the guilt phase that:

- on June 21, 2005, he and Ray went to the barbershop in the morning. Owens and Carter were also there. While at the barbershop, he saw an older barber with a duffle bag. Ray had shown the bag to Todd and the bag contained a disassembled military-type firearm. Owens obtained keys from the barber, and Owens and the barber left the barbershop with the duffle bag. Owens and the barber walked up the alley and returned in approximately five minutes without the duffle bag. Guilt Phase Tr. 98:4-8, 15-16; 99:7-11, 17-25; 100:1-18; 101:8-17; 102; 12-25; 103:1-13 (Apr. 17, 2008 a.m.)

Todd testified on cross-examination during the guilt phase that:

- at some point on June 21, 2005, Ray showed him the duffle bag with a disassembled long firearm. Ray told him that Ray kept it in a closet at the studio for protection. *Id.* at 109:24-25; 110:1-7.

King testified during the post-conviction hearing that he did not do a comparison of Todd's statements about the duffle bag.

During the post-conviction hearing, Todd acknowledged that he initially told Fronapfel that on June 21, 2005, he went to Carter, Sr.'s house. Todd explained that he was confused when he was talking to Fronapfel. According to Todd, a lot of the confusion was caused by the way Fronapfel was asking questions.

Todd testified that he and Ray followed their usual routine and went to the barbershop on June 21, 2005. He confirmed that he saw Owens move the duffle bag out of the barbershop.

(b) Analysis

Todd's initial denial about being at the barbershop and knowing about the duffle bag tend to show that Todd was trying to conceal his involvement in the Dayton Street homicides. However, Todd admitted at trial that he was at the

barbershop on June 21 and knew that the duffle bag that Owens brought to the barber's apartment had at least one gun in it. Todd's admissions carried significant impeachment value because his admissions suggested that Todd was also involved in the Dayton Street homicides. Thus, King's cross-examination supported the defense theory that Todd was a viable alternate suspect. King's failure to cross-examine Todd with his initial statements that he did not go to the barbershop and did not know about a duffle bag was not ineffective under *Strickland*.

(xi) Delayed Departure from Denver

Owens contends that King was ineffective because he failed to cross-examine Todd about Todd's various explanations for the cancellation of his flight from Denver to Chicago. According to Owens, King should have used Todd's various explanations to suggest to the jury that Todd missed his flight in order to stay in Denver and participate in the Dayton Street homicides.

(a) Findings of Fact

On April 18, 2006, Todd told Fronapfel that he missed his flight on June 19, 2005, because he was late arriving at the airport. On April 20, 2006, Todd told Heylin that Ray had told Todd that Todd missed the June 19 flight but did not give him a reason for why he missed it. He also told Heylin that he had told his girlfriend that his flight was delayed due to weather and that there was snow on the ground while he was in Colorado.

Todd testified on July 10, 2006, that he missed the June 19 flight because a flight attendant told him that there was a problem at the airport.

Todd testified on direct examination during the guilt phase that:

- he had planned to leave Colorado on June 19, 2005, but Ray told him the flight was cancelled due to something going wrong at the airport. Guilt Phase Tr. 61:5-25; 62:1-13 (Apr. 17, 2008 a.m.).

- Ray's mother took care of his reservation so he accepted what Ray told him. *Id.* at 61:5-25; 62:1-13.
- He wanted to leave on June 19 because it was Father's Day and he had a son who had been injured in an accident. *Id.* at 61:5-25; 62:1-13.
- Ray's mother bought his airline ticket with a return date of June 19 and on June 18, both she and Ray told him that his flight was cancelled because something, such as weather or a flight attendant problem, was wrong at the airport. *Id.* at 132:11-25; 133:1-22.

Todd testified on cross-examination that:

- at the time of his scheduled departure, he was concerned for his son because his son had fallen down the stairs and received stitches. *Id.* at 133:23-25; 134:1-21.
- nevertheless, he did not leave on June 19. *Id.* at 133:23-25; 134:1-21.
- he relied on Ray and Ray's mother and never checked the status of his flight himself. *Id.* at 133:23-25; 134:1-21.

Todd explained during the post-conviction hearing that he was not trying to tell the police that his flight was canceled due to snow. He explained that he saw some snow in a corner by Ray's house. Todd also explained that because Ray bought his ticket and because he was on vacation, he did not verify the reasons Ray gave him for why the flight was cancelled.

(b) Analysis

Todd's reasons for his delayed departure from Colorado were covered during the guilt phase. In particular, Todd testified on cross-examination that he was told that some of the reasons that his flight was cancelled on June 19 included bad weather and flight attendant problems. Todd also admitted that he delayed his

departure even though his son had been injured. King's cross-examination showed that these reasons were strange and unverified. King developed Todd's unlikely explanations for why his flight was cancelled and then highlighted the fact that he delayed his departure even after learning that his son had been injured. In short, his cross-examination of Todd about why he delayed his departure from Denver was not ineffective under *Strickland*.

(xii) Miscellaneous Topics

(a) Communications with Ray after Returning to Chicago

Owens contends King was ineffective because he did not expose the inconsistency in Todd's statements about his contact with Ray after he left Colorado. Todd initially told Fronapfel that he did not speak to Ray after he left Colorado. During the guilt phase, Todd testified that he had one conversation with Ray after he left Colorado. Guilt Phase Tr. 124:2-8 (Apr. 17, 2008 a.m.). King testified that Todd's trial testimony was favorable because it could suggest that Ray and Todd maintained contact in order to keep their stories straight or so that Ray could pay Todd. Impeaching Todd on his inconsistent statements would have undercut Todd's favorable trial testimony that Ray and Todd maintained contact after Todd left Colorado. Hence, King's decision to forgo impeaching Todd on his inconsistent statements was not ineffective under *Strickland*.

(b) Communications with Sailor after June 20, 2005

Owens contends King was ineffective because he did not ask Todd whether Todd used the phone Ray bought for him to communicate with Sailor. Owens contends King should have questioned Todd about the phone to suggest that Todd and Sailor had a close relationship. Todd testified at the post-conviction hearing

that he did not recall speaking to Sailor after he left Colorado. Sailor testified at the post-conviction hearing that she recalled receiving one call from Todd after he left Colorado. Both Sailor and Todd testified that they had minimum contact with each other during Todd's stay in Colorado. Sailor added that Todd was not important to her. Regardless of whether Todd used the phone to communicate with Sailor, both Todd and Sailor would have testified during the guilt phase that they did not have a close relationship. Thus, King's failure to cross-examine Todd about his communications with Sailor was not ineffective under *Strickland*.

(c) Story Implicating Owens

Owens contends King was ineffective because he did not confront Todd with the fact that Todd only implicated Owens and Carter in the Dayton Street homicides after the police told Todd that Owens and Carter were implicating him for the homicides. Todd testified during the guilt phase that the police repeatedly told him on April 18, 2006, that there were people in Colorado trying to pin the double homicide on him. Guilt Phase Tr. 124:9-25; 125:1-24 (Apr. 17, 2008 a.m.). Thus, King's failure to cross-examine Todd on this point was not ineffective under *Strickland* because the jury had already received the evidence from which they could infer that Todd implicated Owens only after law enforcement told Todd that Owens was implicating him.

(d) Account of Owens's Flight from Denver

Owens contends King was ineffective because he did not investigate or present evidence to contradict Todd's testimony that he briefly spoke to Owens on June 22, 2005, at the airport. On direct examination during the guilt phase, Todd testified that he saw Owens at the airport on June 22 and that Owens told him he had to take care of some business but would be back. *Id.* at 103:14-18; 104:15-24; 105:3-4. On cross-examination, Todd testified that Owens did not say where he

was going. *Id.* at 135:5-20. Owens did not present any evidence during the post-conviction hearing that contradicted Todd's testimony about talking to Owens at the airport.

(xiii) Conclusion

The court concludes that Owens failed to prove that his trial team performed deficiently when it failed to impeach Todd with available evidence. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance."). While there may be one area in which a more vigorous cross-examination with prior inconsistent statements might have been considered,[299] the court concludes that Owens failed to prove that he was prejudiced by the manner in which his team addressed Todd's credibility. *See id.* at 694 ("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."). Accordingly, Owens's motion to vacate his conviction and sentence based on his trial team's failure to impeach Todd with certain available evidence is **Denied**.

(d) Gregory Strickland

(i) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to obtain and present evidence that would have portrayed Strickland as a professional informant and by his trial team's failure to attack Strickland's credibility with his criminal history and jail disciplinary records.

[299] "Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment." *Strickland*, 466 U.S. at 681.

(ii) Overview

Owens's trial team filed SO-53 seeking disclosure from the prosecution of any information pertaining to Strickland, among other witnesses, acting as a professional informant.

In late 2007, King assigned Kepros to cross-examine Strickland at trial. Kepros was familiar with Strickland because she examined him on June 13, 2007, at a pretrial hearing on the admissibility of the statements Carter made to Strickland. Kepros's file shows that she researched the admissibility of Strickland's testimony. At that hearing, Kepros questioned Strickland about Carter's dislike of Owens.

To prepare for Strickland's cross-examination, Kepros reviewed a 125-page judicial database printout for Strickland and gathered 18 transcripts, including his grand jury testimony and transcripts of his guilty pleas and sentencing hearings. She also obtained his criminal history and Blackstone report. From those documents, Kepros identified cases where Strickland had acted as a government informant, and she made a list of the benefits he had sought and/or received in exchange for his cooperation. Kepros compiled the documents into five notebooks and a 350-page file. Kepros testified that the volume of materials she gathered was so large that it was difficult to prepare for Strickland's cross-examination.

In general, Kepros tried to gather any evidence that might have affected Strickland's credibility. She checked the media reports pertaining to this case in an effort to determine whether Strickland could have gathered information about this case from those reports. She also accessed a file in the Arapahoe PDO on Strickland that had been compiled by other DPDs in that office. The file was prepared because of the numerous homicide cases in which Strickland was an endorsed prosecution witness. She also conferred with the various DPDs who had

prepared to cross-examine Strickland. She assigned an investigator to monitor Strickland's testimony in a case in Denver in 2007, reviewed Strickland's ACDF records, and listened to Strickland's recorded interviews with the APD.

Kepros did not try to interview Strickland, and she did not issue subpoenas *duces tecum* for all of the cases in which Strickland was a witness. She also did not obtain Strickland's pre-sentence investigation report. She was aware that Strickland's competency had been raised by his attorney and requested the transcripts pertaining to that situation. She could not recall whether she reviewed those transcripts.

In Reynolds's opinion, Kepros's performance was deficient with respect to Strickland because Kepros did not obtain and review all of the material pertaining to Strickland. Reynolds faulted Kepros for failing to present additional evidence on Strickland's lack of credibility.

Owens claims Kepros failed to impeach Strickland on the following topics:

(iii) Amount of Time Strickland and Carter Shared a Cell

Owens contends Kepros was ineffective because she did not present evidence during a pretrial motions hearing about the amount of time Strickland and Carter shared a cell. Owens also contends Kepros was ineffective because she failed to impeach Strickland during the guilt phase about the amount of time he shared a cell with Carter.

(a) Findings of Fact

Strickland testified during the guilt phase that he was housed with Carter for the month of November 2005. Guilt Phase Tr. 85:2-23 (Apr. 25, 2008 p.m.).

Kepros recalled receiving Strickland's ACDF housing records in discovery yet she did not use the housing records to contradict Strickland's testimony about the amount of time he shared a cell with Carter.

Lieutenant Nathan Fogg (Fogg) testified during the post-conviction hearing about various ACDF housing records. Fogg is employed by the ACSO and is familiar with inmate housing records for the ACDF. Fogg reviewed the housing records for Strickland, Carter, and Patrick Scott (Scott), and he testified that those three men shared the same cell from December 10 to 13, 2005. Fogg added that all three men were in the same pod and therefore shared the same day room from December 3 to December 13, 2005.

(b) Analysis

Owens argues Kepros was ineffective because she did not present Strickland's housing records at the pretrial hearing regarding the admissibility of Carter's statements. After that pretrial hearing, the court issued Order (SO) No. 11 and found that Strickland's testimony about Carter's statements would be admissible at trial. The court noted in its Order that Kepros had argued during the hearing that Strickland and Carter shared a cell for seven days. Thus, Kepros used Strickland's housing records to argue that Strickland and Carter had not spent sufficient time together for Strickland to learn information from Carter. Based on the evidence presented at the post-conviction hearing, there was no other information available to Kepros that she could have used to supplement her argument to exclude Strickland's testimony about Carter's statements.

Owens also argues that Kepros failed to impeach Strickland during the guilt phase about how much time he had been housed with Carter. In December 2005, Strickland and Carter were in the same pod for 10 days and they shared a cell for three days. In April 2008, Strickland testified that he and Carter shared a cell for a

month. Kepros could reasonably have used the ACDF housing records for Strickland and Carter during her cross-examination of Strickland to clarify that he and Carter shared a cell for only three days. However, given that Strickland testified almost two and a half years after he and Carter shared a cell, cross-examining Strickland on this point would not have significantly impeached his credibility. But it would have documented the fact that he had the opportunity to listen to Carter.

Thus, as to this point, neither Kepros's pretrial hearing argument nor her cross-examination of Strickland was ineffective under *Strickland*.

(iv) Reputation as a Professional Informant

Owens contends Kepros was ineffective because she did not present evidence that Strickland had a reputation as a professional informant. He also contends Kepros was ineffective because she did not obtain records from Denver, Aurora, and the ACDF to show that Strickland was an informant before he became a cooperating witness in this case.

(a) Findings of Fact

The court incorporates part IV.D.3.d.i of this Order as though fully set forth herein.

Strickland testified on cross-examination during the guilt phase that:

- he provided false information implicating Banks in a homicide; his claims that he had witnessed the homicide were false; and he gave false information in an effort to get himself out of trouble for possessing a shank in the ACDF. Guilt Phase Tr. 79:3-25; 80; 81:1-15 (Apr. 25, 2008 p.m.).

- he was concerned about felony contraband charges and administrative disciplinary actions inside the ACDF after he was caught with the shank. *Id.* at 81:16-25; 82:1-3.
- he was a witness against eight homicide defendants since October 15, 2005, and had also given information in a Denver case involving rape, kidnapping, and robbery. *Id.* at 94; 95:1-10.[300]

On recross-examination, Strickland testified that:

- he lied about being at the scene of the Banks homicide because it helped him. *Id.* at 126:11-22.

Kepros testified that Strickland's role in the Banks case was an important part of her cross-examination. Kepros also testified that she regularly exchanged information about Strickland with other DPDs in the Arapahoe PDO who were representing other defendants in cases with Strickland as an endorsed prosecution witness. Kepros noted that the exchanges occurred because all of the DPDs involved had their client's consent.

Strickland recalled during the post-conviction hearing that another inmate who accused him of being a snitch had accosted him in a jail or prison. Based on that incident, Strickland was aware that he had a reputation as a jailhouse informant.[301]

(b) Analysis

Owens claimed in the government misconduct section of SOPC-163 that the prosecution failed to disclose that Strickland was an informant in five cases before

[300] Strickland disputed that he was witness against Lamar Rosely.

[301] However, Strickland testified during the post-conviction hearing that he was not known as an informant inside the ACDF. PC Hrg Tr. 109:13-19 (Oct. 1, 2014).

he became a cooperating witness against Owens.[302] Based on the evidence Owens presented on his government misconduct claim, the court found that Strickland was a percipient witness in four out of those five cases. *See* part IV.D.3.d.i of this Order. With respect to the fifth case (Banks), Kepros sufficiently cross-examined Strickland about his false statements. *See id*. Strickland admitted on cross-examination that he had provided false statements about a homicide in Denver to avoid being punished for possessing a shank while he was in the ACDF.

Kepros thoroughly cross-examined Strickland about his cooperation against numerous homicide defendants. She exposed that in all of those cases, Strickland claimed that another inmate talked to him about the inmate's case. Kepros also exposed that Strickland claimed to have information about the killing of Broncos player Darrent Williams. Thus, Kepros's cross-examination demonstrated that Strickland was a professional informant who obtained his information while he was incarcerated with homicide suspects. Any additional questioning of Strickland about his reputation or history as a professional informant would have added only marginal impeachment value to Kepros's cross-examination. Thus, Kepros's failure to further cross-examine Strickland about his reputation as a professional informant was not ineffective under *Strickland*.

(v) Disciplinary Records

Owens contends Kepros was ineffective because she failed to obtain Strickland's prison and jail disciplinary records. According to Owens, the records would have shown that Strickland was an informant before he was housed with Carter and that Strickland had tried to manipulate a prison investigation.

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[302] The cases are Stewart (Denver case 02JD2296), Abdalla (Denver case 04CR4820), Holmes (Arapahoe County case 05CR309), Banks (Denver case 05CR4700) and Mycroft (Arapahoe County case 05CR2985).

(a) Findings of Fact

Strickland testified on cross-examination during the guilt phase that:

- he contacted the Denver Police Department in October 2005 and claimed to have information about a homicide in Denver. His claims that he witnessed the homicide were false. He reached out to the Denver Police Department in an effort to get out of trouble for possessing a shank in the ACDF. Guilt Phase Tr. at 79:3-25; 80; 81:1-15 (Apr. 25, 2008 p.m.).
- as a result of being caught with the shank, he was concerned about facing felony contraband charges and administrative disciplinary actions inside the ACDF. *Id.* at 81:16-25; 82:1-3.
- a Denver detective interviewed him about the homicide in Denver and before the interview began, the Denver detective promised to make the shank case go away in return for Strickland's information about Banks. *Id.* at 82:4-25; 83; 84:1-14.
- his shank case went away based on the information he provided to the Denver detective. *Id.* at 82:4-25; 83; 84:1-14.
- he was an endorsed witness against several homicide defendants including Ray, Owens, Carter, C. Taylor, Samuels, and Sauls. He also told Fronapfel he had information about the homicide of Broncos player Darrent Williams. *Id.* at 94; 95:1-10.
- since October 15, 2005, he had given information in nine homicide cases and had also given information in a Denver case involving rape, kidnapping, and robbery. *Id.* at 94; 95:1-10.

On recross-examination, Strickland testified that:

- he lied about being at the scene of the Banks homicide because it helped him get out of trouble for possessing the shank. *Id.* at 126:11-22.

Michael Baker (M. Baker) was Strickland's close friend in 2005. M. Baker was present when Banks killed the victim. M. Baker testified during the post-conviction hearing that he discussed the incident one time on the phone with Strickland while Strickland was in the ACDF. According to M. Baker, he did not give Strickland any details about the homicide except that it happened during a party.

David Hansen (Hansen) was an ACSO sergeant in 2005 who was assigned to the ACDF. Hansen testified during the post-conviction hearing that he recalled interviewing Strickland about Strickland being found in possession of a razor, which the ACSO viewed as a weapon. According to Hansen, possessing such a weapon in the ACDF subjects the inmate to disciplinary proceedings and isolation for up to 60 days. While interviewing Strickland, Hansen asked Strickland if he had any information that he would share in order to potentially avoid being placed in isolation. Hansen explained during the post-conviction hearing that his practice was to ask inmates if they had any information in order to gain intelligence inside the ACDF. Hansen testified that Strickland was initially reluctant to provide any information but then he began giving Hansen information about a homicide in Denver. Hansen told Strickland that he would relay that information to the Denver Police Department and that Strickland would not have to go into isolation. Hansen relayed Strickland's information to a Denver detective and that detective visited Strickland at the ACDF the next day.

Jaime Castro (Castro) is a detective with the Denver Police Department. Castro testified during the post-conviction hearing that he received a call from a

sergeant at the ACDF in October 2005 advising him that Strickland had information about a homicide in Denver. Castro was given Strickland's handwritten statement detailing the information Strickland claimed to have about the homicide. Castro was aware that Strickland had refused to sign this statement because he wanted to be an anonymous informant.

Castro interviewed Strickland at the ACDF. He recorded the interview. According to Castro, he and Strickland did not have any conversation before he started recording the interview, and he refused Strickland's request to turn off the recording. Castro also testified that he never told Strickland what to say.

Castro recalled that Strickland's information was detailed. Strickland drew a diagram for Castro that was corroborated by other evidence in the case. During the interview, Strickland never mentioned that he wanted to be an anonymous informant. Castro testified that he filed charges against Banks shortly after interviewing Strickland.

After Strickland spoke to Castro, Hansen and Strickland agreed that Strickland should spend a few days in isolation to prevent the other inmates from suspecting that Strickland was an informant. Hansen confirmed that no criminal charges were filed against Strickland for being in possession of a shank.

Castro was an advisory witness at Banks's second trial and was present when Strickland did not give meaningful testimony.[303] He recalled that Strickland admitted that he had lied to Castro about being at the party where the shooting occurred.

While Strickland was in prison in 2007, he faced administrative disciplinary proceedings for fraud, disobeying a lawful order, and possession of unauthorized

[303] Banks's first trial resulted in a mistrial. The grounds for the mistrial were unrelated to Strickland.

legal documents. He pled guilty to disobeying a lawful order and being in possession of unauthorized legal documents. In addition, he was found guilty of fraud. The disciplinary proceedings stemmed from an incident where Strickland passed a letter to another inmate asking that inmate to give false testimony in a hearing. Strickland was found guilty of fraud because he intended to deceive the hearing process for personal gain. SOPC.EX.D-446. Strickland admitted during the post-conviction hearing that while he was prison in 2007, he was disciplined for trying to deceive a hearing officer and for fraud in conjunction with an assault case.

(b) Analysis

Owens's first contention is that Kepros should have subpoenaed Strickland's ACDF records in order to learn that Strickland was an informant against Banks. Kepros did not obtain Strickland's disciplinary records, but she had other information that caused her to investigate Strickland's involvement in the case against Banks. She cross-examined Strickland at length about his cooperation against Banks. Strickland admitted that he had provided false information about the Banks homicide in exchange for the ACDF dropping the disciplinary action against him for possession of the shank. Kepros drew comparisons between Strickland's actions in the Banks case and his actions in this case. Kepros's cross-examination portrayed Strickland as an unreliable informant. Owens did not identify any information in Strickland's ACDF disciplinary records that would have added any impeachment value to Kepros's cross-examination of Strickland.

Owens's second contention is that Kepros should have subpoenaed Strickland's prison records. As part of her investigation of Strickland, Kepros looked for any information that she could use to impugn Strickland's credibility. Given that Strickland became a jailhouse informant while housed in the ACDF in

2005 and cooperated in numerous homicide investigations, Kepros should have obtained Strickland's prison records.

If Kepros had obtained Strickland's prison records, she would have learned that Strickland tried to convince other inmates to give false information to the prison authorities. Strickland wanted the other inmates to provide false information so that he could avoid punishment for committing an assault. Prison authorities learned of Strickland's efforts to manipulate the other inmates. A prison investigation showing that Strickland tried to manipulate other inmates and influence a hearing officer in order to avoid punishment was relevant to Strickland's credibility as a witness in this case.

However, Kepros vigorously attacked Strickland's credibility on cross-examination. Strickland admitted that he provided false information about a homicide in Denver in order to avoid punishment for possessing a shank while in the ACDF. Strickland admitted that he was a cooperating witness against numerous homicide defendants. He also admitted that he received a reduced prison sentence in exchange for his cooperation in this case. In light of the impeachment of Strickland at trial, Kepros's failure to impeach Strickland about trying to falsify evidence in a prison assault case was not ineffective under *Strickland*.

(vi) Violent Character

Owens contends Kepros was ineffective because she did not present evidence about Strickland's violent past to rebut his claim that he was motivated to cooperate in this case because he had sympathy for the victims' mothers.

(a) Findings of Fact

Strickland testified on cross-examination at trial that:

- he had four pending felony cases, including a charge of armed robbery, when he became a cooperating witness in this case. Guilt Phase Tr. 70:21-25; 71:1-11; 76:6-25 (Apr. 25, 2008 p.m.).
- at the time he came forward in this case, he did not have a global disposition for his pending criminal cases. *Id.* at 77:1-16, 21-25; 78:1-6, 10-24.
- when he came forward in this case, the Adams County prosecutor had offered 10 to 32 years with a mandatory minimum of 10 years. *Id.* at 91:18-25; 92; 93:1-7.

Kepros did not investigate Strickland's violent background other than the armed robbery charges he was facing in 2005.

Strickland testified during the post-conviction hearing that he was involved in a fight in the ACDF. Strickland also testified that his guilty plea to illegally possessing a firearm as a convicted felon in Arapahoe County stemmed from throwing a gun out a car window when the police stopped the car. Strickland conceded that he was involved in a prison assault in 2007. Strickland admitted that he was involved in a domestic violence situation with his girlfriend in 2004, but claimed that she struck him. He also admitted that on November 17, 2003, he entered a guilty plea to burglary.

Officer Eric Gray testified during the post-conviction hearing. On January 1, 2005, he participated in the stop of a vehicle that had been reported stolen. As he approached the car, Eric Gray saw one of the occupants in the back seat throw a gun out the window. Eric Gray identified Strickland as one of the occupants in the back seat.

(b) Analysis

Kepros's cross-examination established that Strickland was facing four felony charges, including an armed robbery charge, when he cooperated in this case. Strickland admitted that his Arapahoe charge was for illegally possessing a firearm as a felon. Additionally, Kepros cross-examined Strickland about possessing a shank inside the ACDF. Kepros's questions suggested that Strickland had stabbed another inmate with the shank. Thus, any cross-examination about having a gun as the basis for his guilty plea in Arapahoe County was cumulative impeachment. The other incidents of Strickland's violent background would have been cumulative, collateral matters with minimal additional impeachment value. On this topic, Strickland admitted to facts about his violent past. Kepros was able to portray Strickland to the jury as someone with multiple felony convictions who had access to guns on the street and to a shank in jail. Thus, her cross-examination of Strickland about his violent character was not ineffective under *Strickland*.

(vii) Miscellaneous Topics

(a) Failure to Interview Strickland

Owens contends Kepros was ineffective because she did not interview Strickland. According to Owens, Kepros would have learned that Carter identified Owens as a shooter in order to exculpate himself and to shift blame to Owens.

Strickland was not asked during the post-conviction hearing if he would have consented to an interview with the trial team. And when he was asked if he formed any impressions about whether Carter was trying to exculpate himself by shifting blame to Owens, Strickland testified that Carter implicated both Carter and Owens in the murders. Thus, Owens failed to prove that Strickland believed that Carter was trying to exculpate himself while he was talking to Strickland.

(b) Recorded Phone Calls

Owens did not present any evidence during the post-conviction hearing suggesting that there was information in Strickland's recorded phone calls that the trial team could have used to impeach Strickland's claim that Owens had threatened him in court during a pretrial motions hearing.

(c) Mental Stability

Owens contends Kepros was ineffective because she did not cross-examine Strickland about the head wound he suffered in 2004. Kepros did not review the case file for that incident. However, she was aware that Strickland's attorney had raised the possibility of needing a competency evaluation of Strickland due to his head wound. Kepros ordered the transcript for the hearing where Strickland's attorney addressed Strickland's competency, but Kepros could not recall if she had reviewed that transcript prior to trial. Owens did not present any evidence proving that Strickland's competency was evaluated. Strickland testified during the post-conviction hearing that the head wound did not affect his memory or comprehension.

Assuming Strickland would have testified similarly at trial, his testimony might have supported his claim that he sympathized with the victims' mothers because Strickland's own mother had wanted the person who shot him to be prosecuted. Kepros's failure to cross-examine him on this point was not ineffective under *Strickland*.

(d) History of Providing False Information

Owens contends Kepros was ineffective because she failed to gather and present evidence that Strickland had a character trait of offering false evidence to curry favor with the prosecution and to shift blame away from himself.

Strickland sent a letter to Fronapfel on January 30, 2006. In the letter, Strickland admitted committing an assault in Denver. At trial, Kepros cross-examined Strickland about whether he lied to the police in Denver concerning his culpability for the assault.

Prison authorities found that Strickland tried to manipulate the evidence in his assault case. Kepros was not aware of that incident and therefore did not cross-examine Strickland about it at trial. However, Kepros's cross-examination showed that Strickland had a history of providing false information. She questioned Strickland at length about providing false information against Banks. Kepros's failure to cross-examine Strickland about his prison assault case was not ineffective under *Strickland*.

(viii) Conclusion

The court concludes that Owens failed to prove that his trial team performed deficiently when it failed to impeach Strickland with available evidence. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance."). The court also concludes that Owens failed to prove that he was prejudiced by the manner in which his team addressed Strickland's credibility. *See id.* at 694 ("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."). Accordingly, Owens's motion to vacate his conviction and sentence based on his trial team's failure to impeach Strickland with certain available evidence is **Denied**.

(e) Dexter Harris

(i) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to adequately gather evidence and use available evidence to discredit Harris's credibility on the basis of his criminal history, his work as an informant, and his claim that he was motivated to cooperate by noble purposes.

(ii) Overview

King had experience cross-examining jailhouse informant witnesses. King's practice for jailhouse informant witnesses was to obtain transcripts of their testimony, review their criminal history, and obtain the case files for all felonies and admissible misdemeanors. It was also his practice to get the transcripts for the witness's pending cases to show the pressure applied to and the benefits received by the witness.

King's approach to Harris's cross-examination was to impeach him with the information available in order to demonstrate that his testimony was not credible. King viewed Harris as an important witness and recalled there was pretrial litigation about whether Harris's testimony was admissible.

King's cross-examination notes for Harris covered 18 topics, and his notations indicate that he covered all of the topics during his cross-examination. King had Harris's extensive criminal history in his trial notebook.

King did not obtain information about Harris beyond what was provided in discovery. He did not try to determine whether the car theft and drug cases mentioned during Harris's July 19, 2006, interview existed. King did not investigate the cases Harris claimed to have assisted with in his November 25, 2006, letter to the prosecution. He did not have a tactical reason for not doing these investigations.

King did not seek Harris's prison records and had no reason not to. King acknowledged that it is his practice to investigate whether there is an alternate source for the jailhouse witness's information, such as newspapers or the like, but he did not conduct such an investigation for Harris.

King recalled speaking to an attorney in Denver about Harris. He did not confer with counsel for Owens's codefendants to ascertain what information they may have developed on Harris.

King noted that he is a conservative questioner on cross-examination and does not ask questions when he does not know the witness's answer. For this reason, he prefers to interview witnesses. He recalled that interviewing Harris was difficult due to Harris's status as a protected witness, which meant King had to ask the prosecution to arrange the interview. King never made the request to interview Harris, and he did not have a tactical reason for not doing so.

In Reynolds's opinion, King performed deficiently because he did not obtain evidence from numerous sources or use more of the available evidence to attack Harris's credibility.

Owens contends King failed to impeach Harris on the following topics:

(iii) Criminal History

Owens contends King was ineffective because he did not use Harris's criminal history to show that Harris had a history of violence and dishonesty and to demonstrate the favorable plea agreements Harris received in return for his cooperation.

(a) Findings of Fact

Harris testified during the guilt phase that:

- he was released on parole on March 19, 2008, after serving a two-year sentence for a drug possession conviction out of Denver. Guilt Phase Tr. 91:10-25; 92:1-3 (Apr. 30, 2008 a.m.).
- he was convicted in 1987 for second-degree assault and in 1990 for aggravated robbery, which resulted in a prison sentence. *Id.* at 106:14-25; 107:1- 14.

On cross-examination, Harris testified that:

- when he was released from prison in 2005, he was booked into the ACDF and faced a drug possession charge in Denver with a potential sentence of two to six years in prison. He was aware of the possibility that the Denver prosecutors might bring habitual charges against him based on his two prior convictions. *Id.* at 107:15-25; 108:22-25; 109:1.
- he was incarcerated on a domestic violence charge when he wrote a letter to the prosecution on July 19, 2006. *Id.* at 109:2-25; 110:1-5.
- approximately 18 months before he testified, he had offered information on an unrelated case to the prosecution in Arapahoe County, but the case was resolved without his assistance. *Id.* at 110:6-13.
- he wrote another letter to the prosecution on November 25, 2006. In that letter, he wrote that he wanted probation for his misdemeanor and drug possession cases, and he asked Hower to speak to someone at the Denver District Attorney's Office on his behalf. *Id.* at 120:19-25; 121:1-6.

- Fronapfel attended his sentencing hearing for his domestic violence case in Aurora and he was sentenced to probation because Fronapfel spoke to the judge on his behalf. *Id.* at 121:7-19.
- Hower was the prosecutor on his 1990 aggravated robbery and burglary case. *Id.* at 125:9-24.

King testified during the post-conviction hearing that he had certified court files for four of Harris's convictions and had the appellate record for a fifth conviction, which indicated Harris also had a sixth conviction in Illinois. He cross-examined Harris on two felony convictions. King did not ask Harris whether he was aware that six felony convictions made Harris eligible for big habitual charges.

King acknowledged that Harris's criminal history indicated Harris had used approximately 20 aliases. King testified that he would not have asked Harris about Harris's use of aliases unless he had researched the aliases. King noted the possibility that if other people had used Harris's name as an alias, then it would appear on Harris's criminal history.

At the post-conviction hearing, Harris did not recall being convicted in Chicago in 1981 of robbery or of aggravated assault with a weapon, but he recalled that he had been charged a number of times with unlawful use of a weapon. He acknowledged that he has used aliases. Harris recalled his 1988 assault conviction in Colorado. Harris denied that he told the police that his daughter was sitting near the narcotics when he was arrested on his Denver drug case. Harris admitted that he had two domestic violence charges in Aurora. Harris acknowledged he was facing a possible sentence of one year in jail when he was arrested on his second domestic violence case in June 2006. When he testified during the post-conviction hearing, Harris was serving a prison sentence for a 2008 carjacking.

Harris testified that he did not know Owens. He also testified that he has been repeatedly dishonest, but according to Harris, he testified truthfully about what Ray told him about Ray's cases.

(b) Analysis

King's cross-examination of Harris established that Harris was a professional informant who had multiple violent felony convictions, had served two prison terms, had only recently been released from prison, and was someone who was constantly asking the prosecution and police to intervene in his pending cases in exchange for his cooperation. Harris admitted that he had offered information to the police on an unrelated case 18 months before he testified in this case. King's cross-examination also showed that Harris had been charged with drug distribution and domestic violence. Harris acknowledged that he was concerned about facing habitual charges in the Denver drug case. King highlighted these concerns by using the letters in which Harris asked the prosecution to intervene in the Denver drug case. Harris acknowledged that he obtained probation on the domestic violence charge only after Fronapfel spoke with the judge in that case.

Harris was not connected to Owens or Ray. He did not know Owens and only spoke to Ray over the course of a few days. Nevertheless, Harris related unique evidence that was corroborated by other witnesses in the case. Sailor and Johnson corroborated Harris's testimony that Ray had been involved in two shooting incidents but only fired his gun during the first incident. Sailor and the video from the liquor store corroborated Harris's testimony that Ray had an alibi for the second shooting. Todd corroborated Harris's testimony that Ray had been alerted about the murders but could not acknowledge the alert because someone was with Ray when the alert was given.

Given the inherent credibility in Harris's testimony, and the effectiveness of King's cross-examination concerning Harris's motives, incentives, and history, King's failure to further cross-examine Harris about Harris's criminal history was not ineffective under *Strickland*.

(iv) Drug Addiction

Owens contends King was ineffective because he did not cross-examine Harris about being a drug addict and experiencing withdrawal symptoms when Ray spoke to Harris and when Harris spoke to Fronapfel. Owens also contends King should have exposed that Harris was motivated to cooperate in order to obtain his release from jail to get more drugs, that Harris was using drugs when he testified in this trial, and that Harris told government agents that he needed treatment for his drug addiction.

(a) Findings of Fact

Harris testified during the guilt phase that:

- he was released on parole on March 19, 2008, after serving a two-year sentence for drug possession out of Denver. Guilt Phase Tr. 91:10-25; 92:1-3 (Apr. 30, 2008 a.m.).
- he requested a personal recognizance bond to get out of jail on July 19, 2006, because he feared he would be in danger as a result of giving information to the police. *Id.* at 104:3-5, 16-25; 105:1.
- he was booked into the ACDF in June 2005 while facing a drug possession charge in Denver with a potential sentence of two to six years in prison. *Id.* at 107:15-25.

- he wanted the personal recognizance bond to get out of jail for safety reasons. *Id.* at 112:18-25; 113:1-11, 17-25; 114:6-15.
- he wrote a letter to Hower on November 25, 2006, wherein he stated that he had assisted the APD with drug stings and other investigations. *Id.* at 119:7-25; 120:1-18.
- he wrote a letter to Hower on January 7, 2007, and asked him to recommend to the Denver prosecutor that Harris receive a drug treatment sentence rather than a prison sentence. *Id.* at 121:20-25; 122:5-19.

King knew that Harris was a drug addict, and he was aware of Harris's letter to Hower in which he asked Hower to recommend drug treatment for his Denver drug conviction.

Harris testified during the post-conviction hearing that he was going through withdrawal from his drug use when Fronapfel interviewed him on July 19, 2006. He recalled asking Fronapfel to refer him to the APD narcotics unit.

Harris testified that he started using drugs when he was released from jail in August 2006, but he never told a prosecutor or police officer that he was using drugs. After he was released on parole in March 2008, he started using drugs. He may have been high when he came to court to testify. He never told any prosecutor or police officer that he was using drugs and was not visibly impaired when meeting with them. According to Harris, his drug use did not affect the truthfulness of his testimony in this case.

(b) Analysis

Owens's claim that King should have exposed that Harris was suffering withdrawal symptoms when he spoke to Ray and Fronapfel is based on Harris's

admission many years later that he was suffering withdrawal symptoms during the summer of 2006.

Owens complains that King did not expose Harris's desire to be released from jail on a personal recognizance bond in order to satisfy his drug addiction. King asked Harris why he wanted to get out of jail, and Harris was adamant that he wanted the personal recognizance bond because he was concerned for his safety. King's cross-examination, along with the direct examination, revealed that Harris had picked up a drug possession charge shortly after completing a lengthy prison sentence, cooperated with the police in order to secure his release from jail, and asked the prosecution to recommend that he receive drug treatment as part of his sentence for his Denver drug case.

As for asking Harris about using drugs around the time he testified in this trial, Owens does not explain how his trial team would have known if Harris was using drugs. Harris testified at the post-conviction hearing that while he may have been using drugs when he testified at trial, he did not use drugs every day, did not tell any government agent that he was using drugs, and did not show signs of drug use when he met with government agents.

Owens assumes that his trial team should have learned that Harris was using drugs from government agents. According to Owens, Harris asked government agents for assistance with his drug addiction. However, Owens did not prove Harris ever made such a request.

Owens's argument that his team did not sufficiently investigate Harris's drug use is based on Harris's admissions years after he testified at trial in this case that he used drugs. King's cross-examination revealed that Harris had picked up a drug possession charge shortly after completing a lengthy prison sentence, cooperated with the police in order to secure his release from jail, and asked the

prosecution to recommend that he receive drug treatment as part of his sentence for his Denver drug case. Thus, King's cross-examination of Harris about Harris's drug use was not ineffective under *Strickland*.

(v) Benefits from Prosecution

Owens contends King was ineffective because he did not fully expose all of the benefits Harris received in exchange for his cooperation in this case.

(a) Findings of Facts

Harris testified on cross-examination at trial about various benefits he received in exchange for his cooperation in this case, including that:

- he obtained the personal recognizance bond with assistance from Fronapfel and Hower. Guilt Phase Tr. 114:19-25; 115:1-11 (Apr. 30, 2008 a.m.).
- after he was released from jail, the prosecution paid for him to stay in a hotel for approximately three weeks. *Id.* at 118:14-25; 119:1-2.
- he wrote in his November 25, 2006, letter to the prosecution that he wanted probation for his misdemeanor and drug possession cases. *Id.* at 120:19-25; 121:1-6.
- Fronapfel attended the sentencing hearing on the domestic violence charge and spoke on his behalf to the judge, which resulted in a sentence of probation. *Id.* at 121:7-19.

Fronapfel testified during the guilt phase that:

- she spoke to the Aurora judge on two occasions on Harris's behalf. Guilt Phase Tr. 22:2-16 (May 1, 2008 p.m.).
- she told the judge that Harris was a witness who had cooperated in this case and she asked the judge to consider Harris's cooperation. *Id.* at 22:17-22.

- Harris's lengthy jail sentence in the domestic violence case was stayed by the judge at her request. *Id.* at 24:23-25; 25:1-8.

Owens's trial team called Harris's Aurora probation officer to testify during the guilt phase. The probation officer testified that Harris was continuously non-compliant with the terms and conditions of his probation.

King testified during the post-conviction hearing that he normally would not cross-examine a witness about expenditures incurred on the witness's behalf while the witness was in the Witness Protection Program unless there was evidence that more money than necessary had been expended. King's practice was to question a jailhouse witness about what benefits the witness was seeking as long as he had a way to impeach the witness. King was aware that Harris had asked Fronapfel for assistance with a possible ongoing investigation of his involvement with a stolen car and drug case. However, King did not determine whether Fronapfel quashed any such investigation of Harris.

Harris recalled during the post-conviction hearing that he received $200 prior to the trial in this case. He believed it was part of the Witness Protection Program.

Harris also recalled that his wife told him sometime after his June 6, 2006, arrest that police officers told her that they were investigating him for a stolen car and drugs. According to his wife, the police also told her they were considering filing career criminal charges against Harris. He testified that this was the reason he asked Fronapfel on July 19, 2006, to look into those incidents. He never heard from her or any other police officer that there was such an investigation.

Harris did not recall whether Hower and/or Fronapfel promised him probation in his pending cases, but he was sure that he never asked for it. He also testified that he did not ask Fronapfel to intervene in his Aurora case. He said that

he would have cooperated in this case even if his request for a personal recognizance bond had been denied.

(b) Analysis

Owens contends that King failed to present evidence that Fronapfel openly supported probation for Harris on his Aurora case. However, Fronapfel testified during the guilt phase that she asked the Aurora judge on two occasions to consider Harris's cooperation in his sentencing determination. She also testified that she convinced the judge to suspend Harris's jail sentence. Moreover, Harris admitted during the guilt phase that he was sentenced to probation as a result of Fronapfel's intervention.

Owens argues that the prosecution did not revoke Harris's bond in 2006 or parole in 2008 when he was using drugs and alcohol. But Owens did not present any evidence suggesting that the police or prosecution was aware that Harris was using drugs and alcohol in 2006 or 2008. Nor did Owens present any evidence indicating that the APD was actually investigating him for a stolen car or possession of drugs.

Owens also complains that King did not expose that the prosecution spent more than $10,000 on Harris between March and November 2008. The prosecution paid for Harris to stay in a hotel room and gave him numerous grocery store gift cards. However, because the prosecution withheld these expenditures from Owens's trial team, there was no way for King to confront Harris about the expenditures.

King established that Harris was able to avoid jail with Fronapfel's assistance, that Hower and Fronapfel arranged the personal recognizance bond for him, that he got probation on his Aurora case with Fronapfel's help, and that the prosecution paid for him to live in a hotel after he was released from custody in

2006. In summary, King's cross-examination of Harris showed that Harris received substantial benefits in exchange for his cooperation in this case. King's cross-examination of Harris was not ineffective under *Strickland*.

(vi) Discrepancies in Harris's Testimony

Owens claims King was ineffective because he did not adequately highlight the discrepancies in Harris's testimony. Owens points to (1) Harris's testimony that Ray had an alibi for the first shooting, while also saying that Ray described it as a drive-by shooting on a residential street and the result of insults; (2) Harris's comment on July 19, 2006, that what Ray told him about celebrating the murders was not in the newspaper; and (3) Harris's claim to have been born into the Gangster Disciples in 1961 when the gang did not yet exist.

(a) Findings of Facts

Harris testified on direct examination during the guilt phase that:

- while housed in the ACDF, he met Ray because they shared the same pod. They were both from Chicago. Guilt Phase Tr. 93:24-25; 94:1-3, 14-18 (Apr. 30, 2008 a.m.).
- Ray told Harris about his pending murder case after he saw Ray cut an article out of a newspaper. Harris did not read the article. *Id.* at 95:4-13, 19-25; 96:1-7.
- Ray told Harris that he was involved in shooting a guy who had witnessed another shooting. Ray called the witness a snitch. *Id.* at 96:15-21; 97:4-7; 97:12-14.
- Ray told Harris that he was involved in a shooting when he drove by a group of people who called the people in his car names, and Ray may

have said the shooter was in the passenger seat. Harris did not ask Ray any clarifying questions. *Id.* at 97:19-25; 98:1-10, 11-16.

- Ray told him that he was not present at the second shooting and had to wait for someone to bring him notice that the second shooting had been accomplished. *Id.* at 99:6-18.
- Ray told him that there was a person with him when he received notification of the second killing. *Id.* at 99:6-25; 100:1-18.
- Ray told him that he had arranged an alibi and that he was on a video at another location when the second shooting occurred. *Id.* at 100:19-25; 101:1-7.

On cross-examination, Harris testified that:

- he and Ray started talking because another inmate was looking at a newspaper, and Ray took the paper from the inmate. Ray did not show Harris the article that was in the paper. When confronted with his testimony from June 11, 2007, Harris acknowledged that he had testified that Ray cut an article out of the paper and showed it to him but Harris did not read it. *Id.* at 115:19-25; 116; 117:1.
- Ray referred to the first shooting as a drive-by shooting where he was the driver and had a passenger in the car but did not recall if Ray told him who the shooter was. After having his memory refreshed with his June 11, 2007, testimony, Harris confirmed testifying that Ray told him he may have shot initially but never identified who the other shooter was. *Id.* at 117:7-13, 15-25; 118:1-9.

On redirect examination, Harris said that:

- based on what Ray told him, he may have assumed that Ray's first shooting involved a drive-by shooting. *Id.* at 126:20-25; 127:1.

At the post-conviction hearing, King acknowledged that his practice was to investigate whether there are other sources for the witness's information, such as the media, but he did not do that for Harris. King's cross-examination notes show that he highlighted Harris's statement to Fronapfel on July 19, 2006, that Ray said he was videotaped and Harris had commented to Fronapfel that being videotaped was not in the newspapers. However, he did not cross-examine Harris about it because he did not know whether Ray's videotaped alibi had been reported in the newspaper. King acknowledged that he cross-examined Harris on the article Ray cut out of the newspaper.

King was reminded that Kepros had asked Harris on June 11, 2007, about his association with the Gangster Disciples and that Harris responded that he was born into the gang. King testified that he would not have cross-examined Harris about being born in 1961 in Chicago when the Gangster Disciples reportedly did not exist. King testified that he would not want to get into a discussion with Harris about when the gang came into existence in Chicago unless he had specific evidence on when the gang formed, and King had not investigated the origins of the Gangster Disciples in Chicago.

During the post-conviction hearing, Harris stated that his comment to Fronapfel that Ray's statement about having an alibi was not in the newspapers did not mean that he, Harris, had read the newspapers. Harris acknowledged that during his interviews with Owens's post-conviction counsel he was shown newspaper articles that caused him to express concern that some of his information may have come from newspapers. However, after further reflection, Harris believed that his concern about the source of his information stemmed from this being a death penalty case. Harris was convinced that his information came only

from Ray. Harris did not recall seeing or hearing media reports of any kind about Ray's involvement in the Dayton Street homicides.

(b) Analysis

Owens's first argument is that King should have confronted Harris with the events at Lowry Park to highlight the discrepancies with the drive-by shooting described by Harris. But the jury knew the Lowry Park facts, and asking questions when the attorney does not know the witness's answer carries risks that would not have been justified with Harris. There is no indication in the record that Harris knew anything about the events at Lowry Park. Harris pointed out that he did not ask Ray any clarifying questions because he did not want Ray to think he was an informant. The jury heard substantial evidence about Lowry Park. King had no need to repeat that evidence and risk being seen as endorsing some or all of it.

Owens's second argument is that King should have investigated and cross-examined Harris about whether he obtained information about the Dayton Street homicides from the newspaper. King did not confront Harris with his statement to Fronapfel that Ray's remark about having a video alibi was not in the newspapers. Owens argues that Harris's comment suggests that all the information Harris attributed to Ray came from the newspapers. At trial, King got Harris to admit that Ray had shown him a newspaper article about Ray's case, although Harris still denied reading the article. Harris testified during the post-conviction hearing that Owens's post-conviction counsel had shown him newspaper articles that caused him to start speculating whether the inculpatory information he attributed to Ray came from the newspaper articles. But again, Harris was sure that the information came from Ray and not the newspaper articles. Hence, if King had pursued this line of inquiry, Harris would have denied accessing any media. Because neither King nor Owens's post-conviction counsel had any evidence to contradict Harris's

denial, the only available impeachment is what King achieved – eliciting the admission that Ray showed the article to Harris.

Owens's third argument is that King did not cross-examine Harris about his assertion that he and Ray began talking because they were associated with the Chicago Gangster Disciples. Harris did not testify that he and Ray were associated with the Gangster Disciples. The trial team had successfully obtained a court order that gang affiliation evidence was not admissible. Owens's specific complaint is that King should have impeached Harris's claim that he was born into the Gangster Disciples when, according to Owens, the Gangster Disciples did not exist as of Harris's birth in 1961. King would not have been inclined to get into a discussion with Harris about the origins of the Gangster Disciples without evidence to support his position. Owens failed to produce evidence at the post-conviction hearing on the origins of the Gangster Disciples in Chicago.

Under these circumstances, King's cross-examination of Harris was not ineffective under *Strickland*.

(vii) Miscellaneous Topics

(a) Failure to Interview Harris

Owens contends his trial team was ineffective because it did not interview Harris. King's practice was to try to interview jailhouse witnesses like Harris because in King's experience, they like to talk. But Owens did not present any evidence suggesting that Harris would have consented to an interview with Owens's trial team. Thus, Owens failed to prove that his trial team's failure to interview Harris was ineffective under *Strickland*.

(b) Misrepresentation to Denver Judge

Owens contends his trial team was ineffective because it did not cross-examine Harris about his alleged misrepresentation to a Denver judge that he

missed a pretrial hearing in his Denver drug case because he was cooperating with the APD.

Harris generally admitted during the post-conviction hearing that he has been dishonest in court. He did not recall telling a Denver judge that he missed a court hearing due to his cooperation in this case. Still, he thought that he was probably honest with the judge on that occasion because he was in and out of jail so much in the summer of 2006. Here, Owens failed to prove that Harris did not miss his court date in Denver because he was cooperating with the APD. Thus, he failed to prove that King's failure to cross-examine Harris about his alleged dishonesty with the Denver judge was ineffective under *Strickland*.

(c) Lying to Police

Owens contends King was ineffective because he did not cross-examine Harris about Harris's history of lying to the police. Owens relies on Harris's purported misrepresentations about his military service in his pre-sentence investigation report for his Denver drug case. During the post-conviction hearing, Harris could not recall whether he misrepresented the length of time he had served in the military, and Owens did not present any evidence proving that Harris misrepresented the amount of time he was in the military. Similarly, Owens failed to prove that Harris made an unsubstantiated claim to the police that he had information about the murders of two women.

Owens also contends King was ineffective because he did not ask Harris whether he falsely accused his probation officer of disclosing that he was an informant. Owens's trial team called Harris's probation officer to testify during its defense case. The probation officer testified that she had never spoken to Harris's family. Guilt Phase Tr. 61:19-25; 63:13-21; 64:2-8 (May 5, 2008). King also cross-examined Bart Dorscheid (Dorscheid), an investigator for the district

attorney's office, about his contact with Harris's family. Dorscheid testified that Harris had complained that his probation officer told his family that he was informant, but Harris's family told him that they had not spoken to Harris's probation officer. Guilt Phase Tr. 107:3-25; 108-113 (May 6, 2008 a.m.). Thus, King elicited evidence showing Harris's misrepresentation about his probation officer.

For these reasons, King's presentation of evidence concerning Harris's history of lying to the police was not ineffective under *Strickland*.

(d) Status as an Informant

Owens contends King was ineffective because he did not cross-examine Harris about his role as an APD informant. On cross-examination, King asked Harris whether he had tried to become an informant approximately 18 months before offering to cooperate in this case. Harris admitted that he had given the APD information about another homicide suspect and acknowledged that he offered Fronapfel information about the murders of two women. Harris also admitted that he wrote in his November 25, 2006, letter to the prosecution that he had assisted the prosecution with three homicide cases and had assisted the APD with drug stings. In summary, King established that Harris was an informant.

As to Owens's argument that King was ineffective because he did not cross-examine Harris about being a paid informant, King was unaware that Harris had been paid because prosecution failed to disclose that information.

For these reasons, King's cross-examination of Harris about Harris's status as an informant was not ineffective under *Strickland*.

(e) Jailhouse Lawyer with Access to other Inmates' Discovery

Owens contends King was ineffective because he did not cross-examine Harris about his role as a jailhouse lawyer. Owens claims that this would have allowed Harris to access other inmates' discovery and manufacture inculpatory information against those inmates. Owens failed to prove that Harris had access to other inmates' discovery while he was in jail and prison.

(f) Extortion of Inmates

Owens contends King was ineffective because he did not obtain Harris's prison records. According to Owens, the prison records show that Harris extorted two inmates in 2007. Owens asserts King should have used the records to rebut Harris's claim of having benevolent motives to cooperate in this case. Owens did not present any evidence proving that Harris extorted two inmates in 2007.

(viii) Conclusion

The court concludes that Owens failed to prove that his trial team performed deficiently when it failed to impeach Harris with available evidence. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance."). The court also concludes that Owens failed to prove that he was prejudiced by the manner in which his team addressed Harris's credibility. *See id.* at 694 ("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."). Accordingly, Owens's motion to vacate his conviction and sentence based on his trial team's failure to impeach Harris with certain available evidence is **Denied**.

(f) Brandi Taylor[304]

(g) Teresa Riley[305]

(h) Rickey Carter[306]

(i) Parties' Positions

Owens contends he was prejudiced because King failed to impeach R. Carter in certain areas, failed to obtain impeachment information for R. Carter, and failed to introduce mitigation evidence through R. Carter.

(ii) Overview

King's trial notebook for R. Carter included transcripts of R. Carter's testimony and the reports of the police interviews of R. Carter. Based on the materials in his trial notebook, King prepared seven pages of cross-examination notes for R. Carter.

King's notes reference R. Carter's criminal history. He obtained certified copies of R. Carter's convictions, and he interviewed a ballistics expert in an effort to determine whether the long guns described by R. Carter could have fired the ammunition used to kill Marshall-Fields and Wolfe.

King did not issue subpoenas or utilize the Colorado Open Records Act to obtain additional information on R. Carter. He also did not try to interview R. Carter.

King viewed R. Carter as an important witness because he described the bag of guns in the barbershop and was recalled in the sentencing hearing. King started his cross-examination of R. Carter at the guilt phase with his criminal history because he wanted to attack R. Carter's credibility about the guns being hidden in

[304] Owens withdrew this claim in SOPC-293.

[305] Owens withdrew this claim in SOPC-293.

[306] Owens withdrew the claim regarding R. Carter's and Marlena Taylor's drug use in the spring and summer of 2005 in SOPC-293.

his apartment. King recalled that after R. Carter admitted having felony convictions and being on parole, he decided not to take additional time to pursue R. Carter's criminal history in depth. In King's view, there was no need for him to use the certified copies of R. Carter's convictions because R. Carter conceded his convictions. King also testified that he had to be careful when he was trying to discredit R. Carter's testimony because there was corroborating evidence from other witnesses. King recalled that Marlena Taylor and Todd corroborated R. Carter's testimony about the duffle bag of guns.

Reynolds viewed King's cross-examination of R. Carter as deficient because he did not adequately prepare and did not sufficiently examine him on certain topics, such as the specifics of his convictions, the pressure put on him to cooperate, his report that he had not seen Owens for two to three weeks in June 2005, and R. Carter's inconsistencies relating to the duffle bag.

(iii) Statements About the Guns

Owens contends King was ineffective because he did not cross-examine R. Carter with his inconsistent statements regarding who approached him about storing guns in his apartment and about the caliber of the guns.

(a) Findings of Fact

R. Carter testified during the guilt phase that:

- around the time he was arrested on June 28, 2005, Ray and Owens asked him if they could store something at his apartment. Guilt Phase Tr. 33:14-22; 34:8-25; 35:12-25; 36:1-3; 37:23-25; 38:1-7 (Apr. 21, 2008 p.m.).
- Owens, Ray, Carter, and Ray's friend from Chicago were at the barbershop when Ray asked if he could put something in R. Carter's apartment. *Id.* at 39:2-7, 11-21; 40:24-25; 41:1-21; 42:1-5.

- after he agreed to allow Ray to put something in his apartment, they brought out a duffle bag from the studio wrapped in expensive coats belonging to Owens and Ray. He could see a gun barrel sticking out of the bag. *Id.* at 42:6-7, 20-25; 43:1-19; 45:2-5.
- after he gave his apartment key to either Owens or Ray, three or four of those men got into a Suburban and drove toward his apartment. He was not sure if Ray's friend went to his apartment. *Id.* at 44:6-16; 45:9-25; 46:1-2; 46:8-18.
- about 30 minutes after the men left, he went to his apartment and found the bag in his closet. *Id.* at 47:23-25; 48:1-2, 4-6, 12-18.
- inside the bag was a rifle-like weapon with a banana clip, an army-like gun, and a handgun. He put the bag under his bed. *Id.* at 48:13-15, 23-25; 49:1-20.
- the rifle-like weapon was approximately four feet long and looked like an AK-47 because it had banana clips that were taped together. *Id.* at 63:7-25; 64:1-13.
- the other gun had something on the end of it that supported the barrel and looked like a military machine gun. This gun was as long as the rifle and was broken down. *Id.* at 64:18-25; 65:1-7.
- the handgun was a semiautomatic handgun, and it was a large caliber gun such as a .357 caliber or .45 caliber. This gun had a larger caliber than his gun, which was a .38 caliber. *Id.* at 65:19-25; 66:1-11; 67:20-25.

Regarding the long guns that R. Carter reported seeing, King consulted a ballistics expert to determine whether the long guns could fire ammunition consistent with the ammunition used to kill Marshall-Fields and Wolfe. He

interviewed the expert because he believed it was rare for long guns and handguns to have the same caliber. King did not interview R. Carter and therefore did not ask him before trial about the caliber of the handgun. R. Carter recalled during the post-conviction hearing that the handgun was in the duffle bag along with stray bullets. He did not recall the caliber of the handgun and never checked the gun for its caliber or make/model. He acknowledged testifying at the grand jury that he did not know the caliber of the handgun. He also acknowledged testifying on August 16, 2006, that the handgun was a black semiautomatic with some wood on its handle and that is was likely a 9 mm or .45 caliber.

R. Carter could not recall whether it was Ray or Owens who asked him to store something in his apartment, but he was confident that he gave the key to his apartment to Owens.

Hammond is a firearms expert who testified in both of Owens's trials. From the bullet fragments recovered from the Dayton Street homicides, he identified two weapons as having been used – a .45 caliber and 9 mm. According to Hammond, the shell casings recovered from the Dayton Street homicides had ejector marks, which indicated that they were fired by an automatic or semiautomatic weapon.

Because none of the firearms were recovered, Hammond was unable to match the recovered bullets to specific weapons. However, based on the rifling characteristics found on the bullets recovered from the Dayton Street crime scene, he was able to identify a number of weapons with similar rifling characteristics *via* the FBI rifling characteristics database.[307] The database showed that several

[307] According to Hammond, rifling characteristics come from the lands and grooves placed in the barrel of the firearm when it is manufactured. The characteristics are determined by the number of and spacing of the lands and grooves, as well as the direction of the twist of the lands and grooves machined into the barrel during the manufacturing process. PC Hrg Tr. 33:3-15 (May 13, 2015).

manufacturers made long military-style weapons with similar rifling characteristics for both the .45 caliber and 9 mm bullets recovered from the Dayton Street crime scene.

Based on his database search for the 9 mm bullet recovered from the Dayton Street homicides, Hammond identified semiautomatic, carbine-type firearms manufactured by two manufacturers as a possible weapon used to fire the recovered bullets. He also identified several other manufacturers for military-type weapons that could have fired the recovered bullets.

Hammond did not believe any of the weapons he identified from the FBI database were manufactured with a banana clip. Hammond pointed out that it would be unusual for this type of weapon to come with a bi-pod, which is an attachment placed near the end of the barrel that allows the shooter to rest the barrel on a stable surface.

(b) Analysis

R. Carter initially testified during the guilt phase that Ray and Owens approached him about storing the guns in his apartment. He subsequently testified that Ray asked him to store the guns in his apartment. On cross-examination, R. Carter stated that "they asked" about storing the guns in this apartment. King was careful not to challenge R. Carter on this point because R. Carter had already testified that Ray asked him to store something in his apartment. Had King inquired further, R. Carter likely would have testified, as he did during the post-conviction hearing, that he was confident that he gave his key to Owens, which would have been damaging evidence to Owens.

Owens contends that because R. Carter testified during the guilt phase that the handgun in the duffle bag was a .357 caliber or .45 caliber, King should have impeached R. Carter with his grand jury testimony wherein he testified that he did

not know the caliber of the handgun. However, when R. Carter was shown his grand jury testimony during the post-conviction hearing, R. Carter explained that he was familiar with guns. In particular, R. Carter knew that the handgun in the duffle bag was a larger caliber handgun than the .38 caliber he owned.

Prior to trial, King consulted a firearms expert about whether handguns and long guns could fire the same caliber ammunition. What the expert told King is unknown. If King's cross-examination of R. Carter would have implied that long guns and handguns could not fire the same caliber bullets, the prosecution would have rebutted that implication with Hammond's testimony that several manufacturers made long guns capable of firing .45 caliber and 9 mm bullets.

For these reasons, King's failure to further cross-examine R. Carter about the guns that were stored in his apartment was not ineffective under *Strickland*.

(iv) Statements About Owens's Whereabouts

Owens contends King was ineffective because he did not ask R. Carter about his June 28, 2005, police interview during which he stated he had not seen Owens in two or three weeks.

(a) Findings of Fact

An APD detective interviewed R. Carter on June 28, 2005. SOPC.EX.D-464. R. Carter stated during that interview that he had not seen Owens for two to three weeks.

King recalled during the post-conviction hearing that he was aware that R. Carter told the police on June 28, 2005, that he had not seen Owens for two to three weeks. In King's view, asking witnesses about historical time frames can be problematic because lay witnesses are notoriously bad at recalling or estimating time frames. He added that his practice is to be cognizant of corroborating

evidence when he tries to establish a time frame with a witness so as not to lose credibility with the jury.

R. Carter testified in the grand jury proceedings and during the post-conviction proceedings that he was not good at recalling dates and times because of his drug use.

(b) Analysis

Sailor and Todd corroborated each other's testimony that the duffle bag of guns was moved to R. Carter's apartment on June 21, 2005, the day after the Dayton Street homicides. R. Carter testified that Owens was present when the duffle bag was moved to his apartment. Thus, it appears that R. Carter's estimate that he had not seen Owens for two to three weeks prior to June 28, 2005, was inaccurate. Based on Sailor's and Todd's corroborative testimony, trying to establish with R. Carter that Owens was not in the area around the time of the Dayton Street homicides would not have been persuasive. Accordingly, King's decision not to ask R. Carter about his statement that he had not seen Owens for two to three weeks around the time of the Dayton Street homicides was not ineffective under *Strickland*.

(v) Sailor's Involvement with T's Barbershop

Owens contends King was ineffective because he did not impeach R. Carter's statements about Sailor's involvement with the barbershop, which would have suggested that Sailor was involved in drug dealing.

(a) Findings of Facts

When R. Carter was contacted by the police on June 28, 2005, he told the police that Sailor collected $100 from each barber once a week for use of a chair in the barbershop. SOPC.EX.D-464.

R. Carter testified at the sentencing hearing that Owens came by the barbershop to make sure everything was okay for a short time after Ray was arrested. Phase Two Tr. 118:14-21 (June 6, 2008 a.m.). According to R. Carter, when Owens stopped visiting the barbershop, Sailor started coming by to make sure everything was okay. *Id.*

King observed during the post-conviction hearing that R. Carter told the police that the money Sailor was collecting at the barbershop was the weekly chair rent that each barber had to pay in order to work there. King also observed that R. Carter did not mention whether Sailor was collecting drug money. In King's view, inquiring about Sailor's involvement with drug dealing around the barbershop might have allowed the prosecution to ask R. Carter questions about Owens's involvement with drug dealing around the barbershop. According to King, opening the door to Owens's drug dealing would have been contrary to the trial team's successful efforts to preclude the prosecution from presenting such evidence during the guilt phase.

R. Carter testified during the post-conviction hearing that he viewed Ray as the real owner of the barbershop even though he told the police on June 28, 2005, that he was not sure whether Ray or Sailor owned it. R. Carter clarified that he did not view Sailor as an owner because she picked up the barbershop money. Rather, he viewed Owens as Ray's partner. R. Carter also testified that he paid his drug money to Owens.

(b) Analysis

Evidence of Owens's drug dealing would have been harmful to Owens during the guilt phase. Owens's trial team had successfully precluded that evidence with a pretrial motion. Under these circumstances, it would have been unwise for King to establish *via* R. Carter that Sailor was involved in Ray's drug

business. First, Sailor admitted that she tried to keep the barbershop and the drug business going after Ray's arrest. Second, if King had asked R. Carter whether Sailor collected drug money from him, the prosecution might have been allowed to ask R. Carter who usually collected his drug money. At the post-conviction hearing, R. Carter testified that Owens collected his money. He also described Owens as Ray's partner in the drug distribution business. For these reasons, King's decision not to ask R. Carter whether Sailor collected drug money was not ineffective under *Strickland*.

(vi) Pressure to Cooperate

Owens contends King was ineffective because he did not expose how pressure from the police and prosecution affected R. Carter's statements about the events on June 21, 2005.

(a) Findings of Fact

R. Carter testified during the guilt phase that:

- when he went to the police station after the police hassled him in the alley behind the barbershop, he was not worried about the guns being in his apartment so he did not tell the police about the guns. Guilt Phase Tr. 50:14-23 (Apr. 21, 2008 p.m.).
- the police continued to hassle him because he was on parole and they could always find him. He was picked up three different times and eventually spent two weeks in jail. During that time, detectives were questioning him but he told the detectives that he did not know anything. *Id.* at 51:19-25; 52:1-7, 11-25; 53:1-3.
- when he went to the police station the same day he was hassled in the alley, he argued with a detective. The detective told R. Carter that he was no good. R. Carter responded that if the detective had been doing

his job, the people would not have been killed. His response upset the detective. *Id.* at 53:4-19.

- he eventually understood that the police were hassling him because they wanted to talk to him about the murder of the two young people. *Id.* at 54:11-23.
- before he went to jail, he told Sailor about the police hassling him. *Id.* at 59:11-25; 60:1-14.
- before he left Colorado, he did not tell the police about the bag of guns because he thought his secret was safe. *Id.* at 60:18-25; 61:1-11.
- he was surprised when he received a grand jury subpoena. He had to honor the grand jury subpoena because he was on parole. An attorney was appointed for him and told him that he could request immunity before testifying, which he did. *Id.* at 61:12-25; 62:1-6.
- after obtaining the order of immunity, he testified in the grand jury proceedings about the bag of guns in his apartment. *Id.* at 62:7-25; 63:1-2.
- while he was in jail, Fronapfel spoke to him but he did not tell her about the bag of guns. *Id.* at 68:22-25; 69:1-4.
- but for the grand jury subpoena and the immunity order, he would not have told anyone about the bag of guns. *Id.* at 69:5-11.

R. Carter testified at the sentencing hearing that:

- when he testified in front of the grand jury, he was concerned about getting immunity and about repercussions from Owens, Ray, and Carter. Phase Two Tr. 120:19-25; 121:14-20 (June 6, 2008 a.m.).

King testified that he did not recall whether the APD had threatened R. Carter with a life sentence. He said he might have used that evidence to cross-examine R. Carter unless he had a reason not to.

R. Carter testified during the post-conviction hearing that the police could always find him because he was on parole. According to R. Carter, the police were watching him every day. R. Carter recalled that when he went to the police station on June 28, 2005, he was told that he would not be arrested, but he did not believe that he would not be arrested. During the interview at the police station, one of the detectives became upset when R. Carter remarked that if the police had been doing its job, the young people would still be alive. According to R. Carter, the detective responded that R. Carter would get a life sentence if he had anything to do with the murders. R. Carter added that he did not intend to disclose any information about the guns to the police.

R. Carter recalled that the police arrested him two or three days after his June 28 interview. He also recalled that an APD detective came out to the jail and told him that he could get $10,000 from the crime stoppers program or he could get more jail time. R. Carter felt pressure to cooperate but knew he could get hurt if he cooperated so he did not tell the detective about the guns.

R. Carter explained that he told the grand jury everything he knew because he had obtained immunity and because he was scared. R. Carter acknowledged that when he testified on August 16, 2006, he said he told the grand jury everything because the police had their claws in him.

(b) Analysis

During the guilt phase, R. Carter detailed the pressures put on him by the police and prosecution during his direct examination to such an extent that there was no need for King to explore it further on cross-examination. R. Carter testified

about his contact with the police on June 28, 2005. He repeatedly indicated that the police hassled him and as a result, he mentioned it to Sailor. He testified that despite being frightened by Fronapfel's threat, he decided not to tell her anything about the guns. He also testified that despite the police pressure, he never told anyone about the guns until he was given immunity to testify in front of the grand jury. He testified that he never would have disclosed any information without immunity. Thus, the pressure from the police did not cause R. Carter to cooperate. Because there was no need for King to explore it further with R. Carter, King's failure to do so was not ineffective under *Strickland*.

(vii) Mitigation Evidence

Owens contends King was ineffective because he did not elicit mitigation testimony from R. Carter about Owens's demeanor.

(a) Findings of Fact

At the sentencing hearing, R. Carter testified that:

- Owens and Ray were usually armed. Phase Two Tr. 118:8-13 (June 6, 2008 a.m.).
- Owens came by the barbershop to make sure it was running okay after Ray was arrested. *Id.* at 118:14-21.

At the post-conviction hearing, R. Carter recalled Owens was a person who hardly spoke. He testified that Owens was laid back and was always respectful to R. Carter. R. Carter also testified that he conducted his drug transactions with Owens.

(b) Analysis

During phase two, Owens's friends and family members testified that he was quiet and respectful. Thus, calling R. Carter to testify that Owens was respectful would have been duplicative and might have prompted the prosecution to elicit that

the nature of the contacts during which Owens was respectful involved Owens collecting money for drug transactions. His testimony would have added marginal value to Owens's substantial mitigation case, and R. Carter's testimony about Owens's drug dealing would have overshadowed the testimony about Owens's demeanor. As these circumstances show, King's strategic decision not to ask R. Carter at the sentencing hearing about Owens's character was not ineffective under *Strickland*.

(viii) Miscellaneous Topics

(a) Police Surveillance of Barbershop

Owens contends that King was ineffective because he failed to impeach R. Carter's testimony about how the bag of guns was transported to R. Carter's apartment and that he was hassled by the police in the alley behind the barbershop. Owens also contends his trial team should have asked R. Carter if he knew there was a surveillance camera located behind the barbershop and if he knew that persons associated with the barbershop were being investigated for drug dealing prior to June 20, 2005.

The surveillance camera would not have captured the movement of the guns or of anything else on June 21, 2005, because the camera was inoperable on that date. There was no evidence that the police contact with R. Carter on June 28, 2005, was within the purview of the surveillance camera, and the fact of the contact was not subject to reasonable dispute. As to drug dealing out of the barbershop prior to June 20, 2005, R. Carter testified in detail about that topic during the sentencing hearing.

(b) Involvement in Drug Distribution Before Ray Purchased the Barbershop

Owens contends King was ineffective because he did not confront R. Carter with evidence that R. Carter had been dealing drugs out of the barbershop before Ray purchased the barbershop. R. Carter testified during the sentencing hearing that he began working as a barber at the barbershop before Ray purchased the barbershop. He also testified that he began selling small amounts of cocaine out of the barbershop shortly after securing his job as a barber. Thus, evidence that R. Carter was selling drugs before Ray bought the barbershop was presented to the jury in the sentencing hearing. Additionally, any effort by the trial team to inquire about R. Carter's drug activities around the barbershop might have opened the door to Owens's drug activities.

(c) Criminal History

Owens claims King was ineffective because he did not attack R. Carter's credibility with the specifics of his three felony convictions.

R. Carter testified during the guilt phase that he had been to prison and was on parole while he worked at T's Barbershop; that he had two felony convictions; and that he was not allowed to possess a firearm while on parole but nevertheless carried a .380 caliber semiautomatic handgun. R. Carter testified during the sentencing hearing that he had been in prison for a cocaine distribution conviction.

King's approach to R. Carter's testimony was to attack his veracity about the guns being hidden in his apartment. King testified that after R. Carter admitted that he had suffered felony convictions, had served time in prison, and was on parole, King did not want to go through his criminal history in any more detail. King acknowledged that he did not ask R. Carter about the specifics of his

convictions, which included a conviction for impersonation. King had certified copies of R. Carter's convictions but did not use them to impeach R. Carter.

During his post-conviction testimony, R. Carter acknowledged that he was a career criminal who had spent a lot of time on parole, including when he testified during Owens's Dayton Street trial in 2008. R. Carter estimated that he had as many as 10 to 12 felony convictions and acknowledged that, with his extensive criminal history, his trial testimony was only credible because Marlena Taylor corroborated his testimony. R. Carter testified that he got along with Owens and Ray because they were all bad boys who did not abide by society's rules.

R. Carter portrayed himself as a career criminal at trial. If King had inquired in depth about R. Carter's criminal history, he ran certain risks. R. Carter testified during the post-conviction hearing that he got along with Owens and Ray because they were all bad boys who did not abide by society's rules. Neither that testimony nor an inquiry opening the door to the full nature of his relationship with Ray and Owens would have been helpful to Owens's defense. Eliciting the details of R. Carter's criminal history was not worth the risk of R. Carter implicating Owens in other criminal activity or in an anti-social peer group. Thus, King's decision to focus his cross-examination of R. Carter on the guns hidden in R. Carter's apartment without impeaching R. Carter with all of the details of his criminal history was reasonable.

(d) Providing Police with False Information

Owens contends King was ineffective because he did not present R. Carter's history of providing false information to the police.

During his post-conviction testimony, R. Carter admitted that he gave the police a false name when he was contacted by police on June 28, 2005, in the alley behind T's Barbershop. According to R. Carter, the officer who confronted him

said he could charge R. Carter with using a false name. That threat scared R. Carter, because new charges could have resulted in the revocation of his parole.

Impeaching R. Carter about providing a false name to the police had minimal impeachment value. Thus, Owens failed to prove that King performed deficiently when he omitted this incident from his cross-examination of R. Carter.

(ix) Conclusion

The court concludes that Owens failed to prove that his trial team performed deficiently when it failed to impeach R. Carter with available evidence. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance."). The court also concludes that Owens failed to prove that he was prejudiced by the manner in which his team addressed R. Carter's credibility. *See id*. at 694 ("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."). Accordingly, Owens's motion to vacate his conviction and sentence based on his trial team's failure to impeach R. Carter with certain available evidence is **Denied**.

(i) Miguel Taylor

(i) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to call Miguel Taylor as a witness because Miguel Taylor's testimony would have exculpated Owens.

(ii) Findings of Fact

Miguel Taylor and Marshall-Fields were close friends. After Marshall-Fields's death, Miguel Taylor and Pollard had a phone conversation that was

monitored by Fronapfel. Kepros testified that she was aware of that phone call. From that phone call, Kepros learned:

- Marshall-Fields had told Miguel Taylor that someone had asked Harrison if he was close to Marshall-Fields;
- Johnson and Harrison knew each other because they had worked in the same store; and
- Miguel Taylor was suspicious of Harrison because he had only become friendly with Marshall-Fields shortly before his death.

Despite knowing this information, the trial team did not investigate Miguel Taylor. Kepros testified that she might have forgotten to do this investigation or there was not sufficient time to do the necessary investigation. Kepros believed that she requested that Miguel Taylor be interviewed but did not know whether he was interviewed. Kepros did not recall if the team made efforts to serve Miguel Taylor with a trial subpoena.

According to Kepros, Pollard told Fronapfel that Marshall-Fields and Miguel Taylor had been in the presence of Owens more than once but Marshall-Fields had never identified Owens as Vann's shooter. Given this information, Kepros testified there was no reason for the team's failure to call Miguel Taylor to testify at trial.

Kepros testified that she kept notes of examples of the APD's inadequate investigation of the Lowry Park shootings and Dayton Street homicides. However, in her view, she had not been able to properly organize the information in order to thoroughly cross-examine Fronapfel. According to Kepros, the result was an abbreviated cross-examination of Fronapfel. For example, Kepros did not ask Fronapfel about the APD's failure to pursue the various investigative leads

provided by Miguel Taylor. Kepros testified that she did not have a reason to omit that topic from her cross-examination Fronapfel.

(iii) Analysis

Owens contends that Miguel Taylor could have offered evidence supporting a theory that Harrison was an alternate suspect. At least one witness at trial testified about his suspicions of Harrison. Kepros cross-examined Shelwyn Williams (S. Williams), another close friend of Marshall-Fields's, about Harrison's relationship with Marshall-Fields. S. Williams testified that Marshall-Fields "kept bumping into these guys related to the murder of [Vann]" and that S. Williams's "friends made the statement that he keeps running into them because he is hanging out with Brent." Guilt Phase Tr. 96:18-25; 97:1-4 (Apr. 23, 2008 a.m.). S. Williams also testified that he was "wondering who is that guy Brent because none of us knew Brent, and all of a sudden he is really close to [Marshall-Fields.]" *Id.* at 98:4-6. Thus, Owens's trial team did not need to call Miguel Taylor to raise the jury's suspicions about Harrison.

Owens also contends that his trial team should have called Miguel Taylor to testify at trial that Marshall-Fields did not identify Owens as the Lowry Park shooter despite having been in Owens's presence. Owens did not call Miguel Taylor to testify during the post-conviction hearing or otherwise prove that Miguel Taylor would have testified in that manner at trial and therefore Owens has failed to adequately support this claim. *See Barefield*, 804 P.2d at 1345 (finding that the defendant failed to support his claim that his trial counsel negligently failed to call witnesses at trial when the "defendant failed to call those witnesses to ascertain what their testimony would have been").

As for attacking the APD investigation, Kepros examined Fronapfel about the quality of the investigation. Kepros's examinations of Fronapfel comprise

approximately 20 pages of transcript. *See* Guilt Phase Tr. 24-42; 49-50; 55-56 (May 1, 2008 p.m.). Owens has not shown that cross-examining Fronapfel about her decision not to investigate the information from Miguel Taylor would have been a fruitful area of impeachment. Thus, the failure to do so was not ineffective under *Strickland*.

(iv) Conclusion

The court concludes that Owens failed to prove that the trial team's failure to call Miguel Taylor to testify at trial and that Kepros's failure to cross-examine Fronapfel about Miguel Taylor was deficient performance. The court also concludes Owens failed to prove that he was prejudiced by this alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's approach to Miguel Taylor is **Denied**.

iv. Evidence that Others May have Killed Marshall-Fields

(a) Riean Cazenave

(i) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to investigate and to present evidence that Cazenave was an alternate suspect for the Dayton Street homicides.

(ii) Findings of Fact

Jada Henton (Henton) testified during the post-conviction hearing regarding her interaction with Cazenave around 9:30 p.m. on June 20, 2005, at the Safeway store located at the intersection of Quebec and Leetsdale.[308] Henton recalled she was standing outside the store when Cazenave got out of a white truck. He started a conversation with her and said in a loud voice and with animated mannerisms

[308] The Safeway store is located approximately two miles from the scene of the Dayton Street homicides.

that he had just "shot up" some people in a car with two guns. He told her that he shot up the car with a Desert Eagle because "the guys were messing with his cousin."[309] He said the other gun was a Beretta. He was not acting normally and appeared to be drunk.

After that conversation, Henton spoke to Cazenave on the phone and received a text message from him telling her not to snitch. Then she saw the television reports about the Dayton Street homicides and realized they sounded like the incident Cazenave described to her. She mentioned her conversation with Cazenave to a co-worker who happened to know Pollard. The co-worker put her in touch with Pollard, and shortly after speaking to Pollard, Henton was contacted by the APD on June 28, 2005.

She told the APD that Cazenave said he shot up a gold Monte Carlo but acknowledges that she saw the television reports and spoke to several people about the homicides before her APD interview. She also told the APD that Cazenave owned a maroon four-door Buick. Henton allowed the APD to search her phone. She had Cazenave's phone number in her phone, and it showed that Cazenave called her at 9:48 p.m. that night, which meant that he called shortly after he spoke to her at the Safeway.

Stowell reviewed the surveillance video from the Safeway store. The video showed that a male got out of a white Durango and spoke to Henton in an animated fashion for approximately two minutes.

Sobieski went to the Spyglass apartment complex where Cazenave lived on June 28, 2005, to look for a maroon Buick. He found a four-door maroon Buick with a plexiglass rear window that was duct-taped in place. The car was registered

[309] James Hammack, who lived close to the scene of the shooting, testified at trial that the gunshots he heard coming from Dayton Street sounded like they came from a Desert Eagle.

to Cazenave at his Spyglass address. According to Sobieski, the car did not have a landau roof and appeared to be in poor condition.

On June 29, 2005, Stowell and Fronapfel interviewed Cazenave. Cazenave had a number of stories about his whereabouts on June 20. Cazenave's first story was that he was with a man named Vegas at the mall until 4:00 p.m. and was then with his girlfriend from 10:00 p.m. to 10:30 p.m. He did not admit that he was at the Safeway until Fronapfel told him that she had surveillance video proving that he was there. At this point, Cazenave changed his story and admitted that he saw and spoke to Henton.

During the interview, Cazenave made the following statements:

- he was on vacation on June 20;
- he did not leave his house that night except to go to a Dairy Queen;
- he had gone to a friend's house;
- his friend who arrived at the Safeway with him was named Henry but Cazenave did not know his last name or his phone number;
- he told Henton about shooting up a car;
- he told Henton he shot up a car in order to impress her;
- he was not drinking that night and was not intoxicated; and
- he did not own a handgun, and he bought .380 caliber ammunition so he could shoot his brother's gun.

After the APD interviewed Cazenave, he took a polygraph. The results showed his answer about knowing the names of the victims was inconclusive. The examiner never asked him if he shot the victims.

During the search of Cazenave's apartment, law enforcement found a broken down shotgun, some .380 caliber ammunition, a baseball cap, and five cell phones.

A few days later on July 5, 2005, Stowell spoke to a woman who called the APD but would not give her name. She reported that Cazenave went to her church. The woman claimed to have overheard Cazenave discussing the shooting and reported that he said that he had been hired by Ray's cousin to commit the murder. The same woman called back the next day and said that she had overheard Cazenave saying that a lookout had been posted at a gate and that he had hid something in his bathroom cabinet after the police searched his apartment.

Fronapfel testified during the post-conviction hearing about her investigation and conclusions regarding Cazenave. In terms of the investigation of Cazenave, the APD did not:

- search Cazenave's Buick;
- obtain the Safeway video;
- identify and interview Henry;
- review Henton's text messages;
- interview Cazenave's girlfriend;
- obtain Cazenave's phone records;
- interview the woman who reported that Cazenave was telling people at church about the murders; or
- confront Cazenave with his alleged bragging about the murders.

At that time, Fronapfel was following up on numerous leads about the murders and Cazenave was one of those leads. As the investigation proceeded, in Fronapfel's view, nothing else was developed that pointed toward Cazenave's involvement in the murders. For example,

- he was never mentioned by people close to Owens or Ray;
- there was no indication that a white truck was involved in the Dayton Street homicides;

- Henton noted that Cazenave appeared to be drunk while speaking to her, and the Safeway video showed him to be animated while speaking to Henton;
- Cazenave passed the polygraph examination on the question about whether he knew Marshall-Fields and Wolfe; and
- his vehicle did not match the witness's description of the vehicle purportedly involved in the Dayton Street homicides.

Hammond opined during the post-conviction hearing that his search of the FBI's rifling characteristics database for the bullets recovered from the Dayton Street homicides indicated that the .45 caliber and 9 mm semiautomatic handguns manufactured by Desert Eagle and Beretta did not fire those bullets.

Hammond acknowledged that the FBI database for rifling characteristics is generally limited to the barrels on the weapon when it was manufactured but that it contains some after-market barrels. Hammond also acknowledged that barrels can be easily switched for semiautomatic weapons.

Hammond compared the rifling characteristics on the .45 caliber bullet recovered from Wolfe to all the Beretta .45 caliber weapons in the FBI database. According to the database, Beretta did not make a firearm that fired this type of .45 caliber bullet.

However, Hammond acknowledged that it appeared from documentation shown to him by Owens's post-conviction counsel that Beretta made three .45 caliber firearms that were not in the FBI database. Because the documentation indicated those weapons were manufactured in 2004, in Hammond's opinion, it would be highly unlikely that they would be available in this country by 2005. Hammond did not know the rifling characteristics of these weapons and therefore

could not eliminate them as a weapon that could have fired the bullet that killed Wolfe.

Hammond also compared the rifling characteristics for the .45 caliber and 9 mm bullets recovered from Dayton Street to Desert Eagle weapons in the FBI database to determine if there was a match. Hammond explained that the Desert Eagle is a model manufactured by Israel Military Industries (IMI) and that the database contained five .45 caliber weapons under that model name. The rifling characteristics for those five Desert Eagles did not match the rifling characteristics for the recovered .45 caliber bullets. However, Hammond acknowledged that the FBI database did not contain all of the .45 caliber Desert Eagle weapons. Based on a similar comparison of the rifling characteristics for the 9 mm bullets, Hammond eliminated all of the IMI manufactured weapons in the FBI database and again acknowledged that the database did not contain all of the Desert Eagle 9 mm weapons manufactured by IMI.

Based on Desert Eagle documentation shown to him, Hammond agreed that the rifling characteristics contained in Desert Eagle advertisements appeared to be similar to the rifling characteristics of the recovered bullets.

Thus, Hammond could not include or exclude firearms manufactured by Beretta and Desert Eagle as the possible weapons used to fire the .45 caliber or 9 mm bullets recovered from Dayton Street.

Hammond noted that the Desert Eagle firearm is not a common weapon in this country and that the Beretta is very common.

King testified during the post-conviction hearing that he did not investigate Cazenave as an alternate suspect. He was concerned that presenting Cazenave as an alternate suspect could, in the eyes of the jury, expand the scope of the conspiracy alleged by the prosecution. In King's view, whenever you have a

conspiracy as part of a capital murder case, it is dangerous to expand the conspiracy because it might suggest to the jury that there was gang involvement. King's opinion was that suspected gang involvement could affect the jury's assessment of Owens's future dangerousness. King was also concerned about trying to present alternate suspects when Owens's DNA was found in the baseball cap recovered at the murder scene.[310]

King's approach was to suggest additional suspects as opposed to alternate suspects. Under this approach, the trial team wanted to put someone besides Owens and Carter in the shooter's car. For example, the fact that a mixture of DNA was found on the sweatband of the baseball cap suggested that some other person(s) could have worn the cap at the time of the murders. According to King, Todd was an example of an additional suspect the trial team could present based on the prosecution's evidence. In King's view, Todd was the best additional suspect available to the trial team.

King testified that if he told Owens's post-conviction counsel that he did not view Cazenave as a viable alternate suspect because Cazenave was white, he was in error because there was no evidence of the race of the shooter at Dayton Street.

Kepros testified during the post-conviction hearing that she recalled that Cazenave was a potential alternate suspect for the Dayton Street homicides. She started trying to find Cazenave, based on the APD reports, but had a difficult time because his name was often misspelled. In December 2007, she put Cazenave's and Henton's names on a list for trial subpoenas.

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[310] The DNA evidence available at the time of the trial suggested with high probability that Owens was the major contributor to the DNA on the ball cap and that Cazenave could be excluded as either a major or minor contributor. In 2017, Owens produced a report suggesting that, because of new scientific knowledge concerning the deterioration of DNA, although Cazenave could not included, he could not be excluded as a possible minor contributor. This new science was not available to King in 2008.

According to Kepros, she asked King if they should investigate Cazenave as an alternate suspect and he told her not to spend any time on it because it was not going anywhere. King indicated he had serious questions about calling Cazenave and Henton as witnesses. Even though she believed that Cazenave could be presented to the jury as one more possible shooter, she did not try to persuade King to allow her to pursue this theory.

Reynolds viewed the trial team's decision not to pursue Cazenave as an alternate suspect as deficient performance because he had confessed to committing the Dayton Street homicides to at least two people. She faulted this decision because it was made without a thorough investigation of Cazenave.

Cazenave testified during the post-conviction hearing that he did not kill Marshall-Fields or Wolfe and was not involved in a conspiracy to kill them.

Regarding his knowledge of individuals involved in this case, he testified:

- he knows both Johnson and J. Martin from high school but is not close to either of them;
- the person he knew as Ray Ray is Ray Haley;
- he does not know Ray or Owens; and
- he knew a Perish Carter, who was a year behind him in high school.

Cazenave explained that he was embarrassed by what he had done. In Cazenave's view, this had all happened because he was a drunken braggart when he spoke to Henton. Cazenave testified that, when he went to speak to Henton at the Safeway, he noticed a nearby security guard with a 9 mm Beretta that caused him to start talking about guns. Cazenave denied telling anyone at his church that Ray hired him to kill someone, that there was a lookout for the murders, that he was paid with money and drugs, and that he had gotten rid of the gun. Cazenave

acknowledged that he once owned a 1985 maroon car but had sold it for scrap prior to 2005.

Wood interviewed Cazenave three times. During his 2009 interview, Cazenave told Wood he had been to Ray's barbershop one or two weeks prior to June 20, 2005, but did not recall the purpose of his being there.

During his 2013 interview, Cazenave told Wood that on June 20, 2005, he participated in a rap music meeting with three people and after the meeting, he picked up a person named Vegas at Ray's barbershop. Regarding his maroon Buick, Cazenave said:

- he sold his car to a mechanic and did not recall the mechanic's name;
- the title of his car was not signed over to the mechanic because the mechanic was going to sell the car for parts; and
- he identified a photograph of Carter as someone who lived in his apartment complex.

Wood later confirmed that Cazenave and Carter both lived in the Spyglass apartment complex.

(iii) Analysis

Owens contends his trial team was ineffective because it did not investigate Cazenave and present him as an alternate or additional suspect for the Dayton Street homicides. Had Kepros been lead counsel, she might have considered that approach. But King was inclined to focus on the defense's strongest factual scenario and defense theory. King's view was that Owens's best chance for acquittal was to focus the jury on the most reasonable additional suspect – someone other than Owens who might have been in the car that Carter was driving. That was Todd. Thus, King made the tactical decision not to investigate Cazenave as an alternate suspect because, in his view, it would not result in viable evidence

that the trial team could present to the jury. King's reasoning was sound for several reasons.

First, the APD's contemporaneous investigation did not develop substantive evidence that Cazenave was involved in the Dayton Street homicides. Cazenave did not know Ray, Owens, or Carter; had no reason to kill Marshall-Fields and Wolfe; and had no reason to be involved in their killing.

Second, presenting Cazenave as an additional or alternate suspect would have required the defense to expand the conspiracy alleged by the prosecution. As King recognized, expanding the conspiracy to commit murder could have seriously affected the jury's evaluation of Owens's future dangerousness. Although Cazenave did not know Ray or Owens, it would have been difficult to disassociate Cazenave from Ray because Cazenave reportedly told someone at his church that Ray paid him for the murders with drugs and money. Thus, this evidence would have expanded the conspiracy to include Cazenave and Ray and consequently Owens and Carter.

Third, the primary evidence linking Cazenave to the homicides was his statements to Henton and at the church. To present Cazenave as an alternate suspect, the trial team would first have to deal with the hearsay issues. The team would have to lay a proper foundation by calling Cazenave in the defense case, asking him if he murdered people on Dayton Street, and then asking him about what he reportedly said to Henton and at the church. Then the evidence from Henton and the woman from the church could be elicited. However, Cazenave had offered so many inconsistent and contradictory explanations about what he said about his activities that evening that calling Cazenave to testify might have confused the jury. Ultimately, there would be a good chance that the jury would have viewed a presentation of Cazenave as an alternate or additional suspect as a

ploy by Owens's trial team to divert the jury's attention away from the evidence at hand.

Fourth, because of the lack of evidence connecting Cazenave to the Dayton Street homicides, the trial team would not have been able to meet the legal standard for an alternate suspect as found in *People v. Mulligan*, 568 P.2d 449, 456-57 (Colo. 1977) (there must be some act committed by the alternate suspect directly connecting him or her to the crime).

Fifth, the trial team's strategy was to portray Todd as an alternate suspect. The evidence supporting Todd as an alternate suspect was much stronger than the evidence supporting Cazenave as an alternate or additional suspect. Todd had a motive to kill Marshall-Fields because Ray was Todd's best friend, and Todd had the opportunity to kill Marshall-Fields, because Todd's whereabouts on June 20 were unknown and Todd's trip to Denver was extended to include the date of the homicides. Moreover, Ray's payment for Todd's expenses and airline ticket were consistent with King's theory that Ray hired Todd as a hitman. More importantly, the defense could present Todd as an additional suspect based on the prosecution's evidence. Thus, presenting Cazenave as an alternate suspect would have undermined the defense theory.

Sixth, there was evidence available that the prosecution could have presented to rebut any inference of Cazenave as an alternate suspect. For example, the witness who claimed to be knowledgeable about cars described the car at the murder scene as a light colored, two-door car with a red or maroon landau top and tinted windows. Cazenave's car was a four-door with no such top, and it had plexiglass held on by duct tape in place of its rear window. And he emerged from a white SUV at the Safeway store. Additionally, even if he bragged about owning certain guns, Cazenave never owned a Desert Eagle or a Beretta, and it was

unlikely that either a Desert Eagle or a Beretta was used in the Dayton Street homicides.

King's decision not to investigate or present Cazenave as an alternate suspect was based on having a viable alternate suspect in Todd, avoiding the legal standard for presenting alternate suspect evidence, evaluating the lack of evidence the APD developed on Cazenave, and on his assessment of Cazenave's numerous contradictory and confusing statements. Given the risks associated with pursuing the theory that Cazenave was an alternate suspect, King's decision not to pursue that theory of defense was not ineffective under *Strickland*.

(iv) Conclusion

Owens's petition to vacate his conviction and sentence on the basis that his trial team's performance was deficient because Cazenave was not investigated and presented to the jury as an alternate suspect is **Denied**.

(b) Checados Todd

(i) Parties' Positions

Owens contends he was prejudiced because his trial team failed to investigate and present evidence that Todd was an alternate suspect for the Dayton Street homicides.

(ii) Findings of Fact

Todd testified on cross-examination at trial that:

- Ray left the barbershop in the afternoon on June 20, 2005, but he could not recall the time. He did not recall testifying previously that Ray left around 5:00 p.m.[311] Guilt Phase Tr. 119:1-9 (Apr. 17, 2008 a.m.).

[311] On June 10, 2006, Todd testified that Owens and Carter left the barbershop in the Park Avenue at approximately 5:00 p.m. Pretrial Hrg Tr. 132:4-25 (July 10, 2006). He also testified

- Ray was gone from the barbershop for a couple of hours during the afternoon of June 20, 2005, before he beeped Todd. *Id.* at 119:13- 19.
- he was alone in the barbershop office while Ray was gone. He watched the surveillance screens and waited for a delivery to arrive. *Id.* at 119:20-25; 120:1-5.
- Ray left the barbershop on June 20 with Sailor in her car and left the Suburban for him. After Ray beeped him, he drove the Suburban to Carter, Sr.'s house. When he arrived, Sailor's car was not there and none of Ray's other cars were there. *Id.* at 120:12-25; 121:1-6.
- it was starting to get dark when he arrived at Carter, Sr.'s house and he was there for approximately one hour before Owens and Carter arrived. When the television news program showed a picture of a car, he was not exactly sure it was the witness's car and no one said anything about it. *Id.* at 122:12-17; 123:1-13.
- Ray's mother bought his airline ticket with a return date of June 19 and on June 18, both she and Ray told him that his flight was cancelled because something, such as weather or a flight attendant problem, was wrong at the airport. *Id.* at 132:11-25; 133:1-22.
- nevertheless, he did not leave on June 19. *Id.* at 133:23-25; 134:1-21.

Owens's trial team called Huntington to testify during the guilt phase. He testified that:

- he was Carter's cellmate in the ACDF in October 2005 for three to four weeks. Guilt Phase Tr. 10:11-25; 11:1-11 (May 5, 2008).

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that he arrived at Carter, Sr.'s house at approximately 8:00 p.m. when it was getting dark. *Id.* at 135:5-17.

- Carter told him that the victims were witnesses to a prior shooting and that Carter had threatened the man not to testify. *Id.* at 14:17-21; 15:16-22.
- Carter told him that a man named Chi from Chicago was paid $10,000 on a contract to kill the witness. *Id.* at 15:1-7, 22-25; 16:3-6.
- he provided information from Carter to the APD detectives in March 2006. *Id.* at 16:10-13.

Gonglach testified at trial that there were no media reports referencing Todd or a person from Chicago as having been involved in the Dayton Street homicides prior to July 2006. Guilt Phase Tr. 50:4-6 (May 6, 2008 a.m.).

Todd testified during the post-conviction hearing that he did not kill Marshall-Fields and Wolfe. He also said he was not present when they were killed and was not otherwise involved in their killing.

(iii) Analysis

As King explained during his post-conviction testimony about Todd, he wanted to portray Todd as an additional suspect in order to avoid meeting the legal standard for alternate suspect. To that end, King established that Todd did not leave Colorado on June 19, 2005, as originally planned, and did not have a viable alibi for the evening hours of June 20, 2005. Additionally, there was a significant effort by the trial team to portray Todd as a viable additional suspect through Huntington's and Gonglach's testimony. Owens has not shown that there was significant additional evidence that his trial team could have presented on this point; therefore, the trial team's performance with respect to Todd was not ineffective under *Strickland*.

(iv) Conclusion

Owens's petition to vacate his conviction and sentence on the basis that his trial team performed deficiently because it did not present additional evidence supporting a theory that Todd was an alternate suspect is **Denied**.

(c) Perish Carter

Owens contends he was prejudiced because his trial team failed to investigate and present evidence portraying Carter as an alternate suspect for the Dayton Street homicides. Owens did not present any evidence on this claim during the post-conviction evidentiary hearing. Thus, Owens's petition to vacate his conviction and sentence based on his trial team's failure to portray Carter as an alternate suspect is **Denied**.

(d) Percy Carter, Sr.

(i) Parties' Positions

Owens contends he was prejudiced because his trial team failed to investigate and present evidence portraying Carter, Sr., who was allegedly motivated to kill Marshall-Fields to protect both his and Ray's drug operations, as an alternate suspect for the Dayton Street homicides.

(ii) Findings of Fact

Kepros was responsible for Carter, Sr. because King had a potential conflict. She and King did not discuss Carter, Sr. She did not investigate Carter, Sr. as an alternate suspect in the Dayton Street homicides because she did not view him as a viable alternate suspect. Carter, Sr. had an attorney on a pending case at the time so an interview was unlikely. Kepros testified that she would not have called Carter, Sr. to testify at trial without having interviewed him. Kepros recalled that the trial team had successfully precluded gang association and drug evidence and

did not know how presenting Carter, Sr. as an alternate suspect would have affected those rulings.

Reynolds faulted the trial team for not trying to interview Carter, Sr. to determine whether he should be presented as an alternate suspect. In Reynolds's view, Owens's trial team could have interviewed Carter, Sr. without requesting permission from Carter, Sr.'s attorney as long as they did not discuss his pending cases. However, Reynolds acknowledged that portraying Carter, Sr. as an alternate suspect ran the risk of suggesting to the jury that Ray's family members were criminals who assisted Ray with all of his illegal activities.

(iii) Analysis

Carter, Sr. was a not a viable alternate suspect. There was no evidence of his involvement with the Dayton Street homicides. His involvement in the Lowry Park shootings – disposing of the guns and renting motel rooms – is weak evidence in support of an alternate suspect theory. As with Cazenave, the trial team could not have satisfied the *Mulligan* standard for pursuing an alternate suspect defense. Moreover, presenting Carter, Sr. as an alternate suspect would have expanded the scope of the conspiracy to kill Marshall-Fields without inculpating Owens, which would have been harmful to Owens at sentencing. Thus, the trial team's failure to present Carter, Sr. as an alternate suspect was not ineffective under *Strickland*.

(iv) Conclusion

Owens's petition to vacate his conviction and sentence on the basis that his trial team performed deficiently because it did not investigate or present Carter, Sr. as an alternate suspect for the Dayton Street homicides is **Denied**.

(e) Percy Carter, Jr.

(i) Parties' Positions

Owens contends he was prejudiced because his trial team failed to investigate and present evidence portraying Carter, Jr. as an alternate suspect for the Dayton Street homicides.

(ii) Findings of Fact

There was a report in discovery about an informant who said that he heard from a barber at Ray's barbershop that Carter, Sr. told the barber that the shooters in the car on Dayton Street were Percy, Jr., Face, and Ray Ray. The trial team did not investigate the informant to determine his veracity or the barber who heard what Carter, Sr. allegedly said. Kepros pointed out that the trial team lacked the necessary resources and time to conduct all of the pretrial investigation that was necessary and these were some of the reasons that Carter, Jr. was not pursued as an alternate suspect. She acknowledged that her trial notes indicate that she did not want to subpoena Carter, Jr. to the trial.

Arnold worked with Carter, Jr. at the time of the Dayton Street homicides. She provided information to the APD that Carter, Jr. had come into work one morning, and he was upset because Ray had shot the only witness who was going to testify against him in his Lowry Park case.

In Reynolds's view, Owens's trial team should have investigated Carter, Jr. because it had information suggesting that he was involved in the Dayton Street homicides. However, Reynolds acknowledged that part of that investigation would include an interview of Carter, Jr. who has never spoken to anyone, including Owens's post-conviction counsel. Reynolds also conceded that the information from Arnold about Carter, Jr. did not implicate him in the murders.

(iii) Analysis

Owens relies on three pieces of evidence in support of his contention: Carter, Jr.'s participation in Ray's drug operations; the informant's report that Carter, Jr. was in the car with the shooter who killed Marshall-Fields; and Arnold's information that Carter, Jr. was upset with Ray the day after the Dayton Street homicides.

Carter, Jr. was not a viable alternate suspect. First, Carter, Jr.'s alleged involvement in Ray's drug business does not sufficiently suggest he was an alternate suspect in the Dayton Street homicides. Second, the informant's information that Carter, Jr. was in the shooter's car was triple hearsay that was never verified and was not strong enough to cast Carter, Jr. as an alternate suspect at trial. Third, Arnold's information does not suggest that Carter, Jr. was an alternate suspect. These facts were insufficient to prompt Owens's trial team to launch an investigation of Carter, Jr. as a potential alternate suspect and were insufficient to portray him as an alternate suspect at trial. The trial team's failure to conduct this investigation was not ineffective under *Strickland*.

(iv) Conclusion

Owens failed to prove that his trial team performed deficiently when it failed to pursue Carter, Jr. as an alternate suspect and therefore his petition to vacate his conviction and sentence on that basis is **Denied**.

(f) Brent Harrison

(i) Parties' Positions

Owens contends he was prejudiced because his trial team failed to investigate and present evidence portraying Harrison as an alternate suspect for the Dayton Street homicides.

(ii) Findings of Fact

Harrison testified at trial about his relationship with Marshall-Fields, including that:

- he had known Marshall-Fields since the ninth grade and though not best friends, they spent a lot of time together. They were close at the time of Marshall-Fields's death because Marshall-Fields, after graduating from college, moved in with Wolfe, who lived in Harrison's apartment complex. Guilt Phase Tr. 94:15-20; 95:7-25; 96:3-19; 98:1-7; 102:22-25 (Apr. 9, 2008 a.m.).
- he attended Marshall-Fields's college graduation. *Id.* at 99:12-15.
- in June 2005, he got Marshall-Fields a job at Johnson Storage and Moving where he worked. *Id.* at 100:17-23.
- he called Marshall-Fields around midnight on June 19, 2005, to see if he was okay. Guilt Phase Tr. 21:2-11, 23-24 (Apr. 9, 2008 p.m.).
- when he visited Goodish in Fort Collins, he would see Marshall-Fields. *Id.* at 28:20-25; 29:1-11.

Harrison also testified at trial that when he reached Marshall-Fields's car on Dayton Street, he freaked out and tore off his cap and shirt. Guilt Phase Tr. 108:7-12; 108:19-25; 109:10-15; 110:3-5; 110:11-16 (Apr. 9, 2008 a.m.). He then called Goodish because he was Marshall-Fields's closest friend. Guilt Phase Tr. 31:10-25; 32:2-4 (Apr. 9, 2008 p.m.).

T. Wilson testified at the post-conviction hearing that he and Sobieski interviewed Harrison on June 21, 2005, at 12:30 a.m. Harrison was cooperative throughout the interview and appeared scared. Harrison indicated he was not going back to his apartment because he was scared. Harrison voluntarily turned

over his cell phone. T. Wilson did not seek a search warrant for Harrison's apartment because he did not have probable cause.

Fronapfel interviewed Harrison on July 15, 2005. She collected his DNA during that interview, and she testified at the post-conviction hearing that obtaining a DNA sample from Harrison was routine practice.

After reviewing all the information he had about Harrison, King decided not to pursue Harrison as an alternate suspect in the Dayton Street homicides. King recalled that Harrison ran to the scene of the Dayton Street homicides and tore off his clothes, which King viewed as somewhat suspicious because it seemed to be an overly dramatic reaction. King agreed that it would be advantageous to try to put someone else in the shooter's car but, given what he knew about Harrison, he did not believe there was any evidence to suggest Harrison was in the shooter's car. King testified that when a defense attorney tries presenting someone as an alternate suspect and fails, the attorney's credibility with the jury can be damaged.

Harrison testified during the post-conviction hearing that it was not unusual for Marshall-Fields to pick him up at his apartment complex. Harrison described their routine that Marshall-Fields would call when he was at a certain location, which would prompt Harrison to be outside when Marshall-Fields arrived.

Harrison did not know Johnson. He recalled the nickname J-5 but did not know that person.

Harrison testified during the post-conviction hearing that he was not with Marshall-Fields when, shortly before graduation, Marshall-Fields allegedly took property from a house in Fort Collins. Harrison recalled visiting Marshall-Fields in Fort Collins approximately one month before his graduation. He visited Marshall-Fields and Goodish at different times while they were students at

Colorado State University (CSU). He did not know if Marshall-Fields had any friends at CSU who were named Brent.

The prosecution did not disclose any evidence to Owens's trial team showing that Harrison and Marshall-Fields were involved in a burglary in Fort Collins. Thus, King did not present that evidence at trial. King and Kepros discussed whether to present evidence of Marshall-Fields's bad acts and decided against it, noting that such a tactic could have a negative impact with the jury. Thus, even if the prosecution disclosed such evidence, it is unlikely that the trial team would have presented it at trial.

Reynolds viewed the trial team's performance as deficient because it did not obtain records from the Fort Collins Police Department about the incident where Marshall-Fields and someone named Brent took property. In Reynolds's opinion, the records would have shown a burglary was committed and there might have been a gun involved. That evidence could have been used to suggest that Harrison was motivated to kill Marshall-Fields to prevent him from disclosing Harrison's involvement in the burglary.

Reynolds also viewed the team's performance as deficient for not presenting Harrison as an alternate suspect through his ties to Johnson and Ray. She noted that Pollard and Miguel Taylor suspected Harrison was involved in the murders. Reynolds conceded that there was no evidence that Johnson ever spoke to Harrison and that a witness's suspicions are generally inadmissible at trial.

Reynolds also faulted the trial team for not utilizing evidence that showed Harrison, while running by the Hispanic men in the parking lot, said that his friend was shot before the shots were fired. Reynolds acknowledged that Owens's trial team tried to interview Harrison but he refused.

(iii) Analysis

Owens asserts several grounds in support of his claim that Harrison was an alternate suspect for the Dayton Street homicides. First, Owens asserts that Harrison was a known associate of Johnson's. But Harrison denied knowing Johnson.

Second, Owens asserts that Harrison was motivated to kill Marshall-Fields to prevent Marshall-Fields from disclosing Harrison's involvement in a burglary in Fort Collins. While there is evidence suggesting that a Brent was involved in the burglary, there is no evidence that the Brent and Harrison were the same person. Nor is there any evidence that Marshall-Fields was going to disclose Harrison's supposed involvement.

Third, Owens asserts that on June 20, Harrison directed Marshall-Fields to pick him up at the apartment complex. There is no evidence that Harrison asked Marshall-Fields to pick him up in order to set up the shooting. According to Harrison, Marshall-Fields often picked him up at his apartment.

Fourth, Owens relies on the fact that the APD took Harrison's DNA. However, according to Fronapfel, the APD often takes DNA samples from people regardless of whether the APD views the person as a witness or as a suspect.

Last, Owens asserts Harrison was an alternate suspect because Goodish and Miguel Taylor suspected Harrison was involved in the murders. But suspicions are not only insufficient to portray someone as an alternate suspect, they are generally inadmissible as evidence.

Moreover, the evidence does not suggest that Harrison was involved in Marshall-Fields's death. Harrison and Marshall-Fields had known each other since they were teenagers. They were friends. Harrison went to Marshall-Fields's college graduation. Harrison got Marshall-Fields his first job after graduation. He

was so concerned about Marshall-Fields that he called him after they left Gibby's to make sure Marshall-Fields was okay. And as soon as Harrison saw what had happened to Marshall-Fields and Wolfe, he called Goodish, Marshall-Fields's best friend. Harrison was emotionally distraught and told the detectives that he was afraid to go home. He was cooperative with all law enforcement interviews.

Under these circumstances, King's decision not to present Harrison as an alternate suspect was not ineffective under *Strickland*.

(iv) Conclusion

Owens's petition to vacate his conviction and sentence on the basis that his trial team performed deficiently because it did not investigate and present evidence showing that Harrison was an alternate suspect is **Denied**.

(g) Cars at Scene

(i) Parties' Positions

Owens contends he was prejudiced because his trial team failed to investigate and present evidence that eyewitness descriptions of various cars at the scene of the Dayton Street homicides did not match Todd's description of the car occupied by Owens and Carter at the barbershop prior to the homicides.

(ii) Findings of Fact

Todd testified at trial that Owens and Carter were at the barbershop on June 20, 2005, in a gold or tan Park Avenue, and when they left, Carter was driving, and Owens was in the passenger seat. Guilt Phase Tr. 81:5-11; 83:15-22 (Apr. 17, 2008 a.m.).

James Hammack (Hammack) lived in the neighborhood where the Dayton Street homicides took place and was the first to arrive at the scene. He testified at trial that:

- when the shooting stopped, he ran outside and, from his porch, could see two cars next to each other – one was accelerating away and the other car, a gold Monte Carlo, was rolling in a northerly direction. Guilt Phase Tr. 90:8-13, 17-19, 23-25; 91:1-9 (Apr. 9, 2008 p.m.).
- the accelerating car was a white or cream-colored two-door Buick Regal or Cutlass with a soft half top that was red, maroon, or dark brown vinyl and had tinted windows. According to Hammack, he is familiar with cars and this car was from the late 1970s or mid-1980s. *Id.* at 102:16-25; 103:1-13, 18-25; 104:1-4; 111:19-24; 112:3-19.

Hammack confirmed during the post-conviction hearing that he told the police on the night of the homicides that the car accelerating from the scene might have been a Regal or a Cutlass. Hammack added that he knew cars from previously working in a body shop and believed he could identify the difference between a Park Avenue and a Cutlass. He said that if he had been shown a picture of a Park Avenue at trial, he would have testified that it was not the car he saw at the murder scene.

Harrison told the police that he saw a Dodge Intrepid parked near Marshall-Fields's apartment in the apartment complex parking lot after the Gibby's incident on June 19. Harrison also told the police that he saw an Intrepid leave the apartment complex as he ran toward the murder scene on June 20.

King testified during the post-conviction hearing that it was unlikely that the Intrepid was the shooter's car because Harrison saw it while running toward the scene after being told that Marshall-Fields had just been shot in his car. Most likely, the shooter's car had already sped away without Harrison having had the opportunity to see it. King acknowledged that he knew Carter, Sr. owned a

number of cars but the team did not investigate who in the Carter family owned an Intrepid.

Lewis Luther (Luther) lived near the scene of the Dayton Street homicides. He did not testify at trial. He testified at the post-conviction hearing about a car he saw on Dayton Street on June 20, 2005. Luther described that while it was still light out, he was driving south on Dayton Street, headed toward the turn-in for his apartment complex that is located on Dayton, a half block north of Idaho. While heading toward the turn-in, he noticed a car parked north of Idaho, facing north, and on the east side of Dayton. At the time, there was a lot of traffic on Dayton. The car had its flashers on, turned on its bright headlights, and then dimmed the headlights. He did not recall any other details about the car. Luther recalled coming to the courthouse in 2008 but was not called as a witness. He was interviewed by an unknown person. He recalled telling this person that the car he saw was maroon.

In Reynolds's opinion, Owens's trial team mishandled the identification of the shooter's car. In Reynolds's view, Hammack's and Luther's descriptions could have been used to impeach Todd's description of the car Owens and Carter left the barbershop in on June 20. Reynolds faults the trial team for not pointing out that no one gave a description of a car near the murder scene that matched the car Todd claimed to have seen Carter and Owens leave the barbershop in.

Reynolds also faulted the trial team for not using tire mark evidence gathered by the APD at the murder scene because the APD technician's report said it could not be determined whether one or two cars accelerated away from the scene. This evidence, according to Reynolds, should have been presented to the jury to suggest that there were two cars, each with a shooter in it. In Reynolds's

view, this evidence could have created a reasonable doubt about Owens being the actual shooter.

(iii) Analysis

Todd's description of the car occupied by Owens and Carter at the barbershop was different than Hammack's description of the car he saw at the scene of the Dayton Street homicides. Both descriptions were presented to the jury. Kepros effectively emphasized Hammack's description by using leading questions to have Hammack reaffirm that the shooter's car was a cream-colored Cutlass or Buick with a maroon or brown landau-type roof. Her cross-examination undercut the prosecution's theory that Carter and Owens, in a tan Park Avenue, committed the Dayton Street homicides. The trial team's performance was not ineffective under *Strickland*.

As for not using Luther's testimony about the car parked to the north of the murder scene, it would have been pure speculation that this car had any involvement in the murders. And regarding the fact that it was a maroon car, it would not have been a wise defense tactic to tie any of Ray's or Ray's family members' cars to the scene. Such a tactic would only inculpate Ray and therefore Owens. As for tying Cazenave's maroon car to the murders, as noted previously, such a tactic would only expand the conspiracy without diminishing Owens's involvement. In similar fashion, it would not be advantageous to the defense to present Carter, Jr.'s Dodge Intrepid as being used to surveil Marshall-Fields's apartment because that tactic only expands the conspiracy to Ray's family members without diminishing Owens's culpability.

The trial team's handling of the evidence regarding the cars associated with the Dayton Street homicides was not ineffective under *Strickland*.

(iv) Conclusion

Owens's petition to vacate his conviction and sentence because his trial team failed to present descriptions of various cars reportedly at the scene of the Dayton Street homicides in order to attack Todd's description of the car occupied by Owens and Carter at the barbershop is **Denied**.

c. Deficient Performance in Investigating and Presenting Evidence of Biased, Flawed, and Inadequate Police Investigation

i. Parties' Positions

Owens contends he was prejudiced because his trial team failed to investigate and present evidence that the APD's investigation of the Lowry Park shootings and Dayton Street homicides was inadequate, unreliable, biased, and result-oriented.

ii. Findings of Fact

T. Wilson testified during the post-conviction hearing about his investigation of the Lowry Park shootings. Because his testimony is relevant to all of Owens's claims that the APD's investigation was biased and inadequate, the court sets forth T. Wilson's testimony here and incorporates it into all of the claims in this part V.D.3.c of the Order.

As the lead detective for the Lowry Park shootings, T. Wilson was responsible for reviewing all the investigative reports and maintaining the APD investigative file for that case.

The APD responded in force to Lowry Park. There were numerous uniformed officers, crime scene investigators, and detectives on scene. T. Wilson was at Lowry Park for a short time, and while there, he interviewed one witness. Then he returned to the APD's headquarters and began researching the suspect's

car. At some point during the initial stages of the investigation, he searched Vann's car at Lowry Park.

T. Wilson eventually prepared an investigative report for the Lowry Park shootings that was based in part on the uniformed officers' and detectives' interviews of witnesses and victims. These interview reports contained various descriptions of the shooter(s) and others who may have been involved in the physical and verbal arguments that preceded the shootings.

In the initial stages of the investigation, there were up to five suspects, because some witnesses reported that as many as five people left Lowry Park in a Suburban. However, T. Wilson focused his investigation on witnesses who saw the shooting, including Marshall-Fields, Bell, and Green. As a result, he quickly came to believe that there were two shooters at Lowry Park. One shooter was described as wearing a Sixers jersey. And the other shooter was described as lighter-skinned, tall, medium build, wearing braids, and long jean shorts.

T. Wilson acknowledged during the post-conviction hearing that if he had asked the witnesses who gave the description of the second shooter to view a video of the events at Lowry Park, he might have identified Owens much sooner. But T. Wilson explained that he did not show the video to witnesses because he did not want word to spread that he had the video.

T. Wilson also testified about witnesses who were and were not interviewed. Ashley Brown (A. Brown), who took the video of the fight at Lowry Park, and Brooke Howard (Howard) were interviewed at Lowry Park and were then taken to a police station where they gave more detailed information to a detective. Approximately 20 other witnesses were interviewed at Lowry Park.

T. Wilson tried to do follow-up interviews with many witnesses who had indicated to on-scene officers that they saw the shooting. According to T. Wilson, follow-up interviews were done with approximately five of the on-scene witnesses.

The other witnesses were not re-interviewed because, in general, they did not see the shooting. T. Wilson conceded that he did not interview three individuals who were reportedly at Lowry Park.

Between July 4, 2004, and June 20, 2005, T. Wilson could not locate many of the witnesses and some of the witnesses would not cooperate with him. For example, many of the people who called 911 from Lowry Park refused to give their identity to the dispatcher.

As part of his investigation, T. Wilson researched DMV records because several witnesses had identified a Suburban as the getaway car. After learning that A. Martin had identified Ray as being involved, T. Wilson searched the DMV records to find a connection between Ray and a Suburban. He found a Suburban registered to Ray and to Ray's mother.

T. Wilson also used A. Martin's information to find a high school yearbook with Ray's picture in it. After Ray was arrested, T. Wilson used the yearbook photo to verify that A. Martin had identified the same person who had been arrested. Then T. Wilson prepared a photo array with a photo of Ray in it. He showed the array to Marshall-Fields, Green, and A. Martin. All three identified Ray as the getaway driver.

Through Ray's mother, T. Wilson found Ray and learned that Ray lived with Sailor. T. Wilson did not interview Sailor because he did not know she was at Lowry Park. He did not interview any of Ray's known associates and did not show photos of Ray's associates to any of the Lowry Park witnesses.

In T. Wilson's view, there were initially three main suspects for the Lowry Park shootings: Ray, J. Martin, and Marquell Terrell (Terrell). Ray was a suspect because of the information from A. Martin. J. Martin was a suspect because Baker reported seeing J. Martin with a gun at Lowry Park. However, Baker's information came from an unidentified third party and T. Wilson mistakenly focused on a different J. Martin, which led T. Wilson to put a photo of the wrong J. Martin in the array that he showed to Green. Because he focused on the wrong individual, T. Wilson was unaware that J. Martin had been involved in shootings in Boulder and Aurora or that he had been arrested in Denver in 2004 with a .380 caliber handgun, which is the same caliber as one of the guns used at Lowry Park. He never tried to interview J. Martin. T. Wilson pointed out that between July 4, 2004, and June 20, 2005, no witness identified J. Martin as Vann's shooter. Terrell was a suspect because T. Wilson received an anonymous tip that Terrell was involved. T. Wilson researched DMV records connected to Terrell and found nothing that connected him to the Lowry Park shootings. T. Wilson showed a photo array with Terrell in it to Green.

T. Wilson did not recall an investigative lead from a man who, while in a hospital with a blood alcohol level three times the legal limit, said that someone named "Big RIP" committed the Lowry Park shootings. There was no investigative follow-up on this information. He also did not do any investigative follow-up on someone saying that a security guard at Lowry Park had committed the shootings.

T. Wilson recalled that he could not find Miguel Taylor, whom Marshall-Fields identified as someone who might have information about the Lowry Park shootings and therefore did not interview Miguel Taylor. T. Wilson pointed out

that Miguel Taylor told a police officer at the scene that he did not know Marshall-Fields or Vann.

T. Wilson acknowledged that he never asked the CBI to examine Vann's clothing for stipling. According to T. Wilson, the pathologist routinely looks for stipling on the victim's clothing, and when T. Wilson attended Vann's autopsy, the pathologist did not identify any stipling.

According to T. Wilson, the Dayton Street homicides re-energized the Lowry Park investigation. He tried again to contact some of the Lowry Park witnesses. In his view, as the Dayton Street investigation proceeded, it became clear that certain Lowry Park witnesses had withheld information from the police.

During the post-conviction hearing, T. Wilson acknowledged that he made mistakes in his Lowry Park investigation. He added that he was not able to get enough information about the second shooter at Lowry Park until after witnesses such as Sailor and Johnson began cooperating. T. Wilson noted that he could not charge Ray or Owens with murder and aggravated assault at Lowry Park until those witnesses began cooperating in the latter half of 2005.

Kepros testified during the post-conviction hearing that King's decision not to retry the Lowry Park case in the Dayton Street trial made attacking the APD investigation of the Lowry Park shootings unnecessary.

iii. Prosecution Claim of a Thorough Investigation

This section does not state a claim for relief.

iv. Inadequate Police Investigation Before June 20

(a) Failure to Investigate J. Martin

(i) Parties' Positions

Owens contends his trial team was ineffective because it failed to show that the APD did not adequately investigate J. Martin's involvement in the Lowry Park shootings.

(ii) Findings of Fact

Baker identified J. Martin as the shooter, but his information was from another unidentified individual. Fronapfel initially tried to locate J. Martin but did not interview him after she learned that J. Martin had been arrested in Denver. The APD did not collect J. Martin's DNA, get a search warrant for his home, or otherwise try to search his home. Kepros recalled reviewing T. Wilson's supplemental report. He had not shown a photo of J. Martin to Marshall-Fields, A. Martin, or Bell. Kepros did not have a reason for failing to ask Fronapfel and T. Wilson about their failures to investigate and interview J. Martin.

Kepros wanted to use the cross-examination of T. Wilson and Fronapfel to show that the APD did not adequately investigate any other suspects for the Lowry Park shootings, but she could not fully pursue this line of questioning at trial because, in her opinion, she was unprepared to adequately impeach Fronapfel and T. Wilson.

Hammond testified during the post-conviction hearing that it was highly unlikely that the gun with which J. Martin was arrested in 2004 was the gun that fired the bullets that killed Vann at Lowry Park.

In Reynolds's view, the trial team failed to challenge the APD's investigation of J. Martin as an alternate suspect. Reynolds conceded that no

witness had ever said before the Dayton Street homicides that s/he saw J. Martin shooting a gun at Lowry Park.

(iii) Analysis

There was no reason for Owens's trial team to challenge the APD's lack of investigation of J. Martin because he was not a viable alternate suspect. First, the tip from Baker that J. Martin was shooting at Lowry Park was unreliable. Baker had to call someone else to find out the name of the person he saw with a gun at Lowry Park. Baker refused to identify the person who told him the shooter's name was J. Martin. Second, despite the unreliability of Baker's information, T. Wilson pursued Baker's tip. He put J. Martin's photo – albeit a photo of the wrong J. Martin – into a lineup and showed it to at least one witness. Owens's trial team could only have shown that T. Wilson's efforts to investigate J. Martin, while professional, were premised on poor information. And third, according to Hammond, the gun J. Martin was arrested with in 2004 was likely not the gun that was used to kill Vann.

(b) Failure to Interview Known Scene Witnesses

(i) Parties' Positions

Owens contends that his trial team was ineffective because it did not attack the APD's investigation of the Lowry Park shootings on the basis that the APD failed to sufficiently interview witnesses who were contacted at Lowry Park.

(ii) Findings of Fact

Kepros did not ask T. Wilson at trial about his failure to conduct follow-up interviews with Sailor and other scene witnesses. In Kepros's view, there was no reason for not asking these questions except that she was unprepared for T. Wilson's cross-examination.

(iii) Analysis

Had Owens's trial team cross-examined T. Wilson about the Lowry Park witnesses who were not interviewed by the APD, the prosecution would have asked T. Wilson to explain that his approach to the investigation was to focus on those witnesses who reported seeing a shooting and how that quickly led to the identification of Ray as the getaway driver. T. Wilson would have discussed the apparently intimidated witnesses, the evidence of express and implied threats which correlated the "wall of silence," and the reasons why he pursued the avenues that he did in the Lowry Park investigation. Any potential advantage from cross-examining T. Wilson about the witnesses he did not interview would have been outweighed by his explanation of the reason for not interviewing those witnesses.

(c) Failure to Interview Witnesses Later Identified

(i) Parties' Positions

Owens contends that his trial team was ineffective because it failed to present evidence that the APD had information that other witnesses were at Lowry Park yet did not interview those witnesses.

(ii) Analysis

Owens identified four witnesses who were reportedly identified after the investigation started and were not interviewed by the APD. They were A. Taylor, Brandon Alston (B. Alston), Aja Varnado (Varnado), and Sailor. A. Taylor was interviewed at Lowry Park. T. Wilson attempted to do a follow-up interview, and A. Taylor refused to be interviewed. T. Wilson did not know if the APD interviewed B. Alston, and he conceded that he did not follow up with Varnado. Owens did not call B. Alston, A. Taylor, or Varnado to testify at the post-conviction hearing. Thus, there is no way for the court to know what these witnesses would have testified to at trial.

As for the APD's failure to interview Sailor before the Dayton Street homicides, T. Wilson did not know that she had been at Lowry Park until after the Dayton Street homicides. Additionally, Sailor made it clear at trial and at the post-conviction hearing that she had no intention of cooperating in the pending Lowry Park investigation.

(d) Failure to Utilize CODIS[312]

(e) Failure to Continue Investigating

(i) Parties' Positions

Owens claims his trial team was ineffective because it did not investigate and present evidence demonstrating that the Lowry Park investigation stopped when Ray was arrested.

(ii) Findings of Fact

Kepros did not cross-examine T. Wilson or Fronapfel about their failure to try to identify additional witnesses for the Lowry Park shootings based on leads from witnesses and information gleaned from motor vehicle records for the license plates of cars at the scene. Kepros also did not cross-examine them about their knowledge that there were two guns involved at Lowry Park and that the police had descriptions of up to seven suspects. Kepros noted that she had intended to do this cross-examination at the Dayton Street trial and had no reason for not doing it.

(iii) Analysis

In T. Wilson's experience, the Lowry Park crime scene yielded more information than the police normally obtain. Thus, he focused his investigation on witnesses who saw the shooting. A. Martin's report that Ray was the getaway driver was reliable because A. Martin knew Ray. Marshall-Fields's identification

[312] Owens withdrew this claim in SOPC-232.

of Ray was reliable given his proximity to Ray when Ray shot him. As a result, T. Wilson obtained photographic identification of Ray shortly after the Lowry Park shootings. The trial team might have attacked the APD's investigation for not trying to find more witnesses, but the jury would have accepted T. Wilson's explanation that he made significant progress with the available evidence despite not conducting additional investigation.

As for the trial team not attacking the APD's investigation because it did not pursue the additional potential suspects, T. Wilson's investigation was driven by several witnesses who reported seeing two shooters. It was not driven by the suspect descriptions in the Versadex Report. As T. Wilson explained during the post-conviction hearing, the Versadex Report has no investigative value. *See* part IV.D.3.i of this Order.

(f) Failure to Identify Connections between Witnesses

(i) Parties' Positions

Owens contends that his trial team was ineffective because it did not present evidence showing that the APD did minimal investigation of the relationships among several Lowry Park witnesses.

(ii) Findings of Fact

Several Lowry Park witnesses were friends with one another, and there were several witnesses who were friends with more than one group. Kepros cross-examined the detectives at the Dayton Street trial about some of these relationships in an effort to show how the police bias developed. Kepros did not cross-examine Fronapfel about all of the relationships because she was not fully prepared to do so. The prosecution also presented evidence about the relationships among some of the witnesses.

Cernich testified during the post-conviction hearing that while he was working as an off-duty officer at Aurora South Medical Center on October 17, 2004, Dickey came into the hospital with a gunshot wound. He also testified that several of Dickey's friends were at the hospital, including Johnson.

Stephanie Hayashida (Hayashida) testified during the post-conviction hearing. Fronapfel interviewed her in October 2005. Hayashida told Fronapfel that she was concerned with Harrison becoming friends with Marshall-Fields. She pointed out that she did not know either of them very well, that Marshall-Fields was not really her friend, and that she did not like Harrison.

(iii) Analysis

According to Owens, his trial team could have shown that the witnesses' statements about the incident may have come from conversations among the witnesses instead of from the witnesses' independent recollections. Kepros cross-examined the detectives on this topic. Moreover, Owens failed to prove that Johnson's connection to Dickey resulted in either of those witnesses testifying based on their conversations with each other and not based on their independent recollections.

v. Bias and Inadequacy of Subsequent Investigation[313]

(a) Parties' Positions

Owens contends that his trial team was ineffective because it did not present evidence showing that the prosecution and the APD knew of safety concerns for the witnesses before June 20, 2005, yet did not warn or take actions to protect the witnesses. Owens also contends that his trial team was ineffective because it failed

[313] In SOPC-293, Owens withdrew the claim regarding the failure to investigate Harrison's statement that he went to a bowling alley on June 19, 2005.

to investigate and present evidence that the APD's investigation after the Dayton Street homicides was biased and inadequate.

(b) Findings of Fact

Owens's trial team called 17 witnesses to testify during the guilt phase. The bulk of the witnesses' testimony was focused on the inadequate and biased police investigation.

For example, Dr. Norah Rudin (Rudin), a forensic DNA consultant, testified about the inadequacy of a DNA identification made from the DNA mixture found in the cap recovered at the crime scene. And Shoshanna Bitz (Bitz), an investigator for the public defender's office, testified about the protocol for obtaining DNA and fingerprints from shell casings. Her testimony impeached the testimony of CBI agent George Herrera (Herrera). Additionally, Root testified about the extraordinary plea agreements that the prosecution extended to several major witnesses in order to show those witnesses' bias and motivation for cooperating against Owens. Five crime scene investigators testified, generally for the purpose of impeaching the APD's lack of forensic investigation. And Fronapfel testified about promising Huntington that she would pass on his request for a sentence reconsideration to the prosecution and that she had done so.

The trial team also called Joseph Snyder (Snyder), a crime scene reconstruction expert, who opined that the APD did not pursue many investigative leads from the numerous crime scene photographs. He criticized some of the techniques used by the APD to determine the trajectory of the bullets in the Monte Carlo. He criticized the manner in which the evidence and debris inside the Monte Carlo was thrown into the back seat exposing it to cross-contamination. He also criticized the APD for poorly maintaining the Monte Carlo thereby making it difficult for any follow-up investigation to be accomplished. For example, he

noted that the APD did not collect gunshot residue or investigate a broken headlight. He criticized the APD's failure to properly examine the hairs and fibers obtained from the cap for DNA. Snyder also noted the APD did not investigate the tire marks left at the scene to try to determine the tire width of the suspect's car. Snyder opined that the prosecution's evidence could not support the prosecution's theory of only one shooter and one car, noting there was no way to know the number of shooters or the number of cars involved.

Owens presented additional evidence during the post-conviction hearing in support of his claim that the APD's investigation was biased and inadequate. Stowell testified during the post-conviction hearing that he did not know what was recovered from the search of Cazenave's apartment or whether any of the cell phones found in the apartment were searched.

Stowell also testified that he interviewed Oscar Aguilar (Aguilar) at the scene of the Dayton Street homicides. According to Stowell, Aguilar said that he was on the phone with a friend and the friend said that a black male had just run by him saying his friend had been shot. Shortly after this, Aguilar heard gunshots. According to Stowell's report, Aguilar would not provide his friend's name but said he would have the person call Stowell. Stowell did not speak to Aguilar again and never learned the identity of the person who was on the phone with Aguilar.

B. Taylor testified during the post-conviction hearing that two APD officers showed up at her house on July 28, 2005, and took her to the police station where she spoke to Fronapfel. She did not recall telling Fronapfel that she was willing to cooperate or that she wanted protection from Ray and Sailor. B. Taylor recalled telling Fronapfel, later that day, that she was concerned with Sailor following her in order to hurt her because she sold the speakers that Ray hid at her house. B. Taylor also became concerned when Fronapfel played a recording of a phone call

between B. Taylor's boyfriend (Ray's brother) and Ray, during which Ray said he was going to kill her for selling his speakers. B. Taylor explained that she became afraid because her sister told her that Ray had committed murders. She told Fronapfel that she was afraid of Ray and Sailor at that time. She did not mention Owens. When she testified in the post-conviction hearing, she said that she is no longer afraid of Sailor or Ray but is afraid of Owens. She only interacted with Owens when Ray was around and they were always together.

Before she had her baby in August 2004, B. Taylor recalled telling her boyfriend, who was in prison at the time, that she wanted the Suburban moved out of her garage. She did not recall discussing or knowing about what discovery had been provided to Ray. She did not recall ever discussing Ray's discovery with Fronapfel. B. Taylor testified that when Fronapfel asked her about Sailor's involvement in drug sales, she tried to be honest. She did not recall Fronapfel ever doing any follow-up interviews with her about Sailor's drug sales. B. Taylor denied that she ever said Owens stored drugs at her house, and added that Ray did store drugs at her house.

Kepros testified on various topics concerning the APD's investigation. Kepros recalled that the trial team decided that it was going to attack the adequacy of the APD investigation of the Lowry Park shootings during the Dayton Street trial. To that end, she was assigned the cross-examinations of T. Wilson and Fronapfel. According to Kepros, based on her review of the discovery, the bulk of the Lowry Park investigation prior to the Dayton Street homicides was completed within one week of the Lowry Park shootings.

Kepros acknowledged that before attacking the APD's investigation, she would have to account for the likely response from the prosecution. However, she did not complete an analysis of the prosecution's anticipated response.

Concerning the prosecution's and the APD's investigation of these cases, the following topics were covered by Kepros:

(i) Prosecution's Motion for Protective Order in Ray's Lowry Park Case

Kepros was aware that the prosecution in Ray's Lowry Park case sought a protective order in December 2004 to preclude Ray's attorney from disclosing the discovery to Ray. Kepros was also aware that the motion was not ruled on for approximately six months and that the order precluding Ray's attorney from sharing the discovery with Ray was signed on June 6, 2005. The trial team did not present evidence in this trial showing the prosecution's inaction on the motion. Kepros pointed out that the trial team decided not to raise the issue in Owens's Lowry Park trial because it emphasized fear of Ray and Owens.

Kepros was aware that the prosecution's motion contained a representation that witnesses had informed the prosecutors that they were fearful of cooperating. The motion stated that A. Martin and Marshall-Fields did not want their addresses shared with Ray.

Kepros testified that the trial team's strategy was to avoid the topic of witness protection. However, the strategy changed when the court ruled that the door had been opened to witness protection by Lundin's testimony.

(ii) Rush to Judgment Defense

Kepros confirmed that in her opening statement she set forth the theme that the APD investigation was a rush to judgment. She noted that she made those statements in response to Hower's opening statement that the APD had conducted an extraordinarily thorough investigation. Kepros intended her rush to judgment remark to allow the trial team the opportunity to show the jury that the APD and the prosecution, in response to community pressure, wanted to identify the

perpetrators quickly in order to cover up the prosecution's and the APD's failure to protect Marshall-Fields. She recalled media reports about the failure to protect witnesses that referenced the inaction on the motion for a protective order. She collected some of these media reports, including the reports with negative comments by Marshall-Fields's mother. Kepros did not cross-examine Lundin or any of the APD detectives about rushing to judgment.

(iii) Failure to Respond to Marshall-Fields's Safety Concerns

Kepros recalled that there were reports in discovery about Marshall-Fields telling people about his fear of retaliation. According to Kepros, the APD did not contact these people until after Marshall-Fields was killed. However, she did not know whether the people Marshall-Fields spoke to about his fears ever reported them to the police before he was killed. Kepros intended to cross-examine the APD detectives about these reports but forgot to do so. She also acknowledged that nothing in discovery showed Marshall-Fields expressing concern for his safety or that the police had been alerted to safety concerns before June 20, 2005. According to Kepros, although Rhonda Fields (Fields), Marshall-Fields's mother, testified at trial that Marshall-Fields had never expressed safety concerns to her, Kepros could have used Fields's comments to the media about the police having done a poor job protecting witnesses to impeach the APD detectives. According to Kepros, the trial team would not have been hesitant to explore witnesses' fear of Owens because the APD was perpetrating that fear.

(iv) Prosecution's Failure to Prosecute Sailor, Johnson, and Todd

The prosecution did not seek to indict Sailor, Johnson, or Todd for their alleged involvement in the Dayton Street homicides. According to Kepros, this

omission was important because Sailor had been involved in hiding evidence, Johnson had allegedly threatened Marshall-Fields at the Father's Day barbecue, and Todd had followed Marshall-Fields. According to Kepros, the prosecution's failure to ask the grand jury to indict these individuals showed the prosecution's bias. Kepros noted that the grand jury litigation was completed by the time she was assigned to the case and consequently she did not review the grand jury process. She did not know if the grand jury record contained sufficient evidence to indict Sailor, Johnson, or Todd.

(v) Grand Jury's Desire to Indict Harrison

The prosecution did not disclose to Owens's trial team that the grand jury indicated a desire to indict Harrison. Thus, the trial team did not present that information to the jury. Kepros testified that she was unaware of any evidence to support an indictment of Harrison.

(vi) Maroon Car at Scene of Dayton Street Homicides

One witness reported seeing a maroon car near the scene of the Dayton Street homicides. Kepros testified that the trial team decided not to present evidence that Sailor drove a red car because it could potentially link Ray and Owens to the shooting.

Kepros acknowledged that she was aware that R. Carter and Carter, Sr. had red cars and that it was on oversight not to present evidence that the APD did not investigate those cars.

(vii) Inadequate Background Investigation of Various Cooperating Witnesses

Kepros testified that in her view the APD's investigation of the various cooperating witnesses was insufficient. In some instances, she was aware of

specific deficiencies. For example, Kepros was aware that the APD failed to confirm Todd's testimony that hair dryers were delivered to the barbershop on the day of the Dayton Street homicides. She also felt as though the APD had not adequately investigated Harrison and Todd – specifically that the APD failed to obtain a search warrant to search their apartments. Kepros conceded that she was unaware whether the APD had sufficient probable cause to obtain search warrants for Harrison's or Todd's apartments.

(viii) Fronapfel's Improper Interview Techniques

Kepros testified that Fronapfel's interviews were suspect because Fronapfel lied to witnesses, would feed information to the person being interviewed, and would omit important information from the written reports of her interviews. However, Kepros could not confront Fronapfel about her interview techniques because she was unprepared to impeach Fronapfel.

(ix) Involvement of Marshall-Fields's Sister in Investigation

Kepros viewed Pollard's involvement in the investigation as unusual. According to Kepros, the team should have presented her involvement because it would have shown that the investigation was biased. Kepros was unaware that Pollard was assisting the police because people in the community were reluctant to come forward. She acknowledged that the APD's investigation of Cazenave was started because Henton contacted Pollard.

(x) Failure to Search Barbershop

The APD did not search T's Barbershop. Kepros was aware from discovery that surveillance of the barbershop had been conducted after the Dayton Street

homicides. She viewed the failure to search the barbershop as yet another example of an inadequate investigation.

Reynolds viewed the APD investigation of the Lowry Park shootings prior to June 20 as inadequate. Consequently, she viewed Owens's trial team's performance as deficient because the trial team did not present the inadequacies to the jury. Reynolds rejected the idea that pursuing the APD's inadequacies would somehow bolster the prosecution's argument that the APD faced a "wall of silence" while conducting the Lowry Park investigation.

(c) Analysis

Owens first contends that his trial team should have elicited evidence suggesting that the prosecution and the APD were aware that many Lowry Park witnesses were reluctant to cooperate with the government's investigation because of their concerns for their safety yet the APD did not take measures to protect the witnesses, including Marshall-Fields. But such evidence would have been harmful to Owens. First, it would have shown that the witnesses were afraid of Owens's retaliation if they cooperated. Second, the jury would have looked unfavorably on Owens's trial team for suggesting that the prosecution and the APD – not the murderer – were to blame for Marshall-Fields's death.

Owens's second contention is that his trial team should have presented evidence showing that the APD's investigation after the Dayton Street homicides was biased and inadequate. Owens references over 20 instances of an alleged biased and inadequate investigation. Most, if not all, of the instances have been resolved in other parts of this Order.

Kepros introduced the idea of the APD's inadequate investigation during her opening statement when she accused the prosecution of ignoring some of the evidence. Then the trial team attacked the bias and adequacy of the investigation

both during the prosecution's case-in-chief and in its own case. The trial team called numerous witnesses, including two experts, to testify about the numerous inadequacies and biases of the APD investigation. In particular, Snyder raised many criticisms to the APD's forensic investigation and the sloppy manner in which the Monte Carlo was maintained. The trial team's attack had some success. It prompted two jurors to ask the CSI technicians what happened to the bloodstains and other evidence the technicians had collected, suggesting that the jurors were interested in the shortcomings of the APD's investigation.

As discussed above, it was not in Owens's interest to give the prosecution an opportunity to explain and defend the investigative efforts of the APD. At the post-conviction hearing, T. Wilson offered many logical responses to questions raised by post-conviction counsel about the adequacy of the investigation. For example, he focused on witnesses who reported seeing the shooting rather than on the dozens who only heard it. And he tried to follow up with some eyewitnesses but met resistance of one type or another.

Further attacking the adequacy of the investigation would have allowed the prosecution to highlight:

- how uncooperative most witnesses were due to their fear of Owens and Ray;
- that Pollard was involved with the investigation because people were fearful of cooperating with the police;
- the reasons why the prosecution put many witnesses in the Witness Protection Program;
- the extraordinary efforts the prosecution had to take to secure the cooperation of key witnesses;

- that the prosecution was compelled to bargain with certain witnesses to obtain important evidence against those who actually killed the victims; and
- that the prosecution used extraordinary measures, such as offering witnesses immunity, to investigate the case.

In addition, certain lines of attack might have led to additional evidence that was damaging to Owens. And finally, the jury was going to learn during phase one of the sentencing hearing that another jury had convicted Owens of killing Vann. It was a reasonable tactical judgment to conclude that an excessive attack on the adequacy of the Lowry Park investigation likely would have damaged the trial team's credibility in the eyes of the jury.

(d) Conclusion

Owens's petition to vacate his conviction and sentence on his trial team's alleged failure to adequately attack the thoroughness and objectivity of the APD investigation is **Denied**.

d. Prejudice Resulting from Deficient Performance in Investigating and Presenting Evidence

When appropriate, the court addressed the prejudice prong of *Strickland* in its above analysis. Thus, the court will not repeat a separate prejudice prong analysis here. Additionally, to the extent that Owens is arguing that the court should conduct a cumulative prejudice analysis as to this category of claims, it is this court's view that a cumulative prejudice analysis should be reserved for consideration of all arguably significant defects that might have affected the fairness of Owens's guilt phase or sentencing hearing. *See* part V.U of this Order.

E. Ineffective Assistance in Pretrial Litigation

1. Acquiescence to Protective Orders[314]

a. Parties' Positions

Owens contends his trial team was ineffective because it did not investigate or contest the prosecution's claims of witness fear, which resulted in unwarranted and highly restrictive protective orders that required the trial team to access certain witnesses *via* the prosecution.

The prosecution responds that Owens, in light of *People v. Ray*, 252 P.3d 1042 (Colo. 2011), cannot prove that he was prejudiced by his trial team's acquiescence to the protective orders.

b. Findings of Fact

The court entered protective orders in this case shortly after the grand jury indicted Owens. The protective orders were based on the prosecution's representations that many witnesses entered the Witness Protection Program, left the area out of fear of retaliation for cooperating, or expressed a fear of retaliation. The protective orders allowed the prosecution to withhold addresses for the protected witnesses. Because Owens's trial team could not contact the protected witnesses, subpoenas for those witnesses had to be served by the prosecution. The court also instituted a procedure by which Owens's trial team could attempt to interview those witnesses *via* telephone from the prosecution's office.

c. Principles of Law

"To aid the defendant's right of confrontation, an accused generally has the right to know a witness's identity and address." *People v. Ray*, 252 P.3d 1042, 1048 (Colo. 2011). However, "[t]he right to know a witness's identity and address

[314] The court denied Owens an evidentiary hearing on this claim.

is not absolute." *Id.* If a witness's personal safety is in jeopardy, the court "must balance the threat to witness safety against the materiality of the witness's address and information." *Id.* at 1049. In striking that balance, the court must consider the defendant's ability to "'place the witness in his proper setting' without learning [the witness's] address." *Id.* (quoting *People v. Thurman*, 787 P.2d 646, 654 (Colo. 1990)). If the materiality of the witness's address and information outweighs the threat to the witness's safety, the prosecution must disclose the witness's identity and address to the defense. *Id.* at 1049-50.

d. Analysis

Owens alleges that his trial team's acquiescence to the protective orders resulted in various failures to investigate, confront, and present evidence regarding the Lowry Park and Dayton Street cases. In part V.D of this Order, which the court incorporates herein, the court concluded Owens failed to demonstrate he was prejudiced by those alleged failures. Therefore, he has also failed to demonstrate he was prejudiced by his trial team's acquiescence to the protective orders. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984) ("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.").

Moreover, the nature of this case – a witness killing case – naturally lends itself to witnesses who are fearful of retaliation. It is difficult to imagine how Owens's trial team could have convinced the trial court that the materiality of the witnesses' addresses outweighed the threat to their safety less than a year after Marshall-Fields was killed. *See generally Ray*, 252 P.3d at 1049-50 (more than five years after the date of offense, prosecution's showing of threat to witnesses' safety outweighed defendant's showing of materiality of witnesses' addresses).

e. Conclusion

Owens has failed to prove that he was prejudiced by his trial team's acquiescence to the protective orders. Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's acquiescence to the protective orders is **Denied**.

2. Failure to Suppress Prior Convictions[315]

a. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to move to suppress his Lowry Park conviction on three grounds: 1) the prosecution's discovery violations; 2) its own ineffectiveness; and 3) juror misconduct.

b. General Principles of Law

The United States Supreme Court in *Strickland* announced the standard for ineffective assistance of counsel. To meet the *Strickland* standard, "a defendant must prove that 1) counsel's performance was deficient and 2) the deficient performance prejudiced the defense." *Dunlap v. People*, 173 P.3d 1054, 1062 (Colo. 2007). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *See Strickland*, 466 U.S. at 691. That requirement extends to endorsed statutory aggravating factors. *See Rompilla v. Beard*, 545 U.S. 374, 377 (2005).

"Where defense counsel's failure to litigate a [suppression] claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his [suppression] claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable

[315] The court confines its analysis in this part of the Order to Owens's first-degree murder conviction. The court acknowledges that Owens was also convicted of two counts of attempted first-degree murder and two counts of assault with a deadly weapon.

evidence in order to demonstrate actual prejudice." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *see also People v. Vicente-Sontay*, 361 P.3d 1046, 1051-52 (Colo. App. 2014) (Where defendant claimed counsel was ineffective for failing to move to suppress immigration document before defendant pled guilty, the appellate court applied *Kimmelman* and determined that the defendant was not prejudiced by his counsel's failure to move to suppress the document because the defendant's confession, the most salient evidence, would not have been suppressed.).

Thus, under *Kimmelman*, in order to show prejudice in the context of a failure to file a motion to suppress a prior conviction which has been endorsed as an aggravating factor, the defendant must show (1) that his motion would have been successful, and (2) that, as a result, the sentence would have been different.[316]

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[316] Had Owens shown that his motion to suppress Aggravating Factor No. 1 would have been successful, this court would not necessarily evaluate whether the jury's sentencing verdict of death would have been different. Instead, this court might confine itself to finding whether Aggravating Factor No. 1 was improperly submitted to, considered, and found by the jury. This court would not consider whether the sentence would have been different because, under Colorado's statutory scheme, that analysis is to be done by the Colorado Supreme Court and not this court, when, in post-trial proceedings, one (but not all) statutory aggravating factors is determined to have been invalid.

> If, on appeal, the supreme court finds one or more of the aggravating factors that were found to support a sentence to death to be invalid for any reason, the supreme court may determine whether the sentence of death should be affirmed on appeal by:
> (a) Reweighing the remaining aggravating factor or factors and all mitigating factors and then determining whether death is the appropriate punishment in the case; or
> (b) Applying harmless error analysis by considering whether, if the sentencing body had not considered the invalid aggravating factor, it would have nonetheless sentenced the defendant to death; or
> . . . .
> (d) Employing any other constitutionally permissible method of review.

To determine whether a motion to suppress would have been meritorious, the court looks to Colorado law concerning the suppression of prior convictions offered as sentencing aggravating factors. That aspect of Colorado law has developed in the context of habitual criminal cases.

"To suppress a prior conviction, an accused must make at least a prima facie showing of a constitutional violation." *People v. Romero*, 767 P.2d 782, 786 (Colo. App. 1988). "A prima facie showing means evidence that when considered in a light most favorable to the defendant, will permit the court to conclude that the conviction failed to meet relevant constitutional standards." *Lacy v. People*, 775 P.2d 1, 6 (Colo. 1989). "Once a prima facie showing is made, the conviction is not admissible unless the prosecution establishes by a preponderance of the evidence that the conviction was obtained in accordance with the defendant's constitutional rights." *Id.* at 6-7.

The procedural posture of the case dictates whether the defendant is entitled to an evidentiary hearing when he has moved to suppress a prior conviction. "[C]riminal convictions obtained in violation of an individual's constitutional rights" are not admissible "for the purpose of enhancing punishment in a subsequent criminal proceeding." *People v. Padilla*, 907 P.2d 601, 605 (Colo. 1995). In *Padilla*, the defendant moved to suppress his prior convictions from the court's discretionary sentencing determination. *Id.* at 603. The trial court denied an evidentiary hearing on the suppression motion and refused to rule on the

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C.R.S. § 18-1.4-102(9). A Crim. P. 32.2 proceeding is a post-conviction constitutional review, not an appeal. But, as a practical matter, any 32.2 order would be appealed in a case in which more than one statutory aggravating factor was found and the jury sentenced the defendant to death. The statutory scheme seems to suggest a legislative desire to task the Colorado Supreme Court, not the District Court, with determining whether prejudice exists when an aggravating factor is found unconstitutional.

validity of the defendant's prior convictions. *Id.* at 604. The Colorado Supreme Court held that the defendant's constitutional rights were not violated when the trial court denied an evidentiary hearing. *Id.* at 608. It explained that "restrictions on a defendant's ability to challenge prior convictions [before a discretionary sentencing proceeding] affect only the procedural method of addressing these convictions and not the substantive rights of defendants." *Id.*

According to the Colorado Supreme Court, its holding in *Padilla* funneled the defendant's challenges to his convictions "into more appropriate channels where they can be handled with minimum disruption to the criminal justice process." *Id.* Part of the justification for its holding was that the defendant could directly appeal or collaterally attack the prior convictions and if the defendant was successful, he could move to reopen his sentence in the instant case. *Id.* at 611.

In reaching its conclusion in *Padilla*, the Colorado Supreme Court distinguished discretionary from mandatory sentencing proceedings. Defendants who are subject to discretionary sentencing are not entitled to the same procedural safeguards as those subject to mandatory sentencing. *Id.* at 607. For example, the prosecution is not required to prove prior convictions beyond a reasonable doubt in discretionary sentencing proceedings. *Id.*

The Colorado Supreme Court also distinguished *Padilla* from cases such as *Bales v. People*, 713 P.2d 1280 (Colo. 1986). In *Bales*, the defendant moved *in limine* to preclude the prosecution from impeaching him with a prior conviction that he alleged was unconstitutional. *Bales v. People*, 713 P.2d 1280, 1281 (Colo. 1986). The trial court denied the defendant an evidentiary hearing on the constitutionality of his prior conviction. *Id.* The Colorado Supreme Court held "that the trial court impermissibly burdened the defendant's constitutional right to

testify in his own defense by declining to hold an evidentiary hearing to determine the constitutional admissibility of the prior conviction." *Id.*

But while defendants who are subject to discretionary sentencing may be "traditionally afforded fewer protections" than those who are subject to mandatory sentencing," *Padilla*, 907 P.2d at 606, "[b]ecause of the unique severity and finality of a sentence to death," there is a "heightened need for sentencing reliability" in the penalty phase of a death penalty case. *People v. Tenneson*, 788 P.2d 786, 791 (Colo. 1990).

Capital sentencing hearings are not the type of discretionary sentencing proceedings contemplated by *Padilla*. They are special proceedings that are governed by a separate statutory provision. *See* C.R.S. § 18-1.3-1201. Under *Ring v. Arizona*, 536 U.S. 584, 609 (2002), capital defendants have a Sixth Amendment right to be sentenced by a jury instead of by a judge. Thus, this court's view is that Owens would have been entitled to an evidentiary hearing on the constitutionality of his Lowry Park conviction.

c. Failure to Seek Suppression Based upon *Brady* and *Napue* Violations

i. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to move to suppress his Lowry Park conviction based on alleged *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959), violations in the Lowry Park case related to Johnson.

ii. Findings of Fact

The court incorporates the findings of fact set forth in part IV.C.3.b of this Order as though fully set forth herein.

Owens's trial team did not contemplate moving to suppress Owens's Lowry Park conviction based on *Brady* and *Napue* violations pertaining to Johnson's cooperation and testimony.

iii. Principles of Law

Due process is violated when the prosecution knowingly presents false testimony or suppresses evidence that is material to the outcome of the case. *See generally Giglio v. United States*, 405 U.S. 150 (1972); *Brady*, 373 U.S. 83; *Napue*, 360 U.S. 264; *see also* parts IV.C.2 and IV.D.2 of this Order, which the court incorporates as though fully set forth herein.

iv. Analysis

(a) *Strickland* Performance Prong

Because it is easier to resolve Owens's claim on the prejudice prong, the court does not evaluate whether the trial team's failure to move to suppress the Lowry Park conviction based on *Brady* and *Napue* violations was deficient performance. *See Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

(b) *Kimmelman* Prejudice

To prove he was prejudiced in this case by his trial team's failure to move to suppress his Lowry Park conviction based on *Brady* and *Napue* violations, Owens must prove that a suppression motion would have been "meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence." *Kimmelman*, 477 U.S. at 375.

If Owens's trial team had filed a suppression motion, Owens's burden would have been to make a *prima facie* showing that his Lowry Park conviction was unconstitutionally obtained in violation of *Brady* or *Napue*. *See Romero*, 767 P.2d

at 786 ("To suppress a prior conviction, an accused must make at least a prima facie showing of a constitutional violation.").

Owens claims that his Lowry Park conviction is unconstitutional because the prosecution violated the tenets of *Brady* and *Napue* with respect to Johnson's cooperation and testimony. In part IV.C.3.b of this Order, the court concluded Johnson did not testify falsely in the Dayton Street trial when he told the jury that the only reason he cooperated against Owens was because of his felony case in Arapahoe County. Johnson testified similarly in the Lowry Park trial. Owens would have failed to make a *prima facie* showing, thus, his suppression claim would not have been meritorious. *See Kimmelman*, 477 U.S. at 375 (To demonstrate prejudice when the principal allegation of ineffectiveness is a failure to litigate a suppression claim, "the defendant must also prove that his . . . claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence.").

(c) *Strickland* Prejudice

Because Owens's suppression claim would not have been meritorious, the court concludes there is no reasonable probability that, but for the trial team's failure to move to suppress the Lowry Park conviction based on alleged *Brady* and *Napue* violations, the result of the sentencing hearing would have been different. *See Strickland*, 466 U.S. at 694 ("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.").

v. Conclusion

The court concludes Owens failed to prove that he was prejudiced by his trial team's failure to move to suppress his Lowry Park conviction based on alleged *Brady* and *Napue* violations in his Lowry Park trial. Accordingly, Owens's

petition to vacate his sentence based on his trial team's failure to move to suppress his Lowry Park conviction on *Brady* and *Napue* grounds is **Denied**.

d. Failure to Seek Suppression Based upon Ineffective Assistance of Counsel in the Lowry Park Case[317]

i. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to ask the court to appoint independent counsel to investigate its ineffectiveness in the Lowry Park case. According to Owens, independent counsel was necessary to assess the trial team's performance and to determine whether to file a motion to suppress Owens's Lowry Park conviction in his Dayton Street case. Owens cites 11 instances of alleged ineffectiveness in the Lowry Park case that could have been grounds for a motion to suppress.

ii. Findings of Fact[318]

Owens was arrested on a warrant for the Lowry Park shootings on November 6, 2005. The public defender's office was appointed to represent him on November 23, 2005, and King and D. Wilson were assigned to the case.

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[317] While this Order generally follows the outline of Owens's Crim. P. 32.2 petition, the court has deviated slightly from that practice in this section due to the chronological nature of the trial team's assessment of and decision making regarding its decision not to file a suppression motion.

[318] Some of the testimony at the post-conviction hearing focused on whether Owens's trial team could have or should have filed a Crim. P. 35(c) petition in the Lowry Park case in order to vacate the conviction and prevent the prosecution from using it as an aggravating factor in the Dayton Street sentencing hearing. The Lowry Park trial court was divested of jurisdiction on May 11, 2007, when the Notice of Appeal was filed in that case. A limited remand could have been sought but whether the Colorado Court of Appeals would have granted a limited remand is speculative. Assuming the appellate court would have granted the limited remand, whether the Lowry Park trial court would have vacated Owens's conviction is also speculative. It would also be speculative to assume that the Dayton Street trial court would have delayed the Dayton Street trial until the conclusion of the Lowry Park post-conviction proceedings. Because of the speculative nature of this scenario, the court confines its analysis to the trial team's failure to either file a *Mills* affidavit or ask the Dayton Street trial court to appoint independent counsel to investigate its ineffectiveness in the Lowry Park case.

Shortly after the appointment, Middleton joined D. Wilson and King on the trial team. Kepros replaced D. Wilson in October 2006 when he was appointed State Public Defender. Thus, King, Kepros, and Middleton represented Owens in his Lowry Park trial and his Dayton Street case. Middleton's primary participation in the Lowry Park trial was preparing motions and jury instructions. He also participated in the jury instruction conferences. In contrast, King and Kepros investigated the facts and litigated issues in court.

King and Kepros were concerned with being unprepared for the Lowry Park trial, and they discussed their concerns with Middleton. Shortly before trial, the team filed a motion to continue based on its concerns, and that motion was denied.

After the Lowry Park trial, King and Kepros suspected that they had been ineffective. Middleton did not believe he was ineffective, and because of his limited role in the Lowry Park case, he was not in a position to evaluate King's and Kepros's effectiveness.

After the Lowry Park trial, the trial team had several discussions about how to handle the Lowry Park conviction in the context of the impending guilt and sentencing phases in this case. Those discussions took place around May 11, 2007, when the Lowry Park Notice of Appeal was filed. Although Kepros participated in some of the discussions, the primary discussions occurred between King and Middleton. At the meetings Kepros attended, she took the position that the team was conflicted from even deciding how to address the Lowry Park conviction in this case. Middleton did not recall King or Kepros stating during these discussions that they had been ineffective in the Lowry Park trial.

Both King and Middleton believed there were valid grounds to challenge Owens's Lowry Park conviction. King believed that, due to the denial of the continuance, the trial team had insufficient amount of time to prepare which caused

the team to render ineffective assistance to Owens. Middleton believed the Lowry Park trial court had committed error in the jury instructions.

Middleton, King, and Kepros knew that the trial team was conflicted from evaluating and litigating its performance in the Lowry Park trial. Knowing that the trial team could not litigate a motion to suppress the Lowry Park conviction as an aggravating factor, King relied on Middleton to research and analyze whether a motion to suppress should be filed such that independent counsel would be required. According to Middleton, the risk-reward analysis did not support attacking the conviction at that juncture of the proceedings. Middleton recognized that a successful motion to suppress would not have removed the death penalty as a possible punishment, and he concluded that it would be virtually impossible to suppress the Lowry Park conviction.

In Middleton's view, the grounds for a motion to suppress the Lowry Park conviction would have been substantially similar to the grounds for the motion to continue the trial. Because the Lowry Park trial court denied the motion to continue, King and Middleton anticipated that the trial court in this case would not give serious consideration to a motion to suppress on those grounds. They anticipated that the Dayton Street trial judge would defer to the Lowry Park trial judge's ruling on the motion to continue and would deny a motion to suppress.[319] In Middleton's estimation, because suppressing the conviction was not viable, there was no need to address the team's ineffectiveness in the Lowry Park trial.

Middleton also believed that Owens did not have a constitutional right to challenge the constitutionality of his Lowry Park conviction *via* a suppression

[319] The Colorado Court of Appeals found that the Lowry Park trial judge did not abuse his discretion when he denied Owens's motion to continue the trial. *People v. Owens*, No. 07CA0895, 2012 WL 3031232 (Colo. App. July 26, 2012) (not published pursuant to CAR 35(f)).

motion in the Dayton Street case. Middleton found support for his position in the fact that there was no time limit to file Owens's Crim. P. 35(c) petition in the Lowry Park case. According to Middleton, forgoing a motion to suppress specifically preserved Owens's Crim. P. 35(c) rights in his Lowry Park case because there was no chance that the doctrine of collateral estoppel would affect the filing of Owens's Crim. P. 35(c) petition. And if the Crim. P. 35(c) petition were successful, Middleton believed it would require the courts to revisit the propriety of the Dayton Street guilt phase and sentencing hearing because the Lowry Park conviction would have played such a prominent role in both proceedings. Hence, Middleton decided the better course of action was to leave the team's performance in the Lowry Park trial to a routine post-conviction attack under Crim. P. 35(c).

Moreover, Middleton believed that forgoing a motion to suppress did not waive Owens's constitutional right to challenge the constitutionality of his Lowry Park conviction because Owens could challenge the conviction on direct appeal, in post-conviction proceedings in state court, or *via habeas corpus* proceedings in federal court. Thus, forgoing the motion to suppress, in Middleton's estimation, did not adversely affect Owens's rights in the Lowry Park trial. In Middleton's view, the overall tactical considerations militated against moving to suppress it in this trial.

Furthermore, the trial team was concerned that moving to suppress would have resulted in a substantial delay that might have jeopardized the trial team's preference to go to trial in this case before the Ray case.[320] The trial team

[320] However, King testified that at some point before jury selection began in the Dayton Street case he was no longer concerned with going to trial before Ray. He testified that the desire for additional time to prepare outweighed his preference to go to trial first.

specifically sought to proceed to trial before Ray for the Dayton Street homicides. In the team's view, the first position was important because it allowed the trial team to control the procedural and evidentiary issues that the court would initially consider. By proceeding first, the trial team could avoid having to deal with rulings from the Ray trial that might impede its theory of Owens's case. King was specifically concerned with Owens's chances of avoiding the death penalty if a jury sentenced Ray to death given that Ray had an alibi for the Dayton Street homicides.

The trial team was aware that it was prohibited by Colorado law from investigating and litigating its own performance and believed that filing a motion to suppress the Lowry Park conviction would have resulted in the team's disqualification from representing Owens in the Dayton Street case. In the team's opinion, disqualification would have been harmful to Owens because the team had a longstanding relationship with him and provided him the best opportunity for success. They were also concerned because they could not control the quality of replacement counsel. The trial team was concerned that an unqualified attorney or team of attorneys might be appointed. However, the trial team never asked which capital defense attorneys were available to substitute as counsel.

On the other hand, the trial team knew that if it continued representing Owens, it would be precluded from attacking the use of Owens's Lowry Park conviction based on the team's performance in the Lowry Park trial.

The trial team had the same concern with respect to seeking independent counsel to investigate its performance in Lowry Park. Regarding the appointment of independent counsel, the trial team was concerned that an unqualified or underperforming attorney would be appointed. The trial team was also concerned that the trial court in this case would not allow a sufficient amount of time for

independent counsel to conduct its investigation, which would result in a superficial and truncated investigation that would not produce the grounds necessary to succeed in suppressing Owens's Lowry Park conviction. The trial team also believed that any adverse ruling could have unfavorable consequences to a subsequent collateral attack in the Lowry Park case. In the trial team's opinion, this scenario would have been harmful to Owens.

Middleton also believed that the trial team was not obligated by the ABA Guidelines to move to suppress Owens's Lowry Park conviction because the ABA Guidelines are not law and do not specify when the prior conviction must be attacked.

Middleton was aware that Dunlap's trial team was deemed effective even though it had previously represented Dunlap in his Burger King case and the Burger King conviction was used as an aggravating factor in Dunlap's capital sentencing hearing.

In researching and evaluating the options available, Middleton did not consider the lesser standard of proof for a motion to suppress as opposed to the higher standard of proof applicable to a post-conviction attack. In his view, such a comparison would necessarily have taken the trial team to an ethically prohibited evaluation of its performance in the Lowry Park trial. Middleton did not consult with anyone outside the trial team on this issue.

King was aware that suppressing Owens's Lowry Park conviction would have been beneficial to Owens. King testified that he would have attacked Owens's Lowry Park conviction if private counsel had represented Owens in his Lowry Park case. King understood that the consequences of forgoing an attack on Owens's Lowry Park conviction were that the jury would learn that Owens was

convicted of killing Vann, which was an aggravating factor, and that the conviction would confirm that Owens had a motive for killing Marshall-Fields.

Based on Middleton's research, analysis, and reasoning, King decided in the spring of 2007 not to move to suppress and not to seek independent counsel to investigate and litigate the trial team's performance in Lowry Park. After King made these decisions, the trial team did not further analyze the issue or reconsider those decisions. As a result of King's decisions, King and Kepros did not investigate their performance in Lowry Park. Nor did they ask the Dayton Street trial court to appoint independent counsel to investigate and litigate their suspected ineffectiveness.

King did not obtain a waiver from Owens forgoing any right he might have had to move to suppress his Lowry Park conviction. In Middleton's view, a waiver was not necessary because the team avoided a conflict of interest by not evaluating its own performance. King agreed with Middleton's analysis. Given their view that there was no conflict, neither King nor Middleton saw any need to disclose the issue to the court.

During the post-conviction hearing, King questioned whether he was aware of *People v. Mills*, 163 P.3d 1129 (Colo. 2007), prior to the Dayton Street trial. However, Kepros testified that she was aware of that case and other cases that allowed public defenders to request appointment of independent counsel to investigate another deputy public defender's effectiveness.

iii. Principles of Law

The Colorado Supreme Court has held that an appellate public defender is conflicted from representing a person who claims that his/her public defender at trial rendered ineffective assistance of counsel. *McCall v. Dist. Ct.*, 783 P.2d 1223, 1229 (Colo. 1989). *McCall* was premised on the concept that a deputy public

defender "faced with the prospect of arguing his or her own incompetence to protect a client's interests on appeal clearly has a conflict of interest requiring disqualification." *Id.* at 1228. There is a conflict "because the deputy's own personal and professional interests would be at stake." *Id.* at 1227.

In *Mills*, the Colorado Supreme Court established a procedure for a deputy public defender to follow when s/he moves to suppress a client's prior conviction based on the ineffectiveness of another deputy public defender. *People v. Mills*, 163 P.3d 1129, 1135 (Colo. 2007). The deputy public defender,

> [S]hould file sealed affidavits stating with specificity the facts and circumstances suggesting ineffective assistance of counsel leading to the prior convictions. The affidavit must present a colorable claim that the prior counsel's representation was deficient enough to meet the first prong of *Strickland*. Namely, the affidavit must demonstrate a colorable factual basis that the prior counsel's representation fell below an objective standard of reasonableness.

Id. To demonstrate a colorable claim, "[t]he attorneys may engage in minimal investigation, including a review of the prior cases' transcripts, to establish a credible basis for presenting an ineffective assistance of counsel claim." *Id.* Based on the affidavits, the trial court must determine whether to appoint independent counsel to investigate the alleged ineffectiveness. *Id.*

iv. Analysis

(a) *Strickland* Performance Prong

Had a *Mills* affidavit contained sufficiently detailed grounds for the appointment of counsel, Owens had the right to contest the constitutionality of his Lowry Park conviction in an evidentiary hearing in this case. Therefore, the court will consider whether the trial team's decision not to file a *Mills* affidavit or seek

independent counsel to attack the conviction was deficient performance under *Strickland*.

King and Kepros believed that they had rendered ineffective assistance of counsel during the Lowry Park trial. The trial team could have asked the trial court to appoint independent counsel to investigate the team's performance during Owens's Lowry Park trial and to litigate the trial team's suspected ineffectiveness as grounds for suppressing Owens's Lowry Park conviction. The trial team decided not to seek appointment of independent counsel, and the trial team did not revisit that decision after *Mills*, which was issued eight months before the Dayton Street trial.

The factual scenario in *Mills* is not identical to the factual scenario in this case. In *Mills*, an appellate deputy public defender sought appointment of independent counsel to investigate the effectiveness of a trial deputy public defender. Here, the same deputy public defenders represented Owens in Lowry Park and Dayton Street. But there is no reason why King, Kepros, or Middleton could not have filed a *Mills* affidavit to support a request for the appointment of independent counsel to investigate their performance in Lowry Park. If Owens's trial team believed there was a "colorable factual basis that [its] representation fell below an objective standard of reasonableness[,]" the trial team should have filed a *Mills* affidavit or asked the court to appoint independent counsel. *Mills*, 163 P.3d at 1135.

The trial team's reasons for forgoing a motion to suppress were flawed. The trial court's ruling on a suppression motion would not have had legal implications on Owens's Lowry Park Crim. P. 35(c) petition. Habitual criminal proceedings are analogous to sentencing hearings in capital cases in that the prosecution seeks to prove that the defendant suffered a previous conviction in order to enhance the

defendant's sentence. In *Wright v. People*, 690 P.2d 1257, 1259 (Colo. 1984), the prosecution sought to use the defendant's 1964 Adams County conviction for aggravated robbery during a habitual criminal trial in Jefferson County District Court. The Jefferson County District Court found that the 1964 conviction was unconstitutionally obtained and therefore precluded the prosecution from using it during the habitual criminal trial. *Wright v. People*, 690 P.2d 1257, 1259-60 (Colo. 1984). The defendant later filed a Crim. P. 35(c) petition attempting to vacate his 1964 conviction. *Id.* at 1260. The defendant argued that the Adams County District Court was bound to set aside the 1964 conviction because of the Jefferson County District Court's decision to bar the prosecution from using the conviction during the habitual criminal trial. *Id.* The Colorado Supreme Court disagreed and held that "collateral estoppel does not apply to trial court rulings which merely exclude evidence concerning the defendant's status as an habitual criminal." *Id.* at 1261. "Thus, the Adams County District Court was not bound to set aside its judgment of conviction on the basis of the Jefferson County District Court's evidentiary ruling . . . that the defendant's 1964 conviction . . . was constitutionally inadequate." *Id.* The Colorado Supreme Court noted that "[t]he defendant's 1964 conviction still exists and he now seeks to have it vacated." *Id.*

If Owens had moved to suppress his Lowry Park conviction, the trial court would have decided whether to exclude or admit it. That ruling would not have vacated Owens's conviction and the Lowry Park trial court would not have been bound by it. The trial team's presumption that the Lowry Park trial court would defer to the Dayton Street trial court's ruling may have been based upon the trial team's subjective impression of the degree to which one of the judges respected the other, but such judicial deference would not have been lawfully appropriate. The Lowry Park trial judge was to base his Crim. P. 35(c) decision upon the evidence

and law supplied to him without regard to the suppression decision made by the trial court in this case. Without first discussing the matter with Owens and obtaining his informed concurrence in the decision, the trial team should not have forgone a motion to suppress based on the presumption that the Lowry Park judge's Crim. P. 35(c) decision would be based upon the Dayton Street judge's suppression ruling.

The trial team's conclusion that it was in Owens's best interest to preserve his Crim. P. 35(c) rights until the eve of his execution by forgoing a motion to suppress would have effectively waived the one-year statute of limitations to file a writ of *habeas corpus* in federal court. *See* 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."). A writ of *habeas corpus* must be filed within one year of "the date on which the judgment became final by the conclusion of direct review . . . ." *Id.* at § 2244(d)(1)(A). The one-year limitations period is tolled while "a properly filed application for State post-conviction or other collateral review . . . *is pending*." *Id.* at § 2244(d)(2) (emphasis added). Thus, waiting for more than a year after the resolution of Owens's Lowry Park direct appeal before filing his Crim. P. 35(c) petition meant forgoing Owens's federal *habeas corpus* right. In this court's view, preserving and exercising federal *habeas* rights is important in first-degree homicide cases where the conviction was to be used as an aggravating factor in a subsequent capital sentencing hearing. While waiting until the eve of Owens's execution to file his Lowry Park 35(c) petition may have had potential advantages in an overall strategy to avoid the actual imposition of a death penalty, Owens should have been consulted about the effect that waiting until the eve of execution to file his Crim. P. 35(c) petition

would have on his *habeas corpus* rights before the decision to forgo a suppression motion was made.

It is also concerning that the trial team did not consider the procedurally lower standard of proof for suppression in this case as opposed to Crim. P. 35(c) relief in the Lowry Park case, and any tactical advantages that may have resulted from those differences. *Compare People v. Roybal*, 618 P.2d 1121, 1126 (Colo. 1980) (if the defendant makes a *prima facie* showing, with the evidence viewed in the light most favorable to the defendant, that his conviction was unconstitutionally obtained, the burden shifts to the prosecution to show by a preponderance of the evidence that the conviction was constitutionally obtained), *with People v. Simpson*, 69 P.3d 79, 80 (Colo. 2003) (To vacate a conviction, it is the defendant's "burden to show, by a preponderance of the evidence, that his conviction was constitutionally infirm.").

As a result of the trial team's decision not to file a *Mills* affidavit or otherwise seek appointment of independent counsel, the admissibility of Owens's Lowry Park conviction as an aggravating factor was never litigated. King and Kepros believed that they rendered ineffective assistance of counsel in Lowry Park, yet they made the decision not to file a *Mills* affidavit or otherwise seek independent counsel to investigate their performance and move to suppress Owens's conviction. Nor did they consult with Owens and obtain his waiver and informed consent to the decision to forgo seeking suppression of Owens's Lowry Park conviction. This court therefore finds that failing to take steps to seek suppression of Aggravating Factor No. 1 – Owens's Lowry Park conviction – without consulting Owens was outside the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the

identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

(b) *Kimmelman* Prejudice – Ineffective Assistance of Counsel

(i) Merit of Suppression Motion Based on Violation of Sixth Amendment Right to Effective Assistance of Counsel

Had Owens's counsel filed a suppression motion, Owens's initial burden would have been to make a *prima facie* showing that his Lowry Park conviction was obtained in violation of his Sixth Amendment right to effective assistance of counsel. *See Romero*, 767 P.2d at 786 ("To suppress a prior conviction, an accused must make at least a prima facie showing of a constitutional violation."). If Owens made that *prima facie* showing, the burden would have shifted to the prosecution to establish "by a preponderance of the evidence that the conviction was obtained in accordance with the defendant's constitutional rights." *Lacy*, 775 P.2d at 6-7.

In determining whether Owens would have made a *prima facie* showing, the evidence would be viewed in the light most favorable to Owens. But to determine whether the prosecution would then have met its burden, the court would view the evidence neutrally and in light of all the surrounding circumstances.

Owens claims his trial team performed deficiently during the Lowry Park trial on the following grounds:

(a) Conflicts

Owens contends that his trial team was ineffective in the Lowry Park case because it represented Owens despite laboring under numerous conflicts of interest. Owens relies on the same alleged conflicts of interest to argue that his

trial team was conflicted in Lowry Park as he does to argue that his trial team was conflicted in Dayton Street. The court evaluated those conflicts of interest in part II.A of this Order. Based on the findings of fact and analysis set forth in that part of the Order, which the court incorporates herein, the court concludes that Owens failed to prove that he was adversely affected in his Lowry Park case by his trial team's handling of the alleged witness-client conflicts of interest. *See West v. People*, 341 P.3d 520, 526 (Colo. 2015) ("A defendant seeking post-conviction relief based on ineffective assistance of counsel resulting from an attorney's alleged conflict must demonstrate that an actual conflict of interest adversely affected his [attorney]'s performance.").

Regarding the alleged conflicts of interest, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation. Specifically, he has failed to satisfy step one of *Kimmelman*. He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would have been suppressed based upon a conflict of interest.

(b) Failure to Read Discovery and Adequately Investigate

The discovery for the Lowry Park and Dayton Street cases was combined so that all of the codefendants and their trial teams received identical discovery. The prosecution withheld the discovery on the Dayton Street homicides until the grand jury returned indictments in March 2006. At the time of Owens's Lowry Park trial in January 2007, there were approximately 16,000 pages of discovery and numerous items of media. Not all of it pertained to the Lowry Park case. Prior to the Lowry Park trial, Kepros did not read all of the discovery or review all of the media. King read all of the discovery but did not review all of the media.

It is not clear how much of the discovery and media was relevant to the Lowry Park case. It is also unclear how much that discovery and media went unreviewed by the trial team. Nor has it been demonstrated that a review of any item or items of unreviewed discovery could reasonably have been expected to have led to different verdict in the Lowry Park case.

Regarding the alleged failure to read discovery and adequately investigate, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation. Specifically, he has failed to satisfy step one of *Kimmelman*. He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would have been suppressed based upon the trial team's alleged failure to read discovery and adequately investigate.

(c) Failure to Make an Adequate Record in Seeking a Continuance

On December 27, 2006, Owens's trial team filed a motion to continue the Lowry Park trial, which was scheduled to begin on January 9, 2007. The trial team represented in the motion that "[i]f Mr. Owens is required to proceed to trial[,] . . . he will be denied his state and federal constitutional rights to effective assistance of counsel." SOPC.EX.D-1327. The motion to continue was addressed in court on January 2, 2007, and Kepros told the Lowry Park trial court that "if we are unable to render effective assistance of counsel on behalf of Mr. Owens, I believe this case will not end with the trial this month. This case won't end for years and years and years and years." SOPC.EX.P-2.

Kepros did not feel comfortable informing the Lowry Park trial court that the trial team was unable to locate or subpoena certain witnesses because she was concerned that the prosecution would interfere with the team's efforts to locate those witnesses. She did not list which experts the trial team had not interviewed,

and she did not describe why interviewing certain witnesses or conducting certain investigation was important. She also did not fully disclose the extent of her health problems that were limiting the amount of time she could dedicate to trial preparation, and she did not disclose that, in her opinion, D. Wilson and King had done minimal work on the case prior to her assignment to the case. However, the trial team filed a thorough six-page motion setting forth in detail why a continuance of Owens's Lowry Park trial was necessary. SOPC.EX.D-1327. And Kepros expanded on the reasons set forth in the motion during oral argument on January 2, 2007. SOPC.EX.P-2.

Regarding the alleged failure to make an adequate record in seeking a continuance, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation. Specifically, he has failed to satisfy step one of *Kimmelman*. He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would have been suppressed based upon the trial team's alleged failure to make an adequate record in seeking a continuance.

(d) Failure to Withdraw Due to Inability to Adequately Prepare

Prior to the Lowry Park trial, Kepros suggested that the trial team should withdraw from representing Owens based on the team's unpreparedness. However, King decided not to move to withdraw. There is no evidence suggesting that the Lowry Park trial court would have allowed Owens's trial team to withdraw from representing Owens.

Regarding the failure to withdraw due to an inability to adequately prepare, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation. Specifically, he has failed to satisfy step one of *Kimmelman*.

He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would have been suppressed based upon the trial team's failure to withdraw.

(e) Conceding Involvement in Homicide Despite Pending Capital Case

The trial team considered proceeding with misidentification or self-defense as the theory of defense for Owens's Lowry Park trial. The team specifically considered how conceding Owens's guilt by pursuing self-defense would affect Owens's Dayton Street case. After reviewing the discovery and pretrial testimony, King made a strategic decision that self-defense, without expressly conceding Owens's identity, was the most viable defense. *See also* part V.D.3.a.ii(a) of this Order. When all of the evidence is considered, King's decision was the result of sound and professional judgment.

Regarding the alleged inadequacy due to conceding involvement in the Lowry Park homicide despite the pending capital case, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation. Specifically, he has failed to satisfy step one of *Kimmelman*. He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would have been suppressed based upon the trial team's alleged inadequacy for conceding involvement in the Lowry Park homicide despite the pending capital case.

(f) Conceding Identity When Evidence Supported a Misidentification Defense

The court incorporates its findings of fact set forth in part V.D.3.a.ii(a) of this Order.

Regarding the alleged inadequacy due to conceding identity when evidence supported a misidentification defense, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation. Specifically, he has

failed to satisfy step one of *Kimmelman*. He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would have been suppressed based upon his trial team's decision to concede identity.

(g) Failure to Interview Eyewitnesses

The court incorporates part V.D.3.a of this Order where the court concluded that the trial team's performance with respect to the Lowry Park evidence presented during the Dayton Street trial was not deficient. The evidence has not demonstrated that interviewing additional witnesses, assuming that they could have been found and would have cooperated, could reasonably have been expected to have led to different verdict in the Lowry Park case.

Regarding the alleged inadequacy due to the trial team's failure to interview eyewitnesses, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation. Specifically, he has failed to satisfy step one of *Kimmelman*. He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would have been suppressed based upon the trial team's failure to interview eyewitnesses.

(h) Failure to Keep Promises Made in Opening Statement

Sailor told Owens's trial team in August 2006 that she assumed J. Martin was shooting at Lowry Park, and according to King, there was also evidence that Johnson was the Lowry Park shooter. Kepros incorporated this information into her opening statement for the Lowry Park trial and told the jury, "[s]ome witnesses say Robert Ray was the shooter. Some witnesses say Sir Mario Owens was the shooter. Some witnesses say John [sic] Martin was the shooter. Some witnesses say Jamar Johnson, one of the prosecution's star witnesses, was a shooter." Lowry Park Tr. 89:8-12 (Jan. 10, 2007). Kepros had a good faith basis for saying that

witnesses had said the things that she claimed they had said. Owens did not present any evidence proving that his trial team did not support this line of Kepros's opening statement during the Lowry Park trial.

Regarding the alleged inadequacy due to a failure to keep promises made in opening statement, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation. Specifically, he has failed to satisfy step one of *Kimmelman*. He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would have been suppressed based upon the trial team's failure to keep promises made in opening statement.

(i) Arguing Inconsistent Theories

The court incorporates the findings of fact in part V.E.2.d.iv(b)(i)(f) of this Order.

Regarding the alleged inadequacy of arguing inconsistent theories, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation. Specifically, he has failed to satisfy step one of *Kimmelman*. He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would have been suppressed based on his argument that his trial team argued inconsistent theories.

(j) Failure to Object to Argument Misstating Law

During his Lowry Park closing argument, Hower characterized the time necessary for deliberation "as the time necessary for one thought to follow another." Lowry Park Tr. 95:2-3 (Jan. 25, 2007). In Colorado, after deliberation means "not only intentionally but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or

impulsive manner." *People v. Bartowsheski*, 661 P.2d 235, 241 (Colo. 1983) (quoting C.R.S. § 18-3-101(3)). Thus, Hower's remark about the meaning of after deliberation was contrary to Colorado law. *See Key v. People*, 715 P.2d 319, 322-23 (Colo. 1986) (holding that the trial court erred when it instructed the jury that "[t]he only time requirement for deliberation within the meaning of the first degree murder statute is an interval sufficient for one thought to follow another."). Owens's trial team did not object to Hower's misstatement of the law.

The elemental instruction for first-degree murder required the jury to find:

1. that the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. after deliberation, and with intent
    a. to cause the death of a person other than himself,
    b. caused the death of that person or of another,
4. without the affirmative defense in instruction number 27.

Lowry Park Instr. No. 17. The definition in the relevant jury instruction of after deliberation is identical to the definition set forth in the statute. Lowry Park Instr. No. 14 ("'After deliberation' means not only intentionally, but, also, that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner.").

Thus, the jury instructions cured Hower's misstatement of the law, and the evidence has not demonstrated that the jury was confused as to the elements of first-degree murder. The Lowry Park trial court accurately instructed the jury and a proper, timely objection could not reasonably have been expected to have led to different verdict in the Lowry Park case.

Regarding the alleged inadequacy based on the trial team's failure to object to the prosecution's misstatement of the law, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation. Specifically, he has failed to satisfy step one of *Kimmelman*. He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would have been suppressed based on a failure to object to argument misstating the law.

(k) Failure to Investigate Alternate Suspects

The court incorporates part V.D.3.a.ii(a) of this Order. In that part, the court concluded Owens's trial team was not ineffective for failing to present various witnesses whose testimony would have allegedly supported a theory that Ray was an alternate suspect for the Lowry Park shootings.

The court also incorporates part V.D.3.a.ii(b) of this Order where the court concluded that Owens's trial team was not ineffective for not presenting additional evidence supporting a theory that J. Martin or Johnson was an alternate suspect for the Lowry Park shootings.

Regarding the alleged inadequacy due to the trial team's failure to investigate alternate suspects, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation. Specifically, he has failed to satisfy step one of *Kimmelman*. He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would have been suppressed based on the trial team's failure to investigate alternate suspects.

(l) Summary of *Kimmelman* Analysis of Merit of Suppression Motion – Ineffective Assistance of Counsel

In summary, based on the findings of fact set forth in parts V.E.2.d.iv(b)(i)(a)-(k) of this Order, the court concludes that Owens's suppression

claim based upon the trial team's performance in the Lowry Park case would not have been meritorious, because he would not have made a *prima facie* showing that his Lowry Park conviction was unconstitutionally obtained in violation of his Sixth Amendment right to counsel. *See Kimmelman*, 477 U.S. at 375 (To demonstrate prejudice when the principal allegation of ineffectiveness is a failure to litigate a suppression claim, "the defendant must also prove that his . . . claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence.").

(ii) *Strickland* Prejudice – Ineffective Assistance of Counsel

Because Owens's suppression claim based upon the trial team's performance in the Lowry Park case would not have been meritorious, the court concludes there is no reasonable probability that, but for the trial team's failure to file a *Mills* affidavit and to ask the court to appoint independent counsel, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694 ("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.").

v. Conclusion

The court concludes that the trial team's decision not to file a *Mills* affidavit or to otherwise seek independent counsel was outside of the wide range of professionally competent assistance. However, the court also concludes that Owens failed to prove he was prejudiced by the team's decision not to file a *Mills* affidavit. Accordingly, Owens's petition to vacate his sentence based on his trial team's failure to seek independent counsel in order to pursue suppression of his Lowry Park conviction based on the trial team's alleged ineffectiveness in the Lowry Park trial is **Denied**.

e. Failure to Seek Suppression Based upon Juror Misconduct

i. Parties' Positions

Owens contends he was prejudiced because his trial team had information of possible juror misconduct in his Lowry Park trial before the trial in this case yet did not move to suppress his Lowry Park conviction.

The prosecution argued at the conclusion of the post-conviction hearing that Owens's trial team did not have enough time to fully develop the grounds necessary for a successful suppression motion. It was the prosecution's position that Owens suffered no prejudice because he has rights to challenge his Lowry Park conviction in other forums.

ii. Introductory Statement

Regarding this issue in this case, neither the factual nor legal questions are identical to those in the Lowry Park Crim. P. 35(c).[321] The juror misconduct question in this case arises in the context of a failure to file a motion to suppress Aggravating Factor No. 1. Thus, the facts must be viewed based upon what Owens's counsel knew, or reasonably should have known with a competent investigation, at the time that they considered or should have considered a motion to suppress.

[321] This court was appointed to conduct the Crim. P. 35(c) review of Owens's Lowry Park conviction. The offered evidence in that proceeding concerning the alleged juror misconduct claim and the offered evidence in this proceeding concerning the trial team's failure to investigate and move to suppress Owens's Lowry Park conviction based on juror misconduct are nearly identical. Much of the evidence that concerns these claims was taken before a prior judge in this case and was designated as evidence in and therefore considered by this court in the Crim. P. 35(c) proceeding as well. Additional evidence was taken before this court that was designated as evidence in both cases. The Crim. P. 35(c) order in the Lowry Park case is attached as Appendix Four to this Order. The Juror Misconduct portion is at pp. 64-115.

iii. Initial Discussion

This court has concluded that the trial team fell below the *Strickland* performance standard by not filing a *Mills* affidavit, moving to have ADC appointed to investigate the adequacy of the trial team's performance in the Lowry Park case, or obtaining Owens's informed waiver and consent to the decision not to seek suppression of Aggravating Factor No. 1. In analyzing the questions of *Kimmelman* prejudice, it has been necessary for this court to, in essence, try to determine what would have happened if a motion to suppress Owens's Lowry Park conviction had been filed in his Dayton Street case.

In some instances, a competent investigation in 2008 would have been unlikely to yield information gleaned in post-conviction counsel's subsequent investigation. But for the most part, this court has assumed that the evidence that has now been developed would have been uncovered and presented to the Dayton Street trial judge in 2008.

iv. Findings of Fact

(a) Trial Team's Decision Not to File A Motion to Suppress

Without consulting Owens, the trial team decided not to contest the constitutionality of Aggravating Factor No. 1 based on the trial team's performance *via* a motion to suppress. The decision was made when the trial team was pressed for time and needed to focus on more central Dayton Street issues, including mitigation. And it was motivated in significant part by their view that moving to suppress would have either required the trial team to recuse themselves from the Dayton Street case or seriously risked having the trial court replace them as Dayton Street counsel.

(b) The Lowry Park Facts

The Lowry Park facts are set forth in part I.A of this Order.

(c) Introductory Facts Relating to Juror Misconduct

Stephanie Manuel, the Lowry Park juror at issue in this part of the Order, will be referred to as Juror 75. Juror 75's maiden name is Ealy. Her last name at the time of the Lowry Park trial was Griggs, the name of a former husband. Her current last name is Manuel. These names are reflected in various parts of the record.

When the Lowry Park trial occurred in early 2007, Juror 75 was a 40-year-old, single mother of two sons. She was the only African-American on the jury. She lived in an apartment near the intersection of Dayton and Florida. She did not believe that she lived in a bad neighborhood, but at that time there was significant gang activity in the area and shootings and other violent incidents were not uncommon.

When called for the trial, Juror 75 had some, but not significant, knowledge of the criminal legal system and little knowledge of its terminology. She had never served on a jury or witnessed a trial.

Juror 75 had no particular motivation or desire to serve on the Lowry Park jury. To the contrary, she indicated on her questionnaire a concern about serving due to her need for the income from her two jobs and during the trial she tried to bring matters to the attention of the trial judge that, she hoped, would have resulted in her being replaced by an alternate.

In her post-conviction testimony, Juror 75 maintained her opinion that, although she served without bias, the Lowry Park trial court should have allowed her an opportunity to express herself, considered what she had to say, and replaced

her with an alternate at the time that she made her unsuccessful attempt to talk with the judge.

(i) *Voir Dire* and the Questionnaire

(a) General Facts

Before the Lowry Park trial, all jurors were directed to complete a questionnaire that had been prepared by the attorneys. The questionnaire is single-spaced. It has 35 questions, some with follow-up parts. No question allows more than two lines for an answer. It instructs jurors to print their answers and tells them that time will be saved if they answer completely and accurately, but does not invite comment beyond the provided space or supply any space for additional explanation. The jurors are directed not to show the questionnaire to anyone or discuss it with other jurors. Juror 75's questionnaire is SOPC.EX.D-1052.

On her questionnaire, Juror 75 did not indicate that she wanted to speak to the judge and the attorneys without the other jurors present.

As Juror 75 acknowledged when she testified in 2015 and again in 2016, in hindsight she wishes she had been more careful, taken more time, and possibly taken a broader point of view when answering the questionnaire. It seemed lengthy and she wanted to get it done. When filling in the questionnaire, she did not have in mind certain things that the attorneys drew to her attention years later.

At issue are her answers to several questions and her failure to circle any names.

(b) Questionnaire Answers

(i) Criminal Convictions

The first relevant question asked:

> Question 21. *Have you, a member of your family, or a close friend ever been convicted of a crime other than a*

> *traffic offense? If yes, please state who, what, when & where.*
>
> Answer: *No*
>
> The questionnaire allowed 1 ½ lines for who, what, when and where.

Juror 75. Twenty-two years before answering the questionnaire, at age 18 or 19, Juror 75 had shoplifted and suffered a municipal conviction. And in 1988 – some 19 years before the trial – Juror 75 had been involved in an altercation with three other young women. Although she believed she was innocent, she was arrested, spent one day in jail, and apparently suffered a municipal or misdemeanor conviction. Between 1991 and the trial in 2007, to this court's knowledge, she was never again in trouble with the law. She did not have in mind her own two rather remote and minor difficulties when answering the question in the context of a murder case.

As to her own criminal history, this answer was false.

Her son, D. At the time of the trial, Juror 75 had two sons, 21-year-old Q and 17-year-old D. D was a parochial high school student at the time of the trial. His first two years he received an athletic scholarship and in his junior and senior years he was awarded an academic scholarship. Other than one fight in middle school, to this court's knowledge, D was never in any legal trouble prior to the time of trial. When she completed the questionnaire, Juror 75 did not consider D's middle school fight to be a criminal matter, although it resulted in a misdemeanor level juvenile adjudication and a period of probation.

As to D, her answer was accurate. A misdemeanor level juvenile adjudication is not a criminal conviction.

Her son, Q. Q was fully emancipated well before the 2007 trial. He had joined the Navy in 2003, and was discharged in less than a year. He returned to Aurora, although not to Juror 75's home. He and Juror 75 gradually became more estranged in significant part because she disapproved of his post-Navy choices in lifestyle and friends. She correctly suspected that he was becoming involved in gang activity. Still, for a while after his Navy discharge, he would often visit her and even at the time of the trial, she would visit him to see her two grandchildren. She neither knew nor wanted to know about the things Q was doing. But on one occasion she had bailed him out of jail. And although she did not know it, Q had, in fact, suffered a class six felony check fraud conviction in June 2006.

Although her emancipated son, Q, had suffered a class six felony conviction, Juror 75 was not aware of it. As to Q, she did not know about his conviction. Her answer was inaccurate but not untruthful.

Family of origin and ex-husband. Juror 75 was a 40-year-old single mother of two when she answered the questions. She considered her family to be her sons and herself. She did not view the questionnaire's use of the phrase "your family" as referring to ex-husbands, cousins, or other relatives. Two cousins with whom she was never close had been murdered – one while in the Colorado Department of Corrections. An aunt and Juror 75's mother had each spent at least some time in jail, although Juror 75 did not know why. She had briefly married Rodney Griggs and lived with him for about 30 days before seeking a divorce, which was ultimately granted in 2006. She knew that he had once been to prison in California, although she did not know for what crime.

Juror 75 did not view the question as asking about her cousins, aunt, mother, or ex-husband and, although she knew that they had been incarcerated, she did not know what conviction(s) any of them had suffered. Because she did not know

what convictions these people had suffered, even if she had viewed the question as including them, she could not have answered it completely. Her answer was not deliberately untruthful.

(ii) Witness or Party to Court Proceeding

The second relevant question asked:

> Question 22. *Have you ever been a witness or a party to any court proceeding? When and what type of case?*
>
> Answer: *No*
>
> The questionnaire allowed 1 line for when and what type of case.

Over the years, Juror 75 had encountered financial difficulties. She was sued several times as part of collection efforts. When sued, she did not employ an attorney, defend, or appear in court for the several judgments that were taken against her. She also took bankruptcy at least twice. On two occasions, she employed an attorney, and on one occasion signed the bankruptcy petition that identified her as a party to various collection cases. When answering the questionnaire, she did not view the "court proceeding" question as asking about the debt collection matters that she did not contest or her bankruptcies.

Juror 75's answer was false. Although she did not view the question as asking about such cases, she had been a party to civil collection and bankruptcy cases.

(iii) Victim of Crime

The third relevant question asked:

> Question 20. *Have you, a member of your family, or a close friend ever been a victim of crime? If yes, please state who, when, where & what.*

Answer: *No*

The questionnaire allowed 1 ½ lines for who, when, where & what.

Juror 75 knew that Q had been shot in the leg at an IHOP restaurant in April 2006. Neither Q nor any of his friends called Juror 75, but a friend of hers had been eating at the restaurant and called to tell her that her son had been shot. After he was shot, she visited Q at the hospital and/or his home. She never sought nor was given information about what really happened at the IHOP. She did not know or want to know who shot Q. Nor did she know or want to know whether it was accidental, criminal, or deliberate. No one was ever charged with a crime in connection with her son's shooting.

Her answer was not untruthful because she did not know whether Q was a victim of a crime.

(iv) Experience with Law Enforcement

The fourth relevant question asked:

Question 17. *Have you ever had a pleasant or unpleasant experience involving law enforcement? If yes, please describe.*

Answer: *I was once accused of running a stop sign I did not run.*

The questionnaire allowed almost 2 lines for if yes, please describe.

The answer was truthful.

(v) Hardship

The next series of questions and answers must be considered in context with one another. Those questions include 11, 13, 14, and 33.

Question 11. *Occupation and employer*?

Answer: *Nurse and Title Company.*

The questionnaire allowed about 3/4 of one line for a response.

Question 13: *Job responsibilities and duties.*

Answer: *Care for handicapped adults, process title ins.*

The questionnaire allowed about 2/3 of one line for a response. The space was so limited that she had to write "ins" in the margin below "title."

Question 14. *Level of education/degrees?*

Answer: *College.*

The questionnaire allowed about 2/3 of one line for a response, and she did not include whether she had earned any degrees.

Question 33. *This trial is scheduled for 4 weeks. Except in extraordinary circumstances jury trials are not heard on Saturdays of Sundays. Is there any reason the time necessary for you to act as a juror on this case would cause a hardship? If yes, please explain.*

Answer: *Yes/No. Just work, single parent need income.*

The questionnaire allowed about 2/3 of one line for an answer, and her answer filled the entire space allowed.

These answers were truthful.

(vi) Failure to Circle Names

After the 35 questions, the questionnaire includes a four-page, single-spaced, double column list of 316 names of persons "who may have been involved in the investigation of this case, or whose names may be mentioned during the course of the trial" with direction to circle any whom the juror believes that he or she recognizes. Juror 75 did not circle any of the 316 names.

(ii) Recognition of Witnesses and Observers

(a) Melissa White

Years before the trial, Melissa White (White) had dated Juror 75's younger son, D. White had trouble at home and occasionally lived for short times in Juror 75's home. White also became friends with Q's girlfriend. White's relationship with D ended, but she continued to be close to Q and Q's girlfriend. At the time of the trial, White often helped with Q's two children – Juror 75's grandchildren. At the time of the trial, Juror 75 liked White and continued to have occasional contact with her at Q's home.

White was not a witness but attended the trial regularly. While testifying in 2015, Juror 75 recalled that at some point during the trial White told her that she, White, was a friend of Owens. On January 23, 2007, when the matter arose about Juror 75 recognizing White in court, White was sitting with Owens's mother. By then, Juror 75 had noticed that White was present at trial much of the time. White's name was not on the list of names attached to the questionnaire.

(b) Rhonda Fields

Fields was the mother of Marshall-Fields, who was shot by Ray at Lowry Park and later murdered by Owens on Dayton Street. Fields testified during the Lowry Park trial. Although the jurors were told that Marshall-Fields had passed away, they were not told anything about how he died.

Juror 75 did not know Fields, had never spoken to her, and had no relationship with her. But Juror 75 had seen her before she testified in the Lowry Park trial. Fields spoke at Juror 75's church. Fields did not live in the neighborhood or attend Juror 75's church, but Fields knew the pastor and believes she probably went to the church to give testimony – to tell the congregation about her experience with her son's murder and how it affected her spiritually. But it was Juror 75's recollection that Fields asked the congregation for assistance in finding those responsible for her son's murder. Juror 75 also saw the mothers of the two Dayton Street victims (one of whom was Fields) make a similar appeal on television. Juror 75 believed that she had also seen Fields in Juror 75's neighborhood. Juror 75 did not recognize or circle Fields's name on the questionnaire list.

(c) Q's Current or Former Friends

When Q was in middle and high school, his friends and acquaintances would often come to Juror 75's home. She welcomed them all, allowed them to hang out at her home, and often fed them.

She did not have a close relationship with these boys, and it does not appear that she spent significant time with them. Some referred to her as "mom." She did not know the full names of these youngsters, who referred to one another by nicknames, street names, or first names.

In time, Q and some of his acquaintances drifted apart, but some remained friends. As time went on, some, including Q, began favoring red clothing – the color symbolic of Bloods street gangs. This group included Dickey and Johnson.[322] While Juror 75 did not know it, subsequent events indicate that Q,

[322] When he testified in Owens's 32.2 hearing, Johnson could not recall ever being in Juror 75's home as a youngster.

Dickey, and Johnson became associated with Bloods street gangs and remained friends, although possibly not as close as when they were younger.

Juror 75 did not know these things at the time of the trial, but when in prison many years later, Q said that:[323]

- Vann, Dickey, and Johnson were among the boys who had been to his home as youngsters; and
- while he did not witness the shootings, Q, himself, had been in Lowry Park when Vann was killed; but
- he did not convey any of this information to Juror 75 at or before the time of the Lowry Park trial.

As the trial proceeded, Juror 75 realized that she recognized faces of some people in the courtroom. At the time of the trial, Juror 75 had no relationship with any of these witnesses. She had never had a close or significant relationship with any of them, and she did not recognize any of their true names.

Years later she testified that it also seemed to her that one or two witnesses looked at her specifically, and she thinks that at least one person – probably a witness – mouthed, "Hi, mom" to her. Years later she testified that some of the nicknames also seemed familiar – particularly J-something[324] and Showtime.[325]

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[323] Q was available for interviews during post-conviction counsel's 35(c) and 32.2 investigations because he was in prison. In 2008, he was at liberty and associated with a gang. Given the culture of the gang and its members, the court finds it is unlikely that he would have submitted to interviews in 2008. Except when incarcerated and seeking consideration on their own criminal cases, gang members were generally unwilling to cooperate with either side at the time of these two trials.

[324] Johnson, whose street name was J-5, testified on January 17, 2007.

[325] J. Martin had the nickname Showtime. He did not testify at trial.

One evening during the trial, Juror 75 went to Q's apartment to see her grandchildren. Dickey[326] was there and said he had seen her in court. She acknowledged that, but had no conversation with him and he left immediately. Q and Juror 75 then had a conversation in which Q told her that she should get off the jury. Q told her that she needed to get off the jury if she had been seeing his friends in the courtroom. She told him that she had tried, but was told by the court that she was to stay on the jury.

She had a concern for Q's safety and to some degree her own because of familiar faces in the courtroom and her son's suspected gang involvement. She also knew that Q did not tell her about things that he was involved with. While the jury was watching a poor quality amateur video taken shortly before the shootings at Lowry Park, she was trying to see if she recognized her son in the video.

Years later, when interviewed by both parties and/or testifying in court, Juror 75 indicated that she thought she had recognized the faces of at least three and probably four witnesses and possibly other people in the gallery. One witness was Fields. Two were men – Dickey and Johnson. She described the other as a heavy-set woman. That description did not help the prosecution or post-conviction

[326] On October 18, 2016, the parties stipulated that Dickey was the person she encountered in Q's apartment. When she testified in 2015 and 2016, Juror 75 believed that he said, "I saw you in court *today*." But it seems unlikely that the encounter occurred on the day that Dickey testified. Dickey testified on Friday, January 19, 2007. Juror 75 had only one relevant series of conversations with the bailiff. They occurred on the following Tuesday, January 23, 2007. Both Juror 75 and Q testified that the brief encounter with Dickey occurred on the same evening that Q confronted Juror 75 about getting off the jury. Juror 75's memory that her conversation with Q occurred after the exchanges with the bailiff is particularly clear, credible, and in conformity with Q's testimony. Thus, this court concludes that the encounter with Dickey occurred on or after January 23, 2007. When Dickey testified during the post-conviction hearing, he indicated that he had recognized Juror 75 in court, but never spoke to her. He did not recall seeing her in Q's apartment.

counsel identify any witness so it seems unlikely that any such unidentified person could have offered significant testimony.

Johnson was an important witness for both parties. He identified Owens as the man who shot Vann and gave significant evidence supporting the defense theory of self-defense and defense of Ray.

Johnson's name was on the list of 316, but Juror 75 had never heard it before the trial.

Dickey was considerably less important. He testified that he and Vann were close friends. He had assisted in breaking up an earlier argument between Marshall-Fields and Ray at Lowry Park. Shortly before the shooting, he noticed a commotion and saw Vann running toward it. He started to run that way, too, intending to join with Vann if a fight ensued. He witnessed the shooting at Lowry Park from the parking lot, possibly one hundred feet away. He testified,

> Q. A hundred feet?
>
> A. Something like that. I don't know, I was not – I don't know. I was far.
>
> As soon as Greg [Vann] got over towards where the fight was taking place, I don't know, he put his hands out, I don't know if it was to throw a punch or to break it up. You know, he was running so fast, I really couldn't catch on to what was going on because I was on my way headed over there. I was headed over there. I couldn't exactly see what happened and shots started to be fired.

Lowry Park Tr. 56-57 (Jan. 19, 2007).

He testified that he thought Ray shot Vann, but was not certain.

> Q. Okay, With what degree of certainty have you said that you believed it was Robert [Ray] who shot Greg? Are you certain of that is my question.

> A. I'm not certain of anything. I wasn't right there when it happened, so I can't be certain that this man right here shot him or Robert [Ray] shot him or who shot him because I wasn't exactly right there when it happened. I was several – I was a little distance away and it was a little dark outside. It wasn't pitch black, but it was, I don't know.

Id. at 67. Dickey then acknowledged that he had earlier told the police that Ray shot Vann and had not mentioned Owens as a possible shooter.

Dickey's name was on the list of 316, but Juror 75 had never heard it before the trial.

When Juror 75 testified in 2015, more than eight years after the trial, she was shown photographs of Johnson and Dickey. She was not certain, but under the totality of the circumstances, this court finds that she recognized both of these young men. She tentatively selected Johnson as the person she had seen in court and in Q's apartment. But it could not have been Johnson that she had seen at Q's apartment. Johnson was in the Witness Protection Program at the time of the trial. He was escorted from the airport to court and back to the airport. He could not have gone to Q's apartment. The parties have stipulated that she encountered Dickey at Q's apartment.

On January 23, 2007, Juror 75 told the bailiff that she knew people in the courtroom.[327] The bailiff then reported to the judge, who told the bailiff to get a name. When asked for a name, Juror 75 specifically mentioned White – the only person whom she knew by name. The bailiff reported back to the judge. When

[327] When she testified in 2015, Juror 75 was sure that she told the bailiff that she recognized several people – plural. When she testified again in 2016, she only remembered telling the bailiff about White. The 2015 version was more detailed and appears to be more accurate. Her intention was to explain the entire situation to the judge, but she was never given the opportunity and was told that she would remain on the jury.

contacted years later, the bailiff(s) could not recall what Juror 75 told them or what they told the judge.[328] In 2015, when testifying about her memory of this situation, Juror 75 said the following:

> THE COURT: I am lost. I'm sorry. Are there two conversations with the bailiff? Can you clarify for me?
>
> THE WITNESS: I had one conversation with the bailiff about a person that was sitting in the courtroom and she was Melissa White.
>
> Q (By Mr. Castle) So during that conversation with the bailiff, you didn't tell them that you also knew witnesses or that a witness had been to your son's apartment?
>
> A Nope, I didn't say anything about witnesses. I just said I knew Melissa White's name and I knew other faces that were out there, not that they were a witness.
>
> Q So to be clear when you said you told the Judge, did you have a personal –
>
> A I told the bailiff and the bailiff told the Judge and the Judge told the bailiff and the bailiff came back and told me what the Judge said.
>
> Q So you didn't have any personal conversations with the Judge?
>
> A No, I did not.

PC Hrg Tr. 40:14-25; 41:1-8 (Mar. 26, 2015).

[328] Two possible bailiffs were identified. They, too, were contacted some eight years after the trial. Neither could recall anything about the events.

From the trial record, it appears that the trial judge may have erroneously inferred from the bailiff's reports that Juror 75 recognized only one person – White. The trial record shows the following:

> THE COURT: The record should reflect that all parties are present. One of the jurors, the juror in Seat 16, indicated she recognized an individual who came into the courtroom and I did have the bailiff inquire as to who that person is. I believe Ms. White and she's certainly welcome to be here. I was concerned, of course, if she's a witness that there would be a potential problem, but at this point I believe she is here as an observer and as long as I don't see any contact while the jury is in the courtroom between Ms. White and the defense side of the room, I don't think there will be a problem either. My courtroom is open to anybody who is watching proceedings.
>
> MR. HOWER: Judge, I don't know who Ms. White is. We have a first name with that?
>
> THE COURT: Do we have a first name with that? No.
>
> MR. HOWER: May I get a first name with that?
>
> MS. WHITE: Oh, my name. Melissa.
>
> THE COURT: Melissa White.
>
> MR. HOWER: Not a witness to my knowledge.
>
> THE COURT: I don't believe she's a witness for either side and she's certainly welcome to stay and watch [the] proceedings. I just need to make sure there isn't any sort of contact between really either side and Ms. White when the jurors are present. During breaks it's fine. Whatever will be permitted.

> MS. WARREN: Judge, can you tell us who Juror 16 was because they've all moved around.
>
> THE COURT: That's [Juror 75].
>
> MS. WARREN: Okay.
>
> THE COURT: All right. With that particular record made from the court, is there anything for the People at this point before the jury comes back in?
>
> MR. HOWER: No, Your Honor.
>
> THE COURT: Anything for the defense?
>
> MR. KING: No. Thank you.

Trial Tr. 56:24-25; 57:1-25: 58:1-9 (Jan. 23, 2007). The prosecution later reconsidered and asked that Juror 75 be questioned *in camera* about the situation. The trial team indicated that they did not join but did not object to the request. The judge denied the request. The trial record reflects the following:

> MR. HOWER: The situation with [Juror 75], indicating that she knew Ms. White kind of was -- caught us off guard a little bit. Inasmuch as Ms. White I believe is sitting with Mr. Owens' mother, I don't -- I think it might be wise to inquire if [Juror 75] does know Mr. Owens family at all, does she -- the nature of her relationship with Ms. White. I think it can be done very neutrally by the court, you know, outside the presence of the rest of the jury, but, I mean, clearly Ms. White is sitting next to the defendant's mother and I think that we just need to make a little further inquiry as to whether [Juror 75] thinks that's at all going to affect her.
>
> THE COURT: I can't recall in the course of this trial that Mr. Owens' mother has been identified as being present in the courtroom, where she is, what she looks like, and how can I then arrive at the conclusion that a juror

because of her knowledge of the visitor to the courtroom and because of where she's sitting would take some sort of negative inference or impermissible inference from that.

MR. HOWER: I don't, I mean, I agree with you, I don't believe she has been identified, but if -- if we just perhaps, you know, the nature of the relationship, her knowledge of Ms. White, and whether or not anything related to that would cause any difficulty for her being fair and impartial. My guess is it won't, but I think we ought to know a little bit more about that.

THE COURT: All right. What does the defense think about that?

MR. KING: Judge, I'm not requesting that, but I don't -- I don't have an objection to it.

THE COURT: All right. Well, this is an open courtroom and I actually expand the usual admonition to the jury at recesses, especially at the evening recess to include not only the parties present in the courtroom and any witnesses, but anybody that the jury may see in the courtroom, including any possible observers to the trial, and that they should avoid having contact or discussing the case with those individuals and absent some sort of showing that there is some difficulty other than just simply knowing an individual when they come into the courtroom, I am not going to subject a juror to examination on that particular issue. It's an open courtroom and I certainly don't want to do anything as well to quell or in any way chill any individual's right to come into the open courtroom and watch proceedings and absent some sort of information establishing that just based upon where an individual is seated in the courtroom and who they may be seated next to that I should therefore draw the conclusion that the juror would receive information in an inappropriate fashion I hesitate

> to inquire. So the juror was aware enough to bring the situation to our attention and I will simply defer to that juror to continue to adhere to my admonitions and instructions and restrictions and absent some sort of indication that that is not being done, I'm not going to inquire.
> So I'll decline the People's request.

Id. at 99:18; 100:1-25; 101:1-22.

The judge had apparently instructed the bailiff to tell Juror 75 that she was to continue to serve on the jury. The court made no further inquiry or any further record about whom Juror 75 might have recognized or why she was concerned. She did not raise the matter again with the court. She continued to serve, deliberated, and was part of the jury that returned the verdict.

According to Juror 75, a fellow juror asked her what she had talked to the bailiff about. She told her fellow juror that she knew some people but was told by the bailiff that it was okay. There was no further discussion. Nothing about whom she knew or how she knew them was said to any fellow juror until after the verdict.

After the jury returned its verdict, the jurors were sent to the jury room so that the judge could thank and debrief them. After the judge left the jury room, Juror 75 told a fellow juror about recognizing one or more people in the courtroom and they drew the foreperson into the conversation. The jurors' memories of this were not totally consistent. Juror Barbara Kloster (Kloster) thought Juror 75 knew a member of Owens's family. The foreperson thought "[i]t was almost Kevin Bacon-ish, six layers of separation type of situation" – that she knew someone who knew someone. PC Hrg Tr. 20:3-4 (May 13, 2015). The foreperson asked her if the judge was aware of the situation and Juror 75 told the foreperson that she had told the bailiff, who contacted the judge, and they said there was not a problem.

The trial judge had given instructions relating to the possibility that jurors might recognize witnesses. On January 9, 2007, before evidence began, the judge had instructed the jury this way:

> Also it is important to keep in mind about the potential witnesses in this case. You received a four page list of potential witnesses. I asked the parties to be over-inclusive, included practically any name that may have even floated through the county during the period of time within which the case was being investigated, and many of you didn't register any sort of acknowledgment of information on those particular names, but *a person may walk into the court being called as a witness and suddenly you realize that you recognize this individual from some sort of setting outside of the courtroom, if you would please, again, recognize how important it would be for you to inform us of your knowledge in regards to that particular individual so there are a number of times where I would ask that you please let us know if there's a problem or concern so that we can take steps*.

Lowry Park Tr. 65:19-25; 66:1-8 (Jan. 9, 2007) (emphasis added).

The trial court revisited his admonition at the end of the trial day on at least two occasions, but the instruction was not much clearer. On January 19, 2007, the day that Dickey testified, the trial court said,

> [W]atch the conversations around you and don't discuss the case with any other persons [sic]. Certainly watch your contact with anybody that you may have seen here in the courtroom and don't discuss the case with them. Warn people off if they appear to be discussing the case in your presence and let me know if there's any problem in these areas at all.

Lowry Park Tr. 263:6-12 (Jan. 19, 2007).

(d) Owens and his Family

Shortly after the Lowry Park conviction, in accordance with normal post-conviction practice in serious cases, Kepros directed Gonglach to contact those jurors who would speak to him to see if there was improper juror conduct. Due to the press of the investigative requirements for the Dayton Street case, Gonglach did not immediately make those contacts. But he ultimately talked to Kloster and wrote a report of that interview which he submitted to the trial team in February 2008. By then, the trial team had already decided not to seek suppression of the Lowry Park conviction based upon their Lowry Park performance. When the team reviewed the Kloster report, it apparently did not register as a potentially adequate basis for moving to suppress the Lowry Park conviction due to judicial or juror misconduct.

As relevant to Juror 75's knowledge of Owens, the Kloster report indicates, "[Kloster] stated that after the verdict one the jurors shared that she knew about the shooting and that she knew [Owens's] family. She told the jurors that she was afraid for her safety because she knew about the people Mario was with." SOPC.EX.D-1310. Juror 75 testified during the post-conviction hearings that she did not know Owens or any member of his family; she did not have any fear of them; and she did not feel that she had reason to fear them.

(e) Relationship with Marshall-Fields's Uncles

In 2017, the court granted Owens leave to reopen the joint Crim. P. 32.2 hearing in this case and Crim. P. 35(c) hearing in the Lowry Park case. Owens asked leave to explore whether, at the time of the trial, Juror 75 had a relationship with members of Marshall-Fields's extended family that might have affected her ability to serve without bias. Owens's counsel had reviewed Juror 75's Facebook

account and discovered photos of a 2015 Las Vegas trip. In the photos, Juror 75 and her husband, James Manuel (Manuel), were posing with Marshall-Fields's uncles, Alan Baxter (Chipper) and Michael Baxter (Michael), and their wives.

Neither Chipper nor Michael testified during, nor did either attend the Lowry Park trial. The name Alan Baxter was one of the 316 on the four-page attachment to the questionnaire. Juror 75 did not circle his name.

One of Owens's post-conviction counsel interviewed Michael on January 29, 2017, and he told her that he had known Juror 75 and two of her cousins for over 20 years. When counsel and her investigator returned the next day and asked Michael to review and initial the investigative report of the interview, he corrected himself. He told them that he had known members of the extended Ealy family and particularly two of Juror 75's male cousins for more than 20 years, but did not meet Juror 75 until years after the Lowry Park trial. Owens's counsel also suspected that, because Chipper, Michael, and Juror 75 had all attended George Washington High School, they might have been high school friends.

Chipper, Michael, and Juror 75 testified in April 2017.

Chipper and Michael were two of their mother's 10 children, along with their half-brother, Marshall-Fields's father. Marshall-Fields's father was incarcerated so Chipper and Michael acted as father figures for Marshall-Fields. Chipper was a mechanic and Marshall-Fields would regularly go to Chipper's home, often for assistance with cars. Marshall-Fields was threatened on the night before he was murdered on Dayton Street, and went to Chipper's house to seek the counsel of Chipper and Michael.

Juror 75's cousins, Michael and Tim Ealy, played sports with the Baxter brothers when they were young.

Juror 75 did not meet Chipper or Michael until well after the Lowry Park trial. They met because her now husband, Manuel, had been a friend of Michael and Chipper for years, and he introduced her to them. The Baxter brothers did not know that she had served on the Lowry Park jury until the beginning of 2017, and she did not she realize until recently that they were uncles of one of the young men who had been shot at Lowry Park.

The Baxter brothers were never in the same school at the same time as Juror 75 and never lived particularly close to her. Juror 75 graduated from George Washington High School in 1984, but did not attend the school before transferring in during her senior year. Chipper attended George Washington High School and would have graduated in about 1983, but he stopped attending in his sophomore year and obtained his GED. Michael is 13 months older than Chipper and graduated from George Washington High School in 1982.

The Baxters grew up in a home near 29th and Pontiac. Juror 75's family of origin moved frequently. The closest they ever lived to the Baxter home was 26th and Holly, which is several blocks away. Those homes, while both in Park Hill, are separated by, among more than a dozen other streets, Monaco Parkway.

Juror 75 did not know either Michael or Chipper until well after her jury service had concluded. Indeed, there is no evidence other than Michael's initial statement to defense counsel on January 29, 2017, that suggests that Juror 75 knew either of the Baxter brothers before or during the trial.

(iii) Knowledge of Dayton Street homicides and use of Extraneous Information

The Lowry Park jurors were never given any information about the Dayton Street homicides. Nor were they ever asked what, if anything, they knew about them.

The Kloster report reflects that, "[Kloster] stated that after the verdict one of the jurors shared that she knew about the shooting. [Kloster] stated that this juror told them that she had privately met with the judge to share her concerns but that she was told not to discuss this with the other jurors until after the trial." SOPC.EX.D-1310.

Juror 75's knowledge of the Dayton Street homicides was that:

- she lived within two blocks of the Dayton Street homicide scene and had seen the victims' car within the police-taped crime scene;
- she had seen the mothers of the victims on the television news and a poster mounted on a bus stop bench in her neighborhood asking for the community's assistance with finding who killed Marshall-Fields and Wolfe; and
- had heard Fields speak at Juror 75's church.

There is no evidence that any juror, including Juror 75, shared any information about the Dayton Street homicides with any other juror. Nor does the evidence show that any juror, including Juror 75, considered any information about the Dayton Street murders in reaching their Lowry Park decision.

But there is conflicting evidence concerning whether, in her own mind, Juror 75 started to see a possible connection between the cases after the Lowry Park verdict had been delivered (as she testified) or during the trial (as investigators' reports of interviews with Juror 75 suggest).

When testifying years later, Juror 75 recalled that she connected the cases because either the judge or a member of the court staff came to the jury room after the verdict and told them things that helped them make the connection. Kloster confirmed that the judge came to the jury room and told the jurors that Owens would have another trial. Kloster also recalled that while the jury wondered how

Marshall-Fields had passed away, none of the jurors talked about or seemed to know about his death until after the Lowry Park verdict was returned.

v. Principles of Law Relating to Juror Misconduct Question

(a) Fair Trial, Unbiased Jury

"The due process clauses of the United States and Colorado constitutions guarantee every criminal defendant the right to a fair trial." *Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000). "An impartial jury is a fundamental element of the constitutional right to a fair trial." *Id.*; *see also* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . trial by an impartial jury . . . ."); Colo. Const. art. II, § 16 ("In criminal prosecutions the accused shall have the right to . . . trial by an impartial jury . . . .").

Exercising challenges for cause is a fundamental element of the right to an impartial jury. *Morrison*, 19 P.3d at 672.

(b) Juror Bias – False *Voir Dire* Answers; Relationships with Parties or Witnesses

(i) Balancing Fair Trial and Finality Concerns

When, after a verdict, it appears that there was information that the attorneys would have found relevant in deciding whether to seek the replacement of a juror, a court must balance competing values. The law recognizes that no trial is perfect. "A defendant is entitled to a fair trial, but not a perfect trial." *People v. Rodriguez*, 794 P.2d 965, 971 (Colo. 1990). When the parties have received a fair, albeit imperfect, trial, the law strongly favors finality. As the United States Supreme Court stated,

> To invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our

> judicial system can be expected to give. A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on *voir dire* examination.

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 555 (1984).

But while trials may be imperfect, they may not be unfair.

(ii) Colorado Law

Colorado grants relief when the defendant proves by a preponderance of evidence that either (1) the juror was deliberately dishonest about a material matter to such a degree that prejudice should be found despite the juror's claim to have served without bias or (2) the juror misstated or failed to disclose a material matter, and while the mistake was not deliberately dishonest, the party challenging the verdict has proven that they suffered prejudice.

> In Colorado . . . untruthful answers on *voir dire* concerning material matters do not entitle a party to a new trial *per se* . . . . Under some circumstances, however, a juror's non-disclosure of information during jury selection may be grounds for a new trial.

Allen v. Ramada Inn, Inc., 778 P.2d 291, 292-93 (Colo. App. 1989).

People v. Dunoyair, 660 P.2d 890, 893 (Colo. 1983), involved a juror's inadvertent nondisclosure of his acquaintance with a prosecution witness. But in affirming a denial of post-conviction relief, the supreme court discussed how deliberate misconduct concerning a material matter might affect the analysis:

> Where . . . a juror deliberately misrepresents important biographical information relevant to a challenge for cause or a peremptory challenge or knowingly conceals a bias or hostility towards the defendant, a new trial might well be necessary. *See People v. Borrelli*, 624 P.2d 900 (Colo.

> App. 1980); *People v. Rael*, 40 Colo. App. 374, 578 P.2d 1067 (1978). In such instances the juror's deliberate misrepresentation or knowing concealment is itself evidence that the juror was likely incapable of rendering a fair and impartial verdict in the matter.

People v. Dunoyair, 660 P.2d 890, 895 (Colo. 1983).

People v. Christopher, 896 P.2d 876 (Colo. 1995), involved a juror's inadvertent failure to disclose that she was familiar with the prosecution's advisory witness:

> [Juror] Digeser testified that [prosecution advisory witness] Officer Moran was a former neighbor who used to live two houses away from her, that they had both been at several social functions together, that Officer Moran had driven Digeser to the airport to pick up Digeser's friend, that she had not seen Officer Moran in over a year, and that she had not recognized Officer Moran's surname when the list of witnesses was read to her prior to trial. Digeser stated that she believed Officer Moran to be a 'trustworthy' person based on the fact that her house was well-kept and that Officer Moran had once driven Digeser to the airport to pick up Digeser's friend. Digeser responded affirmatively to questions concerning her ability to be objective and evaluate Officer Moran's testimony, deliberate fairly, and render a fair verdict.

People v. Christopher, 896 P.2d 876, 877 (Colo. 1995). The trial court found that Digeser's relationship with Moran would not affect her ability to remain impartial and denied the defendant's motion to replace her with an alternate. *Id.* at 877-78. The defendant claimed on appeal that he was denied the opportunity to exercise a peremptory challenge. *Id.* at 878. The court of appeals,

> concluded that the trial court had abused its discretion, finding that defendant's right to exercise a peremptory challenge was curtailed by Digeser's failure to initially disclose her acquaintance with Officer Moran during *voir*

> *dire* and that the defendant was therefore prejudiced by the trial court's decision not to replace Digeser with an alternate juror.

Id. at 878. The Colorado Supreme Court granted *certiorari* on the following question:

> Whether the court of appeals erred in holding that the trial court's failure to replace a juror who recognized a prosecution witness after trial began was an abuse of discretion that prejudiced the defendant and curtailed his right to exercise peremptory challenges.

Id. The Colorado Supreme Court held that prejudice would not be presumed in light of the juror's inadvertent failure to disclose her acquaintance with a prosecution witness.

> [T]he court of appeals erred in presuming prejudice from Digeser's inadvertent failure to recognize Officer Moran's name as it was read off during jury selection. We conclude that the trial court did not abuse its discretion in determining not to replace Digeser with an alternate juror since the juror was able to fairly evaluate the credibility of Officer Moran's testimony and could reach an impartial verdict based on the evidence. Accordingly, we reverse the court of appeals and remand with directions to consider any unresolved issues.

Id. at 880. *See also People v. Meis*, 837 P.2d 258 (Colo. App. 1992).[329]

In analyzing whether prejudice has been shown when the inadvertent nondisclosure is discovered after the trial, Colorado appellate courts have

[329] The factors suggested in *Meis* for replacing a sitting juror with an alternate were quoted with approval in *Christopher*. Those factors are, (1) the juror's assurance of impartiality; (2) the nature of the information withheld in *voir dire*; (3) whether the nondisclosure was deliberate; (4) any prejudicial effect the nondisclosed information would have had on either party including the defendant's right to exercise peremptory challenges; and (5) the practical remedies available at the stage of the proceedings when the nondisclosure is revealed. *Meis*, 837 P.2d at 259.

discussed certain factors relevant to prejudice in cases involving undisclosed material information and recognizing witnesses. Those factors have included (1) **the significance of the undisclosed information**, *see Dunoyair*, 660 P.2d at 895-96 (where the testimony was of only peripheral significance and was not disputed, there was no prejudice); (2) **whether the nondisclosure was the product of the juror's forgetfulness**, *see Moynahan v. State*, 334 A.2d 242, 244 (Conn. 1974), cited in *Dunoyair*, 660 P.2d at 895 (no prejudice when the juror forgot about a prior attorney-client relationship with the prosecutor); (3) **the remoteness of the juror's contact with the witness**, *see Moynahan*, 334 A.2d 242, 244 cited in *Dunoyair*, 660 P.2d at 895 (no prejudice when the juror had an attorney-client relationship with the prosecutor 10 years prior to trial); and (4) **the nature of the question asked**, *see People v. Torres*, 224 P.3d 268, 273 (Colo. App. 2009) (no prejudice because the present-tense question did not require disclosure that family members had been involved in law enforcement in the past).

(iii) Federal Law

(a) Actual Bias

The federal standard is set forth in *McDonough* and developed in more detail in various federal cases, including *Sampson v. United States*, 724 F.3d 150 (1st Cir. 2013).

The defendant must demonstrate by a preponderance of the evidence not only that the juror's answers were not fully accurate and/or that she failed to disclose her recognition of one or more witnesses, but also that "under the totality of the circumstances . . . the juror lacked the capacity and the will to decide the case based on the evidence . . . ." *Sampson v. United States*, 724 F.3d 150, 165-66 (1st Cir. 2013).

A *McDonough* juror failed to disclose material biographical information during *voir dire*. 464 U.S. at 549-50. The verdict was adverse to the plaintiff. *Id.* at 550. Had plaintiff's counsel known the true biographical facts, a peremptory challenge would almost certainly have been used against the juror. The Tenth Circuit reversed the federal trial court judgment and concluded that the false *voir dire* information deprived the plaintiff of the right to meaningfully exercise peremptory challenges. *Id.* at 552. The United States Supreme Court reversed and reinstated the verdict, stating:

> We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

Id. at 556.

One factor to be determined is whether a biographical or relationship misrepresentation was deliberately dishonest. Under the *McDonough* standard, the fact that a nondisclosure is deliberate does not prove, in and of itself, that the juror was not impartial. *Sampson*, 724 F.3d at 164-65; *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 516 (10th Cir. 1998). But in some cases, deliberate dishonesty might be persuasive of a juror's inability to be impartial. The ultimate question remains, did the juror lack the capacity and the will to decide the case based on the evidence.

> When all is said and done, the existence vel non of a valid basis for a challenge for cause is not a matter of labels. Any inquiry into potential bias in the event of juror dishonesty must be both context specific and fact specific. The outcome of this inquiry depends on whether a reasonable judge, armed with the information that the

> dishonest juror failed to disclose and the reason behind the juror's dishonesty, would conclude under the totality of the circumstances that the juror lacked the capacity and the will to decide the case based on the evidence (and that, therefore, a valid basis for excusal for cause existed).

Sampson, 724 F.3d at 165-66. *Sampson* suggested,

> A number of factors may be relevant in determining whether a juror has both the capacity and the will to decide the case solely on the evidence. This compendium may include (but is not limited to) the juror's interpersonal relationships, the juror's ability to separate her emotions from her duties, the similarity between the juror's experiences and important facts presented at trial, the scope and severity of the juror's dishonesty, and the juror's motive for lying. Although any one of these factors, taken in isolation, may be insufficient to ground a finding of a valid basis for a challenge for cause, their cumulative effect must nonetheless be considered.

Id. at 166 (internal citations omitted).

(b) Common Law Implied Bias

Implied bias can be divided into statutory or rule-based implied bias on the one hand and common law implied bias on the other.[330]

There seems to be debate among the federal circuits as to whether common law implied bias is an independent basis for review. But in this court's view, there could be federal common law grounds, albeit in extremely rare circumstances, for

[330] Implied bias challenges based upon C.R.S. § 16-10-103(1) and/or Crim. P. 24(b) must be based upon the plain language of the statute or rule and not judicial attempts to discern the spirit of the rule or intent of the legislature. *People v. Bonvicini*, 366 P.3d 151, 157 (Colo. 2016); *People v. Rhodus*, 870 P.2d 470, 477 (Colo. 1994). There is no claim of statutory or rule-based implied bias in this case.

finding implied bias that does not involve deliberate juror dishonesty and is not expressly covered by a statute or rule.

A determination of common law implied bias "turns on an objective evaluation of the challenged juror's experiences and their relation to the case being tried." *Gonzales v. Thomas*, 99 F.3d 978, 987 (10th Cir. 1996). And it involves a determination of "whether an average person in the position of the juror in controversy would be prejudiced." *United States v. Powell*, 226 F.3d 1181, 1188 (10th Cir. 2000) (quotation omitted).

If justified by the facts, implied bias could be found even if a juror denied any bias. "[T]he juror may have an interest in concealing his own bias [and/or] may be unaware of it." *Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring).

Implied bias, as distinguished from actual bias, is a matter of law, which will be reviewed *de novo* on appeal. *Gonzales*, 99 F.3d at 986.

(c) Consideration of Extraneous Information in Jury Deliberations

"[A]ny information that is not properly received into evidence or included in the court's instructions is extraneous to the case and improper for juror consideration." *People v. Harlan*, 109 P.3d 616, 624 (Colo. 2005). In extraneous information cases, the defense must first show by a preponderance of the evidence that extraneous information was introduced into the jury deliberation process. If it was, the court asks, "whether there is a 'reasonable possibility' that extraneous contact or influence affected the verdict . . . ." *Wiser v. People*, 732 P.2d 1139, 1142 (Colo. 1987).

vi. Analysis

(a) Overview

In analyzing *Strickland* prong one, and the two *Kimmelman* steps that describe *Strickland* prong two, the court has considered this sequence of questions:

1. Should Owens's counsel have sought to suppress Owens's Lowry Park conviction?
2. Should there have been follow-up investigation on the Kloster report?
3. What direction would that investigation have taken?
4. What would have been the result(s) of the investigation?
5. Would defense counsel have made a *prima facie* showing that the Lowry Park conviction was unconstitutional?
6. Would the prosecution have then carried its burden of showing, by a preponderance of the evidence, that the Lowry Park conviction was constitutionally obtained?
7. Had a suppression motion been properly filed, investigated, and litigated, would Aggravating Factor No. 1 have been suppressed?

(b) *Strickland* Performance Prong

The court affords the trial team a strong presumption that its performance was adequate and in reviewing its performance must eliminate the effects of hindsight. The court must also view the evidence based on what Owens's counsel knew or, with reasonable investigation, should have known in early 2008. Had it been constitutionally reasonable, without consulting Owens, to have neither filed a *Mills* affidavit nor otherwise sought the appointment of independent counsel to investigate suppression of Aggravating Factor No. 1 due to concerns about the trial team's Lowry Park performance, there would be a serious question concerning *Strickland*'s first prong based on the Kloster report alone. When the trial team

received the Kloster report in February 2008, it was the only information that the trial team had which might suggest that investigation of Lowry Park juror misconduct was appropriate. At that time, the team was hard pressed to complete their preparations for both phases of the Dayton Street case and needed to balance priorities.

The Kloster report suggested three issues for possible investigation. First, the possibility of judicial misconduct if there had been *ex parte* communication between the trial judge and a juror. Second, the possibility of juror misconduct if a juror knew and feared Owens or a member of his family and failed to inform the trial court. Third, the possibility of juror misconduct if a juror had information about the Dayton Street homicides and improperly shared or used it in the Lowry Park deliberations.

It would not have been constitutionally unreasonable for the trial team to have decided that investigating these possibilities was not worth the diversion of resources under the circumstances that existed at the time. First, there was, in fact, no *ex parte* communication, Owens does not now claim that there was, and the trial team might have concluded that the likelihood of improper *ex parte* communication was so remote as to be unworthy of the diversion of resources. Second, in fact, Juror 75 did not know Owens or any member of his family. Owens and his mother were readily available to the trial team. Presumably, Owens and his mother would have known whether a juror knew them. After consulting with Owens and his mother, the trial team might reasonably have concluded that further investigation along this line was unworthy of the diversion of resources.[331] Third, the trial team knew that the Dayton Street homicides had received

[331] The Kloster report also said that the juror feared Owens or those around him. But there is nothing unusual about jurors voicing fear of reprisal after voting to convict in serious cases.

significant publicity. They knew that they, and the Lowry Park trial court, had decided not to bring up the Dayton Street publicity with the Lowry Park jurors. They would not have been surprised to learn that one or more jurors might have known things about the Dayton Street case based on their exposure to the publicity. The Kloster report said that none of the jurors talked about or seemed to know about Marshall-Fields's death until after the Lowry Park verdict was returned. So again, the trial team might reasonably have concluded that this line of investigation was unworthy of the diversion of resources.

But, as this court found in part V.E.2.d.iv(a) of this Order, the trial team's decision, without consulting Owens, to neither file a *Mills* affidavit nor move to suppress Owens's Lowry Park conviction was constitutionally deficient. That *Strickland* prong one deficiency justifies *Strickland* prong two analysis of juror misconduct, because ADC would not have been under the resource pressures that faced the trial team, and, this being a death penalty case, probably would have investigated the information in the Kloster report.

Failure to investigate a sentencing aggravating factor was considered in *Rompilla*. Rompilla was convicted of murder and sentenced to death. *Rompilla*, 545 U.S. at 377-78. One aggravating factor was his significant history of felony convictions involving the use or threat of violence. *Id.* at 378. His trial counsel "knew that the Commonwealth would attempt to establish this history by proving Rompilla's prior conviction for rape and assault, and would emphasize his violent character by introducing a transcript of the rape victim's testimony given in that earlier trial." *Id.* at 383.

"[T]he prior conviction file was a public document, readily available for the asking at the very courthouse where Rompilla was to be tried." *Id.* at 384. But trial counsel did not look at any part of the file – even the relevant portion of the

transcript – until the prosecutor told her, for the second time, of its availability at the courthouse. *Id.* Then, after obtaining the transcript, trial counsel still did not review any of the other material in the file. *Id.* at 385.

The United States Supreme Court found it "difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation." *Id.*

The Court held that "Rompilla's counsel had a duty to make all reasonable efforts to learn what they could about the offense." *Id.*

> Reasonable efforts certainly included obtaining the Commonwealth's own readily available file on the prior conviction to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay, and to anticipate the details of the aggravating evidence the Commonwealth would emphasize. Without making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim.

Id. at 385-86. The Court noted that not every failure to review the details of a prior conviction would be deficient. But in Rompilla's case, "[t]he unreasonableness of attempting no more than they did was heightened by the easy availability of the file at the trial courthouse, and the great risk that testimony about a similar violent crime would hamstring counsel's chosen defense of residual doubt." *Id.* at 389-90. But in "[o]ther situations, where a defense lawyer is not charged with knowledge that the prosecutor intends to use a prior conviction in this way, might well warrant a different assessment." *Id.* at 390.

The alleged failure to investigate the statutory aggravating factor in this case does not approach the level of the failure to investigate in *Rompilla*. The trial team was intimately familiar with the facts that gave rise to most of the aggravating factors – the Lowry Park facts. Other than the very limited investigation authorized by *Mills*, they could not investigate their own Lowry Park performance. And, other than in this area, they cannot reasonably be faulted for failing to investigate the prosecution's aggravating factors.

To this court, *Rompilla* demonstrates that an unreasonable failure to investigate in one area can be constitutionally significant when (1) it would have involved little effort, and (2) it would clearly have led to other, significant mitigating material. The *Rompilla* court found prejudice because, "[i]f the defense lawyers had looked in the file on Rompilla's prior conviction, it is uncontested they would have found a range of mitigation leads that no other source had opened up." *Id.* at 390. Those mitigation leads did not center on the facts of the prior rape and assault, but on other mitigation factors concerning Rompilla's background and history.

It would not have been difficult to investigate the assertions in the Kloster report. Kloster was cooperative and could have readily supplied Owens's counsel with information that led to Juror 75. Juror 75 was, after all, the only African American on the jury. Presumably, Owens and his family were readily available to Owens's counsel. Since Juror 75 was fully cooperative with the attorneys on both sides for many years during their post-trial investigation, this court finds that she would have been cooperative and readily available as well.

The trial team did not (1) file a *Mills* affidavit, (2) ask that ADC be appointed to investigate the suppression of Aggravating Factor No. 1, or (3) investigate the Kloster report. And, while counsel cannot be expected to recall

every tactical or resource allocation decision after the passage of several years, nothing in the record suggests that they reasonably considered and made a tactical decision not to pursue the issues raised by the Kloster report. Nor did they consult with Owens and obtain his waiver and informed consent to the decision to forgo seeking suppression of Aggravating Factor No. 1. This court therefore finds that the trial team's performance was outside of the wide range of professionally competent assistance required by the first prong of *Strickland*. 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance."); *see also Green v. State*, 975 So.2d 1090, 1111-12 (Fla. 2008) (capital defense counsel was ineffective when he failed to review the file for the defendant's prior New York youthful offender adjudication and failed to attempt to argue that, since it was not a conviction, it did not qualify as an aggravating factor).

(c) *Kimmelman* Prejudice – Juror Misconduct

(i) Merit of Suppression Motion Based on Juror Misconduct Claims

Had Owens's counsel filed a suppression motion, Owens's initial burden would have been to make a *prima facie* showing that his Lowry Park conviction was obtained in violation of his Sixth Amendment right to a fair trial by an impartial jury. *See Romero*, 767 P.2d at 786 ("To suppress a prior conviction an accused must make at least a prima facie showing of a constitutional violation."). Thus, Owens's initial burden would have been to make a *prima facie* showing of a Sixth Amendment violation of his right to a fair trial by an impartial jury. If Owens made that *prima facie* showing, the burden would have shifted to the prosecution to establish "by a preponderance of the evidence that the conviction

was obtained in accordance with the defendant's constitutional rights." *Lacy*, 775 P.2d at 7.

In finding whether Owens would have made a *prima facie* showing, the evidence would be viewed in the light most favorable to Owens. But to determine whether the prosecution would then have met its burden, the court would view the evidence neutrally and in light of all the surrounding circumstances.

(a) Juror 75's Credibility

The court finds Juror 75 to be generally credible. This court heard Juror 75 testify in October 2016 and April 2017, read lengthy designated testimony that she had given before another judge in Owens's Crim. P. 32.2 hearing, and read investigators' reports of interviews of her by both parties.

Juror 75 testified that she "had no axe to grind" and that she served without bias. The court finds that testimony to be credible.[332]

When she testified in October 2016 and April 2017, she appeared honest and straightforward in her answers. While her recollection of the events that had occurred between 2004 and 2007 was not always consistent in its details, she cooperated with both parties on the several occasions when she was contacted in 2013 and 2014 and did her best to answer all questions honestly. She did not appear to be coloring her testimony to be beneficial to the prosecution's position.

She had no apparent desire to please or displease either side. Nor did she even appear to be unduly deferential to the court. Indeed, she maintained that, when she unsuccessfully attempted to talk to the trial judge, he should have allowed her to be heard, should have considered what she had to say, and should have replaced her with an alternate.

[332] PC Hrg Tr. 85:8-13 (Oct. 14, 2016).

Juror 75 had no particular desire to serve on the jury. On the contrary, on her questionnaire she raised a financial concern about being selected and, during the trial, tried to bring matters to the attention of the trial judge that, she hoped, would have resulted in her being replaced by an alternate. Nevertheless, when selected and later directed to remain on the jury, this court finds she served without bias toward or against either party.

The court finds no evidence that suggests that Juror 75 had any interest in promoting any political, social, or personal agenda.

Nor does the court find that Juror 75 had a reason to be biased against Owens or in favor of the prosecution. Juror 75 knew and liked White, whom she knew to be a friend of Owens. This relationship does not suggest a reason to be biased against Owens. Owens's conviction would be expected to disappoint White, not please her.

Juror 75's son, Q, was a member of a gang subculture that disdained cooperation with the police or prosecution. Arising from that, she was concerned for her son's safety and had concern for her own safety. But these concerns would be exacerbated, not ameliorated, by the juror serving on the jury and voting to convict. Her safety concerns would be an inducement to get off the jury, and failing that, to acquit.

Juror 75 was the only African-American on the jury. Some might infer that this would suggest an affinity with Owens. But while it is possible that concerns about racial bias within the legal system might have made her sympathetic to Owens, it must be remembered that the victims were also young African-American men and that Juror 75 was the mother of a son whose age was similar to Vann, Bell, and Marshall-Fields, as well as Owens. Juror 75 could reasonably have been expected to be sympathetic to both Owens and to the victims and their families.

Post-conviction counsel has done an examination of Juror 75's background, her relationships, and her questionnaire answers. While it seems unlikely that Owens's counsel would have done such an exhaustive investigation in connection with a 2008 motion to suppress, all of the evidence admitted in 2015, 2016, and 2017 has been considered by this court.

(b) Alleged *Ex Parte* Communication with the Lowry Park Trial Judge

This court finds that Owens's counsel would have investigated whether there was *ex parte* communication between Juror 75 and the Lowry Park trial judge. None of the evidence corroborates the Kloster report's suggestion that Juror 75 had *ex parte* communication with the trial court judge. Juror 75's testimony, the trial court record, and the trial judge's affidavit refute this suggestion of impropriety.

There was not improper contact between the trial court judge and Juror 75. Regarding any alleged *ex parte* communication with the Lowry Park trial judge, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation. Specifically, he has failed to satisfy step one of *Kimmelman*. He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would have been suppressed based on any alleged *ex parte* communication with the Lowry Park trial judge.

(c) Alleged Knowledge of and/or Fear of Owens and/or His Family

This court finds that Owens's counsel would have investigated whether Juror 75 knew and/or feared Owens, his family, or his associates. None of the evidence corroborates the Kloster report's suggestion that Juror 75 knew or feared

Owens or any member of his family. Juror 75's unrebutted testimony refutes this suggestion of impropriety.[333]

Juror 75 had no relationship with Owens, any member of his family, or anyone (other than White) associated with him, and she did not fear them. Regarding Juror 75's alleged knowledge of or fear of Owens and/or his family, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation. Specifically, he has failed to satisfy step one of *Kimmelman*. He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would have been suppressed based any alleged knowledge of or fear of Owens and/or his family.

(d) Knowledge of the Dayton Street Homicides

This court finds that Owens's counsel would have investigated what Juror 75 knew about the Dayton Street homicides. Counsel's primary, if not sole, source of information concerning Juror 75's knowledge would have been Juror 75, herself. She would have told them:

- that she lived within two blocks of and had seen the victims' car in the police-taped crime scene;
- that she saw the mothers of the victims make a plea for community assistance while being interviewed on the television news;
- that she saw the poster on a bus stop bench; and
- that she heard Fields speak at Juror 75's church.

[333] If either Owens's post-conviction counsel or the prosecution has ever interviewed Owens, his mother, or White, no results of such interviews have been provided to this court. Other than Owens's mother's unrelated testimony in the sentencing hearing, neither Owens, his mother, nor White testified in either trial, or in either post-conviction hearing.

Counsel would have learned that Juror 75 did not know Fields and had never spoken to her, but that she thought she had seen Fields in the neighborhood (although, unbeknownst to Juror 75, Fields did not live in the neighborhood). She would have told them that, after the judge debriefed the jury, she realized that the Lowry Park and Dayton Street cases were connected. Her testimony also suggests that she would have told them that, before the Lowry Park verdict, she did not connect the two cases.

Juror 75 did not have a relationship with Fields, but she had been in the congregation when Fields spoke at the church. No evidence suggests that Fields ever implied that Owens was connected to the death of her son and no evidence suggests that Juror 75 had any other reason to connect Owens to the Dayton Street murders even if it were true that she suspected a connection between Dayton Street and Lowry Park. No evidence suggests that Juror 75 or any other juror even mentioned, much less considered, the Dayton Street events when serving as jurors in the Lowry Park case.

The Dayton Street murders received substantial media attention, including the appeal by Fields and Wolfe's mother. Owens's trial team decided not to ask the jurors about their exposure to that publicity, but it should not have come as a surprise that jurors had seen it. No evidence has shown that any publicity that Juror 75 might have seen suggested that Owens was a suspect, person of interest, or otherwise connected to the Dayton Street murders.

Regarding Juror 75's knowledge of the Dayton Street homicides, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation. Specifically, he has failed to satisfy step one of *Kimmelman*. He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would

have been suppressed based on any of Juror 75's alleged knowledge the Dayton Street homicides.

(e) Questionnaire Answers

It is unlikely that Owens's counsel in 2008 would have done the extensive investigation into Juror 75's background that post-conviction counsel have now performed. Nevertheless, the court will analyze those answers. None of Juror 75's questionnaire answers were deliberately dishonest, but some were false. None of the false answers, however, were constitutionally significant. To be constitutionally significant, the juror must have failed to answer honestly a material question on *voir dire* when a correct response would have provided a valid basis for a challenge for cause. *McDonough*, 464 U.S. at 556.

> Question 21 asked, "Have you, a member of your family, or a close friend ever been convicted of a crime other than a traffic offense? If yes, please state who, what, when & where." She answered "no."

In fact, she had been convicted of two minor offenses roughly twenty years earlier – municipal shoplifting and municipal or misdemeanor assault. And while she did not know it, her son Q had been convicted of class six felony check fraud some six or seven months before she completed the questionnaire. Her other son, D, had never suffered a conviction, but had suffered a misdemeanor-level juvenile adjudication for a middle school fight. And she knew that an ex-husband had been to prison, and that an aunt and the juror's mother had spent time in jail when Juror 75 was young. She did not know what conviction the ex-husband had suffered, or what, if any, convictions the aunt or the juror's mother had suffered.

She explained her failure to include her own convictions by saying that she was not mindful of them because they were so remote and did not represent the person whom she had become. She explained that she did not consider D's middle

school fight to be a criminal matter and did not know about Q's conviction. She explained that she took the question's reference to her "family" as referring to her and her two sons, not her more remote relatives or ex-relatives.

None of this information, had it been known to Owens's counsel, would have provided a valid basis for a challenge for cause.

> Question 22 asked "Have you ever been a witness or a party to any court proceeding? When and what type of case?" She answered "no".

In fact, she had been sued several times in debt collection matters and had twice taken bankruptcy.

She had not gone to court or otherwise defended against the collection cases and explained that, in the context of selecting a jury for murder case, she did not view the question as asking about her history of financial difficulties.

This information, had it been known to Owens's trial team, would not have provided a valid basis for a challenge for cause.

> Question 20 asked "Have you, a member of your family, or a close friend ever been a victim of crime? If yes, please state who, when, where & what." She answered "No."

Q had been shot in the leg at an IHOP restaurant in April 2006. Neither Q nor any of his friends told Juror 75 about the shooting, but a friend of hers had been eating at the restaurant and called to tell her that her son had been shot. She visited him in the hospital and/or his apartment. No charges were ever brought in connection with the shooting.

Juror 75 explained that she neither knew nor wanted to know about the things Q was getting involved in. She did not know who shot him or whether it was criminal or accidental. Her answer was not untruthful and the questionnaire neither solicited nor provided room for elaboration or volunteered information.

Still, trial counsel would certainly have wanted to know that her adult son had recently been shot.

Her answers to all of the other questions were true.

Regarding Juror 75's answers to the questionnaire, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation. Specifically, he has failed to satisfy step one of *Kimmelman*. He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would have been suppressed based on Juror 75's answers to the questionnaire.

(f) Questionnaire – Failure to Circle Names

Juror 75 did not circle any of the 316 names listed on the questionnaire. Owens asserts that she should have circled four – Dickey, Johnson, Fields, and Baxter. She ultimately recognized Fields and felt that she recognized Johnson and Dickey. But she came to this realization when or after they testified. Juror 75 did not know any of them by name and did not recognize their names on the list. And she did not meet Baxter until years after the trial. Thus, she could not reasonably have been expected to circle any of their names.

Juror 75's failure to circle names was not dishonest and would not have provided a valid basis for a challenge for cause.

Regarding Juror 75's failure to circle names on the questionnaire, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation. Specifically, he has failed to satisfy step one of *Kimmelman*. He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would have been suppressed based on any or all of Juror 75's failure(s) to circle names on the questionnaire.

(g) Recognition of Witnesses and Observers

(i) Melissa White

White was not a witness, but was a regular observer at the trial. At the time that the matter came to the attention of the trial court, White was sitting next to Owens's mother.

Juror 75 had a relationship with White. White had once dated D, and, at the time of the trial was a friend of Q's girlfriend. Juror 75 would see White at Q's apartment, where White assisted with babysitting Q's children. During the trial White told Juror 75 that she, White, was a friend of Owens. Juror 75 told the bailiff that she recognized White and the trial court made a record concerning it.

Thereafter, neither side objected to Juror 75's continued service. Initially, neither side asked that any further inquiry be made, but the prosecution later reconsidered and asked the court to conduct an *in camera* interview of Juror 75. The trial team, while not objecting, did not join in the request, and the trial court denied the prosecution's request.

The record does not support an inference that Juror 75's relationship with White could have prejudiced Owens, and it would not have provided a valid basis for a challenge for cause.

Regarding Juror 75's relationship with White, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation. Specifically, he has failed to satisfy step one of *Kimmelman*. He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would have been suppressed based on Juror 75's relationship with White.

(ii) Rhonda Fields

Fields was a witness. She was not at Lowry Park but identified a photograph of her son, Marshall-Fields, whom Ray had shot at Lowry Park. The jury was told that Marshall-Fields had died, but was not told anything about how he died.

Juror 75 did not have a relationship with Fields, had never spoken to her, and did not recognize her name. But Juror 75 was in the congregation when Fields "gave testimony" at Juror 75's church and Juror 75 had seen the mothers of the Dayton Street victims, including Fields, make a plea for community support on television.

The current analysis is not assisted by attempting to ascertain what discretionary decisions the trial court or counsel would have made had they known these things. Sitting jurors are sometimes replaced with alternates, not as a matter of right, but of sound trial court discretion. The question here is whether any relationship between Fields and Juror 75 provided a valid basis for a challenge for cause. It did not.

Regarding Juror 75's purported knowledge of Fields, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation. Specifically, he has failed to satisfy step one of *Kimmelman*. He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would have been suppressed based on Juror 75's knowledge of Fields.

(iii) Dickey and Johnson

Dickey and Johnson were witnesses. Johnson was an important witness; Dickey was less important. Juror 75 did not have a relationship with either of them and did not know their names. But she came to realize that they were probably among the group of boys who had visited her home years earlier (although Johnson could not recall ever having done so) as friends of her son. She must have realized

when she saw Dickey at her son's apartment that he remained a friend of Q's and probably assumed the same of Johnson because Q had told her to get off the jury because his friends were testifying.

Juror 75 tried to tell the trial court that she recognized people in the courtroom, but the trial judge elected not to talk to her. Again, the current analysis is not assisted by attempting to ascertain what discretionary decisions the trial court or counsel would have made had they known these things. Sitting jurors are sometimes replaced with alternates, not as a matter of right, but of sound trial court discretion. The question here is whether any relationship that Johnson and/or Dickey had with Juror 75 provided a valid basis for a challenge for cause. It did not.

Regarding Juror 75's recognition of Dickey and Johnson, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation. Specifically, he has failed to satisfy step one of *Kimmelman*. He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would have been suppressed based on Juror 75's recognition of Dickey and Johnson.

(h) Summary of *Kimmelman* Analysis of Merit of Suppression Motion – Juror Misconduct

In this case, like *McDonough*, *Sampson*, and *Christopher*, had the trial court been apprised of all the information that the post-conviction investigation has uncovered, and, had Owens requested Juror 75's replacement, the trial judge might have exercised his discretion to replace her with an alternate. But, as those cases and their progeny make clear, Owens would be entitled to post-conviction relief only if prejudice were shown. Prejudice would be shown if Owens had been deprived of his right to a fair trial by an impartial jury. To show that, it would

have to be shown that the undisclosed information would have been grounds for a valid challenge for cause, which is required by the federal actual bias standard under *McDonough*.

Because the issue arises in the context of an unprosecuted motion to suppress, the court asks whether Owens, had he filed a timely motion, could have made a *prima facie* showing of a valid challenge for cause, and, if so, whether the prosecution would have then overcome Owens's *prima facie* showing by a preponderance of the evidence.

Owens would have made his *prima facie* showing. At that stage, the evidence would have been taken in the light most favorable to him. The Kloster report would have been accepted at face value – as a true recounting that Juror 75 had claimed to have had a private conversation with the judge; that she claimed that she knew and feared Owens, his family, and his associates; and that she had knowledge of the Dayton Street homicides. Juror 75's contrary testimony on those points, the evidence from the jury foreperson, and the trial judge's affidavit would have been discounted as would Juror 75's testimony that she served without bias and had "no axe to grind."

But the evidence would be considered neutrally when considering whether the prosecution, by a preponderance of the evidence, overcame Owens's *prima facie* case. As discussed in the above analysis, when applying the preponderance of the evidence standard, the prosecution would have shown that the undisclosed information would not have been grounds for a valid challenge for cause.

Owens's motion to suppress Aggravating Factor No. 1 would, therefore, have been denied.

Thus, regarding his claim based on juror misconduct, Owens has failed to make a *prima facie* showing that satisfies both prongs of a *Strickland* violation.

Specifically, he has failed to satisfy step one of *Kimmelman*. He has not shown, by a preponderance of the evidence, that Aggravating Factor No. 1 would have been suppressed based on juror misconduct.

(d) *Strickland* Prejudice – Juror Misconduct

Because Owens would not have prevailed on his suppression claim, the result of the sentencing hearing would not have been different. *See Strickland*, 466 U.S. at 694 ("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.").

vii. Conclusion

Owens failed to prove that he was prejudiced by his trial team's failure to move to suppress his Lowry Park conviction in his Dayton Street trial. Accordingly, Owens's petition to vacate his sentence based on his trial team's failure to move to suppress his Lowry Park conviction is **Denied**.

f. Constitutional Error in Jury Instructions[334]

g. Confrontation Violations[335]

h. Denial of Fair and Impartial Jury[336]

3. Ineffective Assistance in Other Pretrial Motions

a. Failure to Suppress Shreveport Statements

i. Right to Counsel

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to investigate and present evidence regarding Owens's request for counsel during his extradition

[334] Owens withdrew this claim and its subparts in SOPC-232.
[335] Owens withdrew this claim and its subparts in SOPC-232.
[336] Owens withdrew this claim and its subparts in SOPC-232.

advisement hearing in Louisiana. According to Owens, his right to counsel attached during that advisement hearing and therefore his trial team should have moved to suppress his Shreveport statements on that basis.

(b) Findings of Fact

The prosecution charged Owens for the Lowry Park shootings on September 30, 2005, and Owens was arrested in Shreveport, Louisiana, on November 6. When Owens appeared in court on the morning of November 8, an attorney from the Louisiana Indigent Defender's Office appeared with him. At that hearing, the prosecutor stated that Owens was being held on two fugitive from justice warrants out of Colorado including one for first-degree murder:

> [THE PROSECUTOR]: Are you, Sir Mario Owens?
>
> [OWENS]: Yes, sir.
>
> [THE PROSECUTOR]: This is Docket No. 246,980. This will be a Section 4 case. He was arrested for aggravated flight from an officer, resisting an officer, possession of marijuana, possession of a firearm while in possession of a controlled, dangerous substance, possession of firearm by a convicted felon and two out-of-state fugitives from Colorado. I would note since one of those out of state fugitives is first degree murder, the State plans on rejecting the charges in Caddo to facilitate bringing him back to Colorado. The State has filed a motion to appoint counsel.

SOPC.EX.D-1604. The fugitive from justice warrants were for the charges in Owens's Lowry Park case. After Owens was informed of the charges, the Indigent Defender's Office was appointed to represent him:

> THE COURT: Mr. Owens, do you have money to hire a lawyer to represent you?
>
> [OWENS]: No.
>
> THE COURT: Do you want to waive extradition and be returned to Colorado?

> [OWENS]: (No response.)
>
> THE COURT: You are not sure. Do you want to speak to a lawyer about it first[?]
>
> [OWENS]: Yes.
>
> THE COURT: The Court appoints the Indigent Defender's Office to represent Mr. Owens.

Id.

Later that day, T. Wilson and another APD detective interviewed Owens. At that time, T. Wilson did not know if Owens was represented by counsel. At the beginning of the interview, T. Wilson gave Owens a standard *Miranda* advisement. Owens waived his *Miranda* rights by signing and initialing the advisement form. The interview lasted about an hour and terminated when Owens asked for an attorney.

The grand jury indicted Owens for the Dayton Street homicides four months later on March 8, 2006.

Owens's trial team moved to suppress his statements to T. Wilson in SO-42 on various grounds including that the interview violated Owens's constitutional right to counsel under the Fifth, Sixth, and Fourteenth Amendments. The motion focused on alleged Fifth Amendment violations. It alleged that Owens's statements were obtained in violation of *Miranda* and that his statements were not made voluntarily. At the hearing on the motion, Owens's trial team did not present evidence suggesting that his Sixth Amendment right to counsel had been violated. As a result, the court's ruling addressed only the alleged Fifth Amendment violation. The court found that Owens knowingly, voluntarily, and intelligently waived his right to counsel under *Miranda* and that his statements were made voluntarily.

King and Kepros testified that they were aware that Owens had an attorney for the extradition proceedings in Louisiana. Kepros also testified that she did not know and did not research whether the appointment of counsel for the extradition proceedings precluded T. Wilson from questioning Owens about the Lowry Park shootings and/or the Dayton Street homicides.

(c) Principles of Law

The Sixth Amendment right to counsel attaches when "a prosecution is commenced, that is, 'at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984)). The Sixth Amendment right to counsel is offense-specific, which means "that it only applies to the charged offenses and not to investigations of other crimes." *People v. Vickery*, 229 P.3d 278, 280 (Colo. 2010). The law at the time of trial in this case was that after the Sixth Amendment right to counsel attached, all subsequent waivers of the right to counsel were *per se* invalid. *Michigan v. Jackson*, 475 U.S. 625, 636 (1986), *overruled by Montejo v. Louisiana*, 556 U.S. 778, 797 (2009).[337] The waivers were invalid only as to the offense for which the Sixth Amendment right to counsel had attached. *McNeil*, 501 U.S. at 175.

(d) Analysis

Owens's first contention is that his trial team was ineffective for failing to present evidence that his Sixth Amendment right to counsel had attached before T. Wilson interviewed him. Because Owens had not been indicted for the Dayton

[337] Although *Montejo* overruled *Jackson*, the court must "evaluate the conduct from counsel's perspective at the time[,]" and *Jackson* applied at the time of trial in this case. *Strickland*, 466 U.S. at 689.

Street homicides when T. Wilson interviewed him, his Sixth Amendment right to counsel for that case had not yet attached. Owens's Sixth Amendment right to counsel for the Dayton Street homicides did not attach until four months later when he was indicted. Thus, T. Wilson's interview of Owens did not violate Owens's Sixth Amendment right to counsel in the Dayton Street case. *See Vickery*, 229 P.3d at 280. Accordingly, there is no reasonable probability that, but for the trial team's failure to present evidence showing that his statements were obtained in violation of his right to counsel, the result of the guilt phase or sentencing hearing would have been different. *See Strickland*, 466 U.S. at 694 ("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.").

Owens's second contention is that his trial team was ineffective for failing to present evidence that Owens had invoked his Sixth Amendment right to counsel in court during the extradition proceedings for Lowry Park, which rendered his *Miranda* waiver *per se* invalid as to Dayton Street. For purposes of evaluating this argument, the court assumes that Owens's Sixth Amendment right to counsel for Lowry Park attached during the advisement hearing in Louisiana. Owens's invocation of his Sixth Amendment right to counsel was offense-specific and was therefore only applicable to the Lowry Park case. Therefore, Owens's *Miranda* waiver was not invalid as to the Dayton Street case. *See McNeil*, 501 U.S. at 175 ("*Jackson* effect of invalidating subsequent waivers in police-initiated interviews is offense specific."). Accordingly, there is no reasonable probability that, but for the trial team's failure to present evidence showing Owens's statements were obtained in violation of his right to counsel, the result of the guilt phase or sentencing hearing would have been different. *See Strickland*, 466 U.S. at 694 ("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.").

(e) Conclusion

The court concludes Owens was not prejudiced by his trial team's failure to present evidence demonstrating Owens's statements were allegedly obtained in violation of his Sixth Amendment right to counsel. Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's failure to present evidence that his Shreveport statements were obtained in violation of his Sixth Amendment right to counsel is **Denied**.

ii. Confrontation

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to adequately argue that his confrontation rights were violated in the Dayton Street guilt phase when the audio recording of T. Wilson's interview of Owens in Louisiana was admitted into evidence and played for the jury.

(b) Findings of Fact

During the November 8, 2005, interview of Owens in Louisiana, T. Wilson confronted Owens with information that the APD had learned from its investigations of the Lowry Park shootings and Dayton Street homicides. T. Wilson specifically asked Owens about certain information the APD had learned from various witnesses.

When the parties litigated the admissibility of Owens's statements, Kepros objected "to all the statements of law enforcement as hearsay and [as] violative of the confrontation clauses." Guilt Phase Tr. 9:12-13 (Apr. 30, 2008 a.m.). The court found that T. Wilson's statements were admissible to provide context to Owens's statements.

When the prosecution sought to play the recording of the interview, the court instructed the jury that the detectives' statements were not admitted for the truth:

> The only evidence on the CD is Mr. Owens' statements. The statements of the police officers are being allowed so that you understand the context of the conversation. But you are instructed that that is not evidence. That is not offered for the truth of the matters asserted therein. It is just simply so that you know what Mr. Owens is saying in response to their questions or their statements or whatever might be said to him.

Guilt Phase Tr. 17:10-17 (May 1, 2008 a.m.). After a bench conference, the court reiterated the limiting instruction: "[w]hat the police officers say on this recording is not evidence. It is offered simply so that you understand the context of what Mr. Owens said. What Mr. Owens says is I have ruled admissible evidence for your consideration." *Id.* at 20:16-19. The court clarified the limiting instruction a third time: "[t]hat instruction is . . . limiting you to what the detectives say. Not to what Mr. Owens says and what the detectives say is not evidence. Only what Mr. Owens says is evidence." *Id.* at 21:19-22.

Kepros testified that she did not have a strategic reason for failing to specify that she was objecting under both the federal and Colorado Confrontation Clauses.

(c) Principles of Law

The Confrontation Clause does not bar statements that are not offered for the truth of the matter asserted. *People v. Isom*, 140 P.3d 100, 103 (Colo. App. 2005); *see also Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) ("The [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.").

(d) Analysis

Owens's first contention is that Kepros failed to object to the admissibility of T. Wilson's statements under both the federal and state Confrontation Clauses.

Kepros objected on various grounds including that T. Wilson's statements violated Owens's rights under "the confrontation clauses." Guilt Phase Tr. 9:13 (Apr. 30, 2008 a.m.). Because Kepros said "clauses," it is clear that she objected based on both the federal and state Confrontation Clauses.

Owens's second contention is that Kepros failed to adequately argue the confrontation objection. Under *Isom* and *Crawford*, the admission of T. Wilson's statements did not implicate Owens's confrontation rights because T. Wilson's statements were not offered for the truth of the matter asserted. The court instructed the jury three times that T. Wilson's statements were not evidence. Owens cites only nonbinding case law from the Circuit Courts and federal district courts in support of his argument. Kepros cannot be faulted for failing to argue nonbinding case law. Because Kepros had no viable grounds on which to expand her confrontation objection, her confrontation objection was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

(e) Conclusion

The court concludes that Kepros's confrontation argument was within the wide range of professionally competent assistance. The court also concludes Owens failed to prove how he was prejudiced by Kepros's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on Kepros's confrontation argument is **Denied**.

iii. Jury's Use of Recording

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to move the court to restrict the jury's access to the audio recording of T. Wilson's interview of Owens in Louisiana.

(b) Findings of Fact

The audio recording of T. Wilson's November 8, 2005, interview of Owens was admitted into evidence and played for the jury during the guilt phase on May 1, 2008. The court allowed the prosecution to provide a transcript to each juror. The transcript was not admitted into evidence. Owens made offensive remarks and used profane language throughout the interview.

The recording of the interview was provided to the jury when it retired for deliberations. During deliberations on May 12, 2008, the jury asked to listen to the interview. In the same note, the jury asked for the corresponding transcript. The court provided a copy of the note to both parties and discussed its proposed response on the record. With the parties' agreement, the court provided a CD player to the jury but not the transcript. The court informed the jury that the transcript was not an admitted exhibit and therefore could not be used by the jury during its deliberations.

Kepros testified that she did not have a strategic reason for failing to ask the court to restrict the jury's use of the interview during its deliberations.

(c) Principles of Law

"[T]he trial court in criminal proceedings has an obligation, much as it does with regard to the admissibility of evidence generally, to assure that juries are not permitted to use exhibits in a manner that is unfairly prejudicial to a party." *Frasco v. People*, 165 P.3d 701, 704 (Colo. 2007). But transcripts or recordings of

a defendant's out-of-court statements are "'categorically allowed into the jury room, for whatever consideration the jury would give them.'" *Rael v. People*, 395 P.3d 772, 776 (Colo. 2017) (quoting *People v. Gingles*, 350 P.3d 968, 971 (Colo. App. 2014)).

(d) Analysis

The court in this case initially prevented the jury from listening to the interview by withholding a CD player from the jury. After the jury asked to listen to the interview and after discussing the matter with both parties, the trial court provided a CD player to the jury. Because unfettered jury access to the recording was legally appropriate, there was no reason for Kepros to ask for additional limits on the jury's access to the interview. Thus, Kepros's performance was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

(e) Conclusion

The court concludes that the trial team's performance with respect to the November 8, 2005, interview was within the wide range of professionally competent assistance. The court also concludes Owens failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's failure to restrict the jury's access to the November 8, 2005, interview is **Denied**.

b. Failure to Suppress or Adequately Challenge "Stop Snitchin" T-shirts Evidence

i. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to adequately move to suppress a receipt found by the APD in Owens's wallet on July 19, 2005.

ii. Findings of Fact

On July 19, 2005, the APD stopped Owens for a window tint violation while he was driving Ray's Camaro. Owens was cited for the window tint violation, and he was arrested on an Aurora Municipal warrant. The APD searched the Camaro and found t-shirts in the back of the Camaro that had "STOP SNITCHIN" on the front and "R.I.P." on the back. The APD found marijuana on Owens's person and seized Owens's wallet.

Owens was transported to the APD's headquarters instead of to the Aurora Municipal Detention Center, because he was a suspect in the Dayton Street case and Fronapfel wanted to interview him. At headquarters and per Fronapfel's directive, Welton inventoried and photocopied the contents of Owens's wallet. Welton found a receipt for the t-shirts in the wallet. Following the interview, Owens was transported and booked into jail.

In SO-38, Owens's trial team moved to suppress the stop and search of the Camaro. The trial team argued that the search of the Camaro and seizure of property inside the Camaro were unconstitutional because there was no reasonable suspicion for the stop. The court found reasonable suspicion for the stop and denied the motion to suppress, because the APD knew Owens had an active warrant and because Owens was driving with illegally tinted windows.

In SO-91, Owens's trial team moved to suppress the t-shirts and receipt. A hearing was held on that motion on April 10, 2007. For unknown reasons, the parties were initially under the impression that the receipt was found with the t-shirts in the back of Ray's Camaro. On that factual premise, Owens's trial team moved to suppress the evidence on, among others, relevance grounds. The court found that there was no nexus linking Owens to the t-shirts and therefore that the t-shirts had no probative value. Relying on a proffer by the prosecution that Sailor

would testify that Owens complained after his arrest that the APD had seized the t-shirts, the court revised its ruling. The court ruled that the t-shirts would be admitted if the prosecution could establish that Owens had an interest in the t-shirts, namely that he knew the t-shirts were in the Camaro or that he told someone that the t-shirts belonged to him. *See* Order (SO) No. 7.

The trial team did not learn that the receipt was found in Owens's wallet until August 21, 2007, when Hower proffered that information to the court. Owens's trial team did not litigate the suppression of the receipt after learning that it was found in Owens's wallet.

Sailor testified that Owens was upset with the APD for confiscating the t-shirts after his arrest. Sailor also testified that she had seen the t-shirts in the back of the Camaro, that she knew Owens had purchased some of the t-shirts, and that she had seen Owens wearing a "Stop Snitchin" t-shirt before he was arrested.

Kepros testified that she did not research inventory searches and did not have a strategic reason for failing to litigate the admissibility of the t-shirts and receipt after she learned the receipt was found in Owens's wallet.

iii. Principles of Law

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." CRE 403.

Items on a person who has been lawfully arrested may be searched without probable cause even if the search occurs at a police station and well after the arrest. *United States v. Edwards*, 415 U.S. 800 (1974); *People v. Boff*, 766 P.2d 646 (Colo. 1988).

iv. Analysis

According to Owens, the failure to move to suppress the receipt for the t-shirts prejudiced him because the prosecution relied on the t-shirts in its guilt phase

and sentencing hearing closing arguments to identify Owens as the perpetrator of the Dayton Street homicides and to argue that Owens lacked remorse for the Dayton Street homicides. Hence, Owens contends he was prejudiced by the admission of the t-shirts and not by the admission of the receipt.

The premise of Owens's argument is that if his trial team had moved to suppress the receipt, the court would have suppressed not only the receipt but also the t-shirts. But the court's ruling did not require the prosecution to show that Owens owned or purchased the t-shirts. It required the prosecution to establish that the probative value of the t-shirts was not "substantially outweighed by the danger of unfair prejudice" by showing that Owens was aware of the t-shirts in the Camaro or by showing that the t-shirts belonged to Owens. *See* CRE 403.

Sailor testified that Owens complained to her that the APD confiscated the t-shirts from the Camaro. Thus, Sailor's testimony satisfied the court's condition on admissibility, and as a result, the t-shirts were admitted into evidence.

Because an attempt to suppress the receipt would not have resulted in the suppression of the t-shirts, the trial team's decision not to move to suppress the receipt after it learned that the receipt was found in Owens's wallet was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance."). Moreover, under *Edwards* and *Boff*, the receipt was not subject to suppression, because the search of the wallet was done incident to Owens's lawful arrest. Thus, Owens failed to demonstrate how the admission of the receipt resulted in prejudice. *See id.* at 694 ("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.").

v. Conclusion

The court concludes that the trial team's performance with respect to the t-shirts and receipt was within the wide range of professionally competent assistance. The court also concludes that Owens failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's failure to move to suppress the receipt is **Denied**.

c. Motion to Continue

i. Parties' Positions

Owens contends he was prejudiced because his trial team did not adequately support the request it made on April 8, 2008, to continue the Dayton Street trial.

ii. Findings of Fact

Jury selection began in this case when the first jury panel reported on March 5, 2008, to fill out questionnaires. Between March 10 and April 5, approximately 440 potential jurors were brought in for individual *voir dire*. That process yielded approximately 110 jurors for general *voir dire*, which took place on April 7.

On April 8, the first day of the guilt phase in Owens's Dayton Street case, Kepros moved to continue the trial. She stated:

> We also are persisting in our prior motions to continue the trial. And I also wanted to note, there are transcripts outstanding from this case. I have spoken to court reporters, I have a transcript I have been unable to get from December 19, 2006. It contains exculpatory information. And I did want to add that and incorporate the prior records made seeking to continue the trial so we can continue our work and be prepared to effectively represent Mr. Owens pursuant to this state and federal constitution, due process clause and Eighth Amendment.

Guilt Phase Tr. 10:3-13 (Apr. 8, 2008). The court denied the motion.

Kepros did not include in her argument that:

- she lost an external hard drive in March 2008 with her work product on it from February and March, including her cross-examinations;
- she was suffering from health problems that limited the amount of time she could dedicate to representing Owens;
- she lacked familiarity with capital litigation and spent a significant amount of time studying the law;
- the trial team lacked resources;
- the trial team had difficulty locating experts for the sentencing hearing; or that
- the trial team had not studied all of the discovery or listened to all of the media.

Kepros anticipated that the court would deny a continuance because the jury had already been selected. She chose to put her energy into trial preparation rather than making a more thorough argument in support of the motion to continue.

iii. Analysis

Kepros limited her argument to reasons that would hinder the trial team's performance during trial, like the absence of a transcript needed to impeach a prosecution witness. She focused on trial preparation and not an argument for a continuance because she presumed the court would deny any request for a continuance. After 21 days of individual *voir dire*, Kepros's reasonably presumed that the court would deny the continuance. Her argument on the motion to continue was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

Moreover, Owens did not present any evidence indicating that the outcome of the guilt phase or sentencing hearing would have been different if Kepros had made a more detailed record about the grounds for a continuance. *See id.* at 694 ("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.").

iv. Conclusion

The court concludes Kepros's argument to continue the trial was within the wide range of professionally competent assistance. The court also concludes that Owens failed to prove that he was prejudiced by Kepros's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on Kepros's argument for a continuance is **Denied**.

F. Jury Selection

1. General Statement of Parties' Positions

Owens claims his trial team's deficiencies during jury selection violated his constitutional right to effective assistance of counsel.

2. Overview of Jury Selection in this Case

The issues raised by Owens must be assessed within the whole framework of the jury selection process employed for this trial.

The court authorized a jury of 12 plus eight alternates for a 10-week trial. Each party was entitled to 18 peremptory challenges, requiring at least 56 jurors for general *voir dire*. To account for cause challenges, the court set a goal of qualifying approximately 100 jurors for general *voir dire*.

In October 2007, the parties submitted proposed questionnaires and the court provided drafts of two introductions – one for when the jurors arrived to complete

their questionnaires (the jury panel introduction), and a second for when they returned for individual *voir dire*.

a. Jury Panel Introduction

The court delivered the jury panel introduction with a court reporter and one attorney from each party present. It covered the practical and legal aspects of the selection process. It told prospective jurors that individual questioning would start on March 10, 2008, was not open to the public, and was necessary before group questioning could start. It included an estimate that the trial would last for the 10 weeks. It alerted prospective jurors to the media attention on the case, told them not to consume any media about the case, and told them not to discuss the case with anyone. It included a brief statement of the case, including that the prosecution was seeking the death penalty, and instructed prospective jurors that Owens was presumed innocent and that the prosecution had the burden to prove his guilt beyond a reasonable doubt.

It told them that the same jurors who decided guilt decided the sentence. It explained the sentencing options of life without the possibility of parole and the death penalty by lethal injection, explained that a sentencing hearing would be necessary only if the jury found Owens guilty beyond a reasonable doubt, and included a brief explanation of the four-step process of the sentencing hearing. It told them that the court and the attorneys wanted to explore their views during individual questioning sessions and that the questionnaire asked questions about their views on the death penalty that would be the starting point for their individual questioning sessions.

b. Jury Panels

Jury panels reported on March 5, March 10, March 26, and April 1, 2008. Upon arrival, each juror received a packet with a copy of the jury panel

introduction and the questionnaire. The judge and an attorney from each party greeted the jurors. The judge read the jury panel introduction verbatim and administered an oath to the jurors before they were allowed to open and complete the questionnaire.

c. Questionnaire[338]

The eight-page questionnaire was divided into six sections. The topics and number of questions were as follows:

- General Background – 33 questions;
- Publicity – six questions;
- Hardship – three questions;
- Potential Punishment – eight questions;
- Miscellaneous – two questions; and
- Witnesses in this Case – a separate four-page list of witnesses.

The questionnaire included background information at the beginning of each section. The background for the publicity section included the statement of the case that had been provided in the jury panel introduction. It told the juror that there had been substantial media coverage of the case, and listed 10 names related to the cases that had appeared in the media. The publicity section asked the juror:

- about his/her views on the accuracy of media reports;
- if s/he had been exposed to any media reports about the case or about the names listed in the questionnaire;
- if s/he could put aside anything s/he had learned about the case from any source and decide the case solely on the evidence presented;
- if s/he had formed an opinion about Owens's guilt or innocence; and

[338] SOPC.EX.D-1478 and SOPC.EX.D-1479.

- if s/he had formed an opinion about Owens's guilt or innocence, if s/he could put that opinion aside and reach a verdict based on the evidence and instructions of law.

The background for the hardship section stated that the scheduled length of trial was 10 weeks. The hardship section asked the juror:

- if 10 weeks of service would cause a hardship;
- if s/he had concerns about his/her ability to concentrate during a trial of this length; and
- if s/he had concerns about the emotional impact of sitting on a case such as this or about having to view graphic evidence.

The background for the potential punishment section explained that Owens must be presumed innocent and that it was the prosecution's burden to prove him guilty beyond a reasonable doubt. It explained that Colorado law requires the jury to determine the appropriate punishment and described the guilt phase and sentencing hearing process. It also explained that the law requires jurors to answer questions regarding their thoughts, feelings, and opinions about the possible penalties because, if Owens was found guilty, the jury may have to consider death as a possible punishment. Following this background, there were eight questions.

The first question was a multiple-choice question and asked "[w]hich of the following statements best represents your opinion of the death penalty?" The available choices were:

a. I believe that the death penalty is appropriate in **some** cases of First Degree Murder and, after hearing and considering all of the evidence, I could return a verdict of death if I believed it to be the appropriate penalty in this case.

b. I believe that the death penalty is **never** appropriate in any case and I would never return a verdict of death under any circumstances.

c. I believe that the death penalty should be imposed in **all** cases of First Degree Murder, regardless of any mitigation that may be presented on the defendant's behalf, and I would automatically return a verdict of death.

d. I believe that the death penalty is appropriate in **some** cases, but because of my personal beliefs and feelings, I could never vote to impose it myself.

e. None of the above represents my opinion. [If the juror selected this answer, the question asked him/her to write out his/her opinion on the blank lines provided.]

SOPC.EX.D-1478 and SOPC.EX.D-1479 (emphasis in original).

Other topics in the potential punishment section included:

- the bases for the juror's views on the death penalty and whether those views had changed over time;
- whether, based on a consideration of all the evidence, if the juror decided death was not appropriate, the juror could follow the law and impose a life sentence; and
- whether, based on a consideration of all the evidence, if the juror was convinced beyond a reasonable doubt that death was appropriate, the juror could impose a death sentence.

This section also provided space for the juror to write anything s/he thought the attorneys and the court should know about her/his attitude toward the death penalty.

The miscellaneous section had two questions. The first asked whether there were any issues raised by the questionnaire or any other issues the juror wanted to discuss in private. The second asked whether there was any reason the juror thought s/he could not be a fair and impartial juror.

The process yielded approximately 800 questionnaires. After both parties reviewed the questionnaires and agreed to excuse certain jurors for cause, the court scheduled the remaining potential jurors for individual *voir dire*.

d. Individual *Voir Dire*

Individual *voir dire* started on March 10, 2008. The court originally scheduled 21 prospective jurors for questioning each day. On March 14, the court increased the number to 24 prospective jurors per day and on March 24, the court again increased the number to 32 per day. Due to the large number of individuals questioned, the uncertainty of their schedules, and the limited amount of time available, the number of jurors questioned per day varied. Approximately 440 potential jurors were brought in for individual *voir dire* between March 10 and April 5.

When they arrived, the jurors watched a 17-minute video of the court's introduction to the four-step sentencing hearing process. The video reiterated all of the legal concepts from the jury panel introduction and the questionnaire. It also explained how the questioning would proceed in the courtroom, provided additional information about the sentencing hearing process, and provided a breakdown of the four-step process. Trial Exh. C-104. Individual questioning sessions began after the jurors watched the video.

The court initiated the questioning, and each party had an allotted amount of time for their questions. The amount of time varied depending on the juror and the number of jurors scheduled each day. The court sometimes expanded the allotted

time for questioning. Time expansions depended on whether the questioning developed relevant information, on whether the juror appeared confused, and on the overall demeanor of the juror. The court rarely allowed a second round of questioning, but when it did, it usually limited the questioning to a particular topic.

After a juror was sworn, the court asked about hardship and media exposure. If no problems were discovered, the court explained why it was necessary to discuss the potential juror's views on punishment. The court generally asked if the juror could presume Owens to be innocent even though the juror was there to discuss potential punishment. The court referenced the four-step process and asked the juror to hypothetically place her/himself at step four.[339] The court usually asked: If you find yourself at step four, do you believe you could look at both alternatives fairly and equally as you start your selection process and then make your selection based on all that you have heard as to what you think is the appropriate punishment?[340] That was normally the court's last question before turning the questioning over to the parties.[341]

This process yielded 110 qualified jurors for general questioning.

e. Colorado Method

Owens's trial team followed the Colorado Method during individual *voir dire*. In the Colorado Method, the attorney asks a stripping question shortly after questioning begins. The stripping question places the juror in a hypothetical trial

[339] The prosecution prepared a flow chart depicting the four-step process that was displayed in front of each prospective juror during individual *voir dire*. The court and the parties often referred to the chart while questioning the prospective juror. Trial Exh. C-159.

[340] Most but not all jurors were asked this question, and the wording sometimes varied.

[341] The court utilized the cup method – if at any point during *voir dire* both parties turned their cups over, the court excused the juror based on the parties' stipulation to excuse the juror for cause.

after finding the defendant guilty of a deliberate murder that has no legal defenses. The attorney then asks the juror what the appropriate sentence is for this defendant.

If the juror answers that a life sentence could or would be appropriate or indicates that s/he wants to know more about the defendant, the attorney rehabilitates the juror in anticipation of the prosecutor trying to disqualify the juror. If the juror answers that the death penalty would be appropriate or focuses on the crime in determining the punishment, the attorney attempts to establish a record that supports a challenge for cause.

After individual questioning, the attorney grades the juror based on a scale from one to seven. In this case, the trial team expanded the scoring by a factor of 10, resulting in a scale from 10.0 to 70.0, because they needed additional decimal places to grade the jurors accurately. The grade guides the attorney in peremptory challenges.[342] A grade of 10 meant the juror would never impose a death sentence. Grades in the twenties and thirties were for jurors inclined to give a life sentence. Grades in the forties through sixties were for jurors inclined to give a death sentence. A grade of seventy meant the juror would always impose the death sentence based solely on the guilty verdict.[343]

The Colorado Method also utilizes concepts such as:

- Shopping mitigation: the attorney provides the potential juror with examples of specific types of mitigation that the defense expects to be presented during the sentencing hearing.
- Teaching respect: the attorney obtains a commitment from the juror to respect the decision of any juror that differs from that juror's decision.

[342] Owens's trial team prepared a chart with the grades for the jurors who returned for general *voir dire*. SOPC.EX.P-212.
[343] A schematic diagram of the Colorado Method is in SOPC.EX.P-250.

- Insulation and Isolation: the juror is isolated by obtaining a commitment that once the juror has reached a decision, the juror is comfortable being a holdout juror, and the attorney insulates the juror by obtaining a commitment that if the juror reaches a decision that is contrary to a majority of the jury, the juror will not change that decision due to pressure from other jurors.

f. General *Voir Dire*

Before general questioning began on April 7, the court invited all of the potential jurors who had concerns about their service to report to the courtroom. Of the 20 who had concerns, the court excused 11 jurors for hardship and two more for cause.

General questioning lasted one day. The court excused one potential juror for cause and another for hardship. The prosecution exercised all but one peremptory challenge. Owens exercised all of his peremptory challenges. The court denied all three *Batson* challenges.

3. General Principles of Law

a. *Witherspoon-Witt* Standard for Impartial Capital Juror

In *Witherspoon*, the trial court began jury selection by stating, "[l]et's get these conscientious objectors out of the way, without wasting any time on them." *Witherspoon, v. Illinois*, 391 U.S. 510, 514 (1968). As a result, 47 prospective jurors who expressed at least some indecision about his/her ability to impose a death sentence were excused for cause without any meaningful effort to determine whether they could follow the law. *Id*. at 514-15.

Witherspoon held that unless a potential juror unambiguously states s/he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, a court cannot assume that s/he would never vote for

death. *Id.* at 515 n.9.[344] Thus, the critical issue is whether a prospective juror's attitude toward the death penalty, including a general objection to its imposition, is grounds for automatic excusal. *Id*. at 522. According to *Witherspoon*, a juror should not be automatically excused unless s/he has made it unambiguously clear that s/he would vote against the death penalty regardless of the evidence or would not find the defendant guilty due to his/her adversity to the death penalty. *Id.* at 522 n.21.

In *Witt*, the Supreme Court clarified the standard for an impartial capital juror by "dispensing with *Witherspoon*'s reference to 'automatic' decisionmaking." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). *Witt* recognized that determining the qualification of a juror is a difficult task and that no combination of words or expressions can help a trial court make the sensitive, constitutionally based decision about a particular juror's views. 469 U.S. at 420-21. Indeed, *Witt* recognized this difficult task was made more difficult because of the differences between the *Witherspoon* excusal standard and the standard articulated in *Adams v. Texas*, 448 U.S. 38, 45 (1980). *Id*. at 419-20. The *Witherspoon* standard is that a juror can be excused for cause if the juror would never vote for death. The standard articulated in *Adams* is that a juror can be excused for cause if the juror's views on capital punishment would prevent or substantially impair her/his duties as a juror. *Id*.

Witherspoon focused on when it is inappropriate (or at least premature) to excuse a juror. *Adams* focused on when it is appropriate to excuse a juror. *Witt* confirmed the *Adams* standard that a juror should be excused when her/his views

[344] Footnote nine relies on, *inter alia*, *Stratton v. People*, 5 Colo. 276, 277 (Colo. 1880), which held that a juror's scruples against the death penalty do not automatically exclude that juror if the juror is willing to make his/her scruples subservient to his/her duty as a sworn juror.

prevent or substantially impair the performance of her/his duties in accordance with the court's instructions. *Id*. at 424. This standard "does not require that a juror's bias be proved with 'unmistakable clarity.'" *Id*.

In *Morgan v. Illinois*, 504 U.S. 719 (1992), the judge conducted the *voir dire*. 504 U.S. at 722. At the request of the prosecution, the trial judge asked each juror, "[w]ould you automatically vote against the death penalty no matter what the facts of the case were?" *Id*. at 723. But the judge refused to ask, "[i]f you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts are?" *Id*. *Morgan* clarified that "jurors-whether they be unalterably in favor of, or opposed to, the death penalty in every case-by definition are ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding." *Id*. at 735.

The Colorado Supreme Court adopted the *Witherspoon-Witt* standard in *People v. Davis*, 794 P.2d 159, 204-07 (Colo. 1990) *rev'd on other grounds by People v. Miller*, 113 P.3d 743 (Colo. 2005).[345] *See also Dunlap v. People*, 173 P.3d 1054, 1081 (Colo. 2007); *People v. Rodriguez*, 914 P.2d 230, 264 (Colo. 1996). In *Davis*, the Colorado Supreme Court addressed the excusal of three potential jurors who provided inconsistent and equivocal answers about their ability to impose the death penalty. 794 P.2d at 204. The Colorado Supreme Court affirmed the excusals for cause, and pointed out that the purpose of *voir dire* is not to instruct jurors on the law but to determine whether they can apply the law impartially and conscientiously. *Id*. at 207.

[345] In *Davis*, the Colorado Supreme Court was careful to point out that the statutory standard for challenges for cause found in C.R.S. § 16-10-103(1)(j) and applicable to capital and non-capital cases was consistent with *Witt*. 794 P.2d at 204 n.42.

In *People v. Harlan*, 8 P.3d 448, 461 (Colo. 2000), the Colorado Supreme Court clarified that the *Witt* standard applies to both death qualification and life qualification – meaning the inquiry must focus on whether the juror is unalterably in favor of or opposed to imposing the death penalty.

In summary, the determination of whether a potential juror is substantially impaired requires the court to conduct a thoughtful and well-supervised *voir dire* that allows both parties to explore the juror's views on the death penalty and the penalty of life without parole. Regardless of the questions asked by the court and counsel, the law recognizes that certain jurors who will provide contradictory, inconsistent, and equivocal answers regarding their views on capital punishment. In these circumstances, appellate courts defer to the trial court's assessment of the juror's demeanor, credibility, and sincerity when determining if the juror can be impartial.

b. Mitigation Impairment

A juror is substantially impaired if the juror cannot make an individualized determination of the appropriate punishment based on the defendant's character and the circumstances of the crime. *Zant v. Stephens*, 462 U.S. 862, 879 (1983). Bifurcating the guilt phase and sentencing hearing allows for an individualized determination of the defendant's suitability for the death sentence because it requires the juror to consider, weigh, and render findings regarding the mitigation and aggravation presented. C.R.S. §§ 18-1.3-1201(1)(a)-(b) requires a separate sentencing hearing where the jury is presented with the relevant mitigating and aggravating evidence concerning the nature of the crime and the character, background, and history of the defendant.

In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), the United States Supreme Court defined mitigation as "any aspect of a defendant's character or record and

any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." The Eighth Amendment precludes any capital statutory scheme that bars the sentencing authority from considering all mitigation. *Lockett*, 438 U.S. at 604-05.

In *Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982), the United States Supreme Court held that a sentencer in a capital case may not refuse to consider any relevant mitigation evidence presented, but the requirement is satisfied when the juror evaluates the evidence and finds it either significant or insignificant. The sentencer must also be able to give effect to any mitigation considered by having the ability to select a life sentence. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 252 (2007).

The Colorado statutory scheme ensures that jurors will consider all of the mitigation evidence presented and, if appropriate, can give effect to mitigation by selecting a life sentence.[346]

c. Ineffective Assistance of Counsel

The Sixth and Fourteenth Amendments guarantee an accused the right to an impartial jury. *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Dunlap*, 173 P.3d at 1081. The Sixth and Fourteenth Amendments also guarantee the accused the right to effective assistance of counsel. A conviction will be reversed if the accused proves both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Ardolino v. People*, 69 P.3d 73, 76 (Colo. 2003).

[346] The Colorado statutory scheme also has a default to life provision if the jury does not unanimously agree that at least one statutory aggravating factor was proved beyond a reasonable doubt. § 18-1.3-1201(2)(b)(I).

i. Deficient Performance

In *People v. Osorio*, 170 P.3d 796, 800 (Colo. App. 2007), the defendant claimed that his attorney was ineffective for failing to challenge a biased prospective juror. The Colorado Court of Appeals held that a defendant who challenges an attorney's *voir dire* as deficient must overcome the presumption that the challenged action was sound trial strategy. *Id.*; *see also People v. Moody*, 676 P.2d 691, 696 (Colo. 1984) (attorney's decision not to challenge a juror does not equate to deficient performance under *Strickland*).

The Tenth Circuit uses a similar standard for evaluating an attorney's performance during jury selection. *See Nguyen v. Reynolds*, 131 F.3d 1340, 1349 (10th Cir. 1997) (attorney's failure to inquire of jurors about their attitudes towards those of Vietnamese descent did not constitute deficient performance).

ii. Prejudice

To prove prejudice, the defendant must show that counsel's deficiencies were so serious as to deprive the accused of a fair trial – one with a reliable result. *Strickland*, 466 U.S. at 687. To obtain relief, a defendant must establish each prong of *Strickland* by a preponderance of evidence. *People v. Russell*, 36 P.3d 92, 95 (Colo. App. 2001).

In *Vieyra*, defense counsel failed to use his last preemptory challenge because he erroneously believed that he had none left. *People v. Vieyra*, 169 P.3d 205, 208 (Colo. App. 2007). A Crim. P. 35(c) motion was denied without a hearing. *Id.* In affirming, the Colorado Court of Appeals discussed *Strickland* prejudice,

> Here, defendant has merely asserted that he was prejudiced. He has failed to establish which juror he would have struck with the remaining challenge or to establish facts that suggest bias by any of the jurors that convicted him.

> Because defendant did not assert facts sufficient to demonstrate prejudice from counsel's failure to exercise the final peremptory challenge, he was not entitled to a hearing on this claim.

Id. at 210.

Proving that prejudice arose during jury selection is a daunting task. "Generally, [a]n attorney's actions during voir dire are considered to be matters of trial strategy, which cannot be the basis of an ineffective assistance claim unless counsel's decision is . . . so ill chosen that it permeates the entire trial with obvious unfairness." *Neill v. Gibson*, 278 F.3d 1044, 1055 (10th Cir. 2001) (internal quotations omitted). With respect to capital cases, attorneys,

> have widely varying views about addressing the delicate balance between the disqualification of jurors whose personal beliefs prevent them from ever imposing the penalty of death under *Witherspoon v. Illinois*, 391 U.S. 510, 520-23, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and those who would automatically recommend that sentence if they found the defendant guilty. *Morgan*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 . . . .The difficulty of the task is greater where [, as here,] there has been widespread publicity and public comment about the crime, the investigation and pre-trial proceedings....'

Id. (quoting *United States v. McVeigh*, 118 F. Supp. 2d 1137, 1152 (D. Colo. 2000)).[347]

[347] *See Garza v. Stephens*, 738 F.3d 669, 675-76 (5th Cir. 2013) (counsel's failure to ask jurors about their views on the death penalty still required defendant to establish prejudice); *Miller v. Francis*, 269 F.3d 609, 616 (6th Cir. 2001) (defendant who alleges deficient performance for failing to strike a juror must prove the juror was biased); *Johnson v. Norris*, 207 F.3d 515, 520 (8th Cir. 2000) (even when trial attorney's tactics during jury selection are viewed as "seriously unprofessional" the defendant must still prove prejudice); *Teague v. Scott*, 60 F.3d 1167, 1172-73 (5th Cir. 1995) (although trial attorney's tactics during jury selection might make it more difficult, defendant must still prove prejudice).

4. Trial Team's General Deficiencies During Jury Selection

a. Failure to *Voir Dire* on Pretrial Publicity

i. Parties' Positions

Owens contends that he was prejudiced by his trial team's failure to inquire of prospective jurors about their exposure to pretrial publicity concerning the Lowry Park case and about their biases resulting from media exposure in general. He argues that the court and his trial team conducted constitutionally inadequate *voir dire* with respect to pretrial publicity.[348]

ii. Findings of Fact

There was extensive media coverage at the time of the Dayton Street homicides, when the indictments were returned, and when the prosecutor announced her decision to seek the death penalty.

The questionnaire addressed publicity with an introduction to the facts of the Dayton Street homicides and the Lowry Park shootings, including the victims' names. It explained that Marshall-Fields was a witness to the Lowry Park case and was scheduled to testify at Ray's Lowry Park trial. It explained that Ray, Owens, and Carter were charged in the Dayton Street homicides and that both cases received substantial publicity. It also identified the victims' mothers, Sailor, and Carter, Sr. as individuals whose names had been reported in the media. It did not mention Owens's charges or convictions in the Lowry Park case. Owens's trial

[348] It appears to the court that some of the claims raised by Owens such as that the court conducted a constitutionally inadequate *voir dire* would be more properly raised on direct appeal. C.R.S. § 16-12-206(1)(c)(II), which states that "[w]hether the conviction was obtained or the sentence was imposed in violation of the constitution or laws of the United States or Colorado," is the only category under which some of these claims could conceivably be appropriate for a post-conviction petition. Nevertheless, in the interests of completeness, the court will address these claims because the claims are intertwined with Owens's ineffective assistance of counsel claims.

team had sought and obtained an order precluding the prosecution from introducing his conviction during the guilt phase of his Dayton Street trial.

The questionnaire contained six questions about media coverage. The first question asked the prospective juror's opinion on the accuracy of media reports. Nineteen of the seated jurors answered that the media was "partially accurate." The second question asked if they had heard, read, or seen any media coverage about the case or the individuals named in the introduction. Sixteen of the seated jurors answered that they had heard of the case. The third question asked if they recognized any of the names listed in the introduction and if they did, to explain any information they could recall and its source. Most of the seated jurors indicated some recognition of the case, but none of the jurors indicated they had followed the case closely. Five of the jurors recalled that the murders involved the killing of a witness.

The fourth question asked if they understood that a jury was required to base its verdict solely on the evidence presented at trial and then asked whether the prospective juror would be able to put aside whatever s/he had heard about this case, regardless of the source. Nineteen answered "yes." Juror JK wrote that she "did not know."

The fifth question asked if the prospective jurors had formed an opinion about Owens's guilt or innocence. Seventeen of the seated jurors indicated that they had not formed an opinion. Juror AW wrote that he had formed an opinion because, according to media coverage, the timing of the murders made him suspicious. Juror AW answered that he could set aside any media exposure and that he could base his verdict solely on the evidence. During questioning by the court, Juror AW stated he could presume Owens innocent and would hold the prosecution to its burden of proof. Juror AW also indicated that he could put any

media exposure out of his mind and base his verdict solely on the evidence and the law.

Juror JK answered that she had formed an opinion about Owens's guilt or innocence because the TV news did not present Owens in a favorable light. However, during questioning by the court, Juror JK indicated that her media exposure was minimal, and she would not allow it to influence her verdict.

Juror TO, who answered he could set aside any media exposure, responded that he viewed Owens as guilty based on the media reports. During the court's questioning, Juror TO stated he could commit to both parties that he would set the media exposure aside and would not let that exposure influence his verdict. Juror TO also wrote that he took his responsibility as a juror seriously and viewed Owens as innocent until proven guilty.

The sixth and final question regarding media exposure asked whether the prospective juror could set aside any opinion about the case based on media coverage and reach a verdict based solely on the evidence and the law. Fifteen of the seated jurors answered "yes." Juror AS answered "no." Juror AS answered that he did not recall the case from the media, indicated that he could set aside anything he had heard about the case from any source, and had not formed an opinion about Owens's guilt or innocence. Therefore, Juror AS circling "no" was of no significance and was undoubtedly a mistake.

The four other seated jurors did not answer this question because they answered in a previous question that they had not formed an opinion based on media coverage.

iii. Principles of Law

The right to an impartial jury encompasses "adequate *voir dire* to identify unqualified jurors." *Morgan*, 504 U.S. at 729; *see also* Colo. Const. art. II, § 16.

This right to an impartial jury does not require unlimited *voir dire*. *People v. O'Neill*, 803 P.2d 164, 169 (Colo. 1990). Limitations on *voir dire* are within the trial court's discretion, and the trial court may restrict *voir dire* questions regarding publicity concerning the defendant and his/her history. *People v. Greenwell*, 830 P.2d 1116, 1118 (Colo. App. 1992).

In the capital case of *Mu'Min*, the United States Supreme Court found that content questions are not constitutionally required. *Mu'Min v. Virginia*, 500 U.S. 415, 425 (1991). Mu'Min was serving time for first-degree murder when he escaped and committed another murder. *Id.* at 417-18. The case received substantial pretrial publicity, and the defendant argued "that his Sixth Amendment right to an impartial jury and his right to due process under the Fourteenth Amendment were violated because the trial judge refused to question further prospective jurors about the specific contents of the news reports to which they had been exposed." *Id*. at 417. Mu'Min moved for individual *voir dire* and submitted a list of 64 proposed *voir dire* questions. *Id*. at 419. The trial court denied the motion for individual *voir dire*, and refused to ask the defendant's proposed questions relating to the content of the media. *Id*. The trial court asked whether any information from the media would affect the jurors' impartiality in the case. *Id*. at 420.

The Court emphasized the "great latitude" retained by trial courts in deciding what questions to ask during *voir dire*. *Id*. at 424. It stated:

> Whether a trial court decides to put questions about the content of publicity to a potential juror or not, it must make the same decision at the end of the questioning: is this juror to be believed when he says he has not formed an opinion about the case? Questions about the content of the publicity to which jurors have been exposed might be helpful in assessing whether a juror is impartial. To be constitutionally compelled, however, it is not enough that

> such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair.

Id. at 425-26. The Court affirmed the lower court's finding and held:

> Petitioner in this case insists, as a matter of constitutional right, not only that the subject of possible bias from pretrial publicity be covered-which it was-but that questions specifically dealing with the content of what each juror has read be asked. For the reasons previously stated, we hold that the Due Process Clause of the Fourteenth Amendment does not reach this far, and that the *voir dire* examination conducted by the trial court in this case was consistent with that provision.

Id. at 431-32.

iv. Analysis

Owens attacks his trial team's alleged failure to question the prospective jurors about their exposure to media concerning the Lowry Park case. Such questioning was unnecessary and potentially counterproductive. The trial team had sought and obtained an order barring Owens's Lowry Park conviction from the guilt phase of this trial. In SO-84, the trial team asked that the prosecution be barred from introducing "evidence regarding the convictions related to the events on July 4, 2004, at Lowry Park in Aurora, Colorado, and the underlying facts thereof," during *voir dire*. SO-84 p. 2. In Order (SO) No. 12, the court ruled that "[t]he fact that Defendant was convicted in 05CR2945 is inadmissible by agreement of the prosecution." Order (SO) No. 12 (emphasis omitted). The court considers the trial team's successful attempt to minimize prejudice during *voir dire* to Owens from the Lowry Park conviction to be "sound trial strategy." *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

The questionnaire addressed publicity. The trial team reasonably relied on jurors' questionnaires in assessing their exposure to Lowry Park media coverage.

The questionnaire included the date of the crime, the names of the victims, and the names of the victims' mothers. The court asked about media exposure to the Dayton Street homicides and what effect, if any, such exposure would have on the juror's impartiality. Publicity was covered on the questionnaire and by the court. The trial team's decision to focus its time inquiring about prospective jurors' views on the death penalty was a reasonable trial tactic that fell within the wide range of reasonable professional assistance to which Owens was entitled. *Id*.

Owens also argues that he was deprived of constitutionally adequate *voir dire*. There is no requirement that content questions be asked. *See Mu'Min*, 500 U.S. at 425. In *Mu'Min*, the Supreme Court acknowledged, "the trial court retains great latitude in deciding what questions should be asked on *voir dire*." *Id*. at 424. Owens has failed to prove that "the trial court's failure to ask these questions . . . render[ed] [his] trial fundamentally unfair." *Id*. at 425-26.

v. Conclusion

The court and Owens's trial team conducted constitutionally adequate *voir dire*. The trial team's decision not to *voir dire* on pretrial publicity was within the wide range of professionally competent assistance required by *Strickland*, and Owens has failed to establish that he was prejudiced by his trial team's decision not to *voir dire* about pretrial publicity. Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's decision not to *voir dire* on pretrial publicity is **Denied**.

b. Failure to Inquire on Race Issues

i. Parties' Positions

Owens contends his trial team was ineffective because it failed to inquire or to ask the court to inquire about the racial attitudes and prejudices of prospective

jurors. Owens also contends the court erred in not inquiring into racial issues because this case involved a cross-racial crime.

ii. Findings of Fact

In the Lowry Park and the Dayton Street cases, the defendants, victims, and major witnesses were African-American, although Wolfe was half African-American and half Asian-American. There is no evidence that race was a consideration or motivation in either crime or that Owens even knew Wolfe. When asked by Sailor why "the girl" was killed, Owens told Sailor that "[Wolfe] was in the wrong place at the wrong time."

On July 6, 2007, Owens's trial team filed SO-154, Motion for Particular Procedures During Jury Selection, which sought additional time for individual *voir dire* because there were a number of sensitive topics that needed to be covered, including race-related issues. Owens's trial team argued that under *Turner v. Murray*, 476 U.S. 28 (1986), Owens was entitled to *voir dire* on issues relating to race and on potential bias due to race.

On October 22, 2007, Owens's trial team filed SO-212, a seven-page proposed questionnaire that contained a question asking the juror's race. The court addressed the composition of the juror questionnaire, including SO-212, on December 13, 2007. Owens's trial team explained that its questionnaire asked for the juror's race because the team might want to mount a legal challenge to the racial composition of the panel and to assist with any potential *Batson* challenges. Pretrial Hrg Tr. 42:16-25; 43:1-3 (Dec. 13, 2007). The court precluded the question and explained that it did not think injecting race into this case was appropriate. *Id*. at 44:23-25; 45:1. Owens's trial team did not raise the issue of race-related questioning with the court again.

In his testimony at the post-conviction hearing, King noted that the law in 2008 generally required him to address race in a capital case and that SO-154 was his effort to obtain court approval to ask about race during individual *voir dire*. In his view, the court's December 13 ruling precluded him from asking any questions about race. Additionally, while King believed a minority defendant always raises racial concerns, he recognized that this case had no racial overtones. King was sensitive that raising the issue of race could be offensive to the jurors and could consume valuable time during individual *voir dire*.

In her testimony at the post-conviction hearing, Kepros viewed SO-154 as the trial team's effort to alert the court to the need to question prospective jurors about race. Kepros viewed race as an important issue because Arapahoe County is geographically segregated by race and the case contained racial issues. Kepros viewed the primary racial issues as the impact of racism on Owens while growing up in Shreveport, Louisiana; Owens's manner of expressing himself during his Shreveport interrogation; and evidence of gang involvement. Although raising racial issues with a jury is difficult, Kepros did not view such difficulty as a reason for not raising the issue. In Kepros's view, there was no strategic reason for not raising race during *voir dire*. Kepros acknowledged there was no indication during the guilt phase and sentencing hearing that race was ever a factor to the jury.

Reynolds opined that reasonably competent counsel would understand the risk of racial bias in a case such as this and take appropriate steps to combat that bias. In Reynolds's view, this case had a plethora of racial issues including that Wolfe was half Asian-American and that Marshall-Fields went to the Father's Day barbecue hosted by members of the Bloods street gang. Additionally, in her view, the trial team was required to *voir dire* on racial issues because much of the mitigation case was rooted in cultural differences and discrimination based on race.

Reynolds opined that King's interpretations of the court's ruling denying the question on the juror's race precluded him from asking race-based questions was reasonable. Reynolds also observed that, given the limited amount of time available for individual *voir dire*, deciding not to inquire about race because of the overriding need to know the jurors' views on the death penalty was a reasonably competent decision. But, in her view, the decision to focus on jurors' views on the death penalty made it imperative to raise racial issues at general *voir dire*, which Owens's trial team did not do.

Owens also called Lisa Wayne (Wayne) as an expert on racial attitudes and racial biases in *voir dire*. Although she has never participated in a capital *voir dire*, Wayne has conducted *voir dire* for over 20 homicide trials during her 30-year career in criminal defense, and she lectures nationally on racial issues in *voir dire*. In her opinion, race is a factor in every trial. Wayne opined that there is no excuse for failing to address race during *voir dire*, especially when the defendant is a member of a minority race. Wayne did not believe it is appropriate for the court to conduct *voir dire* on racial issues because potential jurors usually provide answers they perceive will please the judge, who is an authority figure. In Wayne's view, competent counsel addresses race with the jury because a minority capital defendant loses the presumption of innocence.

Acknowledging that each case is unique, Wayne conceded that she is unaware of any case holding that it is *per se* ineffective not to *voir dire* on racial issues. Wayne also conceded that time pressures in individual *voir dire* make it difficult to raise a complex issue such as race.

iii. Principles of Law

In *Turner*, the defendant was African-American and the victim was Caucasian. *Turner v. Murray*, 476 U.S. 28 (1986). The attorney for the defendant

proposed a *voir dire* question that inquired whether the race of the defendant and the race of the victim would prejudice the jurors against the defendant or affect the jurors' ability to render a fair and impartial verdict. *Id.* at 30-31. The Supreme Court vacated the defendant's death sentence, holding that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Id.* at 36-37. *Turner* did not address ineffective assistance of counsel.

The Court has held that "[o]nly when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion." *Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981). Absent special circumstances, the need for such questions is within the discretion of the trial judge. *Id.*

Special circumstances existed in *Ham v. South Carolina*, 409 U.S. 524, 525 (1973), where the defendant was an African-American civil rights activist. The defendant's defense at trial was that he had been targeted by the police due to his civil rights activism. *Ham*, 409 U.S. at 525. In that case, failure to *voir dire* on racial prejudice after the defendant requested such inquiry was error. *Id*. at 529. Subsequent case law noted that the situation in *Ham* is one in which the "[r]acial issues . . . were inextricably bound up with the conduct of the trial." *Ristaino v. Ross*, 424 U.S. 589, 597 (1976).

iv. Analysis

Here, Owens argues that the cross-racial nature of the crime and purported African-American cultural characteristics presented during the sentencing hearing were special circumstances, which required individual *voir dire* on racial prejudice.

In this case, Wolfe was not a target of the crime. She was killed because she was with Marshall-Fields. This was not a cross-racial crime, and there were no special circumstances requiring *voir dire* on racial issues.

Nor do the discussions about "Stop Snitchin" or the racial slurs used by witnesses constitute special circumstances that "were inextricably bound up with the conduct of the trial." *Id*.

Owens does not provide any case law supporting his argument that failure to *voir dire* on racial issues constitutes ineffective assistance of counsel. There was evidence presented during the post-conviction proceedings that not conducting *voir dire* on this issue was reasonable trial strategy because of the limited time available during individual *voir dire* and the trial team's need to focus on the prospective jurors' views on the death penalty. Evidence was also presented that *voir dire* on racial issues could offend prospective jurors and that the jurors might provide answers that they thought would please the court. Owens's trial counsel considered the issue of race and filed a motion for *voir dire* on race. Thus, the court finds that the trial team's decision not to *voir dire* on race fell within the wide range of professionally competent assistance and does not constitute ineffective assistance of counsel under *Strickland*.

v. Conclusion

Voir dire concerning racial issues was not required in this case because this was not a cross-racial crime and race was not inextricably bound up with the trial. Thus, the court concludes Owens's trial team's decision to *voir dire* on the jurors' death penalty views instead of on race was within the wide range of professionally competent assistance contemplated by *Strickland*. The court also concludes Owens failed to prove he was prejudiced by his trial team's alleged deficient performance.

Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's failure to inquire about racial issues is **Denied**.

c. Failure to Object to Misstatements of the Law

i. Parties' Positions

Owens contends that his trial team was ineffective when it failed to object to the court's misstatements of law in the questionnaire, in the video shown to the jurors before individual *voir dire*, and while questioning potential jurors regarding their decision-making process at step four. He also contends the court and the parties repeatedly misstated the law regarding mitigation.

ii. Findings of Fact

Question five of the potential punishment section of the questionnaire advised that Colorado law allows, but does not require, the imposition of the death penalty if the jury deems it appropriate. Thereafter, that question asked if the juror, after considering all the evidence in the sentencing hearing, could follow the law and impose a death sentence. The video explained that if all of the jurors at step four were unanimously convinced beyond a reasonable doubt that death was the appropriate sentence, they must return a sentence of death. At the start of individual *voir dire*, it was the court's practice to present the juror with an overview of the four-step process. At the end of the overview, the court asked if the juror could, at the beginning of step four, look at the two punishments fairly and equally.[349]

With regard to mitigation, the video advised the prospective jurors that each juror would decide what constitutes mitigation. The video pointed out that there is no burden of proof for mitigation and that there was no requirement that the jurors

[349] According to Owens, the court asked Juror SC, Juror JAA, Juror JK, Juror TL, Juror IG, Juror TO, Juror EG, Juror SM, Juror BW, Juror JS, Juror LT, and Juror AW this question.

agree on what is mitigation. At various times throughout individual *voir dire*, the court or the parties advised potential jurors that each individual juror would decide mitigation.[350]

iii. Principles of Law

In *Davis*, the trial court incorrectly described the law applicable to the sentencing process during individual *voir dire* in a capital case. In response to the argument that the misstatement required reversal, the Colorado Supreme Court stated that "[t]he purpose of the *voir dire* was not to instruct the jurors on the law of the state but to determine whether the juror could impartially and conscientiously apply the law as laid out by the court in its instructions." *Davis*, 794 P.2d at 207. *See also Dunlap*, 173 P.3d at 1085-86 ("Even if the trial court told a prospective juror the law would require the death penalty, we have previously held that doing so during individual voir dire is not reversible error.").

Under § 18-1.3-1201(2)(b)(II), "[t]he jury shall not render a verdict of death unless it unanimously finds and specifies in writing that: (A) [A]t least one aggravating factor has been proved; and (B) [T]here are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved."

A non-exclusive list of mitigating factors is provided in § 18-1.3-1201(4). *See People v. Tenneson*, 788 P.2d 786, 791 (Colo. 1990) ("A nonexclusive list of mitigating factors is set forth as a guide."). In the sentencing hearing of a capital case, "the jury is charged with determining whether mitigating factors exist." *Id.* at 799. In *Tenneson*, the Colorado Supreme Court found that it was error for the trial court to instruct the jury "that they *must* consider certain statements of purported fact to be mitigating factors." *Id*. (emphasis in original). "It is for the jury to

[350] According to Owens, Juror DH, Juror IG, Juror DK, Juror TO, Juror EG, and Juror BW were told this alleged misstatement of the law.

decide whether the 'facts' that the defendant asserts in mitigation are true and, if so, whether they are to be regarded as mitigating factors." *Id*; *see also Rodriguez*, 914 P.2d at 250 n.12 ("The trial court properly instructed the jury that 'a mitigating factor does not have to be proved by any burden of proof. You must find that a mitigating factor exists if there is any evidence to support it.'"). And the United States Supreme Court has stated that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Eddings*, 455 U.S. at 113-14 (emphasis in original).

iv. Analysis

Relying on the statutory language in § 18-1.3-1201,[351] Owens argues that because capital jurors in Colorado are never required to impose the death penalty, the court's various statements were erroneous and his trial team should have objected. Owens contends that the court erred when it told the jurors that they must impose the death penalty if all jurors are convinced beyond a reasonable doubt at step four that death is the appropriate punishment because § 18-1.3-1201 only uses mandatory language in subsection (2)(b)(I). That subsection requires the jury to impose a life sentence if no statutory aggravating factor is proved beyond a reasonable doubt.

The Colorado Supreme Court has held that "a capital defendant is entitled to a *voir dire* sufficient to ascertain whether prospective jurors can *fairly* consider both life imprisonment and a death sentence as possible punishments." *Harlan*, 8 P.3d at 461 (emphasis added). In *Davis*, although the court's question to the juror contained an incorrect statement of law, the Colorado Supreme Court nevertheless

[351] In SOPC-293, Owens withdrew the portion of this claim based on *Tenneson*, 788 P.2d at 796, and acknowledged that Colorado does not have a presumption of life. *Dunlap*, 173 P.3d at 1089.

found the question to be an appropriate device for determining whether the prospective juror was inalterably opposed to a death sentence. *See* 794 P.2d at 207. The rationale was simple – *voir dire* is not the equivalent of instructing the jury. *Id.* Because the court utilized the questionnaire, introductory video, and its own questions in individual *voir dire* to determine whether any prospective juror was impaired, even if the statements were misstatements of law, there are no legal grounds under *Davis* for contending the trial team was ineffective for not objecting to the alleged misstatements of the law.

With regard to mitigation, Owens argues that telling a juror that s/he decides what constitutes mitigation is contrary to the decision in *Eddings*, 455 U.S. at 114-15, which held that a juror must consider and give effect to mitigation. In *Eddings*, the United States Supreme Court explained that a sentencer in a capital case cannot refuse to consider relevant mitigation evidence. 455 U.S. at 114. The requirement that a juror consider mitigation is satisfied when the juror evaluates the evidence and finds it is significant or insignificant. What the juror may not do is refuse to consider the evidence. *Id.* at 114-15.

Telling a juror that s/he decides what mitigation exists is the equivalent of telling the juror that s/he must consider the mitigation evidence to determine whether it is significant or insignificant. *See Rodriguez*, 914 P.2d at 250 n.12 (a jury must find a mitigating factor exists if there is any evidence to support it). Simply put, a juror cannot determine if mitigation exists without considering the mitigation. *See Tenneson*, 788 P.2d at 791 (finding that the statute allows both parties to present evidence on the nature of the crime and the background and character of the defendant "in order to provide information based upon which the jurors can decide whether any mitigating factors exist").

Owens uses the holding in *Eddings* to argue that because § 18-1.3-1201(4) lists certain mitigating factors, a jury must not only consider but also give effect to those mitigating factors solely because they are listed in the statute. The argument misconstrues the United States Supreme Court's guidance on mitigation. *See Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (a capital jury is required to consider both statutory and non-statutory mitigation). A common sense reading of § 18-1.3-1201(4) shows that it is a list of 12 non-exclusive categories of mitigation. The categories are not mitigating factors that the jury must both consider and give effect to regardless of the evidence presented.

Owens also misconstrues the requirement that a juror must give effect to mitigation. Giving effect to mitigation means ensuring that the jurors, after considering and weighing the mitigation, have the ability to select a life sentence based on the mitigation. *Abdul-Kabir*, 550 U.S. at 252. The Colorado statutory scheme ensures that jurors will consider the mitigation evidence presented and provides every juror the opportunity to give effect to mitigation by selecting a life sentence at steps three and four.[352] *People v. Dunlap*, 975 P.2d 723, 736 (Colo. 1999) (Colorado requires jurors to weigh mitigation at step three and allows the juror to consider mitigation at step four). Thus, telling the jury that each juror decides what mitigation exists was not a misstatement of the law.

v. Conclusion

The court concludes Owens's trial team's performance regarding mitigation during *voir dire* fell within the wide range of professionally competent assistance required by *Strickland*. The court also concludes Owens failed to prove he was

[352] Additionally, the Colorado statutory scheme has a default to life provision at step one because, pursuant to § 18-1.3-1201(2)(b)(I), if the jury does not unanimously agree that at least one statutory aggravating factor was proved beyond a reasonable doubt, the sentence must be life.

prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's failure to object to purported misstatements of law is **Denied**.

d. Failure to Object to Improper Questions

i. Parties' Positions

Owens contends that he was prejudiced by his trial team's failure to object to the prosecution's alleged stakeout questions about whether prospective jurors could vote for death if they were convinced beyond a reasonable doubt that death was the appropriate sentence.

ii. Findings of Fact

During individual *voir dire*, it was common for the prosecution to place the jurors at step four and then ask the juror if s/he could actually sign a verdict form for death if s/he had decided that death was the appropriate punishment.[353]

In general, neither party employed stakeout questions – where particular facts from the case were presented before asking the juror to select a punishment based on the proffered facts. The closest either party came to utilizing stakeout questions was when Owens's trial team would shop its mitigation by asking whether the juror would consider a particular type of mitigation, such as a defendant's youth or having a drug-addicted parent. The prosecution did not object to this tactic and did not use stakeout questions.

At the post-conviction hearing, Kepros testified that the trial team did not object to those types of questions because it did not recognize the questions as improper. She added that she was unfamiliar with the applicable law on stakeout questions.

[353] Owens contends that seated Juror DH and Juror SM were asked those questions.

iii. Principles of Law

Case-specific questions are "questions that ask whether or not jurors can consider or would vote to impose a life sentence or a death sentence in a case involving stated facts, either mitigating or aggravating, that are or might be actually at issue in the case that the jurors would hear." *United States v. Johnson*, 366 F. Supp. 2d 822, 840 (N.D. Iowa 2005). A stakeout question is an improper question posed to a potential juror, which asks that juror to speculate as to how the juror might form his or her decision based on any particular fact(s). *United States v. Fell*, 372 F. Supp. 2d 766, 770 (D. Vt. 2005). However, "not all case-specific questions are stake-out questions." *Id.* "There is a crucial difference between questions that seek to discover how a juror might vote and those that ask whether a juror will be able to fairly consider potential aggravating and mitigating evidence." *Id*. at 771. To determine whether a question is a stakeout question, the court should ask,

> Does the question ask a juror to speculate or precommit to how that juror *might vote* based on any particular facts? or (2) Does it seek to discover in advance what a prospective juror's decision will be under a certain state of the evidence? or (3) Does it seek to cause prospective jurors to pledge themselves to a future course of action and indoctrinate them regarding potential issues before the evidence has been presented and they have been instructed on the law?

Johnson, 366 F. Supp. 2d at 845 (internal citations and quotations omitted) (emphasis in original). Additionally, "[w]hile any 'case-specific' question that asks *how a prospective juror would vote* on life or death, if presented with proof of certain facts, is a 'stake-out' question, and does attempt to 'pre-commit' the juror to a certain position, a properly framed case-specific question does not necessarily do any of these things." *Id.* (emphasis in original); *see also United States v.*

McVeigh, 153 F.3d 1166, 1207 (10th Cir. 1998) (finding it improper to seek commitment from prospective juror to vote a certain way based on particular facts).

iv. Analysis

In SOPC-163, Owens provided examples of questions asked of four jurors by the prosecution. The questions did not provide particular facts of this case, but rather asked whether the juror could sign a death verdict if the statutory requirements were met. Accordingly, the purpose of such questions was to give the parties an opportunity to excuse for cause any "juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework." *Uttecht v. Brown*, 551 U.S. 1, 9 (2007). The questions asked by the prosecution did not seek to indoctrinate or pre-commit the jurors to a death sentence. Because the questions asked by the prosecution were proper, Owens's trial team cannot be faulted for failing to object.

v. Conclusion

The court concludes Owens's trial team did not perform deficiently because it had no grounds to object to the prosecution's questions. The court also concludes Owens failed to prove he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's failure to object to allegedly improper questions is **Denied**.

e. Statements Reducing the Burden of Proof

i. Parties' Positions

Owens contends he was prejudiced during individual *voir dire* by King's description of step four as when "the rubber hits the road," because it diminished the importance of steps one through three.

ii. Findings of Fact

Both parties and the court used the phrase "the rubber hits the road" several times with some prospective jurors.[354] This phrase was used with two of the seated jurors.[355]

At the post-conviction hearing, King testified that he regretted using the phrase because it may have reduced the importance of the first three steps of the sentencing process in the jurors' minds. King testified that he used the phrase to simplify the differences between the eligibility stage (steps one through three) and the selection stage (step four).

Reynolds opined that while the phrase sent a message to the jurors that only step four was important, King's use of the phrase did not fall below the prevailing professional norms at the time.

iii. Analysis

Owens did not provide any legal support for his contention that references to "the rubber hits the road" constitute ineffective assistance of counsel. When King used this phrase, he usually referenced the flow chart that set out the four-step process for the jurors. By doing so, he did not suggest that Owens was eligible for the death penalty. While King's language may have been inartful, his use of that language does not rise to the level of deficient performance as defined by *Strickland*.

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[354] At one point, the court used the phrase while referencing step four but noted that steps one, two, and three were equally important. *Voir Dire* Tr. 177:7-11 (Mar. 12, 2008). The court also used the phrase for purposes other than describing the four-step process. *Voir Dire* Tr. 150:3-5 (Mar. 11, 2008).

[355] Juror AW and Juror JAA.

iv. Conclusion

The court concludes King's use of the phrase "the rubber hits the road" did not fall outside of the scope of the professionally competent assistance required by *Strickland*. The court also concludes Owens failed to prove he was prejudiced by King's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's use of statements reducing the burden of proof is **Denied**.

f. Failure to Object to Restrictions on *Voir Dire*

i. Parties' Positions

Owens contends he was prejudiced when his trial team stipulated to time limits for individual *voir dire*.

ii. Findings of Fact

The court raised the issue of time limits for individual *voir dire* on August 29, 2007. The court proposed questioning three jurors per hour. Later in the same hearing, King indicated several times that he expected that panels of three would be utilized for individual *voir dire*. King did not object to the court's proposal.

On March 8, 2008, before individual *voir dire* began, the court brought up the possibility of reducing the panel of prospective jurors from three to two jurors per hour to avoid prospective jurors needlessly waiting for questioning. But after discussing the matter with both parties, the court agreed to keep the panels at three jurors.

Approximately halfway through the individual *voir dire* process, the court, concerned about having enough jurors for general *voir dire*, increased the panels to four jurors per hour. The concern was based on having already continued general *voir dire* once.

In his testimony at the post-conviction hearing, Middleton recalled that the trial team filed a pretrial motion suggesting how many jurors the parties could question individually and requesting sufficient time for questioning. Middleton acknowledged that there were times when the trial team ran out of time during individual *voir dire*. He recalled instructing King and Kepros to make a record about needing more time to complete *voir dire* whenever they ran out of time. Middleton acknowledged that the trial team rarely made such a record.

In Reynolds's opinion, the trial team's acquiescence to the time limits was deficient because it resulted in *voir dire* of approximately five to seven minutes per party thereby precluding a constitutionally sufficient *voir dire*. Reynolds acknowledged that the court has discretion over *voir dire* but noted that the trial team should have made a record about the lack of sufficient time to conduct a proper *voir dire* and moved for additional time. While conceding that some jurors can be adequately examined in five minutes, Reynolds noted that five minutes was not sufficient for this case because of the extensive pretrial publicity. She also faulted the trial team for not objecting when the court increased the number of jurors from three to four jurors per hour.

iii. Principles of Law

"Defense counsel does not have a *constitutional* right to voir dire, so long as the court's 'examination allowed counsel to determine whether any potential jurors possessed any beliefs that would bias them such as to prevent [the defendant] from receiving a fair trial.'" *Rodriguez*, 914 P.2d at 255 (quoting *O'Neill*, 803 P.2d at 169) (emphasis in original). Likewise, there is no statutory right to unlimited *voir dire*. *Id.* Crim. P. 24 states that "[i]n order to minimize delay, the judge may reasonably limit the time available to the parties or their counsel for juror examination. The court may limit or terminate repetitious, irrelevant, unreasonably

lengthy, abusive, or otherwise improper examination." Crim. P. 24(a)(3); *see also People v. Samuels*, 228 P.3d 229, 242-43 (Colo. App. 2009) (finding that the district court did not deprive the defendant of his fundamental right to a fair and impartial jury when the court limited *voir dire* to sixty minutes, instead of the ninety minutes requested by defense counsel).

The court is unaware of any Colorado case law on this issue, but other courts in capital cases have held that failure to make an individual request for additional time for *voir dire* for specific jurors does not constitute ineffective assistance of counsel under *Strickland*. *See, e.g.*, *Wilkes v. Indiana*, 984 N.E.2d 1236, 1249 (Ind. 2013) ("Even if we hypothesize that the defendant's trial counsel were deficient in failing to request additional time to question Juror A, such omission did not result in the requisite prejudice under *Strickland* and thus the defendant is not entitled to prevail on this claim.").

iv. Analysis

Owens does not provide any legal support for his argument that his trial team's failure to object to the time limits for individual *voir dire* constitutes ineffective assistance of counsel. Additionally, "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. Here, Owens's trial team had the benefit of a lengthy completed questionnaire for each juror that contained information regarding the juror's background, media exposure, attitude towards the death penalty, potential hardship, and potential prejudices. Under these circumstances, the trial team's acquiescence to the time limits for *voir dire* was a reasonable professional judgment under *Strickland*.

v. Conclusion

The court concludes the trial team's approach to the limitations on individual *voir dire* fell within the wide range of professionally competent assistance under *Strickland*. The court also concludes Owens failed to prove he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's failure to object to restrictions on *voir dire* is **Denied**.

g. Failure to Object to Misapplication of Legal Standards

i. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object to the court's and the prosecution's "follow the law" questions of prospective jurors because the questions led to erroneous rulings on challenges for cause.

ii. Findings of Fact

Of the 20 seated jurors, Owens's trial team challenged four jurors for cause: Juror DK, Juror DM, Juror LT, and Juror LR. The court incorporates the individual *voir dire* transcripts for those jurors as though fully set forth herein.[356] Neither the court nor the prosecution exclusively asked any of these jurors "follow the law" questions.

At the post-conviction hearing, Kepros testified that during individual questioning of the jurors she was aware that *Morgan* precluded "follow the law" type questions. She believed she failed to identify the issue when the prosecution asked those types of questions. As an example, Kepros believed that she failed to raise a *Morgan* objection whenever the prosecution asked a juror if the juror

[356] For Juror DK, *see Voir Dire* Tr. 79-98 (Mar. 10, 2008). For Juror DM, *see Voir Dire* Tr. 164-182 (Mar. 11, 2008). For Juror LT, *see Voir Dire* Tr. 5-34 (Mar. 24, 2008). For Juror LR, *see Voir Dire* Tr. 200-220 (Mar. 11, 2008).

understood and was willing to follow the four-step process. Reynolds believes that *Morgan* precludes that type of question.

iii. Principles of Law

"The Constitution . . . does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury. Even so, part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors." *Morgan*, 504 U.S. at 729. "Any juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider the mitigating evidence and to decide if it is *sufficient* to preclude imposition of the death penalty." *Id*. at 738 (emphasis in original).

The United States Supreme Court in *Morgan* found that "follow the law" questions were not, standing alone, sufficient to detect that jurors would not automatically impose a death sentence due to a guilty verdict. *Id*. at 735 ("As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed. More importantly, however, the belief that death should be imposed *ipso facto* upon conviction of a capital offense reflects directly on that individual's inability to follow the law. Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law.") (internal citation omitted). Likewise, the Colorado Supreme Court has stated that "the Supreme Court has indicated that general fairness and follow the law questions are not always sufficient to detect those jurors with views preventing or substantially impairing the performance of their duties in accordance with their instructions and oath." *Harlan*, 8 P.3d at 463 (internal quotations omitted).

iv. Analysis

Owens contends that Juror SC, Juror DH, Juror EG, and Juror BW were asked "follow the law" questions by the court, by the prosecution, or by his trial team. The law does not prohibit such questions. Rather, it provides that they are not, standing alone, sufficient to ensure that jurors will not automatically vote for death without giving appropriate consideration to mitigation evidence. In this case, the *voir dire* examination was not improperly restricted. Because those jurors were not asked follow the law questions exclusively, Owens's claims that Juror SC, Juror DH, Juror EG, and Juror BW were asked "follow the law" questions in violation of *Morgan* are denied.

Review of the *voir dire* transcripts for the seated jurors whom Owens's trial team challenged for cause demonstrates that those jurors were not asked "follow the law" questions exclusively in a manner that would violate *Morgan*. Thus, Owens failed to identify or prove any instance where the prosecution asked a "follow the law" question that resulted in an erroneous ruling on a challenge for cause.

v. Conclusion

The court concludes that Owens's trial team's performance regarding "follow the law" questions was not deficient. The court also concludes Owens failed to prove he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's failure to object to the alleged misapplication of legal standards is **Denied**.

5. Trial Team's Deficiencies During Jury Selection Regarding Specific Jurors

a. Parties' Positions

Owens claims his trial team conducted deficient *voir dire* on 16 seated jurors and on several other jurors who did not serve. Owens argues his team was deficient because it did not challenge certain jurors for cause and did not present adequate arguments to support challenges for cause. Owens also faults his trial team for improperly utilizing peremptory challenges.[357]

b. Analysis

i. Jurors Who Served on the Jury

(a) Juror SC (No. 5070)

(i) Parties' Positions

Owens contends he was prejudiced by King's failure to challenge Juror SC for cause and by his trial team's failure to use a peremptory challenge to strike Juror SC because she was substantially impaired due to being pro-death and mitigation impaired.

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[357] Owens claims his trial team failed to use peremptory challenges to strike Juror SC, Juror MF, Juror JAA, Juror JK, Juror DH, Juror IG, Juror DK, Juror DM, Juror TO, and Juror LT. Owens's trial team followed the Colorado Method during jury selection. The team assigned a score to each juror based on the juror's questionnaire and individual questioning session, and the team struck jurors with the highest scores during general questioning. The team's approach to jury selection is entitled to great deference. *See Strickland*, 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential."); *see also Osorio*, 170 P.3d at 800 (defendant challenging attorney's actions during *voir dire* as ineffective must overcome presumption that challenged action is sound trial strategy). Because there were many potential jurors with higher Colorado Method scores than these jurors' scores, the team's decision to conserve its peremptory challenges by choosing not to strike these jurors fell within the wide range of professionally competent assistance required by *Strickland*. Moreover, Owens failed to prove that his trial team's alleged deficient performance in deciding when to exercise peremptory challenges resulted in prejudice. Accordingly, Owens's petition to vacate his conviction and sentence based on his team's alleged deficient performance with respect to peremptory challenges is denied.

(ii) Findings of Fact

Juror SC's relevant questionnaire answers are as follows:

1. She selected answer 1(a) in the Potential Punishment Section indicating that the death penalty was appropriate in some cases, and she explained that: "If the sentenced person was a continuing threat to society he/she may deserve the death penalty."
2. She answered "Yes" that she could follow the law and impose a life sentence, if she believed the death sentence was not appropriate.
3. She answered "Yes" that she could follow the law and impose a death sentence, if she believed the sentence was appropriate.
4. When asked if she had an opinion, based on media coverage, about whether Owens should receive the death penalty, she answered "No" and wrote, "Do not have an opinion."
5. She answered there was no reason why she could not be a fair and impartial juror.

Juror SC's individual questioning occurred on March 27, 2008. King asked Juror SC what she thought about a life without parole sentence for a person who committed an intentional and deliberate murder without any defenses or justification. Juror SC initially answered that it depended on the crime and then added that it depended on the crime and the person who committed it. She added that she could not say one way or the other. *Voir Dire* Tr. 110:5-13 (Mar. 27, 2008). Noting that she was still considering both penalties and referencing her answer in the questionnaire that the death penalty was appropriate for some crimes, King asked her for examples of what she was thinking at the time. *Id*. at 110:14-22. Juror SC responded that an abusive wife who killed her husband to protect herself or her children would not deserve the death penalty. *Id*. at 110:23-25;

111:1-12. On the other hand, a person who killed children or committed treason might deserve the death penalty. *Id*. at 113:1-8.

More than once during individual questioning, Juror SC stated that she would evaluate and weigh whatever mitigation was presented because it is important to consider both the crime and the person. *Id*. at 102:9-25; 103:1-6. She also stated that she wanted to hear about the person's background and how he was raised. *Id*. at 114:15-18. In response to King's questions about specific mitigation, Juror SC responded that an alcoholic or a drug-addicted parent could possibly be meaningful to her but that a family's desire to have an ongoing relationship with a person serving a life sentence would not be meaningful to her. *Id*. at 115:24-25; 116:1-17. She viewed the presumption of life in the jury's decision-making process to be a good thing. *Id*. at 114:7-12. Juror SC stated she was capable of distinguishing between actions that deserve mercy and those that deserve accountability. *Id*. at 103:1-25. Juror SC was not challenged for cause. She deliberated at both the guilt phase and sentencing hearing.

At the post-conviction hearing, King testified that Juror SC's response to the stripping question indicated she was mitigation impaired because she focused on the crime. He suggested the court's time constraints might have been part of the reason he did not develop adequate grounds to challenge Juror SC for cause. King had no strategic reason for not challenging Juror SC for cause. The trial team gave Juror SC a score of 56.2.

Reynolds opined King was ineffective for failing to challenge Juror SC because Juror SC would automatically vote for the death penalty (ADP).[358] In Reynolds's opinion, King did an inadequate job developing a challenge for cause.

[358] The court will utilize the ADP designation to label jurors who allegedly would automatically sentence a defendant to death following a conviction for deliberate first-degree murder.

(iii) Analysis

A review of the record on Juror SC reflects that she was not an ADP juror but that her views on the potential punishments were consistent, balanced, and reasonable. Owens particularly complains about Juror SC's answer in her questionnaire that a person who is a continuing threat to society deserves the death penalty; however, Juror SC wrote on her questionnaire that a person who was a continuing threat to society *may* deserve death. During individual questioning, Juror SC accepted the presumption of life in the sentencing process and volunteered that death should not be an automatic decision. She thought there were only certain crimes that deserved the death penalty, and she offered treason and killing a child as examples. Her examples were reasonable and reflect a potential juror who was not unalterably in favor of the death penalty under *Morgan*.

Likewise, Juror SC was not mitigation impaired. She indicated that she wanted to know about the defendant's background and how he was raised. Other than a family's desire for a continuing relationship with the defendant, she was willing to consider any other mitigation presented. She accepted the role that mercy could play in the sentencing process and viewed herself as capable of balancing mercy and accountability. Thus, Juror SC was not mitigation impaired under *Eddings*.

Because Juror SC was neither unalterably in favor of the death penalty nor mitigation impaired, King's decision not to challenge Juror SC for cause was

within the wide range of professionally competent assistance required by *Strickland*.[359]

As to Owens's claim regarding the failure to use a peremptory challenge[360] to strike Juror SC, Owens contends Juror SC was biased against him because she told Kepros during general questioning that she could possibly view Owens as a criminal if he had an assault weapon. Juror SC qualified her views by noting that she had no problem with a regular gun, and thus, that the existence of a gun in and of itself was not a problem for her. The team's decision not to use a peremptory challenge to excuse Juror SC was reasonably competent under *Strickland*.

(iv) Conclusion

The court concludes King's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror SC is **Denied**.

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[359] Owens also argues that Juror SC's bias as an ADP juror can be gleaned from the fact that subsequent to the trial she testified before the Colorado General Assembly in support of the death penalty. Owens presented no evidence to support this claim.

[360] Determining whether to exercise a peremptory challenge involves an extraordinarily complex matrix of observations and issues of professional discretion and judgment. It can involve observing body language cues; observing how a juror reacts to the other jurors, counsel, or the judge; assessing whether the juror is more comfortable in leader or follower roles; assessing whether the juror is governed by logic or emotion; whether the juror tends toward hasty judgments; whether the juror might be particularly sympathetic or antagonistic to a defendant, a victim, or an important witness; and a myriad of other factors. Trial counsel's judgment in the exercise of peremptory challenges is entitled to substantial deference.

(b) Juror MF (No. 4818)

(i) Parties' Positions

Owens contends he was prejudiced by King's failure to challenge Juror MF for cause and by his trial team's failure to use a peremptory challenge to strike Juror MF who was substantially impaired by his death penalty views.

(ii) Findings of Fact

Juror MF's relevant questionnaire answers are as follows:

1. He saw media coverage about this case, but he could set aside anything he learned about the case from the media and base his decision on the evidence.
2. He selected answer 1(a) in the Potential Punishment Section indicating that the death penalty was appropriate in some cases, and he explained: "If there is guilt [sic] of murder beyond a reasonable doubt – The punishment fits the crime."
3. He answered "Yes" that he could follow the law and impose a life sentence, if he believed the death sentence was not appropriate.
4. He answered "Yes" that he could follow the law and impose a death sentence, if he believed the death sentence was appropriate.
5. When asked if he had an opinion, based on media coverage, about whether Owens should receive the death penalty, he answered "No."
6. He answered there was no reason why he could not be a fair and impartial juror.

Juror MF's individual questioning occurred on March 10, 2008. The court asked about his exposure to media reports, and Juror MF confirmed the answers in his questionnaire by stating, "I don't have any opinion one way or the other." *Voir Dire* Tr. 106:23-25; 107:1-5 (Mar. 10, 2008).

In response to King's stripping question, Juror MF reaffirmed his answer in the questionnaire that the punishment should fit the crime but added that guilt would have to be proved beyond a shadow of a doubt before the death penalty would be appropriate. *Id*. at 112:2-6. When King asked if the death penalty was the only appropriate punishment for first-degree murder, Juror MF answered he did not feel strongly either way and would consider both punishments. He said, "I don't feel like it has to be the death penalty." *Id*. at 112:12-13. When asked if he could consider either punishment, he answered, "I could definitely consider either one." *Id*. at 112:6-15.

During Tomsic's questioning, Juror MF indicated he understood and agreed with the four-step process and was willing to consider mitigation in the nature of various aspects of the defendant's life. He noted that listening to this type of evidence was very important. *Id*. at 116-119.

When asked by King, Juror MF agreed that he could consider a difficult childhood and mental health problems as mitigation, but he rejected a loving family as meaningful mitigation for him. *Id*. at 124-125. Juror MF stated he was the type of person who would listen to everything presented and then weigh it. *Id*. at 125:23-25; 126:2-3. Juror MF was not challenged for cause. He was selected as a juror and deliberated at both the guilt phase and sentencing hearing.

At the post-conviction hearing, King testified that Juror MF was mitigation impaired because his explanation in the questionnaire on why he selected the death penalty as appropriate in some cases was focused on the crime. In King's view, Juror MF's commitment to listen to mitigation confirmed his impairment because the law requires the jury to not only listen but to consider mitigation. King agreed that Juror MF generally accepted mitigation.

In Reynolds's view, Juror MF was an ADP juror who King should have challenged for cause. In Reynolds's view, Juror MF's explanation for why the death penalty was appropriate in some cases demonstrated his status as an ADP juror. Reynolds opined that King's performance was deficient because he failed to develop the appropriate record to challenge Juror MF.

(iii) Analysis

Juror MF was not an ADP juror. In Juror MF's questionnaire, he stated the death penalty was appropriate for some crimes. He stated in his questionnaire and confirmed during his questioning session that his exposure to media coverage had not caused him to form any opinion about this case. Juror MF confirmed his neutrality on punishment during individual questioning. In response to the stripping question, Juror MF said he was not wedded to the death penalty and would consider both punishments. In his final answer to King on this topic, Juror MF was quite definitive, "I could definitely consider either one." *Id*. at 112:6-15. Because Juror MF was not unalterably in favor of the death penalty, he was not substantially impaired under *Morgan* to serve on the jury. Thus, King's decision not to challenge Juror MF for cause was within the wide range of professionally competent assistance required by *Strickland*.

(iv) Conclusion

The court concludes King's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror MF is **Denied**.

(c) Juror JAA (No. 5132)

(i) Parties' Positions

Owens contends he was prejudiced by Kepros's failure to challenge Juror JAA for cause and by his trial team's failure to use a peremptory challenge to strike Juror JAA because she was mitigation impaired with respect to age. Owens also contends he was prejudiced by Kepros's failure to object to Warren's misstatement of the law that a defendant is eligible for the death penalty if the jury finds an aggravating factor has been proved.

(ii) Findings of Fact

Juror JAA's relevant questionnaire answers are as follows:

1. She selected answer 1(a) in the Potential Punishment Section indicating that the death penalty was appropriate in some cases, and she explained: "It is base[d] on each case that I have read or heard about."
2. She answered "Yes" that she could follow the law and impose a life sentence, if she believed the death sentence was not appropriate.
3. She answered "Yes" that she could follow the law and impose a death sentence, if she believed the death sentence was appropriate.
4. When asked if she had an opinion, based on media coverage, about whether Owens should receive the death penalty, she answered "No."
5. When asked if she could set aside any opinion based on media coverage regarding whether Owens should receive the death penalty, she answered "Yes." She added, "I could only give a sentence of the death penalty base[d] on evidence and not my personal opinion."
6. She answered there was no reason why she could not be a fair and impartial juror.

Individual questioning for Juror JAA began on March 13, 2008. During individual questioning, Juror JAA agreed that the proper way to make a decision about the sentence was to look at both the crime and the individual. *Voir Dire* Tr. 117:6-18 (Mar. 13, 2008). She was willing to consider a defendant's background and history. *Id*. at 117:19-25; 118:1.

After presenting the stripping question, Kepros asked Juror JAA what punishment would be appropriate. Juror JAA answered that she did not know and said she would have to give it some thought. *Id*. at 120:1-25; 121:1-16. When Juror JAA stated she would want to know if the victim was killed for no reason, Kepros asked her if that were the case, would she view death as appropriate, and Juror JAA stated, "No, it wouldn't be. I still don't know. I don't know. So I can't answer it yes or no." *Id*. at 121:17-25; 122:1-6. Kepros followed up this answer by asking if Juror JAA could think of things that would make her lean one way or the other for a particular punishment, and she responded that she could not because she was "middle of the road." *Id*. at 122:11-16.

Kepros asked if finding an aggravating factor would push her toward a particular punishment, and she responded she would still need more information. *Id*. at 123:9-25; 124:1. In discussing mitigation based on an abusive childhood, Juror JAA stated she would have to hear the evidence in depth before she would know whether that type of mitigation would cause her to consider a life sentence. *Id*. at 124:15-25; 125:1-9. When asked about age, Juror JAA stated age would not be important to her because "everybody deserves their just punishment." *Id*. at 125:10-17. Kepros immediately followed up and asked if her answer meant that a death sentence was appropriate. Juror JAA said it did not. She then added, "I still couldn't answer yes or no to the death penalty." *Id*. at 125:10-23.

During the prosecution's questioning, Warren explained that the death penalty was only available if an aggravating factor was proved and went on to explain, "you're only eligible for a first degree murder if there's an aggravating fact." *Id*. at 118:2-9. Kepros did not object to this statement.

At the end of individual questioning, neither party challenged Juror JAA. She deliberated in the guilt phase and sentencing hearing.

At the post-conviction hearing, Kepros testified she did not challenge Juror JAA for cause because she did not believe she had sufficient grounds for doing so. The trial team gave Juror JAA a grade of 48.

Reynolds opined that Kepros performed deficiently because Juror JAA was impaired due to her questionnaire answer that she could only give the death penalty based on evidence. Reynolds also viewed Kepros as deficient because she never obtained a definitive answer from Juror JAA about where she stood on the death penalty. According to Reynolds, Kepros's failure to object to Warren's statement that eligibility is based only on a proven aggravating factor was also deficient performance.

(iii) Analysis

Owens claims Juror JAA was mitigation impaired because she told Kepros that the defendant's age would not be meaningful to her. According to Owens, because the statutory language in § 18-1.3-1201(4) concerning mitigation uses the term "shall," Juror JAA could not disregard age as mitigation. The statute reads, "[f]or purposes of this section, mitigating factors shall be the following factors." § 18-1.3-1201(4). The first factor listed is "age of the defendant at the time of the crime." *Id.* Under *Eddings*, Juror JAA was required to evaluate age at the time of the crime and determine whether she viewed it as mitigating. That is what Juror JAA did when she told Kepros that the defendant's age would not be very

important to her. Juror JAA did not disregard age as mitigation. She considered it and assigned it minimal weight. Thus, Juror JAA was not mitigation impaired *Eddings*.

Regarding mitigation generally, Juror JAA acknowledged its importance and indicated that she wanted to know about the defendant's history and background. She told Kepros that she needed to hear the evidence on abusive childhood before she could determine whether it was significant enough to cause her to consider a life sentence. Her answers reflect that she would consider mitigation because she wanted to carefully evaluate that evidence and make a factual determination about whether it was impactful to her. Juror JAA's individual *voir dire* shows she was willing to consider all mitigation presented and she wanted to consider the mitigation before deciding the appropriate sentence. Thus, she was not mitigation impaired under *Eddings*. Accordingly, Kepros's decision not to challenge Juror JAA for cause was within the wide range of professionally competent assistance required by *Strickland*.

Owens also argues Kepros performed deficiently when she failed to object to Warren's statement that a defendant becomes eligible for the death penalty when the jury decides that the prosecution proved an aggravating factor at step one. Here, Owens failed to prove that he was prejudiced by Warren's misstatement of the law. *See Strickland*, 466 U.S. at 694 ("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.").

(iv) Conclusion

The court concludes Kepros's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by his trial team's alleged deficient performance.

Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror JAA is **Denied**.

(d) Juror JK (No. 5131)

(i) Parties' Positions

Owens contends he was prejudiced by King's failure to challenge Juror JK for cause and by his trial team's failure to use a peremptory challenge to strike Juror JK based on her questionnaire answers that she had been exposed to media that placed Owens in a bad light.

(ii) Findings of Fact

Juror JK appeared for individual questioning on March 12. She was not challenged for cause. She appeared for general questioning on April 7, and neither the prosecution nor Owens's trial team used a peremptory challenge to excuse her from the jury. Juror JK was seated as an alternate juror. She did not participate in the guilt phase or sentencing hearing deliberations.

(iii) Analysis

Juror JK was an alternate juror who did not participate in the guilt phase or sentencing hearing deliberations. Because Juror JK did not deliberate, Owens was not prejudiced by King's alleged deficient performance during jury selection with respect to Juror JK. Accordingly, there is no reasonable probability that, but for King's alleged failure to challenge Juror JK, the result of the guilt phase or sentencing hearing would have been different. *See Strickland*, 466 U.S. at 694 ("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.").

(iv) Conclusion

The court concludes Owens failed to prove he was prejudiced by King's alleged deficient performance with respect to Juror JK. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror JK is **Denied**.

(e) Juror TL (No. 4389)

(i) Parties' Positions

Owens contends he was prejudiced by Kepros's failure to challenge Juror TL for cause because he was mitigation impaired and because the answers on his questionnaire suggested he was an ADP juror.

(ii) Findings of Fact

Juror TL's relevant questionnaire answers are as follows:

1. He selected answer 1(a) in the Potential Punishment Section indicating that the death penalty was appropriate in some cases, and he explained: "Some actions are so severe that they must be given our maximum penalty."
2. He answered "Yes" that he could follow the law and impose a life sentence, if he believed the death sentence was not appropriate.
3. He answered "Yes" that he could follow the law and impose a death sentence, if he believed the death sentence was appropriate.
4. When asked if he had formed an opinion, based on media coverage, about whether Owens should receive the death penalty, he answered "No."
5. When asked if he could put aside any opinion, based on media coverage, about the appropriateness of the death penalty for Owens, he answered "Yes" and wrote, "I was not a witness to this crime and

so can only judge the truth based on the best evidence. The media is not the best source for this. The courtroom is."

6. He answered there was no reason why he could not be a fair and impartial juror.

Juror TL's individual questioning occurred on March 20, 2008. Kepros started her questioning by referring Juror TL to his questionnaire where he wrote that there were cases where the defendant's actions were so severe as to require the maximum penalty. Kepros asked him what type of crimes he was considering when he wrote that. When Juror TL told her that he had no particular case in mind, Kepros used the stripping question and asked his views on a life sentence for a deliberate murderer. *Voir Dire* Tr. 185:9-25; 186:1 (Mar. 20, 2008). Juror TL answered that a life sentence was possible and that he would want to know about the person's background and the person's potential for committing similar crimes in the future. *Id*. at 185:22-25; 186:1-18.

When Kepros shopped mitigation, Juror TL said he would consider mitigation in the context of how it affected that person's judgment. Kepros followed up by asking if Juror TL thought people were exclusively the product of their environment, and Juror TL answered that environment was not the exclusive determinant. *Id*. at 187:3-5. He explained that he knew too many people who had been successful notwithstanding a bad environment but also acknowledged that environmental factors do show up later in life. *Id*. at 186:19-25; 187:1-14.

When Hower asked Juror TL if he could impose a death penalty, he said both penalties would be an option for him. *Id*. at 193:19-25; 194:1-6.

Juror TL was not challenged for cause. He deliberated at the guilt phase and sentencing hearing.

Kepros testified in the post-conviction hearing that Juror TL's answer about some crimes being so severe as to require the maximum penalty made him an ADP juror. In her view, this answer made Juror TL an ADP juror because Juror TL believed there were crimes that were so bad that a death sentence would be automatic. She testified that she did not realize at the time that his answer made him an ADP juror. Kepros testified that she did not view Juror TL's answer about knowing some people who had succeeded despite a bad environment as making him mitigation impaired. She acknowledged that Juror TL was an eligible juror because the trial team, based primarily on his acceptance of mitigation, gave him a score of 40.5.

In Reynolds's opinion, Kepros's performance was deficient because Juror TL's answer about some crimes requiring the maximum punishment made him an ADP juror and because Kepros failed to clarify what crimes he thought would warrant death. In Reynolds's view, Kepros was also deficient for not doing a second stripping question when Juror TL rejected bad environment as the exclusive reason for criminal acts later in life.

(iii) Analysis

Juror TL noted in his questionnaire that the death penalty was sometimes appropriate because some crimes were so severe that they required the maximum penalty. However, Juror TL repeatedly noted that he could not answer any question about the appropriateness of the death penalty until presented with all of the evidence on the crime and the defendant. This is consistent with his questionnaire where he wrote that as a juror, he could only judge the truth based on evidence presented in a courtroom. On this record, Juror TL was not unalterably in favor of the death penalty. *See Morgan*, 504 U.S. at 734-35 (jurors who are

unalterably in favor of the death penalty are substantially impaired because they cannot perform their duties in accordance with the law).

Owens also argues Kepros should have challenged Juror TL for cause because his observation that one's environment was not the exclusive determinant of one's actions indicated he was mitigation impaired. Juror TL acknowledged that environmental factors influence a person's actions later in life. He did not reject one's environment as a mitigating factor. Such a view is in line with the *Eddings* requirement for what a juror must do to consider mitigation. *See Eddings*, 455 U.S. at 114-15 (to consider mitigation, a juror evaluates the mitigation and determines its significance to the juror).

Because Juror TL was not impaired under *Morgan* or *Eddings*, there were no viable grounds for Kepros to have challenged Juror TL for cause. Thus, Kepros's decision not to challenge Juror TL fell within the wide range of professionally competent assistance contemplated by *Strickland*.

(iv) Conclusion

The court concludes Kepros's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by Kepros's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror TL is **Denied**.

(f) Juror DH (No. 5267)

(i) Parties' Positions

Owens contends he was prejudiced by Kepros's failure to challenge Juror DH for cause and by his trial team's failure to use a peremptory challenge to strike Juror DH because of exposure to pretrial publicity and because his views on the death penalty made him an ADP juror. Owens also contends he was prejudiced by

Kepros's failure to follow up with Juror DH about certain answers on his questionnaire.

(ii) Findings of Fact

Juror DH's relevant questionnaire answers are as follows:

1. His nephew was on the Aurora Police Department.
2. He saw and read media coverage about this case and wrote, "Javad-Marshall Fields & Vivian Wolfe were shot & killed because they were going to give testimony in case."
3. He could set aside anything he learned about the case from the media and base his decision on the evidence.
4. He had not formed any opinion about the guilt or innocence of Owens.
5. If he had formed any opinion about the guilt or innocence of Owens based on the media, he could set that opinion aside.
6. He selected answer 1(a) in the Potential Punishment Section indicating that the death penalty was appropriate in some cases.
7. He answered "Yes" that he could follow the law and impose a life sentence, if he believed the death sentence was not appropriate.
8. He answered "Yes" that he could follow the law and impose a death sentence, if he believed the death sentence was appropriate.
9. When asked if he had an opinion, based on media coverage, about whether Owens should receive the death penalty, he answered "No."
10. When asked if he could set aside any opinion, based on media coverage, about whether Owens should receive the death penalty, he answered "Yes" and wrote, "I have not formed an opinion."

11. He answered there was no reason why he could not be a fair and impartial juror.

Juror DH's individual questioning was conducted on March 11, 2008. Upon inquiry, Juror DH said he could ensure that he would do his best not to allow any type of media exposure to influence him. *Voir Dire* Tr. 127:6-25; 128:1-7 (Mar. 11, 2008).

In response to Tomsic's questions about his views on the death penalty, Juror DH noted that imposition of the death penalty depends on whether certain criteria can be met and that the decision was unique to each juror. *Id*. at 129:1-8. After explaining the purpose of aggravation, Juror DH told Tomsic that he thought he could determine if aggravation was proved beyond a reasonable doubt. *Id*. at 130:22-25; 131:1-2. Juror DH said he understood mitigation and was willing to listen to it at step two and weigh it against aggravation at step three. *Id*. at 131:3-25; 132:1-2. Juror DH said he could impose either sentence at step four. *Id*. at 132:3-24.

Kepros began her questioning by asking the stripping question. *Id*. at 133:14-25; 134:1-3. When asked what the appropriate punishment would be in that scenario, Juror DH said that the death penalty was not automatic because a juror has to understand what the defendant was going through at the time of the murder. *Id*. at 134:4-15. When asked, Juror DH stated he wanted to know all of the defendant's background information because it was important in deciding the correct punishment. *Id*. at 135:8-21. When Kepros asked if there was any crime, in his view, that would automatically warrant the death penalty, Juror DH responded that the killing of children was one such crime. *Id*. at 136:16-21. Kepros followed up on his answer by asking if Juror DH was still willing to consider mitigation in a crime involving the killing of a child. *Id*. at 136:23-25;

137:1-2. Juror DH answered he would, and he noted that one had to understand that the defendant may not have had a strong capacity to understand what he was doing. *Id*. at 137:3-6. Juror DH acknowledged that, based on the little information he had, he was inclined to go into this sentencing hearing favoring a death penalty but noted that he would be open to a life sentence. *Id*. at 137:17-22.

Juror DH stepped out of the courtroom and both parties indicated they did not challenge him for cause. Juror DH then returned to the courtroom and volunteered that one of his employees' daughters worked in the prosecutor's office, but he did not know the daughter or her last name. *Id*. at 139:5-9. Neither side sought additional *voir dire* on this topic, and the court reiterated its prior caution not to discuss the case with anyone. *Id.* at 139:12-19. After general *voir dire* was completed, Juror DH was seated on the jury and became the jury foreperson.

At the post-conviction hearing, Kepros recalled reviewing Juror DH's questionnaire and noted that he knew that the case involved a witness killing, that his nephew was a member of the Aurora Police Department, and that his mother had been robbed at gunpoint in 1985. She stated that she had no tactical reason for not asking about those topics except for lack of time. Kepros acknowledged that she did not view Juror DH as an ADP juror and acknowledged that he was receptive to mitigation.

Reynolds opined that Kepros should have asked Juror DH about his mother being robbed at gunpoint, about knowing someone who worked in the prosecutor's office, and about his knowledge that the case involved a witness killing. Reynolds was also critical of Kepros for not clarifying Juror DH's answers to the stripping question because his answers made him sound like an ADP juror.

(iii) Analysis

From his questionnaire and throughout his individual questioning, Juror DH maintained that the death penalty was appropriate in some cases. He repeatedly indicated that he wanted to hear about the defendant in order to understand what in his background caused him to commit a murder. At one point, Juror DH stated mitigation was important for understanding whether the defendant understood the consequences of what he was doing at the time of the murders – an important theme of Owens's mitigation case. Juror DH's willingness to consider mitigation indicates he was not unalterably in favor of the death penalty. *See Morgan*, 504 U.S. at 734-35 (jurors who are unalterably in favor of the death penalty are substantially impaired because they cannot perform their duties in accordance with the law). Because Juror DH was not impaired under *Morgan*, Kepros's decision not to challenge him for cause was within the wide range of professionally competent assistance contemplated by *Strickland*.

Kepros did not ask Juror DH about his nephew who worked for the APD or about his mother being robbed at gunpoint. It was reasonable for her to focus on Juror DH's death penalty views. Likewise, it was also reasonable not to inquire further about his media exposure and instead to rely on Juror DH's questionnaire and his assurances to the court that he would not allow media exposure to influence him. With regard to Juror DH's connection to an employee of the district attorney's office, it was unnecessary for Kepros to inquire further because Juror DH stated that he did not know the employee in the prosecutor's office. Kepros's decision to focus on Juror DH's death penalty views instead of these tangential issues was within the wide range of professionally competent assistance required by *Strickland*. *See also Harrington v. Richter*, 562 U.S. 86, 109 (2011) ("There is

a ‘strong presumption’ that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than ‘sheer neglect.’”).

(iv) Conclusion

The court concludes Kepros’s performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by his trial team’s alleged deficient performance. Accordingly, Owens’s petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror DH is **Denied**.

(g) Juror IG (No. 5137)

(i) Parties’ Positions

Owens contends he was prejudiced by Kepros’s failure to adequately question Juror IG about her death penalty views, her ability to consider mitigation, and her religious beliefs. Owens contends he was also prejudiced by his trial team’s failure to strike Juror IG with a peremptory challenge.

(ii) Findings of Fact

Juror IG’s relevant questionnaire answers are as follows:

1. She selected answer 1(a) in the Potential Punishment Section and indicated that the basis for her opinion on the death penalty was that it “prevents further crime.”
2. She answered “Yes” that she could follow the law and impose a life sentence, if she believed the death sentence was not appropriate.
3. She answered “Yes” that she could follow the law and impose a death sentence, if she believed the death sentence was appropriate.
4. When asked if she had formed an opinion, based on media coverage, about whether Owens should receive the death penalty, she answered “No.”

5. She answered there was no reason why she could not be a fair and impartial juror.

Juror IG's individual questioning session occurred on March 24, 2008. After having the purpose and types of aggravation explained to her, Juror IG told Tomsic she could perform step one and understood that a failure of proof at step one would result in a life sentence. *Voir Dire* Tr. at 72:2-25; 73:1 (Mar. 24, 2008). Tomsic then explained mitigation, noting that it could be anything that would cause Juror IG to impose a life sentence. Juror IG assured Tomsic of her willingness to listen to any mitigation presented. *Id*. at 73:2-13. Juror IG stated that she thought the presentation of mitigation was a good thing. *Id*. at 74:10-15. Juror IG stated that she could impose a death sentence at step four if she felt, based on the evidence, it was appropriate. *Id*. at 75:14-20.

Kepros began her questioning with the stripping question and asked if a life sentence would be a sufficient penalty, and Juror IG responded that it would. *Id*. at 76:2-25; 77:1-9. Juror IG confirmed that she viewed mitigation as a good thing and clarified that she previously thought all homicides were subject to the death penalty but has learned from newspaper articles that mitigating circumstances might prevent a death penalty. *Id*. at 77:12-25; 78:1. She identified mental retardation and childhood as possible mitigation and accepted all the mitigation shopped by Kepros. *Id*. at 78:5-25; 79:1-25. Juror IG responded to Kepros's questions about how each juror had to decide mitigation and weigh it against aggravation as being a fair process. *Id*. at 80:8-25; 81:1-3.

The parties did not challenge Juror IG for cause. Juror IG deliberated at both the guilt phase and sentencing hearing.

During the post-conviction hearing, Kepros testified that she thought Juror IG might have been an ADP juror based on her answer in the questionnaire that the

death penalty deters future crime and because she thought the death penalty was available for heat of passion homicide. Kepros did not view Juror IG's religion as a problem and recalled that no one else on the team voiced any concern over this issue. Kepros acknowledged that Juror IG was accepting of all the mitigation proposed to her and of the individualized process for deciding what mitigation is impactful.

In Reynolds's view, Juror IG was probably an ADP juror and mitigation impaired. Accordingly, she opined that Kepros was deficient because Kepros did not probe Juror IG on her answer that the death penalty was a deterrent for future crime. She was also critical of Kepros for not researching Juror IG's religion and asking Juror IG about the concept of blood atonement. Reynolds acknowledged that Juror IG did not reference her religion when asked the basis for her opinion that the death penalty was appropriate in some cases. Reynolds also viewed Kepros's efforts to shop mitigation as inadequate.

(iii) Analysis

A review of the entire record for Juror IG's *voir dire* shows that Juror IG held a balanced view of the potential sentences and was willing to follow the instructions of law. Juror IG's answers on her questionnaire that the death penalty deterred future crime and that a heat of passion murder qualified for the death penalty do not indicate that she would automatically vote for the death penalty. She accepted a life sentence for the deliberate murderer described by Kepros in the stripping question. As demonstrated by her complete *voir dire*, Juror IG was a juror who was open to both punishments and was therefore a qualified juror under *Morgan*. *See Morgan*, 504 U.S. at 734-35 (jurors who are unalterably in favor of the death penalty are substantially impaired because they cannot perform their duties in accordance with the law).

Likewise, Juror IG was not mitigation impaired. She said mitigation was a good thing, and she identified specific types of mitigation that she could accept, including learning disabilities, an alcoholic parent, and a family's desire to have a relationship with the defendant. As demonstrated by her complete *voir dire*, Juror IG was receptive of the relevant mitigation Owens wished to present. Thus, she was a qualified juror under *Eddings*. *See Eddings*, 455 U.S. at 114-15 (a sentencer in a capital case cannot refuse to consider any relevant mitigation evidence presented, including statutory and non-statutory mitigation).

Because Juror IG was not impaired under *Morgan* or *Eddings*, Kepros's decision not to challenge her for cause was within the wide range of professionally competent assistance contemplated by *Strickland*.

With regard to Juror IG's religion, Juror IG did not indicate in her questionnaire or in her individual questioning session that religion played a role in her views on the death penalty. Thus, Kepros's decision not to inquire further fell within the wide range of professionally competent assistance required by *Strickland*.

(iv) Conclusion

The court concludes Kepros's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by the trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror IG is **Denied**.

(h) Juror DK (No. 4958)

(i) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to use a peremptory challenge to strike Juror DK because he was mitigation impaired.

Owens also contends that the court's erroneous denial of his challenge for cause warrants reversal of his conviction and sentence.

(ii) Findings of Fact

Juror DK's relevant questionnaire answers are as follows:

1. He selected answer 1(a) in the Potential Punishment Section indicating that the death penalty was appropriate in some cases.
2. He answered "Yes" that he could follow the law and impose a life sentence, if he believed the death sentence was not appropriate.
3. He answered "Yes" that he could follow the law and impose a death sentence, if he believed the death sentence was appropriate.
4. He answered there was no reason why he could not be a fair and impartial juror.

Juror DK's individual questioning session was on March 10, 2008. King started the questioning by asking Juror DK his opinion of the death penalty, and he responded that it would be a difficult decision and he could do it but only if he was very sure of the person's guilt. *Voir Dire* Tr. 83:20-25; 84:1-4 (Mar. 10, 2008). In response to King's stripping question, Juror DK agreed that both sentences were appropriate. *Id*. at 84:9-25; 85:1-5. When King asked him what he wanted to know about the crime or the defendant to decide an appropriate sentence, Juror DK answered that he wanted to know why the person committed the homicide because someone does not go out and shoot someone for no reason. *Id*. at 85:11-25. King then asked if the death penalty was appropriate for a person who kills without a reason, such as a cold-blooded murderer, and Juror DK answered "No." *Id*. at 86:1-6.

King repeatedly asked Juror DK what he wanted to know about the person in order to make his sentencing decision. Juror DK responded that he would focus on

why the person committed the murder and would not want to know anything about his background. *Id*. at 86:21-25; 87:1-8. Juror DK said he wanted to know if the person had a temper and whether the murder was planned or committed in the spur of the moment. *Id*. at 87:20-25; 88:1-9. King reminded Juror DK that he was asking him about punishment for the deliberate murder described previously, and Juror DK responded that either sentence would be appropriate but added that he would go for life before death because the person would never be released on parole. *Id*. at 88:13-24.

Warren explained the purpose of aggravation and asked Juror DK if he could perform step one, and he said he could. *Id*. at 90:16-25; 91:1-6. Warren explained mitigation as something that, in the juror's view, would warrant a life sentence and pointed out that the jury was required to listen to mitigation. She gave the examples of old age and a law-abiding life before the murder was committed and asked Juror DK if he would be able to consider mitigation. Juror DK answered that he could. *Id*. at 91:7-25; 92:1-8. Juror DK agreed that a default to life at step three was appropriate unless all the jurors agreed that the mitigation did not outweigh the aggravation. *Id*. at 92:12-22. Juror DK assured Warren that, depending on his assessment of the evidence, he could choose either death or life at step four. *Id*. at 93:3-24.

King challenged Juror DK for cause based on being mitigation impaired. King argued Juror DK's rejection of mitigation made him substantially impaired. *Id*. at 94:14-25; 95:1. Warren pointed out that King had not offered any suggested mitigation but merely asked Juror DK what kind of mitigation he wanted to hear. *Id*. at 96:8-17. The court denied the challenge for cause. *Id*. at 97:18-19. Juror DK deliberated at both the guilt phase and sentencing hearing.

At the post-conviction hearing, King stated that he viewed Juror DK as mitigation impaired based on Juror DK's refusal to consider any background information of the defendant, which is why he challenged Juror DK for cause. King conceded that Juror DK volunteered that he would be inclined to choose life over death and that the team scored him as a 50 under the Colorado Method.

Reynolds opined that King was not deficient in his performance because he appropriately challenged Juror DK for cause.

(iii) Analysis

Juror DK said he would consider old age and a law-abiding life as mitigation and indicated a preference for life imprisonment over death in cases of murder after deliberation. Juror DK was not mitigation impaired under *Eddings*. *See* 455 U.S. at 114-15 (a sentencer in a capital case cannot refuse to consider any relevant mitigation evidence presented, including statutory and non-statutory mitigation). Accordingly, Owens's constitutional right to a fair and impartial jury was not violated by virtue of Juror DK's presence on the jury in this case. *See Morrison v. People*, 19 P.3d 668, 671 (Colo. 2000) (defendant's right to an impartial jury is violated and the defendant's conviction must be reversed if a biased juror participated in deciding defendant's guilt as a result of the trial court's erroneous denial of the defendant's challenge for cause).

(iv) Conclusion

The court concludes Owens's trial team's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by Owens's trial team's alleged deficient performance. Additionally, Owens's right to a fair and impartial jury was not violated. Accordingly, Owens's petition to vacate his conviction and sentence

based on ineffective assistance of counsel and judicial error regarding the *voir dire* of Juror DK is **Denied**.

(i) Juror DM (No. 5041)

(i) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to use a peremptory challenge to strike Juror DM due to his mitigation impairment and his views on the death penalty. Owens further contends that the court's erroneous denial of his challenge for cause warrants reversal of his conviction and sentence.

(ii) Findings of Fact

Juror DM appeared for individual *voir dire* on March 11. *See generally Voir Dire* Tr. 164-182 (Mar. 11, 2008). Middleton challenged Juror DM for cause, which the court denied. Juror DM returned for general questioning on April 7. He was seated as an alternate juror, and he did not deliberate.

(iii) Analysis

Juror DM was an alternate juror who did not participate in the guilt phase or sentencing hearing deliberations. Because Juror DM did not deliberate, Owens was not prejudiced by King's alleged deficient performance during jury selection with respect to Juror DM. Accordingly, there is no reasonable probability that, but for King's alleged failure to challenge Juror DM, the result of the guilt phase or sentencing hearing would have been different. *See Strickland*, 466 U.S. at 694 ("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."). Likewise, Owens failed to establish that his right to trial by an impartial jury was violated by virtue of Juror DM sitting on the jury. *See Morrison*, 19 P.3d at 671 (defendant's right to an impartial jury is violated and the defendant's conviction must be reversed if a biased juror participated in deciding

defendant's guilt as a result of the trial court's erroneous denial of the defendant's challenge for cause).

(iv) Conclusion

The court concludes Owens failed to prove he was prejudiced by his trial team's alleged deficient performance with respect to Juror DM. Additionally, Owens's right to a fair and impartial jury was not violated. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel and judicial error regarding the *voir dire* of Juror DM is **Denied**.

(j) Juror TO (No. 4784)

(i) Parties' Positions

Owens contends he was prejudiced by Kepros's failure to meaningfully question Juror TO about mitigation, his daughter being the victim of a shooting, having a friend on the APD, and his exposure to pretrial publicity. Next, Owens contends that his trial team's decision not to use a peremptory challenge to strike Juror TO from the jury was ineffective. Last, Owens contends he was prejudiced when Kepros failed to object to Warren's misstatement of the law that a defendant is eligible for the death penalty after step one of the sentencing hearing.

(ii) Findings of Fact

Juror TO's relevant questionnaire answers are as follows:

1. He had a friend who worked for the APD and a friend who worked for the FBI.
2. His daughter was robbed and shot approximately 10 to 12 years ago.
3. He was exposed to media coverage, both print and television, concerning the shootings and arrests.
4. He recalled that the media reports mentioned witness safety and the names Marshall-Fields, Wolfe, and Owens.

5. He answered "Yes" that he could put aside information he learned from the media and base a verdict only on evidence presented at trial.
6. He answered "Yes" that he had formed an opinion based on media coverage about Owens's guilt or innocence, and wrote, "I have felt he was guilty based on the reports."
7. He answered "Yes" that he could put aside any opinion, based on media coverage, about Owens's guilt or innocence and base a verdict solely on the evidence and the law. He wrote: "I take my responsibility as a Juror seriously and respect our system, and that Mr. Owens is innocent until proven otherwise."
8. He selected answer 1(a) in the Potential Punishment Section indicating that the death penalty was appropriate in some cases, and he explained: "My belief that some crimes merit the death penalty and that it may deter others."
9. He answered "Yes" that his opinion and beliefs on the death penalty had changed over time, and wrote, "Son-in-law and daughter are active in Amnesty International and we have discussed the death penalty–they oppose it."
10. He answered "Yes" that he could follow the law and impose a life sentence, if he believed the death sentence was not appropriate.
11. He answered "Yes" that he could follow the law and impose a death sentence, if he believed the death sentence was appropriate.
12. When asked if he had an opinion, based on media coverage, about whether Owens should receive the death penalty, he answered "No."

13. When asked if he could set aside any opinion, based on media coverage, about whether Owens should receive the death penalty, he answered "Yes."

14. He answered there was no reason why he could not be a fair and impartial juror.

Juror TO's individual questioning took place on March 13, 2008. Regarding media exposure, Juror TO advised that all of his media exposure was historical. *Voir Dire* Tr. 168:19-25; 169:1-22 (Mar. 13, 2008). If selected to be on the jury, Juror TO committed to both parties that he would not allow any media reports to influence him and that his decision would be based solely on the evidence and the law. *Id*. at 170:5-11.

Warren began the questioning by explaining the purposes of aggravation and mitigation, and Juror TO stated he would withhold any decision about sentencing until the jury was at step four. *Id*. at 176:18-25; 177:1-8. When Warren asked him if he could sign a death verdict, Juror TO became emotional and stated that, although it would not be easy, he believed he could sign the verdict but only after going through the four steps. *Id*. at 178:13-25; 179:1-15.

Kepros referred Juror TO to his questionnaire where he noted that discussions with his daughter and son-in-law influenced his views on the death penalty. *Id*. at 180:16-25; 181:1-20. Juror TO responded that in the past he viewed the death penalty as appropriate based solely on how horrible the crime was, but now, when faced with the heavy responsibility of being a juror, he no longer felt that way. *Id*. at 181:21-25; 182:1-7. After defining mitigation as anything that causes an individual juror to view a life sentence as appropriate, Kepros asked Juror TO what mitigation would be important to him. Noting that he did not know what was permissible, Juror TO answered that he would expect to

learn about the person's "values, how they were raised, and what their situation was." *Id*. at 182:13-22. He also accepted an abusive childhood and an alcoholic parent as important mitigation. *Id*. at 182:13-25; 183:1-24.

Kepros referred Juror TO to his answer in the questionnaire that the media made it sound as if Owens was guilty. She asked him to explain how that answer could be reconciled with his commitment to presume Owens innocent. Juror TO responded that he was trying to be honest about how he reacted at the time to the media reports of an arrest, and he explained that he no longer felt that way. He assured Kepros that he believed he could be and would be a fair juror. *Id*. at 183:25; 184:1-25; 185:1-15. Juror TO was not challenged for cause. Juror TO deliberated at both the guilt phase and the sentencing hearing.

At the post-conviction hearing, Kepros testified that she did not ask about Juror TO's friends in law enforcement even though one of the defense themes was an attack on the credibility of the police investigation. She also testified that she clarified Juror TO's comment about believing that Owens was guilty, but she should have asked more specifics about his media exposure. She also did not ask Juror TO about his daughter being the victim of an armed robbery. Kepros testified that she did not object when Warren told Juror TO a person was eligible for the death penalty if the jury found that the prosecution proved one or more aggravating factors.

Reynolds opined that Kepros's performance was deficient for failing to ask probing questions about Juror TO's friends in law enforcement, his daughter being the victim of a shooting, and his media-based opinion that Owens was guilty. Reynolds also viewed Kepros's performance as deficient because she never asked Juror TO the stripping question. Noting that the team scored Juror TO a 42, Reynolds stated it was an invalid score because Kepros never fully developed Juror

TO's death penalty views. Likewise, Reynolds faulted Kepros for not asking questions about his particular media exposure. Even though Juror TO explained why he had answered that Owens appeared guilty based on media coverage and now disavowed that view, Reynolds maintained her opinion that examination on this point was deficient.

(iii) Analysis

The totality of Juror TO's questionnaire and *voir dire* shows that Juror TO favored mitigation and took his responsibilities as a juror very seriously. When Kepros asked an open-ended question about what kind of mitigation he wanted to hear, Juror TO stated he wanted to know the person's background, how the person was raised, and whether the person came from an environment where violent responses were common. Juror TO also accepted an abusive childhood or an alcoholic parent as mitigation. An examination of the total *voir dire* shows that Kepros appropriately vetted Juror TO on his mitigation views. Thus, her *voir dire* of Juror TO does not constitute deficient performance under *Strickland*.

During individual *voir dire*, Kepros discussed Juror TO's media exposure with him. Juror TO assured the court that his answer that Owens was guilty based on media coverage was an effort to be honest and that he did not believe that now. Juror TO explained to Kepros that his answer was an effort to be honest about his thoughts at the time the media was reporting the homicides and Owens's subsequent arrest. He went on to explain that he was confident he could be fair. Owens did not prove that Juror TO's assurances were deceptive. *See Murphy v. Florida*, 421 U.S. 794, 800 (1975) (finding that it is the defendant's responsibility to prove that juror's assurances of neutrality and rejection of media are specious). Because Juror TO was not biased based on his media exposure about this case,

Kepros's decision not to challenge him for cause was within the wide range of professionally competent assistance contemplated by *Strickland*.

Owens's argument that he was prejudiced by Kepros's failure to ask Juror TO about his daughter being robbed at gunpoint and about his friends in the APD and FBI is premised on the theory that Juror TO's answers to Kepros's questions might have provided grounds for a challenge for cause. Owens offers no evidence to support this speculation.

Owens also argues Kepros was deficient for not objecting to Warren's statement that a defendant becomes eligible for the death penalty when the jury decides if the prosecution proved an aggravating factor at step one. Owens failed to prove that he was prejudiced by Warren's misstatement of the law. *See Strickland*, 466 U.S. at 694 ("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.").

(iv) Conclusion

The court concludes Kepros's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror TO is **Denied**.

(k) Juror EG (No. 5285)

(i) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object to Juror EG deliberating during the sentencing hearing when she did not participate in the guilt phase deliberations and by his trial team's failure to ask the court to give Juror EG instructions regarding her role as a deliberating juror. Owens also

contends King failed to adequately question Juror EG on her mitigation views and her views on the burden of proof.

(ii) Findings of Fact

Juror EG's relevant questionnaire answers are as follows:

1. Juror EG selected answer 1(a) in the Potential Punishment Section indicating that the death penalty was appropriate in some cases, and she explained "I believe some crimes are terrible enough to warrant death."
2. She answered "Yes" that she could follow the law and impose a life sentence, if she believed the death sentence was not appropriate.
3. She answered "Yes" that she could follow the law and impose a death sentence, if she believed the death sentence was appropriate.
4. She answered there was no reason why she could not be a fair and impartial juror.

Juror EG began her individual questioning on March 14, 2008. Shortly after beginning his questioning, King gave Juror EG the stripping question for a deliberate first-degree murder and asked what she thought the appropriate sentence should be. Juror EG, noting that the introductory video mentioned mitigation, answered that she would have to go through the four-step process to decide. *Voir Dire* Tr. 13:24-25; 14:1-25; 15:1-3 (Mar. 14, 2008). In response to King's follow-up questions, Juror EG clarified that both life and death remained viable options to her after returning a guilty verdict for first-degree murder. *Id*. at 15:8-15.

After confirming that Juror EG could perform step one, King asked her if both sentences were still open to her, and she said they were. *Id*. at 15:16-25; 16:1-11. King then explained mitigation to Juror EG as anything that causes a juror to lean toward a life sentence, noting that she would decide whether mitigation

existed. When asked, Juror EG told King she could determine mitigation. *Id*. at 16:22-25; 17:1-10. After assuring King that she could perform the weighing function at step three, Juror EG told King that the default to life provision at step four was appropriate. *Id*. at 17:11-22. King referred her to the flow chart, explained that step four was independent of the other steps, and asked Juror EG how she felt about having to make an independent moral decision about the appropriate punishment. Juror EG responded that she was okay with that responsibility and would consider everything she heard. *Id*. at 18:1-14. When asked by King, Juror EG stated that, although it would be hard, she could impose a death penalty. *Id*. at 18:17-22. Likewise, she could find mercy and impose a life sentence. *Id*. at 19:1-8.

Juror EG was not challenged for cause. Juror EG was seated as an alternate juror. She became a deliberating juror on June 3, 2008, when Juror LT was excused from the jury. As a result, Juror EG became a deliberating juror during phase two of the sentencing hearing.

At the post-conviction hearing, King stated that he could not recall what, if any, his concerns were about Juror EG. He acknowledged that he did not ask the court to give her any special instructions regarding her duties as a deliberating juror.

Reynolds opined that King performed deficiently because he did not ask the court to give Juror EG and the remaining deliberating jurors a special instruction that told them Juror EG was not required to accept the jury's guilty verdict. In Reynolds's view, this instruction was necessary because most of the prosecution's proof in phase one of the sentencing hearing came from the guilt phase. She offered no legal support for her view.

(iii) Analysis[361]

Contrary to Owens's argument, King went over various types of mitigation with particular emphasis on mercy, and Juror EG readily accepted all of his examples. Thus, King's questioning concerning mitigation did not fall outside the wide range of professionally competent assistance required by *Strickland*.

Juror EG was originally seated as an alternate juror, but she became a deliberating juror during phase two after Juror LT was discharged for hardship. Juror EG did not participate in deliberations concerning the guilt phase or phase one of the sentencing hearing. Because she did not deliberate at those junctures, Owens was not prejudiced with respect to the guilt phase by King's alleged deficient performance pertaining to Juror EG. Accordingly, there is no reasonable probability that, but for King's alleged errors, the result of the guilt phase would have been different. *See Strickland*, 466 U.S. at 694 ("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.").

In the middle of presenting mitigation evidence during step two of the sentencing hearing, Juror LT asked to be excused because she had family travel plans very close to the anticipated end of the sentencing hearing. At the time, King argued that leaving Juror LT on the jury created the possibility of the jury feeling pressured to reach a quick decision on Owens's fate due to Juror LT's travel obligations. The court excused Juror LT and substituted Juror EG for phase two deliberations. King's approach to this situation was within the wide range of professionally competent assistance required by *Strickland*.

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[361] With respect to Owens's claim concerning § 18-1.3-1201(4), the court incorporates part V.F.5.b.i(c)(iii) of this Order as though fully set forth herein.

As to King's alleged deficiency for failing to ask the court to instruct Juror EG and the remaining jurors on her duties as a replacement juror, Owens failed to present any authority describing an instruction that is either mandated or recommended in such a situation and failed to prove or even proffer what instructions King should have asked the court to give to Juror EG. Juror EG was never discharged from her jury service. She was not substituted mid-deliberations. The sentencing hearing was bifurcated between step one and step two. She replaced juror LT before step two began. So the precautionary instructions contemplated by cases such as *Carrillo v. People*, 974 P.2d 478 (Colo. 1999), were unnecessary. King's failure to draft and present a unique instruction was not substandard, and no prejudice has been shown from any such failure. Juror EG was joining the deliberations after a substantially undisputed step one had been completed and the jury's step one verdict returned. But even if this could be considered a situation where *Carrillo* prejudice might be presumed, it has been overcome. Given Juror EG's *voir dire* answers, there was no risk that she would consider death without having been personally convinced beyond a reasonable doubt of both Owens's guilt and the existence of the aggravating factors. In short, Owens failed to prove that King performed deficiently under *Strickland* by not asking for instructions.

(iv) Conclusion

The court concludes King's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror EG and her placement on the jury is **Denied**.

(l) Juror SM (No. 5266)

(i) Parties' Positions

Owens contends he was prejudiced by Kepros's failure to adequately question Juror SM regarding her views on mitigation.

(ii) Findings of Fact

Juror SM's relevant questionnaire answers are as follows:

1. Juror SM selected answer 1(a) in the Potential Punishment Section indicating that the death penalty was appropriate in some cases, and she explained: "I believe that if you take a life, you should pay with yours (depending on the circumstances)."
2. She answered "Yes" that she could follow the law and impose a life sentence, if she believed the death sentence was not appropriate.
3. She answered "Yes" that she could follow the law and impose a death sentence, if she believed the death sentence was appropriate.
4. She answered there was no reason why she could not be a fair and impartial juror.

Juror SM's individual *voir dire* was held on March 18, 2008. Juror SM stated that she wanted to know as much as possible about the defendant. *Voir Dire* Tr. 203:6-9; 205:15-23 (Mar. 18, 2008). In response to Hower's questions, Juror SM stated she would not decide the sentence based solely on a guilty verdict for first-degree murder and would employ the four-step process. *Id*. at 204:5-22; 208:12-14. While going through the four-step process, Juror SM told Hower that she wanted to know if the person suffered an abusive childhood or had emotional or mental problems. *Id*. at 204:23-25; 205:1-23; 206:4-18.

Kepros started her questioning by asking Juror SM what she meant by her answer in the questionnaire that the death penalty's appropriateness depended on

the circumstances. Juror SM responded that she was thinking of the person's childhood or extenuating circumstances at the time of the crime. *Id*. at 208:25; 209:1-17. Kepros then employed the stripping question and asked Juror SM what her views on punishment for this person were, and she responded that she did not have a feeling about punishment for the guilty murderer. *Id*. at 209:24-25; 210:1-15. Noting that certain aggravating factors could sway her toward the death penalty, Juror SM told Kepros that she would consider mitigation before she made a final decision on punishment. *Id*. at 210:16-25; 211-212; 213:1-4.

Juror SM was not challenged for cause. She was a deliberating juror for both the guilt phase and sentencing hearing.

At the post-conviction hearing, Kepros was only asked about Juror SM's questionnaire where she indicated that she had heard of the case in the media.

In Reynolds's opinion, Kepros's questioning of Juror SM did not meet the prevailing norms of a reasonably competent attorney because she did not shop Owens's mitigation. Notwithstanding her criticism, Reynolds acknowledged that Juror SM told Hower she was interested in all mitigation.

(iii) Analysis

It was evident during Juror SM's individual *voir dire* that she was interested in any mitigation evidence that might be presented. She said the death penalty was appropriate in some cases but that it would depend on the surrounding circumstances. Kepros started her questioning by asking Juror SM what she meant by that phrase. Juror SM said she wanted to know about the defendant's childhood and about any extenuating circumstances at the time of the incident. Juror SM said that to some extent people are products of their environment, which was an important theme of Owens's mitigation case. Juror SM said she would consider mitigation before making a decision on the appropriate punishment. In short,

Kepros's questioning of Juror SM regarding her willingness to consider mitigation fell within the wide range of professionally competent assistance required by *Strickland*.

(iv) Conclusion

The court concludes Kepros's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by Kepros's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror SM is **Denied**.

(m) Juror BW (No. 4788)

(i) Parties' Positions

Owens contends he was prejudiced by King's failure to adequately question Juror BW about her husband's murder and about her son's prosecution by the Arapahoe County District Attorney's Office.

(ii) Findings of Fact

Juror BW's relevant questionnaire answers are as follows:

1. Her husband was murdered in 1997.
2. Her son was convicted of felony menacing.

Juror BW's individual questioning occurred on March 21, 2008. The court referenced the murder of her husband, pointed to the nature of this case, and asked if she could be fair to both parties. Juror BW responded that she absolutely believed she could, causing the court to note that her mannerisms indicated she had given the situation serious thought. *Voir Dire* Tr. 58:6-21 (Mar. 21, 2008). Moving on to her son's menacing conviction, Juror BW confirmed that her son was prosecuted in Arapahoe County. When asked if she could be fair and impartial despite her son's involvement with the prosecutor's office, Juror BW

stated she could and observed that she had been on both sides. *Id*. at 58:22-25; 59:1-13. Juror BW acknowledged the need to be a fair juror and committed to not allowing any outside influences, such as publicity or public opinion, influence her. *Id*. at 63:2-9.

Warren asked whether Juror BW thought both the system and the prosecutor had treated her son fairly, and she responded that she thought he had been treated fairly. She noted that he was still serving a three-year probationary sentence. *Id*. at 66:15-25; 67:1-8. When Warren asked if anyone was prosecuted for her husband's murder, Juror BW responded that the defendant pled guilty. *Id*. at 67:13-18. When asked if she was comfortable with the disposition, Juror BW answered she was. *Id*. at 67:19-25; 68:1-7.

Juror BW was not challenged for cause. She deliberated at the guilt phase and sentencing hearing.

During his post-conviction testimony, King recalled being aware that Juror BW's questionnaire disclosed her husband's murder and her son's conviction by the Arapahoe County prosecutors. He could not recall whether he had a reason for not exploring these topics with her. King acknowledged that the team gave Juror BW a score of 40.75.

Reynolds opined that King was deficient because he never inquired about Juror BW's husband's murder or about her son's conviction. Reynolds did not view the court's questions about these topics as sufficient to allow King to not inquire.

(iii) Analysis

Owens's contention that he was prejudiced by King's failure to question Juror BW about her husband's murder and her son's conviction does not sufficiently credit her questionnaire and *voir dire*. Juror BW was unwavering in

her statements that her husband's murder and her son's conviction would not affect her ability to be a fair and impartial juror in this case. Both the court and King noted Juror BW's sincerity during her *voir dire*. As King noted, Juror BW had obviously given serious consideration to her responsibilities as a juror. Juror BW was confident in her ability to be fair to both parties and readily accepted her responsibility to maintain an open mind about sentencing. Juror BW was candid about those situations when she answered the court's and Warren's questions. As she noted to the court, her experiences in the criminal justice system had exposed her to the victim's perspective when her husband was killed and to the defendant's perspective when her son was prosecuted. Given this record, King's decision not to expend his time on questioning her further about her husband's murder or son's prosecution was within the wide range of professionally competent assistance required by *Strickland*.

(iv) Conclusion

The court concludes King's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by King's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror BW is **Denied**.

(n) Juror JS (No. 4744)

(i) Parties' Positions

Owens contends he was prejudiced by Kepros's failure to adequately question Juror JS about his mitigation views.

(ii) Findings of Fact

Juror JS's relevant questionnaire answers are as follows:

1. Juror JS selected answer 1(a) in the Potential Punishment Section indicating that the death penalty was appropriate in some cases, and he explained: "What I consider to be fair."
2. He answered "Yes" that he could follow the law and impose a life sentence, if he believed the death sentence was not appropriate.
3. He answered "Yes" that he could follow the law and impose a death sentence, if he believed the death sentence was appropriate.
4. He answered there was no reason why he could not be a fair and impartial juror.

Juror JS's individual questioning took place on March 18, 2008. Hower obtained a commitment from Juror JS to keep an open mind about the punishment if Owens was convicted of murder. *Voir Dire* Tr. 18:2-7 (Mar. 18, 2008). Hower asked if Juror JS wanted to know about the defendant before deciding his punishment, and he said he did. *Id*. at 19:13-19. Hower gave examples of mitigation, and Juror JS confirmed he would want to know the mitigating evidence before making any decision. *Id*. at 19:20-25; 20:1-5.

Kepros began her questioning of Juror JS with the stripping question and asked him what he thought would be an appropriate punishment. Juror JS responded that he would have had an opinion before this experience, but he now recognized that the law required him to keep an open mind on punishment. *Id*. at 23:2-9. When Kepros asked whether proof of an aggravating factor would cause him to lean one way or the other, Juror JS responded that he would be fair and impartial in deciding whether the prosecution proved the aggravating factor. *Id*. at 23:24-25; 24:1-19. Juror JS went on to explain that he now recognized the need to consider the person's background before making such a decision. *Id*. at 25:2-11.

He confirmed to Kepros that he believed people are a product of their environments to an extent. *Id*. at 25:16-18.

Juror JS acknowledged that while he was having second thoughts, he still believed he was capable of voting to impose the death penalty. *Id*. at 25:24-25; 26:1-7. When Kepros asked him what things he would consider as a reason for giving a life sentence, Juror JS responded that the person's environment, such as how he grew up and what he experienced in life to make him abnormal, would be possibilities. *Id*. at 27:5-10. At the end, Juror JS assured Kepros that a guilty verdict would not cause him to put the burden on the defense to prove that the death penalty was not the appropriate punishment. *Id*. at 27:11-19.

The parties did not challenge Juror JS for cause. Juror JS deliberated in the guilt phase and sentencing hearing.

Neither Kepros nor King were questioned about Juror JS's *voir dire* during their testimony at the post-conviction hearing.

Reynolds faulted Kepros for not lodging a challenge for cause against Juror JS because he was an ADP juror. Reynolds categorized Juror JS as an ADP juror because his answers suggested that he would impose the death penalty as long as there was a guilty verdict. In Reynolds's opinion, Kepros failed to probe his views and failed to ask for additional information about his son's drug conviction. Reynolds also opined that Kepros did not adequately shop her mitigation with Juror JS.

(iii) Analysis

Kepros covered mitigation in detail with Juror JS. Examination of the record shows that well over half of Kepros's *voir dire* was spent discussing mitigation with Juror JS. During Kepros's questioning, Juror JS repeatedly stated that he could not make a decision about punishment until he knew about the

defendant's background. When Kepros asked what type of mitigation he would be looking for, Juror JS suggested childhood information and life experiences that might have caused the defendant to be abnormal. Moreover, Juror JS stated he wanted to know about the defendant before making a punishment decision and indicated that he would consider many types of mitigation. Juror JS said that even if he found one or more aggravating factors were proved, he would still want to know about the defendant. He told Kepros that he was very conscious of the need to consider mitigation after guilt was established. Kepros recognized Juror JS's commitment to mitigation. On this record, Kepros's questioning of Juror JS fell within the wide range of professionally competent assistance contemplated by *Strickland*.

(iv) Conclusion

The court concludes Kepros's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by Kepros's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror JS is **Denied**.

(o) Juror LT (No. 5212)

(i) Parties' Positions

Owens contends he was prejudiced by Kepros's inadequate challenge for cause and by his trial team's subsequent failure to use a peremptory challenge to strike Juror LT based on her views of the death penalty. Owens further contends that the court's erroneous denial of his challenge for cause warrants reversal of his conviction and sentence.

(ii) Findings of Fact

Juror LT's relevant questionnaire answers are as follows:

1. She selected answer 1(a) in the Potential Punishment Section, indicating that the death penalty was appropriate in some cases, and she explained: "If it was a [heinous] crime; intent to kill."
2. She answered "Yes" that she could follow the law and impose a life sentence, if she believed the death sentence was not appropriate.
3. She answered "Yes" that she could follow the law and impose a death sentence, if she believed the death sentence was appropriate.
4. When asked if there was anything else she thought the court and parties should know about her attitude toward the death penalty, Juror LT wrote: "I am a Lutheran and believe in God & forgiveness but I also believe in our court system & if the death penalty if appropriate I would agree in it."
5. She answered there was no reason why she could not be a fair and impartial juror.

Juror LT's *voir dire* took place on March 24, 2008. Hower started with a modified version of the stripping question. He asked Juror LT if she could withhold her decision about punishment and utilize the four-step process to reach her decision. She said she thought she could. *Voir Dire* Tr. 16:5-17 (Mar. 24, 2008). She agreed that it was appropriate for the jury, *via* the four-step process, to consider both the crime and the perpetrator when deciding the appropriate punishment. *Id*. at 16:18-25.

After explaining mitigation, Hower followed up on his explanation by asking Juror LT if she wanted to know as much as possible about the convicted person before imposing a sentence, and she said she would but that the crime was the most important thing to her. *Id*. at 18:2-23. After Hower again asked if she was willing to consider mitigation, Juror LT said she was willing to listen to and

evaluate everything that might indicate the person deserved life imprisonment. *Id*. at 19:8-14.

Kepros began her questioning with the stripping question to which Juror LT responded that a life sentence would be sufficient punishment. Juror LT said that she would consider the crime, the circumstances surrounding the crime, and the background of the defendant. *Id*. at 21:5-25; 22:1-2. Kepros then asked her what kinds of cases were appropriate or inappropriate for the death penalty. Juror LT responded that possibly a child's murder would warrant a death penalty. *Id*. at 22:3-13. In response to Kepros's observation that Juror LT seemed more focused on the crime than the defendant's background for her sentencing decision, Juror LT answered she was unsure. *Id*. at 22:14-25; 23:1-8. Kepros used a second stripping question with Juror LT but included proven aggravation. When Kepros asked if life for that aggravated murder would ever be a sufficient penalty, Juror LT said it might be. Kepros followed up on that answer by asking Juror LT if her decision depended on how bad the crime was, and Juror LT answered that it would. *Id*. at 23:9-25. Kepros then asked if killing multiple people would make the crime more important to Juror LT than background information, and Juror LT said it probably would. *Id*. at 24:1-7.

Kepros moved to step two, explained the purpose of mitigation, and gave examples such as the victim did not suffer, the defendant's background, and mercy. Kepros asked Juror LT what kind of mitigation would cause her to give a life sentence. Juror LT noted that she was unsure until she heard the mitigation but stated that something in the person's childhood or background could be a reason for a life sentence. *Id*. at 24:8-23. Juror LT acknowledged that she would probably be starting with death as the correct punishment and would need something to change her mind. *Id*. at 24:24-25; 25:1-2.

When asking whether Juror LT would consider specific mitigation, Kepros offered as examples learning disabilities, a drug-addicted parent, an alcoholic parent, a loving family who wanted a relationship with an imprisoned defendant, and mercy. *Id*. at 25:3-19. Juror LT rejected learning disabilities and said she might consider the remaining examples. *Id*. In response to Kepros's question about the fairness of the default to life provision in the four-step process, Juror LT agreed it was fair and observed that unanimity was necessary for such a serious decision. *Id*. at 26:10-20.

Kepros challenged Juror LT for cause arguing that she was mitigation impaired. Kepros pointed out that Juror LT appeared hesitant to consider the traditional mitigation proposed by Hower. *Id*. at 28:7-18. Kepros also challenged Juror LT for cause based on her exposure to the recent news report referring to an inability to keep jurors safe. *Id*. at 28:19-21. Kepros pointed out that there was the possibility Juror LT would tell other jurors about this report thereby creating the inference Owens was responsible for their safety concerns. *Id*. at 28:19-25; 29:1-6. The court found Juror LT was not mitigation impaired because the defense questions about an aggravated murder naturally cause a juror to focus on the crime as opposed to information about the perpetrator. The court noted that Juror LT's responses to Kepros's questions about a holdout juror showed she was committed to the four-step process and to the deliberative process. The court denied the challenge for cause. *Id*. at 29:19-25; 30:1-14. Juror LT deliberated at the guilt phase and at step one of the sentencing hearing.

On June 3, 2008, during Owens's mitigation case, Juror LT advised the court that she had purchased four non-refundable airline tickets for her family with a June 14 departure date. Noting that the alternate jurors had sat through all the evidence and had followed the court's directions, King argued for excusing Juror

LT. Because the parties projected the sentencing hearing would end on June 13, King feared that if Juror LT remained on the jury, she and possibly other jurors would feel pressured or exert pressure on other jurors to reach a quick verdict to accommodate her departure date. Phase Two Tr. 6:9-15; 9:16-22; 11:13-21 (June 3, 2008 a.m.). The court excused Juror LT thereby making Juror EG a deliberating juror. *Id*. at 15:23-24; 17:24-25; 18:1-2.

At the post-conviction hearing, Kepros testified that she viewed Juror LT as an ADP juror because Juror LT said she would focus more on the crime than the defendant if there were multiple victims. She had no reason for not using a peremptory challenge on Juror LT because Juror LT was mitigation impaired and a burden shifter.

Reynolds viewed Juror LT as an ADP juror because Juror LT wrote that the death penalty would be appropriate for a heinous crime. In her opinion, Kepros was deficient for not asking Juror LT about this statement. Reynolds also thought that Kepros was deficient for not asking about Juror LT's questionnaire answer that she believed in the court system and that if the system determined death was appropriate, she could impose the penalty. She also faulted Kepros for not requesting more time to develop Juror LT's impairment.

(iii) Analysis

Examination of Juror LT's entire *voir dire* shows that she would not automatically vote for the death penalty. Juror LT put on her questionnaire that she believed the death penalty was appropriate in some cases. At the end of the questionnaire, Juror LT noted that she was a religious person who believed in forgiveness and in the court system. She went on to write that if the court system indicated death was appropriate, then she could impose that penalty.

During individual *voir dire*, Juror LT said she would withhold her decision on sentencing until the four-step process was completed. Juror LT said a life sentence would be acceptable for a non-aggravated murder and explained that she would make that decision based on the crime, circumstances of the crime, and the individual's background.

Juror LT was not unalterably in favor of the death penalty because she was open to both penalties, she would withhold any decision on punishment until the four-step process was completed, and she was receptive to mitigation. *See Morgan*, 504 U.S. at 734-35 (jurors who are unalterably in favor of the death penalty are substantially impaired because they cannot perform their duties in accordance with the law). Moreover, at the time, Kepros did not believe she had sufficient grounds to challenge Juror LT based on Juror LT's views of the death penalty. Accordingly, Kepros's decision not to challenge Juror LT for cause based on her views of the death penalty was within the wide range of professionally competent assistance contemplated by *Strickland*.

As to Owens's claim that the court erroneously denied Kepros's challenge for cause based on Juror LT's mitigation impairment, the claim is belied by the record. The court found that Juror LT was willing to consider the mitigation Owens's trial team intended to present. She was receptive to the defendant's childhood and background, to whether the defendant had a drug-addicted parent, and to whether the defendant had a loving family who wanted to maintain a relationship with the defendant while he was in prison. She was also receptive to mercy. Thus, Juror LT was not mitigation impaired. *See Eddings*, 455 U.S. at 114-15 (a sentencer in a capital case cannot refuse to consider any relevant mitigation evidence presented, including statutory and non-statutory mitigation). Accordingly, Owens's constitutional right to a fair and impartial jury was not

violated by Juror LT's presence on the jury in this case. *See Morrison*, 19 P.3d at 671 (defendant's right to an impartial jury is violated and the defendant's conviction must be reversed if a biased juror participated in deciding defendant's guilt as a result of the trial court's erroneous denial of the defendant's challenge for cause).

The court also notes that Juror LT deliberated with respect to guilt and phase one of the sentencing hearing before she was discharged. Thus, Juror LT did not participate in the phase two deliberations. Because she did not deliberate at phase two, her views did not influence the jury during phase two; thus, Owens was not prejudiced at phase two by Kepros's alleged deficient performance during jury selection with respect to Juror LT. Accordingly, there is no reasonable probability that, but for Kepros's alleged errors, the result of phase two of the sentencing hearing would have been different. *See Strickland*, 466 U.S. at 694 ("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.").

(iv) Conclusion

The court concludes Kepros's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by his trial team's alleged deficient performance. Additionally, Owens's right to a fair and impartial jury was not violated by the court's denial of the challenge for cause. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel and judicial error regarding the *voir dire* of Juror LT is **Denied**.

(p) Juror AW (No. 4813)

(i) Parties' Positions

Owens contends he was prejudiced by King's failure to adequately question Juror AW about her media exposure, which caused her to question her ability to presume Owens innocent, and by King's failure to adequately question Juror AW about her death penalty views.

(ii) Findings of Fact

Juror AW appeared for individual questioning on March 18. The parties neither challenged Juror AW for cause nor exercised a peremptory challenge against Juror AW. Shortly after the trial began, Juror AW informed the court that she would suffer a substantial hardship if she remained on the jury because her employer reneged on its agreement to pay Juror AW her full salary while she served on the jury. With the agreement of the parties, the court discharged Juror AW. Guilt Phase Tr. 152-155 (Apr. 10, 2008 p.m.).[362]

(iii) Analysis

Juror AW was originally seated as a deliberating juror, but she was excused from jury service shortly after the trial began and therefore did not participate in the guilt phase or sentencing hearing deliberations. Because she did not deliberate, Owens was not prejudiced by King's alleged deficient performance during jury selection with respect to Juror AW. Accordingly, there is no reasonable probability that, but for King's alleged failure to adequately question Juror AW, the result of the guilt phase or sentencing hearing would have been different. *See Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable

[362] Juror MF, the first alternate, replaced Juror AW.

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

(iv) Conclusion

The court concludes Owens failed to prove he was prejudiced by King's alleged deficient performance with respect to Juror AW. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror AW is **Denied**.

ii. Jurors Who Did Not Serve on the Jury

(a) Juror JVA (No. 4872)[363]

(b) Juror SL (No. 4536)[364]

(c) Juror HL (No. 5068)[365]

(d) Juror AR (No. 4601)[366]

(e) Juror AH (No. 5093)[367]

(f) Juror BA (No. 4789)

(i) Parties' Positions

Owens contends he was prejudiced by King's failure to challenge Juror BA for cause because she was mitigation impaired.

(ii) Findings of Fact

Juror BA's relevant questionnaire answers are as follows:

1. She selected answer 1(a) in the Potential Punishment Section, indicating that the death penalty was appropriate in some cases.

[363] Owens withdrew this claim in SOPC-314.
[364] Owens withdrew this claim in SOPC-314.
[365] Owens withdrew this claim in SOPC-314.
[366] Owens withdrew this claim in SOPC-314.
[367] Owens withdrew this claim in SOPC-314.

2. She answered "Yes" that she could follow the law and impose a life sentence, if she believed the death sentence was not appropriate.
3. She answered "Yes" that she could follow the law and impose a death sentence, if she believed the death sentence was appropriate.
4. She answered there was no reason why she could not be a fair and impartial juror.

Juror BA's individual questioning session occurred on March 24, 2008. After explaining the purpose of aggravation and the requirement for the prosecution to prove aggravation to a unanimous jury, Tomsic asked if the default to life provision at step one seemed appropriate to Juror BA, and Juror BA said it did. *Voir Dire* Tr. 153:19-25; 154:1-2 (Mar. 24, 2008). Tomsic then explained the purpose of mitigation and gave some examples before asking if Juror BA was willing to listen to mitigation before making her decision on punishment, and she said she would. In response to a follow-up question, Juror BA said mitigation was important to her. *Id*. at 154:22-25; 155:1-14. Juror BA indicated she could do the weighing process at step three and could sign a death verdict at step four, if she was convinced it was appropriate. *Id*. at 155:15-25; 156:1-25; 157:1-9.

King asked Juror BA the stripping question before asking her if she preferred one punishment to the other. Juror BA answered that she did not. *Id*. at 158:20-25; 159:1-25; 160:1-16. King took Juror BA to step one and asked if a life sentence would be an adequate sentence if the jury was satisfied that at least one aggravating factor had been proved, and she said it could be. *Id*. at 161:13-20. King then asked what Juror BA would like to know about the crime or the perpetrator in order to decide the penalty, and she responded that she wanted information about the person. *Id*. at 161:21-25; 162:1-7. Juror BA said she wanted to know the circumstances of the perpetrator's upbringing but rejected the notion

that people are the products of their environments. *Id*. at 162:12-20. She rejected learning disabilities and lesser mental health problems as mitigation but accepted an alcoholic or drug-addicted parent as mitigation. *Id*. at 163:5-18. Juror BA told King that she would listen to any mitigation presented and consider it in making her decision. *Id*. at 164:11-19.

The parties did not challenge Juror BA for cause. Owens's trial team struck Juror BA with its eleventh peremptory challenge. *Voir Dire* Tr. 164:24-25 (Apr. 7, 2008 p.m.).

At the post-conviction hearing, King noted that Juror BA rejected a learning disability as mitigation. He could not recall whether her answer was concerning to him at the time and what his reasons were for not challenging her. He also acknowledged that the team gave Juror BA a Colorado Method score of 60.5, which meant that she was an unacceptable juror. In King's view, a score of 60.5 indicates he should have challenged Juror BA for cause, but he acknowledged that he was working under time constraints and did the best he could at the time.

Reynolds did not opine at the post-conviction hearing regarding King's performance during Juror BA's *voir dire*.

(iii) Analysis

King's *voir dire* of Juror BA, when combined with her questionnaire and the prosecution's *voir dire*, demonstrates that she was not mitigation impaired. King established that Juror BA wanted to know about the person who committed the murder. Although she rejected learning disabilities as possible mitigation, she accepted an alcoholic or drug-addicted parent. Thus, Juror BA was not mitigation impaired under *Eddings*. *See Eddings*, 455 U.S. at 114-15 (consideration of mitigation requires the juror to evaluate the mitigation and determine its significance to the juror). Because there were no grounds on which King could

challenge Juror BA for cause, his decision not to challenge her fell within the wide range of professionally competent assistance required by *Strickland*.

(iv) Conclusion

The court concludes King's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by King's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror BA is **Denied**.

(g) Juror LB (No. 4511)

(i) Parties' Positions

Owens contends he was prejudiced by Kepros's failure to challenge Juror LB for cause based on her views of the death penalty.

(ii) Findings of Fact

Juror LB's relevant questionnaire answers are as follows:

1. She selected answer 1(a) in the Potential Punishment Section, indicating that the death penalty was appropriate in some cases.
2. Juror LB answered "Yes" that she could follow the law and impose a life sentence, if she believed the death sentence was not appropriate.
3. She answered "Yes" that she could follow the law and impose a death sentence, if she believed the death sentence was appropriate.
4. When asked if she had an opinion, based on media coverage, about whether Owens should receive the death penalty, she answered "No."
5. When asked if she could set aside any opinion, based on media coverage, about whether Owens should receive the death penalty, she answered "Yes."

6. She answered there was no reason why she could not be a fair and impartial juror.

Juror LB's individual questioning occurred on March 11, 2008. In response to the court's question, Juror LB stated she was willing to listen to both parties and keep an open mind on the death penalty. *Voir Dire* Tr. 6:20-25 (Mar. 11, 2008).

Kepros started her questioning with the stripping question. After describing the murder as cold-blooded, she asked what the appropriate punishment should be, and Juror LB answered that the death penalty was probably appropriate. *Id*. at 7:5-21. In a follow-up question, Kepros asked if there was a type of first-degree murder where a life sentence would be acceptable, and Juror LB responded that an accidental killing or heat of passion murder would warrant a life sentence. *Id*. at 7:22-25; 8:1-2. She added that killing for no reason deserved the death penalty. *Id*. Kepros clarified that she was not asking about an accidental murder or one involving heat of passion but rather a deliberate murder, and Juror LB confirmed that a deliberate murder deserved the death penalty. *Id*. at 8:3-7. Kepros then explained aggravation as something that makes intentional murder even worse and asked Juror LB if, having found aggravation, she would view the death penalty as the only suitable punishment. Juror LB answered that she would, but qualified her answer by noting that it would depend on all the evidence presented. *Id*. at 8:21-25; 9:1-3.

Kepros explained mitigation and shopped relevant mitigation before asking Juror LB if she would be leaning toward a death penalty at this stage and require the defense to convince her that a life sentence was appropriate. *Id*. at 9:10-25; 10:1-18. Juror LB answered that she would not be leaning either way until she had heard everything and discussed it with her fellow jurors. *Id*. When Kepros asked if she had given much thought to the death penalty, Juror LB responded that she

had not except for thinking that she would probably want it imposed if anyone ever murdered her family. *Id*. at 12:4-16. She assured Kepros that she would not base her sentencing decision on what the victim's family wanted. *Id*. at 12:17-25; 13:1.

Hower started by asking Juror LB if she still believed that the death penalty was only appropriate in some cases and if she wanted to hear all of the evidence before making that decision. Juror LB answered that he was correct. *Id*. at 13:7-23. After confirming that she could perform step one, Juror LB confirmed to Hower that she wanted to know the mitigation pertaining to the convicted person before deciding on the death penalty. *Id*. at 14:23-25; 15:1-25; 16:1-3. After indicating that she understood and could perform the weighing process at step three and the selection process at step four, Juror LB told Hower that she could sign a death verdict but only if she truly believed it was appropriate. *Id*. at 16:6-25; 17:1-25; 18:1-4.

The parties did not challenge Juror LB for cause. Owens's trial team used its fifth peremptory challenge to strike Juror LB. *Voir Dire* Tr. 161:18-19 (Apr. 7, 2008 p.m.).

At the post-conviction hearing, Kepros opined that Juror LB was an ADP juror based on her answers to the stripping question and that she was mitigation impaired because she rejected some of the mitigation proffered to her. Kepros acknowledged that Hower rehabilitated Juror LB on mitigation thereby lessening her status as an ADP juror. Last, Kepros acknowledged that Middleton did not think a challenge for cause was appropriate for Juror LB. After the individual questioning session, the team scored Juror LB at 58.

Reynolds opined that Kepros's *voir dire* of Juror LB was deficient because she had developed a valid challenge for cause against Juror LB and did not make it. In Reynolds's view, Juror LB's focus on the death penalty in response to the

stripping question and her rejection of some of the relevant mitigation in this case made her an unqualified juror. Reynolds also faulted Kepros for not challenging Juror LB for cause during the general questioning session.

(iii) Analysis

Juror LB answered on her questionnaire that the death penalty was appropriate in some cases. Her view that a life sentence is appropriate for an accidental killing does not support Owens's contention that she was an ADP juror. Rather, it demonstrates her lack of familiarity with the criminal justice system. Juror LB was committed to hearing all of the evidence before she made a decision on the appropriate sentence. She said she would not lean toward either sentence until she considered all of the evidence presented and discussed the evidence with her fellow jurors. She also reiterated to Hower that she believed the death penalty was appropriate only in some cases. Juror LB's openness to either punishment indicates she was not unalterably in favor of the death penalty under *Morgan*. *See* 504 U.S. at 734-35 (jurors who are unalterably in favor of the death penalty are substantially impaired because they cannot perform their duties in accordance with the law). Thus, Kepros's decision not to challenge Juror LB for cause was within the wide range of professionally competent assistance required by *Strickland*.

(iv) Conclusion

The court concludes Kepros's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by Kepros's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror LB is **Denied**.

(h) Juror KF (No. 5158)

(i) Parties' Positions

Owens contends he was prejudiced by Kepros's failure to challenge Juror KF based on appropriate grounds. Owens claims that Kepros's challenge based on mitigation impairment was deficient because the more viable grounds for a challenge for cause were Juror KF's exposure to pretrial publicity and her inability to consider a life sentence.

(ii) Findings of Fact

Juror KF's relevant questionnaire answers are as follows:

1. She recalled news reports about this case from the television and newspapers, including Owens's arrest.
2. She wrote: "I recognize the names of the deceased, the men charged with their murder and that the murders were done to prevent the deceased from testifying against the ones who killed them."
3. When asked if she had formed an opinion about Owens's guilt or innocence, Juror KF circled "No" and wrote: "I don't have enough information."
4. She selected answer 1(a) in the Potential Punishment Section, indicating that the death penalty was appropriate in some cases, and she explained: "My beliefs are the ones I was raised to have and I still feel are valid."
5. Juror KF answered "Yes" that she could follow the law and impose a life sentence, if she believed the death sentence was not appropriate.
6. She answered "Yes" that she could follow the law and impose a death sentence, if she believed the death sentence was appropriate.

7. When asked if she had formed an opinion, based on media coverage, about whether Owens should receive the death penalty, she answered "Yes" and wrote: "If he is guilty beyond a shadow of a doubt, I feel he deserves the death penalty."
8. When asked if she could set aside any opinion, based on media coverage, about whether Owens should receive the death penalty, she answered "Yes" and wrote: "I believe in our justice system and will follow the law and assume innocence until guilt is proven by the facts of the case."
9. She answered there was no reason why she could not be a fair and impartial juror.

Juror KF's individual questioning session took place on March 19, 2008. The court explained the need for jurors to presume Owens innocent and asked Juror KF if she would presume Owens innocent. She said she would. *Voir Dire* Tr. 28:3-22; 30:2-19 (Mar. 19, 2008). Next, the court confirmed that she had knowledge of the case from media exposure, and Juror KF responded she had heard a television report about jury selection. *Id*. at 30:20-25; 31:1-5. In response to the court's follow-up questions, Juror KF committed to avoiding all future media reports about the case and to not allowing any media reports to influence her. *Id*. at 31:6-18.

When questioned by Hower, Juror KF advised that she had not fully digested the four-step process because she thought there would be more time to go over it. Although Juror KF was unaware that a jury decided punishment in a capital case, she thought a jury making the decision was a good idea and would be able to utilize the four-step process. *Id*. at 33:21-25; 34:1-25; 35:1. Hower referred Juror KF to her questionnaire where she wrote that Owens deserved the death penalty if

he was guilty beyond a shadow of a doubt, but how she also answered that the death penalty was only appropriate in some cases. *Id*. at 35:2-12. He then asked Juror KF if she meant that any person convicted of first-degree murder should automatically receive the death penalty. *Id*. at 35:13-17. Juror KF responded that she was unaware of the four-step process when she completed the questionnaire and now needed to know all the facts for the mitigating and aggravating factors. *Id*. at 35:18-20. She further noted that her answer in the questionnaire was not absolute. *Id*. at 35:22-23.

After explaining that jurors cannot decide punishment based solely on a first-degree murder conviction, Hower asked Juror KF if she could keep an open mind on punishment. She said she could and added that jurors were under an obligation to follow the process. *Id*. at 36:3-25; 37:1-12. She said she would keep an open mind if aggravation were proved. *Id*. at 37:14-25; 38:1-13. After explaining mitigation and giving some examples, Hower asked Juror KF if this was information she wanted to know before making her sentencing decision, and she said it was. *Id*. at 38:19-25; 39:1-2. After explaining the weighing process at step three, Hower asked Juror KF if she could still keep an open mind on sentencing even if the jury determined that the mitigation did not outweigh the aggravation, and she said she could. *Id*. at 39:25; 40:1-9.

Kepros began her questioning by asking what type of cases Juror KF thought deserved the death penalty. Juror KF responded that the death penalty was warranted when there was proof beyond a shadow of a doubt that the defendant had a total disregard for the lives taken, was not provoked, had shown no remorse, and there was no evidence that rehabilitation would be effective. *Id*. at 42:8-17. Kepros then asked the stripping question, and Juror KF responded by asking if Kepros was asking her about a preliminary feeling before going into the next step.

Id. at 42:21-25; 43:1-14. Kepros responded that she appreciated Juror KF's willingness to adhere to the four-step process and to keep an open mind but wanted to know if Juror KF was leaning one way or the other as she went into the four-step process. *Id*. at 43:15-19. Juror KF answered that she was probably leaning toward the death penalty. *Id*. at 43:20-21.

Kepros gave the hypothetical of proven aggravation and asked what effect such a finding would have on Juror KF's views. Juror KF answered that it was like a chart with two columns, and one column was filling up with aggravation while the other column with mitigation was remaining empty. *Id*. at 44:9-15. In Juror KF's view, this imbalance, when combined with a finding of guilt, would cause her to view the death penalty as warranted. *Id*. at 43:25; 44:1-24.

Proceeding to step two, Kepros confirmed that Juror KF viewed a potential for rehabilitation as viable mitigation. *Id*. at 45:11-14. Juror KF also accepted the individual's childhood environment, education level, and overall environment as viable mitigation. She added that she would not give much consideration to rehabilitation potential for a 35-year old person with a pattern of bad behavior. *Id*. at 46:1-4. In a follow-up question, Juror KF said that if rehabilitation was not a possibility, then the death penalty might be the more appropriate punishment. *Id*. at 46:5-10.

When Kepros asked Juror KF whether a defendant's age would be viable mitigation for her, she said youthful age would not because it meant the defendant would have a poor quality of life knowing he would never be paroled. Kepros asked if that meant Juror KF viewed youth as a reason to impose the death penalty, and she said it did. *Id*. at 46:11-25; 47:1-6. Juror KF told Kepros that she thought the default to life provision at step four was appropriate because it allowed each juror to examine the process and the facts of the case thoroughly. *Id*. at 47:7-25;

48:1-2. Kepros followed up on this answer by asking whether Juror KF would try to persuade a holdout juror for life to change his/her vote. *Id*. at 48:3-9. Juror KF responded that she wanted to discuss the other juror's reasons in order to determine if the juror misunderstood something about the facts or the law and added that if the juror was committed to a life sentence, she would respect that decision. *Voir Dire* Tr. 48:3-23 (Mar. 19, 2008).

Kepros challenged Juror KF for cause. *Id*. at 49:13-14. She argued that Juror KF was mitigation impaired because she used mitigation as aggravation. *Id.* at 49:14-15. Kepros contended that Juror KF would use childhood background to impose a death penalty because, in her mind, some children who suffered abusive childhoods could not be rehabilitated. *Id*. at 49:13-24. Kepros pointed out that mitigation can only be used to give a life sentence, and Juror KF was mitigation impaired if she was using age to impose a death sentence. *Id*. at 50:21-25; 51:1-2.

The court noted that while the attorneys were employing the legal concepts of aggravation and mitigation, the jury had to decide on an individual basis what is aggravation and mitigation. *Id*. at 51:3-7. The court found that Juror KF was a thoughtful juror who was committed to the four-step process and was committed to keeping an open mind throughout the process. *Id*. at 51:8-16. The court further found that she had expressed a desire to hear evidence about the defendant's potential from appropriate experts. *Id*. at 51:9-13. The court ruled that while Juror KF's view that youthful age could result in a more severe penalty was unusual, it did not make her mitigation impaired. *Id*. at 51:16-21. The court observed this was an issue for the attorneys to address in the presentation of their evidence and arguments to the jury. *Id*. at 51:21-24. In conclusion, the court found that Juror KF was not predisposed to imposing the death penalty and was qualified. *Id*. at 51:3-25; 52:1-3.

Juror KF returned for general questioning on April 7, 2008. Owens's trial team struck Juror KF from the jury with its fourteenth peremptory challenge. *Voir Dire* Tr. 170:8-15 (Apr. 7, 2008 p.m.).

At the post-conviction hearing, Kepros faulted the court's and her own *voir dire* on pretrial publicity while acknowledging that because Juror KF had indicated she could put her media exposure aside, it would have been difficult to successfully challenge her for cause on media. Kepros appropriately employed the Colorado Method and used it to develop Juror KF's possible mitigation impairment. Despite Juror KF's assertion to Hower that she accepted the concept of mitigation and the specific mitigation offered by him, Kepros did not want her on the jury because she used youth as an aggravating factor. Kepros faulted herself for not trying to develop additional grounds at the general questioning session to challenge Juror KF.

Reynolds faulted Kepros for not challenging Juror KF as an ADP juror. Reynolds based her opinion on Juror KF's statement in the questionnaire that the death penalty was acceptable if guilt was proved beyond a shadow of a doubt and her view that a lack of rehabilitation potential warranted the death penalty. While acknowledging Kepros challenged Juror KF as mitigation impaired, Reynolds faulted Kepros for not pursuing the extent of Juror KF's media exposure in order to develop another basis for challenging her.

(iii) Analysis

Juror KF viewed the death penalty as appropriate for some, but not all, cases. Juror KF committed to setting aside her view, based on media coverage, that the death penalty was appropriate if the prosecution proved the defendant was guilty beyond a shadow of a doubt. She said she would set aside her view because

she believed in the justice system. She said she would follow the law and presume Owens to be innocent.

Juror KF's questionnaire reflects a person with minimal exposure to the criminal justice system. Juror KF's lack of knowledge about the criminal justice system, especially the process for determining capital punishment, was obvious. During Hower's questioning, Juror KF explained that she gave her answer about death being appropriate if guilt was proved beyond the shadow of a doubt before she realized the jury had to decide the punishment. She acknowledged that she understood that the jury had to consider both aggravation and mitigation. She was committed to the four-step process, understood it was necessary for jurors to keep an open mind throughout the sentencing process, and wanted to hear mitigation.

At one point, Juror KF told Kepros that she was leaning toward the death penalty after a guilty verdict and after finding aggravation. She explained her answer by noting that she viewed the sentencing hearing as two columns – one with aggravation and the other with mitigation. She explained her view that the aggravation column was filling up quickly and that there was nothing in the mitigation column. Juror KF's answer suggests she was committed to the four-step process and was thinking about the weighing process at step three. After learning about the four-step process, Juror KF was not unalterably in favor of the death penalty. *See Morgan*, 504 U.S. at 734-35 (jurors who are unalterably in favor of the death penalty are substantially impaired because they cannot perform their duties in accordance with the law). Because Juror KF was not *Morgan*-impaired, Kepros did not have a reason to challenge Juror KF either on those grounds or on pretrial publicity. Therefore, her performance fell within the wide range of professionally competent assistance required by *Strickland*.

(iv) Conclusion

The court concludes Kepros's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by Kepros's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror KF is **Denied**.

(i) Juror GF (No. 4758)

(i) Parties' Positions

Owens contends he was prejudiced by Kepros's failure to challenge Juror GF for cause because Juror GF was mitigation impaired.

(ii) Findings of Fact

Juror GF's relevant questionnaire answers are as follows:

1. Juror GF selected answer 1(a) in the Potential Punishment Section indicating that the death penalty was appropriate in some cases, and he explained: "It is a long time belief through education and peace within myself that it is warranted in some cases."
2. He answered "Yes" that he could follow the law and impose a life sentence, if he believed the death sentence was not appropriate.
3. He answered "Yes" that he could follow the law and impose a death sentence, if he believed the death sentence was appropriate.
4. When asked if he had an opinion, based on media coverage, about whether Owens should receive the death penalty, he answered "No."
5. When asked if he could set aside any opinion, based on media coverage, about whether Owens should receive the death penalty, he answered "Yes." He also wrote: "I believe that is what our criminal

justice system is based on and everyone has the right to a fair trial based on the evidence in the case."

6. He answered there was no reason why he could not be a fair and impartial juror.

Juror GF's individual questioning session occurred on March 21, 2008. Kepros posed the stripping question to Juror GF and asked him if a life sentence was appropriate. He answered that it may be appropriate, but he would need more evidence. *Voir Dire* Tr. 92:2-25 (Mar. 21, 2008). Kepros clarified that Juror GF was seeking additional evidence on both the crime and the perpetrator. *Id*. at 93:1-6. When asked if life is an acceptable punishment for a proven aggravated murder, Juror GF said it was. *Id*. at 94:10-16.

After having mitigation and its purpose explained to him, Juror GF told Kepros that no crime was so heinous that he would not want to know the mitigation. *Id*. at 95:7-13. In a follow-up question, Kepros asked how important mitigation would be, and Juror GF said a person's upbringing, surroundings, and similar circumstances would be small factors for him, and the heinous crime was most important to him. *Id*. at 95:14-25; 96:1. In response to Kepros's questions, Juror GF said he agreed with Colorado law that no specific type of murder required the death penalty because the jury had to consider aggravation and mitigation. *Id*. at 96:2-25; 97:1-9. Juror GF rejected learning disabilities, a loving family who wanted a relationship with the defendant, and a drug-addicted parent as mitigation. He explained that mitigation would play a role in his assessment, but he would focus more on aggravation. *Id*. at 97:15-25; 98:1-12.

Hower gave Juror GF a hypothetical involving a battered woman who killed her abuser. Hower asked Juror GF if, based only on the evidence in the guilt phase, he could decide which punishment was appropriate, and he said he could

not. Juror GF stated he could keep an open mind on punishment and still wanted to hear mitigation. *Id*. at 100:3-25; 101:1-2. In response to a follow-up question, Juror GF committed to keeping an open mind on punishment if the jury found Owens guilty of first-degree murder and if the prosecution proved an aggravating factor. *Id*. at 102:2-14. After Hower explained how jurors are required to consider mitigation and determine its weight, Juror GF indicated he would consider and weigh mitigation, such as a parent who loved the defendant and an abusive childhood. *Id*. at 102:15-25; 103:1-17. Juror GF told Hower that at step four he was capable of making the necessary decision and would not hesitate to impose a life sentence if he thought it was appropriate. *Id*. at 105:1-4.

The parties did not challenge Juror GF for cause, and he returned for general questioning on April 7, 2008. Owens's trial team used its seventeenth peremptory challenge to strike Juror GF from the jury. *Voir Dire* Tr. 181:4-14 (Apr. 7, 2008 p.m.).

At the post-conviction hearing, Kepros acknowledged that she shopped mitigation that the team intended to present and Juror GF rejected it. She also acknowledged that Hower rehabilitated Juror GF regarding mitigation. As a result, no one on the team thought a challenge for cause was warranted. Instead, the team exercised a peremptory challenge to strike Juror GF from the jury.

Reynolds faulted Kepros for not challenging Juror GF for cause based on his rejection of relevant mitigation. She also faulted Kepros for not establishing whether Juror GF could consider and give effect to the relevant mitigation. Reynolds acknowledged that Kepros appropriately utilized the Colorado Method to develop Juror GF's mitigation impairment. She disagreed with the notion that Hower rehabilitated Juror GF on mitigation because Hower used non-relevant

mitigation. She also faulted Kepros for not objecting to Hower's use of non-relevant mitigation.

(iii) Analysis

Hower discussed mitigation at length with Juror GF, and at the end of Hower's questioning, Juror GF was committed to considering all mitigation presented. Thus, Juror GF was not mitigation impaired under *Eddings*. *See* 455 U.S. at 114-15 (consideration of mitigation requires the juror to evaluate the mitigation and determine its significance to the juror). On this record, Kepros's decision not to challenge Juror GF for cause based on mitigation impairment fell within the wide range of professionally competent assistance required by *Strickland*.

(iv) Conclusion

The court concludes Kepros's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by Kepros's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror GF is **Denied**.

(j) Juror RR (No. 5221)

(i) Parties' Positions

Owens contends he was prejudiced by Kepros's failure to adequately question Juror RR about the murders of his two friends and about mitigation.

(ii) Findings of Fact

Juror RR's relevant questionnaire answers are as follows:

1. Two of his friends were murdered during the 1970s.

2. Juror RR selected answer 1(a) in the Potential Punishment Section indicating that the death penalty was appropriate in some cases, and he explained: "It is Biblical."
3. He answered "Yes" that he could follow the law and impose a life sentence, if he believed the death sentence was not appropriate.
4. He answered "Yes" that he could follow the law and impose a death sentence, if he believed the death sentence was appropriate.
5. He answered there was no reason why he could not be a fair and impartial juror.

Juror RR's individual questioning occurred on March 24, 2008. Kepros began by focusing Juror RR on the punishment for a deliberate murder, and he responded that he did not know if life or death was a sufficient penalty. *Voir Dire* Tr. 254:13-25; 255-257; 258:1-6 (Mar. 24, 2008). Kepros pressed on trying to determine whether Juror RR would consider mitigation and, at one point, he said he would because the mind was a strange thing. *Id*. at 258:15-25; 259:1-25; 260:1-2.

Warren asked Juror RR if he could withhold a decision on punishment until step one was completed, and he indicated that he could. *Id*. at 263:19-25; 264:1-25; 265:1-2. Juror RR said that he could vote for death but only if he felt it was appropriate, and he added that he would vote for life if he believed death was inappropriate. *Id*. at 267:7-25.

The parties did not challenge Juror RR for cause, and he returned for general questioning on April 7, 2008. Owens's trial team struck him from the jury using its ninth peremptory challenge. *Voir Dire* Tr. 163:14-23 (Apr. 7, 2008 p.m.).

At the post-conviction hearing, Kepros testified that she wanted to challenge Juror RR for cause. She was concerned by the biblical reference in his

questionnaire because it signaled that he was a possible ADP juror. She acknowledged asking him about the biblical reference but noted that she did not fully understand his answer. She noted that Juror RR was a difficult juror to communicate with, and she was not sure if he understood many of her questions. She recognized that Warren had taken Juror RR through the four-step process, including an explanation of mitigation. She admitted that no one on the team suggested there were grounds for challenging Juror RR for cause.

Reynolds conceded that it was difficult to obtain understandable answers from Juror RR. She faulted Kepros for not asking the court to intervene to determine whether Juror RR was mentally deficient. In her view, his ambiguous answers indicated that he was an ADP juror, and she faulted Kepros for not challenging him on that basis. Reynolds also recognized that because Juror RR's answers were obscure, they did not unequivocally support a challenge for cause.

(iii) Analysis

Juror RR was a difficult juror because his answers were ambiguous. As Reynolds conceded, the ambiguity of Juror RR's answers would have made it very difficult for Kepros to articulate a challenge for cause. *See Dunlap*, 173 P.3d at 1087 (whether the juror will be substantially impaired rarely appears with clarity on the printed appellate record). Because of Juror RR's ambiguous answers, Kepros's decision not to challenge Juror RR for cause was reasonable under *Strickland*.

As to Kepros's failure to ask Juror RR about the murder of his friends 30 years prior, Owens failed to prove that Kepros's decision not to inquire into that topic was deficient performance under *Strickland*.

(iv) Conclusion

The court concludes Kepros's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by Kepros's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror RR is **Denied**.

(k) Juror HT (No. 5121)

(i) Parties' Positions

Owens contends he was prejudiced by King's failure to develop a record establishing that Juror HT was a *Morgan*-excludable juror. Owens also contends he was prejudiced by King's failure to question Juror HT about her parents' employment in law enforcement.

(ii) Findings of Fact

Juror HT's relevant questionnaire answers are as follows:

1. Her father is a retired police officer, and her stepmother is an investigator.
2. Juror HT selected answer 1(a) in the Potential Punishment Section indicating that the death penalty was appropriate in some cases.
3. She answered "Yes" that she could follow the law and impose a life sentence, if she believed the death sentence was not appropriate.
4. She answered "Yes" that she could follow the law and impose a death sentence, if she believed the death sentence was appropriate.
5. When asked if she had an opinion, based on media coverage, about whether Owens should receive the death penalty, she answered "No."

6. When asked if she could set aside any opinion, based on the media, about whether Owens should receive the death penalty, she answered "Yes."
7. She answered there was no reason why she could not be a fair and impartial juror.

Juror HT's questioning occurred on March 11, 2008, with the court obtaining her commitment not to allow media exposure to influence her and to avoid all media reports about the trial. *Voir Dire* Tr. 183:21-25 (Mar. 11, 2008). Juror HT confirmed that the death penalty, in her view, was only appropriate in some cases. She also stated that she could impose the death penalty given the correct evidence. *Id*. at 186:11-18.

Warren started out by explaining that a deliberate murder does not warrant the death penalty unless aggravation is proved. Warren provided examples of aggravation and asked Juror HT if she could determine whether the prosecution had proved aggravation. She said she could. *Id*. at 188:13-25; 189:1-15. Next, Warren gave examples of mitigation, including mercy, before asking Juror HT if she was willing to consider mitigation, and she said she was. *Id*. at 189:16-25; 190:1-6. Warren and Juror HT discussed the effects of a good upbringing versus a bad upbringing, and Juror HT stated she would consider the person's background. *Id*. at 190:16-25; 191:1-8. Warren noted that Juror HT paused when asked if she could sign a death verdict, and Juror HT explained that she could do it but that it would be an emotional moment for her. *Id*. at 191:23-25; 192:1-11.

King started his questioning by asking Juror HT how she felt about having to make a life or death decision for someone else. Juror HT said that she could impose the death penalty if things such as the person's upbringing and the facts of the case showed death was the proper decision. *Id*. at 192:14-25; 193:1-12. King

then used the stripping question, describing the murder as cold-blooded, before asking if the death penalty was the only acceptable penalty for Juror HT, and she said it was. *Id*. at 193:21-25; 194:1-11.

The court pointed out to Juror HT that she told Warren she would consider mitigation such as mercy and upbringing, but she told King that a cold-blooded murder required the death penalty. *Id*. at 194:13-22. The court asked Juror HT to explain her answers. Juror HT acknowledged that her answers were contradictory and stated that this was all new to her. *Id*. at 194:25; 195:1-10. The court followed up by asking if she would consider mitigation even if it was a cold-blooded murder, and she said she would. *Id*. at 195:11-17. Juror HT then confirmed that she would do the weighing process at step three and decide whether mitigation was outweighed by aggravation. *Id*. at 195:18-25; 196:1-2.

King challenged Juror HT for cause because she defaulted to the death penalty. King argued that Juror HT believed mitigation was only a defense to the crime and that she believed death was appropriate when a jury returns a guilty verdict for murder. He argued she was a *Morgan*-excludable juror. *Id*. at 196:10-25; 197:1-22. The court denied the challenge. *Id*. at 199:6-25; 200:1.

Juror HT returned for general questioning on April 7, 2008. Owens's trial team used its second peremptory challenge to strike Juror HT from the jury. *Voir Dire* Tr. 160:2-6 (Apr. 7, 2008 p.m.).

At the post-conviction hearing, King testified that Juror HT's parents were involved in law enforcement, but he did not recall his thought processes at the time and, therefore, did not know why he had not asked about her parents. He also acknowledged that his questioning session was short because he believed that he had enough information to challenge Juror HT for cause and wanted to avoid any rehabilitation. King recognized that the court rehabilitated Juror HT, but he still

pursued his challenge for cause. King noted this was only the second day of individual *voir dire* and the trial team was testing the court to determine the court's standard for challenging a juror. Under the Colorado Method, the team scored Juror HT as 67, meaning they viewed her as an ADP juror.

Reynolds approved of King's use of the stripping question because it identified Juror HT as an ADP juror but then faulted King because the Colorado Method requires the attorney to continue to probe the juror's views on the death penalty. She also faulted King for not requesting more time after the court rehabilitated Juror HT. However, Reynolds admitted that King did not anticipate the court's rehabilitation of Juror HT. Reynolds also viewed King as deficient for not asking Juror HT about her parents and their law enforcement connections. Reynolds agreed that King's decision to stop questioning was a strategic decision.

(iii) Analysis

Juror HT stated in her questionnaire that she had not formed any opinions about whether Owens deserved the death penalty and that she was capable of imposing either sentence. King utilized the stripping question and described the deliberate murder as cold-blooded before employing a leading question to ask Juror HT if death was the only acceptable penalty. When she said it was, King stopped his questioning and challenged her for cause. In King's mind, Juror HT's answers were sufficient to substantiate his challenge for cause. King's decision to challenge her for cause at that juncture fell within the wide range of professionally competent assistance under *Strickland*.

As to King's failure to ask Juror HT about her father's and stepmother's employment in law enforcement, Owens failed to prove that King's decision not to inquire into that topic was deficient performance under *Strickland* and that it prejudiced him.

(iv) Conclusion

The court concludes King's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by King's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror HT is **Denied**.

(l) Juror NM (No. 4868)

(i) Parties' Positions

Owens contends he was prejudiced by Kepros's failure to adequately question Juror NM about her views of mitigation and by Kepros's failure to challenge Juror NM for cause.

(ii) Findings of Fact

Juror NM's relevant questionnaire answers are as follows:

1. Juror NM selected answer 1(a) in the Potential Punishment Section indicating that the death penalty was appropriate in some cases, and she explained: "My life experiences."
2. She answered "Yes" that she could follow the law and impose a life sentence, if she believed the death sentence was not appropriate.
3. She answered "Yes" that she could follow the law and impose a death sentence, if she believed the death sentence was appropriate.
4. She answered there was no reason why she could not be a fair and impartial juror.

Juror NM's individual questioning occurred on April 5, 2008. Kepros utilized the stripping question to ask Juror NM if a life sentence would ever be appropriate. *Voir Dire* Tr. 122:8-25; 123:1-5 (Apr. 5, 2008 a.m.). Juror NM responded that Kepros's hypothetical did not give her all the information she

needed to make that decision. *Id*. at 123:6-11. When Kepros asked what kind of information Juror NM wanted, she responded that she did not know. *Id*. at 123:12-21.

Kepros probed Juror NM on her feelings about the appropriate punishment if one of the aggravating factors was proved, and she responded a life sentence could still be acceptable. *Id*. at 124:13-25; 125:1-8. Kepros explained mitigation and its purpose before asking Juror NM if she thought a person's upbringing was something she would consider, and she said it was not. Juror NM explained that people from good homes turn out bad and people from bad homes turn out capable of achieving great success. *Id*. at 125:9-25; 126:1-9. Kepros then shopped youth, emotional problems, mental problems, and a loving family who wanted a relationship even though the person was in prison for life before asking if any of those factors were important to Juror NM. She responded that emotional and mental problems might be important to her and the rest were not. *Id*. at 126:10-25; 127:1-22.

Warren took the mitigating factor about a loving family wanting a relationship with the incarcerated defendant and added that the defendant wanted the relationship to act as a role model for other family members before asking if Juror NM would consider the modified mitigation. Juror NM said that this mitigation might be impactful to her. *Id*. at 132:6-17.

The parties did not challenge Juror NM for cause. Owens's trial team struck Juror NM from the jury with its fourth peremptory challenge. *Voir Dire* Tr. 161:6-9 (Apr. 7, 2008 p.m.).

At the post-conviction hearing, Kepros recalled thinking that Juror NM seemed mitigation impaired because Juror NM would not accept any of the relevant mitigation proffered to her. Kepros stated that she did not want Juror NM

on the jury and had no reason for not challenging Juror NM for cause. She acknowledged that apparently neither Middleton nor King suggested a challenge was warranted. Kepros agreed that when she used the stripping question and asked if a life sentence was appropriate, Juror NM pointed out that she did not have enough information to make that decision, which was an appropriate answer. Kepros also agreed that there were times when Juror NM seemed confused between aggravation and mitigation and their purposes.

In Reynolds's view, Kepros should have challenged Juror NM because Juror NM was mitigation impaired. Reynolds thought Kepros appropriately employed the Colorado Method to shop the relevant mitigation. She also agreed that Warren was able to somewhat rehabilitate Juror NM on mitigation. She faulted Kepros for not mounting a challenge based on Juror NM's leaning toward the death penalty after aggravation was proved. Noting that the team scored Juror NM at 60.25, Reynolds opined the team's failure to challenge for cause resulted in the needless use of a peremptory challenge to keep Juror NM off the jury.

(iii) Analysis

Juror NM was somewhat confused about aggravation and mitigation when Kepros shopped her relevant mitigation. Kepros asked Juror NM to consider the defendant's upbringing, youth, emotional problems, and mental problems as potential mitigation. Juror NM partially accepted emotional or mental problems and did not place much weight on the defendant's upbringing or age. Thus, Juror NM was committed to considering and weighing mitigation. *See Eddings*, 455 U.S. at 114-15 (a sentencer in a capital case cannot refuse to consider any relevant mitigation evidence presented, including statutory and non-statutory mitigation). In light of this record, Kepros's questioning of Juror NM regarding mitigation and

her decision not to challenge Juror NM for cause fell within the wide range of professionally competent assistance required by *Strickland*.

(iv) Conclusion

The court concludes Kepros's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by Kepros's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror NM is **Denied**.

(m) Juror CO (No. 4599)

(i) Parties' Positions

Owens contends he was prejudiced by King's failure to question Juror CO about her views on mitigation and by King's failure to challenge Juror CO for cause.

(ii) Findings of Fact

Juror CO's relevant questionnaire answers are as follows:

1. Juror CO selected answer 1(a) in the Potential Punishment Section indicating that the death penalty was appropriate in some cases, and explained: "I believe in some not all cases the death penalty is warranted."
2. She answered "Yes" that she could follow the law and impose a life sentence, if she believed the death sentence was not appropriate.
3. She answered "Yes" that she could follow the law and impose a death sentence, if she believed the death sentence was appropriate.
4. When asked if she had formed an opinion, based on media coverage, about whether Owens should receive the death penalty, she answered "No."

5. When asked if she could set aside any opinion, based on the media, about whether Owens should receive the death penalty, she answered "Yes" and wrote: "I will solely reach my verdict upon the evidence & instruction received."
6. She answered there was no reason why she could not be a fair and impartial juror.

Juror CO began her individual questioning session on March 13, 2008. King used the stripping question to ask Juror CO what she thought the appropriate sentence should be for that non-aggravated murder. She responded that it was hard to decide without hearing all the details of the case and added that either penalty could be appropriate. *Voir Dire* Tr. 195:5-25; 196:1-8 (Mar. 13, 2008). Juror CO said that a life without parole sentence was, in her mind, a meaningful punishment. *Id*. at 196:9-12.

When asked what she wanted to know before deciding the punishment, Juror CO said she wanted to know everything. *Id*. at 197:6-12. She wanted to know about the crime and the defendant. *Id*. at 197:13-25; 198:1-2. When King suggested a difficult childhood, Juror CO said she would probably consider it but that it may not be significant to her because people with a good childhood do bad things. *Id.* at 198:3-16. After King described the murder as cold-blooded, he asked if there was anything about the perpetrator's life that would matter to her regarding her decision on punishment. Juror CO, noting every person is different, responded that she wanted to know what caused the perpetrator to commit the murder, which probably required the analysis to begin at birth. *Id*. at 198:21-25; 199:1-9.

King moved to the four-step process, and Juror CO stated she could make the step one determination. King asked her whether life would be an appropriate

sentence for this aggravated murder, and Juror CO said that she was still open to both penalties. *Id*. at 200:24-25; 201:1-12. King moved to mitigation at step two and asked if Juror CO could decide what mitigation was significant to her, and she said she thought she could. *Id*. at 201:14-25; 202:1-12.

Warren went over the four-step process with Juror CO. Juror CO said she could do the necessary functions at each step and would deliberate with her fellow jurors on the decisions needed at each step. *Id*. at 204:9-25; 205:1-14.

The parties did not challenge Juror CO for cause, and she returned on April 7, 2008, for general questioning. Owens's trial team struck Juror CO from the jury with its thirteenth peremptory challenge. *Voir Dire* Tr. 166:4-6 (Apr. 7, 2008 p.m.).

At the post-conviction hearing, King was reminded that Juror CO had rejected bad childhood as a mitigating factor. King noted that he did ask follow-up questions about childhood, and Juror CO eventually said she might consider it. He agreed that the team scored Juror CO as 58.5, but he could not recall what his perceptions of Juror CO were at the time.

Reynolds opined that King's performance was lacking in a number of areas. She thought his failure to challenge Juror CO for cause resulted in the needless use of a peremptory challenge. Reynolds said King did not adequately probe Juror CO's views on the death penalty and did not properly shop his relevant mitigation. Reynolds agreed that King shopped the defendant's childhood as a mitigating factor. She also acknowledged that Warren rehabilitated Juror CO on mitigation. Reynolds also acknowledged that when King utilized the stripping question, Juror CO was completely open to both penalties.

(iii) Analysis

Owens complains that King did not adequately develop Juror CO's mitigation impairment. Contrary to Owens's argument, King asked Juror CO many questions related to mitigation. When King asked her what she wanted to know in order to choose between the two punishments, Juror CO said she wanted to know everything about the crime and the defendant. He asked Juror CO if she would be interested in the defendant's childhood. King moved to mitigation at step two and after explaining its various sources, Juror CO said she could consider mitigation. Thus, Juror CO was not mitigation impaired. *See Eddings*, 455 U.S. at 114-15 (a sentencer in a capital case cannot refuse to consider any relevant mitigation evidence presented, including statutory and non-statutory mitigation). On this record, King's questioning with regard to mitigation and his decision not to challenge Juror CO for cause fell within the wide range of professionally competent assistance required by *Strickland*.

(iv) Conclusion

The court concludes King's performance fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by King's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on ineffective assistance of counsel regarding the *voir dire* of Juror CO is **Denied**.

G. Opening Statements and Court's Introductory Instructions

1. Failure to Object to Court's Intrusion on Deliberative Process[368]

a. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object to the court's instruction on how jurors could utilize their notes during deliberations.

The prosecution responds that Owens's trial team's failure to object to the court's instruction about note-taking was not deficient because the court's instruction was legally proper.

b. Findings of Fact

On April 8, 2008, the court instructed the jury that,

> But what I'm trying to point out to you, note taking is up to you, whether you want to take it or not. It is a long trial, it's up to you. Here's the point that needs to be made, though. The note taking is for your memory, it's not for your fellow jurors' memory. And here's what I'm trying to point out. I always try to use concrete examples. You're in the jury room and you're arguing over a very important point with one of your fellow jurors and your fellow juror says, no, I believe Witness X said this and you say no, oh, no, Witness X said that. I know that Witness X said that because I took shorthand and I took exactly – I took it down exactly what Witness X said and that's what Witness X said.
>
> What should your fellow juror say? Your fellow juror should say, baloney, those notes are for your memory, they're not for my memory. Everyone understand what I'm trying to get across to you? You cannot use these notes to say this is exactly what the evidence said. Again, this is what you think the evidence said when you wrote it down on a piece of paper. And remember to respect your fellow juror.

[368] The court denied Owens an evidentiary hearing on this claim.

Guilt Phase Tr. 28:13-25; 29:1-7 (Apr. 8, 2008).

c. Principles of Law

In 1980, the Fifth Circuit stated:

> Jurors should be instructed that they should carefully listen to the evidence and not allow their note taking to distract them. The court should also explain that the notes taken by each juror are to be used only as a convenience in refreshing that juror's memory and that each juror should rely on his or her independent recollection of the evidence rather than be influenced by another juror's notes.

United States v. Rhodes, 631 F.2d 43, 46 (5th Cir. 1980); *see also United States v. Maclean*, 578 F.2d 64, 66 (3d Cir. 1978) ("[A] juror who does not take notes should rely on his or her independent recollection of the evidence and not be influenced by the fact that another juror has taken notes.").

The 2008 version of the Colorado Criminal Jury Instructions includes an instruction that,

> If you take notes, you should not allow the note taking to detract from your close attention to the testimony and conduct of each witness and all other evidence received during the trial.
>
> Whether you take notes or not, you should rely on your memory as much as possible and not upon your notes or the notes of other jurors. Any notes you take are to refresh your own individual memory.

COLJI-Crim. B:04 (2008). Since that time, the Colorado Criminal Jury Instructions have been expanded regarding the use of notes taken during trial, "[w]hether or not you take notes, you should rely on your memory as much as possible. The notes you take are to refresh your own memory. You should not give additional weight to the comments of any juror based upon the quantity or quality of his or her note taking." COLJI-Crim. B:04 (2016).

d. Analysis

Owens has not provided any binding or persuasive legal authority in support of his contention that the instruction regarding note-taking was objectionable. Federal case law and the Colorado Criminal Jury Instructions support the court's instruction.

The court did not impermissibly restrict the jurors' use of their own notes by remarking that each juror's notes are for that individual juror's memory. The court's remarks are consistent with the Colorado Criminal Jury Instructions and any objection would have been overruled. Counsel's failure to object to the court's remarks regarding the use of juror notes was within the wide range of professionally competent assistance. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984) ("The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.").

e. Conclusion

The court concludes that Owens failed to prove that his trial team's failure to object to the court's remarks regarding the use of juror notes was deficient performance. The court also finds that Owens failed to prove that he was prejudiced by this alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's failure to object is **Denied**.

2. Failure to Object to Introduction of Prosecutor's Opinions and Argument in Opening Statement

a. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object to the prosecution's opening statement that plea agreements with witnesses were based

on what the witnesses knew and that the prosecution did not offer a plea agreement to Ray because he refused to identify the person who killed Vann at Lowry Park. Owens also argues that both of those statements constituted argument, and his trial team should have objected on that basis.

The prosecution responds that Owens's trial team had no grounds to object to the prosecution's opening statement because it included only statements of anticipated evidence, not opinions of the prosecution.

b. Findings of Fact

Guilt phase opening statements were made to the jury on April 8, 2008. During his opening statement, Hower stated that "the case had been slowly proceeding through court and Robert Ray was refusing to give up the name of the unidentified killer and the District Attorney was not offering him any plea bargain without that name." Guilt Phase Tr. 59:14-17 (Apr. 8, 2008).

Later in his opening statement, Hower told the jury:

> Ladies and gentlemen, as you probably know from your life experiences, as a vast majority of criminal cases do not go to trial, they are resolved through plea negotiations, plea bargaining, but a defendant does not have a constitutional right to a plea bargain. The District Attorney always has discretion whether to offer any defendant a plea bargain or not. And when defendants have crucial information about a serious crime, they cannot expect a plea bargain in their own case unless they're willing to share that information. Some choose to remain silent rather than be considered a snitch with all the risks that entails.
>
> Plea bargains were not being offered to Latoya Ray, Davinia Ray or J-5 and others unless they agreed to tell the police what they knew, what they saw, and what they had done themselves. They could agree to talk, get a break, or they could have their right to trial.

Id. at 92:7-22.

Lundin, the prosecutor for Ray's Lowry Park case, testified for the prosecution on April 14, 2008. She explained why Ray had not been offered a plea agreement:

> Lundin: There had been no offer of a plea bargain in that case.
>
> Hower: Why was that?
>
> Lundin: Because a condition of offering any plea bargain that I made clear to defense counsel was that Mr. Ray identify who the actual shooter was of the victim, Greg Vann.
>
> Hower: And had that happened?
>
> Lundin: It had not.

Guilt Phase Tr. 154:2-10 (Apr. 14, 2008 p.m.). Additionally, Lundin generally discussed witnesses who had received plea agreements and the conditions of those agreements. *Id*. at 154-169. Lundin testified as to the conditions of several of the plea agreements, "[t]he nature of the conditions were that [the witnesses] make themselves available for interviews, that they honor any subpoenas at subsequent hearings, and that they testify truthfully at those hearings." *Id*. at 164:22-25; 165:1.

During the post-conviction hearing, Kepros testified that she was responsible for making any objections to the prosecution's opening statement. With regard to Hower's remarks about Ray refusing to give up the name of Vann's shooter, Kepros did not recognize the statement as objectionable.

Kepros did not object to Hower's remark that the prosecution gave plea bargains for what witnesses knew because she did not interpret it as a statement that the prosecution knew that the witness's statements were true.

Reynolds testified that Owens's trial team should have objected to the remark about Ray knowing the identity of the Lowry Park shooter because it was hearsay, it bolstered the prosecution's theory that Owens was the shooter, and it communicated a personal opinion by the prosecution. Reynolds testified that trial counsel should have objected to the remark about plea agreements being offered to witnesses for what they knew, because it was a personal opinion of the prosecution, it invoked the imprimatur of the prosecution, and it bolstered the witnesses' testimony.

c. Analysis

Lundin testified that she did not offer Ray a plea agreement because he would not reveal Vann's shooter, and she also testified about the general conditions of the witnesses' plea agreements. The remarks made in the prosecution's opening statement served to preview that evidence for the jury. *See People v. Barron*, 578 P.2d 649, 650 (Colo. 1978) ("[T]he primary purpose of an opening statement is to provide the jury, in brief, outline form and without argument, a preview of what counsel expects to show by the evidence he intends to present."). Because the comments were proper, an objection would have been overruled. Accordingly, Kepros's failure to object was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 ("The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance."). Additionally, because the evidence was brought in through Lundin's testimony, Owens has not demonstrated that he was prejudiced by Kepros's failure to object.

d. Conclusion

The court concludes that Owens failed to prove he was prejudiced by his trial team's failure to object to the prosecution's remarks about plea agreements

during its opening statement. The court also finds that Owens failed to prove that he was prejudiced by this alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's failure to object is **Denied**.

3. Failure to Object to Lack of Discovery of Matters Referenced in Prosecution's Opening Statement

a. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object on lack of discovery supporting the prosecution's opening statement that Sailor agreed to cooperate after Owens was arrested.

The prosecution incorporated its response from the previous claim. The prosecution maintains that its opening statement was a brief preview of what was going to be introduced through testimony at the hearing.

b. Findings of Fact

On April 8, 2008, the prosecution told the jury in its opening statement that "[w]hen Latoya learned that Mr. Owens had been arrested and was in custody, she called her lawyer. Now with Mr. Owens off the street, she wanted her attorney to call and schedule an interview with Detective Fronapfel. She was ready to talk." Guilt Phase Tr. 94:4-8 (Apr. 8, 2008).

Kepros confirmed at the post-conviction hearing that she heard Sailor testify previously on August 20, 2007, about calling her attorney after learning Owens had been arrested. Kepros testified that in 2008 she was unaware of any communications between McDermott and the prosecution that had not been disclosed. Kepros believed that she had all of the relevant information, because she was in possession of Sailor's plea paperwork and the reports concerning Sailor's interview with Fronapfel. Additionally, Kepros noted that they "were

repeatedly given full assurances that the prosecutor was turning all information over as it was required to given the discovery rules, given its ethical and constitutional duties. So, we felt we had the information that existed." PC Hrg Tr. 36:9-13 (Dec. 2, 2014 p.m.).

c. Analysis

Kepros previously heard Sailor testify about the facts mentioned by the prosecution in its opening statement and did not have reason to believe that discovery was being withheld regarding Sailor's plea negotiations. Kepros had no grounds to object on the basis of lack of discovery during the prosecution's opening statement. Accordingly, Kepros's conduct fell within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 ("The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.").

d. Conclusion

The court concludes that Owens failed to prove that his trial team acted deficiently in its failure to object to a lack of discovery regarding matters referenced in the prosecution's opening statement. The court also finds that Owens failed to prove that he was prejudiced by this alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's failure to object is **Denied**.

4. Defense Opening Statement

a. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to present evidence, as promised in its opening statement, that a witness relied upon by the prosecution was previously determined to be incredible as a matter of law in an

unrelated case and that a witness would identify Vann's shooter as someone other than Owens.

b. Findings of Fact

During the defense's opening statement, Kepros told the jury,

> How about this guy, another witness that's been relied upon by the prosecution in their investigation, Robert Anderson. I'm not going to go through all the details. Those orange boxes are all the false reporting cases, the blue boxes are the felony cases.
>
> The first one is from 1989, another false report, another felony. Now, he's had two prior felonies, so by 1996 he's eligible for what they call the little habitual criminal which will expedientially [sic] increase your possible or mandatory sentence and he can no longer get a probation sentence. That's in '96.
>
> Third felony conviction, fourth felony conviction. Arapahoe County charges him as a habitual criminal because now he has four prior felony convictions. That case is pled down, it's in '99. 2000, big habitual, facing four times the presumptive punishment. Another felony conviction.
>
> Robert Anderson becomes a witness in another death penalty case prosecuted by John Hower in 2001. In that case the Court had an opportunity to assess his credibility. The Court found him palpably incredible, totally unbelievable. Another felony conviction.

Guilt Phase Tr. 117:24-25; 118:1-19 (Apr. 8, 2008). Thereafter, Kepros stated that "[t]he people you're going to be hearing from in this case include a cast of characters, and they're people that are coming to this courtroom from the jail, from the prisons, with the help of these people and with the help of the police. They're coming for their own reasons." *Id*. at 119:17-21. Ultimately, neither party called Robert Anderson (Anderson) to testify.

Later in her opening statement, Kepros told the jury "[y]ou'll hear about the witness that said somebody named Jonathan Martin shot Gregory Vann." *Id*. at 128:1-3.

On April 16, 2008, Sailor testified about what transpired at Lowry Park,

> King: And you saw John Martin there; is that right?
>
> Sailor: Yes.
>
> King: At some point, you testified that you believe that John Martin shot Greg Vann --Vann -- in the park that day; is that right?
>
> Sailor: I believe he did shoot him?
>
> King: Yes.
>
> Sailor: If that's what I said, that's what I said.
>
> King: Is that what you believe today?
>
> Sailor: Um, do I believe that he shot Greg Vann?
>
> King: Yes.
>
> Sailor: No.

Guilt Phase Tr. 47:8-22 (Apr. 16, 2008 p.m.). Similarly, on King's cross-examination of Johnson, the following interaction occurred:

> King: Do you remember a friend of yours named John Martin being at the park that day?
>
> Johnson: He wasn't there. I don't think he was there.
>
> King: So you are unaware that people had said he may be the person that shot Greg Vann?
>
> Johnson: I heard that, but ...

Guilt Phase Tr. 115:20-25; 116:1 (Apr. 21, 2008 a.m.).

Kepros confirmed during the post-conviction hearing that she believed it was certainly possible that Anderson would testify for the prosecution. Had

Anderson testified, Kepros confirmed that it would be best to discredit him before the jury heard his testimony. And while the prosecution had not mentioned Anderson in its opening statement, as Kepros confirmed, the prosecution still might have called him to testify at trial.

Both Sailor's and Johnson's testimony was consistent with this portion of Kepros's opening statement. And Kepros testified that Baker might have identified J. Martin as a Lowry Park shooter, although King, as lead counsel, had decided that the trial team was not going to retry the Lowry Park case to the Dayton Street jury.

c. Analysis

First, because Anderson's purported accusations supported the prosecution's theory of the case, it was reasonable for Kepros to use her opening statement to undermine his testimony if he were to testify. Thus, Kepros's actions fell within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 ("The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.").

Second, the trial team's decision not to call a witness to identify J. Martin as Vann's shooter was not deficient performance. *See Dunlap v. People*, 173 P.3d 1054, 1076 (Colo. 2007) ("Determining whether the failure to call a promised witness is ineffective assistance of counsel is necessarily fact-based."). When asked on cross-examination about Vann's shooter, both Sailor and Johnson alluded to the fact that they had heard that J. Martin was Vann's shooter. King maintained throughout the post-conviction proceedings that it was the trial team's strategy not to re-litigate the Lowry Park case, in part, to prevent undermining the credibility of the trial team at the sentencing hearing. Calling a witness to positively identify J.

Martin as Vann's shooter would have contradicted the trial team's strategy. *See Strickland*, 466 U.S. at 689 ("[T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"). Therefore, the trial team's decision not to call a witness to positively identify J. Martin as Vann's shooter was sound trial strategy and within the wide range of professionally competent assistance. *See id*. at 690 ("The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.").

d. Conclusion

The court concludes Owens failed to prove that his trial team was deficient by not calling a witness referenced in the opening statement and by not calling a witness to positively identify J. Martin as Vann's shooter. The court also finds that Owens failed to prove that he was prejudiced by this alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's failure to call witnesses referenced in the opening statement is **Denied**.

H. Failure to Adequately Object to Improper Testimony

1. Former Prosecutor's Testimony

a. Vouching for Witnesses

i. Parties' Positions

Owens contends he was prejudiced by Kepros's failure to adequately object to Lundin's testimony about the prosecution's process and purpose of offering plea agreements to certain witnesses and about the prosecution's decision not to offer a plea agreement to Ray, which resulted in Lundin vouching for the prosecution and the credibility of the prosecution's witnesses.

ii. Findings of Fact

At the guilt phase, Lundin explained the factors she considered before offering plea agreements to defendants who had information on pending investigations and testified that she considered those factors before making offers to witnesses in this case. According to Lundin, some of the offers in this case were extraordinary. Lundin also explained that a proffer or an off-the-record interview of the witness was often utilized during plea negotiations so that the prosecution could evaluate the usefulness and truthfulness of the witness's information.[369]

Lundin also testified during the guilt phase that she told Ray's attorney she would not offer Ray a plea agreement in his Lowry Park accessory case unless Ray disclosed who shot Vann. Lundin did not offer a plea agreement to Ray but offered plea agreements to other witnesses in return for their testimony. Kepros objected to Lundin's testimony about not offering Ray a plea agreement on grounds that the prosecution had not disclosed any information in discovery about whether Lundin had offered Ray a plea agreement. She also successfully moved for and obtained a court order requiring the prosecution to disclose its case file for Ray's Lowry Park charges.

At the post-conviction hearing, Kepros testified that she anticipated Lundin would testify about eyewitness accounts of the Lowry Park shootings and about the procedural history of Ray's Lowry Park case leading up to the Dayton Street homicides. As a result, Kepros did not prepare in depth for Lundin's cross-examination and did not consider that filing pretrial motions *in limine* was necessary to limit Lundin's testimony.

[369] Lundin testified that Sailor, Johnson, and D. Ray were required to provide interviews to the police and the prosecution before receiving their plea agreements.

Reynolds opined that Kepros was deficient for failing to object to Lundin's testimony because it suggested to the jury that the prosecution had information not available to the jury that verified the truthfulness of certain witnesses' testimony. According to Reynolds, Lundin's testimony simultaneously vouched for the prosecution and the witnesses who received plea agreements. She opined that Kepros's discovery objection was appropriate, but she faulted Kepros for not seeking sanctions. She also opined that Kepros should have requsted an instruction limiting the purpose for which the jury could use Lundin's testimony about why she did not offer a plea agreement to Ray.

iii. Principles of Law

Improper vouching occurs when a prosecutor indicates s/he has a personal belief in a witness's credibility or implies that s/he has special knowledge of facts unavailable to the jury. *People v. Coughlin*, 304 P.3d 575, 582 (Colo. App. 2011). However, a prosecutor may elicit testimony regarding plea agreement provisions requiring the witness to testify truthfully as long as there is no expression of a personal belief in the witness's credibility and no indication that the prosecutor has information not available to the jury. *Id.* Such boundaries allow the jury to assess the witness's credibility with all of the pertinent factors surrounding the plea agreement. *Id.* *Coughlin* also held that it is proper for the prosecutor to elicit testimony that the purpose of the proffer was to verify the witness's testimony or gauge the witness's truthfulness. *Id*. at 584.

The prosecution has the unqualified right to rebut any unfavorable inferences drawn from cross-examination. *People v. Nunez*, 684 P.2d 945, 947 (Colo. App. 1984).

iv. Analysis

Knowing Owens's trial team would attack the credibility of witnesses with plea agreements, the prosecution called Lundin to describe the plea negotiating process for cooperating witnesses. Kepros questioned Lundin about these topics on cross-examination. Kepros's cross-examination raised questions about the credibility of witnesses who received extraordinary plea agreements in exchange for their testimony, and the prosecution had an unqualified right to rebut any adverse inferences raised on cross-examination during its redirect examination. *See id*. Moreover, it was proper for the prosecution to elicit testimony that explained to the jury that a proffer can be used to gauge truthfulness and to verify the witness's testimony. *Coughlin*, 304 P.3d at 584. Because Lundin's testimony did not improperly vouch for those witnesses who received plea agreements, there were no viable grounds on which Kepros could object. Thus, Kepros's lack of objection was within the wide range of professionally competent assistance. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984) (defendant must prove that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

v. Conclusion

The court concludes Kepros's failure to object to Lundin's testimony fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove that he was prejudiced by Kepros's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on Kepros's failure to object to Lundin's testimony is **Denied**.

b. Misleading Testimony Enhancing Witness Credibility

i. Parties' Positions

Owens contends he was prejudiced by Kepros's failure to object to Lundin's testimony that the prosecution of Sailor and Johnson was hampered by a lack of evidence, which resulted in Lundin vouching for the credibility of Sailor and Johnson.

ii. Findings of Fact

Sailor was a backseat passenger in a car that was stopped by the APD in August 2005. The APD discovered drugs in the backseat. Sailor was arrested for possession of drugs, and she was charged as a special offender because she was also in possession of a gun.

Lundin testified during the guilt phase that she somewhat recalled the facts of Sailor's drug and special offender case and that there were proof problems with the case. She testified that the drugs were discovered in the backseat of the car and not on either the driver or Sailor. Sailor testified at the guilt phase that the police planted the drugs in the backseat where she was sitting, and admitted that she had a gun in her purse. She testified that she kept the gun for protection.

As to Johnson, Lundin recalled that his charge involved the theft of a cell phone and that the case had proof problems. Kepros objected on grounds that the question was beyond the scope and for lack of discovery. The objection was sustained.

Kepros testified at the post-conviction hearing that she did not object to Lundin's testimony about proof problems on grounds that it was improper vouching because she did not recognize it as improper vouching and because she viewed it as proper opinion testimony.

Reynolds opined that Kepros's performance was deficient because she failed to object to the misleading nature of Lundin's testimony about there being proof problems in Sailor's and Johnson's cases. In Reynolds's view, there were no proof problems, and Lundin's testimony diminished the impeachment value of Kepros's cross-examination about the beneficial plea agreements those witnesses received.

iii. Analysis

Kepros objected to Lundin's testimony about proof problems in Johnson's case, and the objection was sustained. The jury was instructed at the beginning of the guilt phase not to consider any evidence to which an objection was sustained. The court presumes the jury followed this instruction and did not consider Lundin's testimony about the strength of the case against Johnson. *People v. Flockhart*, 304 P.3d 227, 235 (Colo. 2013) (court must "presume that jurors follow the instructions that they receive"). Because Kepros's objection was a reasonable professional decision and because the instruction negated any prejudice, Owens failed to prove he received ineffective assistance on this topic. *See Strickland*, 466 U.S. at 694 ("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.").

As to Sailor's case, Lundin testified that drugs were found in the backseat where Sailor was sitting when the car was stopped and Sailor confessed to carrying the gun. Lundin's testimony that the case had proof problems was admissible. It was a statement about her assessment of the case at the time she decided to extend a plea offer. The jury had the information it needed to assess the credibility of Lundin's testimony.

Kepros did not object to Lundin's testimony about the weakness of the cases against Sailor because she viewed it as proper opinion testimony from a former

prosecutor. Kepros's assessment was reasonable, and her failure to object to Lundin's testimony on grounds that it vouched for Sailor was within the wide range of professionally competent assistance. *See id*. at 690 (defendant must prove that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance"); *see also Harrington v. Richter*, 562 U.S. 86, 107 (2011) ("Counsel [is] entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.").

iv. Conclusion

The court concludes Kepros's failure to object to Lundin's testimony was within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by Kepros's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on Kepros's failure to adequately object to Lundin's testimony about the weakness of the prosecution's cases against Sailor and Johnson is **Denied**.

c. Invoking the Imprimatur of the Court

i. Parties' Positions

Owens contends he was prejudiced when Kepros failed to object to Lundin's testimony invoking the imprimatur of the court by telling the jury that a judge had approved plea agreements for Sailor, Johnson, and D. Ray and had approved the immunity agreements for R. Carter and Markeeta Ray.

ii. Findings of Fact

Lundin testified at the guilt phase that the plea agreements for Sailor, Johnson, and D. Ray were approved by a court and had district court certifications indicating they were accurate copies of court records.

Lundin also explained how immunity works. She noted that only a prosecutor can seek immunity for a witness and that it has to be granted by a judge. Lundin confirmed that immunity was given to R. Carter and Markeeta Ray before they testified before the grand jury. Lundin testified that she did not know if judges always approve requests for immunity but added that she had never heard of a judge denying a request for immunity. Lundin confirmed that the immunity documents for R. Carter and Markeeta Ray had district court certifications indicating they were accurate copies of court records.

Kepros testified during the post-conviction hearing that she did not recognize Lundin's testimony regarding court approval of plea agreements and immunity requests as invoking the imprimatur of the court and therefore improperly boosting the credibility of the prosecution's witnesses.

In Reynolds's opinion, objecting to Lundin's testimony that the immunity documentation was approved by the court would have been futile because court approval is required by Colorado law. However, Reynolds faulted Kepros for failing to object to the plea agreements and failing to redact the court seal from both the pleas agreements and the immunity documentation.

iii. Principles of Law

CRE 605 does not prohibit a judge from testifying about a former trial over which the judge presided, but, when the testimony is unnecessary, the practice is disfavored. *See People v. Beilke*, 232 P.3d 146, 152 (Colo. App. 2009).

iv. Analysis

Lundin's testimony that the court approved the plea agreements and immunity requests for certain witnesses and that the documents had a seal indicating they were certified copies of court records did not improperly invoke the imprimatur of the court. There was no implication in Lundin's testimony that the

judges who approved the plea agreements and requests for immunity found the witnesses credible or truthful. The prosecution presented the fact that the court approved the plea agreements and requests for immunity as a matter of procedure to show the documents were valid. Moreover, judicial signatures and seals are not testimonial, but merely evidence of authenticity. Had the authenticity been challenged by the defense, the prosecution could have called the signing judges to authenticate them. Accordingly, there is no reasonable probability that the outcome of Owens's guilt phase would have been different if Kepros had objected. *See Strickland*, 466 U.S. at 694 ("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.").

v. Conclusion

The court concludes Owens failed to prove he was prejudiced by Kepros's failure to object to Lundin's testimony that the court approved the plea agreements and requests for immunity. Accordingly, Owens's petition to vacate his conviction and sentence based Kepros's failure to object is **Denied**.

d. Admission of Plea Agreements as Exhibits

i. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object to the admission of certain witnesses' plea agreements because the addendum to the plea agreements indirectly bolstered each witness's credibility.

ii. Findings of Fact

Lundin testified at the guilt phase that the plea agreements for Sailor, Johnson, and D. Ray included an addendum. Each addendum provided that, based on the investigation, the prosecution was not aware of any credible evidence that the witness was present for or aided and abetted the Dayton Street homicides. It

also stated that the prosecution would move to withdraw the plea agreement and file appropriate charges if the prosecution ever learned of credible evidence indicating the witness was a principal or complicitor in the Dayton Street homicides. Owens's trial team did not object to the admission of the addenda.

At the post-conviction hearing, Kepros testified that she did not anticipate that the plea agreements would be referenced during Lundin's testimony. She reviewed the plea agreements and addenda prior to trial. According to Kepros, she did not object because she did not recognize this language in the addendum as vouching.

Reynolds opined that Kepros performed deficiently for failing to object to admission of the addenda because the addenda implied the prosecution had evidence the jury did not have.

iii. Analysis

The language in the addenda did not suggest that the prosecution had information unavailable to the jury confirming the witness's testimony. Rather, it said that, based on the investigation, the prosecution had no credible evidence that the witness was present for or aided and abetted the Dayton Street homicides. Because the statement refers only to whether the prosecution had credible evidence that the witness was culpably involved in the murders, it was not vouching for the witness's credibility. Kepros's view that the addenda did not vouch for witness credibility was reasonable. It should also be noted that by allowing Sailor's addendum into evidence, Kepros preserved the option of impeaching the prosecution's objectivity and/or sincerity. The jury would learn that Sailor helped go through the Lowry Park discovery to identify the crucial witnesses against Ray. And, at least arguably, she had some part in surveilling Marshall-Fields. In this instance, as in most instances, the decision whether to object to testimony, an

exhibit, or particular language within an exhibit involves the instincts and judgment of trial counsel to which great deference must be afforded. Kepros's failure to object to the admission of the addenda was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (defendant must prove that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

iv. Conclusion

The court concludes Kepros's performance with respect to the plea agreement addenda was not deficient performance. The court also concludes Owens failed to prove that he was prejudiced by Kepros's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on Kepros's failure to object to the admission of the addenda is **Denied**.

e. Bolstering Prosecution's Theories and Credibility

i. Parties' Positions

Owens contends he was prejudiced by Kepros's failure to object to Lundin's testimony about the prosecution's theory of the Lowry Park case and by her failure to object to Lundin's testimony that the prosecution fully complied with its discovery obligations.

ii. Findings of Fact

Lundin testified during the guilt phase that the investigation of the Lowry Park shootings expanded when the Dayton Street homicides occurred. Kepros objected when Lundin was asked if Ray's Lowry Park charges were increased at some point. The court sustained the objection. Kepros objected again when Lundin was asked if Ray's charges were increased under a complicity theory, but that objection was overruled. As a result, Lundin testified that Ray was charged with the first-degree murder of Vann and the attempted first-degree murder of

Marshall-Fields and Bell. Lundin also testified that Owens was charged with the first-degree murder of Vann. Lundin confirmed that she had never heard of or seen Owens before June 20, 2005.

Regarding discovery, Lundin testified that everything the prosecution receives regarding a case, including names of witnesses, reports, and witness statements, has to be disclosed to the defense. She pointed out that this was an ongoing obligation and that the prosecution generally turns over the name of every witness regardless of how insignificant the witness may appear.

At the post-conviction hearing, Kepros testified that she objected to Lundin's testimony because she recognized that the testimony was bolstering the prosecution's theory of the case.

In Reynolds's opinion, Kepros's performance was deficient because she failed to request a limiting instruction for Lundin's testimony about Owens being charged with murdering Vann. According to Reynolds, Lundin's testimony about the new Lowry Park charges was objectionable because it suggested that the prosecution had information not available to the jury. Although Reynolds conceded that Lundin did not testify that the prosecution had fully complied with its discovery obligations, she maintained that there was a sufficient implication in Lundin's testimony to require Kepros to object as bolstering.

iii. Analysis

Kepros objected twice when Lundin was asked about the filing of charges in the Lowry Park case. The fact that her subsequent objection was overruled does not support an argument for deficient performance. And the prosecution was not insinuating that it had extraneous evidence to support Lundin's testimony. Kepros's actions were professionally reasonable and were within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (defendant

must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

Lundin never testified that the prosecution fully complied with its discovery obligations in this case. Lundin's testimony about discovery was offered to corroborate Sailor's testimony about how she, Ray, and Owens identified Marshall-Fields and A. Martin as the eyewitnesses from the Lowry Park discovery provided to Ray. Because Lundin's testimony about discovery procedures merely explained and did not improperly bolster the prosecution's theory of the case, there is no reasonable probability that the outcome of the guilt phase would have been different if Kepros had objected to her testimony. *Id.* at 694 ("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.").

iv. Conclusion

The court concludes Kepros's performance with respect to Lundin's testimony about the Lowry Park charges and the prosecution's discovery procedures was not deficient. The court also concludes Owens failed to establish that he was prejudiced by Kepros's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on Kepros's failure to object to Lundin's testimony is **Denied**.

f. Testifying as an Expert

i. Parties' Positions

Owens contends he was prejudiced by Kepros's failure to object to Lundin's testimony on grounds that it was improper expert opinion testimony.

ii. Findings of Fact

Lundin was a deputy district attorney for almost seven years. She was assigned to Ray's Lowry Park case in January 2005. At the guilt phase, Lundin

testified about discovery procedures, what constitutes discovery, and the prosecution's ongoing discovery obligations. Lundin also testified that a defense attorney can share the discovery with the client. She was not qualified as an expert witness.

During the post-conviction hearing, Kepros testified that she did not have a strategic reason for not objecting to Lundin's testimony as expert testimony.

Reynolds opined that Kepros should have objected to Lundin's testimony because it was expert testimony and she had not been qualified as an expert under CRE 702. According to Reynolds, Owens was deprived of the opportunity to retain a rebuttal expert who could have testified that the prosecution did not comply with its discovery obligations in this case.

iii. Analysis

Given Lundin's seven-year career as a prosecutor, Lundin could have been qualified as an expert to explain discovery to the jury. She had not been endorsed as an expert or issued a summary report, but given the nature and content of her testimony, it is unlikely that her testimony would have been barred on technical grounds. The trial court would have found no substantial prejudice resulting from the failure to endorse her as an expert and would have allowed her to testify. Qualifying Lundin as an expert also might have enhanced her credibility in the eyes of the jury. Thus, Kepros's decision not to object on grounds that Lundin was not qualified under CRE 702 fell well within the wide range of professionally competent assistance. *See id*. at 690 (defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

iv. Conclusion

The court concludes Kepros's failure to object to Lundin's testimony as unqualified expert witness testimony fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove how Kepros's alleged deficient performance prejudiced him. Accordingly, Owens's petition to vacate his conviction and sentence based on failing to object to Lundin testifying as an expert is **Denied**.

2. Testimony Concerning Witnesses' Fear

a. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to adequately object to testimony about witnesses' fear of retaliation because the testimony was not directly linked to Owens.

b. Findings of Fact

There was extensive argument on the prosecution's pretrial motion seeking to introduce gang affiliation evidence during the guilt phase. During the argument, Owens's trial team acknowledged that witness fear in a witness killing case was understandable but argued that there was no evidence linking any witness's fear to Owens's alleged gang affiliation. As a result, the court precluded gang affiliation evidence from the guilt phase. The court also precluded the prosecution from referring to the Witness Protection Program during its direct examinations but allowed references to the Witness Protection Program after the trial team opened the door.

The prosecution's guilt phase opening statement included a theme that Marshall-Fields's murder created a wall of silence that impeded law enforcement's investigation of the Lowry Park shootings and Dayton Street homicides. Owens's trial team obtained a limiting instruction for Fronapfel's testimony about the fear

Jones experienced because of her connection to the Lowry Park shootings and Dayton Street homicides.

At the guilt phase, Sailor testified that she was afraid to cooperate with the police because she was afraid Owens would retaliate against her or her son. When other witnesses were called to testify, they were cautioned by the prosecution not to reveal their current locations and were asked if they were currently living outside of Colorado. The prosecution did not mention the Witness Protection Program or being relocated for safety reasons in the cautionary questions and instructions. The prosecution also did not link Owens to any of its cautions to the witnesses. Owens's trial team did not object to the prosecution's questions and also did not object when Wolfe's mother testified that other witnesses had been afraid to come forward with information. His trial team did not object when Pollard testified that when she spoke to Marshall-Fields the night of June 19, 2005, he said he was afraid of being killed because he was a witness against Ray.

Owens's trial team objected when B. Taylor and R. Carter testified that they no longer lived in Colorado due to this case. B. Taylor testified that she was only fearful of Ray. Owens's trial team also objected when the prosecution told Jones not to disclose where she worked and when Lundin testified about certain witnesses being relocated by the prosecution.

During the post-conviction hearing, Kepros testified that she did not recognize the prosecution's cautions to the witnesses as supporting the prosecution's theme that witnesses feared Owens. According to Kepros, she did not object to this evidence because she had not reviewed all of the discovery and was concerned this information was contained in those portions of discovery she had not reviewed.

Reynolds opined that the trial team's performance was deficient because they did not recognize the unfairly prejudicial aspects of this evidence, especially in light of the successful pretrial litigation regarding gang affiliation and witness fear.

c. Principles of Law

Under Colorado law, evidence of witness fear is relevant to explain uncooperative attitudes, loss of memory, reluctance to testify, and changed witness statements. *People v. James*, 117 P.3d 91, 94 (Colo. App. 2004) (admission of gang retaliation-related evidence to explain uncooperative attitudes and reluctance to testify is not an abuse of discretion); *People v. Villalobos*, 159 P.3d 624, 630 (Colo. App. 2006) ("[E]vidence of a witness's fear of retaliation is admissible to explain his or her . . . reluctance to testify."). *But see People v. Trujillo*, 338 P.3d 1039, 1053 (Colo. App. 2014) (gang expert's "snitch" evidence to explain reluctance to testify was unduly prejudicial). Evidence of witnesses' fear based on retaliation does not have to be linked to the defendant because it bears on the credibility of the witness. *See James*, 117 P.3d at 94 (citing *People v. Sanchez*, 58 Cal. App. 4th 1435, 1450 (Cal. Ct. App. 1997) (evidence of a witness being afraid to testify and evidence that a witness is fearful of gang retaliation is relevant to the credibility of the witness, and that it is not necessary to show threats against witness were made by defendant personally).

d. Analysis

Owens's main contention is that his trial team performed deficiently when it failed to object to testimony indicating witnesses were in fear because their fear was not directly linked to Owens. There is no legal requirement that the witness's fear be linked directly to the defendant in order for the witness's testimony about his/her fear to be admissible. In *James*, there was no evidence directly linking the

defendant to any witness fears. Rather, the gang culture of retaliation was the basis for witness fears. *James*, 117 P.3d at 94 ("[E]vidence about gang retaliation, including fear thereof, is admissible to explain a witness's . . . reluctance to testify."). The fact that this case involved the killing of a witness is evidence of a culture of retaliation. The witnesses' fear was relevant to explain the witnesses' reluctance to testify. It was also relevant to the jury's evaluation of the witnesses' credibility. The reluctance to testify was particularly relevant in this case because of the extraordinary plea agreements and other assistance the prosecution provided in order to overcome the reluctance of many witnesses to cooperate with the investigation.

Kepros objected at various times to this type of evidence on relevance grounds and was unsuccessful. Continuing to unsuccessfully object would have resulted in highlighting damaging evidence for the jury. In light of controlling precedent and the circumstances of the guilt phase when the evidence was offered, Kepros's intermittent objections were reasonable and fell well within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (defendant must show that the "identified acts of omissions [of counsel] were outside the wide range of professionally competent assistance.").

e. Conclusion

The court concludes Owens failed to prove that his trial team's approach to fear-type evidence was deficient performance. The court also concludes that Owens failed to prove how his trial team's alleged deficient performance prejudiced him. Accordingly, Owens's petition to vacate his conviction and sentence for his trial team's failure to object to fear-type evidence is **Denied**.

3. Detective's Opinion Testimony

a. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to adequately object to Fronapfel's testimony about whether Todd was truthful and about whether Todd remained a suspect after Todd was interviewed.

b. Findings of Fact

Fronapfel testified at the guilt phase that she suspected Todd was a hitman for the Dayton Street homicides before she interviewed him on April 18, 2006. When asked if she still viewed him as a suspected hitman after the interview, Fronapfel said she did not. Fronapfel did not reference Todd's guilt phase testimony and was not asked whether she believed what Todd said to her in the interview. Kepros objected on relevance grounds but her objection was overruled.

Owens's trial team called Huntington to testify during the guilt phase. Huntington and Carter were cellmates while they were in the ACDF. Carter told Huntington that he and a hitman from Chicago named Che killed Marshall-Fields and Wolfe. Carter also told him that Che was paid $10,000 for the murders.

Kepros testified during the post-conviction hearing that she did not recognize the inference that Fronapfel viewed Todd as a truthful witness when Fronapfel testified that she no longer viewed Todd as a hitman.

Reynolds acknowledged Kepros's relevance objection but opined that she had missed the more cogent objection that Fronapfel was improperly commenting on the veracity of Todd's testimony. She also faulted Kepros for not seeking a limiting instruction and moving for a mistrial.

c. Principles of Law

The Colorado Supreme Court has categorically condemned questioning one witness about the veracity of another witness's testimony. *Liggett v. People*, 135

P.3d 725, 731-32 (Colo. 2006). In *Liggett*, the prosecutor repeatedly asked the defendant if he claimed that a witness called by the prosecution had lied during his testimony. *Id.* at 728. But *Liggett* does not prohibit asking a testifying detective about their perception of an interviewee's credibility in order to explain the detective's interrogation techniques or investigative decisions. *Davis v. People*, 310 P.3d 58, 63 (Colo. 2013) (detective testimony regarding the veracity of interviewees who later testify at trial in order to explain the detective's interrogation techniques and investigative decisions was admissible); *People v. Lopez*, 129 P.3d 1061, 1066 (Colo. App. 2005) (holding that detectives may reference witness credibility within the narrow context of describing an investigative interview).

d. Analysis

Fronapfel testified at the guilt phase that she no longer viewed Todd as a hitman after she interviewed him in April 2006. Kepros objected on relevance grounds, but her objection was overruled.[370] Fronapfel did not testify whether she believed what Todd told her when she interviewed him, and she did not testify about the truthfulness of Todd's testimony at the guilt phase. In short, Fronapfel did not comment on Todd's veracity as a witness. Rather, she commented on her investigative decision not to further pursue Todd as a potential hitman, which was proper testimony under *Lopez*. Because Kepros could not have successfully objected under *Lopez*, her failure to object was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (defendant

[370] The objectivity, thoroughness, and bias of the police investigation had been questioned by the trial team. Explaining why Fronapfel did or did not pursue certain avenues of investigation was clearly relevant.

must show that "the identified acts of omissions [of counsel] were outside the wide range of professionally competent assistance.").

Kepros's objection signifies that she recognized a problem and acted accordingly to prevent damaging testimony. Furthermore, Owens's trial team contradicted Fronapfel's testimony by calling Huntington, who testified that Carter told him that a Chicago hitman named Che was paid $10,000 to kill Marshall-Fields. Under these circumstances, Kepros's decisions regarding Fronapfel's testimony fell within the wide range of professionally competent assistance. *Id.*

e. Conclusion

The court concludes Owens failed to prove that Kepros's failure to object to Fronapfel's testimony on grounds that it was an improper comment on Todd's veracity was deficient performance. The court also concludes Owens failed to prove he was prejudiced by Kepros's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on Kepros's failure to object to portions of Fronapfel's testimony is **Denied**.

4. Latoya Sailor's Opinion of Guilt

a. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to ask for a limiting instruction precluding the jury from considering Sailor's testimony that King and Ray knew Owens was guilty and by his trial team's failure to ask the court to admonish Sailor for using profanity toward King.

b. Findings of Fact

During his cross-examination of Sailor at the guilt phase, King accused Sailor of being a liar.

> Q The truth of the matter is that you're lying --
>
> A Okay.

Q -- and that he never said those statements, did he?

A You know what, this is your job to do this. Rio knows. I know. Robert knows. He killed them kids, and we know he did. So what, he ain't come straight out and tell me, "I killed them kids." It all points to him. I was around him the whole time.

THE COURT: Ms. Sailor, Ms. Sailor.

Next question.

Q (By Mr. King) So you're saying he didn't make those statements, you just knew?

A Yes, he did make them statements.

Q You have no problem with telling – not telling the truth, do you?

A No, I got no problem.

Q You got no problem with lying to people?

A But I ain't going to just lie to get somebody sent to jail for life or in prison. I'm not going to do that.

Q You're not?

A And I sure won't sit up here and lie for Rio, and never talk to my family. And you need to stop making it seem like that.

(The witness is yelling.)

You need to quit defending somebody who's guilty, and you know he's guilty. You need to quit that.

THE COURT: Ms. Sailor. Ms. Sailor, stop.

Next question.

> Q (By Mr. King) Yes. You said -- you've said something like that under oath very similar to that before, when you testified in Michigan against your cousin?
>
> A I didn't testify against my cousin. I never said nothing wrong towards my cousin.
>
> Q Let's talk about that.
>
> A I got subpoenaed by a district attorney, and you ass hole for bringing that up. Because he don't bring my family stuff up he's -- oh my.
>
> THE COURT: Ms. Sailor.
>
> A Oh, God. Oh, God. Oh, God. Oh, God.
>
> THE COURT: I think we should take a break.
>
> A Yeah. He's a guilty ass person. You know he guilty.
>
> THE COURT: Ladies and gentlemen, we're going to take a break till 10 minutes after 4.

Guilt Phase Tr. 135:3-25; 136:1-25; 137:1-7 (Apr. 16, 2008 p.m.).

During the recess, Middleton moved for a mistrial based on Sailor's emotional outbursts and her repeated statements that Owens was guilty and that King knew it. Middleton, in the alternative, asked for a curative instruction advising the jury to disregard Sailor's opinions about guilt. The court denied the motion for a mistrial noting that Sailor's emotional outbursts were witnessed by the jury and went to the assessment of her credibility. The court granted the request for the curative instruction.

When the jury returned from the recess, the court instructed the jury that Sailor's opinions about guilt or innocence in this case were not evidence and that the jury must disregard her comments.

During the post-conviction hearing, King testified that he did not have a reason not to make contemporaneous objections to Sailor's comments about Owens being guilty and King knowing it.

In Reynolds's opinion, the trial team's failure to seek a more detailed curative instruction was deficient performance. Reynolds opined that the trial team should have asked the court to instruct the jury to disregard what Sailor said about King and to disregard her comment that Ray knew Owens was guilty. Reynolds agreed that the trial team's decision not to cross-examine Sailor on her opinions about Owens's guilt was the correct approach because she was a difficult witness to control. Reynolds was not concerned that a more detailed curative instruction highlighting aspects of Sailor's outbursts would be damaging.

c. Analysis

Sailor made these comments in an emotionally charged state after King asked her an improper question[371] that was probably intended to induce an emotional response as well as impeach her credibility for truthfulness. King's strategy was to discredit Sailor, and he did not move to strike Sailor's testimony because he believed her emotional outbursts suggested to the jury that she was unstable and incredible. Middleton sought a mistrial based on Sailor's outbursts and her testimony that Owens was guilty. While the court did not declare a mistrial, it instructed the jury to disregard Sailor's comments regarding Owens's guilt, and the curative instruction, together with the circumstances of Sailor's testimony, was sufficient to negate any unfair prejudice to Owens. Thus, there was no reasonable probability that, but for the trial team's failure to seek a more detailed limiting instruction, the outcome of Owens's guilt phase would have been

[371] *See* n. 122.

different. *See Strickland*, 466 U.S. at 694 ("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.").

d. Conclusion

The court concludes Owens failed to prove that he was prejudiced by his trial team's failure to request a more detailed curative instruction concerning Sailor's outbursts that King knew Owens was guilty. Accordingly, Owens's petition to vacate his conviction and sentence based on the trial team's performance concerning Sailor's opinion of guilt is **Denied**.

5. Testimony about Owens's Drug Dealing

a. Parties' Positions

Owens contends he was prejudiced when his trial team, having successfully precluded evidence of Owens's drug dealing, opened the door during cross-examination of Rose Asante (Asante) about Owens's drug dealing. Next, Owens contends he was prejudiced when his trial team failed to object when the prosecution disregarded the court's limitation on its redirect examination of Asante. Last, Owens contends he was prejudiced when his trial team failed to object to R. Carter's testimony, which implied that Owens was involved with drug distribution.

b. Findings of Fact

Kepros asked Asante on cross-examination about the relationship between Owens and Ray. Asante testified that they were close and spent time together chasing girls, playing sports, and going to church.

Before redirect examination, Tomsic requested a sidebar conference during which she argued that Kepros's questions about the relationship between Owens and Ray opened the door to Owens's drug dealing. Kepros objected and noted that

she had not asked any questions about drugs or money. When the court ruled that the door had been opened, Kepros raised additional objections under CRE 403 and 404(b) because Owens had not been charged with the criminal conduct Tomsic wanted to ask about. The court agreed and limited the evidence to whether Asante knew if Ray and Owens had been caught with drugs. The court precluded any references to arrest or prosecution for drug-related charges. Kepros also argued for a limiting instruction that the evidence was only being offered on their relationship, and the court agreed a limiting instruction was appropriate.

Tomsic asked Asante if she knew that Owens and Ray were involved with dealing cocaine, and Asante responded that she knew they were involved in dealing cocaine. Despite the court's order, Tomsic followed up by asking if she knew that Owens and Ray were arrested and charged as juveniles for possession of cocaine, and she responded that she did. Asante confirmed that she was involved in the criminal proceeding as Ray's parent. Kepros did not object. At that point, the court instructed the jury that the evidence was only being offered for the limited purpose of the relationship between Owens and Ray.

Guilt Phase Instruction No. 15 instructed the jury as to what evidence was admitted for a limited purpose. The court required the parties to identify the events where a contemporaneous limiting instruction was given so that such events could be included in the final jury instruction. Asante's testimony about Owens's juvenile drug dealing was not included.

R. Carter testified at the guilt phase that he never asked Owens or Ray why the duffle bag of guns was being stored in his apartment because of the line of business that they, including R. Carter, were in. R. Carter's testimony implied they were dealing drugs. R. Carter added that he carried a gun while he was on parole.

Kepros testified at the post-conviction hearing that she wanted to show that Owens was a sympathetic person by asking Asante about the normal activities he and Ray engaged in. She acknowledged that the trial team successfully moved for and obtained a pretrial order precluding the prosecution from introducing evidence of Owens's involvement in drugs unless Owens's trial team opened the door. Kepros suspected that questioning Asante about normal activities might open the door but after a risk-benefit analysis, she decided to pursue the line of questioning about Ray's and Owens's relationship. Kepros did not recognize that Tomsic's question exceeded the limits placed by the court. Kepros added that she was aware that Owens was not charged with drug possession for the incident that Asante was asked about.

In Reynolds's view, Kepros's strategy to make Owens appear sympathetic through Asante was deficient because it opened the door to his drug activities. Reynolds added that Kepros was also deficient because she did not raise hearsay and personal knowledge objections to Asante's testimony or request a limiting instruction. Reynolds also found Kepros deficient for not having the incident identified in Guilt Phase Final Instruction No. 15.

c. Analysis

Kepros decided to attempt to portray Owens as sympathetic through Asante. She did a risk-benefit analysis and reasonably decided to pursue the strategy. When the prosecution argued that she had opened the door, Kepros vigorously objected and asserted that the drug evidence was inadmissible under CRE 403 and 404(b). She convinced the court that the prosecution should not be allowed to ask about the criminal aspects of the incident when Owens and Ray were caught as juveniles with cocaine. When Tomsic violated the court's limitations on what could be asked, Kepros did not object and did not seek a more expansive limiting

instruction. To do otherwise might have caused the jury to focus on the evidence. In evaluating Kepros's performance, the court must avoid the "distorting effects of hindsight" and acknowledge that "[t]here are countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 690. Kepros determined that the benefits of Asante's testimony would outweigh the risks. Kepros's approach to Asante's testimony was within the wide range of professionally competent assistance.

As for failing to seek a mistrial when R. Carter testified he packed a gun because of the business Ray and Owens were in, King wanted R. Carter to be viewed as a career criminal who was not credible. R. Carter's testimony about having a gun while on parole was consistent with King's strategy. Moving for a mistrial on these points would have been unsuccessful and, if done before the jury or under circumstances where a delay would have highlighted the evidence, would only have served to highlight the damaging aspects of the evidence. Regarding Asante and R. Carter, King's and Kepros's performance fell within the wide range of professionally competent assistance. *See id.* (The defendant must show that "the identified acts of omissions [of counsel] were outside the wide range of professionally competent assistance.").

d. Conclusion

The court concludes the trial team's decisions regarding Asante's and R. Carter's testimony about Owens's drug involvement were not the product of deficient performance. The court also concludes Owens failed to prove that he was prejudiced by the alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on the trial team's handling of Asante's and R. Carter's testimony is **Denied**.

6. Prosecutor's Embrace of Fields

a. Parties' Positions

Owens contends he was prejudiced by King's failure to object when Tomsic and Fields hugged after Fields testified during the guilt phase.

b. Findings of Fact

Fields, Marshall-Fields's mother, was called to testify during the guilt phase. After she was excused from the witness stand, she and Tomsic hugged each other behind the prosecution's table.

During a colloquy with the parties on another matter the following day, King expressed concern that the prosecutors were not regulating themselves or the victim's family members and pointed out that after Fields gave victim impact evidence and left the witness stand, Tomsic hugged her in front of the jury.

During the post-conviction hearing, King testified that there are times when he chose to forgo a proper objection. He viewed the hug between Fields and Tomsic as one such instance. In King's view, the jury would hold it against an attorney who objected to showing compassion for the mother of a murder victim. King added that his primary concern was to make sure that it did not happen again.

Reynolds opined that King's performance was deficient because he should have requested a bench conference, detailed what occurred, and moved for a mistrial. Reynolds disputed King's view that there are times when it is better not to object. In her view, counsel must object at every opportunity regardless of its impact on how the jury perceives counsel.

c. Analysis

King did not contemporaneously object when Tomsic and Fields hugged because he did not want to offend the jury by objecting to the prosecutor showing compassion to the mother of a murder victim. King's concern with not offending

the jury was a reasonable decision because objecting to a compassionate hug would have offended some of the jurors. King was concerned with maintaining his credibility with the jury. *Davis v. People*, 871 P.2d 769, 777 (Colo. 1994) (capital defense counsel's efforts to maintain credibility with the jury is a legitimate strategy). King subsequently made a record of the incident with the intent to prevent similar incidents in the future. In anticipation of a possible sentencing hearing where victim impact evidence would be presented, King wanted to make sure that similar displays of compassion did not occur in front of the jury. Under the circumstances, King's performance fell within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

d. Conclusion

The court concludes Owens failed to prove that King's decision not to contemporaneously object when Fields and Tomsic hugged was deficient performance. The court also concludes Owens failed to prove that he was prejudiced by King's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on King's failure to object is **Denied**.

7. Bag of Guns

a. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object to testimony about the duffle bag containing long guns and by his trial team's failure to cross-examine and impeach Todd, R. Carter, and the prosecution's ballistics expert about the handgun ammunition found at the scene of the Dayton Street homicides.

b. Findings of Fact

Todd testified at the guilt phase that he and Ray went to the barbershop on June 21, 2005, and that Owens and Carter were also there. While there, he saw the older barber and Owens walk a duffle bag up the alley. He could not see what was in the duffle bag and did not see gun barrels sticking out of it. Owens and the barber returned five minutes later without the duffle bag. According to Todd, Ray had previously shown him the bag, which contained a disassembled military-type weapon. Todd reiterated this point when he testified during the post-conviction hearing.

R. Carter testified at the guilt phase that he gave Owens and Ray permission to store something in his apartment. According to R. Carter, the duffle bag they wanted to store in his apartment had a gun barrel sticking out of it wrapped in expensive coats. He testified that the duffle bag was put in a Suburban and driven down the alley in the vicinity of his apartment. Later, R. Carter went to his apartment and found the bag in his closet. Inside the bag, he found a rifle-like weapon with banana clips that looked like an AK-47, a disassembled army-type gun with a support on the end of the barrel, and a large caliber handgun. There were also loose bullets inside the bag. He described the weapon with the banana clips as being a little less than four feet long, and he described the banana clips as being taped together. During the post-conviction hearing, R. Carter recalled the barrel sticking out of the duffle bag and added that a coat sleeve was over the barrel.

Hammond testified during the guilt phase that a .45 caliber and a 9 mm were used in the Dayton Street homicides and that a .380 caliber and a 9 mm were used in the Lowry Park shootings. He opined that the 9 mm used at Lowry Park was not the same 9 mm used at Dayton Street. During the post-conviction hearing,

Hammond testified that the .45 caliber and 9 mm ammunition recovered from the scene of the Dayton Street homicides could have been fired by handguns or by certain long guns.

Reynolds opined that Owens's trial team performed deficiently by failing to file motions to suppress in order to preclude testimony about long guns because the prosecution's theory of the case was that the Dayton Street homicides were committed with handguns. Reynolds also faulted the trial team for failing to contemporaneously object to the testimony about long guns.

c. Analysis

Owens argues that King should have objected under CRE 602 to Todd's testimony about the contents of the duffle bag based on Todd's lack of personal knowledge. However, Todd had personal knowledge because Ray showed him the duffle bag that contained a disassembled military-type weapon before the bag was taken to R. Carter's apartment. Thus, there was no viable objection available to King under CRE 602.

Owens also argues that his trial team was deficient for not pursuing a strategy of proving that the long guns in the duffle bag could not have fired the caliber of ammunition recovered from the Dayton Street crime scene. First, Owens relies on Hammond's reference to the ammunition as handgun ammunition. But Hammond never testified that the ammunition from Dayton Street was handgun ammunition. Second, Owens relies on Hammond's reference to a pistol. However, Hammond referred to a pistol while explaining why certain 9 mm ammunition is called 9 mm Luger. He was not stating that a pistol had been used to commit the Dayton Street homicides. Moreover, Hammond's testimony at the post-conviction hearing showed that there were long guns capable of firing both .45 caliber and 9 mm ammunition. Hence, any pursuit of this strategy by

attempting to impeach R. Carter, Todd, or Hammond about the ammunition found at the scene of the Dayton Street homicides would have been futile. Hammond would have explained that there were long guns capable of firing the ammunition recovered from the Dayton Street crime scene. Thus, King's performance was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

d. Conclusion

The court concludes Owens failed to prove that King's decision not to pursue a strategy of proving that long guns could not have been used in the Dayton Street homicides was deficient performance. The court also concludes Owens failed to prove that he was prejudiced by King's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on King's handling of the long gun evidence is **Denied**.

8. Louisiana Car Chase

a. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to request a limiting instruction to limit the purpose of the video of Owens's car chase in Louisiana to Owens's consciousness of guilt.

b. Findings of Fact

At a pretrial motions hearing on October 29, 2007, the court addressed whether Owens's recorded police chase on November 6, 2005, in Shreveport, Louisiana, was admissible to show Owens's consciousness of guilt. Owens's trial team argued the evidence was not admissible and cited supporting case law, including some Colorado cases that viewed the jury instruction concerning the defendant's flight as inadequate because it rested on speculation of what the

defendant was thinking. The trial team also argued that, in addition to the alleged murders of Marshall-Fields and Wolfe, there were four alternative explanations for why Owens was running from the police.

In the course of the argument, Kepros noted that there were Colorado appellate courts that disapproved of the flight instruction because it is too speculative. The court ruled the chase was admissible, but precluded the police officer from testifying that he was conducting drug surveillance for a car that looked like the one Owens was driving, that he saw Owens throwing what appeared to be bags of marijuana from the car during the chase, and that Owens had a gun on him when he was arrested. The court ordered that these items be redacted from the video of the chase.

When the police officer's direct examination focused on the chase, Kepros objected under CRE 401, 403, and 404; asked to incorporate her pretrial objections; and requested a continuing objection. When the prosecution sought to introduce the video of the chase, Kepros lodged numerous additional objections.

In Reynolds's opinion, it was not deficient for Owens's trial team to fail to ask for the standard flight instruction as a limiting instruction because of the wording of that instruction. In her view, it improperly focuses the jury's attention on the defendant's guilt. But she opined that the trial team performed deficiently for not seeking a modified version of the flight instruction that removed the standard language about the defendant's consciousness of guilt.

c. Analysis

Owens's trial team was conscious of the evidence about the police chase in Louisiana and took appropriate measures to preclude the evidence, including arguing against its admissibility during pretrial motions hearings and making contemporaneous objections based on relevance and unfair prejudice. During the

argument, the trial team referenced several appellate opinions that viewed the flight instruction as speculative. Consequently, the trial team did not request a flight instruction. Although not successful in precluding all of the evidence, the trial team was successful in that the court ordered that some of the prejudicial portions be redacted from the video and the officer's testimony. Thus, the trial team's performance with respect to the car chase evidence was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

d. Conclusion

The court concludes Owens failed to prove that his trial team's decision not to seek a limiting instruction for the police chase was deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on not seeking the limiting instruction is **Denied**.

I. Investigating and Challenging DNA Evidence

1. Parties' Positions

Owens contends his trial team was ineffective in investigating and challenging DNA evidence with respect to the baseball cap found at the Dayton Street crime scene.

2. Principles of Law

Under *Strickland v. Washington*, 466 U.S. 668, 689 (1984), "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Additionally, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In

any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. Furthermore, "[c]ounsel [is] entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Harrington v. Richter*, 562 U.S. 86, 107 (2011).

3. Specific Claims

The court will address each of Owens's specific claims below.

a. Failure to Retest Baseball Cap

i. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to retest the DNA from the baseball cap found at the scene of the Dayton Street homicides.

ii. Findings of Fact

CBI Agent Mary Schleicher (Schleicher) testified at trial as a DNA expert. Schleicher obtained a DNA sample by swabbing the brim and the inside of the New York Yankees baseball cap found at the Dayton Street crime scene. Based on her analysis of the DNA sample, she determined that the cap contained a mixture of DNA and that Owens was the major contributor of the mixture. The minor contributor was unknown. But Schleicher was able to eliminate Ray, Carter, Todd, and Cazenave as minor contributors.

At the post-conviction hearing, Schleicher was provided with a November 2009 Bode Technology report,[372] which was the post-conviction analysis of the swabs she took from the cap. She observed that DNA analysis has advanced since 2005 and that Bode Technology used a different DNA testing kit than the kit she

[372] SOPC.EX.D-1621.

used at the CBI. The Bode Technology report confirmed her findings that Owens was the major contributor to the DNA mixture and that Ray, Carter, Todd, and Cazenave were eliminated as minor contributors to the mixture recovered from the brim of the cap.[373] The mixture from the inside rim of the cap did not yield enough material to either include or exclude Ray, Carter, Todd, or Cazenave as minor contributors, but Owens was the major contributor. During her testimony at the post-conviction hearing, Kepros recalled that Steve Jacobson (Jacobson), former office head of the Boulder PDO, was the trial team's DNA consultant. At Jacobson's suggestion, the trial team sent the CBI's DNA test results to Forensic Bioinformatics to determine whether the CBI had correctly analyzed the DNA mixture and whether it had correctly eliminated Ray, Carter, Todd, and Cazenave as minor contributors. Kepros and Jacobson discussed the Bioinformatics report and concluded there was no basis for attacking the CBI DNA analysis. Jacobson never suggested that a retest of the swabs was necessary. Kepros did not consider whether a retest would be harmful to the defense. She specifically did not consider that a retest could be done confidentially or that she could withhold the results of the retest from the prosecution unless she intended to use the results at trial.

Reynolds pointed out that the ABA Guidelines for capital counsel require independent retesting of any forensic evidence but conceded that it was reasonable for Owens's trial team to rely on Jacobson, who was an expert on DNA evidence. She acknowledged that because Jacobson did not suggest retesting, it was

[373] In 2017, Owens's post-conviction counsel sought to reopen the case to submit additional evidence. In support of the request, they submitted a report from a qualified professor who opined that advances have been made in the scientific understanding of the degradation of DNA. Considering that new understanding, it was the professor's view that Cazenave could not be eliminated as a possible minor contributor of the DNA mixture collected from the top and bottom of the brim of the cap. His report did not include information as to what percentage of the African-American or Caucasian-American population could be excluded.

reasonable for Owens's trial team not to retest. She added that the trial team did a lot of work in preparing for the DNA evidence.

iii. Analysis

Owens's primary complaint is that by not retesting the DNA from the cap found at the crime scene, his trial team missed an opportunity to point out that there were multiple contributors to the DNA mixture found on the cap. The argument is not persuasive. First, Schleicher testified at trial that there were at least two contributors to the mixture. Second, the trial team relied on a DNA consultant who was specifically retained to develop challenges to the DNA evidence, and he never suggested that retesting was necessary. Third, based on Bode Technology's analysis, a retest would have confirmed the CBI results that there were at least two contributors and, therefore, would have been a waste of time and resources. Fourth, Forensic Bioinformatics confirmed the CBI's DNA analysis. For these reasons, the decision not to retest was reasonable. *See Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty . . . to make a reasonable decision that makes particular investigations unnecessary."). Thus, the decision fell within the wide range of professionally competent assistance to which Owens was entitled. *See id*. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

iv. Conclusion

The court concludes Owens failed to prove that his trial team's decision not to retest the DNA mixture was deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on not retesting the DNA is **Denied**.

b. Failure to Independently Test Hairs

i. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to independently arrange for mitochondrial DNA testing of the two hairs found in the baseball cap.

ii. Findings of Fact

During Schleicher's cross-examination at trial, Kepros addressed the fact that Schleicher retrieved hairs from the baseball cap recovered at the Dayton Street crime scene and that the hairs were never tested.

Kepros testified at the post-conviction hearing that her strategy was to argue that the untested hairs were an example of an inadequate police investigation during her closing argument. Kepros noted that her strategy was based on the fact that the hairs were not inculpatory. She acknowledged that if the trial team had tested the hairs and the hairs were determined not to be Owens's hair, then that evidence would have weakened the prosecution's DNA evidence.

David Spirk (Spirk), a supervising criminalist for the Arizona Department of Public Safety Crime Laboratory, testified as an expert in forensic hair and fiber analysis at the post-conviction hearing. He analyzed four items, which included the two suspected hairs taken by Schleicher from inside the baseball cap. Based on his analysis, he opined that the two suspected hairs were human hairs and that they were good candidates for mitochondrial DNA analysis. The other items were a wool thread and an animal hair.

Christie Smith (C. Smith), a special agent forensic scientist with the Tennessee Bureau of Investigation, testified as an expert in mitochondrial DNA analysis at the post-conviction hearing. C. Smith conducted mitochondrial DNA analysis on the human hairs. Based on her analysis, she opined that the two hairs

from the baseball cap were consistent with Owens's mitochondrial DNA. She also opined that the hairs were inconsistent with Ray's and Carter's mitochondrial DNA.

iii. Analysis

Regarding the hairs from the cap, Kepros decided not to have the hairs tested because untested hairs were not inculpatory to Owens and because the prosecution's failure to test the hairs supported the defense strategy of showing that there was an inadequate police investigation. In light of these circumstances, Kepros's decision not to test the hairs was reasonable. *See Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty . . . to make a reasonable decision that makes particular investigations unnecessary."). The decision fell within the wide range of professionally competent assistance to which Owens was entitled. *See id*. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

Moreover, based on the post-conviction testing, any pretrial testing of the hairs would have produced additional inculpatory evidence. Thus, there is no reasonable probability that, but for his trial team's failure to test the hairs, the result of the guilt phase or sentencing hearing would have been different. *See id*. at 694 ("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.").

iv. Conclusion

The court concludes that Owens failed to prove that his trial team's decision not to test the hairs from the baseball cap was deficient performance. The court also concludes Owens failed to prove that he was prejudiced by his trial team's

alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on not testing the hairs is **Denied**.

c. Calling Expert Who Bolstered Prosecution Case

i. Parties' Positions

Owens contends he was prejudiced by his trial team's decision to call a DNA expert whose testimony supported the prosecution expert's determination that Owens was the major contributor to the DNA found in the baseball cap.

ii. Findings of Fact

During the guilt phase, Owens's trial team called Rudin, who was received as an expert in forensic DNA with a specialty in DNA transfer. During her direct testimony, Rudin explained:

- primary DNA transfer as being between two objects and secondary transfer as occurring when DNA goes from a second object to a third object;
- the many variables that affect DNA transfer, including the propensity of the person to shed skin cells;
- that there are variables involved in the persistence of DNA on an object and in the detection of DNA;
- that it is possible for a person to wear a cap and that person's DNA not be transferred; and
- that a DNA mixture cannot tell you who wore the cap the most frequently or who wore the cap last.

Kepros testified during the post-conviction hearing that Jacobson recommended Rudin to the trial team. According to Kepros, Rudin's purpose was to show the jury that DNA does not prove where the person was when their DNA was transferred to the object.

Kepros acknowledged that the prosecution's cross-examination of Rudin focused on how a second person wearing a cap can reduce or replace the first person's DNA. Kepros faulted herself for not conducting a redirect examination because she could have brought up how wearing a doo-rag could also reduce DNA in a cap. She acknowledged that the prosecution's cross-examination was limited, and therefore, she did not have a lot of material for redirect examination.

Reynolds opined that Kepros's examination of Rudin about reduction and replacement of DNA was so harmful to Owens that the team should have considered not calling Rudin as a witness.

iii. Analysis

Jacobson, the trial team's DNA consultant, recommended that the trial team retain Rudin as an expert to explain the numerous variables involved in how DNA can be transferred to an object. As Kepros noted, the defense strategy for the DNA evidence was to suggest that the presence of DNA cannot tell the jury when the DNA was transferred to the cap, where the person was when the DNA was transferred to the cap, how it was transferred to the cap, or who was the last person to wear the cap. Rudin supported this strategy, and her testimony about what DNA cannot prove outweighed any harm in her testimony about reduction and replacement, the amount of contact needed for DNA transfer, and that Owens either wore the cap often or deposited a large amount of his DNA on the cap while wearing it for a short amount of time. In light of all the circumstances, calling a defense DNA expert was a reasonable decision. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

iv. Conclusion

The court concludes Owens failed to prove that his trial team's decision to call Rudin was deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on calling Rudin is **Denied**.

d. Inadequate Cross-Examination of Prosecution Expert

i. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to adequately cross-examine the prosecution's DNA expert on whether the DNA profiles found on the cap could have been altered by the suspect wearing a doo-rag.

ii. Findings of Fact

On cross-examination during the guilt phase, Schleicher testified that if a person wore a head covering such as a doo-rag, it would prevent skin cells from transferring to the inside of a cap. Schleicher confirmed that DNA only establishes who touched the object and that it does not establish when, why, how, or who last touched it. Schleicher acknowledged that she could only say that Owens had contact with the New York Yankees baseball cap.

During her testimony at the post-conviction hearing, Schleicher recalled that Kepros was well prepared and asked detailed questions about Schleicher's analysis and reports when Kepros interviewed her prior to trial.

During the post-conviction hearing, Kepros testified that her pretrial preparation of Schleicher was thorough and that during her cross-examination she covered many innocent reasons why someone's DNA might be transferred to an object.

iii. Analysis

Kepros asked Schleicher about how a doo-rag could prevent the transfer of DNA onto the baseball cap. Accordingly, Owens failed to prove there was

deficient performance on this topic. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

iv. Conclusion

The court concludes Owens failed to prove that Kepros's cross-examination of Schleicher was deficient. Accordingly, Owens's petition to vacate his conviction and sentence based on not cross-examining Schleicher about a suspect wearing a doo-rag is **Denied**.

e. Conclusion

The court concludes that the trial team's performance with respect to the DNA evidence was within the wide range of professionally competent assistance. The court also concludes Owens failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on the trial team's handling of the DNA evidence is **Denied**.

J. Failure to Adequately Investigate and Competently Litigate Hearsay Issues and Preserve Objections

1. Investigating Out-of-Court Statements, Presenting Relevant Evidence, and Objecting and Preserving Objections to Irrelevant and Prejudicial Hearsay

a. Principles of Law

Hearsay is defined as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." CRE 801(c). Hearsay is generally inadmissible unless it falls within one of the exceptions to the hearsay rule. *See* CRE 803 (listing exceptions).

Under the Sixth Amendment to the United States Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. And under the Colorado Constitution, "[i]n criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face." Colo. Const. art. II, § 16.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court addressed testimonial hearsay. The Court said that "[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68. While the Court declined to provide a comprehensive definition of "testimonial," it believed that the word "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*

The question of what constitutes a testimonial statement was addressed by the Colorado Supreme Court in *Raile v. People*, 148 P.3d 126 (Colo. 2006). In *Raile*, the Colorado Supreme Court addressed a situation where a third-party witness made statements about an altercation with the defendant to another witness and was later questioned by a police officer. *Raile*, 148 P.3d at 129. The trial court admitted all of the statements as excited utterances. *Id*. at 128. After a detailed analysis of *Davis v. Washington*, 547 U.S. 813 (2006), the Colorado Supreme Court held that the context and circumstances under which statements are made is by and large determinative of whether the statements are testimonial. *Id*. at 130-32. The Colorado Supreme Court pointed out that when circumstances objectively indicate the primary purpose of the questioning was to elicit statements to prove past events or are potentially relevant to a later criminal prosecution, the witness's answers are testimonial. *Id*. at 130. When the circumstances show the

statements were made during an ongoing emergency and were provided to assist the police in assessing the situation, the statements are nontestimonial. *Id*. at 130. As a result, the Colorado Supreme Court concluded that the statements to the other witness were nontestimonial and properly admitted. *Id.* at 135 n.17. However, the statements to the police officer were testimonial because the statements were given in a controlled setting, when there was not an ongoing emergency, and in response to police questions about past events. *Id.* at 132-33. Under these circumstances, the witness was "testifying" to the police officer. *Id*. at 132. *See also Michigan v. Bryant*, 562 U.S. 344, 375 (2011) (an out of court statement is testimonial if its primary purpose is to establish or prove past events potentially relevant to later a criminal prosecution).

"When and whether trial counsel objects during the trial are matters of trial strategy and technique." *People v. Sparks*, 914 P.2d 544, 548 (Colo. App. 1996). It can be considered trial strategy if an attorney chooses not to object in order to prevent drawing undue attention to an issue. *See id*.

b. Testimonial Hearsay Statements

i. Prosecutor Statements Contained in Plea Agreement Addenda

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object on confrontation grounds to the admission of plea agreements for Sailor, Johnson, and D. Ray and to allowing Hower to read to the jury the addenda to the plea agreements.

(b) Findings of Fact

During the trial, the prosecution moved to admit the plea agreements and addenda thereto of Sailor, Johnson, and D. Ray. Owens's trial team did not object.

Lundin testified as to the plea agreements and addenda, and Hower projected the addenda onto a screen for the jury. Hower had Lundin go through the agreements and addenda, and Hower read the addenda, including:

> Based upon the investigation of the murders of Javad Marshall-Fields and Vivian Wolfe that occurred on June 20, 2005, if the district attorney is unaware of existence of any credible evidence that defendant, Ms. Ray, was physically present at the time and location of those murders.
>
> The district attorney is unaware of the existence of any credible evidence that the defendant with the intent to promote or facilitate the commission of those murders, aided, abetted, advised, or encouraged any person in the planning or commission of those murders.

Guilt Phase Tr. 166:18-25; 167:1-6 (Apr. 14, 2008 p.m.). Owens's trial team did not object.

Kepros testified at the post-conviction hearing that she did not recognize the addenda as testimonial hearsay. On cross-examination, Kepros acknowledged that she wanted to use the plea agreements to impeach the witnesses. Kepros specifically referred to the addendum to Sailor's plea agreement in her opening statement.

(c) Analysis

For most of its analysis in this section, the court will focus its analysis of this claim and similar claims on the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984). When evaluating an ineffective assistance of counsel claim under *Strickland*,

> [T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's

> performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.

466 U.S. at 697. Accordingly, the court will generally analyze claims such as this one on the prejudice prong without addressing whether counsel's performance was deficient. In doing so, the court is not addressing whether the evidence at issue is inadmissible hearsay or otherwise potentially inadmissible under the Colorado Rules of Evidence.

With regard to prong two of *Strickland*, Owens argues that he was prejudiced because the statements informed the jurors that the government's investigation disclosed no evidence that Johnson, Sailor, and D. Ray were complicitors or principals in the Dayton Street homicides. He argues that Hower's statements invoked the imprimatur of the government and served as substantive evidence of Owens's guilt.[374]

The addenda are silent as to Owens's guilt. Kepros testified that it was the trial team's strategy to use witnesses' plea agreements to impeach the witnesses on bias, and Johnson, Sailor, and D. Ray each testified at the trial. Kepros even mentioned the addendum to Sailor's plea agreement in her opening statement. Thus, even if the addenda were testimonial hearsay, it would have been contrary to the defense strategy to object to their admission. *See Sparks*, 914 P.2d at 548 ("When and whether trial counsel objects during the trial are matters of trial

[374] In his argument regarding prong two of *Strickland*, Owens alleges that if his trial team had objected and if the objections had been overruled, then Owens would have had a more favorable standard of review on appeal. This argument appears in different forms throughout this section of SOPC-163. The court will not review that argument in its *Strickland* analysis, because to prove prejudice under *Strickland*, 466 U.S. at 694, "[t]he 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 lower standard of review on appeal does not equate to a reasonable probability that the outcome of the trial would have been different. Similarly, anticipating whether or not the court would have overruled an objection is speculative.

strategy and technique."). Impeaching witnesses' credibility on the basis of favorable plea agreements was a prevalent defense theme throughout the trial, and the court finds that the trial team's actions in not objecting to the addenda was not prejudicial to Owens. Thus, Owens has not proved that he was prejudiced by his trial team's failure to object on the basis of testimonial hearsay. *See Strickland*, 466 U.S. at 694 ("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.").

(d) Conclusion

Owens has not demonstrated that he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence on the basis of his trial team's failure to object to the prosecutor's statements contained in the plea agreement addenda is **Denied**.

ii. Prosecutor Statements in Applications for Immunity Grants

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object on confrontation grounds to the admission of applications for immunity for R. Carter and Markeeta Ray.

(b) Findings of Fact

At trial, the prosecution moved to admit the Application for Order Granting Immunity and Compulsion of Testimony of Witness for both R. Carter and Markeeta Ray. Owens's trial team did not object. The applications contained the following language, "[t]his application for immunity and compulsion of testimony is being made in good faith. In the judgment of the undersigned District Attorney, the testimony of such witness is necessary to the public interest and the witness can

give important testimony which will be pertinent to the Grand Jury's inquiry." SOPC.EX.D-1523. The applications contained Tomsic's name and signature. Each application was accompanied by an Order Granting Immunity and Compulsion of Testimony of Witness, which was signed by a District Court Judge. The documents were stamped by the clerk's office.

During the post-conviction hearing, Kepros testified that she did not recognize the language in the applications as testimonial hearsay. Kepros acknowledged that a witness having immunity is good impeachment evidence, because it demonstrates that the witness is gaining a benefit in exchange for the witness's testimony. Kepros confirmed that she talked about R. Carter receiving immunity during her opening statement and that it played into the defense theme of evidence ignored, evidence overstated, and evidence for sale.

(c) Analysis

At the outset, the court notes that in SOPC-163, Owens states that a District Court Judge's signature and the court's seal are on the applications. This is incorrect, because the District Court Judge's signature is only on the orders granting immunity. *See id*. at 27-29. The orders granting immunity do not contain the language that Owens is contesting. The certification from the clerk's office is located on the top of the applications, but the stamp does not accompany a signature from a District Court Judge. Thus, because the applications do not include a signature from a District Court Judge, the court has not considered Owens's argument that the applications were testimonial hearsay from the court. Nor will the court consider the orders granting immunity as testimonial hearsay, because the orders do not contain the language that Owens contests.

With regard to prong two of *Strickland*, Owens contends that he was prejudiced by his counsel's deficient performance because the court's order and

seal are testimonial statements that approve Tomsic's language from the applications and transform Tomsic's language into judicially noticed facts. Owens does not provide any authority for how the language from the applications is a judicially noticed fact.

Nor do the orders granting immunity either repeat or adopt the language from the applications. The orders granting immunity are silent as to the allegedly objectionable provision in the applications. Owens also argues that he was prejudiced because the applications bolstered the prosecution's evidence and implicitly aligned the prosecution with the court. Owens offers no evidence or legal argument in support of this proposition. Additionally, the applications are silent as to Owens's guilt. R. Carter testified at trial; Markeeta Ray did not testify. Owens has failed to prove that he was prejudiced by his trial team's alleged deficient performance. *See Strickland*, 466 U.S. at 694 ("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.").

(d) Conclusion

Owens has not demonstrated that he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence on the basis of his trial team's failure to raise state and federal confrontation objections to exclude Tomsic's and the court's statements is **Denied**.

iii. Ray's and Attorney's Post-arrest Statements Invoking Constitutional Rights

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object to or request limiting instructions for the testimony of T. Wilson and Fronapfel

regarding Ray's and his attorney's assertion of Ray's Fifth and Sixth Amendment rights.

(b) Findings of Fact

On April 11, 2008, T. Wilson testified at trial that on July 13, 2004, "I went back to the jail and attempted to talk to Mr. Ray. Mr. Ray did not want to talk to me at all without having an attorney . . . ." Guilt Phase Tr. 129:12-14 (Apr. 11, 2008).

On April 29, 2008, Fronapfel testified at trial that she contacted Steinberg on June 21, 2005, and that the conversation impacted her attempts to locate Ray and his family. Guilt Phase Tr. 137:15-18 (Apr. 29, 2008 a.m.). She went on to state that,k "Steinberg advised me that he knew where Robert was and that Robert was fine and that he was representing Robert and that I was to have no contact with Robert or any of Robert's family members." *Id*. at 137:20-23. During her testimony a few days later, Fronapfel confirmed that she ended attempts to talk with Ray after she spoke with Steinberg. Guilt Phase Tr. 53:24-25; 54:1-3 (May 1, 2008 p.m.). Fronapfel testified that Steinberg made it sound like he was also representing members of Ray's family. *Id*. at 55:6-9.

During the post-conviction hearing, Kepros testified that it was part of the defense's trial strategy to show that the police investigation had been shoddy and biased. She perceived T. Wilson's and Fronapfel's statements that obvious leads in the case had not been pursued to be obstructionism by Steinberg. Kepros testified that there was no strategic decision in failing to object.

During the post-conviction hearing, Reynolds identified a number of objections that the trial team should have made to the contested statements. Reynolds emphasized that the statements bolstered the prosecution's "wall of silence" theme. Reynolds believed that Ray's invocation of his right to remain

silent was imputed to Owens, which was exacerbated by Lundin's and Root's testimony at trial that a defendant asserts the Fifth Amendment if the defendant has something incriminating to say. Reynolds identified Ray's statement to T. Wilson as a *Crawford* statement and Steinberg's statement to Fronapfel as potentially not testimonial in nature. On cross-examination, Reynolds agreed that T. Wilson's statement about Ray wanting an attorney was referenced only once at trial. Reynolds recognized that Ray did not provide any information on Owens and that at the time of Ray's statements, Owens had not been identified as a suspect in the case.

(c) Analysis

With regard to the second prong of *Strickland*, Owens alleges that he was prejudiced by the jury being allowed to hear that Ray remained silent and retained Steinberg instead of cooperating with law enforcement. Owens argues that Steinberg impeded the government's investigation by asserting Ray's rights and Ray's family's rights. Owens contends that the statements served as substantive evidence of Owens's guilt and that the prosecution was able to use the statements to bolster its overarching themes of silence in the case. Additionally, Owens argues that the prosecution used the statements to insulate the government's investigation from scrutiny and excuse its ability to quickly solve the cases.

First, T. Wilson testified about a statement that Ray made after Ray's 2004 arrest. Ray invoked his right to remain silent by asserting that he was unwilling to waive that right and talk to law enforcement. His words were not hearsay because they were not offered for the truth of the matter asserted (what he was willing or unwilling to do) but for the effect of his invocation of rights on the direction of the police investigation. Nor were his words testimonial because they were not elicited for the primary purpose of establishing or proving past events potentially

relevant to later a criminal prosecution. Moreover, the incident was only mentioned once and occurred before Owens was a suspect in the Lowry Park shootings. Ray's assertion of his rights to remain silent and to an attorney in July 2004 does not somehow equate to substantive evidence of Owens's guilt. The statement was offered to prove the impediments that law enforcement encountered in the investigation due to uncooperative witnesses. Ray neither mentioned nor implicated Owens in his statement to T. Wilson. Thus, Owens has not proved that he was prejudiced by his trial team's alleged deficient performance. *See Strickland*, 466 U.S. at 694 ("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.").

Second, Reynolds conceded that the statement from Steinberg to Fronapfel might not be testimonial hearsay, but that the trial team should have nevertheless objected. Again, Steinberg's information related to Ray and Ray's family. Steinberg neither indicated that he represented Owens nor implicated Owens in his statements. Objecting to Fronapfel's testimony about Steinberg's statements would have focused the jury on the hurdles that law enforcement faced in its investigation due to uncooperative witnesses. *See Sparks*, 914 P.2d at 548 (decision not to object to avoid drawing undue attention to evidence is reasonable trial strategy). Furthermore, Owens's trial team tried to distance Owens from Ray throughout the trial, and objecting in this instance may have indicated to the jury that Steinberg's statement somehow implicated Owens. Thus, Owens has not proved that he was prejudiced by his trial team's alleged deficient performance. *See Strickland*, 466 U.S. at 694 ("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.").

(d) Conclusion

Owens has not demonstrated that he was prejudiced by his trial team's alleged deficient performance. Owens's petition to vacate his conviction and sentence on the basis of his trial team's failure to object to Ray's and Steinberg's post-arrest statements invoking constitutional rights is **Denied**.

iv. Ray's Post-arrest Silence in Response to Requirement that He Identify "Actual" Lowry Park Killer

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object to or request a limiting instruction regarding Lundin's testimony that the prosecution advised Ray's attorney that it would not offer Ray a plea agreement unless Ray identified the Lowry Park shooter.

(b) Findings of Fact

On April 14, 2008, Lundin testified generally about the plea agreements that were offered in the Lowry Park case. Lundin was asked why she subpoenaed Marshall-Fields and A. Martin to testify, and Lundin responded "[b]ecause they were the only two witnesses who could identify Robert Ray, the defendant, as the person who drove the shooter away from the scene of the murder." Guilt Phase Tr. 130:17-20 (Apr. 14, 2008 p.m.). When asked whether Ray had been offered a plea agreement for the Lowry Park case,

> A: There had been no offer of a plea bargain in that case.
>
> Q: Why was that?
>
> A: Because a condition of offering any plea bargain that I made clear to defense counsel was that Mr. Ray identify who the actual shooter was of the victim, Greg Vann.
>
> Q: And had that happened?

A: It had not.

Id. at 154:2-10. Kepros objected on discovery grounds, but the objection was overruled.

During the post-conviction hearing, Kepros acknowledged that Lundin testified at trial about the fact that Ray had been charged as an accessory to murder and that there was evidence that Ray was the person who drove the shooter away from the Lowry Park crime scene.

Reynolds testified that the introduction of Lundin's statement was objectionable on the basis of *Crawford*, state confrontation grounds, CRE 401, and CRE 403. Reynolds acknowledged that any questions related to Ray possibly getting a plea agreement were predicated on the fact that Ray was only charged as an accessory at that time. Reynolds admitted that Ray's silence could have implied that Owens, Ray, or someone else was the shooter.

(c) Analysis

With respect to prong two of *Strickland*, Owens alleges that he was prejudiced by the jury's exposure to Lundin's implication that Ray was not Vann's shooter, and inferentially, that Owens was the shooter. Owens contends that the prosecution used Ray's silence throughout the trial as substantive evidence of Owens's guilt for all three homicides.

Lundin testified that Ray was originally charged as an accessory to murder and that witnesses identified Ray as the person who drove the shooter away from the Lowry Park crime scene. Thus, the jury heard evidence that Ray was not the suspect for Vann's murder. Lundin did not testify that Ray named Owens or any other individual as the shooter. Reynolds even acknowledged that Ray could have named himself as Vann's shooter. The argument that the jury would make the inferential leap from Ray not being offered a plea deal because he would not name

the shooter to Ray's silence implying that Owens was the shooter is speculation and lacks merit. Accordingly, Owens has not proved that he was prejudiced by his trial team's alleged deficient performance. *See Strickland*, 466 U.S. at 694 ("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.").

(d) Conclusion

Owens has not proved that he was prejudiced by his trial team's alleged deficient performance. Owens's petition to vacate his conviction and sentence based on his trial team's failure to object to Ray's post-arrest silence in response to the requirement that he identify the "actual" Lowry Park killer is **Denied**.

v. Statements of Unknown Declarants Describing Lowry Park Shooter as Matching Owens's Description

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object to Sailor's testimony, based on her review of the Lowry Park discovery, that the shooter described by Lowry Park witnesses was Owens.

(b) Findings of Fact

On April 16, 2008, Sailor testified about going through Ray's Lowry Park discovery from Steinberg with Owens and Ray. During the prosecution's questioning, Sailor testified to the following:

> Q: As you read through what you read, did you ever see, in any of the discovery regarding the July 4th shooting, any mention of Mr. Owens by name?
>
> A: No.
>
> Q: Did you, in reading through it, see any descriptions of the shooter?
>
> A: I believe so.

Q: And did you recognize the description that was given?

A: Yes.

Q: Who?

A: Sir Mario Owens.

Guilt Phase Tr. 32:5-16 (Apr. 16, 2008 a.m.). Owens's trial team did not object.

During the post-conviction hearing, King testified that he did not recall having a strategic reason not to object to that testimony on *Crawford* grounds. On cross-examination, King agreed that Sailor did not provide the declarant's description from the police report, but rather responded to whom she thought the description was referring. Thus, the statement admitted Sailor's state of mind. King acknowledged that the identifications by Lowry Park witnesses were the subject of extensive pretrial litigation.

Reynolds testified that the evidence implied that Owens matched the witnesses' descriptions that were in the discovery. On cross-examination, Reynolds recalled that Marshall-Fields's and Bell's descriptions of the shooter were in the discovery, and admitted in evidence. Reynolds admitted that Marshall-Fields's and Bell's descriptions of the shooter were consistent with Sailor's recollection of how Owens looked the night of the Lowry Park shootings.

(c) Analysis

With regard to the second prong of *Strickland*, Owens contends that he was prejudiced because the statements were substantive evidence of Owens's guilt, enhanced the credibility of Johnson, and exacerbated the likelihood that the jury would believe Ray's silence meant Ray was not the actual shooter.

Marshall-Fields's and Bell's descriptions of the Lowry Park shooter were admitted into evidence. Johnson identified Owens as the Lowry Park shooter. The contested statements encompassed about twelve lines of transcript in a lengthy

guilt phase and Owens's identification as the Lowry Park shooter came in through other evidence. Sailor's testimony that she thought a description in the discovery described Owens, even if it were objectionable,[375] was of little consequence. Thus, Owens has not demonstrated that he was prejudiced by his trial team's alleged deficient performance. *See Strickland*, 466 U.S. at 694 ("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.").

(d) Conclusion

Owens has not demonstrated that he was prejudiced by his trial team's alleged deficient performance. Owens's petition to vacate his conviction and sentence due to the statements of unknown declarants describing the Lowry Park shooter as matching Owens's description is **Denied**.

vi. Todd's Statements During "Ride Around"

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to adequately object to the admission of Fronapfel's testimony about what Todd told her while they were driving around to confirm the locations of incidents he had previously described.

(b) Findings of Fact

On May 1, 2008, Fronapfel testified about accompanying Todd on a drive around when he was in Colorado to testify at a pretrial hearing. The prosecution

[375] The hearsay and associated Sixth Amendment objections do not seem to have arguable merit. But an arguably valid objection might have been made that Sailor's opinion was improper lay opinion testimony because it was not based on her own perceptions but rather those of the people whose information formed the discovery that she reviewed. *See* CRE 701 (setting forth conditions for lay opinion testimony).

elicited a series of statements from Fronapfel about the drive around with Todd, including:

- When they went to Summer Chase Apartments, "he recognized the area and he said this is where the dude lived." Guilt Phase Tr. 111:8-10 (May 1, 2008 a.m.).
- When they got to Summer Chase Apartments, Todd showed Fronapfel where Marshall-Fields's car had been parked when Ray had pointed it out to him. *Id*. at 110:21-25.
- When they went to the park at Quebec and 26th, Todd recognized the park as the location of the Father's Day barbecue, showed Fronapfel where they pulled into, where they parked, and where they had seen Marshall-Fields. *Id*. at 111:15-25.
- When they went to Gibby's, Todd recognized it as "being the place that they had been on the night of the 19th." *Id*. at 112:23-25; 113:1-3.
- When they went by Carter, Sr.'s house, Todd recognized the house, and "he recognized the car port. He showed us the front windows and said that's where the couch was sitting and the area where the pool table was as you are looking at the house itself from the front." *Id*. at 113:23-25; 114:1-3. Todd also pointed out where he parked the silver Suburban the night of June 20. *Id*. at 114:4-6.
- When they went by Lowry Park, Todd "stated this was the park that the little incidents happened with Robert." *Id*. at 114:11-12.

Immediately thereafter, the court initiated a bench conference, indicated that it thought this testimony was hearsay, and thought that a limiting instruction would

be appropriate for the jury. The court then gave the following limiting instruction to the jury:

> Ladies and gentlemen, I just want to point out to you with regard to all of the statements that the detective has told you about Mr. Todd making here in Denver, that's not evidence. That's simply tracking the detective's investigation. And so what Mr. Todd said to you can't be offered nor can it be considered by you for the truth of the matter asserted by Mr. Todd. It is simply so that you understand the course of the detective's investigation.

Id. at 115:22-25; 116:1-5. After the court took a recess, the prosecution advised the court that it believed the limiting instruction was improper because Todd's statements were prior consistent statements of a witness who has testified and been impeached. Kepros objected and cited *People v. Eppens*, 979 P.2d 14 (Colo. 1999). When that objection was unsuccessful, Kepros objected "on due process and confrontation clause grounds pursuant to both constitutions because this evidence was already elicited from Mr. Todd, now that he's not available to be cross-examined about it, to have it come in again in a different fashion is prejudicial and unfair to Mr. Owens." Guilt Phase Tr. 16:2-6 (May 1, 2008 p.m.). Very shortly thereafter, the court retracted its limiting instruction to the jury and advised the jury that it could consider what Todd said as substantive evidence.

During the post-conviction hearing, Kepros testified that there was no strategic reason not to lodge state and federal confrontation clause objections to the testimony. Kepros acknowledged that there was an overarching defense theme that Todd was a viable alternate suspect. Establishing that Todd knew the critical locations and places for the crime, as well as being able to recognize Marshall-Fields and his car, supported the defense's alternate suspect theory. Additionally, while Todd may not have been asked about the drive around with Fronapfel when he testified at trial, Kepros acknowledged that King had asked Todd about Ray

taking Todd to Lowry Park, Todd knowing where the Summer Chase Apartments were, and Todd knowing what Marshall-Fields's car looked like.

Reynolds testified that Fronapfel's testimony about the drive around bolstered Todd's credibility and was phrased in the context of Todd's cooperation. Reynolds viewed this testimony as prejudicial because Fronapfel was talking about Todd's cooperation and Todd no longer being viewed as a suspect.

(c) Analysis

With respect to *Strickland* prong one, following the bench conference, Kepros made the appropriate hearsay objection and cited the leading Colorado case. Because Todd had testified and had been subject to cross-examination concerning the subject matter of the testimony at issue, Kepros's confrontation clause objections would have been overruled pursuant to *United States v. Owens*, 484 U.S. 554 (1988), even if made earlier.

With respect to prong two of *Strickland*, Owens argues that he was prejudiced because the prosecution used Todd's statements to Fronapfel to bolster its case, to bolster and corroborate Todd's testimony, to bolster the soundness of the police investigation, and to insulate that investigation from attack. Owens argues that the effect of the evidence was to separate Todd as a cooperating "good guy" from Owens's and Ray's culture of silence.

Kepros testified that it was a defense strategy to portray Todd as an alternate suspect. She acknowledged that King emphasized in his cross-examination of Todd that Ray was coaching Todd in the commission of the crime. This was established by King showing that Ray identified the victim to Todd, Todd knew that Ray was fighting a case from Lowry Park, Todd had visited Lowry Park with Ray, Ray told Todd what Marshall-Fields's car looked like, and Ray pointed out the Summer Chase Apartments, where Marshall-Fields lived, to Todd. Kepros

confirmed that it was beneficial to the defense that Todd was being instructed by Ray on this information and that it supported an alternate suspect theory. Hence, an earlier objection would have been contrary to the alternate suspect strategy. *See Harrington v. Richter*, 562 U.S. 86, 107 (2011) ("[C]ounsel was entitled to formulate a strategy that was reasonable at the time . . . ."). And by the time the court called the bench conference, Kepros had already allowed the evidence that would reinforce the defense theory, so she made the proper hearsay objection, cited the best Colorado case, and obtained a helpful limiting instruction.

Thus, the court finds that Fronapfel's testimony about Todd's drive around was potentially beneficial to the defense as it supported the defense's alternate suspect theory. Additionally, the court notes that even if the jury had not specifically heard from Todd that he participated in a drive around with Fronapfel, he communicated many of these same points to the jury during King's cross-examination of him. Thus, Owens has not demonstrated that he was prejudiced by the trial team's alleged deficient performance with respect to Todd's statements during the drive around. *See Strickland*, 466 U.S. at 694 ("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.").

(d) Conclusion

Owens has failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's failure to object to Todd's statements during the drive around is **Denied**.

vii. Owens's and Ray's Juvenile Arrests or Charges for Cocaine Distribution

(a) Parties' Positions

Owens contends he was prejudiced when his trial team, after the court precluded evidence of Ray's and Owens's juvenile arrests for drug distribution, opened the door during cross-examination of Asante and failed to object to Asante's testimony about the arrests on confrontation and hearsay grounds.

(b) Findings of Fact

On April 18, 2008, Kepros asked Asante about the relationship between Owens and Ray. Asante testified that Owens and Ray became friends while attending Overland High School and that they did things such as "[c]hased girls, movies, sports, and they went to church." Guilt Phase Tr. 136:9-10 (Apr. 18, 2008 a.m.). Thereafter, Kepros followed up with additional questions about the church Owens and Ray attended. Tomsic initiated a bench conference, in which she argued that Kepros's questioning regarding the kind of activities that Owens and Ray did together opened the door to the fact that they were drug dealing together. *Id*. at 139:25; 140:1-6. Tomsic brought up that "they were arrested together as juveniles dealing drugs. [Asante] was his parent, she was a party of interest, at least as to Robert Ray." *Id*. at 140:19-21. The court stated that "it's been established by this witness that they spent a lot of time together in this time period. And I believe it has opened the door with regard to that incident." *Id*. at 140:22-25.

Kepros objected pursuant to the federal and state due process clauses and CRE 403. Kepros asked that a limiting instruction be given to the jury if the court was going to allow the evidence. Thereafter, Tomsic inquired of Asante:

> Q: (By Ms. Tomsic) Now, you indicated on cross-examination that a lot of the activities -- or you described

the activities between Robert Ray and Sir Mario Owens as chasing girls, sports and going to church together?

A: Yes.

Q: They were also involved in cocaine together, weren't they?

A: Yes.

Q: They were both arrested or charged as juveniles with cocaine?

A: Yes.

Q: And as Robert Ray's parent, you had to be involved in that proceeding?

A: Yes.

Id. at 142:13-25; 143:1. The court then gave a limiting instruction to the jury, "that evidence is being offered simply for the limited purpose with regard to their relationship between the two young men. You may consider it for that purpose and for no other purpose." *Id*. at 143:2-5.

At the post-conviction hearing, Kepros testified that there was no tactical reason not to object based on hearsay, foundation, lack of personal knowledge, CRE 404(b), or confrontation. Kepros acknowledged that she never alerted the court that the Denver prosecutors did not charge Owens when he was arrested during this incident as a juvenile. On cross-examination, Kepros acknowledged that she was trying to humanize Owens and make him appear sympathetic to the jury. She did not intend to open the door to evidence of drug dealing; however, she confirmed that attorneys have to weigh the benefits versus the risks when pursuing a line of questioning.

(c) Analysis

With regard to prong two of *Strickland*, Owens contends that Asante's testimony was highly prejudicial and "cast an irreparable cloud of condemnation"

over Owens, which assured the unfairness of the trial. Owens also argues that due to the inadequacy of the limiting instruction, the jury could infer that because Owens and Ray were "involved in cocaine together" and "arrested or charged as juveniles" that they had bad character and a propensity for crime. Owens argues that the limiting instruction was inadequate because it did not instruct the jury that it could not consider the allegations for the truth of the matter asserted, it could not conclude from the evidence that Owens had bad character or a propensity to commit crime, and it could not consider whether Owens had committed the offenses charged in conformity with that bad character and criminal propensity.

The jury was instructed "that evidence is being offered simply for the limited purpose with regard to their relationship between the two young men. You may consider it for that purpose and for no other purpose." *Id*. The court presumes that the jury follows the instructions it is given. *See People v. Flockhart*, 304 P.3d 227, 235 (Colo. 2013) ("We presume that jurors follow the instructions that they receive."). The limiting instruction clearly instructed the jurors that they could only use the evidence with regard to the relationship between Owens and Ray, and they could not use it for any other purpose. Owens's arguments about the alleged deficient limiting instruction and his trial team's failure to object to that instruction are insufficient to prove prejudice. *See Strickland*, 466 U.S. at 694 ("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.").

(d) Conclusion

Owens failed to prove that he was prejudiced by his trial team's alleged deficient performance. Thus, Owens's petition to vacate his conviction and

sentence on the basis of his trial team's actions with regard to Owens's and Ray's juvenile arrests or charges for cocaine distribution is **Denied**.

viii. Ray's Statements to His Attorney that He Had a Videotaped Alibi

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object on confrontation grounds to Sailor's testimony about Ray's statements to Steinberg regarding Ray's videotaped alibi for the Dayton Street homicides.

(b) Findings of Fact

On April 16, 2008, Sailor testified about a conversation she observed between Ray and Steinberg the day after the Dayton Street homicides. According to Sailor, Steinberg "asked Robert where was he at. Robert was telling him what he had did the following night and the times he was there and all that. And it was weird, just basically he was getting information from his client." Guilt Phase Tr. 107:6-9 (Apr. 16, 2008 a.m.). Sailor testified that Ray "was just saying that he went to the store with Eric at a certain time and they can check the videotape and all that." *Id*. at 107:15-17.

During the post-conviction hearing, King testified that he could not think of a tactical reason for not objecting and that Ray's alibi would not help the defense. On cross-examination, King presumed that he was aware that the alibi evidence would be coming in through other sources. King agreed that other evidence was presented on Ray's alibi, including Sailor testifying about seeing Ray leave with Erick Stookey (Stookey) on June 20, Stookey testifying that he went with Ray to purchase alcohol at Midnight Liquor, and the admission of video footage from Ray's visit to Midnight Liquor.

Reynolds opined that the trial team should have objected to Sailor's testimony because it was a self-serving statement, it did not meet a hearsay exception, it was harmful, it was inadmissible under CRE 401-403, it bolstered Ray's alibi, it violated the confrontation clause, it violated due process, and heightened reliability needed to be considered. Reynolds acknowledged that during trial, Sailor and Stookey provided evidence that went to Ray's alibi, the video surveillance footage of Ray was admitted, and Harris testified that Ray told Harris that he had an alibi. Reynolds further opined that the fact that evidence may have been elicited through other witnesses does not excuse the trial team's failure to object, and the statement added weight to Ray's alibi that was not subject to cross-examination.

(c) Analysis

With regard to prong two of *Strickland*, Owens argues that Sailor's statements about Ray's alibi served as substantive evidence of Owens's guilt. Owens argues that Sailor's statements helped solidify the prosecution's theory that Ray was not at the Dayton Street crime scene, it undercut defense efforts to cast reasonable doubt on that alibi, and it corroborated the prosecution's casting of Ray as the mastermind and Owens as his "flunky."

The jury heard extensive evidence about Ray's alibi during the trial. The jury heard other information from Sailor that supported Ray's alibi, heard from Stookey about going with Ray to the liquor store at the time of the murders, heard from Harris that Ray told Harris he had an alibi, and even saw the videotaped surveillance footage of Ray and Stookey. Thus, there was ample other evidence to support Ray's alibi. Accordingly, the jury would have heard extensive evidence about the alibi, including seeing the described alibi on the surveillance tape, regardless of whether the trial team had objected to Sailor's statements. Therefore,

Owens has failed to prove that he was prejudiced by his trial team's alleged deficient performance. *See Strickland*, 466 U.S. at 694 ("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.").

(d) Conclusion

Owens has not demonstrated that he was prejudiced by his trial team's alleged deficient performance. Owens's petition to vacate his conviction and sentence on the basis of his trial team's failure to object to the introduction of Ray's statements that Ray had a videotaped alibi is **Denied**.

c. Other Testimonial Hearsay or Nontestimonial Hearsay Used to Evade Formalized Process[376]

i. Carter's Jailhouse Confession

(a) Parties' Positions

Owens contends he was prejudiced, notwithstanding his trial team's pretrial objection to Strickland's testimony about Carter's statements inculpating Owens, by his trial team's failure to adequately investigate the circumstances of the statements Carter made to Strickland, to adequately review available jail housing records, to investigate Strickland's history as an informant, and to investigate

[376] In some of his claims concerning nontestimonial hearsay, Owens argues that the court abused its discretion and reversibly erred. This issue is not proper for Crim. P. 32.2 post-conviction review and will not be addressed here. *See* C.R.S. § 16-12-206. Owens acknowledges that the URS seemingly precludes these claims; however, he argues that the court should nevertheless consider the alleged errors in assessing *Strickland* prejudice. Contrary to Owens's argument, whether the court's evidentiary rulings were erroneous is not relevant to *Strickland* prejudice because *Strickland* states that the court must presume that the court acted according to the law. 466 U.S. at 694 ("In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law."). The court will not address those claims, and the court incorporates this analysis into all similar claims raised by Owens.

Strickland's and Carter's mental health problems. Having failed to do this investigation, Owens also contends he was prejudiced by his trial team's inability to present the results of that investigation.

(b) Findings of Fact

The admission of Strickland's testimony was the subject of substantial pretrial litigation. Owens filed 11 motions objecting to its admissibility and responded to the prosecution's motion and supplements seeking its admission. Additionally, Strickland testified on June 13, 2007, and was subjected to cross-examination by counsel for all three codefendants. In Order (SO) No. 11, the court found the statements were nontestimonial, trustworthy, and admissible as statements against penal interest.

At the post-conviction hearing, Kepros acknowledged that the trial team viewed Strickland's testimony as critical because, she claimed, it was the only evidence that identified Owens as a shooter at the Dayton Street homicides. According to Kepros, this was why the team engaged in protracted pretrial litigation over the admissibility of his testimony. She recalled being familiar with Strickland's background when she cross-examined him on June 13. She recalled she did not hold back in her cross-examination and used all the available information. She acknowledged that there was additional information that was not yet developed. For example, Kepros did not interview witnesses regarding Strickland's credibility. She recalled making contemporaneous objections at trial when the prosecution sought admission of the testimony and incorporated all of the extensive pretrial litigation in her objections. She also made a continuing objection on hearsay and confrontation grounds.

Reynolds opined that the trial team's performance was deficient because they failed to investigate Strickland's background and develop evidence of his lack

of reliability. She acknowledged that the team presented Huntington to impeach Strickland and to bolster the defense theme that Todd was an alternate suspect. Reynolds further acknowledged that the team litigated and preserved all pertinent issues except due process.

(c) Analysis

With regard to prong one of *Strickland*, Owens argues that his team's performance was deficient because it did not sufficiently investigate the circumstances surrounding Strickland's interactions with Carter. He argues that such an investigation would have developed additional information to convince the court to preclude Strickland's testimony.

Owens acknowledges that the admissibility of Strickland's testimony was "subject to considerable pretrial litigation." SOPC-163 at 853. Owens's argument is essentially a claim that more investigation would have produced better results. His argument is based on speculation and hindsight. And a review of that pretrial litigation shows that there was extensive investigation to support it. Trial counsel are "entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Richter*, 562 U.S. at 107. Review of Kepros's cross-examination at the pretrial hearing and at trial demonstrates that she raised many concerns about Strickland's credibility and his motivation based on substantial investigation of Strickland's background. This reasonable, but unsuccessful, strategy does not support an argument that more investigation would have caused the court to preclude the testimony.

Accordingly, the court finds that the trial team's performance on this issue fell within the wide range of professionally competent assistance to which Owens was entitled. *Strickland*, 466 U.S. at 689 ("[A] court must indulge a strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .").

(d) Conclusion

Owens has not demonstrated that his team's performance was deficient. Owens also failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, his petition to vacate his conviction and sentence on the basis of his trial team's failure to conduct further investigation on Strickland to support a motion to preclude his testimony is **Denied**.

ii. Ray's Jailhouse Admissions

(a) Parties' Positions

Owens contends he was prejudiced, notwithstanding his trial team's pretrial objection, by his trial team's failure (1) to adequately investigate the circumstances of the statements Ray made to Harris, (2) to investigate Harris's history as an informant, and (3) to investigate Harris's drug problems. Owens also contends his trial team failed to adequately investigate Ray's purported anger with Owens, because Ray believed Owens had stolen money from him and was going to testify against him. Having failed to do this investigation, Owens also contends he was prejudiced by his trial team's inability to present the results of that investigation.

(b) Findings of Fact

The admission of Harris's testimony was the subject of substantial pretrial litigation. Owens filed 11 motions objecting to its admissibility and responded to the prosecution's motion and supplements seeking its admission. Additionally, Harris testified on June 11, 2007, and was subjected to cross-examination by counsel for all three codefendants. In Order (SO) No. 11, the court found the statements were nontestimonial, trustworthy, and admissible as statements against penal interest.

At the post-conviction hearing, King testified that he did not recall whether the team had investigated Harris before he testified on June 11 at the pretrial hearing. He also did not recall whether the team had considered presenting independent evidence on Harris's and Ray's conversations. When Harris testified at trial, King renewed the hearsay objections and incorporated the team's pretrial motions, believing it was sufficient to preserve all the grounds raised prior to trial.

King confirmed that there was extensive pretrial litigation over the admissibility of Harris's testimony and that the team had objected based on Owens's right to confrontation. He acknowledged that Harris had also testified on two other occasions during pretrial proceedings, which gave the team additional opportunities to cross-examine Harris and develop impeachment information.

King acknowledged that Harris was impeached at trial with the benefits he received and his prior convictions, and that appropriate credibility instructions were given to the jury.

Kepros testified at the post-conviction hearing that she urged King to call Huntington in the defense case because, based on her pretrial interview of Huntington, she believed Huntington had important impeachment information. She did not foresee that calling Huntington would open the door to additional Ray statements from Harris.

Reynolds opined that Owens's trial team performed deficiently because it did not do a sufficient investigation of Harris's background. According to Reynolds, the investigation would have shown that Harris was desperate to be released from jail, had a history as an informant, and was being investigated by the police when he came forward to cooperate. In Reynolds's view, this evidence would have shown that Harris was an unreliable witness. Reynolds conceded that Harris's reliability was the issue before the court when Harris testified on June 11

and was cross-examined by attorneys for all three codefendants. Reynolds acknowledged that Harris's criminal history and his written letter to Hower asking for help with his pending case were explored during his testimony.

(c) Analysis

With regard to the first prong of *Strickland*, Owens contends his trial team performed deficiently in its inadequate investigation into the circumstances surrounding the conversations between Harris and Ray. In support of the argument, Owens listed the same investigative omissions used to support his claim of ineffectiveness in the cross-examination of Harris. The court found in part V.D.3.b.iii(e) of this Order that Owens failed to prove that his trial team was ineffective with respect to Harris's cross-examination.

Owens acknowledges that the admissibility of Harris's testimony was "subject to considerable pretrial litigation." SOPC-163 at 880. Owens's argument is essentially a claim that more investigation would have produced better results. His argument is based on speculation and hindsight.

Harris testified twice at pretrial hearings, and he was subjected to six cross-examinations. Owens concedes that "considerable pretrial litigation" occurred on the issue. A review of that litigation suggests that there was extensive investigation to support it. Trial counsel are "entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Richter*, 562 U.S. at 107. Review of Harris's cross-examination at the pretrial hearings shows that numerous concerns about his credibility and motivations were raised.

The team's reasonable, but unsuccessful, strategy to convince the court to preclude Harris's testimony does not support an argument that more investigation would have produced a better result. That is an argument based on hindsight, and

the United States Supreme Court has prohibited trial courts from using "the distorting effects of hindsight" to evaluate trial counsel's performance because "there are countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689. Accordingly, the court finds that the trial team's performance on this issue fell well within the wide range of professionally competent assistance to which Owens was entitled. *Id.* ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .").

(d) Conclusion

Owens has not demonstrated that his trial team's performance was deficient. Owens has failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, his petition to vacate his conviction and sentence on the basis of his trial team's failure to conduct further investigation on Harris to support a motion to preclude his testimony is **Denied**.

d. Nontestimonial Statements

i. Ray's Statements to Sailor Describing How and Why He Fired His Gun at Lowry Park

(a) Parties' Positions

Even though his trial team objected on state and federal confrontation grounds at a pretrial hearing to the admission of Sailor's testimony about what Ray told her while he was recounting how and why he fired his gun at Lowry Park, Owens contends he was prejudiced by his trial team's failure to adequately object at trial on Colorado constitutional grounds and by his team's failure to adequately investigate and impeach Sailor.

(b) Findings of Fact

Sailor testified at trial that,

> Robert told me that there was a kid hanging onto Sir Mario's shirt and Sir Mario was trying to beat him with the gun off of him and the kid just wouldn't move. So Robert said he put his gun under his arm and he fired one time and he fell.

Guilt Phase Tr. 28:19-23 (Apr. 16, 2008 a.m.).

A few days later, Johnson testified that he observed Ray shoot Marshall-Fields and Bell:

> Q: Did you notice when Rob shot at Javad and Greg's brother, how he was holding his gun?
>
> A: Yeah.
>
> Q: Can you, first of all, describe how he was holding his gun when he shot at Javad and Greg's brother.
>
> A: He put it under his arm like that (indicating).
>
> Q: Can you turn and face the jury a little bit. So you are showing your right hand being under your left arm?
>
> A: Yeah.

Guilt Phase Tr. 104:17-25; 105:1 (Apr. 21, 2008 a.m.).

At the post-conviction hearing, King recalled that the trial team tried to preclude Ray's statements to Sailor during pretrial litigation. He also recalled that he objected to the admission of Ray's statements at trial on hearsay and confrontation grounds. Although he did not specify the Colorado Constitution or CRE 403 at trial, he believed his objection preserved all of the confrontation issues.

Reynolds opined that King performed deficiently because he did not object at trial on grounds of the state constitution. Reynolds maintained her position even though she was aware that the Colorado Court of Appeals had already ruled in the Lowry Park case that admission of Ray's statements was proper under the penal interest exception.

(c) Analysis

With regard to the second prong of *Strickland*, Owens contends he was prejudiced by the admission of Ray's statements through Sailor without cross-examination and other limitations. Sailor's testimony about how Ray shot his gun at Lowry Park was not the main evidence on this point. The main evidence came from Johnson, who described watching Ray place the gun under his arm and shoot Marshall-Fields and Bell as they tried to detain Owens. Sailor's testimony was merely corroborative and there is no reasonable probability that the result of either the guilt phase or sentencing hearing would have been different if Sailor's testimony on this point had been precluded. *See Strickland*, 466 U.S. at 694 ("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.").

(d) Conclusion

Owens has not demonstrated that his team's performance was deficient. Owens has failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, his petition to vacate his conviction and sentence on the basis of his trial team's failure to conduct further investigation on Sailor to support a motion to preclude her testimony about Ray's statements is **Denied**.

ii. Ray's Statement that There was No Case Without a Weapon and that Carter Sr. Got Rid of Guns Used at Lowry Park[377]

iii. Ray's Statements Accusing Owens of Shooting Unnecessarily at Lowry Park

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to adequately object to Sailor's testimony about Ray's statements to Owens following the Lowry Park shootings and Owens's subsequent silence.

(b) Findings of Fact

In March 2007, Owens's trial team filed SO-106, Motion In Limine To Exclude Out-of-Court Statements of Robert Ray. The motion included an exhaustive list of grounds, including that the statements violated Owens's state and federal constitutional rights of confrontation, his due process rights, and his right to be free from cruel and unusual punishment. The motion also argued that the statements were hearsay, did not qualify under any exception to the hearsay rule, shifted blame, were irrelevant, and were unfairly prejudicial. As part of the argument that the statements were hearsay, the motion argued that Owens had never expressly or by silence adopted any of Ray's out-of-court statements.

The trial team filed a response to DA-26 SO, which was the prosecution's attempt to seek admission of numerous out-of-court witness statements, including Ray's statements accusing Owens of needlessly firing his gun at Lowry Park. The trial team's response objected on various constitutional and evidentiary grounds. After requiring the prosecution to be more specific regarding the evidentiary

[377] Owens withdrew this claim in SOPC-293.

grounds for the admission of numerous out-of-court statements, the court ordered a second round of briefing from the trial team on DA-26 SO. The prosecution asserted that the statements about Owens shooting at Lowry Park were excited utterances. Owens's trial team argued that they were not excited utterances because too much time had elapsed between the shootings and Ray's statements to Owens.

Sailor testified about Ray's out-of-court statements at pretrial hearings on January 18 and August 20, 2007. The purpose of the hearings was to allow the court to determine the admissibility of the statements and to assess the reliability of the evidence. On September 28, 2007, the court took argument on the admissibility of numerous out-of-court statements, including Ray's statements about Owens shooting at Lowry Park. In Order (SO) No. 11, the court found Sailor's testimony to be reliable and agreed with the trial team that the statements were not excited utterances.

When Sailor testified on April 15, 2008, the prosecution began asking her to describe Ray's demeanor at their apartment, and King objected and referenced the court's prior ruling that Ray's statements did not qualify as excited utterances. Hower responded that he was asking about demeanor in an effort to establish the foundation for the excited utterance exception. Hower established, through Sailor, that Ray was upset and yelling at Owens. Nevertheless, the court reaffirmed its ruling and denied admission of the statements as excited utterances.

At that point, Hower argued that Owens's silence following Ray's statements about not having to shoot and the victims being unarmed was an adoptive admission. King objected and argued that Owens's silence was too ambiguous to be classified as an adoptive admission. King asserted that the issue had been litigated and resolved at pretrial hearings. He noted this new ground for

admission was a surprise and had been rejected by the trial judge in Owens's Lowry Park trial. King requested and received the lunch hour to research the issue. After lunch, Middleton made additional arguments objecting to Owens's silence as an adoptive admission. He convinced the court to hear Sailor's testimony outside the presence of the jury to determine if Owens's silence could be used as an adoptive admission. After the hearing, the court ruled that Owens's silence would be admissible as an adoptive admission with a cautionary instruction to the jury that Ray's accusations could not be taken as truthful. As a result, Sailor was allowed to testify about Ray's statements to Owens about his shooting at Lowry Park and about Owens's silence. The jury was instructed that Sailor's testimony could not be considered for the truth of what Ray said but only for Owens's reaction.

Owens did not present any evidence on this claim during the post-conviction hearing.

(c) Analysis

With regard to prong one of *Strickland*, Owens contends that his trial team performed deficiently because it did not cite Owens's federal and state confrontation rights, his Eighth Amendment rights, his due process rights, and CRE 403. Owens did not to present any evidence on the claim and has, therefore, failed to prove that his trial team was ineffective. *See Dunlap v. People*, 173 P.3d 1054, 1061 (Colo. 2007) (the defendant bears the burden of proving his post-conviction claims by a preponderance of the evidence).

Moreover, the record on this claim clearly establishes that Owens's trial team engaged in extensive pretrial litigation in an attempt to preclude the evidence. Although the trial team was surprised when the prosecution switched tactics at trial and sought admission of Ray's statements to Owens as adoptive admissions, they

handled the situation competently and professionally. King explained that the trial team, having relied on the extensive pretrial litigation and the court's ruling, wanted some time to meet the prosecution's new argument. It bears noting that the team apparently forgot that that it had objected to adoptive admissions in SO-106. Although the team only had the lunch hour to prepare its response, the trial team's argument was sufficient to convince the court to allow both parties to examine Sailor at an *in camera* hearing. Although ultimately unsuccessful in keeping Ray's statements to Owens out of evidence, the trial team never stopped trying and cannot be deemed ineffective. *See Richter*, 562 U.S. at 100 ("[A]n attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for . . . remote possibilities.").

(d) Conclusion

Owens has not demonstrated that his trial team's performance was deficient. Owens failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, his petition to vacate his conviction and sentence on the basis of his trial team's failure to put forth additional objections to the admission of Ray's statements to Owens is **Denied**.

iv. Ray's and Attorney's Statements to Sailor that the Case Against Her was "Bullshit" and Commanding Her to Remain Silent

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object to or to request a limiting instruction concerning Sailor's testimony recounting Ray's and Steinberg's statements to her about the quality of the prosecution's case against her and remaining silent.

(b) Findings of Fact

On April 16, 2008, Sailor testified about conversations she had with Steinberg and Ray. Sailor said that Steinberg told her and Ray that they "weren't to talk to anyone" including the police. Guilt Phase Tr. 107:23 (Apr. 16, 2008 a.m.). The prosecution elicited the following statements from Sailor:

> Q: Prior Mr. McDermott being appointed, had you spoken to or received any advice from Mr. Steinberg at all about what you should do?
>
> A: Um, I don't remember. But I know he said he couldn't represent me.
>
> Q: Okay. Did he ever describe the case against you as "bullshit"?
>
> A: Yes, that -- he was saying they don't have anything on me. They were telling me not to worry about anything. You never been in trouble. You're going to get out. Don't worry about anything. But I knew it wasn't true.
>
> Q: Was it suggested to you that you keep your mouth shut?
>
> A: Yes. "To death do us part, don't say shit." That's what I was told.
>
> Q: That wasn't Mr. McDermott's advice?
>
> A: No.

Guilt Phase Tr. 19:1-20 (Apr. 16, 2008 p.m.).

When asked whether she was aware if she could get a deal for sharing information, she responded,

> Actually, I didn't, because I never talked to anybody the whole time I was in jail. I never talked to a DA or a police officer. I had a suppress -- Robert told me to get a suppression to where no one could speak to me. I told my attorney to get a suppression; I didn't want to talk to anyone. So I did.

Id. at 21:13-20.

When asked about her drug arrest on August 11, 2005, Sailor testified that "[t]hey found out 'Ray' when they got my ID, and they placed dope in the car and planted it on me to arrest me." *Id*. at 15:11-13. Sailor testified that she told law enforcement about the marijuana and the gun that she had with her at the time of arrest, but she again adamantly stated that "they placed crack cocaine on me to take me to jail." *Id*. at 15:19-20. Sailor went on to say that "[m]y fingerprints were not on anything. I - - I wanted to take a lie detector test and everything. Nobody would let me. They know they placed those drugs in that car to arrest me." *Id*. at 16:15-19.

During the post-conviction hearing, King testified that he could not think of a strategic decision for not objecting to Sailor's statements. King recognized that the reason the prosecution elicited this testimony from Sailor was to establish the reasoning behind Sailor's delay in coming forward with information. King acknowledged that Sailor was charged as an accessory for her role in the Lowry Park shootings, pled guilty, and received a deferred judgment and sentence. King also acknowledged that Sailor's drug possession case was dismissed and that Sailor was adamant in her testimony that her drug charges lacked merit.

Reynolds opined that Sailor's statements were objectionable for numerous reasons and that the statements were harmful. Reynolds believed that the statements bolstered Lundin's testimony that there was not much evidence against Sailor in her drug possession case and that the statements devalued Sailor's impeachment on why she came forward. Reynolds acknowledged that the jury heard that Sailor was charged as an accessory for Lowry Park, received a deferred judgment and sentence for that case, and her drug case was dismissed.

(c) Analysis

With regard to prong two of *Strickland*, Owens argues he was prejudiced because Sailor's statements were admitted without a limiting instruction and served as substantive evidence of Owens's guilt. Owens argues that Sailor's statements allowed the jury to hear that Ray and Steinberg were attempting to silence witnesses, that the statements bolstered the prosecution's overarching themes as to silence and intimidation of witnesses, and that the statements showed consciousness of guilt on Ray's part. Owens also argues that Ray's remark "to death do us part, don't say shit" to Sailor could be perceived as a veiled threat and an attempt to intimidate Sailor.

Sailor testified about her drug possession charges and the circumstances of her arrest. She repeatedly testified that the police placed cocaine on her in order to arrest her and take her to jail. Because Sailor had told law enforcement that she had marijuana and a gun when she was arrested, the jury may have concluded that she truly believed that the cocaine was not hers. Hearing Sailor say that someone else called her case "bullshit" was of no consequence. Whether Ray or Steinberg did or did not say it, and whether their motivation was to lend her support or encourage her not to give the police evidence that might be used against her, it had no effect upon the fairness of Owens's trial. Sailor also testified about pleading guilty to accessory to murder and being placed on a four-year deferred judgment and sentence. She testified that her drug possession and gun possession case was dismissed at the same time.

With regard to Owens's allegation that the jury could have perceived the comment "to death do us part, don't say shit" as a threat and/or attempt to intimidate Sailor, the jury heard many hours of testimony from Sailor and was in a position to judge her demeanor. Owens did not present evidence that Sailor

perceived the comment as a threat. Accordingly, Owens has not demonstrated that he was prejudiced by his trial team's alleged deficient performance. *See Strickland*, 466 U.S. at 694 ("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.").

(d) Conclusion

Owens has not demonstrated that he was prejudiced by his trial team's alleged deficient performance. Owens's petition to vacate his conviction and sentence due to his trial team's failure to object or request a limiting instruction regarding Ray's and Steinberg's statements to Sailor that the case against her was "bullshit" and commanding her to remain silent is **Denied**.

v. Ray's Statements that He was Going to Kill B. Taylor

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's inadequate objection to Fronapfel's testimony concerning Ray's statements to D. Brown that he would kill B. Taylor.

(b) Findings of Fact

On May 1, 2008, Fronapfel testified about a phone conversation between Ray and D. Brown. After Hower asked Fronapfel about the content of the phone conversation, Kepros objected based on hearsay and relevance. Guilt Phase Tr. 59:20 (May 1, 2008 a.m.). The court overruled the objection "with regard to these statements that are not offered for the truth, meaning what is said between Mr. Ray and his brother is not offered for the truth, merely for the cause and affect it had on the detective's actions." *Id*. at 60:2-6. Thereafter, the following exchange occurred between Fronapfel and Hower,

Q: What did you hear that caused you concern?

A: Robert Ray had said that he was going to kill Brandi.

Q: In so doing did he mention a reason, a specific reason?

A: Something about speakers.

Id. at 60:11-16.

B. Taylor had previously testified on April 14, 2008, about the recorded phone conversation between Ray and D. Brown. B. Taylor testified that she met with police on July 28, 2005, after she learned the police were trying to reach her. During that interview, the police expressed concern for her safety, B. Taylor told the police what she knew about the gold Suburban, and the police played the recorded phone conversation for her. B. Taylor testified that the recording made her concerned for her safety and ultimately caused her to relocate out of Colorado. Guilt Phase Tr. 76:11-22 (Apr. 14, 2008 a.m.).

During the post-conviction hearing, Kepros confirmed that the court instructed the jury that the statements were not being offered for the truth of the matter asserted, but were being offered for the cause and effect that the statements had on the detective's actions.

Reynolds acknowledged that Kepros objected on hearsay and relevance grounds but added that she should have objected on other grounds as well. Reynolds testified that because Owens and Ray were co-conspirators and good friends, Ray's bad acts could be attributed to Owens.

(c) Analysis

With regard to prong two of *Strickland*, Owens argues that he was prejudiced by the jury hearing that Ray was willing to kill the mother of Ray's nephew over speakers. He argues that this formed impermissible and inherently prejudicial inferences against Owens.

B. Taylor previously testified that there was a recorded phone call between Ray and D. Brown, which included statements that caused her to fear for her safety and relocate out of state. And after Kepros objected to the testimony about the phone call during Fronapfel's testimony, the court ruled that the phone call could not be admitted for the truth of the matter asserted, but rather for the cause and effect on Fronapfel's actions. In her post-conviction testimony, Kepros acknowledged that the court's statements were instructions to the jury on how to use the phone call evidence. The court presumes the jury follows the instructions it is given. *See Flockhart*, 304 P.3d at 235 ("We presume that jurors follow the instructions that they receive."). Accordingly, Owens has not demonstrated that he was prejudiced by his trial team's alleged deficient performance. *See Strickland*, 466 U.S. at 694 ("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.").

(d) Conclusion

Owens has not demonstrated that he was prejudiced by his trial team's alleged deficient performance. Owens's petition to vacate his conviction and sentence based on his trial team's failure to object and seek exclusion of Ray's statement that he was going to kill B. Taylor is **Denied**.

vi. Ray's Statement to Todd that the Lowry Park Shooter Got into His Car

(a) Parties' Positions

Even though his trial team objected at a pretrial hearing and at trial to the admission of Todd's testimony that Ray told Todd that the Lowry Park shooter got into Ray's car after the shootings, Owens contends he was prejudiced by his trial team's failure to adequately object to the admission of Todd's testimony at trial.

(b) Findings of Fact

Owens's trial team filed SO-106, Motion In Limine To Exclude Out-of-Court Statements of Robert Ray in March 2007. The motion sought to preclude all of Ray's out-of-court statements contained in discovery. The motion anticipated the prosecution's arguments and specifically addressed co-conspirator statements, codefendant hearsay statements, and adoptive admissions. It also made arguments against admissibility on the bases of CRE 401, 403, and 404(b). Additionally, the motion asserted Owens's state and federal constitutional rights of confrontation, his due process rights, and his right to be free from cruel and unusual punishment. The motion also argued that Ray's statements did not qualify under any exception to the hearsay rule and pertained to irrelevant and prejudicial topics.

Given the numerous out-of-court statements the prosecution was seeking to introduce in DA-26 SO, the court ordered the prosecution to supplement the motion by identifying the evidentiary basis for the admission of each statement. The prosecution's supplement argued that Ray's statements to Todd about the Lowry Park shooter getting into Ray's car were admissible as co-conspirator statements. In its response, Owens's trial team objected and cited Owens's state and federal constitutional rights to due process, confrontation, and to be free of cruel and unusual punishment, as well as the rules of evidence.

Todd testified at a pretrial hearing on June 13, 2007, and stated that Ray told him the Lowry Park shooter got into his car after the shooting. The purpose of this hearing was to allow the court to determine the admissibility of the statements and to assess the reliability of the evidence. On September 28, 2007, the court took argument on the admissibility of numerous out-of-court statements that were being offered as co-conspirator statements, including Ray's statement about the Lowry Park shooter. In Order (SO) No. 11, the court did not specify whether Ray's

statement about the Lowry Park shooter getting into his car was admissible as a co-conspirator statement. The court found Todd to be a reliable witness.

Todd testified at trial on April 17, 2008. When the prosecution asked Todd whether Ray had ever mentioned his pending court case, King objected on grounds of hearsay and confrontation. Hower responded that the court had already ruled that the statement was admissible. Noting it was a co-conspirator statement, the court agreed and added that the team's prior objections were incorporated and that there was a continuing objection to the evidence.

King testified at the post-conviction hearing that his trial objections regarding this evidence were not intended to forfeit any grounds for the objection. King acknowledged that the trial team had contested the admission of this evidence during pretrial proceedings. King pointed out that the team had to decide how to handle Todd at trial given the pretrial rulings on Todd's testimony. According to King, the team ultimately decided to portray Todd as an alternate suspect. To this end, Huntington was called in the defense case to suggest that Todd was a hitman brought in from Chicago to kill Marshall-Fields. In King's view, any evidence that suggested Todd was Ray's confidante, such as Ray confiding that the shooter got into his car, bolstered the defense theory that Todd was a viable alternate suspect.

(c) Analysis

With regard to prong one of *Strickland*, Owens contends King's performance was lacking because he did not cite Owens's state confrontation and due process rights at trial when he objected to Todd's testimony about Ray saying the Lowry Park shooter got into his car.

King testified at the post-conviction hearing that while the team contested admission of this evidence from Todd in pretrial litigation, the strategy changed as trial approached. By the time of trial, Owens's team decided to portray Todd as an

alternate or additional suspect. King objected at trial to admission of the evidence, but he acknowledged that the evidence supported the defense theory of Todd being Ray's Chicago hitman. The trial team had to decide what strategy to employ and as the "captain of the ship," King could change that strategy whenever necessary. *Steward v. People*, 498 P.2d 933, 934 (Colo. 1972) ("Defense counsel stands as captain of the ship in ascertaining what evidence should be offered and what strategy should be employed in the defense of the case."). The decision to portray Todd as an alternate suspect was a professionally reasonable decision. Accordingly, the trial team's performance fell well within the wide range of professionally competent assistance to which Owens was entitled. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

(d) Conclusion

Owens has not demonstrated that his team's performance was deficient. Owens failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, his petition to vacate his conviction and sentence on the basis of his trial team's failure to put forth additional objections to the admission of Ray's statement about the Lowry Park shooter getting into his car is **Denied**.

vii. Unidentified Declarant's Statement that Lowry Park Altercation Began Because a Girl Got Pushed or Slapped[378]

viii. Unidentified Declarant's Statements Warning Sailor to "Stay Out of the Clubs and Stay Off the Streets"[379]

ix. Steinberg's Statements that Carter Should not Still be Around

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object to Sailor's testimony that Steinberg, by word or gesture, indicated Carter should leave the area.

(b) Findings of Fact

On April 16, 2008, Sailor testified at trial about meeting with Steinberg after a court hearing on July 25, 2005. Sailor testified to the following conversation with Steinberg,

> Q: At Mr. Steinberg's office, did he ask you who Parish Carter was?
>
> A: Yes, he did.
>
> Q: Did you tell him who he was?
>
> A: Yes.
>
> Q: Did he ask you then anything about Parish?
>
> A: Excuse me?
>
> Q: Did Mr. Steinberg ask you anything about Parish?
>
> A: Yes, he did.

[378] Owens withdrew this claim in SOPC-293.
[379] Owens withdrew this claim in SOPC-293.

Q: What was that?

A: He wanted to know if Parish was still around, and I told him yes. And he did this like, what is he still doing around? What is he still doing here?

Q: Are those words he spoke?

A: No, that's words like, what he is still doing around? What is he still doing here?

Q: That's your interpretation of his reaction?

A: Yes. Yes.

Guilt Phase Tr. 139:15-25; 140:1-7 (Apr. 16, 2008 a.m.).

Sailor then testified that she went to Carter, Sr.'s house after speaking with Steinberg. According to Sailor, Owens and Carter were at Carter, Sr.'s house, and she told them everything about what was said in court that day. Sailor asked Carter why he went to Gibby's and let people see him. Sailor testified that she told Carter about what Steinberg had communicated to her about why Carter was still in town. At that point, King objected on the basis of hearsay and confrontation, and the question was withdrawn. When asked whether Owens said anything to Carter about Carter still being in town, Sailor said that he did but she could not recall Owens's exact words.

During the post-conviction hearing, King testified that he did not perceive this information as helpful to the defense. King could not recall whether he had a strategic reason not to object to these statements. King acknowledged that Sailor testified that she told Carter what Steinberg had said about him being in town, which led to Owens advising Carter that he should get his money together and get out of town.

Reynolds testified that the admission of these statements was objectionable on the grounds of hearsay, state confrontation, CRE 401-403, heightened reliability, and the Eighth Amendment. Reynolds testified that these statements

bolstered the prosecution's wall of silence theme, risked showing a consciousness of guilt, and hurt the defense. Reynolds acknowledged that there was no indication that Ray, Owens, or Carter was present for the conversation between Sailor and Steinberg. Reynolds also acknowledged that Sailor used the conversation in warning Owens and Carter that Carter had been identified as the person at Gibby's.

(c) Analysis

With regard to prong two of *Strickland*, Owens argues that he was prejudiced because the statements were substantive evidence of Owens's guilt and the statements communicated Steinberg's belief that Carter was guilty. Owens also argued that the statements bolstered the prosecution's theories that Steinberg was assisting Ray in attempting to silence witnesses and cover up the crime.

Owens's trial team objected during this line of questioning. Following the contested testimony, Sailor testified that almost immediately after talking with Steinberg she relayed the conversation to Owens and Carter, and Owens told Carter to get his money together and leave town. For hearsay and confrontation purposes, a gesture can be a statement if the gesturer intends the gesture to be a communicative assertion. CRE 801(a)(2). But to be hearsay or raise a confrontation issue, the gesture would have had to have been offered to prove what the gesture asserted. In context, Steinberg's gesture could be viewed as communicating the assertion that Carter's continued presence was unwise. But it was not being offered as proof that Carter's continued presence was unwise, but to put Owens's relevant statements to Carter into perspective. Thus, it is not clear that King had a valid basis for objecting. Nevertheless, Owens's statements to Carter were certainly relevant and Sailor's rendition of Steinberg's gesture put Owens's subsequent statements into perspective. Sailor's testimony about Steinberg's statements took up less than one transcript page, and continuously

objecting or initiating a bench conference to request and assist in formulating a limiting instruction would have drawn more attention to this subject. *See Sparks*, 914 P.2d at 548 (finding that it can be considered trial strategy if an attorney chooses not to object in order to prevent drawing undue attention to an issue). Additionally, the contested portion of Sailor's testimony went to Carter's guilt because he was identified as the individual at Gibby's, and the testimony did not go directly to Owens's guilt. Thus, drawing attention to the testimony by objecting could have caused the jury to make adverse inferences about Owens's guilt.

Thus, Owens has not demonstrated that he was prejudiced by his trial team's alleged deficient performance. *See Strickland*, 466 U.S. at 694 ("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.").

(d) Conclusion

Owens has not demonstrated that he was prejudiced by his trial team's alleged deficient performance. Owens's petition to vacate his conviction and sentence on the basis of his trial team's failure to object to Steinberg's statements that Carter should not still be around is **Denied**.

2. Counsel's Deficiencies in Handling Hearsay Issues Prejudiced Owens

When appropriate, the court addressed the prejudice prong of *Strickland* in its above analysis. Thus, the court will not repeat a separate prejudice prong analysis here.

K. Ineffective Assistance in Guilt Phase Closing Arguments

1. Failure to Object to the Prosecution's Improper Guilt Phase Closing Arguments

a. Parties' Positions

Owens contends he was prejudiced by Kepros's failure to object to numerous portions of the prosecution's guilt phase closing arguments.

The prosecution responds that Owens cannot prove that Kepros should have made additional objections to the prosecution's guilt phase closing arguments, that the additional objections would have been sustained, and that if sustained, the jury would have reached a different verdict.

b. Findings of Fact

The court analyzed the propriety of the prosecution's guilt phase closing arguments in part IV.F of this Order. With respect to the prosecution's arguments that the court found were not improper, the court does not address those arguments here because Kepros could not have performed deficiently by failing to object to proper arguments. However, the court found two of the prosecution's arguments improper and will therefore address Kepros's failure to object to those arguments in this part of the Order.

The court found in part IV.F.3.a.i of the Order that Tomsic improperly urged the jury to find Owens guilty in order to bring justice on behalf of Marshall-Fields because Marshall-Fields was prevented from bringing justice on behalf of Vann. Tomsic concluded her guilt phase closing argument by discussing Marshall-Fields's desire to seek justice for the death of Vann. She told the jury, "[a]ll Javad Marshall-Fields wanted was a chance to come and sit in that witness stand." Guilt Phase Tr. 86:15-16 (May 9, 2008). Kepros objected on the grounds that Tomsic's argument was an improper emotional appeal. *Id.* at 86:17. The court overruled the

objection. *Id.* at 86:18. Tomsic concluded by arguing that Marshall-Fields was denied the opportunity to bring justice on behalf of Vann.

> To sit in that witness chair and describe under oath what he saw in terms of the murder of his friend Greg Vann. He wanted to come here and see justice, that opportunity was denied to him.
>
> Members of the jury, the People of the State of Colorado are asking you to now bring that justice.

Id. at 86:19-24. Kepros testified during the post-conviction hearing that there was no reason for her not to object to Tomsic's concluding remarks.

The court also found in part IV.F.3.a.v of the Order that Warren misstated the law when she described the standard for instructing on lesser included offenses as:

> Frankly, those lessers have to be given to you by law[] [i]f there's any argument, no matter how unreasonable by which a jury could conclude that the person committed the lesser, but not the greater.

Id. at 185:25; 186:1-3. Kepros testified during the post-conviction hearing that she did not object to Warren's argument on this point because she did not recognize it as a misstatement of the law.

Reynolds opined that Kepros performed deficiently for failing to object to Tomsic's and Warren's improper guilt phase closing arguments.

c. Principles of Law

The court incorporates the principles of law set forth in parts IV.F.3.a.i(c) and IV.F.3.a.v(c) of this Order as though fully set forth herein.

d. Analysis

Kepros did not hesitate to object to the prosecution's guilt phase closing arguments. She objected five times, including to Tomsic's account of what Marshall-Fields and Wolfe wanted for their futures. When that objection was

overruled, Tomsic argued that Marshall-Fields was prevented from bringing justice on behalf of Vann and asked the jury to bring justice on behalf of Marshall-Fields by finding Owens guilty. Because Tomsic asked the jury to deliver justice on behalf of Marshall-Fields, her argument was improper and Kepros should have objected. *See People v. McBride*, 228 P.3d 216, 223 (Colo. App. 2009) ("Prosecutors may not pressure jurors by suggesting that guilty verdicts are necessary to do justice for a sympathetic victim."). But Tomsic's improper argument was brief, isolated, and interrupted with an objection. There is no reasonable probability that the outcome of the trial would have been different if Kepros had objected to Tomsic's improper argument. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984) ("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.").

Warren misstated the law when she described the standard that the court applies in deciding whether to instruct the jury on lesser included offenses. *People v. Bartowsheski*, 661 P.2d 235, 242 (Colo. 1983) (the defendant is entitled to an instruction on a lesser included offense when there is "a rational basis in the evidence to support a verdict acquitting [the defendant] of a greater offense . . . and convicting [the defendant] of the lesser offense . . . ."). Warren's misstatement of the law was of little consequence. It went only to the standard for when an instruction should be given. Warren did not inform the jury that it was Owens who requested instructions on lesser included offenses. *See People v. Carrier*, 791 P.2d 1204, 1205 (Colo. App. 1990) (prosecutor should refrain from informing the jury which party requested instructions on lesser included offenses). The threshold question of whether the prosecution or Owens was entitled to instructions on lesser included offenses was for the court to decide, not the jury. Warren did not tell the

jury that Owens requested the instructions and the legal standard for giving an instruction was not before the jury. There is no reasonable probability that the outcome of the guilt phase would have been different if Kepros had objected to Warren's misstatement of the law. *See Strickland*, 466 U.S. at 694 ("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.").

e. Conclusion

The court concludes Owens failed to prove that he was prejudiced by Kepros's failure to object to the prosecution's improper arguments. Accordingly, Owens's petition to vacate his conviction and sentence based on Kepros's failure to object is **Denied**.

2. Owens's Trial Team's Guilt Phase Closing Argument

a. Arguing Lesser Offenses[380]

b. Needlessly Offending the Jury[381]

c. Nonsensical Argument on Lesser Offenses[382]

d. Expanding Scope of Complicity Liability[383]

e. Unnecessarily Distracting the Jury[384]

f. Highlighting Failure to Testify[385]

g. Gratuitously Offending the Jury[386]

h. Argument Concerning DNA Evidence

i. Parties' Positions

Owens contends he was prejudiced by Kepros's failure to challenge the DNA evidence during her guilt phase closing argument and by her failure to tie her lack of evidence argument to the presumption of innocence or to the burden of proof.

ii. Findings of Fact

Kepros addressed the presumption of innocence and burden of proof very early in her guilt phase closing argument. She told the jury, "[t]he defendant's presumed innocent. The presumption of innocence should be given effect unless it's been overcome with evidence." Guilt Phase Tr. 95:14-16 (May 9, 2008). Before reading the reasonable doubt instruction, she reiterated that "[t]he evidence

[380] Owens withdrew this claim in SOPC-293.
[381] Owens withdrew this claim in SOPC-293.
[382] Owens withdrew this claim in SOPC-293.
[383] Owens withdrew this claim in SOPC-293.
[384] Owens withdrew this claim in SOPC-293.
[385] Owens withdrew this claim in SOPC-293.
[386] Owens withdrew this claim in SOPC-293.

has to prove beyond a reasonable doubt the existence of all of the elements." *Id.* at 95:20-21.

Kepros's theme was "[e]vidence ignored, evidence overstated, evidence for sale." *Id.* at 93:24-25. With respect to DNA evidence, she argued that the prosecution ignored possible DNA evidence from the shell casings recovered from the crime scene. She questioned if collecting fingerprints from shell casings actually preserves DNA and challenged the credibility of the prosecution's expert witnesses by describing an inconsistency in their testimony.

> We have this little issue of shell casings and whether or not there's DNA in the shell casings. And you know, George Herrera, when he testified said, oh, no, you know, you can try to get fingerprints off shell casings, you always try. But he told Shoshan[n]a [Bitz] and me last winter that the fingerprints are always sacrificed for the DNA. Why did he say something else? He says -- actually, I can't remember if it was him or Agent Schleicher that said fingerprinting preserves DNA. You spray glue on something and then you swab it and the glue is supposed to make that swab better. It just doesn't make sense. It's covered in glue.
>
> Then Agent Schleicher tells you, well, you know, heat destroys DNA so we can never get it off shell casings. Well, then how come Agent Herrera said fingerprints are always sacrificed for DNA because we have a better shot at getting DNA than we have at getting fingerprints.
>
> At the end of the day, we don't have anything off the shell casing. And you're the only ones that can decide if that matters. If you'd like to know whose DNA might have been on the shell casing of one of the bullets that was used to kill these people.

Id. at 115:3-24.

Kepros also argued that the prosecution ignored evidence by pointing out that it did not order nuclear or mitochondrial DNA testing on the hairs in the New York Yankees baseball cap that was found at the crime scene.

> This is just the picture of some of the hair and fiber evidence that was taken off of the baseball cap. And, you know, there were some questions about, well, isn't hair evidence really just not that good anymore, and aren't people really not doing that? But if it's not useful, how come CBI is the one who made this packet? Joe Snyder didn't make this packet, Mary Schleicher made this packet. Mary Schleicher took the hairs off that hat.
>
> And when you think about all the possibilities that arise when it comes to the DNA on that hat, wouldn't you like to know whose DNA is on these hairs? I mean, it's not – the way it was described, at least by Joe Snyder, is you take a thing like a lint brush and you just kind of brush it over. We live in the world, we know how hairs go, wouldn't it be useful to know who had loose hair in that hat?
>
> There was some questions about, well, you know, you can only get hair DNA if you have a root to do nuclear DNA testing. And there was a question from the prosecution saying, well, if you have a choice between nuclear DNA testing and mitochondrial DNA testing, which do you do? And Agent Schleicher said, oh, nuclear is much better. You get a lot more information. Mitochondrial is limited to the mother, that genetic information. But you know, in this case, you don't know. They never tried nuclear testing. Maybe they could have done it. You have no idea, nobody ever tried, nobody ever looked. More stuff about the hairs.

Id. at 115:25; 116:1-25. She concluded this portion of her argument by reminding the jury that it was the prosecution's burden of proof: "Whose burden is it[?]" *Id.* at 117:1.

Kepros touched on reasonable doubt more than a dozen times during her guilt phase closing argument, including near the end of her argument when she posed a series of rhetorical questions in an attempt to show the prosecution's lack of evidence established reasonable doubt:

> Where did the hat come from? Was someone else wearing it? Did it come off a head? Did it come out of a car? You saw how windy it was, did it blow out of an open window? I'm speculating, but you know what, so are they. We don't have evidence. We don't have knowledge of what happened that eliminates reasonable doubt.

Id. at 166:17-22.

Kepros then told the jury that "[i]n this country we don't convict people based on speculation. We don't convict people . . . if there is evidence that leaves you with a reasonable doubt." *Id*. at 167:8-12. She finished her closing argument by asking the jury to find Owens not guilty: "the only conclusion that you can reach is that the prosecution has not overcome that presumption of innocence and that Mario Owens is not guilty." *Id.* at 167:17-19.

Kepros testified during the post-conviction hearing that she intended to highlight the lack of evidence presented by the prosecution, specifically the lack of evidence from the shell casings and hairs, which created reasonable doubt for the jury to find Owens not guilty. She also testified that prior to her closing argument she did not consider whether her argument might emphasize the importance of DNA evidence.

iii. Principles of Law

"The right to effective assistance extends to closing arguments." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). "Judicial review of a defense attorney's summation is . . . highly deferential . . . ." *Id.* at 6.

> [C]ounsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should 'sharpen and clarify the issues for resolution by the trier of fact,' but which issues to sharpen and how best to clarify them are questions with many reasonable answers.

Id. at 5-6 (internal citations omitted).

iv. Analysis

The essence of Kepros's guilt phase closing argument theme was that the prosecution's evidence could not be trusted. She argued that the prosecution presented testimony from unreliable witnesses and introduced unpersuasive evidence. With respect to the DNA evidence, Kepros argued that the lack of evidence from the shell casings and hairs gave rise to reasonable doubt. She did not explain how a cap with Owens's DNA came to rest at the scene of the Dayton Street homicides, and Owens does not offer any evidence Kepros should have used to make such an explanation. Even if Kepros indirectly emphasized the importance of DNA evidence, attacking the lack of arguably available DNA evidence on the shell casings was beneficial to Owens. The shell casings were directly related to the murders – they came from the murder weapon. And while there may not have been evidence explaining how a cap with Owens's DNA came to be at the crime scene, there was evidence of minor contributors – evidence that his was not the only DNA on the cap.

Kepros's guilt phase closing argument revolved around the presumption of innocence and burden of proof. She reminded the jury more than a dozen times that it was the prosecution's burden to prove Owens's guilt beyond a reasonable doubt. At the end of her argument, she pointed out that any answers to her rhetorical questions are speculative. Moments later she connected the lack of DNA

evidence to the burden of proof by saying, "[i]n this country we don't convict people based on speculation. We don't convict people . . . if there is evidence that leaves you with a reasonable doubt." Guilt Phase Tr. 167:8-12 (May 9, 2008). Kepros's last words to the jury were: "the only conclusion that you can reach is that the prosecution has not overcome that presumption of innocence and that Mario Owens is not guilty." *Id.* at 167:17-19. Because Kepros tied the lack of evidence to the presumption of innocence and to the burden of proof, her representation of Owens during her guilt phase closing argument was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

v. Conclusion

The court concludes Owens failed to prove that Kepros performed deficiently in her guilt phase closing argument. Accordingly, Owens's petition to vacate his conviction and sentence based on Kepros's guilt phase closing argument is **Denied**.

3. Prejudice

When appropriate, the court addressed the prejudice prong of *Strickland* in conjunction with its analysis of the performance prong of *Strickland*. Thus, the court does not repeat a separate prejudice prong analysis here.

L. Failure to Object to Erroneous Guilt Phase Instructions and Failure to Propose Proper Instructions

1. Instructions Misstating the Law

a. Parties' Positions

Owens contends he was prejudiced when Middleton failed to adequately object to the guilt phase jury instructions that inaccurately stated the law. He also

contends he was prejudiced when Middleton tendered jury instructions that were incomplete or misleading.

The prosecution responds that the instructions accurately stated the law, were complete, and were not misleading.

b. Specific Instructions

i. Guilt Phase Instruction No. 6

(a) Findings of Fact

Following the guilt phase, the jury was instructed that the law does not distinguish between direct and circumstantial evidence:

> There are two types of evidence from which you may properly find the truth as to the facts of a case. One is direct evidence. The other is circumstantial evidence, that is, the proof of facts from which other facts may reasonably be inferred. The law makes no distinction between direct and circumstantial evidence.

Guilt Phase Instr. No. 6. Middleton did not object to this instruction.

During the post-conviction hearing, Middleton testified that he did not identify a legal issue with the circumstantial evidence instruction and therefore did not object to the instruction. He also testified that he did not have a strategic reason for failing to include language that addressed the weight that the jury might give to direct versus circumstantial evidence. In Middleton's view, the case against Owens rested entirely on circumstantial evidence.

Reynolds opined that Middleton should have objected to Guilt Phase Instruction No. 6 because it informed the jury that it had to give equal weight to direct and circumstantial evidence, which is contrary to Colorado law.

(b) Principles of Law

"'Circumstantial evidence . . . is intrinsically no different from testimonial evidence.'" *People v. Bennett*, 515 P.2d 466, 469 (Colo. 1973) (quoting *Holland v.*

United States, 348 U.S. 121, 140 (1954)). In determining the sufficiency of the evidence, "the law makes no distinction between direct and circumstantial evidence." *People v. Medina*, 51 P.3d 1006, 1013 (Colo. App. 2001).

The Colorado Court of Appeals considered the propriety of a circumstantial evidence instruction, which instructed the jury that "[t]he law makes no distinction between the effect of direct and circumstantial evidence." *People v. Mandez*, 997 P.2d 1254, 1271 (Colo. App. 1999). The Colorado Court of Appeals approved of the language used in *Mandez* because the "instruction inform[ed] the jury concerning the weight it may choose to give to a class of evidence." *Id.* It rejected the defendant's tendered instruction because it "instruct[ed] the jury on the weight it must give to certain evidence. Such an instruction would be an improper interference with the jury's function to determine the weight of the evidence." *Id.*

(c) Analysis

In Owens's view, the language in Guilt Phase Instruction No. 6 that the law does not distinguish between direct and circumstantial evidence suggested to the jury that it was required to give the same weight to both types of evidence. But, as noted in *Mandez*, that language allowed the jury to determine what weight to give to each type of evidence and did not interfere with the jury's responsibility to determine the weight of the evidence. The language in Guilt Phase Instruction No. 6 also comports with *Medina*. Because the language in Guilt Phase Instruction No. 6 did not instruct the jury to give the same weight to direct and circumstantial evidence, there was no reason for Middleton to object. Middleton's performance regarding Guilt Phase Instruction No. 6 fell within the wide range of professionally competent assistance. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984) (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

ii. Guilt Phase Instruction No. 7[387]

iii. Guilt Phase Instruction No. 14

(a) Findings of Fact

Sailor and Johnson were each serving a deferred judgment and sentence when they testified at the guilt phase. As a result, Middleton suggested instructing the jury that a deferred judgment and sentence is the same as a felony conviction for purposes of evaluating witnesses' credibility. His suggestion resulted in the following:

> The credibility of a witness may be discredited by showing that the witness has been convicted of a felony. A previous conviction is one factor which you may consider in determining the credibility of the witness. A deferred judgment and sentence is equivalent to a felony conviction for purposes of evaluating credibility. You must determine the weight to be given to any prior conviction when considering the witness' credibility.

Guilt Phase Instr. No. 14.

Middleton testified during the post-conviction hearing that the purpose of jury instructions is to instruct the jury on the law. In his opinion, the court would have rejected instructions that included argument. With respect to witness credibility, he wanted to inform the jury that it could discount a witness's credibility if the witness was serving a deferred judgment and sentence at the time s/he testified. He requested such an instruction because he was concerned that the jury was not familiar with deferred judgments and sentences and therefore might not know how to evaluate the credibility of a witness who was serving a deferred judgment and sentence. Middleton also testified that a deferred judgment and sentence carries more impeachment value than a prior felony conviction because

[387] Owens withdrew this claim in SOPC-293.

the witness might be motivated to testify in the prosecution's favor in order to avoid revocation of the deferred judgment and sentence. However, in Middleton's view, addressing the relative impeachment value was appropriate for closing argument and not for a jury instruction. He also testified that he did not want the fact that Sailor and Johnson were serving deferred judgments and sentences at the time they testified to be used against Owens.

Reynolds opined that Middleton's suggestion to include deferred judgments and sentences in Guilt Phase Instruction No. 14 was deficient because the instruction lessened the impact of a deferred judgment and sentence on a witness's credibility. According to Reynolds, deferred judgments and sentences have more impeachment value than a felony conviction because of the possibility that the prosecution might revoke the witness's deferred judgment and sentence. Thus, the witness has an incentive to testify favorably for the prosecution in order to avoid revocation of the deferred judgment and sentence.

(b) Analysis

The language in Guilt Phase Instruction No. 14 that a deferred judgment and sentence is relevant in evaluating a witness's credibility is a correct statement of the law. *Cf.* C.R.S. § 13-90-101 ("[T]he conviction of any person for any felony may be shown for the purpose of affecting the credibility of such witness."). Expanding on that statement of the law to address the relative impeachment value of a deferred judgment and sentence compared to a prior felony conviction is argumentative and therefore not appropriate for a jury instruction. Because Guilt Phase Instruction No. 14 properly instructed the jury as to the law on evaluating witness credibility, Middleton's decision not to expand on that instruction was within the wide range of professionally competent assistance. *See Strickland*, 466

U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

iv. Guilt Phase Instruction No. 32[388]

c. Conclusion

The court concludes Middleton's performance with respect to Guilt Phase Instruction Nos. 6 and 14 was within the wide range of professionally competent assistance. The court also concludes there is no reasonable probability that, but for Middleton's alleged unprofessional errors, the result of the guilt phase would have been different. Accordingly, Owens's petition to vacate his conviction based on Middleton's handling of Guilt Phase Instruction Nos. 6 and 14 is **Denied**.

2. Instructions Improperly Bolstering Prosecution Evidence

a. Parties' Positions

Owens contends he was prejudiced when Middleton tendered Guilt Phase Instruction No. 11 and when Middleton failed to adequately object to Guilt Phase Instruction No. 15 because both instructions bolstered the prosecution's theory of the case.

The prosecution disputes that Guilt Phase Instruction Nos. 11 and 15 bolstered the prosecution's theory of the case.

b. Specific Instructions

i. Guilt Phase Instruction No. 11

(a) Findings of Fact

The prosecution sought and obtained a grant of immunity for R. Carter's testimony. While the court did not instruct the jury concerning witnesses who

[388] Owens withdrew this claim in SOPC-293.

were granted immunity for their testimony, the court instructed the jury concerning how it might evaluate a witness's credibility who had received leniency:

> You should carefully consider all of the testimony given and the circumstances under which each witness has testified.
>
> You have heard testimony from witnesses whose testimony may have been induced by promises of leniency. The prosecution has entered into an agreement with those witnesses in exchange for their testimony in this case. The law allows such agreements. The existence of this agreement may be used by you when you consider this witness's knowledge, motive, and state of mind. You should consider all facts and circumstances shown by the evidence which affects the credibility of the witness's testimony.

Guilt Phase Instr. No. 11.

Middleton testified during the post-conviction hearing that he tendered Guilt Phase Instruction No. 11. Middleton borrowed the language from *People v. Gilbert*, 12 P.3d 331, 338-39 (Colo. App. 2000). Although he was not fond of the language that the law allows such agreements, Middleton decided not to modify the language of the *Gilbert* instruction. His goal was to persuade the court to give the *Gilbert* instruction, and he was concerned that the court might reject the instruction if he modified the language. He also noted that the Colorado Court of Appeals in *Gilbert* did not criticize the instruction but rather found that the trial court did not err when it refused to give the instruction. He was also concerned with maintaining his credibility with the court.

With respect to the language in Guilt Phase Instruction No. 11 that a witness's agreement with the prosecution may be considered to evaluate that witness's knowledge, Middleton interpreted that language as allowing the jury to cast doubt on whether the witness had knowledge and to imply that the witness

was testifying falsely on account of his/her agreement with the prosecution. He did not interpret that language to mean that a witness had knowledge of the case just because the witness had an agreement.

Middleton also acknowledged during his testimony that he does not recall why he and King rejected the court's suggestion to address the effect a grant of immunity might have on witness credibility in the jury instructions.

Reynolds opined that Middleton was deficient when he tendered Guilt Phase Instruction No. 11, because it invokes the imprimatur of the court by saying the law allows plea agreements. According to Reynolds, the instruction bolstered the credibility of the prosecution's witnesses because it instructed the jury that witnesses were offered plea agreements on account of their knowledge of the case.

(b) Analysis

Guilt Phase Instruction No. 11 informed the jury that the law allows the prosecution to enter into an agreement with a witness in order to induce that witness's testimony. It was a correct statement of the law, and it did not invoke the imprimatur of the court onto any witness's testimony in this case. Middleton's decision not to modify the language in order to gain the court's approval of the instruction was the result of reasonable professional judgment.

The jury was also instructed that it may use the existence of a witness's agreement with the prosecution to evaluate that witness's knowledge. Owens interprets that language as though the existence of an agreement validates a witness's knowledge. His interpretation does not take into consideration the overall tenor of that instruction, which is that it is appropriate for the jury to question a witness's testimony when that witness has received leniency from the prosecution. The instruction addresses the "testimony from witnesses whose testimony may have been induced by promises of leniency" and told the jury to

"carefully consider . . . the circumstances under which each witness has testified." Guilt Phase Instr. No. 11. It points out that the prosecution gave the witnesses leniency "in exchange for their testimony in this case." *Id.* And it advises the jury to "consider all [of the] facts and circumstances shown by the evidence which affects the credibility of the witness's testimony." *Id.* In fact, Guilt Phase Instruction No. 11 benefited Owens because it authorized the jury to discount the testimony of any witness whom the prosecution induced to testify by offering that witness some sort of leniency in exchange for his/her testimony. Thus, Middleton's failure to address Owens's interpretation of that language did not fall outside of the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

With respect to all of Owens's arguments concerning Guilt Phase Instruction No. 11, including that the instruction did not address witnesses who were granted immunity before testifying, Owens failed to prove that he was prejudiced by Middleton's handling of that instruction. *See id*. at 694 ("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.").

ii. Guilt Phase Instruction No. 15

(a) Findings of Fact

Following a pretrial motions hearing on June 13, 2007, Strickland informed a deputy sheriff that Owens made threatening gestures and mouthed words to Strickland while he was testifying. This incident gave rise to an evidentiary hearing in August 2007 where Strickland and several deputy sheriffs testified.

The court instructed the jury at various times throughout the guilt phase that certain evidence was admitted for a limited purpose. At the end of the guilt phase, the court reiterated its limiting instructions:

> The court admitted certain evidence for a limited purpose. At that time, you were instructed not to consider it for any purpose other than the limited purpose for which it was admitted. The limiting instructions included:
>
> . . . .
>
> 4. The interaction between Gregory Strickland and Sir Mario Owens on June 13, 2007.
>
> You are again instructed that you cannot consider evidence admitted for a limited purpose except for the limited purpose for which it was admitted.

Guilt Phase Instr. No. 15.

During the post-conviction hearing, Middleton testified that the purpose of Guilt Phase Instruction No. 15 was to prevent the jury from misusing evidence that was admitted for a limited purpose.

Reynolds faulted Middleton for failing to characterize the interaction between Owens and Strickland as an alleged interaction. In her opinion, Middleton's failure allowed the jury to presume that the court accepted Strickland's testimony that the interaction actually occurred.

(b) Analysis

Strickland testified at the guilt phase about an interaction he had with Owens in court during a pretrial motions hearing in this case. Thus, Strickland's testimony was evidence that an interaction occurred. In Guilt Phase Instruction No. 15, the court instructed the jury that it could only consider Strickland's testimony about the interaction for the limited purpose for which it was offered. Contrary to Owens's argument, the court's characterization of the interaction as

evidence did not implicitly instruct the jury that Strickland's testimony was true or that the interaction Strickland described actually happened. Because the instruction did not invade the jury's role as a finder of fact, Middleton's failure to ask the court to qualify the interaction as an alleged interaction in the jury instruction fell within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

c. Conclusion

The court concludes Middleton's performance with respect to Guilt Phase Instruction Nos. 11 and 15 was within the wide range of professionally competent assistance. The court also concludes there is no reasonable probability that, but for Middleton's alleged unprofessional errors, the result of the guilt phase would have been different. Accordingly, Owens's petition to vacate his conviction based on Middleton's handling of Guilt Phase Instruction Nos. 11 and 15 is **Denied**.

3. Complicity Instruction[389]

4. Failure to Request Informant Credibility Instruction

a. Parties' Positions

Owens contends he was prejudiced by Middleton's failure to request an informant credibility jury instruction pertaining to Strickland and Harris.

The prosecution responds that Colorado law does not require such an instruction.

[389] Owens withdrew this claim in SOPC-293.

b. Findings of Fact

Strickland and Harris testified as jailhouse informants. They claimed to have learned information from Carter and Ray, who were closely associated with Owens.

Three guilt phase jury instructions addressed witness credibility. First, Guilt Phase Instruction No. 10 instructed the jury that it may have to decide what testimony to believe, listed examples of circumstances that might be considered, such as the witness's means of knowledge, ability to observe, and strength of memory, and directed the jury to consider any other factors that might affect a witness's credibility. Second, Guilt Phase Instruction No. 11 specifically instructed the jury that it may consider the prosecution's promise of leniency to a witness when evaluating that witness's credibility. Third, Guilt Phase Instruction No. 14 instructed the jury that it may consider whether a witness has suffered a felony conviction or is serving a deferred judgment and sentence when evaluating that witness's credibility. However, no guilt phase instruction expressly addressed whether the jury may consider that a witness was a jailhouse informant when evaluating that witness's credibility.

Middleton testified during the post-conviction hearing that he does not recall why he did not ask for a special instruction addressing the credibility of a jailhouse informant.

Reynolds opined that Middleton's failure to request an informant credibility instruction was deficient in light of the prosecution's reliance on informant testimony in this case.

c. Analysis

There were three guilt phase jury instructions given in this case that addressed witness credibility. Guilt Phase Instruction No. 10 was a general

credibility instruction that directed the jurors to consider any circumstance, shown by the evidence, that they considered important in assessing witness's credibility. Guilt Phase Instruction Nos. 11 and 14 described special circumstances that may affect a witness's credibility. Instruction No. 11 allowed the jury to consider the leniency a witness received in exchange for his/her testimony when evaluating that witness's credibility. Instruction No. 14 allowed the jury to discredit a witness's testimony if that witness has suffered a felony conviction. The circumstances described in both instructions applied to Strickland and Harris and invited the jury to properly evaluate, discredit, and/or reject their testimony as it saw fit. Several jury instructions allowed the jury to reject Strickland's and Harris's testimony, and Middleton's failure to tender an informant credibility instruction was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance."). There is no such Colorado criminal jury instruction, and Owens cites no binding legal authority holding that a defense attorney renders ineffective assistance of counsel by failing to tender a jury instruction addressing the credibility of jailhouse informants. Thus, Owens failed to prove that he was prejudiced by Middleton's failure to tender an informant credibility instruction. *See id*. at 694 ("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.").

d. Conclusion

The court concludes Middleton's performance with respect to the credibility instructions was within the wide range of professionally competent assistance. The court also concludes there is no reasonable probability that, but for Middleton's alleged unprofessional errors, the result of the guilt phase would have been

different. Accordingly, Owens's petition to vacate his conviction based on Middleton's handling of the guilt phase credibility instructions is **Denied**.

5. Tendering Instruction Broadening Scope of Liability[390]

6. Prejudice

When appropriate, the court addressed the prejudice prong of *Strickland* in its above analysis. Thus, the court will not repeat a separate prejudice prong analysis here. Additionally, to the extent that Owens is arguing that the court should conduct a cumulative prejudice analysis as to this category of claims, it is this court's view that a cumulative prejudice analysis should be reserved for consideration of all arguably significant defects that might have affected the fairness of Owens's guilt phase or sentencing hearing. *See* part V.U of this Order.

M. Failure to Investigate and Present Critical Mitigation Evidence in Sentencing Hearing

1. Parties' Positions

Owens contends his trial counsel's presentation of mitigation evidence was incomplete, insufficient, and unreasonable, thus rendering their assistance ineffective.

2. Principles of Law

The United States Supreme Court established the standard for an adequate investigation as follows:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel

[390] Owens withdrew this claim in SOPC-293.

> has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland v. Washington, 466 U.S. 668, 690-91 (1984).

The United States Supreme Court applied that standard when it addressed whether a partial mitigation investigation and presentation of some mitigation evidence was sufficient under *Strickland*. *Wiggins v. Smith*, 539 U.S. 510, 521-23 (2003). In *Wiggins*, the Court found that trial counsel's investigation constituted deficient performance. 539 U.S. at 533. In preparation for the sentencing hearing, trial counsel in *Wiggins* had the defendant tested by a psychologist who determined that the defendant had a low IQ, had difficulty coping in stressful situations, and might have a personality disorder. *Id*. at 523. Trial counsel also obtained a presentence investigation report, which contained a one-page life history and records from the Baltimore Department of Social Services. *Id*. at 523-24. The Social Services records showed that the defendant's mother was an alcoholic who had left her children without food for days, the defendant had emotional problems, the defendant was frequently absent from school for lengthy periods, and the defendant had been shuttled among various foster homes. *Id*. at 525. Trial counsel explained that they did not request a social history report because they were focused on establishing that their client was not responsible for the victim's death. *Id*. at 517. During the post-conviction proceedings, a forensic social worker presented an extensive social history report, which showed that the defendant had suffered severe physical and sexual abuse at the hands of his mother and foster parents. *Id*. at 516.

With this information, the Court "focus[ed] on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background was itself reasonable." *Id*. at 523 (emphasis omitted). The Court found that the prevailing standards of practice for capital trial counsel required counsel to have a social history report prepared by a forensic social worker. *Id.* at 524. Given the records of abuse and the standard of practice, the Court concluded that counsel's decision not to expand the investigation beyond the presentence investigation report and Social Services reports was deficient. *Id.* However, the Court emphasized "that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Id*. at 533.

In *Wiggins*, the Court pointed to *Williams v. Taylor*, 529 U.S. 362 (2000), as another example of the application of the *Strickland* standard for a mitigation investigation. *Id.* at 521-22. Trial counsel in *Williams* did not begin preparing for the sentencing hearing until one week before trial. 529 U.S. at 395. Counsel did not obtain records showing the defendant had endured a "nightmarish childhood" based on their incorrect understanding that state law barred access to such records. *Id*. Counsel did not present available evidence that the defendant was "borderline mentally retarded," did not obtain prison records showing he was a model prisoner, and did not contact a participant in the prison ministry program who visited the defendant regularly and called counsel with favorable evidence. *Id*. at 396. With this evidence, the Court found that "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." *Id*.

In *Wiggins* and *Williams*, the Court was particularly troubled by the fact that counsel ignored obvious mitigation investigative leads. In those two cases, the decisions to limit the mitigation investigation were not the result of reasonable

professional judgment because counsel lacked a sufficient basis on which to make strategic decisions.

The United States Supreme Court has approved of counsel's decisions when counsel conducts some limited investigation. *See Strickland*, 466 U.S. at 699 (concluding that counsel could "reasonably surmise . . . that character and psychological evidence would be of little help."); *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (concluding that counsel's limited investigation was reasonable because counsel interviewed all witnesses brought to his attention, and he discovered little that was helpful and much that was harmful); *Darden v. Wainwright*, 477 U.S. 168, 186 (1986) (concluding that counsel engaged in extensive preparation and that the decision to present a mitigation case would have resulted in the jury hearing evidence that the defendant had been convicted of violent crimes and spent much of his life in jail).

Ineffective assistance claims have similarly been addressed in Colorado. Citing to *Wiggins*, the Colorado Supreme Court has noted that "[a]n unreasonable failure to conduct a mitigation investigation can constitute the grounds for ineffective assistance of counsel." *Dunlap v. People*, 173 P.3d 1054, 1065 (Colo. 2007). In *Dunlap*, the defendant's trial team began preparing for the sentencing hearing immediately after being appointed; hired a private investigator to help with the mitigation case; obtained the defendant's school, hospital, and juvenile records; and attempted to obtain the defendant's mother's medical and psychiatric records after learning of her bipolar disorder diagnosis. *Id*. at 1066. The defendant's trial team decided to limit its mental health mitigation investigation due to the defendant's behavior during the mental health evaluation where he made disparaging remarks about the victims and was physically and verbally abusive toward staff. *Id*.

The Colorado Supreme Court in *Dunlap* found that counsel's performance was not deficient: "[e]valuating the situation from trial counsel's viewpoint at the time, and according great deference to counsel's decision, we find the limited mental health mitigation investigation was supported by reasonable professional judgment." *Id*. at 1068. The Colorado Supreme Court noted that, "[t]his is not a case where defense counsel failed to conduct a mitigation investigation altogether, failed to follow-up on an obvious lead, or failed to investigate the prosecution's evidence of aggravation." *Id*. at 1065.

3. Analysis

Each of Owens's specific claims will be addressed below.

a. Failure to Obtain and Present Multi-Axial Diagnosis[391]

i. Post-Conviction Evidence

(a) Parties' Positions

Owens argues that his trial team was ineffective for failing to retain and call a mental health expert such as Dr. Bhushan Agharkar (Agharkar), who would have evaluated Owens and provided a comprehensive psychological profile of Owens, including that he suffered from complex post-traumatic stress disorder (PTSD).

(b) Findings of Fact

During the sentencing hearing, Owens's trial team presented mitigation testimony from five mental health experts. The experts were Dr. Thomas Reidy (Reidy), an expert in forensic psychology; Dr. Thomas Gray (Gray), an expert in forensic psychology; Dr. James Waters (Waters), an expert in neuropsychology; Dr. Joseph Wu (Wu), an expert in neuropsychiatry and brain imaging; and Dr. Suzanne Pinto (Pinto), an expert in forensic psychology.

[391] Owens withdrew this claim in SOPC-232 and the Supplement to SOPC-232.

Reidy used a PowerPoint presentation to explain how exposure to risk factors can affect a person's ability to make appropriate choices. Reidy identified a multitude of risk factors pertinent to Owens's upbringing, including harsh and erratic discipline, problems in school, poverty, a violent neighborhood, exposure to drugs and gang violence, poor parental supervision, and access to weapons. According to Reidy, a person exposed to a multitude of risk factors has less moral culpability because that person's ability to distinguish right from wrong is diminished, which leads that person to make bad decisions.

Gray did a risk assessment of Owens. Based on his assessment, Gray opined during the sentencing hearing that Owens was not psychopathic and did not have an increased risk of violence in prison.

Waters administered a battery of tests to Owens and opined that he suffered from a brain abnormality that caused delayed neurological development. Waters viewed Owens as suffering from significantly decreased mental functioning that could make Owens's decision making almost childlike at times. Waters also opined that Owens could function in the structured environment of a prison.

Wu examined Owens's brain with a PET scan. He opined that based on the imaging and his review of Owens's clinical and family history, the neuropsychological data, and Owens's symptoms, Owens's brain had abnormalities consistent with either a mood disorder or a brain injury.

Pinto studied Owens's social history and opined about the psychological impact certain events had had on him. To prepare for her testimony, Pinto reviewed the following materials:

- The reports and sentencing hearing testimony of all experts called to testify.
- Her clinical interviews of Owens.

- Her interviews of Owens's mother and father.
- Reports of interviews of Owens's family members, friends, neighbors, and church members from Louisiana, Texas, and Colorado.
- Family photographs and photographs taken by the trial team.
- The genograms of Owens's family.
- Crime statistics from the Shreveport and Aurora police departments.
- School, medical, employment, and court records.
- Birth and death certificates.
- Discovery in this case.
- Jail and prison records.
- Books on African-American life and culture.

Pinto prepared a PowerPoint presentation, which included a timeline of Owens's life, to assist the jury in understanding the developmental, social, and emotional influences on him. Pinto noted that it was important to understand how these influences affected Owens as an African-American who grew up in the South and moved to a predominantly Caucasian community in Colorado. She also recounted the effects on Owens of witnessing one friend shoot and kill another friend when Owens was 15 years old. Pinto noted that children sometimes show signs of PTSD after a traumatic event. She added that Owens's family and friends testified that he suffered from nightmares after this incident. In summary, Pinto confirmed Waters's and Wu's findings that Owens suffered impaired cognitive abilities.

At the post-conviction hearing, Michelle Lapidow (Lapidow) testified that she initially conducted the mitigation investigation in this case.[392] She began her investigation in December 2005, and although she did not see any evidence of mental health problems from her interactions with Owens, she still investigated the issue because doing so is a prevailing professional norm when putting together a mitigation case. As part of her duties, she looked for any indication that Owens suffered from neurological deficits possibly caused by head trauma. She thought that Owens suffered from subtle deficits in brain functioning, and that caused her to start looking for experts to evaluate Owens.

During the post-conviction hearing, King testified that he had conducted over 100 criminal jury trials and that he was very familiar with Arapahoe County juries because most of his trials were held in Arapahoe County. King's trial experience informed his decisions regarding the psychological evidence the trial team presented during the sentencing hearing. In his view, juries are generally not receptive to psychological evidence, but King added that whether to present psychological evidence must be determined on a case-by-case basis. He also added that he generally disfavored presenting psychological evidence because it often turns into a battle between experts. King testified that as he prepared Owens's mitigation case, he wanted to focus the jury on Owens's background and character as opposed to only psychological evidence. King also testified that he was concerned that relying on psychological evidence could result in inadvertent waivers of Owens's psychologist-patient privilege and inadvertent disclosure of Owens's psychological test results.

[392] Lapidow and Gonglach overlapped for much of 2006, but in the fall of that year, Gonglach took over primary responsibility for the mitigation investigation.

In putting together the psychological aspects of the mitigation case, King relied primarily on Pinto, Waters, and Reidy. King did not want to put Owens on the stand to recount Owens's social history, and he thought the jury would be receptive to Pinto doing it. King originally considered having Pinto test Owens to confirm he was not psychotic but it became unnecessary when Gray made that determination.

During her testimony at the post-conviction hearing, Kepros recalled Pinto's responsibilities were to provide Owens's social history and to assimilate various pieces of the psychological evidence to show why his culpability was lessened. One of Pinto's primary purposes was to suggest that Owens might have PTSD due to witnessing the murder of his childhood friend.

Owens's post-conviction counsel retained Agharkar, an expert in psychiatry and forensic psychiatry, in June 2009 to do a psychiatric evaluation of Owens. Agharkar met with Owens in 2009 and 2011 for approximately five and a half hours total.

Based on his initial assessment, Agharkar suspected that Owens was suffering from brain damage. In addition to his personal assessments of Owens, Agharkar reviewed the reports and transcripts of the other experts who had examined or tested Owens. He also reviewed reports of interviews of witnesses, records of Owens's social history in school, and Owens's DOC records. Based on his review of those materials and on his assessments of Owens, Agharkar opined that in 2008 Owens suffered from complex PTSD.

As a 15-year old, Owens witnessed the murder of his friend. Agharkar relied on that event as the traumatic event that caused Owens's PTSD. Agharkar relied on Owens's nightmares about people being killed, Owens's minimization of the event, and Owens's avoidance of stressful situations as symptoms of PTSD.

Agharkar explained that the length of time between the traumatic event in 2000 and the onset of PTSD in 2008 is what made the PTSD complex. Agharkar also explained that his 2009 diagnosis of complex PTSD was valid because there was no intervening traumatic event between 2000 and 2009 to explain the delayed onset. Agharkar attributed the delayed onset to Owens having grown up in a traumatic environment and with a family that had a long history of mental illness who did not help him heal after the shooting. By way of example, Agharkar pointed to Owens's school essay about the shooting when he sought admission to the Aurora Public Schools (APS) and his family's rejection of the APS counselor's recommendation that he receive counseling. Agharkar also pointed to Owens's constant use of marijuana because marijuana is a ubiquitous self-medicating drug for PTSD.

In diagnosing Owens with complex PTSD, Agharkar also relied on Dr. Elizabeth Sather's (Sather) 2007 diagnostic impression of Owens as possibly suffering from major depression, noting that the symptoms of PTSD and major depression are similar. He also relied on the findings of Dr. William Orrison (Orrison), a neurologist, and Dr. Jeffrey Lewine (Lewine), a neuroscientist, who were retained by Owens's post-conviction counsel to study and render opinions regarding Owens's 2008 MRI.

Agharkar disagreed with Gray's testimony that Owens was not suffering from major depression because Agharkar believed that Gray had not spent sufficient time with Owens and because Gray mistakenly thought Sather had diagnosed Owens with antisocial personality disorder.

In Agharkar's view, Owens's cognitive deficits aggravated his complex PTSD. In Agharkar's opinion, Owens's complex PTSD caused him to display an

attitude of indifference to stressful situations, prevented him from being able to show remorse, and prevented him from thinking through his problems.

Dr. Beth Hueser (Hueser), an expert in clinical psychology and forensic psychology, testified at the post-conviction hearing that she worked at the Denver Reception and Diagnostic Center (DRDC) as a staff psychologist in 2007. Hueser was trained in PTSD as a clinical psychologist. On April 23, 2007, Hueser did a psychological intake evaluation of Owens at the DRDC. Hueser's evaluation of Owens lasted approximately 30 minutes, and she took three pages of notes. During her assessment, Owens was well mannered, well grounded, and oriented. He exhibited no psychotic symptoms and reported no symptoms of depression. She evaluated him as low risk and saw no symptoms of PTSD.

Hueser met with Owens a second time at the DRDC on May 29, 2007. While she was doing rounds with other inmates, Owens held a fork to his throat and threatened to harm himself unless she spoke to him. According to Hueser, their second interaction lasted approximately 15 minutes. She asked Owens if he was suicidal, and he responded that he was not. He added that his medications did not seem to be working. Hueser evaluated Owens as manipulating, and she did not see any symptoms of PTSD. Hueser testified that she would not expect to see symptoms of PTSD due to the limited amount of time she spent with Owens. According to Hueser, Owens never reported any symptoms consistent with PTSD during their interactions.

(c) Analysis

Owens's trial team began working on the mental health aspects of the mitigation case immediately after being appointed to represent him. As a result of its efforts, Owens's trial team presented five mental health experts and almost four dozen family members, friends, neighbors, and other professionals who interacted

with Owens over the course of his life. Pinto testified about Owens's life history, including that he had witnessed the murder of a friend when he was 15 years old.

King, an experienced trial attorney, was concerned that an Arapahoe County jury would view the presentation of psychological evidence with skepticism and possibly discount it. King's concern was based on his experience that presenting psychological-type evidence often results in a battle of experts with neither party gaining an advantage. Such a battle ensued during the post-conviction hearing when Agharkar testified that Owens suffered complex PTSD as of 2008 while Hueser testified that Owens did not report symptoms of PTSD and that she did not observe any symptoms consistent with PTSD in 2007.

During the post-conviction hearing, Agharkar testified that Owens suffered complex PTSD because he witnessed the murder of his friend. Agharkar testified that his diagnosis was valid as of 2008 based in part on his finding that Owens had not suffered a traumatic event between 2008 and 2011. While there is no evidence that Owens suffered a traumatic event between 2008 and 2011, he necessarily suffered intervening traumatic events in 2004 when he committed the Lowry Park shootings and in 2005 when he committed the Dayton Street homicides. This diagnosis would have resulted in cross-examination and a battle of the experts as to which traumatic event or events caused Owens's PTSD. Indeed, there is a likelihood that it would have resulted in a cross-examination or on evidence dwelling that Owens's trial team reasonably wanted to minimize – things like the gory aspects of the killings, the emotional impact of being berated by Ray shortly after the Lowry Park shootings, and the moral dilemma or guilt associated with stalking and murdering Marshall-Fields and his innocent girlfriend. Presenting a complex PTSD diagnosis at trial based on the traumatic event of witnessing his friend's murder would not have been persuasive because Owens had suffered two

intervening traumatic events in 2004 and 2005, and it would have resulted in the jury being focused on very harmful evidence.

With the assistance of several mental health experts, Owens's trial team concentrated on Owens's life story as mitigation and supplemented it with selected psychological evidence. The trial team presented a picture of Owens as someone with cognitive deficits that suffered from impaired decision making. Because the trial team's approach to mitigation was informed and reasoned, the trial team's failure to retain yet another mental health expert, such as Agharkar, was within the wide range of professionally competent assistance to which Owens was entitled. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance."); *see also Harrington v. Richter*, 562 U.S. 86, 106 (2011) ("Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach." (citation omitted)).

(d) Conclusion

The court concludes that the trial team's decision not to call an additional mental health expert like Agharkar was not deficient performance. The court also concludes Owens failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on his trial team's failure to call a mental health expert to testify that Owens suffered from complex PTSD in 2008 is **Denied**.

ii. Dr. Sather's Pretrial Diagnostic Impression

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to present expert witness testimony from Sather, who evaluated Owens in the ACDF.

Sather's diagnostic impression of Owens was that he suffered from major depression.

(b) Findings of Fact

After visiting with Owens for some time, Lapidow requested that Sather, a licensed clinical psychologist at the ACDF, evaluate Owens because she believed he needed medication. Lapidow urged Owens to give Sather the information she needed to determine whether medication would be appropriate. She also discussed what symptoms he should share with Sather.

At the post-conviction hearing, Lapidow recalled seeing Sather's report and discussing Sather's assessment that Owens suffered from major depression with Owens's trial team. Lapidow was certain that she shared Sather's report with the trial team because it contained the Axis I diagnosis of major depression. Lapidow added that she was constantly requesting copies of Owens's ACDF mental health records, which she shared with trial counsel.

Sather worked part-time as an evaluating psychologist at the ACDF. As an evaluating psychologist, she evaluated inmates to determine if they suffered from a mental illness. Another staff psychologist at the ACDF referred Owens to Sather. That psychologist had determined that Owens was suffering from adjustment disorder. Sather evaluated Owens on January 4, 2007, for 15 to 45 minutes. Lapidow was present for the evaluation. Based on her evaluation, Sather provisionally diagnosed Owens with major depression and adjustment disorder with anxiety. She did not diagnose Owens with an antisocial personality disorder.

At the post-conviction hearing, Sather testified that Lapidow's presence for Owens's evaluation was unusual, but she did not view it as so unusual as to cause her to be skeptical of Owens. She also testified that her diagnostic impression was not a diagnosis because she had limited interaction with Owens, she did not have a

lot of important information about his history, and she did not want to label him with a mental illness. In Sather's view, diagnostic impressions should not be used to label someone with a mental illness, such as major depression. Rather, according to Sather, a multi-axial diagnosis has to be done to obtain a reliable diagnosis. Sather further noted that as a clinical psychologist, she must accept the inmate's statements about her/his symptoms at face value.

Gray, an expert in forensic psychology employed at the CMHIP, evaluated Owens to determine whether he had any diagnosable mental illnesses and to determine Owens's risk assessment. In the course of his assessment, Gray reviewed Sather's report. During the sentencing hearing, Gray testified that Sather had diagnosed Owens with antisocial personality disorder. Gray also testified that Sather misdiagnosed Owens with major depression.

During the post-conviction hearing, Gray testified that he evaluated Owens at the ACDF in March 2008. Gray met with Owens on two days, during which he had short clinical interviews and administered three psychological tests. During this same time period, he reviewed Owens's ACDF medical and mental health records. He did not know if he had the complete set of records. Based on his assessment and review of the voluminous records, he found that Owens did not suffer from depression and did not have organic brain damage. Acknowledging that his report mistakenly cited Sather's report as containing an antisocial personality behavior diagnosis, Gray was confident that he had seen that diagnosis for Owens in the ACDF records he reviewed. Gray added that an antisocial personality disorder is a serious diagnosis. In his report, he noted that the diagnosis needed to be ruled out for Owens because Owens came close to satisfying the criteria for the diagnosis, and even after acknowledging his error,

Gray maintained that his rule-out[393] diagnosis of antisocial personality disorder was still valid.

Dr. Evan Crist (Crist), a clinical psychologist at the ACDF, testified at the post-conviction hearing. During his testimony, Crist identified the ACDF medical and mental health records for Owens, which included DOC records sent to the ACDF. These records listed mental conditions for Owens and antisocial personality disorder was listed between April and October 2007. SOPC.EX.P-384, pp. 84, 86-87.

During the post-conviction hearing, Kepros testified that she knew that Sather had evaluated Owens, but despite her routine records requests to the ACDF, she was not aware of Sather's report prior to trial. According to Kepros, the trial team did not request Gray's notes, which would have shown that he misread Sather's report.

According to Reynolds, the team's failure to use Sather's report to impeach Gray's erroneous reliance on Sather's diagnosis of Owens with antisocial personality disorder was deficient performance.

(c) Analysis

Sather's diagnosis of Owens with major depression was a diagnostic impression, which is a provisional diagnosis. Sather's diagnostic impression is not the equivalent of a major mental health diagnosis. It was based on limited interaction with Owens and limited information that she received exclusively from Owens under unusual circumstances. First, Lapidow asked Sather to evaluate Owens because Lapidow suspected that Owens was suffering from a mental

[393] A rule-out diagnosis is not a statement that the diagnosis has been ruled out. It is a statement that many of the criteria for the diagnosis are present, but not so many that the diagnosis can be made. It can be viewed as a recommendation to a future mental health professional that criteria for such diagnosis be taken into consideration when evaluating the patient.

illness. Second, Lapidow worked with Owens on what to say to Sather. Third, Lapidow attended Owens's assessment, which Sather noted was somewhat unusual. Given that Sather's diagnostic impression was based only on a short evaluation of Owens whereas Gray's evaluation was based on a two-day evaluation and his review of Owens's voluminous records, any attempt to impeach Gray's testimony that Owens did not suffer from major depression would have been futile.

While Gray mistakenly attributed Owens's antisocial personality disorder diagnosis to Sather, he was not mistaken that other records reflected that Owens had been diagnosed with antisocial personality disorder. Moreover, after Gray's errors were brought to his attention, Gray maintained that an ACDF document he reviewed contained an antisocial personality disorder diagnosis and that his rule-out diagnosis for antisocial personality disorder was valid. Because other documents reflected the antisocial personality disorder diagnosis and because Gray would have maintained his rule-out diagnosis, the trial team's failure to impeach Gray was not a professional error. The trial team's representation was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

(d) Conclusion

The court concludes that the trial team's failure to call Sather to testify concerning her diagnostic impression of Owens was not deficient performance. The court also concludes Owens failed to prove how he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on the trial team's failure to call Sather and the failure to impeach Gray with Sather's report is **Denied**.

b. Failure to Present Evidence of Childhood Trauma Consistent with Abnormal Brain Scan

i. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to present evidence that Owens was locked inside a car as an infant on a hot Louisiana day, which resulted in brain damage. Owens also contends his trial team failed to present this information to expert witnesses as a possible explanation for Owens's abnormal brain scan.

ii. Findings of Fact

Immediately after Owens's trial team was appointed to represent him, Lapidow started gathering records. She obtained his school records from Louisiana and Colorado, including his preschool records.

Lapidow and D. Wilson took two trips to Louisiana to meet and interview Owens's family members and friends. Lapidow and D. Wilson spoke with approximately 10 family members on each trip, and Lapidow produced approximately 15 reports of interviews from the trips but noted there were more interviews for which she did not prepare reports. The trial team also had complete access to Owens's parents.

In addition, Gonglach interviewed over 40 people in Louisiana as part of his mitigation investigation. He interviewed Owens's family, friends, and neighbors. Included in that group was Owens's grandmother, Erma Gray (E. Gray). Gonglach and King interviewed E. Gray on May 17, 2007. E. Gray told Gonglach and King that when Owens was one, she inadvertently locked him inside a hot car. Gonglach's interview notes reference the incident described by E. Gray. He prepared a report of E. Gray's interview that covered all the information she provided except for the hot car incident.

Wu examined Owens's brain with a PET scan, which he described at trial as functional brain imaging. Wu opined that Owens's brain had abnormalities consistent with either a mood disorder or a brain injury. Wu's opinion was based on the imaging, his review of Owens's clinical and family history, Waters's neuropsychological data, and Owens's symptoms.

During the post-conviction hearing, Gonglach testified that he recognized the incident described by E. Gray as important potential mitigation. Gonglach could not explain why the incident was not in his report. According to Gonglach, no other family member he interviewed mentioned the hot car incident. Gonglach testified that he never asked any other family member about the incident. He conceded the omission indicates that he did not consider the incident significant.

Dr. Joseph Grubenhoff (Grubenhoff), an expert in emergency pediatric medicine, testified at the post-conviction hearing. Based on the August 2, 2011, interviews of E. Gray and Debra Gray (D. Gray) by Owens's post-conviction counsel, Grubenhoff opined that Owens's symptoms were consistent with heat stroke. He based his opinion on the reports from E. Gray and D. Gray that Owens was in the car for 10 to 30 minutes, that the car had been sitting in the full sun, that Owens was dry and hot to the touch, that Owens was probably unconscious, and that after waking up, Owens was quieter than normal for a child of his age. Grubenhoff added that he was comfortable relying on these reports because they came from matriarchs who would be sensitive to how a child of this age should behave. Grubenhoff acknowledged that there are many variables involved when assessing the possibility of heat stroke in a child, and he did not know the answers for most of these variables. He testified that when heat stroke causes brain damage, the child might experience impaired motor movements. He acknowledged there were no family reports of impaired motor movements. He

also acknowledged that it was common to see children recover from heat stroke without negative consequences.

At the post-conviction hearing, King did not recall E. Gray describing the hot car incident mentioned in Gonglach's interview notes but omitted from his report. King testified that his practice was to review and sometimes edit Gonglach's reports but not to review Gonglach's interview notes. According to King, the trial team interviewed as many of Owens's family members as possible and worked closely with Owens's parents in preparing for and conducting these interviews. According to King, no one mentioned the hot car incident or that there were any concerns with Owens's functioning subsequent to the incident. King added that Owens's mother was very cooperative and was subjected to an in-depth interview about his childhood, during which she never mentioned the hot car incident or his suffering any type of a setback around the age of one.

Kepros testified at the post-conviction hearing that she never saw Gonglach's notes and did not know that Owens was locked inside of a hot car as an infant.

Reynolds opined that the trial team was deficient for not investigating and presenting the hot car incident to its experts and to the jury.

iii. Analysis

Owens presented Grubenhoff during the post-conviction hearing, and Grubenhoff opined that Owens's 1985 symptoms, as described by E. Gray and D. Gray in 2011, were consistent with heat stroke. Grubenhoff lacked significant information and therefore could not make a diagnosis. Grubenhoff relied on the 2011 reports because they were from interviews of family members who would know what would be normal activity for a one-year-old child. However, the reports relied upon by Grubenhoff contain essential details that E. Gray did not tell

King and Gonglach but which, if true, might point to Owens suffering heat stroke. These details were only disclosed after Owens had been sentenced to death. King and Gonglach would have inquired about these details during E. Gray's initial interview if she had given them any indication that the incident had mitigation potential.

Grubenhoff's opinion is based on information that came from Owens's family members who have an understandable affection for him, who were not subjected to cross-examination, and who did not provide the details leading to the suspicion of heat stroke until after Owens was sentenced. It is noteworthy that only E. Gray referenced the hot car incident to Owens's trial team during the trial team's extensive mitigation investigation, which included interviewing over 50 friends and family members and gathering substantial materials on Owens's childhood.

Given the time and effort that Owens's trial team put into investigation and preparation of the mitigation case and the circumstances underlying Grubenhoff's opinion, the trial team's performance fell within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

iv. Conclusion

The court concludes that the trial team's failure to present the hot car incident as mitigation was not deficient performance. The court also concludes Owens failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on his trial team's failure to present evidence that Owens was locked in a hot car as an infant is **Denied**.

c. Failure to Obtain Available Records

i. Family Violence and Law Enforcement Contacts

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to adequately research and obtain law enforcement records and court records for Owens's family members.

(b) Findings of Fact

Derrick Owens (D. Owens), Owens's father, testified during the sentencing hearing that he had a life-long problem with drug addiction and that he had voluntarily attended several outpatient drug rehabilitation programs. D. Owens testified that he sought drug treatment whenever he realized that his addiction was causing him to be absent from his family. He admitted that he sold drugs as a young person to support his family. D. Owens also testified that he had problems finding a steady job since moving to Colorado and that the situation had resulted in contacts with the police.

The trial team gathered records for Owens and his family to present a comprehensive social history on Owens. Lapidow sent out numerous letters with releases in an attempt to gather those records.[394]

Gonglach obtained voluminous records on Owens's family members in order to prepare paternal and maternal genograms that depicted Owens's social history through his immediate and extended family. The genograms were

[394] Lapidow's spreadsheet (SOPC.EX.D-1529) tracked her efforts to obtain many records, including but not limited to birth, marriage, and death certificates for Owens's immediate and extended family members, Owens's school records, Owens's nursery school records, and Owens's medical records from doctors, jails, hospitals, and clinics. It also tracked D. Owens's drug treatment records, Owens's parents' employment histories and earnings statements, mental health records for Owens's paternal aunt and his brother, a court file pertaining to a dispute between Owens's parents, and a record of his father being contacted by the police in April 2004.

introduced into evidence during the sentencing hearing. The genograms covered Owens's family from his paternal great-great-grandparents and his maternal great-grandparents down to his nephew and second cousins. The genograms were color-coded to identify which family members suffered from mental health issues, had substance abuse problems, had criminal records, and/or died unexpectedly.

Reynolds opined that Owens's trial team performed deficiently because it failed to obtain the criminal records for every member of the defendant's immediate and extended family. In Reynolds's view, this is necessary information for the experts and for preparing a mitigation presentation for the jury.

(c) Analysis

Owens's trial team obtained voluminous records in order to prepare a thorough genogram for Owens's family that indicated which family members suffered from mental health or substance abuse problems.

In SOPC-163, Owens asserts that there are nine records that the trial team allegedly failed to obtain. The records relate to Owens's family members. Owens did not introduce those records into evidence during the post-conviction hearing. Thus, there is no evidence on which the court can evaluate any perceived prejudice the trial team's alleged failure to gather those records had on the outcome of Owens's case. Moreover, the records were not necessary because the genograms depicted which of Owens's family members had criminal records and/or suffered from drug addiction.

D. Owens admitted during the sentencing hearing that he had a life-long drug problem, that it caused him to be absent from his family, that he had sold drugs, and that he had run-ins with the police since moving to Colorado. His name was highlighted on the genogram signifying a criminal record and a drug problem.

Given the extensive efforts made by the trial team to obtain records, the volume of records obtained, and Owens's failure during the post-conviction hearing to prove his claim that his trial team failed to obtain certain records, the trial team's performance was within the wide range of professionally competent assistance to which Owens was entitled. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

(d) Conclusion

The court concludes Owens failed to prove that his trial team's alleged failure to obtain certain police and court records was deficient performance. The court also concludes Owens failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on his trial team's failure to obtain certain records is **Denied**.

ii. Mental Health and Incarceration

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to obtain Owens's mental health and jail records.

(b) Findings of Fact

Lapidow sought Owens's records from the Caddo Parish jail shortly after the trial team was appointed to represent him. She sent a request for all records, including mental health records, on December 4, 2005, and received a response on January 4, 2006. The response contained an Inmate Medical Screening Form dated November 7, 2005, which reflects that Owens indicated he had night sweats. It also contained three pages with handwritten notations. The records reflect that on November 6, Owens denied suicidal ideation and reported depression at a level five on a scale of one to 10; on November 9, Owens reported he had night sweats;

and on November 14, Owens reported having anxiety attacks and was referred to mental health for an evaluation. Lapidow also routinely received mental health records from the ACDF.

Lapidow testified at the post-conviction hearing that she was certain that she had received Sather's report and shared it with the trial team because it contained a diagnosis of major depression. Kepros testified that she was not aware of Sather's report prior to trial.

Reynolds testified that capital trial counsel must obtain all mental health records, regardless of where the records are located. She opined that Owens's trial team's performance was deficient because they failed to obtain records from the Caddo Parish jail and failed to obtain Sather's report.

(c) Analysis

Lapidow testified at the post-conviction hearing that she obtained Owens's mental health records from the Caddo Parish jail and that she obtained Sather's report. The court credits Lapidow's testimony and finds that Owens failed to prove that his trial team did not obtain his Caddo Parish mental health records or Sather's report. Thus, the trial team's performance was within the wide range of professionally competent assistance to which Owens was entitled. *See id*. (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

(d) Conclusion

The court concludes Owens failed to prove that his trial team did not obtain the Caddo Parish jail records and Sather's report. Accordingly, Owens's petition to vacate his sentence based the trial team's alleged failure to obtain various records is **Denied**.

iii. Medical[395]

d. Failure to Adequately Interview Family Mitigation Witnesses

i. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to adequately interview S.D. Owens, Linda Sullivan (Sullivan), and D. Gray in Louisiana to further develop mitigation.

ii. Findings of Fact

King interviewed S.D. Owens, Sullivan, and D. Gray during a mitigation investigation trip to Louisiana in May 2007.

According to King, the trial team's mitigation investigation developed three themes. The first theme was Owens's lack of supervision during his formative years while he was exposed to an environment of high crime and street gangs. The second theme was Owens's family history of mental health problems and drug dependency. The third theme was Owens's loss of support from his extended family when he moved to Colorado. During the post-conviction hearing, King acknowledged that the themes were somewhat contradictory, but he noted it was unavoidable.

King recalled Owens's brother, S.D. Owens, told him and Gonglach that he and Owens were close and that he often felt like a parent because he had to watch Owens. King also recalled that S.D. Owens felt responsible for Owens having gone bad. King did not ask whether S.D. Owens felt like a surrogate parent but noted his comment about being responsible for Owens sounded like the regret of an older brother. King also recalled that S.D. Owens talked about his own emotional and physical problems, which overwhelmed him at times. During the

[395] Owens withdrew this claim in SOPC-177.

trial, Owens's mother told King for the first time about S.D. Owens having a breakdown. It was then that King decided to call S.D. Owens in the sentencing hearing. King recalled that Gonglach had to convince S.D. Owens to sign a release to enable the team to obtain his mental health records.

According to King, he recognized that S.D. Owens could potentially help or harm Owens's mitigation case. King decided to call S.D. Owens as a mitigation witness because his situation supported the theme of family mental health problems, and King thought it was important for the jury to hear this evidence. S.D. Owens also supported the theme that Owens grew up in a bad neighborhood because S.D. Owens said that many of their friends wound up in prison and that their neighborhood was so tough that they never left the house without a gun.

King recalled interviewing Sullivan, who had been Owens's neighbor. Subsequently, Sullivan's interview was videotaped and played to the jury. According to Sullivan, S.D. Owens, as a child, sometimes had to feed his brother. Also according to Sullivan, D. Owens was held in high regard because he was not an absentee parent, and all the young boys in the neighborhood looked up to him as a surrogate father.

Reynolds opined that the trial team's mitigation interviews were perfunctory and that they missed numerous red flags for follow-up mitigation investigation.

iii. Analysis

Owens's trial team interviewed S.D. Owens, Sullivan, and D. Gray during its mitigation investigation trip to Louisiana in May 2007. All three witnesses testified either in person or by video during the sentencing hearing. Owens's trial team also presented paternal and maternal genograms to the jury that detailed mental health and drug problems on both sides of Owens's family.

In SOPC-163, Owens sets forth what additional mitigation evidence these witnesses would have provided if Owens's trial team had conducted adequate interviews. However, Owens did not introduce that additional mitigation information into evidence during the post-conviction hearing.

Thus, on this record, Owens failed to prove that his trial team's performance in interviewing certain mitigation witnesses was outside the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

iv. Conclusion

The court concludes Owens failed to prove that his trial team's interviews of S.D. Owens, Sullivan, and D. Gray were so inadequate as to constitute deficient performance. The court also concludes Owens failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on his trial team's alleged inadequate mitigation interviews is **Denied**.

e. Failure to Select and Adequately Prepare Appropriate Experts

i. Dr. Waters

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to retain Waters, a neuropsychologist, with sufficient time and funding to evaluate Owens. Owens also contends that his trial team failed to provide Waters with significant background information for Owens and with the prosecution's theory of how and why Owens committed the Dayton Street homicides.

(b) Findings of Fact

Owens's trial team retained Waters in May 2007 to determine if Owens suffered from brain deficits that affected his functioning. In July 2007, Waters gave Owens a battery of neuropsychological tests to determine whether Owens may be suffering from brain damage.

The trial team met with Waters and Pinto on August 24, 2007, to discuss Waters's findings. Lapidow testified during the post-conviction hearing that she became concerned with using Waters as an expert during that meeting but could not replace Waters due to the short amount of time remaining before trial.

During the August 2007 meeting, Waters stated that Owens suffered from deficits that impaired his impulse control and his ability to self-regulate. Based on his findings, Waters recommended the team retain Wu to do brain imaging. Waters conferred with Wu twice prior to the sentencing hearing. Waters completed his report in November 2007.

Kepros's file for Waters was 133 pages long. She prepared a 10-page outline for his testimony. While preparing for his testimony, Waters sent Kepros a list of suggested questions. Kepros and Waters discussed the Rorschach test in particular and based on their discussion, Kepros decided to have Waters discuss the Rorschach test results during his testimony to support his findings.

Waters testified at the sentencing hearing that brain damage can limit a person's cognitive capabilities, especially in decision making. In Waters's opinion, Owens's test results contained a pattern indicating deficits in Owens's frontal lobe and consequently his executive functioning. Waters based his opinion in part on the Rorschach test results, which he testified were only a small part of his assessment regarding Owens's frontal lobe deficits. Waters also testified that

the Rorschach test was not a diagnostic tool but that the results were consistent with what he knew about Owens and Owens's history.

Waters explained that his tests are demanding. To reduce Owens's fatigue during the testing, he administered the tests over two days at the ACDF. Breaking the tests up into two days resulted in delays, which reduced the amount of time available for testing. However, Waters testified that he had sufficient time to complete the necessary testing and clinical interviews for a valid assessment of Owens. He noted that given the limited time Owens was available at the ACDF and his schedule, there were no other time slots available for additional testing. Waters acknowledged that he never requested the trial team to arrange time for additional testing. Waters also testified that his tests have built-in validity measurements, which indicated to him that Owens put forth sufficient effort in the testing. According to Waters, he had sufficient background information on Owens to reach valid conclusions, especially because he was retained only to test Owens and not to review Owens's history or to integrate the test data into the history.

Gray testified at the sentencing hearing that Owens reported that he did not put forth sufficient effort on the Rorschach test. Waters challenged Gray's testimony that Owens did not put forth effort by testifying that he was not inclined to rely on self-reported malingering from Owens, a person who had been diagnosed with brain damage.

Kepros explained during the post-conviction hearing that the trial team's theory was to use several mental health experts, including Waters, to show that Owens suffered from brain deficits as the predicate for Wu's testimony that the PET scan confirmed that Owens had an abnormal brain. Kepros said that the trial team decided to retain Waters based on Pinto's recommendation and on Waters's 30 years of experience in neuropsychological testing. She testified that the team

did not explore his capital trial experience. According to Kepros, no time limits were placed on Waters, and he never requested additional time to evaluate Owens.

Reynolds opined that the trial team performed deficiently by failing to retain Waters prior to May 2007, because that late date left them with insufficient time to conduct the testing and evaluate its usefulness. Reynolds added that the team was deficient for not investigating Waters's forensic background, for not vetting what tests he intended to utilize, for not providing him with sufficient background materials pertaining to the case against Owens, and for allowing him to rely solely on the Rorschach test.

(c) Analysis

Waters was retained in May 2007, almost a year before Owens's Dayton Street trial began. Waters testified at the sentencing hearing that he had sufficient time to evaluate Owens in July 2007. On this record, Owens failed to prove that a year was an insufficient amount of time for Waters to evaluate Owens.

The trial team retained Waters to conduct neuropsychological tests on Owens and to opine about Owens's brain functioning. He was not retained to integrate his test results into Owens's social history. According to Waters, he had sufficient background information on Owens to conduct the tests. The trial team gave Waters what he needed to make valid conclusions. Even if Waters was aware of the prosecution's theory of the case, the court would not expect an expert witness to modify his or her testimony concerning the results of scientific tests based on the prosecution's theory. On this record, Owens failed to prove that his trial team did not provide Waters with sufficient background in order to evaluate Owens and testify during the sentencing hearing.

Documents introduced during the post-conviction hearing show that Waters was paid over $3,000. Owens did not present any evidence during the post-conviction hearing showing that Waters was underfunded.

Regarding Waters's reliance on the Rorschach test, Waters testified that the Rorschach test was not a diagnostic tool and that the results were only a small part of his assessment regarding Owens's frontal lobe deficits. The prosecution used Gray to impeach Waters's reliance on the Rorschach rest. However, impeachment of an expert witness does not equate to deficient performance on Kepros's part.

Waters also answered Gray's challenge to the reliability of the Rorschach test. Waters testified that Gray's reliance on Owens's claimed lack of effort was questionable in light of Owens's brain damage. Moreover, Waters explained that many of his tests had built-in validity measurements that allowed him to assess Owens's efforts. In Waters's opinion, Owens put forth sufficient effort to produce reliable results on the battery of tests administered by Waters. Gray's contradictory opinion does not mean Owens's trial team failed to adequately prepare Waters for his testimony.

The record developed at the post-conviction hearing shows the trial team put substantial thought and effort into the mental health portion of its mitigation case. The trial team relied on a number of experts, including Waters, to present Owens to the jury as a person who had a brain deficit. The trial team consulted with numerous experts and made substantial efforts to prepare Waters for his testimony. Owens's team utilized a number of experts to build a case of brain impairment, and calling Waters to opine that Owens suffered from brain deficits was part of that strategy.

In summary, Owens failed to prove that the trial team's pretrial preparation and presentation of Waters was outside of the wide range of professionally

competent assistance to which Owens was entitled. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

(d) Conclusion

The court concludes the trial team's preparation and presentation of Waters did not constitute deficient performance. The court also concludes Owens failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on the trial team's preparation and presentation of Waters is **Denied**.

ii. Dr. Gray

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to investigate and present evidence to rebut Gray's testimony that Owens did not suffer from major depression.

(b) Findings of Fact

The court ordered Gray, a staff psychologist at the CMHIP, to do a risk assessment of Owens. Lapidow interviewed Gray on May 2, 2008, and Kepros and Bitz interviewed Gray on May 27, 2008, which was the day before he testified. The trial team's file on Gray was almost 300 pages long.

Based on its pretrial interviews of Gray, Owens's trial team called Gray to testify during the sentencing hearing. Gray obtained a doctorate in anthropology in 1986 and worked in that field until he obtained his doctorate in psychology in 1999. Based on his education and experience, Gray was received as an expert in forensic psychology.

Gray testified that Owens was guarded during the psychological testing he administered but that such guardedness was to be expected in a forensic

assessment. Gray touched on many aspects pertaining to Owens's mental health history. According to Gray, Owens minimized his family's mental health and drug problems and denied experiencing any symptoms of a mental disorder. Gray confirmed that Owens had been treated for a speech disorder as a child, had been diagnosed and treated for ADD, and had been transferred to an alternative school because of behavioral problems. Gray confirmed that Owens had experienced difficulties as a result of moving from Louisiana to Colorado. Gray also testified that Owens had difficulty with abstract thinking and, due to his poor reading ability, had to take a validity test appropriate for a fifth grade reading level.

To assess Owens's risk of future dangerousness, Gray administered the Hare Psychopathy Checklist. Gray testified that Owens scored a bit below the average for other black, male inmates and well below the average for the non-incarcerated population. To detect whether Owens was feigning cognitive impairment, Gray administered the Validity Indicator Profile. Gray testified that the results indicated that Owens was putting forth good effort, that he was not feigning deficits, and that he was not trying to portray himself in an overly favorable or unfavorable light. Based on all of the test results and his review of Owens's voluminous documentation, Gray testified that Owens showed no indication of being at risk for aggressive behavior. However, Gray also testified that there was no way to accurately predict a person's future dangerousness, and he testified that the fact that Owens had killed more than once was a concern.

During the sentencing hearing, Gray rejected Sather's major depression diagnosis because he did not find any evidence in the voluminous historical records that he reviewed indicating Owens suffered from depression prior his arrest. At the post-conviction hearing, Gray testified that Owens was likely suffering from situational depression when Sather evaluated him.

Gray noted that he had access to Waters's report, documents pertaining to Owens's social history, and reports of interviews of Owens's family, friends, and neighbors.

Kepros testified during the post-conviction hearing that the trial team decided to call Gray on May 16, 2008. According to Kepros, the decision was made after the team received Gray's report and sent it to the defense experts for review and comment. Kepros testified that she relied heavily on the expert witnesses when she made decisions concerning what mental health mitigation evidence to present to the jury.

According to Kepros, the trial team decided to call Gray because he could present important aspects of Owens's social history, including Owens's speech impediment, ADD diagnosis, father's drug abuse, father's absence from the family, and family history of mental health problems and drug abuse. In the team's opinion, all of those factors supported Sather's diagnostic impression of major depression.

Kepros also testified that calling Gray as a mitigation witness furthered the strategy of presenting Owens as a person with brain deficits. The trial team believed it could use Gray to portray Owens as a person with brain deficits, which mitigated his behavior, without subjecting Owens to a formal diagnosis.

Additionally, Gray's test data partially supported many of the opinions of Reidy, Waters, and Pinto, which were supported by Wu's brain imaging. Also important in their decision making was Gray's determination that Owens did not present a risk of future dangerousness, was not a malingerer, and did not feign mental deficits. In the end, the team believed that the jury would view Gray as a neutral mitigation witness.

In Reynolds's view, Owens's trial team inadequately interviewed Gray, should have subpoenaed his notes and raw data, and failed to review the ACDF records provided to Gray. She opined that the trial team's decision to call Gray was based on an inadequate investigation and inadequate pretrial preparation of Gray.

(c) Analysis

During the sentencing hearing, Gray disagreed with Sather's diagnostic impression that Owens suffered from major depression. Owens asserts his trial team should have impeached Gray's testimony that Owens did not suffer from major depression. However, the materials the trial team might have used to impeach Gray's testimony were not persuasive.

First, impeaching Gray's testimony with various jail and prison records indicating Owens had symptoms of depression would have allowed Gray to testify, as he did during the post-conviction hearing, that Owens might have been suffering from situational depression caused by his incarceration. Thus, the jail and prison records would not have impeached Gray's testimony that Owens was not suffering from major depression in early 2008 when Gray evaluated Owens.

Second, impeaching Gray's testimony with anecdotal evidence from Owens's friends and family members that Owens suffered from depression before he was arrested would be seen as inherently biased testimony in favor of Owens. Such biased testimony would not have impeached Gray, a neutral expert witness.

Third, impeaching Gray's testimony with Sather's report would not have been persuasive. Sather evaluated Owens for a short amount of time, she relied exclusively on Owens's self-reporting, and gave only a diagnostic impression, not a diagnosis. Because Gray did a comprehensive evaluation of Owens and

reviewed voluminous historical records, Gray's opinion that Owens did not suffer from major depression was more reliable than Sather's diagnostic impression.

Last, impeaching Gray's testimony by suggesting that a diagnosis of major depression can be based on a single traumatic episode might have distracted the jury from Gray's generally favorable testimony. Gray testified that Owens did not present a heightened risk of future dangerousness and was not a psychopath. Both points were important mitigation evidence. Both suggested that Owens would not present a danger to others if he was sentenced to life imprisonment. Gray also testified that Owens had given full effort on his tests and was not feigning deficits or otherwise malingering.

The trial team called Gray as a neutral expert and mitigation witness, and wanted to maintain his credibility with the jury. Under these circumstances, the trial team's decision not to impeach a generally helpful expert was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

Owens also complains that Kepros was deficient for failing to object when Gray testified at the sentencing hearing that societies throughout the world, according to anthropology, reject people who kill more than once. While Kepros could have objected and moved to strike Gray's testimony, such actions might have caused Warren to try to qualify Gray as an expert in anthropology. Regardless of whether Gray would have been qualified as an expert witness, the objection would have highlighted a damaging statement that comprised only 11 lines of transcript. Kepros's decision not to object was reasonable. *See id.*

(d) Conclusion

The court concludes that Owens failed to prove that his trial team's decision not to impeach Gray was deficient performance. The court also concludes Owens failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on the trial team's decision not to impeach Gray during the sentencing hearing is **Denied**.

iii. Dr. Wu

(a) Parties' Positions

Owens contends he was prejudiced by his trial team's failure to present the results of volumetrics analysis of his brain as part of mitigation and by its failure to retain Wu with sufficient time so that he could review and analyze information from other experts and from Owens's personal history prior to testifying. Owens also contends his trial team did not inform Wu that Owens was locked in a hot car as an infant.

(b) Findings of Fact

Based on Waters's recommendation, the trial team decided to pursue imaging of Owens's brain. Kepros testified during the post-conviction hearing that the search for an expert began in August 2007. Kepros made a substantial effort to identify and retain experts for both a functional MRI and a PET scan. She also attempted to locate a facility that could conduct the examinations on an inmate. As a result of her efforts, she identified and retained a doctor in October 2007 to do a functional MRI and to act as a confidential expert. However, that doctor stopped communicating with her, forcing her to resume her search for a different expert.

On November 30, 2007, Owens's trial team moved to continue the trial date. As part of the motion, the trial team requested and was granted an *ex parte* hearing to explain why the continuance was necessary. During the *ex parte* hearing, King

explained that the trial team had retained the services of a neuropsychologist and psychologist who had already evaluated Owens. King advised that the neuropsychologist had recommended that the trial team have an expert conduct brain imaging of Owens to look for possible frontal lobe deficits. King added that there was precedent suggesting that failure to do brain imaging could be considered ineffective assistance. The court granted the motion and continued the trial from January 7 to March 3, 2008.

As a result of her renewed efforts, Kepros identified Wu, who specialized in PET scans and had experience in capital cases. He was retained on December 17, 2007. Wu performed a resting and an activation PET scan of Owens's brain at Porter Hospital on February 11, 2008. Wu recommended that Owens's trial team retain an expert to conduct MRI quantification. Owens's trial team endorsed Wu as an expert witness on February 25, 2008.

After Wu obtained the images of Owens's brain, Kepros consulted with Wu on a continuing basis *via* phone and met with him the evening before he testified. During this meeting, they discussed the PowerPoint presentation Wu had prepared that explained the purpose of PET scans and compared Owens's brain to a normal brain.

During the sentencing hearing, Wu was received as an expert in neuropsychiatry and brain imaging. According to Wu, Owens's brain images showed that he had significant abnormalities in the frontal lobe area that would cause poor coping skills. Wu's opinion was based on the PET scan of Owens's brain, his review of Owens's extensive social history, and the test data obtained by Waters and Gray. According to Wu, there was no documented incident in Owens's extensive records indicating that Owens had suffered a brain injury. Wu also testified that he had not seen any documentation in Owens's social history to

confirm that Owens suffered from depression prior to being incarcerated. Wu testified that the brain imaging corroborated Waters's test data. Wu also testified that Owens's MRI did not show any structural abnormalities but that a lack of structural abnormalities was not unusual.

At the post-conviction hearing, Owens called Orrison to testify as an expert in radiology and neuroradiology. Orrison testified that based on his review of Owens's MRI, Owens's brain tissue had atrophied at several locations. Orrison explained that there were many potential causes of the atrophy such as the loss of consciousness due to heat stroke, long-standing depression, or head trauma. Orrison did not know the cause for Owens's atrophy. According to Orrison, some of the manifestations of Owens's brain atrophy include short-term memory loss, learning disabilities, and difficulty processing auditory information.

Owens called Lewine to testify at the post-conviction hearing as an expert in neuroscience. Lewine subjected Owens's MRI to a volumetric quantitative analysis. The purpose of the analysis was to identify the volume of brain matter in 116 areas of Owens's brain and compare it to a normative database. Lewine explained that he used a database of 212 persons who were similar in age to Owens. He noted that his analysis and conclusions would have been the same in 2008 because the mean and variants of the database had not changed.

Lewine explained that based on his research, two to six abnormal areas within a person's brain are normal. Based on the quantitative analysis of Owens's brain, Lewine identified 45 areas in his brain that were outside volumetric norms. According to Lewine, his findings confirmed Orrison's findings. Lewine noted that the causes of Owens's abnormal brain include, but are not limited to, childhood environment, genetics, and complex PTSD. Lewine did not know what caused the abnormalities. He did not know if heat stroke would cause these

abnormalities. Based on his findings, Lewine opined that Owens's brain circuitry for behavioral regulation was disrupted and that he would expect to see such disruptions manifest as behavioral problems.

Dr. Hal Wortzel (Wortzel), an expert in neuropsychiatry who has studied brain imaging and its use for forensic purposes, testified at the post-conviction hearing. Wortzel testified that while volumetric MRI analysis is not commonly accepted within the medical community for clinical purposes to diagnose psychiatric conditions, it is commonly accepted for research purposes. Wortzel also noted that a staff radiologist at Porter Hospital reviewed Owens's MRI and found it normal.

Reynolds opined that the trial team's performance was deficient because the decision to pursue brain imaging was made too late to allow time to fully investigate and develop an explanation for Owens's brain abnormalities.

(c) Analysis

Owens's first contention is that his trial team should have retained expert witnesses like Orrison and Lewine to conduct quantitative analysis of Owens's MRI. Wu studied a PET scan of Owens's brain and opined that there were significant abnormalities in the frontal lobe resulting in poor coping skills. Orrison's analysis was similar to Wu's, but Orrison studied the MRI instead of the PET scan. Orrison's conclusions were also similar to Wu's in that he opined that there were various areas of Owens's brain that had atrophied. According to Orrison, the atrophy might manifest as short-term memory loss, learning disabilities, and difficulty processing auditory information. It is hard to see how Orrison's testimony would have been any more persuasive than Wu's.

And while Lewine's conclusions were similar to Wu's and Orrison's, his methodology was markedly different. Lewine conducted a volumetric analysis of

Owens's brain based on Owens's MRI. He concluded that 45 areas of Owens's brain were outside of volumetric norms. According to Lewine, complex PTSD might have caused those abnormalities, but he could not be sure. Lewine conceded that he could not opine as to the cause of Owens's brain abnormalities and could not explain Owens's behavior. Lewine testified that he would expect the abnormalities to manifest as mild behavioral deficits, particularly with respect to behavioral regulation and controlled behavior.

The purpose in presenting Lewine would have been to reinforce Agharkar's clinical diagnosis of complex PTSD. The record suggests that this approach was questionable and unpersuasive. *See* part V.M.3.a.i of this Order.

Moreover, Wortzel testified that the volumetric analysis conducted by Lewine is a commonly accepted methodology in the neuroscience profession for research purposes, but is seldom used to evaluate neuropsychiatric patients. Wortzel testified that volumetric analysis is not routinely used in neuropsychiatric clinical applications for the diagnosis of neuropsychiatric conditions. Wortzel maintains a clinical practice, sees patients, and knows about the various neuropsychiatric tests available for use in evaluating patients. Thus, while Lewine's methodology may be valid for research purposes, the fact that it is not commonly used by practicing clinicians to diagnose neuropsychiatric conditions undermines the persuasiveness of Lewine's conclusions.

Because Agharkar's diagnosis would not have been persuasive at trial and because Lewine's volumetrics analysis is not commonly used by practicing neuropsychiatrists, the trial team's failure to present expert witness testimony similar to Lewine's testimony was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show

that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

Owens's second contention is that the trial team failed to retain Wu with sufficient time before trial to complete his analysis of Owens's PET scan. Owens did not present any evidence at the post-conviction hearing supporting his argument that Wu had insufficient time to confer with other defense experts, to review Owens's social history, and/or to conduct quantitative analysis of Wu's findings. In particular, Owens did not call Wu to address any of these concerns. Moreover, Wu did not mention during the sentencing hearing that he lacked sufficient time to conduct his analysis. Thus, Owens failed to prove that his trial team retained Wu with insufficient time for Wu to conduct his analysis and for the trial team to prepare for his testimony. *See id.*

Owens's third contention is that his trial team failed to notify Wu that Owens had been locked in a hot car as an infant. As the court found in part V.M.3.b of this Order, the details E. Gray provided to King and Gonglach and the fact that no other family member reported that incident to Owens's trial team were insufficient to require Owens's trial team to further investigate that incident. Under these circumstances, the trial team's failure to inform Wu that Owens had been locked in a hot car as an infant was within the wide range of professionally competent assistance. *See id.*

(d) Conclusion

The court concludes Owens failed to prove that his trial team's performance with respect to Wu and the presentation of Owens's brain abnormalities was deficient. The court also concludes Owens failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition

to vacate his sentence based on his trial team's performance with respect to Wu and brain imaging is **Denied**.

f. Failure to Adequately Prepare Lay Witnesses and Calling Harmful Witnesses

i. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to adequately prepare certain lay witnesses and by his trial team's decision to call certain lay witnesses whose testimony was not supportive of the mitigation theory.

ii. Findings of Fact

Between May 22 and June 12, 2008, Owens's trial team presented a mitigation case that included testimony from 38 lay witnesses. The lay witnesses were Owens's immediate and extended family members, neighbors, church members, pastor, teachers, and friends from Louisiana, Texas, and Colorado. King met with some of the lay witnesses and Gonglach met with the others to prepare the witnesses for their testimony.

A pretrial order precluded witnesses from testifying that they wanted a particular sentence for Owens without giving the jury a reason for their position. King testified at the post-conviction hearing that he discussed this requirement with all of the mitigation witnesses. King acknowledged that preparing the defendant's family members to testify was difficult, especially when he tried to explain why they could not directly ask for a life sentence.

At the sentencing hearing, D'Angelo Burks (Burks), Owens's cousin, testified that he created a MySpace webpage in Owens's honor. The webpage was titled "Free Sir Mario." Burks testified that he created the webpage on his own and without Owens's involvement. The webpage showed various images such as

stacks of money and played various songs, some of which were about an anti-snitching culture.

During the post-conviction hearing, King did not recall telling each witness that s/he should not challenge the jury's guilty verdicts during their testimony but recalled that he discussed it with Owens's immediate family members. King testified that he did not have a strategic reason not to tell all of the lay witnesses not to challenge the guilty verdicts. According to King, his failure to do so was probably the result of a lack of time.

Reynolds opined that the trial team's performance was deficient because the testimony of certain family members demonstrated that the trial team either did not spend adequate time in preparing the witnesses or made poor decisions on which witnesses to call.

iii. Analysis

Lay witnesses sometimes give unexpected answers regardless of how much preparation goes into their testimony. Unexpected answers, standing alone, are not an indication that trial counsel inadequately prepared the witness. The more reasonable explanations are that the witnesses tried to testify in accordance with the oath and that their determination to express certain thoughts colored their perception of the guidance that the trial team tried to give them. As King noted, it was a very difficult time for Owens's family members, because they were trying to help Owens avoid a death sentence through their testimony. Moreover, it was unlikely that the jury was offended when Owens's family members voiced a belief in his innocence, because the jury would naturally have some compassion for Owens's family members.

King told all of the lay witnesses that they could not simply say that they wanted the jury to sentence Owens to life in prison. Pursuant to court order, King

specifically told the witnesses that they needed to provide a reason why they wanted the jury to sentence Owens to life in prison. King also told Owens's immediate family not to challenge the jury's verdicts during their testimony but, due to a lack of time, King may not have instructed the other lay witnesses not to challenge the jury's verdicts.

Owens also complains that his trial team should not have called his cousin, Burks, because Burks added little to the mitigation case and testified about creating the "Free Sir Mario" MySpace webpage. The webpage suggested Owens had been wrongly convicted, depicted stacks of money, and played songs that promoted an anti-snitching culture. While Burks's testimony on these points showed that he was biased in favor of Owens, it did not establish that the trial team's decision to call Burks as a mitigation witness was deficient performance.

For these reasons, Owens failed to prove that his trial team's performance in preparing lay witnesses to testify and calling certain witnesses to testify was outside of the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

iv. Conclusion

The court concludes Owens failed to prove that his trial team's preparation of lay witnesses and decisions to call certain lay witnesses was deficient performance. The court also concludes Owens failed to prove how he was prejudiced by his trial team's deficient performance. Accordingly, Owens's petition to vacate his sentence based on the alleged lack of preparation of lay witnesses and based on the team's decision to call certain witnesses is **Denied**.

g. Failure to Present Live Mitigation Witnesses

i. Parties' Positions

Owens contends he was prejudiced by his trial team's decision to present nine mitigation witnesses *via* recorded interviews because the interviews lacked emotional impact. Owens also contends he was prejudiced by his trial team's failure to ensure that all of the recorded interviews were admitted into evidence.

ii. Findings of Fact

During the course of the mitigation case, Owens's trial team provided numerous DVDs with recorded interviews of mitigation witnesses to the prosecution and the court for review before the trial team offered the recorded interviews into evidence during the sentencing hearing. The prosecution objected to the admission of one of the recorded interviews. The court sustained the prosecution's objection and admitted the remaining recorded interviews. As a result, the trial team played nine recorded interviews of Owens's family, friends, and neighbors to the jury during phase two of the sentencing hearing. The recorded interviews displayed the person answering questions posed by an off-camera trial team member. The jury had access to the nine recorded interviews during its phase two deliberations.

During Pinto's testimony, the court characterized the recorded interviews as witness statements when it said "[t]hose were not witnesses in the sense that they were not placed under oath or subject to cross-examination. I know it's just a minor point, but the record -- those DVDs are statements of friends and family." Phase Two Tr. 40:5-8 (June 5, 2008 a.m.).

At the post-conviction hearing, King testified that the trial team played the recorded interviews instead of presenting testimony from those witnesses because those witnesses were either unwilling or unable to travel to Colorado to testify in

person. For example, King recalled that Owens's neighbor could not travel due to her medical condition.

iii. Analysis

Certain mitigation witnesses were unable or unwilling to travel to Colorado to testify during Owens's sentencing hearing. Rather than forgoing those witnesses, Owens's trial team prepared and played the recorded interviews for the jury. Owens mischaracterizes the court's statement during Pinto's testimony about the recorded interviews. The record is clear that the trial team obtained a ruling, without objection from the prosecution, that the recorded interviews could be published to the jury during the sentencing hearing and considered by the jury during deliberations. Had the recorded interviews not been admitted, they would not have been played for the jury and made available during deliberations. Under these circumstances, the trial team's decision with respect to the recorded interviews was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

iv. Conclusion

The court concludes Owens failed to prove that his trial team's utilization of videotaped statements from lay witnesses was deficient performance. The court also concludes Owens failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on the presentation of certain mitigation witnesses *via* videotaped statements is **Denied**.

h. Failure to Develop Relationship with Owens and His Family[396]

i. Failure to Conduct Three-Generation Background Investigation

i. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to conduct and present a three-generation longitudinal analysis of his family history.

ii. Findings of Fact

During the sentencing hearing, Owens's trial team presented evidence to support paternal and maternal genograms spanning from Owens's great-grandparents to his cousins' children.

iii. Analysis

Owens did not present any evidence during the post-conviction hearing suggesting that Owens's trial team did not conduct a three-generational investigation of Owens's family. Owens also did not present any evidence suggesting that he was prejudiced by his trial team's alleged failure to conduct such an investigation. In fact, the evidence presented at the sentencing hearing suggests otherwise. Owens's trial team called 38 lay witnesses to testify in mitigation, including members of his immediate and extended family, to support three-generation genograms for both sides of his family. The genograms were admitted into evidence. On this record, Owens failed to prove that his trial team's investigation of his family was outside of the wide range of professionally competent assistance. *See id*. (The defendant must show that "the identified acts or

[396] Owens withdrew this claim in SOPC-177.

omissions [of counsel] were outside the wide range of professionally competent assistance.").

iv. Conclusion

The court concludes Owens failed to prove that his trial team's performance regarding a three-generation background investigation was deficient. The court also concludes Owens failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on his trial team's alleged failure to conduct a three-generation background investigation is **Denied**.

j. Failure to Adequately Staff and Allocate Resources

i. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to adequately staff and to allocate resources for Owens's case.

ii. Findings of Fact

Before it was even filed, the State PDO treated Owens's Dayton Street case as a capital case. D. Wilson, then a Chief Trial Deputy, was assigned to be lead counsel in Owens's Lowry Park case in November 2005. He selected a team consisting of King, Middleton, Gonglach, and Lapidow. Lapidow was designated as the mitigation specialist because of her familiarity with mental health mitigation. Lapidow's involvement on Owens's cases diminished in the fall of 2006 because of her assignment to another pending capital case. But Gonglach was an experienced investigator who had worked on many first-degree homicides and on other potential capital cases as a mitigation investigator. He took over primary responsibility as the mitigation specialist in late 2006.

In August 2007, Bitz joined the trial team as an investigator. While she did not have investigative experience, she assisted the trial team by conducting some interviews, gathering impeachment materials, and serving subpoenas.

According to D. Wilson, the team was supplemented at times by DPD Kathleen Moore, who was the head of State PDO's appellate section.

When D. Wilson was appointed State Public Defender in October 2006, he and the prior State Public Defender promoted King to Chief Trial Deputy and made him Owens's lead counsel for the Lowry Park and Dayton Street cases. D. Wilson, with input from King, decided to appoint Kepros as second chair.

D. Wilson testified during the post-conviction hearing that he was aware of the ABA Guidelines concerning the staffing of capital cases and believed the team he put together complied with those guidelines. In his opinion, he did everything he could to ensure that Owens's team complied with the staffing requirements of the ABA Guidelines. According to D. Wilson, he never refused a request for additional staff or funds for Owens's cases.

King testified during the post-conviction hearing that he asked D. Wilson for additional staff on one occasion. He asked for additional investigators and one additional attorney. The request was not in writing because he and D. Wilson were in the same suite of offices and often spoke about Owens's cases. King made these requests at some point after the Lowry Park trial. During the post-conviction hearing, Kepros testified that the request was made between February and June 2007. According to King, D. Wilson responded that he did not have any additional staff who could assist on Owens's case. Kepros also recalled that the request was denied. King never renewed the request. King noted that at the time of his request, the PDO had staffed several other pending first-degree murder cases with

all of the DPDs qualified to work on such cases. The trial team was given some administrative assistance from staff from other regional PDOs.

In King's view, the team's representation of Owens was inadequate because the team had inadequate time to prepare. He testified that if the Lowry Park trial court and the court in this case would have granted the requested continuances, the trial team would have been fully prepared for both trials and the sentencing hearing.

Kepros testified during the post-conviction hearing that the trial team's time and resources were primarily dedicated to the mitigation case.

Reynolds opined that Owens's Dayton Street case was inadequately staffed. She opined that Owens's trial team failed to make adequate requests to have the Owens's case staffed appropriately.

iii. Analysis

Three attorneys and two investigators worked exclusively on Owens's Dayton Street case. Yet Owens contends his trial team's performance was deficient because they failed to request additional staffing. To succeed on this claim, Owens must prove that his trial team's failure to continue asking for additional resources was outside the wide range of professionally competent assistance and prejudicial to Owens. Owens proved neither.

Moreover, the court is not aware of any binding legal authority setting forth certain requirements for the staffing of capital cases, much less any binding legal authority holding that capital defense counsel was ineffective for failing to staff a defendant's case in a certain way.

iv. Conclusion

The court concludes Owens failed to prove that his trial team performed deficiently because it failed to continually seek additional resources. The court

also concludes Owens failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his conviction and sentence based his trial team's alleged failure to seek additional resources is **Denied**.

k. Failures of Cultural Competence[397]

l. Summary of Performance Prong[398]

m. Resulting Prejudice

The court did not find any instances of deficient performance in this section.

N. Disclosure of Admissions and Bad Character Evidence[399]

1. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to limit the subject matter of the testimony of Pinto, Dewone Gray, and Venise Suggs (Suggs); failure to limit the reciprocal discovery for those witnesses; and failure to adequately object to those witnesses' testimony that was beyond the scope of direct examination.

2. Findings of Fact

Middleton led the legal attack on the constitutionality of reciprocal discovery. The trial team challenged the constitutionality of the reciprocal disclosure requirements of Crim. P. 32.1 and C.R.S. § 18-1.3-1201(3) in pretrial litigation, but the court ultimately rejected the trial team's arguments. The trial team maintained its objections to the court-ordered disclosures throughout the disclosure process.

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[397] Owens withdrew this claim in SOPC-177.

[398] This section does not ask for relief.

[399] The court also addresses Owens's claims on page 1068 of SOPC-163 under the heading "1. Failure to Object to Prosecution's Use of Evidence."

In order to challenge the reciprocal disclosure requirements, Middleton prepared an outline of the applicable law. Because of the outline, King was familiar with the holdings in *People v. Harlan*, 8 P.3d 448 (Colo. 2000), and *People v. Martinez*, 970 P.2d 469 (Colo. 1998), concerning the parameters of reciprocal discovery.

Middleton testified at the post-conviction hearing that he researched the trial team's obligations for reciprocal discovery under Crim. P. 32.1 and *Martinez*. According to Middleton, because of its procedural posture, *Martinez* offered no guidance on how to apply its holding to this case. Middleton recalled discussing the *Martinez* opinion and its pitfalls with King and Kepros, who made their own decisions on what to disclose for their respective witnesses. One of the pitfalls was the possibility of the court imposing a sanction that precluded certain testimony because of inadequate disclosures. The trial team did not rely on the *Martinez* holding during pretrial litigation to urge the court to limit cross-examination to the topics covered on direct examination.

Kepros testified during the post-conviction hearing that she relied on Crim. P. 32.1 and *Martinez* to prepare proposed redactions. She also recalled discussing her proposals with the trial team.

a. Dr. Pinto

Pinto testified at the sentencing hearing about Owens's social history. Pinto's notes of her interviews of Owens contained references to Owens's involvement in the Lowry Park shootings and his lack of involvement in the Dayton Street homicides.[400] According to King and Kepros, the trial team

[400] Regarding Lowry Park, her notes indicated that Owens told her that he felt bad that a person had to die but that he did not feel bad about defending himself, and that he knew nothing about the Dayton Street homicides.

specifically told Pinto not to ask Owens about the charges. As a result, the trial team sought to redact those references prior to disclosing Pinto's notes to the prosecution. The trial team submitted its proposed redactions to the court, and the court agreed with most of the proposed redactions, including the redactions of Owens's admission. The court also ordered all privileged communications between Owens and the trial team to be redacted. According to the court's orders, however, the redacted information would be disclosed to the prosecution if the jury returned a guilty verdict. The result was that while the team was able to preserve its objections to the court's proposed disclosures, the team was only able to delay disclosure of that information until the guilty verdict was returned. The trial team maintained its objections to the disclosures after the guilty verdict but did not oppose disclosure of Pinto's notes based on an argument that Owens's references to the murders were outside the scope of Pinto's proposed testimony. Likewise, King did not argue that Pinto's testimony was beyond the scope of direct examination when the prosecution asked her about Owens's admission.

King testified during the post-conviction hearing that once the court set out the acceptable proposed redactions, the trial team did not take advantage of the seven-day window to redo the redactions and had no reason for not doing so. According to Kepros, the team did not reconsider its decision to call Pinto after the court ruled on the proposed redactions.

b. Lay Witnesses

According to King, the trial team wanted the subject matter for lay witness testimony to be as specific and narrow as possible in order to limit disclosure of the interviews and the interviewers' notes to the prosecution. However, the endorsements had to be broad enough to avoid being foreclosed on a particular topic. The result was that the team was constantly weighing the risks versus the

benefits for each witness when it prepared the lay witness endorsements. As a result, the trial team proposed few, if any, redactions for the documents pertaining to Dewone Gray and Suggs.

Kepros testified that the team disagreed about what information should be redacted from the reports of the interviews with Dewone Gray and Suggs. According to Kepros, the disagreements centered on what information had to be disclosed in order to ensure the witnesses would be allowed to testify. Owens's trial team realized that nondisclosure could result in sanctions. As a result, most of Kepros's proposed redactions were not submitted to the court.

The report of the trial team's interview of Dewone Gray contained an admission by Owens of his and an unnamed friend's involvement in the Lowry Park shootings. Kepros did not ask Dewone Gray about this admission on direct examination, and she did not object to beyond the scope when the prosecution asked him about it on cross-examination.

During the post-conviction hearing, King did not recall the team's redaction process for Dewone Gray's interview. King testified that he forgot to prompt Kepros to use the *Martinez* holding to object to the prosecution's cross-examination when the prosecution asked Dewone Gray about Owens's admission. King acknowledged that trying to limit cross-examination in these circumstances was probably not going to be successful, and he conceded that Owens's admission to Dewone Gray about his involvement in the Lowry Park shootings was not surprising to the jury because Owens's conviction had already been admitted into evidence during phase one of the sentencing hearing.

The report of the trial team's interview of Suggs contained Owens's admission that he had sold drugs to his father. King considered striking her endorsement due to this issue. However, after agonizing over whether to avoid this

topic on direct examination, he decided to bring it out. King's view was that it had significant mitigation impact because it showed how pervasively drugs affected Owens's family and his community. It also reinforced the testimony of other family members about how prevalent the drug culture was within the community. Additionally, because Owens told Suggs that he sold drugs to his father to keep him off the streets and safe, King also decided to use Suggs's testimony to show the gravity of his father's drug addiction.

King did not ask Suggs about this topic during direct examination. During the post-conviction hearing, King could not explain why he had not asked Suggs about this topic.

Reynolds opined that the trial team's handling of reciprocal discovery was deficient. She believed the trial team was ineffective for failing to challenge disclosures for Dewone Gray and Suggs because the topics would not be covered on direct examination. As for the Pinto disclosures, she believed the team was ineffective when it forfeited the issue on appeal by failing to challenge the court's ruling on redactions within the allotted time frame. She also faulted the team for not arguing that Owens's admissions to Pinto were not part of Pinto's evaluation of his history and background and, therefore, were not within the scope of Pinto's testimony.

3. Analysis

As an initial matter, pretrial litigation demonstrates that the trial team was concerned about the consequences of reciprocal discovery early in these proceedings. The trial team aggressively sought to have the procedural rule and statute requiring reciprocal discovery declared unconstitutional. Having lost the constitutional challenges, the trial team was careful to instruct Pinto not to ask Owens anything about the charges. When it became clear that Pinto had discussed

the charges with Owens, the team was forced to grapple with the question of how much of the incriminating information had to be disclosed. The same question presented itself for Dewone Gray's and Suggs's interviews, which contained more incriminating admissions by Owens.

Owens relies on *Martinez* to argue that his trial team's performance in how it addressed the disclosure of this incriminating information was deficient. But *Martinez* does not address disclosure issues involving incriminating information. In *Harlan*, the defendant made incriminating admissions to two mental health experts, and his trial team tried to preclude disclosure of the admissions to the prosecution. 8 P.3d 480-82. The trial court ordered the defense to disclose the incriminating statements but precluded the prosecution from using the incriminating statements until a guilty verdict was returned. *Id*. at 480-81. In approving the trial court's protective order, the Colorado Supreme Court observed that *Martinez* did not address the disclosure of incriminating statements in the interviews of mitigation witnesses. *Id*. at 482. In light of *Harlan*, Owens's trial team could have struck the witnesses' endorsements or could have maintained the endorsements and made the disclosures to the prosecution.

Notwithstanding the limited options available to the trial team, Owens argues that *Martinez* allows the withholding of incriminating information on the basis that the subject matter of the witness's testimony does not cover that information. That is a narrow reading of the opinion. *Martinez* notes that reciprocal discovery must include "any conflicting or differing versions of the proposed testimony." 970 P.2d at 473. This language frames the struggle that all of the team members recognized. Even Kepros, who took an aggressive approach on what should not be disclosed, noted that nondisclosure risked the sanction of testimony preclusion. Instead of proposing substantial redactions, the trial team

intended to preclude the admission of Owens's incriminating statements by objecting under *Martinez* as beyond the scope of direct whenever the prosecution inquired about those statements on cross-examination. As it turned out, the trial team did not make those objections. But had the trial team lodged those objections, the likelihood of success was minimal. Under *Martinez*, when Dewone Gray and Suggs testified about Owens being a kind and considerate person, Owens's admission to Dewone Gray that he shot someone at Lowry Park and his admission to Suggs that he sold drugs to his father were required to be disclosed as "conflicting or differing version[s]" of their testimony. *See id.* The trial team chose to make the disclosures and call the witnesses. Under *Harlan*, the team had no other choice that would have allowed Pinto, Dewone Gray, and Suggs to testify. Failure to make the disclosures could have precluded the witnesses' testimony. Under these circumstances, the decision to disclose the incriminating information was reasonable. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984) (find that a particular decision by trial counsel "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.").

Further, King's decision not to object to Suggs's testimony that Owens sold drugs to his father was a reasonable decision because that testimony reinforced a number of mitigation themes the trial team was trying to develop. It showed the pervasive influence of drugs in Owens's family and community, and it impeached Owens's father's testimony that his drug problem had minimal impact on his family.

As for Pinto's notes, the team worked together on the proposed redactions and then convinced the court to adopt most of the proposed redactions. The trial team successfully delayed disclosure of the incriminating information until after a

guilty verdict was returned. Under *Harlan*, Crim. P. 32.1, and C.R.S. § 18-1.3-1201(3), disclosure of Pinto's notes following the guilty verdict was inevitable.

As for the trial team's failure to consider striking Pinto, the argument ignores the reality of the situation. First, the team had told Pinto not to ask Owens about the charges, but she did anyway. Second, the mitigation strategy was to have Pinto testify about Owens's social history and to have her specifically point to particular circumstances in Owens's life that corroborated the findings of the other experts, particularly those who testified that Owens suffered from brain abnormalities. Thus, Pinto's testimony was central to the presentation of Owens's mitigation evidence. Disclosure of Owens's admissions about Lowry Park was not a surprise to the jury because both his intentional killing of Vann (Aggravating Factor No. 5) and his murder conviction (Aggravating Factor No. 1) in the Lowry Park case had already been proved at step one of the sentencing hearing. Under these circumstances, striking Pinto would not have been a reasonable choice.

In summary, the trial team's performance on this topic was within the wide range of professionally competent assistance. *See id*. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

Regarding prejudice, Owens argues that disclosure of the incriminating information amounted to a confession of Aggravating Factor No. 5. He ignores the fact that the jury at step one of the sentencing hearing had already found Aggravating Factor No. 5 to have been proven beyond a reasonable doubt. Under these circumstances, the effect of his admissions to Dewone Gray and Pinto was greatly diminished. As such, Owens failed to establish a reasonable probability that, but for his trial team's failure to preclude the incriminating information from the sentencing hearing, the jury would have reached a different result. *See id*. at

694 ("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.").

4. Conclusion

The court concludes Owens failed to prove that his trial team's approach to disclosing incriminating information held by mitigation witnesses was deficient performance. The court also concludes Owens failed to prove he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on his trial team's approach to disclosing incriminating information held by mitigation witnesses is **Denied**.

O. Failure to Confront Rebuttal to Mitigation and Aggravating Circumstances Evidence

1. Failure to Challenge Rebuttal to Mitigation Evidence of Owens's Attempted Murder Convictions from Lowry Park

a. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to present evidence that Owens was convicted in the Lowry Park case of two counts of attempted second-degree murder as opposed to attempted first-degree murder. Owens also contends he was prejudiced by his trial team's failure to ensure that the jury understood that the Lowry Park jury was instructed on the theory of complicity with respect to Owens's attempted second-degree murder convictions.

b. Findings of Fact

The jury in Owens's Lowry Park case found him guilty of two counts of attempted second-degree murder. In contrast, the jury in Ray's Lowry Park case found Ray guilty of two counts of attempted first-degree murder. The named

victims of both Owens's and Ray's attempted murder counts were Marshall-Fields and Bell.

After Owens's trial team finished presenting mitigation evidence in phase two of Owens's Dayton Street sentencing hearing, the prosecution presented rebuttal evidence to Owens's mitigation and presented aggravating circumstances evidence. Because steps two, three, and four (phase two) were combined for the purposes of the presentation of evidence, the prosecution did not distinguish between rebuttal to mitigation evidence and aggravating circumstances evidence during phase two. Those distinctions were made in the Phase Two Final Jury Instructions.

The prosecution called T. Wilson during phase two of the sentencing hearing to testify that Owens suffered convictions for the Lowry Park shootings other than the first-degree murder conviction for killing Vann. When the prosecution first broached this topic, King objected and requested at the bench conference a continuing objection to all evidence of aggravating circumstances. The court granted King's request for a continuing objection. After the bench conference, the court read a limiting instruction about the purposes of rebuttal to mitigation and aggravating circumstances evidence. After the court read the limiting instruction, T. Wilson testified that Owens had been convicted of the attempted murders of Marshall-Fields and Bell. He did not testify whether Owens's convictions were for attempted first-degree or attempted second-degree murder. King cross-examined T. Wilson but did not inquire about this topic and did not ask T. Wilson to clarify whether Owens's convictions were for attempted first-degree or attempted second-degree murder.

After phase two, the jury was instructed that Owens's attempted murder convictions were rebuttal to mitigation evidence:

> During Phase Two of the sentencing hearing, the court admitted certain evidence for the limited purpose as rebuttal to mitigation. At that time you were instructed not to consider it for any purpose other than the limited purpose for which it was admitted. The testimony you heard and the evidence introduced pertained to the following matter(s):
>
> . . . .
>
> 9. Det. Tom Wilson
>
> a. Sir Mario Owens was convicted of the attempted murders of Javad Marshall-Fields and Elvin Bell on July 4, 2004, during the same criminal episode where he was convicted of the First Degree Murder of Gregory Vann

Phase Two Final Instr. No. 24.

During phase two, the court took judicial notice that Owens's Lowry Park jury was instructed on the theory of complicity as to the first-degree murder of Vann. The court's judicial notice did not cover the attempted second-degree murders. At the conclusion of phase two, the jury was instructed that it could consider all of the guilt phase and sentencing hearing evidence, including judicially noticed facts:

> The evidence which may be considered at this time consists of all evidence which was presented during the trial on the merits as well as during the sentencing hearing.
>
> The evidence in this case consists of . . . and any judicially noticed facts.
>
> . . . .
>
> A judicially noticed fact is one which the jury may, but is not required to, accept as conclusive.

Phase Two Final Instr. No. 10. Owens's trial team did not argue that the Lowry Park jury was instructed on complicity and may have convicted Owens as a

complicitor rather than as a principal for the attempted second-degree murders of Marshall-Fields and Bell.

At the post-conviction hearing, Kepros testified that Ray's attempted first-degree murder convictions likely were not admissible and therefore the trial team would not have been able to contrast Owens's attempted second-degree murder convictions with Ray's attempted first-degree murder convictions.

Middleton testified that he made global objections to the jury instructions concerning rebuttal to mitigation and aggravating circumstances evidence, including Phase Two Final Instruction No. 24, but did not specifically object to particular pieces of evidence listed in those instructions.

c. Analysis

As to Owens's first contention, he does not explain a theory of admissibility for Ray's attempted first-degree murder convictions. Because Ray's convictions were not relevant to Owens's character, history, or background, it is unlikely that Ray's convictions would have been admitted during Owens's sentencing hearing. Highlighting the distinction between first- and second-degree murder would also present some risk underscoring the conclusion that Owens acted after deliberation in killing Vann. The trial team's decision not to present evidence that Owens suffered convictions for attempted second-degree murder was within the wide range of professionally competent assistance. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984) (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

Owens's second contention is that his trial team failed to apprise the jury of the definition of complicity and of the meaning of a judicially noticed fact. The court defined judicial notice and instructed the jury that it could consider judicially

noticed facts in Phase Two Final Instruction No. 10. However, the court did not take judicial notice of whether Owens's Lowry Park jury was instructed on the theory of complicity as to the attempted second-degree murders of Marshall-Fields and Bell. Because that evidence was not before the jury, and for the reasons set forth in parts V.Q.2 and V.R.1 of this Order, which the court incorporates as though fully set forth herein, the trial team's performance with respect to complicity was within the wide range of professionally competent assistance. *See id.*

d. Conclusion

The court concludes Owens failed to prove that his trial team's performance with respect to Owens's attempted second-degree murder convictions was deficient. The court also concludes Owens failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence is **Denied**.

2. Failure to Challenge Aggravating Circumstances Evidence

a. Sailor's Testimony that Owens Attempted to Communicate with Her During a Pretrial Hearing

i. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object to Sailor's testimony that Owens attempted to intimidate her while she was testifying during a pretrial motions hearing and by his trial team's failure to adequately challenge and rebut Sailor's testimony about that alleged intimidation attempt.

ii. Findings of Fact

On August 20, 2007, during Sailor's testimony at a joint pretrial motions hearing, the following colloquy occurred:

> [MR. HOWER:] And do you remember testifying on December 14th, 2005, before the Grand Jury, and page

> 54 to 58, Counsel, basically testifying that, "When those shirts came out, they was happy, Rob and Rio. They went and got them and put R-I-P on back. Prior to the R-I-P, they had Stop Snitching and bullet hole. Robert had one he wore all the time. After the shooting Rio and P bought a lot of them and had R-I-P added commercially." Does that sound right?
>
> [SAILOR:] Right.
>
> You lie. Shut up. Can you please tell him don't mouth nothing my way. Sir Mario telling you you lying.
>
> You know you're lying.
>
> THE COURT: Ms. Sailor, okay. Mr. King, can we just make sure we don't have this kind of interaction going on.
>
> [SAILOR]: He mad.
>
> MR. KING: I'm not directing at anyone. I can talk to my client.
>
> THE COURT: That's what I meant. Talk to your client about it.
>
> MR. KING: That's fine.
>
> [ ] OWENS: I didn't say --
>
> THE COURT: We'll have no more. If we do, the defendants will turn and face away from the witness and hear her testimony. Am I clear?
>
> Next question please.
>
> MR. HOWER: Thank you.

Pretrial Hrg Tr. 191:4-25; 192:1-5 (Aug. 20, 2007). Later in the hearing, the following colloquy occurred:

> MR. KING: No objection. I do have something I want to make part of the record.
>
> THE COURT: Yes, sir.

> MR. KING: My concern, this has now happened with Mr. Strickland allegedly and now happened again today. And I understand that the Court has a prophylactic concern with this, but the state of the record now, I'm afraid it looks like the Court is making some kind of finding that my client was mouthing words to this witness. And I will state unequivocally from my point of view that is not the case. I had been seated next to Mr. Owens all afternoon. I neither heard or observed him mouthing or make any attempt at communications with this witness. Ms. Kepros is on the other side. Mr. Middleton is in the courtroom. He hasn't indicated he saw anything. I would also indicate for the record Ms. Sheehan, Mr. Lindsey, Mr. Root are all seated in positions where they could observe my client. None of them are indicating they saw any of this. In addition, there were three police officers, sheriff's deputies that are seated in position or standing in position where they could have easily observed such conduct. So I understand the Court's concern in maintaining control of the courtroom. I do not want the record to reflect in any way I'm conceding that my client attempted to communicate with this witness.
>
> THE COURT: And I didn't see anything. So the record is clear, I did not see him. I was writing some notes, and I was reacting to -- I was in essence trying to prevent the situation from getting anymore acute.
>
> MR. KING: I understand.
>
> MR. ROOT: I don't want to be a witness. I think in all fairness I was looking right at Mr. Owens when she said that. I was looking right at him, and he didn't do a thing. I have no interest in Mr. Owens, but I think in all fairness I have to say that.

Id. at 241:7-25; 242:1-16.

Sailor testified during the sentencing hearing that Owens tried to intimidate her by mouthing words and making facial expressions to her while she was

testifying during a pretrial motions hearing. She added that his intimidation efforts did not work. Later in her testimony, she reiterated that Owens did not intimidate her. Owens's trial team did not present evidence to impeach Sailor's testimony about Owens's attempt to intimidate her.

At the post-conviction hearing, King could not recall whether he considered endorsing the judge or a member of the trial team to rebut Sailor's testimony that Owens had tried to intimidate her. He acknowledged that he could have raised CRE 403 and 404(b) as grounds for precluding her testimony.

At the post-conviction hearing, Reynolds opined that the trial team's performance was deficient because the team did not investigate the incident, did not try to preclude Sailor's testimony under CRE 403 and 404(b), and did not present evidence to rebut Sailor's testimony.

iii. Analysis

Owens's argument that his trial team should have objected to Sailor's testimony pursuant to CRE 403 and 404(b) is a conclusory argument and therefore the court does not address it here.

Owens's trial team did not rebut Sailor's testimony about Owens's attempted intimidation, but Root was the only known rebuttal witness who claimed to be looking at Owens, and his bias and interest would have been explored on cross-examination. Moreover, Sailor insisted more than once that Owens had not intimidated her. In the end, any effort to rebut Sailor's testimony on this point might have reinforced the incident in the jurors' minds without a sufficient expectation of damaging Sailor's credibility or diminishing the effect of her testimony. In this instance, the trial team's performance fell within the wide range of professionally competent assistance to which Owens was entitled. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or

omissions [of counsel] were outside the wide range of professionally competent assistance.").

iv. Conclusion

The court concludes Owens failed to prove that his trial team's approach to Sailor's sentencing hearing testimony about Owens's alleged intimidation of Sailor was deficient performance. The court also concludes Owens failed to prove that he was prejudiced by his trial team's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on his trial team's approach to Sailor's testimony about Owens's efforts to intimidate her is **Denied**.

b. Manipulation of Carter

i. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to rebut testimony that Carter's mild mental retardation made him susceptible to manipulation by Owens.

ii. Findings of Fact

During the sentencing hearing, the prosecution called Dr. Mark Pendleton (Pendleton), an expert in clinical psychology and neuropsychology. Pendleton testified that Carter was mildly retarded. Pendleton opined that lay people would be able to recognize Carter's diminished mental capacities and that people with Carter's deficiencies were susceptible to manipulation. On cross-examination, Kepros covered the following topics:

- Carter's attorneys retained Pendleton.
- Pendleton's diagnosis of mild mental retardation meant Carter avoided the death penalty.
- Pendleton knew nothing about Owens or Owens's relationship with Carter.

- Pendleton knew nothing about what Owens knew about Carter's capabilities.
- Pendleton did not know if Carter was manipulated by anyone in this case.
- A previous evaluation showed Carter to have average intelligence; however, Pendleton discarded it as being wrong.
- While Gray found that Carter was mildly mentally retarded, Gray also found Carter to be a malingerer.[401]
- Pendleton did not test Carter for malingering.
- Pendleton and Carter discussed Carter's children while Carter had told Gray he did not know his children.
- In forming his opinion about whether lay people would detect Carter's disability, Pendleton thought it would have been important to know that Fronapfel did not notice it during her interrogation of Carter on September 10, 2005.
- Pendleton was unaware of a court finding that Fronapfel was unaware of Carter's disability.
- Pendleton was unaware of a court finding that Carter was not confused during the September 10, 2005, interrogation.
- Pendleton was unaware that three of Carter's former attorneys, looking for mental deficits, did not detect any deficits in Carter.
- Pendleton was unaware that Carter's Denver presentence report contained no reference to retardation.

[401] Kepros was able to have Gray's report admitted without objection.

At the post-conviction hearing, Kepros testified that the team vigorously tried to prevent Pendleton's testimony. Kepros also testified there was no reason not to present rebuttal evidence on Carter's ability to make independent decisions.

According to Kepros, the team was aware that Pendleton's testimony was damaging because it suggested that Owens had manipulated Carter. She recalled that when the prosecution sought to introduce Pendleton's report, the team was able to obtain various redactions to it.

Kepros thought Gray would testify that Carter, notwithstanding his mild mental retardation, had capabilities. Kepros expected the prosecution to call Gray as a witness, and she was surprised when it did not. She was aware of Carter's previous convictions but did not have sufficient time to investigate Carter's criminal history for use at the sentencing hearing to show Carter had the ability to make independent decisions.

Reynolds opined that the trial team's performance was deficient because the team did not present available rebuttal evidence that showed Carter was capable of independent decision making. She noted the available evidence was his criminal history showing intentional criminal acts, his former girlfriend whom he assaulted, Fronapfel's interrogation, Gray's report, and Carter's former attorneys.

iii. Analysis

Kepros's cross-examination of Pendleton elicited the following:

- His diagnosis of Carter allowed Carter to avoid the death penalty.
- There was a prior evaluation that determined Carter was not mildly mentally retarded.
- Gray found Carter had been malingering during Gray's evaluation yet Pendleton did not test Carter for malingering.

- Carter told Pendleton that he knew his children yet denied knowing his children to Gray.
- Pendleton was unaware that Fronapfel had not detected mental impairment during her interrogation of Carter.
- He was unaware of a court ruling that Carter was not confused during Fronapfel's interrogation.
- He was unaware that several of Carter's former attorneys looked for mental impairment as part of their representation of him but did not see any mental impairment.

Kepros effectively covered almost every point that Owens raises. Additional rebuttal evidence was unnecessary because Pendleton admitted all of the deficiencies in his evaluation.

Kepros did not ask Pendleton about Carter's extensive criminal record. Owens did not introduce Carter's criminal history at the post-conviction hearing but if the delineation of Carter's criminal history in SOPC-163 is accurate, it is replete with violence. A reasonable attorney would not want to associate her client with such a violent person.

Nor did Kepros present evidence on Carter's reported dislike for Owens. Owens does not explain how this evidence would have affected Pendleton's opinion.

Kepros's cross-examination forced Pendleton to acknowledge that there were significant points of information that he had not considered when he determined that Carter was mildly mentally retarded. Accordingly, Kepros's performance fell within the wide range of professionally competent assistance to which Owens was entitled. *See Strickland*, 466 U.S. at 690 (The defendant must

show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

iv. Conclusion

The court concludes Owens failed to prove that Kepros's approach to Pendleton's testimony was deficient performance. The court also concludes Owens failed to prove that he was prejudiced by Kepros's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on Kepros's handling of Pendleton's testimony is **Denied**.

c. Note

i. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to adequately object to the admission of and to adequately cross-examine Fronapfel about a note that read "Fuck the DA."

ii. Findings of Fact

After Hower's direct examination of Fronapfel during the guilt phase, Hower made the following record:

> MR. HOWER: Judge, I just indicate, because there might be some concern whether jurors can see it as well, but standing at the podium here and looking at witnesses, I'm not trying to spy on the defense table here, but it was hard to miss Mr. Owens had a fairly large tablet and written on it, "Fuck the DA." I'm not especially offended. I don't know if that's something that it seemed to be a communication directed at me, and I don't think they want him communicating that way. I doubt that they want the jury to see things like that.
>
> THE COURT: Any response?
>
> MR. KING: No.
>
> THE COURT: Let's not have it happen again.

Guilt Phase Tr. 112:17-25; 113:1-3 (Apr. 22, 2008 p.m.).

On June 11, 2008, during the sentencing hearing, Hower was questioning Fronapfel about rebuttal to mitigation and aggravating circumstances evidence when a bench conference was held with Kepros. During the bench conference on an unrelated issue, the court noted that because Owens's trial team was aware of the note incident on April 22, the discovery requirements as to that aggravating circumstances evidence were satisfied.

At that point, Kepros objected to Fronapfel's testimony about the note because it disclosed confidential communications between the trial team and Owens; because Hower was improperly reading those confidential communications; because Fronapfel had no personal knowledge about the note; and because Hower had misrepresented the incident to the court. Kepros went on to argue that the trial team had disputed Hower's version of the incident at the time he initially raised it with the court. Hower responded that the note was not a confidential communication because it was written in large black letters that were filled in with black ink. Hower acknowledged that although he knew Fronapfel was present when the note incident occurred, he was unsure whether she had personal knowledge of the note. The court overruled Kepros's objections and directed Hower to establish that Fronapfel's testimony about the note was based on personal knowledge.

After the bench conference, the following testimony was elicited:

> Q (By Mr. Hower) Detective, was there a time during this trial in which you became aware of some -- a statement that Mr. Owens was making indicating his attitude toward the District Attorney?
>
> A Yes.
>
> Q Can you explain how that came about?

> A Yes. I believe that you were questioning a witness and during that time you observed a note on the defense table that had a comment towards the District Attorney.
>
> Q What was the comment?
>
> A It said, fuck the DA.
>
> Q And was this described as a small note, large letters, how do you recall?
>
> A No, it was not a small note. It was big enough that you could see it standing back from the podium on the defense table.
>
> Q And was that brought to the attention of the Court at the time?
>
> A Yes, it was.

Phase Two Tr. 56:5-23 (June 11, 2008 a.m.)

Shortly after this testimony, a recess was taken. Outside the presence of the jury, the court noted that authorship of the note was critical and observed that Fronapfel had not been asked about whether she had personal knowledge of the note. Hower laid out the circumstances of the incident and argued that those circumstances suggested Owens was the author. The court agreed with Hower and stated that Fronapfel should be asked about those circumstances. Later during the recess, Kepros returned to the issue of authorship of the note. She pointed out that Hower had just described the circumstances supporting an inference that Owens was the author of the note in front of Fronapfel, who had remained on the witness stand during the colloquy. Kepros argued that Fronapfel would simply repeat in front of the jury what she had just heard Hower say about the circumstances of authorship. Kepros reiterated that the prosecution never gave notice that it intended to use this incident as evidence and that Hower had admitted at the sidebar that he did not know whether Fronapfel had even seen the note. At this point, Kepros objected to allowing the prosecution to reopen direct examination on

this topic. The court precluded the prosecution from reopening the topic when Fronapfel resumed her testimony. Kepros declined to cross-examine Fronapfel.

At the post-conviction hearing, Kepros testified that she did not know that the prosecution intended to use the note as an aggravating circumstance.

Reynolds opined that Kepros's performance was deficient because she did not constitutionalize her objections by invoking the right to confrontation or the Eighth and Fourteenth Amendments. She also faulted Kepros for not moving to strike Fronapfel's testimony when the court pointed out that authorship of the note had not been established.

iii. Analysis

Kepros made several objections to Fronapfel's testimony about the note. She objected on grounds that it was a privileged communication, that Hower had violated the attorney-client privilege by looking at the note, that Fronapfel lacked personal knowledge of the situation, and that Hower had misrepresented the incident to the court. Her objections caused the court to direct Hower to establish that Fronapfel had the requisite personal knowledge about the note before the particulars could be elicited.

During the recess, Kepros joined the court in pointing out that authorship had still not been established. She pointed out that Hower had conceded at the sidebar that he did not know whether Fronapfel had personal knowledge about the incident. She also argued that Fronapfel heard Hower's explanation of the circumstances supporting an inference that Owens authored the note. Kepros's arguments caused the court to preclude Hower from questioning Fronapfel further about the note.

Because the hearsay rules did not apply during phase two, a hearsay objection to Fronapfel's testimony would have been overruled. Kepros was not

able to entirely prevent Fronapfel's testimony about the note, but the effect of her objections and arguments was that the question of who wrote the note went unanswered. Kepros reasonably and effectively minimized the effect of this damaging evidence. The minimization rationale likewise supported Kepros's decision not to cross-examine Fronapfel. Under these circumstances, Kepros's handling of this evidence was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

iv. Conclusion

The court concludes Kepros's objections and arguments to Fronapfel's testimony about the note were within the wide range of professionally competent assistance. The court also concludes Owens failed to prove how Kepros's alleged deficient performance was prejudicial. Accordingly, Owens's petition to vacate his sentence based on his trial team's handling of the note incident is **Denied**.

d. Minimal Employment

i. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object to non-statutory aggravating circumstances evidence that Owens had been minimally employed prior to his arrest in November 2005.

ii. Findings of Fact

On June 10, 2008, during the sentencing hearing, the prosecution called Heylin to testify about his search of Department of Labor records pertaining to Owens's, Ray's, and Carter's employment. Before Heylin testified, the court read the limiting instructions for both rebuttal to mitigation and aggravating circumstances evidence to the jury. According to Heylin, his search covered up to

2006 for each individual. Based on the search, he found records showing Owens and Ray worked at the same Arby's restaurant during the third and fourth quarters of 2001. The records also showed Ray worked from May to June 2005 at a Boston Market restaurant. Heylin testified there were no other records of employment for Owens or Ray. When King objected to Ray's records on CRE 401, CRE 403, and confrontation grounds, the prosecution responded that the records were relevant because Ray's source of income was joined with Owens's source of income. King did not cross-examine Heylin.

During his testimony at the post-conviction hearing, King recalled that the prosecution elicited testimony about Owens's work history in order to prove the aggravating circumstance that Owens was involved in drug distribution. King testified that he did not realize that these aggravating circumstances were intended to support an argument that Owens's lack of verifiable income suggested Owens was engaged in drug distribution.

Reynolds opined that the trial team's performance on this topic was deficient because the team failed to argue that as a young African-American man, Owens could not be expected to have much verifiable employment. She also faulted the team for not constitutionalizing its objections.

iii. Analysis

The prosecution introduced evidence of Owens's lack of verifiable employment to corroborate other evidence that Owens was engaged with Ray in drug distribution. Because such evidence was cumulative to Sailor's and R. Carter's testimony about Ray's and Owens's drug distribution business, any objection to the evidence would only highlight its inferential purposes to the jury. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts

or omissions [of counsel] were outside the wide range of professionally competent assistance.").

iv. Conclusion

The court concludes Owens failed to prove that his trial team's handling of the evidence showing that Owens was minimally employed was deficient performance. That court also concludes Owens failed to prove that he was prejudiced by the alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on his trial team's handling of the minimal employment evidence is **Denied**.

P. Failure to Object to Erroneous Instructions and Tendering Defective Instructions for Phase One of the Sentencing Hearing

1. Omission of a Definition of Complicity

a. Parties' Positions

Owens contends he was prejudiced by Middleton's failure to ask the court to define complicity in the Phase One Final Instructions.

The prosecution responds that Phase One Final Instruction Nos. 14 and 15 correctly stated the law that complicity did not apply to the sentencing hearing and thus a definition of complicity was unnecessary.

b. Findings of Fact

At the end of phase one of the sentencing hearing, the court instructed the jury to disregard the theory of complicity:

> During the trial, you were instructed concerning the legal theory of complicity. That complicity instruction is inapplicable for the sentencing hearing. Instead, you are instructed as follows.
>
> . . .
>
> Concerning Aggravating Factor Nos. 4 and 5, these factors have been proven to exist only if the jury

> unanimously finds that it has been proven beyond a reasonable doubt that Sir Mario Owens himself, and not a person with whom he was complicit, did kill Javad Marshall-Fields, Vivian Wolfe, and/or Gregory Vann.

Phase One Final Instr. No. 15. Middleton did not ask for the definition of complicity to be included in the jury instructions.

Middleton testified during the post-conviction hearing that he asked the court to instruct the jury to disregard the theory of complicity because he was concerned that the jury might misapply complicity and attribute someone else's conduct to Owens in order to find that the aggravating factors were proved beyond a reasonable doubt. In Middleton's view, that scenario would have violated Owens's right to individualized sentencing. According to Middleton, the phrase "Owens himself" was used to prevent the jury from considering the theory of complicity and the language "and not with whom he was complicit" was an effort to prevent the jury from attributing someone else's actions to Owens.

Reynolds opined that Middleton's failure to include a definition of complicity constituted deficient performance.

c. Principles of Law

When a defendant claims a jury instruction was ambiguous and subject to an erroneous interpretation, "the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990).

d. Analysis

Owens views Phase One Final Instruction No. 15 as an elemental instruction, which asked the jury to determine whether Owens was not complicit with another person when he committed the murders. However, neither the

instruction nor Colorado law required the jury to make that determination. The portion of Phase One Final Instruction No. 15 at issue here did not add an element but rather clarified that the prosecution's burden was to prove that Owens, himself, committed the murders.

Colorado law required the prosecution to prove that Owens killed Marshall-Fields and Wolfe to prove Aggravating Factor No. 4, and that he killed Vann and either Marshall-Fields, Wolfe or both of them to prove Aggravating Factor No. 5. *See* C.R.S. § 18-1.3-1201(5)(l) ("The defendant unlawfully and intentionally, knowingly, or with universal malice manifesting extreme indifference to the value of human life generally, killed two or more persons during the commission of the same criminal episode."); § 18-1.3-1201(5)(p) ("The defendant intentionally killed more than one person in more than one criminal episode."). Lack of complicity was not a statutory element of the aggravating factors. Middleton's purpose was to make it clear that the jury must find that Owens, himself, committed the various murders. He obtained an instruction that conveyed that very effectively. Failure to ask the court to define complicity in the Phase One Final Instructions was within the wide range of professionally competent assistance. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984) (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

Moreover, there is no reasonable likelihood that the jury applied Phase One Final Instruction No. 15 "in a way that prevent[ed] the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380. Owens did not suffer any prejudice because of Middleton's alleged deficient performance.[402] *See*

[402] Owens claims he was prejudiced in eight different ways by Middleton's failure to ask the court to include the definition of complicity in the Phase One Final Instructions, including that it:

Strickland, 466 U.S. at 694 ("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.").

e. Conclusion

The court concludes Middleton's performance with respect to Phase One Final Instruction No. 15 was within the wide range of professionally competent assistance. The court also concludes that Owens failed to prove that he was prejudiced by Middleton's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on Middleton's handling of Phase One Final Instruction No. 15 is **Denied**.

2. Phase One Final Instruction No. 15

a. Parties' Positions

Owens contends he was prejudiced by Middleton's failure to tender an instruction that would have cured the conflict between Phase One Final Instruction Nos. 14 and 15.

The prosecution responds that there is no conflict between Phase One Final Instruction Nos. 14 and 15, because Instruction No. 15 defined and limited the scope of Aggravating Factor Nos. 4 and 5 and because the punctuation used in Instruction No. 14 for Aggravating Factor No. 5 correctly indicated the jury was

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- permitted arbitrary decision-making;
- violated Owens's right to have all elements of capital murder found by the jury;
- reduced the burden of proof for Aggravating Factor Nos. 4 and 5;
- may have prevented jurors from considering relevant mitigating circumstances;
- violated Owens's Eighth Amendment right to individualized sentencing;
- skewed the weighing process and introduced arbitrariness;
- deprived owens of heightened reliability; and
- violated Owens's right to have the jury correctly instructed on all matters of law.

required to find Owens killed Vann in one episode and that Owens killed Marshall-Fields and/or Wolfe in another episode.

b. Findings of Fact

The court instructed the jury in Phase One Final Instruction No. 14 concerning Aggravating Factor No. 4, which alleged that Owens killed two or more persons in the same criminal episode, as follows:

> (a) The defendant, Sir Mario Owens,
>
> (b) unlawfully and intentionally or with universal malice manifesting extreme indifference to the value of life generally,
>
> (c) killed two or more persons, to wit: Javad Marshall-Fields and Vivian Wolfe,
>
> (d) during the commission of the same criminal episode on June 20, 2005.

Phase One Final Instr. No. 14. Likewise, the court instructed the jury concerning Aggravating Factor No. 5, which alleged that Owens killed more than one person in more than one criminal episode, as follows:

> (a) The defendant, Sir Mario Owens,
>
> (b) intentionally,
>
> (c) killed more than one person, to wit: Gregory Vann on July 4, 2004,
>
> and Javad Marshall-Fields and/or Vivian Wolfe on June 20, 2005,
>
> (d) in more than one criminal episode.

Phase One Final Instruction No. 14.

In Phase One Final Instruction No. 15, the court clarified that the prosecution's burden with respect to Aggravating Factor Nos. 4 and 5 included proving that Owens himself committed the murders in the circumstances described in each aggravating factor:

> Concerning Aggravating Factor Nos. 4 and 5, these factors have been proven to exist only if the jury unanimously finds that it has been proven beyond a reasonable doubt that Sir Mario Owens himself, and not a person with whom he was complicit, did kill Javad Marshall-Fields, Vivian Wolfe, and/or Gregory Vann.

Phase One Final Instr. No. 15.

Middleton testified during the post-conviction hearing that he did not identify a legal issue with the language used in Phase One Instruction No. 15 and therefore did not object.

c. Analysis

Phase One Final Instruction No. 15 clarified the identity element of Aggravating Factor Nos. 4 and 5 by reiterating that it was the prosecution's burden to prove that Owens himself committed the murders in the manner described in Aggravating Factor Nos. 4 and 5. Instruction No. 15 was not an elemental instruction and did not add to or change any of the elements described in Aggravating Factor Nos. 4 and 5. Phase One Final Instruction No. 15 did not allow the jury to attribute someone else's conduct to Owens. Accordingly, Middleton's handling of Phase One Final Instruction No. 15 was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

d. Conclusion

The court concludes Middleton's handling of Phase One Final Instruction No. 15 was within the wide range of professionally competent assistance. The court also concludes Owens failed to prove that he was prejudiced by Middleton's alleged deficient performance. Accordingly, Owens's petition to vacate his

sentence based on Middleton's performance with respect to Phase One Final Instruction No. 15 is **Denied**.

3. Phase One Final Instruction No. 14 – Aggravating Factor No. 1

a. Parties' Positions

Owens contends he was prejudiced by Middleton's failure to include the statutory elements for a crime of violence with the elements for Aggravating Factor No. 1. Owens also contends his trial team failed to move for judgment of acquittal on Aggravating Factor No. 1 for lack of evidence that the murder of Vann was a crime of violence.

The prosecution responds that Owens's conviction for the murder of Vann involves violence for purposes of Aggravating Factor No. 1.

b. Findings of Fact

Johnson testified during the guilt phase that he witnessed Owens shoot and kill Vann at Lowry Park. Other evidence showed that Vann was shot and killed with a 9 mm handgun. During phase one, the prosecution introduced the mittimus from Owens's Lowry Park case into evidence. The mittimus reflects that Owens was convicted for killing Vann in violation of C.R.S. § 18-3-102(1)(a).

Following phase one of the sentencing hearing, the court instructed the jury about the elements of Aggravating Factor No. 1 as follows:

> (a) The defendant, Sir Mario Owens
>
> (b) was previously convicted in this state,
>
> (c) of a Class 1 Felony involving violence to wit: Murder in the First Degree After Deliberation as alleged in case no. D0032005CR02945 in Arapahoe County, Colorado.

Phase One Final Instruction No. 14. The jury was instructed that "[m]urder in the First Degree is a Class One Felony involving violence as defined by Colorado law." Phase One Final Instr. No. 18.

Middleton testified during the post-conviction hearing that he did not contest Aggravating Factor No. 1 because he interpreted the Colorado Supreme Court's holding in *People v. White*, 870 P.2d 424, 446 n.19 (Colo. 1994), as though the language in § 18-1.3-1201(5)(b) did not require a previous conviction to be a crime of violence.

In Reynolds's opinion, Middleton's reliance on *White* was erroneous. Reynolds believed that the judge in *White*, who was also the sentencer, found that White's prior convictions were crimes of violence. Based on her interpretation of *White*, Reynolds opined that Middleton's failure to ask the court to require the jury to determine whether Owens's Lowry Park conviction was a crime of violence was deficient performance.

c. Principles of Law

Pursuant to C.R.S. § 18-1.3-406, the prosecution may seek to increase the penalty range for designated crimes under certain circumstances. To obtain a sentencing range that goes from the midpoint to double the maximum of the presumptive range, they must allege and prove a crime of violence in a separate count in the information or indictment. If the defendant exercises his right to a jury trial, the jury is then required to determine whether the crime is a crime of violence. C.R.S. § 18-1.3-406(4).

According to the Colorado death penalty statute, it is an aggravating factor if "[t]he defendant was previously convicted in this state of a class 1 or 2 felony involving violence as specified in section 18-1.3-406." § 18-1.3-1201(5)(b). Murder in the first degree is a class one felony. § 18-3-102(3).

Murder would qualify as a crime of violence if, in a separate count, it were alleged and proven that the defendant used a deadly weapon to commit the murder or caused the death of another person except another participant. § 18-1.3-

406(2)(a)(I)(A) and (2)(a)(II)(B). A firearm is not a *per se* deadly weapon. *Montez v. People*, 269 P.3d 1228, 1231 (Colo. 2012). Determining if an object is a deadly weapon is a two-step inquiry: "First, the object must be used or intended to be used as a weapon. . . . Second, the object must be capable of causing serious bodily injury." *People v. Esparza-Treto*, 282 P.3d 471, 476 (Colo. App. 2011) (internal quotations omitted).

The Colorado Supreme Court held that a prior version of § 18-1.3-1201(5)(b) "does not by its terms require that previous convictions actually be convictions for crimes of violence." *White*, 870 P.2d at 446 n.19. In *White*, the Colorado Supreme Court also upheld the trial court's findings that White's prior convictions were crimes of violence because he committed the first crime with a knife and the second crime with a handgun. *Id*.

d. Analysis

According to *White*, the aggravating factor in § 18-1.3-1201(5)(b) does not require the prosecution to prove that the prior conviction was a crime of violence in order to prove the aggravating factor. 870 P.2d at 446 n.19. Similar to the situation in *White*, the court in this case found that Owens's Lowry Park conviction was a class one felony involving violence. As *White* explains, to determine whether a class one or two felony is one involving violence for purposes of § 18-1.3-1201(5)(b), one looks to § 18-1.3-406. But that does not require the jury to find a crime of violence.[403] Pursuant to § 18-1.3-406(2)(a)(I), murder is a crime of violence if either (1) the person used a deadly weapon, or (2) the person caused

[403] Unless concerned that a jury would return a lesser verdict, a prosecutor would have no reason to include a crime of violence count in a charging document, or to ask a jury make a crime of violence finding, in a first-degree murder case. A crime of violence finding enhances the sentence above the presumptive sentencing range. There is no presumptive range to enhance for first-degree murder, because the only penalties are life imprisonment or the death penalty.

death to a person who was not a fellow participant in the murder. There was evidence presented at the guilt phase that Owens used a handgun at Lowry Park to kill Vann. *See Esparza-Treto*, 282 P.3d at 476 (an object is a deadly weapon if it is used as a weapon and if it is capable of causing serious bodily injury). Thus, there clearly was evidence that Owens both used a deadly weapon and caused Vann's death. Middleton's reliance on *White* for his decision not to contest Aggravating Factor No. 1 and not to move for a judgment of acquittal based on insufficiency of the evidence fell within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

Section 18-1.3-406(4) requires the jury to determine whether a crime constitutes a crime of violence when the defendant is charged in a separate count with a crime of violence. Because Owens was not charged with a crime of violence, that statutory provision does not apply, and thus, Owens was not entitled to a jury determination as to whether his Lowry Park conviction was a crime of violence. Thus, the court rejects Owens's equal protection claim.

The court also rejects Owens's claim that § 18-1.3-1201(5)(b) was unconstitutionally vague because it does not identify which jury must find that the prior conviction involved violence. The statute is not unconstitutionally vague based on the Colorado Supreme Court's holding in *White* that the statute does not require a finding that the prior conviction was a crime of violence.

e. Conclusion

The court concludes Middleton's performance was within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by Middleton's alleged deficient performance.

Accordingly, Owens's petition to vacate his sentence based on Middleton's handling of Aggravating Factor No. 1 is **Denied**.

4. Phase One Final Instruction No. 14 – Aggravating Factor No. 1

a. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to request an instruction and to present evidence informing the jury that an appeal of Owens's Lowry Park conviction was pending and that its reliability had not been finally adjudicated.

The prosecution responds that Owens cites no legal authority for his contention that the lack of finality of his Lowry Park conviction deprived him of heightened reliability.

b. Findings of Fact

On May 20, 2008, the jury in this case found that the prosecution proved Aggravating Factor No. 1 – that Owens was previously convicted of a class one felony – beyond a reasonable doubt. More than four years later on September 30, 2012, Owens's Lowry Park appeal was resolved. The Colorado Court of Appeals affirmed Owens's convictions in *People v. Owens*, No. 07CA0895, 2012 WL 3031232 (Colo. App. July 26, 2012) (not published pursuant to C.A.R. 35(f)), *cert. denied*, No. 12SC0810, 2013 WL 4426399 (Colo. Aug. 19, 2013).

c. Analysis

Owens cites no applicable or binding legal authority supporting his contention that Middleton rendered ineffective assistance for failing to request an instruction informing the jury that Owens's Lowry Park conviction was not final because an appeal was pending. Middleton attempted to preclude Aggravating Factor No. 1 because the appeal was not final; thus, his performance with respect to Aggravating Factor No. 1 was not deficient. *See Strickland*, 466 U.S. at 690

(The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

d. Conclusion

The court concludes Middleton's failure to request an instruction informing the jury that Owens's Lowry Park conviction was not final was within the wide range of professionally competent assistance. The court also concludes Owens failed to prove that he was prejudiced by Middleton's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on Middleton's handling of Aggravating Factor No. 1 is **Denied**.

5. Phase One Final Instruction No. 18

a. Parties' Positions

Owens contends he was prejudiced by Middleton's failure to object to Phase One Final Instruction No. 18, which instructed the jury that murder is a class one felony involving violence under Colorado law.

The prosecution responds that Owens's conviction for the murder of Vann involved violence as a matter of law and that the jury was not required to find that Owens's conviction for the murder of Vann involved violence.

b. Findings of Fact

Following phase one of the sentencing hearing, the court instructed the jury about the elements of Aggravating Factor No. 1 as follows:

> (a) The defendant, Sir Mario Owens
>
> (b) was previously convicted in this state,
>
> (c) of a Class 1 Felony involving violence to wit: Murder in the First Degree After Deliberation as alleged in case no. D0032005CR02945 in Arapahoe County, Colorado.

Phase One Final Instr. No. 14. The jury was instructed that "[m]urder in the First Degree is a Class One Felony involving violence as defined by Colorado law."

Phase One Final Instr. No. 18. The court did not take judicial notice that Owens's Lowry Park conviction was a crime of violence.

Middleton testified during the post-conviction hearing that he filed SO-186 challenging Aggravating Factor No. 1 on vagueness grounds. He also asked the court to include the crime of violence elements in Aggravating Factor No. 1. Middleton also testified that he viewed *White* as precluding him from moving for a judgment of acquittal on Aggravating Factor No. 1. He viewed Phase One Instruction No. 18 as proper based on *White*.

In Reynolds's view, the trial court's characterization of White's prior convictions as crimes of violence was a finding of fact and not an interpretation of law. Thus, Reynolds opined that Middleton should have objected and should have asked the court to require the jury to find whether Owens's Lowry Park conviction was a crime of violence.

c. Principles of Law

The court incorporates the principles of law in part V.P.3.c of this Order as though fully set forth herein.

d. Analysis

Because the court did not take judicial notice that Owens's Lowry Park conviction was a crime of violence, the court was not required to instruct the jury regarding judicially noticed facts.

The court also rejects Owens's claim that § 18-1.3-1201(5)(b) was vague because it permits a judicial determination or a determination by the fact-finder as to whether the prior conviction was a crime of violence. Based on the Colorado Supreme Court's holding in *White* that the statute does not require a finding that the prior conviction was a crime of violence, the statute is not unconstitutionally vague. Thus, Middleton's failure to object to Phase One Final Instruction No. 18

and his decision not to seek a judgment of acquittal on Aggravating Factor No. 1 were within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

e. Conclusion

The court concludes Middleton's performance regarding Phase One Final Instruction No. 18 was within the wide range of professionally competent assistance. The court also concludes Owens failed to prove how Middleton's alleged deficient performance prejudiced him. Accordingly, Owens's petition to vacate his sentence based on Middleton's handling of Phase One Final Instruction No. 18 is **Denied**.

6. Phase One Final Instruction No. 14 – Aggravating Factor No. 2

a. Parties' Positions

Owens contends he was prejudiced by Middleton's failure to object to Aggravating Factor No. 2, which permitted the jury to divide the agreement to kill another person into two agreements thereby doubling the weight of Aggravating Factor No. 2.

The prosecution responds that Aggravating Factor No. 2 only required the jury to find a single agreement.

b. Findings of Fact

The evidence at trial showed that Ray, Owens, and Carter entered into an agreement to kill Marshall-Fields, and both Marshall-Fields and Wolfe were killed.

The court instructed the jury as to Aggravating Factor No. 2 as follows:

> (a) The defendant, Sir Mario Owens
>
> (b) has been a party to an agreement to kill another person,
>
> (c) in furtherance of which

> (d) a person, Javad Marshall-Fields and/or Vivian Wolfe, has been intentionally killed.

Phase One Final Instruction No. 14. The jury found Aggravating Factor No. 2 was proved beyond a reasonable doubt as to both Marshall-Fields and Wolfe. In response to the interrogatories with respect to this aggravating factor, the jury indicated that Owens "killed, attempted to kill, or intended to kill Javad Marshall-Fields and/or Vivian Wolfe" and/or "was a major participant in the crime and had at least reckless indifference to human life." Phase One Verdict Form Nos. 1 and 2.

The jury was permitted to consider each aggravating factor separately for purposes of deciding Owens's sentence as to Marshall-Fields and as to Wolfe:

> You are instructed that you are to give separate and individual consideration to the question of the aggravating factors with respect to the murder of each of the victims, Javad Marshall-Fields and Vivian Wolfe. The evidence and the law applicable to the murder of each of the victims should be considered separately by you. The fact that you may enter a finding of an aggravating factor(s) for one of the victims should not control your decision as to the aggravating factor(s) with respect to the first degree murder of the other victim.

Phase One Final Instr. No. 2.

Middleton testified during the post-conviction hearing that he did not consider whether the "and/or" phrasing in Aggravating Factor No. 2 allowed the jury to double the weight of that aggravating factor.

c. Principles of Law

Under Colorado law, it is an aggravating factor if "[t]he defendant has been a party to an agreement to kill another person in furtherance of which a person has been intentionally killed." § 18-1.3-1201(5)(e).

d. Analysis

i. Vague[404]

ii. Skewed the Weighing Process

The effect of the "and/or" language in Aggravating Factor No. 2 was that the jury could find that Owens was a party to an agreement to kill another person and in furtherance thereof killed Marshall-Fields and Wolfe. The "and/or" language therefore allowed the jury to consider the death of Marshall-Fields and the death of Wolfe as separate aggravating factors. In fact, that aggravating factor was submitted for the jury's determination as to both Marshall-Fields and Wolfe, and the jury found both were proved beyond a reasonable doubt. Given the facts of this case, it was appropriate for the jury to consider that Owens not only killed Marshall-Fields as the target of the agreement to kill another person but also killed Wolfe because she was with Marshall-Fields. *See* Phase One Final Instr. No. 2 (the jury was instructed to "give separate and individual consideration to the question of the aggravating factors with respect to the murder of each of the victims."). It therefore did not skew the weighing process. Middleton's failure to object to Aggravating Factor No. 2 was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

[404] Owens withdrew this claim in SOPC-293.

iii. Permitted Arbitrary Decision Making[405]

iv. Failed to Narrowly Apply[406]

e. Conclusion

The court concludes Middleton's performance with respect to Aggravating Factor No. 2 was within the wide range of professionally competent assistance. The court also concludes that Owens failed to prove how Middleton's alleged deficient performance prejudiced him. Accordingly, Owens's petition to vacate his sentence based on Middleton's handling of Aggravating Factor No. 2 is **Denied**.

7. Phase One Final Instruction No. 14 – Aggravating Factor No. 3

a. Parties' Positions

Owens contends he was prejudiced by Middleton's failure to adequately object to Aggravating Factor No. 3 because it did not specify whose arrest or prosecution was being avoided or prevented by committing the murder of Marshall-Fields.

The prosecution responds that the language in Aggravating Factor No. 3 did not deprive Owens of his right to individualized sentencing because it allows there to be multiple purposes behind the killing as long as evidence is presented to support a finding that one of the purposes was to prevent an arrest or prosecution.

b. Findings of Fact

In an effort to compel A. Martin and Marshall-Fields not to testify in his Lowry Park accessory case, Ray threatened A. Martin and attempted to bribe Marshall-Fields. A. Martin agreed not to testify, and the attempts to bribe Marshall-Fields were never completed. Johnson was supposed to communicate the

[405] Owens withdrew this claim in SOPC-293.
[406] Owens withdrew this claim in SOPC-293.

offer to Harrison, who was supposed to communicate it to Marshall-Fields. But the offer was never communicated beyond Johnson.

The elements of Aggravating Factor No. 3 were:

> (a) The Class 1 Felony First Degree Murder After Deliberation of Javad Marshall-Fields,
>
> (b) was committed by Sir Mario Owens with a purpose of avoiding or preventing a lawful arrest or prosecution,
>
> (c) for the offenses committed on July 4, 2004.
>
> (d) This factor shall include the intentional killing of a witness to a criminal offense.

Phase One Final Instr. No. 14. Aggravating Factor No. 3 was submitted for the jury's determination with respect to Marshall-Fields only because there was no evidence that Owens killed Wolfe in order to avoid or prevent a lawful arrest or prosecution for the crimes committed at Lowry Park. The jury found this aggravating factor was proved beyond a reasonable doubt.

Middleton testified during the post-conviction hearing that he challenged Aggravating Factor No. 3 on certain grounds but not on the grounds advanced in SOPC-163.

c. Principles of Law

Colorado law provides that it is an aggravating factor when "[t]he class 1 felony was committed for the purpose of avoiding or preventing a lawful arrest or prosecution or effecting an escape from custody. This factor shall include the intentional killing of a witness to a criminal offense." § 18-1.3-1201(5)(k). "[A]s long as the prosecution presents evidence that preventing arrest was a partial motive of the defendant's murders, submission of the subsection (5)(k) aggravator is not error." *People v. Dunlap*, 975 P.2d 723, 753 (Colo. 1999).

d. Analysis

Section 18-1.3-1201(5)(k) did not require the prosecution to specify whose lawful arrest or prosecution Owens was trying to avoid or prevent when he killed Marshall-Fields. The statutory scheme did not require the jury to specify whether the murder of Marshall-Fields was to prevent the conviction of Ray, the arrest of Owens, and/or the conviction of Owens. Nor did it require that the jury specify whether the murder was to prevent an arrest or conviction for Vann's murder, the assault on Marshall-Fields, and/or the assault of Bell. Nor did it require that the only purpose of the killing was to prevent such an arrest or conviction. It was sufficient that the jury unanimously agreed, beyond a reasonable doubt, that one purpose for Marshall-Fields's murder was to prevent an arrest or conviction for one or more of the crimes committed by Ray and Owens at Lowry Park on July 4, 2004. Thus, Middleton's decision not to challenge Aggravating Factor No. 3 on the basis that it violated Owens's right to individualized sentencing or was unconstitutionally vague fell within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

Based on the holding in *Dunlap*, the prosecution was not required to prove that Owens's only purpose to kill Marshall-Fields was to avoid or prevent a lawful arrest or prosecution in order to prove Aggravating Factor No. 3. Because there was evidence that Owens's motive to kill Marshall-Fields was in part for the purpose of avoiding or preventing a lawful arrest or prosecution, Middleton's failure to ask the court to use the statutory language "for the purpose of" instead of "with a purpose of" was within the wide range of professionally competent assistance. *See id.*

e. Conclusion

The court concludes Middleton's performance with respect to Aggravating Factor No. 3 was within the wide range of professionally competent assistance. The court also concludes Owens failed to prove how Middleton's alleged deficient performance resulted in prejudice. Accordingly, Owens's petition to vacate his sentence based on Middleton's handling of Aggravating Factor No. 3 is **Denied**.

8. Phase One Final Instruction No. 14 – Aggravating Factor No. 4

a. Parties' Positions

Owens contends he was prejudiced by Middleton's failure to adequately object to Aggravating Factor No. 4 because it did not narrow the class of defendants subject to the death penalty and because it skewed the weighing process.

The prosecution generally disputes Owens's claims.

b. Findings of Fact

The court instructed the jury as to Aggravating Factor No. 4 as follows:

> (a) The defendant, Sir Mario Owens,
>
> (b) unlawfully and intentionally or with universal malice manifesting extreme indifference to the value of life generally,
>
> (c) killed two or more persons, to wit: Javad Marshall-Fields and Vivian Wolfe,
>
> (d) during the commission of the same criminal episode on June 20, 2005.

Phase One Final Instr. No. 14.

Middleton testified during the post-conviction hearing that he did not consider whether the language of Aggravating Factor No. 4 allowed the jury to find that Owens committed the Dayton Street homicides intentionally and with universal malice, which might have resulted in the jury doubling the weight of this

aggravating factor. In his view, the jury had already found Owens guilty of intentional murder and thus, the universal malice language was not a substantive addition to the aggravating factor.

c. Analysis

i. Failed to Perform its Narrowing Function

At the guilt phase, the jury made separate determinations as to whether Owens was guilty of killing Marshall-Fields and whether he was guilty of killing Wolfe. Additional findings were required for Aggravating Factor No. 4, namely that Marshall-Fields and Wolfe were killed during the same criminal episode. Because the jury was not required to find Marshall-Fields and Wolfe were killed during the same criminal episode in order to find Owens guilty, Aggravating Factor No. 4 performed its narrowing function. Middleton's failure to object on that basis was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

ii. Skewed the Weighing Process

The phrase "intentionally or with universal malice" in Aggravating Factor No. 4 modifies the phrase "killed two or more persons." Phase One Final Instr. No. 14. The language did not allow the jury to find that Owens killed Marshall-Fields intentionally and that Owens killed Wolfe with universal malice so as to double the weight of the aggravating factor. Middleton's failure to object on this basis fell within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

d. Conclusion

The court concludes Middleton's performance with respect to Aggravating Factor No. 4 fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove that he was prejudiced by Middleton's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on Middleton's handling of Aggravating Factor No. 4 is **Denied**.

9. Phase One Final Instruction No. 14 – Aggravating Factor No. 5

a. Parties' Positions

Owens contends he was prejudiced by Middleton's failure to adequately object to Aggravating Factor No. 5 because it reduced the prosecution's burden of proof and because it allowed the jury to utilize the murder of Vann as two different aggravating factors.

The prosecution responds that Aggravating Factor No. 5 did not reduce the burden of proof. The prosecution also responds that it was proper for the jury to consider Vann's murder for both Aggravating Factor Nos. 1 and 5, because the gravamen of Aggravating Factor No. 1 is a prior conviction and the gravamen of Aggravating Factor No. 5 is the killing of more than one person in more than one criminal episode.

b. Findings of Fact

As to Aggravating Factor No. 5, the jury was instructed as follows:

> (a) The defendant, Sir Mario Owens,
>
> (b) intentionally,
>
> (c) killed more than one person, to wit: Gregory Vann on July 4, 2004, and Javad Marshall-Fields and/or Vivian Wolfe on June 20, 2005,
>
> (d) in more than one criminal episode.

Phase One Final Instr. No. 14. The jury was not given a definition of criminal episode. The jury found Aggravating Factor No. 5 was proved beyond a reasonable doubt.

In Middleton's view, Aggravating Factor No. 5 required the jury in this case to find that Owens intentionally killed Vann. Middleton did not consider whether the effect of Aggravating Factor No. 5 would have been to double the weight of the aggravating factor.

Reynolds opined that Middleton should have objected to the duplicative nature of Aggravating Factor No. 5 because there is tension between the Colorado Supreme Court and the Tenth Circuit Court of Appeals on that issue.

c. Principles of Law

The Colorado Supreme Court has held that "by the plain language of our statute, both aggravators applied under the facts of this case, we find no error in their submission to the jury." *People v. Davis*, 794 P.2d 159, 189 (Colo. 1990) *rev'd on other grounds by People v. Miller*, 113 P.3d 743 (Colo. 2005).

d. Analysis

i. Reduced the Burden of Proof

Failing to include a definition of criminal episode did not prevent the jury from considering the guilt phase evidence that suggested Owens killed Vann in self-defense. The jury's verdict that Aggravating Factor No. 5 was proved beyond a reasonable doubt indicates that the jury rejected the evidence that Owens acted in self-defense when he killed Vann. People of ordinary intelligence understand, without need for further definition, that there is no criminal episode if there is no crime. Because the language of Aggravating Factor No. 5 did not reduce the prosecution's burden of proof, Middleton's failure to ask the court to include a definition of criminal episode was within the wide range of professionally

competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

ii. Permitted Jurors to Find and Weigh the Same Act as Two Different Aggravating Factors

It was proper for the jury to consider Vann's murder for both Aggravating Factor Nos. 1 and 5 because the gravamen of Aggravating Factor No. 1 is a prior conviction and the gravamen of Aggravating Factor No. 5 is the killing of more than one person in more than one criminal episode. Similar to the situation in *Davis*, there was evidence to support the jury's findings that both Aggravating Factor Nos. 1 and 5 were proved, and therefore, there was no "doubling up" on the evidence of Vann's murder. 794 P.2d at 189 ("the doubling up of aggravators is not legally significant under the Colorado death penalty procedure"). Thus, it was not error to submit both aggravating factors to the jury. *Id.* (no error in submitting more than one aggravating factor to the jury that relies on the same evidence). Because there were not viable grounds for Middleton to argue that Aggravating Factor No. 5 skewed the weighing process and contributed to arbitrary decision making, his failure to object fell within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

e. Conclusion

The court concludes Middleton's performance with respect to Aggravating Factor No. 5 fell within the wide range of professionally competent assistance. The court also concludes that Owens failed to prove he was prejudiced by Middleton's alleged deficient performance. Accordingly, Owens's petition to

vacate his sentence based on Middleton's handling of Aggravating Factor No. 5 is **Denied**.

10. Guilt Phase Admonitions Concerning Lowry Park

a. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object to the court's admonition to the jury during the Dayton Street guilt phase, which characterized the death of Vann as a murder. According to Owens, characterizing Vann's death as a murder directed a verdict on Aggravating Factor No. 3 because Vann's death was not a murder if Owens killed him in self-defense and therefore Owens would not have had a motive to kill Marshall-Fields in order to avoid a lawful arrest or prosecution. Owens also contends that characterizing Vann's death as a murder directed a verdict on Aggravating Factor No. 5 because that characterization implied Vann was killed during a criminal episode.

The prosecution responds that Owens's argument ignores the fact that the court instructed the jury in Phase One Final Instruction No. 14 that the jury was to presume the aggravating factors did not exist unless the jury unanimously agreed that the prosecution proved each aggravating factor beyond a reasonable doubt.

b. Findings of Fact

During the guilt phase in this case, the court often instructed the jury about the limited purpose of evidence pertaining to the Lowry Park shootings:

> Ladies and gentlemen, you are about to hear evidence concerning the murder of Gregory Vann on July 4, 2004 at Lowry Park. That evidence is being offered for the purpose of establishing background or the relationship between individuals and identification of the defendant.
>
> You are to consider it only for those purposes. The defendant is entitled to be tried for the crimes charged in this case and no other. Mr. Owens is not charged in this trial with any offenses at Lowry Park on July 4, 2004.

Guilt Phase Tr. 40:25; 41:1-9 (Apr. 9, 2008 a.m.). The trial team did not object to the language of the limiting instruction, and the court reiterated in the final instructions that the jury could not consider evidence of the Lowry Park shootings "for any purpose other than the limited purpose for which it was admitted." Guilt Phase Final Instr. No. 15.

At the beginning of phase one of the sentencing hearing, the jury was instructed to disregard all instructions it had been given during the guilt phase. Guilt Phase Tr. 102:15-18 (May 19, 2008 a.m.).

Following phase one of the sentencing hearing, the jury was asked to determine as part of Aggravating Factor No. 3 whether Owens killed Marshall-Fields "with a purpose of avoiding or preventing a lawful arrest or prosecution." Phase One Final Instr. No. 14. As part of Aggravating Factor No. 5, the jury was asked to consider if Owens killed Vann in a criminal episode. *Id.*

Middleton testified during the post-conviction hearing that the court rejected his proposed limiting instruction that was neutral in tone and did not characterize Vann's death as a murder. He did not argue that referring to Vann's death as a murder was prejudicial to Owens.

According to Reynolds, Middleton's failures to object to the guilt phase admonition and the guilt phase jury instruction constituted deficient performance.

c. Analysis

The guilt phase admonition does not identify Owens as the person who killed Vann. It also does not address Owens's motive for killing Marshall-Fields. Therefore, characterizing Vann's death as a murder did not direct a verdict on Aggravating Factor No. 3 because whether Owens killed Vann deliberately or in self-defense is not relevant to whether Owens killed Marshall-Fields in order to avoid or prevent a lawful arrest or prosecution. Likewise, characterizing Vann's

death as a murder did not direct the jury to find that Vann was killed during a criminal episode for purposes of Aggravating Factor No. 5. As discussed in part V.P.9.d.i above, the language of Aggravating Factor Nos. 3 and 5 did not prevent the jury from considering evidence that Owens killed Vann in self-defense.

The guilt phase admonition that limited the purpose for which certain evidence was admitted was reiterated in Guilt Phase Instruction No. 15. At the beginning of phase one, the court instructed the jury to disregard the guilt phase instructions. The court must presume that the jury followed its instruction to disregard all prior instructions, including Guilt Phase Instruction No. 15. *People v. Flockhart*, 304 P.3d 227, 235 (Colo. 2013) (Colorado courts must "presume that jurors follow the instructions that they receive."). Moreover, Middleton attempted to dissuade the court from referring to Vann's death as a murder but his efforts were unsuccessful. For these reasons, Middleton's performance concerning the guilt phase admonition was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

d. Conclusion

The court concludes Middleton's performance with respect to the guilt phase admonition fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove how Middleton's alleged deficient performance prejudiced him. Accordingly, Owens's petition to vacate his sentence based on Middleton's handling of the guilt phase admonition regarding the Lowry Park evidence is **Denied**.

11. Phase One Final Instruction No. 11[407]

12. Phase One Final Instruction No. 5

Because Owens raises an identical claim to the phase one circumstantial evidence instruction as he did to the guilt phase circumstantial evidence instruction, the court resolves this claim by incorporating part V.L.1.b.i of this Order as though fully set forth herein.

13. Phase One Final Instruction No. 6[408]

14. Phase One Final Instruction No. 9

Because Owens raises an identical claim to the phase one credibility instruction concerning deferred judgments and sentences as he did to the guilt phase credibility instruction, the court resolves this claim by incorporating part V.L.1.b.iii of this Order as though fully set forth herein.

Q. Ineffective Assistance in Sentencing Hearing Closing Arguments

1. Failure to Object to Improper Phase One Closing Argument

a. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object to Tomsic's misstatements of the law during her phase one closing argument.

b. Findings of Fact

The court analyzed the propriety of Tomsic's phase one closing argument in part IV.F.3.b of this Order. With respect to the portions of Tomsic's arguments that the court found were not misstatements of the law, the court does not address those arguments here because Owens's trial team could not have performed deficiently by failing to object to accurate statements of the law. However, the court found in part IV.F.3.b.i of this Order that Tomsic misstated the law when she

[407] Owens withdrew this claim in SOPC-293.
[408] Owens withdrew this claim in SOPC-293.

told the jury, "[i]f any one aggravating factor, again, or more, is proven, then we can move on to the consideration of the death penalty. If not, then the verdict is a life sentence." Phase One Tr. 47:8-12 (May 20, 2008 a.m.). The court also found that Tomsic misstated the law when she described phase one as, "[a]t this stage, we are simply asking you to make a determination that the defendant is eligible." *Id.* at 63:20-22.

At the beginning of phase one, the court instructed the jury that: "If the prosecution has proven beyond a reasonable doubt that one or more of the specified aggravating factors exist, then you should so indicate on the verdict forms and the sentencing hearing will continue." Phase One Tr. 98:12-17 (May 19, 2008 a.m.) (reading Phase One Introductory Instruction No. 1).

The court instructed the jury before Tomsic's phase one closing argument that "[i]f all jurors unanimously agree that the same one or more of these aggravating factors have been proven beyond a reasonable doubt, then the sentencing hearing will continue." Phase One Final Instruction No. 12.

King testified during the post-conviction hearing that there was no reason not to object to Tomsic's misstatement of the law. Reynolds opined that King should have objected to Tomsic's misstatement.

c. Principles of Law

In Colorado, "the eligibility phase continues through step three, when the jury weighs mitigating evidence against statutory aggravators." *People v. Dunlap*, 975 P.2d 723, 739 (Colo. 1999). Colorado courts must "presume that jurors follow the instructions that they receive." *People v. Flockhart*, 304 P.3d 227, 235 (Colo. 2013).

d. Analysis

Owens's trial team should have objected when Tomsic told the jury that Owens was eligible for the death penalty if the jury found an aggravating factor was proved beyond a reasonable doubt because, according to *Dunlap*, Owens was not eligible until after step three of the sentencing hearing. *See* 975 P.2d at 739 ("[T]he eligibility phase continues through step three, when the jury weighs mitigating evidence against statutory aggravators."). The court must presume that the jury followed its instruction that the sentencing hearing would continue if the jury unanimously found an aggravating factor was proved beyond a reasonable doubt. *See Flockhart*, 304 P.3d at 235; *see also* Phase One Tr. 98:12-17 (May 19, 2008 a.m.) (reading the Phase One Introductory Instruction No. 1); Phase One Final Instruction No. 12. The jury instruction corrected Tomsic's misstatement of the law. Moreover, the jury's task at phase one was to make the factual determination of whether one or more aggravating factors had been proved beyond a reasonable doubt, and not to determine Owens's eligibility for the death penalty. Thus, there is no reasonable probability that the outcome of phase one would have been different if Owens's trial team had objected to Tomsic's misstatement of the law concerning Owens's eligibility for the death penalty. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984) ("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.").

e. Conclusion

The court concludes Owens failed to prove he was prejudiced by his trial team's failure to object to Tomsic's misstatement of the law about eligibility during her phase one closing argument. Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's failure to object is **Denied**.

2. Failure to Make Phase One Closing Argument

a. Parties' Positions

Owens contends he was prejudiced by his trial team's decision not to make a closing argument at the end of phase one of the sentencing hearing.

b. Findings of Fact

Owens's trial team did not make a phase one closing argument. King testified during the post-conviction hearing that he decided not to argue after phase one in order to maintain credibility with the jury in anticipation of asking the jury to spare Owens's life after phase two. In his opinion, forgoing the argument was not equivalent to conceding the aggravating factors. King contemplated various points he could have made during a phase one closing argument. He decided not to argue that Owens may have been convicted as a complicitor in Lowry Park because he questioned whether the jurors understood the concept of complicity. He also decided not to argue that Owens's Lowry Park conviction was not final because it had not been affirmed on appeal. In his opinion, such an argument may have confused the jurors who were instructed in this case that its verdict was final and that its sentence would be imposed.

When it was suggested that Owens's trial team could have argued that the prosecution manufactured the charges against Owens in Lowry Park in order to use that conviction as an aggravating factor in the Dayton Street case, King testified he would not have made such an argument. King also testified that he did not consider arguing that Owens's Lowry Park conviction was invalid because of *Brady* violations in that case. According to Middleton, he and Kepros agreed with King's decision not to make a phase one closing argument.

Reynolds opined that reasonably competent capital counsel embrace every opportunity to speak to the jury in order to humanize the defendant and to revisit

the concepts of insulation and isolation from the Colorado Method. In Reynolds's view, Owens's trial team should have challenged the weight of each aggravating factor. For example, the trial team should have argued that the Lowry Park jury may have found Owens guilty as a complicitor and that there was no agreement to kill Wolfe. According to Reynolds, waiving the phase one closing argument was tantamount to admitting the aggravating factors.

c. Principles of Law

Capital defense counsel's efforts to maintain credibility with the jury during closing arguments is a legitimate strategy. *Davis v. People*, 871 P.2d 769, 777 (Colo. 1994); *see also Dunlap v. People*, 173 P.3d 1054, 1079 (Colo. 2007) (capital defense counsel's strategy "to maintain credibility with the jury by admitting the horror of the crime and Dunlap's responsibility . . . was a perfectly reasonable choice.").

d. Analysis

King's decision to forgo a phase one closing argument was the result of thoughtful reflection on a variety of possible arguments concerning the weight of the aggravating factors. He decided against arguing that the Lowry Park conviction was not final and that Owens may have been convicted as a complicitor because he was concerned that the jury might not understand the concepts of finality and complicity. King's conclusion that it was more important to maintain his credibility with the jury than it was to make a phase one closing argument was reasonable in light of these considerations. *See Davis*, 871 P.2d at 777 (capital defense counsel's efforts to maintain credibility with the jury during closing arguments is a legitimate strategy); *see also Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

e. Conclusion

The court concludes that Owens failed to establish that his trial team's decision to forgo a phase one closing argument was deficient. Accordingly, Owens's petition to vacate his conviction and sentence based on the lack of a phase one closing argument is **Denied**.

3. Failure to Object to Evidence of Aggravators

a. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to object to the prosecution's phase one evidence.

b. Findings of Fact

The prosecution relied primarily on the evidence it introduced during the guilt phase to prove the aggravating factors during phase one of the sentencing hearing. The prosecution also introduced the charging document from Owens's Lowry Park case and the mittimus of Owens's Lowry Park conviction. T. Wilson testified he was present when the Lowry Park jury convicted Owens of first-degree murder and when Owens was sentenced to life in prison without parole. Owens's trial team did not object to the introduction of the documents or to T. Wilson's testimony.

King testified during the post-conviction hearing that he would not have lodged a hearsay objection to the mittimus because it was admissible as a certified court document. He also testified he would not have objected to T. Wilson's testimony.

Reynolds opined that Owens's trial team was deficient for failing to object to the prosecution's phase one evidence.

c. Principles of Law

Charging documents set forth the activities of a district attorney's office and are therefore admissible under CRE 803(8)(A). *People v. Carrasco*, 85 P.3d 580, 583 (Colo. App. 2003). A mittimus reflects the activities of a district court and is therefore admissible under CRE 803(8)(A). *People v. Warrick*, 284 P.3d 139, 143 (Colo. App. 2011).

d. Analysis

Because the charging document and mittimus were admissible under CRE 803(8)(A), Owens's trial team did not perform deficiently when it chose not to object to the admission of those documents on hearsay grounds. Owens's Lowry Park mittimus reflects that he was convicted of first-degree murder and sentenced to life without parole. Because those facts were admitted *via* the mittimus, Owens's trial team did not perform deficiently when it chose not to object to T. Wilson's testimony. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

e. Conclusion

The court concludes Owens failed to establish that King's failure to object to the charging document, the mittimus, or T. Wilson's testimony was deficient. Accordingly, Owens's petition to vacate his conviction and sentence based on his trial team's failure to object to the prosecution's phase one evidence is **Denied**.

4. Failure to Object to Improper Phase Two Closing Arguments

a. Parties' Positions

Owens contends he was prejudiced by King's failure to object to Hower's and Tomsic's improper phase two closing arguments.

b. Findings of Fact

The court analyzed the propriety of Hower's and Tomsic's phase two closing arguments in part IV.F.3.c of this Order. With respect to the arguments that the court found were not improper, the court does not address those arguments here because King could not have performed deficiently by failing to object to proper arguments. The court will address two of Hower's phase two closing arguments that the court previously found were improper.[409]

The court found that Hower improperly compared Owens to Marshall-Fields when he argued:

> [T]here's a certain irony in this situation with Nissan Williams and this defendant, if you think about it. The day Nissan shot and killed DeShawn and ran home, the police came, the defendant talked to the police. The defendant gave the police a statement. He said he saw the shooting. He identified Nissan as the shooter. Isn't that his definition of a snitch?

Phase Two Tr. 76:24-25; 77:1-5 (June 13, 2008 a.m.). *See* part IV.F.3.c.iv of this Order. King did not object to this argument.

The court also found that Hower improperly referred to another capital defendant when he discussed Owens's future dangerousness. *See* part IV.F.3.c.vii of this Order. Hower asked the jury to "recall Edward Montour [who] was serving a life-without-parole sentence for murder, beat a prison staff member to death." Phase Two Tr. 82:25; 83:1-2 (June 13, 2008 a.m.). King did not object. King testified during the post-conviction hearing that he did not have a reason not to object to Hower's comment about Montour.

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[409] Owens does not allege that his trial team was ineffective for failing to object to Tomsic's misstatement of the law concerning the purpose of mitigation, and thus, the court does not address it here. *See* part V.Q.1 of this Order.

Reynolds opined that King should have objected to Hower's improper phase two closing arguments.

c. Principles of Law

The court incorporates the principles of law set forth in parts IV.F.3.c.iv(c) and IV.F.3.c.vii(c) of this Order as though fully set forth herein.

d. Analysis

King should have objected when Hower improperly compared Owens's cooperation in a homicide investigation as a teenager with Marshall-Fields's cooperation in this case. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("[A]n individualized decision is essential in capital cases."). Hower made the comparison while pointing out that Owens's mitigation witnesses testified about their memories of their relationships with Owens as a child instead of their current relationships with Owens as an adult. Hower did not revisit the issue of Owens's cooperation with police as a child and did not make it a theme of his argument. Thus, there is no reasonable probability that the outcome of phase two would have been different if King would have objected to Hower's improper argument. *See Strickland*, 466 U.S. at 694 ("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.").

King also should have objected when Hower referred to Montour while addressing Owens's future dangerousness given that "an individualized decision is essential in capital cases." *Lockett*, 438 U.S. at 605. Hower referred to Montour while pointing out that the DOC might not always house Owens in a maximum-security facility because it is the DOC's intent to transition prisoners to lower security facilities if appropriate. The essence of Hower's argument was that Owens might be a danger to other prisoners and guards in a lower level security

facility. However, Hower's reference to Montour's case was brief, and he did not ask the jury to sentence Owens to death based on Montour's conduct. Hower did not make this the theme of his argument. Thus, there is no reasonable probability that the outcome of phase two would have been different if King would have objected to Hower's improper argument. *See Strickland*, 466 U.S. at 694 ("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.").

e. Conclusion

The court concludes Owens failed to prove that he was prejudiced by King's failure to object to Hower's improper phase two closing argument. Accordingly, Owens's petition to vacate his conviction and sentence based on King's failure to object is **Denied**.

5. Prejudice Resulting from Failures to Object

When appropriate, the court addressed the prejudice prong of *Strickland* in conjunction with its analysis of the performance prong of *Strickland*. Thus, the court does not repeat a separate prejudice prong analysis here.

6. Cumulative Effect of Misconduct and Ineffective Assistance in Closing Arguments

When appropriate, the court addressed the prejudice prong of *Strickland* in its above analysis. Thus, the court will not repeat a separate prejudice prong analysis here. Additionally, to the extent that Owens is arguing that the court should conduct a cumulative prejudice analysis as to this category of claims, it is this court's view that a cumulative prejudice analysis should be reserved for consideration of all arguably significant defects that might have affected the fairness of Owens's guilt phase or sentencing hearing. *See* part V.U of this Order.

R. Ineffective Assistance in Phase Two Closing Argument

1. Conceding Eligibility

a. Parties' Positions

Owens contends he was prejudiced by King's failure to argue the weight of the aggravating factors and by King's failure to address weighing during his phase two closing argument.

b. Findings of Fact

Because Owens's argument is an argument by omission, the entirety of King's phase two closing argument is relevant. Thus, the court incorporates King's phase two closing argument herein. *See* Phase Two Tr. 6-67; 75-77 (June 13, 2008 p.m.).

King testified during the post-conviction hearing that he did not have a reason not to address weighing during his phase two closing argument.

Reynolds testified that King performed deficiently when he focused on sentencing instead of weighing aggravation against mitigation.

c. Principles of Law[410]

"The right to effective assistance extends to closing arguments." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). "Judicial review of a defense attorney's summation is . . . highly deferential . . . ." *Id.* at 6.

> [C]ounsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should 'sharpen and clarify the issues for resolution by the trier of fact,' but which issues to sharpen and how best to clarify them are questions with many reasonable answers.

[410] The court incorporates these principles of law into each subsection of part V.R of this Order.

Id. at 5-6 (internal citations omitted).

Capital defense counsel in *Davis v. People*, 871 P.2d 769, 777 (Colo. 1994), conceded Davis's guilt during his sentencing hearing closing argument and focused instead on asking the jury to have mercy on Davis. Because of the overwhelming evidence against Davis, the Colorado Supreme Court did not fault Davis's attorney for choosing not to "argue the absurd." *Davis*, 871 P.2d at 777.

Capital defense counsel's efforts to maintain credibility with the jury during closing argument is a legitimate strategy. *See id.*; *see also Dunlap v. People*, 173 P.3d 1054, 1079 (Colo. 2007) (Capital defense counsel's strategy "to maintain credibility with the jury by admitting the horror of the crime and Dunlap's responsibility . . . was a perfectly reasonable choice.").

d. Analysis

King did not address the weight of the aggravating factors during his phase two closing argument. King did not argue that Aggravating Factor Nos. 1 (prior conviction) and 5 (killed more than one person in more than one criminal episode) were entitled to less weight because Owens might have been convicted of killing Vann as a complicitor. He chose not to argue that the Lowry Park jury may have convicted Owens as a complicitor because he questioned whether the jury would understand the theory of complicity. King intended to maintain credibility with the jury by respecting the jury's verdicts, including the jury's step one verdict that Owens, as a principal, killed Vann. *See* Phase One Final Instruction 15 (instructing the jury that Aggravating Factor No. 5 was not proved unless it found "Owens himself, and not a person with whom he was complicit," killed Vann). Arguing that Owens was convicted of killing Vann as a complicitor was contrary to King's reasonable strategy of maintaining credibility with the jury by respecting

its verdicts. *See Davis*, 871 P.2d at 777 (attempting to maintain credibility with the jury during closing argument is a legitimate strategy).

King also did not argue that the mitigating factors outweighed the aggravating factors. King omitted weighing from his argument, but he did not implicitly concede Owens's eligibility for the death penalty. King focused extensively on mitigation, primarily on Owens's delayed neurological development and the environment in which he was raised, and King asked the jury to sentence Owens to life in prison on account of that mitigation. Under *Davis*, there is no deficiency in focusing on the jury's sentencing determination instead of the jury's weighing determination. *See id*. (capital defendant was not denied effective assistance even though his counsel focused on mercy during closing argument).

e. Conclusion

The court concludes that King's failure to argue the weight of the aggravating factors and his failure to argue about the weighing process does not constitute deficient performance under *Strickland*. Likewise, the court concludes Owens failed to prove that he was prejudiced by King's failure to address weighing in his phase two closing argument. Accordingly, Owens's petition to vacate his sentence based on King's phase two closing argument is **Denied**.

2. Failure to Present Coherent Structure or Theme

a. Parties' Positions

Owens contends he was prejudiced by King's failure to present a coherent structure and theme in his phase two closing argument.

b. Findings of Fact

Because Owens's argument applies to the overarching structure and coherency of King's phase two closing argument, the court incorporates the entire

argument as though fully set forth herein. *See* Phase Two Tr. 6-67; 75-77 (June 13, 2008 p.m.).

King testified during the post-conviction hearing that he reflected on the trainings he attended that addressed whether capital defense counsel should concede his/her client's guilt during the sentencing hearing closing argument. King testified that after much thought, he decided not to criticize the jury's verdicts but to accept and respect the verdicts in order to gain credibility with the jury. King also testified that his goal in making a phase two closing argument was to persuade the jury to sentence Owens to life in prison on account of the mitigation evidence.

c. Analysis

King told the jury in his phase two closing argument that he accepted the jury's guilt phase and phase one verdicts, yet Owens complains that King should have told the jury that Owens himself accepted the verdicts. Owens's argument fails because Owens did not testify so there was no evidentiary basis for King to tell the jury that Owens accepted the jury's verdicts.

Owens also complains that King should not have drawn a difference between knowing right from wrong and moral culpability. King's purpose in making that distinction was to divert the jury's attention away from Owens's guilt and focus the jury on the strength of Owens's mitigation evidence, specifically the circumstances giving rise to Owens's impaired decision making. King laid out his theme, discussed the mitigation evidence in detail, and asked the jury to sentence Owens to life in prison. When considered in its entirety, King's argument was sufficiently coherent and structured for the jury to follow, and it was not ineffective under *Strickland*.

d. Conclusion

The court concludes that King's phase two closing argument was within the wide range of reasonable professional assistance required by *Strickland*. The court also concludes Owens failed to establish that he was prejudiced by King's phase two closing argument. Accordingly, Owens's petition to vacate his sentence based on King's phase two closing argument is **Denied**.

3. Abandoning Client

a. Parties' Positions

Owens contends he was prejudiced by King's remarks that Owens did not deserve mercy and did not deserve to be redeemed.

b. Findings of Fact

King and Kepros introduced the concept of mercy to each juror during individual *voir dire*, and King revisited the concept of mercy during his phase two closing argument. King told the jury that Owens's family was asking the jury to have mercy on him, and King personally asked the jury three times to have mercy on Owens. But he did not tell the jury that Owens himself was asking the jury for mercy. The following portions of King's argument are relevant:

> Let's talk a little bit about mercy and I may get back to this. It begs the question the word mercy. What mercy did he show Javad and Vivian. Any? Certainly not. But you know what, that's the thing about mercy. Mercy doesn't tell us much about the person receiving it. It tells us about the person giving it. Mercy is not deserved. Mercy is an opportunity, a gift which is given out of hope. He may not deserve mercy but I am asking you for it. His family is asking you for it.

Phase Two Tr. 17:5-13 (June 13, 2008 p.m.). He reiterated his request shortly thereafter by saying "I am asking you to show mercy on him." *Id.* at 20:3.

King made a final plea to the jury:

> And I am asking you to give him that chance. I am asking him [sic] not because he deserves it but because you have mercy in your hearts. And I am asking you to give him a chance to live, to be a part of his family's life, to make himself into a better person and to redeem himself in the eyes of God and man.

Id. at 67:6-11.

King testified during the post-conviction hearing that he attempted to empower the jurors to bestow mercy on Owens. In his view, mercy is not earned or deserved but is a gift bestowed upon another person. According to King, arguing that Owens deserved mercy would have been disingenuous, especially given that Owens did not show Marshall-Fields or Wolfe any mercy. King testified that although he believes mercy is not deserved, he did not intend to tell the jury that Owens did not deserve mercy.

Reynolds opined that King violated his duty of loyalty to Owens and his duty to advocate on Owens's behalf when he told the jury that Owens did not deserve mercy. She also opined that King should have argued that Owens was worthy of mercy based on the mitigation evidence. However, Reynolds conceded that there were no good reasons for King to argue that Owens deserved mercy.

c. Analysis

Owens complains that King should have told the jury that Owens himself was asking the jury for mercy. Because Owens did not testify, there was no evidentiary basis for King to tell the jury that Owens was asking for mercy.

King's remarks that Owens did not deserve mercy were consistent with King's message that mercy is a gift that the jurors were empowered to give to Owens. Because King did not abandon Owens but rather implored the jury to have mercy on him, his phase two closing argument on this point was within the wide range of professionally competent assistance contemplated by *Strickland*.

d. Conclusion

The court concludes that telling the jury that Owens did not deserve mercy was consistent with the theme of King's phase two closing argument and was therefore not deficient under *Strickland*. The court also concludes that Owens failed to prove he was prejudiced by King's phase two closing argument. Accordingly, Owens's petition to vacate his sentence based on King's phase two closing argument is **Denied**.

4. Failure to Explain and Argue Mercy

a. Parties' Positions

Owens contends he was prejudiced by King's failure to explain the role of mercy in the jury's decision-making process and by his failure to distinguish mercy from mitigation.

b. Findings of Fact

King addressed mercy during his phase two closing argument by arguing that mercy is not deserved but is given out of hope:

> You are instructed that you may consider mercy for Sir Mario Owens in this case. You must treat the defendant as an individual human being. As Mr. Hower described, you can place whatever weight on the mitigating factors or aggravating factors you want but you must consider them. You can't simply say this is a bad crime therefore death penalty.
>
> You have to consider Mr. Owens as an individual human being and decide whether it is necessary in this scenario to execute him.
>
> Let's talk a little bit about mercy and I may get back to this. It begs the question the word mercy. What mercy did he show Javad and Vivian. Any? Certainly not. But you know what, that's the thing about mercy. Mercy doesn't tell us much about the person receiving it. It tells us about the person giving it. Mercy is not deserved.

> Mercy is an opportunity, a gift which is given out of hope. He may not deserve mercy but I am asking you for it. His family is asking you for it.

Phase Two Tr. 16:20-25; 17:1-13 (June 13, 2008 p.m.).

While addressing step two of the sentencing hearing, King told the jury that mitigation is not a justification or excuse for the crime but instead is any reason to sentence Owens to life in prison:

> You can find mitigation in anything. It is defined as a reason for a life sentence.
>
> You can find it in the case itself, you can find it in any of the mitigation evidence that we presented. You can find it in the testimony of the relatives and the family members that came in here and told you how they felt. You can find it in your own self if you decide that you want to. And it doesn't have to be the same as what other jurors think because you individually have the right to give life, every single one of you. And you can give life based on whatever you want to. Again not restrict to the events and circumstances related to the crime, broad range of factors.
>
> And I want to talk a little bit about this in awhile, get to another slide here but the law says mitigating factors do not constitute a justification or excuse for the crime. And I want to be perfectly clear about that. Because there is a tendency to say if Mr. Hower says and I think it is a human reaction the fact that he has ADD doesn't justify the fact that he is a murderer. And that is not what this is about. Because it is not about justification.

Id. at 18:15-25; 19:1-10.

Before closing arguments, the jury was given the following definition of mitigating factors:

> Mitigating factors are circumstances which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be

> considered as extenuating or reducing the degree of moral culpability or which in any other way, alone or together with other such circumstances, may support for any individual juror a penalty of life imprisonment instead of the death penalty.

Phase Two Final Instruction No. 21. The jury was also instructed that it was "permitted to use mercy for Sir Mario Owens in deciding what weight to give each mitigating factor." Phase Two Final Instruction No. 23.

c. Analysis

King addressed mitigation and mercy during his phase two closing argument. He described mercy by telling the jury that "[m]ercy doesn't tell us much about the person receiving it. It tells us about the person giving it. Mercy is not deserved. Mercy is an opportunity, a gift which is given out of hope." Phase Two Tr. 17:8-11 (June 13, 2008 p.m.). And he described mitigation as "a reason for a life sentence." *Id.* at 18:16. Moreover, mitigation was defined in Phase Two Final Instruction No. 21. Thus, the jurors did not lack instruction on the definitions of mitigation and mercy. Because King addressed both concepts, King's approach to mitigation and mercy was within the wide range of professionally competent assistance under *Strickland*.

d. Conclusion

The court concludes that King's phase two closing argument was within the wide range of professionally competent assistance required by *Strickland* because he adequately described mitigation and mercy. The court also concludes that Owens failed to establish that he was prejudiced by King's phase two closing argument. Accordingly, Owens's petition to vacate his sentence based on King's phase two closing argument is **Denied**.

5. Conceding Moral Culpability

a. Parties' Positions

Owens contends he was prejudiced when King conceded Owens's moral culpability, because the purpose of mitigation is to reduce moral culpability.

b. Findings of Fact

King told the jury four times during his phase two closing argument that Owens was morally corrupt or morally culpable:

> Step 2, this is where you ask for mitigating factors exist. The law states that jurors need not unanimously agree about the existence of a mitigating factor before. It may be considered by the jury. And this is what we talked about in jury selection. You can find mitigation in anything. It is defined as a reason for a life sentence.
>
> You can find it in the case itself, you can find it in any of the mitigation evidence that we presented. You can find it in the testimony of the relatives and the family members that came in here and told you how they felt. You can find it in your own self if you decide that you want to. And it doesn't have to be the same as what other jurors think because you individually have the right to give life, every single one of you. And you can give life based on whatever you want to. Again not restrict to the events and circumstances related to the crime, broad range of factors.
>
> And I want to talk a little bit about this in awhile, get to another slide here but the law says mitigating factors do not constitute a justification or excuse for the crime. And I want to be perfectly clear about that. Because there is a tendency to say if Mr. Hower says and I think it is a human reaction the fact that he has ADD doesn't justify the fact that he is a murderer. And that is not what this is about. Because it is not about justification.
>
> There is no justification for killing two people. It is wrong. It is a choice he made, yeah, but it is a horrible,

horrible choice. It is a morally corrupt choice and it is an impaired choice in his case.

This mitigation evidence that's being presented is not saying don't hold him responsible or don't find him culpable. All it says is you can hold him responsible by putting him in prison for the rest of his life where they will watch his every move but you don't have to kill him to punish him. Punish the bad by locking him away in prison. And have hope for good by allowing him to live.

Step 3. Step 4 I want to talk a little bit about this mitigation evidence. Because I want to talk about what it is and what it isn't. As I just said it is not an excuse and I will say this over and over again. It is not an excuse. It is not a justification. I am not asking you to conclude that he did anything other than deliberately kill these people. I am asking you to show mercy on him. It is not an excuse. It is not a justification.

I disagree with Dr. Reidy's slides where he had the thing where the bad circumstances, the factors on one side and then it had pushing the moral culpability down that somehow the moral culpability is less. I disagree with that. He is culpable morally. He knows right from wrong. He knows that he is making choices and he is responsible for those choices. He is morally culpable. But it is not necessarily -- necessary to kill him in order to punish him.

What this mitigation evidence might be or might show is what we were talking about before when I was talking about a reason why or maybe some part of an explanation of how this could happen. Because the truth of the matter is we are all the product of our genes, our environment and our upbringing. That's what creates us as people and makes us individuals. And what it definitely is and what this mitigation definitely is a reason not to kill Sir Mario Owens.

When I talk about what it might be some kind of partial explanation or some kind of enlightening of how this

could have taken place, it is a piece of the puzzle. Of understanding of how something like this could happen. It is perspective on how such a horrible choice could be made by somebody. And Mr. Hower says well, killing somebody isn't a choice. Well, sure it is. Unless you are completely crazy and don't know what is going on. You are making a choice to do something. We all make choices and we are responsible for our choices. Monica Owens told you he is responsible for the choices that he made.

Now this is a horrible choice, horrible. It is a morally corrupt choice and it is an impaired choice. But it is a choice that he is being held responsible for and should be held responsible for. Part of an explanation of how it could happen. And not an excuse or a justification. Dr. Reidy talked to us about how people make choices that result in behaviors. And this has to do with every aspect of our lives. And I want to talk a little bit about moral culpability versus criminal responsibility. And what we are talking about here is in the guilty phase of the trial.

These are the types of questions that we had to ask and answer. Could he control himself. Was he completely insane and out of control, no. He could control himself. Did he have a choice? Of course, we all have choices. Did he know right from wrong, yes. What did he do. We answered all those questions you did and you found him guilty. And I accept your verdicts.

But we are at a different stage now. We are not asking those type of questions. We are asking not could he control himself at all but was his control somehow diminished. Was his understanding of what is going on somehow diminished. What shaped his choice. Was he able to view all of the possible consequences of his actions. Was he able to understand what he did what was going to result down the road. How is he damaged, what shaped his morality and his value system.

Id. at 18:11-25; 19:1-25; 20:1-25; 21:1-25; 22:1-8. King then discussed at length Owens's delayed neurological development and the circumstances of his upbringing in Louisiana and Colorado. *See id.* at 22-56. After discussing Owens's mitigation, King moved on to Owens's future dangerousness and told the jury that Owens's culpability for the Dayton Street homicides did not predict his future dangerousness:

> Let's talk a little bit about future dangerousness. What we know about this is that Sir Mario Owens is not a danger in the future. It is all about context. As I said before he is not a psychopath, who has no feelings for others and is totally self-centered. He is not a blood thirsty killer who feels compelled to kill. By the prosecution's own theory this was a plan to solve a problem. A really bad plan and but nevertheless a plan to solve a problem. That doesn't predict his risk of violence in prison.

Id. at 57:3-12.

Middleton noted during King's argument that his characterization of Owens as morally culpable and morally corrupt was problematic. SOPC.EX.D-1460A. Middleton testified during the post-conviction hearing that King's concession of Owens's moral culpability undermined Owens's mitigation case.

Following closing argument, the jury was given the following definition of mitigating factors:

> Mitigating factors are circumstances which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or which in any other way, alone or together with other such circumstances, may support for any individual juror a penalty of life imprisonment instead of the death penalty.

Phase Two Final Instruction No. 21.

According to King, the theme of his phase two closing argument was that the mitigation lessened Owens's moral culpability for the Dayton Street homicides, and thus the jury should sentence Owens to life in prison instead of the death penalty. King did not intend to tell the jury that Owens was morally corrupt or morally culpable. Instead, he intended to communicate to the jury that Owens made an impaired choice and a bad choice. King also intended to argue that Owens's moral responsibility was diminished on account of his life circumstances. In King's view, he would have lost all credibility with the jury if he had argued that Owens was not morally responsible for the Dayton Street homicides.

Reynolds opined that while King did not ignore mitigation, his concession of Owens's moral culpability eviscerated the mitigation evidence. She also opined that King's characterization of the Dayton Street homicides as a really bad plan to solve a problem was reckless because it suggested that Owens was a psychopath. According to Reynolds, claiming Owens was not guilty at trial and conceding his guilt at sentencing was an unreasonable strategy. Reynolds admitted that King's failure to argue residual doubt at sentencing was not deficient because a court order precluded him from arguing residual doubt.

c. Principles of Law

Mitigating circumstances are "circumstances which do [not] constitute a justification or excuse for the offense in question, but which in fairness or mercy may be considered as extenuating or reducing the degree of moral culpability." *People v. White*, 870 P.2d 424, 454 (Colo. 1994) (quoting *People v. Rodriguez*, 794 P.2d 965, 987 (Colo. 1990)); *see also Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (Mitigation includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.").

d. Analysis

King characterized Owens as morally culpable and referred to Owens's choice to commit the Dayton Street homicides as morally corrupt during his phase two closing argument. The following contextual analysis shows that King made these remarks while transitioning his argument from accepting the jury's verdicts to discussing Owens's mitigation evidence.

First, King began the portion of his closing argument about mitigation by explaining the purpose of mitigation to the jury. He reiterated that mitigation is not an excuse or justification for the crime. King characterized Owens's choice to commit the Dayton Street homicides as a morally corrupt but impaired choice. *See* Phase Two Tr. 21:8-9 (June 13, 2008 p.m.) ("It is a morally corrupt choice and it is an impaired choice."). Thus, King acknowledged Owens's culpability for the crime before explaining why Owens suffered from impaired decision making.

Next, King said twice that Owens was morally culpable but immediately argued that it is not necessary to sentence Owens to death in order to punish him. *See id.* at 20:9-12 ("He is culpable morally. He knows right from wrong. He knows that he is making choices and he is responsible for those choices. He is morally culpable. But it is not necessarily -- necessary to kill him in order to punish him."). Here, King linked Owens's moral culpability to punishment by arguing that even though Owens was morally culpable, it was not necessary for the jury to sentence Owens to death.

Last, King told the jury that Owens was responsible for the choices he made. King again said Owens made a morally corrupt and impaired choice. *See id.* at 21:8-10 ("It is a morally corrupt choice and it is an impaired choice. But it is a choice that he is being held responsible for and should be held responsible for."). King went on to distinguish moral culpability from criminal responsibility. He

asked rhetorical questions, which were meant to direct the jury's attention to the circumstances that contributed to Owens's impaired decision making. Thus, King again tied Owens's morally corrupt decision to his impaired decision making.

King's remarks that Owens was morally culpable and that he made a morally corrupt choice could be considered harsh. But when considered in context, the remarks were an essential component of King's message to the jury. As much as Davis's counsel chose not to "argue the absurd," *Davis*, 871 P.2d at 777, and Dunlap's counsel sought "to maintain credibility with the jury by admitting the horror of the crime," *Dunlap*, 173 P.3d at 1079, King acknowledged that Owens was morally responsible for killing Marshall-Fields and Wolfe but was not deserving of the death penalty because of his impaired decision making. It was a reasonable tactic to acknowledge the "horror of the crime" in order to get past the crime and onto the reasons why life would be the more appropriate, as well as more merciful, punishment. Because King continued to advocate for Owens by asking the jury to sentence him to life in prison, King's phase two closing argument was within the wide range of professionally competent assistance required by *Strickland*.

Moreover, the purpose of presenting mitigation evidence is to persuade the jury that life in prison is the appropriate sentence because of the defendant's reduced moral culpability. *See White*, 870 P.2d at 454 (mitigating circumstances reduce the degree of the defendant's moral culpability). Owens presented a lengthy and detailed mitigation case to demonstrate that he had a reduced degree of moral culpability, which warranted a sentence to life in prison. Indeed, that was the overall message of King's phase two closing argument. Thus, there is no reasonable probability that the outcome of phase two would have been different if King had not acknowledged Owens was morally culpable for the Dayton Street

homicides based on his impaired ability to make choices. *See Strickland*, 466 U.S. at 694 ("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.").

e. Conclusion

The court concludes that King's representation of Owens during his phase two closing argument was within the wide range of reasonable professional assistance contemplated by *Strickland* and that Owens suffered no prejudice because of King's phase two closing argument. Accordingly, Owens's petition to vacate his sentence based on King's phase two closing argument is **Denied**.

6. Unnecessarily Introducing Religious Theme

a. Parties' Positions

Owens contends he was prejudiced by King's reference to the prodigal son parable about redemption from the Bible.

b. Findings of Fact

King concluded his phase two closing argument by asking the jury to give Owens a chance to redeem himself:

> In a Biblical story of the prodigal son, one of the sons goes out and spends his inheritance doing really bad things, violating rules, really bad things. And the other son remains at home working hard with his father doing what he is supposed to do, playing by all the rules. And when the prodigal son returns, the father throws a feast and is happy. And the other son says why, why are you rewarding him and it is because of the chance to redeem.
>
> And I am asking you to give him that chance. I am asking him not because he deserves it but because you have mercy in your hearts. And I am asking you to give him a chance to live, to be a part of his family's life, to make

> himself into a better person and to redeem himself in the eyes of God and man.

Phase Two Tr. 66:23-25; 67:1-11 (June 13, 2008 p.m.).

c. Principles of Law

Defense counsel in *Harlan* incorporated the Biblical story of Abraham and Isaac into her closing argument. *People v. Harlan*, 109 P.3d 616, 633 (Colo. 2005). Counsel asked the jury to have mercy on the defendant just as God had mercy on Abraham. *Id.* According to the Colorado Supreme Court, the argument was not an invitation for the jurors to consult the Bible for its position on capital punishment. *Id.* The Colorado Supreme Court characterized this part of counsel's closing argument as a "legitimate plea for mercy" that "did not exceed the bounds of a mitigation argument." *Id.*; *see also Davis*, 871 P.2d at 777 ("[A]ppeal[ing] to the jurors' moral and religious beliefs is a common defense tactic" in capital cases.).

d. Analysis[411]

King did not emphasize religious principles in his phase two closing argument, but he used the story of the prodigal son to show the jury that giving Owens a chance to redeem himself by sentencing him to life in prison would be an honorable verdict. King merely asked the jury to give Owens a chance to redeem himself. He did not invite the jurors to invoke their own religious beliefs into their deliberations. *See Harlan*, 109 P.3d at 633 ("[D]efense counsel's argument did not invite the jurors to research the Bible's position on capital punishment."). Because

[411] Owens complains that King's reference to the prodigal son parable was improper because there was no evidence in the record that Owens believed in that parable. Yet in other parts of SOPC-163, Owens faults King for confining his argument to evidence that was in the record. For example, Owens argues King failed to tell the jury that Owens accepted the jury's verdicts (*see* part V.R.2 of this Order) and that Owens was asking the jury to have mercy on him (*see* part V.R.3 of this Order).

King's use of the prodigal son story was not improper mitigation argument under *Harlan*, King's phase two closing argument was not deficient. *See id.* (capital defense counsel's closing argument which incorporated Biblical principles was not improper mitigation argument).

e. Conclusion

The court concludes that King's decision to tell the story of the prodigal son as a way to ask the jury to have mercy on Owens was within the wide range of reasonable professional assistance under *Strickland*. The court also concludes that Owens failed to prove that he was prejudiced by King's use of the story of the prodigal son. Accordingly, Owens's petition to vacate his sentence based on King's phase two closing argument is **Denied**.

7. Undermining Counsel's Credibility

a. Parties' Positions

Owens contends he was prejudiced by King's suggestion that Owens was remorseful when there was no evidence to support that suggestion. According to Owens, King's reference to Owens's feelings of remorse undermined the trial team's credibility with the jury.

b. Findings of Fact

King began his phase two closing argument by quoting Monica Owens's (M. Owens) testimony about Owens's remorse:

> Monica Owens. I have heard the word remorse a lot today and I guess everybody has different definitions of remorse. Standing up, me standing up crying that's not going to change anything. If one thing, the people have to understand about me and Sir Mario, I tell him all the time if he is all right, I am all right. If I am all right, he is all right. Because this is a hard situation for every one of us. Every mother, every parent, every family member. It is just a hard situation.

> So in order to show remorsefulness, you have to know that individual for yourself and to know how they are feeling. I don't know how anybody feels about any of this but I know my son and I know how he feels. He may have different feelings or showed his emotions in different ways but nobody is there with us when I am talking to him. Nobody is there visiting with me and him. So for someone to tell me that another individual does not show remorse, you have to know whether or not that individual is the same as you.

Phase Two Tr. 6:15-25; 7:1-8 (June 13, 2008 p.m.).

King later argued that the jury should not assume Owens had no remorse on account of his decision not to testify:

> Mr. Owens retains his right not to testify. You can't draw any negative inference from that choice whatsoever. Including [that] he must not be . . . remorseful.
>
> Mr. Hower said many times that Mr. Owens has no remorse. He is incapable of remorse. There is no evidence of that. None at all and you can't infer that he is some kind of remorseless monster by the fact that he chooses not to testify after consulting with his attorneys.

Id. at 18:1-9.

King testified during the post-conviction hearing that he made this argument because he did not want the jury to infer from Owens's decision not to testify that Owens did not have any remorse.

c. Analysis

M. Owens did not explicitly testify that Owens was remorseful for committing the Dayton Street homicides, but she strongly implied that Owens showed remorse during their private conversations: "He may have different feelings or showed his emotions in different ways but nobody is there with us when I am talking to him. Nobody is there visiting with me and him." *Id.* at 7:2-5.

Because it was reasonable to infer from M. Owens's testimony that Owens was remorseful, it was not unreasonable for King to suggest that Owens was remorseful.

Owens contends King lost credibility with the jury when he argued there was no evidence that Owens lacked remorse because there was evidence presented at trial that implied Owens lacked remorse for killing Marshall-Fields and Wolfe. King's argument about Owens's remorse was tied to Owens's decision not to testify. King specifically told the jury it could not infer that Owens did not feel remorse on account of his decision not to testify. His argument was an accurate statement of the law, and it did not invite the jurors to speculate as to why Owens's trial team advised Owens not to testify. Accordingly, the manner in which King addressed Owens's remorse was within the wide range of professional assistance contemplated by *Strickland*.

d. Conclusion

The court concludes King's phase two closing argument did not constitute deficient performance under *Strickland* because he appropriately addressed what the jury could infer from Owens's decision not to testify. The court also concludes that Owens failed to prove how he was prejudiced by King's phase two closing argument. Accordingly, Owens's petition to vacate his sentence based on King's phase two closing argument is **Denied**.

8. Conceding Owens's Inability to Change

a. Parties' Positions

Owens contends he was prejudiced when King told the jury that Owens had a certain way of coping with the world because he indicated Owens was incapable of changing.

b. Findings of Fact

King asked the jury to consider "the serious development deficits [Owens] has and how they affect his ability to cope, make decisions, access, control his behavior." *Id.* at 22:15-17. He argued Owens had a "[r]educed ability to cope with and in the every day world," *id.* at 26:14-15, and that:

> Mr. Hower and other prosecutors have throughout the course of the trial talked about Mr. Owens as being callous or insensitive to others. Yes, it is not that he doesn't care. That's the only way he can cope with the world. And will that appear to be callous and insensitive[?] [A]bsolutely.

Id. at 38:7-12.

c. Analysis

Contrary to Owens's contention, King's argument that Owens coped with the stresses of everyday life by appearing apathetic did not imply that Owens was incapable of change. King argued that Owens lacked proper coping mechanisms and suffered from impaired decision making as a result of his neurological deficiencies. Asking the jury to consider how Owens's developmental deficits affected his ability to cope and to make good decisions was a reasonable request in light of Owens's mitigation evidence. *See Strickland*, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .").

d. Conclusion

The court concludes that King's description of how Owens coped with stress did not fall outside the wide range of professional assistance as contemplated by *Strickland*. The court also concludes Owens failed to prove that he was prejudiced by King's phase two closing argument. Accordingly, Owens's petition to vacate his sentence based on King's phase two closing argument is **Denied**.

9. Undermining Mitigation Evidence

a. Parties' Positions

Owens contends he was prejudiced when King characterized Owens's parents as good people even though the mitigation case showed that his parents were largely absent due to drug addiction and other commitments.

b. Findings of Fact

King argued to the jury that Owens progressed through adolescence without much guidance or support:

> Sir Mario Owens had neurological and development problems, severe problems and his parents albeit good, hardworking people because of certain issues were not always there. And did not provide him with the type of guidance and control that you need especially as an adolescent.

Phase Two Tr. 23:9-13 (June 13, 2008 p.m.). King also told the jury that Owens grew up without positive male role models. He specifically argued that "Mr. Derrick Owens loves his kid but he is not able to be an adequate parent and he is certainly not providing a positive role model for Sir Mario Owens." *Id.* at 41:22-24.

c. Analysis

According to Owens, part of his mitigation case was that he was the product of an impoverished and dangerous environment and of neglectful parenting. Owens contends that King's characterization of Owens's parents as good, hardworking people who love their son undermined that mitigation. But in conjunction with describing Owens's parents as good people, King said Owens's parents were not always there for him and did not guide or control Owens during his adolescent years. Likewise, King told the jury that Owens's father was "not able to be an adequate parent and he is certainly not providing a positive role

model for Sir Mario Owens." *Id.* at 41:22-24. Because the thrust of King's argument was that Owens's parents were absent and neglectful, which was a theme of Owens's mitigation case, King did not perform deficiently in his phase two closing argument. *See Strickland*, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .").

d. Conclusion

The court concludes King's characterization of Owens's parents did not undermine Owens's mitigation evidence and therefore did not constitute deficient performance under *Strickland.* The court also concludes Owens failed to establish that he was prejudiced by King's description of Owens's parents as good, hardworking people who love their son. Accordingly, Owens's petition to vacate his sentence based on King's phase two closing argument is **Denied**.

10. Contradictory and Nonsensical Arguments

a. Parties' Positions

Owens contends he was prejudiced by King's argument that although Ray was the leader of the conspiracy, Owens was responsible for doing what Ray instructed him to do.

b. Findings of Fact

King told the jury that Owens was not able to evaluate what Ray instructed him to do:

> It was a horrible choice, yes. Should he have not listened to what Robert Ray his friend was telling him to do would this snitch that he stereotypes it as? Of course, he should not. But people in this scenario are very susceptible to what their peers say to them and he is extremely susceptible to what Robert Ray is telling him to do.

> And when we talk about this conspiracy, let's be perfectly clear. Who is in charge of this conspiracy. Robert Ray. Robert Ray is the boss. Robert Ray is telling people what to do. Robert Ray controls all the money. Robert Ray has all the contacts. Does that mean he is not responsible for doing what he is told to do. He is absolutely responsible. But does that mean that you don't necessarily have to kill him because he wasn't able to evaluate what he was told to do very well.

Phase Two Tr. 34:14-25; 35:1-4 (June 13, 2008 p.m.).

c. Analysis

The message of King's argument was that Owens was criminally responsible for carrying out Ray's instructions but that he was unable to fully evaluate the depravity of Ray's instructions because of his delayed brain development and therefore should be sentenced to life in prison. The argument was not contradictory or nonsensical. Thus, King did not perform deficiently when he told the jury that Owens was responsible for the homicides yet unworthy of the death penalty because of his impaired ability to decide whether to carry out Ray's instructions. *See Strickland*, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .").

d. Conclusion

The court concludes King did not perform deficiently under *Strickland* when he argued that Owens's impaired decision making made him undeserving of the death penalty. The court also concludes Owens failed to prove how this portion of King's phase two closing argument prejudiced him. Accordingly, Owens's petition to vacate his sentence based on King's phase two closing argument is **Denied**.

11. Inviting Prejudicial Comparisons to Victims

a. Parties' Positions

Owens contends he was prejudiced when King invited the jury to compare the opportunities Owens would lose if sentenced to life in prison to what the victims lost.

b. Findings of Fact

King described the life Owens would experience if the jury sentenced him to life in prison:

> If Sir Mario Owens' sentence is a sentence of life without the possibility of parole, he will be told what to do, when to do it and how to do it for the remainder of his life. He will never get married. He will never have a relationship with a woman. He will never go to the beach. He will never walk barefoot through the grass, he will never eat pizza on Saturday night.
>
> He will never drink beer and play horseshoes on a hot afternoon in the summer time and he will never get on a [plane]. He will never take a vacation and he will never be able to have a job, he will never earn any money, it is not really a full life. It is really punishing to be in prison for the rest of your life because all of the things about life that we love and enjoy, he will never have. He will never carve a turkey at Thanksgiving. He will never exchange gifts at the holidays. He won't be able to attend weddings or funerals of anyone in his family.
>
> It is a pretty bad existence. And it is real punishment. For what he will be able to do are some things. He will be able to read books. He will be able to try to improve himself. He will be able to communicate with his family by letters or telephone calls. He will be able to provide support for his nephews as they grow and an example for them. He will be able to be redeemed in the eyes of God and man if given the opportunity.

Phase Two Tr. 64:24-25; 65:1-24 (June 13, 2008 p.m.).

At the end of phase two, the jury was instructed not "to make comparative judgments between a defendant and the victims of his crime. You are never permitted to do a comparative judgment between a defendant and the victims." Phase Two Final Instruction No. 28.

c. Analysis

Not once in his closing argument did King compare what Marshall-Fields and Wolfe lost to what Owens would lose by spending the rest of his life in prison. The purpose of King's argument was to show the jury that life in prison without parole is a severe punishment that is recognized as an appropriate punishment under the law. He did not invite the jurors to compare what Owens would lose if sentenced to life in prison to what Marshall-Fields, Wolfe, and their families lost when Marshall-Fields and Wolfe were killed. Moreover, the jury instructions precluded the jurors from engaging in that type of comparative judgment. *See id*. ("You are never permitted to do a comparative judgment between a defendant and the victims."). Thus, King's argument that life in prison was a harsh punishment for Owens was not an unreasonable professional error under *Strickland*.

d. Conclusion

The court concludes that King's argument that life in prison was an appropriate and harsh sentence for Owens was within the wide range of reasonable professional assistance under *Strickland*. The court also concludes Owens failed to prove that he was prejudiced by this portion of King's phase two closing argument. Accordingly, Owens's petition to vacate his sentence based on King's phase two closing argument is **Denied**.

12. Failure to Effectively Argue Mitigation Evidence

a. Parties' Positions

Owens contends he was prejudiced because King failed to effectively argue that the jury should spare Owens's life based on his diminishing risk of future dangerousness because he would neurologically mature over time.

b. Findings of Fact

King dedicated much of his closing argument to Owens's abnormal brain and his delayed neurological development. *See generally* Phase Two Tr. 22-38 (June 13, 2008 p.m.). He argued that Owens suffered impaired decision making as a result of his neurological deficits. *See id.* King also argued that as Owens gets older, his future dangerousness will decrease:

> The one thing that we do know is that age matters. The first two years are the hardest time in the time when there is most likely to be violence. Mr. Owens has been in jail almost 3 years now. He is now maturing, although his maturity is significantly delayed by his brain problems. He is maturing and as he continues to mature, the risk of any infractions will decrease.

Id. at 58:10-16.

c. Analysis

King did not ignore the connection between Owens's neurological development and risk of future dangerousness, and therefore he did not perform deficiently in his phase two closing argument. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

d. Conclusion

The court concludes that King's performance fell within the wide range of reasonable professional assistance required by *Strickland* because he adequately

addressed how Owens's delayed neurological development affected his future dangerousness. The court also concludes Owens failed to prove that he was prejudiced by this portion of King's phase two closing argument. Accordingly, Owens's petition to vacate his sentence based on King's phase two closing argument is **Denied**.

13. Failing to Argue Owens's Youth as Mitigation

a. Parties' Positions

Owens contends he was prejudiced by King's failure to argue his youth as an independent mitigating factor.

b. Findings of Fact

Because Owens's argument is that King failed to argue his youth as an independent mitigating factor, the entirety of King's phase two closing argument is relevant. Thus, the court incorporates that argument herein. *See* Phase Two Tr. 6-67; 75-77 (June 13, 2008 p.m.).

Owens was 19 years old at the time of the Lowry Park shootings, and he was 20 years old at the time of the Dayton Street homicides.

King testified during the post-conviction hearing that some jurors rejected youth as a mitigating factor during individual *voir dire*.

Reynolds opined that King's failure to present Owens's age at the time he committed the Lowry Park shootings and Dayton Street homicides as a stand-alone mitigating factor fell below an objective standard of reasonableness for reasonably competent capital counsel.

c. Analysis

King did not ignore Owens's age during his phase two closing argument. Although he did not argue Owens's age as an independent reason to sentence him to life in prison, King argued extensively that Owens's delayed brain development

and age contributed to his impaired decision making, which was a reason to sentence him to life in prison. Because King addressed Owens's age, he did not perform deficiently in his phase two closing argument. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

d. Conclusion

The court concludes King's argument about Owens's age did not constitute deficient performance under *Strickland*. The court also concludes Owens failed to prove how he was prejudiced by this portion of King's argument. Accordingly, Owens's petition to vacate his sentence based on King's phase two closing argument is **Denied**.

14. Reducing Sentencing Decision to One of Necessity

a. Parties' Positions

Owens contends he was prejudiced when King acknowledged that the death penalty may be necessary in some cases because it invited the jury to consider retribution and deterrence in deciding Owens's sentence. Owens also contends King's argument invited the jury to respond emotionally to Hower's argument that the criminal justice system is the last line of defense between criminals and law-abiding citizens.

b. Findings of Fact

Hower argued at the end of phase two that the criminal justice system protects citizens from criminals and that in this case, the killing of Marshall-Fields was an attack on the criminal justice system:

> [O]ur criminal justice system is our last line of defense. It is the final barrier, if you will, between us and those who choose to prey upon us. Between our families and those who choose to rape, rob, murder and the killing of a

> witness, a citizen witness to a crime strikes a very deadly blow right at the heart of our criminal justice system.

Phase Two Tr. 93:17-23 (June 13, 2008 a.m.). Hower went on to describe the role citizen witnesses play in the criminal justice system and argued that the system could not function without witnesses. *Id.* at 93:23-25; 94:1-25; 95:1-16. Hower then applied his argument to the facts of this case:

> [I]f witnesses to crimes are killed to prevent their testimony, if then other citizens won't come forward because of fear they'll be killed, that last line of defense, that last barrier, it is gone and we no longer live under the rule of law, we live under the code of the street; you snitch, you die.
>
> So when you're considering – and when you're considering the weight to be given to this aggravator, you may also consider the specific problems that you learned about that, the murder of the citizen witness doing his duty, Javad Marshall-Fields, the problems that created in this case by the fact that the defendant murdered Javad to silence him to avoid his own arrest, prosecution, conviction and punishment for Greg's murder.

Id. at 95:17-25; 96:1-5.

King argued to the jury that it could not retaliate against Owens for killing Marshall-Fields and Wolfe by sentencing Owens to death:

> The law requires that your decision not be the result of sympathy or passion or any other arbitrary emotional response. And that's what I was talking about before. The fact that these murders make you angry the fact that you want to retaliate. The fact that you want to stand up for Javad and Vivian and strike back, the fact that you would like to send a message to the community.
>
> Those are all improper bases for this decision and law requires you to set them out of your mind.

Phase Two Tr. 17:14-22 (June 13, 2008 p.m.). King also argued that sentencing Owens to the death penalty was not necessary and that vengeance was not an appropriate reason to sentence Owens to death:

> Death penalty is a penalty of last resort. The death penalty is to be imposed when it is necessary to impose the death penalty. There may be cases out there where the death penalty is necessary. But it is certainly not necessary in this case. And it serves no other purpose other than vengeance.
>
> All of Mr. Hower's arguments boil down to vengeance. You killed so we are going to kill you. And that's not an appropriate reason to execute somebody.

Id. at 13:11-19.

The court instructed the jury at the end of phase two that "[t]he law requires that your decisions not be the result of mere sympathy, passion, bias, prejudice, conjecture or any other irrational or arbitrary emotional response." Phase Two Final Instruction No. 17.

King testified during the post-conviction hearing that he intended to divert the jury's attention from Hower's theme of "[y]ou killed so we are going to kill you" by reframing the jury's focus to mitigation and mercy.

c. Analysis

King delivered his phase two closing argument to the same jury who found Owens guilty and found the prosecution proved all of the aggravating factors beyond a reasonable doubt. Additionally, all of the jurors expressed their opinions during individual *voir dire* that the death penalty was warranted in some cases and indicated their ability to sign a death verdict. Under those circumstances, it was reasonable for King to focus on the jury's sentencing determination by arguing that the death penalty was not necessary in this case. King's argument did not invite the jury to consider retribution and deterrence because he specifically told the jury

that vengeance is not an appropriate reason to sentence an individual to death. It was not unreasonable for King to argue to the jury that it was not necessary to sentence Owens to death.

With respect to Owens's argument that King caused the jury to respond emotionally to Hower's argument, the jury is presumed to have followed the instruction that the jury's verdicts may "not be the result of mere sympathy, passion, bias, prejudice, conjecture or any other irrational or arbitrary emotional response." *Id*.; *see also People v. Flockhart*, 304 P.3d 227, 235 (Colo. 2013) (Colorado courts must "presume that jurors follow the instructions that they receive."). Thus, the jury instruction negated any prejudice King's argument might have caused. *See Strickland*, 466 at 694 ("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.").

d. Conclusion

The court concludes that King's performance fell within the wide range of professional assistance under *Strickland* when he argued that it was not necessary for the jury to sentence Owens to death. The court also concludes Owens failed to prove that he was prejudiced by this portion of King's closing argument. Accordingly, Owens's petition to vacate his sentence based on King's phase two closing argument is **Denied**.

S. Counsel's Admissions of Owens's Guilt and Moral Culpability

1. Parties' Positions

Owens contends he was prejudiced when King conceded Owens's guilt and moral culpability for the Lowry Park shootings and Dayton Street homicides during the phase two closing argument without consulting him.

2. Findings of Fact

The parties presented their phase two closing arguments on June 13, 2008. Each party made a closing argument and a rebuttal closing argument. The court incorporates those arguments as though fully set forth herein. *See* Phase Two Tr. 57-118 (June 13, 2008 a.m.); Phase Two Tr. 6-77 (June 13, 2008 p.m.). Owens specifically objects to the following portions of King's phase two closing argument:

- King said, "I am concerned because this is a horrible, horrible crime that Mr. Owens has committed. As the families of the victims have said, there are no words that can describe their loss. These [are] good people doing the right thing. These are innocent people who are struck down just when their lives were beginning really." Phase Two Tr. 9:17-22 (June 13, 2008 p.m.).
- King said "[i]t just doesn't seem to make sense. We have someone who has not committed crimes, has not been in trouble really, and then within a span of 2 years there are three people dead." *Id.* at 10:23-25; 11:1.
- King discussed mercy with the jury, "[i]t begs the question the word mercy. What mercy did [Owens] show Javad and Vivian. Any? Certainly not. But you know what, that's the thing about mercy. Mercy doesn't tell us much about the person receiving it. It tells us about the person giving it. Mercy is not deserved. Mercy is an opportunity, a gift which is given out of hope. He may not deserve mercy but I am asking you for it. His family is asking you for it." *Id.* at 17:6-13.

- King told the jury that mitigation was not a justification for the murders, and King went on to say "[t]here is no justification for killing two people. It is wrong. It is a choice [Owens] made, yeah, but it is a horrible, horrible choice. It is a morally corrupt choice and it is an impaired choice in his case." *Id.* at 19:11-14.
- King reiterated that mitigation "is not an excuse. It is not a justification. I am not asking you to conclude that he did anything other than deliberately kill these people. I am asking you to show mercy on him. It is not an excuse. It is not a justification." *Id.* at 19:25; 20:1-4.
- King told the jury that mitigation offered a perspective on how Owens made such a horrible choice. *Id*. at 20:13-21. King added "[w]e all make choices and we are responsible for our choices. Monica Owens told you [Owens] is responsible for the choices that he made. Now this is a horrible choice, horrible. It is a morally corrupt choice and it is an impaired choice. But it is a choice that he is being held responsible for and should be held responsible for." *Id*. at 21:5-11.
- King pointed out that Waters testified that Owens functions like a much younger person. *Id*. at 33:14-18. King tied that testimony into Owens's decision making, by stating that "Owens didn't kill Javad and Vivian because he is some bloodthirsty serial killer. He didn't kill them because he has a need to kill. By [the prosecution's] own theory this was to solve a problem. It was a decision that was made to solve a problem. Well, what a terrible decision." *Id*. at 34:3-7.
- King explained that while Owens made a horrible choice to kill the victims, "people in this scenario are very susceptible to what their

peers say to them and he is extremely susceptible to what Robert Ray is telling him to do." *Id.* at 34:17-20.

- King acknowledged to the jury that while Owens was absolutely responsible for doing what he was told to do, he should not be executed "because he wasn't able to evaluate what he was told to do very well." *Id.* at 35:3-4.
- King pointed out that "Robert Ray is telling [Owens] that snitches are bad. This guy is a snitch. Robert Ray is telling [Owens] he needs to do something about it and he is going to do it. He is going to follow through because he is not able to evaluate the scenario." *Id*. at 35:24-25; 36:1-2. And King said Owens's brain problems prevented him from thinking about the ramifications for his actions. *Id*. at 36:5-14.
- King noted that Owens was not a future danger because Owens was not a psychopath. *Id*. at 57:3-8. King argued that "[t]he fact that he killed multiple people on different instances has nothing to do with predicting any risk of future dangerousness. It just statistically doesn't happen." *Id*. at 57:20-22.

At the post-conviction hearing, King testified that the trial team's strategy during the guilt phase was to contest Owens's guilt for both the Lowry Park shootings and Dayton Street homicides. According to King, the trial team did not hold anything back in trying to prove that Owens was not the shooter at either incident. During the guilt phase, the trial team attacked the witnesses' credibility, pursued a self-defense theory for the Lowry Park shootings, pursued an alternate suspect defense for the Dayton Street homicides, and argued in closing that Owens had not been proven guilty beyond a reasonable doubt.

King recalled reviewing the ABA Guidelines prior to the trial in this case, which recommended that the theory of defense in the guilt phase and sentencing hearing be consistent yet recognized that attorneys have to make decisions based on the facts of the particular case.

King testified that the trial team discussed conceding Owens's guilt during the phase two closing argument. He recalled that conceding guilt was covered at the State PDO training sessions as a plausible tactic.

According to King, he agonized over whether to concede Owens's guilt in his closing argument. Part of his evaluation included considering the negative impact that conceding culpability could have on any residual doubt harbored by the jurors. Eliminating residual doubt was a concern because it was King's opinion that the prosecution had not presented a particularly strong case. King was also concerned that the jury would react negatively to him if he argued that the evidence had not proved Owens guilty beyond a reasonable doubt in light of the jury's recent guilty verdict. King testified that he felt obligated to acknowledge the jury's guilty verdicts especially in light of Pinto's testimony that Owens acknowledged his involvement in the Lowry Park shootings.

King further testified that he did not consult with Owens or otherwise seek Owens's consent to concede Owens's culpability. King did not consider how Owens would react in front of the jury when he heard King concede his guilt. He also did not consider how the jury would react given that Owens denied knowledge of the Dayton Street homicides to Pinto and had not allocuted to the jury.

3. Principles of Law

In *United States v. Cronic*, 466 U.S. 648, 658 (1984), the United States Supreme Court held that there is structural error and that prejudice must be presumed when "circumstances [exist] that are so likely to prejudice the accused

that the cost of litigating their effect in a particular case is unjustified." Those limited circumstances include the complete denial of counsel, the denial of counsel at a critical stage, the absence of "meaningful adversarial testing" by counsel, and circumstances where, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Cronic*, 466 U.S. at 659-60.

Twenty years later in *Florida v. Nixon*, 543 U.S. 175, 186-87 (2004), the United States Supreme Court addressed whether counsel's strategy of conceding Nixon's guilt during the guilt phase of a capital trial was *per se* deficient and whether counsel's effectiveness should be evaluated under *Cronic* or *Strickland*. In that case, counsel told Nixon three times about his plan to concede Nixon's guilt. *Nixon*, 543 U.S. at 181. Nixon never agreed to or rejected this tactic. *Id.* During the opening statement, counsel conceded Nixon's guilt and noted that the trial was really about whether Nixon deserved to be sentenced to death. *Id.* at 182-83. During the guilt phase, counsel contested some of the prosecution's evidence, did not present a defense case, and objected to some of the proposed jury instructions. *Id.* at 183. During closing argument, counsel again reiterated that Nixon was guilty and told the jury that he hoped to convince the jury to spare Nixon's life in the sentencing hearing. *Id.*

In post-conviction proceedings, the Florida Supreme Court ruled that an attorney's concession of guilt during the guilt phase requires the client's "affirmative, explicit acceptance" without which the attorney's performance is presumptively inadequate. *Nixon v. Singletary*, 758 So.2d 618, 624 (Fla. 2000). The Florida Supreme Court's rationale was that a defense attorney's concession of guilt is the functional equivalent of a guilty plea and the decision to plead guilty

rests completely with the defendant. *Id.* After an evidentiary hearing to determine whether Nixon had given consent, the Florida Supreme Court ruled that because Nixon said nothing when told of counsel's plan to concede his guilt, he did not affirmatively and explicitly accept the strategy. *Nixon v. State*, 857 So.2d 172, 176 (Fla. 2003) ("[S]ilent acquiescence to counsel's strategy is not sufficient . . . ."). Thus, reversal and remand for a new trial was required. *Id*. The United States Supreme Court took the case to decide whether counsel's failure to obtain Nixon's consent to concede guilt during the guilt phase was deficient performance and whether the question of prejudice should be decided under *Cronic* or *Strickland. Nixon*, 543 U.S. at 186-87.

The United States Supreme Court started with the observation that the right to plead guilty is a trial right reserved exclusively to the defendant. *Id*. at 187. Concerning the defendant's right to plead guilty, the Court recognized that a defense attorney must consult with the defendant and obtain consent to the recommended course of action. *Id.* But the Court disagreed with the Florida Supreme Court's finding that counsel's concession of Nixon's guilt was the functional equivalent of a guilty plea. *Id*. at 188. The Court observed that the concession of guilt did not relieve the prosecution of its burden of proof and therefore counsel was able to challenge some of the evidence. Furthermore, the concession had no effect on Nixon's right to challenge jury instructions or to file an appeal based on trial errors. *Id.* Because Nixon retained these rights, the Court concluded that the Florida Supreme Court erroneously equated counsel's concession to a guilty plea and therefore erroneously applied *Cronic* instead of *Strickland*. *Id.* at 189.

The Court noted that *Cronic* was a narrow exception to *Strickland's* two-prong analysis that is reserved for those "situations in which counsel has entirely

failed to function as the client's advocate." *Id.* "If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 190 (quoting *Cronic*, 466 U.S. at 659). In *Nixon*, the Court found that counsel's "concession of Nixon's guilt does not rank as a 'fail[ure] to function in any meaningful sense as the Government's adversary.'" *Id.* (quoting *Cronic*, 466 U.S. at 666). Capital defense counsel's goal in the sentencing hearing "is to persuade the trier that his client's life should be spared." *Id.* at 191. "[C]ounsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in a useless charade." *Id.* at 192 (internal quotations omitted).

The United States Supreme Court in *Smith v. Spisak*, 558 U.S. 139, 150 (2010), addressed counsel's effectiveness during a sentencing hearing closing argument where counsel described the killings in graphic detail. Counsel described the defendant as "sick," "twisted," and "demented," and said that the defendant was "never going to be any different." *Spisak*, 558 U.S. at 150.

The United States Supreme Court assumed counsel's closing argument was deficient but found that the defendant was not prejudiced by counsel's argument when the argument was considered in the context of the case. *Id*. at 151. Especially important was that the sentencing hearing occurred immediately after the guilt phase. *Id*. at 154. As a result, the jury recalled the government's evidence, including photographs of the dead bodies, which formed the basis for counsel's graphic descriptions of the murders. *Id*. Likewise, the jury had recent memories from the guilt phase, including the defendant's "boastful and unrepentant confessions and his threats to commit further acts of violence." *Id.* Also fresh in the jurors' minds was the sentencing hearing testimony of three

defense experts that the defendant suffered from mental illness. *Id*. The Court noted that counsel's numerous appeals during the closing argument to the jurors' sense of humanity was a sufficient appeal for mercy. *Id*. at 155. The Court concluded that when considered in context, "there is not a reasonable probability that a more adequate closing argument would have changed the result." *Id*. Thus, the Court made clear in *Spisak* that when a *Strickland* claim is based on an inadequate closing argument in the sentencing hearing, prejudice must be examined in the context of the entire case. *See also Strickland v. Washington*, 466 U.S. 668, 695 (1984) ("[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.").

Similar to counsel's remarks in *Spisak*, counsel in *People v. Bergerud*, 223 P.3d 686, 700 (Colo. 2010), characterized the crime in his opening statement as horrible, violent, and tragic. The defendant argued that his counsel's statements were the equivalent of a judicial admission and that his situation was similar to *Cronic*. *Bergerud*, 223 P.3d at 699.

To resolve whether counsel's opening statement was a judicial admission, the Colorado Supreme Court observed that the statements have to be "read as a whole and understood in light of their context." *Id*. at 700. It found that counsel, in pursuit of a mental impairment defense, can tell the jury that the crime was horrible, violent, and tragic, and then detail the mental health evidence the jury can expect to hear. The Colorado Supreme Court held that "[a]fter examining the opening statements carefully and considering them in context, we conclude that they did not act as a concession of Bergerud's guilt." *Id*. at 699. The Colorado Supreme Court's rationale was that "[n]othing in [counsel's] statements excused prosecutors from meeting their burden of proof with respect to the elements of the

crime charged, nor closed the door on defense counsel later asking for Bergerud's outright acquittal." *Id*. at 700-01.

The Colorado Supreme Court in *Davis v. People*, 871 P.2d 769 (Colo. 1994), addressed whether the defendant was abandoned by his counsel during the sentencing hearing closing argument. During the closing argument, counsel told the jury that he hated his client for what his client had done and added that there was no excuse for the crime. *Davis*, 871 P.2d at 776. Counsel also told the jury that if he thought his client's execution would bring peace to the victim's family, he would choke his client to death himself. *Id*. And after comparing Davis to Davis's manipulative ex-wife, who cooperated with the prosecution in exchange for a life sentence, counsel told the jury that Davis and his ex-wife both deserved life or both deserved death. *Id.* at 776-77. The Colorado Supreme Court found that counsel's argument, when viewed as a whole, conveyed several important messages to the jury. *Id*. at 777. The Colorado Supreme Court concluded it was reasonable for counsel to not put forth an absurd argument, to argue in such a way as to maintain credibility with the jury, to make a strong argument for the inadequate moral justification for the death penalty, and to compare and contrast the culpability of Davis's ex-wife with Davis. *Id*. In its holding, the Colorado Supreme Court noted that counsel was put in a difficult position by the fact that the prosecution had proved six aggravating factors with strong evidence. *Id.* at 777-78. The Colorado Supreme Court held that the closing argument was sound strategy given the circumstances facing counsel. *Id.* at 778.

4. Analysis of Specific Claims

a. Structural Error Resulting from Constructive Deprivation of Right to Counsel at a Critical Stage

Owens contends he was deprived of counsel during the phase two closing argument because King made concessions of guilt and moral culpability without obtaining Owens's consent, resulting in structural error.

As a threshold matter, Owens's argument overlooks *Nixon* and *Spisak* and instead relies on precedent where there was a disagreement between the defendant and counsel on how to defend against the charges. King did not concede Owens's guilt until phase two of the sentencing hearing – after Owens's guilt had already been determined. In addition, although Owens was not consulted about the tactic, he did not present any evidence that he disagreed with King's strategy of conceding guilt and moral culpability. Thus, the precedent cited by Owens is not on point.

Owens's reliance on *Cronic* and *Nixon* to support his argument for structural error is misplaced. Those cases are concerned with safeguarding a defendant's trial rights, including the defendant's right to decide whether to plead guilty. *See Nixon*, 543 U.S. at 187 ("[C]ertain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made from the defendant by a surrogate[,]" including whether to plead guilty). King delivered his phase two closing argument after the jury had found Owens guilty. King's concession of Owens's guilt did not affect Owens's trial rights and was not the equivalent of a guilty plea. *See id*. at 188-89 (defense attorney's concession of the defendant's guilt during opening statement was not the equivalent of a guilty plea because the defendant retained his trial rights despite the concession of his guilt). Moreover, when King characterized Owens's decisions as morally corrupt, he always ended

with the theme that those decisions were impaired. King's use of "morally corrupt" and "morally culpable" were not concessions that relieved the jury of its responsibility to determine Owens's sentence. *See Bergerud*, 223 P.3d at 700-01 (attorney's characterization of crime as horrible, violent, and tragic was not a judicial admission because it did not relieve the prosecution of its burden of proof or foreclose later argument for acquittal).

King's phase two closing argument had to account for Owens's admission to Pinto that he was involved in the Lowry Park shootings, for Owens's denial to Pinto of culpability for the Dayton Street homicides, and for the jury's guilty verdicts. King realized that the jury would not be receptive to him if he questioned its verdicts. King conceded Owens's guilt to retain his credibility with the jury while arguing for a life sentence. *See Davis*, 871 P.2d at 777 (defense counsel cannot be faulted for attempting to maintain credibility with the jury). King's approach was professionally reasonable. *See Nixon*, 543 U.S. at 192 (not ineffective for counsel to try to impress jury with his candor and unwillingness to engage in a charade).

Prejudice is presumed only in those "situations in which counsel has entirely failed to function as the client's advocate." *Id.* at 189. Capital defense counsel's function in the sentencing hearing "is to persuade the trier that his client's life should be spared." *Id.* at 191. King asked the jury to sentence Owens to life in prison throughout his phase two closing argument. King's argument was an effort to save Owens's life based on the mitigation presented. The primary theme of King's argument was that Owens experienced delayed neurological development because of his brain abnormalities, which impaired his decision making. King directly challenged the prosecution's theory concerning why death was appropriate, and he offered the jury numerous reasons to spare Owens's life,

including mitigation and mercy. In fact, King repeatedly asked for the jury's mercy. He asked the jury to have mercy on Owens on behalf of Owens's family even if the jury thought Owens did not deserve mercy. In his rebuttal closing argument, King argued that the prosecution was seeking vengeance, but the jury could choose mercy, hope, and life. Phase Two Tr. 77:6-16 (June 13, 2008 p.m.).

Thus, King continuously argued that Owens's life should be spared. Because King did not "entirely fail[] to function as [Owens's] advocate[,]" it would be legally inappropriate, as well as factually unjustified, for the court to presume that Owens was prejudiced by King's phase two closing argument. *Nixon*, 543 U.S. at 189 (presumption of prejudice is "reserved for situations in which counsel has entirely failed to function as the client's advocate"); *see also Davis*, 871 P.2d at 777 (although counsel's words may have been flamboyant and overdramatic, the argument conveyed important messages to the jury).

b. Violation and Abandonment of Fundamental Duty of Loyalty, Resulting in Actual Conflict of Interest Adversely Affecting Defense

Owens claims King violated his duty of loyalty because King aligned himself with and assisted the prosecution during his phase two closing argument.

An objective assessment of King's closing argument reveals he did not violate his duty of loyalty to Owens. King challenged the prosecution's justification for seeking the death penalty. He told the jury that Hower's argument was designed to cause the jury to sentence Owens to death as vengeance for what Owens had done to the victims. Phase Two Tr. 13:13-19; 77:6-11 (June 13, 2008 p.m.). He later reminded the jury that a decision based on retaliation would not comply with its duty to make a reasoned moral decision as to the appropriate sentence for Owens. *Id.* at 17:14-22; *see also Davis*, 871 P.2d at 777 (counsel's

plea to the jury's moral justification for death penalty was an important message to convey to the jury).

King also argued that the mitigation evidence supported a sentence to life in prison. He explained how Owens's psychological testing, brain imaging, and social history showed he had an impaired brain that delayed his development. Phase Two Tr. 23:1-13; 24:1-7; 25:22-25; 26:20-21; 28:9-13; 31:25; 32:1-6; 39:7-21; 51:1-12 (June 13, 2008 p.m.). King reminded the jury that, according to Waters, Owens functioned like a young child who did not understand the consequences of his actions. *Id*. at 32:14-18; 37:21-24. King made it a point to explain to the jury how the evidence showed Owens, despite having committed multiple murders, did not pose a risk of future dangerousness in prison. *Id.* at 57:4-25; 58:1-18. He noted that the restrictive environment of prison would work well for a person like Owens who has impaired functioning. *Id.* at 60:1-6. King asked the jury several times to extend mercy to Owens by sentencing him to life in prison. *Id*. at 16:20-21; 17:5-13; 20:1-4; 77:13. King reminded the jury more than once that Owens's choices to kill were impaired choices. *Id.* at 19:11-14; 21:8-9.

King testified during the post-conviction hearing that he agonized over his decision to be candid with the jury. There were legitimate reasons for King's candor, namely to maintain the credibility of the trial team, in part by acknowledging the jury's verdicts. And while Owens claims that King conceded his moral culpability, King always tied Owens's moral culpability to his disadvantaged background and impaired decision making in an attempt to persuade the jury to sentence Owens to life in prison. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may

be less culpable than defendants who have no such excuse." (abrogated by *Atkins v. Virginia*, 536 U.S. 304 (2002)).

In summary, King's argument was a continuous effort to convince the jury that the mitigation evidence provided a number of reasons to give Owens a life sentence. King did not abandon his duty of loyalty to Owens. Because King did not violate his duty of loyalty to Owens, the court does not address whether the alleged violation resulted in a conflict of interest.

c. Abandonment of Competent and Effective Advocacy Warranting *Cronic* Presumption of Prejudice

Relying on non-binding Circuit Court opinions, Owens contends King's phase two closing argument nullified the adversarial nature of the sentencing hearing, which resulted in structural error.

The non-binding Circuit Court cases Owens relies on are distinguishable from the instant case because they all address egregious situations where defense counsel's actions resulted in an obvious breakdown of the adversarial system. *See Rickman v. Bell*, 131 F.3d 1150, 1159-1160 (6th Cir. 1997) (finding that the defendant's attorney "succeeded in presenting a terrifying image of [the defendant], and thereby aligned himself with the prosecution against his own client" when the defendant's attorney admitted that he "simply wished to portray his client as vicious and abnormal[,]" continuously displayed personal antagonism toward his client, and elicited evidence detrimental to the client's interests); *United States v. Swanson*, 943 F.2d 1070, 1071 (9th Cir. 1991) (finding that the defendant's attorney lessened the Government's burden of persuading the jury that the defendant was the perpetrator of the bank robbery when the defendant's attorney presented no defense and conceded his client's guilt during closing argument because he did not wish to insult the jury's intelligence); *Osborn v.*

Shillinger, 861 F.2d 612, 628 (10th Cir. 1988) (finding that "the state proceedings were almost totally non-adversarial" when the defendant's attorney did not conduct any investigation or otherwise prepare for the sentencing hearing because his plan was to convince the prosecutor to abandon the death penalty prior to or at the sentencing hearing).

Prejudice is presumed when there is a complete absence of "meaningful adversarial testing" by defense counsel. *Cronic*, 466 U.S. at 659. Owens's trial team called approximately 40 witnesses to testify during phase two of the sentencing hearing. The trial team cross-examined witnesses the prosecution called to rebut Owens's mitigation evidence. King delivered a lengthy phase two closing argument where he responded to Hower's arguments as calls for vengeance. For example, King argued that Hower was attempting to cause the jury to retaliate against Owens for killing Marshall-Fields and Wolfe. The adversarial process was also on full display when King characterized Hower's argument as an effort to dehumanize Owens in order to make it easier for the jury to impose a death sentence. Phase Two Tr. 9:23-25; 10:1-5 (June 13, 2008 p.m.). Thus, an objective assessment of phase two reveals that the adversarial nature of the proceedings was fully functional.

Under these circumstances, there was no breakdown in the adversarial process during King's closing argument, and therefore prejudice will not be presumed. *See Cronic*, 466 U.S. at 659 ("[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."); *Davis*, 871 P.2d at 776-77 (defense counsel's closing remarks that he hated his client as a prelude to asking for mercy is not deficient performance).

d. Counsel's Unauthorized Concessions were Unreasonable and Prejudicial Under *Strickland* and *Nixon*[412]

Owens argues that King was ineffective for failing to discuss the content of his phase two closing argument with Owens.

"An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy" but does not have a duty to obtain the defendant's consent for every tactical decision. *Nixon*, 543 U.S. at 187 (quoting *Strickland*, 466 U.S. at 688).

King did not consult with Owens about the strategy of his phase two closing argument, and he did not obtain Owens's consent before he conceded Owens's guilt. Assuming that King's closing argument strategy was an important decision that required him to consult with Owens, Owens failed to prove that he was prejudiced by King's failure to consult with him. Owens argued in SOPC-163 that he never would have consented to King's strategy, but he did not present any evidence during the post-conviction hearing in support of this argument. Thus, Owens failed to prove that there is a reasonable probability that, but for King's concession of Owens's guilt, the outcome of the sentencing hearing would have been different. *See Strickland*, 466 U.S. at 694 ("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.").

[412] In part V.R.5 of this Order, the court concluded that King did not render ineffective assistance of counsel when he conceded Owens's guilt and moral culpability during his phase two closing argument. Therefore, in this part of the Order, the court's analysis is limited to whether King's failure to consult with Owens and obtain his consent to concede his guilt constitutes ineffective assistance of counsel.

e. Absence of Timely Judicial Determination that Owens Consented to Counsel's Concessions Violated his Rights to Heightened Reliability, Procedural Fairness, and Due Process

Owens asserts that the court was obligated to determine the voluntariness of the concessions King made during his phase two closing argument.

"It is now axiomatic that a defendant in a criminal case is deprived of due process of law if *his conviction* is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession . . . ." *Jackson v. Denno*, 378 U.S. 368, 376 (1964) (emphasis added). Here, King acknowledged the jury's verdicts and conceded Owens's guilt after the jury had convicted Owens of the Dayton Street homicides and found five aggravating factors beyond a reasonable doubt, and while pursuing a penalty phase defense of impaired decision-making capacity. *Cf. Bergerud*, 223 P.3d at 700-01 (defendant's counsel's statements that crime was horrible when pursuing a mental impairment defense did not act as concession of guilt). Because the jury convicted Owens before King conceded Owens's guilt, Owens was not deprived of due process. Owens's only support for the proposition that the trial court was required to hold a hearing is *United States v. Adams*, 422 F.2d 515 (10th Cir. 1970), which does not support the claim. There was no need to determine whether Owens agreed to King's tactical decision, and no need for a hearing to determine whether any such agreement was voluntary.

5. Conclusion

The court concludes Owens failed to prove that King's phase two closing argument was ineffective or resulted in structural error. Accordingly, Owens's petition to vacate his sentence based on King's phase two closing argument is **Denied**.

T. Phase Two Final Sentencing Instructions

1. Failure to Object to and Tendering Improper Instructions

a. Phase Two Final Instruction No. 25

i. Parties' Positions

Owens contends he was prejudiced by Middleton's failure to object to Phase Two Final Instruction No. 25 because it erroneously instructed the jury that it shall impose a death sentence if it was unanimously convinced that death was the appropriate punishment.

The prosecution responds that Owens's argument ignores the admonition in several Phase Two Final Instructions that the jury is never required to impose a death sentence.

ii. Findings of Fact

The jury was instructed three times in the Phase Two Final Instructions that it was never required to impose a death sentence. *See* Phase Two Final Instr. No. 1 ("At the same time, I remind you that none of you individually, nor the jury collectively, is ever required to impose a sentence of death."); Phase Two Final Instr. No. 19 ("Even though you have found the existence of one or more statutory aggravating factors, in addition to your determination of guilt regarding first degree murder, a death sentence is never mandatory or required by law."); Phase Two Final Instr. No. 25 ("Regardless of the findings you have made in steps one, two and three, you do not have to impose a sentence of death. There is never a requirement that you must impose a death sentence in any situation.").

The jury was also instructed that "[i]f all jurors are unanimously convinced, beyond a reasonable doubt, that death is the appropriate punishment in this case, then you shall impose a sentence of death." Phase Two Final Instr. No. 25.

Middleton testified during the post-conviction hearing that he borrowed the language in Phase Two Final Instruction No. 25 from another case. He did not recognize that the instruction was objectionable and thus his failure to object was not the result of a strategic decision.

In Reynolds's opinion, Phase Two Final Instruction No. 25 contradicted the law because it instructed the jury that it was required to sentence Owens to death. Thus, Reynolds opined that Middleton's failure to object constituted deficient performance.

iii. Principles of Law

Colorado law provides that "[t]he jury shall not render a verdict of death unless it unanimously finds and specifies in writing that: (A) At least one aggravating factor has been proved; and (B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved." C.R.S. § 18-1.3-1201(2)(b)(II). "In the event that the jury's verdict is to sentence to death, such verdict shall be unanimous and shall be binding upon the court . . . ." § 18-1.3-1201(2)(c).

To determine "the propriety of a particular jury instruction[,] the instructions should be viewed as a whole." *People v. Riley*, 708 P.2d 1359, 1365 (Colo. 1985). In *Dunlap v. People*, 173 P.3d 1054, 1089 (Colo. 2007), the defendant claimed the trial court erred when it instructed the jury that "[i]f one or more jurors finds that life imprisonment is the appropriate penalty, then the result is a sentence of life imprisonment." In the same instruction, the jury was told that "[i]f all jurors are unanimously convinced, beyond a reasonable doubt, that death is the appropriate punishment in this case, then you shall return a verdict imposing a sentence of death." 173 P.3d at 1089. The jury was also instructed that it never had to impose a sentence of death and that it could not impose a sentence of death unless it was

unanimously convinced beyond a reasonable doubt that death was the appropriate punishment. *Id.* at 1090. The Colorado Supreme Court read the instructions as a whole and concluded the instructions were not erroneous. *Id.*

The United States Supreme Court considered the propriety of instructing the jury that it shall impose a sentence of death in certain circumstances:

> If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall impose* a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you *shall impose* a sentence of confinement in the state prison for life without the possibility of parole.

Boyde v. California, 494 U.S. 370, 374 (1990) (emphasis in original). The United States Supreme Court approved of this instruction because it did not interfere with the jury's consideration of the mitigating evidence. *Id.* at 377.

iv. Analysis

Owens's first contention is that Phase Two Final Instruction No. 25 required the jury to sentence Owens to death if it was unanimously convinced beyond a reasonable doubt that death was the appropriate punishment. Instructions with such mandatory language are not *per se* erroneous. *See id*. (approving of instruction that jury shall impose death sentence in certain circumstances). In this case, the jury was instructed that "[i]f all jurors are unanimously convinced, beyond a reasonable doubt, that death is the appropriate punishment in this case, *then you shall impose a sentence of death*." Phase Two Final Instr. No. 25 (emphasis added). In *Dunlap*, the jury was instructed similarly: "[i]f all jurors are unanimously convinced, beyond a reasonable doubt, that death is the appropriate punishment in this case, *then you shall return a verdict imposing a sentence of death*." 173 P.3d at 1089 (emphasis added). There is no substantive difference

between the instruction in this case and the instruction in *Dunlap*, which the Colorado Supreme Court approved.

Moreover, as in *Dunlap*, the jury in this case was repeatedly instructed that it was never required to impose a death sentence. *See* Phase Two Final Instr. Nos. 1, 19, and 25. The jury was also instructed that it could not impose a death sentence unless all of the jurors were unanimously convinced beyond a reasonable doubt that death was the appropriate punishment. *See* Phase Two Final Instr. No. 25. When considered as a whole, the Phase Two Final Instructions were not erroneous. Thus, Middleton's failure to object did not fall outside of the wide range of professionally competent assistance. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984) (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

Owens's second contention is that Phase Two Final Instruction No. 25 was contrary to Colorado law because § 18-1.3-1201(2)(b)-(c) does not preclude a juror from having mercy on the defendant after the juror concludes that death was the appropriate punishment. In essence, Owens argues there is a permissive fifth step to Colorado's death penalty statute, which allows a juror who has concluded that death is the appropriate punishment to have mercy on the defendant and determine that life in prison is the appropriate punishment. There is no legal authority supporting Owens's theoretical fifth step. Under the existing statutory scheme, mercy is considered as part of the fourth step. Thus, Middleton's performance with respect to Phase Two Final Instruction No. 25 was within the wide range of professionally competent assistance. *See id*. (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

v. Conclusion

The court concludes Middleton's performance on Phase Two Final Instruction No. 25 fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove that he was prejudiced by Middleton's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on Middleton's handling of Phase Two Final Instruction No. 25 is **Denied**.

b. Phase Two Final Instruction No. 9

i. Parties' Positions

Owens contends he was prejudiced when Middleton proposed Phase Two Final Instruction No. 9 because it impeded the jury's consideration of mitigation evidence, imposed a burden on the defense, and misstated the law.

The prosecution responds that the stock instruction regarding the legal distinction between direct and circumstantial evidence did not impede the jury's consideration of mitigation evidence.

ii. Findings of Fact

The jury was instructed that there are two types of evidence. "One is direct evidence. The other is circumstantial evidence, that is, the proof of facts from which other facts may reasonably be inferred. The law makes no distinction between direct and circumstantial evidence." Phase Two Final Instr. No. 9.

Four of the Phase Two Final Instructions instructed the jury that Owens was not subject to any burden of proof. *See* Phase Two Final Instr. No. 8 ("You are instructed that the presentation of any evidence by the accused never puts any burden of proving or disproving any fact or circumstance on the accused. Sir Mario Owens does not have any burden of convincing you that life in prison is the appropriate punishment, or that death is not the appropriate punishment."); Phase

Two Final Instr. No. 19 ("There is no burden on Mr. Owens to prove the existence of any mitigating factor(s) to any degree of certainty."); Phase Two Final Instr. No. 20 ("There is no burden of proof as to mitigating factors. In steps three and four, there is no burden of proof on any party."); Phase Two Final Instr. No. 21 ("There is no burden of proof as to mitigating factors.").

Middleton testified during the post-conviction hearing that he did not consider Phase Two Final Instruction No. 9 as an exclusionary instruction that precluded the jury from considering mitigation evidence.

iii. Analysis

Owens's first contention is that Phase Two Final Instruction No. 9 prevented the jury from considering a proven fact unless it could draw a reasonable inference from that proven fact. The effect of the language in Phase Two Final Instruction No. 9 was that the jury could consider proven facts and facts that could be reasonably inferred from the proven facts. Because it did not preclude the jury from considering any proven facts or any of Owens's mitigation evidence, Middleton's performance concerning Phase Two Final Instruction No. 9 was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

Owens's second contention is that Phase Two Final Instruction No. 9 imposed a burden of proof on him. Four of the Phase Two Final Instructions conveyed to the jury that Owens was not subject to a burden of proof. *See* Phase Two Final Instr. Nos. 8, 19, 20, and 21. When the instructions are read as a whole, Phase Two Final Instruction No. 9 was not erroneous, and Middleton's performance concerning Phase Two Final Instruction No. 9 was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The

defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

As to Owens's argument that Phase Two Final Instruction No. 9 misstated the law, the court incorporates part V.L.1.b.i of this Order as though fully set forth herein.

iv. Conclusion

The court concludes Middleton's performance with respect to Phase Two Final Instruction No. 9 fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove that he was prejudiced by Middleton's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on Middleton's handling of Phase Two Final Instruction No. 6 is **Denied**.

c. Phase Two Final Instruction No. 13[413]

d. Phase Two Final Instruction No. 16[414]

e. Phase Two Final Instruction No. 17[415]

f. Phase Two Final Instruction No. 19

i. Arbitrarily Restricted the Jury's Consideration of Mitigation Evidence[416]

ii. Permitted the Jury to Use Aggravating Factors as a Presumption Favoring Death

(a) Parties' Positions

Owens contends Phase Two Final Instruction No. 19 permitted the jury to view proof of the statutory aggravating factors as creating a presumption in favor of death.

The prosecution responds that Owens's argument is based on an assumption that the jury interpreted Phase Two Final Instruction No. 19 as creating a presumption in favor of death without any legal or factual support.

(b) Findings of Fact

At the end of phase two, the jury was instructed that "[e]ven though you have found the existence of one or more statutory aggravating factors, in addition to your determination of guilt regarding first degree murder, a death sentence is never mandatory or required by law." Phase Two Final Instr. No. 19. The remainder of Phase Two Final Instruction No. 19 described steps two, three, and four of the sentencing hearing process.

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[413] Owens withdrew this claim in SOPC-293.
[414] Owens withdrew this claim in SOPC-293.
[415] Owens withdrew this claim in SOPC-293.
[416] Owens withdrew this claim. *See* PC Hrg Tr. 58:22-25; 59:1-25; 60:1-6 (Nov. 21, 2014).

(c) Analysis

Phase Two Final Instruction No. 19 informed the jury of its responsibilities for its phase two deliberations. The language that "a death sentence is never mandatory or required by law" did not create a presumption in favor of death. Rather, it prevented the jury from assuming there was a presumption in favor of death.

iii. Violated Equal Protection and Denied Owens Fundamental Fairness

(a) Parties' Positions

Owens contends his equal protection rights were violated because he was deprived of his statutory right to written findings on the aggravating and mitigating factors as a result of his choice to stand trial by jury rather than by judge.

The prosecution responds that neither the death penalty statute nor the constitution requires the jury to make written findings concerning the existence of aggravating or mitigating factors.

(b) Findings of Fact

The Phase Two Final Instructions did not require the jury to make detailed findings of fact as to the aggravating and mitigating factors.

Middleton testified during the post-conviction hearing that he considered asking the court to require each juror to make written findings on the mitigating factors but decided against it because he did not want each juror to have to articulate what mitigation s/he found existed.

Reynolds faulted Middleton for failing to object to the language in Phase Two Final Instruction No. 19 that allowed the jurors to determine whether mitigation existed. In Reynolds's opinion, mitigation exists once it is presented, and the jury is required to give it full consideration and effect.

(c) Analysis

For the reasons stated in part V.P.3 of this Order, Phase Two Final Instruction No. 19 did not violate Owens's equal protection rights. Moreover, Middleton's decision not to ask the court to require the jury to make findings concerning what mitigation existed was reasonable.

iv. Confusing and Misleading, Encouraged Arbitrary Decision Making at Step Three, and Violated C.R.S. § 18-1.3-1201[417]

(a) Parties' Positions

Owens contends Phase Two Final Instruction No. 19 promoted arbitrary decision making and violated Colorado's death penalty statute by instructing the jury to consider the weight of the aggravating factors and mitigating factors instead of the number of the aggravating and mitigating factors.

The prosecution responds that Owens cites no legal support for his position.

(b) Findings of Fact

The jury was instructed that "[e]ach juror may assign any weight he/she wishes to each aggravating or mitigating factor. It is the weight assigned to each factor and not the number of factors found to exist that is considered." Phase Two Final Instr. No. 19.

Middleton testified during the post-conviction hearing that his intent with the language in Phase Two Final Instruction No. 19 was to allow each juror the opportunity to find that only one mitigating factor was sufficient to outweigh all of the aggravating factors.

[417] Owens withdrew a portion of this claim in SOPC-276.

(c) Analysis

Instructing the jury not to consider the number of aggravating factors and mitigating factors does not violate the death penalty statute. The instruction was appropriate in order to prevent the jury from arbitrarily concluding that death was the appropriate punishment because there were more aggravating factors than mitigating factors.

Owens also contends Phase Two Final Instruction No. 19 unreasonably pressured individual jurors by incorporating a statutory directive to the court. The jury was instructed: "[i]f one or more jurors are not convinced beyond a reasonable doubt that the mitigating factor(s) do not outweigh the statutory aggravating factors, then the result is a sentence of life in prison without possibility of parole." Phase Two Final Instr. No. 19. According to *People v. Drake*, 748 P.2d 1237, 1254 (Colo. 1988), a trial court commits reversible error when it fails to adequately inform the jury of the effect that its decisions concerning the aggravating and mitigating factors have on punishment. Thus, it was proper for the jury to be instructed that Owens would be sentenced to life in prison if one or more jurors were not convinced that the mitigating factors did not outweigh the aggravating factors.

v. Conclusion

The court concludes Middleton's performance with respect to Phase Two Final Instruction No. 19 fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove that he was prejudiced by Middleton's alleged deficient performance regarding Phase Two Final Instruction No. 19. Accordingly, Owens's petition to vacate his sentence based on Middleton's handling of Phase Two Final Instruction No. 19 is **Denied**.

g. Phase Two Final Instruction No. 3[418]

h. Phase Two Final Instruction No. 6

i. Parties' Positions

Owens contends he was prejudiced by Middleton's failure to object to Phase Two Final Instruction No. 6 because it required the jury to reject defense arguments that the death penalty was sought for vengeance.

The prosecution responds that Owens provides no legal support for his argument and that the prosecution's motivation to seek the death penalty is irrelevant in a death penalty sentencing hearing.

ii. Findings of Fact

The jury was instructed not to consider the fact that the prosecution sought the death penalty against Owens.

> You are instructed that the fact that the death penalty is sought in this case is entitled to no weight whatsoever in your decisions. No juror should allow himself or herself to be influenced or prejudiced against Sir Mario Owens because of the fact that the death penalty is being sought.

Phase Two Final Instr. No. 6.

During his phase two closing argument, King argued that sentencing Owens to death was not necessary and that vengeance was not an appropriate reason to sentence him to death:

> Death penalty is a penalty of last resort. The death penalty is to be imposed when it is necessary to impose the death penalty. There may be cases out there where the death penalty is necessary. But it is certainly not necessary in this case. And it serves no other purpose other than vengeance.

[418] Owens withdrew this claim. *See* PC Hrg Tr. 97:5-9 (Nov. 21, 2014).

> All of Mr. Hower's arguments boil down to vengeance. You killed so we are going to kill you. And that's not an appropriate reason to execute somebody.

Phase Two Tr. 13:11-19 (June 13, 2008 p.m.).

Middleton testified during the post-conviction hearing that he tendered Phase Two Final Instruction No. 6 because he viewed the prosecution's decision to seek the death penalty as the equivalent of the prosecution's decision to file charges. In Middleton's opinion, the prosecution's charging and sentencing decisions are not relevant to the jury's deliberations.

iii. Analysis

Phase Two Final Instruction No. 6 instructed the jury not to consider the prosecution's decision to pursue the death penalty in this case. It did not preclude the jury from considering King's argument that the only purpose of a death sentence is vengeance. The prosecution's reasons for pursuing a death sentence are different from the purposes a death sentence might serve, and Instruction No. 6 only addressed the former. Because Phase Two Final Instruction No. 6 did not require the jury to reject King's argument and because the prosecution's decision to seek the death penalty was not relevant, Middleton's lack of objection was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

iv. Conclusion

The court concludes Middleton's performance concerning Phase Two Final Instruction No. 6 was within the wide range of professionally competent assistance. The court also concludes Owens failed to prove that he was prejudiced by Middleton's alleged deficient performance. Accordingly, Owens's petition to

vacate his sentence based on Middleton's handling of Phase Two Final Instruction No. 6 is **Denied**.

i. Phase Two Final Instruction No. 15[419]

2. Mitigation Instructions

a. Phase Two Final Instruction No. 21

i. Parties' Positions

Owens contends he was prejudiced when Middleton proposed Phase Two Final Instruction No. 21 because one of the mitigating factors was inconsistent with King's phase two closing argument that Owens knew right from wrong.

The prosecution responds that the mitigation listed in Phase Two Final Instruction Nos. 21 and 22 concerning Owens's mental impairment were not inconsistent with King's argument.

ii. Findings of Fact

Owens endorsed the statutory mitigating factor in § 18-1.3-1201(4)(b) about his capacity to appreciate the wrongfulness of his conduct:

> Sir Mario Owens' capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

Phase Two Final Instr. No. 21. The jury was also required to consider numerous mitigating circumstances endorsed by Owens, including that "[a]lthough a person such as Sir Mario Owens knows right from wrong, he may suffer from risk factors that could diminish his control or lead him to make poor or impaired choices or decisions." Phase Two Final Instr. No. 22. King argued to the jury after phase two that Owens knew right from wrong but suffered from impaired decision making as

[419] Owens withdrew this claim. *See* PC Hrg Tr. 99:22-25; 100:1-3 (Nov. 21, 2014).

a result of his upbringing and delayed neurological development. *See generally* Phase Two Tr. 6-67; 75-77 (June 13, 2008 p.m.).

Middleton testified during the post-conviction hearing that he did not consider the risk that a juror might reject the evidence of Owens's impaired decision making because no expert testified that Owens was significantly impaired.

iii. Analysis

Owens's first contention is that King's phase two closing argument was inconsistent with the mitigating factor that Owens's capacity to appreciate the wrongfulness of his conduct was significantly impaired. While King did not specifically argue that Owens's capacity to appreciate the wrongfulness of his conduct was significantly impaired, he discussed at length what contributed to Owens's impaired decision making. King focused on Owens's delayed neurological development and argued that it prevented him from considering the consequences of his actions and from making reasoned decisions. Because King's argument was not inconsistent with the jury instruction, it was not deficient for Middleton to propose Phase Two Final Instruction No. 21. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

Owens's second contention is that Phase Two Final Instruction No. 21 prevented the jury from considering evidence of Owens's impaired decision making because there was no evidence that his decision making was significantly impaired. Phase Two Final Instruction Nos. 21 and 22 required the jury to consider all of the mitigation endorsed by Owens, including that "he may suffer from risk factors that could diminish his control or lead him to make poor or impaired choices or decisions." Phase Two Final Instr. No. 22. When read as a whole, those instructions did not cause the jury to reject Owens's mitigation

evidence. Thus, Middleton's performance concerning this phase two jury instruction fell within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

iv. Conclusion

The court concludes Middleton's tendering of Phase Two Final Instruction No. 21 was within the wide range of professionally competent assistance. The court also concludes Owens failed to prove that he was prejudiced by Middleton's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on Middleton's handling of Phase Two Final Instruction No. 21 is **Denied**.

b. Phase Two Final Instruction No. 22

i. Parties' Positions

Owens contends he was prejudiced when Middleton proposed Phase Two Final Instruction No. 22, which listed 61 non-statutory mitigating circumstances, because the mitigating circumstances were contradictory.

The prosecution responds that Phase Two Final Instruction No. 22 accurately reflected the mitigating circumstances evidence.

ii. Findings of Fact

Due to the length of Phase Two Final Instruction No. 22, the court incorporates it by reference as though fully set forth herein.

Middleton testified during the post-conviction hearing that he did not view the mitigating circumstances as contradictory. He testified that the trial team's approach to the mitigation presentation was to show that Owens experienced a turbulent environment when he lived in Louisiana but had a supportive family

there whereas when he moved to Colorado the turbulent environment overcame his familial support. Middleton's intent of listing the various mitigating circumstances in Phase Two Final Instruction No. 22 was to appeal to the different perspectives of the individual jurors.

iii. Analysis

Owens's first argument is that Middleton performed deficiently for connecting Owens's age to his brain development in the first mitigating circumstance because making that connection prevented the jury from considering Owens's age as an independent mitigating circumstance. Owens's age was listed as a separate statutory mitigating factor in Phase Two Final Instruction No. 21, which the jury was instructed it must consider. Thus, the jury was not precluded from considering Owens's age independent from his brain development.[420]

Owens's second argument is that Phase Two Final Instruction No. 22 prompted the prosecution to argue that Owens was not remorseful. In light of the facts of these cases, the prosecution would have argued that Owens's actions following the Lowry Park shootings and Dayton Street homicides indicated a lack of remorse regardless of the mitigating circumstances instruction. Due to the nature of the evidence, Middleton could not have prevented the prosecution from arguing that Owens lacked remorse.

Owens's third argument is that the jury was precluded from considering each of the nine risk factors that were identified as having interfered with Owens's decision making as independent mitigating circumstances. Each of the nine circumstances was more thoroughly described as a separately enumerated mitigating circumstance in Phase Two Final Instruction No. 22. When read as a

[420] Contrary to Owens's argument, there is no legal requirement for the jury to be instructed concerning the constitutional prohibition against executing minors.

whole, Phase Two Final Instruction No. 22 did not restrict the jury's consideration of mitigation evidence.

Owens's fourth argument is that Phase Two Final Instruction No. 22 was contradictory because it presented two categories of mitigation evidence that negated each other. One category was that Owens was a good person who was raised with positive familial support. Another category was that Owens's dysfunctional family led him to criminal activity. According to Owens, presenting mitigation in this fashion reduced the jury's sentencing determination to whether Owens could revert to the law-abiding and religious person he was in his youth. Owens's trial team's strategy of presenting all of the evidence that it perceived as mitigation, and thus establishing a reason for any juror give Owens a life sentence, was reasonable.

For the reasons stated above, Middleton's performance concerning Phase Two Final Instruction No. 22 was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

iv. Conclusion

The court concludes Middleton's performance with respect to Phase Two Final Instruction No. 22 fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove he was prejudiced by Middleton's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on Middleton's handling of Phase Two Final Instruction No. 22 is **Denied**.

3. Instructions Restricting Consideration of Mercy

a. Phase Two Final Instruction Nos. 17, 21, and 23

i. Parties' Positions

Owens contends he was prejudiced when Middleton proposed Phase Two Final Instruction Nos. 17, 21, and 23 because those instructions unduly restricted the jury's consideration of mercy to its consideration of mitigation as opposed to presenting mercy as a stand-alone reason for a life sentence.

The prosecution responds that the Phase Two Final Instructions did not unduly restrict the jury's consideration of mercy because the law requires that mercy be based on mitigation.

ii. Findings of Fact

Three of the Phase Two Final Jury Instructions addressed the role that mercy played in the jury's phase two deliberations and sentencing determination. First, Phase Two Final Instruction No. 17 instructed the jury that it "may consider mercy for Sir Mario Owens in this case." Second, Phase Two Final Instruction No. 21 instructed the jury that:

> Mitigating factors are circumstances which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or which in any other way, alone or together with other such circumstances, may support for any individual juror a penalty of life imprisonment instead of the death penalty.

Third, Phase Two Final Instruction No. 23 instructed the jury that it was "permitted to use mercy for Sir Mario Owens in deciding what weight to give each mitigating factor."

Middleton testified during the post-conviction hearing that while he recognized mercy had to be based on the evidence, his intent was to insert mercy

into the jury instructions whenever possible. He attempted to construct language that allowed the jury to consider mercy for purposes of mitigation, weighing, and selection. He specifically tendered Phase Two Final Instruction 17, which instructed in general terms that the jury "may consider mercy for Sir Mario Owens in this case" because he did not want to restrict the jury's consideration of mercy during its phase two deliberations. He recalled that he convinced the court to add mercy to Phase Two Final Instruction Nos. 21 and 23.

Reynolds opined that Middleton's proposed instructions were improper because they limited the jury's consideration of mercy to eligibility and did not specifically instruct the jury to consider mercy in selecting the appropriate sentence.

iii. Principles of Law

The United States Supreme Court considered the propriety of a jury instruction that was similar to Phase Two Final Instruction No. 21. In *Kansas v. Marsh*, 548 U.S. 163, 176 (2006), the trial court instructed the jury that:

> A mitigating circumstance is that which in fairness or mercy may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, although it does not justify or excuse the offense. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case.
>
> The appropriateness of the exercise of mercy can itself be a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted.

The United States Supreme Court approved of the instruction because it did not prevent the jury from considering mitigation evidence. *Marsh*, 548 U.S. at 177.

iv. Analysis

Owens's first contention is that the Phase Two Final Jury Instructions restricted the jury's consideration of mercy to the eligibility stage and thereby foreclosed the jury's consideration of mercy during the selection stage. Because the jury was instructed in Phase Two Final Instruction No. 17 that it "may consider mercy for Sir Mario Owens in this case[,]" the jury had the opportunity to consider mercy during its phase two deliberations, including for purposes of deciding the appropriate punishment. Middleton persuaded the court to add mercy to Phase Two Final Instruction Nos. 21 and 23. Thus, Middleton's performance with respect to addressing mercy was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

Owens's second contention is that linking mercy to fairness in Phase Two Final Instruction No. 21 was erroneous because mercy is not always fair. The trial court's instruction in *Marsh* linked mercy to fairness in the same way that Phase Two Final Instruction No. 21 did in this case. Because the United States Supreme Court approved of the instruction in *Marsh*, the court cannot fault Middleton for tendering that instruction in this case. *See id*. (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

v. Conclusion

The court concludes Middleton's performance with respect to Phase Two Final Instructions No. 17, 21, and 23 fell within the wide range of professionally competent assistance. The court also concludes Owens failed to prove that he was prejudiced by Middleton's alleged deficient performance. Accordingly, Owens's

petition to vacate his sentence based on Middleton's handling of mercy in the Phase Two Final Instructions is **Denied**.

4. Instructions Directing Verdict on Aggravating Circumstances

a. Parties' Positions

Owens contends he was prejudiced by Middleton's failure to object to Phase Two Final Instruction Nos. 26 and 27, which described the prosecution's step four evidence as aggravating yet did not require the jury to determine if the circumstances were actually aggravating.

The prosecution responds that the court instructed the jury five times throughout the Phase Two Final Instructions that it, as the fact finder, would decide what was or was not the evidence.

b. Findings of Fact

Phase Two Final Jury Instruction Nos. 26 and 27 described the prosecution's step four evidence as aggravating circumstances evidence. Specifically, Phase Two Final Instruction No. 26 defined aggravating circumstances evidence as "evidence that is unfavorable to the defendant but does not relate to an aggravating factor in step one." Middleton objected to the introduction of aggravating circumstances evidence but did not object to the characterization of that evidence as aggravating.

Middleton testified during the post-conviction hearing that he did not review Phase Two Final Instruction No. 27 for the purpose of confirming that the evidence was aggravating in nature.

Reynolds opined that Middleton's failure to object to Phase Two Final Instruction Nos. 26 and 27 was deficient because the jury is allowed to consider the step four evidence as aggravating or mitigating. She also opined that Middleton should have objected to Owens's drug possession charge, his tattoo, and his

minimal past employment because it was not relevant to the jury's sentencing determination.

c. Principles of Law

The jury in a capital sentencing hearing must be able to consider "[a]ll admissible evidence presented by either the prosecuting attorney or the defendant that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant." § 18-1.3-1201(1)(b).

"Statutory aggravators are those factors the General Assembly has identified as weighing in favor of imposition of the death penalty." *People v. Dunlap*, 975 P.2d 723, 739 (Colo. 1999). Statutory aggravating factors "circumscribe the class of persons eligible for the death penalty." *Id.* (quoting *Zant v. Stephens*, 462 U.S. 862, 878 (1983)).

"Other aggravating evidence is evidence that is unfavorable to the defendant, but that does not relate to a statutory aggravator." *Id.* "'[T]he Constitution does not require the jury to ignore other possible aggravating [circumstances] in the process of selecting, from among that class, those defendants who will actually be sentenced to death.'" *Id.* (quoting *Zant*, 462 U.S. at 878).

d. Analysis

Phase Two Final Instruction Nos. 26 and 27 comported with *Dunlap*'s definition of aggravating circumstances evidence as "evidence that is unfavorable to the defendant, but that does not relate to a statutory aggravator." *Id*. The prosecution's step four evidence was by its nature aggravating and therefore relevant to the jury's sentencing determination. Evidence that Owens was charged with distribution of drugs, had a particular tattoo, and was minimally employed was relevant to Owens's character, history, and background, and was therefore properly considered by the jury as aggravating circumstances evidence. Because

Middleton attempted to preclude all aggravating circumstances evidence and because Phase Two Final Instruction Nos. 26 and 27 were proper, Middleton's performance was within the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

e. Conclusion

The court concludes Middleton's performance concerning Phase Two Final Instruction Nos. 26 and 27 was within the wide range of professionally competent assistance. The court also concludes Owens failed to prove that he was prejudiced by Middleton's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on Middleton's handling of Phase Two Final Instruction Nos. 26 and 27 is **Denied**.

5. Failure to Request Necessary Instructions

a. Failure to Preclude Jury's Use of Lowry Park Victim Impact Evidence

i. Parties' Positions

Owens contends he was prejudiced by Middleton's failure to request an instruction that precluded the jury's consideration of victim impact evidence from the Lowry Park shootings during the Dayton Street homicides sentencing hearing.

The prosecution responds that the decision not to propose an instruction precluding the jury's use of victim impact evidence from the guilt phase concerning the murder of Vann in the Dayton Street homicides sentencing hearing was sound trial strategy.

ii. Findings of Fact

Middleton filed a pretrial motion seeking to preclude all victim impact evidence of the Lowry Park shootings. The motion was granted.

The guilt phase in the Dayton Street case spanned five weeks. Bell testified during the guilt phase about Vann's character. He testified that Vann was going to school, working two jobs, and in the music business. Guilt Phase Tr. 8-10 (Apr. 10, 2008 p.m.). According to Bell, Vann was a peaceful person who had a lot of friends, including his long-time friend Marshall-Fields. *Id.* at 11. Bell also testified about seeing his mother crying after Vann was shot at Lowry Park. *Id.* at 37:23. Later in the guilt phase, Fields testified that Marshall-Fields was saddened over the fact of witnessing Vann's murder. Guilt Phase Tr. 11:18-19 (Apr. 25, 2008 a.m.).

When Bell testified as to what Middleton perceived as victim-impact evidence, Middleton prompted King to object, and wrote a note reflecting that. SOPC.EX.D-1522A. King decided not to object.

The jury was instructed to consider all of the evidence presented during the guilt phase in its phase one and phase two deliberations. Phase One Final Instr. No. 6; Phase Two Final Instr. No. 10.

The jury was also instructed that "[t]he law requires that your decisions not be the result of mere sympathy, passion, bias, prejudice, conjecture or any other irrational or arbitrary emotional response." Phase Two Final Instr. Nos. 17 and 28.

Middleton testified during the post-conviction hearing that he could not recall whether he contemplated submitting an instruction to limit the purpose of the Lowry Park victim impact evidence.

Reynolds opined that Middleton performed deficiently by failing to request a phase two jury instruction limiting the jury's consideration of the victim impact

testimony given during the guilt phase because victim impact evidence of the Lowry Park shootings was irrelevant to the jury's sentencing determination.

iii. Principles of Law

"Evidence regarding the impact of a capital defendant's prior crimes on the victims of those crimes . . . is not admissible because it is not relevant to the actual harm caused by the defendant as a result of the homicide for which he is being sentenced." *Dunlap*, 975 P.2d at 745.

iv. Analysis

Because it was not proper under *Dunlap* for the jury to consider the victim-impact evidence of the Lowry Park shootings while deciding Owens's punishment, Owens's trial team should have considered asking for a limiting instruction concerning Bell's and Fields's testimony. *See id*. (victim-impact evidence of prior crime is not relevant to sentencing determination). And absent a tactical reason not to seek such an instruction, such as not wanting to remind the jury of Bell's and Fields's testimony, such an instruction should have been requested. But Owens was not prejudiced by his trial team's failure to request a limiting instruction. The victim impact testimony filled less than 10 pages of transcript during a guilt phase that lasted five weeks. No particular emphasis was placed on that testimony, and it was not a theme of the prosecution's case-in-chief or of the prosecution's phase two closing argument. Given the vast amount of evidence the jury had before it, there is no reasonable probability that, but for the trial team's failure to request a limiting instruction, the outcome of the sentencing hearing would have been different. *See Strickland*, 466 U.S. at 694 ("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.").

v. Conclusion

The court concludes Owens failed to prove he was prejudiced by his trial team's failure to request an instruction that would have precluded the jury from considering the Lowry Park victim impact evidence during its sentencing hearing deliberations. Accordingly, Owens's petition to vacate his sentence based on his trial team's failure to request a limiting instruction is **Denied**.

b. Failure to Ensure Verdict Complying with Colorado Law

i. Parties' Positions

Owens contends he was prejudiced by his trial team's failure to propose an instruction informing the jury that a death sentence may not be imposed where there is a close issue concerning the identity of the defendant or where new evidence could someday reveal that the wrong person had been convicted.

The prosecution responds that there is no constitutional or statutory requirement to instruct the jury concerning the Colorado Supreme Court's independent review of all death sentences.

ii. Findings of Fact

The jury was instructed to "assume that the penalty of death will be carried out if you vote to impose it." Phase Two Final Instr. No. 32. The jury was not instructed that the Colorado Supreme Court independently reviews the propriety of all death sentences.

Middleton testified during the post-conviction hearing that he was familiar with the Colorado Supreme Court's independent review but did not contemplate instructing the jury about the independent review.

iii. Principles of Law

The Colorado Supreme Court automatically and independently reviews all death sentences, "having regard to the nature of the offense, the character and

record of the offender, the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based." § 18-1.3-1201(6)(a). Pursuant to the public interest in a death sentence, the Colorado Supreme Court will vacate the death sentence if "there is a close issue concerning the identity of the murderer or . . . [if] new evidence someday could reveal that the wrong person has been convicted." *People v. Harlan*, 8 P.3d 448, 499 (Colo. 2000), *overruled on other grounds by People v. Miller*, 113 P.3d 743 (Colo. 2005).

The Colorado Supreme Court has vacated a defendant's death sentence based on the trial court's failure to clearly and unambiguously instruct the jury that it was "the sole arbiter of whether a sentence of death should be imposed upon the defendant." *Drake*, 748 P.2d at 1257.

iv. Analysis

Harlan did not suggest that trial courts must instruct the jury concerning the Colorado Supreme Court's mandatory review of all death sentences, and Owens does not cite any binding legal authority that supports his proposition. Instructing the jury about the Colorado Supreme Court's independent review is inconsistent with instructing the jury that the death sentence would be imposed if the jury voted to impose a death sentence. *See id.* (trial court must instruct jury that it is sole arbiter of the defendant's sentence). Because there is no binding legal authority requiring the court to instruct the jury concerning the Colorado Supreme Court's independent review, Owens's trial team cannot be faulted for failing to request such an instruction. *See Strickland*, 466 U.S. at 690 (The defendant must show that "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.").

v. Conclusion

The court concludes the trial team's decision not to request an instruction about the Colorado Supreme Court's independent review was within the wide range of professionally competent assistance. The court also concludes Owens failed to prove that he was prejudiced by his team's alleged deficient performance. Accordingly, Owens's petition to vacate his sentence based on the trial team's failure to request an instruction about the Colorado Supreme Court's independent review is **Denied**.

U. Cumulative Ineffective Assistance

1. Parties' Positions

Owens argues that when viewed cumulatively, counsel's errors and omissions were constitutionally inadequate and prejudicial.

The prosecution responds that this argument cannot be addressed until the conclusion of the hearing, and if the claims are denied, then there can be no cumulative error.

2. Findings of Fact

The court incorporates the entire ineffective assistance of counsel section in part V of this Order as though fully set forth herein.

3. Principles of Law

Courts are largely divided on the issue of whether cumulative prejudice applies when conducting an analysis under *Strickland v. Washington*, 466 U.S. 668 (1984). This conflict is demonstrated by the different approaches that the Circuit Courts have taken on *habeas* review. *Compare Richards v. Quarterman*, 566 F.3d 553, 571-72 (5th Cir. 2009) (applying the cumulative effect of counsel's inadequate performance in *Strickland* analysis), *and Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005) (quoting the Seventh Circuit in *Kubat v. Thieret*, 867 F.2d

351, 370 (7th Cir. 1989), for the proposition that "*Strickland* clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced."), *with Kennedy v. Kemna*, 666 F.3d 472, 485 (8th Cir. 2012) (finding that precedent foreclosed the claim of cumulative prejudice in *Strickland* analysis), *and Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005) (holding that "post-AEDPA, not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief").

The law regarding cumulative prejudice is not clearly established in Colorado. In *People v. Gandiaga*, 70 P.3d 523 (Colo. App. 2002), the Colorado Court of Appeals relied on the Ninth Circuit case of *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978), to address the issue of cumulative prejudice. In *Gandiaga*, the Colorado Court of Appeals stated that "[w]hile prejudice may result from the cumulative impact of multiple attorney errors, . . . we conclude that the assumed or actual errors of counsel here were neither so numerous nor so prejudicial as to have deprived defendant of a fair trial." 70 P.3d at 529.

Similarly, the defendants in both *People v. Walton*, 167 P.3d 163 (Colo. App. 2007), and *Dunlap v. People*, 173 P.3d 1054 (Colo. 2007), sought to have the Colorado Court of Appeals and the Colorado Supreme Court, respectively, apply a cumulative prejudice standard. Due to the absence of successful claims, neither court applied a cumulative prejudice standard. *Dunlap*, 173 P.3d at 1081 ("Because we have found that none of the cited actions by trial counsel fell below an objective standard of reasonableness, we need not reach the argument that they were cumulatively prejudicial."); *Walton*, 167 P.3d at 169 ("Because we rejected all but one of defendant's ineffective assistance claims, there are not multiple errors to compound. Thus, defendant can be awarded no relief on the basis of cumulative error.").

4. Analysis

Owens cites federal case law and the *dicta* from *Walton* in support of his argument. *Walton* has never been cited as holding that a convicted defendant can obtain reversal of his conviction based on ineffective assistance with prejudice being established by more than one unprofessional error.

Additionally, while *Gandiaga* may support Owens's argument for applying cumulative prejudice in Colorado, that case relies on the Ninth Circuit and has not been cited by the Colorado Supreme Court for the proposition that cumulative prejudice applies in Colorado.

But this court ultimately has an obligation to assess whether Owens's conviction and sentence were constitutionally deficient. To prove constitutional deficiency, Owens must demonstrate prejudice. Thus, if requested, it might be considered appropriate for a Crim. P. 32.2 court to conduct a cumulative *Strickland* analysis. This court has viewed both the guilt phase and sentencing hearing and has considered the cumulative prejudice of all of the matters discussed in this Order. The court has concluded that Owens received a fair trial – one whose result is reliable. He also received a fair sentencing hearing – one whose result was constitutionally obtained, is justified in law, and is rationally based upon the evidence.

5. Conclusion

Accordingly, Owens's petition to vacate his conviction and sentence based on cumulative prejudice is **Denied**.

VI. Cumulative *Strickland-Brady* Prejudice

A. Parties' Positions

Owens contends he is entitled to a new trial and sentencing hearing because of the combined prejudicial effect of prosecutorial misconduct under *Brady v.*

Maryland, 373 U.S. 83 (1963), and ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).

The prosecution responds that Owens's argument cannot be addressed until after the conclusion of the hearing. If all claims are summarily denied, then the prosecution argues that there can be no cumulative error.

B. Findings of Fact

The court incorporates the entire government misconduct section in part IV of this Order and the entire ineffective assistance of counsel section in part V of this Order as though fully set forth herein.

C. Analysis

In support of his argument, Owens cites cases from Circuit Courts and from other states. Owens does not provide any binding legal precedent in support of his argument that a cumulative *Strickland-Brady* analysis is the law in Colorado. Additionally, the court is not aware of any such authority.

But this court ultimately has an obligation to assess whether Owens's conviction and sentence were constitutionally deficient. To prove constitutional deficiency, Owens must demonstrate prejudice. Thus, if requested, it might be considered appropriate for a Crim. P. 32.2 court to conduct a cumulative *Strickland-Brady* analysis. This court has viewed both the guilt phase and sentencing hearing and has considered the cumulative prejudice of all of the matters discussed in this Order. The court has concluded that Owens received a fair trial – one whose result is reliable. He also received a fair sentencing hearing – one whose result was constitutionally obtained, is justified in law, and is rationally based upon the evidence.

D. Conclusion

Accordingly, Owens's petition to vacate his conviction and sentence based on cumulative *Strickland-Brady* prejudice is **Denied**.

VII. *Curtis* Advisements

A. Parties' Positions

Owens argues three points in support of his position that the court's advisements pursuant to *People v. Curtis*, 681 P.2d 504 (Colo. 1984), were erroneous and prevented a valid waiver of his right to testify. First, Owens contends that his waiver in the guilt phase was invalid due to the court's deficient *Curtis* advisement stating that the prosecution could ask him whether his prior felonies resulted from a jury verdict. Second, Owens contends that his waiver in the sentencing hearing was invalid due to the court repeatedly misadvising Owens about the number of his prior convictions and the use of those prior convictions if he testified. Third, Owens contends that his trial team was ineffective for failing to object to the incorrect advisements.

The prosecution responds that Owens's waivers were valid, knowing, and voluntary. In response to Owens's argument that his waiver at the guilt phase was invalid, the prosecution asserts that Owens cites case law, mainly *People v. Gomez*, 211 P.3d 53 (Colo. App. 2008), that was not yet decided at the time of Owens's advisement, and thus, the law was unsettled at the time. In response to Owens's argument that his waiver at the sentencing hearing was invalid, the prosecution asserts that the court properly re-advised Owens and offered to reopen step one of the sentencing hearing so he could testify at step one; however, Owens declined that offer.

B. Findings of Fact

The court gave the guilt phase *Curtis* advisement to Owens on May 1, 2008. *See* Guilt Phase Tr. 92-102 (May 1, 2008 p.m.). At one point during the lengthy advisement, the court said:

> So Mr. Owens, you're now aware that if you decided to testify, the prosecution can ask you just that, in essence, have you been convicted on this date with regard to those charges he listed, and he can also ask you . . . was that by jury verdict? And then they can also say you were convicted of this charge and this charge as a Class 1 felony and you have to acknowledge, or you can refute, but that's the questions that they can ask, the degree of seriousness of the charge, the nature of the charge and was it by jury verdict. Do you understand that?

Id. at 96:11-22. Owens's trial team did not object to this advisement. On May 6, 2008, the court reiterated its previous *Curtis* advisement. During the brief re-advisement, there was no mention of the prosecution being able to ask whether prior convictions were the result of a jury conviction if Owens chose to testify. Guilt Phase Tr. 63-66 (May 6, 2008 a.m.).

On May 19, after the prosecution rested in step one of the sentencing hearing, the court gave a *Curtis* advisement to Owens. In the course of that advisement, the court advised Owens that his prior convictions, if raised by the prosecution on cross-examination, could be considered by the jury for a credibility assessment and also as substantive evidence regarding the alleged aggravating factors. Phase One Tr. 119:11-25; 120:1-8 (May 19, 2008 a.m.).

The court gave another *Curtis* advisement to Owens on June 4 regarding how the jury could use his prior convictions in phase two of the sentencing hearing. *See* Phase Two Tr. 66:20-25 (June 4, 2008 p.m.). The court advised Owens that all of his convictions from the Lowry Park trial and this trial could be

used on cross-examination and the jury could utilize the convictions to evaluate his credibility and as aggravating factors, aggravating circumstances, and rebuttal to mitigation. *Id*. at 66:15-25; 67:1-10.

On June 11, the parties agreed that if Owens chose to testify in phase two, his felony convictions could not be used to prove aggravating factors or aggravating circumstances. Jury Instr. Tr. 2:8-13 (June 11, 2008). Instead, his felony convictions could be used only to impeach Owens's credibility. *Id*. Thereafter, the court advised Owens that his 12 prior convictions could be used only to impeach his credibility. *Id*. at 4:8-14. The court offered to allow Owens to reopen the mitigation case with an instruction to the jury that due to the court's error, he was precluded from testifying. *Id*. at 5:22-25; 6:1-8. The court decided to issue the full advisement the next morning in order to allow time for Owens and his trial team to discuss whether they wanted to reopen the mitigation case at step two. *Id*. at 5:16-21. On June 12, his trial team advised the court that Owens did not wish to reopen the mitigation case. Phase Two Tr. 4:19-22 (June 12, 2008 a.m.).

On June 12, the court re-advised Owens with a modified *Curtis* advisement. In its introduction, the court said:

> Further, do you understand, sir, if you decide to testify, the prosecution has already told us, and I have no indication that they would change their mind, that they would ask you about the 12 felony convictions you suffered in that first trial, January of '07, and also you were convicted of seven felonies in this trial; do you understand they would ask you about those felonies?

Id. at 7:6-12. Thereafter, the court advised Owens that "if you decided to testify and if the prosecution asked you about those 12 felony convictions, the jury would

be instructed that the only . . . thing they could take those felony convictions for is to evaluate your credibility; do you understand that?" *Id*. at 8:2-7.

C. Principles of Law

A criminal defendant has the right to testify in his/her own defense under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and under the Due Process Clause of Article II, § 25 of the Colorado Constitution. *See, e.g.*, *Curtis*, 681 P.2d at 509-10. A defendant's waiver of his/her right to testify must be voluntary, knowing, and intentional. *Id*. at 514. In *Curtis*, the Colorado Supreme Court held that

> A trial court exercising appropriate judicial concern for the constitutional right to testify should seek to assure that waiver is voluntary, knowing and intentional by advising the defendant outside the presence of the jury that he has a right to testify, that if he wants to testify then no one can prevent him from doing so, that if he testifies the prosecution will be allowed to cross-examine him, that if he has been convicted of a felony the prosecutor will be entitled to ask him about it and thereby disclose it to the jury, and that if the felony conviction is disclosed to the jury then the jury can be instructed to consider it only as it bears upon his credibility. In connection with the privilege against self-incrimination, the defendant should also be advised that he has a right not to testify and that if he does not testify then the jury can be instructed about that right.

Id. "A trial court advisement need not conform to any prescribed litany or formula, but 'the advisement given must include the *Curtis* elements *and* avoid misleading a defendant about the consequences of a decision not to testify.'" *Gomez*, 211 P.3d at 55 (emphasis in original) (quoting *People v. Chavez*, 853 P.2d 1149, 1152 (Colo. 1993)), *abrogated by Moore v. People*, 318 P.3d 511 (Colo. 2014).

In *Gomez*, the Colorado Court of Appeals considered, as a matter of first impression, whether the trial court's *Curtis* advisement was defective when "it told [the defendant] that the prosecutor could cross-examine on whether his prior felony conviction was the result of a trial or a plea." *Id*. at 56. In that case, the Colorado Court of Appeals held that during cross-examination, "the prosecutor may not ask whether a prior felony conviction arose from a plea or a trial." *Id*. at 57. The Colorado Court of Appeals found that the defendant's *Curtis* waiver was defective and remanded the case for an evidentiary hearing for the prosecution to have the opportunity to show that the defendant's waiver was voluntary, knowing, and intentional. *Id*.

The Colorado Court of Appeals in *Gomez* noted that the law at the time of its 2008 decision was unsettled, "[t]he parties cite no published Colorado case and we have found none directly resolving whether in impeaching a defendant the prosecutor could ask if the defendant's prior felony conviction resulted from a plea or a trial."[421] *Id*. at 56. "[I]f the law was unsettled at the time of trial the plain error analysis will be conducted using the status of the law at the time of trial."

[421] A similar situation presented itself in *People v. Moore*, 321 P.3d 510 (Colo. App. 2010). In *Moore*, the Colorado Court of Appeals relied on the finding in *Gomez* that the law was unsettled as to whether a prosecutor could cross-examine a defendant on whether a prior felony was the result of a plea or jury trial. *Moore*, 321 P.3d at 513. There, the court found that "because the law was unsettled at the time of defendant's trial, we conclude that the unpreserved error in the *Curtis* advisement, if any, was not plain or obvious." *Id*. The Colorado Supreme Court recently considered the appeal of that case in *Moore v. People*, 318 P.3d 511 (Colo. 2014). On appeal, the Colorado Supreme Court determined that "[t]he court of appeals should not have reviewed Moore's claim that the *Curtis* advisement in his case rendered his waiver of the right to testify not knowing and voluntary. Moore may raise this issue in a post-conviction proceeding." *Moore*, 318 P.3d at 520-21. Accordingly, the Colorado Supreme Court vacated the discussion and holding by the Colorado Court of Appeals regarding the defendant's challenge of his *Curtis* waiver. *Id.* at 521. Thus, the court considers the Colorado Court of Appeals decision in *Moore* as persuasive when evaluating this issue, but not binding.

People v. O'Connell, 134 P.3d 460, 464 (Colo. App. 2005). "For an error to be plain it must be obvious." *Id.* at 465 (internal quotations omitted).

C.R.S. § 13-90-101 discusses who may testify at trial. When a witness testifies, "the credibility of the witness may be drawn in question, as now provided by law, but the conviction of any person for any felony may be shown for the purpose of affecting the credibility of such witness." § 13-90-101. "A defendant who takes the stand becomes a witness within the meaning of § 13-90-101 and is therefore subject to examination concerning prior felony convictions." *People v. Bradley*, 25 P.3d 1271, 1274 (Colo. App. 2001).

The United States Supreme Court articulated the standard for ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). For counsel's assistance to have been so defective as to require reversal of a conviction or death sentence,

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

Strickland, 466 U.S. at 687. The United States Supreme Court in *Strickland* acknowledged that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must 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, 101 (1955)).

D. Analysis

1. Guilt Phase Advisement

Owens contends that his waiver in the guilt phase was invalid due to the court's deficient *Curtis* advisement. Owens contends that the court erroneously advised him that if he testified, the prosecution could ask him whether his prior felonies from the Lowry Park case resulted from a jury verdict. Owens contends this rendered his waiver neither knowing nor intelligent.

Gomez had not been decided at the time of Owens's *Curtis* advisement for the guilt phase. While it is now settled that during cross-examination, "the prosecutor may not ask whether a prior felony conviction arose from a plea or a trial," the question had not been decided at the time of Owens's *Curtis* advisement. 211 P.3d at 57. Because the law was unsettled, the court reviews for plain error. *See O'Connell*, 134 P.3d at 464. The *Gomez* court noted the lack of binding authority in September 2008, which was approximately four months after Owens's guilt phase *Curtis* advisement. Therefore, the court's advisement regarding whether Owens's convictions were obtained through a jury trial or a plea was not plain or obvious error at the time of the advisement in May 2008.

Unlike the trial court and trial counsel, this court has the benefit of *Gomez* and can conclude, with the benefit of hindsight, that Owens's guilt phase advisement may have been defective on the issue of whether the prosecution could ask Owens whether his earlier conviction was by plea or jury verdict. But it is clear that Owens made a voluntary, knowing, and intelligent waiver of his right to testify.

2. Sentencing Hearing Advisement

Owens contends that his waiver in the sentencing hearing was invalid due to repeated incorrect advisements by the court. Owens argues that 1) the court

incorrectly advised Owens that if he testified at step one, his prior convictions could be used as substantive proof of step one aggravating factors and as step four aggravating circumstances; 2) after modifying the advisement, the court incorrectly told Owens that he could be impeached with 19 prior convictions; and 3) the court's advisement was incorrect because Owens's convictions from this case were inadmissible even for impeachment purposes in the sentencing hearing. Owens contends that these inaccurate advisements prevented him from exercising a voluntary, knowing, and intelligent waiver of his right to testify.

First, Owens argues that the court incorrectly advised him that if he testified at phase one and admitted his prior convictions, his admission could be used as substantive proof of the aggravating factors. On May 19 and again on June 4, 2008, the court incorrectly advised Owens that, if he testified, he could be asked about his Lowry Park convictions and his answers could be used by the jury as substantive evidence regarding the aggravating factors. On June 4, the incorrect advisement was expanded to include his Dayton Street convictions. The June 4 *Curtis* advisement was revisited on June 11 when the court added that Owens's convictions could also be used by the jury to assess rebuttal to mitigation at step three.

After the *Curtis* advisement was complete on June 11, the prosecution brought to the court's attention that Owens's felony convictions could only be used to impeach his credibility if he testified. The court offered to give a curative instruction noting that the court erroneously precluded Owens from testifying earlier if Owens wished to reopen his mitigation case. The court gave Owens and his trial team the evening to discuss reopening mitigation to allow him to testify. The next day, the court gave a new *Curtis* advisement to Owens that his 12 felony convictions could only be used to impeach his credibility. Owens decided not to

reopen his mitigation case and reiterated his decision not to testify. Thus, Owens was properly re-advised and given the opportunity to reopen mitigation and testify if he chose to do so. After considering the matter overnight, with time to consider his trial team's advice, he made a voluntary, knowing, and intelligent waiver of his right to testify.

Second, Owens argues that the court erroneously advised him that he could be impeached by 19 prior convictions. Owens's Lowry Park conviction encompassed five felony counts. His Dayton Street conviction encompassed seven felony counts. On June 4, the court advised Owens how the jury could use his 12 felony convictions. On June 11, the court advised Owens his 12 prior convictions could be used to impeach his credibility. On June 12, the court advised Owens that the prosecution could ask him "about the 12 felony convictions you suffered in that first trial, January of '07, and also you were convicted of seven felonies in this trial; do you understand they would ask you about those felonies?" Phase Two Tr. 7:9-12 (June 12, 2008). The court mistakenly said that Owens was convicted of 12 felonies at Lowry Park, instead of 12 total. Shortly thereafter, the court advised Owens that "if you decided to testify and if the prosecution asked you about those 12 felony convictions, the jury would be instructed that the only . . . thing they could take those felony convictions for is to evaluate your credibility; do you understand that?" *Id*. at 8:2-7.

Owens was convicted of five felony counts in the Lowry Park case and seven in this case. Thus, he was convicted of 12 total felony counts. In context, it was abundantly clear that the court was referring to the felony counts in Owens's two murder cases, Lowry Park and Dayton Street, and nothing else. Owens offers no explanation or legal authority for how this one-time misstatement rendered his *Curtis* waiver to be invalid. Indeed, very shortly thereafter, the court stated that

Owens had been convicted of 12 felonies. This minor misstatement did not render Owens's *Curtis* waiver invalid.

Third, Owens argues that the *Curtis* advisement was flawed because his Dayton Street convictions would have been inadmissible for impeachment purposes in the Dayton Street sentencing hearing. He asserts that any Dayton Street conviction was based on the verdict alone and not on a case that had resulted in a felony sentence. Were Owens being advised in an independent case, his position might have arguable merit. *See People v. Goff*, 530 P.2d 512 (Colo. 1974) ("A jury verdict which has not been tested by a motion for a new trial and has not been then supported by the imposition of sentence cannot be used for the purpose of impeachment."). But realistically, the same jury heard both Owens's guilt and sentencing hearings. Thus, the jury was well aware of his convictions arising out of the Dayton Street homicides, and the jury was allowed to consider the evidence presented at the guilt phase in the sentencing hearing. *See* C.R.S. § 18-1.3-1201(1)(b) ("All admissible evidence presented by either the prosecuting attorney or the defendant that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant, including any evidence presented in the guilt phase of the trial, any matters relating to any of the aggravating or mitigating factors enumerated in subsections (4) and (5) of this section, and any matters relating to the personal characteristics of the victim and the impact of the crimes on the victim's family may be presented.").

Owens provides no legal authority that § 13-90-101 precludes use of convictions in a sentencing hearing when the convictions arose out of the guilt phase for the same case; rather, he provides case citations from non-death penalty cases. The *Curtis* advisement in this case arose in the unique posture of the same jury determining punishment and properly considering evidence from the guilt

phase in so doing. *See* § 18-1.3-1201(1)(b). The trial judge effectively advised Owens that the jury could consider the guilt phase evidence when evaluating his credibility as a witness. Owens's status was that of a prior convicted felon based on his Lowry Park conviction, and the jury could also have considered the Dayton Street facts in assessing his credibility. Fashioning a special *Curtis* advisement that distinguished the jury's consideration of the Dayton Street facts from its consideration of Owens's status as a Dayton Street convicted felon, while still advising him that the jury could consider his status as a Lowry Park convicted felon, would have done little to inform Owens's decision on whether to testify. The advisement was adequate and Owens's *Curtis* election to exercise his right to remain silent and waive his right to testify was a knowing, intelligent, and voluntary choice.

3. Owens's Trial Team's Failure to Adequately Object to the Advisements

Owens contends that his trial team was ineffective for failing to object to the incorrect *Curtis* advisements. Owens contends that while his trial team raised several objections to the advisements, his trial team failed to object to erroneous advisements: 1) misinforming Owens that he could be cross-examined on whether his prior convictions resulted from jury verdicts; 2) incorrectly stating the number of prior convictions he could be impeached on; and 3) misadvising him about the admissibility of the guilty verdicts from this case.

With regard to Owens's first argument that his trial team was ineffective for failing to object to the court's advisements that Owens could be cross-examined on whether his prior convictions resulted from jury verdicts, the court finds that the law on this topic was unsettled at the time of Owens's *Curtis* advisements. In September 2008, approximately four months after the court tendered its guilt phase

Curtis advisement to Owens, the Colorado Court of Appeals announced its decision in *Gomez*, making it clear that it was announcing its decision as a matter of first impression. 211 P.3d at 56 ("The parties cite no published Colorado case and we have found none directly resolving whether in impeaching a defendant the prosecutor could ask if the defendant's prior felony conviction resulted from a plea or a trial.").

Under *Strickland*, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689. Accordingly, because *Gomez* had not been decided at the time of Owens's *Curtis* advisement and because it is uncontested that the state of the law was unsettled at that time, his trial team's failure to object to this advisement was reasonable and was not deficient under *Strickland*.

With regard to Owens's second and third arguments that his trial team was ineffective for failing to object to the court incorrectly stating the number of prior convictions and the admissibility of the Dayton Street convictions, this court found above that the trial court's advisement was adequate and Owens's election was valid, especially in light of the re-advisement on June 12, 2008. Due to the re-advisement, Owens did not receive a deficient *Curtis* advisement, and therefore, his trial team was not deficient in failing to object under *Strickland*.

E. Conclusion

The trial court conducted adequate *Curtis* advisements of Owens, Owens's elections to exercise his right to remain silent and waive his right to testify were valid, and his trial team was not ineffective for failing to object.

Accordingly, Owens's petition to vacate his sentence based on the trial court's *Curtis* advisements is **Denied**.

VIII. Public Trial

A. Parties' Positions

Owens contends that he was denied a public trial. Specifically, Owens asserts that the court denied him a public trial by ordering the courtroom closed during individual *voir dire*, ordering counsel to redact witnesses' names from all public filings, sealing transcripts from public access, and creating other impediments to public attendance at court proceedings. Owens argues that those procedures created structural error requiring automatic reversal. Additionally, Owens argues that the court failed to properly advise him of the importance of his right to a public trial and the consequences of waiving that right. Cumulatively, Owens argues that the court's actions prevented him from making a voluntary, knowing, and intelligent waiver of his right to a public trial.

The prosecution responds that Owens exercised an affirmative waiver of his right to a public trial for individual *voir dire*. With regard to the redaction of witnesses' names from pleadings, the prosecution responds that Owens did not object to the redactions until years after his sentence was imposed. Additionally, the prosecution relies on the Colorado Supreme Court's findings regarding the need for protective orders in Owens's codefendant's case, *People v. Ray*, 252 P.3d 1042 (Colo. 2011).

B. Findings of Fact

On November 29, 2007, the parties and the court discussed closing the courtroom for individual *voir dire*. The court suggested closing the courtroom to give the potential jurors confidence that their candid opinions on the death penalty would not be shared in front of the media and the public. King stated on the record

that "Mr. Owens would be willing to waive any public hearing requirement with regard to the individual *voir dire* process, and we would ask that it be held privately." Pretrial Hrg Tr. 104:20-23 (Nov. 29, 2007). Immediately thereafter, the court advised Owens of his right to a public trial, and Owens exercised an affirmative waiver of that right on the record. Without objection from the parties, the court proceeded to hold individual *voir dire* in the closed courtroom, outside the presence of the public.

In Order (SO) No. 5, the court ordered the parties to file a redacted copy of every pleading filed in the case. The redacted copy had the names and locations of all endorsed witnesses redacted, and that copy was to be accessible in the public file. In Consolidated Order No. 6, the court sealed all transcripts in the Lowry Park and Dayton Street cases against Owens, Ray, and Carter, after considering safety concerns of the witnesses, and after weighing the interests favoring public access against the defendants' rights to a fair and impartial jury.[422] The court ordered that "[t]his order does not apply to trial counsel and appellate counsel in these cases." Consolidated Order No. 6 at p. 3. And in Consolidated Order No. 5, the court noted that some of the witnesses' names were being recorded in the Register of Action (ROA), and therefore, the court suppressed the ROA in each of the cases. Counsel and their staff were permitted access to the ROA.

In P.C. Order (SO) No. 9, the court granted Owens an evidentiary hearing with respect to his claim that he was denied a public trial during individual *voir dire*. Owens did not present any evidence in support of this claim during post-conviction proceedings.

[422] Specifically, after the Denver Post requested some of the transcripts, the court sealed the transcripts in 04CR1805, 05CR2945, 06CR697, 06CR705, and 06CR713.

C. Principles of Law

In a criminal case, the accused has the right to a public trial. *See, e.g.*, *People v. Dunlap*, 124 P.3d 780, 818 (Colo. App. 2004)*; see also* U.S. Const. amend. VI; Colo. Const. art. II, § 16. This right to a public trial extends to *voir dire* proceedings. *See Anderson v. People*, 490 P.2d 47, 48 (Colo. 1971). The right to a public trial is not absolute and may be waived. *See id.*; *Dunlap*, 124 P.3d at 818. A defendant waives his or her right to a public trial when the defendant knows of the courtroom closure and fails to object. *See Anderson*, 490 P.2d at 48-49; *United States v. Hitt*, 473 F.3d 146, 155 (5th Cir. 2006).

The deprivation of the right to a public trial is a structural error and subject to automatic reversal. *See Neder v. United States*, 527 U.S. 1, 8 (1999). Generally,

> Structural errors affect the framework within which the trial proceeds and are not amenable to either a harmless error or a plain error analysis. Structural errors affect the entire conduct of the trial or deny the defendant a basic protection and include trial before a biased judge, denial of the right to self-representation at trial, deprivation of the right to counsel, and violation of the right to public trial.

Dunlap, 124 P.3d at 818 (internal citations omitted). However, "[a] party may not complain on appeal of an error that he or she has invited or injected into the case; the party must abide the consequences of such acts. An allegation of constitutional error does not require us to abandon the strict preclusion of review of invited error." *Id*.

In *Dunlap*, the Colorado Court of Appeals held that it was not structural error requiring reversal *per se* when the trial court closed individual *voir dire*.[423]

[423] One media representative was allowed to remain in the courtroom during individual voir dire. *Id*.

Id. After being advised, the defendant did not object to the media procedure for individual *voir dire*. *Id*. at 819. The court in *Dunlap* found that "[b]y agreeing to the procedures adopted for *voir dire*, defendant waived the right to object to them. Under these circumstances, defendant was not denied his right to a public trial. As a matter of trial strategy to ensure a fair trial, he waived this right." *Id*.

In *Stackhouse v. People*, 386 P.3d 440, 441-42 (Colo. 2015), the trial court required members of the public to leave the courtroom during jury selection out of a concern that the family members and others would talk with potential jurors. The defendant did not object when the trial court explained the closure, and he did not object at any other point during the trial. *Id*. at 442. In *Stackhouse*, the Colorado Supreme Court revisited its prior decision from *Anderson*, 490 P.2d 47, where the court had previously addressed an analogous fact pattern, and held that "we conclude that our longstanding precedent in *Anderson* remains good law: Defendants in Colorado affirmatively waive their right to public trial by not objecting to known closures." *Id*. at 446.

In the event a judge closes the courtroom over a criminal defendant's objections, then the court should apply the standards outlined in *Waller v. Georgia*, 467 U.S. 39 (1984). In *Waller*, the prosecution moved to close a suppression hearing over the defendant's objections. 467 U.S. at 41-42. The United States Supreme Court held that its earlier test from *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501 (1984), applied in cases where the courtroom was closed over the criminal defendant's objections. *Id*. at 47. The applicable test is,

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a

> reviewing court can determine whether the closure order was properly entered.

Id. at 45 (quoting *Press-Enterprise Co.*, 464 U.S. at 510).

D. Analysis

1. Structural Error

First, Owens contends that closing the courtroom during individual *voir dire* was structural error requiring reversal. Under Colorado case law, it is not structural error when the defendant waives his right to a public trial for jury selection or when the defendant fails to object to the court's closure of the courtroom for jury selection. *See Stackhouse*, 386 P.3d at 446; *Anderson*, 490 P.2d at 48-49; *Dunlap*, 124 P.3d at 818.

Here, after discussing the procedure with the court, King requested that individual *voir dire* be closed to the public. Shortly thereafter, the court obtained a comprehensive waiver from Owens of his right to a public trial for individual *voir dire*. Thus, under *Anderson*, *Stackhouse*, and *Dunlap*, the court finds that it was not structural error for the court to close the courtroom for individual *voir dire*.

2. Waiver

Second, Owens contends that his waiver of his right to a public trial was invalid. In *Stackhouse*, the Colorado Supreme Court found that:

> First, only a select few rights are so important as to require knowing, voluntary, and intelligent waiver to be personally executed by the defendant. *See, e.g.*, *People v. Davis*, 2015 CO 36, ¶ 15, 352 P.3d 950 (recognizing that only knowing, voluntary, and intelligent waiver is sufficient to waive the right to counsel). The right to a public trial is not among these; if it were, then a judge would be unable to close the courtroom over the defendant's objection despite satisfying the *Waller* test. *See Robinson v. State*, 410 Md. 91, 976 A.2d 1072, 1082 n.6 (2009) (noting that if it were true

> "that the right to a public trial cannot be waived by the defendant's 'inaction'" but rather required knowing, voluntary, and intelligent waiver, then a "defendant's refusal to make an 'intelligent and knowing' waiver of the right would preclude a trial judge from ever closing a courtroom, no matter the circumstances warranting closure"). Rather, the right to a public trial "falls into the class of rights that defense counsel can waive through strategic decisions." *Cf. Hinojos-Mendoza v. People*, 169 P.3d 662, 669 (Colo. 2007) (holding the same regarding the right to confrontation).

386 P.3d at 445.

The court thoroughly advised Owens regarding his right to a public trial for individual *voir dire*. Prior to that advisement, King asked the court to hold individual *voir dire* in a closed courtroom. While Owens's argument relies on the knowing, voluntary, and intelligent aspects of his waiver, the Colorado Supreme Court in *Stackhouse* made it clear that a defendant does not need to personally make a knowing, voluntary, and intelligent waiver of his right to a public trial. *Id*. Significantly, failing to object to known courtroom closures is enough to waive the right to a public trial. *See id*. at 446. Thus, by asking for the closure, by affirmatively waiving his right to a public trial for individual *voir dire*, and by not objecting to the courtroom closure, Owens fulfilled multiple avenues for constitutional courtroom closure. Accordingly, the court finds that Owens waived his right to a public trial for individual *voir dire*.

3. Redaction and Sealing Orders

Third, Owens argues that the court's redaction and sealing orders violated the public's[424] and Owens's rights to a public trial, resulting in further structural error.

The court's redaction and sealing orders have been addressed numerous times. On June 21, 2013, Owens filed a C.A.R. 21 Petition seeking to vacate the redaction, suppression, and sealing orders. *People v. Owens*, No. 13SA161 (Colo. dismissed Sept. 5, 2013). The C.A.R. 21 Petition asked whether the court abused its discretion by denying public access to the ROA, transcripts, witnesses' names, and non-redacted court file. On September 5, 2013, the Colorado Supreme Court denied the petition. After a limited remand from the Colorado Supreme Court on January 30, 2014, the court issued P.C. Order (SO) No. 11, in which it vacated the order suppressing the ROA and vacated the order suppressing the transcripts.[425]

The Colorado Supreme Court in *Ray* addressed whether the court abused its discretion by lifting the protective order and requiring the disclosure of certain witnesses' addresses. 252 P.3d 1042. In Ray's case, the Colorado Supreme Court found that the court abused its discretion and found that:

> Ray not only made threats to harm prosecution witnesses, but he also acted upon these general threats by killing a witness and an innocent bystander. The nature of the threat to witnesses is of the highest order. We note that the danger of inadvertent disclosure increases with each person who has access to the witnesses' addresses.

---

[424] While Owens argues that the public's right to a public trial was violated, he presents no legal precedent or evidence supporting whether he has standing to bring this claim. Accordingly, the court denies his claim on that basis, and the court will instead examine Owens's right to a public trial.

[425] Witnesses' addresses and locations remain redacted.

Id. at 1050. The Colorado Supreme Court's decision is limited to witnesses' addresses; however, it demonstrates the necessity of redacting witnesses' addresses due to the significant safety concerns in this case.

Owens has not presented any evidence, and the court is not aware of any evidence, that he objected to the procedures at the time the relevant orders were issued or that he objected to the procedures during trial. Thus, the court finds that the same public trial principles discussed above apply, and by failing to object to the redaction and sealing orders, Owens waived his right to a public trial. *See Stackhouse*, 386 P.3d at 445; *Anderson*, 490 P.2d at 48-49; *Dunlap*, 124 P.3d at 818. The court further finds that the trial court's decision is supported by the legitimate concerns for witnesses' safety, as acknowledged by the Colorado Supreme Court in *Ray*. 252 P.3d at 1050. Therefore, the court finds that the redaction and sealing orders did not violate Owens's right to a public trial.

E. Conclusion

With respect to waiving his right to a public trial for individual *voir dire*, it was not structural error for the court to close the courtroom for individual *voir dire*. And with respect to the court's redaction and sealing orders, Owens did not object to the procedures until years later, which the court interprets as a waiver of his right to a public trial. Accordingly, Owens's petition to vacate his conviction and sentence based on the courtroom closure for individual *voir dire* and the court's redaction and sealing orders is **Denied**.

IX. Jury Misconduct

A. Parties' Positions

Owens contends he was denied a fair sentencing hearing because a demonstrative chart (the chart) outlining the four-step process for capital

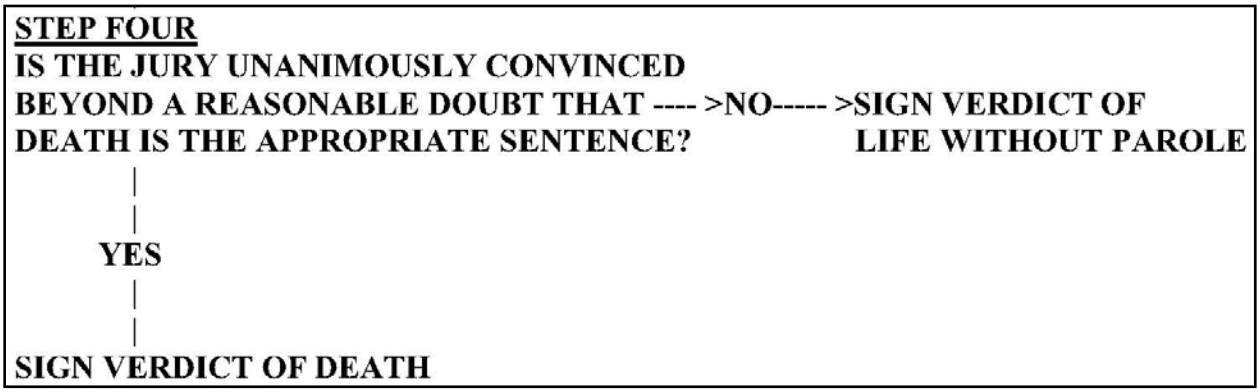
sentencing hearings was found in the jury room after the jury began its phase two deliberations.

The prosecution responds that Owens was not prejudiced because the jurors were familiar with the chart, the chart was in the jury room for only a short time, and the court instructed the jury not to consider the chart. Because the jurors are presumed to have followed the curative instruction, the prosecution argues Owens was not denied his right to a fair sentencing hearing.

B. Findings of Fact

The parties delivered their phase two closing arguments to the jury on Friday, June 13, 2008. The case was submitted to the jury for deliberation at 4:00 p.m. that day. The jury was excused for the weekend after deliberating for 30 minutes. After the jury was excused, court staff discovered two demonstrative aids used during individual *voir dire* in the jury room.

The first was a chart that the court and counsel used to guide jurors through the four-step sentencing process. The chart was found on an easel at the head of the jury room. Step four of the process was represented on the chart as follows:



Trial Exh. C-159.

The second demonstrative aid was a list of the proven statutory aggravating factors found by the jury.[426]

Both demonstrative aids were removed from the jury room, and the court notified the parties on Monday morning when the jurors returned to continue their phase two deliberations. When asked how the demonstrative aids reached the jury room, both parties surmised that the charts were inadvertently taken to the jury room together with hundreds of admitted exhibits.

With input from the parties, the court delivered a written curative instruction to the jury, which read:

> Ladies and gentlemen of the jury, I'm writing to advise you that we have removed two white boards from your collection of white boards that were admitted into evidence. One concerns the four-step process that is set forth in Instruction No. 19 and the other concerns the aggravating factors determined to have been proven beyond a reasonable doubt, which is set forth in the certified copies of the verdict forms from Phase 1 that were provided to you. These white boards were removed because they were never admitted into evidence and cannot be used by you during your deliberations.

Phase Two Tr. 6:7-17 (June 16, 2008). The court's curative instruction also stated, "you are reminded that you must follow the instructions of law that you have been given." *Id*. at 7:22-24. There is no evidence that the jury did not follow the curative instruction.

The jury asked for the chart depicting the four-step sentencing process twice during its deliberations after phase one of the sentencing hearing. Because the

[426] Beyond identifying this demonstrative aid, Owens does not describe how its presence in the jury room constitutes jury misconduct or entitles him to relief. Therefore, the court will not address his argument.

chart was used only for demonstrative purposes and was not admitted into evidence, the court declined to provide the chart to the jury both times.

Owens did not elicit testimony from any jurors about this issue during the post-conviction hearing. He instead relied on the contemporaneous record made by the court.

C. Principles of Law

Determining whether a jury was exposed to extraneous prejudicial information requiring reversal of a defendant's conviction or sentence involves a two-part inquiry: "first, a court makes a determination that extraneous information was improperly before the jury; and second, based on an objective 'typical juror' standard, makes a determination whether use of that extraneous information posed the reasonable possibility of prejudice to the defendant." *People v. Harlan*, 109 P.3d 616, 624 (Colo. 2005).

Regarding the first inquiry, "any information that is not properly received into evidence or included in the court's instructions is extraneous to the case and improper for juror consideration." *Id.* Exposure to extraneous information that was not the result of deliberate juror misconduct might still be improper. *Id.* at 625. Likewise, exposure to extraneous information where the court did not specifically prohibit use of that particular extraneous information might also be improper. *Id.*

If the jury was exposed to extraneous information, the court must decide if "there is a reasonable possibility that the extraneous information influenced the verdict to the detriment of the defendant." *Id.* This inquiry into the potential prejudice to the defendant is an objective test that focuses on "what influence the improperly introduced extraneous information might have had on a typical juror." *Id.* Six factors guide the court's inquiry:

> (1) how the extraneous information relates to critical issues in the case; (2) how authoritative is the source consulted; (3) whether a juror initiated the search for the extraneous information; (4) whether the information obtained by one juror was brought to the attention of another juror; (5) whether the information was presented before the jury reached a unanimous verdict; and (6) whether the information would be likely to influence a typical juror to the detriment of the defendant.

Id. at 626.

These determinations must be made within the bounds of CRE 606(b), which prohibits jurors from testifying

> [A]s to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.

CRE 606(b). However, a juror may testify about "whether extraneous prejudicial information was improperly brought to the jurors' attention" and "whether any outside influence was improperly brought to bear upon any juror." *Id.*

Absent evidence to the contrary, courts "presume that the jury understood and heeded its instructions." *People v. Dunlap*, 975 P.2d 723, 743 (Colo. 1999). A "trial judge's instructions [are] the appropriate way to limit the jury's use of [] evidence." *Tennessee v. Street*, 471 U.S. 409, 417 (1985).

D. Analysis

When evaluating whether a defendant is entitled to a new trial or sentencing hearing based on the jury's exposure to extraneous prejudicial information, courts must be cognizant of CRE 606(b) and must be careful not to invade the jurors' deliberations. In this case, juror testimony was not needed because the court made a contemporaneous record about the relevant circumstances.

It is undisputed that the chart summarizing the four steps of capital sentencing hearings was not admitted into evidence and therefore should not have been submitted to the jury for consideration during its phase two deliberations. In fact, the court rebuffed the jury's requests to use the chart during its phase one deliberations on the grounds that the chart was used for demonstrative purposes only and was not an admitted exhibit. Although the chart was not proper for the jury to consider, the chart was nothing like the extraneous information considered in *Harlan*, 109 P.3d at 622, where jurors considered Biblical passages about the appropriate punishment for murder; *People v. Wadle*, 97 P.3d 932, 934 (Colo. 2004), where jurors consulted the Internet for information about an anti-depressant drug; or *Wiser v. People*, 732 P.2d 1139, 1140 (Colo. 1987), where jurors considered the dictionary for the definition of burglary. However, because the chart was not an admitted exhibit, it was "extraneous to the case and improper for juror consideration." *Harlan*, 109 P.3d at 624.

Harlan set forth six factors to guide the court in determining if there is a reasonable possibility that the jury's exposure to the chart prejudiced Owens, requiring the court to vacate Owens's sentence. *Id*. at 626.

First, the court must consider how the chart related to critical issues in Owens's case. Because the chart depicted Colorado's four-step capital sentencing process, it was closely related to the jurors' evaluation and determination of the appropriate sentence, which was the most critical issue in the case.

Second, the court must consider the authoritative nature of the chart. Because the judge and the attorneys used the chart throughout the proceedings, a typical juror would have perceived the chart as an authoritative summary depiction of the process.

Third, the court must consider whether a juror initiated the search for the chart. Although the jury asked for the chart twice during its phase one deliberations, no juror caused the chart to be in the jury room during its phase two deliberations. Rather, the chart's placement was the result of the court's and the parties' oversight while delivering hundreds of admitted exhibits to the jury room for deliberations. Unlike the jurors in *Harlan* who researched, studied, and considered Biblical passages about the appropriate sentence, no juror in this case was responsible for the chart being in the jury room. *Id*. at 622.

Fourth, the court must consider whether the chart was brought to the attention of other jurors. The chart was found on an easel at the head of the jury room. It is reasonable to infer from its placement that the jurors probably viewed the chart.

Fifth, the court must consider whether the chart was available to the jury before it reached its verdict. The chart was available to the jury on several occasions during the trial and for the first 30 minutes of its deliberations before it recessed for the weekend. When the jury reconvened for deliberations the following Monday, it deliberated for about eight hours before informing the court that it had reached a verdict. Precisely when the jury reached its verdict is unknown.

Sixth, the court must consider the likelihood that the chart would influence a typical juror to Owens's detriment. Owens contends the chart commanded the jurors to sentence Owens to death because it instructed the jury to sign a verdict of death if the jury was unanimously convinced beyond a reasonable doubt that death was the appropriate sentence. Owens argues that that statement is contrary to the death penalty statute, which provides that "[t]he jury shall not render a verdict of death unless it unanimously finds and specifies in writing that: (A) At least one

aggravating factor has been proved; and (B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved." C.R.S. § 18-1.3-1201(2)(b)(II). The statute further specifies that "[i]n the event that the jury's verdict is to sentence to death, such verdict shall be unanimous." § 18-1.3-1201(2)(c). Although the chart addressed the ultimate issue in the case – the appropriate sentence for Owens – the chart was consistent with the law and the jury instructions in this case. To prevent prejudice to Owens, the court removed the chart from the jury deliberation room, instructed the jury that it could not consider the chart because it had not been admitted into evidence, and reminded the jury to follow the instructions of law provided by the court. Because there is no evidence that the jury disregarded the instructions, the court presumes the jury followed the instructions. *See Dunlap*, 975 P.2d at 743. Under these circumstances, a typical juror would not have been influenced to Owens's detriment.

E. Conclusion

The court concludes there is not a reasonable possibility that the sentencing hearing chart influenced the verdict to Owens's detriment.

Accordingly, Owens's petition to vacate his sentence based on the alleged jury misconduct is **Denied**.

X. Death Penalty Statute and Application[427]

A. *Ad Hoc* Scheme and Violation of Separation of Powers Clause

1. Parties' Positions

Owens contends the court improperly bifurcated the sentencing hearing because the procedure differed from the statutory death penalty scheme, and thus exceeded the court's jurisdiction. Owens argues the court was required to hold a single, unitary hearing on sentencing because the only bifurcation allowed by C.R.S. § 18-1.3-1201 is of the guilt and sentencing hearings. Owens argues the court created an *ad hoc* and illegal sentencing procedure by failing to follow the statute.

Owens also contends that the court's variation from the statutory procedure violated the separation of powers clause. He argues that because the legislature is alone entrusted to write the law, the court overstepped its bounds when it created its own sentencing scheme. As support for his argument, Owens points to two other capital cases in this jurisdiction where the sentencing hearings were bifurcated differently than in Owens's case. Thus, Owens argues that trial courts are creating their own sentencing procedures on a case-by-case basis, failing to apply the statute, and usurping the role of the legislature. Owens asserts that because he was not sentenced under the plain language of the statute, the sentence imposed on him is void.

The prosecution responds that the court has the inherent authority to bifurcate a sentencing hearing. The prosecution argues that this authority comes

[427] The court denied Owens an evidentiary hearing on this claim. It appears to the court that this issue would be more properly raised on direct appeal, but the court nevertheless addresses it here on its merits. C.R.S. § 16-12-206(1)(c)(II), which states that "[w]hether the conviction was obtained or the sentence was imposed in violation of the constitution or laws of the United States or Colorado," provides the only category under which this argument could conceivably be appropriate in a post-conviction motion.

from the trial court's duty to ensure due process and a fair trial for criminal defendants. The prosecution also claims that C.R.C.P. 42 and Crim. P. 57 provide the court with the authority to bifurcate the sentencing hearing. According to the prosecution, those rules allow for separate trials of separate issues through bifurcation, so long as it is not done in violation of any other rule.

Additionally, the prosecution compared Colorado's death penalty statute to the Federal Death Penalty Act.[428] The Federal Death Penalty Act does not specify a method for bifurcation of a sentencing hearing, yet multiple federal courts have bifurcated sentencing hearings despite statutory silence on the issue. The prosecution also argues that the Colorado Supreme Court has suggested bifurcation of sentencing hearings in the manner carried out by the court in this case. Last, the prosecution rebuts Owens's separation of powers claim based on the judicial branch's inherent authority to control court procedure as referenced in *People v. Owens*, 228 P.3d 969, 971 (Colo. 2010).

2. Findings of Fact

During Owens's trial on April 24, 2008, the court conducted a hearing outside the presence of the jury on SO-274 and SO-276, which sought a bifurcated sentencing hearing and application of the Colorado Rules of Evidence only at step one, and on DA-88 SO and DA-89 SO, which opposed both bifurcation and application of the rules of evidence. Relying on *People v. Dunlap*, 975 P.2d 723 (Colo. 1999), Owens argued that the Colorado Supreme Court had expressed concern that a unitary sentencing hearing had the potential for the jury to improperly use rebuttal to mitigation evidence and aggravating circumstances

[428] The prosecution cites 21 U.S.C. § 848, which is the death penalty statute for "continuing criminal enterprise" of drug offenses. Instead, 18 U.S.C. § 3591 is the Federal Death Penalty Act, which regulates when a sentence of death may be imposed.

evidence to find the existence of statutory aggravating factors. Owens further argued that bifurcation of step one from steps two through four ensured higher reliability in the jury's decision at step three because the jury would understand that it could only weigh the aggravating factors proved at step one against the mitigation presented at step two.

After considering the arguments of both parties, the court agreed with Owens that if a sentencing hearing took place, it would be bifurcated and that the rules of evidence would apply only at step one.

The sentencing hearing was bifurcated into two phases. Phase one involved step one of the eligibility determination and required the jury to determine whether the prosecution proved one or more of the endorsed statutory aggravating factors beyond a reasonable doubt with evidence that complied with the rules of evidence. Phase two involved steps two through four of the sentencing process, and CRE 401, CRE 402, and CRE 403 applied. At steps two and three, the jury was required to complete the eligibility determination started at step one. At step two, the jury was required to consider the mitigation presented by Owens. At step three, the jury was required to weigh the mitigation against the statutory aggravating factors to determine whether the mitigation outweighed the aggravating factors. Each juror had to make the determination at step three to a level of certainty equivalent to proof beyond a reasonable doubt. If the jury unanimously determined that mitigation did not outweigh the proven aggravating factors, it proceeded to step four where it had to select the appropriate sentence between life without parole and the death penalty. The selection decision at step four for each juror had to be to a level of certainty equivalent to proof beyond a reasonable doubt.

At the conclusion of the April 24 hearing, the court decided to give the jury both introductory instructions and final instructions at each phase to assist the jurors in understanding the purpose of each phase, the applicable steps at each phase, and the standards of proof or standards of certainty applicable to each step. Consequently, both parties submitted proposed introductory and final instructions. The proposed instructions were the subject of nine jury instruction conferences held between May 7 and June 12, 2008.

At the start of phase one, the jury received six introductory instructions. The jury was instructed that the purpose of the sentencing hearing was to select the punishment the jury believed was warranted and that it would utilize the four-step process divided in two phases to make that decision. The jury was instructed that "[y]our verdict in the trial does not in any way require you to vote to impose the sentence of death." Phase One Introductory Instruction No. 1.

After the evidence at phase one was completed, the jury received the final instructions for phase one. The jury was instructed to "determine, as to each victim, whether the prosecution has proven the existence of at least one aggravating factor specified in Instruction No. 14 beyond a reasonable doubt." Phase One Final Instruction No. 12. The instruction indicated that the sentencing hearing would continue if the jury's decision on at least one aggravating factor was unanimous, otherwise the result would be a sentence of life imprisonment.

After the jury determined that all five endorsed statutory aggravating factors had been proved beyond a reasonable doubt, the sentencing hearing moved to phase two. At phase two, the jury was given eight introductory instructions and 37 final instructions to follow when completing steps two through four of the sentencing hearing. Included in those instructions was the admonishment that the

jurors' "deliberations must take place in a certain order and within certain legal guidelines." Phase Two Final Instruction No. 19.

Regarding step two, the instruction read, "jurors need not unanimously agree about the existence of a mitigating factor," instead, "each juror determines for himself or herself what mitigating factors exist." *Id.* Jurors were also instructed, "[t]here is no burden on Mr. Owens to prove the existence of any mitigating factor(s) to any degree of certainty." *Id.* Jurors were given a list of 61 mitigating factors presented by Owens during step two of the sentencing hearing. Phase Two Final Instruction No. 22. The jury was instructed that it "should consider all of the evidence presented at the trial and the sentencing hearing, as it relates to mitigating factors." Phase Two Final Instruction No. 21. To further assist the jury, the court also utilized limiting instructions whenever the prosecution offered rebuttal to mitigation evidence. The instructions limited the jury's consideration of rebuttal to mitigation evidence to steps two and three. Phase Two Final Instruction No. 24.

Step three was set forth similarly. The court instructed the jury to individually "weigh the mitigating factor(s) each juror has determined to exist against the statutory aggravating factor(s) proven beyond a reasonable doubt." Phase Two Final Instruction No. 19. The instruction also specified what evidence jurors could consider at step three: "the only aggravating factors you may consider are those you unanimously concluded were proven beyond a reasonable doubt at step one." *Id.* A list of rebuttal to mitigation evidence and its limited purpose was explained to the jury. Phase Two Final Instruction No. 24. Jurors were also instructed to proceed to step four only if they were "unanimously convinced beyond a reasonable doubt that the mitigating factor(s) do not outweigh the statutory aggravating factors from step one." Phase Two Final Instruction No. 19.

For step four, jurors were instructed that each juror was to decide "whether they are convinced beyond a reasonable doubt that death, rather than life, is the appropriate sentence." *Id*. The jurors were told that any decision made in the previous steps was not controlling to their final decision and that "[i]f any one or more of the jurors is not convinced beyond a reasonable doubt that the appropriate sentence is death, then the result is a sentence of life in prison without the possibility of parole." *Id*. The difference between aggravating factors and aggravating circumstances was explained to the jury. The jury was also instructed that the aggravating factors were the only aggravation it could consider at step three and that aggravating circumstances evidence could be considered only at step four. Phase Two Final Instruction No. 26. Then the jury was given a list of aggravating circumstances evidence and was reminded of its limited purpose. Phase Two Final Instruction No. 27. This instruction also reminded the jurors that their decision on punishment could not be based on sympathy, passion, or an emotional response. Phase Two Final Instruction No. 28. As a result of bifurcating the sentencing hearing, separate verdict forms for each victim were submitted to the jury at the conclusion of each phase.

3. Principles of Law

Capital sentencing in Colorado is governed by § 18-1.3-1201. "Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment . . . ." § 18-1.3-1201(1)(a). This statute explicitly provides for bifurcation of the trial, separating the determination of guilt from sentencing. It further specifies that:

> (2)(a) After hearing all the evidence and arguments of the prosecuting attorney and the defendant, the jury shall

> deliberate and render a verdict based upon the following considerations:
>
> (I) Whether at least one aggravating factor has been proved . . . ;
>
> (II) Whether sufficient mitigating factors exist which outweigh any aggravating factor or factors found to exist; and
>
> (III) Based on the considerations in subparagraphs (I) and (II) of this paragraph (a), whether the defendant should be sentenced to death or life imprisonment.

§ 18-1.3-1201(2)(a).

The Colorado Supreme Court has interpreted the statute as establishing four steps to a capital sentencing hearing. In the first step, the jury must determine whether the prosecution has proved the existence of at least one statutory aggravating factor beyond a reasonable doubt. *See* § 18-1.3-1201(2)(a)(I); *Dunlap*, 975 P.2d at 736. In the second step, the jury must decide whether any mitigating factors exist. *See* § 18-1.3-1201(2)(a)(II); *Dunlap*, 975 P.2d at 736. In the third step, based on the mitigating evidence presented, the jury must assess whether "mitigating factors exist which outweigh any aggravating factor or factors found to exist." § 18-1.3-1201(2)(a)(II). If the jury finds that mitigating factors do not outweigh the statutory aggravating factors, the jury moves to the fourth and final step to determine whether to sentence the defendant to death or life imprisonment. *See* § 18-1.3-1201(2)(a)(III); *Dunlap*, 975 P.2d at 736.

The general assembly has exclusive legislative power. Colo. Const. art. V, § 1. It is tasked with the sole power to write the law, whereas the judicial branch has the authority only to interpret the law. Colo. Const. art. III ("The powers of the government of this state are divided into three distinct departments, -- the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall

exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted."). Therefore, "courts must balance the obligation to construe statutes as constitutional and valid whenever possible against the duty to avoid judicially rewriting statutes in derogation of legislative intent." *Williams v. City and County of Denver*, 607 P.2d 981, 983 (Colo. 1979).

One power bestowed on the judiciary is the duty to ensure a defendant receives due process and a fair trial. "The Due Process Clauses of the United States and Colorado Constitutions guarantee every criminal defendant the right to a fair trial . . . ." *People v. Harmon*, 284 P.3d 124, 127 (Colo. App. 2011). Indeed, "a trial court has the duty to ensure that a defendant be given a fair trial by impartial jurors." *Wafai v. People*, 750 P.2d 37, 43 (Colo. 1988). *See also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 552 (1976) ("[T]rial court[] [has a] duty to protect the defendant's constitutional right to a fair trial."). This duty is particularly heightened in death penalty cases. *See Dunlap v. People*, 173 P.3d 1054, 1092 (Colo. 2007) ("Because the death penalty is qualitatively different from any other punishment under the law, the United State Supreme Court requires heightened reliability in capital cases."). Acknowledging that capital cases require heightened reliability, the Colorado Supreme Court has held that there is "no constitutional infirmity in Colorado's capital sentencing scheme," because it comports with the requirement that "a capital sentencing scheme must direct and limit the discretion of the sentencer to ensure the death penalty is not imposed in an arbitrary and capricious manner." *Id.* The requisite limiting and directing of the sentencing jury's discretion is achieved by Colorado's four-step process. *Id.*

4. Analysis

Colorado's death penalty statute requires a jury in a death penalty case to deliberate and render a verdict based on specific considerations before the jury

decides whether to impose a sentence of death or life imprisonment. *See* § 18-1.3-1201(2)(a). The statute does not specify how the trial court should ensure that a jury considers only the appropriate evidence at the correct time during a sentencing hearing. While *Dunlap* provided some guidance by breaking the statute into four steps, trial courts are left with the discretion to fashion a sentencing hearing as the trial court deems appropriate. 975 P.2d at 736. Indeed, the trial court has the duty, and therefore the inherent authority, to protect a defendant's right to a fair trial. *Cf. People v. Owens*, 330 P.3d 1027, 1032 (Colo. 2014) (trial courts have "the inherent authority to manage their dockets."). This is particularly true in a capital sentencing hearing where the trial court is duty-bound to ensure there is heightened reliability in that process. *See Dunlap*, 173 P.3d at 1092. To ensure a fair trial, the trial court must make sure that the jurors understand what questions they are determining and what evidence they may consider for each determination. Bifurcation of a sentencing hearing is a legitimate technique to ensure that the jury is focusing on the question that has to be decided and on what evidence may be used to answer each question.

The four-step process for capital sentencing is challenging even for judges and attorneys to understand and is quite difficult for lay people. Because a jury of lay people would determine Owens's sentence, the trial court faced the task of ensuring that proper measures were taken to provide Owens with a fair trial, including fashioning a sentencing hearing that could properly be understood by the jury. The trial court took a common sense approach in a manner calculated to ensure that the jurors could understand their duty under the law. By requiring the jury to first determine, based on only legally admissible evidence, whether the prosecution had proved at least one statutory aggravating factor beyond a reasonable doubt, the trial court ensured that the jury's phase one determination

was properly based on the statutory aggravating factor evidence and nothing else. Only after determining that one or more statutory aggravating factors were proved beyond a reasonable doubt were the jurors allowed to move on to phase two.

Trial courts are entrusted with wide discretion to ensure due process and heightened reliability. It is of no concern that other courts have bifurcated, or planned to either bifurcate or trifurcate, capital sentencing hearings in a different manner. Moreover, in this case, bifurcation was requested by Owens's trial team and implemented over the prosecution's objection.

Because the court followed the capital sentencing statute and had the inherent authority to implement measures that would ensure that Owens received a fair trial, there was no separation of powers doctrine violation. In order to violate the separation of powers clause, the judiciary must rewrite or give its own meaning to a statute. The court did not do so here. Bifurcation of the sentencing hearing was consistent with both the statute and the holding in *Dunlap*. 975 P.2d at 736. Owens's capital sentencing hearing was divided into two phases in order to allow the jury to make proper findings regarding the determinations required by the statute. The court did not overstep its power under the Colorado Constitution.

5. Conclusion

The court concludes that § 18-1.3-1201 does not require a unitary sentencing hearing. As such, bifurcation of the sentencing hearing was not an *ad hoc* scheme in violation of the death penalty statute, and the court did not exceed its jurisdiction or violate separation of powers by bifurcating the sentencing hearing.

Accordingly, Owens's petition to vacate his sentence based on the court's bifurcation of the sentencing hearing is **Denied**.

B. Effects of Bifurcation

1. Parties' Positions

Owens contends that the court violated his equal protection rights by bifurcating his sentencing hearing differently than sentencing hearings in other death penalty cases. For support, Owens cites to other death penalty cases in this jurisdiction: *People v. Bueno*[429] and *People v. Montour*.[430] Owens argues that treating defendants facing a death sentence differently violates the equal protection clauses of the United States and Colorado Constitutions. Owens further argues that the bifurcation here was arbitrary, thereby allowing the jury to engage in arbitrary decision making in violation of the Eighth Amendment.

The prosecution responds that procedural differences in sentencing hearings do not implicate equal protection. Instead, judges have the discretion to choose the procedural mechanism necessary to protect a defendant's due process rights. The prosecution argues that even if equal protection applies to the court's bifurcation, the court in this case did not violate Owens's equal protection rights.

2. Findings of Fact

The findings of fact in part X.A.2 of this Order are incorporated herein as though fully set forth.

3. Principles of Law

The United States Constitution provides, "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Similarly, the Colorado Constitution provides, "[n]o person shall be deprived of life, liberty or property, without due process of law." Colo. Const. art. II, § 25; *see also Millis v. Bd. of County Comm'rs of Larimer County*, 626 P.2d

[429] Lincoln County case 05CR73.
[430] Douglas County case 02CR782.

652, 657 (Colo. 1981) ("Inherent in the due process clause of Art. II, s 25 of the Colorado Constitution is a guarantee of equal protection of the laws."). "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

Equal protection assures that individuals "who are similarly situated will be afforded similar treatment." *People v. Jefferson*, 748 P.2d 1223, 1225 (Colo. 1988). If two criminal statutes provide different punishment for the same act, "a defendant convicted and sentenced under the harsher statute is denied equal protection of the laws." *Id.* Likewise, two statutes "proscribing with different penalties what ostensibly might be different acts, but offering no intelligent standard for distinguishing the proscribed conduct, run afoul of equal protection under state constitutional doctrine." *Id.* at 1225-26; *see also People v. Marcy*, 628 P.2d 69, 75 (Colo. 1981).

Both the United States and Colorado Constitutions also protect individuals from cruel and unusual punishment. *See* U.S. Const. amend. VIII; Colo. Const. art. II, § 20. Capital punishment must "be imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

4. Analysis

First, Owens argues that the bifurcation violated his equal protection rights. Equal protection requires common treatment of those similarly situated. Owens cites *City of Cleburne* to support his argument that he was not treated like other

defendants facing the death penalty. 473 U.S. 432. However, in the context of equal protection, the United States Supreme Court's ruling in *City of Cleburne* was specific to government action that draws unconstitutional classifications of individuals based on race, gender, or national origin. *Id.* at 439-40. The court did not create unconstitutional classifications when it bifurcated the sentencing hearing. Section 18-1.3-1201 does not provide that some individuals have bifurcated sentencing hearings and that others do not. Instead, the statute provides the framework for allowing the judge to determine the structure of the sentencing hearing. Bifurcating the sentencing hearing was not an equal protection violation.[431]

Second, Owens argues that the bifurcation was arbitrary. The trial court bifurcated the sentencing hearing at the behest of Owens's trial team after considering the positions and arguments of the attorneys, and exercising its discretion. While trifurcating might also be reasonable, it was appropriate for the trial court to give weight to the apparent preference of the trial team when considering reasonable options. The jury was given instructions at the beginning and end of both phases of the sentencing hearing, which guided the jury throughout its decision-making process. In Phase Two Final Instruction No. 24, the jury was instructed that rebuttal to mitigation evidence could only be used at steps two and three. The instruction listed nine items of rebuttal to mitigation evidence and listed

[431] Owens also contends that the defendant in *People v. Montour* would have benefitted from greater procedural protections than either Owens or the defendant in *People v. Bueno*. The defendant in *People v. Montour* resolved his case on the second day of trial. In that case, the trial judge intended to trifurcate the sentencing hearing into three phases: phase one (step one), phase two (steps two and three), and phase three (step four). In this portion of his argument, Owens seems to suggest that more bifurcation actually bestows more of a due process benefit on a defendant in a capital case.

the particular mitigation against which it was offered. Phase Two Final Instruction No. 19 instructed the jurors that the only aggravation they could consider at step three was the statutory aggravating factor(s) they found at step one. Phase Two Final Instruction No. 26 explained the difference between aggravating factors and aggravating circumstances, and it instructed the jury that aggravating circumstances evidence could only be considered at step four. Phase Two Final Instruction No. 27 listed 18 instances of aggravating circumstances and instructed the jury that such evidence could only be used at step four. The court's bifurcation of the sentencing hearing and use of limiting instructions for rebuttal to mitigation evidence and aggravating circumstances evidence avoided the possibility of arbitrary decision making by the jury during the eligibility stage, ameliorating a concern expressed in *Dunlap*. 975 P.2d at 739-40.

Owens argues that the court was wrong to bifurcate the sentencing hearing, while he simultaneously points with apparent approval to the bifurcation in *Bueno*, where the court separated the eligibility stage from the selection stage. Contrary to Owens's assertion, *Dunlap* does not require bifurcation between the eligibility and selection stages. Colorado's death penalty scheme coincides with the United States Supreme Court's division of the decision-making process into two stages, eligibility and selection. *Id.* at 735-36. While it might be easier for jurors to understand the process if they deliberate between the eligibility and selection stages, *Dunlap* does not require it. *Id*. at 739-40. Instead, *Dunlap* requires that the jury's determination of statutory aggravating factors and the weighing process not be contaminated by evidence of aggravating circumstances. *Id.* While there may be several ways to achieve this goal, one acceptable way is to bifurcate step one so that the jury recognizes the statutory aggravating factors are the only aggravating evidence the jury can consider at step three. Bifurcating in this fashion was not

arbitrary, was consistent with the trial team's apparent preference, and provided procedural assurance that the jury's decision-making process would not be arbitrary.

5. Conclusion

The court concludes there were no unconstitutional effects of bifurcating the sentencing hearing because bifurcation did not violate equal protection and was not done in an arbitrary manner in violation of the Eighth Amendment.

Accordingly, Owens's petition to vacate his sentence based on the court's bifurcation of the sentencing hearing is **Denied**.

C. C.R.S. § 18-1.3-1201 is Facially Unconstitutional

1. Parties' Positions

Owens argues that § 18-1.3-1201 is unconstitutional on its face. First, he asserts that the statute fails to minimize the risk of an arbitrary imposition of the death penalty because it only provides for a unitary sentencing hearing, such that all evidence must be presented before the jury deliberates on sentencing. Thus, according to Owens, the jury can wrongly consider evidence that is only admissible in the selection stage at an earlier time.

Second, he argues that the unitary sentencing hearing required by the statute denies defendants an impartial jury. Owens argues that a unitary sentencing hearing allows the jury to hear step four evidence before the jury has made its determinations on steps one through three.

Third, Owens contends that the statute is unconstitutional because it does not require the prosecutor to provide reasons for pursuing or not pursuing the death penalty. Owens also complains that the statute allows the prosecutor to withdraw the death notice at some stages of the proceeding but not at others.

Fourth, Owens argues that the statute slants the decision-making process toward a death sentence because § 18-1.3-1201 requires statutory aggravating factors to be proved beyond a reasonable doubt, but it does not apply a standard of proof to mitigating factors.

Last, Owens argues that the statute violates equal protection because capital defendants sentenced by a jury are treated differently than those who are sentenced by a judge in that only the judge's sentencing decision has to be supported by written findings of fact.

The prosecution responds that the Colorado death penalty statute has passed constitutional muster. The prosecution also reasserts its position that the statute does not require a unitary sentencing hearing. The prosecution notes that the jurors in this case were given limiting instructions so they knew when and how to consider the evidence presented at the sentencing hearing, and courts must presume the jury followed these instructions. The prosecution points out that nothing in the statute precludes it from withdrawing a statement of intent to seek the death penalty. The prosecution similarly disclaims that Colorado's death penalty statute slants the decision-making process in favor of death. Lastly, the prosecution denies Owens's equal protection claim, stating that capital defendants are on notice that by exercising the constitutional right to trial by jury they are accepting that there would be no findings of fact and conclusions of law by the jury.

2. Findings of Fact

The findings of fact in part X.A.2 of this Order are incorporated herein as though fully set forth.

3. Principles of Law

Generally, a statute is unconstitutional on its face only "if the complaining party can show that the law is unconstitutional in all its applications." *Dallman v. Ritter*, 225 P.3d 610, 625 (Colo. 2010). A facial challenge to legislation is the most difficult challenge to mount successfully because the challenge must establish beyond a reasonable doubt that no set of circumstances exists under which the statute would be valid. *See City and County of Denver v. Casados*, 862 P.2d 908, 913 (Colo. 1993). The complaining party must show beyond a reasonable doubt that the statute is unconstitutional in all its applications. *See, e.g., People v. Boles*, 280 P.3d 55, 59 (Colo. App. 2011).

A capital defendant has an inherent right to sentencing by a jury. *See Ring v. Arizona*, 536 U.S. 584, 589 (2002); *People v. Montour*, 157 P.3d 489, 496 (Colo. 2007) (finding § 18-1.3-1201 affords greater right to jury sentencing than the Sixth Amendment); *People v. Hagos*, 110 P.3d 1290, 1291 (Colo. 2005) ("The Governor called a special legislative session on July 1, 2002, to reform Colorado's capital sentencing procedures in response to *Ring*. At the session, the legislat[ure] passed a bill that became effective on July 12, 2002, prospectively abolishing the three-judge panel and returning the responsibility for finding aggravating factors and determining whether the defendant would receive a death sentence to the jury that heard the guilt phase.").

To ensure that right, the Colorado Supreme Court has interpreted the statute as laying out four steps to a capital sentencing hearing. *Woldt v. People*, 64 P.3d 256, 264 (Colo. 2003). In the first step, the jury must determine whether the prosecution has proved the existence of at least one statutory aggravating factor beyond a reasonable doubt. *See* § 18-1.3-1201(2)(a)(I); *Dunlap*, 975 P.2d at 736. In the second step, the jury must decide whether any mitigating factors exist. *See* §

18-1.3-1201(2)(a)(II); *Dunlap*, 975 P.2d at 736. In the third step, based on the mitigating evidence presented, the jury must assess whether "mitigating factors exist which outweigh any aggravating factor or factors found to exist." § 18-1.3-1201(2)(a)(II). These first three steps are considered the eligibility stage. *See Dunlap*, 975 P.2d at 739. During those steps, the jury may only consider evidence related to statutory aggravating factors, mitigating evidence, and the prosecution's evidence offered to rebut the mitigating evidence. *Id.* If the jury finds the mitigating evidence does not outweigh the statutory aggravating factors, then the jury moves to the fourth and final step to determine whether the defendant should be sentenced to death or life imprisonment. *See* § 18-1.3-1201(2)(a)(III); *Dunlap*, 975 P.2d at 736. At that final step, the selection stage, the jury may consider all relevant evidence, including aggravating circumstances.[432] *See Dunlap*, 975 P.2d at 741.

Under § 18-1.3-1201, a jury in a Colorado capital sentencing hearing must sentence a defendant to life imprisonment if it does not find that an aggravating factor exists, if there are sufficient mitigating factors to outweigh the statutory aggravating factors, or if the jury cannot make a unanimous decision regarding a verdict of death. § 18-1.3-1201(2)(b). Whether the jury's decision is life without parole or death, there is no requirement for the jury to make findings of fact. However, the Colorado death penalty statute provides that "[i]n all cases where the sentencing hearing is held before the court alone, ... [t]he sentence of the court shall be supported by specific written findings of fact" based upon aggravating and mitigating factors. § 18-1.3-1201(2.5). If, on the other hand, the trial and sentencing hearing are heard by a jury, the jury must find in writing that "[a]t least

[432] In this case, Owens was afforded the opportunity to present rebuttal evidence to the aggravating circumstances evidence.

one aggravating factor has been proved; and . . . [t]here are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved," if the verdict by the jury is death. § 18-1.3-1201(2)(b)(II)(A)-(B). According to the Colorado Supreme Court, "Colorado's sentencing scheme is sufficiently reliable to pass constitutional muster." *Dunlap*, 173 P.3d at 1092.

Next, the statute provides for judicial oversight of any death verdict. When a defendant is convicted of a class one felony, "the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment." § 18-1.3-1201(1)(a). If a jury subsequently returns a death sentence, the verdict "shall be binding upon the court unless the court determines . . . that the verdict of the jury is clearly erroneous as contrary to the weight of the evidence." § 18-1.3-1201(2)(c). Then in cases where a sentence of death is imposed, "the supreme court shall review the propriety of that sentence," bearing in mind the nature of the offense, background of the defendant, and the manner in which the sentence was imposed. § 18-1.3-1201(6)(a).

If a case in which the death sentence was obtained is invalidated on appeal and remanded to the trial court, the prosecutor may "inform[] the trial court that, in the opinion of the prosecutor, capital punishment would no longer be in the interest of justice." § 18-1.3-1201(7)(b). Giving the prosecutor this discretion is in line with the legal principle that "the duty of the prosecutor is to seek justice, not merely convict." *People v. Dist. Court*, 632 P.2d 1022, 1023 (Colo. 1981); *see also Berger v. United States*, 295 U.S. 78, 88 (1935) (a prosecutor's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

Equal protection assures that individuals "who are similarly situated will be afforded similar treatment." *Jefferson*, 748 P.2d at 1225. If two criminal statutes

provide different punishment for the same acts, "a defendant convicted and sentenced under the harsher statute is denied equal protection of the laws." *Id.* Likewise, two statutes "proscribing with different penalties what ostensibly might be different acts, but offering no intelligent standard for distinguishing the proscribed conduct, run afoul of equal protection under state constitutional doctrine." *Id.* at 1225-26; *see also Marcy*, 628 P.2d at 75.

4. Analysis

a. C.R.S. § 18-1.3-1201 Requires a Unitary Sentencing Hearing, Which Skews Weighing Process in Favor of Death

The Colorado death penalty statute clearly lays out the steps a jury is to follow during sentencing deliberations; however, the statute does not require a unitary sentencing hearing. *See* § 18-1.3-1201(2)(a)(I)-(III); *Dunlap*, 975 P.2d at 736. Each step requires the jury to make various determinations within specific parameters in the process thereby minimizing any risk of an arbitrary imposition of the death penalty.[433] Owens's argument that the statute requires a unitary sentencing hearing that skews the weighing process in favor of death is without merit.

But even if the statute required a unitary sentencing hearing, section 18-1.3-1201 would not be facially unconstitutional. The point at which evidence is admitted at sentencing, whether the hearing is bifurcated or not, does not skew the weighing process in favor of a death sentence.[434] Without evidence to the contrary, courts must presume jurors understood and followed the jury instructions. *See, e.g.*, *Tennessee v. Street*, 471 U.S. 409, 415 (1985) (It is a "crucial assumption that

[433] In this case, the court bifurcated the sentencing hearing to ensure Owens's due process rights.
[434] In this case, the jurors were repeatedly instructed on when and how they could and could not consider certain evidence.

[] jurors followed the instructions given them by the trial judge." (quotations omitted)); *Dunlap*, 975 P.2d at 743 ("[W]e presume that the jury understood and heeded its instructions."). Without such an assumption, the jury process fails. Particularly where capital punishment is involved, the right to trial by jury is important and fundamental. *See Montour*, 157 P.3d at 497. Defendants, attorneys, judges, and the public entrust juries to make decisions between life and death and must trust that juries follow the instructions of law and reach verdicts that are not arbitrary.

b. C.R.S. § 18-1.3-1201 Denies Capital Defendants an Impartial Jury on Death Eligibility

Any argument by Owens that a unitary sentencing hearing creates a biased jury is similarly rejected. Owens argues that a unitary sentencing hearing allows the jury to hear selection stage evidence, which they may not consider until step four, before the jurors have made their determinations on steps two and three. He claims that this exposure to evidence creates a partial jury and denies defendants the right to a trial by an impartial jury.[435] But it is not uncommon for jurors to be exposed to evidence that they may consider for only limited purposes, or, in some cases, must ignore entirely (e.g. evidence to which an objection is sustained). Owens has not demonstrated that § 18-1.3-1201 is unconstitutional on its face.

[435] An extensive individual voir dire selection process was carried out in this case. Individual voir dire allowed the attorneys for both parties to filter out prospective jurors who would be unable to follow instructions or who would otherwise allow themselves to become partial during the sentencing hearing.

c. Admitting Step Four Evidence During Steps Two and Three is Fundamentally Unfair and Undermines Reliability

For the same reasons set forth above, Owens's argument that the statute is fundamentally unfair and undermines reliability because it admits prejudicial step four evidence during the eligibility stage is unpersuasive.

d. Prosecutorial Discretion is Arbitrary and Irrational

Owens's argument that prosecutorial discretion under the death penalty statute is arbitrary, irrational, unfair, and unreliable is unfounded. He seems to claim that there are no conditions or restrictions on when a prosecutor can seek the death penalty and that there are arbitrary restrictions on when the prosecutor can withdraw the death penalty. While acknowledging that the statute requires proof of a statutory aggravating factor in order for a prosecutor to seek the death penalty, Owens claims that this is insufficient, as it does not require a prosecutor to justify his decision. A prosecutor may not have to justify the decision whether to seek the death penalty, but in order to obtain a death verdict the prosecutor must: 1) convince every juror, beyond a reasonable doubt, that at least one of the 17 statutory aggravating factors was present, and 2) convince every juror that mitigating factors do not outweigh aggravating factors.

Prosecutorial discretion is an important element of the criminal justice system. The community instills broad power in an elected district attorney to determine whether to bring charges for an alleged crime. Each time the prosecutor files a case, he or she makes a discretionary determination that is guided by law and ethics. In a death penalty case, the prosecutor must also be guided in the exercise of that discretion by § 18-1.3-1201. Furthermore, a prosecutor is a sworn law enforcement officer and an attorney who has taken an oath to uphold the law. Prosecutors must seek justice, not solely a conviction. *See Berger*, 295 U.S. at 88.

The discretion afforded to a prosecutor under the Colorado capital sentencing statute is within the well-established bounds of prosecutorial discretion. Although the prosecutor may seek the death penalty, the statute requires a separate hearing in conformity with *Ring*, 536 U.S. 584, to allow a jury to determine the appropriate sentence. Thus, Owens's argument related to the prosecution's arbitrary discretion is not persuasive.

e. C.R.S. § 18-1.3-1201 Slants Decision-Making Process in Favor of Death

Owens argues that § 18-1.3-1201, by not requiring a burden of proof for mitigating factors, signals to the jury that statutory aggravating factors are more important than mitigating factors. Thus, he argues, the statute is composed in a way that favors a death sentence. The argument lacks merit. Statutory aggravating factors must be proved beyond a reasonable doubt because their proof is required to a high degree of certainty, before the death penalty can even be considered. There is no burden required for mitigating factors because the law is generally adverse to imposing a presentence burden on a criminal defendant and because mitigation is an open-ended, subjective concept. A broad range of factors can qualify as mitigation.[436] Having such a broad standard and instructing the jurors that a defendant does not have to prove mitigation signals to jurors that almost anything can qualify as mitigation, if at least one juror sees it as such. Therefore, the lack of a burden of proof on the defendant related to mitigation does not slant the sentencing hearing to favor death.

[436] As the jury instructions in this case read, "[a] mitigating factor is anything arising from the evidence which suggests a reason for not imposing a death sentence." Phase Two Final Instruction No. 19. Under this broad standard, Owens presented 61 mitigating factors to the jury. Phase Two Final Instruction No. 22.

Similarly, there is no merit to Owens's assertion that the statutory requirement that a jury's death sentence is generally binding on the court slants the jury toward a verdict of death. The jurors are never told about this statutory requirement. They are only told that they should assume that their verdict will be carried out. The statute merely emphasizes the importance of the jury's role in a death penalty case.[437]

Owens's argument that the court is reduced to a rubber stamp ignores the magnitude of the constitutional right to a jury determination and is inapposite. The United States Supreme Court has held that a capital defendant has an inherent right to be sentenced by a jury under the Sixth Amendment of the United States Constitution. *Ring*, 536 U.S. at 589. The Colorado death penalty statute implements this vital right.

Likewise, § 18-1.3-1201(6)(a), which requires the Colorado Supreme Court to independently review all death sentences, does not slant the jury's decision making in favor of a death verdict because the jury is unaware of that review. Instead, it affords a defendant greater protection against an unconstitutional sentence. The Colorado Supreme Court must review the propriety of a jury's death sentence, and it will not allow the death sentence to stand if it determines that "the sentence was imposed under the influence of passion or prejudice or any other arbitrary factor or that the evidence presented does not support the finding of statutory aggravating circumstances." § 18-1.3-1201(6)(b). In summary, the statute affords a capital defendant in Colorado with two judicial reviews of a jury's

[437] In this case, all the jurors were required to sign the verdict forms at steps three and four thereby providing more confidence that each juror recognized his or her responsibility at the sentencing hearing.

determination that death is appropriate. Accordingly, Owens's argument that these provisions are unconstitutional is meritless.

f. C.R.S. § 18-1.3-1201 Violates Equal Protection

Finally, the statute does not violate equal protection. The fact that the statute affords a defendant the opportunity to choose who will decide punishment is not a violation of the defendant's right to equal protection. It does not put the defendant in the untenable position of choosing between constitutional rights. *See People v. Chavez*, 621 P.2d 1362, 1365 (Colo. 1981).

Owens argues that defendants who choose to have the court decide punishment are treated differently than defendants who choose to have a jury decide punishment because the jury is not required to support its decision with written findings of fact while the court is required to do so. Traditionally, jurors render verdicts but are not required to make findings of fact. On the other hand, judges traditionally make findings of fact. *See, e.g.*, C.R.C.P. 52 (requiring judges to make findings of fact in actions tried without a jury). The statute mandates that the court make such findings if a capital defendant chooses to be sentenced by a judge. Section 18-1.3-1201 applies to any defendant against whom the prosecution seeks the death penalty. Regardless of whether a defendant decides to waive his right to a jury trial and sentencing hearing, all defendants facing the death penalty are afforded similar treatment, as required by the Constitution.

5. Conclusion

The court concludes Owens failed to establish beyond a reasonable doubt that § 18-1.3-1201 is facially unconstitutional.

Accordingly, Owens's petition to vacate his sentence based on the facial unconstitutionality of § 18-1.3-1201 is **Denied**.

D. C.R.S. § 18-1.3-1201 was Unconstitutionally Applied

1. Parties' Positions

Owens argues that § 18-1.3-1201 was unconstitutionally applied in this case. He specifically argues that the court failed to bifurcate the eligibility stage from the selection stage in violation of the Eighth Amendment of the United States Constitution and article II, section 20 of the Colorado Constitution. Owens further argues that because his trial team encouraged the court to bifurcate the sentencing hearing in the way it did, his team was ineffective, and his right to effective assistance of counsel was violated.

Next, Owens argues that the court's limiting instructions to the jury during the sentencing hearing were inadequate and did not prevent the jury from misusing step four evidence when it was determining eligibility in steps two and three. Owens again argues that his trial team was ineffective because it failed to endorse mitigating factors before presenting mitigation evidence at step two.

The prosecution responds that there was no error in the court's bifurcation of the sentencing hearing. The prosecution argues that there was no error because Owens requested that such bifurcation and explicit limiting instructions were given to the jury. The prosecution also argues that the limiting instructions were adequate because the instructions were given contemporaneously with the testimony and again in the final instructions for each phase.

2. Findings of Fact

The findings of fact in part X.A.2 are incorporated herein as though fully set forth.

3. Principles of Law

Capital sentencing in Colorado is governed by § 18-1.3-1201. "Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a

separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment . . . .” § 18-1.3-1201(1)(a). This statute explicitly provides for separating the determination of guilt from sentencing.

The statute lays out four steps for a capital sentencing hearing. In the first step, the jury must determine whether the prosecution has proved the existence of at least one statutory aggravating factor beyond a reasonable doubt. *See* § 18-1.3-1201(2)(a)(I); *Dunlap*, 975 P.2d at 736. In the second step, the jury must decide whether any mitigating factors exist. *See* § 18-1.3-1201(2)(a)(II); *Dunlap*, 975 P.2d at 736. In the third step, based on the mitigating evidence presented, the jury must assess whether “mitigating factors exist which outweigh any aggravating factor or factors found to exist.” § 18-1.3-1201(2)(a)(II). If the jury finds that mitigating factors do not outweigh the statutory aggravating factors, the jury moves to the fourth and final step to determine whether the defendant should be sentenced to death or life imprisonment. *See* § 18-1.3-1201(2)(a)(III); *Dunlap*, 975 P.2d at 736.

The court has the duty to ensure a defendant’s rights to due process and a fair trial. “The Due Process Clauses of the United States and Colorado Constitutions guarantee every criminal defendant the right to a fair trial . . . .” *Harmon*, 284 P.3d at 127. Indeed, “a trial court has the duty to ensure that a defendant be given a fair trial by impartial jurors.” *Wafai*, 750 P.2d at 43. *See also Nebraska Press Ass’n*, 427 U.S. at 552 (“[T]rial court[] [has a] duty to protect the defendant’s constitutional right to a fair trial.”). This duty is particularly heightened in death penalty cases. *See Dunlap*, 173 P.3d at 1092 (“Because the death penalty is qualitatively different from any other punishment under the law, the United States Supreme Court requires heightened reliability in capital cases.”). The Colorado Supreme Court has held that there is “no constitutional infirmity in

Colorado's capital sentencing scheme," as it comports with the requirement that "a capital sentencing scheme must direct and limit the discretion of the sentencer to ensure the death penalty is not imposed in an arbitrary and capricious manner." *Id.*; *see also Tuilaepa v. California*, 512 U.S. 967, 973 (1994) (process must be neutral and principled to guard against bias and caprice in sentencing decision).

Absent evidence to the contrary, courts "presume that the jury understood and heeded its instructions." *Dunlap*, 975 P.2d at 743. There is a "crucial assumption that [] jurors followed the instructions given them by the trial judge." *Street*, 471 U.S. at 415 (internal quotations omitted). Thus, a "trial judge's instructions [are] the appropriate way to limit the jury's use of [] evidence." *Id.* at 417. Indeed, courts routinely allow evidence of prior convictions accompanied by a limiting instruction that it may not be considered as evidence of bad character or a propensity to commit crimes. *See People v. McKeel*, 246 P.3d 638, 641 (Colo. 2010).

The Sixth Amendment to the United States Constitution guarantees effective assistance of counsel for the accused in a criminal case. The United States Supreme Court addressed this right in *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant must prove two components to show that counsel was "so defective as to require reversal of a conviction or death sentence." *Strickland*, 466 U.S. at 687. First, the defendant must show that his/her attorneys made errors so serious that they were not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* Second, *Strickland* requires a showing that "the deficient performance prejudiced the defense" to the point of deprivation of a fair trial with a reliable result. *Id.*

4. Analysis

a. Failing to Bifurcate Steps Two and Three from Step Four

Owens's first argument mirrors his arguments in parts X.A and X.B of this Order that his death sentence must be vacated because of the unconstitutional effects of bifurcating the sentencing hearing. As the court found above, trial courts have discretion to decide whether and how to bifurcate a sentencing hearing under Colorado's death penalty statute.

Section 18-1.3-1201(2)(a) does not specify how the trial court should conduct a capital sentencing hearing. While *Dunlap* provides some guidance by breaking the statute into four steps, trial courts are left with the discretion to bifurcate or trifurcate a sentencing hearing as the judge deems appropriate. 975 P.2d at 736. In deciding how to structure and conduct the sentencing hearing, the trial court is guided by its duty and inherent authority to protect a defendant's right to a fair trial.

In this case, the trial court employed the procedure that Owens's trial team suggested and then crafted appropriate limiting instructions to ensure that the jury properly viewed and appropriately limited certain evidence.

At the behest of Owens's trial team, the court bifurcated the sentencing hearing between step one and the remaining steps. Owens's trial team did not ask that the court trifurcate the sentencing hearing. The trial team could have made such a request and, had the trial court agreed, step four might then have been bifurcated from steps two and three. It was appropriate for the trial court to consider the preference of experienced and competent defense counsel.[438]

[438] Some criminal defense attorneys might credit the theory of recency and would prefer that the jury not make its life or death decision right after hearing only step four evidence – evidence that can be strongly tilted toward aggravation.

In this case, the evidence that would be admissible only at step four was outlined in Phase Two Final Instruction No. 27, a limiting instruction.[439] Had the hearing been trifurcated, the jury would not have heard the aggravating circumstances evidence before it made the eligibility decision after steps two and three. But most of the aggravating circumstances evidence related to things that the jury already knew or at least strongly suspected – that Owens was associated with Ray and Carter, that he was associated with the Lowry Park and Dayton Street cases, and that he had made his living in the drug business.

The rules of evidence applied in step one but not in the remaining steps. And unless the jury unanimously found beyond a reasonable doubt that at least one of the step one aggravating factors had been proved, it would have been inappropriate to put the defendant, the defense witnesses, the victims' families, and the jury through the expensive, time-consuming, and emotionally-wrenching process of steps two through four. Moreover, it was those step one factors against which mitigation was to be measured in steps two and three. Thus, the trial court

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[439] Phase Two Final Instruction No. 27 lists the evidence that the prosecution designated as aggravating circumstances evidence. The instruction advised the jury that such evidence was admitted for a limited purpose and instructed the jury about when that evidence could be considered in its deliberations:

> This evidence was admitted solely for possible consideration by you in the fourth step of your deliberations.
>
> You may not consider this evidence for any purpose when making your determinations at step two and step three of your deliberations.
>
> You may consider the evidence concerning the above listed matters for this limited purpose and for no other purpose whatsoever. You are reminded that you may not consider this evidence for any purpose in steps two or three of your deliberations.

Phase Two Final Instr. No. 27.

exercised sound discretion in bifurcating step one from the remaining steps. These clear distinctions did not apply to bifurcating steps two and three from step four (and thereby trifurcating phase two). The rules of evidence did not apply at steps two, three, or four and the decision of whether to bifurcate or trifurcate the sentencing hearing would involve a discretionary determination of which option would more effectively afford Owens a fair trial. Neither the prosecution nor Owens's trial team sought trifurcation, neither the statute nor *Dunlap* require it, and the trial court gave appropriate limiting instructions.

Because (1) the trial court followed the capital sentencing statute and (2) the trial court reasonably exercised its inherent authority to bifurcate the sentencing hearing in order to ensure that Owens received a fair trial, there was no violation of the United States and Colorado Constitutions. Bifurcation of the sentencing hearing was consistent with both the statute and the holding in *Dunlap*.

b. Ineffective Assistance of Counsel for Failing to Ask Court to Bifurcate Steps Two and Three from Step Four

Owens claims that his trial team was ineffective because it disregarded the risk identified in *Dunlap* that the jury will consider aggravating circumstances evidence while it weighs mitigation against the aggravating factors. *See generally* 975 P.2d at 739. As discussed above, there are potential advantages and disadvantages to bifurcating rather than trifurcating the sentencing hearing. Owens has not shown that his trial team's decision to seek bifurcation was unreasonable. Moreover, the court gave several specific and detailed limiting instructions during phase two and reiterated them in the final instructions. As in *Dunlap*, "the nature of the limiting instructions given by the trial court" made any error caused by the juror's exposure to aggravating circumstance prior to step four, harmless. *Id.* at 740. In this case, limiting instructions were effectively employed to guard against

bias or caprice in the sentencing decision. *See Tuilaepa*, 512 U.S. at 973 (process must be neutral and principled to guard against bias and caprice in sentencing decision).

c. Limiting Instructions were Inadequate

Owens next argues that the court's limiting instructions were inadequate to prevent the jury from misusing step four evidence at an earlier point in phase two of the sentencing hearing because the instructions were contradictory and confusing. In support of his argument, Owens cites the June 6, 2008, transcript where the court advised the jury on how it could use certain evidence during Owens's sentencing hearing. *See* Guilt Phase Tr. 80:9-17 (June 6, 2008 a.m.). Both the contemporaneous and final instructions provided the jurors with sufficient and clear instructions on how they could and could not use any evidence presented by the prosecution in phase two of the sentencing hearing. The instruction given at trial set forth that the mitigation evidence could be used solely to determine "whether mitigation exists and the weight of such mitigation" and that jurors "may not and must not consider this evidence as aggravating factor or factors in Steps 2 and 3." *Id.* Later in the final instructions, jurors were once again instructed that "[d]uring Phase Two of the sentencing hearing, the court admitted certain evidence for the limited purpose as rebuttal to mitigation." Phase Two Final Instruction No. 24. The instruction listed each prosecution witness and the subject matter covered by their testimony, identified the mitigation the evidence purportedly rebutted, limited the use of the evidence to steps two and three, and advised the jury that it could not consider the evidence as aggravating factors in steps two and three. *Id.* The court provided contemporaneous limiting instructions that stated "[i]f you reach Step 4, you may consider [step two] evidence for the purpose of determining the appropriate sentence." Guilt Phase Tr. 80:15-17 (June 6, 2008 a.m.).

There were times when the prosecution's evidence was offered to rebut mitigation, but the evidence also described aggravating circumstances. In those cases, the court gave appropriate limiting instructions for how the jury should use rebuttal to mitigation evidence and aggravating circumstances evidence. *See id.* at 80:9-23; 106:21-25; 107:1-11. Combining the contemporaneous limiting instructions did not cause the jury to consider inadmissible evidence and did not deprive Owens of his rights under the United States and the Colorado Constitutions. If there had been any confusion, it was cured by the Phase Two Final Instructions. The final instructions made clear that any rebuttal to mitigation evidence, as set forth in Phase Two Final Instruction No. 24, could be considered only for that purpose during the steps two and three deliberations. Phase Two Final Instr. No. 24. The jury was also instructed not to use that evidence as aggravation in steps two and three. *Id.* Likewise, Phase Two Final Instruction Nos. 26 and 27 instructed the jury that aggravating circumstances evidence could not be used at steps two and three and could only be used at step four. Therefore, Owens's argument that these instructions unfairly skewed the jury's decision making in favor of death is without merit.

As part of his argument that the limiting instructions in this case were inadequate, Owens alleges that jurors are often incapable of understanding and following the instructions. In this case, the court was following Colorado's capital sentencing statute, which requires jurors to consider only certain evidence at different points in a sentencing hearing. The instructions were drafted in accordance with the guidance of *Dunlap*. The court assisted the jury by bifurcating the final three steps from the first step and provided sufficient instructions before, during, and after the presentation of the evidence.

This is not a situation in which limiting instructions would be inadequate to ensure a fair trial. Unlike in *Bruton* and *Madson*, inadmissible, inflammatory evidence was not placed before this jury. In *Bruton*, "powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant," created the impossibility of limiting instructions providing a fair trial. *Bruton v. United States*, 391 U.S. 123, 135-36 (1968). In *People v. Madson*, 638 P.2d 18 (Colo. 1981), a first-degree murder trial, the trial court allowed witnesses to testify that the victim had been afraid of the defendant prior to her death. *Madson*, 638 P.2d at 26-31. The judge allowed the hearsay evidence for the limited purpose of showing the victim's state of mind and instructed the jurors not to consider the evidence for any other purpose. *Id.* at 24 n.9. But the victim's state of mind was not relevant and the Colorado Supreme Court found such evidence so inflammatory as to "irreparably impair[] the fairness of the trial proceedings." *Id.* at 31.

In this case, Owens does not take issue with whether the evidence would ultimately have been admissible, but merely with when the jury might properly consider it.

Admission of aggravating circumstances evidence during phase two, accompanied by limiting instructions, did not deprive Owens of his constitutional rights. The limiting instructions were adequate, and the court presumes the jury both understood and followed the instructions as given. *See Dunlap*, 975 P.2d at 743.

d. Ineffective Assistance of Counsel to Failing to Request Adequate Limiting Instructions

Last, Owens argues his trial team was ineffective because it requested bifurcation of the sentencing hearing and failed to endorse mitigating factors prior

to phase two, which caused the court to give inadequate limiting instructions. As the court previously concluded, the bifurcation of the sentencing hearing in this case was done reasonably, was within the bounds of the statute, and was done to protect Owens's right to a fair sentencing hearing. The court also previously found that the limiting instructions provided by the court in this case were adequate. Therefore, Owens's contentions do not rise to the level of ineffective assistance of counsel under *Strickland*.

5. Conclusion

The court concludes § 18-1.3-1201 was not unconstitutionally applied, and Owens's trial team was not ineffective for suggesting bifurcation of step one from steps two, three, and four. The court properly bifurcated the sentencing hearing and provided the jury with adequate limiting and final instructions so as not to violate Owens's Sixth or Eighth Amendment rights.

Accordingly, Owens's petition to vacate his sentence based on the unconstitutional application of § 18-1.3-1201 is **Denied**.

E. Capital Sentencing Scheme Violates the Eighth Amendment of the United States Constitution and Article II, Section 20 of the Colorado Constitution

1. Parties' Positions

Owens asserts that while aggravating factors are required by the Eighth Amendment to narrow the class of defendants eligible for the death penalty, Colorado's 17 statutory aggravating factors fail to perform the narrowing function because the aggravating factors are too numerous and overbroad. Owens argues his death sentence was obtained in violation of the Eighth Amendment because Colorado's death penalty statute does not appropriately narrow the class of persons subject to the death penalty in Colorado.

The prosecution asserts that Owens applies the wrong test for evaluating whether Colorado's statute meets the Eighth Amendment narrowing requirement. The prosecution argues that the test, under the Eighth Amendment, is whether each individual aggravating factor narrows the class of defendants eligible for the death penalty. The prosecution also points out that under Colorado law, not only does a jury have to find that a statutory aggravating factor was proved beyond a reasonable doubt, but the jury must also determine that mitigating factors do not outweigh statutory aggravating factors for a defendant to be eligible for imposition of the death penalty.

2. Findings of Fact

On February 15, 2007, the prosecution filed a notice of statutory aggravating factors. On May 14, 2008, the jury found Owens guilty of two counts of first-degree murder. Phase one of the sentencing hearing commenced five days later. Phase one lasted one day, and the jury was given the Phase One Final Instructions. Phase One Final Instruction No. 12 instructed the jury that it was required to determine, as to each victim, whether the prosecution had proved the existence of at least one of the five aggravating factors specified in Instruction No. 14 beyond a reasonable doubt. Phase One Final Instruction No. 13 informed the jury that two verdict forms, one for each victim, had been prepared. Phase One Final Instruction No. 14 listed five aggravating factors:

> Aggravating Factor No. 1 – Prior Conviction
>
> (a) The defendant, Sir Mario Owens
>
> (b) was previously convicted in this state,
>
> (c) of a Class 1 Felony involving violence to wit: Murder in the First Degree After Deliberation as alleged in case no. D0032005CR02945 in Arapahoe County, Colorado.
>
> Aggravating Factor No. 2 – Party to an Agreement to Kill

(a) The defendant, Sir Mario Owens

(b) has been a party to an agreement to kill another person,

(c) in furtherance of which

(d) a person, Javad Marshall-Fields and/ or Vivian Wolfe, has been intentionally killed.

Aggravating Factor No. 3 – Avoid/Prevent Lawful Arrest/Prosecution – Javad Marshall-Fields ONLY

(a) The Class 1 Felony First Degree Murder After Deliberation of Javad Marshall-Fields,

(b) was committed by Sir Mario Owens with a purpose of avoiding or preventing a lawful arrest or prosecution,

(c) for the offenses committed on July 4, 2004.

(d) This factor shall include the intentional killing of a witness to a criminal offense.

Aggravating Factor No. 4 – Kill Two or More Persons in Same Criminal Episode

(a) The defendant, Sir Mario Owens,

(b) unlawfully and intentionally or with universal malice manifesting extreme indifference to the value of life generally,

(c) killed two or more persons, to wit: Javad Marshall-Fields and Vivian Wolfe,

(d) during the commission of the same criminal episode on June 20, 2005.

Aggravating Factor No. 5 – Kill More than One Person in More than One Criminal Episode

(a) The defendant, Sir Mario Owens,

(b) intentionally,

> (c) killed more than one person, to wit: Gregory Vann on July 4, 2004, and Javad Marshall-Fields and/or Vivian Wolfe on June 20, 2005,
>
> (d) in more than one criminal episode.

Phase One Final Instruction No. 14. Phase One Final Instruction No. 14 advised the jurors that when starting its deliberations they must presume the aggravating factors do not exist. It further instructed that they must determine if they unanimously agree on whether any of the listed aggravating factors were proved beyond a reasonable doubt and that they must unanimously agree on which ones were so proved. Phase One Final Instruction No. 16 instructed the jury that each element of the aggravating factor had to be proved beyond a reasonable doubt. Phase One Final Instruction No. 14 further advised the jury that if "any one or more of [the jurors] believe that none of the aggravating factors has been proven beyond a reasonable doubt[,]" the court would enter a sentence of life imprisonment. Phase One Final Instr. 14. The jury unanimously found all five aggravating factors were proved beyond a reasonable doubt as to both victims.

3. Principles of Law

The Eighth Amendment, which is applicable to the states through the Fourteenth Amendment, states that "cruel and unusual punishment" shall not be inflicted. U.S. Const. amend. VIII. The Eighth Amendment prohibits "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." *Atkins v. Virginia,* 536 U.S. 304, 311 n.7 (2002). Similarly, the Colorado Constitution prohibits infliction of "cruel and unusual punishments." Colo. Const. art. II, § 20.

The Eighth Amendment "imposes special limitations" upon the death penalty. *Payne v. Tennessee*, 501 U.S. 808, 824 (1991).

> First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. . . . Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot challenge the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

Id. (quoting *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987)). "[B]eyond these limitations . . . the [United States Supreme] Court has deferred to the State's choice of substantive factors relevant to the penalty determination." *Id*. (quoting *California v. Ramos*, 463 U.S. 992, 1001 (1983)). Like the United States Supreme Court, the Colorado Supreme Court has recognized that "[t]o pass constitutional scrutiny, a capital sentencing scheme must direct and limit the discretion of the sentencer to ensure the death penalty is not imposed in an arbitrary and capricious manner." *Dunlap*, 173 P.3d at 1092. "The eligibility phase of a capital sentencing scheme must genuinely narrow the class of persons eligible to receive the death penalty." *Id.*

The Colorado capital sentencing scheme consists of four steps. In the first step, the jury must determine whether the prosecution has proved the existence of at least one statutory aggravating factor beyond a reasonable doubt. *See* § 18-1.3-1201(2)(a)(I); *Dunlap*, 975 P.2d at 736. In the second step, the jury must decide whether any mitigating factors exist. *See* § 18-1.3-1201(2)(a)(II); *Dunlap*, 975 P.2d at 736. In the third step, based on the mitigating evidence presented, the jury must assess whether "mitigating factors exist which outweigh any aggravating factor or factors found to exist." § 18-1.3-1201(2)(a)(II). Only if the jury finds beyond a reasonable doubt that the mitigation does not outweigh the statutory

aggravating factors is the defendant "eligible to receive the death penalty." *Dunlap*, 173 P.3d at 1092. If the jury finds that mitigating factors do not outweigh the statutory aggravating factors, the jury moves to the fourth and final step to determine whether the defendant should be sentenced to death or life imprisonment. § 18-1.3-1201(2)(a)(III); *Dunlap*, 975 P.2d at 736.

The Colorado capital sentencing scheme narrows the class of persons eligible to receive the death penalty "by requiring [that] the jury find the existence of one statutory aggravating factor beyond a reasonable doubt." *Dunlap*, 173 P.3d at 1092. Additionally, the jury "considers the existence of any mitigating factors and must determine whether mitigation outweighs aggravation." *Id.* Thus, the narrowing function occurs during the first three steps of the sentencing hearing. *See id.*

4. Analysis

Section 18-1.3-1201 complies with the Eighth Amendment by sufficiently narrowing the class of defendants eligible for the death penalty. In 2007, the Colorado Supreme Court addressed and rejected an argument identical to Owens's argument. The Colorado Supreme Court found that the requisite narrowing function is accomplished by the establishment of at least one aggravating factor at step one of the sentencing hearing, coupled with the establishment of mitigation and the weighing of mitigation at steps two and three of the sentencing hearing. *Id*. ("We see no constitutional infirmity in Colorado's capital sentencing scheme . . . . Colorado's sentencing scheme is sufficiently reliable to pass constitutional muster.").

Owens cites an empirical study of Colorado murders, which was designed and conducted by a research team of legal experts. It is not legal precedent. It is a defense-oriented study of Colorado murder cases between 1999 and 2010 that

speculates on whether a prosecutor would have been able to prove a statutory aggravating factor beyond a reasonable doubt. The fact established by the study is one already well known – Colorado prosecutors do not pursue the death penalty very often. In this case, the prosecution originally endorsed eight statutory aggravating factors but proposed only five for the jury to consider. The jury was instructed to determine whether the prosecution had proved all the elements of each endorsed aggravating factor beyond a reasonable doubt. At step one, the jury found that Owens might be eligible for the death penalty based on the following aggravating factors having been proved beyond a reasonable doubt:

- He was previously convicted of Vann's murder;
- He agreed with others to kill Marshall-Fields;
- He killed Marshall-Fields because he was a witness;
- He killed both Marshall-Fields and Wolfe in one criminal episode; and/or
- He killed Vann in a separate criminal episode.

These aggravating factors are neither too numerous nor overbroad. Each pertained to a distinct aspect of Owens's criminal history, his actions at Lowry Park, his actions at Dayton Street, and the purpose and/or the consequence of his actions.

5. Conclusion

The court concludes that § 18-1.3-1201 does not violate the Eighth Amendment of the United States Constitution or article II, section 20 of the Colorado Constitution because, as the Colorado Supreme Court has previously held, the capital sentencing scheme sufficiently narrows the class of defendants eligible to receive the death penalty.

Accordingly, Owens's petition to vacate his sentence based on a violation of his constitutional rights under the United States and Colorado Constitutions is **Denied**.

F. Imposition of Death Penalty Violates the Eighth Amendment of the United States Constitution and Article II, Section 20 of the Colorado Constitution

1. Parties' Positions

Owens argues that the evolving standards of decency preclude him from being put to death due to his young age and mental and emotional deficits at the time of the crime charged in this case. Owens argues that the evolving standards of decency disfavor imposition of the death penalty for any defendant, especially someone with his deficits. Therefore, he argues that his death sentence violates the Eighth Amendment.

The prosecution argues that the Colorado Supreme Court has consistently upheld the death penalty and that polls show many Americans favor the death penalty. Thus, the prosecution argues that the Colorado death penalty statute does not constitute cruel and unusual punishment and is not in violation of the evolving standards of decency.

2. Findings of Fact

Owens presented a mitigation case to the jury from May 22 to June 10, 2008, which included testimony from family members, friends, day care providers, a school counselor, a pastor, and neighbors. They painted a picture of a young boy growing up in Shreveport, Louisiana, with a caring extended family but surrounded by poverty, drugs, violence, and gangs. Those witnesses explained that Owens was normally a quiet, obedient child who had difficulty in school but had never been in serious trouble. Owens's mother explained that her move to Colorado

when Owens was 14 years old was in part an effort to improve her son's environment and his performance in school. Witnesses testified that until he became friends with Ray, Owens did not like Colorado and felt picked on and isolated at school. All the witnesses who personally knew Owens stated that his involvement in the murders was inconsistent with the person they knew.

As part of his mitigation case, Owens also presented a number of experts who examined him and his background. The first was Reidy, a board-certified forensic psychologist, who was accepted as an expert is his field. Without referencing Owens's background, he provided an overview of the factors that affect a person's culpability. Guilt Phase Tr. 40:18-25; 41:1-23 (May 21, 2008 a.m.). Next, Waters, a clinical psychologist, was accepted as an expert in clinical and neuropsychology. Based on his testing and examination of Owens, plus a review of background materials, Waters diagnosed Owens with an abnormally functioning brain that resulted in a lesser ability to cope with his environment. Guilt Phase Tr. 30:21-25; 31:1-12 (May 27, 2008 p.m.).

Owens also called Gray, a board-certified psychologist at the CMHIP. In Gray's opinion, Owens was not a psychopath and posed no more risk of future dangerousness than any other incarcerated person. Guilt Phase Tr. 82:17-20; 81:18-19 (May 28, 2008 p.m.).

The next expert called was Wu, a board-certified psychiatrist who is the clinical director of the Brain Imaging Center at the University of California Irvine College of Medicine. Wu opined that Owens's brain was asymmetrical due to a mild traumatic brain injury from an unknown cause. Guilt Phase Tr. 56:1-13 (May 30, 2008 a.m.); Guilt Phase Tr. 16:10-22 (June 2, 2008 a.m.). He opined that Owens had deficits in his frontal lobe that could lead to a lack of judgment and a lack of impulse control. Guilt Phase Tr. 74:3-11; 75: 3-16 (May 30, 2008 a.m.).

The final mitigation expert called by Owens was Pinto, a clinical psychologist. She recounted for the jury numerous difficulties and adversities Owens faced growing up as a child in the deep South and later as a juvenile in Colorado, while opining as to their individual and cumulative psychological impact on his development. Based on her study of Owens and his background, Pinto confirmed Waters's opinion that Owens had a decision-making deficit and suffered from cognitive disabilities. Guilt Phase Tr. 91:19-25; 92:1-15; 93:7-15 (June 9, 2008 a.m.).

In the final instruction for phase two, jurors were given a list of 61 mitigating factors presented by Owens during the sentencing hearing. Phase Two Final Instruction No. 22. The jury was instructed that it "should consider all of the evidence presented at the trial and the sentencing hearing, as it relates to mitigating factors." Phase Two Final Instruction No. 21.

3. Principles of Law

The Eighth Amendment, which is applicable to the states through the Fourteenth Amendment, states that "cruel and unusual punishment" shall not be inflicted. U.S. Const. amend. VIII. The Eighth Amendment prohibits "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." *Atkins*, 536 U.S. at 311 n.7. Similarly, the Colorado Constitution prohibits infliction of "cruel and unusual punishments." Colo. Const. art. II, § 20.

Eighth Amendment analysis of death penalty cases encompasses discussions of standards of decency concerning the nature of the offense and the characteristics of the offender. *See Graham v. Florida*, 560 U.S. 48, 60 (2010). The death penalty is not constitutional for non-homicide crimes against individuals. *Id.* at 60-

61. The death penalty cannot be imposed on defendants under the age of 18 or whose intellectual functioning is in a low range. *Id.* at 61.

Likewise, in Colorado, "[a] sentence of death shall not be imposed upon any defendant who is determined to be a mentally retarded defendant." C.R.S. § 18-1.3-1103. A defendant who claims intellectual functioning in a low range so as not to be eligible for the death penalty may "file a motion with the trial court in which the defendant may allege that such defendant is a mentally retarded defendant." C.R.S. § 18-1.3-1102(1). A defendant who makes such a claim "shall have the burden of proof to show by clear and convincing evidence that [s/he] is mentally retarded." § 18-1.3-1102(2).

Colorado's death penalty statute also accounts for age and level of intellect as forms of mitigation evidence. Section 18-1.3-1201 includes a non-exclusive list of mitigating factors that may be argued by the defendant at steps two and three of a capital sentencing hearing, including "[t]he age of the defendant at the time of the crime," and "[t]he defendant's capacity to appreciate wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." § 18-1.3-1201(4)(a)-(b).

4. Analysis

Both the United States and the Colorado Supreme Courts have continuously held that the death penalty is constitutional when properly limited. Nonetheless, Owens argues that evolving standards of decency reflect opposition to the death penalty, and thus its imposition violates the Eighth Amendment. Absent evidence to the contrary and in compliance with the decisions of the United States and Colorado Supreme Courts, this court finds, after considering the current state of evolving standard of decency, that the death penalty does not currently violate the

Eighth Amendment. This argument, like some of Owens's arguments on other claims, is more suited for consideration by the Colorado Supreme Court's review than this court's Crim. P. 32.2 consideration.

Factors individual to the defendant, such as his age and mental and emotional deficits, have been addressed by the United States Supreme Court. As noted in *Graham*, imposition of the death penalty against an individual under the age of 18 or an individual with low range intellectual functioning is unconstitutional. 560 U.S. at 61. Owens was 20 years old when the Dayton Street homicides occurred and his intellectual functioning, while below average, was not low. Because Owens does not fit in either category, the court cannot find a violation of the Eighth Amendment that has been currently articulated in controlling precedent.

Owens presented extensive mitigation evidence and jurors were instructed to consider his mitigation during their deliberations at and after phase two. *See* Phase Two Final Instruction No. 21. After considering all of the evidence, the jury unanimously found that the death penalty was the appropriate sentence in this case. This court cannot find, based upon current law, that a death sentence for Owens offends the Eighth Amendment of the United States Constitution or article II, section 20 of the Colorado Constitution.

5. Conclusion

The court concludes that imposition of the death penalty is not unconstitutional under the Eighth Amendment of the United States Constitution or article II, section 20 of the Colorado Constitution.

Accordingly, Owens's petition to vacate his sentence based on a violation of the Eighth Amendment of the United States Constitution or article II, section 20 of the Colorado Constitution is **Denied**.

XI. Cumulative Error

A. Parties' Positions

Owens contends that even if the individual errors alleged in SOPC-163 do not warrant reversal of his conviction and sentence, the cumulative effect of those errors warrants reversal. He argues that government misconduct, conflicts of interest, ineffective assistance of counsel, jury misconduct, and court errors all combine to create a magnitude of error that made his trial fundamentally unfair and unreliable.

The prosecution responds that if the court determines there to be error, then cumulative error will have to be argued to the court.

B. Findings of Fact

The court incorporates the entirety of this Order as though fully set forth herein.

C. Principles of Law

"Although an appellate court may find that individual errors do not require reversal, numerous irregularities may in the aggregate show the absence of a fair trial." *People v. Jenkins*, 83 P.3d 1122, 1130 (Colo. App. 2003). "The cumulative error doctrine applies only if the trial court committed numerous errors, and mere assertions of error by the defendant are insufficient." *People v. Rivas*, 77 P.3d 882, 893 (Colo. App. 2003). "A conviction will not be reversed if the cumulative effect of any errors did not substantially prejudice the defendant's right to a fair trial." *People v. Whitman*, 205 P.3d 371, 387 (Colo. App. 2007).

With respect to constitutional errors, the Tenth Circuit has found that the harmless beyond a reasonable doubt standard applies:

> A cumulative-error analysis aggregates all errors found to be harmless and 'analyzes whether their cumulative effect on the outcome of the trial is such that collectively

> they can no longer be determined to be harmless.' *United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990) (en banc). This court considers whether the defendant's substantial rights were affected by the cumulative effect of the harmless errors. *Id.* Only actual errors are considered in determining whether the defendant's right to a fair trial was violated. *Id.* at 1470–71. If any of the errors being aggregated are constitutional in nature, the cumulative error must be harmless beyond a reasonable doubt, in accordance with *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

United States v. Toles, 297 F.3d 959, 972 (10th Cir. 2002).

D. Analysis

Owens argues that cumulative error in this case warrants reversal, but he does not establish that a cumulative error analysis is appropriate for Crim. P. 32.2 post-conviction review. Instead, Owens cites case law where the appellate courts addressed cumulative error. For some of the errors alleged by Owens, he notes in a footnote that "[u]nder the URS, however, the nature and extent of such errors is destined to remain unresolved until the Colorado Supreme Court rules on Owens'[s] direct appeal." SOPC-163 at 1301 n.414. Owens added that the situation "presents a legal and analytical conundrum that is impossible for this Court to solve accurately prior to resolution [of] the unitary appeal." *Id*.

This court agrees with Owens that a cumulative error analysis is appropriate for direct appeal. While there is no precedent indicating whether a cumulative error analysis is appropriate in Crim. P. 32.2 proceedings, this court does not consider these proceedings to be an appropriate vehicle for consideration of appellate cumulative error analysis. In determining whether Owens received a fair trial, it is proper for this court to consider cumulative prejudice. Cumulative error is to be considered by appellate courts, not trial courts.

E. Conclusion

The court finds that cumulative error is not a proper issue for this post-conviction review. Therefore, Owens's petition to reverse his conviction and vacate his sentence based on cumulative error is **Denied**.

XII. Newly Discovered Evidence

A. Parties' Positions

Owens contends that his conviction and sentence should be vacated because newly discovered evidence shows that Sailor, Johnson, Strickland, and T. Wilson testified falsely and that the prosecution did not correct it.

B. Findings of Fact

The court incorporates the findings of fact set forth in part IV.C.3 of this Order as though fully set forth herein. Owens did not present any evidence on this claim during the post-conviction hearing.

C. Analysis

Owens alleged in the government misconduct section of SOPC-163 that Sailor, Johnson, Strickland, and T. Wilson testified falsely and that the prosecution, knowing the testimony was false, did not correct it. Some of those claims were premised on the allegation that the prosecution failed to disclose evidence that proved the testimony was false.

In the government misconduct section of SOPC-163, Owens claimed that Sailor testified falsely several times, but the court found that Sailor testified falsely only once. This court found Sailor's testimony that she was not willing to become a cooperating witness until after Owens was arrested was false. This court also found that the prosecution suppressed evidence showing her testimony was false. *See* part IV.C.3.a.i of this Order.

Owens also claimed in the government misconduct section of SOPC-163 that Strickland testified falsely when he testified that his Adams County plea agreement was not contingent on his cooperation against Owens and when he testified that he had not received benefits in exchange for his cooperation against Owens. This court found that Strickland testified falsely on these points and that the government had suppressed evidence showing his testimony was false. *See* part IV.C.3.c of this Order.

With respect to Owens's claims that Johnson and T. Wilson testified falsely, this court found that neither Johnson nor T. Wilson testified falsely. *See* parts IV.C.3.b and IV.C.3.d of this Order.

In part IV.C.3 of this Order, the court analyzed this evidence under *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972). In *Napue*, the prosecution failed to correct testimony it knew was false and suppressed evidence showing the testimony to be false. In *Giglio*, the United States Supreme Court recognized that claims of false testimony and claims of nondisclosure of evidence that would show the testimony was false go hand-in-hand. *Giglio* held that undisclosed evidence that affects a witness's credibility is subject to the same materiality standard set forth in *Napue*. *Giglio*, 405 U.S. at 154 ("A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" (quoting *Napue*, 360 U.S. at 271)).

Regarding Owens's claims that the prosecution suppressed evidence that would have shown Sailor's and Strickland's testimony was false, this court concluded that neither of the instances of false testimony were individually or cumulatively material because they could not have affected the outcome of the trial.

Here, Owens repeats some of his government misconduct claims as a newly discovered evidence claim. In light of this court's findings with respect to Owens's government misconduct claims, Owens's newly discovered evidence claim is limited to evidence showing that Sailor and Strickland testified falsely.

To obtain relief based on newly discovered evidence,

> [T]he defendant should show that the evidence was discovered after the trial; that defendant and his counsel exercised diligence to discover all possible evidence favorable to the defendant prior to and during the trial; that the newly discovered evidence is material to the issues involved, and not merely cumulative or impeaching; and that on retrial the newly discovered evidence would probably produce an acquittal.

People v. Scheidt, 528 P.2d 232, 233 (Colo. 1974).

The evidence involved is impeachment evidence, and this court has already determined that the evidence was not material under *Napue*. Because Owens failed to present any evidence to warrant a different conclusion on his newly discovered evidence claim, the court finds the evidence is not "of such a character as to probably bring about an acquittal if presented at another trial." *Id*.

D. Conclusion

The court concludes Owens failed to prove that newly discovered evidence warrants either a new trial on the merits or a new sentencing hearing. Accordingly, Owens's petition to vacate his conviction and sentence based on newly discovered evidence is **Denied**.

XIII. Unconstitutionality of the Unitary Review Statute[440]

A. Overview of the Unitary Review Statute

The United States Supreme Court has never addressed the right to a speedy appeal, but the Colorado Court of Appeals has "recognized that inordinate delay in processing appeals can give rise to a cognizable due process claim." *Hoang v. People*, 323 P.3d 780, 788 (Colo. 2014). The Colorado Supreme Court has since found that "the Constitution does not guarantee the right to a 'speedy appeal' per se, but rather a due process right to fairness on appeal." *Id.* at 789.

The URS provides "an expedited system of unitary review of class 1 felony cases in which a death sentence is imposed." C.R.S. § 16-12-201(1). The intent of the URS is to improve accuracy, completeness, and justice in the review of death penalty proceedings, and to ensure full and fair examination of legal issues while eliminating unreasonable and unjust delays in the resolution of those issues. § 16-12-201(2)(b)-(d).

After a defendant is sentenced to death, the trial court must set the date of execution and stay the execution until it receives an order from the Colorado Supreme Court. C.R.S. § 16-12-204(1). Within seven days of sentencing, the trial court must advise the defendant of his post-conviction review and appellate rights, and the court must appoint new counsel if the defendant wishes to pursue post-conviction review and a direct appeal. *See* Crim. P. 32.2(b)(3)(I); § 16-12-204(2); C.R.S. § 16-12-205(1). At the advisement hearing, the court must order post-

[440] The court denied Owens an evidentiary hearing on this claim. It appears to the court that this issue would be more properly raised on direct appeal, but the court nevertheless addresses it here on its merits. C.R.S. § 16-12-206(1)(c)(II), which states that "[w]hether the conviction was obtained or the sentence was imposed in violation of the constitution or laws of the United States or Colorado," provides the only category under which this argument could conceivably be appropriate in a post-conviction motion.

conviction counsel to file post-conviction review motions within 154 days of the advisement date. Crim. P. 32.2(b)(3)(V).[441]

Only certain issues designated by statute can be raised in a post-conviction motion. C.R.S. § 16-12-206(1)(b). Those issues include:

- new evidence of material facts is available to the defendant that require the death penalty to be vacated;
- the conviction or sentence was obtained in violation of state or federal law or under an unconstitutional state or federal law;
- lack of jurisdiction over the defendant or subject matter;
- any other grounds that are a proper basis for a collateral attack on a criminal judgment; and
- ineffective trial counsel.

§ 16-12-206(1)(c)(I)-(VI). Upon receipt of a post-conviction motion, the court must determine whether an evidentiary hearing is needed. Crim. P. 32.2(b)(4). If a hearing is granted, the hearing must be scheduled within 63 days after the motion was filed, and if a hearing is not granted, the court has 35 days from the last filing in which to issue its order. *Id.*

The URS allows a defendant to appeal directly to the Colorado Supreme Court. C.R.S. § 16-12-207(1)(a). If the defendant did not file any post-conviction motions, the notice of appeal must be filed within seven days of the expiration deadline for filing post-conviction review motions. Crim. P. 32.2(c)(1). However, if the defendant filed a post-conviction motion and is seeking review of the trial court's ruling on the motion, notice of appeal for post-conviction review and notice of appeal for direct appeal must be filed by unitary notice. *Id*. The unitary notice

[441] At the time Owens was sentenced, the timeline for filing his post-conviction review motion was 150 days.

must be filed within seven days of the trial court's order on the post-conviction motion. *Id.* The unitary appeal to the Colorado Supreme Court allows the Colorado Supreme court to resolve all issues on direct appeal and post-conviction review in one proceeding. § 16-12-207.

B. Stages of the System of Unitary Review[442]

C. Unconstitutional as Written

Owens claims the URS is unconstitutional as written because it violates capital defendants':

- right to counsel;
- equal protection rights;
- due process rights;
- right to remain silent; and
- right against cruel and unusual punishment.

A statute is unconstitutional on its face "if the complaining party can show that the law is unconstitutional in all its applications." *Dallman v. Ritter*, 225 P.3d 610, 625 (Colo. 2010). A facial challenge to legislation is a difficult challenge to mount successfully because the challenge must establish beyond a reasonable doubt that no set of circumstances exists under which the statute would be valid. *See City and County of Denver v. Casados*, 862 P.2d 908, 913 (Colo. 1993). The complaining party must show beyond a reasonable doubt that the statute is unconstitutional in all its applications. *See, e.g.*, *People v. Boles*, 280 P.3d 55, 59 (Colo. App. 2011). A successful facial challenge will render a statute utterly inoperative. *See, e.g.*, *Sanger v. Dennis*, 148 P.3d 404, 411 (Colo. App. 2006).

[442] In this section of SOPC-163, Owens asserts that all stages of the system of unitary review – direct appeal, post-conviction review, and post-conviction review appeal – are critical stages in Colorado's capital sentencing process. Owens does not state a claim for relief in this section.

Owens failed to establish that the URS is facially unconstitutional on each of the five grounds listed in SOPC-163 because he does not explain how the URS is facially unconstitutional and does not attempt to establish that it is unconstitutional in all its applications beyond a reasonable doubt. *See Casados*, 862 P.2d at 913.

Accordingly, Owens's petition to strike the URS and vacate his sentence based on the alleged facial unconstitutionality of the URS is **Denied**.

D. Right to Counsel

1. Parties' Positions

Owens contends the URS is unconstitutional as applied to him on the following grounds:

- he was denied his right to counsel because his direct appeal counsel had a conflict of interest;
- he was denied his right to continued counsel of his choice when the court disqualified his trial counsel as his direct appeal counsel;
- he was denied his right to counsel because actual and inherent conflicts existed between his post-conviction counsel and direct appeal counsel;
- he was denied effective assistance of counsel because he is forced to raise his claims without the benefit of an appellate record; and
- he will be denied his right to conflict-free counsel because the URS requires his post-conviction counsel and direct appeal counsel to collaborate on the unitary notice of appeal.

The prosecution responds to Owens's arguments as follows:

- Owens was not denied his right to counsel for the URS advisement because Ridley was appointed for that purpose;

- while a defendant's desire for continued representation by a court-appointed attorney is entitled to great weight, a conflict may require the court to terminate the appointment;
- the relationship between post-conviction counsel and direct appeal counsel may result in disagreements about how to handle certain issues but the relationship does not give rise to a conflict of interest;
- post-conviction counsel has access to the trial court record; and
- filing a unitary notice of appeal does not give rise to a conflict of interest.

2. Findings of Fact

The jury returned its verdicts of death on June 16, 2008. Anticipating that the OADC may represent Owens on post-conviction review and on the direct appeal, the court gave the OADC access to the court file to conduct a conflicts check on October 28.

On October 31, Owens's trial team filed SO-297. In that motion, Owens sought to strike the URS as unconstitutional, asked for reasonable notice of when the court would rule on the constitutionality of the URS, and requested that the court disclose the nature of the advisement Owens would receive pursuant to § 16-12-204 and § 16-12-205.

The OADC asked to be recognized as a real party in interest in the post-conviction proceedings in order to present its own constitutional challenge to the URS. The court denied the OADC's motion on November 5. On November 13, the court granted the OADC access to the discovery to allow for a more thorough conflicts check.

On November 20, the court held a hearing on SO-297.[443] Owens's trial team presented several experts who testified that the URS was unconstitutional and impractical.[444] Based on that hearing, the court found § 16-12-205(5),[445] which provides that "[t]he ineffectiveness of counsel during post-conviction review shall not be a basis for relief," unconstitutional and severed it from the URS.[446] The court also found C.R.S. § 16-12-208(3), which mandates the post-conviction proceedings at the trial level to be completed and the appellate brief filed within two years of the date the sentence of death was imposed, to be unconstitutional.[447]

At the conclusion of the November 20 hearing, the court set Owens's sentencing for December 8 and raised the question of whether an independent advisory attorney should be appointed to assist Owens during the advisement hearing required by § 16-12-204(2). On December 5, pursuant to SO-309, the court ruled it would appoint advisory counsel to assist Owens at the URS advisement hearing. The court also ordered the prosecution and the APD to preserve their complete files for post-conviction review. *See* SO-295.

On December 8, after sentencing Owens to death and staying the execution date, the court appointed Ridley as advisory counsel and granted him access to the discovery and to the court file. The court provided all counsel with a copy of a proposed advisement and gave counsel time to file objections or corrections to the proposed advisement.

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[443] On December 3, 2008, Owens's trial team filed a C.A.R. 21 petition attacking the constitutionality of the URS. His petition was denied on December 4, 2008. *People v. Owens*, 08SA392 (Colo. Dec. 4, 2008).

[444] The theme of their testimony was that the complexity and size of this case precluded any attorney from investigating and preparing a proper post-conviction petition under the URS time constraints.

[445] The Minute Order incorrectly references § 16-12-205(4) as the section held unconstitutional.

[446] Neither party challenged that ruling.

[447] That Order was overturned in *People v. Owens*, 228 P.3d 969 (Colo. 2010).

On December 12, after a second draft was provided to all counsel, the court considered arguments about the proposed advisement from all counsel, including Ridley. During that hearing, there was extensive colloquy regarding how the post-conviction and appellate teams would interface under the URS for purposes of filing a unitary appeal.

Pursuant to Crim. P. 32.2(b)(3), the court set the advisement hearing for December 15. The court noted that it would advise Owens on that date but that Owens would not be required to make any decisions about how he wished to proceed with post-conviction review and direct appeal. To allow Owens time to consult with Ridley, his trial team, and his family about his impending decisions, the court set December 19 for completion of the advisement.

At the beginning of the December 15 hearing, the court addressed SO-311. In SO-311, Owens's trial team objected to the latest advisement draft and renewed its motion to strike the URS. The court denied the renewed motion to strike the URS. The court considered the objections to the advisement, heard arguments, and made contemporaneous rulings, which resulted in a final version of the advisement that was provided to Owens and all counsel.[448]

During the advisement on December 15, Owens was able to consult with his trial team, Lord, and Ridley.[449] Owens's trial team and Ridley made objections and requested additional advisements for various sections. After ruling on the objections and requests for additional advisements, the court completed the advisement.

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[448] Court Trial Exh. 167.

[449] Lord appeared in front of the court on November 5, 2008. She had previously represented Owens before Chief Judge Leopold in grand jury proceedings in 2006 that lead to the charges in this case.

The court indicated its intent to appoint the PDO to file a notice of appeal for Owens's convictions that were not class one felonies, if Owens chose that office to pursue his direct appeal.

Castle and Gedde appeared on December 15 and were introduced to Owens as potential appointees for pursuing post-conviction review.

On December 19, the court reviewed each section of the advisement and asked Owens if he understood each section.[450] Next, the court asked Owens if he had any questions about his rights. Last, the court asked Owens how he wished to proceed on appeal and post-conviction review. Owens decided to pursue an appeal of his conviction and sentence, and he elected to have the PDO appointed to represent him. The court appointed Lord to handle the appeal. Owens also decided to pursue post-conviction review with new counsel.[451] The court appointed the OADC to pursue Owens's post-conviction review, and the OADC designated Castle as lead counsel. The court found Castle qualified under § 16-12-205(2)-(3), and Owens accepted Castle as his counsel pursuant to § 16-12-205(1).

Under Crim. P. 32.2(b)(6), the court found extraordinary circumstances that could not have been foreseen or prevented and granted Owens's post-conviction counsel a one-year extension to file the post-conviction petition. The court also ordered the prosecution and the trial team to comply with the time-sensitive disclosures required by Crim. P. 32.2(b)(3)(III) and (IV).

On January 14, 2009, the prosecution filed DA-113 SO asking the court to resolve whether Lord suffered from a conflict of interest because she was a

[450] At times, Owens indicated he did not understand the advisement but did not ask the court any clarifying questions when given the opportunity to do so.

[451] Owens told the court he was not answering the questions knowingly and voluntarily but told the court he was answering the questions intelligently. Owens did not ask the court any clarifying questions when given the opportunity to do so.

member of Owens's trial team. Lord objected to the motion as being premature because it was unknown whether Owens's post-conviction counsel would pursue ineffective assistance claims against the trial team or whether the claims would involve Lord. The court reappointed Ridley to advise Owens. On February 6, Owens informed the court he would not waive any potential conflicts with his trial team, including Lord. Based on Owens's position, the court precluded Lord from arguing certain motions previously filed by the trial team. Owens ultimately refused to waive any potential conflict involving Lord, and she was discharged as Owens's direct appeal counsel. On July 27, the OADC designated new appellate counsel, and the court appointed new appellate counsel to handle Owens's direct appeal.[452]

3. Principles of Law

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defen[s]e." U.S. Const. amend. VI; *see also* Colo. Const. art. II, § 16 ("In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel . . . ."). "Where a constitutional right to counsel exists, [the] Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). An indigent defendant has a presumptive right to continued

[452] The new appellate counsel team was disqualified by the court on September 14, 2014, due to a conflict of interest. *See People v. Owens*, No. 14SA297 (Colo. dismissed Oct. 16, 2014). That team also prosecuted Owens's direct appeal in his Lowry Park case and was likely to be the subject of ineffective assistance claims in Owens's Crim. P. 35(c) claim in that case. SOPC-231. With Ridley present, Owens refused to waive the potential conflicts that would arise by virtue of such claims so the court discharged the team. The Crim. P. 35(c) petition in Owens's Lowry Park case was filed on December 1, 2014, and ineffective assistance claims were asserted against that direct appeal team.

representation by counsel of choice. *See People v. Harlan*, 54 P.3d 871, 878 (Colo. 2002). The relationship continues until there is a factual and legal basis for terminating the relationship. *See Williams v. District Court*, 700 P.2d 549, 555 (Colo. 1985).

4. Analysis

First, Owens argues that Lord suffered a conflict of interest while representing him at his advisement pursuant to § 16-12-205(1). At the time of the advisement hearing, it was unknown whether Owens's post-conviction counsel would raise ineffective assistance of counsel claims against Owens's trial team, which included Lord. Thus, it was not clear whether Lord suffered a conflict of interest at that point in time. Additionally, the court appointed Ridley in part to advise Owens on the various alternatives for exercising his post-conviction review and appellate rights. The purpose of the advisement was to notify Owens of his appellate and post-conviction review rights, including his rights to direct appeal counsel and post-conviction counsel. *See* Crim. P. 32.2(b)(3)(I); § 16-12-204(2); § 16-12-205(1). The court finds Owens was not denied his right to counsel for the URS advisement because Ridley was appointed to represent him for that purpose.

Second, Owens claims that he was denied his right to continued counsel of choice because the court disqualified Lord as direct appeal counsel due to a conflict of interest.[453] Regardless of the URS, trial counsel cannot represent a defendant in post-conviction proceedings when there is an ineffective assistance of counsel claim. *See Murphy v. People*, 863 P.2d 301, 305 (Colo. 1993) ("[D]ue to the inherent conflict of interest as well as the appearance of impropriety, we hold

[453] Owens simultaneously argues that the URS is unconstitutional because it forced him to be represented by Lord, who had a conflict of interest, and that when the court found a conflict and disqualified Lord, he was denied his constitutional right to continued representation by counsel of his choice.

that the district court erred in appointing the public defender who represented [the defendant] in the trial below to assist in the litigation of [the defendant's] postconviction proceedings."). Although Owens wanted to keep Lord as direct appeal counsel, his post-conviction counsel indicated that it would raise ineffective assistance of counsel claims against his trial team. Pursuant to *Harlan*, 54 P.3d 871, the court inquired whether Owens was willing to waive the potential conflict. Owens refused. Under the circumstances, the court disqualified Owens's preferred attorney, Lord, as his direct appeal counsel. The court finds Owens was not denied his right to continued counsel of choice because accepting Owens's refusal to waive the conflict and preserving Owens's right to conflict-free counsel required the court to discharge Lord.

Third, Owens argues that the URS inherently pits his direct appeal counsel and post-conviction counsel against each other, creating a conflict of interest. Owens relies on three cases – *Estelle v. Smith*, 451 U.S. 454 (1981) (right to counsel applies before defendant is questioned in a competency evaluation by a doctor who will later testify as to future dangerousness in a death penalty proceeding), *Anders v. California*, 386 U.S. 738 (1967) (indigent defendant is entitled to assistance of counsel to pursue first appeal), and *Penson v. Ohio*, 488 U.S. 75 (1988) (*Anders* right cannot be denied simply because appellate counsel, claiming to have found no meritorious appellate issues, moves to withdraw). Those cases are not useful in the current context. As an example of the tension between direct appeal counsel and post-conviction counsel, Owens cites to when Owens's direct appeal counsel instructed his trial counsel not to cooperate with his post-conviction counsel. The court addressed this issue in P.C. *Ex Parte* Order (SO) No. 6 on April 5, 2012. The court reappointed Ridley to advise Owens on his options for pursuing post-conviction relief and direct appeal. Order No. 6

adequately addressed the concerns raised by Owens in SOPC-163. The court finds that a disagreement between Owens's post-conviction counsel and direct appeal counsel does not violate Owens's right to counsel.

Fourth, Owens argues that his right to effective assistance of counsel was violated because his post-conviction counsel were forced to raise claims without the benefit of an appellate record. Owens's post-conviction counsel filed a petition pursuant to § 16-12-206(1)(c)(I)-(VI) that was over 1,300 pages in length. The petition raises numerous claims of, *inter alia*, conflicts of interest, government misconduct, and ineffective assistance of counsel. Based on the comprehensive nature of the petition, the court finds that the lack of an appellate record did not deny Owens his right to effective assistance of counsel for post-conviction review.

Fifth, Owens argues that the URS will violate his right to conflict-free counsel on appeal because his post-conviction counsel must collaborate with his direct appeal counsel in order to file the unitary notice of appeal in the Colorado Supreme Court. Because any necessary collaboration to prepare the unitary notice of appeal will be dictated by the nature of the two appeals, the court finds the URS does not deprive Owens of his right to counsel.

5. Conclusion

The court finds Owens failed to establish that the URS violated Owens's right to counsel under the Sixth Amendment to the United States Constitution or article II, sections 16 and 25 of the Colorado Constitution.

Therefore, Owens's petition to strike the URS and vacate his sentence based on the alleged unconstitutionality of the URS is **Denied**.

E. Equal Protection

1. Parties' Positions

Owens argues the URS violates his equal protection rights because it creates unconstitutional statutory classifications. Owens argues the URS is unconstitutional as applied because the URS distinguishes between defendants sentenced to death and all other defendants – creating an improper classification. Therefore, Owens asserts that his fundamental equal protection right is violated.

The prosecution responds that the equal protection clause applies only to those similarly situated and because those sentenced to death are not similarly situated to all other defendants, equal protection does not apply to the URS.

2. Findings of Fact

The findings of fact in part XIII.D.2 of this Order are incorporated herein.

3. Principles of Law

The United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Similarly, the Colorado Constitution states, "[n]o person shall be deprived of life, liberty or property, without due process of law." Colo. Const. art. II, § 25; *see also Millis v. Bd. of County Comm'rs of Larimer County*, 626 P.2d 652, 657 (Colo. 1981) ("Inherent in the due process clause of Art. II, s 25 of the Colorado Constitution is a guarantee of equal protection of the laws."). "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

Equal protection assures that individuals "who are similarly situated will be afforded similar treatment." *People v. Jefferson*, 748 P.2d 1223, 1225 (Colo. 1988). If two criminal statutes provide different punishment for the same act, "a

defendant convicted and sentenced under the harsher statute is denied equal protection of the laws." *Id.* Likewise, two statutes "proscribing with different penalties what ostensibly might be different acts, but offering no intelligent standard for distinguishing the proscribed conduct, run afoul of equal protection under state constitutional doctrine." *Id.* at 1225-26; *see also People v. Marcy*, 628 P.2d 69, 75 (Colo. 1981). However, the threshold question in an equal protection challenge is "whether the classes created by a statute are similarly situated." *People v. Young*, 859 P.2d 814, 816 (Colo. 1993).

Colorado has a specific sentencing scheme unique to capital cases. *See Dunlap v. People*, 173 P.3d 1054, 1092 (Colo. 2007). The Colorado Supreme Court has specifically found that, in an equal protection analysis, "no other defendants are similarly situated to capital defendants." *People v. Martinez*, 970 P.2d 469, 477 (Colo. 1998). The Colorado legislature enacted the URS due to this qualitative difference between those sentenced to death and those with any other sentence. *See* § 16-12-201. "Because the death penalty is qualitatively different from any other punishment under the law, the United States Supreme Court requires heightened reliability in capital cases." *Dunlap*, 173 P.3d at 1092. Therefore, the sentencing scheme "direct[s] and limit[s] the discretion of the sentencer to ensure the death penalty is not imposed in an arbitrary and capricious manner." *Id.*

4. Analysis

Equal protection assures that individuals "who are similarly situated will be afforded similar treatment." *Jefferson*, 748 P.2d at 1225. There is a qualitative difference between a death sentence and any other sentence. *Dunlap*, 173 P.3d at 1092. The Colorado Supreme Court has specifically found that "no other defendants are similarly situated to capital defendants." *Martinez*, 970 P.2d at 477.

The Colorado legislature enacted the URS due to the qualitative difference between those sentenced to death and those who are not. *See* § 16-12-201; *see also id.*

Owens's failed to establish that he is similarly situated to defendants not sentenced to death. Thus, his equal protection argument does not pass the threshold inquiry for an equal protection claim. *See Young*, 859 P.2d at 816; *see also Martinez*, 970 P.2d at 477.

5. Conclusion

The court finds that Owens failed to establish that the URS violated Owens's rights under the equal protection clauses of the Fourteenth Amendment to the United States Constitution or article II, section 25 of the Colorado Constitution.

Therefore, Owens's petition to strike the URS and vacate his sentence based on the alleged unconstitutionality of the URS is **Denied**.

F. Due Process

1. Parties' Positions

Owens argues the URS is unconstitutional as applied to him because it deprives him of his due process rights to meaningfully challenge his conviction. In support, Owens cites the absence of an appellate record under the URS structure. Owens also argues the URS creates tension between his constitutional rights, making the statute unconstitutional.

The prosecution responds that there is no constitutional requirement that an appellate record be available prior to post-conviction proceedings.

2. Findings of Fact

The findings of fact in part XIII.D.2 of this Order are incorporated herein.

3. Principles of Law

"The Due Process Clauses of the United States and Colorado Constitutions guarantee every criminal defendant the right to a fair trial . . . ." *People v. Harmon*, 284 P.3d 124, 127 (Colo. App. 2011); *see also* Colo. Const. art. II, § 25 ("No person shall be deprived of life, liberty or property, without due process of law."). The due process clause also requires "that defendants have a meaningful opportunity to challenge their convictions." *Close v. People*, 180 P.3d 1015, 1019 (Colo. 2008); *see also People v. Germany*, 674 P.2d 345, 350 (Colo. 1983) ("[W]hile the state may enact reasonable requirements for collateral challenges to prior criminal convictions, thereby ensuring that claims will be raised at a time when they may be easily determined and necessary corrective action taken, it may not do so without providing a criminally accused a meaningful opportunity to challenge allegedly unconstitutional convictions . . . ."). The court has the duty to ensure a defendant's rights to due process and a fair trial are not violated.

4. Analysis

Owens has a right to a speedy trial that is fair and in compliance with due process. The URS was passed by the legislature to provide just, fair, and speedy resolution of death penalty cases. It guarantees any defendant sentenced to death, an expedited, accurate, complete, and fair appeal. § 16-12-201.

For the reasons stated in part XIII.D.4 of this Order, the court finds that the lack of an appellate record does not deprive Owens of his right to due process.

Owens's second argument rests on the assertion that his substantive due process rights are violated by the URS for five reasons – all which rest on the premise that he was forced to choose between certain constitutional rights. However, the cases he cites refer to defendants who are forced to compromise their Fifth Amendment rights. None of Owens's alleged constitutional violations

involves the Fifth Amendment so the cases he cites are inapposite to his claim. Owens does not articulate specifically how his rights were violated. Nor does he provide any authority supporting his argument that his constitutional rights were violated.

5. Conclusion

The court finds that Owens failed to establish that the URS violated Owens's rights under the due process clauses of the United States and Colorado Constitutions.

Therefore, Owens's petition to strike the URS and vacate his sentence based on the alleged unconstitutionality of the URS is **Denied**.

G. Right to Remain Silent and Attorney-Client Privilege

1. Parties' Positions

Owens argues that the URS is unconstitutional as applied to him because his right to remain silent and his attorney-client privilege were violated by § 16-12-206(2), which imposed an automatic waiver of his attorney-client privilege when he alleged that his trial team rendered ineffective assistance.

The prosecution responds that the attorney-client privilege is not absolute and can be waived. The prosecution also responds that when the attorney-client privilege is waived due to an ineffective assistance claim, the waiver is limited to the issues related to the claim.

2. Findings of Fact

The findings of fact in part XIII.D.2 of this Order are incorporated herein.

3. Principles of Law

Under the Fifth Amendment to the United States Constitution, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; *see also* Colo. Const. art II, § 18 ("No person shall be compelled

to testify against himself . . . ."). The constitutional protection against self-incrimination is much narrower than the attorney-client privilege. *See Swidler & Berlin v. United States*, 524 U.S. 399, 407 (1998). The attorney-client privilege was created by common law but is now codified in Colorado. *See* C.R.S. § 13-90-107; *People v. Trujillo*, 144 P.3d 539, 542 (Colo. 2006). The privilege is held by the client and can be waived only by the client. *Trujillo*, 144 P.3d at 542. The attorney-client privilege is neither absolute nor free from waiver. *Id.*

Under the URS, when a defendant raises ineffective assistance of counsel in a post-conviction review proceeding, the defendant "automatically waives confidentiality pursuant to the provisions of section 18-1-417, C.R.S., between the defendant and trial counsel but only with respect to the information that is related to the defendant's claim of ineffective assistance." § 16-12-206(2). As stated in the statute, the URS is consistent with § 18-1-417, which applies to all criminal cases in Colorado and provides for the same limited waiver of confidentiality when a defendant alleges ineffective assistance of counsel.

Courts have long held that the implied waiver of the attorney-client privilege is necessary when a defendant "places the allegedly privileged communication at issue in the litigation, because 'any other rule would enable the client to use as a sword the protection which is awarded him as a shield.'" *People v. Madera*, 112 P.3d 688, 691 (Colo. 2005) (quoting *Mountain States Tel. & Tel. Co. v. DiFede*, 780 P.2d 533, 544 (Colo. 1989)). The United States Supreme Court recognized this waiver as early as 1888 in *Hunt v. Blackburn*, 128 U.S. 464, 470-71 (1888).

4. Analysis

The automatic waiver of the attorney-client privilege applies only with respect to information related to claims of ineffective assistance. The attorney-client privilege may not be used as a sword and a shield. *Madera*, 112 P.3d at 691.

It is inherent in an ineffective assistance of counsel claim that the attorney must be able to defend himself or herself. But in doing so, the attorney is limited to the information involving the claim, even if the information would typically be protected by the defendant's right against self-incrimination. The attorney cannot reveal confidential or incriminating information received from the defendant that is not relevant to the claim. Because this waiver has long-standing recognition, the court finds that the URS is not unconstitutional as applied to Owens. *See Hunt*, 128 U.S. at 470-71.

5. Conclusion

The court finds that Owens failed to establish that the URS violated Owens's attorney-client privilege or his right to remain silent under the Fifth Amendment of the United States Constitution or article II, § 18 of the Colorado Constitution.

Therefore, Owens's petition to strike the URS and vacate his sentence based on the alleged unconstitutionality of the URS is **Denied**.

H. Right Against Cruel and Unusual Punishment

1. Parties' Positions

Owens alleges the URS is unconstitutional as applied to him because the URS violates his right to be free from cruel and unusual punishment by introducing arbitrariness, caprice, and irrationality into the process of a death penalty case. In support, Owens cites instances where the trial judge interpreted the URS and made certain determinations throughout the process in an effort to implement the URS.

The prosecution responds that the URS, when read in conjunction with the Colorado Rules of Criminal Procedure, provides clear procedures for the review of Owens's conviction and sentence. The prosecution also responds that Owens does not assert how he was harmed by the court's actions or how his rights were violated by any procedures in the URS.

2. Findings of Fact

The findings of fact in part XIII.D.2 of this Order are incorporated herein.

3. Principles of Law

The Eighth Amendment provides that "cruel and unusual punishments" shall not be inflicted. U.S. Const. amend. VIII; *see also* Colo. Const. art. II, § 20 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). It prohibits "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." *Atkins v. Virginia*, 536 U.S. 304, 311 n.7 (2002).

The Eighth Amendment "imposes special limitations" upon the death penalty. *Payne v. Tennessee*, 501 U.S. 808, 824 (1991).

> First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. . . . Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty.

Id. (quoting *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987)). "[B]eyond these limitations . . . the [Supreme] Court has deferred to the State's choice of substantive factors relevant to the penalty determination." *Id*. (quoting *California v. Ramos*, 463 U.S. 992, 1001 (1983)). Like the United States Supreme Court, the Colorado Supreme Court has recognized that "[t]o pass constitutional scrutiny, a capital sentencing scheme must direct and limit the discretion of the sentencer to ensure the death penalty is not imposed in an arbitrary and capricious manner." *Dunlap*, 173 P.3d at 1092. "The eligibility phase of a capital sentencing scheme

must genuinely narrow the class of persons eligible to receive the death penalty." *Id.*

The general assembly has exclusive legislative power. Colo. Const. art. V, § 1. It is tasked with the power to write the law, whereas the judicial branch has the authority to interpret the law. Colo. Const. art. III. ("The powers of the government of this state are divided into three distinct departments, ---- the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted."). Therefore, "courts must balance the obligation to construe statutes as constitutional and valid whenever possible against the duty to avoid judicially rewriting statutes in derogation of legislative intent." *Williams v. City and County of Denver*, 607 P.2d 981, 983 (Colo. 1979). If a statute is ambiguous, "the court, in determining the intention of the general assembly, may consider" among other things, legislative history, declaration, or purpose in addition to the consequences of a particular construction and the circumstances under which the statute was enacted. C.R.S. § 2-4-203.

4. Analysis

Owens argues in a conclusory fashion that the poorly conceived and drafted URS required the court to rewrite and add provisions to the URS. This court finds that the trial court did not rewrite or add provisions to the URS. In this court's view, the trial court was interpreting the URS and implementing procedures to ensure that Owens's due process rights were protected.

Interpretation of statutes is a proper judicial task. Colo. Const. art. III. The legislature acknowledges that statutes can be ambiguous and provides guidance to the judiciary on how to interpret ambiguous statutes. *See* § 2-4-203.

Implementing procedures to follow a statute is not the equivalent of adding provisions to a statute. In fact, the judicial branch has the inherent authority to control court procedure. *See Owens*, 228 P.3d at 971.

Regardless of any ambiguities in the statute, Owens does not provide any factual or legal support for how the court's interpretation of the statute violated his right to be free from cruel and unusual punishment.

5. Conclusion

The court finds Owens failed to establish that the URS violated Owens's rights under the Eighth Amendment of the United States Constitution or article II, section 20 of the Colorado Constitution.

Therefore, Owens's petition to strike the URS and vacate his sentence based on the alleged unconstitutionality of the URS is **Denied**.

I. Article III

1. Parties' Positions

Owens argues that the URS violates article III of the Colorado Constitution. Owens asserts that the legislature overstepped its authority by passing the URS, which directs the Colorado Supreme Court to implement procedures for post-conviction review of capital cases.

In response, the prosecution relies on the Colorado Supreme Court's holding in *Owens*, 228 P.3d at 971-72.

2. Findings of Fact

The findings of fact in part XIII.D.2 of this Order are incorporated herein.

3. Principles of Law

Article III of the Colorado Constitution separates the powers of the state government into three distinct branches – the legislative, executive, and judicial – and prohibits any branch from "exercis[ing] any power properly belonging to

either of the others, except as in this constitution expressly directed or permitted." Colo. Const. art. III. The legislative branch is entrusted with the power to make law and generally may not delegate that power. *Hazlet v. Gaunt*, 250 P.2d 188, 193 (Colo. 1952). The legislature "may delegate power to determine some fact or a state of things upon which the law, as prescribed, depends." *Id.* (quoting *Colo. & S. Ry. Co. v. State R.R. Comm'n*, 129 P. 506 (Colo. 1912)). In other words, it is not unconstitutional for the legislature to "confer[] authority or discretion as to [the law's] execution, to be exercised under and in pursuance of the law." *Id.*

The Colorado Supreme Court has the power to "make and promulgate rules governing the administration of all courts and shall make and promulgate rules governing practice and procedure in . . . criminal cases." Colo. Const. art. VI, § 21. Such rules can "overlap and coexist to some extent" with legislative acts that touch on judicial matters regarding more than daily court operations in which those legislative acts "do not substantially conflict with court rules." *Owens*, 228 P.3d at 971.

In the URS, the legislature directed the Colorado Supreme Court to "adopt rules to establish procedures, including time limits, for the postconviction review and unitary appeal process." § 16-12-208(1). The Colorado Supreme Court adopted Crim. P. 32.2, which addresses trial court procedure and appellate procedure "in class one felony cases in which a sentence of death is imposed." Crim. P. 32.2(a)-(c).

The Colorado Supreme Court addressed the relationship between the legislative and judicial power in relation to the URS in *Owens*. 228 P.3d at 971. The Colorado Supreme Court recognized that § 16-12-208 is an example of the legislature's "deliberate choice to avoid potential conflict between statute and court rule." *Id.* at 972. The Colorado Supreme Court also pointed out that the legislative

enactment of the URS consisted of "expressly articulated policy goals, including its contemplated time constraints, without simultaneously imposing an absolute time limit that would effectively strip the judiciary of its ability to enforce constitutional obligations." *Id.*

4. Analysis

The legislature created the law and structure for the URS and delegated to the judiciary the responsibility to promulgate procedural rules for implementing the law in the courts. *See Hazlet*, 250 P.2d at 193. The legislature defined the scope and applicability of the URS, enumerated definitions, and provided detailed instructions for post-conviction review procedures. *See* C.R.S. §§ 16-12-201 to 210. The legislature directed the Colorado Supreme Court to "adopt rules to establish procedures, including time limits, for the post-conviction review and unitary appeal process." § 16-12-208(1). That directive is consistent with the judiciary's obligation to make and promulgate rules governing practice and procedure in criminal cases and is consistent with the judicial power described by the Colorado Constitution. Colo. Const. art. VI, § 21. The rules created by the Colorado Supreme Court "overlap and coexist" with the URS as enacted by the legislature, and "do not substantially conflict with court rules." *Owens*, 228 P.3d at 971; *see also* Crim. P. 32.2. Based on *Owens*, the court finds that the URS does not violate Article III of the Colorado Constitution.

5. Conclusion

The court finds that Owens failed to establish that the URS violates article III of the Colorado Constitution.

Therefore, Owens's petition to strike the URS and vacate his sentence based on the alleged unconstitutionality of the URS is **Denied**.

J. Remedy

1. Parties' Positions

In his final argument regarding the URS, Owens suggests that the remedy for the pervasive constitutional deficiencies in the URS is to strike the URS, vacate his death sentence, and impose a sentence of life imprisonment.

In the prosecution's view, there are no pervasive constitutional deficiencies in the URS.

2. Findings of Fact

The findings of fact in part XIII.D.2 of this Order are incorporated herein.

3. Principles of Law

If a court finds a statute unconstitutional, "the proper remedy is determined by looking to legislative intent." *People v. Montour*, 157 P.3d 489, 502 (Colo. 2007). If a court determines that part of a statute is unconstitutional, the court is not bound to strike the entire sentence, section, or statute, but may instead sever the words or phrases found to be unconstitutional. *Id.* The Colorado Supreme Court did that in *Montour* when it struck two sentences from C.R.S. § 18-1.3-1201(1)(a). *Id.*

4. Analysis

Because the court denied Owens's challenges to the constitutionality of the URS, Owens is not entitled to any relief.

5. Conclusion

Owens's petition to strike the URS and vacate his sentence based on the alleged unconstitutionality of the URS is **Denied**.

XIV. Independent Review

A. Parties' Positions

Owens urges this court to allow him to present evidence that he deems relevant to the Colorado Supreme Court's independent review of his death sentence, if such independent review is necessary. Aside from asking for an evidentiary hearing, Owens does not request substantive relief in this section of SOPC-163.

B. Findings of Fact

In P.C. Order (SO) No. 9, the court granted Owens an evidentiary hearing with respect to his claim that certain jurors would not have sentenced him to death if he had allocuted. As to Owens's other requests to present evidence he deems relevant to the Colorado Supreme Court's independent review of his death sentence, the court denied Owens the opportunity to do so. P.C. Order (SO) No. 9, p. 4. The court also denied Owens an evidentiary hearing into the circumstances giving rise to the termination of the trial judge's post-retirement contract.

C. Principles of Law

The Colorado Supreme Court independently reviews the propriety of every death sentence imposed in Colorado. C.R.S. § 18-1.3-1201(6)(a)-(b). In doing so, the Colorado Supreme Court considers:

- the nature of the offense;
- the character and record of the offender;
- the public interest; and
- the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based.

§ 18-1.3-1201(6)(a). Based on its review, the Colorado Supreme Court vacates any death sentence that it determines was imposed "under the influence of passion

or prejudice or any other arbitrary factor" or if it determines "the evidence presented does not support the finding of statutory aggravating circumstances." § 18-1.3-1201(6)(b).

To conduct its independent review, the Colorado Supreme Court reviews the record of the proceedings below "as a whole." *People v. Harlan*, 8 P.3d 448, 499 (Colo. 2000), *rev'd on other grounds by People v. Miller*, 113 P.3d 743 (Colo. 2005).

D. Analysis

Owens seeks to present evidence relevant to the Colorado Supreme Court's independent review of his sentence. Owens presented evidence on each of the factors the Colorado Supreme Court will consider when determining the propriety of Owens's sentence during the trial, the sentencing hearing, and the post-conviction hearing. For example, evidence of the nature and circumstances of the Dayton Street homicides was introduced at trial. Evidence of Owens's character, upbringing, and history of mental illness was introduced during the sentencing hearing. Evidence supporting Owens's claims regarding ineffective assistance of counsel, prosecutorial and police misconduct, and conflicts of interest was introduced during the post-conviction hearing.

In SOPC-163, Owens claims that certain jurors would not have sentenced him to death if he had allocuted; however, he did not present any evidence supporting that claim during the post-conviction hearing.

E. Conclusion

The court finds the voluminous trial court record is sufficiently developed for the Colorado Supreme Court to independently review Owens's sentence.

XV. Conclusion

This Order has discussed each area which might have even arguable significance. Any arguments raised by Owens and not discussed herein are hereby summarily **DENIED**.

The court concludes that Owens received a fair trial – one whose result is reliable. He also received a fair sentencing hearing – one whose result was constitutionally obtained, justified in law, and is rationally based upon the evidence.

Owens's petition pursuant to Crim. P. 32.2 is hereby **DENIED**.

SO ORDERED this 14th day of September 2017.

CHRISTOPHER J. MUNCH
DISTRICT COURT SENIOR JUDGE

CERTIFICATE OF SERVICE

I certify that a true, accurate, and complete copy of the foregoing ORDER was delivered by electronic mail on September 14, 2017, to the following:

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Brenda Lopez	blopez@jbk-law.com

Amanda Venenga

Amanda J. Venenga

Appendix One - Names

Name	Reference	Nickname/Moniker	Description
Abdalla, Faraji	Abdalla		Strickland's friend
Agharkar, Dr. Bhushan	Agharkar		Expert Witness
Aguilar, Oscar	Aguilar		Interviewed at Scene of Dayton Street homicides
Alston, Brandon	B. Alston		Present at Lowry Park
Anderson, Robert	Anderson		Potential Witness
Arnold, Jimilah	Arnold		Provided information to the APD
Asante, Rose	Asante		Ray's Mother
Baker, Marcus	Baker		Present at Lowry Park
Baker, Michael	M. Baker		Strickland's friend
Banks, Tenarro	Banks		Defendant in Denver case 05CR4700
Barnacle, Elizabeth	Barnacle		ADC for Strickland
Barnes, Steven	Barnes		ADC for Strickland
Barnicle, Leslee	Barnicle		ADC for Carter
Bartlemay, Winona			Marshall-Fields's friend
Baumann, Christopher	Baumann		Arapahoe DPD for Strickland, J. Martin, and C. Taylor
Baxter, Alan	Baxter and Chipper	Chipper	Marshall-Fields's Uncle
Baxter, Michael	Michael		Marshall-Fields's Uncle
Bell, Elvin	Bell		Victim of Lowry Park shootings
Bennett, Tyjuan	Bennett		Former Owner of T's Barbershop
Bitz, Shoshanna	Bitz		PD Investigator
Bockman, Harlan	Bockman		Adams County District Court Judge
Bogan, Justin	Bogan		Arapahoe DPD for Sailor
Bond, Eric	Bond		APD Officer
Boyce, Michael	Boyce		Denver DPD for Strickland
Braddock, Christopher	Braddock		ADC for Johnson
Brannigan, Daniel	Brannigan		Cook County State's Attorney Investigator
Brewer, Tetrick	Brewer		Provided information about the Lowry Park shootings to the APD
Brown, Ashley	A. Brown		Lowry Park Witness
Brown, Dumas	D. Brown	Ray Ray	Ray's Brother
Brown, Frances	Brown		Chief Deputy Public Defender
Burks, D'Angelo	Burks		Owens's family member
Canney, Randolph	Canney		ADC for Carter
Carter, Jerrick	J. Carter	Jigg	Present at Father's Day barbecue

Carter, Jr., Percy	Carter, Jr.	Little Percy	Carter's Brother
Carter, Perish	Carter	P; Little P; Lil P	Codefendant
Carter, Rickey	R. Carter		Barber at T's Barbershop
Carter, Sr., Percy	Carter, Sr.	Big Percy	Carter's Father
Castle, James			Post-conviction Counsel for Owens
Castro, Jaime	Castro		Denver Police Department Detective
Cazenave, Riean	Cazenave		Potential Alternate Suspect for Dayton Street homicides
Cernich, David	Cernich		APD Officer
Chambers, Carol	Chambers		District Attorney for the 18th Judicial District
Clein, Carrie	Clein		Attorney
Cohen, Heather	Cohen		McDermott's Investigator
Connell, Matthew	Connell		Adams DPD for Strickland
Cordero, Albert	Cordero		ADC for Nash
Crawford, Cherie	Crawford		Present at Lowry Park
Crist, Dr. Evan	Crist		Expert Witness
Crowell, Julie	Crowell		Arapahoe County Probation Officer for Johnson
DeFranco, Ingrid			Direct Appeal Counsel for Owens
Dickey, Jamar	Dickey		Present at Lowry Park
Dorscheid, Bart	Dorscheid		DA Investigator
Dunlap, Nathan	Dunlap		Defendant in Arapahoe County case 93CR2071
Ealy, Donovan	D		Juror 75's Son
Ealy, Michael	M. Ealy		Victim of shooting at Cherry Street Bar & Grill
Ealy, Quincy	Q and Q. Ealy	Q-Nut	Juror 75's Son
Edson, Jacob	Edson		Prosecutor
Eliassen, Kelly	Eliassen		DA Investigator
Elliott, Suzanne			Direct Appeal Counsel for Owens
Emeson, Joel	Emeson		APD Detective
Fang, Tina	Fang		Arapahoe DPD for C. Taylor
Ficco, Steve	Ficco		APD Officer
Fields, Rhonda	Fields		Marshall-Fields's Mother
Fogg, Nathan	Fogg		Arapahoe County Sheriff's Office Lieutenant
Forouzandeh, Yasmin	Forouzandeh		Boulder DPD for Johnson
Fronapfel, Gretchen	Fronapfel		APD Lead Detective on Dayton Street homicides
Gaines, Jahmon	Gaines		Present at Lowry Park

Gallegos, David	Gallegos		APD Officer
Gedde, Jennifer			Post-conviction Counsel for Owens
Gonglach, John	Gonglach		Arapahoe PDO Investigator
Goodish, Tom	Goodish		Marshall-Fields's friend
Gordon, Bertino	Gordon		Present at Lowry Park
Graf, Greg	Graf		ADC for Strickland
Gray, Debra	D. Gray		Owens's Aunt
Gray, Dr. Thomas	Gray		Expert Witness
Gray, Eric	Eric Gray		Denver Police Department Officer
Gray, Erma	E. Gray		Owens's Grandmother
Green, Jeremy	Green		Victim of Lowry Park shootings
Grier, David	Grier		Harris provided information against Grier
Griffin, Gregory	Griffin		Grand Rapids, Michigan Detective
Grubenhoff, Dr. Joseph	Grubenhoff		Expert Witness
Hall, Demarcus	Hall		Owens's family member
Hammack, James	Hammack		Lived near Dayton & Idaho
Hammond, Alan	Hammond		Expert Witness
Hanifin, Mike	Hanifin		APD Officer
Hansen, David	Hansen		ACSO Sergeant
Harris, Dexter	Harris		Incarcerated with Ray
Harrison, Brent	Harrison		Marshall-Fields's friend
Hayashida, Stephanie	Hayashida	Stevie	Marshall-Fields's friend
Heinz, Michael	Heinz		Adams County Prosecutor
Henton, Jada	Henton		Spoke to Cazenave after Dayton Street homicides
Herrera, George	Herrera		CBI Agent
Heylin, Mike	Heylin		DA Investigator
Hicks, Stacy	Hicks		Present at Lowry Park
Holmes, Shamone	Holmes		Defendant in Arapahoe County case 05CR309
Houser-Williams, Doris	Houser-Williams		CFO for DA's Office
Howard, Brooke	Howard		Present at Lowry Park
Hower, John	Hower		Prosecutor
Hueser, Dr. Beth	Hueser		Expert Witness
Humphries, Alicia	Humphries		Todd's Girlfriend
Hunt, William	Hunt		Incarcerated with Ray

Huntington, Phillip	Huntington		Incarcerated with Carter
Jacobson, Steve	Jacobson		DNA Consultant
Johnson, Jamar	Johnson	J-5	Present at Lowry Park
Jones, Cashmier	Jones		Present at Lowry Park
Kaplan, David	Kaplan		State Public Defender 2000-2006
Kelly, Rashika	Kelly		Present at Lowry Park
Kenney, Kevin	Kenney		APD Sergeant
Kepros, Laurie	Kepros		Trial Counsel for Owens
King, Daniel	King		Trial Counsel for Owens
Kloster, Barbara	Kloster		Lowry Park Juror
Kopp, Stephanie	Kopp		Harrison's Girlfriend
Lapidow, Michelle	Lapidow		PD Investigator
Larranaga, Mark			Direct Appeal Counsel for Owens
Lazzara, Joseph	Lazzara		Private Counsel for Johnson
Lewine, Dr. Jeffrey	Lewine		Expert Witness
Lord, Kathleen	Lord		Direct Appeal Counsel for Owens
Lundin, Jennifer	Lundin		Prosecutor
Luther, Lewis	Luther		Lived near Dayton & Idaho
Mair, Todd			Direct Appeal Counsel for Owens
Manning, Andrea	Manning		Trial Counsel for Owens
Manuel, James	Manuel	Uncle Cornbread	Juror 75's husband
Manuel, Stephanie	Juror 75		Lowry Park Juror
Marshall-Fields, Javad	Marshall-Fields	J-Rock	Victim of Dayton Street homicides
Martin, Askari	A. Martin		Witness
Martin, Jon	J. Martin	Showtime	Witness
Mayes, Rashad	Mayes		Present at Lowry Park
McDermott, Sean	McDermott		ADC for Sailor
McPherson, Michael	McPherson		Present at Lowry Park
Medina, Gerald	Medina		APD Officer
Mehl, Chuck	Mehl		APD Detective
Mickling, Sr., Leon	Mickling		Marshall-Fields's Family Member
Middleton, Jason	Middleton		Trial Counsel for Owens
Mitchell, Sean	Mitchell		APD Officer
Montour, Edward	Montour		Defendant in Douglas County case 02CR782

Moore, Kathleen			Appellate Public Defender
Mycroft, Eugene	Mycroft		Arapahoe County Jail Inmate
Nash, James	Nash		Incarcerated with Carter, Sr.
Newton, Jennifer	Newton		Present at Lowry Park
O'Connell, Keyonyu			Direct Appeal Counsel for Owens
O'Connor, James	O'Connor		Arapahoe PDO Office Head; Arapahoe DPD for Nash
O'Keefe, Timothy	O'Keefe		Arapahoe DPD for Nash
Orrison, Dr. William	Orrison		Expert Witness
Owens, Derrick	D. Owens		Owens's Father
Owens, Monica	M. Owens		Owens's Mother
Owens, Sir Derrius	S.D. Owens		Owens's Brother
Owens, Sir Mario	Owens	Rio	Defendant
Pearson, Schuylor	Pearson		Associated with Q. Ealy, Dickey, and Johnson
Pendleton, Dr. Mark	Pendleton		Expert Witness
Phillips, Amber	Phillips		Friend of Dickey's
Pinto, Dr. Suzanne	Pinto		Expert Witness
Pollard, Maisha	Pollard		Marshall-Fields's Sister
Pope, Keith			Post-conviction Counsel for Owens
Ray, Davinia	D. Ray	DeDe	Ray's Sister-in-Law
Ray, Markeeta			Ray's Sister
Ray, Maurice		Rico	Ray's Brother
Ray, Robert	Ray	Rob G	Codefendant
Reidy, Dr. Thomas	Reidy		Expert Witness
Reisch, Scott	Reisch		Counsel for Banks
Rentrope, Jennifer			Direct Appeal Counsel for Owens
Reppucci, Jonathan			Post-conviction Counsel for Owens
Reynolds, Sharlene	Reynolds		Expert Witness
Ridley, Patrick	Ridley		Advisory Counsel for Owens
Riessland, Tyler	Riessland		APD Officer
Riley, Teresa	Riley		Witness
Rogers, Dallis	D. Rogers		Present at Father's Day barbecue
Rogers, Frank	F. Rogers		Provided information to the APD
Root, Michael	Root		ADC for Ray
Rudin, Dr. Norah	Rudin		Expert Witness

Sailor, Latoya	Sailor	Tiny	Ray's ex-wife
Salkeld, Sandy	Salkeld		Victim-Advocate for DA's Office
Samuels, Ricardo	Samuels	Smoke	Defendant in Arapahoe County case 05CR926
Sather, Dr. Elizabeth	Sather		Expert Witness
Sauls, Quentin	Sauls		Defendant in Arapahoe County case 07CR2775
Schaefer, Sara	Schaefer		Victim-Advocate for DA's Office
Schleicher, Mary	Schleicher		Expert Witness
Scott, Patrick	Scott		Incarcerated with Strickland and Carter
Sheehan, Cynthia	Sheehan		ADC for Carter
Silver, Neil	Silver		ADC for Carter, Sr.
Silverman, Craig	Silverman		Attorney
Silverstein, Lila			Direct Appeal Counsel for Owens
Simmons, Michael	Simmons		APD Officer
Singletary, Teretha	Singletary		Johnson's Probation Officer
Smith, Christie	C. Smith		Expert Witness
Smith, Philip	Smith		ADC for Carter
Snyder, Joseph	Snyder		Expert Witness
Sobieski, Thomas	Sobieski		APD Detective
SOPC-56	SOPC-56		Confidential Informant
Spirk, David	Spirk		Expert Witness
Steinberg, Harvey	Steinberg		Private Counsel for Ray on Lowry Park case
Stewart, Chauncey	Stewart		Defendant in Denver case 03JD576 and in Arapahoe County case 04JD50
Stookey, Erick	Stookey		Ray's neighbor
Stowell, Hershel	Stowell		APD Detective
Strickland, Gregory	Strickland		Incarcerated with Carter
Suggs, Venise	Suggs		Owens's family member
Sullivan, Linda	Sullivan		Mitigation Witness
Taylor, Armando	A. Taylor		Present at Lowry Park
Taylor, Brandi	B. Taylor		Ray's Sister-in-Law
Taylor, Christopher	C. Taylor		Defendant in Arapahoe County case 05CR1909 (Aurora Mall shooter)
Taylor, Marlena			R. Carter's Girlfriend
Taylor, Miguel			Marshall-Fields's friend
Terrell, Marquell	Terrell	Lizard	Potential Alternate Suspect for Dayton Street homicides
Todd, Checados	Todd	ChiChi; Scooter	Ray's childhood friend from Chicago

Tomsic, Ann	Tomsic		Prosecutor
Turner, Beth	Turner		Arapahoe DPD for J. Martin
Valdez, Michael	Valdez		Glendale Police Officer
Vann, Clarence			Vann's Uncle
Vann, Gregory	Vann	Whiz	Victim of Lowry Park shootings
Varnado, Aja	Varnado		Present at Lowry Park
Vaughn, Christopher	Vaughn		Associated with Arnold
Veasley, William	Veasley	Black	Barber at T's Barbershop
Walsh, Jeffrey	Walsh		Arapahoe DPD for Strickland and Samuels
Warren, Emily	Warren		Prosecutor
Waters, Dr. James	Waters		Expert Witness
Wayne, Lisa	Wayne		Expert Witness
Welton, Thomas	Welton		APD Detective
White, Melissa	White		Owens's friend
Williams, Darrent			Denver Broncos player
Williams, Kendra			Present at Lowry Park
Williams, Nissan	N. Williams		Owens's family member
Williams, Shelwyn	S. Williams	Plucky	Marshall-Fields's friend
Wilson, Douglas	D. Wilson		State Public Defender 2006-Present
Wilson, Thomas	T. Wilson		APD Detective on Lowry Park shootings
Wolfe, Vivian	Wolfe		Victim of Dayton Street homicides
Wood, Ben	Wood		Investigator for Owens's Post-Conviction Counsel
Wortzel, Dr. Hal	Wortzel		Expert Witness
Wu, Dr. Joseph	Wu		Expert Witness

Appendix Two - Timeline

Lowry Park	Date
Lowry Park shootings	July 4, 2004
Complaint and Information filed	September 30, 2005
Arrested in Shreveport, Louisiana	November 6, 2005
OSPD entered its appearance	November 23, 2005
Jury trial	January 8, 2007 - January 24, 2007
Verdicts	January 30, 2007
Sentencing	April 3, 2007

Dayton Street	Date
Dayton Street homicides	June 20, 2005
Grand Jury indictment	March 8, 2006
67 Hearings	March 2006 - March 2008
Individual *voir dire*	March 10, 2008 - April 5, 2008
General *voir dire*	April 7, 2008
Opening statements	April 8, 2008
Guilt phase	April 8, 2008 - May 8, 2008
Guilt phase verdicts	May 14, 2008
Phase one	May 19, 2008
Phase one verdicts	May 20, 2008
Phase two	May 21, 2008 - June 12, 2008
Phase two verdicts	June 16, 2008
Sentencing	December 8, 2008

Appendix Three - Abbreviations

Abbreviation	Description
ACDF	Arapahoe County Detention Facility
ADC	Alternate Defense Counsel
ADP	used to describe a juror who would automatically vote for the death penalty
APD	Aurora Police Department
APS	Aurora Public Schools
CCIC	Colorado Crime Information Center
CDPD	Chief Deputy Public Defender
CMHIP	Colorado Mental Health Institute at Pueblo
CSU	Colorado State University
CTD	Chief Trial Deputy
DDA	Deputy District Attorney
DHS	Department of Human Services
DMV	Department of Motor Vehicles
DPD	Deputy Public Defender
DRDC	Denver Reception and Diagnostic Center
GPD	Glendale Police Department
ICAOS	Interstate Compact for Adult Offender Supervision
IMI	Israel Military Industries
MCU	Major Crimes Unit
NCIC	National Crime Information Center
OADC	Office of Alternate Defense Counsel
PDO	Public Defender's Office
PTSD	Post-traumatic Stress Disorder
ROA	Register of Action
SO-#	Motion filed by Owens's Trial Counsel
SOPC-#	Motion filed by Owens's Post-conviction Counsel
SOPC.EX.C-#	Post-conviction Court Exhibit
SOPC.EX.D-#	Post-conviction Defense Exhibit
SOPC.EX.P-#	Post-conviction Prosecution Exhibit
URS	Unitary Review Statute

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 South Potomac Street Centennial, Colorado 80112	DATE FILED: May 16, 2017 10:00 AM
PEOPLE OF THE STATE OF COLORADO **vs.** **SIR MARIO OWENS**	▲ COURT USE ONLY ▲ Case Number: 05CR2945 Div: SR

ORDER RE: PETITION FOR RELIEF PURSUANT TO CRIM. P. 35(C)

THIS MATTER comes before the court on Sir Mario Owens's Petition for Relief Pursuant to Crim. P. 35(c). The motion is hereby DENIED.

I. Introduction

Following a ten-day jury trial in January of 2007, a jury convicted Sir Mario Owens (Owens) of the first-degree murder of Gregory Vann (Vann) and, as a complicitor, the attempted murders of Javad Marshall-Fields (Marshall-Fields) and Elvin Bell (Bell). Daniel King (King), Laurie Rose Kepros (Kepros), and Jason Middleton (Middleton) represented Owens at trial. On April 3, 2007, the trial court sentenced Owens to life in prison without parole plus 64 years. Owens filed a Notice of Appeal on May 10, 2007. The Colorado Court of Appeals affirmed his convictions in *People v. Owens*, No. 07CA0895, 2012 WL 3031232 (Colo. App. July 26, 2012) (not published pursuant to C.A.R. 35(f)), *cert. denied*, No. 12SC810, 2013 WL 4426399 (Colo. Aug. 19, 2013).

In December of 2014, Owens brought this Crim. P. 35(c) motion alleging that his constitutional rights were violated. He raised over 150 specific claims. With its four supplements, the petition's length exceeds 400 pages. His assertions

include, *inter alia*, that (1) both his trial and appellate counsel were constitutionally inadequate, (2) his trial was unconstitutionally tainted by juror misconduct, (3) his trial was tainted by unconstitutional prosecutorial misconduct, and (4) his trial counsel labored under conflicts of interest. The trial judge did not rule on this motion, and the case was assigned to this court.

A defendant who seeks "postconviction relief pursuant to Crim. P. 35 is entitled to a prompt evidentiary hearing unless the motion, the files, and the record 'clearly establish that the allegations presented in the defendant's motion are without merit and do not warrant postconviction relief.'" *People v. Rodriguez*, 914 P.2d 230, 255 (Colo. 1996) (quoting *People v. Trujillo*, 549 P.2d 1312, 1313 (Colo. 1976)). The court granted Owens an evidentiary hearing on some but not all of the claims raised in the petition and its four supplements. The court conducted a five-day hearing that ended on October 21, 2016, a one-day hearing on April 17, 2017, took additional telephone testimony on April 28, 2017, and considered certain offers of proof. The court has read the transcripts of the trial and sentencing and has reviewed many thousands of pages of additional material designated by the parties. It also reviewed hundreds of exhibits and considered the written arguments submitted in November of 2016 and May of 2017.

This Order resolves all of Owens's claims.

II. Facts

A. The events at Lowry Park

Around dusk on July 4, 2004, Owens shot and killed Vann. Robert Ray (Ray) shot and injured Bell and Marshall-Fields. The shootings occurred in and near a parking lot at Lowry Park in Aurora. People had gathered at the park for a barbeque and rap contest promoted and sponsored by Vann and Marshall-Fields.

At the time, Ray was married to Latoya Sailor (Sailor) who, along with other young women, went to the barbeque and rap contest. Ray arrived later. He was drunk, driving his Suburban on the lawn, playing rap music on his car radio so loudly as to interfere with the rap contest, and generally interacting with people in offensive and obnoxious ways.

Sailor called Owens and asked him to come to the park. She told him that Ray was drunk, "acting a fool," and she feared that the crowd was about to physically attack him. Sailor believed that Owens – Ray's closest friend – would protect Ray.

After the rap contest ended, Sailor and the other young women attempted to drive out of the parking lot. Their path was impeded by pedestrians who were standing around in the parking lot. The pedestrians were asked to move and the situation escalated. Ray got into a verbal confrontation with several young people. This exchange, coupled with Ray's earlier conduct, caused tempers to flare. Some in the crowd flipped their middle fingers at Ray. Many were loud and confrontational. Different witnesses recalled details differently. The various perceptions included:

- The driver of Sailor's car honked her horn at the pedestrians.
- One or more young men yelled epithets at Sailor.
- Ray suggested, in offensive language, that the driver of Sailor's car run the pedestrians over.
- Ray put his open hand on a female pedestrian's face and pushed her, and her brother angrily confronted Ray.
- A crowd of people moved toward Ray and angrily confronted him.
- Ray flailed his arms and repeatedly said he would kill those who were confronting him.

- While retreating toward his Suburban, Ray pushed another woman out of the way with his shoulder.
- Jeremy Green (Green) removed his shirt as a prelude to a fight, lightly head-butted Ray, and said Ray was a "pussy" unless he agreed to fight Green without weapons.
- Ray continued to verbally threaten to kill those who were advancing upon him.
- Owens, without saying anything, came to Ray's side.
- Owens and Ray lifted their shirts to show the crowd that they were armed with handguns.
- There was substantial yelling back and forth between Ray and the crowd.
- Owens waived his gun as he and Ray were retreating toward the Suburban.
- Vann ran toward Owens, and raised his arms. Some felt that Vann was verbally expressing his anger that Owens brought a gun to the event. Others felt that Vann was trying to break up the argument and confrontation. One witness, Jamar Johnson (Johnson), testified that Vann punched Owens in the face.

Shortly before the shootings, Sailor and the young women drove out of the park. Owens then shot and killed Vann. Vann was shot twice. The second shot was delivered after Vann had fallen to the ground. Owens then ran to Ray's Suburban to escape, but Marshall-Fields, Bell, and possibly others attempted to detain him. Ray shot and wounded both Bell and Marshall-Fields as they tried to prevent Owens from leaving with Ray in the Suburban. Ray and Owens then left

hurriedly in the Suburban, drove over the lawn, and possibly had a passing, minor collision with another vehicle.

Police arrived shortly thereafter. The scene was chaotic, hard to control, and exacerbated because Aurora officers were trying to identify possible witnesses while Denver officers were trying to clear the park. The police received minimal cooperation from the people who were present. Most refused to talk to the police. Many were hostile and insulting. Some even had physical altercations with the police. No one at the scene identified either shooter by name. But some of the people present spoke to the police, and Green accompanied them to their station where his interview about the events was video-recorded.

B. Subsequent facts relating to the crimes

The police later obtained an amateur video that appears to show two men lifting their shirts in a way that would show whether they had guns in their waistbands, but the quality of the video is not good. No reliable identification could be made based upon the video alone, nor was it of sufficient quality to see whether any item in the waistband was a gun.

Bell and Marshall-Fields were taken to area hospitals. An Aurora police officer interviewed Bell, who described the shooter as a 6' tall, light-skinned black male, 19-20 years old, wearing a white shirt, jean shorts, and a white hat. Other officers interviewed Marshall-Fields, who described the shooter as 6'1", 180 lbs. with braids and wearing a white shirt, jean shorts, and a white hat. Both of these descriptions were consistent with Owens.

Green's description was similar, although he described the shooter as dark-skinned. The clothing descriptions generally match a person who can be seen on the video lifting his shirt.

According to Bell and Marshall-Fields, Vann's shooter fled in a gold-colored Suburban, which was driven by someone else. Bell described the getaway driver as a darker-skinned black male, 20 years old, wearing a white t-shirt.

After she left the park, Sailor found Ray and Owens in the home she and Ray shared. According to Sailor, Ray was very upset with Owens over the shootings. Ray anticipated that he would be quickly identified as the driver of the Suburban. In an emotional state, Ray berated Owens, indicating that it was not necessary to shoot Vann because those who were closing in on Ray and Owens were not armed.

Later that night, Sailor, Ray, and Owens cleaned blood off the Suburban and hid the Suburban in a garage belonging to Ray's sister-in-law, Brandi Taylor (B. Taylor). After pouring bleach on the clothes worn by Ray and Owens, Sailor disposed of the clothes by throwing them into one or more dumpsters. Ray directed Percy Carter, Sr. (Carter, Sr.) to dispose of the guns that he and Owens used that night. Owens cut off his braids in order to change his appearance. Carter Sr. and his girlfriend rented two motel rooms. Ray, Sailor, Owens, and Owens's girlfriend, Cashmier Jones (Jones), spent the night in the motel rooms that had been registered to Carter, Sr. and his girlfriend. The next day, the four moved to the home of Ray's other sister-in-law and stayed there for a couple of days. Then Owens and Jones drove to Shreveport, Louisiana, where they stayed with Owens's relatives. Owens was from Shreveport and had a large, extended family in the area. Owens remained in Shreveport until late fall 2004. The guns, clothing, and Suburban were never recovered.

Askari Martin (A. Martin) surfaced as an eyewitness when he returned to Lowry Park on the morning of July 5 to retrieve his vehicle. While speaking with a detective, he identified Ray as the driver of the Suburban. On July 13, Marshall-

Fields identified Ray in a photo lineup, and on July 20, the prosecution charged Ray as an accessory to Vann's murder. Ray posted a $25,000 bond and was released.

The prosecution provided discovery to Ray's attorney who provided a copy to Ray. Ray and Owens reviewed the discovery and identified Marshall-Fields and A. Martin as the only witnesses who had identified Ray as the driver of the Suburban. The discovery confirmed that the identity of the person who shot and killed Vann was unknown.

Ray's jury trial was scheduled for April 25, 2005, with a pretrial motions hearing on February 24, 2005. The prosecution subpoenaed Marshall-Fields and A. Martin to testify during the motions hearing. After the hearing, because he was afraid that Ray would harm him, A. Martin sought out Ray in the courthouse parking lot and promised he would not appear for trial.

Due to a continuance of the motions hearing, a new trial date was set for June 27, 2005. On June 20, 2005, Marshall-Fields and his fiancée, Vivian Wolfe (Wolfe), were shot and killed while driving on Dayton Street.[1] In the aftermath of the Dayton Street homicides, evidence was developed that identified Owens as the man who shot Vann. Sailor was in jail on drug and gun charges, and she agreed to cooperate with the prosecution. Johnson was in jail on a probation violation and aggravated robbery charges, and he agreed to cooperate as well. Both were given very favorable plea bargains and witness protection relocation. Jones also cooperated and was given witness protection relocation. Their cooperation led the police to other witnesses and evidence that inculpated Owens for the murders of Vann, Marshall-Fields, and Wolfe.

[1] *See People v. Owens*, Arapahoe County case 06CR705.

Once Owens was identified, the police developed ample evidence of the close relationship between Ray and Owens. They had attended middle and high school together in Aurora and had been almost inseparable friends ever since. While the jury did not hear about their business relationship, the prosecution was in a position to prove – had the trial court allowed it – that Ray ran a successful drug distribution business out of his barbershop, and that Owens was his second-in-command and almost constant companion.

Owens was arrested on November 8, 2005, in the Shreveport area. When interviewed by Aurora officers in Shreveport, Owens claimed that he had been in Shreveport at the time of Vann's shooting and denied any involvement in the crime.

C. Selected trial evidence of significance

Johnson testified that he was close by when the shootings occurred, and that he saw Vann punch Owens and Owens shoot Vann. He testified that, after the first shot, Vann fell to the ground, and Owens fired into Vann's body until the clip in his gun was empty or the gun jammed. Johnson also testified that he saw Ray shoot the men who were attempting to detain Owens. Johnson knew Ray and Owens well and was certain of his identification. When cross-examined, Johnson gave significant evidence that was helpful to a claim of defense of Ray and self-defense. He testified that Owens and Ray were vastly outnumbered; that the crowd was angry and advancing upon them; that one or more of the young men had removed their shirts and that – given the nature of the young men in the crowd – at least some of them were almost certainly armed; and that Owens did not shoot until Vann attacked Owens and punched Owens in the face.

Green's trial testimony was not particularly helpful to either party. But his videotaped interview provided significant corroboration of points that may have

been important to both parties. His description of the shooter corroborated the identity of Owens, and his description of the events corroborated many facts supporting the defense of defense of Ray/self-defense.

Sailor and Jones testified concerning Sailor's phone call to Owens, the verbal exchange as the young women were trying to leave the park, and the events that occurred after the shooting. Sailor also recounted Ray's berating of Owens over the shooting.

Several police officers and technicians testified about the chaotic nature of the crime scene; the uncooperativeness and hostility of the crowd and the potential witnesses; the steps taken to attempt to secure the crime scene; the crime scene investigation; the three shell casings recovered from the scene; and their inability to find any other slugs or casings with a metal detector sweep. Medical doctors testified as to the cause of Vann's death and the nature of Bell's and Marshall-Fields's wounds. Forensic experts testified, based upon slugs recovered from Vann and a fragment recovered from Bell, that Bell and Vann were shot with guns of different calibers.

The jury did not hear any evidence about the Dayton Street homicides.

III. Trial Counsel's Performance

A. Parties' Positions

Owens challenges nearly every facet of his trial counsel's performance, including their investigation, pretrial motions practice, and their performance during trial with respect to evidentiary objections, cross-examinations, and arguments.

The prosecution responds that Owens can neither show that his counsel performed incompetently nor that his counsel's performance prejudiced his defense.

B. Overview, staffing, and diligence

Owens was charged with the Lowry Park murder on September 30, 2005. The Public Defender's office anticipated that the death penalty would be sought against Owens for the Dayton Street homicides, so when Owens was arrested on November 8, 2005, Douglas Wilson (D. Wilson) of the Public Defender's office flew to Shreveport and met with him a few days later. The Public Defender formally entered on November 23, 2005. A conviction in Lowry Park would be an aggravator in Dayton Street, and the Lowry Park facts were connected as the motive for the Dayton Street homicides. Thus, to the Public Defender's office, it seemed appropriate to have the same team of lawyers handle both cases. The Public Defender's office attempted, as best as it could, to follow its death penalty protocol in staffing both cases even though Lowry Park did not involve the death penalty. When possible, the Public Defender's office assigns three lawyers and one investigator to death penalty cases. The lead lawyer is someone with death penalty trial experience as either lead counsel or second chair. The second lawyer is someone with prior first-degree murder trial experience.

The Public Defender's office assigned three lawyers and an investigator to Owens's cases. The initial staffing had D. Wilson as the lead lawyer, King as second chair, and Middleton as the third lawyer. About four months before the Lowry Park trial, D. Wilson was appointed the State Public Defender. The State Public Defender does not carry a caseload so King was elevated to the lead lawyer and Kepros was appointed as second chair. Middleton remained as the third lawyer.

King was licensed to practice law in 1995 and had been a public defender for just over 11 years before the trial in this case. During that time, he tried hundreds of jury trials including approximately 20 homicides. Kepros was

licensed to practice law in 1999 and began working as a public defender in 2000. Prior to the trial in this case, she had tried two homicide cases to a jury. Kepros was selected to represent Owens because of her work ethic, litigation skills, and diligence. While King and Kepros investigated and litigated, Middleton drafted a majority of the motions and participated in the jury instruction conferences. Middleton was licensed to practice law in Texas in 1993. While in Texas, he was second chair on a capital case, although the death penalty was withdrawn shortly before trial. Since moving to Colorado in 1995, Middleton had worked as a private criminal defense attorney and as an appellate public defender. As an appellate public defender, Middleton represented Nathan Dunlap on his post-conviction appeal.

When he was second chair, King was primarily responsible for the guilt phase of the Dayton Street trial and he shared trial responsibility for Lowry Park under D. Wilson's leadership. He also had some responsibilities in other cases – a first-degree homicide case which he took to trial in June 2006, one potential death penalty case in Southern Colorado that resolved in August 2006, and a few non-trial cases that were so far along before his appointment to represent Owens that it was most efficient for him to finish rather than transfer them. Kepros also had transition issues. While concentrating on the Owens cases, she had to write transition memos to the attorneys who were taking over her cases and meet with some clients to explain the transition. Both King and Kepros found the situation stressful to a degree that bordered on overwhelming.

At the time of D. Wilson's elevation, the Public Defender's office was highly stressed. Three of their experienced death penalty lawyers had left the office and another had passed away. There was also a substantial increase in their

load of serious cases. Lawyers on various cases around the state were making requests for additional resources that could not be provided.

The Lowry Park murder had occurred on July 4, 2004, Ray was charged shortly thereafter and as the investigation continued, thousands of pages of discovery built up. Because Owens was not identified as a suspect until the second half of 2005 and Kepros did not join the team until September of 2006, the team's workload was extremely heavy. King's primary focus was on the Dayton Street case, and Kepros worked very long hours every day to prepare. She also had some medical issues that required her to attend some outpatient medical appointments. As she worked through the discovery, she spotted various issues or areas where additional investigation might be useful but the magnitude was such that she had to focus primarily on the Lowry Park witnesses whom King had assigned to her.

Their investigator, the lead investigator in the Arapahoe County regional office, was also overwhelmed. Mitigation aspects of the Dayton Street case required significant travel, some of the Lowry Park witnesses would not cooperate with the defense, and at one point he was injured when he fell off a roof.

Thus, as the January 2007 trial date grew close, the defense did not feel that they were ready. On December 27, 2006, they moved to continue the trial. Both in the written motion and in oral argument they informed the trial judge that there were many witnesses who had not been interviewed, substantial discovery that had not been reviewed, and experts who had not been consulted. The trial judge denied the motion to continue and, on appeal, that decision was found not to be an abuse of discretion. *See People v. Owens*, No. 07CA0895, 2012 WL 3031232 (Colo. App. July 26, 2012) (not published pursuant to C.A.R. 35(f)), *cert. denied*, No. 12SC810, 2013 WL 4426399 (Colo. Aug. 19, 2013).

C. Principles of Law

The Sixth Amendment to the United States Constitution provides that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defen[s]e." U.S. CONST. amend. VI; *see also* COLO. CONST. art. II, § 16; C.R.S. § 18-1-403. "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy [this] constitutional command." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Accordingly, "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

To prevail on an ineffective assistance of counsel claim,

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

Strickland, 466 U.S. at 687. "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. In making this assessment, the court should not "second-guess counsel's assistance" or let itself be swayed by "the

distorting effects of hindsight." *Id.* at 689. Instead, the court should make every effort "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* Simply put, "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). Moreover, the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689.

With respect to counsel's pretrial investigation and preparation for trial, the United States Supreme Court observed that,

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91. Furthermore, "[c]ounsel [is] entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Harrington v. Richter*, 562 U.S. 86, 107 (2011).

Proving that counsel performed deficiently is not enough to succeed on an ineffectiveness claim. The defendant must also demonstrate that the deficient

performance prejudiced the defense to the point of deprivation of a fair trial with a reasonable result. *Strickland*, 466 U.S. at 687. There is prejudice when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. "The likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 112. The United States Supreme Court has observed that a "verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696.

The court must ultimately determine whether "the identified acts or omissions were outside the wide range of professionally competent assistance" and whether "the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id.* However, "there is no reason for a court . . . to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id*. at 697. "A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* If it is easier to dispose of an ineffectiveness claim because there is a lack of prejudice, courts are encouraged to do so. *See id*.

When relief is sought based on a claim of ineffectiveness, the defendant must "state with particularity the grounds upon which the defendant intends to rely." C.R.S. § 16-12-206(1)(b). Failure to state claims with specificity can result in a summary denial of the claim. *Rodriguez*, 914 P.2d at 300-01 (a vague and unsupported claim of ineffective assistance will be denied).

D. Trial Counsel's Investigation

1. Choice of Defense Strategy

Owens asserts that his trial counsel were constitutionally inadequate. Many of the claims flow from Owens's assertion that trial counsel's choice of defense strategy – defense of Ray/self-defense – was unreasonable and was selected before an adequate investigation was done. While defense of Ray/self-defense did not prove a successful strategy, it was not only *a* reasonable strategy, but *the more* reasonable strategy in this case.

The defense team seriously considered two generally inconsistent defense strategies. Some consideration was given to adopting the position that the prosecution could not prove beyond a reasonable doubt that Owens killed Vann. Identity depended largely upon the testimony of Johnson, Jones, and Sailor, including Sailor's recounting of Ray's remarks after the Lowry Park shootings. But Owens's identity was corroborated by strong inferences from the descriptions of Green, Bell, Marshall-Fields, and others, as well as Owens's relationship with Ray. And his hiding, cutting his braids, disposing of evidence, and flight after the homicide would be viewed as corroboration of his involvement. Ultimately King determined that a jury was likely to conclude that Owens was a shooter and that defense of Ray/self-defense was the more viable defense.

Many factors suggested that defense of Ray/self-defense was viable. Defense counsel knew the following information before deciding on a defense strategy. No further investigation was necessary before making the decision.

Factors suggesting that defense of Ray/self-defense was viable included:

- Sailor called Owens to the park. She asked him to come to the park and get Ray because the crowd was about to cause Ray serious harm. Thus, Owens's state of mind when he arrived at the

park might reasonably have been that Ray needed to be defended against mob violence.

- As Sailor and the other young women were attempting to leave the park, Ray's drunken talk was again obnoxious and offensive. But there was very little evidence that Owens, himself, did anything aggressive or inflammatory. According to Green, Owens never said anything.
- Before any shooting occurred, Owens and Ray retreated toward the Suburban in what could reasonably be inferred to be an attempt to avoid or withdraw from the growing confrontation.
- A large, angry crowd kept advancing on Ray and Owens. Some young men in the crowd removed their shirts – an indication that they intended to engage in a fight. Others were yelling, flipping their middle fingers, and otherwise acting confrontationally. Green head-butted Ray, removed his shirt to fight, and told Ray he was a "pussy" if he would not fight without a gun.
- Ray and Owens were greatly outnumbered, and no one seemed to be coming to their aid.
- When Owens first showed and later waived his gun, it appeared to be in an effort to dissuade the crowd from advancing further. The crowd was not deterred and continued to advance aggressively toward Ray and Owens.
- According to Jamar Dickey (Dickey), Vann ran toward Owens and raised his hands, possibly to hit Owens, right before shots were fired. Dickey followed Vann, planning to assist Vann in what appeared to Dickey to be an imminent fight.

- According to Johnson, Owens was physically attacked by Vann, who struck Owens in the face with a fist.
- Owens could reasonably have believed that some of his attackers had guns.
- From the police description of their interactions with people in the park, it was reasonable for trial counsel to predict that jurors might infer that many people at the park might have been carrying guns. The police consistently described the crowd as belligerent, hostile, and aggressive – some even fought with the police.

Factors suggesting that an alternate suspect/reasonable doubt as to identification approach would be problematic included:

- Evidence identifying Owens as Vann's shooter
  - Johnson, who knew Owens, identified him as the man who shot and killed Vann.
  - Ray's berating of Owens for shooting Vann.
  - Marshall-Fields's, Bell's, and Green's descriptions of the man who shot Vann are consistent with Owens.
- Ballistics evidence
  - The ballistics experts' evidence established that the bullet fragment removed from Bell was from a different caliber gun than the bullets removed from Vann. Thus, the jury would conclude that because there were two different guns, there were two different shooters.
- Inference from Ballistics Evidence
  - The jury would conclude Ray was one of the shooters. Some potential witnesses identified Ray as the only shooter. Ray was

the person who initially drew everyone's attention through his obnoxious talk and threats. And after Owens's two shots drew people's attention, it was Ray alone who was shooting. Ray shot Bell, who was trying to detain Owens, and the gun used to shoot Bell was not used to kill Vann. So Vann was shot by the other man with a gun – the man who was trying to protect or assist Ray. That was the man who, along with Ray, lifted his shirt to display a gun, and the man who fled with Ray in the Suburban.

- Owens's relationship with Ray
  - Dickey characterized Owens and Ray as "best friends."
  - Sailor's testimony that Owens was Ray's best friend, constant companion, and loyal assistant, and that she called Owens to come to the park and get Ray.
  - Owens was at the house with Ray after the shooting.
- Efforts to conceal evidence
  - Owens changed his appearance the night of the shooting by cutting his braids.
  - Sailor poured bleach on the clothes that Owens and Ray wore at the park and later disposed of the clothes in one or more dumpsters.
  - Owens and Ray arranged for the disposal of the Suburban and guns.
  - Ray, Sailor, Owens, and Jones stayed at a motel on the night of July 4, 2004, in rooms that were registered in the names of others.

- Then after staying with Ray's relatives for a couple nights, Owens and Jones went to Louisiana in what could reasonably be inferred to be an effort to avoid apprehension.

Trial counsel reasonably concluded that it was likely that the jury would conclude that Owens shot Vann. Based on the analysis set forth above, defense of Ray/self-defense was not only *a* reasonable strategy, but *the more* reasonable strategy in this case.

2. Interviewing and Investigating Witnesses

Owens contends his trial counsel were ineffective because they did not interview or investigate 23 potential witnesses whose testimony, Owens asserts, would have contradicted the prosecution's theory that Owens shot and killed Vann. According to Owens, discovery reflected that 14 of those 23 witnesses would have named Ray as the individual who killed Vann.[2]

As discussed above, (1) it is unlikely that a jury would entertain a reasonable doubt as to whether Owens shot Vann, and (2) trial counsel's review of the evidence before selecting their theory of defense was adequate. Trial counsel might have preferred to interview some of these witnesses, had time and resources permitted, but the choice of defense strategy obviated the need to interview them.

Choosing not to interview and investigate the 14 witnesses who would have inculpated Ray was reasonable in light of all of the evidence. Several witnesses either identified Owens as having been at Lowry Park or provided suspect descriptions that closely matched Owens. Several described Ray's and Owens's close relationship. Further evidence implicating Ray would not have been helpful.

[2] Deonta Combs, Jamar Dickey, Jahmon Gaines, Bertino Gordon, Stacy Hicks, Nicole Huntley, Rashika Kelly, Michael McPherson, Askari Martin, Rashad Mayes, Leon Mickling, Sr., Maisha Pollard, Miguel Taylor, and Charona Wilson.

Indeed, because Owens was charged as Ray's accomplice to the shootings of Marshall-Fields and Bell, it might have been detrimental.

Four of the witnesses gave suspect descriptions that did not match Owens.[3] But their descriptions did not match each other's and would not have raised a serious doubt about identity.

Testimony from Winona Bartlemay would have been inadmissible hearsay.

Amber Johnson was a character witness. Reasonable trial counsel would not have deliberately opened the door to Owens's character.

Jon Martin (J. Martin) did not testify at trial. In the 32.2 hearing in Owens's Dayton Street case, J. Martin testified that he did not see who shot Vann initially, but later saw a dark-skinned man who was bald or had a bald fade and gold teeth shoot three to five shots into Vann's body. But J. Martin was an acquaintance of Ray and Owens who had his own significant criminal issues. Even if trial counsel had been able to interview J. Martin before the Lowry Park trial, and had he offered the same description, it is highly unlikely that trial counsel would have called him to testify. J. Martin's description of the shooter would not have been believed. And his testimony about shots fired into Vann's body would corroborate the part of Johnson's testimony that Owens wanted to discredit. Competent defense counsel would not have called J. Martin.

The final two, Sailor and Johnson, testified. Trial counsel interviewed Sailor. Owens's assertion seems to be that a more thorough interview might have uncovered useful impeachment evidence.

It is not clear that Johnson, who was represented by counsel and in witness protection, would have submitted to a defense interview. But it is clear that Owens

[3] Cherie Crawford, Jennifer Newton, Frank Rogers, and Armando Taylor.

suffered no prejudice from trial counsel's failure to interview Johnson before trial. The court has evaluated the evidence as it relates to these two witnesses, including the direct and cross-examinations. The record does not support the claim that trial counsel inadequately impeached Sailor and Johnson. S*ee* part III.K.2 of this Order.

3. Failure to Use Experts

Owens faults his trial counsel for failing to employ a ballistics expert to contradict Johnson's testimony that Owens shot Vann again after Vann had fallen to the ground. This court authorized Owens's post-conviction counsel to employ a ballistics expert, allow the expert unfettered access to the evidence, and present the expert and/or the expert's report at the hearing. They chose not to call the expert or submit a report. The court concludes that no prejudice has been shown.

Similarly, no prejudice has been shown with respect to Owens's claim that his trial counsel did not consult a pathologist. The conclusions of the pathologist do not appear to be subject to legitimate dispute and no contrary evidence has been submitted.

Owens also faults his trial counsel for failing to consult a crime scene expert. Because Owens was not identified until more than a year after the homicide, there is little that such an expert could have examined first hand. The expert could have criticized the police preservation or investigation of the scene, but the evidence showed that the scene was chaotic and difficult to control. Again, no prejudice has been shown.

E. Pretrial Litigation

1. Counsel of Choice

D. Wilson, King, and Middleton were initially assigned to represent Owens. D. Wilson stopped actively representing Owens in October of 2006 when he was

appointed State Public Defender. Owens advances three arguments: (1) D. Wilson failed to comply with any requirements for withdrawal; (2) D. Wilson's departure violated Owens's right to continued representation by counsel of choice; and (3) D. Wilson withdrew on account of a personal conflict of interest.

a. Withdrawal

The court must give an attorney permission to withdraw from representing a client. *See generally People v. Schultheis*, 638 P.2d 8 (Colo. 1981). In some scenarios, "a written substitution of counsel is filed which is signed by current counsel, future counsel and the defendant." Crim. P. 44(d)(1). Here, a state commission appointed D. Wilson as State Public Defender. D. Wilson elevated King to Chief Trial Deputy, substituted King for himself on the team, and assigned Kepros to fill King's role as second chair. With Owens present, King made a record about D. Wilson's departure and the necessity for Kepros's substitution in October of 2006. Owens did not voice any concerns. Owens was also present when King argued for a continuance of the trial because Kepros had only recently been assigned to the case. Again, Owens did not object. Under these circumstances, it can reasonably be inferred that Owens was apprised of the circumstances involving D. Wilson's departure. In the court's view, the records made by King together with Owens's silence is evidence that neither D. Wilson, King, Kepros, nor Owens would have withheld their consent to the substitution of counsel. As such, the court perceives no error under either Crim. P. 44 or Colo. RPC 1.16(c).

b. Continued Representation by Counsel of Choice

While an indigent defendant has a constitutional right to appointment of counsel, *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963), s/he does not have a right to demand a particular attorney, *People v. Arguello*, 772 P.2d 87, 92 (Colo.

1989). But once an attorney is appointed, the attorney-client relationship is no less inviolable than if counsel had been retained. *People v. Harlan*, 54 P.3d 871, 878 (Colo. 2002). Indeed, an indigent defendant has a presumptive right to continued representation by counsel of choice. *Id.*

Contrary to Owens's assertion that D. Wilson was clearly was Owens's counsel of choice, the record is devoid of any evidence that Owens objected to D. Wilson's departure or to King assuming the role of lead counsel. Owens did not put the trial court on notice that he did not understand why D. Wilson was no longer working on his cases or that he was dissatisfied with King or Kepros. In addition, Owens presumably consulted with his appellate counsel yet did not claim on appeal that D. Wilson's departure deprived him of his right to continued representation by counsel of his choice. That Owens now claims for the first time that he would have objected to D. Wilson's departure if D. Wilson had consulted with him appears to be a contrived argument. *Cf. Anaya v. People*, 764 P.2d 779 (Colo. 1988) (no indication defendant acquiesced to replacement counsel when he continually renewed his objection to the disqualification of his original counsel).

State appointed lawyers are often replaced when, for example, they leave the Public Defender's office, die, become infirm, or retire. Those who choose to leave their public office or accept a promotion have a liberty interest to do so. No persuasive authority has been presented which suggests that D. Wilson's right to accept the promotion to State Public Defender would be trumped by Owens's desire to have him remain as lead counsel, even if such a desire had been timely expressed.

Because Owens was not denied his counsel of choice, there is no structural error. *Id.* at 781-83 (erroneous denial of the right to representation by counsel of choice is structural error).

c. Personal Conflict of Interest

Owens contends D. Wilson was conflicted because his personal interests in accepting the appointment as State Public Defender materially limited his ability to represent Owens. *See* Colo. RPC 1.7(a)(2) (A lawyer shall not represent a client if "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer."). Owens claims D. Wilson's departure is proof that he knew he had a conflict. D. Wilson's departure was not an acknowledgment that there was a conflict but was, rather, necessitated by his assuming responsibility for running a multi-million dollar governmental agency with hundreds of employees that provides critical services to indigent citizens. D. Wilson did not leave the trial team due to a personal conflict of interest.

2. Motion to Continue

Owens contends the motion to continue filed and argued by his trial counsel was incompetently drafted and argued, which caused him to be deprived of a much-needed continuance of the trial. He also contends his trial counsel should have withdrawn from representing him on account of their unpreparedness for trial.

Trial counsel filed a thorough, six-page motion to continue two weeks before trial in which they set forth in detail why a continuance was necessary. SOPC.EX.D-1327. Trial counsel represented in their motion that "[i]f Mr. Owens is required to proceed to trial[,] . . . he will be denied his state and federal constitutional rights to effective assistance of counsel." *Id.* When the motion was argued in court, Kepros expanded on the reasons set forth in the motion and told the judge, "if we are unable to render effective assistance of counsel on behalf of Mr. Owens, I believe this case will not end with the trial this month. This case won't end for years and years and years and years." Hrg Tr. 9:15-18 (Jan. 2,

2007). And on no less than three occasions during trial, the trial team supplemented its request for a continuance based on the fact that it had yet to receive transcripts for witnesses' prior testimony. *See generally* Trial Tr. 27-28 (Jan. 9, 2007); Trial Tr. 4 (Jan. 12, 2007); Trial Tr. 115-116 (Jan. 16, 2007); and Trial Tr. 46 (Jan. 18, 2007).

Kepros testified during the Dayton Street post-conviction hearing that she did not feel comfortable informing the court that the trial team was unable to locate or subpoena certain witnesses because she was concerned that the prosecution would interfere with the team's efforts to locate those witnesses. She did not list which experts the trial team had not interviewed, and she did not describe why interviewing certain witnesses or conducting certain investigation was important. She also did not fully disclose the extent of her health problems that were limiting the amount of time she could dedicate to trial preparation, and she did not disclose that, in her opinion, D. Wilson and King had done minimal work on the case prior to her assignment to the case.

Owens alleges that trial counsel did not make offers of proof as to the devastating impact of not having the transcripts with which to impeach the prosecution witnesses yet he fails to describe how the lack of transcripts devastatingly affected his defense at trial. Nor does he point to a single missing transcript that his trial counsel could have used to impeach a witness.

In the end, there may have been additional reasons to support a continuance, but there is no evidence suggesting that the trial court would have been persuaded by those additional reasons. In fact, based on the trial court's affect and rulings in other situations, King did not believe the trial court would grant the continuance. He also did not believe that submitting additional material or making further argument would result in the trial court changing its ruling.

Prior to trial, Kepros suggested that the trial team withdraw from representing Owens based on the team's unpreparedness. King seemed to agree that the team was unprepared. *See* SOPC.EX.D-2150 (email from King to defense team in which he says "at the very least [the Lowry Park] trial will help bring us up to speed on things we need to know for the [Dayton Street] trial"). Yet he ultimately decided not to move to withdraw. Again, there is no evidence suggesting that the trial court would have allowed the trial team to withdraw, especially in light of the nature of the charges and the impending trial date.

King's decisions not to further supplement the motion to continue and not to move to withdraw are entitled to great deference. Owens has failed to prove that he received ineffective assistance of counsel with respect to the request to continue his trial. He has also failed to prove that it was ineffective for his trial team not to move to withdraw.

3. Staffing of the Case

Owens contends he was prejudiced because the Office of the State Public Defender (OSPD) grossly understaffed his case thereby depriving him of an adequate and thorough investigation.

D. Wilson was a Chief Trial Deputy when he was assigned as lead counsel in this case. He was responsible for staffing Owens's case, and the attorneys he selected were King and Middleton. According to D. Wilson, the team was supplemented at times by Kathleen Moore, who was the head of the OSPD's appellate section at the time. When D. Wilson was appointed State Public Defender, King was promoted to Chief Trial Deputy and substituted as lead counsel for Owens. With input from King, D. Wilson selected Kepros as second chair. Middleton continued to handle motions and jury instructions.

D. Wilson chose two investigators to work on Owens's cases – Michelle Lapidow (Lapidow) and John Gonglach (Gonglach). Lapidow was designated as the mitigation specialist for the Dayton Street case because of her familiarity with mental health mitigation. Lapidow's involvement on Owens's cases diminished in the fall of 2006 because of her assignment to another pending capital case. But Gonglach was an experienced investigator who had worked on many first-degree homicides and on other potential capital cases as a mitigation investigator. As a result, Gonglach became primarily responsible for all facets of the investigation for both cases in late 2006. Due to an injury in November 2006, Gonglach was unavailable for a few weeks leading up to trial.

Three attorneys and an investigator worked on Owens's case. Owens does not indicate what investigation those individuals failed to complete or how the lack of investigation prejudiced him at trial. Thus, Owens failed to prove that he was prejudiced by the OSPD's staffing decisions.

4. Motion to Suppress Owens's Shreveport Statements

Owens argues his trial counsel were ineffective because they did not argue that his statements in Louisiana were obtained in violation of his Sixth Amendment right to counsel. The court denied Owens an evidentiary hearing on this claim because it requires resolution of only a legal issue.

The prejudice prong of *Strickland* is assessed now – the time at which the defendant filed his post-conviction petition. *See Henderson v. United States*, 568 U.S. 266 (2013); *People v. Ray*, 378 P.3d 772 (Colo. App. 2015). At the time of the trial, Owens may have had a legitimate argument for suppression under *Michigan v. Jackson*, 475 U.S. 625 (1986). But that case was overruled by *Montejo v. Louisiana*, 556 U.S. 778 (2009). Under *Montejo*, Owens's Shreveport statement would be admissible during a retrial. Because prejudice is assessed

under the current law, he was not prejudiced by his trial counsel's failure to move to suppress the Shreveport statement.

5. Motion to Change Venue

Owens contends his trial counsel failed to make an adequate record in support of the motion to change venue. Owens's trial counsel filed a five-page motion, elicited testimonial evidence in support of the motion, submitted exhibits in support of the motion, and addressed the issue in court at least three times. And after a jury was selected, Middleton tendered to the court additional materials regarding media coverage, including more than 100 articles that were published in the three years leading up to trial, and argued that the extensive nature of the publicity would jeopardize the jurors' ability to remain impartial:

> [T]he coverage of these two cases has been so extensive and is so interrelated that it does create a great problem of having an impartial jury in this case. And I would, as an example, raise Mr. – I believe it was [Juror] Spiers, who was the last one to speak individually yesterday afternoon, who indicated at that time that he had recognized the name of Mr. Marshall-Fields – and this was on Tuesday afternoon – even though the name had been raised in the questionnaire on Friday and he had several days to think about it, some – something on Tuesday triggered his memory. And it's our belief that, due to the nature of the publicity in this case and the extent of it, that that's a concern with all the jurors that have been seated in this case, that there will be events during this trial that will trigger their memory, that they will have been exposed to the publicity, and that it will affect their ability at that time to be fair and impartial in this case.

Trial Tr. 5:22-25; 6:1-15 (Jan. 10, 2007).

Hower responded that very few jurors had been exposed to publicity about the case and pointed out that those jurors assured the court and the parties that they

would not let the publicity affect their judgment. *Id*. at 6:20-25; 7:1. Middleton did not reply to Hower's statements. *Id.* at 7:5-8.

Owens faults Middleton's decision not to reply to Hower's argument but presents no evidentiary basis for such a reply. Without evidence that Hower's representations were untruthful or misleading, declining to make an additional record was reasonable. Trial counsel had already filed a motion, addressed the issue several times on the record, and submitted evidence in support of the motion. Trial counsel's handling of the motion to change venue was not ineffective.

6. Protective Orders

Owens contends his trial counsel were ineffective because they did not investigate or contest the prosecution's claims of witness fear, which Owens claims resulted in unwarranted and highly restrictive protective orders that required trial counsel to access certain witnesses via the prosecution. The prosecution responds that Owens, in light of *People v. Ray*, 252 P.3d 1042 (Colo. 2011), cannot prove that he was prejudiced by trial counsel's acquiescence to the protective orders.

The court entered protective orders based on the prosecution's representations that many witnesses formally entered the witness protection program, left the area out of fear of retaliation for cooperating, or expressed a fear of retaliation. The protective orders allowed the prosecution to withhold addresses for the protected witnesses from Owens and his trial counsel. Because trial counsel could not contact the protected witnesses, the subpoenas for those witnesses had to be served by the prosecution, and trial counsel, if they wanted to interview a protected witness, had to contact the protected witnesses via telephone at the prosecution's office.

"To aid the defendant's right of confrontation, an accused generally has the right to know a witness's identity and address." *Ray*, 252 P.3d at 1048. But "[t]he right to know a witness's identity and address is not absolute." *Id.* If a witness's personal safety is in jeopardy, "the court must balance the threat to witness safety against the materiality of the witness's address and information." *Id.* at 1049. In striking that balance, the court must consider the defendant's ability to "'place the witness in his proper setting' without learning [the witness's] address." *Id.* (quoting *People v. District Court*, 933 P.2d 22, 25 (Colo. 1997)). If the materiality of the witness's address and information outweighs the threat to the witness's safety, the prosecution must disclose the witness's identity and address to the defense. *Id.* at 1049-50.

In the Dayton Street case, Owens was accused and convicted of murdering Marshall-Fields in order to prevent Marshall-Fields from testifying in Ray's trial arising from the Lowry Park events. A witness killing case naturally lends itself to witnesses who are fearful of retaliation. It is difficult to imagine how trial counsel could have convinced the trial court that the materiality of the witnesses' addresses outweighed the threat to the witnesses' safety after Marshall-Fields was killed. *See generally id.* (more than five years after the date of offense, prosecution's showing of threat to witnesses' safety outweighed defendant's showing of materiality of witnesses' addresses). Owens has failed to prove that he was prejudiced by trial counsel's acquiescence to the protective orders.

7. Prosecution's Proximity to the Jury Box and Audible Commentary During Trial

Owens contends his trial counsel were ineffective because they did not object to the prosecution's private yet audible commentary during the trial, which could allegedly have been heard by the jury.

Kepros brought to the court's attention that she could hear the prosecutors talking to each other at counsel table, and the trial court instructed the prosecutors to be careful in their conversations:

> MS. KEPROS: Judge, I am hearing every word that Ms. Warren is saying. She's commenting on my performance, the questions I'm asking. She is about four times closer to the jury than she is to me and she's making comments and I'm very concerned the jury can hear every word that she's saying, which is basically providing editorial on the testimony and I would ask that she be asked to stop talking or at least lower her voice.
>
> MR. HOWER: I know my hearing isn't so good, but I'll say I have not heard that. My hearing isn't so good.
>
> THE COURT: Mr. Hower, let me just indicate that for some reason Ms. Warren's tone is something that carries very well, not necessarily a bad thing in an attorney, but nonetheless, her whispers [are] what I would consider to be stage whispers at best, so she will have to be careful because I noted through the course of the trial that oftentimes her comments may not be audible to the court, but certainly there is an audible nature to them.
>
> MR. HOWER: Okay.
>
> THE COURT: To draw my attention to it.

Trial Tr. 79:17-25; 80:1-11 (Jan. 19, 2007). Thus, not only did Kepros bring this issue to the trial court's attention, she convinced the trial court to admonish the prosecution. The prosecution apparently corrected its behavior because Kepros did not raise the issue again. There was no need for Kepros to make any additional record, and therefore, the court concludes that Kepros was not ineffective with respect to how she addressed the prosecution's audible commentary during the trial.

8. Security Methods Employed at Trial

Owens contends he was prejudiced by his trial counsel's failure to formally object to the added security checkpoint set up outside the courtroom during his trial.

A security checkpoint was set up outside the courtroom door during the trial in this case. Trial Tr. 10:16-18 (Jan. 10, 2007). With the exception of counsel and their investigators, all individuals were wanded by a sheriff's deputy as they entered the courtroom. *Id.* at 10:18-20. The jury deliberation room was just down the hall from the courtroom. The jury room has two doors – one leads into the secure hallway and a second leads into the public hallway. *Id.* at 9:16-17. Jurors could use both doors. *Id.* at 9:23-25. But the trial court instructed the jury to use the secure hallway:

> You were introduced to the back hallway today, that is for your area, as well, and I would prefer that you use the back hallway in coming to and leaving the jury room. So if you would leave that way instead of going out the front hallway area where, of course, you would have the possibility of running into people involved.

Id. at 124:11-17.

The record is devoid of an instruction to the jury that the security checkpoint set up outside the courtroom door was added security for this trial. The record is also devoid of evidence showing that the jurors observed the added security. Thus the added security could not have prejudiced Owens and therefore his trial counsel were not ineffective for not raising the issue again with the trial court.

F. Opening Statement

Owens argues his trial counsel did not present evidence in support of certain claims made in opening statement – namely that J. Martin or Johnson would be identified as the person who shot Vann and that Owens was repeatedly punched

and strangled. Because a discovery reference indicated the possibility that a witness would say that J. Martin or Johnson was shooting at Lowry Park, it was not unreasonable for Kepros to make such a claim in her opening. And while there was no evidence that Owens was repeatedly punched and strangled, there was evidence that Vann punched Owens right before the shooting, that Green head-butted Ray, and that others were physically confronting them.

Owens also faults Kepros for presenting inconsistent theories of defense during opening statement. She focused on self-defense but also intimated that someone else – possibly J. Martin or Johnson – killed Vann. It would have been difficult for Kepros to have predicted exactly what the evidence would be at trial. Ray and Owens had been hanging out with J. Martin and Johnson shortly before the shootings and the discovery suggested that a witness might identify J. Martin or Johnson as having fired shots. There was, therefore, at least a remote possibility that the jury could hear evidence from which it might conclude that there were more than two shooters. By referencing J. Martin and Johnson during her opening, Kepros kept open a line of argument that the prosecution did not prove beyond a reasonable doubt that Owens fired the fatal shot.

Kepros did not think that her opening statement was one of her best. It may not have been. But it did not fall below the standard of competence.

G. Trial Preparation and Handling of Evidence Related to Owens's Arrest in Louisiana

The essence of these claims is that Owens's trial counsel failed to order transcripts from pretrial hearings in a timely manner. Aside from the cross-examinations of Sailor and Johnson, *see* part III.K.2 of this Order, the prejudice Owens asserts is that trial counsel were unable to support their mistrial motion following opening statements. During opening, the prosecutor mentioned that

Owens was arrested in Louisiana. Because they did not have the pretrial hearing transcript, trial counsel could not dispute the prosecutor's and trial court's recollection that the court had excluded evidence of the circumstances of the arrest in Louisiana but not the mere fact that the arrest occurred on Louisiana. Owens has not supplied this court with evidence that the trial court's recollection was inaccurate, and even if trial counsel's recollection of the order of exclusion were accurate, the reference in the prosecutor's opening was innocuous. The trial court would not have granted a mistrial. Because the court would not have granted a mistrial, Owens was not prejudiced.

H. Introduction of Testimony Regarding Gang-Related Shooting and Testimony Regarding Propensity of Owens to Possess Firearms

Defense attorneys commonly exercise a certain degree of discretion when objecting. A failure to object must be viewed in light of the totality of the evidence at trial. The defense objected more than 100 times at trial. When viewed as a whole, the defense was diligent in their effort to prevent inadmissible and harmful evidence from being admitted at trial and to keep the prosecution's style of examination within the proper boundaries.

Trial counsel successfully urged the trial court to exclude evidence of gangs, but the trial court denied their request to redact a 911 call in which the caller speculated that the shooting might be gang related. Owens faults his trial team for failing to contemporaneously object to the 911 call. But a contemporaneous objection at the time the call was admitted might have had the effect of highlighting, and possibly validating that suspicion.

The defense objected to the prosecutor's attempts to elicit evidence that Owens habitually carried a gun. With Jones, the prosecutor's attempts were unsuccessful. In essence, Jones testified that Owens was not that kind of man.

And Johnson was equivocal about whether Owens carried a gun. It may not have been wise to further highlight whether Owens typically carried a gun. No evidence suggested that Owens carried a gun unlawfully, and it could not be reasonably disputed that he had a gun when the Lowry Park events occurred. Some jurors look unsympathetically upon those who deliberately seek out a gun, load it, and bring it to an encounter – only to then claim self-defense.

Substantial deference should be afforded to trial counsel's tactical decisions regarding objections. Trial counsel's handling of this evidence was not unreasonable.

I. Jamar Johnson Interview Tape

The essence of this claim is that trial counsel did not adequately prepare for Johnson's cross-examination by studying the content of the police interview. The cross-examination of Johnson was more than adequate. *See* part III.K.2 of this Order. Any additional impeachment that could have been attempted with information derived from studying the interview would have minimal. Because no prejudice has been shown, there is no further need to address this claim.

J. Police Investigation

Owens argues his trial counsel should have impeached the allegedly poor police investigation of the Lowry Park crime scene, of witnesses, and of potential suspects. As the court has discussed above, trial counsel made a competent and reasonable, strategic decision to argue Owens acted in defense of Ray and in self-defense. In light of that decision, the court questions how impeaching the quality of the police investigation on the basis that the APD did not develop other potential suspects would have furthered the defense of Ray/self-defense argument.

Owens's arguments about the preservation of the crime scene, interviews of witnesses, and investigation of potential suspects are unpersuasive. Law

enforcement and lay witnesses alike testified at trial about the chaotic nature of the crime scene after the shootings occurred. People ran to their cars and fled as soon as they heard gunshots. Some people refused to talk with the police. Others refused to give their names to the police. Despite those circumstances, T. Wilson made significant efforts to investigate. Again, many people were unwilling to cooperate with the investigation. The defense would have been ill advised to question T. Wilson about the difficulties he encountered while trying to investigate this case. Only damaging evidence would have flowed from that line of questioning – most notably, T. Wilson's accounts that witnesses did not want to cooperate out of fear that they would be ostracized, harmed, or killed for cooperating with the police.

Owens's argument that his counsel should have exposed the government's failure to conduct DNA testing on the blood on Vann's clothing is without merit. This, again, is an argument that seems premised upon an alternate suspect theory.

K. Cross-Examination and Impeachment of Witnesses

1. Kimberly Bellanger

Kimberly Bellanger (Bellanger) admitted at trial that she, together with Carter, Sr., rented motel rooms on July 4, 2004, in an effort to harbor Ray and Owens from the police. There was no need and nothing to be gained attempting to impeach Bellanger with the fact that she was given immunity to testify, because her testimony was corroborated by Sailor, Jones, and the disinterested motel clerk.

2. Jamar Johnson and Latoya Sailor

Owens asserts that trial counsel inadequately impeached Sailor and Johnson. The record does not support the claim. The teaching of *Strickland* and its progeny is that it is inappropriate for the reviewing court to second-guess trial counsel – particularly when, as with these two witnesses, they did a good job.

Appropriate cross-examination depends upon what the cross-examiner is trying to achieve with a witness. Trial counsel developed substantial parts of their defense through Johnson and Sailor. Trial counsel needed to walk a fine line. They wanted to demonstrate that these witnesses had a strong incentive to shade their testimony toward the prosecution without devaluing the parts of the testimony that were favorable to the defense. They did so in textbook fashion. With each witness, they reinforced the favorable testimony that had come out on direct; expanded and emphasized that testimony; and emphasized the available impeachment that would underscore the witnesses' need to please the prosecutors – essentially, that each witness had received a favorable plea deal and might face lengthy prison time if the prosecution revoked their deals. While there may have been additional material available for impeachment, its use would create a risk of being counterproductive.

A cross-examiner must always be mindful of the risks that certain forms and methods of impeachment might entail. When possible, one wishes to avoid diminishing the credibility of the favorable admissions that have been elicited. Except in rare instances, one must also be careful not to appear to be unnecessary bullying the witness. With witnesses like Johnson and Sailor, the purpose of the cross-examination and impeachment is usually to demonstrate to the jury that even when shading their testimony favorably for the prosecution, these witnesses still had to acknowledge certain facts that are favorable to the defense – facts that should therefore be viewed as indisputable.

Through Sailor, trial counsel elicited these favorable facts, among others:

- Owens was Ray's closest friend.

- Ray did not usually drink and could not hold his liquor. He came to the park and, due to the alcohol he was drinking, was being verbally obnoxious.
- Sailor called Owens to come get Ray. In her phone call, Sailor expressed that Ray was in urgent need of protection against a mob that was on the verge of assaulting him. Her best memory was that her words included, "[Owens], you need to get down here, get your boy. He drunk, he acting a fool, he talking shit to people, and he going to get his ass whooped." Trial Tr. 126:5-7 (Jan. 18, 2007).
- Owens calmed Ray down for a time.
- When Sailor was trying to leave and asked people to move, someone yelled, concerning her and the other women in her car, "Fuck them bitches." *Id.* at 142:10. Ray responded, saying, "They ain't gonna move, run them motherfuckers over." *Id.* at 256:21-24.
- The crowd grew loud and angry.
- Ray was totally outnumbered.
- Johnson and J. Martin were also present. Neither they nor anyone else came to Ray's aid, other than Owens.
- Ray and Owens kept backing toward Ray's Suburban.
- The crowd kept advancing and it looked like the crowd was going to beat them up.
- Someone may have snatched Ray's neckless off.
- Many in the mob were drinking alcohol, smoking marijuana, and ingesting ecstasy.
- Owens, himself, never did or said anything to insult or anger the mob, other than to lift his shirt to show the mob that he was armed.

- A big, aggressive man in yellow and black was beating on his chest and provoking Owens to get into a fight.
- Even after Ray and Owens showed their guns, the crowd kept advancing on them.

Through the cross-examination of Johnson, the defense was able to establish, among other favorable facts, that:

- Many in the mob were likely armed with guns.
- Owens and Ray were greatly outnumbered.
- Some in the crowd had expressed both verbally and by their actions, their intent to fight.
- The mob kept advancing, even after Owens and Ray showed that they had weapons.
- Owens did not remove his gun from his waist until Vann had attacked him and punched him in the face.

Cross-examination is not the only way to effectively minimize the adverse effect of evidence. Other methods are sometimes stronger and less risky. Among them are seeking to have the harmful evidence excluded and stressing other more persuasive evidence.

Trial counsel sought to exclude Sailor's testimony that, at their home after the shootings, Ray had berated Owens for shooting Vann rather than shooting into the air. The defense made a strong albeit unsuccessful argument that Ray's statement should be excluded. They argued that it did not conform to any well-established hearsay exception and that it violated the United States and Colorado constitutions as articulated in *Lilly v. Virginia*, 527 U.S. 116 (1999), *People v. Vigil*, 127 P.3d 916 (Colo. 2006), and *People v. Dement*, 661 P.2d 675 (Colo.

1983). After failing to exclude the hearsay evidence, trial counsel attempted to minimize its effect by eliciting evidence to impeach Ray.[4] They elicited that:

- although he berated Owens for shooting Vann rather than shooting into the air, Ray did not, himself, shoot into the air;
- Ray shot two people; and
- when berating Owens, Ray's real concern was self-centered. Ray was primarily concerned about the trouble that he would encounter because he, unlike Owens, would be readily identified.

Such evidence put the defense in a position to argue that Ray was doing nothing more than attempting to blame Owens for the consequences of Ray's own drunken misconduct. Trial counsel focused on impeaching Ray instead of Sailor, and that was not an unreasonable tactic.

Johnson testified that after the first shot Vann fell to the ground and Owens shot several more times into Vann's fallen body. But strong evidence contradicted this harmful aspect of Johnson's testimony. The pathologist testified that Vann was shot only two times. The police used a metal detector to sweep the area where Vann had fallen and found no additional spent bullets. In fact, in their closing argument,[5] the prosecution conceded that Owens only shot Vann twice. Memories

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[4] When faced with potentially damaging hearsay evidence, counsel must often decide whether it is more efficacious to attempt to impeach the witness, the declarant, or both. Attempting to impeach both has so much potential to undermine the credibility of defense counsel that it is generally not a wise choice. Counsel can attempt to impeach the witness in the hope that the jury will doubt whether the declarant's statement was actually made or was accurately reported. Or, as in this case, they can attempt to minimize the impact of the hearsay by impeaching the declarant.

[5] The prosecutor argued,

> Recall Jamar Johnson said he sees that first shot, Greg falls to the ground, he says Owens stands over him and empties the gun into him.

of many witnesses regarding the timing of shots were arguably consistent – they heard two batches of shots, each in quick succession. That would be consistent with two shots by Owens, then a delay while he tried to get to and into the Suburban, followed by several shots by Ray. The defense was in a position to argue that both the physical evidence and the witnesses' memories were inconsistent with Johnson's version of one shot – then a passage of time while Vann fell – then the cold-blooded firing of multiple shots into Vann's fallen body.

3. Brandi Taylor

Owens asserts that the cross-examination of B. Taylor was ineffective. The record does not support the claim. B. Taylor was the girlfriend of Ray's brother, Dumas Brown (Brown), at the time of these events. She testified that Ray called her on the night of July 4, 2004, and asked her to clean out her garage. He and Owens arrived and parked the Suburban in the garage. They then brought heavy speakers into the house and put them in her closet. She did not pay attention to what they were doing because she had remained in the house. A couple weeks later, she got Brown to get Ray to move the Suburban out of the garage, and several months later, she sold the speakers.

On cross-examination, trial counsel elicited that, when her memory was fresher, she submitted to a long interview with the police and told them that it was only Ray who brought the Suburban to her house and that Ray alone had moved the speakers into the house. They also elicited her opinion that Sailor was a liar. The cross-examination was effective.

> We know he's only shot once. It's unlikely that he would have missed from that close range. Different people saw and heard different things.

Trial Tr. 86:19-24 (Jan. 25, 2007).

4. Detective Thomas Wilson

a. Police Investigation

Part III.J of this Order is incorporated as though fully set forth herein.

b. Testimony about the Video

Owens asserts that trial counsel should have objected to APD Detective Thomas Wilson's (T. Wilson) testimony about the video evidence of some of the events leading up to the shootings at Lowry Park. The video did not capture the shootings.

The jurors saw the video. Its poor quality would have been obvious to them. They would have realized that T. Wilson's opinion that Owens can be seen on the video was based on witness descriptions. While an inadmissible opinion objection to the identification might have been sustained, it would have served no useful purpose. After the ruling, a proper question would have then directed the jury's attention to the slim, tall man with braids wearing a white t-shirt, blue jeans, and a white hat. The video shows that the man lifted his shirt in a way that would have exposed a handgun if there were one in his waistband. The defense did not dispute that Owens displayed his handgun. Its position was that Owens did not do this to menace but to dissuade the crowd against further aggression. The video is not inconsistent with that position. Because there was no harm in T. Wilson's testimony, there was no reason for trial counsel to have objected.

c. Statements by Marshall-Fields to T. Wilson

Marshall-Fields told T. Wilson that he saw Ray and Owens earlier in the day at Lowry Park, and T. Wilson recounted as much at trial. But the evidence established that Owens did not arrive at Lowry Park until the evening. And (1) T. Wilson was merely repeating what Marshall-Fields had told him; (2) the prosecution did not stress this aspect of the testimony in closing – on the contrary,

they stressed that Owens came in response to Sailor's call; and (3) competent defense counsel would generally want to avoid unnecessarily impeaching the words of a shooting victim who was now deceased. Owens has not shown that he was prejudiced by trial counsel's tactical judgment not to impeach Marshall-Fields's statements to T. Wilson.

L. Testimony Concerning Uncooperative Witnesses

Owens contends his trial counsel were ineffective because they did not object to testimony at trial that witnesses were uncooperative with law enforcement's investigation of the Lowry Park shootings. That witnesses were uncooperative with the investigation was relevant and any objection would have been overruled.

M. Presenting a Defense Case and Introducing Favorable Evidence

1. Testimony that Someone other than Owens was the Shooter

In light of trial counsel's reasonable choice of defense strategy, trial counsel would have no rational reason to present witnesses who might have identified someone else as the individual who shot Vann.

2. Testimony from Expert Witnesses

Part III.D.3 of this Order is incorporated herein.

3. Annetta Vann's Testimony

Annetta Vann was Vann's mother, and she testified at trial that she saw Owens at Lowry Park earlier in the day. But her description was not consistent with Owens's appearance. One must be careful when cross-examining the mother of a homicide victim. It was not in the best interest of the defense to impeach her through cross-examination. Rather, it was best to allow the jury to believe that she mistakenly identified someone else as Owens.

N. Prosecution's Opening Statement and Closing Argument

Owens identifies several portions of the prosecution's opening statement and closing argument which he asserts were improper. He also argues his trial counsel were ineffective because they failed to object. With the two exceptions[6] discussed below, the prosecutor's statements were not improper and therefore there was no reason for trial counsel to object.

"[T]he primary purpose of an opening statement is to provide the jury, in brief, outline form and without argument, a preview of what counsel expects to show by the evidence he intends to present." *People v. Barron*, 578 P.2d 649, 650 (Colo. 1978). And in closing arguments, prosecutors may argue the facts admitted into evidence and any reasonable inferences drawn therefrom. *Domingo-Gomez v. People*, 125 P.3d 1048, 1048 (Colo. 2005). "[A]rguments delivered in the heat of trial are not always perfectly scripted . . . [so] reviewing courts accord prosecutors the benefit of the doubt where remarks are ambiguous or simply inartful." *People v. McBride*, 228 P.3d 216, 221 (Colo. App. 2009) (internal citations and quotations omitted).

1. Bolstering and Vouching for Witnesses

Owens takes issue with the prosecutors' references to the witnesses' plea agreements. He claims those references improperly bolstered the witnesses' credibility.

Improper vouching occurs when a prosecutor indicates s/he has a personal belief in a witness's credibility or implies that s/he has special knowledge of facts unavailable to the jury. *People v. Coughlin*, 304 P.3d 575, 582 (Colo. App. 2011). However, a prosecutor may elicit testimony regarding plea agreement provisions

[6] *See* Deliberation Requirement in part III.N.6 of this Order and Duty to Convict in part III.N.7 of this Order.

requiring the witness to testify truthfully. *Id.* Such boundaries allow the jury to assess the witness's credibility with all of the pertinent factors surrounding the plea agreement. *Id.* Prosecutors must also refrain from arguing that witnesses were given favorable plea agreements because the witnesses were telling the truth. Nevertheless, written plea agreements are often self-serving because they require the witness to give truthful testimony.

The prosecution in this case specifically asked the jury to closely scrutinize the testimony of the witnesses who were given favorable plea agreements and to identify the evidence that corroborates those witnesses' testimony:

> Ms. Warren, in her jury selection, or what we called voir dire, yesterday addressed a little bit about how you're going to hear witnesses in this case have been given plea agreements that have been – that the people have made favorable plea agreements with them in exchange for their truthful testimony in this trial and that, because of that, you might scrutinize their testimony more closely.
>
> And I would ask you to do so. In fact, I would encourage you to do so . . . .
>
> But what you will notice about their testimony – I think is a better way to say it – is that it is corroborated; it's corroborated by the testimony of other witnesses that didn't receive favorable plea agreements, and it is corroborated by the physical evidence in this case.

Trial Tr. 69:23-25; 70:1-17 (Jan. 10, 2007). The prosecutor reiterated the same in closing argument:

> If you don't like the fact they got a deal, that they got a plea bargain, hold that against me. I made these deals. I made those decisions. If it takes giving a thief a break, if it takes giving an accessory a break in order to get them to share their information to solve a murder like this one and catch a murderer like that one, I'll do it every day of the week. Don't throw the baby out with the

> bath. Scrutinize their testimony. Does it make common sense, common sense to you? Is it corroborated by other things? Very easy to say you can't believe them, they got a deal, DA bought their testimony.
>
> You heard what the agreement was. They had to make themselves available, had to accept subpoenas, they had to testify truthfully.
>
> You determine whether they met that last one, I guess. Apply your reason and common sense to that.

Trial Tr. 91:4-19 (Jan. 25, 2007). There is nothing wrong with a prosecutor asking the jury to scrutinize certain witnesses' testimony.

Owens's remaining claims that the prosecution improperly vouched for witnesses' credibility (both law enforcement and lay witnesses) and bolstered the other prosecutors' credibility are without merit and do not warrant additional discussion.

2. Appealing to Fear and Sympathy

The prosecution used their opening statement and closing argument to explain why it took law enforcement over a year to identify Owens as the individual who killed Vann by offering reasons why witnesses were reluctant to cooperate, namely their fear of Ray and/or Owens. Evidence that witnesses were afraid to cooperate was admitted at trial so it was available for closing argument.[7] The court does not view the prosecutor's opening comments as anything other than a preview of the evidence or their closing comments as anything other than reasonable argument. There was no reason for trial counsel to object.

[7] *See People v. Villalobos*, 159 P.3d 624, 630 (Colo. App. 2006) ("[E]vidence of a witness's fear of retaliation is admissible to explain his or her . . . reluctance to testify."). *But see People v. Trujillo*, 338 P.3d 1039, 1053 (Colo. App. 2014) (gang expert's "snitch" evidence offered to explain reluctance to testify was unduly prejudicial).

Owens also argues the prosecution's characterizations of the victims as "real people,"[8] "good citizens,"[9] and "courageous young men"[10] were improper. "[I]t is impermissible for a prosecutor to use arguments calculated to inflame the passions or prejudice of the jury." *People v. Dunlap*, 975 P.2d 723, 758 (Colo. 1999). As the court finds in part IV.B.4 of this Order, the prosecutor's argument humanized the victims in a way that did not rise to the level of impermissibly inflaming the passions of the jury.

3. Describing Self-Defense

Owens argues that the prosecutor improperly shifted the burden of proving that he acted in self-defense when the prosecutor argued to the jury,

> The affirmative defense of self-defense means that the defendant is saying even if I committed all of the acts that I'm charged with, even if I – if the evidence proves all of the other elements of these crimes, I'm not guilty, I committed no crime because I was justified in killing and attempting to kill.

Trial Tr. 74:21-25; 75:1 (Jan. 25, 2007). Owens also argues the prosecution misstated the law when it remarked that (1) Vann was not armed, (2) Owens was not attacked before he fired his gun, (3) Owens could not have acted in self-defense because he was taller than Vann, and (4) neither Ray nor Owens was injured. The court reviewed the prosecution's opening statement and closing argument, and does not deem any of these comments as a misstatement of the law. The prosecution did not say that it was Owens's burden to prove that he was justified when he acted or that Owens would be justified to use physical force only

[8] Trial Tr. 98:23 (Jan. 25, 2007).
[9] Trial Tr. 90:10 (Jan. 25, 2007).
[10] Trial Tr. 64:12-13 (Jan. 25, 2007).

if he had been attacked first. Rather, the prosecution argued that certain facts militated against self-defense.

4. Defining Complicity

The prosecutor remarked in opening statement, "[b]ut what you will know, after hearing all the evidence in this case, beyond a reasonable doubt, is that the defendant is legally accountable for the attempted murder of Javad and Elvin under the rule of complicity." Trial Tr. 64:17-21 (Jan. 10, 2007). This remark does not suggest, as Owens urges, that the prosecution was relieved of its burden of proving the *mens rea* beyond a reasonable doubt for the attempted murders of Marshall-Fields and Bell.

5. Jury Urged Not to Follow Jury Instructions

The prosecutor said in closing argument, "[the jury instructions are] intended to assist you. They're intended to explain things and clear up confusion. Sometimes, I fear, they may engender more confusion than assistance." Trial Tr. 70:21-23 (Jan. 25, 2007). The prosecutor then moved on to a discussion about the charges against Owens. His remarks were made in passing, did not appear to suggest that jurors would be justified in failing to follow the court's instructions, and did not have an adverse effect on the jury.

6. Deliberation Requirement

"The term 'after deliberation' means not only intentionally but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner." C.R.S. § 18-3-101(3). The prosecutor misstated the law when he said during closing argument that the time necessary for deliberation can be simply "the time necessary for one thought to follow another." Trial Tr. 95:2-3 (Jan. 25, 2007). Had trial counsel objected

and/or requested a curative instruction, the objection would have been sustained, that portion of the argument would have been stricken, and a curative instruction would probably have been given. But the jury instruction given in this case correctly stated the law. This prosecutorial misstatement has been considered by the appellate courts. When the jury instructions accurately state the law, this misstatement is not grounds for a new trial. *See People v. Grant*, 174 P.3d 798, 810-11 (Colo. App. 2007) (prosecutor's misstatement of the definition of "after deliberation" as the time necessary for "one thought to follow another" was not plain error because the jury instructions accurately defined "after deliberation.").

7. Duty to Convict

"[E]xhort[ing] the jury to do its job" is improper. *United States v. Young*, 470 U.S. 1, 18 (1985) (internal quotations omitted). "[T]hat kind of pressure . . . has no place in the administration of criminal justice." *Id.* "Prosecutors may not pressure jurors by suggesting that guilty verdicts are necessary to do justice for a sympathetic victim." *McBride*, 228 P.3d at 223. In *McBride*, the prosecutor asked the jury to "do justice for other strangers," which the Attorney General conceded was an ill-advised argument. *Id.* The Colorado Court of Appeals condemned the prosecutor's plea to the jury to do justice on behalf of the victim and the victim's family. *Id.*

In opening statement, the prosecutor in this case said,

> After hearing all the evidence in this case and receiving the instructions at the end of the evidence, it will be your duty to find the defendant, Sir Mario Owens, guilty of all of the charges against him.

Trial Tr. 71:11-14 (Jan. 10, 2007).

This theme was revisited in closing argument,

> The evidence has proven each of those elements beyond a reasonable doubt. It's your duty to hold him

> accountable by finding him guilty of the first degree murder of Greg Vann, the attempted first degree murder of Jeremy Green, the attempted first degree murder of Elvin Bell, the attempted first degree murder of Javad Marshall-Fields, and the first degree assault of Javad and of Elvin.

Trial Tr. 103:1-8 (Jan. 25, 2007). Because the prosecutor linked the jury's duty to convict to the evidence, this portion of the argument was not improper. But then the prosecutor went on to suggest that the function of the jury is like the function of the police – not to release Owens:

> Ladies and gentlemen, Elvin, Jeremy, and Javad never let go. They didn't let him get away. They and those outstanding officers found him in his hideout. They took hold of him and they didn't let go. They brought him to you. Ladies and gentlemen, don't you let him get away, don't you let go.

Id. at 103:9-14. It is the view of this court that this portion of the argument suggests an erroneous starting point for the jurors in their deliberative process. An accused enjoys the presumption of innocence. It is the duty of the jury to "let the accused go" unless the evidence proves him guilty beyond a reasonable doubt. However, the jury was properly instructed as to the presumption of innocence and the burden of proof, and the jury is presumed to have followed the instructions. While trial counsel might have objected and the objection might have been sustained, neither the closing argument nor trial counsel's failure to object was so prejudicial to Owens as to warrant relief.

8. Louisiana Arrest

Owens moved to suppress evidence surrounding his arrest in November, 2005, in Shreveport, Louisiana. The trial court ruled that that evidence "will essentially not be permitted unless there is established that concept of the open

door that is understood under the law." Hrg Tr. 71:20-23 (Nov. 8, 2006). Evidence of Owens's conduct at the time of his arrest could have inflamed the jury. The court precluded the prosecution from eliciting the circumstances surrounding the arrest, but did not preclude the prosecution from discussing the fact that Owens had been arrested in Louisiana. Thus, the prosecutor's reference to Owens's arrest during opening statement did not violate a court order.

9. Dehumanizing Owens

Owens argues the prosecutor improperly referred to him as a "killer" during closing argument. As the court finds in part IV.B.4 of this Order, "killer" was used to describe the individual who shot and killed Vann as opposed to the "accomplice" who shot and injured Marshall-Fields and Bell. The prosecutor's use of that term did not constitute misconduct.

10. Denigrating Owens's defense and burden shifting

In response to defense counsel's rhetorical questions posed to the jury during closing argument, the prosecutor suggested in rebuttal that the jury should question trial counsel's actions:

> Now you have to consider the defense has no burden in any case, right?
>
> But when they choose to admit certain items of evidence, you have to scrutinize those items the way that you scrutinize anything in a case.
>
> So, what's the job of the defense attorney if they don't have any burden? The burden rests entirely on the People to prove beyond a reasonable doubt all of the charges. What's their job? Well, their job is to do exactly what Mr. King did in his closing argument. Their job is to make a pitch to you for an acquittal, to try to inject doubt, because if there's a reasonable doubt, you have to acquit. So you have to consider why do they do certain things.

Trial Tr. 152:3-15 (Jan. 25, 2007). Later, the prosecutor again responded to rhetorical questions,

> Mr. King questions why, oh, why does the number of wounds that we know occurred in this case not match the number of bullets or the number of shell casings.
>
> Well, Alan Hammond told you a number of reasons why that can be true. Sometimes you just can't find all of the evidence at a crime scene because it is the kind of evidence that disappears.
>
> But by asking that question, he's trying to inject doubt. You have to consider what's the conclusion supposed to be from that? That Elvin Bell wasn't shot that many times? That Javad Marshall-Fields wasn't shot? That Gregory Vann wasn't shot? That there really wasn't a shooting in this park?

Id. at 153:16-25; 154:1-3.

It is improper for a prosecutor to denigrate the motives or responsibilities of defense counsel. But in rebuttal, a prosecutor is "allowed considerable latitude in responding to defense counsel's arguments." *People v. Salyer*, 80 P.3d 831, 839 (Colo. App. 2003). Here, the prosecutor's comments may have been inartful, but they did not denigrate the defense.

11. Arguing facts not in evidence

While it is improper for a prosecutor to argue facts not admitted into evidence, *People v. Davis*, 280 P.3d 51, 53-55 (Colo. App. 2011), a prosecutor in rebuttal is "allowed considerable latitude in responding to defense counsel's arguments[,]"*Salyer*, 80 P.3d at 839. In this case, defense counsel pointed out during closing argument that the prosecution did not produce numerous witnesses who were mentioned during trial. Defense counsel argued the prosecution's failure was tantamount to reasonable doubt. *See* Trial Tr. 139-141 (Jan. 25, 2007). In rebuttal, the prosecutor explained that those witnesses were not called because they

would have provided cumulative or irrelevant information. *Id.* at 154:8-11. The court is not convinced that the prosecutor argued facts not in evidence. The remarks fall within the considerable latitude afforded by *Salyer* to respond to trial counsel's closing argument.

O. Conclusion as to Trial Counsel's Performance

Among many other things, this court has considered extensive designated excerpts from the testimony of King and Kepros at the 32.2 hearing in the Dayton Street case and their testimony at the 35(c) hearing in this case. Despite the diligent and professional efforts of three excellent and experienced criminal defense lawyers, they were not as prepared as they would have liked to have been. There were lines of investigation, which might have proved useful, that they did not have the time or resources to pursue. But the issue for this court to resolve is not whether the defense provided was up to the level that these lawyers would have liked or whether it was up to the high standard to which the Colorado State Public Defender's office strives in a case that might serve as an aggravator in a subsequent death penalty case. The issue for this court is whether the defense provided was constitutionally adequate. It most certainly was.

IV. Direct Appeal Counsel's Performance

The principles of law set forth in part III.C of this Order are incorporated herein.

A. Overview, staffing, and diligence

The Office of Alternate Defense Counsel (ADC) generally assigns one lawyer to pursue the direct appeal of a first-degree murder conviction that does not result in the death penalty. In this case, because Owens faced the death penalty in his other case, ADC assigned a team that originally consisted of four experienced

appellate lawyers. The team was later reduced to three. This team constitutes Direct Appeal counsel.

One of the attorneys had done around two hundred Colorado criminal appeals, another had done several dozen, and one was a national death penalty expert at the time they represented Owens. In order to adequately develop issues and remain within the word limit imposed by the appellate court, attorneys exercise their professional judgment to select some issues and disregard others. Each of the attorneys read the entire record independently and noted possible issues for appeal. They conferred several times in person, by phone, and via email. They initially noted roughly forty potential issues and ultimately settled upon twelve, which they thought had the best potential for success on appeal. They submitted an opening brief on November 10, 2010, (the "Rejected Brief") that contained about 40,000 words. The Colorado Court of Appeals rejected it on January 31, 2011, because it exceeded the 9,500-word limit. In its Order rejecting the brief, the Colorado Court of Appeals set the limit at 20,000 words. Direct Appeal counsel streamlined the Rejected Brief without abandoning or unduly minimizing any issue and submitted an amended brief (the "Opening Brief") of more than 24,000 words on March 3, 2011. The Court of Appeals accepted the Opening Brief, which framed the issues for appeal. Owens's convictions were affirmed on July 26, 2012. *People v. Owens*, No. 07CA895, 2012 WL 3031232 (Colo. App. July 26, 2012) (not published pursuant to C.A.R. 35(f)), *cert. denied*, No. 12SC810, 2013 WL 4426399 (Colo. Aug. 19, 2013).

The staffing and diligence of Direct Appeal counsel more than met the competency standard. The Opening Brief was generally very good. But as to the first *Strickland* prong, there was one issue which they should have yet did not raise – the *DeBella* issue (*see* part IV.D of the Order). It is clear, however, that the

second prong of *Strickland* has not been met as to the *DeBella* issue or any of the other claims raised in the petition regarding the direct appeal.

B. Issues not selected

Owens's primary assertion is that there were other issues that should have been asserted on appeal and that the failure to assert them resulted in the waiver of potentially valid grounds for reversal. But "[a]ppellate counsel is not required to raise on appeal every nonfrivolous issue a defendant desires to raise." *People v. Trujillo*, 169 P.3d 235, 238 (Colo. App. 2007). "[O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Id.* (quoting *Ellis v. Hargett*, 302 F.3d 1182, 1189 (10th Cir. 2002)).

With the exception of the *DeBella* issue (*see* part IV.D of the Order), the evidence suggests that Direct Appeal counsel spotted the issues discussed below and made the professional judgment that each had less potential for reversal than the issues raised in the Opening Brief. As to each issue, the exercise of judgment was sound and reasonable and did not fall below the *Strickland* competency standard. This court has considered the testimony of the experts, reviewed the exhibits, the arguments, and the trial record. This court agrees with Direct Appeal counsel that none of the other issues appear to have had a higher likelihood of reversal than the issues they selected. The other issues included the failure to designate:

1. The admission of the interview of Jeremy Green over objection on Confrontation grounds.

Direct Appeal counsel considered whether to designate a Confrontation issue regarding the admission of the interview and concluded that any error was unlikely to lead to a reversal of Owens's conviction. *See* SOPC.EX.P-2037 (Direct Appeal

counsel's email characterizing this as a "loser" claim.). Not only was Direct Appeal counsel's judgment reasonable but *United States v. Owens*, 484 U.S. 554 (1988) would have appeared to be dispositive at the time of their evaluation.[11] Moreover, Direct Appeal counsel correctly concluded that even had the trial court erred in admitting the interview, there was no reasonable probability that Owens's convictions would be reversed. The interview was corroborative of other testimony, except concerning the charges in which Green was a named victim. Because Owens was acquitted of those charges, Direct Appeal counsel's decision not to raise this issue on appeal does not constitute ineffective assistance of counsel under *Strickland*.

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[11] The United States Supreme Court held:

> The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.
>
> Our opinion noted that a defendant seeking to discredit a forgetful expert witness is not without ammunition, since the jury may be persuaded that his opinion is as unreliable as his memory. We distinguished, however, the unresolved issue in *Green* on the basis that that involved the introduction of an out-of-court statement.
>
> . . . .
>
> Here that question is squarely presented, and we agree with the answer suggested 18 years ago by Justice Harlan. The Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.

Owens, 484 U.S. at 558-59 (internal citations and quotations omitted).

2. The denial of the motion for mistrial after the prosecutor mentioned in her opening statement that Owens had been arrested in Louisiana.

The prosecution did not violate a court order. *See* part III.N.8 of this Order. Thus, Direct Appeal counsel's decision not to raise this issue was not ineffective under *Strickland*.

3. Prosecutorial misconduct in closing argument.

In discussing the elements of first-degree murder, the prosecutor said, "[t]he time for deliberation has been described as the time necessary for one thought to follow another. Use your reason and common sense. You know just because someone acts quickly doesn't mean it was hasty and impulsive." Trial Tr. 95:2-5 (Jan. 25, 2007). As the court found in part III.N.6 of this Order, the prosecutor's closing argument was not of a kind which had any reasonable likelihood of leading to a reversal under the plain error standard because the jury instructions correctly defined "after deliberation." *See Grant*, 174 P.3d at 810-11 (observing that the "one thought to follow another" standard has not been in effect since 1973 and concluding that the prosecutor's misstatement of the definition of "after deliberation" as the time necessary for "one thought to follow another" was not plain error because the jury instructions accurately defined "after deliberation"). Thus, Direct Appeal counsel's decision not to raise this issue on appeal did not fall below the standard of competency set forth in *Strickland*. The remaining claims regarding the prosecutor's closing argument do not merit discussion.

4. The admission of supposedly character evidence.

The supposedly negative character references to Owens consist of evidence that he had a propensity to carry a gun and that the prosecutor referred to him as the "killer." The prosecutor did not assert that Owens carried a gun unlawfully.

While some citizens may believe that people should not carry guns, no authority has been cited indicating that any court has found it to be inadmissible character evidence to have a propensity to carry one. And in the context of the entire trial, "killer" was not used as a pejorative (i.e., a person who, by character or history, is not adverse to killing others). Instead, the term was used to distinguish the person who shot and killed Vann from the other shooter who shot and injured, but did not kill, Marshall-Fields and Bell.

The supposedly positive character evidence – or vouching for witnesses – consisted of little more than the sort of brief humanizing of witnesses and victims that trial courts generally allow and comments about certain witnesses' willingness to attempt to detain Owens after the killing and their willingness to come to court and testify. It is a matter of trial court discretion to determine when a line is crossed between testimony that simply supplies some humanization and testimony of a CRE 404(b) nature.

It is unlikely that an appellate court would find any abuse of the trial court's discretion in this area; there is no realistic chance that an appellate court would find grounds for reversal; and Direct Appeal counsel's judgment not to designate this as an issue for appeal was reasonable.

C. Raising issues that might prejudice Owens

Owens also faults Direct Appeal counsel for raising issues on appeal regarding the adequacy of trial counsel. The argument seems to be that either the appellate decision or Direct Appeal counsel's characterizations in their briefs might be viewed as a judicial admission or otherwise bar Crim. P. 35(c) review of certain issues. No prejudice having been shown, these arguments will not analyzed further.

D. The *DeBella* issue

The *DeBella* issue is the most significant issue relating to Direct Appeal counsel. As to this issue: (1) Direct Appeal counsel should have spotted the issue and failed to do so,[12] (2) had the issue been designated, the appellate court would have found that the trial court committed error, and (3) there is no reasonable probability that the error would have led to a reversal.

The *DeBella* issue concerns a video-recorded police interview of Green taken hours after the Lowry Park shootings. Green was a listed victim of attempted murder and the lesser non-included offense of felony menacing. Owens was acquitted of those charges. Green testified at the trial and repeatedly denied any significant memory of the events. He also repeatedly denied that his memory was refreshed or could be refreshed by reviewing a transcript of the interview. He was asked numerous questions about the interview and its contents on both direct and cross-examination.

When the police officer who had conducted the interview later testified, both the video and a transcript of it were admitted over objections on hearsay and Confrontation grounds. The interview substantially corroborated other testimony as to how the shooting of Vann occurred and it provided a detailed physical and clothing description that corroborated evidence from others identifying Owens as the person who shot Vann. Over objection that the court should not allow the jury unfettered access to the video and transcript, the trial court ruled that it would allow unfettered access to both. Apparently relying on *People v. McKinney*, 80 P.3d 823 (Colo. App. 2003), *rev'd on other grounds*, 99 P.3d 1038 (Colo. 2004),

[12] An original member of the Direct Appeal team had highlighted language from *DeBella* and brought it to the attention of one of his colleagues in an e-mail related to another appeal upon which they were working. SOPC.EX.D-2371. That attorney withdrew from the team, however, and it does not appear that designating the issue was seriously considered thereafter.

and other appellate cases following its reasoning, the trial court ruled that unfettered access was mandated by an applicable rule of civil procedure because the rules of criminal procedure were silent on the subject. While, as a matter of law, this grant of unfettered access constituted an abuse of the trial court's discretion, the trial court's ruling was based upon appellate decisions that many trial judges would have considered to be correct statements of the law as it existed at the time.

An appellate court will generally apply the law as it exists at the time of the appeal. *See Henderson*, 568 U.S. 266; *Ray*, 378 P.3d 772. Thus, Colorado appellate counsel have a duty to keep abreast of significant, relevant cases decided by the Colorado Supreme Court. When a case from the Colorado Supreme Court modifies or clarifies the law in a manner that gives rise to a claim of abuse of discretion, appellate counsel are expected to spot the issue and consider whether the issue should be designated in an opening brief.

Following the trial but before the Opening Brief was filed, the Colorado Supreme Court decided *DeBella*. *DeBella* made it clear that trial judges in criminal cases have a duty to exercise discretion in deciding what restrictions, if any, should be placed upon the jury's access during deliberations to recorded statements. In exercising its discretion, "the trial court's ultimate objective must be to assess whether the exhibit will aid the jury in its proper consideration of the case, and even if so, whether a party will nevertheless be unfairly prejudiced by the jury's use of it." *Frasco v. People*, 165 P.3d 701, 704-05 (Colo. 2007). When the trial court exercises discretion, "a court's refusal to exclude or otherwise limit the use of an exhibit will generally be overturned only when it is manifestly arbitrary, unreasonable, or unfair." *DeBella v. People*, 223 P.3d 664, 667 (Colo. 2010). But

failing to exercise any discretion in a situation where the exercise of discretion is mandated constitutes an abuse of the trial court's discretion. *Id*.

The interview could have aided the jury in its proper consideration of the case. The interview occurred shortly after the events being described. Green had been directly involved in the events leading up to the killing and had observed it from, at most, a few feet away. Green's description of the events was clear and articulate. At the time of the interview, he was forthcoming and cooperative. He supplied reasonably detailed descriptions of some of the people and vehicles involved, drew a diagram that might have been helpful to the jury, and volunteered information that included his own part in possibly escalating events. Had the trial judge exercised discretion, it seems likely that he would have allowed the jury to review the interview at least once or twice, had the jury sought to do so. In addition to Green's verbal description of the events, the jury might have found it helpful to hear Green's recorded remarks for a second time because what he said as he was drawing and adding to the diagram would have been helpful to the jury's understanding of the diagram.

Because the trial court appears to have concluded that it was not permitted to restrict the jury's access to the interview, there is a near certainty that, had the issue been designated in the Opening Brief, the appellate court would have agreed that the trial court abused its discretion by failing to exercise any discretion at all. There is, however, no reasonable probability that the appellate court would have found this error to be grounds for reversal.

In *DeBella*, the video recording of the victim's interview was the only complete recounting of the sexual assaults and "the inconsistencies of the tape's content with [the victim's] trial testimony were central to the resolution of the case." 223 P.3d at 669. Similarly, in *People v. Jefferson*, 2017 CO 35, there were

no eyewitnesses to the sexual assaults and no corroborating physical evidence. The video recording of the victim's interview provided the only complete and detailed account of the incidents.

The improper admission of the recordings in *DeBella* and *Jefferson* can be contrasted with *Martinez v. People*, 2017 CO 36, a child sexual assault case in which the trial court granted unfettered access to three DVDs. In *Martinez*, defense counsel did not object to the admission of the DVDs. While recognizing that a plain error standard applies in such circumstances, the court stated,

> Assuming without deciding both that the trial court abused its discretion and that, in doing so, it committed an obvious and substantial error, we still perceive no grounds for reversal because as we proceed to discuss, we cannot say that any error here so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction.

Martinez v. People, 2017 CO 36, ¶ 25.

The court then pointed out that, unlike in *DeBella* and *Jefferson*, Martinez's defense did not significantly rely on inconsistencies between the victim's trial testimony and their recorded statements, the recordings did not constitute the lynchpin of the prosecution's case because significant other evidence corroborated the evidence on the recordings, and the case against the defendant was strong.

Unfettered access to video recorded statements, like the improper admission of such evidence, is particularly concerning in a case like *DeBella* where the video constitutes "the only complete recounting of the assaults" and is "the linchpin of the prosecution's case." 223 P.3d at 669. In such cases, there are "grave doubts as to whether the error adversely affected the fairness of the trial proceedings." *Id.*

But unlike *DeBella* and *Jefferson*, this is a case where the interview corroborated other evidence provided by several witnesses. Had the *DeBella* issue been raised, it would have been analyzed in the following manner:

> Unlike the type of statements at issue when convictions have been reversed because of similar errors—recorded statements of child victims of sexual assault—[the interview was] not of a comparable inflammatory nature that would have aroused the passion or sympathy of the jurors each time they listened to the recording. Moreover, unlike *DeBella* and *Jefferson*, [the interview] was not the linchpin of the prosecution's case against [Owens].

People v. Riley, 380 P.3d 157, 166 (Colo. App. 2015) (internal citations omitted). Here, the trial court's failure to exercise its discretion before allowing the jury unfettered access to the video did not substantially influence the verdict or affect the fairness of the trial.

Direct Appeal counsel should have spotted the *DeBella* issue and they did not. Had the issue been spotted and designated, the appellate court would have found that the trial court committed error. But there is no reasonable probability that the appellate court would have reversed Owens's convictions. Direct Appeal counsel's failure to raise the *DeBella* issue did not therefore prejudice Owens.

E. Conclusion as to Direct Appeal Counsel's Performance

Direct Appeal Counsel provided constitutionally sound representation to Owens.

V. Juror 75

A significant claim in the petition has been titled Juror Misconduct. This court does not find that the juror in question was deliberately dishonest about any material matter or that she engaged in any deliberate misconduct. Nevertheless, this is a significant issue that deserves findings of fact and legal analysis.

Juror 75's maiden name was Ealy. Her last name at the time of the trial was Griggs, the name of a former husband. Her current last name is Manuel. These names are reflected in various parts of the record. In this order, she will be referred to as Juror 75.

A. Parties' Positions

The claim can be divided into four basic assertions, all relating to the same juror. First, Owens asserts that Juror 75 was dishonest in answering a questionnaire given to all jurors as part of *voir dire*. The prosecution disputes the materiality of Juror 75 questionnaire answers.

Second, Owens asserts that Juror 75 violated the trial court's instructions by failing to inform the court that during the trial that, (a) she recognized and had contact with one witness; (b) one or more other witnesses looked familiar and were probably friends of her grown son; and (c) she recognized another witness, Marshall-Fields's mother, who had spoken at Juror 75's church and appeared on television seeking help in identifying those who had murdered her son. The prosecution argues Juror 75's familiarity with the witnesses did not rise to the level where Juror 75 would be biased against Owens.

Third, Owens asserts that Juror 75 was biased because she was friends with two of Marshall-Fields's uncles. The prosecution admits that Juror 75 is now familiar with Marshall-Fields's uncles but points out that she did not meet them until after the Lowry Park trial.

Fourth, Owens asserts that Juror 75 had knowledge about the Dayton Street murders and improperly used that knowledge in reaching her verdict in the Lowry Park case. The prosecution disputes that Juror 75 improperly employed or shared extraneous information.

B. Principles of Law

As to the first three assertions, the court has conducted its legal analysis based upon both Colorado and federal law. The federal law is, at least arguably, more fully developed.

1. Balancing fair trial and finality concerns

This and similar cases present a troubling dilemma. When there is information that the attorneys would have found relevant in deciding whether to seek the replacement of a juror, it is regrettable that the attorneys did not have the information in order to present their positions to the trial court. The law recognizes that no trial is perfect. "A defendant is entitled to a fair trial, but not a perfect trial." *People v. Rodriguez*, 794 P.2d 965, 971 (Colo. 1990). When the parties have received a fair, albeit imperfect, trial, the law strongly favors finality. As the United States Supreme Court stated,

> To invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give. A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on *voir dire* examination.

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 555 (1984).

Often, as in this case, a retrial would occur many years after the events in question, and it cannot be denied that the passage of time is not a friend to the search for truth.

But while trials may be imperfect, they may not be unfair. "The due process clauses of the United States and Colorado constitutions guarantee every criminal

defendant the right to a fair trial." *Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000). "An impartial jury is a fundamental element of the constitutional right to a fair trial." *Id.*; *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . trial[] by an impartial jury . . . ."); COLO. CONST. art. II, § 16 ("In criminal prosecutions the accused shall have the right to . . . trial by an impartial jury . . . .").

2. Overall Analytic Framework

As to the first three of Owens's basic assertions, this court must first determine the standard to be applied to a case of claimed juror misconduct when (1) the juror gave incomplete or inaccurate biographical information during *voir dire* and/or recognized one or more witnesses once the trial began, (2) the juror served, (3) the jury has returned a verdict and (4) the matter first arises in post-trial proceedings.

Relevant categories of alleged juror misconduct include:

- False or undisclosed biographical information; and
- Recognizing or having a relationship with a witness, victim, or party.

a. Colorado Law

Colorado grants relief when the defendant proves by a preponderance of evidence that either (1) the juror was deliberately dishonest about a material matter to such a degree that prejudice should be found despite the juror's claim to have served without bias or (2) the juror misstated or failed to disclose a material matter, and while the mistake was not deliberately dishonest, the party challenging the verdict has proven that they suffered prejudice.

> In Colorado . . . untruthful answers on *voir dire* concerning material matters do not entitle a party to a new trial *per se* . . . . Under some circumstances, however, a juror's non-disclosure of information during jury selection may be grounds for a new trial.

Allen v. Ramada Inn, Inc., 778 P.2d 291, 292-93 (Colo. App. 1989).

Dunoyair involved a juror's inadvertent non-disclosure of his acquaintance with a prosecution witness. But in affirming a denial of post-conviction relief, the supreme court discussed how deliberate misconduct concerning a material matter might affect the analysis:

> Where . . . a juror deliberately misrepresents important biographical information relevant to a challenge for cause or a peremptory challenge or knowingly conceals a bias or hostility towards the defendant, a new trial might well be necessary. *See People v. Borrelli*, 624 P.2d 900 (Colo. App. 1980); *People v. Rael*, 40 Colo. App. 374, 578 P.2d 1067 (1978). In such instances the juror's deliberate misrepresentation or knowing concealment is itself evidence that the juror was likely incapable of rendering a fair and impartial verdict in the matter.

People v. Dunoyair, 660 P.2d 890, 895 (Colo. 1983).

Christopher also involved a juror's inadvertent failure to disclose that she was familiar with the prosecution's advisory witness:

> [Juror] Digeser testified that [prosecution advisory witness] Officer Moran was a former neighbor who used to live two houses away from her, that they had both been at several social functions together, that Officer Moran had driven Digeser to the airport to pick up Digeser's friend, that she had not seen Officer Moran in over a year, and that she had not recognized Officer Moran's surname when the list of witnesses was read to her prior to trial. Digeser stated that she believed Officer Moran to be a 'trustworthy' person based on the fact that her house was well-kept and that Officer Moran had once driven Digeser to the airport to pick up Digeser's friend. Digeser responded affirmatively to questions concerning her ability to be objective and evaluate Officer Moran's testimony, deliberate fairly, and render a fair verdict.

People v. Christopher, 896 P.2d 876, 877 (Colo. 1995). The trial court found that Digeser's relationship with Moran would not affect her ability to remain impartial and denied the defendant's motion to replace her with an alternate. The defendant claimed on appeal that he was denied ~~of~~ the opportunity to exercise a peremptory challenge. The court of appeals,

> [C]oncluded that the trial court had abused its discretion, finding that defendant's right to exercise a peremptory challenge was curtailed by Digeser's failure to initially disclose her acquaintance with Officer Moran during voir dire and that the defendant was therefore prejudiced by the trial court's decision not to replace Digeser with an alternate juror.

Id. at 878. The Colorado Supreme Court granted *certiorari* on the following question:

> Whether the court of appeals erred in holding that the trial court's failure to replace a juror who recognized a prosecution witness after trial began was an abuse of discretion that prejudiced the defendant and curtailed his right to exercise peremptory challenges.

Id. The Colorado Supreme Court held that prejudice would not be presumed in light of the juror's inadvertent failure to disclose her acquaintance with a prosecution witness.

> [T]he court of appeals erred in presuming prejudice from Digeser's inadvertent failure to recognize Officer Moran's name as it was read off during jury selection. We conclude that the trial court did not abuse its discretion in determining not to replace Digeser with an alternate juror since the juror was able to fairly evaluate the credibility of Officer Moran's testimony and could reach an impartial verdict based on the evidence. Accordingly, we reverse the court of appeals and remand with directions to consider any unresolved issues.

Id. at 880. *See also People v. Meis*, 837 P.2d 258 (Colo. App.).[13]

In analyzing whether prejudice has been shown when the inadvertent nondisclosure is discovered after the trial, Colorado appellate courts have discussed certain factors relevant to prejudice in cases involving undisclosed material information and recognizing witnesses. They have included (1) **the significance of the undisclosed information**, *see Dunoyair*, 660 P.2d at 895-96 (where the testimony was of only peripheral significance and was not disputed, there was no prejudice); (2) **whether the nondisclosure was the product of the juror's forgetfulness**, *see Moynahan v. State*, 334 A.2d 242 (Conn. 1974), cited in *Dunoyair*, 660 P.2d at 895 (no prejudice when the juror forgot about a prior attorney-client relationship with the prosecutor); (3) **the remoteness of the juror's contact with the witness**, *see Moynahan*, 334 A.2d 242, cited in *Dunoyair*, 660 P.2d at 895 (no prejudice when the juror had an attorney-client relationship with the prosecutor ten years prior to trial); and (4) **the nature of the question asked**, *see People v. Torres*, 224 P.3d 268 (Colo. App. 2009) (no prejudice because the present-tense question did not require disclosure that family members had been involved in law enforcement in the past).

b. Federal Law

Because constitutional rights are involved and because the federal law is arguably more fully developed, the court has also conducted a federal law analysis.

[13] The factors suggested in *Meis* for replacing a sitting juror with an alternate were quoted with approval in *Christopher*. Those factors are, (1) the juror's assurance of impartiality; (2) the nature of the information withheld in *voir dire*; (3) whether the nondisclosure was deliberate; (4) any prejudicial effect the nondisclosed information would have had on either party including the defendant's right to exercise peremptory challenges; and (5) and the practical remedies available at the stage of the proceedings when the nondisclosure is revealed. *Meis*, 837 P.2d at 259.

In this court's view, the proper approach is a two-fold process. First, ask whether the defendant has shown that the juror was actually biased. In doing so, apply a *McDonough* analysis as developed in various federal cases. As set forth below, the court does not find that such an analysis provides a basis for relief. Second, determine whether relief should be granted under a common law implied bias basis. *See Gonzales v. Thomas*, 99 F.3d 978 (10th Cir. 1996) (conducting three-part analysis under *McDonough* and the doctrines of actual and implied bias).

i. Actual Bias

The federal standard is set forth in *McDonough* and developed in more detail in various federal cases, including *Sampson v. United States*, 724 F.3d 150 (1st Cir. 2013).

The defendant must demonstrate by a preponderance of the evidence not only that the juror's answers were not fully accurate and/or that she failed to disclose her recognition of one or more witnesses, but also that "under the totality of the circumstances . . . the juror lacked the capacity and the will to decide the case based on the evidence." *Sampson v. United States*, 724 F.3d 150, 165-66 (1st Cir. 2013).

A *McDonough* juror failed to disclose material biographical information during *voir dire*. The verdict was adverse to the plaintiff. Had plaintiff's counsel known the true biographical facts, a peremptory challenge would almost certainly have been used against the juror. The 10th Circuit reversed the federal trial court judgment and concluded that the false *voir dire* information deprived the plaintiff of the right to meaningfully exercise peremptory challenges. The United States Supreme Court reversed and reinstated the verdict, stating:

> We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further

> show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

McDonough, 464 U.S. at 556.

One factor to be determined is whether a biographical or relationship misrepresentation was deliberately dishonest. Under the *McDonough* standard, the fact that a nondisclosure is deliberate does not prove, in and of itself, that the juror was not impartial. *Sampson*, 724 F.3d at 164-65; *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 516 (10th Cir. 1998). But in some cases, deliberate dishonesty might be persuasive of a juror's inability to be impartial. The ultimate question remains, did the juror lack the capacity and the will to decide the case based on the evidence. As the First Circuit pointed out in *Sampson*:

> When all is said and done, the existence vel non of a valid basis for a challenge for cause is not a matter of labels. Any inquiry into potential bias in the event of juror dishonesty must be both context specific and fact specific. The outcome of this inquiry depends on whether a reasonable judge, armed with the information that the dishonest juror failed to disclose and the reason behind the juror's dishonesty, would conclude under the totality of the circumstances that the juror lacked the capacity and the will to decide the case based on the evidence (and that, therefore, a valid basis for excusal for cause existed).

Sampson, 724 F.3d at 165-66. *Sampson* suggested,

> A number of factors may be relevant in determining whether a juror has both the capacity and the will to decide the case solely on the evidence. This compendium may include (but is not limited to) the juror's interpersonal relationships, the juror's ability to separate her emotions from her duties, the similarity between the

> juror's experiences and important facts presented at trial, the scope and severity of the juror's dishonesty, and the juror's motive for lying[.] Although any one of these factors, taken in isolation, may be insufficient to ground a finding of a valid basis for a challenge for cause, their cumulative effect must nonetheless be considered

Id. at 166 (internal citations omitted).[14]

ii. Common Law Implied Bias

Implied bias can be divided into statutory or rule-based implied bias on the one hand and common law implied bias on the other.

Colorado case law is clear that implied bias challenges based upon C.R.S. 16-10-103(1) and/or Crim. P. 24(b) must be based upon the plain language of the statute or rule and not judicial attempts to discern the spirit of the rule or intent of the legislature. *People v. Bonvicini*, 366 P.3d 151, 157 (Colo. 2016); *People v. Rhodus*, 870 P.2d 470, 477 (Colo. 1994).

Some jurisdictions, California, for example, expressly limit implied bias challenges to those set forth in their rule. *See* Cal.C.C.P. § 229 ("A challenge for implied bias may be taken for one or more of the following causes, and for no other . . . .").

This court also recognizes that there is discussion among the federal circuits as to whether, when not dealing with grounds expressly set forth in a statute or rule, common law implied bias is an independent basis for review.

But in this court's view, there could be grounds under federal common law, albeit in extremely rare circumstances, for finding implied bias that does not involve deliberate juror dishonesty and which are not expressly covered by a statute or rule.

[14] The court has considered these factors. *See* n.35.

A determination of common law implied bias "turns on an objective evaluation of the challenged juror's experiences and their relation to the case being tried." *Gonzales*, 99 F.3d at 987, and involves a determination of "whether an average person in the position of the juror in controversy would be prejudiced." *United States v. Powell*, 226 F.3d 1181, 1188 (10th Cir. 2000).

If justified by the facts, implied bias could be found even if a juror denied any bias. As Justice O'Connor recognized, "the juror may have an interest in concealing his own bias [and/or] may be unaware of it." *Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring).

Actual bias is a factual matter so appellate courts afford deference to the trial court's findings. Implied bias is a matter of law, to which no such deference is appropriate. Appellate cases discussing implied bias generally involve a single experience or relationship of a juror. In this case, Owens asserts that there are several. Owens argues that, even if none of these would individually be sufficient, collectively they should be sufficient to demonstrate implied bias notwithstanding a juror's honest assertion that she served without bias. Thus, although this court does not consider this to be one of those rare and extreme cases in which a finding of common law implied bias would be appropriate, but to facilitate appellate review, some factors for *de novo* review are highlighted in footnote 36.

3. Additional Legal Questions

The court has considered these additional questions: (a) whether a juror's testimony concerning his or her bias is admissible evidence under CRE 606(b) and/or the implied bias doctrine, and (b) whether the legal standard is affected by the trial court's decision not to talk to the juror.

a. Is a juror's testimony as to her lack of bias admissible under CRE 606(b)?

Owens asserts that the court should employ the hypothetical, reasonable juror standard employed in cases where extraneous information has been injected into the jury deliberation process. CRE 606(b) memorializes the concept that courts may not delve into the jury's deliberative process.

> Under [CRE 606(b)'s] plain language, we exclude juror testimony or affidavits divulging juror deliberations, thought processes, confusion, mistake, intent, or other verdict impeaching grounds. Thus, investigation into juror misconduct must cease once any possibility arises that the juror is acting during deliberations based on his or her view of the sufficiency of the evidence.

Black v. Waterman, 83 P.3d 1130, 1137 (Colo. App. 2003) (internal quotations and citations omitted). Except in cases of alleged racial bias,[15] when extraneous information has been introduced into that process, rather than inquiring into the effect on the actual jury, courts ask whether hypothetical, reasonable jurors would have had their verdict affected by the extraneous information.

Cases involving false *voir dire* information or witness recognition do not present the same problem. Nothing prohibits counsel from presenting evidence concerning the false *voir dire* information, the relationship of the juror to a witness, or evidence of actual bias of the particular juror. There is no need to resort to a hypothetical, reasonable juror standard. Counsel are at liberty to not only investigate, but also present evidence of, and the court may make findings regarding, the actual facts.

[15] *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

Owens takes the view that CRE 606(b) bars Juror 75's testimony as to her lack of bias. In the view of this court, it depends to some degree on how the question to the witness is phrased and, more importantly, to what ultimate inquiry it is addressed. CRE 606(b)'s purpose and its language are intended to prohibit inquiry into the deliberation process. CRE 606(b) "is designed to promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion." *People v. Harlan*, 109 P.3d 616, 624 (Colo. 2005). Neither the language nor the purpose of the rule is intended to preclude inquiry into whether a juror was biased for or against either party. This court distinguishes between two inquiries.

The proper inquiry goes to bias. It is, "under the totality of the circumstances, did the juror lack the capacity and the will to decide the case based on the evidence?" Questions going to this inquiry are proper and the answers to those questions are admissible.

The improper inquiry goes to the deliberation process. It is, "how did the juror's relationship with or recognition of someone affect the juror or other jurors in the deliberation process?" This second inquiry violates CRE 606(b).

Many of the questions asked of Juror 75 on this topic were leading and phrased in terms of whether certain circumstances affected her verdict and not whether she was able to serve without bias.[16] The court has disregarded the

[16] This may be attributed to this court's explanation of what would and would not be admitted. Because the court could not operate the recording equipment, it had an off-the-record sidebar conference with the attorneys. The court doubts that it explained its view of the distinction between bias and 606(b) evidence with appropriate clarity. The on-the-record attempt to summarize the conference was:

> THE COURT: Counsel, we had a bench conference and because of, frankly, I think because of my lack of knowledge of what to do with respect to all of this technology, we had to have an old-

answers to such questions. A couple questions, however, related to bias and not to how information affected her verdict.[17] To the degree that her testimony goes to the proper inquiry, this court has considered it. To the degree that it goes to the improper inquiry, it has not been considered. The distinction is certainly a fine and difficult one, particularly when the juror is questioned after a verdict has been reached. Nevertheless, it is this court's view that while a juror's testimony about what influenced her deliberation process is inadmissible, her testimony about whether she was biased is admissible.

> fashioned sidebar and it wasn't recorded. I want you to all have an opportunity to correct my summary of it if you would like to.
>
> What I indicated -- what I believe I indicated to you was that there was one evidentiary ruling that Judge Rafferty made which precluded certain evidence being elicited from this witness and that I would permit either side to ask questions on that point if they chose to.
>
> We will determine later on what the standard is, what the law is on this subject in Colorado, and if it turns out that anything that you all elicit on this point is inadmissible, there's no jury here to be prejudiced and it will simply be disregarded, but I'm not going to preclude either side, particularly the defense, from asking questions in this particular area just because that was the ruling of Judge Rafferty in the 32.2.
>
> That's my summary of basically what the sidebar was about and I want to give both sides the opportunity to clarify that or add to if either side would like to.
>
> MR. HOWER: That's my understanding.
>
> MR. CASTLE: That's my understanding.

Hrg Tr. 15:25; 16:1-23 (Oct. 14, 2016).

[17] The two questions related to bias include:

> Q Can you think of any of that information that created in you a bias against the defendant?
>
> A No.
>
> Q Did any of that information that you did not disclose create a bias for you in favor of the prosecution?
>
> A No.

Hrg. Tr. 85:8-13 (Oct. 14, 2016).

b. Is a juror's testimony as to her lack of bias admissible under an implied bias analysis?

Alternatively, Owens asserts that Juror 75's testimony is irrelevant because this court should apply an objective standard in implied bias analysis.

Implied bias cases can be divided into statutory and common law cases. Colorado law specifies relationships whose existence is grounds for a challenge for cause. C.R.S. § 16-10-103(1); Crim. P. 24(b). Were the basis for the implied bias claim one of those relationships, Owens's position would have merit. In those circumstances, the conclusion of bias is automatic if the relationship is established so while the juror's testimony about the existence of the relationship would be admissible, the juror's testimony regarding her bias would be appropriately excluded as irrelevant under CRE 402.

But where the claim is based on the common law, this court has found no authority supporting Owens's position. For the most part, the cases stress how sparingly the common law doctrine should be used. But in doing so, they point out that, in an appropriate case, a court would be justified in discounting or totally disregarding the juror's testimony that she or he served without bias. But the fact that a court might be justified in disregarding certain evidence does not mean that the evidence should not have been received. It simply means that relevant, admissible evidence may properly be discounted or even completely disregarded in certain circumstances. Indeed, leading cases on implied bias seem to assume, in pointing out that a court might be justified in disregarding such testimony, that the juror's testimony as to her or his bias will be received. *See*, *e.g.*, *Smith*, 455 U.S. at 221-22 (O'Connor, J., concurring) (discussing a juror's interest in concealing his bias without indicating the juror's testimony concerning his bias is inadmissible); *Gonzales*, 99 F.3d at 982 (recounting juror's testimony concerning the alleged

similarities between her experience and the victim's experience). In determining whether a defendant has sustained his burden, the court should consider the totality of the circumstances. These can include the nature of any relationship with a party or witness, any involvement in the events giving rise to the case, any history that might suggest a predisposition or bias on cases of a particular nature and any evidence indicating that the juror had a particular desire or motivation to serve on the jury. The juror's testimony may be relevant to one or more of the factors considered by the court.

A juror's post-trial testimony that he or she was or was not biased is certainly not conclusive and in some cases might carry very little weight. But in the view of this court, it is admissible evidence to be weighed and evaluated along with all other relevant evidence.

c. Is the legal standard affected by the trial court's decision not to talk to the juror?

This court has found only one Colorado case involving a failure of court staff to adequately convey information to the judge regarding a juror's recognition of a witness or party. In *People v. Hernandez*, 695 P.2d 308 (Colo. App. 1984), the defendant sought a new trial for juror misconduct. In support of his motion for new trial, the defendant submitted the affidavit and testimony of a juror detailing her recognition of the defendant, her attempts to inform the court, and her assurances that recognizing the defendant did not affect her verdict.

> During *voir dire* the juror thought she recognized defendant; during recess she attempted to contact the judge in this regard through the bailiff and the bailiff told her to "forget it"; she then brought the matter to the attention of a jury clerk; during trial she saw the defendant's parents and realized she did know the defendant; she was unable to bring these matters to the attention of the trial court following the trial; and this

> matter weighed on her mind because she knew that it was her duty to disclose this matter to the trial court. In answer to the court's questions she testified that this knowledge did not affect her verdict.

People v. Hernandez, 695 P.2d 308, 310 (Colo. App. 1984). The Colorado Court of Appeals held that the defendant needed to prove prejudice to obtain relief.

> Defendant must establish that he was prejudiced by misconduct in the jury selection process in order to overturn his conviction. Here, the misconduct was that of the trial court bailiff and of the jury clerk, and not of the juror. We conclude that defendant failed to establish that he was prejudiced by this misconduct.

Id. (internal citations omitted). Thus, *Hernandez* suggests that the standard is the same regardless of whether the inquiry relates to juror misconduct or court misconduct.

C. Findings of Fact and Analysis

1. Juror 75's credibility and basic general facts

This court heard Juror 75 testify in October of 2016 and April of 2017, read lengthy designated testimony that she had given before another judge in Owens's 32.2 hearing, and read investigators' reports of interviews of her by both parties.

When the trial occurred in early 2007, Juror 75 was a 40-year-old, single mother of two sons. She was the only African-American on the jury. She lived in an apartment near the intersection of Dayton and Florida. She did not believe that she lived in a bad neighborhood, but at that time there was significant gang activity in the area and shootings and other violent incidents were not uncommon.

When called for the trial, Juror 75 had some, but not significant, knowledge of the criminal legal system and little knowledge of its terminology. She had never served on a jury or witnessed a trial.

The court finds Juror 75 to be generally credible. When she testified in October of 2016 and April of 2017, she appeared honest and straightforward in her answers. While her recollection of the events that had occurred between 2004 and 2007 was not always consistent in its details, she cooperated with both parties on the several occasions when she was contacted in 2013 and 2014 and did her best to answer all questions honestly. She did not appear to be coloring her testimony to be beneficial to the prosecution's position.

She had no apparent desire to please or displease either side or to promote any political, social, or personal agenda.

Juror 75 had no particular desire to serve on the jury. On the contrary, she tried to bring matters to the attention of the trial judge that, she hoped, would have resulted in her being replaced by an alternate. Nevertheless, when selected and later directed to remain on the jury, this court finds she served without bias toward or against either party. In her post-conviction testimony the juror maintained her clear opinion that, although she served without bias, the court should have considered what she had to say and replaced her when she unsuccessfully attempted to talk to the judge.

Nor does the court find that this juror had a reason to be biased against Owens or in favor of the prosecution. The court notes that, as will be discussed below: (1) Juror 75 knew and liked Melissa White (White), whom she knew to be a friend of Owens. A conviction would be expected to disappoint White. *See* part V.C.3.a of this Order. (2) Juror 75's son Q was a member of a gang subculture that disdained cooperation with the police or prosecution. Arising from that, she was concerned for her son's safety and also had concern for her own. But these concerns would be exacerbated, not ameliorated, by the juror serving on the jury and voting for conviction. Those concerns would be an inducement to get off the

jury, and failing that, to acquit. *See* part V.C.3.c of this Order. (3) Juror 75 was the only African-American on the jury. Some might infer that this would suggest an affinity with Owens. While it is possible that concerns about racial bias within the legal system might have made her sympathetic to Owens, it must be remembered that the victims were also young African-American men and that Juror 75 was the mother of a son whose age was similar to Vann, Bell, and Marshall-Fields, as well as Owens. Juror 75 could reasonably have been expected to be sympathetic to both Owens and to the victims and their families.

The court also notes that neither side asked Juror 75 any meaningful questions during *voir dire*. *See* Trial Tr. 128-31; 206-07 (Jan. 9, 2007). Experienced trial attorneys such as these often try to ascertain jurors' predispositions by observing them during the questioning of other jurors. The lack of any meaningful questions suggests that, after observing her body language and her reactions to questions asked of others, neither side perceived any bias concern that they deemed worthy of exploring.

2. *Voir dire* and the questionnaire

a. General facts

Before the trial, all jurors were directed to complete a questionnaire. The attorneys prepared the questionnaire. The jurors had nothing to do with either its design or the conditions under which it was to be completed. The questionnaire is single-spaced. It has 35 questions, some with follow-up parts. No question allows more than two lines for an answer. It instructs jurors to print their answers, tells them that time will be saved if they answer completely and accurately, but does not invite comment beyond the provided space, or supply any space for additional explanation. The jurors are directed not to show the questionnaire to anyone or discuss it with other jurors. In assessing whether an answer is dishonest, one must

view the answer in the context of the questionnaire and its limitations on space, ability to explain or amplify answers and its apparent prohibition against obtaining any explanation or clarification. Juror 75's questionnaire is SOPC.EX.D-1052.

After the 35 questions, the questionnaire includes a four page, single spaced, double column list of 316 names of persons "who may have been involved in the investigation of this case, or whose names may be mentioned during the course of the trial" with direction to circle any whom the juror believes that he or she recognizes.

Juror 75 indicated on the questionnaire that she worked two jobs – one in a nursing capacity for disabled adults and the other for a title company. As to the question of whether service would pose a hardship, she answered "Yes/no" and explained, "Just work – single parent – need income." She did not ask to speak to the judge and the attorneys without the other jurors present.

As Juror 75 acknowledged when she testified in 2015 and again in 2016, in hindsight she wishes she had been more careful, taken more time, and possibly taken a broader point of view when answering the questionnaire. It seemed lengthy and she wanted to get it done. When filling in the questionnaire, she did not have in mind certain things that the attorneys drew to her attention years later.

b. Answers on the questionnaire

At issue are her answers to several questions and her failure to circle any names. Her answers were not deliberately false or dishonest, but in hindsight, at least two were not accurate.

The first relevant question asked:

> Question 21. Have you, a member of your family, or a close friend ever been convicted of a crime other than a traffic offense? If yes, please state who, what, when & where.

Answer: No

The questionnaire allowed 1 ½ lines for who, what, when and where.

Juror 75. Twenty-two years before answering the questionnaire, at age 18 or 19, Juror 75 had shoplifted and suffered a municipal conviction. And in 1988 – some 19 years before the trial – Juror 75 had been involved in an altercation with three other young women. Although she believed she was innocent, she was arrested, spent one day in jail, and apparently suffered a municipal or misdemeanor conviction. Between 1991 and the trial in 2007, to this court's knowledge, she was never again in trouble with the law. She did not have in mind her own two rather remote and minor difficulties when answering the question in the context of a murder case.

As to herself, this answer was not accurate. But Juror 75's failure to recall and/or relate her two, remote misdemeanor or ordinance cases was neither deliberate no material and is of no constitutional consequence.

Her son, D. At the time of the trial, Juror 75 had two sons, 21-year-old Q and 17-year-old D. D was a parochial high school student at the time of the trial. His first two years he received an athletic scholarship and in his junior and senior years he was awarded an academic scholarship. Other than one fight in middle school, to this court's knowledge, D was never in any legal trouble prior to the time of trial. When she completed the questionnaire, Juror 75 did not consider D's middle school fight to be a criminal matter, although it did result in a juvenile adjudication and a period of probation.

As to D, her answer was not inaccurate. A misdemeanor level juvenile adjudication is not a criminal conviction. But Juror 75's failure to recall and/or

relate D's middle school fight, even if a juvenile adjudication were a criminal conviction, would not have been material and is of no constitutional consequence.

Her son, Q. Q was fully emancipated well before the 2008 trial. He had joined the Navy in 2003, and was discharged in less than a year. He returned to Aurora, although not to Juror 75's home. He and Juror 75 gradually became more estranged in significant part because she disapproved of his post-Navy choices in lifestyle and friends. She correctly suspected that he was becoming involved in gang activity. Still, for a while after his Navy discharge, he would often visit her and even at the time of the trial, she would visit him to see her two grandchildren. She sometimes provided Q and his girlfriend with groceries and/or modest amounts of money. She neither knew nor wanted to know about the things Q was doing.

Juror 75 was never asked whether her son was getting into trouble with the law,[18] but she knew that he was. On one occasion she bailed him out of jail. And although she did not know it, Q had, in fact, suffered a class six felony check fraud conviction on June 26, 2006.

Although her emancipated son, Q, had suffered a class six felony conviction, Juror 75 was not aware of it. Her answer was not deliberately untruthful as to her son, Q, and was of no constitutional consequence.

Family of origin and ex-husband. Juror 75 was a 40-year-old mother of two when she answered the questions. She considered her family to be her sons

[18] It is regrettable that the Question 21 asked only about convictions with follow-up questions of who, what, when, and where. It might have been more helpful had it invited comments about, for example, being in trouble with the law. Although attempts were made to insulate the jury from any gang overtones surrounding the Lowry Park events, the attorneys would have liked to have known that Juror 75 suspected Q of gang involvement. The attorneys knew, although the jurors did not, that there were gang relationships between many of the people at Lowry Park.

and herself. She did not view the questionnaire's use of the phrase "your family" as referring to ex-husbands, cousins, or other relatives. Two cousins with whom she was never close had been murdered – one while in the Colorado Department of Corrections. An aunt and Juror 75's mother had each spent at least some time in jail, although Juror 75 did not know why. She had briefly married Rodney Griggs and lived with him for about 30 days before seeking a divorce, which was ultimately granted in 2006. She knew that he had once been to prison in California, although she did not know for what crime.

Juror 75 did not view the question as asking about her cousins, aunt, mother, or ex-husband and, although she knew that they had been incarcerated, she did not know what conviction(s) any of them had suffered. Thus, she could not answer the question as it was posed. While information that these people had been in legal trouble might have been useful in evaluating whether to use a peremptory challenge, her answer was not material, deliberately false, or of any constitutional consequence.

The second relevant question asked:

> Question 22. Have you ever been a witness or a party to any court proceeding? When and what type of case?
>
> Answer: No
>
> The questionnaire allowed 1 line for when and what type of case.

Over the years, Juror 75 had encountered financial difficulties. She was sued several times as part of collection efforts. When sued, she did not employ an attorney, defend, or appear in court for the several judgments that were taken against her. She also took bankruptcy at least twice. On two occasions, she employed an attorney and on one signed the bankruptcy petition that identified her

as a party to various collection cases. When answering the questionnaire, she did not view the "court proceeding" question as asking about the debt collection matters that she did not contest or her bankruptcies.

Juror 75's answer was false. She had been a party to civil collection and bankruptcy cases. She did not view the question as asking about such cases. While her answer was not accurate, her failure to relate her history of financial difficulties was not material and is of no constitutional consequence.

The third relevant question asked:

> Question 20. Have you, a member of your family, or a close friend ever been a victim of crime? If yes, please state who, when, where & what.
>
> Answer: No
>
> The questionnaire allowed 1 ½ lines for who, when, where & what.

The juror knew that Q had been shot in the leg at an IHOP restaurant in April 2006. Neither Q nor any of his friends called Juror 75, but a friend of hers had been eating at the restaurant and called to tell her that her son had been shot. After he was shot, she visited Q at the hospital and/or his home. She never sought nor was given information about what really happened at the IHOP. She did not know or want to know who shot Q. Nor did she know or want to know whether it was accidental, criminal, or deliberate. No one was ever charged with a crime in connection with her son's shooting.

Juror 75 did not know whether her son had been a victim of a crime, but she did know that he had been shot. It would have been preferable if (in the allocated 1 ½ lines) she had given an answer such as, "son was shot in leg; do not know if crime." But given the nature of the question, the circumstances and the limitation

on space, the court concludes the answer was not untruthful. It was therefore of no constitutional consequence.

The next series of relevant questions and answers must be considered in context with one another. Those questions include 11, 13, 14, 17, and 33.

> Question 11. Occupation and employer?
>
> Answer: Nurse and Title Company.
>
> The questionnaire allowed about 3/4 of one line for a response.
>
> Question 13: Job responsibilities and duties.
>
> Answer: Care for handicapped adults, process title ins.
>
> The questionnaire allowed about 2/3 of one line for a response. The space was so limited that she had to write "ins" in the margin below "title."
>
> Question 14. Level of education/degrees?
>
> Answer: College.
>
> The questionnaire allowed about 2/3 of one line for a response, and she did not include whether she had earned any degrees.
>
> Question 17. Have you ever had a pleasant or unpleasant experience involving law enforcement? If yes, please describe.
>
> Answer: I was once accused of running a stop sign I did not run.
>
> The questionnaire allowed almost two lines for if yes, please describe.

> Question 33. This trial is scheduled for 4 weeks. Except in extraordinary circumstances jury trials are not heard on Saturdays of Sundays. Is there any reason the time necessary for you to act as a juror on this case would cause a hardship? If yes, please explain.
>
> Answer: Yes/No. Just work, single parent need income.
>
> The questionnaire allowed about 2/3 of one line for an answer, and her answer filled the entire space allowed.

Owens asserted in 2017 that some or all of these answers to the five questions set forth above were untruthful. He asserts, in essence, that these answers suggest that she was claiming to be a governmentally licensed nurse with a college degree. The court is not persuaded. To the court, these answers are not only consistent with, but when taken together, suggest that the juror needed two jobs to support her family. They suggest that she took some college, but did not obtain a degree. They suggest that she would prefer to be excused from the jury because the income from her two jobs was necessary to support her family. Owens was denied a hearing on this claim, but he was authorized to submit any affidavits or documentation suggesting that the juror did not attend college, did not hold two jobs, or did not have a job assisting the handicapped. Nothing has been submitted. Owens failed to prove these answers were untruthful and they are of no constitutional consequence.

c. Failure to circle names

Juror 75 did not circle any of the 316 names. Owens asserts that she should have circled four -- Dickey, Johnson, Rhonda Fields (Fields), and Alan Baxter. As noted below, although she ultimately felt that she recognized Johnson and Dickey (who were past and/or current friends of Q) she did not know their names and could not have circled them. She ultimately recognized Fields as the woman who

had come to her church, but did not know her by name, and could not have circled her name. At the time of the trial, she had never met Alan Baxter, and could not have circled his name.[19] Alan Baxter, an uncle of Marshall-Fields, did not testify in the Lowry Park case, his name never came up in the testimony, and he did not attend the trial.

Because she did not recognize the names Dickey, Johnson, Fields, or Alan Baxter, the juror could not reasonably be expected to have circled those names.

3. The juror's recognition of witnesses and observers

a. Melissa White

Years before the trial, White had dated Juror 75's younger son, D. White had trouble at home and occasionally lived for short times in Juror 75's home. White also became friends with Q's girlfriend. White's relationship with D ended, but she continued to be close to Q and Q's girlfriend at the time of the trial, and often helped with Q's two children – Juror 75's grandchildren. At the time of the trial, Juror 75 liked White and continued to have contact with her at Q's home.

White attended the trial regularly. While testifying in 2015, Juror 75 recalled that at some point during the trial White told her that she, White, was a friend of Owens. On January 23, 2007, when the matter arose in court, White was sitting with Owens's mother. By then, Juror 75 had noticed that White was present at trial much of the time.

[19] She may have seen his name and face on television, however. Question 26: What news programs do you regularly watch or listen to on TV or radio? Answer: 9 6A & 10P. Juror 75 lived in the neighborhood and had seen the Dayton Street homicides crime scene. The day after the murders, 9news ran a news clip on its 10:00 p.m. broadcast that included brief comments by Alan Baxter, whose name appeared on the screen. *See* SOPC.EX.D-3008. But no evidence was developed as to whether she either saw or remembered the news clip.

b. Rhonda Fields

See part V.C.4 of this Order.

c. Q's current or former friends

When Q was in middle and high school, his friends and acquaintances would often come to Juror 75's home. She welcomed them all, allowed them to hang out at her home, and often fed them.

She did not have a close relationship with these boys, and it does not appear that she spent significant time with them, but some referred to her as "mom." She did not know the full names of these youngsters, who referred to one another by nicknames, street names, or first names.

In time, Q and some of his acquaintances drifted apart, but some remained friends and, as time went on, some, including Q, began favoring red clothing – the color symbolic of one of the street gangs. It is likely that this latter group included Dickey and Johnson. While Juror 75 did not know it, subsequent events indicate that Q, Dickey, and Johnson became associated with Bloods street gangs and remained friends, although possibly not as close as when they were younger.

Juror 75 did not know these things at the time of the trial, but when in prison many years later, Q said that:

- People involved in the trial – including Vann, Dickey, and Johnson – were among the boys who had been to his home as youngsters;[20] and
- while he did not witness the shootings, he, Q, had been at Lowry Park when Vann was killed; but
- he did not convey any of this information to Juror 75 at or before the time of the trial.

[20] When he testified in Owens's 32.2 hearing in the Dayton Street case, Johnson could not recall ever being in Juror 75's home as a youngster.

As the trial proceeded, Juror 75 realized that she recognized faces of some people in the courtroom. At the time of the trial, Juror 75 had no relationship with any of these young men. She had never had a close or significant relationship with any of them, and she did not recognize any of their true names.

Years later she testified that it also seemed to her that one or two witnesses looked at her specifically, and she thinks that at least one person – probably a witness – mouthed, "Hi, mom" to her. Years later she also testified that some of the nicknames also seemed familiar – particularly J-something[21] and Showtime.[22]

One evening during the trial, Juror 75 went to Q's apartment to see her grandchildren. Dickey[23] was there and said he had seen her in court. She acknowledged that, but had no conversation with him and he left immediately. Q and Juror 75 then had a conversation in which Q told her that she should get off the jury. Q told her that if she needed to get off the jury if she had been seeing his friends in the courtroom. She told him that she had tried, but was told by the court that she was to stay on the jury. She had a concern for Q's safety and to some degree her own because of familiar faces in the courtroom and her son's suspected

[21] Johnson, whose street name was J-5, testified on January 17, 2007.

[22] J. Martin had the nickname Showtime. He did not testify at trial.

[23] On October 18, 2016, the parties stipulated that Dickey was the person she encountered. When she testified in 2015 and 2016, Juror 75 believed that he said, "I saw you in court *today*." But it seems unlikely that the encounter occurred on the day that Dickey testified. Dickey testified on Friday, January 19, 2007. Juror 75 had only one relevant series of conversations with the bailiff. They occurred on the following Tuesday, January 23, 2007. Both Juror 75 and Q testified that the brief encounter with Dickey occurred on the same evening that Q confronted Juror 75 about getting off the jury. Juror 75's memory that her conversation with Q occurred after the exchanges with the bailiff is particularly clear, credible, and in conformity with Q's testimony. Thus, this court concludes that the brief encounter occurred on or after January 23, 2007. When Dickey later testified, he indicated that he had recognized Juror 75 in court, but never spoke to her.

gang involvement. Juror 75 did not know Owens or any member of his family; she did not have any fear of them; and she did not feel that she had reason to fear them.

Years later, when interviewed by both parties and/or testifying in court, Juror 75 indicated that she thought she had recognized the faces of at least three and probably four witnesses and possibly other people in the gallery. One witness was Fields. Two were men – Dickey and Johnson. The other was a heavy-set woman. That description did not help the prosecution or post-conviction counsel identify any witness so it seems unlikely that she could have offered significant testimony.

Johnson was an important witness for both parties. He identified Owens as the man who shot Vann and gave significant evidence supporting the defense. *See* part III.K.2 of this Order.

Dickey was considerably less important. He testified that he and Vann were very close friends. He had assisted in breaking up an earlier argument between Marshall-Fields and Ray. Shortly before the shooting, he noticed a commotion and saw Vann running toward it. He started to run that way too, intending to join with Vann if a fight ensued. He witnessed the shooting from the parking lot, possibly one hundred feet away. He testified,

> Q A hundred feet?
>
> A Something like that. I don't know, I was not – I don't know. I was far.

Trial Tr. 56:22-24 (Jan. 19, 2007). Dickey later continued,

> As soon as Greg [Vann] got over towards where the fight was taking place, I don't know, he put his hands out, I don't know if it was to throw a punch or to break it up. You know, he was running so fast, I really couldn't catch on to what was going on because I was on my way

> headed over there. I was headed over there. I couldn't exactly see what happened and shots started to be fired.

Id. at 57:12-18. He testified that he thought Ray shot Vann, but was not certain.

> Q Okay. With what degree of certainty have you said that you believed it was Robert [Ray] who shot Greg? Are you certain of that is my question.
>
> A I'm not certain of anything. I wasn't right there when it happened, so I can't be certain that this man right here shot him or Robert shot him or who shot him because I wasn't exactly right there when it happened. I was several – I was a little distance away and it was a little dark outside. It wasn't pitch black, but it was, I don't know –

Id. at 68:10-18. Dickey then acknowledged that he had earlier told the police that Ray shot Vann and had not mentioned Owens as a possible shooter. *Id.* at 88:13-25; 89:1-4.

When she testified in 2015, more than eight years after the trial, Juror 75 was shown photographs of Johnson and Dickey. She was not certain, but under the totality of the circumstances it seems clear that she recognized both men. She selected Johnson as the person she had seen in court and in Q's apartment. But Johnson was in the witness protection program at the time of the trial. He was escorted from the airport to court and back to the airport. He could not have gone to Q's apartment. The parties have stipulated that she encountered Dickey at Q's apartment.[24]

[24] Dickey, when testifying years later, did not recall encountering Juror 75 at Q's apartment.

On January 23, 2007, Juror 75 told the bailiff that she knew people in the courtroom.[25] The bailiff then reported to the judge, who told the bailiff to get a name. When asked for a name, Juror 75 specifically mentioned Melissa White – the only person whom she knew by name. The bailiff reported back to the judge. When contacted years later, the bailiff could not recall what Juror 75 told her or what she told the judge.[26] In 2015, when testifying about her memory of this situation, Juror 75 said the following:

> THE COURT: I am lost. I'm sorry. Are there two conversations with the bailiff? Can you clarify for me?
>
> THE WITNESS: I had one conversation with the bailiff about a person that was sitting in the courtroom and she was Melissa White.
>
> Q (By Mr. Castle) So during that conversation with the bailiff, you didn't tell them that you also knew witnesses or that a witness had been to your son's apartment?
>
> A Nope, I didn't say anything about witnesses. I just said I knew Melissa White's name and I knew other faces that were out there, not that they were a witness.
>
> Q So to be clear when you said you told the Judge, did you have a personal –
>
> A I told the bailiff and the bailiff told the Judge and the Judge told the bailiff and the bailiff came back and told me what the Judge said.

[25] When she testified in 2015, Juror 75 was sure that she told the bailiff that she recognized several people – plural. When she testified again in 2016 she only remembered telling the bailiff about White. The 2015 version was more detailed and appears to be more accurate. Her intention was to explain the entire situation to the judge, but she was never given the opportunity and was told that she would remain on the jury.

[26] Two possible bailiffs were identified. They, too, were contacted some eight years after the trial. Neither could recall anything about the events.

> Q So you didn't have any personal conversations with the Judge?
>
> A No, I did not.

06CR705 Hrg Tr. 40:14-25; 41:1-8 (Mar. 26, 2015)

From the trial record, it appears that the trial judge may have erroneously inferred from the bailiff's reports that Juror 75 recognized only one person – White. The trial record shows the following:

> THE COURT: The record should reflect that all parties are present. One of the jurors, the juror in Seat 16, indicated she recognized an individual who came into the courtroom and I did have the bailiff inquire as to who that person is. I believe Ms. White and she's certainly welcome to be here. I was concerned, of course, if she's a witness that there would be a potential problem, but at this point I believe she is here as an observer and as long as I don't see any contact while the jury is in the courtroom between Ms. White and the defense side of the room, I don't think there will be a problem either. My courtroom is open to anybody who is watching proceedings.
>
> MR. HOWER: Judge, I don't know who Ms. White is. We have a first name with that?
>
> THE COURT: Do we have a first name with that? No.
>
> MR. HOWER: May I get a first name with that?
>
> MS. WHITE: Oh, my name. Melissa.
>
> THE COURT: Melissa White.
>
> MR. HOWER: Not a witness to my knowledge.

> THE COURT: I don't believe she's a witness for either side and she's certainly welcome to stay and watch [the] proceedings. I just need to make sure there isn't any sort of contact between really either side and Ms. White when the jurors are present. During breaks it's fine. Whatever will be permitted.
>
> MS. WARREN: Judge, can you tell us who Juror 16 was because they've all moved around.
>
> THE COURT: That's [Juror 75].
>
> MS. WARREN: Okay.
>
> THE COURT: All right. With that particular record made from the court, is there anything for the People at this point before the jury comes back in?
>
> MR. HOWER: No, Your Honor.
>
> THE COURT: Anything for the defense?
>
> MR. KING: No. Thank you.

Trial Tr. 56:24-25; 57:1-25: 58:1-9 (Jan. 23, 2007). The prosecution later reconsidered and asked that Juror 75 be questioned *in camera* about the situation. The defense indicated that they did not join in, but did not object to the request. The judge denied the request. The trial record reflects the following:

> MR. HOWER: The situation with [Juror 75], indicating that she knew Ms. White kind of was -- caught us off guard a little bit.
>
> Inasmuch as Ms. White I believe is sitting with Mr. Owens' mother, I don't -- I think it might be wise to inquire if [Juror 75] does know Mr. Owens family at all, does she -- the nature of her relationship with Ms. White. I think it can be done very neutrally by the court, you know, outside the presence of the rest of the jury, but, I mean, clearly Ms. White is sitting next to the defendant's

mother and I think that we just need to make a little further inquiry as to whether [Juror 75] thinks that's at all going to affect her.

THE COURT: I can't recall in the course of this trial that Mr. Owens' mother has been identified as being present in the courtroom, where she is, what she looks like, and how can I then arrive at the conclusion that a juror because of her knowledge of the visitor to the courtroom and because of where she's sitting would take some sort of negative inference or impermissible inference from that.

MR. HOWER: I don't, I mean, I agree with you, I don't believe she has been identified, but if -- if we just perhaps, you know, the nature of the relationship, her knowledge of Ms. White, and whether or not anything related to that would cause any difficulty for her being fair and impartial. My guess is it won't, but I think we ought to know a little bit more about that.

THE COURT: All right. What does the defense think about that?

MR. KING: Judge, I'm not requesting that, but I don't -- I don't have an objection to it.

THE COURT: All right. Well, this is an open courtroom and I actually expand the usual admonition to the jury at recesses, especially at the evening recess to include not only the parties present in the courtroom and any witnesses, but anybody that the jury may see in the courtroom, including any possible observers to the trial, and that they should avoid having contact or discussing the case with those individuals and absent some sort of showing that there is some difficulty other than just simply knowing an individual when they come into the courtroom, I am not going to subject a juror to examination on that particular issue.

> It's an open courtroom and I certainly don't want to do anything as well to quell or in any way chill any individual's right to come into the open courtroom and watch proceedings and absent some sort of information establishing that just based upon where an individual is seated in the courtroom and who they may be seated next to that I should therefore draw the conclusion that the juror would receive information in an inappropriate fashion I hesitate to inquire.
>
> So the juror was aware enough to bring the situation to our attention and I will simply defer to that juror to continue to adhere to my admonitions and instructions and restrictions and absent some sort of indication that that is not being done, I'm not going to inquire.
>
> So I'll decline the People's request.

Id. at 99:18-25; 100:1-25; 101:1-22.

The judge had apparently instructed the bailiff to tell Juror 75 that she was to continue to serve on the jury. The court made no further inquiry or any further record about whom Juror 75 might have recognized or why she was concerned. She did not raise the matter again with the court. She continued to serve, deliberated, and was part of the jury that returned the verdict.

According to Juror 75, a fellow juror asked her what she had talked to the bailiff about. She told her fellow juror that she knew some people but was told by the bailiff that it was okay. There was no further discussion. Nothing about whom she knew or how she knew them – and nothing else was said to any fellow juror until after the verdict.

After the jury returned its verdict, the jurors were sent back to the jury room so that the judge could thank and debrief them. After the judge left the jury room, Juror 75 told a fellow juror about recognizing one or more people in the courtroom and they drew the foreperson into the conversation. The memories of the jurors

were not totally consistent. One thought Juror 75 knew a member of the defendant's family. The foreperson thought "[i]t was almost Kevin Bacon-ish, six layers of separation type of situation" – that she knew someone who knew someone. 06CR705 Hrg Tr. 20:3-4 (May 13, 2015). The foreperson asked her if the judge was aware of the situation and Juror 75 told the foreperson that she had told the bailiff, who contacted the judge, and they said there was not a problem.

The trial judge had given instructions relating to the possibility that jurors might recognize witnesses. On January 9, 2007, before evidence began, the judge had instructed the jury this way:

> Also it is important to keep in mind about the potential witnesses in this case. You received a four page list of potential witnesses. I asked the parties to be over-inclusive, included practically any name that may have even floated through the county during the period of time within which the case was being investigated, and many of you didn't register any sort of acknowledgment of information on those particular names, but a person may walk into the court being called as a witness and suddenly you realize that you recognize this individual from some sort of setting outside of the courtroom, if you would please, again, recognize how important it would be for you to inform us of your knowledge in regards to that particular individual so there are a number of times where I would ask that you please let us know if there's a problem or concern so that we can take steps.

Trial Tr. 65:19-25; 66:1-8 (Jan. 9, 2007) (emphasis added). We trial judges are not always as clear as we would like to be. When they recognize witnesses, trial judges usually want jurors to speak up (1) promptly, (2) regardless of whether it creates a problem or concern, and (3) without waiting to be asked. But the trial court's direction was not completely clear. It suggests that the court would expect the juror to speak up if a juror recognized a witness and it caused a problem or

concern, but a juror might not feel an urgency to volunteer, expecting the judge to raise the subject a number of times during the case.

The trial court revisited his admonition at the end of the trial day on at least two occasions, but the instruction was not much clearer. On January 19, 2007, the day that Dickey testified, the trial court said,

> [W]atch the conversations around you and don't discuss the case with any other persons [sic]. Certainly watch your contact with anybody that you may have seen here in the courtroom and don't discuss the case with them. Warn people off if they appear to be discussing the case in your presence and let me know if there's any problem in these areas at all.

Trial Tr. 263:6-12 (Jan. 19, 2007). The admonition is subject to the inference that one should (1) watch her contact with anybody that she saw in the courtroom, (2) warn people not to discuss the case in her presence, and (3) bring the matter to the court's attention if there's any problem in these areas.

Juror 75 was watchful of her contacts with Dickey (the witness she saw in Q's apartment) and White (Owens's friend who observed the trial). She did not permit them, her son, or anyone else to discuss the case with her, and she attempted to bring her recognition of people in the courtroom to the attention of the court when she thought that there was a problem.

This court finds that, as the trial was progressing, Juror 75 found faces to be familiar although, other than White, she could not immediately place them. As the trial proceeded, she came to realize that they were former or current friends of her son. She attempted to bring the matter to the attention of the judge, but was denied the opportunity to talk to him and was directed to remain on the jury.

In hindsight, it would certainly have been preferable if the trial court had spoken to Juror 75 as she, and later the prosecution, requested. This court finds

that, had the trial court spoken to her, it is probable that the court and attorneys would have learned that (1) she knew and recognized White who was a friend of her son, (2) White had told her that she was a friend of Owens, (3) she recognized witnesses but did not know any of them, had no relationship with them, and had not formed an opinion about their credibility, (4) she thought some recognized her, (5) because of her son's suspected gang involvement and suspecting that witnesses or gallery observers might be associated with that lifestyle, she had a concern for her son's welfare and her own, (6) she would prefer to be replaced, (7) but if told to remain on the jury, she could serve without bias[27] toward or against either party.

This court finds that Juror 75 made a reasonable, good faith effort to bring to the attention of the court her recognition of White and others in the courtroom. These matters did not come to the attention of the court and attorneys because the court chose not to conduct the *in camera* interview that had been requested by the juror and, later, the prosecution.

The issue before this court is whether juror 75's service deprived Owens of his constitutional right to trial by an impartial jury, not whether the trial court should have acceded to the juror's and/or prosecutor's request and interviewed her. The court's decision not to interview the juror deprived the court and the parties of information that would have been useful in deciding whether to replace Juror 75 with an alternate juror.[28]

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[27] This is based on the court's assessment of the juror at the 2016 and 2017 hearings, and in part, upon her 2015 testimony. Owens objects to the court considering her testimony that she served without bias and, as discussed in part V.B.3.a of this Order, the court recognizes the difficulty of distinguishing between admissible bias testimony and inadmissible CRE 606(b) testimony when the question first arises after the verdict.

[28] This court is unable to make a finding as to whether the juror would have been replaced by an alternate if the trial court had interviewed the juror. The court might have, but would not have been required to factored into its decision the fact that Juror 75 was the only African-American

This is not a case in which the court denied a defendant's request that a juror be interviewed. While not objecting to the prosecution's request, Owens's trial counsel made it clear that he was not requesting that the juror be interviewed.

Juror 75 recognized witnesses, but did not know their names and did not have a relationship with any of them. Two were people whom she felt had been, and might still be, friends of her son from whom she was partially estranged. She recognized Fields as a woman who had spoken to the congregation of her church, but she did not know Fields's name and had no relationship with her.

She had a relationship with White and knew that White was a friend of Owens, but White was not a witness.

Owens has not shown that he was deprived of a fair trial due to Juror 75's recognition of witnesses and courtroom observers, nor due to her concern for her son's safety and her own.

3. Relationship with Marshall-Fields's Uncles

In 2017, the court granted Owens leave to re-open the Crim. P. 35(c) evidentiary hearing. Owens asked leave to explore whether, at the time of the trial, Juror 75 had a relationship with members of Marshall-Fields's extended family that might have affected her ability to serve without bias. Owens's counsel had reviewed Juror 75's Facebook account and discovered photos of a 2015 Las Vegas trip. In the photos, Juror 75 and her then husband, James Manuel (Manuel), were posing with Marshall-Fields's uncles, Alan "Chipper" Baxter (Chipper) and

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juror on a case in which the defendant, all victims, and nearly all non-police and non-expert witnesses were African-American. There would be no need for a *Batson* inquiry. *See Batson v. Kentucky*, 476 U.S. 79 (1986). Although also not required to do so, trial judges often take into consideration a juror's sincere desire to be replaced. Had both parties requested her replacement, it seems likely that the judge would have replaced Juror 75 with an alternate. Had one party requested her replacement and the other party objected, it would have been within the trial court's discretion to either grant or deny the request.

Michael Baxter (Michael), and their wives. Owens's counsel interviewed Michael on January 29, 2017 and he initially told her that he had known Juror 75 and two of her cousins for over 20 years. When counsel and her investigator returned the next day and asked Michael to review and initial the investigative report of the interview, he corrected himself. He told them that he had known members of the extended Ealy family and particularly two of Juror 75's male cousins for more than 20 years, but did not meet Juror 75 until years after the Lowry Park trial. Owens's counsel also suspected that, because Chipper, Michael, and Juror 75 had all attended George Washington High School, they might have been high school friends.

Chipper, Michael, and Juror 75 testified in April of 2017. The court finds as follows: Chipper and Michael were two of their mother's ten children, along with their half-brother, Marshall-Fields's father. Marshall-Fields's father was incarcerated and Chipper and Michael acted as father figures for Marshall-Fields. Chipper was a mechanic and Marshall-Fields would regularly go to Chipper's home, often for assistance with cars. Marshall-Fields was threatened on the night before he was murdered on Dayton Street, and went to Chipper's house to seek the counsel of Chipper and Michael.

Juror 75's maiden name was Ealy. Her cousins, Michael and Tim Ealy, played sports with the Baxter brothers when they were young.

As Juror 75, Michael, and Chipper each credibly testified, Juror 75 did not know either Chipper or Michael until well after the Lowry Park trial. They met because her now husband, James Manual, had been a friend of Michael and Chipper for years, and he introduced her to them. The Baxter brothers did not know that she had served on the Lowry Park jury until the beginning of 2017, and

she did not she realize until recently that they were uncles of one of the young men who had been shot at Lowry Park.

The Baxter brothers were never in the same school at the same time as Juror 75 and never lived particularly close to her. Juror 75 graduated from George Washington High School in 1984, but did not attend the school before transferring in during her senior year. Chipper attended George Washington High School and would have graduated in about 1983, but he stopped attending in his sophomore year and obtained his GED. Michael is 13 months older than Chipper and graduated from George Washington High School in 1982.

The Baxters grew up in a home near 29th and Pontiac. Juror 75's family of origin moved frequently. The closest they ever lived to the Baxter home was 26th and Holly, which is several blocks away. Those homes, while both in Park Hill, are separated by, among more than a dozen other streets, Monaco Parkway.

Juror 75's maiden name was Ealy. Her cousins, Michael and Tim, played sports with the Baxter brothers when they were younger. Either before or shortly after the trial, Juror 75 began a relationship with James Manuel, to whom she is now married.[29] Their relationship developed romantically, and well after the trial, he introduced her to his friends, Michael and Chipper. Manuel, Juror 75, the Baxter men, and the Baxters' wives went on a vacation to the mountains together in 2014, and in 2015, they met in Las Vegas to celebrate Chipper's 50th birthday. They all testified that Juror 75 and the Baxter men first met well after the Lowry

[29] Juror 75 testified that she did not meet Manuel until after the trial. But, while her son D has never testified, in an interview with a defense investigator he gave an account of the timing of issues he had with Manuel that resulted in his moving from his mother's home. D's account to the investigator suggests that the relationship between Juror 75 and Manuel may very well have begun before the Lowry Park trial. The court makes no finding as to when Juror 75 and Manuel first met or began dating. The factual issue that may be of consequence is when her relationship with the Baxter brothers began, not when her relationship with Manuel began.

Park trial, but their estimates of the particular year in which they met were not consistent. The evidence overwhelmingly demonstrates, and the court finds, that Juror 75 did not know either Michael or Chipper until well after her jury service had concluded. Indeed, there is no evidence other than Michael's initial statement to defense counsel on January 29, 2017 that suggests that Juror 75 knew either of the Baxter brothers before or during the trial.

A verdict cannot be impeached based upon knowledge obtained by a juror after returning her verdict. *People v. Thornton*, 712 P.2d 1095, 1099 (Colo. App. 1985), *rev'd on other grounds, Thornton v. People*, 716 P.2d 1115 (Colo. 1986) (mem.). Juror 75 did not meet either Chipper or Michael until years after her jury service in 2007. Since she did not know them, nor know that they were related to Marshall-Fields until well after her jury service, her subsequent friendship with them is of no constitutional consequence.

4. Connection with the Dayton Street homicides and extraneous information

The jurors were never given any information about or asked whether they knew anything about the Dayton Street homicides. Juror 75 had some knowledge about the Dayton Street murders, but there is no evidence that any juror, including Juror 75, shared any information about Dayton Street matters with other jurors. Nor does the evidence show that any juror, including Juror 75, considered any information about the Dayton Street murders in reaching their decision. But there is conflicting evidence concerning whether, in her own mind, Juror 75 started to see a possible connection between the cases only after the Lowry Park verdict had been delivered (as she testified) or during the trial (as investigators' reports of interviews with Juror 75 suggest).

Juror 75 lived within a block of the Dayton Street homicides scene. She had seen the police tape and the victims' car during the investigation. Fields, Marshall-Fields's mother, had come to Juror 75's church. Juror 75's recollection was that Fields asked the congregation for assistance in finding those responsible for her son's murder. As Fields testified in 2017, she did not live in the neighborhood nor attend Juror 75's church, but she knew the pastor and believes she probably went to the church to give testimony – to tell the congregation about her experience with her son's murder and how it affected her spiritually. Juror 75 also saw the mothers of the two Dayton Street victims make an appeal on TV. Juror 75 believed that she had also seen Fields in Juror 75's neighborhood, but did not know her and did not recognize her name on the questionnaire list.

A poster was mounted on a bus bench in Juror 75's neighborhood seeking community assistance in finding those responsible for the Dayton Street murders. It bore a picture of Marshall-Fields and Wolfe. Although she did not use the bus, Juror 75 saw the poster on the bench.

Fields testified in the Lowry Park trial. Ray had shot her son, Marshall-Fields, at Lowry Park.[30] Although the jurors were told that Marshall-Fields had passed away, they were not told anything about how he died.

When testifying years later, Juror 75 recalled that she connected the cases because either the judge or a member of the court staff came to the jury room after the verdict and told them things that helped them make the connection. Juror Barbara Kloster (Kloster) confirmed that the judge came to the jury room and told the jurors that Owens would have another trial. Kloster also recalled that while the

[30] Owens was convicted as a complicitor of the attempted murder of Marshall-Fields.

jury wondered how Marshall-Fields had passed away none of the jurors talked about it until after the verdict was returned.[31]

"[A]ny information that is not properly received into evidence or included in the court's instructions is extraneous to the case and improper for juror consideration." *Harlan*, 109 P.3d at 624. In extraneous information cases, the defense must first show, by a preponderance of the evidence, that extraneous information was introduced into the jury deliberation process. If so, the court asks, "whether there is a reasonable possibility that extraneous information or influence affected the verdict." *Wiser v. People*, 732 P.2d 1139, 1142 (Colo. 1987). This court is not aware of any authority expanding *Wiser*'s "reasonable possibility" standard beyond extraneous information and juror coercion cases. *See People v. Rudnick*, 878 P.2d 16, 21 (Colo. App. 1993) (applying reasonable possibility standard to case of juror threats and coercion).

In determining whether Owens has proven a constitutional deprivation under this section, the court must consider, first, whether Juror 75 possessed extraneous information; second whether she shared any such information with any other juror and third whether there is a reasonable possibility that such extraneous information influenced or affected the verdict.

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[31] Juror Kloster was interviewed by a defense investigator who reported: "BK stated that the jury wondered how [Marshall-Fields] had passed away and told me that they only heard about this after the verdict. She stated that none of the jurors talked about or seemed to know about the shooting of [Marshall-Fields]. She stated that after the verdict the Judge told them that Mario was going to have another trial. She stated that after the verdict one of the jurors shared that she knew about the shooting and that she knew [Owens's] family. She told the jurors that she was afraid for her safety because she knew about the people Mario was with. BK stated that this juror told them that she had privately met with the judge to share her concerns but that she was told not to discuss this with the other jurors until after the trial." SOPC.EX.D-1310. It must be acknowledged, however, that parts of the Kloster interview are not consistent with the facts. For example, Juror 75 did not know Owens's family and did not meet privately with the judge.

Any arguable extrinsic evidence that Juror 75 possessed consisted of the following:

On the night of the Lowry Park shootings, her son Q probably told her that a shooting occurred at the park. He told her nothing else about it. She may or may not have recalled this during the trial, but, obviously, all jurors knew that the Lowry Park shootings had occurred long before they deliberated.

She would have realized that one of the witnesses, Dickey, was a friend of Q, because she encountered him in Q's apartment. Dickey was not a particularly important witness, she did not discuss the case with him and nothing suggests that this information was communicated to other jurors or that it influenced Juror 75's verdict.

She knew that murders had occurred on Dayton Street. She saw the crime-taped murder scene, saw a poster on a bus stop bench, heard Fields's testimony at Juror 75's church, and saw something about the murders on the TV news. No evidence suggests that she shared any of her limited knowledge with any other juror until after the verdict.

She did not conceal her knowledge about Dayton Street. The Lowry Park lawyers made a deliberate decision not to ask what jurors knew about the Dayton Street murders. Juror 75's limited knowledge could only be significant if she first inferred that Marshall-Fields was one of the Dayton Street victims, then inferred that Owens was involved in the Dayton Street murders and then allowed her inferences to influence her verdict against him in the Lowry Park trial. This court finds that Juror 75 did not connect Owens to the Dayton Street murders until after the Lowry Park verdict was decided. In making this finding, the court has considered more than the just the affect, demeanor, and testimony of the juror. She appeared to this court to be honest in answering questions and never gave an

indication of a bias or prejudice for or against either side. Until ultimately becoming quite frustrated,[32] she cooperated with both sides in their post-trial investigations. She appeared to appreciate the gravity and importance of giving honest answers in court.

The court has also considered Juror 75's circumstances at the time of these events. For most of us, shootings and other violent acts do not occur regularly in our community. For most of us, a parent sharing the impact of their son's murder with churchgoers or asking for help in identifying those who killed the parent's son would be extraordinary. But then most of us do not live in a community where there is, at least among many teenagers and young adults, a pervasive culture of non-cooperation with the authorities. While Juror 75 did not feel that she lived in a bad neighborhood, she was living in a time and place where gang conflicts and

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[32] Before 2017, each side had interviewed her at least twice and she had testified twice in post-trial proceedings. Jurors are not obliged to submit to post-trial interviews. After the verdict was returned the jury in this case was instructed,

> You have a right to obviously talk with anybody you would like about this case. You also have the right to control the nature of any discussion that is held.
>
> In other words, if you agree to talk to somebody about this case, you may cut that conversation off at any time.
>
> I would indicate to you that if anyone should persist in trying to discuss this case with you over your objection or if they should try to persist in discussing this case after you have told them you no longer wish to talk with them, you need to inform me of that immediately. That simply is not permitted and any contact by anybody with you about this case needs to be on your terms, so you don't have to talk with anybody. If you do talk with someone, it can be for as short or as long as you would like.

Trial Tr. 23:21-25; 24:1-10 (Jan. 30, 2007). By 2017, it was clear, from both the examinations in court and the media coverage, that the juror was being accused of improper conduct and she was no longer interested in cooperating with either side. Outside a Denver courtroom where she appeared for a divorce hearing, she refused to accept a subpoena *duces tecum*, which ultimately resulted in the issuance of a contempt citation and arrest warrant. While it does not appear to this court that the attorneys on either side acted improperly or unprofessionally, the court appreciates the juror's frustration.

shootings were common and where there was, at least among the young, such a culture of non-cooperation. While Juror 75's perception that, "on the news there was people getting shot all the time, every day"[33] may be exaggerated, this court's review of the post-trial evidence in this case has included, in addition to the Lowry Park shootings, mention of (1) a drive-by shooting while Q and his girlfriend were in his girlfriend's car, (2) a shooting at a Waffle House, (3) a shooting at an IHOP, (4) a shooting at the Cherry Street Bar and Grill, (5) another shooting in Lowry Park, and (6) the Dayton Street homicides. In passing, some of the witnesses indicated that they were involved in or observed many more local shootings. Juror 75's perception that people were being shot "all the time" was not inconsistent with the reality that she perceived. The context makes it much easier to understand why Juror 75 did not readily relate the Lowry Park case to the Dayton Street murders, or connect Owens to the Dayton Street murders until she and the other jurors were debriefed after their verdict and told that Owens would be facing another trial.

The court recognizes that there is conflicting evidence on whether Juror 75 connected the Lowry Park case to the Dayton Street shootings before or after the verdict.[34] But no evidence suggests that she connected Owens to the Dayton Street murders until the trial judge told the jurors that Owens would be facing another trial.

As importantly, however, this court finds that any knowledge that Juror 75 may have had about the Dayton Street murders played no part in either hers or any

[33] Hrg Tr. 26:22-23 (Oct. 14, 2016).

[34] This court finds her testimony that she did not connect the Lowry Park case to the Dayton Street murders until after the verdict to be credible, but realizes that there are portions of the notes of investigators' interviews which indicate that Juror 75 made this connection during the trial. *See, e.g.*, SOPC.EX.D-2141; SOPC.EX.D-2143.

other juror's consideration of the case. Even if it were true that, before the jury reached its verdict, Juror 75 had privately come to the realization that Marshall-Fields must have been one of the Dayton Street victims, she did not have information directly connecting Owens to the Dayton Street murders. Owens's trial team made the conscious and tactically sound decision not to ask what jurors knew about the Dayton Street murders. Neither the trial attorneys nor the trial court conducted any inquiry about Dayton Street. By making this sound, tactical judgment, they assumed some risk that one or more jurors might possess information of which the court and counsel would not become aware. Owens has not proven that a reasonable possibility exists that Juror 75's limited information was improperly used by Juror 75 in her own deliberation and has not presented any proof that she shared any such information with any other juror.

D. Conclusion as to Juror 75's Service

1. Under Colorado law, Owens is not entitled to relief. Juror 75 was not deliberately dishonest and Owens has not shown by a preponderance of the evidence that he was prejudiced.

2. Under the federal *McDonough* standard, Owens is not entitled to relief. He has failed to prove by a preponderance of the evidence that under the totality of the circumstances Juror 75 lacked the capacity and the will to decide the case based on the evidence.[35]

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[35] While the court made its determination on the totality of the evidence, it has also considered *Sampson*'s non-exclusive compendium of factors that are relevant in deciding if a juror was biased after she deliberately misrepresented material information during *voir dire*. This case does not involve deliberate misrepresentation, but those factors can still be instructive and the court has considered them.

The juror's interpersonal relationships.

Juror 75 recognized witnesses, but did not know their names and did not have a significant relationship with any of them. Dickey and Johnson were people whom she felt had been, and might still be, friends of a son from whom she was partially estranged. She recognized Fields as

3. Under the common law doctrine of implied bias, Owens is not entitled to relief. He has failed to prove that this is one of those extreme and exceptional cases to which the doctrine applies. This court has found no implied bias case involving facts similar to this case. In this court's view, none of Juror 75's questionnaire answers are of constitutional significance, nor are any of her alleged connections to either the Lowry Park facts, the Dayton Street facts, or the people connected with them. The issue would seem to be whether the cumulative effect rises to such a level that a new trial is

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a woman who had spoken at Juror 75's church, but she did not know Fields's name and had no relationship with her. She had a relationship with White and knew that White was a friend of Owens, but White was not a witness. She had no relationship with either of the Baxter brothers at the time of the trial.

The juror's ability to separate her emotions from her duties.

While Juror 75 was concerned for her son and herself, there is little, if any, evidence that she ever either acted emotionally or allowed emotion to affect her judgment. What little there is suggests that she did not. Both Q's and her accounts of the exchange at his home suggest that, while disappointed that the judge had not excused her, she steeled herself to do her duty. And both of the bailiff's lack of any memory of their exchanges with Juror 75 and the bailiff's failure to report any emotional concerns to the judge seem more consistent with an unemotional than an emotional effect on Juror 75's part.

The similarity between the juror's experiences and important facts presented at trial.

Juror 75's son had once been shot and the Lowry Park victims were young men of a similar age.

The scope and severity of the juror's dishonesty.

Juror 75 was not deliberately dishonest. Her inaccurate answers consisted of her failure to mention the civil collection cases to which she had been a party, and the two municipal or misdemeanor convictions which she had suffered 19 to 22 years earlier. (She did not know about her son Q's 2006 fraud by check conviction, and one cannot provide information of which she is unaware.)

The juror's motive for lying.

Juror 75 did not lie. She did not have her old shoplifting and municipal or misdemeanor assault convictions in mind when completing a questionnaire concerning a murder case, and did not think that the "party" question was asking about civil collection cases.

justified without regard to the juror's testimony, which this court finds to be credible, that she served without bias.[36]

4. Because Juror 75 did not met the Baxter brothers until after her jury service was concluded, and she did not know that they were related to Marshall-Fields until many years after that, her friendship with them could not have influenced and did not have any influence on her jury service.

5. There is no reasonable possibility that extraneous information or influence affected the jury verdict. This court finds that Owens has failed to prove that any extraneous information was introduced into the jury deliberation process and has failed to prove that Juror 75's verdict was influenced by extraneous information. She had seen the Dayton Street murder scene, heard a news segment, seen a bus stop flyer about the murders, and heard Fields speak in her church. But there is no evidence that she ever mentioned anything about the Dayton Street murders to her fellow jurors. This court finds, by a preponderance of the evidence, that she did not, herself, connect the

[36] Juror 75 testified that she served without bias and this court found her credible. When reviewing for implied bias, an appellate court performs a *de novo* review. That court could, if it deemed it appropriate, disregard or totally discount the testimony of the juror as to her lack of bias. The appellate court might wish to consider, *inter alia*, the following: (1) While Juror 75 did not have a personal relationship with any witness, she recognized the faces of at least three. (2) Sometime after the Lowry Park shootings, Q told Juror 75 that there had been a shooting at Lowry Park. Knowing that many in their late teens and early twenties attended the event, and that Q did not tell her about the things he was involved in, she specifically looked for Q when the Lowry Park video was shown in court. (3) After she encountered Dickey at Q's apartment, Q told her that his homeboys were testifying and that if she had been seeing his friends testify, she needed to get herself excused from juror service. (4) Juror 75 was concerned for her son's safety and her own because she recognized faces of people whom she suspected might have gang involvement. (5) She attempted to bring her recognition of faces to the attention of the court.

Dayton Street murders to the Lowry Park case and she did not connect Owens to the Dayton Street murders until the judge addressed the jurors in the jury room after the verdict had been returned.

VI. Claims of Prosecutorial Misconduct

A. Parties' Positions

Owens argues the prosecution failed to disclose various pieces of materially favorable evidence, which, had it been disclosed, would have altered the outcome of the trial. The prosecution disputes the materiality of all of the undisclosed evidence.

B. Principles of Law

"The prosecution's affirmative duty to disclose evidence favorable to a defendant . . . is . . . most prominently associated with [the United States Supreme] Court's decision in *Brady v. Maryland*." *Kyles v. Whitley*, 514 U.S. 419, 432 (1995).[37] However, *Brady* did not create a general constitutional right to discovery in a criminal case. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). The oft-cited *Brady* holding "that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution" continues to guide courts in determining whether the government's failure to disclose evidence is a due process violation entitling the defendant to relief. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). As the United States Supreme Court reiterated in *Strickler*, "[t]here are three components of a true *Brady* violation: [t]he evidence at issue must be favorable to the accused, either because it is exculpatory,

[37] Colorado codified *Brady* in its procedural rules. *See* Crim. P. 16(I); Crim. P. 32.1(d)(5).

or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

Evidence is favorable to the accused if it "would tend to exculpate [the defendant] or reduce the penalty," *Brady*, 373 U.S. at 88, or if "the defense might have used [the evidence] to impeach the Government's witnesses by showing bias or interest," *United States v. Bagley*, 473 U.S. 667, 676 (1985). The United States Supreme Court "disavow[s] any difference between exculpatory and impeachment evidence for *Brady* purposes." *Kyles*, 514 U.S. at 433.

Due process does not demand that the government employ an open file policy. *Id*. at 437. And the United States Supreme Court has "rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel." *United States v. Agurs*, 427 U.S. 97, 111 (1976). Thus, there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defendant of all police investigatory work on a case." *Id.* at 109 (quoting *Moore v. Illinois*, 408 U.S. 786, 795 (1972)).

Despite these long-standing limitations on the prosecution's discovery obligations, the prosecution, "which alone can know [what evidence] is undisclosed," bears the burden of disclosing to the accused all materially favorable evidence. *Kyles*, 514 U.S. at 437. In *Kyles*, the government argued it should not be held accountable for failing to disclose evidence known only to police investigators and not to the prosecutor. *Id*. at 438. The United States Supreme Court rejected that argument and held that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's

behalf in this case, including the police." *Id.* at 437.[38] Also, neither the moral culpability nor the character of the prosecutor is determinative of whether the government suppressed materially favorable evidence. *Agurs*, 427 U.S. at 110-11. "Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.* at 108. "But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *Bagley*, 473 U.S. at 675-76 (quoting *Agurs*, 427 U.S. at 108).

"[S]howing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more." *Kyles*, 514 U.S. at 437; *see also Agurs*, 427 U.S. at 109-10 ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."). Analyzing the materiality of undisclosed evidence is a fact-intense inquiry. *See Kyles*, 514 U.S. at 423-28 (wherein the recitation of facts spans six pages of the opinion). After all, "[a] fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *Agurs*, 427 U.S. at 104. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would

[38] Crim. P. 16 is not limited to favorable evidence and is therefore broader than the principle set forth in *Kyles*. Crim. P. 16(I)(a)(3) extends the prosecution's disclosure obligations to "material and information in the possession or control of members of his or her staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his or her office."

have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682.[39] "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in . . . absence [of the undisclosed evidence] he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434.

C. Analysis

1. Evidence of Plea Negotiations

a. Latoya Sailor

Owens claims that the prosecution violated its disclosure obligations by withholding impeachment evidence related to Sailor. Sailor was incarcerated in October of 2005, and facing drug and gun charges. In October, before Owens's November 8, 2005, arrest, Sailor authorized her attorney to begin plea negotiations with the prosecution and authorized him to share a tentative outline of information she could provide about the Lowry Park and Dayton Street homicides. Shortly after Owens's arrest, Sailor made a proffer, met with the prosecution, and entered into a very favorable plea bargain that included her release from custody. The prosecution knew that negotiations had occurred before Owens's arrest, and an Aurora detective had dated notes concerning at least one meeting with Sailor's attorney that preceded Owens's arrest. Those notes were not provided to the defense.

Regardless of whether the notes in question were discoverable as a witness statement under Crim. P. 16(I)(a)(1)(VIII), they were not material in the Lowry

[39] "The *Bagley* materiality standard is couched in terms appropriate for use in appellate review. It does, however, provide general guidance to trial courts as to the degree of importance that evidence must possess in order to be considered material." *People v. District Court*, 790 P.2d 332, 338 (Colo. 1990).

Park case. Owens asserts that they were discoverable under Crim. P. 16(I)(a)(2) and *Bagley*, 473 U.S. at 676, because they would impeach Sailor. In the Dayton Street case the prosecution took the position that, because she feared Owens, Sailor was not willing to come forward until he was in custody.[40] While this issue may have greater significance in connection with Owens's conviction and/or sentence in the Dayton Street case, it has little significance here. In this case, Sailor did not express a fear of Owens. Nor did the prosecution suggest in opening or closing that she feared him. She testified that she did not agree to come forward until after the police caught the main suspect, meaning Owens, but she did not indicate that her delay was because of fear. One could as easily infer that she did not want to help the police find and arrest Owens out of loyalty to either Owens or Ray.

Owens claims that the prosecution failed to disclose that it promised to move Sailor out of state. But the defense was aware that Sailor was in the witness protection program and had been relocated. Owens also claims that the prosecution promised to prevent social services' involvement in Sailor's relationship with her son. This claim is unsupported and does not have merit.

None of this additional discovery related to Sailor would have affected the outcome of the case.

b. Jamar Johnson

Owens asserts the prosecution withheld several pieces of materially favorable evidence that King could have used to further impeach Johnson. First, he asserts that the prosecution failed to disclose that APD Detective Gretchen Fronapfel (Fronapfel) threatened Johnson with co-conspirator liability and life in

[40] But the prosecution knew, and the detective's notes demonstrate, that Sailor's attorney had discussed her possible testimony with the prosecution before Owens's arrest.

prison for killing Marshall-Fields and Wolfe. This non-disclosure claim relates to a recorded interview. The police recorded some interviews on mini-cassettes, some on standard audio cassettes, some on video cassettes, and some digitally. Cassettes were not routinely copied. Instead, the defense was put on notice that the recording existed and could ask for a copy if they wished. Shortly before trial, the prosecutor discovered that he did not have the recording of Johnson's August 2005 interview. He obtained one and the defense was provided a copy of the cassette at that time. Some parts of the interview were inaudible, including a part in which the detective attempted to induce Johnson to cooperate by threatening to charge him as a conspirator in the Dayton Street murders. Johnson testified during the 32.2 hearing in the Dayton Street case that he was not affected by Fronapfel's threats because he knew he was not involved with the Dayton Street homicides.

Second, Owens asserts the prosecution failed to disclose that it issued Johnson a target subpoena to testify before the grand jury. Owens believes it was a target subpoena because it contained an advisement of rights. While the subpoena itself was not disclosed, Johnson's grand jury testimony was, and in it, he acknowledged that his subpoena contained an advisement of his rights.

Third, Owens asserts the prosecution did not disclose that Johnson received a deferred judgment and sentence in Arapahoe County. The defense must have had this information because Johnson admitted it on cross-examination at trial.

Fourth, Owens asserts the prosecution withheld that the prosecution in Boulder County did not revoke Johnson's probation after he committed a new law violation. Again, King impeached Johnson at trial with the fact that Johnson's probationary sentence in Boulder County was not revoked after he picked up new charges. Thus, the defense must have had the information.

Fifth, Owens asserts the prosecution did not disclose that it conferred some benefit on Johnson with respect to his driving under restraint ticket. The impeachment value of such a benefit would have been *de minimis*.

Sixth, Owens asserts the prosecution withheld information that Johnson witnessed a shooting incident at the Cherry Street Bar and Grill. Johnson was not a suspect in that incident. After the shooting, he and the victim fled from the assailant. Law enforcement officers called them back. Johnson cooperated with the officers and tried to convince the victim to do so as well. He wandered off repeatedly and had to be called back, and he gave the officers a date of birth that was two days off and told them that his name was Jay Johnston. Owens asserts that this was relevant impeachment evidence because Johnson was on probation and did not report the police contact to his probation officer until asked about it. They also assert that it was relevant impeachment evidence because he could have been charged with an offense for giving false information to a police officer, even though the officer considered him a cooperating witness and had no intention to charge him with anything. Even if the trial court had admitted this evidence, it would not have caused the jury to disbelieve Johnson's eyewitness account of the Lowry Park shootings.

Seventh, Owens asserts the prosecution failed to disclose that Johnson provided a false name to a Denver police officer yet was not charged with providing false information. The prosecution represents in its response that it has no knowledge of the incident to which Owens is referring. Even assuming a Crim. P. 16 violation, the impeachment value would have been *de minimis*.

Eighth, Owens contends the prosecution did not disclose that Johnson was involved in a shooting between the Bloods and Crips at a Waffle House. When interviewed about the incident, Johnson admitted he was associated with the

Bloods but did not identify the shooter(s). J. Martin testified during the 32.2 hearing in the Dayton Street case that Johnson was one of the shooters and that 9 mm and .45 caliber guns were used. According to J. Martin, Johnson was concerned that he would be charged for the Waffle House incident. According to Owens, this impeachment might have caused the jury to believe that Johnson did not need or want witness protection because the Bloods provided him with the protection he needed. But eliciting that testimony would have opened the door to rehabilitative evidence about Johnson's need for witness protection, due to the murder of Marshall-Fields because he was a Lowry Park witness. Competent defense counsel would not have chanced opening the door to such evidence.

None of the alleged undisclosed evidence presents a significant issue. These lines of impeachment would not have affected the outcome of the trial.

c. Miguel Taylor

Miguel Taylor did not testify at trial, and to this court's knowledge, none of his information was used to convict Owens. In fact, the exhibits submitted by the defense in support of this claim reflect that Miguel Taylor consistently reported that he did not witness the shooting at Lowry Park. Thus the court fails to see how Owens was prejudiced by the prosecution's failure to disclose any benefits Miguel Taylor received in exchange for any cooperation he provided against Owens.

d. Brandi Taylor

Owens argues the prosecution failed to disclose that it caused the dismissal of a misdemeanor/petty offense case against B. Taylor. She was charged with throwing missiles at vehicles and disorderly conduct following a road rage

incident. She threw a pop can and a juice box at another vehicle.[41] This information is not materially favorable.

2. Sailor's Alleged Involvement in a Michigan Homicide

Sailor's former boyfriend, a Michigan drug dealer, claimed her as an alibi witness in a Michigan homicide investigation. The Michigan detectives wanted to find out whether she would confirm the alibi. The Michigan detectives were not investigating Sailor. They were interested in her only as a witness in connection with the homicide. Without consulting Sailor, Fronapfel and prosecution investigators arranged a meeting between the Michigan detectives and Sailor at the Denver airport before Sailor was returned to her protected witness location. No Colorado investigator or police officer sat in on the interview. Sailor cooperated in the interview. She did not confirm her ex-boyfriend's alibi, but he was ultimately cleared when DNA evidence confirmed that someone else committed the murder.

The prosecution is responsible to disclose information "in the possession or control of members of his or her staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his or her office." Crim. P. 16(I)(a)(3). The Michigan detectives do not fall within the ambit of persons whose information is attributable to the prosecution. But the prosecution's investigators accompanied Sailor to the airport, arranged for the detectives to interview her, and knew the general purpose of the interview. Nevertheless, the court does not find that the Michigan information constitutes materially favorable evidence. There is

[41] As to Owens's claim that the prosecution did not disclose a letter that Fronapfel wrote to an apartment complex on B. Taylor's behalf, the prosecution disclosed the letter and Fronapfel's report about the letter to the defense prior to trial.

no reasonable probability that the trial's outcome would have been affected by the Michigan information.

3. Evidence on Alternate Suspects

Owens argues the prosecution deprived him of three documents – the Special Bulletin, Case Filing (Versadex Report), and Person Hardcopy – generated by law enforcement which indicate numerous alternate suspects for the Lowry Park shootings.

On the night of the Lowry Park shootings, T. Wilson received suspect descriptions and vehicle descriptions from officers on scene at Lowry Park. Because the scene was chaotic, the descriptions of the suspects were numerous and inconsistent. From these varying descriptions, T. Wilson hurriedly compiled three suspect descriptions for a Special Bulletin. None of the descriptions in the bulletin pertained to any single suspect. In contrast, the descriptions of the getaway vehicle were consistent so he entered that description into the Special Bulletin as well and distributed the Special Bulletin to the officers on the street. The purpose of issuing the Special Bulletin was to alert patrol officers to the description of the suspects' vehicle.

The Versadex Report for this case lists seven suspects. The first five suspects are not identified by name but include physical descriptions and some include clothing descriptions. Owens is listed as Suspect 6, and Carter, Sr. is listed as Suspect 7. The Versadex Report is a compilation of information for a particular case that is used for administrative purposes such as compiling statistics. It has no investigative value and does not reflect a belief among law enforcement that there were seven suspects in the Lowry Park shootings.

T. Wilson ran a special computerized inquiry known as a Person Hardcopy on Owens on July 21, 2004. T. Wilson does not recall why he ran this inquiry.

The report has all of the identifying information on Owens available in the APD's system. It also has a Related Persons section, where Perish Carter (Carter) and Maurice Ray (Ray's brother) are listed. But there is no information about why the APD considered these people to be Owens's associates. Neither Carter nor Maurice Ray was significant to the APD at that time. Carter was in prison on July 4, 2004, and there was no information in the report that would have caused T. Wilson to connect Maurice Ray to Ray and Ray to Owens. In short, the Person Hardcopy does not constitute evidence that law enforcement viewed Owens as a suspect well before the Dayton Street homicides, and it does not have any other material significance.

4. Jimilah Arnold Reports/Recordings

The essence of Jimilah Arnold's (Arnold) information was that Percy Carter, Jr. had indicated to Arnold that Ray was facing charges in connection with the Lowry Park shootings and that after the Dayton Street homicides, he was upset with Ray because he considered the murders of Marshall-Fields and Wolfe to be unnecessary and unjustified. In terms of Lowry Park, Arnold did not provide any exculpatory information because Owens's trial team was aware that Ray had been charged as an accessory in Lowry Park.

5. Statements of Tetrick Brewer

Owens claims the prosecution failed to disclose the information Tetrick Brewer (Brewer) provided to law enforcement about Lowry Park, specifically that there was only one shooter and that the shooter lost a fight, got a gun, and left. There was overwhelming evidence that there were two shooters at Lowry Park. There was also abundant evidence that both had guns on their persons and lifted their shirts to reveal that guns were tucked into their pants. While Brewer's information, if deemed credible, might have provided additional evidence in

support of self-defense, namely that another witness saw the shooter attacked, it also would have provided evidence that the shooting was done after deliberation – evidence of going to a vehicle to retrieve a gun and returning to shoot someone. Because the jury would conclude that Owens shot Vann, evidence that Owens was in a fight, obtained a gun from the Suburban, and then shot Vann would have been highly detrimental to the self-defense argument. Brewer's information was not materially favorable evidence.

6. Police Recordings and Records

As to the audio recording of Fronapfel's interview of B. Taylor on February 4, 2006, vehicle records, and investigator notes, Owens does not describe in his petition the materiality of the allegedly undisclosed evidence.

But the undisclosed report of the interview of Brent Harrison (Harrison) warrants some discussion. An APD officer interviewed Harrison at the scene of the Dayton Street homicides. That report reflects that Marshall-Fields and Harrison attended a Father's Day barbeque on June 19, 2005. At the barbeque, Marshall-Fields told Harrison that the man who shot Marshall-Fields and that man's girlfriend were at the barbecue. Sailor told law enforcement that she and Ray attended the barbecue but she could not recall if Owens was there. Thus, Marshall-Fields's statements to Harrison tend to indicate that Ray shot Marshall-Fields.

After being shot at Lowry Park on July 4, 2004, Marshall-Fields was taken to Denver Health hospital where, at 12:10 a.m. on July 5, 2004, an APD detective recorded a brief interview with him. It reads in relevant part:

> Marshall-Fields: [Vann] runs over to the guy um, and then the dude pulled out his gun shoots him three, four times like from a distance we are, from me to you. And then I start like turning . . . well I'm walk . . . well I'm going, I'm trying to chase after him. He looks up at me,

> sh . . . sh . . . point the gun at me, so I dodge, whatever. And he shot me twice and then I . . . I think he shot some more other people. And then uh, him and his friends, they (inaudible), they drove off.
>
> [Detective]: The person with the gun that shot you and uh, your friend [Vann], do you remember what he looked like?
>
> Marshall-Fields: Um, the same person and he had a white shirt on, braids, uh . . . blue jeans, blue short jeans, white hat. About 6'1", 180 or something like that (inaudible).

SOPC.EX.P-2063.

Owens asserts that the undisclosed Harrison interview was exculpatory. He argues that Marshall-Fields statements at the barbeque indicate that Ray shot Marshall-Fields and that Marshall-Fields's statement to the detective indicate that the person who shot Marshall-Fields also shot Vann. He asserts that, taken together, they suggest that Ray, not Owens, shot and killed Vann. But the ballistics evidence clearly established that there were two shooters, not one. The description Marshall-Fields gave to the detective was a description of Owens and not Ray. And it was a description of the man who shot Vann and then aimed the gun at Marshall-Fields before Marshall-Fields dodged and was shot.

Had this evidence been disclosed, it would not have affected the outcome of the trial.

7. Cumulative Effect

The prosecution presented a convincing case that Owens killed Vann. Johnson's eyewitness account of the shooting directly inculpated Owens. Sailor's testimony about Ray's statements to Owens after the shooting was highly inculpatory. Green's video-recorded interview and the various witnesses'

descriptions supplied powerful corroboration of Owens's identity as Vann's shooter.

All of the undisclosed evidence is impeachment evidence. Some of it may have been used by Owens's trial team to impeach a witness, the APD's investigation, or the prosecution's integrity. At trial, Owens's trial team impeached witnesses with their criminal histories, they suggested that certain witnesses were biased in favor of the prosecution, they brought to light inconsistencies in many witnesses' testimony, and they generally impeached the witnesses on salient points. The points that they made carried greater impeachment value than any of the undisclosed evidence.

There is no reasonable probability that the outcome of the trial or sentencing hearing would have been different had the undisclosed evidence been timely provided to the defense. *See Bagley*, 473 U.S. at 682 ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."). The undisclosed evidence did not violate Owens's right to a fair trial and therefore did not undermine confidence in the outcome of his trial. *See Kyles*, 514 U.S. at 434 (the controlling question is "whether in its absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

VII. Conflict of Interest Claims

A. Parties' Positions

Owens contends he was deprived of his Sixth Amendment right to effective and conflict-free counsel because four of the government's witnesses – Sailor, Johnson, Carter, Sr., and J. Martin – were represented by deputy public defenders in Boulder and Arapahoe Counties. In the prosecution's view, Owens's trial counsel were not conflicted because the Office of the State Public Defender's

(OSPD) conflicts of interest policy anticipated and avoided the very conflict issues now raised by Owens.

B. Summary of the OSPD's Conflicts of Interest Policy and Practices

1. Written Conflicts of Interest Policy

The OSPD has maintained a written conflicts of interest policy since approximately 1993. The 2000 version was in effect at the time of the trial in this case. SOPC.EX.D-2.

2. Duties of Loyalty

Under the OSPD conflicts of interest policy, each deputy public defender (DPD) has a duty of loyalty to zealously represent his/her current clients. As used here, current clients are those clients with whom the DPD appears regularly in court. For current clients, the DPD also files and argues substantive motions, engages in plea negotiations and/or takes the case to trial, and represents the client at sentencing. A current client enjoys a confidential attorney-client relationship with his/her DPD.

Each DPD also owes a continuing duty of loyalty to each former client. The OSPD designed its conflicts of interest policy to conform, *inter alia*, to Colo. RPC 1.9(c)(1), which precludes each DPD from using information relating to his/her representation of a former client to the former client's disadvantage. This is referred to as the duty "to do no harm."

Within a regional office, each DPD also owes a duty "to do no harm" to other DPDs' current and former clients. One DPD cannot use information from another DPD's current or former client to that client's disadvantage. Information means confidential information, or information that is not within the public realm.

3. Current Clients of a Regional Office[42]

Whenever a current client of a regional office is a witness against another current client of the same regional office, the conflicts of interest policy mandates withdrawal from one of the cases. The policy allows the office to analyze the cases to determine if the office can remain on the most serious case with the most culpable defendant. In situations where a conflict is not initially discernible, the policy still requires withdrawal because in the OSPD's view, a conflict is inevitable.

The withdrawing DPD's client becomes a former client. The remaining client is known as the surviving client.

After withdrawal has occurred, an ethical screening device is put in place within the regional office.[43] The screening device precludes access to the former client's closed file without approval from the office head of the regional office. It also precludes the withdrawing DPD from discussing the former client's case with anyone. Under the policy, the withdrawing DPD is supposed to issue a memo to the regional office informing the staff of the withdrawal with a reminder that s/he cannot discuss the former client's case with anyone. While issuing the memo rarely happens in practice, the withdrawing DPD adheres to the screening device to prevent conflicts of interest.

Similarly, the ethical screening device precludes the DPD for the surviving client from seeking information about the former client from the closed file or from the DPD who withdrew. The ethical screening device allows the DPD for the

[42] The court's analysis on witness-client conflicts of interest presumes that Owens's trial team practiced out of the Arapahoe public defender's office. In reality, King moved his office to the OSPD around November 2006. Middleton's office was always in the OSPD. Only Kepros had an office in the Arapahoe PDO.

[43] Owens argues investigators and other support staff were not subject to the ethical screening device, but per the policy, the device applies to all employees of the OSPD.

surviving client to avoid any imputation of a conflict because s/he does not have access to confidential information about the former client.

4. Former Clients of a Regional Office

When a former client of a regional office becomes a witness against a current client of the same regional office, the DPD for the current client owes a duty of loyalty to the current client to zealously represent that client as well as a duty of loyalty to the former client "to do no harm" to that client. According to the OSPD's policy, the concurrent duties of loyalty do not normally result in a conflict of interest because the DPD for the current client generally does not possess confidential information from a former client that is relevant to the current client's case and that would materially advance the current client's interests.

To determine if the DPD must withdraw from the current client's case, the OSPD's conflicts of interest policy utilizes Colo. RPC 1.9. Under the policy and Colo. RPC 1.9, the DPD is allowed to remain on the current client's case if the current and former clients' cases are not the same or substantially related. The cases are not substantially related if the current client's DPD does not have confidential information about the former client that will materially advance the current client's case. In that scenario, the DPD can zealously represent the current client while also honoring the duty to the former client not to use confidential information to disadvantage the former client.

On the other hand, if the DPD possesses confidential information from a former client that is relevant to the current client's case and that would also materially advance the current client's interests, the DPD is required to withdraw. By withdrawing, the DPD preserves the current client's right to conflict-free counsel and the DPD complies with the duty of loyalty to the former client not to use confidential information to that client's disadvantage.

The duty not to harm a former client is therefore not mutually exclusive to the duty to zealously represent a current client. The duty of loyalty to the former client does not preclude the current client's DPD from vigorously cross-examining the former client as long as the DPD does not have any of the former client's confidential information.

The policy also allows the DPD for the current client to determine if anything else about the former client's representation precludes him/her from zealously representing the current client pursuant to Colo. RPC 1.7(a)(2). If there is, then the policy requires the DPD to withdraw and to ask the court to appoint ADC.

5. Current and Former Clients of Different Regional Offices

The OSPD views each regional office as a separate firm for purposes of resolving conflicts. The policy allows DPDs within a regional office to share their client's confidences with other DPDs in the same regional office in an effort to provide the most effective representation available. The policy recognizes the need for DPDs to share information about their cases in order to take advantage of the accumulated expertise and knowledge within each regional office. In contrast, the policy precludes DPDs in one regional office from sharing client confidences with DPDs in other regional offices. There is one exception – if a client has cases in multiple jurisdictions, the policy allows the client's DPDs to discuss the client's confidential information for the purpose of reaching a disposition that covers all of the jurisdictions involved.

Pursuant to the policy, if one regional office's client is a witness against a different regional office's client, neither regional office is required to withdraw because confidential information cannot be shared among regional offices and thus there is no conflict of interest.

6. Courtesy Appearances During Duty Court

In addition to each DPD's normal caseload, each DPD in the Arapahoe Public Defender's office (PDO) is assigned on a rotating basis to handle the high volume of initial appearances for recent arrestees in duty court. The duty DPD appears with all of the recent arrestees unless private counsel appears. It is not uncommon for there to be many recent arrestees in duty court. Consequently, the duty DPD handles many cases in a very short period of time. Duty DPDs routinely address bonds, mandatory protection orders, and set future court appearances. Duty DPDs will at times even make bond arguments on behalf of codefendants at the initial appearances. Because a majority of the PDO's clients are in custody, it is rare that the duty DPD substantively represents a recent arrestee.

Courtesy appearances usually occur before the court formally appoints the regional PDO on the case and before any type of conflicts check has occurred.[44] Yet the duty DPD must represent each person with the level of competence and diligence required by the Colorado Rules of Professional Conduct. *See, e.g.*, Colo. RPC 1.1; Colo. RPC 1.3. The circumstances of each case and the practices of the individual court determine whether the court formally appoints the regional PDO at the initial appearance.

Following a courtesy appearance, and without regard to whether a different DPD is assigned to a recent arrestee's case or if the recent arrestee retains private counsel, the duty DPD owes a duty "to do no harm" to all of the recent arrestees s/he appeared with in duty court.

The OSPD views courtesy appearances as important to the criminal justice system because the duty DPD can argue bond, put the government on notice that

[44] In the court's view, appearances by the duty DPD are best described as courtesy appearances.

the individual is represented, and identify evidentiary or constitutional issues at an early stage. On the other hand, courtesy appearances often occur before the regional office or the duty DPD determines whether there are any conflict issues arising out of the recent arrestee's case.

At other times, a particular case or arrestee has such notoriety within the courthouse that the duty DPD immediately recognizes a conflict. When a conflict is recognized, the duty DPD alerts the court of the conflict but still provides limited assistance, such as arguing bond, to the arrestee. Under the policy, DPDs should file a Notice of Withdrawal, but in practice, they do not always file the notice, especially if the DPD only made a courtesy appearance on behalf of the recent arrestee.[45]

The OSPD policy encourages duty DPDs to avoid substantive confidential conversations with the arrestee until the questions of conflicts and indigency are resolved.

7. The Colorado Supreme Court's View of the OSPD's Conflicts of Interest Policy and Ethical Screening Device

The Colorado Supreme Court in *People v. Shari*, 204 P.3d 453 (Colo. 2009), relied on the OSPD's adherence to its conflicts of interest policy and to its ethical screening device when it reversed the trial court's pretrial order disqualifying Shari's DPDs.[46] The *Shari* court reversed the trial court for failing to rely on the

[45] This practice differs among and within each regional office.

[46] After the 2008 version of the Colorado Rules of Professional Conduct was issued, the conflicts of interest policy was updated and revised, and became effective on January 1, 2009. The written policy regarding one client becoming a witness against another client did not change. No change was necessary because the 2000 policy was drafted and implemented to conform with Colo. RPC 1.7 and 1.9, and these rules were not substantially changed in the 2008 revision to the Rules of Professional Conduct. Thus, the same policy for witness-client conflicts was in place for both Owens and Shari.

ethical screening device as an effective tool used to prevent the unauthorized dissemination of a client's confidential information. *People v. Shari*, 204 P.3d 453, 459-60 (Colo. 2009).

In *Shari*, the Colorado Supreme Court addressed conflicts arising within different regional offices of the public defender system.[47] In that case, two DPDs in the Jefferson PDO represented the defendant. *Id.* at 455-56. At the same time, a DPD in the Denver PDO represented a government witness against the defendant. *Id*. at 456. In addition, other DPDs in the Jefferson PDO and in other regional offices previously represented two other government witnesses against the defendant. *Id.*

During the relevant time period, the OSPD operated pursuant to the ethical screening device described in its conflicts of interest policy. The screening device prohibited DPDs from (1) accessing closed files of former clients, (2) using any confidential information from a former client to that former client's disadvantage, and (3) sharing clients' confidential information between regional offices within the public defender system. *Id.* The defendant's DPDs in *Shari* were therefore screened from learning and using confidential information from the other clients that could be used to the other clients' disadvantage.

With respect to the Denver DPD's simultaneous representation of a witness against Shari, the Colorado Supreme Court found that "the Denver public defender who handled the Levy case . . . is in no way involved in the Shari case, and neither [of Shari's DPDs in Jefferson County] had any involvement in Levy's case [in Denver]." *Id.* at 458.

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[47] In *Rodriguez v. District Court*, 719 P.2d 699 (Colo. 1986), the Colorado Supreme Court addressed a conflict of interest caused by the representation of the defendant and a witness by the same regional PDO.

With respect to the former representation of two witnesses by other DPDs in the Jefferson PDO, it found that "none of the individual public defenders involved in representing these 'former clients' is involved in the Shari case, and neither [of Shari's DPDs] participated in any of the prior cases." *Id.* at 458. Based on those findings, the Colorado Supreme Court held that there was no conflict of interest because "there [was] no reason to think that either [of Shari's public defenders] obtained any confidential, material information." *Id.*

Relying on the adherence to the conflicts of interest policy and the ethical screening device, the Colorado Supreme Court found there was no conflict of interest and vacated the trial court's order disqualifying Shari's DPDs. *Id.* at 462; *see also People v. Nozolino*, 298 P.3d 915, 921 (Colo. 2013) (trial court's order disqualifying public defender was reversed in part because the conflicted DPD was screened from the case and was not supervising the other DPDs representing the defendant); *People v. Chavez*, 139 P.3d 649, 654-55 (Colo. 2006) (whether prosecutor's office employed a properly drafted screening device was relevant to issue of disqualification of entire office).[48]

C. Principles of Law

1. Sixth Amendment Right to Counsel

The Sixth Amendment to the United States Constitution provides that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defen[s]e." U.S. CONST. amend. VI; *see also* COLO. CONST. art. II, § 16; C.R.S. § 18-1-403. "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy [this] constitutional command." *Strickland*, 466 U.S. at 685. The constitutional right to counsel, therefore, "has

[48] The Colorado Supreme Court did not address the OSPD's conflicts of interest policy in *West v. People*, 341 P.3d 520 (Colo. 2015).

long been recognized" as "the right to the effective assistance of counsel." *United States v. Cronic*, 466 U.S. 648, 654 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). "Where a constitutional right to counsel exists, [the] Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981).

The two-pronged test announced in *Strickland* generally governs post-conviction ineffective assistance of counsel claims. 466 U.S. at 687. But when the alleged ineffectiveness is based on conflicts of interest stemming from multiple representation,[49] *Cuyler v. Sullivan*, 446 U.S. 335 (1980), applies. *See also Armstrong v. People*, 701 P.2d 17, 19 (Colo. 1985) (applied *Sullivan* to multiple representation conflict of interest where an attorney represented a husband and wife who were charged with several offenses in connection with an armed robbery).

In *Sullivan*, two attorneys represented three codefendants in their separate trials. 446 U.S. at 337. Sullivan did not object during trial but later claimed his attorneys labored under a conflict that denied him the right to the effective assistance of counsel under the Sixth Amendment. *Id.* at 337-38. The United States Supreme Court held that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348.[50] "Thus, a defendant who shows that a conflict of interest actually affected

[49] Multiple representation encompasses representation of codefendants by an attorney regardless of whether the codefendants are tried simultaneously (multiple simultaneous representation) or separately (multiple serial representation). *See Beets v. Scott*, 65 F.3d 1258, 1265 n.8 (5th Cir. 1995).

[50] *Mickens v. Taylor*, 535 U.S. 162, 173 (2002), substitutes "significantly" for "adversely" when describing the *Sullivan* standard.

the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Id.* at 349-50.

Conflicts of interest exist in countless forms throughout the practice of law. The United States Supreme Court in *Sullivan* analyzed only one type of conflict, which was multiple representation. Multiple representation does not exist in this case. According to Owens, other types of conflicts exist, specifically in the form of his trial team's (and other DPDs') simultaneous and successive representation of government witnesses.

2. Simultaneous Representation of a Government Witness

In January 2015, the Colorado Supreme Court announced *West v. People*, 341 P.3d 520 (Colo. 2015). *West* is a joint opinion that addresses conflicts of interest alleged by West and Cano. In *West*, the Colorado Supreme Court, relying primarily on Fourth Circuit precedent, applied *Sullivan* to conflicts created by simultaneous representation of the defendant and a government witness. *West*, 341 P.3d at 531.

West was charged with, *inter alia*, sexual assault on a child. *Id.* at 524. The victim's mother (the "witness") testified against West. *Id.* The Mesa PDO represented West at the same time the El Paso PDO represented the witness on unrelated charges. *Id.* An investigator for the Mesa PDO requested the witness's file from the El Paso PDO. *Id.* at 530-31. It is not clear if that request was fulfilled, but the Colorado Supreme Court, without referring to the OSPD's ethical screening device, found that the Mesa PDO "undeniably had access to" the witness's confidential information in the El Paso PDO's file. *Id.* at 531. The Colorado Supreme Court viewed that situation as one that was "inherently conducive to and productive of divided loyalties." *Id.* (quoting *People v. Castro*, 657 P.2d 932, 945 (Colo. 1983)). According to the Colorado Supreme Court, the

Mesa PDO had a potential imputed conflict in representing West because the El Paso PDO simultaneously represented the witness. *Id*. Because the Mesa PDO's representation of West and the El Paso PDO's representation of the witness were simultaneous, the Colorado Supreme Court held that the potential imputed conflict must be analyzed under *Sullivan* and remanded the case for that determination. *Id.*

Cano was charged in Adams County with first-degree murder. *Id.* at 524-25. The prosecution endorsed Aguilar as a witness against Cano. *Id.* At that time, Aguilar also faced charges in Adams County and was represented by the Adams PDO. *Id.* Different DPDs in the Adams PDO represented Cano and Aguilar simultaneously. *Id.* The charges against Aguilar were unrelated to the charges against Cano. *Id.* at 524. Aguilar did not testify at trial. *Id.* at 525. Based on its finding that the DPDs in the Adams PDO "routinely consulted each other on cases and worked in close proximity to one another," the Colorado Supreme Court "presume[d] that Cano's public defenders . . . had access to confidential material about Aguilar, and vice versa." *Id.* at 531. According to the Colorado Supreme Court, the Adams PDO had a potential conflict in representing Cano because the Adams PDO simultaneously represented Aguilar. *Id*. Because the representation was simultaneous, the Colorado Supreme Court held that the potential conflict must be analyzed under *Sullivan* and remanded the case for that determination.[51] *Id.*

[51] The Colorado Supreme Court distinguished direct and imputed conflicts of interest, but that distinction did not affect its analysis. *West*, 341 P.3d at 531 n.10 ("[W]e express no opinion regarding which ethics rule applies to these public defenders—Colo. RPC 1.10 (the general imputation rule) or Colo. RPC 1.11 (the special conflicts of interest rule for government employees)."). *But see Nozolino*, 298 P.3d at 919 n.1 (conflict of one DPD is not imputed to another DPD under Colo. RPC 1.11 cmt. 2).

Even before *West*, the Colorado Court of Appeals applied *Sullivan* to conflicts of interest stemming from an attorney's simultaneous representation of the defendant and a government witness. In *People v. Miera*, 183 P.3d 672, 673-74 (Colo. App. 2008), an attorney simultaneously represented Miera and D.R. who were both charged with sexually assaulting the same victim but at different times. Miera and D.R. were charged separately, not as codefendants. *Id.* at 673. After five months of simultaneously representing Miera and D.R., the attorney withdrew from D.R.'s case. *Id.* D.R. testified at trial against Miera. *Id.* at 674.

Miera involves conflicts of interest based upon the attorney's simultaneous and successive representation of the defendant and a government witness. Even though the attorney did not represent D.R. during Miera's trial, the Colorado Court of Appeals viewed the scenario as more akin to simultaneous than to successive representation because of the close relationship between the cases: the victim was the same, D.R. testified against Miera, and the attorney simultaneously represented Miera and D.R. for five months. *Id.* at 676.

To resolve whether *Sullivan* applied, the *Miera* court surveyed case law from the Colorado appellate courts as well as from the federal Circuit Courts. *Id*. Finding no Colorado authority limiting the scope of *Sullivan*, the Colorado Court of Appeals applied *Sullivan* and concluded the attorney suffered an actual conflict of interest that adversely affected his performance in representing Miera. *Id.* at 677-78.

3. Successive Representation of a Government Witness

Whether *Sullivan* applies to conflicts of interest stemming from an attorney's successive representation of a defendant and a government witness is an "open question." *Mickens v. Taylor*, 535 U.S. 162, 176 (2002).

Mickens was convicted of murder and sentenced to death. *Id.* at 164. In federal habeas proceedings, Mickens claimed he was denied effective assistance of counsel due to his attorney's conflict of interest. *Id.* at 162. One of Mickens's court-appointed trial attorneys had been representing Mickens's victim in an unrelated juvenile case at the time that Mickens killed him. *Id.*

Mickens presents a conflict scenario unlike *Sullivan*. In *Sullivan*, two attorneys simultaneously represented three codefendants. 446 U.S. at 337. In *Mickens*, the defendant's attorney previously represented the victim. 535 U.S. at 162. Despite the difference, the parties in *Mickens* assumed *Sullivan* applied. *Id.* at 174. In *Mickens*, Justice Scalia observed that assuming *Sullivan* applied was "not unreasonable" in light of the broad application of *Sullivan* by the Circuit Courts. *Id.* (citing cases); *see also Beets v. Scott*, 65 F.3d 1258, 1266 n.10 (5th Cir. 1995) (listing cases). Justice Scalia agreed with the Fifth Circuit that the Circuit Courts have applied *Sullivan* "unblinkingly" to all types of conflicts. *Mickens*, 535 U.S. at 174 (quoting *Beets*, 65 F.3d at 1266). To date, neither the United States Supreme Court nor the Colorado Supreme Court has resolved whether *Sullivan* applies to conflicts arising from successive representation of a government witness and the defendant.

The Colorado Supreme Court acknowledged the unresolved question in *Dunlap v. People*, 173 P.3d 1054, 1073 n.24 (Colo. 2007), when it stated that "[i]n this case, the parties' briefs assume [*Sullivan*] applies . . . . We therefore decide the issue on the assumption that [*Sullivan*] applies." Additionally, the Colorado Supreme Court stated in *West* that "[b]ecause the parties have not briefed the issue,

we assume, without deciding, that the *Sullivan* standard applies to alleged conflicts arising from successive representation." *West*, 341 P.3d at 530.[52]

People v. Drake, 748 P.2d 1237 (Colo. 1988) preceded *Dunlap* and *West*. In *Drake*, the Colorado Supreme Court cited *Sullivan* when it resolved the defendant's ineffective assistance claim based on his counsel's prior representation of a government witness. *People v. Drake*, 748 P.2d 1237, 1247 (Colo. 1988). The Colorado Supreme Court in *Drake* disposed of the defendant's claim finding,

> [N]o basis in the record to support the assumption that defendant's attorney did not fully explore the circumstances of [the witness's] conviction because of conflict of interest concerns. To the contrary, the public record of that conviction contained ample information to illustrate the circumstances thereof without resort to any information that might have been privileged.

Id.

Like the Colorado Court of Appeals in *Miera*, the Colorado Supreme Court in *West* recognized that "[t]he [United States] Supreme Court has never expressly limited *Sullivan* to cases involving only joint representation of codefendants, not even in *Mickens* when it plainly could have." *West*, 341 P.3d at 528. And, while noting that the majority of federal Circuit Courts apply *Sullivan* in cases of successive representation, *id.* at 530 n.9 (listing cases), the Colorado Supreme Court also has not resolved the question.

Following the trend of the federal Circuit Courts and drawing support from *West* and *Drake*, this court will apply *Sullivan* to the alleged successive representation conflicts of interest.

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[52] In this case, the prosecution does not concede that *Sullivan* applies to successive representation conflicts of interest.

4. Standard for Post-Conviction Ineffective Assistance of Counsel Claims Based on Witness-Client Conflicts of Interest

"A defendant seeking post-conviction relief based on ineffective assistance of counsel resulting from an attorney's alleged conflict 'must demonstrate that an actual conflict of interest adversely affected his [attorney]'s performance.'" *Id.* at 526 (quoting *Sullivan*, 446 U.S. at 348). To establish a conflict of interest, the defendant must prove "that his [attorney] actively represented conflicting interests." *Id.* at 530 (emphasis omitted) (quoting *Mickens*, 535 U.S. at 175). And to prove adverse effect, the defendant must,

> (1) [I]dentify a plausible alternative defense strategy or tactic that counsel could have pursued, (2) show that the alternative strategy or tactic was objectively reasonable under the facts known to counsel at the time of the strategic decision, and (3) establish that counsel's failure to pursue the strategy or tactic was linked to the actual conflict.

Id. at 533. Both the conflict and the adverse effect must be proven by a preponderance of the evidence. *Id.* at 534.

D. Analysis

1. King's prior representation of Carter, Sr.

This purported conflict deserves more attention than the others. Prior to his appointment to represent Owens, King represented Carter, Sr. in an unrelated case. In 2003, the prosecution charged Carter, Sr. with illegal distribution of narcotics. He also faced a special offender charge because he had a revolver and a shotgun on him at the time of the distribution. King last appeared with him in April 2004 when he entered a guilty plea to drug distribution and was sentenced to probation. Pursuant to the plea agreement, the trial court ordered that the revolver and shotgun taken from Carter, Sr. at the time of his arrest be forfeited and destroyed.

In January 2006, the prosecution filed a Notice of Potential Conflicts in this case and raised King's representation of Carter, Sr. as a potential conflict. Owens's trial team responded that there was no conflict. The trial court ruled there was no conflict yet sought Carter, Sr.'s waiver of any potential conflict. The trial court also ordered King not to cross-examine Carter, Sr. at trial. Owens was present during this hearing, but neither the court nor his trial team asked him to waive any potential conflict. During that hearing, King recalled Carter, Sr. but did not recall any confidential information about Carter, Sr. or his case.

Although the court prohibited King from cross-examining Carter, Sr., it did not prohibit King from investigating Carter, Sr. as an alternate suspect. There was a dispute within the trial team about whether Carter, Sr. was a *bona fide* alternate suspect. King viewed the evidence that Carter, Sr. was a viable alternate suspect as weak. Kepros thought an alternate suspect investigation should be pursued but deferred to King as lead counsel. In her view, there was no time to pursue an alternate suspect investigation due to the urgency of other pretrial matters. As a result, the team did not try to interview Carter, Sr. or his attorney.

While this court does not view King's prior representation of Carter, Sr. in the unrelated case as a conflict of interest, it will apply a *West* analysis and determine whether King's representation of Owens was adversely affected by his prior representation of Carter, Sr.

Owens's trial team did not investigate Carter, Sr. as an alternate suspect or portray him as an alternate suspect at trial. According to King and Kepros, King's prior representation of Carter, Sr. did not inhibit them from investigating Carter, Sr. as an alternate suspect and did not impede their representation of Owens in any way. Neither Kepros nor King discussed King's prior representation of Carter, Sr. with Owens because neither viewed it as a conflict.

King either never learned confidential information from Carter, Sr. or he had forgotten it before he began representing Owens. As a result, he had no confidential information about Carter, Sr. to utilize while representing Owens. King testified during the 32.2 hearing that his representation of Carter, Sr. did not impede his investigation of Carter, Sr.

Owens suggests that Carter, Sr. was an alternate suspect because he disposed of the guns Ray and Owens used at Lowry Park and rented hotel rooms for Ray and Owens to stay in the night of the Lowry Park shootings. Compared to the evidence implicating Owens, *see* part III.D of the Order, the evidence that Carter, Sr. disposed of evidence and harbored Ray and Owens was a weak basis for an alternate suspect strategy. Thus, investigating and portraying Carter, Sr. as an alternate suspect was not objectively reasonable. *See West*, 341 P.3d at 533 (prong two is satisfied if the "plausible alternative that counsel might have pursued . . . was objectively reasonable under the facts known to counsel at the time of the strategic decision.").

2. Representation of Sailor, Johnson, Carter, Sr., and J. Martin

Arapahoe DPD Justin Bogan (Bogan) appeared twice with Sailor and once with Johnson in duty court in August of 2005. Bogan informed the judge on both occasions that the OSPD was conflicted from representing Sailor and Johnson, and asked that ADC be appointed. Bogan's practice was to avoid discussing confidential case-specific matters with recent arrestees during duty week, and he was particularly cautious not to discuss confidential matters with Sailor or Johnson because he knew there was a potential conflict. Given that he did not have any confidential information from Sailor or Johnson, he did not share any information about them with Owens's trial team. A different Arapahoe DPD appeared once

with Carter, Sr. in September 2005 and moved to withdraw about a month later. That Arapahoe DPD did not testify during the 32.2 or 35(c) hearings.

A similar situation arose in Boulder when Johnson's probation was revoked in August of 2005. A Boulder DPD appeared with Johnson for his initial advisement on the revocation complaint. The advisement occurred during her normal duty rotation for initial appearances. She moved to withdraw shortly thereafter. It was her practice not to discuss confidential information with new arrestees until a conflicts check was completed. According to that DPD, she did not provide any information about Johnson to Owens's trial team.

Various Boulder DPDs represented J. Martin from February 2004 through March 2008. None of those DPDs testified during the 32.2 or 35(c) hearings.

In addition to Owens's trial team, at least 10 DPDs testified during the 32.2 hearing in Owens's Dayton Street case. Many had appeared with or represented a witness who was endorsed to testify against Owens. All of the DPDs, including Owens's trial team, acknowledged their ethical responsibilities under the Colorado Rules of Professional Conduct and the OSPD's conflicts of interest policy. Without exception, the DPDs testified that they adhered to the ethical screening device and did not share any confidential information about their clients with Owens's trial team.

Owens's trial team did not attempt to access and did not access the public defender case files for any endorsed witnesses. The team also did not ask for or obtain permission to access closed files for any endorsed witnesses. Likewise, neither King nor Kepros accessed any Arapahoe DPDs' computer files. Owens elicited a great deal of testimony during the 32.2 hearing from various DPDs concerning their access to the shared drive on the public defender computer network and to open physical case files within each regional office. The consensus

was that the shared drive was used to store motions and trial preparation materials while confidential and privileged information was usually stored in each client's physical file. In short, Owens's trial team did not attempt to learn any confidential information about any endorsed witnesses from the witnesses' case files.

Guided by the Colorado Supreme Court's reliance on the ethical screening device in *Shari*, this court relies on the OSPD's adherence to the conflicts of interest policy and to the ethical screening device. 204 P.3d at 459 ("We also note that any concerns regarding the communication of confidential information from the public defenders who previously represented the prosecution's witnesses to [the defendant's deputy public defenders] are assuaged by the screening policy . . . in effect throughout the Public Defender's Office."). Unlike *West*, there is no evidentiary basis in this record to presume that Owens's trial team acquired confidential information about Sailor, Johnson, Carter, Sr., or J. Martin from other DPDs. In fact, the evidence shows that the witnesses' DPDs and Owens's trial team adhered to the Colorado Rules of Professional Conduct and the OSPD's conflicts of interest policy. Accordingly, the court finds Owens's trial team did not "actively represent conflicting interests." *West*, 341 P.3d at 530 (emphasis omitted) (quoting *Mickens*, 535 U.S. at 175).

3. Failure to Consult Owens and to Disclose Conflicts

Owens also asserts that both his trial team and the prosecution ignored their duties to him and to the court to disclose the conflicts, which deprived him and the court of the opportunity to address the conflicts. To prevail under *Strickland*, Owens must "show that there is a reasonable probability that, but for [his trial team's failure to advise him and the court of the purported conflicts of interest], the result of the proceeding would have been different." 466 U.S. at 694. His argument presumes both that a conflict existed and that his trial team would have

been discharged if Owens had been advised of the purported conflicts of interest. This court finds no such conflict and there is no evidence supporting a presumption that trial counsel would have been discharged. Thus there is no prejudice from his trial team's failure to inform him and the court of the alleged conflicts of interest.

E. Conclusion as to Alleged Conflicts of Interest

Owens failed to prove any of his alleged conflicts of interest and failed to prove that any of the alleged conflicts of interest adversely affected his trial counsel's representation of him.

VIII. Claims Regarding Post Trial Motions

In light of the court's findings in parts III.N and VI of this Order, there were no colorable grounds on which trial counsel could have sought a new trial.

IX. Alleged Cumulative Error

Owens argues that cumulative error in this case warrants reversal. The court has considered the prejudice resulting from trial counsel's errors, together with the prosecution's and direct appeal counsel's errors, as well as the alleged juror misconduct, and concludes the errors, when considered cumulatively, are insufficient to warrant a new trial.

X. Conclusion

Owens is "entitled to a fair trial, but not a perfect trial." *Rodriguez*, 794 P.2d at 971. A fair trial is a trial whose result is reliable. *Strickland*, 466 U.S. at 687. Owens received a fair trial, and its result is reliable.

For the reasons set forth herein, the motion is hereby DENIED.

SO ORDERED this 16th day of May 2017.

CHRISTOPHER MUNCH
DISTRICT COURT SENIOR JUDGE