IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY CRIMINAL DIVISION

STATE OF FLORIDA,

CASE NO.: 15-01644-CF

v.

DIVISION: A

[redacted]

Person ID: 1416974, Defendant.

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FINAL ORDER GRANTING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF; DIRECTIONS TO CLERK

THIS CAUSE came before the Court on Defendant's *pro se* "Motion to Vacate and Set Aside Judgment and Conviction," filed on August 26, 2019, and his "Supplemental Motion to Vacate and Set Aside Judgment and Sentence with Incorporated Memorandum of Law," filed by counsel on January 16, 2020, both pursuant to Florida Rule of Criminal Procedure 3.850. On September 27, 2019, and January 23, 2020, the Court issued orders denying in part and directing the State to respond in part to Defendant's motions.[1] The State filed its response on May 29, 2020. Defendant filed a reply on June 30, 2020. On July 15, 2020, the Court granted an evidentiary hearing on four claims. The Court held the hearing on July 16, 2021. Having reviewed the motions, the State's response, Defendant's reply, the testimony at the evidentiary hearing, the record, and applicable law, the Court finds as follows:

PROCEDURAL HISTORY

On March 10, 2015, the State charged Defendant by information with DUI manslaughter (count one) and unlawful possession of cocaine (count two), stemming from an incident that occurred on February 13, 2015. The Court severed the counts for trial on March 29, 2017. On April 4, 2017, Defendant proceeded to trial on count one. The jury found him guilty, and on May 4, 2017, the Court sentenced Defendant to 15 years' imprisonment. On May 5, 2017, Defendant pled guilty to count two, and the Court sentenced Defendant to five years' imprisonment, concurrent to count one. (Ex. A, Judgments and Sentences). Defendant appealed, and the Second District Court

[1] The Court hereby adopts and incorporates by reference its September 27, 2019, Order and its January 23, 2020, Order.

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of Appeal affirmed per curiam. *Donnelly v. State*, 275 So. 3d 1195 (Fla. 2d DCA 2019). Defendant then filed the instant motion.

GROUNDS FOR RELIEF

In his motions, Defendant raised nine claims of ineffective assistance of counsel, one claim that the Court lacked jurisdiction, and one claim of cumulative error. In its September 27, 2019, and January 23, 2020, orders, the Court denied all claims except grounds three, four, eight, ten, and eleven. At the evidentiary hearing, Defendant withdrew grounds three, four, ten, and eleven, and proceeded on ground eight only.

Defendant claims that trial counsel rendered ineffective assistance by failing to file a motion to suppress the blood evidence seized pursuant to section 316.1933(1), Florida Statutes (2015), without a warrant or Defendant's consent. Defendant argues that he refused to consent to a blood draw, and that his refusal was not honored and his blood taken by force. He contends that no reasonable attorney would have failed to file a motion to suppress the blood draw because, in light of *Missouri v. McNeely*, the State would have been unable to show that a bona fide exigent circumstance existed to justify the warrantless blood draw.

For substantially similar reasons, Defendant argues that a motion to suppress the blood evidence would have been granted. Defendant notes that the State waited two-and-a-half to three-and-a-half hours to seize Defendant's blood, showing that no exigency existed based on the dissipation of alcohol in Defendant's blood. Defendant also argues that the State could not create its own exigency by relying on outdated warrant-application procedures that trial counsel described as "laborious" and "unnecessarily long."

Defendant contends that counsel's failure to move to suppress the blood draw prejudiced him. He contends that the BAC evidence was the "most damaging piece of evidence"—in his view, the State used the BAC evidence to prove impairment, to bolster its case regarding the other signs of impairment, and to bolster its case regarding causation through testimony about the effects of BAC on driving and reaction time—and that had it been suppressed, there is a reasonable probability that the outcome of the proceeding would have been different.

In response, the State contends that counsel made a reasonable decision not to file a motion to suppress because (1) she reasonably believed it would not have been granted, and (2) other evidence supported a finding that Defendant was impaired. The State also argues that the decision was a reasonable strategic decision because counsel developed a strategy to focus on the issue of

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causation. The State further contends that the motion would have failed because exigent circumstances did exist: in the State's view, the dissipation of alcohol in Defendant's blood constituted a *per se* exigency that eliminated the need to conduct a fact-specific inquiry because this was a manslaughter case. In neither its written response nor its arguments at the hearing did the State put forward an argument that, if counsel did render deficient performance by failing to seek suppression of the blood evidence, then Defendant was not prejudiced at trial by its admission.

In their written pleadings, both parties addressed the issue of whether the good-faith exception to the exclusionary rule would prevent suppression if the seizure of Defendant's blood were deemed unconstitutional. The State argued that it would apply because the officers relied on section 316.1933 in good faith. Defendant argued that it would not apply because *McNeely* had called the statute's application into question, and therefore it could not be relied upon in good faith. Neither party presented testimony or additional argument at the hearing on this issue.

TESTIMONY AT THE EVIDENTIARY HEARING

The Court held the evidentiary hearing on July 16, 2021. Dwight Gibiser appeared on behalf of Defendant, and Sara Waechter appeared on behalf of the State. At the start of the hearing, Defendant withdrew grounds three, four, ten, and eleven, and proceeded on ground eight only. (Tr 4–6.) Defendant testified and called trial counsel, Lynley Flagler, to testify at the hearing. No other witnesses testified, and the parties presented no other non-record evidence.

Defendant testified that law enforcement arrested him for DUI Manslaughter in February 2015. (Tr 8.) At the scene of the crash that led to his arrest, law enforcement officers asked that he provide a blood sample, and he refused. (Tr 8.) Law enforcement then took a blood sample without his consent and without a search warrant after threatening to seize it by force. (Tr 8–9.) He retained Ms. Flagler to represent him, and she moved to suppress his statements made at the scene but did not move to suppress the blood evidence. (Tr 8.) He did not ask Ms. Flagler to file a motion to suppress the blood draw, but also stated that he was unaware of the law surrounding blood draws. (Tr 10.)

Ms. Flagler testified that Defendant retained her to represent him in February 2016, about a year after he had been arrested for DUI Manslaughter. (Tr 11-12.) The scope of her representation was "everything through a jury trial." (Tr 11.) She received and reviewed the discovery in the case from Defendant's previous attorney. (Tr 13–14.) She was aware that law enforcement had not obtained any search warrants in the case. (Tr 14.)

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The State's theory at the time she took the case was that the victim had been crossing the street, and Defendant's vehicle struck him after he had traversed about three-fourths of the street. (Tr 15.) Ms. Flagler "never felt that Mr. Donnelly's blood-alcohol content had anything to do with the death of the victim in this case." (Tr 15.) She "always felt and still feel[s] that the victim had stepped out in front of oncoming traffic." (Tr 15.) But she acknowledged that, "[b]y necessity of the jury instructions," the State presented to the jury that Defendant's 0.18 blood alcohol concentration (BAC) "contributed to the death" of the victim. (Tr 15.)

Law enforcement took two non-consensual blood draws in this case. (Tr 16.) Those blood draws showed a BAC of 0.18 at 10:07 p.m. and 0.16 at 11:16 p.m. (Tr 16–17.) The Court instructed the jury on the presumption in DUI cases that a BAC of 0.08 or higher is sufficient evidence in and of itself to show that a person is impaired. Ms. Flagler testified that a defendant is "basically trying to overcome" a finding of impairment "[b]ecause of the presumption." (Tr 19–20.) Ms. Flagler conceded in her opening statement at trial that the element of impairment was not in dispute. (Tr 20–21.) Instead, she focused on what she felt was the "main issue of the entire case": causation. (Tr 21, 46.) Law enforcement believed that the victim "clearly had been in the road for quite a long time period" crossing the street, and that Defendant "had to have been under the influence because he didn't see him." (Tr 23.) However, she worked to demonstrate that the victim had stepped into the road from the opposite, much shorter, direction. (Tr 23.)

Ms. Flagler was aware that the State presented testimony from its expert about the effects that a 0:18 BAC would have on the human body, such as impaired motor functions, ability to operate a vehicle, and reaction times, and how those diminished faculties could contribute to the crash. (Tr 23.) She acknowledged that the State would not have been able to elicit that testimony if the BAC number had been suppressed. (Tr 24.) She acknowledged that it would be "a lot easier" to defend a case without a BAC number: "if you can have your dream case, you would prefer not to have high levels in a DUI manslaughter," or "any levels at all." (Tr 25.)

Ms. Flagler did not file a motion to suppress the blood evidence in this case. (Tr 26, 47.) She explained that she chose not to because

> I did not feel it would be very successful, to be honest with you. And I also felt that the major issue in the case was a causation issue. You know, again, there was other evidence that the State had to show intoxication, mainly his video. And a lot of the statements came in, you know, about comments he had made. He didn't look horrible on the video, but he did not look great on the video either.

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> I wouldn't [s]ay it was a dream video by any stretch of the imagination. There were observations the officers made that kind of supported findings of impairment. Again, we litigated those issues at trial.
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> We -- you know, but at the end of the day, there were other things that the State could rely on other than the blood draw. And because the main issue in the case was did this gentleman, the named victim, step out in front of Mr. Donnelly, that was really where all the focus on the case was.

(Tr 27.) She testified that she was aware of the decisions in *Missouri v. McNeely* and *State v. Liles*, and their effect on the need for a warrant in the context of section 316.1933, Florida Statutes—specifically, that a warrant would be required absent a showing by the State of exigent circumstances. (Tr 28–30, 34–36.) She was not aware of any Florida case holding section 316.1933 unconstitutional, but understood *McNeely* to have "changed the way that that statute was looked at." (Tr 48, 50.) She was aware that law enforcement never sought a warrant in this case. (Tr 29, 34.)

She "felt that a motion to suppress would not be successful" based on the information from depositions as well as her "knowledge of how specifically the State Attorney's Office obtained warrants." (Tr 47.) She explained her understanding of the warrant-application process:

> [C]andidly, the way that the warrants are set up through the Pinellas County State Attorney's Office, it's a very slow laborious process which takes multiple supervisors as well as prosecutors. So the fact that Ms. Sullivan or any prosecutor for that matter was at the scene, you know, they would have had to come back to the office. They have to wake people up. They have to get them back to the office. They have to have, you know, somebody come and type. There's all these people that are -- you know, have to come together in order for the State Attorney's Office to type a warrant.
>
> So in a lot of jurisdictions, law enforcement is the one that's obtaining the warrant. And law enforcement is the one that's going directly to the judge with a warrant. But in Pinellas County, they oversee all that information.
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> So first you have to get the prosecutor to the scene. Then you have to communicate that fact to the prosecutor. Then the prosecutor has to call the office. Then the prosecutor has to call a supervisor. Then the person from -- that's going to type it up from the typing pool has to be contacted. The supervisor has to be come in. Everybody meets back at the State Attorney's Office. They review this warrant. A duty judge has to be woken up. It is a very long,

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> unnecessarily long process, given, you know, modern technology in today's society.
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> But back then, which was pre-COVID, you have to understand, the Pinellas County State Attorney's Office did not have emails. They had -- we couldn't email anybody at their office. We had to send a fax to a central fax machine that had to be turned on before we sent it. So I knew that because I actually had worked at the Pinellas County State Attorney's Office for over nine years. I was actually a member of the DUI manslaughter squad at the State Attorney's Office. And I knew the process that was involved. And I knew the testimony that would be elicited about how long how it was going to take to get this warrant.

(Tr 36–38.) She also testified that

> the prosecuting attorney was the one that would draft the warrant as opposed to the police which that does sometimes shorten the timeframe for getting the warrant [instead of when] the police, you know, draft them solely and then go directly to the judge. You're kind of cutting out a middle man, if you will. But in Pinellas County, you know, everybody works together, the police and the State Attorney's Office. And then a lot of times they go to the judge's house together as well.

(Tr 47–48.)

She testified that she "knew that the likelihood of the judge granting that motion" to suppress the blood evidence was "very slim," based on the State's warrant-application procedures. (Tr 38.) When asked if not seeking suppression of the blood evidence was a "strategic decision," she explained that "it was certainly just a decision that was made in the case." (Tr 27–28; *see also* Tr 49.) She explained that she did not feel that such a motion would be successful based on the county's warrant-application procedures. (Tr 49.) She also knew that the State could present other evidence of Defendant's impairment in the form of video evidence, statements, and testimony about the officer's observations, which would have included testimony from Corporal Blair about "bloodshot watery eyes, slurred speech, odor of alcohol," and "the fact that the defendant had urinated himself." (Tr 49, 53.) Ms. Flagler commented that none of those indicators of impairment were "earth-shattering," but the jury would have heard that testimony. (Tr 53.)

RECORD EVIDENCE

Both Defendant and the State directed the Court to portions of the record to support their respective arguments on ground eight. Defendant referred the Court to the depositions of Jeffrey Hays, Deputy James Wilhelm, Detective Trenton Taylor, and Corporal Ronald Blair. The State

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referred the Court to the deposition of Sergeant Keith Williams, as well as those of Detective Taylor and Corporal Blair. The Court recites the salient portions of those depositions to outline the information available to counsel about the investigation, and then recites the material facts elicited at trial.

Investigation

The crash in this case occurred at approximately 7:30 p.m. on February 13, 2015, on 58th Street southbound near Kenneth City. (Ex. B, Trial Transcript, at 285.) The call for the major accident investigation team (MAIT) went out at 8:00 p.m. (Ex. B, at 285.) Lieutenant Lazaris, the MAIT leader, sent Sergeant Williams to the scene and advised him that it was serious-injury crash. (Ex. C, Deposition of Sergeant Keith Williams, at 7.) When Sergeant Williams arrived, "there were several officers and deputies on scene already," at least one of whom advised him that Defendant showed signs of impairment. (Ex. C, at 7.) The victim had already been transported to the hospital by the time Sergeant Williams arrived. (Ex. C, at 8.)

Sergeant Williams assigned Deputy James Wilhelm to lead the investigation. (Ex. C, at 8.) Deputy Wilhelm arrived on scene at 8:38p.m., over an hour after the crash had been reported. (Ex. D, Deposition of Deputy James Wilhelm, at 8.) When he arrived, he saw Detective Trenton Taylor talking to Defendant, and another officer, Corporal Montgomery, canvassing for witnesses. (Ex. D, at 8.) In addition to Detective Taylor, Corporal Montgomery, and himself, at least six other officers were also on scene. (*See* Ex. D, at 14–15.)

Because the victim had already been transported to the hospital and the streets were blocked off, "it wasn't a flurry of activity, but there was some activity going on." (Ex. D, at 8.) At that time, Defendant was obligated to remain to answer questions as part of the traffic crash investigation. (Ex. D, at 11.) Deputy Wilhelm met with Sergeant Williams and Lieutenant Lazaris and decided that the team would take photographs of the scene while Detective Taylor talked with Defendant, and then he surveyed the scene. (Ex. D, at 12, 15–16.)

Deputy Wilhelm determined that Defendant's Jeep had been travelling south along 58th Street and struck the victim "towards the right side of the front of the vehicle." (Ex. D, at 19.) Based on statements relayed to him from witnesses, he believed that the victim had been crossing the street east-to-west (left to right, or driver's side to passenger side) and had been three-quarters of the way across when Defendant's vehicle struck him, but nothing about the crash itself made

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that evident. (Ex. D, at 20–21.) The roadway was well lit. (Ex. D, at 21.) Deputy Wilhelm did not have any reason to believe, when he arrived on scene, that Defendant was impaired or that he had caused the crash. (Ex D, at 19.) Shortly after arriving on scene, Deputy Wilhelm learned that the victim had died. (Ex. D, at 28.)

Detective Taylor responded to the scene at the direction of Sergeant Williams. (Ex. F, Deposition of Detective Trenton Taylor, at 6–7.) When he made contact with Sergeant Williams, he observed Defendant talking to another deputy. (Ex. F, at 8.) Sergeant Williams directed him to interview Defendant as part of the crash investigation, which he explained was always kept separate from any DUI investigation. (Ex. F, at 10, 20.)

Detective Taylor made contact with Defendant at approximately 8:50 p.m. (Ex. F, at 10, 20.) He noted that Defendant was very nervous and that he "assumed he was going to be arrested, and be held responsible for what happened." (Ex. F, at 11.) Defendant showed indications of impairment: watery, red eyes; slurred speech; unsteady balance; odor of alcoholic beverages about his person; and his emotions were extreme, varying between "very excited and upset to being almost despondent." (Ex. F, at 11, 16–17.) He had also urinated in his pants. (Ex. F, at 11.) Detective Taylor advised Defendant that he may be asked to give a blood sample. (Ex. F, at 19.) Detective Taylor "knew there would be impairment there" during the DUI investigation. (Ex. F, at 24.) After speaking to Defendant, Detective Taylor advised Sergeant Williams and Deputy Wilhelm about his observations. (Ex. D, at 27–28; Ex. F, at 21.)

Sergeant Williams called Corporal Ronald Blair to the scene around 8:00p.m. (Ex. C, at 285; Ex. E, Deposition of Corporal Ronald Blair, at 5.) When he arrived shortly thereafter, Sergeant Williams gave him "a run down of the situation, vehicle hit a pedestrian, pedestrian passed away, and they were conducting a traffic investigation at the current time, and asked [him] to conduct a DUI investigation, if necessary, after the crash investigation was complete." (Ex. E, at 7–8.) At around 9:00 to 9:15 p.m., Deputy Wilhelm assigned Corporal Blair to take over the DUI investigation, and called an Assistant State Attorney to the scene. (Ex. D, at 30–32.)

Corporal Blair began his DUI investigation approximately 90 minutes after arriving on scene, at 9:38p.m. by Deputy West's COBAN video system. (Ex. E, at 8–9.) Upon making contact with Defendant, Corporal Blair noticed that Defendant's eyes were watery and bloodshot, he had an odor of an alcoholic beverage on his breath, and he had urinated his pants. (Ex. E, at 10.) He

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believed that Defendant was under the influence of alcohol based on the totality of the indicators of impairment he observed. (Ex. E, at 11.)

After spending 15-20 minutes with Defendant, Corporal Blair met back with Deputy Wilhelm to brief him. (Ex. E, at 15; Ex. D, at 33.) In Deputy Wilhelm's opinion, had Defendant not been impaired the crash would not have occurred. (Ex. D, at 36.) He explained that

> it was a very well-lit area, it was a low speed crash, there was no signage, no foliage, no environmental factors, no weather factors, the Jeep was in perfect working condition, the headlights were on, and that was proven by hot shock that we found during the inspection, the brakes were fine, there's no reason he should have hit that person.

(Ex. D, at 36.) He believed that Defendant's being under the influence of alcohol was "a contributing factor" to the crash. (Ex. D, at 36.)

Deputy Wilhelm directed Corporal Blair to take a blood sample. (Ex. . E, at 15; Ex. D, at 33.) "[I]t was a nonconsensual blood draw." (Ex. E, at 15.) At 10:07 p.m., the paramedic took two blood samples from Defendant. (Ex. B, at 423; Ex. E, at 15–16.) At 11:16 p.m., another paramedic took two more blood samples. (Ex. E, at 17.) Corporal Blair arrested Defendant for DUI Manslaughter at 11:38 p.m. and transported him to Central Breath Testing. (Ex. E, at 18.) After being arrested, Defendant refused to perform field sobriety tests or provide a breath sample. (Ex. B, at 332–33.)

Ms. Flagler also took the deposition of Jeffrey Hays, the chief toxicologist of the Pinellas County Forensic Lab. He tested both blood samples that were taken from Defendant and obtained results of 0.182 and 0.160 for BAC. (Ex. G, Deposition of Jeffrey Hays, at 15.) He opined that the BAC would have been "considerably higher at the time of the accident," probably around 0.24 given that the sample was taken three hours after the crash. (Ex. G, at 16.) He stated that someone with a high concentration of alcohol in their system would not be able to function efficiently. (Ex. G, at 19.) Even a functioning alcoholic would have impairment regarding motor control, ability to react to stimulus, and judgment. (Ex. G, at 20.) In general terms, "with alcohol this high, a person would have slower reaction times and would be experiencing other effects" such as "ability to concentrate" and react to stimuli. (Ex. G, at 20.) Ms. Flagler posed the hypothetical question whether a driver's BAC would "cause" a crash where a pedestrian stepped off of a curb and into oncoming traffic, and Mr. Hays indicated that it "would probably have a large influence on it." (Ex. G, at 22.) The driver's high BAC would "inhibit his ability to react if somebody stepped

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off the curb," and "he may not even notice because [his] peripheral vision is diminished." (Ex. G, at 23.) A high BAC "would definitely limit the person's ability to react and respond," "[s]o all of those things . . . could have contributed to the accident." (Ex. G, at 23.)

Trial

The State's primary evidence of Defendant's guilt at trial came from Corporal Blair, Mr. Hays, Dr. Noel Palma and Sean Davis.[2] Corporal Blair arrived around 8:00 p.m. and was directed to conduct a DUI investigation if one needed to be conducted. (Ex. B, at 287.) He noted that Defendant's vehicle was at a stop off the road and had suffered damage to the passenger-side front end consistent with striking a pedestrian. (Ex. B, at 296–98.) He testified that it could be difficult to pinpoint the exact location of impact in a vehicle-pedestrian crash. (Ex. B, at 301.) He explained some of the evidence he would look at to determine the location of impact. (Ex. B, at 301–08.) He explained that, based on the evidence, he believed that Defendant's vehicle struck the pedestrian on the west side of the road, but he could not say where the victim was when he was struck or whether or not the pedestrian was in the road. (Ex. B, at 402–03, 409–10.) Defendnat later called Corporal Stephen West, who testified that the "it's a good probability [the impact] was in the road." (Ex. B, at 771.)

Corporal Blair eventually began a criminal investigation into Defendant. (Ex. B, at 312.) He observed that Defendant's eyes were bloodshot and watery, that he had an odor of alcohol on his breath, and that he had urinated himself. (Ex. B, at 312–13.) Defendant refused to perform field sobriety tests, refused to submit to a breath test, and refused to submit to a blood draw. (Ex. B, at 315–17, 332–33, 380–81.) Corporal Blair testified at length about the compelled blood draw and the procedures involved. (*See* Ex. B, at 317–30.) After seizing the blood samples from Defendant, Corporal Blair placed him under arrest and transported him to Central Breath Testing. (Ex. B, at 331.) During transport, he told Defendant that the victim had died. (Ex. B, at 331.)

The State introduced a video of Defendant's interaction with Corporal Blair at the scene. (*See* Ex. B, at 337–45; State's Trial Exhibit 5.)[3] In the video, Defendant tells Corporal Blair that

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[2] Four other witnesses testified for the State: the two paramedics who drew Defendant's blood, a forensic technician who authenticated the photographs of the scene, and Denise Rotunda who testified about the absence of drugs in the victim's system.

[3] State's Trial Exhibit 5 is currently held in evidence by the Clerk. As it is not a documentary exhibit, the Court does not attach it, but incorporates it into the record for this proceeding by reference.

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he had "two beers earlier" and that "you guys are going to give me a DUI." (Ex. B, at 339.) He states "I don't believe I can pass a breathalyzer," but also states "I'm not shit-faced. I'm not drunk." (Ex. B, at 339.) He states that he had been crying for some time and urinated himself while waiting at the scene as directed. (Ex. B, at 340–41.) He tells Corporal Blair "You're going to put me under arrest," and explains that he will not perform field sobriety tests because "I don't feel that I could leave here regardless if I take the field sobriety tests or not. I don't feel that I'm going to be able to walk away." (Ex. B, at 341.) After being taken to Central Breath Testing, Defendant states that he "killed somebody tonight," that his "life is ruined," and that he is not "accepting or dealing with this . . . too well right now."[4] (Ex. B, at 342–43.) Corporal Blair ultimately opined that Defendant "was under the influence of alcohol to the extent his normal faculties were impaired" and that Defendant's impairment caused or contributed to the victim's death. (Ex. B, at 350.)

Mr. Hays testified that he tested the blood samples taken from Defendant for BAC. (Ex. B, at 431–34.) The blood sample taken at 10:16 p.m. showed a BAC of 0.18. (Ex. B, at 434–35.) The sample taken at 11:16 p.m. showed a BAC of 0.16. (Ex. B, at 434–35.) He testified about absorption, peak alcohol concentration, and dissipation. (*See* Ex. B, at 436–38.) He opined that Defendant's BAC would have been at least 0.18 at the time of the crash, three hours prior to the first blood draw. (Ex. B, at 440–41.) He explained that, with enough information, he could determine Defendant's BAC at the time of the crash through the process of retrograde extrapolation, but he did not have that information here. (Ex. B, at 455–56.) He also explained the general effects that a person would feel at a BAC as high as Defendant's in this case:

> People with concentrations of alcohol at that level, they will be experiencing emotional changes, mood changes. Their ability to react to stimulus will be diminished. Reaction times will be longer. They will not be able to process sensory input. Their thinking is slower. Their ability to react to something, that once they've realized something isn't the same, it takes them longer to react to that. Vision, peripheral vision goes, is diminished at that level. You can start seeing double at that level. And then again being able to process what you're seeing takes longer.

(Ex. B, at 460–62.)

Sean Davis shared a dormitory with Defendant in the Pinellas County Jail while they were incarcerated. (Ex. B, at 634.) He had 11 felony convictions and three convictions for misdemeanor

[4] In the video, Defendant appears steady while standing and does not appear to sway. He is emotionally volatile. It is difficult to tell whether Defendant slurred his speech while speaking.

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crimes of false statement or dishonesty. (Ex. B, at 628.) He was facing 23 charges in three open cases for, among other things, grand theft and various forms of unlicensed contracting, as well as violations of probation for scheme to defraud and grand theft. (Ex. B, at 629–32.) His potential exposure if convicted was 113 years, and the minimum sentence under the guidelines was 55.8 months. (Ex. B, at 632.) He testified that he had not been offered any leniency for testifying in Defendant's case, but he was aware that it was a possibility. (Ex. B, at 633, 667.)

Mr. Davis shared the same cell area as Defendant. (Ex. B, at 634.) Although he had access to Defendant's discovery materials, he stated that he never looked at them. (Ex. B, at 641–48.) He testified that Defendant told him that, on the night of the crash, he "went to a bar, started drinking, and he went to another bar after that one and continued drinking." (Ex. B, at 635.) He then decided to purchase something and met someone at the Tobacco King strip mall. (Ex. B, at 635.) Afterwards, he "pulled out of the parking lot rather excitedly, I guess, and he floored it." (Ex. B, at 636.)

> When he turned on to the main street there, he floored the vehicle in his words. And he was looking down as soon as he floored it, and he was going -- I'm using the mannerisms he used when he was telling me. He looked down and when he looked down, that's when he thought he might have went on the outside of the lane. And that's when he heard a loud crack, the person that he hit. And he said that -- I guess he was assuming he was bending down because the headlight is where it had the biological matter, I guess is the way to describe it, on the headlight or on the truck.
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> As he -- after he hit him, he stopped. He realized that he -- the guy had a large hole in his head. He started in his words freaking out a little bit. He went back, and he went back to the vehicle. I guess at that time he was going to -- I don't know if he was – the purchase that he made, he kept it on his person, I guess. And that's when he called police for the accident.

(Ex. B, at 637.) Mr. Davis testified that he and Defendant had "three to four detailed conversations about" the crash. (Ex. B, at 638.) Defendant also told him that he "wasn't happy with the police investigations" and that he was "intoxicated." (Ex. B, at 638.) Mr. Davis acknowledged that he reached out to the prosecutor with this information. (Ex. B, at 639.)

Dr. Noel Palma testified that the cause of the victim's death was the traffic collision. (Ex. B, at 510.) The victim suffered a number of injuries in the collision consistent with a pedestrian-to-vehicle collision, but Dr. Palma could not use those findings to explicate how the crash occurred.

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(Ex. B, at 500–06.) He indicated there were too many other factors to determine on which side of the victim the initial impact occurred. (Ex. B, at 506–07.)

Denise Cao testified for the defense. She worked as a bartender at a bar adjacent to the scene of the crash. (Ex. B, at 739–42.) On the evening of the incident, she saw an individual standing on the curb on the opposite side of the street from the scene of the crash. (Ex. B, at 742–44.) She noted that he appeared "very wobbly," "off-balance, teetering." (Ex. B, at 744.) "[N]ot too long after that," about 20 minutes, police and emergency medical personnel arrived. (Ex. B, at 745, 755.) She knew Defendant as an "acquaintance," but he had not been drinking in her bar that night. (Ex. B, at 747.)

Professor William Lee also testified for the defense. He opined that, based on his analysis, the victim had his back to the vehicle when it collided with him, which suggested that the victim was walking along the road southbound when the collision occurred. (Ex. B, at 822–23.) He explained that the evidence showed that the victim went onto the hood of the car and then fell off of the passenger side of the vehicle. (Ex. B, at 823.) It appeared to him that the collision occurred in the roadway itself, and that Defendant did not veer off the road to collide with the victim. (Ex. B, at 824–26, 860–61.) But, he noted, the evidence "doesn't really say one way or the other" whether the victim was already in the roadway or stepped out just prior to the collision. (Ex. B, at 827–28.)

ANALYSIS

Florida Rule of Criminal Procedure 3.850 permits a defendant to challenge the legality of his or her conviction via a timely filed motion for postconviction relief. *See* Fla. R. Crim. P. 3.850. In a motion for postconviction relief, the defendant bears the burden of establishing a *prima facie* case based on a legally valid claim. *See Griffin v. State*, 866 So. 2d 1, 9 (Fla. 2003).

In his motions, Defendant raised nine claims of ineffective assistance of counsel, one claim that the Court lacked jurisdiction, and one claim of cumulative error. In its September 27, 2019, and January 23, 2020, orders, the Court denied all claims except grounds three, four, eight, ten, and eleven. At the evidentiary hearing, Defendant withdrew grounds three, four, ten, and eleven, and proceeded on ground eight only. Therefore the Court dismisses grounds three, four, ten, and eleven with prejudice, and turns to ground eight.

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Legal Standards for Claims of Ineffective Assistance of Counsel

"At an evidentiary hearing, the defendant [has] the burden of presenting evidence and the burden of proof in support of his or her motion, unless otherwise provided by law." Fla. R. Crim. P. 3.850(f)(8)(B); *see also Campbell v. State*, 247 So. 3d 102, 106 (Fla. 2d DCA 2018).

Claims of ineffective assistance of counsel are analyzed under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 694 (1984). To prevail on such a claim, a defendant must show that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Jones v. State*, 998 So. 2d 573, 582 (Fla. 2008). To satisfy the deficiency prong, the defendant must identify specific acts or omissions by counsel that fell below a standard of reasonableness under prevailing professional norms. *Jones*, 998 So. 2d at 582. To satisfy the prejudice prong, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the trial would have been different. *Haliburton v. Singletary*, 691 So. 2d 466, 470 (Fla. 1997). A "reasonable probability" is a probability that is "sufficient to undermine confidence in the outcome." *Id.* (quoting *Cruse v. State*, 588 So. 2d 983, 987 (Fla. 1991)).

The Supreme Court has articulated the specific requirements necessary to sustain a claim that counsel rendered ineffective assistance by failing to file a motion to suppress under the Fourth Amendment:

> Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the **defendant must also prove that his Fourth Amendment claim is meritorious** and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

Kimmelman v. Morrison, 477 U.S. 365, 375 (1986) (emphasis added). "Although a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim . . ., a good Fourth Amendment claim alone will not earn" a defendant postconviction relief. *Id.* at 382.

Legal Standards under the Fourth Amendment

Constitutionality of the Blood Draw

Defendant's claim rests on the application of U.S. Supreme Court precedent to section 316.1933, Florida Statutes, which justified the warrantless seizure of Defendant's blood in this case. Section 316.1933(1)(a) states that:

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> If a law enforcement officer has probable cause to believe that a motor vehicle driven by or in the actual physical control of a person under the influence of alcoholic beverages . . . has caused the death or serious bodily injury of a human being, a law enforcement officer shall require the person driving or in actual physical control of the motor vehicle to submit to a test of the person's blood for the purpose of determining the alcoholic content thereof . . . .

In *Missouri v. McNeely*, 569 U.S. 141 (2013), decided almost 20 months prior to the crash and subsequent blood draw in this case, the Supreme Court held that the dissipation of alcohol in the bloodstream does not, on its own, constitute an exigency justifying the warrantless taking of blood. *Id.* at 165. The *McNeely* Court observed that a warrantless search in exigent circumstances is reasonable when "there is compelling need for official action and no time to secure a warrant." *Id.* at 149 (quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978)). But although "some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test," "[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id.* at 152–53. The key holding of *McNeely* was that something more than dissipation of alcohol in the blood was required to justify a warrantless blood draw, and, in most cases, that "something more" would be insufficient time to get a warrant. "The relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending upon the circumstances in the case." *Id.* at 164.

As Florida courts have explained, the "exigent circumstances" exception to the warrant requirement necessarily requires that insufficient time exist to get a warrant: "Some set of facts must exist that precludes taking the time to secure a warrant." *Lee v. State*, 856 So. 2d 1133, 1136 (Fla. 1st DCA 2003); *see also Herring v. State*, 168 So. 3d 240, 243–44 (Fla. 1st DCA 2015). "[I]f time to get a warrant exists, the enforcement agency must use that time to obtain the warrant." *Hornblower v. State*, 351 So. 2d 716, 718 (Fla. 1977). The Florida Supreme Court added: "Law enforcement officers may not sit and wait . . . (when they could be seeking a warrant), then utilize their self-imposed delay to create exigent circumstances." *Hornblower*, 351 So. 2d at 719. The

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state bears the burden to demonstrate that "procurement of a warrant was not feasible because 'the exigencies of the situation made that course imperative.'" *Id.* at 717.

Following the blood draw in this case, but prior to trial, the Fifth District applied the holding of *McNeely* to section 316.1933(1). In *State v. Liles*, 191 So. 3d 484 (Fla. 5th DCA 2016), the Fifth District held that "[a]fter *McNeely*, law enforcement must obtain a warrant or later show that exigent circumstances prevented them from doing so" when relying on section 316.1933 to draw blood over a suspect's objection. *Liles*, 191 So. 3d at 489. *Liles* involved a similar situation to this case: Liles was involved in a fatal traffic accident, showed signs of impairment due to alcohol, refused to consent to a blood draw requested pursuant to section 316.1933(1), and police drew his blood over his objection.

The Fifth District concluded that the State "failed to present sufficient evidence that exigent circumstances existed to support the warrantless blood draws under the totality of the circumstances," observing that "the State made no effort to do so, as the blood draws were based solely on the officers' reliance on section 316.1933(1)." *Liles*, 191 So. 3d at 488. The Fifth District explained that "[t]o comply with *McNeely*, the statute must assume the blood draw will be obtained with a warrant, absent consent or proof of exigent circumstances." In light of *McNeely*, the Fifth District interpreted section 316.1933 "as a directive to law enforcement to obtain blood samples in serious and deadly crashes when probable cause exists to suggest impaired driving" in compliance with the Fourth Amendment.

No district court of appeal issued a decision conflicting with *Liles* prior to Defendant's trial, and none have issued since. *See McGraw v. State*, 245 So. 3d 760, 769 (Fla. 4th DCA 2018), *vacated on other grounds*, 289 So. 3d 836 (Fla. 2019) ("We agree with *Liles*'s conclusion that when a defendant specifically withdraws his or her consent, the state cannot compel a blood draw."); *Aguilar v. State*, 239 So. 3d 108, 112 n.4 (Fla. 3d DCA 2018) (distinguishing *Liles* because, in *Liles*, "the State had failed to present sufficient evidence to the trial court that exigent circumstances existed even though it had the burden of doing so"). Therefore, at the time of the trial in this case, the Court would have been obligated to follow the *Liles* precedent. *See Pardo v. State*, 596 So. 2d 665 (Fla. 1992) (in the absence of interdistrict conflict, district court decisions bind all Florida trial courts).

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Only three other Florida cases have specifically considered what facts constitute exigent circumstance under *McNeely*, and all three issued after *Liles* and Defendant's trial.[5]

In *State v. Goodman*, 229 So. 3d 366 (Fla. 4th DCA 2017), the Fourth District determined that exigent circumstances existed to justify a warrantless blood draw. Goodman "ran a stop sign without braking and 't-boned' the victim. . . . The force of the impact pushed the victim's Hyundai through the intersection and into a nearby canal, where it came to rest upside down. [Goodman] did not remain on the scene or assist the victim, who ultimately drowned." *Id.* at 369–70. Goodman then "absented himself from the scene for over an hour," only to later return and go "to the hospital for treatment of his own injuries" before law enforcement discovered the victim's vehicle and body. *Id.* at 381. "By the time the homicide investigator arrived and then went to the hospital, nearly four hours had passed since the time of the crash, but less than two hours from the time the body was discovered. The investigator testified that it would have taken an additional two hours to obtain a search warrant." *Id.* at 381. The trial court found that exigent circumstances were present, and the Fourth District agreed. *Id.* at 381.

In *Aguilar v. State*, 239 So. 3d 108 (Fla. 3d DCA 2018), the Third District determined that exigent circumstances existed to justify a warrantless blood draw.

> Aguilar's accident occurred at approximately 4:22 a.m. on a Sunday. The accident was serious, resulting in the instantaneous death of one pedestrian, and caused serious bodily injuries to two more pedestrians. The accident occurred at the scene of a prior accident, further complicating the accident scene investigation. Aguilar himself was seriously injured, taken to a hospital for treatment, and induced into a coma and intubated. At both the accident scene and later at the hospital, Aguilar smelled of alcohol and exhibited symptoms consistent with drunkenness. The blood sample was taken at 5:42 a.m., about ninety minutes after the accident. And the testimony provided by the State was that a warrant would have taken *at least* four hours to obtain from the time the process began.

Id. at 112. The Fourth District distinguished *Liles* because, in *Liles*, "the State had failed to present sufficient evidence to the trial court that exigent circumstances existed even though it had the burden of doing so," while the State in Aguilar's case "met its evidentiary burden regarding the existence of exigent circumstances." *Id.* at 112 n.4.

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[5] In one additional case, *State v. Quintanilla*, 276 So. 3d 941 (Fla. 3d DCA 2019), the Third District stated that "the State firmly demonstrated the existence of exigent circumstances," but Quintanilla did not challenge the blood draw on that basis in the trial court, and the Third District's analysis does not address exigent circumstances in any detail.

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In *Dusan v. State*, No. 5D19-2987, 2021 WL 1931440 (Fla. 5th DCA May 14, 2021), the Fifth District determined that "the State failed to meet its burden at the suppression hearing of showing that the procurement of a warrant was not feasible due to the exigencies of the situation." *Id.* at *2. The crash occurred "shortly before midnight." *Id.* at *1. When the primary investigator arrived at approximately 12:30 a.m., "[f]ive deputy sheriffs along with emergency medical responders were already at the accident scene." *Id.* at *1. "Within thirty minutes" of his arrival on scene, two more troopers arrived, "one of whom was a traffic homicide investigator." *Id.* at *1. The investigator quickly learned that the crash involved serious physical injury and that Dusan was the driver. *Id.* at *1. The investigator conducted a DUI investigation, determined that Dusan was impaired, and placed her under arrest at 2:17 a.m. *Id.* at *1–*2. "While still at the crash scene, [Dusan] refused [the investigator's] two requests for a voluntary blood draw." *Id.* at *2. He then drove Dusan to a nearby hospital, where a blood draw was conducted at 3:02 a.m. *Id.* at *2. "Neither [the investigator] nor any of the seven other law enforcement officers on the scene made any effort whatsoever to obtain a warrant to require [Dusan] to submit to the blood draw. *Id.* at *2.

The State urged the court to adopt "a per se rule that exigent circumstances categorically exist in all injury causing drunk-driving investigations," which the Fifth District rejected. *Id.* at *2. The Fifth District also rejected the State's argument that exigent circumstances existed:

> Here, there were eight law enforcement officers on the scene. According to the evidence, none of them made any attempt to find out who the on-call assistant State Attorney was nor which judge might be available nearby or anywhere in Brevard County in order to secure a warrant. None of the officers attempted to make contact with any department's legal advisor. Clearly, the law enforcement officers, including [the investigator], were on notice very early in the investigation that a forensic blood draw would be required given the severity of the victim's injuries which was directly communicated by on-scene medical personnel. Under *McNeely* those circumstances would not excuse obtaining a warrant for the forensic blood draw, and they do not do so here.

Id. at *3.

Good Faith Exception to the Exclusionary Rule

Both parties briefed the good faith exception to the exclusionary rule and its effect on the suppression of the BAC evidence, although neither party addressed it at the hearing.

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"[W]hen the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful," exclusion is not warranted. *Davis v. United States*, 564 U.S. 229, 238 (2011). One application of the good-faith exception is for "searches conducted in reasonable reliance on subsequently invalidated statutes." *Id.* at 239. The Fifth District held in *Liles* that, because the seizure at issue had occurred prior to the Supreme Court's decision in *McNeely*, "it was reasonable for the officers to have a good-faith belief in the constitutional validity of a warrantless blood draw authorized by section 316.1933(1)(a)." *Liles*, 191 So. 3d at 489–90.

However, the Supreme Court decided *McNeely* almost 20 months prior to the seizure at issue in this case. The Fifth District recently held, in a case involving a blood draw conducted after *McNeely* but before *Liles*, that the good faith exception was inapplicable. *See Dusan*, 2021 WL 1931440, at *2. The Fifth District has also explained that "the good faith exception cannot be applied where the police officer's acts occur subsequent to a binding appellate court decision which determines that such acts are violative of the Fourth Amendment." *Campbell v. State*, 288 So. 3d 739, 741 (Fla. 5th DCA 2019) (citing *Carpenter v. State*, 228 So. 3d 535, 538 (Fla. 2017)).[6]

Application to this Case

Given the nature of the claim in this case, the Court addresses it in three distinct steps, as *Kimmelman* requires: (1) whether counsel performed deficiently in failing to file the motion to suppress; (2) whether the claim Defendant alleges counsel should have raised in the motion to suppress would have been meritorious; and (3) whether counsel's failure to file the motion to suppress prejudiced Defendant.

Deficient Performance

Defendant contends that no reasonable attorney would have failed to file a motion to suppress the blood draw because, in light of *Missouri v. McNeely*, the State would have been unable to show that a bona fide exigent circumstance existed to justify the warrantless blood draw.

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[6] *Campbell* involved the reading of the statutorily required implied consent warning in section 316.1932(1) (2016). The trial court had found that police violated Campbell's constitutional rights because the warning informed him that he may face criminal penalties for refusing a breath test, and the Supreme Court had held similar warnings unconstitutional in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). The trial court ruled that the good faith exception applied because *Birchfield* had been decided "a day or two" prior to Campbell's arrest. The Fifth District concluded that the amount of time was immaterial; because it had been decided prior to the arrest, the good faith exception did not apply. *Campbell*, 288 So. 3d at 741–42

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The State contends that counsel made a reasonable decision not to file a motion to suppress because (1) she reasonably believed it would not have been granted, and (2) other evidence supported a finding that Defendant was impaired.[7] The State also argues that the decision was a reasonable strategic decision because counsel developed a strategy to focus on the issue of causation.

To satisfy the deficiency prong, a defendant must show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Griffin v. State*, 866 So. 2d 1, 8 (Fla. 2003). A defendant must identify specific acts or omissions by counsel that fell below a standard of reasonableness under prevailing professional norms. *Jones*, 998 So. 2d at 582; *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986). Moreover, 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." *Hampton v. State*, 219 So. 3d 760, 770 (Fla. 2017) (quoting *Strickland*, 466 U.S. at 689). The defendant must overcome the presumption that the challenged action "might be considered sound trial strategy" under the circumstances. *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91 (1955)). "Mere unhappiness or anger with the representation of counsel, or disagreement with regard to counsel's strategic decisions, does not render counsel ineffective." *Taylor*, 87 So. 3d at 758. "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. Judicial scrutiny of counsel's performance must be highly deferential and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. A court 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.

The depositions taken in this case showed that at least nine law enforcement officers were on scene within an hour of the crash in addition to an unknown number of patrol deputies who had arrived earlier. The depositions also showed that the DUI investigation did not begin until approximately two hours after the crash, after an Assistant State Attorney arrived on scene. The

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[7] The State does not urge the Court to find that counsel could have reasonably concluded that the good faith exception to the exclusionary rule would have operated to prevent suppression in this case, and counsel did not give any testimony that the good faith exception entered into her assessment of the issue. Therefore, the Court does not consider the good-faith exception in assessing whether counsel reasonably believed that the motion would be denied.

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deposition of Mr. Hays also included his testimony, which the State would elicit at trial, that the high BAC Defendant had would cause additional side effects, such as double vision and loss of peripheral vision, that would make him more likely to be unable to avoid the crash.

Here, counsel knew of controlling caselaw that "changed the way" section 316.1933 operated and required a showing of exigent circumstances when law enforcement seized blood without a warrant or consent. She was aware of the necessary facts of the investigation timeline, the number of officers involved, that police made no attempt to obtain a warrant, and that police relied on section 316.1933 to justify the warrantless, nonconsensual seizure of Defendant's blood. She was aware that the State's warrant-application process was "laborious," but she did not testify to any specific timeframes that would have been involved in this incident, which occurred in the early evening. She also knew that countering the State's evidence of impairment would be much easier without a high BAC number to deal with.

Based on her knowledge of the case at the time a motion to suppress would have been filed, the Court finds that Ms. Flagler's decision not to file a motion to suppress the blood evidence constitutes deficient performance. *Liles* squarely held that section 316.1933 required a showing of exigent circumstances, and well-established caselaw, of which effective counsel would have been aware, had held that police "may not sit and wait . . . (when they could be seeking a warrant), then utilize their self-imposed delay to create exigent circumstances." *Hornblower*, 351 So. 2d at 719. The information she had gathered revealed no rush from law enforcement to collect evidence of Defendant's BAC, given that the officers on scene—despite information upon their arrival that Defendant was the driver, showed signs of impairment, and that the victim had died—did not proceed to a DUI investigation for over 90 minutes and did not utilize that time to begin the warrant process. Although counsel noted that the State had other evidence of impairment, she also conceded that the case would have been better for the defense without the BAC evidence. Moreover, the BAC evidence was relevant to whether Defendant caused the accident—the main issue on which counsel stated she was focused—as Mr. Hays explained at his deposition.

Ms. Flagler's generalized knowledge that the State could present evidence that its warrant-application process was laborious and involved a number of steps is not sufficient to render her failure to file the motion to suppress a reasonable decision. For one, she did not testify to any specific knowledge about the procedures that may have been in place that Friday evening. She identified four individuals who would need to be involved—the prosecutor on scene, a supervisor,

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a typist, and the duty judge—in addition to the investigators on scene, but did not testify as to any specific knowledge about how long it would have taken to summon them and to complete the warrant-application process. For two, counsel was, or should have been, aware that the Supreme Court had explained there is "no plausible justification for an exception to the warrant requirement" if multiple officers are involved and one of them can take steps to secure a warrant without "significantly increas[ing] the delay before the blood test is conducted." *McNeely*, 569 U.S. at 154. Here, there were at least nine officers on scene—Ms. Flagler should have known that she could argue that the State's failure to even engage in the warrant-application process with so many officers available would not justify its reliance on exigent circumstances.[8] For those reasons, her understanding of the warrant-application process does not make her belief that the motion would fail a reasonable one.

Moreover, general considerations of litigating DUI cases militate against finding counsel's decision not to file a motion to suppress reasonable. As Ms. Flagler acknowledged, it is far better to litigate a DUI case without evidence of BAC than to do so with it. Counsel had caselaw in hand explaining that the State would need to justify this search based on exigent circumstances. The delay in investigating the DUI portion of the crash made it appear that the circumstances were not exigent. Counsel could not have known whether the State would justify its warrantless seizure by presenting detailed evidence of its "unnecessarily long" and "laborious" warrant-application process or by trying to succeed on a *per se* approach;[9] in any event, then-existing caselaw gave counsel a roadmap to succeed against either theory.

The Court also cannot conclude that the decision not to file the motion to suppress the blood draw was a strategic decision. Ms. Flagler twice refused to agree that her decision was "strategic" and never gave any strategic reason for not filing the motion. Her explicit reason for not filing the motion was that she did not believe it would succeed, not that she believed allowing the State to present evidence of Defendant's high BAC gave her a strategic advantage.

Nor can the Court see any strategic value in not filing an even potentially meritorious motion to suppress where a case is headed to trial, a motion to suppress is already being filed

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[8] The Court notes that such an argument would have succeeded. The Fifth District agreed with this argument, on very similar facts, in *Dusan v. State*, No. 5D19-2987, 2021 WL 1931440 (Fla. 5th DCA May 14, 2021). Although the Court does not consider *Dusan* in determining that counsel performed deficiently, it does demonstrate that *McNeely* provided a roadmap to making the argument that the sheer number of people involved in the investigation limits the State in asserting that exigent circumstances gave it insufficient time to obtain a warrant.

[9] The State urged a *per se* approach in its response to this motion, and in both *Liles* and *Dusan*.

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involving much the same facts, and where the State will bear the burden under controlling caselaw to justify the seizure. The Court cannot conclude that counsel had to focus on issues of causation to the exclusion of challenging any other evidence. Moreover, such a strategy would have been flawed because the BAC evidence provided evidence of causation. Even under the State's argument that counsel chose to focus on issues of causation and allow the BAC evidence to be admitted, the decision not to challenge the BAC evidence was could not have been a reasonable strategic decision because the BAC evidence provided evidence of causation.

Given the state of the law at the time and the information available to counsel, the Court concludes that counsel's failure to file a motion to suppress the blood draw in this case constitutes deficient performance.

Merits of the Fourth Amendment Claim

Defendant argues that a motion to suppress the blood evidence would have been granted. Defendant notes that the State waited two-and-a-half to three-and-a-half hours to seize Defendant's blood, showing that no exigency existed based on the dissipation of alcohol in Defendant's blood. Defendant also argues that the State could not create its own exigency by relying on outdated procedures that trial counsel described as "laborious" and "unnecessarily long." The State contends that the motion would have failed because exigent circumstances did exist: in the State's view, the dissipation of alcohol in Defendant's blood constituted a *per se* exigency that eliminated the need to conduct a fact-specific inquiry because this was a manslaughter case.

Defendant bears the burden to demonstrate that "his Fourth Amendment claim is meritorious." *Kimmelman*, 477 U.S. at 375. The record evidence shows that at least nine law enforcement officers were on scene, and the first responding officers observed that Defendant was showing signs of impairment from alcohol. At least one later-responding officer, Detective Taylor, spoke to Defendant within 90 minutes of the crash and opined that he believed Defendant to be under the influence of alcohol based on specifically identified indicators of impairment. In that same time frame, Deputy Wilhelm and Corporal Blair both were made aware of the victim's injuries and death, and both determined that Defendant's vehicle struck the victim. Thus, within an hour and a half of the crash, at the latest, law enforcement collectively had information that Defendant was impaired by alcohol and had struck and killed the victim, although the record indicates that this understanding likely came together much earlier. Thereafter, no one on scene

made any effort to obtain a warrant, instead waiting another 30 minutes to begin a separate DUI investigation and then another 40 minutes until obtaining a blood sample.

On that evidence, the Court cannot find that exigent circumstances existed due to the time needed to obtain a warrant. Without evidence as to how long it would have taken to procure a warrant, the Court is left with the facts that a number of officers were on scene and that no one sought a warrant. The Fifth District, in *Dusan*, 2021 WL 1931440, held, on nearly identical facts, that the State had failed to show an exigent circumstance existed. Although that case had not been decided at the time of Defendant's trial, it represents an application of *McNeely* and *Liles* to a specific set of facts that the Court cannot ignore.[10]

The evidence that Defendant presented, through counsel, of the State's warrant-application procedures in Pinellas County—that three individuals would need to be involved in addition to the investigators on scene to type up the warrant application and then that a judge would need to be located to sign the warrant—does not change the analysis. First, that evidence represented trial counsel's understanding of the process, not specific evidence of the process in place the night of the crash. Although that information is relevant and material to the assessment of whether counsel performed deficiently, it carries less weight in the determining whether the State could have proven that exigent circumstances existed at a motion to suppress hearing. And second, even incorporating counsel's understanding of the process into the determination of whether the State could have proven that exigent circumstances existed, neither Defendant nor the State presented evidence as to *how long* the process would have taken or whether the process could have been expedited given the severity of the case and the importance of preserving the blood evidence. The Court cannot infer from counsel's testimony whether the process would have taken one hour, four hours, or seven hours, and the Court will not speculate from a silent record. Without a more specific time frame, the Court cannot conclude from counsel's testimony about her understanding of the State's warrant-application process that the State could have proven that exigent circumstances existed.

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[10] Although Defendant bears the burden of proving that his Fourth Amendment claim is meritorious, had the motion been filed prior to trial, the State would have borne the burden of proving the existence of exigent circumstances. *See Dusan*, 2021 WL 1931440, at *2 ("It is the State's burden to prove that such an exception to the warrant requirement, in this case exigent circumstances, applies."). In this posture, Defendant bears the burden of showing that the State would have been unable to prove that an exception to the warrant requirement applied. However, the Court does not read *Kimmelman* to require a defendant to anticipatorily present all the evidence that the State would or should have presented in order to succeed on his claim. The State had an equal opportunity at the evidentiary hearing to present evidence if it believed the evidence insufficient to show that the State would have proven an exception to the warrant requirement and did not do so.

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The State also argues that the fact that the victim died, combined with the dissipation of alcohol in Defendant's blood, constitutes an exigent circumstance. That argument is foreclosed by *Liles*. In that case, the Fifth District "decline[d] to adopt the State's argument that *McNeely* does not apply in these cases," *i.e.* fatal crashes where blood is drawn in reliance on section 316.1933, and held that the State must obtain a warrant, "absent consent or proof of exigent circumstances" in order to comply with section 316.1933 and *McNeely*. 191 So. 3d at 489. In the absence of contravening caselaw from the Second District Court of Appeal or any other district, this Court is bound, and would have been bound at the time of Defendant's trial, by the decision in *Liles*. Therefore, this argument fails.

The Court also finds that the good faith exception to the exclusionary rule would not prevent suppression in this case. As the Fifth District explained in *Liles*, "**before *McNeely***, it was reasonable for the officers to have a good-faith belief in the constitutional validity of a warrantless blood draw authorized by section 316.1933(1)(a)." *Liles*, 191 So. 3d at 489 (emphasis added). That was so because "the primary purpose of the exclusionary rule is to deter future unlawful police conduct;" accordingly, "the rule has not been applied in certain circumstances, such as when an officer acts in objectively reasonable reliance on a subsequently invalidated statute." *Liles*, 191 So. 3d at 489. Here however, the language in *McNeely* made clear that warrantless blood draws would require justification:

> In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment **mandates** that they do so. We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test. That, however, is a reason to decide each case on its facts, as we did in *Schmerber*, not to accept the "considerable overgeneralization" that a *per se* rule would reflect.

McNeely, 569 U.S. at 152–53 (emphasis added; internal citations omitted). The Supreme Court decided *McNeely* over a year and a half before the seizure in this case. The language used in *McNeely* makes its application to section 316.1933 straightforward—such that no Florida District Court of Appeal has held that *McNeely* left intact law enforcement's ability to seize blood evidence in fatal traffic crashes pursuant to section 316.1933 without a warrant or a showing of exigent circumstances. The Fifth District also recently held that the good faith exception to the

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exclusionary rule would not apply to warrantless blood draws that occurred after *McNeely*. *See Dusan*, 2021 WL 1931440, at *3. Again, although that case was decided after the trial in this case, it represents an application of pre-existing law to a specific set of facts that has not been contradicted. In the absence of any evidence showing that a good faith effort was made to comply with both the holding of *McNeely* and the requirements of section 316.1933 in drawing Defendant's blood, the Court concludes that the good faith exception to the exclusionary rule would not apply to the seizure in this case.

Based on the evidence presented at the evidentiary hearing, the Court concludes that Defendant has proven that his Fourth Amendment claim is meritorious. He would have succeeded on a motion to suppress the blood evidence, and the Court would have suppressed the evidence of his BAC from trial.

Prejudice

Having found that counsel performed deficiently by failing to file a motion to suppress the blood evidence and that Defendant's Fourth Amendment claim is meritorious, the Court turns to prejudice—whether there is a reasonable probability of a different result at trial without the blood evidence.

Defendant argues that there is a reasonable probability of a different result because the blood evidence was "the most damaging piece of evidence" at trial. In his view, the blood evidence forced counsel to concede an element of the crime because his BAC, as revealed by the blood evidence, exceeded the legal limit. The BAC allowed the State to have an expert testify about the effects of such a high BAC on Defendant's ability to drive and react, drawing a line from impairment to causation. He argues that the presence of the BAC evidence made counsel's arguments rebutting the other signs of impairment weaker and less credible. Lastly, the BAC evidence worked to explain those other signs of impairment and bolstered the State's case as to causation. In short, Defendant appears to argue that the BAC evidence provided a foundation upon which the State built the rest of its case. The State makes no independent argument regarding prejudice.

To satisfy the prejudice prong, a defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial. *Griffin*, 866 So. 2d at 8. In other words, a defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding

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would have been different. *Jones*, 998 So. 2d at 582. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694.

The State relied heavily on the blood evidence at trial. In its nine-page opening statement, the State used the word "blood" in relation to the samples taken from Defendant twenty times, and spent almost four pages discussing the importance of those samples. (*See* Ex. B, at 234–42.) Three of its seven witnesses, the two paramedics and Mr. Hays, testified solely about the blood evidence. In its closing arguments, the State connected Defendant's BAC to the signs of impairment he showed and used it to show that it had proven the impairment element. (*See* Ex. B, at 926–28, 931, 978, 986).

Without the BAC evidence, the evidence of impairment would have been limited to Corporal Blair's observations, Defendant's refusals, the informant's testimony about Defendant's statements, and the video. Corporal Blair's lengthy testimony about the compelled blood draw and the procedures involved would have been excluded. (*See* Ex. B, at 317–30.) The combination of observations, refusals, informant testimony, and the video would give the jury sufficient evidence to find that Defendant was impaired by alcohol at the time of the crash, but given the importance of BAC evidence in any DUI prosecution, it is hard to say that there is no reasonable probability of a different result on the element of impairment had the blood evidence been suppressed.

But the State did not use the evidence of BAC just to show impairment. The State used that evidence to buttress its proof on the element of causation. Regarding causation, the State presented the testimony of Mr. Davis. He testified that Defendant told him he was not looking at the road when the collision occurred and "he thought he might have went on the outside of the lane." (Ex. B, at 637.) The State argued that the physical evidence was consistent with that statement. (Ex. B, at 688–89.) However, Professor Lee explained that the crash occurred in the roadway itself, meaning the victim was either in the road or stepped into it, undermining the State's reliance on the informant for its theory of the crash. (Ex. B, at 824–28, 860–61.)

In its closing arguments, the State connected Defendant's high BAC to the sorts of impairment that could have led to the crash:

> When you get to a blood alcohol level .182 and .160, you're going to have slowed reaction time. Your vision could be doubled. You could have trouble just in general with peripheral vision, and that's all, of course, goes to his normal faculty to drive an automobile. It's very unique with this definition that to drive an

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> automobile common sense will tell you that you have to be able to see, to hear, make judgments, judge distances.
>
> And when we get to what Dr. Bill Lee and officers testified to is that if the defendant had been able to do all these faculties, to see, to hear, judge distances, make judgments, act in emergencies -- remember, Dr. Bill Lee said there was about 50 feet from where that right-hand turn that the defendant made to where the crash scene was, that the lighting was good enough, that if he -- that he would have been able to see the victim.

(Ex. B, at 927.)

> Jeff Hays talked about at a .181 or .160 the effects that has on somebody's motor functions, and he told you it has great effects. At that level you could be seeing double. You could lose peripheral vision. Where is Mark Ehrhardt in the road that night? He's not walking down the center. He's over here somewhere on the west side of this roadway. You lose peripheral vision. Your reaction time is slower. If you were impaired and you see someone and you start trying to brake but your reaction time is impaired by the alcohol, you caused or contributed. You are a contributory factor to that crash. And Jeff Hays told you that at the time he was at least at .181, two times the legal limit.

(Ex. B, at 986–87.) Without the blood evidence, the State would not have been able to argue that Defendant was suffering a particular set of symptoms due to a high BAC that would have prevented him from seeing and reacting as well as a sober person—particularly that, at a BAC of 0.18, he would have loss of peripheral vision, double vision, and extremely slowed reaction times. Thus the State used the BAC evidence not just to show that Defendant was impaired, but also to show that he caused or contributed to the death of the victim.

Without the BAC number in evidence, the State would not have been able to call Mr. Hays to testify as to the specific effects a person could feel at that BAC level, nor argue that Defendant was suffering those specific effects and ask the jury to draw the inference that Defendant's high level of intoxication was the reason that the victim died. Given that the State used the blood evidence to bolster its evidence on the causation element, the Court finds that, had counsel moved to suppress the blood evidence and succeeded in suppressing it, there is a reasonable probability that the result of the proceeding would have been different.

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Conclusion

Based on the foregoing, the Court concludes that Defendant's claim satisfies both prongs of *Strickland*, and the additional requirement of *Kimmelman* that he prove his Fourth Amendment claim meritorious. *See Strickland*, 466 U.S. at 687; *Kimmelman*, 477 U.S. at 375. The Court finds that the only appropriate remedy is to grant Defendant a new trial on Count One. Therefore, ground eight of Defendant's Motion for Postconviction Relief is granted and the judgment and sentence for Count One are vacated. The Court will address the matters of bond and appointment of counsel at a status check to be scheduled as soon as practicable.

Accordingly it is,

ORDERED AND ADJUDGED that **GROUND EIGHT** of Defendant's Motion is hereby **GRANTED**.

IT IS FURTHER ORDERED AND ADJUDGED that **GROUNDS THREE, FOUR, TEN, and ELEVEN** of Defendant's Motion are hereby **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED AND ADJUDGED that Defendant's conviction and sentence on **Count One of case number 15-01644-CF** are hereby **VACATED**. The State and defense counsel shall confer and contact this Court within 15 days to set a status check. The State shall arrange for Defendant's transportation to the status check and any further hearings.

THE CLERK OF THE CIRCUIT COURT IS HEREBY DIRECTED TO AMEND the Judgment and Sentence filed May 4, 2017, and recorded on May 12, 2017, in OFF REC BK: 19627, PG: 412-415, in **case number 15-01644-CF** to **vacate the judgment and sentence for count one**. The clerk shall then forward a certified copy of the newly amended Judgment and Sentence to the Department of Corrections, attention: Sentence Structure, 501 South Calhoun Street, Tallahassee, FL 32399-2500.

DEFENDANT IS HEREBY NOTIFIED that this is a final order, and he has thirty (30) days from the date of this order in which to file an appeal, should he choose to do so.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 26 day of Aug, 2021. A true and correct copy of this order has been furnished to the parties listed below.

Nancy Moate Ley

Nancy Moate Ley, Circuit Judge

[redacted]

cc: Office of the State Attorney

Robert David Malove and Dwight Gibiser, Attorneys for Defendant
633 S. Andrew Ave., Ste. 102
Ft. Lauderdale, FL 33301

[redacted]
Dade Correctional Institution
19000 S. W. 377th Street
Florida City, Florida 33034-6409