No. _____

IN THE

Supreme Court of the United States

JOHNNY MACK SKETO CALHOUN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

---

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether trial counsel's failure to investigate and present exculpatory evidence, which significantly undermines the State's evidence is deficient performance that results in prejudice?

2. Whether a state court is required to conduct a cumulative error analysis of violations of *Brady*, *Giglio*, and/or *Strickland*?

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Petitioner, **JOHNNY MACK SKETO CALHOUN**, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court. Respondent, the State of Florida, was the appellee below. Petitioner respectfully urges that this Honorable Court issue its writ of certiorari to review the judgment and decision of the Florida Supreme Court. *Calhoun v. State*, --- So. 3d --- (Fla. 2019), 2019 WL 6204937 (Fla. Nov. 21, 2019).

CITATION TO OPINION BELOW

The decision of the Florida Supreme Court is reported at --- So. 3d --- (Fla. 2019), 2019 WL 6204937 (Fla. Nov. 21, 2019), and is attached to this petition as Exhibit 1. (App. 1). Petitioner's Motion for rehearing was denied on February 12, 2020, and is attached to this petition as Exhibit 2. (App. 54).

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257. The Florida Supreme Court issued an opinion denying relief on November 21, 2019, and denied rehearing on February 12, 2020.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part:

> No persons . . . shall . . . be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

PROCEDURAL HISTORY[1]

Petitioner was indicted for first-degree murder on February 18, 2011. His trial began approximately one year later on February 20, 2012. (T. 2). The jury found him guilty as charged. (R. 960). The penalty phase was held on February 29, 2012. (T. 1276). The jury recommended death by a vote of 9 to 3 the same day. (T. 1373). On May 8, 2012, the trial court sentenced Petitioner to death. (T. 1308).

Petitioner appealed his conviction and sentence on direct appeal to the Florida Supreme Court. The following issues were raised on direct appeal: (1) the trial court erred in refusing to allow the defense to present Petitioner's statement to the police under the rule of completeness, after the State introduced selected parts of the statement, on the grounds that Petitioner's statement was exculpatory; (2) the trial court erred in finding and weighing two aggravating circumstances not proven beyond a reasonable doubt; and (3) the death penalty is unconstitutionally imposed because Florida's sentencing procedures are unconstitutional under the Sixth Amendment pursuant to *Ring v. Arizona*.

As to Issue 1, the Florida Supreme Court found that any error of the trial court in excluding Petitioner's statements to law enforcement, which Petitioner sought to be included under the rule of completeness, was harmless. As to Issue 2, the court

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[1] The abbreviation "T." will be used to refer to Petitioner's trial, and "R." will be used to refer to the record on appeal as compiled for Petitioner's direct appeal *Calhoun v. State*, 138 So. 3d 350 (Fla. 2013). The abbreviation "PCR." will be used to refer to the record on appeal, and "EH" will be used to refer to the evidentiary hearing transcript as compiled for Petitioner's state postconviction proceeding in *Calhoun v. State*, --- So. 3d --- (Fla. 2019), 2019 WL 6204937 (Fla. Nov. 21, 2019).

found evidence did not support the avoid arrest aggravator, but the error was harmless because the trial court correctly found the aggravators of CCP and kidnapping and Petitioner presented limited mitigation. The court denied Issue 3 and declined to revisit its decisions in *Bottoson* and *King* on the *Ring* issue. *Calhoun v. State*, 138 So. 3d 350 (Fla. 2013). This Court denied certiorari review on October 6, 2014. *Calhoun v. Florida*, 135 S. Ct. 236 (2014).

On September 25, 2015, Petitioner filed a motion for postconviction relief under Fla. R. Crim. P. 3.851. (PCR. 460-739). The motion was amended five times prior to the evidentiary hearing: (1) February 11, 2016 (PCR. 1210-97); (2) August 16, 2016 (PCR. 1378-86); May 22, 2017 (PCR. 1535-1626); June 22, 2017 (PCR. 1845-94); and September 1, 2017 (PCR. 1979-96). The court granted Petitioner a new penalty phase pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

An evidentiary hearing was held on Petitioner's guilt phase claims on September 15, 19, and 20, 2017. On November 1, 2017, Petitioner filed a sixth motion to amend his postconviction motion, seeking to add a claim of newly discovered evidence. (PCR. 2418-36). Petitioner also sought to reopen the evidentiary hearing to present evidence related to the claim. The court denied both Petitioner's sixth motion to amend and his request to reopen the evidentiary hearing. (PCR. 2437-38). On January 3, 2018, the court denied relief on all guilt-phase claims. (PCR. 2557-3911).

Petitioner appealed the lower court's ruling to the Florida Supreme Court. Simultaneously, Petitioner filed a state court petition for writ of habeas corpus. The Florida Supreme Court affirmed the denial of Petitioner's postconviction motion.

Calhoun v. State, --- So. 3d --- (Fla. 2019), 2019 WL 6204937 (Fla. Nov. 21, 2019). The court denied rehearing on February 12, 2020.

While Petitioner's motion for rehearing was pending, the Florida Supreme Court decided *Poole v. State*, --- So. 3d --- (Fla. 2020), 2020 WL 3116597 (Fla. Jan. 23, 2020), "reced[ing] from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *Id*. at *15.

On February 13, 2020, the State filed a motion in circuit court to reinstate Petitioner's death sentence in light of *Poole*. Petitioner filed a response on February 19, 2020. The Florida Supreme Court issued its mandate on February 28, 2020. Petitioner filed a motion in circuit court to enforce the mandate on March 5, 2020, as well as a motion in the Florida Supreme Court to enforce the mandate and stay the proceedings below. On March 9, 2020, the State filed a motion in the Florida Supreme Court to recall the mandate, and Petitioner filed a response on March 10, 2020. On April 1, 2020, the Florida Supreme Court issued an order staying Petitioner's proceedings in both the circuit court and the Florida Supreme Court pending disposition of *State v. Okafor*, No. SC20-323, and *State v. Jackson*, No. SC20-257. [2]

[2] The majority in *State v. Poole* was comprised of the dissenters in *Hurst v. State* (Chief Justice Canady and Justice Polston) and the two new Justices (Justice Lawson and Justice Muniz). After *Poole* was decided, prosecutors across the state of Florida began filing motions, like the one filed in Petitioner's case, to reinstate death sentences vacated under *Hurst v. State. Poole* was just one of a number of cases in which Justice Canady's court has turned its back on Florida Supreme Court precedent. *See Phillips v. State*, 2020 WL 2563476 (Fla. May 21, 2020) (The Florida Supreme Court receded from *Walls v. State*, 213 So. 3d 340 (Fla. 2016), which held that *Hall v. Florida* applied retroactively); *Bush v. State*, 2020 WL 2479140 (Fla. May

FACTS RELEVANT TO QUESTIONS PRESENTED

I. INTRODUCTION

Petitioner's attorney, Kimberly Jewell, was minimally qualified to sit first chair in a capital case. Petitioner's case was only her second capital trial as a first chair attorney. (EH. 12). Although she was the captain of a three-member defense team in Petitioner's capital case, the investigation and trial were completely on her shoulders, and the record shows that she was overwhelmed by the burden. Her second chair attorney, Kevin Carlisle, had been a member of the Florida Bar less than two years before Petitioner's trial and was assigned to county court, where he handled misdemeanor cases. (EH. 211). He had never handled a homicide case, let alone a capital murder case, nor had he attended any continuing legal education courses geared towards capital litigation. *Id*. He did not have any responsibilities during the investigation or trial and described himself as Jewell's "bag holder." (EH. 214).

Not only did Jewell have to conduct the entire capital trial by herself, but she also carried the burden of conducting the pretrial investigation alone. Her investigator, Ernest Jordan, was not interested in Petitioner's case. He did not know the defense trial strategy. (EH. 292). Jordan did not investigate any leads that had been discounted by law enforcement because he did not have the "time and energy"

14, 2020) (The Florida Supreme Court abrogated an established heightened standard of review governing circumstantial evidence cases); and *Pedroza v. State*, 291 So. 3d 541 (Fla. 2020) (The Florida Supreme Court reversed its prior precedent in *Johnson v. State*, 215 So. 3d 1237 (Fla. 2017), that held juveniles could not be sentenced to terms longer than 20 years in prison without an opportunity for release). In *Okafor and Jackson*, the Florida Supreme Court stands poised to make yet another radical decision that could deprive Petitioner of his penalty phase relief.

to chase leads down. (EH. 286; 285). In Jordan's view, it is the job of the incarcerated defendant to steer the investigation of his own case. (EH. 285).

It was with this team of inexperienced and unqualified counsel, and an unmotivated investigator, that Petitioner faced his capital murder charge.

II. THE TRIAL

In December of 2010, Petitioner lived in a small camper on his father's salvage yard in Esto, Florida, a small town on the Florida/Alabama border. The victim worked at Charlie's Deli in Esto. (T. 545). Petitioner and the victim went missing on the evening of December 16, 2010. Four days later, the victim's burned car was found in Geneva County, Alabama, with her remains in the trunk. Petitioner was charged with her murder.

A. The State's case

Harvey Glen Blush testified that on the afternoon of December 16, 2010, he was at Charlie's Deli, talking with the victim. According to Bush, Petitioner arrived around 1:30 p.m. and interrupted their conversation to ask her for a ride later that evening. The victim agreed to Petitioner's request. (T. 593-94). Bush also testified that the victim usually got off work between 8:00 and 9:00 p.m. (T. 596). Jerry Gammons testified that on the evening of December 16, around 8:40 p.m., a young woman in a light-colored car knocked on his door looking for Petitioner. (T. 606; 612). Gammons lived in a camper about two blocks from where Petitioner lived. (T. 606). This was the last time the victim was seen alive. Four days later, her burned car was found in the woods in Geneva County, Alabama by Dick Mowbry, an Alabama game

warden. Her remains were in the trunk, bound with coaxial cable and duct tape. (T. 555). Mowbry testified that he saw what appeared to be a rib cage and it was a "charred, bad sight" and that "the thought in my mind I will never forget it." (T. 566; 567).

The State's theory at trial was that after asking the victim for a ride in front of a witness, Petitioner kidnapped and murdered her. The State did not introduce any direct evidence implicating Petitioner. Bush was the only witness that testified to seeing Petitioner and the victim together on December 16 or 17, but his sighting was twelve hours before they both went missing. (T. 595). Gammons' testimony placed the victim in the vicinity of Petitioner's home on the evening of December 16, but there were no witnesses that saw the victim inside Petitioner's home.

Sherry Bradley, a convenience store clerk in Hartford, Alabama, testified that she saw Petitioner in her store in the early morning of December 17. (T. 647). The store is 13 miles north of where the victim's car was found. According to Bradley, Petitioner pulled up to the store in a white car with Florida plates. (T. 649; 651-52). When he bought a pack of cigarettes, she noticed scratches on his hands and that he was covered with dried blood. (T. 650-51). Bradley also testified that she had not watched, heard, or read any news reports about the case. (T. 666).

Darren Batchelor testified that he knew Petitioner from their days in school together, and he saw Petitioner at Sherry Bradley's convenience store one time in December 2010 around 6:30 a.m. (T. 676-77).

Brittany Mixon was Petitioner's girlfriend and Doug Mixon's daughter. She testified at trial that the victim was her longtime friend. (T. 703). According to Brittany, on the evening of December 16, the victim was going to give Petitioner a ride to Brittany's house but he never arrived. (T. 704). The next day around 9:30 – 10:00 a.m., Brittany went looking for Petitioner at the salvage yard. (T. 704-05). Petitioner's father told her he had not seen him, and Brittany opened the door to the camper to look inside. (T. 707). She denied going inside the trailer at that time, and she also denied taking anything inside the trailer or taking anything out of it. *Id*. She left the salvage yard and saw law enforcement at Charlie's Deli, so she called the deli to speak with the victim. Her calls went unanswered. (T. 709). She found out shortly thereafter that Petitioner and the victim were missing. Brittany returned to the salvage yard around 4:00 p.m. (T. 712-13). She went inside the trailer and found a bottle of wine, a pack of cigarettes, and a purse. (T. 715). Brittany took the purse to the Friendly Mini Mart in Esto and met with Lieutenant Raley, who determined the purse belonged to the victim. (T. 769).

Tiffany Brooks testified that on the morning of December 18, she found Petitioner sleeping in the shed behind her Alabama home. (T. 780). She also testified, without a hearsay objection, that her boyfriend Steven Bledsoe called and told her that Petitioner and the victim were featured in a missing persons flier. (T. 784). When she asked Petitioner about the flyer, he denied knowing the victim. Tiffany Brooks' mother, Glenda Brooks, testified nearly identically to her daughter. Defense counsel

did not object to her hearsay testimony either. The State used their testimony as evidence of Petitioner's consciousness of guilt. (T. 1158-60).

The State also offered two witnesses who testified they saw smoke in Geneva County, Alabama, during the late morning hours of December 17. (T. 752; 759). The State hypothesized that the smoke was from the victim's burning car.

An investigator with the Alabama State Fire Marshall testified that the car fire was set with an ignitable liquid, a light petroleum distillate, like camp fuel or lighter fluid. (T. 814-15). An arson investigator with the Florida Bureau of Fire and Arson Investigations testified that the fire originated in the area of the driver's seat and the passenger compartment of the vehicle. (T. 821).

The State relied on DNA evidence and a photograph found on an SD card from the victim's camera to place the victim inside Petitioner's home. Law enforcement did not execute a search warrant of Petitioner's trailer until December 18. At that point, at least four people had been inside Petitioner's small trailer. (T. 628; 1011; 1013; 1018).

Trevor Seifret, an analyst at FDLE, testified to the DNA evidence found in Petitioner's trailer. The victim's DNA was on a roll of duct tape and a quilt. Petitioner was a possible minor contributor to the mixture found on the roll of duct tape. (T. 872). Seifret testified there was also a possible third contributor to the mixture. Both the duct tape and the quilt tested positive during presumptive testing for the presence of blood. (T. 870; 876). The victim's DNA was also found on roughly eight hairs found

on various pieces of clothing removed from Petitioner's home. (T. 881; 883; 885; 887; 890).

The State introduced a photograph from the victim's SD card that Lieutenant Raley found during the search of Petitioner's camper. (T. 936-37). By the time the SD card was seized, at least four people had been inside the camper, none of whom reported seeing an SD card. (T. 628; 1011; 1013; 1018). Lieutenant Raley inserted the SD card into his laptop and accessed the files without the benefit of a write-blocking device. (T. 936). Lieutenant Raley opined that the photograph was of the ceiling of Petitioner's trailer. (T. 937).

Holmes County Sherriff's Office sent the SD card to FDLE for analysis. (T. 936). Jennifer Roeder, an analyst in the digital evidence section at FDLE, together with the prosecutor, developed a calculation method to determine when the photo was taken. (T. 920-21). The State used the displayed date and time of a known photograph from the SD card, a photograph of the victim's husband holding a baby, and the displayed date and time of the photograph purported to be the ceiling of Petitioner's trailer, and calculated the time between the two, which was 46 days and 12 hours. *Id*. The State then used the victim's sister to determine the actual date and time of the known photograph and added 46 days and 12 hours to that. (T. 911-14; 920). Through this method, the State surmised that the trailer photograph was taken on December 17, 2010, between 3:30 and 4:00 a.m. (T. 921).

Petitioner was arrested in his trailer on December 20. (T. 928). Law enforcement photographed the scratches on his body, and the State referred to the

injuries as fingernail scratches and submitted the photographs as evidence of his violent encounter with the victim. (T. 1168; 1153). Investigator Raley testified that Petitioner confessed to evading and hiding from law enforcement. (T. 955). Petitioner told Investigator Raley that at least three times during their search, Petitioner was close enough to touch them. *Id*. The State objected to the entire interrogation being entered into evidence, specifically where Petitioner says he was close to law enforcement in the woods near Bethlehem Campground in *Florida*. The State argued in closing that Petitioner confessed to being in the woods with law enforcement the afternoon of December 17, in *Alabama*, near the victim's car hours after it was set on fire. (T. 1210-11).

B. The defense's case

Trial counsel presented evidence in her case-in-chief of suspicious activities at the salvage yard where Petitioner lived on the evening of December 16 and the early morning hours of December 17. Three neighbors testified they heard loud noises coming from the salvage yard. (T. 992; 996; 998). One neighbor testified that the noise sounded like "a car wreck." (T. 999).

Petitioner's father, John Sketo, and his business partner, Terry Ellenburg, testified there was evidence of foul play at the salvage yard when they arrived to work on the morning of December 17. Sketo testified the door to Petitioner's camper was open, as was the door to a truck parked in front of the camper. (T. 1006-07). Someone had thrown the contents of the truck on the ground. (T. 1007). The Bobcat had been hotwired and moved, and there were tire tracks that indicated a vehicle was pushed

off the loading dock. (T. 1010). The inside of Petitioner's camper was ransacked. (T. 1011). While Sketo was waiting for law enforcement to arrive, Petitioner's girlfriend Brittany arrived. (T. 1016). Although Sketo told her to stay out of the camper, she went inside. (T. 1019). After she emerged from the trailer, Mixon grabbed a puppy from the yard, threw it in the back of her truck, and left. (T. 1026).

Deputy White arrived after Mixon left. (T. 1022). He did not process the Bobcat for fingerprints. (T. 1023). Sketo took Deputy White into Petitioner's trailer and noticed, for the first time, a shotgun. (T. 1026). Sketo testified that the shotgun was not in the trailer before Mixon went inside. (T. 1026).

Glenda Brooks, who testified for the State, was also called to testify in the defense case-in-chief. Counsel elicited testimony that after Brooks heard about the missing persons flier, she was uncomfortable with Petitioner remaining in her home because her granddaughter was in the house and she asked him to leave. (T. 1076).

Counsel also called Lieutenant Raley and elicited testimony that a tag bracket and cardboard with an oil stain were found on property in Alabama owned by Petitioner's family. (T. 1083-84; 1090). He testified that the victim's family said the tag bracket was consistent with the one on her car, and that her car had an oil leak, but he could not conclusively say that the items came from her car. (T. 1089-92).

III. THE POSTCONVICTION EVIDENTIARY HEARING

During his postconviction proceedings, Petitioner asserted claims based on ineffective assistance of counsel for failing to investigate Doug Mixon's alibi, for failing to consult with or hire a forensic pathologist and a digital forensic expert, and

in handling twelve trial witnesses. Petitioner also presented newly discovered evidence pertaining to Doug Mixon that implicates him in the victim's murder, and that the State violated *Brady* by failing to disclose information that Natasha Simmons allegedly provided to sheriff of Geneva County, Alabama, before Petitioner's trial concerning a suspicious encounter with Doug Mixon around the time of the victim's disappearance. Petitioner also presented evidence that the State violated *Giglio* by knowingly presenting the false testimony of Lieutenant Raley concerning statements that Petitioner made regarding his whereabouts while law enforcement was searching in the woods, and by knowingly presenting false and misleading closing arguments on this issue that could have wrongly led Petitioner's jury to believe the Petitioner placed himself in the woods with law enforcement on December 17, 2010, near where the victim's car and body were burned, and by doing so, effectively confessed to the victim's murder.

A. Ineffective assistance of counsel for failure to investigate Doug Mixon's alibi

At Petitioner's evidentiary hearing, trial counsel was unequivocal in her testimony that her trial strategy was to blame Doug Mixon for the victim's murder. (EH. 54, 102). "We were blaming it on Doug Mixon." (EH. 102). She claimed that Petitioner, "from the very beginning" was "insistent" and "adamant" that Doug Mixon was responsible for the victim's death. (EH. 54, 84, 157, 193).

Counsel was also aware that law enforcement investigated Doug Mixon as a possible alternate suspect. (EH. 157). Law enforcement officers spoke to Mixon a number of times, and during those conversations, he did not provide a succinct alibi.

Officers spoke to his then-girlfriend, Gabrielle Faulk ("Gabby"), and his children, Brittany Mixon and John Will Mixon.

Counsel had copies of all the interviews conducted by law enforcement. (EH. 80). Doug Mixon gave his first sworn statement to law enforcement on January 20, 2011. (PCR. 2257-74). He claimed he spent the evening of December 16, 2010, and the following day with Gabby. According to Mixon, he and Gabby planned to get married on Friday, December 17, but they did not go through with it. (PCR. 2263).

A week prior on January 13, 2011, Gabby gave a sworn statement to law enforcement. (PCR. 2275-89). Gabby told law enforcement that Mixon was not with her on December 16 or 17 and denied they ever had plans to marry. (PCR. 2280). The only time she saw Mixon during the time period that Petitioner and the victim were missing was on Saturday night, when he came armed with roses to plead with her to take him back. (PCR. 2279). She claimed the only time she actually spent with Mixon the weekend Petitioner and the victim disappeared was on Sunday, December 19, when she was at Mixon's house making dinner. (PCR. 2278).

When trial counsel deposed Mixon on September 28, 2011, he had firmed up details of his alibi. (PCR. 2290-2313). He claimed he and Gabby spent the evening of December 16, together at Jose Contreras' home in Geneva, Alabama. (PCR. 2295). When counsel deposed Gabby on January 12, 2012, she and Mixon were married. (PCR. 2326). Gabby changed her story and corroborated Mixon's alibi. (PCR. 2314-33). Gabby testified that Mixon was with her during the evening and afternoon

following the victim's disappearance. Her father lived across the street from Contreras, and they spent time at Contreras' house that evening. (PCR. 2318).

Contreras testified at the evidentiary hearing that Mixon was not at his home the night the victim went missing, nor has Mixon ever spent the night at Contreras' house. (EH. 342-43). Contreras also testified that Mixon confessed to him that he was responsible for the victim's murder. (EH. 345).

Even though the State listed Contreras as a witness on January 23, 2012, and provided trial counsel with two addresses for him, and her only strategy at Petitioner's trial was to blame Doug Mixon for the murder, the defense team did not contact Contreras to investigate Doug Mixon's alibi. (EH. 170).

Her investigator, Ernest Jordan, admitted that he did not do much investigation into Doug Mixon, saying that he and counsel discussed it and decided the best approach "would be to depose him and then call him at the trial in the penalty phase." (EH. 289). Jordan testified that he "just did basically a background, from what law enforcement had and so forth." *Id*. When questioned about his failure to speak to Contreras, Jordan testified that he did not know how speaking to Contreras would help because "if [Mixon] has an alibi during the time of the commission of the crime, he couldn't have been available to commit the crime." (EH. 290). Without even conducting a cursory background check, Jordan concluded that Contreras was a liar and a criminal, and thus, not worth the time and energy to interview. (EH. 290-91).

Jordan testified that he did not see the critical need to investigate Mixon's alibi because Petitioner never told Jordan that Mixon killed the victim. (EH. 291-92). It

appears that counsel had completely abdicated her responsibility to direct the investigation as Jordan testified that had Petitioner told Jordan that Mixon was responsible, Jordan would have done more to investigate Mixon. (EH. 212-13). Apparently, trial counsel did not tell her lead investigator that blaming Doug Mixon was her trial strategy because Jordan testified that if she had told him that Petitioner told her that Mixon was responsible, he would have done more to investigate Mixon. (EH. 292).

B. Newly discovered evidence/*Brady* claim further inculpating Doug Mixon

Natasha Simmons testified at the evidentiary hearing about a suspicious encounter she had with Doug Mixon during the time surrounding the victim's murder. (EH. 328). Simmons picked up Mixon and her boyfriend, Charlie Utley, close to the Florida-Alabama border. When she arrived, Mixon ran to the car, shirtless, covered in blood, carrying an empty gas jug. (EH. 328). Mixon was agitated and kept repeating "That goddamn Gabby" as she drove the men to Geneva, Alabama, per their demand. (PCR. 2439, EH. 329). Simmons did not connect this encounter with the victim's disappearance and murder until she spoke to a friend. (EH. 330-31). She went to the Geneva County Sheriff's Office and spoke to Sheriff Greg Ward. (EH. 331). He told her she was wasting her time because the "killer was already locked up." *Id.* Petitioner's counsel was never provided this information. This claim was presented as a *Brady* violation (because Simmons told Sheriff Ward who failed to turn over this information to the defense), newly discovered evidence (if the court did not think Simmons conveyed this information to law enforcement), or ineffective assistance of

counsel (if the court believed this information was readily discoverable before Petitioner's trial).

C. Newly discovered evidence regarding Doug Mixon's confession to Robert Vermillion

Robert Vermillion, the victim's husband's cousin, testified about statements Doug Mixon made in July of 2016. (EH. 362). Mixon told Vermillion, "I know I've done a lot of things I'm not proud of" and asked for Vermillion's forgiveness. *Id*. Vermillion assumed the statement referred to the victim's murder, and he told Mixon he could not forgive him for anything, and he needed to seek forgiveness from the victim's husband. *Id*. Mixon became hysterical and suffered a heart attack that required transport to the hospital by EMS. (EH. 364, 310-11).

D. Ineffective assistance of counsel for failure to elicit testimony from Harvey Bush that Charlie's Deli closed at 7:00 p.m. on December 16

Bush testified at trial that on December 16, Petitioner interrupted his conversation with the victim to ask her for a ride later that evening. (T. 593-94). He also testified the victim usually got off work between 8:00 and 9:00 p.m. (T. 594). However, during his pretrial deposition, Bush testified that he returned to Charlie's Deli around 7:00 p.m. on the evening of December 16 and the store was closed. (PCR. 2126). Jerry Gammons testified that a young lady in a light colored car knocked on his door at 8:40 p.m. (T. 606; 612).

Counsel conceded that Petitioner and Gammons lived right down the road from Charlie's Deli, where the victim worked. (EH. 77). There is a discrepancy between him seeing the store closed at 7p.m. and encountering a young lady (allegedly the

victim) at 8:40p.m Trial counsel could not provide a reason why she did not elicit this information from Bush. (EH. 79).

E. Ineffective assistance of counsel for failure to impeach Sherry Bradley with her prior inconsistent statement

Trial counsel was in possession of Sherry Bradley's statement to law enforcement, and Bradley told Lieutenant Raley that she read about the case in the newspaper, and expressed concern that she might supplant what she read for what she actually saw in her convenience store on the morning of December 17. (EH. 107-08; PCR. 2161-75). When Bradley testified at trial that she had not watched, heard, or read any news reports about the case (T. 666), counsel did not impeach her with this prior inconsistent statement. Counsel could not provide a strategic reason for failing to impeach Bradley and conceded that she "probably should have" impeached the basis of Bradley's identification with her prior inconsistent statement. (EH. 105).

F. Ineffective assistance of counsel for failure to prepare for cross-examination of Darren Batchelor, and for failure to impeach him with his prior inconsistent statement

Darren Batchelor testified at trial without hesitation that he saw Petitioner at Bradley's convenience store in December of 2010. (T. 677). However, when Batchelor initially spoke to law enforcement, he equivocated on whether or not it was Petitioner that he saw. (EH. 114; PCR. 2176-86). Counsel did not cross-examine Batchelor on his prior identification, and she conceded that it was something she "should have asked him." (EH. 115). And Batchelor bolstered his identification of Petitioner at trial by testifying that he knew Petitioner from attending school together. However, Batchelor is twelve years older than Petitioner. (EH. 113). Had counsel conducted a

cursory background check on Mr. Batchelor she would have been aware of the age difference. When confronted with that fact at the evidentiary hearing, counsel conceded, "there's no way they could have gone to school together." *Id*.

G. Ineffective assistance of counsel for failure to cross-examine Brittany Mixon with telephone records from the victim and Charlie's Deli

Brittany Mixon testified at trial that she called Charlie's Deli on the morning of December 17 to speak with the victim, but her calls were unanswered. (T. 709). Counsel received telephone records for both Carlie's Deli and the victim through pre-trial discovery. (EH. 126). The records for Charlie's Deli do not show a phone call from a number linked to Brittany Mixon. (EH. 127-28; PCR. 2213-18). Likewise, the victim's cell phone records do not show an incoming call from a number associated with Brittany Mixon. (EH. 130; PCR. 2132-38). The phone records show Brittany did not attempt to contact the victim, and the reasonable inference based on defense counsel's trial strategy of blaming Brittany's father for the murder is that Brittany never called because she already knew what happened.

At the evidentiary hearing, trial counsel testified that many things Brittany did were "suspicious." (EH. 132). Counsel did not provide a strategic reason for not questioning Brittany about the phone records and conceded that she should have. (EH. 132).

H. Ineffective assistance of counsel for failure to object to the hearsay testimony from Tiffany and Glenda Brooks

Trial counsel could not provide a strategic reason for why she failed to object to the classic hearsay testimony from Tiffany and Glenda Brooks about the phone call

from Tiffany's boyfriend. (EH. 135). Counsel explained that she will sometimes miss an objection due to a client talking to her but she could not say that was the case here. *Id*. Counsel conceded that Petitioner talking to her was unlikely the reason she missed the objection with Tiffany, given that she missed the same objection again with her mother. *Id*.

I. Ineffective assistance of counsel for failure to effectively cross-examine the victim's husband

Counsel testified, "A lot of things surrounding [the victim's husband] were somewhat suspicious." (EH. 89). These suspicious actions included lying to law enforcement about calls he made to his wife the night she disappeared and lying about his reasoning for not going out to look for her. (EH. 82-85; 87). There were also seven deleted images on the victim's SD card that were taken in the victim's home that depicted a woman with similar characteristics to the victim with injuries. (EH. 96-98; 226-30). Counsel testified she chose not to investigate the victim's husband because Petitioner was adamant that Doug Mixon killed the victim and she did not want to attack a grieving husband in front of the jury. (EH. 84; 194). However, counsel conceded that the suspicious circumstances surrounding the victim's husband were in conflict with the State's portrayal of their happy marriage. (EH. 100).

J. Ineffective assistance of counsel for failing to effectively cross-examine Lieutenant Raley

At trial, Lieutenant Raley testified that Brittany Mixon called Charlie's Deli numerous times on the morning of December 17 from a phone number belonging to her grandparents. (T. 764). The phone records were entered into evidence at the

evidentiary hearing and do not show call from a number associated with Brittany Mixon. (PCR. 2213-18). Counsel did not cross-examine Raley about this discrepancy.

At trial, Raley could not describe the shirt Petitioner was wearing when he arrived at the Brooks' residence; he just recalled that it had "Fanta" written on it. (T. 1085-86). In pretrial discovery, trial counsel received a photograph of the shirt Petitioner was wearing. (PCR. 2255). The t-shirt had a huge logo on the front, as well as the words "Wanta Fanta?" *Id*. The shirt he was wearing was very different from the shirt Sherry Bradley claimed he was wearing at the convenience store and counsel could not provide a reason why she did not show Raley the picture of the shirt and question him further on that issue. (EH. 156).

At the evidentiary hearing, trial counsel agreed that parts of the statement the State cherry-picked to present to the jury were misleading. (EH. 48). She conceded that Petitioner's statement could have been construed as a confession because taken out of context; it implied he was in the woods near the victim's car within hours of the fire. (EH. 50). Counsel could not provide a strategic reason for not cross-examining Raley on this issue.

K. Ineffective assistance of counsel for failure to consult with/retain digital forensic expert

Petitioner presented the testimony of John Sawicki, an expert in digital forensic evidence, to discuss the SD card found in Petitioner's camper. Sawicki testified that when Lieutenant Raley accessed the SD card without the benefit of a forensic write-blocker, he altered the metadata of the photographs. (EH. 380). According to Sawicki, this was problematic because the metadata in Petitioner's case

was "critical" and the Lieutenant Raley's alternation of the evidence affected the calculation the State used to put a date and timestamp on the photograph of Petitioner's trailer ceiling. The State's calculation was only as reliable as the evidence it was based on. If the evidence is flawed, the calculation process is corrupted. (EH. 386). Sawicki testified that in order for the State's calculation method to valid, three things must be true: (1) the known date is valid; (2) there have been no changes to the time and date stamp between the known photograph and the unknown date and time; and (3) the metadata has not been changed. (EH. 386-88).

Sawicki testified that there were a number of photographs on the SD card that showed a created-on date of June 2011, months after the card was seized. (EH. 387). At some point, the date and time on the camera was manipulated. (EH. 388). The metadata on the card was altered when Lieutenant Raley accessed the card without a write-blocker. Sawicki opined that the State's calculation was "problematic" and because the card was not maintained in a forensically sound manner, it was compromised and not reliable evidence. (EH. 387; 388; 390; 391).

At the evidentiary hearing, trial counsel testified that she did not consult with or retain a digital forensic expert to challenge the State's calculation method because she was able to "personally follow [FDLE agent Roeder] through that and understand where she was at." (EH. 42). Counsel testified that she did not ask Roeder about Lieutenant Raley accessing the SD card without forensic protection was because she mistakenly thought that the State addressed it during direct examination. (EH. 145).

L. Ineffective assistance of counsel for failure to consult with/retain a forensic pathologist

At Petitioner's trial, counsel argued the scratches found on Petitioner's body upon his arrest were the result of briars and were not fingernail scratches inflicted by the victim while she was fighting for her life. Counsel did not retain or consult with a forensic pathologist to support her argument because she showed the photographs to a colleague and he told her she did not need an expert. (EH. 177). Counsel decided it was "obvious" that they were briar scratches and not fingernail scratches and her jurors were from "the country" and would reach the same conclusion without expert testimony. *Id*.

At his evidentiary hearing, Petitioner presented the testimony of Dr. Edward Willey, a forensic pathologist. Dr. Willey testified about the specific characteristics generally associated with fingernail scratches. (EH. 245; 247; 260). After utilizing his computer to enhance the photographs of Petitioner's scratches, Dr. Willey opined that it was not at all probable that fingernails caused any of the scratches. (EH. 249-56). Dr. Willey opined that a briar patch was a reasonable explanation of how Petitioner obtained the injuries. (EH. 257).

M. Ineffective assistance of counsel for eliciting damaging information in the defense's case-in-chief

At the evidentiary hearing, trial counsel could not recall why she called Glenda Brooks (who had already testified during the State's case) as a witness in her case-in-chief to testify that she ordered Petitioner out of her home when she learned of the missing persons flier. (EH. 138). Counsel could only theorize that it was because she

wanted to show that Brooks only wanted Petitioner to leave because her granddaughter was there an she did not want an additional person in the house. *Id*.

Counsel testified that she called Lieutenant Raley to testify about the tag bracket and oil stain found on Petitioner's family's property because "everything looked just a little too made up. Because everything was winding up on property of Johnny Mack . . ." (EH. 148). Counsel conceded that although she elicited this testimony from Lieutenant Raley, she never explained to the jury how the tag bracket and oil stain failed to fit the State's theory, nor did she ever make the argument to the jury that everything looked "a little too made up." (EH. 152).

FLORIDA SUPREME COURT'S RULINGS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

As to Petitioner's ineffective assistance of counsel claim relating to counsel's failure to investigate Doug Mixon's alibi, the Florida Supreme Court deferred to the circuit court's finding that Jose Contreras' testimony was false, and agreed with the circuit court that trial counsel was not deficient for failing to discover Contreras' false statements regarding Doug Mixon, which constituted inadmissible hearsay. The court also found that Petitioner could not establish prejudice. *Calhoun*, --- So. 3d at 14-15.

Further, as to trial counsel's failure to consult with or hire a forensic pathologist, the court found that trial counsel's performance was not deficient. *Id*. at 16. As to counsel's failure to use a digital forensic expert to explain that law enforcement's accessing the victim's SD card without a write-blocking protection

device altered the evidence on the card, the court found trial counsel was not deficient for failing to present largely cumulative testimony of an expert who could not opine that the State's mishandling of the SD card had any meaningful consequence to the calculation of when the last image was taken. *Id*. at 18.

As to Petitioner's claim that trial counsel was ineffective for failing to subject the State's case to adversarial testing through investigation, cross-examination, impeachment, and proper objections in the handling of twelve witnesses, the court found counsel's performance was not deficient. *Id*. at 21. As to Sherry Bradley and Darren Batchelor, the court noted that Petitioner had not presented the testimony of the witnesses. *Id*. at 25-26.

II. *BRADY/GIGLIO* CLAIMS

In response to Petitioner's claim that the State violated his due process rights by failing to disclose exculpatory evidence, the Florida Supreme Court held that because of the circuit court's finding that the State did not suppress favorable evidence is supported by competent, substantial evidence, Petitioner failed to establish the second prong of *Brady*. *Id*. at 41.

In response to Petitioner's claim that the State knowingly presented the false testimony of Lieutenant Raley concerning statements Petitioner made regarding his whereabouts while law enforcement, and that the State presented false and misleading closing arguments, the Florida Supreme Court held that the State did not violate *Giglio* because Lieutenant Raley's testimony was not false. *Id*. at 43.

III. NEWLY DISCOVERED EVIDENCE

As to Petitioner's claims of newly discovered evidence that implicates Doug Mixon in the victim's murder, the Florida Supreme Court deferred to the circuit court's credibility assessment of Jose Contreras and held the other newly discovered evidence does not entitle Petitioner to a new trial because when considered cumulatively with all of the evidence that would be admissible on retrial, evidence from Simmons and Vermillion does not so weaken the State's case as to give rise to a reasonable doubt as to Petitioner's culpability. *Id.* at 5.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD REVIEW THE ISSUES SURROUNDING TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PREPARE FOR THE GUILT PHASE OF PETITIONER'S CAPITAL TRIAL

Ignored by the Florida Supreme Court in its opinion is the fact that Petitioner's defense team violated Petitioner's Sixth Amendment rights by failing to investigate and execute their trial strategy of blaming the victim's murder on Doug Mixon. Trial counsel's poorly executed strategy included failing to interview Doug Mixon's alibi witness, failing to impeach Brittany Mixon (who counsel nonetheless presented as a suspicious character), failing to impeach two witnesses whose testimony places Petitioner in Alabama prior to the crime, introducing superfluous detrimental evidence, failing to discredit the state's timeline by impeaching Jerry Gammons, and failing to cross-examine the lead investigator about misleading testimony that seemed to place Petitioner at the crime scene. This sort of haphazard representation is not what is envisioned by the Sixth Amendment. *See Williams v. Taylor*, 529 U.S.

362, 369 (2000) (counsel was found ineffective for offering testimony of a witness they had never interviewed, offering testimony that revealed defendant's previous criminal history, failing to investigate or present significant mitigation of abuse, neglect, repeated head injuries and intellectual disability).

Doug Mixon claimed he was with his girlfriend at the home of Jose Contreras on the night of the crime. Had counsel spoken to Jose Contreras, she would have learned that not only was Doug Mixon not with Contreras during the timeframe that the victim disappeared and was murdered, but Mixon actually confessed to Contreras that he killed the victim. (EH. 342-43, 345). Contreras was available and willing to testify at trial, and would have talked to Petitioner's defense team had he been approached. (EH. 347). He would have been a key witness to advance the defense trial strategy of blaming Doug Mixon for the victim's murder.

In addressing Petitioner's claim that trial counsel was ineffective for failing to cross-examine Brittany Mixon regarding phone records that establish she did not attempt to contact the victim after learning the victim and Petitioner were missing, the Florida Supreme Court determined that because Brittany Mixon did not testify at the evidentiary hearing, Petitioner's claim is based on mere speculation that confronting Mixon with the phone records would have created the impression that Brittany was involved in the victim's murder or its cover-up. *Calhoun,* at *28.

Ignored by the Florida Supreme Court in its opinion was that Brittany played a central role in Petitioner's trial strategy of blaming Doug Mixon for the victim's murder. She was Doug Mixon's daughter and one of the few people who entered

Petitioner's camper after he went missing and before it was processed for evidence by law enforcement. It was Brittany Mixon who conveniently found the victim's purse in Petitioner's camper. At trial, counsel attempted to make the argument that Brittany planted or tampered with evidence when she entered Petitioner's trailer after his father told her not to, but counsel never provided the jury with a motive for why Brittany would want to implicate Petitioner in the victim's murder. As discussed above, counsel never actually even implied that her alternate suspect, Doug Mixon, was responsible for the victim's murder.

The Florida Supreme Court ignored the fact that had counsel effectively cross-examined Brittany Mixon, she would have been able to provide the jury with a motive for Brittany's planting or tampering with evidence: that she wanted to help or protect or father, or possibly herself. Implicating Brittany Mixon in a plot to frame Petitioner would have advanced trial counsel's trial strategy of blaming the murder on Brittany's father. Her failure to do so left the jury at a loss for why Brittany would want to frame Petitioner, and impeded counsel's ability to tie Doug Mixon to the murder.

With regard to Petitioner's claim that trial counsel was deficient in failing to impeach Sherry Bradley and Darren Batchelor with prior inconsistent statements, the Florida Supreme Court denied relief, finding that because Bradley and Batchelor did not testify at the evidentiary hearing, what they would have said if questioned about the prior inconsistent statement is too speculative to support postconviction relief. *Calhoun*, at *25-27.

Ignored by the Florida Supreme Court's determination is the fact that trial counsel's failure to impeach witnesses was established through the prior statements to law enforcement. Petitioner was not required to produce the witnesses, as the statements were admitted into evidence at the evidentiary hearing for establishing what was available to trial counsel to impeach and/or obtain during cross-examination of the witnesses.

In its opinion finding that trial counsel was not ineffective for failing to object to the hearsay testimony from Tiffany and Glenda Brooks, the Florida Supreme Court overlooked that if those hearsay statements had been excluded, the State would have been unable to elicit testimony that Petitioner claimed not to know the victim because Steven Bledsoe's phone call precipitated the entire conversation between Petitioner and Brooks. The Florida Supreme Court overlooked the prejudice, where the State used this statement to argue consciousness of guilt that Petitioner lied about knowing the victim because he kidnapped and murdered her.

As to Petitioner's claim that trial counsel failed to cross-examine Harvey Glen Bush about the closing time of Charlie's Deli on December 16, the Florida Supreme Court held that the claim was too speculative to support postconviction relief. *Calhoun*, at *36-37.

The Florida Supreme Court overlooked that this information was damaging to the State's timeline and raises reasonable doubt, as there was no explanation of what Mia Brown was doing between getting off work and showing up at Gammons' trailer an hour and forty minutes later.

With regard to Petitioner' claim that trial counsel was deficient for failing to cross-examine Lieutenant Raley on critical issues, the Florida Supreme Court determined that his claims regarding the phone records and the clothing he was wearing when he arrived at the Brooks' home were too speculative. The court also found that Petitioner's claim regarding his post-arrest statements about being in the woods with law enforcement failed because Raley's testimony was not misleading because at some point Petitioner was in the woods in Alabama near the victim's car when he was at the Brooks' residence. *Calhoun*, at *33-36.

The Florida Supreme Court incorrectly found there was no prejudice to Petitioner for trial counsel's failure to clarify that Petitioner told Raley he was in the woods and near law enforcement on December 19 near the Bethlehem Campground in Florida. (PCR. 1091). What the Florida Supreme Court fails to recognize is that Raley's testimony taken out of context was, in fact, false, and gave the impression that Petitioner had a guilty conscience. While hiding from law enforcement in Alabama, only hours after the crime, may be evidence of a guilty conscience, hiding from law enforcement in Florida days later when he was declared "missing" by the police is merely evidence of a fear of law enforcement.

The Florida Supreme Court ignored that the only evidence trial counsel brought out in her case-in-chief was evidence that further implicated her client, and did absolutely nothing to advance her trial strategy. First, trial counsel called Glenda Brooks and elicited testimony that after Mrs. Brooks realized Mr. Calhoun was wanted by the police she became uncomfortable with him in her home. And then trial

counsel called Lieutenant Raley to elicit testimony that law enforcement found a tag bracket consistent with the victim's car on property owned by Petitioner's family. The Florida Supreme Court credited this as strategy, where counsel explained "that everything looked just a little too made up. Because everything was winding up on property of Johnny Mack . . ." (EH. 148). The Florida Supreme Court further overlooked the fact that counsel never actually made this argument to the jury. (EH. 152). Poor decisions cannot be excused simply by categorizing them as strategy. See *Sears v. Upton,* 561 U.S. 945, 953 (2010) (The "reasonableness" of counsel's theory was, at this stage in the inquiry, beside the point: Sears might be prejudiced by his counsel's failures, whether his haphazard choice was reasonable or not.")

This court should grant review in order to assess the Florida Supreme Court's upholding of the circuit court's assessment that counsel was effective. Despite counsel's failings (failing to investigate the alternate suspect, failing to impeach the alternate suspect's daughter, failing to impeach three witnesses the state used to establish a timeline, failing to object to detrimental hearsay, failing to impeach the lead investigator as to a partial statement of defendant's that was used to mislead the jury, and introducing multiple pieces of detrimental evidence) the Florida Supreme Court dismisses many of the claims as speculative, even where documentary evidence or testimony (including counsel's) establish the concrete effect of these errors on the overall case.

II. THIS COURT SHOULD REVIEW WHETHER A STATE COURT IS REQUIRED TO CONDUCT A CUMULATIVE ERROR ANALYSIS OF *BRADY*, *GIGLIO*, AND/OR *STRICKLAND*

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." The defendant is entitled to a new trial if he establishes that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 685 (1985) (internal quotations marks omitted); *see also Kyles v. Whitley*, 514 U.S. 419, 433 (1995). A "reasonable probability" of a different result exists when the government's evidentiary suppressions, viewed cumulatively, undermine confidence in the guilty verdict. *See Kyles*, 514 U.S. at 434, 436-37 n.10. Thus, in evaluating whether relief is warranted upon a claim that the State failed to disclose exculpatory evidence, the undisclosed or undiscovered information must be evaluated cumulatively to determine whether confidence is undermined in the outcome. In the *Brady* context, the "prejudice" evaluation of the withheld evidence must be considered "collectively, not item-by-item." *Kyles*, 514 U.S. at 436.

Moreover, the standard for determining whether the "prejudice" prong of *Strickland* has been satisfied is identical to the legal standard for determining "materiality" under *Brady*. *See Banks v. Dretke*, 540 U.S. 668, 698-99 (2004) (holding evidence is "material" under *Brady* where there exists a "reasonable probability" that had the evidence been disclosed the result at trial would have been different); *Kyles*,

514 U.S. at 433-34 (holding that *Brady* materiality standard is identical to the prejudice prong of *Strickland*). As such, Petitioner contends that the prejudice inquiry for ineffective assistance of counsel claims and for *Brady/Giglio* claims must be combined so that any prejudice from deficient performance of counsel and any prejudice from failure to disclose evidence favorable to the defense must be considered cumulatively. *See Cargle v. Mullin*, 317 F.3d 1196, 1206-07 (10th Cir. 2003) (noting the Tenth Circuit's practice of aggregating all errors in cumulative analysis, even those based on diverse legal claims, including *Strickland* and *Brady*).

In the instant case, Petitioner submits that the state court failed to conduct a cumulative analysis of the newly discovered evidence of *Brady*, *Giglio*, and ineffective assistance of counsel.[3] Had such an analysis occurred, the state court would have found that the newly discovered evidence corroborated Petitioner's claims… that trial counsel rendered ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).

In making its determination, the Florida Supreme Court failed to conduct a cumulative review of the newly discovered evidence in conjunction with Petitioner's evidence of ineffective assistance of counsel and the State's withholding of exculpatory evidence. The Florida Supreme Court also incorrectly relied on the circuit court's credibility determinations.

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[3] Florida courts must conduct exactly this analysis on newly discovered evidence. See *Hildwin v. State*, 141 So. 2d 1178, 1184 (2014) citing *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013).("In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so there is a 'total picture' of the case and 'all the circumstances of the case.")

The circuit court's determination that Vermillion's testimony was false relied on a finding that Doug Mixon was credible. (PCR. 2606). However, in order to deny the claim regarding Natasha Simmons, the circuit court found Sheriff Greg Ward credible. Sheriff Ward testified he had known Doug Mixon for years and "wouldn't believe anything [Doug Mixon] told you." (EH. 399-400). The circuit court cherry-picked from Sheriff Ward's testimony and only credited the testimony that supported the court's findings, ignoring the testimony that contradicted the court's desired result. These contradictions cast doubt on whether the circuit court's findings are supported by competent, substantial evidence.

As this Court noted in *Kyles v. Whitley*, 514 U.S. 419 (1995), the issue presented by *Brady* and *Strickland* claims concerns the potential impact upon the jury at the capital defendant's trial of the information and/or evidence that the jury did not hear because the State improperly failed to disclose it or present it. It is not a question of what the judge presiding at the postconviction evidentiary hearing thought of the unpresented information or evidence. Similarly, the judge presiding at the trial cannot substitute his credibility findings and weighing of the evidence for those of the jury in order to direct a verdict for the State. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977). The Constitution protects a right to a trial by jury, and it is that right which *Brady* and *Strickland* serve to vindicate.

In addressing the cumulative view of the newly discovered evidence in addition to all other evidence in Petitioner's case, the Florida Supreme Court only assessed evidence that was admitted in Petitioner's original trial that supported the State's

theory. The court noted that both Petitioner and the victim's DNA were found on a blanket and a roll of duct tape removed from Petitioner's camper. The Florida Supreme Court failed to analyze evidence that was available at the time of Petitioner's trial, but overlooked by defense counsel. Doug Mixon was included as a possible contributor to DNA found on a shirt in Petitioner's camper that also contained the victim's hair. (EH. 176). There was also a possible third contributor to the DNA mixture found on the roll of duct tape. (T. 872). But for trial counsel's deficient performance, Petitioner's jury would have heard Contreras' testimony that Doug Mixon was not at his home on the night of the murder. This testimony would be presented at a new trial. Also, the victim's husband should have been cross-examined about his sincerity and concern for his missing wife in order case doubt about whether or not this was a happily married couple. This would support trial counsel's argument that Brittany Mixon was suspicious and jealous of the interactions between Petitioner and the victim. (T. 1189).

At a new trial, Sherry Bradley would be confronted with the fact that she had read about Petitioner and the victim's vehicle prior to speaking with the police, even though she testified at trial that she had no prior knowledge of the incident from the media. Also, at a new trial, Darren Batchelor would be confronted with the fact that there was a 12-year age difference between him and Petitioner and he could not have possibly known Petitioner from going to school together. A new jury would hear testimony from Harvey Glenn Bush that Charlie's Deli was closed by 7:00 p.m. on the night the victim went missing, and this would cast doubt on Jerry Gammons'

testimony that the victim stopped by his trailer around 8:40 p.m. This evidence would chip away at the State's timeline and create reasonable doubt, and would probably produce an acquittal at a new trial.

Petitioner submits that this Court should grant certiorari to review whether the state court was required to conduct a cumulative error analysis of violations of *Brad*, *Giglio*, and/or *Strickland* in conjunction with newly discovered evidence presented at his postconviction proceeding.

CONCLUSION

Petitioner, Johnny Mack Sketo Calhoun, requests that certiorari review be granted.

Respectfully submitted,

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JULY 2020