NO. 20-5086

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

RESPONDENT'S APPENDIX

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
Counsel of Record

Jason William Rodriguez
Assistant Attorney General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
(850) 414-3300

COUNSEL FOR RESPONDENT

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IN THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR HOLMES COUNTY, FLORIDA
CRIMINAL DIVISION

CASE NO.: 11-11 CF

STATE OF FLORIDA
Plaintiff,

v.

JOHNNY MACK SKETO CALHOUN,
Defendant.

ORDER ON DEFENDANT'S MOTION FOR POST CONVICTION RELIEF PURSUANT TO RULE 3.851, FLORIDA RULES OF CRIMINAL PROCEDURE

THIS MATTER is before the Court on the Defendant's Motion for Post Conviction Relief pursuant to Fla. R. Crim. P. 3.851 filed September 25, 2015. Having considered said Motion, court file and records, and being otherwise fully advised, this Court finds that:

Facts and Procedural History

The relevant facts concerning the murder of Mia Shay Brown are recited in the Florida Supreme Court's opinion on direct appeal:

> Johnny Mack Sketo Calhoun and Mia Chay Brown were both reported missing on December 17, 2010. On December 20, Brown's remains were found bound and burnt in her car, which had been lit on fire in the woods of Alabama. Calhoun, thought to be the last person to see Brown alive, was found hiding in the frame of his bed inside his trailer on December 20.
>
> **Guilt Phase**
>
> Brown worked at Charlie's deli and grocery store in Esto, Florida. Harvey Glenn Bush saw Brown working at Charlie's deli around 1 to 1:30 p.m. on December 16, 2010, and knew Brown drove a white car. Bush heard Calhoun ask Brown for a ride that evening and Brown responded that she would pick him up after work at approximately 8 to 9 p.m.

Brown drove to Jerry Gammons' trailer in a light colored four-door car and knocked on his door at about 8:40 p.m. on December 16. Brown asked for Calhoun, and Gammons told her that Calhoun did not live there. America's Precious Metals junkyard, where Calhoun's trailer was located, is approximately one road down from Gammons' trailer.

Brandon Brown, Brown's husband, talked with Brown at lunch time on December 16 while she was working at Charlie's deli. Brown usually got off of work at approximately 9 p.m. Brandon called brown at 10 p.m. because she was not home. Brandon fell asleep on the couch at about 10:30 p.m., and when he woke up at 2 a.m., his wife was still not home. It was unusual for Brown not to come home; Brandon started calling family members to find her.

Sherry Bradley, the manager at Gladstone's convenience store located between Enterprise and Hartford, Alabama, testified that Calhoun came into her store between 5:30 and 6:00 a.m. on December 17, 2010, and bought cigarettes. Bradley noticed scratches and dried blood on his hands and sores on his face. Calhoun was wearing a white shirt that had spots of blood on it and there was something black underneath his fingernails. She asked Calhoun about his appearance, and he responded that he had been deer hunting. Calhoun was driving a white, four-door car with a Florida license plate. Darren Bratchelor, a former schoolmate of Calhoun's also saw Calhoun at the convenience store at about 6 a.m. After that day, Bradley left town for a few days, but when she returned, another employee had posted a missing persons flyer in the store, on which she recognized Calhoun's photograph.

Chuck White, a patrol officer for Holmes County, Florida, arrived at America's Precious Metals at 8 a.m. on December 17. White looked in Calhoun's trailer and found clothes and trash scattered everywhere. Calhoun was not there. On cross-examination, White testified that Sketo Calhoun ("Sketo") and Terry Ellenburg, co-owners of America's Precious Metals, told him that there had been a break-in at the junkyard, that there were pry marks on Calhoun's trailer door, and that the skid steer loader, or Bobcat, had been hot-wired and moved. White noticed many tire tracks around the yard. White acknowledged that he did not secure Calhoun's trailer before he left the yard.

Brett Bennett, a cattle broker in Geneva, Alabama, noticed smoke from the highway on December 17 at approximately 11 a.m. Keith Brinley, a school maintenance employee in Geneva, Alabama, also saw a big fire behind the Bennett residence at about that same time.

Tiffany Brooks, a resident of Hartford, Alabama, found Calhoun in her family's shed on the morning of December 18, 2010. Calhoun was on the ground wrapped in sleeping bags that the family kept around the freezer. Calhoun was wearing overalls

and a white t-shirt and was wet and dirty. Brooks brought Calhoun into the house and the family washed his clothes, gave him new clothes, let him shower and nap, and gave him some food. Steven Bledshoe, Tiffany's boyfriend, called the Brooks' residence and told them about the missing persons flyer he saw with Calhoun and Brown's pictures on it. Calhoun told the Brooks he did not know Brown but she was probably the person who was supposed to pick him up at his trailer the night before. Calhoun had the Brooks drop him off at a dirt road. Glenda Brooks, Tiffany's mother, also testified to these events.

Brittany Mixon, Calhoun's ex-girlfriend, testified that she went to school with Brown and that Brown knew Calhoun through her and from working at the convenience store. On December 16, Mixon stayed at her father's house and expected Calhoun to come over that night but he never came. Mixon drove to America's Precious Metals on the morning of December 17 to find Calhoun because he did not have a phone to call. Mixon used to live in Calhoun's trailer with him but moved out in October of that year. She testified that they had lost the key to the trailer so they had had to pry the door open to get inside the trailer. Mixon asked Sketo if he had seen Calhoun, but he had not. Mixon looked inside Calhoun's trailer; and no one was inside, but the trailer was ransacked. Lieutenant Michael Raley of the Holmes County Sheriff's Office investigated Brown's missing persons report. He called Mixon, who told Raley about a campsite in Hartford, Alabama, approximately ten miles from America's Precious Metals, where Mixon and Calhoun would camp. The campground was on the property of Charlie Skinnard, Calhoun's brother-in-law. Mixon met the Brooks family once while camping with Calhoun. She took Raley to the campsite. Raley noted that the burnt car was off of Coleman Road, approximately 1,488 feet away from Calhoun's campsite. The Brooks' residence was approximately 1.5 miles from the burnt car.

Angie Curry, Priscilla Strickland, and Mixon went to Calhoun's trailer around 4 p.m. on December 17. Mixon went into the trailer and found wine, a purse, and menthol cigarettes. They took the items and called the police. Brandon identified the purse as belonging to Brown. When Mixon gave Brown's purse to Raley, Raley sent a police officer to Calhoun's trailer to secure it until they got a search warrant. On cross-examination, Mixon acknowledged that Sketo and Ellenburg told her that the trailer had been broken into and not to go in it, but she did anyway. She stated that Calhoun did not smoke cigarettes and did not have cable television service in his trailer.

Dick Mowbry, a former game warden for Geneva County, Alabama, participated in a search for Brown and Brown's vehicle on December 20, 2010. He found a burnt, white Toyota with no license plate. The entire inside of the car was burnt and while he was looking through the front of the car, he saw a rib cage in the trunk, so he called the police.

Mike Gillis, with the Alabama Bureau of Investigation, responded on December 20 to the call regarding the burnt vehicle. Remains of a body were in the trunk of the car. There was what looked like coaxial cable wrapped around the wrists of the body; duct tape was also found in the car.

On December 21, 2010, Dr. Stephen Boudreau, a medical examiner for Alabama, received the human remains found inside the burnt car. The remains were badly burnt; the hands and lower limbs had been burnt off. Dr. Boudreau was able to identify the remains as female because the uterus and vagina were not destroyed, but the sex organs were denatured, or heated, to such an extent that there was no way to analyze them. He found coaxial cable wrapped around what was left of the remains' upper arms and tape on the neck. Dr. Boudreau determined that the cause of death was smoke inhalation and thermal burns and that the death was a homicide. He found soot embedded in the airway of the lungs' mucus blanket and carbon monoxide in the back tissue, meaning that the victim had inhaled smoke. Dental x-rays matched those of Brown's. On cross-examination, the defense elicited that no foreign DNA was found in Brown's vagina. Dr. Boudreau also acknowledged that no ends of the coaxial cable were found, and that he could not determine whether Brown was conscious or not when she inhaled the smoke or at what point in time she would have lost consciousness.

On December 20, 2010, Jeffery Lowry, deputy state fire marshal with the Alabama Fire Marshal's Office, took debris samples from the burnt car and sent them to the Alabama and Florida laboratories. Jason Deese, an arson investigator for the Florida Bureau of Fire and Arson, testified that on December 22, 2010, he inspected the car. The vehicle identification number (VIN) was matched to a 2000 Toyota Avalon. Brown owned a four-door 2000 Toyota Avalon. The fire originated in the driver's seat and passenger compartment; it was not an engine fire. Perry Koussiafes, senior crime laboratory analyst for the Florida Fire Marshal's Office, received six samples from the car on December 30, 2010. The samples from the right front quarter and left quarter of the car tested positive for ignitable liquid.

Trevor Seifret, a crime scene lab analyst for the Florida Department of Law Enforcement (FDLE), testified that blood found on the cardboard of a roll of duct tape taken from Calhoun's trailer was a major donor match to Brown and a minor donor partial match to Calhoun. Blood found on blankets taken from Calhoun's trailer were total matches to Calhoun and Brown. DNA from hair found in Calhoun's trailer also matched Brown; Seifret testified that DNA is found on hair only when the hair is pulled out of the scalp.

Jennifer Roeder, a digital evidence crime analyst for FDLE, testified that an SD memory card found in Calhoun's trailer was from Brown's camera, and based on the time and date stamps of other pictures on the camera, the last picture was taken

between 3:30 and 4:00 a.m. on December 17, assuming no one reset the clock on the camera.

On December 20, 2010, Harry Hamilton, captain of the Holmes County Sheriff's Department, seized Calhoun's trailer pursuant to a search warrant. He noticed that the evidence tape on the door had been broken. He found Calhoun hiding under his mattress in the bed frame in his trailer. Calhoun had scratches on his hands, arms, and neck.

Raley executed a second search of Calhoun's trailer on December 28 at the impound yard of the Holmes County Sheriffs office after Brown's remains had been found. He found a TV face down on the mattress of the bed and a DVD player. A VCR was on the floor and the top was off, with wires tangled in the corner. A converter box with outputs for a coaxial cable and a TV with a coaxial coupling were found, but no coaxial cable was found in the trailer.

The State rested, and the defense provided witnesses as follows. Jose Martinez, owner of the Friendly Mini—Mart, testified that Calhoun came to his store on December 16 and bought a pack of cigars, wine, and apple cider. He never knew Calhoun to buy cigarettes.

Matt Crutchfield who lived near America's Precious Metals was awakened on December 17 between 1 and 3:30 a.m. by a loud bang. He had heard the noise before and thought it came from the recycling plant. Monica Crutchfield, his wife, was also awakened by a loud noise that came from America's Precious Metals, but she testified that she had never heard that noise before. Darlene Madden, who lived one block from America's Precious Metals, awoke to a loud noise that sounded like cars colliding at approximately 2:30 to 3:00 a.m. She testified that she may have heard a second noise but did not get up to investigate it.

John Sketo, Calhoun's father and co-owner of America's Precious Metals, testified that Calhoun's trailer was located beside the scrap yard. Sketo arrived at the scrap yard at approximately 7:30 a.m. on December 17 and noticed that the Bobcat was missing from the place it had been the day before. He also noticed that the door to Calhoun's trailer was open. Sketo testified that none of this was like that the day before. Ellenburg called the police. Ellenburg and Sketo found the Bobcat by the loading dock, and they thought it had pushed something off of the dock. Tread marks on the ground had not been there the day before. Sketo looked in Calhoun's trailer and it looked like someone had searched it; drawers were open and things were strewn about. Sketo saw a small grill on Calhoun's bed, which usually remained outside the trailer. Sketo did not see anyone in the trailer. He did not see a purse on the floor of the trailer. Sketo exited the trailer and left the door open.

Mixon arrived at the junkyard and asked if Sketo had seen Calhoun. Sketo replied that he had not and told Mixon not to go into the trailer because someone had broken into it, but Mixon went into the trailer anyway. Mixon was in the trailer for about one minute. Then Mixon left the junkyard. Sketo went back into the trailer and found Calhoun's gun leaning against the couch on the floor. Sketo testified that if the gun had been there the first time he went into the trailer he would have noticed it. He stated that the gun was not there before Mixon went into the trailer. On cross-examination, the State elicited from Sketo that he did not see Mixon carry the gun or anything else into the trailer.

Ellenburg testified that he arrived at the junkyard at approximately 7:30 a.m. on December 17. He stated that Calhoun's door did not have pry marks on it the day before, and Calhoun's trailer was not in disarray the day before. He did not see a gun in the trailer the first time he looked. He stated that the tire tracks near the loading dock and next to the Bobcat looked like they were made by a dual-wheeled vehicle. A corner of the cement steps was also knocked off, and had not been like that the day before.

Lieutenant Raley searched a barn in Pine Oak Community in Geneva, Alabama, and a license tag bracket matching the description of one on Brown's car was found at the property. There was also a piece of cardboard that had oil and tire marks on it. Brown's family told Raley that her car had a small oil leak. However, Raley could not trace the oil stain or the bracket to Brown's car.

On February 28, 2012, the jury returned a verdict of guilty of first-degree murder and kidnapping.

Penalty Phase

The State moved for admission of all evidence from the guilt phase into the penalty phase and rested.

The defense provided witnesses as follows. Pastor A.J. Lombarin, Cliff Jenkins, and Ryan George, all ministers to Calhoun, each testified that Calhoun was devoted to Christian study and ministered to other inmates while awaiting the instant trial. Patrick O'Dell, an inmate, testified that Calhoun invited him to bible study and was his mentor, teacher, and minister, and changed the course of O'Dell's life by telling him to take responsibility for his actions. Jerry Pappas, an inmate, testified that Calhoun was like a brother to him and changed his life for the better. Darryl Williams, a former inmate, testified that Calhoun helped him change and encouraged him to witness to others outside of the jail.

Lieutenant Bill Pate, a security officer at the Holmes County jail, testified that Calhoun had no behavioral problems while incarcerated and that his only prior criminal record was driving while his license was suspended and violating probation.

Charlie Skinner, Calhoun's brother-in-law, testified that Calhoun was generous to a fault and that he had given his life to God. Sharon Calhoun. Calhoun's mother, testified that Calhoun and his father had a close relationship. Calhoun has a son with whom he is very close and to whom he is a good father. Calhoun also treated Mixon's son like his own son. Sharon testified that Calhoun was a good student, a boy scout, never got into trouble, and sends preachers to his father to help counsel him.

The jury recommended a sentence of death by a vote of nine to three.

Spencer[1] Hearing

Betsy Spann, Calhoun's sister, testified that Calhoun was like her best friend and kept her out of trouble while they were growing up. Sharon Calhoun testified that Calhoun had found God and that Calhoun was innocent. John Searcy, a minister who had gone to counsel Calhoun on the night of the verdict, testified that Calhoun had actually counseled him that night. Following the conclusion of the Spencer hearing, the trial court allowed victim impact statements from Brown's family members.

The trial court found three aggravators: (1) cold, calculated, and premeditated (CCP)—very great weight; (2) during the commission of a kidnapping—great weight; and (3) for the purpose of avoiding arrest—very great weight. The trial court found one statutory mitigator: no significant history of criminal activity—significant weight, and five nonstatutory mitigators: (1) good jail conduct pending and during trial—little weight; (2) positive role model to other inmates—some weight; (3) capable of forming loving relationships—little weight; (4) childhood history—little weight; and (5) defendant will be incarcerated for the remainder of his life with no danger to others—minimal weight. The trial court gave the jury recommendation of death great weight. The trial court concluded that the aggravating circumstances far outweighed the mitigating circumstances and sentenced Calhoun to death for the murder of Brown and 100 years of imprisonment for the kidnapping of Brown.

Calhoun v. State, 138 So. 3d 350 (Fla. 2013) (Footnotes and internal page numbers omitted).

[1] Spencer v. State, 615 So. 2d 688 (Fla. 1993)

On direct appeal, the Florida Supreme Court addressed five issues: (1) whether the trial court erred in excluding Calhoun's exculpatory statements to police under the rule of completeness; (2) whether the trial court erred in finding the aggravators of CCP and avoiding arrest; (3) a Ring[2] claim; (4) sufficiency of the evidence; and (5) proportionality.

On October 31, 2013, after briefing and oral argument, the Florida Supreme Court issued its opinion striking the avoid arrest aggravator and rejecting the remainder of Calhoun's issues on appeal. The Court also found the evidence was sufficient to support Calhoun's conviction for one count of first degree murder. On July 17, 2014, Calhoun filed a Petition for Writ of Certiorari in the United States Supreme Court. On October 6, 2014, the United States Supreme Court denied review. Calhoun v. Florida, 135 S. Ct. 236 (2014).

Short Procedural Post Conviction History

On September 25, 2015, the Defendant, represented by Alice B. Copek, Esq., filed a Motion to Vacate Judgment and Sentence under Rule 3.851 with Special Leave to Amend. The State filed its Answer on November 24, 2015. Thereafter, the Defendant, through counsel, amended his motion on February 11, 2016, raising Claim 13, a Hurst v. Florida claim. The State addressed the claim at the Huff[3] hearing held on April 21, 2016.

Subsequently, on August 16, 2016, the Defendant filed a Second Amended Motion to Vacate Judgments of Conviction and Sentence, raising Claim 14. The post conviction court ordered the State to respond within 20 days pursuant to Rule 3.851(f)(4). The State filed its response on October 3, 2016. On May 22, 2017, the Defendant, through counsel, filed a Motion to Supplement and Amend Defendant's Second Amended Motion to Vacate Judgments of Conviction and Sentence. On June 1, 2017, the post conviction court granted the amendment and ordered the State to file a response within twenty (20) days. The State filed its response on June 12, 2017. On June 22, 2017, the Defendant filed a Motion to Supplement and Amend Defendant's Third Amended Motion to Vacate Judgments of Conviction and Sentence, raising Claims 15 and 16. On July 6, 2017, the post conviction court granted the amendment and ordered the State to file a response within ten (10) days. The State filed its response on July 7, 2017. The evidentiary hearing was set for July 6, 2017, but was ultimately continued for other matters.

On September 1, 2017, the Defendant, through counsel, filed a Motion to Supplement and Amend Defendant's Fourth Amended Motion to Vacate Judgments of Conviction and Sentence, raising Claim 17, a claim of newly discovered evidence. The State filed its response on September 6, 2017. At the start of the evidentiary hearing on September 15, 2017, the Court acknowledged the State's objection and subsequently denied the Defendant's motion to supplement and amend his Fourth Amended Motion to the pleadings.[4]

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[2] Ring v. Arizona, 536 U.S. 584 (2002)

[3] See Huff v. State, 622 So. 2d 982 (Fla. 1993).

[4] See Fla. R. Crim. P. 3.851(f)(4). Defendant, through counsel, filed the motion to supplement **14** days prior to the

The evidentiary hearing in this matter was held on the following three days: September 15, 2017, September 19, 2017, and September 20, 2017.

The evidentiary hearing was limited to the following issues as set forth in the Defendant's post conviction motion: **Claim 3(A)** (the issue regarding whether counsel was ineffective for failure to test the State's evidence through proper objections, available impeachment evidence, and/or effective cross-examination of Charles Howe, Dr. Swindle, Dick Mowbry, Mike Gillis, Harvey Glen Bush, Jerry Gammons, Brandon Brown, Chuck White, Sherri Bradley, Darren Batchelor, Dr. Boudreau, Brittany Mixon, Tiffany Brooks, Glenda Brooks, Charles Richards, Trever Siefert, Megan Kriser, Jennifer Roeder, Michael Raley); **Claim 3(B)** (the issue regarding whether counsel was ineffective for eliciting potentially damaging evidence in the defense case, in chief via Ms. Glenda Brooks and Investigator Michael Raley); **Claim 3(C)** (the issue regarding whether counsel was ineffective for failing to retain or consult with forensic experts, i.e., failure to consult a pathologist or medical expert to show how Defendant received scratches and injuries to his body, and counsel's failure to consult a digital forensic expert related to the seized SD card from Defendant's residence); **Claim 3(D)** (the issue regarding whether counsel failed to object to numerous improper and/or misleading prosecutorial statements during closing arguments); **Claim 11,** the Court shall hold any ruling on the cumulative error claim in abeyance until after the evidentiary hearing; **Claim 14** (based on his trial counsel having a conflict of interest which should have precluded their representation of Defendant in this case); **Claim 15** (Brady violation—Defendant was deprived of his right to due process because the State withheld evidence which was material and exculpatory in nature. Such omissions rendered defense counsel's representation ineffective and prevented a full adversarial testing. Or in the alternative, Defendant was denied the effective assistance of counsel when trial counsel failed to obtain exculpatory evidence for Defendant's defense which deprived him of full adversarial testing.); and **Claim 16** (Newly Discovered Evidence establishes that Defendant's conviction and sentence were obtained in violation of his constitutional rights. Or in the alternative, Defendant was denied the effective assistance of counsel when trial counsel failed to exercise due diligence in finding the newly discovered evidence and thus depriving him of full and fair adversarial testing).

Numerous witnesses were listed[5] and tentatively scheduled to testify during the evidentiary hearing. However, the Court only heard testimony from the following thirteen (13) witnesses: (1) Kimberly Jewell and (2) Kevin Carlisle (Defendant's trial attorneys); (3) Melody Harrison, Public Defender Investigator, Fourteenth Judicial Circuit; (4) Major Michael Raley, Holmes County Sheriff's Office; (5) Dr. Edward Willey (pathology expert witness); (6) Earnest Jordan, Public Defender Chief Investigator, Fourteenth Judicial Circuit; (7) Doug Mixon; (8) Natasha Simmons; (9)

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evidentiary hearing.

[5] Defendant's initial Witness list filed June 3, 2016, listed 38 witnesses; Defendant's Second Supplemental Witness list filed June 2, 2017, listed 5 witnesses; Defendant's Third Supplemental Witness List filed June 22, 2017, listed 2 witnesses; and Defendant's Fourth Supplemental Witness List filed September 1, 2017, listed 4 witnesses. The State's initial Witness list filed June 23, 2016, listed 7 witnesses; and State's Second Witness list filed September 7, 2017, listed 4 witnesses.

Jose Contreras; (10) Robert Vermillion; (11) John Sawicki (digital forensic expert witness); (12) Greg Ward, the former Sheriff for Geneva County, Alabama; and (13) Ricky Morgan, Geneva Police Department, in Geneva, Alabama. The Court would note that the Defendant, through counsel, filed a motion to waive his appearance at the evidentiary hearing on July 10, 2017, which the Court granted on July 20, 2017. Therefore, the Defendant elected not to appear in person for the evidentiary hearing in this matter.

After the evidentiary hearing and pursuant to Rule 3.851(f)(5)(e), the Court directed the court reporter to transcribe the evidentiary hearing. The hearing was transcribed and submitted to the parties on November 3, 2017. Pursuant to the Rule 3.851, the parties had thirty (30) days from receipt of the hearing transcript to submit written arguments to the Court. However, the Court granted a short extension of time to Friday, December 8, 2017, after the Defendant's Unopposed Motion for Extension of Time to Submit Written Closing Arguments, which was filed on December 4, 2017. The parties subsequently filed Defendant's Closing Argument on December 8, 2017, and the State filed its Post-Conviction Hearing Memorandum of Law on December 8, 2017, for the Court's consideration. Having considered the demeanor and credibility of the witnesses, the Court will now address the claims in the Defendant's Motion pursuant to Rule 3.851.

References and Record Citations

References to the Defendant will be to "Calhoun" or "Defendant". References to the victim in this case will be to "Mia Chay Brown" or "Mrs. Brown."

The record on appeal is in eighteen volumes that are numbered consecutively and conform with the requirements of Fla. R. App. P. 9.200. Volumes (10-18) contain the transcripts for jury selection, guilt phase of the trial. They are numbered separately from the transcripts of the remaining parts of the trial. They will be referenced by the letter "T" followed by an appropriate volume and page number "(T#:##)."

Volumes (1-9) include the Spencer hearing, sentencing hearing, and sentencing order. They will be referenced by the letter "R" followed by an appropriate volume and page number "(R#:##)." Additionally, there is a supplemental record containing transcripts from a pre-trial hearing that will be referenced by "SR" followed by an appropriate page number "(SR:##)."

Finally, Calhoun's Motion to Vacate will be referenced by "DM" followed by the appropriate page number "(DM:##)" which can be found at the bottom of each page. References to Calhoun's Amended Motions shall be referred to by "Second/Third/Fourth Amended Motion" followed by the page number. References to the evidentiary hearing transcript shall be referred to by "Evid. Hrg. Trans." and the page number. Any other references will be self-evident.

DEFENDANT IS ENTITLED TO RELIEF BASED ON HURST V. FLORIDA

On February 11, 2016, the Defendant filed an Amended Motion to Vacate Judgments of Conviction and Sentence, raising Claim 13, a Hurst v. Florida claim. The State addressed this claim orally at the Huff hearing held on April 21, 2016. The State also submitted a written response to this claim on October 3, 2016. Thereafter, Defendant filed a Motion for Partial Summary Relief on March 30, 2017. After a hearing on the Defendant's motion, the Court, without objection by the State, entered an Order Granting Motion for Partial Summary Relief filed June 5, 2017.

In light of the Court's decision above that the Defendant is entitled to a new penalty phase which complies with the Hurst decisions, Defendant's Claim 5, Claims 6 A and 6 B, and Claim 12 related to the penalty phase and trial counsel's representation are dismissed as moot.

Ineffective Assistance of Counsel

To establish a claim of ineffective assistance of counsel, a defendant must prove both deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668 (1984). "Judicial scrutiny of counsel's performance must be highly deferential." Pagan v. State, 29 So. 3d 938, 949 (Fla. 2009) (citing Strickland, 466 U.S. at 690). There is a strong presumption that trial counsel was effective in their representation. Pagan, 29 So. 3d at 949 (citing Strickland, 466 U.S. at 689). The standard for evaluation is not whether an attorney could have done more. Id. "A fair assessment of an attorney's 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." Pagan, 29 So. 3d at 949 (citing Strickland, 466 U.S. at 689). "Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Pagan, 29 So. 3d at 949 (quoting Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000)).

The strong presumption that counsel's performance was sound is even stronger when trial counsel is experienced. See Cummings v. Sec'y, Fla. Dept. of Corr., 588 F.3d 1331, 1356 (11th Cir. 2009) (citing Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000)(en banc)). In Florida, minimum standards have been established for appointment of defense attorneys in capital cases. Fla. R. Crim. P. 3.112. Those rigorous standards govern not just the qualifications of lead counsel on a capital case, but also co-counsel on a capital case in order to ensure the quality of representation afforded to a defendant facing capital punishment. As such, defendants facing capital punishment are often benefited with the legal expertise and experience of some of the most seasoned and knowledgeable lawyers available.

To establish prejudice, the defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668 (1984). The Florida Supreme Court has determined that a reasonable probability is a probability sufficient to undermine confidence in the outcome. Rutherford v. State, 727 So. 2d 216, 219 (Fla. 1998). "To assess that probability, we consider 'the totality of the available mitigation evidence - both adduced at trial, and the evidence adduced in the . . . [post-conviction] proceedings' - and 'reweig[h] it against the evidence in aggravation.'" Porter v. McCollum, 558 U.S. 30, 41 (2009). Therefore, Calhoun must show that but for counsel's alleged errors, he probably would have received an acquittal at trial or a life sentence during the penalty phase. Gaskin v. State, 822 So. 2d 1243, 1247 (Fla. 2002).

CLAIM 1—Improper Victim Impact Statements during Guilt Phase not cognizable in post conviction motion

In Claim 1, Defendant alleges he was denied his fundamental right to a fair trial, due process, and reliable adversarial testing, due to the State introducing improper victim impact evidence in the guilt phase of his trial in violation of Mr. Calhoun's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

Calhoun alleges his fundamental right to a fair trial was denied because the State was allowed to introduce victim impact evidence during the guilt phase of trial. (DM:4-7). In particular, Calhoun argues that Charles Howe and Dr. Swindle were allowed to testify as to the victim's signature containing hearts over the letter "I." (DM:5-6). He asserts that this was improper victim impact testimony that was cumulative to other documentary exhibits already entered and it was not relevant to any issue at trial. The record indicates the State introduced said evidence for identification purposes, not as victim impact evidence.

Calhoun raises a claim that is not cognizable in a post conviction motion. He asserts he was denied his fundamental rights pursuant to the Sixth, Eighth, and Fourteenth Amendment by the State introducing improper victim impact evidence. A constitutional challenge should have been raised on direct appeal and is not proper as a post conviction claim. See Jones v. State, 928 So. 2d 1178, 1182, n.5 (Fla. 2006). As such, this claim should be summarily denied without an evidentiary hearing as it is procedurally barred.

CLAIM 2—Jury Selection

In Claim 2, Defendant alleges he was denied his fundamental right to a fair trial, due process, and reliable adversarial testing due to improper rehabilitation and ineffective assistance of counsel at the jury selection phase of his capital trial, in violation of Mr. Calhoun's rights under the Sixth, Eighth and Fourteenth amendments to the United States Constitution and the corresponding provisions of the Florida constitution.

A. Trial court error in finding venire panel rehabilitated not cognizable in post conviction motion

Calhoun alleges members of the venire panel indicated that trial counsel would have to prove some evidence of innocence for them to render a verdict of not guilty. (DM:8). After questioning by Ms. Jewell, the State Attorney addressed with the panel that the Defendant was not required to put on any evidence and that the burden rested with the State. (T:234-237). Later, when trial counsel attempted to strike several members of the panel, the trial court found that the State effectively rehabilitated the jurors and denied the for cause challenges. Calhoun argues that the trial court erred in finding that the attempted rehabilitation of the venire panel was sufficient and the jurors should have been removed for cause. (DM:8).

However, claims of trial court error are not cognizable in a post conviction motion and should have been raised on direct appeal. State v. Coney, 845 So. 2d 120, 137 (Fla. 2003); see also Jones v. State, 928 So. 2d 1178, 1182, n.5 (Fla. 2006). As such, this claim should be summarily denied without an evidentiary hearing as it is procedurally barred.

B. Counsel was not ineffective for failing to ask for additional peremptory strikes

Calhoun argues counsel was ineffective for failing to request additional peremptory strikes after the denial of cause challenges. (DM:9). He asserts that with the additional peremptory strikes trial counsel could have stricken five additional jurors. (DM:10). Calhoun argues counsel should have stricken Jurors Remmel, Hatcher, Anderson, Cox, and Sanders for various reasons if counsel had asked for additional peremptory strikes. (DM:10-11).

Counsel's strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected. Occhione v. State, 768 So. 2d 1037, 1048 (Fla. 2000). "Effective assistance of trial counsel includes a proficient attempt to empanel a competent and impartial jury through the proper utilization of voir dire, challenges to venire members for cause, and the proper employment of peremptory challenges to venire members." Peterson v. State, 154 So. 3d 275, 281 (Fla. 2014) (quoting Nelson v. State, 73 So. 3d 77, 85 (Fla. 2011)). The defendant has the burden to show that the challenged actions were not effective trial strategy. Peterson, 154 So. 3d at 280. Further, the defendant must show that but for counsel's unprofessional errors, the results of the proceedings would have been different. Id. at 280.

Calhoun has not shown that counsel's performance fell below the standard guaranteed by the Sixth Amendment. During the jury selection process trial counsel effectively questioned the venire panel along with the trial court and the State. All potential jurors were questioned and when there were issues the venire panel was rehabilitated effectively. Further, during jury selection trial counsel skipped over many of the listed venire members Calhoun now alleges were biased to seek cause challenges. (T11:240-249, 303-304).

Jury selection occurred over the course of two days and on day one trial counsel was able to exercise ten peremptory challenges to select a jury, again without challenging the above listed venire members. (T11:250-251, 303-306). After the first panel of 12 was selected, trial counsel and Defendant informed the court that they were satisfied with the panel. (T11:305, 310, 336). On the second day when the alternates were selected, trial counsel got two peremptory strikes and after the alternates were selected, defense counsel again agreed with the panel. (T12:495). Therefore, it is clear that trial counsel made a proficient attempt to empanel a competent and impartial jury through the process.

Moreover, Calhoun cannot show he was prejudiced as there is no indication on the record that any biased juror actually served. Carratelli v. State, 961 So. 2d 312, 324 (Fla. 2007). A juror is competent if he or she "can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." Carratelli, 961 So. 2d

at 324 (quoting Lusk v. State, 446 So. 2d 1038, 1041 (Fla.1984)). Under the actual bias standard, the defendant must demonstrate that the juror in question was not impartial, i.e., that the juror was biased against the defendant, and the evidence of bias must be plain on the face of the record. Carratelli, 961 So. 2d at 324.

Juror Remmel

Calhoun asserts that Juror Remmel was one of the jurors who said that he would require the defense to put on evidence and he would vote not guilty if innocence was proven. (DM:10). Further, Juror Remmel was a volunteer firefighter and EMT, and trial counsel failed to challenge him for cause.

Calhoun's assertions regarding Juror Remmel are misplaced. During voir dire, there was a discussion between a group of the panel regarding what evidence, if any, trial counsel had to present to the jury. (T11:222-230). Throughout the discussion and questioning by trial counsel, Juror Remmel made it clear that he did not think the burden was shifting to trial counsel, rather that he expected to hear her say something regarding the case. (T11:230-231). After trial counsel questioned the jurors, State Attorney Hess got up to clarify the discussion.

> "MR. HESS: No. Because we had not met our burden of proof. There's no requirement they put on any evidence; it's our job to bring justice to this courthouse, to bring the proof. Now, we had a Public Defender in this circuit many years ago, his name was Tom Ingles. Tom Ingles died protecting his client in the Gulf County Courthouse. He was shot by an irate husband, and he stood between the wife and the husband and he took a bullet for her. See, I get emotional. But Tom used to say the practice of law is the year but. That's what a defense attorney does; they test the evidence the State brings. Certainly, Mr. Moss, you expect Ms. Dowgul to test our evidence, correct? Mr. Moss?
>
> MR. MOSS: (Nod yes), yes, sir.
>
> MR. HESS: But in our system of justice it's my responsibility to bring the evidence. It's her responsibility, she said an ethical requirement, to test the evidence. Would anybody require any more of her than that, to test our evidence? If I didn't get the job done, would any of you feel bad about going home and saying that man's not guilty? Anybody? And that's what our system of justice is all about.
>
> The judge will tell you that reasonable doubt can come from lack of evidence, or conflicts in the evidence. If I don't bring the evidence, there's a reasonable doubt. If I bring evidence that's conflicting and you can't reconcile that, there's reasonable doubt...."

(T11:236-237). All of the members of the panel agreed with the State Attorney's example and were

effectively rehabilitated. (T11:234-237). Therefore, there was no sufficient reason for trial counsel to ask to strike Juror Remmel for cause.

Juror Remmel was juror number 1 and at the start of the peremptory challenges, trial counsel had sufficient challenges to vote Juror Remmel off the panel. Trial counsel did not seek to have Juror Remmel removed from the jury as there was no reason to have him removed. (T11:250-251, 305). Rather it appears throughout the jury selection transcript, Juror Remmel was a fair juror. Calhoun has not shown Juror Remmel was actually biased against him. Juror Remmel was aware of the burden remaining on the State Attorney as he stated during voir dire. (T11:230). Accordingly, Calhoun was not prejudiced and this claim should be denied.

Juror Hatcher

Calhoun asserts Juror Hatcher was a juror who said that he would require the defense to put on evidence and he was elected as the foreperson. (DM:10). However, Calhoun has not shown how Hatcher being the foreperson prejudiced his case. (T17:1246). During voir dire, the whole panel expressed concern over whether trial counsel should have to present any evidence during the trial. (T11:222-234). Juror Hatcher raised his concern in stating that defense counsel would have to prove innocence, and then he attempted to clarify by stating, "Maybe they're trying to say you would have to disprove what, what they come up with." (T11:225). Nevertheless, State Attorney Hess rehabilitated the panel of jurors by explaining to them that the burden of proof is on the State and that defense counsel's only responsibility is to test the evidence. (T11:236). Clearly, Juror Hatcher was not a biased juror as trial counsel did not try to strike him for cause or use a peremptory challenge. (T11:240-251). Ms. Jewell still had three peremptory strikes when she tendered the panel, including Juror Hatcher, to the State. (T11:251). Further, this claim is also speculative as there is no evidence that this juror was biased. See Wade v. State, 156 So. 3d 1004, 1032 (Fla. 2014) (holding that the evidence of bias must be plain on the face of the record). Calhoun is asserting that if this juror had been struck then better jurors would have been on the panel, however, that is not a basis for trial counsel to strike the juror. As such, Calhoun cannot show that he was prejudiced by any failure of counsel to request additional peremptory challenges to strike this juror.

Juror Anderson

Calhoun alleges Juror Anderson stated he felt that the death penalty was appropriate for heinous or very serious murders. (DM:10). He asserts that because trial counsel did not "life qualify" the jury to see if they were receptive to mitigation, Anderson was an automatic vote for death. (DM:10). During voir dire, the State Attorney asked Juror Anderson questions regarding voting for the death penalty:

> "MR. YOUNG:... All right, Mr. Anderson, do you think that the death penalty is appropriate for some murder cases?
>
> MR. ANDERSON: Sure.

MR. YOUNG: Does that mean that you also think that it's not appropriate for some murder cases?

MR. ANDERSON: Sure.

MR. YOUNG: Okay. Well, what, how would you make that decision?

MR. ANDERSON: If it were proven beyond a reasonable doubt they committed a heinous or very serious murder.

MR. YOUNG: Well, now, Mr. Anderson, before you can get out of the guilty phase, the jury has to find that the State's proven the charge of first degree murder against a defendant beyond a reasonable doubt, okay? Now, you're not saying just because you find that he's guilty beyond a reasonable doubt, that you'd automatically vote for the death penalty, are you?

MR. ANDERSON: No.

MR. YOUNG: Okay. Is that, just for record, you shook your head no, right?

MR. ANDERSON: I said no.

MR. YOUNG: Okay. So you would listen to any further factors or evidence presented in the form of mitigating factors or aggravating factors to make that decision?

MR. ANDERSON: Yes, sir."

(T11:270-71). Juror Anderson had a clear understanding that he would not automatically vote for death if he found the Defendant guilty. (T11:271). He also agreed that he would listen to mitigating and aggravating factors in making his decision. (T11:271). Calhoun cannot show any actual bias by this juror nor can he demonstrate how he was prejudiced. Therefore, as to Juror Anderson this claim should be denied.

Juror Cox

Calhoun alleges Juror Cox was the stepson of another venire member, Juror Commander. (DM:10-11). Calhoun asserts that Juror Commander was dismissed because his wife, Juror Cox's mother, knew the victim and had an opinion. (T10:23, 26). Calhoun asserts defense counsel did not inquire of Juror Cox whether his mother had spoken to him about the victim and whether his feelings would affect his judgment as they did his stepfather. (DM:11).

Calhoun's arguments are meritless as this claim calls for speculation. See Wade v. State, 156 So. 3d 1004, 1032 (Fla. 2014) (holding that the evidence of bias must be plain on the face of the record). Juror Commander stated that his wife knew the victim and had told him about the victim. (T10:26). He asserted that he had an opinion about the victim but no opinion as to the Defendant's guilt or innocence. (T10:26-27). Ms. Jewell sought to have Juror Commander stricken for cause. The court noted that Juror Commander's mind would clearly be on his employment, yet the court found that there were not sufficient reasons for cause. (T11:240-242). Nevertheless, Juror Commander was removed from the jury through a peremptory strike by trial counsel. (T11:250). Calhoun is assuming that because Juror Commander's wife knew the victim and informed her husband of her opinion, Juror Cox also learned of the case through his mother. Despite Juror Cox not indicating that he knew anything about the victim or the case, Calhoun is trying to prove the bias of one juror through another juror. (T11:263-268). As such, Calhoun is merely speculating that Juror Cox had a bias without any indication on the record. Consequently, Calhoun has not shown that Juror Cox was a biased juror and he cannot show any prejudice.

Juror Sanders

Calhoun argues Juror Sanders stated that if a person premeditatedly killed someone they deserved what they gave and trial counsel failed to "life-qualify." (DM:11). Further, Juror Sanders was the neighbor of the victim's sister's grandmother, and trial counsel did not inquire whether it was the same grandmother of the victim. (DM:11). Calhoun also asserts that Juror Sanders was a family friend of Agent Mike Gillis, a witness in the trial. (DM:11).

Calhoun's allegations lack merit. Juror Sanders was an alternate and therefore did not deliberate with the jury in finding Calhoun guilty or sentencing him to death. (T12:493-494). Calhoun cannot show how he was prejudiced by any alleged failure of trial counsel. There was no reason for trial counsel to have exercised a peremptory against this juror when there was no bias shown in her statements. Accordingly, the Defendant has not shown that a biased juror actual sat on the jury or how he was prejudiced.

C. Counsel was not ineffective for failing to death or life qualify the panel

Calhoun argues that trial counsel failed to conduct a meaningful death or life qualification with the voir dire panel. (DM:11-12). Ms. Jewell did not ask any juror to express their feelings on the death penalty or whether they would be able to consider the evidence she intended to present as mitigation in an argument for life. (DM:12).

However, Calhoun's claim lacks merit. When the trial court and the State adequately question the venire panel, there is no prejudice if defense counsel does not repeat the same line of questioning. See Johnson v. State, 921 So. 2d 490, 503 (Fla. 2005) ("Essentially, even if we were to assume counsel's performance was deficient, given the thorough questioning by the State and the court, Johnson has failed to show any prejudice."). As Calhoun asserts, the State did conduct a death

qualification with the panel regarding the death penalty. (T10:150-153). Trial counsel did not have to repeat the same questions of the panel and, as such, Calhoun is not prejudiced.

Further, much of Calhoun's claim relies on speculation about what trial counsel could have inquired about from the venire in order to obtain a more defense friendly jury. He has not asserted that any juror was actually biased or could not listen to all of the evidence and mitigation. Actual bias is not shown by the mere presumption or belief that a juror may have been biased. See Johnson v. State, 921 So. 2d 490, 503-04 (Fla. 2005) citing Reaves v. State, 826 So. 2d 932, 939 (Fla. 2002) (holding that an allegation that there would have been a basis for a for-cause challenge if counsel had "followed up" during voir dire with more specific questions was mere conjecture). Defense lawyers are given wide latitude in developing a strategy and selecting jurors based on that strategy. Such an argument is not a basis for relief under Strickland. As Calhoun cannot show actual bias in any of the jurors' service, this claim should be denied.

CLAIM 3—Guilt Phase

In Claim 3, Defendant alleges he was denied his fundamental right to fair trial, due process, and reliable adversarial testing due to ineffective assistance of counsel at the guilt phase of his capital trial, in violation of Mr. Calhoun's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

A. Counsel was not ineffective for failing to object, impeach, or effectively cross-examine witnesses.

In this claim, Calhoun argues trial counsel failed to test the State's evidence through proper objections, available impeachment evidence, and effective cross-examination. Calhoun lists numerous witnesses that he feels counsel should have asked more questions, should have objected, or should have impeached their testimony. (DM:13-29).

"Whether to object is a matter of trial tactics which are left to the discretion of the attorney so long as his performance is within the range of what is expected of reasonably competent counsel." Peterka v. State, 890 So. 2d 219, 233 (Fla. 2004) (quoting Muhammad v. State, 426 So. 2d 533, 538 (Fla. 1982)). The Florida Supreme Court has held that defense counsel's decision not to object to minor hearsay matters are considered trial tactics. Brown v. State, 846 So. 2d 1114, 1122 (Fla. 2003). In the absence of testimony regarding trial counsel's strategy, a court presumes trial counsel exercised reasonable professional judgment in all decisions. Gore v. State, 964 So. 2d 1257, 1269-70 (Fla. 2007) (finding the defendant did not meet his burden of deficient performance when his lead counsel was not called to testify during the hearing, and defendant only presented testimony from co-counsel which criticized the strategy of lead counsel); see Callahan v. Campbell, 427 F.3d 897, 933 (11th Cir. 2005).

While courts may not indulge in *post hoc* rationalization, they also cannot insist that counsel "confirm every aspect of the strategic basis for his or her actions." Harrington v. Richter, 131 S.Ct. 770, 794 (2001). "There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.' Richter, 131 S.Ct. at 791 (citing Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (per curiam)).

During Calhoun's case, Ms. Jewell effectively cross-examined each witness presented by the State. Through her cross-examination of various witnesses, trial counsel was able to make it clear there was no evidence that Calhoun was in the trailer at the time the kidnapping occurred, and she was able to insinuate that someone broke in and committed the crime. (T17:1178). Further, trial counsel challenged the identification of the man who came into the store in Alabama at 6:00 a.m. on December 17, 2010. (T13:659-665). During closing arguments, trial counsel methodically went through the testimony of each witness and explained to the jury why each testimony was important to show that Calhoun was not guilty. (T17:1179-1207).

Trial counsel's failure to object regarding the alleged hearsay testimony of Tiffany and Glenda Brooks appears to be a trial tactic by trial counsel. (T14:783-787, 794-797). The objections would have drawn attention to their testimony and would not have assisted in Calhoun's defense. In addition, by effectively cross-examining the witnesses presented, trial counsel was able to challenge the timeline of events. Trial counsel questioned Brittany Mixon on her events the day Calhoun was reported missing as well as her subsequent tampering of the evidence. (T14:720-745). Trial counsel also questioned Investigator Raley regarding his investigation, the investigative timeline, and omissions to the investigation. (T14:774-777; T15:957-962; T16:1080-1087, 1092).

Even though, Calhoun may think that trial counsel should have asked more questions and sought more answers, it does not mean that trial counsel was ineffective in her defense of Calhoun. There is no evidence of neglect on the part of counsel or that her approach was not strategic. Calhoun has not shown prejudice. To establish prejudice, the defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668 (1984). The Florida Supreme Court has determined that a reasonable probability is a probability sufficient to undermine confidence in the outcome. Rutherford v. State, 727 So. 2d 216, 219 (Fla. 1998).

Charles Howe

Defendant asserts Mr. Howe, without objection, testified to victim impact evidence. Charles Howe was Mrs. Brown's employer and the first witness called by the State. After establishing that Mrs. Brown worked for him at Charlie's Deli, he went on to identify a photograph of Mrs. Brown and her employment application to Charlie's Deli. Both documents were introduced into evidence, without objection, as State's Exhibit 2 and 3, respectively. The State then went on to elicit testimony regarding Mrs. Brown's employment application, i.e. the little hearts in her signature. (T 548). Defendant asserts the exhibits and testimony were not relevant to any issue at trial. Moreover, Howe's testimony injected emotion and sympathy into the trial. Defendant's ground alleges that the

fact Mrs. Brown worked at Charlie's Deli was never in dispute. Thus, Defendant submits that her employment application was not relevant to any issue in the case, much less material issue. Further, Defendant claims that the photograph the State introduced was not necessary, as Mr. Howe was not testifying as an "identification" witness. Therefore, Defendant submits that counsel's failure to object to the exhibits and testimony is ineffective, and prejudicial.

At the evidentiary hearing, Ms. Jewell testified that she had discussions with the State about the employment application. Specifically, Ms. Jewell understood the application was offered for her signature and to match a known signature in her dental records. Ms. Jewell testified,

> "I believe that they were arguing, you know, to show that it was her signature. Because Dr. Swindle, I don't think, could testify to that actually being her signature, if I'm not mistaken, I can't, I'm looking at this and I think Charlie's Deli knew her signature. And my preference was not to have a family member be the one to attest to her signature as being hers."

(Evid. Hrg. Trans. 59).

Ms. Jewell further testified she didn't find the material objectionable, as the signature of the victim was there for purposes of clarifying that these were her records.

As for personal characteristics of Mrs. Brown's signature with hearts, Ms. Jewell responded that she didn't consider this victim impact evidence. Explained further, Ms. Jewell commented as follows:

> "...victim impact, in this case, literally could have been autopsy photos because those are highly emotionally charged. This is a signature. It, you know, in my opinion, and this was, you know, I was the one trying the case, this was my opinion, this did not fall into, this did not fall into victim impact. Because when you're watching, you know, on a cold record, you don't see anyone else. You know the jury, looking at the stuff, is just like, okay, that's her signature. I don't know that there's any evidence that affected them emotionally."

(Evid. Hrg. Trans. 63-64).

Ms. Jewell believed this evidence was not going to influence this jury. As such, Ms. Jewell did not make an objection to this testimony. Ms. Jewell stated that she was not disputing that the identification wasn't Mrs. Brown. While counsel could not remember if she could stipulate with the State, Ms. Jewell believed the State was entitled to put on this evidence. Calhoun cannot demonstrate Ms. Jewell was deficient in her performance, or that he suffers prejudice in this claim.

Dr. Swindle

At trial the State called Dr. Swindle to identify Mrs. Brown through her dental records. Eight documentary exhibits were introduced through Dr. Swindle without objection. Four of the documentary exhibits were forms that included Mrs. Brown's signature, all with the hearts to which Mr. Howe had testified to. They were introduced into evidence as State's Exhibits 4C-4F. The State made certain to ask Dr. Swindle more than once whether Mrs. Brown's signature was on the forms so as to emphasize her hearted-signature. (T. 552, 555).

As with the employment application, the four documentary exhibits with Mrs. Brown's signature were not relevant nor necessary to prove a material issue in the case according to the Defendant's allegations in his post conviction motion. In his motion, the Defendant alleges that the exhibits the State introduced did not have Mrs. Brown's signature included her registration form, patient chart and x-rays, all bearing her name on them for identification purposes. Defendant submits that if the evidence was even remotely relevant, it was cumulative and substantially outweighed by its prejudice.

As previously noted, Ms. Jewell did not think the testimony of Charles Howe was prejudicial as it relates to the hearts or victim impact evidence, and that she did not object according to her testimony from the evidentiary hearing.

Further, Ms. Jewell agreed with the comment about the law that even if the Defense stipulates to identification of the victim in a murder case that does not prohibit the State from presenting that type of evidence. In this particular case, the State only had scant remains of Mrs. Brown's body. Therefore, the State had to identify the victim through dental records. Ms. Jewell testified that it was her understanding that the State put on those items in an effort to establish Mrs. Brown, with her unique signature, worked at Charlie's Deli, and that the signature matched Brown's dental records. Counsel agreed that the State put forth this evidence to establish that those were the same person. (Evid. Hrg. Trans. 191-192). Accordingly, Calhoun fails to demonstrate deficient performance on the part of his trial attorney, or actual prejudice.

Dick Mowbry

As its third trial witness, the State called Officer Mowbry to testify about finding Mrs. Brown's body. He testified he saw what appeared to be a "charred" rib cage and that it was a "bad sight." According to the Defendant's allegations within his claim, the State referenced Mrs. Brown's rib cage, at minimum, five times without objection. The State also had Officer Mowbry identify a photograph and attempt to point out the rib cage. In identifying the rib cage, Officer Mowbry testified that the photograph was blurry "but the thought in my mind I will never forget it." (T. 566-67). Despite the inflammatory nature of the testimony, Defendant alleges in his claim that counsel lodged no objections, did not move for a mistrial, did not request that the testimony be stricken, and did not ask for a curative instruction. Therefore, Defendant submits that Officer Mowbry's testimony injected emotion and sympathy into the trial.

In reference to the Mowbry statement that "I will never forget it", Ms. Jewell testified at the evidentiary hearing that she didn't feel that it was as inflammatory and emotional as argued. Ms. Jewell stated that it was a strategic decision not to lodge an objection at that time. In Ms. Jewell's opinion, an objection in this instance would have drawn additional attention to testimony given what was already emotional exhibits. Ms. Jewell testified "...that's just a matter of are you one of those attorneys who likes to jump up and down and object to everything and annoy the jury or do you just let the trial keep running smoothly unless it's something so egregious you've got to interfere with it." (Evid. Hrg. Trans. 73).

In response to whether it was overly prejudicial or inflammatory, Ms. Jewell stated the following:

> "...when you're in that moment, you know, I sense a trial in my own, you know, what things are inflammatory to me, what might be to them. But, you know you're looking at a cold record for years on end. In a trial, you're moment to moment and things are moving not at the pace, necessarily, that I read them. But they could've been going back and forth faster than even that. So, that language can get lost on a jury just through the speed of which it's going."

(Evid. Hrg. Trans. 74). Ms. Jewell agreed that it appeared as though the State was referencing different angles of the ribcage, and that the photos were not cumulative in her belief. (Evid. Hrg. Trans. 192-193). This Court finds Ms. Jewell's decision to not raise an objection strategic in nature.

Mike Gillis

In his motion, Defendant alleges that Ms. Jewell was ineffective in her cross-examination of Mike Gillis. However, at the evidentiary hearing, the movant elicited no testimony from Ms. Jewell about her cross-examination of Gillis. As such, Calhoun has failed to establish deficient performance by Ms. Jewell and how he was prejudiced by her performance.

Harvey Glen Bush

In his September 30, 2011, deposition, Mr. Bush testified that he went to Charlie's Deli on the night of December 16, 2010, a little after 7:00 p.m. According to Mr. Bush, Charlie's Deli was already closed and Mrs. Brown was no longer there. Defendant asserts that this information is significant in that counsel could have used it to challenge the State's timeline and theory that Mrs. Brown left work and went straight to Mr. Calhoun's trailer. Counsel could have also used this testimony to call into question the veracity of Jerry Gammons' trial testimony, where he stated that Mrs. Brown arrived at his trailer at approximately 8:40 p.m. (T. 606). This conflict in the evidence leaves at least one hour and forty minutes unaccounted for and is potentially fatal to the State's timeline and theory of events. Defendant's claim asserts that by inexplicably failing to present and capitalize upon this glaring conflict, trial counsel rendered deficient performance that severely prejudiced Mr. Calhoun.

During the evidentiary hearing, Ms. Jewell testified that she could not recall as to why she did not establish with Mr. Bush at what time Charlie's Deli may have closed, and if it was unusual to close that night.

However, Calhoun has failed to establish deficient performance by Ms. Jewell, as well as prejudice. At the evidentiary hearing, Mr. Bush was not called to testify about how he would have answered had Ms. Jewell asked the additional questions. Ms. Jewell testified that she took the deposition of Mr. Bush. (Evid. Hrg. Trans. 75). During the deposition, Ms. Jewell asked Mr. Bush if it was a regular occurrence for Charlie's Deli to close early "so that we avoided the look that, you know, the store closed at the exact same time every day so something was obviously off if it closed at a different time." (Evid. Hrg. Trans. 76: 9-12).

The Court finds, absent any Mr. Bush testimony at the evidentiary hearing, Calhoun has failed to prove Ms. Jewell performed deficiently as his trial attorney and has failed to prove prejudice. As such, Calhoun has not proven ineffective assistance of counsel.

Jerry Gammons

The Defendant submits in his next allegation that during Ms. Jewell's cross-examination of Mr. Gammons, counsel failed to question him about the fact that his trailer was mere blocks away from Charlie's Deli and that the travel time was no more than five minutes. This, combined with Mr. Bush's deposition testimony referenced above, could have and should have been used to highlight a conflict in the State's evidence and challenge the State's timeline and theory of events. According to the Defendant, trial counsel completely failed in this regard.

However, Calhoun has failed to establish deficient performance by Ms. Jewell, as well as prejudice. At the evidentiary hearing, Mr. Gammons was not called to testify about he would have answered had Ms. Jewell asked the additional questions. Calhoun has failed to prove Ms. Jewell performed deficiently as his trial attorney and has failed to prove prejudice. As such, Calhoun has not proven ineffective assistance of counsel.

Brandon Brown

During cross-examination, counsel asked Mrs. Brown's husband, Brandon Brown, only two questions: (1) whether his wife had a cell phone, and (2) whether her cell phone and camera were missing from her purse. In effect, Defendant claims trial counsel failed to cross-examine Brandon Brown at all.

Defendant asserts that trial counsel was in possession of a plethora of information that could have been used to thoroughly cross-examine and impeach Mr. Brown. (See sub-claims a-e). Not only did trial counsel render deficient performance by failing to use the information she had through pre-trial discovery, trial counsel also failed to investigate other avenues of impeachment evidence that could have been used on cross-examination. (See sub-claims f-g).

According to the Defendant's allegations, trial counsel's failure to cross-examine Brandon Brown is particularly egregious given that the State could not provide nor prove any motive Mr. Calhoun had to commit these crimes, and Brandon Brown had no alibi witness for the evening. Thus, Defendant asserts that counsel could have used all of the above-mentioned evidence to cast a reasonable doubt on the State's tenuous theory that Mr. Calhoun was responsible for the murder of Mia Brown.

During the evidentiary hearing, Ms. Jewell stated that as he was Mrs. Brown's husband, as a matter of strategy she did not want to attack the grieving husband. Further, Mr. Calhoun was adamant that it was Doug Mixon and that Mr. Brown was not involved in it. (Evid. Hrg. Trans. 84). Ms. Jewell stated that "I thought a lot of things surrounding Mr. Brown were somewhat suspicious. But when you have a client telling you certain things, you know. When I try cases, I'm more of, like I said, I don't like the shotgun approach. I pick a horse and I ride it. And it was a strategic decision not to attack Mr. Brown and place the blame on him, though some of the stuff was curious." (Evid. Hrg. Trans. 89). Ms. Jewell reiterated that "the strategy was not to attack Mr. Brown." (Evid. Hrg. Trans. 101). In her reasoning for not doing the reasonable doubt shotgun approach, Ms. Jewell stated that "... you can't blame it on one person, then turn around and blame it on another because then you lose the jury's trust. They're like your just pointing the finger at everybody so it's not him." (Evid. Hrg. Trans. 102).

Ms. Jewell stated that the defense theory was to blame the murder on Doug Mixon. It is noted, however, when the defense got to the decision of calling Mr. Mixon to testify, Mr. Calhoun decided he did not want Mr. Mixon to testify. (Evid. Hrg. Trans. 102). Calhoun on his own subverted his defense theory.

Defendant stated to Ms. Jewell that Doug Mixon was to blame and the defense theory centered on him, not Mr. Brown. Ms. Jewell testified that in her experience the defense of blaming the grieving husband actually garners a lot of disdain out of the jury when you do that. Counsel reiterated there was absolutely no evidence that she was aware of which would point to Brandon Brown as being responsible for this crime. (Evid. Hrg. Trans. 193-194). This Court finds Ms. Jewell had sound reasons for not trying to put the blame on Brandon Brown for the murder of Mrs. Brown.

As for the pictures on the SD Card, Ms. Jewell testified that there was no evidence that the photographs depicting bruises were actually Mrs. Brown, or that depicted injuries were caused by Brandon Brown. (Evid. Hrg. Trans. 193). No witness was presented to identify the person in the photographs, or even testify as to what caused the bruises on the unknown person. Notwithstanding, these photographs would not have been admissible at trial as they lack authentication. (Evid. Hrg. Trans. 100).

It is clear that Ms. Jewell did her best to adhere to her strategy and attack the State's case, while keeping the jury's trust. This was a reasonable plan to take by Ms. Jewell and did not fall below the standards of being a competent attorney. As such, Calhoun has failed to prove Ms. Jewell was ineffective.

Chuck White

In his motion, Defendant alleges that Ms. Jewell was ineffective in her cross-examination of Chuck White. However, at the evidentiary hearing, there was no testimony from Ms. Jewell about her cross-examination of him. As such, Calhoun has failed to establish deficient performance by Ms. Jewell and how he was prejudiced by her performance.

Sherri Bradley

Calhoun's counsel conceded at the evidentiary hearing that Ms. Jewell did a really "great job" attacking Sherri Bradley's identification. (Evid. Hrg. Trans. 104). Ms. Jewell wanted to have that point made to the jury that Bradley could not have made an accurate identification of the Defendant given the differences in the Flyer and his hairstyle on the morning of her encounter. Ms. Jewell explained that "...I was attacking her ID of him. Because it was so clearly wrong and you had to have that in conjunction with the next one that we'll talk about, Mr. Batchelor, because they obviously saw two different people at the same place." (Evid. Hrg. Trans. 108). Ms. Jewell stated Bradley's identification, when compared to Batchelor's identification, created a conflict in the evidence that she could effectively argue to the jury. (Evid. Hrg. Trans. 109-110).

Ms. Bradley was never called as a witness at the evidentiary hearing and it is purely speculation as to what she would have testified to had she been asked the additional questions. As such, Calhoun has failed to meet his burden to show Ms. Jewell was ineffective.

Darren Batchelor

In this allegation, Defendant asserts Ms. Jewell did not confront Mr. Batchelor with his prior inconsistent statements to law enforcement or the vast disparity in his description of Calhoun's age. The Defendant claims the State utilized Mr. Batchelor largely to corroborate Ms. Bradley's testimony who, as set forth in the preceding paragraphs, had credibility issues of her own.

During the evidentiary hearing, Ms. Jewell reiterated that counsel was playing the identifications of the Defendant by Darren Batchelor and Sherri Bradley against each other. As for the allegations raised above about impeaching Mr. Batchelor, Ms. Jewell could not recall why she did not go further to explore.

> "And to be honest, I don't know. It could have, you know, there could be any number of reasons for that. But, again, I got, and sometimes you do this, you get so focused on one point that you want to make with them, that some of these other things, you forget, quite honestly, to talk to them about some other stuff that you know.
>
> But then you forget and it's, you know, it's why I say every time I've done a trial or witness testimony for a day, I go back and I just beat myself up about it.

Because I'll see something and go, I should have asked that. It's just unfortunately the nature of the beast."

(Evid. Hrg. Trans. 115).

At the trial, Mr. Batchelor claimed to have gone to school with Calhoun. (Evid. Hrg. Trans. pp. 110-11). According to Ms. Jewell, had Mr. Calhoun actually looked at the case, discovery materials, and talked to her about the witnesses, he could have assisted her in this cross-examination. Instead, the first time Defendant told counsel, "no, I don't know him," in regards to Mr. Batchelor, was in trial. Ms. Jewell testified that this was specifically why she had warned Calhoun about the perils of not assisting in his defense preparation, because during trial is not the time to tell me these things. (Evid. Hrg. Trans. 111-112). Calhoun cannot demonstrate that counsel was deficient in her cross-examination.

Dr. Boudreau

During the evidentiary hearing, Ms. Jewell stated the focus in her questioning of the medical examiner, Dr. Boudreau, was whether the victim was conscious when the fire started. (Evid. Hrg. Trans. Pg. 123). In response as to why counsel did not ask Dr. Boudreau about the specimen being unsuitable for carboxyhemoglobin analysis by co-oximeter in Dr. Goldberg's lab report, Ms. Jewell testified that she could not say. Counsel was more focused on the soot in the victim's esophagus as it showed inhalation. As for the distinction between presumptive and confirmatory tests, Ms. Jewell testified that she cannot say why she didn't bring this out to the jury, but that "...when you are dealing with this type of thing, the one thing you don't want is your medical examiner on the stand for extensive periods of time..." (Evid. Hrg. Trans. 123). Counsel further stated "and when it is a test such as this, a fire such as this, you know, it is more important to, I was looking at him in terms of penalty phase, where you have heinous, atrocious and cruel and was she conscious..." (Evid. Hrg. Trans. 123).

The record demonstrates Ms. Jewell had a reasonable strategy as to why she asked certain questions in an attempt to minimize the M.E.'s time before the jury. Likewise, according to Ms. Jewell, her focus on the M.E.'s testimony was as it could apply to a penalty phase. As such, Calhoun has failed to show the prejudice he sustained as a result of the questioning.

Brittany Mixon

During the evidentiary hearing, Ms. Jewell testified that Brittany Mixon claimed to be, "best friends with Mia Brown." At the same time, Ms. Jewell stated very often, "that people surrounding a case like this exaggerate their knowledge of and connection to the victims." Ms. Jewell testified that a lot of things Ms. Mixon did were suspicious. However, Ms. Jewell stated that it appears that she did not question Ms. Mixon about her curious phone calls, which in hindsight may have been something she needed to go into with her. (Evid. Hrg. Trans. 124-133).

However, it was at all times the defense strategy that Brittany Mixon's father, Doug Mixon, was the focus of the defense theory, and not Brittany Mixon. Calhoun fails to establish what prejudice he sustained as a result of Ms. Jewell not asking additional questions.

Tiffany Brooks

During the evidentiary hearing, Ms. Jewell testified that she did not recollect why she did not object to the hearsay in either case for Glenda Brooks or Tiffany Brooks. Ms. Jewell commented that "when you have a client sitting next to you and talking to you constantly, sometimes it's very easy for those things to get missed." (Evid. Hrg. Trans. 133-135). However, Defense did not elicit any testimony that would establish how Calhoun was prejudiced by this evidence being presented. Therefore, Calhoun has failed to establish deficient performance by Ms. Jewell and how he was prejudiced by her performance.

Glenda Brooks

For reasons already expressed in the claim above for Tiffany Brooks, which would apply equally to Glenda Brooks. Further, Ms. Jewell testified that Glenda Brooks was difficult during cross-examination. (Evid. Hrg. Trans. 136). She also stated, as with Tiffany Brooks, she might have just missed the hearsay objection. The Court finds this as a prime example of a Defendant who had not been active in his defense constantly interrupting counsel during a direct-examination. There was no evidence elicited that would establish how Calhoun was prejudiced by this evidence. Therefore, Calhoun has failed to establish deficient performance by Ms. Jewell and how he was prejudiced by her performance.

Charles Richards

In his motion, Defendant alleges that Ms. Jewell was ineffective in her cross-examination of Charles Richards. However, at the evidentiary hearing, there was no testimony from Ms. Jewell nor anyone else, about her cross-examination of him. As such, Calhoun has failed to establish deficient performance by Ms. Jewell and how he was prejudiced by her performance.

Trevor Siefert

Mr. Siefert was the FDLE crime lab analyst who performed the DNA analysis in this case. At the evidentiary hearing, Ms. Jewell was asked why she did not ask additional questions from Mr. Seifret. In her cross-examination, Ms. Jewell established that when and how DNA appears on an item cannot be determined from testing the DNA. (T15:892-93). Additionally, Ms. Jewell was able to establish that there were at least three contributors of DNA on the collar of a shirt that was found in the trailer. (T15:899-900). The jury was able to hear this evidence.

During the evidentiary hearing, Ms. Jewell acknowledged that Brittany Mixon had clothes in the trailer and that, Brittany Mixon and Doug Mixon share DNA. Ms. Jewell stated that the

frequency of occurrence was only 1 in 800 Caucasians. (Evid. Hrg. Trans. 201). Since it was undisputed that Ms. Mixon had previously left clothes in Calhoun's trailer, it would also be likely that Doug Mixon's DNA would be identified as a possible contributor. This was the thrust of the defense theory. Calhoun is unable to prove prejudice from pursuing his defense theory.

Megan Kriser

In his motion, Defendant alleges that Ms. Jewell was ineffective in her cross-examination of Megan Kriser. However, at the evidentiary hearing, there was no testimony from Ms. Jewell nor anyone else, about her cross-examination of her. Therefore, Calhoun has failed to establish deficient performance by Ms. Jewell and how he was prejudiced by her performance.

Jennifer Roeder

Ms. Roeder was the FDLE crime lab analyst who examined the SD card found in Mr. Calhoun's trailer. During the evidentiary hearing, Ms. Jewell testified she knew that Investigator Raley accessed the SD Card via his laptop. Further, counsel knew of Jennifer Roeder's report and that she, herself, looked at the SD Card. Counsel discussed how this often happens in child pornography cases when law enforcement officers may open a file for investigative purposes. Counsel did not perceive a good faith basis to make a challenge to the chain of custody or integrity of the evidence. (Evid. Hrg. Trans. 143-144).

As for the State's use of Jennifer Roeder in explaining how SD Cards are inserted and removed from cameras, Ms. Jewell testified that she never asked jurors had they ever pulled out an SD Card from camera. Counsel stated that she did not "assume that jurors are really stupid," and with basic information, she doesn't get experts. However, counsel articulated that she did not think about having Ms. Roeder testify to the effort it takes to get an SD Card out of a camera. (Evid. Hrg. Trans. 140-141). Ms. Roeder did not testify at the evidentiary hearing. The Court finds that Calhoun failed to show that the additional questions would have caused a different outcome in the trial and he cannot prove prejudice.

Michael Raley

As to the trial issue regarding the rule of completeness, as applied to Calhoun's statement to investigators, Ms. Jewell testified she thought she had placed a written proffer and placed the defendant's written statement in as an exhibit, but, obviously, she did not do that. (Evid. Hrg. Trans. 40-41). Further, counsel articulated that she understood the necessity of the rule of completeness. (Evid. Hrg. Trans. 41).

Regardless, the Florida Supreme Court held any error of trial in excluding statements of the defendant made to police officer, which defendant sought to have admitted under the rule of completeness, was harmless beyond a reasonable doubt. See Calhoun, 138 So. 3d 350 (Fla. 2013). This Court is inclined to concur with the Florida Supreme Court's findings that any error was

harmless beyond a reasonable doubt and it would not have affected the outcome of the trial. Therefore, counsel is not ineffective because even if properly preserved for appeal, he would not be entitled to relief on the rule of completeness.

With respect to counsel clarifying in which or when Defendant was in the woods in close proximity to law enforcement, Counsel stated that she did not clarify which wooded area in Investigator Raley's testimony. (Evid. Hrg. Trans. 46). In the Defendant's statement with law enforcement, Defendant testified he was in the woods near Bethlehem, Florida, campground when law enforcement was nearby. (Evid. Hrg. Trans. 47). Ms. Jewell indicated that she wanted to avoid misleading the jury as to Calhoun's location, especially in light of the Brooks' testimony that he was seen in Alabama. (Evid. Hrg. Trans. 49). Furthermore, Ms. Jewell testified that Defendant told her he was in the woods running towards the Brooks' residence. To argue Defendant had been in Florida would have been a violation of the Code of Professional Conduct.

The Court finds that any other claims alleged by the Defendant which relate to Investigator Michael Raley are without merit. Calhoun has failed to establish deficient performance by Ms. Jewell and how he was prejudiced by her performance.

In this case, there was overwhelming evidence of Calhoun's guilt. The victim's blood, hair, and purse was found inside of Calhoun's trailer wherein there was evidence of a struggle. See Calhoun, 138 So. 3d 350, 366 (Fla. 2013). Calhoun was witnessed asking the victim for a ride on December 16 and a witness testified that the victim came to the wrong residence the night she went missing, looking for Calhoun's trailer. Id. The morning that Mrs. Brown and Calhoun were both reported missing; Calhoun was seen in a white four-door car, matching the victim's car, and buying cigarettes at a convenience store in Alabama. Id. He was observed with blood and scratches on his hands and later that day a fire was seen burning in the vicinity. Id. Eventually, Calhoun went to the home of friends in Alabama, less than 1.5 miles from the victim's burnt car where he was informed that he was reported as missing along with the victim, Mrs. Brown. Calhoun, 138 So. 3d at 367. The victim's burnt remains were found in the trunk of her car on December 20. Id.

At the evidentiary hearing, Ms. Jewell testified about how she prepared the case for trial, as well as her actions during the trial. Ms. Jewell testified that Calhoun was insistent that the murderer was Doug Mixon. (Evid. Hrg. Trans. 54). She also testified that the strategy for trial was to attack the State's case and to show that the State could not prove the case beyond a reasonable doubt. (Evid. Hrg. Trans. 53-54). Ms. Jewell testified that she had a focused approach because she wanted to maintain her credibility with the jury. (Evid. Hrg. Trans. 55).

With the overwhelming evidence in this case, Calhoun was not prejudiced by any alleged failure of trial counsel to object to the testimony of witnesses regarding issues that did not affect the jury's verdict. Therefore, trial counsel's objections would not have made a difference as they do not pertain to the DNA evidence that was found, the location of the burnt car, nor the citings of Calhoun and the victim before her death.

This Court finds that Ms. Jewell had a clear strategy for how she handled the case that was not "so patently unreasonable that no competent attorney would have chosen it." Dingle v. Sec'y Dept. of Corr., 480 F.3d 1092, 1099 (11th Cir. 2007) (quoting Adams v. Wainwright. 709 F.2d 1443. 1445 (11th Cir. 1983)). As such, this entire claim is denied in its entirety.

B. Calhoun was not prejudiced by the testimony of Glenda Brooks and Investigator Raley in the defense's case.

Calhoun argues that trial counsel was ineffective for eliciting potentially damaging evidence in the defense case-in-chief. Calhoun challenges trial counsel's decision to recall Ms. Glenda Brooks and Investigator Raley to testify again when the information they presented could have been elicited during cross-examination in the State's case-in-chief. (DM: 29-30).

The Florida Supreme Court has held that there is a strong presumption that defense counsels render effective assistance and the assessment of their performance cannot be based on hindsight. "[A]n attorney is not ineffective for decisions that are part of trial strategy that in hindsight, did not work out to the defendant's advantage." Mansfield v. State, 911 So. 2d 1160, 1174 (Fla. 2005).

Trial counsel re-called Ms. Glenda Brooks and elicited testimony that Ms. Brooks did not want Calhoun in her home after she received the call from her daughter's boyfriend. (T16:1076). While Calhoun asserts he did not know why trial counsel re-called Ms. Brooks, trial counsel made that fact clear at side bar and during closing arguments. At side bar, trial counsel told the court she was trying to get information regarding Calhoun's statement to Ms. Brooks regarding the victim. (T16:1078).

> "Your Honor, this is opening up me to ask her about what he told her when he got there. They said they wondered why he didn't call the police, because he had told them that he was kidnapped and tied up. So I think if we go to that direction, that opens the door."

(T16:1078). This line of questioning was disallowed by the Court. During closing arguments, trial counsel again reiterated that Ms. Brooks' testimony the day after the incident was different than her testimony at the time of trial. (T17:1191-1192). It is clear that trial counsel was trying to show the inconsistent statements of this witness while also attempting to get this information to the jury.

At the evidentiary hearing, Ms. Jewell could not recall what her specific reasoning was for Ms. Brooks' testimony. However, after Ms. Jewell's memory was refreshed, she articulated that there was some conversation she had with the Defendant. Ms. Jewell recalls Defendant told her that Ms. Brooks wanted him (Defendant) to leave the residence because Ms. Brooks' granddaughter was there. Ms. Jewell conceded sometimes witnesses just don't say what you know is out there. (Evid. Hrg. Trans. 135-139). This shows clear strategy to imply to the jury that Ms. Brooks was not afraid of Calhoun when she asked him to leave her home.

Through the trial testimony of Investigator Raley, trial counsel attempted to show the State was withholding information. Trial counsel questioned Investigator Raley about Doug Mixon who was known to fight with Calhoun in an effort to show that there was a possible second suspect. (T16:1082). During closing arguments, trial counsel sought to demonstrate there was doubt Calhoun was actually seen buying cigarettes since he already had some. (T17:1197-1199). Trial counsel also argued the evidence regarding an unknown shoe print that did not belong to Calhoun and was not presented to the jury as it did not match the State's theory of the case. (T16:1084; T17:1195-1198). By recalling Investigator Raley, trial counsel was able to suggest that the State was excluding evidence that did not work for their case. Trial counsel was not ineffective for presenting evidence that put doubt on the State's case.

At the evidentiary hearing, Ms. Jewell stated that as a strategic move, she has more than once, called law enforcement in her case-in-chief. (Evid. Hrg. Trans. 147). Ms. Jewell's reasoning is because you get some type of information in through a law enforcement witness because you can often make it look as though they have not been forthcoming to a jury, and the jury may think, "well, why didn't they tell us that." (Evid. Hrg. Trans. 147). Ms. Jewell wanted to put evidence into the case to establish that everything looked just "a little too made up" in this case. (Evid. Hrg. Trans. 148). Therefore, trial counsel was not ineffective for presenting evidence to create doubt on the State's case.

Ms. Jewell testified about how the Sage Loop property didn't fit the State's theory of the case. (Evid. Hrg. Trans. 150-153). Specifically, Ms. Jewell testified this was not well thought out and planned, a smooth action on the part of one person. (Evid. Hrg. Trans. 150). Rather, in counsel's view, more than one person was involved in this homicide and she sought to bring this out with a variety of witnesses. (Evid. Hrg. Trans. 150). According to Ms. Jewell, she had suspicions that Doug Mixon was an alternate suspect. In fact, Ms. Jewell testified that the Defendant had all but insisted that he (Mixon) was involved. (Evid. Hrg. Trans. 157). This is the reason why counsel called different witnesses and Investigator Raley was one of those witnesses along with others called.

During defense's case-in-chief at trial, trial counsel solicited testimony through Investigator Raley that Doug Mixon was with his girlfriend, Gabby Faulk, during evening of December 16 and December 17 in Geneva, Alabama. At the evidentiary hearing, Ms. Jewell testified that she was not trying to establish an alibi for Doug Mixon, but rather that Doug Mixon was lying to law enforcement. (Evid. Hrg. Trans. 157-162).

Ms. Jewell was also questioned about calling Gabby Faulk as a witness, given her inconsistent statements compared to Doug Mixon's alibi. Gabby Faulk's statement reflects that she was never married to Doug Mixon and she was not planning on getting married to Doug Mixon. Ms. Jewell testified that Gabby Faulk was not consistent with her own whereabouts and Ms. Faulk seemed very confused. In Ms. Jewell's opinion, "Gabby Faulk is, putting her on the stand would be like lighting a stick of dynamite, you just don't know what's going to come out of her." (Evid. Hrg. Trans. 167). Moreover, Ms. Jewell testified that Ms. Faulk was just "all over the place" and she would be under the influence of Doug Mixon. (Evid. Hrg. Trans. 167-169).

Ms. Jewell agreed that she believed that the State's theory of the case was that the clothes in which Calhoun showed up wearing at the Brooks' house were the ones that he was wearing at Ms. Bradley's convenience store. While Ms. Jewell did not remember the State ever saying that Defendant had changed clothes, she sought to establish through Investigator Raley that Defendant was wearing a bold shirt versus just a plain white shirt, in opposition to Bradley's testimony. (Evid. Hrg. Trans. 153-156).

The Court finds that Calhoun has not shown how he was prejudiced. Glenda Brooks and Investigator Raley testified in the State's case-in-chief and there was substantial evidence of Calhoun's guilt that was presented throughout trial. Therefore, their testimony does not undermine the jury's verdict. See Everett v. State, 54 So. 3d 464, 478 (Fla. 2010). Consequently, Calhoun has failed to show prejudice by any of Ms. Brooks or Investigator Raley's testimony in the defense case, and offered for strategic purposes. This claim is denied.

C. Counsel was not ineffective for failing to consult with forensic experts

Calhoun argues trial counsel was ineffective for failing to retain or consult with a forensic expert. In particular, Calhoun argues that counsel should have consulted with a pathologist or medical expert to show how Calhoun received the scratches and injuries to his body. (DM:30). In addition, Calhoun asserts trial counsel should have consulted with a digital forensic expert to ensure that the SD card seized was not altered in any way as it was used to establish a timeline for the crime. (DM:31).

The Florida Supreme Court has repeatedly rejected a claim of ineffectiveness for failing to hire various experts when the proffered testimony would not have assisted in the defense. Reed v. State, 875 So. 2d 415, 422-423, 425, 427 (Fla. 2004); Beasley v. State, 18 So. 3d 473 (Fla. 2009) (finding defense counsel was not ineffective for failing to hire experts, when the experts would not have presented any testimony contrary to the State's position). The test to be applied in a claim of ineffective assistance of counsel for failure to retain an expert is whether counsel's performance was deficient and whether the defendant was prejudiced by that deficiency. Reed v. State, 875 So. 2d 415 (Fla. 2004). But, in this case, any such testimony from an expert would have been fruitless.

Scratches

In regards to the scratches obtained by Calhoun, neither the State nor defense counsel had experts testify as to how Calhoun obtained the scratches. In closing arguments, trial counsel argued to the jury that briars or other similar shrubbery caused the injuries. (T17:1194-1195). Even taking Calhoun's arguments that an expert would have supported his theory of how he received the scratches, he cannot show how he was prejudiced. Throughout trial, testimony presented that Calhoun was in the bushes hiding out which is consistent with the injuries he sustained. Even if an expert could have testified fingernails did not cause the injuries, the other option did not help Calhoun's defense. Reed, 875 So. 2d at 423 (finding there is no prejudice when the employment of an expert would not have assisted the defense). Consequently, Calhoun was not prejudiced by any

alleged failure of trial counsel to call an expert witness.

Dr. Edward Willey, an expert in forensic medicine, testified at the evidentiary hearing. The witness was retained in this case to analyze photos and to report as to the scratches on the Defendant's body. In his testimony, Dr. Willey discussed the four (4) characteristics to look for: lunar, width, multiplicity, and parallel. (Evid. Hrg. Trans. 260-261). However, the witness testified that the defect in all the pictures was no scale included within the pictures. The failure to include a scale would be fatal in his analysis. As such, Dr. Willey could not give a definitive opinion as to how the scratches occurred if he testified at trial. (Evid. Hrg. Trans. 264). In fact, his comments indicate that running through bushes is a reasonable explanation for some perhaps all of the scratches.[6] Additionally, Dr. Wiley testified that given the photos he enhanced, there were no apparent indications of fingernail scratches.

Ms. Jewell indicated she would not have hired an expert to explain scratches as it was obvious on its face that nothing indicated fingernail scratches. (Evid. Hrg. Trans. 177-179). Ms. Jewell testified that it would insult the juror's intelligence in this case as they were country folk, farmers, mostly hunters, etc. Likewise, the jury had previously been told that Defendant was running through woods and bushes during this case. Calhoun has not demonstrated any prejudice by trial counsel's failure to call a medical or pathologist expert.

SD card

Mr. John Sawicki, an expert witness in digital forensics, was called to testify at the evidentiary hearing.[7] Mr. Sawicki is also an attorney admitted in both the states of Florida and Oregon, and he is based in Tallahassee, Florida. In this case, the Defense called upon Mr. Sawicki to review the SD card as well as the trial transcripts and any other biography information of this case. In his testimony, the witness discussed the ways in which one would view the SD card without altering the metadata via a write blocking device. The write blocking devices are generally used in the digital forensic field.

In Mr. Sawicki's testimony, the witness testified that the only time that the metadata had been altered was under the accessed part with an access date of January 17, 2011. (See Evid. Hrg. Trans. 387:16-17; 389:6-14). This was consistent with Investigator Raley's trial testimony. Some of the pictures were assigned a date of up to June of 2011. However, when the witness was asked whether the testimony of the FDLE agent and time and date stamps are consistent with FDLE analysis to the time clock, he partially agreed. (Evid. Hrg. Trans. 390). Mr. Sawicki submits the sample was compromised and a jury cannot rely upon the contents of the SD Card. Mr. Sawicki conceded; however, that there was no indication of the date/time stamps being manually changed. (Evid. Hrg. Trans. 390-391, 393). Mr. Sawicki offered no opinion as to unreliability. Mr. Sawicki was not aware of any of the photographs having their created or modified dates changed to January 17, 2011,

[6] The Court notes that the expert's report was not offered into evidence.

[7] The Court notes that the expert's report was not offered into evidence.

which is when Investigator Raley accessed the SD card. (Evid. Hrg. Trans. 393:10-19). Mr. Sawicki agreed this information was consistent with an officer reviewing the SD card on January 17, 2011, and not changing any other metadata. (Evid. Hrg. Trans. 393-394). Mr. Sawicki testified he was unable to say that the officer was untruthful or to refute the officer's testimony. (Evid. Hrg. Trans. 394).

Accordingly, Calhoun has not established how failing to call an expert on the SD Card issue would have created a reasonable probability of a different result. This claim is denied.

D. Counsel was not ineffective for failing to object to the State Attorney's closing argument

Calhoun argues trial counsel was ineffective for failing to object to the improper and misleading prosecutorial statements made during closing arguments.[8] Calhoun argues that during closing statements the State Attorney appealed to the emotional sympathy of the jury by repeating Calhoun committed the crime. (DM:39-42). Calhoun argues that the State Attorney also commented on Calhoun hunting the victim the night of the murder, and that Calhoun was later found hiding like a dog. Calhoun argues the State Attorney improperly referred to another case in discussing jurisdiction, expressed his own opinion on evidence, and asked the jury to send a message to the community. (DM:41-42). Calhoun argues he suffered prejudice by the comments of the State Attorney in closing arguments and he was denied his rights to a fair trial. Calhoun's allegations lack merit.

During closing arguments, an attorney is to assist the jury in analyzing, evaluating, and applying the evidence. Miller v. State, 926 So. 2d 1243, 1254 (Fla. 2006). The assistance that is allowed includes the attorney's right to state his contention as to the conclusions that the jury should draw from the evidence. Id. at 1254; see Ruiz v. State, 743 So. 2d 1, 4 (Fla. 1999). Moreover, "the proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." Robinson v. State, 610 So. 2d 1288, 1290 (Fla. 1992) (quoting Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985)). Further, as long as an argument is based on the evidence presented, an attorney can argue reasonable inferences from the evidence, or any relevant issue. Miller, 926 So. 2d at 1254-55. Therefore, to the extent that the State Attorney went through the evidence presented at trial and explained it to the jury; there was no reason for defense counsel to object. The State Attorney committed no error in stating that Calhoun committed the crime, in commenting on how the police found Calhoun, or how he obtained the scratches on his arm. (T17:1148-1176). Thus, trial counsel was not ineffective for failing to object to the prosecutor's statements.

[8] The information regarding this claim is found in claim 4(B). Calhoun raises the information in this claim under ineffective assistance of counsel.

Ms. Jewell testified that in her judgment the jury completely shut down during the State's closing arguments. (Evid. Hrg. Trans. 180). While there may be objectionable arguments in closing arguments, the last thing counsel wanted to do is to wake up the jury or have them draw their attention to something in particular. In Ms. Jewell's opinion, the jury was not impressed with the theatrics of closing arguments by the State. Further, in counsel's judgment, she didn't want to give the State's closing any weight as it appeared as though the jurors were insulted by State's closing argument at times. (Evid. Hrg. Trans. 180-181). Ms. Jewell specifically made a strategic decision to allow the State to lose the jury's interest and attention during the State's closing arguments. Thus, trial counsel cannot be ineffective for failing to object to the prosecutor's statements.

Moreover, even if the State's closing arguments are deemed improper, it does not necessarily mean that Calhoun was deprived of a fair trial or was prejudiced. In Braddy v. State, 111 So. 3d 810, 842-44 (Fla. 2012), the Florida Supreme Court concluded that any improprieties contained in the prosecutors statements did not deprive the defendant of a fair trial because the comments did not go to the heart of the case. In Braddy, the State Attorney made comments that denigrated defense counsel, that the jury would be committing a miscarriage of justice if it convicted the defendant of a lesser-included offense instead of first-degree murder, and describing the victim's rear by using the pronoun "you" thereby having the jury place themselves in the position of the victim. Id. at 842-43. The Florida Supreme Court held that individually none of the comments were fundamental error. Id. The Court also held that the cumulative effect of any errors in the State's closing argument did not compromise the integrity of the trial and when viewed in the full context of the lengthy trial they were not sufficient to vitiate the Defendant's right to a fair trial. Braddy, 111 So. 3d at 844. Similarly in this case, the State Attorney's comments in closing argument did not go to the heart of the case. Individually or cumulatively any comments made by the State Attorney in Calhoun's case would not have changed the jury's verdict. The jury was presented evidence that the victim's purse was found in Calhoun's trailer, the victim's blood and hair was found in Calhoun's trailer, and the victim's burnt car was found approximately 1,488 feet from Calhoun's campsite. Calhoun, 138 So. 3d at 366. As such, Calhoun cannot establish prejudice, and accordingly, this claim should be denied.

E. Counsel was not ineffective for not objecting to venue and jurisdiction jury instructions

Calhoun argues trial counsel was ineffective for failing to object to the State's proposed instruction on venue and jurisdiction. (DM:32-35). Calhoun argues that there was no dispute as to venue because if Florida had jurisdiction, Holmes County was the proper venue. He asserts that trial counsel did not request a venue instruction and counsel should have objected when the Court gave the instruction. (DM:32). Further, Calhoun argues the instruction that was given to the jury in regards to jurisdiction was flawed. (DM:33-34). Calhoun maintains that trial counsel failed to object or even argue jurisdiction in her closing arguments. (DM:35).

To show that defense counsel was ineffective, Calhoun has to prove that counsel's failures were deficient and that it so undermined the outcome of the proceeding that he was prejudiced. Strickland v. Washington, 466 U.S. 668 (1984). The jury was given instructions on venue and on jurisdiction and both instructions were correctly written, accurately reflecting the law. Although

Calhoun asserts an instruction on venue was not needed, prior to jury selection trial counsel presented an oral motion for change of venue. (R5:889), "There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" Harrington v. Richter, 131 S.Ct. 770, 791 (2001) (citing Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (per curiam)). Nevertheless, the instruction on venue was properly before the jury and it did not affect the verdict of the jury.

Moreover, trial counsel accurately presented instructions on jurisdiction, which were accepted by the trial court. When the instructions were being reviewed, after both sides rested, defense counsel informed the trial court that she had done research regarding jurisdiction and got her sample from Lane. Lane v. State, 388 So. 2d 1022 (Fla. 1980). Trial counsel's recommended jury instruction applied the Lane standard. (R6:997-998; T16:1128-1130). Therefore, Calhoun's assertions that the instructions require proving all the elements of the crime is incorrect. The instructions require that the jury find an essential element beyond a reasonable doubt. Trial counsel appropriately listed an essential element of the crime of kidnapping and premeditated murder- with which Calhoun was charged- in providing jury instructions on jurisdiction. Consequently, trial counsel was not ineffective in her jurisdiction instruction recommendation to the Court.

Moreover, Calhoun cannot show how he was prejudiced in the giving of these instructions. The instruction on jurisdiction was correct and did not affect the verdict of the jury. The evidence of guilt was overwhelming in this case and even if the instruction on venue and jurisdiction was not given, it would not have changed the outcome. Therefore, this claim should be denied.

F. Counsel was not ineffective for failing to investigate Doug Mixon's alibi

Calhoun argues trial counsel was ineffective for failing to investigate Doug Mixon's alibi. The Court's facts and findings contained in Claims 15 and 16 are hereby incorporated into this claim. It is clear from the testimony that Ms. Jewell tried to investigate Doug Mixon's alibi to the best of her ability. Calhoun refused to cooperate with counsel and "he did not even look at the discovery", as testified to by Ms. Jewell and her investigator. Simply because Ms. Jewell was unable to discover any evidence beyond inadmissible hearsay that Mr. Mixon was involved in this murder, Calhoun cannot establish deficient performance by Ms. Jewell. This claim must be denied.

In this case, there was overwhelming evidence of Calhoun's guilt. The victim's blood, hair, and purse was found inside of Calhoun's trailer, and the trailer was in a disarray. See Calhoun v. State, 138 So. 3d 350, 366 (Fla. 2013). Calhoun was witnessed asking the victim for a ride on December 16. A witness testified that the victim came to the wrong residence the night she went missing, looking for Calhoun's trailer. Id. On morning Mrs. Brown and Calhoun were both reported missing, Calhoun was seen in a white four-door car, matching the victim's car, and buying cigarettes at a convenience store in Alabama. Id. He was witnessed with blood and scratches on his hands the day a fire was seen burning. Id. Eventually, Calhoun went to the home of friends in Alabama, less than 1.5 miles from the victim's burnt car where he was informed that he was reported as missing along with the victim, Mrs. Brown. Id. at 367. The victim's burnt remains were found in the trunk of

her car on December 20. Id. With this overwhelming evidence, Calhoun was not prejudiced by any alleged failure of counsel to object to the testimony of witnesses regarding issues that did not affect the jury's verdict. Therefore, trial counsel's calling Doug Mixon would not have made a difference as it does not pertain to the DNA evidence that was found, the location of the burnt car, and the citings of Calhoun and the victim before her death. Notwithstanding, trial counsel had Mr. Mixon under subpoena and in the courthouse ready to testify. It was Calhoun's choice to abandon calling Mr. Mixon to testify, thereby undermining his defense theory.

CLAIM 4—Prosecutorial Misconduct

In Claim 4, Defendant alleges that he was denied his fundamental right to fair trial, due process, and reliable adversarial testing due to improper prosecutorial misconduct at the guilt phase of his capital trial, in violation of Mr. Calhoun's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

A. The State did not commit any Giglio violations

Calhoun asserts there was a Giglio violation when his entire statement to the police was not admitted into the trial and the false testimony of a witness was allowed. (DM:38). A Giglio v. U.S, 405 U.S. 150 (1972) violation is demonstrated when (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material. See Guzman v. State, 941 So. 2d 1045, 1050 (Fla. 2006). Once the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. See id. at 1050-51. Under this standard, the State has the burden to prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt. See id. at 1050; see also Mordenti, 894 So. 2d 161, 175 (Fla. 2004). With regard to the third prong of Giglio, "the false evidence is material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' Guzman v. State, 868 So. 2d 498, 506 (quoting United States v. Agurs, 427 U.S. 97, 103 (1976)).

Investigator Raley's Testimony

Calhoun argues the testimony elicited from Investigator Raley was incorrect as the jury was left with the impression that Calhoun was in the woods near the crime scene in Alabama when in actuality he was at a campground in Florida. (DM:38). Calhoun asserts that the State argued to the jury that Calhoun admitted to being in the woods near the crime scene within hours of the car being burned and this was patently false and deliberately deceptive. At trial, Investigator Raley stated that Calhoun told him that police were closing in on him at least three times while he was in the woods. (T15:955).

Calhoun cannot show how this information was material to his case. During closing arguments the State Attorney implied that Calhoun was in the woods close to where the car was burnt. (T17:1210-1211). There was sufficient testimony presented at trial that Calhoun went to the Brooks' home, which is 1.5 miles away from where the car was burnt. (T15:948-949, 953). Therefore, even if the State Attorney had not incorrectly implied Calhoun's statements to the investigator, there was still sufficient evidence that he was in close proximity to where the car was found burnt in Alabama. Consequently, the State Attorney did not knowingly present false information to the jury and merely implied it incorrectly. Nevertheless, this information was also not material to Calhoun's conviction as it did not affect the jury's verdict. The jury was presented evidence that the victim's purse was found in Calhoun's trailer, the victim's blood and hair was found in Calhoun's trailer, and the victim's burnt car was found approximately 1,488 feet from Calhoun's Alabama campsite. Calhoun v. State, 138 So. 3d 350, 366 (Fla. 2013). This claim should be summarily denied.

Sherri Bradley's testimony

Calhoun asserts during trial Ms. Bradley testified she did not look at any news reports before speaking to investigators. (DM:39). Calhoun claims the State Attorney was aware this testimony was false because in an interview with Ms. Bradley she stated that she did not want to say something that she had actually read it in the newspaper. (DM: 39). However, even if Ms. Bradley made a misstatement regarding reading the news, it was not material to Calhoun's case. Ms. Bradley testified she saw Calhoun coming to the store early in the morning before the victim was reported missing, and that she saw scratches on Calhoun. (T13:649-651). Ms. Bradley also testified she saw a long haired Calhoun in a white car with Florida license plates. (T13:650-659). Ms. Bradley's testimony was corroborated by another witness who saw Calhoun in the store at the same time. (T14:675-683). Ms. Bradley's testimony was not material to Calhoun's case where it would have affected the verdict of the jury. Even without Ms. Bradley's testimony Calhoun would have been found guilty based on the overwhelming evidence. Accordingly, Calhoun cannot demonstrate any material impact upon the jury, and his conviction.

B. Claims of prosecutorial misconduct regarding improper closing arguments are not cognizable in a post conviction motion

Calhoun asserts that the prosecutor made improper comments during closing arguments. Calhoun asserts that the pattern and course of conduct violated his due process rights. (DM:42). Calhoun is arguing prosecutorial misconduct and such claims are not cognizable in a post conviction motion. Claims such as these should be raised on direct appeal and therefore, are procedurally barred. See Johnson v. State, 104 So. 3d 1010, 1029 (Fla. 2012); see also Spencer v. State, 842 So. 2d 52, 60-61 (Fla. 2013) (post conviction court properly concluded that claims alleging prosecutorial misconduct were procedurally barred because each of the alleged violations appeared on the trial record and could have been raised on direct appeal). Therefore, this claim should be summarily denied.

CLAIM 7—Counsel was not ineffective for failing to have a mental health expert in violation of Ake v. Oklahoma

In Claim 7, Defendant alleges he was denied his rights under Ake v. Oklahoma at the guilt and penalty phases of his capital trial in violation of his rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution, as well as Fifth, Sixth, and Eighth Amendment rights.

Calhoun alleges his trial counsel was ineffective for failing to have him evaluated by an expert to assist in the preparation and presentation of his defense. (DM:71). He asserts that instead he had an "all purpose" expert to only determine his competency and this was in violation of Ake v. Oklahoma, 470 U.S. 68 (1985). He asserts that the jury failed to receive substantial and competent evidence to support the statutory and non-statutory mitigating factors.

In Ake v. Oklahoma, the United States Supreme Court held "the Constitution requires that a State provide access to a psychiatrist's assistance on the issue if the defendant cannot otherwise afford one." Ake 470 U.S. at 74. What Ake requires is the State to provide access to and pay for a psychiatrist when a defendant's sanity is at issue. Id. Contrary to Calhoun's argument, Ake neither provides a defendant with their choice of mental health professional nor does it set a standard for an effective mental health evaluation. Wright v. Moore, 278 F.3d 1245 (11th Cir. 2002) (noting that a Sixth Amendment right to a mental competency examination is a "non-starter"); Wilson v. Greene, 155 F.3d 396, 401 (4th Cir. 1998)(rejecting the notion that there is either a procedural or constitutional rule of ineffective assistance of an expert witness); Walls v. McNeil, 2009 WL 3187066, *77 (N.D. Fla. Sept. 20, 2009)(citing cases). Ake is violated when a state or court denies a defendant access to a mental health professional when that defendant's sanity is at issue. Ake, 470 U.S. at 85.

Calhoun has not demonstrated a basis for meeting any of the requirements of Ake. First, Calhoun has not demonstrated that his sanity at the time of the offense was going to be a significant factor at trial. Id. at 85. And second, Calhoun has also not shown that he had requested and was denied access to a reliable mental health professional who would conduct an appropriate examination. Id. On the contrary, Calhoun asserts that his counsel hired an "all purpose" expert to determine his competency to proceed and his sanity at the time of the offense. (DM:71). Therefore, because Calhoun has failed to meet any of the prongs of Ake v. Oklahoma, this claim should be denied as lacking merit.

CLAIM 8—Alleged Juror Misconduct

In Claim 8, Defendant alleges he was deprived of his right to a fair trial and impartial jury due to juror misconduct between the guilt and penalty phases of his capital trial in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

Calhoun asserts that prior to the beginning of the penalty phase the trial court was informed of juror misconduct. (DM:72). The court was informed that someone saw two members of the jury discussing the trial at Middle Crossroads Convenience Store in Holmes County. The jurors were called up individually and questioned. Each responded negatively. (DM:72). Calhoun asserts that the witnesses were not questioned as to what they saw. He asserts that he was denied his right to a fair trial by an impartial and competent jury.

However, any claims of juror misconduct are not cognizable in a motion for post conviction relief and should have been raised on direct appeal. "Any substantive claim pertaining to juror misconduct is procedurally barred as it could have and should have been raised on direct appeal." Troy v. State, 57 So. 3d 828, 838 (Fla. 2011) (quoting Elledge v. State, 911 So. 2d 57, 77 n.27 (Fla. 2005)). The claim is summarily denied.

CLAIM 9—Counsel was not ineffective for failing to further investigate alleged juror misconduct

In Claim 9, Defendant alleges trial counsel was ineffective by failing to investigate allegations of juror misconduct and by neglecting to question each juror, counsel rendered deficient performance in violation of Mr. Calhoun's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

Calhoun alleges that his trial counsel was ineffective for failing to question each juror after learning of the juror misconduct. (DM:74). He asserts that trial counsel made no effort to corroborate the juror misconduct herself or to ask for a mistrial based on what she learned. (DM:75). Calhoun alleges that in failing to investigate the juror misconduct, trial counsel allowed the trial to proceed without a fair and impartial jury.

Calhoun is attempting to couch juror misconduct as an ineffective assistance of counsel claim by raising this conclusory allegation that counsel should have done more investigation. See Troy v. State, 57 So. 3d 828, 838 (Fla. 2011) ("A defendant may not attempt to circumvent the procedural bar to his claims by raising conclusory allegations of ineffective assistance of counsel."). Nevertheless, Calhoun's allegations lack merit. Upon finding out of the alleged juror misconduct, trial counsel agreed with individually questioning each juror. (T18:1266). The trial court called each juror one at a time and asked them if they had been contacted by anyone or discussed the case with anyone. (T18:1270-1275). Each juror responded negatively. Consequently, there was no reason for trial counsel to continue to investigate the alleged juror misconduct. This claim shall be summarily denied as trial counsel was not ineffective and Calhoun was not prejudiced.

CLAIM 10—ABA Guidelines

In Claim 10, Defendant alleges trial counsel was ineffective by completely disregarding the American Bar Association's (ABA) guidelines for the appointment and performance of trial counsel in death penalty cases, counsel rendered deficient performance through the pre-trial, guilt/innocence phase and penalty phase of Mr. Calhoun's capital trial. (DM: 75-76).

Calhoun raises several ABA violations committed by defense counsel and asserts that, but for counsel's failure to comply with the guidelines, there would be a reasonable probability that he would have received a life sentence.

The United States Supreme Court has stated that the ABA guidelines are merely "guides to determining what is reasonable." Wiggins v. Smith, 539 U.S. 510, 524 (2003)(quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)). In Strickland, the Court further explained:

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

Strickland, 466 U.S. at 688-89. The Florida Supreme Court has held that the ABA guidelines are not a set of rules that govern the Court's Strickland analysis because they would effectively revoke the presumption that counsel's actions are reasonable when based on strategic decisions. Mendoza v. State, 87 So. 3d 644, 653 (Fla. 2011). Therefore, trial counsel in Calhoun's case is not held to the standard established in the ABA guidelines in her representation of Calhoun. Instead there is a presumption that her decisions were reasonable under professional norms, unless Calhoun can show otherwise. To the extent that Calhoun's allegations of ABA deficiencies are merely recommended through the guidelines, those claims should be summarily denied. The State notes that the remainder of the issues raised in this claim that merit a Strickland analysis have already been raised and addressed throughout this response. As such, this claim shall be summarily denied without an evidentiary hearing.

CLAIM 11—Cumulative Error

The Defendant asserts a cumulative error claim. Although Calhoun presents this claim as independent basis for relief, a cumulative error claim cannot warrant relief unless the trial court finds specific claims of error meritorious. See Israel v. State, 985 So. 2d 510, 520 ("As discussed in the analysis of the individual issue above, the alleged errors are neither meritless, procedurally barred, or do not meet the Strickland standard for ineffective assistance of counsel. Because the alleged individual errors are without merit, the contention of cumulative error is similarly without merit.") See also Parker v. State, 904 So. 2d 370, 380 (Fla. 2005). Because all of Calhoun's claims are meritless, he is not entitled to cumulative error relief. See Griffin v. State, 866 So. 2d 1, 22 (Fla. 2003) ("[W]here individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail.); Vining v. State, 827 So. 2d 201, 219 (Fla. 2002) (where the defendant's claims were either meritless, procedurally barred, or did not meet the Strickland standard, his cumulative error claim necessarily failed). Accordingly, Calhoun is not entitled to relief and his claim is denied.

CLAIM 14—Conflict of Interest

Calhoun was not deprived of his fundamental right to effective assistance of counsel as his trial counsel did not have a conflict of interest.

In his second amended motion, Defendant asserts a conflict existed in the Office of the Public Defender which was not relayed to him. He asserts his trial counsel had just become qualified as a lead counsel in capital cases, and should have been assisted by qualified co-counsel in his case. Calhoun maintains the only qualified co-counsel in the office had a personal conflict as he knew the victim and her family. Defendant maintains that the whole office of the Public Defender should have been conflicted off of his case. Furthermore, he argues that the use of another attorney who was not qualified co-counsel adversely affected the entirety of his defense. Defendant's claim lacks merit as he has not shown that there was any actual conflict on the part of trial counsel. Moreover, although co-counsel did not meet the qualifications this does not amount to per se ineffective assistance of counsel.

A. Conflict-Free Counsel

The right to effective assistance of counsel also encompasses the right to conflict-free counsel. See Hunter v. State, 817 So. 2d 786, 791 (Fla. 2002). To establish ineffective assistance of counsel based on an alleged conflict of interest, the defendant must illustrate an actual conflict of interest that adversely affected the performance of counsel. See id. at 791-92. A defendant must illustrate the conflict through the identification and utilization of "specific evidence in the record that suggests that his or her interests were compromised." Id. at 792. A mere speculative or hypothetical conflict of interest is insufficient to establish ineffective assistance of counsel based on an alleged conflict. See id. (quoting Cuvler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)).

At the time of trial, Defendant was represented by Ms. Jewell, who he acknowledges was qualified as lead counsel. Defendant asserts that another attorney, Mark Sims, who was qualified to be co-counsel, knew the victim and her family and elected to not participate in the defense of the Defendant. Based on this election, Defendant asserts that everyone in the Public Defender's Office should have been conflicted. In particular, he asserts that Mr. Sims' conflict was imputed to Ms. Jewell.

During the evidentiary hearing, Ms. Jewell testified about how Mr. Sims had capital trial experience as an assistant state attorney, but his experience was not on the defense side. Therefore, he was not qualified at time of trial. According to Ms. Jewell, Mr. Sims was working in separate office for the Public Defender's Office in Blountstown, Florida, and he was effectively walled off from the case at hand. Ms. Jewell worked from the Panama City, Florida Public Defender's Office location. Ms. Jewell articulated that the decision to wall off Mr. Sims from the case and not impact the defendant's case was made by the Honorable Herman Laramore, who was the elected Public

Defender for the Fourteenth Judicial Circuit at the time of counsel's (Ms. Jewell) representation.[9] Further, Ms. Jewell testified she never spoke about the case with Mr. Sims. In effect, Mr. Sims was never involved in the defendant's case. Additionally, Ms. Jewell articulated that she had other attorneys, i.e. Doug White, and Walter Smith, to consult with for advice within the Public Defender's Office at the time as opposed to Mr. Sims. Moreover, Ms. Jewell discussed how she did not keep her files on the public defender web viewing system for everyone in her office to view.

The defense never called Mr. Sims nor the Public Defender Herman Laramore, so there was no contradictory evidence to suggest that the conflict went beyond a concern over an appearance of impropriety. Ms. Jewell was qualified as a defense attorney to sit on death cases and Mr. Sims' conflict did not adversely affect her ability to represent Calhoun.

According to the Florida Rules Regulating the Florida Bar, Mr. Sims declination of representation to the Defendant did not rise to the level of an actual conflict that adversely affected the performance of counsel. Pursuant to Rule 4-1.7 Conflict of Interest; Current Clients-a lawyer must not represent a client if it is directly adverse to another client or there is a risk that it will limit his responsibilities to another client, former client or a third person or a personal interest of the lawyer. Mr. Sims' knowledge of the victim and her family is a result of a personal interest of the lawyer and rather than having any adverse interest against Calhoun. With his knowledge of the victim and her family, a conflict may have arisen if he had participated in the defense of the Defendant. However, this does not mean that his decision to not participate became an actual conflict or adversely affected the Defendant.

Moreover, Rule 4-1.10(a) allows an exception for the prohibition when it is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. In this situation, the Defendant has only asserted that Mr. Sims knew the victim and her family. There is no assertion that anyone else in the Public Defender's Office knew of the victim or her family. As such there was no way that his knowledge of the family presented a significant risk of limiting the representation by Ms. Jewell. The Defendant has not shown that Mr. Sims' knowledge of the family affected Ms. Jewell's representation such that there was a conflict. The Defendant has not shown that Mr. Sims did any work on the case, had any personal participation, and that there was any communication between him and Ms. Jewell.

Further, the Defendant has not shown that there was an actual conflict that adversely affected the performance of defense counsel Ms. Jewell. The Defendant has only made generalized complaints based on Mr. Sims alleged conflict. This claim lacks merit as the defendant has not provided any specific evidence from the record that would suggest that Ms. Jewell's interest was compromised. See Taylor v. State, 87 So. 3d 749, 759 (Fla. 2012). Moreover, Ms. Copek failed to call the supervisor Herman Laramore to discuss this decision at the evidentiary hearing. Therefore,

[9] At the time of this evidentiary hearing, Mark Sims is now the elected Public Defender of the Fourteenth Judicial Circuit.

Calhoun's claim is due to be denied.

B. Lack of Qualified Co-Counsel

Defendant asserts he was also prejudiced by his counsel's inability to rely on Mr. Sims as co-counsel, when he was knowledgeable about capital cases. He asserts that instead Ms. Jewell had to rely on a co-counsel who was not qualified and had only been an attorney for two years at the time of trial. However, as the Florida Supreme Court has stated repeatedly failure to appoint co-counsel and an attorney's failure to meet the minimum standards for co-counsel in capital cases does not amount to ineffective assistance of counsel. The Court notes that this claim is diametrically opposed to Claim 14 A. In this case, even though Mr. Sims chose to not participate in this case, the Defendant cannot use this as a basis for deficiency of counsel or prejudice. Therefore, Calhoun's allegations that trial counsel was ineffective because co-counsel was not death qualified must be denied.

CLAIM 15—Brady Violation

Counsel was not ineffective for failing to obtain exculpatory evidence

Defendant claims that his due process rights were violated by a failure of the State to disclose a conversation between Natasha Simmons and Sheriff Greg Ward of the Geneva County Sheriff's Office in Alabama. Defense claims that Ms. Simmons approached Sheriff Ward after the murder had occurred, to discuss a strange encounter she had with Doug Mixon the night of the murder. Ms. Simmons, in a provided unsworn declaration, stated that Sheriff Ward told her the case was closed and sent her away. Defense claims that this conversation was never relayed to the prosecution or the defense. As such, defense is claiming a Brady[10] violation.

In order to obtain a reversal based on Brady, a defendant must prove four elements:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Jones v. State, 709 So.2d 512 (Fla. 1998) (citing Robinson v. State, 707 So.2d 688, 693 (Fla. 1998) (quoting Hegwood v. State, 575 So.2d 170, 172 (Fla. 1991)). "There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Smith v. State, 931 So.2d 790,

[10] Brady v. Maryland, 373 U.S. 83 (1963).

796 (Fla. 2006) (quoting Strickler v. Greene, 527 U.S. 263, 281-82 (1999)). To establish prejudice, a defendant must demonstrate that the suppressed evidence is material. Id.

As an alternative argument, defense claims that defense trial counsel was ineffective for his failure to obtain the exculpatory evidence. To establish prejudice, Calhoun must show that there is a reasonable probability that but for trial counsel's deficiencies, she would have received a different outcome. Sears v. Upton, 561 U.S. 945 (2010).

At the evidentiary hearing, the Court heard from Greg Ward, the former Sheriff of Geneva County, Alabama. (Evid. Hrg. Trans. 397-402). Mr. Ward was the Sheriff of Geneva County, Alabama in 2010 and during the time of this case when Mrs. Brown went missing from Florida and her body was discovered in Alabama. Mr. Ward testified about his role with the Geneva County Sheriff's Office when investigating Mrs. Brown's murder. According Mr. Ward, once the vehicle was found in Geneva County, Alabama, the Geneva County Sheriff's Office called in the state agent for ABI (Alabama Bureau of Investigation) and the investigation was henceforth conducted by ABI.

Mr. Ward acknowledged he knew a person named Natasha Simmons. However, under direct examination by the State, Mr. Ward testified that Natasha Simmons (notwithstanding Simmons' testimony at the evidentiary hearing) never came to meet him personally around this time period of 2010 or early 2011, or anytime for that matter, while he was Sheriff of Geneva County. Further, Natasha Simmons never told him she had picked up Doug Mixon and Charlie Utley from an area in Holmes County, Florida or that Doug Mixon had blood on him or that Mr. Mixon was carrying a gas can. Under cross examination, Mr. Ward testified at the evidentiary hearing that "I don't recall getting information from her whatsoever about anything." (Evid. Hrg. Trans. 400). Further, Mr. Ward testified he never told Natasha Simmons to forget about that information because Florida had already caught somebody who had confessed. Mr. Ward did testify that if somebody had reported something like that information to him and/or his agency, that information would have been relayed to the lead agent of ABI. The Court makes a specific finding that Sheriff Ward was not a member of the prosecution team, nor did the prosecution suppress favorable evidence.

As for Mr. Ward's knowledge of Doug Mixon, he did acknowledge he knew a person named Doug Mixon through the many years of dealing with him as a law enforcement officer. Through Mr. Ward's experience and knowledge, he offered his opinion about Doug Mixon's reputation for truth and honesty in the community that "I wouldn't believe, I wouldn't believe anything he told you, just to be honest with you, no sir." (Evid. Hrg. Trans. 399-400). Under cross examination, Mr. Ward stated that Doug Mixon would steal from you, and steal a lot of drugs, and "never known him to being, honestly being violent, never known him to do that." (Evid. Hrg. Trans. 401).

The Court also heard from Investigator Michael Raley of the Holmes County Sheriff's Office. According to Investigator Raley, he knows Sheriff Greg Ward, as Raley testified when Ward was Sheriff of Geneva County, Alabama, both Geneva County and Holmes County Sheriff's Office worked closely together. Investigator Raley testified he did not receive any information from Geneva County Sheriff's Office or ABI, Alabama Bureau of Investigation, about any statements

from Natasha Simmons regarding information Ms. Simmons had about Doug Mixon's involvement in the murder of Mrs. Brown. (Evid. Hrg. Trans. 414).

Further, Investigator Raley was asked about Investigator Ricky Morgan, of the Geneva Police Department. (Evid. Hrg. Trans. 415). According to Investigator Raley, he knows of Ricky Morgan, and he has worked with him in the past. Investigator Raley testified he never received any information from Investigator Morgan regarding information that Jose Contreras had about Doug Mixon's admission that he had killed Mrs. Brown and burned her body in a car. (Evid. Hrg. Trans. 415).

Investigator Raley was asked about whether he knew Doug Mixon. Investigator Raley was asked to offer his opinion about Doug Mixon's reputation for truth and honesty within the community. Investigator Raley described that Doug Mixon's reputation as not very truthful, and he often times tries to exaggerate. (Evid. Hrg. Trans. 415-416).

During the evidentiary hearing, the Court heard from Jose Contreras.[11] (Evid. Hrg. Trans. 338-351). Mr. Contreras testified he knew Doug Mixon as they worked together for three years. Further, Mr. Contreras also knew Gabby Faulk, as she lived with Mr. Contreras, as she (Ms. Faulk) is the mother his granddaughter, his son's daughter. According to Mr. Contreras, he knew both Doug Mixon and Gabby Faulk before they were in a relationship together. Mr. Contreras stated that he did not know Johnny Mack Sketo Calhoun.

Mr. Contreras testified that he went to the Geneva Police Department in Alabama to report that Doug Mixon had confessed to him. However, when he went there, Captain Ricky Morgan, told him that Doug Mixon had not killed anybody and kicked him out. Mr. Contreras was not happy with Ricky Morgan's attitude and he called another office. However, Mr. Contreras states that he left a message, but he does not remember exactly what office that was, and he thinks that he remembers talking to somebody, but he does not remember who exactly. (Evid. Hrg. Trans. 346). By clarification, Mr. Contreras stated that it was another law enforcement agency, and he called a Sheriff's office in Florida, in Bonifay, Florida. He further indicated during the hearing that he was not sure if he left a message or talked with someone, but he left his phone number. (Evid. Hrg. Trans. 346-347).

Captain Ricky Morgan was called as a witness in the evidentiary hearing. (Evid. Hrg. Trans. 404-406). Captain Morgan is with the Geneva Police Department in Alabama and he is supervisor over the investigations department. He was employed with the Geneva Police Department in the latter part of 2010 and the beginning in 2011. Captain Morgan stated he was aware and/or recalled the time period when a person named Mrs. Brown went missing from Florida and her body was later discovered in Geneva County, Alabama. However, he stated that he was not involved in the investigation of the murder of Mrs. Brown.

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[11] Mr. Contreras had an interpreter for him during the evidentiary proceedings.

Captain Morgan also stated that he knew Mr. Contreras. Captain Morgan testified that Jose Contreras never reported personally to him that Doug Mixon had confessed that he had killed Mrs. Brown and burned her body up in a car. (Evid. Hrg. Trans. 405-406). Captain Morgan testified nobody relayed that information to him. But, if that information would have been relayed to him, it would have been immediately turned over and relayed straight back to Holmes County, i.e. Sheriff's Office. The Court makes a specific finding that Captain Morgan was not a member of the prosecution team, nor did the prosecution suppress favorable evidence.

The Court heard from Robert Vermillion. (Evid. Hrg. Trans. 355-371). Mr. Vermillion is the second cousin of Brandon Brown and he also knew Mrs. Brown before she married his cousin. When Mrs. Brown disappeared and her body was located, Mr. Vermillion described when he learned that Mr. Calhoun was arrested for the crime. Shortly after Mr. Calhoun was arrested, Vermillion was also arrested and spent time in the Holmes County Jail in an adjoining cell beside Mr. Calhoun. Mr. Vermillion testified about how he plotted to get his hands on the Mr. Calhoun while in jail because of Mrs. Brown and the relationship with his family. (Evid. Hrg. Trans. 357). However, Mr. Vermillion's feelings subsequently changed towards the Defendant, Mr. Calhoun. Specifically, Mr. Vermillion testified that there came a time where he believed that somebody else killed Mrs. Brown. He believed that Doug Mixon was involved in this case. Thereafter, Mr. Vermillion went on to describe an encounter he had with Doug Mixon at a relative's house, Linda Thames. (Evid. Hrg. Trans. 361-367). According to Mr. Vermillion, Doug Mixon mentioned forgiveness in reference to Mrs. Brown. Mr. Vermillion also described how Doug Mixon stabbed him in his hand with a knife during the same encounter. Mr. Vermillion described how Doug Mixon was panicking and nervous, and started having a heart attack. Ultimately, Mr. Vermillion stated that the ambulance carried away Doug Mixon. Mr. Vermillion later clarified that Doug Mixon did not come out and say he killed her, but he insinuated it. (Evid. Hrg. Trans. 365).

Mr. Vermillion testified that he never told law enforcement about this encounter with Doug Mixon because his family has been through enough, and he did not want to bring it up. Under cross examination by the State, Mr. Vermillion acknowledged that he is eight or nine time convicted felon. Mr. Vermillion testified Doug Mixon did not really say that he "done it", so there was really nothing that I could say, that I could tell somebody, bit it's just suspicious, you know, hearsay. (Evid. Hrg. Trans. 367).

The Court heard from Doug Mixon during the evidentiary hearing. (Evid. Hrg. Trans. 307-321). He articulated that he knew both the Defendant, Mr. Calhoun, and the victim, Mrs. Brown. Doug Mixon stated he remembered talking to law enforcement but his recollection and memory about providing a statement to law enforcement was faulty. Mr. Mixon also remembered giving a deposition to Mr. Calhoun's lawyers but he also doesn't remember what was said or nothing. (Evid. Hrg. Trans. 309).

As for his heart issues, Mr. Mixon admitted that he has had some heart issues. As for an incident which occurred in July of last year, and Mr. Mixon described that he had a heart attack while at Linda Thames' house and he was transported to the hospital by ambulance.

Regarding Mr. Mixon's involvement in the murder of Mrs. Brown, he testified that he was aware that there were rumors in the case that he was involved. Also, Mr. Mixon agreed that he has somewhat of a bad reputation around town in the community. (Evid. Hrg. Trans. 310-311). In response, Mr. Mixon commented on how the Defendant, Mr. Calhoun, went around and told several people that he had done a bunch of stupid stuff including this things in this case.

Mr. Mixon also went on to testify about an encounter he had with the Defendant, Mr. Calhoun, while both were in the jail. Mr. Mixon articulated that the Defendant "was telling him that he was sorry. And what he done was, you know, and I believed it because he was in prison, that was bad, that was, you know, that wasn't no good..." (Evid. Hrg. Trans. 315).

Mr. Mixon testified that he never confessed to Contreras or Vermillion. Under cross-examination by the State, Mr. Mixon testified that as for the night when Mrs. Brown and the Defendant went missing, Mr. Mixon testified that he and Gabby Faulk were cooking dope. Mr. Mixon stated Mr. Contreras did not participate with the drugs. In fact, Mr. Mixon stated that Mr. Contreras knew nothing about it, because he and Gabby were trying to get through before he got back from work. (Evid. Hrg. Trans. 316-318).

Finally, the State inquired of Mr. Mixon in reference to being subpoenaed for trial in the Defendant's case back in 2012. Mr. Mixon replied by stating "yes sir, yes sir, but I didn't have to come in. When I got right up there, they told me I didn't have to come, to leave." (Evid. Hrg. Trans. 321). Again, the State asked Mr. Mixon, "so you did, you came to the courthouse and then they told you that you didn't have to testify?" To which, Mr. Mixon replied, "yes, sir." (Evid. Hrg. Trans. 321).

Ms. Jewell testified that the defense pursued leads as it related to Doug Mixon. In fact, counsel articulated that the defense had "doors slammed in our face." Furthermore, counsel testified that every time we followed through the chain of people who were in or around those statements that we had been made aware of, no one would every admit to them or we couldn't get past the hearsay of all of it. As a result of the investigation, Counsel identified a pattern of Doug Mixon's general reputation for dishonesty and reputation in the community. (Evid. Hrg. Trans. 197-198).

Ms. Jewell testified that Doug Mixon was under subpoena for trial and he was in fact present in the courthouse for trial purposes. As for why she did not put Doug Mixon on the stand, counsel testified to the following:

> "He was here. He, I mean, he had a very wild look about him that day. We, or I discussed, with Mr. Calhoun, that he was here and this was, you know, we were going to lay the blame at his feet, knowing full well Doug would either elaborate on something else or outright lie pretty much, and denying everything. And most of that was going to be just to get Doug Mixon in front of that jury so they could put the craziness to a face.

> And he was extremely concerned. Johnny [Calhoun] had become very concerned about the safety of his family. The closer this came to trial, he became more and more concerned about his mother in particular, and did not want to run the risk of Doug, I think because of Doug's reputation that Doug had actually built, he feared that by attacking Doug and laying the blame at Doug's feet, with Doug right there, would actually cause him to hurt his family."

(Evid. Hrg. Trans. at pp. 198-199).

Ms. Jewell further testified that ultimately it was her decision whether to put a witness on the stand or not. Counsel agreed she really had no idea what Doug Mixon was going to say if she put him on the stand. (Evid. Hrg. Trans. 199). Likewise, Defendant made it clear to Ms. Jewell he did not want her to put Doug Mixon on the stand.

> "When, even though we deposed him, when he came that day and was wound that tight and, you know, because Mr. Calhoun had expressed his concerns, not just that day, but before. Because he did, he was very concerned for his family. And when Doug came that day, I'm not an expert in drugs recognition, but I swear up and down he was lit by either meth or something else. He just had the wildest look in his eye."

(Evid. Hrg. Trans. at pp. 199-200).

Calhoun has failed to meet his burden of showing ineffective assistance of counsel. Sheriff Ward was adamant that the conversation between Natasha Simmons and he did not occur. He also stated that he would have conveyed any information he received about the case to the investigators who were assigned to the case. Ms. Jewell did a thorough job investigating the case, despite Calhoun refusing to cooperate and discuss the case with her. Ms. Jewell could not have possibly discovered the false statements of either Vermillion or Contreras. The Court specifically determines there was not a Brady violation in this cause. Calhoun has failed to establish ineffective assistance of counsel and this claim shall be denied.

CLAIM 16—Newly Discovered Evidence

Claim of newly discovered evidence does not establish that Defendant's conviction and sentence were obtained in violation of his rights and he was not denied effective assistance of counsel

Defendant claims that the emergence of Ms. Simmons supports the defense theory that Doug Mixon was the person who committed the murder. This claim is predicated on the same evidence in Claim 15. Based on the allegations, defense claims that this should be considered newly discovered evidence and is a basis for a new trial.

For a conviction to be set aside based on newly discovered evidence, two requirements must be met. Jones, 709 So.2d at 521. "First, in order to be considered newly discovered, the evidence 'must have been unknown by the trial court, by the party, or by counsel at the time of the trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence.'" Id. (citing Torres-Arboleda v. Dugger, 636 So.2d 1321, 1324-25 (Fla. 1994). "Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." Id. See also Mansfield v. State, 204 So.3d 14 (Fla. 2016).

> In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility. See Johnson v. Singletary, 647 So.2d 106, 110-11 (Fla. 1994); cf. Bain v. State, 691 So.2d 508, 509 (Fla. 5th DCA 1997). Once this is determined, an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. See Williamson v. Dugger, 651 So.2d 84, 89 (Fla. 1994). The trial court should also determine whether the evidence is cumulative to other evidence in the case. See State v. Spaziano, 692 So.2d 174, 177 (Fla. 1997); Williamson, 651 So.2d at 89. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence. Where, as in this case, some of the newly discovered evidence includes the testimony of individuals who claim to be witnesses to events that occurred at the time of the crime, the trial court may consider both the length of the delay and the reason the witness failed to come forward sooner.

Id. at 521-22.

In this case, the possible evidence from Ms. Simmons should be evaluated under the Brady test. This evidence is based on a possible non-disclosure from Sheriff Ward. As already discussed in Claim 15, this evidence would not meet the standards of ineffective assistance of counsel or a Brady violation. Sheriff Ward was adamant that had that kind of information been relayed to him or any of his deputies, he would have shared it with the "lead agent with AB." (Evid. Hrg. Trans. 399). The Court's findings and conclusions contained in Claims 3F and 15 are hereby incorporated into this claim.

Further, this evidence would not produce an acquittal at trial. By Mr. Vermillion's own admission, Mr. Mixon did not admit to committing the murder. He stated that Mr. Mixon just asked for forgiveness. Mr. Mixon never testified to seeing Natasha Simmons that night and he claimed that he was with Ms. Faulk the night of the murder at Mr. Contreras's house. He never stated he was with Charlie Utley the night of the murder. Additionally, Ms. Simmons described Mr. Mixon as more relaxed the night of the murder, but then stated Mr. Mixon repeatedly stated, "that goddamn Gabby." (Evid. Hrg. Trans. 329:21-22). Ms. Simmons initially stated that she saw the news about Ms. Brown missing the night before her supposed interaction with Mr. Mixon and Mr. Utley (Evid. Hrg. Trans. 332); however, she then backtracked and said she was not sure when she saw the news. (Evid. Hrg.

Trans. 332:23-25; 333:1-5). Ms. Simmons then agreed that the earliest she would have been able to see the news would be Friday night, after the murder had happened, and she would have picked up Mr. Mixon on Saturday morning. (Evid. Hrg. Trans. 333).

With Ms. Simmons inconsistencies, along with Sheriff Ward's testimony mean that the outcome of the trial would not have been different. Mr. Mixon was adamant that he had never confessed to killing Mrs. Brown. "And for one minute, ma'am, what I was saying a while, I would never confess to something, but if I did or didn't do, more or less, in all honesty. But I sure as sin wouldn't confess to something that I didn't do." (Evid. Hrg. Trans. 320:10-13). When asked if he has ever confessed to anybody that he had a part in Mrs. Brown's murder, Mr. Mixon answered with a clear no. ".. . I had nothing to do with it and I don't know anything about it." (Evid. Hrg. Trans. 320:20-21). This evidence would not produce an acquittal at trial and this claim must be denied.

Therefore, it is

ORDERED AND ADJUDGED as follows:

1. The Defendant's Motion for Post Conviction Relief is hereby GRANTED IN PART to the extent Defendant is granted Hurst relief raised in Claim 13;

2. The Defendant's Motion for Post Conviction Relief as to Claims 5, Claim 6A, Claim 6B and Claim 12 are hereby DISMISSED as moot; and

3. The Defendant's Motion for Post Conviction Relief as to Claim 1, Claim 2, Claim 3, Claim 4, Claim 7, Claim 8, Claim 9, Claim 10, Claim 11, Claim 14, Claim 15, Claim 16 are hereby DENIED. The Defendant has thirty (30) days from the date of this Order to appeal this decision.

DONE AND ORDERED in chambers, Holmes County, Florida, this 3rd day of January 2018.

HONORABLE CHRISTOPHER N. PATTERSON,
CIRCUIT JUDGE

Attachments:

Transcript of Jury Selection
Day One, Part One held February 20, 2012 pp. 1-184
Day One, Part Two held February 20, 2012 pp. 185-337
Day Two held February 21, 2012 pp. 338-508

Transcript of Trial
Jury Trial held February 22, 2012 pp. 509-672
Jury Trial held February 23, 2012 pp. 673-831
Jury Trial held February 24, 2012 pp. 832-969
Jury Trial held February 27, 2012 pp. 970-1135
Jury Trial held February 28, 2012 pp. 1136-1261

Transcript of Penalty Phase
Excerpt of Penalty Phase held February 29, 2012 pp. 1262-1275

I HEREBY CERTIFY that a true and exact copy of the foregoing has been provided by U.S. Mail and/or e-mail to the following: **The Honorable Glenn Hess**, State Attorney, (Glenn.hess@sa14.fl.gov); **Brandon Young**, Assistant State Attorney, (Brandon.young@sa14.fl.gov); **Lisa Hopkins**, Assistant Attorney General, (lisa.hopkins@myfloridalegal.com; capapp@myfloridalegal.com); **Alice Copek**, Esq., Special Assistant Capital Collateral Regional Counsel, (Alice.copek@ccrc-north.org) (copeklaw@gmail.com); **Stacy Biggart**, at (Stacy.Biggart@ccrc-north.org); **Johnny M. Calhoun**, DOC# Q26629, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, this 3rd day of January, 2018.

Amanda Williams, Judicial Assistant

IN THE SUPREME COURT OF FLORIDA

Case No. SC18-340

Lower court Case No. 2011-CF-11A

JOHNNY MACK SKETO CALHOUN,
Appellant,
v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR HOLMES COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

KATHLEEN PAFFORD
Assistant CCRC – North
Florida Bar No. 99527

ELIZABETH SALERNO
Assistant CCRC-North
Florida Bar No. 1002602

OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUSNEL – NORTH
1004 DeSoto Park Drive
Tallahassee, Florida 32301
COUNSEL FOR APPELLANT

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REQUEST FOR ORAL ARGUMENT

Johnny Mack Sketo Calhoun has been sentenced to death. Resolution of the issues presented will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to address the issues through oral argument would be more than appropriate, given the seriousness of the claims at issue and the stakes involved. Calhoun, through counsel, respectfully requests this Court hear oral argument in this appeal.

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Calhoun's motion for post-conviction relief following an evidentiary hearing. The motion was brought pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

"R." – record on direct appeal to this Court;

"T." – trial transcript on direct appeal to this Court;

"PCR." – postconviction record on appeal to this Court;

"EH." – evidentiary hearing transcript on appeal to this Court

Additional citations will be self-explanatory.

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

The Circuit Court of the Fourteenth Judicial Circuit in and for Holmes County, Florida entered the judgments of conviction and sentence at issue.

On December 10, 2010, Calhoun was arrested in Bonifay, Florida, four days after he and the victim, Mia Brown, were reported missing. Calhoun was indicted for the first-degree murder of Mia Brown on February 18, 2011. The circuit court appointed the Office of the Public Defender to represent Calhoun.

Calhoun pled not guilty to all charges. (R. 42). Trial commenced on February 20, 2012, merely a year after Calhoun was indicted. (T. 2). On February 28, 2012, the jury returned a verdict finding Calhoun guilty as charged. (R. 960). The penalty phase of Calhoun's trial started on February 29, 2012. (T. 1276). The jury recommended death by a vote of 9-3 the same day. (T. 1373). A *Spencer*[1] hearing was held on August 4, 2012. (T. 1251). The circuit court followed the jury's recommendation and sentenced Calhoun to death on May 18, 2012. (T. 1308). This Court affirmed Calhoun's convictions and sentence on direct appeal. *Calhoun v. State*, 138 So. 3d 350 (Fla. 2013). Relying on the mostly unchallenged evidence of the State, the Court, applying a special standard of review unique to cases based wholly on circumstantial evidence, found that the evidence was inconsistent with

[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

Calhoun's hypothesis of innocence that another individual committed the murder. *Id*. at 367. Calhoun filed a Petition for Writ of Certiorari in the United States Supreme Court, which was denied on October 6, 2014. *Calhoun v. Florida*, 135 S. Ct. 236 (2014).

Calhoun filed his Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend pursuant to Fla. R. Crim. P. on September 25, 2015. (PCR. 460).[2] The State filed its response on November 24, 2015. (PCR. 1138). The circuit court held a *Huff*[3] hearing on April 21, 2016. (PCR. 3928). Following the *Huff* hearing, the circuit court issued an order, granting Calhoun an evidentiary hearing on some issues and denying a hearing on the remaining issues. (PCR. 1343).

An evidentiary hearing commenced on September 15, 2017, and continued on September 19 and 20. On November 1, 2017, Calhoun filed a sixth Motion to Amend, seeking to amend with a claim of newly discovered evidence. (PCR. 2418).

[2] Calhoun filed the following Motions to Amend: (1) February 11, 2016 Motion to Amend with a claim premised upon *Hurst v. Florida*, 136 S. Ct. 616 (2016) (PCR. 1138); (2) August 16, 2016 Motion to Amend with a claim based on a conflict of interest (PCR. 1378); (3) May 22, 2017 Motion to Amend with an additional claim of ineffective assistance of counsel (PCR. 1535); (4) June 22, 2017 Motion to Amend seeking to add one claim based on a *Brady v. Maryland*, 83 S. Ct. 1194 (1963)violation and a second claim based on newly discovered evidence (PCR. 1845); (5) September 1, 2017 Motion to Amend with a claim based on newly discovered evidence. (PCR. 2003).

[3] *Huff v. State*, 495 So. 2d 145 (Fla. 1986).

Calhoun also sought to reopen the evidentiary hearing to present evidence related to the claim. The circuit court filed an order denying relief on all claims on January 3, 2018. (PCR. 2557).

II. CALHOUN'S TRIAL[4]

A. The murder of Mia Brown

In December of 2010, Mia Brown worked as a clerk at Charlie's Deli in Esto, Florida. (T. 545). On the afternoon of December 16, 2010, Harvey Glen Bush was at Charlie's, talking to Mia. According to Bush, Calhoun arrived around 1:30 p.m., interrupting his conversation with Mia to ask her for a ride later that evening, which she agreed to provide. (T. 593-94). Jerry Gammons testified that on the evening of December 16, around 8:40 p.m., a young lady in a light-colored car knocked on his door looking for Calhoun's residence. (T. 606; 612). This was the last time she was seen alive. Four days later, her burned car was found in the woods in Alabama, with her remains in the trunk.

B. The State's case

The State's theory was that after asking Mia Brown for a ride in broad daylight and in front of witnesses, Calhoun proceeded to kidnap and murder her. The State did not introduce any evidence of a motive. The State told the jury that, "We

[4] The circuit court granted Calhoun a new penalty phase pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Accordingly, Calhoun's recitation of the facts and argument are all focused on the guilt phase of his capital trial.

can't know what happened that night; the evidence doesn't tell us." (T. 1151). Motive aside, the State did not introduce any direct evidence implicating Calhoun, either in the form of an eyewitness testimony, an admission, or otherwise.

The State opened its case by establishing that Mia Brown was a sweet and pretty girl. Bush was the only witness who testified to actually seeing Calhoun and Mia together, twelve hours before they both went missing. (T. 595). The State put on the testimony of Jerry Gammons to place Mia in the vicinity of Calhoun's trailer that evening. No witnesses placed Mia Brown inside Calhoun's trailer.

To place Mia inside Calhoun's trailer the State relied upon DNA evidence and a photograph found on an SD card belonging to Brown. Trevor Seifret, a crime laboratory analyst with the Florida Department of Law Enforcement (FDLE) testified regarding the DNA evidence collected from Calhoun's trailer. (T. 862). Seifret testified that there was no way to establish when DNA is deposited on an item, nor is there any way to establish how long DNA has been on an item. (T. 892-93). Seifret also testified there is no way to establish where an item was located when the DNA in question was deposited on it. (T. 893).

Seifret testified that, through known samples, he was able to develop DNA profiles for Brittany Mixon, Calhoun, and Mia Brown.[5] Seifret testified that Mia

[5] Seifret was also able to develop a DNA profile for Doug Mixon through a buccal swab taken by law enforcement. (EH. 174). Mixon was included as a possible contributor to the DNA mixture found on State's exhibit 21-X, a pink shirt that

Brown's DNA was on a duct tape roll and a quilt found inside Calhoun's trailer.[6] Both tested positive during presumptive testing for the presence of blood. (T. 870, 876). Mia Brown's DNA was found on roughly eight hairs found on various pieces of clothing taken from Calhoun's trailer. (T. 881, 883, 885, 887, 890). Seifret testified that there is no way to establish the force necessary to remove a hair that still contained DNA from a person's head. (T. 895). The State did not call any witnesses to established that that duct tape belonged to Calhoun, or that Mia Brown's DNA was deposited on it while she was inside Calhoun's trailer. No witnesses testified that Mia Brown's hair was actually pulled out of her hair, or pulled out by Calhoun on the night of December 16, 2010. The DNA evidence was the only evidence the State introduced to put Calhoun and Mia Brown together, and to support its theory that Brown made it inside Calhoun's trailer, where a violent struggle then ensued.

The State presented a photograph taken from an SD card belonging to Mia Brown. (T. 937). The lead investigator, Lt. Raley testified that he located the SD card during a search of Calhoun's trailer. By the time the SD card was seized, at

also yielded four hairs belonging to Mia Brown. (T. 886-87; EH. 176) The jury remained unaware of this fact throughout trial.

[6] Calhoun was included as a possible minor contributor to the mixture found on the roll of duct tape. (T. 872). Seifret also testified that there was a possible third contributor.

least four people had been inside Calhoun's trailer, if not more. (T. 628, 1011, 1013, 1018)[7]. None of those four people reported seeing an SD card.

After seizing the SD card, Lt. Raley placed it in his laptop and accessed the photographs. (T. 936). At trial. Lt. Raley testified, without objection, that the photograph in question was of the ceiling of Calhoun's trailer. (T. 937). The State then called FDLE analyst Jennifer Roeder, who worked in the digital evidence section as a crime laboratory analyst. (T. 915). Roeder, using a known photograph also taken from the SD card, opined that the photograph purported to be of Calhoun's trailer was taken on December 17, 2010, between 3:30 and 4:00 a.m. (T. 921). This evidence, which helped form the basis of the State's timeline, went unchallenged by the defense.

Mia Brown's car and body were both found in Alabama. No witnesses testified to seeing Calhoun in Alabama with Mia. The State called Sherry Bradley, a clerk who worked at a convenience store near Hartford, Alabama. Bradley testified that on the morning of December 17, 2010, Calhoun came into her store to buy a pack of cigarettes. She testified that he was covered in scratches and dried blood, and that he was driving a white car with Florida plates. (T. 649, 651-52).[8] The State

[7] John Sketo, Terry Ellenburg, Brittany Mixon and Deputy Chuck White, in that order, all made entry into Calhoun's trailer before Lt. Raley seized the SD card.
[8] Bradley provided this information to law enforcement on December 29, 2010, over a week after Calhoun's arrest and after she saw the missing persons flier and read about the case in the newspaper. (EH. 107-108; EH. Exhibit 12).

also presented Darren Batchelor, who testified that he too saw Calhoun at the convenience store on the morning of December 17. (T. 677). Batchelor claimed to know Calhoun from school, despite the fact that Batchelor was 12 years older than Calhoun. (T. 677).[9]

The State put on Tiffany Brooks and Glenda Brooks, a mother and daughter who lived in Alabama. Tiffany testified that on the morning of December 18, 2010, she found Calhoun sleeping in her family's shed. (T. 780). She also testified, without objection, that she received a telephone call from her boyfriend, Steven Bledsoe, who informed her that Calhoun was featured in a missing persons flier, along with Mia Brown. (T. 784) The State then elicited from Tiffany that Calhoun claimed to not know who Mia Brown was. (T. 784). Glenda Brooks testified to nearly the same thing as Tiffany, including Bledsoe's telephone call and Calhoun's response. Counsel lodged no hearsay objections, and the State went on to argue that this was evidence of Calhoun's consciousness of guilt. (T. 1158-60).

Calhoun was arrested on December 20, 2010, after he was located in his trailer by Officer Harry Hamilton. (T. 928). After he was taken into custody, he was subjected to an interrogation by Ofc. Hamilton and Lt. Raley. (T. 952). It was during this interrogation that Calhoun told law enforcement, "[Y]'all was tightening up the

[9] The jury never knew about the vast age difference between Batchelor and Calhoun, which would have placed Calhoun in kindergarten while Batchelor was a senior in high school. (EH. 113).

noose last night [December 19, 2010] when I was in the woods man" and "I'd say more than three times a deputy could have reached out and done like that." (EH. Exhibit 5). Lt. Raley asked Calhoun where he was when this happened, to which Calhoun responded that he was "Down there, close to the Bethlehem Campground." (EH. Exhibit 5). However, this is not what the jury heard. The State elicited a handful of lines from Calhoun's and objected to the entire interrogation being entered into evidence. Lt. Raley testified that Calhoun confessed to evading and hiding from law enforcement. (T. 955). Lt. Raley also testified that Calhoun "leaned over and he made the statement that there were three times that he was close enough to (tapping on desk) he tapped the side of my leg with his foot." (T. 955). Calhoun's counsel did not clarify when and where Calhoun said this occurred during cross-examination. Without that clarification, the State argued in closing that Calhoun confessed to being in the woods with law enforcement the afternoon of December 17, 2010, close to Mia Brown's car, hours after it was set on fire. (T. 1210-11).

Additionally, the State also presented two witnesses who testified to seeing smoke in Alabama on December 17, 2010, during the late morning hours. (T. 752, 759). The State argued that the smoke these witnesses spotted was from Mia Brown's burning car. The State did not introduce any other evidence to link the smoke these witnesses saw with Brown's burning car.

The State relied on the above-mentioned witnesses, as well as several law enforcement witnesses who conducted various searches and seizures, to prove its case. The State did not present the jury with a motive, nor did it present the jury with an admission or any direct evidence to tie Calhoun to Mia Brown's murder.

C. The Defense's case

Calhoun was represented by the Office of the Public Defender for the Fourteenth Judicial Circuit. At the time of appointment, Walter Smith was the de facto chief of capital, yet Kimberly Jewell was assigned to Calhoun's case. (EH. 12).

At trial, Calhoun called ten witnesses in his defense, two of which were state witnesses that counsel re-called in the defense's case. Through these witnesses, Calhoun presented evidence that there were suspicious activities at the junkyard where Calhoun lived on the evening of December 16 and the early morning hours of December 17, 2010. Three neighbors testified to hearing loud noises coming from the junkyard. (T. 992, 996, 998). One of these neighbors, Darlene Madden, testified that the noise sounded like "a car wreck." (T. 999).

Calhoun's father, John Sketo, testified that there was evidence of foul play at the junkyard when he arrived to work on the morning of December 17, 2010.[10] According to Sketo, the door to Calhoun's trailer was wide open, as was the door to

[10] Terry Ellenburg, John Sketo's nephew and business partner, testified to similar information. (T. 1049).

a truck parked in front of the trailer. (T. 1006-07). It appeared that somebody had thrown the contents of the truck on the ground. (T. 1007). The junkyard's Bobcat had been hotwired and moved, and there were suspicious tire tracks that indicated a vehicle had been pushed off the loading dock. (T. 1010). When he inspected the inside of Calhoun's trailer it looked like it had been ransacked. (T. 1011). Sketo then testified that as he was waiting for law enforcement to arrive, Brittany Mixon showed up. (T. 1016). Despite telling Brittany not to go into the trailer because it had been burglarized, she went in and remained inside for a minute or two. (T. 1019). After emerging from the trailer, Brittany grabbed a puppy, threw it in the back of her truck, and left. (T. 1020).

After Brittany left, Deputy White arrived. (T. 1022). Sketo asked Deputy White to take fingerprints from the Bobcat, which he failed to do. (T. 1023). Sketo then took Deputy White into Calhoun's small trailer and noticed for the first time, a shotgun. (T. 1026). Sketo testified that the shotgun was not in the trailer before Brittany went inside. (T. 1026).

Counsel then called Glenda Brooks, who had already testified during the State's case in chief. During the defense's case, counsel elicited from Brooks that after she heard about the missing persons flier, she became uncomfortable with Calhoun being in the house, so she asked him to leave. (T. 1076). Counsel also called Lt. Raley, who had already testified twice during the State's case in chief. Counsel

elicited from Lt Raley that a piece of a tag bracket and a piece of cardboard with an oil stain was found at a property in Alabama owned by Calhoun's family. (T. 1083-84). The property where he found the tag bracket was between Calhoun's trailer and the site where Mia Brown's car was burned. (T. 1090). Lt. Raley went on to testify that Mia Brown's family told him the tag bracket was consistent with the one located on Brown's car, and that her car had an oil leak.

At no point during the Defense's case did counsel call Doug Mixon or anybody related to Doug Mixon's alibi.

III. The Evidentiary Hearing

A. Newly discovered evidence implicates Doug Mixon as a viable suspect

At Calhoun's evidentiary hearing, numerous witnesses testified to actions and statements of Doug Mixon, which tend to implicate him in the murder of Mia Brown. Natasha Simmons testified to a suspicious encounter she had with Mixon during the time surrounding Mia Brown's murder. (EH. 328). According to Simmons, she picked up Mixon and her ex-boyfriend, Charley Utley, close to the Florida-Alabama line. When she arrived, Mixon came running to the car, shirtless, covered in blood, with an empty gas jug in hand. (EH. 328). Mixon appeared agitated and kept repeating "That goddamn Gabby" as she drove the men to Geneva, Alabama, per their demand. (PCR. 2439; EH. 329).

Additionally, Robert Vermillion, a cousin of Brandon Brown, testified to statements made by Mixon in July of 2016. (EH. 362). According to Vermillion, Mixon told him "I know I've done a lot of things I'm not proud of" and asked Vermillion to forgive him. (EH. 362). Assuming Mixon's statement to be related to Mixon's involvement in Mia Brown's murder, Vermillion told Mixon that he could not forgive him for anything, instead directing him to seek forgiveness from Brandon Brown. (EH. 362). Mixon did not respond, but grew hysterical. (EH. 364). Mixon then suffered from a heart attack and was removed from the house via ambulance, a fact that Mixon himself confirmed at the evidentiary hearing. (EH. 310-11).

B. Doug Mixon's alibi has been conclusively refuted and his alleged alibi witness says Mixon confessed to murdering Mia Brown

Jose Contreras served as Doug Mixon's alibi when he was questioned by law enforcement as to his whereabouts during the time period surrounding Mia Brown's disappearance and murder. (EH. Exhibit 12). According to Mixon, he was with his girlfriend, Gabby Faulk, at Contreras' house in Alabama the night Mia Brown disappeared. (EH. Exhibit 12).

Contreras testified at Calhoun's evidentiary hearing. Contreras was adamant that Doug Mixon was not with him the night Mia Brown went missing, nor has Mixon ever spent the night at Contreras' house. (EH. 342, 343). What's more, Contreras testified that Mixon actually confessed to him that he was responsible for Mia Brown's murder. (EH. 345). Counsel testified that she never investigated

Mixon's alibi, though her strategy was to blame the murder on Doug Mixon. (EH. 54; 170-72; 216; 221; 289-91).

C. Expert witnesses have cast doubt on the veracity of the State's evidence and arguments

At trial, the State highlighted the scratches found on Calhoun's body and argued to the jury that they were fingernail scratches, inflicted by Mia Brown while she was fighting for her life. (T. 1168, 1153). Counsel told the jury the scratches were caused by briars, an argument the State easily cast aside.

At his evidentiary hearing, Calhoun presented the testimony of Dr. Edward Willey, a forensic pathologist. Dr. Willey testified as to the specific characteristics generally associated with fingernail scratches. (EH. 245, 247, 260). After reviewing a number of photographs provided to him by Calhoun, and utilizing his computer to enhance those photographs, Dr. Willey was able to opine that it was not at all probable that any of the scratches were caused by fingernails. (EH. 249-256). What's more, Dr. Willey testified a briar patch was a perfectly reasonable explanation of how Calhoun obtained the scratches. (EH. 257).

Calhoun also presented the testimony of John Sawicki, an expert in digital forensic evidence to discuss the SD card taken into evidence and the calculation that stemmed from photographs discovered on it. Sawicki testified that by improperly accessing the SD card, Lt. Raley altered the metadata of the photographs. (EH. 380). According to Sawicki, this was problematic because the metadata in Calhoun's case

was "critical". (EH. 379). Sawicki went on to testify that Lt. Raley's alteration of the evidence affected the calculation method employed by the State, which it used to argue that Mia Brown was inside Calhoun's trailer on December 17, 2010, in the early morning hours.

D. Trial counsel was unable to articulate strategic reasons or a strategy based on sound, professional judgment, for most of the alleged errors and omissions

During the evidentiary hearing, counsel addressed Calhoun's allegations that she was deficient in her performance. In many instances, counsel was unable to articulate a strategy for why she failed to take certain actions or why she chose to pursue the actions she did take. (EH. 156; 170-71, 184-85). In some instances, counsel conceded that she probably should have taken the course of action Calhoun alleged she failed to do. (EH. 105, 115, 132, 135, 176).

In other instances, counsel advanced a strategic reason for her actions. (EH. 57-60; 73; 84; 138; 145; 148-152; 177-78). In each instance where counsel articulated a strategic reason, the circuit court's order does not contain any analysis of whether counsel's decision was based on sound, professional judgment.

IV. The circuit court's denial of relief

On January 3, 2018, the circuit court entered an order denying Calhoun's

postconviction motion in its entirety. The bulk of the circuit court's order, including its purported findings, was copied and pasted directly from the State's various answers and its written closing argument.

SUMMARY OF THE ARGUMENT

ARGUMENT I: Calhoun was deprived of his fundamental right to conflict-free counsel. During the course of his case, trial counsel was paired with Attorney Henry Mark Sims, and the two comprised the capital division of the Office of the Public Defender for the Fourteenth Judicial Circuit. Sims had a longstanding personal relationship with the victim, Mia Brown, and her family. Due to this relationship, Sims determined a conflict of interest was present and did not participate in Calhoun's defense. Trial counsel, who was only minimally qualified to serve as lead counsel, did not advise Calhoun or the circuit court of the conflict of interest within the Public Defender's Office, and chose to proceed with her representation of Calhoun. Calhoun was assigned a second chair attorney who had been a member of the Florida Bar for less than two years, had only handled misdemeanor cases, and had never received any training geared towards the defense of capital cases. The circuit court erred finding Calhoun was not denied his Sixth Amendment right to counsel due to a conflict of interest on the part of the Public Defender's Office. The circuit court incorrectly found that no conflict of interest existed, ignoring the facts and well-established law holding otherwise.

ARGUMENT 2: Newly discovered evidence implicates Doug Mixon in the death of Mia Brown. Mixon was investigated by law enforcement during the search for Mia Brown and trial counsel firmly believed him to be a viable alternate suspect, so much so that her defense was to blame the murder on Mixon. Calhoun has discovered that Mixon was seen running with a gas can, bloody and agitated, close in time to when Mia Brown was burned in the trunk of her car with the use of an accelerant. Calhoun has also discovered evidence that Mixon has made admissions that he was responsible for the murder. When all of these new facts, together with all of the evidence that could be presented at a new trial, are weighed against the State's circumstantial evidence case, the "total picture" is so different that there is a reasonable doubt as to Calhoun's guilt.

ARGUMENT 3: In violation of *Brady*, the State suppressed exculpatory information that a witness, Natasha Simmons, informed the Sheriff of Geneva County, Greg Ward, that she had seen Mixon running with a gas can, bloody and agitated, close in time to when Mia Brown was burned in the trunk of her car with the use of an accelerant. Brown's body was found in Geneva County and the Geneva County Sheriff's Office was actively involved in the investigation of her death. Simmons' statement was never disclosed to Calhoun's defense team. Had Calhoun been aware of her suspicious encounter with Mixon, he could have used it to cast

doubt on his guilt and strengthen his defense at trial that Doug Mixon was responsible for the death of Mia Brown.

ARGUMENT 4: Calhoun's lawyer failed to provide effective assistance of counsel at the guilt phase of his capital trial. Calhoun was able to establish a pervasiveness of deficient performance on the part of counsel. Counsel failed to conduct a competent, reasonable investigation into Calhoun's case. Counsel's strategy was to imply Doug Mixon was responsible for the murder of Mia Brown, yet counsel took no steps to investigate Mixon's alibi. The vast majority of the State's witnesses had problems inherent in their testimony that went unchallenged. Counsel failed to utilize available impeachment material, failed to object to impermissible, inflammatory, and prejudicial testimony and evidence, elicited damaging testimony in her own case-in-chief and failed to clarify misleading testimony and false argument. Counsel also neglected to hire or consult with any experts to challenge the State's forensic evidence. Effectively, the State's case was not subjected to any adversarial testing.

Had counsel subjected the State's case to a true adversarial testing as required by the United States Constitution, she would have been able to raise substantial and reasonable doubt as to Calhoun's guilt. Counsel's errors and omissions undermine the confidence in the outcome and independently warrant a new trial. The cumulative effect of the multiple instances of ineffective assistance of counsel

demonstrate a breakdown in the adversarial process and render the result of Calhoun's trial unreliable.

ARGUMENT 5: The trial court abused its discretion when it denied two Motions to Amend Calhoun's postconviction motion with claims of newly discovered evidence. In addition to attaching affidavits to both Motions to Amend, Calhoun also alleged the facts with specificity and detailed why relief was warranted. This is not a case where the facts asserted in either amended motion were vague and nonspecific, nor were they readily available to counsel at the time Calhoun's initial 3.851 motion was filed, or even at the time that the evidentiary hearing was conducted. This Court should remand this issue back to the circuit court for a full and fair evidentiary hearing on the matter.

ARGUMENT 6: The State committed a *Giglio* violation by eliciting misleading testimony from the lead investigator regarding what Calhoun said during his interrogation with police. The State then took that misleading testimony and falsely argued in closing that Calhoun confessed to being in the woods, right by Mia Brown's car, within hours of it being burned. The circuit court erroneously found that the State did not knowingly present false information to the jury, but rather "merely implied it incorrectly." Implying something you know to be false and explicitly stating something you know to be false are one and the same. The circuit court further erred in shifting the burden to Calhoun to prove the false testimony was

material, when it is the State's burden to show that the false evidence was harmless beyond a reasonable doubt. When the proper materiality analysis is conducted, it is clear that Calhoun's conviction cannot stand.

ARGUMENT 7: The circuit court violated Calhoun's right to due process when it adopted nearly verbatim the State's written responses and closing argument in crafting its order denying relief. The circuit court's order cannot be viewed as the product of an independent, impartial and reasoned decision, and it should not be given any deference by this Court.

ARGUMENT

I. CALHOUN WAS DEPRIVED OF HIS FUNDAMENTAL RIGHT TO EFFECTIVE COUNSEL AND A FAIR TRIAL DUE TO COUNSEL'S ACTIVE CONFLICT OF INTEREST.

The trial court erred in denying Calhoun's claim that he was deprived of his fundamental right to counsel and a fair trial due to defense counsel's conflict of interest.[11]

At the time of appointment, the Public Defender's Office was in a period of transition. (EH. 22). During the course of Calhoun's case, Walter Smith left the office and Henry Mark Sims joined. (EH. 12-13). Sims, a former prosecutor, had

[11] This issues presents a mixed question of law and fact. When reviewing such questions, the ultimate ruling must be subject to de novo review but the court's factual findings must be sustained if supported by competent, substantial evidence. *See State v. Coney*, 845 So. 2d 120 (Fla. 2003).

extensive trial experience, including experience handling capital cases. (EH. 13). Sims was paired with Jewell to work on the office's capital cases together. (EH. 13, 22).

Despite his extensive experience, Sims was not assigned to work on Calhoun's case with Jewell due to his longstanding personal relationship with Mia Brown and her family. (EH. 22-23, 212, 274). Sims' conflict of interest was brought to the attention of Herman Laramore, the elected Public Defender for the Fourteenth Judicial Circuit, who ultimately made the decision not to withdraw from Calhoun's case. (EH. 25-26).

Kevin Carlisle was then assigned as the second chair on Calhoun's case. (EH. 23, 29, 37). At the time of trial, Carlisle had been admitted to the bar for less than two years 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 (CLE) courses geared towards the defense of capital cases. (EH. 211).

The right to effective assistance of counsel encompasses the right to be free from actual conflict. *See, Strickland. Washington,* 466 U.S. 668 (1984); *Cuyler v. Sullivan,* 446 U.S. 335, 349 (1980). "Defense counsel have an ethical obligation to avoid conflicting representation and to advise the court promptly when a conflict of

interest arsis during the course of the [proceedings]." *Cuyler* at 335; *see also*, Florida Rules of Professional Conduct 4-1.7.

In order to show a Sixth Amendment violation, a defendant who raised no objection at trial must demonstrate an actual conflict of interest affected his lawyer's representation. A defendant who shows a conflict of interest affected the adequacy of representation need not demonstrate prejudice in order to obtain relief. *Cuyler* at 350.

"As a general rule, a public defender's office is the functional equivalent of a law firm. Different attorneys in the same public defender's office cannot represent defendants with conflicting interests." *Bouie v. State*, 559 So. 2d 1113, 1115 (Fla. 1990). Additionally, public defenders within the same circuit cannot be appointed to represent adverse defendants, regardless of the location of their offices. *Babb v. Edwards*, 412 So. 2d 859, 862 (Fla. 1982). The prohibition against representing a client while laboring under a conflict of interest extends to conflicts of interest due to witnesses, parties, or the personal interests of the lawyer. Rule 4-1.7(a)(2) of the Rules Regulating the Florida Bar states that a lawyer must not represent a client if "there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by *a personal interest of the lawyer*." (emphasis supplied). When a lawyer is a member of a firm, a conflict for one lawyer is imputed to all the lawyers

in the firm. *See*, Rules Regulating the Florida Bar: Rule 4-1.10; *U.S. v. Campbell*, 491 F. 3d 1306, 1311 (11th Cir. 2007)("if one attorney in a firm has an actual conflict of interest, we impute that conflict to all the attorneys in the firm, subjecting the entire firm to disqualification.").

Sims clearly had a conflict of interest due to his longstanding relationship with Mia Brown and her family. Because he was employed by the Office of the Public Defender for the Fourteenth Judicial Circuit, his conflict of interest was imputed to all of the lawyers within the office, including Jewell.

A defendant can waive his fundamental right to conflict free counsel. For a waiver to be valid, the record must show that the defendant was aware of the conflict of interest, that the defendant realized the conflict could affect the defense, and that the defendant knew of the right to obtain other counsel. *Larzelere v. State*, 676 So. 2d 394, 403 (Fla. 1996). It is axiomatic that in order to waive a conflict, the defendant must first be aware that it exists. Calhoun was not. (EH.28). Jewell failed to disclose the conflict of interest to him and never obtained the required informed consent to continue her representation. Jewell also failed to advise the circuit court that a conflict of interest had arisen, despite and ethical obligation to do so. *Cuyler* at 346. As a result, Calhoun was unknowingly represented by a lawyer laboring under an actual conflict of interest.

The conflict of interest materially limited the representation Calhoun received and adversely affected the performance of his trial counsel. Due to the conflict, Calhoun was denied effective representation by two qualified lawyers, as contemplated by Fla. R. Crim. P. 3.112, as well as the ABA guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

When Jewell was assigned to Calhoun's case, it was only the second time she served as lead counsel in a capital case. (EH. 12). During her first capital case as lead counsel, she had the benefit of Walter Smith serving as her second chair. (EH. 12). After Smith left the office, Jewell and Sims were the only lawyers with capital experience. (EH. 28). Due to Sims' longstanding personal relationship with Mia Brown and her family, he was prohibited from working on Calhoun's case, meaning Jewell was unable to consult with Sims on matters of strategy, theories of defense, and evidentiary issues, and also left her unable to anticipate strategies employed by the State, as evidenced by her being caught off guard when the State cherry-picked parts of Calhoun's statement. Sims' conflict and subsequent recusal led to Carlisle, a county court attorney with less than two years of experience, joining the defense team as the second chair. Carlisle's role was so limited that he considered himself to be more of a "bag holder" than a second chair. (EH. 214). In fact, Carlisle's role was so minuscule that Earnest Jordan, the lead investigation on the case, did not even know Carlisle was a member of the defense team. (EH. 273).

The circuit court's order denying relief misapprehends the law regarding conflicts of interest.[12] The circuit court posits that because Sims did not participate in Calhoun's case, his "personal interest" did not become a conflict. (PCR. 2600). The court completely ignores the fact that Sims' "personal interest", i.e. Sims' longstanding relationship with Mia Brown and her family, was in and of itself the conflict. The circuit court also ignored well-established precedent and the Florida Bar Rules which hold that when a lawyer is a member of a firm, a conflict for one lawyer is imputed to all the lawyers in the firm.

Due to the Public Defender's undisclosed conflict of interest, Calhoun was represented by only one minimally qualified lawyer. The conflict hampered counsel's ability to zealously advocate for Calhoun, effectively investigate, prepare, test the evidence, and present a cohesive and sound defense. By demonstrating that an actual conflict of interest existed and that it adversely affected his representation, Calhoun has proven that his Sixth Amendment right to effective representation has been violated. Relief in the form of a new trial is required.

II. NEWLY DISCOVERED EVIDENCE REGARDING DOUG MIXON SO WEAKENS THE CASE AGAINST CALHOUN THAT IT CREATES A REASONABLE DOUBT AS TO HIS GUILT.

[12] The relevant portion of the circuit court's order was not written by the circuit court at all. Rather, with the exception of two paragraphs, it is taken verbatim from the State's closing argument. (PCR. 2483-2487)

Two requirements must be met in order to set aside a conviction or sentence because of newly discovered evidence. *See*, *Hildwin v. State*, 141 So. 3d 1178, 1184 (2014), *citing Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or his counsel could not have known of it by the use of due diligence. Second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. *Id*. "Newly discovered evidence satisfies the second prong of the *Jones* test if it 'weakens the case against [the defendant] so as it give rise to a reasonable doubt as to his culpability'." *Id*., citing *Jones*, 709 So. 2d at 526.

"[T]he postconviction court must consider the effect of the newly discovered evidence, in additional to all of the admissible evidence that could be introduced at a new trial." *Hildwin*, 141 So. 2d at 1184, *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'." *Id*.[13]

[13] For claims based on newly discovered evidence, this Court reviews a court court's findings of fact, credibility determinations, and the conclusions about the weight of the evidence to determine whether they are supported by competent, substantial evidence. *See Swafford v. State*, 125 So. 3d 760 (Fla. 2013). Legal conclusions and application of law to those facts are reviewed de novo. *See Id.*

A. The Newly Discovered Evidence[14]

1. Natasha Simmons

Natasha Simmons testified at the evidentiary hearing that either the morning before or the morning after she heard of Mia Brown's disappearance, she received a telephone call from her ex-boyfriend, Charley Utley. Utley told her that he and a friend ran out of gas near Bonifay, Florida and requested that she come and pick them up. (EH. 323-27, 330, 333). When she arrived at the location Utley directed her to, she saw Utley and another man running towards her car from the north, gas jug in hand. (EH. 328). Both men got into Simmons' car and the other man introduced himself as Doug Mixon. (EH. 328). Mixon was shirtless and had blood all over his chest. (EH. 328). Utley was wearing a white tank top and had scratches on his shoulder with a blood smear. (EH. 328).

As Simmons went to pull into a gas station to get the men gas, they told her to keep driving and to take them to Geneva, Alabama. (EH. 329). Simmons

[14] Following the evidentiary hearing in this case, Calhoun discovered additional evidence of another confession by Doug Mixon. He filed a motion, seeking to amend his postconviction motion and reopen the evidentiary hearing on November 1, 2017, which was denied by the circuit court. (PCR. 2418, 2437). The crux of the new claim is that Doug Mixon confessed to an inmate named Keith Ellis at the Graceville Correctional Facility. Mixon claimed that he killed Mia Brown because she was "messing around" with his daughter's boyfriend. Ellis also provided new information that Doug Mixon admitted to framing Calhoun for Mia Brown's murder. (PCR. 2424-2429). The denial of his motion to amend is addressed in Claim V, *infra.*

described Utley as frantic. (EH. 329). Mixon was calm in comparison, but kept repeating "That goddamn Gabby, that goddamn Gabby." (PCR. 2439). Simmons drove Utley and Mixon to an apartment complex in Geneva, where they got out of the car, taking a large empty gas can with them. (EH. 334).

Simmons could not be sure whether she heard a news report about Mia Brown's disappearance before or after this encounter with Mixon and Utley, but was confident it occurred in the timeframe surrounding her disappearance. (EH. 330). Simmons testified that at first, she did not have any inclination that her suspicious encounter with Mixon and Utley was related to Mia Brown's disappearance in anyway. (EH. 330-31). It was only later, after speaking with a friend, did she connect the dots. (EH. 331). Simmons then went to the Geneva County Sheriff's Office where she spoke with Sheriff Greg Ward. (EH. 331). When she told him about her suspicious encounter with Mixon and Utley, Sheriff Ward told her that she was wasting her time because the "killer was already locked up." (EH. 331). Based on Sheriff Ward's representations that the guilty party was behind bars, Simmons concluded that her strange encounter with Mixon was not related to the murder of Mia Brown and let the issue go. Calhoun's trial counsel was never provided with this information. Simmons was not approached by anyone to discuss her run in with Mixon until Calhoun's postconviction team interviewed her in the spring of 2017.

That the evidence regarding Simmons' suspicious encounter with Mixon is newly discovered cannot be in dispute. Simmons' name does not appear anywhere in the pretrial discovery. She did not testify at trial, nor was her name mentioned at trial. The circuit court denied relief, and without any explanation or legal analysis, concluded that the evidence from Simmons "should be evaluated under the *Brady* test." (PCR. 2607, 2494-96). However, because the circuit court found that the State did not possess or suppress the information regarding Simmons, it must then be considered as newly discovered evidence.

2. Robert Vermillion[15]

Robert Vermillion testified at Calhoun's evidentiary hearing that he and Brandon Brown, Mia Brown's husband, are cousins. (EH. 356). Vermillion and Brown grew up together, much like brothers. (EH. 356). Vermillion had gone to school with Mia Brown, and when she married Brandon, he came to consider Mia

[15] Due to rulings of the circuit court, Calhoun's claim regarding the newly discovered evidence of Robert Vermillion finds itself in an odd procedural posture. Calhoun filed a Motion to Amend his postconviction motion with this claim on September 1, 2017. (PCR. 1979). The circuit court denied Calhoun's Motion to Amend, however allowed Calhoun to present the testimony of Vermillion at his evidentiary hearing. (EH. 6, 355). The denial of Calhoun's Motion to Amend is addressed in Claim V, *infra*. However, because the evidence regarding Vermillion was both presented at the evidentiary hearing and analyzed as newly discovered evidence by the circuit court, in the interests of judicial economy, Calhoun addresses the merits of the issue in this brief.

as family, too. (EH. 356). Sometime after Mia Brown was killed, Vermillion came to believe that Doug Mixon was the one responsible. (EH. 358).

During the summer of 2016, a woman living with Vermillion's aunt, Linda Thames, began to hang out with Doug Mixon. (EH. 361). This woman would often invite Mixon over to Thames' house. (EH 361). Vermillion was adamant that he did not want Mixon at his family's house, but was told by his aunt to mind his own business. (EH 361). For his aunt's sake, Vermillion tried to maintain civility with Mixon. (EH 361).

One evening, Mixon started divulging things about his past to Vermillion. (EH. 362). During the course of this conversation, Mixon said "I know I've done a lot of things I'm not proud of" and asked Vermillion to forgive him. (EH. 362). Vermillion responded, telling Mixon that he could not forgive him for anything and directed him to seek forgiveness from Brandon Brown. (EH. 362). Mixon did not protest Vermillion's direction. (EH 362).

Mixon then began to panic and became "hysterical." (EH. 364). Vermillion believed Mixon was having a heart attack. (EH. 363). Vermillion left Thames' house and called 911, but actually saw an ambulance come and take Mixon from the residence. (EH. 364). Mixon confirmed at the hearing that he did, in fact, have a heart attack at Linda Thames' house in July of 2016, that Vermillion was present and that he was taken from the house by ambulance. (EH. 310, 311).

It is not in dispute that this evidence constitutes newly discovered evidence. It is clear from the testimony itself that counsel nor Calhoun could not have known of it by the use of due diligence, as Mixon's statements were not made until July 2016, well after the conclusion of Calhoun's trial.

B. The newly discovered evidence gives rise to a reasonable doubt about Calhoun's guilt

Jones requires that any newly discovered evidence "probably produce an acquittal on retrial." *Jones,* 709 So. 2d at 514. The fundamental question when assessing a newly discovered evidence claim is whether the new evidence "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones,* 709 So. 2d at 526. This Court then, must "conduct a cumulative analysis of all the evidence" – that is, weigh the new evidence, "in combination with the evidence developed in postconviction proceedings," and the evidence at trial viewed through the lens of these new revelations – "so that there is a 'total picture' of the case and 'all the circumstances of the case.'" *Swafford*, 125 So. 3d at 776, 778 (quoting *Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999)); see also *Jones*, So. 2d at 521.

Calhoun's newly discovered evidence clearly satisfied the *Jones* standard. The testimony of Simmons and Vermillion both implicate Doug Mixon in Mia Brown's murder. Simmons places an anxious, shirtless, blood-covered Mixon running with a large, empty gas can, close in time to Mia Brown's disappearance.

As this court noted several times in its order denying Calhoun's direct appeal, the remnants of Mia Brown's car tested positive for an ignitable liquid. *Calhoun* at 357, 366. Additionally, Mixon, in effect, confessed his involvement in Mia Brown's murder to Vermillion. While true that Mixon did not explicitly tell Vermillion that he killed Mia Brown, he certainly intimated it. At a new trial, the argument could be made and a jury could reasonably infer that his asking Vermillion, a member of Mia Brown's extended family for forgiveness, is akin to a confession. *See, State v. Gad*, 27 So. 3d 768, 770 (Fla. 2d DCA 2010). Further, when Vermillion directed Mixon to seek forgiveness from Brandon Brown, Mixon did not protest his innocence in the murder of Mia Brown; he instead grew agitated and hysterical. This newly discovered evidence would strengthen Calhoun's claims of innocence and his Mixon-did-it theory of defense.[16]

Evidence pointing to Mixon's guilt must also be considered in light of the fact that his dubious alibi has since been destroyed, as Jose Contreras maintains that Mixon never stayed the night at his house. Contreras' testimony is supported by Mixon's numerous statements to law enforcement, where he fails to initially provide an alibi. What's more, Contreras also testified that Mixon confessed his involvement in Mia Brown's murder to him. Further, Mixon's main alibi witness, Gabby Faulk,

[16] In addition, Calhoun would be able to introduce the newly discovered evidence of Keith Ellis, who would testify that Doug Mixon confessed to burning a girl in the trunk of her car and framing the person convicted of her murder.

initially dismissed Mixon's claim that they were together during the relevant time period, further calling into question Mixon's whereabouts.

This Court must also consider additional evidence presented by Calhoun in postconviction to obtain a "total picture" of the case. This includes evidence that the State's digital forensic evidence, which it relied upon to establish a timeline, was compromised and unreliable. It also includes evidence that it is not at all probable that the scratches found on Calhoun were caused by fingernail scratches, as the State argued to the jury at Calhoun's first trial.

Additionally, at a new trial Calhoun would be able to present evidence of suspicious circumstances surrounding Brandon Brown, such as the fact that he lied to law enforcement about calling Mia when she was discovered missing and that he lied about his reason for not going out to look for her. Calhoun could present evidence that less than two weeks before she was murdered, Mia Brown documented injuries that she sustained and then deleted those images from her camera.

Calhoun would also be able to call into question the dubious identifications of Sherry Bradley and Darren Batchelor, both of which were integral to the State's case. This could be done through impeachment evidence, and by presenting the jury with an actual photograph of the shirt Calhoun was wearing when he was alleged to have been in Bradley's store, which is fundamentally at odds with the clothing Bradley describes. Calhoun would be able to present to the jury the full picture of where he

was in the woods when he was close to law enforcement, instead of letting the State paint a misleading picture which places him a stone's throw from Mia Brown's car, hours after it was burned, depriving the State of its consciousness of guilt argument.

All of this evidence would be combined with the evidence elicited at Calhoun's first trial regarding the suspicious activities at the junkyard the night Mia Brown went missing. It would also be combined with the evidence and argument that Brittany Mixon either tampered with, or planted evidence, to implicate Calhoun in Mia Brown's death. Though trial counsel attempted to argue this at Calhoun's first trial, she did so without providing the jury with a motive for why Brittany Mixon would tamper with evidence. Given the new evidence demonstrating Doug Mixon's involvement, Calhoun would be able to demonstrate to the jury why Brittany Mixon had her hands on critical pieces of evidence in this case.

At a new trial, the State still has to contend with the fact that it has no motive, no confession, and no eyewitnesses to establish that Calhoun killed Mia Brown. In a circumstantial evidence case, the State will bear a particularly high burden of proof at any new trial – i.e., all of the facts "must be inconsistent with innocence" and must "lead to a reasonable and moral certainty that [Calhoun] and no one else committed the offense charged." *Dausch v. State*, 141 So. 2d 513, 517 (Fla. 2014); *Ballard v. State*, 923 So. 2d 475 (Fla. 2006) (evidence must exclude "all other inferences" than guilt).

When all of these new facts, together with all of the evidence that Calhoun could present at a new trial, are weighed against the State's circumstantial evidence case, the "total picture" is so different that there is a reasonable doubt as to Calhoun's guilt. Because Calhoun's new evidence "completely changes the character" of the State's circumstantial evidence case against him, *Swafford* at 778, this Court should vacate Calhoun's convictions and sentence and remand for a new trial.

C. The circuit court erred by denying relief

In denying relief, the circuit court failed to conduct an independent analysis of Calhoun's claim, copying the State's disjointed written closing argument nearly word for word. Additionally, there are no credibility findings as to Natasha Simmons or Robert Vermillion. In a conclusory statement, the circuit court finds that the outcome of the trial would not have been different with "Ms. Simmons' inconsistencies", but failed to cite to a single inconsistency. This is not a credibility finding. The circuit court, and State by obvious extension, failed to conduct any meaningful legal analysis to explain its denial of relief.

III. CALHOUN'S TRIAL WAS AFFLICTED WITH A VIOLATION OF BRADY V. MARYLAND

Calhoun's trial was afflicted by a violation of *Brady v. Maryland* 373 U.S. 83 (1963). In order to prove a *Brady* violation, a claimant must establish that the government possessed evidence that was suppressed, that the evidence was "exculpatory" or "impeachment" and that the evidence was "material." *United State*

v. Bagley, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527 U.S. 263 (1999). Evidence is "material" and a new trial or sentencing is warranted "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different." *Kyles* at 433-34; *Hoffman v. State*, 800 So. 2d 174 (Fla. 2001); *Rogers v. State*, 782 So. 2d 373 (Fla. 2001); *Young v. State*, 739 So. 2d 553 (Fla. 1999). [17] To the extent that counsel was or should have been aware of this information, counsel was ineffective in failing to discover it and utilize it.

A proper materiality analysis under *Brady* must also contemplate the cumulative effect of all the suppressed information. Further, the materiality inquiry is not a "sufficiency of the evidence" test. *Kyles*, 514 U.S. at 434. The burden of proof for establishing materiality is less than a preponderance. *Williams v. Taylor*, 529 U.S. 362 (2000); *Kyles*, 514 U.S. at 434. Or in other words: "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id*. Rather, the suppressed information must be evaluated in light of the effect on the prosecution's case as a whole and the "importance and specificity" of the witnesses' testimony. *United States v. Scheer*, 168 F.3d 445, 452-53 (11th Cir. 1999).

[17] The determination of whether a *Brady* violation has occurred is subject to independent appellate review. *See Cardona v. State*, 826 So. 2d 968 (Fla. 2002).

This claim is predicated on the same evidence regarding Natasha Simmons' encounter with Doug Mixon, discussed *supra*. The factual matters contained in that claim are fully incorporated herein by specific reference.

The foregoing demonstrate a clear *Brady* violation. As required by *Brady*, Calhoun has proven that the government possessed the evidence that was suppressed. Simmons went directly to the Sheriff of Geneva County, Alabama, Greg Ward, and told him about her suspicious encounter with Doug Mixon, who was considered a person of interest in the disappearance of Mia Brown. It is apparent that this information was suppressed from Calhoun and his defense team. Simmons' name does not appear anywhere in the record in this case. While there is no indication that Ward provided the prosecution with this information, that question is not a factor in a *Brady* analysis. "It is irrelevant whether the prosecutor or police is responsible for the nondisclosure; it is enough that the State itself fails to disclose." *Garcia v. State*, 622 So. 2d 1324, 1330 (Fla. 1993). "The State is charged with constructive knowledge and possession of evidence withheld by other state agents, including law enforcement officers." *Jones v. State*, 709 So. 2d 512, 520 (Fla. 1993)(internal citations omitted).

It cannot be seriously in dispute that the Geneva County Sheriff's Office assisted in the investigation into Mia Brown's murder, which directly led to the prosecution of Calhoun. Mia Brown's burnt car and her remains were found in a

patch of woods located in Geneva County. (T. 577). In fact, it was an Alabama Game Warden who located the car and body. (T. 563, 566). Additionally, on August 26, 2011, counsel for Calhoun filed a subpoena for deposition duces tecum with the circuit court, commanding the Geneva County Sheriff's Office to turn over "photos, videotapes, and any and all crime scene evidence pertaining to this case. Geneva County File #86-0170-09-2011; Holmes county case no. 20101210068." Anie Ward, a lieutenant with the Geneva County Sheriff's Office, was deposed by counsel and the State on September 26, 2011. (R 734.) Lt. Raley utilized Anie Ward to obtain search warrants in Alabama and it was Ward who collected the evidence at the Brooks residence. (R. 832). Members of the Geneva County Sheriff's Office, including Greg Ward, were at the burn site while evidence was being processed. (R. 342). It was a Geneva County deputy sheriff who was keeping the crime scene log. (R. 343). It is patently obvious that the Geneva County Sheriff's Office was involved in the investigation of Mia Brown's death. *See, Rogers v. State*, 782 So. 2d 373 (Fla. 2001)(finding police reports from other jurisdictions were *Brady* material where other law enforcement agencies were investigating crimes similar to what defendant was charged with). The circuit court's conclusory finding that Sheriff Greg Ward was not a member of the prosecution team is meritless and contradicted by the record. (PCR. 2602). Calhoun has proven that the government possessed the information that was suppressed.

The information Simmons provided to Ward was clearly exculpatory and material. During its investigation, law enforcement spoke to Mixon a number of times, always considering him to be an alternate suspect, or at the very least, a person of interest. Counsel clearly considered Mixon to be a viable alternate suspect, as her entire strategy was to "blame Doug Mixon." (EH. 54).

The case against Calhoun was entirely circumstantial. And it was not a strong circumstantial evidence case, at that. There is no confession, no eyewitnesses, and no motive for Calhoun to kill Mia Brown. Calhoun adamantly maintained his innocence to law enforcement. During her case-in-chief, trial counsel put on evidence of suspicious events occurring the night of Mia Brown's disappearance and went to great lengths to suggest that Brittany Mixon planted or tampered with evidence. Counsel also made a vague argument to the jury that Doug Mixon may have been involved in the murder. (T. 1199). The information that Simmons provided Sheriff Ward would have given counsel an evidentiary basis for which to make the argument that it was Doug Mixon, not Calhoun, who killed Mia Brown. After all, according to Simmons, Mixon was running, covered in blood, carrying an empty gas container close in time to when Mia Brown was burned in her car with the use of an accelerant. He was insistent that he be taken to Geneva, Alabama and appeared to be agitated, cursing Gabby from the back seat. This evidence would have cast the case against Calhoun in an entirely different light.

The failure to disclose this evidence to Calhoun was a clear *Brady* violation. Had Calhoun been aware of this information, he could have utilized it at trial to diminish the State's case against him. There is a reasonable probability that the result of the proceeding would have been different.

The circuit court's order in regards to Calhoun's *Brady* claim is befuddling.[18] The circuit court failed to engage in any legal analysis regarding the components of a *Brady* violation, only making a conclusory statement that the court "specifically determines there was not a *Brady* violation in this cause. [sic]" (PCR. 2606). Additionally, the circuit court mischaracterized the testimony of Greg Ward, writing that Ward testified that Simmons never came to meet him while he was the Sheriff of Geneva County. (PCR. 2602). Ward actually testified that he did not recall such an encounter, not that it never happened. (EH. 399, 400).[19] Notably, the circuit court made no findings that Simmons was not credible, or that Ward was more credible than Simmons. This Court, then, is not obligated to give great deference to the circuit courts findings regarding credibility and fact, as there are none, and is able to make its own credibility determination. *See, Everett v. State*, 54 So. 3d 464 (Fla. 2010).

[18] In its order, the circuit court conflates evidence related to Robert Vermillion and Jose Contreras with the evidence related to the *Brady* claim at issue. Any *Brady* analysis related to Vermillion and Contreras is misplaced.

[19] In its order, the circuit court also wrote that Calhoun "went around and told several people that he had done a bunch of stupid stuff including this things in this case." (PCR. 2605). This alleged testimony, which the circuit court fails to cite to, is not found anywhere in the transcript of the evidentiary hearing.

IV. CALHOUN'S APPOINTED TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.

Counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 667 688 (1984). A successful ineffective assistance of counsel claim must satisfy two components: (1) counsel's performance must have been deficient, and (2) the deficient performance must have prejudiced the defendant. *Id*. at 668, 687-89. To establish deficient performance, a petitioner must demonstrate that counsel's representation fell below an "objective standard of reasonableness". *Id*. at 688. Although courts generally give great weight to strategic decisions, *see, e.g., Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000), a court may not defer to a *post hoc* rationalization in lieu of examining the attorney's actual decision making process. *See, Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003). Prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome." *Strickland* at 694. At the guilt phase, the question is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt[.]" *Id*. at 694-95.[20] Regarding prejudice, the level of certainty is less that preponderance of

[20] The circuit court utilized the wrong standard of review when evaluating Calhoun's claims of ineffective assistance of counsel, believing that Calhoun had

the evidence. "[I]t need not be proved that counsel's performance more likely than not affected the outcome. Instead, the petitioner need only demonstrate a probability sufficient to undermine confidence in the outcome." *Nelson v. State*, 123 So. 3d 1195 (Fla. 4th DCA 2012)(citations omitted). "The benchmark of an ineffective assistance of counsel claim is the fairness of the adversary proceeding." *Code v. Montgomery*, 799 F. 2d 1481 (11th Cir. 1986).

Strickland makes clear that counsel has a duty to conduct a reasonable investigation. In fact, "[o]ne of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial." *Fitzpatrick v. State*, 118 So. 3d 737, 753 (Fla. 2013)(internal citations omitted). As this Court has recognized, "[p]retrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps the most critical stage of a lawyer's preparation." *Id.*

In light of that essential and basic duty of preparation, counsel is required to either make reasonable investigations or to "make a reasonable decision that makes particular investigations unnecessary." *Strickland* at 690-91. In other words, if counsel decides not to investigate an issue, that decision "must be directly assessed

to show that "but for counsel's alleged errors, he probably would have received an acquittal at trial or a life sentence during the penalty phase." (PCR. 2568). Calhoun pointed out the circuit court's error in his Motion for Rehearing, which was denied. (PCR. 3912, 3916).

for reasonableness in all the circumstances." *Id.* What's more, even when counsel conducts some investigation, "a court must consider not only the quantum of evidence already known to counsel but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). A "cursory investigation" does not "automatically justif[y] a tactical decision." *Id.* [21]

A. Counsel's failure to investigate Doug Mixon's alibi was Deficient Performance that Prejudiced Calhoun

1. Counsel's failure to investigate Doug Mixon's alibi constitutes deficient performance

At Calhoun's evidentiary hearing, trial counsel was unequivocal in her testimony that her trial strategy was to blame Doug Mixon for the murder of Mia Brown. (EH. 54, 102). Calhoun, "from the very beginning" was "insistent" and "adamant" that Doug Mixon was responsible for the death of Mia Brown. (EH. 54, 84, 157, 193). Counsel testified that she generally does not favor the "shotgun approach" to trial; rather, she prefers a "focused approach", particularly as it related to arguing an alternative suspect is the one responsible for the crime. (EH 55). It is

[21] Ineffective assistance of counsel claims present a mixed questions of law and fact. This Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo. See *Sochor v. State*, 883 So. 2d 766 (Fla. 2004).

evident from her testimony that her focus was Doug Mixon. "We were blaming it on Doug Mixon." (EH. 102).

Once counsel made the decision to put forth a defense theory that Doug Mixon was the one responsible for this crime, it was incumbent upon her to investigate the viability of this defense, including investigating any alibi Mixon offered. Though counsel did not testify as to precisely when she chose to advance the Mixon-did-it theory of defense, she testified throughout the evidentiary hearing that Calhoun was insistent "from the very beginning" that Doug Mixon killed Mia Brown. (EH. 52, 84, 157, 193).

Additionally, counsel was aware that law enforcement investigated Mixon as a possible alternate suspect. (EH. 157). Law enforcement officers spoke to Mixon a number of times, and during those conversations, he provided an alibi that was full of inconsistencies. Officers also spoke to his then-girlfriend, Gabrielle Faulk ("Gabby"), and his children, Brittany Mixon and John Will Mixon. Given Calhoun's early and constant insistence that Mixon was the guilty party, and law enforcement's early focus on him, it is reasonable to conclude that counsel was at least considering Mixon as an alternate suspect very early on in her representation of Calhoun. Therefore, it is axiomatic that counsel's obligation to investigate Mixon as an alternate suspect, which necessarily encompasses investigating his alibi, was triggered the moment she decided that they "were blaming it on Doug Mixon."

Counsel was provided with copies of all of the witness interviews that law enforcement conducted. (EH. 80). Doug Mixon gave his first sworn statement to law enforcement on January 20, 2011. (EH Exh. 19). In that statement, Mixon claimed to have spent the evening of December 16, 2010 – the evening Calhoun and Mia Brown went missing – and the following day with his girlfriend, Gabby. According to Mixon, he and Gabby were to be married on Friday, December 17, 2010, but they did not go through with it. (EH Exh. 19).

On January 13, 2011, a week prior to Mixon's first recorded statement, Gabby gave a sworn statement to law enforcement. (EH Exh. 20). In her statement, Gabby told law enforcement that Mixon was not with her on December 16 or 17 and denied that they ever had plans to marry. She also told law enforcement that the only time she saw Mixon during the time period that Calhoun and Mia Brown were missing was on Saturday night, when he came to plead with her to take him back. She claimed the only time she actually spent with Mixon the weekend Calhoun and Mia Brown disappeared was on Sunday, December 19, when she was at Mixon's house making dinner.

When counsel deposed Mixon on September 28, 2011, he had firmed up the details of his alibi. (EH Exh. 21). During his deposition, Mixon stated definitively that he and Gabby spent the evening of December 16, 2010 together at Jose Contreras' house in Geneva, Alabama. When counsel deposed Gabby on January

12, 2012, Gabby, too, had changed her initial story, and now said that Mixon was with her during the evening of and afternoon following Mia Brown's disappearance. (EH Exh. 22). In the intervening time between her initial statement to police and her deposition, Gabby had married Mixon and she was now corroborating the alibi she initially claimed to be false. (EH 169). What's more, the State listed Contreras as a witness on January 23, 2012, providing Counsel with two addresses for him, which counsel confirmed she received. (EH. 170).

Counsel conceded that she knew Doug Mixon was claiming Contreras as his alibi at least as early as Mixon's deposition in September of 2011. (EH. 171). Despite knowing who her alternate suspect's alibi was, counsel never made any attempt to speak to Contreras. (EH. 170).

Not only did counsel herself fail to conduct any investigation into Mixon's alibi, Earnest Jordan, the investigator assigned to Calhoun's case, also shirked his responsibility. Jordan testified that if law enforcement had discounted a particular piece of information, he would not follow up on it, reasoning that he did not have the "time and energy" to chase leads down. (EH. 286, 285). In Jordan's view, it is the job of an incarcerated defendant to steer the investigation of his own case. (EH. 285). 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." (EH. 289). From this "investigation", Jordan, without speaking to a single witness, surmised that anyone Mixon named as an alibi witness would confirm his alibi, even if it were not true. (EH. 289). When questioned about his failure to speak to Jose 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 investigation Mixon's alibi because Calhoun never told Jordan that Mixon killed Mia Brown. (EH. 291-92). Apparently the fact that Mixon was a person of interest to law enforcement was lost on Jordan. Had Calhoun told Jordan that Mixon was responsible, Jordan would have done more to investigate Mixon. (EH. 212-13). Jordan also testified that had trial counsel advised him that Calhoun told her that Mixon was responsible, he would have done more to investigate Mixon. (EH. 292). It is clear from the record that trial counsel never shared her Mixon-did-it theory of defense with her defense team.

In its order denying Calhoun's claim, the circuit court copied verbatim from the State's written closing arguments, finding that Calhoun did not establish

deficient performance on the part of trial counsel. (PCR. 2593). The circuit court stated that counsel "tried to investigate Doug Mixon's alibi to the best of her ability." (PCR. 2593). Because this is merely a legal conclusion by the circuit court, it is not entitled to any deference by this Court. *See Bogle v. State*, 213 So. 3d 833, 846 (Fla. 2017).

Counsel admittedly made no effort to contact Jose Contreras, nor did anybody else on Calhoun's defense team. (EH. 170-72, 216, 221, 289-91). There is no testimony that the failure to contact Jose Contreras or to otherwise investigate Mixon's alibi was strategic or based on reasonable, professional judgment. When pressed, counsel simply stated that she did not know why she failed to even attempt to speak to Contreras. (EH. 171). Counsel is required to either make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Strickland* at 690-91. Neglecting to investigate an alternate viable suspect that is central to your theory of defense is patently unreasonable. Neglecting to conduct such an investigation based on untested, unfounded and incorrect assumptions is neither reasonable nor professional. It is clear counsel rendered constitutionally deficient representation.

2. Counsel's failure to investigate Doug Mixon's alibi was deficient performance that prejudiced Calhoun

Counsel firmly believed Doug Mixon was a viable alternate suspect and she wanted the jury to know that. (EH. 171). She thought it was critical to show the jury

that Doug Mixon lied to law enforcement. (EH. 162). It is clear from her testimony that she believed implicating Doug Mixon in the crime and exposing his efforts at concealing the truth would give the jury a basis to find reasonable doubt as to Calhoun's guilt. Implicating Doug Mixon became a central theory of counsel's defense. (EH. 54, 102).

Had counsel spoken to Jose Contreras, she would have learned that not only was Mixon not with Contreras during the time frame that Mia Brown disappeared and was murdered, but that Mixon actually confessed to Contreras that it was he who killed Mia Brown. (EH. 342-43, 345). Contreras, who was available and willing to testify at trial, testified at Calhoun's evidentiary hearing that he made efforts to tell law enforcement what Mixon told him, but he was turned away. (EH. 346-47). Thus, Contreras would have talked to Calhoun's defense team had he been approached and would have refused to lie for Mixon. (EH. 347).

Due to her failure to investigate Doug Mixon's alibi, counsel had to formulate a different strategy to implicate Doug Mixon. Though his involvement was central to her defense, counsel never mentioned his name during opening statement. (EH. 534-540). The only reference to Doug Mixon at all during counsel's opening was that Brittany Mixon took "her father's truck" the morning of Mia Brown's disappearance. (T. 538). During the State's case-in-chief, the only references to Doug Mixon were during counsel's cross-examination of Brittany Mixon. Counsel

elicited that Brittany's father did not have a phone, that she took her father's truck the morning Mia Brown was reported missing, that her father's house had chicken coops, and most inexplicably, that Doug Mixon did not know where Calhoun's campground was and that Brittany had never told him. (T. 722, 732-33, 735). At no point during her cross-examination of Brittany Mixon did counsel imply or attempt to imply that Doug Mixon was involved.

Counsel failed to bring up Doug Mixon for the remainder of the State's case and did not mention him again until she called the lead investigator in the case, Lt. Michael Raley, to the stand to testify for the defense. During her direct examination, counsel asked Lt. Raley if he ever established Mixon's alibi "through the course of [his] investigation." (T. 1080-82). Lt. Raley testified that he did and that Mixon was with Gabby Faulk in Geneva, Alabama during the relevant timeframe. (T. 1080-82). Because counsel had failed to speak to Jose Contreras or do any investigation into Mixon's alibi, she had no way to refute this testimony – testimony that she elicited. It is unfathomable that defense counsel would thwart her own theory of defense by establishing an alternate suspect's alibi for them. This testimony did nothing to imply that Doug Mixon was responsible for the death of Mia Brown. In fact, it did the exact opposite.

Counsel's stated reason for establishing the alibi of the person she was blaming the murder on was that she wanted to establish that Mixon lied to law

enforcement. (EH. 162). Counsel's plan was to show that Brittany Mixon's story was that her father was in Geneva the night Mia Brown disappeared, came to Bonifay the next morning, and then returned to Geneva. (EH. 106-62). Counsel claimed that she wanted to compare this with what Doug Mixon told Lt. Raley, which was that he went to Geneva and stayed there with Gabby, never returning to Bonifay. (EH. 162). However, during her direct examination of Lt. Raley, she elicited from him that Mixon was "in Geneva, back and forth[.]" (T. 1082). Not only did counsel establish Mixon's alibi, she also cleared up any potential inconsistencies between what Mixon told law enforcement and what Brittany Mixon testified to. Had counsel investigated Mixon's alibi at all, she could have avoided this disastrous line of questioning.

Counsel chose the "focused approach" to "imply Doug Mixon's involvement." (EH. 53, 55). The foundation of her case appears to have rested upon her presumption that Calhoun would testify and Mixon's denial of involvement. (EH. 102, 198-200). However, Calhoun decided prior to trial that he was not going to testify, a fact which counsel knew. (EH. 205).

Counsel also knew that Mixon would deny that he killed Mia Brown or had any knowledge relevant to the murder. (EH. 149, 198). Because she had done no investigation into Mixon's alibi, she would have been unable to counter his testimony. Had counsel performed the investigation and preparation required of her

by the Sixth Amendment to the United States Constitution, she would have learned that Mixon's alibi was false and easily refuted. This would have allowed counsel to do more than simply "imply" that Mixon was involved, it would have given her theory of defense some teeth. She could have vigorously argued, with evidentiary support, that it was Doug Mixon who killed Mia Brown.

Counsel appeared to suggest that her Mixon-did-it theory of defense was thwarted by Calhoun exercising his constitutional right not to testify and by his desire to keep Mixon off the stand out of fear for his family's safety. (EH. 54, 102, 199-200). The circuit court too blamed Calhoun for counsel's prejudicial performance, saying "It was Calhoun's choice to abandon calling Mr. Mixon to testify, thereby undermining his defense theory." (PCR. 2594). However, the circuit court failed to articulate any basis as to how Calhoun thwarted counsel's ability to even investigate Mixon's albi. It was Calhoun who implicated Doug Mixon to begin with. There is no evidence that he told counsel not to investigate Mixon.

Furthermore, is defense counsel who has the ultimate authority in exercising his or her client's constitutional right to present witnesses. *Puglisi v. State*, 112 So. 3d 1196, 1206 (Fla. 2013). This is because the decision whether or not to present a witness is a "tactical, strategic decision within counsel's professional judgment." *Id.* "Therefore, if a criminal defendant disagrees with his or her attorney as to whether to have a witness testify at trial, it is the defense counsel who has the ultimate

authority on the matter[.]" *Id.* Counsel acknowledged that the decision of whether or not to call Mixon was within her sole discretion. (EH. 139). By counsel's own admission, she was blaming the murder of Mia Brown on Doug Mixon. (EH. 102). She set up her case, including eliciting harmful information, with an eye towards presenting Mixon. (EH. 147, 148, 158, 160-64). Building a defense on a house of cards, without investigating a single card in the deck, was unreasonable. Abandoning a defense at the last minute, with no alternate plan, was unreasonable. This is especially true given counsel's advance notice that Calhoun was uncomfortable with the idea of calling Mixon. (EH. 198-200, 205) Counsel testified that as trial approached, Calhoun's concerns about his family's safety grew. (EH. 198-99). According to counsel, Calhoun continued to express his concerns throughout trial. His opposition to Mixon being called as a witness was not a last-minute surprise. Counsel has time to ponder this exact situation and alter her trial strategy accordingly.

In its plagiarized order, the circuit court found that Calhoun was not prejudiced by counsel's failure to call Mixon due to the "overwhelming evidence of Calhoun's guilt." (PCR. 2594). The case against Calhoun was an entirely a circumstantial one. The "overwhelming evidence of guilt" the circuit court relies on in finding that Calhoun suffered no prejudice from counsel's failings has largely been refuted. This, combined with the evidence Calhoun presented regarding Mixon's non-existent alibi

establish that Calhoun suffered great prejudice due to the deficient performance of counsel.[22]

B. Counsel's failure to consult with and hire forensic experts was deficient performance that prejudiced Calhoun

1. Counsel's failure to consult with or hire a forensic pathologist constitutes deficient performance

Counsel failed to consult with or retain a forensic pathologist, thereby failing to subject the State's evidence to any adversarial testing. Counsel has a responsibility to educate themselves about the aspects of a case they do not understand. However, gaining personal knowledge of a subject does not end counsel's obligation to his or her client. *Fitzpatrick*, 118 So. 3d at 757. Counsel must then apply the knowledge gained in a way that provides his or her client with evidence and constitutionally adequate legal representation. *Id.*

[22] In its order denying Calhoun's claim, the circuit court stated "calling Doug Mixon as a witness would not have made a difference as it does not pertain to the DNA evidence that was found, the location of the burnt car, and the citings [sic] of Calhoun and the victim before her death. (PCR. 2586). To be clear, Calhoun's claim is not ineffective assistance of counsel for failure to call Doug Mixon as a witness; it's ineffective assistance of counsel for failing to investigate Doug Mixon's alibi. Notwithstanding the circuit court's error in conflating the two issues, this statement further highlights the error and prejudice that resulted from the circuit court's denial of Calhoun's Motion to Amend and Reopen, discussed *infra*. As demonstrated through the facts presented in Calhoun's Motion to Amend and Reopen, Doug Mixon's false alibi does pertain to the DNA evidence and the location of the burnt car. Additionally, Calhoun and Mia Brown were only seen together once before her death – at Charlie's Deli on the afternoon of December 16. There were not multiple sightings.

When Calhoun was taken into custody he was covered with scratch marks. Law enforcement took great pains to document these scratches, taking nearly 200 photographs. (EH. 178). Counsel knew pre-trial that it was a possibility that the State would argue to the jury that the scratches on Calhoun were inflicted by Mia Brown. (EH. 179).

The State did just that, telling the jury during opening statements that a violent struggle took place in Calhoun's trailer that left him with injuries. (T. 519). During closing arguments, the State once again highlighted the scratches, calling them "important pieces of evidence" and used them to dismiss the idea that there had been a break-in at Calhoun's trailer, a proposition that was important to sustain the Mixon-did-it theory of defense. (T. 1153, 1168). What's more, the State used the scratches to bolster Sherry Bradley's identification of Calhoun, as well as its faulty timeline based on digital forensic evidence that also went unchallenged. (T. 1215-16). The State dismissed the idea that the scratches came from briars, giving a detailed explanation of why it could not be the case. (T. 1221-22).

Despite knowing ahead of time that the State was going to argue the scratches were inflicted by Mia Brown, counsel failed to consult with or retain a forensic pathologist or similarly qualified medical professional. Her reasoning for failing to do so is twofold. First, she showed the photographs of the scratches to her former colleague, Walter Smith, and he told her that she did not need an expert. (EH. 177).

Second, she decided an expert was not needed because it was "obvious" the scratches were not caused by fingernails because none of the characteristics one would expect from a fingernail scratch were present. (EH. 178). Counsel did not want to "insult [the jury's] intelligence by calling an expert to say the injuries were inconsistent with fingernail scratches. (EH. 177).

While it was "obvious" to counsel that the injuries to Calhoun were inconsistent with being fingernail scratches, the forensic pathologist called by Calhoun, Dr. Edward Willey, testified that at least two of the four characteristics commonly seen in fingernail scratches were present in some of the injuries to Calhoun. (EH. 263). Thus, the images on their face bore some indices that they could have been caused by fingernails. Dr. Willey testified that he needed to further enhance the images and ask several additional forensic questions before he could conclude that they were actually inconsistent with fingernail scratches. (EH. 245; 263-64; 270-71). Not only would it not have been insulting to call an expert to testify regarding the scratches, it was clearly necessary. Not doing so was unreasonable.

While it was "obvious" to her that the characteristics of fingernail scratches, such as appropriate thickness and a linear track, were not present, she clearly reached this conclusion based on advanced or ascertained knowledge. Assuming the jury possessed this same knowledge because they were from "the country" was unreasonable. (EH. 177). What's more, counsel's reasoning lacks any basis in the

record. Nowhere in the trial record is it stated by any juror that they are from "the country" or that they are familiar with the characteristics of fingernail scratches versus that of briar scratches. Further, it was unreasonable for counsel to rely on the advice of Walter Smith. He was not qualified to render an opinion on the necessity of an expert given the fact that he was shown the photographs in a vacuum, without any working knowledge of the case. Counsel cannot avoid her responsibilities to her client based on unsubstantiated beliefs of another lawyer. *See, Brown v. State*, 892 So. 2d 1119 (Fla. 2d DCA 2004); *Rose v. State*, 675 So. 2d 567 (Fla. 1996)(counsel is not at liberty to abdicate his responsibility to his client by substituting his own judgment with that of another lawyer).

Counsel appears to have educated herself regarding fingernail scratches and the characteristics that are unique to them. (EH. 178). However, counsel failed to apply that knowledge in a way that provided Calhoun with any evidence. *See, Fitzpatrick* at 757. She failed to address the scratches at all during her opening statement, despite the fact that the State did just that. (T. 1153). The State referenced the scratches on Calhoun numerous times, using them to bolster the testimony of witnesses and its timeline. By comparison, counsel addressed the scratches only twice. Once, she merely stated that anybody who has been out in the woods before knows that the scratches were caused by briars and a second time to make the point

that the scratches were not dated, so they could have been inflicted at any time. (T. 1194, 1203).

Counsel's decision to forego hiring an expert to rebut the State's argument regarding the scratches on Calhoun and instead relying on her own advanced knowledge, which she then failed to apply to Calhoun's case, was not the product of reasonable, professional judgment. Counsel failed to utilize the knowledge she possessed in a way that meaningfully benefitted Calhoun, depriving him of constitutionally adequate representation. The circuit court failed to address the issue of deficient performance in its order denying relief, however it is clear that counsel's representation was just that – deficient.

2. Counsel's failure to consult with or hire a forensic pathologist prejudiced Calhoun.

In denying Calhoun's claim, the circuit court found that Calhoun could not show how he was prejudiced by counsel's failure to call an expert, writing "Even if an expert could have testified fingernails did not cause the injuries, the other option did not help Calhoun's defense." (PCR. 2589). [23]

The State argued to the jury that the scratches on Calhoun, which it repeatedly characterized as fingernail scratches, were "important pieces of evidence." (T. 1153).

[23] The relevant portion of the circuit court's order was not written by the circuit court at all. Rather, with the exception of two paragraphs, it is taken verbatim from the State's closing argument. (PCR. 2467-2471)

In referencing the scratches, the State repeatedly made inflammatory arguments that had no basis in evidence, such as "[t]hat girl had scratched Johnny up good" and ". . . she scratched, and she scratched, and she scratched. She did not go without a fight." (T. 1168, 1153). The State also argued to the jury, that there was no way the scratches on Calhoun were caused by briars, dismissing a plausible explanation for his injuries and used the scratches to argue premeditation to the jury. (T. 1221, 22, 1161). Continuing to capitalize on counsel's deficient performance, the State used the presence of scratches on Calhoun to dismiss the defense's argument that there had been a break-in at Calhoun's trial and most prejudicially, to bolster Sherry Bradley's identification of Calhoun, as well as its faulty timeline. (T. 1215-16).

Had counsel consulted with or hired a forensic pathologist, she would have been able to refute the State's inflammatory, misleading, and downright false arguments. At his evidentiary hearing, Calhoun presented Dr. Edward Willey, a physician who practices forensic medicine. (EH. 242). Dr. Willey testified that he reviewed "a substantial number" of photographs and opined that none of them had any of the characteristics that are generally associated with fingernail scratches, those being semi-lunar indentations, parallel markings, convincing width and multiplicity. (EH. 245, 247, 260). He went on to say that most fingernail scratches do not break the skin, yet all the scratches found on Calhoun did. (EH. 248). Dr. Willey went through a number of photographs, all depicting various areas of

Calhoun's body, an opined that, because none of the scratches had the expected characteristics of fingernail scratches, it was **not at all probable** that any of the scratches were caused by fingernails. (EH. 249-256) (emphasis added). Conversely, Dr. Willey opined that a briar patch was a reasonable explanation of how Calhoun obtained the scratches. (EH. 257). Calhoun's jury never had the benefit of this testimony.

The circuit court relied heavily on this Court's opinion in *Reed v. State*, 875 So. 2d 415 (Fla. 2004), which stands for the proposition that where an expert would not have assisted the defense, trial counsel cannot be found ineffective for failing to call one. However, the circuit court's reliance is misplaced, as *Reed* is easily distinguishable from the case at hand. Reed raised a claim of ineffective assistance of counsel based on trial counsel's failure to retain a hair expert. *Id*. at 422. In finding that Reed had not proven prejudice, this Court noted the existence of incriminating statements made by Reed, as well as the fact that the hair expert would not have been able to assist trial counsel in any real way. *Id*. Additionally, this Court noted that the hair expert possessed information already within the average person's realm of knowledge. *Id.*

Here, the exact opposite is true. In *Reed*, there was extensive evidence of the defendant's guilt. *Id*. at 419. In comparison, the case against Calhoun was wholly circumstantial and notably, devoid of admissions. A qualified expert would have

been able to shut down the State's inflammatory arguments that the victim fought for her life and "scratched Johnny up real good." (T. 1168). An expert would have lent credence to the defense's theory that the scratches were caused by briars, while simultaneously preventing the State from using the existence of scratches to cut down the defense's theory and corroborate its own witnesses and timeline. *See*, *Fitzpatrick* at 756 (prejudice shown where counsel's errors permitted the State to develop an inaccurate timeline of the crime.) Moreover, the circuit court's insistence that there was testimony "presented throughout trial that Calhoun was in the bushes hiding" is not supported by the record. The only testimony to that effect was a scant mention during the testimony of Lt. Raley. (T. 955). In the words of the State, it was "kind of fast testimony and it might have went by you a little quick." (T. 1210).

Calhoun has presented evidence that undermines the confidence in the outcome of his trial. Had trial counsel not been ineffective, the jury would have received evidence that called into question the State's witnesses and timeline, and would have been prevented from hearing inflammatory arguments that had no basis in the evidence. Counsel's errors and omissions resulted in Calhoun receiving a fundamentally unfair trial, the result of which is unreliable. There can be no confidence in the outcome.

3. Counsel's failure to consult with or hire a digital forensic expert constitutes deficient performance

Despite knowing the digital forensic evidence against Calhoun would

provide the State with a much needed timeline of events if not refuted, counsel failed to retain the appropriate expert, rendering deficient performance. Incumbent upon counsel is the duty to prepare for trial, which necessarily includes the duty to consult and present expert testimony in cases where the jury's interpretation of scientific evidence imperative. *See, Williams v. Thaler*, 864 F. 3d 597 (5th Cir. 2012)(defense counsel's performance fell below an objective standard of reasonableness when counsel failed to obtain independent ballistics or forensic experts, and was therefore unable to offer any meaningful challenge to the findings and conclusions of the state's experts, many of which proved to be incorrect.)

During a search of Calhoun's trailer, law enforcement seized a SD card found on the floor. (T. 936). While the card was in the custody of the Holmes County Sheriff's Office (HCSO), but before it was sent to FDLE for analysis, Lt. Raley put the SD card into his laptop and accessed the files without the benefit of a write-blocking device, thereby altering the evidence in a first-degree murder case. (T. 936, EH. 378, 380). On the SD card was a photograph, which Lt. Raley opined to be of the ceiling of Calhoun's trailer. (T. 937).

HSCO then sent the corrupted evidence to FDLE for analysis. (T. 936). FDLE agent Jennifer Roeder, together with the Assistant State Attorney prosecuting the case, developed a calculation method to determine when the photo purported to be of Calhoun's trailer was taken. (T. 920-21). The method is as follows: the State took

the displayed date and time of a known photograph, in this case a photo of Brandon Brown holding a baby, and the displayed date and time of the trailer photo, and calculated the time between the two, which was 46 days and 12 hours. (T. 920-21). The State then used Mia Brown's sister to determine the actual date and time of the known photo 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 4:00am. (T. 921).

The State relied on the calculation done by Roeder and the ASA to place Mia Brown in Calhoun's trailer on the night she disappeared. (T. 1149). The calculation also formed the entire basis of the State's timeline, arguing that from roughly 9:00 p.m. on December 16, 2010 until smoke was spotted on December 17, 2010 around 11:00.a.m., Mia Brown was held captive and terrorized by Calhoun. (T. 1225). The State argued this showed premeditation on the part of Calhoun and used it to make improper arguments, inflaming the passions of the jury.

Counsel is not an expert in the field of digital forensics. (EH. 141). Counsel also agreed that testimony that evidence was compromised and is no longer reliable is "important". (EH. 146). What's more, counsel knew prior to trial that Lt. Raley corrupted the evidence on the SD card, compromising it. (EH. 144, 206). However, Counsel failed to hire an expert to analyze the digital forensic evidence and subsequent calculations in Calhoun's case because counsel was able to "personally

follow her through that and understand where she was at." (EH. 142). Counsel testified that the only reason she did not ask Roeder about Lt. Raley accessing the SD card without forensic protection was because it was her impression that the State already addressed it during direct examination. (EH. 145). Her reasoning falls flat. At no time during Roeder's testimony is it revealed that Lt. Raley improperly accessed the files on the SD card, rendering the integrity of the evidence questionable. (T. 914-922).

The SD card, as well as the photograph of the trailer and timeline that was extrapolated from it, were critical to the State's case. Counsel herself acknowledged the importance of highlighting compromised and unreliable evidence. (EH. 146). Yet, despite knowing of Lt. Raley's improper actions and the importance of the photograph to the State's timeline, counsel did nothing to challenge the State's evidence. This was deficient performance.

4. Counsel's failure to consult with or hire a digital forensic expert prejudiced Calhoun

Had counsel consulted with an expert in digital forensic evidence, she would have learned there were two significant problems with the State's digital evidence against Calhoun.

First, the fact that Lt. Raley accessed the SD card without forensic write-blocking protection is problematic in and of itself. By simply putting the SD card into his laptop without the benefit of a forensic write-blocker, Lt. Raley altered the

evidence. (EH. 329). Specifically, Lt. Raley altered the metadata of the photographs. (EH. 380). Though Raley testified that he accessed the photographs on the SD card before sending it to FDLE, at no point did either the State or counsel question Lt. Raley or any other witness about the implications of his actions. At the evidentiary hearing, Calhoun's digital forensics expert, John Sawicki, testified that the metadata in this case was "critical." (EH. 379).

The second problem, which is intertwined with the first, is the calculation method employed by the State. While the calculation method is not per se improper, it rests on a set of assumptions that must be taken as true. (EH. 386). That is, calculations such as the one done by the State are only as reliable as the evidence it's based on. If there are flaws within the evidence, the entire calculation process is corrupted. (EH. 386).

In order for the calculation method employed in Calhoun's case to be valid, three things must be assumed to be true: 1) the known date is valid; 2) there has 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).

Here, it cannot be definitively said whether or not the date or timestamp had been changed between the known photograph and the trailer photograph. (EH. 387). However, there were a number of photographs on the SD card that showed a crated-on date of June 2011, months after the card was taken into custody. (EH. 387). This

is problematic because it shows at some point, the date and time on the camera had been manipulated. (EH. 388). This was never pointed out to the jury. The third assumption cannot be taken as true because it is known for a fact that the metadata on the SD card was changed by virtue of Lt. Raley's actions. (EH. 388). Based on what was known about the SD card and what simply cannot be known, the calculation done by the State, and therefore the timeline on which the State's case was based, is problematic. Counsel should have called this into question.

In its order denying Calhoun relief, the circuit court provided no legal reasoning for its finding that Calhoun did not prove prejudice. (PCR. 2590-91).[24] It also misquoted and misconstrued Mr. Sawicki's testimony to conform it to fit its opinion. For instance, the circuit court claims that Mr. Sawicki testified that there is no indication that the date and timestamps were manually changed. Mr. Sawicki did not testify to that. In fact, what he did say was that it cannot be known whether or not the date and timestamp had been changed. (EH. 387, 393). The circuit court also claimed that Mr. Sawicki offered no opinion as to the reliability of the evidence, which is incorrect. Throughout his testimony Mr. Sawicki referred to the State's calculation as "problematic." (EH, 387, 388, 391). Mr. Sawicki also testified that because the SD card was not kept in a forensically sound manner, it was

[24] The relevant portion of the circuit court's order was not written by the circuit court at all. Rather, with the exception of two paragraphs, it is taken verbatim from the State's closing argument. (PCR. 2467-2471)

compromised and because of that, **it cannot be relied on.** (EH. 390)(emphasis supplied).

Counsel knew pre-trial that the State's timeline hinged on the digital evidence. She knew the State intended to call an expert witness to explain the evidence to the jury and she also knew that the evidence had been mishandled by law enforcement. Based on this information alone, counsel should have sought the assistance of an expert in the field of digital forensics. Had she done so, she would have learned about the significant problems with the State's evidence against Calhoun and would have been able to challenge the State's timeline as well as the reliability of its evidence. Counsel's errors resulted in Calhoun receiving a fundamentally unfair trial, the result of which is unreliable. There can be no confidence in the outcome.

C. Counsel's failure to subject the State's case to adversarial testing through investigation, cross-examination, the utilization of available impeachment evidence and proper objections was deficient performance that prejudiced Calhoun.

1. Counsel's failure to object to improper testimony constitutes deficient performance that prejudiced Calhoun.

The law is clear that counsel is duty-bound to object to improper attempts to prejudice the defendant and secure a conviction on an improper basis. *See, Eure v. State*, 764 So. 2d 798, 801 (Fla. 4th DCA 2000); *Hodges v. State*, 885 So. 2d 338 (Fla. 2004) (Pariente, J., dissenting); *Ross v. State*, 726 So. 2d 317 (Fla. 2d DCA 1988). Failure to object results in either a fundamental error approach, or an

ineffective assistance of counsel claim, both of which impose a heavy burden on the defendant. Without an objection at trial to improper arguments, courts hesitate to find reversible error. *Id.*

a. Charles Howe

Charles Howe was the first witness to testify for the State. (T. 543). After establishing that Mia Brown worked for him, he went on to identify her employment application. (T. 545-46). During Howe's testimony, the State elicited details regarding the characteristics of Mia's signature, namely that she dots her "I" and ends her name with a heart. (T. 548).

Counsel was ineffective for failing to object to the introduction of the employment application and the testimony regarding the hearts in Mia Brown's signature. The testimony regarding the hearts was utilized to show Mia's uniqueness as an individual and could properly be regarded as victim impact evidence.[25]

In its order denying relief, the circuit court ignored Calhoun's argument regarding the relevance of the evidence. The court made no findings as to whether or not the evidence was relevant, or whether its relevance was outweighed by its

[25] Fla. Stat. § 921.141(7) (2011) provides for the introduction of victim impact evidence at the penalty phase of a capital trial. However, it prohibits characterizations and opinions about the crime, the defendant, and the appropriate sentence. *Id.* It also prohibits the introduction of the evidence until the prosecution has provided evidence of one or more aggravating factors. *Id.*

prejudice. Nor did the court make any findings as to whether counsel's failure to object was the product of strategy.

Counsel testified that she knew the State was intending to introduce Mia Brown's employment application for the express purpose of introducing her signature. (EH. 57). Counsel's understanding was that the State needed the signature on the employment application to properly authenticate Mia Brown's dental records. (EH. 57, 58, 60). Notably, at no point during trial did the State ask Howe questions aimed at authenticating Mia Brown's signature. Instead, the State's entire line of questioning focused on the unique characteristics of Mia's signature, i.e. "her little hearts." (T. 548).

It is clear counsel did not know the law as it pertains to the admissibility of business records. "Under the business record exception, the trustworthiness of medical records is presumed." *Barber v. State*, 775 So. 2d 258, 260 (Fla. 2000)(*citing Phillips v. Ficarra*, 618 So. 2d 312, 313 (Fla. 4th DCA 1993)). Treatment records are routinely authenticated through the treatment provider and admitted as a business record exception to the hearsay rule. *See Johnson v. State*, 117 So. 3d 1238 (Fla. 3d DCA 2013). Counsel's ignorance of the law is apparent and inexcusable, especially given the State's advance notice regarding its reason use Mia Brown's signature. It is well established law that "a tactical or strategic decision is unreasonable if it is

based on a failure to understand the law." *Sochor v. State*, 883 So. 2d 766 (Fla. 2004); *State v. Williams*, 127 So. 2d 890 (Fla. 1st DCA 2013);

Counsel's subjective belief that there was nothing wrong with the State's presentation of evidence in regards to Mia Brown's signature is not dispositive of the issue. (T. 64). Counsel conceded at the evidentiary hearing that the testimony of Howe could result in sympathy and emotion on the part of jurors. (EH. 66). Further, counsel conceded that it is her duty as a capital defense lawyer to try to minimize the emotions inherent in a capital trial. (EH. 65).

By failing to realize that the introduction of Mia Brown's signature was prejudicial and not necessary to prove identity, an issue which was not in dispute, counsel rendered deficient performance.

b. Dr. Swindle

Dr. Swindle was Mia Brown's dentist. (T. 549). Through Dr. Swindle, the State published exhibits 4C and 4F, which were forms that included Mia Brown's distinctive signature. The State made sure to emphasize the fact that Mia's signature was in fact, on the forms, a point the circuit court seemingly concedes in its order. (T. 552, 555, PCR. 2578).

For the sake of brevity, undersigned relies on the argument made as it related to the introduction of documents bearing Mia Brown's signature made *supra*.

Counsel's failure to object to this improper and prejudicial evidence can only be classified as deficient performance.

c. Dick Mowbry

Mowbry is an Alabama game warden who found Mia Brown's body. (T. 555). Mowbry testified that, while examining the car, he saw what appeared to be a rib cage and it was a "charred, bad sight." (T. 566). The State went on to repeat this testimony a number of times and showed Mowbry several photographs of the rib cage. (T. 566). After looking at the photographs, Mowbry testified that the photograph was blurry but "the thought in my mind I will never forget it." (T. 567).

For evidence to be admissible, it must be relevant. "Relevant evidence is evidence tending to prove or disprove a material fact." Fla. Stat. § 90.401 (2011). Mowbry's testimony regarding the ribcage did not tend to prove anything. Its sole purpose was to inflame the passions of the jury, yet counsel failed to raise a single objection, despite having notice that this evidence was going to be introduced. (EH. 56). In fact, counsel testified that the pictures, which she had pre-trial, were more emotional than the testimony itself. (EH 73). Counsel did not dispute that the testimony regarding Mia Brown's ribcage was inflammatory and emotional. (EH. 71).

The circuit court's finding that counsel's decision not to object was strategic in nature is not supported by competent, substantial evidence. (PCR. 2579). Counsel

never testified that she failed to object due to a strategy decision. She testified that she did not even think to object. (EH. 73). Any argument that counsel did not object because she did not want to draw the jury's attention to the prejudicial evidence falls flat. The State referenced the ribcage at least five times and showed Mowbry at least two photographs of it. Counsel conceded that the testimony was already being emphasized to the jury through repetitive questioning. (EH. 72).

Not objecting to completely irrelevant, prejudicial evidence designed to draw emotion into the trial and inflame the passions of the jury was deficient performance on the part of counsel.

Exposing the jury to emotionally charged and inherently prejudicial testimony at the guilt phase of trial prejudiced Calhoun. Counsel herself acknowledged that victim impact evidence can induce jurors to make decisions based on emotion. (EH. 63). It is impossible to say that this evidence, presented at the beginning of the guilt phase, did not affect the juror's views of the case, and ultimately their verdict. Counsel's errors resulted in Calhoun receiving a fundamentally unfair trial, the result of which is unreliable. There can be no confidence in the outcome.

2. Counsel's failure to investigate, effectively cross-examine witnesses and utilize available impeachment evidence was deficient performance that prejudiced Calhoun.

Counsel's stated strategy was to "[b]asically attack the State's case, but

imply Doug Mixon's involvement." (EH. 54). Counsel planned to accomplish this through cross-examination of the State's witnesses. (EH. 53, EH exhibit 6)). Therefore, it was incumbent upon counsel to scour the discovery and investigate and discover all the weaknesses in the State's case that could be attacked through cross-examination, including the presentment of impeachment evidence.

Counsel has a professional obligation to investigate any potential impeaching or exculpatory evidence that may assist in the defense. *Fitzpatrick* at 753. "It is clear that where the record does not indicate otherwise, trial counsel's failure to impeach a key witness with inconsistencies constitutes ineffective assistance of counsel and warrants relief." *Tyler v. State*, 793 So. 2d 137 (Fla. 2d DCA 2001). *See also, Kegler v. State*, 712 So. 2d 1167 (Fla. 2d DCA 1998) (trial counsel's failure to impeach crucial state witness was not reasonable under the circumstances); *Kelly v. State*, 198 So. 3d 1077 (Fla. 5th DCA 2016) (failure to impeach a key witness may amount to ineffective assistance of counsel, warranting relief).

a. Brandon Brown

The circuit court found that counsel rendered deficient performance by "failing to use the information she had through pre-trial discovery" and by "failing to investigate other avenues of impeachment evidence that could have been used on cross-examination." (PCR. 2850). The circuit court's finding is supported by competent, substantial evidence.

Counsel conceded that "a lot of things surrounding Mr. Brown were somewhat suspicious." (EH. 89). These suspicions actions included lying to law enforcement about the calls he made to his wife the night she disappeared and lying about his reasoning for not going out to look for his wife. (EH. 82-85, 87). Additionally, counsel failed to investigate the seven deleted images from Mia Brown's SD card that depicted a woman, who had similar physical characteristics to Mia Brown, with injuries that were taken in the Brown residence. (EH. 96-98, 226-30). Based on the calculation method of FDLE agent Roeder, these photographs were taken approximately nine days before Mia Brown disappeared. (EH. 98-99, 228).[26]

Counsel testified she chose not to investigate Brandon Brown because Calhoun was adamant that it was Doug Mixon who killed Mia Brown. (EH. 84). Counsel conceded, however, that it is her professional obligation to investigate any possible leads of avenues of defense, despite what her client tells her. (EH. 85). *Bell v. State*, 965 So. 2d 48, 62 (Fla. 2007), *citing Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

[26] The circuit court, without providing any legal reasoning, found that the photographs depicting injuries would not be admissible at trial. That is demonstrably false, as photographs taken from the same SD card were admitted into evidence at Calhoun's trial. *See*, State's trial exhibit 24. Furthermore, counsel conceded that she conducted no investigation into the images, hence her inability to authenticate them. In contrast, Lt. Raley testified that the images were clearly taken in the Brown residence and were consistent with known images of Mia Brown. (EH. 230-33.).

Counsel believed that the underlying tone of the State's case was that Calhoun had a "thing" for Mia, and that even Brittany Mixon believed that to be the case. (EH. 85). Counsel conceded that the suspicious circumstances surrounding Mr. Brown were in conflict with the State's portrayal of the Browns as a happily married couple. (EH. 100). Counsel justified her failure to investigate Brandon Brown by saying she did not want to attack a grieving husband in front of the jury. (EH. 84, 194). Informing the jury that Brown lied to law enforcement and made virtually no effort to find his wife does not equate to an "attack" on Brown, rather it gives the jury a full picture of the Brown's marriage. However, counsel conceded that she could have introduced the deleted images which documented the apparent injuries to Mia Brown through FDLE agent Roeder to avoid attacking Mr. Brown in front of the jury. (EH. 101).

Counsel's decision not to investigate Brandon Brown or call attention to the suspicious circumstances surrounding him was an uninformed decision, made without the benefit of any investigation. Strategy decisions made after no investigation cannot be deemed reasonable. *Strickland* at 691. Counsel's failure in this regard was deficient performance.

The circuit court made no findings as to the prejudice suffered by Calhoun due to counsel's failure to investigate and effectively cross-examine Brandon Brown, saying only "It is clear Ms. Jewell did her best to adhere to her strategy and

attack the State's case, while keeping the jury's trust." (PCR. 2581). This finding is not supported by competent, substantial evidence. Nor is "doing your best" the standard outlined in *Strickland* for assessing deficient performance or prejudice in ineffective assistance of counsel claims.

It is clear that Calhoun was prejudiced by counsel's deficiencies as it relates to Brandon Brown. The State was able to portray Mia Brown as a happily married woman, yet the suspicious circumstances surrounding Brandon Brown and the photographs of her documenting injuries call that into question. The State told the jury that it did not know what happened the night Mia Brown was murdered, but they knew it was violent. (T. 1151). Had counsel cast some suspicion upon Brandon Brown, she would have been able to argue there was a reasonable doubt that Calhoun, who had little prior relationship with Mia Brown to speak of, was responsible for her violent murder.

b. Sherry Bradley

Sherry Bradley testified that she saw Calhoun in a convenient store she managed near Hartford, Alabama in the early morning of December 17, 2010. (T. 647).[27] According to Bradley, Calhoun pulled up to the store in a white car with Florida plates and parked in a handicap spot. (T. 649, 651-52). When he entered the

[27] Bradley's store is located 13 miles north of where Mia Brown's car was discovered.

store, he bought a pack of cigarettes and she noticed scratches on his hands. (T. 650-51). Bradley also testified that she had not watched, heard, or read any news reports about the case. (T. 666).

Prior to trial, counsel was in possession of all the interviews conducted by law enforcement, as well as the missing persons flier for Calhoun and Mia Brown. (EH. 80). Counsel, therefore, knew or should have known that the fact that Mia Brown's car was a white Avalon with Florida plates was contained within the flier. (Trial exhibit 9A). Counsel also knew, or should have known, that Bradley told law enforcement that she read about the case in the newspaper, and even expressed concern that she might supplant what she read for what she actually saw. (EH. 107-108. EH exhibit 12). In sum, all of the information Bradley testified to could have been obtained from secondary sources, rather than an actual encounter with Calhoun.

Counsel failed to impeach Bradley with her prior inconsistent statement to law enforcement that she read about the case in the newspaper. (EH exhibit 12). Counsel provided no strategic reason for failing to impeach Bradley. Instead, counsel conceded that she "probably should have" impeached the basis of Bradley's identification with her prior inconsistent statement. (EH. 105). Counsel theorized that she missed this opportunity to impeach a critical witness because she was "very focused on that ID." (EH. 108).

The foundation for Bradley's knowledge is directly related to her identification of Calhoun. A tainted foundation leads to a tainted identification. Counsel conceded that discovering the foundation of a witness's information is important. (EH. 108). If counsel's focus truly was "that ID", there was was no reason for her not to impeach Bradley. Failing to do so was deficient.

In denying Calhoun's claim, the circuit court found that he had not met his burden of proving counsel was ineffective because Bradley was not called to testify at the evidentiary hearing. (PCR. 2582). The circuit court surmised that it was "speculation" as to what she would have testified to if asked additional questions. (PCR. 2582). That is simply not the case.

Prior to trial, Bradley gave a sworn statement to Lt. Raley, where she told him that she had read about the case in the paper. (PCR. 2161, 2174, EH exhibit 12). Had counsel confronted Bradley with this statement, Bradley would have had one of two options: 1) deny making the statement, at which point counsel could have introduced it, or 2) admitted to making the statement. Fla. Stat. 90.608 (2011). Since Bradley's statement to law enforcement is in evidence, one need not speculate as to what she would have said if impeached. Court's routinely evaluate ineffective assistance of

counsel claims premised upon a failure to impeach based on record evidence. *See, Butler v. State*, 100 So. 3d 638, 654 (Fla. 2012).[28]

Calhoun was prejudiced by counsel's failure to impeach Bradley and the foundation of her information. Bradley was key to the State's bizarre theory that after hours of holding Mia Brown captive, Calhoun put her in the trunk of her car, drove her to store in Alabama, flagrantly parked in a handicap spot, and left her alive in the trunk to go in to the store and buy cigarettes.[29] Bradley was also necessary to the State's argument that the scratches on Calhoun were caused by Mia Brown, not by running through the woods. It was imperative that counsel impeached both Bradley's identification, and the foundation of her information. Counsel's failure to do so allowed the State to argue that it was more than mere speculation that Calhoun took Mia Brown's body to Alabama, in her own car, before burning it. Bradley gave the State an eyewitness it so desperately needed. Failure to utilize available impeachment evidence which would have given rise to a reasonable doubt as to Calhoun's guilt was a breakdown of the adversarial system and calls into question

[28] *See also*, *Connor v. State*, 979 So. 2d 852, 862 (Fla. 2008); *Grim v. State*, 971 So. 2d 85, 94 (Fla. 2007), *Blake v. State*, 180 So. 3d 89, 104 (Fla. 2014); *Spann v. State*, 985 So. 2d 1059 (Fla. 2008); *Kilgore v. State*, 55 So. 3d 487 (Fla. 2010); *Kormondy v. State*, 983 So. 2d 418 (Fla. 2007); *Davis v. State*, 136 So. 3d 1169 (Fla. 2014).

[29] The uncontradicted evidence at trial was that Calhoun did not smoke cigarettes. (T. 740, 990).

the reliability of the jury's verdict. There can be no confidence in the outcome of Calhoun's trial.

c. Darren Batchelor

The State used to testimony of Darren Batchelor to corroborate Sherry Bradley's testimony, a point which counsel concedes. (EH. 110). The circuit court also cited to Batchelor's testimony as corroboration of Bradley's flawed identification. (PCR. 2595). Batchelor testified without hesitation that he saw Calhoun at Bradley's store in December of 2010. (T. 677). However, when Batchelor initially spoke to law enforcement, he equivocated on whether or not it was Calhoun who he saw. (EH. 114, EH exhibit 13). Counsel never questioned Batchelor about his prior identification.

Counsel did not provide a strategic reason for not impeaching Batchelor, conceding that it was something she "should have asked him." (EH. 115). Counsel explained that sometimes, she gets so focused on one point that she forgets to question witnesses about other points. (EH. 115). Forgetting to question a witness who integral to the State's case is unacceptable. What's more, Batchelor was called as an identification witness. Identifying Calhoun was the sole purpose of his testimony. Forgetting to impeach an identification witness with prior uncertainties about their identification is constitutionally deficient.

Batchelor bolstered his identification of Calhoun by testifying that he knew Calhoun from attending school together. (T. 677). However, Batchelor is twelve years older than Calhoun. (EH. 113). In the words of counsel, "there's no way they could have gone to school together." (EH. 113). Counsel should have known this prior to trial, however she failed to conduct any pretrial investigation into Batchelor. (EH. 111).

In its order denying relief, the circuit court attempted to blame counsel's failure to prepare on Calhoun. (PCR. 2583). In doing so, the circuit court ignored counsel's independent constitutional obligation to prepare adequately for trial. *See, Magill v. Dugger,* 824 F. 2d 879, 886 (11th Cir. 1987). Counsel's failure to adequately prepare for trial left her woefully unprepared to react to Batchelor's testimony and rendered her performance deficient.

The prejudice suffered by Calhoun due to counsel's failure to impeach Batchelor is clear. Not only did his testimony provide the State with a second, desperately needed eyewitness, he also corroborated the testimony of Sherry Bradley, who was a critical witness for the State. Without Batchelor, the State would have been left with the shaky identification of Bradley, which as discussed *supra*, was easily discredited. This impeachment evidence was critical to arguing reasonable doubt to the jury, which counsel claimed to be her theory of defense.

Counsel failed to utilize this helpful evidence and as a result, there can be no confidence in the outcome of Calhoun's trial.

d. Brittany Mixon

Brittany Mixon played a central role in Calhoun's case. At trial, counsel attempted to make the argument that Brittany planted or tampered with evidence. "Because her father is Doug Mixon, the implication [that she was involved] was there." (EH. 132).[30] Counsel did not, however, provide the jury with a motive for why Brittany would want to implicate Calhoun in Mia Brown's murder. Furthermore, as illustrated by Claim IV(A), *supra*, counsel never actually implied that Doug Mixon was the one responsible for Mia Brown's death.

At trial, Brittany Mixon testified that Calhoun was her boyfriend and that Mia Brown was a longtime friend of hers. (T. 703). According to Brittany, on the evening the pair went missing, Calhoun was supposed to be getting a ride to her house from Mia Brown. (T. 704, EH. 130). Brittany testified on December 17, 2010, she went looking for Calhoun and saw law enforcement gathered at Charlie's Deli, so she attempted to call the deli to speak with Mia. (T. 709). According to Brittany, she found out shortly thereafter that Calhoun and Mia were missing.

[30] Counsel's statement completely refutes the circuit court's finding that Calhoun cannot establish prejudice because Doug Mixon was the focus of counsel's theory of defense, not Brittany Mixon. (PCR. 2584).

Counsel was provided with the telephone records for both Charlie's Deli and Mia Brown through pre-trial discovery. (EH. 126). The records for Charlie's Deli fail to show a single phone call from a number linked to Brittany Mixon. (EH. 127-28, EH exhibit 16). Though Brittany testified that her calls went unanswered, the phone records for Charlie's Deli show calls at 10:25 p.m. and 3:46 a.m. from other numbers that show a duration of mere seconds. (EH exhibit 16). Thus, the records show all incoming calls, regardless of whether or not the phone is answered. (EH. 409). Likewise, the telephone records for Mia Brown's cell phone fail to show a single incoming call from a number linked to Brittany Mixon. (EH. 130, EH exhibit 10).

In sum, despite the fact that both her boyfriend and close friend were missing, Brittany Mixon failed to make a single attempt to contact Mia Brown. The reasonable inference is that Brittany never called because she already knew what happened. Counsel testified that a lot of things Brittany Mixon did were "suspicious." (EH. 132). Given the suspicious actions of Brittany, combined with counsel's argument to the jury that Brittany Mixon planted or tampered with evidence, and her stated strategy that she was blaming the crime on Doug Mixon, it is unfathomable that she would not want to portray that to the jury. Counsel did not provide a strategic reason for failing to question Brittany Mixon regarding the phone

records and conceded that that she should have. (EH. 132). Counsel's failure to do so was objectively unreasonable and was deficient performance.

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 of evidence, that being, she wanted to help or protect her father, and possibly herself. Implicating Brittany Mixon in a nefarious plot to frame Calhoun would have given credence to counsel's Mixon-did-it theory of defense. Not utilizing this evidence left the jury at a loss for why Brittany would want to frame Calhoun, and impeded counsel's ability to tie Doug Mixon to the murder. Counsel's omission prevented Calhoun from receiving a fair trial and as a result, there can be no confidence in the outcome of the proceedings.

e. Tiffany Brooks

Tiffany Brooks testified that she found Calhoun sleeping in her family's shed in the early morning hours of December 18, 2010. (T. 780). She went on to describe Calhoun's time at her family's house up until the point that Calhoun left. (T. 780-83). Additionally, she testified that she received a telephone call from her boyfriend, Steven Bledsoe. (T. 784). After the State asked "What did he tell you?" Brooks testified that Bledsoe told her that he saw a missing persons flier with Calhoun's picture on it, as well as the picture of a girl. (T. 784). At no point did counsel raise a hearsay objection or a confrontation clause objection to this testimony.

Immediately after eliciting Bledsoe's hearsay statements, the State elicited from Brooks that Calhoun denied knowing the girl pictured in the flier with him. (T. 784). The State went on to emphasize this point, asking "He didn't know Mia Chay Brown?", "Is that what he told you?" and "Are you sure about that? He didn't know Mia Chay Brown?" (T. 784-85). The State clearly wanted to make the point that Calhoun would not lie about knowing Mia unless he was guilty of kidnapping and killing her. Indeed, in closing the State argued Calhoun's statement was evidence of consciousness of guilt. (T. 1158-60).

Counsel testified that she had no strategic reason for not objecting to this classic hearsay question. In fact, counsel had no idea why she failed to object. (EH. 135). Counsel explained that she will sometimes miss and objection due to a client talking to her, however she could not say that was the case here. (EH. 135). Moreover, counsel conceded that Calhoun talking was unlikely the reason, given the fact that she missed the same objection with the very next witness. (EH. 135). Counsel's failure to object to classic hearsay, which then allowed the State to argue consciousness of guilt, was objectively unreasonable and constitutes deficient performance.

Without eliciting the hearsay statements of Bledsoe, the State would have been unable to elicit from Tiffany Brooks that Calhoun claimed not to know Mia Brown, as Bledsoe's phone call precipitated the entire conversation between

Calhoun and Brooks. It had to strike the jury as odd, at best, that Calhoun allegedly lied about knowing Mia Brown. The obvious reason for doing so is that he kidnapped and murdered her. Had counsel made this basic hearsay objection, the State would have been deprived of this damaging evidence, which it used to argue consciousness of guilt. Because of counsel's failure, there can be no confidence in the outcome of Calhoun's trial.

f. Glenda Brooks

Glenda Brooks' testimony was nearly identical to that of her daughter, Tiffany Brooks. For the sake of brevity, undersigned relies on the argument made in Claim IV C(3)(f), *supra*, as it relates to counsel's failure to object to inadmissible hearsay. The factual matters and argument contained in that claim are fully incorporated herein by specific reference.

Additionally, in its order denying relief, the circuit court found "[T]his as a prime example of a Defendant who had not been active in his defense constantly interrupting counsel during a direct-examination." The circuit court's finding is not supported by competent, substantial evidence. Counsel never testified that Calhoun was constantly interrupting her, nor did she testify that an interruption from Calhoun was the reason she missed two basic hearsay objections. In fact, counsel was clear that she did not know why she missed the objections and clarified that she was not

saying that Calhoun was constantly interrupting her. (EH. 135). Any finding indicating otherwise is contrary to the evidentiary hearing record.

Counsel's failure to object to this improper and prejudicial hearsay evidence can only be classified as deficient performance which prejudiced Calhoun.

g. Jennifer Roeder

Counsel conceded that she could have used Roeder to establish how an SD card is removed from a camera but that she did not think to even ask her. (EH. 140-41). It was unreasonable for counsel not to highlight for the jury the amount of effort it takes to remove an SD card and the suspicious nature of the SD card's convenient location.

Counsel also failed to ask a single question related the compromised nature of the SD card due to Lt. Raley's actions and its impact on reliability of the evidence. The facts of this claim are detailed in Claim IV (B)(3), *supra*. The factual matters and argument contained in that claim are fully incorporated herein by specific reference. Counsel's reason for not asking Roeder about Lt. Raley accessing the SD card without forensic protection was because it was her impression that the State already addressed it during direct examination. (EH. 145). Her reasoning falls flat. At no time during Roeder's testimony is it revealed that Lt. Raley improperly accessed the files on the SD card. (T. 914-922).

Counsel failed to adequately cross-examine Roeder and elicit testimony that counsel herself believed was necessary and important for the jury to hear. This failure was objectively unreasonable and constitutes deficient performance.

Counsel testified that she wanted to establish that "everything looked just a little too made up.", yet she failed to point out the convenient location of the SD card. (EH. 148). She also wanted to imply that Brittany Mixon planted or tampered with evidence. These arguments could have been strengthened had she bothered to question Roeder about the force necessary to remove SD cards from cameras and the convenient location of Mia Brown's SD card. Counsel failed to use this readily available evidence to bolster her own theory of defense, depriving Calhoun of the ability to make a strong case for reasonable doubt. What's more, had counsel effectively cross-examined Roeder she would have had a solid evidentiary basis to argue that the evidence in Calhoun's case was tampered with – whether intentionally or inadvertently, and was compromised and unreliable as a result. Such testimony by Roeder would have enabled her to cast a serious doubt as to the State's timeline, which was already problematic. Failure to do this was unreasonable and as a result, there can be no confidence in the outcome of the proceedings.

h. Michael Raley

At trial. Lt. Raley testified that Brittany Mixon called Charlie's Deli

numerous times on the morning of December 17, 2010 from a phone number belonging to her grandparents. (T. 764). As discussed in Claim IV(3)(C)(e), *supra*, the phone records fail to show a single phone call from a number associated with Brittany Mixon. Counsel failed to question Lt. Raley in regards to this discrepancy.

During cross-examination, counsel asked Lt. Raley about the clothes Calhoun was wearing when he arrived at the Brooks' residence. (T. 1085-86). Lt. Raley testified that the shirt had the word "Fanta" written on it, but he could not provide any further description. He testified that he was not sure whether or not there was a logo on the shirt and said that he would have to see a photograph of the shirt to know. (T. 1086-86). Counsel had been provided a picture of the shirt in question through pre-trial discovery, yet failed to show it to Lt. Raley at trial. (EH exhibit 18). The shirt in question has a logo on the front of it that takes up nearly the entire shirt, as well as the words "Wanta Fanta?" (EH exhibit 18). The shirt Calhoun was actually wearing when he arrived at the Brooks' house is in stark contrast to the shirt Sherry Bradley claimed he was wearing when she saw him at the convenient store. (T. 654, 660). Counsel could provide no reason, strategic or otherwise, why she failed to show Lt. Raley a photograph of the shirt and question him further on this issue. (EH. 156). By failing to question Lt. Raley about Calhoun's shirt, counsel forfeited the opportunity to impeach Sherry Bradley, a witness crucial to the State's case and timeline. This failure on counsel's part was deficient performance.

In what was perhaps counsel's greatest deficiency, she failed to clarify with Lt. Raley when Calhoun claimed to have been in the woods with law enforcement. At trial, Raley testified that during Calhoun's December 20, 2010 interrogation, which took place in the presence of both Lt. Raley and Ofc. Harry Hamilton, Calhoun told them that during the days he was missing, he had been in the woods with law enforcement and "there were three times he was close enough to . . ." (T. 995). Lt. Raley then tapped on the stand and testified that during the interview, Calhoun tapped the side of his leg with his foot. (T. 955). The State presented this statement in a vacuum specifically to mislead the jury regarding Calhoun's location.

What Calhoun actually told Lt. Raley and Ofc. Hamilton was "[Y]'all was tightening up the noose last night [December 19, 2010] when I was in the woods man" and "I'd say more than three times a deputy could of reached out and done like that." (EH exhibit 5). When Lt. Raley asked Calhoun where he was when this happened, Calhoun responded "Down there, close to the Bethlehem Campground. I don't really know where I was in the woods." (EH exhibit 5). Lt. Raley asked Calhoun if he was referring to the Bethlehem Campground "down here in Florida?" saying "You made it all the way down there?" Calhoun confirmed that he did. The jury never heard any of this.

Counsel made a Rule of Completeness argument to the circuit court, seeking to put Calhoun's entire statement into evidence, which was overruled. However,

counsel still had the opportunity to clarify Calhoun's location in the woods for the jury through cross-examination of Lt. Raley, which she failed to do. This is astounding, considering counsel herself testified that she believed the parts of the statement the State cherry picked out to be misleading. (EH. 48). In fact, counsel conceded that Calhoun's statement could have been construed as a confession. (EH. 50). Counsel's failure to clarify for the jury where Calhoun said he was in the woods and when he was there left the jury with the impression that he was in the woods with law enforcement, next to Mia Brown's burnt car, within hours of it being burned. At the evidentiary hearing, counsel provided no reason, strategic or otherwise, for her failure to clarify this point for the jury. Her failure to do so was unreasonable and constitutes deficient performance.

Counsel's failure to effectively cross-examine Lt. Raley allowed the State to seize on the misleading evidence it elicited and argue that Calhoun told Lt. Raley that he was in the woods with law enforcement on Friday afternoon, close to Mia Brown's car, within hours of when the State claimed it was set on fire. (T. 1210-11). Lt. Raley's uncorrected, misleading testimony cast a shadow of guilt over Calhoun, the harm of which cannot be overstated. "[A] defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. *Bruton v. United States*, 391 U.S. 123, 139 (1968). Counsel's failure to clarify

Calhoun's statement to Lt. Raley was unreasonable, deficient, and caused Calhoun great harm. There can be no confidence in the outcome of the proceeding.

In denying Calhoun's claim, the circuit court found that trial counsel would have been in violation of the Code of Professional Conduct had she clarified with Lt. Raley when and where Calhoun told him that he was in the woods. (PCR. 2586). This finding is not supported by the record or any competent, substantial evidence. The circuit court based its finding on counsel's testimony that Calhoun had told her that he had been running in the woods in Alabama before he got to the Brooks' house. (EH. 186). However, Calhoun was not seen at the Brooks' house until Saturday morning, almost 24 hours after Mia Brown's car was burned, according to the State's timeline. (T. 780). Counsel never testified that Calhoun told her he was in the woods right by Mia Brown's car, within hours of it being burned. Nor did counsel testify that Calhoun ever told her that he lied to Lt. Raley when he said he was in the woods with law enforcement in Florida, days after the car was burned. The trial court's finding that counsel was ethically bound not to clarify Calhoun's statement is directly contradicted by the record.

i. Harvey Glen Bush

Bush testified at trial that on the afternoon of December 16, 2010, Calhoun interrupted a conversation Bush was having with Mia Brown to ask her for a ride later that evening. (T. 593-94). He also testified that Mia usually got off work

between 8:00 and 9:00 p.m. (T. 594). Bush was the only witness to actually place Calhoun and Mia Brown in the same place at the same time.

During cross-examination counsel reiterated that Mia usually got off work between 8:00 and 9:00 p.m. and that sometimes the store would close even earlier than that. (T. 596). However, counsel knew for a fact that on the day Mia Brown went missing, Charlie's Deli closed much earlier than usual. During his deposition, Bush testified that he returned to Charlie's Deli around 7:00 p.m. on the evening of December 16, 2010 and that it was already closed. (EH. Exhibit 9). This is curious in light of Jerry Gammons' testimony that a young lady in a light colored car knocked on his door at 8:40 p.m. (T. 606, 612). Counsel conceded that Calhoun's trailer, and by extension Gammons' trailer, were right down the road from Charlie's Deli. (EH. 77). This information was damaging to the State's timeline, as there was no explanation of what Mia Brown was doing between getting off work and showing up at Gammons' trailer. Counsel could not provide a single reason, strategic or otherwise, for failing to elicit this information from Bush. (EH. 79). Her failure to do so was deficient performance.

D. By eliciting damaging evidence in the defense's case in chief, counsel rendered deficient performance that prejudiced Calhoun.

1. Counsel rendered deficient performance that prejudiced Calhoun by eliciting harmful evidence from Glenda Brooks

During the defense's case, counsel called Glenda Brooks as a witness and

elicited from her she became uncomfortable with Calhoun being in her house after she learned of the missing persons flier featuring him and Mia Brown. (T. 1076). Because Brooks had her granddaughter in the house, she wanted Calhoun to leave. (T. 1076).

The testimony was neither relevant nor necessary. It did nothing to disprove the State's case and only served to paint Calhoun as a scary individual who intimidates grandmothers. At the evidentiary hearing, counsel could not recall why she put Glenda Brooks on or elicited the above mentioned testimony. (EH. 138). Counsel theorized that it was because she wanted to show that Brooks' only wanted Calhoun to leave because her granddaughter was there and she did not want an additional person in the house. (EH. 138). Counsel's explanation is nonsensical. It was totally unnecessary for her to make this point, as Glenda Brooks never testified that she asked Calhoun to leave her house. Counsel's decision to call Glenda Brooks and elicited harmful evidence from her was unnecessary, patently unreasonable and was deficient performance.

The circuit court's finding that counsel was "trying to show the inconsistent statements of this witness while also attempting to get this information to the jury." is not supported by competent, substantial evidence and is actually refuted by the record. (PCR. 2587). When counsel recalled Glenda Brooks, she did not impeach her or do anything to show a prior inconsistent statement. Counsel's attempted

impeachment of Brooks with her prior inconsistent statement took place during cross-examination, when Brooks was called by the State, days prior. (T. 795-98). Nor was counsel's purpose for calling Brooks to get "this information", i.e. Calhoun's other statements, to the jury. On direct examination, counsel only asked Brooks questions related to her asking Calhoun to leave. (T. 1075-77). It was not until the State started its cross-examination of Brooks did counsel make an argument that the State opened the door to her being able to ask Brooks' about Calhoun's statement. (T. 1078). There is no evidence that counsel knew what the State was planning to ask on cross-examination prior to her calling Brooks.

Counsel's decision to elicit this harmful evidence caused prejudice to Calhoun. Tiffany Brooks' testimony established that Calhoun spent a substantial amount of time in the Brooks' home on the morning and afternoon of December 18, with no objection from Glenda Brooks. It was not until Glenda Brooks learned of the missing persons flier that she became uncomfortable his presence, a fact the jury would not have known but for counsel eliciting it. The jury could have easily concluded that Glenda Brooks was afraid of Calhoun and believed that he did something wrong, tainting their view of him.

2. Counsel rendered deficient performance that prejudiced Calhoun by eliciting harmful evidence from Michael Raley

At trial, counsel recalled Lt. Raley in her case-in-chief and elicited from him

that a license plate bracket and a piece of cardboard with a tire impression and oil stain were found in a pole barn in Alabama that was owned by Calhoun's family. (T. 1083-84). During the State's cross-examination, Lt. Raley testified that members of Mia Brown's family told him the bracket was consistent with the one on Mia's car and that her car had an oil leak. Lt. Raley testified that he could not conclusively say that the tag bracket and oil stain came from Mia Brown's car. (T. 1089-92). This testimony served no purpose other than to place more damaging evidence in front of the jury.

Counsel testified that she elicited this harmful evidence because "[E]verything looked just a little too made up. Because everything was winding up on property of Johnny Mack . . ." (EH. 148). If this was in fact counsel's strategy, she failed to execute it. Counsel testified that she took the route the State was alleging Calhoun took and that in her mind, the evidence did not fit the State's theory. (EH. 152). However, counsel never explained to the jury how the tag bracket evidence failed to fit the State's theory. Nor did she ever make the argument that it looked "a little too made up." Counsel conceded that she never painted the picture for the jury that the evidence did not fit the State's case and could provide no explanation for why she failed to do so. (EH. 152).

Counsel's decision to elicit incriminating evidence, and her subsequent failure to explain it to the jury, caused prejudice to Calhoun. The jury was left with the

impression that Mia Brown's car was likely at another property connected to Calhoun. The implication is obvious – her car was at a property connected to Calhoun because it was Calhoun who kidnapped and murdered her. The State seized upon counsel's presentation of this incriminating evidence, arguing to the jury that the evidence "absolutely fit the theory" of its case, but they did not introduce it because it could not be conclusively proven. (EH. 1211-12). Had counsel not elicited this evidence, the jury would have never heard it. Counsel's decision to place incriminating evidence in front of the jury was irresponsible, unreasonable and ultimately prejudiced Calhoun.

V. THE CIRCUIT COURT ABUSED ITS DISCRETION BY NOT ALLOWING CALHOUN TO AMEND HIS MOTION FOR POSTCONVICTION RELIEF

"The trial court's denial of a motion to amend is subject to an abuse of discretion standard." *Smith v. State*, 213 So. 3d 722 (Fla. 2017) (citing *Moore v. State*, 820 So. 2d 199, 206-06 (Fla. 2002).

> "A trial court does not abuse discretion in refusing to grant leave to amend when the facts asserted in the amended motion are vague, nonspecific and fail to suggest how relief may be warranted. Additionally, a trial court does not abuse discretion when the facts in the amended motion "were readily available to postconviction counsel at the time that [the defendant] filed his initial 3.851 motion[.]"

Tanzi v. State, 94 So. 3d 482 (Fla. 2012).

A. Newly discovered evidence regarding Robert Vermillion

This claim is predicated on the same evidence regarding Robert Vermillion as the newly discovered evidence claim discussed *supra*, in Claim II(A)(2). The factual matters contained in that claim are fully incorporated herein by specific reference. Additionally, while the circuit court denied Calhoun's Motion to Amend, it signed an order transporting Vermillion to the evidentiary hearing. (PCR. 2001). Calhoun was allowed to proffer the testimony of Vermillion, and the circuit court addressed the merits of the claim in its order denying relief. Thus, both the denial of the Motion to Amend and the denial of relief on the merits by the circuit court are properly before this court. The merits of Calhoun's newly discovered evidence claim are addressed in Claim II(A)(2), *supra*.

The circuit court abused its discretion by not permitting Calhoun to amend his motion for postconviction relief with a newly discovered evidence claim regarding Vermillion. The Motion to Amend regarding Vermillion does not fall into either category contemplated by the Court in *Tanzi*. Rather than filing the claim as a successive motion for postconviction relief at a later point in time, requiring a second *Huff* hearing and a second evidentiary hearing, Calhoun chose the more efficient route. The claim contained all of the information known to counsel as well as a sworn, written statement from Vermillion. (PCR. 1991). Calhoun did not request a continuance of the evidentiary hearing, nor would there have been any prejudice to the State had Calhoun's amendment been granted. At the time of the filing and

evidentiary hearing, Vermillion was housed at the Holmes County Jail, easily accessible to the prosecutor. (PCR. 1998).

B. Newly discovered evidence regarding Keith Ellis

The circuit court further abused its discretion when it denied Calhoun's Motion to Supplement and Amend Defendant's Fifth Amended Motion to Vacate Judgments of Conviction and Sentence and Reopen Evidentiary Hearing to Prove Supplemental Claim (Motion to Amend and Reopen).

The question of whether Mr. Calhoun should have been granted leave to amend and the question of the merits of the amendment are two separate inquiries. Mr. Calhoun only addresses the circuit court's denial of his Motion to Amend and Reopen, as the question of the merits of the amended claim have not been adjudicated by the circuit court, therefore it is not properly before this Court for review.

In his Motion to Amend and Reopen and proposed claim, Mr. Calhoun asserted that a woman named Carol Matheny contacted his legal team on or about October 24, 2017, informing them that Doug Mixon confessed his responsibility for Mia Brown's murder to a fellow inmate named Keith Ellis. (PCR. 2424). Prior to Ms. Matheny's phone call, nobody on Mr. Calhoun's legal team knew of Ellis. His name does not appear anywhere in the voluminous records that were provided pre-trial, nor do they appear in any of the records obtained by post-conviction counsel.

After speaking with Ms. Matheny, Jayson Shannon, an investigator working for Mr. Calhoun arranged a meeting with Ellis where he learned the following: Ellis and Mixon had been housed together at Graceville Correctional Facility when the men struck up a friendship in late July or early August of 2017. (PCR. 2425, 2431). Mixon shared details of his life with Ellis, including accounts of Mixon setting fire to things. (PCR. 2425, 2431). Once, while discussing prison medical costs, the conversation turned to a nurse employed at Graceville C.F. – Carol Matheny. (PCR. 2425, 2432). Mixon then began to elaborate on one of his burning tales, telling Ellis that he burned a girl on Ms. Matheny's property. He also said that Ms. Matheny was the aunt or a family friend of the man who was actually convicted of the crime. (PCR. 2425-26, 2432). According to Mixon, he killed the girl because she was messing around with his daughter's boyfriend. (PCR. 2426, 2432). Mixon told Ellis that he burned the girl up in her car and made it look like "the kid" did it. He went on to say that "the kid" was now on death row for the murder. (PCR 2426, 2432.).

Weeks after this conversation, Mixon was transferred out of the dorm he and Ellis shared. (PCR. 2426, 2433). Ellis did not see Mixon for a period of time until running into him in the medication line. (PCR. 2426, 2433). When Ellis asked Mixon where he had been, Mixon told Ellis that he had been to court and that people were telling on him for burning that girl up in the car. (PCR. 2426, 2433). Mixon said that

even people from Alabama were telling on him. (PCR. 2426, 2433).[31] Mixon mentioned that Ms. Matheny was the one causing all the problems and he was going to have to "deal with her." (PCR. 2426, 2433). Fearing for Ms. Matheny's safety, Ellis informed her what Mixon had said, as well as the assistant warden at Graceville C.F. (PCR. 2426, 2433). He did not speak of it again until approached by Mr. Calhoun's legal team on October 30, 2017. (PCR. 2426, 2434). A sworn affidavit signed by Mr. Ellis was attached to Calhoun's Motion to Amend and Reopen, affirming the facts outlined above. (PCR. 2431).

It is clear the circuit court abused its discretion in denying Calhoun's Motion to Amend and Reopen. The circuit court's order was brief and unreasoned, providing no legal justification for denying the amendment. (PCR. 2437). In his Motion to Amend and Reopen and the attached claim, Calhoun laid out detailed, specific facts to form the basis of his newly discovered evidence claim. (PCR. 2418-2436). Calhoun also engaged in a detailed legal analysis, explaining how the newly discovered evidence of yet another confession by Mixon is such that would probably produce an acquittal on retrial. (PCR. 2427-28). Calhoun detailed the circumstances

[31] Carol Matheny does, in fact, own land bordering Charlie Skinner's property. It was never definitively determined whether the body was found on Skinner's property or the neighboring land. The area where Mia Brown's car was found is visible from a trailer that sits on the property Ms. Matheny owns. Additionally, Calhoun is a friend of the Matheny family. He went to school with Ms. Matheny's daughter and remained close with the family, even after they both graduated from high school.

that led to his filing the newly discovered evidence claim after the conclusion of his evidentiary hearing. It has been shown without a doubt that the facts Calhoun sought to amend his postconviction motion with were not readily available to postconviction counsel at the time he filed his initial 3.851 motion. In fact, many of Mixon's statements alleged in the motion were made *after* the conclusion of Calhoun's hearing.

Given the procedural posture of Calhoun's case at the time this newly discovered evidence came to light, he found himself in a unique situation not contemplated by Fla. R. Crim. P. 3.851. Fla. R. Crim. P. 3.851(f)(4) states, in pertinent part, "The trial court may in its discretion grant a motion to amend provided that the motion to amend was filed at least 45 days before the scheduled evidentiary hearing." While he could have filed a successive petition based on Fla. R. Crim. P. 3.851(d)(2)(A), his initial postconviction motion had yet to reach a point of finality. Counsel's deadline for submitting written closing arguments had not yet come, nor had the circuit court filed an order ruling on Calhoun's claims. Additionally, Fla. R. Crim. P. 3.851(e)(2) allows the circuit court to dismiss successive motions if the court finds the failure to assert those grounds in a prior motion constituted an abuse of procedure, or if the circuit court finds there was no good cause for failing to assert those grounds in a prior motion. In fact, the State has itself argued that a Motion to Amend to supplement claims discovered after an evidentiary hearing is a better

practice than attempting to adjudicate the claims in a successive petition. *See Aguirre-Jarquin v. State*, 202 So. 3d 785, 792-93 (Fla. 2016).

In non-capital cases, it has oft been held that a trial court abuses its discretion when it does not allow a defendant to amend his postconviction motion after an evidentiary hearing is completed but before the trial court has ruled. *See*, *Pritchett v. State*, 884 So. 2d 417 (Fla. 2d DCA 2004)(holding the defendant was entitled to amend his postconviction motion with additional claims where the statutory time period had not expired and the court had not yet ruled on the original claims); *Ramirez v. State*, 854 So. 2d (Fla 2d DCA 2003)(holding the trial court erred in failing to consider the merits of new claims in an amended motion for postconviction relief where the court denied the motion in part but not yet entered a final order disposing of the original motion). Allowing non-capital defendants greater latitude in amending their postconviction motions while denying those under the sentence of death the same opportunity leads to absurd results.

This is not a case where the facts asserted in either amended motion were vague and nonspecific, nor were they readily available to counsel at the time Calhoun's initial 3.851 motion was filed. The circuit court's denial of Calhoun's Motion to Amend regarding Vermillion and his Motion to Amend and Reopen was an abuse of discretion. This Court should remand this issue back to the circuit court for a full and fair evidentiary hearing on the matter.

VI. THE STATE VIOLATED CALHOUN'S DUE PROCESS RIGHTS BY PRESENTING MISLEADING EVIDENCE AND ADVANCING FALSE AND MISLEADING ARGUMENT IN CONTRAVENTION OF GIGLIO/NAPUE[32]

Due process precludes the State from presenting either false or misleading evidence and/or false or misleading argument. *Giglio*, 405 U.S. at 53 ("deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'")

To establish a *Giglio* violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. *Guzman v. State*, 868 So. 2d 498 (Fla. 2003). Under *Giglio*, false testimony is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Guzman, citing United States v. Agurs*, 427 U.S. 97, 103 (1976).[33] Further, the State, as the beneficiary of the *Giglio* violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt. *Guzman* at 506.

Lt. Raley and Ofc. Harry Hamilton interrogated Calhoun on December 20, 2010. At trial, the State cherry picked a few statements made by Calhoun and

[32] *Giglio v. U.S.*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959).
[33] This Court applied a mixed standard of review to *Giglio* claims, deferring to the factual findings made by the circuit court to the extent they are supported by competent, substantial evidence, but reviewing de novo the application of those facts to the law. *See Duckett v. State*, 231 So. 3d 393 (Fla. 2017).

presented them to the jury. Counsel objected, arguing Calhoun's entire statement was admissible under the rule of completeness. (T. 953-54). The trial court overruled counsel's objection and allowed the State to present only the statements it saw fit.[34]

The State asked Lt. Raley if Calhoun made any statements concerning being in the woods with law enforcement in the days leading up to December 20, 2010. (T. 955). Lt. Raley responded in the affirmative, testifying "He leaned over and he made the statement that there were three times that he was close enough to (tapping on desk) he tapped the side of my leg with his foot." (T. 955).

The State took this testimony, presented in a vacuum, and ran with it. During closing arguments, the State told the jury, in no uncertain terms, that the only time Calhoun admitted to being in the woods with law enforcement and the only time that was possible was on the afternoon of Friday, December 17, "where that car was burned." (T. 1210-11). Further, the State made it a point to say with specificity that it was Lt. Raley that was in the woods with Calhoun. (T. 1210-11).

The testimony of Lt. Raley is clearly misleading and the State's argument is patently false. What Calhoun actually told Lt. Raley and Ofc. Hamilton, who was also present during his interrogation, was "[Y]'all was tightening up the noose last night [December 19, 2010] when I was in the woods man" and "I'd say more than

[34] The circuit court's erroneous ruling was later found to be error by this Court. *See, Calhoun v. State,* 138 So. 3d 350, 360 (Fla. 2013).

three times **a deputy** could of reached out and done like that." (EH exhibit 5)(emphasis added). When Lt. Raley asked Calhoun where he was when this happened, Calhoun responded "Down there, close to the Bethlehem Campground. I don't really know where I was in the woods." (EH exhibit 5). Lt. Raley asked Calhoun if he was referring to the Bethlehem Campground "down here in Florida?" saying "You made it all the way down there?" Calhoun confirmed that he did. Calhoun could not have been any clearer with Lt. Raley and Ofc. Hamilton. He was close to **law enforcement** on the **night** of **December 19, 2010** in **Florida**.

The State committed a clear *Giglio* violation. As demonstrated, the evidence and argument were misleading and false. Lt. Raley's testimony and the State's subsequent argument do not match what Calhoun actually said. The State clearly knew the testimony and its subsequent argument was misleading and false, as it fought, successfully, to keep the remainder of Calhoun's statement out of evidence.

The circuit court does not dispute the first two prongs required to establish a *Giglio* violation.[35] In fact, the circuit court conceded the State Attorney "implied Calhoun was in the woods close to where the car was burnt." (PCR. 2595). The circuit court went on to theorize that "even if the State attorney had not **incorrectly**

[35] The portion of the circuit court's order denying Calhoun relief based on claims of a *Giglio*[35] violation was copied and pasted entirely from the State's response, dated November 24, 2015. (PCR. 1170-1173).[35]

implied Calhoun's statements to the investigator, there was still sufficient evidence that he was in close proximity to where the car was found burnt in Alabama. Consequently, the State Attorney did not knowingly present false information to the jury and merely **implied it incorrectly**" (PCR. 2595)(emphasis added). The circuit court's reasoning is nonsensical. Implying something you know to be false and explicitly stating something you know to be false are the same thing. The fact remains, the State told the jury that Calhoun confessed to being with the woods with law enforcement and the only time it was possible was on the afternoon of Friday, December 17, "where that car was burned." (T. 1210-11). That was false and the State Attorney knew it.

Because Calhoun established that the State knowingly presented false testimony and argument at trial, the burden shifted to the State to show that the false evidence was harmless beyond a reasonable doubt. *Guzman* at 506. The circuit court erroneously ignored this point of law, stating that Calhoun "cannot show how this information is material to his case. (PCR. 2595). The burden was not on Calhoun to demonstrate the materiality of the statements. Rather, the burden was on the State to demonstrate that it was not, which it failed to do.

Regardless, the materiality of these false statements cannot be overstated. The case against Calhoun was entirely circumstantial. Counsel conceded that the false testimony and argument could have been construed as a confession and that it was

harmful to Calhoun. (EH. 50). Counsel further conceded that confessions are the most damaging evidence in a case. (EH. 185). As demonstrated above, Calhoun never actually confessed to being in close proximity to Mia Brown's burned car at or near the time it was burned, nor did he ever confess to this crime. The State did not have any direct evidence linking Calhoun to Mia Brown's murder. Its case was nothing more than a hodge-podge of assumptions based on a faulty timeline.

Calhoun has demonstrated a *Giglio* violation that absolutely affected the judgment of the jury. Any argument to the contrary is discredited by the fact that the circuit court, sitting as a fact finder, viewed this evidence in a manner extremely prejudicial to Calhoun.[36] Relief in the form of a new trial is proper.

VII. THE CIRCUIT COURT VIOLATED CALHOUN'S RIGHT TO DUE PROCESS WHEN IT ADOPTED THE STATE'S PLEADINGS IN LIEU OF CONDUCTING AN INDEPENDENT AND IMPARTIAL ANALYSIS

The circuit court's verbatim adoption of the State's written responses and its closing argument violated Calhoun's right to due process and presents an additional consideration for this Court in deciding Calhoun's case.[37]

[36] The circuit court characterized this evidence as Calhoun "boast[ing] about being in the woods near the car, the very afternoon it was burned, hiding from Raley." (EH. 188).

[37] Pure questions of law are subject to de novo review. *See State v. Glatzmayer*, 789 So. 2d 297 (Fla. 2001).

Fla. R. Crim. P. 3.851(f)(5)(F) states that "**the court** shall rule on each claim considered at the evidentiary hearing and all other claims raised in the motion, making detailed findings of fact and conclusions of law with respect to each claim, and attached or referencing such portions of the records as are necessary to allow for meaningful appellate review."(emphasis added).

It is axiomatic than an order granting or denying a petitioner postconviction relief must be an order of the **court**. Courts have routinely disavowed the practice of mechanically adopting the findings of facts and legal conclusions prepared by one party to the controversy. *See*, *Ex Parte v. Scott*, 2011 WL 925761 (Ala. 2011)(reversing and remanding a trial court's order adopting verbatim the State's answer as its order denying postconviction relief because "by its nature," the appellate court could not conclude the order was the manifestation of the findings and conclusion of the lower court); *Cuthbertson v. Biggers Bros., Inc.*, 702 F. 2d 454 (4th Cir. 1983) (condemning lower courts for the practice of adopting the prevailing party's proposed findings of fact and conclusions of law and remanding, directing the district court to prepare its own findings of fact and conclusions of law); *Ingram v. State*, 51 So. 3d 1119 (Ala. 2010) (reversing denial of postconviction relief where state court judge adopted verbatim a proposed order which included erroneous factual findings); *Commonwealth v. Beasley*, 967 A.2d 376, 395 (Pa. 2009)

(criticizing postconviction judges who have resorted to "wholesale adoption" of the prosecution's briefs).

This Court has previously held that due process was not violated when a trial court adopts the State's **proposed order** in postconviction cases where the defendant had notice of the request for proposed orders and an opportunity to submit his or her own proposed order and/or objections. *See, Glock v. Moore*, 776 So. 2d 243 (Fla. 2001); *Groover v. State*, 640 So. 2d 1077 (Fla. 1994); and *Patton v. State*, 784 So. 2d 380 (Fla. 2000). That is not what occurred in Calhoun's case. The circuit court did not ask the parties to submit **proposed orders**, rather it directed the parties to submit **written closing arguments**, pursuant to Fla. R. Crim. P. 3.851(f)(5)(E). In accordance with that section, Calhoun was not afforded the opportunity to file an answer or reply to the State's closing. Nor was Calhoun on notice that the written closing arguments would effectively be regarded as proposed orders.

The circuit court's order spans fifty-three pages. (PCR. 2557-2609). The first seven pages contain the facts of Calhoun's case, as recited by this Court's opinion on direct appeal. (PCR. 2557-2563). The next three pages detail the procedural history of Calhoun's postconviction history, followed by the circuit court's granting of *Hurst* relief. (PCR. 2564-2566, 2567).

On page twelve of its order, the circuit court ostensibly begins its legal and factual analysis of Calhoun's postconviction claims. (PCR. 2568). What follows is

an order containing analysis that is roughly seventy-five percent copied verbatim from the State's written responses and closing argument. By comparing the circuit court's order to the State's pleadings, Calhoun has been able to deduce the following: (1) pages 12-19, 37, 39, 40-42, 45, and 51-52 are entirely taken from the State's pleadings, the only additions being headers; (2) pages 20, 30-31, 33, 35-36, 38, and 43-44 are nearly entirely taken from the State's pleadings, only containing one to two small, original paragraphs; and (3) pages 25-26, 28-29, 32, 46, and 50 all contain portions taken entirely from the State's pleadings. In sum, out of forty pages that purport to contain the circuit court's factual and legal findings, roughly thirty of them contain purported "findings" copied verbatim from the State's pleadings, either in part or in full.

The circuit court's order is further subject to concerns of denial of due process because the court failed to address, let alone acknowledge, any of the evidence or argument Calhoun offered in support of his claims for postconviction relief. It would appear the circuit court failed to read Calhoun's written closing argument, much less give it any independent thought or analysis.

As a consequence of copying the State's pleadings verbatim, the circuit court applied an incorrect and heightened standard of proof to Calhoun's ineffective assistance of counsel claims. In determining what constitutes a probability sufficient to undermine confidence in the outcome, the circuit court asserted that Calhoun

"must show that but for counsel's alleged errors, he probably would have received an acquittal at trial or a life sentence during the penalty phase. Gaskin v. State, 822 So. 2d 1243, 1247 (Fla. 2002)." (PCR. 2568)[38]. It is evident that due to this error, the circuit court violated Calhoun's due process right to a fair postconviction proceeding by erroneously applying a heightened standard of proof.

By its nature, the circuit court's order in Calhoun's case is not the product of an independent, impartial and reasoned decision by the court. This Court should harbor serious doubts regarding the circuit court's findings, and should not give any deference to the conclusions of law or findings of fact of the circuit court in this case. The circuit court's verbatim adoption of the State's pleadings casts doubt upon the independence of the court's thought processes and fails to provide a clear understanding for the basis of the circuit court's decision.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing and the record before this Court, Calhoun respectfully urges this Court to reverse the circuit court, grant a new trial, and grant such other relief as this Court deems just and proper.

[38] Nowhere in *Gaskin* did this Court state that a defendant claiming ineffective assistance of counsel must show that he "probably would have received an acquittal at trial." There is such a standard in postconviction law; it is found in case law regarding claims based on newly discovered evidence. As noted by the *Gaskin* Court itself, the standard of proof for newly discovered evidence claims is higher than the standard of proof required for claims based on ineffective assistance of counsel.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copy of the foregoing brief has been electronically filed with the Clerk of the Florida Supreme Court, and electronically served upon Lisa Hopkins, Assistant Attorney General on the 18th day of July, 2018.

/s/ KATHLEEN PAFFORD
Kathleen Pafford
Assistant CCRC-North
Florida Bar No. 99527
1004 DeSoto Park Drive
Tallahassee, FL 32301
(850) 487-0922

Elizabeth Salerno
Assistant CCRC-North
Florida Bar No.

COUNSEL FOR THE APPELLANT

CERTIFICATE OF FONT

I hereby certify that the foregoing Initial Brief was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

/s/ KATHLEEN PAFFORD
Kathleen Pafford
Assistant CCRC-North
Florida Bar No. 99527

IN THE SUPREME COURT OF FLORIDA

JOHNNY MACK SKETO CALHOUN,

Appellant,

v.

CASE NO. 18-340
Lower Tribunal No.
2011-CF-11
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR HOLMES COUNTY, FLORIDA

RESPONSE BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

LISA A. HOPKINS
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 99459
The Capitol, PL-01
Tallahassee, Florida 32311
Telephone: (850) 414-3300
Facsimile: (850) 414-0997
Lisa.Hopkins@myfloridalegal.com
capapp@myfloridalegal.com

Counsel for Appellee

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STATEMENT OF THE CASE AND FACTS

The relevant facts concerning the murder of Mia Chay Brown are recited in this Court's opinion on direct appeal:

> Johnny Mack Sketo Calhoun and Mia Chay Brown were both reported missing on December 17, 2010. On December 20, Brown's remains were found bound and burnt in her car, which had been lit on fire in the woods of Alabama. Calhoun, thought to be the last person to see Brown alive, was found hiding in the frame of his bed inside his trailer on December 20.
>
> **Guilt Phase**
>
> Brown worked at Charlie's deli and grocery store in Esto, Florida. Harvey Glenn Bush saw Brown working at Charlie's deli around 1 to 1:30 p.m. on December 16, 2010, and knew Brown drove a white car. Bush heard Calhoun ask Brown for a ride that evening and Brown responded that she would pick him up after work at approximately 8 to 9 p.m.
>
> Brown drove to Jerry Gammons' trailer in a light colored, four-door car and knocked on his door at about 8:40 p.m. on December 16. Brown asked for Calhoun, and Gammons told her that Calhoun did not live there. America's Precious Metals junkyard, where Calhoun's trailer was located, is approximately one road down from Gammons' trailer.
>
> Brandon Brown, Brown's husband, talked with Brown at lunch time on December 16 while she was working at Charlie's deli. Brown usually got off of work at approximately 9 p.m. Brandon called Brown at 10 p.m. because she was not home. Brandon fell asleep on the couch at about 10:30 p.m., and when he woke up at 2 a.m., his wife was still not home. It was unusual for Brown not to come home; Brandon started calling family members to find her.

Sherry Bradley, the manager at Gladstone's convenience store located between Enterprise and Hartford, Alabama, testified that Calhoun came into her store between 5:30 and 6:00 a.m. on December 17, 2010, and bought cigarettes. Bradley noticed scratches and dried blood on his hands and sores on his face. Calhoun was wearing a white shirt that had spots of blood on it and there was something black underneath his fingernails. She asked Calhoun about his appearance, and he responded that he had been deer hunting. Calhoun was driving a white, four-door car with a Florida license plate. Darren Bratchelor, a former schoolmate of Calhoun's, also saw Calhoun at the convenience store at about 6 a.m. After that day, Bradley left town for a few days, but when she returned, another employee had posted a missing persons flyer in the store, on which she recognized Calhoun's photograph.

Chuck White, a patrol officer for Holmes County, Florida, arrived at America's Precious Metals at 8 a.m. on December 17. White looked in Calhoun's trailer and found clothes and trash scattered everywhere. Calhoun was not there. On cross-examination, White testified that Sketo Calhoun (“Sketo”) and Terry Ellenburg, co-owners of America's Precious Metals, told him that there had been a break-in at the junkyard, that there were pry marks on Calhoun's trailer door, and that the skid steer loader, or Bobcat, had been hot-wired and moved. White noticed many tire tracks around the yard. White acknowledged that he did not secure Calhoun's trailer before he left the yard.

Brett Bennett, a cattle broker in Geneva, Alabama, noticed smoke from the highway on December 17 at approximately 11 a.m. Keith Brinley, a school maintenance employee in Geneva, Alabama, also saw a big fire behind the Bennett residence at about that same time.

Tiffany Brooks, a resident of Hartford, Alabama, found Calhoun in her family's shed on the morning of December 18, 2010. Calhoun was on the ground wrapped in sleeping bags that the family kept around the freezer. Calhoun was wearing overalls and a white t-shirt and was wet and dirty. Brooks brought Calhoun into the house and the family washed his clothes, gave him new clothes, let him shower and nap, and

gave him some food. Steven Bledshoe, Tiffany's boyfriend, called the Brooks' residence and told them about the missing persons flyer he saw with Calhoun and Brown's pictures on it. Calhoun told the Brooks he did not know Brown but she was probably the person who was supposed to pick him up at his trailer the night before. Calhoun had the Brooks drop him off at a dirt road. Glenda Brooks, Tiffany's mother, also testified to these events.

Brittany Mixon, Calhoun's ex-girlfriend, testified that she went to school with Brown and that Brown knew Calhoun through her and from working at the convenience store. On December 16, Mixon stayed at her father's house and expected Calhoun to come over that night but he never came. Mixon drove to America's Precious Metals on the morning of December 17 to find Calhoun because he did not have a phone to call. Mixon used to live in Calhoun's trailer with him but moved out in October of that year. She testified that they had lost the key to the trailer so they had had to pry the door open to get inside the trailer. Mixon asked Sketo if he had seen Calhoun, but he had not. Mixon looked inside Calhoun's trailer; no one was inside, but the trailer was ransacked. Lieutenant Michael Raley of the Holmes County Sheriff's Office investigated Brown's missing persons report. He called Mixon, who told Raley about a campsite in Hartford, Alabama, approximately ten miles from America's Precious Metals, where Mixon and Calhoun would camp. The campground was on the property of Charlie Skinnard, Calhoun's brother-in-law. Mixon met the Brooks family once while camping with Calhoun. She took Raley to the campsite. Raley noted that the burnt car was off of Coleman Road, approximately 1,488 feet away from Calhoun's campsite. The Brooks' residence was approximately 1.5 miles from the burnt car.

Angie Curry, Priscilla Strickland, and Mixon went to Calhoun's trailer around 4 p.m. on December 17. Mixon went into the trailer and found wine, a purse, and menthol cigarettes. They took the items and called the police. Brandon identified the purse as belonging to Brown. When Mixon gave Brown's purse to Raley, Raley sent a police officer to

Calhoun's trailer to secure it until they got a search warrant. On cross-examination, Mixon acknowledged that Sketo and Ellenburg told her that the trailer had been broken into and not to go in it, but she did anyway. She stated that Calhoun did not smoke cigarettes and did not have cable television service in his trailer.

Dick Mowbry, former game warden for Geneva County, Alabama, participated in a search for Brown and Brown's vehicle on December 20, 2010. He found a burnt, white Toyota with no license plate. The entire inside of the car was burnt and while he was looking through the front of the car, he saw a rib cage in the trunk, so he called the police.

Mike Gillis, with the Alabama Bureau of Investigation, responded on December 20 to the call regarding the burnt vehicle. Remains of a body were in the trunk of the car. There was what looked like coaxial cable wrapped around the wrists of the body; duct tape was also found in the car.

On December 21, 2010, Dr. Stephen Boudreau, a medical examiner for Alabama, received the human remains found inside the burnt car. The remains were badly burnt; the hands and lower limbs had been burnt off. Dr. Boudreau was able to identify the remains as female because the uterus and vagina were not destroyed, but the sex organs were denatured, or heated, to such an extent that there was no way to analyze them. He found coaxial cable wrapped around what was left of the remains' upper arms and tape on the neck. Dr. Boudreau determined that the cause of death was smoke inhalation and thermal burns and that the death was a homicide. He found soot embedded in the airway of the lungs' mucus blanket and carbon monoxide in the back tissue, meaning that the victim had inhaled smoke. Dental x-rays matched those of Brown's. On cross-examination, the defense elicited that no foreign DNA was found in Brown's vagina. Dr. Boudreau also acknowledged that no ends of the coaxial cable were found, and that he could not determine whether Brown was conscious or not when she inhaled the smoke or at what point in time she would have lost consciousness.

On December 20, 2010, Jeffery Lowry, deputy state fire marshal with the Alabama Fire Marshal's Office, took debris samples from the burnt car and sent them to the Alabama and Florida laboratories. Jason Deese, an arson investigator for the Florida Bureau of Fire and Arson, testified that on December 22, 2010, he inspected the car. The vehicle identification number (VIN) was matched to a 2000 Toyota Avalon. Brown owned a four-door 2000 Toyota Avalon. The fire originated in the driver's seat and passenger compartment; it was not an engine fire. Perry Koussiafes, senior crime laboratory analyst for the Florida Fire Marshal's Office, received six samples from the car on December 30, 2010. The samples from the right front quarter and left quarter of the car tested positive for ignitable liquid.

Trevor Seifret, a crime lab analyst for the Florida Department of Law Enforcement (FDLE), testified that blood found on the cardboard of a roll of duct tape taken from Calhoun's trailer was a major donor match to Brown and a minor donor partial match to Calhoun. Blood found on blankets taken from Calhoun's trailer were total matches to Calhoun and Brown. DNA from hair found in Calhoun's trailer also matched Brown; Seifret testified that DNA is found on hair only when the hair is pulled out of the scalp.

Jennifer Roeder, a digital evidence crime analyst for FDLE, testified that an SD memory card found in Calhoun's trailer was from Brown's camera, and based on the time and date stamps of other pictures on the camera, the last picture was taken between 3:30 and 4:00 a.m. on December 17, assuming no one reset the clock on the camera.

On December 20, 2010, Harry Hamilton, captain of the Holmes County Sheriff's Department, seized Calhoun's trailer pursuant to a search warrant. He noticed that the evidence tape on the door had been broken. He found Calhoun hiding under his mattress in the bed frame in his trailer. Calhoun had scratches on his hands, arms, and neck.

Raley executed a second search of Calhoun's trailer on December 28 at the impound yard of the Holmes County Sheriff's office after Brown's

remains had been found. He found a TV face down on the mattress of the bed and a DVD player. A VCR was on the floor and the top was off, with wires tangled in the corner. A converter box with outputs for a coaxial cable and a TV with a coaxial coupling were found, but no coaxial cable was found in the trailer.

The State rested, and the defense provided witnesses as follows. José Martinez, owner of the Friendly Mini-Mart, testified that Calhoun came to his store on December 16 and bought a pack of cigars, wine, and apple cider. He never knew Calhoun to buy cigarettes.

Matt Crutchfield who lived near America's Precious Metals was awakened on December 17 between 1 and 3:30 a.m. by a loud bang. He had heard the noise before and thought it came from the recycling plant. Monica Crutchfield, his wife, was also awakened by a loud noise that came from America's Precious Metals, but she testified that she had never heard that noise before. Darlene Madden, who lived one block from America's Precious Metals, awoke to a loud noise that sounded like cars colliding at approximately 2:30 to 3:00 a.m. She testified that she may have heard a second noise but did not get up to investigate it.

John Sketo, Calhoun's father and co-owner of America's Precious Metals, testified that Calhoun's trailer was located beside the scrap yard. Sketo arrived at the scrap yard at approximately 7:30 a.m. on December 17 and noticed that the Bobcat was missing from the place it had been the day before. He also noticed that the door to Calhoun's trailer was open. Sketo testified that none of this was like that the day before. Ellenburg called the police. Ellenburg and Sketo found the Bobcat by the loading dock, and they thought it had pushed something off of the dock. Tread marks on the ground had not been there the day before. Sketo looked in Calhoun's trailer and it looked like someone had searched it; drawers were open and things were strewn about. Sketo saw a small grill on Calhoun's bed, which usually remained outside the trailer. Sketo did not see anyone in the trailer. He did not see a purse on the floor of the trailer. Sketo exited the trailer and left the door open.

Mixon arrived at the junkyard and asked if Sketo had seen Calhoun. Sketo replied that he had not and told Mixon not to go into the trailer because someone had broken into it, but Mixon went into the trailer anyway. Mixon was in the trailer for about one minute. Then Mixon left the junkyard. Sketo went back into the trailer and found Calhoun's gun leaning against the couch on the floor. Sketo testified that if the gun had been there the first time he went into the trailer he would have noticed it. He stated that the gun was not there before Mixon went into the trailer. On cross-examination, the State elicited from Sketo that he did not see Mixon carry the gun or anything else into the trailer.

Ellenburg testified that he arrived at the junkyard at approximately 7:30 a.m. on December 17. He stated that Calhoun's door did not have pry marks on it the day before, and Calhoun's trailer was not in disarray the day before. He did not see a gun in the trailer the first time he looked. He stated that the tire tracks near the loading dock and next to the Bobcat looked like they were made by a dual-wheeled vehicle. A corner of the cement steps was also knocked off, and had not been like that the day before.

Lieutenant Raley searched a barn in Pine Oak Community in Geneva, Alabama, and a license tag bracket matching the description of one on Brown's car was found at the property. There was also a piece of cardboard that had oil and tire marks on it. Brown's family told Raley that her car had a small oil leak. However, Raley could not trace the oil stain or the bracket to Brown's car.

On February 28, 2012, the jury returned a verdict of guilty of first-degree murder and kidnapping.

Penalty Phase

The State moved for admission of all evidence from the guilt phase into the penalty phase and rested.

The defense provided witnesses as follows. Pastor A.J. Lombarin, Cliff Jenkins, and Ryan George, all ministers to Calhoun, each testified that

Calhoun was devoted to Christian study and ministered to other inmates while awaiting the instant trial. Patrick O'Dell, an inmate, testified that Calhoun invited him to bible study and was his mentor, teacher, and minister, and changed the course of O'Dell's life by telling him to take responsibility for his actions. Jerry Pappas, an inmate, testified that Calhoun was like a brother to him and changed his life for the better. Darryl Williams, a former inmate, testified that Calhoun helped him change and encouraged him to witness to others outside of the jail.

Lieutenant Bill Pate, a security officer at the Holmes County jail, testified that Calhoun had no behavioral problems while incarcerated and that his only prior criminal record was driving while his license was suspended and violating probation.

Charlie Skinner, Calhoun's brother-in-law, testified that Calhoun was generous to a fault and that he had given his life to God. Sharon Calhoun, Calhoun's mother, testified that Calhoun and his father had a close relationship. Calhoun has a son with whom he is very close and to whom he is a good father. Calhoun also treated Mixon's son like his own son. Sharon testified that Calhoun was a good student, a boy scout, never got into trouble, and sends preachers to his father to help counsel him.

The jury recommended a sentence of death by a vote of nine to three.

Spencer[1] Hearing

Betsy Spann, Calhoun's sister, testified that Calhoun was like her best friend and kept her out of trouble while they were growing up. Sharon Calhoun testified that Calhoun had found God and that Calhoun was innocent. John Searcy, a minister who had gone to counsel Calhoun on the night of the verdict, testified that Calhoun had actually counseled him that night. Following the conclusion of the Spencer hearing, the

[1] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

> trial court allowed victim impact statements from Brown's family members.
>
> The trial court found three aggravators: (1) cold, calculated, and premeditated (CCP)—very great weight; (2) during the commission of a kidnapping—great weight; and (3) for the purpose of avoiding arrest—very great weight. The trial court found one statutory mitigator: no significant history of criminal activity—significant weight, and five nonstatutory mitigators: (1) good jail conduct pending and during trial—little weight; (2) positive role model to other inmates—some weight; (3) capable of forming loving relationships—little weight; (4) childhood history—little weight; and (5) defendant will be incarcerated for the remainder of his life with no danger to others—minimal weight. The trial court gave the jury recommendation of death great weight. The trial court concluded that the aggravating circumstances far outweighed the mitigating circumstances and sentenced Calhoun to death for the murder of Brown and 100 years of imprisonment for the kidnapping of Brown.

Calhoun v. State, 138 So. 3d 350, 354-59 (Fla. 2013) (internal page numbers omitted).

On direct appeal, this Court addressed five issues: (1) whether the trial court erred in excluding Calhoun's exculpatory statements to the police under the rule of completeness; (2) whether the trial court erred in finding the aggravators of cold, calculated, and premeditated (CCP) and avoiding arrest; (3) a Ring[2] claim; (4) sufficiency of the evidence; and (5) proportionality.

On October 31, 2013, after briefing and oral argument, this Court issued its

[2] Ring v. Arizona, 536 U.S. 584 (2002).

opinion striking the avoid arrest aggravator and rejecting the remainder of Calhoun's issues on appeal. This Court also found the evidence was sufficient to support Calhoun's conviction for one count of first-degree murder. On October 6, 2014, the United States Supreme Court denied the petition for writ of certiorari. Calhoun v. Florida, 135 S.Ct. 236 (2014).

On September 25, 2015, the Appellant filed a Motion to Vacate Judgment and Sentence under Rule 3.851 with Special Leave to Amend. The State filed its Answer on November 24, 2015. Thereafter, Appellant, through counsel, amended his motion on February 11, 2016, raising Claim 13, a Hurst v. Florida[3] claim. The State addressed the claim at the Huff[4] hearing held on April 21, 2016. Subsequently, on August 16, 2016, Appellant filed a Second Amended Motion to Vacate Judgments of Conviction and Sentence, raising Claim 14. The postconviction court ordered the State to respond within 20 days pursuant to rule 3.851(f)(4). The State filed its response on October 3, 2016. On June 22, 2017, Appellant filed a Motion to Supplement and Amend Defendant's Third Amended Motion to Vacate Judgments of Conviction and Sentence, raising two additional claims. The State filed its response on July 7, 2017. An evidentiary hearing was held on September 15, 19, and 20, 2017, where Calhoun presented testimony and exhibits to support his Motions.

[3] Hurst v. Florida, 136 S.Ct. 616 (2016).
[4] Huff v. State, 622 So. 2d 982 (Fla. 1993).

Because the evidentiary hearing did not produce any evidence that entitled Calhoun to relief, the postconviction court issued an order denying him relief on his guilt-phase claims and ordered a new penalty phase under Hurst. This appeal followed.

REFERENCES

References to the Appellant will be to "Calhoun" or "Appellant." References to the victim in this case will be to "Mrs. Brown" or "the victim."

Citations to the record shall be designated as follows: The direct appeal record shall be referred to by "R" and followed by the volume and page number; references to Calhoun's Motion shall be referred to by "Motion" followed by the page number; references to Calhoun's Amended Motions shall be referred to by "Second/Third/Fourth Amended Motion" followed by the page number; references to the evidentiary hearing transcripts shall be referred to by "Evid. Hrg. Trans." and the page number. Any other references will be self-evident.

JURISDICTION

Initially, the State questions whether this Court has jurisdiction of this case given the postconviction court's order granting a new penalty phase pursuant to Hurst v. State, 202 So. 3d 40 (Fla. 2016). See State v. Preston, 376 So. 2d 3, 4 (Fla. 1979) (where this Court declined to hear an interlocutory appeal from a murder trial because the death penalty had not yet been entered); Trepal v. State, 754 So. 2d 702, 706-07 (Fla. 2000) (holding that this Court had jurisdiction to hear an

interlocutory appeal arising during capital postconviction proceedings because a valid death sentence was imposed in the defendant's case). It remains the State's position that because there is no final judgment and sentence in Calhoun's case at this time, his appeal is untimely and this Court lacks the necessary jurisdiction to hear the appeal. Holding Calhoun's appeal in abeyance will moot any jurisdictional challenges to this appeal and prevent the possibility of relitigating his guilt-phase claims in the future.

Moreover, the judgment and sentence are not intended to be litigated separately. When a sentence is vacated, the judgment associated with that sentence is also vacated. Berman v. United States, 302 U.S. 211 (1937). If Calhoun's guilt-phase claims are litigated while no valid judgment exists in his case, Calhoun could potentially be provided the opportunity to relitigate those claims after his sentence is re-imposed, which would waste valuable state and judicial resources.

For these reasons, the State respectfully submits that Calhoun's appeal challenging the denial of his guilt-phase claims is untimely until his resentencing is completed and a new judgment is entered. Accordingly, the State respectfully requests that this Court hold Calhoun's appeal in abeyance pending completion of his resentencing proceedings.

SUMMARY OF THE ARGUMENT

ARGUMENT I: Appellant failed to establish that his counsel had a conflict in her representation. Under the law, Appellant had to show that his counsel's representation fell below standards. Ms. Jewell, who was trial counsel, testified at the evidentiary hearing that the other death-qualified attorney declined to work on the case with her because he did not want an appearance of a conflict. This testimony was undisputed. The other attorney's possible conflict was not imputed onto Ms. Jewell. Appellant failed to present any evidence of how Ms. Jewell's representation fell below standards and what prejudice he sustained as a result of her representation. Additionally, Ms. Jewell's co-counsel did not do anything substantial on the case. Appellant failed to present any evidence of how he was prejudiced.

ARGUMENT II: Appellant failed to establish that, if the testimony of Natasha Simmons, Jose Contreras, and Robert Vermillion had been presented at trial, it would have led to an acquittal at a new trial. Simmons testified about a strange encounter she had with Doug Mixon around the time that the victim went missing. However, she contradicted her own testimony multiple times. She claimed that Mixon, who was presented as a possible alternative suspect in this case, was calm the night she picked him and another person up, but he kept muttering to himself in an agitated manner. She also could not remember which day she had this interaction with Mixon. Simmons claimed to have told Sheriff Ward about this

interaction, but Sheriff Ward, who also testified at the evidentiary hearing, disputed this claim.

Vermillion initially claimed that Mixon confessed to participating in the murder of Ms. Brown, but then he admitted that Mixon never actually mentioned the murder and was just asking for forgiveness for some unnamed thing after Vermillion admittedly followed Mixon around the house and was harassing him.

Contreras, through a Spanish interpreter, claimed that Mixon, who does not speak Spanish, confessed to killing Ms. Brown. Contreras also claimed to have told Officer Ricky Morgan about this alleged confession. Officer Morgan testified that Contreras never approached him about this case. Officer Morgan stated that had Contreras made those accusations, he would have immediately informed the investigating officers. Mixon testified at the hearing that he never confessed to the murder of Ms. Brown to anyone.

The postconviction court was correct in finding that the testimony of Simmons, Vermillion, and Contreras would not have resulted in an acquittal at trial because the court did not find their testimony credible. The court also found that their testimony did not negate the overwhelming evidence against Appellant.

The postconviction court was also correct in finding that the pictures found depicting bruises on a female body would not have created a new suspect of Brandon Brown, the victim's husband. Ms. Jewell testified at the hearing that Calhoun was

adamant that Mr. Brown was not involved in the murder of his wife. Ms. Jewell also admitted that there was no way to authenticate the photographs because it was unknown who was being photographed. No one was able to say how the bruises occurred or when they occurred. As such, the postconviction court was correct in finding that they would be inadmissible and therefore, unable to be used to prove who committed the murder.

ARGUMENT III: The postconviction court was correct in finding that there was no violation under Brady. Appellant claims that Simmons spoke with Sheriff Ward about her interaction with Mixon but was turned away because a suspect had already been found. However, Sheriff Ward testified that Simmons, who he is familiar with, never approached him about this case. Sheriff Ward, who is a law enforcement officer in Alabama and was never listed as a witness because he had no direct involvement in this case, was not a member of the prosecution team. As such, any knowledge that Sheriff Ward had would not have been impugned onto the prosecution team. Additionally, the prosecution and defense cannot be expected to know of a conversation that did not occur. Therefore, the postconviction court was correct in finding that there was no violation under Brady.

ARGUMENT IV: Ms. Jewell did not render ineffective assistance of counsel. Appellant claims that Ms. Jewell should have investigated Mixon's alibi more effectively. However, Ms. Jewell and her investigator, Mr. Jordan, both testified that

they were unable to get any evidence beyond inadmissible hearsay. Additionally, they both testified that Calhoun refused to look at the discovery and assist them with the preparation of the trial. Mixon was called as a witness for the defense, but Calhoun himself insisted that Ms. Jewell not call him.

Ms. Jewell also testified that it was part of her strategy to not call forensic experts for the scratches on Calhoun's hands and the SD card found. Ms. Jewell testified that she was able to argue about what she believed had caused the scratches and that she did not have reason to believe that there was a chain of custody issue.

Ms. Jewell was very effective in her impeachment and cross-examination of various witnesses. Ms. Jewell testified about her strategy with each witness and that her goal was to create reasonable doubt in the State's case, and to maintain her credibility with the jury. She also testified that with one of the witnesses, it was only at trial that Calhoun stated he did not know the witness and that Calhoun tried to talk to her at the table during the trial, so that there were things that were missed. However, Ms. Jewell was still able to cross-examine each of the witnesses and impeach them with inconsistencies between their previous statements and their testimony.

Ms. Jewell had a clear strategic reason for recalling Glenda Brooks and Investigator Raley during the defense case-in-chief. As was discussed at sidebar during Brooks' testimony, Ms. Jewell wanted to show the jury that Brooks was not

afraid of Calhoun, as it was suggested during the State's case-in-chief. Ms. Jewell testified that she recalled Investigator Raley to show he was not forthcoming during the State's case-in-chief and to have him lose credibility with the jury.

It was clear from Ms. Jewell's testimony, that she had a strategic reason for how she tried the case. Her strategy was reasonable and did not fall below professional standards. Therefore, the postconviction court was correct in finding that Calhoun failed to prove his ineffective assistance of counsel claims.

ARGUMENT V: The postconviction court did not abuse its discretion in denying Calhoun the opportunity to untimely amend his motion to vacate only 14 days prior to the evidentiary hearing. Calhoun also did not suffer any prejudice because he was able to present the testimony of Vermillion and that testimony was considered in conjunction with the other evidence presented. The court did not abuse its discretion by denying Calhoun the ability to amend his motion to vacate more than a month after the evidentiary hearing. In their motion to amend, defense admitted that they could have filed the claims in a successive motion to vacate. The information that they relied on, an affidavit signed by Keith Ellis, was not discovered until over a month after the evidentiary hearing had occurred. Denials for motions to amend are reviewed under an abuse of discretion standard. The postconviction court was within its discretion to deny both motions.

ARGUMENT VI: The postconviction court was correct in finding that there had been no violation under Giglio. The court found that the evidence was not false and even if it had been, the evidence was not material to the case. For the court to find a violation under Giglio, the evidence must be both false and material. Additionally, Calhoun's claim that the prosecutor argued false evidence was properly denied. Any such claims of prosecutorial misconduct must be raised during the direct appeal. Also, as the jury was twice instructed during the trial, what the attorneys argue in their opening statements and closing arguments are not evidence and therefore, their statements cannot be considered for purposes of Giglio.

ARGUMENT VII: The postconviction court gave Appellant a fair hearing. The court relied on established case law and applied it to the evidence that was presented at the evidentiary hearing. The court arriving at the same conclusions as the State does not mean that the court did not give Appellant a fair hearing.

Appellee is requesting that this Court affirm the postconviction court's order in denying the guilt-phase claims and granting Appellant a new penalty phase under Hurst.

ARGUMENT

I. APPELLANT WAS NOT DEPRIVED OF HIS FUNDAMENTAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS HIS DEFENSE COUNSEL DID NOT HAVE A CONFLICT OF INTEREST.

In his Brief, Appellant asserts that a conflict existed in the Office of the Public Defender which was not relayed to him. He asserts that his defense counsel had just become qualified as a lead counsel in capital cases and should have been assisted by qualified co-counsel in his case. However, he maintains that the only qualified co-counsel in the office had a personal conflict as he knew the victim and her family. Defendant maintains that the whole office of the public defender should have been conflicted off his case. Furthermore, he argues that the use of another attorney who was not qualified co-counsel adversely affected the entirety of his defense. However, Appellant's claim lacks merit as he has not shown that there was any actual conflict on the part of defense counsel. Moreover, although co-counsel did not meet the qualifications, this does not amount to per se ineffective assistance of counsel.

A. Conflict-free counsel

The right to effective assistance of counsel also encompasses the right to conflict-free counsel. See Hunter v. State, 817 So. 2d 786, 791 (Fla. 2002). To establish ineffective assistance of counsel based on an alleged conflict of interest, the defendant must illustrate an actual conflict of interest that adversely affected the performance of counsel. See id. at 791-92. A defendant must illustrate the conflict

through the identification and utilization of "specific evidence in the record that suggests that his or her interests were compromised." Id. at 792. A mere speculative or hypothetical conflict of interest is insufficient to establish ineffective assistance of counsel based on an alleged conflict. See id. (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)).

At the time of trial, Appellant was represented by Kimberly Jewell, who he acknowledges was qualified as lead counsel. Defendant asserts that another attorney, Henry Sims, who was qualified to be co-counsel, knew the victim and her family and elected to not participate in the defense of the Defendant. Based on this election, Defendant asserts that everyone in the public defender's office should have been conflicted. In particular, he asserts that Attorney Sims's conflict was imputed to Ms. Jewell.

However, according to the Florida Rules Regulating the Florida Bar, Attorney Sims's desire to not represent the Defendant did not rise to the level of an actual conflict that adversely affected the performance of counsel. Pursuant to Rule 4-1.7 Conflict of Interest; Current Clients—a lawyer must not represent a client if it is directly adverse to another client or there is a risk that it will limit his responsibilities to another client, former client or a third person or a personal interest of the lawyer. Attorney Sims's knowledge of the victim and her family is a result of a personal interest of the lawyer and rather than raise any concern he appropriately declined to

participate in the defense of the Defendant. With his knowledge of the victim and her family, a conflict may have arisen if he had participated in the defense of the Defendant. However, this does not mean that his decision to not participate became an actual conflict or adversely affected the Defendant.

Per the committee notes in In re Amendment to Florida Rules of Criminal Procedure – Rule 3.112, 820 So. 2d 185 (Fla. 2002):

> These standards are not intended to establish any independent legal rights. For example, the failure to appoint co-counsel, standing alone, has not been recognized as a ground for relief from a conviction or sentence. See Ferrell v. State, 653 So. 2d 367 (Fla. 1995); Lowe v. State, 650 So. 2d 969 (Fla. 1994); Armstrong v. State, 642 So. 2d 730 (Fla. 1994). Rather, these cases stand for the proposition that a showing of inadequacy of representation in the particular case is required. See Strickland v. Washington, 466 U.S. 668 (1984). These rulings are not affected by the adoption of these standards. Any claims of ineffective assistance of counsel will be controlled by Strickland.

Alleging that trial counsel failed to meet the standards as set by Fla. R. Crim. P. 3.112 is not a per se ground for relief. Appellant is still required to meet the standards as set by Strickland, which he cannot do in this case.

Moreover, Rule 4-1.10(a) allows an exception for the prohibition when it is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. In this situation, Appellant has only asserted that Attorney Sims knew the victim and her family. There is no assertion that anyone else in the public defender's office knew of the victim or her family. Calhoun has

failed to establish that Attorney Sims's knowledge of the family affected Ms. Jewell's representation such that there was a conflict. Calhoun has not shown that Attorney Sims did any work on the case, had any personal participation, and that there was any communication between him and Ms. Jewell.

Further, Appellant has not shown that there was an actual conflict that adversely affected the performance of defense counsel Ms. Jewell. Appellant has only made generalized complaints based on Attorney Sims's alleged conflict.

Ms. Jewell testified that Attorney Sims did not have access to the files for this case. She stated that her files are kept in her office and are not placed on the file program, Stak Web. (Evid. Hrg. Trans. 24:2-14). Ms. Jewell testified that when the issue of Mr. Sims's conflict arose, Ms. Jewell took the issue to Mr. Laramore, who was the chief public defender at the time. (Evid. Hrg. Trans. 25). Mr. Laramore made the decision to not conflict the case "[b]ecause he did not feel like there was a conflict with Mr. Sims not involved in it." (Evid. Hrg. Trans. 25:10-11). "And he told Mr. Sims, basically, that was where the decision was made for Mr. Sims, since he wasn't even in the same office with me, to just not take over part of the case, and for me to keep the case in our office." (Evid. Hrg. Trans. 26:17-21). Mr. Sims was never involved in the case, even from the beginning. (Evid. Hrg. Trans. 28). Ms. Jewell was not certain if she informed Calhoun of the conflict because he had never met Mr. Sims and she was the first attorney Calhoun had ever met. (Evid. Hrg. Trans.

28). Ms. Jewell also was not certain how well Mr. Sims knew the Browns, but she believed that they were avoiding the appearance of a conflict. (Evid. Hrg. Trans. 28). Ms. Jewell also testified that she was able to consult with Walter Smith, another attorney in the office who did not have a conflict of interest. (Evid. Hrg. Trans. 37).[5]

The defense never called Mr. Sims, so there was no contradictory evidence to suggest that the conflict went beyond a concern over an appearance of impropriety. Ms. Jewell was qualified as a defense attorney to sit on death cases and Mr. Sims's conflict did not adversely affect her ability to represent Calhoun.

This claim lacks merit as Calhoun has not provided any specific evidence from the record that would suggest that Ms. Jewell's interest was compromised. See Taylor v. State, 87 So. 3d 749, 759 (Fla. 2012) (finding that the defendant failed to illustrate any specific instance or basis to support his statement of an **actual** conflict of interest or establish how he was prejudiced by his failure to move to have counsel discharged). As such, this claim was correctly denied.

B. Lack of qualified co-counsel

Appellant also asserts that he was also prejudiced by his counsel's inability to rely on Attorney Sims as co-counsel, when he was knowledgeable about capital cases. (Initial Brief at 20). He asserts that instead Ms. Jewell had to rely on a co-

[5] Mr. Smith chose to not sit as counsel of record on this case and, because he was her superior, Ms. Jewell could not direct him to sit on the case. (Evid. Hrg. Trans. 37).

counsel who was not qualified and had only been an attorney for two years at the time of trial. However, as this Court has stated repeatedly, failure to appoint co-counsel and an attorney's failure to meet the minimum standards for co-counsel in capital cases does not amount to ineffective assistance of counsel.

To establish a claim of ineffective assistance of counsel, a defendant must prove both deficient performance and prejudice. Strickland, 466 U.S. 668. However, Florida Rule of Criminal Procedure 3.112 was not intended to create an independent cause of action, without a showing of inadequacy of representation. See Cox v. State, 966 So. 2d 337, 358 n.10 (Fla. 2007) (holding that even though co-counsel did not meet the minimum standards for co-counsel in capital cases this does not amount to per se ineffective assistance of counsel). The committee comment in In re Amendment to Florida Rules of Criminal Procedure – Rule 3.112, 820 So. 2d 185, still applies to co-counsel. Therefore, Defendant's allegations that defense counsel was ineffective because co-counsel was not death qualified must be denied.

Nevertheless, co-counsel assigned to this case did not assist with the mitigation investigation or penalty phase of the case. In this case, Kevin Carlisle, the assigned co-counsel on this case, testified at the evidentiary hearing. He classified his involvement as "a bag holder, essentially." (Evid. Hrg. Trans. 214:2). Attorney Carlisle was unable to recall if he was given any specific tasks to complete in the preparation of trial. (Evid. Hrg. Trans. 214:8). He also admitted that he did not

consult Attorney Sims on this case, saying that Attorney Sims, who worked in an outer county, was unavailable. (Evid. Hrg. Trans. 213:13-23). He did not cross-examine or question any witnesses in this case at trial or at deposition. Therefore, because Attorney Carlisle was not involved in any meaningful way, there was no prejudice to Calhoun by the co-counsel being assigned to this case and this claim was correctly denied by the trial court.

II. APPELLANT'S CLAIM OF NEWLY DISCOVERED EVIDENCE DOES NOT ESTABLISH THAT THE CASE AGAINST APPELLANT WAS WEAKENED AND CREATES REASONABLE DOUBT.

A. Natasha Simmons

In order to set aside his conviction based on newly discovered evidence, Calhoun must show (1) the evidence was unknown by the trial court, by the parties, or by counsel at the time of trial and the defendant or his counsel could not have known of it by the use of due diligence; and (2) the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. Jones v. State, 709 So. 2d 512, 521 (Fla. 1998); see also Robinson v. State, 865 So. 2d 1259, 1262 (Fla. 2004). In analyzing the second prong, once it is determined that there are no evidentiary bars to the evidence being admitted, the trial court should consider whether the evidence goes to the merits, is impeachment evidence, or whether the evidence is cumulative to other evidence in the case. See Williamson v. Dugger, 651 So. 2d 84, 89 (Fla. 1994); Johnson v. Singletary, 647 So. 2d 106, 110-11 (Fla. 1994).

Further, when the evidence is from a witness to the events that occurred at the time of the crime, the trial court should also consider the length of the delay and the reason the witness failed to come forward sooner. Jones, 709 So. 2d at 521-22.

Appellant argues that his due process rights were violated by a failure of the State to disclose a conversation between Natasha Simmons and Sheriff Greg Ward of the Geneva County Sheriff's Office in Alabama. Appellant also claims that Ms. Simmons approached Sheriff Ward after the murder had occurred, to discuss a strange encounter she had with Doug Mixon the night of the murder. Ms. Simmons, in a provided unsworn declaration, stated that Sheriff Ward had told her the case was closed and sent her away. Defense claims that this conversation was never relayed to the prosecution or the defense. As such, defense is claiming a Brady[6] violation.

> In order to obtain a reversal based on Brady, a defendant must prove four elements:
>
> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Jones, 709 So. 2d at 512 (citing Robinson v. State, 707 So. 2d 688, 693 (Fla. 1998) (quoting Hegwood v. State, 575 So. 2d 170, 172 (Fla. 1991))). "There are three components of a true Brady violation: The evidence at issue must be favorable to the

[6] Brady v. Maryland, 373 U.S. 83 (1963).

accused, either because it is exculpatory, or because it is impeaching; that the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Smith v. State, 931 So. 2d 790, 796 (Fla. 2006) (quoting Strickler v. Green, 527 U.S. 263, 281-82 (1999)). To establish prejudice, a defendant must demonstrate that the suppressed evidence is material. Id.

In Turner v. United States, 137 S.Ct. 1885 (2017), the United States Supreme Court rejected a Brady claim, concluding that the withheld evidence was not material. Petitioners were convicted of the kidnapping, armed robbery, and murder of Catherine Fuller in 1985. The victim had been robbed, severely beaten, and sodomized with a pipe or pole that caused extensive internal injuries. Id. At trial, two of the co-perpetrators testified against petitioners in exchange for leniency. Id. Thomas, a 14-year-old, who lived in the neighborhood and who knew some of the petitioners, also testified as to what he saw the night of the murder. Id.

Years later, in 2010, during postconviction proceedings, Turner raised a Brady claim, asserting that the prosecution failed to disclose evidence of another possible suspect, McMillan, who had been seen in the alley near where the victim's body was discovered shortly after the murder and impeachment evidence, including impeachment evidence relating to Thomas. Turner, 137 S.Ct. 1885. Petitioners argued that if they had been informed of the other suspect, they could have raised as a defense that a single perpetrator, or two perpetrators at most, had committed the

murder. Id. In other words, they could have asserted to the jury that McMillan, alone or with an accomplice, murdered Fuller. The prosecution admitted that it suppressed the evidence of McMillan, but asserted the evidence was not material. Id. The postconviction court held an extensive evidentiary hearing, and then denied the Brady claim, concluding that the evidence was not material. Id. The appellate court agreed that the evidence was not material and the United States Supreme Court affirmed. Id.

The Court first explained that due process is only violated if the prosecution "withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." Turner, 137 S.Ct. at 1888 (citing Smith v. Cain, 565 U.S. 73, 75 (2012)). The Court explained that evidence "is 'material' within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different" and that a "reasonable probability of a different result is one in which the suppressed evidence undermines confidence in the outcome of the trial." Id. at 1893. The Court explained that a determination of materiality was often "factually complex" and required that the reviewing court "examine the trial record" to "evaluate the withheld evidence in the context of the entire record." Id.

The Court then reasoned that the withheld evidence, in the context of the entire record, was "too little, too weak, or too distant from the main evidentiary points to

meet Brady." Turner, 137 S.Ct. at 1894. The Court noted that the single attacker defense was inconsistent with the evidence establishing a group attack. Id. The Court observed that while the witnesses "differed on minor details," virtually every witness agreed that the victim "was killed by a large group of perpetrators." Id. The Court pointed out that the single attacker defense would have required the jury to believe that both the co-perpetrators falsely confessed and, through coordinated effort or coincidence, gave highly similar accounts of how the murder occurred, as well as believe that Thomas, "a distinterested witness," wholly fabricated his story. Id. The Court also concluded that the undisclosed impeachment evidence was "largely cumulative." Id.

At the evidentiary hearing, Natasha Simmons claimed that she had told Sheriff Ward about an interaction between herself and Doug Mixon. (Evid. Hrg. Trans. 102-11). However, Sheriff Ward testified at the evidentiary hearing that he knew Natasha Simmons. (Evid. Hrg. Trans. 398:21-23). He denied ever talking with her about this case and that she did not tell him that "she had picked up Doug Mixon and Charlie up from an area of Holmes County, and Doug Mixon had blood on him and was carrying a gas can." (Evid. Hrg. Trans. 399:2-4). He did not tell Natasha Simmons to forget about the incident because a suspect was caught and he confessed to the crime. (Evid. Hrg. Trans. 399:6-9). Sheriff Ward was adamant that had that kind of information been relayed to him or any of his deputies, he would have shared it with

the "lead agent with AB." (Evid. Hrg. Trans. 399:13-17). As such, this evidence could not be considered Brady evidence because the information did not exist for either the prosecutor or defense to discover and this claim should be denied.

As an alternative argument, defense claims that defense trial counsel was ineffective for her failure to obtain the exculpatory evidence. To establish ineffective assistance of counsel (also known as a Strickland claim), Calhoun must satisfy a two-prong test, establishing both deficient performance and prejudice. Strickland, 466 U.S. 668. To establish deficient performance, a defendant must show that counsel made specific errors so serious that she was not functioning as the counsel guaranteed to Calhoun by the Sixth Amendment. Id. at 687; Pietri v. State, 885 So. 2d 245, 252 (Fla. 2004) ("a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct") (quoting Strickland, 466 U.S. at 690). Strickland refrained from providing specific guidelines to evaluate counsel's performance, and held "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. To establish prejudice, Calhoun must show that there is a reasonable probability that but for trial counsel's deficiencies, she would have received a different outcome. Sears v. Upton, 561 U.S. 945 (2010).

Calhoun has failed to meet his burden of showing ineffective assistance of counsel. Sheriff Ward was adamant that the conversation between him and Natasha Simmons did not occur. He also stated that he would have conveyed any information he received about the case to the investigators who were assigned to the case. Ms. Jewell did a thorough job investigating the case, despite Calhoun refusing to cooperate and discuss the case with her. Investigator Jordan testified that he followed any leads he received and would report his findings back to Ms. Jewell. Additionally, Vermillion and Mr. Contreras testified that Mr. Mixon confessed to them. However, Vermillion did not receive his "confession" until the summer of 2016, which is well after the trial. Mr. Contreras claims to have told Officer Morgan that Mr. Mixon confessed to him, but Officer Morgan very clearly denied that Mr. Contreras, with whom he was familiar, informed him that Mr. Mixon confessed to him. Ms. Jewell could not have possibly discovered this evidence. Calhoun has failed to establish ineffective assistance of counsel and this claim should be denied.

Appellant claims that the emergence of Ms. Simmons supports the defense theory that Doug Mixon was the person who committed the murder. (Initial Brief at 26). Based on the allegations, Appellant claims that this should be considered newly discovered evidence and is a basis for a new trial.

For a conviction to be set aside based on newly discovered evidence, two requirements must be met. Jones, 709 So. 2d at 521. "First, in order to be considered

newly discovered, the evidence 'must have been unknown by the trial court, by the party, or by counsel at the time of the trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence.'" Id. (citing Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324-25 (Fla. 1994)). "Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." Id. See also Mansfield v. State, 204 So. 3d 14 (Fla. 2016).

> In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility. See Johnson v. Singletary, 647 So. 2d 106, 110-11 (Fla. 1994); cf. Bain v. State, 691 So. 2d 508, 509 (Fla. 5th DCA 1997). Once this is determined, an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. See Williamson v. Dugger, 651 So. 2d 84, 89 (Fla. 1994). The trial court should also determine whether the evidence is cumulative to other evidence in the case. See State v. Spaziano, 692 So. 2d 174, 177 (Fla. 1997); Williamson, 651 So. 2d at 89. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence. Where, as in this case, some of the newly discovered evidence includes the testimony of individuals who claim to be witnesses to events that occurred at the time of the crime, the trial court may consider both the length of the delay and the reason the witness failed to come forward sooner.

Jones, 709 So. 2d at 521-22.

In this case, the possible evidence from Ms. Simmons should be evaluated under the Brady test. This evidence is based on a possible non-disclosure from Sheriff Ward.

At the evidentiary hearing, Natasha Simmons claimed that she had told Sheriff Ward about an interaction between herself and Doug Mixon. (Evid. Hrg. Trans. 102-11). However, Sheriff Ward testified at the evidentiary hearing that he knew Natasha Simmons. (Evid. Hrg. Trans. 398:21-23). He denied ever talking with her about this case and that she did not tell him that "she had picked up Doug Mixon and Charlie up from an area of Holmes County, and Doug Mixon had blood on him and was carrying a gas can." (Evid. Hrg. Trans. 399:2-4). He did not tell Natasha Simmons to forget about the incident because a suspect was caught and he confessed to the crime. (Evid. Hrg. Trans. 399:6-9). Sheriff Ward was adamant that had that kind of information been relayed to him or any of his deputies, he would have shared it with the "lead agent with AB." (Evid. Hrg. Trans. 399:13-17).

This evidence would not produce an acquittal at trial. By Vermillion's own admission, Mr. Mixon did not admit to committing the murder. He stated that Mr. Mixon just asked for forgiveness. Mr. Mixon never testified to seeing Natasha Simmons that night and he claimed that he was with Ms. Faulk the night of the murder at Mr. Contreras's house. He never stated he was with Charlie Uttley the night of the murder. Additionally, Ms. Simmons described Mr. Mixon as more

relaxed the night of the murder, but then stated Mr. Mixon repeatedly stated, "that goddamn Gabby." (Evid. Hrg. Trans. 329:21-22). Ms. Simmons initially stated that she saw the news about Mrs. Brown missing the night before her supposed interaction with Mr. Mixon and Mr. Uttley (Evid. Hrg. Trans. 332); however, she then backtracked and said she was not sure when she saw the news.

> Q: You just know that you had seen this news report the night before?
>
> A: Right.
>
> Q: Do you know that Mrs. Brown wasn't reported missing until Friday morning?
>
> A: I was, let me clarify that. I'm not really sure if it was before or after, but I do recall that being the same area.

(Evid. Hrg. Trans. 332:23-25; 333:1-5). Ms. Simmons then agreed that the earliest she would have been able to see the news would be Friday night, after the murder had happened, and she would have picked up Mr. Mixon on Saturday morning. (Evid. Hrg. Trans. 333).

Ms. Simmons' inconsistencies, along with Sheriff Ward's testimony mean that the outcome of the trial would not have been different. Mr. Mixon was adamant that he had never confessed to killing Mrs. Brown. "And for one minute, ma'am, what I was saying a while, I would never confess to something, but if I did or didn't do, more or less, in all honesty. But I sure as sin wouldn't confess to something that I didn't do." (Evid. Hrg. Trans. 320:10-13). When asked if he has ever confessed to **anybody** that he had a part in Mrs. Brown's murder, Mr. Mixon answered with a

clear no. “I had nothing to do with it and I don’t know anything about it.” (Evid. Hrg. Trans. 320:20-21). This evidence would not produce an acquittal at trial and this claim must be denied.

B. Robert Vermillion

At the evidentiary hearing, the defense called Robert Vermillion, who is related to the victim’s husband, and he testified that in the summer of 2016, Mr. Mixon was at his aunt’s house. (Evid. Hrg. Trans. 361). Vermillion claimed that Mr. Mixon told him that he had done things he was not proud of and he asked for forgiveness. (Evid. Hrg. Trans. 362). Vermillion admitted that Mr. Mixon “didn’t come right out and say [he] killed her, but he insinuated it.” (Evid. Hrg. Trans. 365:5-6). Though he believes that Mr. Mixon knows something about the murder, he does not know if Mr. Mixon committed the murder. (Evid. Hrg. Trans. 366). During cross-examination, Vermillion admitted that, before Mr. Mixon said anything to him, “I wasn’t really harassing him, but I wasn’t not harassing him.” (Evid. Hrg. Trans. 368:20-21). Vermillion also admitted that he was following Mr. Mixon around everywhere that night. (Evid. Hrg. Trans. 368). The statement that Vermillion claims Mr. Mixon made never referenced Mrs. Brown. It never referenced any murder. Mr. Mixon supposedly just asked for forgiveness for some unnamed thing. This evidence would not change the outcome of the case. Vermillion merely stated that he thinks Mr. Mixon knew something about the murder.

It is clear from the testimony that Ms. Jewell tried to investigate Doug Mixon's alibi to the best of her ability. Calhoun refused to cooperate and did not even look at the discovery, as testified to by Ms. Jewell and Mr. Jordan. Because Ms. Jewell and Mr. Jordan were unable to discover any evidence beyond inadmissible hearsay that Mr. Mixon was involved in this murder, Calhoun has failed to establish deficient performance by Ms. Jewell and this claim must be denied.

In this case, there was overwhelming evidence of Calhoun's guilt. The victim's blood, hair, and purse were found inside of Calhoun's trailer, which was in a disarray. See Calhoun, 138 So. 3d at 366. Calhoun was witnessed asking the victim for a ride on December 16 and a witness testified that the victim came to the wrong residence the night she went missing, looking for Calhoun's trailer. Id. The morning that Mia Chay Brown and Calhoun were both reported missing, Calhoun was seen in a white four-door car, which matched the victim's car, as well as buying cigarettes at a convenience store in Alabama. Id. He was witnessed with blood and scratches on his hands and later that day a fire was seen burning. Id. Eventually, Calhoun went to the home of friends in Alabama, less than 1.5 miles from the victim's burnt car where he was informed that he was reported as missing along with the victim. Id. at 367. The victim's burnt remains were found in the trunk of her car on December 20. Id. Therefore, defense counsel's calling Doug Mixon would not have made a

difference as it does not pertain to the DNA evidence that was found, the location of the burnt car, and the sightings of Calhoun and the victim before her death.

C. Jose Contreras

At the evidentiary hearing, the defense called Jose Contreras. Mr. Contreras, who testified with the aid of an interpreter, stated that he only speaks a little bit of English. (Evid. Hrg. Trans. 338). At the time of the murder, he had known Mr. Mixon for three years. (Evid. Hrg. Trans. 339). In September 2010, Mr. Contreras's son was arrested for murder. (Evid. Hrg. Trans. 340). He denied that Ms. Faulk ever lived at his house, but would allow her to stay there occasionally. (Evid. Hrg. Trans. 341-42). Mr. Contreras testified that Mr. Mixon never spent the night at his house and that he never drank with Mr. Mixon and Ms. Faulk. (Evid. Hrg. Trans. 343). Mr. Contreras claimed that Mr. Mixon came to his house one night after the murder and confessed to killing Mrs. Brown. (Evid. Hrg. Trans. 345). He claimed that he went to Officer Ricky Morgan and told him that Mr. Mixon confessed to the murder. (Evid. Hrg. Trans. 346). Mr. Contreras admitted that he was the one who turned his son in for murder. (Evid. Hrg. Trans. 347). During cross-examination, Mr. Contreras stated that he and Mr. Mixon were only co-workers and did not have a relationship outside of work. (Evid. Hrg. Trans. 349). Mr. Contreras also admitted that he had no independent recollection of the night of murder. (Evid. Hrg. Trans. 349).

The State, in rebuttal, called Officer Morgan. While he was aware of the case, he was not involved. (Evid. Hrg. Trans. 405). Officer Morgan knows Jose Contreras through an investigation. (Evid. Hrg. Trans. 405). He testified that Mr. Contreras speaks English and that Mr. Contreras **never** told him that Mr. Mixon confessed to him. (Evid. Hrg. Trans. 405-06). Officer Morgan knew the officers on the case and he would have immediately passed the information to them. (Evid. Hrg. Trans. 406).

Mr. Contreras's testimony is not credible at all. It is highly improbable that Mr. Mixon would confess murdering Mrs. Brown to someone who claims to barely speak English and claimed that he had never spent time with Mixon outside of work. Additionally, Officer Morgan testified that Mr. Contreras never approached him about this case.

D. Brandon Brown

Appellant argues that at a new trial, Appellant could present evidence pointing the blame on Brandon Brown, the victim's husband. (Initial Brief at 32). However, Appellant had an opportunity to have his trial counsel bring out evidence against Mr. Brown at trial, but he instructed her not to.

> [A]s a matter of strategy and not wanting to attack the husband of the victim in front of the jury, we made, I made, and I don't say we, I made this call, not to lay the blame on Mr. Brown given the fact that Mr. Calhoun was **adamant** that it was Doug Mixon and that Mr. Brown was not involved in it.

(Evid. Hrg. Trans. 84:8-13) (emphasis added).

At the evidentiary hearing, counsel asked Ms. Jewell about photographs depicting bruises. However, no one was able to identify the person in the photographs, or even testify as to what caused the bruises on the unknown person. These photographs would not be admissible at a new trial because they cannot be authenticated. Ms. Jewell testified that no one knows the cause of the injuries and that it is unknown if Mr. Brown was even the cause of the injuries. (Evid. Hrg. Trans. 100). "I can't guess and accuse him of something. And, you know, I don't know what the cause of those [injuries] are. I mean, I don't know if she did something." (Evid. Hrg. Trans. 100:22-25). Ms. Jewell repeatedly stated that her strategy did not include placing blame on Mr. Brown, based on her client's insistence that he had nothing to do with the murder of Mrs. Brown. The strategy was to place all the blame on Doug Mixon. (Evid. Hrg. Trans. 102). Ms. Jewell did not have a singular focus, "[b]ut you can't blame it on one person, then turn around and blame it on another because then you lose the jury's trust." (Evid. Hrg. Trans. 102:7-9).

> Q: As a defense attorney in a case like this, do you see any potential downfall in blaming grieving husband for a murder, basically, with no evidence in front of a jury?
>
> A: Yes, you actually garner a lot of disdain out of a jury when you do that. When you attack a family [ ] member of a victim, unless that family member is the one who is sitting next to me at this trial, juries do not like that at all.
>
> Q: Did you have any other type of evidence, anything that had come out in the case, that Brandon Brown was responsible for this particular crime?

A: Absolutely nothing that I was aware of.

(Evid. Hrg. Trans. 193:25-194:1-11). Ms. Jewell had sound reasons for not trying to put the blame on Brandon Brown for the murder of Mia Brown.

In this case, there was overwhelming evidence of Calhoun's guilt. The victim's blood, hair, and purse were found inside of Calhoun's trailer which was in a disarray. See Calhoun, 138 So. 3d at 366. Calhoun was witnessed asking the victim for a ride on December 16 and a witness testified that the victim came to the wrong residence the night she went missing, looking for Calhoun's trailer. Id. The morning that Mia Chay Brown and Calhoun were both reported missing, Calhoun was seen in a white four-door car, which matched the victim's car, as well as buying cigarettes at a convenience store in Alabama. Id. He was witnessed with blood and scratches on his hands and later that day a fire was seen burning. Id. Eventually, Calhoun went to the home of friends in Alabama, less than 1.5 miles from the victim's burnt car where he was informed that he was reported as missing along with the victim, Mia Chay Brown. Id. at 367. The victim's burnt remains were found in the trunk of her car on December 20. Id. With this overwhelming evidence, Calhoun was not prejudiced by any alleged failure of counsel to object to the testimony of witnesses regarding issues that did not affect the jury's verdict. Therefore, the additional evidence Appellant seeks to use at a retrial would not have made a difference as they

do not pertain to the DNA evidence that was found, the location of the burnt car, and the sightings of Calhoun and the victim before her death.

The circuit court did not err in finding that Appellant is not entitled to relief. The court clearly made a credibility determination when it found "Ms. Jewell could not have possibly discovered the **false** statements of either Vermillion or Contreras." (Order at 50) (emphasis added). The court also found that there was no Brady violation, thereby rejecting the testimony of Ms. Simmons.

As such, this claim was correctly denied.

III. THE TRIAL COURT WAS CORRECT IN FINDING THAT THERE WAS NO VIOLATION UNDER BRADY.

Appellant claims that his due process rights were violated by a failure of the State to disclose a conversation between Natasha Simmons and Sheriff Greg Ward of the Geneva County Sheriff's Office in Alabama. (Initial Brief at 36). Appellant claims that Ms. Simmons approached Sheriff Ward after the murder had occurred, to discuss a strange encounter she had with Doug Mixon the night of the murder. Ms. Simmons, in a provided unsworn declaration, stated that Sheriff Ward had told her the case was closed and sent her away. Appellant claims that this conversation was never relayed to the prosecution or the defense. As such, Appellent is claiming a Brady violation.

In order to obtain a reversal based on Brady, a defendant must prove four elements:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Jones, 709 So. 2d at 512 (citing Robinson, 707 So. 2d at 693 (quoting Hegwood, 575 So. 2d at 172)). "There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Smith v. State, 931 So. 2d at 796 (quoting Strickler, 527 U.S. at 281-82). To establish prejudice, a defendant must demonstrate that the suppressed evidence is material. Id.

In Turner v. United States, 137 S.Ct. 1885 (2017), the United States Supreme Court rejected a Brady claim, concluding that the withheld evidence was not material. Petitioners were convicted of the kidnapping, armed robbery, and murder of Catherine Fuller in 1985. The victim had been robbed, severely beaten, and sodomized with a pipe or pole that caused extensive internal injuries. Id. At trial, two of the co-perpetrators testified against petitioners in exchange for leniency. Id. Thomas, a 14-year-old, who lived in the neighborhood and who knew some of the petitioners, also testified as to what he saw the night of the murder. Id.

Years later, in 2010, during postconviction proceedings, Turner raised a Brady claim, asserting that the prosecution failed to disclose evidence of another possible suspect, McMillan, who had been seen in the alley near where the victim's body was discovered shortly after the murder and impeachment evidence, including impeachment evidence relating to Thomas. Turner, 137 S.Ct. 1885. Petitioners argued that if they had been informed of the other suspect, they could have raised as a defense that a single perpetrator, or two perpetrators at most, had committed the murder. Id. In other words, they could have asserted to the jury that McMillan, alone or with an accomplice, murdered Fuller. The prosecution admitted that it suppressed the evidence of McMillan, but asserted the evidence was not material. Id. The postconviction court held an extensive evidentiary hearing, and then denied the Brady claim, concluding that the evidence was not material. Id. The appellate court agreed that the evidence was not material and the United States Supreme Court affirmed. Id.

The Court first explained that due process is only violated if the prosecution "withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." Turner, 137 S.Ct. at 1888 (citing Smith, 565 U.S. at 75). The Court explained that evidence "is 'material' within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different" and that a "reasonable probability of a

different result is one in which the suppressed evidence undermines confidence in the outcome of the trial." Id. at 1893. The Court explained that a determination of materiality was often "factually complex" and required that the reviewing court "examine the trial record" to "evaluate the withheld evidence in the context of the entire record." Id.

The Court then reasoned that the withheld evidence, in the context of the entire record, was "too little, too weak, or too distant from the main evidentiary points to meet Brady." Turner, 137 S.Ct. at 1894. The Court noted that the single attacker defense was inconsistent with the evidence establishing a group attack. Id. The Court observed that while the witnesses "differed on minor details," virtually every witness agreed that the victim "was killed by a large group of perpetrators." Id. The Court pointed out that the single attacker defense would have required the jury to believe that both the co-perpetrators falsely confessed and, through coordinated effort or coincidence, gave highly similar accounts of how the murder occurred, as well as believe that Thomas, "a distinterested witness," wholly fabricated his story. Id. The Court also concluded that the undisclosed impeachment evidence was "largely cumulative." Id.

This Court must also decide if Sheriff Ward was a member of the prosecution team. In Kyles v. Whitley, 514 U.S. 419, 437 (1995), the United States Supreme Court stated an "individual prosecutor has the duty to learn of any favorable evidence

known to the others acting on the government's behalf." The Eleventh Circuit Court of Appeals has held "that a claimant must show that the favorable evidence was possessed by 'a district's prosecution team, which includes both investigative and prosecutorial personnel.'" Moon v. Head, 285 F.3d 1301 (11th Cir. 2002) (quoting United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989)). A prosecution team has been defined as "the prosecutor or anyone over whom he has authority." Meros, 866 F.2d at 1309. In Meros, the Eleventh Circuit held "that a prosecutor in the Middle District of Florida did not 'possess' favorable information known by prosecutors in the Northern District of Georgia and the Eastern District of Pennsylvania." Id. They stated "[a] prosecutor has no duty to undertake a fishing expedition in other jurisdictions in an effort to find potentially impeaching evidence every time a criminal defendant makes a Brady request for information regarding a government witness." Id.

> [K]nowledge on the part of persons employed by a different office of the government does not in all instances warrant the imputation of knowledge to the prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require us to adopt "a monolithic view of government" that would "condemn the prosecution of criminal cases to a state of paralysis."

United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) (citing United States v. Gambino, 835 F.Supp. 74, 95 (E.D.N.Y. 1993)). Sheriff Ward is a member of the Geneva County Sheriff's Office, which is in Alabama. Sheriff Ward was never listed

as a witness by the prosecution. As such, Sheriff Ward was not a member of the prosecution team and it is not expected that the State would not be impugned with his knowledge.

At the evidentiary hearing, Natasha Simmons claimed that she had told Sheriff Ward about an interaction between herself and Doug Mixon. (Evid. Hrg. Trans. 102-11). However, Sheriff Ward testified at the evidentiary hearing that he knew Natasha Simmons. (Evid. Hrg. Trans. 398:21-23). He denied ever talking with her about this case and that she did not tell him that "she had picked up Doug Mixon and Charlie up from an area of Holmes County, and Doug Mixon had blood on him and was carrying a gas can." (Evid. Hrg. Trans. 399:2-4). He did not tell Natasha Simmons to forget about the incident because a suspect was caught and had confessed to the crime. (Evid. Hrg. Trans. 399:6-9). Sheriff Ward was adamant that had that kind of information been relayed to him or any of his deputies, he would have shared it with the "lead agent with AB." (Evid. Hrg. Trans. 399:13-17). As such, this evidence could not be considered Brady evidence because the information did not exist for either the prosecutor or defense to discover and this claim was correctly denied.

IV. CALHOUN'S TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL.

To establish a claim of ineffective assistance of counsel, a defendant must prove both deficient performance and prejudice. Strickland, 466 U.S. 668. "Judicial scrutiny of counsel's performance must be highly deferential." Pagan v. State, 29

So. 3d 938, 949 (Fla. 2009) (citing Strickland, 466 U.S. at 690). There is a strong presumption that trial counsel was effective in their representation. Id. (citing Strickland, 466 U.S. at 689). The standard for evaluation is not whether an attorney could have done more. Id. "A fair assessment of an attorney's 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." Id. (citing Strickland, 466 U.S. at 689). "Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Id. (quoting Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000)).

The strong presumption that counsel's performance was sound is even stronger when trial counsel is experienced. See Cummings v. Sec'y, Fla. Dept. of Corr., 588 F.3d 1331, 1356 (11th Cir. 2009) (citing Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000) (en banc)). In Florida, minimum standards have been established for appointment of defense attorneys in capital cases. Fla. R. Crim. P. 3.112. Those rigorous standards govern not just the qualifications of lead counsel on a capital case, but also co-counsel on a capital case in order to ensure the quality of representation afforded to a defendant facing capital punishment. As such, defendants facing capital punishment are often benefited with the legal expertise and

experience of some of the most seasoned and knowledgeable lawyers available.

To establish prejudice, the defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different. Strickland, 466 U.S. 668. The Florida Supreme Court has determined that a reasonable probability is a probability sufficient to undermine confidence in the outcome. Rutherford v. State, 727 So. 2d 216, 219 (Fla. 1998). "To assess that probability, we consider 'the totality of the available mitigation evidence – both adduced at trial, and the evidence adduced in the . . . [post-conviction] proceedings' — and 'reweig[h] it against the evidence in aggravation.'" Porter v. McCollum, 558 U.S. 30, 41 (2009). Therefore, Calhoun must show that but for counsel's alleged errors, he probably would have received an acquittal at trial or a life sentence during the penalty phase. Gaskin v. State, 822 So. 2d 1243, 1247 (Fla. 2002).

A. Counsel was not ineffective in her investigation of Doug Mixon's alibi.

Ms. Jewell testified that Calhoun told her not to call Mixon as a witness. (Evid. Hrg. Trans. 56:2-5). She stated that she had no idea what Mixon's demeanor would be during his testimony, or what he would even say. (Evid. Hrg. Trans. 199). Ms. Jewell stated that Mixon had a crazy look in his eye. (Evid. Hrg. Trans. 56:9-10). Mixon was under subpoena to testify at trial and it was Calhoun who instructed her not to call him as a witness, even though he was present in the courthouse. (Evid.

Hrg. Trans. 54:20-21). Ms. Jewell testified that she and her investigator, Mr. Jordan, chased down leads regarding Doug Mixon. (Evid. Hrg. Trans. 197).

> We chased down leads. We had doors slammed in our face. We had denials. We, I know Mr. Jordan had been to the jail several times, with people asking or wanting to give information about Doug Mixon, I heard Doug Mixon say this or that. And every time we followed through the chain of people who were in or around those statements that we had been made aware of, no one would ever either admit to them or we couldn't get past the hearsay of all of it.

(Evid. Hrg. Tran. 197:3-10). Between herself and Mr. Jordan, they recognized that Mr. Mixon lied about pretty much everything. (Evid. Hrg. Trans. 197:17). They learned that Mr. Mixon liked to be involved in big time cases. (Evid. Hrg. Trans. 197). On the day Mr. Mixon was set to testify at trial, Ms. Jewell believed Mr. Mixon to be on some type of drug. (Evid. Hrg. Trans. 200).

Mr. Jordan testified at the evidentiary hearing as well. Mr. Jordan was the lead investigator that assisted Ms. Jewell in her preparation for the trial. Mr. Jordan only handled murder, capital cases. (Evid. Hrg. Trans. 280). Of the witnesses Mr. Jordan was able to speak with, most of their knowledge was based on hearsay, "they had no firsthand knowledge of anything." (Evid. Hrg. Trans. 282:18-19). While Mr. Jordan tried to follow leads he got from the witnesses, "[n]obody wants to own up to actually knowing what occurred." (Evid. Hrg. Trans. 283:1-2). Mr. Jordan testified that he never heard of Natasha Simmons or Amy Salter. (Evid. Hrg. Trans. 284). Mr. Jordan would have to make a judgment call about who to talk to because, in his

experience, he has talked to witnesses who will change their story once they get on the stand to testify. (Evid. Hrg. Trans. 285). He gets names of possible witnesses from defendants.

> Like I say, based on the assistance I get from the defendant, if they don't have anything, if they don't want to assist me with the case, it makes it harder for me. And I usually ask them who they want me to talk to or who can verify, you know, maybe give them an alibi or something. If they don't have anything to give me, I have to just go out on my own and look.
>
> And there are stories about every murder you hear all over every town you go in. There's hearsay about everything. And you can't, I don't have the time and energy, you're right, to chase all that down. Because some of them told me they called the police and the police hung up on them because they didn't want to hear it, so.

(Evid. Hrg. Trans. 285:13-25).

Mr. Jordan testified that Calhoun would not help him with the investigation. (Evid. Hrg. Trans. 295). "He wouldn't even read his discovery. He said it was a bunch of bull." (Evid. Hrg. Trans. 295:10-11). "He wouldn't talk about his case." (Evid. Hrg. Trans. 299:25). Mr. Jordan believed that Calhoun had knowledge of what happened based on their limited conversations. (Evid. Hrg. Trans. 300). Mr. Jordan did state that Calhoun told him hearsay that Mr. Mixon burned Mrs. Brown in the car, which was consistent with what a lot of people in the area said, and that Mr. Mixon had a reputation. (Evid. Hrg. Trans. 303). Mr. Jordan stated that his reputation was that "[h]e was a liar and heavy drug user and he was possibly a serial killer, according to a lot of people." (Evid. Hrg. Trans. 303:24-25).

Calhoun, during his statement to police, claimed to have been kidnapped. Mr. Jordan testified that he spoke with Calhoun about the kidnapping. However, "[i]t never made any sense because the person that kidnapped him, he didn't know him, it was the first time he saw him. There was no reason for someone to kidnap him." (Evid. Hrg. Trans. 304:10-13). Calhoun made it clear that it was not Mr. Mixon who kidnapped him, but some redhead, red-bearded man. (Evid. Hrg. Trans. 304). Calhoun told Mr. Jordan that he had found God. (Evid. Hrg. Trans. 304).

> [H]e was satisfied with whatever the outcome of the trial would be. And I asked him outright, I said, well, do you know who did this or do you have any idea. They [are] trying to take your life from you, and he said I'm satisfied with that. If they take my life, whatever.
>
> And he said if they don't, I'm going to minister to the prisoners once I get to prison on death row or wherever I go. But he also told me that he was worried about the safety of his family, that's why he couldn't divulge who was involved. And led me to believe that he did know who was involved, but for the sake of his family, he couldn't tell me or wouldn't tell me.

(Evid. Hrg. Trans. 304:25; 305:1-12). Mr. Jordan confirmed that he was never able to find anything other than hearsay that Mr. Mixon was connected to this murder. (Evid. Hrg. Trans. 305). "[Calhoun] had no knowledge that Doug Mixon did it, it was hearsay." (Evid. Hrg. Trans. 306:23-24).[7]

[7] Melody Harrison was also called by the defense. She was the investigator who accompanied Ms. Jewell to the crime scene. Her involvement was minimal in this case, only when Mr. Jordan was out of the office due to knee surgery, and Mr. Jordan was the primary investigator, who did almost all of the investigation. Ms. Harrison's testimony did not establish any prejudice to Calhoun.

At the evidentiary hearing, Doug Mixon was called by the defense. Mr. Mixon is well aware of his reputation in the community. (Evid. Hrg. Trans. 311). Mr. Mixon testified that, on the night of murder, he was at the home of Jose Contreras in Geneva. (Evid. Hrg. Trans. 312). He testified that Mr. Contreras, who was a co-worker of Mr. Mixon, was not present at the house. (Evid. Hrg. Trans. 313). Mr. Mixon went to the house to spend time with Gabrielle Faulk, who was living there at the time. (Evid. Hrg. Trans. 313). He testified that Mr. Contreras was drunk that night and that they were driving to the store to get more beer when they were pulled over by a Geneva City police officer. (Evid. Hrg. Trans. 313-14). Mr. Mixon was adamant that he never told Mr. Contreras or Robert Vermillion that he committed the murder. (Evid. Hrg. Trans. 317).

The defense also called Jose Contreras. Mr. Contreras, who testified with the aid of an interpreter, stated that he only speaks a little bit of English. (Evid. Hrg. Trans. 338). At the time of the murder, he had known Mr. Mixon for three years. (Evid. Hrg. Trans. 339). In September 2010, Mr. Contreras's son was arrested for murder. (Evid. Hrg. Trans. 340). He denied that Ms. Faulk ever lived at his house, but would allow her to stay there occasionally. (Evid. Hrg. Trans. 341-42). Mr. Contreras testified that Mr. Mixon never spent the night at his house and that he never drank with Mr. Mixon and Ms. Faulk. (Evid. Hrg. Trans. 343). Mr. Contreras claimed that Mr. Mixon came to his house one night after the murder and confessed

to killing Mrs. Brown. (Evid. Hrg. Trans. 345). He claimed that he went to Officer Ricky Morgan and told him that Mr. Mixon confessed to the murder. (Evid. Hrg. Trans. 346). Mr. Contreras admitted that he was the one who turned his son in for murder. (Evid. Hrg. Trans. 347). During cross-examination, Mr. Contreras stated that he and Mr. Mixon were only co-workers and did not have a relationship outside of work. (Evid. Hrg. Trans. 349). Mr. Contreras also admitted that he had no independent recollection of the night of murder. (Evid. Hrg. Trans. 349).

The State, in rebuttal, called Officer Morgan. While he was aware of the case, he was not involved. (Evid. Hrg. Trans. 405). Officer Morgan knows Jose Contreras through an investigation. (Evid. Hrg. Trans. 405). He testified that Mr. Contreras speaks English and that Mr. Contreras **never** told him that Mr. Mixon confessed to him. (Evid. Hrg. Trans. 405-06). Officer Morgan knew the officers on the case and he would have immediately passed the information to them. (Evid. Hrg. Trans. 406).

Mr. Contreras is not credible at all. It is highly improbable that Mr. Mixon would confess murdering Mrs. Brown to someone that barely speaks English and that he had never spent time with Mixon outside of work. Additionally, Officer Morgan testified that Mr. Contreras never approached him about this case.

The defense called Robert Vermillion, who is related to Brandon Brown, and he testified that in the summer of 2016, Mr. Mixon was at his aunt's house. (Evid. Hrg. Trans. 361). Vermillion claimed that Mr. Mixon told him that he had done

things he was not proud of and he asked for forgiveness. (Evid. Hrg. Trans. 362). Vermillion admitted that Mr. Mixon "didn't come right out and say [he] killed her, but he insinuated it." (Evid. Hrg. Trans. 365:5-6). Though he believes that Mr. Mixon knows something about the murder, he does not know if Mr. Mixon committed the murder. (Evid. Hrg. Trans. 366). During cross-examination, Vermillion admitted that, before Mr. Mixon said anything to him, "I wasn't really harassing him, but I wasn't not harassing him." (Evid. Hrg. Trans. 368:20-21). Vermillion also admitted that he was following Mr. Mixon around everywhere that night. (Evid. Hrg. Trans. 368). The statement that Vermillion claims Mr. Mixon made never referenced Mrs. Brown. It never referenced any murder. Mr. Mixon supposedly just asked for forgiveness for some unnamed thing. This evidence would not change the outcome of the case. Vermillion merely stated that he thinks Mr. Mixon knew something about the murder.

It is clear from the testimony that Ms. Jewell tried to investigate Doug Mixon's alibi to the best of her ability. Calhoun refused to cooperate and did not even look at the discovery, as testified to by Ms. Jewell and Mr. Jordan. Because Ms. Jewell and Mr. Jordan were unable to discover any evidence beyond inadmissible hearsay that Mr. Mixon was involved in this murder, Calhoun has failed to establish deficient performance by Ms. Jewell and this claim must be denied.

In this case, there was overwhelming evidence of Calhoun's guilt. The victim's blood, hair, and purse were found inside of Calhoun's trailer, which was in a disarray. See Calhoun, 138 So. 3d at 366. Calhoun was witnessed asking the victim for a ride on December 16 and a witness testified that the victim came to the wrong residence the night she went missing, looking for Calhoun's trailer. Id. The morning that Mia Chay Brown and Calhoun were both reported missing, Calhoun was seen in a white four-door car, which matched the victim's car, as well as buying cigarettes at a convenience store in Alabama. Id. He was witnessed with blood and scratches on his hands and later that day a fire was seen burning. Id. Eventually, Calhoun went to the home of friends in Alabama, less than 1.5 miles from the victim's burnt car where he was informed that he was reported as missing along with the victim, Mia Chay Brown. Id. at 367. The victim's burnt remains were found in the trunk of her car on December 20. Id. Therefore, defense counsel's calling Doug Mixon would not have made a difference as it does not pertain to the DNA evidence that was found, the location of the burnt car, and the sightings of Calhoun and the victim before her death.

B. Trial counsel did not render ineffective assistance of counsel when she did not hire forensic experts.

Calhoun argues that defense counsel was ineffective for failing to retain or consult with a forensic expert. In particular, Calhoun argues that counsel should have consulted with a pathologist or medical expert to show how Calhoun received the

scratches and injuries to his body. (Initial Brief at 53). In addition, Calhoun asserts defense counsel should have consulted with a digital forensic expert to ensure that the SD card seized was not altered in any way as it was used to establish a timeline for the crime. (Motion at 53).

This Court has repeatedly rejected a claim of ineffectiveness for failing to hire various experts when the proffered testimony would not have assisted in the defense. Reed v. State, 875 So. 2d 415, 422-23, 425, 427 (Fla. 2004); Beasley v. State, 18 So. 3d 473 (Fla. 2009) (finding defense counsel was not ineffective for failing to hire experts, when the experts would not have presented any testimony contrary to the State's position). The test to be applied in a claim of ineffective assistance of counsel for failure to retain an expert is whether counsel's performance was deficient and whether the defendant was prejudiced by that deficiency. Reed, 875 So. 2d at 415. But, in this case, any such testimony from an expert would have been fruitless.

Scratches

In regards to the scratches observed on Calhoun, neither the State nor trial counsel had experts testify as to how Calhoun obtained the scratches. In closing arguments, defense counsel argued to the jury that briars or other similar shrubbery caused the injuries. (T17:1194-95). Even taking Calhoun's arguments that an expert would have supported his theory of how he received the scratches, he cannot show how he was prejudiced. Throughout trial the testimony presented was that Calhoun

was in the bushes hiding out which is consistent even with the injuries he sustained. Therefore, even if an expert had testified that fingernails did not cause the injuries, the other option did not help Calhoun's defense. Reed, 875 So. 2d at 423 (finding there is no prejudice when the employment of an expert would not have assisted the defense).

Ms. Jewell testified that her strategy for handling the scratches was to let the State "step on their own toes." (Evid. Hrg. Trans. 196:21). She thought the State's explanation that they were caused by Mrs. Brown was ridiculous and "pretty outlandish, given what those photographs represented and looked like." (Evid. Hrg. Trans. 196:18; 196:24-25). The State did not call an expert to explain the scratches at trial.

Dr. Willey testified at the evidentiary hearing. He testified that his opinion was based on only his review of the photographs taken of the scratches and he did not have any case materials or transcripts. (Evid. Hrg. Trans. 247). Dr. Willey testified while he did not think the scratches were made by fingernails, he could not positively assert that the scratches were not made by fingernails either. (Evid. Hrg. Trans. 249). He stated that he suspected some of the scratches were partially healed. (Evid. Hrg. Trans. 252). During cross-examination, Dr. Willey admitted that he had not testified for the State in a case since around 1970. (Evid. Hrg. Trans. 260). Dr. Willey stated that there are four things that he looks for: lunar, width, multiplicity,

and parallel. (Evid. Hrg. Trans. 260-61). He stated that most manual scratches do not break the skin surface, "much less produce a semilunar mark." (Evid. Hrg. Trans. 261:16-17). Dr. Willey also testified that some of the scratches were parallel. (Evid. Hrg. Trans. 262:17-19). While he continued to insist that the scratches were wider than he would expect, he did not have a scale where he would say for certain how far the scratches were from each other. (Evid. Hrg. Trans. 263). Dr. Willey could not testify how the scratches occurred.

> Q: . . . But I just ask you to elicit the testimony from you, if you were to testify in trial, just like you've testified here today, you could not give a definitive opinion or tell the jury or tell us here today, that you know exactly how these scratches were caused?
>
> A: No. As a matter of fact, I assert I simply don't know how they occurred.

(Evid. Hrg. Trans. 264:23-25; 265:1-5).

Ms. Jewell was able to argue that the scratches were caused by Calhoun running through the woods. Appellant is unable to show how he was prejudiced and how the calling of Dr. Willey would have changed the outcome of the trial. There was no dispute that Calhoun had been in the woods prior to being arrested. He admitted to detectives he was present in the woods during his interview.

Consequently, Calhoun was not prejudiced by any alleged failure of counsel to call a medical or pathologist expert.

SD Card

In regard to the SD card, Calhoun has not shown how testimony of a defense expert would have changed the outcome of the case. The State called an expert who was able to approximate the date and timing of the pictures on the victim's SD card. (T15:914-22). The expert, Jennifer Roeder, approximated the timing of the photo from the testimony of the victim's sister and determined a range of time that the picture was taken of the roof of the trailer. (T15:921). During cross-examination, defense counsel was able to get the expert to admit that her testimony was based on no one resetting the time and date on the camera. (T15:922). Therefore, defense counsel effectively cross-examined the expert to show the issues with her testimony.

At the evidentiary hearing, Ms. Jewell testified about why she did not hire an expert. While she agreed that they can be important in some cases, she made the decision to not hire an expert for this issue. (Evid. Hrg. Trans. 143). The decision was part of her strategy and did not fall below the standards.

Mr. Sawicki was called by the defense to testify about the SD card. Mr. Sawicki, who is an expert in digital forensics, testified that he conducted an examination of the SD card, as well as reviewed reports and the testimony of the forensic analyst. (Evid. Hrg. Trans. 376). Mr. Sawicki's testimony was consistent with that of the Florida Department of Law Enforcement (FDLE) expert called by the State. He stated that the modified and created dates were consistent with the

analysis done on the clock of the digital camera and that the access date was the only date altered on the SD card. (Evid. Hrg. Trans. 387:16-17; 389:6-11). Even though Mr. Sawicki testified that having created dates after January 2011 would not be consistent with the trial testimony, his report that he prepared in this case stated that many of the photographs had created and modified time stamps after the date of the murder was consistent with FLDE's analysis related to the clock on the digital camera. (Evid. Hrg. Trans. 391:3-11). Mr. Sawicki was not aware of any of the photographs having their created or modified dates changed to January 17, 2011, which is when Investigator Raley accessed the SD card. (Evid. Hrg. Trans. 393:10-19). Mr. Sawicki also admitted that he could not tell from the metadata that the officer was lying about how the photographs were accessed. (Evid. Hrg. Trans. 394:13-16).

Ms. Jewell effectively cross-examined Ms. Roeder about the SD card. Mr. Sawicki's testimony would have been, at best, cumulative to the other testimony that was presented to the jury. As Calhoun is unable to demonstrate how calling this witness would create a reasonable probability of a different result, this claim should be denied.

C. Trial counsel subjected the State's case to adversarial testing through investigation, cross-examination, the utilization of available impeachment evidence, and proper objection and did not render ineffective assistance of counsel that prejudiced Calhoun.

Calhoun argues that trial counsel failed to test the State's evidence through proper objections, available impeachment evidence and effective cross-examination. (Initial Brief at 66-67). Calhoun listed numerous witnesses that he feels counsel should have asked more questions, should have objected, or should have impeached their testimony. (Initial Brief at 67-92).

"Whether to object is a matter of trial tactics which are left to the discretion of the attorney so long as his performance is within the range of what is expected of reasonably competent counsel." Peterka v. State, 890 So. 2d 219, 233 (Fla. 2004) (quoting Muhammad v. State, 426 So. 2d 533, 538 (Fla. 1982)). The Florida Supreme Court has held that defense counsel's decision not to object to minor hearsay matters are considered trial tactics. Brown v. State, 846 So. 2d 1114, 1122 (Fla. 2003). In the absence of testimony regarding trial counsel's strategy, a court presumes trial counsel exercised reasonable professional judgment in all decisions. Gore v. State, 964 So. 2d 1257, 1269-70 (Fla. 2007) (finding the defendant did not meet his burden of deficient performance when his lead counsel was not called to testify during the hearing, and defendant only presented testimony from co-counsel which criticized the strategy of lead counsel); see Callahan v. Campbell, 427 F.3d 897, 933 (11th Cir. 2005).

While courts may not indulge in *post hoc* rationalization, they also cannot insist that counsel "confirm every aspect of the strategic basis for his or her actions." Harrington v. Richter, 131 S.Ct. 770, 794 (2001). "There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" Id. at 791 (citing Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (per curiam)). Therefore, with the presentation of each witness defense counsel is not deemed automatically defective for not choosing the method that current counsel would have chosen. Further, unlike current counsel, defense counsel does not have the benefit of hindsight in determining what would be effective and what would not work. See Pagan, 29 So. 3d at 949.

During Calhoun's case, trial counsel effectively cross-examined each witness presented by the State. Through her cross-examination of various witnesses, defense counsel was able to make it clear that there was no evidence that Calhoun was in the trailer at the time that the kidnapping occurred, she was able to insinuate that someone broke in and committed the crime. (T17:1178). Further, defense counsel challenged the identification of the man who came into the store in Alabama at 6:00 a.m. (T13:659-65; T14:621). During closing arguments, defense counsel went through the testimony of each witness and explained to the jury why each testimony was important to show that Calhoun was not guilty. (T17:1179-207).

Counsel's failure to object to the testimony was clearly a strategic decision. Therefore, defense counsel's failure to object regarding the alleged hearsay testimony of Tiffany and Glenda Brooks appears to be a trial tactic by defense counsel. (T14:783-87, 794-97). The objections would have just drawn attention to their testimony and would not have assisted in Calhoun's defense. In addition, by effectively cross-examining the witnesses presented defense counsel was able to challenge the timeline of events. Defense counsel questioned Brittany Mixon on her events the day Calhoun was reported missing and her tampering with the evidence. (T14:720-45). Defense counsel also questioned Investigator Raley regarding his investigation, when he asserts everything occurred, and what information he left out. (T14:774-77; T15:957-62; T16:1080-87, 1092).

Even though, Calhoun may think that defense counsel should have asked more questions and should have gleaned additional answers, it does not mean that defense counsel was ineffective in her defense of Calhoun. There is no evidence of neglect on the part of counsel or that her approach was not strategic. Calhoun also has not been able to establish prejudice. To establish prejudice, the defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different. Strickland, 466 U.S. 668. The Florida Supreme Court has determined that a reasonable probability is a probability sufficient to undermine confidence in the outcome. Rutherford, 727 So. 2d at 219.

At the evidentiary hearing, Ms. Jewell testified about how she prepared the case for trial, as well as her actions during the trial. Ms. Jewell testified that Calhoun was insistent that the murderer was Doug Mixon. (Evid. Hrg. Trans. 54). She also testified that the strategy for trial was to attack the State's case and to show that the State could not prove the case beyond a reasonable doubt. (Evid. Hrg. Trans. 53-54). Ms. Jewell testified that she had a focused approach because she wanted to maintain her credibility with the jury. (Evid. Hrg. Trans. 55).

Charles Howe, Dr. Swindle, Dick Mowbry

Charles Howe, Dr. Swindle, and Dick Mowbry were witnesses that the State used to prove the identification of Mia Brown's body. Ms. Jewell admitted that she was not going to object to the witnesses because she did not think their testimony would be prejudicial. (Evid. Hrg. Trans. 68:6-24). Ms. Jewell agreed that there was no reason to cross-examine Mr. Howe or Dr. Swindle. (Evid. Hrg. Trans. 69:4-6). When Mr. Mowbry had testified at trial about the scene being something he would not forget, Ms. Jewell did not object. She did not think it was as inflammatory as it seemed and "[a]n objection draws the jury to a fact that that, oh, that was something that [the jury] was really supposed to be paying close attention to." (Evid. Hrg. Trans. 72:1-3). Additionally, Calhoun argues that Mr. Mowbry's identification of Mrs. Brown's ribs multiple times was inflammatory. However, Ms. Jewell stated that the identification was multiple photographs, and not the same one repeatedly.

(Evid. Hrg. Trans. 192-93). The questions asked by Ms. Jewell were clearly part of her strategy to focus on causing reasonable doubt that Calhoun was the person who committed the murder and to not present several theories and lose credibility with the jury. These witnesses were merely called to establish the identification of the body that was found.

In reference to Mr. Mowbry's statement that Appellant contends injected emotion and sympathy into the trial, the postconviction court noted that Ms. Jewell believed an objection "would have drawn additional attention to testimony given what was already emotional exhibits." (Order at 23). The postconviction court found the decision to not object to be strategic. (Order at 23). Calhoun has failed to show Ms. Jewell was ineffective in her performance and that he was prejudiced.

Brandon Brown

Ms. Jewell testified that her strategy was to not attack Brandon Brown and point to him as a possible person who killed Mia Brown.

> [A]s a matter of strategy and not wanting to attack the husband of the victim in front of the jury, we made, I made, and I don't say we, I made this call, not to lay the blame on Mr. Brown given the fact that Mr. Calhoun was **adamant** that it was Doug Mixon and that Mr. Brown was not involved in it.

(Evid. Hrg. Trans. 84:8-13) (emphasis added). Ms. Jewell had a reasonable strategy for not putting the blame on Mr. Brown.

At the evidentiary hearing, counsel asked Ms. Jewell about photographs depicting bruises. However, no one was able to identify the person in the photographs, or even testify as to what caused the bruises on the unknown person. These photographs would not be admissible at trial because they cannot be authenticated. Ms. Jewell testified that no one knows the cause of the injuries and that it is unknown if Mr. Brown was even the cause of the injuries. (Evid. Hrg. Trans. 100). "I can't guess and accuse him of something. And, you know, I don't know what the cause of those [injuries] are. I mean, I don't know if she did something." (Evid. Hrg. Trans. 100:22-25). Ms. Jewell repeatedly stated that her strategy did not include placing blame on Mr. Brown, based on Calhoun's insistence that Mr. Brown had nothing to do with the murder of Mrs. Brown. The strategy was to place all the blame on Doug Mixon. (Evid. Hrg. Trans. 102). She "reiterated there was absolutely no evidence that she was aware of which would point to Brandon Brown as being responsible for this crime." (Order at 25). Ms. Jewell did not have a singular focus, "[b]ut you can't blame it on one person, then turn around and blame it on another because then you lose the jury's trust." (Evid. Hrg. Trans. 102:7-9).

> Q: As a defense attorney in a case like this, do you see any potential downfall in blaming grieving husband for a murder, basically, with no evidence in front of a jury?
>
> A: Yes, you actually garner a lot of disdain out of a jury when you do that. When you attack a family [ ] member of a victim, unless that family member is the one who is sitting next to me at this trial, juries do not like that at all.

> Q: Did you have any other type of evidence, anything that had come out in the case, that Brandon Brown was responsible for this particular crime?
>
> A: Absolutely nothing that I was aware of.

(Evid. Hrg. Trans. 193:25-194:1-11). Ms. Jewell had sound reasons for not trying to put the blame on Brandon Brown for the murder of Mia Brown. (Order at 25).

It is clear that Ms. Jewell did her best to adhere to her strategy and attack the State's case, while keeping the jury's trust. This was a reasonable plan to take by Ms. Jewell and did not fall below the standards of being a competent attorney. As such, Calhoun has failed to prove Ms. Jewell was ineffective.

Sherri Bradley

By postconviction counsel's own statement during the evidentiary hearing, Ms. Jewell "did a really good job attacking [Ms. Bradley's] identification, there's no question about that." (Evid. Hrg. Trans. 104:8-9). Ms. Jewell stated that she focused on the hair issue because that was the strongest issue with Ms. Bradley. (Evid. Hrg. Trans. 105). "[O]bviously, she couldn't identify him [Calhoun]." (Evid. Hrg. Trans. 105:7). "[A]t the time, you want to, you know, when you have that point that you think you have made to a jury, then you let that witness go so that they're left with that, you know, she can't even get it right." (Evid. Hrg. Trans. 105:10-14).

> I mean, you can always, you know, look back and say, well, I probably could've taken that one a little bit further than what I did. But, again, I know at the time, in my head, it was, you know, this hair issue was the

> strongest thing, I felt, that the jury could really grab on to because she was totally identifying the wrong person.

(Evid. Hrg. Trans. 106:6-11). Ms. Jewell clearly had a strategy when questioning this witness. Ms. Bradley was never called as a witness at the evidentiary hearing and it is purely speculation as to what she would have testified to had she been asked the additional questions. As such, Calhoun has failed to meet his burden to show Ms. Jewell was ineffective.

Darren Batchelor

At the evidentiary hearing, the age difference between Mr. Batchelor and Calhoun was discussed. At the trial, for the first time, Mr. Batchelor claimed to have gone to school with Calhoun. (Evid. Hrg. Trans. 110-11). Ms. Jewell stated

> [a]nd this is where one of those instances where had we gotten Mr. Calhoun to actually look at the case and talk to us about these witnesses, because the first time he told me, no, I don't know him, was in trial. And that was specifically what I had warned him about, at the time of trial is not the time to tell me these things.

(Evid. Hrg. Trans. 111:2-7). Ms. Jewell also stated that her strategy was to play Mr. Batchelor's identification off of Ms. Bradley's identification because they were inconsistent and she wanted to make that point to the jury.[8] (Evid. Hrg. Trans. 115). This is not an unreasonable strategy and Calhoun has failed to establish prejudice.

[8] Ms. Bradley stated that the person had longer hair; however, Mr. Batchelor stated that the person had shorter hair. (Evid. Hrg. Trans. 109).

Brittany Mixon

Ms. Jewell testified that Brittany Mixon did not make herself out to be a sympathetic character when she testified. (Evid. Hrg. Trans. 132). She also testified that she does not know what effect the fact that Ms. Mixon did not make any phone calls to Charlie's Deli would have on the jury. (Evid. Hrg. Trans. 131-32). Because her father is Doug Mixon, Ms. Jewell stated that the implication that Ms. Mixon was involved in the murder was present. (Evid. Hrg. Trans. 132). Calhoun failed to establish what prejudice he sustained as a result of Ms. Jewell not asking additional questions.

Tiffany Brooks, Glenda Brooks

Ms. Jewell testified that when Tiffany Brooks testified about what her boyfriend told her about the flyer, she did not object to hearsay. She stated that sometimes, when a defense attorney is sitting at the table with a client sitting next to them and talking to them while a person is testifying, it is very easy for an objection to be missed. (Evid. Hrg. Trans. 135). Defense counsel did not elicit any testimony that would establish how Calhoun was prejudiced by this evidence being presented.

Ms. Jewell testified that Glenda Brooks was difficult during cross-examination. (Evid. Hrg. Trans. 136). She also stated, as with Tiffany Brooks, she might have just missed the hearsay objection. However, there was no evidence elicited that would establish how Calhoun was prejudiced by this evidence. By

postconviction counsel's own admission, Ms. Jewell was able to impeach both Tiffany Brooks and Glenda Brooks with prior inconsistent statements. (Motion at 22-23). Without a showing of any prejudice, Calhoun has failed to establish deficient performance by Ms. Jewell. (Order at 28).

Jennifer Roeder

Ms. Roeder, who analyzed the SD card, did not testify at the evidentiary hearing. When asked why she did not have Ms. Roeder testify about the efforts it takes to remove an SD card from a camera, Ms. Jewell replied, "I, to be honest, didn't even think about having her testify to that." (Evid. Hrg. Trans. 140:18-19). She further stated, "[a]nd I could've, in error, assumed that the jurors, I try not to assume my jurors are really stupid, but, you know. So, basic information, I don't get experts for." (Evid. Hrg. Trans. 140:21-23).

Calhoun argues that Ms. Jewell should have raised a chain of custody argument regarding the SD card. However, Ms. Jewell did not believe that the data had been altered, removed, or added in any way from the SD card. (Evid. Hrg. Trans. 195). There was a reasonable explanation to show why the access dates on the SD card had been changed.[9] Ms. Jewell testified that she did not ask additional questions about the data because she believed Ms. Roeder had "laid it out" during her direct

[9] Investigator Raley testified that he had accessed the SD card to see if there was anything of value on it.

examination and she did not want to "go down a whole nother line of questioning that mimics the direct." (Evid. Hrg. Trans. 145:3-10). Ms. Jewell did not ask questions of Ms. Roeder about the compromised data because she believed the jury had already heard that the SD card was compromised and that the integrity of it was questionable. (Evid. Hrg. Trans. 146).

Calhoun failed to show that the additional questions would have caused a different outcome in the trial and he cannot prove prejudice.

Michael Raley

Calhoun argues because the Florida Supreme Court found that the trial court erred in excluding Calhoun's statement to Investigator Raley and the issue was not preserved for appeal (Motion at 28), that is the definition of ineffective assistance of counsel. See Calhoun, 138 So. 3d at 360. However, the Florida Supreme Court also found that, even if the issue had been preserved, Calhoun still would not be entitled to relief. The Court agreed that the trial court erred in excluding the statements because they were self-serving, without making a determination based on fairness. Id. However, the Court further concluded that "any error in excluding these statements is harmless beyond a reasonable doubt because there is no reasonable possibility that exclusion of the redacted statements affected the outcome of the jury's verdict." Id. "Additionally, both statements were cumulative to other information elicited during the trial." Id. at 361. "The information Calhoun seeks to

introduce through the rule of completeness, that he did not know if Brown arrived at his trailer on December 16 and that his statement that Brown had never been to his trailer before December 16, was in fact provided to the jury." Id. Calhoun did not establish prejudice. This Court has already made findings that any error was harmless and it would not have affected the outcome of the trial. Id.

Even though Ms. Jewell stated that she would try the case differently now than before, that does not mean she was ineffective. Ms. Jewell stated that she has called law enforcement as witnesses more than once. (Evid. Hrg. Trans. 147). "Because you can often make it look as though something has not been, they've not been forthcoming to a jury and so you get some type of information through them, that the jury may think, okay, well, why didn't they tell us that." (Evid. Hrg. Trans. 147:7-11). She also stated that her strategy was to establish that everything looked made up. (Evid. Hrg. Trans. 148). Ms. Jewell had wanted to call Doug Mixon, so that she could establish that he knew the places Calhoun liked to visit. (Evid. Hrg. Trans. 148). Because Calhoun told her not to call Doug Mixon as a witness, it changed Ms. Jewell's strategy. (Evid. Hrg. Trans. 150). Ms. Jewell was still able to make the arguments and attack the credibility of the investigation. Calhoun has failed to prove prejudice.

Harvey Glen Bush

Calhoun argues that Ms. Jewell failed to effectively cross-examine Harvey Glen Bush. However, Calhoun has failed to establish deficient performance by Ms. Jewell, as well as prejudice. At the evidentiary hearing, Mr. Bush was not called to testify about how he would have answered had Ms. Jewell asked the additional questions. Ms. Jewell testified that she took the deposition of Mr. Bush. (Evid. Hrg. Trans. 75). During the deposition, Ms. Jewell asked Mr. Bush if it was a regular occurrence for Charlie's Deli to close early "so that we avoided the look that, you know, the store closed at the exact same time every day so something was obviously off if it closed at a different time." (Evid. Hrg. Trans. 76:9-12).

Calhoun has failed to prove Ms. Jewell performed deficiently as his trial attorney and has failed to prove prejudice. As such, Calhoun has not proven ineffective assistance of counsel.

In this case, there was overwhelming evidence of Calhoun's guilt. The victim's blood, hair, and purse were found inside of Calhoun's trailer which was in a disarray. See Calhoun, 138 So. 3d at 366. Calhoun was witnessed asking the victim for a ride on December 16 and a witness testified that the victim came to the wrong residence the night she went missing, looking for Calhoun's trailer. Id. The morning that Mia Chay Brown and Calhoun were both reported missing, Calhoun was seen in a white four-door car, which matched the victim's car, as well as buying cigarettes

at a convenience store in Alabama. Id. He was witnessed with blood and scratches on his hands and later that day a fire was seen burning. Id. Eventually, Calhoun went to the home of friends in Alabama, less than 1.5 miles from the victim's burnt car where he was informed that he was reported as missing along with the victim, Mia Chay Brown. Id. at 367. The victim's burnt remains were found in the trunk of her car on December 20. Id. With this overwhelming evidence, Calhoun was not prejudiced by any alleged failure of counsel to object to the testimony of witnesses regarding issues that did not affect the jury's verdict. Therefore, defense counsel's objections and additional questions during cross-examination would not have made a difference as they do not pertain to the DNA evidence that was found, the location of the burnt car, and the sightings of Calhoun and the victim before her death. Ms. Jewell had a clear strategy for how she handled the case that was not "so patently unreasonable that no competent attorney would have chosen it." Dingle v. Sec'y Dept. of Corr., 480 F.3d 1092, 1099 (11th Cir. 2007) (quoting Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983)). As such, this claim should be denied.

D. Calhoun was not prejudiced by the testimony of Glenda Brooks and Investigator Raley during the defense's case-in-chief at trial.

Calhoun argues that defense counsel was ineffective for eliciting potentially damaging evidence in the defense's case-in-chief. Calhoun challenges defense counsel's decision to recall Ms. Brooks and Investigator Raley to testify again when

the information they presented could have been elicited during cross-examination in the State's case-in-chief. (Initial Brief at 92-96).

This Court has held that there is a strong presumption that defense counsels render effective assistance and the assessment of their performance cannot be based on hindsight. "[A]n attorney is not ineffective for decisions that are part of trial strategy that in hindsight, did not work out to the defendant's advantage." Mansfield v. State, 911 So. 2d 1160, 1174 (Fla. 2005). "Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance, only if it was 'so patently unreasonable that no competent attorney would have chosen it.'" Dingle, 480 F.3d at 1099. The defendant on the other hand has to overcome the burden that what the attorney did is not considered trial strategy. See Darling v. State, 966 So. 2d 366 (Fla. 2007).

Ms. Jewell recalled Ms. Glenda Brooks and elicited testimony that Ms. Brooks did not want Calhoun in her home after she received the call from her daughter's boyfriend. (T16:1076). Although, Calhoun asserts he did not know why defense counsel recalled Ms. Brooks, defense counsel made it clear at side bar and during closing arguments. At side bar, defense counsel told the court she was trying to get information regarding Calhoun's statement to Ms. Brooks regarding the victim. (T16:1078).

> Your Honor, this is opening up me to ask her about what he told her when he got there. They said they wondered why he didn't call the

> police, because he had told them that he was kidnapped and tied up. So I think if we go to that direction, that opens the door.

(T16:1078). However, this was not allowed in by the trial court and trial counsel was not able to get this testimony in through the witness. During closing arguments, trial counsel again reiterated that Ms. Brooks' testimony the day after the incident was different than her testimony at the time of trial. (T17:1191-92). It is clear that trial counsel was trying to show the inconsistent statements of this witness, while also attempting to get this information to the jury.

At the evidentiary hearing, Ms. Jewell testified she believed she called Ms. Brooks during the defense's case-in-chief to ask her why Ms. Brooks did not want Calhoun at her home. (Evid. Hrg. Trans. 137). Ms. Jewell testified that she had a conversation with Calhoun and that Ms. Brooks did not want another person at the house and it was not specific to Calhoun. (Evid. Hrg. Trans. 137-38). This shows clear strategy to imply to the jury that Ms. Brooks was not afraid of Calhoun when she asked him to leave her home.

Through the testimony of Investigator Raley, trial counsel was able to show the State was withholding information. Trial counsel questioned Investigator Raley about Doug Mixon, who was known to fight with Calhoun in an effort to show that there was a possible second suspect. (T16:1082). During closing arguments defense counsel stated that she wanted to show that there was doubt that Calhoun was actually seen buying cigarettes since he already had some. (T17:1197-99). Defense

counsel also argued that the information regarding an unknown shoe print did not belong to Calhoun and was hidden by the State because it did not match the State's theory of the case. (T16:1084; T17:1195-98).

At the evidentiary hearing, Ms. Jewell testified that, as a matter of strategy, she will routinely call law enforcement witnesses during the defense case-in-chief to make it appear that they were not forthcoming to the jury and to make the jury wonder why the witness did not disclose that information previously. (Evid. Hrg. Trans. 147). Ms. Jewell had a strategy for calling Investigator Raley. Although Calhoun argues that defense counsel's decision to recall Investigator Raley was puzzling, defense counsel was able to show that the State was hiding information that did not work for their case. Therefore, trial counsel was not ineffective for presenting evidence that put doubt on the State's case.

Further, Calhoun has not shown how he was prejudiced. Both of these witnesses testified in the State's case-in-chief and there was substantial evidence of Calhoun's guilt that was presented throughout trial. Therefore, their testimony does not undermine the jury's verdict. See Everett v. State, 54 So. 3d 464, 478 (Fla. 2010). Consequently, Calhoun has failed to show prejudice by any testimony of Ms. Brooks or Investigator Raley in the defense's case and this claim should be denied.

V. THE POSTCONVICTION COURT DID NOT ABUSE ITS DISCRETION BY NOT ALLOWING CALHOUN TO AMEND HIS MOTION FOURTEEN DAYS PRIOR TO THE START OF THE EVIDENTIARY HEARING.

On September 1, 2017, Appellant filed a motion to amend his 3.851 motion, raising a claim of newly discovered evidence involving Robert Vermillion. The evidentiary hearing was set to begin on September 15, 2017, and resume on September 19, 2017. On November 1, 2017, over a month after the evidentiary hearing, Appellant filed another motion to amend, raising a claim of newly discovered evidence involving Keith Ellis.

Fla. R. Crim. P. 3.851(f)(4) states that a trial court **may** grant a motion to amend provided that the motion was filed **at least 45 days prior** to the evidentiary hearing. Denials of motions to amend are reviewed under the abuse of discretion standard. See Doorbal v. State, 983 So. 2d 464 (Fla. 2008) (finding no abuse of discretion where motion to amend was filed less than 30 days before the evidentiary hearing); Smith v. State, 213 So. 3d 722 (Fla. 2017) (finding no abuse of discretion when motion to amend was filed after the evidentiary hearing).

Calhoun, through counsel, filed the motion to supplement 14 days prior to the evidentiary hearing. On September 15, the postconviction court, in accordance with the rule, denied the motion to amend. However, the court allowed Appellant to present the testimony of Vermillion and his testimony was considered by the court in its order denying relief. In rejecting the claim of newly discovered evidence filed

under Claim 16, the postconviction court found with Simmons' inconsistencies and Sheriff Ward's testimony, the outcome of the trial would not have been different. (Order at 52). The court stated that Mixon was adamant that he had never confessed to the murder of Mrs. Brown. (Order at 52). "But I sure as sin wouldn't confess to something that I didn't do." (Evid. Hrg. Trans. at 320). The court clearly found Mixon's denial believable. The court did not abuse its discretion in denying the untimely motion to amend and Appellant was still able to argue the evidence of Vermillion's testimony at the evidentiary hearing.[10]

The November 1st motion to amend was also untimely, as it was filed more than a month after the evidentiary hearing. The postconviction court did not abuse its discretion in denying the motion. Additionally, counsel for Appellant acknowledged in the motion to amend that the claims could be filed in a successive 3.851 motion.[11] (Fifth Amended Motion at 4). Appellant is still able to bring his claims and is not prejudiced. Because the postconviction court did not abuse its discretion in denying either motion to amend, this claim is meritless and must be denied.

[10] The postconviction court noted that Vermillion admitted at the evidentiary hearing that Mixon did not confess to the murder of Mrs. Brown to him. (Order at 51).

[11] On August 17, 2018, Appellant filed a successive motion to vacate in the trial court, raising claims of newly discovered evidence with Vermillion and Ellis, which was stayed by this Court on August 22, 2018.

VI. THE STATE DID NOT COMMIT ANY VIOLATIONS UNDER GIGLIO AND CALHOUN'S DUE PROCESS RIGHTS WERE NOT VIOLATED.

Calhoun claims that he was denied his right to fair trial based on the testimony of Investigator Raley and Sherri Bradley, as well as the State's closing arguments. (Initial Brief at 103-07).

To establish a Giglio violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. Giglio v. United States, 405 U.S. 150 (1972); Guzman v. State, 868 So. 2d 498, 505 (Fla. 2003). Satisfying the second prong requires more than an incidental inconsistency in a prosecution witness's testimony, it requires evidence establishing that the prosecutor knew[12] the testimony was false. Guzman, 868 So. 2d at 505 (holding knowledge prong met where informant and lead detective testified falsely that informant received no benefit for her testimony other than not being arrested; in fact, the detective paid the informant $500); Ventura v. State, 794 So. 2d 553, 562-63 (Fla. 2001) (holding knowledge prong met where co-defendant testified that no promises were made to him in exchange for his testimony; the prosecutor in the case wrote letters to the U.S. Attorney's Office seeking favorable treatment for co-defendant).

[12] Knowledge is imputed onto the prosecutor if other State agents, such as law enforcement officers, withheld correct information. Gorham v. State, 597 So. 2d 782, 784 (Fla. 1992).

In this case, Investigator Raley testified that Calhoun told him that police were closing in on him at least three times while he was in the woods. (T15:955). As the postconviction court stated in its order, "[t]here was sufficient testimony presented at trial that Calhoun went to the Brooks' home, which is 1.5 miles away from where the car was burnt." (Order at 39; T15:948-49, 953). There was sufficient evidence to establish that Calhoun was near where the car was burnt. (Order at 39). Additionally, Ms. Bradley's testimony was corroborated by another witness who saw Calhoun in the store at the same time. (Order at 39). Her statement about the news was not material to her testimony and is not a Giglio violation.

Calhoun also claims that during closing arguments, the State made improper statements that were misleading and false. However, the postconviction court correctly found that the claim should have been raised on direct appeal. (Order at 39). Additionally, the State's statements during closing arguments would not fall under Giglio because, as the jury was properly instructed, what the lawyers say during their opening statements and closing arguments is not evidence. (T13:514; T17:1148). As such, this claim was properly denied by the postconviction court.

VII. THE POSTCONVICTION COURT RELIED ON ESTABLISHED LAW AND PROPERLY APPLIED THE LAW TO THE EVIDENCE THAT WAS PRESENTED AT THE EVIDENTIARY HEARING.

Calhoun claims that the postconviction court violated his right to due process when the court, in its order, used much of the same language as what was submitted

by the State in its written closings. (Initial Brief at 107-11). Appellant claims that the court relied on the State's "proposed order," but this is simply not true. The State did not submit any proposed order; however, it did submit written closings, as did defense. The fact that the court arrived at the same legal conclusions as the State, does not mean that the court did not conduct on independent analysis of the evidence. The court relied on established law and applied it to the evidence that was presented at the hearing. This claim is meritless and should be denied.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court affirm the postconviction court's order denying Appellant relief. Appellant committed the brutal murder of Mia Chay Brown. The evidence of guilt was overwhelming. "When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 at 695. "A court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." Id. at 696. The record affirmatively demonstrates beyond a doubt that even if defense counsel had committed each of the errors complained of in the Motion for Postconviction Relief, there is no chance that the outcome would have been different.

In conclusion, Appellee respectfully requests that this Honorable Court affirm the postconviction court's Order granting Appellant a new penalty phase and denying his guilty phase claims.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ *Lisa A. Hopkins*
Lisa A. Hopkins
Assistant Attorney General
Florida Bar No. 99459
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399
Telephone: (850)414-3336
Facsimile: (850)414-0997
capapp@myfloridalegal.com
Lisa.Hopkins@myfloridalegal.com

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 26th day of September, 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Kathleen Pafford, at Kathleen.pafford@ccrc-north.org, and Elizabeth Salerno, at Elizabeth.salerno@ccrc-north.org, Attorneys for Appellant.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ *Lisa A. Hopkins*
COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

Case No. SC

JOHNNY MACK SKETO CALHOUN,
Petitioner,
v.

JULIE JONES
SECRETARY, DEPARTMENT OF CORRECTIONS
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

ROBERT S. FRIEDMAN
Capital Collateral Regional Counsel – North

KATHLEEN PAFFORD
Assistant CCRC – North
Florida Bar No. 99527

ELIZABETH SALERNO
Assistant CCRC-North
Florida Bar No. 1002602

OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUSNEL – NORTH
1004 DeSoto Park Drive
Tallahassee, Florida 32301

COUNSEL FOR PETITIONER

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PRELIMINARY STATEMENT

Article I, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is filed to address substantial claims of error under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. The claims allege ineffective assistance of Mr. Calhoun's direct appeal counsel.

Citations to the record on direct appeal to this Court shall be designated by "R.", followed by the appropriate page number. Citations to the trial transcript on direct appeal to this Court shall be designated by "T.", followed by the appropriate page number. All other citations will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Johnny Mack Sketo Calhoun has been sentenced to death. The resolution of issues in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Johnny Mack Sketo Calhoun, through counsel, respectfully requests this Court grant oral argument.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Florida Rule of Appellate Procedure 9.100(a). Article I, Section 13 of the Florida Constitution provides that, [t]he writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety." This Court has original jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(3) and Fla. Cont. Art V, §3(b)(1) and (9). This petition presents constitutional issues which directly concerns the judgement of the Florida State courts and Mr. Calhoun's death sentence.

This Court has jurisdiction and the inherent power to do justice. *Brown v. Wainwright*, 392 So. 2d 1327 (Fla. 1981). The ends of justice call on the Court to grant the relief sought in this case. The petition raises claims involving fundamental state and federal constitutional error. This Court's exercise of its habeas corpus jurisdiction and of its authority to correct constitutional errors is warranted in this action. As the petition shows, habeas corpus relief is proper on the basis of Mr. Calhoun's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

Mr. Calhoun asserts that his conviction was obtained in violation of his rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution because his appellate counsel rendered ineffective assistance of counsel during his direct appeal. This renders Mr. Calhoun's conviction unconstitutional.

PROCEDURAL HISTORY

On February 28, 2011, the grand jury for the Fourteenth Judicial Circuit, in and for Holmes Court, indicted Calhoun for the offense of first-degree murder. Calhoun pled not guilty to all charges and the guilt phase of his capital trial began on February 20, 2012. On February 28, 2012, the jury returned a verdict finding Calhoun guilty as charged. (R. 960). His penalty phase took place the following day, wherein the jury recommended death by a vote of 9 to 3. The Spencer[1] hearing took place on August 4, 2012. Mr. Calhoun was sentenced to death on May 18, 2012.

On direct appeal, this Court affirmed Calhoun's convictions and sentence. *Calhoun v. State*, 138 So. 3d 350 (Fla. 2013). Calhoun filed a Petition for Writ of Certiorari in the United States Supreme Court, which was denied on October 6, 2014. *Calhoun v. Florida*, 135 S. Ct. 236 (2014).

[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

Mr. Calhoun filed a timely Motion to Vacate Judgments of Conviction and Sentence on September 26, 2016.[2] The State filed its response on November 24, 2015. (PCR. 1138). The circuit court held a *Huff*[3] hearing on April 21, 2016. (PCR. 3928). Following the *Huff* hearing, the circuit court issued an order, granting Calhoun an evidentiary hearing on some issues and denying a hearing on the remaining issues. (PCR. 1343).

An evidentiary hearing commenced on September 15, 2017, and continued on September 19 and 20. On November 1, 2017, Calhoun filed a sixth Motion to Amend, seeking to amend with a claim of newly discovered evidence. (PCR. 2418). Calhoun also sought to reopen the evidentiary hearing to present evidence related to the claim. The circuit court denied Calhoun's Motion to Amend and Reopen in an order dated November 2, 2017. (PCR. 2437). The circuit court filed an order denying relief on all claims on January 3, 2018. (PCR. 2557). This timely appeal

[2] Calhoun filed the following Motions to Amend: (1) February 11, 2016 Motion to Amend with a claim premised upon *Hurst v. Florida* 136 S. Ct. 616 (2016) (PCR. 1138); (2) August 16, 2016 Motion to Amend with a claim based on a conflict of interest (PCR. 1378); (3) May 22, 2017 Motion to Amend with an additional claim of ineffective assistance of counsel (PCR. 1535); (4) June 22, 2017 Motion to Amend seeking to add one claim based on a *Brady v. Maryland,* 83 S. Ct. 1194 (1963) violation and a second claim based on newly discovered evidence (PCR. 1845); (5) September 1, 2017 Motion to Amend with a claim based on newly discovered evidence. (PCR. 2003).

[3] *Huff v. State,* 495 So. 2d 145 (Fla. 1986).

follows. Calhoun has timely appealed the denial of his Motion to Vacate and his Initial Brief was filed in Case SC18-340 simultaneously with this habeas petition.

ARGUMENT I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL MERITORIOUS ISSUES WHICH WARRANTS REVERSAL OF MR. CALHOUN'S CONVICTION AND SENTENCE

A. Introduction

Appellate counsel has the "duty to bring such skill and knowledge as will render [the appeal] a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). To establish that counsel was ineffective, *Strickland* requires a defendant to demonstrate: (1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professional acceptable performance; and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. *Wilson v. Wainwright*, 476 So. 2d 1162. 1163 (Fla. 1985).

In order to grant habeas relief based on ineffectiveness of appellate counsel, this Court must determine "whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as

to undermine confidence in the correctness of the result." *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986).

Appellate counsel's failure to raise the meritorious issues addressed in this petition proves his advocacy involved "serious and substantial deficiencies" which establishes that "confidence in the outcome is undermined." *Fitzpatrick v. Wainwright*, 490 So. 2d 938, 940 (Fla. 1986); *Barclay v. Wainwright*, 444 So. 2d 956, 959 (Fla. 1984); *Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985).

This Court has held that "constitutional errors, with rare exceptions, are subject to harmless error analysis." *State v. DiGuilio*, 491 So. 2d 1129, 1134 (Fla. 1986). Harmless error analysis:

> Requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the verdict.

Id. at 1135. Once error is found, it is presumed harmful unless the state can prove beyond a reasonable doubt that the error "did not contribute to the verdict, or, alternatively stated, that there is no reasonable probability that the error contributed to the [verdict]." *Id*. at 1138.

B. Appellate counsel was ineffective for failing to challenge the trial court's exclusion of Mr. Calhoun's statement related to where and when he was in the woods with law enforcement

The State introduced as admissions against interests five statements that

Calhoun made during an interrogation by law enforcement. Calhoun's trial counsel objected, arguing that the entirety of Calhoun's statement should be admitted under the rule of completeness. The trial court denied trial counsel's objection, and trial counsel failed to proffer the remainder of Calhoun's statement for review.

On direct appeal, appellate counsel raised a claim challenging the exclusion of Calhoun's entire statement to law enforcement based on the circuit court's misunderstanding of the rule of completeness. Appellate counsel focused his argument on two portions of Calhoun's statement: (1) that Calhoun admitted to being at the Brooks' residence on Saturday, December 18, 2010 and (2) that Calhoun told law enforcement that Mia Brown had never been to Calhoun's trailer located on the property of the junkyard. *Calhoun*, 138 So. 3d at 359. Appellate counsel failed to include in his argument that the State also selectively chose a statement from Calhoun's interrogation, where he placed himself in the woods with law enforcement and then mischaracterized his statement to argue that he essentially confessed to being at the crime scene.

The statement at issue was relayed to the jury by Lt. Michael Raley. In response to being asked if Calhoun made any statements concerning being in the woods with law enforcement in the days leading up to December 20, 2010, Lt. Raley testified "He leaned over and he made the statement that there were three

times that he was close enough to (tapping on desk) he tapped the side of my leg with his foot." (T. 955). The State then took this testimony, which was presented out of context, and argued the following to the jury:

> And one other thing. It was kind of fast testimony and it might have went by you a little quick. Mike Raley, I asked him, I said did you ever discuss with him about being in the woods the same time as law enforcement? He said Johnny Mack Sketo Calhoun leaned forward and looked at Michael Raley and said there was a couple times where y'all were close enough (kick podium three times) and could have kicked me three times. Now, why is that important? Friday, December 17th, this car's on fire at 11:00, 11:30 in the morning, right here. Two o'clock that day, about three hours later, Michael Raley is taken right here by Brittany Mixon, but it had started raining.
>
> Now, you heard Dick Mabry, Mowbray talk about that the area around the car burnt severely and then, he couldn't tell why, but it just quit burning there. Well, it started raining that afternoon. So when, in all the evidence that you've heard in the last week and a half, is the defendant in the woods with law enforcement, that we know of, that you have evidence of? It's Friday afternoon when Michael Raley is right there in the same woods where the defendant is, where that car was burned.

(T. 1210-1211).

The State clearly wanted the jury to believe that Calhoun placed himself in right near Mia Brown's burned car and body, within hours of the car being burned. The inference is obvious – if Calhoun was a stone's throw from Mia Brown's burnt car, he must have been the one who burnt it. There can be no doubt that the jury made this connection and came to the conclusion that Calhoun's location in the woods, so close to the burnt car, was due to his involvement in the crime. After

all, the circuit court reached that very conclusion, writing in its sentencing order that "The defendant would later boast to law enforcement at about 2:00 p.m., that same rainy afternoon, he remained concealed near the campsite and was close enough to reach out and touch a deputy." (T. 1077).

However, at no point in time did Calhoun ever tell law enforcement that he was with them in the woods on December 17, 2010, close to Mia Brown's car and body.

The actual exchange between Lt. Raley and Calhoun was as follows:

Hamilton: About what time did you get back to the trailer?

Calhoun: Last night.

Hamilton: Last night?

Calhoun: Yeah, Ya'll was tightening up the noose last night when I was in the woods man.

Raley: Why do you say that?

Calhoun: Ya'll was just getting close to me man. Ya'll don't even know how close ya'll was several times.

Raley: Huh?

Calhoun: I'd say more than three times a deputy could have reached out and done like that.

Raley: Where was that at?

Calhoun: Down there, close to Bethlehem Campground. I don't really

know where I was in the woods.

Raley: Bethlehem Campground. Talking about down here in Florida?

Calhoun: Yeah.

Raley: You made it all the way down there?

Calhoun: Yeah.

(R. 103). It is clear Calhoun never placed himself in the woods by Mia Brown's car.

It was error for appellate counsel not to raise the above misleading statement on Calhoun's direct appeal. It is apparent from the record that the State took Calhoun's statement completely out of context and then outright lied to the jury in closing argument. Appellate counsel had the benefit of both the State's closing argument and a transcript of Calhoun's statement. Appellate counsel clearly knew that the purpose of the rule of completeness was to "avoid the potential for creating misleading impressions by taking statements out of context." *Calhoun*, 138 So. 3d at 360, and should have argued to this Court that the portion of Calhoun's statement at issue should have been admitted to provide a proper context. *Id*. at 359.

As the foregoing illustrates, it is clear that the testimony about Calhoun being in the woods with law enforcement created a misleading impression when not placed in the proper context, which, of course, it was not. Yet, appellate

counsel inexplicitly omitted any mention of it to this Court in litigating Calhoun's rule of completeness argument. His failure to raise this issue fell outside the range of professionally acceptable performance.

Appellate counsel's error compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. On direct appeal, this Court found that the trial court erred in excluding Calhoun's statements, but found the issue was not preserved due to the failure of trial counsel to properly preserve the issue for appellate review. *Calhoun v. State*, 138 So. 3d 350, 360 (Fla. 2013). Due to trial counsel's failures, this Court was then forced to determine whether the trial court's error was fundamental. *Id.* Fundamental error is "define as error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Anderson v. State*, 841 So. 2d 390, 403 (Fla. 2003). This Court ultimately determined that the trial court's error in refusing to admit Calhoun's statement was harmless beyond a reasonable doubt because "The statements with which Calhoun asserts error **were only two statements** out of the extensive record in this case. *Calhoun* at 361. (emphasis supplied).

This Court's fundamental error analysis was clearly hampered by appellate counsel's failure to raise the issue of Calhoun's statements regarding being in the woods with law enforcement. Had appellate counsel done so, this Court would

have been able to conclude that the trial court's error reached down into the validity of the trial itself. After all, the State portrayed Calhoun's statement, taken out of context, to be something akin to a confession. This is important because the case against Calhoun was a purely circumstantial one. *Calhoun* at 365. The State was unable to provide the jury any direct evidence that Calhoun was the one responsible for Mia Brown's death. There was no motive, no eyewitnesses, and no confession. Calhoun, allegedly placing himself in the same vicinity of Mia Brown's burned car, on the day and within hours of when it was set fire to it, was the strongest evidence the State had tying Calhoun to the crime. Without this statement, it is unlikely the State could have obtained a guilty verdict.

Unlike the statements that appellate counsel raised on direct appeal, the statement about Calhoun being in the woods with law enforcement was not cumulative to any other information elicited during the trial. There is more than a reasonable probability that the misleading testimony and subsequent false argument affected the jury's verdict, thus, the error could not be harmless beyond a reasonable doubt. Appellate counsel's failure to raise this issue fell far outside the range of professionally acceptable performance. Due to this failure, there can be no confidence in the correctness of the appellate process. Relief in the form of a new trial is required.

C. Appellate counsel was ineffective for failing to raise the flawed jury instruction regarding venue and jurisdiction given in Calhoun's case

The circuit court failed to properly instruct the jury in Calhoun's case regarding the issues of venue and jurisdiction. The improper instructions given to the jury essentially relieved that State of its burden of proof. Appellate counsel failed to raise this issue on direct appeal, rendering ineffective assistant of counsel.

1. Venue

The State proposed a special jury instruction on venue, arguing that the Florida Standard Jury Instruction (Crim.) 3.8(e) did not adequately set out the law as it applied to the facts of the case. (R. 959).

As a preliminary matter, a venue instruction is only given when requested by the defense. *See* Fla. Std. Jury Instr. (Crim.) 3.8(e) What's more, standard jury instructions are presumed correct and are preferred over special instructions. *Stephens v. State*, 787 So. 2d 747 (Fla. 2001). When a standard instruction accurately and adequately states the law, it should be given in the absence of extraordinary circumstances. *Leverette v. State*, 295 So. 2d 372 (Fla. 1st DCA 1974). When a trial court deviates from the standard instructions, the court is required to state on the record, or in a separate written order, why the standard instruction is inadequate. Fla. R. Crim. P. 3.985. No explanation was provided by the trial court in Calhoun's case.

Here, there was no dispute that if Florida had jurisdiction to prosecute the crimes at issue, Holmes County was the proper venue. Thus, the crux of the issue was jurisdiction, not venue, and there was no reason for the giving of the venue instruction. To aggravate matters, the State's proposed instruction set out a truncated and simplified law of jurisdiction. The jury was told, before it was even instructed on the issue of jurisdiction, that "If the commission of an offense commenced within this State and is consummated outside the State, the offender shall be tried in the county where the offense is commenced." (T. 1236). This erroneous instruction was never even identified as a venue instruction. It is likely then, that the jury in Calhoun's case failed to understand that venue and jurisdiction were separate and distinct issues, with different burdens of proof. *See* Fla. Std. Jury Instr. (Crim.) 3.8(e)(venue must be proved only to a reasonable certainty); *Lane v. State*, 388 So. 2d 1022 (Fla. 1980) (territorial jurisdiction must be proven beyond a reasonable doubt). Thus, the jury likely believed that all the State needed to prove for it to find Calhoun guilty was that "something" happened in Holmes County, even if that "something" was only tangentially related to the crime.

Appellate counsel's failure to raise on direct appeal the trial court's erroneous giving of the venue instruction at the State's behest clearly fell outside the range of professional acceptable performance. There can be no excuse, as the

standard jury instructions themselves state that the venue instruction is only to be given if requested by the defense. Fla. Std. Jury Instr. (Crim.) 3.8(e) It is obvious from the record that it was the State, not the defense who requested the venue instruction. (R. 959; T. 1119). Appellate counsel's error allowed the jury's alleviating the State of its burden of proof to go unchecked, thereby compromising the appellate process. There can be no confidence in the correctness of the appellate result.

2. Jurisdiction

The instruction given to the jury on the issue of jurisdiction was fundamentally flawed. At trial, defense counsel proposed a special instruction on jurisdiction, based on *Lane v. State*, comprising two pages. (R. 940-41). The State objected to all of the language contained on the second page and the instruction was not given to the jury. (T. 1118).

The State must establish beyond a reasonable doubt that the essential elements of an offense are committed within the jurisdiction of the State of Florida. *Deaton v. Dugger*, 635 So. 2d 4 (Fla. 1993), citing *Lane v. State* at 1028. The issue of jurisdiction is a factual one to be determined by the jury upon appropriate instruction. *Id.* Territorial jurisdiction must be proved beyond a reasonable doubt. *Id*. at 1029. Upon request of the defendant, the court should instruct the jury on jurisdiction when the evidence is in conflict on the issue. *Deaton* at 7.

The jurisdiction instruction that was given to the jury was a misstatement of the law, as it allowed for jurisdiction to be found without a finding by the jury that the intent to commit murder originated in Florida. The critical part of the instruction given to the jury reads as follow:

> To prove that the State of Florida has jurisdiction to prosecute the crime or crimes charged, the State must prove only one of the following:
>
> 1. Mia Chat Brown was burned or suffocated by smoke inhalation within the State of Florida.
>
> 2. Mia Chay Brown died within the State of Florida.
>
> 3. Mia Chay Brown was taken against her will by Johnny Mack Sketo Calhoun from the State of Florida; **OR**
>
> 4. Johnny Mack Sketo Calhoun formed the premeditated intent to kill Mia Chay Brown within the State of Florida.

(R. 940; T. 1236-37) (emphasis added).

Calhoun was charged with felony murder, the underlying felonies being arson and/or kidnapping. (R. 39). All of the evidence presented by the State indicated that the act of arson was committed solely in the State of Alabama. No evidence was presented to even infer that the intent to commit arson was formed in Florida. Additionally, all of the evidence presented by the State indicated that Mia Brown died in Alabama, rendering paragraphs one and two of the jury instruction moot. Thus, the critical issues as it related to jurisdiction were found in paragraphs

three and four of the instruction. Paragraph three essentially defines the elements of false imprisonment. Paragraph four defines first degree premeditated murder.

Simply put, kidnapping is the felonious act of a confinement or abduction with specific intent. *See* Fla. Stat. §787.01. In Calhoun's case, the specific felonious intent was to commit first degree murder. Therefore, to prove that Florida had jurisdiction over the prosecution of the case, the State was required to prove that Calhoun not only took Mia Brown from the State of Florida against her will, but he did so with the intent to kill her. Simply taking Mia Brown from the State of Florida against her will is false imprisonment. *See* Fla. Stat. §787.02. False imprisonment is not a qualifying felony under the felony murder rule. Fla. Stat. §782.04(2).

Therefore, in order for the jury to find that the State of Florida had jurisdiction to prosecute Calhoun under the felony murder theory, the jury had to find that Calhoun took Mia Brown from the State of Florida against her will **and** he did so with the premeditated intent to kill her. The jury was not instructed on this.

Whether or not the State of Florida had jurisdiction to prosecute Calhoun for Mia Brown's murder was a glaring issue in this case. Appellate counsel had notice of the flawed jury instructions, as they appear in the trial transcript. (T. 1236-37). The mere fact that Mia Brown's death actually occurred in Alabama should have

alerted appellate counsel to a potential jurisdiction issue in and of itself. Appellate counsel's failure to raise the flawed jury instructions fell outside the range of professional acceptable performance.

Jurisdiction is an essential element of a crime, and must be proven beyond a reasonable doubt. *Lane* at 1029. Had the jury been properly instruction, it would not have been able to find jurisdiction beyond a reasonable doubt. The evidence against Calhoun was entirely circumstantial. There was no direct evidence of Calhoun's intent. Nor was there any evidence of when an intent to kill was formed. The State's theory is that Mia Brown was tied up in her trunk when Sherri Bradley claims to have seen Calhoun at an Alabama gas station, but that was not proven. Bradley claimed to see Calhoun between 5:30 and 6:00 a.m. and testified that after he left her store, he headed south. (T. 658, 652). Calhoun's father did not arrive to the junkyard until after 7:30 a.m. (T. 1005). Further, according to the State, the car was not burned until 11:30 a.m. (T. 762). There is absolutely no evidence regarding where Mia Brown was during that time. Appellate counsel's failure to raise this issue on appeal further alleviated the State of its high burden of proof. There can be no doubt that appellate counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the result.

D. Appellate counsel was ineffective for failing to raise the issue of improper introduction of victim impact evidence during the guilt phase of Calhoun's capital trial

Through the first two witnesses at the guilt phase of Calhoun's capital trial, the State introduced impermissible victim impact evidence. Fla. Stat. § 921.141(7) provides for the introduction of victim impact evidence at the penalty phase of a capital trial. However, it prohibits characterizations and opinions about the crime, the defendant, and the appropriate sentence. *Id*. It also prohibits the introduction of the evidence until the prosecution has provided evidence of one or more aggravating factors. *Id.*

Charles Howe was the first witness to testify for the State. (T. 543). After establishing that Mia Brown worked for him, he went on to identify a picture of her and her employment application. (T. 545-46). The employment application was introduced into evidence, without objection, as State's exhibit 2. During Howe's testimony, the State elicited details regarding the characteristics of Mrs. Brown's signature, namely that she dots her "I" and ends her name with a heart. (T. 548). Notably, at no point during trial did the State ask Howe questions aimed at authenticating Mrs. Brown's signature. Instead, the State's entire line of questioning focused on the unique characteristics of Mrs. Brown's signature, i.e. "her little hearts." (T. 548).

The State continued to emphasize this impermissible victim impact evidence with its second witness, Dr. Swindle. Dr. Swindle was Mia Brown's dentist. (T. 549). Through him, the State published exhibits 4C and 4F, which were forms that included Mia Brown's signature, complete with the hearts Charles Howe previously testified to. The State made certain to ask Dr. Swindle more than once whether Mia Brown's signature was on the forms, again emphasizing her hearted-signature. (T.552, 555).

It is clear from the record that the evidence pertaining to Mia Brown's signature was introduced purely to stress the unique characteristics of it, presumably to drive home the State's point that Mia Brown was a pretty, sweet girl.[4] Just as clear is the prohibition against victim impact evidence in the guilt phase of a capital trial. This emotional and inflammatory testimony was not simply elicited in the guilt phase of Calhoun's capital trial, it was the very first thing the jury heard. With the injection of this victim impact evidence into the trial at its very onset, it is hard to imagine a juror would not be overcome with emotion and sympathy.

[4] The State's opening line in closing argument to the jury stressed this very point: "Like a good Baptist sermon, the State's case has three points. This **pretty girl** died a horrible death. And Johnny Mack Calhoun did it; Johnny Mack Calhoun did it." (T. 1148)(emphasis added).

Appellate counsel's failure to raise this issue on direct appeal fell outside the range of professionally acceptable performance. Aside from being prohibited, the evidence at issue was also entirely unnecessary, as it was not needed to prove Mia Brown's identity. Avoiding prejudicial personal details of the victim by utilizing alternative methods of identification is a "fundamental proposition of trial practice according to the decisional law of this State." *Ashmore v. State*, 214 So. 2d 67, 69 (Fla. 1st DCA 1968). The case law in this area is very clearly motivated by policy considerations meant to ensure the State "present their evidence in the manner most likely to secure for the accused a fair trial, free, insofar as possible, from any suggestion which might bring before the jury any matter not germane to the issue of guilt." *Hathaway v. State*, 100 So. 2d 662, 664 (Fla. 3d DCA 1958).

The objectionable evidence, introduced through the State's first two witnesses, set the tone for an emotionally charged trial in which the jurors were biased against Calhoun from the very beginning. By failing to raise this issue, appellate counsel compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the result.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Calhoun respectfully urges this Court to grant habeas relief and set aside his conviction.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copy of the foregoing petition has been electronically filed with the Clerk of the Florida Supreme Court, and electronically served upon Lisa Hopkins, Assistant Attorney General on the 18th day of July, 2018.

/s/ KATHLEEN PAFFORD
Kathleen Pafford
Assistant CCRC-North
Florida Bar No. 99527
1004 DeSoto Park Drive
Tallahassee, FL 32301
(850) 487-0922

Elizabeth Salerno
Assistant CCRC-North
Florida Bar No.

COUNSEL FOR THE APPELLANT

CERTIFICATE OF FONT

I hereby certify that the foregoing Initial Brief was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.210.

/s/ KATHLEEN PAFFORD
Kathleen Pafford
Assistant CCRC-North
Florida Bar No. 99527

IN THE SUPREME COURT OF FLORIDA

JOHNNY MACK SKETO CALHOUN,

Petitioner,

CASE NO. SC18-1174

vs.

STATE OF FLORIDA,

Respondent.
_____/

RESPONSE TO PETITIONER FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, the STATE OF FLORIDA, by and through the undersigned counsel, and hereby responds to the Petition for Writ of Habeas Corpus filed herein, pursuant to this Court's Order of July 20, 2018. Respondent respectfully submits that the petition should be denied as meritless.

FACTS AND PROCEDURAL HISTORY

The relevant facts concerning the murder of Mia Chay Brown are recited in this Court's opinion on direct appeal:

> Johnny Mack Sketo Calhoun and Mia Chay Brown were both reported missing on December 17, 2010. On December 20, Brown's remains were found bound and burnt in her car, which had been lit on fire in the woods of Alabama. Calhoun, thought to be the last person to see Brown alive, was found hiding in the frame of his bed inside his trailer on December 20.
>
> **Guilt Phase**
>
> Brown worked at Charlie's deli and grocery store in Esto, Florida. Harvey Glenn Bush saw Brown working at Charlie's deli around 1 to 1:30 p.m. on December 16, 2010, and knew Brown drove a white car. Bush heard

Calhoun ask Brown for a ride that evening and Brown responded that she would pick him up after work at approximately 8 to 9 p.m.

Brown drove to Jerry Gammons' trailer in a light colored, four-door car and knocked on his door at about 8:40 p.m. on December 16. Brown asked for Calhoun, and Gammons told her that Calhoun did not live there. America's Precious Metals junkyard, where Calhoun's trailer was located, is approximately one road down from Gammons' trailer.

Brandon Brown, Brown's husband, talked with Brown at lunch time on December 16 while she was working at Charlie's deli. Brown usually got off of work at approximately 9 p.m. Brandon called Brown at 10 p.m. because she was not home. Brandon fell asleep on the couch at about 10:30 p.m., and when he woke up at 2 a.m., his wife was still not home. It was unusual for Brown not to come home; Brandon started calling family members to find her.

Sherry Bradley, the manager at Gladstone's convenience store located between Enterprise and Hartford, Alabama, testified that Calhoun came into her store between 5:30 and 6:00 a.m. on December 17, 2010, and bought cigarettes. Bradley noticed scratches and dried blood on his hands and sores on his face. Calhoun was wearing a white shirt that had spots of blood on it and there was something black underneath his fingernails. She asked Calhoun about his appearance, and he responded that he had been deer hunting. Calhoun was driving a white, four-door car with a Florida license plate. Darren Bratchelor, a former schoolmate of Calhoun's, also saw Calhoun at the convenience store at about 6 a.m. After that day, Bradley left town for a few days, but when she returned, another employee had posted a missing persons flyer in the store, on which she recognized Calhoun's photograph.

Chuck White, a patrol officer for Holmes County, Florida, arrived at America's Precious Metals at 8 a.m.

on December 17. White looked in Calhoun's trailer and found clothes and trash scattered everywhere. Calhoun was not there. On cross-examination, White testified that Sketo Calhoun ("Sketo") and Terry Ellenburg, co-owners of America's Precious Metals, told him that there had been a break-in at the junkyard, that there were pry marks on Calhoun's trailer door, and that the skid steer loader, or Bobcat, had been hot-wired and moved. White noticed many tire tracks around the yard. White acknowledged that he did not secure Calhoun's trailer before he left the yard.

Brett Bennett, a cattle broker in Geneva, Alabama, noticed smoke from the highway on December 17 at approximately 11 a.m. Keith Brinley, a school maintenance employee in Geneva, Alabama, also saw a big fire behind the Bennett residence at about that same time.

Tiffany Brooks, a resident of Hartford, Alabama, found Calhoun in her family's shed on the morning of December 18, 2010. Calhoun was on the ground wrapped in sleeping bags that the family kept around the freezer. Calhoun was wearing overalls and a white t-shirt and was wet and dirty. Brooks brought Calhoun into the house and the family washed his clothes, gave him new clothes, let him shower and nap, and gave him some food. Steven Bledshoe, Tiffany's boyfriend, called the Brooks' residence and told them about the missing persons flyer he saw with Calhoun and Brown's pictures on it. Calhoun told the Brooks he did not know Brown but she was probably the person who was supposed to pick him up at his trailer the night before. Calhoun had the Brooks drop him off at a dirt road. Glenda Brooks, Tiffany's mother, also testified to these events.

Brittany Mixon, Calhoun's ex-girlfriend, testified that she went to school with Brown and that Brown knew Calhoun through her and from working at the convenience store. On December 16, Mixon stayed at her father's house and expected Calhoun to come over that night but he never came. Mixon drove to America's Precious Metals on the

morning of December 17 to find Calhoun because he did not have a phone to call. Mixon used to live in Calhoun's trailer with him but moved out in October of that year. She testified that they had lost the key to the trailer so they had had to pry the door open to get inside the trailer. Mixon asked Sketo if he had seen Calhoun, but he had not. Mixon looked inside Calhoun's trailer; no one was inside, but the trailer was ransacked. Lieutenant Michael Raley of the Holmes County Sheriff's Office investigated Brown's missing persons report. He called Mixon, who told Raley about a campsite in Hartford, Alabama, approximately ten miles from America's Precious Metals, where Mixon and Calhoun would camp. The campground was on the property of Charlie Skinnard, Calhoun's brother-in-law. Mixon met the Brooks family once while camping with Calhoun. She took Raley to the campsite. Raley noted that the burnt car was off of Coleman Road, approximately 1,488 feet away from Calhoun's campsite. The Brooks' residence was approximately 1.5 miles from the burnt car.

Angie Curry, Priscilla Strickland, and Mixon went to Calhoun's trailer around 4 p.m. on December 17. Mixon went into the trailer and found wine, a purse, and menthol cigarettes. They took the items and called the police. Brandon identified the purse as belonging to Brown. When Mixon gave Brown's purse to Raley, Raley sent a police officer to Calhoun's trailer to secure it until they got a search warrant. On cross-examination, Mixon acknowledged that Sketo and Ellenburg told her that the trailer had been broken into and not to go in it, but she did anyway. She stated that Calhoun did not smoke cigarettes and did not have cable television service in his trailer.

Dick Mowbry, former game warden for Geneva County, Alabama, participated in a search for Brown and Brown's vehicle on December 20, 2010. He found a burnt, white Toyota with no license plate. The entire inside of the car was burnt and while he was looking through the front of the car, he saw a rib cage in the trunk, so he called the police.

Mike Gillis, with the Alabama Bureau of Investigation, responded on December 20 to the call regarding the burnt vehicle. Remains of a body were in the trunk of the car. There was what looked like coaxial cable wrapped around the wrists of the body; duct tape was also found in the car.

On December 21, 2010, Dr. Stephen Boudreau, a medical examiner for Alabama, received the human remains found inside the burnt car. The remains were badly burnt; the hands and lower limbs had been burnt off. Dr. Boudreau was able to identify the remains as female because the uterus and vagina were not destroyed, but the sex organs were denatured, or heated, to such an extent that there was no way to analyze them. He found coaxial cable wrapped around what was left of the remains' upper arms and tape on the neck. Dr. Boudreau determined that the cause of death was smoke inhalation and thermal burns and that the death was a homicide. He found soot embedded in the airway of the lungs' mucus blanket and carbon monoxide in the back tissue, meaning that the victim had inhaled smoke. Dental x-rays matched those of Brown's. On cross-examination, the defense elicited that no foreign DNA was found in Brown's vagina. Dr. Boudreau also acknowledged that no ends of the coaxial cable were found, and that he could not determine whether Brown was conscious or not when she inhaled the smoke or at what point in time she would have lost consciousness.

On December 20, 2010, Jeffery Lowry, deputy state fire marshal with the Alabama Fire Marshal's Office, took debris samples from the burnt car and sent them to the Alabama and Florida laboratories. Jason Deese, an arson investigator for the Florida Bureau of Fire and Arson, testified that on December 22, 2010, he inspected the car. The vehicle identification number (VIN) was matched to a 2000 Toyota Avalon. Brown owned a four-door 2000 Toyota Avalon. The fire originated in the driver's seat and passenger compartment; it was not an engine fire. Perry Koussiafes, senior crime laboratory analyst for the Florida Fire Marshal's Office, received six samples from the car on December 30, 2010. The samples from the

right front quarter and left quarter of the car tested positive for ignitable liquid.

Trevor Seifret, a crime lab analyst for the Florida Department of Law Enforcement (FDLE), testified that blood found on the cardboard of a roll of duct tape taken from Calhoun's trailer was a major donor match to Brown and a minor donor partial match to Calhoun. Blood found on blankets taken from Calhoun's trailer were total matches to Calhoun and Brown. DNA from hair found in Calhoun's trailer also matched Brown; Seifret testified that DNA is found on hair only when the hair is pulled out of the scalp.

Jennifer Roeder, a digital evidence crime analyst for FDLE, testified that an SD memory card found in Calhoun's trailer was from Brown's camera, and based on the time and date stamps of other pictures on the camera, the last picture was taken between 3:30 and 4:00 a.m. on December 17, assuming no one reset the clock on the camera.

On December 20, 2010, Harry Hamilton, captain of the Holmes County Sheriff's Department, seized Calhoun's trailer pursuant to a search warrant. He noticed that the evidence tape on the door had been broken. He found Calhoun hiding under his mattress in the bed frame in his trailer. Calhoun had scratches on his hands, arms, and neck.

Raley executed a second search of Calhoun's trailer on December 28 at the impound yard of the Holmes County Sheriff's office after Brown's remains had been found. He found a TV face down on the mattress of the bed and a DVD player. A VCR was on the floor and the top was off, with wires tangled in the corner. A converter box with outputs for a coaxial cable and a TV with a coaxial coupling were found, but no coaxial cable was found in the trailer.

The State rested, and the defense provided witnesses as follows. José Martinez, owner of the Friendly Mini-Mart,

testified that Calhoun came to his store on December 16 and bought a pack of cigars, wine, and apple cider. He never knew Calhoun to buy cigarettes.

Matt Crutchfield who lived near America's Precious Metals was awakened on December 17 between 1 and 3:30 a.m. by a loud bang. He had heard the noise before and thought it came from the recycling plant. Monica Crutchfield, his wife, was also awakened by a loud noise that came from America's Precious Metals, but she testified that she had never heard that noise before. Darlene Madden, who lived one block from America's Precious Metals, awoke to a loud noise that sounded like cars colliding at approximately 2:30 to 3:00 a.m. She testified that she may have heard a second noise but did not get up to investigate it.

John Sketo, Calhoun's father and co-owner of America's Precious Metals, testified that Calhoun's trailer was located beside the scrap yard. Sketo arrived at the scrap yard at approximately 7:30 a.m. on December 17 and noticed that the Bobcat was missing from the place it had been the day before. He also noticed that the door to Calhoun's trailer was open. Sketo testified that none of this was like that the day before. Ellenburg called the police. Ellenburg and Sketo found the Bobcat by the loading dock, and they thought it had pushed something off of the dock. Tread marks on the ground had not been there the day before. Sketo looked in Calhoun's trailer and it looked like someone had searched it; drawers were open and things were strewn about. Sketo saw a small grill on Calhoun's bed, which usually remained outside the trailer. Sketo did not see anyone in the trailer. He did not see a purse on the floor of the trailer. Sketo exited the trailer and left the door open.

Mixon arrived at the junkyard and asked if Sketo had seen Calhoun. Sketo replied that he had not and told Mixon not to go into the trailer because someone had broken into it, but Mixon went into the trailer anyway. Mixon was in the trailer for about one minute. Then Mixon left the junkyard. Sketo went back into the trailer and

found Calhoun's gun leaning against the couch on the floor. Sketo testified that if the gun had been there the first time he went into the trailer he would have noticed it. He stated that the gun was not there before Mixon went into the trailer. On cross-examination, the State elicited from Sketo that he did not see Mixon carry the gun or anything else into the trailer.

Ellenburg testified that he arrived at the junkyard at approximately 7:30 a.m. on December 17. He stated that Calhoun's door did not have pry marks on it the day before, and Calhoun's trailer was not in disarray the day before. He did not see a gun in the trailer the first time he looked. He stated that the tire tracks near the loading dock and next to the Bobcat looked like they were made by a dual-wheeled vehicle. A corner of the cement steps was also knocked off, and had not been like that the day before.

Lieutenant Raley searched a barn in Pine Oak Community in Geneva, Alabama, and a license tag bracket matching the description of one on Brown's car was found at the property. There was also a piece of cardboard that had oil and tire marks on it. Brown's family told Raley that her car had a small oil leak. However, Raley could not trace the oil stain or the bracket to Brown's car.

On February 28, 2012, the jury returned a verdict of guilty of first-degree murder and kidnapping.

Penalty Phase

The State moved for admission of all evidence from the guilt phase into the penalty phase and rested.

The defense provided witnesses as follows. Pastor A.J. Lombarin, Cliff Jenkins, and Ryan George, all ministers to Calhoun, each testified that Calhoun was devoted to Christian study and ministered to other inmates while awaiting the instant trial. Patrick O'Dell, an inmate, testified that Calhoun invited him to bible study and was his mentor, teacher, and minister, and changed the

course of O'Dell's life by telling him to take responsibility for his actions. Jerry Pappas, an inmate, testified that Calhoun was like a brother to him and changed his life for the better. Darryl Williams, a former inmate, testified that Calhoun helped him change and encouraged him to witness to others outside of the jail.

Lieutenant Bill Pate, a security officer at the Holmes County jail, testified that Calhoun had no behavioral problems while incarcerated and that his only prior criminal record was driving while his license was suspended and violating probation.

Charlie Skinner, Calhoun's brother-in-law, testified that Calhoun was generous to a fault and that he had given his life to God. Sharon Calhoun, Calhoun's mother, testified that Calhoun and his father had a close relationship. Calhoun has a son with whom he is very close and to whom he is a good father. Calhoun also treated Mixon's son like his own son. Sharon testified that Calhoun was a good student, a boy scout, never got into trouble, and sends preachers to his father to help counsel him.

The jury recommended a sentence of death by a vote of nine to three.

Spencer[1] Hearing

Betsy Spann, Calhoun's sister, testified that Calhoun was like her best friend and kept her out of trouble while they were growing up. Sharon Calhoun testified that Calhoun had found God and that Calhoun was innocent. John Searcy, a minister who had gone to counsel Calhoun on the night of the verdict, testified that Calhoun had actually counseled him that night. Following the conclusion of the *Spencer* hearing, the trial court allowed victim impact statements from Brown's family members.

[1] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

> The trial court found three aggravators: (1) cold, calculated, and premeditated (CCP)—very great weight; (2) during the commission of a kidnapping—great weight; and (3) for the purpose of avoiding arrest—very great weight. The trial court found one statutory mitigator: no significant history of criminal activity—significant weight, and five nonstatutory mitigators: (1) good jail conduct pending and during trial—little weight; (2) positive role model to other inmates—some weight; (3) capable of forming loving relationships—little weight; (4) childhood history—little weight; and (5) defendant will be incarcerated for the remainder of his life with no danger to others—minimal weight. The trial court gave the jury recommendation of death great weight. The trial court concluded that the aggravating circumstances far outweighed the mitigating circumstances and sentenced Calhoun to death for the murder of Brown and 100 years of imprisonment for the kidnapping of Brown.

Calhoun v. State, 138 So. 3d 350, 354-59 (Fla. 2013) (internal page numbers omitted).

On direct appeal, this Court addressed five issues: (1) whether the trial court erred in excluding Calhoun's exculpatory statements to the police under the rule of completeness; (2) whether the trial court erred in finding the aggravators of cold, calculated, and premeditated (CCP) and avoiding arrest; (3) a Ring[2] claim; (4) sufficiency of the evidence; and (5) proportionality.

On October 31, 2013, after briefing and oral argument, this Court issued its opinion striking the avoid arrest aggravator and rejecting the remainder of Calhoun's issues on appeal. This Court

[2] Ring v. Arizona, 536 U.S. 584 (2002).

also found the evidence was sufficient to support Calhoun's conviction for one count of first-degree murder. On October 6, 2014, the United States Supreme Court denied the petition for writ of certiorari. Calhoun v. Florida, 135 S.Ct. 236 (2014).

On September 25, 2015, the Appellant filed a Motion to Vacate Judgment and Sentence under Rule 3.851 with Special Leave to Amend. The State filed its Answer on November 24, 2015. Thereafter, Appellant, through counsel, amended his motion on February 11, 2016, raising Claim 13, a Hurst v. Florida[3] claim. The State addressed the claim at the Huff[4] hearing held on April 21, 2016. Subsequently, on August 16, 2016, Appellant filed a Second Amended Motion to Vacate Judgments of Conviction and Sentence, raising Claim 14. The postconviction court ordered the State to respond within 20 days pursuant to rule 3.851(f)(4). The State filed its response on October 3, 2016. On June 22, 2017, Appellant filed a Motion to Supplement and Amend Defendant's Third Amended Motion to Vacate Judgments of Conviction and Sentence, raising two additional claims. The State filed its response on July 7, 2017. An evidentiary hearing was held on September 15, 19, and 20, 2017, where Calhoun presented testimony and exhibits to support his Motions. Because the evidentiary hearing did not produce any evidence that entitled Calhoun to relief, the postconviction court

[3] Hurst v. Florida, 136 S.Ct. 616 (2016).
[4] Huff v. State, 622 So. 2d 982 (Fla. 1993).

issued an order denying him relief on his guilt-phase claims and ordered a new penalty phase under Hurst. The appeal is currently pending in SC18-340. The initial brief in that appeal was filed simultaneously with Calhoun's Petition.

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Calhoun's petition alleges that extraordinary relief is warranted because he was denied the effective assistance of counsel in his direct appeal. The standard of review applicable to ineffective assistance of appellate counsel claims mirrors the Strickland v. Washington, 466 U.S. 688 (1984), standard for claims of trial counsel ineffectiveness. See Valle v. Moore, 837 So. 2d 905 (Fla. 2002); Rutherford v. Moore, 774 So. 2d 637, 645 (Fla. 2000). Such a claim requires an evaluation of whether counsel's performance was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it compromised the appellate process to such a degree that it undermined the confidence in the correctness of the result. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995). A review of the record demonstrates that neither deficiency nor prejudice has been shown in this case.

CLAIM I

Calhoun first argues that appellate counsel was ineffective for failing to challenge the trial court's exclusion of Calhoun's

statement related to where and when he was in the woods with law enforcement. (Petition at 6-7). The arguments Calhoun relies upon are the same arguments made during the direct appeal. This Court ruled that, even if trial counsel had preserved the claim, Calhoun was not entitled to relief. Calhoun, 138 So. 3d at 360. This Court held that any error in excluding the statements was harmless because "there [was] no reasonable possibility that exclusion of the redacted statements affected the outcome of the jury's verdict." Id. "The statements with which Calhoun asserts error were only two statements out of the extensive record in this case. Additionally, both statements were cumulative to other information elicited during the trial." Id. at 361.

> Calhoun's statement that he was at the Brooks' residence on December 18 was cumulative to the testimonies of Tiffany and Glenda Brooks, who both testified that Calhoun was in their shed on the morning of December 18. Regarding Calhoun's statement that Brown had never been to Calhoun's trailer before, Calhoun contends that he should have been allowed to clarify that the statement meant any time before the night of December 16 and that he did not know if Brown made it to his trailer on December 16. This information that Calhoun contends should have been admitted is cumulative to the testimonies of Glenda and Tiffany Brooks that Calhoun told the Brooks that Brown was probably the girl who was supposed to pick him up. This implies that Calhoun was not at his trailer when Brown arrived the night she was supposed to pick him up. Additionally, during the defense's case-in-chief, the defense introduced testimony from Sketo and Ellenburg that someone had broken into Calhoun's trailer the night of December 16. This also implies that someone other than Calhoun was at Calhoun's trailer when Brown arrived and therefore, Calhoun did not know if Brown arrived at his trailer that night. Thus, the information Calhoun seeks to

> introduce through the rule of completeness, that he did not know if Brown arrived at his trailer on December 16 and that his statement that Brown had never been to his trailer before December 16, was in fact provided to the jury. Accordingly, any error in not admitting these statements under the rule of completeness is harmless beyond a reasonable doubt.

Id. The State's argument that Calhoun was in the woods near law enforcement was a reasonable inference from Calhoun's statement that law enforcement came near him three times. (T15:955). The Brookses testified that Calhoun came to their home, which was merely 1.5 miles away from where the burnt car was found. (T15:948-49, 953). This Court would have clearly found no prejudice to Calhoun had appellate counsel raised these additional issues because the claims are meritless. See Rutherford, 774 So. 2d 637 (finding no ineffective assistance of appellate counsel where "[i]f a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective" citing Williamson v. Dugger, 651 So. 2d 84, 86 (Fla. 1996)).

As such, this claim must be denied.

Claim II

Calhoun argues that appellate counsel was ineffective at the direct appeal for failing to raise a claim regarding the jury instruction for venue and jurisdiction given in his case. (Petition at 12-18). As previously noted, claims of ineffective assistance

of appellate counsel are evaluated under a standard similar to Strickland. See Valle, 837 So. 2d 905; Rutherford, 774 So. 2d at 645. Calhoun concedes that if Florida had jurisdiction to prosecute the crimes, Holmes County was the proper venue. (Petition at 14).

This claim is waived and should be denied. Where a defense attorney requests or affirmatively agrees to an erroneous jury instruction, fundamental error review is waived. Universal Ins. Co. of North America v. Warfel, 80 So. 3d 47, 65 (Fla. 2012) (citing State v. Lucas, 645 So. 2d 425, 427 (Fla. 1994)). "Fundamental error is waived under the invited error doctrine because 'a party may not make or invite error at trial and then take advantage of the error on appeal.'" Id. (citing Sheffield v. Superior Ins. Co., 800 So. 2d 197, 202 (Fla. 2001)). This Court has extended this concept to capital murder cases. See Boyd v. State, 200 So. 3d 685, 702 (Fla. 2015).

In the present case, trial counsel specifically agreed that the instruction on venue was appropriate under the law. (T16:1118-19). After discussion of changing the language for the instruction on jurisdiction, trial counsel agreed to the instruction as given. (T16:1130). Trial counsel gave explicit agreement to use the jurisdiction and venue instructions as they were given. The jury was properly instructed that they had to determine jurisdiction beyond a reasonable doubt. (T17:1236). Pursuant to Warfel, trial counsel's agreement not only fails to preserve this issue for

appeal but waives fundamental error review as well. This claim should be denied as waived.

Should this Court reach the merits of this claim, Calhoun's argument is meritless and should be denied. The jury was given instructions on venue and on jurisdiction and both instructions were correctly written, accurately reflecting the law. Although Calhoun asserts an instruction on venue was not needed, prior to jury selection, trial counsel presented an oral motion for change of venue. (R5:889). "There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" Harrington v. Richter, 131 S.Ct. 770, 791 (2001) (citing Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (per curiam)). The instruction on venue was properly before the jury and it did not affect the verdict of the jury.

Trial counsel accurately presented instructions on jurisdiction, which was accepted by the trial court. When the instructions were being reviewed, after both sides had rested, trial counsel informed the court that she had done research regarding jurisdiction and got her sample from Lane. Lane v. State, 388 So. 2d 1022 (Fla. 1980). In Lane, this Court gave specific instructions to be given to a jury to find beyond a reasonable doubt:

(1) The fatal blow to the victim occurred in Florida;

(2) The death of the victim occurred in Florida;

> (3) Or an essential element of the offense which was part of one continuous plan, design, and intent leading to the eventual death of the victim occurred in Florida.

Id. at 1029. Defense counsel's recommended jury instruction applied this standard and the only requirement is that an essential element of the crime be proven beyond a reasonable doubt. (R6:997-98; T16:1128-30; T17:1236).

This Court, on direct appeal, looked at the sufficiency of the evidence and found that the evidence supported the verdicts of first-degree murder and kidnapping.

As to the first first-degree murder, this Court found specifically:

> Harvey Glenn Bush saw Calhoun ask Brown for a ride on December 16, 2010, and Brown responded that she would pick him up after work. Brown drove a 2000 white, four-door Toyota Avalon. Brown drove up to Jerry Gammons' trailer in a light colored, four-door car and knocked on his door at about 8:40 p.m. on December 16, and asked for Calhoun. Calhoun's trailer was located approximately one road from Gammons' trailer.
>
> Brown's purse was found in Calhoun's trailer. Blood found on a roll of duct tape in Calhoun's trailer was a major donor match to Brown's DNA and a minor donor partial match to Calhoun's DNA. Blood found on blankets taken from Calhoun's trailer matched Calhoun and Brown. DNA from hair that had been pulled out of the scalp and found in Calhoun's trailer also matched Brown.
>
> Calhoun came into the convenience store in which Sherry Bradley worked in the early morning of December 17. Bradley noticed scratches and dried blood on Calhoun's hands. Calhoun had on a white shirt that had spots of blood on it and his fingernails had black underneath them. Calhoun was driving a white, four-door car with a Florida license plate.

> Witnesses noticed smoke from the highway in Geneva, Alabama, on December 17, at approximately 11 a.m. Dick Mowbry found a burnt white Toyota with no license plate on December 20. The VIN on the car was matched to a 2000 Toyota Avalon. Samples from the right front quarter and left quarter of the car tested positive for ignitable liquid. The entire inside of the car was burnt and Brown's remains were found in the trunk. The hands and lower limbs had been burnt off. Dr. Stephen Boudreau, the medical examiner, determined that the cause of death was smoke inhalation and thermal burns and that the death was a homicide.
>
> Tiffany Brooks found Calhoun in her family's shed on December 18, on the ground wrapped in sleeping bags. Investigator Raley went to the site of Brown's car on December 20. Raley noted that the car was near Coleman Road approximately 1,488 feet from Calhoun's campsite. The Brooks' residence was approximately 1.5 miles from Brown's car.

Calhoun, 138 So. 3d at 366-67.

This Court specifically found regarding kidnapping:

> [W]itnesses placed Brown as having been last seen headed toward Calhoun's trailer on the night of December 16 and witnesses heard Brown tell Calhoun she would pick him up that night. Her blood and hair were found in his trailer. Brown's remains were found in the trunk of her car in the woods in Alabama with coaxial cable wrapped around what remained of her upper arms and duck tape around her neck. The medical examiner testified that smoke and carbon dioxide were found in her lung tissue, indicating that Brown was alive while she was bound in the trunk of the car and the car was lit on fire. As provided above, the medical examiner testified that Brown died as a result of smoke inhalation and thermal burns, and that the death was a homicide.

Calhoun, 138 So. 3d at 367. Calhoun's argument that the jury would have not found jurisdiction had it been instructed differently, is without merit. The evidence clearly shows that the crime began in

Holmes County, which retained jurisdiction. The jury was properly instructed, and this claim is without merit.

Because the State was still held to its burden of proof, there was no error and this claim should be denied.

Claim III

Calhoun claims appellate counsel was ineffective for failing to raise the issue of victim impact evidence during the guilt phase of the trial. (Petition at 19-21). As previously noted, claims of ineffective assistance of appellate counsel are evaluated under a standard similar to Strickland. See Valle, 837 So. 2d 905; Rutherford, 774 So. 2d at 645. Calhoun argues that the testimony of Charles Howe and Dr. Swindle introduced victim impact evidence into the guilt phase of the trial.

Florida State Statute § 921.141(8) provides that once the State has proven one or more aggravating factors, the State may introduce evidence "designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death," known as victim impact evidence. Failure to object to improper victim impact evidence "renders the claim procedurally barred absent fundamental error." Sexton v. State, 775 So. 2d 923, 932 (Fla. 2000); see also McGirth v. State, 48 So. 3d 777, 790 (Fla. 2010). For there to be fundamental error, "the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not

have been obtained without the assistance of the alleged error." State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991); see also Roberts v. State, 242 So. 3d 296, 298 (Fla. 2018).

In this case, trial counsel did not object to the testimony of Charles Howe, and Dr. Swindle, who identified the victim's unique signature as a way to identify the body found in the car. As such, any claim appellate counsel made on direct appeal would be procedurally barred because it was not preserved, and the fundamental error standard would apply. The identification of the forms that contained the victim's signature was to aid the State in proving the identity of the body found by police. As was testified, the victim's lower legs and hands were burned off. Calhoun, 138 So. 3d at 356. The medical examiner was only able to make an identification using dental records. Id. The testimony was limited to her signature and did not go into the effect of her death.

Because the testimony does not qualify as victim impact evidence, appellate counsel was not deficient for not raising a meritless claim. As such, this claim must be denied.

CONCLUSION

Respondent respectfully requests that this Honorable Court DENY the instant petition for writ of habeas corpus.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Lisa A. Hopkins
Lisa A. Hopkins
Assistant Attorney General
Florida Bar No. 99459
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399
Telephone: (850)414-3336
Facsimile: (850)414-0997
capapp@myfloridalegal.com
Lisa.Hopkins@myfloridalegal.com

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 26th day of September, 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Stacy Biggart, at stacy.biggart@ccrc-north.org, and Elizabeth Salerno, at Elizabeth.salerno@ccrc-north.org, attorneys for Appellant.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Lisa A. Hopkins
COUNSEL FOR RESPONDENT

IN THE SUPREME COURT OF FLORIDA

JOHNNY MACK SKETO CALHOUN,

Appellant,

v.

CASE NO. SC18-340
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

MOTION TO RECALL MANDATE

Appellee, State of Florida, moves this Court pursuant to Florida Rules of Appellate Procedure 9.340 and 9.300, and Florida Statute § 43.44, to recall the mandate that was issued on February 28, 2020, in this case, and as grounds therefore states:

1. This Court entered a decision affirming the trial court's order on November 21, 2019, and the mandate issued on February 28, 2020.
2. Pursuant to Florida Rule of Appellate Procedure 9.340 and Florida Statute § 43.44, this Court may, within 120 days of it being issued, direct the clerk to recall the mandate to require, reconsider, revise, reform, or modify its own opinions for the purpose of making them accord with law and justice. Because this motion is well within that 120-day window, Appellee requests this Court

recall the mandate and remand the case to the lower court to address the pending Motion to Reinstate the Death Sentence.

3. In the trial court prior to this appeal, Calhoun filed a motion for postconviction relief alleging several guilt-phase and penalty-phase claims, one of which was a claim to vacate his death sentence pursuant to this Court's opinion in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and his non-unanimous jury verdict for death. The trial court granted *Hurst* relief, granting Calhoun a new penalty phase, but rejected his other claims for relief.
4. Calhoun appealed to this Court, and as the Court's precedent had been decided uniformly against the State in non-unanimous death cases, at that time the State did not file a cross-appeal on the *Hurst* issue. This Court ultimately affirmed the trial court's order, and as noted above, the mandate related to that opinion issued on February 28, 2020.
5. Prior to the mandate being issued, this Court issued its opinion in *State v. Poole*, 2020 WL 370302 (Fla. Jan. 23, 2020) (SC18-245), largely receding from its holdings in *Hurst*. In *Poole*, this Court overruled the *Hurst* case "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.

6. Recalling this mandate to allow for the case to be remanded to address the Motion to Reinstate the Death Sentence would allow this Court to revise its decision so it can accord with law and justice, as required by Fla. Stat. § 43.44.
7. It would be an enormous waste of both the bench and bar's time, in addition to the time of the citizens who are called for jury duty, as well as taxpayers' money, to require new penalty phases based on a decision that this Court in *State v. Poole* acknowledged "got it wrong." *State v. Poole*, 2020 WL 370302 at *14. The *Poole* Court explained that *Hurst v. State* was incorrectly decided on a myriad of levels including mischaracterizing weighing as a fact and ignoring the Florida Constitution's conformity clause regarding the Eighth Amendment when it held that all the jury's additional findings and final recommendation had to be made unanimously. *Id.* at *11-*13; *id.* at *8 (noting the United States Supreme Court's decision in *Hurst v. Florida* "did not address Hurst's Eighth Amendment argument").
8. In light of the number and magnitude of the legal errors in *Hurst v. State*, this Court should not require the prosecutors and citizens of Florida to have to go through the empty formality and enormous waste of resources of new penalty phases based on that erroneous decision. New penalty phases in capital cases are quite time consuming in the trial court and will result in dozens of appeals in this Court as well. The victim's family also must endure yet another penalty

phase and the additional years of delay starting over again will cause. Moreover, new penalty phases are dangerous. One egregious example of this is Michael Hernandez whose death sentence was vacated based on *Hurst v. State* and who consequently was released into the general population of the prison where he murdered again. *Hernandez v. Jones*, 217 So. 3d 1032 (Fla. 2017). And transporting inmates is dangerous, especially in inmate murder resentencings where many of the witnesses are inmates too. *Van Poyck v. State*, 116 So. 3d 347, 349 (Fla. 2013) (noting the victim was a correctional officer who was transporting an inmate to the doctor's office, who was murdered by the defendant during an escape attempt). These numerous new penalty phases required by the now-repudiated *Hurst v. State* decision will consume massive amounts of prosecutorial resources that are better spent in prosecuting other cases. To prevent this massive waste that serves no purpose, a belated cross-appeal should be permitted.

9. In *State v. Poole*, this Court explained that *Hurst v. State* was not entitled to stare decisis protection because the erroneous *Hurst v. State* decision "serves no one well and only undermines the integrity and credibility of the court." *State v. Poole*, 2020 WL 370302 at *14 (citation omitted). And instead of being a "narrow and predictable ruling that should have had limited practical effect on the administration of the death penalty in our state," *Hurst v. State*

had the opposite result. *Id*. But not allowing the State to cross-appeal would result, in the end, in mandating Florida courts follow the repudiated *Hurst v. State* decision and continue the deleterious effect on the administration of the death penalty in Florida caused by that decision. In the interest of justice, as well as to give full effect to the *State v. Poole* decision, a belated cross-appeal should be permitted. The interests of justice and judicial economy support allowing a cross-appeal.

10. In this case, under *State v. Poole*, there was no violation of the right-to-a-jury-trial. In this case, the court found three aggravators, including that the capital felony was committed while the defendant was engaged in the commission of a kidnapping, which was based on the jury's contemporaneous unanimous conviction of Calhoun for kidnapping. The jury specifically found the felony murder aggravator in convicting him of kidnapping during the guilt phase. Here, as in *State v. Poole*, the jury made the required finding of one aggravator by convicting Calhoun of this felony. *State v. Poole*, 2020 WL 370302 at *15 (noting that in addition to the capital murder, the jury convicted Poole of attempted first-degree murder, sexual battery, armed burglary, and armed robbery and under "a correct understanding of *Hurst v. Florida*, this satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt").

11. Since this Court issued its opinion in this case, the Supreme Court has expressly recognized that *Hurst v. Florida* was limited to the finding of an aggravating circumstance that renders a defendant eligible for the death penalty. Notably, the Court also held that *Hurst v. Florida*, like *Ring* before it, is not retroactive. *See McKinney v. Arizona*, 140 S.Ct. 702 (2020).

CONCLUSION

Accordingly, this Court should permit the belated cross-appeal and supplemental briefing on the *Hurst v. State* issue in light of this Court's new decision in *State v. Poole*.

Respectfully submitted,

ASHLEY B. MOODY
ATTORNEY GENERAL

S/ *Lisa A. Hopkins*
LISA A. HOPKINS
Assistant Attorney General
Florida Bar No. 99459
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399
Telephone: (850) 414-3300
Facsimile: (850) 487-0997
capapp@myfloridalegal.com
Lisa.Hopkins@myfloridalegal.com
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 9th day of March, 2020, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Stacy Biggart, at stacy.biggart@ccrc-north.org, and Elizabeth Spiaggi, at Elizabeth.salerno@ccrc-north.org, attorneys for Appellant.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.100(*l*).

Respectfully submitted,

ASHLEY B. MOODY
ATTORNEY GENERAL

S/ *Lisa A. Hopkins*
LISA A. HOPKINS
COUNSEL FOR APPELLEE

Supreme Court of Florida

WEDNESDAY, APRIL 1, 2020

CASE NOs.: SC18-340 & SC18-1174
Lower Tribunal No(s).:
302011CF000011CFAXMX

JOHNNY MACK SKETO CALHOUN	vs.	STATE OF FLORIDA
JOHNNY MACK SKETO CALHOUN	vs.	MARK S. INCH, ETC.
Appellant/Petitioner(s)		Appellee/Respondent(s)

The proceedings in the circuit court and in this Court in the above case are stayed pending disposition of *State of Florida v. Michael James Jackson*, Case No. SC20-257 and *State of Florida v. Bessman Okafor*, Case No. SC20-323, which are pending in this Court.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

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HON. KYLE HUDSON, CLERK
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