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

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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.

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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.

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