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,

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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: 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 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Lisa A. Hopkins
COUNSEL FOR RESPONDENT