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

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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.

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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).

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[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

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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

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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.

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[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.

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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.

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