IN THE SUPREME COURT OF FLORIDA

JOHNNY MACK SKETO CALHOUN,

Appellant,

v.

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

STATE OF FLORIDA,

Appellee.
_____/

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

RESPONSE BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Penalty Phase

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

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

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

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

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

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

Spencer[1] Hearing

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

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

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

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

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

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

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

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

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

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

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

REFERENCES

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

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

JURISDICTION

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

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

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

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

SUMMARY OF THE ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

A. Conflict-free counsel

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Lack of qualified co-counsel

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

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

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

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

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

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

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

A. Natasha Simmons

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

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

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

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

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

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

accused, either because it is exculpatory, or because it is impeaching; that the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Smith v. State, 931 So. 2d 790, 796 (Fla. 2006) (quoting Strickler v. Green, 527 U.S. 263, 281-82 (1999)). To establish prejudice, a defendant must demonstrate that the suppressed evidence is material. Id.

In Turner v. United States, 137 S.Ct. 1885 (2017), the United States Supreme Court rejected a Brady claim, concluding that the withheld evidence was not material. Petitioners were convicted of the kidnapping, armed robbery, and murder of Catherine Fuller in 1985. The victim had been robbed, severely beaten, and sodomized with a pipe or pole that caused extensive internal injuries. Id. At trial, two of the co-perpetrators testified against petitioners in exchange for leniency. Id. Thomas, a 14-year-old, who lived in the neighborhood and who knew some of the petitioners, also testified as to what he saw the night of the murder. Id.

Years later, in 2010, during postconviction proceedings, Turner raised a Brady claim, asserting that the prosecution failed to disclose evidence of another possible suspect, McMillan, who had been seen in the alley near where the victim's body was discovered shortly after the murder and impeachment evidence, including impeachment evidence relating to Thomas. Turner, 137 S.Ct. 1885. Petitioners argued that if they had been informed of the other suspect, they could have raised as a defense that a single perpetrator, or two perpetrators at most, had committed the

murder. Id. In other words, they could have asserted to the jury that McMillan, alone or with an accomplice, murdered Fuller. The prosecution admitted that it suppressed the evidence of McMillan, but asserted the evidence was not material. Id. The postconviction court held an extensive evidentiary hearing, and then denied the Brady claim, concluding that the evidence was not material. Id. The appellate court agreed that the evidence was not material and the United States Supreme Court affirmed. Id.

The Court first explained that due process is only violated if the prosecution "withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." Turner, 137 S.Ct. at 1888 (citing Smith v. Cain, 565 U.S. 73, 75 (2012)). The Court explained that evidence "is 'material' within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different" and that a "reasonable probability of a different result is one in which the suppressed evidence undermines confidence in the outcome of the trial." Id. at 1893. The Court explained that a determination of materiality was often "factually complex" and required that the reviewing court "examine the trial record" to "evaluate the withheld evidence in the context of the entire record." Id.

The Court then reasoned that the withheld evidence, in the context of the entire record, was "too little, too weak, or too distant from the main evidentiary points to

meet Brady." Turner, 137 S.Ct. at 1894. The Court noted that the single attacker defense was inconsistent with the evidence establishing a group attack. Id. The Court observed that while the witnesses "differed on minor details," virtually every witness agreed that the victim "was killed by a large group of perpetrators." Id. The Court pointed out that the single attacker defense would have required the jury to believe that both the co-perpetrators falsely confessed and, through coordinated effort or coincidence, gave highly similar accounts of how the murder occurred, as well as believe that Thomas, "a distinterested witness," wholly fabricated his story. Id. The Court also concluded that the undisclosed impeachment evidence was "largely cumulative." Id.

At the evidentiary hearing, Natasha Simmons claimed that she had told Sheriff Ward about an interaction between herself and Doug Mixon. (Evid. Hrg. Trans. 102-11). However, Sheriff Ward testified at the evidentiary hearing that he knew Natasha Simmons. (Evid. Hrg. Trans. 398:21-23). He denied ever talking with her about this case and that she did not tell him that "she had picked up Doug Mixon and Charlie up from an area of Holmes County, and Doug Mixon had blood on him and was carrying a gas can." (Evid. Hrg. Trans. 399:2-4). He did not tell Natasha Simmons to forget about the incident because a suspect was caught and he confessed to the crime. (Evid. Hrg. Trans. 399:6-9). Sheriff Ward was adamant that had that kind of information been relayed to him or any of his deputies, he would have shared it with

the "lead agent with AB." (Evid. Hrg. Trans. 399:13-17). As such, this evidence could not be considered Brady evidence because the information did not exist for either the prosecutor or defense to discover and this claim should be denied.

As an alternative argument, defense claims that defense trial counsel was ineffective for her failure to obtain the exculpatory evidence. To establish ineffective assistance of counsel (also known as a Strickland claim), Calhoun must satisfy a two-prong test, establishing both deficient performance and prejudice. Strickland, 466 U.S. 668. To establish deficient performance, a defendant must show that counsel made specific errors so serious that she was not functioning as the counsel guaranteed to Calhoun by the Sixth Amendment. Id. at 687; Pietri v. State, 885 So. 2d 245, 252 (Fla. 2004) ("a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct") (quoting Strickland, 466 U.S. at 690). Strickland refrained from providing specific guidelines to evaluate counsel's performance, and held "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. To establish prejudice, Calhoun must show that there is a reasonable probability that but for trial counsel's deficiencies, she would have received a different outcome. Sears v. Upton, 561 U.S. 945 (2010).

Calhoun has failed to meet his burden of showing ineffective assistance of counsel. Sheriff Ward was adamant that the conversation between him and Natasha Simmons did not occur. He also stated that he would have conveyed any information he received about the case to the investigators who were assigned to the case. Ms. Jewell did a thorough job investigating the case, despite Calhoun refusing to cooperate and discuss the case with her. Investigator Jordan testified that he followed any leads he received and would report his findings back to Ms. Jewell. Additionally, Vermillion and Mr. Contreras testified that Mr. Mixon confessed to them. However, Vermillion did not receive his "confession" until the summer of 2016, which is well after the trial. Mr. Contreras claims to have told Officer Morgan that Mr. Mixon confessed to him, but Officer Morgan very clearly denied that Mr. Contreras, with whom he was familiar, informed him that Mr. Mixon confessed to him. Ms. Jewell could not have possibly discovered this evidence. Calhoun has failed to establish ineffective assistance of counsel and this claim should be denied.

Appellant claims that the emergence of Ms. Simmons supports the defense theory that Doug Mixon was the person who committed the murder. (Initial Brief at 26). Based on the allegations, Appellant claims that this should be considered newly discovered evidence and is a basis for a new trial.

For a conviction to be set aside based on newly discovered evidence, two requirements must be met. Jones, 709 So. 2d at 521. "First, in order to be considered

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

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

Jones, 709 So. 2d at 521-22.

In this case, the possible evidence from Ms. Simmons should be evaluated under the Brady test. This evidence is based on a possible non-disclosure from Sheriff Ward.

At the evidentiary hearing, Natasha Simmons claimed that she had told Sheriff Ward about an interaction between herself and Doug Mixon. (Evid. Hrg. Trans. 102-11). However, Sheriff Ward testified at the evidentiary hearing that he knew Natasha Simmons. (Evid. Hrg. Trans. 398:21-23). He denied ever talking with her about this case and that she did not tell him that "she had picked up Doug Mixon and Charlie up from an area of Holmes County, and Doug Mixon had blood on him and was carrying a gas can." (Evid. Hrg. Trans. 399:2-4). He did not tell Natasha Simmons to forget about the incident because a suspect was caught and he confessed to the crime. (Evid. Hrg. Trans. 399:6-9). Sheriff Ward was adamant that had that kind of information been relayed to him or any of his deputies, he would have shared it with the "lead agent with AB." (Evid. Hrg. Trans. 399:13-17).

This evidence would not produce an acquittal at trial. By Vermillion's own admission, Mr. Mixon did not admit to committing the murder. He stated that Mr. Mixon just asked for forgiveness. Mr. Mixon never testified to seeing Natasha Simmons that night and he claimed that he was with Ms. Faulk the night of the murder at Mr. Contreras's house. He never stated he was with Charlie Uttley the night of the murder. Additionally, Ms. Simmons described Mr. Mixon as more

relaxed the night of the murder, but then stated Mr. Mixon repeatedly stated, "that goddamn Gabby." (Evid. Hrg. Trans. 329:21-22). Ms. Simmons initially stated that she saw the news about Mrs. Brown missing the night before her supposed interaction with Mr. Mixon and Mr. Uttley (Evid. Hrg. Trans. 332); however, she then backtracked and said she was not sure when she saw the news.

> Q: You just know that you had seen this news report the night before?
>
> A: Right.
>
> Q: Do you know that Mrs. Brown wasn't reported missing until Friday morning?
>
> A: I was, let me clarify that. I'm not really sure if it was before or after, but I do recall that being the same area.

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

Ms. Simmons' inconsistencies, along with Sheriff Ward's testimony mean that the outcome of the trial would not have been different. Mr. Mixon was adamant that he had never confessed to killing Mrs. Brown. "And for one minute, ma'am, what I was saying a while, I would never confess to something, but if I did or didn't do, more or less, in all honesty. But I sure as sin wouldn't confess to something that I didn't do." (Evid. Hrg. Trans. 320:10-13). When asked if he has ever confessed to **anybody** that he had a part in Mrs. Brown's murder, Mr. Mixon answered with a

clear no. "I had nothing to do with it and I don't know anything about it." (Evid. Hrg. Trans. 320:20-21). This evidence would not produce an acquittal at trial and this claim must be denied.

B. Robert Vermillion

At the evidentiary hearing, the defense called Robert Vermillion, who is related to the victim's husband, and he testified that in the summer of 2016, Mr. Mixon was at his aunt's house. (Evid. Hrg. Trans. 361). Vermillion claimed that Mr. Mixon told him that he had done things he was not proud of and he asked for forgiveness. (Evid. Hrg. Trans. 362). Vermillion admitted that Mr. Mixon "didn't come right out and say [he] killed her, but he insinuated it." (Evid. Hrg. Trans. 365:5-6). Though he believes that Mr. Mixon knows something about the murder, he does not know if Mr. Mixon committed the murder. (Evid. Hrg. Trans. 366). During cross-examination, Vermillion admitted that, before Mr. Mixon said anything to him, "I wasn't really harassing him, but I wasn't not harassing him." (Evid. Hrg. Trans. 368:20-21). Vermillion also admitted that he was following Mr. Mixon around everywhere that night. (Evid. Hrg. Trans. 368). The statement that Vermillion claims Mr. Mixon made never referenced Mrs. Brown. It never referenced any murder. Mr. Mixon supposedly just asked for forgiveness for some unnamed thing. This evidence would not change the outcome of the case. Vermillion merely stated that he thinks Mr. Mixon knew something about the murder.

It is clear from the testimony that Ms. Jewell tried to investigate Doug Mixon's alibi to the best of her ability. Calhoun refused to cooperate and did not even look at the discovery, as testified to by Ms. Jewell and Mr. Jordan. Because Ms. Jewell and Mr. Jordan were unable to discover any evidence beyond inadmissible hearsay that Mr. Mixon was involved in this murder, Calhoun has failed to establish deficient performance by Ms. Jewell and this claim must be denied.

In this case, there was overwhelming evidence of Calhoun's guilt. The victim's blood, hair, and purse were found inside of Calhoun's trailer, which was in a disarray. See Calhoun, 138 So. 3d at 366. Calhoun was witnessed asking the victim for a ride on December 16 and a witness testified that the victim came to the wrong residence the night she went missing, looking for Calhoun's trailer. Id. The morning that Mia Chay Brown and Calhoun were both reported missing, Calhoun was seen in a white four-door car, which matched the victim's car, as well as buying cigarettes at a convenience store in Alabama. Id. He was witnessed with blood and scratches on his hands and later that day a fire was seen burning. Id. Eventually, Calhoun went to the home of friends in Alabama, less than 1.5 miles from the victim's burnt car where he was informed that he was reported as missing along with the victim. Id. at 367. The victim's burnt remains were found in the trunk of her car on December 20. Id. Therefore, defense counsel's calling Doug Mixon would not have made a

difference as it does not pertain to the DNA evidence that was found, the location of the burnt car, and the sightings of Calhoun and the victim before her death.

C. Jose Contreras

At the evidentiary hearing, the defense called Jose Contreras. Mr. Contreras, who testified with the aid of an interpreter, stated that he only speaks a little bit of English. (Evid. Hrg. Trans. 338). At the time of the murder, he had known Mr. Mixon for three years. (Evid. Hrg. Trans. 339). In September 2010, Mr. Contreras's son was arrested for murder. (Evid. Hrg. Trans. 340). He denied that Ms. Faulk ever lived at his house, but would allow her to stay there occasionally. (Evid. Hrg. Trans. 341-42). Mr. Contreras testified that Mr. Mixon never spent the night at his house and that he never drank with Mr. Mixon and Ms. Faulk. (Evid. Hrg. Trans. 343). Mr. Contreras claimed that Mr. Mixon came to his house one night after the murder and confessed to killing Mrs. Brown. (Evid. Hrg. Trans. 345). He claimed that he went to Officer Ricky Morgan and told him that Mr. Mixon confessed to the murder. (Evid. Hrg. Trans. 346). Mr. Contreras admitted that he was the one who turned his son in for murder. (Evid. Hrg. Trans. 347). During cross-examination, Mr. Contreras stated that he and Mr. Mixon were only co-workers and did not have a relationship outside of work. (Evid. Hrg. Trans. 349). Mr. Contreras also admitted that he had no independent recollection of the night of murder. (Evid. Hrg. Trans. 349).

The State, in rebuttal, called Officer Morgan. While he was aware of the case, he was not involved. (Evid. Hrg. Trans. 405). Officer Morgan knows Jose Contreras through an investigation. (Evid. Hrg. Trans. 405). He testified that Mr. Contreras speaks English and that Mr. Contreras **never** told him that Mr. Mixon confessed to him. (Evid. Hrg. Trans. 405-06). Officer Morgan knew the officers on the case and he would have immediately passed the information to them. (Evid. Hrg. Trans. 406).

Mr. Contreras's testimony is not credible at all. It is highly improbable that Mr. Mixon would confess murdering Mrs. Brown to someone who claims to barely speak English and claimed that he had never spent time with Mixon outside of work. Additionally, Officer Morgan testified that Mr. Contreras never approached him about this case.

D. Brandon Brown

Appellant argues that at a new trial, Appellant could present evidence pointing the blame on Brandon Brown, the victim's husband. (Initial Brief at 32). However, Appellant had an opportunity to have his trial counsel bring out evidence against Mr. Brown at trial, but he instructed her not to.

> [A]s a matter of strategy and not wanting to attack the husband of the victim in front of the jury, we made, I made, and I don't say we, I made this call, not to lay the blame on Mr. Brown given the fact that Mr. Calhoun was **adamant** that it was Doug Mixon and that Mr. Brown was not involved in it.

(Evid. Hrg. Trans. 84:8-13) (emphasis added).

At the evidentiary hearing, counsel asked Ms. Jewell about photographs depicting bruises. However, no one was able to identify the person in the photographs, or even testify as to what caused the bruises on the unknown person. These photographs would not be admissible at a new trial because they cannot be authenticated. Ms. Jewell testified that no one knows the cause of the injuries and that it is unknown if Mr. Brown was even the cause of the injuries. (Evid. Hrg. Trans. 100). "I can't guess and accuse him of something. And, you know, I don't know what the cause of those [injuries] are. I mean, I don't know if she did something." (Evid. Hrg. Trans. 100:22-25). Ms. Jewell repeatedly stated that her strategy did not include placing blame on Mr. Brown, based on her client's insistence that he had nothing to do with the murder of Mrs. Brown. The strategy was to place all the blame on Doug Mixon. (Evid. Hrg. Trans. 102). Ms. Jewell did not have a singular focus, "[b]ut you can't blame it on one person, then turn around and blame it on another because then you lose the jury's trust." (Evid. Hrg. Trans. 102:7-9).

> Q: As a defense attorney in a case like this, do you see any potential downfall in blaming grieving husband for a murder, basically, with no evidence in front of a jury?
>
> A: Yes, you actually garner a lot of disdain out of a jury when you do that. When you attack a family [ ] member of a victim, unless that family member is the one who is sitting next to me at this trial, juries do not like that at all.
>
> Q: Did you have any other type of evidence, anything that had come out in the case, that Brandon Brown was responsible for this particular crime?

A: Absolutely nothing that I was aware of.

(Evid. Hrg. Trans. 193:25-194:1-11). Ms. Jewell had sound reasons for not trying to put the blame on Brandon Brown for the murder of Mia Brown.

In this case, there was overwhelming evidence of Calhoun's guilt. The victim's blood, hair, and purse were found inside of Calhoun's trailer which was in a disarray. See Calhoun, 138 So. 3d at 366. Calhoun was witnessed asking the victim for a ride on December 16 and a witness testified that the victim came to the wrong residence the night she went missing, looking for Calhoun's trailer. Id. The morning that Mia Chay Brown and Calhoun were both reported missing, Calhoun was seen in a white four-door car, which matched the victim's car, as well as buying cigarettes at a convenience store in Alabama. Id. He was witnessed with blood and scratches on his hands and later that day a fire was seen burning. Id. Eventually, Calhoun went to the home of friends in Alabama, less than 1.5 miles from the victim's burnt car where he was informed that he was reported as missing along with the victim, Mia Chay Brown. Id. at 367. The victim's burnt remains were found in the trunk of her car on December 20. Id. With this overwhelming evidence, Calhoun was not prejudiced by any alleged failure of counsel to object to the testimony of witnesses regarding issues that did not affect the jury's verdict. Therefore, the additional evidence Appellant seeks to use at a retrial would not have made a difference as they

do not pertain to the DNA evidence that was found, the location of the burnt car, and the sightings of Calhoun and the victim before her death.

The circuit court did not err in finding that Appellant is not entitled to relief. The court clearly made a credibility determination when it found "Ms. Jewell could not have possibly discovered the **false** statements of either Vermillion or Contreras." (Order at 50) (emphasis added). The court also found that there was no Brady violation, thereby rejecting the testimony of Ms. Simmons.

As such, this claim was correctly denied.

III. THE TRIAL COURT WAS CORRECT IN FINDING THAT THERE WAS NO VIOLATION UNDER BRADY.

Appellant claims that his due process rights were violated by a failure of the State to disclose a conversation between Natasha Simmons and Sheriff Greg Ward of the Geneva County Sheriff's Office in Alabama. (Initial Brief at 36). Appellant claims that Ms. Simmons approached Sheriff Ward after the murder had occurred, to discuss a strange encounter she had with Doug Mixon the night of the murder. Ms. Simmons, in a provided unsworn declaration, stated that Sheriff Ward had told her the case was closed and sent her away. Appellant claims that this conversation was never relayed to the prosecution or the defense. As such, Appellent is claiming a Brady violation.

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

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

Jones, 709 So. 2d at 512 (citing Robinson, 707 So. 2d at 693 (quoting Hegwood, 575 So. 2d at 172)). "There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Smith v. State, 931 So. 2d at 796 (quoting Strickler, 527 U.S. at 281-82). To establish prejudice, a defendant must demonstrate that the suppressed evidence is material. Id.

In Turner v. United States, 137 S.Ct. 1885 (2017), the United States Supreme Court rejected a Brady claim, concluding that the withheld evidence was not material. Petitioners were convicted of the kidnapping, armed robbery, and murder of Catherine Fuller in 1985. The victim had been robbed, severely beaten, and sodomized with a pipe or pole that caused extensive internal injuries. Id. At trial, two of the co-perpetrators testified against petitioners in exchange for leniency. Id. Thomas, a 14-year-old, who lived in the neighborhood and who knew some of the petitioners, also testified as to what he saw the night of the murder. Id.

Years later, in 2010, during postconviction proceedings, Turner raised a Brady claim, asserting that the prosecution failed to disclose evidence of another possible suspect, McMillan, who had been seen in the alley near where the victim's body was discovered shortly after the murder and impeachment evidence, including impeachment evidence relating to Thomas. Turner, 137 S.Ct. 1885. Petitioners argued that if they had been informed of the other suspect, they could have raised as a defense that a single perpetrator, or two perpetrators at most, had committed the murder. Id. In other words, they could have asserted to the jury that McMillan, alone or with an accomplice, murdered Fuller. The prosecution admitted that it suppressed the evidence of McMillan, but asserted the evidence was not material. Id. The postconviction court held an extensive evidentiary hearing, and then denied the Brady claim, concluding that the evidence was not material. Id. The appellate court agreed that the evidence was not material and the United States Supreme Court affirmed. Id.

The Court first explained that due process is only violated if the prosecution "withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." Turner, 137 S.Ct. at 1888 (citing Smith, 565 U.S. at 75). The Court explained that evidence "is 'material' within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different" and that a "reasonable probability of a

different result is one in which the suppressed evidence undermines confidence in the outcome of the trial." Id. at 1893. The Court explained that a determination of materiality was often "factually complex" and required that the reviewing court "examine the trial record" to "evaluate the withheld evidence in the context of the entire record." Id.

The Court then reasoned that the withheld evidence, in the context of the entire record, was "too little, too weak, or too distant from the main evidentiary points to meet Brady." Turner, 137 S.Ct. at 1894. The Court noted that the single attacker defense was inconsistent with the evidence establishing a group attack. Id. The Court observed that while the witnesses "differed on minor details," virtually every witness agreed that the victim "was killed by a large group of perpetrators." Id. The Court pointed out that the single attacker defense would have required the jury to believe that both the co-perpetrators falsely confessed and, through coordinated effort or coincidence, gave highly similar accounts of how the murder occurred, as well as believe that Thomas, "a distinterested witness," wholly fabricated his story. Id. The Court also concluded that the undisclosed impeachment evidence was "largely cumulative." Id.

This Court must also decide if Sheriff Ward was a member of the prosecution team. In Kyles v. Whitley, 514 U.S. 419, 437 (1995), the United States Supreme Court stated an "individual prosecutor has the duty to learn of any favorable evidence

known to the others acting on the government's behalf." The Eleventh Circuit Court of Appeals has held "that a claimant must show that the favorable evidence was possessed by 'a district's prosecution team, which includes both investigative and prosecutorial personnel.'" Moon v. Head, 285 F.3d 1301 (11th Cir. 2002) (quoting United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989)). A prosecution team has been defined as "the prosecutor or anyone over whom he has authority." Meros, 866 F.2d at 1309. In Meros, the Eleventh Circuit held "that a prosecutor in the Middle District of Florida did not 'possess' favorable information known by prosecutors in the Northern District of Georgia and the Eastern District of Pennsylvania." Id. They stated "[a] prosecutor has no duty to undertake a fishing expedition in other jurisdictions in an effort to find potentially impeaching evidence every time a criminal defendant makes a Brady request for information regarding a government witness." Id.

> [K]nowledge on the part of persons employed by a different office of the government does not in all instances warrant the imputation of knowledge to the prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require us to adopt "a monolithic view of government" that would "condemn the prosecution of criminal cases to a state of paralysis."

United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) (citing United States v. Gambino, 835 F.Supp. 74, 95 (E.D.N.Y. 1993)). Sheriff Ward is a member of the Geneva County Sheriff's Office, which is in Alabama. Sheriff Ward was never listed

as a witness by the prosecution. As such, Sheriff Ward was not a member of the prosecution team and it is not expected that the State would not be impugned with his knowledge.

At the evidentiary hearing, Natasha Simmons claimed that she had told Sheriff Ward about an interaction between herself and Doug Mixon. (Evid. Hrg. Trans. 102-11). However, Sheriff Ward testified at the evidentiary hearing that he knew Natasha Simmons. (Evid. Hrg. Trans. 398:21-23). He denied ever talking with her about this case and that she did not tell him that "she had picked up Doug Mixon and Charlie up from an area of Holmes County, and Doug Mixon had blood on him and was carrying a gas can." (Evid. Hrg. Trans. 399:2-4). He did not tell Natasha Simmons to forget about the incident because a suspect was caught and had confessed to the crime. (Evid. Hrg. Trans. 399:6-9). Sheriff Ward was adamant that had that kind of information been relayed to him or any of his deputies, he would have shared it with the "lead agent with AB." (Evid. Hrg. Trans. 399:13-17). As such, this evidence could not be considered Brady evidence because the information did not exist for either the prosecutor or defense to discover and this claim was correctly denied.

IV. CALHOUN'S TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL.

To establish a claim of ineffective assistance of counsel, a defendant must prove both deficient performance and prejudice. Strickland, 466 U.S. 668. "Judicial scrutiny of counsel's performance must be highly deferential." Pagan v. State, 29

So. 3d 938, 949 (Fla. 2009) (citing Strickland, 466 U.S. at 690). There is a strong presumption that trial counsel was effective in their representation. Id. (citing Strickland, 466 U.S. at 689). The standard for evaluation is not whether an attorney could have done more. Id. "A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. (citing Strickland, 466 U.S. at 689). "Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Id. (quoting Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000)).

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

experience of some of the most seasoned and knowledgeable lawyers available.

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

A. Counsel was not ineffective in her investigation of Doug Mixon's alibi.

Ms. Jewell testified that Calhoun told her not to call Mixon as a witness. (Evid. Hrg. Trans. 56:2-5). She stated that she had no idea what Mixon's demeanor would be during his testimony, or what he would even say. (Evid. Hrg. Trans. 199). Ms. Jewell stated that Mixon had a crazy look in his eye. (Evid. Hrg. Trans. 56:9-10). Mixon was under subpoena to testify at trial and it was Calhoun who instructed her not to call him as a witness, even though he was present in the courthouse. (Evid.

Hrg. Trans. 54:20-21). Ms. Jewell testified that she and her investigator, Mr. Jordan, chased down leads regarding Doug Mixon. (Evid. Hrg. Trans. 197).

> We chased down leads. We had doors slammed in our face. We had denials. We, I know Mr. Jordan had been to the jail several times, with people asking or wanting to give information about Doug Mixon, I heard Doug Mixon say this or that. And every time we followed through the chain of people who were in or around those statements that we had been made aware of, no one would ever either admit to them or we couldn't get past the hearsay of all of it.

(Evid. Hrg. Tran. 197:3-10). Between herself and Mr. Jordan, they recognized that Mr. Mixon lied about pretty much everything. (Evid. Hrg. Trans. 197:17). They learned that Mr. Mixon liked to be involved in big time cases. (Evid. Hrg. Trans. 197). On the day Mr. Mixon was set to testify at trial, Ms. Jewell believed Mr. Mixon to be on some type of drug. (Evid. Hrg. Trans. 200).

Mr. Jordan testified at the evidentiary hearing as well. Mr. Jordan was the lead investigator that assisted Ms. Jewell in her preparation for the trial. Mr. Jordan only handled murder, capital cases. (Evid. Hrg. Trans. 280). Of the witnesses Mr. Jordan was able to speak with, most of their knowledge was based on hearsay, "they had no firsthand knowledge of anything." (Evid. Hrg. Trans. 282:18-19). While Mr. Jordan tried to follow leads he got from the witnesses, "[n]obody wants to own up to actually knowing what occurred." (Evid. Hrg. Trans. 283:1-2). Mr. Jordan testified that he never heard of Natasha Simmons or Amy Salter. (Evid. Hrg. Trans. 284). Mr. Jordan would have to make a judgment call about who to talk to because, in his

experience, he has talked to witnesses who will change their story once they get on the stand to testify. (Evid. Hrg. Trans. 285). He gets names of possible witnesses from defendants.

> Like I say, based on the assistance I get from the defendant, if they don't have anything, if they don't want to assist me with the case, it makes it harder for me. And I usually ask them who they want me to talk to or who can verify, you know, maybe give them an alibi or something. If they don't have anything to give me, I have to just go out on my own and look.
>
> And there are stories about every murder you hear all over every town you go in. There's hearsay about everything. And you can't, I don't have the time and energy, you're right, to chase all that down. Because some of them told me they called the police and the police hung up on them because they didn't want to hear it, so.

(Evid. Hrg. Trans. 285:13-25).

Mr. Jordan testified that Calhoun would not help him with the investigation. (Evid. Hrg. Trans. 295). "He wouldn't even read his discovery. He said it was a bunch of bull." (Evid. Hrg. Trans. 295:10-11). "He wouldn't talk about his case." (Evid. Hrg. Trans. 299:25). Mr. Jordan believed that Calhoun had knowledge of what happened based on their limited conversations. (Evid. Hrg. Trans. 300). Mr. Jordan did state that Calhoun told him hearsay that Mr. Mixon burned Mrs. Brown in the car, which was consistent with what a lot of people in the area said, and that Mr. Mixon had a reputation. (Evid. Hrg. Trans. 303). Mr. Jordan stated that his reputation was that "[h]e was a liar and heavy drug user and he was possibly a serial killer, according to a lot of people." (Evid. Hrg. Trans. 303:24-25).

Calhoun, during his statement to police, claimed to have been kidnapped. Mr. Jordan testified that he spoke with Calhoun about the kidnapping. However, "[i]t never made any sense because the person that kidnapped him, he didn't know him, it was the first time he saw him. There was no reason for someone to kidnap him." (Evid. Hrg. Trans. 304:10-13). Calhoun made it clear that it was not Mr. Mixon who kidnapped him, but some redhead, red-bearded man. (Evid. Hrg. Trans. 304). Calhoun told Mr. Jordan that he had found God. (Evid. Hrg. Trans. 304).

> [H]e was satisfied with whatever the outcome of the trial would be. And I asked him outright, I said, well, do you know who did this or do you have any idea. They [are] trying to take your life from you, and he said I'm satisfied with that. If they take my life, whatever.
>
> And he said if they don't, I'm going to minister to the prisoners once I get to prison on death row or wherever I go. But he also told me that he was worried about the safety of his family, that's why he couldn't divulge who was involved. And led me to believe that he did know who was involved, but for the sake of his family, he couldn't tell me or wouldn't tell me.

(Evid. Hrg. Trans. 304:25; 305:1-12). Mr. Jordan confirmed that he was never able to find anything other than hearsay that Mr. Mixon was connected to this murder. (Evid. Hrg. Trans. 305). "[Calhoun] had no knowledge that Doug Mixon did it, it was hearsay." (Evid. Hrg. Trans. 306:23-24).[7]

[7] Melody Harrison was also called by the defense. She was the investigator who accompanied Ms. Jewell to the crime scene. Her involvement was minimal in this case, only when Mr. Jordan was out of the office due to knee surgery, and Mr. Jordan was the primary investigator, who did almost all of the investigation. Ms. Harrison's testimony did not establish any prejudice to Calhoun.

At the evidentiary hearing, Doug Mixon was called by the defense. Mr. Mixon is well aware of his reputation in the community. (Evid. Hrg. Trans. 311). Mr. Mixon testified that, on the night of murder, he was at the home of Jose Contreras in Geneva. (Evid. Hrg. Trans. 312). He testified that Mr. Contreras, who was a co-worker of Mr. Mixon, was not present at the house. (Evid. Hrg. Trans. 313). Mr. Mixon went to the house to spend time with Gabrielle Faulk, who was living there at the time. (Evid. Hrg. Trans. 313). He testified that Mr. Contreras was drunk that night and that they were driving to the store to get more beer when they were pulled over by a Geneva City police officer. (Evid. Hrg. Trans. 313-14). Mr. Mixon was adamant that he never told Mr. Contreras or Robert Vermillion that he committed the murder. (Evid. Hrg. Trans. 317).

The defense also called Jose Contreras. Mr. Contreras, who testified with the aid of an interpreter, stated that he only speaks a little bit of English. (Evid. Hrg. Trans. 338). At the time of the murder, he had known Mr. Mixon for three years. (Evid. Hrg. Trans. 339). In September 2010, Mr. Contreras's son was arrested for murder. (Evid. Hrg. Trans. 340). He denied that Ms. Faulk ever lived at his house, but would allow her to stay there occasionally. (Evid. Hrg. Trans. 341-42). Mr. Contreras testified that Mr. Mixon never spent the night at his house and that he never drank with Mr. Mixon and Ms. Faulk. (Evid. Hrg. Trans. 343). Mr. Contreras claimed that Mr. Mixon came to his house one night after the murder and confessed

to killing Mrs. Brown. (Evid. Hrg. Trans. 345). He claimed that he went to Officer Ricky Morgan and told him that Mr. Mixon confessed to the murder. (Evid. Hrg. Trans. 346). Mr. Contreras admitted that he was the one who turned his son in for murder. (Evid. Hrg. Trans. 347). During cross-examination, Mr. Contreras stated that he and Mr. Mixon were only co-workers and did not have a relationship outside of work. (Evid. Hrg. Trans. 349). Mr. Contreras also admitted that he had no independent recollection of the night of murder. (Evid. Hrg. Trans. 349).

The State, in rebuttal, called Officer Morgan. While he was aware of the case, he was not involved. (Evid. Hrg. Trans. 405). Officer Morgan knows Jose Contreras through an investigation. (Evid. Hrg. Trans. 405). He testified that Mr. Contreras speaks English and that Mr. Contreras **never** told him that Mr. Mixon confessed to him. (Evid. Hrg. Trans. 405-06). Officer Morgan knew the officers on the case and he would have immediately passed the information to them. (Evid. Hrg. Trans. 406).

Mr. Contreras is not credible at all. It is highly improbable that Mr. Mixon would confess murdering Mrs. Brown to someone that barely speaks English and that he had never spent time with Mixon outside of work. Additionally, Officer Morgan testified that Mr. Contreras never approached him about this case.

The defense called Robert Vermillion, who is related to Brandon Brown, and he testified that in the summer of 2016, Mr. Mixon was at his aunt's house. (Evid. Hrg. Trans. 361). Vermillion claimed that Mr. Mixon told him that he had done

things he was not proud of and he asked for forgiveness. (Evid. Hrg. Trans. 362). Vermillion admitted that Mr. Mixon "didn't come right out and say [he] killed her, but he insinuated it." (Evid. Hrg. Trans. 365:5-6). Though he believes that Mr. Mixon knows something about the murder, he does not know if Mr. Mixon committed the murder. (Evid. Hrg. Trans. 366). During cross-examination, Vermillion admitted that, before Mr. Mixon said anything to him, "I wasn't really harassing him, but I wasn't not harassing him." (Evid. Hrg. Trans. 368:20-21). Vermillion also admitted that he was following Mr. Mixon around everywhere that night. (Evid. Hrg. Trans. 368). The statement that Vermillion claims Mr. Mixon made never referenced Mrs. Brown. It never referenced any murder. Mr. Mixon supposedly just asked for forgiveness for some unnamed thing. This evidence would not change the outcome of the case. Vermillion merely stated that he thinks Mr. Mixon knew something about the murder.

It is clear from the testimony that Ms. Jewell tried to investigate Doug Mixon's alibi to the best of her ability. Calhoun refused to cooperate and did not even look at the discovery, as testified to by Ms. Jewell and Mr. Jordan. Because Ms. Jewell and Mr. Jordan were unable to discover any evidence beyond inadmissible hearsay that Mr. Mixon was involved in this murder, Calhoun has failed to establish deficient performance by Ms. Jewell and this claim must be denied.

In this case, there was overwhelming evidence of Calhoun's guilt. The victim's blood, hair, and purse were found inside of Calhoun's trailer, which was in a disarray. See Calhoun, 138 So. 3d at 366. Calhoun was witnessed asking the victim for a ride on December 16 and a witness testified that the victim came to the wrong residence the night she went missing, looking for Calhoun's trailer. Id. The morning that Mia Chay Brown and Calhoun were both reported missing, Calhoun was seen in a white four-door car, which matched the victim's car, as well as buying cigarettes at a convenience store in Alabama. Id. He was witnessed with blood and scratches on his hands and later that day a fire was seen burning. Id. Eventually, Calhoun went to the home of friends in Alabama, less than 1.5 miles from the victim's burnt car where he was informed that he was reported as missing along with the victim, Mia Chay Brown. Id. at 367. The victim's burnt remains were found in the trunk of her car on December 20. Id. Therefore, defense counsel's calling Doug Mixon would not have made a difference as it does not pertain to the DNA evidence that was found, the location of the burnt car, and the sightings of Calhoun and the victim before her death.

B. Trial counsel did not render ineffective assistance of counsel when she did not hire forensic experts.

Calhoun argues that defense counsel was ineffective for failing to retain or consult with a forensic expert. In particular, Calhoun argues that counsel should have consulted with a pathologist or medical expert to show how Calhoun received the

scratches and injuries to his body. (Initial Brief at 53). In addition, Calhoun asserts defense counsel should have consulted with a digital forensic expert to ensure that the SD card seized was not altered in any way as it was used to establish a timeline for the crime. (Motion at 53).

This Court has repeatedly rejected a claim of ineffectiveness for failing to hire various experts when the proffered testimony would not have assisted in the defense. Reed v. State, 875 So. 2d 415, 422-23, 425, 427 (Fla. 2004); Beasley v. State, 18 So. 3d 473 (Fla. 2009) (finding defense counsel was not ineffective for failing to hire experts, when the experts would not have presented any testimony contrary to the State's position). The test to be applied in a claim of ineffective assistance of counsel for failure to retain an expert is whether counsel's performance was deficient and whether the defendant was prejudiced by that deficiency. Reed, 875 So. 2d at 415. But, in this case, any such testimony from an expert would have been fruitless.

Scratches

In regards to the scratches observed on Calhoun, neither the State nor trial counsel had experts testify as to how Calhoun obtained the scratches. In closing arguments, defense counsel argued to the jury that briars or other similar shrubbery caused the injuries. (T17:1194-95). Even taking Calhoun's arguments that an expert would have supported his theory of how he received the scratches, he cannot show how he was prejudiced. Throughout trial the testimony presented was that Calhoun

was in the bushes hiding out which is consistent even with the injuries he sustained. Therefore, even if an expert had testified that fingernails did not cause the injuries, the other option did not help Calhoun's defense. Reed, 875 So. 2d at 423 (finding there is no prejudice when the employment of an expert would not have assisted the defense).

Ms. Jewell testified that her strategy for handling the scratches was to let the State "step on their own toes." (Evid. Hrg. Trans. 196:21). She thought the State's explanation that they were caused by Mrs. Brown was ridiculous and "pretty outlandish, given what those photographs represented and looked like." (Evid. Hrg. Trans. 196:18; 196:24-25). The State did not call an expert to explain the scratches at trial.

Dr. Willey testified at the evidentiary hearing. He testified that his opinion was based on only his review of the photographs taken of the scratches and he did not have any case materials or transcripts. (Evid. Hrg. Trans. 247). Dr. Willey testified while he did not think the scratches were made by fingernails, he could not positively assert that the scratches were not made by fingernails either. (Evid. Hrg. Trans. 249). He stated that he suspected some of the scratches were partially healed. (Evid. Hrg. Trans. 252). During cross-examination, Dr. Willey admitted that he had not testified for the State in a case since around 1970. (Evid. Hrg. Trans. 260). Dr. Willey stated that there are four things that he looks for: lunar, width, multiplicity,

and parallel. (Evid. Hrg. Trans. 260-61). He stated that most manual scratches do not break the skin surface, "much less produce a semilunar mark." (Evid. Hrg. Trans. 261:16-17). Dr. Willey also testified that some of the scratches were parallel. (Evid. Hrg. Trans. 262:17-19). While he continued to insist that the scratches were wider than he would expect, he did not have a scale where he would say for certain how far the scratches were from each other. (Evid. Hrg. Trans. 263). Dr. Willey could not testify how the scratches occurred.

> Q: . . . But I just ask you to elicit the testimony from you, if you were to testify in trial, just like you've testified here today, you could not give a definitive opinion or tell the jury or tell us here today, that you know exactly how these scratches were caused?
>
> A: No. As a matter of fact, I assert I simply don't know how they occurred.

(Evid. Hrg. Trans. 264:23-25; 265:1-5).

Ms. Jewell was able to argue that the scratches were caused by Calhoun running through the woods. Appellant is unable to show how he was prejudiced and how the calling of Dr. Willey would have changed the outcome of the trial. There was no dispute that Calhoun had been in the woods prior to being arrested. He admitted to detectives he was present in the woods during his interview.

Consequently, Calhoun was not prejudiced by any alleged failure of counsel to call a medical or pathologist expert.

SD Card

In regard to the SD card, Calhoun has not shown how testimony of a defense expert would have changed the outcome of the case. The State called an expert who was able to approximate the date and timing of the pictures on the victim's SD card. (T15:914-22). The expert, Jennifer Roeder, approximated the timing of the photo from the testimony of the victim's sister and determined a range of time that the picture was taken of the roof of the trailer. (T15:921). During cross-examination, defense counsel was able to get the expert to admit that her testimony was based on no one resetting the time and date on the camera. (T15:922). Therefore, defense counsel effectively cross-examined the expert to show the issues with her testimony.

At the evidentiary hearing, Ms. Jewell testified about why she did not hire an expert. While she agreed that they can be important in some cases, she made the decision to not hire an expert for this issue. (Evid. Hrg. Trans. 143). The decision was part of her strategy and did not fall below the standards.

Mr. Sawicki was called by the defense to testify about the SD card. Mr. Sawicki, who is an expert in digital forensics, testified that he conducted an examination of the SD card, as well as reviewed reports and the testimony of the forensic analyst. (Evid. Hrg. Trans. 376). Mr. Sawicki's testimony was consistent with that of the Florida Department of Law Enforcement (FDLE) expert called by the State. He stated that the modified and created dates were consistent with the

analysis done on the clock of the digital camera and that the access date was the only date altered on the SD card. (Evid. Hrg. Trans. 387:16-17; 389:6-11). Even though Mr. Sawicki testified that having created dates after January 2011 would not be consistent with the trial testimony, his report that he prepared in this case stated that many of the photographs had created and modified time stamps after the date of the murder was consistent with FLDE's analysis related to the clock on the digital camera. (Evid. Hrg. Trans. 391:3-11). Mr. Sawicki was not aware of any of the photographs having their created or modified dates changed to January 17, 2011, which is when Investigator Raley accessed the SD card. (Evid. Hrg. Trans. 393:10-19). Mr. Sawicki also admitted that he could not tell from the metadata that the officer was lying about how the photographs were accessed. (Evid. Hrg. Trans. 394:13-16).

Ms. Jewell effectively cross-examined Ms. Roeder about the SD card. Mr. Sawicki's testimony would have been, at best, cumulative to the other testimony that was presented to the jury. As Calhoun is unable to demonstrate how calling this witness would create a reasonable probability of a different result, this claim should be denied.

C. Trial counsel subjected the State's case to adversarial testing through investigation, cross-examination, the utilization of available impeachment evidence, and proper objection and did not render ineffective assistance of counsel that prejudiced Calhoun.

Calhoun argues that trial counsel failed to test the State's evidence through proper objections, available impeachment evidence and effective cross-examination. (Initial Brief at 66-67). Calhoun listed numerous witnesses that he feels counsel should have asked more questions, should have objected, or should have impeached their testimony. (Initial Brief at 67-92).

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

While courts may not indulge in *post hoc* rationalization, they also cannot insist that counsel "confirm every aspect of the strategic basis for his or her actions." Harrington v. Richter, 131 S.Ct. 770, 794 (2001). "There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" Id. at 791 (citing Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (per curiam)). Therefore, with the presentation of each witness defense counsel is not deemed automatically defective for not choosing the method that current counsel would have chosen. Further, unlike current counsel, defense counsel does not have the benefit of hindsight in determining what would be effective and what would not work. See Pagan, 29 So. 3d at 949.

During Calhoun's case, trial counsel effectively cross-examined each witness presented by the State. Through her cross-examination of various witnesses, defense counsel was able to make it clear that there was no evidence that Calhoun was in the trailer at the time that the kidnapping occurred, she was able to insinuate that someone broke in and committed the crime. (T17:1178). Further, defense counsel challenged the identification of the man who came into the store in Alabama at 6:00 a.m. (T13:659-65; T14:621). During closing arguments, defense counsel went through the testimony of each witness and explained to the jury why each testimony was important to show that Calhoun was not guilty. (T17:1179-207).

Counsel's failure to object to the testimony was clearly a strategic decision. Therefore, defense counsel's failure to object regarding the alleged hearsay testimony of Tiffany and Glenda Brooks appears to be a trial tactic by defense counsel. (T14:783-87, 794-97). The objections would have just drawn attention to their testimony and would not have assisted in Calhoun's defense. In addition, by effectively cross-examining the witnesses presented defense counsel was able to challenge the timeline of events. Defense counsel questioned Brittany Mixon on her events the day Calhoun was reported missing and her tampering with the evidence. (T14:720-45). Defense counsel also questioned Investigator Raley regarding his investigation, when he asserts everything occurred, and what information he left out. (T14:774-77; T15:957-62; T16:1080-87, 1092).

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

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

Charles Howe, Dr. Swindle, Dick Mowbry

Charles Howe, Dr. Swindle, and Dick Mowbry were witnesses that the State used to prove the identification of Mia Brown's body. Ms. Jewell admitted that she was not going to object to the witnesses because she did not think their testimony would be prejudicial. (Evid. Hrg. Trans. 68:6-24). Ms. Jewell agreed that there was no reason to cross-examine Mr. Howe or Dr. Swindle. (Evid. Hrg. Trans. 69:4-6). When Mr. Mowbry had testified at trial about the scene being something he would not forget, Ms. Jewell did not object. She did not think it was as inflammatory as it seemed and "[a]n objection draws the jury to a fact that that, oh, that was something that [the jury] was really supposed to be paying close attention to." (Evid. Hrg. Trans. 72:1-3). Additionally, Calhoun argues that Mr. Mowbry's identification of Mrs. Brown's ribs multiple times was inflammatory. However, Ms. Jewell stated that the identification was multiple photographs, and not the same one repeatedly.

(Evid. Hrg. Trans. 192-93). The questions asked by Ms. Jewell were clearly part of her strategy to focus on causing reasonable doubt that Calhoun was the person who committed the murder and to not present several theories and lose credibility with the jury. These witnesses were merely called to establish the identification of the body that was found.

In reference to Mr. Mowbry's statement that Appellant contends injected emotion and sympathy into the trial, the postconviction court noted that Ms. Jewell believed an objection "would have drawn additional attention to testimony given what was already emotional exhibits." (Order at 23). The postconviction court found the decision to not object to be strategic. (Order at 23). Calhoun has failed to show Ms. Jewell was ineffective in her performance and that he was prejudiced.

Brandon Brown

Ms. Jewell testified that her strategy was to not attack Brandon Brown and point to him as a possible person who killed Mia Brown.

> [A]s a matter of strategy and not wanting to attack the husband of the victim in front of the jury, we made, I made, and I don't say we, I made this call, not to lay the blame on Mr. Brown given the fact that Mr. Calhoun was **adamant** that it was Doug Mixon and that Mr. Brown was not involved in it.

(Evid. Hrg. Trans. 84:8-13) (emphasis added). Ms. Jewell had a reasonable strategy for not putting the blame on Mr. Brown.

At the evidentiary hearing, counsel asked Ms. Jewell about photographs depicting bruises. However, no one was able to identify the person in the photographs, or even testify as to what caused the bruises on the unknown person. These photographs would not be admissible at trial because they cannot be authenticated. Ms. Jewell testified that no one knows the cause of the injuries and that it is unknown if Mr. Brown was even the cause of the injuries. (Evid. Hrg. Trans. 100). "I can't guess and accuse him of something. And, you know, I don't know what the cause of those [injuries] are. I mean, I don't know if she did something." (Evid. Hrg. Trans. 100:22-25). Ms. Jewell repeatedly stated that her strategy did not include placing blame on Mr. Brown, based on Calhoun's insistence that Mr. Brown had nothing to do with the murder of Mrs. Brown. The strategy was to place all the blame on Doug Mixon. (Evid. Hrg. Trans. 102). She "reiterated there was absolutely no evidence that she was aware of which would point to Brandon Brown as being responsible for this crime." (Order at 25). Ms. Jewell did not have a singular focus, "[b]ut you can't blame it on one person, then turn around and blame it on another because then you lose the jury's trust." (Evid. Hrg. Trans. 102:7-9).

> Q: As a defense attorney in a case like this, do you see any potential downfall in blaming grieving husband for a murder, basically, with no evidence in front of a jury?
>
> A: Yes, you actually garner a lot of disdain out of a jury when you do that. When you attack a family [ ] member of a victim, unless that family member is the one who is sitting next to me at this trial, juries do not like that at all.

> Q: Did you have any other type of evidence, anything that had come out in the case, that Brandon Brown was responsible for this particular crime?
>
> A: Absolutely nothing that I was aware of.

(Evid. Hrg. Trans. 193:25-194:1-11). Ms. Jewell had sound reasons for not trying to put the blame on Brandon Brown for the murder of Mia Brown. (Order at 25).

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

Sherri Bradley

By postconviction counsel's own statement during the evidentiary hearing, Ms. Jewell "did a really good job attacking [Ms. Bradley's] identification, there's no question about that." (Evid. Hrg. Trans. 104:8-9). Ms. Jewell stated that she focused on the hair issue because that was the strongest issue with Ms. Bradley. (Evid. Hrg. Trans. 105). "[O]bviously, she couldn't identify him [Calhoun]." (Evid. Hrg. Trans. 105:7). "[A]t the time, you want to, you know, when you have that point that you think you have made to a jury, then you let that witness go so that they're left with that, you know, she can't even get it right." (Evid. Hrg. Trans. 105:10-14).

> I mean, you can always, you know, look back and say, well, I probably could've taken that one a little bit further than what I did. But, again, I know at the time, in my head, it was, you know, this hair issue was the

> strongest thing, I felt, that the jury could really grab on to because she was totally identifying the wrong person.

(Evid. Hrg. Trans. 106:6-11). Ms. Jewell clearly had a strategy when questioning this witness. Ms. Bradley was never called as a witness at the evidentiary hearing and it is purely speculation as to what she would have testified to had she been asked the additional questions. As such, Calhoun has failed to meet his burden to show Ms. Jewell was ineffective.

Darren Batchelor

At the evidentiary hearing, the age difference between Mr. Batchelor and Calhoun was discussed. At the trial, for the first time, Mr. Batchelor claimed to have gone to school with Calhoun. (Evid. Hrg. Trans. 110-11). Ms. Jewell stated

> [a]nd this is where one of those instances where had we gotten Mr. Calhoun to actually look at the case and talk to us about these witnesses, because the first time he told me, no, I don't know him, was in trial. And that was specifically what I had warned him about, at the time of trial is not the time to tell me these things.

(Evid. Hrg. Trans. 111:2-7). Ms. Jewell also stated that her strategy was to play Mr. Batchelor's identification off of Ms. Bradley's identification because they were inconsistent and she wanted to make that point to the jury.[8] (Evid. Hrg. Trans. 115). This is not an unreasonable strategy and Calhoun has failed to establish prejudice.

[8] Ms. Bradley stated that the person had longer hair; however, Mr. Batchelor stated that the person had shorter hair. (Evid. Hrg. Trans. 109).

Brittany Mixon

Ms. Jewell testified that Brittany Mixon did not make herself out to be a sympathetic character when she testified. (Evid. Hrg. Trans. 132). She also testified that she does not know what effect the fact that Ms. Mixon did not make any phone calls to Charlie's Deli would have on the jury. (Evid. Hrg. Trans. 131-32). Because her father is Doug Mixon, Ms. Jewell stated that the implication that Ms. Mixon was involved in the murder was present. (Evid. Hrg. Trans. 132). Calhoun failed to establish what prejudice he sustained as a result of Ms. Jewell not asking additional questions.

Tiffany Brooks, Glenda Brooks

Ms. Jewell testified that when Tiffany Brooks testified about what her boyfriend told her about the flyer, she did not object to hearsay. She stated that sometimes, when a defense attorney is sitting at the table with a client sitting next to them and talking to them while a person is testifying, it is very easy for an objection to be missed. (Evid. Hrg. Trans. 135). Defense counsel did not elicit any testimony that would establish how Calhoun was prejudiced by this evidence being presented.

Ms. Jewell testified that Glenda Brooks was difficult during cross-examination. (Evid. Hrg. Trans. 136). She also stated, as with Tiffany Brooks, she might have just missed the hearsay objection. However, there was no evidence elicited that would establish how Calhoun was prejudiced by this evidence. By

postconviction counsel's own admission, Ms. Jewell was able to impeach both Tiffany Brooks and Glenda Brooks with prior inconsistent statements. (Motion at 22-23). Without a showing of any prejudice, Calhoun has failed to establish deficient performance by Ms. Jewell. (Order at 28).

Jennifer Roeder

Ms. Roeder, who analyzed the SD card, did not testify at the evidentiary hearing. When asked why she did not have Ms. Roeder testify about the efforts it takes to remove an SD card from a camera, Ms. Jewell replied, "I, to be honest, didn't even think about having her testify to that." (Evid. Hrg. Trans. 140:18-19). She further stated, "[a]nd I could've, in error, assumed that the jurors, I try not to assume my jurors are really stupid, but, you know. So, basic information, I don't get experts for." (Evid. Hrg. Trans. 140:21-23).

Calhoun argues that Ms. Jewell should have raised a chain of custody argument regarding the SD card. However, Ms. Jewell did not believe that the data had been altered, removed, or added in any way from the SD card. (Evid. Hrg. Trans. 195). There was a reasonable explanation to show why the access dates on the SD card had been changed.[9] Ms. Jewell testified that she did not ask additional questions about the data because she believed Ms. Roeder had "laid it out" during her direct

[9] Investigator Raley testified that he had accessed the SD card to see if there was anything of value on it.

examination and she did not want to "go down a whole nother line of questioning that mimics the direct." (Evid. Hrg. Trans. 145:3-10). Ms. Jewell did not ask questions of Ms. Roeder about the compromised data because she believed the jury had already heard that the SD card was compromised and that the integrity of it was questionable. (Evid. Hrg. Trans. 146).

Calhoun failed to show that the additional questions would have caused a different outcome in the trial and he cannot prove prejudice.

Michael Raley

Calhoun argues because the Florida Supreme Court found that the trial court erred in excluding Calhoun's statement to Investigator Raley and the issue was not preserved for appeal (Motion at 28), that is the definition of ineffective assistance of counsel. See Calhoun, 138 So. 3d at 360. However, the Florida Supreme Court also found that, even if the issue had been preserved, Calhoun still would not be entitled to relief. The Court agreed that the trial court erred in excluding the statements because they were self-serving, without making a determination based on fairness. Id. However, the Court further concluded that "any error in excluding these statements is harmless beyond a reasonable doubt because there is no reasonable possibility that exclusion of the redacted statements affected the outcome of the jury's verdict." Id. "Additionally, both statements were cumulative to other information elicited during the trial." Id. at 361. "The information Calhoun seeks to

introduce through the rule of completeness, that he did not know if Brown arrived at his trailer on December 16 and that his statement that Brown had never been to his trailer before December 16, was in fact provided to the jury." Id. Calhoun did not establish prejudice. This Court has already made findings that any error was harmless and it would not have affected the outcome of the trial. Id.

Even though Ms. Jewell stated that she would try the case differently now than before, that does not mean she was ineffective. Ms. Jewell stated that she has called law enforcement as witnesses more than once. (Evid. Hrg. Trans. 147). "Because you can often make it look as though something has not been, they've not been forthcoming to a jury and so you get some type of information through them, that the jury may think, okay, well, why didn't they tell us that." (Evid. Hrg. Trans. 147:7-11). She also stated that her strategy was to establish that everything looked made up. (Evid. Hrg. Trans. 148). Ms. Jewell had wanted to call Doug Mixon, so that she could establish that he knew the places Calhoun liked to visit. (Evid. Hrg. Trans. 148). Because Calhoun told her not to call Doug Mixon as a witness, it changed Ms. Jewell's strategy. (Evid. Hrg. Trans. 150). Ms. Jewell was still able to make the arguments and attack the credibility of the investigation. Calhoun has failed to prove prejudice.

Harvey Glen Bush

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

Calhoun has failed to prove Ms. Jewell performed deficiently as his trial attorney and has failed to prove prejudice. As such, Calhoun has not proven ineffective assistance of counsel.

In this case, there was overwhelming evidence of Calhoun's guilt. The victim's blood, hair, and purse were found inside of Calhoun's trailer which was in a disarray. See Calhoun, 138 So. 3d at 366. Calhoun was witnessed asking the victim for a ride on December 16 and a witness testified that the victim came to the wrong residence the night she went missing, looking for Calhoun's trailer. Id. The morning that Mia Chay Brown and Calhoun were both reported missing, Calhoun was seen in a white four-door car, which matched the victim's car, as well as buying cigarettes

at a convenience store in Alabama. Id. He was witnessed with blood and scratches on his hands and later that day a fire was seen burning. Id. Eventually, Calhoun went to the home of friends in Alabama, less than 1.5 miles from the victim's burnt car where he was informed that he was reported as missing along with the victim, Mia Chay Brown. Id. at 367. The victim's burnt remains were found in the trunk of her car on December 20. Id. With this overwhelming evidence, Calhoun was not prejudiced by any alleged failure of counsel to object to the testimony of witnesses regarding issues that did not affect the jury's verdict. Therefore, defense counsel's objections and additional questions during cross-examination would not have made a difference as they do not pertain to the DNA evidence that was found, the location of the burnt car, and the sightings of Calhoun and the victim before her death. Ms. Jewell had a clear strategy for how she handled the case that was not "so patently unreasonable that no competent attorney would have chosen it." Dingle v. Sec'y Dept. of Corr., 480 F.3d 1092, 1099 (11th Cir. 2007) (quoting Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983)). As such, this claim should be denied.

D. Calhoun was not prejudiced by the testimony of Glenda Brooks and Investigator Raley during the defense's case-in-chief at trial.

Calhoun argues that defense counsel was ineffective for eliciting potentially damaging evidence in the defense's case-in-chief. Calhoun challenges defense counsel's decision to recall Ms. Brooks and Investigator Raley to testify again when

the information they presented could have been elicited during cross-examination in the State's case-in-chief. (Initial Brief at 92-96).

This Court has held that there is a strong presumption that defense counsels render effective assistance and the assessment of their performance cannot be based on hindsight. "[A]n attorney is not ineffective for decisions that are part of trial strategy that in hindsight, did not work out to the defendant's advantage." Mansfield v. State, 911 So. 2d 1160, 1174 (Fla. 2005). "Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance, only if it was 'so patently unreasonable that no competent attorney would have chosen it.'" Dingle, 480 F.3d at 1099. The defendant on the other hand has to overcome the burden that what the attorney did is not considered trial strategy. See Darling v. State, 966 So. 2d 366 (Fla. 2007).

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

> Your Honor, this is opening up me to ask her about what he told her when he got there. They said they wondered why he didn't call the

> police, because he had told them that he was kidnapped and tied up. So I think if we go to that direction, that opens the door.

(T16:1078). However, this was not allowed in by the trial court and trial counsel was not able to get this testimony in through the witness. During closing arguments, trial counsel again reiterated that Ms. Brooks' testimony the day after the incident was different than her testimony at the time of trial. (T17:1191-92). It is clear that trial counsel was trying to show the inconsistent statements of this witness, while also attempting to get this information to the jury.

At the evidentiary hearing, Ms. Jewell testified she believed she called Ms. Brooks during the defense's case-in-chief to ask her why Ms. Brooks did not want Calhoun at her home. (Evid. Hrg. Trans. 137). Ms. Jewell testified that she had a conversation with Calhoun and that Ms. Brooks did not want another person at the house and it was not specific to Calhoun. (Evid. Hrg. Trans. 137-38). This shows clear strategy to imply to the jury that Ms. Brooks was not afraid of Calhoun when she asked him to leave her home.

Through the testimony of Investigator Raley, trial counsel was able to show the State was withholding information. Trial counsel questioned Investigator Raley about Doug Mixon, who was known to fight with Calhoun in an effort to show that there was a possible second suspect. (T16:1082). During closing arguments defense counsel stated that she wanted to show that there was doubt that Calhoun was actually seen buying cigarettes since he already had some. (T17:1197-99). Defense

counsel also argued that the information regarding an unknown shoe print did not belong to Calhoun and was hidden by the State because it did not match the State's theory of the case. (T16:1084; T17:1195-98).

At the evidentiary hearing, Ms. Jewell testified that, as a matter of strategy, she will routinely call law enforcement witnesses during the defense case-in-chief to make it appear that they were not forthcoming to the jury and to make the jury wonder why the witness did not disclose that information previously. (Evid. Hrg. Trans. 147). Ms. Jewell had a strategy for calling Investigator Raley. Although Calhoun argues that defense counsel's decision to recall Investigator Raley was puzzling, defense counsel was able to show that the State was hiding information that did not work for their case. Therefore, trial counsel was not ineffective for presenting evidence that put doubt on the State's case.

Further, Calhoun has not shown how he was prejudiced. Both of these witnesses testified in the State's case-in-chief and there was substantial evidence of Calhoun's guilt that was presented throughout trial. Therefore, their testimony does not undermine the jury's verdict. See Everett v. State, 54 So. 3d 464, 478 (Fla. 2010). Consequently, Calhoun has failed to show prejudice by any testimony of Ms. Brooks or Investigator Raley in the defense's case and this claim should be denied.

V. THE POSTCONVICTION COURT DID NOT ABUSE ITS DISCRETION BY NOT ALLOWING CALHOUN TO AMEND HIS MOTION FOURTEEN DAYS PRIOR TO THE START OF THE EVIDENTIARY HEARING.

On September 1, 2017, Appellant filed a motion to amend his 3.851 motion, raising a claim of newly discovered evidence involving Robert Vermillion. The evidentiary hearing was set to begin on September 15, 2017, and resume on September 19, 2017. On November 1, 2017, over a month after the evidentiary hearing, Appellant filed another motion to amend, raising a claim of newly discovered evidence involving Keith Ellis.

Fla. R. Crim. P. 3.851(f)(4) states that a trial court **may** grant a motion to amend provided that the motion was filed **at least 45 days prior** to the evidentiary hearing. Denials of motions to amend are reviewed under the abuse of discretion standard. See Doorbal v. State, 983 So. 2d 464 (Fla. 2008) (finding no abuse of discretion where motion to amend was filed less than 30 days before the evidentiary hearing); Smith v. State, 213 So. 3d 722 (Fla. 2017) (finding no abuse of discretion when motion to amend was filed after the evidentiary hearing).

Calhoun, through counsel, filed the motion to supplement 14 days prior to the evidentiary hearing. On September 15, the postconviction court, in accordance with the rule, denied the motion to amend. However, the court allowed Appellant to present the testimony of Vermillion and his testimony was considered by the court in its order denying relief. In rejecting the claim of newly discovered evidence filed

under Claim 16, the postconviction court found with Simmons' inconsistencies and Sheriff Ward's testimony, the outcome of the trial would not have been different. (Order at 52). The court stated that Mixon was adamant that he had never confessed to the murder of Mrs. Brown. (Order at 52). "But I sure as sin wouldn't confess to something that I didn't do." (Evid. Hrg. Trans. at 320). The court clearly found Mixon's denial believable. The court did not abuse its discretion in denying the untimely motion to amend and Appellant was still able to argue the evidence of Vermillion's testimony at the evidentiary hearing.[10]

The November 1st motion to amend was also untimely, as it was filed more than a month after the evidentiary hearing. The postconviction court did not abuse its discretion in denying the motion. Additionally, counsel for Appellant acknowledged in the motion to amend that the claims could be filed in a successive 3.851 motion.[11] (Fifth Amended Motion at 4). Appellant is still able to bring his claims and is not prejudiced. Because the postconviction court did not abuse its discretion in denying either motion to amend, this claim is meritless and must be denied.

[10] The postconviction court noted that Vermillion admitted at the evidentiary hearing that Mixon did not confess to the murder of Mrs. Brown to him. (Order at 51).

[11] On August 17, 2018, Appellant filed a successive motion to vacate in the trial court, raising claims of newly discovered evidence with Vermillion and Ellis, which was stayed by this Court on August 22, 2018.

VI. THE STATE DID NOT COMMIT ANY VIOLATIONS UNDER GIGLIO AND CALHOUN'S DUE PROCESS RIGHTS WERE NOT VIOLATED.

Calhoun claims that he was denied his right to fair trial based on the testimony of Investigator Raley and Sherri Bradley, as well as the State's closing arguments. (Initial Brief at 103-07).

To establish a Giglio violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. Giglio v. United States, 405 U.S. 150 (1972); Guzman v. State, 868 So. 2d 498, 505 (Fla. 2003). Satisfying the second prong requires more than an incidental inconsistency in a prosecution witness's testimony, it requires evidence establishing that the prosecutor knew[12] the testimony was false. Guzman, 868 So. 2d at 505 (holding knowledge prong met where informant and lead detective testified falsely that informant received no benefit for her testimony other than not being arrested; in fact, the detective paid the informant $500); Ventura v. State, 794 So. 2d 553, 562-63 (Fla. 2001) (holding knowledge prong met where co-defendant testified that no promises were made to him in exchange for his testimony; the prosecutor in the case wrote letters to the U.S. Attorney's Office seeking favorable treatment for co-defendant).

[12] Knowledge is imputed onto the prosecutor if other State agents, such as law enforcement officers, withheld correct information. Gorham v. State, 597 So. 2d 782, 784 (Fla. 1992).

In this case, Investigator Raley testified that Calhoun told him that police were closing in on him at least three times while he was in the woods. (T15:955). As the postconviction court stated in its order, "[t]here was sufficient testimony presented at trial that Calhoun went to the Brooks' home, which is 1.5 miles away from where the car was burnt." (Order at 39; T15:948-49, 953). There was sufficient evidence to establish that Calhoun was near where the car was burnt. (Order at 39). Additionally, Ms. Bradley's testimony was corroborated by another witness who saw Calhoun in the store at the same time. (Order at 39). Her statement about the news was not material to her testimony and is not a Giglio violation.

Calhoun also claims that during closing arguments, the State made improper statements that were misleading and false. However, the postconviction court correctly found that the claim should have been raised on direct appeal. (Order at 39). Additionally, the State's statements during closing arguments would not fall under Giglio because, as the jury was properly instructed, what the lawyers say during their opening statements and closing arguments is not evidence. (T13:514; T17:1148). As such, this claim was properly denied by the postconviction court.

VII. THE POSTCONVICTION COURT RELIED ON ESTABLISHED LAW AND PROPERLY APPLIED THE LAW TO THE EVIDENCE THAT WAS PRESENTED AT THE EVIDENTIARY HEARING.

Calhoun claims that the postconviction court violated his right to due process when the court, in its order, used much of the same language as what was submitted

by the State in its written closings. (Initial Brief at 107-11). Appellant claims that the court relied on the State's "proposed order," but this is simply not true. The State did not submit any proposed order; however, it did submit written closings, as did defense. The fact that the court arrived at the same legal conclusions as the State, does not mean that the court did not conduct on independent analysis of the evidence. The court relied on established law and applied it to the evidence that was presented at the hearing. This claim is meritless and should be denied.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court affirm the postconviction court's order denying Appellant relief. Appellant committed the brutal murder of Mia Chay Brown. The evidence of guilt was overwhelming. "When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 at 695. "A court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." Id. at 696. The record affirmatively demonstrates beyond a doubt that even if defense counsel had committed each of the errors complained of in the Motion for Postconviction Relief, there is no chance that the outcome would have been different.

In conclusion, Appellee respectfully requests that this Honorable Court affirm the postconviction court's Order granting Appellant a new penalty phase and denying his guilty phase claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 26th day of September, 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Kathleen Pafford, at Kathleen.pafford@ccrc-north.org, and Elizabeth Salerno, at Elizabeth.salerno@ccrc-north.org, Attorneys for Appellant.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ *Lisa A. Hopkins*
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