IN THE SUPREME COURT OF FLORIDA

No. SC18-340

Lower Court Case No. 2011-CF-11A

JOHNNY MACK SKETO CALHOUN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES

RULES

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Calhoun's Motion to Vacate Judgements of Conviction and Sentence. The State has filed its answer to Mr. Calhoun's initial brief, and this reply follows. This reply will address only the most salient points argued by the State. Mr. Calhoun relies upon his initial brief in reply to any argument or authority argued by the State that is not specifically addressed in this reply.

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the record: "T" refers to the transcript of trial proceedings; "R" refers to the record on direct appeal to this Court; "PCR" refers to the record on appeal to this Court; "EH" refers to the evidentiary hearing transcript on appeal to this Court; "AB" refers to the State's answer brief. All other references are self-explanatory.

ARGUMENT IN REPLY

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

To rebut Mr. Calhoun's claim that the Public Defender's Office had a conflict of interest in representing him in his capital case, the State argues that no actual conflict existed that adversely affected the performance of trial counsel (RB.22), and that Mr. Carlisle's failure to meet the minimum standards for co-counsel in capital

cases does not amount to ineffective assistance of counsel. (RB.24). Mr. Carlisle's inexperience and inability to meaningfully participate in Mr. Calhoun's trial is *precisely* the prejudice that resulted from the conflict. But for the Public Defender's Office's conflict, Mr. Calhoun would have been represented by two attorneys with capital experience as required by Fla. R. Crim. P. 3.112, and the myriad of errors discussed in Argument IV of Mr. Calhoun's initial brief likely would not have occurred.

While a conflict of interest claim is similar to an ineffective assistance of counsel claim because both are rooted in the Sixth Amendment, conflict claims are distinct because there is no assessment of whether counsel's decisions effected the outcome of the trial. In *Alessi*, the court referred to the distinction as the "*Sullivan* exception to *Strickland*," where prejudice is presumed once the defense shows that an actual conflict of interest adversely affected the lawyer's performance. *Alessi v. State*, 969 So. 2d 430, 437 (Fla. Dist. Ct. App. 2007) (citing to *Quince v. State*, 732 So. 2d 1059, 1065 (Fla. 1999). In *Alessi*, counsel's conflict affected the client's representation because counsel made strategic decisions based on his own personal interest rather than decisions based on the client's best interest. *Alessi*, 969 So. 2d at 440.

The State cites to the committee notes for Fla. R. Crim. P. 3.112 and correctly states that the standards do not establish "any *independent* legal rights." However,

Mr. Calhoun's request for relief is not based solely on the violation of Rule 3.112. Mr. Calhoun's claim is that the Public Defender's Office violated Rule 4-1.7(a)(2) of the Rules Regulating the Florida Bar. The other death-qualified attorney in Ms. Jewell's office, Henry Mark Sims, had a personal relationship with the victim and her family. Rather than comply with Rule 4-1.7(a)(2) and conflict out Mr. Calhoun's case, the Public Defender chose to keep the file and attempt to firewall off the conflicted attorney. As a result, unqualified co-counsel was assigned to assist Ms. Jewell with Mr. Calhoun's case in violation of Rule 3.112.

Rule 3.112 requires that co-counsel in capital cases have three years of experience in criminal law. Mr. Carlisle had one year of criminal law experience prior to Mr. Calhoun's trial. (EH.211). Rule 3.112 also mandates that co-counsel in capital cases have prior experience as lead counsel or co-counsel in not fewer than three state or federal jury trials of serious complex cases, two of which were trials in which the charge was murder; or alternatively, of the three, at least one is a murder and one was a felony jury trial. Mr. Carlisle's trial experience was limited to misdemeanor cases. (EH.211). Rule 3.112 also requires co-counsel in capital cases to attend a 12-hour CLE program dedicated to capital cases within two years of a capital representation. Mr. Carlisle never attended a capital CLE as required by the rule. (EH.211). Mr. Carlisle admitted that he was not qualified to represent Mr. Calhoun in his capital trial and minimized his involvement. (EH.214).

The State argues that "because Attorney Carlisle was not involved in any meaningful way, there was no prejudice to Calhoun." (AB.25). Mr. Carlisle's lack of meaningful involvement in Mr. Calhoun's capital trial is precisely the prejudice to Mr. Calhoun. Instead of two qualified capital attorneys under Rule 3.112, Mr. Calhoun had one minimally qualified attorney and one self-proclaimed "bagholder." (EH.214). Lead counsel, Kimberly Jewell, was accustomed to working capital cases as co-counsel, or at least with the assistance of co-counsel. Ms. Jewell testified that although her former co-worker liked to work alone, she qualified that "[w]hen you have that intelligence level, you can do that." Ms. Jewell's testimony implied that she did not have the ability to work alone. (EH.20).

As discussed in Argument IV of Mr. Calhoun's initial brief, there were numerous witnesses at trial that Ms. Jewell failed to impeach with their deposition testimony. An experienced co-counsel would have helped her keep track of these discrepancies. Ms. Jewell did not have strategic reasons for failing to impeach the State's witnesses. She simply forgot. "You get so focused on one point that you want to make with them, that some of these other things, you forget, quite honestly, to talk to them about some other stuff that you know." (EH 115). "But when you are in the middle of it, you know, you get on, a sense of a roll and sometimes you get off on a different track and you forget to come back to your track." (EH.153). These instances

of forgetting to impeach witnesses with information she was already had would have been prevented had she had qualified co-counsel to assist her at trial.

Taylor v. State, 87 So. 3d 749, 759 (Fla. 2012), cited by the State, does not apply to Mr. Calhoun's case. In *Taylor*, this Court found there was no evidence to support defendant's allegation of a conflict with his attorney's representation. In Mr. Calhoun's case, however, his attorney recognized the existence of the conflict but failed to bring it to the attention of the court or Mr. Calhoun. Instead, the Public Defender's Office dealt with the issue internally and chose to keep Mr. Calhoun's case without any input from Mr. Calhoun. The Public Defender's Office's failure to conflict itself out of Mr. Calhoun's case compromised his representation by leaving him with a single death-qualified attorney in violation of Rule 3.112 and his Sixth Amendment Right to conflict-free counsel.

II. THE TESTIMONY OF NATASHA SIMMONS MUST BE EITHER *BRADY* MATERIAL, NEWLY DISCOVERED EVIDENCE, OR INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Calhoun's Argument II of his initial brief is a newly discovered evidence claim based on the testimony of Natasha Simmons and Robert Vermillion. In its answer brief, the State combines the newly discovered evidence argument regarding Natasha Simmons with a *Brady* argument (see Argument III of Mr. Calhoun's initial brief), and an ineffective assistance of counsel argument, all in its answer to Argument II. In the interest of clarity, Mr. Calhoun will address all of the State's

arguments regarding the testimony of Natasha Simmons in Section II of this Reply. Mr. Calhoun will address the State's arguments about the newly discovered evidence of Robert Vermillion's testimony in Section III of this Reply.

Natasha Simmons told former Geneva County Sheriff Greg Ward that around the time of the victim's disappearance, her ex-boyfriend Charles Utley asked her to give him and his friend Doug Mixon a ride because they had run out of gas. (EH.328, 331). When she picked them up, Doug Mixon was covered in blood and was carrying an empty gas can. (EH.328). Sheriff Ward dismissed her report and told her that someone had already been arrested for the victim's murder. (EH.331). This information is either *Brady* material (see Mr. Calhoun's initial brief, Argument III), newly discovered evidence (see Mr. Calhoun's initial brief, Argument II), or defense counsel was ineffective for failing to discover this information and utilize it in Mr. Calhoun's trial.

A. Natasha Simmons's testimony is *Brady* material.

The State claims that the testimony of Natasha Simmons is not *Brady* material because she never told Sheriff Ward about her encounter with Charles Utley and Doug Mixon. (AB.31, 46). The State further argues that even if she did tell Sheriff Ward, he was not a member of the prosecution team. (AB.46).

1. The State misrepresents Sheriff Ward's testimony.

The State misrepresents Sheriff Ward's testimony at the evidentiary hearing. The State claims Sheriff Ward denied ever talking with Natasha Simmons about this case. (AB.46). That it is not an accurate representation of his testimony. On direct examination by the prosecutor, Sheriff Ward testified to the following:

> Q: Do you recall Natasha Simmons coming to meet with you personally around this time period of 2010 or early 2011, or I guess at any time, while you were the Sheriff there in Geneva County, and telling you that she had picked Doug Mixon and Charlie up from an area of Holmes County, and Doug Mixon had blood on him and was carrying a gas can?
>
> A: No, sir.
>
> (EH.398-99).

On cross examination by Mr. Calhoun's counsel, Sheriff Ward testified to the following:

> Q: I think you said, was it your testimony that you don't remember, that you don't recall that, Natasha Simmons coming to your officer and telling what you Mr. Brandon Young just said?
>
> A: I don't recall getting information from her whatsoever about anything.
>
> Q: You don't remember that?
>
> A: No.
>
> (EH.400).

Sheriff Ward's testimony was not that Natasha Simmons *never* told him about bloody Doug Mixon with the empty gas can. His testimony on direct examination and on cross examination was that he did not *recall* such a conversation. In fact, he was given two opportunities to clarify his testimony during cross examination, and he twice verified that the did not remember such a conversation, not that it did not happen.

2. Sheriff Ward was a member of the prosecution team.

The Geneva County Sheriff's Office actively participated in the investigation of the victim's disappearance and murder. The victim's burned car and body were found in Geneva County. (R.736-37). During the investigation, Lt. Annie Ward of the Geneva County Sheriff's Department assisted Investigator Michael Raley of the Holmes County Sheriff's Department with search warrants in Geneva County. (R.737, 832). Lt. Ward obtained search warrants for the Brooks' residence, the victim's burned vehicle, and a campsite near the burned vehicle. (R.737, 738, 830, 850). She participated in the search of the Brooks' residence with Investigator Raley and Investigator Harris of the Fourteenth Circuit State Attorney's Office. She collected evidence at the Brooks' residence. (R.738, 832). Lt. Ward also spoke with witness Bennett about his sighting of smoke and reported her findings to Investigator Raley. (R.739). The Geneva County Sheriff's Office helped Investigator Raley locate and contact potential witness Larry Tompkins. (R.830). When Mr. Calhoun

was found in his trailer in Florida, Investigator Raley was with authorities from the Geneva County Sheriff's Office discussing an additional search warrant. (R.844). Sheriff Ward was a member of the prosecution team.

3. *Meros* and *Avellino* do not apply to Mr. Calhoun's case.

The State relies on *United States v. Meros*, 866 F. 2d 1304, 1309 (11th Cir. 1989) for the proposition that "[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." (AB.45). *Meros* is distinguishable from Mr. Calhoun's case because the *Brady* issue in *Meros* is about plea negotiations between a witness in the case in the Middle District of Florida and prosecutors in unrelated cases in the Northern District of Georgia and the Eastern District of Pennsylvania. The district court found that defense counsel had discussions with the witness's attorney and knew more about the witness's plea negotiations than the prosecutor in Florida. The Eleventh Circuit found there was no *Brady* violation because Meros' attorney was "in as good a position as the prosecutor to learn more about such negotiations through reasonably diligent efforts." *Id*. Mr. Calhoun's prosecutor did not have to go on a fishing expedition to get information from the Geneva County Sheriff's Department. Geneva County actively participated in the investigation.

The State's reliance on *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) is also misplaced. (AB.45). *Avellino* holds that prosecutors do not have a duty to inquire of other government offices that are not working with their office on a case. The Geneva County Sheriff's Office worked with the Holmes County Sheriff's Office in the investigation of the victim's murder, and the Fourteenth Circuit State Attorney's Office prosecuted the case. Imputation of the knowledge of the Geneva County Sheriff about this case to Mr. Calhoun's prosecutor is proper and does not require this Court "to adopt 'a monolithic view of government' that would 'condemn the prosecution of criminal cases to a state of paralysis.'" *Avellino*, 136 F. 3d at 255.

B. If Natasha Simmons's testimony is not *Brady* material, then it is newly discovered evidence.

If this Court finds that Natasha Simmons's testimony is not *Brady* material, then it is newly discovered evidence because this information was unavailable to the trial court, the parties and defense counsel at the time of trial and Mr. Calhoun and his trial counsel could not have known of this information by due diligence. In the State's limited discussion of Ms. Simmons's testimony as newly discovered evidence, the State argues that Ms. Simmons's testimony would not change the outcome of the trial because of her inconsistencies, Sheriff Ward's testimony, and Mr. Mixon's denial that he confessed to killing the victim. (AB.34).

The only inconsistency in Ms. Simmons' testimony articulated by the State was her lack of memory several years later at the evidentiary hearing about when she saw the news report about the victim's disappearance. (AB.34). As discussed above, the State has misconstrued Sheriff Ward's testimony. He testified that he did not recall Ms. Simmons telling him about Doug Mixon and Charles Utley, not that Ms. Simmons did not tell him about her strange encounter with the two men. Finally, it is clear from the testimony at the evidentiary hearing that Doug Mixon lacks credibility. As the State notes, Mr. Mixon lied about pretty much everything. (AB.49).

The State's argument regarding Natasha Simmons' testimony as newly discovered evidence lacks any analysis of the requirement that this Court "conduct a cumulative analysis of all the evidence"– that is, weigh the new evidence, "in combination with the evidence developed in postconviction proceedings," and the evidence at trial viewed through the lens of these new revelations –"so that there is a 'total picture' of the case and 'all the circumstances of the case.'" *Swafford v. State*, 125 So. 3d 760, 776-78 (Fla. 2013) (quoting *Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999)); see also *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998).

The State's answer brief does not address additional evidence developed in postconviction, such as the State's compromised and unreliable digital forensic evidence and Dr. Willey's testimony that it is not at all probable that the scratches

found on Mr. Calhoun were caused by fingernail scratches, as the State argued at Mr. Calhoun's trial. (IB.32; EH.249-256).

The State also fails to address Mr. Calhoun's argument that at a new trial, he would be able to challenge the identifications of Sherry Bradley and Darren Batchelor, and he would be able to present to the jury a full picture of where he was in the woods when he was close to law enforcement. (IB.32-33).

The State's answer brief also does not address the fact that all of this evidence would be combined with the evidence from Mr. Calhoun's first trial regarding the suspicious activities at the scrapyard the night the victim went missing and that Mr. Calhoun would be able to show that Doug Mixon's daughter, Brittany Mixon, had motive to tamper with evidence. (IB.33). The newly discovered evidence of Natasha Simmons must be analyzed in connection with the evidence at Mr. Calhoun's first trial **and** the evidence developed in postconviction.

C. If Natasha Simmons's testimony is not *Brady* material or newly discovered evidence, then it must be ineffective assistance of counsel.

The evidence of Natasha Simmons's strange encounter with Doug Mixon and Charles Utley was presented at Mr. Calhoun's evidentiary hearing. If Ms. Simmons' testimony is not *Brady* material and not newly discovered evidence, then the evidence must have been available for trial counsel to discover with the exercise of due diligence. If that is the case, trial counsel's failure to discover the evidence of Natasha Simmons is ineffective assistance of counsel. The prejudice is clear. Trial

counsel's theory of defense was to blame Doug Mixon, and Ms. Simmons places a blood-covered Doug Mixon with a gas can around the time of the victim's disappearance.

III. THE TESTIMONY OF ROBERT VERMILLION IS NEWLY DISCOVERED EVIDENCE REGARDING DOUG MIXON THAT SO WEAKENS THE CASE AGAINST MR. CALHOUN THAT IT CREATES A REASONABLE DOUBT AS TO HIS GUILT.

The State's answer brief analyzes Mr. Calhoun's newly discovered evidence claim regarding the testimony of Robert Vermillion under an ineffective assistance of counsel standard. The State argues that defense counsel tried to investigate Doug Mixon's alibi and Mr. Calhoun refused to cooperate. (AB.36). The State also argues that defense counsel was "unable to discover any evidence beyond inadmissible hearsay that Mr. Mixon was involved in the murder, Calhoun has failed to establish deficient performance by Ms. Jewell and this claim must be denied." (AB.36).

Mr. Calhoun has not claimed that counsel was ineffective for failing to discover Mr. Vermillion's testimony. Mr. Mixon made the statements to Mr. Vermillion in 2016, several years after Mr. Calhoun's trial. It is impossible for trial counsel to have discovered this information while investigating Mr. Mixon's alibi, and that is why this is a claim of newly discovered evidence.

The State's analysis of this claim based on ineffective assistance of counsel instead of newly discovered evidence results in a lack of analysis of the requirement that this Court "conduct a cumulative analysis of all the evidence" – that is, weigh

the new evidence, "in combination with the evidence developed in postconviction proceedings," and the evidence at trial viewed through the lens of these new revelations – "so that there is a 'total picture' of the case and 'all the circumstances of the case.'" *Swafford v. State*, 125 So. 3d 760, 776-78 (Fla. 2013) (quoting *Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999)); see also *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). The State's answer brief only addresses the postconviction testimony of Jose Contreras and (AB.37) and Mr. Calhoun's argument that at a new trial he would be able to present evidence of suspicious circumstances regarding the victim's husband. (RB.38). Beyond that, Appellant just reiterates this Court's discussion in the direct appeal about the evidence of guilt at trial. (RB.36, 40).

The State does not address additional evidence developed in postconviction such as the State's compromised and unreliable digital forensic evidence and Dr. Willey's testimony that it is not at all probable that the scratches found on Mr. Calhoun were caused by fingernail scratches. (IB.32, EH.249-256).

The State also fails to address Mr. Calhoun's argument that at a new trial, he would be able to call into question the identifications of Sherry Bradley and Darren Batchelor, and he would be able to present to the jury a full picture of where he was in the woods when he was close to law enforcement. (IB.32-33).

The State's answer brief also ignores the fact that all of the newly discovered evidence regarding Doug Mixon and the evidence developed during postconviction would be combined with the evidence from Mr. Calhoun's first trial regarding the suspicious activities at the scrapyard the night the victim went missing and that Mr. Calhoun would be able to show that Doug Mixon's daughter, Brittany Mixon, had motive to tamper with evidence. (IB.33). The State's reiteration of the evidence against Mr. Calhoun at trial does not satisfy the analysis required under newly discovered evidence. (AB.36-370.

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

Mr. Calhoun's ineffective assistance of counsel claim pled in Argument IV of his initial brief is detailed and comprehensive. Mr. Calhoun will address only the most salient points of the State's arguments in this reply.

A. Failure to investigate Doug Mixon's alibi.

In response to Mr. Calhoun's ineffective assistance claim regarding Doug Mixon's alibi, the State blames Mr. Calhoun. "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." (AB.54). Neither the State, nor the circuit court who adopted the State's closing argument, have articulated any basis as to how Mr. Calhoun's

failure to read his discovery thwarted trial counsel's ability to investigate Doug Mixon.

The State and circuit court also underscore Mr. Jordan's testimony to support the denial of Mr. Calhoun's claim. (AB.50). Mr. Jordan blamed Mr. Calhoun for the shortcomings in the investigation. (EH.295). Mr. Jordan did not need Mr. Calhoun to tell him that Doug Mixon was an alternative suspect in the victim's murder. All Mr. Jordan had to do was communicate with trial counsel to know that Doug Mixon should be the focus of his investigation. Ms. Jewell testified that Mr. Calhoun was insistent that the murderer was Doug Mixon. (EH. 54). Although Mr. Jordan testified he does not "have the time and energy" to chase down all potential leads, he is an investigator on capital murder cases and chasing down those leads is crucial to his client's defense. (EH.285).

The State also has no basis for its conclusion that "Mr. Contreras is not credible at all." (AB.53). The State claims "[i]t is highly improbable that Mr. Mixon would confess to murdering Mrs. Brown to someone that barely speaks English and that he had never spent time with Mixon outside of work." *Id*. The State's only basis for its credibility judgment of Mr. Contreras is his lack of mastery of the English language.

B. Failure to retain forensic experts.

The State argues that Mr. Sawicki's testimony regarding the SD card would have been cumulative to other evidence presented to the jury, and that Mr. Calhoun is unable to demonstrate how calling Mr. Sawicki at trial would create a reasonable probability of a different result. (AB.60).

The State's argument completely ignores Mr. Sawicki's testimony that the State's calculation method was "problematic" (EH. 387, 388, 391), and that because the SD card was not kept in a forensically sound manner, it was compromised and cannot be relied on. (EH. 390). This evidence is not cumulative. Given the purely circumstantial nature of the evidence used to convict Mr. Calhoun at trial, a witness that completely discredits the evidence the State used to place the victim at Mr. Calhoun's home on the night she went missing would so chip away at the credibility of the State's case against Mr. Calhoun that it would probably produce a different result at trial.

C. Failure to object to improper testimony.

The State argues that trial counsel's failure to object to improper testimony was clearly a strategic decision. (AB.63). That is misstatement of trial counsel's testimony by the State because she did not invoke a strategy reason for not objecting to the testimony of Charles Howe and Dr. Swindle about the victim's heart-studded signature, and Dick Mowbry about his discovery of the victim's charred body. She

testified that she did not think even think to object. (EH.73). Nor did defense counsel provide a strategic reason or failing to object to the hearsay testimony of Tiffany Brooks and Glenda Brooks. She had no idea why she failed to object. (EH.135).

The State's argument that trial counsel had strategic reasons for not objecting to improper victim impact evidence and hearsay testimony is simply not supported by the record.

D. Failure to effectively cross examine and impeach the State's witnesses.

The State argues that defense counsel's failure to effectively cross examine and impeach the State's witnesses at Mr. Calhoun's trial was based on her trial strategy and not ineffective assistance of counsel. However, the State concedes that Ms. Jewell "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." (AB.64, quoting EH.53-54) Reasonable doubt is a defense strategy, and defense counsel can establish reasonable doubt by whittling away at the State's case. Mr. Calhoun's trial counsel did not adhere to her strategy and the State cannot use "strategy" to excuse Ms. Jewell's deficient performance. Trial counsel could have attacked the State's case with effective cross examination and impeachment. In most cases where defense counsel failed to effectively cross examine or impeach the State's witnesses, she did not invoke a strategic reason at all.

- Defense counsel did not invoke a strategic reason for failing to impeach Sherry Bradley. She missed the opportunity because she was focused on other things. (EH.108). She admitted she "probably should have" impeached Ms. Bradley with her prior inconsistent statement.
- Defense counsel did not invoke a strategic reason for failing to impeach Darren Batchelor. She conceded it was something she "should have asked him" and that sometimes she gets so focused on one point that she forgets to question witnesses about other points. (EH.115).
- Defense counsel did not invoke a strategic reason for failing to question Brittany Mixon about the phone records. She conceded that she should have. (EH.132).
- Defense counsel did not invoke a strategic reason for failing to question Jennifer Roeder about Lieutenant Raley accessing the SD card without forensic protection. She mistakenly believed the State already addressed the issue during direct examination. (EH.145).
- Defense counsel could not provide any reason, strategic or otherwise, why she failed to show Lieutenant Raley a picture of the shirt Mr. Calhoun was wearing at the Brooks' residence and question him further on the issue. (EH.156). She did not invoke a strategy for failing to cross examine Lieutenant Raley and clarify Mr. Calhoun's position in the woods when he

could reach out and touch law enforcement, even though she concedes his statement could have been construed as a confession. (EH.50).

- Defense counsel could not provide any reason, strategic or otherwise, for failing to cross examine Harvey Bush about his prior statement the closing time of Charlie's Deli on the date the victim went missing. (EH.79).

The State's strategy justification for counsel's failure to object to improper testimony and effectively cross examine and impeach the State's witnesses is simply not supported by the record.

E. Eliciting harmful evidence from Glenda Brooks and Investigator Raley.

The State once again invokes strategic reasons for defense counsel's deficient performance. (AB.74-77). Trial counsel called two witnesses in her case-in-chief and elicited damaging evidence. Glenda Brooks testified that she did not want Mr. Calhoun in her home after she learned of the missing persons flier featuring him and the victim. (T.1076). Trial counsel called Lieutenant Raley to testify that a license plate bracket and a piece of cardboard with a tire impression and oil stain were found in a barn on Mr. Calhoun's family's property in Alabama.

Although the State argues that trial counsel had a clear strategy to imply to the jury that Ms. Brooks was not afraid of Calhoun when she asked him to leave her home (AB.76), that is not what happened at trial. Trial counsel failed to make this point during her direct examination of Ms. Brooks and during her closing argument

to the jury. This appears to be another circumstance of the State invoking a strategic reason for trial counsel's deficient performance that is not supported by the record.

The State also invokes a strategic reason for calling Investigator Raley to testify about potentially incriminating evidence found on Mr. Calhoun's family's barn. Trial counsel testified that she took the route the State alleged Mr. Calhoun took after kidnapping the victim and the evidence did not fit the State's theory. (EH.152). However, counsel never explained to the jury how the tag bracket evidence failed to fit the State's theory, and she could not provide any explanation of why she failed to do. (EH.152). Trial counsel might have had a strategy, but she did not follow it. Instead, she prejudiced Mr. Calhoun by putting forth additional evidence that connected Mr. Calhoun to the victim and her vehicle that the State seized upon in its closing argument to the jury. (T.1211-12).

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

Fla. R. Crim. P. 3.851(f)(4) provides that a court may exercise its discretion and allow amendments to 3.851 motions less than 45 days before an evidentiary hearing. An opportunity to amend should be allowed when "the failure to comply with the rule is a matter of form more than substance." *Bryant v. State*, 901 So. 2d 810, 819 (Fla. 2005).

Mr. Calhoun's proposed amendment to his 3.851 motion was based on newly discovered evidence that was received less than 45 days before his evidentiary hearing. Postconviction counsel learned of the evidence on August 29, 2017 and filed a motion to amend on September 1, 2017. (PCR.1979-80). The State argues that the circuit court did not abuse its discretion by denying Mr. Calhoun's motion to amend his 3.851 motion because Mr. Calhoun was able to argue the evidence of Mr. Vermillion's statement at the evidentiary hearing and the claims could also be filed later in a successive 3.851 motion. (AB.79).

The State supports its position with cases where defendants have strategically or irresponsibly filed amendments too close to the evidentiary hearing. In *Doorbal*, the amendments did not add new claims, but instead added unnecessary details to claims already in the 3.851 motion. *Doorbal v. State*, 983 So. 2d 464 (Fla. 2008). The State also cited to *Smith*, where trial counsel motion to amend was untimely because he was so busy with trials. *Smith v. State*, 983 So. 2d 464 (Fla. 2008). These cases illustrate that the time limit on amendments is meant to curtail strategic delay and procrastination. That is not what happened in Mr. Calhoun's case. The closeness in time of the request to amend to the evidentiary hearing was a result of the unpredictable nature in which newly discovered evidence surfaces.

For reasons of judicial economy and efficiency it would have been prudent for the circuit court to evaluate the claim involving Doug Mixon's confession at the

already scheduled evidentiary hearing. It is more efficient for the court, Mr. Calhoun, and the State to handle all known issues during the initial 3.851 case, rather than push certain issues off to a successive 3.851 proceeding. It is also prejudicial to Mr. Calhoun to not present all claims involving Doug Mixon together. Claims of newly discovered evidence are evaluated together to evaluate the impact of *all* the newly discovered evidence. *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). Mr. Calhoun is prejudiced because his newly discovered evidence claims regarding Natasha Simmons and Jose Contreras should be evaluated together with the newly discovered evidence of Robert Vermillion. The newly discovered evidence about the culpability of Doug Mixon casts doubt on the reliability of Mr. Calhoun's conviction. The circuit court should have allowed the amendment for the sake of judicial efficiency and to ensure the fairest proceeding for both Mr. Calhoun and the State.

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

To establish a *Giglio* violation, Mr. Calhoun must prove that the prosecutor knew the testimony of Investigator Raley was false. *Giglio v. United States*, 405 U.S. 150 (1972). The State never argues that the prosecutor did not know that Investigator Raley's testimony was false. Rather, the State circumvents the issue by arguing that there was evidence at trial that placed Mr. Calhoun roughly 1.5 miles from the burnt

car and that the claim regarding the prosecutor's misleading and false closing arguments should have been raised on direct appeal. (AB.81).

The State's arguments do not address the fact that the State knowingly presented false testimony to the jury, and then argued that false evidence in closing argument. Investigator Raley interviewed Mr. Calhoun after his arrest. Mr. Calhoun told Investigator Raley that he had been hiding close enough to reach out and touch deputies while hiding at the Bethlehem Campground in Florida. (PCR.2091). This area is not near the site where the victim's vehicle and body were found. Nonetheless, at trial Investigator Raley misconstrued Mr. Calhoun's statement to law enforcement and implied that Mr. Calhoun admitted he had been hiding in the woods where the victim's burnt vehicle was found on the very day after Mr. Calhoun and the victim were missing. (T.1210-11). This false testimony was elicited by the prosecutor and emphasized in his closing argument to the jury.

This is clearly a *Giglio* violation. Investigator Raley's interrogation of Mr. Calhoun is in the State Attorney's Office's file. The prosecutor's direct examination of Investigator Raley was framed by Mr. Calhoun's statement and he pointedly asked Investigator Raley about Mr. Calhoun in the woods. He knew Investigator Raley's testimony was false. Investigator Raley, who conducted the interview with Mr. Calhoun, certainly knew he was misconstruing Mr. Calhoun's statement to the jury, and this Court has previously held that the state attorney has "constructive

knowledge" of evidence known to other state agents. *Gorham v. State*, 597 So. 2d 782, 784 (Fla. 1992).

The State argues that Investigator Raley's false testimony is not material because Mr. Calhoun admits to being at the Brooks' residence (about 1.5 miles from the site where the vehicle was found) on December 18th. (T.948-49). However, it is much more incriminating to be at the scene of the crime on the day in question (Dec. 17th) than to be 1.5 miles away the day after the incident. This evidence was material because the prosecutor argued it in his closing argument and the circuit court used this evidence to justify a finding of the CCP aggravator.

The State also addresses Sherri Bradley's testimony through the lens of a *Giglio* violation. In Mr. Calhoun's initial brief, Ms. Bradley's testimony was addressed in the ineffective assistance of counsel claim. (IB.75-79). Ms. Bradley testified at trial that she had not seen or read any media reports on the case (T.666), however in her initial interview to law enforcement she stated that she did not want to identify the make of the vehicle as she had heard it on the news and was uncertain if she was remembering the news report or the actual vehicle. (PCR.2174). While defense counsel was ineffective for not impeaching with her pretrial statement, respondent correctly identifies this as an additional *Giglio* claim because (1) her testimony was false as she had previously given a statement that she had seen reports of the case in the media; (2) the prosecutor and the investigator were in possession

of the initial statement, and were aware that her trial testimony was false; and (3) Ms. Bradley's testimony was material because it helped establish the State's timeline. In addressing the materiality of this claim, the State argues that testimony from an additional witness, Darren Batchelor, put Mr. Calhoun at the gas station. At trial, defense counsel brought out several inconsistencies between Mr. Batchelor's description and Ms. Bradley's description. When these inconsistencies are combined with the false statement regarding the source of Ms. Bradley's information, a reasonable juror would doubt whether Mr. Calhoun was in the gas station at all that morning.

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

The State argues that the postconviction court conducted an independent analysis of the evidence and simply reached the same legal conclusions as the State. (AB.82). The State's argument is an incredible understatement of the similarities between the State's closing argument and the circuit court's order on Mr. Calhoun's 3.851 motion. The circuit court did not merely reach the same conclusions as the State. The circuit court treated the State's closing argument as a proposed order and published most of it as the court's own.

Rather than focus on the State's brief response to this claim, it is striking to note what is *not* addressed in the State's argument. The State does not address that

(1) pages 12-19, 37, 39, 40-42, 45 and 51-52 of the circuit court's order are entirely taken from the State's pleadings, the only additions being headers; (2) pages 20, 30-31, 33, 35-36, 38, and 43-44 of the circuit court's order are nearly entirely taken from the State's pleadings, only containing one or two short original paragraphs; and (3) pages 25-26, 28-29, 32, 46, and 50 of the circuit court's order all contain portions taken entirely from the State's pleadings. The State does not address Mr. Calhoun's allegations that 30 out of 40 pages of the circuit court's factual and legal findings contain "findings" that have been copied verbatim from the State's pleadings, either in part or in full.

The circuit court adopted the State's closing argument without any indication that the court considered Mr. Calhoun's closing argument and made independent conclusions of law or findings of fact. This is a violation of Fla. R. Crim. P. 3.851(f)(5)(F), which requires the circuit court to "rule on each claim considered at the evidentiary hearing and all other claims raised in the motion, making detailed findings of fact and conclusions of law with respect to each claim, and attaching or referencing such portions of the records as are necessary to allow for meaningful appellate review." As such, this Court should not give any deference to the circuit court's conclusions of law or findings of fact in Mr. Calhoun's postconviction case.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2018, the foregoing was electronically served via the e-portal to Assistant Attorney General Lisa Hopkins at lisa.hopkins@myfloridalegal.com and capapp@myfloridalegal.com.

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CERTIFICATION OF FONT

This is to certify that the foregoing Initial Brief of Appellant has been reproduced in Times New Roman 14-point font, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.

/s/ Stacy R. Biggart
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