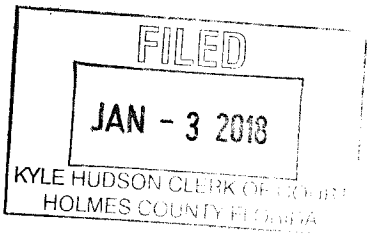
IN THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR HOLMES COUNTY, FLORIDA
CRIMINAL DIVISION

CASE NO.: 11-11 CF

STATE OF FLORIDA
Plaintiff,

v.

JOHNNY MACK SKETO CALHOUN,
Defendant.



ORDER ON DEFENDANT'S MOTION FOR POST CONVICTION RELIEF PURSUANT TO RULE 3.851, FLORIDA RULES OF CRIMINAL PROCEDURE

THIS MATTER is before the Court on the Defendant's Motion for Post Conviction Relief pursuant to Fla. R. Crim. P. 3.851 filed September 25, 2015. Having considered said Motion, court file and records, and being otherwise fully advised, this Court finds that:

Facts and Procedural History

The relevant facts concerning the murder of Mia Shay Brown are recited in the Florida Supreme 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; and 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, a 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 scene 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 Sheriffs 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. Jose Martinez, owner of the Friendly Mini—Mart, testified that Calhoun came to his store on December 16 and bought a pack of cigars, wine, and apple cider. He never knew Calhoun to buy cigarettes.

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

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

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

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

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

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

Penalty Phase

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

The defense provided witnesses as follows. Pastor A.J. Lombarin, Cliff Jenkins, and Ryan George, all ministers to Calhoun, each testified that Calhoun was devoted to Christian study and ministered to other inmates while awaiting the instant trial. Patrick O'Dell, an inmate, testified that Calhoun invited him to bible study and was his mentor, teacher, and minister, and changed the course of O'Dell's life by telling him to take responsibility for his actions. Jerry Pappas, an inmate, testified that Calhoun was like a brother to him and changed his life for the better. Darryl Williams, a former inmate, testified that Calhoun helped him change and encouraged him to witness to others outside of the jail.

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

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

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

Spencer[1] Hearing

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

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 (Fla. 2013) (Footnotes and internal page numbers omitted).

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

On direct appeal, the Florida Supreme Court addressed five issues: (1) whether the trial court erred in excluding Calhoun's exculpatory statements to police under the rule of completeness; (2) whether the trial court erred in finding the aggravators of 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, the Florida Supreme Court issued its opinion striking the avoid arrest aggravator and rejecting the remainder of Calhoun's issues on appeal. The Court also found the evidence was sufficient to support Calhoun's conviction for one count of first degree murder. On July 17, 2014, Calhoun filed a Petition for Writ of Certiorari in the United States Supreme Court. On October 6, 2014, the United States Supreme Court denied review. Calhoun v. Florida, 135 S. Ct. 236 (2014).

Short Procedural Post Conviction History

On September 25, 2015, the Defendant, represented by Alice B. Copek, Esq., 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, the Defendant, through counsel, amended his motion on February 11, 2016, raising Claim 13, a Hurst v. Florida claim. The State addressed the claim at the Huff[3] hearing held on April 21, 2016.

Subsequently, on August 16, 2016, the Defendant filed a Second Amended Motion to Vacate Judgments of Conviction and Sentence, raising Claim 14. The post conviction 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 May 22, 2017, the Defendant, through counsel, filed a Motion to Supplement and Amend Defendant's Second Amended Motion to Vacate Judgments of Conviction and Sentence. On June 1, 2017, the post conviction court granted the amendment and ordered the State to file a response within twenty (20) days. The State filed its response on June 12, 2017. On June 22, 2017, the Defendant filed a Motion to Supplement and Amend Defendant's Third Amended Motion to Vacate Judgments of Conviction and Sentence, raising Claims 15 and 16. On July 6, 2017, the post conviction court granted the amendment and ordered the State to file a response within ten (10) days. The State filed its response on July 7, 2017. The evidentiary hearing was set for July 6, 2017, but was ultimately continued for other matters.

On September 1, 2017, the Defendant, through counsel, filed a Motion to Supplement and Amend Defendant's Fourth Amended Motion to Vacate Judgments of Conviction and Sentence, raising Claim 17, a claim of newly discovered evidence. The State filed its response on September 6, 2017. At the start of the evidentiary hearing on September 15, 2017, the Court acknowledged the State's objection and subsequently denied the Defendant's motion to supplement and amend his Fourth Amended Motion to the pleadings.[4]

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

[3] See Huff v. State, 622 So. 2d 982 (Fla. 1993).

[4] See Fla. R. Crim. P. 3.851(f)(4). Defendant, through counsel, filed the motion to supplement **14** days prior to the

The evidentiary hearing in this matter was held on the following three days: September 15, 2017, September 19, 2017, and September 20, 2017.

The evidentiary hearing was limited to the following issues as set forth in the Defendant's post conviction motion: **Claim 3(A)** (the issue regarding whether counsel was ineffective for failure to test the State's evidence through proper objections, available impeachment evidence, and/or effective cross-examination of Charles Howe, Dr. Swindle, Dick Mowbry, Mike Gillis, Harvey Glen Bush, Jerry Gammons, Brandon Brown, Chuck White, Sherri Bradley, Darren Batchelor, Dr. Boudreau, Brittany Mixon, Tiffany Brooks, Glenda Brooks, Charles Richards, Trever Siefert, Megan Kriser, Jennifer Roeder, Michael Raley); **Claim 3(B)** (the issue regarding whether counsel was ineffective for eliciting potentially damaging evidence in the defense case, in chief via Ms. Glenda Brooks and Investigator Michael Raley); **Claim 3(C)** (the issue regarding whether counsel was ineffective for failing to retain or consult with forensic experts, i.e., failure to consult a pathologist or medical expert to show how Defendant received scratches and injuries to his body, and counsel's failure to consult a digital forensic expert related to the seized SD card from Defendant's residence); **Claim 3(D)** (the issue regarding whether counsel failed to object to numerous improper and/or misleading prosecutorial statements during closing arguments); **Claim 11,** the Court shall hold any ruling on the cumulative error claim in abeyance until after the evidentiary hearing; **Claim 14** (based on his trial counsel having a conflict of interest which should have precluded their representation of Defendant in this case); **Claim 15** (Brady violation—Defendant was deprived of his right to due process because the State withheld evidence which was material and exculpatory in nature. Such omissions rendered defense counsel's representation ineffective and prevented a full adversarial testing. Or in the alternative, Defendant was denied the effective assistance of counsel when trial counsel failed to obtain exculpatory evidence for Defendant's defense which deprived him of full adversarial testing.); and **Claim 16** (Newly Discovered Evidence establishes that Defendant's conviction and sentence were obtained in violation of his constitutional rights. Or in the alternative, Defendant was denied the effective assistance of counsel when trial counsel failed to exercise due diligence in finding the newly discovered evidence and thus depriving him of full and fair adversarial testing).

Numerous witnesses were listed[5] and tentatively scheduled to testify during the evidentiary hearing. However, the Court only heard testimony from the following thirteen (13) witnesses: (1) Kimberly Jewell and (2) Kevin Carlisle (Defendant's trial attorneys); (3) Melody Harrison, Public Defender Investigator, Fourteenth Judicial Circuit; (4) Major Michael Raley, Holmes County Sheriff's Office; (5) Dr. Edward Willey (pathology expert witness); (6) Earnest Jordan, Public Defender Chief Investigator, Fourteenth Judicial Circuit; (7) Doug Mixon; (8) Natasha Simmons; (9)

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evidentiary hearing.

[5] Defendant's initial Witness list filed June 3, 2016, listed 38 witnesses; Defendant's Second Supplemental Witness list filed June 2, 2017, listed 5 witnesses; Defendant's Third Supplemental Witness List filed June 22, 2017, listed 2 witnesses; and Defendant's Fourth Supplemental Witness List filed September 1, 2017, listed 4 witnesses. The State's initial Witness list filed June 23, 2016, listed 7 witnesses; and State's Second Witness list filed September 7, 2017, listed 4 witnesses.

Jose Contreras; (10) Robert Vermillion; (11) John Sawicki (digital forensic expert witness); (12) Greg Ward, the former Sheriff for Geneva County, Alabama; and (13) Ricky Morgan, Geneva Police Department, in Geneva, Alabama. The Court would note that the Defendant, through counsel, filed a motion to waive his appearance at the evidentiary hearing on July 10, 2017, which the Court granted on July 20, 2017. Therefore, the Defendant elected not to appear in person for the evidentiary hearing in this matter.

After the evidentiary hearing and pursuant to Rule 3.851(f)(5)(e), the Court directed the court reporter to transcribe the evidentiary hearing. The hearing was transcribed and submitted to the parties on November 3, 2017. Pursuant to the Rule 3.851, the parties had thirty (30) days from receipt of the hearing transcript to submit written arguments to the Court. However, the Court granted a short extension of time to Friday, December 8, 2017, after the Defendant's Unopposed Motion for Extension of Time to Submit Written Closing Arguments, which was filed on December 4, 2017. The parties subsequently filed Defendant's Closing Argument on December 8, 2017, and the State filed its Post-Conviction Hearing Memorandum of Law on December 8, 2017, for the Court's consideration. Having considered the demeanor and credibility of the witnesses, the Court will now address the claims in the Defendant's Motion pursuant to Rule 3.851.

References and Record Citations

References to the Defendant will be to "Calhoun" or "Defendant". References to the victim in this case will be to "Mia Chay Brown" or "Mrs. Brown."

The record on appeal is in eighteen volumes that are numbered consecutively and conform with the requirements of Fla. R. App. P. 9.200. Volumes (10-18) contain the transcripts for jury selection, guilt phase of the trial. They are numbered separately from the transcripts of the remaining parts of the trial. They will be referenced by the letter "T" followed by an appropriate volume and page number "(T#:##)."

Volumes (1-9) include the Spencer hearing, sentencing hearing, and sentencing order. They will be referenced by the letter "R" followed by an appropriate volume and page number "(R#:##)." Additionally, there is a supplemental record containing transcripts from a pre-trial hearing that will be referenced by "SR" followed by an appropriate page number "(SR:##)."

Finally, Calhoun's Motion to Vacate will be referenced by "DM" followed by the appropriate page number "(DM:##)" which can be found at the bottom of each page. 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 transcript shall be referred to by "Evid. Hrg. Trans." and the page number. Any other references will be self-evident.

DEFENDANT IS ENTITLED TO RELIEF BASED ON HURST V. FLORIDA

On February 11, 2016, the Defendant filed an Amended Motion to Vacate Judgments of Conviction and Sentence, raising Claim 13, a Hurst v. Florida claim. The State addressed this claim orally at the Huff hearing held on April 21, 2016. The State also submitted a written response to this claim on October 3, 2016. Thereafter, Defendant filed a Motion for Partial Summary Relief on March 30, 2017. After a hearing on the Defendant's motion, the Court, without objection by the State, entered an Order Granting Motion for Partial Summary Relief filed June 5, 2017.

In light of the Court's decision above that the Defendant is entitled to a new penalty phase which complies with the Hurst decisions, Defendant's Claim 5, Claims 6 A and 6 B, and Claim 12 related to the penalty phase and trial counsel's representation are dismissed as moot.

Ineffective Assistance of Counsel

To establish a claim of ineffective assistance of counsel, a defendant must prove both deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668 (1984). "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. Pagan, 29 So. 3d at 949 (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." Pagan, 29 So. 3d at 949 (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." Pagan, 29 So. 3d at 949 (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 v. Washington, 466 U.S. 668 (1984). 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).

CLAIM 1—Improper Victim Impact Statements during Guilt Phase not cognizable in post conviction motion

In Claim 1, Defendant alleges he was denied his fundamental right to a fair trial, due process, and reliable adversarial testing, due to the State introducing improper victim impact evidence in the guilt phase of his trial in violation of Mr. Calhoun's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

Calhoun alleges his fundamental right to a fair trial was denied because the State was allowed to introduce victim impact evidence during the guilt phase of trial. (DM:4-7). In particular, Calhoun argues that Charles Howe and Dr. Swindle were allowed to testify as to the victim's signature containing hearts over the letter "I." (DM:5-6). He asserts that this was improper victim impact testimony that was cumulative to other documentary exhibits already entered and it was not relevant to any issue at trial. The record indicates the State introduced said evidence for identification purposes, not as victim impact evidence.

Calhoun raises a claim that is not cognizable in a post conviction motion. He asserts he was denied his fundamental rights pursuant to the Sixth, Eighth, and Fourteenth Amendment by the State introducing improper victim impact evidence. A constitutional challenge should have been raised on direct appeal and is not proper as a post conviction claim. See Jones v. State, 928 So. 2d 1178, 1182, n.5 (Fla. 2006). As such, this claim should be summarily denied without an evidentiary hearing as it is procedurally barred.

CLAIM 2—Jury Selection

In Claim 2, Defendant alleges he was denied his fundamental right to a fair trial, due process, and reliable adversarial testing due to improper rehabilitation and ineffective assistance of counsel at the jury selection phase of his capital trial, in violation of Mr. Calhoun's rights under the Sixth, Eighth and Fourteenth amendments to the United States Constitution and the corresponding provisions of the Florida constitution.

A. Trial court error in finding venire panel rehabilitated not cognizable in post conviction motion

Calhoun alleges members of the venire panel indicated that trial counsel would have to prove some evidence of innocence for them to render a verdict of not guilty. (DM:8). After questioning by Ms. Jewell, the State Attorney addressed with the panel that the Defendant was not required to put on any evidence and that the burden rested with the State. (T:234-237). Later, when trial counsel attempted to strike several members of the panel, the trial court found that the State effectively rehabilitated the jurors and denied the for cause challenges. Calhoun argues that the trial court erred in finding that the attempted rehabilitation of the venire panel was sufficient and the jurors should have been removed for cause. (DM:8).

However, claims of trial court error are not cognizable in a post conviction motion and should have been raised on direct appeal. State v. Coney, 845 So. 2d 120, 137 (Fla. 2003); see also Jones v. State, 928 So. 2d 1178, 1182, n.5 (Fla. 2006). As such, this claim should be summarily denied without an evidentiary hearing as it is procedurally barred.

B. Counsel was not ineffective for failing to ask for additional peremptory strikes

Calhoun argues counsel was ineffective for failing to request additional peremptory strikes after the denial of cause challenges. (DM:9). He asserts that with the additional peremptory strikes trial counsel could have stricken five additional jurors. (DM:10). Calhoun argues counsel should have stricken Jurors Remmel, Hatcher, Anderson, Cox, and Sanders for various reasons if counsel had asked for additional peremptory strikes. (DM:10-11).

Counsel's strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected. Occhione v. State, 768 So. 2d 1037, 1048 (Fla. 2000). "Effective assistance of trial counsel includes a proficient attempt to empanel a competent and impartial jury through the proper utilization of voir dire, challenges to venire members for cause, and the proper employment of peremptory challenges to venire members." Peterson v. State, 154 So. 3d 275, 281 (Fla. 2014) (quoting Nelson v. State, 73 So. 3d 77, 85 (Fla. 2011)). The defendant has the burden to show that the challenged actions were not effective trial strategy. Peterson, 154 So. 3d at 280. Further, the defendant must show that but for counsel's unprofessional errors, the results of the proceedings would have been different. Id. at 280.

Calhoun has not shown that counsel's performance fell below the standard guaranteed by the Sixth Amendment. During the jury selection process trial counsel effectively questioned the venire panel along with the trial court and the State. All potential jurors were questioned and when there were issues the venire panel was rehabilitated effectively. Further, during jury selection trial counsel skipped over many of the listed venire members Calhoun now alleges were biased to seek cause challenges. (T11:240-249, 303-304).

Jury selection occurred over the course of two days and on day one trial counsel was able to exercise ten peremptory challenges to select a jury, again without challenging the above listed venire members. (T11:250-251, 303-306). After the first panel of 12 was selected, trial counsel and Defendant informed the court that they were satisfied with the panel. (T11:305, 310, 336). On the second day when the alternates were selected, trial counsel got two peremptory strikes and after the alternates were selected, defense counsel again agreed with the panel. (T12:495). Therefore, it is clear that trial counsel made a proficient attempt to empanel a competent and impartial jury through the process.

Moreover, Calhoun cannot show he was prejudiced as there is no indication on the record that any biased juror actually served. Carratelli v. State, 961 So. 2d 312, 324 (Fla. 2007). A juror is competent if he or she "can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." Carratelli, 961 So. 2d

at 324 (quoting Lusk v. State, 446 So. 2d 1038, 1041 (Fla.1984)). Under the actual bias standard, the defendant must demonstrate that the juror in question was not impartial, i.e., that the juror was biased against the defendant, and the evidence of bias must be plain on the face of the record. Carratelli, 961 So. 2d at 324.

Juror Remmel

Calhoun asserts that Juror Remmel was one of the jurors who said that he would require the defense to put on evidence and he would vote not guilty if innocence was proven. (DM:10). Further, Juror Remmel was a volunteer firefighter and EMT, and trial counsel failed to challenge him for cause.

Calhoun's assertions regarding Juror Remmel are misplaced. During voir dire, there was a discussion between a group of the panel regarding what evidence, if any, trial counsel had to present to the jury. (T11:222-230). Throughout the discussion and questioning by trial counsel, Juror Remmel made it clear that he did not think the burden was shifting to trial counsel, rather that he expected to hear her say something regarding the case. (T11:230-231). After trial counsel questioned the jurors, State Attorney Hess got up to clarify the discussion.

> "MR. HESS: No. Because we had not met our burden of proof. There's no requirement they put on any evidence; it's our job to bring justice to this courthouse, to bring the proof. Now, we had a Public Defender in this circuit many years ago, his name was Tom Ingles. Tom Ingles died protecting his client in the Gulf County Courthouse. He was shot by an irate husband, and he stood between the wife and the husband and he took a bullet for her. See, I get emotional. But Tom used to say the practice of law is the year but. That's what a defense attorney does; they test the evidence the State brings. Certainly, Mr. Moss, you expect Ms. Dowgul to test our evidence, correct? Mr. Moss?
>
> MR. MOSS: (Nod yes), yes, sir.
>
> MR. HESS: But in our system of justice it's my responsibility to bring the evidence. It's her responsibility, she said an ethical requirement, to test the evidence. Would anybody require any more of her than that, to test our evidence? If I didn't get the job done, would any of you feel bad about going home and saying that man's not guilty? Anybody? And that's what our system of justice is all about.
>
> The judge will tell you that reasonable doubt can come from lack of evidence, or conflicts in the evidence. If I don't bring the evidence, there's a reasonable doubt. If I bring evidence that's conflicting and you can't reconcile that, there's reasonable doubt...."

(T11:236-237). All of the members of the panel agreed with the State Attorney's example and were

effectively rehabilitated. (T11:234-237). Therefore, there was no sufficient reason for trial counsel to ask to strike Juror Remmel for cause.

Juror Remmel was juror number 1 and at the start of the peremptory challenges, trial counsel had sufficient challenges to vote Juror Remmel off the panel. Trial counsel did not seek to have Juror Remmel removed from the jury as there was no reason to have him removed. (T11:250-251, 305). Rather it appears throughout the jury selection transcript, Juror Remmel was a fair juror. Calhoun has not shown Juror Remmel was actually biased against him. Juror Remmel was aware of the burden remaining on the State Attorney as he stated during voir dire. (T11:230). Accordingly, Calhoun was not prejudiced and this claim should be denied.

Juror Hatcher

Calhoun asserts Juror Hatcher was a juror who said that he would require the defense to put on evidence and he was elected as the foreperson. (DM:10). However, Calhoun has not shown how Hatcher being the foreperson prejudiced his case. (T17:1246). During voir dire, the whole panel expressed concern over whether trial counsel should have to present any evidence during the trial. (T11:222-234). Juror Hatcher raised his concern in stating that defense counsel would have to prove innocence, and then he attempted to clarify by stating, "Maybe they're trying to say you would have to disprove what, what they come up with." (T11:225). Nevertheless, State Attorney Hess rehabilitated the panel of jurors by explaining to them that the burden of proof is on the State and that defense counsel's only responsibility is to test the evidence. (T11:236). Clearly, Juror Hatcher was not a biased juror as trial counsel did not try to strike him for cause or use a peremptory challenge. (T11:240-251). Ms. Jewell still had three peremptory strikes when she tendered the panel, including Juror Hatcher, to the State. (T11:251). Further, this claim is also speculative as there is no evidence that this juror was biased. See Wade v. State, 156 So. 3d 1004, 1032 (Fla. 2014) (holding that the evidence of bias must be plain on the face of the record). Calhoun is asserting that if this juror had been struck then better jurors would have been on the panel, however, that is not a basis for trial counsel to strike the juror. As such, Calhoun cannot show that he was prejudiced by any failure of counsel to request additional peremptory challenges to strike this juror.

Juror Anderson

Calhoun alleges Juror Anderson stated he felt that the death penalty was appropriate for heinous or very serious murders. (DM:10). He asserts that because trial counsel did not "life qualify" the jury to see if they were receptive to mitigation, Anderson was an automatic vote for death. (DM:10). During voir dire, the State Attorney asked Juror Anderson questions regarding voting for the death penalty:

> "MR. YOUNG:... All right, Mr. Anderson, do you think that the death penalty is appropriate for some murder cases?
>
> MR. ANDERSON: Sure.

MR. YOUNG: Does that mean that you also think that it's not appropriate for some murder cases?

MR. ANDERSON: Sure.

MR. YOUNG: Okay. Well, what, how would you make that decision?

MR. ANDERSON: If it were proven beyond a reasonable doubt they committed a heinous or very serious murder.

MR. YOUNG: Well, now, Mr. Anderson, before you can get out of the guilty phase, the jury has to find that the State's proven the charge of first degree murder against a defendant beyond a reasonable doubt, okay? Now, you're not saying just because you find that he's guilty beyond a reasonable doubt, that you'd automatically vote for the death penalty, are you?

MR. ANDERSON: No.

MR. YOUNG: Okay. Is that, just for record, you shook your head no, right?

MR. ANDERSON: I said no.

MR. YOUNG: Okay. So you would listen to any further factors or evidence presented in the form of mitigating factors or aggravating factors to make that decision?

MR. ANDERSON: Yes, sir."

(T11:270-71). Juror Anderson had a clear understanding that he would not automatically vote for death if he found the Defendant guilty. (T11:271). He also agreed that he would listen to mitigating and aggravating factors in making his decision. (T11:271). Calhoun cannot show any actual bias by this juror nor can he demonstrate how he was prejudiced. Therefore, as to Juror Anderson this claim should be denied.

Juror Cox

Calhoun alleges Juror Cox was the stepson of another venire member, Juror Commander. (DM:10-11). Calhoun asserts that Juror Commander was dismissed because his wife, Juror Cox's mother, knew the victim and had an opinion. (T10:23, 26). Calhoun asserts defense counsel did not inquire of Juror Cox whether his mother had spoken to him about the victim and whether his feelings would affect his judgment as they did his stepfather. (DM:11).

Calhoun's arguments are meritless as this claim calls for speculation. See Wade v. State, 156 So. 3d 1004, 1032 (Fla. 2014) (holding that the evidence of bias must be plain on the face of the record). Juror Commander stated that his wife knew the victim and had told him about the victim. (T10:26). He asserted that he had an opinion about the victim but no opinion as to the Defendant's guilt or innocence. (T10:26-27). Ms. Jewell sought to have Juror Commander stricken for cause. The court noted that Juror Commander's mind would clearly be on his employment, yet the court found that there were not sufficient reasons for cause. (T11:240-242). Nevertheless, Juror Commander was removed from the jury through a peremptory strike by trial counsel. (T11:250). Calhoun is assuming that because Juror Commander's wife knew the victim and informed her husband of her opinion, Juror Cox also learned of the case through his mother. Despite Juror Cox not indicating that he knew anything about the victim or the case, Calhoun is trying to prove the bias of one juror through another juror. (T11:263-268). As such, Calhoun is merely speculating that Juror Cox had a bias without any indication on the record. Consequently, Calhoun has not shown that Juror Cox was a biased juror and he cannot show any prejudice.

Juror Sanders

Calhoun argues Juror Sanders stated that if a person premeditatedly killed someone they deserved what they gave and trial counsel failed to "life-qualify." (DM:11). Further, Juror Sanders was the neighbor of the victim's sister's grandmother, and trial counsel did not inquire whether it was the same grandmother of the victim. (DM:11). Calhoun also asserts that Juror Sanders was a family friend of Agent Mike Gillis, a witness in the trial. (DM:11).

Calhoun's allegations lack merit. Juror Sanders was an alternate and therefore did not deliberate with the jury in finding Calhoun guilty or sentencing him to death. (T12:493-494). Calhoun cannot show how he was prejudiced by any alleged failure of trial counsel. There was no reason for trial counsel to have exercised a peremptory against this juror when there was no bias shown in her statements. Accordingly, the Defendant has not shown that a biased juror actual sat on the jury or how he was prejudiced.

C. Counsel was not ineffective for failing to death or life qualify the panel

Calhoun argues that trial counsel failed to conduct a meaningful death or life qualification with the voir dire panel. (DM:11-12). Ms. Jewell did not ask any juror to express their feelings on the death penalty or whether they would be able to consider the evidence she intended to present as mitigation in an argument for life. (DM:12).

However, Calhoun's claim lacks merit. When the trial court and the State adequately question the venire panel, there is no prejudice if defense counsel does not repeat the same line of questioning. See Johnson v. State, 921 So. 2d 490, 503 (Fla. 2005) ("Essentially, even if we were to assume counsel's performance was deficient, given the thorough questioning by the State and the court, Johnson has failed to show any prejudice."). As Calhoun asserts, the State did conduct a death

qualification with the panel regarding the death penalty. (T10:150-153). Trial counsel did not have to repeat the same questions of the panel and, as such, Calhoun is not prejudiced.

Further, much of Calhoun's claim relies on speculation about what trial counsel could have inquired about from the venire in order to obtain a more defense friendly jury. He has not asserted that any juror was actually biased or could not listen to all of the evidence and mitigation. Actual bias is not shown by the mere presumption or belief that a juror may have been biased. See Johnson v. State, 921 So. 2d 490, 503-04 (Fla. 2005) citing Reaves v. State, 826 So. 2d 932, 939 (Fla. 2002) (holding that an allegation that there would have been a basis for a for-cause challenge if counsel had "followed up" during voir dire with more specific questions was mere conjecture). Defense lawyers are given wide latitude in developing a strategy and selecting jurors based on that strategy. Such an argument is not a basis for relief under Strickland. As Calhoun cannot show actual bias in any of the jurors' service, this claim should be denied.

CLAIM 3—Guilt Phase

In Claim 3, Defendant alleges he was denied his fundamental right to fair trial, due process, and reliable adversarial testing due to ineffective assistance of counsel at the guilt phase of his capital trial, in violation of Mr. Calhoun's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

A. Counsel was not ineffective for failing to object, impeach, or effectively cross-examine witnesses.

In this claim, Calhoun argues trial counsel failed to test the State's evidence through proper objections, available impeachment evidence, and effective cross-examination. Calhoun lists numerous witnesses that he feels counsel should have asked more questions, should have objected, or should have impeached their testimony. (DM:13-29).

"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.' Richter, 131 S.Ct. at 791 (citing Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (per curiam)).

During Calhoun's case, Ms. Jewell effectively cross-examined each witness presented by the State. Through her cross-examination of various witnesses, trial counsel was able to make it clear there was no evidence that Calhoun was in the trailer at the time the kidnapping occurred, and she was able to insinuate that someone broke in and committed the crime. (T17:1178). Further, trial counsel challenged the identification of the man who came into the store in Alabama at 6:00 a.m. on December 17, 2010. (T13:659-665). During closing arguments, trial counsel methodically went through the testimony of each witness and explained to the jury why each testimony was important to show that Calhoun was not guilty. (T17:1179-1207).

Trial counsel's failure to object regarding the alleged hearsay testimony of Tiffany and Glenda Brooks appears to be a trial tactic by trial counsel. (T14:783-787, 794-797). The objections would have drawn attention to their testimony and would not have assisted in Calhoun's defense. In addition, by effectively cross-examining the witnesses presented, trial counsel was able to challenge the timeline of events. Trial counsel questioned Brittany Mixon on her events the day Calhoun was reported missing as well as her subsequent tampering of the evidence. (T14:720-745). Trial counsel also questioned Investigator Raley regarding his investigation, the investigative timeline, and omissions to the investigation. (T14:774-777; T15:957-962; T16:1080-1087, 1092).

Even though, Calhoun may think that trial counsel should have asked more questions and sought more answers, it does not mean that trial 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 has not shown 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 v. Washington, 466 U.S. 668 (1984). 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).

Charles Howe

Defendant asserts Mr. Howe, without objection, testified to victim impact evidence. Charles Howe was Mrs. Brown's employer and the first witness called by the State. After establishing that Mrs. Brown worked for him at Charlie's Deli, he went on to identify a photograph of Mrs. Brown and her employment application to Charlie's Deli. Both documents were introduced into evidence, without objection, as State's Exhibit 2 and 3, respectively. The State then went on to elicit testimony regarding Mrs. Brown's employment application, i.e. the little hearts in her signature. (T 548). Defendant asserts the exhibits and testimony were not relevant to any issue at trial. Moreover, Howe's testimony injected emotion and sympathy into the trial. Defendant's ground alleges that the

fact Mrs. Brown worked at Charlie's Deli was never in dispute. Thus, Defendant submits that her employment application was not relevant to any issue in the case, much less material issue. Further, Defendant claims that the photograph the State introduced was not necessary, as Mr. Howe was not testifying as an "identification" witness. Therefore, Defendant submits that counsel's failure to object to the exhibits and testimony is ineffective, and prejudicial.

At the evidentiary hearing, Ms. Jewell testified that she had discussions with the State about the employment application. Specifically, Ms. Jewell understood the application was offered for her signature and to match a known signature in her dental records. Ms. Jewell testified,

> "I believe that they were arguing, you know, to show that it was her signature. Because Dr. Swindle, I don't think, could testify to that actually being her signature, if I'm not mistaken, I can't, I'm looking at this and I think Charlie's Deli knew her signature. And my preference was not to have a family member be the one to attest to her signature as being hers."

(Evid. Hrg. Trans. 59).

Ms. Jewell further testified she didn't find the material objectionable, as the signature of the victim was there for purposes of clarifying that these were her records.

As for personal characteristics of Mrs. Brown's signature with hearts, Ms. Jewell responded that she didn't consider this victim impact evidence. Explained further, Ms. Jewell commented as follows:

> "...victim impact, in this case, literally could have been autopsy photos because those are highly emotionally charged. This is a signature. It, you know, in my opinion, and this was, you know, I was the one trying the case, this was my opinion, this did not fall into, this did not fall into victim impact. Because when you're watching, you know, on a cold record, you don't see anyone else. You know the jury, looking at the stuff, is just like, okay, that's her signature. I don't know that there's any evidence that affected them emotionally."

(Evid. Hrg. Trans. 63-64).

Ms. Jewell believed this evidence was not going to influence this jury. As such, Ms. Jewell did not make an objection to this testimony. Ms. Jewell stated that she was not disputing that the identification wasn't Mrs. Brown. While counsel could not remember if she could stipulate with the State, Ms. Jewell believed the State was entitled to put on this evidence. Calhoun cannot demonstrate Ms. Jewell was deficient in her performance, or that he suffers prejudice in this claim.

Dr. Swindle

At trial the State called Dr. Swindle to identify Mrs. Brown through her dental records. Eight documentary exhibits were introduced through Dr. Swindle without objection. Four of the documentary exhibits were forms that included Mrs. Brown's signature, all with the hearts to which Mr. Howe had testified to. They were introduced into evidence as State's Exhibits 4C-4F. The State made certain to ask Dr. Swindle more than once whether Mrs. Brown's signature was on the forms so as to emphasize her hearted-signature. (T. 552, 555).

As with the employment application, the four documentary exhibits with Mrs. Brown's signature were not relevant nor necessary to prove a material issue in the case according to the Defendant's allegations in his post conviction motion. In his motion, the Defendant alleges that the exhibits the State introduced did not have Mrs. Brown's signature included her registration form, patient chart and x-rays, all bearing her name on them for identification purposes. Defendant submits that if the evidence was even remotely relevant, it was cumulative and substantially outweighed by its prejudice.

As previously noted, Ms. Jewell did not think the testimony of Charles Howe was prejudicial as it relates to the hearts or victim impact evidence, and that she did not object according to her testimony from the evidentiary hearing.

Further, Ms. Jewell agreed with the comment about the law that even if the Defense stipulates to identification of the victim in a murder case that does not prohibit the State from presenting that type of evidence. In this particular case, the State only had scant remains of Mrs. Brown's body. Therefore, the State had to identify the victim through dental records. Ms. Jewell testified that it was her understanding that the State put on those items in an effort to establish Mrs. Brown, with her unique signature, worked at Charlie's Deli, and that the signature matched Brown's dental records. Counsel agreed that the State put forth this evidence to establish that those were the same person. (Evid. Hrg. Trans. 191-192). Accordingly, Calhoun fails to demonstrate deficient performance on the part of his trial attorney, or actual prejudice.

Dick Mowbry

As its third trial witness, the State called Officer Mowbry to testify about finding Mrs. Brown's body. He testified he saw what appeared to be a "charred" rib cage and that it was a "bad sight." According to the Defendant's allegations within his claim, the State referenced Mrs. Brown's rib cage, at minimum, five times without objection. The State also had Officer Mowbry identify a photograph and attempt to point out the rib cage. In identifying the rib cage, Officer Mowbry testified that the photograph was blurry "but the thought in my mind I will never forget it." (T. 566-67). Despite the inflammatory nature of the testimony, Defendant alleges in his claim that counsel lodged no objections, did not move for a mistrial, did not request that the testimony be stricken, and did not ask for a curative instruction. Therefore, Defendant submits that Officer Mowbry's testimony injected emotion and sympathy into the trial.

In reference to the Mowbry statement that "I will never forget it", Ms. Jewell testified at the evidentiary hearing that she didn't feel that it was as inflammatory and emotional as argued. Ms. Jewell stated that it was a strategic decision not to lodge an objection at that time. In Ms. Jewell's opinion, an objection in this instance would have drawn additional attention to testimony given what was already emotional exhibits. Ms. Jewell testified "...that's just a matter of are you one of those attorneys who likes to jump up and down and object to everything and annoy the jury or do you just let the trial keep running smoothly unless it's something so egregious you've got to interfere with it." (Evid. Hrg. Trans. 73).

In response to whether it was overly prejudicial or inflammatory, Ms. Jewell stated the following:

> "...when you're in that moment, you know, I sense a trial in my own, you know, what things are inflammatory to me, what might be to them. But, you know you're looking at a cold record for years on end. In a trial, you're moment to moment and things are moving not at the pace, necessarily, that I read them. But they could've been going back and forth faster than even that. So, that language can get lost on a jury just through the speed of which it's going."

(Evid. Hrg. Trans. 74). Ms. Jewell agreed that it appeared as though the State was referencing different angles of the ribcage, and that the photos were not cumulative in her belief. (Evid. Hrg. Trans. 192-193). This Court finds Ms. Jewell's decision to not raise an objection strategic in nature.

Mike Gillis

In his motion, Defendant alleges that Ms. Jewell was ineffective in her cross-examination of Mike Gillis. However, at the evidentiary hearing, the movant elicited no testimony from Ms. Jewell about her cross-examination of Gillis. As such, Calhoun has failed to establish deficient performance by Ms. Jewell and how he was prejudiced by her performance.

Harvey Glen Bush

In his September 30, 2011, deposition, Mr. Bush testified that he went to Charlie's Deli on the night of December 16, 2010, a little after 7:00 p.m. According to Mr. Bush, Charlie's Deli was already closed and Mrs. Brown was no longer there. Defendant asserts that this information is significant in that counsel could have used it to challenge the State's timeline and theory that Mrs. Brown left work and went straight to Mr. Calhoun's trailer. Counsel could have also used this testimony to call into question the veracity of Jerry Gammons' trial testimony, where he stated that Mrs. Brown arrived at his trailer at approximately 8:40 p.m. (T. 606). This conflict in the evidence leaves at least one hour and forty minutes unaccounted for and is potentially fatal to the State's timeline and theory of events. Defendant's claim asserts that by inexplicably failing to present and capitalize upon this glaring conflict, trial counsel rendered deficient performance that severely prejudiced Mr. Calhoun.

During the evidentiary hearing, Ms. Jewell testified that she could not recall as to why she did not establish with Mr. Bush at what time Charlie's Deli may have closed, and if it was unusual to close that night.

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).

The Court finds, absent any Mr. Bush testimony at the evidentiary hearing, 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.

Jerry Gammons

The Defendant submits in his next allegation that during Ms. Jewell's cross-examination of Mr. Gammons, counsel failed to question him about the fact that his trailer was mere blocks away from Charlie's Deli and that the travel time was no more than five minutes. This, combined with Mr. Bush's deposition testimony referenced above, could have and should have been used to highlight a conflict in the State's evidence and challenge the State's timeline and theory of events. According to the Defendant, trial counsel completely failed in this regard.

However, Calhoun has failed to establish deficient performance by Ms. Jewell, as well as prejudice. At the evidentiary hearing, Mr. Gammons was not called to testify about he would have answered had Ms. Jewell asked the additional questions. 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.

Brandon Brown

During cross-examination, counsel asked Mrs. Brown's husband, Brandon Brown, only two questions: (1) whether his wife had a cell phone, and (2) whether her cell phone and camera were missing from her purse. In effect, Defendant claims trial counsel failed to cross-examine Brandon Brown at all.

Defendant asserts that trial counsel was in possession of a plethora of information that could have been used to thoroughly cross-examine and impeach Mr. Brown. (See sub-claims a-e). Not only did trial counsel render deficient performance by failing to use the information she had through pre-trial discovery, trial counsel also failed to investigate other avenues of impeachment evidence that could have been used on cross-examination. (See sub-claims f-g).

According to the Defendant's allegations, trial counsel's failure to cross-examine Brandon Brown is particularly egregious given that the State could not provide nor prove any motive Mr. Calhoun had to commit these crimes, and Brandon Brown had no alibi witness for the evening. Thus, Defendant asserts that counsel could have used all of the above-mentioned evidence to cast a reasonable doubt on the State's tenuous theory that Mr. Calhoun was responsible for the murder of Mia Brown.

During the evidentiary hearing, Ms. Jewell stated that as he was Mrs. Brown's husband, as a matter of strategy she did not want to attack the grieving husband. Further, Mr. Calhoun was adamant that it was Doug Mixon and that Mr. Brown was not involved in it. (Evid. Hrg. Trans. 84). Ms. Jewell stated that "I thought a lot of things surrounding Mr. Brown were somewhat suspicious. But when you have a client telling you certain things, you know. When I try cases, I'm more of, like I said, I don't like the shotgun approach. I pick a horse and I ride it. And it was a strategic decision not to attack Mr. Brown and place the blame on him, though some of the stuff was curious." (Evid. Hrg. Trans. 89). Ms. Jewell reiterated that "the strategy was not to attack Mr. Brown." (Evid. Hrg. Trans. 101). In her reasoning for not doing the reasonable doubt shotgun approach, Ms. Jewell stated that "... you can't blame it on one person, then turn around and blame it on another because then you lose the jury's trust. They're like your just pointing the finger at everybody so it's not him." (Evid. Hrg. Trans. 102).

Ms. Jewell stated that the defense theory was to blame the murder on Doug Mixon. It is noted, however, when the defense got to the decision of calling Mr. Mixon to testify, Mr. Calhoun decided he did not want Mr. Mixon to testify. (Evid. Hrg. Trans. 102). Calhoun on his own subverted his defense theory.

Defendant stated to Ms. Jewell that Doug Mixon was to blame and the defense theory centered on him, not Mr. Brown. Ms. Jewell testified that in her experience the defense of blaming the grieving husband actually garners a lot of disdain out of the jury when you do that. Counsel reiterated there was absolutely no evidence that she was aware of which would point to Brandon Brown as being responsible for this crime. (Evid. Hrg. Trans. 193-194). This Court finds Ms. Jewell had sound reasons for not trying to put the blame on Brandon Brown for the murder of Mrs. Brown.

As for the pictures on the SD Card, Ms. Jewell testified that there was no evidence that the photographs depicting bruises were actually Mrs. Brown, or that depicted injuries were caused by Brandon Brown. (Evid. Hrg. Trans. 193). No witness was presented to identify the person in the photographs, or even testify as to what caused the bruises on the unknown person. Notwithstanding, these photographs would not have been admissible at trial as they lack authentication. (Evid. Hrg. Trans. 100).

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.

Chuck White

In his motion, Defendant alleges that Ms. Jewell was ineffective in her cross-examination of Chuck White. However, at the evidentiary hearing, there was no testimony from Ms. Jewell about her cross-examination of him. As such, Calhoun has failed to establish deficient performance by Ms. Jewell and how he was prejudiced by her performance.

Sherri Bradley

Calhoun's counsel conceded at the evidentiary hearing that Ms. Jewell did a really "great job" attacking Sherri Bradley's identification. (Evid. Hrg. Trans. 104). Ms. Jewell wanted to have that point made to the jury that Bradley could not have made an accurate identification of the Defendant given the differences in the Flyer and his hairstyle on the morning of her encounter. Ms. Jewell explained that "...I was attacking her ID of him. Because it was so clearly wrong and you had to have that in conjunction with the next one that we'll talk about, Mr. Batchelor, because they obviously saw two different people at the same place." (Evid. Hrg. Trans. 108). Ms. Jewell stated Bradley's identification, when compared to Batchelor's identification, created a conflict in the evidence that she could effectively argue to the jury. (Evid. Hrg. Trans. 109-110).

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

In this allegation, Defendant asserts Ms. Jewell did not confront Mr. Batchelor with his prior inconsistent statements to law enforcement or the vast disparity in his description of Calhoun's age. The Defendant claims the State utilized Mr. Batchelor largely to corroborate Ms. Bradley's testimony who, as set forth in the preceding paragraphs, had credibility issues of her own.

During the evidentiary hearing, Ms. Jewell reiterated that counsel was playing the identifications of the Defendant by Darren Batchelor and Sherri Bradley against each other. As for the allegations raised above about impeaching Mr. Batchelor, Ms. Jewell could not recall why she did not go further to explore.

> "And to be honest, I don't know. It could have, you know, there could be any number of reasons for that. But, again, I got, and sometimes you do this, 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.
>
> But then you forget and it's, you know, it's why I say every time I've done a trial or witness testimony for a day, I go back and I just beat myself up about it.

Because I'll see something and go, I should have asked that. It's just unfortunately the nature of the beast."

(Evid. Hrg. Trans. 115).

At the trial, Mr. Batchelor claimed to have gone to school with Calhoun. (Evid. Hrg. Trans. pp. 110-11). According to Ms. Jewell, had Mr. Calhoun actually looked at the case, discovery materials, and talked to her about the witnesses, he could have assisted her in this cross-examination. Instead, the first time Defendant told counsel, "no, I don't know him," in regards to Mr. Batchelor, was in trial. Ms. Jewell testified that this was specifically why she had warned Calhoun about the perils of not assisting in his defense preparation, because during trial is not the time to tell me these things. (Evid. Hrg. Trans. 111-112). Calhoun cannot demonstrate that counsel was deficient in her cross-examination.

Dr. Boudreau

During the evidentiary hearing, Ms. Jewell stated the focus in her questioning of the medical examiner, Dr. Boudreau, was whether the victim was conscious when the fire started. (Evid. Hrg. Trans. Pg. 123). In response as to why counsel did not ask Dr. Boudreau about the specimen being unsuitable for carboxyhemoglobin analysis by co-oximeter in Dr. Goldberg's lab report, Ms. Jewell testified that she could not say. Counsel was more focused on the soot in the victim's esophagus as it showed inhalation. As for the distinction between presumptive and confirmatory tests, Ms. Jewell testified that she cannot say why she didn't bring this out to the jury, but that "...when you are dealing with this type of thing, the one thing you don't want is your medical examiner on the stand for extensive periods of time..." (Evid. Hrg. Trans. 123). Counsel further stated "and when it is a test such as this, a fire such as this, you know, it is more important to, I was looking at him in terms of penalty phase, where you have heinous, atrocious and cruel and was she conscious..." (Evid. Hrg. Trans. 123).

The record demonstrates Ms. Jewell had a reasonable strategy as to why she asked certain questions in an attempt to minimize the M.E.'s time before the jury. Likewise, according to Ms. Jewell, her focus on the M.E.'s testimony was as it could apply to a penalty phase. As such, Calhoun has failed to show the prejudice he sustained as a result of the questioning.

Brittany Mixon

During the evidentiary hearing, Ms. Jewell testified that Brittany Mixon claimed to be, "best friends with Mia Brown." At the same time, Ms. Jewell stated very often, "that people surrounding a case like this exaggerate their knowledge of and connection to the victims." Ms. Jewell testified that a lot of things Ms. Mixon did were suspicious. However, Ms. Jewell stated that it appears that she did not question Ms. Mixon about her curious phone calls, which in hindsight may have been something she needed to go into with her. (Evid. Hrg. Trans. 124-133).

However, it was at all times the defense strategy that Brittany Mixon's father, Doug Mixon, was the focus of the defense theory, and not Brittany Mixon. Calhoun fails to establish what prejudice he sustained as a result of Ms. Jewell not asking additional questions.

Tiffany Brooks

During the evidentiary hearing, Ms. Jewell testified that she did not recollect why she did not object to the hearsay in either case for Glenda Brooks or Tiffany Brooks. Ms. Jewell commented that "when you have a client sitting next to you and talking to you constantly, sometimes it's very easy for those things to get missed." (Evid. Hrg. Trans. 133-135). However, Defense did not elicit any testimony that would establish how Calhoun was prejudiced by this evidence being presented. Therefore, Calhoun has failed to establish deficient performance by Ms. Jewell and how he was prejudiced by her performance.

Glenda Brooks

For reasons already expressed in the claim above for Tiffany Brooks, which would apply equally to Glenda Brooks. Further, 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. The Court finds this as a prime example of a Defendant who had not been active in his defense constantly interrupting counsel during a direct-examination. There was no evidence elicited that would establish how Calhoun was prejudiced by this evidence. Therefore, Calhoun has failed to establish deficient performance by Ms. Jewell and how he was prejudiced by her performance.

Charles Richards

In his motion, Defendant alleges that Ms. Jewell was ineffective in her cross-examination of Charles Richards. However, at the evidentiary hearing, there was no testimony from Ms. Jewell nor anyone else, about her cross-examination of him. As such, Calhoun has failed to establish deficient performance by Ms. Jewell and how he was prejudiced by her performance.

Trevor Siefert

Mr. Siefert was the FDLE crime lab analyst who performed the DNA analysis in this case. At the evidentiary hearing, Ms. Jewell was asked why she did not ask additional questions from Mr. Seifret. In her cross-examination, Ms. Jewell established that when and how DNA appears on an item cannot be determined from testing the DNA. (T15:892-93). Additionally, Ms. Jewell was able to establish that there were at least three contributors of DNA on the collar of a shirt that was found in the trailer. (T15:899-900). The jury was able to hear this evidence.

During the evidentiary hearing, Ms. Jewell acknowledged that Brittany Mixon had clothes in the trailer and that, Brittany Mixon and Doug Mixon share DNA. Ms. Jewell stated that the

frequency of occurrence was only 1 in 800 Caucasians. (Evid. Hrg. Trans. 201). Since it was undisputed that Ms. Mixon had previously left clothes in Calhoun's trailer, it would also be likely that Doug Mixon's DNA would be identified as a possible contributor. This was the thrust of the defense theory. Calhoun is unable to prove prejudice from pursuing his defense theory.

Megan Kriser

In his motion, Defendant alleges that Ms. Jewell was ineffective in her cross-examination of Megan Kriser. However, at the evidentiary hearing, there was no testimony from Ms. Jewell nor anyone else, about her cross-examination of her. Therefore, Calhoun has failed to establish deficient performance by Ms. Jewell and how he was prejudiced by her performance.

Jennifer Roeder

Ms. Roeder was the FDLE crime lab analyst who examined the SD card found in Mr. Calhoun's trailer. During the evidentiary hearing, Ms. Jewell testified she knew that Investigator Raley accessed the SD Card via his laptop. Further, counsel knew of Jennifer Roeder's report and that she, herself, looked at the SD Card. Counsel discussed how this often happens in child pornography cases when law enforcement officers may open a file for investigative purposes. Counsel did not perceive a good faith basis to make a challenge to the chain of custody or integrity of the evidence. (Evid. Hrg. Trans. 143-144).

As for the State's use of Jennifer Roeder in explaining how SD Cards are inserted and removed from cameras, Ms. Jewell testified that she never asked jurors had they ever pulled out an SD Card from camera. Counsel stated that she did not "assume that jurors are really stupid," and with basic information, she doesn't get experts. However, counsel articulated that she did not think about having Ms. Roeder testify to the effort it takes to get an SD Card out of a camera. (Evid. Hrg. Trans. 140-141). Ms. Roeder did not testify at the evidentiary hearing. The Court finds that Calhoun failed to show that the additional questions would have caused a different outcome in the trial and he cannot prove prejudice.

Michael Raley

As to the trial issue regarding the rule of completeness, as applied to Calhoun's statement to investigators, Ms. Jewell testified she thought she had placed a written proffer and placed the defendant's written statement in as an exhibit, but, obviously, she did not do that. (Evid. Hrg. Trans. 40-41). Further, counsel articulated that she understood the necessity of the rule of completeness. (Evid. Hrg. Trans. 41).

Regardless, the Florida Supreme Court held any error of trial in excluding statements of the defendant made to police officer, which defendant sought to have admitted under the rule of completeness, was harmless beyond a reasonable doubt. See Calhoun, 138 So. 3d 350 (Fla. 2013). This Court is inclined to concur with the Florida Supreme Court's findings that any error was

harmless beyond a reasonable doubt and it would not have affected the outcome of the trial. Therefore, counsel is not ineffective because even if properly preserved for appeal, he would not be entitled to relief on the rule of completeness.

With respect to counsel clarifying in which or when Defendant was in the woods in close proximity to law enforcement, Counsel stated that she did not clarify which wooded area in Investigator Raley's testimony. (Evid. Hrg. Trans. 46). In the Defendant's statement with law enforcement, Defendant testified he was in the woods near Bethlehem, Florida, campground when law enforcement was nearby. (Evid. Hrg. Trans. 47). Ms. Jewell indicated that she wanted to avoid misleading the jury as to Calhoun's location, especially in light of the Brooks' testimony that he was seen in Alabama. (Evid. Hrg. Trans. 49). Furthermore, Ms. Jewell testified that Defendant told her he was in the woods running towards the Brooks' residence. To argue Defendant had been in Florida would have been a violation of the Code of Professional Conduct.

The Court finds that any other claims alleged by the Defendant which relate to Investigator Michael Raley are without merit. Calhoun has failed to establish deficient performance by Ms. Jewell and how he was prejudiced by her performance.

In this case, there was overwhelming evidence of Calhoun's guilt. The victim's blood, hair, and purse was found inside of Calhoun's trailer wherein there was evidence of a struggle. See Calhoun, 138 So. 3d 350, 366 (Fla. 2013). 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 Mrs. Brown and Calhoun were both reported missing; Calhoun was seen in a white four-door car, matching the victim's car, and buying cigarettes at a convenience store in Alabama. Id. He was observed with blood and scratches on his hands and later that day a fire was seen burning in the vicinity. 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, Mrs. Brown. Calhoun, 138 So. 3d at 367. The victim's burnt remains were found in the trunk of her car on December 20. Id.

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).

With the overwhelming evidence in this case, Calhoun was not prejudiced by any alleged failure of trial counsel to object to the testimony of witnesses regarding issues that did not affect the jury's verdict. Therefore, trial counsel's objections would not have made a difference as they do not pertain to the DNA evidence that was found, the location of the burnt car, nor the citings of Calhoun and the victim before her death.

This Court finds that 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 entire claim is denied in its entirety.

B. Calhoun was not prejudiced by the testimony of Glenda Brooks and Investigator Raley in the defense's case.

Calhoun argues that trial counsel was ineffective for eliciting potentially damaging evidence in the defense case-in-chief. Calhoun challenges trial counsel's decision to recall Ms. Glenda 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. (DM: 29-30).

The Florida Supreme 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).

Trial counsel re-called 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). While Calhoun asserts he did not know why trial counsel re-called Ms. Brooks, trial counsel made that fact clear at side bar and during closing arguments. At side bar, trial 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). This line of questioning was disallowed by the Court. 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. (T17:1191-1192). 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 could not recall what her specific reasoning was for Ms. Brooks' testimony. However, after Ms. Jewell's memory was refreshed, she articulated that there was some conversation she had with the Defendant. Ms. Jewell recalls Defendant told her that Ms. Brooks wanted him (Defendant) to leave the residence because Ms. Brooks' granddaughter was there. Ms. Jewell conceded sometimes witnesses just don't say what you know is out there. (Evid. Hrg. Trans. 135-139). 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 trial testimony of Investigator Raley, trial counsel attempted 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, trial counsel sought to demonstrate there was doubt Calhoun was actually seen buying cigarettes since he already had some. (T17:1197-1199). Trial counsel also argued the evidence regarding an unknown shoe print that did not belong to Calhoun and was not presented to the jury as it did not match the State's theory of the case. (T16:1084; T17:1195-1198). By recalling Investigator Raley, trial counsel was able to suggest that the State was excluding evidence that did not work for their case. Trial counsel was not ineffective for presenting evidence that put doubt on the State's case.

At the evidentiary hearing, Ms. Jewell stated that as a strategic move, she has more than once, called law enforcement in her case-in-chief. (Evid. Hrg. Trans. 147). Ms. Jewell's reasoning is because you get some type of information in through a law enforcement witness because you can often make it look as though they have not been forthcoming to a jury, and the jury may think, "well, why didn't they tell us that." (Evid. Hrg. Trans. 147). Ms. Jewell wanted to put evidence into the case to establish that everything looked just "a little too made up" in this case. (Evid. Hrg. Trans. 148). Therefore, trial counsel was not ineffective for presenting evidence to create doubt on the State's case.

Ms. Jewell testified about how the Sage Loop property didn't fit the State's theory of the case. (Evid. Hrg. Trans. 150-153). Specifically, Ms. Jewell testified this was not well thought out and planned, a smooth action on the part of one person. (Evid. Hrg. Trans. 150). Rather, in counsel's view, more than one person was involved in this homicide and she sought to bring this out with a variety of witnesses. (Evid. Hrg. Trans. 150). According to Ms. Jewell, she had suspicions that Doug Mixon was an alternate suspect. In fact, Ms. Jewell testified that the Defendant had all but insisted that he (Mixon) was involved. (Evid. Hrg. Trans. 157). This is the reason why counsel called different witnesses and Investigator Raley was one of those witnesses along with others called.

During defense's case-in-chief at trial, trial counsel solicited testimony through Investigator Raley that Doug Mixon was with his girlfriend, Gabby Faulk, during evening of December 16 and December 17 in Geneva, Alabama. At the evidentiary hearing, Ms. Jewell testified that she was not trying to establish an alibi for Doug Mixon, but rather that Doug Mixon was lying to law enforcement. (Evid. Hrg. Trans. 157-162).

Ms. Jewell was also questioned about calling Gabby Faulk as a witness, given her inconsistent statements compared to Doug Mixon's alibi. Gabby Faulk's statement reflects that she was never married to Doug Mixon and she was not planning on getting married to Doug Mixon. Ms. Jewell testified that Gabby Faulk was not consistent with her own whereabouts and Ms. Faulk seemed very confused. In Ms. Jewell's opinion, "Gabby Faulk is, putting her on the stand would be like lighting a stick of dynamite, you just don't know what's going to come out of her." (Evid. Hrg. Trans. 167). Moreover, Ms. Jewell testified that Ms. Faulk was just "all over the place" and she would be under the influence of Doug Mixon. (Evid. Hrg. Trans. 167-169).

Ms. Jewell agreed that she believed that the State's theory of the case was that the clothes in which Calhoun showed up wearing at the Brooks' house were the ones that he was wearing at Ms. Bradley's convenience store. While Ms. Jewell did not remember the State ever saying that Defendant had changed clothes, she sought to establish through Investigator Raley that Defendant was wearing a bold shirt versus just a plain white shirt, in opposition to Bradley's testimony. (Evid. Hrg. Trans. 153-156).

The Court finds that Calhoun has not shown how he was prejudiced. Glenda Brooks and Investigator Raley 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 of Ms. Brooks or Investigator Raley's testimony in the defense case, and offered for strategic purposes. This claim is denied.

C. Counsel was not ineffective for failing to consult with forensic experts

Calhoun argues trial 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. (DM:30). In addition, Calhoun asserts trial 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. (DM:31).

The Florida Supreme 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, 422-423, 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 v. State, 875 So. 2d 415 (Fla. 2004). But, in this case, any such testimony from an expert would have been fruitless.

Scratches

In regards to the scratches obtained by Calhoun, neither the State nor defense counsel had experts testify as to how Calhoun obtained the scratches. In closing arguments, trial counsel argued to the jury that briars or other similar shrubbery caused the injuries. (T17:1194-1195). 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, testimony presented that Calhoun was in the bushes hiding out which is consistent with the injuries he sustained. Even if an expert could have testified 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). Consequently, Calhoun was not prejudiced by any

alleged failure of trial counsel to call an expert witness.

Dr. Edward Willey, an expert in forensic medicine, testified at the evidentiary hearing. The witness was retained in this case to analyze photos and to report as to the scratches on the Defendant's body. In his testimony, Dr. Willey discussed the four (4) characteristics to look for: lunar, width, multiplicity, and parallel. (Evid. Hrg. Trans. 260-261). However, the witness testified that the defect in all the pictures was no scale included within the pictures. The failure to include a scale would be fatal in his analysis. As such, Dr. Willey could not give a definitive opinion as to how the scratches occurred if he testified at trial. (Evid. Hrg. Trans. 264). In fact, his comments indicate that running through bushes is a reasonable explanation for some perhaps all of the scratches.[6] Additionally, Dr. Wiley testified that given the photos he enhanced, there were no apparent indications of fingernail scratches.

Ms. Jewell indicated she would not have hired an expert to explain scratches as it was obvious on its face that nothing indicated fingernail scratches. (Evid. Hrg. Trans. 177-179). Ms. Jewell testified that it would insult the juror's intelligence in this case as they were country folk, farmers, mostly hunters, etc. Likewise, the jury had previously been told that Defendant was running through woods and bushes during this case. Calhoun has not demonstrated any prejudice by trial counsel's failure to call a medical or pathologist expert.

SD card

Mr. John Sawicki, an expert witness in digital forensics, was called to testify at the evidentiary hearing.[7] Mr. Sawicki is also an attorney admitted in both the states of Florida and Oregon, and he is based in Tallahassee, Florida. In this case, the Defense called upon Mr. Sawicki to review the SD card as well as the trial transcripts and any other biography information of this case. In his testimony, the witness discussed the ways in which one would view the SD card without altering the metadata via a write blocking device. The write blocking devices are generally used in the digital forensic field.

In Mr. Sawicki's testimony, the witness testified that the only time that the metadata had been altered was under the accessed part with an access date of January 17, 2011. (See Evid. Hrg. Trans. 387:16-17; 389:6-14). This was consistent with Investigator Raley's trial testimony. Some of the pictures were assigned a date of up to June of 2011. However, when the witness was asked whether the testimony of the FDLE agent and time and date stamps are consistent with FDLE analysis to the time clock, he partially agreed. (Evid. Hrg. Trans. 390). Mr. Sawicki submits the sample was compromised and a jury cannot rely upon the contents of the SD Card. Mr. Sawicki conceded; however, that there was no indication of the date/time stamps being manually changed. (Evid. Hrg. Trans. 390-391, 393). Mr. Sawicki offered no opinion as to unreliability. Mr. Sawicki was not aware of any of the photographs having their created or modified dates changed to January 17, 2011,

[6] The Court notes that the expert's report was not offered into evidence.
[7] The Court notes that the expert's report was not offered into evidence.

which is when Investigator Raley accessed the SD card. (Evid. Hrg. Trans. 393:10-19). Mr. Sawicki agreed this information was consistent with an officer reviewing the SD card on January 17, 2011, and not changing any other metadata. (Evid. Hrg. Trans. 393-394). Mr. Sawicki testified he was unable to say that the officer was untruthful or to refute the officer's testimony. (Evid. Hrg. Trans. 394).

Accordingly, Calhoun has not established how failing to call an expert on the SD Card issue would have created a reasonable probability of a different result. This claim is denied.

D. Counsel was not ineffective for failing to object to the State Attorney's closing argument

Calhoun argues trial counsel was ineffective for failing to object to the improper and misleading prosecutorial statements made during closing arguments.[8] Calhoun argues that during closing statements the State Attorney appealed to the emotional sympathy of the jury by repeating Calhoun committed the crime. (DM:39-42). Calhoun argues that the State Attorney also commented on Calhoun hunting the victim the night of the murder, and that Calhoun was later found hiding like a dog. Calhoun argues the State Attorney improperly referred to another case in discussing jurisdiction, expressed his own opinion on evidence, and asked the jury to send a message to the community. (DM:41-42). Calhoun argues he suffered prejudice by the comments of the State Attorney in closing arguments and he was denied his rights to a fair trial. Calhoun's allegations lack merit.

During closing arguments, an attorney is to assist the jury in analyzing, evaluating, and applying the evidence. Miller v. State, 926 So. 2d 1243, 1254 (Fla. 2006). The assistance that is allowed includes the attorney's right to state his contention as to the conclusions that the jury should draw from the evidence. Id. at 1254; see Ruiz v. State, 743 So. 2d 1, 4 (Fla. 1999). Moreover, "the proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." Robinson v. State, 610 So. 2d 1288, 1290 (Fla. 1992) (quoting Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985)). Further, as long as an argument is based on the evidence presented, an attorney can argue reasonable inferences from the evidence, or any relevant issue. Miller, 926 So. 2d at 1254-55. Therefore, to the extent that the State Attorney went through the evidence presented at trial and explained it to the jury; there was no reason for defense counsel to object. The State Attorney committed no error in stating that Calhoun committed the crime, in commenting on how the police found Calhoun, or how he obtained the scratches on his arm. (T17:1148-1176). Thus, trial counsel was not ineffective for failing to object to the prosecutor's statements.

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[8] The information regarding this claim is found in claim 4(B). Calhoun raises the information in this claim under ineffective assistance of counsel.

Ms. Jewell testified that in her judgment the jury completely shut down during the State's closing arguments. (Evid. Hrg. Trans. 180). While there may be objectionable arguments in closing arguments, the last thing counsel wanted to do is to wake up the jury or have them draw their attention to something in particular. In Ms. Jewell's opinion, the jury was not impressed with the theatrics of closing arguments by the State. Further, in counsel's judgment, she didn't want to give the State's closing any weight as it appeared as though the jurors were insulted by State's closing argument at times. (Evid. Hrg. Trans. 180-181). Ms. Jewell specifically made a strategic decision to allow the State to lose the jury's interest and attention during the State's closing arguments. Thus, trial counsel cannot be ineffective for failing to object to the prosecutor's statements.

Moreover, even if the State's closing arguments are deemed improper, it does not necessarily mean that Calhoun was deprived of a fair trial or was prejudiced. In Braddy v. State, 111 So. 3d 810, 842-44 (Fla. 2012), the Florida Supreme Court concluded that any improprieties contained in the prosecutors statements did not deprive the defendant of a fair trial because the comments did not go to the heart of the case. In Braddy, the State Attorney made comments that denigrated defense counsel, that the jury would be committing a miscarriage of justice if it convicted the defendant of a lesser-included offense instead of first-degree murder, and describing the victim's rear by using the pronoun "you" thereby having the jury place themselves in the position of the victim. Id. at 842-43. The Florida Supreme Court held that individually none of the comments were fundamental error. Id. The Court also held that the cumulative effect of any errors in the State's closing argument did not compromise the integrity of the trial and when viewed in the full context of the lengthy trial they were not sufficient to vitiate the Defendant's right to a fair trial. Braddy, 111 So. 3d at 844. Similarly in this case, the State Attorney's comments in closing argument did not go to the heart of the case. Individually or cumulatively any comments made by the State Attorney in Calhoun's case would not have changed the jury's verdict. The jury was presented evidence that the victim's purse was found in Calhoun's trailer, the victim's blood and hair was found in Calhoun's trailer, and the victim's burnt car was found approximately 1,488 feet from Calhoun's campsite. Calhoun, 138 So. 3d at 366. As such, Calhoun cannot establish prejudice, and accordingly, this claim should be denied.

E. Counsel was not ineffective for not objecting to venue and jurisdiction jury instructions

Calhoun argues trial counsel was ineffective for failing to object to the State's proposed instruction on venue and jurisdiction. (DM:32-35). Calhoun argues that there was no dispute as to venue because if Florida had jurisdiction, Holmes County was the proper venue. He asserts that trial counsel did not request a venue instruction and counsel should have objected when the Court gave the instruction. (DM:32). Further, Calhoun argues the instruction that was given to the jury in regards to jurisdiction was flawed. (DM:33-34). Calhoun maintains that trial counsel failed to object or even argue jurisdiction in her closing arguments. (DM:35).

To show that defense counsel was ineffective, Calhoun has to prove that counsel's failures were deficient and that it so undermined the outcome of the proceeding that he was prejudiced. Strickland v. Washington, 466 U.S. 668 (1984). The jury was given instructions on venue and on jurisdiction and both instructions were correctly written, accurately reflecting the law. Although

Calhoun asserts an instruction on venue was not needed, prior to jury selection trial counsel presented an oral motion for change of venue. (R5:889), "There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" Harrington v. Richter, 131 S.Ct. 770, 791 (2001) (citing Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (per curiam)). Nevertheless, the instruction on venue was properly before the jury and it did not affect the verdict of the jury.

Moreover, trial counsel accurately presented instructions on jurisdiction, which were accepted by the trial court. When the instructions were being reviewed, after both sides rested, defense counsel informed the trial court that she had done research regarding jurisdiction and got her sample from Lane. Lane v. State, 388 So. 2d 1022 (Fla. 1980). Trial counsel's recommended jury instruction applied the Lane standard. (R6:997-998; T16:1128-1130). Therefore, Calhoun's assertions that the instructions require proving all the elements of the crime is incorrect. The instructions require that the jury find an essential element beyond a reasonable doubt. Trial counsel appropriately listed an essential element of the crime of kidnapping and premeditated murder- with which Calhoun was charged- in providing jury instructions on jurisdiction. Consequently, trial counsel was not ineffective in her jurisdiction instruction recommendation to the Court.

Moreover, Calhoun cannot show how he was prejudiced in the giving of these instructions. The instruction on jurisdiction was correct and did not affect the verdict of the jury. The evidence of guilt was overwhelming in this case and even if the instruction on venue and jurisdiction was not given, it would not have changed the outcome. Therefore, this claim should be denied.

F. Counsel was not ineffective for failing to investigate Doug Mixon's alibi

Calhoun argues trial counsel was ineffective for failing to investigate Doug Mixon's alibi. The Court's facts and findings contained in Claims 15 and 16 are hereby incorporated into this claim. 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 with counsel and "he did not even look at the discovery", as testified to by Ms. Jewell and her investigator. Simply because Ms. Jewell was unable to discover any evidence beyond inadmissible hearsay that Mr. Mixon was involved in this murder, Calhoun cannot establish deficient performance by Ms. Jewell. This claim must be denied.

In this case, there was overwhelming evidence of Calhoun's guilt. The victim's blood, hair, and purse was found inside of Calhoun's trailer, and the trailer was in a disarray. See Calhoun v. State, 138 So. 3d 350, 366 (Fla. 2013). Calhoun was witnessed asking the victim for a ride on December 16. A witness testified that the victim came to the wrong residence the night she went missing, looking for Calhoun's trailer. Id. On morning Mrs. Brown and Calhoun were both reported missing, Calhoun was seen in a white four-door car, matching the victim's car, and buying cigarettes at a convenience store in Alabama. Id. He was witnessed with blood and scratches on his hands the 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, Mrs. 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, trial 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 citings of Calhoun and the victim before her death. Notwithstanding, trial counsel had Mr. Mixon under subpoena and in the courthouse ready to testify. It was Calhoun's choice to abandon calling Mr. Mixon to testify, thereby undermining his defense theory.

CLAIM 4—Prosecutorial Misconduct

In Claim 4, Defendant alleges that he was denied his fundamental right to fair trial, due process, and reliable adversarial testing due to improper prosecutorial misconduct at the guilt phase of his capital trial, in violation of Mr. Calhoun's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

A. The State did not commit any Giglio violations

Calhoun asserts there was a Giglio violation when his entire statement to the police was not admitted into the trial and the false testimony of a witness was allowed. (DM:38). A Giglio v. U.S, 405 U.S. 150 (1972) violation is demonstrated when (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material. See Guzman v. State, 941 So. 2d 1045, 1050 (Fla. 2006). Once the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. See id. at 1050-51. Under this standard, the State has the burden to prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt. See id. at 1050; see also Mordenti, 894 So. 2d 161, 175 (Fla. 2004). With regard to the third prong of Giglio, "the false evidence is material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' Guzman v. State, 868 So. 2d 498, 506 (quoting United States v. Agurs, 427 U.S. 97, 103 (1976)).

Investigator Raley's Testimony

Calhoun argues the testimony elicited from Investigator Raley was incorrect as the jury was left with the impression that Calhoun was in the woods near the crime scene in Alabama when in actuality he was at a campground in Florida. (DM:38). Calhoun asserts that the State argued to the jury that Calhoun admitted to being in the woods near the crime scene within hours of the car being burned and this was patently false and deliberately deceptive. At trial, Investigator Raley stated that Calhoun told him that police were closing in on him at least three times while he was in the woods. (T15:955).

Calhoun cannot show how this information was material to his case. During closing arguments the State Attorney implied that Calhoun was in the woods close to where the car was burnt. (T17:1210-1211). There 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. (T15:948-949, 953). Therefore, even if the State Attorney had not incorrectly implied Calhoun's statements to the investigator, there was still sufficient evidence that he was in close proximity to where the car was found burnt in Alabama. Consequently, the State Attorney did not knowingly present false information to the jury and merely implied it incorrectly. Nevertheless, this information was also not material to Calhoun's conviction as it did not affect the jury's verdict. The jury was presented evidence that the victim's purse was found in Calhoun's trailer, the victim's blood and hair was found in Calhoun's trailer, and the victim's burnt car was found approximately 1,488 feet from Calhoun's Alabama campsite. Calhoun v. State, 138 So. 3d 350, 366 (Fla. 2013). This claim should be summarily denied.

Sherri Bradley's testimony

Calhoun asserts during trial Ms. Bradley testified she did not look at any news reports before speaking to investigators. (DM:39). Calhoun claims the State Attorney was aware this testimony was false because in an interview with Ms. Bradley she stated that she did not want to say something that she had actually read it in the newspaper. (DM: 39). However, even if Ms. Bradley made a misstatement regarding reading the news, it was not material to Calhoun's case. Ms. Bradley testified she saw Calhoun coming to the store early in the morning before the victim was reported missing, and that she saw scratches on Calhoun. (T13:649-651). Ms. Bradley also testified she saw a long haired Calhoun in a white car with Florida license plates. (T13:650-659). Ms. Bradley's testimony was corroborated by another witness who saw Calhoun in the store at the same time. (T14:675-683). Ms. Bradley's testimony was not material to Calhoun's case where it would have affected the verdict of the jury. Even without Ms. Bradley's testimony Calhoun would have been found guilty based on the overwhelming evidence. Accordingly, Calhoun cannot demonstrate any material impact upon the jury, and his conviction.

B. Claims of prosecutorial misconduct regarding improper closing arguments are not cognizable in a post conviction motion

Calhoun asserts that the prosecutor made improper comments during closing arguments. Calhoun asserts that the pattern and course of conduct violated his due process rights. (DM:42). Calhoun is arguing prosecutorial misconduct and such claims are not cognizable in a post conviction motion. Claims such as these should be raised on direct appeal and therefore, are procedurally barred. See Johnson v. State, 104 So. 3d 1010, 1029 (Fla. 2012); see also Spencer v. State, 842 So. 2d 52, 60-61 (Fla. 2013) (post conviction court properly concluded that claims alleging prosecutorial misconduct were procedurally barred because each of the alleged violations appeared on the trial record and could have been raised on direct appeal). Therefore, this claim should be summarily denied.

CLAIM 7—Counsel was not ineffective for failing to have a mental health expert in violation of Ake v. Oklahoma

In Claim 7, Defendant alleges he was denied his rights under Ake v. Oklahoma at the guilt and penalty phases of his capital trial in violation of his rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution, as well as Fifth, Sixth, and Eighth Amendment rights.

Calhoun alleges his trial counsel was ineffective for failing to have him evaluated by an expert to assist in the preparation and presentation of his defense. (DM:71). He asserts that instead he had an "all purpose" expert to only determine his competency and this was in violation of Ake v. Oklahoma, 470 U.S. 68 (1985). He asserts that the jury failed to receive substantial and competent evidence to support the statutory and non-statutory mitigating factors.

In Ake v. Oklahoma, the United States Supreme Court held "the Constitution requires that a State provide access to a psychiatrist's assistance on the issue if the defendant cannot otherwise afford one." Ake 470 U.S. at 74. What Ake requires is the State to provide access to and pay for a psychiatrist when a defendant's sanity is at issue. Id. Contrary to Calhoun's argument, Ake neither provides a defendant with their choice of mental health professional nor does it set a standard for an effective mental health evaluation. Wright v. Moore, 278 F.3d 1245 (11th Cir. 2002) (noting that a Sixth Amendment right to a mental competency examination is a "non-starter"); Wilson v. Greene, 155 F.3d 396, 401 (4th Cir. 1998)(rejecting the notion that there is either a procedural or constitutional rule of ineffective assistance of an expert witness); Walls v. McNeil, 2009 WL 3187066, *77 (N.D. Fla. Sept. 20, 2009)(citing cases). Ake is violated when a state or court denies a defendant access to a mental health professional when that defendant's sanity is at issue. Ake, 470 U.S. at 85.

Calhoun has not demonstrated a basis for meeting any of the requirements of Ake. First, Calhoun has not demonstrated that his sanity at the time of the offense was going to be a significant factor at trial. Id. at 85. And second, Calhoun has also not shown that he had requested and was denied access to a reliable mental health professional who would conduct an appropriate examination. Id. On the contrary, Calhoun asserts that his counsel hired an "all purpose" expert to determine his competency to proceed and his sanity at the time of the offense. (DM:71). Therefore, because Calhoun has failed to meet any of the prongs of Ake v. Oklahoma, this claim should be denied as lacking merit.

CLAIM 8—Alleged Juror Misconduct

In Claim 8, Defendant alleges he was deprived of his right to a fair trial and impartial jury due to juror misconduct between the guilt and penalty phases of his capital trial in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

Calhoun asserts that prior to the beginning of the penalty phase the trial court was informed of juror misconduct. (DM:72). The court was informed that someone saw two members of the jury discussing the trial at Middle Crossroads Convenience Store in Holmes County. The jurors were called up individually and questioned. Each responded negatively. (DM:72). Calhoun asserts that the witnesses were not questioned as to what they saw. He asserts that he was denied his right to a fair trial by an impartial and competent jury.

However, any claims of juror misconduct are not cognizable in a motion for post conviction relief and should have been raised on direct appeal. "Any substantive claim pertaining to juror misconduct is procedurally barred as it could have and should have been raised on direct appeal." Troy v. State, 57 So. 3d 828, 838 (Fla. 2011) (quoting Elledge v. State, 911 So. 2d 57, 77 n.27 (Fla. 2005)). The claim is summarily denied.

CLAIM 9—Counsel was not ineffective for failing to further investigate alleged juror misconduct

In Claim 9, Defendant alleges trial counsel was ineffective by failing to investigate allegations of juror misconduct and by neglecting to question each juror, counsel rendered deficient performance in violation of Mr. Calhoun's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

Calhoun alleges that his trial counsel was ineffective for failing to question each juror after learning of the juror misconduct. (DM:74). He asserts that trial counsel made no effort to corroborate the juror misconduct herself or to ask for a mistrial based on what she learned. (DM:75). Calhoun alleges that in failing to investigate the juror misconduct, trial counsel allowed the trial to proceed without a fair and impartial jury.

Calhoun is attempting to couch juror misconduct as an ineffective assistance of counsel claim by raising this conclusory allegation that counsel should have done more investigation. See Troy v. State, 57 So. 3d 828, 838 (Fla. 2011) ("A defendant may not attempt to circumvent the procedural bar to his claims by raising conclusory allegations of ineffective assistance of counsel."). Nevertheless, Calhoun's allegations lack merit. Upon finding out of the alleged juror misconduct, trial counsel agreed with individually questioning each juror. (T18:1266). The trial court called each juror one at a time and asked them if they had been contacted by anyone or discussed the case with anyone. (T18:1270-1275). Each juror responded negatively. Consequently, there was no reason for trial counsel to continue to investigate the alleged juror misconduct. This claim shall be summarily denied as trial counsel was not ineffective and Calhoun was not prejudiced.

CLAIM 10—ABA Guidelines

In Claim 10, Defendant alleges trial counsel was ineffective by completely disregarding the American Bar Association's (ABA) guidelines for the appointment and performance of trial counsel in death penalty cases, counsel rendered deficient performance through the pre-trial, guilt/innocence phase and penalty phase of Mr. Calhoun's capital trial. (DM: 75-76).

Calhoun raises several ABA violations committed by defense counsel and asserts that, but for counsel's failure to comply with the guidelines, there would be a reasonable probability that he would have received a life sentence.

The United States Supreme Court has stated that the ABA guidelines are merely "guides to determining what is reasonable." Wiggins v. Smith, 539 U.S. 510, 524 (2003)(quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)). In Strickland, the Court further explained:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Strickland, 466 U.S. at 688-89. The Florida Supreme Court has held that the ABA guidelines are not a set of rules that govern the Court's Strickland analysis because they would effectively revoke the presumption that counsel's actions are reasonable when based on strategic decisions. Mendoza v. State, 87 So. 3d 644, 653 (Fla. 2011). Therefore, trial counsel in Calhoun's case is not held to the standard established in the ABA guidelines in her representation of Calhoun. Instead there is a presumption that her decisions were reasonable under professional norms, unless Calhoun can show otherwise. To the extent that Calhoun's allegations of ABA deficiencies are merely recommended through the guidelines, those claims should be summarily denied. The State notes that the remainder of the issues raised in this claim that merit a Strickland analysis have already been raised and addressed throughout this response. As such, this claim shall be summarily denied without an evidentiary hearing.

CLAIM 11—Cumulative Error

The Defendant asserts a cumulative error claim. Although Calhoun presents this claim as independent basis for relief, a cumulative error claim cannot warrant relief unless the trial court finds specific claims of error meritorious. See Israel v. State, 985 So. 2d 510, 520 ("As discussed in the analysis of the individual issue above, the alleged errors are neither meritless, procedurally barred, or do not meet the Strickland standard for ineffective assistance of counsel. Because the alleged individual errors are without merit, the contention of cumulative error is similarly without merit.") See also Parker v. State, 904 So. 2d 370, 380 (Fla. 2005). Because all of Calhoun's claims are meritless, he is not entitled to cumulative error relief. See Griffin v. State, 866 So. 2d 1, 22 (Fla. 2003) ("[W]here individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail.); Vining v. State, 827 So. 2d 201, 219 (Fla. 2002) (where the defendant's claims were either meritless, procedurally barred, or did not meet the Strickland standard, his cumulative error claim necessarily failed). Accordingly, Calhoun is not entitled to relief and his claim is denied.

CLAIM 14—Conflict of Interest

Calhoun was not deprived of his fundamental right to effective assistance of counsel as his trial counsel did not have a conflict of interest.

In his second amended motion, Defendant asserts a conflict existed in the Office of the Public Defender which was not relayed to him. He asserts his trial counsel had just become qualified as a lead counsel in capital cases, and should have been assisted by qualified co-counsel in his case. Calhoun maintains 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 of his case. Furthermore, he argues that the use of another attorney who was not qualified co-counsel adversely affected the entirety of his defense. Defendant's claim lacks merit as he has not shown that there was any actual conflict on the part of trial 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, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)).

At the time of trial, Defendant was represented by Ms. Jewell, who he acknowledges was qualified as lead counsel. Defendant asserts that another attorney, Mark 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 Mr. Sims' conflict was imputed to Ms. Jewell.

During the evidentiary hearing, Ms. Jewell testified about how Mr. Sims had capital trial experience as an assistant state attorney, but his experience was not on the defense side. Therefore, he was not qualified at time of trial. According to Ms. Jewell, Mr. Sims was working in separate office for the Public Defender's Office in Blountstown, Florida, and he was effectively walled off from the case at hand. Ms. Jewell worked from the Panama City, Florida Public Defender's Office location. Ms. Jewell articulated that the decision to wall off Mr. Sims from the case and not impact the defendant's case was made by the Honorable Herman Laramore, who was the elected Public

Defender for the Fourteenth Judicial Circuit at the time of counsel's (Ms. Jewell) representation.[9] Further, Ms. Jewell testified she never spoke about the case with Mr. Sims. In effect, Mr. Sims was never involved in the defendant's case. Additionally, Ms. Jewell articulated that she had other attorneys, i.e. Doug White, and Walter Smith, to consult with for advice within the Public Defender's Office at the time as opposed to Mr. Sims. Moreover, Ms. Jewell discussed how she did not keep her files on the public defender web viewing system for everyone in her office to view.

The defense never called Mr. Sims nor the Public Defender Herman Laramore, 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' conflict did not adversely affect her ability to represent Calhoun.

According to the Florida Rules Regulating the Florida Bar, Mr. Sims declination of representation to 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. Mr. Sims' knowledge of the victim and her family is a result of a personal interest of the lawyer and rather than having any adverse interest against Calhoun. 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.

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, the Defendant has only asserted that Mr. 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. As such there was no way that his knowledge of the family presented a significant risk of limiting the representation by Ms. Jewell. The Defendant has not shown that Mr. Sims' knowledge of the family affected Ms. Jewell's representation such that there was a conflict. The Defendant has not shown that Mr. Sims did any work on the case, had any personal participation, and that there was any communication between him and Ms. Jewell.

Further, the Defendant has not shown that there was an actual conflict that adversely affected the performance of defense counsel Ms. Jewell. The Defendant has only made generalized complaints based on Mr. Sims alleged conflict. This claim lacks merit as the defendant 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). Moreover, Ms. Copek failed to call the supervisor Herman Laramore to discuss this decision at the evidentiary hearing. Therefore,

[9] At the time of this evidentiary hearing, Mark Sims is now the elected Public Defender of the Fourteenth Judicial Circuit.

Calhoun's claim is due to be denied.

B. Lack of Qualified Co-Counsel

Defendant asserts he was also prejudiced by his counsel's inability to rely on Mr. Sims as co-counsel, when he was knowledgeable about capital cases. He asserts that instead Ms. Jewell had to rely on a co-counsel who was not qualified and had only been an attorney for two years at the time of trial. However, as the Florida Supreme 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. The Court notes that this claim is diametrically opposed to Claim 14 A. In this case, even though Mr. Sims chose to not participate in this case, the Defendant cannot use this as a basis for deficiency of counsel or prejudice. Therefore, Calhoun's allegations that trial counsel was ineffective because co-counsel was not death qualified must be denied.

CLAIM 15—Brady Violation

Counsel was not ineffective for failing to obtain exculpatory evidence

Defendant 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. Defense 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 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[10] 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 v. State, 709 So.2d 512 (Fla. 1998) (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 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,

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

796 (Fla. 2006) (quoting Strickler v. Greene, 527 U.S. 263, 281-82 (1999)). To establish prejudice, a defendant must demonstrate that the suppressed evidence is material. Id.

As an alternative argument, defense claims that defense trial counsel was ineffective for his failure to obtain the exculpatory evidence. 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).

At the evidentiary hearing, the Court heard from Greg Ward, the former Sheriff of Geneva County, Alabama. (Evid. Hrg. Trans. 397-402). Mr. Ward was the Sheriff of Geneva County, Alabama in 2010 and during the time of this case when Mrs. Brown went missing from Florida and her body was discovered in Alabama. Mr. Ward testified about his role with the Geneva County Sheriff's Office when investigating Mrs. Brown's murder. According Mr. Ward, once the vehicle was found in Geneva County, Alabama, the Geneva County Sheriff's Office called in the state agent for ABI (Alabama Bureau of Investigation) and the investigation was henceforth conducted by ABI.

Mr. Ward acknowledged he knew a person named Natasha Simmons. However, under direct examination by the State, Mr. Ward testified that Natasha Simmons (notwithstanding Simmons' testimony at the evidentiary hearing) never came to meet him personally around this time period of 2010 or early 2011, or anytime for that matter, while he was Sheriff of Geneva County. Further, Natasha Simmons never told him she had picked up Doug Mixon and Charlie Utley from an area in Holmes County, Florida or that Doug Mixon had blood on him or that Mr. Mixon was carrying a gas can. Under cross examination, Mr. Ward testified at the evidentiary hearing that "I don't recall getting information from her whatsoever about anything." (Evid. Hrg. Trans. 400). Further, Mr. Ward testified he never told Natasha Simmons to forget about that information because Florida had already caught somebody who had confessed. Mr. Ward did testify that if somebody had reported something like that information to him and/or his agency, that information would have been relayed to the lead agent of ABI. The Court makes a specific finding that Sheriff Ward was not a member of the prosecution team, nor did the prosecution suppress favorable evidence.

As for Mr. Ward's knowledge of Doug Mixon, he did acknowledge he knew a person named Doug Mixon through the many years of dealing with him as a law enforcement officer. Through Mr. Ward's experience and knowledge, he offered his opinion about Doug Mixon's reputation for truth and honesty in the community that "I wouldn't believe, I wouldn't believe anything he told you, just to be honest with you, no sir." (Evid. Hrg. Trans. 399-400). Under cross examination, Mr. Ward stated that Doug Mixon would steal from you, and steal a lot of drugs, and "never known him to being, honestly being violent, never known him to do that." (Evid. Hrg. Trans. 401).

The Court also heard from Investigator Michael Raley of the Holmes County Sheriff's Office. According to Investigator Raley, he knows Sheriff Greg Ward, as Raley testified when Ward was Sheriff of Geneva County, Alabama, both Geneva County and Holmes County Sheriff's Office worked closely together. Investigator Raley testified he did not receive any information from Geneva County Sheriff's Office or ABI, Alabama Bureau of Investigation, about any statements

from Natasha Simmons regarding information Ms. Simmons had about Doug Mixon's involvement in the murder of Mrs. Brown. (Evid. Hrg. Trans. 414).

Further, Investigator Raley was asked about Investigator Ricky Morgan, of the Geneva Police Department. (Evid. Hrg. Trans. 415). According to Investigator Raley, he knows of Ricky Morgan, and he has worked with him in the past. Investigator Raley testified he never received any information from Investigator Morgan regarding information that Jose Contreras had about Doug Mixon's admission that he had killed Mrs. Brown and burned her body in a car. (Evid. Hrg. Trans. 415).

Investigator Raley was asked about whether he knew Doug Mixon. Investigator Raley was asked to offer his opinion about Doug Mixon's reputation for truth and honesty within the community. Investigator Raley described that Doug Mixon's reputation as not very truthful, and he often times tries to exaggerate. (Evid. Hrg. Trans. 415-416).

During the evidentiary hearing, the Court heard from Jose Contreras.[11] (Evid. Hrg. Trans. 338-351). Mr. Contreras testified he knew Doug Mixon as they worked together for three years. Further, Mr. Contreras also knew Gabby Faulk, as she lived with Mr. Contreras, as she (Ms. Faulk) is the mother his granddaughter, his son's daughter. According to Mr. Contreras, he knew both Doug Mixon and Gabby Faulk before they were in a relationship together. Mr. Contreras stated that he did not know Johnny Mack Sketo Calhoun.

Mr. Contreras testified that he went to the Geneva Police Department in Alabama to report that Doug Mixon had confessed to him. However, when he went there, Captain Ricky Morgan, told him that Doug Mixon had not killed anybody and kicked him out. Mr. Contreras was not happy with Ricky Morgan's attitude and he called another office. However, Mr. Contreras states that he left a message, but he does not remember exactly what office that was, and he thinks that he remembers talking to somebody, but he does not remember who exactly. (Evid. Hrg. Trans. 346). By clarification, Mr. Contreras stated that it was another law enforcement agency, and he called a Sheriff's office in Florida, in Bonifay, Florida. He further indicated during the hearing that he was not sure if he left a message or talked with someone, but he left his phone number. (Evid. Hrg. Trans. 346-347).

Captain Ricky Morgan was called as a witness in the evidentiary hearing. (Evid. Hrg. Trans. 404-406). Captain Morgan is with the Geneva Police Department in Alabama and he is supervisor over the investigations department. He was employed with the Geneva Police Department in the latter part of 2010 and the beginning in 2011. Captain Morgan stated he was aware and/or recalled the time period when a person named Mrs. Brown went missing from Florida and her body was later discovered in Geneva County, Alabama. However, he stated that he was not involved in the investigation of the murder of Mrs. Brown.

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[11] Mr. Contreras had an interpreter for him during the evidentiary proceedings.

Captain Morgan also stated that he knew Mr. Contreras. Captain Morgan testified that Jose Contreras never reported personally to him that Doug Mixon had confessed that he had killed Mrs. Brown and burned her body up in a car. (Evid. Hrg. Trans. 405-406). Captain Morgan testified nobody relayed that information to him. But, if that information would have been relayed to him, it would have been immediately turned over and relayed straight back to Holmes County, i.e. Sheriff's Office. The Court makes a specific finding that Captain Morgan was not a member of the prosecution team, nor did the prosecution suppress favorable evidence.

The Court heard from Robert Vermillion. (Evid. Hrg. Trans. 355-371). Mr. Vermillion is the second cousin of Brandon Brown and he also knew Mrs. Brown before she married his cousin. When Mrs. Brown disappeared and her body was located, Mr. Vermillion described when he learned that Mr. Calhoun was arrested for the crime. Shortly after Mr. Calhoun was arrested, Vermillion was also arrested and spent time in the Holmes County Jail in an adjoining cell beside Mr. Calhoun. Mr. Vermillion testified about how he plotted to get his hands on the Mr. Calhoun while in jail because of Mrs. Brown and the relationship with his family. (Evid. Hrg. Trans. 357). However, Mr. Vermillion's feelings subsequently changed towards the Defendant, Mr. Calhoun. Specifically, Mr. Vermillion testified that there came a time where he believed that somebody else killed Mrs. Brown. He believed that Doug Mixon was involved in this case. Thereafter, Mr. Vermillion went on to describe an encounter he had with Doug Mixon at a relative's house, Linda Thames. (Evid. Hrg. Trans. 361-367). According to Mr. Vermillion, Doug Mixon mentioned forgiveness in reference to Mrs. Brown. Mr. Vermillion also described how Doug Mixon stabbed him in his hand with a knife during the same encounter. Mr. Vermillion described how Doug Mixon was panicking and nervous, and started having a heart attack. Ultimately, Mr. Vermillion stated that the ambulance carried away Doug Mixon. Mr. Vermillion later clarified that Doug Mixon did not come out and say he killed her, but he insinuated it. (Evid. Hrg. Trans. 365).

Mr. Vermillion testified that he never told law enforcement about this encounter with Doug Mixon because his family has been through enough, and he did not want to bring it up. Under cross examination by the State, Mr. Vermillion acknowledged that he is eight or nine time convicted felon. Mr. Vermillion testified Doug Mixon did not really say that he "done it", so there was really nothing that I could say, that I could tell somebody, bit it's just suspicious, you know, hearsay. (Evid. Hrg. Trans. 367).

The Court heard from Doug Mixon during the evidentiary hearing. (Evid. Hrg. Trans. 307-321). He articulated that he knew both the Defendant, Mr. Calhoun, and the victim, Mrs. Brown. Doug Mixon stated he remembered talking to law enforcement but his recollection and memory about providing a statement to law enforcement was faulty. Mr. Mixon also remembered giving a deposition to Mr. Calhoun's lawyers but he also doesn't remember what was said or nothing. (Evid. Hrg. Trans. 309).

As for his heart issues, Mr. Mixon admitted that he has had some heart issues. As for an incident which occurred in July of last year, and Mr. Mixon described that he had a heart attack while at Linda Thames' house and he was transported to the hospital by ambulance.

Regarding Mr. Mixon's involvement in the murder of Mrs. Brown, he testified that he was aware that there were rumors in the case that he was involved. Also, Mr. Mixon agreed that he has somewhat of a bad reputation around town in the community. (Evid. Hrg. Trans. 310-311). In response, Mr. Mixon commented on how the Defendant, Mr. Calhoun, went around and told several people that he had done a bunch of stupid stuff including this things in this case.

Mr. Mixon also went on to testify about an encounter he had with the Defendant, Mr. Calhoun, while both were in the jail. Mr. Mixon articulated that the Defendant "was telling him that he was sorry. And what he done was, you know, and I believed it because he was in prison, that was bad, that was, you know, that wasn't no good..." (Evid. Hrg. Trans. 315).

Mr. Mixon testified that he never confessed to Contreras or Vermillion. Under cross-examination by the State, Mr. Mixon testified that as for the night when Mrs. Brown and the Defendant went missing, Mr. Mixon testified that he and Gabby Faulk were cooking dope. Mr. Mixon stated Mr. Contreras did not participate with the drugs. In fact, Mr. Mixon stated that Mr. Contreras knew nothing about it, because he and Gabby were trying to get through before he got back from work. (Evid. Hrg. Trans. 316-318).

Finally, the State inquired of Mr. Mixon in reference to being subpoenaed for trial in the Defendant's case back in 2012. Mr. Mixon replied by stating "yes sir, yes sir, but I didn't have to come in. When I got right up there, they told me I didn't have to come, to leave." (Evid. Hrg. Trans. 321). Again, the State asked Mr. Mixon, "so you did, you came to the courthouse and then they told you that you didn't have to testify?" To which, Mr. Mixon replied, "yes, sir." (Evid. Hrg. Trans. 321).

Ms. Jewell testified that the defense pursued leads as it related to Doug Mixon. In fact, counsel articulated that the defense had "doors slammed in our face." Furthermore, counsel testified that 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 every admit to them or we couldn't get past the hearsay of all of it. As a result of the investigation, Counsel identified a pattern of Doug Mixon's general reputation for dishonesty and reputation in the community. (Evid. Hrg. Trans. 197-198).

Ms. Jewell testified that Doug Mixon was under subpoena for trial and he was in fact present in the courthouse for trial purposes. As for why she did not put Doug Mixon on the stand, counsel testified to the following:

> "He was here. He, I mean, he had a very wild look about him that day. We, or I discussed, with Mr. Calhoun, that he was here and this was, you know, we were going to lay the blame at his feet, knowing full well Doug would either elaborate on something else or outright lie pretty much, and denying everything. And most of that was going to be just to get Doug Mixon in front of that jury so they could put the craziness to a face.

> And he was extremely concerned. Johnny [Calhoun] had become very concerned about the safety of his family. The closer this came to trial, he became more and more concerned about his mother in particular, and did not want to run the risk of Doug, I think because of Doug's reputation that Doug had actually built, he feared that by attacking Doug and laying the blame at Doug's feet, with Doug right there, would actually cause him to hurt his family."

(Evid. Hrg. Trans. at pp. 198-199).

Ms. Jewell further testified that ultimately it was her decision whether to put a witness on the stand or not. Counsel agreed she really had no idea what Doug Mixon was going to say if she put him on the stand. (Evid. Hrg. Trans. 199). Likewise, Defendant made it clear to Ms. Jewell he did not want her to put Doug Mixon on the stand.

> "When, even though we deposed him, when he came that day and was wound that tight and, you know, because Mr. Calhoun had expressed his concerns, not just that day, but before. Because he did, he was very concerned for his family. And when Doug came that day, I'm not an expert in drugs recognition, but I swear up and down he was lit by either meth or something else. He just had the wildest look in his eye."

(Evid. Hrg. Trans. at pp. 199-200).

Calhoun has failed to meet his burden of showing ineffective assistance of counsel. Sheriff Ward was adamant that the conversation between Natasha Simmons and he 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. Ms. Jewell could not have possibly discovered the false statements of either Vermillion or Contreras. The Court specifically determines there was not a Brady violation in this cause. Calhoun has failed to establish ineffective assistance of counsel and this claim shall be denied.

CLAIM 16—Newly Discovered Evidence

Claim of newly discovered evidence does not establish that Defendant's conviction and sentence were obtained in violation of his rights and he was not denied effective assistance of counsel

Defendant claims that the emergence of Ms. Simmons supports the defense theory that Doug Mixon was the person who committed the murder. This claim is predicated on the same evidence in Claim 15. Based on the allegations, defense 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.

Id. 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. As already discussed in Claim 15, this evidence would not meet the standards of ineffective assistance of counsel or a Brady violation. 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). The Court's findings and conclusions contained in Claims 3F and 15 are hereby incorporated into this claim.

Further, this evidence would not produce an acquittal at trial. By Mr. 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 Utley 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 Ms. Brown missing the night before her supposed interaction with Mr. Mixon and Mr. Utley (Evid. Hrg. Trans. 332); however, she then backtracked and said she was not sure when she saw the news. (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).

With 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.

Therefore, it is

ORDERED AND ADJUDGED as follows:

1. The Defendant's Motion for Post Conviction Relief is hereby GRANTED IN PART to the extent Defendant is granted Hurst relief raised in Claim 13;

2. The Defendant's Motion for Post Conviction Relief as to Claims 5, Claim 6A, Claim 6B and Claim 12 are hereby DISMISSED as moot; and

3. The Defendant's Motion for Post Conviction Relief as to Claim 1, Claim 2, Claim 3, Claim 4, Claim 7, Claim 8, Claim 9, Claim 10, Claim 11, Claim 14, Claim 15, Claim 16 are hereby DENIED. The Defendant has thirty (30) days from the date of this Order to appeal this decision.

DONE AND ORDERED in chambers, Holmes County, Florida, this 3rd day of January 2018.

HONORABLE CHRISTOPHER N. PATTERSON,
CIRCUIT JUDGE

Attachments:

Transcript of Jury Selection
Day One, Part One held February 20, 2012 pp. 1-184
Day One, Part Two held February 20, 2012 pp. 185-337
Day Two held February 21, 2012 pp. 338-508

Transcript of Trial
Jury Trial held February 22, 2012 pp. 509-672
Jury Trial held February 23, 2012 pp. 673-831
Jury Trial held February 24, 2012 pp. 832-969
Jury Trial held February 27, 2012 pp. 970-1135
Jury Trial held February 28, 2012 pp. 1136-1261

Transcript of Penalty Phase
Excerpt of Penalty Phase held February 29, 2012 pp. 1262-1275

I HEREBY CERTIFY that a true and exact copy of the foregoing has been provided by U.S. Mail and/or e-mail to the following: **The Honorable Glenn Hess**, State Attorney, (Glenn.hess@sa14,fl.gov); **Brandon Young**, Assistant State Attorney, (Brandon.young@sa14.fl.gov); **Lisa Hopkins**, Assistant Attorney General, (lisa.hopkins@myfloridalegal.com; capapp@myfloridalegal.com); **Alice Copek**, Esq., Special Assistant Capital Collateral Regional Counsel, (Alice.copek@ccrc-north.org) (copeklaw@gmail.com); **Stacy Biggart**, at (Stacy.Biggart@ccrc-north.org); **Johnny M. Calhoun**, DOC# Q26629, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, this 3rd day of January, 2018.

Amanda Williams, Judicial Assistant