IN THE SUPREME COURT OF FLORIDA

Case No. SC19-704

Lower Court Case No. 2010-CF-001608A

TINA LASONYA BROWN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

Tina Lasonya Brown has been sentenced to death. Resolution of the issues presented will determine whether she lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to address the issues through oral argument would be more than appropriate, given the seriousness of the claims at issue and the stakes involved. Ms. Brown, through counsel, respectfully requests this Court hear oral argument in this appeal.

STANDARD OF REVIEW

Strickland claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions *de novo*. *Sochor v. State*, 883 So.2d 766, 771-72 (Fla. 2004).

Where the circuit court denies 3.851 claims without an evidentiary hearing, this Court reviews the circuit court's decision *de novo*, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling only if the record conclusively shows the movant is entitled to no relief. *Howell v. State,* 109 So.3d 763, 777 (Fla. 2013).

Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because "even though there was competent substantial evidence to support a verdict…and even though each of the

alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation." *McDuffie v. State*, 970 So.2d 312, 328 (Fla. 2007).

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE CASE[1]

The Circuit Court for the First Judicial Circuit in and for Escambia County, Florida, entered the judgments of conviction and sentence at issue. On April 2, 2010, Ms. Brown was indicted for the kidnapping and first-degree murder of Audreanna Zimmerman. The State dropped the kidnapping charge. Following conflicts by the public defender, regional conflict counsel, and other private conflict counsel, John Jay Gontarek and Sharon Wilson were appointed to represent Ms. Brown.

Ms. Brown's trial began on June 18, 2012. The jury found her guilty as charged on June 21. The penalty phase was held on June 25-26. The jury recommended death by a vote of 12 to 0. A *Spencer*[2] hearing was held on August 22, and a sentencing hearing followed on September 28. The Honorable Gary L. Bergosh followed the jury's recommendation and sentenced Ms. Brown to death.[3]

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[1] The following will be utilized to cite to the record: "R." – record on direct appeal; "T." – trial transcript; "PC." – postconviction record on appeal. Any additional citations will be self-explanatory.

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

[3] Judge Bergosh found the following aggravating factors: (1) the crime was committed during a kidnapping, (2) heinous, atrocious, or cruel (HAC), and (3) cold, calculated, and premeditated (CCP). Judge Bergosh found one statutory mitigator -- no prior criminal history. Judge Bergosh also found twenty-seven non-statutory mitigators: (1) Ms. Brown was the child of a teenage mother, (2) Ms. Brown was neglected by both parents, (3) loss of childhood, (4) abandonment by mother, (5) family violence, (6) early exposure to drugs, (7) damaged development caused by parental drug dependence, (8) sexually abused by father, (9) betrayal by trusted family member, (10) corrupt community and exposure to criminal lifestyle, (11)

This Court affirmed Ms. Brown's conviction and sentence on direct appeal. *Brown v. State*, 143 So.3d 392 (Fla. 2014).[4] Her petition for writ of certiorari to the United States Supreme Court was denied on December 1, 2014. *Brown v. Florida*, 135 S.Ct. 726 (2014).

On May 1, 2017, Ms. Brown filed her Third Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend.[5]

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chaotic moves and transitions, (12) victim of domestic violence, (13) witness to extreme violence and witness for state, (14) loss of family, (15) inadequate treatment for repeated traumas of neglect, abandonment, sexual abuse and domestic violence, (16) drug addiction, (17) long-term effects of chronic crack cocaine abuse on the brain, (18) productive citizen in times of sobriety, (19) living circumstances at time of crime, (20) good jail behavior, (21) Bible study at jail, (22) good courtroom behavior, (23) no possibility of parole if sentenced to life, (24) remorse, (25) proportionality with co-defendants' sentences, (26) no history of violent crime prior to instant offense, and (27) use of crack cocaine on the day of the murder. Judge Bergosh rejected the following statutory mitigators: (1) the crime was committed while the Defendant was under the influence of extreme mental or emotional disturbance, (2) the Defendant was an accomplice in the capital felony committed by another person and her participation was relatively minor, (3) the Defendant acted under extreme duress or under the substantial domination of another person, and (4) the capacity of the Defendant to appreciate the criminality of her conduct or to conform her conduct to the requirements of law was substantially impaired.

[4] The following issues were raised in Ms. Brown's direct appeal: (1) the trial court reversibly erred in instructing the jury on and in finding the aggravating circumstance that the crime was committed in a cold, calculated, and premeditated manner; (2) Ms. Brown's death sentence is disproportionate; and (3) Florida's capital sentencing proceedings are unconstitutional under the Sixth Amendment pursuant to *Ring v. Arizona*.

[5] Ms. Brown raised the following claims in her 3.851 motion: (1A) counsel failed to conduct a meaningful death qualification; (1B) counsel failed to inquire about pretrial publicity of the case; (1C) counsel failed to inquire about racial bias;

(PC.1597-1862). The State filed its response on June 14, 2017. (PC.1872-1930). A case management conference was held on September 14, 2017. (PC.2017-2047). Following this hearing, the postconviction court issued an order granting an evidentiary hearing on Claims 2A-C, 2E-H, 3A-D (regarding impeachment evidence of witness Sturdivant only), 7, and 8. (PC.2048-50). The hearing was conducted on

(1D) counsel failed to strike Juror Goodwin; (1E) counsel failed to strike Juror Taylor; (1F) counsel failed to strike Juror Courtney; (1G) counsel failed to educate the jury on the penalty phase process; (1H) counsel failed to conduct any *voir dire* of some jurors; (2A) counsel failed to conduct an adequate investigation and prepare for trial; (2B) counsel failed to adequately challenge the state's evidence through cross-examination; (2C) counsel failed to ask for a Richardson hearing and move for a mistrial; (2D) counsel failed to argue the admissibility of Wendy Moye's testimony as substantive evidence and failed to object to the special jury instruction regarding her testimony; (2E) counsel failed to call Terrance Woods as a witness; (2F) counsel failed to call Darren Lee as a witness; (2G) counsel failed to call Nicole Henderson as a witness; (2H) counsel failed to refute the statutory aggravator of cold, calculated, and premeditated; (2I) counsel failed to object to prosecutor's improper closing argument; (3A) counsel failed to conduct a reasonably competent mitigation investigation and to present adequate mitigation; (3B) counsel failed to consult with and present experts to explain the combined effects of polysubstance abuse, childhood trauma, and mental illness on the brain; (3C) counsel failed to present evidence supporting statutory mitigators; (3D) counsel failed to object to hearsay evidence from Ricki Atwood and Sheree Sturdivant; (4) Ms. Brown was deprived of her right to due process because trial counsel failed to comply with Florida Rule of Criminal Procedure 3.112; (5A) prosecutorial misconduct in the form of inflammatory statements; (5B) prosecutorial misconduct in the form of belittling defense counsel; (5C) prosecutorial misconduct in the form of expressing personal opinion; (6A) *Giglio* violation in the form of false testimony by Heather Lee; (6B) *Giglio* violation in the form of false testimony by Pamela Valley; (7) *Brady* violation in the form of impeachment information against Dr. Bingham; (8) newly discovered evidence; (9) cumulative error; and (10) *Hurst* claim.

May 14-18, 2018, and January 29, 2019. (PC.2716-3160). The court issued a final order denying all claims. (PC.5204-5313). This appeal timely follows.

STATEMENT OF THE FACTS

I. MS. BROWN'S TRIAL

A. Guilt Phase

1. Opening Statements

Before opening statements, the judge asked trial counsel if he would be conceding second-degree murder in his opening, to which he responded: "I don't know what my opening is going to be yet." (T.317). The judge then asked if trial counsel had spoken to Ms. Brown about this issue, whereby counsel stated: "Yes, Judge, I have. But, you know, she pretty much goes along with whatever we say…she may not be in agreement with that…I don't know if I'm ready to do that at this point. I'll need to explain that with her." (T.317-18). The judge asked Ms. Brown if she had any objections to defense counsel's strategy. She responded "no" and the jury was brought in for opening statements. (T.324).

The State told jurors in opening statement that Heather Lee, Ms. Brown's co-defendant, would testify that it was Ms. Brown who got a gas can from her vehicle, poured gasoline on the victim, and lit her on fire. (T.343). Jurors were told that the State gave Ms. Lee a deal and allowed her to plea to second-degree murder. (T.341).

Defense counsel told jurors that they were "going to hear a lot of self-serving testimony, conflicting testimony, unreliable testimony, testimony that is given to further [one's own] interest." (T.346). He told jurors that this was not a first-degree murder case and Ms. Brown is not guilty of first-degree murder, but offered no basis for this suggestion. *Id.*

2. The State's Case

Mallory Azriel testified about the night of the crime. (T.448). At time of the murder, Ms. Azriel was only 13 years old, and was friends with 16 year-old Britnee Miller. (T.449). She testified that she regularly visited Ms. Miller at the trailer she shared with her mother, Tina Brown. *Id*. On the day of the crime, Ms. Azriel was at Ms. Brown's house with Ms. Brown, Ms. Miller, and Ms. Lee. (T.451-52). The victim came over to Ms. Brown's trailer to borrow some cream to put on her tattoo. (T.452). Ms. Azriel testified that the victim was attacked by Ms. Brown, Ms. Miller, and Ms. Lee, and that she did not try to help the victim herself because she was scared that they would do the same thing to her. (T.454; 470). She testified that Ms. Lee put a sock in the victim's mouth to keep her quiet. (T.455). Once the victim was in the vehicle with the other women, Ms. Azriel stayed in the trailer, closed the door, and turned all the lights off. (T.457).

When the women returned, the victim was not with them. (T.458). They came back into the trailer and Ms. Lee cleaned off her bloody shoes. (T.459; 475). Ms.

Miller said something along the lines of "we burned her." (T.476). About 15 minutes after they returned to the trailer, Ms. Azriel, Ms. Miller, and another neighbor drove to the hospital to receive treatment for Ms. Miller's hand, which she had injured during the crime. (T.459-60). Ms. Azriel was present when Ms. Miller disposed of bloody clothes in a dumpster, and helped clean up the blood inside the vehicle with hand sanitizer and soap from the hospital. (T.461-62). After Ms. Miller was treated at the hospital, they drove back to Ms. Miller's house and went to sleep. (T.463).

Ms. Azriel testified that just prior to the victim coming over to Ms. Brown's trailer, Ms. Miller told her "we're fixing to kill Audreanna." (T.464). Ms. Miller then stated: "Don't tell anybody or else we'll kill you, too." (T.465). Ms. Brown and Ms. Lee were not present when those statements were made by Ms. Miller to Ms. Azriel. *Id*. Ms. Azriel testified that they were either in the kitchen or in the bathroom, where Ms. Lee was showing Ms. Brown how to use the Taser. *Id*.

Heather Lee testified that she was arrested for first-degree murder in April of 2010, and initially faced the death penalty. (T.511). She was allowed to plea to second-degree murder in exchange for her testimony against Ms. Brown. *Id*. During her testimony, she portrayed herself as a victim, while depicting Ms. Brown as the ringleader of this entire episode. (T.521-31; 542). Ms. Lee testified that it was Ms. Brown who poured gasoline on the victim and set her on fire. (T.527-28; 547). During cross-examination, trial counsel brought out the same information that Ms.

Lee had just testified to on direct concerning her plea to second-degree murder. (T. 536). She initially lied to police because she was scared. (T.537). She claimed that although she accepted a plea in this case, she "did not participate" in the murder, and was "not going to let nobody say that [she] did anything." (T.537-38).

Ms. Lee claimed that she "was not involved" and "didn't ram a sock in nobody's mouth". (T.538-39). She claimed Ms. Azriel was the one who put the sock into the victim's mouth to keep her quiet. (T.539). She testified that she did not show Ms. Brown how to use the Taser and that Ms. Azriel's testimony about that was a lie. *Id*. In fact, Ms. Lee was confronted with all of Ms. Azriel's statements and was allowed to testify that all of them were lies. (T.540).

Pamela Valley testified that she met Ms. Brown in 1997 or 1999 in Wisconsin. (T.561). She moved to Pensacola in February of 2009. (T.562). Ms. Brown moved to Pensacola during the summer of 2009. *Id*. Ms. Valley testified that in 2010, Ms. Brown called and told her that they beat up the victim and lit her on fire. *Id*. Ms. Brown told her that she was the one who lit the victim on fire. (T.566). Ms. Valley testified that a few days later, Ms. Brown asked her to finish off the victim at the hospital. *Id*. She also testified that Ms. Brown asked her to take a lie detector test for her, and asked Ms. Valley's daughter to take a lie detector test for Ms. Miller. (T.567). She refused to help Ms. Brown and went to police. (T.566-67). During cross-examination she admitted that she invited Ms. Brown and her daughter to

come to Pensacola to live with her. (T.569). However, she and Ms. Brown had a falling out, and she kicked Ms. Brown and Ms. Miller out of her home. (T.571-72). She admitted that she did not initially tell police that Ms. Brown asked her to go to the hospital to finish off the victim. (T.574). She also admitted that she called Crime Stoppers rather than going directly to the police. *Id*.

Corie Doyle testified that she had been serving a sentence for grand theft of her own vehicle in the Escambia County Jail and was housed with Ms. Brown. (T.605). Ms. Doyle wore a dark green jumpsuit and Ms. Brown wore a lime green jumpsuit. (T.606). She asked Ms. Brown about the color of her jumpsuit. *Id*. Ms. Doyle claimed that while Ms. Brown initially did not want to discuss the issue, she did so a few days later when Ms. Doyle had gotten up for breakfast at 4:00 a.m. and stayed up to read and drink coffee. (T.606-07). Ms. Brown sat down with her to have some coffee and asked Ms. Doyle about the book she was reading. (T.607). Nobody else was sitting with them during this time. *Id*. Ms. Brown brought up the conversation about the jumpsuit and told her it was because she, her daughter, and another woman killed a girl. *Id*. Ms. Doyle testified that Ms. Brown and her daughter picked up Ms. Lee and didn't tell her what they were going to do. (T.607-08). Ms. Brown supposedly told Ms. Doyle that Ms. Lee was there but didn't have anything to do with it. (T.608). During the time that Ms. Brown was discussing this with Ms. Doyle, Ms. Doyle claimed to have "never laid eyes on [Heather Lee]". *Id*.

In late October or early November of 2011, she was transferred to another area of the jail and assigned the bunk next to Ms. Lee. (T.608-09). She eventually told Ms. Lee that she didn't need to be in jail for murder. *Id.* This comment was based on information she learned from Ms. Brown during their early morning talk. *Id*. Ms. Doyle claimed that Ms. Lee never spoke to her about her case, but merely indicated that she should speak to her (Lee's) attorney, which she did. (T.609-10).

3. The Defense's Case

Wendy Moye was the only witness called by the defense during the guilt phase. (T.636). She testified that she was currently incarcerated and had been convicted of eleven felonies. (T.637). She was previously housed at the Escambia County Jail with Ms. Lee. (T.638). They had coffee in the mornings together. *Id*. Ms. Moye testified that one morning over coffee, Ms. Lee told Ms. Moye that she was the one who set the victim on fire. (T.639-40). During cross-examination by the prosecutor, Ms. Moye admitted that she threatened to withdraw her testimony if certain conditions were not met regarding her housing. (T.644-45). She testified that an investigator from the State Attorney's Office made certain promises to her about where she would be housed. (T.645).

4. Closing Arguments

During the State's closing, the prosecutor argued that "[t]his was a thought-out, planned, premeditated kidnapping and murder". (T.680). "The State submits to

you that the evidence in this case proves beyond a reasonable doubt that Tina Brown is the one who actually killed Audreanna. The State submits to you that Tina Brown is the one who actually poured the gas on Audreanna's body and lit her on fire." (T.684). "Heather Lee is not looking at the death penalty any longer. She's only looking at the possibility of life in prison for second-degree murder." (T.688). "The State has the authority to allow a codefendant where the evidence shows that they are less culpable, less to blame than the other two defendants, the State has the authority and the discretion to allow her to plea to something less." *Id*.

Defense counsel began his closing by stating that Ms. Brown is not guilty of first-degree murder. (T.690). "Remember I told you that the State's case was going to be built on inconsistent statements, contradictory statements, ambiguities, statement of witnesses that were self-serving. These are the kind of – these are the house of cards that the State's really relying on." (T.691). Trial counsel pointed out the differences in testimony between Ms. Azriel and Ms. Lee. (T.694-95). He argued that Ms. Lee's portrayal of herself as a victim in this case was not believable, that she was a "cold-blooded liar", and that she would do whatever she had to do in order to get a favorable deal in this case. (T.695-96).

He further argued: the unlikelihood that Ms. Brown would confess to Pamela Valley, considering they were on bad terms with each other; that Ms. Brown was telling her what the police were accusing her of, not what she actually did; and that

Ms. Valley called Crime Stoppers rather than the police because she sought to gain a financial benefit. (T.699-701). In reference to Corie Doyle, trial counsel attempted to make some argument that she was also a liar because she was a bunkmate of Heather Lee and obviously they spoke to one another about the case since Ms. Lee asked Ms. Doyle to contact her attorney on her behalf about the case. (T.701-02).

In his final remarks, trial counsel argued: "The bottom line in this case, ladies and gentlemen, is that Heather Lee was facing first-degree premeditated murder charges and the death penalty, and she got off with second-degree murder. I ask you to find Tina Brown not guilty of first-degree premeditated murder." (T.703).

In rebuttal, the State emphasized Tina's involvement in the crime as "the initiator", "the aggressor". (T.703-04; 708). "Mr. Gontarek spent a lot of time talking about Heather Lee….and he knows that if he gets you to focus on Heather Lee, the cold-blooded liar, as he referred to her, then maybe you won't focus on his client, the cold-blooded murderer." (T.706). "Tina Brown poured that gas, lit Audreanna on fire, and never looked back." (T.709).

B. Penalty Phase

1. Lay Witnesses

Gerald Coleman was Ms. Brown's paternal uncle. (T.757). He testified that Ms. Brown's parents, Willie and Lillie, got married young. (T.759). They worked all day, and on the weekends they spent a lot of time at nightclubs. (T.760). Tina and

Willie Jr. did not get the attention that they should have gotten from their parents. *Id*. His mother, the children's grandmother, "played a major part in their lives as they were growing up". *Id*. The family tried to make sure that they were taken care of when they were left alone in the home. *Id*. Tina was left alone when she was 6 or 7 years old. *Id*. Tina was like a mother to Willie, Jr. *Id*. She made sure that he ate breakfast and was ready for school. *Id*. Gerald testified that it wasn't that they were being mistreated, they were just being left alone. *Id*. They didn't want for anything that he was aware of. *Id*. Their grandmother probably raised them 90% of the time. (T.761). He was not aware of what happened to cause the divorce. *Id*.

He participated in Willie's wedding to Melinda, but didn't endorse it. (T.762). After Willie married Melinda, Gerald noticed a change in Willie's behavior, and that Melinda and Tina were spending a lot of time together. (T.763). He was concerned about this and brought it to Willie's attention. (T.762-63). Willie always drank and used drugs at clubs, but with Melinda he drank at home. They didn't hide it. (T.763). He never witnessed Tina drink or using drugs. *Id*. Willie used marijuana and cocaine. (T.764). Willie was around other people who sold drugs. *Id*. Willie was indicted for being part of a drug organization; letting men sell drugs at the house where Tina and Willie, Jr. lived. *Id*. Willie let these drug dealers use his home in exchange for drugs. *Id*. Tina was a witness to this illegal drug activity.

Willie was violent with Melinda in front of Tina. (T.765). Willie, Jr. tried to avoid the situation by leaving the house. *Id*. Tina and her family moved a few times but always stayed close to the projects of North Chicago where there is a lot of gang activity and violence. (T.766). Tina never got to experience what it was like to be a kid because she had to take care of her brother at such a young age. (T.770). He had to go to a drug rehab when he was coming up and couldn't help Tina because he was having issues himself. (T.771).

Tina was 15 or 16 when she left home. (T.766). Gerald believes she left home because of the drug-infested and violent environment. *Id*. He tried to talk to Willie about this several times, but he didn't want to listen. *Id*. He also tried to talk to Willie about Melinda and her reputation as being a heavy drug user and prostitute. *Id*. "He kicked us to the curb and not only kicked Tina and his kids to the curb also. She became first in his life." (T.767). Tina went to Wakegan in the projects to live. *Id*. There were a lot of gangs and drug use. *Id*. He had a friend that told him: "Man, she be at the house with me. We be shooting up and getting high up at the house." *Id*. She was shooting up heroin. *Id*. After that, Tina moved to Danville. (T.768). They talked on the phone all the time, and he would go visit her there. (T.768-69).

Cheryl Coleman is married to Gerald. (T.773). Tina was the flower girl in her wedding. (T.775). Willie and Lillie got married young. (T.777). Willie and Lillie like to party. *Id*. She would babysit for them. *Id*. The grandmother also babysat them.

Id. Willie and Lillie didn't spend much time with their kids. (T.778). She saw Tina be a caretaker for her brother. *Id*. She did not go to Willie and Melinda's wedding because she objected. (T.779). She saw changes in Willie after he married Melinda. He was always a good dresser and worked 3 or 4 jobs at a time. *Id*. After he married Melinda, his appearance changed. He looked worn out, like he'd been on the streets. And he started asking for money. (T.780). Melinda was boisterous and used a lot of profanity. When she drank it got worse. She also got argumentative and aggressive when she drank. (T.782). It was common knowledge that Melinda used drugs, although Cheryl never saw her use drugs. *Id*. Melinda was not a motherly person. She didn't really get along with anyone, especially when she was drinking. *Id*.

J.C. Coleman is Tina's paternal uncle. (T.788). He testified that Willie worked as a security guard and as a police officer for the City of North Chicago. (T.790). He was around Tina and Willie, Jr. from the time that they were about 8 years old. (T.791). Willie would drop them off on the weekends. *Id*. When they were younger they were babysat by the grandmother or by Gerald. (T.792). After the divorce Willie took care of the kids but he still did his own thing on the weekends and still dropped them off with either J.C., Gerald, or their grandmother. (T.793). Things changed when he moved Melinda into the house. *Id*. J.C. confronted Willie about this, but Willie was not receptive. *Id*. He thinks Tina was 9, 10, 11 years old when Melinda

moved in. *Id*. Melinda was not accepted into the family. (T.794). J.C. saw Melinda intoxicated many times around Tina. *Id*.

One day when Tina was around 12 or 13, she walked over to J.C.'s house and told him that she and Willie had gotten into it. (T.795). He called Lilly and told her to come pick up Tina because he wasn't going to send her back to Willie's house. *Id*. They suspected that she was being physically and sexually abused by Willie. *Id*. Tina did not really feel comfortable around her dad. He was overprotective of her. A couple of times he chastised her, but it was more like chastising a woman he was with than his daughter. (T.795-96). Tina never spoke to J.C. about the physical and sexual abuse by her father but she did tell her grandmother, who got very upset and told Tina never to come back to her house again. (T.796-97).

Lilly left her kids with Willie to get away from him. (T.798). J.C. believes Willie was involved with crack cocaine before he and Lilly got divorced. *Id*. Shortly after the divorce, Willie had an accident when he was cooking cocaine. It exploded and burned him. (T.799). Tina and Melinda didn't get along well. (T.800). "We are a very well-known family and people talk." *Id*. People told him "your niece is on crack." *Id*. And then it was brought to his attention that Melinda was the one that started her on crack and was prostituting her. *Id*. There was drug use going on in the house where Tina lived, and the majority of the people that came over to the house were drug addicts. *Id*. He tried to confront Willie about this but Willie said Tina was

lying. *Id*. Melinda was known as a hooker and a crackhead. (T.801). He confronted Willie over selling crack out of the house where the kids lived. Ultimately, Willie was convicted for his involvement as an enforcer in this drug organization. (T 803).

J.C. also testified that Tina was involved in a situation in Waukegan where the guy she was involved with was prostituting her and they were using drugs. (T.805). Tina then moved to Danville after rehab and got a job. (T.806).

Willie Coleman, Jr. is Tina's younger brother. (T.810). When he was younger he remembers spending time with the grandparents. (T.812). Tina took care of him ninety percent of the time when they lived with their parents. *Id*. He stayed at the neighbor's house a lot as well. *Id*. The neighbor was involved with a gang. (T.813). Tina helped him with baths, homework, and walked him to school. (T.814). His mother left and they lived with the father. His father worked as a security guard and police officer. *Id*. He never really got along with his father and wasn't close to his mother. (T.815). When his father married Melinda, "our family became very dysfunctional". (T.816). "He had time for Melinda; he didn't have time for us." *Id*. Melinda had an issue with alcohol and drugs. *Id*. He would smell crack and marijuana in the house and car. (T.817). Melinda tried to push him into hot bathwater and Tina intervened. *Id*. His father would hit him and Tina. (T.818). Melinda was very verbally abusive. (T.819). Greg Miller was involved with drugs. *Id*. They ran

in the same circles. *Id*. He found out his father was smoking crack when he was in the sixth grade. (T.820).

2. Expert Witnesses

Dr. Elaine Bailey, a licensed psychologist, testified on behalf of Ms. Brown. (T.848).[6] She met with Ms. Brown to assess her mental health and review her history. (T.851). She also reviewed relevant documents and interviewed family members. (T.853-54). Dr. Bailey testified that there is a bit of a mask when it comes to Ms. Brown's family. (T.856-57). During her interviews with family members, they tended to minimize some of the issues involving substance abuse and addiction. (T.857; 890). For instance, Ms. Brown compared her mother to Mary Poppins and her family to the Cosby family. (T.857). In reality, her family lived a block from the projects, her father was a former police officer who went to prison for his involvement in a drug cartel, and she was physically and sexually abused by her father and others. *Id*.

Dr. Bailey described Ms. Brown's childhood as neglectful and inadequate. (T.860). However, when she was 12 years old, the domestic violence between her parents culminated in a fight in which her mother left the home. (T.861). This was an extremely significant event. (T.861-62). According to Dr. Bailey, "after her

[6] In addition to Ms. Brown's case, Dr. Bailey had only been involved in two other death penalty cases, and had never testified in one prior to this case. (T. 939).

mother was out of the house is when her father began sexually abusing her." (T.861). She testified that Ms. Brown "clearly had a lot of negative emotion and distress in talking about it, even to the point of reliving it and closing her eyes, 'Yuk, his slobber on me' and just very sickened talking about it." *Id*.

Dr. Bailey testified that the sexual abuse by her father stopped when Ms. Brown was still 12 years old, when Melinda moved into the home. (T.862; 959). After Ms. Brown's father got married, Melinda became the priority. (T.863). The children were often found walking the streets late at night and locked out of their house. *Id*. Willie and Melinda often locked themselves up in the bedroom for hours using drugs. (T.863-64). Willie and Melinda had physical altercations, and the situation at home became very chaotic and violent. (T.864). "And that's where you heard testimony about Melinda prostituting Tina." *Id*.

Dr. Bailey testified that our brains develop in response to stimulation. (T. 870). While these early childhood experiences are going on, one's brain is developing. *Id*. "Repercussions from childhood extend for decades into adolescence and into adulthood." (T.871). When asked to describe Tina's development in childhood and adolescence and how it might have affected her, Dr. Bailey listed "on the unhealthy side": born to a teenage mother; parental violence; sexual abuse by father; parental addiction and substance abuse; crime-filled neighborhood; broken relationship with mother; and frequent school changes. (T.871-72). As to the

"healthy, protective factors", Dr. Bailey listed the following: living with both parents until age 12, and having local extended family filling in and helping. (T.873). According to Dr. Bailey, this was not sufficient to help protect Tina from what was going on in her home. *Id*. Having different members filling in for her parents and going from place to place, would not have had any sort of stabilizing effect. (T.888).

Dr. Bailey described the effects of sexual abuse as follows: victims of sexual abuse are seven times more likely to become drug and alcohol dependent based on some research; sexual abuse can cause life-long problems in relationships; and studies show that sexually abused children have very high levels of Cortisol, a stress hormone. (T.879-80). Dr. Bailey also described the effects of drug abuse in the home by parents, noting that substance abuse is modeled, especially if there is already a genetic predisposition. (T.882).

Dr. Bailey testified that a common theme in Ms. Brown's life was repeat trauma. (T.907). Ms. Brown's experiences of parental violence, as well as the physical and sexual abuse, are all considered traumatic. (T.909). Ms. Brown still exhibits some symptoms of her childhood trauma in the form of numbing and avoidance. (T.917). One of the symptoms of trauma is hypervigilance – an excessive feeling that threat is going to get you. (T.920). Neurochemicals come into the body and increase levels of arousal, anxiety, and vigilance. *Id*.

At the point when this crime occurred, Ms. Brown had the chronic stressors of all the things she had lived with as well as financial stress. (T.922-23). On the day of the offense, Ms. Brown used crack heavily. She had used two to three hundred dollars' worth of crack. (T.923). Heather's husband was the drug dealer, but Heather was the supplier. *Id*. On this particular day, Heather was making deliveries for him and Heather would use Ms. Brown's car in exchange for crack. *Id*.

Dr. Bailey testified that crack cocaine is a stimulant, and the most common side effect is paranoia. (T.924-25). "You're ready for fight or flight." (T.925). She explained this paranoia as either an irrational belief that someone will do you harm in the absence of any kind of threat or a belief that is out of proportion to the actual threat. *Id*. This paranoia is short lasting. (T.926). Once you are no longer intoxicated, the paranoia resolves. *Id*. Crack-induced paranoia is worse at higher dosages. *Id*. The dominant long-term effect of crack cocaine is craving. (T.927). "It's intense, it's immediate, and it's strong." *Id*. There is an especially strong craving when one is coming down from the high of crack cocaine. *Id*. There is a decline in sensory gating, the ability to filter out irrelevant stimuli. *Id*.

Trial counsel asked Dr. Bailey: "based on the totality of your evaluation, did you develop an overall opinion of how Tina Brown was affected by all of these stressors and traumas that we've been talking about?" Dr. Bailey's responded: "I mean, I think y'all can develop your own opinions about that." (T.928). Dr. Bailey

then stated that Ms. Brown was exposed to repeated trauma and deficient parenting, and "it basically messed with her and affected her." (T.929). Ms. Brown's development had an impact on "her trust, safety, structure, attachment, childhood intimacy, guidance, those kinds of things." (T.931). Trauma affected these same areas, and results in disengaging, emotional numbing, and avoidance. *Id*.

Dr. Bailey discussed social mediation or social influence that may have been going on during the offense. (T.932). When you involve a group in emotionally laden events, there is an increase in emotional intensity, in goal directedness, and in more extreme behavior. (T.933-35).

During cross-examination, the State tried to simplify Ms. Brown's traumas and addictions: "Would it be fair to say that Tina Brown is able to be sober for extended periods of time when she wants to?"; "She could have made a conscious decision not to smoke crack?"; "There were periods of time when Ms. Brown was gainfully employed?"; "She was involved in two extended treatment programs and obtained years of sobriety?" Dr. Bailey responded in the affirmative to all of these questions. (T.942-47). Dr. Bailey further conceded that the sexual abuse by her father was 27 years prior to the murder, and the sexual abuse by Greg Miller was 17-19 years before the murder. (T.950). Dr. Bailey testified that the immediate euphoric effects of crack cocaine lasts approximately 15-30 minutes, and the crack-induced

paranoia lasts about the same amount of time. (T.952). Both of these effects would occur at the same time. *Id*.

John E. Bingham, a licensed mental health counselor with a doctorate in education, testified for the State. (T.1001). He reviewed materials, sat through penalty phase testimony, and conducted an evaluation of Ms. Brown. (T.1008-09). His evaluation of Ms. Brown consisted of a mental status examination, which he described as a comprehensive evaluation of a person's mental state, combined with biographical and historical information. (T.1009-10).

He found no evidence of psychosis either at the time of the interview or in Ms. Brown's history. (T.1010). He saw no evidence of a depressed mood, although she had a diagnosis of depression while at the Escambia County Jail, which he attributed to her being in jail and facing a first-degree murder charge and possible death sentence. (T.1011; 1039). He testified that there was no history of auditory or visual hallucinations or paranoid thinking. (T.1011-12). Ms. Brown's overall level of intelligence was found to be in the low average range. (T.1012). He did not believe she was under the influence of crack induced paranoia at the time of the offense based on the documents that he reviewed which detailed the incident and contained "goal directed thoughts". (T.1039). In his opinion, the offense did not appear to be an impulsive response to things, but rather, something that had been preplanned. (T.1040).

He testified that he was familiar with the statutory mitigators provided by Florida law and reviewed them as they may pertain to Ms. Brown. (T.1013). He found no indications that Ms. Brown was under the influence of extreme mental or emotional disturbance at the time of this incident. *Id*. He found that Ms. Brown was not suffering from paranoid delusions or crack-induced paranoia at the time of the incident. (T.1015-16). He testified that there was no indication that Ms. Brown acted under extreme duress at the time of the incident. (T.1016). There was no indication that Ms. Brown acted under the substantial domination of another person at the time of the incident. (T.1017). He also found no evidence that Ms. Brown's capacity to appreciate the criminality of her conduct or her capacity to conform to the requirements of the law were substantially impaired. (T.1017-18).

When asked about Ms. Brown's childhood trauma, Dr. Bingham testified that she described going from a normal childhood with her parents at an early age, to one that was not so normal. (T.1020). He testified that she got involved with drugs and then became involved in unhealthy relationships that included domestic violence, drug use, and prostitution. (T.1021). He testified that the time-period during which Ms. Brown described her childhood as being "normal" was up until the time that her mother left and she moved in with her father, around the age of 11 or 12. (T.1022). He stated that these formative years are critical to a child's development and that both sides of her family were supportive of Ms. Brown during that time. *Id*.

When asked what effect, if any, Ms. Brown's traumas had to do with the murder, Dr. Bingham testified that her life experience contributed to her use of cocaine which eventually led to dependency. (T.1023). However, he could not find any cause and effect relationship of how her past caused her to kill a person. *Id*.

II. THE EVIDENTIARY HEARING

A. John Jay Gontarek

Trial counsel agreed he had an obligation to conduct a thorough and independent investigation of both guilt and penalty phase issues. (PC.2737). However, counsel did not seek appointment of a guilt-phase investigator or conduct any sort of independent investigation into the facts of the case himself. *Id*. In fact, his response to a question about whether he conducted any investigation into the facts was simply: "just the discovery, and review police reports, and that kind of stuff." (PC.2742). He never visited the crime scene or spoke to any guilt phase witnesses outside of deposition. (PC.2738; EH. Def. Exh. 1, pp. 33-38; 304-309).

Regarding his strategy, trial counsel said: "this was a penalty phase case, not a whodunit case"; "I tried to put as much as I could on Heather"; "I tried to bring about that this was not a very well planned out murder"; "it was a spontaneous-type thing"; "I was trying to minimize Ms. Brown's actions in the case as much as I could without losing credibility with the jury." (PC.2734-35).

B. Sharon Wilson

Sharon Wilson was the penalty phase attorney for Ms. Brown's case. (PC.2974-75). She testified that she did not interact very much with lead counsel, John Jay Gontarek during the pendency of Ms. Brown's case. (PC.2975). "It was more of a case where he handled one part, and I handled one part." (PC.2976). She acknowledged that part of the guilt phase strategy was to decrease Tina's culpability. (PC.2977). She agreed that it is generally a good idea to have a cohesive theme from the guilt phase through the penalty phase, but Mr. Gontarek was not receptive to this idea. *Id*. She also agreed that there are things that can be presented in the guilt phase that would assist in the penalty phase with respect to culpability. (PC.2978). This would have been consistent with themes in both the guilt and penalty phases to reduce Ms. Brown's culpability. *Id*. Ms. Wilson agreed that Heather Lee was a key witness for the State and that it was important to challenge her credibility. *Id*. If she had information that would have challenged Heather's credibility and her role in the murder, she would have presented such information to the jury. *Id*. This kind of information, if presented in the guilt phase, would have assisted her in the penalty phase. (PC.2979). She agreed that multiple witnesses testifying that Heather confessed to the murder would have been helpful to her in the penalty phase. *Id*.

Ms. Wilson testified that impeaching Heather Lee through prior inconsistent statements or through additional witnesses would have assisted her arguments in the penalty phase as to the culpability of Ms. Brown. (PC.2990). She was hindered in

her penalty phase presentation because Mr. Gontarek refused to present things in the guilt phase to assist her in penalty phase. (PC.2992). It took away from the arguments that she could make and from any evidence that she may have been able to pull from the guilt phase into the penalty phase. (PC.2993).

As part of her penalty phase investigation, Ms. Wilson had Lisa McDermott, a mitigation specialist, appointed by the court. (PC.2982). She also retained psychologist Dr. Elaine Bailey as a defense expert in the case. (PC.2985).

Ms. Wilson was aware that Ms. Brown had a long-time drug addiction. *Id*. She thought it was important for the jury to hear about that, both because it was mitigating and because it was relevant to the crime. *Id*. Dr. Bailey testified about Ms. Brown's drug addiction. (PC.2986). Ms. Wilson agreed that if she had any more specific or detailed information regarding Ms. Brown's drug addiction she would have presented it, if it could have helped Ms. Brown. *Id*. She also agreed that if she had any more information regarding multi-generational struggles with drug addiction in Ms. Brown's family, she would have presented that as well. *Id*. She agreed that evidence Ms. Brown's drug use impacted her brain would have been mitigating and consistent with her penalty phase themes. *Id*. She would have presented such evidence to the jury. (PC.2987).

Ms. Wilson agreed that if there was any neuropsychological testing that revealed that Ms. Brown's brain and her executive functioning skills were

compromised, she would have presented that to the jury. *Id*. Ms. Wilson testified that she was aware that Ms. Brown suffered trauma throughout her life and that this was important to let jurors hear about this. *Id*. Ms. Wilson further testified that if she had more detailed and specific information about the abuse that Ms. Brown suffered, she would have presented this to the jury. *Id*. She also testified that if she had information about additional abusers, she would have presented that to the jury. *Id*. And that such information would have been consistent with her themes at penalty phase. (PC.2988). If she had a diagnosis of PTSD for Ms. Brown she would have presented that information. *Id*.

Dr. Bailey's notes reflect a lunch meeting that occurred with Ms. Wilson to discuss strategy for the case, in which Dr. Bailey wrote: "Considering hiring a substance abuse specialist. Lisa M has recommending (sic) also hiring a neuropsychologist." (PC.2988-89; EH. Def. Exh. 23, Dr. Bailey's notes, pp. 11; 13). Ms. Wilson did not recall this but testified that if Dr. Bailey or Lisa McDermott, also a psychologist, had recommended an addiction specialist that she would have hired one. (PC.2989). Likewise, if they had recommended neuropsychological testing or the hiring of a neuropsychologist, she would have done that as well. *Id*. Ms. Wilson testified that she never had such a conversation with Dr. Bailey nor received Dr. Bailey's notes. (PC.3012). However, Ms. Wilson also testified that she had no reason to believe Dr. Bailey's notes were not accurate. *Id*.

C. Heather Lee

Heather Lee testified at the evidentiary hearing. At the time of the hearing, she was incarcerated at Homestead Correctional Institution. (PC.2787). Ms. Lee accepted a plea to second-degree murder and was sentenced to 25 years for her involvement in this case. *Id*. She admitted that she attended a volunteer class while at Homestead called Hannah's Gift, but denied keeping a journal as part of the class or during her time at Homestead. (PC.2788). She testified that Darren Lee is her husband. (PC.2788-89). He was also her husband back in 2010, when this crime occurred. (PC.2789). She testified that her husband was not cheating on her with the victim or with Ms. Brown. *Id*.

When asked if she ever threatened to kill the victim in front of her husband and Terrance Woods, she claimed to not know Terrance Woods. *Id*. When asked whether she recalled any conversations about the murder with her husband and another male individual in her trailer, she stated: "No. I don't even allow people to come and sit in my trailer long. And if they come visit, I stop them at the door." *Id*.

Ms. Lee claimed to only know of Nicole Henderson, but testified that she did not know her personally. *Id*. She testified that she was not aware that Ms. Henderson had a sister. (PC.2790). Ms. Lee denied trying to fight Ms. Henderson's sister because she thought the sister was sleeping with her husband. *Id*. She admitted that she was housed at the Escambia County Jail prior to being sentenced in this case,

but denied being housed with Nicole Henderson. *Id*. She denied telling Ms. Henderson and other inmates that she lit the victim on fire because the victim was sleeping with her husband. *Id*. She denied telling Ms. Henderson that she would be getting off easy because she was cooperating with the State. *Id*. She also denied telling Ms. Henderson that she had gotten two juveniles to testify against Britnee Miller and Tina Brown. (PC.2790-91). Ms. Lee stated: "First of all, I don't talk about my case with anybody because I don't trust anybody." (PC.2791).

She admitted to knowing Tajiri Jabali, and that she was her girlfriend. *Id*. However, she claimed that she never discussed the case with her. *Id*. She was further questioned about discussions with Ms. Jabali:

> Q: Did you ever tell her that she had better not cheat on you or you would do to the person that she cheated with what you did to your baby daddy's mistress?
>
> A: No, I did not, because my baby daddy didn't have no mistress. I was with him 24/7. I knew every move he made. We went everywhere together.
>
> Q: Did you ever tell her that you killed your husband's mistress because he was cheating on you?
>
> A: No, I did not.

Id. She further denied telling Ms. Jabali that Ms. Brown and Ms. Miller were weak and that she had to do everything herself. *Id*. She denied every threatening anyone while incarcerated at Homestead by saying, "I'll set you on fire." (PC.2792).

She denied knowing both Shayla Edmonson and Jessica Swindle, and denied any conversations with them about lighting a girl on fire because the girl was sleeping with Ms. Lee's husband. *Id*. She also denied telling Ms. Edmonson and Ms. Swindle that she did not regret anything because all of the women involved were sleeping with her husband. *Id*.

Ms. Lee admitted she got a Disciplinary Report while at Homestead for getting a tattoo. (PC.2792; 3965-76). She admitted that one of these tattoos was of flames. (PC.2792). She stated: "I thought it was cool." (PC.2793).

D. Darren Lee

Darren Lee testified at the evidentiary hearing. He was married to Heather Lee during the time of the murder, and they are currently still married. (PC.2801). He testified Terrance Woods would frequently come to his and Heather's trailer and at times when Heather was home. *Id*. Mr. Lee testified to Heather Lee's motive as well as her confession to the murder:

> Q: Do you remember – a few days before the attack on Ms. Zimmerman, do you remember a conversation that happened between you, and Heather Lee and Terrance Woods?
>
> A: Yes.
>
> Q: And what happened – what had happened just prior to that conversation? What was going on outside of the trailer?
>
> A: Heather and Audreanna was fighting.

Q: Okay. And at some point, did Heather – at some point, did Heather come into the trailer?

A: Yes.

Q: And did she make any statements?

A: Yes.

Q: What did she say?

A: She said that I won't be sleeping with that bitch.

Q: And when she said "that bitch", who was she referring to?

A: Audreanna.

Q: Okay. And were you in fact having an affair with Audreanna?

A: Yes.

Q: Okay. And Terrance Woods was present when you – when she made the statement, correct?

A: Yes.

***

Q: Okay. Do you recall another conversation that took place on the night of the murder after Ms. Brown and Heather Lee had gotten back to the police station, do you recall a conversation that took place between you, and Heather and Ms. Brown that night?

A: Yes.

Q: And what did Heather say about the murder at that time?

A: Well, she had talked about how Audreanna was on one leg, like, begging for her life or something. And … that's when she said she poured gas on her.

Q: Okay. Did she say that she lit her on fire as well?

A: Yeah.

***

Q: Do you know whether Heather was familiar with that wooded area?

A: Yeah.

Q: How was she familiar with that area?

A: Because her family stayed back there.

***

Q: And do you recall another conversation roughly two to three days after the murder, again, between you, and Terrance Woods and Heather, do you remember a conversation where she talked about the murder then?

A: Yes.

Q: And what did she say at that time?

A: She stated that I wouldn't be sleeping with her anymore.

Q: With who?

A: Audreanna.

(PC.2802-07).

E. Terrance Woods

Mr. Woods testified at the evidentiary hearing. He grew up in the same neighborhood as Heather Lee. (PC.3118). They had a sexual relationship. *Id*. Mr. Woods met Darren Lee through Heather. *Id*. Mr. Woods testified that Heather and the victim were friends once. (PC.3119). He also testified that Darren Lee and the

victim were having a sexual affair. *Id*. Heather found out about this and, a few days before the crime, had a physical fight with the victim. *Id*. Mr. Woods was in the trailer with Darren when "Heather busted in and said she was going to kill the bitch," referring to the victim. (PC.3120).

Mr. Woods remembers a similar conversation at Darren's trailer a few days after the murder. *Id*. Heather made a statement that "Darren wouldn't be fucking his girlfriend anymore . . . because she killed her." *Id*. Heather Lee said that she had poured gas on the victim and set her on fire. (PC.3121). He further testified that he is familiar with the wooded area where this incident took place. *Id*. "It's behind [Heather's] grandmother's house." *Id*. Mr. Woods testified he sent letters to ASA Jensen prior to trial, seeking to be a witness in the case against Heather Lee. *Id*. He said he was trying to get a reduction in his own sentence by assisting the State with the case. *Id*. He also said he would have testified for the defense, had he been called to trial. (PC.3122).

F. Nicole Henderson

Ms. Henderson first came into contact with Ms. Lee in 2009 as a result of a physical altercation that Ms. Lee had with Ms. Henderson's teenage sister. *Id*. The fight was over Ms. Lee's boyfriend wanting to have sex with her sister. *Id*. She was incarcerated at the Escambia County Jail between 2011 and 2013, and saw Ms. Lee at the jail during this time. (PC.2818). Ms. Henderson overheard Ms. Lee tell another

inmate that "she was going home because she was going to blame it all on Britnee and Ms. Tina, and she's going to get off and live her life". (PC.2818-19). Regarding two juveniles who gave statements against Britnee, Ms. Lee stated that they were going to get on the stand and say what she wanted them to say. (PC.2819). Ms. Lee stated that the reason for the murder "was because her boyfriend had got another young lady pregnant". *Id*.

Ms. Henderson testified that she came into contact with Ms. Brown during their time at the Escambia County Jail. (PC.2820). Ms. Brown "was always sleeping a lot. They said it was because of her medication … you have to wake her up for breakfast, and the guards would have to wake her up again for lunch. But she most – like, sleep most of the time." *Id*. Ms. Henderson never saw her up early in the morning drinking coffee in a common area, as suggested by Corie Doyle at trial. *Id*. "She always stayed on her bunk." *Id*. Ms. Henderson is currently serving a sentence at Lowell Correctional Annex. (PC.2816). She was previously incarcerated at Homestead Correctional with Ms. Lee. (PC.2819). She witnessed Ms. Lee's relationships with other inmates and saw what happened if they cheated on her:

> A: Well, she used to date this girl named Gracie, and her and Gracie used to have it out all the time because Gracie used to cheat, but Heather used to fight the girlfriend that cheated with Gracie about the situation.
>
> Q: Okay. So she would never fight Gracie, she would fight the person who Gracie was cheating on her with?

A: Correct.

(PC.2820).

G. Jessica Swindle

Ms. Swindle was incarcerated at Homestead Correctional Institution with Ms. Lee. (PC.2811). They were in a parenting and bible study class together called Hannah's Gift. *Id*. Oftentimes the women in the class would speak about their crimes. *Id*. Ms. Swindle testified that Heather told the class "that she was there for murder, that she didn't get the death row, and that there was another lady with her, and her daughter was with her also, and that they didn't do anything, that it was just her, that she set a girl on fire that was sleeping with her baby's dad." (PC.2812-13). When Heather spoke about the murder she didn't show remorse. "[S]he was just … not, like bragging but kind of, like … she got away with it and the other one didn't" (PC.2813). Ms. Swindle testified that she did not know Tina Brown. *Id*.

H. Shayla Edmonson

Shayla Edmonson was previously incarcerated at Homestead Correctional Institution with Ms. Lee. (PC.2836). They worked in the mow crew together, lived in the same dorm, and were both in a class called Hannah's Gift. (PC.2837). She described Hannah's Gift as a Christian-based class that dealt with areas such as parenting and anger issues. *Id*. Ms. Edmonson testified that, on a day when the class was discussing anger issues, Ms. Lee spoke about her crime and said that: "she killed

someone and she would do it again because the people that were involved in the case …were sleeping with her husband … and she set the girl on fire." (PC.2838-39).

I. Tajiri Jabali

Tajiri Jabali is currently serving a prison sentence at Lowell Correctional Institution. (PC.2825). She was previously incarcerated with Ms. Lee at Homestead Correctional Institution. *Id*. Ms. Jabali was Ms. Lee's girlfriend. (PC.2825-26). Ms. Lee spoke to Ms. Jabali about the reason she was in prison. (PC.2825). Ms. Jabali stated that Ms. Lee indicated that "she orchestrated taking care of her boyfriend's mistress, and she was kind of the ringleader." (PC.2826). Ms. Jabali then testified about a warning that Ms. Lee gave her when they first began their relationship. *Id*. Ms. Lee told her not to ever cheat on her because if she did, Ms. Lee would do to her what she did to her baby daddy's mistress. (PC.2826-27).

Despite this warning, Ms. Jabali ended up cheating on Ms. Lee during the course of their relationship. (PC.2827). When Ms. Lee found out about it, she made good on her threat. "She beat the girl up. And if the officer wouldn't have came in it probably would have been worse, but she jumped on the girl." *Id*. fight happened right in front of Ms. Jabali. *Id*. "She ran up on the girl when she wasn't even paying attention." *Id*. Ms. Lee then stated: "I told you I was going to get that bitch one way or another. Don't try me." (PC.2828).

Ms. Jabali spoke to an investigator for Britnee Miller named Kirby Jordan. (PC.2828-29). She told Mr. Jordan that she read about the murder in Ms. Lee's journal. (PC.2829). Ms. Jabali stated that Ms. Lee wrote "she got what she deserved because of what she did … the involvement the girl had with her baby daddy, she got what she deserved." (PC.2830; 4586-4608). Ms. Jabali further testified that the journal also described how Ms. Lee got Ms. Brown involved on the night of the murder. (PC.2831). "[S]he was bribing her, I guess, with drugs, and she just kept referring to it in the journal as these – like, referring to them – the two people – the other two people that was involved was these bitches and they act like they were scared and they didn't want to do nothing. She had to, like, force them." *Id*. Ms. Jabali testified that she heard Ms. Lee threaten to set people on fire while they were at Lowell together. (PC.2832). Ms. Lee would say "I'll set your ass on fire." *Id*. She even got a tattoo of flames since she has been incarcerated at Lowell. (PC.3965-76).

J. Dr. Faye Sultan

Dr. Faye Sultan was retained by postconviction counsel. She is a licensed forensic clinical psychologist. (PC.4515-40; Def. EH Exh. 23). Dr. Sultan reviewed relevant documents and interviewed Ms. Brown, her family, and her friends. At the evidentiary hearing, Ms. Brown presented testimony through Dr. Sultan with respect to those interviews of friends and family members. Ms. Brown's cousin, Jerod Coleman, stated: "They would show up with no clothes other than the clothes they

were wearing, no toothbrushes … and would just stay for days." (PC.2884). He remembers this happening from the time the kids were very young up until Tina was about 10 years old. *Id*. They basically had no parents. (PC.2885).

Jerod and his sister, Cidney Matthews, were close in age to Tina and Willie, Jr. (PC.2882). Cidney recalled Ms. Brown's father as "creepy". (PC.2885). She said that when they were children, he would show up at their house in the middle of the day when their parents were not home. The kids would hide and pretend not to be home, because if they let him inside, he would demand kisses from them and other things that made them feel very uncomfortable. (PC.2886). They were afraid to answer the door because of the inappropriate way he interacted with them. *Id*.

"[Jerod] also stated that he came from a family where there was generations of domestic violence." (PC.2885). In fact, domestic violence is what led Ms. Brown's mother to leave her father. Ms. Matthews believed "Ms. Brown's life deteriorated significantly following the separation of her biological parents and that Ms. Brown felt very, very abandoned." (PC.2887). This coincided with when the sexual abuse of Ms. Brown began.

Although Willie, Jr. testified at the penalty phase, new evidence was presented at the evidentiary hearing, through Dr. Sultan, that the jury had not heard. Willie, Jr. "acknowledged that there was a lot of physical violence between his mother and father". (PC.2903). He "recalled a specific incident of violence between his parents;

his father beating his mother and said his mom moved out of the house immediately afterwards. *Id*. After his parents' divorce, Willie, Jr. said that his "father worked very hard to turn the children against their mother". (PC.2902). He added: "He insulted her and he told the children that their mother didn't want them." *Id*.

Willie, Jr. also witnessed great violence between his father and stepmother. *Id*. He stated that he and Tina were scared all the time. *Id*. They were not allowed to play with other children. *Id*. They were often left without food. *Id*. Both of them were physically abused in their house and beaten with hands and electrical cords. *Id*. There was constant violence in the house, as well as screaming and verbal abuse. *Id*. There were a few times when he ran away from home after the beatings. (PC.2904). He kept to himself and tried to stay away from his house as possible. *Id*. As part of his father's involvement with the criminal gang, "at least two drug dealers [were] always at the front of his house and two at the back." (PC.2902). There were drug dealers in and out of the home all of the time. *Id*. His father dealt drugs and involved him in the processing and cutting of drugs. (PC.2901).

In addition to this new testimony about physical abuse in the home, there was also new information presented at the evidentiary hearing regarding Ms. Brown's history of sexual abuse that had not been previously presented. Dr. Sultan testified that in addition to the sexual abuse by her father, Ms. Brown was also raped multiple times by a neighbor during this same time period. (PC.2864-2871). Furthermore,

when Melinda began prostituting Ms. Brown at age 14, grown men would come to the house, spend some time buying and using drugs with Willie and Melinda, and then would be sent to Ms. Brown's bedroom to have sex with her. (PC.2868).

Dr. Sultan testified that years later, Ms. Brown confided in friends about the abuse. Nina McGruder is a friend of Ms. Brown's from Danville, Illinois. She met Ms. Brown during the time that Ms. Brown had a boyfriend named Benny Shaw. (PC.2888). This was around 1999 to 2000. *Id*. "Ms. Brown told Ms. McGruder that she had a terrible childhood, that her father had molested her and that he had prostituted her to his friends in exchange for drugs, that the money that she earned – or she used the word 'gained' from this prostitution supported the drug habits of her father and stepmother." *Id*. Ms. Brown told Ms. McGruder that her mother knew that she was being sexually abused by her father, but she did nothing to protect her, didn't remove her from the home, and didn't attempt to get her to safety. (PC.2889).

Ms. McGruder was aware that Ms. Brown had told her grandmother about the sexual abuse by her father, that her grandmother responded with anger and disbelief, and that their relationship turned to one of rejection and anger. The grandmother completely rejected Ms. Brown and ejected her from her home. *Id*. Ms. McGruder was also aware that there was a great deal of physical abuse by the stepmother of both Ms. Brown and her brother. (PC.2888). Additionally, Ms. McGruder witnessed Benny Shaw being verbally abusive to Ms. Brown and being very controlling over

her. (PC.2891-92). Ms. McGruder described Ms. Brown "as being willing to help with anything that anybody needed. She was a person that would go out of her way to be kind to other people." (PC.2892).

Dr. Sultan further testified that, "Ms. McGruder reported that Ms. Brown had a crack addiction when she first met her." (PC.2891). They would regularly use crack together and she had seen Ms. Brown high many times. *Id*. "She described Ms. Brown as easily dominated and easily led, easily convinced to do dangerous and self-destructive things when she was high." *Id*. Ms. McGruder said that Ms. Brown was "easy prey" when she was high. *Id*.

Kim Washington is another friend of Ms. Brown's. They met around 2004 or 2005 when Ms. Brown was going through the Drug Court program in Danville, Illinois. (PC.2892). Ms. Washington said "Ms. Brown was struggling with sobriety and abstinence at the time she met her." *Id*. Ms. Washington was a participant in the program and later became a sponsor. *Id*. She was a sponsor when she met Ms. Brown and "helped Ms. Brown along her path because she had been along that path, too." *Id*. She described it as: "we are all as sick as our secrets". (PC.2893). Ms. Washington was aware Benny Shaw was physically, mentally, and emotionally abusive to Ms. Brown. *Id*. He would say things to Ms. Brown like "you are worthless, you'll never be anything but a dope girl". *Id*. Ms. Washington was aware Ms. Brown had been sexually abused by a family member and had been prostituted

by her father and stepmother. (PC.2894). Ms. Washington described Ms. Brown's addiction as "severe" and stated that Ms. Brown worked very hard to achieve abstinence during the time that she knew her. *Id*.

Jennifer Malone was an old friend of Ms. Brown's and a former girlfriend of Willie, Jr. *Id*. She was the victim of extreme physical abuse by Willie, Jr. *Id*. Ms. Brown was one of the most influential people in her life. *Id*. She said this because Ms. Brown always looked after her and Willie, Jr. – she made sure that they had food and a place to live. *Id*. Ms. Brown even intervened when Willie, Jr. was being physically abusive to Ms. Malone and tried to protect her. (PC.2895). Ms. Malone and Ms. Brown both had "very horrible childhood histories of abuse." *Id*. Ms. Malone said, "We were both damaged people. We were just trying to make it." *Id*. Ms. Malone knew about some of Ms. Brown's prior relationships. *Id*. "Guns and drugs were normal to us. That was the world we lived in. We lived in the world of guns and drugs." *Id*.

Ms. Malone said "Ms. Brown had been abstinent for a period of about two years at some point while she knew her, that she had worked very hard to become abstinent. She also knew that the abstinence, in part, had ended because Ms. Brown had moved in order to become a stripper . . . very hard to do that work when you were not intoxicated in some way." (PC.2896). She was aware Ms. Brown's husband, Greg Miller, had been very violent with her during their marriage. *Id*. She

had also "witnessed boyfriends of Ms. Brown punching her in the face and that Ms. Brown told her that lots of people had physically abused her." (PC.2896-97).

Greg Miller is Ms. Brown's ex-husband and the father of her children. (PC.2897). They first met in 1989 when she was dating his cousin, Mark. *Id*. When Mark went to prison, Ms. Brown began dating his much older uncle. *Id*. Ms. Brown was18 or 19, and the uncle was in his forties. *Id*. The uncle was a drug dealer, and Ms. Brown was living in his drug houses and using drugs. *Id*. Mr. Miller received a phone call that the uncle was beating Ms. Brown badly, so he "took her from that situation." (PC.2898). That was the beginning of their relationship. *Id*. However, he was also a drug dealer at that time, and was very demanding of her. *Id*.

Mr. Miller acknowledged that he had been physically violent with Ms. Brown. *Id*. He knew that Ms. Brown's father would beat her with his hands and with extension cords. (PC.2899). As young people, they shared many details of their childhoods because neither one of them had a good childhood. (PC.2900). He knew that her father was a big drug dealer, that he was very violent towards her, that he would get drunk or high and beat her with his hands or extension cords. *Id*. When Mr. Miller discovered Ms. Brown had been cheating on him, he took her into a bathroom in the park, made her strip naked, and then beat her with an extension cord. (PC.2899). He knew this was very traumatic for Ms. Brown, having been beaten by her father in the same manner. *Id*. He also knew Ms. Brown and her brother

witnessed their father beating their mother often. (PC.2900). He acknowledged Ms. Brown tried to get away from him because he was selling drugs for a living and she didn't want that life. *Id*.

Mary Lewis met Ms. Brown in 2005 or 2006. (PC.2875). Ms. Lewis owned her own restaurant in Danville, Illinois. *Id*. Ms. Brown approached her for a job and Ms. Lewis turned her away multiple times. *Id*. She kept coming back, asking for work, and Ms. Lewis finally hired her as a dishwasher. *Id*. Ms. Lewis stated: "Tina was the best person I have ever hired. She was a hard worker and was dependable. Tina was never late for a shift and never missed a day of work." *Id*. When she first met Ms. Brown, she appeared to not be using drugs, and that was the woman she got to know for the next two or three years. (PC.2876).

Ms. Lewis purchased a home for Ms. Brown with the goal that Ms. Brown would clear up her credit and buy it back from Ms. Lewis. (PC.2877). She and Ms. Brown worked on renovating the house together. "She was so excited and full of joy about being able to do it. It was the first time in her life she had a place of her own to take care of." *Id*. There was an instance where they went to buy curtains together and Ms. Brown told her that was the very first time she had ever had a covered window where she lived and she found that to be very exciting. *Id*. Ms. Lewis also realized the following about Ms. Brown during their relationship:

> [She] had never had a relationship with someone who didn't want her for her body or want to exploit her body in some way. Ms. Brown's

> sexual abuse and sexual exploitation was very apparent … not just by what Ms. Brown told her because Ms. Brown winded up telling her some things about her childhood … but because it was apparent that their relationship was very unusual and unsettling for Ms. Brown and she wasn't quite sure how to trust it, and she never had anybody just like her for herself instead of what her body could do. (PCR. 2878).

Ms. Lewis noticed difference in Tina when she went to work for Ms. Lewis' brother, who ran a bar. (PC.2879). Ms. Brown had a new boyfriend during that time and her attitude changed. *Id*. Ms. Lewis told Ms. Brown not to take the job at the bar because it was dangerous for her and would expose her to illegal substances. *Id*. Ms. Brown indeed began using these substances again and Ms. Lewis noticed a difference in her attitude. *Id*. Ms. Brown moved out of the house they bought together, stopped paying rent, and failed to show up for work. *Id*. Ms. Lewis discovered money missing from the cash register, as well as checks that had been stolen and cashed. *Id*. When she later saw Ms. Brown, she looked so ashamed. *Id*.

Dr. Sultan testified that from the time of her first interview with Ms. Brown, it was "clear that she was experiencing disruption, disorder of her brain in her cognition, in her information processing, in her impulse control, all of the things that we also know are 100 percent true of trauma survivors, and all of that was apparent from my first interview with her." (PC.2865). She "was not taking any medication either for her physical illnesses or for her psychiatric illnesses the first time that I met her." *Id*. Dr. Sultan gathered from Ms. Brown's DOC records, that she had been off her psychiatric medication about four to six months. (PC.2866). "So at the time

I met her, she was in her natural psychiatric state and her natural medical state." *Id*. "She was experiencing great swings of emotion, was tearful, unable to regulate her emotions, was very, very depressed, thinking about being dead, unable to see anything positive in her life and experiencing a lot of anxiety, very fearful, very worried irrationally and rationally, unable to focus very well, unable to think clearly." (PC.2865-66). "She was not thinking clearly and really talking about very extreme things all over the place; extreme religiosity, extremely nervous and upset and extremely anxious, extremely everything." (PC.2867).

Dr. Sultan met with her a second time, at a later date, when she was back on her medication. (PC.2922). She noted a marked difference between Ms. Brown on the medication versus off the medication:

> Ms. Brown, without psychotropic medication, is extremely anxious, filled with dread, feels quite hopeless and sad, has hallucinations, auditory hallucinations. She does see some things moving so she's got some visual hallucinations as well. She's bombarded with flashbacks of her traumatic events. She has nightmares. She cries uncontrollably. That was the condition I saw her in.

Id. This is the same condition she would have been in when she was out on the street. *Id*. The second time Dr. Sultan saw Ms. Brown "she had been placed on a low-dose of anti-psychotic medication and it made a remarkable difference in terms of her presentation. She was able to control her hallucinations. She was able to control the thoughts that were frightening her. She had fewer nightmares, still some flashbacks,

still had symptoms of PTSD, but not the whole constellation of symptoms that was so unnerving her." (PC.2923).

Dr. Sultan testified about Adverse Childhood Experiences. (PC.2912; 4609). There are ten adverse childhood experiences that have been identified as causing significant risk in the lifetime of a person: emotional abuse; physical abuse; incarceration of a household member; emotional neglect; physical neglect; divorce or separated parents; domestic violence; exposure to substance abuse; depression or mental illness of a family member; and sexual abuse. (PC.2914-15).

Dr. Sultan testified that Ms. Brown has been exposed to all ten of these risk factors. (PC.2915). Research shows that a score of seven out of ten, one in 1,000 people have been exposed to that level of risk. *Id*. "Ms. Brown has been exposed to far greater risk than that." *Id*. When asked about the significance of Ms. Brown having been exposed to all ten factors, Dr. Sultan testified:

> [W]e know that she has disruptive neuro-development. We know that she has social, emotional and cognitive impairment. We know that she has health risks that she's already manifesting in terms of hypertension and diabetes. We know that it increases her risk of disease in the future and significant social problems, and we know that her lifespan has probably decreased as a consequence. . . . [T]hese are predictable outcomes from exposing children to these kinds of experiences.

(PC.2916).

Dr. Sultan explained chronic trauma:

> **Chronic trauma has to do with constantly living in an abusive, a dangerous environment.** And it means that the brain is constantly

> responding to stressors by sending distress signals to the rest of the body. This is how it's manifested in the body. The body reacts. The senses are heightened in the person, and the person is prepared for fight or flight. That is what a trauma response is. The set of responses are repeated many times, and like a strengthening of a muscle, the brain begins to send distress signals even in the absence of real danger or conflict. That means **the person is always in crisis whether there is a crisis externally or not because their brain is now patterned to respond all the time as if there is an immediate danger.**
>
> ***
>
> **A traumatized brain develops in a way that the individual's reactions are governed by her emotions, not by reason.** And so this would describe the life pattern of Ms. Brown and every other traumatized person that I have known during my career.

(PC.2917) (emphasis added).

Dr. Sultan testified that Ms. Brown experienced chronic trauma in the form of sexual abuse, physical abuse, and psychological abuse. (PC.2917-18). This chronic victimizing "shatters a person's sense of safety" and impacts a person's "response pattern." (PCR. 2896). Most people in Ms. Brown's life knew she was being sexually abused, but nobody did anything to help. Ms. Brown had considered her grandmother to be a "stable figure in her life, not to provide stability the way we would think of as consistent nurturing, but rather a place where she would not be hurt." (PC.2868). Her mother had already left the family home when Ms. Brown told her grandmother about the sexual abuse and her grandmother threw her out. (PC.2869).

> **It would have impacted the way that her brain developed. It would have created a sense of constant crisis within her brain so that the parts of her brain that are triggered when a crisis occurs were**

> **constantly being triggered so that she was in constant stress response, crisis response. Abandonment produced a sense of emergency in a child that has biological consequences, brain consequences, thinking consequences, coping consequences, consequences in every possible sphere of life.**
>
> ***
>
> What we know about complex trauma is that each additional trauma compounds the damage of all of the traumas that have occurred before.
>
> ***
>
> Ms. Brown was already abandoned by her mother and then experienced abandonment by her grandmother. And in fact, Ms. Brown . . . had a total sense of disbelief that she could no longer count on anyone in the world for safety of any kind at all. So she's about 13 or 14 when she makes the conclusion that the world is completely unreliable and that she can turn to no one and that in turn does its own kind of damage to a person. So I think the abandonment by the grandmother really made things much worse.

(PC.2869-71) (emphasis added). Dr. Sultan was asked about the impact of knowing that her mother was aware of the sexual abuse and did nothing to help her, as well as knowing that her grandmother had rejected her because of this. She stated:

> **In the language of psychological injury and psychological abuse, what you have just described is about the worst injury that we know about, which is to say if someone is supposed to be a protector, the primary protector, the person who you count on betrays you in that way, has an opportunity to save you or to rescue you and doesn't take it, the injury that is done to the person by that kind of betrayal is very significant, probably it is the worst kind of psychological injury we know about specifically from trauma.**
>
> ***
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> **It's about Ms. Brown's perception that people knew she was in danger, not just her mother, but her uncles, her cousins, and that no one intervened that created that sense of absolute helplessness and despair.**
>
> ***
>
> And so to be completely overwhelmed and to feel like there is nowhere to turn for safety is psychologically overwhelming. That is the very

> definition of trauma, by the way, which is experiences that are psychologically overwhelming outside of the realm of coping for that person, and specifically here we are talking about a child.

(PC.2889-91) (emphasis added).

Dr. Sultan further testified in response to a question by the Court, that **the effect of nobody coming to her aid, "is cataclysmic and it leads to the total collapse of the person because there is no one to whom to turn.**" (PC.2960) (emphasis added).

Dr. Sultan explained how the sexual trauma experienced by Ms. Brown over a number of years would have affected her relationships into adulthood:

> She just never knew how to attach to men who wouldn't harm her. She had a pattern of responding to men as if she were an object, a sexual object. She had a pattern of responding to men where her understanding is that she would be physically beaten, randomly, so without any ability to predict when the physical violence would be arising. And so she formed a pattern of relationships with men, and we see it through the domestic violence arrests that she had and through the stories that she tells about it and corroborated by other people, she was in relationships only with abusers, only with horrible abusers, with people who were violent and egregious with her. They were across the board substance abusers themselves, and provided access to drugs for Ms. Brown and Ms. Brown learned to use substances, to rely on substances to endure the physical and sexual abuse that she was experiencing.

(PC.2872-73).

When asked about coping mechanisms and resilience, Dr. Sultan stated:

> **Many, many people with this kind of background wind up killing themselves … so the fact that she survived into adulthood is in and of itself remarkable**…People with a trauma history like Ms. Brown's don't have any sense of future**. One of the things that happens in the**

> **neurological damage that is caused is that the ability to think for the future, to anticipate consequences in addition to the ability to control impulses or think about what is best to do in a situation, but the sense of future is just gone…That part of the brain has simply not developed. There is no future. There is only surviving the moment.**

(PC.2873-74) (emphasis added).

Physical abuse was prevalent throughout Ms. Brown's life. When discussing the incident where Mr. Miller beat Ms. Brown with an extension cord because he knew her father beat her that way, Dr. Sultan stated: "Abuse that reminds a person of prior abuse is kind of like the double whammy of traumatic responses because you are not just responding to the immediate trauma but to the triggering of the memories of the trauma that took place that were similar." (PC.2899).

Dr. Sultan explained the effects of Ms. Brown's psychological abuse:

> Children are born with still developing brains. The environmental factors involved in psychological maltreatment play a significant role in the postnatal, the after birth brain development. Emotion is regulated by the frontal lobe. Because the frontal lobe is not developed at birth, an infant needs to look to the primary caregiver to learn appropriate reactions to new situations. Therefore, bonding, nurturing and soothing affection are critical to the development of the frontal lobe and consequently the ability to regulate your own emotions. So the way that we describe psychological maltreatment may be to describe it a few ways:
>
> Rejection: Ms. Brown experienced multiple rejections. Being told that she's worthless; having no one inquire about her wellbeing or ask about her dreams or try to make her feel safe.
>
> Isolation: Ms. Brown and her brother were very isolated and didn't really interact with other children. They weren't really permitted to

> leave the home. That is pretty typical of someone living in that abusive environment.
>
> Ignoring: Ms. Brown and her brother were thrown out of the house when the adults wanted to do their drugs, but their emotional needs were also ignored.
>
> Terrorizing: There was fear and threat and terror in Ms. Brown's life.
>
> Corrupting: Ms. Brown's father and stepmother engaged her in inappropriate experiences with substance abuse and sexual abuse.
>
> Humiliation: This was built into many of the experiences that Ms. Brown had. Ms. Brown describes and it is apparent in many of her stories that having her body used over and over again either for money or simply because some larger person, stronger person, decided that she was going to submit is per se humiliating, shaming, degrading.

(PC.2928-29).

Dr. Sultan described Ms. Brown as "highly suggestible" and said there were many examples "of her feeling, forced, being easily coerced into situations that were not good for her." (PC.2929). She explained:

> [W]hen people have assumed power over you, dominance over you your whole life, when your environment and completely unpredictable and unsafe, when anything can happen that can completely roll over your whole person so that you are in danger emotionally, physically, sexually, you are training yourself, your brain, to be submissive. You are teaching yourself, your brain is teaching you, these experiences are teaching you to not have your own voice. So if we look at the number and the severity of the traumas that she endured, she would certainly have turned out to be a person who would be submissive to the demands of other people.

(PC.2930). All of these factors were present at the time of the offense. *Id.*

Dr. Sultan found the two statutory mitigators: Ms. Brown was experiencing extreme mental disturbance at the time of the offense, and she was substantially impaired in her ability to appreciate the criminality of her conduct and to conform her conduct to the requirements to the law at the time of the offense. (PC.2932).

Dr. Sultan also diagnosed Ms. Brown with post-traumatic stress disorder, including a psychotic disorder; major depressive disorder; and anxiety. (PC.2919). Post-traumatic stress disorder is a characteristic set of responses caused by exposure to a trauma. (PC.2920). Ms. Brown is "the picture of complex trauma…one trauma on top of another. PTSD is defined as a serious mental illness characterized by symptoms of avoidance and overall nerve system overarousal…being in a constant state of stress and alert for danger coming." *Id*. In regards to her major depressive disorder, "Ms. Brown has, from the time of her adolescence, experienced feelings of sadness, feeling overwhelmed by life, deriving very little enjoyment from life, has been unable to think clearly." *Id*. "Ms. Brown has sufficient anxiety that I have assigned her the diagnosis … separate from her trauma." (PC.2921). "She is a person who has irrational fears that are directly the consequence of her trauma…she worries, has endless thoughts about terrible things happening, thinks about her death often and becomes anxious when that happens. *Id*. These diagnoses are inexplicably intertwined. Trauma and the neurobiological impairment it causes "creates the setting for all kinds of mental illness to pop up. The symptom pattern that Ms. Brown

exhibits is a common symptom pattern for people with severe trauma. This is a constellation of diagnoses." *Id*.

K. Dr. Drew Edwards

Dr. Edwards is an addiction expert retained by postconviction counsel. He evaluated Ms. Brown and testified at the evidentiary hearing. (PC.4541-53; EH Def. Exh. 30). He testified that addiction is chronic neurobiological brain disease that is characterized by: preoccupation with obtaining and using an intoxicant; neuroadaptive changes in brain structure and function; narrowing of interests; loss of behavior control; underachievement in academics or career; strained personal relationships; rigid "alibi" system; and repeated harmful consequences. (PC.3028).

He explained the way drugs of abuse work in the brain as follows:

> In the brain's reward center, nature rewards us for doing behaviors related to survival: eating, hydration. . . . [D]rugs of abuse highjack that part of the brain. And to put it briefly, the narrowing of interests in drugs is similar to the narrowing of interests of someone who hadn't eaten in a day. They would be preoccupied with obtaining food, and drugs of abuse provide reward that's greater than attaining food. And animal settings have shown animals prefer drugs to food and water and they will die in that preference. They will not take food if there's any pain or shock involved, but they will endure the shock and pain to go get drugs.

Id. Dr. Edwards testified that all of these characteristics of addiction were present in Ms. Brown's case. (PC.3029). He explained:

> The earlier someone is initiated, the more likely they are to become addicted. And that's primarily the result of the development of the frontal brain. That is where our higher learning decision-making – the

> ability to abstract reason, focus, executive function, all those things, they're there. . . . **So you see impulsive, poor decision-making regardless of drug use in young people. You put drug use on that, and the frontal area becomes even more impaired.**

Id. (emphasis added). According to Dr. Edwards, about fifty percent of addiction can be explained by genetic factors. (PC.3030). He explained that genotype includes things such as eye color and genetic diseases, while phenotype is a propensity, increased risk, plus environmental provocation." *Id*. Ms. Brown not only had a likely genetic predisposition – her father was an alcoholic and drug addict – but she also grew up in an environment that was full of trauma and abuse. *Id*.

Risk factors for addiction include early exposure to drugs and alcohol, witnessing domestic violence between one's parents, maternal abandonment, and any kind of trauma or abuse, all of which were present in Ms. Brown's life. (PC.3029; 3031-32). At the time of her parents' divorce and during the time she was sexually abused, Ms. Brown had very little coping skills. (PC.3030).

> She fits the profile of someone who was self-medicating emotional pain because she didn't really have any responsible adults in her life where she could learn how to cope.
>
> ***
>
> [Ms. Brown] **had no external assets either. Her family was a mess and her family, which most young people would turn to if they were hurt, her family was hurting her.**

(PC.3030-32) (emphasis added).

> **Given her history of psychological, emotional injury, she was [] a sitting duck for addiction.** Getting high was the best she'd probably ever felt in her life. You know, her human relationships didn't cause

> her to feel happy and joyful like it would in a healthy family. She wasn't nurtured. In fact, she was raped by the people who were responsible for her care.

(PC.3042) (emphasis added).

Dr. Edwards discussed research involving children who were traumatized at a young age, explaining that MRIs on their brains showed that "emotional trauma" had damaged their brains to such a degree that they were at "high risk of substance abuse." The functional damage in their brains included the burning up of neurotransmitters in the reward center and deficits of "brain chemicals, particularly dopamine and serotonin, that help them feel normal." (PC.3032-33).

Dr. Edwards described cocaine as a stimulant, primarily used in two ways. Dr. Edwards testified about the differences between snorting cocaine and smoking cocaine (or crack):

> The only thing different about smoking cocaine is you avoid the body's ability to metabolize it. **When you smoke it, you bypass the blood system primarily. You go to the lungs, to the pulmonary vein, to the heart, to the carotid artery, right to the pleasure center. So you get 100 percent of the dose to the brain in three seconds. And the high is exponentially higher.** So if we scaled on one to a hundred, snorting cocaine would be a 20, smoking cocaine would be 100.

(PC.3034) (emphasis added).

He further explained that:

> Because of that extreme dose hitting that pleasure center, the dopamine that's responsible for our good feelings is raised to unnatural levels, but it's all depleted…one big hit of crack, the analogy would be like flushing the toilet. You've just flushed all of your available dopamine,

> and then the rest of it is just trying to feel normal again. So without dopamine, you don't feel normal. Your brain is craving dopamine and you interpret that as I need cocaine.

(PC.3035). "None of the natural things that made them feel happy before will make them happy because the dopamine can't be elevated fast enough." (PC.3036).

Dr. Edwards described the withdrawals from crack as happening just as quickly as the initial effects:

> Once you smoke crack, within five or ten minutes you start withdrawal, because it's a fast-acting drug. It gets in and out very fast. So **the withdrawal after several hours gets pretty intense and … symptoms of it are inhibitory control problems, inability to focus, inability to predict consequences, impulsivity, paranoia, overreaction, overstimulation**.

(PC.3037) (emphasis added).

The inhibitory control problems involve the frontal cortex and the amygdala. The frontal cortex is where we decide the consequences of our actions. In addicted people, the frontal lobe fails to function during intoxication or addiction. And so they're really more driven by the animal brain, the hedonic brain, and you see a lot of crimes and a lot of impulsive behavior associated with addiction. (PC.3038). The amygdala, on the other hand, is our fight or flight. It protects us and gives us cortisol and adrenaline when we're threatened. (PC.3037).

When a cocaine addict is impaired, the frontal lobe fails to inhibit urges and impulses. This leads to impulsive behaviors and overreaction. (PC.3038). The addict will "feel a threat when you're coming off of cocaine. And the equivalent of a threat

might be like a pebble, but when you're coming off, it feels like someone threw a brick in your face and you respond inappropriately and irrationally to imagine or real threats." *Id*.

Long-term crack cocaine use functionally damages the brain. (PC.3040). The nervous system is coated with a substance called myelin. During puberty, the myelin strengthens and extends the neurons into the frontal area of the brain so you can perform things like algebra and higher math and abstract concepts. You are able to do these once your frontal brain is working and is developed fully. *Id*. Drug usage and addiction inhibits and causes damage to these neuronal connections to the front brain, thereby affecting impulse control. *Id*.

Dr. Edwards testified to the utter inadequacy of Ms. Brown's prior treatment for addiction. (PC.3042). According to records, her treatment consisted of weekly group meetings, weekly individual counseling, attending NA and AA meetings, and submitting to random drug testing. *Id*. Dr. Edwards testified Ms. Brown treatment was not sufficient to treat her addiction. *Id*. Someone with her history, particularly of the co-occurring issues with trauma, would be referred to a six-month residential program with five years of aftercare. (PC.3043). Additionally, "a special trauma counselor would be brought in to help her deal with that because the literature tells us that if you don't deal with the trauma, relapse is inevitable." *Id*.

When asked about whether Ms. Brown successfully completed this program at the Prairie Center, Dr. Edwards testified:

> According to their checklist she did. But anyone could successfully do that. I mean, she was recommended individual counseling once a week and, of course, she was, I think, court ordered to do that. And **it was a level of care that was willfully insufficient for the level of her illness**. So, yeah – so you can say she did the time, in essence, but **she didn't get treatment adequate to mediate any part of her disease**.

(PC.3048) (emphasis added).

Dr. Edwards found no indication that Ms. Brown ever received any type of substantive treatment to deal with her emotional issues or her addiction, and stated: "AA and NA meeting aren't treatment." (PC.3043). **The individual counseling she received once a week at the Prairie Center was "like putting a Band-Aid on cancer."** *Id*. **"There is no way that is going to help her, with this level of how severely sick this woman was."** *Id*. (emphasis added).

Ms. Brown needed very intensive therapy, according to Dr. Edwards. *Id*.This is because the relapse and craving is so high with cocaine addicts:

> In general treatment population, about 60 to 70 percent of the people relapse within six months without extended care. The model that's used for physicians and pilots and safety sensitive is an inpatient stay, five years of support groups after that and drug testing. And the recovery rate is near almost 90 percent with that type of care. And that's the model we all believe is the best model, because **it's a chronic disease. It's just – you are never cured. The underlying disease state is always there**.

(PC.3043-44) (emphasis added).

Dr. Edwards testified to the importance of also treating the underlying mental health issues that addicts may have. (PC.3044). Such issues are referred to as co-occurring. *Id*. It does not matter which one came first, they should both be aggressively treated. *Id*. "Because if you're five months sober and still depressed, you're going to go back to self-medicating." (PC.3044-45). Dr. Edwards also testified that "in our treatment population, 70 percent of the women in treatment have been sexually abused." (PC.3041).

A support system – to encourage you, to confront you, to hold you accountable for your choices and actions – is absolutely critical. (PC.3045). "When you're addicted and you have no ability to cope with stressors, as soon as stressors happen, you don't know how to cope. You go back to medicating." *Id*. Ms. Brown "wasn't taught any resilience or coping skills in her life…the people who were supposed to nurture her were abusing her." *Id*. Drugs were her only coping skill. (PC.3046). "The more you use, the more loss of behavioral control, the more guilt, the shame, the pain, the consequences, and the more of that, the more you want to use." *Id*.

When asked about whether there can be a conscious decision to relapse, Dr. Edwards stated the following:

> Nora Volkow, the director of NIDA, and probably the best neuroscientist in the country says **there is not [a conscious decision to relapse], that once you're addicted, the intensity of the craving is likened to the intensity of craving if you were dehydrated or starving. And she says there is no choice in that because of our evolutionary survival drive. And she says drugs of abuse,**

> **particularly cocaine, highjack that survival drive, rewarding bad behavior as if it's good behavior.**

(PC.3053) (emphasis added). While crack addicts can plan, their plans are most certainly formed and driven by their addiction. (PC.3058-59).

Ms. Brown had an unusual situation where she could easily obtain drugs, and was therefore, able to maintain a high. (PC.3039). However, on the day of the crime, she had been without crack cocaine for five or six hours. *Id*. At this point, "her nerves are red and raw and she is irritated, easily agitated, and is likely to overreach to a perceived or real threat." *Id*. She reported feeling "agitated, irritated, fearful, afraid she was going to be exposed." (PC.3040). Dr. Edwards opined that Ms. Brown's addiction, combined with the stressors present, impacted her thinking and behavior. (PC.3046). The stressors caused an overreaction for her:

> Without the crack upping her dopamine, she is very depressed, agitated, narrowly focused … she doesn't have inhibitory control, poor impulsive control. The literature talks about aggressive and paranoid behavior, risky behavior, antisocial behavior, and violence is associated with withdrawal from crack cocaine. And as I said, the withdrawal starts within an hour.

(PC.3046-47). Dr. Edwards further opined:

> Her frontal brain has been dysfunctional for a long time, and I don't think she had any good inhibitory control at all, and particularly the ability to predict consequences. A stressor was there … she irrationally processed it as danger and her subsequent behavior was just all reactive in the midbrain and just survival, basically, survival. It's like a cornered animal really.

(PC.3047-48). Dr. Edwards noted the important difference between the high received after smoking crack and the long-term brain damage of a chronic drug user:

> It's the long-term brain damage from her drug use and all the other stressors in her life and all the injuries she [received] emotionally. The cumulative effect of all of that was neuronal degradation between her midbrain and her front brain, unable under stressful situations to respond normally. She responded hedonically…to survive. And that's typical. Prisons are filled with people who 15 minutes of bad choices have got them locked up…and that's kind of what we talk about when we talk about crack.

(PC.3059).

L. Dr. Michael Herkov

Dr. Michael Herkov is a Florida licensed neuropsychologist who was hired by postconviction counsel and testified at the evidentiary hearing. (PC.4554-85; EH Def. Exh. 30). To elaborate on Dr. Edwards' testimony about how drugs affect the brain, Dr. Herkov testified:

> We've heard about how drugs affect the brain in terms of reward, but it's not just that the drug just goes to the reward center of the brain and affects the dopamine and the nucleus accumbens. It – the drug, once it crosses that blood brain barrier, it goes through the whole brain. And so there are dopamine receptors all over the brain, not just in the reward center. They're in the frontal lobe. They're everyplace. And what the drugs do is that they affect every single aspect of cognitive function. Everything that we hear, see, do, think, feel can be affected by the drugs. That's why when you take – when you're inebriated with alcohol, your vision might change. Well, that's because it's affecting the visual cortex in the brain. Or you may stumble when you're on a drug. Well, that's because he cerebellum has been affected by the drug.
>
> So it affects every part of the brain. And, specifically, from my perspective it affects behavior and cognitive development. And not just

> when the person is using the drug, but depending on when the person starts using the drug in terms of the person's whole response to how they view the environment.
>
> ***
>
> It affects our problem solving. You know, does a person who has – using drugs, unable to problem solve? No, they still, quote, unquote, solve problems, they're just not very good at it and they tend to keep making the same mistakes again and again and again. And that's what oftentimes results in this sort of relapsing behavior.

(PC.3070-72).

Dr. Herkov testified about how our brains develop salients. He described salients as the idea of what the brain pays attention to:

> They took two groups of adolescents. . . . [O]ne group who was not a drug user, never used any drugs, the second group who was using a substance. And so what they did was is they hooked them up to a machine that measured their brain functioning and they showed them pictures. And when they showed them a picture of a stapler, the brain didn't particularly react. . . . When they showed them the second picture, which is a crack pipe, when the first group who didn't use drugs, if you would show them something like a crack pipe, their brain didn't really react to that because it's just a dirty glass tube with a bulb on the end of it. But to a group who is using a substance, whether it be cigarettes or whether it be cocaine, the brain activated to that and started releasing dopamine, not because their body was given any drugs, but because their brain knew that that is a picture of something that delivers drugs to my brain and gives me brain reward. **And so very early on, the adolescent brain gets changed and it starts paying attention to things that feed their brain drugs, and not only that, but it stops paying attention to things that aren't related to drugs.**
>
> . . . [N]ow they show them a picture of a nice giant juicy cheeseburger, which, for an adolescent brain, should light that brain up. And it did for the kids who don't use drugs, but for the kids who were using this substance, the brain responded much less to the cheeseburger than the – than for the kids who didn't use drugs.

> **And so the point of this in salient is that once you start using drugs, especially at an early age, the wiring of your brain changes and you start paying attention to the things that are bad for you and not paying attention to things that are good for you.** And so you get to the point, you know, how could this person, you know, sell their child? How could this person do this or do that for drugs? And you understand that the brain has shifted. The things that are rewarding to you or I no longer become rewarding for them, it's only about getting the brain drugs.

(PC.3072-74) (emphasis added).

The brain develops from the back of the brain to the forehead. (PC.3075). The frontal lobe is the last part of the brain to develop and doesn't finish developing until the person is in their mid-20's. *Id*. When a person starts using drugs at a young age, the trajectory of brain is altered. *Id*. "[T]he frontal lobe that would develop the things that you would pay attention to, the impulse control that you would have, the decision-making you would make, the self-correction and monitoring you would have now is fundamentally interrupted by the drug use." *Id*.

Dr. Herkov testified that the neuropsychological research is clear that drugs like cocaine affect long term the person's cognitive functions long after the cocaine has left their system. (PC.3078). There is a significantly large difference between a group who hasn't used cocaine, and a group that has used cocaine, in relation to their attention, executive functioning, and impulse control. (PC.3077-78).

Dr. Herkov testified about the previous psychological testing that Ms. Brown underwent with Dr. Larson in 2011 approximately six or eight months after the

offense. (PC.3078). Dr. Larson gave an intelligence test and an achievement test. (PC.3079). In reference to the achievement test – the WRAT – given by Dr. Larson, Dr. Herkov testified that this is a test that looks at spelling and match ability. *Id*. This is something that one would use if they were doing an evaluation of a child who was having problems in school. *Id*. It is not something he would do in a neuropsychological evaluation. Dr. Herkov testified that Dr. Larson's testing is not considered a full neuropsychological evaluation. *Id*. Dr. Larson also gave Ms. Brown the WAIS-IV. *Id*. Ms. Brown received a full-scale IQ score of 80, which is in the low average range. (PC.3080).

Dr. Herkov also administered the WAIS-IV to Ms. Brown, approximately seven years later. *Id*. In comparing the scores from the two administrations of the WAIS-IV, Dr. Herkov testified that there is significant improvement in Ms. Brown's scores. *Id*. In his opinion, this is explained by the healing process in her brain since she stopped using drugs when she became incarcerated as a result of this case. *Id*. He testified that three significant things would have happened when she became incarcerated that could have impacted her testing scores:

(1) she would have had a more stable environment – a consistent place to sleep; electricity; running water; three meals a day; (2) she's receiving treatment for her mental illness and she's on appropriate medication; and (3) she doesn't have access to alcohol or drugs. (PCR. 3081). In her seven years of no drug use, Ms. Brown's

scores have improved from the borderline and low average range, to the average and high average range. (PCR. 3081). In his professional opinion, the only explanation for this is that we have taken drugs out of her system. (PC.3081-82).

Dr. Herkov opined that had she been given tests of executive functioning near the time of the crime, we would have seen significantly lower scores. (PC.3082-83). Dr. Herkov pointed to the 2012 testing administered when Ms. Brown was transferred to DOC custody after her trial. She was given a brief psychological evaluation called the WASI, an abbreviated IQ assessment. (PC.3083). Ms. Brown scored an 87, an increase of seven points from the 2011 testing Dr. Larson had administered to her. *Id*. Dr. Herkov testified that, given the rates of healing in the brain and given that she had been incarcerated and drug free for many months when tested by Dr. Larson, it is his professional opinion that her scores would have been even lower and more impaired at the time of the offense. *Id*.

SUMMARY OF ARGUMENT

ARGUMENT I: Ms. Brown's court-appointed attorneys failed to provide effective assistance of counsel at the guilt phase of her capital trial by failing to adequately challenge the State's evidence through the cross-examination and impeachment of the State's witnesses. Trial counsel was also ineffective for failing to present witnesses who would have impeached Heather Lee's testimony and implicated her as the ringleader in the crime.

ARGUMENT II: The circuit court erred in finding that evidence of Heather Lee's confessions to Jessica Swindle, Shayla Edmonson and Tajiri Jabali were not newly discovered evidence, nor of such a nature to produce an acquittal on retrial or yield a less severe sentence.

ARGUMENT III: Ms. Brown's court-appointed attorneys failed to provide effective assistance of counsel at the penalty phase of Ms. Brown's capital trial by failing to conduct a reasonably competent mitigation investigation, present adequate mitigation, and consult and present experts to explain the combined effects of Ms. Brown's polysubstance abuse, childhood trauma, and mental illness on her brain.

ARGUMENT IV: Ms. Brown's court-appointed attorneys failed to provide effective assistance of counsel during jury selection for failing to strike Juror Taylor, who stated he would automatically vote for death if he found Ms. Brown guilty of first-degree murder.

ARGUMENT V: The circuit court erred in finding that cumulative error did not deprive Ms. Brown of a fundamentally fair trial.

ARGUMENT VI: Ms. Brown's death sentence violates the Sixth and Eighth Amendments under *Hurst v. Florida* and *Hurst v. State* because her advisory jury did not make the factfindings necessary to sentence Ms. Brown to death under Florida law.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF MS. BROWN'S CAPITAL TRIAL.

An ineffective assistance claim has two components: deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Performance is deficient if it falls below an objective standard of reasonableness, which is defined by prevailing professional norms. *Id*. at 688. To establish prejudice, Ms. Brown "must show . . . a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. "In assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

Trial counsel stated the following with regard to his strategy in Ms. Brown's case: "this was a penalty phase case, not a whodunit case"; "I tried to put as much as I could on Heather"; "I tried to bring about that this was not a very well planned out murder"; "it was a spontaneous-type thing"; "I was trying to minimize Ms. Brown's actions in the case as much as I could without losing credibility with the jury." (PC.2734-35).

Trial counsel agreed he had an obligation to conduct a thorough and independent investigation relating to issues of *both* guilt and penalty phases. (PC.2737). Yet counsel never sought appointment of a guilt-phase investigator, nor did he conduct any sort of independent investigation into the facts of the case himself. *Id*. Counsel testified: "just the discovery, and review police reports, and that kind of stuff." (PC.2742). He never visited the crime scene or spoke to any witnesses outside of depositions. (PC.2738; EH Def. Exh. 1, pp. 33-38; 304-309).

Had counsel properly investigated, he would have discovered confessions by co-defendant Heather Lee to Terrance Woods, Darren Lee, and Nicole Henderson, admitting she set the victim on fire, not Ms. Brown. He not only could have cross-examined Ms. Lee on this, but he could have called these witnesses to impeach her with her admissions and her plans to cast blame on Ms. Brown in order to avoid the death penalty. Furthermore, trial counsel could have used Nicole Henderson's statements to cross-examine the testimony of Corie Doyle, and then could have called Ms. Henderson to impeach Ms. Doyle. Because trial counsel did not conduct an adequate investigation, he was unprepared to challenge the State's case at trial. Not only did he fail to cross-examine witnesses on their prior inconsistent statements, he also forfeited any other viable avenue of impeachment.

A. Failure to Adequately Challenge the State's Evidence through Cross-Examination of Witnesses

1. Failure to Impeach Heather Lee with Prior Convictions

Heather Lee was the *only* eyewitness who testified at trial as to what occurred in the wooded area between herself, Ms. Brown, Ms. Miller, and the victim. (PC.2741; 2753-54). She was the only witness to testify that Ms. Brown poured gas on the victim and set her on fire. Ms. Lee's testimony was crucial to the State's case against Ms. Brown, and challenging her credibility was critical. At the evidentiary hearing, trial counsel attempted to defend his failure to thoroughly attack Ms. Lee's credibility by downplaying her significance to the State's case – in complete contrast to the trial record and counsel's own arguments to the jury.

Q: Would you agree she was the State's star witness? I mean, she was the one putting on the primary testimony for the State?

A: No.

***

Q: …do you agree that challenging her credibility was important? I mean, that was – that was essential to your defense, right?

A: I called her a liar I don't know how many times, but I knew it wouldn't make a difference.

Q: Okay. Would you agree that one of the ways that you can impeach a witness or challenge their credibility is through their prior convictions?

A: I think she had a conviction for failure to appear or something like that. That's not going to make any difference.

Q: That was a felony, though, right?

A: Yeah.

Q: Right. And do you agree that jurors only hear whether it was a felony or crime of dishonesty?

A: No.

Q: You don't think that that's all they can hear?

A: It wouldn't have made any difference.

Q: Okay. And you're aware of the jury instruction, I believe it's 3.8(b), where you can argue conviction of certain crimes is impeachment, so you don't think that would have mattered to argue that?

A: It would not have mattered in this case.

(PC.2753-55). This decision to not impeach Ms. Lee with her prior convictions was not based upon any reasonable strategy. The procedures for cross-examining witnesses as to their prior convictions is well-settled Florida law. Trial counsel seems to imply that if somehow Ms. Lee "opened the door" and began discussing the nature of her offense, all the jurors would hear is that it was a felony conviction for a "failure to appear". Had counsel investigated Heather Lee's background, he would have discovered that she was actually convicted of two felonies and two crimes of dishonesty. The two felonies were both failures to appear, the underlying offense for one being a battery charge, and the underlying offense for the other one being an armed burglary, aggravated battery with a deadly weapon, and aggravated assault, wherein she stabbed a stranger in the back with a knife after chasing him into his hotel room. (PC.3812-66). Had Ms. Lee opened the door to this conviction, trial counsel could have brought out the facts of this prior violent felony. He could have then argued for the jury instruction that due to her prior convictions for felonies

and crimes of dishonesty, the jury should not believe any of her testimony. He could have also argued that she is likely more culpable because she has a violent history. Trial counsel had no reasonable strategy for not investigating Ms. Lee and using her prior convictions for impeachment.

The postconviction court found that trial counsel was not deficient in failing to impeach Ms. Lee with her prior convictions stating: "The record shows that trial counsel made the jury aware that Ms. Lee had been charged with first degree murder in this case and was still convicted of second degree murder after she entered into a plea in exchange for her testimony against Defendant. Ms. Lee's previous criminal record is insignificant under these circumstances." (PC.5234). This finding relies on trial counsel's testimony at the evidentiary hearing that the fact that Ms. Lee pled to second degree murder and was getting a benefit as a result of her plea "was everything". *Id*. This finding ignores the fact that this information came out on direct examination. Trial counsel merely asked the same question on cross-examination. According to this reasoning, it was permissible for trial counsel to not have done anything because of "these circumstances". There is no reason that trial counsel could not have also impeached her with her prior convictions to challenge her credibility. Counsel had no reasonable strategic reason for failing to impeach Ms. Lee with her prior convictions. Failure to investigate and prepare for cross-examination of a testifying co-defendant can never be a reasonable strategy.

2. Failure to Impeach Heather Lee with Prior Inconsistent Statements

Ms. Lee's trial testimony was markedly different than her previously recorded statements and deposition testimony, yet counsel failed to use any of her prior inconsistent statements to impeach her. The postconviction court held that Ms. Brown failed to present evidence to demonstrate how these inconsistencies on such tangential issues would have changed the results of Defendant's trial. (PC.5234-40). This finding is not supported by competent substantial evidence:

First, Ms. Lee was never impeached with her inconsistent statements regarding her whereabouts on the day of the offense. At trial, Ms. Lee testified that she was at home all afternoon on the day of the incident. When asked if anyone was at home with her, she responded, "[m]y husband, Darren." (T.514). However, during her deposition, Ms. Lee testified that she was at Ms. Brown's house around 3:45 p.m. that afternoon and then came home to cook fish, during which time multiple family members came over to her home. (R.429-30). This is also what Ms. Lee told the prosecutor in a recorded interview on April 7, 2011. (PC.3694-97).

Second, Ms. Lee was never impeached with her inconsistent statements regarding who was in the wooded area during the offense. At trial, Ms. Lee described who was present as the victim was being transported to the woods: "I was in the middle of the backseat"; Britnee was in the front passenger seat; and Tina was driving. (T.521-22). Conversely, during her audio statement to the State Attorney on

April 7, 2011, Ms. Lee stated that she was in the middle of the back seat with Britnee Miller and Mallory Azriel on each side. (PC.3703). Ms. Lee further stated during this interview that Britnee Miller and Mallory Azriel were holding her by the truck while Ms. Brown pulled the victim out of the car in the wooded area. (PC.3706-08). However, at trial, Ms. Lee testified that Ms. Azriel was not in the jeep or in the wooded area – only Britnee Miller and Ms. Brown were present. (T.521-23).

Third, Ms. Lee was never impeached with her inconsistent statements about whether she was familiar with the wooded area. At trial, Ms. Lee was asked if she had ever been to the wooded area before, to which she responded, "[n]o, ma'am." (T.522). But, during the taped interview with the State Attorney's Office, Ms. Lee stated that she knew the area because her grandmother lived there. (PC.3706).

Fourth, Ms. Lee was never impeached with her inconsistent statements about blood on her shoes. At trial, Ms. Lee was asked about the blood found on her shoes after she returned to the trailer park with Ms. Brown. Defense counsel asked whether she was trying to clean off the blood, and Ms. Lee responded: "No, I was not." (T.540). However, during her deposition, she stated, "…I tried to get the blood off my shoes." (R.438). Counsel did not question her as to this inconsistency even though a previous witness, Mallory Azriel, also testified that she saw Ms. Lee cleaning blood off her shoes. Additionally, when asked at trial how she got the blood

on her shoes, Ms. Lee responded, "…I stepped in some." (T.530). Yet, at her deposition, she said that the blood "flew" on her while the victim was being hit. *Id*.

Despite having impeachment material in his possession that would have challenged the credibility of the State's star witness against Ms. Brown, trial counsel failed to utilize it. Although he called Ms. Lee a liar during his closing argument, he had put forth no evidence to support that assertion. Had he utilized this available impeachment, he could have argued that she should not be believed because of her prior convictions for felonies and crimes of dishonesty and because of her numerous prior inconsistent statements about the offense. No reasonable counsel would have forfeited the use of all this impeachment material.

3. Failure to Impeach Heather Lee by showing Bias

Trial counsel never asked Ms. Lee about Ms. Brown's affair with her husband, Darren. During Ms. Lee's deposition, she admitted to hearing rumors that Ms. Brown was sleeping with her husband (R.424), and Darren Lee admitted during his deposition that he was sleeping with Ms. Brown. (R.380-81). Yet, counsel never asked Ms. Lee about this motive for testifying against Ms. Brown. The postconviction court found that there was no evidence that Ms. Lee *knew* that her husband was sleeping with Ms. Brown. (PC.5243-45). Even if Ms. Lee only suspected it, which she testified to in her deposition, trial counsel should have asked her about this. Counsel could have then called her husband to say that indeed he was

having an affair with Ms. Brown, as he stated in his deposition. Instead trial counsel usurped the jury's responsibility to weigh the credibility of witnesses. Ms. Lee's credibility was crucial, and this evidence would have shown that she was a biased witness who had multiple motives to shift blame to Ms. Brown.

Trial counsel also never asked Ms. Lee about the victim's affair with her husband, Darren. Ms. Lee had previously accused the victim of having an affair with her husband – which Darren Lee admitted to in his deposition. (R.381-82). Throughout her trial testimony, Ms. Lee stated that she in no way participated in the crime but "was real close friends" with the victim. (T.513). However, two days before the crime, Ms. Lee and the victim got into a physical fight because Ms. Lee confronted the victim about sleeping with her husband. (PC.3389-97). Trial counsel admitted he was aware that Ms. Lee knew the victim was having an affair with her husband. However, the court found that "even if counsel had called Darren Lee and Terrance Woods to testify at trial regarding the affair and the physical altercation, this testimony would have done little to impeach Ms. Lee's trial testimony about Ms. Lee and the victim being 'real close friends'." (PC.5246). This finding is not based upon competent substantial evidence. The reason Ms. Lee was claiming to be "real close friends" with the victim was to deflect from her involvement in the murder. If the jury believed that they were good friends, they would be less likely to believe that she was the ringleader in the assault. The testimony demonstrating that the

victim was having an affair with Ms. Lee's husband, and that Ms. Lee knew about it and had come to blows with the victim over it, shows that they were no longer good friends. More importantly, it shows Ms. Lee had a motive to kill the victim, which was also corroborated by Mr. Lee and Mr. Woods who testified at the evidentiary hearing that that is exactly what Heather Lee set out to do.

4. Failure to Impeach Heather Lee with Darren Lee

Ms. Lee testified at trial that after the incident, Ms. Brown followed her home. (T.532). Once there, Ms. Lee stated she was "shooken (sic)" and "crying" and that her husband "just kept asking what was wrong." (T.550). When the police knocked on the door, Ms. Brown allegedly told Ms. Lee that "[she] better not open the door." (T.532-33). This testimony is contradicted by Darren Lee's deposition testimony. Mr. Lee stated that he was home watching a movie with Ms. Lee and Ms. Brown right before the police arrived. (R.389). The reason no one answered the door when the police knocked was because he was "high." (R.391). Counsel failed to cross examine Ms. Lee about this discrepancy and failed to call Darren Lee as a witness to impeach her statements. The postconviction court held that these events were not mutually exclusive – that Ms. Lee might not have answered the door because Mr. Lee was high and also because Ms. Brown told her not to open the door. (PC.5243). The court's reasoning disregards the gravity of Ms. Lee's testimony that she did not answer the door because Ms. Brown told her not to. The implication is that Ms.

Brown was calling the shots, even after they returned to the trailer. Trial counsel stated that part of his strategy was to minimize Ms. Brown's actions in the case as much as he could without losing credibility with the jury. Challenging Ms. Lee's testimony of why she did not answer the door for police would have supported such a defense strategy, but counsel failed to utilize this information to impeach Ms. Lee.

5. Failure to Impeach Corie Doyle with Prior Convictions

Ms. Doyle's testimony only served to bolster the credibility of Ms. Lee's testimony. Challenging Ms. Doyle's credibility was just as important as challenging Ms. Lee's credibility because Ms. Doyle claimed that Ms. Brown confessed to her, thereby corroborating Ms. Lee's version of what happened to the victim in the wooded area. Trial counsel was asked why he failed to impeach Ms. Doyle with her prior convictions:

> Q: And the same thing with Corie Doyle, I guess, do you agree that it would have – do you think it would have been helpful to – to get her prior convictions and ask her about those?
>
> A: No.

(PC.2753-55). Trial counsel's decision not to impeach Ms. Doyle with her prior convictions was not based upon any reasonable strategy. Ms. Doyle was convicted of one felony and one crime of dishonesty. (PC.3495-3500). Counsel had no strategy for not investigating Ms. Doyle and using her prior convictions for impeachment, which could have been used as a reason for jurors to disbelieve her testimony.

6. Failure to Impeach Corie Doyle with Jail Records

Ms. Doyle testified that prior to her alleged conversation with Ms. Brown, she had "never laid eyes" on Ms. Lee before. (T.608). However, Ms. Doyle's jail movement records tell a different story. (PC.4198-4513; 5252). Ms. Doyle was originally housed in the same dorm as Ms. Lee. She was then transferred to Ms. Brown's dorm, and then sent back to the same dorm as Ms. Lee. *Id.* Ms. Doyle was never questioned about this inconsistency. The Escambia County Jail records clearly indicate that Ms. Doyle was housed with Ms. Lee for a period in July 2011, prior to her being moved to Ms. Brown's dorm in October 2011. *Id.* During Ms. Doyle's deposition and trial testimony she was adamant that the only reason she spoke to Ms. Brown initially was because her jumpsuit color was different than the rest of the inmates. (T.606; PC.3470). Yet, she testified in her deposition that Ms. Lee was also wearing this same lime green jumpsuit. (PC.3475). If Ms. Brown's lime green jumpsuit was so eye-catching and distinct, then Ms. Lee's same colored jumpsuit would also have stood out to Ms. Doyle in July 2011, prior to her ever having met Ms. Brown.

Trial counsel was asked about these jail records at the evidentiary hearing. He testified that he "guessed jail records that reflected Corie Doyle was housed with Heather Lee before she was housed with Tina Brown might have been helpful in attacking Corie Doyle's credibility." (PC.5252-54). Regardless of trial counsel's

concession, the postconviction court found this claim to be "facially insufficient for failing to allege specific, proper prejudice." *Id*. In its reasoning, the court cited to Ms. Doyle's jail records which were entered into evidence by Ms. Brown at the evidentiary hearing, and stated that even though Ms. Doyle appears to have been in the same dorm with Ms. Lee first, she might not have noticed her. *Id*. This ignores Ms. Doyle's testimony that the only reason Ms. Brown stood out to her was because of the color of her jumpsuit. If the lime green jumpsuit stood out on Ms. Brown, it should have also stood out on Ms. Lee. Trial counsel could have challenged Ms. Doyle on this and argued her credibility to jurors.

7. Failure to Impeach Corie Doyle with Deposition Statements

Ms. Doyle made statements during her deposition that could have been used to challenge the credibility of her trial testimony against Ms. Brown. Ms. Doyle admitted to seeing news reports about the case before she ever spoke to Ms. Brown. She recalled hearing that there was a girl that was lit on fire and that she was taken by helicopter, but that before she died, she said the girls' names. (PC.3490-91). Counsel missed the opportunity to question Ms. Doyle on this alternate source of information. The postconviction court found that that "Ms. Doyle's deposition testimony only seems to support a conclusion that Ms. Doyle learned the details of the murder from Defendant and not the news." (PC.5251). This finding ignores the fact that Ms. Doyle's deposition reflects details that were factually wrong about the

murder. This would support a conclusion that she learned about the murder from the news and then embellished details on her own.

For example, Ms. Doyle testified in her deposition about details given to her by Ms. Brown about the murder. Specifically, she alleged: "When she caught that girl on fire, she said that – she giggled about it, and she was like, as funny as it sounds, my daughter was so screwed up, that she accidentally caught herself on fire." (PC.3474). The postconviction court found that "[a]lthough the information regarding Britnee Miller catching on fire might have been incorrect, the fact that Corie Doyle knew the details of the beating and the tasing, without proof that she saw any news reports regarding those details of the crime, makes her testimony that much more powerful." (PCR. 5257-58). However, had counsel cross-examined Ms. Doyle at trial as to these previous statements made during her deposition, he would have been able to argue in closing that her statements were unreliable because there was no physical evidence to support the claim that Britnee Miller caught herself on fire. He would have also been able to argue that she concocted this story based upon information she had seen in the news about the murder.

8. Failure to Impeach Corie Doyle with Nicole Henderson

Ms. Doyle testified that Ms. Brown confessed to her early one morning while Ms. Doyle was up drinking coffee and reading a book. Had counsel hired an investigator to look into this allegation, he would have uncovered the following

information: Nicole Henderson was also incarcerated with Tina Brown at the Escambia County Jail prior to Ms. Brown's trial. (PC.2820). During this time, Ms. Brown was heavily sedated on medication and slept a lot. *Id*. Ms. Henderson never saw Ms. Brown wake up early, and she always needed to be pushed to go eat breakfast, nor did she ever see Ms. Brown alone in the common area drinking coffee early in the morning. *Id.* All Ms. Brown did was sleep. *Id.* This information would have directly refuted Ms. Doyle's story about Ms. Brown's confession, and would have further called into question Ms. Doyle's credibility.

The postconviction court found that Ms. Henderson's testimony did nothing to refute Ms. Doyle's testimony. The court cited to Ms. Henderson's affirmative answer on cross-examination when she was asked whether it was *possible* that Ms. Brown ever got up early. (PC.5229). This finding is not based upon competent substantial evidence. Ms. Henderson testified that it was Ms. Brown's routine to sleep late, and that she needed to be pushed to get up for breakfast. This evidence challenges the credibility of Ms. Doyle's assertion that Ms. Brown was randomly up one morning drinking coffee when she decided to confess to Ms. Doyle.

B. Failure to Present Witnesses Who Would Have Impeached Heather Lee's Testimony and Implicated Her as the Ringleader

Trial counsel refused to acknowledge any other possible method that he could have utilized to impeach Ms. Lee:

Q: Do you think that attacking Heather Lee's credibility in the guilt phase, or doing everything you could to attack her credibility in the guilt phase, could have assisted in the penalty phase to argue culpability?

A: No.

Q: You don't think that if the jury believed that Heather Lee was more culpable, that they would be more inclined to vote for life for Tina?

A: I mean, I tried to play that card by saying, look, she got a deal for 20 years or something and, you know, if she got that deal, why can't Ms. Brown get life, or something. I think Ms. Jensen went nuts, I'm not mistaken.

Q: Okay. Do you think that any confessions by Heather Lee would have been helpful to you?

A: No.

Q: You don't think that would have challenged her credibility?

A: Nope.

Q: Would you have presented a witness who testified to any confessions that she had made? That Heather had made.

A: No.

Q: Would you have presented a witness who testified – who would testify to – to information showing that Heather was the mastermind behind the crime, or that she had no remorse?

A: That – that Heather had no remorse?

Q: Uh-huh.

A: Or – I probably would have considered that.

Q: Do you think that's something the jury would have wanted to hear?

A: I thought the thing the jury needed to hear was Heather Lee got 20 years, why can't Ms. Brown get life? To me, that mattered.

(PC.2758-59). The gist of counsel's defense strategy at trial is essentially: Heather got a deal, why can't Tina get a deal? Such an argument was easily defeated by the State, who argued that Heather got a deal because she was less culpable. Trial counsel forfeited avenues for impeachment that he could have used to give the jury a reason to give Ms. Brown life, in light of Ms. Lee's greater culpability.

Trial counsel further stated:

Q: If you – for instance, if you had people at the jail who would testify that Heather had confessed to them –

A: Jailhouse rats?

Q: A witness at the jail.

A: Right, jailhouse snitches and rats? I – I didn't have any -- I don't go with those people.

Q: Okay. Even if they have useful information, you generally don't use –

A: No, they lie.

(PC.2762-63).

Trial counsel's conclusory statement that jailhouse witnesses always lie is not reasonable. His reasoning is based on the idea that jailhouse witnesses lie because they want some benefit. However, this is exactly what Ms. Lee was doing. It was

unreasonable to completely forgo this area of investigation and this avenue to impeach Ms. Lee and Ms. Doyle. Trial counsel's purported reasoning is undermined by the fact that he did call a jailhouse witness, Wendy Moye, at Ms. Brown's trial. (PC.2777). When asked about this by the State, he testified:

> Q: Well, let me ask you this: The fact that she was housed with … Heather Lee and said Heather Lee confessed, did you feel like that was helpful for your case?
>
> A: Yeah, I mean, it was but I didn't want to believe it.
>
> Q: Okay. Did you feel like parading five other witnesses who said the same thing was going to be helpful for Tina Brown?
>
> A: No, I didn't.
>
> Q: Okay. If these witnesses had prior convictions or were trying to seek favors from the State, did you think that would be helpful?
>
> A: No.

Id. If trial counsel was worried about giving jurors the impression that jailhouse witnesses only want a benefit and should not be believed, then he was deficient for failing to present corroborating testimony, such as that from Nicole Henderson. Trial counsel's post hoc rationalization that witnesses who had prior convictions would not be helpful to the defense contradicts his previous statements that Ms. Lee's prior convictions would not have mattered to the jury. According to trial counsel, the jury would not have cared if Ms. Lee had prior convictions, but he would not call a

witness for the defense – regardless of what they had to say – if they had prior convictions because that would not be helpful. This is illogical.

Counsel's utter refusal to acknowledge any means by which to properly challenge the State's case and defend his client, and his statements that "nothing would have mattered", is indefensible and should not be given any deference by this Court. Trial counsel cannot simply throw his hands up in the air and do nothing because the facts were so "overwhelming and horrific". (PC.2735; 2770). Counsel had no reasonable strategy for not presenting such witnesses and evidence to impeach Ms. Lee and Ms. Doyle. His stated strategy was to "try to put as much on Heather as he could without losing credibility with the jury." Impeaching Ms. Lee with her prior inconsistent statements would not have cost him any credibility with jurors. Impeaching her with testimony from other witnesses and challenging her involvement and culpability would have supported his strategy of trying to blame Ms. Lee and decrease Ms. Brown's culpability. Merely calling a witness a liar in closing, without having put forth any evidence to substantiate that argument, is not reasonable. It was likewise important to challenge Ms. Brown's confession to Ms. Doyle, yet counsel failed to present such evidence and had no reasonable explanation for failing to do so.

1. Darren Lee

Counsel's failure to call Mr. Lee as a witness was unreasonable and prejudicial. At the evidentiary hearing, counsel did not recall Mr. Lee, Heather Lee's husband. (PCR. 2761). He was not present for Mr. Lee's deposition, but testified that he *probably* would have read it. (PC.2761; 3418-61). When asked about the possibility of presenting testimony by Mr. Lee to impeach his wife, counsel stated that he did not think Mr. Lee could provide them with any useful information. Counsel testified that he did not believe that testimony of Heather's confession to him and Mr. Woods would have been useful to impeach her credibility. (PC.2761).

Darren Lee testified that Terrance Woods would frequently come to his and Heather's trailer and at times when Heather was present. (PC.2801). Mr. Lee testified that a few days before the offense, Ms. Lee and the victim were outside the trailer fighting. Ms. Lee came inside the trailer, where Mr. Lee was with Terrance Woods, and told him: "You won't be sleeping with that bitch." Mr. Lee confirmed that he was indeed having an affair with the victim. Mr. Lee recalled another conversation that took place on the night of the offense after Ms. Brown and Ms. Lee had returned to his trailer from the police station. Ms. Lee said that the victim was on one leg, begging for her life, and that's when she said she poured gas on her. Ms. Lee also stated that was the one who lit the victim on fire. Mr. Lee recalled another conversation roughly two to three days after the offense between himself,

his wife, and Terrance Woods, whereby Ms. Lee stated that he (Darren Lee) wouldn't be sleeping with the victim anymore. (PC.2802-07).

The postconviction court held that regardless of the testimony presented at the evidentiary hearing, Mr. Lee never made any statements to police or during his deposition regarding Ms. Lee's confession to the murder, and that counsel cannot be ineffective in failing to present Mr. Lee as a witness on this issue when he never made any statements regarding his wife's confession prior to the evidentiary hearing. (PC.5270; 5273). The court further stated: "A review of the deposition shows that even though Darren Lee testified to having an affair with the victim, Darren Lee was instructed not to answer any questions about what Heather Lee told him." (PC.5270).

Mr. Lee was not represented at the deposition by counsel. It was Ms. Lee's attorney who instructed him not to answer questions that may invoke the marital privilege. However, after subsequently taking the deposition of Mr. Woods, trial counsel was on notice that statements about the murder were made by Ms. Lee to *both* her husband and Mr. Woods, therefore, no marital privilege applied. No reasonable counsel would have failed to follow up on this. Counsel could have done a motion to re-depose Mr. Lee based on the information gained during the deposition of Mr. Woods. Ms. Brown's claim specifies that counsel both failed to investigate Darren Lee and failed to call him as a witness at trial. As a result, the jury never heard this confession by Ms. Lee. Had jurors heard this testimony, corroborated by

other witnesses, the result of these proceedings would have been different. There is a reasonable probability that confidence in the outcome is undermined.

2. Terrance Woods

Counsel's failure to present the testimony of Terrance Woods was unreasonable and prejudiced Ms. Brown. Trial counsel did not recall Mr. Woods at the time of the evidentiary hearing but stated:

> Q: If he had testified in his deposition to conversations that took place both before and after the attack on Ms. Zimmerman between himself, and Heather Lee and Darren Lee, do you think you could have used that information to – to challenge the State's theory of the case?
>
> A: Unless I didn't believe him.

(PC.2761). He stated this without giving any reason as to why Terrance Woods should not be believed, and despite the premise that credibility determinations are for the jury to make. He was present for the Mr. Woods' deposition and testified that he would have reviewed this deposition in preparation for trial. (PC.2760).

Mr. Woods testified at the evidentiary hearing consistent with the deposition he gave pretrial and consistent with his correspondence with the State. (PC.3377-3417; 5074-85). Critically, Mr. Woods testified that Darren and the victim were having a sexual affair. (PC.3119). Ms. Lee found out about the affair and, a few days before the murder, had a physical fight with the victim. *Id*. Mr. Woods was in the trailer with Darren when "Heather busted in and said she was going to kill the bitch,"

referring to the victim. (PC.3120). A similar conversation occurred at the Lee's trailer a few days after the murder. *Id*. Ms. Lee made a statement that "Darren wouldn't be fucking his girlfriend anymore . . . because she killed her." *Id*. Ms. Lee said that she had poured gas on the victim and set her on fire. (PC.3121).

Mr. Woods stated that if he been subpoenaed for trial by the defense, he would have testified, just as he did at the evidentiary hearing. (PC.3122). Counsel had no reasonable explanation as to why he did not call Mr. Woods, who would have pointed the finger at Ms. Lee as the ringleader of the offense and supported the defense theory of the case. Furthermore, Mr. Woods's testimony regarding Ms. Lee's statements is corroborated by Darren Lee. Counsel was deficient for not presenting this testimony at trial. Had the jury heard this compelling and corroborative testimony, the result would have been different.

The postconviction court held that this testimony by Mr. Woods – that Ms. Lee admitted to pouring the gasoline and setting the victim on fire – would not have refuted the State's theory that Ms. Lee was less culpable than Ms. Brown because such evidence had already been presented through Wendy Moye, and because the evidence was very strong against Ms. Brown, even if Ms. Lee did indeed pour the gas and set the victim on fire. (PC.5265). However, Ms. Moye's testimony was easily impeached by the State when they argued that she was not credible because she threatened to withdraw her testimony if she was not moved to another jail

facility. (T.644-45). Having more than one witness corroborate Ms. Lee's confession would have been much more compelling. Moreover, the court neglected to consider the impact of this evidence for penalty phase arguments as to culpability. This would have supported the defense that Ms. Brown was less culpable, especially considering the State argued that Ms. Lee was less culpable because she just stood by and watched, while Ms. Brown set the victim on fire.

As to Terrance Woods' testimony regarding Ms. Lee's motive, the court found that trial counsel was deficient for not calling him as a witness, stating:

> This Court cannot ignore the fact that Terrance Woods' testimony has never wavered on the topic of the affair, Heather Lee's discovery of the affair, and her reactions to the affair. Counsel gave no good reason at the evidentiary hearing why he did not call Terrance Woods as a witness. While trial counsel indicated he would not have called Terrance Woods "if he thought he were lying," this reason is not sufficient under these circumstances. Short of counsel having actual knowledge that Terrance Woods was lying, the stakes were simply too high for counsel not to call Terrance Woods as a witness. Considering the fact that Defendant was facing the death penalty, this Court finds that trial counsel was deficient in not presenting Terrance Woods' testimony regarding Heather Lee's motive in this case.

(PC.5266). Ultimately, though, the court found that this testimony about Ms. Lee's motive would still not have changed the evidence presented regarding Ms. Brown's participation in the crime. *Id*. Again, this would have had an impact for penalty phase arguments. Trial counsel's defense was trying to lessen Ms. Brown's culpability and Mr. Woods' testimony would have done just that.

3. Nicole Henderson[7]

Counsel's failure to call Ms. Henderson as a witness was unreasonable and prejudiced Ms. Brown. Ms. Henderson met Ms. Lee around 2009. (PC.2817). She first came into contact with Heather Lee as a result of a physical altercation that Heather Lee had with Ms. Henderson's teenage sister. *Id*. The fight was over Heather Lee's boyfriend wanting to have sex with her sister. *Id*. This testimony about Ms. Lee's altercation with Ms. Henderson's sister shows a fact pattern very similar to the one that played out in this case, wherein Ms. Lee went after the victim who was sleeping with her husband, rather than going after her husband.[8]

Ms. Henderson was incarcerated at the Escambia County Jail between 2011 and 2013. (PC.2818). She saw Ms. Lee at the jail during this time. *Id*. She overheard conversations between Ms. Lee and another inmate about the murder. *Id*. Ms. Lee stated that "she was going home because she was going to blame it all on Britnee and Ms. Tina, and she's going to get off and live her life". (PC.2818-19). With regard to the two juveniles who gave statements against Britnee, Ms. Lee stated that they were going to get on the stand and say what she wanted them to say. (PC.2819). Ms.

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[7] Nicole Henderson is also mentioned *infra* in the Newly Discovered Evidence claim. However, the information discussed in this section is only in reference to the evidence that she became aware of *before* Ms. Brown's trial.

[8] *See* Newly Discovered Evidence argument *infra* regarding additional instances of the same pattern of violence by Ms. Lee that would have been admissible at trial as reverse *Williams* rule evidence.

Lee stated that the reason for the murder "was because her boyfriend had got another young lady pregnant". *Id*.

The court stated that it was doubtful that Ms. Henderson's testimony would be admissible regarding a conversation she overheard between Ms. Lee and another inmate. (PC.5274). And that even if it was admissible, it would not have made a difference because Ms. Lee was simply bragging. *Id*. It certainly would have been admissible as impeachment evidence against Ms. Lee, just as the testimony of Ms. Moye was admissible as impeachment evidence. And just because Ms. Henderson thought Ms. Lee was bragging about the murder certainly doesn't mean that what she said was not true. Those two things are not mutually exclusive.

In furtherance of it's holding on this claim, the court pointed to the testimony of Ms. Moye, which had already been presented at trial, as if to say that a defendant can only present one witness per topic. (PC.5275). Trial counsel had knowledge prior to trial about rumors at the jail that Ms. Lee had confessed to the murder. It was unreasonable not to investigate this and present the testimony of Nicole Henderson. Even though counsel presented the testimony of Wendy Moye as to Ms. Lee's confession, multiple witnesses testifying that Ms. Lee confessed to the murder would have been much more compelling.

Ms. Henderson stated that she also came into contact with Ms. Brown during their time at the Escambia County Jail, prior to Ms. Brown's trial. (PC.2820). She

stated that Ms. Brown "was always sleeping a lot. They said it was because of her medication … you have to wake her up for breakfast, and the guards would have to wake her up again for lunch. Bust she most – like, sleep most of the time." *Id*. Ms. Henderson never saw her up early in the morning drinking coffee in a common area, as suggested by Ms. Doyle at trial. *Id*. "She always stayed on her bunk." *Id*.

The court found that Ms. Henderson's testimony did not refute Ms. Doyle's testimony because Ms. Henderson admitted that it was possible that Ms. Brown got up early one morning. (PC.5275). This finding is not based upon competent substantial evidence. Ms. Henderson testified that it was Ms. Brown's routine to sleep late, and that she needed to be pushed to get up for breakfast. This evidence challenges the credibility of Ms. Doyle's assertion that Ms. Brown was randomly up one morning drinking coffee when she decided to confess to Ms. Doyle. Had the jury heard the testimony of Ms. Henderson, the result would have been different. Counsel had no reasonable strategy for not investigating the rumor at the jail and not presenting the testimony of Ms. Henderson.

II. THE CIRCUIT COURT ERRED IN FINDING THAT NEWLY DISCOVERED EVIDENCE WAS NEITHER NEWLY DISCOVERED NOR WAS OF SUCH A NATURE AS TO PRODUCE AN ACQUITTAL ON RETRIAL OR YIELD A LESS SEVERE SENTENCE.

To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements. First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant

or defense counsel could not have known of it by the use of due diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See Jones v. State*, 591 So.2d 911, 916 (Fla. 1991); *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998). Newly discovered evidence satisfies the second prong of this test if it weakens the case against the defendant so as to give rise to a reasonable doubt as to his culpability. *Jones v. State*, 678 So.2d 309, 315 (Fla. 1996). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. *See Jones v. State*, 591 So.2d at 915.

In applying this two-prong test, the court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Jones*, 591 So.2d at 916. This determination necessarily includes consideration of whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence; whether this evidence is cumulative to other evidence in the case; whether this evidence is material and relevant; as well as whether there are any inconsistencies in this newly discovered evidence. *Jones*, 709 So.2d at 521.

The newly discovered evidence presented by Ms. Brown regarding Ms. Lee's involvement in the murder was primarily in the form of confessions made by Ms. Lee to fellow inmates since her incarceration after pleading to second-degree murder

in this case, as well as a specific pattern of violent behavior directed at the paramours of her romantic partners. Ms. Brown submits that the newly discovered evidence presented at the evidentiary hearing would both weaken the case against her so as to give rise to a reasonable doubt as to her culpability, and yield a less severe sentence.

A. Heather Lee's Confession to Jessica Swindle

Jessica Swindle was incarcerated with Ms. Lee. (PC.2811). During their incarceration, they were in a class together called Hannah's Gift, wherein Ms. Lee told the class: "that she was there for murder, that she didn't get the death row, and that there was another lady with her, and her daughter was with her also, and that they didn't do anything, that it was just her, that she set a girl on fire that was sleeping with her baby's dad." (PC.2812-13). When Ms. Lee spoke about the murder she didn't show remorse. "[S]he was just … not, like bragging but kind of, like … she got away with it and the other one didn't". (PC.2813).

These statements are relevant because they go directly to Ms. Lee's involvement in the murder, as well as her motive for the murder. At trial, she painted herself as just another victim of Ms. Brown. These statements constitute impeachment evidence against Ms. Lee. Ms. Swindle's testimony would be admissible at a new trial because these are prior inconsistent statements and could be used to impeach Ms. Lee and her assertions of merely being a victim in the attack.

B. Heather Lee's Confession to Shayla Edmonson

Shayla Edmonson was also incarcerated with Ms. Lee. (PC.2836). They worked in the mow crew together, lived in the same dorm, and were both in a class called Hannah's Gift, wherein Ms. Lee stated: "she killed someone and she would do it again because the people that were involved in the case …were sleeping with her husband … and she set the girl on fire." (PC.2837-39).

Much like the statements to Ms. Swindle, these statements are relevant because they go directly to Ms. Lee's involvement in the murder. Additionally, these statements made to Ms. Edmonson reveal not only Ms. Lee's motive for the murder, but her motive for blaming the murder on Ms. Brown: "*the people* ... involved … were sleeping with her husband." *Id*. (emphasis added). This statement indicates that she knew the victim and Ms. Brown had both been sleeping with her husband. These statements constitute impeachment evidence against Ms. Lee. Ms. Edmonson's testimony would be admissible at a new trial because these are prior inconsistent statements and could be used to impeach Ms. Lee's testimony concerning her involvement in the murder.

C. Heather Lee's Confession to Tajiri Jabali

Tajiri Jabali was not only incarcerated with Ms. Lee, but was also involved in an intimate relationship with her. (PC.2825-26). Ms. Lee told her that "she orchestrated taking care of her boyfriend's mistress, and she was kind of the ringleader." (PC.2826). In addition to Ms. Lee's verbal statements, Ms. Jabali also

read about the murder in Ms. Lee's journal. (PC.2829). Ms. Lee wrote in her journal that the victim "got what she deserved because of what she did"; that she bribed Ms. Brown with drugs; that Ms. Brown and Ms. Miller were scared and didn't want to do anything; and that she had to force them. (PC.2830-31; 4586-4608).

These statements are relevant because they directly contradict Ms. Lee's trial testimony about not only her involvement in the murder, but also Ms. Brown's involvement. Additionally, these statements reveal Ms. Lee's motive for the murder. and constitute impeachment evidence against Ms. Lee. Ms. Jabali's testimony would be admissible at a new trial because these are prior inconsistent statements and could be used to impeach Ms. Lee's testimony concerning her involvement in the murder.

D. Similar-Fact Evidence of Heather Lee's Pattern of Violence as Witnessed by Tajiri Jabali

Ms. Jabali also testified to a pattern of violence by Ms. Lee that she witnessed. When they first began their relationship, Ms. Lee told her not to ever cheat on her because if she did, Ms. Lee would do to her what she did to her baby daddy's mistress. (PC.2826-27). When Ms. Jabali ultimately cheated, Ms. Lee made good on her threat and brutally attacked the other girl. (PC.2827). Ms. Lee then told Ms. Jabali: "I told you I was going to get that bitch one way or another. Don't try me." (PC.2828). Other times, Ms. Jabali heard Ms. Lee threaten to set people on fire, saying: "I'll set your ass on fire." (PC.2832).

Such evidence that similar offenses were committed by another person, in this case, by Ms. Lee, would be admissible at trial as reverse *Williams* rule evidence. The test for admissibility of reverse *Williams* rule evidence is relevancy. *Traina v. State*, 657 So.2d 1227 (Fla. 4th DCA 1995), *citing State v. Savino,* 567 So.2d 892 (Fla. 1990). In *Savino,* this Court stated:

> When the purported relevancy of past crimes is to identify the perpetrator of the crime being tried, we have required a close similarity of facts, a unique or "fingerprint" type of information, for the evidence to be relevant. If a defendant's purpose is to shift suspicion from [herself] to another person, evidence of past criminal conduct of that other person should be of such nature that it would be admissible if that person were on trial for the present offense.

Id. at 894. The testimony by Ms. Jabali is relevant because in this case, Ms. Lee found out that the victim had been sleeping with her husband, and rather than taking any revenge on her husband, she chose to retaliate against the victim. Ms. Lee's pattern of retaliation against the person who her significant other is cheating on her with, rather than her significant other is precisely the type of similar-fact or "fingerprint" evidence envisioned by this Court in *Savino*.

E. Similar-Fact Evidence of Heather Lee's Pattern of Violence as Witnessed by Nicole Henderson

Ms. Henderson[9] was incarcerated with Ms. Lee, whom she knew from living in Pensacola. (PC.2819). Much like Ms. Jabali, Ms. Henderson witnessed a pattern

[9] Ms. Henderson is also mentioned *supra* in the IAC Guilt Phase claim. This section only refers to the evidence that she became aware of *after* Ms. Brown's trial.

As to the newly discovered evidence of Heather Lee's confessions to fellow inmates and the similar-fact evidence of her pattern of violence, the circuit court held that the first prong of *Jones* had not been met because these confessions occurred *after* Ms. Brown's trial, and therefore, they were not newly discovered. (PC.5303). The court stated:

> As explained in *Wright v. State*, 857 So.2d 861 (Fla. 2003), newly discovered evidence is evidence that **existed at the time of the trial** but was unknown by the trial court, by the party, or by counsel at that time, and it must further appear that neither the defendant nor defense counsel could have known of the evidence by the exercise of due diligence. *Moss v. State*, 860 So.2d 1007, 1009 (Fla. 5th DCA 2003)(emphasis added).

Id.

However, the circuit court's reliance on *Wright* and *Moss* is erroneous. In *Wyatt v. State*, 71 So.3d 86 (2011), this Court held:

> **[T]he language "must have existed … at the time of trial,"** which was promulgated by this Court in *Kearse* and applied by the postconviction court in this case, **has never been a part of newly discovered evidence analysis and was an incorrect recitation of the test set forth in the *Jones* decisions.**

Wyatt, 71 So.3d at 100. (emphasis added).

In conformity with the first prong of *Jones*, this information was unknown by the trial court, Ms. Brown, or counsel at the time of trial, and neither Ms. Brown nor defense counsel could have known of it by the use of due diligence because these statements did not occur until after Ms. Brown's trial.

However, in addition to finding that these admissions by Ms. Lee were not newly discovered because they occurred *after* Ms. Brown's trial, the postconviction court simultaneously found that Ms. Lee's admissions were not newly discovered evidence because that information existed *before* trial. (PCR. 5305). Specifically, the court states:

> The substance of [the] testimony – that Heather Lee admitted to lighting the victim on fire because she was sleeping with Heather Lee's husband – is far from newly discovered evidence. Wendy Moye testified to a similar confession by Heather Lee at trial and Terrance Woods testified before trial regarding Heather Lee's husband having an affair with the victim. As this evidence was already discovered before trial by trial counsel, this testimony is not newly discovered information.

(PC.5305). The court, in this instance, is attempting to parse out the substance of the admissions from the admissions themselves. This can be analogized to this Court's reasoning in *Wyatt*:

> This holding is in accord with prior decisions, which have recognized newly discovered evidence claims predicated upon a witness who testified at trial but then subsequently recanted his or her testimony; the witness's recantation, which did not exist at the time of trial, constituted newly discovered evidence. *See, e.g. Hurst v. State*, 18 So.3d 975, 992-93 (Fla. 2009) (recognizing the statements made by State witness after trial acknowledging that defendant did not confess to the crime was newly discovered evidence of recantation).

Wyatt, 71 So.3d at 100. Hence, the admissions made by Ms. Lee after trial, did not exist at the time of trial, and therefore, constitute newly discovered evidence.

H. Second Prong of *Jones*

Since the postconviction court held that none of this evidence detailed *supra* was newly discovered, it did not address the second prong of *Jones*. The newly discovered evidence detailed above is of such a nature that it would produce an acquittal on retrial, or in the alternative, yield a less severe sentence. Testimony about Ms. Lee's confession goes to the heart of the State's case. Ms. Lee was the State's star witness at trial. She was the only way the State was able to present any eyewitness testimony that Ms. Brown poured gas on the victim and set her on fire. Four individuals were in the woods that night – Tina Brown, Heather Lee, Britnee Miller, and Audreanna Zimmerman. Of those individuals, Ms. Lee was the only one to testify about what happened. And she pointed the finger at Ms. Brown. Other than Ms. Lee's testimony, there is no other eyewitness testimony Ms. Brown poured gas on the victim and set her on fire. The State used this testimony about Ms. Brown's involvement to argue to the jury that Ms. Brown was the ringleader, that she was the primary aggressor. They laid the blame for the most horrific part of this attack squarely on Ms. Brown.

When considering the credibility of these witnesses who testified in support of Ms. Brown's newly discovered evidence claim, this Court should consider the consistencies in their statements. They all testified that Ms. Lee confessed to planning and carryout out this murder and then blaming it on Ms. Brown. This Court should also consider that none of these witnesses have a motive to testify either

against Ms. Lee or for Ms. Brown. They received no benefit for their testimony at the evidentiary hearing. Moreover, this Court should not give less credibility to their consistent statements because they are convicted felons, since Ms. Lee is a convicted felon as well. All of these women testified that Ms. Lee confessed, if not bragged, to them about murdering the victim because she was sleeping with her husband. This is consistent with other evidence prior to trial that Ms. Lee told her husband, Darren Lee, that she was going to kill "that bitch" and then afterwards that she did, in fact, kill "that bitch". Such testimony was also corroborated by Terrance Woods. Multiple people have now testified that Ms. Lee callously murdered the victim by pouring gas on her and lighting her on fire. The effect that such weighty testimony would have had on jurors cannot be discounted. It is one thing for jurors to hear one witness say that Ms. Lee confessed, but quite another to hear multiple witnesses who have come forward to say that Ms. Lee bragged about committing this murder and putting the blame on Ms. Brown. Ms. Lee's statements cannot simply be discounted as the braggadocio of a prison inmate because she made the same statements to her husband, Darren Lee, and Terrance Woods *before* she was ever arrested. Moreover, her statements about why she committed this murder are consistent with her pattern of attacking the person that her significant other cheats on her with.

This testimony would have revealed that it was Ms. Lee who decided to kill the victim because she was sleeping with her husband, and that she had no remorse

for doing so. It would have shown that she was in fact the one in control and directing things that night, not Ms. Brown. This testimony certainly gives rise to a reasonable doubt as to Ms. Brown's culpability. If Ms. Lee was shown to be a liar, the jury could have disregarded her testimony altogether and concluded that she was really the person responsible for the victim's death.

However, should this Court disagree that a new trial is warranted, Ms. Brown's death sentence should be vacated because this newly discovered evidence would probably yield a less severe sentence. The State argued in its penalty phase closing that "you have to look at what [Heather Lee] did in comparison to what Tina Brown did. Heather Lee's actions or inactions while despicable do not rise to the level of what Tina Brown did to Audreanna Zimmerman." (T.1068). The State further argued: "Tina Brown was the instigator. Tina Brown was the aggressor." *Id*. And finally, that Tina Brown deserved the death penalty because: "Heather Lee was there, Heather Lee stood there, but ladies and gentlemen, Tina Brown killed Audreanna Zimmerman in one of the worst ways possible, by fire." *Id*. Had jurors heard that Ms. Lee was actually the one who was the instigator, the aggressor, and who killed the victim in one of the worst ways possible, it is likely they would have recommended a life sentence rather than death for Ms. Brown.

III. THE CIRCUIT COURT ERRED IN FINDING THAT TRIAL COUNSEL RENDERED EFFECTIVE ASSISTANCE AT THE PENALTY PHASE OF MS. BROWN'S CAPITAL TRIAL.

Trial counsel's mitigation investigation and presentation was deficient and prejudiced Ms. Brown. In assessing the reasonableness of an attorney's investigation a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. A cursory investigation does not automatically justify a decision with respect to strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy. *Strickland*, 466 U.S. at 691. In this case, undiscovered mitigating evidence might well have influenced the jury's appraisal of her culpability, and the likelihood of a different result undermines confidence in the outcome. *Id*. at 694. *See also Wiggins v. Smith*, 539 U.S. 510, 538 (2003).

A. Failure to conduct a reasonably competent mitigation investigation and present adequate mitigation.

The postconviction court found that this claim was facially insufficient, and that even if it was facially sufficient, it was cumulative to the mitigation already presented at the penalty phase. (PC.5281). Contrary to the court's finding, the evidence presented at the evidentiary hearing was far from cumulative. Although the evidence *included* information that had been previously presented at the penalty phase, the focus was on the information that existed at the time of trial, but was undiscovered because trial counsel failed to adequately investigate.

Despite having acknowledged the importance of spending time with mitigation witnesses and developing a rapport due to the sensitive nature of potential

information, trial counsel and Lisa McDermott, the mitigation specialist, made only one trip up north – where Ms. Brown had lived for her entire life up until a few months before the offense – just prior to trial. This was simply not enough time to build a rapport with witnesses and develop details of Ms. Brown's life to present to a jury. (PC.3287; EH Def. Exh. 1, p. 323). The cursory information learned during this trip would most certainly have lead a reasonable attorney to investigate further.

At the penalty phase of Ms. Brown's trial, three adult family members testified that they only had suspicions about the sexual abuse that was going on; that the Coleman's were a good family; and that there was always someone there to fill-in when Ms. Brown's parents were absent. Either they were willfully ignorant or they were full of denial about what was actually going on in Ms. Brown's life. As a result, this incomplete and deficient presentation fell short of telling the whole store.

Although trial counsel uncovered and presented some evidence of the sexual abuse suffered by Ms. Brown throughout her life, it was cursory in nature. For example, there was testimony that the family suspected that Ms. Brown's father was sexually abusing her; testimony that Ms. Brown tried to talk to her grandmother about this abuse and was subsequently banished from her grandmother's home; testimony that this abuse stopped when Melinda came into the picture; and testimony that Melinda was pimping Ms. Brown out. (T.795-97; 800). Critically, there were little or no details provided with respect to these issues.

Not only did Ms. Brown experience sexual abuse at the hands of her own father, but she was also raped multiple times by a neighbor during this same time. (PC.2864; 2871). She was between the ages of 12 and 14 when this was happening. (PC.2871). The evidence at trial was that the sexual abuse by her father ended once Melinda moved into the home. However, at that point, Melinda and father began prostituting Ms. Brown so that they could get money and purchase drugs for themselves. (PC.2867). No details were presented previously about this. Only statements that "Melinda prostituted Tina". (T.800; 864). At the evidentiary hearing, Ms. Brown presented evidence that men would come into the house, spend some period of time with her father and stepmother using or exchanging drugs, and then the men would be sent to Ms. Brown's bedroom to have sex with her. (PC.2868). Money was exchanged for sex and then she was required to turn the money back over to her father and stepmother. *Id*. Ms. Brown was around 14 years old when strange men were raping her in her own childhood bedroom. *Id*. Experts who testified at trial for both the State and defense testified that Ms. Brown repeatedly stated that she had dealt with the sexual abuse and was over it. However, into adulthood, she still struggled with this trauma. She confided to close friends that both her mother and her grandmother knew that she was being sexually abused and did nothing to help her. Jurors at Ms. Brown's penalty phase never heard any of this

detailed information regarding the sexual abuse she suffered as a young child and how it affected her into adulthood.

Ms. Brown also presented additional evidence regarding the violence in her childhood home, as well as the physical and psychological abuse she suffered throughout her life. Willie, Jr. told Dr. Sultan that there was significant domestic violence in the home before his mother left. Once his mother was gone, his father repeatedly told the children that their mother didn't want them. Willie, Jr. also witnessed tremendous domestic violence between his father and Melinda. He and Ms. Brown lived in a constant state of fear. They were not allowed to play with other children and were often left alone and without food. There was constant violence, including beatings with both hands and electrical cords, as well as screaming and verbal abuse. Ms. Brown's cousin confirmed that Ms. Brown's life deteriorated significantly following the separation of her biological parents and that Ms. Brown felt very, very abandoned. All of a sudden the family that had tried to "fill in" before, was no longer around, and Willie, Jr. and Ms. Brown were increasingly isolated.

In addition to the physical and verbal abuse by Willie and Melinda, there was also fear associated with Willie's ever-present criminal gang. Willie, Jr. said that there were always at least two drug dealers at the front of the house and two at the back, and drug dealers were in and out of the house all the time.

As an adult, Ms. Brown suffered abuse at the hands of her husbands and boyfriends. This information was generally referenced at the penalty phase of trial simply as domestic violence incidents between her and boyfriends. However, these references were lacking in details. At the evidentiary hearing, evidence was presented that her friends Nina McGruder and Kim Washington both witnessed her boyfriend Benny Shaw being physically and verbally abusive to her, telling her she was worthless. Jennifer Malone witnessed boyfriends of Ms. Brown punching her in the face. She was also aware that Greg Miller had been very violent during his marriage to Ms. Brown. Ms. Brown met Mr. Miller because she was dating his uncle. After a particularly bad beating by his uncle, Mr. Miller took her out of that situation, and that was the beginning of their relationship. However, Mr. Miller admitted that he was also physically violent with Ms. Brown. He recalled an incident when he found out Ms. Brown had been cheating on him. Mr. Miller took her into a bathroom in the park, made her strip naked, and then beat her with an extension cord. He knew this was very traumatic for Ms. Brown because her father used to get drunk or high and beat her with his hands and with extension cords, just as Mr. Miller had done.

Another important and relevant detail presented at the evidentiary hearing was Ms. McGruder's description of Ms. Brown as easy prey when she was high – easily dominated, easily led, easily convinced to do dangerous and self-destructive things.

Had trial counsel investigated further, they would have uncovered additional, more specific, and more detailed information that would have been mitigating and would have led to a different result with regard to her sentence.

B. Failure to consult and present experts to explain the combined effects of polysubstance abuse, childhood trauma, and mental illness on the brain.

The postconviction court found that Dr. Bailey, who was hired to provide mental health expertise and assess Ms. Brown, failed to notify trial counsel that other mental health experts might be helpful in developing mitigation in this case. (PCR. 5291). However, the court held that trial counsel was not deficient for relying on Dr. Bailey's expertise and for failing to hire additional mental health experts, when no such suggestion was provided by Dr. Bailey. *Id*. Additionally, the court found that Ms. Brown was not prejudiced by this failure to hire additional experts because the expert testimony presented at the evidentiary hearing was largely cumulative to the evidence presented during the penalty phase at trial. *Id*.

The expert testimony presented during the evidentiary hearing was not cumulative to the evidence presented at trial. Not only did Dr. Bailey not testify to any statutory mitigators at trial, despite having testified about them in her deposition, but she also failed to educate jurors regarding the ACE factors, which this court has previously held to be of critical importance. *Ellerbee v. State*, 87 So.3d 730 (Fla. 2017). Dr. Bailey only spoke in general terms about what happens to victims of

sexual abuse or trauma, and she never connected Ms. Brown's past drug addiction and abuse to the offense for which she was on trial. Dr. Sultan testified to all of these things at the evidentiary hearing and stated that any trained psychologist would have been able to testify to the same information at trial. (PC.2934). Furthermore, the jury never heard about the severity of Ms. Brown's drug addiction as testified to by Dr. Edwards. Trial counsel stated that she was aware of Ms. Brown's longtime struggles with drug addiction, her treatment programs, and her relapses. That should have been a red flag to investigate further and retain an addiction expert to be able to present compelling testimony about drug addiction and how it affected Ms. Brown, all the way up until the night of the offense. In addition to Ms. Brown's longtime drug addiction, trial counsel was also aware that Ms. Brown suffered repeated traumas from childhood through adulthood. Her lifelong traumas combined with her serious drug addiction should have been another red flag to further investigate how these two things would have affected the development of her brain, as testified to by Dr. Herkov. In fact, there is record evidence that the hiring of two such experts – an addiction specialist and a neuropsychologist – were considered by Dr. Bailey, trial counsel, and the mitigation specialist. (EH Def. Exh. 23, Dr. Bailey's Notes, pp. 11; 13). Despite trial counsel's testimony that Dr. Bailey never discussed this with her, she also testified that she had no reason to dispute the accuracy of Dr. Bailey's notes. (PC.3012). Regardless of the court's finding that trial counsel was not deficient for

relying upon Dr. Bailey, trial counsel was, in fact, deficient for failing to recognize these red flags and investigate further.

IV. THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MS. BROWN'S CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE DURING JURY SELECTION BY FAILING TO STRIKE JUROR TAYLOR

The circuit court summarily denied this claim, stating: "the subclaims are facially insufficient for failing to allege actual juror bias". (PCR. 5219). The court further stated: "a defendant must show that a biased juror served during the defendant's trial to satisfy *Strickland*'s requirement of showing a reasonable probability of a more favorable result." *Id*., *citing King v. State*, 211 So.3d 866, 887 (Fla. 2017).

A court should strike for cause any juror who would automatically vote for the death penalty. *O'Connell v. State*, 480 So. 2d 1284, 1287 (Fla. 1985). "Such bias against the defendant in the sentencing aspect of a capital case amounts to a fundamental violation of the express requirements in the sixth amendment to the United States Constitution and in article I, section 16 of the Florida Constitution, that an accused be tried by an impartial jury." *Id*. (internal citations omitted).

Here, trial counsel failed to strike for cause Juror Taylor after he voiced his opinion that if the State proved its case against Ms. Brown beyond a shadow of a doubt, a death recommendation would be automatic:

Mr. Gontarek:	Well, could you put your personal feelings aside in the appropriate case and follow the Judge's instructions and consider the evidence before you'd impose a death penalty if you thought that was appropriate in a case?
Juror Taylor:	No. Depending on the evidence is how I would go either way. If it's proven without a shadow of a doubt, I would go with the death penalty. If not, then I would not.

(T.242). At no point was Juror Taylor rehabilitated by the State or further questioned on this point by defense counsel or the court. Thus, by stating that he would vote for death automatically if the State proved its case, Juror Taylor was announcing his intention not to follow the court's instructions. *See Morgan v. Illinois*, 504 U.S. 719 (1992). Juror Taylor had already formed "an opinion on the merits" resulting in "the presence or absence of either aggravating or mitigating circumstances" to be entirely irrelevant to him. *Id*. at 729. "Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment" Ms. Brown was entitled to strike Juror Taylor for cause. *Id*.

Since Juror Taylor sat on Ms. Brown jury for the guilt and penalty phase, the State is not entitled to implement Ms. Brown's death sentence. The United States Supreme Court held that if even one juror is empaneled who will automatically vote for the death penalty "and the death sentence is imposed, the State is disentitled to execute the sentence." *Id*.

Counsel's failure to strike Juror Taylor constituted deficient performance because it denied Ms. Brown her right to due process, a fair trial, an impartial jury, and to be free from cruel and/or unusual punishment. Ms. Brown was prejudiced because Juror Taylor indicated that he would automatically vote for death if Ms. Brown was convicted of murder. This position is contrary to the law, and this juror should have been stricken for cause because of it. Ms. Brown was prejudiced because this juror remained and did exactly what he said he would do – automatically vote for death after Ms. Brown was convicted of murder.

V. THE CIRCUIT COURT ERRED IN FINDING THAT CUMULATIVE ERROR DID NOT DEPRIVE MS. BROWN OF A FUNDAMENTALLY FAIR TRIAL

As to cumulative error, the postconviction court reasoned that since it only found trial counsel deficient regarding one claim, but did not find any prejudice as to that claim, then a cumulative analysis regarding this single claim would not render any different result. (PC.5310). As a result, the postconviction court did not conduct a cumulative analysis of the errors that occurred during Ms. Brown's trial.

Ms. Brown did not receive the fundamentally fair trial to which she was entitled under the Fifth, Sixth, Eighth and Fourteenth Amendments. *See Heath v. Jones*, 941 F. 2d 1126 (11th Cir. 1991); *Derden v. McNeel*, 938 F.2d 605 (5th Cir. 1991). The errors in Ms. Brown's guilt and penalty phases, when considered as a whole, virtually dictated the sentence of death. While there are means for addressing

each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the state or federal constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel significantly tainted Ms. Brown's guilt and penalty phases. The errors as claimed in this brief are hereby specifically incorporated into this claim and include: ineffective assistance of counsel at the guilt and penalty phases; and all others listed and presented at the evidentiary hearing.

Under Florida law, the cumulative effect of these errors denied Ms. Brown her fundamental rights under the United States and Florida Constitutions. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Ray v. State*, 403 So. 2d 956 (Fla. 1981). In *Jones v. State*, 569 So. 2d 1234 (Fla. 1990), the Florida Supreme Court vacated a capital sentence and remanded the case for a new sentencing proceeding before a jury because of the "cumulative errors affecting the penalty phase." *Id*. at 1235. When cumulative errors exist the proper concern is whether:

> Even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.

Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991) (internal citations omitted).

A series of errors may accumulate a very real prejudicial effect. The burden remains on the State to prove beyond a reasonable doubt that the individual and

cumulative errors did not affect the verdict and/or sentence. *Chapman v. California*, 386 U.S. 18 (1967); *State v. DeGuilio*, 491 So. 2d 1129 (Fla. 1986). These errors prejudiced Ms. Brown. This Court is required to analyze the prejudice not only individual, but also cumulatively. *See Parker v. State*, 89 So. 3d 844, 867-8 (Fla. 2011); *State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996).

VI. THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MS. BROWN'S CLAIM THAT SHE IS ENTITLED TO RELIEF UNDER *HURST V. FLORIDA* AND *HURST V. STATE*

The postconviction court held that the Hurst opinions undoubtedly apply retroactively to Ms. Brown's case, since her death sentence became final after the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002). (PCR. 5310). However, the court also found that since the jury in Ms. Brown's case unanimously recommended the death penalty, and since the facts of the case were so egregious, any *Hurst* error was harmless and she is therefore, not entitled to a new penalty phase. (PCR. 5312-13).

There is no dispute that Ms. Brown's death sentence was obtained in violation of the United States Constitution for the reasons described in *Hurst v. Florida*, 136 S. Ct. 616 (2016). In *Hurst*, the United States Supreme Court held that Florida's capital sentencing scheme—the scheme pursuant to which Ms. Brown was sentenced to death—violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. *Id.* at 620-22. Those findings included: (1) the aggravating factors that

were proven beyond a reasonable doubt; (2) whether those aggravators were "sufficient" to justify the death penalty; and (3) whether those aggravators outweighed the mitigation. Because Ms. Brown was sentenced to death pursuant to that scheme, his sentence is unconstitutional under *Hurst*.

Ms. Brown's death sentence also violates the Florida Constitution. On remand in *Hurst*, this Court held that the Eighth Amendment requires unanimous jury fact-finding as to *each* of the required elements above, and also a unanimous death recommendation by the jury. *Hurst v. State*, 202 So. 3d at 53-59. Even if the jury unanimously finds that each of the required elements is satisfied, the jury is not required to recommend the death penalty, and the judge is not required to sentence the defendant to death. *Id*. at 57-58.

Ms. Brown's advisory jury unanimously recommended death to the judge, but made none of the findings of fact required for a death sentence under Florida law. Ms. Brown's trial judge alone made the required state-law findings: (1) the aggravating circumstances that had been proven beyond a reasonable doubt; (2) whether those aggravators were "sufficient" to justify death; and (3) whether the aggravators were outweighed by the mitigation. *See* Fla. Stat. 921.141(3) (2017); *see also Hurst*, 136 S. Ct. at 623; *Hurst v. State*, 202 So. 3d 40, 51-54 (Fla. 2016) (discussing required elements).

There is also no dispute that the *Hurst* decisions apply retroactively to Ms.

Brown. *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); *see also Danforth v. Minnesota*, 552 U.S. 264 (2008). The only issue here is whether the *Hurst* error was "harmless." The "harmless error" doctrine does not preclude *Hurst* relief in this case, notwithstanding the pre-*Hurst* jury's unanimous recommendation to sentence Ms. Brown to death.[10] Under the per se *Hurst* harmless-error rule, this Court has held that *Hurst* errors are harmless in every case in which the pre-*Hurst* advisory jury recommended death by a vote of 12 to 0, rather than a majority vote of 11 to 1; 10 to 2; 8 to 4; or 7 to 5. Although in some cases this Court mentions additional factors in the course of a *Hurst* harmless-error decision, this Court has *never* held a *Hurst* violation harmful in a case with a unanimous advisory jury recommendation. And the court has *never* held a *Hurst* violation harmless in a split-vote advisory jury case. This Court's per se rule that *Hurst* errors are harmless in every case where the pre-*Hurst* jury unanimously recommended death, *see, e.g.*, *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), violates the United States Constitution.

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[10] *Hurst* errors should be deemed "structural" and not subject to harmlessness review. *See Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991). The Sixth Amendment error identified in *Hurst*—stripping the capital jury of its constitutional fact-finding role—represents a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id*. at 310. *Hurst* errors "infect the entire trial process," *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), and "deprive defendants of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination" of whether the elements necessary for a death sentence exist. *Neder v. United States*, 527 U.S. 1, 8-9 (1999).

This Court's rule relies entirely on the vote of a defendant's "advisory" jury—a jury that did not conduct the fact-finding required by the Sixth Amendment but made only a generalized recommendation to the judge. The rule has been mechanically applied in every Florida *Hurst* case. If a defendant's advisory jury voted to recommend death by a majority vote—i.e., a margin between 7-to-5 and 11-to-1—the *Hurst* error is deemed not harmless and this Court vacates the defendant's sentence. But if the defendant's advisory jury recommended death by a vote of 12-to-0, the *Hurst* error is automatically deemed harmless and this Court upholds the defendant's death sentence. No other factors make a difference. There is no individualized review of the *Hurst* error's impact in light of the specific aggravation and mitigation presented or any factor other than the raw advisory vote.[11] Because this Court's rule violates the United States Constitution, it should not be applied to Ms. Brown.

The United States Supreme Court has explained that constitutional errors may

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[11] Although in some cases the Florida Supreme Court, having applied the per se rule, goes on to describe other factors that favor a harmless-error ruling, this does not negate the per se nature of the Florida Supreme Court's unanimous-jury-recommendation rule. It is the unanimous jury recommendation that is the common determinative factor in the Florida Supreme Court's harmless-error analysis in every *Hurst* case. The Florida Supreme Court has never denied *Hurst* relief on harmless-error grounds without relying on the unanimous jury recommendation, even if other factors are discussed. In many cases, the unanimous recommendation is the only factor discussed.

only be deemed harmless where there is no reasonable possibility that they contributed to the result. *See Chapman v. California*, 386 U.S. 18, 21 (1967). Harmless error review must also include consideration of the entire record. *See, e.g.*, *Rose v. Clark*, 478 U.S. 570, 583 (1986). Here, the whole record reveals a possibility that the *Hurst* error at Ms. Brown's sentencing contributed to her death sentence. An average rational jury instructed in compliance with *Hurst* and the Sixth Amendment could have voted for a life sentence in Ms. Brown's case.

This uncertainty as to what the advisory jury would have decided if tasked with making the critical findings of fact take on additional significance in light of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (holding that a death sentence is invalid if imposed by a jury that believed the ultimate responsibility for determining the appropriateness of a death sentence is rested elsewhere). Ms. Brown's jury was led to believe that its role was diminished when the court instructed it that the jury's role was advisory and that the judge would ultimately determine the sentence.

During jury selection, the judge instructed the jury: "[t] he final determination of which sentence should be imposed is my responsibility." (T.78). At the beginning of the penalty phase, the judge instructed the jury: "the law requires that you, the jury, render to me an advisory sentence as to which punishment should be imposed upon the defendant." (T.751).

In addition, the prosecutor repeatedly emphasized to the jury that they would

"render an advisory recommendation" and "the judge would ultimately decide which punishment to impose." (T.112; 131; 756; 1054; 1069; 1071). The State argued: "If you vote and recommend the death penalty for Tina Brown, her death would not be on your hands." (T.1070).

Trial counsel also consistently diminished the jury's role in sentencing. Counsel repeatedly minimized "the jury's sense of responsibility for determining the appropriateness of death" in violation of the Eighth Amendment. *Caldwell*, 472 U.S. at 341. (T.215; 217; 224; 1101; 1103; 1104). During penalty phase closing, defense counsel argued: "what you're about to do is render … an advisory sentence or a recommendation. And the reason it's called that is that you don't actually impose the final sentence on Tina Brown. Only the Judge can do that." (T.1107).

Finally, at the conclusion of the penalty phase, the judge gave his final instructions to the jury: "the final decision as to which punishment shall be imposed is the responsibility of the Judge. In this case, as the trial Judge, that responsibility will fall on me." (T.1111). The judge repeatedly emphasized the jury's "recommendation" and "advisory sentence" during his final remarks. (T.1110; 1113-15; 1120-23; 1126-27).

In light of *Caldwell*, this Court cannot even be certain that the jury would have made the same unanimous *recommendation* without the *Hurst* error, and thus cannot be certain that the jury would have unanimously found the preceding required

elements beyond a reasonable doubt.

At least three Justices of the United States Supreme Court have urged this Court to revisit the state's decisional law on *Caldwell*, particularly in light of *Hurst*. *See, e.g.*, *Guardado v. Jones*, 138 S. Ct. 1131 (2017)(Sotomayor, J., dissenting from the denial of certiorari); *Middleton v. Florida*, 138 S. Ct. 829 (2018)(Ginsburg, Sotomayor, JJ., dissenting from the denial of certiorari); *Truehill v. Florida*, 138 S. Ct. 3 (2017)(Ginsburg, Breyer, Sotomayor, JJ., dissenting from the denial of certiorari).

This Court's total reliance on the advisory jury's recommendation, without considering the jury's diminished sense of responsibility for the death sentence violated *Caldwell*. Ms. Brown's advisory jurors were led to believe their role in sentencing was diminished when jurors were repeatedly instructed that their recommendation was advisory and the final sentencing decision rested solely with the judge. Given that the jury was led to believe it was not ultimately responsible for imposing Ms. Brown's death sentence, this Court's per se rule cannot be squared with the Eighth Amendment. Under *Caldwell*, no court can be certain beyond a reasonable doubt that a jury would have made the same unanimous *recommendation* absent the *Hurst* error, let alone that a jury that properly grasped its critical role in determining a death sentence would have unanimously found all of the elements for the death penalty satisfied.

This Court's rule does not allow for meaningful consideration of the actual record. The per se rule cannot permissibly predict that a jury with full awareness of the gravity of its role in the capital sentencing process would have unanimously found or rejected any specific mitigators in a proceeding comporting with constitutional requirements. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988) (holding in the mitigation context that the Eighth Amendment is violated when there is uncertainty about jury's vote); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (same). This Court's failure to consider Ms. Brown's mitigation in its harmless-error analysis is also inconsistent with *Parker v. Dugger*, where the United States Supreme Court rejected the state supreme court's cursory harmless-error analysis in jury-override cases. 498 U.S. 308, 320 (1991). ("What the Florida Supreme Court could not do, but what it did, was to ignore evidence of mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings."). In light of *Caldwell* and *Hurst*, Ms. Brown's death sentence is unconstitutional and should be vacated.

CONCLUSION AND RELIEF SOUGHT

Ms. Brown respectfully requests this Honorable Court reverse the postconviction court's denial of her 3.851 motion and remand for a new guilt phase and a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant has been furnished via electronic service to Michael Kennett, Assistant Attorney General, on this 21st day of August, 2019.

/s/ Dawn B. Macready
Dawn B. Macready

CERTIFICATE OF COMPLIANCE

This is to certify that the Initial Brief of Appellant was generated in Times New Roman 14-point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

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