No. SC21-1778

Lower Tribunal No. CF07-009386-XX

IN THE

Supreme Court of Florida

LEON DAVIS, JR.
Appellant,

v.

STATE OF FLORIDA,
Appellee.

On Appeal from the Circuit Court, Tenth Judicial Circuit, in and for Polk County, Florida

Honorable Donald G. Jacobsen, Presiding Judge

CORRECTED INITIAL BRIEF OF APPELLANT

STACY R. BIGGART
Special Assistant CCRC-North
Fla. Bar No. 0089388
3495 SW 106th Street
Gainesville, FL 32608
stacybiggart@gmail.com

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Other Authorities

PRELIMINARY STATEMENT

This is Mr. Davis's appeal of the circuit court's order denying his motion for postconviction relief under Fla. R. Crim. P. 3.851. The following symbols are used to designate references to the record: the trial proceedings in volumes 67 through 99 are designated with "T" followed by the volume and page number(s); "R" followed by the volume and page number(s) refers to the record on appeal; "PCR" refers to the postconviction record on appeal. Citations to the record on appeal from the BP trial are as follows: "BP" followed by the volume and page number(s). All other references are self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Davis has been sentenced to death. The resolution of this appeal will determine whether he lives or dies. This Court has allowed oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims and the stakes involved. Mr. Davis respectfully requests this Court grant oral argument.

STANDARD OF REVIEW

Mr. Davis raises claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). *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 Rule 3.851 claims without an evidentiary hearing, this Court accepts the appellant's allegations as true to the extent they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009). Further, this Court "review[s] the trial court's application of the law to the facts *de novo*." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). A postconviction court's decision regarding whether to grant an evidentiary hearing depends upon the actual material before the court, not the court's innate belief about the evidence, and the ruling as to whether a hearing is appropriate is subject to *de novo* review. *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

When 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 the defendant the fair and impartial trial that is the inalienable right of all litigants in this state and nation.

McDuffie v. State, 970 So. 2d 312, 328 (Fla. 2007).

This brief also raises a claim that the circuit court erred in denying postconviction counsel's request for a competency hearing before the court granted the State's motion to dismiss portions of Claim 17 and to exclude any and all mental health testimony from any source at the evidentiary hearing. "A court's decision as to whether a competency hearing or a new evaluation is necessary is reviewed for abuse of discretion." *Trueblood v. State*, 193 So. 3d 1060, 1061 (Fla. 1st DCA 2016), *citing Rodgers v. State*, 3 So. 3d 1127, 1132 (Fla. 2009).

STATEMENT OF THE CASE

The victims, Yvonne Bustamante and Juanita Luciano, died from traumatic burn injuries sustained at Headley Insurance Company on December 13, 2007. Michael Bustamante died from extreme prematurity as a result of the injuries sustained by his mother, Juanita Luciano.

The Polk County Grand Jury indicted Mr. Davis on January 9, 2008, on three counts of first-degree murder (Yvonne Bustamante, Juanita Luciano, and Michael Bustamante), one count of attempted first-degree murder (Brandon Greisman), one count of armed robbery, one count of first-degree arson, and one count of possession of a firearm by a convicted felon. (R2.73-78). The firearm charge was severed from the other charges. (R8.1251).

That same day, the Polk County Grand Jury also indicted Mr. Davis on two counts of first-degree murder (Pravinkumar Patel and Dashrath Patel), one count of attempted armed robbery, and one count of possession of a firearm by a convicted felon for crimes committed at the BP station located at CR 557 and I-4 in Polk County on December 7, 2007. (BP R1.46-50).

The instant case was scheduled for trial before the BP case. The first attempt at a jury trial began on October 11, 2010, and ended in a mistrial partway through the State's case due to a witness's superfluous comment. (R55.9169-96).

The second attempt at a jury trial took place in January and February 2011. On February 15, 2011, the jury returned a verdict finding Mr. Davis guilty on all counts. (R64.10697-702).

The penalty phase began on February 17, 2011. On February 18, 2011, the jury voted 8-4 to recommend a death sentence for the murder of Michael Bustamante, and unanimously recommended death sentences for the murders of Yvonne Bustamante and Juanita Luciano. (R64.10714-16). After a *Spencer*[1] hearing on March 29, 2011, the court followed the jury's recommendation and sentenced Mr. Davis to death for the murders of Ms. Bustamante and Ms. Luciano. The court overrode the death recommendation for the murder of Michael Bustamante and sentenced Mr. Davis to life in prison. The court also sentenced Mr. Davis to life in prison for the attempted first-degree murder of Brandon Greisman and armed

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

robbery while in possession of a firearm; and thirty years in prison for first-degree arson. (R66.10843-64).

The court found the following aggravating factors: (1) Mr. Davis was previously convicted of a felony and on felony probation (great weight); (2) the murders were committed in a cold, calculated, and premeditated manner (great weight); (3) Mr. Davis was contemporaneously convicted of three first-degree murders, the attempted murder of Brandon Greisman, and armed robbery with a firearm (very great weight); (4) the murders were committed while Mr. Davis was engaged in the commission of an armed robbery with a firearm and first-degree arson (moderate weight); (5) the murder of Yvonne Bustamante was committed for the purpose of avoiding or preventing arrest (some weight); (6) the murders were committed for pecuniary gain (little weight); and (7) the murders were especially heinous, atrocious or cruel (great weight). (R66.10845-56).

The court found one statutory mitigating circumstance: the crime was committed while Mr. Davis was under the influence of extreme mental or emotional disturbance (little weight). (R66.10862-63).

The trial court also considered fifteen nonstatutory mitigating factors: (1) Mr. Davis was the victim of bullying as a child (moderate weight); (2) he was the victim of sexual assault as a child (moderate weight); (3) he was the victim of physical and emotional child abuse by a caretaker (moderate weight); (4) his overall family dynamics (little weight); (5) he served in the U.S. Marine Corps (little weight); (6) he had been suicidal as a child and as an adult (slight weight); (7) he had a diagnosed personality disorder (slight weight); (8) he had a history of depression (slight weight); (9) he was experiencing stressors at the time of the incident (little weight); (10) he was a good person in general (very slight weight); (11) he was a good worker (little weight); (12) he was a good son, sibling, and husband (moderate weight); (13) he was a good father to a child with Down Syndrome (moderate weight); (14) he displayed good behavior during trial as well as other court proceedings (slight weight); and (15) he displayed good behavior while in jail and prison (little weight). (R66.10857-62).

This Court affirmed Mr. Davis's convictions and sentences on direct appeal. *Davis v. State*, 207 So. 3d 177 (Fla. 2016). The following issues were raised in Mr. Davis's direct appeal: (1) the trial court erred when it admitted the statements of Yvonne Bustamante as a

dying declaration; (2) the photopack identifications of Mr. Davis, made by victim Brandon Greisman and eyewitness Carlos Ortiz, should have been excluded; (3) the photographs of the murder victims were unfairly prejudicial; and (4) the trial court improperly found that Mr. Davis committed the murder of Yvonne Bustamante to avoid arrest. All claims were denied. *Davis v. State*, 207 So. 3d 177 (Fla. 2016). Rehearing was denied on January 5, 2017. The mandate was issued on January 23, 2017.

The United States Supreme Court denied certiorari review on June 5, 2017. *Davis v. Florida*, 137 S. Ct. 2218 (2017).

On May 19, 2018, Mr. Davis filed his initial Rule 3.851 motion for postconviction relief. (PCR.548-909). He filed amended motions on November 6, 2018 (PCR.1042-406); October 14, 2019 (PCR.1752-95); and July 16, 2020. (PCR.2024-41).

Mr. Davis raised twenty-two claims for relief:

(1) trial counsel failed to move to dismiss the indictment based on the fact the very elements needed to charge a capital felony were not found by the grand jury;

(2) trial counsel failed to move to bar the State from seeking the death penalty when there is no allegation of aggravators in the indictment;

(3) trial counsel failed to seek to bar prosecution of this case on a felony murder theory when the grand jury only found the elements of first-degree premeditated murder;

(4) trial counsel failed to seek a change of venue for the jury trial in this case given its notoriety;

(5) trial counsel failed to object to, and in fact participated in, comments by the trial court that the photos of the deceased shown to the venire during jury selection were the worst they've seen;

(6) trial counsel failed to object to the trial court's vouching for the Office of the State Attorney when he said to the jury that the State does not seek death in every first-degree murder case;

(7) trial counsel failed to engage in a case-specific voir dire as described in the ABA guidelines and in not objecting to the trial court's admonition to the jury that they should start with a "neutral" perspective if there is a penalty phase;

(8) trial counsel failed to aggressively litigate a motion to suppress based on a key false statement in the affidavit for search warrant;

(9) trial counsel failed to cross examine the State's witnesses about the crime scene in a way that would show that the physical evidence supported a verdict of second-degree murder; to engage in cross examination in a way that would demonstrate the State withheld and/or lost and/or destroyed evidence in a way that made it impossible for Mr. Davis to fight the charge made by the State; to cross examine in a way that would reveal failure by the fire marshal to follow proper laboratory protocols; and to develop important evidence;

(10) trial counsel failed to seek a special instruction on circumstantial evidence;

(11) trial counsel failed to seek a special instruction on dying declarations;

(12) trial counsel failed to argue case law from the Florida Supreme Court in conflict with its own holding on the issue of admitting photographs of the deceased;

(13) trial counsel failed to argue that aggravators should be tried in the "guilt" phase of the trial since the aggravators are the very elements that transform first-degree murder *simpliciter* into a capital offense;

(14) trial counsel failed to argue that the maximum sentence allowed under the jury's verdict was life;

(15) trial counsel failed to insist on an instruction regarding a presumption that a life sentence is appropriate in the absence of proof beyond a reasonable doubt;

(16) trial counsel failed to argue that Mr. Davis's sentence violates the Eighth Amendment and Florida Constitution's prohibition against cruel and unusual punishment since the execution process itself meets the Florida Supreme Court's definition of especially heinous, atrocious and cruel;

(17) trial counsel failed to thoroughly investigate Mr. Davis's background and present social history and mental health mitigation, and as a result Mr. Davis's waiver of a mental health evaluation cannot be knowing, intelligent and voluntary;

(18) trial counsel failed to ensure a comprehensive PSI report or provide all mitigation evidence in his possession to the court prior to sentencing;

(19) trial counsel failed to aggressively litigate a motion to suppress based on a stale search warrant pursuant to Fla. Stat. 933.05;

(20) trial counsel failed to show through the available evidence that the State's hypothesis of prosecution was critically flawed;

(21) trial counsel failed to file a motion to suppress the Greisman photopack based upon chain of custody violations; and

(22) cumulative error.

The circuit court granted an evidentiary hearing on claims 4, 5, 7, 17, and 18.

On October 9, 2019, the State filed a motion to exclude testimony from Mr. Davis's mental health expert Dr. Quiroga, and any and all expert mental health evidence by way of testimony, reports, or medical, psychological, or other records. (PCR.1596-600). The circuit court granted the State's motion, and ordered that "[a]ny testimony from Dr. Michele Quiroga as a mental health expert shall be excluded at the evidentiary hearing. (PCR.1893).

On May 3, 2021, the State filed a motion to dismiss portions of Mr. Davis's Claim 17 and to exclude any and all mental health testimony or evidence from any source. (PCR.2129-38). At the hearing on June 4, 2021, postconviction counsel asked the circuit court to reserve ruling on the State's motion and made an ore tenus motion that Mr. Davis be transported to the next status conference so the court could conduct an in-person colloquy to determine the necessity for a competency evaluation. (PCR.3567-95). The circuit court granted the State's motion. (PCR.2233-36). The court struck from his previous order granting an evidentiary hearing those portions of Claim 17 that address trial counsel's mental health investigation and presentation. The court limited Mr. Davis's presentation of evidence supporting Claim 17 to evidence dealing with trial counsel's ineffectiveness for failing to speak with Mr. Davis's family and friends. (PCR.2235).

The evidentiary hearing in the instant case and the BP case were consolidated and held on August 23-24, 2021. The circuit court issued an order denying all postconviction claims on November 29, 2021. (PCR.3624-814).

This timely appeal follows.

STATEMENT OF THE FACTS

I. The guilt phase of trial

At approximately 3:00 p.m. on December 13, 2007, the Headley Insurance Agency in Lake Wales was robbed and the two employees, Yvonne Bustamante and Juanita Luciano, were bound with duct tape, doused with gasoline, and set on fire. Ms. Luciano was twenty-four weeks pregnant. Ms. Luciano's son, Michael Bustamante, was delivered by an emergency caesarian section that evening. (T88.3707). He died three days later from extreme prematurity. (T88.3709). Ms. Bustamante died five days after the attack (T88.3710), and Ms. Luciano died on January 3, 2008. (T88.3721).

On December 13, Evelyn Anderson drove to the Headley Insurance Agency to make her insurance payment. The door was locked when she arrived at around 3:00 p.m., even though Headley did not close until 5:00 p.m. (T82.2585,2587). She saw smoke coming from the top of the building and heard three "pops" that sounded like electrical wires popping. (T82.2589,2591). A tall, attractive, and nicely-dressed black man come out the front door. (T82.2587,2592). He had something under his arm. (T82.2590). She asked him what was going on inside the building, and he told her

there was a fire. (T82.2587). He walked around the side of the building and out of her sight. (T82.2589-90).

A few minutes later, Ms. Bustamante came out the same door. (T82.2590). She was badly burned and screaming for help. Someone else called 911 because Ms. Anderson was so nervous she could not get her cell phone to work. Ms. Bustamante got into Ms. Anderson's Tahoe, but Ms. Anderson coaxed her out to wait for the paramedics. Ms. Bustamante was laying on the hood of the truck when the paramedics arrived. (T82.2595). Ms. Anderson was with her when Ms. Bustamante told the paramedics that Leon Davis did it. (T82.2597).

Fran Murray was staying with Carlos Ortiz in his apartment on Stuart Avenue behind Headley. (T81.2457). When she got home from her job at the antique shop across the street, she noticed a black car parked down Phillips Street. (T81.2478-79). She was sitting on her neighbor Vicky Rivera's porch when she saw smoke coming from the area near the antique shop. She and Ms. Rivera went to investigate. The smoke was coming from the Headley building. (T81.2460-61). Their neighbor Brandon Greisman also went to investigate, but he was on the other side of the antique shop. Ms. Murray was at the

corner of the antique shop when she saw Ms. Bustamante coming out of the back of the Headley building between the shed and the chain link fence. (T81.2463). She was badly burned. (T81.2466). Ms. Murray noticed a tall, stocky black man near Phillips Street. She heard three "pops" that sounded like fire crackers and dropped to the ground. Ms. Rivera ran back home. (T81.2464-65).

Ms. Murray saw the black man put a gun in an orange or red collapsible lunch pail over his shoulder and walk north on Phillips Street. (T81.2471-72). Ms. Bustamante ran towards the front of the Headley building and Ms. Murray went to help Mr. Greisman, who was shot in the face. The whole tip of Mr. Greisman's nose was ripped off and it was bleeding profusely. She ripped off her t-shirt to pack his nose. (T81.2474). She helped Mr. Greisman home and met up with his wife and Mr. Ortiz in the driveway. (T81.2509,2475). Mr. Ortiz sat Mr. Greisman in a chair to wait for paramedics. (T81.2480).

Mr. Ortiz seemed to have everything under control at the Greisman residence, so Ms. Murray went back to Headley and found Ms. Bustamante leaning against an SUV. She was screaming that she was hot. Ms. Murray ran next door to Havana Nights to get her some ice water and saw Ms. Luciano sitting in a booth. She ran back

to Ms. Bustamante to give her water. (T81.2481-82). Ms. Bustamante told Ms. Murray a black man taped her up, doused her with gasoline, pushed her into a bathroom, and set her on fire. (T81.2486). She did not say the black man's name.

The first responders who cared for Ms. Bustamante at the scene were paramedic Jim Johnson and EMT Ernest Froehlich. They were dispatched at 3:41 p.m. and arrived at 3:45 p.m. (T82.2681). There were already police and firefighters there when they arrived. (T82.2683-84). They found Ms. Bustamante leaned over the hood of an SUV. Mr. Johnson heard her call out to a police officer and say: "Davis did this." He could not make out a first name. (T83.2769). They quickly got her on a gurney and moved her inside the truck. (T82.2687). Roughly eighty-five percent of her body was burned. (T83.2782).

Mr. Johnson left Ms. Bustamante in Mr. Froehlich's care while he triaged other patients. He found Ms. Luciano sitting in a booth in Havana Nights. She was severely burned and had a plastic substance around her wrists and neck. (T83.2771). She told him that she was set on fire after being doused with gasoline. (T83.2777). She complained of burning under the plastic material on her wrists. He

went back to the ambulance to get sterile water to douse her wrists. (T83.2773). Additional medical personnel arrived shortly thereafter and he left Ms. Luciano in their care. (T83.2775-76).

Mr. Froehlich was with Ms. Bustamante the entire time Mr. Johnson was triaging Ms. Luciano. (T83.2778). She was alert to person, place, and time. Her responses were verbal and coherent. (T82.2691). She told him she had been shot in her left hand, but her hands were very black and charred and he did not see the wound. (T82.2695-96). While he was treating her, he felt somebody step up on the back of the truck. It was a police officer, so Mr. Froehlich let him stay. He heard the officer ask Ms. Bustamante if she knew who did this to her, and she said, "Yes, I know who did it. It was Leon Davis." (T82.2701).

Lieutenant Joe Elrod of the Lake Wales Police Department was dispatched to Headley at 3:40 p.m. (T82.2627). The first victim he encountered was Brandon Greisman at the intersection of Stewart Avenue and Phillips Street. His face was badly bleeding. (T82.2630). The bridge of his nose was shot through and completely gapped. (T82.2631). Mr. Greisman told him: "I heard screaming and saw a lady on fire and a man throwing something on her so I went to help

and he shot me." (T82.2652). Mr. Greisman's injuries were not life-threatening, so Lieutenant Elrod went to check on the victim in the ambulance outside Headley. (T82.2633-34).

He found paramedics treating Ms. Bustamante on a gurney. (T82.2634). He estimated that roughly eighty percent of her body was burned. (T82.2636). She did not appear to be in pain, so Lieutenant Elrod assumed she was either in shock or all the nerve endings in her body were burned. (T82.2672). He did not think she would survive, so he asked her who did it and she told him it was Leon Davis. Lieutenant Elrod asked how she knew Leon Davis, and she said he was a previous client of the insurance agency. (T82.2637). Ms. Bustamante told him that the perpetrator tried to rob them, but they did not give him any money so he doused them with gas and set them on fire. (T82.2638). He continued to throw gas on her as she ran out of the building. (T82.2639).

Lieutenant Elrod also checked on Ms. Luciano inside Havana Nights. (T82.2641). Her injuries were worse than Ms. Bustamante's and she was obviously pregnant. (T82.2642). Ms. Luciano was treated by paramedic George Bailey and EMT Joshua Thompson. (T85.3151). Approximately eighty percent of her body was burned.

(T85.3158). Mr. Bailey asked her what happened, and Ms. Luciano told him that there had been a robbery, she had been bound with tape, doused with gasoline, and lit on fire. (T85.3163). She said she knew the man who did it. (T85.3164).

Brandon Greisman and Carlos Ortiz were the only witnesses at the Headley crime scene that identified Mr. Davis as the perpetrator. Mr. Greisman had just gotten home from work around 3:30 p.m. when he saw smoke between the Headley building and the antique shop and went to investigate. (T83.2863-65). His neighbor Vicky Rivera also saw the smoke and sped ahead of him. When Ms. Rivera reached the corner of the antique building, she said, "Oh my God, she is on fire." (T83.2867). Mr. Greisman ran past Ms. Rivera, and crossed paths with a woman on fire. (T83.2868). She ran into him and he tried to grab her. (T83.2869). Her body was smoking and her clothes were burned off. (T83.2870). He saw a tall black man walking their way. (T83.2876,2879). The man pulled a gun out of a lunch bag and pointed it at them. (T83.2881). Mr. Greisman tried to get out of the line of fire, but was still shot in the nose. (T83.2882). He fled to his home. (T83.2885). Ms. Murray was there and took off her shirt to stop the bleeding. (T83.2886). Mr. Ortiz was also in Mr. Greisman's

driveway and remained by his side until he was transported to the hospital. (T83.2887).

Mr. Greisman had surgery that evening to repair his nose. When he woke up, he was not allowed to watch television. (T83.2894). He was released from the hospital the next day and his mother drove him to the Lake Wales Police Department. (T83.2896-97). He was shown a photopack to see if he recognized anyone. Mr. Greisman could not recall exactly what the officers told him before they showed him the photographs. He looked at the photopack and pointed out Mr. Davis's photograph. (T83.2899). He also identified Mr. Davis in the courtroom *after* he was shown the photopack. (T83.2902).

Carlos Ortiz lived in the triplex beside Mr. Greisman's house. (T84.3019,3070). On December 13, he was outside talking on his cell phone when his neighbor Vicky Rivera saw smoke from the building across the street. (T84.3030). Ms. Rivera, Ms. Murray, and Mr. Greisman went to investigate, but Mr. Ortiz returned to his apartment to lock the door. (T84.3032). Mr. Ortiz thought the smoke was coming from the antique store. He was on his way to join his neighbors when he heard three "pops" that sounded like gunshots. (T84.3038-39). Then he saw Mr. Greisman making his way back

home holding his face. (T84.3038). Mr. Greisman pointed at a black man standing behind him and said, "That guy shot me." (T84.3040). The man was about twenty-five feet away and had a red lunch bag over his shoulder. Mr. Ortiz saw the top of the barrel of a pistol when the man reached inside the bag. (T84.3042,3049-50). Mr. Ortiz watched as the man walked north on Phillips Street to make sure he did not turn around and shoot at him as he led Mr. Greisman to safety. He lost sight of the man after he crossed Stuart Avenue and walked to the back of the vacant house across the street from the Greisman residence. (T84.3046). There was a black Nissan Maxima parked in the driveway of the vacant house, and it drove off. (T84.3047). Mr. Ortiz was certain that the vehicle he saw was a Nissan Maxima. (T85.3111). Mr. Ortiz did not see if the man got into the car because his view was blocked by a car parked in front of Mr. Greisman's house. (T84.3051,3045). Mr. Ortiz could not see who was driving the car. He just saw it leave the driveway and head north. (T84.3051).

Mr. Ortiz described the man as black, approximately thirty years old, over six feet tall, and roughly two hundred pounds. (T84.3042,3049,3052). Mr. Ortiz claimed that he recognized the man

as someone he had seen at the entrance gate to Florida Natural Growers. (T84.3052). Mr. Ortiz performed warehouse work through Spartan Staffing at various citrus plants, including Florida Natural. (T84.3026). However, he was not working at all in December 2007, and had not worked at Florida Natural at all in 2007. (T84.3029;T92.4376). Hundreds of people passed through that gate during shift change every day, and Mr. Ortiz could not say when he saw the man or how many times he had seen him. He did not know his name and had never spoken to him. (T84.3054;T85.3132).

Mr. Ortiz stayed with Mr. Greisman until the ambulance arrived. Ms. Murray took off her shirt and gave it to Mr. Greisman to stop the bleeding. (T84.3055). Once the ambulance arrived, Mr. Ortiz left Mr. Greisman and went to the front of the insurance company. (T84.3056). He recognized a police officer, Sergeant Black, and tried to tell him about black the car he saw. Sergeant Black was busy and told Mr. Ortiz he would get back to him. (T84.3060,3114). Mr. Ortiz went home and did not speak to any of the other police officers working the Headley scene. He did not make any attempt to tell the police that he could identify the man who committed the Headley crimes. (T85.3115).

Four days later, on December 17, Sergeant Black sent Detective Townsel to interview Mr. Ortiz. (T84.3061-62). Officer Townsel showed him a photopack and asked if he recognized anyone. He picked out Mr. Davis's photograph. (T84.3063). Like Mr. Greisman, he also identified Mr. Davis in court *after* he was shown the photopack. (T84.3066).

On cross-examination, Mr. Ortiz agreed that in the brief time it took the black man to cross the road, Mr. Ortiz only got a quick glimpse of him from the front, the side, the back, and then lost sight of him. And during that time, there were all kinds of distractions, people running around and screaming. (T85.3090). Mr. Ortiz agreed he was also focused on the man's right hand as he put a gun in the cooler bag (T85.3092-94), yet he did not notice if the man was wearing gloves, or if he was wearing a long or short-sleeved shirt. (T85.3109-10).

Mr. Ortiz did not remember if the man had facial hair. (T85.3101). He might have had a goatee. (T85.3102). Mr. Ortiz described his hair as a curly Afro. (T85.3103). Mr. Ortiz agreed that the photograph of Mr. Davis he identified in the photopack was clean-shaven with close-cropped hair. (T85.3104). Mr. Ortiz suggested that

maybe Mr. Davis got a haircut after he saw him at Headley. (T85.3109).

Officer Lynette Townsel with the Lake Wales Police Department testified about the photopacks she administered to Mr. Greisman and Mr. Ortiz. She showed the photopack to Mr. Greisman on December 14 at the Lake Wales Police Department. (T92.4314-15). Officer Townsel did not record what she actually said to him (T92.4322), but she usually advised witnesses that the suspect may or may not be in the photopack. (T92.4316). Mr. Greisman selected Mr. Davis's photograph. (T92.4317,4318).

Officer Townsel met with Carlos Ortiz at his apartment four days after the crime. (T92.4318-19). She showed him the photopack and he selected Mr. Davis's photo. (T92.4320-21).

Officer Townsel did not utilize a double-blind procedure when she administered the photopacks to Mr. Greisman and Mr. Ortiz. She knew Mr. Davis was in the photopack. (T92.4323).

The Greisman photopack went missing and was located in June 2010 in a shed at her home nearly three years after the crime. (T92.4324-25). The prosecutor and defense counsel were never even provided a copy of the photopack until Officer Townsel found the

original in her shed. (T92.4327). She admitted that it was not a good thing to misplace evidence and it should not have happened. (T92.4326).

The State's direct evidence at trial consisted of the eyewitness identifications made by Brandon Greisman and Carlos Ortiz, and Yvonne Bustamante's dying declaration, discussed *supra*. The remainder of the State's case was circumstantial, including the conflicting interpretations of statements made by Mr. Davis to his brother and Barry Gaston, the Davis family's financial difficulties, and ballistics evidence that all the bullets at the scene were shot from the same .38 or .357 magnum caliber firearm. (T90.4014-39). The State also presented evidence Mr. Davis acquired a .357 magnum from his cousin Randy Black a week before the Headley crimes. (T90.4049-81). Mr. Davis testified that he sold the gun after his mother told him to get rid of it because he was on probation. (T93.4557-61;T94.4628-30). No firearm linked to the Headley crime scene was ever recovered.

Security video from Wal-Mart (State Exhibit 9034; Defense Exhibit 9; R62.10361; R64.10608), Enterprise Car Rental (State's Exhibit 9031; Defense Exhibit 10; R62.10359; R64.10609), Beef

O'Brady's (State Exhibit 9032; R62.10360), and Mid-Florida Credit Union (State Exhibit 9026; Defense Exhibit 10, R62.10357; R64.10609) were introduced at trial.

There was no dispute that Mr. Davis was shown in the videos from Enterprise, Beef O'Brady's, and Mid-Florida Credit Union. The videos contradicted Mr. Greisman's and Mr. Ortiz's identifications of Mr. Davis as the perpetrator. Both Mr. Greisman and Mr. Ortiz described the perpetrator as having an Afro but not a full Afro (Greisman), or "Afro hair, curly hair" (Ortiz). (T84.2993; T85.3103-04). The videos from Enterprise and Beef O'Brady's from earlier in the day showed that Mr. Davis had the same close-cropped hairstyle in the morning and at lunch that he had that night when he turned himself in. If the shooter did in fact have an Afro, it was not Mr. Davis. (T80.2247-49; T86.3317-19; T96.5067,5090; T97.5161-62).

However, the defense disputed that Mr. Davis was the person in the Wal-Mart video that purchased an orange cooler, a Bic lighter, a large-sized gray t-shirt, and gloves. The State argued those items were consistent with items connected to the Headley scene, even though there was no testimony that the perpetrator wore gloves. (T85.3222-28; T87.3467-97). In fact, there was a fingerprint found

on the underside of a piece of duct tape that covered the lens of a security camera inside Headley (T80.2292,2301-03,2321,2334-5,2348), which the prosecutor argued was placed there by the perpetrator. (T99.5501,5505). However, the State could not link the print to Mr. Davis. (T82.2579). Moreover, none of the prints recovered from the Headley scene were linked to Mr. Davis. (T92.4281).

After the court ruled that the quality of the Wal-Mart video was insufficient to permit an identification of Mr. Davis (R20.3143-49), the State called Wal-Mart employees Mark Gammons and Jennifer DeBarros to testify that Mr. Davis was in the store on the morning of December 13. (T85.3226-27; T86.3272-74). The defense argued that Mr. Gammons was mistaken in his identification, and that Ms. DeBarros was confused about the date Mr. Davis visited the store. (T85.3237-51; T86.3276-92). Mr. Davis had large tattoos on his forearms, and the defense called a video production and engineering expert, Richard Smith, who zoomed in on the arms of the person in the Wal-Mart video with a high-resolution monitor and testified that if the person had a tattoo on his arm like Mr. Davis, he would have expected to see contrast. (T95.4935-39,4947-51).

The defense called three additional experts during its case-in-chief to challenge the State's eyewitness identifications: (1) William Gaut; (2) Dr. Richard Marshall; and (3) Dr. John Brigham.

William Gaut served as a homicide specialist in the Birmingham (Alabama) Police Department for over fifteen years, and eventually retired as Captain of Detectives. At the time of trial, he was working on his dissertation for his Ph.D. He had lectured at the University of Alabama-Birmingham and Samford University, and served as a full-time adjunct professor of criminal justice at Jefferson State College. Mr. Gaut had testified as an expert witness in the area of police practices and procedures in twenty-eight states and numerous federal jurisdictions. (T94.4742-53).

Mr. Gault testified that a double-blind procedure for showing a photopack or lineup was the standard procedure accepted by the International Association of Chiefs of Police and various law enforcement agencies. In a double-blind showing, the detective working the case procured a photo of the suspect, and then asked another detective unrelated to the case to pull at least five additional photographs that are similar in height, weight, clothing and general description. The prepared photopack was then given to a detective

that had no involvement in the case and no idea who the suspect was to administer to the witness. This procedure eliminated the possibility that the officer who conducted the showing would inadvertently do something—verbal cues, physical cues, or even stare at one of the photos for an undue amount of time—that could influence the witness. (T94.4756-58).

According to Mr. Gault, once a witness has picked out somebody in a photopack, they should not be told if they picked out the suspect. (T94.4759). All photopack and line-up showings should be recorded so it is clear what the officer administering the photopack said to the witness. There is no reason not to do this and it is really affordable. (T94.4766). The photos selected for the showing should be similar in age, weight, dress, height, marks, scars, tattoos, facial hair, etc., but not so close that the average person would not be able to tell the difference. (T94.4770-71).

According to Mr. Gault, the photopacks shown to Brandon Greisman and Carlos Ortiz contained information that should not have been there. Each photo had a number associated with it. There was only one photo that had 2007. All the others had '93 and '94. Those numbers should not have been on the photopacks. The crime

occurred in 2007 and Mr. Davis was the only suspect with 2007 under his photograph. (T94.4767).

Mr. Gaut also reviewed the booking information for the individuals in the photopack. Mr. Davis was twenty-eight years old, and the other individuals' ages ranged from seventeen to nineteen. Every person in the photopack should have been of similar age to avoid undue influence. If the suspect was in his late twenties, the photopack should have had suspects that were twenty-five to thirty years old, not teenagers. (T94.4768-70).

Mr. Greisman testified that the person who shot him wore a gray shirt. There were only two people in the photopack with a gray shirt, and one of them was Mr. Davis. The other four suspects wore white shirts. And the other person with a gray shirt had facial hair, and Mr. Davis did not. (T94.4771-72).

The photopack was in black and white, but color photographs would have been better. Black and white photos are misleading because they do not show shades of skin and contrast. In the Greisman photopack, the suspect with the darkest complexion was Mr. Davis. (T94.4763-64). He could have selected Mr. Davis by the process of elimination. (T94.4772).

After the photopack was shown to the witness, chain of custody should be maintained. (T94.4774). Regarding Officer Townsel's misplacement of the original Greisman photopack in her shed, Mr. Gaut testified, "That is the kind of mistake that should not happen. The detective should not take original evidence home, or anywhere else." (T94.4774).

The defense also presented the testimony of neuropsychologist Dr. Richard Marshall to explain how the brain processes what the eyes see. (T95.4812-31). "A memory is a reconstructive process, not a recording." (T95.4830). The more similar things are – whether people, cars, trees, or anything else – the harder they can be to differentiate and the more likely an error may occur. (T95.4828).

The defense also called Dr. John Brigham, an Emeritus Professor of Psychology at Florida State University. He taught at FSU for his entire academic career, except for the one year he taught at United States military bases in Europe and Turkey and two semesters at the FSU London Center. (T95.4842).

Dr. Brigham testified about the five factors that affect the accuracy of eyewitness memory: stress, weapon focus, the forgetting curve, confidence, and cross-racial identification. (T95.4855-67).

High stress usually interferes with the ability to encode accurate memory. (T95.4855-57). The ability to encode an accurate memory is diminished if stress is high. (T95.4859).

"Weapon focus" also affects eyewitness identification. When a weapon is involved in an event, a person's ability to encode an accurate memory is diminished because the weapon is likely to increase the level of stress in the situation, and people are likely to focus their attention on the weapon rather than on the face holding the weapon. (T95.4858-59).

The research on cross-racial identification shows that people tend to recognize faces of persons of their own race better than faces of persons of another race. (T95.4864-65).

The relationship between confidence and accuracy for eyewitness memory is weaker than it is for other kinds of memory. Just because an eyewitness is confident does not necessarily mean they are accurate. (T95.4866-67).

In addition to the expert witness testimony, the defense also presented the testimony of Headley customer Sylvia Long who saw a black man arguing with Yvonne Bustamante on the morning of December 13 when Mr. Davis was with his sister India Owens

(T92.4343-4367), employees of Spartan Staffing and Florida Natural Growers to dispute Mr. Ortiz's claim that he recognized Mr. Davis as someone he saw at the temporary employee gate at Florida Natural (T92.4368-4428), and Detective Ivan Navarro with the Polk County Sheriff's Office and Detective Kelli Collins with the Lakeland Police Department to dispute Garrion Davis's testimony that Mr. Davis told him that he hurt somebody. (T92.4432-T93.4480).

Trial counsel also called Mr. Davis's wife, Victoria Davis, who testified that the jacket and gloves found in the Nissan Altima were hers. (T93.4489). She also testified that although she was out of work in December 2007, she planned to go back to work after the first trimester of her pregnancy. Her medical bills were covered by Medicaid. (T93.4494). Monday was tight and they were cutting costs (T93.4496), but Mr. Davis always found a way to make money through odd jobs like cutting hair, in-home sales parties, and working security at his cousin's nightclub. (T93.4490). They were expecting a large tax refund and received financial assistance from their families. (T93.4498-99,4500).

Trial counsel called India Owens to testify about the time she spent with Mr. Davis on December 13 from approximately 8:00 a.m.

to the middle of the afternoon. (T93.4508-13). She testified that if Mr. Davis was in financial trouble, he knew she was able to take out a loan from her job to help him cover his expenses. (T93.4517).

Linda Davis testified that she knew Mr. Davis and his wife were having money problems and offered to move in with them and help with Garrion, housework, and grocery bills. (T94.4627-28).

Mr. Davis testified about his activities on December 13, including an altercation with a gang member in the parking lot of the rec center after a road rage incident. Mr. Davis was hit in the face and his shirt was ripped. (T94.4669-71). He was busy helping his sister all morning and running errands all afternoon and did not know about the crimes at Headley until he called Dawn Henry from McDonald's. She told him that there was a manhunt for him and he needed to turn himself in. (T94.4677-78). Ms. Henry told him not to go to the police station by himself and that he should call his sister. He called Noniece. She picked him up and he left the Nissan Altima in the Lagoon Nightclub parking lot next to McDonald's. (T94.4678).

II. The penalty phase of trial

The penalty phase of Mr. Davis's trial was held on February 17, 2011. The State called Mr. Davis's probation officer, Angela Bryson,

to testify that Mr. Davis was placed on probation July 6, 2007, and was still on probation on December 13, 2007. (T98.5345-56).

The State recalled Dr. Stephen Nelson. (T98.5347). The medical examiner testified about the pain the victims felt from the time they were set on fire until the nerve endings under their skin were damaged. Once the nerve endings were destroyed, there was no more pain because there were no nerve signals. (T98.5350). Dr. Nelson testified that humans have millions of nerve endings, so while hundreds of nerve endings might be damaged, there could still be hundreds more that are not damaged and still signal pain. (T98.5368). The pain medication administered by the flight nurses would have blocked the pain as soon as it was injected. (T98.5371).

The State also called two victim impact witnesses (Ms. Bustamante's mother Ebelia Rodriguez and her son Damon Lugo) and the prosecutor read the statements of three additional victim impact witnesses into the record (Ms. Luciano's sisters Adelita Luciano and Brendita Luciana, as well as the statement of Ms. Bustamante's cousin Alicia Gray). (T98.5376-82). The prosecutor entered Mr. Davis's certified convictions into evidence to close the State's penalty phase presentation. (T98.5384).

The defense presented mitigation evidence through the testimony of Mr. Davis's former partner Dawn Henry, his mother Linda Davis, and his sister India Owens.

Dawn Henry and Leon Davis were in a relationship for five years and have one child together named Garrion, after Mr. Davis's brother. Garrion was born with Down Syndrome. (T98.5387-88). She ended their romantic relationship when Garrion was three or four years old, but Mr. Davis continued to play a big part in Garrion's life. Father and son never wanted to be apart. Mr. Davis provided for his son and Ms. Henry never had to ask for anything. (T98.5390-91). Mr. Davis was a great father and supported her as they raised their special-needs son. He loved his child, provided for his family, and was Ms. Henry best friend. (T98.5399-400).

Ms. Henry was a licensed practical nurse. She did not have any specialized training in mental health issues, but she knew that Mr. Davis had gotten out of the military because he tried to harm himself. (T98.5393). She had also observed his obsessive-compulsive behaviors and mood swings. He was very down and depressed on Garrion's birthday in 2007 because he could not do anything big for him. (T98.5394-95). She was afraid he was going to harm himself,

even take his own life. (T98.5396). She had never seen him be violent. Mr. Davis called her at 5:00 p.m. on December 13. Ms. Henry confronted him with the news she had heard about Headley. He sounded so lost and confused, not at all like himself. (T98.5398). He did not seem to know what he had done. (T98.5399).

Linda Davis testified that Mr. Davis's father moved out of the home and to another state when Mr. Davis was a toddler. Mr. Davis saw his father on vacations and holidays. (T98.5401-02). He was a "soft" skinny child and bullied at school. Ms. Davis talked to plenty of parents to try to stop it. (T98.5402-03). One particular bully, Travis, jumped him all the time. When Mr. Davis was eight, he came home from school crying and very upset because Travis sexually assaulted him. Travis held Mr. Davis down and put his penis in his mouth. (T98.5404). Ms. Davis spoke to Travis's mother, but she told Ms. Davis that "[t]hey are boys, you know. They was playing." (T98.5405). Despite Ms. Davis's interventions with parents, the bullying continued. (T98.5406).

Deneen Clark moved into the Davis home when Mr. Davis was eight or nine. When he was twelve or thirteen, Ms. Davis moved out of the house and left Mr. Davis and his brother Gary with Ms. Clark.

(T98.5407). One day Mr. Davis came to visit her. He was crying and took his shirt off. "His whole back was busted." He told her that Ms. Clark had beaten him with an extension cord. She attempted to calm him down, but he tried to run away because he thought she was going to take him back to Ms. Clark. Eventually she quieted him down and cleaned his back. She did not take him to the emergency room, even though his back looked like "a slave being whipped." She was afraid the people at the hospital would think she abused her son. (T98.5409-10). She had a hard time getting Mr. Davis to talk about life with Ms. Clark, but once he was a grown man he told his mom that Ms. Clark whipped him all the time. (T98.5411).

Mr. Davis never wanted to discuss his pain and sadness, and Ms. Davis said she "spent [her] whole life trying to save him,"… "trying to convince Leon that [suicide] is something you just don't want to do." (T98.5413). His suicidal ideation started in middle school, and she took Mr. Davis and Gary to a family counseling crisis center. (T98.5414). She thought he improved, but when Mr. Davis was in the Marines, he called her and told her that he wanted to kill himself. She talked to him for six hours and thought she had made a breakthrough, but she got a call from one of his friends in boot

camp that Mr. Davis was in the hospital in a coma because "ran his car up to over 100 miles per hour and hit a concrete pole." (T98.5416-17). Mr. Davis got a medical discharge from the Marines and came home. (T98.5425). His mood swings and suicidal ideation got worse after his discharge. She tried to convince him that if he killed himself, he would harm her too because they were very close. He always tried to hide his emotional breakdowns from her. (T98.5426-27). When he showed her the gun in December 2007, her first reaction was fear that he would kill himself. She did not want to put that thought in his head, so she told him to get rid of the gun to avoid getting in trouble with probation. (T98.5428).

Mr. Davis's mental health took another turn when he got married to Vicky. Ms. Davis felt her son was not ready for marriage, and Mr. Davis and Vicky both had their own personal issues that "just [didn't] go together." (T98.5429).

When Ms. Davis and Noniece picked Mr. Davis up at McDonald's on December 13, she confronted him with what she had heard about the Headley crimes as soon as he got in the car. (T98.5430). Mr. Davis held his head and cried. She told him the media said he had hurt somebody. Mr. Davis asked, "I hurt

somebody?" He cried uncontrollably and said, "Ma, I didn't hurt nobody" and put his head in her lap. (T98.5431). He did not stop crying from the time she picked him up until they reached the police station. (T98.5433).

India Owens testified that she had witnessed many of her brother's obsessive-compulsive behaviors, but she had never seen anything like his behavior on December 13 when he kept locking her door from the inside and even locked her out of her own bathroom. (T98.5434-35).

When Ms. Owens and Barry picked Mr. Davis up at the Circle K, he was crying "like a seven-year-old, laying in my mom's arms." He was hysterical, and asked several times, "Did I hurt somebody?" (T98.5437). He mumbled and cried during the drive to the police station, but she could not hear what he said. According to Ms. Owens, her "kid brother" was a compassionate, loving, and selfless man who helped her through two miscarriages. She was a disabled vet with a back injury. He helped her get through her first Christmas alone after her husband left. Mr. Davis was always there for her. (T98.5438).

After their father left home, the family was "somewhat busted up." Ms. Owens and her sister first ended up in Fort Walton Beach with her stepfather, and then later they were separated in foster care. Mr. Davis and Garry were not with them, but she did not remember what happened to them. (T98.5440).

Ms. Owens was out of foster care and back at her mother's home when Deneen Clark moved in with them. (T98.5441). Ms. Clark was an alcoholic who consumed a twelve-pack or more daily. (T98.5443). She was a hateful woman. She beat them, punched them in the face, and kicked them. (T98.5444). She called Mr. Davis a punk, a fagot, and told him he was a pussy because he could not stand up for himself and fight. She beat him with extension cords and water hoses and punched him in the chest. Her abuse would leave him bleeding with welts, open scabs, and sores on his back, legs, chest and ribs. (T98.5445-46). Ms. Clark's abuse got so bad that Ms. Owens once pulled a gun on her. After this incident, her mother moved her in with a family friend, but the boys and Noniece continued to live with Ms. Clark. (T98.5446). Mr. Davis was finally taken out of the house and away from Ms. Clark when she beat him so bad that the skin on his back, his legs, and his butt was ripped wide open. (T98.5448). Mr.

Davis tried to pretend the abuse by Ms. Clark and all the school bullies never happened. His obsessive-compulsive behavior and desire for everything to be perfect were consequences of living in an abusive environment all those years. (T98.5449-50).

III. The postconviction evidentiary hearing

The evidentiary hearing was held on August 23–24, 2021. The circuit court heard testimony on claims from both the Headley and BP Rule 3.851 motions. This Statement of Facts will be limited to testimony relevant to the Headley case.

Robert Norgard is an attorney at Norgard, Norgard & Chastang in Bartow, Florida. (PCR.2722). He has been a member of the Florida Bar since 1981. (PCR.2725). He has been in private practice since 1995. His practice is entirely criminal defense work, and he predominantly handles more serious cases. (PCR.2723). He has been board-certified in criminal trial practice since 1995. (PCR.2729). He worked on his first death penalty case when he was employed with the Public Defender's Office for the Sixth Circuit. After three-and-a-half years at the Sixth Circuit, he spent ten years at the Public Defender's Office for the Tenth Circuit. (PCR.2726). He was in the capital division for most of his time at the Tenth Circuit and was

routinely assigned first-degree murder cases. (PCR.2727). Mr. Norgard has tried more than thirty-five death penalty cases. (PCR.2730). He has served as an expert witness in capital postconviction cases, as well as postconviction counsel in approximately twelve cases. He has done a few capital appeals, but his wife does a lot of capital appellate work and advises him on appellate issues that deal with first-degree murder cases. (PCR.2731-32).

Mr. Norgard was involved with the Florida Association of Criminal Defense Lawyers in the formalization of qualifications to handle court-appointed capital cases. He characterized the requirements for death qualification as "pretty minimal." (PCR.2728).

Mr. Norgard was court-appointed to represent Mr. Davis. His law partner and wife, Andrea Norgard, was his co-counsel. He performed the courtroom work. She performed legal research, reviewed the discovery, and took the lead on the penalty phase preparation. They conferred on tactics and strategy. (PCR.2724-25).

A. Pretrial publicity

Mr. Norgard had handled some high-profile cases in Polk County and dealt with the media and publicity surrounding them.

He tracked the media coverage of his cases so he would know what information the jury pool was exposed to. Mr. Norgard recalled that there was a lot of publicity surrounding Mr. Davis's case. (PCR.2737-38). His team kept copies of most of the articles. In addition to the print media, there were also news cameras at the courthouse during trial. (PCR.2739).

After the first attempt at a trial ended in a mistrial, Mr. Norgard filed a motion to keep the case in Polk County. (PCR.2462-64). Mr. Norgard admitted that he had never filed this type of motion before. (PCR.2745). "By the time we tried Mr. Davis's case in 2010, it's surprising to me, but people's knowledge of local criminal cases is very limited compared to what I would deal with back in the '80s and '90"s …[b]y 2010, very few people read the local papers." (PCR.2748).

After the judge declared a mistrial, members of Ms. Bustamante's family attacked Mr. Davis and Ms. Norgard in the courtroom. When asked if he was concerned about potential jurors' exposure to the widely televised outburst, Mr. Norgard stated: "I would have been shocked if anybody walked in at jury selection and said, oh, yeah, I saw the video, the guy attacking Mr. Davis and your

wife. I mean, you know, we would have asked him about that and asked to have him excused." (PCR.2752).

B. Judge Hunter's comments about the victims' photographs to the venire

During jury selection, Judge Hunter told the venire that he had been doing death penalty cases for a number of years and the photographs of the victims in this case were incredibly graphic and this was the first time in all his years on the bench that he had to give such a dire warning to jurors. Mr. Norgard testified that he did not object to those comments because: "I'm not gonna stick my head in the sand. These are horrible photos." (PCR.2759).

Mr. Norgard was familiar with the phrase "worst of the worst" as it relates to death penalty cases. "That's a reference to considering the overall aggravation and lack of mitigation in the case, which cases are deserving of the death penalty." (PCR.2758).

C. Case-specific voir dire

Mr. Norgard was concerned about the emotional aspects of this case. He recalled asking jurors whether they could base their verdict on the evidence and not emotion. (PCR.2760). Mr. Norgard agreed

that the emotional aspects of this case could have affected both the guilt and penalty phases. (PCR.2761).

Mr. Norgard disagreed that it was important to ask potential jurors whether they would have been able to consider a life sentence in a case where someone was set on fire or where a baby was killed. "The jurors already [knew] that those [were] the facts of the case. My decisions on what questions I ask the jurors are based on what the State's asked them regarding death qualification and then I make a determination as to what questions I feel like I want to ask regarding death qualifications." Mr. Norgard based his voir dire on a "totality of the circumstances." (PCR.2762). "I don't think it's important that certain specific question be asked." (PCR.2763). He also testified that he has been in the Tenth Circuit since 1985 and when he hears where someone lives, he knows their background. (PCR.2764-65).

SUMMARY OF ARGUMENT

ISSUE 1:

Trial counsel was ineffective because he insisted that Mr. Davis's trial remain in Polk County, despite inflammatory and overwhelmingly pro-prosecution pretrial publicity. It was clear from the record that Judge Hunter would have granted a motion to change venue. Had trial counsel filed a motion to remove the case from Polk County, the outcome of Mr. Davis's trial would have been different.

ISSUE 2:

Trial counsel was also ineffective because he failed to object to the trial court's comments to the venire that the injuries to the victims in this case were so uniquely gruesome that he was giving a warning to jurors that he had never given before during all of his time on the bench. Trial counsel could have accomplished his objective of weeding out jurors who could not handle the graphic nature of this case without the trial court's comments that singled out Mr. Davis's case out as worse than any other capital cases. But for counsel's deficient conduct, the outcome of Mr. Davis's trial would have been different.

ISSUE 3:

Trial counsel was also ineffective because he failed to engage in case-specific voir dire to discover potential jurors who could not be fair and impartial to Mr. Davis and were predisposed to vote for guilt not matter what because of the victim's horrible injuries. It was also critical for trial counsel to discover any jurors for whom no mitigating circumstances would ever outweigh the State's aggravating circumstances. But for counsel's deficient conduct, the outcome of Mr. Davis's trial would have been different.

ISSUE 4:

The circuit court should have granted a hearing on Mr. Davis's claim that trial counsel was ineffective because he failed to file a motion to suppress the Greisman photopack based on Officer Townsel's chain of custody violation. The motions, files, and records in this case do not conclusively show that Mr. Davis is entitled to no relief. Officer Townsel misplaced this critical piece of evidence in her backyard shed. The Greisman photopack was not secured in an evidence bag and missing for almost three years. Mr. Greisman's identification of Mr. Davis in the photopack and his in-court identification of Mr. Davis were critical to the State's case, and but

for counsel's deficient conduct, the outcome of the trial would have been different. Mr. Davis should have been able to ask trial counsel about his strategic reasons or lack thereof, for not challenging this evidence.

ISSUE 5:

The circuit court should have granted a hearing on Mr. Davis's claim that trial counsel was effective because he failed to file a motion to suppress the evidence seized during the execution of the search of the Davis's Nissan Altima. The motions, files, and records in this case do not conclusively show that Mr. Davis is entitled to no relief. The search warrant was stale and improperly executed, and the State used the floor mats from the Altima to argue that Mr. Davis transported gasoline to Headley with the plan to set the victims on fire. Mr. Davis should have been able to ask trial counsel about his strategic reasons, or lack thereof, for not challenging this evidence. But for counsel's deficient conduct, the outcome of the trial would have been different.

ISSUE 6:

The circuit court should have granted a hearing on Mr. Davis's claim that trial counsel was ineffective because he failed to cross-

examine the State's law enforcement witnesses about the existence of dash cam footage of the Headley scene that mysteriously went missing before trial. Trial counsel could have used this evidence to challenge the State's witness and raise reasonable doubt. The motions, files, and records in this case do not conclusively show that Mr. Davis is entitled to no relief. But for counsel's deficient conduct, the outcome of the trial would have been different.

ISSUE 7:

Repeated instances of ineffective assistance of counsel so tainted Mr. Davis's trial that he did not receive the fundamentally fair trial he was entitled to under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution.

ISSUE 8:

The circuit court erred in granting the State's motion to summarily deny Mr. Davis's Claim 17 of his Rule 3.851 motion and exclude all mental health testimony or evidence from any source without conducting a colloquy with Mr. Davis to determine the necessity for a competency evaluation.

ARGUMENT

The *Strickland* Standard

Mr. Davis's appeal of the denial of his Rule 3.851 motion for postconviction relief contains claims of ineffective assistance of counsel.

> Our adversary system is designed to serve the ends of justice; it cannot do that unless accused's counsel presents an intelligent and knowledgeable defense. Such a defense requires investigation and preparation. Petitioner's counsel did not adequately prepare himself for his client's defense, and therefore petitioner did not receive adequate assistance of counsel.

Caraway v. Beto, Texas DOC, 421 F.2d 636, 637-38 (5th Cir. 1970).

Trial counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Specifically, counsel has a duty to investigate in order to make the adversarial testing process meaningful. *Id.* at 690. An ineffective assistance of counsel claim has two components. The defendant must show that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687. Prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Id.* at 694.

The Eighth Amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. *Beck v. Alabama*, 447 U.S. 625 (1980). The United States Supreme Court noted, in the context of ineffective assistance of counsel, that the correct focus is on the fundamental fairness of the proceeding:

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland, 466 U.S. at 696.

One of the primary duties defense counsel owes his client is the duty to prepare himself adequately prior to trial. Pretrial preparation, principally because it provides a basis upon which most of the defense's case must rest, is perhaps the most critical of stage of the

lawyer's preparation. *See Magill v. Dugger*, 824 F.2d 879, 886 (11th Cir. 1987).

Importantly, trial counsel cannot be found to have made a strategic decision when he failed to fully investigate the evidence. *Strickland*, 466 U.S. at 690-91; *Wiggins v. Smith*, 539 U. S. 510, 527 (2003) (a reviewing 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); and *Henry v. State*, 862 So. 2d 679, 685 (Fla. 2003) ("A reasonable strategic decision is based on informed judgment.").

ISSUE 1

THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO SEEK A CHANGE OF VENUE FOR TRIAL

I. Applicable law

Mr. Davis's trial counsel should have requested a change of venue from Polk County due to significant pretrial publicity that was overwhelming pro-prosecution and hostile to Mr. Davis.

This Court has acknowledged that

> [i]t is a well-settled principle under our caselaw that a criminal trial may be held in a county other than that

> designated by the constitution or statute if prejudice in the proper county makes it impossible for a defendant [ ] to secure a fair trial by an impartial jury there. Such prejudice may warrant a change of venue when widespread public knowledge of the case in the proper county causes prospective jurors to judge the defendant with great disfavor because of his character or the nature of the alleged offense. When this occurs, the defendant's right, under the United States and Florida Constitutions, to a fair trial by an impartial jury is protected by moving the trial from the proper, but partial county, to an impartial one.

Rolling v. State, 695 So. 2d 278, 284 (Fla. 1997); *see also Manning v. State*, 378 So. 2d 274, 276 (Fla. 1979).

This Court established the test for whether a change of venue is necessary due to prejudice in the proper county:

> The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and pre-conceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977).

The trial court is required to evaluate (1) the extent and nature of any pretrial publicity; and (2) the difficulty encountered in actually selecting a jury. *Murphy v. Florida*, 421 U.S. 794 (1975). In evaluating the first prong, the trial court must consider the length of time that

has passed from the crime to the trial and when, within this time, the publicity occurred; whether the publicity consisted of straight, factual news stories or inflammatory stories; whether the news stories consisted of the police or prosecutor's version of the offense to the exclusion of the defendant's version; the size of the community in question; and whether the defendant exhausted all of his peremptory challenges. *Rolling v. State*, 695 So. 2d at 285 (internal citations omitted).

In evaluating the second prong, the trial court should examine the difficulty in selecting an impartial jury that will decide the case on the basis of the evidence rather than on their extrinsic knowledge of the case. *Id.* at 285.

II. Trial counsel failed to move for a change of venue due to inflammatory pro-prosecution pretrial publicity

This case was featured heavily in the Florida papers that cover news and events in Polk County, including the Lakeland Ledger (Polk County), Tampa Bay Times (Hillsborough County), and the News Chief in Winter Haven (Polk County), as well as various television news networks and internet sources.

The news coverage in the initial days and weeks after the Headley crimes was intense. The Lake Wales Police Department issued press releases on December 15, 16, and 19, with details of the crime, Mr. Davis's arrest, and the victims' deaths. (PCR.2377-78).

On December 14, the News Chief ran a front-page, above-the-fold article about the Headley crimes and Michael Bustamante's birth, that also included a large photograph of Mr. Davis. (PCR.2439). The Tampa Tribune also reported the crime on December 14, quoting LWPD Captain Troy Schulze that he had "never seen anything come close to this, violence-wise." (PCR.2369-70).

On December 15, the Lakeland Ledger featured a large, front-page, above-the-fold article about the Headley crimes with a large photograph of Mr. Davis and claimed he confessed: "I hurt somebody." (PCR.2388-95). The News Chief also ran a front-page, above-the-fold story titled "Rampage Suspect" that quoted Polk County Sheriff Judd calling Mr. Davis a "mean rascal." (PCR.2441).

On December 16, the Ledger ran another front-page, above-the-fold story that linked Mr. Davis to the crimes at the BP station, a timeline of both crimes, and details about Mr. Davis's life. (PCR.2382-87). On December 17, the Ledger ran a front-page, above-the-fold

story about the death of Michael Bustamante, as well as an article on the front page of Section B with a large photograph of Brandon Greisman titled "Neighbors Deal with Horrific Images." (PCR.2396,2399-400).

On December 18, the Ledger and the News Chief ran front-page stories about the victims' families. (PCR.2401-02,2443). On December 19 and 20, the Ledger ran stories on the death of Yvonne Bustamante and her "inseparable and happy" relationship with her partner James Lugo. (PCR.2403,2405). The News Chief ran a front-page, above-the-fold article declaring that Mr. Davis's motives were robbery and revenge. (PCR.2445).

On December 21, the Ledger covered the community prayer service in a front-page, above-the-fold story (PCR.2407), while the News Chief ran an article asking for public information about Mr. Davis's whereabouts between December 7 and December 13. (PCR.2449). Yvonne Bustamante's funeral was also covered on the front page on December 23. (PCR.2409).

On January 4, the Ledger covered Juanita Luciano's death on the front page (PCR.2411-12), and the News Chief covered her funeral in a front-page, above-the-fold article on January 7. (PCR.2458).

The Ledger ran several case updates between the crime and the trial. On January 10, the Ledger announced on the front page of Section B that Mr. Davis was indicted for five murders. (PCR.2422). The Ledger ran an article on May 27, 2010, that detailed the dying declarations of Ms. Bustamante and Ms. Luciano and the defense's attempts to keep them out at trial. Ultimately, the jury did not hear Ms. Luciano's dying declaration, but if any of the jurors read the Ledger, they knew about it anyway. (PCR.2366-67).

The Tampa Bay Times ran an inflammatory investigative piece on February 10, 2008, titled "How debt led one man to an American nightmare." The article hypothesized that Mr. Davis killed five people because he bought a house he could not afford. (PCR.2371-76). The article portrayed Mr. Davis as a scheming, materialistic person who cultivated an image of wealth even though he made $13 an hour driving a forklift. (PCR.2371-72). The article documented Mr. Davis's criminal history of thefts and schemes and the financial distress that ensued after he was caught. This article also alleged that in 1999, Mr. Davis trashed the car of a man who got in a fight with his girlfriend. He smashed the rear window, poured acid all over the car, and put sugar in the gas tank. After they broke up and she had a

new boyfriend, someone doused the boyfriend's car with gasoline and lit it on fire. The article claimed that witnesses saw Mr. Davis in the area. (PCR.2374). Although the article acknowledged that Mr. Davis was never charged with a crime related to these two incidents, any potential juror who read this inflammatory article would conclude that Mr. Davis committed these crimes.

Nearly every article about the Headley case reminded readers that Mr. Davis was also charged with double murder in an attempted robbery of the BP station near Lake Alfred. (PCR.2367, 2374, 2377, 2378, 2382-87, 2400, 2402, 2403, 2406, 2408, 2410, 2411, 2412, 2414, 2417, 2419, 2420-21, 2422, 2424, 2425-26, 2428, 2441-42, 2444, 2445, 2448, 2449, 2452-53, 2455, 2459, 2461). Any juror who read the local news would undoubtedly conclude that Mr. Davis killed the clerks at the BP station and the employees at Headley, and deserved to die.

After the first attempt at a trial ended in a mistrial, Ms. Bustamante's mother threw her purse at Andrea Norgard. Ms. Bustamante's father jumped two benches and the rail that divided the gallery from the attorneys to attack Mr. Davis and Ms. Norgard.

(R56.9239). This astonishing event generated enormous amounts of publicity. According to Mr. Norgard,

> [I]n 30 years of practicing law, and I think we could take our collective memories here, I don't think anybody can point to another situation where somebody came over, threw something and hit an attorney and came over two benches and grabbed a female attorney. I don't think any of us have ever experienced that in our entire careers, and we would be hard pressed to find other people who have.

(R56.9243-44).

The attack on Mr. Davis and Ms. Norgard so saturated the local media that the court was compelled to start looking at alternative venues for the next trial. Judge Hunter recounted his experience with the publicity after the incident:

> I can tell you that I went home that night that I declared the mistrial and my wife had Channel 9 on. And before I could pour a glass of water, it came on television and I watched it. And after I watched it, I hit the mute button and sat down at the kitchen table where I could still see the television and had several more glasses of water and it was being shown every 30 minutes.
>
> And then the next day I went to the gym, as I do every day, and I get on the treadmill first before I - - for about five minutes to warm up before I start working out, and there's television sets up there and there it was again.
>
> And then someone told me you could get on The Ledger's website and they had a version of it you could click on and watch.

> And I can tell you that I went to the post office and a lady waited on me that I have never laid eyes on before in my life, and she said something to the effect that – I don't remember how she worded it, but—
>
> ***
>
> And, you know, here she sees me out of context. I'm not wearing a robe obviously at the post office, so I have real concerns as to whether we can get a jury here. And so I have already started looking at options. And I have already made some phone calls.

(R56.9259-60).

The press coverage of the attack on Mr. Davis and Ms. Norgard was overwhelmingly sympathetic to Ms. Bustamante's family. Ms. Rodriguez was interviewed by the media, and the newspaper reported:

> Rodriguez said, Friday, she reacted without thinking when she threw the purse. When you are hurting you don't think, you get mad and angry and you just react. I didn't want to hurt nobody, I just want to do something to Davis the way he did my girl. The girls had their rights, too. But, the girls are gone. It is like they don't exist no more. Everyone forgets about what he did.

(R56.9338).

Ms. Rodriguez was interviewed again a few days later and complained that she was being treated like a criminal and "they are acting like they are scared of me doing something…They should be

scared of him, he's the criminal. They are protecting the criminal instead of the people who are hurting." (R56.9339-40).

Those were the heartbreaking words of a grieving mother and any potential juror who was exposed to the media coverage of the Bustamante family's pain would be overwhelmingly sympathetic and prejudiced against Mr. Davis. Judge Hunter even acknowledged that "people that may not have been paying attention to this case that much, because they don't like reading or watching about crime, when he flew over the railing, it got everybody's attention. You can't imagine how many people have called me or told me they saw that on television. . ." (R56.9268).

This Court has held that "an atmosphere of deep hostility raises a presumption [of partiality], which can be demonstrated by either inflammatory publicity or great difficulty in selecting a jury." *Provenzano v. State*, 497 So. 2d 1177, 1182 (Fla. 1986), *quoting Murphy v. Florida*, 421 U.S. 794 (1975). Clearly, the inflammatory publicity that surrounded this case for years after the crime demonstrated a presumption of partiality in the jury pool in Polk County.

The circuit court order denying this claim stated that Mr. Davis failed to show any evidence that a motion for change of venue would have been granted. The court completely ignored the record. Judge Hunter had done significant research about the racial composition of potential counties for the next trial, and was particularly concerned about finding a county that would be acceptable to the defense. (R56.9263-69). Judge Hunter's willingness to grant a motion for change of venue was so alarming to the prosecutors that they filed a motion to recuse Judge Hunter because of what they perceived as his defense-friendly perspective on venue. (R56.9282-328). Mr. Norgard was so concerned about the judge moving the case to another venue that he filed a motion to try the case in Polk County, something he claimed he had never done before. (R56.9276-79).

The circuit court's description of Mr. Norgard's "sound strategic reasons" for wanting the trial to be held in Polk County mischaracterizes Mr. Norgard's statement at the hearing on November 2, 2010, that, "[w]e have two kids in school where we have to deal with kid care issues, which we have already talked about." (R56.9262). The circuit court claimed "[t]he purpose of this statement was to notify the court of the time necessary to make child care

arrangements prior to beginning the trial should venue be changed, not an argument in opposition of changing venue." (PCR.3003). However, Judge Hunter's response to Mr. Norgard's November 2010 statement made it clear that he perceived this was an argument by Mr. Norgard against a change of venue. Judge Hunter responded, "Well, I hope we don't have to do it, but I want to be realistic enough to be prepared to go." (R56.9262-63). Mr. Norgard's subsequent motion a week later to keep the trial in Polk County reinforced that childcare issues were a huge consideration for Mr. and Mrs. Norgard. Childcare, while very important for working parents, should not have been a consideration of where Mr. Davis's case was tried.

III. Prejudice

Mr. Davis was clearly prejudiced by trial counsel's insistence on keeping the trial in Polk County. Mr. Davis was convicted by a jury in a county that was saturated with inflammatory publicity about the crime, his life, his previous crimes, his debts and other financial difficulties, and even detailed theories about his alleged motives. The local news sources that were readily available to the jurors extensively covered the victim's deaths, funerals, local prayer services, and the ongoing sufferings of the victims' families. As Judge

Hunter told the jury venire, "This case has probably generated as much news in the Lakeland Ledger as any case [he] could remember in the last 20 years." (T68.341).

The evidence against Mr. Davis was mostly circumstantial, and Mr. Davis had legitimate defenses to the eyewitness identifications by Mr. Greisman and Mr. Ortiz. Mr. Davis had evidence that another black man fought with Ms. Bustamante on the morning of the crimes when Mr. Davis was across town helping his sister. There was no forensic evidence at the Headley scene, including fingerprints and DNA, that connected Mr. Davis to the crime. It was clear that Judge Hunter was willing to grant a motion for change of venue, and had trial counsel made such a motion, the outcome of this case would have been different. A jury outside of Polk County that was not exposed to the intense and inflammatory local pretrial publicity would have considered the State's evidence *and* Mr. Davis's compelling defenses instead of making a decision based on bias and preconceived opinions rooted in the community's knowledge of the crime.

ISSUE 2:

THE CIRCUIT COURT ERRED IN FINDING TRIAL COUNSEL WAS NOT INEFFECTIVE BECAUSE HE FAILED TO OBJECT TO COMMENTS BY THE TRIAL COURT TO THE VENIRE THAT THE PHOTOS OF THE VICTIMS WERE UNIQUELY GRAPHIC AND HE WAS HANDLING MR. DAVIS'S CASE DIFFERENTLY FROM ALL OTHER DEATH PENALTY CASES

During jury selection, three photographs of the victims were shown during individual voir dire. While the jurors were still together in the courtroom, Judge Hunter gave the venire some basic facts of the case, and then made the following statement:

> **This case is truly not for the faint of heart. The photographs alone in this case are graphic.**
>
> For the last three and a half years, I have handled all of the first-degree murder cases in this circuit, and I have been doing this for 16 years, so **I have seen a lot in my service on the bench.** And I typically tell jurors that you are going to see photographs, because in every homicide case, the jury is shown photographs of the crime scene and they are typically shown photographs from an autopsy, where a medical examiner performs an autopsy on the victim, and I tell people typically that yes, you may see some blood and it is not something you particularly want to look at, but it is no worse than you probably see on television any more. As you will know, between movies and television, it's become so graphic that I don't see jurors shocked as maybe 10 or 15 years ago**. These photographs are graphic.**
>
> There are some people, and I don't fault you if you fall in this category, but there are some folks that may not be

> able to handle the emotional aspect of this case and the graphic nature of this case.
>
> **I don't normally give this kind of presentation for my other cases**, we just simply tell folks there may be some semi-graphic photographs, if you have a weak stomach, let us know, we'll talk about it. **But I don't do it quite like we're doing this.** And the reason I'm doing this, I don't want to pick a jury, and you see how much time we're spending to get this done correctly, and then the first day that you are shown photographs, one of you absolutely can't take it and emotionally and I have lost a juror or two or three.

(R71.803-06) (emphasis added). Then, the jurors were called in one by one and shown graphic photographs of the victims.

When asked why he did not object to the court's comments, trial counsel stated: "I'm not gonna stick my head in the sand. These are horrible photos." (PCR.2759).

In his order denying Mr. Davis's claim, the circuit court focused on the parties' intent in showing the pictures to the venire—"to determine if potential jurors could cope with the emotional aspects of this case." (PCR.3003).

The trial court's and trial counsel's objective to weed out jurors who could not handle the graphic nature of the victims' injuries could have been accomplished without the court's gratuitous comments about the uniquely gruesome nature of this case among other all

other murder cases he has handled. The court should not have confided to the jury that he was handling Mr. Davis's case in a different way from how he typically handled all other cases.

This improper comment on the evidence was not a minor misstep by the trial court. The jurors were told that the State does not seek death in every murder case, but they sought the death penalty in Mr. Davis's case. (T68.241). The court's comments to the jurors about the uniquely graphic nature of the photographs in this case telegraphed that this was the most gruesome case the judge had ever presided over. The jurors were told that the judge was treating this case differently from all his other cases. Before the State presented its first aggravator in the penalty phase, Mr. Davis's jury knew this case was different from [worse than] all other capital cases.

Mr. Davis was prejudiced by trial counsel's failure to object to these comments. Trial council should have argued that although the jurors should be shown photographs of the victims during individual voir dire, no comments should be made that singled Mr. Davis's case out as worse than any other cases. But for the trial court's gratuitous comments and trial counsel's failure to object to them, the result of the proceeding would have been different.

ISSUE 3:

THE CIRCUIT COURT ERRED IN FINDING TRIAL COUNSEL WAS NOT INEFFECTIVE BECAUSE HE FAILED TO ENGAGE IN A CASE-SPECIFIC VOIR DIRE

I. Applicable law

Trial counsel failed to engage in case-specific voir dire designed to discover jurors that could not be fair and impartial to Mr. Davis in the guilt phase and consider his mitigation in their penalty phase deliberations. In *Morgan v. Illinois*, the United States Supreme Court held that juror[s] who will automatically vote for the death penalty in every case must be disqualified from service, because their presence on the jury would violate "the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment." 504 U.S. 719, 729 (1992). "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

The American Bar Association has developed specific guidelines for selecting capital juries. The ABA Guideline 10.10.2 for voir dire and jury selection in death penalty cases:

> A. Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case (particularly those relating to bias on the basis of race or gender), whether any procedures have been instituted for selection of juries in capital cases that present particular legal bases for challenge. Such challenges may include challenges to the selection of the grand jury and grand jury forepersons as well as to the selection of the petit jury venire.
>
> B. Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques: (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; (2) for uncovering those prospective jurors who were unable to give meaningful consideration to mitigating evidence; and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possible excludable.
>
> C. Counsel should consider seeking expert assistance in the jury selection process.

31 Hofstra L. Rev. 913 (2003).

According to the Commentary to Guideline 10.10.2, capital jury selection is a "highly specialized and technical procedure." It is incumbent upon trial counsel to ask probing questions that "expose those prospective jurors who are unable or unwilling to follow the applicable sentencing law, whether they will automatically vote for death in certain circumstances or because they are unwilling to consider mitigating evidence." 31 Hofstra L. Rev. 913 (2003).

In *Boyd v. State*, 200 So. 3d 685 (Fla. 2015), the Florida Supreme Court made it clear that a postconviction claim for ineffective assistance of counsel during voir dire must proffer the questions the defendant believes should have been asked. In his First Amended Motion for Postconviction Relief with Special Request for Leave to Amend, Mr. Davis satisfied the requirement articulated in *Boyd v. State* and proffered the questions that trial counsel should have asked the jury venire. (PCR.1072-77).

II. Trial counsel he failed to engage in case-specific voir dire

At the evidentiary hearing, Mr. Davis elicited testimony from trial counsel about five specific questions that should have been posed to the venire (originally listed as b), f), h), i), and p) in Claim 7):

1) Based on the pictures of the deceased you were shown earlier—if we were to reach the penalty phase, could you entertain the possibility that the time Ms. Bustamante and Ms. Luciano spent in pain was relatively short? (PCR.1072).

2) Does the death of an unborn fetus/child affect your ability to be fair and impartial? (PCR.1074).

3) Given the injuries you observed in the photos shown to you earlier in jury selection is there any set of mitigating circumstances you could ever hear that would outweigh what you observed in those photographs? (PCR.1074).

4) It has been put forth that the photos, and thus this case, is the worst any of the court personnel have seen—do you understand you have to completely put that out of your mind in deciding these cases? Are you in fact able to put those comments out of your mind? (PCR.1074).

5) If you were to find Mr. Davis guilty of first-degree murder and that the basic facts outlined by the judge earlier were the result of Mr. Davis's actions—could you begin the sentencing phase presuming Mr. Davis was entitled to a life sentence? (PCR.1077).

In his order denying Mr. Davis's claim, the circuit court invoked *Mendoza v. State*, 87 So. 3d 644 (Fla. 2012), and held that the ABA Guidelines provide guidance, and "to hold otherwise would effectively revoke the presumption that trial counsel's actions, based upon strategic decisions, are reasonable, as well as eviscerate 'prevailing' from 'professional norms' to the extent those have advanced over time." *Mendoza*, 87 So. 3d at 653.

Strickland requires that "[t]he trial strategy itself must be objectively reasonable." *Strickland*, 466 U.S. at 681. In Mr. Davis's case, trial counsel's explanations for his failure to conduct case-specific voir dire were not reasonable. Trial counsel's testimony at the evidentiary hearing made it clear that he did not consider the ABA Guidelines when he selected Mr. Davis's jury. Trial counsel testified that he did not think it was important for certain questions to be asked during a capital voir dire. (PCR.2763). Trial counsel employed a "totality of the circumstances" approach to pick a capital jury, which took into account the questions and responses from the jurors, as well as his own observations such as if he caught a juror giving his client a nasty look. (PCR.2764).

Trial counsel's voir dire at Mr. Davis's trial was inconsistent. For example, trial counsel asked an important question to one group of prospective jurors, of which nine sat on Mr. Davis's jury:

> In this case, if Mr. Davis, and if he were found guilty of these crimes, first-degree murder, first-degree murder, first-degree murder, the three people who you saw dead, attempted murder, arson, and armed robbery, do you really feel that if you found him guilty of that beyond a reasonable doubt, having seen those photos, knowing what you know, that you could truly keep an open mind as to what penalty to recommend, whether it be death or

> life in prison without the possibility of parole? Do you really feel you could keep an open mind?
>
> …
>
> Is there anybody who, just because of what you know right now, you are sitting there, if I convict him of that, there's no way I could consider giving that person a life sentence without parole versus the death penalty? Is there anybody who feels different about that?

(T77.1782-83). However, trial counsel did not ask the second group of prospective jurors this case-specific question. This group included three individuals who sat on Mr. Davis's jury, as well as the four alternate jurors.

According to the circuit court, trial counsel was not deficient for failing to ask specific questions about the victims' injuries and the fact that one of the victims was an infant because those concerns "were addressed as the photographs were shown." (PCR.3009). The court missed the point of case-specific voir dire. The specific questions Mr. Davis alleged that trial counsel should have asked the prospective jurors were tailored to expose those prospective jurors who were predisposed to vote for guilt no matter what because of the victims' horrible injuries. They were also tailored to expose jurors who would not be able to keep an open mind and consider Mr. Davis's mitigation. In Mr. Davis's case, it was important for trial counsel to

know if the death of an unborn fetus/child would affect a juror's ability to be fair and impartial. It was also critical that trial counsel discover any jurors for which no mitigating circumstances would ever outweigh the victim's injuries. And although Mr. Davis's argues in Claim 5, *supra*, that the court should not have given any commentary on the photographs shown to the potential jurors, it would have been important to know if any prospective jurors could not set aside the court's comments about the uniquely gruesome nature of Mr. Davis's case.

The circuit court found that trial counsel was not ineffective for failing to ask the prospective jurors that if they were to find Mr. Davis guilty of first-degree murder, they could begin the sentencing phase presuming Mr. Davis was entitled to a life sentence. The circuit court based his holding on trial counsel's testimony that he would never ask the jury to assume Mr. Davis was guilty. (PCR.3009-10). The problem with Mr. Norgard's strategy was that the guilt and penalty phase voir dire were done together at the beginning of the trial. When the jury was asked about their thoughts and feelings on the death penalty, the jury was already being asked to consider what they

would do if Mr. Davis was found guilty. Trial counsel's explanation does not make sense.

III. Prejudice

Given the facts of this case, the nature of the injuries to Ms. Bustamante and Ms. Luciano and the death of an infant, and the aggravating factors trial counsel knew the State could prove should Mr. Davis be found guilty, it was incumbent upon trial counsel to conduct a thorough and detailed voir dire to select a jury that could actually be fair and impartial to Mr. Davis during the guilt phase, and consider Mr. Davis's mitigation during their penalty phase deliberations. Trial counsel's failure to ask critical questions during voir dire to discover jurors who would never be able to vote for life in this case no matter how compelling Mr. Davis's mitigation deprived Mr. Davis of a fair and impartial jury in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

ISSUE 4:

TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO FILE A MOTION TO SUPPRESS THE GREISMAN PHOTOPACK BASED ON OFFICER TOWNSEL'S CHAIN OF CUSTODY VIOLATION, AND THE CIRCUIT COURT ERRED IN DENYING THIS CLAIM WITHOUT AN EVIDENTIARY HEARING

Trial counsel was ineffective for failing to protect Mr. Davis's due process rights under the Fifth Amendment and file a motion to suppress the Greisman photopack based on Officer Townsel's chain of custody violation. The trial court should have granted an evidentiary hearing on this claim. Postconviction counsel should have been allowed to ask trial counsel about his strategic reasons, or lack thereof, for not challenging this evidence. The motions, files, and records in the case do not conclusively show that Mr. Davis is entitled to no relief.

I. Applicable law

"Relevant physical evidence is admissible unless there is an indication of probable tampering." *Peek v. State*, 395 So. 2d 492, 495 (Fla. 1981). In order to demonstrate probable tampering, the party attempting to bar the evidence must show that there was a probability that the evidence was tampered with—the mere

possibility is insufficient. *Murray v. State (Murray I)*, 838 So. 2d 1073, 1082-83 (Fla. 2002). Once the party moving to bar the evidence has met its burden, the burden shifts to the nonmoving party to establish a proper chain of custody or submit other evidence that tampering did not occur. *Id.*

A sufficient showing of the chain of custody is made where the object has been kept in proper custody since the time it was under possession and control until the time it is produced at trial. *See Murray v. State (Murray II),* 3 So. 3d 1108 (Fla. 2009) (concluding that there was no break in the chain of custody where lotion was missing from an evidence bag, but was later found to have been intentionally removed from the bag by a print examiner so it would not contaminate other evidence).

II. Trial counsel failed to file a motion to suppress the Greisman photopack and his in-court identification of Mr. Davis

Brandon Greisman was shot in the face when he tried to help Ms. Bustamante at the Headley scene. He was transported to the hospital for surgery to save his nose. When he was released from the hospital on December 14, 2007, he was taken to the Lake Wales

Police Department, where Officer Townsel administered a photopack to him. (T92.4317; State's Exhibit 4467).

After administering the photopack to Mr. Greisman, Officer Townsel was required to turn that evidence into the property room. However, Officer Townsel failed to do so, in violation of Section 13-1, Evidence and Property, Lake Wales Police Department Standard Operating Procedures. (PCR.2032,2384-91).

Nobody knew that the Greisman photopack was not in evidence for two and a half years. Law enforcement performed a file and evidence review in May 2010 and discovered that the Greisman photopack was missing. There was an exhaustive search of all records and files within the Lake Wales Police Department and the evidence section of the Polk County Sheriff's Office. (T92.4327). In June 2010, Officer Townsel searched through boxes of files in her backyard storage shed and discovered the original Greisman photopack. (PCR.2032). It had been missing from the day Officer Townsel showed it to Mr. Greisman on December 14, 2007, until the day she found it in her shed in June 2010. (T92.4325). Moreover, this photopack was not even secured in an evidence bag until *after* it was found in her shed. She was unable to provide an explanation for its

disappearance, and could not account for how it ended up in her shed, except that she had been up for three days straight. (T92.4326).

Despite the obvious chain of custody violation of this evidence, trial counsel failed to investigate and file a motion to suppress the photopack at trial, and to suppress Mr. Greisman's in-court identification of Mr. Davis.

The unexplained disappearance of this critical evidence in Mr. Davis' capital murder case, especially where identification of the perpetrator is at issue, is certainly suspect and indicative of tampering. *See Murray I*, 838 So. 2d at 1082-83 (concluding that the trial court abused its discretion in admitting the evidence because Murray met his burden of demonstrating probable evidence tampering and the State failed to meet its burden of proving that such tampering did not occur); *see also Dodd v. State*, 537 So. 2d 626, 627 (Fla. 3d DCA 1989).

Further, an in-court identification may not be admitted "unless it's found to be reliable and based solely upon the witness's independent recollection of the offender at the time of the crime," uninfluenced by any intervening illegal confrontation. *Edwards v. State*, 538 So. 2d 440, 442 (Fla. 1989). Mr. Greisman did not identify

Mr. Davis in court until after he was shown the photopack. This photopack evidence was unreliable, and therefore, Mr. Greisman's in-court identification was also tainted and should have been suppressed.

III. Prejudice

The circuit court should have granted an evidentiary hearing on this claim and allowed postconviction counsel to explore why trial counsel failed to protect Mr. Davis's due process rights under the Fifth Amendment and move to suppress the Greisman photopack and Mr. Greisman's in-court identification. Mr. Davis was prejudiced by trial counsel's deficient conduct because Mr. Greisman's identification of Mr. Davis was critical to the State's case. There is a reasonable probability that if the Greisman photopack had been thrown out and Mr. Greisman was prohibited from identifying Mr. Davis in court, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

ISSUE 5:

TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO FILE A MOTION TO SUPPRESS THE FRUITS OF A STALE SEARCH WARRANT, AND THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS'S CLAIM WITHOUT AN EVIDENTIARY HEARING

Trial counsel should have protected Mr. Davis's right to unreasonable searches and seizures under the Fourth Amendment and filed a motion to suppress the fruits of the search warrant for Victoria Davis's Nissan Altima. The circuit court should have granted an evidentiary hearing on this claim. Postconviction counsel should have been allowed to ask trial counsel about his strategic decisions, or lack thereof, not to challenge this evidence. The motions, files, and records in the case do not conclusively show that Mr. Davis is entitled to no relief.

I. Applicable law

The Fourth Amendment of the United States Constitution "protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *Carpenter v. United States*, 138 S.Ct. 2206 (2018), *quoting Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967). In 1914, the United States Supreme Court

established the "exclusionary rule" when it held that the federal government could not use evidence obtained in an illegal search to convict a defendant in federal court. *Weeks v. United* States, 232 U.S. 383 (1914). In *Mapp v. Ohio*, the United State Supreme Court made the exclusionary rule the national standard when it held that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments" and is also protects citizens "against rude invasions of privacy by state officers." 367 U.S. 643, 657 (1961).

Pursuant to Section 933.05, Florida Statutes, a search warrant cannot be issued except upon probable cause supported by affidavit or affidavits, naming or describing the person, place, or thing to be searched and particularly describing the property or thing to be seized; no search warrant shall be issued in blank, and any such warrant shall be returned within ten days after issuance thereof. *See e.g., Spera v. State*, 467 So. 2d 329 (Fla. 2d DCA 1985).

II. Trial counsel failed to file a motion to suppress the fruits of the stale search warrant for the Nissan Altima

On December 14, 2007, Detective Benjamin Metz requested a warrant to search Victoria Davis's Nissan Altima from Judge Robert Griffin. (PCR.1811). Judge Griffin issued the warrant the same day.

It was returned to the clerk on January 8, 2008, with a blank Inventory and Receipt, as well as a blank Return. (PCR.1802-08).

On September 19, 2008, Detective Benjamin Metz was contacted by Assistant State Attorney Robert Antinello and advised that the clerk had the original search warrant for the Nissan Altima, but the property section page and the return page were still blank. (PCR.1810).

Finally, on September 23, 2008, Detective Metz filled out the blank return page and took what he claimed to be the original property receipt page along with a copy of the warrant and returned it to Judge Griffin, nine months after he authorized the warrant. (PCR.1812-14).

Florida law required that the Return be filed within ten days of the execution of the warrant. The search warrant for the Nissan Altima was stale and incomplete and trial counsel failed to argue the fruits of the vehicle search should be suppressed. The motion to suppress actually filed by trial counsel was skeletal at best and was abandoned by counsel. No specific arguments were ever made by the defense. Trial counsel's abandonment of a constitutionally significant issue did not advance Mr. Davis's interests in any way

and was certainly not strategic. The evidence seized from the Altima, including the floor mats, played a major role in this case.

In his opening statement, the prosecutor told the jury:

> [T]he State Fire Marshal did testing to determine whether or not there was a presence of gasoline in the interior of the car. Now, the car was recovered early the very next morning. And the Fire Marshall used a dog, a canine that has been trained in detecting the presence and odor of gasoline. And he had the dog take a look at the floor mats from the car, laid them out, and the dog alerted on various car mats. So those things were sent off to the laboratory for the State Fire Marshall. And you'll hear testimony from the analyst that they determined that, yes, on some of those mats there was in fact the presence of gasoline.

(T79.2183).

Deputy Fire Marshal Kurt Lanthrop testified that his accelerant detection canine, Lucky, was trained to alert on petroleum hydro carbon, which includes gasoline, lighter fluid, mineral spirits, lamp oils, candle oils, and anything else with a petroleum substance. (T90.4047). On December 14, 2007, the Davis's Nissan Altima was impounded in the garage at Bartow Air Base and Deputy Lanthrop and Lucky were asked to do an interior examination of the vehicle. Deputy Lanthrop removed the floor mats from the Altima and put them in a multipurpose room free of petroleum products. (T90.4044-45). The floor mats were placed on brown freezer paper in the order

they were removed from the vehicle: driver, passenger front, passenger back, driver's back. (T90.4046-47). Lucky alerted to the driver's floor mat and the passenger rear floor mat. (T90.4047; R61.10154, State's Exhibit 7099).

Ryan Bennett, a crime laboratory analyst with the State Fire Marshal's laboratory, received the following items from the search of the Nissan Altima:

State's Exhibit 20: carpet and rubber matting
State's Exhibit 21: carpet and rubber matting
State's Exhibit 22: rubber matting
State's Exhibit 23: rubber matting
State's Exhibit 24: rubber matting

(T91.4122).

Each item tested positive for gasoline. (T91.4128). The State used this evidence to argue to the jury that Mr. Davis transported gasoline to the Headley scene with the plan to set the victims on fire.

III. Prejudice

The mishandled search warrant for the Nissan Altima was just one of many examples of shoddy police work and professional misconduct by officers of the Lake Wales Police Department. The department failed to retain the dash cam video from the Headley scene. *See infra*, Issue 6. Officer Townsel lost the Greisman

photopack. *See supra,* Issue 4. Trial counsel's failure to aggressively fight to exclude evidence obtained from the stale search warrant deprived Mr. Davis of his Fourth Amendment right to be protected from unreasonable searches and seizures by the government.

The circuit court should have granted an evidentiary hearing on this claim and allowed postconviction counsel to explore why trial counsel failed to move to suppress this damaging evidence. Mr. Davis was prejudiced by trial counsel's deficient conduct because the evidence seized from the Nissan Altima was critical to the State's case. There is a reasonable probability that if the evidence recovered during the search of the Nissan Altima was suppressed, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

ISSUE 6:

TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO PRESENT EVIDENCE TO THE JURY THAT WOULD RAISE REASONABLE DOUBT, AND THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS'S CLAIM WITHOUT AN EVIDENTIARY HEARING

Trial counsel should have confronted the State's law enforcement witnesses with the evidence that there was dash cam footage recorded at the Headley scene that mysteriously went

missing. The circuit court should have granted an evidentiary hearing on this claim. Postconviction counsel should have been allowed to ask trial counsel about his strategic decisions, or lack thereof, not to challenge this evidence. The motions, files, and records in the case do not conclusively show that Mr. Davis is entitled to no relief.

I. Applicable law

The United States Supreme Court has explicitly stated that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). The Due Process Clause requires defense counsel to engage in rigorous adversarial testing of the State's evidence at trial.

II. Trial counsel failed to present evidence that there was dash cam video of the Headley scene and the police lost it

On December 27, 2007, Sergeant Griffin Crosby filed a supplemental incident report in this case that stated:

> On 12/27/2007, I recovered the video hard drive from Officer Hampton's in-car video system. I then transferred the video images to the Digital Eyewitness Media Manager (DEMM). The server is secured with limited access. I then

> transferred the video images from the DEMM, to a Digital Video Disc (DVD). The disc was turned over to the Property/Evidence Custodian. At this time, I have no further information regarding this case.

(PCR.876).

If the circuit court had granted an evidentiary hearing on this claim, postconviction counsel could have examined trial counsel and confirmed he received all of the police reports in Mr. Davis's case, and therefore would have been in possession of Sergeant Crosby's supplemental report from December 27, 2007.

Mr. Davis filed a request under Rule 3.852(g) during his postconviction investigation to obtain a copy of the dash cam video referenced in Sergeant Crosby's report. (PCR.265-69). Postconviction counsel was informed that all the Lake Wales Police Department evidence was transferred to the Polk County Sheriff's Office. The Polk County Sheriff's Office filed a response to Mr. Davis's Rule 3.852(g) request that represented they were not in possession of any dash cam videos. (PCR.315-19).

On December 17, 2007, the circuit court held a hearing on Mr. Davis's Rule 3.852 requests, and Jason Reuters, Esquire, of the Polk County Sheriff's Office informed the circuit court, "Our – our vehicles

did not and do not have dashboard cameras. So we would have no records for dashcam or video surveillance. There are no policies and procedures regarding the same." (PCR.3432). This was a technical answer that "our vehicles" did not have dashboard cameras, and if the Polk County Sheriff's Office indeed did not have dashboard cameras, it was clear that Lakes Wales Police Department did. Otherwise, Sergeant Crosby filed a fictitious report in a murder case.

If the circuit court had granted an evidentiary hearing on this claim, postconviction counsel would called witnesses and asked them the questions that Mr. Davis claimed trial counsel should have asked. Postconviction counsel would have called Sergeant Crosby and Officer Hampton to testify at the evidentiary hearing about the existence of the dash cam video that Sergeant Crosby turned over to the Property/Evidence Custodian of the Lake Wales Police Department.

The missing dash cam video issue could have allowed defense counsel to contest the testimony of the witnesses at the scene. Regardless of whether there was a video or not, the report that the video existed provided fertile ground for cross examination of the State's witnesses. It would have provided the defense with the

opportunity to show law enforcement failed to preserve critical evidence.

III. Prejudice

The State was required to prove its case against Mr. Davis beyond a reasonable doubt. It was incumbent upon defense counsel to chip at away at every piece of the State's evidence and challenge every aspect of the State's theory of the case. Trial counsel already had evidence that the Lake Wales Police Department used evidence from a stale search warrant and a grossly mishandled photopack to charge Mr. Davis with multiple murders. A Lake Wales Police Officer, Lieutenant Elrod, was the witness who testified that he determined that Ms. Bustamante was not going to survive her injuries, asked her who harmed her, and she told him it was Leon Davis. It was critical that defense counsel used whatever evidence that was at his disposal to undermine Lieutenant Elrod's credibility.

The postconviction investigation uncovered evidence that trial counsel had police reports that showed at least one of the LWPD officers who responded to the Headley scene had a dash cam video that mysteriously disappeared. The circuit court should have granted an evidentiary hearing on this claim and allowed postconviction

counsel to explore why trial counsel failed to use this critical information to chip away at the State's case, undermine the credibility of the LWPD, and raise reasonable doubt.

ISSUE 7:

THE CIRCUIT COURT ERRED IN FINDING THAT CUMULATIVE ERROR DID NOT DEPRIVE MR. DAVIS OF A FUNDAMENTALLY FAIR TRIAL

Mr. Davis did not receive the fundamentally fair trial he was entitled to 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 sheer number and types of errors in Mr. Davis's trial, when considered as a whole, virtually dictated his conviction. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford the adequate safeguards required by the state or federal constitution against an improperly imposed conviction.

Repeated instances of ineffective assistance of counsel significantly tainted Mr. Davis's trial. The errors as claimed in this brief are hereby specifically incorporated into this claim and include ineffective assistance of counsel for failure to request a change of

venue for Mr. Davis's trial, failure to object to gratuitous comments by the trial judge during voir dire, failure to engage in case-specific voir dire, failure to challenge the chain of custody of a critical piece of the State's evidence, failure to use available evidence to challenge the State's case and raise reasonable doubt, and all others listed in Mr. Davis's initial brief and presented at the evidentiary hearing.

Under Florida case law, the cumulative effect of these errors denied Mr. Davis his 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), this Court vacated a capital sentence and remanded the case for a new sentencing proceeding 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. *Chapman v. California*, 386 U.S. 18 (1967); *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). This Court is required to analyze prejudice not only individually, but also cumulatively. *See Parker v. State*, 89 So. 3d 844, 867-68 (Fla. 2011); *State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996).

Mr. Davis was on trial for his life, and his attorneys had a duty to prepare for trial and present the best defense they could. Instead, trial counsel insisted Mr. Davis's trial be held in a hostile venue that was saturated with pro-prosecution publicity; allowed the trial court to tell the jury that Mr. Davis's case was uniquely grotesque and that he was treating Mr. Davis's case differently from all other death penalty cases; failed to engage in case-specific voir dire to make sure that Mr. Davis's jurors could be fair and impartial in the guilt phase, as well as consider all the mitigation and not automatically sentence Mr. Davis to death, because two of the victims were burned to death and the third victim was an infant; allowed the State to use the floor mats from the Nissan Altima against Mr. Davis even though the

search warrant was stale and improperly executed; allowed the State to use a photopack that was improperly stored in a backyard shed for almost three years; and failed to use evidence of the existence of dash cam video at the Headley scene to undermine the credibility of the State's law enforcement witnesses.

Addressing these errors on an individual basis will not afford adequate standards required by the Constitution. These errors cannot be harmless. The cumulative effect of these errors denied Mr. Davis his fundamental rights under the United States and Florida constitutions.

ISSUE 8:

THE RECORD SUFFICED TO CREATE BONA FIDE DOUBT IN MR. DAVIS'S COMPETENCE TO PROCEED. THE CIRCUIT COURT THUS ERRED IN DENYING MR. DAVIS'S MOTION FOR A COMPETENCY EVALUATION BEFORE GRANTING THE STATE'S MOTION TO EXCLUDE ALL MENTAL HEALTH TESTIMONY AND EVIDENCE AND SUMMARILY DENYING CLAIM 17

I. Applicable law

The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right not to be tried or convicted while incompetent. *See Drope v. Missouri*, 420 U.S. 162, 172 (1975). The test for whether

a defendant is competent to stand trial is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U. S. 402, 402 (1960). Further, a trial court must sua sponte make a competency determination once sufficient evidence exists to raise a bona fide doubt as to the defendant's competency. *Pate v. Robinson*, 383 U.S. 375, 385 (1966).

In *Carter v. State*, this Court guaranteed the right to a judicial determination of a defendant's competency during postconviction proceedings. 706 So. 2d 873, 875 (Fla. 1997). In doing so, this Court reasoned:

> There can be no question that a capital defendant's competency is crucial to a proper determination of a collateral claim when the defendant has information necessary to the development or resolution of that claim. Unless a death-row inmate is able to assist counsel by relaying such information, the right to collateral counsel, as well as the postconviction proceedings themselves, would be practically meaningless.

Id. (internal citation omitted). The Florida legislature codified *Carter* when it amended Fla. R. Crim. P. 3.851(g), which governs the

procedure for evaluating and determining legal competence during capital postconviction proceedings:

> If, at any stage of a postconviction proceeding, the court determines that there are reasonable grounds to believe that a death-sentenced defendant is incompetent to proceed and that factual matters are at issue, the development or resolution of which require the defendant's input, a judicial determination of incompetency is required.

3.851(g)(3). This statute limits halting proceedings to those in which "there are factual matters at issue, the development or resolution of which require the defendant's input." 3.851(g)(1). The postconviction court's determination of competency is normally initiated by collateral counsel filing a written motion. *See* 3.851(g)(2) ("Collateral counsel **may** file a motion for competency determination . . . .") (emphasis added); *but see* 3.851(g)(4) ("The motion for competency examination shall be in writing and shall allege with specificity the factual matters at issue . . . ."). However, the onus for finding reasonable grounds to conduct a competency evaluation remains with the court. *See Pate*, 383 U.S. at 385 ("We believe that the evidence introduced on Robinson's behalf entitled him to a hearing on this issue. The court's failure to make such an inquiry thus deprived Robinson of his constitutional right to a fair trial."); *see also*

3.851(g)(5) ("If the court finds that there are reasonable grounds to believe that a death-sentenced defendant is incompetent to proceed . . . .").

II. The circuit court erred when he failed to hold a hearing to evaluate Mr. Davis's competency before he granted the State's motion to summarily deny Mr. Davis's Claim 17 and bar Mr. Davis from presenting any and all mental health testimony and evidence at the evidentiary hearing

After Mr. Berry left CCRC-North in early January 2020, Mr. Davis's evidentiary hearing was set for August 2020. Throughout several orders, the court had granted evidentiary hearings on Claims 4, 5, 7, 17, and 18 and reserved ruling on Claim 22. However, on January 20, news broke of the first confirmed cases of COVID-19 in the United States. On March 1, Governor Ron DeSantis ordered the State Health Officer to declare a public health emergency. (PCR.1954-57). On March 11, 2020, the Chief Justice of this Court issued an Order authorizing the chief justices of the district and circuit courts to "take such mitigating measures as may be necessary to address the effects of the COVID-19 outbreak on their respective courts." (PCR.1980-85). Governor DeSantis restricted travel for state employees like Mr. Davis's attorneys at CCRC-North, the Department of Corrections restricted the transportation of inmates, and it became

impossible for Mr. Davis's postconviction counsel to interview and prepare witnesses and consult with Mr. Davis. (PCR.1987-88).

Although Judge Jacobsen was very patient with Mr. Davis during the early days of the postconviction proceeding, he appeared increasingly stressed about the delays in Mr. Davis's case as the COVID-19 pandemic began to impact the circuit courts. Mr. Davis's new postconviction counsel filed a motion to continue the evidentiary hearing when it became evident it was unlikely the courts would be open for an in-person hearing. (PCR.1944-88). Even then, Judge Jacobsen was hesitant to grant a continuance over the State's objection. (PCR.1989-96;3748-51). The Court assured the State, "I can sense your frustration, and I share the frustration. These cases seem to linger far longer than they ever should with what's at stake. That's part of what's in the back of my mind." (PCR.3751).

The hearing was tentatively rescheduled for January 6-8, 2021. (PCR.3549). The circuit court commented on the chaos in the felony division due to the pandemic and a temporary scheduling calendar. (PCR.3548). He was also under pressure because the criminal docket was backed up and the courts were under pressure to get as many jury trials "up and running and done" as possible. (PCR.3545).

Although Polk County courts were in Phase II of the COVID protocols established by this Court in January 2021, the Polk County Jail was reluctant to transport inmates due to the high transmission rates at the jails and prisons. However, the court stated that "takes second chair to the need to move the matter forward." (PCR.3558). Although he ultimately conceded to continue the evidentiary hearing (PCR.3562), he apologized profusely to the State. "I know every time I feel almost grim because I know how anxious you are with all the cases that you have that are kind of, you know, kind of jammed up in a log jam. I know things are difficult for you." (PCR.3559).

In January 2021, the COVID-19 cases in Polk County had been increasing significantly and the courts were "on the cusp of falling back into Phase I." (PCR.3599). The hearing was eventually rescheduled for eight months later on August 23-26, 2021. (PCR.3463).

At the June 4, 2021, hearing on the State's motion to bar any mental health testimony or evidence of any kind at the evidentiary hearing, Ms. Macready alerted the court that she was concerned about Mr. Davis's competency:

> I will say that I'm in a bit of a difficult position with regards [to] Mr. Davis, and I know Your Honor, as well as other counsel, have been on this case for a while and are familiar with the issues concerning Mr. Davis. But when I took over the case as counsel, he initially agreed to cooperate and allow us to conduct a mitigation investigation despite it being very late in the game. You know, it was already set for an evidentiary hearing, this was just maybe a month before this COVID global pandemic began. So despite that, we've been doing our best to conduct a mitigation investigation. However, at this point Mr. Davis is – I believe he's back to where he was at mid-2019 in not wanting to present any penalty phase testimony or evidence.
>
> We've spoken with him on several occasions about this, and we recently spoke with him again in person, and I told him that Your Honor may want to do a colloquy with him, may want to do a competency evaluation, because I believe that's where it was going in 2019. And so that is what I'm asking the Court to do at this time.

(PCR.3576-77).

Ms. Macready was concerned that Mr. Davis's mental illness caused him to vacillate between allowing his postconviction attorneys to conduct a mental health investigation, and sending letters to the court voluntarily waiving his penalty phase claims. (PCR.3577). Ms. Macready requested that Mr. Davis be transported to the next status hearing on June 25, 2021, so the circuit court could conduct a colloquy to determine the necessity for a competency evaluation

before the court granted the State's motion and terminated his ability to seek penalty phase relief. (PCR.3579).

The State objected to Ms. Macready's request because if the court determined that Mr. Davis did need to be evaluated for competency, the decision would delay the August 2021 evidentiary hearing and require the State to find a mental health expert of its own:

> And the problem, of course, is that if we start addressing the mental health issue and he gets evaluated or there is a report existing regarding his mental health in postconviction, then the State would be obligated to go ahead and hire its own expert and get him evaluated, and I don't think that's something that we really could do in two months. Maybe we could, but I don't think we should be placed in a position to do that now, when we've been litigating this motion since 2018.

(PCR.3582).

Although the circuit court was not obligated to accept Ms. Macready's representations concerning Mr. Davis's competence without question, "an expressed doubt in that regard by one with 'the closest contact with the defendant' is unquestionably a factor which should be considered." *Scott v. State*, 420 So. 2d 595, 598 (Fla. 1982), *quoting Drope v. Missouri*, 420 U.S. 162, 177-78 n.13 (1975).

Even if Judge Jacobsen was hesitant to accept Ms. Macready's representations about Mr. Davis's competence, he was well-acquainted with Mr. Davis. He presided over the BP and Headley postconviction proceedings, and he also presided over Mr. Davis's bench trial in the BP case. The postconviction record was replete with numerous instances that should have alerted the court that a hearing was necessary, including Mr. Davis's battles with Robert Berry (PCR.995-96;1000-1001;3219-26;3301-3333;3675-81;3691-711), his pro se filings and prolific written communications with the court (PCR.507-10;994-1002;1521-24;1532-35;1540-49;1563-68), and his paranoia that Mr. Berry was not telling him the truth about his case. (PCR.508-09;995;1532-35;3705). This evidence was sufficient to create a "bona fide doubt" regarding Mr. Davis's competency to proceed on the several claims, thus requiring the court to "hold a competency hearing and make an independent determination of whether [Mr. Davis was] competent to proceed." *Sheheane v. State*, 228 So. 3d 1178, 1180 (Fla. 1st DCA 2017). "[A]n independent competency finding is a due-process right that cannot be waived" *Zern v. State*, 191 So. 3d 962, 965 (Fla. 1st DCA 2016);

likewise, a defendant may not stipulate to the ultimate issue of competency . . . .” *Dougherty v. State*, 149 So. 3d 672, 678 (Fla. 2014).

In deciding that a competency hearing was unwarranted, the circuit court was guided solely by the length of time Mr. Davis’s case was on the docket, the state’s sense of urgency in adhering to the schedule, and the judicial backlog created by the COVID pandemic. The circuit court was overwhelmingly sympathetic of the State’s point of view, and commented on the “long in the length delay in getting [this case] scheduled for a[n] [evidentiary] hearing” when he granted the State’s motion. (PCR.3588). The circuit court did not make any findings regarding Mr. Davis’s competency or give any explanation for his decision to deny Ms. Macready’s motion at the hearing or in his written order that followed. (PCR.2233-2236).

Further, the record is deplete of any evidence to show that Mr. Davis knowingly, voluntarily, and intelligently waived his right to present this mental health mitigation evidence to support the trial court’s granting of the State’s motion to preclude any and all mental health evidence. The trial court cannot have it both ways – if the court failed to conduct a competency determination, then the court is obligated to ensure that the waiver of this mental health evidence was

constitutionally sound. *See Lonchar v. Zant*, 978 F.2d 637, 641 (11th Cir. 1992), *citing Rees v. Peyton*, 384 U.S. 312, 314 (1966) ("Competency to forego further legal proceedings depends on whether the person whose competency is in question 'has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises'").

The circuit court violated Mr. Davis's due process rights when he refused to hold a hearing to evaluate Mr. Davis's competency before he granted the State's motion to preclude any and all mental health evidence. The court failed to make any findings for the record regarding Mr. Davis's competency and his decision was based on pressure by the State to hold Mr. Davis's evidentiary hearing in August 2021. This Court has been clear that "in ruling on a motion to determine a defendant's competency to stand trial, the question before the court is whether there is reasonable ground to believe the defendant *may* be incompetent, not whether he *is* incompetent. The latter issue should be determined after hearing." *Scott v. State*, 420 So. 2d at 597, *quoting Walker v. State*, 384 So. 2d 730, 733 (Fla. 4th

DCA 1980). "The competency rule states that upon reasonable ground the court *shall* fix a time for a hearing." *Id.* at 597. The circuit court prioritized expediency over Mr. Davis's constitutional due process rights, and this Court must reverse the circuit court's order barring mental health evidence from the evidentiary hearing and remand Mr. Davis's case for a competency hearing.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Davis respectfully urges this Court to reverse the circuit court, set aside his convictions and sentences, and remand his case for a new trial; or in the alternative, reverse the circuit court's order barring mental health evidence from the evidentiary hearing and remand Mr. Davis's case to the circuit court for a competency hearing and a new evidentiary hearing.

Respectfully submitted,

/s/ Stacy R. Biggart
STACY R. BIGGART
Special Assistant CCRC-North
Florida Bar No. 0089388
3495 SW 106th Street
Gainesville, FL 32608
(850) 459-2226
stacybiggart@gmail.com
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Corrected Initial Brief of the Appellant has been furnished via electronic service to Marilyn Beccue, Assistant Attorney General, on this 15th day of August, 2022.

s/ *Stacy R. Biggart*
STACY R. BIGGART

CERTIFICATE OF FONT

I hereby certify that the foregoing Initial Brief of Appellant was generated in Bookman Old Style 14-point font and 21,634 words excluding the title page, tables, certificates and signature block, pursuant to Fla. R. App. P. 9.210.

s/ *Stacy R. Biggart*
STACY R. BIGGART