IN THE SUPREME COURT OF FLORIDA

LEON DAVIS, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE No. SC21-1778
L.T. No. 2007-CF-009386
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to direct appeal record (SC11-1122) will be referred to by the appropriate volume and page number. Citations to the postconviction record on appeal in the instant case number (SC21-1778) will be referred to as “R” followed by the appropriate page number.

STATEMENT REGARDING ORAL ARGUMENT

The State respectfully submits that oral argument is not necessary on this appeal of the denial of postconviction relief. Accordingly, argument will not materially aid the decisional process.

STATEMENT OF THE CASE AND FACTS

The facts underlying Davis's convictions and sentences for armed robbery, first-degree arson, and the murders of Yvonne Bustamante, Juanita Luciano, and Michael Bustamante, and the attempted murder of Brandon Greisman are adequately summarized in this Court's opinion on direct appeal affirming Davis's convictions and sentences.

The Events at Headley Insurance

> The evidence introduced at Davis's trial revealed the following. Around 3 p.m. on December 13, 2007, Davis entered the Lake Wales location of the Headley Insurance Agency (Headley) with the intent to commit robbery. Davis was armed with a loaded .357 magnum revolver and equipped with duct tape, a cigarette lighter, gloves, a gasoline can that contained gasoline, and a lunch cooler to conceal the revolver.
>
> That afternoon, two Headley employees, Yvonne Bustamante (Bustamante) and Juanita Luciano (Luciano), were working. Bustamante, a licensed customer service representative, had worked at Headley for nine years. Luciano, a customer service representative, had worked at Headley for about three years. At the time, Luciano was twenty-four weeks pregnant. Upon entering the business, Davis locked the front door to prevent other customers from entering. He also placed duct tape over the lens of a security camera. Davis demanded money from the women, who initially refused to comply.
>
> Davis then forced the women to open the company's safe and cash box, which contained a combined amount of about $900. During the course of the robbery, Davis bound the women with duct tape, poured gasoline on them, and set them on fire. At 3:35 p.m., one of the women activated the office's panic alarm, which sent a signal to the alarm company. The Lake Wales Police Department was contacted one minute later.

Victims Seek Help; Davis Shoots Bystander

Bustamante and Luciano escaped the burning building and ran in separate directions seeking help. Bustamante eventually ran to the parking lot of the Headley building, and Luciano ran to a nearby restaurant, Havana Nights. As Bustamante tried to escape, Davis shot her in her left hand.

By this time, concerned people who lived nearby had noticed the presence of smoke and walked to the area to investigate. These people, Fran Murray, Brandon Greisman, and Carlos Ortiz, were on the scene before emergency personnel arrived and became eyewitnesses to the aftermath of the robbery. Another eyewitness, Evelyn Anderson, was a Headley customer who arrived at Headley while the robbery was in progress. At trial, these eyewitnesses testified about the events at Headley, including their various encounters with Davis.

Fran Murray (formerly Fran Branch) testified that at the time of the robbery, she was sitting outside of her apartment and saw smoke nearby. She walked toward the smoke to investigate its source. Around the same time, her neighbors, including Greisman and Ortiz, also noticed the smoke. They all proceeded to walk toward the smoke to investigate.

As Murray approached the smoke, she realized that it was coming from the Headley building. She then saw Bustamante, who was yelling for help and whose body was burning. Murray observed that Bustamante was wriggling her wrists to free them of a thick gray tape, and that Bustamante's “skin was falling off of her.” “And, just, she wasn't screaming, but she wasn't talking lightly either. She was just trying to get away.”

As Greisman approached the building, he saw a woman whose body was burning, and he went to help her. At the same time, Greisman saw Davis walking towards them, and he originally thought that Davis was coming to help the distressed woman. Greisman made eye contact with Davis, who pulled a gun out of the cooler that he was carrying and pointed it at Greisman. Greisman tried to get away, but Davis shot him in the face,

hitting him in the nose. The gunshot caused profuse bleeding and removed the tip of Greisman's nose.

Murray, who was still in the vicinity, heard popping sounds and saw Greisman fall to the ground and catch himself with his hands. She saw Davis walk away and place a gun into his lunch cooler. Murray then assisted Greisman, who was getting up from the ground.

Carlos Ortiz also heard the popping sounds as he approached the Headley building. As he got closer to the building, Greisman was walking back toward him with a bloody face. Greisman told Ortiz that he had been shot, and Ortiz saw Davis behind Greisman. Ortiz saw a part of the gun that Davis was carrying, and he saw Davis stick his hand into the lunch cooler. Ortiz made eye contact with Davis while trying to help Greisman as well as make sure that Davis was not following them. Greisman walked back to his home, and Ortiz and Murray assisted him while awaiting the arrival of emergency help.

Evelyn Anderson, a Headley customer, arrived at Headley to pay her insurance bill during the time that the robbery was taking place. Anderson parked her sport utility vehicle in front of Headley, and her teenage granddaughter and infant grandson remained inside the vehicle. When Anderson tried to open the front door of the Headley building, she discovered that it was locked. Anderson walked to the side of the building to try and determine why she was unable to enter the building during normal business hours. While walking, she noticed that smoke was coming out of the building. Anderson also heard popping sounds, and shortly thereafter, Davis walked out of the building and placed the cooler under his arm. Anderson asked Davis what was happening. Davis continued walking away but responded that there was a fire in the building. Davis then walked to his vehicle, a black Nissan Altima, that was parked at a vacant house nearby. Davis got inside of the vehicle and drove away.

Shortly thereafter, Anderson came into contact with Bustamante. Anderson received a minor burn on her hand

when she touched Bustamante, who was screaming for help and was severely burned. Bustamante walked towards Anderson's vehicle, and Anderson's granddaughter, who was seated in the front seat of the vehicle, ran away from the vehicle after seeing Bustamante's burning body. Bustamante walked to the open vehicle door and climbed inside the vehicle. Anderson encouraged Bustamante to get out of the vehicle because the paramedics were on the way. Bustamante got out of the vehicle and leaned on the hood.

By this time, Murray had finished attending to Greisman, and she returned to Headley to see if she could provide further help. Murray saw Bustamante leaning against Anderson's SUV. Murray described the scene as follows:

She [Bustamante] was um, screaming she was hot. And that her skin was rolling off of her body at this time. It was disgusting. You could smell the burnt skin and flesh. And she was screaming she was really, really hot and she was thirsty. And so I ran across the street at that time to Havana Nights, which was a restaurant, a Cuban restaurant, across the street of Headley, off of the other corner of Phillips, and got a cup of ice water in a to go cup.

Murray returned to Bustamante with the cup of water, and Bustamante sipped from the cup while awaiting the arrival of emergency personnel. Murray talked with Bustamante, and Murray described their conversation as follows:

I introduced myself as Fran and she introduced herself as Yvonne. We sat there talking a minute and she started to say—and I gave her water. And, um, she said that she didn't understand how anybody would rob her, she didn't have any money. And that her kids, please pray, I'm not going to make this Fran. And I told her that I would get to the hospital if I could to see her, if it was allowed and that I would keep her in my prayers, that with God everything was possible. She wanted to talk about her children. And I cannot remember clearly if I asked her who did it, or if she was just talking. And she said that it was a black gentleman, and that he should be on video

tape. She then started crying again and said she loved her babies very much, and she doesn't understand how anybody could do this to her.

Bustamante also told Murray that she had been bound with tape, doused with gasoline, pushed into a bathroom, and set on fire.

In the meantime, Luciano escaped the Headley building and ran to the nearby Havana Nights restaurant. The restaurant's owner, Jaidy Jiminez, heard a loud boom, and shortly thereafter, Luciano ran into the restaurant. Although Luciano was a Havana Nights customer, she was so badly burned that Jiminez did not recognize her: “I saw a woman that was naked, burned, um, burned from head to toe, no shoes on, or any clothes on, just underwear. But I couldn't recognize her.”

Luciano asked for help and begged Jiminez to close the door because “he” was coming. Jiminez helped Luciano, whom she realized was pregnant, sit down. Additionally, other people inside the restaurant were trying to call 9–1–1 and to assist Luciano. Luciano asked what was taking so long for help to arrive and stated that she could not feel her baby moving. Jiminez tried to reassure her. It was during this time that Murray came into the restaurant asking for water, and Jiminez provided it to her. Jiminez walked outside the restaurant to get help, and she saw the severely burned Bustamante. Once the paramedics arrived and began to assist Bustamante, Jiminez told them that another injured woman, Luciano, was inside of the restaurant.

Emergency Personnel Response

Emergency dispatches increased in their sense of urgency as the initial report of a fire gave way to additional reports of injuries and a shooting. Lt. Joe Elrod of the Lake Wales Police Department first encountered Greisman, who explained that he was shot while attempting to help a woman whom he heard screaming for help and soon discovered was on fire.

Lt. Elrod determined that Greisman's injuries were not life-threatening, and because emergency medical personnel were on the way to assist Greisman, he proceeded to the Headley building. When Lt. Elrod arrived at Headley, emergency medical personnel were already on the scene and were assisting Bustamante in the parking lot. Lt. Elrod observed Bustamante's severe burns, and he estimated that the burns covered about eighty percent of her body. Lt. Elrod immediately understood the gravity of Bustamante's injuries, and he decided not to wait until later to obtain Bustamante's statement. Lt. Elrod testified: "I knew she was going to die, so I tried to get information from her on who did it to her." "I asked her who did it to her. And she told me it was Leon Davis. And then I asked her, how she knew him. And she said that she knows him and that he was [a] prior client of theirs in the Insurance Company." Bustamante explained that Davis tried to rob them, and when they did not give him money, he threw gasoline on them and set them on fire. When they tried to run, Davis continued to throw gasoline on them.

Lt. Elrod then located Luciano inside of the Havana Nights restaurant. When he walked inside the restaurant, he saw Luciano, who was "obviously pregnant," sitting down. Lt. Elrod characterized Luciano's burn injuries as even worse than Bustamante's. Lt. Elrod went outside and told emergency personnel that another victim needed help who was in even worse condition than Bustamante. He then began dispatching the name "Leon Davis" to law enforcement and conducting routine duties at the crime scene.

Paramedic John "Chip" Johnson and emergency medical technician Ernest Froehlich were the first emergency medical personnel to arrive on the scene. Upon arrival, they first saw Bustamante, who was in the parking lot and leaning on Anderson's SUV. Johnson observed: "the skin, everywhere I could see it, it was peeling back, and she had suffered major burns. Also she had darkened hands, and a further injury to her left hand, [t]hat was my observations at that time." Froehlich testified that Bustamante "looked like she had burns all over her body, hair singed off, most of her clothing was burned off, skin

was hanging off her back and buttocks."

Froehlich was present when Lt. Elrod asked Bustamante if she knew who the perpetrator was, and he overheard Bustamante say "Leon Davis." Johnson also heard Bustamante state that Davis was the perpetrator, although he was unable to clearly hear Bustamante say Davis's first name. Anderson also heard Bustamante identify Davis as the perpetrator.

After initially assisting Bustamante, Johnson went to Havana Nights to assist Luciano. When Johnson entered the restaurant, he noticed water on the floor and saw Luciano, who was severely burned and "basically naked." There was a plastic substance on her wrists, neck area, and feet. Luciano, who was conscious, breathing, and able to talk clearly, told Johnson that she was pregnant and that while working in her office, someone poured gasoline on her and set her on fire. Luciano also told Johnson that her wrists were burning, and Johnson went to the ambulance to get sterile water to alleviate her pain.

By this time, additional emergency medical personnel were dispatched to the scene. Upon arrival, paramedic George Bailey assumed primary responsibility for Luciano's care, and Johnson went back to the parking lot to continue assisting Bustamante. Luciano was conscious and able to respond to questions. She explained to Bailey "that there had been a robbery, at the business where she was at, she had been tied up or bound with tape, and had gasoline poured on her and had been lit on fire." Bailey did not ask her who harmed her, but Luciano told him that the person was a man and that she knew who it was. Luciano also told Bailey that she was twenty-four weeks pregnant. Bailey estimated that eighty percent of Luciano's body was burned with second- and third-degree burns.

Both Bustamante and Luciano were airlifted to the Orlando Regional Medical Center for treatment in the burn unit. Luciano underwent an emergency caesarean section, during which she gave birth to her son, Michael Bustamante, Jr. Although detectives went to the hospital in hopes of interviewing

Bustamante and Luciano, the severity of their injuries prevented the detectives from ever meeting with them.

Michael lived for three days after his emergency delivery. He died as the result of extreme prematurity. Bustamante lived for five days, and Luciano lived for three weeks. Autopsies of both women revealed that they died from complications of thermal burns due to the fire. According to the medical examiner, Bustamante suffered burns that covered eighty to ninety percent of her body. Luciano suffered burns that covered about ninety percent of her body. Additionally, the autopsy of Bustamante revealed bullet fragments from the gunshot to her left hand, although the gunshot was not a cause of her death.

Events after the Robbery

After leaving the scene, Davis went to a branch of the Mid Florida Credit Union, where he was an established customer. At 4:19 p.m., less than forty-five minutes after the alarm was activated at Headley, Davis walked into the credit union to make a cash deposit. Jessica Lacy, the teller who assisted Davis, was familiar with him as a customer and knew Davis by name. Davis deposited $148 in cash into his account that previously had a balance of $5.33. While processing Davis's transaction, Lacy observed that Davis's face was bloody and appeared to have scratches and marks on the nose, lip, and chin. The credit union branch manager, Valerie Dollison, was also working that afternoon. She did not personally know Davis, but she heard someone call him “Leon.”

Davis also went to the house where his brother, Garrion Davis (Garrion), and Garrion's girlfriend, Melissa Sellers, resided. Garrion testified that on the afternoon of December 13, “my brother came to my house. He wanted to - he needed some soap to wash his face. And he went outside my house and washed his face. I noticed he had a scratch on his face. He told me he had robbed somebody.” Garrion testified that Davis also came inside the house and took a shower. Garrion estimated that Davis was at the house for ten to fifteen minutes.

Sellers, who was at home with Garrion at the time, testified about Davis's visit to their house that afternoon. Sellers wished Davis, whose birthday was the next day, a happy early birthday. She estimated that Davis was at her house for ten minutes or less, and although she was not certain whether he had taken a shower, she knew that he had been in their bathroom. When Davis left, Sellers observed that Garrion's demeanor had changed. Garrion seemed upset and was teary-eyed.

Later, Davis went to a friend's home, where he used the cell phone of a woman named Fonda Roberts. Roberts was unable to hear Davis's conversation, which lasted a couple of minutes. When Davis was finished using the phone, he started to hand the phone to Roberts and then pulled it back from her. Davis then erased the number that he called. Roberts observed that at the time, Davis was driving a black vehicle.

Davis Turns Himself In

As the afternoon progressed, a massive investigation began. Davis's photograph was shown on television as media began to report the events at Headley, and Davis's family and friends became increasingly aware of Davis's status as a suspect in the day's events. Davis's family and friends frantically began trying to locate him in hopes that they could convince him to turn himself in safely.

That evening, Davis called his sister, Noniece DeCosey, and asked her to come and pick him up near a McDonald's. Their mother, Linda Davis, accompanied DeCosey to meet Davis. DeCosey drove them to a Circle K convenience store to meet Davis's and DeCosey's other sister, India Owens, and family friend Barry Gaston. Upon arrival, Davis walked up to Gaston, hugged him, and said: “I hurt someone.” When Gaston asked Davis what he did, Davis said that he did not know. Davis and his mother got into a car with Owens and Gaston.

Gaston, a former law enforcement officer, helped facilitate Davis turning himself in at the Polk County Sheriff's substation. Gaston testified that on the way to the substation, Davis laid his

head on his mother's lap in the backseat of the car and cried and sobbed. Davis again said that he hurt somebody, but Gaston told him not to say anything more. Davis was turned over to the Polk County Sheriff's Office without incident. Davis was later transported from the Sheriff's Office substation to the Bartow Air Base for further processing.

A number of people with whom Davis came into contact later in the day testified at trial that Davis appeared to have some sort of injury to his nose. The crime scene technician who photographed Davis after he was taken into custody and a law enforcement officer who interacted with Davis upon his transfer to the Bartow Air Base both testified that Davis appeared to have either scratches or a burn on his nose. Additionally, Davis's sister, Noniece DeCosey, saw a red mark on Davis's nose that could have been a burn.

That night, a black Nissan Altima was found at the Lagoon nightclub in Winter Haven. Law enforcement officers were dispatched to the location, and the car was seized pending a warrant to search the car's interior. Searches conducted in the vicinity of where the car was located, in particular to look for a firearm, did not reveal any additional evidence. The following day, after the search warrant was signed, law enforcement conducted an interior search of the Altima. Davis's driver license was found inside the car.

Davis was later tried for three counts of first-degree murder (Bustamante, Luciano, and baby Michael), one count of attempted first-degree murder (Greisman), one count of armed robbery, and one count of first-degree arson.

The Guilt Phase

The State's theory at trial was that Davis, a man driven by mounting financial pressures, planned the robbery of Headley, a business with which he was familiar. Davis's business relationship with Headley dated back to 2004, and as reflected in various records, Davis's insurance needs were primarily handled by Bustamante. The State introduced evidence that

established a timeline of events leading up to the robbery, including Davis's actions on the day of the robbery. A summary of this evidence follows.

In the months leading up to the robbery, Davis experienced increasing financial difficulty. Davis, who at the time was married to his wife Victoria, was primarily responsible for the family obligations, including the mortgage payment on their home. At the time, Davis and his wife had two cars: a blue Nissan Maxima owned by Davis, and a black Nissan Altima owned by Victoria. Both vehicles were insured under policies written by Headley. In June 2007, during a visit to the Mid Florida Credit Union, Davis became aware that the amount of the automatic debit from his account for his insurance coverage had been increasing over time. Davis was also informed that his account was overdrawn and became irate.

Unable to afford insurance for both cars, Davis and Victoria removed the license plate from the Maxima, canceled the car's insurance policy, and relied solely on the Altima for transportation. The couple was also unable to afford cell phone service during this time. Victoria had been working, but she became pregnant and was forced to stop working because of pregnancy complications.

Davis's Plan to Rob Headley

Davis's plan to rob Headley began to coalesce in early December. By this time, the couple had reached the limits on their credit cards, and the mortgage payment was delinquent. One week before the robbery, Headley customer Virginia Vazquez saw Davis at Headley. She first saw Davis in the parking lot looking in the back of a black car. Then, Davis went inside and began talking with Bustamante. Vazquez and her husband waited inside the insurance agency for fifteen to twenty minutes before Bustamante finished talking with Davis. Vazquez later recognized Davis from news coverage as the person she saw during her visit to Headley.

Davis's preparation for the robbery also involved acquiring

various items that he would need in order to carry out the robbery, including a gun and ammunition. On December 7, 2007, six days before the robbery, Davis went to visit his cousin, Randy Black. Davis told Black that he needed a gun for personal protection because he was going to travel to Miami. Black owned two guns, including a recently purchased Dan Wesson .357 magnum revolver. Black showed Davis both guns, and Davis opted to purchase the .357 magnum for around $200. Black also gave Davis .38 caliber bullets which were compatible with the .357 magnum. Davis and Black fired the revolver, which was operating normally. Later, Davis showed his mother the revolver. Davis told her that he got the revolver from Black and that he and Black fired it.

Davis's Actions on the Day of the Robbery

The evidence introduced at trial also established a detailed timeline of Davis's actions on the day of the robbery, which included a visit to Walmart to purchase supplies that he would use later that day. On the morning of December 13, Victoria Davis last saw her husband at about 6 a.m. Before 7 a.m., Davis took his son, who had spent the previous night with Davis and Victoria, home to the boy's mother, Dawn Henry. His son's birthday was that day.

Davis then went to the Lake Wales Walmart, where surveillance video and still photographs showed him making three separate purchases around 7 a.m. The first purchase included a cap, long-sleeved shirt, and soft, orange lunch cooler. Davis's second purchase was a pair of gloves, and the third purchase was a Bic cigarette lighter. All of the purchases were cash transactions.

While at Walmart, Davis spoke with the store manager, Mark Gammons, and a store employee, Jennifer DeBarros. Gammons testified that Davis approached him and asked where gloves were located in the store. When Gammons saw Davis's picture on the news that evening, he realized that he had seen Davis in Walmart that morning. Walmart employee Jennifer DeBarros had known Davis for more than ten years

and was a family friend. DeBarros testified that on the morning of December 13, she talked with Davis during his visit to Walmart. DeBarros talked with Davis about his son's birthday.

Some time after leaving Walmart, Davis drove to the home of his sister, India Owens. Davis then accompanied Owens to take her car for repairs and pick up a rental car. They later went to pick up some furniture, and they stopped at a restaurant for lunch. Davis seemed agitated while eating lunch.

Video surveillance showed that Davis left the restaurant at 1:38 p.m. Davis and Owens then delivered the furniture to Owens's house. During that time, Owens noticed that Davis began acting strangely, obsessively locking doors in the house. Davis also asked for a piece of duct tape but did not say why he needed it. A short time later, Davis left Owens's house. Although Davis's son had a birthday party at school that afternoon, Davis did not attend. Davis entered the Headley building sometime around 3 p.m.

The Investigation

In addition to evidence surrounding the events at Headley, their aftermath, and Davis's behavior leading up to and including the day of the robbery, the State introduced evidence regarding various aspects of the investigation.

The expansive crime scene investigation spanned several days, and the numerous crime scene photographs entered into evidence depicted a gruesome series of events that began inside the Headley building and continued outside. The exterior photographs depict the entrance to Headley, the parking lot, Anderson's vehicle, and the trail of bloody footprints and burnt skin that led from the Headley building to Havana Nights. Anderson's SUV was smeared with blood on both sides of the hood and was marked by blood stains on the vehicle doors and in the passenger side interior.

The interior photographs captured the damage in various areas of the Headley building, including fire damage in the office area,

the storage area, and the extensively damaged bathroom. Among the widespread fire damage to and debris in the Headley building, the interior crime scene photographs revealed the presence of blood, a severely burnt chair, two cigarette lighters (one of which was identified as a Bic lighter), burnt duct tape, a burnt plastic gasoline can, an open cash box that contained only coins, an open and empty safe, a bloody alarm key pad, and burnt surveillance equipment. The photographs also showed bullet holes in a wall, a door, and an exterior shed door. A bullet was retrieved from the shed floor.

Detective Jeff Batz, an arson investigator, detected the odor of gasoline inside the Headley building, and noted that it was particularly strong near the rear of the building. Batz identified three areas of fire origin inside the Headley building: a chair located near the front door, the storage room, and the bathroom. Batz testified as follows: “Three-points of origin, separate in nature[,] neither one of them had connections with each other, directly through flame impingement. They all started with an open flame type device and accelerant was used on all three areas.”

The investigation also included an examination of the seized Nissan Altima. When the car's floor mats were analyzed for the presence of an accelerant, a certified accelerant detection K–9 alerted to the presence of accelerant on the driver's floor mat and the passenger rear floor mat.

Several days after the robbery, a search warrant was executed at Davis's home. Although trial testimony revealed that Davis was responsible for the yard work at his home and that he kept a lawn mower and a gasoline can in the garage, law enforcement located only the lawn mower. No gasoline can was found at Davis's home.

The gun used in the Headley crimes was never recovered. However, the rifling characteristics of the projectiles retrieved from the crime scene and from Bustamante's hand were determined to be consistent with the rifling characteristics of handgun manufacturer Dan Wesson, the manufacturer of the

.357 magnum revolver that Davis bought several days before the robbery.

The Verdict and the Penalty Phase

On February 15, 2011, the jury convicted Davis of six counts: the first-degree murders of Bustamante, Luciano, and baby Michael; the attempted first-degree murder of Greisman; armed robbery; and first-degree arson. The penalty phase began two days after the jury rendered its guilty verdicts, wherein the State sought to prove seven aggravating circumstances. In addition to testimony from Davis's probation officer and the medical examiner, the State presented victim impact testimony from Bustamante's and Luciano's families.

Angela Bryson, the State's first witness, was Davis's felony probation officer. Bryson testified that Davis was placed on probation for grand theft on July 6, 2007. Davis was still on probation at the time of the Headley crimes. Dr. Stephen Nelson, the medical examiner, returned to the stand as the State's second witness. Dr. Nelson provided further testimony regarding the injuries sustained by Bustamante and Luciano:

They would begin to feel pain immediately upon the fire starting to consume their skin. The burns that are present on these victims is approximately 80 to 90% of the body surface area. It is third and fourth degree burns. First-degree burn is a sunburn, a second-degree burn is a blistered sunburn, a third-degree would be a full thickness burn that goes through the full thickness of the skin, involves nerve endings. And fourth degree burns would largely be charred, burns where the skin is charred. So, the first-degree and second-degree burns, I think we have all had sunburns, we know how painful those are. If we have a sunburn, a second degree burn that has fluid filled vessel that pops, that's painful. The third-degree burn, again, it involves the degree of thickness that is burned through skin. And the third-degree burns are painful in that they produce the burning sensation itself, up to a point at which point the nerve endings under their skin are damaged. And then there is no more pain or nerve signal that is sent from the fire. However in

addition to the burn being produced by the gasoline, whatever it is that is on their skin that's flaming, the subsequent treatment for a burn is also painful.

Dr. Nelson also testified that both women would have been capable of feeling pain in some areas even if their nerve endings were destroyed in others. Both women, who were so severely injured that an IV could not be inserted into their veins, would have experienced pain when intraosseous catheters were inserted into their leg bones to receive medication. The women would have stopped experiencing pain once they received the medication or were medically induced into a coma, but they could have been conscious of what was going on until that point.

After the State's penalty phase presentation, Davis offered evidence in mitigation and alleged the existence of two statutory mitigating circumstances and fifteen non-statutory mitigating circumstances.

Multiple witnesses testified that Davis's childhood was marked by abuse. When Davis was eight years old, he was sexually assaulted by another child. The following year, a woman named Ms. Clark moved into the family home as a roommate. Sometime later, Davis and his brother Garrion moved out of the family home and began staying with Clark, who was an alcoholic and was physically and verbally abusive. Clark routinely beat Davis, and on one occasion, she caused severe injuries to the back of his body by beating him with an extension cord. Clark taunted Davis with physical and verbal abuse because he was bullied by other children, and she also hit him with water hoses and punched him in the chest. Family members observed physical injuries such as welts, bleeding, and open scabs and sores on Davis's body.

Additionally, Davis suffered from ongoing depressive and mood episodes, in part due to the bullying he suffered from elementary school through high school. In middle school, Davis began talking about suicide, and his mother encouraged him not to take his life. Davis received mental health counseling for

> two to three months, but his problems continued. After graduating from high school, Davis joined the United States Marine Corps. However, the following year, Davis was involved in a vehicle accident and he revealed that he intentionally crashed the vehicle that he was driving. Pursuant to a recommendation for an administrative separation, Davis was discharged from military service.
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> Although Davis was only about one year old when his father moved out of the family home, his father remained a part of Davis's life. While growing up, Davis and his siblings were separated and placed in foster care, but Davis remained close with his mother and siblings. Davis's sister, India Owens, described him as compassionate, loving, and selfless. After Davis's discharge from the military, he met a woman named Dawn Henry, with whom he had a son. The child was born with Down Syndrome. Henry testified that while she had trouble adjusting to being a mother of a child with special needs, Davis immediately accepted their son and was consistently present in his life.
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> Around the time of the robbery, Davis was depressed and upset that he could not afford to do anything for his son's birthday. Davis's mother testified that when Davis purchased the revolver shortly before the robbery, she was concerned that Davis might use it to commit suicide.

Davis v. State, 207 So. 3d 142, 147–57 (Fla. 2016).

Immediately after the verdict was read and the jury was polled, the trial court convened a side bar. The court asked defense counsel if Davis was still insisting on not presenting any mitigation. (V97/5238). Defense counsel responded that he had not spoken to Davis about it since the verdict, but up to that point Davis was insisting on waiving all mitigation. (V97/5238). The court informed the parties that the court had another

attorney on stand-by to present limited mitigation to the court should Davis opt to waive all mitigation. (V97/5239).

After the jury was released, the court asked defense counsel to speak to Davis regarding his decision to waive mitigation. (V97/5241). After attempting to speak to Davis, defense counsel informed the court that his efforts were nonproductive because Davis was not in the frame of mind to discuss the matter on the heels of the guilty verdicts. Davis asked his counsel if they could meet the next day in the jail to discuss the matter. (V97/5242). The court scheduled a status conference for the next afternoon. (V97/5242).

The next afternoon counsel represented to the court that he had spoken with Davis and that Davis initially wanted to waive all mitigation. After further conversation with counsel, Davis decided to allow presentation of some mitigation. (V97/5246). Counsel was prepared to move forward with the penalty phase. (V97/5249). Counsel further explained that despite Davis's previous desire to waive all mitigation, counsel had been investigating and preparing mitigation regardless. (V97/5249). Counsel had his witnesses ready to appear and subpoenas were being issued. (V97/5249). Counsel also stated that as part of his discussions with Davis prior to trial he "made tactical and strategic decisions as to what I want to

present to the jury versus what I would want to save for a Spencer[1] Hearing." (V97/5250).

Counsel also advised the court that he and Davis had spoken extensively about a mental health evaluation. Davis had numerous reasons for not wanting a mental health evaluation. Counsel also noted that there were strategic and tactical considerations regarding mental health evaluations that he discussed in detail with Davis. (V97/5250). Counsel, through previous investigation, had Davis's military records that contained diagnoses of mental health conditions related to Davis's service. (V97/5251). Counsel stated that "there will be mental health evidence, just not through somebody who evaluated him as a defense expert and not listed as a witness." (V97/5251).

The prosecutor asked the court to inquire of Mr. Davis whether he understood and agreed with the strategic and tactical decisions made regarding what mitigation would be presented and what potential mitigation would be waived. (V97/5266). Defense counsel pointed out the difference between a complete waiver and a partial waiver. (V97/5268). Nonetheless, counsel asked Davis if it was his decision to present certain mitigation and waive other mitigation. Counsel also asked if "you want us to tactically and

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

strategically present what we talked about to this Jury." (V97/5268). Davis replied, "That's correct." (V97/5268).

The prosecutor also asked the court to inquire of Davis if it was his decision to not submit to a mental health examination for whatever mitigation that might yield. (V97/5269). Davis agreed that he did not want a mental health evaluation and that his military records accurately represent his mental health diagnoses. (V97/5270). The court found that Davis was competent to waive a mental health evaluation and to made decisions regarding presentation of mitigation. (V97/5272).

At the conclusion of the penalty phase, the jury unanimously recommended that Davis be sentenced to death for the murders of Bustamante and Luciano. By a vote of eight to four, the jury recommended that Davis be sentenced to death for the murder of baby Michael. The Court subsequently held a Spencer hearing at which both parties presented additional arguments but did not present additional evidence. (V65/10734-65).

The trial court sentenced Davis to death for the murders of Bustamante and Luciano. [2] In its sentencing order, the trial court found the

[2] The trial court overrode the jury's recommendation of death and imposed a sentence of life imprisonment for the murder of Michael.

existence of six aggravating circumstances as to the murders of both women: (1) the capital felony was committed by a person previously convicted of a felony and on felony probation (some weight); (2) the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (CCP) (great weight); (3) the defendant was contemporaneously convicted of another capital felony or a felony involving the use or threat of violence to the person (very great weight); (4) the capital felony was committed while the defendant was engaged in the commission of, or attempt to commit, or in flight after committing or attempting to commit any robbery or arson (moderate weight); (5) the capital felony was committed for pecuniary gain (little weight); and (6) the capital felony was especially heinous, atrocious, or cruel (HAC) (great weight). The trial court found a seventh aggravating circumstance as to the murder of Bustamante; the felony was committed for the purpose of avoiding or preventing a lawful arrest (some weight).

The sentencing court also considered two statutory mitigating circumstances. The court rejected Davis's argument that he had no significant prior criminal history. However, the trial court did find that the crime was committed while Davis was under the influence of extreme

mental or emotional disturbance (little weight). As nonstatutory mitigating circumstances, the trial court found the following: (1) the defendant was the victim of bullying throughout his childhood (slight to moderate weight); (2) the defendant was the victim of sexual assault as a child (slight to moderate weight); (3) the defendant was the victim of both physical and emotional child abuse by a caretaker (moderate weight); (4) the defendant was the victim of overall family dynamics (very little weight); (5) the defendant served in the United States Marine Corps (very little weight); (6) the defendant had a history of being suicidal, both as a child and as an adult (slight weight); (7) the defendant was diagnosed with a personality disorder (slight weight); (8) the defendant had a history of depression (slight weight); (9) the defendant was dealing with stress at the time of the incident (little weight); (10) the defendant was a good person in general (very slight weight); (11) the defendant was a good worker (very slight weight); (12) the defendant was a good son, good sibling, and good husband (very slight weight); (13) the defendant was a good father to a child with Down Syndrome (moderate weight); (14) the defendant exhibited good behavior during the trial and other court proceedings (very slight weight); and (15) the defendant exhibited good behavior while in jail (little weight). Davis, 207 So. 3d at 157–58.

Davis filed a motion for postconviction relief under on May 19, 2018, and several amendments thereto, ultimately raising twenty-two claims. (R548, 1042, 1752, 1894, 2024, 2081). The postconviction court granted an evidentiary hearing on five claims. On June 8, 2021, the postconviction court granted the State's motion to preclude evidence related to Davis's claim that counsel was ineffective in his investigation and presentation of mental health mitigation because, even though the case was pending for almost three years, Davis did not provide any discovery related to his mental health claims. (R2129, 2233).

The evidentiary hearing was held on August 23 – 24, 2021. (R2503-2910). The court denied postconviction relief on all of Davis's claims on November 29, 2021. (R2972-3025).

Evidentiary Hearing Testimony[3]

Davis was represented by Robert and Andrea Norgard. The Norgards worked as a team, but Mr. Norgard[4] handled most of the motion hearings, jury selection, trial, and other in-court matters. (R2724). Norgard has been

[3] The evidentiary hearing included testimony related to claims for which the postconviction court granted an evidentiary hearing in Davis's 3.851 motion related to case number CF07-9613 (SC13-1). Davis v. State, 207 So. 3d 177 (Fla. 2016).

[4] Hereinafter referred to as Norgard. Andrea Norgard did not testify at the evidentiary hearing.

a practicing attorney since 1981. He began his career with a private firm for which criminal law was about 40% of the practice. (R2725). In 1993, he began working for the Office of the Public Defender for the Sixth Judicial Circuit. During his approximately three and a half years with that office, he handled three death penalty cases. He was lead counsel in at least one of those cases. (R2726). After his time with the Office of the Public Defender for the Sixth Judicial Circuit, Norgard worked for the Office of the Public Defender for the Tenth Judicial Circuit, where he spent ten years. During his tenure at the Office of the Public Defender for the Tenth Judicial Circuit, Norgard was routinely assigned death penalty cases and was a member of the office's capital division. (R2727). After leaving the Office of the Public Defender, Norgard started his own firm, which exclusively handles criminal defense matters. (R2723).

Over the course of his career, Norgard has represented 150 to 200 death penalty defendants. (R2730). Norgard is board certified in criminal trial practice and served for twelve years on the Florida Bar's Criminal Law Committee Board. (R2729). He has testified as an expert in criminal trial practice in 20 to 25 criminal postconviction cases and has personally handled about a dozen death penalty postconviction cases. (R2731).

Norgard was involved in the movement to formalize qualifications for

defense attorneys who handle death penalty cases. (R2724, 2728). He has been "death qualified" since the inception of the rule. (R2724). From 1992 to 2004 he was responsible for summarizing and updating death penalty cases for the Florida Association of Criminal Defense Lawyers' (FACDL) quarterly publication, "The Defender." (R2732). He wrote two chapters in the first edition of FACDL's death penalty manual. He continues to obtain and review the updated manuals as they are published. He helped establish FACDL's "Death is Different" yearly seminar and was its chair from 1992 to 2004 and has been co-chair two or three times since then. (R2733). He served on the FACDL's board of directors in 2005 or 2006. (R2734). He has attended or presented at numerous death penalty seminars throughout the country. (R2735).

Prior to representing Davis, Norgard had handled a number of high-profile, highly publicized cases. He routinely keeps track of publicity surrounding the defendants he represents and did so in this case. (R2738). Norgard recalled that television cameras were present in the courtroom during trial, but he could not recall if cameras were present for the various pretrial hearings and status conferences. (R2739). Davis's first trial in the Headley case ended in a mistrial in October 2010. Norgard did not recall the presiding judge, Judge Hunter, expressing a desire to change venue

after the mistrial. (R2742).

After the mistrial, Norgard filed a Motion to Invoke the Defendant's Right to be tried in Polk County, which he discussed with Davis prior to filing. (R2745, 2750). Davis testified that he could not recall Norgard discussing the motion with him. (R3944-4539). In the motion, Norgard argued that the parties had no difficulty seating a jury for the mistried case. He also noted that the publicity generated during that trial did not negatively affect Davis. In fact, some of the media accounts were favorable to the defense. (V56/9276-79).

In addition to what is stated in the motion itself, Norgard's reasoning for filing the motion included: the fact there was a large percentage of potential jurors in the mistried case who had no knowledge of the case or Davis; that Judge Hunter had been very liberal in striking individuals who had any knowledge of either case or Davis; and that Norgard had received unsolicited feedback from one of the mistrial jurors that the defense was winning. (R2746-49). Furthermore, Norgard understood that he would have to attempt to seat a Polk County jury before moving for a change of venue. (R2749).

Any childcare issues that may have arisen due to a change in venue had no bearing on the decision to file the motion requesting the trial remain

in Polk County. (R2754). But, because Judge Hunter wanted to get the trial moving as soon as possible after the mistrial, Norgard raised the issue of childcare to put the court on notice that it was an issue that he and co-counsel would have to address if the need for a change of venue arose. (R2756).

As in the mistried case, the parties were able to select a jury for Davis's January 2012 trial. Norgard did not exhaust his peremptory challenges in order to seat an acceptable jury. (R2768, 2755). Also, like the mistried case, Judge Hunter was very liberal in excusing potential jurors who had any knowledge of the case or Davis. Indeed, included in the jury summons was an order directing the potential jurors not to read, view, or listen to anything involving the name Leon Davis. (R2751-52). Norgard understood that had seating a jury become impossible he could have, and would have, moved for a change of venue. (R2778).

Norgard did not recall Judge Hunter stating that the photographs in this case were "the worst" he has seen. (R2756). Postconviction counsel directed Norgard's attention to a section of the transcript of the individual voir dire where Norgard referenced a comment by the judge regarding the nature of the photographs. (R2757-58; V70/863). The particular juror to whom the comment was directed had previously served on a death penalty

jury. Norgard did not want a juror who had previously been on a death penalty case. (R2812). To that end, Norgard emphasized the nature of the photographs as being “the worst” hoping to strike the juror for cause. (R2812).

Neither counsel nor Norgard were able to find in the record where Judge Hunger allegedly said the photographs were “the worst he’s ever seen.” Judge Hunter did advise the potential jurors that the attorneys would be showing them some pictures during individual voir dire in order to determine if they can handle the emotional aspects of the case. Judge Hunter advised the panel that the photographs are “graphic,” but, in the judge’s experience, jurors are not as shocked by graphic photographs as they once were because what is shown in movies and on television is more graphic than in the past. (V71/805). Regardless, the judge informed the potential jurors that their decision must be based on the evidence and not emotion. The parties and the judge wanted to seat a jury that would be able to handle both the intellectual and emotional aspects of the case. (V81/807).

Norgard did not object to any of the judge’s comments regarding the graphic nature of the photographs because he wanted to address the photographs and the emotional aspects of the case with the potential

jurors. (R2759). He also understood that jurors tend to listen to the judge more so than to the attorneys. (R2815). Even if Judge Hunter had said the photographs were "the worst" he had seen, it would not have given Norgard any cause for concern regarding the jurors' ability to fairly recommend a sentence should it become necessary. The jurors are not instructed that the death penalty is reserved for the "worst of the worst." Instead, they are instructed to consider the aggravating factors and mitigating circumstances. (R2758). Likewise, even if the comment was made it did not affect Norgard's ability to argue against aggravating factors such as heinous, atrocious, and cruel. According to Norgard, "there was a lot of effort put into explaining how quickly they were medicated, how after being burned there's some degree of desensitization because of nerve damage." (R2794). Similarly, the comment, if made, did not compromise his ability to argue that Davis was not deserving of the death penalty. (R2795).

Norgard acknowledged that the photographs in this case are horrible. In fact, they are "some of the worst photographs [he] ever had to deal with." (R2779, 2793). He was not going to "stick his head in the sand" during jury selection. Instead, he wanted to address the issue with the potential jurors, in part to desensitize the jurors as much as possible. (R2759). In his experience, cases can be lost once the jury views graphic autopsy or crime

scene photographs for the first time at trial. (R2759). In some cases, words alone are insufficient to prepare the jurors for the potential impact of particularly graphic photos. (R2779). Therefore, he filed a pretrial motion to allow the publication of some of the photographs so that he could address them with the potential jurors and so he could avoid having the jurors exposed to the graphic nature of the photographs for the first time at trial. (V8/1200; R2779). Ultimately, the potential jurors who said they were unable to handle viewing photos such as the one shown were excused by the court. Had the court not excused them, Norgard would have challenged those jurors for cause. (R2784).

Norgard explained that finding jurors who could put the emotional aspects of a case aside and determine whether a defendant is guilty based on the evidence is a common concern in murder cases. Therefore, he dedicates a large part of his voir dire to asking questions to reveal the potential juror's ability to consider only the evidence presented in determining a verdict and, if necessary, a recommended penalty. (R2760-61). Norgard testified he relies less on specific questions, rather, he considers the totality of the circumstances. (R2763). Asking potential jurors if they can "be fair and impartial" rarely reveals much. In Norgard's experience, most jurors would answer that question affirmatively. (R2763).

With regard to death-qualifying jurors, Norgard considers what the State has already asked the juror in determining how much further he needs to inquire. (R2762). There is no "magic formula" that requires certain questions be asked. (R2763). In addition to the jurors' answers, Norgard considers other factors like body language and how the jurors interact with each other. To help in that regard, Norgard usually has at least one defense team member with him during jury selection. (R2764). In this case, both co-counsel Andrea Norgard and investigator Jack Miller were present during jury selection. (V76/1746). Because he has been practicing since 1985, primarily in the Polk County area, Norgard believes he has a "pretty good feel for the types of people" who would be summoned for jury duty. (R2764).

When asked why he did not inquire as to whether the potential jurors could consider that the adult victims were in pain for a relatively short period of time, Norgard explained that attorneys cannot delve into the facts of the case during jury selection. (R2813). That said, the defense took every opportunity during trial and the penalty phase to emphasize that the adult victims' pain would have been alleviated by pain medication, damage to the nerve endings, and being put into a comatose state. (R2813). Norgard testified that he believed he did ask the jurors about the fact that

one of the victims was an infant. Judge Hunter informed all the potential jurors of some of the undisputed facts of the case, including that one of the victims was born premature via Cesarean section as a result of the injuries to his mother and died a few days later. (V71/804). Additionally, one of the photographs shown to the potential jurors was of the infant victim. Any concerns potential jurors expressed after seeing the photograph was explored. (R2815). Norgard recalled that at least one juror who initially stated she could deal with the emotional aspects of the case changed her mind after seeing the photograph of the deceased infant. (R2784; V71/869).

Norgard testified that he did not think it necessary to ask the potential jurors if there was any set of mitigating circumstances that could outweigh what they saw in the photographs. In his opinion, this topic was addressed by asking the jurors if they could put aside whatever emotions the photographs raised and fairly decide the case on the facts. (R2816). Norgard also testified that he would not have mentioned to all jurors that the photographs were “the worst” he had seen. He mentioned it in individual voir dire in an effort to establish cause to excuse that potential juror. (R2818).

Norgard insisted that he would have never asked potential jurors to

hypothetically consider Davis, or any of his other clients, guilty. Norgard testified that "[t]hose words have never come out of my mouth." (R2818). Specific to this case, he would have never phrased a question to indicate in any way that the deaths were a result of Davis's actions. (R2818). He believed that he could ascertain whether the potential jurors could be fair and impartial should the case get to a penalty phase without ever implying that Davis was responsible for the deaths. (R2818-20). Norgard acknowledged that there is much debate among defense attorneys about the best way to address penalty phase issues when the client maintains his innocence. (R2820).

Postconviction Order Denying Relief

The postconviction court denied all of Davis's claims. In denying Davis's claim that counsel was ineffective for failing to move for a change of venue, and for moving to keep the case in Polk County after the mistrial, the postconviction court recognized that publicity is expected in some cases and, in and of itself, does not provide a basis for a change of venue. Davis did not prove that had counsel moved for a change of venue, the motion would have been granted. Further, crediting Norgard's evidentiary hearing testimony, the postconviction court determined that Norgard did not file the motion to keep the case in Polk County for self-serving purposes.

(R3002).

The postconviction court also determined that counsel was not ineffective for failing to object to the judge's alleged comments during voir dire that the photos of the victims were the worst the judge had seen. First, the postconviction court quoted the trial judge's commentary and noted that the judge never said the photographs were the "worst" he had ever seen. (R3005). Further, the postconviction court accepted Norgard's testimony that part of the rationale for showing the potential jurors select photographs was to desensitize jurors so that when they inevitably viewed the photographs at trial they were not as shocking. (R3005-06). Norgard commented during an individual voir dire that the photographs were the worst he had seen. Norgard explained that the juror in question had previously served on a capital jury and he was trying to lay a foundation for a for cause challenge. Finally, the postconviction court stated that it was inconsistent for Davis to claim that Norgard was ineffective for stating in individual voir dire that the photographs were the worst he had seen, and also ineffective for not asking each prospective juror about the judge's alleged statement that he photographs were the worst the judge had seen. (R3006).

Additionally, the court determined that, when taken in context, the trial

court was not vouching for the Office of the State Attorney when he informed the jury that the Office does not seek death in all murder cases. The comment was made as part of a larger explanation informing the jurors that they would be asked questions in private about their ability to serve on a death penalty case. (R3006-08). Consequently, there was no basis for an objection.

The postconviction court recognized that ABA guidelines regarding jury selection are just that – guidelines, which do not replace the Strickland[5] standard governing ineffective assistance of counsel claims. The postconviction court accepted Norgard's testimony regarding his general philosophy regarding voir dire and his specific strategy in this case. The postconviction court found that Davis did not meet his burden to prove both deficient performance and prejudice and, therefore, denied relief. (R3009-10).

The postconviction court summarily denied Davis's claim that the search warrant issued for his wife's car was stale and that counsel should have moved to suppress the resulting evidence. The postconviction court noted that Norgard did file a motion to suppress and alleged, in part, that suppression was necessary because the return was not done within ten

[5] Strickland v. Washington, 466 U.S. 668 (1984).

days. The trial court rejected that argument. (R3011; V18/2912-13, 2918, 2924-28). In postconviction, Davis claimed trial counsel was ineffective because he did not "aggressively litigate" the motion with respect to the late return. Davis failed to advance any additional argument that Norgard should have made. (R3031). The postconviction court agreed with the trial court that the warrant was not stale as it was executed on the same day it was issued. The failure to return the warrant within the statutorily mandated 10 days did not provide a basis for suppression. (R3030-31).

Similarly, the court determined that there was no legal basis for filing a motion to suppress the Greisman photo-pack based on a failure to maintain a chain of custody. There was no evidence of tampering that would render the photo-pack inadmissible. As such, counsel was not ineffective for failing to file a non-meritorious motion. (R3032-33).

The court also summarily denied Davis's claim that counsel was ineffective for failing to utilize the fact that, despite a supplemental report claiming a dash cam video was downloaded, one was not produced. In summarily denying this claim, the postconviction court attached Officer Crosby's deposition, which was taken by Norgard on June 2, 2010, and filed with the clerk's office on June 4, 2010, to the order denying postconviction relief. (R3089). Officer Crosby described what he saw on

Officer Hampton's dash cam video prior to placing it in property/evidence. He testified it ". . . just shows him pulling into the west side of the Headley parking lot. It shows the vehicle – I mean the building burning, and then you can see him run across the front of the screen. That's really about all it shows. And then, of course, you can see the firefighters and other personnel running around." (R3015, 3090). The postconviction court concluded that Davis's claim was meritless, and he did not prove prejudice. (R3015, 3031).

Finally, having found each individual claim to be without merit, the postconviction court denied Davis's cumulative error claim. (R3033).

Order Precluding Evidence of Davis's Mental Health and Striking Claim 17 from the Evidentiary Hearing

The initial case management conference in this case was held on June 7, 2019. (R3214). At the hearing, the State alerted the court that Davis had not provided a witness and exhibit list as required by Florida Rule of Criminal Procedure 3.851(5)(a). Without objection, the Court granted Davis an extension of time to file a witness and exhibit list. (R3293). Davis filed a witness and exhibit list on June 25, 2019. Dr. Michele Quiroga was listed a "defense mental health expert," but Davis did not provide a report from Dr. Quiroga as required by the rule. At a subsequent telephonic status hearing, the State alerted the court that it had

not received a report from Dr. Quiroga. (R3865).

Shortly thereafter, on July 16, 2019, the court received a letter from Davis wherein he claimed he wanted to waive his postconviction penalty phase claims. (R1564). The parties agreed that it would be appropriate for the court to conduct a colloquy regarding Davis's stated desire to waive his penalty phase claims. (R3674, 3680-81). On October 4, 2019, Davis appeared before the court and lodged various complaints about his attorneys' representation and the pleadings that were filed on his behalf. (R3710). Davis informed the court that there were claims that he wanted his attorneys to raise, which were not raised. (R3700-01, 3705-06). The State advised that the purpose of the hearing was to determine if Davis wanted to waive his penalty phase claims. (R3711). The court directed Davis's attention to the first line of the letter, which stated: "I would like to inform the court that I am voluntarily waiving my rights to any penalty phase claims raised in the cases." (R3718). Davis claimed that he wrote the letter based on a misunderstanding of the issues that his attorneys raised. (R3719). Based on that representation, the State again alerted the court that Davis had not provided Dr. Quiroga's report or any other mental health mitigation information. (R3720). In response, Davis's counsel stated: "We are not going to call her." (R3720).

Although the State had no reason to doubt counsel's representation that Dr. Quiroga would not be called as a witness, the State filed a "Motion to Exclude Dr. Quiroga and Motion to Exclude Any and All Expert Mental-Health Testimony" on October 9, 2019, which the court granted. (R1596). On December 24, 2019, Robert Berry, Davis's counsel, filed a Motion to Continue Huff Hearing and Evidentiary Hearing, notifying the court that he was resigning from CCRC-N and the office would be reassigning Davis's cases. (R1918, 3305-06). The case management conference for Davis's Second Amended Postconviction hearing was to be held on December 30, 2019, and the evidentiary hearing was scheduled to commence on January 9, 2020. At the December 30, 2019, hearing the court recognized that the case had already been continued on more than one occasion. (R3307). Even so, the court permitted Mr. Berry to withdraw from the case and, over the State's objection, continued the evidentiary hearing (though the case management conference proceeded as scheduled). (R3307-3312). The evidentiary hearing was rescheduled for August 31, 2020. (R1940).

On May 29, 2020, Davis's new counsel filed a Motion to Continue the August evidentiary hearing. Counsel cited the voluminous nature of Davis's case files, the COVID-19 pandemic and related restrictions, and the discovery of potentially meritorious claims some of which would require the

"assistance of experts" including claims related to Davis's possible brain damage and a significant family history of mental illness. (R1944, 1948). The State filed a written objection noting, among other things, that the Court had granted the State's motion to preclude mental health expert testimony based on Davis's failure to provide any relevant discovery. The State also noted that it had previously expressed concerns about Davis claiming he wanted to waive or assert claims and then saying the opposite at a later date. (R1993). The court agreed to bifurcate the hearing to permit at least some of the claims to be heard in anticipation of Davis amending his motion.

Davis filed an amended motion on July 16, 2020, which did not include any mental health mitigation or penalty phase claims. (R2024). About 10 days later Davis filed a "Motion to Strike the August 31, 2020, Evidentiary Hearing" primarily citing the COVID-19 epidemic. (R2024). Over the State's objection, the court granted the motion to strike the evidentiary hearing. (R2078, 2104). The hearing was rescheduled for January 6-8, 2021. That hearing date was also continued due to the ongoing COVID-19 epidemic. (R2115). After a number of status hearings, the evidentiary hearing was rescheduled for August 23-24, 2021. On May 3, 2021, the State filed a Motion to Dismiss Portions of Claim 17 and to

Exclude any and All Mental Health Testimony from Any Source. The State also contemporaneously filed motions to compel production of Davis's medical and mental health records from various entities. (R2129, 2164, 2169, 2174).

At the hearing on the motions, the State explained that since the inception of Davis's postconviction case, the State had not been provided with any discovery related to Davis's alleged brain damage and mental health issues, including medical records, school records, psychological records, etc. (R3573). Nonetheless, there was an order requiring an evidentiary hearing on the mental health mitigation claims. The State proposed that the court could either strike from the evidentiary hearing or summarily deny the claims related to investigation and presentation of Davis's mental health mitigation because the allegations were conclusory and lacking factual support. (R3574).

Davis's postconviction counsel informed the court that Davis did not want to present evidence related to his penalty phase claims at the August 2021 evidentiary hearing; though he previously allowed postconviction counsel to conduct a mitigation investigation. Counsel stated that she "told [Davis] that [the court] may want to do a colloquy with him, may want to do competency evaluation . . . and so that's what I am asking the court to do at

this time." (R3577). Counsel admitted that Davis was not seeking to waive his postconviction proceedings or discharge his postconviction counsel. (R3577).

In response, the State pointed out that the postconviction motion had been pending for almost three years and that Davis had previously claimed he wanted to waive his penalty phase claims only to revoke that request after he had been transported to Polk County for a colloquy. (R3681). The State asserted that the issue was a matter of lack of evidence regardless of whether Davis's actions could be considered a waiver of the penalty phase claims. (R3581). The State also pointed out that if Davis belatedly decided to proceed with the penalty phase claims and produced an expert report, the State would be obligated to hire an expert to evaluate Davis, which could postpone the evidentiary hearing yet again. (R3583). The State argued that the court should summarily deny the penalty phase claims because they were factually and legally insufficient. (R3586).

On June 8, 2021, the postconviction court issued an order striking from the evidentiary hearing claims related to defense counsel's investigation and presentation of mental health mitigation, but permitting evidence regarding the allegation that counsel was ineffective for failing to speak to various family members and friends of Davis. (R2233-35).

In its final order denying relief, the court noted that the reason it struck portions of Claim 17 from the evidentiary hearing was due to Davis's failure to provide mental health discovery. (R3028). The court also observed that, though permitted to do so, Davis did not present any evidence regarding counsel's alleged failure to speak to certain family and friends. Finally, the court found that the trial record established that Norgard conducted a mitigation investigation and was prepared to present mental health mitigation, but Davis refused to participate in a mental health evaluation and wanted to waive any such mitigation. (R3028; V97/5249). The court denied relief.

SUMMARY OF THE ARGUMENTS

ISSUE I: Davis failed to show that there was undue difficulty in selecting a fair and impartial jury. Hence, there was no legal basis for a change of venue, and trial counsel cannot be deemed deficient for failing to move for one. Norgard knew and understood that if such difficulty arose, he would not be precluded from moving for a change of venue regardless of what pretrial motions were filed or not filed.

ISSUE II: It was undisputed that the photographs in this case were particularly disturbing. It was also undisputed that Bustamante and Luciano were bound, doused with an accelerant, and set on fire. Norgard asked the judge to address the emotional aspects of the case with the potential jurors. He also requested that the jurors be shown representative photographs so the parties could weed out those potential jurors who would not be able to put their emotions aside and rule on the evidence. There was no basis for an objection. Likewise, there was no basis for an objection to the trial judge's comment regarding the State's decision to pursue the death penalty in Davis's case.

ISSUE III: With regard to the proposed voir dire questions addressed at the evidentiary hearing, Davis did not establish that Norgard's failure to ask those questions was deficient performance. Norgard explained his strategy

regarding what questions he asked during voir dire. This Court has rejected jury-selection ineffective assistance of counsel claims where the defendant cannot show how counsel's performance resulted in an unfair or biased jury.

ISSUE IV: Where a postconviction motion lacks sufficient factual allegations, or where the facts do not render the judgment vunerable to collateral attack, the motion should be summarily denied. Davis did not present evidence that the photo-pack had been tampered with in any way during the time it was stored in Officer Townsel's shed. Consequently, even assuming a court could find a break in the chain of evidence, the photo-pack would have still been admissible because there was no proof of tampering. The claim of ineffective assistance of counsel for failing to move to suppress the photo-pack and Greisman's in-court identification was factually and legally insufficient.

ISSUE V: Norgard did file a motion to suppress with regard to the search of car and alleged, in part, that suppression was necessary because the return was not done within ten days. This claim could have been summarily denied on that basis alone. Nonetheless, the postconviction court addressed Davis's claim that trial counsel was ineffective for because he did not "aggressively litigate" the motion with respect to the late return.

However, Davis failed to advance any additional argument that Norgard should have made. Therefore, the postconviction court properly summarily denied relief.

ISSUE VI: Counsel's performance with regard to the dash cam video was not deficient. Considering Sergeant Crosby's description of what was depicted on the video, it would not have provided an avenue for counsel to contest the witnesses' testimony. Further, based on the description of the video, there was no basis for counsel to have argued that law enforcement failed to preserve "critical evidence." The postconviction court properly denied relief.

ISSUE VII: All of Davis's claims are either meritless, procedurally barred, or do not satisfy the Strickland standard for ineffective assistance of counsel. Therefore, this Court should affirm the postconviction court's denial of relief on this claim.

ISSUE VIII: This issue was not properly preserved. Davis's request was not in writing as required by Florida Rule of Criminal Procedure 3.851(4). Moreover, the oral request did not specify what observations of and conversations with Davis formed the basis of the request or what factual matters required competent consultation. Further, the postconviction court's order does not address the competency issue and counsel did not request

a ruling. This claim is without merit and should be rejected by this Court.

ARGUMENT

Ineffective Assistance of Counsel

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984) promulgated a two-pronged test to determine whether counsel's assistance was so defective as to require a reversal of a verdict or sentence. First, the defendant must show counsel's performance was deficient. Second the defendant must prove that counsel's deficient performance prejudiced the results of his proceedings. Id.

To prove deficient performance, the defendant must establish that his counsel made errors so serious that he was deprived of "counsel" as contemplated by the Sixth Amendment. In evaluating allegations of deficient performance, one must keep in mind that "the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." Bobby v. Van Hook, 558 U.S. 4 (2009). Courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . ." Strickland, 466 U.S. at 689 (quotation marks omitted). While counsel has a duty to conduct a reasonable investigation into a capital defendant's background for possible mitigating evidence, counsel is not required to "to run down every possible lead." Hall v. State, 212 So. 3d 1001, 1025 (Fla. 2017) (internal citations

omitted); See also Wiggins v. Smith, 539 U.S. 510, 533 (2013) (stating that "Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing.").

The defendant must also show counsel's errors resulted in prejudice. The appropriate test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. The defendant bears the burden of proving a "substantial," not just "conceivable," likelihood of a different result. Harrington v. Richter, 562 U.S. 86, 112 (2011); Wong v. Belmontes, 558 U.S. 15 (2009) (quoting Strickland, 466 U.S. at 694). To establish prejudice as a result of deficient performance during a capital penalty phase, the defendant must show that the sentencer would have weighed the aggravating and mitigating factors and found that the circumstances did not warrant the death penalty. Occhicone v. State, 768 So. 2d 1037, 1049 (Fla. 2000) (citations omitted); Strickland, 466 U.S. at 694.

"When a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001);

Zakrzewski v. State, 866 So. 2d 688, 692 (Fla. 2003).

Postconviction courts are not required to hold evidentiary hearings on claims that are insufficiently pleaded either factually or legally. A "defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing." State v. Coney, 845 So. 2d 120, 135 (Fla. 2003). If a defendant's conclusory allegations are not supported by a properly pled factual basis, the claim is facially insufficient and should be summarily denied. See Davis v. State, 875 So. 2d 359, 368 (Fla. 2003).

Both prongs of the Strickland test present mixed questions of law and fact. Therefore, on appellate review this Court must accept the postconviction court's factual findings so long as they are supported by competent, substantial evidence; but reviews the postconviction court's application of the law to the facts *de novo*. Mungin v. State, 932 So. 2d 986, 998 (Fla. 2006). However, "[e]ven under *de novo* review, the standard for judging counsel's representation is a most deferential one." Harrington v. Richter, 562 U.S. 86, 105 (2011). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Id., quoting Strickland, 466 U.S. at 690.

ISSUE I

DAVIS FAILED TO ESTABLISH A BASIS FOR A CHANGE OF VENUE AND THAT THE TRIAL COURT WOULD HAVE GRANTED A MOTION FOR CHANGE OF VENUE; THEREFORE, THE POSTCONVICTION COURT PROPERLY DENIED THIS CLAIM.

The decision of whether to seek a change of venue is a matter of trial strategy and, therefore, is not generally an issue to be second-guessed in postconviction proceedings. Rolling v. State, 825 So. 2d 293, 298 (Fla. 2002); Buford v. State, 492 So. 2d 355, 359 (Fla. 1986) ("Counsel's failure to move for a change of venue was a tactical decision and therefore not subject to attack."). Further, this Court has emphasized that to support an ineffective assistance of counsel claim for failure to move for a change of venue, "postconviction counsel must bring forth evidence to demonstrate that there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue if one had been filed." Carter v. State, 175 So. 3d 761, 776 (Fla. 2015). "If the defendant shows no undue difficulties in selecting a fair and impartial jury, then no legal basis would have existed for a change of venue – and trial counsel would not have been deficient in failing to move for one." Id. at 778 (citing Griffin v. State, 866 So. 2d 1, 12 (Fla. 2003)).

Here, Davis failed to establish that had counsel moved for a change

of venue, that the motion would have been granted. The impartiality of prospective jurors is presumed, and the mere existence of extensive pretrial publicity is insufficient to rebut that presumption. Bundy v. State, 471 So. 2d 9, 20 (Fla. 1985). Likewise, prospective jurors' awareness of the facts and issues involved in a case and/or a preconceived opinion as to guilt or innocence standing alone does not rebut the presumption of impartiality. Id. While criminal defendants have a right to have a panel of fair and impartial jurors those jurors need not be totally ignorant of the facts and issues involved in the present case or of the defendant's other unrelated offenses. Murphy v. Florida, 421 U.S. 794 (1975); See also Bundy, 471 So. 2d at 20.

Pretrial publicity is normal and expected in certain cases. That fact alone, though, does not require a change of venue. Rolling, 695 So. 2d at 285. Instead, courts should consider various factors, including: (1) the length of time that has passed from the crime to the trial and when, within this time, the publicity occurred; (2) whether the publicity consisted of straight, factual news stories or inflammatory stories; (3) whether the news stories consisted of the police or prosecutor's version of the offense to the exclusion of the defendant's version; (4) the size of the community in question; and (5) whether the defendant exhausted all of his peremptory

challenges. Rolling, 695 So. 2d at 285 (internal citations omitted).

In this case, there was no undue difficulty in selecting a fair and impartial jury in Polk County. On the contrary, Norgard explained that there was no difficulty at all in selecting a fair and impartial jury either in the mistried case, or the January 2011 case. Norgard knew and understood that if such difficulty arose, he would not be precluded from moving for a change of venue regardless of what pretrial motions were filed or not filed. (R2778).

Additionally, the record reflects that the trial judge excused almost every juror who had knowledge of either of Davis's cases or of the mistrial. (V68/179, 185, 191, 193-93, 201, 251, 253, 257, 268, 272, 277, 280-81, 291-92, 294, 322, 336; V69/354-55, 360, 371, 380, 396, 398, 402, 404, 406, 411, 415, 433, 435-36, 465, 471-72, 498-99; V70/560. 574, 577, 586, 593-94, 624-25, 641-42, 687; V71/742, 753, 754, 771, 777, 781). The judge and the parties took a great deal of time selecting a jury comprised of persons who knew nothing about either of Davis's cases, or the mistrial. Additionally, Norgard did not exhaust his peremptory challenges during jury selection.

Notably, the crimes for which Davis was charged and convicted occurred in December 2007 and the challenged jury selection began a little

more than three years later in January 2011. Admittedly, there was a mistrial in October 2010, which garnered some publicity because of the actions of one of the victim's family members after the mistrial was declared. The fact that the trial judge, after the mistrial, researched possible alternative venues is irrelevant to the question of whether counsel was ineffective for failing to move for a change of venue. The judge indicated that he was conducting preliminary research to be prepared *if* it became necessary to change venue. (V56/9262-63). Davis has not demonstrated that the mistrial publicity negatively affected the community's view of him or that it prevented the seating of a fair and impartial jury. In fact, the potential jurors were asked about their knowledge of both of Davis's cases and of the mistrial. The postconviction court properly denied relief and this Court should affirm.

ISSUE II

DAVIS FAILED TO ESTABLISH BOTH THAT ANY REASONABLE ATTORNEY WOULD HAVE OBJECTED TO THE COURT'S COMMENTS REGARDING THE PHOTOGRAPHS AND THAT HE SUFFERED PREJUDICE FROM THE LACK OF OBJECTION.

Davis's postconviction motion alleged: "Trial counsel failed to object, and in fact participated in comments by the trial court that the photos of the deceased that were being shown to the venire during jury selection were

the worst they've seen when that statement is a comment not only on the evidence itself but a comment on the evidence he has seen in other cases as well." Davis argued that by not objecting, counsel conceded that Davis's case was one of the "worst of the worst" and, therefore, worthy of the death penalty. (R574).

Although given the opportunity at the evidentiary hearing to substantiate his claim, Davis could not point to where in the record the judge stated that the photographs are "the worst" he had ever seen. The best Davis could do was to point to where Norgard represented that the judge had stated the photographs were "the worst" he had seen. (V70/863). Norgard made this comment during individual voir dire and explained that the potential juror had previously served on a capital jury. He did not want such a juror on Davis's case and was attempting to lay a foundation for a for cause challenge. (R2812).

Perhaps owing to this lack of factual support for the claim as originally presented, Davis changed his claim on appeal. He now alleges counsel was ineffective for failing 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." (IB67). This is not merely semantics. The crux of the argument below was

that the death penalty was reserved for the "worst of the worst" and that the trial judge's use of something akin to that phrase implied to the jury that Davis's case was just that – the worst of the worst. (R2916-17). Both Davis's and the State's closing arguments addressed the issue as presented, and the postconviction court clearly understood that to be the argument. (R2916-17, 2957). In the order denying relief, the court cites a lengthy quote from the trial judge and observed, "Nowhere in this colloquy does Judge Hunter use the word 'worst' or imply that these photographs are the worst he has seen. As the colloquy was requested by Mr. Norgard and does not contain the comment alleged by Mr. Davis, there were no grounds for Mr. Norgard to have objected." (R3005). Therefore, Davis's current argument has not been preserved for appellate review. § 924.051(b), Fla. Stat.

Whether the photographs were described as "the worst" the judge had seen or just "uniquely graphic," there was no basis for Norgard to object. It was undisputed that the photographs in this case were particularly disturbing. It was also undisputed that Bustamante and Luciano were bound, doused with an accelerant, and set on fire. (V71/T804). Norgard asked the judge to address the emotional aspects of the case with the potential jurors. Norgard testified that jurors tend to listen more attentively

to the judge as opposed to the attorneys. He also requested that the jurors be shown representative photographs so the parties could weed out those potential jurors who would not be able to put their emotions aside and rule on the evidence. (V8/1200). The parties and the court all agreed that it was important to find jurors who would maintain their impartiality in light of the photographs. (V8/1220, 1226-27).

To that end, the judge informed the potential jurors that "there are some folks who may not be able to handle the emotional aspect of this case and the graphic nature of this case." (V71/T806). The court further stated, "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 emotionally and I have lost a juror or two or three." (V71/T806).

At the evidentiary hearing, Norgard testified about an additional strategic reason for discussing the graphic nature of the photographs during jury selection. In his experience, he has seen cases lost as soon as

the jurors are confronted with graphic autopsy or crime scene photographs for the first time at trial. In this case, there was additional concern because one of the victims was an infant. (R2759). As such, he wanted to desensitize the jurors as much as possible. The postconviction court found that this was a reasonable tactical decision. (R3005-06). This Court should affirm.

Davis incorporates into this issue an argument that was a separate claim in his postconviction motion. In Claim 6 of his initial postconviction motion, Davis alleged that counsel was ineffective for failing to object to the court's statement that the State of Florida does not seek the death penalty for all murders. (R575; V68/241). This argument is analogous to the argument that counsel was ineffective for failing to object to a prosecutor's statement. Therefore, Davis was required to show that the comments were improper or objectionable and that there was no tactical reason for failing to object. Additionally, the comments must have deprived Davis "of a fair and impartial trial, materially contribute[d] to the conviction, [were] so harmful or fundamentally tainted as to require a new trial, or [were] so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." Stephens v. State, 975 So. 2d 405, 420 (Fla. 2007) (quoting Spencer v. State, 645 So. 2d 377, 383 (Fla.1994)).

Here, the statement was not objectionable. Despite Davis's characterization, the statement was merely a statement of fact. The statement in no way implied that the court agreed with the State's charging decision or that they should find Davis guilty and sentence him to death merely because the State Attorney's Office opted to seek death. In fact, the parties agreed to have the court read certain instructions to the panel prior to jury selection so they understood why they would be asked about their feelings on the death penalty. (V68/234-241).

The postconviction court properly considered the statement in context and found that it was not objectionable; therefore, counsel was not deficient for failing to object. The court also found that even assuming counsel had grounds to object, Davis failed to allege any resulting prejudice. (R3008). This Court should affirm the postconviction court's decision.

ISSUE III

DAVIS FAILED TO ESTABLISH THAT COUNSEL'S PERFORMANCE DURING VOIR DIRE WAS DEFICIENT AND THAT HE SUFFERED PREJUDICE AS A RESULT.

Effective assistance of counsel during voir dire requires a "proficient attempt to empanel a competent and impartial jury through the proper utilization of voir dire, challenges to venire members for cause, and the proper employment of peremptory challenges to venire members."

Durousseau v. State, 218 So. 3d 405, 411 (Fla. 2017) quoting Nelson v. State, 73 So. 3d 77, 85 (Fla. 2011). Jurors are competent and impartial if they are capable of setting aside any bias and are willing to render a verdict based on the evidence presented and the law provided. Id.

This Court has rejected jury-selection ineffective assistance of counsel claims where the defendant cannot show how counsel's performance resulted in an unfair or biased jury. See Peterson v. State, 154 So. 3d 275, 282 (Fla. 2014); See also Carratelli v. State, 961 So. 2d 312, 324 (Fla. 2007). Similarly, this Court has rejected ineffective assistance of counsel claims alleging counsel's failure to ask specific questions or to follow up on questions asked resulted in missed opportunities to use peremptory or for cause challenges to obtain a more "defense friendly jury." Durousseau, 218 So. 3d at 411 (citing Johnson v. State, 921 So. 2d 490, 503–04 (Fla. 2005)) (footnote omitted) (quoting Reaves v. State, 826 So. 2d 932, 939 (Fla. 2002)); see also Wade v. State, 156 So. 3d 1004, 1033 (Fla. 2014) ("Wade's claim that 'there would have been a basis for a for cause challenge if counsel had followed up during voir dire with more specific questions is speculative.'") (quoting Green v. State, 975 So. 2d 1090, 1105 (Fla. 2008)).

With regard to the proposed questions addressed at the evidentiary

hearing, Davis did not establish that Norgard's failure to ask those questions was deficient performance. When asked why he did not inquire as to whether the potential jurors could consider that the adult victims were in pain for a relatively short period of time, Norgard explained that attorneys cannot delve into the facts of the case during jury selection. (R2831). That said, the defense took every opportunity during trial and the penalty phase to emphasize that the adult victims' pain would have been alleviated by pain medication, damage to the nerve endings, and being put into a comatose state.

Further, Norgard testified that the fact that one of the victims was an infant was explored during jury selection both through attorney questioning and because the judge informed the potential jurors of some of the undisputed facts, including that one of the victims was an infant. (V71/804). Indeed, one of the photographs shown to the potential jurors was of the infant victim. Any concerns potential jurors expressed after seeing the photographs was discussed and addressed.

Norgard testified that he did not think it necessary to ask the potential jurors if there was any set of mitigating circumstances that could outweigh what they saw in the photographs. (R2816). In his opinion, this topic was addressed by asking the jurors if they could put aside whatever emotions

the photographs raised and fairly decide the case on the facts. Norgard also testified that he would not have mentioned to all jurors that the photographs were “the worst” he has seen. He stated that in individual voir dire in an effort to establish cause to excuse that potential juror, but did not think it was appropriate to make that comment to the entire venire. (R2818).

Finally, Norgard insisted that he would have never asked potential jurors to hypothetically consider Davis, or any of his other clients, guilty. Norgard testified that “[t]hose words have never come out of my mouth.” (R2818). Specific to this case, he would have never phrased a question to indicate in any way that the deaths were a result of Davis’s actions. He believed that he could ascertain whether the potential jurors could be fair and impartial should the case get to a penalty phase without ever implying that Davis was responsible for the deaths. (R2818-20).

This Court should affirm the postconviction court’s order finding that Davis failed to prove deficient attorney performance and resulting prejudice.

ISSUE IV

THERE WAS NO BASIS FOR FILING A MOTION TO SUPPRESS THE GREISMAN PHOTO-PACK BECAUSE THERE WAS NO EVIDENCE OF TAMPERING; THEREFORE, THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED RELIEF.

Where a postconviction motion lacks sufficient factual allegations, or where the facts do not render the judgment vulnerable to collateral attack, the motion should be summarily denied. Hamilton v. State, 875 So. 2d 586, 591 (Fla. 2004). "The defendant bears the burden of establishing a prima facie case based upon a legally valid claim." Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000).

Generally, chain of custody issues arise regarding physical evidence directly related to the crime and the crime scene that the State seeks to introduce. Evidence such as illegal narcotics, clothing, hair, skin, bodily fluids, etc. A photo-pack created by law enforcement for the purpose of an after-the-fact identification is not the type of "physical evidence" usually requiring a chain of custody.

Even assuming a photo-pack could be subject to a chain of custody challenge, "[a] mere break in the chain of custody is not in and of itself a basis for exclusion of physical evidence." State v. Jones, 30 So. 3d 619, 622 (Fla. 2d DCA 2010) citing Bush v. State, 543 So. 2d 283, 284 (Fla. 2d

DCA 1989). Instead, the defendant must prove that there is a "probability that the evidence has been tampered with during the interim for which it is unaccounted." Id. Proof of probable tampering is necessary before the State is required to establish a chain of custody or other evidence that tampering did not occur. Taylor v. State, 855 So. 2d 1, 25 (Fla. 2003) citing Taplis v. State, 703 So. 2d 453, 454 (Fla. 1997).

Davis did not present evidence that the photo-pack had been tampered with in any way during the time it was stored in Officer Townsel's home. Murray v. State, 838 So. 2d 1073, 1083 (Fla. 2002) (stating the appellant's allegations regarding tampering amount to mere speculation.). Consequently, even assuming a court could find a break in the chain of evidence, the photo-pack would have still been admissible because there was no proof of tampering.

Furthermore, an in-court identification is prohibited only if an impermissibly suggestive pretrial identification procedure "gives rise to a very substantial likelihood of irreparable mistaken identification." State v. Sepulvado, 362 So. 2d 324, 327 (Fla. 2d DCA 1978) citing Simmons v. United States, 390 U.S. 377, 384 (1968). The location of the photo-pack during the pretrial period has no bearing on whether the procedure was impermissibly suggestive or on the reliability of Mr. Greisman's in-court

identification. Therefore, there is no merit to the claim that "Mr. Greisman's in-court identification was also tainted and should have been suppressed." (Initial Brief p.82).

In fact, Mr. Greisman testified that shortly after he was shot he was taken to the hospital in an ambulance. No one other than paramedics accompanied him to the hospital. (V83/2805). While at the hospital he did not watch any television or read the newspaper. He was in the hospital for one day after his surgery. His mother picked him up and instead of taking him home she drove him immediately to the Lake Wales Police Department where he was shown a photo-pack. (V83/T2897, 2900, 2910). He was certain of his identification of Davis as the man who shot him. (V83/T2910). Mr. Greisman was extensively cross examined regarding his identification of Davis as the shooter. (V84/T2917-31).

Because Davis cannot establish that had a motion to suppress been filed it would have been granted, he cannot establish ineffective assistance of counsel. Furthermore, even if the introduction of the photo-pack were to be precluded, there is no likelihood of a different trial outcome. The postconviction court properly summarily denied relief on this claim. This Court should affirm.

ISSUE V

THE WARRANT WAS EXECUTED ON THE SAME DAY IT WAS ISSUED; THEREFORE, THERE WAS NO MERITORIOUS FOURTH AMENDMENT CLAIM THAT THE WARRANT WAS STALE AND THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED RELIEF.

Norgard filed a motion to suppress evidence obtained as a result of the search warrant alleging, in part, that suppression was necessary because the return was not done within ten days. The trial court rejected that argument. (R3011; V18/2912-13, 2918, 2924-28). This claim could have been summarily denied on that basis alone. Even so, the postconviction court addressed Davis's claim that trial counsel was ineffective for because he did not "aggressively litigate" the motion with respect to the late return. However, Davis failed to advance any additional argument that Norgard should have made. (R3031).

To prevail on a claim of ineffective assistance of counsel for failing to litigate a Fourth Amendment issue, a defendant has the burden of proving that the Fourth Amendment claim is meritorious. Zakrzewski v. State, 866 So. 2d 688, 694 (Fla. 2003). Thus, where there is no cognizable Fourth Amendment claim regarding the allegedly improperly admitted evidence, trial counsel's performance is not deficient for failing to file a motion to suppress. Lynch v. State, 2 So. 3d 47, 67-68 (Fla. 2008).

A meritorious Fourth Amendment claim is not enough to establish ineffective assistance of counsel, though. Additionally, the movant must prove "there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice" under Strickland v. Washington, 466 U.S. 668 (1984); Kimmelman v. Morrison, 477 U.S. 365, 375 (1986).

Here, there was no meritorious Fourth Amendment challenge to the search of the Nissan Altima based on the delayed return. Davis is correct that § 933.05, Fla. Stat. states that a search warrant shall be returned within 10 days of issuance. The question is whether failure to do so would require the court to exclude the evidence obtained. The answer to that question is no. In State v. Featherstone, 246 So. 2d 597 (Fla. 3d DCA 1971) the Third District Court of Appeal was presented with the questions of "whether a search warrant is void because of an improper or late return and whether the evidence seized thereunder becomes inadmissible." 246 So. 2d at 558.

In Featherstone, the warrant was issued on June 1, 1970, and was executed on June 3, 1970, but the return was not made until more than 10 days after issuance, on June 12, 1970. The district court noted that the state rule tracks the language of the federal rule. Federal courts had held

that the making of a return is a ministerial task. Id. citing Joyner v. City of Lakeland, 90 So. 2d 118, 122 (Fla. 1956) (holding, this "matter, it has been frequently decided by the federal courts and on the basis of the federal decisions we are inclined to hold, as we do, that the delay of eight days was not unreasonable.") (citing Dixon v. United States, 211 F.2d 547 (5th Cir. 1954). The court found that the great weight of authority, state and federal, held that the failure of law enforcement to make a timely return does not invalidate the search "because these acts are ministerial and do not affect the validity of the search." Featherstone, 246 So. 2d at 599.

In this case, like in Featherstone, the warrant was executed within the 10-day period. In fact, the warrant was executed on the same day it was issued, December 14, 2007. Therefore, the warrant was not stale when it was executed. The lack of a timely return does not render the warrant void or the discovered evidence inadmissible. "While it is the duty of the officer serving the search warrant to make due return when the same is served, nevertheless, the failure to do this will not have a retroactive effect to render void a search that was valid at the time it was made." Featherstone, 246 So. 2d at 599. Counsel was not ineffective for failing to file a non-meritorious motion to suppress.

Even if a motion to suppress would have been granted, it would not

have changed the result of the trial. The evidence obtained from the Nissan was but one piece of the puzzle linking Davis to the murders. The State presented Bustamante's dying declaration that Davis was the perpetrator, eyewitness testimony that he was at the scene, his own statements to his various family members, and other physical evidence linking him to the murders. The State also presented evidence that on the morning of the murders Davis was recorded on a Walmart surveillance video purchasing a Bic lighter, gloves, an orange six-pack cooler, and a gray t-shirt. A Walmart employee, and friend of Davis's, testified that she saw him in the store that morning. A Bic lighter, duct tape, and a gas can were found at the crime scene. Murray, Greisman and Ortiz testified that Davis had put a gun into an orange-ish lunch bag. Davis also asked a friend if he could borrow duct tape. Bustamante and Luciano were bound with duct tape before being doused with gasoline and set on fire. That afternoon, Davis made a cash deposit in the amount of $148 at Mid Florida Credit Union in Winter Haven. The teller testified that Davis had blood and scratches on his face. Hence, even if a motion to suppress the evidence found in the car was granted, it would not have changed the outcome of the trial. Therefore, Davis cannot show prejudice. This Court should affirm the denial of relief.

ISSUE VI

DAVIS'S CLAIM RELATED TO THE ALLEGED DASH CAM VIDEO WAS SPECULATIVE AND LEGALLY INSUFFICIENT; HENCE, THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED RELIEF.

A defendant is not entitled to an evidentiary hearing based on conclusory allegations trial counsel was ineffective. Coney, 845 So. 2d at 135. If a defendant's conclusory allegations are not supported by a properly pled factual basis, the claim is facially insufficient and should be summarily denied. See Davis, 875 So. 2d at 368.

In summarily denying this claim, the postconviction court attached Officer Crosby's deposition, which was taken by Norgard on June 2, 2010, and filed with the clerk's office on June 4, 2010, to the order denying postconviction relief. (R3089). Officer Crosby described what he saw on Officer Hampton's dash cam video prior to placing it in property/evidence. He testified it ". . . just shows him pulling into the west side of the Headley parking lot. It shows the vehicle – I mean the building burning, and then you can see him run across the front of the screen. That's really about all it shows. And then, of course, you can see the firefighters and other personnel running around." (R3015, 3090).

Counsel's performance with regard to the dash cam video was not deficient. First, counsel deposed Sergeant Crosby and asked about the

dash cam video. Considering Sergeant Crosby's description of what was depicted on the video, it would not have provided an avenue for counsel to contest the witnesses' testimony. Davis does not identify which "witnesses at the scene" counsel could have cross examined regarding the handling of the video or what it depicted. Nor does Davis explain what questions would have been asked of the witnesses. Further, based on the description of the video, there was no basis for counsel to have argued that law enforcement failed to preserve "critical evidence."

In the prejudice portion of his argument on appeal, Davis seems to suggest that counsel could have used the missing video to challenge Lt. Elrod's credibility. Lt. Elrod is the officer who asked Bustamante who harmed her. She named Davis as the person who bound her and Luciano and set them on fire. It was not Lt. Elrod's patrol car dash cam that recorded the video. Lt. Elrod was not responsible for maintaining the video or placing it in evidence. Whatever transpired with the video has absolutely nothing to do with Lt. Elrod or his credibility. It is unclear how counsel would have been able to, without objection, cross examine Lt. Elrod about anything related to the video. Additionally, Lt. Elrod's testimony is corroborated by other witnesses. EMT Ernest Froehlich, paramedic John Johnson, and Headley insurance customer Evelyn Anderson all heard and

testified about Bustamante's dying declaration to Lt. Elrod. Davis, 207 So. 3d at 150.

Further, Davis has not proven that he was prejudiced by the counsel's performance related to the dash cam video. To establish prejudice, as defined by Strickland, a defendant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. As the postconviction court observed, Davis "can only speculate that the additional argument of [a] lost inconsequential dash cam video footage would have led the jury to ignore all other evidence that established Mr. Davis's guilt." (R3015).

Davis's argument below, and on appeal, are entirely speculative. This Court should affirm the summary denial of relief.

ISSUE VII

BECAUSE THE POSTCONVICTION COURT FOUND EACH OF DAVIS'S CLAIMS TO BE WITHOUT MERIT THE COURT PROPERLY DENIED THE CLAIMS THAT CUMULATIVE ERROR DEPRIVED HIM OF A FAIR TRIAL.

Claims of cumulative error do not warrant relief where each individual claim of error is "either meritless, procedurally barred, or [does] not meet the Strickland standard for ineffective assistance of counsel." Schoenwetter v. State, 46 So. 3d 535, 562 (Fla. 2010); quoting Israel v. State, 985 So. 2d

510, 520 (Fla. 2008) (other internal citation omitted). All of Davis's claims are either meritless, procedurally barred, or do not satisfy the Strickland standard for ineffective assistance of counsel. Therefore, this Court should affirm the postconviction court's denial of relief on this claim.

ISSUE VIII

THERE WERE NO REASONABLE GROUNDS TO BELIEVE THAT DAVIS WAS NOT COMPETENT AND POSTCONVICTION DID NOT OBTAIN A RULING ON THE SUGGESTION THAT THE COURT CONDUCT A COLLOQUY TO DETERMINE IF THERE WAS A REASONABLE BASIS FOR A COMPETENCY EVALUATION.

This issue has not been preserved for appellate review. Pursuant to § 924.051(b), Fla. Stat. "'Preserved'" means that an issue, legal argument, or objection to evidence was timely raised before, *and ruled on by*, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor." (emphasis added). As this Court has previously noted, "[a] plethora of Florida cases support the notion that a party must obtain a ruling from the trial court in order to preserve an issue for appellate review." Carratelli v. State, 832 So. 2d 850, 856 (Fla. 4th DCA 2002) (string cite omitted).

Florida Rule of Criminal Procedure 3.851(4) states:

> The motion for competency examination shall be in writing and shall allege with specificity the factual matters at issue and the reason that competent consultation with the defendant is necessary with respect to each factual matter specified. To the extent that it does not invade the lawyer-client privilege with collateral counsel, the motion shall contain a recital of the specific observations of, and conversations with, the death-sentenced defendant that have formed the basis of the motion.

Davis's request was not in writing. Moreover, the oral request did not specify what observations of, and conversations with, Davis formed the basis of the request. Importantly, postconviction counsel did not specify what factual matters required competent consultation. Finally, the postconviction court's order does not address the competency issue and counsel did not request a ruling. Regardless, there was no reasonable basis for the court to order a competency evaluation.

At the hearing on the State's motion to strike, Davis's postconviction counsel informed the court that Davis did not want to present any penalty phase testimony or evidence at the August 2021 evidentiary hearing. Counsel also advised the court that Davis had previously agreed to allow postconviction counsel to conduct a mitigation investigation. Counsel stated that she "told [Davis] that [the court] may want to do a colloquy with him, may want to do competency evaluation . . . and so that's what I am asking the court to do at this time." (R3577). Counsel admitted that Davis was not

seeking to waive his postconviction proceedings or discharge his postconviction counsel. (R3577).

In response, the State pointed out that the motion had been pending for almost three years and that Davis had previously claimed he wanted to waive his penalty phase claims only to revoke that request after he had been transported to Polk County for a colloquy. (R3681). The State asserted that the issue was a matter of lack of evidence regardless of whether Davis's actions could be considered a waiver of the penalty phase claims. (R3581). The State also pointed out that if Davis belatedly decided he wanted to present evidence regarding penalty phase claims and produced an expert report, the State would be obligated to hire an expert to evaluate Davis, which could postpone the evidentiary hearing yet again. (R3583). The State argued that the court could summarily deny the mental health penalty phase claims because they were both factually and legally insufficient. (R3586).

The request for a colloquy was connected to whether Davis would permit counsel to present evidence to support his mental health penalty phase claims. There were no allegations that Davis did not understand the factual basis for his claims or that he could not competently assist his counsel with the presentation of those facts. Instead, Davis understood the

factual basis of his penalty phase claims but was unwilling to allow his postconviction attorneys to present evidence to support the claims. This position is consistent with his refusal to allow trial counsel to present mental health mitigation, other than that contained in his military records, at either the penalty phase or the Spencer hearing. (V97/5265-73). Postconviction counsel may not have believed Davis made a wise decision, but it was Davis's decision to make.

Of note, during the two-day hearing, counsel never requested, either orally or in writing, that the court conduct a colloquy to assess Davis's competency. Davis attended both days of the hearing and testified with regard to an issue raised in a companion case. (R2901). He understood the questions asked of him and his answers were clear and contextually appropriate. (R2901-05).

There was no reasonable basis for the postconviction court to conclude that Davis was not competent. This Court should affirm the summary denial of relief.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of September, 2022, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal which will send a notice of electronic filing to the following: Dawn B. Macready, Assistant CCRC-North, Capital Collateral Regional Counsel-North, 1004 Desoto Park Drive, Tallahassee, Florida 32301, **dawn.macready@ccrc-north.org;** and Stacy R. Biggart, Special Assistant CCRC-North, 3495 SW 106th Street, Gainesville, Florida 32608, **stacy.biggart@gmail.com**.

Respectfully submitted,

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CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Arial, and the word count is 18,352 words in compliance with Fla. R. App. P. 9.045.

/s/ Marilyn Muir Beccue
COUNSEL FOR APPELLEE