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

STATE OF FLORIDA,
Plaintiff,

v. **CASE NO.:** 2007-CF-009386-XX

LEON DAVIS, JR.,
Defendant.

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FINAL ORDER ON MOTION FOR POSTCONVICTION RELIEF

THIS MATTER is before the Court upon Defendant's "Motion to Vacate Judgments of Conviction and Sentence with Special Request For Leave to Amend," filed on May 19, 2018; the "State's Response to Defendant's Motion to Vacate Judgment and Sentence," filed on July 18, 2018; the Defendant's First Motion to Amend Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend" filed on October 26, 2018; the Defendant's "First Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend," filed on November 6, 2018; the "State's Response to Defendant's Amended Motion to Vacate Judgment and Sentence" filed on November 13, 2018; the State's "Notice of Supplemental Authority" and "Amended Notice of Supplemental Authority" filed on December 11, 2018; the Defendant's "Response to Notice of Supplemental Authority" filed on January 18, 2019; the Court's "Order on Case Management Conference," entered on June 7, 2019; the "Motion to Amend 3.851 Motion to Include Additional Claims" filed on October 14, 2019; the "Order Granting Defendant's Motion to Amend 3.851 Motion to Include Additional Claims" entered on October 18, 2019; the "State's Response to Defendant's Second Amended Motion to Vacate Judgment and Sentence" filed on November 8, 2019; the Court's "Order on Case Management Conference" entered on January 7, 2020; the Defendant's "Motion to Amend Defendant's Motion

to Vacate Judgments of Conviction and Sentence" filed on July 16, 2020; the "State's Response to Defendant's Third Amended Motion to Vacate Judgment and Sentence" filed on July 31, 2020; the Court's "Order on Defendant's Motions to Amend Defendant's Motion to Vacate Judgments of Conviction and Sentence and Order Scheduling Hearing and Case Management Conference" entered on August 10, 2020; the Court's "Amended Order on Third Case Management Conference" entered on August 19, 2020; the State's "Motion to Dismiss Portions of Claim 17 in Case Number 07-CF-9386 and to Exclude Any and All Mental Health Testimony or Evidence from Any Source" filed on May 3, 2021; the "Notice of Supplemental Authority" filed on June 3, 2021; the "Order on the State's Motion to Dismiss Portions of Claim 17 in Case Number 07-CF-9386 and to Exclude Any and All Mental Health Testimony from Any Source" entered on June 8, 2021; and the "Notice of Filing" filed on June 9, 2021. An evidentiary hearing was conducted on August 23, 2021, and August 24, 2021. Written closing arguments were filed on November 1, 2020. The Court having reviewed the various postconviction motions, amendments, responses, and notices of supplemental authority filed by the parties in the matter; having heard the testimony and reviewed the evidence presented at the evidentiary hearing; having heard the arguments of legal counsel; having reviewed the written closing arguments from all parties; having reviewed the case file, the applicable case and statutory law; and being otherwise fully advised in the premises, now finds as follows:

STATEMENT OF PROCEDURAL HISTORY

On January 9, 2008, the Defendant, Leon Davis, Jr., (hereinafter referred to as Mr. Davis), was charged by indictment with three counts of First-Degree Murder for the murders of Michael J. Bustamante, Yvonne Bustamante, and Juanita Luciano; Attempted First Degree Murder of

Brandon Greisman; Armed Robbery; First Degree Arson; and Possession of a Firearm by a Convicted Felon. On February 15, 2011, the jury returned a verdict finding Mr. Davis guilty as charged on counts one through six. A Notice of Nolle Prosequi was filed on June 21, 2012, as to the latter charge of Possession of a Firearm by a Convicted Felon.

The penalty phase of the trial commenced on February 17, 2011. On February 18, 2011, the jury recommended by a vote of eight to four that Mr. Davis be sentenced to death for the murder of Michael J. Bustamante, and unanimously voted that Mr. Davis be sentenced to death for the murders of Yvonne Bustamante and Juanita Luciano. A *Spencer*[1] hearing was held on March 29, 2011. The Court followed the jury's recommendation with regard to the murders of Yvonne Bustamante and Juanita Luciano, and sentenced Mr. Davis to death. For the murder of Michael J. Bustamante; attempted murder of Brandon Greisman; and armed robbery while in possession of a firearm, the Court sentenced Mr. Davis to life in State Prison. For the crime of first-degree arson, the Defendant was sentenced to thirty years in State Prison.

The Court found that the following aggravators were established for the murders of Yvonne Bustamante and Juanita Luciano: (1) Mr. Davis was previously convicted of a felony and on felony probation (some weight); (2) the murders were committed in a cold, calculated, and premeditated manner (great weight); (3) Mr. Davis was contemporaneously convicted of three first degree murders, the attempted murder of Brandon Greisman, and armed robbery with a firearm (very great weight); (4) the murders were committed while Mr. Davis was engaged in the commission of an armed robbery with a firearm and first degree arson (moderate weight); (5) the murder of Yvonne Bustamante was committed for the purpose of avoiding or preventing a lawful

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

arrest (some weight); (6) the murders were committed for pecuniary gain (little weight); and (7) the murders were especially heinous, atrocious or cruel (great weight).

The Court found one statutory mitigating circumstance, that the murders were committed while Mr. Davis was under the influence of extreme mental or emotional disturbance, and assigned it little weight. The Court found that the following fifteen non-statutory mitigators were established: (1) Mr. Davis was the victim of bullying through his childhood (slight to moderate weight); (2) Mr. Davis was the victim of sexual assault as a child (slight to moderate weight); (3) Mr. Davis was the victim of both physical and emotional child abuse by a caretaker (moderate weight); (4) Mr. Davis was the victim of overall family dynamics (very little weight); (5) Mr. Davis served in the U.S. Marine Corps (very little weight); (6) Mr. Davis has a history of being suicidal, both as a child and as an adult (slight weight); (7) Mr. Davis was diagnosed with a personality disorder (slight weight); (8) Mr. Davis has a history of depression (slight weight); (9) Mr. Davis was dealing with stress at the time of the incident (little weight); (10) Mr. Davis was a good person in general (very slight weight); (11) Mr. Davis was a good worker (very slight weight); (12) Mr. Davis was a good son, good sibling, and good husband (very slight weight); (13) Mr. Davis was a good father to a child with Down syndrome (moderate weight); (14) Mr. Davis exhibited good behavior during the trial as well as other Court proceedings (very slight weight); (15) Mr. Davis exhibited good behavior while in jail (little weight).

On November 10, 2016, on direct appeal, the Supreme Court of Florida affirmed the convictions and sentences. *Davis v. State*, 207 So. 3d 142 (Fla. 2016). Mr. Davis filed a motion for rehearing which was denied on January 5, 2017. The Mandate was issued on January 23, 2017. On June 5, 2017, the United States Supreme Court denied certiorari. *Davis v. Florida*, 137 S.Ct. 2218, 198 L.Ed.2d 663, 85 USLW 3569 (2017).

STATEMENT OF THE CASE FACTS

The underlying facts of the case are set forth in *Davis v. State*, 207 So. 3d 142, 147-155 (Fla. 2016), and are presented below:

> **The Events at Headley Insurance**
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> 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.
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> 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.
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> 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.
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> **Victims Seek Help; Davis Shoots Bystander**
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> 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.
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> 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.

POSTCONVICTION MOTIONS

Mr. Davis filed his "Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend" on May 19, 2018. The State filed the "State's Response to Defendant's Motion to Vacate Judgment and Sentence" on July 18, 2018.

On October 15, 2018, Mr. Davis filed the "Unopposed Motion for Extension of Time to File Proposed Amended 3.850 Motion." An "Order Regarding October 17, 2018, Status Conference" was filed on October 23, 2018, providing Mr. Davis leave to file an Amended Motion for Postconviction Relief on or before October 26, 2018. Mr. Davis filed the "Defendant's First Motion to Amend Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend" on October 26, 2018. The proposed amendments consisted of more specific claims regarding trial counsel's alleged deficient performance at sentencing, as set forth in claims 17 and 18. An "Order Granting the Defendant's First Motion to Amend Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend" was entered on November 6, 2018. On November 6, 2018, the Defendant filed the "First Amended Motion to

Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend." The State filed the "State's Response to Defendant's Amended Motion to Vacate Judgment and Sentence" on November 13, 2018.

On December 11, 2018, the State filed the "Notice of Supplemental Authority" and the "Amended Notice of Supplemental Authority," attaching the opinion of *Foster v. State*, 2018 WL 6379348 (Fla. Dec 6, 2018). On January 18, 2019, Mr. Davis filed the "Response to Notice of Supplemental Authority."

On July 17, 2019, the Court filed the "Notice of Filing", notifying all parties of the receipt of an ex-parte communication letter dated July 11, 2019, received from Mr. Davis. In the letter, Mr. Davis represented his desire to abandon any penalty phase claims raised in the postconviction proceedings. In a subsequent inquiry before the Court, Mr. Davis withdrew this request and stated his desire to proceed on all claims.

A "Motion to Amend 3.851 Motion to Include Additional Claims" was filed on October 14, 2019, raising two additional claims. An "Order Granting Defendant's Motion to Amend 3.851 Motion to Include Additional Claims" was entered on October 18, 2019. The State filed the "State's Response to Defendant's Second Amended Motion to Vacate Judgment and Sentence" on November 8, 2019.

On December 24, 2019, counsel for Mr. Davis, Robert R. Berry, Esq., filed a "Motion to Continue *Huff* Hearing and Evidentiary Hearing". In the motion and at the hearing held on December 30, 2019, Mr. Berry represented he was resigning from his position with Capital Collateral Regional Counsel (CCRC), and new counsel from CCRC would be assigned to Mr. Davis's cases. Mr. Berry's *ore tenus* Motion to Withdraw was granted on December 30, 2019.

On January 3, 2020, current counsel for Mr. Davis (Ms. Dawn B. Macready, Esq.) and Ms. Stacy R. Biggart, Esq., filed a Notice of Appearance.

An Order Setting Evidentiary Hearing was entered on February 14, 2020, scheduling a four-day evidentiary hearing to begin on August 31, 2020. Due to the public health emergency as a result of the Coronavirus Disease 2019 (COVID-19), the parties agreed only claims 4, 5, and 7 could be heard at that time.[2]

Mr. Davis filed a "Motion to Amend Defendant's Motion to Vacate Judgments of Conviction and Sentence" on July 16, 2020, raising two additional claims. At a status conference held on July 17, 2020, the State objected to the Motion to Amend, but agreed to file a response within 20 days pursuant to rule 3.851(f)(4). The State's Response was filed on July 31, 2020.

Mr. Davis filed a "Motion to Strike August 31, 2020, Evidentiary Hearing Date" on July 27, 2020. Citing COVID-19 and the inability for counsel to confer with Mr. Davis, this motion sought to continue the evidentiary hearing until an in-person evidentiary hearing could be conducted. Following a hearing held on August 19, 2020, this Court entered the "Order Continuing Evidentiary Hearing and Order Scheduling Status Conference" on August 19, 2020. An Amended Order, amended only as to the Certificate of Service, was entered that same day.

On May 3, 2021, the State filed the "Motion to Dismiss Portions of Claim 17 in Case Number 07-CF-9386 and to Exclude Any and All Mental Health Testimony or Evidence From Any Source". Following a hearing held on June 4, 2021, this Court entered the "Order on the State's Motion to Dismiss Portions of Claim 17 in Case Number 07-CF-9386 and to Exclude Any and All Mental Health Testimony From any Source" on June 8, 2021. In this order, the Court

[2] Mr. Davis had moved for a continuance of the evidentiary hearing, which was denied. The Court directed the parties to determine which claims, if bifurcated, could be addressed at the originally scheduled evidentiary hearing through a remote hearing.

struck from the evidentiary hearing any portions of claim 17 which addressed trial counsel's mental health investigation and presentation. This order specifically stated the remaining portions of the claim dealing with counsel's alleged ineffectiveness for failing to speak to family members and friends would be addressed at the evidentiary hearing.

CASE MANAGEMENT CONFERENCE

A Case Management Conference for Defendant's "First Amended Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend" was held on June 7, 2019, pursuant to Rule 3.851, Fla. R. Crim. P. In the "Order on Case Management Conference" the Court found that it would be appropriate to have an evidentiary hearing on claims 4, 5, 7, 17, and 18.

A Case Management Conference for Defendant's second amended motion was held on December 30, 2019. In the "Order on Case Management Conference" entered on January 7, 2020, the Court found it was not necessary to have an evidentiary hearing on either of the two additional claims alleged in the second amended motion.

A Case Management Conference was held on August 19, 2020, on Defendant's third amended motion. In the "Order on Third Case Management Conference" entered on August 19, 2020, this Court found it was not necessary to have a hearing on claim 21, and reserved ruling on claim 22, which alleged cumulative error.

EVIDENTIARY HEARING TESTIMONY

An evidentiary hearing was held in this matter on August 23, 2021, and August 24, 2021. Mr. Davis was represented at trial by Robert and Andrea Norgard. Mr. Norgard was appointed as

lead counsel and did most of the "courtroom work," while Mrs. Norgard researched, reviewed discovery, and was primarily responsible for developing the penalty phase workup. Tr. 222-223.[3] Although Mr. Norgard testified at the evidentiary hearing, Mrs. Norgard was not called as a witness.

Mr. Norgard has been a member of the Florida Bar since 1981. Tr. 223. Mr. Norgard has been death-qualified since the inception of the rule for the minimum standards for attorneys in capital cases (having met those qualifications as far back as 1985 or 1986) and has been board certified in criminal trial practice since 1995. Tr. 222; 226-227. Mr. Norgard began his career in private practice, with criminal work comprising about 40 percent of his practice. Tr. 223. Mr. Norgard was next employed by the Office of the Public Defender for the Sixth Judicial Circuit, beginning in 1983. Mr. Norgard was employed here for three-and-a-half years and was assigned to three death penalty cases. Tr. 224. Following the Sixth Circuit, Mr. Norgard was employed by the Office of the Public Defender for the Tenth Judicial Circuit for ten years. Tr. 225. Mr. Norgard was assigned to the capital division and routinely handled first-degree murder cases. Tr. 225.

Mr. Norgard established his own law firm in 1995, where he exclusively handles "serious" criminal matters. Tr. 221. Throughout his career, Mr. Norgard has tried between 35-40 death penalty trials. Tr. 228. Including cases where the death penalty was waived and those that resulted in pleas, Mr. Norgard estimates he has handled at least 150-200 death penalty cases. Tr. 228. Mr. Norgard has testified as an expert witness in postconviction matters approximately 20-25 times and has handled about a dozen death penalty postconviction cases. Tr. 229.

[3] This order will reference testimony from the evidentiary hearing in this format. Pre-trial and trial testimony will be referenced by the volume and page numbers as they appeared in the record on appeal for the direct appeal, case number SC11-1122, and attached to this order.

From 1992 until 2004, Mr. Norgard prepared a Florida Supreme Court death penalty update, summarizing every death penalty case, which was published quarterly in the Florida Association of Criminal Defense Lawyers magazine. Tr. 230. Since then, Mr. Norgard reviews the Florida Law Weekly and obtains and reviews the updated death penalty manual published by the Florida Public Defender's Association. Tr. 231. Mr. Norgard authored two chapters of this manual's initial publication. He established the Death is Different seminar for the Florida Association of Criminal Defense Lawyers ("FACDL") in 1992 and was the chair of this seminar until 2004 or 2005. Tr. 231-232. He has co-chaired the seminar two or three times since then. Tr. 231. Mr. Norgard has been an active member of the FACDL since the early '90s, was chairman of their death penalty committee for approximately 15 years and was on the board of directors in 2005 or 2006. *Id.*

Prior to Mr. Davis's case, Mr. Norgard had handled a number of high-profile cases. Tr. 235-236. Mr. Norgard normally kept track of media attention surrounding a case to evaluate the type of information to which jury pool could potentially be exposed. Tr. 236. He recalled a lot of publicity surrounding Mr. Davis's case. Tr. 236. Copies of several newspaper articles were contained in Mr. Norgard's trial file and entered into evidence at the evidentiary hearing as Defense Composite Exhibit No. 3. Tr. 238-239.

Mr. Davis's first trial ended in a mistrial. Tr. 239. Mr. Norgard did not recall Judge Hunter, the judge that presided over the first trial, indicate a willingness to change venue after the mistrial Tr. 240. Although Mr. Norgard stated they had gone through a large number of potential jurors in selecting the first jury, he was not concerned that they would not be able to get a jury at the second trial. Tr. 240. Following this mistrial, Mr. Norgard filed a "Motion to Invoke the Defendant's Right to be Tried in the County Where the Alleged Crimes Occurred and to Provide for Adequate

Jurors and Time for this Purpose". Tr. 242-243. Mr. Norgard explained that other than the reasons set forth in the motion, he also filed the motion based on his experience in dealing with high-publicity cases, including those where venue had been changed. Tr. 243. Mr. Norgard stated it took less time to select the jury for the first trial than they originally anticipated. Tr. 244. He also stated there was a large number of people that either had no knowledge or no significant knowledge about the case. Tr. 245. He also testified that after the mistrial, they received unsolicited feedback from one of the jurors that the jury thought the defense was winning. Tr. 246-247. Mr. Norgard stated he spoke to Mr. Davis prior to filing this motion. Tr. 248. In discussing the possibility of changing venue, Mr. Norgard informed the Court that he and co-counsel would need sufficient time to make child care arrangements. Tr. 253. However, Mr. Norgard testified that the necessity for such arrangements was not a factor in his decision to file the motion to keep the trial in Polk County. Tr. 254. Mr. Norgard was also aware that case law required they attempt to seat a jury in the county where the crime happened before seeking to change venue. Tr. 270. He also did not believe failing to move to change venue prior to beginning jury selection in the second trial prevented him from making such a request should it become apparent that they would have difficulty in selecting a jury. Tr. 276. In selecting the jury for the second trial, Mr. Norgard did not exercise all of his peremptory challenges. Tr. 273.

Mr. Norgard recalled the trial judge commenting during jury selection that the photographs were some of the worst he had seen. Tr. 254. Mr. Norgard did not object to this comment as he was "not gonna stick my head in the sand." Tr. 257. He further explained his strategy was to win the guilt phase and to desensitize the jury as much as possible to the emotional aspects of the case. Tr. 257. This was the first case where Mr. Norgard requested the Court to show some photographs to the jury panel, as ". . . even though you try to desensitize a jury by words, words alone. . . are

not sufficient." Tr. 277. In showing the photographs during jury selection, Mr. Norgard's goal was to excuse jurors for cause that would make an emotional decision, rather than using a peremptory challenge; to desensitize the jurors; and prevent the jurors from viewing the photographs for the first time during the trial. Tr. 282-283. Although Mr. Norgard's strategy was to win the case in the guilt phase, he did not believe that the jury would have been more likely to recommend a sentence of death based on comments that these photos are the worst. Tr. 291-292. Finally, Mr. Norgard noted that in reference to him stating the photo was the worst he had personally seen, this comment was made during individual and sequestered voir dire and not in front of the entire panel. Tr. 309. The particular juror the comment was made in front of had previously served on a capital case and Mr. Norgard was attempting to find reason to use a cause challenge against this juror. Tr. 309-310.

Mr. Norgard recalled a large portion of his voir dire was to determine if jurors could base their verdict on the evidence and not emotion. Tr. 258. Another major topic he covered included holding the State to their burden beyond a reasonable doubt. Tr. 258. He did not find it important to ask if potential jurors could consider a life sentence in a case where the facts involve a suspect setting other people on fire or where a baby is killed. Tr. 260. Mr. Norgard believed he used a "totality of the circumstances" analysis to make an informed decision during jury selection. Tr. 262. This included his observations in addition to the answers and responses given. Tr. 262. Mr. Norgard did not ask questions relating to how much pain the victims were in or mitigating circumstances, as he did not believe he would be able to without getting into the facts of the case more extensively than is allowed. Tr. 311; 314-315. Mr. Norgard did ask questions about the fact that one of the victims was a child, which was included in the process of showing a photograph of this victim. Tr. 312-313. Mr. Norgard would never ask potential jurors to consider Mr. Davis

being guilty. Tr. 316. He believed he could assess whether a juror could be fair and impartial without implying Mr. Davis's guilt. Tr. 316-318. His focus on the guilt phase was a purposeful strategy. Tr. 317.

Mr. Davis testified that Mr. Norgard did not discuss any issues regarding the change of venue or his motion to keep the trial in Polk County. Tr. 399-400.

ANALYSIS OF DEFENDANT'S CLAIMS

Strickland Standard:

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), set forth the standard for determining ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must prove two elements. First, the defendant must show that counsel's performance was deficient. The defendant must show that counsel's representation fell below an objective standard of reasonableness. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. Second, the defendant must show that counsel's deficient performance prejudiced the defense. This occurs when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland*, 466 U.S. at 687. The *Strickland* standard requires establishment of both prongs. Where a defendant fails to make a showing as to one prong, it is not necessary to

delve in whether he has made a showing as to the other prong. See *Waterhouse v. State*, 792 So. 2d 1176 (Fla. 2001).

In *Douglas v. State*, 141 So. 3d 107, 117 (Fla. 2012), the Florida Supreme Court discussed prejudice in the penalty phase, and stated:

> "Penalty phase prejudice under the *Strickland* standard is measured by whether the error of trial counsel undermines the Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the Trial Court . . . That standard does not "require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome of his penalty proceeding, but rather that he establish a probability sufficient to undermine confidence in [that] outcome.' " *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 455-56, 175 L.Ed. 2d 398 (2009) (alteration in original) (quoting *Strickland*, 466 U.S. at 693-94, 104 S.Ct. 2052). "To assess that probability. [the Court] consider[s] 'the totality of the available mitigation evidence . . .' and 'reweigh[s] it against the evidence in aggravation.' " *Id.* at 453-54 (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

3.851 CLAIMS

Mr. Davis has alleged twenty-two claims for relief, with three enumerated subclaims alleged in claim 17, and unenumerated subclaims in claims 9 and 20. These claims and subclaims are discussed below.

Claim 1: **Trial counsel failed to protect the Defendant's rights under Article I, Section 15(a) of the Florida Constitution by failing to move to dismiss the indictment in the instant case based on the fact the very elements needed to charge a capital felony were not found by the grand jury and in fact they were never asked to deliberate on those issues.**

In claim 1, Mr. Davis argues that Mr. Norgard was ineffective for failing to move to dismiss the indictment in this case as the elements needed to charge a capital felony were not found by the grand jury, nor were they ever asked to make a determination as to those issues. As the aggravating

factors were not alleged in the indictment, Mr. Davis argues the maximum sentence for first-degree murder is life in state prison. The State responds that neither Florida nor Federal law require that aggravating factors be included in the indictment.

Case law has long supported the proposition that aggravating factors do not need to be alleged in the indictment. *See Hall v. State*, 246 So. 3d 210 (Fla. 2018); *Tai A. Pham v. State*, 70 So. 3d 485, 496 (Fla. 2011); *Miller v. State*, 42 So. 3d 204 (Fla. 2010); *Grim v. State*, 971 So. 2d 85, 103 (Fla. 2007); *Rogers v. State*, 957 So. 2d 538, 554 (Fla. 2007); *Coday v. State*, 946 So. 2d 988, 1006 (Fla. 2006); *Ibar v. State*, 938 So. 2d 451, 473 (Fla. 2006); *Blackwelder v. State*, 851 So. 2d 650, 654 (Fla. 2003); *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003). "The aggravating factors to be considered in determining the propriety of a death sentence are limited to those set out [by statute]. Therefore, there is no reason to require the State to notify defendants of the aggravating factors that it intends to prove." *Vining v. State*, 637 So. 2d 921, 927 (Fla. 1994). See also, *England v. State*, 940 So. 2d 389, 407 (Fla. 2006); *Gore v. State*, 475 So. 2d 1205, 1210 (Fla. 1985).

Additionally, *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *receded from by State v. Poole*, 297 So. 3d 487 (Fla. 2020), continuously distinguished between an "element" of a crime and an aggravating factor, with an aggravating factor to be determined by the jury during the penalty phase of the proceeding. *Poole* further clarified that *Hurst* "was based on a mistaken view of what constitutes an element." *Poole* at 505. The holding in *Hurst* was based on the determination that the jury findings were the "equivalent of an element of an offense," and not that they were in fact elements of an offense. *Id. Poole* held only the existence of an aggravating circumstance qualified as an "element" as was discussed in *Hurst*. Mr. Davis can find no relief here, where the indictment

alleged–and the jury found Mr. Davis guilty of–three counts of first-degree murder, attempted first-degree murder, armed robbery, and first-degree arson.

". . . [T]he only purpose of an indictment is to fairly apprise the defendant of the charge." *Drozewski v. State*, 84 So. 2d 329, 330 (Fla. 1955). See also, *Miller*, 42 So. 3d at 215. In the instant case, Mr. Davis was given sufficient notice that he was being charged pursuant to Fla. Stat. section 782.04, Fla. Stat. This statute states that first-degree murder is punishable as provided in section 775.082. Section 782.04, Fla. Stat., also referenced the procedure set forth in section 921.141, to determine if the sentence should be death or life imprisonment.

Mr. Davis was also provided with actual notice of the aggravating circumstances the State would rely upon. Mr. Davis filed a "Motion for Notice of Aggravating Factors" on March 15, 2010. Following a hearing on May 11, 2010, the Court granted the motion by written order on May 25, 2010, to the extent the State was required to list the statutory aggravating circumstances it would rely upon in the penalty phase. The "State's Response to Order to Disclose Aggravating Circumstances" was filed on June 16, 2010, listing nine aggravating circumstances; with the "State's Supplemental Response to Order to Disclose Aggravating Circumstances" filed on September 28, 2010, listing a tenth aggravating circumstance.

The Court finds that Mr. Norgard cannot be deemed deficient in his representation for failing to raise a non-meritorious claim.

Claim 1 is DENIED.

Claim 2: **Trial counsel failed to protect the Defendant's rights under Federal Due Process as well as Article I of the Florida Constitution by failing to move to bar the State from seeking the death penalty when there is no allegation of aggravators in the indictment since a citizen cannot be convicted of a crime he is not charged with.**

In claim 2, Mr. Davis argues a capital offense was not charged, as the grand jury did not find or allege the elements necessary to prosecute a capital offense. This argument relies upon the same faulty premise alleged in claim 1 above (and repeated in several claims throughout the Motion), that the aggravating circumstances must be alleged in the indictment. This is not the case. See Claim 1, *supra*.

Defendant further alleges the grand jury's discretion to find aggravating circumstance did not exist was unlawfully removed from this case. There is no requirement for such discretion with the grand jury, and whether they would have exercised such discretion is based on speculation. Such speculation cannot form the basis of postconviction relief. See *Sanders v. State*, 946 So. 2d 953, 956 (Fla. 2006).

The State makes a compelling argument that even if trial counsel had successfully challenged the indictment, the State likely would have had the opportunity to re-indict Mr. Davis and include the aggravating circumstances. See *United States v. Thurston*, 362 F.3d 1319, 1323 (11th. Cir. 2004); *Smith v. State*, 424 So. 2d 726, 729 (Fla. 1982).

Finally, the Court notes that Mr. Norgard did in fact argue the only applicable sentence that could be imposed upon conviction would be for life imprisonment. See "Motion to Declare Florida's Death Penalty Unconstitutional Under *Ring v. Arizona*" filed on May 10, 2010. Page 22 of this motion specifically argues ". . . [b]ecause aggravating circumstances are elements of the offense of capital murder under ***Ring***, Florida law also requires that they be charged in the indictment and found unanimously by the jury beyond a reasonable doubt." This argument continues on to page 26: ". . . [i]t is axiomatic that a defendant can only be found guilty of the elements alleged in the information because conviction of an offense not charged violates due process."

As Mr. Norgard did make this argument and Mr. Davis has failed to establish prejudice, **claim 2 is DENIED.**

Claim 3: Trial counsel failed to protect the Defendant's rights under Article I, Section 15(a) of the Florida Constitution when he did not seek to bar prosecution of this case on a felony murder theory when the grand jury only found the elements of first degree premeditated murder.

Mr. Davis's third claim alleges Mr. Norgard failed to argue that a theory of felony murder could not be advanced by the State as it was not alleged in the indictment. As prejudice, Mr. Davis alleges this prevented Mr. Norgard from arguing the person responsible is guilty only of second-degree murder.

It has been repeatedly held that an indictment which charges premeditated murder permits the State to prosecute under both the premeditated and felony murder theories. *Dessaure v. State*, 55 So. 3d 478, 485 (Fla. 2010); *Dailey v. State*, 965 So. 2d 38, 47 (Fla. 2007); *Parker v. State*, 904 So. 2d 370, 382 (Fla. 2005), as revised on denial of reh'g (June 2, 2005); *Kearse v. State*, 662 So. 2d 677, 682 (Fla. 1995); *Bush v. State*, 461 So. 2d 936, 940 (Fla. 1984), (holding modified by *State v. Evans*, 770 So. 2d 1174 (Fla. 2000)); *O'Callaghan v. State*, 429 So. 2d 691, 695 (Fla. 1983); *Knight v. State*, 338 So. 2d 201, 204 (Fla. 1976) (citing *Larry v. State*, 104 So. 2d 352 (Fla. 1958)). This Court finds no merit in the contention that it is constitutionally required for both theories to be alleged in the indictment.

Mr. Davis has further failed to show prejudice. Mr. Davis vaguely asserts the evidence is consistent with "a rushed act against the two women in the office" and thus without premeditation. The sentencing court found the homicides were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. This aggravating circumstance which found Mr. Davis exhibited heightened premeditation was upheld on appeal. The evidence

presented at trial established Mr. Davis purchased a firearm a week before the murders. On the day of the murders, Mr. Davis purchased gloves, a cooler, a shirt, and a lighter. Mr. Davis was a longtime customer of the Headley Insurance Agency. Juanita Luciano and Yvonne Bustamante were bound with duct tape procured in advance, doused with gasoline, and set on fire. This was done after the armed robbery had been completed and the victims were no longer a threat to Mr. Davis. The facts are wholly inconsistent with the theory that this was a "rushed act" committed without premeditation.

As Mr. Norgard was not deficient in failing to raise a non-meritorious defense and Mr. Davis has failed to establish prejudice, **claim 3 is DENIED**.

Claim 4: Trial counsel failed to render effective assistance of counsel by failing to seek a change of venue and a jury trial in this case given its notoriety.

Mr. Davis's fourth claim faults Mr. Norgard for failing to seek a change in venue, denying him a fair and impartial jury as well as ineffective assistance of counsel.

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

Rolling v. State, 695 So. 2d 278, 284 (Fla. 1997) (quoting *McCaskill v. State*, 344 So. 2d 1276 (Fla. 1977)). ". . . [A] trial court must make a two-pronged analysis, evaluating: (1) the extent and nature of any pretrial publicity; and (2) the difficulty encountered in actually selecting a jury." *Id.* (citing *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975)).

As to the first prong, ". . .pretrial publicity is normal and expected in certain kinds of cases . . . and that fact standing alone will not require a change of venue." *Id.* at 285 (citing *Provenzano v. State*, 497 So. 2d 1177, 1182 (Fla. 1986)). Rather, the Florida Supreme Court set forth numerous

factors a trial court should consider, such as: (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 versions; (4) the size of the community in question; and (5) whether the defendant exhausted all of his peremptory challenges. *Id.* at 285. "The second prong of the analysis requires the trial court to examine the extent of difficulty in actually selecting an impartial jury at voir dire." *Id. See also*, *Morris v. State*, 233 So. 3d 438, 445-46 (Fla. 2018); *Ellerbee v. State*, 232 So. 3d 909, 921-22 (Fla. 2017).

Mr. Davis has failed to show any evidence to support his claim that a motion for change of venue would have been granted. While this case did garner some media coverage, including the events that occurred after a mistrial was declared in the first trial, there is nothing other than speculation and conjecture to suggest the jurors did not try the case solely on the evidence presented in the courtroom. Instead, Mr. Norgard testified at the evidentiary hearing about the relative ease in selecting the first jury. He presented sound strategic reasons for wanting to keep the trial in Polk County for the second trial, including that the trial judge liberally granted cause challenges for those with any prior knowledge of the case. Mr. Norgard's long history of practicing in this circuit left him with a sense of familiarity and understanding of Polk Countians. Further, Mr. Norgard had not exhausted all of his peremptory challenges. "Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions." *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000).

Mr. Norgard's testimony also allayed any concerns that seeking to keep the trial in Polk County was for any self-serving purpose regarding the convenience in arranging child care. Mr.

Norgard made this reference after the first trial ended in a mistrial. The purpose of this statement was to notify the court of the time necessary to make child care arrangements prior to beginning the trial should venue be changed, and not an argument in opposition of changing venue.

As Mr. Davis has failed to establish any grounds upon which a motion for change of venue should have been granted or that he has suffered any prejudice, **claim 4 is DENIED**.

Claim 5: **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.**

Mr. Davis's fifth claim faults Mr. Norgard for failing to object to comments made by the Court, and for participating in such comments, that the photos of the victims were the worst they have seen. Mr. Davis argues as the death penalty is reserved for the "worst of the worst" offenders, this comment implied Mr. Davis deserved the death penalty based upon the nature of the photographs.

Three photographs of the deceased victims were shown during individual voir dire to determine if potential jurors could cope with the emotional aspects of this case. In discussions that morning, Mr. Norgard stated the parties decided to show a photo of the child as well, to determine if the potential jurors could handle the emotional aspects of the case. (V71/794). In addressing the venire, the trial court stated the following:

> What I want to talk to you about this morning very briefly and then we're going to call each of you back individually and talk to you and show you some things. There is no disputing, the defense is not disputing, that two women were restrained in an insurance office, doused with a flammable liquid, ignited on fire. The two women exited the building on their own, in flames, were met by citizens who tried to render aid before paramedics arrived.

They were eventually assisted by paramedics, were airlifted to Orlando where they were treated at a burn center. I think you will find that the record will show that they were burned somewhere between 80 and 90 percent whole person. This case – and of course, as you will know from me reading the Indictment, one of them was pregnant. The child was taken Cesarean and it lived for a day or so and died as a result of issues concerning prematurity and issues concerning thermal issues.

I have heard extensive pretrial motions in this case, which is common in a case like this one, and so I have heard the testimony of many of the people that you're going to hear testimony from. And in particular, I have heard testimony from the civilians. Well, for that matter, even professionals that dealt with these ladies when this initially occurred. I can't anticipate how they will react when they testify in trial, but I can tell you that when they testified in front of me, they became emotional.

This case is – and I tell you all this because the defense does not dispute any of the things I'm saying. Mr. Davis has entered a plea of not guilty and they will tell you at some point that their theory is this was not Mr. Davis that committed this crime. That's not the purpose of why I'm telling you all this stuff. This case is truly not for the faint of heart. The photographs alone in this case are graphic.

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

There are some people, and I don't fault you if you fall in this category, but there are some folks that may not be able to handle the emotional aspect of this case and the graphic nature of this case.

I don't normally give this kind of presentation for my other cases, we just simply tell folks there may be some semi-graphic

> photographs, if you have a weak stomach, let us know, we'll talk about it. But I don't do it quite like we're doing this. And the reason I'm doing this, I don't want to pick a jury, and you see how much time we're spending to get this done correctly, and then the first day that you are shown photographs, one of you absolutely can't take it emotionally and I have lost a juror or two or three.

(V71/803-806). 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.

Mr. Norgard explained the purpose of showing the photographs was to desensitize the jurors as much as possible prior to showing the photographs at trial. Mr. Norgard did not believe this could be accomplished by words alone. As to the nature of the photographs, Mr. Norgard acknowledged, "I'm not gonna stick my head in the sand. These are horrible photos." Tr. 257.

Mr. Norgard's comment referenced in this claim occurred during the individual voir dire of a juror that was ultimately selected in this case. After this juror indicated they had previously served on a capital case, Mr. Norgard asked: "As Judge Hunter said, he's done these cases for a number of years and these are the worst photographs he's seen. I have done this for a number of years and these are some of the worst I have seen. So, I mean, I don't know what the – what was the nature of the case in Dade County?" (V71/863-864). After further questioning, this juror answered that they could handle the emotional impact of this case, could make a rational decision, and nothing about their previous experience of having served as a juror on a capital case would cause an issue in this case. (V71/865-866). Mr. Norgard testified that he was attempting to find cause to strike this juror as they had previously served as a juror on a capital case.

Finally, the Court notes that in claim 7, Mr. Davis alleges Mr. Norgard was ineffective for not asking specific questions regarding the photographs during voir dire, including to repeat to

each juror individually, that the photographs are ". . . the worst any of the court personnel have seen. . . ." It is contradictory for Mr. Davis to allege Mr. Norgard was ineffective as to this individual juror, only to later claim Mr. Norgard was ineffective for not repeating the same alleged error to every prospective juror.

Mr. Davis has failed to show trial counsel was ineffective. Mr. Norgard made a strategic decision to have the photographs shown during individual voir dire, to find cause to strike any jurors that could not handle the emotional aspect of this case and the graphic nature of the photographs. There is no dispute that the photographs of the victims were in fact "horrible" as they have been described. Further, Mr. Davis can only speculate that Mr. Norgard's comment had any prejudicial effect. There was no testimony or evidence presented that Mr. Norgard's comment to this juror "put this idea" in his head. The jury was properly instructed and not told that the death penalty is reserved for the "worst of the worst" or that the nature of the particular photographs should sway their decision.

Claim 5 is DENIED.

Claim 6: Trial counsel failed to object to the trial court's vouching for the Office of the State Attorney when he said to the jury that the State does not seek death in every first degree murder case when that comment did nothing but put the court's imprimatur on the trustworthiness and professionalism of the State Attorney.

Mr. Davis's sixth claim alleges Mr. Norgard failed to object to a comment made by the trial court during voir dire. Mr. Davis isolates a statement by the trial court, that the State does not seek the death penalty in all first-degree murder cases, characterizing it as vouching for the Office of the State Attorney.

To provide full context regarding the circumstances in which this comment was made, the Court began addressing jurors with the standard introduction into the criminal justice system and

process of trials in criminal cases. Tr. 222-229. After reading the indictment, the trial court stated the following:

> In this particular case the State has filed a notice of seeking the death penalty. And I understand that many people have strong feelings about the death penalty, both for and against it. The fact that you have such feelings does not disqualify you to serve as [a] juror as long as you are able to put those feelings aside and apply the law that I instruct you on. In other words, you must be willing to be bound by your oath as jurors to obey the laws of the State of Florida and make a recommendation. Now, I'm going to read to you what's called a bifurcated instruction to give you some sense or feeling of how a case, a capital case in Florida is handled. So bear with me as I read this instruction, and listen carefully.

Tr. 233-234.

After warning the prospective jurors that Mr. Davis was presumed innocent, an agreed upon instruction regarding the bifurcated nature of the proceedings was read. Tr. 234-240. The Court then discussed the upcoming procedure for individual voir dire, stating the following:

> We're going to talk to you about two issues in private. And that is whether you know anything about the case from having seen it in the media in whatever form. Or whether you know people involved and have heard about it and so on. The other thing we're going to talk about is your views on the death penalty. Without a doubt the most difficult issue we ask judges and jurors to decide is the issue of capital punishment. The State of Florida has a statutory procedure set up in dealing with this. And I read to you the bifurcated instruction, but it starts very simply, and that is the State must put someone on notice of seeking the death penalty. The death penalty is not appropriate in all First Degree Murder cases, and the State does not seek it in all First Degree Murder cases.

Tr. 241.

With this additional context, it is clear this was not a comment on the Office of the State Attorney or their decision on the severity of this case. The purpose of this comment was to inform jurors they would be questioned in private regarding their ability to serve in this particular case. The comments were true statements of fact, and not misleading. No reasonable interpretation

supports the claim that a juror believed the Court was "vouching" for the prosecution, and any such claim is purely speculative.

Similar comments made to prospective jurors were recently discussed in *Smiley v. State*, 295 So. 3d 156 (Fla. 2020). In *Smiley*, the prosecutor stated:

> We have, you know, 60 death—60 first-degree murder cases pending in our circuit. Okay? Probably nine of them are death eligible. So just because you're charged with first-degree murder does not mean that your case qualifies as a case that we would seek the death penalty in. Do you understand that?

Id. Smiley argued the State impermissibly added legitimacy to its case by vouching for the death penalty, citing to *Pait v. State*, 112 So. 2d 380 (Fla. 1959), *Brooks v. State*, 762 So. 2d 879 (Fla. 2000), and *Farrell v. State*, 29 So. 3d 959 (Fla. 2010). The Florida Supreme Court noted these cases were addressed in *Braddy v. State*, 111 So. 3d 810 (Fla. 2012), where a prosecutors' comments involved ' "a direct, unambiguous appeal' to the jury to give weight to the State's decision." *Smiley*, 295 So. 3d at 170. Next, the Florida Supreme Court held the comments at issue did not violate the principle described in *Braddy*. "Viewing the prosecutor's statements in context, she was conveying the point that the law does not permit jurors to vote for the death penalty as an 'automatic' punishment for first-degree murder." *Id.*

The comments here are more akin to the statement in *Smiley*, and not *Braddy*. The comments were made during voir dire, and not closing arguments. They were true statements of fact, and viewed in context, provided jurors with a brief overview on the procedure of a capital case. Unlike *Smiley*, there was no discussion as to the rarity or circumstances in which the State may seek the death penalty in any given case.

Having determined there was nothing objectionable regarding the comment, trial counsel could not have been ineffective for failing to object. Even assuming trial counsel had any grounds to object, Mr. Davis has failed to allege any resulting prejudice. **Claim 6 is DENIED.**

Claim 7: Trial counsel failed to render effective assistance of counsel by failing to engage in a case specific voir dire as described in the ABA guidelines and in not objecting to the trial court's admonition to the jury that they should start with a "neutral" perspective if there is a penalty phase.

Mr. Davis's seventh claim alleges Mr. Norgard failed to engage in a case specific voir dire, as directed by the ABA guidelines for litigation in death penalty cases. To the extent the claim generally alleges a failure to comply with these guidelines, the Court finds the claim is without merit. "The ABA Guidelines are not a set of rules constitutionally mandated under the Sixth Amendment and that govern the Court's *Strickland* analysis. Rather, the ABA Guidelines provide guidance, and have evolved over time as has this Court's own jurisprudence. To hold otherwise would effectively revoke the presumption that trial counsel's actions, based upon strategic decisions, are reasonable, as well as eviscerate 'prevailing' from 'professional norms' to the extent those have advanced over time." *Mendoza v. State*, 87 So. 3d 644, 653 (Fla. 2011).

As to specific challenges raised towards Mr. Norgard's performance at jury selection, Mr. Davis has failed show or allege–other than in conclusory statements–any prejudice. At the evidentiary hearing, Mr. Davis limited the specific questions he alleged that should have been asked, to b), f), h), i), and p), in Defendant's "First Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request For Leave to Amend". As to the other questions, Mr. Davis has not met his burden following the evidentiary hearing.

Mr. Norgard explained the attorneys were not permitted to delve into the facts of the case during jury selection. Concerns about one of the victims being an infant and the injuries sustained were addressed as the photographs were shown. As to the final alleged question, Mr. Norgard explained he would have never employed a strategy to invite the jurors to assume Mr. Davis was

guilty, as this was contrary to the primary defense. Every juror was questioned individually regarding their prior knowledge of the case, given the pretrial publicity in this case.

As Mr. Davis has failed to show any deficient performance or prejudice, **claim 7 is DENIED.**

Claim 8: Trial counsel failed to protect the Defendant's fourth and sixth amendment rights when he failed to aggressively litigate a motion to suppress based on a key false statement in the affidavit for search warrant.

Mr. Davis's eighth claim faults Mr. Norgard for failing to more aggressively litigate a motion to suppress the search of an automobile, based on an alleged false statement provided by law enforcement in the affidavit for the issuance of the search warrant. Mr. Davis also notes the warrant was not returned until approximately nine months following its execution, a claim independently raised in claim 19.[4] Finally, Mr. Davis alleges a second search warrant based on the fruits of the first warrant should also be excluded.

In order to establish prejudice in alleging a failure to file a motion to suppress, a defendant must show that the motion would have been successful, and the proceeding would have been different. *Sanchez-Torres v. State*, 322 So. 3d 15 (Fla. 2020) (citing *Lebron v. State*, 135 So. 3d 1040, 1053 (Fla. 2014) and *Abdool v. State*, 220 So. 3d 1106, 1112 (Fla. 2017)).

Under *Franks v. Delaware*, 438 U.2. 154, 98 S.Ct. 2674, L.Ed.2d. 667 (1978), a defendant must make a substantial preliminary showing that an affiant knowingly or intentionally or with reckless disregard for the truth included a false statement in the affidavit, necessary to the finding of probable cause.

> Even where a court finds the police acted deceptively, it must excise the erroneous material and determine whether the remaining allegations in the affidavit support probable cause. If the remaining

[4] As this was raised as an independent claim, it is addressed in this order in Claim 19, *infra*.

> statements are sufficient to establish probable cause, the false statement will not invalidate the resulting search warrant. If, however, the false statement is necessary to establish probable cause, the search warrant must be voided, and the evidence seized as a result of the search must be excluded.

Pagan v. State, 830 So. 2d 792, 807 (Fla. 2002) (internal citations omitted).

On June 9, 2010, trial counsel filed a motion to suppress on the grounds Mr. Davis now alleges. Specifically, the motion sought to suppress evidence from the search of a Nissan Altima owned by Victoria Davis (Mr. Davis' wife), on grounds that:

> a. The return on the warrant was not done within ten (10) days as ordered by the judge who signed the warrant. T[h]e return was not made until September 23, 2008.
>
> b. The items that were seized exceed the scope of the items specified in the warrant.
>
> c. The Statements of Fact Constituting Probable Cause are inaccurate, misleading and otherwise insufficient.

A hearing was held on the motion on June 11, 2010. As to the *Franks* claim, the trial court found:

> I'm going to find that – and I agree with Mr. Norgard because I know way more about this case than I did six months ago because we've had an adversarial preliminary hearing, we've had multiple motions over the past two weeks in which testimony has come in and I – although I don't know of everything that the State intends to produce at trial, I certainly have a general overview of what the State's case is and I would agree with Mr. Norgard that some of the facts stated in this – in the search warrant are slightly off, and in general terms its quite accurate but more importantly it's certainly accurate enough that – that any inaccuracies are simply unintentional and don't fall within that category of false statements that are knowingly, intentionally or reckless disregard for the truth, which would be the standard for a facially – for a warrant not to be facially valid. So I find that the warrant is facially valid.

(V18/2928-2929).

In disagreeing with this pre-trial ruling, Mr. Davis takes issue with the statement in the affidavit of "[d]uring our investigation officers learned, from the defendant's wife Victoria Lynn Campo/Davis, that the defendant used her 2005 Nissan vehicle to commit the crimes and flee the scene." Mr. Davis alleges his wife actually stated that Mr. Davis simply had her car on that day.

Even assuming trial counsel was ineffective for failing to argue with the trial court after it made its ruling, Mr. Davis still has not shown his motion would have been meritorious. Under *Franks*, if the alleged false statement of "... to commit the crimes and flee the scene" were excised, the importance of the statement remaining is the wife of Mr. Davis informed law enforcement that Mr. Davis was using that vehicle on the date of the incident. The affidavit also included that two victims independently identified Mr. Davis by name, and knew him personally; another victim identified Mr. Davis through a photo line-up; Mr. Davis made statements of "I hurt somebody" and "I swear I hurt somebody but I don't know" after he surrendered to law enforcement; and that his wife's vehicle was found the day after the incident, abandoned in the parking lot of the Lagoon Night Club. These remaining allegations sufficiently establish probable cause. As the motion would not have been granted, there clearly was also no basis to suppress the second search warrant as a fruit of the poisonous tree.

Claim 8 is DENIED.

Claim 9: **Trial counsel failed to provide effective assistance of counsel through his failure to cross examine state witnesses about the crime scene in a way that would show that the physical evidence supported a verdict of second degree murder as opposed to first degree murder; to engage in cross examination in a way that would demonstrate the State withheld and/or lost and/or destroyed evidence in a way that made it impossible for the Defendant to fight the charges made by the State; to cross examine in a way that would reveal failure by the fire marshal to follow proper laboratory protocols; and to develop other important evidence.**

Mr. Davis's ninth claim raises a panoply of alleged failures by Mr. Norgard, addressed in turn below.[5]

Failed to argue second-degree murder as the most culpable offense.

For the majority of this claim, Mr. Davis faults Mr. Norgard for failing to raise a "viable" argument that the perpetrator of the acts charged in this case is guilty of second-degree murder. Mr. Davis now attempts to argue Ms. Luciano's statements that Mr. Davis threw gasoline on her was in an effort to ". . . convince Ms. Luciano to cease her efforts to move away from the Defendant." Defendant's First Amended Motion at 39. Mr. Davis further argues ". . . the perpetrator may have reacted to the appearance of the person at the front door and/or the sudden movement of Mr. [sic] Luciano toward the back of the office." Defendant's First Amended Motion at 39. Mr. Davis then argues crime scene photographs and other witnesses "provided ample opportunities for defense counsel to demonstrate that the killings in this case did not meet the definition of first degree premeditated murder." Defendant's First Amended Motion at 39. Mr. Davis cites to untested blood which could have shown the movements of the victims or possibly identify Mr. Davis at the scene.

The testimony and evidence presented at trial established premeditation. Mr. Davis purchased a firearm from his cousin the week before the murders. (V91/4052; 4056). On the day of the murders, Mr. Davis went to Walmart, where he was identified by a long-time family friend. (V86/3256; 3268). Mark Gammons, the store manager of the same Walmart, also recognized Mr. Davis after seeing media coverage, recalling an interaction he had with Mr. Davis the same day as the murders. (V85/3172; 3183). Surveillance footage from Walmart on this date depicts Mr. Davis

[5] Many of these same claims are raised again in claim 20.

purchasing gloves, a cooler, long-sleeved pull over shirt, and a red Bic lighter. (V85/3222-3228). The victims were bound with duct tape, doused in gasoline, and lit on fire. (V85/3163). Mr. Greisman lived nearby and attempted to provide assistance when he observed Mr. Davis reach into a lunch bag, pull out a firearm, and fire a shot that struck Mr. Greisman in the nose. (V83/2880-2882).

Even if all of the evidence and testimony briefly summarized in the preceding paragraph were ignored and the Court were to find the State failed to establish premeditation, Mr. Davis is still guilty of first-degree felony murder. The murders were committed during the course of a robbery and an arson. (V85/3163; V91/4246).

As the elements to first-degree murder were clearly established, Mr. Davis's claim regarding the failure to argue second degree murder is in essence a failure to request a jury pardon. Such a claim cannot form the basis of postconviction relief, as it based on the faulty premise that a reasonable probability exists that the jury would have violated its oath, disregarded the law, and ignored the trial court's instructions. See *Sanders v. State*, 946 So. 2d 953, 959 (Fla. 2006).

Failed to argue the lack of evidence created a reasonable doubt.

In raising a claim that Mr. Norgard was ineffective for failing to argue the lack of evidence, Mr. Davis cites to several examples. First, Mr. Davis argues blood found in various places at the scene could have provided more insight into the movements of the perpetrator and/or victims, if tested. Mr. Norgard did argue in closing arguments that blood, serology, and DNA evidence at the scene was not tested. (V96/5075). Although Mr. Norgard did not specifically argue this testing could have provided the insight Mr. Davis now claims, this specific argument appears to be based on speculation. Mr. Davis does not indicate how identifying the source of each blood sample could

have indicated the order in which the evidence was created. Mr. Davis also fails to demonstrate how this creates reasonable doubt, as Mr. Davis was identified by a victim and witnesses as the perpetrator of these crimes. (V82/2619; 2637; 2701; V85/3163-3164).

Second, Mr. Davis claims Mr. Norgard failed to cross examine law enforcement on the failure to retain dash cam video footage. Mr. Davis attaches a report from Officer Griffin Crosby, stating Officer Hampton's dash cam video was transferred to a DVD and turned over to the property/evidence custodian. Mr. Davis alleges that following a request for production, the State has represented no such video ever existed. Officer Crosby was not called as a witness at trial. However, in a deposition, Officer Crosby was asked what Officer Hampton's dash cam video footage depicted, and stated:

> His 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.

Crosby Dep. 16:15-20, June 2, 2010. Therefore, Mr. Davis's speculative argument that this would have provided him with a method to contest testimony of the witnesses at trial appears to be without merit. Mr. Davis also alleges trial counsel should have argued the failure to preserve the video is further proof of police misconduct or incompetence. Trial counsel did make such an argument regarding a temporarily misplaced photo pack. (V96/5114). Mr. Davis can only speculate that the additional argument of lost inconsequential dash cam video footage would have led the jury to ignore all other evidence that established Mr. Davis's guilt.

Third, Mr. Davis asserts Mr. Norgard failed to cross examine law enforcement regarding a fingerprint found on duct tape used to cover the lens of the surveillance camera in the Headley establishment. Trial counsel made the following argument to the jury in closing:

> And, finely [sic], there were no fingerprints of Mr. Davis at this scene. There were a number of latent fingerprints collected at this scene, some of them were in fairly common areas, but they weren't Mr. Davis'. There were latent fingerprints on the doors, and there was a latent fingerprint on the underside of the sticky part of tape that was put up to cover the lens of the camera. It ain't Mr. Davis'. Like I said, in some of these common areas, I understand, people working there leave a print. But use your common sense of who is going to leave a latent print on the sticky side of the duct tape that is put over a camera.

(V96/5076). In light of this argument, Mr. Davis cannot show any prejudice for failing to additionally cross examine any witnesses on these same points.

Failed to cross examine the laboratory for the State Fire Marshal on accreditation.

Mr. Davis alleges Mr. Norgard should have discovered and cross-examined witnesses regarding the laboratory for the State Fire Marshal failing to comply with accreditation standards. Evidence of the non-compliance was not discovered by accrediting entities until 2016, yet Mr. Davis claims Mr. Norgard should have been able to discover this before those agencies without any further explanation. Therefore, Mr. Davis has failed to allege any deficient performance.

Mr. Davis also fails to identify what issues led to the loss of accreditation in 2016. Likewise, Mr. Davis fails to set forth any basis that these issues also existed in 2007, when the laboratory performed its analysis in this case, and more importantly, that the results from his case are in question. Therefore, Mr. Davis has also failed to allege any prejudice.

Failed to call a witness about Carlos Ortiz's records.

Mr. Davis alleges Mr. Norgard failed to call a witness from Florida Natural that could produce timecards for both himself and Carlos Ortiz. Mr. Ortiz lived near the Headley building,

and identified Mr. Davis as the perpetrator, stating he recognized Mr. Davis from having worked in the same facility. (V84/ 3052).

In this claim, Mr. Davis does not identify any specific witness that would have provided such testimony or evidence. Work records for Mr. Ortiz were admitted at trial. (V92/4374). Pamela Grooms, an employee with the temporary worker agency that placed Mr. Ortiz at Florida Natural, testified as to the dates in November and December of 2006 that Mr. Ortiz worked. (V92/4388). Mr. Ortiz worked in the Sholey area, where his job duties would take him to several different areas throughout the plant. (V92/4391). Although temporary workers typically entered through the east gate, Ms. Grooves testified there were times when temporary workers would utilize the northwest gate. (V92/4392-4393). The work records themselves are not entirely accurate, as they could indicate more than 24 hours worked for a single day, and do not show the time Mr. Ortiz began or ended his shifts. (V92/4394-4395). Mr. Davis was regularly employed during this time. (V92/4409-4410).

Mr. Davis does not appear to dispute he worked on some of the same dates as Mr. Ortiz. In fact, in claim 20, infra, Mr. Davis acknowledges as much. However, Mr. Davis alleges this would have refuted Mr. Ortiz's testimony that he recognized Mr. Davis from entering and exiting the facility at the same time. Even if refuted on this point, this does not prove that Mr. Ortiz did not recognize Mr. Davis as he worked throughout the plant. Furthermore, even if this cursory allegation managed to disprove Mr. Ortiz's identification, it does not dispute the identification made by the other witnesses. Furthermore, trial counsel argued at closing that Mr. Ortiz could not have seen Mr. Davis entering the facility, and only recognized him from media reports. (V96/5124-5125).

Mr. Davis also faults Mr. Norgard for not entering a "blown up" image of the Florida Natural facility, which would have shown the distance between all of the gates. Ms. Grooves testified the distance was "quite a bit" and beyond her judgment in terms of feet, as they were on different streets. (V92/4379). Due to the size of the facility, it would take approximately 45 minutes to an hour to walk to each area within the same facility. (V92/4379-4380). Mr. Davis only offers speculation that this testimony was insufficient to inform the jury on the scope of the size of the facility.

Failed to examine Mr. Davis and his wife regarding rubber floor mats.

Mr. Davis claims Mr. Norgard failed to examine either Mr. Davis or his wife regarding the positioning of rubber floor mats in his vehicle. Mr. Davis alleges this would have shown no accelerants could have been detected on the carpets.

Kurt Lathrop, a Deputy Fire Marshal and certified accelerant detection canine handler, conducted an examination with his canine which alerted to the presence of petroleum hydrocarbons (such as gasoline, lighter fluids, etc.), on two of the floor mats of Mr. Davis's vehicle. (V90/4041-4042; 4047). Ryan Bennett, a crime laboratory analyst with the Bureau of Forensic Fire and Explosives Analysis testified that he is able to determine the presence of gasoline through testing of an extraction containing only microliters from a submitted sample. (V91/4116-4117; 4132-4133). It is unreasonable to conclude that merely placing rubber floor mats over carpeted floor mats could prevent even a minute but detectable amount of an accelerant.

Furthermore, Mr. Davis's sister, India Owens, testified that Mr. Davis used to do yard work for her. (V93/4505). Ms. Owens stated she did not own a weed eater, although the lawn

maintenance performed by Mr. Davis included weed whacking. (V93/4505-4506). Mr. Norgard argued this as an explanation for the detection of accelerants on the floor mats. (V96/5088-5089).

The cumulative effect of these alleged failure prejudiced Mr. Davis.

Mr. Davis concludes this claim by alleging the individual and cumulative effect of these failures deprived him of his constitutional right to effective assistance of counsel and his right of confrontation. This Court has addressed each individual sub-claim and found them to be without merit. Likewise, there is no cumulative prejudice to Mr. Davis for these alleged failures. Therefore, **claim 9 is DENIED**.

Claim 10: Trial counsel was ineffective in failing to request a special jury instruction on circumstantial evidence.

In claim ten, Mr. Davis alleges Mr. Norgard failed to request a special jury instruction on circumstantial evidence. Additionally, Mr. Davis alleges Mr. Norgard was ineffective for moving for a judgment of acquittal on the charges of first-degree murder.

A defendant is entitled to an instruction as to any valid defense supported by the evidence; however, a failure to give a special jury instruction does not constitute error where the instructions given adequately address the applicable legal standards. *Coday v. State*, 946 So. 2d 988, 994 (Fla. 2006). The Florida Supreme Court eliminated the standard jury instruction on circumstantial evidence 40 years ago, finding the instruction unnecessary in light of the standard instructions on reasonable doubt and burden of proof. *In Matter of Use by Trial Courts of Standard Jury*

Instructions in Criminal Cases, 431 So. 2d 594, 595 (Fla. 1981).[6] Although such a special instruction can be given, it is not error for a trial court not to give such an instruction when a jury has been fully instructed on reasonable doubt and burden of proof. *Jackson v. State*, 25 So. 3d 518, 531 (Fla. 2009).

Mr. Davis fails to allege prejudice, as he cannot show that the trial court would have given such an instruction if requested. The evidence presented was not entirely circumstantial and suggests such an instruction should not have been given even if requested. As noted by the State in its response, Ms. Bustamante's dying declarations; eyewitness testimony from Mr. Greisman; and eyewitness testimony from Mr. Ortiz, all directly implicated Mr. Davis. On direct appeal, the Florida Supreme Court reviewed the sufficiency of the evidence ". . . in the light most favorable to the State to determine whether a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." *Davis v. State*, 207 So. 3d 142, 171 (Fla. 2016) (quoting *Rodgers v. State*, 948 So. 2d 655, 674 (Fla. 2006)). The Florida Supreme Court did not utilize the standard at the time for wholly circumstantial evidence. See *Deparvine v. State*, 995 So. 2d 351, 376 (Fla. 2008).[7] Even if the instruction were requested and given, Mr. Davis can only further speculate that the jury would have reached a different result.

Mr. Davis's additional argument that Mr. Norgard failed to move for a judgment of acquittal on the charges of first-degree murder was addressed in claim 9 above, and is without merit for the reasons stated therein.

Claim 10 is DENIED.

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[6] The Florida Supreme Court specifically rejected the contrary position taken by the Criminal Law Section, quoting *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954), as "the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. . . ."

[7] Even this standard itself was recently abrogated in *Bush v. State*, 295 So. 3d 179 (Fla. 2020), as it was confusing and incorrect. See also, *Knight v. State*, 107 So. 3d 449 (Fla. 5th DCA 2013).

Claim 11: Trial counsel failed to seek a special instruction on dying declarations.

In claim eleven Mr. Davis alleges Mr. Norgard was ineffective for failing to request a special jury instruction be given at the time the evidence of Ms. Bustamante's dying declaration was admitted. Mr. Davis argues a cautionary instruction informing the jury that the dying declaration is hearsay, a type of testimony not normally admitted into evidence, and that Mr. Davis has no opportunity to cross examine the person making the statement, should have been requested and given.

Mr. Davis has not pled any prejudice that resulted from the jury not being informed a dying declaration is an exception to the hearsay rule. Ms. Bustamante's obvious unavailability for cross examination was pointed out by Mr. Norgard during closing arguments. (V97/5129-5130). Mr. Norgard argued against the weight the jurors should place in the dying declaration, questioning the differences in her statements from various witnesses and referenced testimony from an expert witness to attack the accuracy of Ms. Bustamante's memory. (V97/5130-5133). A cautionary instruction informing the jurors this testimony was admitted as a hearsay exception and that Mr. Davis had no opportunity to cross-examine Ms. Bustamante would not have added any credence to these arguments and would not have allowed for any additional argument. Therefore, Mr. Davis cannot show the result of the proceeding would have been different with such an instruction. **Claim 11 is DENIED.**

Claim 12: Trial counsel failed to render effective assistance of counsel in failing to argue case law from the Florida Supreme Court in conflict with its own holding on the issue of admitting photographs of the deceased.

In Mr. Davis's twelfth claim, he argues Mr. Norgard was ineffective in failing to argue against the admissibility of "photographs of the deceased." Mr. Davis specifically alleges a comparison in the instant case should have been made with *Johnson v. State*, 660 So. 2d 637 (Fla.

1995). Mr. Davis claims that the photographs were needlessly inflammatory or disturbing, and the cause and manner of death could have been elicited through oral testimony without using any photographs.

The Court first notes Mr. Davis has failed to allege prejudice. This claim concludes with: "[t]he Florida Supreme Court's dual standard for admissibility of photographs should have been pointed out and argued so as **to allow them to address** their inconsistent application of the rules in a way that favor the state and disfavor the defense." Defendant's First Amended Motion at 46 (emphasis added). Mr. Davis does not appear to allege any different result in the trial proceedings, either that the trial court would not have admitted the photographs over the objection or even that the jury would have reached a different result had the photographs not been admitted. Rather, his alleged prejudice is a failure to preserve this for appeal. This cannot form the basis of postconviction relief. See *Carratelli v. State*, 961 So. 2d 312, 322-323 (Fla. 2007).

Even if the trial court were to have considered *Johnson*, the photographs still would have been admitted. Johnson murdered a 73-year-old woman, who suffered twenty-four stab wounds, one incised wound, blunt trauma to the back of the head, defensive wounds, and abrasions near the vagina and anus. *Johnson*, 660 So.2d at 641. The photograph discussed on appeal was of Johnson's daughter that died by miscarriage and was only relevant to show the importance and effect it had on Johnson as potentially mitigating evidence. *Id.* At 645. The Florida Supreme Court ruled there was no error in the trial court's determination that the photograph was cumulative with testimony about the photograph, and any relevance was otherwise needlessly inflammatory or disturbing. *Id.* In the instant case, Mr. Davis does not specify the particular photograph(s) he is arguing. However, all photographs of "the deceased" were of victims Mr. Davis was charged with killing. Dr. Stephen Nelson, the Chief Medical Examiner for District Ten, testified as to the

cause of deaths for the victims and injuries depicted in the photographs. Michael Bustamante died of extreme prematurity due to a preterm delivery necessitated by the injuries caused to his mother. (V88/3708-3709). Ms. Bustamante died as a result of second and third degree burns to approximately 80-90% of her body, with some fourth degree burns as well as a gunshot wound. (V88/3712-3713; 3719). Ms. Luciano died as a result of burns to approximately 90% of her body. (V88/3721; 3726). The photographs were relevant to assist Dr. Nelson with his testimony. They were not admitted by Mr. Davis as possible mitigation to show they had any effect on him.

The Florida Supreme Court's opinion on direct appeal further shows Mr. Davis cannot have suffered any prejudice as to this claim. The Florida Supreme Court found no error by the trial court in admitting the photographs. The opinion specifically stated:

> There was no error—fundamental or otherwise—in the admission of the victims' photographs. The photographs were relevant to explain the nature of the victims' injuries and manner of death. Five color photographs of Michael's body were introduced as well as two x-ray photographs. The photographs were relevant to Dr. Nelson's testimony regarding Michael's death from extreme prematurity.
>
> Eighteen autopsy photographs of Bustamante were admitted into evidence. These photographs assisted the medical examiner in testifying about the degree of Bustamante's burns, the percentage of body surface area burned, the incisions that were necessary to enable blood flow, the swelling caused by extensive fluid loss, the absence of burns consistent with being bound, and the cause of death from thermal burns.
>
> Fourteen autopsy photographs and seven hospital photographs of Luciano were admitted into evidence. The photographs assisted the medical examiner in testifying about the percentage of body surface area burned, the degree of burns, the skin grafts that were done to treat her severe burns, the absence of burns consistent with being bound, and the cause of death from thermal burns.
>
> Davis is correct in that the photographs of the severely burned women and the deceased infant in this case are gruesome.

> However, the photographs were relevant to prove the nature and extent of each victim's injuries, and their causes of death, and were not "so inflammatory as to create an undue prejudice in the minds of the jury and [distract] them from a fair and unimpassioned consideration of the evidence." *Czubak*, 570 So. 2d at 928. What is more, "[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." *Arbelaez v. State*, 898 So. 2d 25, 44 (Fla. 2005) (quoting *Henderson v. State*, 463 So. 2d 196, 200 (Fla.1985)). Thus, there was no error in admitting the photographs.

Davis, 207 So. 3d at 169-70.

Claim 12 is DENIED.

Claim 13: Trial counsel failed to protect the Defendant's right to have the elements making first degree murder a capital offense in Florida tried using a single standard of proof when he did not argue that aggravators should be tried in the "guilt" phase of the trial since the aggravators are the very elements that transform first degree murder *simpliciter* into a capital offense.

Mr. Davis's thirteenth claim alleges Mr. Norgard was ineffective for failing to argue the aggravators should have been tried in the guilt phase, as they are elements of the offense. This argument has been rejected. See *Banks v. State*, 842 So. 2d 788 793 (Fla. 2003) ("... Banks argues that it is clear that the aggravators under the Florida death penalty sentencing scheme are arguably elements of the offense which must be charged in the indictment, submitted to a jury during the guilt phase, and proven beyond a reasonable doubt... In *Bottoson [v. Moore*, 833 So. 2d 693 (Fla.), *cert denied*, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002)], we rejected the type of constitutional challenge Banks presents in this case. We again reject this claim. Additionally, it should be noted that the trial court found as aggravating factors that Banks had been previously convicted of a violent felony and that the murder was committed during the course of a felony. Both factors involve circumstances that were submitted to the jury and found to exist beyond a reasonable doubt."). Like *Banks*, some of the aggravating factors found in this case included Mr.

Davis's previous felony conviction and that he was on felony probation, and that Mr. Davis was contemporaneously convicted of other first-degree murders, armed robbery with a firearm, and first degree arson.

As Mr. Norgard could not have been ineffective for failing to make a non-meritorious argument, **claim 13 is DENIED**.

Claim 14: Defense counsel failed to protect the Defendant's right to adversarial representation when he failed to argue that the maximum sentence allowed under the jury's verdict was life.

Mr. Davis's fourteenth claim reincorporates and asserts previous arguments to support his contention that the maximum sentence allowed based upon the Indictment was a sentence of life. Those arguments are all without merit. Mr. Norgard cannot be ineffective for failing to make a non-meritorious argument. **Claim 14 is DENIED**.

Claim 15: Trial counsel failed to protect the Defendant's interest in a properly instructed trier of fact when he failed to insist on an instruction regarding a presumption of (sic) that a life sentence is appropriate in the absence of proof beyond a reasonable doubt to the contrary.

Mr. Davis's fifteenth claim alleges Mr. Norgard should have requested a jury instruction regarding the presumption of a life sentence. The jury was instructed in the penalty phase with the standard instructions. These included the following:

> You must follow the law that is given to you, and render an advisory sentence based on your determination as to whether sufficient aggravating circumstances exist to justify imposition of the death penalty. Or whether sufficient mitigating circumstances exist that outweigh any aggravating circumstances found to exist.
>
> * * *
>
> An aggravating circumstance is a standard to guide the jury in making the choice between alternative recommendations of life

> imprisonment without the possibility of parole, or death. It is a statutory enumerated circumstance which increases the gravity of a crime, or the harm to the victim. An aggravating circumstance must be proved beyond a reasonable doubt before it may be considered by you in arriving at your recommendation. In order to consider the death penalty as a possible penalty you must determine that at least one aggravating circumstance has been proven. The State has the burden to pro[ve] each aggravating circumstance beyond a reasonable doubt.
>
> * * *
>
> Should you find sufficient aggravating circumstances do exist to justify the imposition of the death penalty, it is your duty to the[n determine] whether the mitigating circumstances outweigh the aggravating circumstances that you find to exist. . . A mitigating circumstance need not be proven beyond a reasonable doubt by the Defendant.
>
> * * *
>
> If after weighing the aggravating and mitigating circumstances you determine at least one aggravating circumstance is found to exist, and that the mitigating circumstances do not outweigh the aggravating circumstances, or in the absence of mitigating factors, that the aggravating factors alone are sufficient, you may recommend a sentence of death be imposed rather than a sentence of life imprisonment without the possibility of parole. Regardless of your findings in this respect, however, you are neither compelled or required to recommend a sentence of death. On the [other] hand, if you determine no aggravating circumstances are found to exist, or that the mitigating circumstances outweigh the aggravating circumstances, or in the absence of mitigating factors, that the aggravating factors alone are not sufficient, you must recommend imposition of life in prison without the possibility of parole rather than the sentence of death.

(V99/5540-5549). These standard instructions were proper and sufficient to inform the jury the proper law necessary in determining an appropriate sentence, and Mr. Norgard was not deficient in failing to request a different instruction. See *Thompson v. State*, 759 So. 2d 650, 665 (Fla. 2000)

(holding that it was not deficient for counsel to fail to object to a standard instruction that had not been invalidated). Mr. Davis also has failed to allege prejudice. **Claim 15 is DENIED.**

Claim 16: Trial counsel failed to argue the Defendant's sentence violates the Eighth Amendment and Florida Constitution prohibition against cruel and unusual punishment since the execution process itself meets the Florida Supreme Court's definition of especially heinous, atrocious and cruel.

Mr. Davis's sixteenth claim alleges Mr. Norgard was ineffective for failing to argue his sentence violates the Eighth Amendment as the execution process itself is especially heinous, atrocious and cruel, and cites to the definition of HAC in *Gonzalez v. State*, 136 So. 3d 1125 (Fla. 2014) to support this contention. The HAC aggravator has also been defined as applying ". . . to murders that are both 'conscienceless or pitiless and unnecessarily torturous to the victim.' The focus is 'on the *means and manner* in which death is inflicted and the immediate circumstances surrounding the death." *Cruz v. State*, 320 So. 3d 695, 728 (Fla. 2021) (quoting *Francis v. State*, 808 So. 2d 110, 134 (Fla. 2001) and *Buzia v. State*, 926 So. 2d 1203, 1211-12 (Fla. 2006)). Mr. Davis has failed to allege how the means and manner and immediate circumstances surrounding the execution of a lawfully imposed sentence of death is heinous, atrocious, or cruel. This Court further finds such a sentence does not violate the prohibition against cruel and unusual punishment. See *Thompkins v. State*, 994 So. 2d 1072 (Fla. 2008); *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007).

Claim 16 is DENIED.

Claim 17: Mr. Davis was denied his fundamental right to a fair trial, due process, and reliable adversarial testing due to ineffective assistance of counsel at the penalty phase of his capital trial, in violation of his rights under the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution and his corresponding rights under the Florida Constitution.

Subclaim A:	**Trial counsel failed to thoroughly investigate Mr. Davis' background and present complete social history mitigation.**
Subclaim B:	**Trial counsel failed to thoroughly investigate Mr. Davis' background and present sufficient mental health mitigation.**
Subclaim C:	**Based on trial counsel's failure to fully investigate Mr. Davis' background, his waiver of a mental health evaluation cannot be knowing, intelligent and voluntary.**

Prior to the evidentiary hearing, this Court struck any portions of claim seventeen pertaining to Mr. Norgard's mental health investigation and presentation in the penalty phase. This ruling was due to Mr. Davis's failure to provide any mental health reports. The Court specifically ruled the portions of this claim alleging ineffectiveness for failing to speak to family members and friends would be addressed at the evidentiary hearing. Despite this, Mr. Davis did not present any evidence to support any of the allegations or subclaims alleged in this claim.

The record shows that at trial it was Mr. Davis who initially intended to waive presentation of mitigation. (V97/5248). Despite this, Mr. Norgard indicated he had conducted his mitigation investigation. (V97/5249). In regard to mental health, Mr. Norgard stated the following:

> The other thing I wanted to mention is, is that I have talked extensively with Mr. Davis about doing a mental health evaluation. Mr. Davis did not want to do a mental health evaluation for a number of reasons, which I listened to and understood. One other factor that I do want to mention that the Court plays a strategic role here, is that, you know, under the current rules of procedure, if a defendant were to utilize mental health testimony, then he'll be required, potentially, to have a compelled mental health evaluation by the State. That's a tactical and strategic reason that we . . . If I present any mitigation through a mental health professional, they can have a compelled mental health evaluation. That was something he and I talked about in detail. That's something where we made the decision in part based on the compelled mental health evaluation. I will tell the Court that we do have some mental health evidence based on military records, with diagnoses and with certain mental health conditions, and certain mental health issues that arose from

> the military. I don't see, have any reason to believe that if he were to see any mental health professional today that they would find anything different than what the military found in 1999 that, or 1998. Whatever, one of those two. You know, there will be mental health evidence, just not through somebody who evaluated him as a Defense expert and not listed as a witness.

(97/5250-5251). When questioned by the court at trial, Mr. Davis agreed a mental health evaluation would only produce mental health mitigation cumulative to what was already contained in his military records. (V97/5269).

Mr. Davis has failed to show any evidence to support his claim that Mr. Norgard's mitigation investigation was inadequate. Therefore, **claim 17 is DENIED**.

Claim 18: **Mr. Davis was deprived of his right to a reliable adversarial testing due to ineffective assistance of counsel at the *Spencer* hearing in failing to ensure either a comprehensive pre-sentencing investigation report or providing all mitigation evidence in its possession to the court directly, in violation of Mr. Davis' fifth, sixth, eighth, and fourteenth amendment rights under the United States Constitution and his corresponding rights under the declaration of rights of the Florida Constitution and under Florida common law.**

At trial, Mr. Norgard explained, "I have seen PSIs develop nonstatutory aggravating factor[s], or things that rebut mitigating factors, that you may have felt and presented." (V97/5253). Following the jury's recommendation on sentencing, Mr. Norgard again explained his strategic reason for waiving a PSI. (V100/5580-5581). As with claim 17, Mr. Davis has failed to present any evidence to support his claim that Mr. Norgard provided ineffective assistance of counsel at the *Spencer* hearing for failing to ensure a comprehensive pre-sentencing investigation report was prepared, or in failing to provide additional mitigation evidence. **Claim 18 is DENIED.**

Claim 19: **TRIAL COUNSEL FAILED TO PROTECT THE DEFENDANT'S FOURTH AND SIXTH AMENDMENT RIGHTS WHEN HE FAILED TO**

AGGRESIVELY LITIGATE A MOTION TO SUPPRESS BASED ON A STALE SEARCH WARRANT PURSUANT TO FLA. STAT. 933.05[8]

Mr. Davis's nineteenth claim, raised in the Motion to Amend 3.851 Motion to Include Additional Claims filed on October 14, 2019, alleges Mr. Norgard failed to more aggressively litigate a motion to suppress, as the search warrant was not returned within ten days of its issuance. This claim was noted in claim 8 above and is fully addressed here.

In order to establish prejudice in alleging a failure to file a motion to suppress, a defendant must show that the motion would have been successful, and the proceeding would have been different. *Sanchez-Torres v. State*, 322 So. 3d 15, 21-22 (Fla. 2020) (citing *Lebron v. State*, 135 So. 3d 1040, 1053 (Fla. 2014) and *Abdool v. State*, 220 So. 3d 1106, 1112 (Fla. 2017)).

"... [T]he legislature has decided that ten days is a reasonable time and ... a search warrant becomes stale if not executed within ten days after its issuance." *Spera v. State*, 467 So. 2d 329, 330 (Fla. 2d DCA 1985) (discussing § 933.05, Fla. Stat.). However, *Spera* distinguished the staleness of a warrant not executed within ten days after its issuance, from that of a warrant executed within ten days but not returned until after ten days. The latter situation was addressed in *State v. Featherstone*, 246 So. 2d 597 (Fla. 3d DCA 1971). The Third District Court of Appeal noted the purpose of section 933.05, Fla. Stat., "is to prohibit promiscuous searches upon stale warrants." *Id.* At 599. *Featherstone* then held a failure to timely return a warrant will not void a search that was valid at the time it was made, absent a showing of prejudice by the late return. *Id.*

The warrant was issued on December 14, 2007. The warrant was returned on May 14, 2008, with an incomplete property section and return page. On September 23, 2008, the property receipt page was returned. This search warrant was executed on December 14, 2007, the same date it was issued. The failure to return the executed warrant within ten days does not invalidate

[8] The Court has formatted the headings of the claims as they are in the motions and amendments.

the search. The trial court made the same determination. (V18/2914; 2975-2930). Mr. Davis fails to advance any further argument that Mr. Norgard should have made which could have resulted in the granting of this motion.

Claim 19 is DENIED.

Claim 20: TRIAL COUNSEL FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO SHOW THROUGH THE AVAILABLE EVIDENCE THAT THE STATE'S HYPOTHESIS OF PROSECUTION WAS CRITICALLY FLAWED

Mr. Davis's twentieth claim raises various alleged failure by Mr. Norgard in challenging the State's case. All of these allegations were addressed in claim 9 above. First, Mr. Davis alleges Mr. Norgard failed to present as evidence missing dash cam video evidence. Sergeant Griffin Crosby wrote a supplemental report on December 27, 2007, indicating dash-cam footage from Officer Hampton's vehicle was reviewed and collected. Mr. Davis states that in response to a request for production of the video, the State represented no video ever existed. Mr. Davis claims Mr. Norgard could have argued the "lack of evidence" from the missing footage and prosecutorial misconduct, as the evidence was favorable to Mr. Davis's case. As addressed in claim 9 above, nothing indicates the contents of this video are exculpatory or helpful in any way to Mr. Davis. There was no dispute the building was on fire and that law enforcement responded to the scene. Further, Mr. Davis only speculates that arguing law enforcement's failure to preserve this inconsequential video or improper conduct would have had any effect on the outcome of the trial.

Next, Mr. Davis alleges Mr. Norgard failed to present copies of his timesheet records, along with "blown up" images of the Florida Natural Growers worksite. Mr. Davis alleges these records would have shown Mr. Ortiz was unable to see him at work. These subclaims were addressed and denied in claim 9 above.

Finally, Mr. Davis alleges that Mr. Norgard failed to argue to the jury that rubber floor mats were positioned on top of the carpeted floormats in his wife's vehicle. This was also addressed in claim 9 above and found to be without merit.

Claim 20 is DENIED.

Claim 21: MR. DAVIS WAS DENIED HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL, DUE PROCESS, AND RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION WHEN TRIAL COUNSEL FAILED TO FILE A MOTION TO SUPPRESS THE PHOTO PACK OF (sic) MR. GREISMAN BASED UPON A CHAIN OF CUSTODY VIOLATION.

In claim 21, Mr. Davis faults Mr. Norgard for failing to file a motion to suppress alleging a chain of custody violation of the photo pack shown to Mr. Greisman. Mr. Greisman went to a police station upon his discharge from the hospital, where he was shown a photo pack line up. (V83/2897-2898). Almost immediately, Mr. Greisman identified Mr. Davis. (V83/2900-2901). Prior to making this identification, Mr. Greisman did not talk to any officers and did not watch any television or other media accounts of the events. (V83/2909). The photo pack shown to Greisman was temporarily misplaced by Officer Lynett Townsel. (V92/4324). After Officer Townsel was informed the photo pack could not be found, she searched her shed where she kept copies of case files. (V92/4325). The original photo pack, unaltered, was found in her shed, and entered into evidence. (V83/2900-2902; V92/4330-4332).

> Relevant physical evidence is admissible unless there is an indication of probable tampering. This is a test for determining whether the chain of custody is established. In order to demonstrate probable tampering, the party attempting to bar the evidence must show that there was a probability that the evidence was tampered with – the mere possibility is insufficient. Once the party moving to bar the evidence has met its burden, the burden shifts to the

> nonmoving party to establish a proper chain of custody or submit other evidence that tampering did not occur.

Armstrong v. State, 73 So. 3d 155, 171 (Fla. 2011) (internal citations removed). Clearly, Officer Townsel did not follow the proper procedure by failing to enter the photo pack securely in evidence immediately after Mr. Greisman made the identification. However, Mr. Davis has offered only speculation that the location of the photo pack prior to being placed into evidence resulted in tampering. Such bare allegations are insufficient to render the evidence inadmissible. See *Terry v. State*, 668 So. 2d 954, n.4 (Fla. 1996); *Bush v. State*, 543 So. 2d 283, 284 (Fla. 2d DCA 1989). Instead, the testimony from Officer Townsel and Mr. Greisman reflect that no tampering occurred during the time the photo pack was in Officer Townsel's shed.

As Mr. Davis has failed to raise any grounds upon which such a motion could have been granted, **claim 21 is DENIED**.

Claim 22 **CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. DAVIS OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION.**

Mr. Davis's final claim alleges the cumulative effect of all previously alleged claims entitle him to relief. Having determined each individual claim to be without merit, there are no errors to cumulate. **Claim 22 is DENIED.**

Therefore, it is **ORDERED AND ADJUDGED** that Defendant's Motion to Vacate Judgments of Conviction and Sentence is **DENIED**. Defendant has thirty (30) days to appeal this Order to the Florida Supreme Court.

DONE AND ORDERED at Bartow, Polk County, Florida, this 29th day of November, 2021.

DONALD G. JACOBSEN
Circuit Court Judge

Copies furnished to:

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DGJ/jwl

I HEREBY CERTIFY the foregoing is a true copy of the original as it appears on file in the office of the Clerk of the Circuit Court of Polk County, Florida, and that I have furnished copies of this order and its attachments to the above-listed on this _____ day of November, 2021.

CLERK OF THE CIRCUIT COURT

By: _____
Deputy Clerk

Therefore, it is **ORDERED AND ADJUDGED** that Defendant's Motion to Vacate Judgments of Conviction and Sentence is **DENIED**. Defendant has thirty (30) days to appeal this Order to the Florida Supreme Court.

DONE AND ORDERED at Bartow, Polk County, Florida, this 29th day of November, 2021.

DONALD G. JACOBSEN
Circuit Court Judge

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DGJ/jwl

I HEREBY CERTIFY the foregoing is a true copy of the original as it appears on file in the office of the Clerk of the Circuit Court of Polk County, Florida, and that I have furnished copies of this order and its attachments to the above-listed on this 30th day of November, 2021.

CLERK OF THE CIRCUIT COURT

By: L. Wilson
Deputy Clerk