RECEIVED 08/24/2018 FLORIDA SUPREME COURT

RECORD ON APPEAL

H.T. CASE NO.: SC18-899
L.T. CASE NO.: 2009 002872 CFAWS

JOSEPH EDWARD JORDAN
APPELLANT

–VS–

STATE OF FLORIDA
APPELLEE

APPEAL RECORD ~ 3.851

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

FOR THE APPELLANT
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JOSEPH EDWARD JORDAN
APPELLANT
VS
STATE OF FLORIDA
APPELLEE
Appeal Record ~ 3.851

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IN THE CIRCUIT COURT OF THE 5TH JUDICIAL CIRCUIT
VOLUSIA COUNTY, FLORIDA

CASE HISTORY

JOSEPH EDWARD JORDAN
D/L: J635485700990 FL
Race: W
Sex: M
DOB: 3/19/1970

CASE NUMBER: 2009 002872 CFAWS **Felony**

Judge:
Pros Attorney: J RYAN WILL
Def Attorney: MARIA DEL CARMEN CALZON

DATE	COURT EVENTS
01/15/2013	01:30 Pre-trial Continued by Defense
02/12/2013	01:30 Pre-trial Continued by Defense
03/26/2013	01:30 Pre-trial-Private Pass-Reset
03/27/2013	01:30 Criminal Hearing Scheduled
04/03/2013	01:30 Criminal Hearing Scheduled
04/11/2013	01:30 Docket Sounding Private Cancelled
04/15/2013	08:30 Trial Scheduled
04/16/2013	08:30 Trial Scheduled
04/17/2013	08:30 Trial Scheduled
04/18/2013	08:30 Trial Scheduled
04/19/2013	08:30 Trial Scheduled
04/22/2013	09:01 Trial Scheduled
04/23/2013	08:31 Trial Scheduled
04/24/2013	08:31 Trial Scheduled
08/12/2013	08:30 Criminal Hearing Scheduled
09/23/2013	08:30 Criminal Hearing Scheduled
01/06/2014	01:30 Criminal Hearing Scheduled
02/12/2016	08:30 Criminal Hearing Scheduled
05/12/2016	01:15 Criminal Hearing Scheduled
09/13/2016	08:30 Criminal Hearing Scheduled
09/23/2016	12:00 Criminal Hearing Scheduled
10/26/2016	01:30 Criminal Hearing Scheduled
01/23/2017	01:30 Criminal Hearing Scheduled
04/27/2017	08:30 Criminal Hearing Cancelled
04/27/2017	01:30 Criminal Hearing Scheduled
08/01/2017	03:00 Criminal Hearing Scheduled
12/01/2017	08:30 Criminal Hearing Cancelled
02/02/2018	08:30 Criminal Hearing Scheduled
04/12/2018	08:30 Criminal Hearing Scheduled
08/02/2018	10:00 Criminal Hearing Scheduled
09/12/2018	01:30 Docket Sounding Scheduled

DATE	DOCKETS
08/20/2018	TRAN. OF PROCEEDING 2/2/18 ~ Evidentiary Hearing
08/20/2018	TRAN. OF PROCEEDING 9/13/16 ~ Status Hearing
08/17/2018	NOTICE OF APPEARANCE BY MARIA DEL CARMEN CALZON
08/15/2018	TRAN. OF PROCEEDING 10/26/16 ~ Status Hearing
08/15/2018	TRAN. OF PROCEEDING 5/12/16 ~ Motion Hearing
08/14/2018	TRAN. OF PROCEEDING 8/2/18 ~ Appeal Status Conference

08/10/2018	TRAN. OF PROCEEDING 4/12/18 ~ Evidentiary Hearing
08/02/2018	COURT ACTION FORM FILED
08/01/2018	TRAN. OF PROCEEDING 4/27/17 ~ Status Conference
07/20/2018	TEXT DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS AND EMERGENCY MOTION TO PRESERVE EVIDENCE
07/16/2018	TRAN. OF PROCEEDING 8/1/17 ~ Case Management Conference Hearing
07/16/2018	TRAN. OF PROCEEDING 2/12/16 ~ Status Conference Hearing
07/16/2018	TRAN. OF PROCEEDING 1/23/17 ~ Case Management Conference Hearing
07/03/2018	COURT REPORTER'S ACKNOWLEDGEMENT AMENDED Transcripts ready by 8/20/18
06/28/2018	DESIG. TO THE COURT REPORTER AND ACKNOWLEDGEMENT (Amended) to Include the Status Hearing being held on 8/2/18-emailed VRC
06/25/2018	COURT REPORTER'S ACKNOWLEDGEMENT Transcripts will be ready by 8/20/18
06/22/2018	ORDER SETTING STATUS CONFERENCE
06/19/2018	DESIG. TO THE COURT REPORTER AND ACKNOWLEDGEMENT emailed VRC
06/08/2018	ORDER FROM SUPREME COURT SC18-899 (3.851) Transcript to be filed w/i 80 days of NOA, Trial Clerk shall have 20 days from the filing of the Transcript to file the record on appeal, The Trl Jdg is directed to hold a status conference w/i 60 days -emailed Division 41
06/08/2018	ACKNOWLEDGMENT FROM SUPREME COURT SC18-899 (3.851) emailed Division 41
06/01/2018	NOTICE OF APPEAL by CCRC ~ 5/4/18 Order Granting Claim 1 & Denying 2 thru 8 (efiled w/SC)
05/08/2018	COURT VERIFICATION FORM - LEGITIMATE
05/04/2018	ORDER final granting claim 1 & denying 2 through 8 of def's motn to vacate judgements of conviction & sentence
05/01/2018	TRAN. OF PROCEEDING 8/1/17 ~ Case Management Conference Hearing
05/01/2018	NOTICE OF FILING TRANSCRIPT
05/01/2018	TRAN. OF PROCEEDING 4/12/18 ~ Evidentiary Hearing
05/01/2018	NOTICE OF FILING TRANSCRIPT
05/01/2018	NOTICE OF FILING TRANSCRIPT
05/01/2018	NOTICE OF FILING TRANSCRIPT
04/12/2018	HEARING SHEET EVIDENTIARY
04/12/2018	COURT ACTION FORM FILED
03/07/2018	RETURNED SUBPOENA
02/09/2018	ORDER REGARDING THE BI-FURCATION OF THE EVIDENTIARY HEARING ON GROUND iv OF THE DEF'S 3.851 MOTION FOR POST CONVICTION
02/07/2018	NOTICE OF EVIDENTIARY HEARING (AMENDED) 4/12/18 @ 8:30 A.M.
02/02/2018	HEARING SHEET
02/02/2018	COURT ACTION FORM FILED
12/12/2017	NOTICE OF HEARING EVIDENTIARY - 2/2/18 8:30 AM
11/27/2017	ORDER GRANTING regarding joint motn for cont
11/21/2017	MOTION FOR CONTINUANCE JOINT MOTION TO CONTINUE RULE 3.851 (F) EVIDENTIARY HEARING
11/06/2017	NOTICE OF APPEARANCE ASSISTANT ATTORNEY GENERAL LESLIE CAMPBELL
10/30/2017	RETURNED SUBPOENA
10/30/2017	NOTICE OF FILING SUBPOENAS AND RETURNS OF SERVICE

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10/02/2017	NOTICE OF APPEARANCE AS CO-COUNSEL BY TAYO POPOOLA OBO THE STATE OF FLORIDA
08/22/2017	ORDER granting claim 1 of def's motion to vacate sentence of death
08/22/2017	COURT VERIFICATION FORM - LEGITIMATE
08/18/2017	NOTICE OF FILING (with attachment)
08/16/2017	NOTICE OF INTENT TO SEEK DEATH PENALTY AND AGGRAVATING CIRCUMSTANCES IN CAPITAL PROCEEDING
08/04/2017	NOTICE OF HEARING EVIDENTIARY 12/1/17 8:30AM
08/01/2017	COURT ACTION FORM FILED
07/28/2017	MOTION (DEFENDANT'S) REQUESTING THE COURT TO TAKE JUDICIAL NOTICE OF THE RECORD ON APPEAL @ EVID. HEARING
07/28/2017	TEXT DEFENDANT'S EXHIBIT LIST
07/28/2017	DEFENDANT'S WITNESS LIST
05/09/2017	STATES RESPONSE TO DEFENDANT'S MOTION TO VACATE JUDGMENTS (EMAILED TO DIV 41)
05/08/2017	NOTICE OF APPEARANCE BY COLLATERAL COUNSELS
04/28/2017	NOTICE OF CASE MANAGEMENT CONFERENCE
04/27/2017	COURT ACTION FORM FILED
04/20/2017	NOTICE OF APPEARANCE AND SUBSTITUTION OF CO-COUNSEL BY VIVIAN SINGLETON
04/12/2017	ORDER **AMENDED** SETTING STATUS CONFERENCE 4/27/2017 @2:00PM
03/24/2017	NOTICE OF SUPPLE AUTHORITY IN SUPPORT OF MTN TO VACATE JUDGMENT E-MAILED TO DIV 41
03/21/2017	NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851 - EMAILED TO DIV 41
03/10/2017	NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FL RULE OF CRP 3.851 - EMAILED TO DIV 41
03/07/2017	NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FL RULE OF CRIMINAL PROCEDURE 3.851 (EMAILED TO DIV. 41)
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02/08/2017	NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FL RULE OF CRIMINAL PROCEDURE 3.851 - EMAILED TO DIV 41
02/06/2017	MOTION B THE STATE TO DELAY THE FILING OF ITS RESPONSE AND TOLL TIME
02/02/2017	NOTICE OF CASE MANAGEMENT CONFERENCE
01/31/2017	NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851
01/23/2017	COURT ACTION FORM FILED
01/23/2017	NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANTS MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851
01/03/2017	NOTICE OF SUPPLEMENTAL AUTHORITY

12/19/2016	NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851
12/15/2016	MOT. POST. COV. REL. 3.851
12/15/2016	TEXT APPENDIX IN SUPPORT OF DEF MOTION TO VAC JUDGEMENTS OF CONV AND SENT - EMAIL TO JUDGE HUTCHESON
11/01/2016	NOTICE OF APPEARANCE AMENDED
10/31/2016	ORDER SETTING STATUS CONFERENCE
10/31/2016	ORDER DEF'S REQUEST FOR PRODUCTION AND DELIVERY OF EXEMPT RECORDS FROM THE OFFICE OF THE STATE ATTORNEY, SEVETEENTH JUDICIAL CIRCUIT
10/26/2016	COURT ACTION FORM FILED
10/13/2016	ORDER to deliver exempt public records office of the sao7th judicial circuit
10/03/2016	ORDER ON DEF'S REQUEST FOR PRODUCTION AND DELIVERY OF EXEMPT RECORDS
09/30/2016	ORDER GRANTING Order to Deliver Exempt Public Records (Office of the State Attorney, Seventeenth Judicial Circuit) Request to Records Repository - Tallahassee
09/30/2016	ORDER GRANTING Order to Deliver Exempt Public Records (Volusia County Medical Examiner's Office) Request to Records Repository - Tallahassee
09/29/2016	MOTION (6TH) REQUESTING THE IN CAMERA REVIEW W/PROP ORDER E-MAILED
09/21/2016	TEXT OBJ BY 8TH DISTRICT MED EXAMINERS OFFICE TO DEF SUPPLE REQ FOR PRODUCTION OF PUBLIC RECORDS
09/19/2016	NOTICE OF DELIVERY OF EXEMPT PUBLIC RECORDS TO RECORDS REPOSITORY
09/19/2016	NOTICE OF COMPLIANCE BY THE OFFICE OF THE STATE ATTORNEY FOR THE SEVENTEENTH JUDICIAL CIRCUIT
09/13/2016	COURT ACTION FORM FILED
09/12/2016	NOTICE OF HEARING 09/13/16
09/09/2016	MOTION (5TH) REQUESTNG IN CAMERA REVIEW OF ADDT RECORDS W/PROP ORDER E-MAILED
08/30/2016	NOTICE OF COMPLIANCE BY THE VOLUSIA COUNTY MEDICAL EXAMINER'S OFFICE
08/26/2016	TEXT FLORIDA DEPARTMENT OF LAW ENFORCEMENT'S RESPONSE AND OBJECTIONS TO DEFENDANT'S DEMAN FOR ADDITIONAL PUBLIC RECORDS
08/25/2016	ORDER GRANTING FLORIDA DEPARTMENT OF CORRECTIONS UNOPPOSED MOTN. FOR RECONSIDERATION
08/22/2016	ORDER PROPOSED ON FLORIDA DEPARTMENT OF LAW ENFORCEMENT'S UNOPPOSED MOTION FOR EXTENSION OF TIME
08/18/2016	MOTION FLORIDA DEPARTMENT OF LAW ENFORCEMENT'S UNOPPOSED MOTION FOR EXTENSION OF TIME W/PROPOSED ORDER (EMAILED TO DIV. 41)
08/12/2016	MOTION FOR RECONSIDERATION
08/02/2016	ORDER DETERMINING DISCOVERY
08/01/2016	ORDER SETTING STATUS CONFERENCE
07/25/2016	NOTICE OF DELIVERY OF EXEMPT PUBLIC RECORDS TO RECORDS DEPOSITORY
07/25/2016	NOTICE OF FILING
07/15/2016	TEXT DEPARTMENTS OBJECTION TO DEFENDANTS REQUEST FOR PRODUCTION
06/20/2016	NOTICE OF FILINGDEFS DEMAND FOR ADDTL PUBLIC RECORDS
05/12/2016	COURT ACTION FORM FILED
03/29/2016	MOTION TO CLARIFY ORDER DATED FEBRUARY 16, 2016 (Duplicate)

03/28/2016	ORDER to deliver excempt public records department of public protection & office of the state attorney 17th judicial circuit w/attachment
03/24/2016	MEMO TO FILE CORRESPONDENCE FROM JA TO DONNA VENNA (CCRC)
03/24/2016	JUDGE'S ACKNOWLEDGEMENT OF CORRESPONDENCE MOTION TO CLARIFY ORDER DATED 2/16/16
03/24/2016	MOTION REQUESTING THE IN CAMERA REVIEW OF RECORDS W/ PROP ORDER (FWD TO JUDGE)
03/23/2016	MOTION TO CLARIFY ORDER DATED FEB. 16, 2016 WITH PROPOSED NOTICE OF HEARING (FWD TO JUDGE)
03/16/2016	NOTICE OF DELIVERY OF EXEMPT PUBLIC RECORDS TO RECORDS REPOSITORY
03/14/2016	NOTICE OF COMPLIANCE BY THE OFFICE OF THE STATE ATTORNEY FOR THE SEVENTEENTH JUDICIAL CIRCUIT
03/09/2016	ORDER GRANTING STATE'S MOTION FOR EXTENSION OF TIME TO PRODUCE & DELIVER PUBLIC RECORDS TO THE RECORDS REPOSITORY
03/07/2016	MOTION FOR EXTENSION OF TIME TO PRODUCE & DELIVER PUBLIC RECORDS TO THE RECORDS REPOSITORY W/ PROP ORDER (FWD TO JUDGE)
03/01/2016	NOTICE OF COMPLIANCE BY THE DEPARTMENT OF PUBLIC PROTECTION, DIVISION OF EMERGENCY MEDICAL SERVICES & NOTICE OF CONFIDENTIALITY AND EXEMPTION FROM THE PUBLIC RECORDS DISCLOSURE REQUIREMENTS
03/01/2016	RECEIVED CORRESPONDENCE FLORIDA DEPARTMENT OF STATE (FWD TO JUDGE)
03/01/2016	NOTICE OF DELIVERY OF EXEMPT PUBLIC RECORDS TO JUDGE/CLERK W/ MEDICAL EXAMINER PHOTOS (FWD TO JUDGE)
02/29/2016	ORDER to deliver excempt public records
02/25/2016	MOTION REQUESTING THE IN CAMERA REVIEW OF RECORDS W/ PROP ORDER (FWD TO JUDGE)
02/22/2016	ORDER to produce & deliever public records tot he records repository
02/18/2016	ORDER TO DELIVER EXEMPT PUBLIC RECORD [FDOC, SAO, AND BROWARD COUNTY SHERIFF'S OFFICE]
02/17/2016	ORDER ON DEF'S 1ST MOTION REQUESTING THE IN CAMERA REVIEW OF RECORDS [EDGEWATER PD & FLORIDA DEPT OF LAW ENFORCEMENT]
02/16/2016	ORDER ALLOWING TELEPHONIC APPEARANCE OF COUNSEL
02/16/2016	ORDER TO MAINTAIN PUBLIC RECORDS EXEMPTION AND CONFIDENTIALITY AS TO DISCOVERABLE RECORDS
02/16/2016	ORDER SETTING STATUS CONFERENCE
02/15/2016	MOTION (DEF'S SECOND) REQUESTING THE IN CAMERA REVIEW OF RECORDS W/ PROP ORDER (FWD TO JUDGE)
02/12/2016	NOTICE OF COMPLIANCE BY THE DISTRICT 7 MEDICAL EXAMINER
02/11/2016	NOTICE OF COMPLIANCE BY THE STATE ATTORNEY SEVENTH JUDICIAL CIRCUIT
02/08/2016	NOTICE OF COMPLIANCE BY THE BROWARD SHERIFFS OFFICE
02/05/2016	ORDER to deliver exempt public records
02/03/2016	NOTICE OF COMPLIANCE BY BROWARD SHERIFFS OFFICE W/ATTACHED
02/02/2016	MOTION REQUESTING THE IN CAMERA REVIEW OF RECORDS W/ PROP ORDER FWD TO JUDGE
01/28/2016	NOTICE OF COMPLIANCE BY LAW ENFORCEMENT AGENCY
01/25/2016	NOTICE OF COMPLIANCE BY THE SECRETARY OF THE DEPARTMENT OF CORRECTIONS
01/25/2016	NOTICE OF DELIVERY OF EXEMPT PUBLIC RECORDS TO RECORDS REPOSITORY

01/25/2016	NOTICE OF COMPLIANCE BY EDGEWATER POLICE DEPARTMENT
01/22/2016	NOTICE OF COMPLIANCE BY THE SECRETARY OF THE DEPARTMENT OF CORRECTIONS
01/22/2016	NOTICE OF DELIVERY OF EXEMPT PUBLIC RECORDS TO RECORD REPOSITORY
12/07/2015	ORDER SETTING STATUS CONFERENCE 2/12/16 @ 100:00 AM
11/24/2015	ORDER of assigment w/attachment
11/13/2015	NOTICE TO THE FT LAUDERDALE PD OF AFFIRM OF DEATH PEN & TO PROD PUB RECORDS
11/13/2015	NOTICE TO THE HOLLYWOOD PD OF AFFIRMANCE OF DEATH PEN & TO PROD PUB RECORDS
11/13/2015	NOTICE TO THE EDGEWATER PD OF AFFIRMA OF DEATH PEN & TO PROD PUB RECORDS
11/13/2015	NOTICE TO THE EDGEWATER FIRE DEP OF AFFIRM OF DEATH PEN & TO PROD PUB RECORDS
11/13/2015	NOTICE TO THE VOLUSIA COUNT SHER OFFICE OF AFFIRM OF DEATH PEN & TO PROD PUB RECORDS
11/13/2015	NOTICE TO THE DIST 7 MED EXAMINER OF AFFIRMANCE OF DEATH PEN & TO PROD PUB RECORDS
11/13/2015	NOTICE TO THE BROWARD COUNT SHERIFFS OFFICE OF AFFIRM OF DEATH PEN & TO PROD PUB RECORDS
11/13/2015	NOTICE TO THE BROWARD COUNTY STATE ATTY OFFICE OF AFFIRM OF DEATH PEN & TO PRODUCE PUB RECORDS
11/13/2015	NOTICE TO THE FL DEP OF LAW ENF ORLANDO REG CRIME LAB OF AFFIRMANCE OF DEATH PENALTY & TO PRODUCE PUB RECORDS
11/13/2015	NOTICE TO THE DEP OF PUB PROTECTION, DIVISION OF EMERGENCY MED SERVICES OF AFFIRMANCE OF DEATH PEN & TO PROD PUB RECORDS
11/13/2015	NOTICE TO THE US MARSHALLS OFFICE MID-FL OF AFFIRM OF DEATH PEN & TO PROD PUB RECORDS
11/13/2015	NOTICE TO THE FL DEP OF LAW ENFORCEMENT, ENFOR & INVEST SUPPORT OF AFFIRM OF DEATH PEN & TO PROD PUB RECORDS
11/04/2015	NOTICE OF APPEARANCE BY: RAHEELA AHMED
11/02/2015	ORDER FROM SUPREME COURT SC13-2091 Pursuant to FL Rule of Crim Procedure 3.851 (b) the Office of CCRC-Middle Region is appointed to handle postconviction proceedings for appellant (emailed Judge's JA)
11/02/2015	MANDATE AFFIRMING SC13-2091 (emailed Judge's JA)
11/02/2015	NOTICE TO SECRETARY OF DEPARTMENT OF CORRECTIONS OF AFFIRMANCE OF DEATH PENALTY
11/02/2015	NOTICE TO STATE ATTORNEY OF AFFIRMANCE OF DEATH PENALTY
04/21/2014	RECORD FORWARDED TO SUPREME COURT AG & Ofc of Criminal Conf/Civil Reg Counsel, SC13-2091, Supp Vol 1 & 2
04/16/2014	TRAN. OF PROCEEDING 5/15/12, Docket Sounding (CD Only)
04/16/2014	TRAN. OF PROCEEDING 7/18/09, First Appearance (CD Only)
04/15/2014	TRAN. OF PROCEEDING 3/27/13, Status Conference Hearing (CD Only)
04/15/2014	TRAN. OF PROCEEDING 2/12/13, Docket Sounding (CD Only)
04/15/2014	TRAN. OF PROCEEDING 1/15/13, Docket Sounding (CD Only)
04/15/2014	TRAN. OF PROCEEDING 11/6/12, Docket Sounding (CD Only)
04/15/2014	TRAN. OF PROCEEDING 9/11/12, Docket Sounding (CD Only)
04/15/2014	TRAN. OF PROCEEDING 7/10/12, Docket Sounding (CD Only)
04/15/2014	TRAN. OF PROCEEDING 6/12/12, Docket Sounding (CD Only)
04/15/2014	TRAN. OF PROCEEDING 2/2/12, Motion to Suppress/Motion in Limine (CD Only)
04/15/2014	TRAN. OF PROCEEDING 1/10/12, Docket Sounding (CD Only)
04/15/2014	TRAN. OF PROCEEDING 11/8/11, Docket Sounding (CD Only)

04/15/2014	TRAN. OF PROCEEDING 7/28/11, Hearing (CD Only)
04/15/2014	TRAN. OF PROCEEDING 7/12/11, Hearing (CD Only)
04/15/2014	TRAN. OF PROCEEDING 5/12/11, Hearing (CD Only)
04/15/2014	TRAN. OF PROCEEDING 4/12/11, Hearing (CD Only)
04/15/2014	TRAN. OF PROCEEDING 2/15/11, Hearing (CD Only)
04/15/2014	TRAN. OF PROCEEDING 11/30/10, Hearing (CD Only)
04/15/2014	TRAN. OF PROCEEDING 10/12/10, Docket Sounding (CD Only)
04/15/2014	TRAN. OF PROCEEDING 8/10/10, Docket Sounding (CD Only)
04/15/2014	TRAN. OF PROCEEDING 5/11/10, Docket Sounding (CD Only)
04/15/2014	TRAN. OF PROCEEDING 2/9/10, Docket Sounding (CD Only)
04/15/2014	TRAN. OF PROCEEDING 12/1/09, Docket Sounding (CD Only)
04/15/2014	TRAN. OF PROCEEDING 10/7/09, Hearing (CD Only)
04/15/2014	TRAN. OF PROCEEDING 9/16/09, Hearing (CD Only)
04/15/2014	TRAN. OF PROCEEDING 8/27/09, First Appearance (CD Only)
04/15/2014	TRAN. OF PROCEEDING 8/26/09, Hearing (CD Only)
04/14/2014	TRAN. OF PROCEEDING 8/12/13, Hearing (CD Only)
04/14/2014	TRAN. OF PROCEEDING 4/3/13, Hearing (CD Only)
04/14/2014	COURT REPORTER'S ACKNOWLEDGEMENT Transcripts of Proceedings will be available by 5-9-14
04/07/2014	DESIG. TO THE COURT REPORTER AND ACKNOWLEDGEMENT First Supplemental (Emailed Vol Rep 4/8)
03/28/2014	ORDER FROM SUPREME COURT SC13-2091, Granting Motn to Supp the ROA with Trans of Proceeding - by 4/25/14
01/27/2014	ITEMIZATION SHEET PREP OF RECORD ON APPEAL $10,326 - Indigent
01/27/2014	RECORD FORWARDED TO SUPREME COURT AG/Ofc of Crim Conf/Civ Reg Counsel, 16 Volumes, SC13-2091
01/21/2014	TRAN. OF PROCEEDING 1/6/14 Status Hearing (CD Only)
01/08/2014	TEXT STATUS REPORT
01/06/2014	COURT ACTION FORM FILED
12/13/2013	NOTICE OF STATUS CONFERENCE HEARING - 1/6/14 @ 2:00PM
12/11/2013	ORDER ALLOWING THE P.D. TO WITHDRAW AND APPOINTING REGIONAL CONFLICT COUNSEL and Appointing Office of Criminal Conflict and Civil Regiona Counsel for Appellant (cc forwarded to Supreme Court)
12/10/2013	CASE TRIAL REPORT
11/26/2013	TRAN. OF PROCEEDING 4/26/11, Hearing (CD Only)
11/22/2013	TRAN. OF PROCEEDING 4/24/13, Jury Trial - Vol XV of XV (CD Only)
11/22/2013	TRAN. OF PROCEEDING 4/23/13, Jury Trial - Vol XIV of XV (CD Only)
11/22/2013	TRAN. OF PROCEEDING 4/23/13, Jury Trial - Vol XIII of XV (CD Only)
11/22/2013	TRAN. OF PROCEEDING 4/22/13, Jury Trial - Vol XII of XV (CD Only)
11/22/2013	TRAN. OF PROCEEDING 4/19/13, Jury Trial - Vol XI of XV (CD Only)
11/22/2013	TRAN. OF PROCEEDING 4/18/13, Jury Trial - Vol X of XV (CD Only)
11/22/2013	TRAN. OF PROCEEDING 4/18/13, Jury Trial - Vol IX of XV (CD Only)
11/22/2013	TRAN. OF PROCEEDING 4/17/13, Jury Trial - Vol VIII of XV (CD Only)
11/22/2013	TRAN. OF PROCEEDING 4/17/13, Jury Trial - Vol VII of XV (CD Only)

11/22/2013	TRAN. OF PROCEEDING 4/16/13, Jury Trial - Vol VI of XV (CD Only)
11/22/2013	TRAN. OF PROCEEDING 4/16/13, Jury Trial - Vol V of XV (CD Only)
11/22/2013	TRAN. OF PROCEEDING 4/16/13, Jury Trial - Vol IV of XV (CD Only)
11/22/2013	TRAN. OF PROCEEDING 4/15/13, Jury Trial - Vol III of XV (CD Only)
11/22/2013	TRAN. OF PROCEEDING 4/15/13, Jury Trial - Vol II of XV (CD Only)
11/22/2013	TRAN. OF PROCEEDING 4/15/13, Jury Trial - Vol I of XV (CD Only)
11/21/2013	RECEIVED CERT. COPY ORDER/FINAL JUDG. FOR COSTS SEMINOLE COUNTY
11/21/2013	CASE TRIAL REPORT
11/18/2013	ORDER FROM SUPREME COURT SC13-2091 tran due w/in 80 days from NOA; clerk has 20 days after tran to file ROA; Judge to have SC w/in 60 days from order
11/18/2013	ORDER FROM SUPREME COURT Acknowledgement of new case SC13-2091 (initial)
11/13/2013	TRAN. OF PROCEEDING 9/23/13, Sentencing (CD Only)
11/13/2013	MOTION TO WITHDRAW & request to appoint conflict free counsel for appeal SC13-2091
11/04/2013	RECEIVED CERT. COPY ORDER/FINAL JUDG. FOR COSTS
10/25/2013	CORRESPONDENCE SENT TO Copies of Court Actions Forms sent to The P.D., A.G. and Court Reporter
10/24/2013	CERT. COPY ORDER INSOLV. Fwd to Supreme Court, Faxed to Public Defender with All Appeal Paperwork, Faxed To Volusia Reporting With Designation
10/23/2013	ORDER INSOLV./APPOINT. PD FOR PURPOSE OF APPEAL
10/22/2013	CRT CPY NOTE/APPEAL TO SUP CRT & ATTY GEN
10/21/2013	MOTION TO PROCEED WITHOUT PAYMENT OF COSTS, ETC.
10/21/2013	STATEMENT OF JUDICIAL ACTS TO BE REVIEWED
10/21/2013	DESIG. TO THE COURT REPORTER AND ACKNOWLEDGEMENT
10/21/2013	DIRECTIONS TO THE CLERK
10/21/2013	NOTICE OF APPEAL by atty; J & S
09/23/2013	ORDER/FINAL JUDGMENT FOR COSTS
09/23/2013	COURT ACTION FORM FILED
09/23/2013	JUDGMENT & SENTENCE FILED
09/23/2013	UNIFORM COMMITMENT TO CUSTODY TO DOC
09/23/2013	SCORE SHEET
09/23/2013	ORDER SENTENCING
09/23/2013	TEXT DEFENDANT'S WAIVER OF APPEARANCE @ SENTENCING
08/26/2013	TEXT state's Spencer hrg sentencing memorandum
08/26/2013	TEXT Def. Jordan's memorandum in suppt. of a life sentence
08/20/2013	ORDER SETTING SENTENCING & NOTICE 9/23/13 @ 10:30AM
08/12/2013	COURT ACTION FORM FILED
06/11/2013	NOTICE OF HEARING AMENDED
06/03/2013	MOTION FOR CONTINUANCE
05/30/2013	ORDER GRANTING CONTINUANCE on def's spencer hrg.
05/29/2013	MOTION FOR CONTINUANCE of the Spencer Hearing
05/10/2013	RECEIVED CORRESPONDENCE
05/10/2013	NOTICE of filing
05/07/2013	NOTICE OF HEARING 6/3/13 8:30am

04/24/2013	EXHIBITS SHEET DEFENSE
04/24/2013	EXHIBITS SHEET (STATE)
04/24/2013	TRIAL SHEET
04/24/2013	JURY PANEL USAGE RECORD (COPY)
04/24/2013	JURY PANEL USAGE RECORD (COPY)
04/24/2013	TEXT PENALTY PHASE ADVISORY SENTENCE
04/24/2013	TEXT PENALTY PHASE JURY INSTRUCTIONS
04/24/2013	TEXT NEWSPAPER ARTICLE-KEEP IN FILE PER JUDGE HUTCHESON
04/24/2013	COURT ACTION FORM FILED
04/23/2013	COURT ACTION FORM FILED
04/22/2013	COURT ACTION FORM FILED
04/22/2013	TRAN. OF PROCEEDING PERPETUATED PENALTY PHASE TESTIMONY OF RAYMOND HILL 4/18/13
04/22/2013	MOTION IN LIMINE REGARDING PRIOR ALLEGATIONS OF SEXUAL BATTERY, ARMED KIDNAPPING & AGGRAVATED ASSAULT
04/19/2013	JURY VERDICT FORM
04/19/2013	TEXT JURY INSTRUCTIONS
04/19/2013	COURT ACTION FORM FILED
04/19/2013	SUPPLEMENTAL WITNESS LIST
04/18/2013	COURT ACTION FORM FILED
04/17/2013	COURT ACTION FORM FILED
04/16/2013	COURT ACTION FORM FILED
04/16/2013	SUPPLEMENTAL WITNESS LIST
04/16/2013	SUPPLEMENTAL WITNESS LIST
04/15/2013	COURT ACTION FORM FILED
04/15/2013	SUPPLEMENTAL WITNESS LIST
04/11/2013	SUPPLEMENTAL WITNESS LIST
04/10/2013	DEFENDANT'S WITNESS LIST (THIRD AMND.)
04/10/2013	SUPPLEMENTAL WITNESS LIST
04/08/2013	SUPPLEMENTAL WITNESS LIST
04/04/2013	SUPPLEMENTAL WITNESS LIST
04/03/2013	DEFENDANT'S WITNESS LIST SECOND AMENDED
04/03/2013	MOTION TO SUPPRESS EVIDENCE
04/03/2013	NOTICE OF MENTAL MITIGATION PURSUANT TO RULE 3.202
04/03/2013	COURT ACTION FORM FILED
04/02/2013	SUPPLEMENTAL WITNESS LIST
04/01/2013	NOTICE OF HEARING 4/03/13 @ 3:30PM
04/01/2013	NOTICE OF DOCKET SOUNDING
03/28/2013	NOTICE OF HEARING 3/27/13 3:30pm
03/28/2013	NOTICE OF HEARING 3/27/12 3:30pm
03/27/2013	COURT ACTION FORM FILED
03/27/2013	DEFENDANT'S WITNESS LIST
03/26/2013	SUPPLEMENTAL WITNESS LIST
03/26/2013	NOTICE OF APPEARANCE AS CO-COUNSEL-CHRISTOPHER SMITH
03/25/2013	NOTICE OF APPEARANCE AS CO-COUNSEL
03/20/2013	SUPPLEMENTAL WITNESS LIST
03/12/2013	SUPPLEMENTAL WITNESS LIST
03/08/2013	NOTICE OF PRE-TRIAL
03/05/2013	NOTICE OF TAKING DEPOSITION
02/21/2013	SUPPLEMENTAL WITNESS LIST
02/19/2013	NOTICE OF INTENT TO INTRODUCE SELF AUTHENTICATING RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY

02/19/2013 STATE'S DISCOVERY EXHIBIT W/WITNESS LIST
02/15/2013 NOTICE OF INTENT TO SEEK THE DEATH PENALTY
02/15/2013 NOTICE (STATE'S) - TO CLASSIFY DEF AS A PRISON RELEASE REOFFENDER
02/12/2013 ORDER COMPELLING PRINTS
02/12/2013 MOTION TO COMPEL PRINTS
02/12/2013 COURT ACTION FORM FILED
01/25/2013 NOTICE OF PRE-TRIAL
01/15/2013 COURT ACTION FORM FILED
12/20/2012 SUPPLEMENTAL WITNESS LIST
12/11/2012 NOTICE OF TRIAL - 021813
11/06/2012 TRIAL SET: 021813 PTR 011513 01:30 HUTCHESON WK1
11/06/2012 ADDR LEGACY DATA CODE ADR UPD: 101 SUNNYTOWN RD. STE. 310
11/06/2012 ADDR LEGACY DATA CODE CASSELBERRY FL 32707
11/06/2012 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
11/06/2012 WAIVED RIGHT TO SPEEDY TRIAL:
11/06/2012 CONT. BY DEF.:
11/02/2012 NOTICE OF PTL OR DKS/TRL RET'D:
10/15/2012 NOTICE OF TRIAL - 121012
09/12/2012 TRIAL SET: 121012 PTR 110612 01:30 HUTCHESON WK1
09/11/2012 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
09/11/2012 WAIVED RIGHT TO SPEEDY TRIAL:
09/11/2012 CONT. BY DEF.:
09/10/2012 TEXT CASE RESET: TRL 101512 PTR 091112 HUTCHESON
08/20/2012 NOTICE OF TRIAL - 101512
07/12/2012 TRIAL SET: 101512 PTR 091112 01:30 HUTCHESON WK1
07/10/2012 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
07/10/2012 WAIVED RIGHT TO SPEEDY TRIAL:
07/10/2012 CONT. BY DEF.:
06/16/2012 NOTICE OF TRIAL - 082012
06/14/2012 TRIAL SET: 082012 PTR 071012 01:30 HUTCHESON WK1
06/12/2012 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
06/12/2012 WAIVED RIGHT TO SPEEDY TRIAL:
06/12/2012 CONT. BY DEF.:
06/01/2012 FILE SENT TO: JDG HUTCHESON *RET'D 6-7-12*
05/21/2012 NOTICE OF TRIAL - 071612
05/16/2012 TRIAL SET: 071612 PTR 061212 01:30 HUTCHESON WK1
05/15/2012 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
05/15/2012 WAIVED RIGHT TO SPEEDY TRIAL:
05/15/2012 CONT. BY DEF.:
04/20/2012 NOTICE OF TRIAL - 061812
04/17/2012 FILE SENT TO: JDG HUTCHESON *RET'D 4-27-12* N/A
04/10/2012 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
04/10/2012 WAIVED RIGHT TO SPEEDY TRIAL:
04/10/2012 CONT. BY DEF.:
04/02/2012 TRIAL SET: 061812 PTR 051512 01:30 HUTCHESON WK1

03/29/2012 CONT. BY DEF.:
03/29/2012 ORDER GRANTING CONTINUANCE:
03/29/2012 MOTION FOR CONTINUANCE: COPY
03/29/2012 MOTION FOR CONTINUANCE:
03/19/2012 NOTICE OF TRIAL - 052112
03/13/2012 SUPPLEMENTAL WITNESS LIST:
02/13/2012 SUPPLEMENTAL WITNESS LIST:
02/02/2012 TEXT GRANTING MOTION IN LIMINE
02/02/2012 ORDER DENYING: MOTION TO SUPPRESS STATEMENTS/N
02/02/2012 TEXT CD ROM
02/02/2012 NOTICE: OF FILING
02/02/2012 TRIAL SET: 052112 PTR 041012 01:30 HUTCHESON WK1
02/02/2012 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
02/02/2012 CONT. BY STATE:
02/02/2012 TEXT MOTION TO SUPPRESS PHONE CONVERSATION-DENIED
02/01/2012 FILE SENT TO: JDG HUTCHESON
01/30/2012 TEXT CD
01/30/2012 NOTICE: OF FILING
01/30/2012 HEARING SET FOR: 020212 HUTCHESON CR#1-JC.DB WK1
01/12/2012 TRIAL SET: 041612 PTR 031312 01:30 HUTCHESON WK1
01/10/2012 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
01/10/2012 WAIVED RIGHT TO SPEEDY TRIAL:
01/10/2012 CONT. BY DEF.:
12/20/2011 NOTICE OF TRIAL - 022012
12/01/2011 NOTICE OF HEARING: 2/2/11 9:00AM HUTCHESON(MOTION)
11/09/2011 NOTICE OF TAKING DEPOSITION: 1/25/12(SEE NOTICE)
11/09/2011 TRIAL SET: 022012 PTR 011012 01:30 HUTCHESON WK1
11/08/2011 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
11/08/2011 WAIVED RIGHT TO SPEEDY TRIAL:
11/08/2011 CONT. BY DEF.:
10/28/2011 HEARING SET FOR: 110311 HUTCHESON **CANCELLED**
10/18/2011 NOTICE OF TRIAL - 121211
10/07/2011 MOTION: IN LIMINE
10/07/2011 MOTION TO SUPPRESS: STATEMENTS
10/06/2011 DEFENDANT'S WITNESS LIST:
10/06/2011 NOTICE OF HEARING: 11/3/11 9:30AM HUTCHESON(MOTION)
10/06/2011 NOTICE OF TAKING DEPOSITION: 11/2/11(SEE NOTICE)
09/14/2011 TRIAL SET: 121211 PTR 110811 01:30 HUTCHESON WK1
09/13/2011 WAIVED RIGHT TO SPEEDY TRIAL:
09/13/2011 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
09/13/2011 CONT. BY DEF.:
08/17/2011 NOTICE OF TRIAL - 101711
07/28/2011 TRIAL SET: 101711 PTR 091311 01:30 HUTCHESON WK1
07/28/2011 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
07/28/2011 CONT. BY STATE: (DKS)
07/28/2011 TEXT 28.DENIED (SEE COURT ACTION FORM)
07/28/2011 TEXT IN PART; 24.DENIED; 25.DENIED; 26.DENIED; 27.DENIED;

07/28/2011	TEXT 20.DENIED; 21.DENIED; 22.DENIED; 23.GRANTED IN PART, DENIED
07/28/2011	TEXT 15.DENIED; 16.DENIED; 17.DENIED; 18.DENIED; 19.DENIED;
07/28/2011	TEXT 11.RULING RESERVED; 12.DENIED; 13.DENIED; 14.DENIED;
07/28/2011	TEXT G.NO ACTION; 9.DENIED, PARAGRAPH 7 GRANTED; 10.GRANTED;
07/28/2011	TEXT 8. A.DENIED, B.DENIED, C.DENIED, D.DENIED, E.N/A, F.DENIED,
07/28/2011	TEXT 3.GRANTED; 4.GRANTED; 5.GRANTED; 6.GRANTED; 7.GRANTED;
07/28/2011	TEXT 1.PARAGRAPH 4 GRANTED, PARAGRAPH 4 DENIED; 2.GRANTED;
07/28/2011	TEXT (REFERENCE NOTICE OF HEARING FOR MOTION TITLES):
07/25/2011	MOTION: FOR INTERROGATORY PENALTY PHASE VERDICT
07/25/2011	TEXT UNDER RING V. ARIZONA
07/25/2011	MOTION: TO DECLARE FLORIDA'S DEATH PENALTY UNCONSTITUTIONAL
07/25/2011	TEXT ARIZONA, 536 U.S. 584 (2002)
07/25/2011	TEXT OBJECTION TO DEATH QUALIFICATION OF JURY BASED ON RING V.
07/25/2011	TEXT UNCONSTITUTIONAL AND MEMORANDUM OF LAW
07/25/2011	MOTION: DEFENDANT'S TO DECLARE FLORIDA'S DEATH PENALTY
07/25/2011	TEXT INSTRUCTIONS (PENALTY PHASE)
07/25/2011	TEXT DEFENDANTS OBJECTIONS TO FLORIDA'S STANDARD JURY
07/25/2011	TEXT MISSISSIPPI
07/25/2011	TEXT STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES" RE:CALDWELL V.
07/25/2011	MOTION: IN LIMINE AND TO STRIKE PORTIONS OF "FLORIDA
07/25/2011	MOTION: FOR FINDINGS OF FACT BY THE JURY
07/25/2011	MOTION: TO DECLARE FLORIDA'S DEATH PENALTY UNCONSTITUTIONAL
07/25/2011	TEXT AT PENALTY PHASE
07/25/2011	TEXT UNCONSTITUTIONAL AND TO BAR STATE'S USE OF HEARSAY EVIDENCE
07/25/2011	MOTION: TO DECLARE 921.141(1), FLORIDA STATUTES
07/25/2011	TEXT PERSUASION
07/25/2011	TEXT MITIGATION BY IMPOSING IMPROPER BURDENS OF PROOF OR
07/25/2011	TEXT UNCONSTITUTIONAL BECAUSE IT PRECLUDES CONSIDERATION OF
07/25/2011	MOTION: TO DECLARE SECTION 921.141, FLORIDA STATUTES
07/25/2011	TEXT SUFFICIENT TO RECOMMEND A DEATH SENTENCE
07/25/2011	TEXT UNCONSTITUTIONAL BECAUSE ONLY A BARE MAJORITY OF JURORS IS
07/25/2011	MOTION: TO DECLARE SECTION 921.141, FLORIDA STATUTE,
07/25/2011	TEXT ON ITS FACE AND AS APPLIED
07/25/2011	MOTION: TO DECLARE SECTION 921.141(5)(I) UNCONSTITUTIONAL
07/25/2011	TEXT UNCONSTITUTIONAL FACIALLY AND AS APPLIED
07/25/2011	TEXT FLORIDA STATUTES AND/OR THE STANDARD (5)(H0 INSTRUCTION
07/25/2011	MOTION: TO DECLARE SECTION 921.141 AND/OR 921.141 (5)(H),
07/25/2011	TEXT JURY INSTRUCTION INCONSTITUTIONAL AS APPLIED

07/25/2011 TEXT 921.141(5)(F) FLORIDA STATUTES AND/OR THE (5)(F) STANDARD
07/25/2011 MOTION: TO DECLARE SECTION 921.141 AND/OR SECTION
07/25/2011 TEXT FACIALLY AND AS APPLIED TO PRECLUDE THEIR APPLICATION AT BAR
07/25/2011 TEXT STATUTES AND/OR THE(5)(D)STANDARD INSTRUCTION UNCONSTITUTION
07/25/2011 MOTION: TO DECLARE SECTION 921.141 AND/OR 921(5)(D) FLORIDA
07/25/2011 TEXT UNCONSTITUTIONAL FACIALLY AND AS APPLIED
07/25/2011 TEXT STATUTES, AND THE RESPECTIVE STANDARD JURY INSTRUCTION
07/25/2011 MOTION: TO DECLARE SECTION 921.141, 921.141(5)(B), FLORIDA
07/25/2011 TEXT AND PENALTY PHASE
07/25/2011 MOTION: FOR RECESS OF TRIAL BETWEEN POTENTIAL GUILTY VERDICT
07/25/2011 TEXT SYMPATHY FOR THE DECEASED
07/25/2011 MOTION: TO EXCLUDE EVIDENCE OR ARGUMENT DESIGNED TO CREATE
07/25/2011 TEXT UNCONSTITUTIONAL AS APPLIED
07/25/2011 MOTION: TO DECLARE SECTION 921.141(5)(A), FLORIDA STATUTES,
07/25/2011 MOTION: IN LIMINE RE:PHOTOGRAPHS
07/25/2011 MOTION: TO LIMIT VICTIM IMPACT EVIDENCE
07/25/2011 MOTION: IN LIMINE REGARD REF TO NON-ENUMERATED MITIGAT FACTR
07/25/2011 MOTION: TO CMPL THE ST TO FURNISH PENALTY PHASE WITNESS LIST
07/25/2011 MOTION: TO COMPEL DISCLOSURE OF MITIGATING CIRCUMSTANCES
07/25/2011 MOTION FOR DISCLOSURE OF EVIDENCE: PENALTY PHASE
07/25/2011 MOTION: FOR DISCLOSURE OF IMPEACHING INFORMATION
07/25/2011 TEXT LAW ENFORCEMENT AND/OR STATE AGENTS
07/25/2011 MOTION FOR STATEMENT OF PART: RE:IMMUNITY AND PROMISES BY
07/25/2011 TEXT AND THEORY OF PROSECUTION
07/25/2011 MOTION FOR STATEMENT OF PART: AS TO AGGRAVATING CIRCUMSTANCE
07/25/2011 NOTICE OF HEARING: 072811 0830 JDG HUTCHESON
07/22/2011 NOTICE OF TRIAL - 082211
07/21/2011 HEARING SET FOR: 072811 HUTCHESON CR#1-JC.DB WK1
07/14/2011 TRIAL SET: 082211 DKS 081111 01:30 HUTCHESON WK1
07/12/2011 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
07/05/2011 NOTICE OF PTL OR DKS/TRL RET'D
07/05/2011 NOTICE OF PTL OR DKS/TRL RET'D:
07/05/2011 NOTICE OF PTL OR DKS/TRL RET'D:
06/20/2011 NOTICE OF TRIAL - 082211
06/07/2011 SUPPLEMENTAL WITNESS LIST:
05/13/2011 TRIAL SET: 082211 PTR 071211 01:30 HUTCHESON WK1
05/12/2011 SUPPLEMENTAL WITNESS LIST:
05/12/2011 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
05/12/2011 WAIVED RIGHT TO SPEEDY TRIAL:
05/12/2011 CONT. BY DEF.:

04/26/2011 ORDER GRANTING: DEF'S MOT.IN LIMINE
04/26/2011 ORDER DENYING:DEF'S MOT.TO SUPPRESS STATEMENTS MADE 12/21/09
04/26/2011 ORDER DENYING:DEF'S MOT.TO SUPPRESS STATEMENTS & PHONE CALLS
04/26/2011 ORDER DENYING:DEF'S MOT.TO SUPPRESS STATEMENTS & RECORDS
04/26/2011 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
04/26/2011 TEXT MOTIONS - GRANTED/DENIED IN PART
04/21/2011 TEXT -SUPPRESS STATEMENTS & RECORDS
04/21/2011 MOTION: (ST'S) TO STRIKE DEF'S MOT/RESP.TO DEF'S MOT.TO
04/21/2011 TEXT -STATEMENTS & PHONE CALLS
04/21/2011 MOTION: (ST'S) TO STRIKE/RESP.TO THE DEF'S MOT.TO SUPPRESS
04/21/2011 STATES RESPONSE: TO DEF'S MOT.IN LIMINE
04/21/2011 STATES RESPONSE: TO THE DEF'S MOT.TO SUPPRESS STMTS.
04/21/2011 NOTICE OF TRIAL - 051611
04/20/2011 NOTICE OF TAKING DEPOSITION: 5/11/11(SEE NOTICE)
04/20/2011 HEARING SET FOR: 042611 HUTCHESON CR#1-JC.DB WK1
04/19/2011 FILE SENT TO: JDG HUTCHESON *RET'D 4-26-11*
04/12/2011 MOTION: IN LIMINE
04/12/2011 MOTION TO SUPPRESS: STATEMENTS
04/12/2011 MOTION TO SUPPRESS: STATEMENTS AND PHONE CALLS
04/12/2011 MOTION: IN LIMINE
04/12/2011 MOTION TO SUPPRESS: STATEMENTS AND RECORDS
04/12/2011 NOTICE OF HEARING: 4/26/11 8:30AM HUTCHESON(MOTION)
04/12/2011 TRIAL SET: 051611 DKS 051211 01:30 HUTCHESON WK1
04/12/2011 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
03/21/2011 NOTICE OF TRIAL - 051611
02/23/2011 SUPPLEMENTAL WITNESS LIST:
02/18/2011 TRIAL SET: 051611 PTR 041211 01:30 HUTCHESON WK1
02/15/2011 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 02
02/15/2011 CONT. BY DEF.:
01/31/2011 NOTICE OF TAKING DEPOSITION: 2/24/11(SEE NOTICE)
01/21/2011 NOTICE OF TRIAL - 032111
01/18/2011 NOTICE OF TAKING DEPOSITION: 2-24-11 @ 130PM//SEE NOTICE
12/01/2010 TRIAL SET: 032111 PTR 021511 01:30 HUTCHESON WK1
11/30/2010 RCV'D CORRESPONDENCE FROM DEF:TO COURT
11/30/2010 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
11/30/2010 CONT. BY DEF.:
11/19/2010 NOTICE OF PTL OR DKS/TRL RET'D:MOVED, LEFT NO ADDRESS
11/12/2010 NOTICE OF TRIAL - 011811
11/08/2010 TEXT CASE RESET: TRL 011811 PTR 113010 HUTCHESON
10/27/2010 NOTICE OF TAKING DEPOSITION: 12/07/10 @ 9:00 ETC, SEE NOTICE
10/27/2010 NOTICE OF TAKING DEPOSITION: 12/09/10 @ 9:30 SEE NOTICE
10/27/2010 NOTICE OF TAKING DEPOSITION: 12/09/10 @ 10:15 SEE NOTICE
10/18/2010 SUPPLEMENTAL WITNESS LIST:
10/14/2010 TRIAL SET: 011711 PTR 113010 01:30 HUTCHESON WK1
10/12/2010 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01

10/12/2010 CONT. BY DEF.:
09/17/2010 NOTICE OF TRIAL - 111510
08/26/2010 SUPPLEMENTAL WITNESS LIST: DISCOVERY
08/12/2010 TRIAL SET: 111510 PTR 101210 01:30 HUTCHESON WK1
08/10/2010 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
08/10/2010 CONT. BY DEF.:
08/04/2010 SUPPLEMENTAL WITNESS LIST:
07/20/2010 NOTICE OF TRIAL - 092010
07/12/2010 MOTION FOR CONTINUANCE: AND NOTICE OF CONFLICT
07/08/2010 CONT. BY DEF.:
07/08/2010 TRIAL SET: 092010 PTR 081010 01:30 HUTCHESON WK1
07/08/2010 ORDER GRANTING CONTINUANCE: OF 071310 PTL
07/08/2010 MOTION FOR CONTINUANCE: OF 071310 PTL (FAX)
06/24/2010 NOTICE OF PTL OR DKS/TRL RET'D:MOVED LEFT NO ADDRESS
06/21/2010 NOTICE OF TRIAL - 081610
05/14/2010 TRIAL SET: 081610 PTR 071310 01:30 HUTCHESON WK1
05/11/2010 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
05/11/2010 CONT. BY DEF.:
05/11/2010 WAIVED RIGHT TO SPEEDY TRIAL:
04/16/2010 NOTICE OF TRIAL - 062110
02/09/2010 TRIAL SET: 062110 PTR 051110 01:30 HUTCHESON WK1
02/09/2010 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
02/09/2010 WAIVED RIGHT TO SPEEDY TRIAL:
02/09/2010 CONT. BY DEF.:
01/25/2010 SUPPLEMENTAL WITNESS LIST:
01/25/2010 NOTICE OF PTL OR DKS/TRL RET'D:RETURN TO SENDER
01/15/2010 NOTICE OF TRIAL - 031510
01/06/2010 SUPPLEMENTAL WITNESS LIST:
12/01/2009 TRIAL SET: 031510 PTR 020910 01:30 HUTCHESON WK1
12/01/2009 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
12/01/2009 WAIVED RIGHT TO SPEEDY TRIAL:
12/01/2009 CONT. BY DEF.:
11/18/2009 DEMAND FOR RECIPROCAL DISCLOSURE:
11/18/2009 STATE'S DISCOVERY EXHIBIT W/WITNESS LIST:
11/13/2009 NOTICE OF PTL OR DKS/TRL RET'D:UNABLE TO FORWARD
11/06/2009 NOTICE OF TRIAL - 011910
10/22/2009 NOTICE OF ARN. RET'D: ATTEMPTED NOT KNOWN
10/15/2009 TRIAL SET: 011910 PTR 120109 01:30 HUTCHESON WK1
10/13/2009 NOTICE OF ARRAIGNMENT - 102809
10/09/2009 TEXT OF PARTICULARS AND REQUEST FOR JURY TRIAL BY MICHAEL NIELSEN
10/09/2009 NOTICE OF APPEARANCE: WPNG, DEMAND FOR DISCOVERY, STATEMENT
10/09/2009 ORDER: ON STATES ORAL MOTN. FOR TRANSPORT
10/09/2009 RECEIVED NOTICE OF APPEARANCE PLEADINGS(S)MICHEL NEILSEN
10/07/2009 ARR. SET FOR:102809 HUTCHESON @08:30CR#1-JC.DB WK 1
10/07/2009 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01

10/07/2009 PASSED AT: ARN DEF NEEDS TO APPEAR
09/29/2009 NOTICE OF ARN. RET'D: MOVED LEFT NO ADDRESS
09/22/2009 NOTICE OF ARRAIGNMENT - 100709
09/16/2009 ARR. SET FOR:100709 HUTCHESON @08:30CR#1-JC.DB WK 1
09/16/2009 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
09/16/2009 PASSED AT: ARN FOR COUNSEL TO APPEAR
09/04/2009 NOTICE OF ARN. RET'D: UNABLE TO FORWARD
09/01/2009 NOTICE OF ARRAIGNMENT - 091609
08/31/2009 TEXT APPOINT REGIONAL CONFLICT COUNSEL
08/31/2009 ORDER: ALLOWING PUB.DEF.TO W/DRAW AND
08/28/2009 MOTION TO WITHDRAW: & APPT REGIONAL CONFLICT COUNSEL
08/27/2009 ORIGINAL WARRANT/CAPIAS RECEIVED: 09081005
08/27/2009 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
08/27/2009 BOND SET AT: 0000000.00 NONE ALLOW.@ 1ST APP.
08/27/2009 PROBABLE CAUSE FOUND:
08/27/2009 PUBLIC DEFENDER APPOINTED:
08/27/2009 CAPIAS RET. EXECUTED: 09081005
08/27/2009 BOOKING/ARREST REPORT:
08/26/2009 TEXT CHRG 1 UPDATED: F/ROBBERY W/DEADLY WEAPON
08/26/2009 FILE SENT TO: DB FELONY ATTN:HUTCHESON CLERK**RECV'D8/27/09*
08/26/2009 ARR. SET FOR:091609 HUTCHESON @08:30CR#1-JC.DB WK 1
08/26/2009 BOND SET AT: 0000000.00/NONE PER JDG.CLAYTON
08/26/2009 CAPIAS TO SHERIFF: GRAND JURY INDICTMENT
08/26/2009 INDICTMENT: FIRST DEGREE FELONY MURDER
08/26/2009 INDICTMENT: ROBB.W/A FIREARM/DEAD WEAP.
08/26/2009 TRIAL SET: 100509PTR09150908:15 **REMOVED**
08/26/2009 COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
08/26/2009 PUBLIC DEF. APP.-PLEA NOT GUILTY:
08/26/2009 INDIGENT APPL.FEE ASSESSED: 50.00
08/26/2009 AFFIDAVIT OF INDIGENCE/INDIGENT/ORDER APPT.PD:
08/24/2009 NOTICE OF ARN. RET'D: MOVED;LEFT NO ADDRESS
08/13/2009 NOTICE OF ARRAIGNMENT - 082609
07/28/2009 INFORMATION FILED: ROBBERY W/A FIREARM/DEAD.WEAP.
07/27/2009 ARR. SET FOR:082609 CLAYTON @08:15CR4C-CRTHS.DL WK 1
07/22/2009 PUBLIC ACCESS RESTRICTION REMOVED
07/22/2009 TEXT RE-ARREST BOOKING # CHANGED FROM CLERK TO WS736230
07/22/2009 TEXT CHRG 1 UPDATED: F/ROBBERY W/DEADLY WEAPON
07/22/2009 TEXT FIX "F" AND "L" SCREENS
07/21/2009 ORIGINAL WARRANT/CAPIAS RECEIVED: 09070787
07/21/2009 WRT. RETURNED EXECUTED: 09070787
07/21/2009 NON-PUBLIC CASE - VIEWING ACCESS RESTRICTED
07/21/2009 BOND SET AT: 0000000.00 (NONE) PER JDG PARSONS (7/17/09)
07/21/2009 WARRANT TO SHERIFF: PER SAO (7/17/09)
07/21/2009 COMPLAINT:
07/21/2009 TEXT A/O: EWPD/ECKERSEN

07/21/2009	DATE OF OFFENSE: 062409
07/21/2009	PLACE OF OFFENSE: 2232 VICTORY PALM DR,EDGEWATER
07/21/2009	ADDR LEGACY DATA CODE MAIL ADR: 2232 VICTORY PALM DR
07/21/2009	ADDR LEGACY DATA CODE EDGEWATER FL 32141
07/21/2009	ADDR LEGACY DATA CODE SA761 ADR: 2232 VICTORY PALM DRIVE
07/21/2009	ADDR LEGACY DATA CODE EDGEWATER FL 32141
07/21/2009	TEXT NO ARREST-NTA/COMPLAINT:F/ROBBERY W/DEADLY WEAPON
07/18/2009	COURT ACTION FORM FILED NUMBER OF COURT ACTION FORMS USED: 01
07/18/2009	BOOKING/ARREST REPORT: REF: XX83793CFAES
07/17/2009	TEXT NO ARREST-NTA/COMPLAINT:F/GJI ROBERY W/F/A (CLAYTON)
07/17/2009	TEXT NO ARREST-NTA/COMPLAINT:F/GJI 1ST DEG MURDER (CLAYTON)

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, **FSC SC13-2091**
v. **VOLUSIA CO. 2009-CF-002872XXXAWS**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE TO STATE ATTORNEY OF AFFIRMANCE OF DEATH PENALTY

TO: R.J. LARIZZA, STATE ATTORNEY
SEVENTH JUDICIAL CIRCUIT

The Attorney General of the State of Florida, pursuant to Florida Rule of Criminal Procedure 3.852(d)(1), gives notice that on the 29th day of October, 2015, the Florida Supreme Court issued its mandate affirming the death sentence in this case.

Within 15 days of receipt of this notice, you should provide written notice to each law enforcement agency involved in this case.

Within 90 days after receipt of this notice, you and each law enforcement agency involved in this case, should copy, seal, index, and deliver to the records repository of the Secretary of State all public records, except for those filed in the trial court, which were produced in the investigation or prosecution of this case.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on R.J. Larizza, State Attorney, larizzar@sao7.org, Seventh Judicial Circuit, 251 N. Ridgewood Avenue,

3rd Floor, Daytona Beach, FL 32114; Rosemary Calhoun, Assistant State Attorney, calhounr@sao7.org, 440 S. Beach Street, Daytona Beach, FL 32114; Edwin L. Davis, Assistant State Attorney, davise@sao7.org, 440 S. Beach Street, Daytona Beach, FL 32114; J. Ryan Will, Assistant State Attorney, willr@sao7.org, 440 S. Beach Street, Daytona Beach, FL 32114; Michael W. Nielsen, Esquire, nielsenlaw@cfl.rr.com, 720 West State Road 434, Winter Springs, FL 32708; Christopher L. Smith, Esquire, chrislegalcounsel@yahoo.com, 605 E. Robinson Street, Suite 250, Orlando, FL 32801; Michael Reiter, Esquire, rccmarion@rc5state.com and mreiter@rc5state.com, Office of Criminal Conflict and Civil Regional Counsel, 5th District, 307 N.W. 3rd Street, Ocala, FL 34475; and James Viggiano, Esquire, viggiano@ccmr.state.fl.us, and support@ccmr.state.fl.us, CCRC-Middle, 3801 Corporex Drive, Suite 210, Tampa, FL 33619, on this 2nd day of November, 2015.

/S/ Stacey E. Kircher

STACEY E. KIRCHER
ASSISTANT ATTORNEY GENERAL
FL. BAR #50218
444 Seabreeze Blvd., 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax (386) 226-0457
stacey.kircher@myfloridalegal.com
CapApp@MyFloridaLegal.com

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, **FSC SC13-2091**
v. **VOLUSIA CO. 2009-CF-002872XXXAWS**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE TO SECRETARY OF DEPARTMENT OF CORRECTIONS OF AFFIRMANCE OF DEATH PENALTY

TO: JULIE L. JONES
SECRETARY, DEPARTMENT OF CORRECTIONS

The Attorney General of the State of Florida, pursuant to Florida Rule of Criminal Procedure 3.852(d)(1), gives notice that on the 29th day of October, 2015, the Florida Supreme Court issued its mandate affirming the death sentence in this case.

Within 15 days of receipt of this notice, you should provide written notice to each law enforcement agency involved in this case.

Within 90 days after receipt of this notice, you and each law enforcement agency involved in this case, should copy, seal, index, and deliver to the records repository of the Secretary of State all public records, except for those filed in the trial court, which were produced in the investigation or prosecution of this case.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on

Julie L. Jones, Secretary, Department of Corrections, jones.julie@mail.dc.state.fl.us; Rana Wallace, Assistant General Counsel, Department of Corrections, wallace.rana@mail.dc.state.fl.us; 501 South Calhoun Street, Tallahassee, FL 32399-2500; R.J. Larizza, State Attorney, larizzar@sao7.org, Seventh Judicial Circuit, 251 N. Ridgewood Avenue, 3rd Floor, Daytona Beach, FL 32114; Rosemary Calhoun, Assistant State Attorney, calhounr@sao7.org, 440 S. Beach Street, Daytona Beach, FL 32114; Edwin L. Davis, Assistant State Attorney, davise@sao7.org, 440 S. Beach Street, Daytona Beach, FL 32114; J. Ryan Will, Assistant State Attorney, willr@sao7.org, 440 S. Beach Street, Daytona Beach, FL 32114; Michael W. Nielsen, Esquire, nielsenlaw@cfl.rr.com, 720 West State Road 434, Winter Springs, FL 32708; Christopher L. Smith, Esquire, chrislegalcounsel@yahoo.com, 605 E. Robinson Street, Suite 250, Orlando, FL 32801; Michael Reiter, Esquire, rccmarion@rc5state.com and mreiter@rc5state.com, Office of Criminal Conflict and Civil Regional Counsel, 5th District, 307 N.W. 3rd Street, Ocala, FL 34475; and James Viggiano, Esquire, viggiano@ccmr.state.fl.us, and support@ccmr.state.fl.us, CCRC-Middle, 3801 Corporex Drive, Suite 210, Tampa, FL 33619, on this 2nd day November, 2015.

/S/ Stacey E. Kircher

STACEY E. KIRCHER
ASSISTANT ATTORNEY GENERAL
FL. BAR #50218
444 Seabreeze Blvd., 5th FL
Daytona Beach, FL 32118
(386) 238-4990
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stacey.kircher@myfloridalegal.com
CapApp@MyFloridaLegal.com

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

**NOTICE OF APPEARANCE
OF POST-CONVICTION CAPITAL COLLATERAL COUNSEL**

Please take notice in accordance with the Supreme Court of Florida's order appointing the Law Office of the Capital Collateral Regional Counsel-Middle Region dated Thursday, October 29, 2015, that Raheela Ahmed, Assistant Capital Collateral Counsel, Maria Christine Perinetti, Assistant Collateral Counsel, and Donna Ellen Venable, Assistant Capital Collateral Counsel hereby enter their appearances as counsel in the above-captioned action. The official status of counsel in the instant case should reflect the following:

JAMES VINCENT VIGGIANO, JR.
CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE

RAHEELA AHMED
ASSISTANT CCRC

MARIA CHRISTINE PERINETTI
ASSISTANT CCRC

DONNA ELLEN VENABLE
ASSISTANT CCRC

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar Number 0013837
Email: perinetti@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/ Donna Ellen Venable
Donna Ellen Venable
Florida Bar No. 100816
Email: venable@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33607
Tel: (813) 740-3544
Fax: (813) 740-3554

-30-

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing **Notice of Appearance of Post-Conviction Capital Collateral Counsel** has been transmitted to this Court through the Florida Courts E-Filing Portal on this 4th day of November, 2015.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has also been served upon the Clerk for the **Supreme Court of Florida**, 500 South Duval Street, Tallahassee, Florida 32399, through the Florida Courts E-Filing Portal on this 4th day of November, 2015.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via electronic mail to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com on this 4th day of November, 2015.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via electronic mail to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com on this 4th day of November, 2015.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; to the **Honorable R. Michael Hutcheson**, Seventh Judicial Circuit in and for Volusia County, Division 41, 251 North Ridgewood Avenue, Daytona Beach Florida 32114; to **Jeffrey Duane Deen, Esquire**, Office of the Criminal Conflict and Civil Regional Counsel, 101 Sunnytown Road, Suite 310, Casselberry, Florida 32707; **Michael Paul Reiter, Esquire**, 4 Mulligan Ct, Ocala, Florida 34472; to **Christopher Lillard Smith, Esquire**, 605 East Robinson Street, Suite 250, Orlando, Florida 32801; to **Michael William Nielsen, Esquire**, 720 West State Road 434, Winter Springs, Florida 32708; to **Joseph Ryan Will, Assistant State Attorney**, Office of the State Attorney, Seventh Judicial Circuit, 440 South Beach Street, Daytona Beach, Florida 32114; and to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 4th day of November, 2015.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33607
Tel: (813) 740-3544
Fax: (813) 740-3554

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

CASE NO: 2009 002872 CFAES

JOSEPH EDWARD JORDAN
DEFENDANT.
_____/

NOTICE TO THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT, ENFORCEMENT AND INVESTIGATIVE SUPPORT OF AFFIRMANCE OF DEATH PENALTY AND TO PRODUCE PUBLIC RECORDS

State Attorney R.J. LARIZZA, pursuant to Florida Rules of Criminal Procedure 3.852 (d) (1), gives notice that on the 29th day of October, 2015, the Florida Supreme Court issued its mandate affirming the death penalty in this case.

Within ninety (90) days after receipt of this notice, you and each law enforcement agency involved in this case should copy, seal, index, and deliver to the records repository of the Secretary of State all public records determined by your agency to be relevant to the subject matter of a proceeding under Florida Rules of Criminal Procedure 3.850 or 3.851, unless the production of such records would be unduly burdensome.

Additionally, pursuant to Florida Rules of Criminal Procedure 3.852 (e) (4), the head of your agency should provide written notification to the Attorney General of compliance with this section including certifying that, to the best of the agency head's knowledge or belief, all such public records in possession of the agency have been copied, indexed, and delivered to the records repository.

Your agency case numbers are as follows:

FDLE SEX OFFENDER DATABASE REPORT 234588
DECEDENT: KEITH COPE

FILED
2015 NOV 13 PM 4:28
CLERK OF THE CIRCUIT & COUNTY COURT VOLUSIA CTY., FL
CC 45

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to: Tanya Weldon of The Florida Department of Law Enforcement, Enforcement & Investigative Support, PO BOX 1489, Tallahassee, Florida 32302; to the Honorable J. Terence R. Perkins, S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; to Stacey E. Kircher, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, Florida 32118; to Raheela Ahmed, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; to Maria Christine Perinetti, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; and to Donna Ellen Venable, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 this 12th day of November 2015.

ROSEMARY L. CALHOUN
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0611700
251 N. Ridgewood Avenue
Daytona Beach, FL 32114
(386) 239-7710

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

CASE NO: 2009 002872 CFAES

JOSEPH EDWARD JORDAN
DEFENDANT.
_____/

NOTICE TO THE US MARSHALLS OFFICE MID-FLORIDA OF AFFIRMANCE OF DEATH PENALTY AND TO PRODUCE PUBLIC RECORDS

State Attorney R.J. LARIZZA, pursuant to Florida Rules of Criminal Procedure 3.852 (d) (1), gives notice that on the 29th day of October, 2015, the Florida Supreme Court issued its mandate affirming the death penalty in this case.

Within ninety (90) days after receipt of this notice, you and each law enforcement agency involved in this case should copy, seal, index, and deliver to the records repository of the Secretary of State all public records determined by your agency to be relevant to the subject matter of a proceeding under Florida Rules of Criminal Procedure 3.850 or 3.851, unless the production of such records would be unduly burdensome.

Additionally, pursuant to Florida Rules of Criminal Procedure 3.852 (e) (4), the head of your agency should provide written notification to the Attorney General of compliance with this section including certifying that, to the best of the agency head's knowledge or belief, all such public records in possession of the agency have been copied, indexed, and delivered to the records repository.

Your agency case numbers are as follows:

VCSO AGENCY #: 0927090
DECEDENT: KEITH COPE

FILED
2015 NOV 13 PM 4:28
CLERK OF THE CIRCUIT & COUNTY COURT VOLUSIA CTY, FL
CC 45

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to: Ross Moser of the US Marshalls Office, Mid Florida, 401 W. Central Blvd., Suite 2300, Orlando, FL 32801; to the Honorable J. Terence R. Perkins, S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; to Stacey E. Kircher, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, Florida 32118; to Raheela Ahmed, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; to Maria Christine Perinetti, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; and to Donna Ellen Venable, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 this 12th day of November 2015.

ROSEMARY L. CALHOUN
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0611700
251 N. Ridgewood Avenue
Daytona Beach, FL 32114
(386) 239-7710

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

CASE NO: 2009 002872 CFAES

JOSEPH EDWARD JORDAN
DEFENDANT.
_____/

NOTICE TO THE DEPARTMENT OF PUBLIC PROTECTION, DIVISION OF EMERGENCY MEDICAL SERVICES OF AFFIRMANCE OF DEATH PENALTY AND TO PRODUCE PUBLIC RECORDS

State Attorney R.J. LARIZZA, pursuant to Florida Rules of Criminal Procedure 3.852 (d) (1), gives notice that on the 29th day of October, 2015, the Florida Supreme Court issued its mandate affirming the death penalty in this case.

Within ninety (90) days after receipt of this notice, you and each law enforcement agency involved in this case should copy, seal, index, and deliver to the records repository of the Secretary of State all public records determined by your agency to be relevant to the subject matter of a proceeding under Florida Rules of Criminal Procedure 3.850 or 3.851, unless the production of such records would be unduly burdensome.

Additionally, pursuant to Florida Rules of Criminal Procedure 3.852 (e) (4), the head of your agency should provide written notification to the Attorney General of compliance with this section including certifying that, to the best of the agency head's knowledge or belief, all such public records in possession of the agency have been copied, indexed, and delivered to the records repository.

Your agency case numbers are as follows:

REPORT/RUN 09-36705
DECEDENT: KEITH COPE

FILED
2015 NOV 13 PM 4:28
CLERK OF THE CIRCUIT COURT VOLUSIA CTY, FL
CC 45

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to: John R. Zaragoza of the Department of Public Protection, Division of Emergency Medical Services, 112 Carswell Avenue, Holly Hill, Florida 32117; to the Honorable J. Terence R. Perkins, S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; to Stacey E. Kircher, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, Florida 32118; to Raheela Ahmed, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; to Maria Christine Perinetti, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; and to Donna Ellen Venable, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 this 12th day of November 2015.

Rosemary L. Calhoun

ROSEMARY L. CALHOUN
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0611700
251 N. Ridgewood Avenue
Daytona Beach, FL 32114
(386) 239-7710

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

CASE NO: 2009 002872 CFAES

JOSEPH EDWARD JORDAN
DEFENDANT.
_____/

NOTICE TO THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT ORLANDO REGIONAL CRIME LABORATORIES OF AFFIRMANCE OF DEATH PENALTY AND TO PRODUCE PUBLIC RECORDS

State Attorney R.J. LARIZZA, pursuant to Florida Rules of Criminal Procedure 3.852 (d) (1), gives notice that on the 29th day of October, 2015, the Florida Supreme Court issued its mandate affirming the death penalty in this case.

Within ninety (90) days after receipt of this notice, you and each law enforcement agency involved in this case should copy, seal, index, and deliver to the records repository of the Secretary of State all public records determined by your agency to be relevant to the subject matter of a proceeding under Florida Rules of Criminal Procedure 3.850 or 3.851, unless the production of such records would be unduly burdensome.

Additionally, pursuant to Florida Rules of Criminal Procedure 3.852 (e) (4), the head of your agency should provide written notification to the Attorney General of compliance with this section including certifying that, to the best of the agency head's knowledge or belief, all such public records in possession of the agency have been copied, indexed, and delivered to the records repository.

Your agency case numbers are as follows:

2009-07-02064 (REFERENCE EDGEWATER POLICE DEPARTMENT # 090603 77)
DECEDENT: KEITH COPE

FILED
2015 NOV 13 PM 4:28
CLERK OF THE CIRCUIT
CTY. COURT VOLUSIA CTY., FL
CC 45

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to: Lori Napolitano of The Florida Department of Law Enforcement, Orlando Regional Crime Laboratories, 500 West Robinson Street, Orlando, Florida 32801; to the Honorable J. Terence R. Perkins, S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; to Stacey E. Kircher, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, Florida 32118; to Raheela Ahmed, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; to Maria Christine Perinetti, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; and to Donna Ellen Venable, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 this 12th day of November 2015.

Rosemary L. Calhoun

ROSEMARY L. CALHOUN
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0611700
251 N. Ridgewood Avenue
Daytona Beach, FL 32114
(386) 239-7710

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

CASE NO: 2009 002872 CFAES

JOSEPH EDWARD JORDAN
DEFENDANT.
_____/

NOTICE TO THE BROWARD COUNTY STATE ATTORNEY'S OFFICE OF AFFIRMANCE OF DEATH PENALTY AND TO PRODUCE PUBLIC RECORDS

State Attorney R.J. LARIZZA, pursuant to Florida Rules of Criminal Procedure 3.852 (d) (1), gives notice that on the 29th day of October, 2015, the Florida Supreme Court issued its mandate affirming the death penalty in this case.

Within ninety (90) days after receipt of this notice, you and each law enforcement agency involved in this case should copy, seal, index, and deliver to the records repository of the Secretary of State all public records determined by your agency to be relevant to the subject matter of a proceeding under Florida Rules of Criminal Procedure 3.850 or 3.851, unless the production of such records would be unduly burdensome.

Additionally, pursuant to Florida Rules of Criminal Procedure 3.852 (e) (4), the head of your agency should provide written notification to the Attorney General of compliance with this section including certifying that, to the best of the agency head's knowledge or belief, all such public records in possession of the agency have been copied, indexed, and delivered to the records repository.

Your agency case numbers are as follows:

90-17686CF10A
DECEDENT: KEITH COPE

FILED
2015 NOV 13 PM 4:28
CLERK OF THE CIRCUIT & CTY. COURT VOLUSIA CTY. FL
CC 45

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to: State Attorney Michael Satz of The Broward State Attorney's Office, 201 Southeast 6th Street, Ft. Lauderdale, Florida 33301; to the Honorable J. Terence R. Perkins, S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; to Stacey E. Kircher, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, Florida 32118; to Raheela Ahmed, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; to Maria Christine Perinetti, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; and to Donna Ellen Venable, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 this 12th day of November 2015.

ROSEMARY L. CALHOUN
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0611700
251 N. Ridgewood Avenue
Daytona Beach, FL 32114
(386) 239-7710

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

CASE NO: 2009 002872 CFAES

JOSEPH EDWARD JORDAN
DEFENDANT.
_____/

NOTICE TO THE BROWARD COUNTY SHERIFF'S OFFICE OF AFFIRMANCE OF DEATH PENALTY AND TO PRODUCE PUBLIC RECORDS

State Attorney R.J. LARIZZA, pursuant to Florida Rules of Criminal Procedure 3.852 (d) (1), gives notice that on the 29th day of October, 2015, the Florida Supreme Court issued its mandate affirming the death penalty in this case.

Within ninety (90) days after receipt of this notice, you and each law enforcement agency involved in this case should copy, seal, index, and deliver to the records repository of the Secretary of State all public records determined by your agency to be relevant to the subject matter of a proceeding under Florida Rules of Criminal Procedure 3.850 or 3.851, unless the production of such records would be unduly burdensome.

Additionally, pursuant to Florida Rules of Criminal Procedure 3.852 (e) (4), the head of your agency should provide written notification to the Attorney General of compliance with this section including certifying that, to the best of the agency head's knowledge or belief, all such public records in possession of the agency have been copied, indexed, and delivered to the records repository.

Your agency case numbers are as follows:

09802465
DECEDENT: KEITH COPE

FILED
2015 NOV 13 PM 4:28
CLERK OF THE CIRCUIT
CTY. COURT VOLUSIA CTY., FL
CC 45

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to: Sheriff Israel of The Broward County Sheriff's Office, 2601 W. Broward Blvd., Ft. Lauderdale, Florida 33312; to the Honorable J. Terence R. Perkins, S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; to Stacey E. Kircher, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, Florida 32118; to Raheela Ahmed, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; to Maria Christine Perinetti, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; and to Donna Ellen Venable, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 this 12th day of November 2015.

Rosemary L Calhoun

ROSEMARY L CALHOUN
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0611700
251 N. Ridgewood Avenue
Daytona Beach, FL 32114
(386) 239-7710

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

CASE NO: 2009 002872 CFAES

JOSEPH EDWARD JORDAN
DEFENDANT.
_____/

NOTICE TO THE DISTRICT 7 MEDICAL EXAMINER OF AFFIRMANCE OF DEATH PENALTY AND TO PRODUCE PUBLIC RECORDS

State Attorney R.J. LARIZZA, pursuant to Florida Rules of Criminal Procedure 3.852 (d) (1), gives notice that on the 29th day of October, 2015, the Florida Supreme Court issued its mandate affirming the death penalty in this case.

Within ninety (90) days after receipt of this notice, you and each law enforcement agency involved in this case should copy, seal, index, and deliver to the records repository of the Secretary of State all public records determined by your agency to be relevant to the subject matter of a proceeding under Florida Rules of Criminal Procedure 3.850 or 3.851, unless the production of such records would be unduly burdensome.

Additionally, pursuant to Florida Rules of Criminal Procedure 3.852 (e) (4), the head of your agency should provide written notification to the Attorney General of compliance with this section including certifying that, to the best of the agency head's knowledge or belief, all such public records in possession of the agency have been copied, indexed, and delivered to the records repository.

Your agency case numbers are as follows:

09-07-364
DECEDENT: KEITH COPE

FILED
2015 NOV 13 PM 4:28
CLERK OF THE CIRCUIT
& CTY. COURT VOLUSIA CTY., FL
CC 45

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to: Chief Herrmann of The District 7 Medical Examiner's Office, 1360 Indian Lake Road, Daytona Beach, Florida 32124; to the Honorable J. Terence R. Perkins, S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; to Stacey E. Kircher, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, Florida 32118; to Raheela Ahmed, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; to Maria Christine Perinetti, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; and to Donna Ellen Venable, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 this 12th day of November 2015.

ROSEMARY L. CALHOUN
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0611700
251 N. Ridgewood Avenue
Daytona Beach, FL 32114
(386) 239-7710

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

CASE NO: 2009 002872 CFAES

JOSEPH EDWARD JORDAN
DEFENDANT.
_____/

NOTICE TO THE VOLUSIA COUNTY SHERIFF'S OFFICE OF AFFIRMANCE OF DEATH PENALTY AND TO PRODUCE PUBLIC RECORDS

State Attorney R.J. LARIZZA, pursuant to Florida Rules of Criminal Procedure 3.852 (d) (1), gives notice that on the 29th day of October, 2015, the Florida Supreme Court issued its mandate affirming the death penalty in this case.

Within ninety (90) days after receipt of this notice, you and each law enforcement agency involved in this case should copy, seal, index, and deliver to the records repository of the Secretary of State all public records determined by your agency to be relevant to the subject matter of a proceeding under Florida Rules of Criminal Procedure 3.850 or 3.851, unless the production of such records would be unduly burdensome.

Additionally, pursuant to Florida Rules of Criminal Procedure 3.852 (e) (4), the head of your agency should provide written notification to the Attorney General of compliance with this section including certifying that, to the best of the agency head's knowledge or belief, all such public records in possession of the agency have been copied, indexed, and delivered to the records repository.

Your agency case numbers are as follows:

0927090
DECEDENT: KEITH COPE

FILED
2015 NOV 13 PM 4:28
CLERK OF THE CIRCUIT
COUNTY VOLUSIA CTY. FL
CC 45

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to: Sheriff Ben Johnson of The Volusia County Sheriff's Office, 1330 Indian Lake Road, Daytona Beach, Florida 32124; to the Honorable J. Terence R. Perkins, S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; to Stacey E. Kircher, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, Florida 32118; to Raheela Ahmed, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; to Maria Christine Perinetti, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; and to Donna Ellen Venable, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 this 12th day of November 2015.

ROSEMARY L. CALHOUN
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0611700
251 N. Ridgewood Avenue
Daytona Beach, FL 32114
(386) 239-7710

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

CASE NO: 2009 002872 CFAES

JOSEPH EDWARD JORDAN
DEFENDANT.
_____/

NOTICE TO THE EDGEWATER FIRE DEPARTMENT OF AFFIRMANCE OF DEATH PENALTY AND TO PRODUCE PUBLIC RECORDS

State Attorney R.J. LARIZZA, pursuant to Florida Rules of Criminal Procedure 3.852 (d) (1), gives notice that on the 29th day of October, 2015, the Florida Supreme Court issued its mandate affirming the death penalty in this case.

Within ninety (90) days after receipt of this notice, you and each law enforcement agency involved in this case should copy, seal, index, and deliver to the records repository of the Secretary of State all public records determined by your agency to be relevant to the subject matter of a proceeding under Florida Rules of Criminal Procedure 3.850 or 3.851, unless the production of such records would be unduly burdensome.

Additionally, pursuant to Florida Rules of Criminal Procedure 3.852 (e) (4), the head of your agency should provide written notification to the Attorney General of compliance with this section including certifying that, to the best of the agency head's knowledge or belief, all such public records in possession of the agency have been copied, indexed, and delivered to the records repository.

Your agency case numbers are as follows:

2009009552
DECEDENT: KEITH COPE

FILED
2015 NOV 13 PM 4:28
CLERK OF THE CIRCUIT & CTY. COURT VOLUSIA CTY., FL
CC 45

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to: Chief Cousins of The Edgewater Fire Department, 1605 South Ridgewood Avenue, Edgewater, Florida 32132; to the Honorable J. Terence R. Perkins, S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; to Stacey E. Kircher, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, Florida 32118; to Raheela Ahmed, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; to Maria Christine Perinetti, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; and to Donna Ellen Venable, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 this 12th day of November 2015.

ROSEMARY L. CALHOUN
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0611700
251 N. Ridgewood Avenue
Daytona Beach, FL 32114
(386) 239-7710

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

CASE NO: 2009 002872 CFAES

JOSEPH EDWARD JORDAN
DEFENDANT.
_____/

NOTICE TO THE EDGEWATER POLICE DEPARTMENT OF AFFIRMANCE OF DEATH PENALTY AND TO PRODUCE PUBLIC RECORDS

State Attorney R.J. LARIZZA, pursuant to Florida Rules of Criminal Procedure 3.852 (d) (1), gives notice that on the 29th day of October, 2015, the Florida Supreme Court issued its mandate affirming the death penalty in this case.

Within ninety (90) days after receipt of this notice, you and each law enforcement agency involved in this case should copy, seal, index, and deliver to the records repository of the Secretary of State all public records determined by your agency to be relevant to the subject matter of a proceeding under Florida Rules of Criminal Procedure 3.850 or 3.851, unless the production of such records would be unduly burdensome.

Additionally, pursuant to Florida Rules of Criminal Procedure 3.852 (e) (4), the head of your agency should provide written notification to the Attorney General of compliance with this section including certifying that, to the best of the agency head's knowledge or belief, all such public records in possession of the agency have been copied, indexed, and delivered to the records repository.

Your agency case numbers are as follows:
09060377
DECEDENT: KEITH COPE

FILED
2015 NOV 13 PM 4:29
CLERK OF THE CIRCUIT
CTY. COURT VOLUSIA CTY., FL
CC 45

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to: Chief Mackey of The Edgewater Police Department, 135 East Park Avenue, Edgewater, Florida 32132; to the Honorable J. Terence R. Perkins, S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; to Stacey E. Kircher, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, Florida 32118; to Raheela Ahmed, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; to Maria Christine Perinetti, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; and to Donna Ellen Venable, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 this 12th day of November 2015.

ROSEMARY H. CALHOUN
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0611700
251 N. Ridgewood Avenue
Daytona Beach, FL 32114
(386) 239-7710

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

CASE NO: 2009 002872 CFAES

JOSEPH EDWARD JORDAN
DEFENDANT.
_____/

NOTICE TO THE HOLLYWOOD POLICE DEPARTMENT OF AFFIRMANCE OF DEATH PENALTY AND TO PRODUCE PUBLIC RECORDS

State Attorney R.J. LARIZZA, pursuant to Florida Rules of Criminal Procedure 3.852 (d) (1), gives notice that on the 29th day of October, 2015, the Florida Supreme Court issued its mandate affirming the death penalty in this case.

Within ninety (90) days after receipt of this notice, you and each law enforcement agency involved in this case should copy, seal, index, and deliver to the records repository of the Secretary of State all public records determined by your agency to be relevant to the subject matter of a proceeding under Florida Rules of Criminal Procedure 3.850 or 3.851, unless the production of such records would be unduly burdensome.

Additionally, pursuant to Florida Rules of Criminal Procedure 3.852 (e) (4), the head of your agency should provide written notification to the Attorney General of compliance with this section including certifying that, to the best of the agency head's knowledge or belief, all such public records in possession of the agency have been copied, indexed, and delivered to the records repository.

Your agency case numbers are as follows:

R3309-019924 & R3307-014091
DECEDENT: KEITH COPE

FILED
2015 NOV 13 PM 4:29
CLERK OF THE CIRCUIT
CTY. COURT VOLUSIA CTY. FL
CC 45

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to: Chief Sanchez of The Hollywood Police Department, 3250 Hollywood Blvd., Hollywood, Florida 33021; to the Honorable J. Terence R. Perkins, S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; to Stacey E. Kircher, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, Florida 32118; to Raheela Ahmed, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; to Maria Christine Perinetti, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; and to Donna Ellen Venable, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 this 12th day of November 2015.

ROSEMARY L. CALHOUN
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0611700
251 N. Ridgewood Avenue
Daytona Beach, FL 32114
(386) 239-7710

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

CASE NO: 2009 002872 CFAES

JOSEPH EDWARD JORDAN
DEFENDANT.
_____/

NOTICE TO THE FORT LAUDERDALE POLICE DEPARTMENT OF AFFIRMANCE OF DEATH PENALTY AND TO PRODUCE PUBLIC RECORDS

State Attorney R.J. LARIZZA, pursuant to Florida Rules of Criminal Procedure 3.852 (d) (1), gives notice that on the 29th day of October, 2015, the Florida Supreme Court issued its mandate affirming the death penalty in this case.

Within ninety (90) days after receipt of this notice, you and each law enforcement agency involved in this case should copy, seal, index, and deliver to the records repository of the Secretary of State all public records determined by your agency to be relevant to the subject matter of a proceeding under Florida Rules of Criminal Procedure 3.850 or 3.851, unless the production of such records would be unduly burdensome.

Additionally, pursuant to Florida Rules of Criminal Procedure 3.852 (e) (4), the head of your agency should provide written notification to the Attorney General of compliance with this section including certifying that, to the best of the agency head's knowledge or belief, all such public records in possession of the agency have been copied, indexed, and delivered to the records repository.

Your agency case numbers are as follows:

P091790190
DECEDENT: KEITH COPE

FILED
2015 NOV 13 PM 4:29
CLERK OF THE CIRCUIT & CTY. COURT VOLUSIA CTY. FL
CC 45

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to: Chief Adderley of The Fort Lauderdale Police Department, 1300 W. Broward Blvd., Ft. Lauderdale, Florida 33312; to the Honorable J. Terence R. Perkins, S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; to Stacey E. Kircher, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, Florida 32118; to Raheela Ahmed, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; to Maria Christine Perinetti, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; and to Donna Ellen Venable, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 this 12th day of November 2015.

Rosemary L Calhoun

ROSEMARY L. CALHOUN
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0611700
251 N. Ridgewood Avenue
Daytona Beach, FL 32114
(386) 239-7710

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO.: 2009-002872-CFAWS
DIVISION: 41

STATE OF FLORIDA,

vs.

JOSEPH EDWARD JORDAN,

Defendant.
_____/

ORDER OF ASSIGNMENT

The Florida Supreme Court having issued a mandate related to this case on October 29, 2015 in which it directed the undersigned chief judge to assign this case to a judge qualified to handle capital cases (see SC10-1771); therefore

I, Terence R. Perkins, Chief Judge of the Seventh Judicial Circuit of Florida, hereby assign this cause to Judge Terence R. Perkins (Div. 41) to determine said cause and to dispose of all matters considered by him therein.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida this 24 day of November, 2015.

TERENCE R. PERKINS
CIRCUIT JUDGE

Copies to:

Rosemary L. Calhoun
James Vincent Viggiano, Jr. - viggiano@ccmr.state.fl.us
Raheela Ahmed – ahmed@ccmr.state.fl.us
Maria Christine Perinetti – perinetti@ccmr.state.fl.us
Donna Ellen Venable – venable@ccmr.state.fl.us
Court Administration
Florida Supreme Court

FILED
15 NOV 24 AM 11:35
CLERK OF THE CIRCUIT & CTY COURT VOLUSIA CTY FL
0013

Supreme Court of Florida

THURSDAY, OCTOBER 29, 2015

CORRECTED
CASE NO.: SC13-2091
Lower Tribunal No(s).:
642009CF002872XXXAWS

JOSEPH EDWARD JORDAN vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Pursuant to Florida Rule of Criminal Procedure 3.851(b), the Office of the Capital Collateral Regional Counsel-Middle Region is hereby appointed to handle postconviction proceedings for appellant.

The Office of the Capital Collateral Regional Counsel-Middle Region shall, within thirty days from this date of this order, file a notice of appearance in the trial court or a motion to withdraw based on a conflict of interest or some other legal ground. **A copy of the notice of appearance or motion to withdraw shall be served on the Florida Supreme Court.**

In accordance with this Court's opinion issued in Amendments to Florida Rules of Criminal Procedure 3.851, 3.852, and 3.991 and Florida Rule of Judicial Administration 2.215, 802 So. 2d 298 (Fla. 2001), the chief judge shall forthwith assign this case to a judge qualified to handle capital cases. **A copy of the assignment order shall be served on the Florida Supreme Court.**

Due 11/28/15

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

jat
Served:

MICHAEL PAUL REITER
STACEY E. KIRCHER
HON. DIANE M. MATOUSEK, CLERK
HON. TERENCE ROBERT PERKINS, CHIEF JUDGE
JAMES VINCENT VIGGIANO, JR.
HON. R. MICHAEL HUTCHESON, JUDGE
JOSEPH RYAN WILL

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. Case No. 2009-CF-002872XXXAWS

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF DELIVERY OF EXEMPT PUBLIC RECORDS TO RECORDS REPOSITORY

TO: **CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY**
State Archives of Florida
Attn: CCR Records Archivist
R.A. Gray Building, MS 9-E
500 South Bronough Street
Tallahassee, FL 32399-0250

The undersigned, Rana M. Wallace, hereby gives notice to the Capital Collateral Postconviction Record Repository, that certain delivered records are confidential or exempt from the requirements of section 119.07(1), Florida Statutes. These public unredacted records have been separately contained, sealed and are labeled in accordance with Florida Rule of Criminal Procedure 3.852(f). The nature of the public records and the legal bases under which the public records are exempt have been identified.

Respectfully submitted,

RANA M. WALLACE
Assistant General Counsel
Florida Department of Corrections
Florida Bar No: 0028619
501 South Calhoun Street
Tallahassee, Florida 32399-2500
P: (850) 717-3597

F: (850) 410-3073
E: wallace.rana@mail.dc.state.fl.us

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded via EMAIL and US MAIL on this, the 21 day of JANUARY, 2016, to the following:

Honorable Michael R. Hutcheson
Circuit Judge, Seventh Judicial Circuit
The S. James Foxman Justice Center
251 North Ridgewood Avenue, Ste.204
Daytona Beach, FL 32114-3259

Stacey E. Kircher
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118
E: stacey.kircher@myfloridalegal.com

R.J. Larizza
State Attorney, Seventh Judicial Circuit
251 N. Ridgewood Avenue, 3rd Floor
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Rosemary Calhoun
Assistant State Attorney,
Office of the State Attorney
440 S. Beach Street
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E: calhounr@sao7.org

Edwin L. Davis
Assistant State Attorney,
Office of the State Attorney
440 S. Beach Street
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Michael W. Nielsen, Esq
720 West State Road 434
Winter Springs, FL 32708
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Christopher L. Smith, Esq.
605 E. Robinson Street, Suite 250
Orlando, FL 32801
E: chrislegalcounsel@yahoo.com

Michael Reiter, Esq.
Office of the Criminal Conflict and Civil Regional Counsel
5th District
307 N.W. 3rd Street
Ocala, FL 34475
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E: mreiter@rc5state.com

James Viggiano
Capital Collateral Regional Counsel-Middle
Office of the Capital Collateral Regional Counsel-Middle
3801 Corporex Drive, Suite 210
Tampa, Florida 33619
E: viggiano@ccmr.state.fl.us
E: support@ccmr.state.fl.us

Tangy Williams
Capital Case Clerk
Supreme Court of Florida
500 S. Duval Street
Tallahassee, Florida 32399-1927

RANA M. WALLACE
Assistant General Counsel

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. Case No. 2009-CF-002872XXXAWS

JOSEPH EDWARD JORDAN.,

Defendant.
_____/

NOTICE OF COMPLIANCE BY THE SECRETARY OF THE DEPARTMENT OF CORRECTIONS

TO: Stacey E. Kircher
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118

The Secretary of the Department of Corrections, having received a Notice of Affirmance of the Death Penalty in this case from the Assistant Attorney General for the Seventh Judicial Circuit on the 2nd day of November, 2015, hereby gives notice of compliance with Florida Rule of Criminal Procedure 3.852(e)(3) and certifies that, to the best of my knowledge and belief, all public records determined by the Department to be relevant to the subject matter of a proceeding under Florida Rule of Criminal Procedure 3.850 or 3.851, except for those previously filed in the trial court, have been copied, indexed, and delivered to the records repository of the Secretary of State.

Respectfully submitted,

Julie L. Jones, Secretary
Florida Department of Corrections
501 S. Calhoun Street
Tallahassee, FL 32399-2500

Christian G. Cea, Paralegal Specialist

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded via EMAIL and US MAIL on this, the 21 day of JANUARY, 2016, to the following:

Honorable Michael R. Hutcheson
Circuit Judge, Seventh Judicial Circuit
The S. James Foxman Justice Center
251 North Ridgewood Avenue, Ste.204
Daytona Beach, FL 32114-3259

Stacey E. Kircher
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118
E: stacey.kircher@myfloridalegal.com

R.J. Larizza
State Attorney, Seventh Judicial Circuit
251 N. Ridgewood Avenue, 3rd Floor
Daytona Beach, FL 32114
E: larizzar@sao7.org

Rosemary Calhoun
Assistant State Attorney,
Office of the State Attorney
440 S. Beach Street
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Edwin L. Davis
Assistant State Attorney,
Office of the State Attorney
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Michael W. Nielsen, Esq
720 West State Road 434
Winter Springs, FL 32708
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Christopher L. Smith, Esq.
605 E. Robinson Street, Suite 250

Orlando, FL 32801
E: chrislegalcounsel@yahoo.com

Michael Reiter, Esq.
Office of the Criminal Conflict and Civil Regional Counsel
5th District
307 N.W. 3rd Street
Ocala, FL 34475
E: rccmarion@rc5state.com
E: mreiter@rc5state.com

James Viggiano
Capital Collateral Regional Counsel-Middle
Office of the Capital Collateral Regional Counsel-Middle
3801 Corporex Drive, Suite 210
Tampa, Florida 33619
E: viggiano@ccmr.state.fl.us
E: support@ccmr.state.fl.us

Tangy Williams
Capital Case Clerk
Supreme Court of Florida
500 S. Duval Street
Tallahassee, Florida 32399-1927

RANA M. WALLACE
Florida Bar No.: 0028619
Assistant General Counsel
Florida Department of Corrections
501 S. Calhoun Street
Tallahassee, FL 32399-2500
P: (850) 717-3597
F: (850) 410-3073
E: wallace.rana@mail.dc.state.fl.us

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.
JOSEPH EDWARD JORDAN
DEFENDANT.
_____/

CASE NUMBER: 2009 002872 CFAES

NOTICE OF COMPLIANCE BY THE EDGEWATER POLICE DEPARTMENT

TO: Stacey E. Kircher
Assistant Attorney General
Office of the Attorney General
Capital Appeals Division
444 Seabreeze Blvd., Suite 500
Daytona Beach, Florida 32118

The Edgewater Police Department, having received notice of the Affirmance of the Death Penalty in this case from the Office of the State Attorney for the Seventh Judicial Circuit on 11/15/15, hereby gives notice of compliance with the Florida Rule of Criminal Procedure 3.852(e) and certifies that, to the best of my knowledge and belief, all public records determined by this agency to be relevant to the subject matter of a proceeding under Florida Rule of Criminal Procedure 3.851, except for those previously filed in the trial court, have been copied, indexed, and delivered to the records repository of the Secretary of State. Our agency file number is 09060377.

RESPECTFULLY SUBMITTED
FOR THE EDGEWATER
POLICE DEPARTMENT

FILED
16 JAN 25 PM 12:57
CLERK OF THE CIRCUIT COURT VOLUSIA CO.

(Signature of person who prepared
and submitted records)

~~Chief Mackey Of The~~
EDGEWATER POLICE DEPARTMENT
135 EAST PARK AVENUE
EDGEWATER, FL 32132

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to: Rosemary Calhoun, Assistant State Attorney, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; to the Honorable J. Terence R. Perkins, S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; to Stacey E. Kircher, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, Florida 32118; to Raheela Ahmed, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; to Maria Christine Perinetti, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; and to Donna Ellen Venable, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 this 19th day of ~~November 2015.~~ January 2016.

Robert Hendrick.

~~COUNSEL FOR CHIEF MACKEY~~
EDGEWATER POLICE DEPARTMENT
CITY CLERK

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	**TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO.
2. AGENCY EDGEWATER POLICE DEPARTMENT	3. DIVISION Records and Evidence	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
135 E. Park Ave. Edgewater, FL 32132	Name: Josh Raver Title: Detective/Evidence Technician Phone Number: 386-424-2400
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009 002872 CFAES

9. DESCRIPTION
Box 1: Joseph Edward Jordan Case

Box 1: Criminal intelligence information -- EXEMPT pursuant to Florida Statutes 119.07(6)(f)2.

File 1: Investigation Report and Attachments from Records
File 2: Investigation Reports from Evidence
File 3: Autopsy Photos, Crime Scene and Audio/Video Interviews
File 4: Homicide Case File (1 of 2)
File 5: Homicide Case File (2 of 2)

TOTAL NUMBER OF BOXES 1 **OR** PACKAGES _____ SENT TO THE REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? ☒ YES ☐ NO
ARE **EXEMPT** RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? ***(If not, records will be returned to you)*** ☒ YES ☐ NO
DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

AUTOPSY RECORDS AND PHOTOGRAPHS OF VICTIM AND CRIME SCENE

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)
a. ☒ PAPER COPIES b. ☒ PHOTOGRAPHS c. ☒ AUDIO TAPES d. ☐ VIDEO TAPES e. ☒ OTHER CDs/DVDs

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
Jan 19, 2016 DATE SIGNATURE Detective Josh Raver TYPE NAME AND TITLE	CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. Case No. 2009-CF-002872XXXXAWS

JOSEPH EDWARD JORDAN,

Defendant.
_____/

FILED
2016 JAN 25 AM 9:33
CLERK OF THE CIRCUIT
CTY. COURT VOLUSIA CTY., FL
CC 55

NOTICE OF DELIVERY OF EXEMPT PUBLIC RECORDS TO RECORDS REPOSITORY

TO: **CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY**
State Archives of Florida
Attn: CCR Records Archivist
R.A. Gray Building, MS 9-E
500 South Bronough Street
Tallahassee, FL 32399-0250

The undersigned, Rana M. Wallace, hereby gives notice to the Capital Collateral Postconviction Record Repository, that certain delivered records are confidential or exempt from the requirements of section 119.07(1), Florida Statutes. These public unredacted records have been separately contained, sealed and are labeled in accordance with Florida Rule of Criminal Procedure 3.852(f). The nature of the public records and the legal bases under which the public records are exempt have been identified.

Respectfully submitted,

RANA M. WALLACE
Assistant General Counsel
Florida Department of Corrections
Florida Bar No: 0028619
501 South Calhoun Street
Tallahassee, Florida 32399-2500
P: (850) 717-3597

F: (850) 410-3073
E: wallace.rana@mail.dc.state.fl.us

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded via EMAIL and US MAIL on this, the 21 day of JANUARY, 2016, to the following:

Honorable Michael R. Hutcheson
Circuit Judge, Seventh Judicial Circuit
The S. James Foxman Justice Center
251 North Ridgewood Avenue, Ste.204
Daytona Beach, FL 32114-3259

Stacey E. Kircher
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118
E: stacey.kircher@myfloridalegal.com

R.J. Larizza
State Attorney, Seventh Judicial Circuit
251 N. Ridgewood Avenue, 3rd Floor
Daytona Beach, FL 32114
E: larizzar@sao7.org

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Assistant State Attorney,
Office of the State Attorney
440 S. Beach Street
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Office of the State Attorney
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Tangy Williams
Capital Case Clerk
Supreme Court of Florida
500 S. Duval Street
Tallahassee, Florida 32399-1927

RANA M. WALLACE
Assistant General Counsel

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. Case No. 2009-CF-002872XXXAWS

JOSEPH EDWARD JORDAN.,

Defendant.
_____/

FILED
2016 JAN 25 AM 9:33
CLERK OF THE CIRCUIT
& CTY. COURT VOLUSIA CTY., FL
CC 55

NOTICE OF COMPLIANCE BY THE SECRETARY OF THE DEPARTMENT OF CORRECTIONS

TO: Stacey E. Kircher
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118

The Secretary of the Department of Corrections, having received a Notice of Affirmance of the Death Penalty in this case from the Assistant Attorney General for the Seventh Judicial Circuit on the 2nd day of November, 2015, hereby gives notice of compliance with Florida Rule of Criminal Procedure 3.852(e)(3) and certifies that, to the best of my knowledge and belief, all public records determined by the Department to be relevant to the subject matter of a proceeding under Florida Rule of Criminal Procedure 3.850 or 3.851, except for those previously filed in the trial court, have been copied, indexed, and delivered to the records repository of the Secretary of State.

Respectfully submitted,

Julie L. Jones, Secretary
Florida Department of Corrections
501 S. Calhoun Street
Tallahassee, FL 32399-2500

Christian G. Cea, Paralegal Specialist

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded via EMAIL and US MAIL on this, the 21 day of JANUARY, 2016, to the following:

Honorable Michael R. Hutcheson
Circuit Judge, Seventh Judicial Circuit
The S. James Foxman Justice Center
251 North Ridgewood Avenue, Ste.204
Daytona Beach, FL 32114-3259

Stacey E. Kircher
Assistant Attorney General
Office of the Attorney General
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State Attorney, Seventh Judicial Circuit
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Rosemary Calhoun
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Edwin L. Davis
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Christopher L. Smith, Esq.
605 E. Robinson Street, Suite 250

Orlando, FL 32801
E: chrislegalcounsel@yahoo.com

Michael Reiter, Esq.
Office of the Criminal Conflict and Civil Regional Counsel
5th District
307 N.W. 3rd Street
Ocala, FL 34475
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E: mreiter@rc5state.com

James Viggiano
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Office of the Capital Collateral Regional Counsel-Middle
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Capital Case Clerk
Supreme Court of Florida
500 S. Duval Street
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RANA M. WALLACE
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Assistant General Counsel
Florida Department of Corrections
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P: (850) 717-3597
F: (850) 410-3073
E: wallace.rana@mail.dc.state.fl.us

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. **Case No. 2009002872 CFAES** CF AWS

Joseph Edward Jordan

Defendant

_____/

NOTICE OF COMPLIANCE BY LAW ENFORCEMENT AGENCY

TO: Ms. Stacey E. Kircher
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Boulevard, 5th Floor
Daytona Beach, Florida 32118

FILED
16 JAN 28 PM 3:44
CLERK OF THE CIRCUIT & CTY. COURT VOLUSIA CTY. FL CC13

RICHARD L. SWEARINGEN, Commissioner of the Florida Department of Law Enforcement, having been involved in this case by investigation, arrest, prosecution, or incarceration, hereby gives notice to the Office of the Attorney General, of compliance by delivery of public records to the records repository of the Secretary of State. I further certify that, to the best of my knowledge and belief, all public records in possession of this agency or in the possession of any employee of this agency involving this case have been copied, sealed, indexed, and delivered to the records repository of the Secretary of State.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by mail to: R.J. Larizza, State Attorney, Seventh Judicial Circuit, 251 N. Ridgewood Avenue, Daytona Beach, FL 32114; Honorable J. Terence R. Perkins, S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; Raheela Ahmed, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; Maria Christine Perinetti, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, and Donna Ellen Venable, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, on this 20th day of January 2016.

RICHARD L. SWEARINGEN
Commissioner
Florida Department of Law Enforcement

cc: Janine D. Robinson, Assistant General Counsel

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

**DEFENDANT'S FIRST MOTION REQUESTING
THE *IN CAMERA* REVIEW OF RECORDS
[EDGEWATER POLICE DEPARTMENT &
FLORDIA DEPARTMENT OF LAW ENFORCEMENT]**

The Defendant, Joseph Edward Jordan, pursuant to Fla.R.Crim.P. 3.852(f)(3), by and through his undersigned counsel, hereby moves this Honorable Court for an order to the Florida State Archives (Records Repository) to deliver certain exempt public records to the Clerk of this Court and for this Court to conduct an *in camera* review of those records. In support, Mr. Jordan states the following:

1. Joseph Edward Jordan is incarcerated at Florida State Prison under a sentence of death.

2. Pursuant to Florida Rule of Criminal Procedure 3.852(f) [1], to-date the following agencies

[1] Fla. R. Crim. P. Rule 3.852 (f) provides as follows:

> **(f) Exempt or Confidential Public Records.**
>
> (1) Any public records delivered to the records repository pursuant to these rules that are confidential or exempt from the requirements of section 119.07(1), Florida Statutes, or article I, section 24(a), Florida Constitution, must be separately contained, without being redacted, and sealed. The outside of the container must clearly identify that the public record is confidential or exempt and that the seal may not be broken without an order of the trial court. The outside of the container must identify the nature of the public records and the legal basis for the exemption.

have provided a Notice of Compliance, along with the Transmittal/Receipt sheets of the Transfer of Capital Collateral Postconviction Records to the State Archives of Florida, indicating that it has delivered records to the Records Repository that include sealed exempt and/or confidential records:

AGENCY	**REPOSITORY**	**NOTICE OF COMPLIANCE DATE**
1. **Edgewater Police Department** *See Appendix A.*	Container 07078	January 19, 2016.
2. **Florida Department of Law Enforcement** *See Appendix B.*	Containers 07074 & 07076.	January 20, 2016.

3. The Supreme Court of Florida has discussed this process several times since the introduction of the rule as a reform in 1998. The Supreme Court of Florida in *Rose v. State*, 774 So. 2d 629 (Fla. 2000), has approved the "pre-Huff" procedure of *in camera* inspections of records designated as exempt and/or confidential and has held as follows:

> Rose also alleges that the trial court violated his constitutional right to have a full and fair state postconviction proceeding by conducting an in-camera inspection of public records to determine whether the State was justified in claiming that such records were exempt from disclosure. On July 11, 1996, Rose filed a public records request with the Pinellas County State Attorney's Office pursuant to chapter 119, Florida Statutes. The State responded and provided Rose with a detailed explanation of the public records that were exempt from disclosure under Florida Rule of Criminal Procedure 3.852. The trial court subsequently conducted an in-

---

> (2) Upon the entry of an appropriate court order, sealed containers subject to an inspection by the trial court shall be shipped to the clerk of court. The containers may be opened only for inspection by the trial court in camera. The moving party shall bear all costs associated with the transportation and inspection of such records by the trial court. The trial court shall perform the unsealing and inspection without ex parte communications and in accord with procedures for reviewing sealed documents.
>
> (3) Collateral counsel must file a motion for in camera inspection within 30 days of *receipt of the notice of delivery of sealed records* to the central records repository or the in camera inspection will be deemed waived.

> camera review of the public records withheld by the State. After conducting the in-camera review, the trial court concluded that the withheld records contained no *Brady* material, but the court instructed the State in a written order to provide Rose with certain records that were not covered under the statutory exemptions. According to Rose, the trial court's in-camera review of the allegedly exempt public records and its refusal to require the State to turn over handwritten notes pertaining to the alleged "deal" between Borton and Poole and the State prejudiced him. Rose claims that he is entitled to an evidentiary hearing. We disagree.
>
> In *Ragsdale v. State*, 720 So. 2d 203, 206 (Fla. 1998), this Court had to determine whether public records were properly exempted from disclosure by the State. This Court ruled that where doubt existed as to whether the State must disclose a particular document, the proper procedure is to have a trial judge conduct an in-camera review of the documents. *See id.; see also State v. Kokal*, 562 So. 2d 324, 327 (Fla. 1990) (stating that when certain statutory exemptions are claimed by the party against whom the public records request has been filed or when doubt exists as to whether a particular document must be disclosed, the proper procedure is to furnish the document to the trial judge for an in-camera inspection). After conducting an in-camera review, the State must turn over the nonexempt materials to the defense. *See Ragsdale*, 720 So. 2d at 206.
>
> In this case, Judge Schaeffer conducted an in-camera proceeding and examined each of the alleged documents that the State withheld to determine whether the documents were properly withheld. After reviewing the documents, the trial court issued a written order instructing the State as to which documents it needed to produce to the defense. Rose has failed to cite to any authority that suggests that Judge Schaeffer's review of the withheld documents was improper and we have found no authority that supports this view. Therefore, we find that Judge Schaeffer fully complied with procedures set forth in *Ragsdale* and *Kokal* for determining whether the State's claimed exemptions were proper.

Rose v. State, 774 So. 2d 629, 636-637 (Fla. 2000) (footnote omitted).

9. The procedure approved in *Rose* was again discussed by the Florida Supreme Court in *Damren v. State*, 838 So. 2d 512 (Fla. 2003), as follows:

> Damren asserts that the trial court erred in denying his request for certain public records from the State Attorney's office. According to Damren, the circuit court failed to review these records for exculpatory information under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We disagree.
>
> As this Court has held, "where doubt existed as to whether the State must disclose a particular document, the proper procedure is to have a trial judge conduct an in-camera review of the documents." *Rose v. State*, 774 So. 2d 629, 636 (Fla. 2000). This Court applies an abuse of discretion standard when reviewing a trial court's determination on a public records request. *Moore v. State*, 820 So. 2d 199, 204

(Fla. 2002).

> The record reveals that the State provided the requested records to the trial court for an in-camera review and the postconviction judge granted the public records request in part and denied it in part. During a hearing, the circuit court carefully reviewed each folder of materials which was submitted, explained what information was contained in each folder and whether it included exculpatory information, and indicated the files to which defense counsel was entitled. We find that the trial court did not abuse its discretion in denying in part Damren's request and hence deny relief. We find no error.

Damren v. State, 838 So.2d 512, 519 (Fla. 2003) (footnote omitted).

10. The effects of the discovery and other post-conviction reforms from the late 1990s onward was analyzed by the Honorable O.H. Eaton, Jr. as follows:

> Litigation in a death penalty case does not end when the judgment and sentence of death are affirmed by the Supreme Court of Florida. The next phase of litigation in these cases falls under the general heading of "postconviction relief." It is during this phase that death row defendants litigate matters "collateral" to the judgment and sentence that could not have been raised on appeal. . . . They are charged with reinvestigating the case to find out deficiencies that occurred during the trial. This reinvestigation usually includes review of numerous public records that may have some bearing on the case.
>
> . . .
>
> Over the last several years both the Supreme Court and the legislature have made efforts to streamline the processing of postconviction motions in capital cases.
>
> . . .
>
> Prior to 1996, collateral counsel had to file a civil action in order to obtain public records from persons or agencies other than the state attorney and local law enforcement agencies that investigated the crime. This cumbersome process often required suit to be filed in several jurisdictions and delays were inevitable.
>
> . . .
>
> The legislature created a centralized repository for storage of public records in capital cases in order to provide easy access to them. It was the legislature's hope that a process could be developed that would allow these records to be automatically sent to the repository and made accessible to counsel without the necessity of resorting to litigation.
>
> Currently, the Secretary of State is the officer responsible for storing the records and the records repository is located in the R.A. Gray building in Tallahassee.
>
> . . .
>
> [T]he procedural aspects of discovery of public records are now regulated by the Supreme Court of Florida. Rule 3.582 provides for an orderly method to obtain public records and, if the various offices and agencies that maintain public records cooperate, collateral counsel should be able to review them and have copies made

in a timely fashion.

. . .

Assuming every person and agency complies with the requirement to submit public records to the records repository, all of the public records should be on file there less than 330 days from the date the mandate affirming the death sentence is issued by the Supreme Court of Florida. However, in capital litigation, things are never that easy. Some of the records may be claimed to be exempt or confidential and there may be old cases out there that are subject to a separate procedure. Ironically, the persons or agencies claiming records to be exempt or confidential are aligned with the prosecution whose interest is to avoid delays. By providing a separate procedure for old cases, additional delays may be expected.

Exempt or Confidential Public Records

Rule 3.852(f) provides that any public records delivered to the records repository that are claimed to be exempt or confidential must be boxed separately, without redaction, and sealed. The box must clearly identify that the public record is confidential or exempt and the seal may not be broken without an order of the trial court. The box must also identify "the nature of the public records and the legal basis for the exemption."

In order for collateral counsel to obtain a ruling to unseal the public records claimed to be exempt or confidential, an order must first be obtained from the trial court directing the records repository to ship the sealed boxes of records to the clerk of the trial court. *Undoubtedly, collateral counsel will always want to obtain a ruling to determine if these records are really exempt or confidential and delay could be avoided if these records were filed with the clerk of the court in the first place.* However, the Supreme Court wanted to carry out legislative intent where possible so this unnecessary complication is part of the procedure and will undoubtedly cause delay.

The "moving party" is responsible to pay for the cost of the "transportation and inspection of such records by the trial court." Presumably, the "cost" will be just the postage. It is unclear what "cost" could possibly be associated with inspecting the records.

Once the records claimed to be exempt or confidential are delivered to the clerk of the court, they may only be opened by the trial court in camera without ex parte communication in the same manner as inspecting any sealed document. Presumably, the trial court will enter an order sustaining the claim of exemption or confidentiality or order the records disclosed.

. . .

In Camera Inspection of Exempt Public Records

Persons or agencies claiming public records to be exempt from production must box the records separately, seal them, index them with the reasons for the exemption, and deliver them to the records repository. From there, the records are

shipped to the clerk of the trial court.

> *The trial judge must inspect the records in camera to determine if they are in fact exempt. A detailed order must be entered identifying each public record and the reason for its exemption.*
>
> *In* Rose v. State, *774 So. 2d 629 (Fla. 2000), the trial judge held an in camera inspection of public records claimed to be exempt before the Huff hearing. The state attorney was ordered to produce certain of the records and others were ruled to be exempt. The Supreme Court approved the procedure.*
> . . .
> Public records have provided collateral counsel with significant evidence in the past and will undoubtedly continue to do so in the future. Trial judges need to take their responsibility to rule on public records issues seriously and make every effort to resolve public records disputes in a timely manner.

O.H. Eaton, Jr., *Discovery of Public Records in Capital Cases*, 76 Fla. B.J. 24, 30 (April 2002) (footnotes omitted) (emphasis added).

WHEREFORE, Mr. Jordan hereby requests the entry of an order so that the aforementioned records can be transferred to the Clerk of this Circuit Court for an *in camera* review by this Court to determine whether they are exempt public records. It is further requested that if a subsequent *in camera* determination is made by this Honorable Court that these records are not exempt, that the records be released to undersigned counsel pursuant to a subsequent Court's order.

Respectfully submitted

s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

s/ Maria Christine Perinetti
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Donna Ellen Venable

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Law Office of the Capital Collateral
Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Telephone (813) 558-1600
Fax No. (813) 558-1601 or (813) 558-1602

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

APPENDIX A

TO DEFENDANT'S FIRST MOTION REQUESTING
THE *IN CAMERA* REVIEW OF RECORDS
[EDGEWATER POLICE DEPARTMENT &
FLORIDA DEPARTMENT OF LAW ENFORCEMENT]

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	**TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7077 - 7078(R)
2. AGENCY EDGEWATER POLICE DEPARTMENT	3. DIVISION Records and Evidence	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
135 E. Park Ave. Edgewater, FL 32132	Name: Josh Raver Title: Detective/Evidence Technician Phone Number: 386-424-2400
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009 002872 CFAES

9. DESCRIPTION
Box 1: Joseph Edward Jordan Case

Box 1: Criminal intelligence information -- EXEMPT pursuant to Florida Statutes 119.07(6)(f)2.

File 1: Investigation Report and Attachments from Records Box 7077 #1
File 2: Investigation Reports from Evidence Box 7078(R) #1
File 3: Autopsy Photos, Crime Scene and Audio/Video Interviews Box 7078(R) #2
File 4: Homicide Case File (1 of 2) Box 7077 #2
File 5: Homicide Case File (2 of 2) Box 7077 #3

CAS

2016 JAN 21 AM 8:16

TOTAL NUMBER OF BOXES 1 **OR** PACKAGES _____ SENT TO THE REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? ☒ YES ☐ NO
ARE **EXEMPT** RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? ***(If not, records will be returned to you)*** ☒ YES ☐ NO
DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

AUTOPSY RECORDS AND PHOTOGRAPHS OF VICTIM AND CRIME SCENE

(USE CONTINUATION SHEET IF NECESSARY)

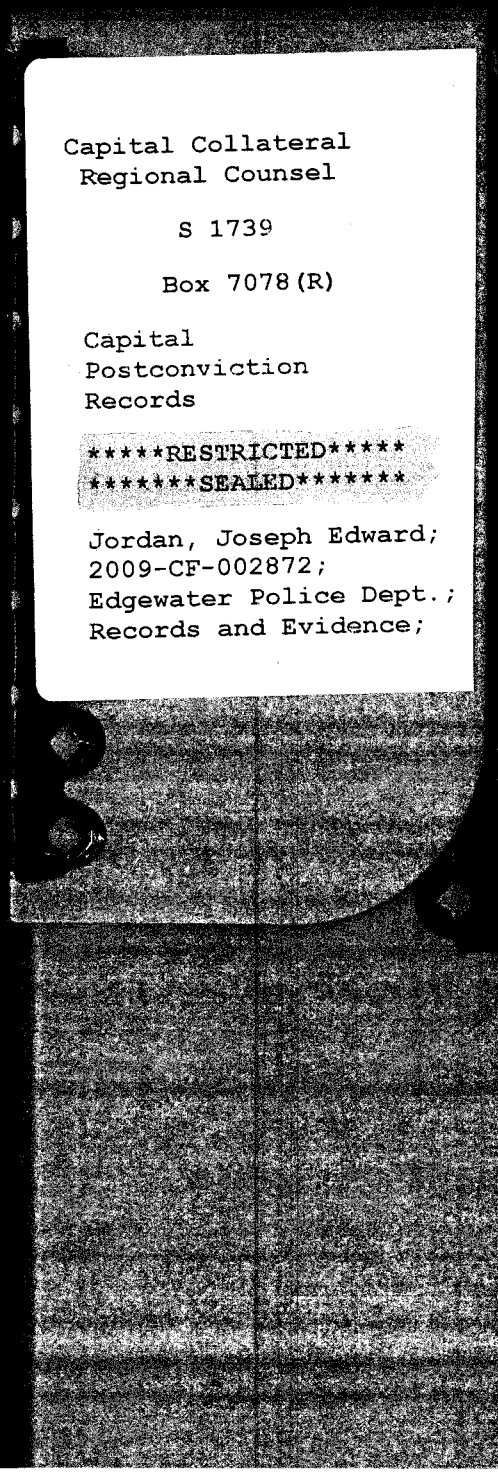
10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)
a. ☒ PAPER COPIES b. ☒ PHOTOGRAPHS c. ☒ AUDIO TAPES d. ☐ VIDEO TAPES e. ☒ OTHER CDs/DVDs

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
SIGNATURE — Jan 19, 2016 (DATE) Detective Josh Raver TYPE NAME AND TITLE	CHIEF, ARCHIVES AND RECORDS MANAGEMENT — 1/21/16 (DATE)

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07077			Jordan, Joseph Edward; 2009-CF-002872; Edgewater Police Department--Records and Evidence
07077	00001		File #1: Investigation Report and Attachments from Records
07077	00002		File #4: Homicide Case File (Blue Document Folder) Item #5242-62 (1 of 2) [ca. 72 pages black and white photocopied images]
07077	00003		File #5: Homicide Case File (Blue Document Folder) Item #5242-62 (2 of 2)
07078			Jordan, Joseph Edward; *RESTRICTED* SEALED; 2009-CF-002872; Edgewater Police Department--Records and Evidence
07078	00001		Confidential/Exempt -- File #2: Investigation Reports from Evidence -- Exempt per F.S. 119.07(6)(f)2
07078	00002		Confidential/Exempt -- File #3: Autopsy Photos, Crime Scene and Audio/Video Interviews -- Exempt per F.S. 119.07(6)(f)2
CD001			CD-1 to CD-29
CD002			CD-30 to CD-59
CD003			CD-60 to CD-89
CD004			CD-90 to CD-118
CD005			CD-119 to CD-147
CD006			CD-148 to CD-176
CD007			CD-177 to CD-204
CD008		10	CD-205 to CD-230


Capital Collateral
Regional Counsel
S 1739
Box 7078(R)
Capital
Postconviction
Records
*****RESTRICTED*****
*******SEALED*******
Jordan, Joseph Edward;
2009-CF-002872;
Edgewater Police Dept.;
Records and Evidence;

S1739

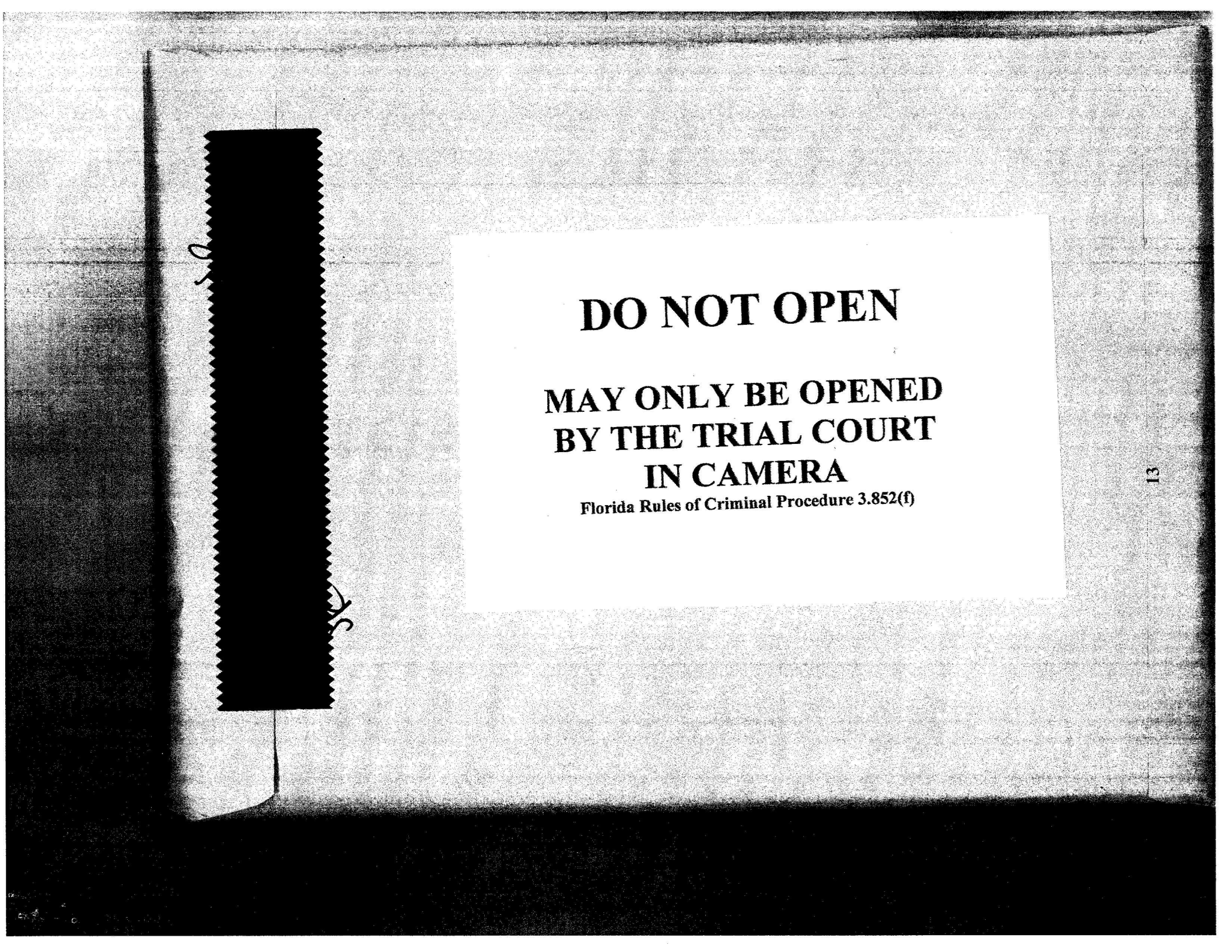
Reports submitted to Evidence Case File

File #2

Box 7078, FF1

CONFIDENTIAL

12


DO NOT OPEN
MAY ONLY BE OPENED
BY THE TRIAL COURT
IN CAMERA
Florida Rules of Criminal Procedure 3.852(f)
13

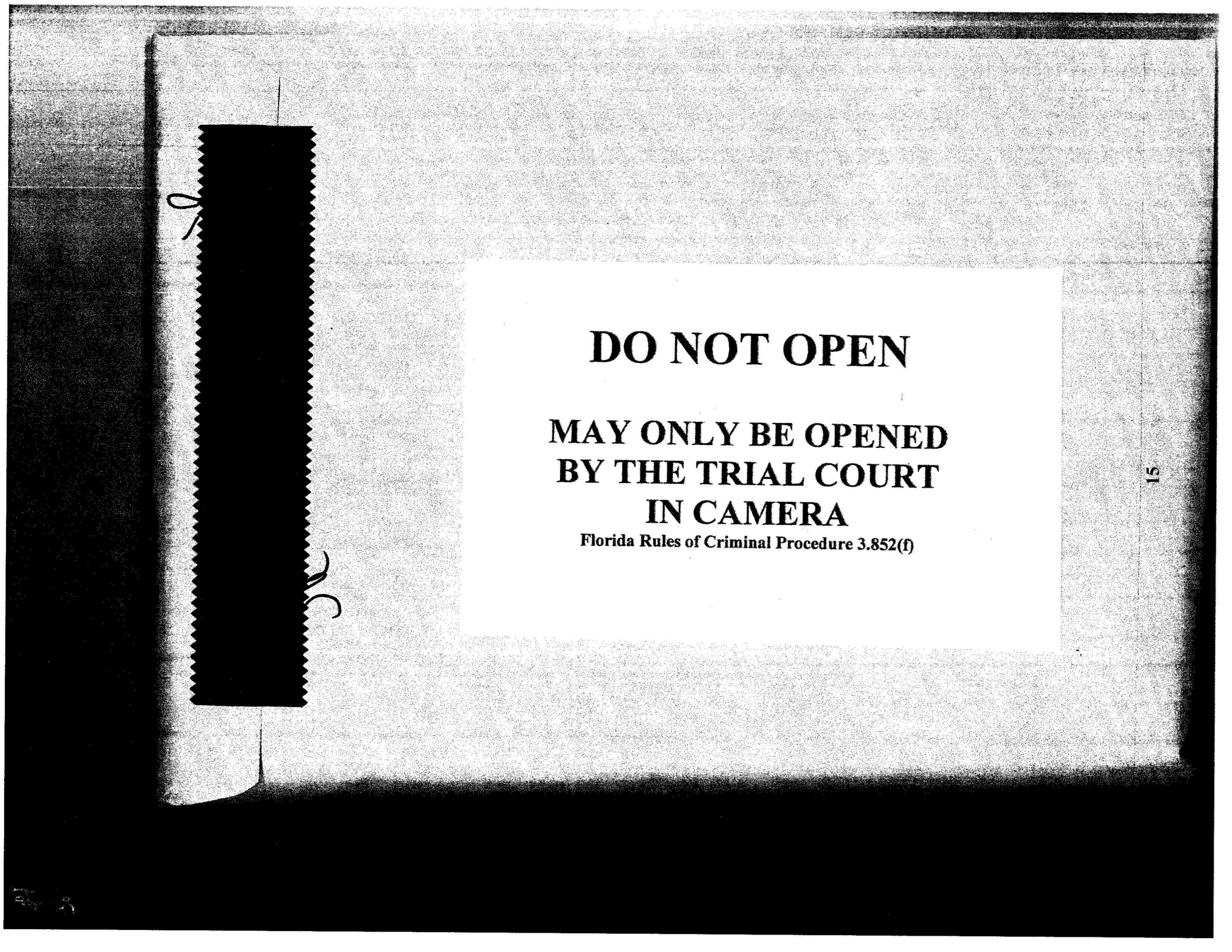
File #3 S1739

16 CDs/DVDs

(Autopsy, Audio/Video Records)

Box 7078, FF 2

CONFIDENTIAL


DO NOT OPEN
MAY ONLY BE OPENED
BY THE TRIAL COURT
IN CAMERA
Florida Rules of Criminal Procedure 3.852(f)

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

APPENDIX B

TO DEFENDANT'S FIRST MOTION REQUESTING
THE *IN CAMERA* REVIEW OF RECORDS
[EDGEWATER POLICE DEPARTMENT &
FLORIDA DEPARTMENT OF LAW ENFORCEMENT]

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/REV06-2012/CCR100	**TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7075 - 7076(R)
2. AGENCY FDLE	3. DIVISION OED	4 BUREAU OGC

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title, and Telephone Number)
2336 Phillips Road Tallahassee, Florida 32308	Janine Robinson, Assistant General Counsel (850) 410-8342
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME JOSEPH EDWARD JORDAN DEFENDANT CIRCUIT CT. CASE # 2009002872 CFAES, Seventh Judicial Circuit in and for Volusia County, Florida

9. DESCRIPTION

Please see attached indexes.

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TOTAL NUMBER OF BOXES _____ **OR** PACKAGES 2 SENT TO REPOSITORY

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ARE **EXEMPT** RECORDS SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? (***If not, records will be returned to you***) X YES ___NO

DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION: ss. 395.3025(4), (7), and (8), F.S. Patient records; Health Insurance Portability and Accountability Act (HIPAA); HIPAA Privacy Rule; s. 119.071(4)(d)2.a.(I), F.S. Home addresses, home telephone numbers (includes home telephone numbers, personal cellular telephone numbers, personal pager telephone numbers, and telephone numbers associated with personal communications devices), photographs, date of birth, social security number of active or former sworn or civilian law enforcement personnel are exempt; s. 119.071(5)(g)2., F.S. Biometric identification information-fingerprints (latents); s. 119.071(5)(a)5., F.S. Social security numbers; s. 119.071(5)(g), F.S. Biometric identification information-fingerprints (standards); s. 943.053(3)(b), F.S. Florida criminal justice information services information; the fee per record for criminal history information is $24.00 per name submitted; s. 943.053(2), F.S. Criminal justice information derived from federal criminal justice information systems; s. 119.071(2)(h)1.b., F.S. Any information which may reveal the identity of a person who is a victim of any sexual offense. (USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ___PAPER COPIES b.___ PHOTOGRAPHS c.___ AUDIO TAPES d.___ VIDEO TAPES e. X OTHER DVD ___Compact Discs (~~CDs~~)___

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
Janine Robinson 1/20/16 SIGNATURE DATE	1/21/16 CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Janine Robinson, Assistant General Counsel TYPE NAME AND TITLE	

ARCHIVES REPOSITORY—NON-EXEMPT DOCUMENTS

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

vs.

JOSEPH EDWARD JORDAN CASE NO. 2009002872 CFAES

Non-Exempt Index

LAB #20090702064 - BIOLOGY - OROC.pdf (18 pages) – **Non-exempt**
No Redactions

LAB #20090702064 - CASE CORRESPONDENCE.pdf (3 pgs.) – **Non-exempt**
No Redactions

LAB #20090702064 - CASE JACKET.pdf (8 pgs.) – **Non-exempt**
No Redactions

LAB #20090702064 - CHAIN OF CUSTODY.pdf (49 pgs.) – **Non-exempt**
No Redactions

LAB #20090702064 - CRIME SCENE – OROC_redacted.pdf (696 pgs.) – **Non-exempt**
ss. 395.3025(4), (7), and (8), F.S. Patient records; Health Insurance Portability and Accountability Act (HIPAA); HIPAA Privacy Rule (pgs. 15, 35)
s. 119.071(4)(d)2.a.(I), F.S. Home addresses, home telephone numbers (includes home telephone numbers, personal cellular telephone numbers, personal pager telephone numbers, and telephone numbers associated with personal communications devices), photographs, date of birth, social security number of active or former sworn or civilian law enforcement personnel are exempt (pgs. 594, 595, 648, 238, 239)
s. 119.071(5)(g)2., F.S. Biometric identification information-fingerprints (latents) (pgs. 652-696)

LAB #20090702064 - LATENT - OROC combined_redacted.pdf (33 pgs.) – **Non-exempt**
s. 119.071(5)(g)2., F.S. Biometric identification information-fingerprints (latents) (pgs. 2)
s. 119.071(5)(a)5., F.S. Social security numbers (pg.12, 30)
s. 119.071(5)(g), F.S. Biometric identification information-fingerprints (standards) (pgs.12, 13, 30, 32, 33)
s. 943.053(3)(b), F.S. Florida criminal justice information services information; the fee per record for criminal history information is $24.00 per name submitted. (pg. 12, 30)

LAB #20090702064 - QUESTIONED DOCUMENTS - PROC.pdf (44 pgs.) – **Non-exempt**
No Redactions

LAB #20090702064 - TOXICOLOGY - OROC.pdf (8 pgs.) – **Non-exempt**
No Redactions

LAB #20090702064 - TRACE EVIDENCE – OROC_redacted.pdf (178 pgs.) – **Non-exempt**

s. 119.071(5)(g)2., F.S. Biometric identification information-fingerprints (latents) (pgs. 36-39, 48, 49, 50, 55, 56, 57, 58, 83, 116)

JORDAN, JOSEPH - FLORIDA SEXUAL OFFENDER PREDATOR RECORDS_redacted.pdf (192 pgs.) – **Non-exempt**

s. 119.071(5)(a)5., F.S. Social security numbers (pg.1, 3, 4, 5, 6, 8, 9, 10, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 28, 33, 38, 39, 45, 48, 51, 85, 89, 100, 101, 107, 109, 129, 138, 139, 143, 149, 155, 161, 167, 173, 179, 185, 187, 189)

s. 943.053(2), F.S. Criminal justice information derived from federal criminal justice information systems (pgs. 1, 3, 4, 5, 6, 8, 9, 10, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 101, 138, 139, 141, 142)

s. 119.071(5)(g)2., F.S. Biometric identification information-fingerprints (latent) (pgs. 28, 33, 109)

s. 943.053(3)(b), F.S. Florida criminal justice information services information; the fee per record for criminal history information is $24.00 per name submitted (pgs. 53-59, 60-66)

s. 119.071(2)(h)1.b., F.S. Any information which may reveal the identity of a person who is a victim of any sexual offense (pgs. 97, 98, 129, 131, 132, 133, 134, 135, 136, 137, 138, 139, 141, 142)

s. 119.071(5)(g), F.S. Biometric identification information (standards) (pg. 185)

ARCHIVES REPOSITORY—EXEMPT DOCUMENTS

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

vs.

JOSEPH EDWARD JORDAN CASE NO. 2009002872 CFAES

Exempt Index

LAB #20090702064 - CRIME SCENE – OROC.pdf (696 pgs.) – **Exempt**
ss. 395.3025(4), (7), and (8), F.S. Patient records; Health Insurance Portability and Accountability Act (HIPAA); HIPAA Privacy Rule (pgs. 15, 35)
s. 119.071(4)(d)2.a.(I), F.S. Home addresses, home telephone numbers (includes home telephone numbers, personal cellular telephone numbers, personal pager telephone numbers, and telephone numbers associated with personal communications devices), photographs, date of birth, social security number of active or former sworn or civilian law enforcement personnel are exempt (pgs. 594, 595, 648, 238, 239)
s. 119.071(5)(g)2., F.S. Biometric identification information-fingerprints (latents) (pgs. 652-696)

LAB #20090702064 - LATENT - OROC combined.pdf (33 pgs.) – **Exempt**
s. 119.071(5)(g)2., F.S. Biometric identification information-fingerprints (latents) (pgs. 2)
s. 119.071(5)(a)5., F.S. Social security numbers (pg.12, 30)
s. 119.071(5)(g), F.S. Biometric identification information-fingerprints (standards) (pgs.12, 13, 30, 32, 33)
s. 943.053(3)(b), F.S. Florida criminal justice information services information; the fee per record for criminal history information is $24.00 per name submitted. (pg. 12, 30)

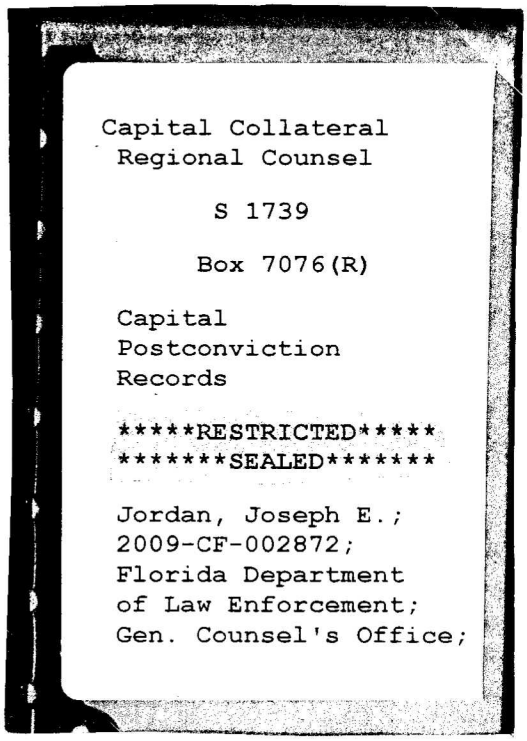
LAB #20090702064 - TRACE EVIDENCE – OROC.pdf (178 pgs.) – **Exempt**
s. 119.071(5)(g)2., F.S. Biometric identification information-fingerprints (latents) (pgs. 36-39, 48, 49, 50, 55, 56, 57, 58, 83, 116)

JORDAN, JOSEPH - FLORIDA SEXUAL OFFENDER PREDATOR RECORDS.pdf (192 pgs.) – **Exempt**
s. 119.071(5)(a)5., F.S. Social security numbers (pg.1, 3, 4, 5, 6, 8, 9, 10, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 28, 33, 38, 39, 45, 48, 51, 85, 89, 100, 101, 107, 109, 129, 138, 139, 143, 149, 155, 161, 167, 173, 179, 185, 187, 189)
s. 943.053(2), F.S. Criminal justice information derived from federal criminal justice information systems (pgs. 1, 3, 4, 5, 6, 8, 9, 10, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 101, 138, 139, 141, 142)
s. 119.071(5)(g)2., F.S. Biometric identification information-fingerprints (latent) (pgs. 28, 33, 109)
s. 943.053(3)(b), F.S. Florida criminal justice information services information; the fee per record for criminal history information is $24.00 per name submitted (pgs. 53-59, 60-66)
s. 119.071(2)(h)1.b., F.S. Any information which may reveal the identity of a person who is a victim of any sexual offense (pgs. 97, 98, 129, 131, 132, 133, 134, 135, 136, 137, 138, 139, 141, 142)
s. 119.071(5)(g), F.S. Biometric identification information (standards) (pg. 185)

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
			F.S. 119.071(5)(a) and 119.071(2)(h)
07073	00002		Confidential/Exempt -- Short Arrest Information Forms -- Exempt per F.S. 119.071(5)(a) and 119.071(2)(h)
07073	00003		Confidential/Exempt -- Capias -- Exempt per F.S. 119.071(5)(a) and 119.071(2)(h)
07073	00004		Confidential/Exempt -- Complaint Affidavits -- Exempt per F.S. 119.071(5)(a) and 119.071(2)(h)
07074			**Jordan, Joseph Edward; *RESTRICTED* SEALED; 2009-CF-002872; Broward County Sheriff's Office--Department of Detention--Healthcare**
07074	00001		Confidential/Exempt -- Inmate Healthcare Records -- Exempt per F.S. 395.3025(4), 395.3025(8) and 456.057
07075			**Jordan, Joseph Edward; 2009-CF-002872; Florida Department of Law Enforcement--General Counsel's Office**
07075	00001		Lab (#20090702064): Biology, Case Correspondence, Case Jacket, Chain of Custody, Crime Scene, Latent, Questioned Documents, Toxicology, Trace Evidence, and Florida Sexual Offender Predator Records [1 DVD]
07076			**Jordan, Joseph Edward; *RESTRICTED* SEALED; 2009-CF-002872; Florida Department of Law Enforcement--General Counsel's Office**
07076	00001		Confidential/Exempt -- Lab (#20090702064): Crime Scene, Latent, Trace Evidence and Florida Sexual Offender Predator Records [1 DVD] -- Exempt per F.S. 395.3025(4), 395.3025(7), 395.3025(8), 119.071(4)(d)2.a.(l), 119.071(5)(g)2, 119.071(5)(a)5, 119.071(5)(g), 943.053(3)(b), 943.053(2), and 119.071(2)(h)1.b


Capital Collateral
Regional Counsel
S 1739
Box 7076(R)
Capital
Postconviction
Records
*****RESTRICTED*****
*******SEALED*******
Jordan, Joseph E.;
2009-CF-002872;
Florida Department
of Law Enforcement;
Gen. Counsel's Office;

S1739

EXEMPT

Box 7076, FF 1

EXEMPT

EXEMPT

AGENCY NAME & ADDRESS	CUSTOMER BOX NUMBER (if applicable)
Florida Department of Law Enforcement Office of General Counsel 2331 Phillips Road Tallahassee **Florida** 32308	
RETENTION SCHEDULE NUMBER: **ITEM NUMBER:** **RECORD SERIES TITLE:** .S 1739	**FROM DATE:** / / (mm dd yyyy) **TO DATE:** / / (mm dd yyyy)

DESCRIPTION OF RECORDS (When describing records, avoid vague terms such as "Miscellaneous." If describing a person's files, include the person's position title. For example, rather than saying "Bob Smith's Files," use "Director of Marketing Bob Smith's Promotion Planning Files" instead. Make a note of the range of records in the box for future reference.) :

STATE OF FLORIDA vs. JOSEPH EDWARD JORDAN
CASE NO.: 2009002872 CFAES
EXEMPT RECORDS: LAB #20090702064 - CRIME SCENE - OROC.pdf; LAB #20090702064 - LATENT - OROC combined.pdf; LAB #20090702064 - TRACE EVIDENCE - OROC.pdf; JORDAN, JOSEPH - FLORIDA SEXUAL OFFENDER PREDATOR RECORDS.pdf

STATE OF FLORIDA
DEPARTMENT OF STATE
Division of Library and
Information Services
Form LS5E200 R 09-2004

Records Storage Box Label

EXEMPT

EXEMPT

DO NOT OPEN

MAY ONLY BE OPENED BY THE TRIAL COURT IN CAMERA

Florida Rules of Criminal Procedure 3.852(f)

EXEMPT

EXEMPT

24

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this 2nd day of February, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via electronic mail to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com on this 2nd day of February, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; to **Rosemary Calhoun, Assistant State Attorney**, Office of the State Attorney, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach Florida 32114; to **Janine Robinson**, Assistant General Counsel, Florida Department of Law Enforcement, Office of General Counsel, 2331 Phillips Road, Tallahassee, Florida 32308; to **Josh Raver**, Detective/Evidence Technician, Edgewater Police Department, 135 East Park Avenue, Edgewater Florida 32132; and to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 2nd day of February, 2016.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

**ORDER TO DELIVER EXEMPT PUBLIC RECORDS
[EDGEWATER POLICE DEPARTMENT & FDLE]**

TO: **RECORDS REPOSITORY**
The Florida State Archives
Attn: **CCRC Records Archivist**
R.A. Gray Building,M.S. 9-E,
500 South Bronough Street,
Tallahassee, Florida 32399-0250.

This Court having received notice on this ____ day of _____, 2016, that certain records which have been claimed as confidential or exempt from disclosure have been copied, indexed, separately contained without being redacted, sealed, identified as to their nature and their legal basis for confidentiality or exemption, and delivered to the Records Repository of the Secretary of the State. The following agencies or entities delivered sealed and/or exempt records to the Records Repository and noted that said following designated records were confidential or exempt from the requirements of Section 119.07, Florida Statutes:

AGENCY	REPOSITORY	NOTICE OF COMPLIANCE DATE
1. **Edgewater Police Department**	Container 07078	January 19, 2016.
2. **Florida Department of Law Enforcement**	Containers 07074 & 07076.	January 20, 2016.

It is ordered that the above listed records be delivered by the Records Repository to the **Clerk of Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, 251 North Ridgewood Avenue, Daytona Beach, Florida 32114**, for further proceedings consistent with Florida Rule of Criminal Procedure 3.852 (2016). The Law Office of the Capital Collateral Regional Counsel - Middle Region shall bear all the costs associated with the transportation and inspection of these records by the trial court.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida on this _____ day of _____, 201__.

_____
Honorable Terrence R. Perkins
Chief Circuit Court Judge

Copies Furnished to:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
Law Office of the Capital Collateral Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907.
ahmed@ccmr.state.fl.us;
perinetti@ccmr.state.fl.us;
venable@ccmr.state.fl.us;
support@ccmr.state.fl.us

Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney, Seventh Judicial Circuit,
251 North Ridgewood Avenue,
Daytona Beach Florida 32114.

Stacey Elaine Johns Kircher,
Assistant Attorney General,
Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
Daytona Beach, Florida 32118.
Stacey.kircher@myfloridalegal.com;
CapApp@myfloridalegal.com

Janine Robinson,
Assistant General Counsel,
Florida Department of Law Enforcement,
Office of General Counsel,
2331 Phillips Road,
Tallahassee, Florida 32308.

Josh Raver,
Detective/Evidence Technician,
Police Department,
135 East Park Avenue,
Edgewater, Florida 32132.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this 2nd day of February, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via electronic mail to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com on this 2nd day of February, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; to **Rosemary Calhoun, Assistant State Attorney**, Office of the State Attorney, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach Florida 32114; to **Janine Robinson**, Assistant General Counsel, Florida Department of Law Enforcement, Office of General Counsel, 2331 Phillips Road, Tallahassee, Florida 32308; to **Josh Raver**, Detective/Evidence Technician, Edgewater Police Department, 135 East Park Avenue, Edgewater Florida 32132; and to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 2nd day of February, 2016.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, **CASE NO.: 2009 002872 CFAES**

v.

JOSEPH EDWARD JORDAN,

Defendant,

_____/

NOTICE OF COMPLIANCE BY THE BROWARD SHERIFF'S OFFICE

TO: Stacey E. Kircher
Assistant Attorney General
Office of the Attorney General
Capital Appeals Division
444 Seabreeze Blvd., Suite 500
Daytona Beach, FL 32118

SHERIFF SCOTT J. ISRAEL, SHERIFF OF BROWARD COUNTY, FLORIDA, who was involved in this case by an investigation, arrest, prosecution, or incarceration, through undersigned counsel, hereby gives notice to the Attorney General of compliance by delivery of public records involving this case to the records repository of the Secretary of State, as evidenced by the Transmittals to the Florida State Archives, attached hereto as Exhibit "A". I further certify that, to the best of my knowledge and belief, all public records in possession of this agency or in the possession of any employee of this agency that were produced in the investigation or prosecution of the case, except those previously filed in the trial court, have been copied, indexed, and delivered to the records repository of the Secretary of State.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on: Rosemary Calhoun, Assistant State Attorney, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; to the Honorable J. Terence R. Perkins, S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; Stacey E. Kircher, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118; Raheela Ahmed, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; Maria Christine Perinetti, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; Donna Ellen Venable, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Drive, Suite 210, Tampa, Florida 33619 this 3rd day of February, 2016.

Respectfully submitted,

SCOTT J. ISRAEL
SHERIFF OF BROWARD COUNTY

By: _____

TERRENCE O. LYNCH, ESQ.
Assistant Legal Counsel
Broward Sheriff's Office
Public Safety Building
2601 W. Broward Boulevard
Fort Lauderdale, FL 33312
Telephone: (954) 831-8920
Fla. Bar No. 121355

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	**TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1.RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7066
2. AGENCY Broward Sherrif's Office	3. DIVISION Office of the General Counsel	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
2601 W. Broward Boulevard Fort Lauderdale, FL 33301	Name: Dena Robbins Title: Legal Assistant Phone Number: 954-831-8920
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009-2872CFAES

9. DESCRIPTION

CAS

2009 Correspondence from Joseph Jordan

2016 JAN 13 P 3:53

TOTAL NUMBER OF BOXES _____ **OR** PACKAGES 1 SENT TO THE REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? ☐ YES ☒ NO

ARE **EXEMPT** RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? ***(If not, records will be returned to you)*** ☐ YES ☐ NO

DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER _____

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
Dena Robbins 1/12/16 SIGNATURE DATE	[signature] 1/19/16 CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Dena Robbins, Legal Assistant TYPE NAME AND TITLE	

EXHIBIT A

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	**TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1.RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7069 (R)
2. AGENCY Broward Sheriff's Office	3. DIVISION Crime Lab	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
201 S.E. Sixth Street North Wing Fort Lauderdale, FL 33312	Name: Diana Edwards Title: Administrative Coordinator Phone Number: 954-831-6427
7. SUBMIT TO. Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT CASE# 2009-002872CFAES

9. DESCRIPTION

Crime Laboratory Analysis report - DNA Analysis - Lab Number 10-27306
DNA Unit Technical Review Checklist - CODIS & Report - Lab Number 10-27306

2016 JAN 22 AM 8:33

TOTAL NUMBER OF BOXES _____ OR PACKAGES 1 SENT TO THE REPOSITORY

ARE EXEMPT RECORDS INCLUDED IN THIS SHIPMENT? ☒ YES ☐ NO
ARE EXEMPT RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? *(If not, records will be returned to you)* ☒ YES ☐ NO
DESCRIPTION OF EXEMPT RECORDS AND STATUTORY BASIS FOR EXEMPTION

DNA Analysis information exempt per FSS 943.325(14)

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER _____

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
Diana Edwards 1-14-2016 SIGNATURE DATE	1/21/16 CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Diana Edwards, Admin Coordinator TYPE NAME AND TITLE	

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7068
2 AGENCY Broward Sheriff's Office	3 DIVISION Crime Lab	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6 CONTACT (Name, Title and Telephone Number)
201 S.E Sixth Street North Wing Fort Lauderdale, FL 33312	Name: Diana Edwards Title: Administrative Coordinator Phone Number: 954-831-6427
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8 DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT CASE# 2009-002872CFAES

9. DESCRIPTION

Request for Crime Lab Analysis Reports - SAO & Hallandale Beach PD
Crime Lab Analysis Lab Number 10-27306
DNA Unit Analysis Lab Number 10-27306

TOTAL NUMBER OF BOXES _____ OR PACKAGES 1 SENT TO THE REPOSITORY

ARE EXEMPT RECORDS INCLUDED IN THIS SHIPMENT? ☐ YES ☒ NO
ARE EXEMPT RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? *(If not, records will be returned to you)* ☐ YES ☐ NO
DESCRIPTION OF EXEMPT RECORDS AND STATUTORY BASIS FOR EXEMPTION:

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)
a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER _____

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
1-14-2016 DATE SIGNATURE Diana Edwards, Admin Coordinator TYPE NAME AND TITLE	CHIEF, ARCHIVES AND RECORDS MANAGEMENT 1/21/16 DATE

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7071(R)
2. AGENCY Broward Sherrif's Office	3. DIVISION Department of Detention	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
555 S.E. 1st Avenue Fort Lauderdale, FL 33301	Name: Heather Conner Title: DOD Records Custodian Phone Number: 954-831-5821
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009-002872CFAES

2016 JAN 20 PM 4:39

9. DESCRIPTION

Jail records
- Booking Report (unredacted)
- Inmate Summary
- Movement History
- Contact Log

CAB

TOTAL NUMBER OF BOXES _____ OR PACKAGES 1 SENT TO THE REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? ☒ YES ☐ NO

ARE **EXEMPT** RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? *(If not, records will be returned to you)* ☒ YES ☐ NO

DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

Social Security numbers exempt per FSS 119.071(5)(a)

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER _____

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
Heather Conner 1-13-16 SIGNATURE DATE	[signature] 1/21/16 CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Heather Conner, DOD Records Custodian, TYPE NAME AND TITLE	

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	**TRANSMITTAL/RECEIPT** **TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7070
2. AGENCY Broward Sherrif's Office	3. DIVISION Department of Detention	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
555 S.E. 1st Avenue Fort Lauderdale, FL 33301	Name: Heather Conner Title: DOD Records Custodian Phone Number: 954-831-5821
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009-002872CFAES

9. DESCRIPTION

Jail records
- Booking Report
- Inmate Summary
- Movement History
- Contact Log

2016 JAN 22 PM 4:33

CAB

TOTAL NUMBER OF BOXES _____ OR PACKAGES 1 SENT TO THE REPOSITORY

ARE EXEMPT RECORDS INCLUDED IN THIS SHIPMENT? ☐YES ☒NO

ARE EXEMPT RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? *(If not, records will be returned to you)* ☐YES ☐NO

DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER _____

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
Heather Conner 1-13-16 SIGNATURE DATE	[signature] 1/21/16 CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Heather Conner, DOD Records Custodian TYPE NAME AND TITLE	

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	**TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7073(R)
2. AGENCY Broward Sheriff's Office	3. DIVISION Records Division	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
2601 W. Broward Boulevard Fort Lauderdale, FL 33312	Name: Kelly Giustino Title: Assistant Manager Phone Number: 954-831-8702
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8 DEFENDANT NAME: Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE#: 2009-002872CFAES

9. DESCRIPTION

Booking Reports (unredacted)
Short Arrest Information Forms
Capias
Complaint Affidavits (unredacted)

CASE FILE 09-2872CFAES

TOTAL NUMBER OF BOXES _____ OR PACKAGES 1 SENT TO THE REPOSITORY

CASE

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? ☒ YES ☐ NO

ARE **EXEMPT** RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? ***(If not, records will be returned to you)*** ☒ YES ☐ NO

DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

1. Social security numbers exempt per FSS 119 071(5)(a)
2. Identity of victim of sexual battery exempt per FSS 119 071(2)(h)

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER _____

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
Kelly Giustino 1/13/16 SIGNATURE DATE	1/21/16 CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Kelly Giustino, Assistant Manager, Records TYPE NAME AND TITLE	

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	**TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1.RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7072
2. AGENCY Broward Sheriff's Office	3. DIVISION Records Division	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
2601 W. Broward Boulevard Fort Lauderdale, FL 33312	Name: Kelly Giustino Title: Assistant Manager Phone Number: 954-831-8702
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8 DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009-002872CFAES

9. DESCRIPTION

Booking Reports
Short Arrest Information Forms
Capias
Complaint Affidavits

2016 JAN 20 PM 3:53

TOTAL NUMBER OF BOXES _____ OR PACKAGES 1 SENT TO THE REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? ☐ YES ☒ NO

ARE **EXEMPT** RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? *(If not, records will be returned to you)* ☐ YES ☐ NO

DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER _____

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
Kelly Giustino 1/13/16 SIGNATURE DATE	1/21/16 CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Kelly Giustino, Assistant Manager, Records TYPE NAME AND TITLE	

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7074(R)
2. AGENCY Broward County Sheriff's Office	3. DIVISION Department of Detention	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
555 S.E. 1st Avenue Fort Lauderdale, FL 33301	Name: Yusimir Arencibia Title: Inmate Healthcare Manager Phone Number: 954-831-5905
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009-002872CFAES

9. DESCRIPTION

Inmate Healthcare records

TOTAL NUMBER OF BOXES _____ OR PACKAGES _____ SENT TO THE REPOSITORY

ARE EXEMPT RECORDS INCLUDED IN THIS SHIPMENT? [X] YES [ ] NO

ARE EXEMPT RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? *(If not, records will be returned to you)* [X] YES [ ] NO

DESCRIPTION OF EXEMPT RECORDS AND STATUTORY BASIS FOR EXEMPTION:

Medical records exempt per FSS 395.3025(4), (8); 456.057

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. [X] PAPER COPIES b. [ ] PHOTOGRAPHS c. [ ] AUDIO TAPES d. [ ] VIDEO TAPES e. [ ] OTHER

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED
SIGNATURE _____ DATE 1/12/2016	CHIEF, ARCHIVES AND RECORDS MANAGEMENT _____ DATE 1/21/16
Yusimir Arencibia, Inmate Health Care Manager TYPE NAME AND TITLE	
Y. ARENCIBIA, RN, BSN, PHN, CBE	

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

ORDER TO DELIVER EXEMPT PUBLIC RECORDS
[EDGEWATER POLICE DEPARTMENT & FDLE]

TO: **RECORDS REPOSITORY**
The Florida State Archives
Attn: **CCRC Records Archivist**
R.A. Gray Building,M.S. 9-E,
500 South Bronough Street,
Tallahassee, Florida 32399-0250.

This Court having received notice on this 5th day of Feb, 2016, that certain records which have been claimed as confidential or exempt from disclosure have been copied, indexed, separately contained without being redacted, sealed, identified as to their nature and their legal basis for confidentiality or exemption, and delivered to the Records Repository of the Secretary of the State. The following agencies or entities delivered sealed and/or exempt records to the Records Repository and noted that said following designated records were confidential or exempt from the requirements of Section 119.07, Florida Statutes:

FILED
16 FEB -
PM 3:25
CLERK OF THE CIRCUIT
CIVIL COURT VOLUSIA CTY, FL
013

AGENCY	REPOSITORY	NOTICE OF COMPLIANCE DATE
1. **Edgewater Police Department**	Container 07078	January 19, 2016.
2. **Florida Department of Law Enforcement**	Containers 07074 & 07076.	January 20, 2016.

It is ordered that the above listed records be delivered by the Records Repository to **the Clerk of Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, 251 North Ridgewood Avenue, Daytona Beach, Florida 32114**, for further proceedings consistent with Florida Rule of Criminal Procedure 3.852 (2016). The Law Office of the Capital Collateral Regional Counsel - Middle Region shall bear all the costs associated with the transportation and inspection of these records by the trial court.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida on this 5 day of Feb., 2016.

Honorable Terrence R. Perkins
Chief Circuit Court Judge

Copies Furnished to:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
Law Office of the Capital Collateral Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907.
ahmed@ccmr.state.fl.us;
perinetti@ccmr.state.fl.us;
venable@ccmr.state.fl.us;
support@ccmr.state.fl.us

Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney, Seventh Judicial Circuit,
251 North Ridgewood Avenue,
Daytona Beach Florida 32114.

Stacey Elaine Johns Kircher,
Assistant Attorney General,
Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
Daytona Beach, Florida 32118.
Stacey.kircher@myfloridalegal.com;
CapApp@myfloridalegal.com

Janine Robinson,
Assistant General Counsel,
Florida Department of Law Enforcement,
Office of General Counsel,
2331 Phillips Road,
Tallahassee, Florida 32308.

Josh Raver,
Detective/Evidence Technician,
Police Department,
135 East Park Avenue,
Edgewater, Florida 32132.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this 2nd day of February, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via electronic mail to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com on this 2nd day of February, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; to **Rosemary Calhoun, Assistant State Attorney**, Office of the State Attorney, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach Florida 32114; to **Janine Robinson**, Assistant General Counsel, Florida Department of Law Enforcement, Office of General Counsel, 2331 Phillips Road, Tallahassee, Florida 32308; to **Josh Raver**, Detective/Evidence Technician, Edgewater Police Department, 135 East Park Avenue, Edgewater Florida 32132; and to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 2nd day of February, 2016.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601

Price, Susan

From: Rockey, Janet [Rockey@ccmr.state.fl.us]
Sent: Friday, February 05, 2016 9:23 AM
To: Price, Susan
Subject: Joseph Jordan - Motion & Proposed Order

Good Morning, Susan,

Attorney Ahmed has determined that AAG Stacey Kircher has no objection to the motion.

Thanks,

Janet Rockey

Janet Rockey
Legal Secretary II
Capital Collateral Regional Counsel - Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 33637-0907
Phone: (813) 558-1600 – Main Line
Phone: (813) 558-1633 – Direct Line
Fax: (813) 558-1601 or (813) 558-1602
Rockey@ccmr.state.fl.us

From: Ahmed, Raheela
Sent: Friday, February 05, 2016 9:04 AM
To: Rockey, Janet
Subject: RE: Joseph Jordan - Motion & Proposed Order

AAG Stacey Kircher does not have an objection to the motion.

Thanks
Raheela.

From: Rockey, Janet
Sent: Wednesday, February 03, 2016 8:59 AM
To: Ahmed, Raheela <ahmed@ccmr.state.fl.us>
Subject: Joseph Jordan - Motion & Proposed Order

JA says you can discuss Motion/Proposed Order at STC on 2/12.
Thanks,
Janet

From: Price, Susan [mailto:sprice@circuit7.org]
Sent: Wednesday, February 03, 2016 8:56 AM
To: Rockey, Janet
Subject: RE: Joseph Jordan - Motion & Proposed Order

I just realized that we have a status conference set on this one for 2/12. I guess they can discuss it then.

From: Rockey, Janet [mailto:Rockey@ccmr.state.fl.us]
Sent: Wednesday, February 03, 2016 8:54 AM
To: Price, Susan
Subject: RE: Joseph Jordan - Motion & Proposed Order

Attorney Ahmed emailed the AG and once she gets back to me, I will let you know.
Thank you so much,

Janet Rockey

Janet Rockey
Legal Secretary II
Capital Collateral Regional Counsel - Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 33637-0907
Phone: (813) 558-1600 – Main Line
Phone: (813) 558-1633 – Direct Line
Fax: (813) 558-1601 or (813) 558-1602
Rockey@ccmr.state.fl.us

From: Price, Susan [mailto:sprice@circuit7.org]
Sent: Tuesday, February 02, 2016 3:23 PM
To: Rockey, Janet
Subject: RE: Joseph Jordan - Motion & Proposed Order

Does the State have an objection? I didn't see that in your motion. If so, please set a hearing.

From: Rockey, Janet [mailto:Rockey@ccmr.state.fl.us]
Sent: Tuesday, February 02, 2016 3:08 PM
To: Price, Susan
Subject: Joseph Jordan - Motion & Proposed Order

Dear Ms. Price,

Attached please find the Defendant's First Motion Requesting the *In Camera* Review of Records [Edgewater Police Department & Florida Department of Law Enforcement] and the Proposed Order to Deliver Exempt Public Records [Edgewater Police Department & FDLE], which we filed with the 7th Circuit Court today. Please ask Judge Perkins to sign the Order, then distribute copies to the following via e-mail:

E-mail Addresses for the Order:

Clerk of the Circuit Court, Diane Matousek – clerk@clerk.org
CCRC-M – ahmed@ccmr.state.fl.us; Perinetti@ccmr.state.fl.us; Venable@ccmr.state.fl.us; support@ccmr.state.fl.us
Assistant State Attorney Rosemary Calhoun – calhounr@sao7.org
Assistant Attorney General Stacey Elaine Johns Kircher – Stacey.kircher@myfloridalegal.com; CapApp@myfloridalegal.com
Assistant General Counsel for FDLE Janine Robinson – janinerobinson@fdle.state.fl.us
Detective/Evidence Technician with Edgewater Police Dept. Josh Raver – jraver@cityofedgewater.org

If you have any questions, please feel free to contact me.

Thank you so much,

Janet Rockey

Janet Rockey
Legal Secretary II
Capital Collateral Regional Counsel - Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 33637-0907
Phone: (813) 558-1600 – Main Line
Phone: (813) 558-1633 – Direct Line
Fax: (813) 558-1601 or (813) 558-1602
Rockey@ccmr.state.fl.us

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, **CASE NO.: 2009 002872 CFAES**

v.

JOSEPH EDWARD JORDAN,

Defendant,

_____/

NOTICE OF COMPLIANCE BY THE BROWARD SHERIFF'S OFFICE

TO: Stacey E. Kircher
Assistant Attorney General
Office of the Attorney General
Capital Appeals Division
444 Seabreeze Blvd., Suite 500
Daytona Beach, FL 32118

SHERIFF SCOTT J. ISRAEL, SHERIFF OF BROWARD COUNTY, FLORIDA, who was involved in this case by an investigation, arrest, prosecution, or incarceration, through undersigned counsel, hereby gives notice to the Attorney General of compliance by delivery of public records involving this case to the records repository of the Secretary of State, as evidenced by the Transmittals to the Florida State Archives, attached hereto as Exhibit "A". I further certify that, to the best of my knowledge and belief, all public records in possession of this agency or in the possession of any employee of this agency that were produced in the investigation or prosecution of the case, except those previously filed in the trial court, have been copied, indexed, and delivered to the records repository of the Secretary of State.

FILED
16 FEB -8 PM 3:34
CLERK OF THE CIRCUIT
CTY COURT VOLUSIA CTY, FL
C013

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on: Rosemary Calhoun, Assistant State Attorney, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; to the Honorable J. Terence R. Perkins, S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; Stacey E. Kircher, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118; Raheela Ahmed, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; Maria Christine Perinetti, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; Donna Ellen Venable, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Drive, Suite 210, Tampa, Florida 33619 this 3rd day of February, 2016.

Respectfully submitted,

SCOTT J. ISRAEL
SHERIFF OF BROWARD COUNTY

By: _____

TERRENCE O. LYNCH, ESQ.
Assistant Legal Counsel
Broward Sheriff's Office
Public Safety Building
2601 W. Broward Boulevard
Fort Lauderdale, FL 33312
Telephone: (954) 831-8920
Fla. Bar No. 121355

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7066
2. AGENCY Broward Sherrif's Office	3. DIVISION Office of the General Counsel	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
2601 W. Broward Boulevard Fort Lauderdale, FL 33301	Name: Dena Robbins Title: Legal Assistant Phone Number: 954-831-8920
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009-2872CFAES

9. DESCRIPTION

CAB

2009 Correspondence from Joseph Jordan

TOTAL NUMBER OF BOXES _____ OR PACKAGES 1 SENT TO THE REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? ☐ YES ☒ NO

ARE **EXEMPT** RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? ***(If not, records will be returned to you)*** ☐ YES ☐ NO

DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER _____

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
Dena Robbins 1/12/16 SIGNATURE DATE	[signature] 1/19/16 CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Dena Robbins, Legal Assistant TYPE NAME AND TITLE	

EXHIBIT A

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7069 (R)
2. AGENCY Broward Sheriff's Office	3. DIVISION Crime Lab	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
201 S.E. Sixth Street North Wing Fort Lauderdale, FL 33312	Name: Diana Edwards Title: Administrative Coordinator Phone Number: 954-831-6427
7. SUBMIT TO. Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME: Joseph Edward Jordan DEFENDANT CIRCUIT CT CASE#: 2009-002872CFAES

9. DESCRIPTION

Crime Laboratory Analysis report - DNA Analysis - Lab Number 10-27306
DNA Unit Technical Review Checklist - CODIS & Report - Lab Number 10-27306

2016 JAN 20 AM 8:33

TOTAL NUMBER OF BOXES _____ OR PACKAGES 1 SENT TO THE REPOSITORY

ARE EXEMPT RECORDS INCLUDED IN THIS SHIPMENT? ☒ YES ☐ NO
ARE EXEMPT RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? *(If not, records will be returned to you)* ☒ YES ☐ NO
DESCRIPTION OF EXEMPT RECORDS AND STATUTORY BASIS FOR EXEMPTION:

DNA Analysis information exempt per FSS 943.325(14)

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER _____

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
SIGNATURE: [signature] DATE: 1-14-2016 Diana Edwards, Admin Coordinator TYPE NAME AND TITLE	CHIEF, ARCHIVES AND RECORDS MANAGEMENT: [signature] DATE: 1/21/16

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA	1. RECORD GROUP NO. 880 SERIES NO. 1739 ARCHIVES BOX NO. 7068
2. AGENCY Broward Sheriff's Office	3. DIVISION Crime Lab	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
201 S.E. Sixth Street North Wing Fort Lauderdale, FL 33312	Name: Diana Edwards Title: Administrative Coordinator Phone Number: 954-831-6427
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009-002872CFAES

9. DESCRIPTION

Request for Crime Lab Analysis Reports - SAO & Hallandale Beach PD
Crime Lab Analysis Lab Number 10-27306
DNA Unit Analysis Lab Number 10-27306

FILED: 03/10/2016

TOTAL NUMBER OF BOXES _____ OR PACKAGES 1 SENT TO THE REPOSITORY

ARE EXEMPT RECORDS INCLUDED IN THIS SHIPMENT? ☐ YES ☒ NO

ARE EXEMPT RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? *(If not, records will be returned to you)* ☐ YES ☐ NO

DESCRIPTION OF EXEMPT RECORDS AND STATUTORY BASIS FOR EXEMPTION:

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER _____

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
1-14-2016 DATE	1/20/16 DATE
SIGNATURE Diana Edwards, Admin Coordinator TYPE NAME AND TITLE	CHIEF, ARCHIVES AND RECORDS MANAGEMENT

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7071(2)
2. AGENCY Broward Sherrif's Office	3. DIVISION Department of Detention	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
555 S.E. 1st Avenue Fort Lauderdale, FL 33301	Name: Heather Conner Title: DOD Records Custodian Phone Number: 954-831-5821
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009-002872CFAES

9. DESCRIPTION

Jail records
- Booking Report (unredacted)
- Inmate Summary
- Movement History
- Contact Log

TOTAL NUMBER OF BOXES _____ OR PACKAGES 1 SENT TO THE REPOSITORY

ARE EXEMPT RECORDS INCLUDED IN THIS SHIPMENT? ☒ YES ☐ NO

ARE EXEMPT RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? *(If not, records will be returned to you)* ☒ YES ☐ NO

DESCRIPTION OF EXEMPT RECORDS AND STATUTORY BASIS FOR EXEMPTION:

Social Security numbers exempt per FSS 119.071(5)(a)

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER _____

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
Heather Conner 1-13-16 SIGNATURE DATE	[signature] 1/21/16 CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Heather Conner, DOD Records Custodian TYPE NAME AND TITLE	

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA	1. RECORD GROUP NO. 650 SERIES NO. 1739 ARCHIVES BOX NO. 7070
2. AGENCY Broward Sherrif's Office	3. DIVISION Department of Detention	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
555 S.E. 1st Avenue Fort Lauderdale, FL 33301	Name: Heather Conner Title: DOD Records Custodian Phone Number: 954-831-5821
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009-002872CFAES

9. DESCRIPTION

Jail records
- Booking Report
- Inmate Summary
- Movement History
- Contact Log

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ARE EXEMPT RECORDS INCLUDED IN THIS SHIPMENT? ☐ YES ☒ NO

ARE EXEMPT RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? *(If not, records will be returned to you)* ☐ YES ☐ NO

DESCRIPTION OF EXEMPT RECORDS AND STATUTORY BASIS FOR EXEMPTION:

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER _____

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
SIGNATURE: [signature] DATE: 1-13-16	CHIEF, ARCHIVES AND RECORDS MANAGEMENT: [signature] DATE: 1/21/16
Heather Conner, DOD Records Custodian TYPE NAME AND TITLE	

OK SV

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA	1.RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7073(R)
2. AGENCY Broward Sheriff's Office	3. DIVISION Records Division	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
2601 W. Broward Boulevard Fort Lauderdale, FL 33312	Name: Kelly Giustino Title: Assistant Manager Phone Number: 954-831-8702
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8 DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009-002872CFAES

9. DESCRIPTION

Booking Reports (unredacted)
Short Arrest Information Forms
Capias
Complaint Affidavits (unredacted)

TOTAL NUMBER OF BOXES _____ OR PACKAGES 1 SENT TO THE REPOSITORY

ARE EXEMPT RECORDS INCLUDED IN THIS SHIPMENT? ☒ YES ☐ NO

ARE EXEMPT RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? *(If not, records will be returned to you)* ☒ YES ☐ NO

DESCRIPTION OF EXEMPT RECORDS AND STATUTORY BASIS FOR EXEMPTION:

1. Social security numbers exempt per FSS 119 071(5)(a)
2. Identity of victim of sexual battery exempt per FSS 119 071(2)(h)

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
Kelly Giustino 1/13/12 SIGNATURE DATE	[signature] 1/20/12 CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Kelly Giustino, Assistant Manager, Records TYPE NAME AND TITLE	

CASE

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7072
2. AGENCY Broward Sheriff's Office	3. DIVISION Records Division	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
2601 W. Broward Boulevard Fort Lauderdale, FL 33312	Name: Kelly Giustino Title: Assistant Manager Phone Number: 954-831-8702
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8 DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009-002872CFAES

9. DESCRIPTION

Booking Reports
Short Arrest Information Forms
Capias
Complaint Affidavits

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TOTAL NUMBER OF BOXES _____ OR PACKAGES 1 SENT TO THE REPOSITORY

ARE EXEMPT RECORDS INCLUDED IN THIS SHIPMENT? ☐ YES ☒ NO

ARE EXEMPT RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? *(If not, records will be returned to you)* ☐ YES ☐ NO

DESCRIPTION OF EXEMPT RECORDS AND STATUTORY BASIS FOR EXEMPTION:

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
Kelly Giustino 1/12/16 SIGNATURE DATE	1/21/16 CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Kelly Giustino, Assistant Manager, Records TYPE NAME AND TITLE	

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA	1.RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7074(R)
2. AGENCY Broward County Sheriff's Office	3. DIVISION Department of Detention	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
555 S.E. 1st Avenue Fort Lauderdale, FL 33301	Name: Yusimir Arencibia Title: Inmate Healthcare Manager Phone Number: 954-831-5905
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME: Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009-002872CFAES

9. DESCRIPTION

Inmate Healthcare records

TOTAL NUMBER OF BOXES _____ OR PACKAGES _____ SENT TO THE REPOSITORY

ARE EXEMPT RECORDS INCLUDED IN THIS SHIPMENT? ☒ YES ☐ NO

ARE EXEMPT RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? *(If not, records will be returned to you)* ☒ YES ☐ NO

DESCRIPTION OF EXEMPT RECORDS AND STATUTORY BASIS FOR EXEMPTION:

Medical records exempt per FSS 395.3025(4), (6); 456.057

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED
SIGNATURE: Yusimir Arencibia 1/12/2012 DATE	CHIEF, ARCHIVES AND RECORDS MANAGEMENT 1/21/12 DATE
Yusimir Arencibia, Inmate Health Care Manager TYPE NAME AND TITLE Y. ARENCIBIA, RN, BSN, PHN, CBE	

Robbins, Dena

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Dear Terrence O Lynch:

This email verifies the receipt of 1 document submitted by you to Volusia Circuit Criminal on 02/03/2016 02:59:45 PM.

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Document Title:	Notice
Matter #:	
Memo:	
Filing Fee:	$0.00
Notices Notice:	$0.00
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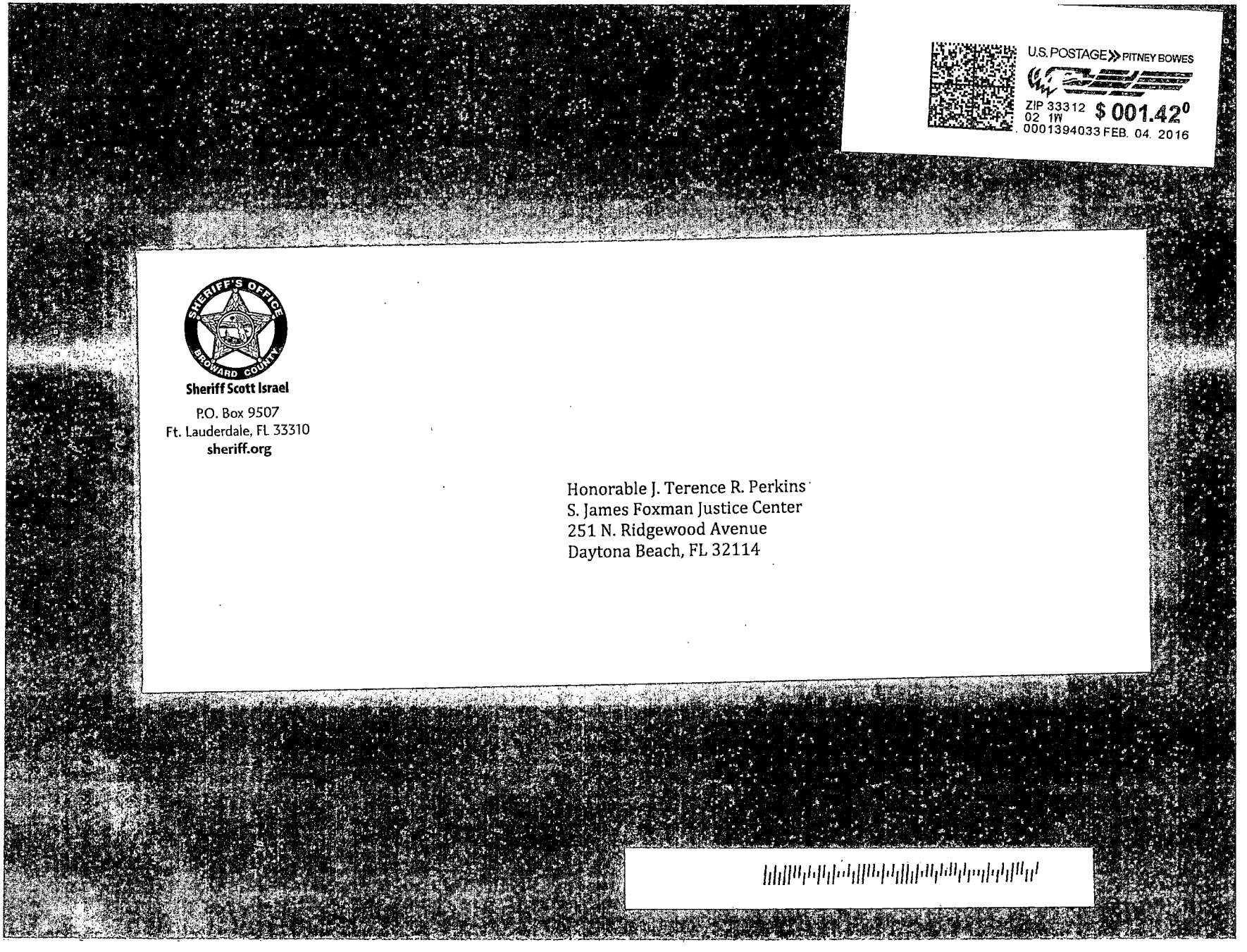
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Sheriff Scott Israel

P.O. Box 9507
Ft. Lauderdale, FL 33310
sheriff.org

Honorable J. Terence R. Perkins
S. James Foxman Justice Center
251 N. Ridgewood Avenue
Daytona Beach, FL 32114

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

CASE NO: 2009-002872 CFAWS

JOSEPH EDWARD JORDAN,
DEFENDANT.
_____/

NOTICE OF COMPLIANCE BY THE STATE ATTORNEY SEVENTH JUDICIAL CIRCUIT

TO: Stacey E. Kircher, Esquire
Assistant Attorney General
444 Seabreeze Boulevard, 5th Floor
Daytona Beach, Florida 32118

The Office of the State Attorney, having received notice of the affirmance of the death penalty in this case from the Office of the Attorney General on November 6, 2015, hereby gives notice of compliance with Florida Rule of Criminal Procedure 3.852 (e) and certifies that, to the best of my knowledge and belief, all public records determined by this agency to be relevant to the subject matter of a proceeding under Florida Rule of Criminal Procedure 3.851, except for those previously filed in the trial court, have been copied, indexed, and delivered to the records repository of the Secretary of State on January 28, 2016. Our agency case number is 2009-002872 CFAWS.

RESPECTFULLY SUBMITTED
FOR THE STATE ATTORNEY

Nichole D. Reagan
(Signature of Person who prepared and submitted records)

Rosemary L. Calhoun
ROSEMARY L. CALHOUN
ASSISTANT STATE ATTORNEY
Florida Bar No. 611700
251 North Ridgewood Avenue
Daytona Beach, FL 32114
(386) 239-7710

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the Honorable Terence R. Perkins, Circuit Court Judge, S. James Foxman Justice Center, 251 North Ridgewood Avenue, Daytona Beach, Florida 32114; and to Raheela Ahmed ahmed@ccmr.state.fl.us; Maria Perinetti perinetti@ccmr.state.fl.us; and Donna Venable venable@ccmr.state.fl.us, Assistant CCRC, Office of the Capital Collateral Regional Counsel-Middle Region, Tampa, Florida, 33619, on this 11th day of February, 2016.

ROSEMARY L. CALHOUN
ASSISTANT STATE ATTORNEY
Florida Bar No. 611700
251 North Ridgewood Avenue
Daytona Beach, FL 32114
(386) 239-7710
eservicevolusia@sao7.org

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

CASE #: 2009 002872 ~~CFAES~~ CFAWS

JOSEPH EDWARD JORDAN
DEFENDANT

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CLERK OF CIRCUIT & CTY. COURT VOLUSIA CTY., FL
CC 3

NOTICE OF COMPLIANCE BY THE DISTRICT 7 MEDICAL EXAMINER

TO: Stacey Kircher
Assistant Attorney General
Office Of The Attorney General
Capital Appeals Division
444 Seabreeze Blvd., Suite 500
Daytona Beach, FL 32118

The District 7 Medical Examiner, in and for Volusia County Florida, having received notice of the affirmance of the death penalty in this case from the Office of the State Attorney for the Seventh Judicial Circuit on 16 November 2015, hereby gives notice of compliance with Florida Rule of Criminal procedure 3.852(e) and certifies that, to the best of my knowledge and belief, all public records determined by this agency to be relevant to the subject matter of a proceeding under Florida Rule of Criminal Procedure 3.851, except for those previously filed in the trial court, have been copied, indexed, and delivered to the records repository of the Secretary of State. Our case file # is 09-07-364.

RESPECTFULLY SUBMITTED
FOR THE 7TH DIST. MEDICAL EXAMINER

Jessi Haraas
(Signature of Person who prepared and submitted records)

Marie A. Herrmann MD 2-9-16
MARIE A. HERRMANN, M. D. DATE
DISTRICT 7 MEDICAL EXAMINER
1360 Indian Lake Road
Daytona Beach, FL 32124

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on Rosemary Calhoun, Assistant State Attorney, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; to the Honorable J. Terence R. Perkins, S. James Foxman Justice Center, 251 N. Rigewood Avenue, Daytona Beach, Florida 32114: to Stacey E. Kircher, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118: to Raheela Ahmed, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619: to Maria Christine Perinetti, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619: and to Donna Ellen Venable, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Fampa Florida 33619, on this 9th day of February, 2016.

Marie A. Herrmann M.D. 2-9-16

MARIE A. HERRMANN M. D.
DISTRICT 7 MEDICAL EXAMINER

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

**DEFENDANT'S SECOND MOTION REQUESTING
THE *IN CAMERA* REVIEW OF RECORDS
[FDOC, SAO, AND BROWARD COUNTY SHERIFF'S OFFICE]**

The Defendant, Joseph Edward Jordan, pursuant to Fla.R.Crim.P. 3.852(f)(3), by and through his undersigned counsel, hereby moves this Honorable Court for an order to the Florida State Archives (Records Repository) to deliver certain exempt public records to the Clerk of this Court and for this Court to conduct an *in camera* review of those records. In support, Mr. Jordan states the following:

1. Joseph Edward Jordan is incarcerated at Florida State Prison under a sentence of death.

2. Pursuant to Florida Rule of Criminal Procedure 3.852(f) [1], the following agencies have

[1] Fla. R. Crim. P. Rule 3.852 (f) provides as follows:

> **(f) Exempt or Confidential Public Records.**
>
> (1) Any public records delivered to the records repository pursuant to these rules that are confidential or exempt from the requirements of section 119.07(1), Florida Statutes, or article I, section 24(a), Florida Constitution, must be separately contained, without being redacted, and sealed. The outside of the container must clearly identify that the public record is confidential or exempt and that the seal may not be broken without an order of the trial court. The outside of the container must identify the nature of the public records and the legal basis for the exemption.

provided a Notice of Compliance indicating that it has delivered records to the Records Repository that include sealed exempt and/or confidential records located as follows:

AGENCY	REPOSITORY	NOTICE OF COMPLIANCE DATE
1. **Florida Department of Corrections**[2] *See Appendix A.*	Container 07061	January 21, 2016.
2. **Office of the State Attorney – R.J. Larizza** *See Appendix B.*	Container 07085	February 11, 2016.
3. **Broward County Sheriff's Office** *See Appendix C.*	Container 07074	February 3, 2016.

3. The Supreme Court of Florida has discussed this process several times since the introduction of the rule as a reform in 1998. The Supreme Court of Florida in *Rose v. State*, 774 So. 2d 629 (Fla. 2000), has approved the "pre-Huff" procedure of *in camera* inspections of records designated as exempt and/or confidential and has held as follows:

> Rose also alleges that the trial court violated his constitutional right to have a full and fair state postconviction proceeding by conducting an in-camera inspection of public records to determine whether the State was justified in claiming that such records were exempt from disclosure. On July 11, 1996, Rose filed a public records request with the Pinellas County State Attorney's Office pursuant to chapter 119, Florida Statutes. The State responded and provided Rose with a detailed explanation of the public records that were exempt from disclosure under Florida Rule of Criminal Procedure 3.852. The trial court subsequently conducted an in-camera review of the public records withheld by the State. After conducting the in-

---

> (2) Upon the entry of an appropriate court order, sealed containers subject to an inspection by the trial court shall be shipped to the clerk of court. The containers may be opened only for inspection by the trial court in camera. The moving party shall bear all costs associated with the transportation and inspection of such records by the trial court. The trial court shall perform the unsealing and inspection without ex parte communications and in accord with procedures for reviewing sealed documents.
>
> (3) Collateral counsel must file a motion for in camera inspection within 30 days of *receipt of the notice of delivery of sealed records* to the central records repository or the in camera inspection will be deemed waived.

[2] A release was provided to the Florida Department of Correction signed by Mr. Jordan.

> camera review, the trial court concluded that the withheld records contained no *Brady* material, but the court instructed the State in a written order to provide Rose with certain records that were not covered under the statutory exemptions. According to Rose, the trial court's in-camera review of the allegedly exempt public records and its refusal to require the State to turn over handwritten notes pertaining to the alleged "deal" between Borton and Poole and the State prejudiced him. Rose claims that he is entitled to an evidentiary hearing. We disagree.
>
> In *Ragsdale v. State*, 720 So. 2d 203, 206 (Fla. 1998), this Court had to determine whether public records were properly exempted from disclosure by the State. This Court ruled that where doubt existed as to whether the State must disclose a particular document, the proper procedure is to have a trial judge conduct an in-camera review of the documents. *See id.; see also State v. Kokal*, 562 So. 2d 324, 327 (Fla. 1990) (stating that when certain statutory exemptions are claimed by the party against whom the public records request has been filed or when doubt exists as to whether a particular document must be disclosed, the proper procedure is to furnish the document to the trial judge for an in-camera inspection). After conducting an in-camera review, the State must turn over the nonexempt materials to the defense. *See Ragsdale*, 720 So. 2d at 206.
>
> In this case, Judge Schaeffer conducted an in-camera proceeding and examined each of the alleged documents that the State withheld to determine whether the documents were properly withheld. After reviewing the documents, the trial court issued a written order instructing the State as to which documents it needed to produce to the defense. Rose has failed to cite to any authority that suggests that Judge Schaeffer's review of the withheld documents was improper and we have found no authority that supports this view. Therefore, we find that Judge Schaeffer fully complied with procedures set forth in *Ragsdale* and *Kokal* for determining whether the State's claimed exemptions were proper.

Rose v. State, 774 So. 2d 629, 636-637 (Fla. 2000) (footnote omitted).

9. The procedure approved in *Rose* was again discussed by the Florida Supreme Court in *Damren v. State*, 838 So. 2d 512 (Fla. 2003), as follows:

> Damren asserts that the trial court erred in denying his request for certain public records from the State Attorney's office. According to Damren, the circuit court failed to review these records for exculpatory information under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We disagree.
>
> As this Court has held, "where doubt existed as to whether the State must disclose a particular document, the proper procedure is to have a trial judge conduct an in-camera review of the documents." *Rose v. State*, 774 So. 2d 629, 636 (Fla. 2000). This Court applies an abuse of discretion standard when reviewing a trial court's determination on a public records request. *Moore v. State*, 820 So. 2d 199, 204 (Fla. 2002).

> The record reveals that the State provided the requested records to the trial court for an in-camera review and the postconviction judge granted the public records request in part and denied it in part. During a hearing, the circuit court carefully reviewed each folder of materials which was submitted, explained what information was contained in each folder and whether it included exculpatory information, and indicated the files to which defense counsel was entitled. We find that the trial court did not abuse its discretion in denying in part Damren's request and hence deny relief. We find no error.

Damren v. State, 838 So.2d 512, 519 (Fla. 2003) (footnote omitted).

10. The effects of the discovery and other post-conviction reforms from the late 1990s onward was analyzed by the Honorable O.H. Eaton, Jr. as follows:

> Litigation in a death penalty case does not end when the judgment and sentence of death are affirmed by the Supreme Court of Florida. The next phase of litigation in these cases falls under the general heading of "postconviction relief." It is during this phase that death row defendants litigate matters "collateral" to the judgment and sentence that could not have been raised on appeal. . . . They are charged with reinvestigating the case to find out deficiencies that occurred during the trial. This reinvestigation usually includes review of numerous public records that may have some bearing on the case.
>
> . . .
>
> Over the last several years both the Supreme Court and the legislature have made efforts to streamline the processing of postconviction motions in capital cases.
>
> . . .
>
> Prior to 1996, collateral counsel had to file a civil action in order to obtain public records from persons or agencies other than the state attorney and local law enforcement agencies that investigated the crime. This cumbersome process often required suit to be filed in several jurisdictions and delays were inevitable.
>
> . . .
>
> The legislature created a centralized repository for storage of public records in capital cases in order to provide easy access to them. It was the legislature's hope that a process could be developed that would allow these records to be automatically sent to the repository and made accessible to counsel without the necessity of resorting to litigation.
>
> Currently, the Secretary of State is the officer responsible for storing the records and the records repository is located in the R.A. Gray building in Tallahassee.
>
> . . .
>
> [T]he procedural aspects of discovery of public records are now regulated by the Supreme Court of Florida. Rule 3.582 provides for an orderly method to obtain public records and, if the various offices and agencies that maintain public records cooperate, collateral counsel should be able to review them and have copies made in a timely fashion.

. . .
Assuming every person and agency complies with the requirement to submit public records to the records repository, all of the public records should be on file there less than 330 days from the date the mandate affirming the death sentence is issued by the Supreme Court of Florida. However, in capital litigation, things are never that easy. Some of the records may be claimed to be exempt or confidential and there may be old cases out there that are subject to a separate procedure. Ironically, the persons or agencies claiming records to be exempt or confidential are aligned with the prosecution whose interest is to avoid delays. By providing a separate procedure for old cases, additional delays may be expected.

Exempt or Confidential Public Records

Rule 3.852(f) provides that any public records delivered to the records repository that are claimed to be exempt or confidential must be boxed separately, without redaction, and sealed. The box must clearly identify that the public record is confidential or exempt and the seal may not be broken without an order of the trial court. The box must also identify "the nature of the public records and the legal basis for the exemption."
In order for collateral counsel to obtain a ruling to unseal the public records claimed to be exempt or confidential, an order must first be obtained from the trial court directing the records repository to ship the sealed boxes of records to the clerk of the trial court. *Undoubtedly, collateral counsel will always want to obtain a ruling to determine if these records are really exempt or confidential and delay could be avoided if these records were filed with the clerk of the court in the first place*. However, the Supreme Court wanted to carry out legislative intent where possible so this unnecessary complication is part of the procedure and will undoubtedly cause delay.

The "moving party" is responsible to pay for the cost of the "transportation and inspection of such records by the trial court." Presumably, the "cost" will be just the postage. It is unclear what "cost" could possibly be associated with inspecting the records.

Once the records claimed to be exempt or confidential are delivered to the clerk of the court, they may only be opened by the trial court in camera without ex parte communication in the same manner as inspecting any sealed document. Presumably, the trial court will enter an order sustaining the claim of exemption or confidentiality or order the records disclosed.
. . .
In Camera Inspection of Exempt Public Records

Persons or agencies claiming public records to be exempt from production must box the records separately, seal them, index them with the reasons for the exemption, and deliver them to the records repository. From there, the records are shipped to the clerk of the trial court.

> *The trial judge must inspect the records in camera to determine if they are in fact exempt. A detailed order must be entered identifying each public record and the reason for its exemption.*
>
> *In* Rose v. State, *774 So. 2d 629 (Fla. 2000), the trial judge held an in camera inspection of public records claimed to be exempt before the Huff hearing. The state attorney was ordered to produce certain of the records and others were ruled to be exempt. The Supreme Court approved the procedure.*
>
> . . .
>
> Public records have provided collateral counsel with significant evidence in the past and will undoubtedly continue to do so in the future. Trial judges need to take their responsibility to rule on public records issues seriously and make every effort to resolve public records disputes in a timely manner.

O.H. Eaton, Jr., *Discovery of Public Records in Capital Cases*, 76 Fla. B.J. 24, 30 (April 2002) (footnotes omitted) (emphasis added).

4. There are no objections by the State of Florida or the forgoing agencies to this Motion and accompanying proposed order.

WHEREFORE, Mr. Jordan hereby requests the entry of an order so that the aforementioned records can be transferred to the Clerk of this Circuit Court for an *in camera* review by this Court to determine whether they are exempt public records. It is further requested that if a subsequent *in camera* determination is made by this Honorable Court that these records are not exempt, that the records be released to undersigned counsel pursuant to a subsequent Court's order.

Respectfully submitted

s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

s/ Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar Number 13837
Email: perinetti@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

s/ Donna Ellen Venable
Donna Ellen Venable
Florida Bar Number 100816
Email: venable@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

Law Office of the Capital Collateral
Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Telephone (813) 558-1600
Fax No. (813) 558-1601 or (813) 558-1602

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

APPENDIX A

**TO DEFENDANT'S SECOND MOTION REQUESTING
THE *IN CAMERA* REVIEW OF RECORDS
[FDOC, SAO, AND BROWARD COUNTY SHERIFF'S OFFICE]**

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/REV06-2012/CCR100	**TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7060-7061(R)
2. AGENCY Florida Department of Corrections	3. DIVISION	4 BUREAU Office of the General Counsel

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title, and Telephone Number)
501 South Calhoun Street Tallahassee, Florida 32399-2500	Name: Christian G. Cea Title: Paralegal Specialist Phone Number: (850) 717-3580
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME : **Joseph Edward Jordan, DC # 180632** DEFENDANT CIRCUIT CT. CASE : # 2009CF002872XXXAWS 7th Judicial Circuit Volusia County

9. DESCRIPTION:

DISC 1 of 1 **Confidential and Exempt (Unredacted/Sealed)** Records of **Joseph Edward Jordan, DC # 180632**
PAGES CFE-1 through CFE-232 **Confidential or Exempt portions** of Florida State Prison Classification file
PAGES CRE-1 through CRE-483 **Confidential or Exempt portions** of Central Records File
PAGES IGE-1 through IGE- 2 **Confidential or Exempt portions** of Inspector General File
PAGES P&PE-1 through P&PE-26 **Confidential or Exempt portions** of Probation & Parole Office File
PAGES FPCE-1 through FPCE- 80 **Confidential/Exempt (Florida Parole Commission Record)**
PAGES Med-1 through Med- 268 **Confidential/Exempt (MEDICAL FILE) Joseph Edward Jordan, DC # 180632**, Florida State Prison

DISC 1 of 1 Non-confidential/Redacted Public Records of **Joseph Edward Jordan, DC # 180632**
PAGES CF-1 through CF- 295 **Unsealed (public):** Florida State Prison Classification file (non-confidential)
PAGES CR-1 through CR-688 **Unsealed (public):** Central Records file (non-confidential)
PAGES IG-1 through IG- 5 **Unsealed (public):** Inspector General File file (non-confidential)
PAGES P&P-1 through P&P-32 **Unsealed (public):** Probation & Parole File (non-confidential)

2016 JUN 13 PM 4:20

TOTAL NUMBER OF DISCS ____2____ **OR** PACKAGES_____ SENT TO REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? __X__ YES ___NO
ARE **EXEMPT** RECORDS SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? (***If not, records will be returned to you***) __X__ YES ___NO

DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

Statutory authority for redaction/exclusion of Medical, psychological, and dental info: Fla. Stat. 456.057, 945.10(1)(a), 45 C.F.R. § 164.502
Statutory authority for redaction/exclusion of HIV/AIDS Testing Information and/or Substance Abuse information: Fla. Stat. 381.004, 397.501, 397.752, 42 C.F.R. Part 2
Statutory authority for redaction/exclusion Information relating to cause of death in all death records, including medical certification of the cause of death in a death certificate.§§ 382.008(6), 945.101(1)(a), F.S., 45 C.F.R., §164.502
Statutory authority for exclusion of Pre/Post-sentence Investigation and/or Violation Report: Fla. Stat. 945.10(1)(b)
Statutory authority for redaction of Educational records: Fla. Stat. 1002.22
Statutory authority for exclusion/redaction of biometric identification information, including fingerprints, held by the department: Fla. Stat. 119.071 (5)(g)
Statutory authority for exclusion of Juvenile records, Fla. Stat. 985.04
Statutory authority for redaction/exclusion of Information regarding a victim's statement and/or identity. Fla. Stat. 945.10(1)(f), 119.071(2)(h)-(j),
Statutory authority for exclusion of Parole Commission records: Fla. Stat. 14.28 and 945.10(1)(d)
Statutory authority for redaction of Sensitive information: Fla. Stat. 945.10(1)(e)
Statutory authority for exclusion of FCIC/NCIC or Criminal Justice (Florida/Federal) information: Fla. Stat. 943.053
Statutory authority for redaction of FDLE/FBI numbers: Fla. Stat. 943.053
Statutory authority for redaction of Social Security (SS) info: Fla. Stat. 119.071(5)(a)
Statutory authority for redaction of Computer printouts containing offender information which are not specifically designated for public use: Fla. Stat. 943.053, 943.0525, and Chap. 33-601-901(5)
Statutory authority for redaction of Sensitive information: Fla. Stat. 945.10 and 119.071

Statutory authority for redaction of records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations or portions thereof relating directly to the physical security of an institution or revealing security systems of an institution. Fla. Stat. 119.071(3) and 281.301
Statutory authority for redaction/exclusion of the home addresses, telephone numbers, including cellular personal pager numbers, social security numbers, dates of birth, and photographs of active or former department employees and/or their spouses and children; places of employment; daycare facilities, and/or schools of active or former department employees' spouses and children: 119.071 9(4)(d), F.S. and 945.10(1)(e), F.S.

(USE CONTINUATION SHEET IF NECESSARY

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ____PAPER COPIES b.____ PHOTOGRAPHS c.____ AUDIO TAPES d.____ VIDEO TAPES e. X OTHER CDs

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
1-13-2016.	1/14/16
SIGNATURE DATE	CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Christian G. Cea, Paralegal Specialist	
TYPE NAME AND TITLE	

Record Group: 000660 Call Number: .S1739

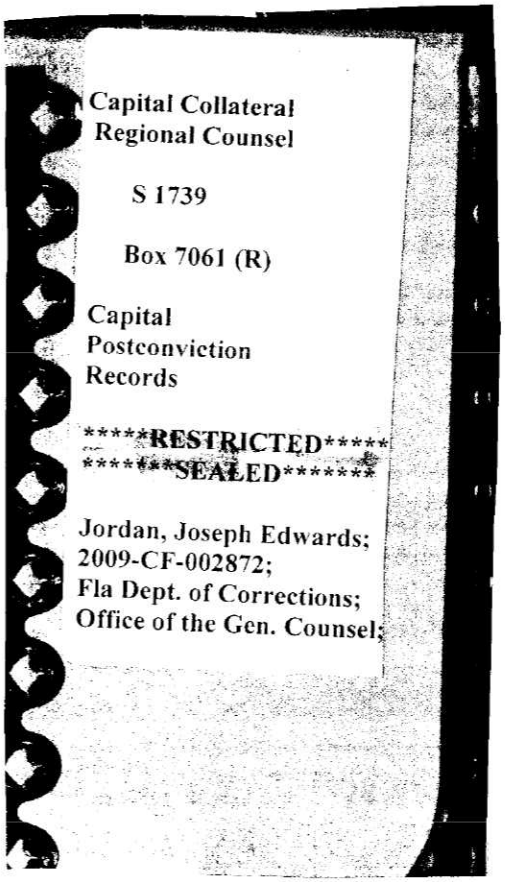
Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
			406.135(2)
07057	00002		Confidential/Exempt: File #6 Case# 09-3354--Folder O Exempt Files Summary Pages From Database--Exempt per F.S. 119.0712
07058			Martin, Arthur James; 2009-CF-014374; State Attorney's Office, 4th Judicial Circuit--Public Records Division
07058	00001		Emails Involving Arthur James Martin and Javon Abdullah Daniles [1 CD]
07059			Martin, Arthur James; *RESTRICTED* SEALED; 2009-CF-014374; State Attorney's Office, 4th Judicial Circuit--Public Records Division
07059	00001		Confidential/Exempt: Emails Involving Arthur James Martin and Javon Abdullah Daniels Exempt Set--Exempt per F.S. 119.071(4)(d)
07060			Jordan, Joseph Edwards; 2009-CF-002872; Florida Department of Corrections--Office of the General Counsel
07060	00001		Non-confidential/Redacted Public Records of Joseph Edward Jordan--Florida State Prison Classification File (CF-1 -- CF-295), Central Records File (CR-1 -- CR-688), Inspector General File (IG-1 -- IG-5), and Probation and Parole File (P&P-1 -- P&P-32)
07061			Jordan, Joseph Edwards; *RESTRICTED* SEALED; 2009-CF-002872; Florida Department of Corrections--Office of the General Counsel
07061	00001		Confidential/Exempt: Unredacted/Sealed Record of Joseph Edward Jordan--Florida State Prison Classification file (CFE-1 -- CFE-232), Central Records file (CRE-1 -- CRE-483), Inspector General file (IGE-1

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
			-- IGE-2), Probation and Parole file (P&PE-1 -- P&PE-26), Florida Parole Commission record (FPCE-1 -- FPCE-80), Florida State Prison Medical file (Med-1 -- Med-268)--Exempt per F.S. 456.057, 945.10(1)(a), 45 CFR § 164.502, 381.004, 397.501, 397.752, 42 USC § 290dd-2, 42 CFR Part 2, 382.008(6), 945.101(1)(a), 945.10(1)(b), 14.28, 945.10(1)(d), 945.10(1)(f), 119.071(2)(h)-(j), 943.053, 1002.221, 119.071(5)(a), 119.071(5)(g), 119.071(3), 281.301, 943.053, 943.0525, Chap. 33-601.901(5), 985.04, and 119.071(3)
07062			McCoy, Thomas Ford; *RESTRICTED* SEALED; 2009-CF-000257; Florida Department of Corrections--Office of the General Counsel
07062	00001		Confidential/Exempt: Unredacted/Sealed Records of Thomas Ford McCoy--Union Correctional Institution Medical file (Med-1 -- Med-54)--Exempt per F.S. 456.057, 945.10(1)(a), 45 CFR § 164.502, 381.004, 397.501, 397.752, and 42 CFR Part 2
07063			Gamble, Guy R.; *RESTRICTED* SEALED; 91-1676-CF-B-DS; Florida Department of Corrections--Office of the General Counsel
07063	00001		Confidential/Exempt: Unredacted/Sealed Records of Guy R. Gamble--Union Correctional Institution Medical file (Med-1 -- Med-463)--Exempt per F.S. 456.057, 945.10(1)(a), 45 CFR § 164.502, 381.004, 397.501, 397.752, and 42 CFR Part 2
07064			McCoy, Thomas Ford; 2009-CF-000257; Walton County Clerk of Court
07064	00001		Attorney Notes and Drafts--Section A
07064	00002		Attorney Notes and Drafts--Section B
07064	00003		Attorney Notes and Drafts--Section C


Capital Collateral
Regional Counsel
S 1739
Box 7061 (R)
Capital
Postconviction
Records
*****RESTRICTED*****
*******SEALED*******
Jordan, Joseph Edwards;
2009-CF-002872;
Fla Dept. of Corrections;
Office of the Gen. Counsel;

S1739 Confidential/Exempt Box 7061, FF1

Department of Corrections, Office of the General Counsel

Joseph Edward Jordan, DC# 180632

Confidential/Exempt Records from:

Florida State Prison – Medical Records,

CONFIDENTIAL

Florida Parole commission Records,

Florida State Prison – Classification, Central Records, Inspector General Records, Probation & Parole Records

DISC 1 of 1 CONFIDENTIAL/EXEMPT Records
Joseph Edward Jordan, DC # 180632
Florida State Prison CONFIDENTIAL [MEDICAL] RECORDS, Florida Parole Commission Records, Classification Records, Central Records, Inspector General Records, Probation & Parole Records

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SEAL MAY NOT BE BROKEN WITHOUT AN ORDER FROM THE TRIAL COURT!!

The following information is confidential and has been redacted from the records (check all that apply):

__X_ Medical, psychological, and dental records. Fla. Stat. 456.057, 945.10(1)(a), 45 C.F.R. § 164.502
__X__ HIV/AIDS testing information and/or substance abuse treatment records, to the extent any exist. Fla. Stat. 381.004, 397.501, 397.752, 42 U.S.C. § 290dd-2, 42 C.F.R. Part 2
_X___ Information relating to cause of death in all death records, including medical certification of the cause of death in a death certificate. §§ 382.008(6), 945.101(1)(a), F.S., 45 C.F.R., §164.502.
_X__ Preplea, pretrial intervention, violation reports, presentence or post sentence investigations (PSI's) to persons other than those described in Fla. Stat. 945.10(1)(b)
_____ Information regarding person in the federal witness protection program. Fla. Stat. 945.10(1)(c)
__X__ Parole Commission records: 14.28 and Fla. Stat. 945.10(1)(d)
_____ Information which if released would jeopardize a person's safety. Fla. Stat. 945.10(1)(e), F.S. and Chap. 33-601.901(3)(e)
__X__ Information regarding a victim's statement and/or identity. Fla. Stat. 945.10(1)(f), 119.071(2)(h)-(j),
_____ Identity of confidential informants. Fla. Stat. 119.071(2)(f)
__X__ FCIC / NCIC and criminal justice information. Fla. Stat. 943.053
_____ Active criminal investigations or criminal intelligence information. Fla. Stat. 119.071(2)(c)
_____ On-going investigations regarding correctional officers. Fla. Stat. 112.533(2)(a)
__X__ School transcripts or educational records; including personally identifiable records or reports of a student, and any personal information contained therein. Fla. Stat. 1002.22
__X__ Social Security Numbers Fla. Stat. 119.071(5)(a)
_____ Home addresses, telephone numbers, social security numbers and photographs of active or former department employees; places of employment and/or daycare facilities, schools of employees, spouses and children, Fla. Stat. 119.071(4)(d), 945.10(1)(e)
__X__ Biometric identification information, including fingerprints, held by the department Fla. Stat. 119.071(5)(g)
__X__ Records developed or received by any state entity pursuant to a Board of Executive Clemency investigation. Fla. Stat. 14.28
__X___ Sensitive information: 119.071(1), Fla. Stat., and Article I of the State Constitution.

__X__ Records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations or portions thereof relating directly to the physical security of an institution or revealing security systems of an institution. Fla. Stat. 119.071(3) and 281.301
_____ Information revealing surveillance techniques, procedures or personnel Fla. Stat. 119.071(2)(d)
__X__ FDLE / FBI Numbers Fla. Stat. 943.053
_____ Drivers Licence Numbers: Fla Sta. 119.07(6)(aa)
_____ Bank account, debit, credit card numbers held by an agency. Fla. Stat. 119.071(5)9.(b)
_____ Other (describe) Staff ID

__X__ Computer printouts containing offender information which are not specifically designated for public use. Fla. Stat. 943.053, 943.0525, and Chap. 33-601.901(5)
__X___ Juvenile records, Fla. Stat. 985.04
_____ Birth certificates, Fla. Stat. 382.013
_____ Death certificates, Fla. Stat. 382.008
_____ Clemency info, Fla. Stat. 14.28
__X___ Security info, Fla. Stat. 119.071(3)
_____ Info identifying executioner, or any individual preparing, compounding, dispensing, or administering lethal injection, Fla. Stat. 945.10(g)

CONFIDENTIAL

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

APPENDIX B

**TO DEFENDANT'S SECOND MOTION REQUESTING
THE *IN CAMERA* REVIEW OF RECORDS
[FDOC, SAO, AND BROWARD COUNTY SHERIFF'S OFFICE]**

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	**TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7083 - 7085(R)
2. AGENCY OFFICE OF THE STATE-ATTORNEY R.J. LARIZZA	3. DIVISION POST-CONVICTION	4. BUREAU HOMICIDE

5. ADDRESS (Street, City, and Zip Code)
251 N. RIDGEWOOD AVE
DAYTONA BEACH, FL 32114

6. CONTACT (Name, Title and Telephone Number)
Name: NICHOLE PAUGH
Title: SECRETARY
Phone Number: 386 239-7710 X21314

7. SUBMIT TO:

Capital Collateral Postconviction Records Repository
State Archives of Florida
R.A. Gray Building, MS 9-E
500 South Bronough Street
Tallahassee, FL 32399-0250

8. DEFENDANT NAME JOSEPH EDWARD JORDAN
DEFENDANT CIRCUIT CT. CASE# 2009-002872 CFAWS

9. DESCRIPTION

BOX 1 FILE FOLDERS 1-11 (WITH INDEX)

APT BOX 2 FILE FOLDERS 1-69 - INCLUDES CDS/DVDS WITH INDEX IN FILE 65

★BOX 3 FILE FOLDERS★ 1-9 - INCLUDES CDS
★(EXEMPT/SEALED BOX)★ IN FILE 1 - EXEMPT CDS WITH INDEX

TOTAL NUMBER OF BOXES 3 **OR** PACKAGES _____ SENT TO THE REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? ☒ YES ☐ NO

ARE **EXEMPT** RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? ***(If not, records will be returned to you)*** ☒ YES ☐ NO

DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION: BOX 3 FILES 1-9 EXEMPT - PAPER COPIES + CD'S - EXEMPT FOR DISCLOSURE PER F.S. 406.135, F.S. 119.071, F.S. 395.3025, F.S. 943.053, F.S. 119.0712, F.S. 382.025. (INDEX WITH EXEMPTIONS PROVIDED)

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☒ PHOTOGRAPHS c. ☒ AUDIO TAPES d. ☒ VIDEO TAPES e. ☐ OTHER _____

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.

Nichole Paugh — 1-27-16
SIGNATURE — DATE

Nichole Paugh - Secretary
TYPE NAME AND TITLE

Office of the State Attorney

12. STATE ARCHIVES OF FLORIDA:
I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.

_____ — 1/29/16
CHIEF, ARCHIVES AND RECORDS MANAGEMENT — DATE

INDEX OF BOX 1 OF 3

STATE OF FLORIDA VS. JOSEPH EDWARD JORDAN

2009 002872 CFAWS

FILE 1	INDICTMENT/ INFORMATION
FILE 2	PLEADINGS
FILE 3	DISCOVERY RECEIPTS
FILE 4	DEPOSITION NOTICES
FILE 5	DISCOVERY/ WITNESS LISTS
FILE 6	MEDIA/NEWS RELEASES
FILE 7	DEFENDANT'S FILE- 2009-02615 CFAWS
FILE 8	DEFENDANT'S FILE- 2009-02465 CFAWS
FILE 9	DEFENDANT'S PRIOR RECORDS/ VIRGINIA & BROWARD COUNTY
FILE 10	BROWARD COUNTY STATE ATTORNEY'S OFFICE FILE
FILE 11	MISC COURT DOCUMENTS- INCLUDING TRANSCRIPTS, DIGITAL AUDIO OF HEARING- (1 CD) & JUDGEMENT AND SENTENCES

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STATE OF FLORIDA VS. JOSEPH EDWARD JORDAN

2009 002872 CFAWS

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FILE 2	PRESS RELEASE
FILE 3	POLICE REPORTS
FILE 4	707/ WARRANTS
FILE 5	HOLLYWOOD POLICE DEPARTMENT
FILE 6	FT. LAUDERDALE POLICE DEPARTMENT
FILE 7	BROWARD COUNTY SHERIFF'S OFFICE REPORTS
FILE 8	EDGEWATER FIRE DEPARTMENT
FILE 9	SUBPOENAS FOR DEPOSITIONS
FILE 10	GOLD SEAL
FILE 11	CRIME SCENE LOG
FILE 12	CAD REPORT
FILE 13	CLAUDIO, R/ EPD
FILE 14	CONROY, GARY/ EPD
FILE 15	ECKERSEN, JOHN/ HIU
FILE 16	GADEN, ANDREW/ EPD
FILE 17	GRAZIANI, GINA/ HOLLYWOOD PD

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STATE OF FLORIDA VS. JOSEPH EDWARD JORDAN

2009 002872 CFAWS

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FILE 19	SELVAGGIO, ERIC/ EPD
FILE 20	STAVRIS, MICHAEL/ EPD
FILE 21	SWETS, GREG/ EPD
FILE 22	TINELLI, LEONARD/ HOLLYWOOD PD
FILE 23	WINSTON, JOANNE/ EPD
FILE 24	PROPERTY & EVIDENCE
FILE 25	BANK OF AMERICA
FILE 26	CREDIT CARD STATEMENTS
FILE 27	PAWN TICKET RECORDS
FILE 28	YAHOO RECORDS
FILE 29	VCBJ RECORDINGS OF DEFENDANT-(INCLUDES 1 CD-AUDIO)
FILE 30	AT&T BILL
FILE 31	954-465-8769
FILE 32	954-895-2435
FILE 33	CURRICULUM VITAE/ MISC. COURT DOCUMENTS
FILE 34	CERTIFIED CONVICTIONS
FILE 35	FDLE- SUBMITTAL FORMS

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STATE OF FLORIDA VS. JOSEPH EDWARD JORDAN

2009 002872 CFAWS

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FILE 37	VACHA, RUTH/ FDLE
FILE 38	PETREE, TIM/ FDLE
FILE 39	NOBLES, KAREN/ FDLE
FILE 40	MELL, TIM/ FDLE
FILE 41	MAY, KELLY/ FDLE
FILE 42	HILDRETH, MARIANNE/ FDLE
FILE 43	GUZMAN, ALVIN/ FDLE
FILE 44	STRAWSER, MARTA/ FDLE
FILE 45	SUBPOENAS
FILE 46	CASSANDRA CASTELLANOS
FILE 47	EMILY COPE
FILE 48	AMI HALL- GEORGIA- OUT OF STATE WITNESS
FILE 49	HAQUE, SADIA
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FILE 53	NICHOLS, JUSTIN/ EFD

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STATE OF FLORIDA VS. JOSEPH EDWARD JORDAN

2009 002872 CFAWS

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FILE 56	POWELL, MATTHEW
FILE 57	YARROW, EDWIN
FILE 58	CAD/ CRIME SCENE LOG
FILE 59	TIMELINES
FILE 60	FDLE REPORTS #2
FILE 61	MAGGIE COPE
FILE 62	RAYMOND HILL-PERPETUATED PENALTY PHASE TESTIMONY
FILE 63	PRIOR VIOLENT FELONY
FILE 64	TRANSCRIPTS OF DEFENDANT
FILE 65	25 CD'S WITH INDEX ATTACHED- *(3 OUT OF 25 CD'S IN EXEMPT BOX)*
FILE 66	DEFENDANT'S STATEMENTS
FILE 67	VICTIM IMPACT
FILE 68	TRIAL
FILE 69	JURY PANEL

INDEX OF CD'S (FROM BOX 2 FILE 65)

STATE OF FLORIDA VS. JOSEPH EDWARD JORDAN

2009 002872 CFAWS

DISC 1:	**CD/ PHOTOS OF RESIDENCE, 6/28/09* (CD 1 & CD 4 THE SAME)**
DISC 2:	**CD/ PHOTOS OF RESIDENCE, 6/30/09 *(CD 2 INCLUDED IN CD 1 & CD 4)**
DISC 3:	**CD/ PHOTOS OF SCENE & VICTIM AT HOSPITAL, 6/28/09**
DISC 4:	**CD/ PHOTOS OF RESIDENCE, 6/28/09 * (CD 1 & CD 4 THE SAME)**
DISC 5:	**CD/ PHOTOS OF AUTOPSY FROM M.E.*IN EXEMPT BOX SEALED***
DISC 6:	**CD/ YAHOO RECORDS**
DISC 7:	**CD/ INTERVIEW WITH JOSEPH JORDAN, 12/21/09**
DISC 8:	**DVD/ INTERVIEW WITH CASANDRA CASTELLANOS/ MARLON POWELL**
DISC 9:	**DVD/ INTERVIEW WITH MATTHEW POWELL/ SADIA HAQUE**
DISC 10:	**CD/ INTERVIEW WITH SADIA HAQUE & JORDAN/ R. HILL**
DISC 11:	**CD/ INTERVIEW WITH ALAN STAGILE**
DISC 12:	**CD/ INTERVIEW JORDAN, RANDALL, FORTRESS, R. HILL**
DISC 13:	**CD/ PHOTOS OF AUTOPSY FROM EPD OFFICER *IN EXEMPT BOX SEALED***
DISC 14:	**CD/ INTERVIEW WITH MICHAEL RILEY FROM BROWARD COUNTY SAO**
DISC 15:	**CD/ INTERVIEW WITH JAMI BRATUET FROM BROWARD COUNTY SAO**

INDEX OF CD'S (FROM BOX 2 FILE 65)

STATE OF FLORIDA VS. JOSEPH EDWARD JORDAN

2009 002872 CFAWS

DISC 16:	CD/ DIGITAL IMAGES FROM MARTA STAWSER/ FDLE (1 OF 2)
DISC 17:	CD/ DIGITAL IMAGES FROM MARTA STAWSER/ FDLE (2 OF 2)
DISC 18:	CD/ DIGITAL IMAGES FROM MARTA STAWSER/ FDLE (1 OF 1)
DISC 19:	CD/ DIGITAL IMAGES FROM MARTA STRAWSER/FDLE (COURT TRIAL PICS)
DISC 20:	CD/ 911 CALL
DISC 21:	CD/ SEARCH WARRANT CONDUCTED ON DEFENDANT'S PHONE
DISC 22:	CD/ DEFENDANT'S REDACTED INTERVIEW, 12/21/09
DISC 23:	CD/ JAIL CALLS- LOUIE
DISC 24:	CD/ JAIL CALLS- THERESA
DISC 25:	CD/ TRIAL PHOTOS- CONTAINS AUTOPSY PHOTOS- ***IN EXEMPT BOX SEALED***

(EXEMPT DOCUMENTS)

INDEX OF BOX 3 OF 3

STATE OF FLORIDA VS. JOSEPH EDWARD JORDAN

2009 002872 CFAWS

FILE 1	PHOTOS- 3 CD'S- AUTOPSY PHOTOS & TRIAL PHOTOS- (CONTAINS AUTOPSY PHOTOS) (EXEMPT FROM DISCLOSURE PER F.S. 406.135 & F.S. 119.071))
FILE 2	ATTORNEY NOTES (EXEMPT FROM DISCLOSURE PER F.S.119.071)
FILE 3	VICTIM INFO- EVAC MEDICAL REPORTS/INVOICES (EXEMPT FROM DISCLOSURE PER F.S. 395.3025 & F.S. 119.071)
FILE 4	VICTIM MEDICAL REPORTS BY: DR. RULLAN, DR. WILSON & DR. RAMSHAW (EXEMPT FROM DISCLOSURE PER F.S. 395.3025 & F.S. 119.071)
FILE 5	CRIMINAL HISTORY (EXEMPT FROM DISCLOSURE PER F.S. 943.053 & DAVID 119.0712)
FILE 6	MEDICAL EXAMINER'S FILE- DR. HERRMANN (EXEMPT FROM DISCLOSURE PER F.S. 395.3025 & F.S. 119.071)
FILE 7	DEATH CERTIFICATE (EXEMPT FROM DISCLOSURE PER F.S. 382.025)
FILE 8	MEDICAL RECORDS (EXEMPT FROM DISCLOSURE PER F.S. 395.3025 & F.S. 119.071)
FILE 9	SEX OFFENDER REGISTRATION (EXEMPT FROM DISCLOSURE PER F.S. 943.053)

INDEX OF CD'S (EXEMPT BOX 3)

STATE OF FLORIDA VS. JOSEPH EDWARD JORDAN

2009 002872 CFAWS

FILE 1 **PHOTOS- 3 CD'S- AUTOPSY PHOTOS & TRIAL PHOTOS- (CONTAINS AUTOPSY PHOTOS)**
(EXEMPT FROM DISCLOSURE PER F.S. 406.135 & F.S. 119.071))

CD 1:

*"DISC 5": CD/ PHOTOS OF AUTOPSY FROM M.E.

IN EXEMPT BOX SEALED

CD 2:

*"DISC 13": CD/ PHOTOS OF AUTOPSY FROM EPD OFFICER

IN EXEMPT BOX SEALED

CD 3:

*"DISC 25": CD/ TRIAL PHOTOS- CONTAINS AUTOPSY PHOTOS-

IN EXEMPT BOX SEALED

DISC 5, DISC 13 & DISC 25 LISTED ON INDEX FROM BOX 2 FILE 65

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07080	00001		Confidential/Exempt: Lab Documents (#20110300704) [1 CD] -- Exempt per F.S. 943.325(14), 943.045 and 119.07(1)
07081			Ault, Howard S.; 96-21248-CF-10; State Attorney's Office--Seventeenth Judicial Circuit [SCANNED - CD-1889]
07081	00001		Joint Notice to the Court and Parties
07081	00002		Exhibit 1: Howard Steven Ault (96-21248CF10A) [1 DVD]
07081	00003		Exhibit 2: Transcription of Video Recording of Court's A, Box 1-18 (Wednesday, November 4, 2015)
07081	00004		Exhibit 3: Transcription -- Videotaped Perpetuation of Testimony -- John Valenzuela (Friday, November 13, 2015)
07081	00005		Exhibit 4: Howard Steven Ault (96-21248CF10A) -- Perpetuation of John Valenzuela (November 13, 2015) [1 DVD]
07082			Asay, Mark James; 1987-CF-006876; Florida Department of Law Enforcement--General Counsel's Office [SCANNED - CD-1890]
07082	00001		Mark Asay (870743245): Firearms [1 page black and white photocopied images]
07083			Jordan, Joseph Edward; 2009-CF-002872; Office of the State Attorney, 7th Judicial Circuit--Postconviction--Homicide
07083	00001		Indictment / Information
07083	00002		Pleadings

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07083	00003		Discovery Receipts
07083	00004		Deposition Notices
07083	00005		Discovery / Witness Lists
07083	00006		Media / News Releases
07083	00007		Defendant's File- 2009-02615 CFAWS
07083	00008		Defendant's File- 2009-02465 CFAWS
07083	00009		Defendant's Prior Records / Virginia and Broward County
07083	00010		Broward County State Attorney's Office File
07083	00011		Miscellaneous Documents- Including Transcripts, Digital Audio of Hearing & Judgement and Setences [1 CD]
07084			Jordan, Joseph Edward; 2009-CF-002872; Office of the State Attorney, 7th Judicial Circuit--Postconviction--Homicide
07084	00001		Search Warrants
07084	00002		Press Release
07084	00003		Police Reports
07084	00004		707 / Warrants
07084	00005		Hollywood Police Department
07084	00006		Ft. Lauderdale Police Department
07084	00007		Broward County Sheriff's Office Reports

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07084	00008		Edgewater Fire Department
07084	00009		Subpoenas for Depositions
07084	00010		Gold Seal
07084	00011		Crime Scene Log
07084	00012		CAD Report
07084	00013		Claudio, R/ EPD
07084	00014		Conroy, Gary / EPD
07084	00015		Eckersen, John / HIU
07084	00016		Gaden, Andrew / EPD
07084	00017		Graziani, Gina / Hollywood PD
07084	00018		Lopez, Corey / EVAC
07084	00019		Selvaggio, Eric / EPD
07084	00020		Stavris, Michael / EPD
07084	00021		Swets, Greg / EPD
07084	00022		Tinelli, Leonard / Hollywood PD
07084	00023		Winston, Joanne / EPD
07084	00024		Property and Evidence
07084	00025		Band of America
07084	00026		Credit Card Statements

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07084	00027		Pawn Ticket Records
07084	00028		Yahoo Records
07084	00029		VCBJ Recordings of Defendant [1 CD]
07084	00030		AT&T Bill
07084	00031		954-465-8769
07084	00032		954-895-2435
07084	00033		Cirriculum Vitae / Misc. Court Documents
07084	00034		Certified Convictions
07084	00035		FDLE- Submittal Forms
07084	00036		FDLE Reports #2
07084	00037		Vacha, Ruth / FDLE
07084	00038		Petree, Tim / FDLE
07084	00039		Nobles, Karen / FDLE
07084	00040		Mell, Tim / FDLE
07084	00041		May, Kelly / FDLE
07084	00042		Hildreth, Marianne / FDLE
07084	00043		Guzman, Alvin / FDLE
07084	00044		Strawser, Marta / FDLE
07084	00045		Subpoenas

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07084	00046		Cassandra Castellanos
07084	00047		Emily Cope
07084	00048		Ami Hall- Georgia- Out of State Witness
07084	00049		Haque, Sadia
07084	00050		Hill, Raymond
07084	00051		Meraz, Carl
07084	00052		Morrow, Chrisopher / EVAC
07084	00053		Nichols, Justin / EFD
07084	00054		Norman, Harold
07084	00055		Powell, Marlon
07084	00056		Powell, Matthew
07084	00057		Yarrow, Edwin
07084	00058		CAD / Crime Scene Log
07084	00059		Timelines
07084	00060		FDLE Reports #2
07084	00061		Maggie Cope
07084	00062		Raymond Hill- Perpetuated Penalty Phase Testimony
07084	00063		Prior Violent Felony
07084	00064		Transcripts of Defendant

Record Group: 000660 Call Number: .S1739

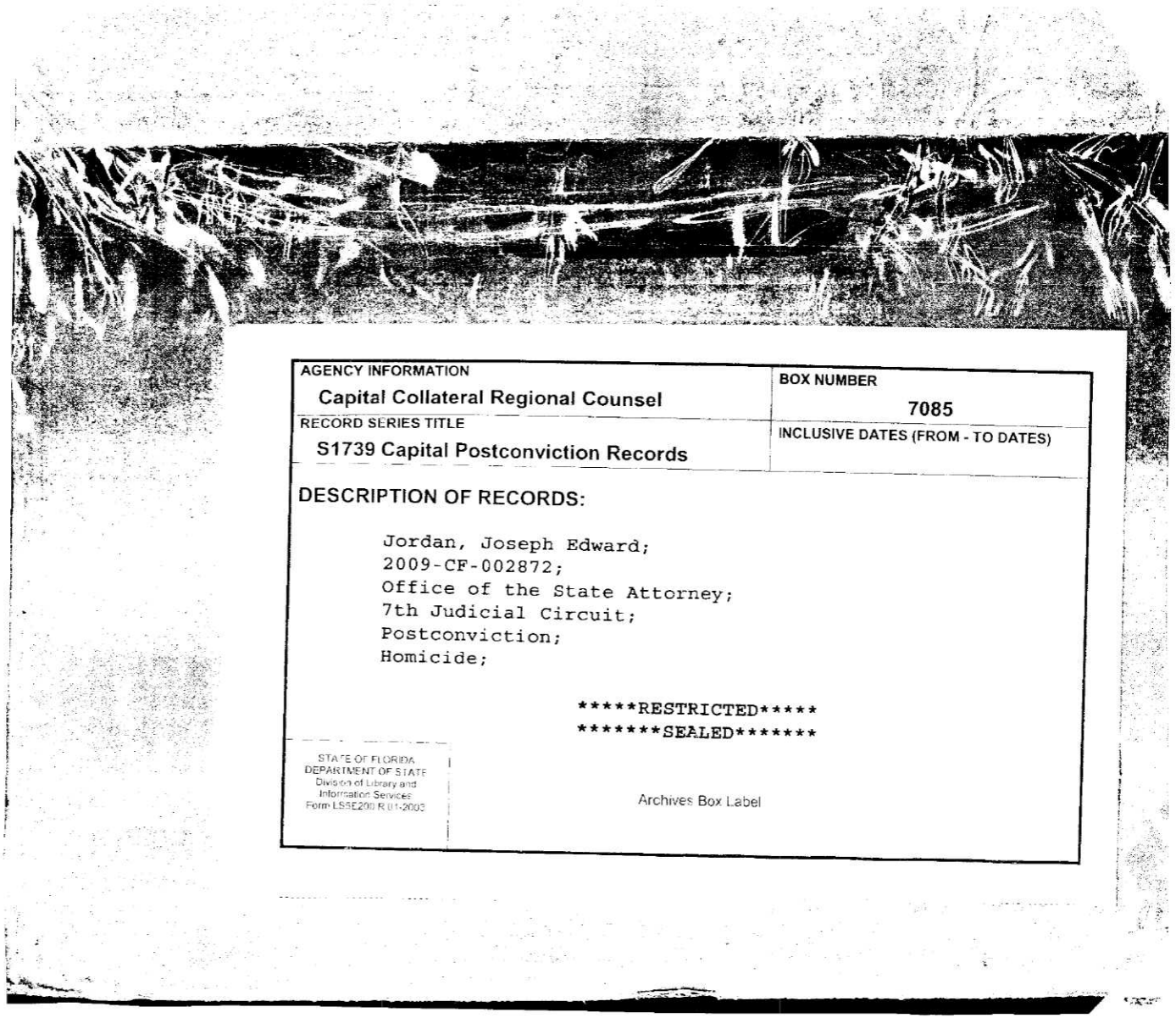
Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07084	00065		25 CD's with Attached Index (3 out of 25 CD's in Exempt Box) [20 CDs and 2 DVDs]
07084	00066		Defendant's Statements
07084	00067		Victim Impact
07084	00068		Trial
07084	00069		Jury Panel
07085			Jordan, Joseph Edward; *RESTRICTED* SEALED; 2009-CF-002872; Office of the State Attorney, 7th Judicial Circuit--Postconviction--Homicide
07085	00001		Confidential/Exempt: Photos- 3 CDs- Autopsy Photos & Trial Photos--Exempt per F.S. 406.135 and 119.071
07085	00002		Confidential/Exempt: Attorney Notes--Exempt per F.S. 119.071
07085	00003		Confidential/Exempt: Victim Info-Evac Medical Reports/Invoices--Exempt per F.S. 119.071 and 395.3025
07085	00004		Confidential/Exempt: Victim Medical Reports by: Dr. Rullan, Dr. Wilson & Dr. Ramshaw--Exempt per F.S. 119.071 and 395.3025
07085	00005		Confidential/Exempt: Criminal History--Exempt per F.S. 119.0712 and 943.053
07085	00006		Confidential/Exempt: Medical Examiner's File: Dr. Herrmann--Exempt per F.S. 119.071 and 395.3025
07085	00007		Confidential/Exempt: Death Certificate--Exempt per F.S. 382.025
07085	00008	32	Confidential/Exempt: Medical Records--Exempt per

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
			F.S. 395.3025 and 119.071
07085	00009		Confidential/Exempt: Sex Offender Registration--Exempt per F.S. 943.053
07086			Asay, Mark James; 1987-CF-006876; Florida Department of Corrections--General Counsel's Office
07086	00001		Union Correctional Institution--Classification File (CF-1 -- CF-2739), Central Records (CR-1 -- CR-263) and Inspector General Records (IG-1 -- IG-4) [1 DVD]
07087			Asay, Mark James; *RESTRICTED* SEALED; 1987-CF-006876; Florida Department of Corrections--General Counsel's Office
07087	00001		Confidential/Exempt: Union Correctional Institution--Classification File (CFE-1 - CFE-1264), Central Records File (CRE-1 - CRE-83), Union Correctional Institution--Medical Records (Med-1 - Med-1348) and Central Records/Florida Parole Commission (FPCE-1 - FPCE-44) [1 CD] -- Exempt per F.S. 456.057, 945.10(1)(a), 45 CFR § 164.502, 381.004, 397.501, 397.752, 42 USC § 290dd-2, 42 CFR Part 2, 382.008(6), 945.101(1)(a), 45 CFR § 164.502, 945.10(1)(b), 14.28, 945.10(1)(d), 945.10(1)(f), 119.071(2)(h)-(j), 943.053, 1002.22, 119.071(5)(a), 119.071(5)(g), 119.071(1), 119.071(3), 281.301, 119.07(6)(aa), 943.0525, Chap. 33-601.901(5), 985.04, 322.124(4) and 119.071(3)
07088			Rodgers Jr., Theodore; 01-CF-2386; Florida Department of Corrections--General Counsel's Office
07088	00001		Confidential/Exempt: Union Correctional Institution--Medical Records (Med-1 - Med-124) [1 CD] -- Exempt per F.S. 456.057, 945.10(1)(a), 45 CFR § 164.502, 381.004, 397.501, 397.752, 42 USC § 290dd-2 and 42 CFR Part 2



AGENCY INFORMATION	BOX NUMBER
Capital Collateral Regional Counsel	7085
RECORD SERIES TITLE	**INCLUSIVE DATES (FROM - TO DATES)**
S1739 Capital Postconviction Records	

DESCRIPTION OF RECORDS:

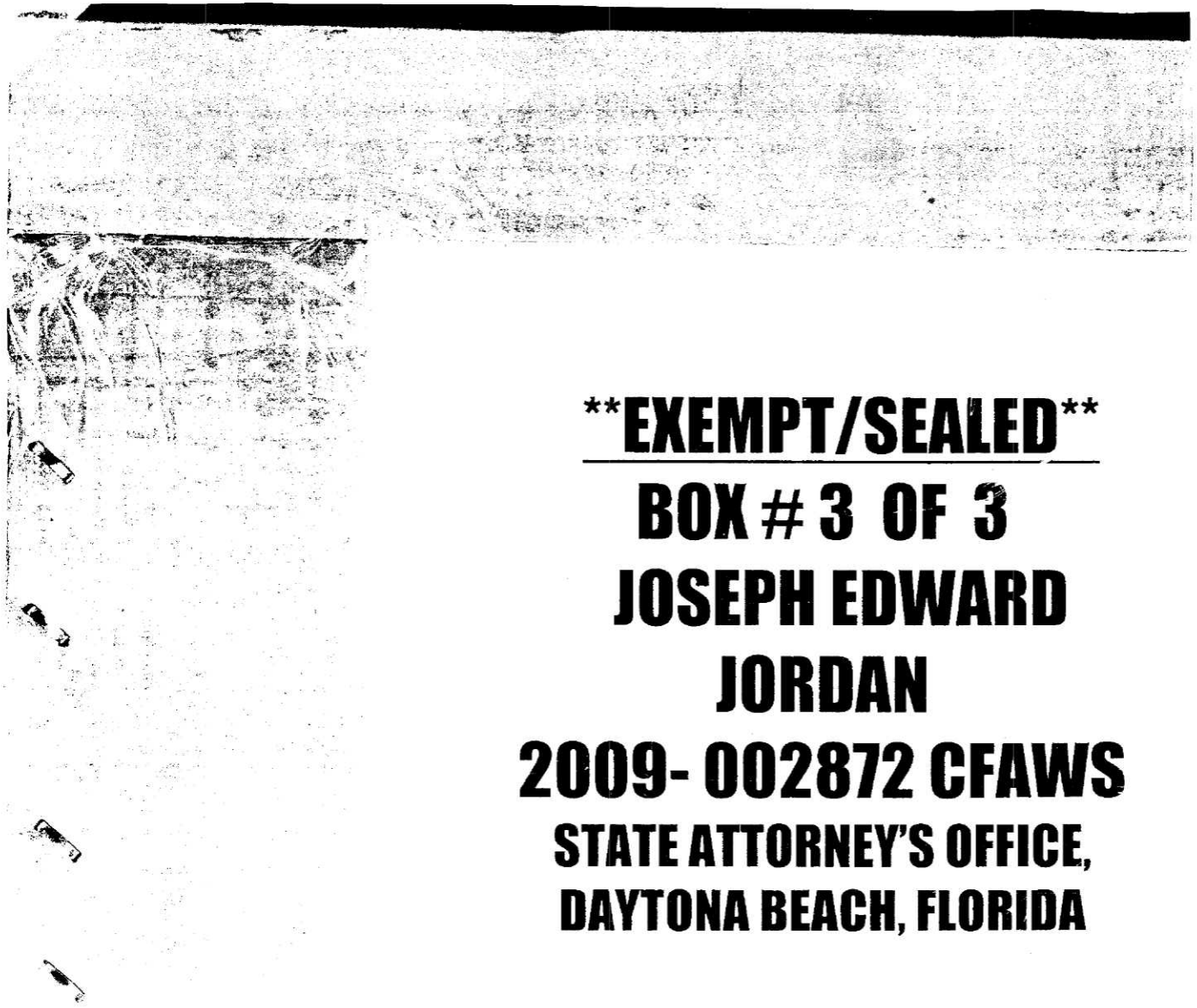
Jordan, Joseph Edward;
2009-CF-002872;
Office of the State Attorney;
7th Judicial Circuit;
Postconviction;
Homicide;

*****RESTRICTED*****
*******SEALED*******

STATE OF FLORIDA
DEPARTMENT OF STATE
Division of Library and Information Services
Form LS5E200 R 01-2003

Archives Box Label

34



EXEMPT/SEALED

BOX # 3 OF 3

JOSEPH EDWARD

JORDAN

2009- 002872 CFAWS

STATE ATTORNEY'S OFFICE,

DAYTONA BEACH, FLORIDA

35

INDEX OF CD'S (FROM BOX 2 FILE 65)

STATE OF FLORIDA VS. JOSEPH EDWARD JORDAN

2009 002872 CFAWS

DISC 1: CD/ PHOTOS OF RESIDENCE, 6/28/09* (CD 1 & CD 4 THE SAME)

DISC 2: CD/ PHOTOS OF RESIDENCE, 6/30/09 *(CD 2 INCLUDED IN CD 1 & CD 4)

DISC 3: CD/ PHOTOS OF SCENE & VICTIM AT HOSPITAL, 6/28/09

DISC 4: CD/ PHOTOS OF RESIDENCE, 6/28/09 * (CD 1 & CD 4 THE SAME)

DISC 5: CD/ PHOTOS OF AUTOPSY FROM M.E. ***IN EXEMPT BOX SEALED***

DISC 6: CD/ YAHOO RECORDS

DISC 7: CD/ INTERVIEW WITH JOSEPH JORDAN, 12/21/09

DISC 8: DVD/ INTERVIEW WITH CASANDRA CASTELLANOS/ MARLON POWELL

DISC 9: DVD/ INTERVIEW WITH MATTHEW POWELL/ SADIA HAQUE

DISC 10: CD/ INTERVIEW WITH SADIA HAQUE & JORDAN/ R. HILL

DISC 11: CD/ INTERVIEW WITH ALAN STAGILE

DISC 12: CD/ INTERVIEW JORDAN, RANDALL, FORTRESS, R. HILL

DISC 13: CD/ PHOTOS OF AUTOPSY FROM EPD OFFICER ***IN EXEMPT BOX SEALED***

DISC 14: CD/ INTERVIEW WITH MICHAEL RILEY FROM BROWARD COUNTY SAO

DISC 15: CD/ INTERVIEW WITH JAMI BRATUET FROM BROWARD COUNTY SAO

INDEX OF CD'S (FROM BOX 2 FILE 65)

STATE OF FLORIDA VS. JOSEPH EDWARD JORDAN

2009 002872 CFAWS

DISC 16:	CD/ DIGITAL IMAGES FROM MARTA STAWSER/ FDLE (1 OF 2)
DISC 17:	CD/ DIGITAL IMAGES FROM MARTA STAWSER/ FDLE (2 OF 2)
DISC 18:	CD/ DIGITAL IMAGES FROM MARTA STAWSER/ FDLE (1 OF 1)
DISC 19:	CD/ DIGITAL IMAGES FROM MARTA STRAWSER/FDLE (COURT TRIAL PICS)
DISC 20:	CD/ 911 CALL
DISC 21:	CD/ SEARCH WARRANT CONDUCTED ON DEFENDANT'S PHONE
DISC 22:	CD/ DEFENDANT'S REDACTED INTERVIEW, 12/21/09
DISC 23:	CD/ JAIL CALLS- LOUIE
DISC 24:	CD/ JAIL CALLS- THERESA
DISC 25:	CD/ TRIAL PHOTOS- CONTAINS AUTOPSY PHOTOS- ***IN EXEMPT BOX SEALED***

INDEX OF CD'S (EXEMPT BOX 3)

STATE OF FLORIDA VS. JOSEPH EDWARD JORDAN

2009 002872 CFAWS

FILE 1 PHOTOS- 3 CD'S- AUTOPSY PHOTOS
& TRIAL PHOTOS- (CONTAINS AUTOPSY PHOTOS)
(EXEMPT FROM DISCLOSURE PER F.S. 406.135 & F.S. 119.071))

CD 1:

*"DISC 5": CD/ PHOTOS OF AUTOPSY FROM M.E.

IN EXEMPT BOX SEALED

CD 2:

*"DISC 13": CD/ PHOTOS OF AUTOPSY FROM EPD OFFICER

IN EXEMPT BOX SEALED

CD 3:

*"DISC 25": CD/ TRIAL PHOTOS- CONTAINS AUTOPSY PHOTOS-

IN EXEMPT BOX SEALED

DISC 5, DISC 13 & DISC 25 LISTED ON INDEX FROM BOX 2 FILE 65

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

APPENDIX C

**TO DEFENDANT'S SECOND MOTION REQUESTING
THE *IN CAMERA* REVIEW OF RECORDS
[FDOC, SAO, AND BROWARD COUNTY SHERIFF'S OFFICE]**

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	**TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 70660
2. AGENCY Broward Sherrif's Office	3. DIVISION Office of the General Counsel	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
2601 W. Broward Boulevard Fort Lauderdale, FL 33301	Name: Dena Robbins Title: Legal Assistant Phone Number: 954-831-8920
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009-2872CFAES

9. DESCRIPTION

CAS

2009 Correspondence from Joseph Jordan

TOTAL NUMBER OF BOXES _____ **OR** PACKAGES 1 SENT TO THE REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? ☐ YES ☒ NO

ARE **EXEMPT** RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? ***(If not, records will be returned to you)*** ☐ YES ☐ NO

DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER _____

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
Dena Robbins 1/12/16 SIGNATURE DATE	1/19/16 CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Dena Robbins, Legal Assistant TYPE NAME AND TITLE	

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA	1. RECORD GROUP NO. 860 SERIES NO. 1739 ARCHIVES BOX NO. 7068
2. AGENCY Broward Sheriffs Office	3. DIVISION Crime Lab	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
201 S.E. Sixth Street North Wing Fort Lauderdale, FL 33312	Name: Diana Edwards Title: Administrative Coordinator Phone Number: 954-831-6427
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009-002872CFAES

9. DESCRIPTION

Request for Crime Lab Analysis Reports - SAO & Hallandale Beach PD
Crime Lab Analysis Lab Number 10-27306
DNA Unit Analysis Lab Number 10-27306

2016 JAN 20 AM 11:38

TOTAL NUMBER OF BOXES _____ OR PACKAGES 1 SENT TO THE REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? ☐ YES ☒ NO

ARE **EXEMPT** RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? *(If not, records will be returned to you)* ☐ YES ☐ NO

DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER _____

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
SIGNATURE 1-14-2016 DATE	CHIEF, ARCHIVES AND RECORDS MANAGEMENT 1/20/16 DATE
Diana Edwards, Admin Coordinator TYPE NAME AND TITLE	

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	**TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1.RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7069(R)
2. AGENCY Broward Sheriff's Office	3. DIVISION Crime Lab	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
201 S.E. Sixth Street North Wing Fort Lauderdale, FL 33312	Name: Diana Edwards Title: Administrative Coordinator Phone Number: 954-831-6427
7. SUBMIT TO. Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009-002872CFAES

9. DESCRIPTION

Crime Laboratory Analysis report - DNA Analysis - Lab Number 10-27306
DNA Unit Technical Review Checklist - CODIS & Report - Lab Number 10-27306

2016 JAN 19 AM 11:35

TOTAL NUMBER OF BOXES _____ **OR** PACKAGES 1 SENT TO THE REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? [X] YES [ ] NO

ARE **EXEMPT** RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? ***(If not, records will be returned to you)*** [X] YES [ ] NO

DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

DNA Analysis information exempt per FSS 943.325(14)

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. [X] PAPER COPIES b. [ ] PHOTOGRAPHS c. [ ] AUDIO TAPES d. [ ] VIDEO TAPES e. [ ] OTHER _____

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
SIGNATURE 1-14-2016 DATE Diana Edwards, Admin Coordinator TYPE NAME AND TITLE	CHIEF, ARCHIVES AND RECORDS MANAGEMENT 1/21/16 DATE

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	**TRANSMITTAL/RECEIPT** **TRANSFER OF CAPITAL COLLATERAL** **POSTCONVICTION RECORDS** **TO THE STATE ARCHIVES OF FLORIDA**	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7070
2. AGENCY Broward Sherrif's Office	3. DIVISION Department of Detention	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
555 S.E. 1st Avenue Fort Lauderdale, FL 33301	Name: Heather Conner Title: DOD Records Custodian Phone Number: 954-831-5821
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009-002872CFAES

9. DESCRIPTION

Jail records
- Booking Report
- Inmate Summary
- Movement History
- Contact Log

2015 JAN 02 PM 1:53

CAB

TOTAL NUMBER OF BOXES _____ OR PACKAGES 1 SENT TO THE REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? ☐YES ☒NO

ARE **EXEMPT** RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? *(If not, records will be returned to you)* ☐YES ☐NO

DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER _____

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
Heather Conner 1-13-16 SIGNATURE DATE	[signature] 1/21/16 CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Heather Conner, DOD Records Custodian TYPE NAME AND TITLE	

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	**TRANSMITTAL/RECEIPT** **TRANSFER OF CAPITAL COLLATERAL** **POSTCONVICTION RECORDS** **TO THE STATE ARCHIVES OF FLORIDA**	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7071(R)
2. AGENCY Broward Sherrif's Office	3. DIVISION Department of Detention	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
555 S.E. 1st Avenue Fort Lauderdale, FL 33301	Name: Heather Conner Title: DOD Records Custodian Phone Number: 954-831-5821
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009-002872CFAES

9. DESCRIPTION

Jail records
- Booking Report (unredacted)
- Inmate Summary
- Movement History
- Contact Log

2016 JAN 25 PM 3:52

CAB

TOTAL NUMBER OF BOXES _____ OR PACKAGES 1 SENT TO THE REPOSITORY

ARE EXEMPT RECORDS INCLUDED IN THIS SHIPMENT? ☒ YES ☐ NO

ARE EXEMPT RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? *(If not, records will be returned to you)* ☒ YES ☐ NO

DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

Social Security numbers exempt per FSS 119.071(5)(a)

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER _____

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
Heather Conner 1-13-16 SIGNATURE DATE	[signature] 1/21/16 CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Heather Conner, DOD Records Custodian TYPE NAME AND TITLE	

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	**TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1.RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7072
2. AGENCY Broward Sheriff's Office	3. DIVISION Records Division	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
2601 W. Broward Boulevard Fort Lauderdale, FL 33312	Name: Kelly Giustino Title: Assistant Manager Phone Number: 954-831-8702
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8 DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009-002872CFAES

9. DESCRIPTION

Booking Reports
Short Arrest Information Forms
Capias
Complaint Affidavits

FILED 2016 JAN 20 P 1:43 BROWARD CLERK

TOTAL NUMBER OF BOXES _____ OR PACKAGES 1 SENT TO THE REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? ☐ YES ☒ NO

ARE **EXEMPT** RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? ***(If not, records will be returned to you)*** ☐ YES ☐ NO

DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER _____

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
Kelly Giustino 1/13/16 SIGNATURE DATE Kelly Giustino, Assistant Manager, Records TYPE NAME AND TITLE	CHIEF, ARCHIVES AND RECORDS MANAGEMENT 1/21/16 DATE

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	**TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1.RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7073(R)
2. AGENCY Broward Sheriff's Office	3. DIVISION Records Division	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name, Title and Telephone Number)
2601 W. Broward Boulevard Fort Lauderdale, FL 33312	Name: Kelly Giustino Title: Assistant Manager Phone Number: 954-831-8702
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8 DEFENDANT NAME Joseph Edward Jordan DEFENDANT CIRCUIT CT. CASE# 2009-002872CFAES

9. DESCRIPTION

Booking Reports (unredacted)
Short Arrest Information Forms
Capias
Complaint Affidavits (unredacted)

FILED 05 JAN 16 2013

TOTAL NUMBER OF BOXES _____ OR PACKAGES 1 SENT TO THE REPOSITORY

CASE

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? [X] YES [ ] NO

ARE **EXEMPT** RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? ***(If not, records will be returned to you)*** [X] YES [ ] NO

DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

1. Social security numbers exempt per FSS 119 071(5)(a)
2. Identity of victim of sexual battery exempt per FSS 119 071(2)(h)

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. [X] PAPER COPIES b. [ ] PHOTOGRAPHS c. [ ] AUDIO TAPES d. [ ] VIDEO TAPES e. [ ] OTHER

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
Kelly Giustino 1/13/16 SIGNATURE DATE	1/21/16 CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Kelly Giustino, Assistant Manager, Records TYPE NAME AND TITLE	

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA	1.RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7074(R)
2. AGENCY Broward County Sheriff's Office	3. DIVISION Department of Detention	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)

555 S.E. 1st Avenue
Fort Lauderdale, FL 33301

6. CONTACT (Name, Title and Telephone Number)

Name: Yusimir Arencibia

Title: Inmate Healthcare Manager

Phone Number: 954-831-5905

7. SUBMIT TO:

Capital Collateral Postconviction Records Repository
State Archives of Florida
R.A. Gray Building, MS 9-E
500 South Bronough Street
Tallahassee, FL 32399-0250

8. DEFENDANT NAME Joseph Edward Jordan

DEFENDANT CIRCUIT CT. CASE# 2009-002872CFAES

9. DESCRIPTION

Inmate Healthcare records

2016 JAN 20 PM 4:30

TOTAL NUMBER OF BOXES _____ OR PACKAGES _____ SENT TO THE REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? ☒ YES ☐ NO

ARE **EXEMPT** RECORD SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? *(If not, records will be returned to you)* ☒ YES ☐ NO

DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

Medical records exempt per FSS 395.3025(4), (8); 456.057

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☐ OTHER

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.

Yusimir Arencibia 1/12/2016
SIGNATURE DATE

Yusimir Arencibia, Inmate Health Care Manager
TYPE NAME AND TITLE

Y. ARENCIBIA, RN, BSN, PHN, CBC

12. STATE ARCHIVES OF FLORIDA:
I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED

[signature] 1/21/16
CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE

Record Group: 000660

Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07065			McCoy, Thomas Ford; *RESTRICTED* SEALED; 2009-CF-000257; Walton County Clerk of Court
07065	00001		Confidential/Exempt: Attorney Notes and Drafts--Exempt per F.S. 119.071(1)(d)
07066			Jordan, Joseph Edward; 2009-CF-002872; Broward County Sheriff's Office--General Counsel's Office [SCANNED - CD-1886]
07066	00001		Correspondence (2009)
07067			Asay, Mark James; 1987-CF-006876; Department of Legal Affairs--Office of the Attorney General
07067	00001		State Records on Appeal From Direct and Collateral Proceedings [1 CD]
07068			Jordan, Joseph Edward; 2009-CF-002872; Broward County Sheriff's Office--Crime Lab
07068	00001		Request for Crime Lab Analysis Reports / Crime Lab Analysis (Lab #10-27306) / DNA Unit Analysis (Lab #10-27306) [12 pages black and white photocopied images]
07069			Jordan, Joseph Edward; *RESTRICTED* SEALED; 2009-CF-002872; Broward County Sheriff's Office--Crime Lab
07069	00001		Confidential/Exempt: Crime Laboratory Analysis Report -- DNA Analysis (Lab #10-27306) / DNA Unit Technical Review Checklist -- CODIS and Report (Lab #10-27306) -- Exempt per F.S. 943.325(14)
07070			Jordan, Joseph Edward; 2009-CF-002872; Broward County Sheriff's Office--Department of Detention
07070	00001	48	Jail Records: Booking Report

Record Group: 000660

Call Number: .S1739

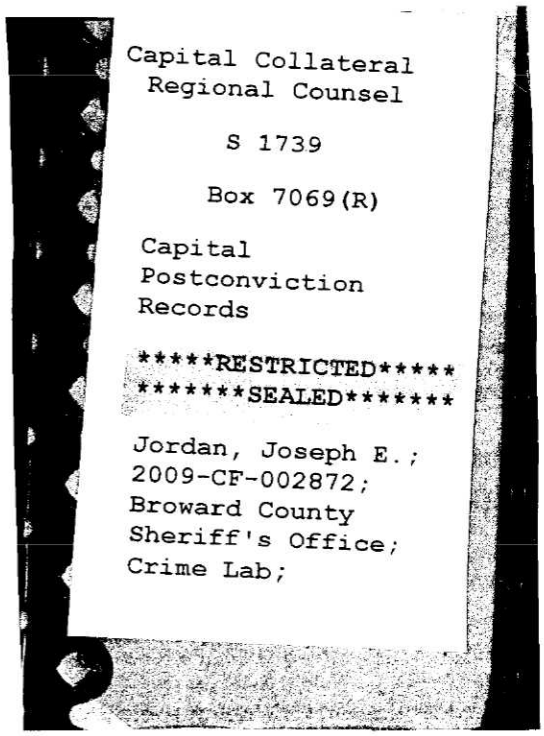
Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

	Container	File Unit	Item	Title
	07070	00002		Jail Records: Inmate Summary
	07070	00003		Jail Records: Movement History
	07070	00004		Jail Records: Contact Log
	07071			**Jordan, Joseph Edward; *RESTRICTED* SEALED; 2009-CF-002872; Broward County Sheriff's Office--Department of Detention**
	07071	00001		Confidential/Exempt -- Jail Records: Booking Report -- Exempt per F.S. 119.071(5)(a)
	07071	00002		Confidential/Exempt -- Jail Records: Inmate Summary -- Exempt per F.S. 119.071(5)(a)
	07071	00003		Confidential/Exempt -- Jail Records: Movement History -- Exempt per F.S. 119.071(5)(a)
	07071	00004		Confidential/Exempt -- Jail Records: Contact Log -- Exempt per F.S. 119.071(5)(a)
	07072			**Jordan, Joseph Edward; 2009-CF-002872; Broward County Sheriff's Office--Records**
	07072	00001		Booking Reports [2 pages black and white photocopied images]
	07072	00002		Short Arrest Information Forms
	07072	00003		Capias
	07072	00004		Complaint Affidavits
	07073			**Jordan, Joseph Edward; *RESTRICTED* SEALED; 2009-CF-002872; Broward County Sheriff's Office--Records**
	07073	00001	49	Confidential/Exempt -- Booking Reports -- Exempt per

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
			F.S. 119.071(5)(a) and 119.071(2)(h)
07073	00002		Confidential/Exempt -- Short Arrest Information Forms -- Exempt per F.S. 119.071(5)(a) and 119.071(2)(h)
07073	00003		Confidential/Exempt -- Capias -- Exempt per F.S. 119.071(5)(a) and 119.071(2)(h)
07073	00004		Confidential/Exempt -- Complaint Affidavits -- Exempt per F.S. 119.071(5)(a) and 119.071(2)(h)
07074			**Jordan, Joseph Edward; *RESTRICTED* SEALED; 2009-CF-002872; Broward County Sheriff's Office--Department of Detention--Healthcare**
07074	00001		Confidential/Exempt -- Inmate Healthcare Records -- Exempt per F.S. 395.3025(4), 395.3025(8) and 456.057
07075			**Jordan, Joseph Edward; 2009-CF-002872; Florida Department of Law Enforcement--General Counsel's Office**
07075	00001		Lab (#20090702064): Biology, Case Correspondence, Case Jacket, Chain of Custody, Crime Scene, Latent, Questioned Documents, Toxicology, Trace Evidence, and Florida Sexual Offender Predator Records [1 DVD]
07076			**Jordan, Joseph Edward; *RESTRICTED* SEALED; 2009-CF-002872; Florida Department of Law Enforcement--General Counsel's Office**
07076	00001		Confidential/Exempt -- Lab (#20090702064): Crime Scene, Latent, Trace Evidence and Florida Sexual Offender Predator Records [1 DVD] -- Exempt per F.S. 395.3025(4), 395.3025(7), 395.3025(8), 119.071(4)(d)2.a.(I), 119.071(5)(g)2, 119.071(5)(a)5, 119.071(5)(g), 943.053(3)(b), 943.053(2), and 119.071(2)(h)1.b

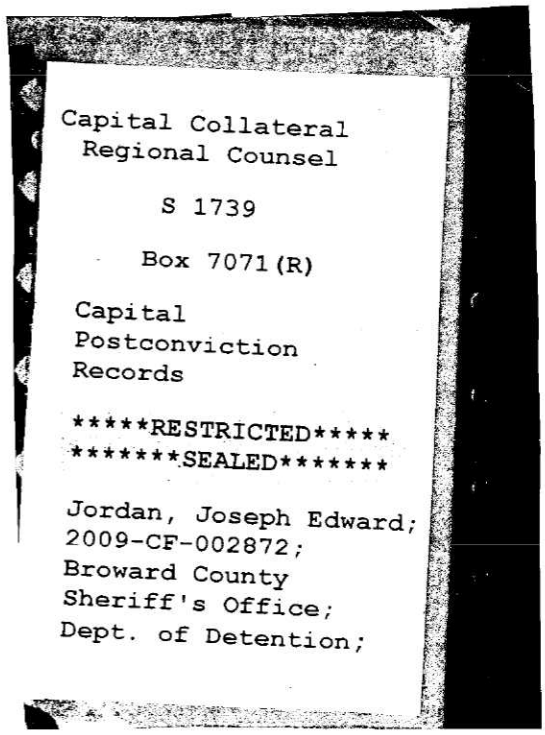

Capital Collateral
Regional Counsel
S 1739
Box 7069(R)
Capital
Postconviction
Records
*****RESTRICTED*****
*******SEALED*******
Jordan, Joseph E.;
2009-CF-002872;
Broward County
Sheriff's Office;
Crime Lab;

Exempt per
FSS 943.325(14)

Joseph Edward Jordan
2009-2872 CFAES

-190-

51739 Confidential Exempt Bar 7069, FF1


Capital Collateral
Regional Counsel
S 1739
Box 7071(R)
Capital
Postconviction
Records
*****RESTRICTED*****
*******SEALED*******
Jordan, Joseph Edward;
2009-CF-002872;
Broward County
Sheriff's Office;
Dept. of Detention;

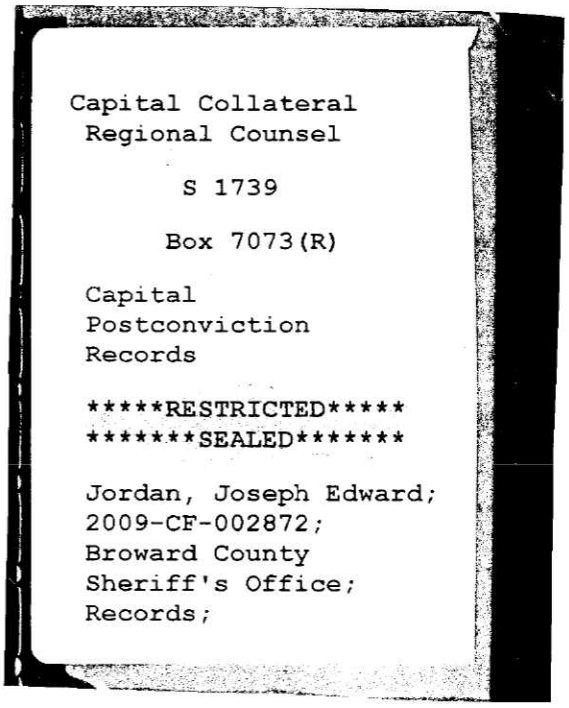
Exempt Per
FSS 119.071(5)(a)

S1739

Confidential | Exempt

Box 7071, FF 1-4

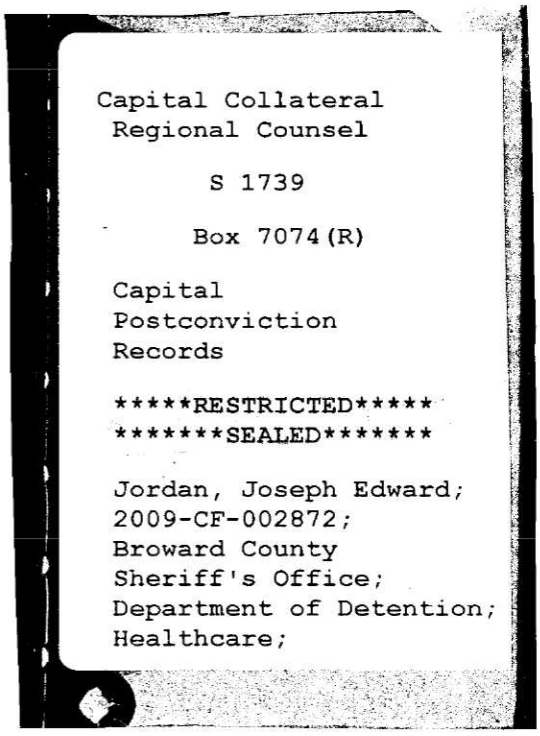
Joseph Edward Jordan
© 2009. 2872 CFAES


Capital Collateral
Regional Counsel
S 1739
Box 7073(R)
Capital
Postconviction
Records
*****RESTRICTED*****
*******SEALED*******
Jordan, Joseph Edward;
2009-CF-002872;
Broward County
Sheriff's Office;
Records;

Exempt per FSS 119.071(5)(a)
FSS 119.071(2)(h)

S1739 Confidential Exempt Box 7073, FF 1-4

Joseph Edward Jordan
2009-2872 CFAES


Capital Collateral
Regional Counsel
S 1739
Box 7074(R)
Capital
Postconviction
Records
*****RESTRICTED*****
*******SEALED*******
Jordan, Joseph Edward;
2009-CF-002872;
Broward County
Sheriff's Office;
Department of Detention;
Healthcare;

Exempt per FSS 395.3025(4), (8)
456.057

S1739 Confidential/Exempt Box 7074, FPL

Joseph Edward Jordan
2009-2872 CFAES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this day 15th day of February, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via the Florida Courts E-Filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com; to **Rana Wallace**, Assistant General Counsel, Florida Department of Corrections, 501 South Calhoun Street, Tallahassee, Florida 32399, at Wallace.Rana@mail.dc.state.fl.us and Cea.Christian@mail.dc.state.fl.us; to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach Florida 32114 at calhounr@sao7.org; and to **Terrence O. Lynch**, Esquire, Assistant Legal Counsel, Broward Sheriff's Office, Public Safety Building. 2601 West Broward Boulevard, Fort Lauderdale, Florida 33312 at dena_robbins@sheriff.org and terrence_lynch@sheriff.org on this 15th day of February, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 15th day of February, 2016.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

**ORDER TO DELIVER EXEMPT PUBLIC RECORDS
[FDOC, SAO, AND BROWARD COUNTY SHERIFF'S OFFICE]**

TO: **RECORDS REPOSITORY**
The Florida State Archives
Attn: **CCRC Records Archivist**
R.A. Gray Building, M.S. 9-E,
500 South Bronough Street,
Tallahassee, Florida 32399-0250.

This Court having received notice on this ____ day of _____, 2016, that certain records which have been claimed as confidential or exempt from disclosure have been copied, indexed, separately contained without being redacted, sealed, identified as to their nature and their legal basis for confidentiality or exemption, and delivered to the Records Repository of the Secretary of the State. The following agencies or entities delivered sealed and/or exempt records to the Records Repository and noted that said following designated records were confidential or exempt from the requirements of Section 119.07, Florida Statutes:

AGENCY	REPOSITORY	NOTICE OF COMPLIANCE DATE
1. **Florida Department of Corrections** *See Appendix A.*	Container 07061	January 21, 2016.
2. **Office of the State Attorney – R.J. Larizza** *See Appendix B.*	Container 07085	February 11, 2016.
3. **Broward County Sheriff's Office** *See Appendix C.*	Container 07074	February 3, 2016.

It is ordered that the above listed records be delivered by the Records Repository to the **Clerk of Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, 251 North Ridgewood Avenue, Daytona Beach, Florida 32114**, for further proceedings consistent with Florida Rule of Criminal Procedure 3.852 (2016). The Law Office of the Capital Collateral Regional Counsel - Middle Region shall bear all the costs associated with the transportation and inspection of these records by the trial court.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida on this _____ day of _____, 201__.

_____
Honorable Terrence R. Perkins
Chief Circuit Court Judge

Copies Furnished to:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
Law Office of the Capital Collateral Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907.
ahmed@ccmr.state.fl.us;
perinetti@ccmr.state.fl.us;
venable@ccmr.state.fl.us;
support@ccmr.state.fl.us

Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney, Seventh Judicial Circuit,
251 North Ridgewood Avenue,
Daytona Beach Florida 32114.
calhounr@sao7.org

Stacey Elaine Johns Kircher,
Assistant Attorney General,
Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
Daytona Beach, Florida 32118.
Stacey.kircher@myfloridalegal.com;
CapApp@myfloridalegal.com

Rana Wallace,
Assistant General Counsel,
Florida Department of Corrections,
501 South Calhoun Street,
Tallahassee, Florida 32399.
Wallace.Rana@mail.dc.state.fl.us;
Cea.Christian@mail.dc.state.fl.us

Terrence O. Lynch, Esquire,
Assistant Legal Counsel,
Broward Sheriff's Office,
Public Safety Building,
2601 West Broward Boulevard,
Fort Lauderdale, Florida 33312.
dena_robbins@sheriff.org;
terrence_lynch@sheriff.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this 15th day of February, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via the Florida Courts E-Filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com; to **Rana Wallace**, Assistant General Counsel, Florida Department of Corrections, 501 South Calhoun Street, Tallahassee, Florida 32399, at Wallace.Rana@mail.dc.state.fl.us and Cea.Christian@mail.dc.state.fl.us; to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach Florida 32114 at calhounr@sao7.org; and to **Terrence O. Lynch**, Esquire, Assistant Legal Counsel, Broward Sheriff's Office, Public Safety Building. 2601 West Broward Boulevard, Fort Lauderdale, Florida 33312 at dena_robbins@sheriff.org and terrence_lynch@sheriff.org on this 15th day of February, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 15th day of February, 2016.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. **VOLUSIA CO. 2009-CF-002872CFAWS**

JOSEPH EDWARD JORDAN,

Defendant.

_____/

ORDER TO MAINTAIN PUBLIC RECORDS EXEMPTION AND CONFIDENTIALITY AS TO DISCOVERABLE RECORDS

THIS CAUSE comes before the Court on the State's Motion to maintain the exempt status and confidentiality of records disclosed in postconviction discovery.

On February 12, 2016 this Court held the first status conference pertaining to public records disclosure under Florida Rules of Criminal Procedure 3.851 and 3.852. This Court found, after *in camera* inspection of sealed exempt documents, that the 16 disks enclosed and the index accompanying same were discoverable to CCRC in preparation of Jordan's claims. At the State's request, these documents will maintain their exemption from public records disclosure and be made available to CCRC only for their interoffice use in preparation of Jordan's claims, to include consultation with expert witness(es).

FEB 16 2016

This Court, having reviewed the motion, hereby GRANTS the State's request to maintain public records exemption and confidentiality of records disclosed in post-conviction discovery.

DONE AND ORDERED in Chambers in Daytona Beach, Volusia County, Florida, this 15 day of February 2016.

Honorable Terrance Perkins
Circuit Court Judge

Copies furnished to:

Stacey Kircher
Assistant Attorney General Office
of the Attorney General 444
Seabreeze Blvd., 5th Floor Daytona
Beach, FL 32118
stacey.kircher@myfloridalegal.com
CapApp@myfloridalegal.com

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Assistant State Attorney
Office of the State Attorney
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Daytona Beach, FL 32114
calhounr@sao7.org
eservicevolusia@sao7.org.

Raheela Ahmed Assistant CCRC
Capital Collateral Regional Counsel - Middle
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support@ccmr.state.fl.us

Maria C. Perinetti
Assistant CCRC
Capital Collateral Regional Counsel - Middle
12973 N. Telecom Parkway
Temple Terrace, FL 33637
perinetti@ccmr.state.fl.us
support@ccmr.state.fl.us

Donna Venable
Assistant CCRC
Capital Collateral Regional Counsel - Middle
12973 N. Telecom Parkway
Temple Terrace, FL 33637
venable@ccmr.state.fl.us
support@ccmr.state.fl.us

IN THE CIRCUIT COURT OF THE
7TH JUDICIAL CIRCUIT IN AND FOR
VOLUSIA COUNTY, FLORIDA

CASE NO.: 2009-002872-CFAWS
DIVISION: 41

STATE OF FLORIDA,

vs.

JOSEPH EDWARD JORDAN,

Defendant.
_____/

ORDER ON DEFENDANT'S FIRST MOTION REQUESTING THE *IN CAMERA* REVIEW OF RECORDS [EDGEWATER POLICE DEPARTMENT & FLORIDA DEPARTMENT OF LAW ENFORCEMENT]

The Court has conducted an *in camera* review of documents "exempt" from public disclosure from the FDLE and Edgewater Police Department and determined that the following documents are subject to discovery:

1. FDLE Laboratory Report dated Feb. 20, 2013 with attachments.

2. FDLE Case Tracking Forms and Laboratory evidence release forms.

3. Handwritten and typed investigation notes and Property Room Listing from the Edgewater Police Department.

4. 16 CDs/DVDs containing autopsy audio/video records and results.

The Court finds that the documents contained on the CD-R and described by the Archives Repository – Exempt documents, are not discoverable at this time.

Nothing in this Order shall be construed as finding those documents ordered to be produced herein are subject to public records disclosure or are admissible into evidence at any proceedings in this matter.

16 DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida, this 16 day of February, 2016.

TERENCE R. PERKINS
CIRCUIT JUDGE

FILED
16 FEB 17 PM 3:05
CLERK OF THE CIRCUIT & CTY COURT VOLUSIA CTY, FL
CC13

Rosemary L. Calhoun, Esquire – eservicevolusia@sao7.org
Raheela Ahmed, Esquire – ahmed@ccmr.state.fl.us
Maria Perinetti, Esquire – perinetti@ccmr.state.fl.us
Donna Venable, Esquire – venable@ccmr.state.fl.us

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

ORDER TO DELIVER EXEMPT PUBLIC RECORDS
[FDOC, SAO, AND BROWARD COUNTY SHERIFF'S OFFICE]

TO: **RECORDS REPOSITORY**
The Florida State Archives
Attn: **CCRC Records Archivist**
R.A. Gray Building, M.S. 9-E,
500 South Bronough Street,
Tallahassee, Florida 32399-0250.

FILED
16 FEB 18 PM 5:3
CLERK OF THE CIRCUIT & CTY. COURT VOLUSIA CTY, FL
0013

This Court having received notice on this 17 day of Feb., 2016, that certain records which have been claimed as confidential or exempt from disclosure have been copied, indexed, separately contained without being redacted, sealed, identified as to their nature and their legal basis for confidentiality or exemption, and delivered to the Records Repository of the Secretary of the State. The following agencies or entities delivered sealed and/or exempt records to the Records Repository and noted that said following designated records were confidential or exempt from the requirements of Section 119.07, Florida Statutes:

AGENCY	REPOSITORY	NOTICE OF COMPLIANCE DATE
1. **Florida Department of Corrections** *See Appendix A.*	Container 07061	January 21, 2016.
2. **Office of the State Attorney – R.J. Larizza** *See Appendix B.*	Container 07085	February 11, 2016.
3. **Broward County Sheriff's Office** *See Appendix C.*	Container 07074	February 3, 2016.

It is ordered that the above listed records be delivered by the Records Repository to the **Clerk of Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, 251 North Ridgewood Avenue, Daytona Beach, Florida 32114**, for further proceedings consistent with Florida Rule of Criminal Procedure 3.852 (2016). The Law Office of the Capital Collateral Regional Counsel - Middle Region shall bear all the costs associated with the transportation and inspection of these records by the trial court.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida on this 17 day of Feb., 2016.

Honorable Terrence R. Perkins
Chief Circuit Court Judge

Copies Furnished to:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
Law Office of the Capital Collateral Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907.
ahmed@ccmr.state.fl.us;
perinetti@ccmr.state.fl.us;
venable@ccmr.state.fl.us;
support@ccmr.state.fl.us

Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney, Seventh Judicial Circuit,
251 North Ridgewood Avenue,
Daytona Beach Florida 32114.
calhounr@sao7.org

Stacey Elaine Johns Kircher,
Assistant Attorney General,
Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
Daytona Beach, Florida 32118.
Stacey.kircher@myfloridalegal.com;
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Rana Wallace,
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Florida Department of Corrections,
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Wallace.Rana@mail.dc.state.fl.us;
Cea.Christian@mail.dc.state.fl.us

Terrence O. Lynch, Esquire,
Assistant Legal Counsel,
Broward Sheriff's Office,
Public Safety Building,
2601 West Broward Boulevard,
Fort Lauderdale, Florida 33312.
dena_robbins@sheriff.org;
terrence_lynch@sheriff.org

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

09-002872CFAWS

CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

ORDER TO PRODUCE AND DELIVER PUBLIC RECORDS TO THE RECORDS REPOSITORY

TO: FDLE, ENFORCEMENT AND INVESTIGATIVE SUPPORT,
Tanya Weldon, P.O. Box 1489, Tallahassee, FL 32302; and
2331 Phillips Road, Tallahassee, FL 32308.

DEPARTMENT OF PUBLIC PROTECTION, DIVISION OF EMERGENCY MEDICAL SERVICES,
John R. Zaragoza, 112 Carswell Ave., Holly Hill, FL 32117.

EDGEWATER FIRE DEPARTMENT,
Chief Cousins, 1605 South Ridgewood Ave., Edgewater, FL 32132.

HOLLYWOOD POLICE DEPARTMENT,
Chief Sanchez, 3250 Hollywood Blvd., Hollywood, FL 33021.

U.S. MARSHALL'S OFFICE MID-FLORIDA,
Ross Moser, 401 W. Central Blvd., Suite 2300, Orlando, FL 32801.

VOLUSIA COUNTY SHERIFF'S OFFICE,
Sheriff Ben Johnson, 1330 Indian Lake Rd., Daytona Beach, FL 32124.

BROWARD COUNTY STATE'S ATTORNEY OFFICE,
S.A. Michael Satz, 201 Southeast 6th Street, Ft. Lauderdale, FL 33301.

FILED
16 FEB 22 PM 3:20
CLERK OF THE CIRCUIT & CTY. COURT VOLUSIA CTY. FL
CC13

THIS CAUSE came before this Court during a status hearing on February 12, 2016, when the above listed agencies were identified as having not yet delivered to the Records Repository public records in this case pursuant to requirements set forth by Fla. R. Crim. P. 3.852(d) and (e).

This Court finds that the Office of the State Attorney for the Seventh Judicial Circuit sent a written notice to the above listed agencies on November 12, 2015, giving a ninety (90) day deadline after receipt of the notice to copy, seal, index, and deliver all required public records to the Records Repository

This Court finds that to-date the above listed agencies have not timely provided any records to the Records Repository. This Court ORDERS that the above listed agencies copy, seal, index, and deliver all public records as necessary to comply with Fla. R. Crim. P. 3.852(d) and (e) in this case to the **Records Repository, The Florida State Archives, Attn: CCRC Records Archivist, R.A. Gray Building, M.S. 9-E, 500 South Bronough Street, Tallahassee, Florida 32399-0250** by MONDAY, MARCH 7, 2016.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida on this 22 day of Feb., 2016.

Honorable Terrence R. Perkins
Chief Circuit Court Judge

Copies Furnished to:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
Law Office of the Capital Collateral Regional Counsel-Middle Region
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Rosemary Calhoun,
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Daytona Beach, Florida 32118.
Stacey.kircher@myfloridalegal.com;
CapApp@myfloridalegal.com

FDLE, ENFORCEMENT AND INVESTIGATIVE SUPPORT,
Tanya Weldon,
P.O. Box 1489,
Tallahassee, FL 32302; and
2331 Phillips Road,
Tallahassee, FL 32308

DEPARTMENT OF PUBLIC PROTECTION, DIVISION OF EMERGENCY MEDICAL SERVICES,
John R. Zaragoza,
112 Carswell Ave.,
Holly Hill, FL 32117.

EDGEWATER FIRE DEPARTMENT,
Chief Cousins,
1605 South Ridgewood Ave.,
Edgewater, FL 32132.

HOLLYWOOD POLICE DEPARTMENT,
Chief Sanchez,
3250 Hollywood Blvd.,
Hollywood, FL 33021.

U.S. MARSHALL'S OFFICE MID-FLORIDA,
Ross Moser,
401 W. Central Blvd., Suite 2300,
Orlando, FL 32801.

VOLUSIA COUNTY SHERIFF'S OFFICE,
Sheriff Ben Johnson,
330 Indian Lake Rd.,
Daytona Beach, FL 32124.

BROWARD COUNTY STATE'S ATTORNEY OFFICE,
S.A. Michael Satz,
201 Southeast 6th Street,
Ft. Lauderdale, FL 33301.

Hello ladies,

CCRC's, I hope your drive back was a pleasant one. Just wanted to follow up before I forgot our homework. :)

90 days puts us at May 14th (leap year). The last two weeks of April, I will be on vacation around the 20-25, 27-29, but any time other than than is fine with me to schedule our next status conference. I have cc'd Ms. Price, Judge Perkins' JA, who can likely point us in the right direction as to scheduling.

I have included the proposed order to appear telephonically, and the order to keep the exempt public records exempt though discoverable, please let me know if you have any issue with either, if not, Ms. Price could forward it to the judge as he requested.

I will be looking for your proposed order for the 15 day follow-up.

Thanks so much and have a great day.

(See attached file: Order allowing telephonic appearance.pdf)(See attached file: order confidential exemption public records.pdf)

In appreciation,

Stacey E. Kircher, B.C.S.
Assistant Attorney General
Capital Collateral Division

THE FLORIDA BAR
BOARD CERTIFIED
CRIMINAL TRIAL

Office Line: 386-238-4990
Facsimile: 386-226-0457

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

**DEFENDANT'S THIRD MOTION REQUESTING
THE *IN CAMERA* REVIEW OF RECORDS
[MEDICAL EXAMINER'S OFFICE]**

The Defendant, Joseph Edward Jordan, pursuant to Fla.R.Crim.P. 3.852(f)(3), by and through his undersigned counsel, hereby moves this Honorable Court for an order to the Florida State Archives (Records Repository) to deliver certain exempt public records to the Clerk of this Court and for this Court to conduct an *in camera* review of those records. In support, Mr. Jordan states the following:

1. Joseph Edward Jordan is incarcerated at Florida State Prison under a sentence of death.

2. Pursuant to Florida Rule of Criminal Procedure 3.852(f) [1], the following agency have

[1] Fla. R. Crim. P. Rule 3.852 (f) provides as follows:

> **(f) Exempt or Confidential Public Records.**
>
> (1) Any public records delivered to the records repository pursuant to these rules that are confidential or exempt from the requirements of section 119.07(1), Florida Statutes, or article I, section 24(a), Florida Constitution, must be separately contained, without being redacted, and sealed. The outside of the container must clearly identify that the public record is confidential or exempt and that the seal may not be broken without an order of the trial court. The outside of the container must identify the nature of the public records and the legal basis for the exemption.

provided a Notice of Compliance indicating that it has delivered records to the Records Repository that include sealed exempt and/or confidential records located as follows:

AGENCY	REPOSITORY	NOTICE OF COMPLIANCE DATE
1. **Volusia County District 7 Medical Examiner** *See Appendix A.*	Container 07103	February 9, 2016.

3. The Supreme Court of Florida has discussed this process several times since the introduction of the rule as a reform in 1998. The Supreme Court of Florida in *Rose v. State*, 774 So. 2d 629 (Fla. 2000), has approved the "pre-Huff" procedure of *in camera* inspections of records designated as exempt and/or confidential and has held as follows:

> Rose also alleges that the trial court violated his constitutional right to have a full and fair state postconviction proceeding by conducting an in-camera inspection of public records to determine whether the State was justified in claiming that such records were exempt from disclosure. On July 11, 1996, Rose filed a public records request with the Pinellas County State Attorney's Office pursuant to chapter 119, Florida Statutes. The State responded and provided Rose with a detailed explanation of the public records that were exempt from disclosure under Florida Rule of Criminal Procedure 3.852. The trial court subsequently conducted an in-camera review of the public records withheld by the State. After conducting the in-camera review, the trial court concluded that the withheld records contained no *Brady* material, but the court instructed the State in a written order to provide Rose with certain records that were not covered under the statutory exemptions. According to Rose, the trial court's in-camera review of the allegedly exempt public records and its refusal to require the State to turn over handwritten notes pertaining to the alleged "deal" between Borton and Poole and the State prejudiced him. Rose claims that he is entitled to an evidentiary hearing. We disagree.

> (2) Upon the entry of an appropriate court order, sealed containers subject to an inspection by the trial court shall be shipped to the clerk of court. The containers may be opened only for inspection by the trial court in camera. The moving party shall bear all costs associated with the transportation and inspection of such records by the trial court. The trial court shall perform the unsealing and inspection without ex parte communications and in accord with procedures for reviewing sealed documents.
>
> (3) Collateral counsel must file a motion for in camera inspection within 30 days of *receipt of the notice of delivery of sealed records* to the central records repository or the in camera inspection will be deemed waived.

> In *Ragsdale v. State*, 720 So. 2d 203, 206 (Fla. 1998), this Court had to determine whether public records were properly exempted from disclosure by the State. This Court ruled that where doubt existed as to whether the State must disclose a particular document, the proper procedure is to have a trial judge conduct an in-camera review of the documents. *See id.; see also State v. Kokal*, 562 So. 2d 324, 327 (Fla. 1990) (stating that when certain statutory exemptions are claimed by the party against whom the public records request has been filed or when doubt exists as to whether a particular document must be disclosed, the proper procedure is to furnish the document to the trial judge for an in-camera inspection). After conducting an in-camera review, the State must turn over the nonexempt materials to the defense. *See Ragsdale*, 720 So. 2d at 206.
>
> In this case, Judge Schaeffer conducted an in-camera proceeding and examined each of the alleged documents that the State withheld to determine whether the documents were properly withheld. After reviewing the documents, the trial court issued a written order instructing the State as to which documents it needed to produce to the defense. Rose has failed to cite to any authority that suggests that Judge Schaeffer's review of the withheld documents was improper and we have found no authority that supports this view. Therefore, we find that Judge Schaeffer fully complied with procedures set forth in *Ragsdale* and *Kokal* for determining whether the State's claimed exemptions were proper.

Rose v. State, 774 So. 2d 629, 636-637 (Fla. 2000) (footnote omitted).

9. The procedure approved in *Rose* was again discussed by the Florida Supreme Court in *Damren v. State*, 838 So. 2d 512 (Fla. 2003), as follows:

> Damren asserts that the trial court erred in denying his request for certain public records from the State Attorney's office. According to Damren, the circuit court failed to review these records for exculpatory information under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We disagree.
>
> As this Court has held, "where doubt existed as to whether the State must disclose a particular document, the proper procedure is to have a trial judge conduct an in-camera review of the documents." *Rose v. State*, 774 So. 2d 629, 636 (Fla. 2000). This Court applies an abuse of discretion standard when reviewing a trial court's determination on a public records request. *Moore v. State*, 820 So. 2d 199, 204 (Fla. 2002).
>
> The record reveals that the State provided the requested records to the trial court for an in-camera review and the postconviction judge granted the public records request in part and denied it in part. During a hearing, the circuit court carefully reviewed each folder of materials which was submitted, explained what information was contained in each folder and whether it included exculpatory information, and indicated the files to which defense counsel was entitled. We find

> that the trial court did not abuse its discretion in denying in part Damren's request and hence deny relief. We find no error.

Damren v. State, 838 So.2d 512, 519 (Fla. 2003) (footnote omitted).

10. The effects of the discovery and other post-conviction reforms from the late 1990s onward was analyzed by the Honorable O.H. Eaton, Jr. as follows:

> Litigation in a death penalty case does not end when the judgment and sentence of death are affirmed by the Supreme Court of Florida. The next phase of litigation in these cases falls under the general heading of "postconviction relief." It is during this phase that death row defendants litigate matters "collateral" to the judgment and sentence that could not have been raised on appeal. . . . They are charged with reinvestigating the case to find out deficiencies that occurred during the trial. This reinvestigation usually includes review of numerous public records that may have some bearing on the case.
>
> . . .
>
> Over the last several years both the Supreme Court and the legislature have made efforts to streamline the processing of postconviction motions in capital cases.
>
> . . .
>
> Prior to 1996, collateral counsel had to file a civil action in order to obtain public records from persons or agencies other than the state attorney and local law enforcement agencies that investigated the crime. This cumbersome process often required suit to be filed in several jurisdictions and delays were inevitable.
>
> . . .
>
> The legislature created a centralized repository for storage of public records in capital cases in order to provide easy access to them. It was the legislature's hope that a process could be developed that would allow these records to be automatically sent to the repository and made accessible to counsel without the necessity of resorting to litigation.
>
> Currently, the Secretary of State is the officer responsible for storing the records and the records repository is located in the R.A. Gray building in Tallahassee.
>
> . . .
>
> [T]he procedural aspects of discovery of public records are now regulated by the Supreme Court of Florida. Rule 3.582 provides for an orderly method to obtain public records and, if the various offices and agencies that maintain public records cooperate, collateral counsel should be able to review them and have copies made in a timely fashion.
>
> . . .
>
> Assuming every person and agency complies with the requirement to submit public records to the records repository, all of the public records should be on file there less than 330 days from the date the mandate affirming the death sentence is issued by the Supreme Court of Florida. However, in capital litigation, things are never that easy. Some of the records may be claimed to be exempt or confidential and there may be old cases out there that are subject to a separate procedure. Ironically,

the persons or agencies claiming records to be exempt or confidential are aligned with the prosecution whose interest is to avoid delays. By providing a separate procedure for old cases, additional delays may be expected.

Exempt or Confidential Public Records

Rule 3.852(f) provides that any public records delivered to the records repository that are claimed to be exempt or confidential must be boxed separately, without redaction, and sealed. The box must clearly identify that the public record is confidential or exempt and the seal may not be broken without an order of the trial court. The box must also identify "the nature of the public records and the legal basis for the exemption."
In order for collateral counsel to obtain a ruling to unseal the public records claimed to be exempt or confidential, an order must first be obtained from the trial court directing the records repository to ship the sealed boxes of records to the clerk of the trial court. *Undoubtedly, collateral counsel will always want to obtain a ruling to determine if these records are really exempt or confidential and delay could be avoided if these records were filed with the clerk of the court in the first place*. However, the Supreme Court wanted to carry out legislative intent where possible so this unnecessary complication is part of the procedure and will undoubtedly cause delay.

The "moving party" is responsible to pay for the cost of the "transportation and inspection of such records by the trial court." Presumably, the "cost" will be just the postage. It is unclear what "cost" could possibly be associated with inspecting the records.

Once the records claimed to be exempt or confidential are delivered to the clerk of the court, they may only be opened by the trial court in camera without ex parte communication in the same manner as inspecting any sealed document. Presumably, the trial court will enter an order sustaining the claim of exemption or confidentiality or order the records disclosed.
. . .
In Camera Inspection of Exempt Public Records

Persons or agencies claiming public records to be exempt from production must box the records separately, seal them, index them with the reasons for the exemption, and deliver them to the records repository. From there, the records are shipped to the clerk of the trial court.

The trial judge must inspect the records in camera to determine if they are in fact exempt. A detailed order must be entered identifying each public record and the reason for its exemption.

In Rose v. State, *774 So. 2d 629 (Fla. 2000), the trial judge held an in camera inspection of public records claimed to be exempt before the Huff hearing. The state*

> *attorney was ordered to produce certain of the records and others were ruled to be exempt. The Supreme Court approved the procedure.*
> . . .
> Public records have provided collateral counsel with significant evidence in the past and will undoubtedly continue to do so in the future. Trial judges need to take their responsibility to rule on public records issues seriously and make every effort to resolve public records disputes in a timely manner.

O.H. Eaton, Jr., *Discovery of Public Records in Capital Cases*, 76 Fla. B.J. 24, 30 (April 2002) (footnotes omitted) (emphasis added).

4. There are no objections by the State of Florida as to this Motion and accompanying proposed order as relayed to this Court at the Status Conference conducted on February 12, 2016.

WHEREFORE, Mr. Jordan hereby requests the entry of an order so that the aforementioned records can be transferred to the Clerk of this Circuit Court for an *in camera* review by this Court to determine whether they are exempt public records. It is further requested that if a subsequent *in camera* determination is made by this Honorable Court that these records are not exempt, that the records be released to undersigned counsel pursuant to a subsequent Court's order.

Respectfully submitted

s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

s/ Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar Number 13837
Email: perinetti@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

s/ Donna Ellen Venable
Donna Ellen Venable
Florida Bar Number 100816
Email: venable@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

Law Office of the Capital Collateral
Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Telephone (813) 558-1600
Fax No. (813) 558-1601 or (813) 558-1602

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

APPENDIX A

**DEFENDANT'S THIRD MOTION REQUESTING
THE *IN CAMERA* REVIEW OF RECORDS
[MEDICAL EXAMINER'S OFFICE]**

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/V06-2012/CCR100	**TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7102-7103(B)
2. AGENCY **Volusia County Medical Examiner Office**	3. DIVISION **Public Protection – County of Volusia**	4. BUREAU

5. ADDRESS (Street, City, and Zip Code)	6. CONTACT (Name and Telephone Number)
1360 Indian Lake Road Daytona Beach, FL 32124	Teri Hanans Staff Assistant II 386-258-4060 ext. #11124
7. SUBMIT TO: Capital Collateral Postconviction Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee FL. 32399-0250	8. DEFENDANT NAME - **Joseph Edward Jordan** DEFENDANT CIRCUIT CT. CASE **#2009 002872 CFAES**

9. DESCRIPTION

File 1: ME case #09-07-364(Cope, Keith) – case file
File 2: Exempt autopsy photos (Digital Images on CD) – case#(s) 09-07-364

2016 FEB 12 PM 1:16
ARCHIVES AND RECORDS MANAGEMENT

TOTAL NUMBER OF BOXES 0 **OR** PACKAGES 1 SENT TO THE REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? ☒YES ☐NO

ARE **EXEMPT** RECORDS SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? (***If no, records will be returned to you***) ☒YES ☐NO

DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

Exempt autopsy photos (Digital Images on CD) – case#(s) 09-07-364
F.S. 406.135

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☒ OTHER –digital images on CD

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
Marie A. Herrmann, M.D. 2-9-16 SIGNATURE DATE	2/12/16 CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Marie A. Herrmann, M.D. TYPE NAME AND TITLE	

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
			164.502, 119.071(5)(a) and 119.07(6)(aa)
07100			Smith, Terry; 09-CF-004417A; Florida Department of Corrections--Office of the General Counsel
07100	00001		Redacted Public Records of Terry Smith-Central Records (CR-1--CR-6), Florida State Prison Classification File (CF-1--CF-24), and Inspector General Records (IG-1--IG-2) [1 CD]
07101			Smith, Terry; *RESTRICTED* SEALED; 09-CF-004417A; Florida Department of Corrections--Office of the General Counsel
07101	00001		Confidential/Exempt: Unredacted Records of Terry Smith, Florida State Prison Medical (Med-1--Med-14), Florida State Prison Classification file (CFE-1--CFE-7), Central Records (CRE-1--CRE-4), and Inspector General Records (IGE-1--IGE-2)--Exempt per F.S. 456.057, 945.10(1)(a), 45 CFR § 164.502, 328.013(5), 119.071(1)(f), 812.081, 119.071(4)(d), and 945.10(1)(e)
07102			Jordan, Joseph Edward; 2009-CF-002872; Medical Examiner's Office--District Seven--Volusia County
07102	00001		Medical Examiner Case File: Cope, Keith Curtis (#09-07-364)
07103			Jordan, Joseph Edward; *RESTRICTED* SEALED; 2009-CF-002872; Medical Examiner's Office--District Seven--Volusia County
07103	00001		Confidential/Exempt: Medical Examiner Autopsy Photos: Cope, Keith Curtis (#09-07-364) [1 CD] -- Exempt per F.S. 406.135
07104			Sheppard, Billy Jim Jr.; 2008-CF-011059; Florida Department of Law Enforcement--General Counsel's Office

Capital Collateral
Regional Counsel

S 1739

Box 7103(R)

Capital
Postconviction
Records

*****RESTRICTED*****
*******SEALED*******

Jordan, Joseph Edward;
2009-CF-002872;
Med. Examiner's Office;
District Seven;
Volusia County;

S1739

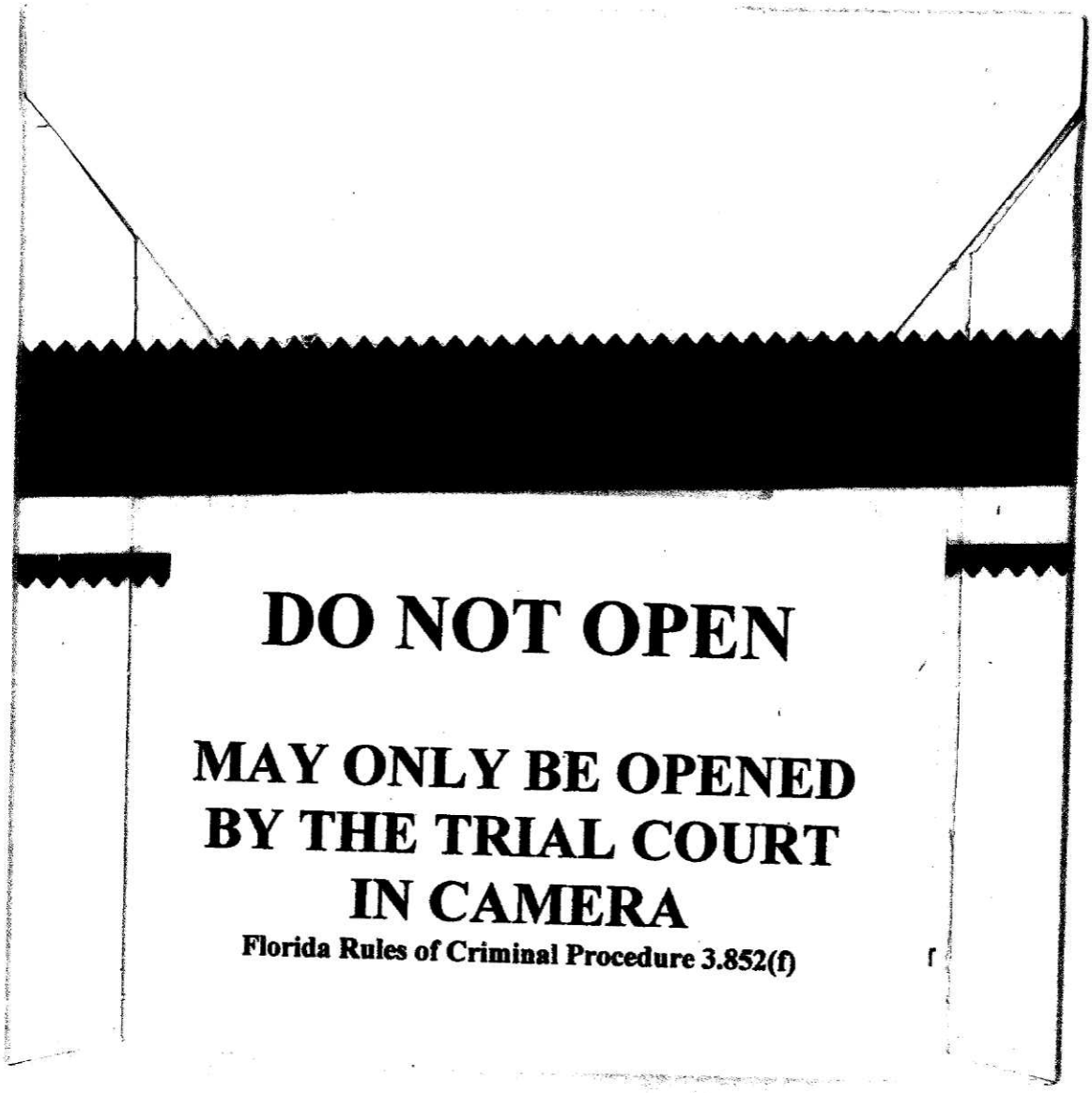
Box 7103, FF 1

MEDICAL EXAMINER PHOTOS
M. E. CASE #09-07-364
COPE, KEITH

DISK MAILER

PUBLIC RECORD EXEMPTIONS
FS 406.135
AGOs 03-57, 01-47

CAUTION
Do not bend or fold
Avoid exposure to all magnetic fields


DO NOT OPEN
MAY ONLY BE OPENED
BY THE TRIAL COURT
IN CAMERA
Florida Rules of Criminal Procedure 3.852(f)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this day 25th day of February, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via the Florida Courts E-Filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com; and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach Florida 32114 at calhounr@sao7.org on this 25th day of February, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to **Marie A. Herrmann, M.D.**, District 7 Medical Examiner, 1360 Indian Lake Road, Daytona Beach, Florida 32124; to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 25th day of February, 2016.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

**ORDER TO DELIVER EXEMPT PUBLIC RECORDS
[MEDICAL EXAMINER'S OFFICE]**

TO: **RECORDS REPOSITORY**
The Florida State Archives
Attn: **CCRC Records Archivist**
R.A. Gray Building,M.S. 9-E,
500 South Bronough Street,
Tallahassee, Florida 32399-0250.

This Court having received notice on this ____ day of _____, 2016, that certain records which have been claimed as confidential or exempt from disclosure have been copied, indexed, separately contained without being redacted, sealed, identified as to their nature and their legal basis for confidentiality or exemption, and delivered to the Records Repository of the Secretary of the State. The following agencies or entities delivered sealed and/or exempt records to the Records Repository and noted that said following designated records were confidential or exempt from the requirements of Section 119.07, Florida Statutes:

AGENCY	REPOSITORY	NOTICE OF COMPLIANCE DATE
1. **Volusia County District 7 Medical Examiner**	Container 07103	February 9, 2016.

It is ordered that the above listed records be delivered by the Records Repository to the **Clerk of Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, 251 North Ridgewood Avenue, Daytona Beach, Florida 32114**, for further proceedings consistent with Florida Rule of Criminal Procedure 3.852 (2016). The Law Office of the Capital Collateral Regional Counsel - Middle Region shall bear all the costs associated with the transportation and inspection of these records by the trial court.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida on this _____ day of _____, 201__.

_____

Honorable Terrence R. Perkins
Chief Circuit Court Judge

Copies Furnished to:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
Law Office of the Capital Collateral Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907.
ahmed@ccmr.state.fl.us;
perinetti@ccmr.state.fl.us;
venable@ccmr.state.fl.us;
support@ccmr.state.fl.us

Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney, Seventh Judicial Circuit,
251 North Ridgewood Avenue,
Daytona Beach Florida 32114.

Stacey Elaine Johns Kircher,
Assistant Attorney General,
Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
Daytona Beach, Florida 32118.
Stacey.kircher@myfloridalegal.com;
CapApp@myfloridalegal.com

Marie A. Herrmann, M.D.,
District 7 Medical Examiner,
1360 Indian Lake Road,
Daytona Beach, Florida 32124.

CERTIFICATE OF SERVICE

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I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to **Marie A. Herrmann, M.D.**, District 7 Medical Examiner, 1360 Indian Lake Road, Daytona Beach, Florida 32124; to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 25th day of February, 2016.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

2009-002872 CFAWS

v.

CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

ORDER TO DELIVER EXEMPT PUBLIC RECORDS
[MEDICAL EXAMINER'S OFFICE]

TO: **RECORDS REPOSITORY**
The Florida State Archives
Attn: **CCRC Records Archivist**
R.A. Gray Building,M.S. 9-E,
500 South Bronough Street,
Tallahassee, Florida 32399-0250.

This Court having received notice on this 29 day of Feb., 2016, that certain records which have been claimed as confidential or exempt from disclosure have been copied, indexed, separately contained without being redacted, sealed, identified as to their nature and their legal basis for confidentiality or exemption, and delivered to the Records Repository of the Secretary of the State. The following agencies or entities delivered sealed and/or exempt records to the Records Repository and noted that said following designated records were confidential or exempt from the requirements of Section 119.07, Florida Statutes:

FILED
2016 FEB 29 PM 4:23
CLERK OF THE CIRCUIT
CTY COURT VOLUSIA CTY FL
CC13

AGENCY	REPOSITORY	NOTICE OF COMPLIANCE DATE
1. **Volusia County District 7 Medical Examiner**	Container 07103	February 9, 2016.

It is ordered that the above listed records be delivered by the Records Repository to the **Clerk of Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, 251 North Ridgewood Avenue, Daytona Beach, Florida 32114**, for further proceedings consistent with Florida Rule of Criminal Procedure 3.852 (2016). The Law Office of the Capital Collateral Regional Counsel - Middle Region shall bear all the costs associated with the transportation and inspection of these records by the trial court.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida on this ____ day of FEB 29 2016, 201__.

Honorable Terrence R. Perkins
Chief Circuit Court Judge

Copies Furnished to:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
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12973 North Telecom Parkway,
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ahmed@ccmr.state.fl.us;
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support@ccmr.state.fl.us

Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney, Seventh Judicial Circuit,
251 North Ridgewood Avenue,
Daytona Beach Florida 32114.

Stacey Elaine Johns Kircher,
Assistant Attorney General,
Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
Daytona Beach, Florida 32118.
Stacey.kircher@myfloridalegal.com;
CapApp@myfloridalegal.com

Marie A. Herrmann, M.D.,
District 7 Medical Examiner,
1360 Indian Lake Road,
Daytona Beach, Florida 32124.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this day 25th day of February, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via the Florida Courts E-Filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com; and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach Florida 32114 at calhounr@sao7.org on this 25th day of February, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to **Marie A. Herrmann, M.D.**, District 7 Medical Examiner, 1360 Indian Lake Road, Daytona Beach, Florida 32124; to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 25th day of February, 2016.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601

In the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida
Case No. 2009-CF-002872
Judge: Terrence R. Perkins

STATE OF FLORIDA,

Plaintiff,

V.

JOSEPH EDWARD JORDAN,

Defendant,

FILED
2016 MAR -1 PM 2:36
CLERK OF THE CIRCUIT & CTY. COURT VOLUSIA CTY., FL CC 45

NOTICE OF DELIVERY OF EXEMPT PUBLIC RECORDS TO JUDGE/CLERK OF THE CIRCUIT COURT

TO: The Honorable Diane M. Matousek, Clerk of Circuit Court
Seventh Judicial Circuit, Volusia County
Daytona Beach Justice Center
251 North Ridgewood Avenue
Daytona Beach, Florida 32114

The Secretary of State, by and through the undersigned, having received an appropriate court order pursuant to Florida Rules of Criminal Procedure 3.852, hereby gives notice that the sealed box(es) containing exempt public records has/have been shipped to the above-listed judge/clerk of circuit court. These public records may only be opened for an inspection by the trial court in camera pursuant to the provisions of Florida Rules of Criminal Procedure 3.852(f)(2) and Florida Statutes Ch. 27.7081.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on Adam S. Tanenbaum, General Counsel, General Counsel's Office, Florida Department of State, R.A. Gray Building, 500 South Bronough Street, Tallahassee, Florida 32399-0250; Lydia J. Strom, General Counsel's Office, Florida Department of State, R.A. Gray Building, 500 South Bronough Street, Tallahassee, Florida 32399-0250; Stacey Elaine Johns Kircher, Assistant Attorney General, Attorney General's Office, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118-3951; Rosemary L. Calhoun, Assistant State Attorney, State Attorney's Office, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach, Florida 32114; Raheela Ahmed, Assistant CCRC, CCRC-Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637-0907; Maria Christine Perinetti, Assistant CCRC, CCRC-Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637-0907; Donna Ellen Venable, Assistant CCRC, CCRC-Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637-0907; Marie A. Herrmann, M.D., Medical Examiner's Office--District Seven, 1360 Indian Lake Road, Daytona Beach, Florida 32124; and Beth Golding, Florida Department of State, Capital Collateral Postconviction Records Repository, State Archives of Florida, R.A. Gray Building, MS # 9-E, 500 South Bronough Street, Tallahassee, Florida 32399-0250 on this 29th day of February, 2016.

Ken Detzner
Secretary of State

By: Gerard J. Clark,
Chief, Archives and Records Management
for Gerard Clark

STATE OF FLORIDA
DEPARTMENT OF STATE
Division of Library and Information Services
Form LS/V06-2012/CCR100

TRANSMITTAL/RECEIPT
TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA

1. RECORD GROUP NO. 660
SERIES NO. 1739
ARCHIVES BOX NO. 7102-7103(P)

2. AGENCY
Volusia County Medical Examiner Office

3. DIVISION **Public Protection – County of Volusia**

4. BUREAU

5. ADDRESS (Street, City, and Zip Code)

1360 Indian Lake Road
Daytona Beach, FL 32124

6. CONTACT (Name and Telephone Number)

Teri Hanans
Staff Assistant II
386-258-4060 ext. #11124

7. SUBMIT TO:

Capital Collateral Postconviction Records Repository
State Archives of Florida
R.A. Gray Building, MS 9-E
500 South Bronough Street
Tallahassee FL. 32399-0250

8. DEFENDANT NAME - **Joseph Edward Jordan**

DEFENDANT CIRCUIT CT. CASE **#2009 002872 CFAES**

9. DESCRIPTION

File 1: ME case #09-07-364(Cope, Keith) – case file
File 2: Exempt autopsy photos (Digital Images on CD) – case#(s) 09-07-364

2016 FEB 12 PM 1:16
ARCHIVES AND RECORDS MANAGEMENT

TOTAL NUMBER OF BOXES 0 **OR** PACKAGES 1 SENT TO THE REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? ☒YES ☐NO

ARE **EXEMPT** RECORDS SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? (***If no, records will be returned to you***) ☒YES ☐NO

DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

Exempt autopsy photos (Digital Images on CD) – case#(s) 09-07-364
F.S. 406.135

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ☒ PAPER COPIES b. ☐ PHOTOGRAPHS c. ☐ AUDIO TAPES d. ☐ VIDEO TAPES e. ☒ OTHER –digital images on CD

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.

Marie A. Herrmann, M.D. 2-9-16
SIGNATURE DATE

Marie A. Herrmann, M.D.
TYPE NAME AND TITLE

12. STATE ARCHIVES OF FLORIDA:
I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.

2/12/16
CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

ORDER TO DELIVER EXEMPT PUBLIC RECORDS
[MEDICAL EXAMINER'S OFFICE]

TO: **RECORDS REPOSITORY**
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AGENCY	REPOSITORY	NOTICE OF COMPLIANCE DATE
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DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida on this _____ day of FEB 29 2016, 201__.

Honorable Terrence R. Perkins
Chief Circuit Court Judge

Copies Furnished to:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
Law Office of the Capital Collateral Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907.
ahmed@ccmr.state.fl.us;
perinetti@ccmr.state.fl.us;
venable@ccmr.state.fl.us;
support@ccmr.state.fl.us

Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney, Seventh Judicial Circuit,
251 North Ridgewood Avenue,
Daytona Beach Florida 32114.

Stacey Elaine Johns Kircher,
Assistant Attorney General,
Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
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Marie A. Herrmann, M.D.,
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1360 Indian Lake Road,
Daytona Beach, Florida 32124.

CERTIFICATE OF SERVICE

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Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.
JOSEPH EDWARD JORDAN
DEFENDANT.
_____/

CASE NUMBER: 2009 002872 CFAES

NOTICE OF COMPLIANCE BY THE DEPARTMENT OF PUBLIC PROTECTION, DIVISION OF EMERGENCY MEDICAL SERVICES

TO: Stacey E. Kircher
Assistant Attorney General
Office of the Attorney General
Capital Appeals Division
444 Seabreeze Blvd., Suite 500
Daytona Beach, Florida 32118

The Department of Public Protection, Division of Emergency Medical Services, having received notice of the Affirmance of the Death Penalty in this case from the Office of the State Attorney for the Seventh Judicial Circuit on 11/16/2015, hereby gives notice of compliance with the Florida Rule of Criminal Procedure 3.852(e) and certifies that, to the best of my knowledge and belief, all public records determined by this agency to be relevant to the subject matter of a proceeding under Florida Rule of Criminal Procedure 3.851, except for those previously filed in the trial court, have been copied, indexed, and delivered to the records repository of the Secretary of State. Our agency file number is 09-36705 [Keith Cope].

RESPECTFULLY SUBMITTED
FOR THE DEPARTMENT OF
PUBLIC PROTECTION, DIVISION OF
EMERGENCY MEDICAL SERVICES

Michael G. Moore
(Signature of person who prepared and submitted records)

JOHN R. ZARAGOZA OF THE DEPARTMENT
OF PUBLIC PROTECTION, DIVISION OF
EMERGENCY MEDICAL SERVICES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to: Rosemary Calhoun, Assistant State Attorney, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; to the Honorable J. Terence R. Perkins, S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114; to Stacey E. Kircher, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, Florida 32118; to Raheela Ahmed, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; to Maria Christine Perinetti, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; and to Donna Ellen Venable, Assistant Capital Collateral Regional Counsel, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 this 1st day of ~~November 2015~~ March 2016.

COUNSEL FOR
THE DEPARTMENT OF PUBLIC
PROTECTION, DIVISION OF
EMERGENCY MEDICAL SERVICES
Michael G. Moore
Assistant County Attorney
Volusia County
Legal Department
123 West Indiana Avenue
DeLand, Florida 32720-4613
email: mmoore@volusia.org
(386) 736-5950

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS. CASE NUMBER 2009 002872 CFAES

JOSEPH EDWARD JORDAN,

DEFENDANT.
_____/

INDEX OF RECORDS OF VOLUSIA COUNTY DEPARTMENT OF PUBLIC PROTECTION, DIVISION OF EMERGENCY SERVICES [EVAC File No. 09-36705]

INDEX

	Description	Page(s)
1.	Subpoena dated 14 February 2013 [Harold Norman](1 page).	
2.	Subpoena dated 14 February 2013 [Corey Lopez](1 page).	
3.	Subpoena dated 19 March 2013 [Corey Lopez](1 page).	

Pursuant to section 401.30(4), Florida Statutes, the following records are confidential and exempt from the public records disclosure requirements of section 119.07(1), Florida Statutes. Pursuant to Rule 3.852(f)(1), Florida Rules of Criminal Procedure, these records are submitted in a sealed container that may not be broken without an order of the trial court.

4.	Patient Care Report for Keith Cope, Case Number 0936690, Date of Service 6/28/2009 (4 pages).	
5.	Case Report (Electrocardiogram), Keith Cope, Incident ID 2009062806310400 (40 pages).	

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS. CASE NUMBER 2009 002872 CFAES

JOSEPH EDWARD JORDAN,

DEFENDANT.
_____/

NOTICE OF CONFIDENTIALITY AND EXEMPTION FROM THE PUBLIC RECORDS DISCLOSURE REQUIREMENTS OF SECTION 119.07, FLORIDA STATUTES

Pursuant to section 401.30(4), Florida Statutes, the contents of this container is confidential and exempt from the public records disclosure requirements of section 119.07(1), Florida Statutes. Pursuant to Rule 3.852(f)(1), Florida Rules of Criminal Procedure, the seal to this container may not be broken without an order of the trial court.

The legal basis for the exemption from section 119.07(1), Florida Statutes, is section 401.30(4), Florida Statutes, which provides "Records of emergency calls which contain patient examination and treatment information are confidential and exempt from the provisions of s. 119.07(1)."

The nature of the records in this container includes the following 44 pages:

INDEX

1. Patient Care Report for Keith Cope, Case Number 0936690, Date of Service 6/28/2009 (4 pages).

2. Case Report (Electrocardiogram), Keith Cope, Incident ID 2009062806310400 (40 pages).

IN THE CIRCUIT COURT OF THE 7TH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA :

Plaintiff, : Case No. **2009 002872 CFAES**

v.

: Judge: **TERRENCE R. PERKINS**

JOSEPH EDWARD JORDAN,

Defendant.

NOTICE OF COMPLIANCE BY THE OFFICE OF THE STATE ATTORNEY FOR THE SEVENTEENTH JUDICIAL CIRCUIT

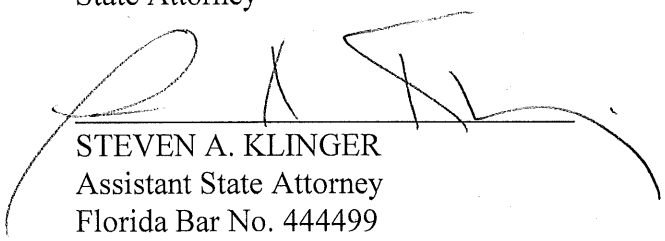
TO: Stacey E. Kircher,
Assistant Attorney General
Office of the Attorney General
Capital Appeals Division
444 Seabreeze Blvd., Suite 500
Daytona Beach, Florida 32118

The State Attorney for Seventeenth Judicial Circuit, by and through the undersigned Assistant State Attorney, having received a Notice of Affirmance of the Death Penalty in this case from the Office of the State Attorney for the Seventh Judicial Circuit on December 3, 2015, hereby gives notice of compliance with Florida Rule of Criminal Procedure 3.852(e) and certifies that, to the best of my knowledge and belief, all public records determined by this agency to be relevant to the subject matter of a proceeding under Florida Rule of Criminal Procedure 3.851, except for those previously filed in the trial court, have been copied, indexed, and delivered to the records repository of the Secretary of State. Our agency file number is 90-17686CF10A.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the Florida E-Portal which will provide a copy of the foregoing by E-Mail to: Rosemary Calhoun, Assistant State Attorney (calhounr@sao7.org.com), 251 North Ridgewood Avenue, Daytona Beach, FL 32114; Stacey E. Kircher, Assistant Attorney General (Stacey.kircher@myfloridalegal.com), 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118; Raheela Ahmed, Assistant CCRC (ahmed@ccmr.state.fl.us), CCRC-Middle, 12973 North Telecom Parkway, Temple Terrace, FL 33637; Maria Perinetti, Assistant CCRC (perinetti@ccmr.state.fl.us), CCRC-Middle, 12973 North Telecom Parkway, Temple Terrace, FL 33637; Donna E. Venable, Assistant CCRC (venable@ccmr.state.fl.us), CCRC-Middle, 12973 North Telecom Parkway, Temple Terrace, FL 33637; and to the Honorable Terrence R. Perkins, Chief Circuit Court Judge (sprice@circuit7.org), S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Room 284, Daytona Beach, FL 32114, this 14th day of March, 2016.

Respectfully submitted

MICHAEL J. SATZ
State Attorney



STEVEN A. KLINGER
Assistant State Attorney
Florida Bar No. 444499
Broward County Courthouse
201 S.E. 6th Street, Suite 660A
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Telephone: (954)831-7913
SKlinger@sao17.state.fl.us

IN THE CIRCUIT COURT OF THE 7TH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA	:	
Plaintiff,	:	Case No. **2009 002872 CFAES**
v.	:	Judge: **TERRENCE R. PERKINS**
JOSEPH EDWARD JORDAN,	:	
Defendant,	:	

NOTICE OF DELIVERY OF EXEMPT PUBLIC RECORDS TO RECORDS REPOSITORY

TO: Capital Collateral Postconviction Records Repository
State Archives of Florida
R.A. Gray Building, MS 9-E
500 South Bronough Street
Tallahassee, FL 32399-0250

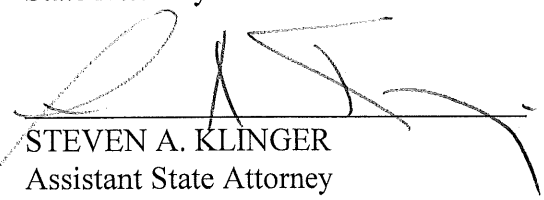
The Office of the State Attorney for the Seventeenth Judicial Circuit, hereby gives notice to the records repository of the Secretary of State that certain delivered records are confidential or exempt from the requirements of section 119.07(1), Florida Statutes. These public records have been separately contained without being redacted, sealed, and the nature of the public records and the legal basis under which the public records are exempt has been identified.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the Florida E-Portal which will provide a copy of the foregoing by E-Mail to: Capital Collateral Records Repository, (cheryl.spicer@dos.myflorida.com); Rosemary Calhoun, Assistant

State Attorney (calhounr@sao7.org.com), 251 North Ridgewood Avenue, Daytona Beach, FL 32114; Stacey E. Kircher, Assistant Attorney General (Stacey.kircher@myfloridalegal.com), 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118; Raheela Ahmed, Assistant CCRC (ahmed@ccmr.state.fl.us), CCRC-Middle, 12973 North Telecom Parkway, Temple Terrace, FL 33637; Maria Perinetti, Assistant CCRC (perinetti@ccmr.state.fl.us), CCRC-Middle, 12973 North Telecom Parkway, Temple Terrace, FL 33637; Donna E. Venable, Assistant CCRC (venable@ccmr.state.fl.us), CCRC-Middle, 12973 North Telecom Parkway, Temple Terrace, FL 33637; and to the Honorable Terrence R. Perkins, Chief Circuit Court Judge (sprice@circuit7.org), S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Room 284, Daytona Beach, FL 32114, this 16th day of March, 2016.

Respectfully submitted

MICHAEL J. SATZ
State Attorney



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**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

MOTION TO CLARIFY ORDER DATED FEBRUARY 16, 2016

The Defendant, Joseph Edward Jordan, by and through undersigned counsel, respectfully requests that this Honorable Court issue an Order clarifying the previous Order on Defendant's First Motion Requesting the *In Camera* Review of Records [Edgewater Police Department & Florida Department of Law Enforcement], which was issued on February 16, 2016. *See Attachment A: Order.*

This Court held a status conference pursuant to Fla. R. Crim. P. 3.851(c)(2) on February 12, 2016. At the conference, the Court determined that certain records claimed exempt should be released to undersigned counsel and indicated that it would issue a written order after concluding its *in camera* review. On February 16, 2016, the Court issued the attached Order. On February 18, 2016, an investigator for undersigned counsel contacted the office of the Clerk of the Circuit Court and was notified that the Clerk was unclear as to which records should be released to undersigned counsel.

ACCORDINGLY, at this time, Mr. Jordan requests an Order clarifying the Court's previous order and, as necessary to ensure that undersigned counsel is provided with the records

this Court intends to be released, a hearing at which the Clerk, counsel for the State, and undersigned counsel is noticed to appear. A proposed Notice of Hearing is attached to this motion and will be furnished to counsel of record for all parties.

Respectfully submitted,

/s/ Raheela Ahmed
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Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/ Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar Number 13837
Assistant CCRC
Email: perinetti@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/ Donna Ellen Venable
Donna Ellen Venable
Florida Bar Number 100816
Assistant CCRC
Email: venable@ccmr.state.fl.us
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12973 North Telecom Parkway,
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Telephone (813) 558-1600
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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

MOTION TO CLARIFY ORDER DATED FEBRUARY 16, 2016

ATTACHMENT A: ORDER

IN THE CIRCUIT COURT OF THE
7TH JUDICIAL CIRCUIT IN AND FOR
VOLUSIA COUNTY, FLORIDA

CASE NO.: 2009-002872-CFAWS
DIVISION: 41

STATE OF FLORIDA,

vs.

JOSEPH EDWARD JORDAN,

Defendant.
_____/

ORDER ON DEFENDANT'S FIRST MOTION REQUESTING THE *IN CAMERA* REVIEW OF RECORDS [EDGEWATER POLICE DEPARTMENT & FLORIDA DEPARTMENT OF LAW ENFORCEMENT]

The Court has conducted an *in camera* review of documents "exempt" from public disclosure from the FDLE and Edgewater Police Department and determined that the following documents are subject to discovery:

1. FDLE Laboratory Report dated Feb. 20, 2013 with attachments.

2. FDLE Case Tracking Forms and Laboratory evidence release forms.

3. Handwritten and typed investigation notes and Property Room Listing from the Edgewater Police Department.

4. 16 CDs/DVDs containing autopsy audio/video records and results.

The Court finds that the documents contained on the CD-R and described by the Archives Repository – Exempt documents, are not discoverable at this time.

Nothing in this Order shall be construed as finding those documents ordered to be produced herein are subject to public records disclosure or are admissible into evidence at any proceedings in this matter.

16 DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida, this 16 day of February, 2016.

TERENCE R. PERKINS
CIRCUIT JUDGE

Rosemary L. Calhoun, Esquire – eservicevolusia@sao7.org
Raheela Ahmed, Esquire – ahmed@ccmr.state.fl.us
Maria Perinetti, Esquire – perinetti@ccmr.state.fl.us
Donna Venable, Esquire – venable@ccmr.state.fl.us

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF HEARING

TO: Stacey Elaine Johns Kircher
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Blvd.
5th Floor
Daytona Beach, Florida 32114

Rosemary Calhoun
Assistant State Attorney
Office of the State Attorney
Seventh Judicial Circuit
251 North Ridgewood Ave.
Daytona Beach, Florida 32114

Raheela Ahmed
Maria Christine Perinetti
Donna Ellen Venable
Assistant CCRCs
Law Office of the Capital Collateral
Regional Counsel – Middle Region
12973 North Telecom Parkway
Temple Terrace, Florida 33637-0907

The Honorable Diane M. Matousek
Clerk of the Circuit Court
Volusia County, Florida
251 North Ridgewood Avenue
Daytona Beach, Florida 32114

YOU ARE HEREBY NOTIFIED that a HEARING has been set before the Honorable Terence R. Perkins, at the Seventh Judicial Circuit Court, 251 North Ridgewood Avenue, Room _____, Daytona Beach, Florida 32114, on _____ _____, 2016 at _____ a.m./p.m. on the Defendant's MOTION TO CLARIFY ORDER DATED FEBRUARY 16, 2016.

PLEASE GOVERN YOURSELVES ACCORDINGLY.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this 23rd day of March, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via electronic mail to **Stacey Elaine Johns Kircher, Assistant Attorney General,** Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118, at Stacey.Kircher@myfloridalegal.com and at CapApp@myfloridalegal.com on this 23rd day of March, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terence R. Perkins, Chief Judge,** Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach, Florida 32114; to **Rosemary Calhoun, Assistant State Attorney,** Office of the State Attorney, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach, Florida 32114; to **Janine Robinson, Assistant General Counsel,** Florida Department of Law Enforcement, Office of General Counsel, 2331 Phillips Road, Tallahassee, Florida 32308; to **Josh Raver,** Detective/Evidence Technician, Edgewater Police Department, 135 East Park Avenue, Edgewater, Florida 32132; to **The Honorable Diane M. Matousek, Clerk of the Circuit Court, Volusia County Florida,** 251 North Ridgewood Avenue, Daytona Beach, Florida 32114; and to **Mr. Joseph Edward Jordan,** DOC# 180632, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 23rd day of March, 2016.

Respectfully submitted,

/s/ Donna Ellen Venable
Donna Ellen Venable
Florida Bar Number 100816
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**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

**DEFENDANT'S FOURTH MOTION REQUESTING
THE *IN CAMERA* REVIEW OF RECORDS
[DEPARTMENT OF PUBLIC PROTECTION AND OFFICE OF THE STATE ATTORNEY – 17TH JUDICIAL CIRCUIT]**

The Defendant, Joseph Edward Jordan, pursuant to Fla.R.Crim.P. 3.852(f)(3), by and through his undersigned counsel, hereby moves this Honorable Court for an order to the Florida State Archives (Records Repository) to deliver certain exempt public records to the Clerk of this Court and for this Court to conduct an *in camera* review of those records. In support, Mr. Jordan states the following:

1. Joseph Edward Jordan is incarcerated at Florida State Prison under a sentence of death.

2. Pursuant to Florida Rule of Criminal Procedure 3.852(f) [1], the following agencies have

[1] Fla. R. Crim. P. Rule 3.852 (f) provides as follows:

> **(f) Exempt or Confidential Public Records.**
>
> (1) Any public records delivered to the records repository pursuant to these rules that are confidential or exempt from the requirements of section 119.07(1), Florida Statutes, or article I, section 24(a), Florida Constitution, must be separately contained, without being redacted, and sealed. The outside of the container must clearly identify that the public record is confidential or exempt and that the seal may not be broken without an order of the trial court. The outside of the container must identify the nature of the public records and the legal basis for the exemption.

provided a Notice of Compliance indicating that it has delivered records to the Records Repository that include sealed exempt and/or confidential records located as follows:

AGENCY	REPOSITORY	NOTICE OF COMPLIANCE DATE
1. **Department of Public Protection** *See Appendix A.*	Container 7125	March 1, 2016.
2. **Office of the State Attorney, Seventh Judicial Circuit** *See Appendix B.*	Container 7130	March 16, 2016.

3. The Supreme Court of Florida has discussed this process several times since the introduction of the rule as a reform in 1998. The Supreme Court of Florida in *Rose v. State*, 774 So. 2d 629 (Fla. 2000), has approved the "pre-Huff" procedure of *in camera* inspections of records designated as exempt and/or confidential and has held as follows:

> Rose also alleges that the trial court violated his constitutional right to have a full and fair state postconviction proceeding by conducting an in-camera inspection of public records to determine whether the State was justified in claiming that such records were exempt from disclosure. On July 11, 1996, Rose filed a public records request with the Pinellas County State Attorney's Office pursuant to chapter 119, Florida Statutes. The State responded and provided Rose with a detailed explanation of the public records that were exempt from disclosure under Florida Rule of Criminal Procedure 3.852. The trial court subsequently conducted an in-camera review of the public records withheld by the State. After conducting the in-camera review, the trial court concluded that the withheld records contained no *Brady* material, but the court instructed the State in a written order to provide Rose with certain records that were not covered under the statutory exemptions. According to Rose, the trial court's in-camera review of the allegedly exempt public

---

> (2) Upon the entry of an appropriate court order, sealed containers subject to an inspection by the trial court shall be shipped to the clerk of court. The containers may be opened only for inspection by the trial court in camera. The moving party shall bear all costs associated with the transportation and inspection of such records by the trial court. The trial court shall perform the unsealing and inspection without ex parte communications and in accord with procedures for reviewing sealed documents.
>
> (3) Collateral counsel must file a motion for in camera inspection within 30 days of *receipt of the notice of delivery of sealed records* to the central records repository or the in camera inspection will be deemed waived.

> records and its refusal to require the State to turn over handwritten notes pertaining to the alleged "deal" between Borton and Poole and the State prejudiced him. Rose claims that he is entitled to an evidentiary hearing. We disagree.
>
> In *Ragsdale v. State*, 720 So. 2d 203, 206 (Fla. 1998), this Court had to determine whether public records were properly exempted from disclosure by the State. This Court ruled that where doubt existed as to whether the State must disclose a particular document, the proper procedure is to have a trial judge conduct an in-camera review of the documents. *See id.; see also State v. Kokal*, 562 So. 2d 324, 327 (Fla. 1990) (stating that when certain statutory exemptions are claimed by the party against whom the public records request has been filed or when doubt exists as to whether a particular document must be disclosed, the proper procedure is to furnish the document to the trial judge for an in-camera inspection). After conducting an in-camera review, the State must turn over the nonexempt materials to the defense. *See Ragsdale*, 720 So. 2d at 206.
>
> In this case, Judge Schaeffer conducted an in-camera proceeding and examined each of the alleged documents that the State withheld to determine whether the documents were properly withheld. After reviewing the documents, the trial court issued a written order instructing the State as to which documents it needed to produce to the defense. Rose has failed to cite to any authority that suggests that Judge Schaeffer's review of the withheld documents was improper and we have found no authority that supports this view. Therefore, we find that Judge Schaeffer fully complied with procedures set forth in *Ragsdale* and *Kokal* for determining whether the State's claimed exemptions were proper.

Rose v. State, 774 So. 2d 629, 636-637 (Fla. 2000) (footnote omitted).

9. The procedure approved in *Rose* was again discussed by the Florida Supreme Court in *Damren v. State*, 838 So. 2d 512 (Fla. 2003), as follows:

> Damren asserts that the trial court erred in denying his request for certain public records from the State Attorney's office. According to Damren, the circuit court failed to review these records for exculpatory information under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We disagree.
>
> As this Court has held, "where doubt existed as to whether the State must disclose a particular document, the proper procedure is to have a trial judge conduct an in-camera review of the documents." *Rose v. State*, 774 So. 2d 629, 636 (Fla. 2000). This Court applies an abuse of discretion standard when reviewing a trial court's determination on a public records request. *Moore v. State*, 820 So. 2d 199, 204 (Fla. 2002).
>
> The record reveals that the State provided the requested records to the trial court for an in-camera review and the postconviction judge granted the public records request in part and denied it in part. During a hearing, the circuit court carefully

> reviewed each folder of materials which was submitted, explained what information was contained in each folder and whether it included exculpatory information, and indicated the files to which defense counsel was entitled. We find that the trial court did not abuse its discretion in denying in part Damren's request and hence deny relief. We find no error.

Damren v. State, 838 So.2d 512, 519 (Fla. 2003) (footnote omitted).

10. The effects of the discovery and other post-conviction reforms from the late 1990s onward was analyzed by the Honorable O.H. Eaton, Jr. as follows:

> Litigation in a death penalty case does not end when the judgment and sentence of death are affirmed by the Supreme Court of Florida. The next phase of litigation in these cases falls under the general heading of "postconviction relief." It is during this phase that death row defendants litigate matters "collateral" to the judgment and sentence that could not have been raised on appeal. . . . They are charged with reinvestigating the case to find out deficiencies that occurred during the trial. This reinvestigation usually includes review of numerous public records that may have some bearing on the case.
>
> . . .
>
> Over the last several years both the Supreme Court and the legislature have made efforts to streamline the processing of postconviction motions in capital cases.
>
> . . .
>
> Prior to 1996, collateral counsel had to file a civil action in order to obtain public records from persons or agencies other than the state attorney and local law enforcement agencies that investigated the crime. This cumbersome process often required suit to be filed in several jurisdictions and delays were inevitable.
>
> . . .
>
> The legislature created a centralized repository for storage of public records in capital cases in order to provide easy access to them. It was the legislature's hope that a process could be developed that would allow these records to be automatically sent to the repository and made accessible to counsel without the necessity of resorting to litigation.
>
> Currently, the Secretary of State is the officer responsible for storing the records and the records repository is located in the R.A. Gray building in Tallahassee.
>
> . . .
>
> [T]he procedural aspects of discovery of public records are now regulated by the Supreme Court of Florida. Rule 3.582 provides for an orderly method to obtain public records and, if the various offices and agencies that maintain public records cooperate, collateral counsel should be able to review them and have copies made in a timely fashion.
>
> . . .
>
> Assuming every person and agency complies with the requirement to submit public records to the records repository, all of the public records should be on file there less than 330 days from the date the mandate affirming the death sentence is issued

by the Supreme Court of Florida. However, in capital litigation, things are never that easy. Some of the records may be claimed to be exempt or confidential and there may be old cases out there that are subject to a separate procedure. Ironically, the persons or agencies claiming records to be exempt or confidential are aligned with the prosecution whose interest is to avoid delays. By providing a separate procedure for old cases, additional delays may be expected.

Exempt or Confidential Public Records

Rule 3.852(f) provides that any public records delivered to the records repository that are claimed to be exempt or confidential must be boxed separately, without redaction, and sealed. The box must clearly identify that the public record is confidential or exempt and the seal may not be broken without an order of the trial court. The box must also identify "the nature of the public records and the legal basis for the exemption."
In order for collateral counsel to obtain a ruling to unseal the public records claimed to be exempt or confidential, an order must first be obtained from the trial court directing the records repository to ship the sealed boxes of records to the clerk of the trial court. *Undoubtedly, collateral counsel will always want to obtain a ruling to determine if these records are really exempt or confidential and delay could be avoided if these records were filed with the clerk of the court in the first place*. However, the Supreme Court wanted to carry out legislative intent where possible so this unnecessary complication is part of the procedure and will undoubtedly cause delay.

The "moving party" is responsible to pay for the cost of the "transportation and inspection of such records by the trial court." Presumably, the "cost" will be just the postage. It is unclear what "cost" could possibly be associated with inspecting the records.

Once the records claimed to be exempt or confidential are delivered to the clerk of the court, they may only be opened by the trial court in camera without ex parte communication in the same manner as inspecting any sealed document. Presumably, the trial court will enter an order sustaining the claim of exemption or confidentiality or order the records disclosed.
. . .
In Camera Inspection of Exempt Public Records

Persons or agencies claiming public records to be exempt from production must box the records separately, seal them, index them with the reasons for the exemption, and deliver them to the records repository. From there, the records are shipped to the clerk of the trial court.

The trial judge must inspect the records in camera to determine if they are in fact exempt. A detailed order must be entered identifying each public record and the reason for its exemption.

> *In* Rose v. State, *774 So. 2d 629 (Fla. 2000), the trial judge held an in camera inspection of public records claimed to be exempt before the Huff hearing. The state attorney was ordered to produce certain of the records and others were ruled to be exempt. The Supreme Court approved the procedure.*
>
> . . .
>
> Public records have provided collateral counsel with significant evidence in the past and will undoubtedly continue to do so in the future. Trial judges need to take their responsibility to rule on public records issues seriously and make every effort to resolve public records disputes in a timely manner.

O.H. Eaton, Jr., *Discovery of Public Records in Capital Cases*, 76 Fla. B.J. 24, 30 (April 2002) (footnotes omitted) (emphasis added).

4. There are no objections by the State of Florida as to this Motion and accompanying proposed order as relayed to this Court at the Status Conference conducted on February 12, 2016.

WHEREFORE, Mr. Jordan hereby requests the entry of an order so that the aforementioned records can be transferred to the Clerk of this Circuit Court for an *in camera* review by this Court to determine whether they are exempt public records. It is further requested that if a subsequent *in camera* determination is made by this Honorable Court that these records are not exempt, that the records be released to undersigned counsel pursuant to a subsequent Court's order.

Respectfully submitted

s/ Raheela Ahmed
Raheela Ahmed
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Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

s/ Maria Christine Perinetti
Maria Christine Perinetti
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s/ Donna Ellen Venable
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**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

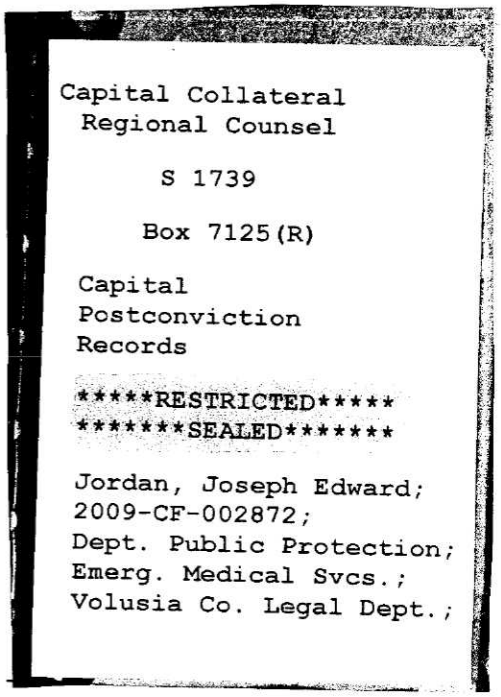
APPENDIX A

**DEFENDANT'S FOURTH MOTION REQUESTING
THE *IN CAMERA* REVIEW OF RECORDS
[DEPARTMENT OF PUBLIC PROTECTION AND OFFICE OF THE STATE
ATTORNEY – 17TH JUDICIAL CIRCUIT**

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07121	00001		Arrest Affidavit -- Warrant #09081005 (Case #09-27090)
07121	00002		Arrest Affidavit -- Warrant #09070787 (Case #09-22626)
07122			McDonald, Meryl S.; 94-2958CFANO-B; State Attorney's Office--Sixth Judicial Circuit
07122	00001		Additional Public Records
07123			Jordan, Joseph Edward; 2009-CF-002872; United States Marshall's Office--Mid-Florida
07123	00001		Case File (FID #1739542) [1 page black and white photocopied image]
07124			Jordan, Joseph Edward; 2009-CF-002872; Department of Public Protection--Emergency Medical Services--Volusia County Legal Department
07124	00001		Subpoena: Harold Norman (February 14, 2013)
07124	00002		Subpoena: Corey Lopez (February 14, 2013)
07124	00003		Subpoena: Corey Lopez (March 19, 2013)
07125			Jordan, Joseph Edward; *RESTRICTED* SEALED; 2009-CF-002872; Department of Public Protection--Emergency Medical Services--Volusia County Legal Department
07125	00001		Confidential/Exempt: Patient Care Report - Keith Cope (Case #0936690 -- 6/28/2009) -- Exempt per F.S. 401.30(4) and 119.07(1)
07125	00002		Confidential/Exempt: Case Report (Electrocardiogram) - Keith Cope (Incident ID 2009062806310400) -- Exempt per F.S. 401.30(4) and 119.07(1)


Capital Collateral
Regional Counsel
S 1739
Box 7125(R)
Capital
Postconviction
Records
*****RESTRICTED*****
*******SEALED*******
Jordan, Joseph Edward;
2009-CF-002872;
Dept. Public Protection;
Emerg. Medical Svcs.;
Volusia Co. Legal Dept.;

S. 1739

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS. CASE NUMBER 2009 002872 CFAES

JOSEPH EDWARD JORDAN,

DEFENDANT.
_____/

NOTICE OF CONFIDENTIALITY AND EXEMPTION FROM THE PUBLIC RECORDS DISCLOSURE REQUIREMENTS OF SECTION 119.07, FLORIDA STATUTES

Pursuant to section 401.30(4), Florida Statutes, the contents of this container is confidential and exempt from the public records disclosure requirements of section 119.07(1), Florida Statutes. Pursuant to Rule 3.852(f)(1), Florida Rules of Criminal Procedure, the seal to this container may not be broken without an order of the trial court.

The legal basis for the exemption from section 119.07(1), Florida Statutes, is section 401.30(4), Florida Statutes, which provides "Records of emergency calls which contain patient examination and treatment information are confidential and exempt from the provisions of s. 119.07(1)."

The nature of the records in this container includes the following 44 pages:

INDEX

1. Patient Care Report for Keith Cope, Case Number 0936690, Date of Service 6/28/2009 (4 pages).

2. Case Report (Electrocardiogram), Keith Cope, Incident ID 2009062806310400 (40 pages).

Box 7125, FF 1-2

DO NOT OPEN

MAY ONLY BE OPENED BY THE TRIAL COURT IN CAMERA
Florida Rules of Criminal Procedure 3.852(f)

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS. CASE NUMBER 2009 002872 CFAES

JOSEPH EDWARD JORDAN,

DEFENDANT.
_____/

NOTICE OF CONFIDENTIALITY AND EXEMPTION FROM THE PUBLIC RECORDS DISCLOSURE REQUIREMENTS OF SECTION 119.07, FLORIDA STATUTES

Pursuant to section 401.30(4), Florida Statutes, the contents of this container is confidential and exempt from the public records disclosure requirements of section 119.07(1), Florida Statutes. Pursuant to Rule 3.852(f)(1), Florida Rules of Criminal Procedure, the seal to this container may not be broken without an order of the trial court.

The legal basis for the exemption from section 119.07(1), Florida Statutes, is section 401.30(4), Florida Statutes, which provides "Records of emergency calls which contain patient examination and treatment information are confidential and exempt from the provisions of s. 119.07(1)."

The nature of the records in this container includes the following 44 pages:

INDEX

1. Patient Care Report for Keith Cope, Case Number 0936690, Date of Service 6/28/2009 (4 pages).

2. Case Report (Electrocardiogram), Keith Cope, Incident ID 2009062806310400 (40 pages).

DO NOT OPEN

MAY ONLY BE OPENED
BY THE TRIAL COURT
IN CAMERA
Florida Rules of Criminal Procedure 3.852(f)

IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

APPENDIX B

DEFENDANT'S FOURTH MOTION REQUESTING THE *IN CAMERA* REVIEW OF RECORDS [DEPARTMENT OF PUBLIC PROTECTION AND OFFICE OF THE STATE ATTORNEY – 17TH JUDICIAL CIRCUIT

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/REV06-2012/CCR100	**TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7129
2. AGENCY Office of the State Attorney	3. DIVISION Seventeenth Judicial Circuit	4. BUREAU

5. ADDRESS 201 SE 6th Street, Room 660A Ft. Lauderdale, FL 33301	6. CONTACT Name: Steven A. Klinger Title: Assistant State Attorney Phone Number: 954-831-7913
7. SUBMIT TO: Capital Collateral Postconvicton Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME : **JOSEPH EDWARD JORDAN** DEFENDANT SEVENTEENTH CIRCUIT CASE # **90-17686CF10A** DEFENDANT SEVENTH CIRCUIT CASE # **2009 002872 CFAES**

9. DESCRIPTION

STATE v JOSEPH EDWARD JORDAN CASE NO. 90-17686CF10A

1. Public Record Request (two)
2. Prosecutor Memorandum (Redacted)
3. Probable Cause Affidavit (Redacted)
4. Information (Redacted)
5. Attorney General Letter dated July 14, 1993 (Redacted)
6. Fourth District Court of Appeal Opinion and Mandate
7. Jury Panel Information List
8. Verdict Forms (three)
9. Sentencing Guidelines Scoresheet
10. Category 2 Sexual Offense Guidelines
11. Assignment of Investigator
12. Habitual Offender Notice
13. State's Discovery Submission (Redacted)

MDT
ARCHIVES AND RECORDS MANAGEMENT
2016 MAR 15 AM 1:29

TOTAL NUMBER OF BOXES _____1_____ **OR** PACKAGES _____ SENT TO REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? _____YES __X__NO
ARE **EXEMPT** RECORDS SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? ***(If not, records will be returned to you)*** ***__X__YES____NO***
DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. __X__ PAPER COPIES b.____ PHOTOGRAPHS c. X AUDIO TAPES d._____ VIDEO TAPES e._____ OTHER

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
SIGNATURE 3/11/16 DATE	CHIEF, ARCHIVES AND RECORDS MANAGEMENT 3/16/16 DATE
Steven A. Klinger, Assistant State Attorney TYPE NAME AND TITLE	

DEFENDANT: JOSEPH JORDAN
CASE# 90-17686CF10A

14. Booking Sheets (Redacted)
15. Lawson Affidavit
16. Certificates of Non-Appearance (Redacted)
17. Letter to Detective Luther Riley, January 8, 1991
18. Envelope, Expert Witness Order, and Order Fixing Compensation
19. Demand for Notice of Alibi
20. State's Supplemental Discovery (Redacted)
21. Letter to Detective Luther Riley, Dated September 3, 1990
22. Comparison for SAO and BSO Report
23. Victim Impact Statement (Blank)
24. Case Filing Recommendation
25. Statement – Michael Lawson (Redacted)
26. Statement – Victim (Redacted)
27. Victim Information Report (two)
28. Judgment and Restitution Order
29. BSO Crime Laboratory Analysis Report – Lab Number: 10384A
30. Witness Subpoena (two)
31. Investigator's Memo
32. Defendant's Letter dated January 26, 1994
33. Legal Mail Envelope from Defendant
34. Hearing Transcript dated September 14, 1993
35. Letter from State Attorney (Seventh Judicial Circuit) dated November 6, 2015
36. Notice to Broward SAO of Affirmance of Death Penalty and to Produce Public Records
37. Envelope from R.J. Larizza, State Attorney, Daytona Beach
38. Letter to Raheela Ahmed dated February 23, 2016
39. Letter to Michael Satz from Raheela Ahmed dated February 22, 2016
40. UPS Express Envelope from Janet Rocky to Michael Satz
41. Police Reports (Redacted)
42. Defense Motions (Redacted)
43. State's Motions (Redacted)
44. Court Orders
45. Praecipes for Witnesses.
46. Handwritten Letters (Redacted)
47. Case File Jacket (empty and redacted)
48. Victim Deposition (Redacted)
49. Joan Menke Deposition
50. Frank DiSanto Deposition
51. Rita Beth Greenspan Deposition (Redacted)
52. Jennifer Elise Goodman Deposition (Redacted
53. Victim's Mother Deposition (Redacted)
54. Audrey Lynn Russo Deposition (Redacted)
55. Patricia Ann Russo Deposition (Redacted)
56. Judith McClure Deposition (Redacted)
57. CD – Statement of Michael Lawson (Redacted)
58. CD – Statement of Victim (Redacted)

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/REV06-2012/CCR100	**TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7130 (R)
2. AGENCY Office of the State Attorney.	3. DIVISION Seventeenth Judicial Circuit	4. BUREAU

5. ADDRESS 201 SE 6th Street, Room 660A Ft. Lauderdale, FL 33301	6. CONTACT Name: Steven A. Klinger Title: Assistant State Attorney Phone Number: 954-831-7913
7. SUBMIT TO: Capital Collateral Postconvicton Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME : JOSEPH EDWARD JORDAN DEFENDANT SEVENTEENTH CIRCUIT CASE # **90-17686CF10A** DEFENDANT SEVENTH CIRCUIT CASE# **2009 002872 CFAES**

9. **DESCRIPTION** **STATE v JOSEPH EDWARD JORDAN**

EXEMPT MATERIALS

2016 MAR 15 AM 11:30
ARCHIVES AND RECORDS MANAGEMENT

DEFENDANT NAME: JOSEPH EDWARD JORDAN
DESCRIPTION – JOSEPH EDWARD JORDAN, **CASE NO. 90-17686CF10A**, 3.852 SUBMISSION

EXEMPT BOX

STATE v. JOSEPH EDWARD JORDAN (CASE No. 90-17686CF10A)

1. Prosecutor Notes – Exempt under *State v. Arbalaez*, 775 So.2d 909 (Fla. 2000); *Lopez v. State*, 696 So.2d 725 (Fla.1997); *State v. Kokal*, 562 So.2d 324 (Fla. 1990).
2. Criminal History Data/NCIC/FCIC –Exempt under Florida Statute § 943.0525.
3. Medical Records–Exempt under Florida Statute § 395.3025(4); § 395.3025(8); §456.057
4. Identity of Sexual Offense Victim–Exempt under Florida Statute § 119.071(2)(h)(b)
5. Department of Corrections Records – Exempt under Florida Statute § 945.10
6. First Draft Case Filing Recommendation – Exempt under *State v. Arbalaez*, 775 So.2d 909 (Fla. 2000); *State v. Kokal*, 562 So.2d 324 (Fla. 1990).
7. Juvenile Records–Exempt under Florida Statute § 985.04

TOTAL NUMBER OF BOXES _____ OR PACKAGES ___1___ SENT TO REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? ___X___YES ____NO
ARE **EXEMPT** RECORDS SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? ***(If not, records will be returned to you)*** ***___X___YES____NO***
DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:
(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ___x___ PAPER COPIES b.____ PHOTOGRAPHS c._____ AUDIO TAPES d.___ VIDEO TAPES e._____ OTHER

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
SIGNATURE 3/11/16 DATE	CHIEF, ARCHIVES AND RECORDS MANAGEMENT 3/17/16 DATE
Steven A. Klinger, Assistant State Attorney TYPE NAME AND TITLE	

16

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
			- Keith Cope (Incident ID 2009062806310400) -- Exempt per F.S. 401.30(4) and 119.07(1)
07126			Jordan, Joseph Edward; 2009-CF-002872; Hollywood Police Department--Professional Standards--Records [SCANNED - CD-1900]
07126	00001		Incident Report: Joseph Edward Jordan (Case # R3309-019924)
07126	00002		Probable Cause Affidavit and Incident Report: David Farrant (Case # R3307-014091)
07127			Jordan, Joseph Edward; 2009-CF-002872; Edgewater Fire Department [SCANNED - CD-1901]
07127	00001		Fire Reports
07127	00002		EMS Incident Report
07128			Marquardt, Bill Paul; 2006-CF-768; Serological Research Institute
07128	00001		Case Discovery (SERI Case # U-5176-00) [1 CD]
07129			**Jordan, Joseph Edward; 2009-CF-002872; State Attorney's Office--Seventeenth Judicial Circuit**
07129	00001		Public Records Request
07129	00002		Prosecutor Memorandum
07129	00003		Probable Cause Affidavit
07129	00004		Information
07129	00005		Attorney General Letter (July 14, 1993)
07129	00006	17	Fourth District Court of Appeal: Opinion and Mandate

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07129	00007		Jury Panel Information List
07129	00008		Verdict Forms
07129	00009		Sentencing Guidelines Scoresheet
07129	00010		Category 2: Sexual Offense Guidelines
07129	00011		Assignment of Investigator
07129	00012		Habitual Offender Notice
07129	00013		State's Discovery Submission
07129	00014		Booking Sheets
07129	00015		Lawson Affidavit
07129	00016		Certificates of Non-Appearance
07129	00017		Letter: Detective Luther Riley (January 8, 1991)
07129	00018		Envelope, Expert Witness Order, and Order Fixing Compensation
07129	00019		Demand for Notice of Alibi
07129	00020		State's Supplemental Discovery
07129	00021		Letter: Detective Luther Riley (September 3, 1990)
07129	00022		Comparison for SAO and Broward County Sheriff's Office Report
07129	00023		Victim Impact Statement
07129	00024		Case Filing Recommendation

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07129	00025		Statement: Michael Lawson
07129	00026		Statement: Victim
07129	00027		Victim Information Report
07129	00028		Judgement and Restitution Order
07129	00029		Crime Laboratory Analysis Report (Lab #10384A)
07129	00030		Witness Subpoena
07129	00031		Investigator's Memo
07129	00032		Defendant's Letter (January 26, 1994)
07129	00033		Legal Mail Envelope from Defendant
07129	00034		Hearing Transcript (September 14, 1993)
07129	00035		Letter from State Attorney, Seventh Judicial Circuit (November 6, 2015)
07129	00036		Notice to Broward SAO of Affirmance of Death Penalty and to Produce Public Records
07129	00037		Envelope: R. J. Larizza, State Attorney, Daytona Beach
07129	00038		Letter: Raheela Ahmed (February 23, 2016)
07129	00039		Letter: Michael Satz from Raheela Ahmed (February 22, 2016)
07129	00040		UPS Express Envelope: Janet Rocky to Michael Satz
07129	00041		Police Reports
07129	00042		Defense Motions

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07129	00043		State's Motions
07129	00044		Court Orders
07129	00045		Praecipes for Witnesses
07129	00046		Handwritten Letters
07129	00047		Case File Jacket
07129	00048		Victim Deposition
07129	00049		Deposition: Joan Menke
07129	00050		Deposition: Frank DiSanto
07129	00051		Deposition: Rita Beth Greenspan
07129	00052		Deposition: Jennifer Elise Goodman
07129	00053		Deposition: Victim's Mother
07129	00054		Deposition: Audrey Lynn Russo
07129	00055		Deposition: Patricia Ann Russo
07129	00056		Deposition: Judith McClure
07129	00057		Statement: Michael Lawson [1 CD]
07129	00058		Statement: Victim [1 CD]
07130			**Jordan, Joseph Edward; *RESTRICTED* SEALED; 2009-CF-002872; State Attorney's Office--Seventeenth Judicial Circuit**
07130	00001		Prosecutor Notes -- Exempt per 775 So.2d 909 (Fla. 2000), 696 So.2d 725 (Fla. 1997) and 562 So.2d 324

R

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
			(Fla. 1990)
07130	00002		Criminal History Data/NCIC/FCIC -- Exempt per F.S. 943.0525
07130	00003		Medical Records -- Exempt per F.S. 395.3025(4), 395.3025(8) and 456.057
07130	00004		Identity of Sexual Offense Victim -- Exempt per F.S. 119.071(2)(h)(b)
07130	00005		Department of Corrections Records -- Exempt per F.S. 945.10
07130	00006		First Draft Case Filing Recommendation -- Exempt per 775 So.2d 909 (Fla. 2000) and 562 So.2d 324 (Fla. 1990)
07130	00007		Juvenile Records -- Exempt per F.S. 985.04
CD001			CD-1 to CD-29
CD002			CD-30 to CD-59
CD003			CD-60 to CD-89
CD004			CD-90 to CD-118
CD005			CD-119 to CD-147
CD006			CD-148 to CD-176
CD007			CD-177 to CD-204
CD008			CD-205 to CD-230
CD009			CD-231 to CD-260

Capital Collateral
Regional Counsel
S 1739
Box 7130(R)
Capital
Postconviction
Records
*****RESTRICTED*****
*****SEALED*****
Jordan, Joseph E;
2009-CF-002872;
State Atty's Office;
17th Judicial Circuit
30

EXEMPT RECORDS

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/REV06-2012/CCR100	TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO.
2. AGENCY Office of the State Attorney	3. DIVISION Seventeenth Judicial Circuit	4. BUREAU

5. ADDRESS	6. CONTACT
201 SE 6th Street, Room 660A Ft. Lauderdale, FL 33301	Name: Steven A. Klinger Title: Assistant State Attorney Phone Number: 954-831-7913
7. SUBMIT TO: Capital Collateral Postconvicton Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME : JOSEPH EDWARD JORDAN DEFENDANT SEVENTEENTH CIRCUIT CASE # **90-17686CF10A** DEFENDANT SEVENTH CIRCUIT CASE# **2009 002872 CFAES**

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DESCRIPTION – JOSEPH EDWARD JORDAN, **CASE NO. 90-17686CF10A**, 3.852 SUBMISSION

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STATE v. JOSEPH EDWARD JORDAN (CASE No. 90-17686CF10A)

1. Prosecutor Notes – Exempt under *State v. Arbalaez*, 775 So.2d 909 (Fla. 2000); *Lopez v. State*, 696 So.2d 725 (Fla.1997); *State v. Kokal*, 562 So.2d 324 (Fla. 1990).
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TOTAL NUMBER OF BOXES _____ OR PACKAGES ____1____ SENT TO REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? ___X___YES ____NO
ARE **EXEMPT** RECORDS SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? (*If not, records will be returned to you*)___X___*YES*____*NO*
DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:
(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ___x___ PAPER COPIES b.____ PHOTOGRAPHS c._____ AUDIO TAPES d.____ VIDEO TAPES e._____ OTHER

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
SIGNATURE 3/11/16 DATE	CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Steven A. Klinger, Assistant State Attorney TYPE NAME AND TITLE	

This box is recyclable and contains 25% recycled material. FedEx uses only non-toxic soy or water-based inks and varnishes, and non-toxic adhesives.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this day 24th day of March, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via the Florida Courts E-Filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com; to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach Florida 32114 at calhounr@sao7.org; to **Michael Gray Moore**, Department of Public Protection, Division of Emergency Medical Services, John R. Zaragoza, 112 Carswell Ave., Holly Hill, FL 32117 at mmoore@volusia.org and mgm1962@cfl.rr.com; and to **Steven A. Klinger**, Assistant State Attorney, Broward County Office of the State Attorney, S.A. Michael Satz, 201 Southeast 6th Street, Suite 33301, Ft. Lauderdale, FL 33301 at SKlinger@sao17.state.fl.us on this 24th day of March, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been e-mailed to; to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and mailed to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 24th day of March, 2016.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

**ORDER TO DELIVER EXEMPT PUBLIC RECORDS
[DEPARTMENT OF PUBLIC PROTECTION AND OFFICE OF THE STATE ATTORNEY – 17TH JUDICIAL CIRCUIT]**

TO: **RECORDS REPOSITORY**
The Florida State Archives
Attn: **CCRC Records Archivist**
R.A. Gray Building,M.S. 9-E,
500 South Bronough Street,
Tallahassee, Florida 32399-0250.

This Court having received notice on this ____ day of _____, 2016, that certain records which have been claimed as confidential or exempt from disclosure have been copied, indexed, separately contained without being redacted, sealed, identified as to their nature and their legal basis for confidentiality or exemption, and delivered to the Records Repository of the Secretary of the State. The following agencies or entities delivered sealed and/or exempt records to the Records Repository and noted that said following designated records were confidential or exempt from the requirements of Section 119.07, Florida Statutes:

AGENCY	REPOSITORY	NOTICE OF COMPLIANCE DATE
1. **Department of Public Protection**	Container 7125	March 1, 2016.
2. **Office of the State Attorney, Seventh Judicial Circuit**	Container 7130	March 16, 2016.

It is ordered that the above listed records be delivered by the Records Repository to the **Clerk of Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, 251 North Ridgewood Avenue, Daytona Beach, Florida 32114**, for further proceedings consistent with Florida Rule of Criminal Procedure 3.852 (2016). The Law Office of the Capital Collateral Regional Counsel - Middle Region shall bear all the costs associated with the transportation and inspection of these records by the trial court.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida on this _____ day of _____, 201__.

_____

Honorable Terrence R. Perkins
Chief Circuit Court Judge

Copies Furnished to:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
Law Office of the Capital Collateral Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907.
ahmed@ccmr.state.fl.us;
perinetti@ccmr.state.fl.us;
venable@ccmr.state.fl.us;
support@ccmr.state.fl.us

Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney, Seventh Judicial Circuit,
251 North Ridgewood Avenue,
Daytona Beach Florida 32114.

Stacey Elaine Johns Kircher,
Assistant Attorney General,
Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
Daytona Beach, Florida 32118.
Stacey.kircher@myfloridalegal.com;
CapApp@myfloridalegal.com

Michael Gray Moore,
Department of Public Protection, Division of Emergency Medical Services,
John R. Zaragoza,
112 Carswell Ave.,
Holly Hill, FL 32117
mmoore@volusia.org
mgm1962@cfl.rr.com

Steven A. Klinger,
Assistant State Attorney,
Broward County Office of the State Attorney,
S.A. Michael Satz,
201 Southeast 6th Street, Suite 33301,
Ft. Lauderdale, FL 33301
SKlinger@sao17.state.fl.us

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this day 24th day of March, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via the Florida Courts E-Filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com; to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach Florida 32114 at calhounr@sao7.org; to **Michael Gray Moore**, Department of Public Protection, Division of Emergency Medical Services, John R. Zaragoza, 112 Carswell Ave., Holly Hill, FL 32117 at mmoore@volusia.org and mgm1962@cfl.rr.com; and to **Steven A. Klinger**, Assistant State Attorney, Broward County Office of the State Attorney, S.A. Michael Satz, 201 Southeast 6th Street, Suite 33301, Ft. Lauderdale, FL 33301 at SKlinger@sao17.state.fl.us on this 24th day of March, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been e-mailed to; to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and mailed to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 24th day of March, 2016.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

**ORDER TO DELIVER EXEMPT PUBLIC RECORDS
[DEPARTMENT OF PUBLIC PROTECTION AND OFFICE OF THE STATE ATTORNEY – 17TH JUDICIAL CIRCUIT]**

TO: **RECORDS REPOSITORY**
The Florida State Archives
Attn: **CCRC Records Archivist**
R.A. Gray Building,M.S. 9-E,
500 South Bronough Street,
Tallahassee, Florida 32399-0250.

This Court having received notice on this 28 day of March, 2016, that certain records which have been claimed as confidential or exempt from disclosure have been copied, indexed, separately contained without being redacted, sealed, identified as to their nature and their legal basis for confidentiality or exemption, and delivered to the Records Repository of the Secretary of the State. The following agencies or entities delivered sealed and/or exempt records to the Records Repository and noted that said following designated records were confidential or exempt from the requirements of Section 119.07, Florida Statutes:

FILED
16 MAR 28 PM 3:54
CLERK OF THE CIRCUIT
& CTY COURT VOLUSIA CTY, FL
CC13

AGENCY	REPOSITORY	NOTICE OF COMPLIANCE DATE
1. **Department of Public Protection**	Container 7125	March 1, 2016.
2. **Office of the State Attorney, Seventh Judicial Circuit**	Container 7130	March 16, 2016.

It is ordered that the above listed records be delivered by the Records Repository to the **Clerk of Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, 251 North Ridgewood Avenue, Daytona Beach, Florida 32114**, for further proceedings consistent with Florida Rule of Criminal Procedure 3.852 (2016). The Law Office of the Capital Collateral Regional Counsel - Middle Region shall bear all the costs associated with the transportation and inspection of these records by the trial court.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida on this _____ day of MAR 28 2016, 201__.

Honorable Terrence R. Perkins
Chief Circuit Court Judge

Copies Furnished to:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
Law Office of the Capital Collateral Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907.
ahmed@ccmr.state.fl.us;
perinetti@ccmr.state.fl.us;
venable@ccmr.state.fl.us;
support@ccmr.state.fl.us

Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney, Seventh Judicial Circuit,
251 North Ridgewood Avenue,
Daytona Beach Florida 32114.

Stacey Elaine Johns Kircher,
Assistant Attorney General,
Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
Daytona Beach, Florida 32118.
Stacey.kircher@myfloridalegal.com;
CapApp@myfloridalegal.com

Michael Gray Moore,
Department of Public Protection, Division of Emergency Medical Services,
John R. Zaragoza,
112 Carswell Ave.,
Holly Hill, FL 32117
mmoore@volusia.org
mgm1962@cfl.rr.com

Steven A. Klinger,
Assistant State Attorney,
Broward County Office of the State Attorney,
S.A. Michael Satz,
201 Southeast 6th Street, Suite 33301,
Ft. Lauderdale, FL 33301
SKlinger@sao17.state.fl.us

CERTIFICATE OF SERVICE

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Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
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Email: ahmed@ccmr.state.fl.us
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Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601

TP

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

NO - 1
obj 10

Defendant.
_____/

DEFENDANT'S FOURTH MOTION REQUESTING THE *IN CAMERA* REVIEW OF RECORDS [DEPARTMENT OF PUBLIC PROTECTION AND OFFICE OF THE STATE ATTORNEY – 17TH JUDICIAL CIRCUIT]

The Defendant, Joseph Edward Jordan, pursuant to Fla.R.Crim.P. 3.852(f)(3), by and through his undersigned counsel, hereby moves this Honorable Court for an order to the Florida State Archives (Records Repository) to deliver certain exempt public records to the Clerk of this Court and for this Court to conduct an *in camera* review of those records. In support, Mr. Jordan states the following:

1. Joseph Edward Jordan is incarcerated at Florida State Prison under a sentence of death.

2. Pursuant to Florida Rule of Criminal Procedure 3.852(f) [1], the following agencies have

[1] Fla. R. Crim. P. Rule 3.852 (f) provides as follows:

> **(f) Exempt or Confidential Public Records.**
>
> (1) Any public records delivered to the records repository pursuant to these rules that are confidential or exempt from the requirements of section 119.07(1), Florida Statutes, or article I, section 24(a), Florida Constitution, must be separately contained, without being redacted, and sealed. The outside of the container must clearly identify that the public record is confidential or exempt and that the seal may not be broken without an order of the trial court. The outside of the container must identify the nature of the public records and the legal basis for the exemption.

provided a Notice of Compliance indicating that it has delivered records to the Records Repository that include sealed exempt and/or confidential records located as follows:

AGENCY	REPOSITORY	NOTICE OF COMPLIANCE DATE
1. **Department of Public Protection** *See Appendix A.*	Container 7125	March 1, 2016.
2. **Office of the State Attorney, Seventh Judicial Circuit** *See Appendix B.*	Container 7130	March 16, 2016.

3. The Supreme Court of Florida has discussed this process several times since the introduction of the rule as a reform in 1998. The Supreme Court of Florida in *Rose v. State*, 774 So. 2d 629 (Fla. 2000), has approved the "pre-Huff" procedure of *in camera* inspections of records designated as exempt and/or confidential and has held as follows:

> Rose also alleges that the trial court violated his constitutional right to have a full and fair state postconviction proceeding by conducting an in-camera inspection of public records to determine whether the State was justified in claiming that such records were exempt from disclosure. On July 11, 1996, Rose filed a public records request with the Pinellas County State Attorney's Office pursuant to chapter 119, Florida Statutes. The State responded and provided Rose with a detailed explanation of the public records that were exempt from disclosure under Florida Rule of Criminal Procedure 3.852. The trial court subsequently conducted an in-camera review of the public records withheld by the State. After conducting the in-camera review, the trial court concluded that the withheld records contained no *Brady* material, but the court instructed the State in a written order to provide Rose with certain records that were not covered under the statutory exemptions. According to Rose, the trial court's in-camera review of the allegedly exempt public

---

(2) Upon the entry of an appropriate court order, sealed containers subject to an inspection by the trial court shall be shipped to the clerk of court. The containers may be opened only for inspection by the trial court in camera. The moving party shall bear all costs associated with the transportation and inspection of such records by the trial court. The trial court shall perform the unsealing and inspection without ex parte communications and in accord with procedures for reviewing sealed documents.

(3) Collateral counsel must file a motion for in camera inspection within 30 days of *receipt of the notice of delivery of sealed records* to the central records repository or the in camera inspection will be deemed waived.

records and its refusal to require the State to turn over handwritten notes pertaining to the alleged "deal" between Borton and Poole and the State prejudiced him. Rose claims that he is entitled to an evidentiary hearing. We disagree.

In *Ragsdale v. State*, 720 So. 2d 203, 206 (Fla. 1998), this Court had to determine whether public records were properly exempted from disclosure by the State. This Court ruled that where doubt existed as to whether the State must disclose a particular document, the proper procedure is to have a trial judge conduct an in-camera review of the documents. *See id.; see also State v. Kokal*, 562 So. 2d 324, 327 (Fla. 1990) (stating that when certain statutory exemptions are claimed by the party against whom the public records request has been filed or when doubt exists as to whether a particular document must be disclosed, the proper procedure is to furnish the document to the trial judge for an in-camera inspection). After conducting an in-camera review, the State must turn over the nonexempt materials to the defense. *See Ragsdale*, 720 So. 2d at 206.

In this case, Judge Schaeffer conducted an in-camera proceeding and examined each of the alleged documents that the State withheld to determine whether the documents were properly withheld. After reviewing the documents, the trial court issued a written order instructing the State as to which documents it needed to produce to the defense. Rose has failed to cite to any authority that suggests that Judge Schaeffer's review of the withheld documents was improper and we have found no authority that supports this view. Therefore, we find that Judge Schaeffer fully complied with procedures set forth in *Ragsdale* and *Kokal* for determining whether the State's claimed exemptions were proper.

Rose v. State, 774 So. 2d 629, 636-637 (Fla. 2000) (footnote omitted).

9. The procedure approved in *Rose* was again discussed by the Florida Supreme Court in *Damren v. State*, 838 So. 2d 512 (Fla. 2003), as follows:

Damren asserts that the trial court erred in denying his request for certain public records from the State Attorney's office. According to Damren, the circuit court failed to review these records for exculpatory information under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We disagree.

As this Court has held, "where doubt existed as to whether the State must disclose a particular document, the proper procedure is to have a trial judge conduct an in-camera review of the documents." *Rose v. State*, 774 So. 2d 629, 636 (Fla. 2000). This Court applies an abuse of discretion standard when reviewing a trial court's determination on a public records request. *Moore v. State*, 820 So. 2d 199, 204 (Fla. 2002).

The record reveals that the State provided the requested records to the trial court for an in-camera review and the postconviction judge granted the public records request in part and denied it in part. During a hearing, the circuit court carefully

> reviewed each folder of materials which was submitted, explained what information was contained in each folder and whether it included exculpatory information, and indicated the files to which defense counsel was entitled. We find that the trial court did not abuse its discretion in denying in part Damren's request and hence deny relief. We find no error.

Damren v. State, 838 So.2d 512, 519 (Fla. 2003) (footnote omitted).

10. The effects of the discovery and other post-conviction reforms from the late 1990s onward was analyzed by the Honorable O.H. Eaton, Jr. as follows:

> Litigation in a death penalty case does not end when the judgment and sentence of death are affirmed by the Supreme Court of Florida. The next phase of litigation in these cases falls under the general heading of "postconviction relief." It is during this phase that death row defendants litigate matters "collateral" to the judgment and sentence that could not have been raised on appeal. . . . They are charged with reinvestigating the case to find out deficiencies that occurred during the trial. This reinvestigation usually includes review of numerous public records that may have some bearing on the case.
>
> . . .
>
> Over the last several years both the Supreme Court and the legislature have made efforts to streamline the processing of postconviction motions in capital cases.
>
> . . .
>
> Prior to 1996, collateral counsel had to file a civil action in order to obtain public records from persons or agencies other than the state attorney and local law enforcement agencies that investigated the crime. This cumbersome process often required suit to be filed in several jurisdictions and delays were inevitable.
>
> . . .
>
> The legislature created a centralized repository for storage of public records in capital cases in order to provide easy access to them. It was the legislature's hope that a process could be developed that would allow these records to be automatically sent to the repository and made accessible to counsel without the necessity of resorting to litigation.
>
> Currently, the Secretary of State is the officer responsible for storing the records and the records repository is located in the R.A. Gray building in Tallahassee.
>
> . . .
>
> [T]he procedural aspects of discovery of public records are now regulated by the Supreme Court of Florida. Rule 3.582 provides for an orderly method to obtain public records and, if the various offices and agencies that maintain public records cooperate, collateral counsel should be able to review them and have copies made in a timely fashion.
>
> . . .
>
> Assuming every person and agency complies with the requirement to submit public records to the records repository, all of the public records should be on file there less than 330 days from the date the mandate affirming the death sentence is issued

by the Supreme Court of Florida. However, in capital litigation, things are never that easy. Some of the records may be claimed to be exempt or confidential and there may be old cases out there that are subject to a separate procedure. Ironically, the persons or agencies claiming records to be exempt or confidential are aligned with the prosecution whose interest is to avoid delays. By providing a separate procedure for old cases, additional delays may be expected.

Exempt or Confidential Public Records

Rule 3.852(f) provides that any public records delivered to the records repository that are claimed to be exempt or confidential must be boxed separately, without redaction, and sealed. The box must clearly identify that the public record is confidential or exempt and the seal may not be broken without an order of the trial court. The box must also identify "the nature of the public records and the legal basis for the exemption."
In order for collateral counsel to obtain a ruling to unseal the public records claimed to be exempt or confidential, an order must first be obtained from the trial court directing the records repository to ship the sealed boxes of records to the clerk of the trial court. *Undoubtedly, collateral counsel will always want to obtain a ruling to determine if these records are really exempt or confidential and delay could be avoided if these records were filed with the clerk of the court in the first place.* However, the Supreme Court wanted to carry out legislative intent where possible so this unnecessary complication is part of the procedure and will undoubtedly cause delay.

The "moving party" is responsible to pay for the cost of the "transportation and inspection of such records by the trial court." Presumably, the "cost" will be just the postage. It is unclear what "cost" could possibly be associated with inspecting the records.

Once the records claimed to be exempt or confidential are delivered to the clerk of the court, they may only be opened by the trial court in camera without ex parte communication in the same manner as inspecting any sealed document. Presumably, the trial court will enter an order sustaining the claim of exemption or confidentiality or order the records disclosed.

. . .

In Camera Inspection of Exempt Public Records

Persons or agencies claiming public records to be exempt from production must box the records separately, seal them, index them with the reasons for the exemption, and deliver them to the records repository. From there, the records are shipped to the clerk of the trial court.

The trial judge must inspect the records in camera to determine if they are in fact exempt. A detailed order must be entered identifying each public record and the reason for its exemption.

> *In* Rose v. State, *774 So. 2d 629 (Fla. 2000), the trial judge held an in camera inspection of public records claimed to be exempt before the Huff hearing. The state attorney was ordered to produce certain of the records and others were ruled to be exempt. The Supreme Court approved the procedure.*
>
> . . .
>
> Public records have provided collateral counsel with significant evidence in the past and will undoubtedly continue to do so in the future. Trial judges need to take their responsibility to rule on public records issues seriously and make every effort to resolve public records disputes in a timely manner.

O.H. Eaton, Jr., *Discovery of Public Records in Capital Cases*, 76 Fla. B.J. 24, 30 (April 2002) (footnotes omitted) (emphasis added).

4. There are no objections by the State of Florida as to this Motion and accompanying proposed order as relayed to this Court at the Status Conference conducted on February 12, 2016.

WHEREFORE, Mr. Jordan hereby requests the entry of an order so that the aforementioned records can be transferred to the Clerk of this Circuit Court for an *in camera* review by this Court to determine whether they are exempt public records. It is further requested that if a subsequent *in camera* determination is made by this Honorable Court that these records are not exempt, that the records be released to undersigned counsel pursuant to a subsequent Court's order.

Respectfully submitted

s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

s/ Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar Number 13837
Email: perinetti@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

s/ Donna Ellen Venable
Donna Ellen Venable
Florida Bar Number 100816

Email: venable@ccmr.state.fl.us
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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

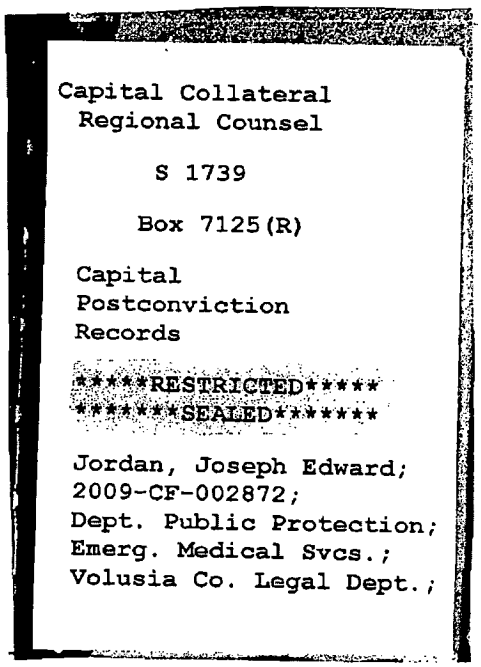
APPENDIX A

DEFENDANT'S FOURTH MOTION REQUESTING THE *IN CAMERA* REVIEW OF RECORDS [DEPARTMENT OF PUBLIC PROTECTION AND OFFICE OF THE STATE ATTORNEY – 17TH JUDICIAL CIRCUIT

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07121	00001		Arrest Affidavit -- Warrant #09081005 (Case #09-27090)
07121	00002		Arrest Affidavit -- Warrant #09070787 (Case #09-22626)
07122			McDonald, Meryl S.; 94-2958CFANO-B; State Attorney's Office--Sixth Judicial Circuit
07122	00001		Additional Public Records
07123			Jordan, Joseph Edward; 2009-CF-002872; United States Marshall's Office--Mid-Florida
07123	00001		Case File (FID #1739542) [1 page black and white photocopied image]
07124			Jordan, Joseph Edward; 2009-CF-002872; Department of Public Protection--Emergency Medical Services--Volusia County Legal Department
07124	00001		Subpoena: Harold Norman (February 14, 2013)
07124	00002		Subpoena: Corey Lopez (February 14, 2013)
07124	00003		Subpoena: Corey Lopez (March 19, 2013)
07125			Jordan, Joseph Edward; *RESTRICTED* SEALED; 2009-CF-002872; Department of Public Protection--Emergency Medical Services--Volusia County Legal Department
07125	00001		Confidential/Exempt: Patient Care Report - Keith Cope (Case #0936690 -- 6/28/2009) -- Exempt per F.S. 401.30(4) and 119.07(1)
07125	00002		Confidential/Exempt: Case Report (Electrocardiogram) - Keith Cope (Incident ID 2009062806310400) -- Exempt per F.S. 401.30(4) and 119.07(1)


Capital Collateral
Regional Counsel
S 1739
Box 7125(R)
Capital
Postconviction
Records
*****RESTRICTED*****
*******SEALED*******
Jordan, Joseph Edward;
2009-CF-002872;
Dept. Public Protection;
Emerg. Medical Svcs.;
Volusia Co. Legal Dept.;

S. 1739

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS. CASE NUMBER 2009 002872 CFAES

JOSEPH EDWARD JORDAN,

DEFENDANT.
_____/

NOTICE OF CONFIDENTIALITY AND EXEMPTION FROM THE PUBLIC RECORDS DISCLOSURE REQUIREMENTS OF SECTION 119.07, FLORIDA STATUTES

Pursuant to section 401.30(4), Florida Statutes, the contents of this container is confidential and exempt from the public records disclosure requirements of section 119.07(1), Florida Statutes. Pursuant to Rule 3.852(f)(1), Florida Rules of Criminal Procedure, the seal to this container may not be broken without an order of the trial court.

The legal basis for the exemption from section 119.07(1), Florida Statutes, is section 401.30(4), Florida Statutes, which provides "Records of emergency calls which contain patient examination and treatment information are confidential and exempt from the provisions of s. 119.07(1)."

The nature of the records in this container includes the following 44 pages:

INDEX

1. Patient Care Report for Keith Cope, Case Number 0936690, Date of Service 6/28/2009 (4 pages).

2. Case Report (Electrocardiogram), Keith Cope, Incident ID 2009062806310400 (40 pages).

BOX 7125, AF 1-2

DO NOT OPEN

MAY ONLY BE OPENED BY THE TRIAL COURT IN CAMERA
Florida Rules of Criminal Procedure 3.852(f)

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS. CASE NUMBER 2009 002872 CFAES

JOSEPH EDWARD JORDAN,

DEFENDANT.
_____/

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DO NOT OPEN

MAY ONLY BE OPENED BY THE TRIAL COURT IN CAMERA
Florida Rules of Criminal Procedure 3.852(f)

IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

APPENDIX B

DEFENDANT'S FOURTH MOTION REQUESTING THE *IN CAMERA* REVIEW OF RECORDS [DEPARTMENT OF PUBLIC PROTECTION AND OFFICE OF THE STATE ATTORNEY – 17TH JUDICIAL CIRCUIT

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/REV06-2012/CCR100	**TRANSMITTAL/RECEIPT** **TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7129
2. AGENCY Office of the State Attorney	3. DIVISION Seventeenth Judicial Circuit	4. BUREAU

5. ADDRESS 201 SE 6th Street, Room 660A Ft. Lauderdale, FL 33301	6. CONTACT Name: Steven A. Klinger Title: Assistant State Attorney Phone Number: 954-831-7913
7. SUBMIT TO: Capital Collateral Postconvicton Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME : JOSEPH EDWARD JORDAN DEFENDANT SEVENTEENTH CIRCUIT CASE # **90-17686CF10A** DEFENDANT SEVENTH CIRCUIT CASE # **2009 002872 CFAES**

9. DESCRIPTION

STATE v JOSEPH EDWARD JORDAN CASE NO. 90-17686CF10A

1. Public Record Request (two)
2. Prosecutor Memorandum (Redacted)
3. Probable Cause Affidavit (Redacted)
4. Information (Redacted)
5. Attorney General Letter dated July 14, 1993 (Redacted)
6. Fourth District Court of Appeal Opinion and Mandate
7. Jury Panel Information List
8. Verdict Forms (three)
9. Sentencing Guidelines Scoresheet
10. Category 2 Sexual Offense Guidelines
11. Assignment of Investigator
12. Habitual Offender Notice
13. State's Discovery Submission (Redacted)

MDT
ARCHIVES AND RECORDS MANAGEMENT
2016 MAR 16 AM 1:29

TOTAL NUMBER OF BOXES _____1_____ OR PACKAGES _____ SENT TO REPOSITORY

ARE EXEMPT RECORDS INCLUDED IN THIS SHIPMENT? _____YES __X__NO
ARE EXEMPT RECORDS SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? (*If not, records will be returned to you*)__X__*YES*____*NO*
DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. __X__ PAPER COPIES b.____ PHOTOGRAPHS c. X AUDIO TAPES d._____ VIDEO TAPES e._____ OTHER

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
SIGNATURE 3/11/16 DATE	CHIEF, ARCHIVES AND RECORDS MANAGEMENT 3/16/16 DATE
Steven A. Klinger, Assistant State Attorney TYPE NAME AND TITLE	

DEFENDANT: JOSEPH JORDAN
CASE# 90-17686CF10A

14. Booking Sheets (Redacted)
15. Lawson Affidavit
16. Certificates of Non-Appearance (Redacted)
17. Letter to Detective Luther Riley, January 8, 1991
18. Envelope, Expert Witness Order, and Order Fixing Compensation
19. Demand for Notice of Alibi
20. State's Supplemental Discovery (Redacted)
21. Letter to Detective Luther Riley, Dated September 3, 1990
22. Comparison for SAO and BSO Report
23. Victim Impact Statement (Blank)
24. Case Filing Recommendation
25. Statement – Michael Lawson (Redacted)
26. Statement – Victim (Redacted)
27. Victim Information Report (two)
28. Judgment and Restitution Order
29. BSO Crime Laboratory Analysis Report – Lab Number: 10384A
30. Witness Subpoena (two)
31. Investigator's Memo
32. Defendant's Letter dated January 26, 1994
33. Legal Mail Envelope from Defendant
34. Hearing Transcript dated September 14, 1993
35. Letter from State Attorney (Seventh Judicial Circuit) dated November 6, 2015
36. Notice to Broward SAO of Affirmance of Death Penalty and to Produce Public Records
37. Envelope from R.J. Larizza, State Attorney, Daytona Beach
38. Letter to Raheela Ahmed dated February 23, 2016
39. Letter to Michael Satz from Raheela Ahmed dated February 22, 2016
40. UPS Express Envelope from Janet Rocky to Michael Satz
41. Police Reports (Redacted)
42. Defense Motions (Redacted)
43. State's Motions (Redacted)
44. Court Orders
45. Praecipes for Witnesses.
46. Handwritten Letters (Redacted)
47. Case File Jacket (empty and redacted)
48. Victim Deposition (Redacted)
49. Joan Menke Deposition
50. Frank DiSanto Deposition
51. Rita Beth Greenspan Deposition (Redacted)
52. Jennifer Elise Goodman Deposition (Redacted
53. Victim's Mother Deposition (Redacted)
54. Audrey Lynn Russo Deposition (Redacted)
55. Patricia Ann Russo Deposition (Redacted)
56. Judith McClure Deposition (Redacted)
57. CD – Statement of Michael Lawson (Redacted)
58. CD – Statement of Victim (Redacted)

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/REV06-2012/CCR100	**TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7130 (R)
2. AGENCY Office of the State Attorney.	3. DIVISION Seventeenth Judicial Circuit	4. BUREAU

5. ADDRESS 201 SE 6th Street, Room 660A Ft. Lauderdale, FL 33301	6. CONTACT Name: Steven A. Klinger Title: Assistant State Attorney Phone Number: 954-831-7913
7. SUBMIT TO: Capital Collateral Postconvicton Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME : JOSEPH EDWARD JORDAN DEFENDANT SEVENTEENTH CIRCUIT CASE # **90-17686CF10A** DEFENDANT SEVENTH CIRCUIT CASE# **2009 002872 CFAES**

9. **DESCRIPTION** **STATE v JOSEPH EDWARD JORDAN**

EXEMPT MATERIALS

FILED MAR 15 AM 11:30
ARCHIVES AND RECORDS MANAGEMENT

DEFENDANT NAME: JOSEPH EDWARD JORDAN
DESCRIPTION – JOSEPH EDWARD JORDAN, **CASE NO. 90-17686CF10A**, 3.852 SUBMISSION

EXEMPT BOX

STATE v. JOSEPH EDWARD JORDAN (CASE No. 90-17686CF10A)

1. Prosecutor Notes – Exempt under *State v. Arbalaez*, 775 So.2d 909 (Fla. 2000); *Lopez v. State*, 696 So.2d 725 (Fla.1997); *State v. Kokal*, 562 So.2d 324 (Fla. 1990).
2. Criminal History Data/NCIC/FCIC –Exempt under Florida Statute § 943.0525.
3. Medical Records–Exempt under Florida Statute § 395.3025(4); § 395.3025(8); §456.057
4. Identity of Sexual Offense Victim–Exempt under Florida Statute § 119.071(2)(h)(b)
5. Department of Corrections Records – Exempt under Florida Statute § 945.10
6. First Draft Case Filing Recommendation – Exempt under *State v. Arbalaez*, 775 So.2d 909 (Fla. 2000); *State v. Kokal*, 562 So.2d 324 (Fla. 1990).
7. Juvenile Records–Exempt under Florida Statute § 985.04

TOTAL NUMBER OF BOXES _____ OR PACKAGES 1 SENT TO REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? X YES ___ NO
ARE **EXEMPT** RECORDS SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? ***(If not, records will be returned to you)*** X ***YES*** ___ ***NO***
DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:
(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. x PAPER COPIES b. ___ PHOTOGRAPHS c. ___ AUDIO TAPES d. ___ VIDEO TAPES e. ___ OTHER

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
SIGNATURE 3/11/16 DATE	CHIEF, ARCHIVES AND RECORDS MANAGEMENT 3/17/16 DATE
Steven A. Klinger, Assistant State Attorney TYPE NAME AND TITLE	

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
			- Keith Cope (Incident ID 2009062806310400) -- Exempt per F.S. 401.30(4) and 119.07(1)
07126			Jordan, Joseph Edward; 2009-CF-002872; Hollywood Police Department--Professional Standards--Records [SCANNED - CD-1900]
07126	00001		Incident Report: Joseph Edward Jordan (Case # R3309-019924)
07126	00002		Probable Cause Affidavit and Incident Report: David Farrant (Case # R3307-014091)
07127			Jordan, Joseph Edward; 2009-CF-002872; Edgewater Fire Department [SCANNED - CD-1901]
07127	00001		Fire Reports
07127	00002		EMS Incident Report
07128			Marquardt, Bill Paul; 2006-CF-768; Serological Research Institute
07128	00001		Case Discovery (SERI Case # U-5176-00) [1 CD]
07129			Jordan, Joseph Edward; 2009-CF-002872; State Attorney's Office--Seventeenth Judicial Circuit
07129	00001		Public Records Request
07129	00002		Prosecutor Memorandum
07129	00003		Probable Cause Affidavit
07129	00004		Information
07129	00005		Attorney General Letter (July 14, 1993)
07129	00006	17	Fourth District Court of Appeal: Opinion and Mandate

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07129	00007		Jury Panel Information List
07129	00008		Verdict Forms
07129	00009		Sentencing Guidelines Scoresheet
07129	00010		Category 2: Sexual Offense Guidelines
07129	00011		Assignment of Investigator
07129	00012		Habitual Offender Notice
07129	00013		State's Discovery Submission
07129	00014		Booking Sheets
07129	00015		Lawson Affidavit
07129	00016		Certificates of Non-Appearance
07129	00017		Letter: Detective Luther Riley (January 8, 1991)
07129	00018		Envelope, Expert Witness Order, and Order Fixing Compensation
07129	00019		Demand for Notice of Alibi
07129	00020		State's Supplemental Discovery
07129	00021		Letter: Detective Luther Riley (September 3, 1990)
07129	00022		Comparison for SAO and Broward County Sheriff's Office Report
07129	00023		Victim Impact Statement
07129	00024		Case Filing Recommendation

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07129	00025		Statement: Michael Lawson
07129	00026		Statement: Victim
07129	00027		Victim Information Report
07129	00028		Judgement and Restitution Order
07129	00029		Crime Laboratory Analysis Report (Lab #10384A)
07129	00030		Witness Subpoena
07129	00031		Investigator's Memo
07129	00032		Defendant's Letter (January 26, 1994)
07129	00033		Legal Mail Envelope from Defendant
07129	00034		Hearing Transcript (September 14, 1993)
07129	00035		Letter from State Attorney, Seventh Judicial Circuit (November 6, 2015)
07129	00036		Notice to Broward SAO of Affirmance of Death Penalty and to Produce Public Records
07129	00037		Envelope: R. J. Larizza, State Attorney, Daytona Beach
07129	00038		Letter: Raheela Ahmed (February 23, 2016)
07129	00039		Letter: Michael Satz from Raheela Ahmed (February 22, 2016)
07129	00040		UPS Express Envelope: Janet Rocky to Michael Satz
07129	00041		Police Reports
07129	00042		Defense Motions

Record Group: 000660 Call Number: .S1739

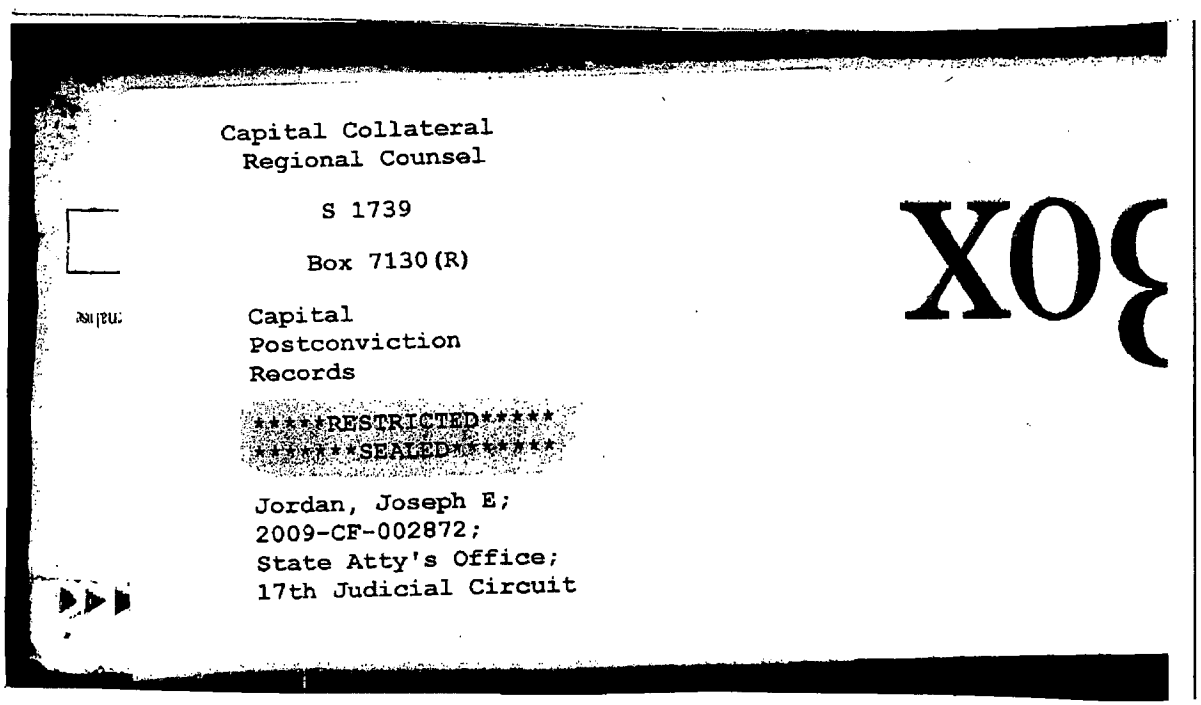
Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07129	00043		State's Motions
07129	00044		Court Orders
07129	00045		Praecipes for Witnesses
07129	00046		Handwritten Letters
07129	00047		Case File Jacket
07129	00048		Victim Deposition
07129	00049		Deposition: Joan Menke
07129	00050		Deposition: Frank DiSanto
07129	00051		Deposition: Rita Beth Greenspan
07129	00052		Deposition: Jennifer Elise Goodman
07129	00053		Deposition: Victim's Mother
07129	00054		Deposition: Audrey Lynn Russo
07129	00055		Deposition: Patricia Ann Russo
07129	00056		Deposition: Judith McClure
07129	00057		Statement: Michael Lawson [1 CD]
07129	00058		Statement: Victim [1 CD]
07130			**Jordan, Joseph Edward; *RESTRICTED* SEALED; 2009-CF-002872; State Attorney's Office--Seventeenth Judicial Circuit**
07130	00001		Prosecutor Notes -- Exempt per 775 So.2d 909 (Fla. 2000), 696 So.2d 725 (Fla. 1997) and 562 So.2d 324

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
			(Fla. 1990)
07130	00002		Criminal History Data/NCIC/FCIC -- Exempt per F.S. 943.0525
07130	00003		Medical Records -- Exempt per F.S. 395.3025(4), 395.3025(8) and 456.057
07130	00004		Identity of Sexual Offense Victim -- Exempt per F.S. 119.071(2)(h)(b)
07130	00005		Department of Corrections Records -- Exempt per F.S. 945.10
07130	00006		First Draft Case Filing Recommendation -- Exempt per 775 So.2d 909 (Fla. 2000) and 562 So.2d 324 (Fla. 1990)
07130	00007		Juvenile Records -- Exempt per F.S. 985.04
CD001			CD-1 to CD-29
CD002			CD-30 to CD-59
CD003			CD-60 to CD-89
CD004			CD-90 to CD-118
CD005			CD-119 to CD-147
CD006			CD-148 to CD-176
CD007			CD-177 to CD-204
CD008			CD-205 to CD-230
CD009			CD-231 to CD-260


Capital Collateral
Regional Counsel
S 1739
Box 7130(R)
Capital
Postconviction
Records
*****RESTRICTED*****
*****SEALED*****
Jordan, Joseph E;
2009-CF-002872;
State Atty's Office;
17th Judicial Circuit
BOX

22

EXEMPT RECORDS

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/REV06-2012/CCR100	TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO.
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5. ADDRESS 201 SE 6th Street, Room 660A Ft. Lauderdale, FL 33301	6. CONTACT Name: Steven A. Klinger Title: Assistant State Attorney Phone Number: 954-831-7913
7. SUBMIT TO: Capital Collateral Postconvicton Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME : JOSEPH EDWARD JORDAN DEFENDANT SEVENTEENTH CIRCUIT CASE # 90-17686CF10A DEFENDANT SEVENTH CIRCUIT CASE# 2009 002872 CFAES

9. DESCRIPTION STATE v JOSEPH EDWARD JORDAN

EXEMPT MATERIALS

DEFENDANT NAME: JOSEPH EDWARD JORDAN
DESCRIPTION – JOSEPH EDWARD JORDAN, **CASE NO. 90-17686CF10A**, 3.852 SUBMISSION.

EXEMPT BOX

STATE v. JOSEPH EDWARD JORDAN (CASE No. 90-17686CF10A)

1. Prosecutor Notes – Exempt under *State v. Arbalaez*, 775 So.2d 909 (Fla. 2000); *Lopez v. State*, 696 So.2d 725 (Fla.1997); *State v. Kokal*, 562 So.2d 324 (Fla. 1990).
2. Criminal History Data/NCIC/FCIC –Exempt under Florida Statute § 943.0525.
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4. Identity of Sexual Offense Victim–Exempt under Florida Statute § 119.071(2)(h)(b)
5. Department of Corrections Records – Exempt under Florida Statute § 945.10
6. First Draft Case Filing Recommendation – Exempt under *State v. Arbalaez*, 775 So.2d 909 (Fla. 2000); *State v. Kokal*, 562 So.2d 324 (Fla. 1990).
7. Juvenile Records–Exempt under Florida Statute § 985.04

TOTAL NUMBER OF BOXES _____ OR PACKAGES ___1___ SENT TO REPOSITORY

ARE EXEMPT RECORDS INCLUDED IN THIS SHIPMENT? ___X___YES ____NO
ARE EXEMPT RECORDS SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? (*If not, records will be returned to you*) ___X___YES ____NO
DESCRIPTION OF EXEMPT RECORDS AND STATUTORY BASIS FOR EXEMPTION:
(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. ___X___ PAPER COPIES b.____ PHOTOGRAPHS c.____ AUDIO TAPES d.____ VIDEO TAPES e.____ OTHER

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
SIGNATURE 3/11/16 DATE Steven A. Klinger, Assistant State Attorney TYPE NAME AND TITLE	CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE

This box is recyclable and contains 25% recycled material. FedEx uses only non-toxic soy or water-based inks and varnishes, and non-toxic adhesives.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this day 24th day of March, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via the Florida Courts E-Filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com; to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach Florida 32114 at calhounr@sao7.org; to **Michael Gray Moore**, Department of Public Protection, Division of Emergency Medical Services, John R. Zaragoza, 112 Carswell Ave., Holly Hill, FL 32117 at mmoore@volusia.org and mgm1962@cfl.rr.com; and to **Steven A. Klinger**, Assistant State Attorney, Broward County Office of the State Attorney, S.A. Michael Satz, 201 Southeast 6th Street, Suite 33301, Ft. Lauderdale, FL 33301 at SKlinger@sao17.state.fl.us on this 24th day of March, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been e-mailed to; to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and mailed to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 24th day of March, 2016.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601

Filing # 39360428 E-Filed 03/23/2016 11:19:46 AM

FILED
2016 MAR 29 AM 9:46
CLERK OF THE CIRCUIT & CTY. COURT VOLUSIA CTY., FL
CC 45

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

2009002872CFAWS

CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

MOTION TO CLARIFY ORDER DATED FEBRUARY 16, 2016

The Defendant, Joseph Edward Jordan, by and through undersigned counsel, respectfully requests that this Honorable Court issue an Order clarifying the previous Order on Defendant's First Motion Requesting the *In Camera* Review of Records [Edgewater Police Department & Florida Department of Law Enforcement], which was issued on February 16, 2016. *See Attachment A: Order.*

This Court held a status conference pursuant to Fla. R. Crim. P. 3.851(c)(2) on February 12, 2016. At the conference, the Court determined that certain records claimed exempt should be released to undersigned counsel and indicated that it would issue a written order after concluding its *in camera* review. On February 16, 2016, the Court issued the attached Order. On February 18, 2016, an investigator for undersigned counsel contacted the office of the Clerk of the Circuit Court and was notified that the Clerk was unclear as to which records should be released to undersigned counsel.

ACCORDINGLY, at this time, Mr. Jordan requests an Order clarifying the Court's previous order and, as necessary to ensure that undersigned counsel is provided with the records

this Court intends to be released, a hearing at which the Clerk, counsel for the State, and undersigned counsel is noticed to appear. A proposed Notice of Hearing is attached to this motion and will be furnished to counsel of record for all parties.

Respectfully submitted,

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/ Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar Number 13837
Assistant CCRC
Email: perinetti@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/ Donna Ellen Venable
Donna Ellen Venable
Florida Bar Number 100816
Assistant CCRC
Email: venable@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

Law Office of the Capital Collateral
Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Telephone (813) 558-1600
Fax No. (813) 558-1601 or (813) 558-1602

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

MOTION TO CLARIFY ORDER DATED FEBRUARY 16, 2016

ATTACHMENT A: ORDER

IN THE CIRCUIT COURT OF THE
7TH JUDICIAL CIRCUIT IN AND FOR
VOLUSIA COUNTY, FLORIDA

CASE NO.: 2009-002872-CFAWS
DIVISION: 41

STATE OF FLORIDA,

vs.

JOSEPH EDWARD JORDAN,

Defendant.
_____/

ORDER ON DEFENDANT'S FIRST MOTION REQUESTING THE *IN CAMERA* REVIEW OF RECORDS [EDGEWATER POLICE DEPARTMENT & FLORIDA DEPARTMENT OF LAW ENFORCEMENT]

The Court has conducted an *in camera* review of documents "exempt" from public disclosure from the FDLE and Edgewater Police Department and determined that the following documents are subject to discovery:

1. FDLE Laboratory Report dated Feb. 20, 2013 with attachments.

2. FDLE Case Tracking Forms and Laboratory evidence release forms.

3. Handwritten and typed investigation notes and Property Room Listing from the Edgewater Police Department.

4. 16 CDs/DVDs containing autopsy audio/video records and results.

The Court finds that the documents contained on the CD-R and described by the Archives Repository – Exempt documents, are not discoverable at this time.

Nothing in this Order shall be construed as finding these documents ordered to be produced herein are subject to public records disclosure or are admissible into evidence at any proceedings in this matter.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida, this 16 day of February, 2016.

TERENCE R. PERKINS
CIRCUIT JUDGE

Rosemary L. Calhoun, Esquire – eservicevolusia@sao7.org
Raheela Ahmed, Esquire – ahmed@ccmr.state.fl.us
Maria Perinetti, Esquire – perinetti@ccmr.state.fl.us
Donna Venable, Esquire – venable@ccmr.state.fl.us

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF HEARING

TO: Stacey Elaine Johns Kircher
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Blvd.
5th Floor
Daytona Beach, Florida 32114

Rosemary Calhoun
Assistant State Attorney
Office of the State Attorney
Seventh Judicial Circuit
251 North Ridgewood Ave.
Daytona Beach, Florida 32114

Raheela Ahmed
Maria Christine Perinetti
Donna Ellen Venable
Assistant CCRCs
Law Office of the Capital Collateral
Regional Counsel – Middle Region
12973 North Telecom Parkway
Temple Terrace, Florida 33637-0907

The Honorable Diane M. Matousek
Clerk of the Circuit Court
Volusia County, Florida
251 North Ridgewood Avenue
Daytona Beach, Florida 32114

YOU ARE HEREBY NOTIFIED that a HEARING has been set before the Honorable Terence R. Perkins, at the Seventh Judicial Circuit Court, 251 North Ridgewood Avenue, Room _____, Daytona Beach, Florida 32114, on _____ _____, 2016 at _____ a.m./p.m. on the Defendant's MOTION TO CLARIFY ORDER DATED FEBRUARY 16, 2016.

PLEASE GOVERN YOURSELVES ACCORDINGLY.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this 23rd day of March, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via electronic mail to **Stacey Elaine Johns Kircher, Assistant Attorney General,** Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118, at Stacey.Kircher@myfloridalegal.com and at CapApp@myfloridalegal.com on this 23rd day of March, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terence R. Perkins, Chief Judge,** Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach, Florida 32114; to **Rosemary Calhoun, Assistant State Attorney,** Office of the State Attorney, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach, Florida 32114; to **Janine Robinson, Assistant General Counsel,** Florida Department of Law Enforcement, Office of General Counsel, 2331 Phillips Road, Tallahassee, Florida 32308; to **Josh Raver,** Detective/Evidence Technician, Edgewater Police Department, 135 East Park Avenue, Edgewater, Florida 32132; to **The Honorable Diane M. Matousek, Clerk of the Circuit Court, Volusia County Florida,** 251 North Ridgewood Avenue, Daytona Beach, Florida 32114; and to **Mr. Joseph Edward Jordan,** DOC# 180632, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 23rd day of March, 2016.

Respectfully submitted,

/s/ Donna Ellen Venable
Donna Ellen Venable
Florida Bar Number 100816
Assistant CCRC
Email: venable@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us
Law Office of the Capital Collateral
Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Telephone (813) 558-1600
Fax No. (813) 558-1601 or (813) 558-1602

VOLUSIA COUNTY COURT ACTION FORM

CASE: 2009 002872 CFAWS
STATE OF FLORIDA
VS
JORDAN, JOSEPH EDWARD
TOT
SPN: 574944
TRIAL DATE:

COURT/SESSION TYPE: Criminal Hearing
DATE: 05/12/2016
TIME: 01:15 PM
JUDGE: PERKINS
ATTY: PERINETTI, MARIA CHRISTINE
BNA:
LOCATION: Justice Center Courtroom 1, 251 N. RIDGEWOOD AVENUE , DAYTONA BEACH, Florida

DIANE M. MATOUSEK
CLERK OF THE CIRCUIT COURT
VOLUSIA COUNTY, FLORIDA
P.O. BOX 6043
DELAND, FL 32721-6043

PARTIES PRESENT	RELEASE ACTIONS	Custody/Capias/Estreat	Continued To: ☐ By Def. ☐ By State ☐ By Court ☐ Waived Spdy.Trl
☐ DEF. APPEARED ☐ APP.W/COUNSEL	☐ TOTAL BOND FOR CASE SET	☐ CAPIAS ISSUED-BOND SET	REMARKS:
☐ DEF. COUNSEL APP. W/OUT DEF.	☐ AT $	☐ AT $	**MOTION TO CLARIFY ORDER DATED 2/16/16 IS WITHDRAWN**
☐ DEF. FAILED TO APPEAR	☐ DEF. ROR'D	☐ BOND ESTREATED	
ATTORNEY STATUS	☐ RELEASE TO PTS	☐ CAPIAS WITHDRAWN	**COURT WILL REVIEW DOCUMENTS AT LATER TIME.**
☐ APP. IND. STATUS - PD APPT.	☐ RELEASE TO PTS W/BOND	☐ BOND REINSTATED	
☐ APP. IND. STATUS - NOT INDIGENT	☐ OTHER:	☐ BOND ESTR. SET ASIDE	
☐ PD APPT. BY COURT	☐ NO CONTACT W/VICTIM	☐ OTHER:	
☐ DEF. TO RETAIN COUNSEL	☐ NO VIOL.CONTACT W/VICTIM	☐ HOLD CAPIAS-PTS INVEST.	
☐ PD WITHDREW ☐ ATTY.TO BE APPT	☐ OTHER:	☐ 48 HRS	
☐ OTHER:			

CT. CHARGE	COURT ACTION	INCARCERATION/PROBATION/COMMUNITY CONTROL INFORMATION	COSTS
1 FIRST DEGREE FELONY MURDER (ADJG) Statute: 782.04(1)(a)2 LVL:F DEG:C AMENDED CHARGE: BOND SET AT $	☐ N.G.PLEA ☐ NO INFO. ☐ GUILTY PLEA ☐ NOLLE PROSS. ☐ NOLO PLEA ☐ DISMISSED ☐ NG.VERDICT ☐ JGMT ACQT. ☐ GLTY.VERDICT ☐ ADJ.WITHHELD ☐ MISTRIAL ☐ ADJ.GUILTY ☐ WAIVED PSI ☐ PSI ORDERED ☐ PDR ORDERED ☐ TO BE SENT:	☐ VCJ ___ MO ___ DY ☐ PROB.REVOKED ☐ DOC ___ YR ___ MO ___ DY ☐ C.C. REVOKED ☐ JAIL CREDIT TIME: ___ DY ☐ PROB. REINSTATE ☐ PROB ___ YR ___ MO ___ DY ☐ C.C. REINSTATE ☐ COM.CONT. ___ YR ___ MO ☐ PROB. MODIFIED ☐ DRUG OFFENDER ☐ SEX OFFENDER ☐ C.C. MODIFIED ☐ CONCURRENT ☐ CONSECUTIVE TO: ☐ ___ HRS.COM. SERVICE ☐ STANDARD COND. ☐ SUBST.ABUSE COUNSEL/TREAT. ☐ PREVIOUS COND. ☐ RANDOM U/A ☐ NO ALCOHOL/ILL.DRUG ☐ COS WAIVED	CRT. COSTS $ FINE $ PD FEE $ SAO FEE $ LEO FEE $ PD APP.FEE $ REST. $ OTHER: ☐ CONVRT. FINE/COST
2 ROBBERY WITH FIREARM/DEADLY WEAPON (ADJG) Statute: 812.13(2)(a) LVL:F DEG:F AMENDED CHARGE: BOND SET AT $	☐ N.G.PLEA ☐ NO INFO. ☐ GUILTY PLEA ☐ NOLLE PROSS. ☐ NOLO PLEA ☐ DISMISSED ☐ NG.VERDICT ☐ JGMT ACQT. ☐ GLTY.VERDICT ☐ ADJ.WITHHELD ☐ MISTRIAL ☐ ADJ.GUILTY ☐ WAIVED PSI ☐ PSI ORDERED ☐ PDR ORDERED ☐ TO BE SENT:	☐ VCJ ___ MO ___ DY ☐ PROB.REVOKED ☐ DOC ___ YR ___ MO ___ DY ☐ C.C. REVOKED ☐ JAIL CREDIT TIME: ___ DY ☐ PROB. REINSTATE ☐ PROB ___ YR ___ MO ___ DY ☐ C.C. REINSTATE ☐ COM.CONT. ___ YR ___ MO ☐ PROB. MODIFIED ☐ DRUG OFFENDER ☐ SEX OFFENDER ☐ C.C. MODIFIED ☐ CONCURRENT ☐ CONSECUTIVE TO: ☐ ___ HRS.COM. SERVICE ☐ STANDARD COND. ☐ SUBST.ABUSE COUNSEL/TREAT. ☐ PREVIOUS COND. ☐ RANDOM U/A ☐ NO ALCOHOL/ILL.DRUG ☐ COS WAIVED	CRT. COSTS $ FINE $ PD FEE $ SAO FEE $ LEO FEE $ PD APP.FEE $ REST. $ OTHER: ☐ CONVRT. FINE/COST

DIANE M. MATOUSEK, CLERK OF THE CIRCUIT COURT
Filed in Open Court this 12 day of May , 20 16.

/S/ PERKINS, TERENCE R
PRESIDING JUDGE

ASSISTANT STATE ATTORNEY

/S/ MARVA MOORE
DEPUTY CLERK IN ATTENDANCE

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

FIRST NOTICE OF FILING OF DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS

COMES NOW, the defendant, Joseph Edward Jordan, by and through undersigned counsel and hereby files this Notice of Filing of his Demands for Additional Public Records that are attached.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar Number 0013837
Assistant CCRC
Email: perinetti@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/Donna Ellen Venable
Donna Ellen Venable
Florida Bar Number 100816
Assistant CCRC
Email: venable@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by the Florida Courts E-filing Portal on this 20th day of June, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has already been served via the Florida Courts E-filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney for the Seventh Judicial Circuit on this 20th day of June 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and to **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 20th day of June, 2016.

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC

Law Office of the Capital Collateral Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637
Tel: (813) 558-1600
Fax: (813) 558-1601
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS

June 20, 2016.

Sarah J. Rumph, Esquire
Assistant General Counsel
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399-2500

RE: DEMAND FOR PUBLIC RECORDS PERTAINING TO THE ABOVE-CAPTIONED CAPITAL CASE.

Dear Attorney Rumph,

This is a formal supplemental request for production of records pursuant to Florida Rule of Criminal Procedure 3.852(g), Chapter 119 of the Florida Statutes and *Brady v. Maryland*, 373 U.S. 83 (1963). This request is for information relating to *State of Florida v. Joseph Edward Jordan* as stated above. It "has long been recognized that the Public Records Act should be 'construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and

limited to their designated purpose.'" *Weeks v. Golden*, 798 So. 2d 848, 850 (Fla. 1st DCA 2001) *quoting City of Riviera Beach v. Barfield*, 642 So.2d 1135, 1136 (Fla. 4th DCA 1994). **Please note that a separate additional public records demand that specifically relates to post-conviction lethal injection claims will also be filed**.

To the best of our knowledge, prior requests for production of these requested records pertaining to the above listed client have not been made to the Florida Department of Corrections by our agency in this case. **We previously provided Florida Department of Corrections (former Assistant General Counsel Rana Wallace) via electronic mail a signed and notarized release by Mr. Jordan on February 2, 2016, and we are attaching a copy of that same release to this request.**

It is requested that within *ninety [90] days* of receipt of this written demand, you *shall* deliver to the **RECORDS REPOSITORY, The Florida State Archives, Attn: CCRC Records Archivist, R.A. Gray Building, M.S. 9-E, 500 South Bronough Street, Tallahassee, Florida 32399-0250** any public records in your possession and shall certify to the best of your knowledge and belief that all public records have been delivered to the records repository or, if no additional public records are found, shall certify that no such public records exist.

Any objections to the request for production, claims of exemptions asserted,

or motions for protective orders ***must*** be filed with the trial court, with **the Honorable Chief Judge Terrence R. Perkins**, Seventh Judicial Circuit in and for Volusia County, Criminal Justice Center, 251 North Ridgewood Avenue, Daytona Beach Florida 32114, within *sixty [60] days* of receipt of this written demand for the production of the records requested. Copies of any objections or exemptions asserted are also to be provided to all counsels listed below. Please be aware that failure to file an objection, if required, to this request for production of records shall act as a waiver of the objection or exemption asserted (F.R.C.P. 3.852).

If there are **no additional records** listed below in your possession or control, please execute the enclosed CERTIFICATE and serve it on all counsels listed below. The records requested in *State of Florida v. Joseph Edward Jordan* are as follows:

> A. All Medical, Dental, and Mental Health Records for Florida Department of Corrections inmate Joseph Edward Jordan, DOC# 180632, from all Florida Department of Corrections facilities in which he was incarcerated from 1987 to current date. Mr. Jordan's custodial history found on the Florida Department of Corrections' Inmate Population Information Detail lists Mr. Jordan's incarceration history as follows:
>
> 4/23/1987 to 06/02/1988
>
> 06/25/1992 to 12/01/1997
>
> 09/22/1998 to 03/13/2000
>
> 09/03/2002 to 06/03/2004
>
> 03/27/2007 to 07/22/2008

09/25/2013 to currently incarcerated.
[Collateral counsel does not request the already received records that were provided to the Repository].

B. All Classification Records for Florida Department of Corrections inmate Joseph Edward Jordan, DOC# 180632, from all Florida Department of Corrections facilities in which he was incarcerated from 1987 to current date. Mr. Jordan's custodial history found on the Florida Department of Corrections' Inmate Population Information Detail lists Mr. Jordan's incarceration history as follows:
4/23/1987 to 06/02/1988
06/25/1992 to 12/01/1997
09/22/1998 to 03/13/2000
09/03/2002 to 06/03/2004
03/27/2007 to 07/22/2008
09/25/2013 to currently incarcerated.
[Collateral counsel does not request the already received records that were provided to the Repository].

C. All Central Records for Florida Department of Corrections inmate Joseph Edward Jordan, DOC# 180632, from all Florida Department of Corrections facilities in which he was incarcerated from 1987 to current date. Mr. Jordan's custodial history found on the Florida Department of Corrections' Inmate Population Information Detail lists Mr. Jordan's incarceration history as follows:
4/23/1987 to 06/02/1988
06/25/1992 to 12/01/1997

09/22/1998 to 03/13/2000
09/03/2002 to 06/03/2004
03/27/2007 to 07/22/2008
09/25/2013 to currently incarcerated.
[Collateral counsel does not request the already received records that were provided to the Repository].

D. All visitation logs, and communications regarding visitation with Florida Department of Corrections inmate Joseph Edward Jordan, DOC# 180632, from all Florida Department of Corrections facilities in which he was incarcerated from 1987 to current date. Mr. Jordan's custodial history found on the Florida Department of Corrections' Inmate Population Information Detail lists Mr. Jordan's incarceration history as follows:
4/23/1987 to 06/02/1988
06/25/1992 to 12/01/1997
09/22/1998 to 03/13/2000
09/03/2002 to 06/03/2004
03/27/2007 to 07/22/2008
09/25/2013 to currently incarcerated.
[Collateral counsel does not request the already received records that were provided to the Repository].

E. All probation and parole services records for Florida Department of Corrections Probationer Joseph Edward Jordan, DOC# 180632 for **cases numbers 86-17289CF10A, 87-3797CF10A, and 90-17686CF10A stemming from Broward County**. In particular, but not

limited to notes, reports, interviews, and assessments of probation officers who supervised Joseph Jordan in the above listed case numbers. One of the probation officers was Joseph Feinberg from the 17th Judicial Circuit Probation and Parole Office. [Collateral counsel does not request the already received records that were provided to the Repository].

F. All probation and parole services records related to the educational classes, vocational classes, mental health evaluations and treatment, drug and alcohol therapy, and self-improvement programs for Probationer Joseph Edward Jordan, DOC# 180632 for **cases numbers 86-17289CF10A, 87-3797CF10A, and 90-17686CF10A stemming from Broward County**. [Collateral counsel does not request the already received records that were provided to the Repository].

G. All probation and parole services records, including notes by the probation officer or personnel with any prosecutorial or law enforcement agency regarding this case, related to facilities that Florida Department of Corrections Probationer Matthew Powell for case number **10001261CF10A** stemming from Broward County. This probationer was on probation for a drug related felony offense, violated in 2013, placed back on community control and probation until 2018. The original arresting agency was Hallandale Police Department.

Undersigned counsel asserts that the above related records are relevant to potential colorable claims in the post-conviction proceedings as they are related to the investigation of Ineffective Assistance of Counsel claims as related to Mr.

Jordan's competency, mental health status, psychiatric/psychological mitigation and other relevant claims pursuant to Fla.R.Crim.P. 3.581. Mr. Jordan has a history of documented mental illnesses, to include Bi-Polar disorder. His mental health continues to be an issue in his post-conviction proceedings. Furthermore, these records are reasonably calculated to lead to the discovery of admissible evidence with regard to Mr. Jordan's mental health. Furthermore, the request for the visitation logs is reasonably related to Ineffective Assistance of Counsel claims pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) and *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) for failures to investigate available witnesses.

The records of probationer Matthew Powell are related to claims regarding potential deals, request for favorable testimony, or offers in return for his testimony at trial which the defense is entitled to investigate in accordance with Joseph Jordan's due process rights and *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed. 2d 104 (1972). It should be noted that Matthew Powell was reinstated after his violation for serious felony drug charges of Attempted Trafficking of Hydrocodone, Possession of Carisoprodol, Possession of Proxyohene, and Trafficking of Oxycodone. It is also related to Ineffective Assistance of Counsel claims pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) and *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) for failures to competently impeach witness Matthew Powell.

Undersigned counsel further asserts that based on the records received to date, the above descriptions are pursuant to a good faith effort to specifically describe what is being requested, to alleviate any burden on the agency. Undersigned counsel further asserts that based on the information and records received to date from the records repository that a timely and diligent search of the records repository has been made. We also request that you conduct an *exhaustive search* of all records.

Respectfully submitted,

s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

s/ Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar Number 13837
Email: perinetti@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

s/ Donna Ellen Venable
Donna Ellen Venable
Florida Bar Number 100816
Email: venable@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

Law Office of the Capital Collateral
Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Telephone (813) 558-1600

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

DEFENDANT'S SIGNED AND NOTARIZED RELEASE

FLORIDA DEPARTMENT OF CORRECTIONS
CONSENT AND AUTHORIZATION FOR USE AND DISCLOSURE INSPECTION AND RELEASE OF CONFIDENTIAL INFORMATION

I, Joseph Jordan authorize Florida Department of Corrections (FDOC)
(Name, organization or general designation of program making disclosure)

to disclose to The Law Office Of the Capital Collateral Regional Counsel - Middle Region (CCRC-M)
(Name of person(s) or organization(s) and address to which disclosure is to be made)

Purpose of disclosure authorized herein: Legal/Collateral Representation

The undersigned hereby authorizes the inspection and release of copies of my medical records indicated below by the above-named health care facility/medical record custodian only to the above-named entity(ies) or persons or their agents. Indicate all of the records authorized to be inspected/released by **initialing** in the appropriate box(es) below:

INITIAL BELOW FOR RELEASE OF INFORMATION	
JJ	A. Release of all medical records except: any information relating to HIV testing, AIDS and AIDS-related syndromes; psychiatric and psychological information; or alcohol and substance abuse treatment information related to my condition, care, and confinement **(initial box).**
JJ	B. Release of any records regarding HIV testing, AIDS and AIDS-related syndromes relating to my condition, care, and confinement **(initial box).**
JJ	C. Release of any records of psychiatric and psychological information (mental health records) other than psychotherapy notes relating to my conditions, care, and confinement **(initial box).**
JJ	D. Release of all dental records relating to my condition, care and confinement **(initial box).**
JJ	E. Release of any records regarding alcohol and substance abuse treatment relating to my condition, care, and confinement. I understand that my records are protected under the federal regulations governing *Confidentiality of Alcohol and Drug Abuse Patient Records*, 42 U.S.C. §290 (ee)(2), and cannot be disclosed without my written consent unless otherwise provided for in the regulations. As to release of alcohol/substance abuse treatment records, please state the specific information to be released as provided by 42 U.S.C. §290 (ee)(2), Fed rule 42 CFR Part 2 **(initial box)**:

Name of information -- dates of treatment/programs, etc., if possible

NOTE: IF PSYCHOTHERAPY OR SUBSTANCE ABUSE PROGRESS NOTES ARE THE SUBJECT OF THE RELEASE, OTHER RECORDS CANNOT BE THE SUBJECT OF THE SAME AUTHORIZATION. RELEASE OF PSYCHOTHERAPY OR SUBSTANCE ABUSE PROGRESS NOTES IN ADDITION TO THE RECORDS SPECIFIED ABOVE WILL REQUIRE A SEPARATE AUTHORIZATION (SEE BELOW).

I understand that I may refuse to sign this authorization and my refusal to sign will not affect my access to health care treatment, eligibility for benefits or enrollment, or payment for or coverage of services. I also understand that once my protected health information is disclosed pursuant to this authorization, it may be used and/or redisclosed by the recipient unless the recipient is covered by law which prohibits or limits its use and/or disclosure.

I understand that I may revoke this consent and authorization at any time, provided the revocation is in writing, except to the extent that action has been taken in reliance on it, and that in any event, this consent and authorization shall be effective for 90 days unless I specify a different expiration as follows: Until the conclusion of CCRC's post-conviction representation of Inmate
(Specification of the date, event, or condition upon which this consent expires if less than six months or greater than 90 days)

In furtherance of this authorization, I (we) do hereby waive all provisions of law and privileges relating to the disclosures hereby authorized. I acknowledge the extent of my authorization of release as to the records and information denoted in paragraphs A, B, C, D and E by **initialing** the appropriate box(es) above.

X Joseph Jordan
SIGNATURE OF PATIENT (Guardian or Statutorily Authorized Representative, when required)

1 Dec 2015
Date

AUTHORIZATION FOR RELEASE OF PSYCHOTHERAPHY OR SUBSTANCE ABUSE PROGRESS NOTES

I, Joseph Jordan authorize Florida Department of Corrections (FDOC)
(Name, organization or general designation of program making disclosure)

to disclose to The Law Office Of the Capital Collateral Regional Counsel - Middle Region (CCRC-M)
(Name of person(s) or organization(s) and address to which disclosure is to be made)

Purpose of disclosure authorized herein: Legal/Collateral Representation

FLORIDA DEPARTMENT OF CORRECTIONS
CONSENT AND AUTHORIZATION FOR USE AND DISCLOSURE INSPECTION AND RELEASE OF CONFIDENTIAL INFORMATION

The undersigned hereby authorizes the inspection and release of copies of my psychotherapy progress notes and/or my substance abuse progress notes as indicated below by the above-named health care facility/medical record custodian only to the above-named entity(ies) or persons or their agents. Indicate all of the records authorized to be inspected/released by **initialing** in the appropriate box(es) below:

INITIAL BELOW FOR RELEASE OF INFORMATION	
JJ	A. Release psychotherapy progress notes **(initial box)**:
JJ	B. Release substance abuse progress notes **(initial box)**:

Name of information -- dates of treatment/programs, etc., if possible

I understand that I may refuse to sign this authorization and my refusal to sign will not affect my access to health care treatment, eligibility for benefits or enrollment, or payment for or coverage of services. I also understand that once my protected health information is disclosed pursuant to this authorization, it may be used and/or redisclosed by the recipient unless the recipient is covered by law which prohibits or limits its use and/or disclosure.

I understand that I may revoke this consent and authorization at any time, provided the revocation is in writing, except to the extent that action has been taken in reliance on it, and that in any event, this consent and authorization shall be effective for 90 days unless I specify a different expiration as follows: Until the conclusion of CCRC's post-conviction representation of Inmate
(Specification of the date, event, or condition upon which this consent expires if less than six months or greater than 90 days)

In furtherance of this authorization, I (we) do hereby waive all provisions of law and privileges relating to the disclosures hereby authorized. I acknowledge the extent of my authorization of release as to the records and information denoted in paragraphs A and B **initialing** the appropriate box(es) above.

X JJ
SIGNATURE OF PATIENT (or Next of Kin, Guardian or Authorized Representative, when required) — 1 Dec 2015 — Date

---

COMPLETE NOTARY PORTION ONLY WHEN REQUEST IS NOT FROM CURRENT INMATE/OFFENDER PERSONALLY KNOWN TO WITNESS OR IS FROM SOURCE EXTERNAL TO DEPARTMENT

STATE OF Florida
COUNTY OF Bradford

Sworn to (or affirmed) and subscribed before me this day of 1 Dec, 20 15
by Joseph Jordan who is personally known to me or who has produced _____ as identification.

Anna R. Dixon ANNA R. DIXON
Notary Public Signature
Print, type, or stamp commissioned name of Notary Public
My Commission Expires: 17 NOV ~~FEB~~ APR 2019

SEAL

ANNA R. DIXON
Commission # FF 936930
Expires November 17, 2019
Bonded Thru Troy Fain Insurance 800-385-7019

ACKNOWLEDGEMENT OF RECEIPT OF COPY OF SIGNED AUTHORIZATION(S)

Inmate/Offender Name _____
DC# _____
R/S _____
Date of Birth _____
SS# _____
Institution/Office _____

Witness Name _____
Witness Signature _____
Date: _____

COUNSELS FOR NOTIFICATION:

The list of counsels for notification is as follows: **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach Florida 32114, calhounr@sao7.org; **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, Stacey.kircher@myfloridalegal.com; CapApp@myfloridalegal.com; and **Raheela Ahmed, Maria Christine Perinetti, and Donna Ellen Venable**, Assistant CCRCs, Law Office of the Capital Collateral Regional Counsel-Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637-0907, ahmed@ccmr.state.fl.us; perinetti@ccmr.state.fl.us; venable@ccmr.state.fl.us; support@ccmr.state.fl.us.

Thank you in advance for your assistance and cooperation.

Yours Sincerely,

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

FLORIDA RECORDS REQUEST DATED JUNE 20, 2016. CERTIFICATE

The undersigned does hereby certify that a diligent search has been made for the records requested in the records request dated June 20, 2016, pertaining to this case, and that there are no records that have been requested that are in my possession or control.

Signed,

_____
[NAME]

_____
[AGENCY NAME]

_____
[DATE]

COPIES TO BE FURNISHED TO:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Honorable Terrence R. Perkins, Chief Judge,
Seventh Judicial Circuit Courts,
Division 41,
251 North Ridgewood Avenue, Room 284,
Daytona Beach, Florida 32114

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
Law Office of the Capital Collateral Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907.
ahmed@ccmr.state.fl.us;
perinetti@ccmr.state.fl.us;
venable@ccmr.state.fl.us;
support@ccmr.state.fl.us

Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney, Seventh Judicial Circuit,
251 North Ridgewood Avenue,
Daytona Beach Florida 32114.
calhounr@sao7.org

Stacey Elaine Johns Kircher,
Assistant Attorney General,
Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
Daytona Beach, Florida 32118.
Stacey.kircher@myfloridalegal.com;
CapApp@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing DEFENDANT'S POSTPRODUCTION REQUEST FOR ADDITIONAL PUBLIC RECORDS has been served by electronic mail to the above-named addressee at Rumph.Sarah@mail.dc.state.fl.us and Cea.Christian@mail.dc.state.fl.us, on this 20th day of June, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing (Notice of Filing) has already been served via the Florida Courts E-filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, and to Rosemary Calhoun, Assistant State Attorney, Office of the State Attorney for the Seventh Judicial Circuit on this 20th day of June, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and to **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 20th day of June, 2016.

/s/ Raheela Ahmed

Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC

Law Office of the Capital Collateral Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637
Tel: (813) 558-1600
Fax: (813) 558-1601
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS

June 20, 2016

Sarah J. Rumph, Esquire
Assistant General Counsel
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399-2500

RE: DEMAND FOR PUBLIC RECORDS PERTAINING TO THE ABOVE-CAPTIONED CAPITAL CASE

Dear Attorney Rumph:

This is a formal written demand for production of additional public records pursuant to Florida Rule of Criminal Procedure 3.852(g) and Chapter 119 of the Florida Statutes in the matter referenced above.

This demand relates to records pertaining to lethal injection. Please note that a separate Demand for Additional Public Records pertaining to matters not related to lethal injection is being filed simultaneously with this demand.

Pursuant to Florida Rule of Criminal Procedure 3.852(g)(2), within 90 days of your receipt of this written demand, your agency shall:

1. Deliver to the records repository any additional public records in the agency's possession, and

2. Certify to the best of the agency's knowledge and belief that all additional public records have been delivered to the records repository; or

3. If no additional public records are found, recertify that the public records previously delivered are complete.

Pursuant to Florida Rule of Criminal Procedure 3.852(g)(3), if your agency has an objection to this written demand, it must file any objection with the trial court.

If there are no records listed below in your possession or control, you may sign the enclosed certificate and serve it on all counsel listed below.

The records sought are as follows:

Records Pertaining to Lethal Injection.

(1) Public records concerning the review process which led to the promulgation of the September 9, 2013 lethal injection procedures, for example, computer printouts or copies of research or literature reviewed, emails, faxes, letters, minutes or notes of meetings, and telephone call records or notes from July 1, 2011 through the present. This demand is intended to include public records of any communications with the Offices of the Attorney General or Governor, Department of Law Enforcement, and governmental agencies of other jurisdictions such as other state departments of corrections.

(2) Public records relating to any research or experiments done by or on behalf of the Department of Corrections with respect to the September 9, 2013 lethal injection protocol from July 1, 2011 to the present.

(3) Public records relating to any consultation with experts (medical or otherwise) with respect to midazolam hydrochloride, for example, faxes, letters, minutes or notes of meetings, telephone call records or notes, and emails from July 1, 2011 to the present. This demand is intended to include internal communication with experts employed by or contracted on behalf of the Department of Corrections regarding midazolam hydrochloride.

(4) Correspondence from July 1, 2011 to the present with any federal agency, including the Drug Enforcement Administration (DEA), the Food and Drug Administration (FDA), the Federal Bureau of Prisons (BOP), and the Department of Justice (DOJ), relating to Florida's execution procedures or the drugs used for lethal injection. This demand is intended to include application or registration for permits or licenses that are required by any federal agency in connection with the purchase, storage, use, research, and disposal of sodium thiopental, pentobarbital, midazolam hydrochloride, vecuronium bromide, rocuronium bromide, pancuronium bromide, potassium chloride, potassium acetate, and

hydromorphone.

(5) Correspondence from July 1, 2011 to the present with any public agency, including governmental agencies of other jurisdictions, relating to the acquisition of drugs used for lethal injection. This demand is intended to include correspondence concerning sodium thiopental, pentobarbital, midazolam hydrochloride, vecuronium bromide, rocuronium bromide, pancuronium bromide, potassium chloride, potassium acetate, and hydromorphone.

(6) Package inserts, manufacturer instructions, date of manufacture information, and expiration date information for any drugs used for lethal injection which are currently in the custody of the Department of Corrections. This demand is intended to include information concerning any sodium thiopental, pentobarbital, midazolam hydrochloride, vecuronium bromide, rocuronium bromide, pancuronium bromide, potassium chloride, potassium acetate, and hydromorphone currently possessed by the Department of Corrections.

(7) Public records, including logs or record books, from July 1, 2011 to the present regarding the purchase, storage, maintenance, use, distribution, disposal, and expiration dates of drugs used for lethal injection. This demand is intended to include records regarding sodium thiopental, pentobarbital, midazolam hydrochloride, vecuronium bromide, rocuronium bromide, pancuronium bromide, potassium chloride, potassium acetate, and hydromorphone.

(8) Public records, including the required logs, notes, memoranda, letters, emails, facsimiles, photographs, and videos relating to all executions carried out since December 13, 2006, not previously provided to the repository. This demand is intended to include records pertaining to the executions of Mark Dean Schwab, Richard Henyard, Wayne Tomkins, John R. Marek, Martin Grossman, Manuel Valle, Oba Chandler, Robert Waterhouse, David Alan Gore, Manuel Pardo, Jr., Larry E. Mann, Elmer Carroll, Willam Van Poyck, John E. Ferguson, Marshall Gore, William Happ, Darious Kimbrough, Askari Muhammad (f.k.a. Thomas Knight), Juan Carlos Chavez, Paul Howell, Robert Henry, Robert Hendrix, John Henry, Eddie Davis, Chadwick Banks, Johnny Kormondy, Jerry W. Correll, and Oscar Ray Bolin, Jr. This demand is not intended to include the FDLE logs previously provided regarding William Happ, Darious Kimbrough, Askari Muhammad, Juan Carlos Chavez, Paul Howell, and Robert Henry previously provided in *Correll v. State*, Ninth Judicial Circuit Case No. 85-CF-3550, Florida Supreme Court Case No. SC15-147.

(9) Public records relating to execution training exercises, including logs, checklists, sign-in sheets, photographs, and videos from all executions carried out since December 13, 2006. This demand is intended to include records pertaining to the executions of Mark Dean Schwab, Richard Henyard, Wayne Tomkins, John R. Marek, Martin Grossman, Manuel Valle, Oba Chandler, Robert Waterhouse, David Alan Gore, Manuel Pardo, Jr., Larry E. Mann, Elmer Carroll, Willam Van Poyck, John E. Ferguson, Marshall Gore, William Happ, Darious Kimbrough, Askari Muhammad (f.k.a. Thomas Knight), Juan Carlos Chavez, Paul Howell, Robert Henry, Robert Hendrix, John Henry, Eddie Davis, Chadwick Banks,

Johnny Kormondy, Jerry W. Correll, and Oscar Ray Bolin, Jr.

(10) Photographs and videos of the execution chamber and anteroom taken from December 13, 2006 to the present, including close-up photographs of equipment and apparatuses, tubing, and connections.

(11) Public records related to the training and experience of all individuals directly involved with the executions of Mark Dean Schwab, Richard Henyard, Wayne Tomkins, John R. Marek, Martin Grossman, Manuel Valle, Oba Chandler, Robert Waterhouse, David Alan Gore, Manuel Pardo, Jr., Larry E. Mann, Elmer Carroll, Willam Van Poyck, John E. Ferguson, Marshall Gore, William Happ, Darious Kimbrough, Askari Muhammad (f.k.a. Thomas Knight), Juan Carlos Chavez, Paul Howell, Robert Henry, Robert Hendrix, John Henry, Eddie Davis, Chadwick Banks, Johnny Kormondy, Jerry W. Correll, and Oscar Ray Bolin, Jr.

It is undersigned counsel's understanding that:

a. The September 9, 2013 lethal injection procedures were signed into effect by Department of Corrections Secretary Michael W. Crews. The procedures call for the drugs midazolam hydrochloride, vecuronium bromide, and potassium chloride.

b. Previously, the Department of Corrections used a three-drug protocol calling for pentobarbital, vecuronium bromide, and potassium chloride. *See, e.g., Pardo v. State*, 18 So. 3d 558 (Fla. 2012). The Department of Corrections began using pentobarbital in 2011, after sodium thiopental became unavailable. *Valle v. State*, 70 So. 3d 530, 536 (Fla. 2011). Previously, the Department carried out executions using a three-drug protocol calling for sodium thiopental, vecuronium bromide, and potassium chloride. *See, e.g., Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007).

c. On July 1, 2011, Lundbeck, the sole United States manufacturer of pentobarbital, announced that it would implement a shipping program that would deny distribution to prisons in the United States currently carrying out lethal injections. Lundbeck, *Lundbeck's position regarding misuse of Nembutal CII Sodium Solution (pentobarbital sodium injection, USP) in the execution of prisoners, available at* http://www.lundbeck.com/upload/us/files/pdf/Products/NembutalStmtwithDistSystem_US_website.pdf.

d. To date, in 2016, 12 executions have been carried out using pentobarbital (in Texas, Georgia, and Missouri). Death Penalty Information Center, *Execution List 2016, available at* http://www.deathpenaltyinfo.org/execution-list-2016. In 2015, 25 executions were carried out using pentobarbital (in Texas, Georgia, Missouri, and Virginia). Death Penalty Information Center, *Execution List 2015, available at* http://www.deathpenaltyinfo.org/execution-list-2015 These executions were carried out using pentobarbital despite the restricted distribution resulting from Lundbeck's position, described above.

e. Other states have used the additional drugs named above (rocuronium bromide, pancuronium bromide, potassium acetate, and hydromorphone) to carry out executions.

f. The creation of lethal injection procedures is an administrative act exempt from the Florida Administrative Procedure Act. *Power v. State*, 992 So. 2d 218, 220 (Fla. 2008); *Diaz v. State*, 945 So. 2d 1136, 1143-44 (Fla. 2006). In the view of the Florida Supreme Court, judicial review and oversight of lethal injection procedures is preferable to administrative proceedings pursuant to Chapter 120, Florida Statutes; Florida Rule of Criminal Procedure 3.851 is an appropriate vehicle for mounting a challenge. *Diaz*, 945 So. 2d at 1143-44. The exemption of lethal injection procedures from the Administrative Procedure Act should not give the Department of Corrections "unfettered discretion" as to lethal injection procedures. *Id.*

g. Lethal injection protocols calling for midazolam hydrochloride as the agent used to render and maintain unconsciousness have been the subject of much controversy, having been implicated in botched executions in Arizona (Joseph Wood), Oklahoma (Clayton Lockett and Charles Warner), and Ohio (Dennis McGuire). Due to the risks involved with use of midazolam hydrochloride, most death penalty states do not use it. *See* Manny Fernandez, *Delays as Death-Penalty States Scramble for Execution Drugs*, THE NEW YORK TIMES, Oct. 8, 2015, *available at* http://www.nytimes.com/2015/10/09/us/death-penalty-lethal-injection.html. In fact, since the United States Supreme Court's June 29, 2015 decision in *Glossip v. Gross*, 135 S. Ct. 2726, 192 L.Ed.2d 761 (2015), holding that lower courts did not err in finding the petitioners had not met their burden of proof in challenging Oklahoma's three-drug protocol which included midazolam hydrochloride, only Florida and Alabama have carried out executions using the drug. *See* Death Penalty Information Center, *Execution List 2015, available at* http://www.deathpenaltyinfo.org/execution-list-2015; Death Penalty Information Center, *Execution List 2016, available at* http://www.deathpenaltyinfo.org/execution-list-2016.

h. In order to challenge the current lethal injection protocol as unconstitutional under Florida Rule of Criminal Procedure 3.851, undersigned counsel will be required to allege that:

   i. the protocol is "very likely to result in needless suffering" and
   ii. "there is an alternative that is readily available and significantly reduces the risk of pain."

Correll v. State, 184 So. 3d, 478, 489 (Fla. 2015) (citing *Glossip*, 135 S. Ct. at 2737-38)).

Undersigned counsel asserts that:

1. The exemption of lethal injection procedures from the Florida Administrative Procedure Act, combined with restricted access to public records under Rule of Criminal Procedure 3.852 (the sole means by which a death-sentenced prisoner may access public records for purposes of Rule 3.851 claims), means that the development, implementation, and review of lethal injection procedures is left to the exclusive discretion of the State agencies charged

with carrying out executions. Judicial review and oversight is pre-empted by the inability of counsel for the accused to access the information required to challenge protocols suspected to be unconstitutional.

a. Inadequate oversight concerning the development and implementation of lethal injection procedures has been an issue in the past. On December 15, 2006, following the botched execution of Angel Diaz, Governor Jeb Bush issued Executive Order 06-260 to create the Governor's commission on Administration of Lethal Injection. The Governor's Commission on Administration of Lethal Injection, *Final Report with Findings and Recommendations* (March 1, 2007), *available at* http://www.deathpenaltyinfo.org/scommissiononadministrationoflethalinjectionfinalreport.pdf. The Commission's report, submitted to the Governor on March 1, 2007, reported unresolved conflicts in the following areas:

   i. Observations of the inmate during the execution process, including movement of the body, facial movements and verbal comments

   ii. Conflicting testimony of the expert medical witnesses regarding the impact of drugs, absorption of drugs, etc.

   Id. at 8.

   The Commission recommended, among other things, that the Department of Corrections "on an ongoing basis explore other more recently developed chemicals for use in lethal injection execution with specific consideration and evaluation of the need of a paralytic drug like pancuronium bromide in an effort to make the lethal injection execution procedure less problematic." *Id.* at 13.

b. Since the Governor's Commission made its recommendations, the development and implementation of lethal injection procedures has been unchecked due to an inability, on the part of counsel for condemned inmates, to access public records related to the process. Without access to records, counsel cannot mount a claim, and therefore judicial oversight is impossible.

2. Before states began using midazolam hydrochloride, lethal injection was carried out using barbiturate drugs to induce unconsciousness. This was consistent with the original recommendations of Dr. Stanley Deutsch, an anesthesiologist consulted when Oklahoma became the first state to adopt lethal injection as an execution method. *See id.* at 6 (citing Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 Ohio St. L.J. 63, 95-97 (2002) and Rebecca Brannan, *Sentence and Punishment: Change Method of Executing Individuals Convicted of Capital Crimes from Electrocution to Lethal Injection*, 17 Ga. St. U. L. Rev. 116, 121 (2000). Undersigned counsel does not concede that any method of execution is humane; however, the Department of Corrections' departure from the expert-recommended and routinely used barbiturate drug class in choosing midazolam hydrochloride as the first drug in the current protocol is troubling.

3. The harm from use of midazolam hydrochloride in lethal injections is insidious. Because the second drug in the protocol, vecuronium bromide, is a paralytic, it is impossible to assess whether midazolam hydrochloride is able to maintain unconsciousness throughout the process. The only context in which midazolam hydrochloride is implemented as the sole drug to render and maintain unconsciousness in a proceeding involving the prolonged inability to breathe and the level of pain involved with a lethal dose of potassium chloride is the lethal injection context itself. That pain has been described as causing "burning, searing pain." *Glossip*, 135 S. Ct. at 2780-81 (Sotomayor, J., dissenting).

4. It is imperative that undersigned counsel have access to the full scope of the records demanded so that judicial oversight is carried out. These records are necessary to prove that the current protocol is "very likely to result in needless suffering" and that "there is an alternative that is readily available and significantly reduces the risk of pain."

    a. The records sought under (1) – (3) above are relevant to prove that the current protocol is "very likely to result in needless suffering." *See Correll*, 184 So. 3d at 489.

        i. The only way determine the adequacy of a drug intended to render and maintain unconsciousness in this context, when the individual undergoing lethal injection is paralyzed partway through and therefore unable to show blatant signs of suffering, is through expert advice and extrapolation from experimental data. Therefore, the expert advice obtained and research conducted by or on behalf of the Department of Corrections is necessary for purposes of proving that such advice and research was incomplete or incorrect.

        ii. Undersigned counsel has reason to believe that such advice and research was incomplete or incorrect. *See* Brief of Amici Curiae Sixteen Professors of Pharmacology in Support of Neither Party, *Glossip v. Gross*, 135 S.Ct. 2726, 192 L.Ed.2d 761 (2015). Undersigned counsel would submit any records obtained for expert review in developing this claim.

        iii. The July 1, 2011 date is relevant as the date that Lundbeck's announcement foretold restricted access to pentobarbital.

    b. The records sought under (4) – (7) above are relevant to prove that an alternative is readily available. *See id.* It is impossible for undersigned counsel to know what drugs the Department of Corrections is able to access for purposes of lethal injection without these records. A simple allegation that pentobarbital is available to other states or could be accessed through sterile compounding has not been found to be sufficient. *Correll*, 184 So. 3d at 490.

    c. The records sought under (8) – (11) above are relevant to prove both that the current protocol is "very likely to result in needless suffering" and that the alternative

identified will significantly reduce the risk of pain. The December 13, 2006 date is relevant as the date of Angel Diaz' execution. Executions resumed on July 1, 2008, after the Governor's Commission submitted its report. Observations from executions carried out under the previous protocols and the current protocol are necessary in order to show that midazolam hydrochloride is inferior to drugs previously used to render and maintain unconsciousness and therefore its use results in needless suffering. To the extent that undersigned counsel is able to prove that previously-used drugs are currently available to the Department of Corrections, observations from executions using all protocols are necessary to show that the identified alternative will significantly reduce the risk of pain when compared to midazolam hydrochloride. Records documenting the execution team's training and the set-up within the execution chamber and anteroom are necessary to account for variability in the conditions when making comparisons.

Undersigned counsel represents that:

a. Undersigned counsel has made a timely and diligent search of the records repository for records submitted in this case.

b. The records now sought are not at the records repository.

c. The records now sought are relevant to the subject matter of a proceeding under Florida Rule of Criminal Procedure 3.851 or are reasonably calculated to lead to the discovery of admissible evidence.

d. This demand is not intended to be overly broad or unduly burdensome.

The list of counsel for notification is as follows:

1. Stacey Elaine Johns Kircher
   Assistant Attorney General
   444 Seabreeze Blvd., Fifth Floor
   Daytona Beach, FL 32118-3951

2. Rosemary Calhoun
   Assistant State Attorney
   Office of the State Attorney, Seventh Judicial Circuit
   251 N. Ridgewood Ave.
   Daytona Beach, FL 32114

3. Raheela Ahmed, Maria Christine Perinetti, and Donna Ellen Venable
   Assistant CCRCs
   The Law Office of the Capital Collateral Regional Counsel - Middle Region
   12973 North Telecom Parkway

Temple Terrace, Florida 33637-0907

Thank you in advance for your assistance and cooperation.

Sincerely,

/s/ Raheela Ahmed
Raheela Ahmed
Assistant CCRC
Florida Bar Number 0713457
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/Maria Christine Perinetti
Maria Christine Perinetti
Assistant CCRC
Florida Bar Number 0013837
Email: perinetti@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/ Donna Ellen Venable
Donna Ellen Venable
Assistant CCRC
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Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601 or (813) 558-1602

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

FLORIDA RECORDS REQUEST DATED JUNE 20, 2016. CERTIFICATE

The undersigned does hereby certify that a diligent search has been made for the records requested in the records request dated June 20, 2016, pertaining to this case, and that there are no records that have been requested that are in my possession or control.

Signed,

_____
[NAME]

_____
[AGENCY NAME]

_____
[DATE]

COPIES TO BE FURNISHED TO:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Honorable Terrence R. Perkins, Chief Judge,
Seventh Judicial Circuit Courts,
Division 41,
251 North Ridgewood Avenue, Room 284,
Daytona Beach, Florida 32114

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
Law Office of the Capital Collateral Regional Counsel-Middle Region
12973 North Telecom Parkway,
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251 North Ridgewood Avenue,
Daytona Beach Florida 32114.
calhounr@sao7.org

Stacey Elaine Johns Kircher,
Assistant Attorney General,
Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
Daytona Beach, Florida 32118.
Stacey.kircher@myfloridalegal.com;
CapApp@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing DEFENDANT'S POSTPRODUCTION REQUEST FOR ADDITIONAL PUBLIC RECORDS has been served by electronic mail to the above-named addressee at Rumph.Sarah@mail.dc.state.fl.us and Cea.Christian@mail.dc.state.fl.us, on this 20th day of June, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing (Notice of Filing) has already been served via the Florida Courts E-filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, and to Rosemary Calhoun, Assistant State Attorney, Office of the State Attorney for the Seventh Judicial Circuit on this 20th day of June, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and to **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 20th day of June, 2016.

/s/ Raheela Ahmed

Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC

Law Office of the Capital Collateral Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637
Tel: (813) 558-1600
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Secondary Email: support@ccmr.state.fl.us

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS

June 20, 2016.

Steven A. Klinger,
Assistant State Attorney,
Office of the State Attorney,
Seventeenth Judicial Circuit,
201 SE 6th Street, Room 660A,
Fort Lauderdale, Florida 33301.

RE: DEMAND FOR PUBLIC RECORDS PERTAINING TO THE ABOVE-CAPTIONED CAPITAL CASE.

Dear Assistant Attorney Klinger,

This is a formal supplemental request for production of records pursuant to Florida Rule of Criminal Procedure 3.852(g), Chapter 119 of the Florida Statutes and *Brady v. Maryland*, 373 U.S. 83 (1963). This request is for information relating to *State of Florida v. Joseph Edward Jordan* as stated above. It "has long been recognized that the Public Records Act should be 'construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and

limited to their designated purpose.'" *Weeks v. Golden*, 798 So. 2d 848, 850 (Fla. 1st DCA 2001) *quoting City of Riviera Beach v. Barfield*, 642 So.2d 1135, 1136 (Fla. 4th DCA 1994). To the best of our knowledge, prior requests for production of these requested records pertaining to the above listed client have not been made to the Florida Department of Corrections by our agency in this case.

It is requested that within *ninety [90] days* of receipt of this written demand, you *shall* deliver to the **RECORDS REPOSITORY, The Florida State Archives, Attn: CCRC Records Archivist, R.A. Gray Building, M.S. 9-E, 500 South Bronough Street, Tallahassee, Florida 32399-0250** any public records in your possession and shall certify to the best of your knowledge and belief that all public records have been delivered to the records repository or, if no additional public records are found, shall certify that no such public records exist.

Any objections to the request for production, claims of exemptions asserted, or motions for protective orders ***must*** be filed with the trial court, with **the Honorable Chief Judge Terrence R. Perkins**, Seventh Judicial Circuit in and for Volusia County, Criminal Justice Center, 251 North Ridgewood Avenue, Daytona Beach Florida 32114, within *sixty [60] days* of receipt of this written demand for the production of the records requested. Copies of any objections or exemptions asserted are also to be provided to all counsels listed below. Please be aware that failure to file an objection, if required, to this request for production of records shall act as a

waiver of the objection or exemption asserted (F.R.C.P. 3.852).

If there are **no additional records** listed below in your possession or control, please execute the enclosed CERTIFICATE and serve it on all counsels listed below. The records requested in *State of Florida v. Joseph Edward Jordan* are as follows:

A. All records including but not limited to media releases, social media records, written/typed communications, texts, and electronic mail to the Office of the State Attorney for the Seventh Judicial Circuit, the Volusia County Sheriff's Office, Florida Department of Corrections, Edgewater Police Department, and any other law enforcement agencies, related to defendant, **Matthew Powell**, for case number **10001261CF10A** stemming from Broward County. *See Young v. State*, 739 So. 2d 553 (Fla. 1999) ("We reject the State's argument. First, *we again make plain that the obligation to disclose state attorney notes of witness interviews exists even if such a document is work product or exempt from the public records law*. *Johnson*, 707 So.2d at 335; *Walton v. Dugger*, 634 So.2d 1059 (Fla.1993). Second, we find that the trial court's decision that the state attorney notes of witness interviews were not *Brady* material was error."); *see Cardona v. State*, 826 So. 2d 968 (Fla. 2002) (Court found a *Brady* violation for failure to disclose defendant's criminal investigation reports of state's interviews with a witness (co-defendant)); *see Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So. 2d 633, 640 (Fla.1980) (The physical format of the record is irrelevant; electronic communications, such as e-mail, are covered just like communications on paper); *see* § 119.01(1)&(2)(a), Fla. Stat. (2009) ("[a]utomation of public records must not erode the

right of access to those records"); *see Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So.3d 1201, 1207 (Fla. 1st DCA 2009) (observing that "public records law is not limited to paper documents but that it applies, as well, to documents that exist only in digital form"); *see Ingram v. State*, 39 Fla. L. Weekly D412 (Fla. 5th DCA Feb. 21, 2014) *review granted*, 151 So. 3d 1228 (Fla. 2014) (Section 119.071(2)(j) provides that a "public employee" may not "disclose videotaped information that reveals the minor's identity ... to a person who is not assisting in the investigation or prosecution of the offense or to any person **other than the defendant,** the defendant's attorney, or a person specified in an order entered by the court having jurisdiction of the alleged offense."). Matthew Powell was a key prosecution witness in ***State of Florida v. Joseph Edward Jordan*, Case No. 642009CF002872XXXAWS**, stemming from Volusia County, Florida. Matthew Powell was on probation for a drug related felony offense, violated in 2013, placed back on community control and probation until 2018. The original arresting agency was Hallandale Police Department.

Undersigned counsel asserts that the above related records are relevant to potential colorable claims in the post-conviction proceedings as the records of probationer Matthew Powell are related to claims regarding potential deals, request for favorable testimony, or offers in return for his testimony at trial which the defense is entitled to investigate in accordance with Joseph Jordan's due process rights and *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed. 2d 104 (1972). Matthew Powell was reinstated after his violation for serious felony drug charges of Attempted Trafficking of Hydrocodone, Possession of Carisoprodol, Possession of

Proxyohene, and Trafficking of Oxycodone. It is also related to Ineffective Assistance of Counsel claims pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) and *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) for failures to competently impeach witness Matthew Powell.

Undersigned counsel further asserts that based on the records received to date, the above descriptions are pursuant to a good faith effort to specifically describe what is being requested, to alleviate any burden on the agency. Undersigned counsel further asserts that based on the information and records received to date from the records repository that a timely and diligent search of the records repository has been made. We also request that you conduct an *exhaustive search* of all records.

Respectfully submitted,

s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

s/ Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar Number 13837
Email: perinetti@ccmr.state.fl.us
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s/ Donna Ellen Venable
Donna Ellen Venable
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Law Office of the Capital Collateral
Regional Counsel-Middle Region

12973 North Telecom Parkway,
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Telephone (813) 558-1600

COUNSELS FOR NOTIFICATION:

The list of counsels for notification is as follows: **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach Florida 32114, calhounr@sao7.org; **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, Stacey.kircher@myfloridalegal.com; CapApp@myfloridalegal.com; and **Raheela Ahmed, Maria Christine Perinetti, and Donna Ellen Venable**, Assistant CCRCs, Law Office of the Capital Collateral Regional Counsel-Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637-0907, ahmed@ccmr.state.fl.us; perinetti@ccmr.state.fl.us; venable@ccmr.state.fl.us; support@ccmr.state.fl.us.

Thank you in advance for your assistance and cooperation.

Yours Sincerely,

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

FLORIDA RECORDS REQUEST DATED JUNE 20, 2016. CERTIFICATE

The undersigned does hereby certify that a diligent search has been made for the records requested in the records request dated June 20, 2016, pertaining to this case, and that there are no records that have been requested that are in my possession or control.

Signed,

_____
[NAME]

_____
[AGENCY NAME]

_____
[DATE]

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Rosemary Calhoun,
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Stacey Elaine Johns Kircher,
Assistant Attorney General,
Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
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Stacey.kircher@myfloridalegal.com;
CapApp@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing DEFENDANT'S POSTPRODUCTION REQUEST FOR ADDITIONAL PUBLIC RECORDS has been served by electronic mail to the above-named addressee at SKlinger@sao17.state.fl.us, courtdocs@sao17.state.fl.us, and jhamblen@sao17.state.fl.us on this 20th day of June, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has already been served via the Florida Courts E-filing Portal (Notice of Filing) to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney for the Seventh Judicial Circuit on this 20th day of June, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and to **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 20th day of June, 2016.

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC

Law Office of the Capital Collateral Regional Counsel - Middle Region
12973 North Telecom Parkway,
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**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS

June 20, 2016.

Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney,
Seventh Judicial Circuit,
251 North Ridgeway Avenue,
Daytona Beach, Florida 32114.

RE: DEMAND FOR PUBLIC RECORDS PERTAINING TO THE ABOVE-CAPTIONED CAPITAL CASE.

Dear Assistant Attorney Calhoun,

This is a formal supplemental request for production of records pursuant to Florida Rule of Criminal Procedure 3.852(g), Chapter 119 of the Florida Statutes and *Brady v. Maryland*, 373 U.S. 83 (1963). This request is for information relating to *State of Florida v. Joseph Edward Jordan* as stated above. It "has long been recognized that the Public Records Act should be 'construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and

limited to their designated purpose.'" *Weeks v. Golden*, 798 So. 2d 848, 850 (Fla. 1st DCA 2001) *quoting City of Riviera Beach v. Barfield*, 642 So.2d 1135, 1136 (Fla. 4th DCA 1994). To the best of our knowledge, prior requests for production of these requested records pertaining to the above listed client have not been made to the Florida Department of Corrections by our agency in this case.

It is requested that within *ninety [90] days* of receipt of this written demand, you *shall* deliver to the **RECORDS REPOSITORY, The Florida State Archives, Attn: CCRC Records Archivist, R.A. Gray Building, M.S. 9-E, 500 South Bronough Street, Tallahassee, Florida 32399-0250** any public records in your possession and shall certify to the best of your knowledge and belief that all public records have been delivered to the records repository or, if no additional public records are found, shall certify that no such public records exist.

Any objections to the request for production, claims of exemptions asserted, or motions for protective orders ***must*** be filed with the trial court, with **the Honorable Chief Judge Terrence R. Perkins**, Seventh Judicial Circuit in and for Volusia County, Criminal Justice Center, 251 North Ridgewood Avenue, Daytona Beach Florida 32114, within *sixty [60] days* of receipt of this written demand for the production of the records requested. Copies of any objections or exemptions asserted are also to be provided to all counsels listed below. Please be aware that failure to file an objection, if required, to this request for production of records shall act as a

waiver of the objection or exemption asserted (F.R.C.P. 3.852).

If there are **no additional records** listed below in your possession or control, please execute the enclosed CERTIFICATE and serve it on all counsels listed below. The records requested in *State of Florida v. Joseph Edward Jordan* are as follows:

> A. Electronic mail, texts, social media statements, media releases, pre-file interviews, and victim advocate interviews by personnel of the Office of the State Attorney for the Seventh Judicial Circuit related to ***State of Florida v. Joseph Edward Jordan*, Case No. 642009CF002872XXXAWS**. This request includes any witness statements in electronic mail, texts, social media statements, pre-file interviews, interviews notes, and victim advocate statements by personnel of other State of Florida agencies that are in the custody of the Office of the State Attorney for the Seventh Judicial Circuit. *See Young v. State*, 739 So. 2d 553 (Fla. 1999) ("We reject the State's argument. First, *we again make plain that the obligation to disclose state attorney notes of witness interviews exists even if such a document is work product or exempt from the public records law*. *Johnson,* 707 So.2d at 335; *Walton v. Dugger*, 634 So.2d 1059 (Fla.1993). Second, we find that the trial court's decision that the state attorney notes of witness interviews were not *Brady* material was error."); *see Cardona v. State*, 826 So. 2d 968 (Fla. 2002) (Court found a *Brady* violation for failure to disclose defendant's criminal investigation reports of state's interviews with a witness (co-defendant)); *see Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So. 2d 633, 640 (Fla.1980) (The physical format of the record is irrelevant; electronic communications, such as e-mail, are covered just like communications on paper); *see* § 119.01(1)&(2)(a), Fla. Stat. (2009) ("[a]utomation of public records must not erode the right of access to those records"); *see Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So.3d 1201, 1207 (Fla. 1st DCA 2009) (observing that "public records law is not limited to paper documents but that it applies, as well, to documents that exist only in digital form"); *see Ingram v. State*, 39 Fla. L. Weekly D412 (Fla. 5th DCA Feb. 21, 2014) *review granted*, 151 So. 3d 1228 (Fla. 2014) (Section 119.071(2)(j) provides that a "public employee" may not "disclose videotaped information that reveals the minor's identity ... to a person who is not assisting in the investigation or prosecution of

the offense or to any person **other than the defendant,** the defendant's attorney, or a person specified in an order entered by the court having jurisdiction of the alleged offense.").

B. All handwritten notes/reports, texts, electronic mail, to and from the Volusia and Broward County Sheriff's Office individual investigators, law enforcement, and personnel in reference to the investigation in your cursotdy in ***State of Florida v. Joseph Edward Jordan*¸ Case No. 642009CF002872XXXAWS.** This includes any references to State witnesses, Sadia Haque, Eddie (Edwin) Yarrow, Marlon Powell, Matthew Powell, Cassandra Castellanos, and Sanya Cordray-Rochlin. *See Young v. State*, 739 So. 2d 553 (Fla. 1999) ("We reject the State's argument. First, *we again make plain that the obligation to disclose state attorney notes of witness interviews exists even if such a document is work product or exempt from the public records law*. *Johnson,* 707 So.2d at 335; *Walton v. Dugger,* 634 So.2d 1059 (Fla.1993). Second, we find that the trial court's decision that the state attorney notes of witness interviews were not *Brady* material was error."); *see Cardona v. State,* 826 So. 2d 968 (Fla. 2002) (Court found a *Brady* violation for failure to disclose defendant's criminal investigation reports of state's interviews with a witness (co-defendant)).

C. All records including but not limited to written/typed communications, texts, and electronic mail related to communications to and from the Office of the State Attorney for the Seventeenth Judicial Circuit, the Volusia/Broward County Sheriff's Office, Florida Department of Corrections, Edgewater Police Department, and any other law enforcement agencies, related to the probation of defendant, **Matthew Powell**, for case number **10001261CF10A** stemming from Broward County. *See Young v. State*, 739 So. 2d 553 (Fla. 1999) ("We reject the State's argument. First, *we again make plain that the obligation to disclose state attorney notes of witness interviews exists even if such a document is work product or exempt from the public records law*. *Johnson,* 707 So.2d at 335; *Walton v. Dugger*, 634 So.2d 1059 (Fla.1993). Second, we find that the trial court's decision that the state attorney notes of witness interviews were not *Brady* material was error."); *see Cardona v. State*, 826 So. 2d 968 (Fla. 2002) (Court found a *Brady* violation for failure to disclose defendant's criminal investigation reports of state's interviews with a witness (co-defendant)); *see Shevin v. Byron, Harless, Schaffer, Reid & Assocs.,*

Inc., 379 So. 2d 633, 640 (Fla.1980) (The physical format of the record is irrelevant; electronic communications, such as e-mail, are covered just like communications on paper); *see* § 119.01(1)&(2)(a), Fla. Stat. (2009) ("[a]utomation of public records must not erode the right of access to those records"); *see Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So.3d 1201, 1207 (Fla. 1st DCA 2009) (observing that "public records law is not limited to paper documents but that it applies, as well, to documents that exist only in digital form"); *see Ingram v. State*, 39 Fla. L. Weekly D412 (Fla. 5th DCA Feb. 21, 2014) *review granted*, 151 So. 3d 1228 (Fla. 2014) (Section 119.071(2)(j) provides that a "public employee" may not "disclose videotaped information that reveals the minor's identity ... to a person who is not assisting in the investigation or prosecution of the offense or to any person **other than the defendant,** the defendant's attorney, or a person specified in an order entered by the court having jurisdiction of the alleged offense."). Matthew Powell was a key prosecution witness in ***State of Florida v. Joseph Edward Jordan*¸ Case No. 642009CF002872XXXAWS**, stemming from Volusia County, Florida. Matthew Powell was on probation for a drug related felony offense, violated in 2013, placed back on community control and probation until 2018. The original arresting agency was Hallandale Police Department.

D. All records including but not limited to written/typed communications, memorandum, texts, and electronic mail related to communications regarding plea negotiations in ***State of Florida v. Joseph Edward Jordan*¸ Case No. 642009CF002872XXXAWS**, stemming from Volusia County, Florida by the Office of State Attorney for the Seventh Judicial Circuit, the victim's family, and law enforcement agencies.

E. All records including but not limited to written/typed communications, memorandum, texts, and electronic mail related to communications regarding plea negotiations or offers for prosecution witness Matthew Powell's testimony in ***State of Florida v. Joseph Edward Jordan*¸ Case No. 642009CF002872XXXAWS**, stemming from Volusia County, to and from the Office of State Attorney for the Seventh Judicial Circuit or any law enforcement agencies involved. Matthew Powell was on probation for case number **10001261CF10A** stemming from Broward County for a drug related felony offense,

violated in 2013, placed back on community control and probation until 2018.

Undersigned counsel asserts that the above related records are relevant to potential colorable claims in the post-conviction proceedings as they are related to the investigation of Ineffective Assistance of Counsel claims in the guilt phase proceedings. The witnesses listed in Section B., were deposed, testified, or were mentioned by other law enforcement officers during the course of the case, the requested information are vital in determining issues of credibility assessments of witnesses, and *Giglio v. United States*, 405 U.S. 150 (1972), and *Brady v. Maryland*, 373 U.S. 83 (1963) with regard to discovery. These also lend to ineffective assistance of trial counsel claims. Undersigned counsel asserts that the above related records are relevant to potential colorable claims in the post-conviction proceedings as the records of probationer Matthew Powell are related to claims regarding potential deals, request for favorable testimony, or offers in return for his testimony at trial which the defense is entitled to investigate in accordance with Joseph Jordan's due process rights and *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed. 2d 104 (1972). Matthew Powell was reinstated after his violation for serious felony drug charges of Attempted Trafficking of Hydrocodone, Possession of Carisoprodol, Possession of Proxyohene, and Trafficking of Oxycodone. It is also related to Ineffective Assistance of Counsel claims pursuant to *Strickland v. Washington*, 466

U.S. 668, 104 S.Ct. 2052 (1984) and *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) for failures to competently impeach witness Matthew Powell. There are conversations during the jail phone calls that indicate that there was a plea offer in this case.

Undersigned counsel further asserts that based on the records received to date, the above descriptions are pursuant to a good faith effort to specifically describe what is being requested, to alleviate any burden on the agency. Undersigned counsel further asserts that based on the information and records received to date from the records repository that a timely and diligent search of the records repository has been made. We also request that you conduct an *exhaustive search* of all records.

Respectfully submitted,

s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

s/ Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar Number 13837
Email: perinetti@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

s/ Donna Ellen Venable
Donna Ellen Venable
Florida Bar Number 100816

Email: venable@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

Law Office of the Capital Collateral
Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Telephone (813) 558-1600

COUNSELS FOR NOTIFICATION:

The list of counsels for notification is as follows: **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, Stacey.kircher@myfloridalegal.com; CapApp@myfloridalegal.com; and **Raheela Ahmed, Maria Christine Perinetti, and Donna Ellen Venable**, Assistant CCRCs, Law Office of the Capital Collateral Regional Counsel-Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637-0907, ahmed@ccmr.state.fl.us; perinetti@ccmr.state.fl.us; venable@ccmr.state.fl.us; support@ccmr.state.fl.us.

Thank you in advance for your assistance and cooperation.

Yours Sincerely,

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

FLORIDA RECORDS REQUEST DATED JUNE 20, 2016. CERTIFICATE

The undersigned does hereby certify that a diligent search has been made for the records requested in the records request dated June 20, 2016, pertaining to this case, and that there are no records that have been requested that are in my possession or control.

Signed,

_____
[NAME]

_____
[AGENCY NAME]

_____
[DATE]

COPIES TO BE FURNISHED TO:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Honorable Terrence R. Perkins, Chief Judge,
Seventh Judicial Circuit Courts,
Division 41,
251 North Ridgewood Avenue, Room 284,
Daytona Beach, Florida 32114

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
Law Office of the Capital Collateral Regional Counsel-Middle Region
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Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
Daytona Beach, Florida 32118.
Stacey.kircher@myfloridalegal.com;
CapApp@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing DEFENDANT'S POSTPRODUCTION REQUEST FOR ADDITIONAL PUBLIC RECORDS has been served by electronic mail to the above-named addressee at calhounr@sao7.org on this 20th day of June, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has already been served via the Florida Courts E-filing Portal (Notice of Filing) to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, on this 20th day of June 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and to **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 10th day of June, 2016.

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC

Law Office of the Capital Collateral Regional Counsel - Middle Region
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Secondary Email: support@ccmr.state.fl.us

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS

June 20, 2016

Janine D. Robinson, Esquire
Assistant General Counsel
Florida Department of Law Enforcement Office of the General Counsel
2331 Phillips Road
Tallahassee, Florida 32308

RE: DEMAND FOR PUBLIC RECORDS PERTAINING TO THE ABOVE-CAPTIONED CAPITAL CASE

Dear Attorney Robinson:

This is a formal written demand for production of additional public records pursuant to Florida Rule of Criminal Procedure 3.852(g) and Chapter 119 of the Florida Statutes in the matter referenced above.

This demand relates to records pertaining to lethal injection. Please note that a separate Demand for Additional Public Records pertaining to matters not related to lethal injection is being filed simultaneously with this demand.

Pursuant to Florida Rule of Criminal Procedure 3.852(g)(2), within 90 days of your receipt of this written demand, your agency shall:

1. Deliver to the records repository any additional public records in the agency's possession, and
2. Certify to the best of the agency's knowledge and belief that all additional public records have

been delivered to the records repository; or

3. If no additional public records are found, recertify that the public records previously delivered are complete.

Pursuant to Florida Rule of Criminal Procedure 3.852(g)(3), if your agency has an objection to this written demand, it must file any objection with the trial court.

If there are no records listed below in your possession or control, you may sign the enclosed certificate and serve it on all counsel listed below.

The records sought are as follows:

Records Pertaining to Lethal Injection.

(1) Public records concerning the review process which led to the promulgation of the Florida Department of Corrections' September 9, 2013 lethal injection procedures, for example, computer printouts or copies of research or literature reviewed, emails, faxes, letters, minutes or notes of meetings, and telephone call records or notes from July 1, 2011 through the present. This demand is intended to include public records of any communications with the Offices of the Attorney General or Governor, Department of Corrections, and governmental agencies of other jurisdictions such as other state departments of corrections or departments of law enforcement.

(2) Public records relating to any research or experiments done by or on behalf of the Florida Department of Law Enforcement with respect to the September 9, 2013 lethal injection protocol from July 1, 2011 to the present.

(3) Public records relating to any consultation with experts (medical or otherwise) with respect to midazolam hydrochloride, for example, faxes, letters, minutes or notes of meetings, telephone call records or notes, and emails from July 1, 2011 to the present. This demand is intended to include internal communication with experts employed by or contracted on behalf of the Department of Law Enforcement regarding midazolam hydrochloride.

(4) Correspondence from July 1, 2011 to the present with any federal agency, including the Drug Enforcement Administration (DEA), the Food and Drug Administration (FDA), the Federal Bureau of Prisons (BOP), and the Department of Justice (DOJ), relating to Florida's execution procedures or the drugs used for lethal injection. This demand is intended to include application or registration for permits or licenses that are required by any federal agency in connection with the purchase, storage, use, research, and disposal of sodium thiopental, pentobarbital, midazolam hydrochloride, vecuronium bromide, rocuronium bromide, pancuronium bromide, potassium chloride, potassium acetate, and

hydromorphone.

(5) Correspondence from July 1, 2011 to the present with any public agency, including governmental agencies of other jurisdictions, relating to the acquisition of drugs used for lethal injection. This demand is intended to include correspondence concerning sodium thiopental, pentobarbital, midazolam hydrochloride, vecuronium bromide, rocuronium bromide, pancuronium bromide, potassium chloride, potassium acetate, and hydromorphone.

(6) Package inserts, manufacturer instructions, date of manufacture information, and expiration date information for any drugs used for lethal injection which are currently in the custody of the Department of Law Enforcement. This demand is intended to include information concerning any sodium thiopental, pentobarbital, midazolam hydrochloride, vecuronium bromide, rocuronium bromide, pancuronium bromide, potassium chloride, potassium acetate, and hydromorphone currently possessed by the Department of Law Enforcement.

(7) Public records, including logs or record books, from July 1, 2011 to the present regarding the purchase, storage, maintenance, use, distribution, disposal, and expiration dates of drugs used for lethal injection. This demand is intended to include records regarding sodium thiopental, pentobarbital, midazolam hydrochloride, vecuronium bromide, rocuronium bromide, pancuronium bromide, potassium chloride, potassium acetate, and hydromorphone.

(8) Public records, including the required logs, notes, memoranda, letters, emails, facsimiles, photographs, and videos relating to all executions carried out since December 13, 2006, not previously provided to the repository. This demand is intended to include records pertaining to the executions of Mark Dean Schwab, Richard Henyard, Wayne Tomkins, John R. Marek, Martin Grossman, Manuel Valle, Oba Chandler, Robert Waterhouse, David Alan Gore, Manuel Pardo, Jr., Larry E. Mann, Elmer Carroll, Willam Van Poyck, John E. Ferguson, Marshall Gore, William Happ, Darious Kimbrough, Askari Muhammad (f.k.a. Thomas Knight), Juan Carlos Chavez, Paul Howell, Robert Henry, Robert Hendrix, John Henry, Eddie Davis, Chadwick Banks, Johnny Kormondy, Jerry W. Correll, and Oscar Ray Bolin, Jr. This demand is not intended to include the FDLE logs previously provided regarding William Happ, Darious Kimbrough, Askari Muhammad, Juan Carlos Chavez, Paul Howell, and Robert Henry previously provided in *Correll v. State*, Ninth Judicial Circuit Case No. 85-CF-3550, Florida Supreme Court Case No. SC15-147.

(9) Public records relating to execution training exercises, including logs, checklists, sign-in sheets, photographs, and videos from all executions carried out since December 13, 2006. This demand is intended to include records pertaining to the executions of Mark Dean Schwab, Richard Henyard, Wayne Tomkins, John R. Marek, Martin Grossman, Manuel Valle, Oba Chandler, Robert Waterhouse, David Alan Gore, Manuel Pardo, Jr., Larry E. Mann, Elmer Carroll, Willam Van Poyck, John E. Ferguson, Marshall Gore, William Happ, Darious Kimbrough, Askari Muhammad (f.k.a. Thomas Knight), Juan Carlos Chavez, Paul Howell, Robert Henry, Robert Hendrix, John Henry, Eddie Davis, Chadwick Banks,

Johnny Kormondy, Jerry W. Correll, and Oscar Ray Bolin, Jr.

(10) Photographs and videos of the execution chamber and anteroom taken from December 13, 2006 to the present, including close-up photographs of equipment and apparatuses, tubing, and connections.

(11) Public records related to the training and experience of all individuals directly involved with the executions of Mark Dean Schwab, Richard Henyard, Wayne Tomkins, John R. Marek, Martin Grossman, Manuel Valle, Oba Chandler, Robert Waterhouse, David Alan Gore, Manuel Pardo, Jr., Larry E. Mann, Elmer Carroll, Willam Van Poyck, John E. Ferguson, Marshall Gore, William Happ, Darious Kimbrough, Askari Muhammad (f.k.a. Thomas Knight), Juan Carlos Chavez, Paul Howell, Robert Henry, Robert Hendrix, John Henry, Eddie Davis, Chadwick Banks, Johnny Kormondy, Jerry W. Correll, and Oscar Ray Bolin, Jr.

It is undersigned counsel's understanding that:

a. The September 9, 2013 lethal injection procedures were signed into effect by Department of Corrections Secretary Michael W. Crews. The procedures call for the drugs midazolam hydrochloride, vecuronium bromide, and potassium chloride.

b. Previously, the Department of Corrections used a three-drug protocol calling for pentobarbital, vecuronium bromide, and potassium chloride. *See, e.g., Pardo v. State*, 18 So. 3d 558 (Fla. 2012). The Department of Corrections began using pentobarbital in 2011, after sodium thiopental became unavailable. *Valle v. State*, 70 So. 3d 530, 536 (Fla. 2011). Previously, the Department carried out executions using a three-drug protocol calling for sodium thiopental, vecuronium bromide, and potassium chloride. *See, e.g., Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007).

c. On July 1, 2011, Lundbeck, the sole United States manufacturer of pentobarbital, announced that it would implement a shipping program that would deny distribution to prisons in the United States currently carrying out lethal injections. Lundbeck, *Lundbeck's position regarding misuse of Nembutal CII Sodium Solution (pentobarbital sodium injection, USP) in the execution of prisoners, available at* http://www.lundbeck.com/upload/us/files/pdf/Products/NembutalStmtwithDistSystem_US_website.pdf.

d. To date, in 2016, 12 executions have been carried out using pentobarbital (in Texas, Georgia, and Missouri). Death Penalty Information Center, *Execution List 2016, available at* http://www.deathpenaltyinfo.org/execution-list-2016. In 2015, 25 executions were carried out using pentobarbital (in Texas, Georgia, Missouri, and Virginia). Death Penalty Information Center, *Execution List 2015, available at* http://www.deathpenaltyinfo.org/execution-list-2015 These executions were carried out using pentobarbital despite the restricted distribution resulting from Lundbeck's position, described above.

e. Other states have used the additional drugs named above (rocuronium bromide, pancuronium bromide, potassium acetate, and hydromorphone) to carry out executions.

f. The creation of lethal injection procedures is an administrative act exempt from the Florida Administrative Procedure Act. *Power v. State*, 992 So. 2d 218, 220 (Fla. 2008); *Diaz v. State*, 945 So. 2d 1136, 1143-44 (Fla. 2006). In the view of the Florida Supreme Court, judicial review and oversight of lethal injection procedures is preferable to administrative proceedings pursuant to Chapter 120, Florida Statutes; Florida Rule of Criminal Procedure 3.851 is an appropriate vehicle for mounting a challenge. *Diaz*, 945 So. 2d at 1143-44. The exemption of lethal injection procedures from the Administrative Procedure Act should not give the Department of Corrections "unfettered discretion" as to lethal injection procedures. *Id.*

g. Lethal injection protocols calling for midazolam hydrochloride as the agent used to render and maintain unconsciousness have been the subject of much controversy, having been implicated in botched executions in Arizona (Joseph Wood), Oklahoma (Clayton Lockett and Charles Warner), and Ohio (Dennis McGuire). Due to the risks involved with use of midazolam hydrochloride, most death penalty states do not use it. *See* Manny Fernandez, *Delays as Death-Penalty States Scramble for Execution Drugs*, THE NEW YORK TIMES, Oct. 8, 2015, *available at* http://www.nytimes.com/2015/10/09/us/death-penalty-lethal-injection.html. In fact, since the United States Supreme Court's June 29, 2015 decision in *Glossip v. Gross*, 135 S. Ct. 2726, 192 L.Ed.2d 761 (2015), holding that lower courts did not err in finding the petitioners had not met their burden of proof in challenging Oklahoma's three-drug protocol which included midazolam hydrochloride, only Florida and Alabama have carried out executions using the drug. *See* Death Penalty Information Center, *Execution List 2015, available at* http://www.deathpenaltyinfo.org/execution-list-2015; Death Penalty Information Center, *Execution List 2016, available at* http://www.deathpenaltyinfo.org/execution-list-2016.

h. In order to challenge the current lethal injection protocol as unconstitutional under Florida Rule of Criminal Procedure 3.851, undersigned counsel will be required to allege that:

   i. the protocol is "very likely to result in needless suffering" and
   ii. "there is an alternative that is readily available and significantly reduces the risk of pain."

Correll v. State, 184 So. 3d, 478, 489 (Fla. 2015) (citing *Glossip*, 135 S. Ct. at 2737-38)).

i. The Department of Law Enforcement assists the Department of Corrections in executions by lethal injection in the state of Florida.

Undersigned counsel asserts that:

1. The exemption of lethal injection procedures from the Florida Administrative Procedure Act, combined with restricted access to public records under Rule of Criminal Procedure

3.852 (the sole means by which a death-sentenced prisoner may access public records for purposes of Rule 3.851 claims), means that the development, implementation, and review of lethal injection procedures is left to the exclusive discretion of the State agencies charged with carrying out executions. Judicial review and oversight is pre-empted by the inability of counsel for the accused to access the information required to challenge protocols suspected to be unconstitutional.

a. Inadequate oversight concerning the development and implementation of lethal injection procedures has been an issue in the past. On December 15, 2006, following the botched execution of Angel Diaz, Governor Jeb Bush issued Executive Order 06-260 to create the Governor's commission on Administration of Lethal Injection. The Governor's Commission on Administration of Lethal Injection, *Final Report with Findings and Recommendations* (March 1, 2007), *available at* http://www.deathpenaltyinfo.org/scommissiononadministrationoflethalinjectionfinalreport.pdf. The Commission's report, submitted to the Governor on March 1, 2007, reported unresolved conflicts in the following areas:

   i. Observations of the inmate during the execution process, including movement of the body, facial movements and verbal comments

   ii. Conflicting testimony of the expert medical witnesses regarding the impact of drugs, absorption of drugs, etc.

   Id. at 8.

   The Commission recommended, among other things, that the Department of Corrections "on an ongoing basis explore other more recently developed chemicals for use in lethal injection execution with specific consideration and evaluation of the need of a paralytic drug like pancuronium bromide in an effort to make the lethal injection execution procedure less problematic." *Id.* at 13.

b. Since the Governor's Commission made its recommendations, the development and implementation of lethal injection procedures has been unchecked due to an inability, on the part of counsel for condemned inmates, to access public records related to the process. Without access to records, counsel cannot mount a claim, and therefore judicial oversight is impossible.

2. Before states began using midazolam hydrochloride, lethal injection was carried out using barbiturate drugs to induce unconsciousness. This was consistent with the original recommendations of Dr. Stanley Deutsch, an anesthesiologist consulted when Oklahoma became the first state to adopt lethal injection as an execution method. *See id.* at 6 (citing Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 Ohio St. L.J. 63, 95-97 (2002) and Rebecca Brannan, *Sentence and Punishment: Change Method of Executing Individuals Convicted of Capital Crimes from Electrocution to Lethal Injection*, 17 Ga. St. U. L. Rev. 116, 121 (2000). Undersigned counsel does not concede that any

method of execution is humane; however, the state's departure from the expert-recommended and routinely used barbiturate drug class in choosing midazolam hydrochloride as the first drug in the current protocol is troubling.

3. The harm from use of midazolam hydrochloride in lethal injections is insidious. Because the second drug in the protocol, vecuronium bromide, is a paralytic, it is impossible to assess whether midazolam hydrochloride is able to maintain unconsciousness throughout the process. The only context in which midazolam hydrochloride is implemented as the sole drug to render and maintain unconsciousness in a proceeding involving the prolonged inability to breathe and the level of pain involved with a lethal dose of potassium chloride is the lethal injection context itself. That pain has been described as causing "burning, searing pain." *Glossip*, 135 S. Ct. at 2780-81 (Sotomayor, J., dissenting).

4. It is imperative that undersigned counsel have access to the full scope of the records demanded so that judicial oversight is carried out. These records are necessary to prove that the current protocol is "very likely to result in needless suffering" and that "there is an alternative that is readily available and significantly reduces the risk of pain."

    a. The records sought under (1) – (3) above are relevant to prove that the current protocol is "very likely to result in needless suffering." *See Correll*, 184 So. 3d at 489.

        i. The only way determine the adequacy of a drug intended to render and maintain unconsciousness in this context, when the individual undergoing lethal injection is paralyzed partway through and therefore unable to show blatant signs of suffering, is through expert advice and extrapolation from experimental data. Therefore, the expert advice obtained and research conducted is necessary for purposes of proving that such advice and research was incomplete or incorrect.

        ii. Undersigned counsel has reason to believe that such advice and research was incomplete or incorrect. *See* Brief of Amici Curiae Sixteen Professors of Pharmacology in Support of Neither Party, *Glossip v. Gross*, 135 S.Ct. 2726, 192 L.Ed.2d 761 (2015). Undersigned counsel would submit any records obtained for expert review in developing this claim.

        iii. The July 1, 2011 date is relevant as the date that Lundbeck's announcement foretold restricted access to pentobarbital.

    b. The records sought under (4) – (7) above are relevant to prove that an alternative is readily available. *See id.* It is impossible for undersigned counsel to know what drugs the Department of Corrections is able to access for purposes of lethal injection without these records. A simple allegation that pentobarbital is available to other states or could be accessed through sterile compounding has not been found to be sufficient. *Correll*, 184 So. 3d at 490.

c. The records sought under (8) – (11) above are relevant to prove both that the current protocol is "very likely to result in needless suffering" and that the alternative identified will significantly reduce the risk of pain. The December 13, 2006 date is relevant as the date of Angel Diaz' execution. Executions resumed on July 1, 2008, after the Governor's Commission submitted its report. Observations from executions carried out under the previous protocols and the current protocol are necessary in order to show that midazolam hydrochloride is inferior to drugs previously used to render and maintain unconsciousness and therefore its use results in needless suffering. To the extent that undersigned counsel is able to prove that previously-used drugs are currently available to the Department of Corrections, observations from executions using all protocols are necessary to show that the identified alternative will significantly reduce the risk of pain when compared to midazolam hydrochloride. Records documenting the execution team's training and the set-up within the execution chamber and anteroom are necessary to account for variability in the conditions when making comparisons.

Undersigned counsel represents that:

a. Undersigned counsel has made a timely and diligent search of the records repository for records submitted in this case.

b. The records now sought are not at the records repository.

c. The records now sought are relevant to the subject matter of a proceeding under Florida Rule of Criminal Procedure 3.851 or are reasonably calculated to lead to the discovery of admissible evidence.

d. This demand is not intended to be overly broad or unduly burdensome.

The list of counsel for notification is as follows:

1. Stacey Elaine Johns Kircher
   Assistant Attorney General
   444 Seabreeze Blvd., Fifth Floor
   Daytona Beach, FL 32118-3951

2. Rosemary Calhoun
   Assistant State Attorney
   Office of the State Attorney, Seventh Judicial Circuit
   251 N. Ridgewood Ave.
   Daytona Beach, FL 32114

3. Raheela Ahmed, Maria Christine Perinetti, and Donna Ellen Venable

Assistant CCRCs
The Law Office of the Capital Collateral Regional Counsel - Middle Region
12973 North Telecom Parkway
Temple Terrace, Florida 33637-0907

Thank you in advance for your assistance and cooperation.

Sincerely,

/s/ Raheela Ahmed
Raheela Ahmed
Assistant CCRC
Florida Bar Number 0713457
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/Maria Christine Perinetti
Maria Christine Perinetti
Assistant CCRC
Florida Bar Number 0013837
Email: perinetti@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/ Donna Ellen Venable
Donna Ellen Venable
Assistant CCRC
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The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601 or (813) 558-1602

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

FLORIDA RECORDS REQUEST DATED JUNE 20, 2016. CERTIFICATE

The undersigned does hereby certify that a diligent search has been made for the records requested in the records request dated June 20, 2016, pertaining to this case, and that there are no records that have been requested that are in my possession or control.

Signed,

_____
[NAME]

_____
[AGENCY NAME]

_____
[DATE]

COPIES TO BE FURNISHED TO:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Honorable Terrence R. Perkins, Chief Judge,
Seventh Judicial Circuit Courts,
Division 41,
251 North Ridgewood Avenue, Room 284,
Daytona Beach, Florida 32114

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
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ahmed@ccmr.state.fl.us;
perinetti@ccmr.state.fl.us;
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Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney, Seventh Judicial Circuit,
251 North Ridgewood Avenue,
Daytona Beach Florida 32114.
calhounr@sao7.org

Stacey Elaine Johns Kircher,
Assistant Attorney General,
Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
Daytona Beach, Florida 32118.
Stacey.kircher@myfloridalegal.com;
CapApp@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing DEFENDANT'S POSTPRODUCTION REQUEST FOR ADDITIONAL PUBLIC RECORDS has been served by electronic mail to the above-named addressee at JanineRobinson@fdle.state.fl.us, on this 20th day of June, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing (Notice of Filing) has already been served via the Florida Courts E-filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, and to Rosemary Calhoun, Assistant State Attorney, Office of the State Attorney for the Seventh Judicial Circuit on this 20th day of June, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and to **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 20th day of June, 2016.

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC

Law Office of the Capital Collateral Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637
Tel: (813) 558-1600
Fax: (813) 558-1601
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. **CASE NO: 642009CF002872XXXAWS**
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS

June 20, 2016.

Teri Hanans, Staff Assistant II
Volusia County Medical Examiner's Office
1360 Indian Lakes Road
Daytona Beach, Florida 32124
Volusia County Medical Examiner's Office

RE: DEMAND FOR PUBLIC RECORDS PERTAINING TO THE ABOVE-CAPTIONED CAPITAL CASE.

Dear Teri Hanans,

This is a formal supplemental request for production of records pursuant to Florida Rule of Criminal Procedure 3.852(g), Chapter 119 of the Florida Statutes and *Brady v. Maryland*, 373 U.S. 83 (1963). This request is for information relating to *State of Florida v. Joseph Edward Jordan* as stated above. It "has long been recognized that the Public Records Act should be 'construed liberally in favor of

openness, and all exemptions from disclosure are to be construed narrowly and limited to their designated purpose.'" *Weeks v. Golden*, 798 So. 2d 848, 850 (Fla. 1st DCA 2001) *quoting City of Riviera Beach v. Barfield*, 642 So.2d 1135, 1136 (Fla. 4th DCA 1994).

To the best of our knowledge, prior requests for production of these requested records pertaining to the above listed client have not been made to the Volusia County Medical Examiner's Office by our agency in this case.

It is requested that within *ninety [90] days* of receipt of this written demand, you *shall* deliver to the **RECORDS REPOSITORY, The Florida State Archives, Attn: CCRC Records Archivist, R.A. Gray Building, M.S. 9-E, 500 South Bronough Street, Tallahassee, Florida 32399-0250** any public records in your possession and shall certify to the best of your knowledge and belief that all public records have been delivered to the records repository or, if no additional public records are found, shall certify that no such public records exist.

Any objections to the request for production, claims of exemptions asserted, or motions for protective orders ***must*** be filed with the trial court, with **the Honorable Chief Judge Terrence R. Perkins**, Seventh Judicial Circuit in and for Volusia County, Criminal Justice Center, 251 North Ridgewood Avenue, Daytona Beach Florida 32114, within *sixty [60] days* of receipt of this written demand for the production of the records requested. Copies of any objections or exemptions asserted

are also to be provided to all counsels listed below. Please be aware that failure to file an objection, if required, to this request for production of records shall act as a waiver of the objection or exemption asserted (F.R.C.P. 3.852).

If there are **no additional records** listed below in your possession or control, please execute the enclosed CERTIFICATE and serve it on all counsels listed below. The records requested in *State of Florida v. Joseph Edward Jordan* are as follows:

1. All medical records received by the Volusia County Medical Examiner's Office in ME Case Number 09-07-364 (Keith Curtis Cope) pertaining to the decedent, Keith Curtis Cope. The Volusia County Medical Examiner's Office requested Mr. Cope's hospital records from The Halifax Medical Center on or about July 14, 2009, and Marie A. Hermann, M.D. noted in the Classification of Pending case that she reviewed the hospital records of Keith Curtis Cope.

Undersigned counsel asserts that the above related records are relevant to potential colorable claims in the post-conviction proceedings as they are related to the investigation of Ineffective Assistance of Counsel claims as related to the cause and manner of death of Keith Curtis Cope, as well as the heinous, atrocious, and cruel aggravating factor, which the trial court afforded great weight. It is necessary for an independent expert to review these records to determine whether a claim exists.

Undersigned counsel further asserts that based on the records received to date, the above descriptions are pursuant to a good faith effort to specifically describe what is being requested, to alleviate any burden on the agency. The trial court has entered an Order after an *in camera* review of those confidential/exempt records, but those records have yet to be released to collateral counsel.

Undersigned counsel further asserts that based on the information and records received to date from the records repository that a timely and diligent search of the records repository has been made. We also request that you conduct an *exhaustive search* of all records.

Respectfully submitted,

s/ Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar Number 0013837
Email: perinetti@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

s/ Donna Ellen Venable
Donna Ellen Venable
Florida Bar Number 100816
Email: venable@ccmr.state.fl.us
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Law Office of the Capital Collateral
Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Telephone (813) 558-1600

COUNSELS FOR NOTIFICATION:

The list of counsels for notification is as follows: **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach Florida 32114, calhounr@sao7.org; **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, Stacey.kircher@myfloridalegal.com; CapApp@myfloridalegal.com; and **Raheela Ahmed, Maria Christine Perinetti, and Donna Ellen Venable**, Assistant CCRCs, Law Office of the Capital Collateral Regional Counsel-Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637-0907, ahmed@ccmr.state.fl.us; perinetti@ccmr.state.fl.us; venable@ccmr.state.fl.us; support@ccmr.state.fl.us.

Thank you in advance for your assistance and cooperation.

Yours Sincerely,

s/ Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar Number 0013837

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. **CASE NO: 642009CF002872XXXAWS**
SUPREME COURT NO: SC13-2091

POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

FLORIDA RECORDS REQUEST DATED JUNE 20, 2016.
CERTIFICATE

The undersigned does hereby certify that a diligent search has been made for the records requested in the records request dated June 20, 2016, pertaining to this case, and that there are no records that have been requested that are in my possession or control.

Signed,

_____
[NAME]

_____
[AGENCY NAME]

_____
[DATE]

COPIES TO BE FURNISHED TO:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Honorable Terrence R. Perkins, Chief Judge,
Seventh Judicial Circuit Courts,
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Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney, Seventh Judicial Circuit,
251 North Ridgewood Avenue,
Daytona Beach Florida 32114.
calhounr@sao7.org

Stacey Elaine Johns Kircher,
Assistant Attorney General,
Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
Daytona Beach, Florida 32118.
Stacey.kircher@myfloridalegal.com;
CapApp@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing DEFENDANT'S POSTPRODUCTION REQUEST FOR ADDITIONAL PUBLIC RECORDS has been served by UPS to the above-named addressee on this 20th day of June, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has already been served via the Florida Courts E-filing Portal (Notice of Filing) to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney for the Seventh Judicial Circuit on this 20th day of June 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and to **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 20th day of June, 2016.

/s/ Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar Number 0013737
Assistant CCRC

Law Office of the Capital Collateral Regional Counsel - Middle Region
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**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS

June 20, 2016

William F. Hamilton, M.D.
Office of the Medical Examiner, District 8
606 SW 3rd Ave.
Gainesville, Florida 32601

RE: DEMAND FOR PUBLIC RECORDS PERTAINING TO THE ABOVE-CAPTIONED CAPITAL CASE

Dear Legal Counsel:

This is a formal written demand for production of additional public records pursuant to Florida Rule of Criminal Procedure 3.852(g) and Chapter 119 of the Florida Statutes in the matter referenced above.

Pursuant to Florida Rule of Criminal Procedure 3.852(g)(2), within 90 days of your receipt of this written demand, your office shall:

1. Deliver to the records repository, located at **The Florida State Archives, Attn: CCRC Records Archivist, R.A. Gray Building, M.S. 9-E, 500 South Bronough Street, Tallahassee, Florida 32399-0250**, any responsive public records in the office's possession, and
2. Certify to the best of the office's knowledge and belief that all responsive public records have been delivered to the records repository; or

3. If no responsive public records are found, recertify that any public records previously delivered are complete.

Pursuant to Florida Rule of Criminal Procedure 3.852(g)(3), if your agency has an objection to this written demand, it must file any objection with the trial court.

If there are no records listed below in your possession or control, you may sign the enclosed certificate and serve it on all counsel listed below.

The records sought are as follows:

Records Pertaining to Lethal Injection.

(1) Public records relating to any research or experiments done by or on behalf of the Office of the Medical Examiner with respect to the September 9, 2013 lethal injection protocol from July 1, 2011 to the present.

(2) Public records relating to any consultation with experts (medical or otherwise) with respect to midazolam hydrochloride, for example, faxes, letters, minutes or notes of meetings, telephone call records or notes, and emails from July 1, 2011 to the present. This demand is intended to include internal communication with experts employed by or contracted on behalf of the Office of the Medical Examiner regarding midazolam hydrochloride.

(3) Public records, including the required logs, notes, memoranda, letters, emails, facsimiles, photographs, and videos relating to all executions carried out since December 13, 2006 in the office's possession that have not previously provided to the repository. This demand is intended to include records pertaining to the executions of Mark Dean Schwab, Richard Henyard, Wayne Tomkins, John R. Marek, Martin Grossman, Manuel Valle, Oba Chandler, Robert Waterhouse, David Alan Gore, Manuel Pardo, Jr., Larry E. Mann, Elmer Carroll, Willam Van Poyck, John E. Ferguson, Marshall Gore, William Happ, Darious Kimbrough, Askari Muhammad (f.k.a. Thomas Knight), Juan Carlos Chavez, Paul Howell, Robert Henry, Robert Hendrix, John Henry, Eddie Davis, Chadwick Banks, Johnny Kormondy, Jerry W. Correll, and Oscar Ray Bolin, Jr. This demand is not intended to include the FDLE logs previously provided regarding William Happ, Darious Kimbrough, Askari Muhammad, Juan Carlos Chavez, Paul Howell, and Robert Henry previously provided in *Correll v. State*, Ninth Judicial Circuit Case No. 85-CF-3550, Florida Supreme Court Case No. SC15-147.

(4) Photographs and videos of the execution chamber and anteroom in the office's possession, taken from December 13, 2006 to the present, including close-up photographs of equipment and apparatuses, tubing, and connections.

(5) Public records in the office's possession related to the training and experience of all individuals directly involved with the executions of Mark Dean Schwab, Richard Henyard, Wayne Tomkins, John R. Marek, Martin Grossman, Manuel Valle, Oba Chandler, Robert Waterhouse, David Alan Gore, Manuel Pardo, Jr., Larry E. Mann, Elmer Carroll, Willam Van Poyck, John E. Ferguson, Marshall Gore, William Happ, Darious Kimbrough, Askari Muhammad (f.k.a. Thomas Knight), Juan Carlos Chavez, Paul Howell, Robert Henry, Robert Hendrix, John Henry, Eddie Davis, Chadwick Banks, Johnny Kormondy, Jerry W. Correll, and Oscar Ray Bolin, Jr.

(6) Public records concerning post-mortem examinations or autopsies performed on all inmates executed after December 13, 2006. This demand is intended to include any photographs or videos produced during such examinations. It is intended to include records pertaining to the executions of Mark Dean Schwab, Richard Henyard, Wayne Tomkins, John R. Marek, Martin Grossman, Manuel Valle, Oba Chandler, Robert Waterhouse, David Alan Gore, Manuel Pardo, Jr., Larry E. Mann, Elmer Carroll, Willam Van Poyck, John E. Ferguson, Marshall Gore, William Happ, Darious Kimbrough, Askari Muhammad (f.k.a. Thomas Knight), Juan Carlos Chavez, Paul Howell, Robert Henry, Robert Hendrix, John Henry, Eddie Davis, Chadwick Banks, Johnny Kormondy, Jerry W. Correll, and Oscar Ray Bolin, Jr.

(7) Public records relating to the Office of the Medical Examiner's autopsy protocols from December 13, 2006 to the present.

It is undersigned counsel's understanding that:

a. The September 9, 2013 lethal injection procedures were signed into effect by Department of Corrections Secretary Michael W. Crews, and certified to the Executive Office of the Governor. The procedures call for the drugs midazolam hydrochloride, vecuronium bromide, and potassium chloride.

b. Previously, the Department of Corrections used a three-drug protocol calling for pentobarbital, vecuronium bromide, and potassium chloride. *See, e.g., Pardo v. State*, 18 So. 3d 558 (Fla. 2012). The Department of Corrections began using pentobarbital in 2011, after sodium thiopental became unavailable. *Valle v. State*, 70 So. 3d 530, 536 (Fla. 2011). Previously, the Department carried out executions using a three-drug protocol calling for sodium thiopental, vecuronium bromide, and potassium chloride. *See, e.g., Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007).

c. On July 1, 2011, Lundbeck, the sole United States manufacturer of pentobarbital, announced that it would implement a shipping program that would deny distribution to prisons in the United States currently carrying out lethal injections. Lundbeck, *Lundbeck's position regarding misuse of Nembutal CII Sodium Solution (pentobarbital sodium injection, USP) in the execution of prisoners, available at* http://www.lundbeck.com/upload/us/files/pdf/Products/NembutalStmtwithDistSystem_US_website.pdf.

d. To date, in 2016, 12 executions have been carried out using pentobarbital (in Texas, Georgia, and Missouri). Death Penalty Information Center, *Execution List 2016, available at* http://www.deathpenaltyinfo.org/execution-list-2016. In 2015, 25 executions were carried out using pentobarbital (in Texas, Georgia, Missouri, and Virginia). Death Penalty Information Center, *Execution List 2015, available at* http://www.deathpenaltyinfo.org/execution-list-2015 These executions were carried out using pentobarbital despite the restricted distribution resulting from Lundbeck's position, described above.

e. Other states have used the additional drugs named above (rocuronium bromide, pancuronium bromide, potassium acetate, and hydromorphone) to carry out executions.

f. The creation of lethal injection procedures is an administrative act exempt from the Florida Administrative Procedure Act. *Power v. State*, 992 So. 2d 218, 220 (Fla. 2008); *Diaz v. State*, 945 So. 2d 1136, 1143-44 (Fla. 2006). In the view of the Florida Supreme Court, judicial review and oversight of lethal injection procedures is preferable to administrative proceedings pursuant to Chapter 120, Florida Statutes; Florida Rule of Criminal Procedure 3.851 is an appropriate vehicle for mounting a challenge. *Diaz*, 945 So. 2d at 1143-44. The exemption of lethal injection procedures from the Administrative Procedure Act should not give the Department of Corrections "unfettered discretion" as to lethal injection procedures. *Id.*

g. Lethal injection protocols calling for midazolam hydrochloride as the agent used to render and maintain unconsciousness have been the subject of much controversy, having been implicated in botched executions in Arizona (Joseph Wood), Oklahoma (Clayton Lockett and Charles Warner), and Ohio (Dennis McGuire). Due to the risks involved with use of midazolam hydrochloride, most death penalty states do not use it. *See* Manny Fernandez, *Delays as Death-Penalty States Scramble for Execution Drugs*, THE NEW YORK TIMES, Oct. 8, 2015, *available at* http://www.nytimes.com/2015/10/09/us/death-penalty-lethal-injection.html. In fact, since the United States Supreme Court's June 29, 2015 decision in *Glossip v. Gross*, 135 S. Ct. 2726, 192 L.Ed.2d 761 (2015), holding that lower courts did not err in finding the petitioners had not met their burden of proof in challenging Oklahoma's three-drug protocol which included midazolam hydrochloride, only Florida and Alabama have carried out executions using the drug. *See* Death Penalty Information Center, *Execution List 2015, available at* http://www.deathpenaltyinfo.org/execution-list-2015; Death Penalty Information Center, *Execution List 2016, available at* http://www.deathpenaltyinfo.org/execution-list-2016.

h. In order to challenge the current lethal injection protocol as unconstitutional under Florida Rule of Criminal Procedure 3.851, undersigned counsel will be required to allege that:

   i. the protocol is "very likely to result in needless suffering" and
   ii. "there is an alternative that is readily available and significantly reduces the risk of pain."

Correll v. State, 184 So. 3d, 478, 489 (Fla. 2015) (citing *Glossip*, 135 S. Ct. at 2737-38)).

i. Executions are carried out at Florida State Prison, which is within the jurisdiction of the Office of the Medical Examiner, District 8.

Undersigned counsel asserts that:

1. The exemption of lethal injection procedures from the Florida Administrative Procedure Act, combined with restricted access to public records under Rule of Criminal Procedure 3.852 (the sole means by which a death-sentenced prisoner may access public records for purposes of Rule 3.851 claims), means that the development, implementation, and review of lethal injection procedures is left to the exclusive discretion of the State agencies charged with carrying out executions. Judicial review and oversight is pre-empted by the inability of counsel for the accused to access the information required to challenge protocols suspected to be unconstitutional.

    a. Inadequate oversight concerning the development and implementation of lethal injection procedures has been an issue in the past. On December 15, 2006, following the botched execution of Angel Diaz, Governor Jeb Bush issued Executive Order 06-260 to create the Governor's commission on Administration of Lethal Injection. The Governor's Commission on Administration of Lethal Injection, *Final Report with Findings and Recommendations* (March 1, 2007), *available at* http://www.deathpenaltyinfo.org/scommissiononadministrationoflethalinjectionfinalreport.pdf. The Commission's report, submitted to the Governor on March 1, 2007, reported unresolved conflicts in the following areas:

        i. Observations of the inmate during the execution process, including movement of the body, facial movements and verbal comments

        ii. Conflicting testimony of the expert medical witnesses regarding the impact of drugs, absorption of drugs, etc.

    Id. at 8.

    The Commission recommended, among other things, that the Department of Corrections "on an ongoing basis explore other more recently developed chemicals for use in lethal injection execution with specific consideration and evaluation of the need of a paralytic drug like pancuronium bromide in an effort to make the lethal injection execution procedure less problematic." *Id.* at 13.

    b. Since the Governor's Commission made its recommendations, the development and implementation of lethal injection procedures has been unchecked due to an inability, on the part of counsel for condemned inmates, to access public records related to the process. Without access to records, counsel cannot mount a claim, and therefore judicial oversight is impossible.

2. Before states began using midazolam hydrochloride, lethal injection was carried out using barbiturate drugs to induce unconsciousness. This was consistent with the original recommendations of Dr. Stanley Deutsch, an anesthesiologist consulted when Oklahoma became the first state to adopt lethal injection as an execution method. *See id.* at 6 (citing Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 Ohio St. L.J. 63, 95-97 (2002) and Rebecca Brannan, *Sentence and Punishment: Change Method of Executing Individuals Convicted of Capital Crimes from Electrocution to Lethal Injection*, 17 Ga. St. U. L. Rev. 116, 121 (2000). Undersigned counsel does not concede that any method of execution is humane; however, the state's departure from the expert-recommended and routinely used barbiturate drug class in choosing midazolam hydrochloride as the first drug in the current protocol is troubling.

3. The harm from use of midazolam hydrochloride in lethal injections is insidious. Because the second drug in the protocol, vecuronium bromide, is a paralytic, it is impossible to assess whether midazolam hydrochloride is able to maintain unconsciousness throughout the process. The only context in which midazolam hydrochloride is implemented as the sole drug to render and maintain unconsciousness in a proceeding involving the prolonged inability to breathe and the level of pain involved with a lethal dose of potassium chloride is the lethal injection context itself. That pain has been described as causing "burning, searing pain." *Glossip*, 135 S. Ct. at 2780-81 (Sotomayor, J., dissenting).

4. It is imperative that undersigned counsel have access to the full scope of the records demanded so that judicial oversight is carried out. These records are necessary to prove that the current protocol is "very likely to result in needless suffering" and that "there is an alternative that is readily available and significantly reduces the risk of pain."

    a. The records sought under (1) – (7) above are relevant to prove that the current protocol is "very likely to result in needless suffering" and that any alternative identified will significantly reduce the risk of pain. *See Correll*, 184 So. 3d at 489.

        i. The only way determine the adequacy of a drug intended to render and maintain unconsciousness in this context, when the individual undergoing lethal injection is paralyzed partway through and therefore unable to show blatant signs of suffering, is through expert advice and extrapolation from experimental data. Therefore, the expert advice obtained and research conducted is necessary for purposes of proving that such advice and research was incomplete or incorrect.

        ii. Undersigned counsel has reason to believe that such advice and research was incomplete or incorrect. *See* Brief of Amici Curiae Sixteen Professors of Pharmacology in Support of Neither Party, *Glossip v. Gross*, 135 S.Ct. 2726, 192 L.Ed.2d 761 (2015). Undersigned counsel would submit any records obtained for expert review in developing this claim.

        iii. The July 1, 2011 date is relevant as the date that Lundbeck's announcement

foretold restricted access to pentobarbital.

iv. The December 13, 2006 date is relevant as the date of Angel Diaz' execution. Executions resumed on July 1, 2008, after the Governor's Commission submitted its report. Post-mortem observations from executions carried out under the previous protocols and the current protocol are necessary in order to show that midazolam hydrochloride is inferior to drugs previously used to render and maintain unconsciousness and therefore its use results in needless suffering. To the extent that undersigned counsel is able to prove that previously-used drugs are currently available to the Department of Corrections, observations from executions using all protocols are necessary to show that the identified alternative will significantly reduce the risk of pain when compared to midazolam hydrochloride. Records documenting the execution team's training and the set-up within the execution chamber and anteroom are necessary to account for variability in the conditions when making comparisons.

Undersigned counsel represents that:

a. Undersigned counsel has made a timely and diligent search of the records repository for records submitted in this case.

b. The records now sought are not at the records repository.

c. The records now sought are relevant to the subject matter of a proceeding under Florida Rule of Criminal Procedure 3.851 or are reasonably calculated to lead to the discovery of admissible evidence.

d. This demand is not intended to be overly broad or unduly burdensome.

The list of counsel for notification is as follows:

1. Stacey Elaine Johns Kircher
   Assistant Attorney General
   444 Seabreeze Blvd., Fifth Floor
   Daytona Beach, FL 32118-3951

2. Rosemary Calhoun
   Assistant State Attorney
   Office of the State Attorney, Seventh Judicial Circuit
   251 N. Ridgewood Ave.
   Daytona Beach, FL 32114

3. Raheela Ahmed, Maria Christine Perinetti, and Donna Ellen Venable
   Assistant CCRCs
   The Law Office of the Capital Collateral Regional Counsel - Middle Region
   12973 North Telecom Parkway
   Temple Terrace, Florida 33637-0907

Thank you in advance for your assistance and cooperation.

Sincerely,

/s/ Raheela Ahmed
Raheela Ahmed
Assistant CCRC
Florida Bar Number 0713457
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/Maria Christine Perinetti
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/s/ Donna Ellen Venable
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**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

FLORIDA RECORDS REQUEST DATED JUNE 20, 2016. CERTIFICATE

The undersigned does hereby certify that a diligent search has been made for the records requested in the records request dated June 20, 2016, pertaining to this case, and that there are no records that have been requested that are in my possession or control.

Signed,

_____
[NAME]

_____
[AGENCY NAME]

_____
[DATE]

COPIES TO BE FURNISHED TO:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Honorable Terrence R. Perkins, Chief Judge,
Seventh Judicial Circuit Courts,
Division 41,
251 North Ridgewood Avenue, Room 284,
Daytona Beach, Florida 32114

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Stacey.kircher@myfloridalegal.com;
CapApp@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing DEFENDANT'S POSTPRODUCTION REQUEST FOR ADDITIONAL PUBLIC RECORDS has been served by UPS to the above-named addressee on this 20th day of June, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has already been served via the Florida Courts E-filing Portal (Notice of Filing) to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney for the Seventh Judicial Circuit on this 20th day of June 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and to **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 20th day of June, 2016.

/s/ Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar Number 0013737
Assistant CCRC

Law Office of the Capital Collateral Regional Counsel - Middle Region
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**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS

June 20, 2016

Executive Office of the Governor
Attn: Legal Department
PL 05, The Capitol
400 South Monroe Street
Tallahassee, Florida 32399-0001

RE: DEMAND FOR PUBLIC RECORDS PERTAINING TO THE ABOVE-CAPTIONED CAPITAL CASE

Dear Legal Counsel:

This is a formal written demand for production of additional public records pursuant to Florida Rule of Criminal Procedure 3.852(g) and Chapter 119 of the Florida Statutes in the matter referenced above.

Pursuant to Florida Rule of Criminal Procedure 3.852(g)(2), within 90 days of your receipt of this written demand, your office shall:

1. Deliver to the records repository, located at **The Florida State Archives, Attn: CCRC Records Archivist, R.A. Gray Building, M.S. 9-E, 500 South Bronough Street, Tallahassee, Florida 32399-0250**, any responsive public records in the office's possession, and
2. Certify to the best of the office's knowledge and belief that all responsive public records have been delivered to the records repository; or

3. If no responsive public records are found, recertify that any public records previously delivered are complete.

Pursuant to Florida Rule of Criminal Procedure 3.852(g)(3), if your agency has an objection to this written demand, it must file any objection with the trial court.

If there are no records listed below in your possession or control, you may sign the enclosed certificate and serve it on all counsel listed below.

The records sought are as follows:

Records Pertaining to Lethal Injection.

(1) Public records concerning the review process which led to the promulgation of the Florida Department of Corrections' September 9, 2013 lethal injection procedures, for example, computer printouts or copies of research or literature reviewed, emails, faxes, letters, minutes or notes of meetings, and telephone call records or notes from July 1, 2011 through the present. This demand is intended to include public records of any communications with the Office of the Attorney General, Department of Corrections, Department of Law Enforcement, and governmental agencies of other jurisdictions such as other state departments of corrections, departments of law enforcement, or offices of the governor.

(2) Public records relating to any research or experiments done by or on behalf of the Executive Office of the Governor with respect to the September 9, 2013 lethal injection protocol from July 1, 2011 to the present.

(3) Public records relating to any consultation with experts (medical or otherwise) with respect to midazolam hydrochloride, for example, faxes, letters, minutes or notes of meetings, telephone call records or notes, and emails from July 1, 2011 to the present. This demand is intended to include internal communication with experts employed by or contracted on behalf of the Executive Office of the Governor regarding midazolam hydrochloride.

(4) Correspondence from July 1, 2011 to the present with any federal agency, including the Drug Enforcement Administration (DEA), the Food and Drug Administration (FDA), the Federal Bureau of Prisons (BOP), and the Department of Justice (DOJ), relating to Florida's execution procedures or the drugs used for lethal injection. This demand is intended to include application or registration for permits or licenses that are required by any federal agency in connection with the purchase, storage, use, research, and disposal of sodium thiopental, pentobarbital, midazolam hydrochloride, vecuronium bromide, rocuronium bromide, pancuronium bromide, potassium chloride, potassium acetate, and hydromorphone.

(5) Correspondence from July 1, 2011 to the present with any public agency, including governmental agencies of other jurisdictions, relating to the acquisition of drugs used for lethal injection. This demand is intended to include correspondence concerning sodium thiopental, pentobarbital, midazolam hydrochloride, vecuronium bromide, rocuronium bromide, pancuronium bromide, potassium chloride, potassium acetate, and hydromorphone.

(6) Public records, including the required logs, notes, memoranda, letters, emails, facsimiles, photographs, and videos relating to all executions carried out since December 13, 2006 in the office's possession that have not previously provided to the repository. This demand is intended to include records pertaining to the executions of Mark Dean Schwab, Richard Henyard, Wayne Tomkins, John R. Marek, Martin Grossman, Manuel Valle, Oba Chandler, Robert Waterhouse, David Alan Gore, Manuel Pardo, Jr., Larry E. Mann, Elmer Carroll, Willam Van Poyck, John E. Ferguson, Marshall Gore, William Happ, Darious Kimbrough, Askari Muhammad (f.k.a. Thomas Knight), Juan Carlos Chavez, Paul Howell, Robert Henry, Robert Hendrix, John Henry, Eddie Davis, Chadwick Banks, Johnny Kormondy, Jerry W. Correll, and Oscar Ray Bolin, Jr. This demand is not intended to include the FDLE logs previously provided regarding William Happ, Darious Kimbrough, Askari Muhammad, Juan Carlos Chavez, Paul Howell, and Robert Henry previously provided in *Correll v. State*, Ninth Judicial Circuit Case No. 85-CF-3550, Florida Supreme Court Case No. SC15-147.

(7) Photographs and videos of the execution chamber and anteroom in the office's possession, taken from December 13, 2006 to the present, including close-up photographs of equipment and apparatuses, tubing, and connections.

(8) Public records in the office's possession related to the training and experience of all individuals directly involved with the executions of Mark Dean Schwab, Richard Henyard, Wayne Tomkins, John R. Marek, Martin Grossman, Manuel Valle, Oba Chandler, Robert Waterhouse, David Alan Gore, Manuel Pardo, Jr., Larry E. Mann, Elmer Carroll, Willam Van Poyck, John E. Ferguson, Marshall Gore, William Happ, Darious Kimbrough, Askari Muhammad (f.k.a. Thomas Knight), Juan Carlos Chavez, Paul Howell, Robert Henry, Robert Hendrix, John Henry, Eddie Davis, Chadwick Banks, Johnny Kormondy, Jerry W. Correll, and Oscar Ray Bolin, Jr.

It is undersigned counsel's understanding that:

a. The September 9, 2013 lethal injection procedures were signed into effect by Department of Corrections Secretary Michael W. Crews, and certified to the Executive Office of the Governor. The procedures call for the drugs midazolam hydrochloride, vecuronium bromide, and potassium chloride.

b. Previously, the Department of Corrections used a three-drug protocol calling for pentobarbital, vecuronium bromide, and potassium chloride. *See, e.g., Pardo v. State*, 18

So. 3d 558 (Fla. 2012). The Department of Corrections began using pentobarbital in 2011, after sodium thiopental became unavailable. *Valle v. State*, 70 So. 3d 530, 536 (Fla. 2011). Previously, the Department carried out executions using a three-drug protocol calling for sodium thiopental, vecuronium bromide, and potassium chloride. *See, e.g., Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007).

c. On July 1, 2011, Lundbeck, the sole United States manufacturer of pentobarbital, announced that it would implement a shipping program that would deny distribution to prisons in the United States currently carrying out lethal injections. Lundbeck, *Lundbeck's position regarding misuse of Nembutal CII Sodium Solution (pentobarbital sodium injection, USP) in the execution of prisoners, available at* http://www.lundbeck.com/upload/us/files/pdf/Products/NembutalStmtwithDistSystem_US_website.pdf.

d. To date, in 2016, 12 executions have been carried out using pentobarbital (in Texas, Georgia, and Missouri). Death Penalty Information Center, *Execution List 2016, available at* http://www.deathpenaltyinfo.org/execution-list-2016. In 2015, 25 executions were carried out using pentobarbital (in Texas, Georgia, Missouri, and Virginia). Death Penalty Information Center, *Execution List 2015, available at* http://www.deathpenaltyinfo.org/execution-list-2015 These executions were carried out using pentobarbital despite the restricted distribution resulting from Lundbeck's position, described above.

e. Other states have used the additional drugs named above (rocuronium bromide, pancuronium bromide, potassium acetate, and hydromorphone) to carry out executions.

f. The creation of lethal injection procedures is an administrative act exempt from the Florida Administrative Procedure Act. *Power v. State*, 992 So. 2d 218, 220 (Fla. 2008); *Diaz v. State*, 945 So. 2d 1136, 1143-44 (Fla. 2006). In the view of the Florida Supreme Court, judicial review and oversight of lethal injection procedures is preferable to administrative proceedings pursuant to Chapter 120, Florida Statutes; Florida Rule of Criminal Procedure 3.851 is an appropriate vehicle for mounting a challenge. *Diaz*, 945 So. 2d at 1143-44. The exemption of lethal injection procedures from the Administrative Procedure Act should not give the Department of Corrections "unfettered discretion" as to lethal injection procedures. *Id.*

g. Lethal injection protocols calling for midazolam hydrochloride as the agent used to render and maintain unconsciousness have been the subject of much controversy, having been implicated in botched executions in Arizona (Joseph Wood), Oklahoma (Clayton Lockett and Charles Warner), and Ohio (Dennis McGuire). Due to the risks involved with use of midazolam hydrochloride, most death penalty states do not use it. *See* Manny Fernandez, *Delays as Death-Penalty States Scramble for Execution Drugs*, THE NEW YORK TIMES, Oct. 8, 2015, *available at* http://www.nytimes.com/2015/10/09/us/death-penalty-lethal-injection.html. In fact, since the United States Supreme Court's June 29, 2015 decision in *Glossip v. Gross*, 135 S. Ct. 2726, 192 L.Ed.2d 761 (2015), holding that lower courts did not err in finding the petitioners had not met their burden of proof in challenging

Oklahoma's three-drug protocol which included midazolam hydrochloride, only Florida and Alabama have carried out executions using the drug. *See* Death Penalty Information Center, *Execution List 2015, available at* http://www.deathpenaltyinfo.org/execution-list-2015; Death Penalty Information Center, *Execution List 2016, available at* http://www.deathpenaltyinfo.org/execution-list-2016.

h. In order to challenge the current lethal injection protocol as unconstitutional under Florida Rule of Criminal Procedure 3.851, undersigned counsel will be required to allege that:
   i. the protocol is "very likely to result in needless suffering" and
   ii. "there is an alternative that is readily available and significantly reduces the risk of pain."

Correll v. State, 184 So. 3d, 478, 489 (Fla. 2015) (citing *Glossip*, 135 S. Ct. at 2737-38)).

i. The Executive Office of the Governor approves and reviews any changes to the lethal injection protocol, and previously provided records to the repository concerning the change from sodium thiopental to pentobarbital. *See Valle*, 70 So. 3d at 548.

Undersigned counsel asserts that:

1. The exemption of lethal injection procedures from the Florida Administrative Procedure Act, combined with restricted access to public records under Rule of Criminal Procedure 3.852 (the sole means by which a death-sentenced prisoner may access public records for purposes of Rule 3.851 claims), means that the development, implementation, and review of lethal injection procedures is left to the exclusive discretion of the State agencies charged with carrying out executions. Judicial review and oversight is pre-empted by the inability of counsel for the accused to access the information required to challenge protocols suspected to be unconstitutional.

   a. Inadequate oversight concerning the development and implementation of lethal injection procedures has been an issue in the past. On December 15, 2006, following the botched execution of Angel Diaz, Governor Jeb Bush issued Executive Order 06-260 to create the Governor's commission on Administration of Lethal Injection. The Governor's Commission on Administration of Lethal Injection, *Final Report with Findings and Recommendations* (March 1, 2007), *available at* http://www.deathpenaltyinfo.org/scommissiononadministrationoflethalinjectionfinalreport.pdf. The Commission's report, submitted to the Governor on March 1, 2007, reported unresolved conflicts in the following areas:

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The Commission recommended, among other things, that the Department of Corrections "on an ongoing basis explore other more recently developed chemicals for use in lethal injection execution with specific consideration and evaluation of the need of a paralytic drug like pancuronium bromide in an effort to make the lethal injection execution procedure less problematic." *Id.* at 13.

b. Since the Governor's Commission made its recommendations, the development and implementation of lethal injection procedures has been unchecked due to an inability, on the part of counsel for condemned inmates, to access public records related to the process. Without access to records, counsel cannot mount a claim, and therefore judicial oversight is impossible.

2. Before states began using midazolam hydrochloride, lethal injection was carried out using barbiturate drugs to induce unconsciousness. This was consistent with the original recommendations of Dr. Stanley Deutsch, an anesthesiologist consulted when Oklahoma became the first state to adopt lethal injection as an execution method. *See id.* at 6 (citing Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 Ohio St. L.J. 63, 95-97 (2002) and Rebecca Brannan, *Sentence and Punishment: Change Method of Executing Individuals Convicted of Capital Crimes from Electrocution to Lethal Injection*, 17 Ga. St. U. L. Rev. 116, 121 (2000). Undersigned counsel does not concede that any method of execution is humane; however, the state's departure from the expert-recommended and routinely used barbiturate drug class in choosing midazolam hydrochloride as the first drug in the current protocol is troubling.

3. The harm from use of midazolam hydrochloride in lethal injections is insidious. Because the second drug in the protocol, vecuronium bromide, is a paralytic, it is impossible to assess whether midazolam hydrochloride is able to maintain unconsciousness throughout the process. The only context in which midazolam hydrochloride is implemented as the sole drug to render and maintain unconsciousness in a proceeding involving the prolonged inability to breathe and the level of pain involved with a lethal dose of potassium chloride is the lethal injection context itself. That pain has been described as causing "burning, searing pain." *Glossip*, 135 S. Ct. at 2780-81 (Sotomayor, J., dissenting).

4. It is imperative that undersigned counsel have access to the full scope of the records demanded so that judicial oversight is carried out. These records are necessary to prove that the current protocol is "very likely to result in needless suffering" and that "there is an alternative that is readily available and significantly reduces the risk of pain."

a. The records sought under (1) – (3) above are relevant to prove that the current protocol is "very likely to result in needless suffering." *See Correll*, 184 So. 3d at 489.

i. The only way determine the adequacy of a drug intended to render and

maintain unconsciousness in this context, when the individual undergoing lethal injection is paralyzed partway through and therefore unable to show blatant signs of suffering, is through expert advice and extrapolation from experimental data. Therefore, the expert advice obtained and research conducted is necessary for purposes of proving that such advice and research was incomplete or incorrect.

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iii. The July 1, 2011 date is relevant as the date that Lundbeck's announcement foretold restricted access to pentobarbital.

b. The records sought under (4) – (5) above are relevant to prove that an alternative is readily available. *See id.* It is impossible for undersigned counsel to know what drugs the Department of Corrections is able to access for purposes of lethal injection without these records. A simple allegation that pentobarbital is available to other states or could be accessed through sterile compounding has not been found to be sufficient. *Correll*, 184 So. 3d at 490.

c. The records sought under (6) – (8) above are relevant to prove both that the current protocol is "very likely to result in needless suffering" and that the alternative identified will significantly reduce the risk of pain. The December 13, 2006 date is relevant as the date of Angel Diaz' execution. Executions resumed on July 1, 2008, after the Governor's Commission submitted its report. Observations from executions carried out under the previous protocols and the current protocol are necessary in order to show that midazolam hydrochloride is inferior to drugs previously used to render and maintain unconsciousness and therefore its use results in needless suffering. To the extent that undersigned counsel is able to prove that previously-used drugs are currently available to the Department of Corrections, observations from executions using all protocols are necessary to show that the identified alternative will significantly reduce the risk of pain when compared to midazolam hydrochloride. Records documenting the execution team's training and the set-up within the execution chamber and anteroom are necessary to account for variability in the conditions when making comparisons.

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   The Law Office of the Capital Collateral Regional Counsel - Middle Region
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Thank you in advance for your assistance and cooperation.

Sincerely,

/s/ Raheela Ahmed
Raheela Ahmed
Assistant CCRC
Florida Bar Number 0713457
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/Maria Christine Perinetti
Maria Christine Perinetti
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The undersigned does hereby certify that a diligent search has been made for the records requested in the records request dated June 20, 2016, pertaining to this case, and that there are no records that have been requested that are in my possession or control.

Signed,

_____
[NAME]

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[AGENCY NAME]

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[DATE]

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CapApp@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing DEFENDANT'S POSTPRODUCTION REQUEST FOR ADDITIONAL PUBLIC RECORDS has been served by UPS to the above-named addressee on this 20th day of June, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has already been served via the Florida Courts E-filing Portal (Notice of Filing) to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney for the Seventh Judicial Circuit on this 20th day of June 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and to **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 20th day of June, 2016.

/s/ Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar Number 0013737
Assistant CCRC

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**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

vs.

Case No.: 2009-CF-2872

JOSEPH EDWARD JORDAN,

Defendant.

DEPARTMENT'S OBJECTION TO DEFENDANT'S REQUEST FOR PRODUCTION

COMES NOW, the Department of Corrections, by and through undersigned counsel, having received the Defendant's Demand for Additional Public Records filed pursuant to Rule 3.852(g), Fla. R. Crim. Pro., and hereby files this, its Response and Objections to Defendant's Demand for Additional Public Records in which Defendant seeks public records specifically pertaining to lethal injection information. In support thereof, the Department of Corrections states as follows:

FACTS

1. On June 20, 2016, the Department of Corrections ("Department") received a copy of the Defendant's Demand for Additional Public Records, filed pursuant to Rule 3.852(g), Fla. R. Crim. P., and Chapter 119, Florida Statutes.

2. The instant case is a capital post-conviction matter and the instant demand is filed by Defendant's collateral counsel. Therefore Rule 3.852, Fla. R. Crim. P., governs and constitutes the only means by which public records associated with the instant matter may be demanded or by which a court may order public records produced.

3. In his demand, the Defendant seeks records related to lethal injection. The records sought can be generally categorized as either: records related to the acquisition, source, procurement, possession, storage, maintenance, and use of lethal injection drugs or equipment; or records related to the manner in which the Department carries out its duties related to lethal injection.

4. The Department makes no representation that the requested records exist, but to the extent they may, the records will likely be of a sensitive nature as well as confidential and exempt from public record. As such, the Department is not, at this time, setting forth all potential statutory exemptions and does not waive the right to claim those exemptions should this Court order production of the records identified in the Defendant's demand.

Objection to the Request for Additional Records

In accordance with Rule 3.852(g)(3), Fla. R. Crim. P., a court may order production of requested records if it determines that each of the following exists:

a. Collateral counsel has made a timely and diligent search of the Repository as provided in Rule 3.852;

b. Collateral counsel's written demand identifies, with specificity, those additional public records that are not at the Repository;

c. The additional public records sought are relevant to the subject matter of a proceeding under Rule 3.851, Fla. R. Crim. Pro., or appear reasonably calculated to lead to the discovery of admissible evidence; and

d. The additional public records request is not overly broad or unduly burdensome.

Rule 3.852(g) is subject to the scope of production limitations of Rule 3.852(k), Fla. R. Crim. P., which states, "[u]nless otherwise limited, the scope of production under [any provision of Rule 3.852] *shall* be that the public records sought are not privileged or immune from production and

are either relevant to the subject matter of the proceeding under [R]ule 3.851 or are reasonably calculated to lead to the discovery of admissible evidence." (Emphasis added.)

The Florida Supreme Court has repeatedly stressed and long held that collateral post-conviction public records requests are not to be used for fishing expeditions and that the defendant bears the burden of proving that the records he requests are, in fact, related to a colorable claim for post-conviction relief. See Moore v. State, 820 So.2d 199, 204 (Fla. 2002); Glock v. Moore, 776 So.2d 243, 253 (Fla. 2001); Johnson v. State, 804 So.2d 1218, 1224 (Fla. 2001) (denial of a request for additional public records upheld where the request sought general information to "research and discover" post-conviction claims that defendant had no specific basis for believing); Muhammad v. State, 132 So.3d 176, 200 (Fla. 2013); Valle v. State, 70 So.3d 530 (Fla. 2011) (acknowledging the public records procedure under Rule 3.852 "is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief"). Here, the Defendant has not met his burden.

The simple recitation of the language setting forth the requirements of Rule 3.852(g)(3), Fla. R. Crim. P., is insufficient to meet the requirements necessary for this Court to order production of the named records. The Florida Supreme Court has consistently held that "a defendant must show *how* the requested records relate to a *colorable claim for postconviction relief*." See Mann v. State, 112 So.2d 1158, 1163 (Fla. 2013) (emphasis added), *citing*, Tomkins v. State, 872. So.2d 230, 244 (Fla. 2003). The Defendant demands the particular records without specifying or articulating that an actual colorable post-conviction claim exists. Without a sufficient demonstration it is improper to order records production; it results in the court sanctioning a prohibited fishing expedition. As stated above, this is expressly disallowed by the Florida Supreme Court.

The Florida Supreme Court has described requests made pursuant to Rule 3.852 as post-conviction discovery requests. See Amendments to Fla. R. Crim. P. 3.852, 754 So.2d 640, 643 (Fla. 1999). The Court has further determined that it is proper to deny post-conviction discovery requests if the documents sought would not support a valid claim. See Reaves v. State, 942 So.2d 874, 881-82 (Fla. 2006); Rutherford v. Crist, 945 So.2d 1113 (Fla. 2006). A trial court may properly deny post-warrant records requests as exceeding the scope of Rule 3.852 records production if the requests are overbroad, of questionable relevance, and unlikely to lead to discoverable evidence. Muhammad v. State, 132 So.3d 176, 176 (Fla. 2013), *cert. denied*, 1324 S. Ct. 984 (2014). See also Mann v. State, 112 So.3d 1158, 1163 (Fla. 2013) ("where a defendant cannot demonstrate that he or she is entitled to relief" or cannot demonstrate "that the records are relevant [to] or may reasonably lead to the discovery of admissible evidence[,]" a trial court may properly deny a public records request). Here, the Defendant has requested records related to a lethal injection challenge. The Florida Supreme Court has indisputably held that claims of this nature are not cognizable or colorable claims for relief.

The Florida Supreme Court has reliably affirmed trial courts' orders denying similar lethal injection records demands. Most recently, the Florida Supreme Court has done so in Muhammad v. State, *supra*, Chavez v. State, 132 So.3d 826 (Fla. 2014); Howell v. State, 133 So.3d 511 (Fla. 2014) *cert. denied*, 134 S.Ct. 1376 (2014); Davis v. State, 142 So.3d 867, 872 (Fla. 2014) *cert. denied*, 135 S.Ct. 15 (2014); Banks v. State, 150 So.3d 797, 800 (Fla. 2014), *cert. denied*, 135 S.Ct. 511 (2014); and Correll v. State, 184 So.3d 478, 487-90, *cert. denied*, 2015 WL 6111441 (U.S. 2015). In these cases, the Court held that production of these records would not lead to a colorable claim and the requests for such records were properly denied by the circuit court. See also Dennis v. State, 109 So.3d 680, 700 (Fla. 2012); Tompkins v. State, 994 So.2d 1072, 1090

(Fla. 2008); Walton v. State, 3 So.3d 1000, 1013-14 (Fla. 2009). The constitutionality of Florida's current lethal injection procedure has been upheld since its inception and against every challenge mounted, including, among other cases, Muhammad v. State, *supra*; Chavez v. Florida SP Warden, 742 F.3d 1267 (11th Cir. 2014) *cert. denied*, 134 S.Ct. 1156 (2014); Howell v. State, *supra*; Davis v. State, *supra*; Banks v. State, *supra*; and Correll v. State, *supra*.

As the Florida Supreme Court held in Banks, *supra*, "[o]nce the [Florida Supreme Court has] upheld the constitutionality of a lethal injection protocol, that protocol is facially constitutional as a matter of law." The Defendant has presented no evidence or demonstration that he has a colorable postconviction claim related to the current lethal injection protocol that is, as the Florida Supreme Court held in Banks, "facially constitutional as a matter of law." Id.

The United States Supreme Court has held that post-conviction claims based on nothing more than the source of lethal injection drugs do not present a cognizable claim that a lethal injection procedure is unconstitutional. Brewer v. Landrigan, 131 S.Ct. 445 (2010) (vacating a stay of execution that was based upon a finding that the condemned inmate had a substantial likelihood of success on the merits of his claim that the use of sodium thiopental obtained from a foreign source and not approved by the FDA creates a substantial and unnecessary risk of serious harm in violation of the Eighth Amendment; speculation cannot substitute for evidence that the use of the drug is sure or very likely to cause serious illness and needless suffering); Valle v. State, 70 So.3d 530, 549 (Fla. 2011) (requests for records to demonstrate that pentobarbital may have been procured illegally are speculative and conclusory and amount to no more than a "fishing expedition" for which Rule 3.852 is not intended). This Court should not order the production of any records related to acquisition, source, procurement, possession, storage, maintenance, or use of any lethal injection drug.

Additionally, the Florida Supreme Court has held that there is a presumption that the members of the executive branch will properly perform their duties. Squires v. State, 565 So.2d 318, 319-20 (Fla. 1990) (it must be presumed that members of the executive branch will properly perform their duties); Provenzano v. State, 739 So.2d 1150, 1153 (Fla. 1999) (there is a presumption that the members of the executive branch will properly perform their duties in carrying out an execution). See also Buenoano v. State, 565 So.2d 309, 311 (Fla. 1990) (the defendant bears the burden of alleging sufficient basis to overcome the presumption that the executive branch will properly perform its duties); Valle v. State, *supra* (records related to the Department's administration of previous executions are not related to a colorable Eighth Amendment claim); Alaska Dept. of Envt'l Conservation v. E.P.A., 540 U.S. 461, 507 (2004) (government officials are presumed to carry out their duties in a good faith manner and in compliance with federal laws). This Court should not order the production of any records related to any unsupported assertion or speculation that the Department may not be properly performing its duties, including any records related to training, execution personnel, or the manner in which the Department has carried out previous executions. Any such information which identifies an executioner, or any persons prescribing, preparing, compounding, dispensing, or administering a lethal injection, is also clearly confidential and exempt from disclosure. § 945.10(g), Fla. Stat. This Court should not order the production of any records related to the identity of members of the Department's execution team or which would lead to a discovery of these individuals involved.

A defendant seeking to mount a successful Eighth Amendment challenge to a state's lethal injection protocol must demonstrate that "the conditions presenting the risk [of cruel and unusual punishment] must be 'sure or very likely to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.'" Baze v. Rees 553 U.S. 49-50 (2008) (*quoting* Helling v.

McKinney, 509 U.S. 25, 33, 34-35 (1993)) (plurality opinion). Additionally, "speculation cannot substitute for evidence that the use of the drug is 'sure or very likely to cause serious illness and needless suffering." Brewer, 562 U.S. at 996 (*quoting* Baze, 553 U.S. at 50). See also Sells v. Livingston, 561 Fed.Appx. 342 (5th Cir. 2014) (a plaintiff cannot rely on speculation alone, he must point to facts or evidence based on science and fact showing a likelihood of severe pain). Here, the Defendant has failed to establish a sufficient basis; in fact, he has not stated any basis at all for a cognizable claim under the Baze standard.

In its June 29, 2015, Glossip v. Gross, 576 U.S. ____, 135 S.Ct. 2726 (2015) decision, the United States Supreme Court summarily upheld the constitutionality of Oklahoma's lethal injection protocol, which, as to the particular drugs and dosages of those drugs is, for all intents and purposes, nearly identical to Florida's lethal injection protocol. In fact, the Glossip Court gave deference to Florida's lethal injection protocol and the multiple lower court decisions which considered and upheld its constitutionality. See e.g., Glossip, 135 S.Ct. at 2734, 2740, 2745-46. The Glossip Court reaffirmed that *Baze* is the controlling opinion on the constitutionality of, and the standard for an Eighth Amendment challenge to a method of execution. See Glossip, *supra* at 2737-39.

The Florida Supreme Court considered the exact same arguments that the Defendant seeks to raise as his proof of meeting the standards for being "very likely to result in needless suffering" and as an acceptable "alternative that is readily available and significantly reduces the risk of pain" in Correll v. State, 184 So.3d 478, 489 (Fla. 2015), *citing* Glossip, *supra*. Facial constitutional challenges to the use of midazolam as applied were rejected. There is additionally, like in Correll, absolutely no information, indication, or hint as to why the midazolam as applied specifically to

the Defendant versus any other inmate would result in meeting his "exceptionally heavy burden of proof" as noted in Glossip, *supra*. Correll, at 488.

CONCLUSION

Without demonstration that the records he seeks are relevant to a colorable claim for post-conviction relief, the records named in the Defendant's demand for lethal injection records amount to nothing more than a fishing expedition, which is expressly disallowed by the Florida Supreme Court. There is no basis or legal authority to order records produced without a sufficient demonstration that the records he seeks are relevant to a colorable postconviction claim.

It is undisputed that the Defendant "bears the burden of demonstration that the records sought relate to a colorable claim." Twilegar v. State, 175 So.3d 242, 250 (Fla. 2015). See also Chavez v. State, 132 So.3d 826, 829 (Fla. 2014); Mann v. State, 112 So.3d 1158, 1163 (Fla. 2013) (in order to meet the burdens established in Rule 3.852, "a defendant must show how the requested records relate to a colorable claim for postconviction relief"). Conclusory allegations or speculations as to what the records may contain, is insufficient to meet his Rule 3.852 burden. See Correll, *supra*; Rodriguez v. State, 919 So.2d 1252, 1269 (Fla. 2005) (a defendant "is not entitled to relief" where he produced no direct evidence and offers nothing more than speculation). See also Jones v. State, 854 So.2d 55, 64 (Fla. 2003); Pardo v. State, 108 So.3d 558 (Fla. 2012).

WHEREFORE, based on the foregoing argument and authority, the Department respectfully requests this Honorable Court enter an order denying the production of the records named in the June 20, 2016, Defendant's Demand for Additional Public Records.

Respectfully submitted,
s/Sarah J. Rumph
SARAH RUMPH
Florida Bar No. 0653616
Assistant General Counsel
Florida Department of Corrections

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Secondary: cea.christian@mail.dc.state.fl.us

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed and electronically served on this, the 15th day of July, 2016, to the following:

Honorable Terrence R. Perkins
Circuit Judge
tperkins@circuit7.org

Stacey Kircher
Assistant Attorney General
Stacey.Kircher@myfloridalegal.com; capapp@myfloridalegal.com

Rosemary Calhoun
Assistant State Attorney
CalhounR@sao7.org

Raheela Ahmed
Assistant Capital Collateral Regional Counsel
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s/Sarah J. Rumph
SARAH RUMPH
Assistant General Counsel

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO. 2009-CF-2872

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF FILING

COMES NOW, the Florida Department of Corrections, by and through undersigned counsel, and hereby gives notice of filing and certifies that pursuant to the Defendant's Demand for Additional Public Records filed June 20, 2016 and the medical records release dated December 1, 2015, the medical records of Joseph Edward Jordan were provided directly to counsel via Fedex.

Furthermore, a copy of all records responsive to the Defendant's Demand were delivered, in accordance with the provisions of Rule 3.852, Fla. R. Crim. Pro., to the Capital Postconviction Records Repository on June 25, 2016.

Respectfully submitted,

s/Sarah J. Rumph
Sarah J. Rumph
Florida Bar No.: 0653616
Assistant General Counsel
Florida Department of Corrections
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed and electronically served on this, the 25th day of July, 2016, to the following:

Honorable Terrence R. Perkins
Circuit Judge, Seventh Judicial Circuit
E: tperkins@circuit7.org

Stacey E. Kircher
Assistant Attorney General
E: stacey.kircher@myfloridalegal.com

Rosemary Calhoun
Assistant State Attorney,
E: calhounr@sao7.org

Raheela Ahmed
Capital Collateral Regional Counsel-Middle
Office of the Capital Collateral Regional Counsel-Middle
E: ahmed@ccmr.state.fl.us
E: support@ccmr.state.fl.us

s/Sarah J. Rumph
Sarah J. Rumph
Assistant General Counsel

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO. 2009-CF-2872

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF DELIVERY OF EXEMPT PUBLIC RECORDS TO RECORDS REPOSITORY

TO: **CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY**
State Archives of Florida
Attn: CCR Records Archivist
R.A. Gray Building, MS 9-E
500 South Bronough Street
Tallahassee, FL 32399-0250

The undersigned, Sarah J. Rumph, hereby gives notice to the Capital Postconviction Record Repository, that certain delivered records are confidential or exempt from the requirements of section 119.07(1), Florida Statutes. These public unredacted records have been separately contained, sealed and are labeled in accordance with Florida Rule of Criminal Procedure 3.852(f). The nature of the public records and the legal bases under which the public records are exempt have been identified.

Additionally, a copy of Defendant's medical records placed at the Repository was delivered to Counsel for Defendant, in accordance with the submission of a valid medical release form. The Department has designated the unredacted records placed at the Repository as exempt, under the authority of Florida Rule of Criminal Procedure 3.852(f).

Respectfully submitted,

s/Sarah J. Rumph
Sarah J. Rumph
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed and electronically served on this, the 25th day of July, 2016, to the following:

Honorable Terrence R. Perkins
Circuit Judge, Seventh Judicial Circuit
E: tperkins@circuit7.org

Stacey E. Kircher
Assistant Attorney General
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Rosemary Calhoun
Assistant State Attorney,
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Raheela Ahmed
Capital Collateral Regional Counsel-Middle
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E: support@ccmr.state.fl.us

s/Sarah J. Rumph
Sarah J. Rumph
Assistant General Counsel

IN THE CIRCUIT COURT OF THE
7TH JUDICIAL CIRCUIT IN AND FOR
VOLUSIA COUNTY, FLORIDA

CASE NO.: 2009-002872-CFAWS
DIVISION: 41

STATE OF FLORIDA,

vs.

JOSEPH EDWARD JORDAN,

Defendant.
_____/

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CLERK OF THE CIRCUIT
& CTY COURT VOLUSIA CTY, FL
CC13

ORDER DETERMINING DISCOVERY

The Defendant seeks post-conviction review of his conviction and sentence in this matter and has requested certain public records from various entities involved in his prosecution, criminal investigation or otherwise related to this matter. All such documents were delivered to the Florida State Archives Records Repository for access and use in this case. Some of these records, however, were designated as exempt public records, confidential and not subject to discovery by the Defendant. The Defendant now seeks under Rule 3.852(f)(3), *Fla. R. Crim. P.* (2013) for this court to conduct an in-camera review of those records and determine whether such records may be discoverable by the Defendant. Accordingly, the Court reviewed those records claimed to be confidential and exempt public record. Per Florida law, these records were submitted in a sealed container or envelope and opened by this Court during the in-camera review. In addition, the request for discovery and in-camera review was heard by the Court and the Court having heard arguments of counsel, being fully informed in the premises and having conducted it's in-camera review, finds as follows:

1. Regarding the records claimed to be confidential and exempt public records from Volusia County Department of Public Protection, this Court finds that the patient care report for the victim, Keith Cope, case number 093-6690, date of service 6-28-09 consisting of four pages is subject to discovery by the Defendant. Similarly, the case report (electrocardiogram) relating to the victim, Keith Cope, incident ID 2009062806310400 consisting of 40 pages is discoverable by the Defendant.

2. Regarding the records claimed to be confidential and exempt public records from Volusia County Medical Examiner's file, case number 09 – 07 – 364 relating to the victim Keith Cope consisting of the case file and the autopsy photos (digital images on CD) are discoverable by the Defendant.

3. Office of the State Attorney file containing medical records for the Defendant and the victim, Keith Cope, are discoverable by the defense. Similarly, criminal history data and juvenile history relating to the Defendant are discoverable. Records relating to

the prosecutor's notes, case filing recommendations and identity of sexual offense victim are exempt public records and not subject to discovery.

4. Regarding the records claimed to be confidential and exempt public records from The Department of Corrections, medical file for the Defendant (pages 1 through 268) and the central records file relating to the Defendant (pages 1 through 483) are discoverable by the Defendant.

5. Regarding the records claimed to be confidential and exempt public records from Armor Correctional Health Services North Broward Bureau, medical records related to the treatment of the Defendant and consisting of 21 pages are discoverable by the Defendant.

6. Regarding the records claimed to be confidential and exempt public records from the Broward County Sheriff's Office, medical records relating to the treatment of the Defendant are discoverable by the Defendant.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida, this 1 day of July, 2016.

TERENCE R. PERKINS
CIRCUIT JUDGE

Rosemary L. Calhoun, Esquire – eservicevolusia@sao7.org
Raheela Ahmed, Esquire – ahmed@ccmr.state.fl.us
Maria Perinetti, Esquire – perinetti@ccmr.state.fl.us
Donna Venable, Esquire – venable@ccmr.state.fl.us
Stacey Elaine Johns Kircher, Esquire – stacey.kircher@myfloridalegal.com; capapp@myfloridalegal.com

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO. 2009-CF-2872

v.

JOSEPH EDWARD JORDAN,

Defendant.

FLORIDA DEPARTMENT OF CORRECTIONS' UNOPPOSED MOTION FOR RECONSIDERATION

COMES NOW, the Florida Department of Corrections, by and through undersigned counsel and pursuant to Rule 3.852, Fla. R. Crim. P., and hereby files this, its Motion for Reconsideration of this Court's "Order Determining Discovery" dated August 1, 2016. The Department requests this Court set aside this Order, in part, allow the following input from the Department regarding these documents, and issue a new order accordingly.

In support of this request, the Department states as follows:

1. Joseph Edward Jordan, DC #180632, (Defendant) is an inmate committed to custody of the Florida Department of Corrections (Department), serving a sentence of death at Florida State Prison.

2. On or about November 2, 2015, the Department received notice that the Florida Supreme Court issued its mandate affirming the death sentence in the instant case.

3. Approximately two months later, the Secretary of the Department properly served her Notice of Compliance indicating that all public records determined by the Department to be relevant to the subject matter of a Rule 3.851, Florida Rules of Criminal Procedure, proceeding except those that had previously been filed in the trial court, were copied, indexed, and delivered to the Capital Postconviction Records Repository. Records determined to be confidential and

exempt pursuant to chapter 119, Florida Statutes, and other applicable authority were separately sealed and delivered.

4. These records were then delivered to this Court by the Secretary of State in February 2016. After an in camera inspection was held of these sealed records, this Court entered an order finding, as to the Department:

> Regarding the records claimed to be confidential and exempt public records from The Department of Corrections, medical file for the Defendant (pages 1 through 268) and the central records file relating to the Defendant (pages 1 through 483) are discoverable by the Defendant.

5. When the records were sent to the Repository, the Department provided the Defendant with a complete, unredacted copy of the following:

a. Medical file (pages 1 through 268)

b. Central records file (pages 97-175, 182-183, 334-341 & 343-346)

The records were placed in the confidential file and noted as exempt for Repository purposes solely because they contained medical information.

6. Of the remaining central records file for the Defendant, the Department is requesting certain information remain confidential and exempt from disclosure. The Department requests this Court's order be reconsidered to allow the Department to provide the remainder of the central records file in full to the Defendant with the following protected information redacted:

a. *Victim Information*:

Located within the records is the names and identifying information of victims of the Defendant's, including one who is a victim of sexual battery. Statutes §§ 119.071(2)(j) & 945.10(1)(f), Fla. Stat., advises that this information, as held by the Department, is confidential and exempt from disclosure. Additionally, § 945.10(1)(e), Fla. Stat., makes confidential and exempt from disclosure information, which if released, could jeopardize a person's safety. The

Department submits that unregulated and unnecessary access to the contact information of these victims and their family members may well jeopardize the safety of those individuals.

b. *Proprietary Data-Processing Software Codes*:

The Department objects to the release of particular proprietary and sensitive software codes generated by and used in its software, when that software itself is a trade secret and when the related licensing agreement prohibits its disclosure. Under § 119.071(1)(f), Fla. Stat., data processing software obtained by an agency under a licensing agreement that prohibits its disclosure and which software is a trade secret, as defined in § 812.081, Fla. Stat., and agency-produced data processing software that is sensitive is confidential and exempt from disclosure.

c. *Information from Individuals Other Than the Defendant*:

In the central records file for the Defendant, at pages 65-73, there is a pre-sentence investigation for an inmate that is not related to the defendant and appears to have been inadvertently misfiled with the Defendant's records. There is also information regarding another inmate's security issues in pages 276-282 & 284-292. Sensitive inmate information and pre-sentence investigations are confidential and exempt from public records disclosure by § 945.10(1)(a), Fla. Stat.

7. The Department has contacted counsel for the Defendant regarding this motion. It is the understanding of the undersigned that defense has no objections to the motion as presented herein and to the records being released with the above redactions. These redactions have been completed and may be provided immediately to defense counsel.

CONCLUSION

The Department respectfully submits that the provision of records that are the subject of this Court's order, to defense counsel, *with the information specifically identified herein redacted*,

is proper pursuant to Rule 3.852(k), because the redacted information is not relevant to the subject matter of a Rule 3.851, Fla. R. Crim. Pro., and is not reasonably calculated to lead to the discovery of admissible evidence. Additionally, the Department respectfully submits that the information specifically identified herein is directly tied to both privacy and proprietary rights and security interests that override any right or interest the Defendant may have in the disclosure of the information specifically identified herein.

WHEREFORE, the Department respectfully requests this Court enter an amended order maintaining the confidentiality of the information and records specifically identified herein and maintaining the Department's redactions of the information specifically identified herein from the broader production of records contemplated in this Court's August 1, 2016 order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed and electronically served on this, the 12th day of August, 2016, to the following:

Honorable Terrence R. Perkins
Circuit Judge, Seventh Judicial Circuit
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Rosemary Calhoun
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s/Sarah J. Rumph
Sarah J. Rumph
Assistant General Counsel

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, **CASE NO.: 642009CF002872XXXAWS**

vs.

JOSEPH EDWARD JORDAN,

Defendant. /

FLORIDA DEPARTMENT OF LAW ENFORCEMENT'S
UNOPPOSED MOTION FOR EXTENSION OF TIME

The Florida Department of Law Enforcement ("FDLE"), by and through undersigned counsel, respectfully requests this Court to grant an extension of time within which to respond to Defendant JOSEPH EDWARD JORDAN's Demand for Additional Public Records ("Demand"). In support FDLE states:

1. The Defendant served his Florida Rule of Criminal Procedure 3.852(g) Demand upon FDLE on or about June 20, 2016. Rule 3.852(g) provides sixty (60) days for FDLE to respond or otherwise object.

2. However, the undersigned had a difficult family emergency, has been out of town and unavailable, requiring additional time to adequately respond to the Demand.

3. The undersigned conferred with Defendant's legal counsel, Ms. Raheela Ahmed, Esquire, regarding an extension of time to respond. Ms. Ahmed had no objection to the extension of time.

4. Therefore, FDLE request this Honorable Court to grant its Unopposed Motion for Extension of Time, until Friday, August 26, 2016.

5. No further extensions will be requested.

Respectfully submitted,

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Florida Department of Law Enforcement
Post Office Box 1489
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Telephone: (850) 410-7676
JanineRobinson@fdle.state.fl.us

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following, via electronic mail and/or U.S. Mail, this 18th day of August, 2016:

The Honorable Terrence Perkins, Chief Judge
Seventh Judicial Circuit, Volusia County, FL
251 N. Ridgewood Avenue, Room 284
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JANINE D. ROBINSON

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, **CASE NO.: 642009CF002872XXXAWS**

vs.

JOSEPH EDWARD JORDAN,

Defendant. /

PROPOSED ORDER ON FLORIDA DEPARTMENT OF LAW ENFORCEMENT'S UNOPPOSED MOTION FOR EXTENSION OF TIME

On or about June 20, 2016, Defendant JOSEPH EDWARD JORDAN served his Demand for Additional Public Records under Florida Rule of Criminal Procedure 3.852(g) upon the Florida Department of Law Enforcement ("FDLE"). FDLE's response and objections is due on or about August 19, 2016. FDLE now requests an extension of time to respond.

Upon a showing of good cause and without objection, this Court hereby GRANTS FDLE's request for an extension of time, until Friday, August 26, 2016 to reply or otherwise object to the Defendant's Demand. No further extensions will be granted.

DONE AND ORDERED in Chambers, in Daytona Beach, Volusia County, Florida, on this _____ day of August, 2016.

_____
TERRENCE PERKINS
Circuit Court Judge

Copies to:

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Janine D. Robinson, Assistant General Counsel
Florida Department of Law Enforcement
Email: JanineRobinson@fdle.state.fl.us

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO. 2009-CF-2872

v.

JOSEPH EDWARD JORDAN,

Defendant.

ORDER GRANTING FLORIDA DEPARTMENT OF CORRECTIONS' UNOPPOSED MOTION FOR RECONSIDERATION

On August 1, 2016, this Court issued its "Order Determining Discovery" directed to various parties. Thereafter, the Department of Corrections filed an unopposed Motion for Reconsideration requesting this Court set aside its Order, in part, and issue a new order accordingly.

Upon a showing of good cause and without objection, this Court orders as follows:

This Court hereby GRANTS the Department's Unopposed Motion for Reconsideration. Having represented that all medical records and medical portions of the central records files were previously provided by the Department to counsel for the defense, the remaining central records file relating to the Defendant (pages 1-96, 176-181, 184-333, 342 & 347-483) shall be provided with the following exceptions:

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CLERK OF THE CIRCUIT & COUNTY COURT VOLUSIA CTY FL
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1. Victim identification information shall be redacted;
2. Proprietary data-processing software codes belonging to the Department's system shall be redacted; and
3. Information relating to individuals completely unrelated to the Defendant or his case shall be omitted or redacted as needed.

This remaining information with the above exceptions shall be provided to counsel for the Defendant by September 2, 2016.

DONE and ORDERED in Chambers, in Daytona Beach, Volusia County, Florida, on this 24 day of August, 2016.

TERRENCE PERKINS
Circuit Court Judge

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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, **CASE NO.: 642009CF002872XXXAWS**

vs.

JOSEPH EDWARD JORDAN,

Defendant. /

FLORIDA DEPARTMENT OF LAW ENFORCEMENT'S RESPONSE AND OBJECTIONS TO DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS

COMES NOW, the Florida Department of Law Enforcement ("FDLE"), by and through undersigned counsel and submits its Response and Objections to Defendant JOSEPH EDWARD JORDAN's Demand for Additional Public Records. FDLE states as follows:

INTRODUCTION

1. On June 20, 2016, FDLE received Defendant's Demand for Additional Public Records ("Demand"), filed pursuant to Florida Rule of Criminal Procedure 3.852(g) ("Rule 3.852(g)") and Florida Statutes Chapter 119 – Public Records Act.[1] As this is a capital postconviction matter, Rule 3.852 is the only means through which the Defendant may obtain public records or under which this Court may order production.

2. In short, the Defendant's fails to comply with Rule 3.852, as the Defendant a) failed to satisfy his burdens under Rule 3.852; b) failed to present sufficient basis to challenge the constitutionality of Florida's lethal injection protocol; c) failed to state a colorable claim for relief; and d) submitted an extensive, overly broad and burdensome Demand, which is contrary to Rule 3.852.

[1]/ FDLE's Response and Objection were due on or before August 19, 2016. However, this Court granted FDLE's unopposed extension of time.

3. The lengthy Demand seeks, *inter alia*, records regarding a) the Department of Corrections' lethal injection procedures; a) "research or experiments" regarding lethal injection protocol; c) records regarding over 20 prior executions; d) the drugs' current supply, storage, procurement and expiration dates. *See*, Demand at 2-4.

4. The Defendant's singular objective is to obtain above-referenced records in order to challenge Florida's well-established and constitutionally validated three drug protocol and lethal injection method of execution.

5. As discussed in detail below, the Defendant categorically failed to: 1) comply with Rule 3.852(g); and 2) overcome the United States Supreme Court's holding in ***Glossip v. Gross***, 135 S.Ct. 2726 (2015), as well as numerous Florida Supreme Court holdings, thereby failing to meet his burden for production of records, if any exist.[2]

ARGUMENT

A. Florida's Three Drug Lethal Injection Execution Protocol is Constitutional.

1. First and foremost, the Defendant does not present a viable or colorable claim for relief in order to challenge Florida's lethal injection protocol and justify the large volume of records sought. The United State Supreme Court recently validated the constitutionality of Oklahoma's lethal injection three drug protocol, which is virtually identical to that utilized in Florida.

2. It is significant that the ***Glossip*** Court incorporated and gave deference to Florida's lethal injection protocol and our State Supreme Court's numerous constitutional reviews. For example, Justice Alito stated for the Court,

---

[2]/ As more fully discussed below, ***Glossip*** definitively upheld the constitutionality of Florida's method of execution and the three drug protocol.

> In October 2013, Florida became the first State to substitute midazolam for pentobarbital as part of a three-drug lethal injection protocol. . . . To date, Florida has conducted 11 executions using that protocol, which calls for midazolam followed by a paralytic agent and potassium chloride. [citing] *Chavez v. Florida SP Warden,* 742 F.3d 1267, 1269 (C.A.11 2014).

Glossip at 2734. Justice Alito further acknowledged several Florida Supreme Court holdings stating,

> . . . ***numerous courts*** have concluded that the use of midazolam as the first drug in a three-drug protocol is likely to render an inmate insensate to pain that might result from administration of the paralytic agent and potassium chloride. See, *e.g.*, 776 F.3d 721 (case below affirming the District Court); ***Chavez v. Florida SP Warden,* 742 F.3d 1267 (affirming the District Court); *Banks v. State,* 150 So.3d 797 (Fla. 2014) (affirming the lower court); *Howell v. State,* 133 So.3d 511 (Fla. 2014) (same); *Muhammad v. State,* 132 So.3d 176 (Fla. 2013) (same).** (It is noteworthy that one or both of the two key witnesses in this case—Dr. Lubarsky for petitioners and Dr. Evans for respondents—were witnesses in the ***Chavez, Howell,* and *Muhammad*** cases.). . . ***Our review is even more deferential where, as here, multiple trial courts have reached the same finding, and multiple appellate courts have affirmed those findings.***

Glossip at 2739-2740. (Emphasis added).

3. In his final comments for the ***Glossip*** majority, Justice Alito responded to the principal dissent's "groundless suggestion",

> that our decision is tantamount to allowing prisoners to be "drawn and quartered, slowly tortured to death, or actually burned at the stake." [citation omitted] That is simply not true, and the principal dissent's resort to this ***outlandish rhetoric reveals the weakness of its legal arguments***.

Glossip at 2746. (Emphasis added). Similarly, the instant Demand contains unsupported opinion to substantiate or justify the additional public records' relationship to a constitutional challenge.

B. The Defendant Failed to Meet His Burden Mandated by Florida Rule of Criminal Procedure 3.852(g).

1. First, the Defendant incorrectly stated his burden to challenge the current lethal injection protocol there therefore be entitled to the requested records. The Defendant stated, he is merely "be required to allege" a) the protocol is likely to result in "needless suffering; and b) an alternative is readily available, citing ***Correll v. State***, 184 So.3d 478, 489 (Fla. 2015). *See*, Demand at 5. h..

2. On the contrary, the ***Correll*** Court specifically stated, "it is ***insufficient*** for an individual ***to simply allege*** that he or she is sure or very likely to suffer . . .". ***Correll*** at 488. (emphasis added). Moreover, he must comply with Rule 3.852.

3. When applying Rule 3.852(g), this Court may order production of additional public records only "***if*** the court determines ***each*** of the following exists":

> (A) collateral counsel has made a timely and diligent search as of the records repository;
>
> (B) collateral counsel's affidavit ***identifies with specificity*** those additional public records that are not at the records repository.
>
> (C) the additional public records sought are either ***relevant to the subject matter*** of a proceeding under rule 3.851, or appear ***reasonably calculated to lead to the discovery of admissible evidence***; and
>
> (D) the additional public records request is ***not overly broad or unduly burdensome.***

Rule 3.852(g)(3) (emphasis added). The Defendant failed to demonstrate his entitlement to the records and failed to comply with subsections (C) and (D).

4. The Florida Supreme Court has "consistently held that a defendant bears the burden of demonstrating that the ***records sought relate to a colorable claim.***" ***Twilegar v. State***, 175 So.3d 242, 250 (Fla. 2015) *citing* ***Chavez v. State***, 132 So.3d 826, 829 (Fla. 2014); ***Mann v.***

State, 112 So.3d 1158, 1163 (Fla. 2013); and ***Valle v. State***, 70 So.3d 530, 549 (Fla. 2011) (emphasis added). In denying the defendant's claim for records and applying Rule 3.852, the ***Twilegar*** Court stated,

> [a]ccordingly, where a defendant ***cannot demonstrate*** that he or she is entitled to relief on a claim or that records are relevant or may ***reasonably lead to the discovery of admissible evidence***, the ***trial court may properly deny a public records request***.

Twilegar at 250, *citing*, ***Mann***, 112 So.3d at 1163 (emphasis added).

5. The Defendant's basis of his entitlement to relief is simply a lengthy boiler plate discussion regarding the current protocol utilized in Florida, as well as in other states. However, the ***Correll*** Court clearly acknowledged the Defendant's "exceptionally heavy burden of proof" to challenge a method of execution. In so doing, it referred to several prior capital cases where similar claims and demands for records relating to lethal injection were rejected. *See*, ***Correll*** at 490-493:

a. ***Muhammad v. State***, 132 So.3d 176, 203 (Fla. 2013) (proper denial of the demand for lethal injection records, as "voluminous", "overbroad and burdensome, and also were not related to a colorable claim."). ***Correll*** at 491-492;

b. ***Pardo v. State***, 108 So.3d 588, 565-566 (Fla. 2012) ("information concerning the source of the drugs has been held not to present a cognizable lethal injection claim."). ***Correll*** at 491;

c. ***Valle v. State***, 70 So.3d 530, 549 (Fla. 2011) ("requests related to actions of lethal injection personnel in past executions do not relate to a colorable claim concerning future executions . . ."). ***Correll*** at 491;

d. ***Banks v. State,*** 150 So.3d 797, 802 (Fla. 2014) (public records demand rejected "based upon a general challenge to the lethal injection protocol"). ***Correll*** at 491;

e. ***Chavez v. State***, 132 So.3d 826, 829-30 (Fla. 2014) (denial of request for information about acquisition, manufacture, or distribution of drugs used in Florida's lethal injection protocol, checklists and notes prepared by personnel). ***Correll*** at 491; and

f. ***Walton v. State,*** 3 So.3d 1000, 1014 (Fla. 2009) (production of records related to lethal injection is unlikely to lead to a colorable claim for relief). ***Correll*** at 491;

6. Furthermore, the ***Valle*** Court commented, "***speculation cannot substitute for evidence*** [and the defendant] ***simply posits a hypothetical argument***, but he ***does not explain why*** these risks will result in a substantial risk of serious harm." ***Valle*** at 549 (emphasis added).

7. In the instant Demand, the Defendant has made no persuasive argument, nor put forward a plausible reason for the additional public records.

8. The ***Correll*** Court plainly stated that "[c]onclusory allegations are not sufficient to establish a legally sufficient claim for postconviction relief." *See*, ***Correll*** at 491, *citing,* ***Freeman v. State***, 761 So.2d 1055, 1061 (Fla. 2000). Therefore, the Defendant's general discussion is grossly insufficient basis for relief and does not support the reasonable discovery of admissible evidence.

C. The Defendant's Demand is Overly Broad and Unduly Burdensome And a Prohibited Fishing Expedition.

1. The United States Supreme Court in ***Glossip*** unequivocally answered any constitutional challenge to Florida's lethal injection protocol. As discussed above, the Florida Supreme Court has acknowledged the same.

9. Instead, of providing this Court with legally or factually supported colorable claims relief, FDLE has illustrated that the Defendant's Demand is based upon loose conjecture, opinion and vague speculation. In other words, the Defendant seeks a significant volume of records which is tantamount to nothing more than a prohibited fishing expedition. This Court

has the discretion to deny the Defendant's public records request which is of "questionable relevancy and is unlikely to lead to discoverable evidence. ***Valle***, 70 So.3d at 548-549.

2. The Florida Supreme Court has "long acknowledged" that the public records procedure under the Rule 3.852 "is ***not intended*** to be a procedure authorizing a ***fishing expedition*** for records ***unrelated to a colorable claim for postconviction relief***." *See*, ***Correll*** at 490, quoting ***Valle***, 70 So.2d at 549, ***Moore v. State***, 820 So. 2d 199, 204 (Fla. 2002), and ***Glock v. Moore***, 776 So. 2d 243, 253 (Fla. 2001) (emphasis added).

3. The Demand is precisely the sort of "fishing expedition" which has been expressly and consistently disallowed. As stated by the Florida Supreme Court in ***Sims v. State***, 753 So.2d 66 (Fla. 2000), "Rule 3.852 is not intended for use by defendants . . . as 'nothing more than an eleventh hour attempt to delay the execution rather than a focused investigation into some legitimate area of inquiry.'" ***Sims***, 753 So. 2d at 70 (quoting the trial court in that case).

4. Even though the Defendant stated, "[t]his Demand is not intended to be overly broad or unduly burdensome, that is exactly what it is. *See*, Demand at 8.

5. Hence, this Court is granted the discretion to deny the Demand where the "voluminous request was overbroad and burdensome, and the possibility relevance to a colorable claim was not established." ***Muhammad***, 132 So.3d at 203, citing, ***Valle*** at 549.

6. Where such requests are denied, reversal will only happen upon the trial court's ***abuse of discretion***, which is "abused only" where such action is "arbitrary, fanciful or unreasonable . . . [or] where no reasonable person would take the view adopted by the trial court". *See*, ***Correll*** at 490; ***Muhammad***, 132 So.3d at 200, citing ***State v. Coney***, 845 So.2d 130, 137 (Fla. 2003); and ***Dennis v. State***, 109 So.3d 680, 700 (Fla. 2012), citing ***Tompkins v. State***, 994 So.2d 1072, 1090 (Fla. 2008) (no abuse of discretion in denying request for records

Florida's lethal injection protocol and summary denial was proper where the requested records were neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.).

WHEREFORE, the Florida Department of Law Enforcement asks this Honorable Court to deny the Defendant's Demand for Additional Public Records, for the reasons set forth above.

Respectfully submitted,

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Florida Bar No. 865966

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following, via electronic mail and/or U.S. Mail, this 26th day of August, 2016:

The Honorable Terrence Perkins, Chief Judge
Seventh Judicial Circuit, Volusia County, FL
251 N. Ridgewood Avenue, Room 284
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JANINE D. ROBINSON

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS. **CASE NUMBER 2009 002872 CFAES**

JOSEPH EDWARD JORDAN,

DEFENDANT.
_____/

NOTICE OF COMPLIANCE BY THE
VOLUSIA COUNTY MEDICAL EXAMINER'S OFFICE

The Volusia County Medical Examiner's Office, having received Defendant's Demand for Additional Public Records dated June 20, 2016 from the Office of the Capital Collateral Regional Counsel-Middle Region hereby gives notice of compliance with Florida Rule of Criminal Procedure 3.852(e) and certifies that, to the best of its knowledge and belief, all public records requested by the Defendant's Demand for Additional Public Records have been copied, indexed, and delivered to the records repository of the Secretary of State. Our case number is: ME 09-07-364 [Keith Curtis Cope].

Respectfully submitted for the Volusia County Medical Examiner's Office.

Michael G. Moore
Assistant County Attorney
Volusia County
Legal Department
123 West Indiana Avenue
DeLand, Florida 32720-4613
mmoore@volusia.org
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by email/delivery to:

Rosemary Calhoun, calhounr@sao7.org
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this 30th day of August 2016.

Michael G. Moore
Assistant County Attorney

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS. **CASE NUMBER 2009 002872 CFAES**

JOSEPH EDWARD JORDAN,

DEFENDANT.
_____/

INDEX OF RECORDS OF
VOLUSIA COUNTY MEDICAL EXAMINER'S OFFICE
CASE NUMBER ME 09-07-364 [KEITH CURTIS COPE]

INDEX

	Description	Page(s)
1.	Defendant's Demand for Additional Public Records [REQUESTING "All medical records . . . in ME Case Number 09-07-364 (Keith Curtis Cope) . . . ."]	9
2.	Patient Medical Records for Keith Cope ME Case Number 09-07-364.	170

Pursuant to section 456.057(7)(a), Florida Statutes, the following indexed records are confidential from the public records disclosure requirements of section 119.07(1), Florida Statutes. Pursuant to Rule 3.852(f)(1), Florida Rules of Criminal Procedure, these records are submitted in a sealed container that may not be broken without an order of the trial court.

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS. **CASE NUMBER 2009 002872 CFAES**

JOSEPH EDWARD JORDAN,

DEFENDANT.
_____/

NOTICE OF CONFIDENTIALITY AND EXEMPTION FROM THE PUBLIC RECORDS DISCLOSURE REQUIREMENTS OF SECTION 119.07, FLORIDA STATUTES

Pursuant to section 456.057(7)(a), Florida Statutes, the content of this container is confidential and exempt from the public records disclosure requirements of section 119.07(1), Florida Statutes. Pursuant to Rule 3.852(f)(1), Florida Rules of Criminal Procedure, the seal to this container may not be broken without an order of the trial court.

The legal basis for the exemption from section 119.07(1), Florida Statutes, is section 456.057(7)(a), Florida Statutes, which provides "Except as otherwise provided in this section . . . [medical] records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient . . . ."

The nature of the records in this container includes the following 170 pages:

CONTAINER INDEX

	Description	Page(s)
1.	Patient Medical Records for Keith Cope ME Case Number 09-07-364.	170

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

**DEFENDANT'S FIFITH MOTION REQUESTING
THE *IN CAMERA* REVIEW OF ADDITIONAL RECORDS REQUESTED
[VOLUSIA COUNTY MEDICAL EXAMINER'S OFFICE]**

The Defendant, Joseph Edward Jordan, pursuant to Fla.R.Crim.P. 3.852, by and through his undersigned counsel, hereby moves this Honorable Court for an order to the Florida State Archives (Records Repository) to deliver certain exempt public records to the Clerk of this Court and for this Court to conduct an *in camera* review of those records. In support, Mr. Jordan states the following:

1. Joseph Edward Jordan is incarcerated at Florida State Prison under a sentence of death.

2. Pursuant to Florida Rule of Criminal Procedure 3.852 [1], on August 30, 2016, the Volusia

[1] Fla. R. Crim. P. Rule 3.852 (f) provides as follows:

> **(f) Exempt or Confidential Public Records.**
>
> (1) Any public records delivered to the records repository pursuant to these rules that are confidential or exempt from the requirements of section 119.07(1), Florida Statutes, or article I, section 24(a), Florida Constitution, must be separately contained, without being redacted, and sealed. The outside of the container must clearly identify that the public record is confidential or exempt and that the seal may not be broken without an order of the trial court. The outside of the container must identify the nature of the public records and the legal basis for the exemption.

County Medical Examiner's Office provided a Notice of Compliance in response to the Defendant's Demand for Additional Public Records, indicating that the records were set to the records repository.

3. On September 6, 2016, Ms. Elizabeth Golding, Archivist Supervisor, II, Bureau of Archives and Records Management, Division of Library and Information Services, Florida Department of State, communicated to undersigned counsel that of the records received from the Volusia County Medical Examiner's Office were sealed/restricted and are found in container 07226. *See Appendix A*. These records are subjected to *in camera* review by this Court for purposes of these post-conviction proceedings.

4. The Supreme Court of Florida has discussed this process several times since the introduction of the rule as a reform in 1998. The Supreme Court of Florida in *Rose v. State*, 774 So. 2d 629 (Fla. 2000), has approved the "pre-Huff" procedure of *in camera* inspections of records designated as exempt and/or confidential and has held as follows:

> Rose also alleges that the trial court violated his constitutional right to have a full and fair state postconviction proceeding by conducting an in-camera inspection of public records to determine whether the State was justified in claiming that such records were exempt from disclosure. On July 11, 1996, Rose filed a public records request with the Pinellas County State Attorney's Office pursuant to chapter 119, Florida Statutes. The State responded and provided Rose with a detailed explanation of the public records that were exempt from disclosure under Florida Rule of Criminal Procedure 3.852. The trial court subsequently conducted an in-

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> (2) Upon the entry of an appropriate court order, sealed containers subject to an inspection by the trial court shall be shipped to the clerk of court. The containers may be opened only for inspection by the trial court in camera. The moving party shall bear all costs associated with the transportation and inspection of such records by the trial court. The trial court shall perform the unsealing and inspection without ex parte communications and in accord with procedures for reviewing sealed documents.
>
> (3) Collateral counsel must file a motion for in camera inspection within 30 days of *receipt of the notice of delivery of sealed records* to the central records repository or the in camera inspection will be deemed waived.

> camera review of the public records withheld by the State. After conducting the in-camera review, the trial court concluded that the withheld records contained no *Brady* material, but the court instructed the State in a written order to provide Rose with certain records that were not covered under the statutory exemptions. According to Rose, the trial court's in-camera review of the allegedly exempt public records and its refusal to require the State to turn over handwritten notes pertaining to the alleged "deal" between Borton and Poole and the State prejudiced him. Rose claims that he is entitled to an evidentiary hearing. We disagree.
>
> In *Ragsdale v. State*, 720 So. 2d 203, 206 (Fla. 1998), this Court had to determine whether public records were properly exempted from disclosure by the State. This Court ruled that where doubt existed as to whether the State must disclose a particular document, the proper procedure is to have a trial judge conduct an in-camera review of the documents. *See id.; see also State v. Kokal*, 562 So. 2d 324, 327 (Fla. 1990) (stating that when certain statutory exemptions are claimed by the party against whom the public records request has been filed or when doubt exists as to whether a particular document must be disclosed, the proper procedure is to furnish the document to the trial judge for an in-camera inspection). After conducting an in-camera review, the State must turn over the nonexempt materials to the defense. *See Ragsdale*, 720 So. 2d at 206.
>
> In this case, Judge Schaeffer conducted an in-camera proceeding and examined each of the alleged documents that the State withheld to determine whether the documents were properly withheld. After reviewing the documents, the trial court issued a written order instructing the State as to which documents it needed to produce to the defense. Rose has failed to cite to any authority that suggests that Judge Schaeffer's review of the withheld documents was improper and we have found no authority that supports this view. Therefore, we find that Judge Schaeffer fully complied with procedures set forth in *Ragsdale* and *Kokal* for determining whether the State's claimed exemptions were proper.

Rose v. State, 774 So. 2d 629, 636-637 (Fla. 2000) (footnote omitted).

5. The procedure approved in *Rose* was again discussed by the Florida Supreme Court in *Damren v. State*, 838 So. 2d 512 (Fla. 2003), as follows:

> Damren asserts that the trial court erred in denying his request for certain public records from the State Attorney's office. According to Damren, the circuit court failed to review these records for exculpatory information under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We disagree.
>
> As this Court has held, "where doubt existed as to whether the State must disclose a particular document, the proper procedure is to have a trial judge conduct an in-camera review of the documents." *Rose v. State*, 774 So. 2d 629, 636 (Fla. 2000). This Court applies an abuse of discretion standard when reviewing a trial court's determination on a public records request. *Moore v. State*, 820 So. 2d 199, 204

(Fla. 2002).

> The record reveals that the State provided the requested records to the trial court for an in-camera review and the postconviction judge granted the public records request in part and denied it in part. During a hearing, the circuit court carefully reviewed each folder of materials which was submitted, explained what information was contained in each folder and whether it included exculpatory information, and indicated the files to which defense counsel was entitled. We find that the trial court did not abuse its discretion in denying in part Damren's request and hence deny relief. We find no error.

Damren v. State, 838 So.2d 512, 519 (Fla. 2003) (footnote omitted).

6. The effects of the discovery and other post-conviction reforms from the late 1990s onward was analyzed by the Honorable O.H. Eaton, Jr. as follows:

> Litigation in a death penalty case does not end when the judgment and sentence of death are affirmed by the Supreme Court of Florida. The next phase of litigation in these cases falls under the general heading of "postconviction relief." It is during this phase that death row defendants litigate matters "collateral" to the judgment and sentence that could not have been raised on appeal. . . . They are charged with reinvestigating the case to find out deficiencies that occurred during the trial. This reinvestigation usually includes review of numerous public records that may have some bearing on the case.
>
> . . .
>
> Over the last several years both the Supreme Court and the legislature have made efforts to streamline the processing of postconviction motions in capital cases.
>
> . . .
>
> Prior to 1996, collateral counsel had to file a civil action in order to obtain public records from persons or agencies other than the state attorney and local law enforcement agencies that investigated the crime. This cumbersome process often required suit to be filed in several jurisdictions and delays were inevitable.
>
> . . .
>
> The legislature created a centralized repository for storage of public records in capital cases in order to provide easy access to them. It was the legislature's hope that a process could be developed that would allow these records to be automatically sent to the repository and made accessible to counsel without the necessity of resorting to litigation.
>
> Currently, the Secretary of State is the officer responsible for storing the records and the records repository is located in the R.A. Gray building in Tallahassee.
>
> . . .
>
> [T]he procedural aspects of discovery of public records are now regulated by the Supreme Court of Florida. Rule 3.582 provides for an orderly method to obtain public records and, if the various offices and agencies that maintain public records cooperate, collateral counsel should be able to review them and have copies made

in a timely fashion.

. . .

Assuming every person and agency complies with the requirement to submit public records to the records repository, all of the public records should be on file there less than 330 days from the date the mandate affirming the death sentence is issued by the Supreme Court of Florida. However, in capital litigation, things are never that easy. Some of the records may be claimed to be exempt or confidential and there may be old cases out there that are subject to a separate procedure. Ironically, the persons or agencies claiming records to be exempt or confidential are aligned with the prosecution whose interest is to avoid delays. By providing a separate procedure for old cases, additional delays may be expected.

Exempt or Confidential Public Records

Rule 3.852(f) provides that any public records delivered to the records repository that are claimed to be exempt or confidential must be boxed separately, without redaction, and sealed. The box must clearly identify that the public record is confidential or exempt and the seal may not be broken without an order of the trial court. The box must also identify "the nature of the public records and the legal basis for the exemption."

In order for collateral counsel to obtain a ruling to unseal the public records claimed to be exempt or confidential, an order must first be obtained from the trial court directing the records repository to ship the sealed boxes of records to the clerk of the trial court. *Undoubtedly, collateral counsel will always want to obtain a ruling to determine if these records are really exempt or confidential and delay could be avoided if these records were filed with the clerk of the court in the first place.* However, the Supreme Court wanted to carry out legislative intent where possible so this unnecessary complication is part of the procedure and will undoubtedly cause delay.

The "moving party" is responsible to pay for the cost of the "transportation and inspection of such records by the trial court." Presumably, the "cost" will be just the postage. It is unclear what "cost" could possibly be associated with inspecting the records.

Once the records claimed to be exempt or confidential are delivered to the clerk of the court, they may only be opened by the trial court in camera without ex parte communication in the same manner as inspecting any sealed document. Presumably, the trial court will enter an order sustaining the claim of exemption or confidentiality or order the records disclosed.

. . .

In Camera Inspection of Exempt Public Records

Persons or agencies claiming public records to be exempt from production must box the records separately, seal them, index them with the reasons for the exemption, and deliver them to the records repository. From there, the records are

shipped to the clerk of the trial court.

> *The trial judge must inspect the records in camera to determine if they are in fact exempt. A detailed order must be entered identifying each public record and the reason for its exemption.*
>
> *In* Rose v. State, *774 So. 2d 629 (Fla. 2000), the trial judge held an in camera inspection of public records claimed to be exempt before the Huff hearing. The state attorney was ordered to produce certain of the records and others were ruled to be exempt. The Supreme Court approved the procedure.*
> . . .
> Public records have provided collateral counsel with significant evidence in the past and will undoubtedly continue to do so in the future. Trial judges need to take their responsibility to rule on public records issues seriously and make every effort to resolve public records disputes in a timely manner.

O.H. Eaton, Jr., *Discovery of Public Records in Capital Cases*, 76 Fla. B.J. 24, 30 (April 2002) (footnotes omitted) (emphasis added).

7. There are no objections by the State of Florida as to motions regarding delivery of records to this Court for *in camera* inspection and any accompanying proposed order as relayed to this Court at the Status Conference conducted on February 12, 2016.

WHEREFORE, Mr. Jordan hereby requests the entry of an order so that the aforementioned records can be transferred to the Clerk of this Circuit Court for an *in camera* review by this Court to determine whether they are exempt public records. It is further requested that if a subsequent *in camera* determination is made by this Honorable Court that these records are not exempt, that the records be released to undersigned counsel pursuant to a subsequent Court's order.

Respectfully submitted

___s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

___s/ Maria Christine Perinetti
Maria Christine Perinetti

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Law Office of the Capital Collateral
Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Telephone (813) 558-1600
Fax No. (813) 558-1601 or (813) 558-1602

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

APPENDIX A

**DEFENDANT'S FIFITH MOTION REQUESTING
THE *IN CAMERA* REVIEW OF ADDITIONAL RECORDS REQUESTED
[VOLUSIA COUNTY MEDICAL EXAMINER'S OFFICE]**

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07225	00006		Autumn Pare - 5716MM000287A: Social Security Numbers - 119.071(5)(a)
07225	00007		Autumn Pare - 5713MM010314A: Bank Account Numbers - 119.071(5)(b)
07225	00008		Autumn Pare - 5713MM010315A: Bank Account Numbers - 119.071(5)(b); Social Security Numbers - 119.071(5)(a)
07225	00009		Autumn Pare - 5716MM010182A: Bank Account Numbers - 119.071(5)(b)
07225	00010		Autumn Pare - 5716MM010183A: Bank Account Numbers - 119.071(5)(b)
07225	00011		Autumn Pare - 5716MM010184A: Bank Account Numbers - 119.071(5)(b)
07225	00012		Tony Simpson - 1703CF005317A: Attorney Notes - 119.071(1)(d)1; Department of Children and Families - 39.202 & 39.205; Fingerprints - 119.071(5)(g); Social Security Numbers - 119.071(5)(a); Victim information in sex offense cases - 119.071(2)(h) & (j)
07226			Jordan, Joseph Edward; *RESTRICTED* SEALED; 2009-CF-002872; Volusia County Medical Examiner's Office
07226	00001		Patient Medical Records for Keith Cope, ME Case Number 09-07-364: Confidential pursuant to 456.057(7)(a), Florida Statutes
CD001			CD-1 to CD-29
CD002			CD-30 to CD-59
CD003			CD-60 to CD-89

RL

INTER-DEPARTMENT DELIVERY

DA

ENT

Box 7226, FF 1

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

CASE NUMBER 2009 002872 CFAES

JOSEPH EDWARD JORDAN,

DEFENDANT.

_____/

NOTICE OF CONFIDENTIALITY AND EXEMPTION FROM THE PUBLIC RECORDS DISCLOSURE REQUIREMENTS OF SECTION 119.07, FLORIDA STATUTES

Pursuant to section 456.057(7)(a), Florida Statutes, the content of this container is confidential and exempt from the public records disclosure requirements of section 119.07(1), Florida Statutes. Pursuant to Rule 3.852(f)(1), Florida Rules of Criminal Procedure, the seal to this container may not be broken without an order of the trial court.

The legal basis for the exemption from section 119.07(1), Florida Statutes, is section 456.057(7)(a), Florida Statutes, which provides "Except as otherwise provided in this section . . . [medical] records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient . . . ."

The nature of the records in this container includes the following 170 pages:

CONTAINER INDEX

	Description	Page(s)
1.	Patient Medical Records for Keith Cope ME Case Number 09-07-364.	170

DO NOT OPEN

MAY ONLY BE OPENED BY THE TRIAL COURT IN CAMERA

Florida Rules of Criminal Procedure 3.852(f)

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS. CASE NUMBER 2009 002872 CFAES

JOSEPH EDWARD JORDAN,

DEFENDANT.
_____/

INDEX OF RECORDS OF
VOLUSIA COUNTY MEDICAL EXAMINER'S OFFICE
CASE NUMBER ME 09-07-364 [KEITH CURTIS COPE]

INDEX

Description	Page(s)
1. Defendant's Demand for Additional Public Records [REQUESTING "All medical records . . . in ME Case Number 09-07-364 (Keith Curtis Cope) . . . ."]	9
2. Patient Medical Records for Keith Cope ME Case Number 09-07-364.	170

Pursuant to section 456.057(7)(a), Florida Statutes, the following indexed records are confidential from the public records disclosure requirements of section 119.07(1), Florida Statutes. Pursuant to Rule 3.852(f)(1), Florida Rules of Criminal Procedure, these records are submitted in a sealed container that may not be broken without an order of the trial court.

RECEIVED
2016 SEP -6 AM 11:28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on t this 9th day of September, 2016. **I HEREBY FURTHER CERTIFY** that a copy of the PDF document of the foregoing has been served via the Florida Courts E-Filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com; to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach Florida 32114 at calhounr@sao7.org; to **Michael Gray Moore**, Volusia County Medical Examiner's Office at mmoore@volusia.org on this 9th day of September, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been e-mailed (on the 9th day of September, 2016) and mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and mailed to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 12th day of September, 2016.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

**ORDER TO DELIVER EXEMPT PUBLIC RECORDS
[VOLUSIA COUNTY MEDICAL EXAMINER'S OFFICE]**

TO: **RECORDS REPOSITORY**
The Florida State Archives
Attn: **CCRC Records Archivist**
R.A. Gray Building,M.S. 9-E,
500 South Bronough Street,
Tallahassee, Florida 32399-0250.

This Court having received notice on this ____ day of _____, 2016, that certain records which have been claimed as confidential or exempt from disclosure have been copied, indexed, separately contained without being redacted, sealed, identified as to their nature and their legal basis for confidentiality or exemption, and delivered to the Records Repository of the Secretary of the State. The following agencies or entities delivered sealed and/or exempt records to the Records Repository and noted that said following designated records were confidential or exempt from the requirements of Section 119.07, Florida Statutes:

AGENCY **REPOSITORY**

1. **Volusia County Medical Examiner's Office Container 7226**

It is ordered that the above listed records be delivered by the Records Repository to the **Clerk of Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, 251 North Ridgewood Avenue, Daytona Beach, Florida 32114**, for further proceedings consistent with Florida Rule of Criminal Procedure 3.852 (2016). The Law Office of the Capital Collateral Regional Counsel - Middle Region shall bear all the costs associated with the transportation and inspection of these records by the trial court.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida on this _____ day of _____, 201__.

_____
Honorable Terrence R. Perkins
Chief Circuit Court Judge

Copies Furnished to:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
Law Office of the Capital Collateral Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907.
ahmed@ccmr.state.fl.us;
perinetti@ccmr.state.fl.us;
venable@ccmr.state.fl.us;
support@ccmr.state.fl.us

Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney, Seventh Judicial Circuit,
251 North Ridgewood Avenue,
Daytona Beach Florida 32114.

Stacey Elaine Johns Kircher,
Assistant Attorney General,
Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
Daytona Beach, Florida 32118.
Stacey.kircher@myfloridalegal.com;
CapApp@myfloridalegal.com

Michael Gray Moore,
Assistant County Attorney,
Volusia County Medical Examiner's Office,
Legal Department,
123 West Indiana Avenue,
DeLand, Florida 32720-4613
112 Carswell Ave.,
Holly Hill, FL 32117
mmoore@volusia.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on t this 9th day of September, 2016. **I HEREBY FURTHER CERTIFY** that a copy of the PDF document of the foregoing has been served via the Florida Courts E-Filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com; to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach Florida 32114 at calhounr@sao7.org; to **Michael Gray Moore**, Volusia County Medical Examiner's Office at mmoore@volusia.org on this 9th day of September, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been e-mailed (on the 9th day of September, 2016) and mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and mailed to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 12th day of September, 2016.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601

VOLUSIA COUNTY COURT ACTION FORM

CASE: 2009 002872 CFAWS
STATE OF FLORIDA
VS
JORDAN, JOSEPH EDWARD
TOT
SPN: 574944
TRIAL DATE:

COURT/SESSION TYPE: Criminal Hearing
DATE: 09/13/2016
TIME: 08:30 AM
JUDGE: PERKINS
ATTY: PERINETTI, MARIA CHRISTINE
BNA:
LOCATION: Justice Center Courtroom 1, 251 N. RIDGEWOOD AVENUE , DAYTONA BEACH, Florida

DIANE M. MATOUSEK
CLERK OF THE CIRCUIT COURT
VOLUSIA COUNTY, FLORIDA
P.O. BOX 6043
DELAND, FL 32721-6043

PARTIES PRESENT	RELEASE ACTIONS	Custody/Capias/Estreat	Continued To: ☐ By Def. ☐ By State ☐ By Court ☐ Waived Spdy.Trl
☐ DEF. APPEARED ☐ APP.W/COUNSEL	☐ TOTAL BOND FOR CASE SET	☐ CAPIAS ISSUED-BOND SET	REMARKS: **Status hearing**
☐ DEF. COUNSEL APP. W/OUT DEF.	☐ AT $	☐ AT $	**Phone confrence regarding judges order from 8/2/16 obtaining copies. Judge lets court know the copies are to be made by the records repository clerk not to make copies but hearing cont**
☐ DEF. FAILED TO APPEAR	☐ DEF. ROR'D	☐ BOND ESTREATED	
ATTORNEY STATUS	☐ RELEASE TO PTS	☐ CAPIAS WITHDRAWN	
☐ APP. IND. STATUS - PD APPT.	☐ RELEASE TO PTS W/BOND	☐ BOND REINSTATED	
☐ APP. IND. STATUS - NOT INDIGENT	☐ OTHER:	☐ BOND ESTR. SET ASIDE	
☐ PD APPT. BY COURT	☐ NO CONTACT W/VICTIM	☐ OTHER:	
☐ DEF. TO RETAIN COUNSEL	☐ NO VIOL.CONTACT W/VICTIM	☐ HOLD CAPIAS-PTS INVEST.	
☐ PD WITHDREW ☐ ATTY.TO BE APPT	☐ OTHER:	☐ 48 HRS	
☐ OTHER:			

CT. CHARGE	COURT ACTION	INCARCERATION/PROBATION/COMMUNITY CONTROL INFORMATION	COSTS
1 FIRST DEGREE FELONY MURDER (ADJG) Statute: 782.04(1)(a)2 LVL:F DEG:C AMENDED CHARGE: BOND SET AT $	☐ N.G.PLEA ☐ NO INFO. ☐ GUILTY PLEA ☐ NOLLE PROSS. ☐ NOLO PLEA ☐ DISMISSED ☐ NG.VERDICT ☐ JGMT ACQT. ☐ GLTY.VERDICT ☐ ADJ.WITHHELD ☐ MISTRIAL ☐ ADJ.GUILTY ☐ WAIVED PSI ☐ PSI ORDERED ☐ PDR ORDERED ☐ TO BE SENT:	☐ VCJ ___ MO ___ DY ☐ PROB.REVOKED ☐ DOC ___ YR ___ MO ___ DY ☐ C.C. REVOKED ☐ JAIL CREDIT TIME: ___ DY ☐ PROB. REINSTATE ☐ PROB ___ YR ___ MO ___ DY ☐ C.C. REINSTATE ☐ COM.CONT. ___ YR ___ MO ☐ PROB. MODIFIED ☐ DRUG OFFENDER ☐ SEX OFFENDER ☐ C.C. MODIFIED ☐ CONCURRENT ☐ CONSECUTIVE TO: ___ HRS.COM. SERVICE ☐ STANDARD COND. ☐ SUBST.ABUSE COUNSEL/TREAT. ☐ PREVIOUS COND. ☐ RANDOM U/A ☐ NO ALCOHOL/ILL.DRUG ☐ COS WAIVED	CRT. COSTS $ FINE $ PD FEE $ SAO FEE $ LEO FEE $ PD APP.FEE $ REST. $ OTHER: ☐ CONVRT. FINE/COST
2 ROBBERY WITH FIREARM/DEADLY WEAPON (ADJG) Statute: 812.13(2)(a) LVL:F DEG:F AMENDED CHARGE: BOND SET AT $	☐ N.G.PLEA ☐ NO INFO. ☐ GUILTY PLEA ☐ NOLLE PROSS. ☐ NOLO PLEA ☐ DISMISSED ☐ NG.VERDICT ☐ JGMT ACQT. ☐ GLTY.VERDICT ☐ ADJ.WITHHELD ☐ MISTRIAL ☐ ADJ.GUILTY ☐ WAIVED PSI ☐ PSI ORDERED ☐ PDR ORDERED ☐ TO BE SENT:	☐ VCJ ___ MO ___ DY ☐ PROB.REVOKED ☐ DOC ___ YR ___ MO ___ DY ☐ C.C. REVOKED ☐ JAIL CREDIT TIME: ___ DY ☐ PROB. REINSTATE ☐ PROB ___ YR ___ MO ___ DY ☐ C.C. REINSTATE ☐ COM.CONT. ___ YR ___ MO ☐ PROB. MODIFIED ☐ DRUG OFFENDER ☐ SEX OFFENDER ☐ C.C. MODIFIED ☐ CONCURRENT ☐ CONSECUTIVE TO: ___ HRS.COM. SERVICE ☐ STANDARD COND. ☐ SUBST.ABUSE COUNSEL/TREAT. ☐ PREVIOUS COND. ☐ RANDOM U/A ☐ NO ALCOHOL/ILL.DRUG ☐ COS WAIVED	CRT. COSTS $ FINE $ PD FEE $ SAO FEE $ LEO FEE $ PD APP.FEE $ REST. $ OTHER: ☐ CONVRT. FINE/COST

DIANE M. MATOUSEK, CLERK OF THE CIRCUIT COURT
Filed in Open Court this 13 day of September , 20 16.

/S/ PERKINS, TERENCE R
PRESIDING JUDGE

ASSISTANT STATE ATTORNEY

/S/ JUSTY TURBERVILLE
DEPUTY CLERK IN ATTENDANCE

IN THE CIRCUIT COURT OF THE 7TH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA :

Plaintiff, : Case No. **2009 002872 CFAES**

v.

: Judge: **TERRENCE R. PERKINS**

JOSEPH EDWARD JORDAN,

Defendant.

NOTICE OF COMPLIANCE BY THE OFFICE OF THE STATE ATTORNEY FOR THE SEVENTEENTH JUDICIAL CIRCUIT

TO: Stacey E. Kircher,
Assistant Attorney General
Office of the Attorney General
Capital Appeals Division
444 Seabreeze Blvd., Suite 500
Daytona Beach, Florida 32118

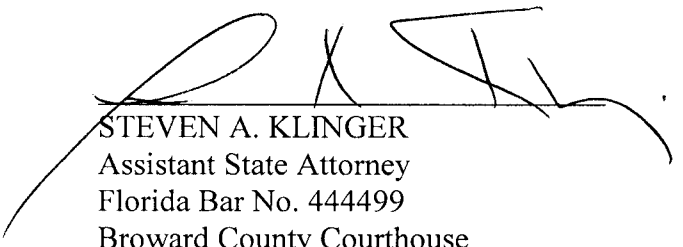
The State Attorney for Seventeenth Judicial Circuit, by and through the undersigned Assistant State Attorney, having received Defendant's Demand for Additional Public Records dated June 20, 2016, hereby gives notice of compliance with Florida Rule of Criminal Procedure 3.852(e) and certifies that, to the best of my knowledge and belief, all public records requested by Defendant's Demand for Additional Public Records have been copied, indexed, and delivered to the records repository of the Secretary of State. Our agency case file number is 10-1261CF10A.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the Florida E-Portal which will provide a copy of the foregoing by E-Mail to: Rosemary Calhoun,

Assistant State Attorney (calhounr@sao7.org.com), 251 North Ridgewood Avenue, Daytona Beach, FL 32114; Stacey E. Kircher, Assistant Attorney General (Stacey.kircher@myfloridalegal.com), 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118; Raheela Ahmed, Assistant CCRC (ahmed@ccmr.state.fl.us), CCRC-Middle, 12973 North Telecom Parkway, Temple Terrace, FL 33637; Maria Perinetti, Assistant CCRC (perinetti@ccmr.state.fl.us), CCRC-Middle, 12973 North Telecom Parkway, Temple Terrace, FL 33637; Donna E. Venable, Assistant CCRC (venable@ccmr.state.fl.us), CCRC-Middle, 12973 North Telecom Parkway, Temple Terrace, FL 33637; and to the Honorable Terrence R. Perkins, Chief Circuit Court Judge (sprice@circuit7.org), S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Room 284, Daytona Beach, FL 32114, this 19th day of September, 2016.

Respectfully submitted

MICHAEL J. SATZ
State Attorney



STEVEN A. KLINGER
Assistant State Attorney
Florida Bar No. 444499
Broward County Courthouse
201 S.E. 6th Street, Suite 660A
Ft. Lauderdale, Florida 33301
Telephone: (954)831-7913
SKlinger@sao17.state.fl.us

IN THE CIRCUIT COURT OF THE 7TH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA	:	
Plaintiff,	:	Case No. **2009 002872 CFAES**
v.	:	Judge: **TERRENCE R. PERKINS**
JOSEPH EDWARD JORDAN,	:	
Defendant,	:	

NOTICE OF DELIVERY OF EXEMPT PUBLIC RECORDS TO RECORDS REPOSITORY

TO: Capital Collateral Postconviction Records Repository
State Archives of Florida
R.A. Gray Building, MS 9-E
500 South Bronough Street
Tallahassee, FL 32399-0250

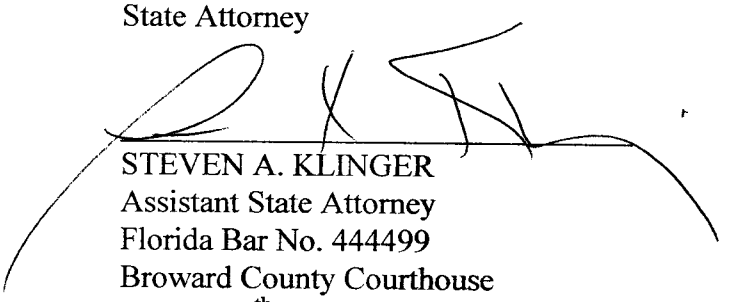
The Office of the State Attorney for the Seventeenth Judicial Circuit, hereby gives notice to the records repository of the Secretary of State that certain delivered records are confidential or exempt from the requirements of section 119.07(1), Florida Statutes. These public records have been separately contained without being redacted, sealed, and the nature of the public records and the legal basis under which the public records are exempt has been identified.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the Florida E-Portal which will provide a copy of the foregoing by E-Mail to: Capital Collateral Records Repository, (cheryl.spicer@dos.myflorida.com); Rosemary Calhoun, Assistant

State Attorney (calhounr@sao7.org.com), 251 North Ridgewood Avenue, Daytona Beach, FL 32114; Stacey E. Kircher, Assistant Attorney General (Stacey.kircher@myfloridalegal.com), 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118; Raheela Ahmed, Assistant CCRC (ahmed@ccmr.state.fl.us), CCRC-Middle, 12973 North Telecom Parkway, Temple Terrace, FL 33637; Maria Perinetti, Assistant CCRC (perinetti@ccmr.state.fl.us), CCRC-Middle, 12973 North Telecom Parkway, Temple Terrace, FL 33637; Donna E. Venable, Assistant CCRC (venable@ccmr.state.fl.us), CCRC-Middle, 12973 North Telecom Parkway, Temple Terrace, FL 33637; and to the Honorable Terrence R. Perkins, Chief Circuit Court Judge (sprice@circuit7.org), S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Room 284, Daytona Beach, FL 32114, this 19th day of September, 2016.

Respectfully submitted

MICHAEL J. SATZ
State Attorney



STEVEN A. KLINGER
Assistant State Attorney
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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. **CASE NO. 2009-CF-2872**

JOSEPH EDWARD JORDAN,

Defendant,
_____/

OBJECTION ON BEHALF OF THE EIGHTH DISTRICT MEDICAL EXAMINERS OFFICE TO DEFENDANT'S SUPPLEMENTAL REQUEST FOR PRODUCTION OF PUBLIC RECORDS

THE OFFICE OF THE MEDICAL EXAMINER FOR THE EIGHTH DISTRICT, by and through undersigned counsel, hereby objects to Defendant's June 20, 2016 Supplemental Request for Production of Public Records, and states:

1. On June 21, 2016, the Office of the Medical Examiner for the Eighth District received from Defendant a supplemental request for production of records pursuant to Florida Rule of Criminal Procedure 3.852(g).
2. Defendant's request seeks records pertaining to post mortem examinations and autopsies conducted regarding thirteen (13) prior executions in Florida and records and documents relating to autopsy protocols in effect at the time of said executions. Defendant also requests documents relating to "discoloring, physical nature, consciousness, heart rate, and breathing" with regard to the executions.

3. Pursuant to Rule 3.852(g), such records shall only be produced if the court determines that each of the following exists:

> (A) Collateral counsel has made a timely and diligent search as provided in Rule 3.852.
>
> (B) Collateral counsel's written demand identifies, with specificity, those additional public records that are not at the records repository.
>
> (C) The additional public records sought are relevant to the subject matter of a proceeding under rule 3.851, or appear reasonably calculated to lead to the discovery of admissible evidence.
>
> (D) The additional public records request is not overly broad or unduly burdensome.

4. The Medical Examiner for the Eighth District should not be ordered to respond to Defendant's request because such seeks documents that are not relevant to the subject matter of a proceeding under rule 3.851, and do not appear to be reasonably calculated to lead to the discovery of admissible evidence. As stated, said requests are also unduly burdensome.

5. The suggestion that the records may relate to an unnamed claim other than a challenge to lethal injection procedures is refuted by the demand itself, which does not request any documents related to Defendant personally, but only to general records regarding post mortem examinations of previously executed death row inmates, protocols for such examinations and observations of

individuals involved in prior executions. These records could not be relevant to any claim as to any potential, colorable postconviction issue.

6. In *Walton v. State*, 3 So. 3d 1000, 1013-14 (Fla. 2009), the Court explained that records regarding lethal injection do not lead to a colorable claim once "the challenge to the constitutionality of lethal injection as currently administered in Florida has been fully considered and rejected by the Court."

7. Here, challenges to the current lethal injection protocol have been fully considered and rejected. *Banks v. State*, 150 So. 3d 797 (Fla. 2014); *Chavez v. State*, 132 So. 3d 826 (Fla. 2014); *Muhammad v. State*, 132 So. 3d 176, 203 (Fla. 2013). In both of those cases, pre-execution requests similar to that filed in this case were denied, rulings which the Florida Supreme Court upheld due to the lack of any identifiable, colorable claim for relief. Similarly, Defendant has also not shown that the records here are relevant to a colorable claim for postconviction relief.

8. Additionally, the Florida Supreme Court has stressed that public records requests are not to be used for fishing expeditions and that defendants bear the burden of proving that the records they request are, in fact, related to a colorable claim for postconviction relief. *Moore v. State*, 820 So. 2d 199, 204 (Fla. 2002); *Glock v. Moore*, 776 So. 2d 243, 253 (Fla. 2001); *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000). The Florida Supreme Court has upheld the denial of a request for

additional public records where the requests sought general information to "research and discover" postconviction claims that Defendant had no specific basis for believing actually existed. *Johnson v. State*, 804 So. 2d 1218, 1224 (Fla. 2001). It is proper to deny postconviction discovery if the documents sought would not support a claim. *Reaves v. State*, 942 So. 2d 874, 881-82 (Fla. 2006).

9. In addition, Defendant's demand concerns circumstances that are not present during an autopsy conducted by the medical examiner's office, including consciousness, heart rate and breathing and the demands are accordingly overly broad.

WHEREFORE, since Defendant's requests are overly broad and the records requested would be irrelevant to any cognizable postconviction claim, the Office of the Medical Examiner for the Eighth District respectfully requests that it not be ordered to comply with Defendant's Demands for Additional Public Records.

Respectfully submitted,

/s/ JDRC

/for/ STACEY E. KIRCHER
ASSISTANT ATTORNEY GENERAL
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(386) 238-4990
Fax (386) 226-0457
stacey.kircher@myfloridalegal.com

CapApp@MyFloridaLegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon: The Honorable Terrence R. Perkins Circuit Judge, Seventh Judicial Circuit Email: tperkins@circuit7.org; Rosemary Calhoun, Assistant State Attorney, calhounr@sao7.org; Raheela Ahmed Assistant CCRC Capital Collateral Regional Counsel – Middle 12973 N. Telecom Parkway Temple Terrace, FL 33637 ahmed@ccmr.state.fl.us, support@ccmr.state.fl.us; Maria C. Perinetti Assistant CCRC Capital Collateral Regional Counsel – Middle, 12973 N. Telecom Parkway, Temple Terrace, FL 33637 perinetti@ccmr.state.fl.us, support@ccmr.state.fl.us; Donna Venable Assistant CCRC Capital Collateral Regional Counsel – Middle, 12973 N. Telecom Parkway Temple Terrace, FL 33637 venable@ccmr.state.fl.us, support@ccmr.state.fl.us; Catherine Weldon, Esq. District 8 Medical Examiner's Office, weldonc@pathology.ufl.edu.

/s/ [signature]

/for/ STACEY E. KIRCHER
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CapApp@MyFloridaLegal.com

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

**DEFENDANT'S SIXTH MOTION REQUESTING
THE *IN CAMERA* REVIEW OF ADDITIONAL RECORDS REQUESTED
[OFFICE OF THE STATE ATTORNEY, SEVENTEENTH JUDICIAL CIRCUIT]**

The Defendant, Joseph Edward Jordan, pursuant to Fla.R.Crim.P. 3.852, by and through his undersigned counsel, hereby moves this Honorable Court for an order to the Florida State Archives (Records Repository) to deliver certain exempt public records to the Clerk of this Court and for this Court to conduct an *in camera* review of those records. In support, Mr. Jordan states the following:

1. Joseph Edward Jordan is incarcerated at Florida State Prison under a sentence of death.

2. Pursuant to Florida Rule of Criminal Procedure 3.852 [1], on September 19, 2016, the

[1] Fla. R. Crim. P. Rule 3.852 (f) provides as follows:

> **(f) Exempt or Confidential Public Records.**
>
> (1) Any public records delivered to the records repository pursuant to these rules that are confidential or exempt from the requirements of section 119.07(1), Florida Statutes, or article I, section 24(a), Florida Constitution, must be separately contained, without being redacted, and sealed. The outside of the container must clearly identify that the public record is confidential or exempt and that the seal may not be broken without an order of the trial court. The outside of the container must identify the nature of the public records and the legal basis for the exemption.

Office of the State Attorney for the Seventeenth Judicial provided a Notice of Compliance in response to the Defendant's Demand for Additional Public Records, indicating that records were set to the records repository.

3. The records sent include records that are deemed exempt by the agency and found in Container 7231. *See Appendix A.* These records are subjected to *in camera* review by this Court for purposes of these post-conviction proceedings.

4. The Supreme Court of Florida has discussed this process several times since the introduction of the rule as a reform in 1998. The Supreme Court of Florida in *Rose v. State*, 774 So. 2d 629 (Fla. 2000), has approved the "pre-Huff" procedure of *in camera* inspections of records designated as exempt and/or confidential and has held as follows:

> Rose also alleges that the trial court violated his constitutional right to have a full and fair state postconviction proceeding by conducting an in-camera inspection of public records to determine whether the State was justified in claiming that such records were exempt from disclosure. On July 11, 1996, Rose filed a public records request with the Pinellas County State Attorney's Office pursuant to chapter 119, Florida Statutes. The State responded and provided Rose with a detailed explanation of the public records that were exempt from disclosure under Florida Rule of Criminal Procedure 3.852. The trial court subsequently conducted an in-camera review of the public records withheld by the State. After conducting the in-camera review, the trial court concluded that the withheld records contained no *Brady* material, but the court instructed the State in a written order to provide Rose with certain records that were not covered under the statutory exemptions. According to Rose, the trial court's in-camera review of the allegedly exempt public records and its refusal to require the State to turn over handwritten notes pertaining

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> (2) Upon the entry of an appropriate court order, sealed containers subject to an inspection by the trial court shall be shipped to the clerk of court. The containers may be opened only for inspection by the trial court in camera. The moving party shall bear all costs associated with the transportation and inspection of such records by the trial court. The trial court shall perform the unsealing and inspection without ex parte communications and in accord with procedures for reviewing sealed documents.
>
> (3) Collateral counsel must file a motion for in camera inspection within 30 days of *receipt of the notice of delivery of sealed records* to the central records repository or the in camera inspection will be deemed waived.

> to the alleged "deal" between Borton and Poole and the State prejudiced him. Rose claims that he is entitled to an evidentiary hearing. We disagree.
>
> In *Ragsdale v. State*, 720 So. 2d 203, 206 (Fla. 1998), this Court had to determine whether public records were properly exempted from disclosure by the State. This Court ruled that where doubt existed as to whether the State must disclose a particular document, the proper procedure is to have a trial judge conduct an in-camera review of the documents. *See id.; see also State v. Kokal*, 562 So. 2d 324, 327 (Fla. 1990) (stating that when certain statutory exemptions are claimed by the party against whom the public records request has been filed or when doubt exists as to whether a particular document must be disclosed, the proper procedure is to furnish the document to the trial judge for an in-camera inspection). After conducting an in-camera review, the State must turn over the nonexempt materials to the defense. *See Ragsdale*, 720 So. 2d at 206.
>
> In this case, Judge Schaeffer conducted an in-camera proceeding and examined each of the alleged documents that the State withheld to determine whether the documents were properly withheld. After reviewing the documents, the trial court issued a written order instructing the State as to which documents it needed to produce to the defense. Rose has failed to cite to any authority that suggests that Judge Schaeffer's review of the withheld documents was improper and we have found no authority that supports this view. Therefore, we find that Judge Schaeffer fully complied with procedures set forth in *Ragsdale* and *Kokal* for determining whether the State's claimed exemptions were proper.

Rose v. State, 774 So. 2d 629, 636-637 (Fla. 2000) (footnote omitted).

5. The procedure approved in *Rose* was again discussed by the Florida Supreme Court in *Damren v. State*, 838 So. 2d 512 (Fla. 2003), as follows:

> Damren asserts that the trial court erred in denying his request for certain public records from the State Attorney's office. According to Damren, the circuit court failed to review these records for exculpatory information under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We disagree.
>
> As this Court has held, "where doubt existed as to whether the State must disclose a particular document, the proper procedure is to have a trial judge conduct an in-camera review of the documents." *Rose v. State*, 774 So. 2d 629, 636 (Fla. 2000). This Court applies an abuse of discretion standard when reviewing a trial court's determination on a public records request. *Moore v. State*, 820 So. 2d 199, 204 (Fla. 2002).
>
> The record reveals that the State provided the requested records to the trial court for an in-camera review and the postconviction judge granted the public records request in part and denied it in part. During a hearing, the circuit court carefully reviewed each folder of materials which was submitted, explained what

> information was contained in each folder and whether it included exculpatory information, and indicated the files to which defense counsel was entitled. We find that the trial court did not abuse its discretion in denying in part Damren's request and hence deny relief. We find no error.

Damren v. State, 838 So.2d 512, 519 (Fla. 2003) (footnote omitted).

6. The effects of the discovery and other post-conviction reforms from the late 1990s onward was analyzed by the Honorable O.H. Eaton, Jr. as follows:

> Litigation in a death penalty case does not end when the judgment and sentence of death are affirmed by the Supreme Court of Florida. The next phase of litigation in these cases falls under the general heading of "postconviction relief." It is during this phase that death row defendants litigate matters "collateral" to the judgment and sentence that could not have been raised on appeal. . . . They are charged with reinvestigating the case to find out deficiencies that occurred during the trial. This reinvestigation usually includes review of numerous public records that may have some bearing on the case.
>
> . . .
>
> Over the last several years both the Supreme Court and the legislature have made efforts to streamline the processing of postconviction motions in capital cases.
>
> . . .
>
> Prior to 1996, collateral counsel had to file a civil action in order to obtain public records from persons or agencies other than the state attorney and local law enforcement agencies that investigated the crime. This cumbersome process often required suit to be filed in several jurisdictions and delays were inevitable.
>
> . . .
>
> The legislature created a centralized repository for storage of public records in capital cases in order to provide easy access to them. It was the legislature's hope that a process could be developed that would allow these records to be automatically sent to the repository and made accessible to counsel without the necessity of resorting to litigation.
>
> Currently, the Secretary of State is the officer responsible for storing the records and the records repository is located in the R.A. Gray building in Tallahassee.
>
> . . .
>
> [T]he procedural aspects of discovery of public records are now regulated by the Supreme Court of Florida. Rule 3.582 provides for an orderly method to obtain public records and, if the various offices and agencies that maintain public records cooperate, collateral counsel should be able to review them and have copies made in a timely fashion.
>
> . . .
>
> Assuming every person and agency complies with the requirement to submit public records to the records repository, all of the public records should be on file there less than 330 days from the date the mandate affirming the death sentence is issued by the Supreme Court of Florida. However, in capital litigation, things are never

that easy. Some of the records may be claimed to be exempt or confidential and there may be old cases out there that are subject to a separate procedure. Ironically, the persons or agencies claiming records to be exempt or confidential are aligned with the prosecution whose interest is to avoid delays. By providing a separate procedure for old cases, additional delays may be expected.

Exempt or Confidential Public Records

Rule 3.852(f) provides that any public records delivered to the records repository that are claimed to be exempt or confidential must be boxed separately, without redaction, and sealed. The box must clearly identify that the public record is confidential or exempt and the seal may not be broken without an order of the trial court. The box must also identify "the nature of the public records and the legal basis for the exemption."
In order for collateral counsel to obtain a ruling to unseal the public records claimed to be exempt or confidential, an order must first be obtained from the trial court directing the records repository to ship the sealed boxes of records to the clerk of the trial court. *Undoubtedly, collateral counsel will always want to obtain a ruling to determine if these records are really exempt or confidential and delay could be avoided if these records were filed with the clerk of the court in the first place.* However, the Supreme Court wanted to carry out legislative intent where possible so this unnecessary complication is part of the procedure and will undoubtedly cause delay.

The "moving party" is responsible to pay for the cost of the "transportation and inspection of such records by the trial court." Presumably, the "cost" will be just the postage. It is unclear what "cost" could possibly be associated with inspecting the records.

Once the records claimed to be exempt or confidential are delivered to the clerk of the court, they may only be opened by the trial court in camera without ex parte communication in the same manner as inspecting any sealed document. Presumably, the trial court will enter an order sustaining the claim of exemption or confidentiality or order the records disclosed.
. . .
In Camera Inspection of Exempt Public Records

Persons or agencies claiming public records to be exempt from production must box the records separately, seal them, index them with the reasons for the exemption, and deliver them to the records repository. From there, the records are shipped to the clerk of the trial court.

The trial judge must inspect the records in camera to determine if they are in fact exempt. A detailed order must be entered identifying each public record and the reason for its exemption.

> *In* Rose v. State, *774 So. 2d 629 (Fla. 2000), the trial judge held an in camera inspection of public records claimed to be exempt before the Huff hearing. The state attorney was ordered to produce certain of the records and others were ruled to be exempt. The Supreme Court approved the procedure.*
> . . .
> Public records have provided collateral counsel with significant evidence in the past and will undoubtedly continue to do so in the future. Trial judges need to take their responsibility to rule on public records issues seriously and make every effort to resolve public records disputes in a timely manner.

O.H. Eaton, Jr., *Discovery of Public Records in Capital Cases*, 76 Fla. B.J. 24, 30 (April 2002) (footnotes omitted) (emphasis added).

7. There are no objections by the State of Florida as to motions regarding delivery of records to this Court for *in camera* inspection and any accompanying proposed order as relayed to this Court at the Status Conference conducted on February 12, 2016.

WHEREFORE, Mr. Jordan hereby requests the entry of an order so that the aforementioned records can be transferred to the Clerk of this Circuit Court for an *in camera* review by this Court to determine whether they are exempt public records. It is further requested that if a subsequent *in camera* determination is made by this Honorable Court that these records are not exempt, that the records be released to undersigned counsel pursuant to a subsequent Court's order.

Respectfully submitted

s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

s/ Maria Christine Perinetti
Maria Christine Perinetti
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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

APPENDIX A

DEFENDANT'S SIXTH MOTION REQUESTING
THE *IN CAMERA* REVIEW OF ADDITIONAL RECORDS REQUESTED
[OFFICE OF THE STATE ATTORNEY, SEVENTEENTH JUDICIAL CIRCUIT]

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/REV06-2012/CCR100	**TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7230
2. AGENCY Office of the State Attorney	3. DIVISION Seventeenth Judicial Circuit	4. BUREAU

5. ADDRESS 201 SE 6th Street, Room 660A Ft. Lauderdale, FL 33301	6. CONTACT Name: Steven A. Klinger Title: Assistant State Attorney Phone Number: 954-831-7913
7. SUBMIT TO: Capital Collateral Postconvicton Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME : **JOSEPH EDWARD JORDAN** DEFENDANT SEVENTH CIRCUIT CASE # **2009 002872CFAES** WITNESS POWELL SEVENTEENTH CIRCUIT CASE # **10-1261CF10A**

9. DESCRIPTION

STATE v MATTHEW POWELL CASE NO. 10-1261CF10A

1. Information (Amended)
2. Case Filing Recommendation
3. Notice Letter (Redacted)
4. Drug Analysis Request Forms (Redacted)
5. Booking Sheets (Redacted)
6. Probable Cause Affidavit (Redacted)
7. Hallandale Beach Case Filing Cover Sheet
8. Hydrocodone Tablet Illustration
9. Crime Laboratory Analysis Report

CAS

2016 SEP 19 PM 7:37

TOTAL NUMBER OF BOXES _____1_____ **OR** PACKAGES _____ SENT TO REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? _____YES __X__NO
ARE **EXEMPT** RECORDS SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? (***If not, records will be returned to you)*** ***__X__YES____NO***
DESCRIPTION OF EXEMPT RECORDS AND **STATUTORY BASIS** FOR EXEMPTION:

(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. __X___ PAPER COPIES b.____ PHOTOGRAPHS c. __ AUDIO TAPES d._____ VIDEO TAPES e.__x___ OTHER

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
SIGNATURE 9/16/16 DATE	Per delay for Gerard Clark 9/20/16 CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Steven A. Klinger, Assistant State Attorney TYPE NAME AND TITLE	

WITNESS: MATTHEW POWELL
CASE# 10-1261CF10A

10. Police Reports (Redacted)
11. Picture of Priority Mail Box
12. Hallandale Beach Police Department Property Receipt
13. Hallandale Beach Police Department Fax Transmittal
14. Court Orders (Redacted)
15. BSO PICS
16. Invocation of Right to Remain Silent
17. Brady Notice dated February 19, 2010
18. Defense Motions
19. Defendant's Achievement Certificates
20. State's Amended Discovery
21. Interim Report of Grand Jury, Fall Term 2009
22. Defense Notices of Deposition
23. Envelope From Attorney John Fry
24. State's Supplemental Discovery
25. Defense Notice of Hearing
26. Attorney John Fry Letter dated May 20, 2010
27. Defendant's Motion to Suppress
28. Deposition of Timothy Church
29. Case Law (provided by defense for suppression motion)
30. CD's (2) Statement and Picture
31. Request for Court Reporter
32. Judgment
33. Criminal Punishment Code Scoresheet
34. Demand for Discovery on V.O.P.
35. Acknowledgment of Public Defender Appointment
36. Departure Memorandum
37. Emails
38. Hallandale Beach Police Department Fax Transmittal Sheet
39. Case File Jacket ~~(Empty)~~
40. Acetaminophen Information
41. Carisoprodol Information
42. Cyclobenzaprine Hydrochloride Information
43. Medium Manila Envelope (Empty)
44. State's Discovery Exhibit
45. Notice of Confidential Information Within Court Filing
46. Sworn Statement of Sadia Haque
47. Sworn Statement of Cassandra Castallanos
48. Defendant Jordan's Demand for Additional Public Records
49. Notice of Compliance by the Volusia County Medical Examiner's Office

STATE OF FLORIDA DEPARTMENT OF STATE Division of Library and Information Services Form LS/REV06-2012/CCR100	**TRANSMITTAL/RECEIPT TRANSFER OF CAPITAL COLLATERAL POSTCONVICTION RECORDS TO THE STATE ARCHIVES OF FLORIDA**	1. RECORD GROUP NO. 660 SERIES NO. 1739 ARCHIVES BOX NO. 7231(R)
2. AGENCY Office of the State Attorney	3. DIVISION Seventeenth Judicial Circuit	4. BUREAU

5. ADDRESS 201 SE 6th Street, Room 660A Ft. Lauderdale, FL 33301	6. CONTACT Name: Steven A. Klinger Title: Assistant State Attorney Phone Number: 954-831-7913
7. SUBMIT TO: Capital Collateral Postconvicton Records Repository State Archives of Florida R.A. Gray Building, MS 9-E 500 South Bronough Street Tallahassee, FL 32399-0250	8. DEFENDANT NAME : JOSEPH EDWARD JORDAN DEFENDANT SEVENTH CIRCUIT CASE # **2009 002872CFAES** WITNESS POWELL SEVENTEENTH CIRCUIT CASE # **10-1261CF10A**

9. **DESCRIPTION** **STATE v JOSEPH EDWARD JORDAN, CASE NO. 2009 002872CFAES, 3.852 SUBMISSION**

EXEMPT MATERIALS

EXEMPT BOX

STATE v. MATTHEW POWELL (CASE No. 10-1261CF10A)

1. Prosecutor Notes – Exempt under *State v. Arbalaez*, 775 So.2d 909 (Fla. 2000); *Lopez v. State*, 696 So.2d 725 (Fla.1997); *State v. Kokal*, 562 So.2d 324 (Fla. 1990).
2. Criminal History Data/NCIC/FCIC –Exempt under Florida Statute § 943.0525.
3. Medical Records–Exempt under Florida Statute § 395.3025(4); § 395.3025(8); §456.057.
4. Department of Corrections Records – Exempt under Florida Statute § 945.10.
5. First Draft Case Filing Recommendation – Exempt under *State v. Arbalaez*, 775 So.2d 909 (Fla. 2000); *State v. Kokal*, 562 So.2d 324 (Fla. 1990).
6. Pharmacy Records–Exempt under Florida Statute § 465.017(2).
7. DL, DMV Records and Driver's License Digital Imaging—Exempt under Florida Statute § 119.0712(2); § 322.142(4).

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TOTAL NUMBER OF BOXES _____ **OR** PACKAGES ____1____ SENT TO REPOSITORY

ARE **EXEMPT** RECORDS INCLUDED IN THIS SHIPMENT? ___X___YES ____NO
ARE **EXEMPT** RECORDS SEPARATELY SEALED AND CLEARLY MARKED AS EXEMPT? (***If not, records will be returned to you)*** ___X___***YES***____***NO***
DESCRIPTION OF EXEMPT RECORDS **AND STATUTORY BASIS** FOR EXEMPTION:
(USE CONTINUATION SHEET IF NECESSARY)

10. TYPE OF RECORD (CHECK EACH TYPE THAT APPLIES)

a. __x__ PAPER COPIES b.____ PHOTOGRAPHS c._____ AUDIO TAPES d.___ VIDEO TAPES e.__x__ OTHER

11. TRANSMITTING AGENCY: I AUTHORIZE THE TRANSFER OF THE ABOVE-DESCRIBED RECORDS TO THE CUSTODY OF THE CAPITAL COLLATERAL POSTCONVICTION RECORDS REPOSITORY (STATE ARCHIVES OF FLORIDA). OUR AGENCY RETAINS CUSTODY OF AND RESPONSIBILITY FOR OUR ORIGINAL AGENCY RECORDS.	12. STATE ARCHIVES OF FLORIDA: I ACCEPT CUSTODY OF THE RECORDS HEREIN DESCRIBED.
SIGNATURE 9/16/16 DATE	for Gerard Clark 9/20/16 CHIEF, ARCHIVES AND RECORDS MANAGEMENT DATE
Steven A. Klinger, Assistant State Attorney TYPE NAME AND TITLE	

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
			Attorney's Office--Fourth Judicial Circuit--Public Records
07227	00001		Emails for Rashard Evans and Billy Jim Sheppard, Jr. [1 CD]
07228			Sheppard, Billy Jim Jr.; *RESTRICTED* SEALED; 2008-CF-011059; State Attorney's Office--Fourth Judicial Circuit--Public Records
07228	00001		Confidential/Exempt: Emails for Rashard Evans and Billy Jim Sheppard, Jr.--Exempt per F.S. 119.071(5)(g), 119.071(5)(a), 119.071(4)(d), 110.123(9), 112.08(7), 119.071(4)(b), 381.004(5), 395.3025(4), 395.3025(7), 395.3025(8), 119.071(2)(h), 119.071(2)(j)2.a, 119.071(2)(j)2.b, 810.145, 794.024, 119.071(2)(c)1, 1002.221, 1006.52, and 119.071(2)(d)
07229			Fletcher, Timothy W.; 2009-CF-648,806,807; State Attorney's Office--Homicide Investigations Unit - North [SCANNED - CD-1926]
07229	00001		Request for Assistance--Special Agent Guy to Locate Jewelry Pawned/Sold in Tennessee, 4/21/09
07229	00002		Contact Joanna Curtis--Use of Home Computer by Fletcher, 4/21/09
07230			**Jordan, Joseph Edward; 2009-CF-002872; State Attorney's Office--Seventeenth Judicial Circuit**
07230	00001		Matthew Powell (Case #10-1261CF10A): Information (Amended)
07230	00002		Matthew Powell (Case #10-1261CF10A): Case Filing Recommendations
07230	00003		Matthew Powell (Case #10-1261CF10A): Notice Letter (Redacted)

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07230	00004		Matthew Powell (Case #10-1261CF10A): Drug Analysis Request Forms (Redacted)
07230	00005		Matthew Powell (Case #10-1261CF10A): Booking Sheets (Redacted) [1 page black and white photocopied image]
07230	00006		Matthew Powell (Case #10-1261CF10A): Probable Cause Affidavit (Redacted)
07230	00007		Matthew Powell (Case #10-1261CF10A): Hallandale Beach Police Department -- Case Filing Cover Sheet
07230	00008		Matthew Powell (Case #10-1261CF10A): Hydrocodone Tablet Illustration
07230	00009		Matthew Powell (Case #10-1261CF10A): Crime Laboratory Analysis Report
07230	00010		Matthew Powell (Case #10-1261CF10A): Police Reports (Redacted)
07230	00011		Matthew Powell (Case #10-1261CF10A): Picture of Priority Mail Box [1 page black and white photocopied image]
07230	00012		Matthew Powell (Case #10-1261CF10A): Hallandale Beach Police Department -- Property Receipt
07230	00013		Matthew Powell (Case #10-1261CF10A): Hallandale Beach Police Department -- Fax Transmittal
07230	00014		Matthew Powell (Case #10-1261CF10A): Court Oders (Redacted)
07230	00015		Matthew Powell (Case #10-1261CF10A): BSO PICS [1 page black and white photocopied image]

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07230	00016		Matthew Powell (Case #10-1261CF10A): Invocation of Right to Remain Silent
07230	00017		Matthew Powell (Case #10-1261CF10A): Brady Notice (February 19, 2010)
07230	00018		Matthew Powell (Case #10-1261CF10A): Defense Motions
07230	00019		Matthew Powell (Case #10-1261CF10A): Defendant's Achievment Certificates
07230	00020		Matthew Powell (Case #10-1261CF10A): State's Amended Discovery
07230	00021		Matthew Powell (Case #10-1261CF10A): Interim Report of Grand Jury, Fall Term 2009
07230	00022		Matthew Powell (Case #10-1261CF10A): Defense Notices of Deposition
07230	00023		Matthew Powell (Case #10-1261CF10A): Envelope from Attorney John Fry
07230	00024		Matthew Powell (Case #10-1261CF10A): State's Supplemental Discovery
07230	00025		Matthew Powell (Case #10-1261CF10A): Defense Notice of Hearing
07230	00026		Matthew Powell (Case #10-1261CF10A): Attorney John Fry Letter (May 20, 2010)
07230	00027		Matthew Powell (Case #10-1261CF10A): Defendant's Motion to Suppress
07230	00028		Matthew Powell (Case #10-1261CF10A): Deposition -- Timothy Church

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07230	00029		Matthew Powell (Case #10-1261CF10A): Case Law (Provided by Defense for Suppression Motion)
07230	00030		Matthew Powell (Case #10-1261CF10A): CD's (2) -- Statement and Picture [2 CDs]
07230	00031		Matthew Powell (Case #10-1261CF10A): Request for Court Reporter
07230	00032		Matthew Powell (Case #10-1261CF10A): Judgment
07230	00033		Matthew Powell (Case #10-1261CF10A): Criminal Punishment Code Scoresheet
07230	00034		Matthew Powell (Case #10-1261CF10A): Demand for Discovery -- Violation of Probation
07230	00035		Matthew Powell (Case #10-1261CF10A): Acknowledgment of Public Defender Appointment
07230	00036		Matthew Powell (Case #10-1261CF10A): Departure Memorandum
07230	00037		Matthew Powell (Case #10-1261CF10A): Emails
07230	00038		Matthew Powell (Case #10-1261CF10A): Hallandale Beach Police Department -- FAX Transmittal Sheet
07230	00039		Matthew Powell (Case #10-1261CF10A): Case File Jacket
07230	00040		Matthew Powell (Case #10-1261CF10A): Acetaminophen Information
07230	00041		Matthew Powell (Case #10-1261CF10A): Carisoprodol Information
07230	00042		Matthew Powell (Case #10-1261CF10A): Cyclobenzaprine Hydrochloride Information

Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07230	00043		Matthew Powell (Case #10-1261CF10A): Medium Manila Envelope (empty)
07230	00044		Matthew Powell (Case #10-1261CF10A): State's Discovery Exhibit
07230	00045		Matthew Powell (Case #10-1261CF10A): Notice of Confidential Information Within Court Filing
07230	00046		Matthew Powell (Case #10-1261CF10A): Sworn Statement -- Sadia Haque
07230	00047		Matthew Powell (Case #10-1261CF10A): Sworn Statement -- Cassandra Castallanos
07230	00048		Matthew Powell (Case #10-1261CF10A): Defendant Jordan's Demand for Additional Public Records
07230	00049		Matthew Powell (Case #10-1261CF10A): Notice of Compliance by the Volusia County Medical Examiner's Office
07231			**Jordan, Joseph Edward; *RESTRICTED* SEALED; 2009-CF-002872; State Attorney's Office--Seventeenth Judicial Circuit**
07231	00001		Confidential/Exempt--Matthew Powell (Case #10-1261CF10A): Prosecutor Notes -- Exempt per 775 So.2d 909 (Fla. 2000), 696 So.2d 725(Fla. 1997), 562 So.2d 324 (Fla. 1990)
07231	00002		Confidential/Exempt--Matthew Powell (Case #10-1261CF10A): Criminal History Data / NCIC / FCIC -- Exempt per F.S. 943.0525
07231	00003		Confidential/Exempt--Matthew Powell (Case #10-1261CF10A): Medical Records -- Exempt per F.S. 395.3025(4), 395.3025(8) and 456.057

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Record Group: 000660 Call Number: .S1739

Creator: Florida. Office of the Capital Collateral Representative
Title: Capital Collateral Regional Counsel postconviction records,
Date: 1964-2012.

Container	File Unit	Item	Title
07231	00004		Confidential/Exempt--Matthew Powell (Case #10-1261CF10A): Department of Corrections Records -- Exempt per F.S. 945.10
07231	00005		Confidential/Exempt--Matthew Powell (Case #10-1261CF10A): First Draft Case Filing Recommendations -- Exempt per 775 So.2d 909 (Fla. 2000) and 562 So.2d 324 (Fla. 1990)
07231	00006		Confidential/Exempt--Matthew Powell (Case #10-1261CF10A): Pharmacy Records -- Exempt per F.S. 465.017(2)
07231	00007		Confidential/Exempt--Matthew Powell (Case #10-1261CF10A): Driver's License, Department of Motor Vehicle Records and Driver's License Digital Imaging -- Exempt per F.S. 119.0712(2) and 322.142(4)
07232			Brown, Tina; *RESTRICTED* SEALED; 2010-CF-001608A; Florida Department of Corrections--General Counsel's Office
07232	00001		Confidential/Exempt: Lowell Annex--Medical Records (Med-1 -- Med-363) [1 CD] -- Exempt per F.S. 456.057, 945.10(1)(a), and 45 CFR § 164.502
07233			Davis, William Roger; *RESTRICTED* SEALED; 2009-CF-5140A; Florida Department of Corrections--General Counsel's Office
07233	00001		Confidential/Exempt: Email Search Files--Medical Records (Email search file years: 2005-2006, 2008-2010, 2012-2015) [1 CD] -- Exempt per F.S. 456.057, 945.10(1)(a), 45 CFR § 164.502, 381.004, 397.501, 397.752, 42 USC § 290dd-2, 42 CFR Part 2, 119.071(5)(a), 119.071(1), 119.071(3), 281.301, 382.013(5), 812.081, 119.071(1)(f), 119.011(12), 943.053, 943.0525 and Chap. 33-601.901(5)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on t this 29th day of September, 2016. **I HEREBY FURTHER CERTIFY** that a copy of the PDF document of the foregoing has been served via the Florida Courts E-Filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com; to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, Seventh Judicial Circuit, at calhounr@sao7.org; and to **Steven Klinger**, Assistant State Attorney, Office of the State Attorney, Seventeenth Judicial Circuit, at SKlinger@sao17.state.fl.us on this 29th day of September, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been e-mailed (via the Florida Courts E-Filing Portal) and mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and mailed to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 29th day of September, 2016.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

**ORDER TO DELIVER EXEMPT PUBLIC RECORDS
[OFFICE OF THE STATE ATTORNEY, SEVENTEENTH JUDICIAL CIRCUIT]**

TO: **RECORDS REPOSITORY**
The Florida State Archives
Attn: **CCRC Records Archivist**
R.A. Gray Building,M.S. 9-E,
500 South Bronough Street,
Tallahassee, Florida 32399-0250.

This Court having received notice on this ____ day of _____, 2016, that certain records which have been claimed as confidential or exempt from disclosure have been copied, indexed, separately contained without being redacted, sealed, identified as to their nature and their legal basis for confidentiality or exemption, and delivered to the Records Repository of the Secretary of the State. The following agencies or entities delivered sealed and/or exempt records to the Records Repository and noted that said following designated records were confidential or exempt from the requirements of Section 119.07, Florida Statutes:

AGENCY **REPOSITORY**

1. **Office of the State Attorney, 17th Judicial Circuit Container 7231**

It is ordered that the above listed records be delivered by the Records Repository to the **Clerk of Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, 251 North Ridgewood Avenue, Daytona Beach, Florida 32114**, for further proceedings consistent with Florida Rule of Criminal Procedure 3.852 (2016). The Law Office of the Capital Collateral Regional Counsel - Middle Region shall bear all the costs associated with the transportation and inspection of these records by the trial court.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida on this _____ day of _____, 201__.

_____

Honorable Terrence R. Perkins
Chief Circuit Court Judge

Copies Furnished to:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
Law Office of the Capital Collateral Regional Counsel-Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907.
ahmed@ccmr.state.fl.us;
perinetti@ccmr.state.fl.us;
venable@ccmr.state.fl.us;
support@ccmr.state.fl.us

Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney, Seventh Judicial Circuit,
251 North Ridgewood Avenue,
Daytona Beach Florida 32114.

Stacey Elaine Johns Kircher,
Assistant Attorney General,
Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
Daytona Beach, Florida 32118.
Stacey.kircher@myfloridalegal.com;
CapApp@myfloridalegal.com

Steven Klinger,
Assistant State Attorney,
Office of the State Attorney,
Seventeenth Judicial Circuit,
201 SE 6th Street, Room 660A,
Fort Lauderdale, Florida 33301.
SKlinger@sao17.state.fl.us

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on t this 29th day of September, 2016. **I HEREBY FURTHER CERTIFY** that a copy of the PDF document of the foregoing has been served via the Florida Courts E-Filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com; to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, Seventh Judicial Circuit, at calhounr@sao7.org; and to **Steven Klinger**, Assistant State Attorney, Office of the State Attorney, Seventeenth Judicial Circuit, at SKlinger@sao17.state.fl.us on this 29th day of September, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been e-mailed (via the Florida Courts E-Filing Portal) and mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and mailed to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 29th day of September, 2016.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

FILED
16 SEP 30 AM 8:29
CLERK OF THE CIRCUIT & CTY. COURT VOLUSIA CTY, FL CC13

ORDER TO DELIVER EXEMPT PUBLIC RECORDS [VOLUSIA COUNTY MEDICAL EXAMINER'S OFFICE]

TO: **RECORDS REPOSITORY**
The Florida State Archives
Attn: **CCRC Records Archivist**
R.A. Gray Building,M.S. 9-E,
500 South Bronough Street,
Tallahassee, Florida 32399-0250.

This Court having received notice on this 21 day of Sept., 2016, that certain records which have been claimed as confidential or exempt from disclosure have been copied, indexed, separately contained without being redacted, sealed, identified as to their nature and their legal basis for confidentiality or exemption, and delivered to the Records Repository of the Secretary of the State. The following agencies or entities delivered sealed and/or exempt records to the Records Repository and noted that said following designated records were confidential or exempt from the requirements of Section 119.07, Florida Statutes:

AGENCY **REPOSITORY**

1. **Volusia County Medical Examiner's Office** **Container 7226**

It is ordered that the above listed records be delivered by the Records Repository to the **Clerk of Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, 251 North Ridgewood Avenue, Daytona Beach, Florida 32114**, for further proceedings consistent with Florida Rule of Criminal Procedure 3.852 (2016). The Law Office of the Capital Collateral Regional Counsel - Middle Region shall bear all the costs associated with the transportation and inspection of these records by the trial court.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida on this 26 day of Sept., 2016

Honorable Terrence R. Perkins
Chief Circuit Court Judge

Copies Furnished to:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
Law Office of the Capital Collateral Regional Counsel-Middle Region
12973 North Telecom Parkway,
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venable@ccmr.state.fl.us;
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Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney, Seventh Judicial Circuit,
251 North Ridgewood Avenue,
Daytona Beach Florida 32114.

Stacey Elaine Johns Kircher,
Assistant Attorney General,
Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
Daytona Beach, Florida 32118.
Stacey.kircher@myfloridalegal.com;
CapApp@myfloridalegal.com

Michael Gray Moore,
Assistant County Attorney,
Volusia County Medical Examiner's Office,
Legal Department,
123 West Indiana Avenue,
DeLand, Florida 32720-4613
112 Carswell Ave.,
Holly Hill, FL 32117
mmoore@volusia.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on t this 9th day of September, 2016. **I HEREBY FURTHER CERTIFY** that a copy of the PDF document of the foregoing has been served via the Florida Courts E-Filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com; to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach Florida 32114 at calhounr@sao7.org; to **Michael Gray Moore**, Volusia County Medical Examiner's Office at mmoore@volusia.org on this 9th day of September, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been e-mailed (on the 9th day of September, 2016) and mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and mailed to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 12th day of September, 2016.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

**ORDER TO DELIVER EXEMPT PUBLIC RECORDS
[OFFICE OF THE STATE ATTORNEY, SEVENTEENTH JUDICIAL CIRCUIT]**

TO: **RECORDS REPOSITORY**
The Florida State Archives
Attn: **CCRC Records Archivist**
R.A. Gray Building,M.S. 9-E,
500 South Bronough Street,
Tallahassee, Florida 32399-0250.

FILED
16 SEP 30 AM 11:47
CLERK OF THE CIRCUIT & CTY COURT VOLUSIA CO FL
CC13

This Court having received notice on this ____ day of _____, 2016, that certain records which have been claimed as confidential or exempt from disclosure have been copied, indexed, separately contained without being redacted, sealed, identified as to their nature and their legal basis for confidentiality or exemption, and delivered to the Records Repository of the Secretary of the State. The following agencies or entities delivered sealed and/or exempt records to the Records Repository and noted that said following designated records were confidential or exempt from the requirements of Section 119.07, Florida Statutes:

AGENCY **REPOSITORY**

1. **Office of the State Attorney, 17th Judicial Circuit Container 7231**

It is ordered that the above listed records be delivered by the Records Repository to the **Clerk of Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, 251 North Ridgewood Avenue, Daytona Beach, Florida 32114**, for further proceedings consistent with Florida Rule of Criminal Procedure 3.852 (2016). The Law Office of the Capital Collateral Regional Counsel - Middle Region shall bear all the costs associated with the transportation and inspection of these records by the trial court.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida on this 30 day of Sept., 2016

Honorable Terrence R. Perkins
Chief Circuit Court Judge

Copies Furnished to:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
Law Office of the Capital Collateral Regional Counsel-Middle Region
12973 North Telecom Parkway,
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Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney, Seventh Judicial Circuit,
251 North Ridgewood Avenue,
Daytona Beach Florida 32114.

Stacey Elaine Johns Kircher,
Assistant Attorney General,
Office of the Attorney General,
444 Seabreeze Blvd, 5th Floor,
Daytona Beach, Florida 32118.
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Steven Klinger,
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Filing # 47067024 E-Filed 09/29/2016 09:57:54 AM

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

No obj. See pg 6

DEFENDANT'S SIXTH MOTION REQUESTING THE *IN CAMERA* REVIEW OF ADDITIONAL RECORDS REQUESTED [OFFICE OF THE STATE ATTORNEY, SEVENTEENTH JUDICIAL CIRCUIT]

The Defendant, Joseph Edward Jordan, pursuant to Fla.R.Crim.P. 3.852, by and through his undersigned counsel, hereby moves this Honorable Court for an order to the Florida State Archives (Records Repository) to deliver certain exempt public records to the Clerk of this Court and for this Court to conduct an *in camera* review of those records. In support, Mr. Jordan states the following:

1. Joseph Edward Jordan is incarcerated at Florida State Prison under a sentence of death.

2. Pursuant to Florida Rule of Criminal Procedure 3.852 [1], on September 19, 2016, the

[1] Fla. R. Crim. P. Rule 3.852 (f) provides as follows:

> **(f) Exempt or Confidential Public Records.**
>
> (1) Any public records delivered to the records repository pursuant to these rules that are confidential or exempt from the requirements of section 119.07(1), Florida Statutes, or article I, section 24(a), Florida Constitution, must be separately contained, without being redacted, and sealed. The outside of the container must clearly identify that the public record is confidential or exempt and that the seal may not be broken without an order of the trial court. The outside of the container must identify the nature of the public records and the legal basis for the exemption.

Office of the State Attorney for the Seventeenth Judicial provided a Notice of Compliance in response to the Defendant's Demand for Additional Public Records, indicating that records were set to the records repository.

3. The records sent include records that are deemed exempt by the agency and found in Container 7231. *See Appendix A*. These records are subjected to *in camera* review by this Court for purposes of these post-conviction proceedings.

4. The Supreme Court of Florida has discussed this process several times since the introduction of the rule as a reform in 1998. The Supreme Court of Florida in *Rose v. State*, 774 So. 2d 629 (Fla. 2000), has approved the "pre-Huff" procedure of *in camera* inspections of records designated as exempt and/or confidential and has held as follows:

> Rose also alleges that the trial court violated his constitutional right to have a full and fair state postconviction proceeding by conducting an in-camera inspection of public records to determine whether the State was justified in claiming that such records were exempt from disclosure. On July 11, 1996, Rose filed a public records request with the Pinellas County State Attorney's Office pursuant to chapter 119, Florida Statutes. The State responded and provided Rose with a detailed explanation of the public records that were exempt from disclosure under Florida Rule of Criminal Procedure 3.852. The trial court subsequently conducted an in-camera review of the public records withheld by the State. After conducting the in-camera review, the trial court concluded that the withheld records contained no *Brady* material, but the court instructed the State in a written order to provide Rose with certain records that were not covered under the statutory exemptions. According to Rose, the trial court's in-camera review of the allegedly exempt public records and its refusal to require the State to turn over handwritten notes pertaining

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> (2) Upon the entry of an appropriate court order, sealed containers subject to an inspection by the trial court shall be shipped to the clerk of court. The containers may be opened only for inspection by the trial court in camera. The moving party shall bear all costs associated with the transportation and inspection of such records by the trial court. The trial court shall perform the unsealing and inspection without ex parte communications and in accord with procedures for reviewing sealed documents.
>
> (3) Collateral counsel must file a motion for in camera inspection within 30 days of *receipt of the notice of delivery of sealed records* to the central records repository or the in camera inspection will be deemed waived.

to the alleged "deal" between Borton and Poole and the State prejudiced him. Rose claims that he is entitled to an evidentiary hearing. We disagree.

In *Ragsdale v. State*, 720 So. 2d 203, 206 (Fla. 1998), this Court had to determine whether public records were properly exempted from disclosure by the State. This Court ruled that where doubt existed as to whether the State must disclose a particular document, the proper procedure is to have a trial judge conduct an in-camera review of the documents. *See id.; see also State v. Kokal*, 562 So. 2d 324, 327 (Fla. 1990) (stating that when certain statutory exemptions are claimed by the party against whom the public records request has been filed or when doubt exists as to whether a particular document must be disclosed, the proper procedure is to furnish the document to the trial judge for an in-camera inspection). After conducting an in-camera review, the State must turn over the nonexempt materials to the defense. *See Ragsdale*, 720 So. 2d at 206.

In this case, Judge Schaeffer conducted an in-camera proceeding and examined each of the alleged documents that the State withheld to determine whether the documents were properly withheld. After reviewing the documents, the trial court issued a written order instructing the State as to which documents it needed to produce to the defense. Rose has failed to cite to any authority that suggests that Judge Schaeffer's review of the withheld documents was improper and we have found no authority that supports this view. Therefore, we find that Judge Schaeffer fully complied with procedures set forth in *Ragsdale* and *Kokal* for determining whether the State's claimed exemptions were proper.

Rose v. State, 774 So. 2d 629, 636-637 (Fla. 2000) (footnote omitted).

5. The procedure approved in *Rose* was again discussed by the Florida Supreme Court in *Damren v. State*, 838 So. 2d 512 (Fla. 2003), as follows:

Damren asserts that the trial court erred in denying his request for certain public records from the State Attorney's office. According to Damren, the circuit court failed to review these records for exculpatory information under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We disagree.

As this Court has held, "where doubt existed as to whether the State must disclose a particular document, the proper procedure is to have a trial judge conduct an in-camera review of the documents." *Rose v. State*, 774 So. 2d 629, 636 (Fla. 2000). This Court applies an abuse of discretion standard when reviewing a trial court's determination on a public records request. *Moore v. State*, 820 So. 2d 199, 204 (Fla. 2002).

The record reveals that the State provided the requested records to the trial court for an in-camera review and the postconviction judge granted the public records request in part and denied it in part. During a hearing, the circuit court carefully reviewed each folder of materials which was submitted, explained what

information was contained in each folder and whether it included exculpatory information, and indicated the files to which defense counsel was entitled. We find that the trial court did not abuse its discretion in denying in part Damren's request and hence deny relief. We find no error.

Damren v. State, 838 So.2d 512, 519 (Fla. 2003) (footnote omitted).

6. The effects of the discovery and other post-conviction reforms from the late 1990s onward was analyzed by the Honorable O.H. Eaton, Jr. as follows:

> Litigation in a death penalty case does not end when the judgment and sentence of death are affirmed by the Supreme Court of Florida. The next phase of litigation in these cases falls under the general heading of "postconviction relief." It is during this phase that death row defendants litigate matters "collateral" to the judgment and sentence that could not have been raised on appeal. . . . They are charged with reinvestigating the case to find out deficiencies that occurred during the trial. This reinvestigation usually includes review of numerous public records that may have some bearing on the case.
>
> . . .
>
> Over the last several years both the Supreme Court and the legislature have made efforts to streamline the processing of postconviction motions in capital cases.
>
> . . .
>
> Prior to 1996, collateral counsel had to file a civil action in order to obtain public records from persons or agencies other than the state attorney and, local law enforcement agencies that investigated the crime. This cumbersome process often required suit to be filed in several jurisdictions and delays were inevitable.
>
> . . .
>
> The legislature created a centralized repository for storage of public records in capital cases in order to provide easy access to them. It was the legislature's hope that a process could be developed that would allow these records to be automatically sent to the repository and made accessible to counsel without the necessity of resorting to litigation.
>
> Currently, the Secretary of State is the officer responsible for storing the records and the records repository is located in the R.A. Gray building in Tallahassee.
>
> . . .
>
> [T]he procedural aspects of discovery of public records are now regulated by the Supreme Court of Florida. Rule 3.582 provides for an orderly method to obtain public records and, if the various offices and agencies that maintain public records cooperate, collateral counsel should be able to review them and have copies made in a timely fashion.
>
> . . .
>
> Assuming every person and agency complies with the requirement to submit public records to the records repository, all of the public records should be on file there less than 330 days from the date the mandate affirming the death sentence is issued by the Supreme Court of Florida. However, in capital litigation, things are never

that easy. Some of the records may be claimed to be exempt or confidential and there may be old cases out there that are subject to a separate procedure. Ironically, the persons or agencies claiming records to be exempt or confidential are aligned with the prosecution whose interest is to avoid delays. By providing a separate procedure for old cases, additional delays may be expected.

Exempt or Confidential Public Records

Rule 3.852(f) provides that any public records delivered to the records repository that are claimed to be exempt or confidential must be boxed separately, without redaction, and sealed. The box must clearly identify that the public record is confidential or exempt and the seal may not be broken without an order of the trial court. The box must also identify "the nature of the public records and the legal basis for the exemption."
In order for collateral counsel to obtain a ruling to unseal the public records claimed to be exempt or confidential, an order must first be obtained from the trial court directing the records repository to ship the sealed boxes of records to the clerk of the trial court. *Undoubtedly, collateral counsel will always want to obtain a ruling to determine if these records are really exempt or confidential and delay could be avoided if these records were filed with the clerk of the court in the first place.* However, the Supreme Court wanted to carry out legislative intent where possible so this unnecessary complication is part of the procedure and will undoubtedly cause delay.

The "moving party" is responsible to pay for the cost of the "transportation and inspection of such records by the trial court." Presumably, the "cost" will be just the postage. It is unclear what "cost" could possibly be associated with inspecting the records.

Once the records claimed to be exempt or confidential are delivered to the clerk of the court, they may only be opened by the trial court in camera without ex parte communication in the same manner as inspecting any sealed document. Presumably, the trial court will enter an order sustaining the claim of exemption or confidentiality or order the records disclosed.

. . .

In Camera Inspection of Exempt Public Records

Persons or agencies claiming public records to be exempt from production must box the records separately, seal them, index them with the reasons for the exemption, and deliver them to the records repository. From there, the records are shipped to the clerk of the trial court.

The trial judge must inspect the records in camera to determine if they are in fact exempt. A detailed order must be entered identifying each public record and the reason for its exemption.

> *In* Rose v. State, *774 So. 2d 629 (Fla. 2000), the trial judge held an in camera inspection of public records claimed to be exempt before the Huff hearing. The state attorney was ordered to produce certain of the records and others were ruled to be exempt. The Supreme Court approved the procedure.*
>
> . . .
>
> Public records have provided collateral counsel with significant evidence in the past and will undoubtedly continue to do so in the future. Trial judges need to take their responsibility to rule on public records issues seriously and make every effort to resolve public records disputes in a timely manner.

O.H. Eaton, Jr., *Discovery of Public Records in Capital Cases*, 76 Fla. B.J. 24, 30 (April 2002) (footnotes omitted) (emphasis added).

7. There are no objections by the State of Florida as to motions regarding delivery of records to this Court for ~~*in camera*~~ inspection and any accompanying proposed order as relayed to this Court at the Status Conference conducted on February 12, 2016.

WHEREFORE, Mr. Jordan hereby requests the entry of an order so that the aforementioned records can be transferred to the Clerk of this Circuit Court for an *in camera* review by this Court to determine whether they are exempt public records. It is further requested that if a subsequent *in camera* determination is made by this Honorable Court that these records are not exempt, that the records be released to undersigned counsel pursuant to a subsequent Court's order.

Respectfully submitted

s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

s/ Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar Number 13837
Email: perinetti@ccmr.state.fl.us
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Law Office of the Capital Collateral
Regional Counsel-Middle Region

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on t this 29th day of September, 2016. **I HEREBY FURTHER CERTIFY** that a copy of the PDF document of the foregoing has been served via the Florida Courts E-Filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com; to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, Seventh Judicial Circuit, at calhounr@sao7.org; and to **Steven Klinger**, Assistant State Attorney, Office of the State Attorney, Seventeenth Judicial Circuit, at SKlinger@sao17.state.fl.us on this 29th day of September, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been e-mailed (via the Florida Courts E-Filing Portal) and mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and mailed to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 29th day of September, 2016.

Respectfully submitted

/s/ Raheela Ahmed
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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. CASE NO. 2009-CF-2872

JOSEPH EDWARD JORDAN,

Defendant.
_____/

ORDER ON DEFENDANT'S REQUEST FOR PRODUCTION AND DELIVERY OF EXEMPT RECORDS

THIS CAUSE came before this Court during a status hearing on September 23, 2016, when CCRC requested the delivery of certain sealed and exempt records deemed discoverable by this Court after in camera review under Fla. R. Crim. P. 3.852(f)(3).

Having specifically identified documents in an order dated August 1, 2016, to be copied and provided to the CCRC, this Court hereby ORDERS that the Records Repository shall unseal, copy, and reseal those documents specifically identified in paragraphs one through six of the August 1 order and prepare those copies for transmission to the CCRC. All costs of copying and transmission shall be borne by the CCRC. Upon receipt of payment, the Records Repository shall make the copies available to the CCRC. Upon request, the Records Repository shall provide a conforming copy of those documents to the Florida Department of Legal Affairs ("DLA"), Office of the Attorney General, after receipt of payment from DLA for all costs of copying and transmission of the conforming copy. Nothing in this order shall be deemed to be an abrogation of any otherwise applicable exemption from public disclosure.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida on this 3 day of Oct., 2016.

FILED
16 OCT 13 AM 11:17
CLERK OF THE CIRCUIT & CITY COURT VOLUSIA CTY, FL CC13

Honorable Terrence R. Perkins
Chief Circuit Court Judge

Copies Furnished to:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
Law Office of the Capital Collateral Regional Counsel-Middle Region
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ahmed@ccmr.state.fl.us;
perinetti@ccmr.state.fl.us;
venable@ccmr.state.fl.us;
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Rosemary Calhoun,
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calhounr@sao7.org

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Office of the Attorney General,
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CapApp@myfloridalegal.com

Adam Tanenbaum,
General Counsel,
Florida Department of State
R.A. Gray Building, M.S. 9-E,
500 South Bronough Street,
Tallahassee, Florida 32399-0250
DOS.GeneralCounsel@DOS.MyFlorida.com

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

ORDER TO DELIVER EXEMPT PUBLIC RECORDS
[OFFICE OF THE STATE ATTORNEY, SEVENTEENTH JUDICIAL CIRCUIT]

TO: **RECORDS REPOSITORY**
The Florida State Archives
Attn: **CCRC Records Archivist**
R.A. Gray Building,M.S. 9-E,
500 South Bronough Street,
Tallahassee, Florida 32399-0250.

This Court having received notice on this 5 day of Oct, 2016, that certain records which have been claimed as confidential or exempt from disclosure have been copied, indexed, separately contained without being redacted, sealed, identified as to their nature and their legal basis for confidentiality or exemption, and delivered to the Records Repository of the Secretary of the State. The following agencies or entities delivered sealed and/or exempt records to the Records Repository and noted that said following designated records were confidential or exempt from the requirements of Section 119.07, Florida Statutes:

AGENCY REPOSITORY

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16 OCT 13 AM 11:17
CLERK OF THE CIRCUIT
& CTY. COURT VOLUSIA CTY, FL
2013

1. **Office of the State Attorney, 17th Judicial Circuit Container 7231**

It is ordered that the above listed records be delivered by the Records Repository to the **Clerk of Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, 251 North Ridgewood Avenue, Daytona Beach, Florida 32114**, for further proceedings consistent with Florida Rule of Criminal Procedure 3.852 (2016). The Law Office of the Capital Collateral Regional Counsel - Middle Region shall bear all the costs associated with the transportation and inspection of these records by the trial court.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida on this ____ day of OCT 5 2016 201__.

Honorable Terrence R. Perkins
Chief Circuit Court Judge

Copies Furnished to:

The Honorable Diane M. Matousek,
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County,
251 North Ridgewood Avenue
Daytona Beach, Florida 32114.

Raheela Ahmed, Maria Christine Perinetti, & Donna Ellen Venable,
Assistant CCRCs
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ahmed@ccmr.state.fl.us;
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support@ccmr.state.fl.us

Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney, Seventh Judicial Circuit,
251 North Ridgewood Avenue,
Daytona Beach Florida 32114.

Stacey Elaine Johns Kircher,
Assistant Attorney General,
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444 Seabreeze Blvd, 5th Floor,
Daytona Beach, Florida 32118.
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CapApp@myfloridalegal.com

Steven Klinger,
Assistant State Attorney,
Office of the State Attorney,
Seventeenth Judicial Circuit,
201 SE 6th Street, Room 660A,
Fort Lauderdale, Florida 33301.
SKlinger@sao17.state.fl.us

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on t this 29th day of September, 2016. **I HEREBY FURTHER CERTIFY** that a copy of the PDF document of the foregoing has been served via the Florida Courts E-Filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com; to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, Seventh Judicial Circuit, at calhounr@sao7.org; and to **Steven Klinger**, Assistant State Attorney, Office of the State Attorney, Seventeenth Judicial Circuit, at SKlinger@sao17.state.fl.us on this 29th day of September, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been e-mailed (via the Florida Courts E-Filing Portal) and mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and mailed to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 29th day of September, 2016.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
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The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
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VOLUSIA COUNTY COURT ACTION FORM

CASE: 2009 002872 CFAWS
STATE OF FLORIDA
VS
JOSEPH EDWARD JORDAN
TOT
SPN: 574944
TRIAL DATE:

COURT/SESSION TYPE: Criminal Hearing
DATE: 10/26/2016
TIME: 01:30 PM
JUDGE: PERKINS
ATTY: MARIA CHRISTINE PERINETTI
BNA:
LOCATION: Justice Center Courtroom 1, 251 N. RIDGEWOOD AVENUE , DAYTONA BEACH, Florida

DIANE M. MATOUSEK
CLERK OF THE CIRCUIT COURT
VOLUSIA COUNTY, FLORIDA
P.O. BOX 6043
DELAND, FL 32721-6043

PARTIES PRESENT	RELEASE ACTIONS	Custody/Capias/Estreat	Continued To: ☐ By Def. ☐ By State ☐ By Court ☐ Waived Spdy.Trl
☐ DEF. APPEARED ☐ APP.W/COUNSEL	☐ TOTAL BOND FOR CASE SET	☐ CAPIAS ISSUED-BOND SET	REMARKS:
☐ DEF. COUNSEL APP. W/OUT DEF.	☐ AT $	☐ AT $	
☐ DEF. FAILED TO APPEAR	☐ DEF. ROR'D	☐ BOND ESTREATED	
ATTORNEY STATUS	☐ RELEASE TO PTS	☐ CAPIAS WITHDRAWN	
☐ APP. IND. STATUS - PD APPT.	☐ RELEASE TO PTS W/BOND	☐ BOND REINSTATED	
☐ APP. IND. STATUS - NOT INDIGENT	☐ OTHER:	☐ BOND ESTR. SET ASIDE	
☐ PD APPT. BY COURT	☐ NO CONTACT W/VICTIM	☐ OTHER:	
☐ DEF. TO RETAIN COUNSEL	☐ NO VIOL.CONTACT W/VICTIM	☐ HOLD CAPIAS-PTS INVEST.	
☐ PD WITHDREW ☐ ATTY.TO BE APPT	☐ OTHER:	☐ 48 HRS	
☒ OTHER: **ASA: R.CALHOUN & S. KIRCHER**			

STATUS HEARING: RE: SEALED PACKET IN JUDGES CHAMBERS AWAITING RULING/ HEARD , ORDERS TO FOLLOW

CT. CHARGE	COURT ACTION	INCARCERATION/PROBATION/COMMUNITY CONTROL INFORMATION	COSTS
1 FIRST DEGREE FELONY MURDER (ADJG) Statute: 782.04(1)(a)2 LVL:F DEG:C AMENDED CHARGE: BOND SET AT $	☐ N.G.PLEA ☐ NO INFO. ☐ GUILTY PLEA ☐ NOLLE PROSS. ☐ NOLO PLEA ☐ DISMISSED ☐ NG.VERDICT ☐ JGMT ACQT. ☐ GLTY.VERDICT ☐ ADJ.WITHHELD ☐ MISTRIAL ☐ ADJ.GUILTY ☐ WAIVED PSI ☐ PSI ORDERED ☐ PDR ORDERED ☐ TO BE SENT:	☐ VCJ MO DY ☐ PROB.REVOKED ☐ DOC YR MO DY ☐ C.C. REVOKED ☐ JAIL CREDIT TIME: DY ☐ PROB. REINSTATE ☐ PROB YR MO DY ☐ C.C. REINSTATE ☐ COM.CONT. YR MO ☐ PROB. MODIFIED ☐ DRUG OFFENDER ☐ SEX OFFENDER ☐ C.C. MODIFIED ☐ CONCURRENT ☐ CONSECUTIVE TO: HRS.COM. SERVICE ☐ STANDARD COND. ☐ SUBST.ABUSE COUNSEL/TREAT. ☐ PREVIOUS COND. ☐ RANDOM U/A ☐ NO ALCOHOL/ILL.DRUG ☐ COS WAIVED	CRT. COSTS $ FINE $ PD FEE $ SAO FEE $ LEO FEE $ PD APP.FEE $ REST. $ OTHER: ☐ CONVRT. FINE/COST
2 ROBBERY WITH FIREARM/DEADLY WEAPON (ADJG) Statute: 812.13(2)(a) LVL:F DEG:F AMENDED CHARGE: BOND SET AT $	☐ N.G.PLEA ☐ NO INFO. ☐ GUILTY PLEA ☐ NOLLE PROSS. ☐ NOLO PLEA ☐ DISMISSED ☐ NG.VERDICT ☐ JGMT ACQT. ☐ GLTY.VERDICT ☐ ADJ.WITHHELD ☐ MISTRIAL ☐ ADJ.GUILTY ☐ WAIVED PSI ☐ PSI ORDERED ☐ PDR ORDERED ☐ TO BE SENT:	☐ VCJ MO DY ☐ PROB.REVOKED ☐ DOC YR MO DY ☐ C.C. REVOKED ☐ JAIL CREDIT TIME: DY ☐ PROB. REINSTATE ☐ PROB YR MO DY ☐ C.C. REINSTATE ☐ COM.CONT. YR MO ☐ PROB. MODIFIED ☐ DRUG OFFENDER ☐ SEX OFFENDER ☐ C.C. MODIFIED ☐ CONCURRENT ☐ CONSECUTIVE TO: HRS.COM. SERVICE ☐ STANDARD COND. ☐ SUBST.ABUSE COUNSEL/TREAT. ☐ PREVIOUS COND. ☐ RANDOM U/A ☐ NO ALCOHOL/ILL.DRUG ☐ COS WAIVED	CRT. COSTS $ FINE $ PD FEE $ SAO FEE $ LEO FEE $ PD APP.FEE $ REST. $ OTHER: ☐ CONVRT. FINE/COST

DIANE M. MATOUSEK, CLERK OF THE CIRCUIT COURT
Filed in Open Court this 26 day of October , 20 16.

/S/ ANN MARIE MOORE

TERENCE R PERKINS | ASSISTANT STATE ATTORNEY | DEPUTY CLERK IN ATTENDANCE

-521-

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

CASE NO. 2009-CF-2872

v.

JOSEPH EDWARD JORDAN,

Defendant.
_____/

ORDER ON DEFENDANT'S REQUEST FOR PRODUCTION AND DELIVERY OF EXEMPT RECORDS FROM THE OFFICE OF THE STATE ATTORNEY, SEVENTEENTH JUDICIAL CIRCUIT

THIS CAUSE came before this Court during a status hearing on October 26, 2016, when this Court considered the discoverability of certain records which have been claimed as confidential or exempt from disclosure. These records were furnished by the Office of the State Attorney, Seventeenth Judicial Circuit to the Records Repository of the Secretary of State on or about September 19, 2016 in response to the Defendant's Demand for Additional Public Records filed on June 20, 2016 pursuant to Fla. R.Crim. P. 3.852(g). The records in question pertain to Matthew Powell, a State witness in Joseph Jordan's trial. The Defendant seeks under Fla. R.Crim. P. 3.852(f)(3) for this Court to conduct an in-camera review of those records and determine whether such records may be discoverable by the Defendant. Pursuant to Florida law, the records were submitted in a sealed container or envelope and opened by this Court during the in-camera review. Having heard arguments, being fully informed in the premises, and conducted its in-camera review pursuant to Fla. R.Crim. P. 3.852(f), this Court finds as follows:

1. The following exempt materials contained in Archives Box Number 7231 (R) **ARE** subject to discovery by the Defendant:
- File Unit 1, Prosecutor Notes
- File Unit 2, Criminal History Dara/NCIC/FCIC

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16 OCT 31 AM 11:18
CLERK OF THE CIRCUIT
CT COURT VOLUSIA CTY, FL
0013

- File Unit 4, Department of Corrections Records
- File Unit 5, First Draft Case Filing Recommendation

2. The following exempt materials contained in Archives Box Number 7231 (R) **ARE NOT** subject to discovery by the Defendant, and shall remain sealed:

- File Unit 3, Medical Records
- File Unit 6, Pharmacy Records
- File Unit 7, DL, DMV Records and Driver's License Digital Imaging

This Court hereby ORDERS that the Records Repository of the Secretary of State shall unseal, copy, and reseal those document specifically identified in paragraph one above and prepare those copies for transmission to CCRC-Middle. All costs of copying and transmission shall be borne by CCRC-Middle. Upon receipt of payment, the Records Repository shall make the copies available to CCRC-Middle. Upon request, the Records Repository shall provide a conforming copy to the Florida Department of Legal Affairs ("DLA"), Office of the Attorney General, after receipt of payment from DLA for all costs of copying and transmission of the conforming copy. Nothing in this order shall be deemed to be an abrogation of any otherwise applicable exemption from public disclosure.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida on this 28th day of October, 2016.

Honorable Terrance R. Perkins
Chief Circuit Judge

Copies Furnished to:

The Honorable Diane M. Matousek
Clerk of Circuit Court of the Seventh Judicial Circuit in and for Volusia County
251 North Ridgewood Avenue
Daytona Beach, Florida 32114

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Ft. Lauderdale, Florida 33301

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

**CASE NO: 642009CF002872XXXAWS
SUPREME COURT NO: SC13-2091
POST-CONVICTION CAPITAL CASE**

JOSEPH EDWARD JORDAN,

Defendant.
_____/

**AMENDED NOTICE OF APPEARANCE
OF POST-CONVICTION CAPITAL COLLATERAL COUNSEL**

Please take notice of the following amendment to post-conviction Capital Collateral Regional Counsel. Attorney Donna Venable has resigned from the Law Office of the Capital Collateral Regional – Middle Region, and should be excluded from future filings. The official status of counsel in the instant case should reflect the following:

JAMES VINCENT VIGGIANO, JR.
CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE

RAHEELA AHMED
ASSISTANT CCRC

MARIA CHRISTINE PERINETTI
ASSISTANT CCRC

REUBEN A. NEFF
ASSISTANT CCRC

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
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Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar Number 0013837
Email: perinetti@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/ Reuben A. Neff
Reuben A. Neff
Florida Bar Number 089171
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Secondary Email: support@ccmr.state.fl.us

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Tel: (813) 558-1600
Fax: (813) 558-1601

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing **Amended Notice of Appearance of Post-Conviction Capital Collateral Counsel** has been transmitted to this Court through the Florida Courts E-Filing Portal on this 1st day of November, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via the Florida Courts E-Filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com; and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, Seventh Judicial Circuit, at calhounr@sao7.org, on this 1st day of November, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been e-mailed (via the Florida Courts E-Filing Portal) and mailed to the **Honorable Terrence R. Perkins, Chief Judge**, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach Florida 32114; and mailed to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 1st day of November, 2016.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

APPENDIX IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

APPENDIX INDEX

Appendix A Indictment

Appendix B Judgment and Sentence

Respectfully submitted,

/s/ Raheela Ahmed
Raheela Ahmed
Assistant CCRC
Florida Bar Number 0713457
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/s/Maria Christine Perinetti
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/s/ Reuben A. Neff
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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

APPENDIX IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

APPENDIX A

Indictment

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO: 2009-02872CFAWS

VS.

JOSEPH EDWARD JORDAN
W/M, DOB: 03/19/1970

INDICTMENT

The Spring Term 2009 Grand Jury, in and for Volusia County, Florida, empanelled and sworn to inquire and true presentment make, hereby, in the name of and by the authority of the State of Florida, brings this prosecution and makes the following charges:

COUNT I

CHARGE: FIRST DEGREE FELONY MURDER, in Violation of F.S. 782.04(1)(a)2 (CF)

SPECIFICATION OF CHARGE: In that JOSEPH EDWARD JORDAN, between on or about June 24, 2009, and on or about June 26, 2009, in the County of VOLUSIA and State of Florida, did knowingly and unlawfully, while engaged in the perpetration of, or in the attempt to perpetrate the felony of robbery, kill and murder Keith Cope, a human being, by restraining him with rope and tape.

COUNT II

CHARGE: ROBBERY WITH A FIREARM AND/OR DEADLY WEAPON, in Violation of F.S. 812.13(2)(a) and 775.087(1) and (2) (1F)

SPECIFICATION OF CHARGE: In that JOSEPH EDWARD JORDAN, between on or about June 24, 2009, and on or about June 26, 2009, in the County of VOLUSIA and State of Florida, by force, violence, assault, or putting in fear, did knowingly take away a Ford truck an/or U. S. currency and/or a debit card, of some value, from the person or custody of KEITH COPE, with the intent to permanently or temporarily deprive KEITH COPE or any other person not the defendant of the property, and in the course of committing the robbery JOSEPH EDWARD JORDAN carried a firearm as defined in Florida Statute 790.001(6) and/or another deadly weapon, to wit: tape and/or rope.

A TRUE BILL

Robert Haught

FOREPERSON OF THE GRAND JURY

FILED
IN OPEN COURT
AUG 26 2009
Clerk Circuit & County
Court Volusia County, FL

INDT

I, the undersigned State Attorney or Assistant State Attorney, as authorized and required by law, have advised the Grand Jury returning this Indictment.

COLLEEN S. TAYLOR
ASSISTANT STATE ATTORNEY
Florida Bar Number 0049247

This Indictment presented by the aforementioned Grand Jury, and filed by me, in open court, this 26th day of August, 2009.

CLERK OF THE COURT

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

APPENDIX IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

APPENDIX B

Judgment and Sentence

☐ Probation Violator

☐ Community Control Violator

☐ Retrial

☐ Resentence

State of Florida

v.

JOSEPH EDWARD JORDAN

In the Circuit Court, 7th Judicial Circuit

in and for Volusia County, Florida

Division CRIMINAL **41**

Case Number **2009 002872 CFAWS**

JUDGMENT

The defendant, JOSEPH EDWARD JORDAN, being personally before this court represented by M.NIELSON/C.SMITH, the attorney of record, and the state represented by RYAN WILL, and having

☒ been tried and found guilty (by jury ~~by court~~) of the following crime(s)

☐ entered a plea of guilty to the following crime(s)

☐ entered a plea of nolo contendere to the following crime(s)

Count	Crime	Offense Statute Number(s)	Degree of Crime	Case Number	OBTS Number
1	FIRST DEGREE FELONY MURDER	782.04(1)(a)2	CF	2009 002872 CFAWS	6401144306
2	ROBBERY W/FIREARM	812.13(2)(a)	1F(PBL)		

☒ and no cause being shown why the defendant should not be adjudicated guilty, **IT IS ORDERED THAT** the defendant is hereby **ADJUDICATED GUILTY** of the above crime(s)

☐ and good cause being shown; **IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.**

☒ and having been convicted or found guilty of, or having entered a plea of nolo contendere or guilty, regardless of adjudication, to an offense specified in section 943.325, Florida Statutes, the defendant shall be required to submit blood or other biological specimens.

Filed in Open Court
Seventh Judicial Circuit
Volusia County, Florida

SEP 23 2013

State of Florida

v.

Defendant **JOSEPH EDWARD JORDAN** Case Number **2009 002872 CFAWS**

FINGERPRINTS OF DEFENDANT

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
				
6. Left Thumb	**7. Left Index**	**8. Left Middle**	**9. Left Ring**	**10. Left Little**
				

Fingerprints taken by: W. R. Mon 2278 Deputy Sheriff

Name Title

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant JOSEPH EDWARD JORDAN and that they were placed thereon by the defendant in my presence in open court this date.

Defendant's Social Security No./Reason for absence: [redacted]

DONE AND ORDERED in open court in Volusia County, Florida this 23 day of SEPTEMBER, 2013.

R. Michael Hutcheson

R. MICHAEL HUTCHESON

Circuit Judge

Defendant JOSEPH EDWARD J( )AN C: Number 2009 002872 CFAWS

SENTENCE

(As to Count 1)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, M.NIELSON/C.SMITH, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown

(Check one if applicable.)

- ☐ and the Court having on _____ deferred imposition of sentence until this date
- ☐ and the Court having previously entered a judgment in this case on _____ now resentences the defendant
- ☐ and the Court having placed the defendant on probation/community control and having subsequently revoked the defendant's probation/community control.

It is The Sentence Of The Court that:

- ☐ The defendant pay a fine of $ _____, pursuant to section 775.083, Florida Statutes, plus $ _____ as the 5% surcharge required by section 938.04, Florida Statutes.
- ☒ The defendant is hereby committed to the custody of the Department of Corrections.
- ☐ The defendant is hereby committed to the custody of the Sheriff of Volusia County, Florida.
- ☐ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida statutes.

To Be Imprisoned (Check One; unmarked sections are inapplicable.):

- ☐ For a term of natural life.
- ☒ For a term of DEATH.
- ☐ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "split" sentence, complete the appropriate paragraph.

- ☐ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.
- ☐ However, after serving a period of _____ imprisonment in _____,the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

Defendant JOSEPH EDWARD DAN Case Number 2009 002872 CFAWS

SPECIAL PROVISIONS (As to Count 1)

Mandatory/Minimum Provisions: By appropriate notation, the following provisions apply to the sentence imposed:

Firearm	☐	It is further ordered that the 3-year minimum imprisonment provisions of §775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.
Drug Trafficking	☐	It is further ordered that the _____ mandatory minimum imprisonment provisions of §893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count.
Controlled Substance Within 1,000 Feet of School	☐	It is further ordered that the 3-year minimum imprisonment provisions of §893.13(1)(e)1, Florida Statutes, is hereby imposed for the sentence specified in this court.
Habitual Felony Offender	☐	The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of §775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court.
Habitual Violent Felony Offender	☐	The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of §775.084(4)(b), Florida Statutes. A minimum term of _____ year(s) must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court.
Three-time Violent Felony Offender	☐	The defendant is adjudicated a three-time violent felony offender and has been sentenced to an extended term in accordance with the provisions of §775.084(4)(c), Florida Statutes. It is further ordered that the _____ year mandatory minimum imprisonment provisions of s. 775.084(4)(c) is hereby imposed for the sentence specified in this count. The requisite findings of the court are set forth in a separate order or stated on the record in open court. The defendant shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release.
Violent Career Criminal	☐	The defendant is adjudicated a violent career criminal and has been sentenced to an extended term in accordance with the provisions of §775.084(4)(d), Florida Statutes. A minimum term of _____ years must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court. The defendant is not eligible for any form of discretionary early release, other than pardon or executive clemency, or conditional medical release pursuant to s. 947.149, Florida Statutes.
Law Enforcement Protection Act	☐	It is further ordered that the defendant shall serve a minimum of _____ years before release in accordance with §775.0823, Florida Statutes.
Capital Offenses	☐	First Degree Murder **Prior to** 05/25/94 and Other Capital Felonies **Prior to** 10/01/95. It is further ordered that the defendant shall serve no less than 25 years in accordance with the provisions of §775.082(1), Florida Statutes.
	☒	First Degree Murder **After** 05/25/94 and Other Capital Felonies **After** 10/01/95. It is further ordered that the defendant shall be ineligible for parole in accordance with the provisions of §775.082(1), Florida Statutes.
Short-Barreled Rifle Shotgun, Machine Gun	☐	It is further ordered that the 5-year minimum provisions of §790.221(2), Florida Statutes, are hereby imposed for the sentence specified in this count.
Continuing Criminal Enterprise	☐	It is further ordered that the 25-year minimum sentence provisions of §893.20, Florida Statutes, are hereby imposed for the sentence specified in the count.
Dangerous Sexual Felony Offender	☐	The defendant is adjudicated a dangerous sexual felony offender. This finding of the court was stated in open court or set forth in a separate order. A minimum term of _____ years must be served prior to release in accordance with §794.0015(2)(e), Florida Statutes. The defendant is not eligible for gain-time or any form of discretionary early release, other than pardon, executive clemency or conditional medical release, before serving the minimum sentence.
Sexual Offender	☐	It is further ordered that the defendant shall register as a sexual offender pursuant to §943.0435, Florida Statutes.

Mandatory/Minimum Provisions Continued:

Sexual Predator	☐	It is further ordered that the defendant is found to be a sexual predator pursuant to §775.21, Florida Statutes. This finding by the court is set forth in a separate order.
Prison Releasee Reoffender:	☐	The defendant is adjudicated a prison releasee reoffender and has been sentenced to an extended term in accordance with §775.082(9), Florida Statutes. The defendant must serve 100 percent of this sentence and shall not be eligible for parole, control release, or any form of early release.
Firearm 10-20-Life: Possess	☐	It is further ordered that the defendant shall serve a minimum of 10 years before release in accordance with §775.087(2)(a)1, Florida Statutes. The defendant is not eligible for statutory gain-time under §944.275, Florida Statutes, or any form of discretionary early release prior to serving the minimum sentence.
Discharge	☐	It is further ordered that the defendant shall serve a minimum of 20 years before release in accordance with §775.087(2)(a)2, Florida Statutes. The defendant is not eligible for statutory gain-time under §944.275, Florida Statutes, or any form of discretionary early release prior to serving the minimum sentence.
Death or Great Bodily Harm	☐	It is further ordered that the defendant shall serve a minimum of 25 years before release in accordance with §775.087(2)(a)3, Florida Statutes. The defendant is not eligible for statutory gain-time under §944.275, Florida Statutes, or any form of discretionary early release prior to serving the minimum sentence.

Other Provisions

Retention of Jurisdiction	☐	The court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statutes (1983).
Jail Credit	☒	It is further ordered that the defendant shall be allowed a total of 1570 days as credit for time incarcerated before imposition of this sentence.

CREDIT FOR TIME SERVED IN RESENTENCING AFTER VIOLATION OF PROBATION OR COMMUNITY CONTROL

☐ It is further ordered that the defendant be allowed _____ total days time served (Jail Credit) between the original date of arrest and this sentencing. This includes Jail time served from original arrest to release to probation or community control as well as, VOP arrest to resentencing. No duplicate credit shall be given. The Department of Corrections shall compute and apply credit for time served in state prison and unforfeited gain time previously awarded on case/count _____.

(Offenses committed before October 1, 1989)

☐ It is further ordered that the defendant be allowed _____ total days time served (Jail Credit) between the original date of arrest and this sentencing. This includes Jail time served from original arrest to release to probation or community control as well as, VOP arrest to resentencing. No duplicate credit shall be given. The Department of Corrections shall compute and apply credit for time served in state prison and unforfeited gain time previously awarded on case/count _____.

(Offenses committed between October 1, 1989 and December 31, 1993)

☐ The Court deems the unforfeited gain time previously awarded on the above case/count forfeited under Section 948.06(7).

☐ The Court allows unforfeited gain time previously awarded on the above case/count. (Gain time may be subject to forfeiture by the Department of Corrections under Section 944.28(1).

☐ It is further ordered that the defendant be allowed _____ total days time served (Jail Credit) between the original date of arrest and this sentencing. This includes Jail time served from original arrest to release to probation or community control as well as, VOP arrest to resentencing. No duplicate credit shall be given. The Department of Corrections shall compute and apply credit for time served in state prison only pursuant to section 921.0017, Florida Statutes, on case/count _____.

(Offenses committed on or after January 1, 1994)

Defendant JOSEPH EDWARD J( )AN C: Number 2009 002872 CFAWS

SENTENCE

(As to Count 2)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, M.NIELSON/C.SMITH, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown

(Check one if applicable.)

- ☐ and the Court having on _____ deferred imposition of sentence until this date
- ☐ and the Court having previously entered a judgment in this case on _____ now resentences the defendant
- ☐ and the Court having placed the defendant on probation/community control and having subsequently revoked the defendant's probation/community control.

It is The Sentence Of The Court that:

- ☐ The defendant pay a fine of $ _____, pursuant to section 775.083, Florida Statutes, plus $ _____ as the 5% surcharge required by section 938.04, Florida Statutes.
- ☒ The defendant is hereby committed to the custody of the Department of Corrections.
- ☐ The defendant is hereby committed to the custody of the Sheriff of Volusia County, Florida.
- ☐ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida statutes.

To Be Imprisoned (Check One; unmarked sections are inapplicable.):

- ☒ For a term of natural life.
- ☐ For a term of _____.
- ☐ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "split" sentence, complete the appropriate paragraph.

- ☐ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.
- ☐ However, after serving a period of _____ imprisonment in _____,the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

Defendant JOSEPH EDWARD J)AN Case Number 2009 002872 CFAWS

SPECIAL PROVISIONS (As to Count 2)

Mandatory/Minimum Provisions: By appropriate notation, the following provisions apply to the sentence imposed:

Firearm	☐	It is further ordered that the 3-year minimum imprisonment provisions of §775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.
Drug Trafficking	☐	It is further ordered that the _____ mandatory minimum imprisonment provisions of §893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count.
Controlled Substance Within 1,000 Feet of School	☐	It is further ordered that the 3-year minimum imprisonment provisions of §893.13(1)(e)1, Florida Statutes, is hereby imposed for the sentence specified in this court.
Habitual Felony Offender	☐	The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of §775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court.
Habitual Violent Felony Offender	☐	The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of §775.084(4)(b), Florida Statutes. A minimum term of _____ year(s) must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court.
Three-time Violent Felony Offender	☐	The defendant is adjudicated a three-time violent felony offender and has been sentenced to an extended term in accordance with the provisions of §775.084(4)(c), Florida Statutes. It is further ordered that the _____ year mandatory minimum imprisonment provisions of s. 775.084(4)(c) is hereby imposed for the sentence specified in this count. The requisite findings of the court are set forth in a separate order or stated on the record in open court. The defendant shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release.
Violent Career Criminal	☐	The defendant is adjudicated a violent career criminal and has been sentenced to an extended term in accordance with the provisions of §775.084(4)(d), Florida Statutes. A minimum term of _____ years must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court. The defendant is not eligible for any form of discretionary early release, other than pardon or executive clemency, or conditional medical release pursuant to s. 947.149, Florida Statutes.
Law Enforcement Protection Act	☐	It is further ordered that the defendant shall serve a minimum of _____ years before release in accordance with §775.0823, Florida Statutes.
Capital Offenses	☐	First Degree Murder **Prior to** 05/25/94 and Other Capital Felonies **Prior to** 10/01/95. It is further ordered that the defendant shall serve no less than 25 years in accordance with the provisions of §775.082(1), Florida Statutes.
	☐	First Degree Murder **After** 05/25/94 and Other Capital Felonies **After** 10/01/95. It is further ordered that the defendant shall be ineligible for parole in accordance with the provisions of §775.082(1), Florida Statutes.
Short-Barreled Rifle Shotgun, Machine Gun	☐	It is further ordered that the 5-year minimum provisions of §790.221(2), Florida Statutes, are hereby imposed for the sentence specified in this count.
Continuing Criminal Enterprise	☐	It is further ordered that the 25-year minimum sentence provisions of §893.20, Florida Statutes, are hereby imposed for the sentence specified in the count.
Dangerous Sexual Felony Offender	☐	The defendant is adjudicated a dangerous sexual felony offender. This finding of the court was stated in open court or set forth in a separate order. A minimum term of _____ years must be served prior to release in accordance with §794.0015(2)(e), Florida Statutes. The defendant is not eligible for gain-time or any form of discretionary early release, other than pardon, executive clemency or conditional medical release, before serving the minimum sentence.
Sexual Offender	☐	It is further ordered that the defendant shall register as a sexual offender pursuant to §943.0435, Florida Statutes.

Mandatory/Minimum Provisions Continued:

Sexual Predator	☐	It is further ordered that the defendant is found to be a sexual predator pursuant to §775.21, Florida Statutes. This finding by the court is set forth in a separate order.
Prison Releasee Reoffender:	☐	The defendant is adjudicated a prison releasee reoffender and has been sentenced to an extended term in accordance with §775.082(9), Florida Statutes. The defendant must serve 100 percent of this sentence and shall not be eligible for parole, control release, or any form of early release.
Firearm 10-20-Life: Possess	☐	It is further ordered that the defendant shall serve a minimum of 10 years before release in accordance with §775.087(2)(a)1, Florida Statutes. The defendant is not eligible for statutory gain-time under §944.275, Florida Statutes, or any form of discretionary early release prior to serving the minimum sentence.
Discharge	☐	It is further ordered that the defendant shall serve a minimum of 20 years before release in accordance with §775.087(2)(a)2, Florida Statutes. The defendant is not eligible for statutory gain-time under §944.275, Florida Statutes, or any form of discretionary early release prior to serving the minimum sentence.
Death or Great Bodily Harm	☐	It is further ordered that the defendant shall serve a minimum of 25 years before release in accordance with §775.087(2)(a)3, Florida Statutes. The defendant is not eligible for statutory gain-time under §944.275, Florida Statutes, or any form of discretionary early release prior to serving the minimum sentence.

Other Provisions

Retention of Jurisdiction	☐	The court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statutes (1983).
Jail Credit	☒	It is further ordered that the defendant shall be allowed a total of 1570 days as credit for time incarcerated before imposition of this sentence.

CREDIT FOR TIME SERVED IN RESENTENCING AFTER VIOLATION OF PROBATION OR COMMUNITY CONTROL

☐ It is further ordered that the defendant be allowed _____ total days time served (Jail Credit) between the original date of arrest and this sentencing. This includes Jail time served from original arrest to release to probation or community control as well as, VOP arrest to resentencing. No duplicate credit shall be given. The Department of Corrections shall compute and apply credit for time served in state prison and unforfeited gain time previously awarded on case/count _____.

(Offenses committed before October 1, 1989)

☐ It is further ordered that the defendant be allowed _____ total days time served (Jail Credit) between the original date of arrest and this sentencing. This includes Jail time served from original arrest to release to probation or community control as well as, VOP arrest to resentencing. No duplicate credit shall be given. The Department of Corrections shall compute and apply credit for time served in state prison and unforfeited gain time previously awarded on case/count _____.

(Offenses committed between October 1, 1989 and December 31, 1993)

☐ The Court deems the unforfeited gain time previously awarded on the above case/count forfeited under Section 948.06(7).

☐ The Court allows unforfeited gain time previously awarded on the above case/count. (Gain time may be subject to forfeiture by the Department of Corrections under Section 944.28(1).

☐ It is further ordered that the defendant be allowed _____ total days time served (Jail Credit) between the original date of arrest and this sentencing. This includes Jail time served from original arrest to release to probation or community control as well as, VOP arrest to resentencing. No duplicate credit shall be given. The Department of Corrections shall compute and apply credit for time served in state prison only pursuant to section 921.0017, Florida Statutes, on case/count _____.

(Offenses committed on or after January 1, 1994)

Defendant JOSEPH EDWARD RDAN **C Number 2009 002872 CFAWS**

Other Provisions, continued:

Consecutive/Concurrent As to Other Counts ☒ It is further ordered that the sentence imposed for this count shall run (check one) X consecutive to ____ concurrent with the sentence set forth in count 1,2 of this case.

Consecutive/Concurrent As to Other Convictions ☒ It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run

(Check one) X consecutive to ____ concurrent with the following: (check one)

☒ any active sentence being served.

☐ specific sentences:

In the event the above sentence is to the Department of Corrections, the Sheriff of Volusia County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statute.

The defendant in open court was advised of the right to appeal from this sentence by filing notice of appeal within 30 days from this date with the clerk of this court and the defendant's right to the assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

In imposing the above sentence, the court further recommends:

DONE AND ORDERED in open court at Volusia County, Florida, this 23 day of SEPTEMBER, 2013.

R. Michael Hutcheson

R. MICHAEL HUTCHESON
Circuit Judge

COPIES TO:
Counsel for the state: ____ hand delivery open court ____ U.S. Mail X interoffice/hand delivery
Counsel for the defendant: ____ hand delivery open court ____ U.S. Mail X interoffice/hand delivery

I do certify that a copy hereof has been furnished to counsel for the state and the defendant by the method indicated above, done this 23 day of September, 2013.

CIRCUIT COURT CLERK SIGILLUM CURIAE VOLUSIA COUNTY, FLORIDA

DIANE M. MATOUSEK
CLERK OF CIRCUIT COURT
BY: Maria Moore
Deputy Clerk

In The Circuit Court Seventh Judicial Circuit
In and For Volusia County, Florida

State of Florida
v.
JOSEPH EDWARD JORDAN

Case No. 2009 002872 CFAWS
Division: 41

Defendant Address:
101 SUNNYTOWN RD. STE. 310
CASSELBERRY, FL 32707

SS [redacted]

Order/Final Judgment for Charges, Costs, & Fees

(Costs are assessed by case)

The above named defendant is hereby ordered to pay the following sums, if checked:

Mandatory Costs (Select one)

☒	$ 418.00	Felony Standard	§ 938.01(1), 938.03, 938.05, 938.15, 775.083(2), 939.185(1)(a), 938.19(2), 938.06
☐	$ 770.00	Felony Assault & Battery	§ 938.01(1), 938.03, 938.05, 938.15, 775.083(2), 939.185(1)(a), 938.19(2), 938.08, 938.085, 938.06
☐	$ 451.00	Felony Traffic	§ 938.01(1), 938.03, 938.05, 938.15, 775.083(2), 939.185(1)(a), 938.19(2), 318.18(17), 318.18(13)(a), 938.06
☐	$ 586.00	Felony DUI	§ 938.01(1), 938.03, 938.05, 938.15, 775.083(2), 939.185(1)(a), 938.19(2), 938.07, 318.18(17), 318.18(13)(a), 938.06
☐	$ 569.00	Felony Crime Agst.Minor	§ 938.01(1), 938.03, 938.05, 938.15, 775.083(2), 939.185(1)(a), 938.19(2), 938.10(1), 938.06
☐	$ 613.00	Felony BUI	§ 938.01(1), 938.03, 938.05, 938.15, 775.083(2), 939.185(1)(a), 938.19(2), 938.07, 327.35(9), 938.06
☐	$ 921.00	Felony Asslt/Battery-Minor	§ 938.01(1), 938.03, 938.05, 938.15, 775.083(2), 939.185(1)(a), 938.19(2), 938.08, 938.085, 938.10(1), 938.06
☐	$ 521.00	Felony Reckless Driv.	§938.01(1), 938.03, 938.05, 938.15, 775.083(2), 939.185(1)(a),938.19(2),316.192, 318.18(17),318.18(13)(a),318.18(20),938.06
☐	$ 569.00	Felony Standard & Rape Crisis	§ 938.01(1), 938.03, 938.05, 938.15, 775.083(2), 939.185(1)(a), 938.19(2), 938.085, 938.06
☐	$ 720.00	Felony Crime Agst.Minor & Rape Crisis	§938.01(1),938.03,938.05,938.15, 775.083(2), 939.185(1)(a), 938.19(2), 938.10(1),938.085,938.06

Additional Mandatory Costs (Select all that apply)

☑	$ 50.00	Indigency Application Fee/Public Defender	§ 27.52(2)(a)
☐	$ 5000.00	Prostitution- Additional Civil Penalty	§796.07(6)
☐	$ 500.00	BUI Refusal-Civil Penalty	§327.35215(1)
☑	$ 100.00	Indigent Defense Cost/Fee (No less than $100.00) OPCC	§ 938.29
☒	$ 100.00	State Attorney Cost of Prosecution (No less than $100.00)	§ 938.27

Fines: (Select all that apply – Enter Amount)

☐	$	Fine & 5% surcharge	§ 316.193, 327.35, 775.083(1), 893.13, 893.135, 938.04
☐	$	Fine (Crime result death/injury-not exceed $10,000)	§ 775.0835(1), 938.04
☐	$	Fine & 5% surcharge – Other (explain)	

Discretionary Costs: (Select all that apply – Enter Amount)

☐	$ 100.00	Drug Related – FDLE Operating Trust Fund	§ 938.25
☐	$	Alcohol and Drug Abuse Additional Cost (up to amount of fine)	§ 938.21, 938.23
☒	$ 100.00	Investigation Costs to EWPD	§ 938.27
☐	$	Other (explain)	

Restitution (Select one)

☐ No restitution ordered.
☐ Restitution Ordered. To be paid in accordance with separate Restitution Order.
☑ Jurisdiction is reserved to determine restitution upon motion of the State.

Payment of charges, costs, and fees are due immediately and are payable to the Clerk of Court for Distribution unless otherwise noted :

☐ A condition of probation/community control, payable to FL DOC, Probation & Parole, pursuant to probation/community control order.
☐ Due within _____ days following release from jail/prison and is payable to the Clerk of Court for distribution.
☐ Due within _____ days and is payable to the Clerk of Court for distribution.

Unless payment is ordered as a condition of probation, it is further ordered that Judgment is hereby entered in favor of the State of Florida, and/or Clerk of Court, and victim(s) for the sum of the above amounts, together with interest at the lawful rate, for which let execution issue. (§ § 55.10, 960.295, Fla. Stat.) **This judgment shall supersede any previous judgment that may have been entered against the defendant in the above referenced case only. Fines/Costs/Fees which remain unpaid for 90 days or more may be turned over to a collection agency for further action. Failure to pay as ordered may result in the suspension of your Florida Driver's License.**

DONE AND ORDERED in Volusia County, Florida, this 23 day of SEPTEMBER, 2013.

DIANE M. MATOUSEK, CLERK OF THE CIRCUIT COURT
Filed in Open Court this 23 day of September, 20 13

R. Michael Hutcheson
R. MICHAEL HUTCHESON
Circuit Judge

CC: State Attorney
Defense Counsel
Probation & Parole (if applicable)

Prepared by: MFM

-827-

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Joseph Edward Jordan, defendant in the above-captioned case, by and through undersigned counsel and pursuant to Fla. R. Crim. P. 3.851 (2016) and the Constitutions of the United States and the State of Florida, respectfully moves this Honorable Court to vacate and set aside the judgment of conviction and sentence for first-degree felony murder and robbery with a firearm or other deadly weapon. Mr. Jordan reserves the right to amend this pleading due to the delay in receiving records from timely filed additional records requests. In support of this motion, Mr. Jordan respectfully submits the following:

PRELIMINARY STATEMENT

Mr. Jordan is currently incarcerated at Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, under a sentence of death. The record on appeal consists of 16 volumes, and the supplemental record on appeal consists of two volumes. Page references to the record on appeal are designated with R[volume number]/[page number]. Page references to the supplemental record on appeal are designated with SR[volume number]/page number]. All other references are self-explanatory or otherwise explained.

PROCEDURAL HISTORY

Trial Proceedings

On August 26, 2009, a grand jury returned an indictment for Mr. Jordan, for one count of First Degree Felony Murder in violation of Fla. Stat. § 782.04(1)(a)2 and one count of Robbery with a Firearm and/or Deadly Weapon in violation of Fla. Stat. § 812.13(2)(a) and § 775.087(1) and (2). R1/184-85; *Appendix A.* The victim was of these crimes was Keith Cope. R1/184.

Mr. Jordan was tried before the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, the Honorable R. Michael Hutcheson. R5/847. Attorneys Michael W. Nielsen and Christopher L. Smith represented Mr. Jordan.[1] Assistant State Attorneys Edwin L. Davis and J. Ryan Will represented the State of Florida.[2]

The voir dire proceedings took place April 15-16, 2013. R5/849-52. The guilt phase proceedings took place April 17-19, 2013. R5/852-57. Mr. Jordan was found guilty by a jury on both counts. R4/730-31. The penalty phase proceedings took place April 23-24, 2013. R5/857-60. On April 24, 2013, the jury recommended a sentence of death by a 10-2 majority vote. R4/768. The Court held a *Spencer*[3] hearing on August 12, 2013. SR2/315-42. On September 23, 2013, the Court entered a judgment and sentence imposing death on the felony murder count and life imprisonment on the count of Robbery with a Firearm and/or Deadly Weapon, with the sentences to run concurrently. R5/806-14; 818-27. These are the judgment and sentences under attack pursuant to Fla. R. Crim. P. 3.851(e)(1)(A). *Appendix B.*

[1] Throughout the motion, Mr. Jordan's counsel will be referred to by name or collectively as "trial counsel."
[2] Throughout the motion, the Assistant State Attorneys will be referred to by name or collectively as "the State."
[3] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

The Court found the following statutory aggravating circumstances:

> (1) prior violent felony – little weight; (2) the capital felony was committed while the defendant was engaged in the commission of a robbery and the capital felony was committed for pecuniary gain were merged together as one aggravator in order to avoid improper doubling – great weight; and (3) the capital felony was especially heinous, atrocious, or cruel (HAC) – great weight.

Jordan v. State, 176 So. 3d 920, 926 n. 3 (Fla. 2015); R5/807-09.

In terms of mitigating factors, the Court

> found one statutory mitigating factor was proven: the capital felony was committed when the defendant was under the influence of extreme mental or emotional disturbance – moderate weight. The following nonstatutory mitigating factors were considered: (1) the defendant had a history of mental illness and hospitalizations – moderate weight; (2) the defendant suffered from a closed-head injury or injuries as a child – little weight; (3) the defendant was physically and emotionally abused by his mother – little weight; (4) the defendant has a sister who loves him and will maintain a loving relationship with him – little weight; (5) the defendant has the capacity to form loving relationships with friends and family members while in custody – little weight; (6) the defendant had good grades in school and obtained his general education degree – little weight; (7) the defendant has a long history of substance abuse and was hospitalized because of cocaine abuse – some weight; (8) the defendant was ill as a child and used an oxygen tank for two years – little weight; (9) the defendant is bipolar and takes a prescription medication to stabilize his moods – some weight; (10) the defendant's parents were divorced when he was twelve years of age – little weight; (11) the defendant gave shelter to a homeless friend – little weight; (12) the defendant was employed as a carpenter on cruise ships and was a hard worker – little weight; (13) the defendant has two children – little weight; (14) the defendant was aware that his mother drove her car into another car in a fit of rage – little weight; (15) the defendant tried to commit suicide on three occasions – some weight; (16) the defendant has an IQ score within the average range – little weight; (17) the defendant has a memory impairment related to the effects of multiple head trauma – some weight; (18) the defendant has verbal memory weakness from mild traumatic brain damage – little weight; (19) the defendant was diagnosed as a juvenile with Attention Deficit Hyperactivity Disorder and was prescribed Ritalin – little weight; (20) the defendant had multiple prescription drugs to help with his mental health problems – some weight; (21) the defendant suffers from depression – little weight; (22) the defendant suffers from panic attacks – little weight; (23) the defendant has a severe substance abuse history – some weight; (24) the defendant received substance abuse treatment at fourteen years of age – some weight; (25) the defendant was attending Alcoholics Anonymous and Narcotics Anonymous – little weight; (26) the defendant is very nice and would perform random acts of kindness to others – minimal weight; (27) the defendant acts

> differently when he is on his medications as compared to when he is off his medications – some weight; (28) the defendant has loving and kind relationships with friends – little weight; (29) the defendant was not taking his bipolar medications at the time of the crime – some weight; (30) the defendant had a loving relationship with his father – little weight; (31) the defendant had cigarettes extinguished on him as a child by his mother – little weight; (32) the defendant's mother would purposely humiliate and embarrass the defendant in front of other people – some weight; (33) the defendant would not react with violence while being abused by his mother – little weight; (34) the defendant is a hard and diligent worker in many fields – minimal weight; (35) the defendant's adoptive brother loves the defendant and will maintain a loving relationship with him – little weight; (36) the mother of the defendant's child still loves the defendant and claims that he has a good heart – little weight; and (37) the defendant's family and friends do not want him to be sentenced to death – little weight. Additionally, the trial court concluded that the nonstatutory mitigator that the crime was committed in an unsophisticated manner was not established and therefore not given any weight.

Jordan, 176 So. 3d at 926 n. 4; R5/808-13.

Appellate Proceedings

Mr. Jordan raised the following grounds on direct appeal:

> (1) that the trial court should have declared a mistrial due to the prosecutor's improper statements during closing arguments; (2) that the trial court erred in finding the heinous, atrocious, or cruel aggravating circumstance; (3) that the trial court abused its discretion by admitting the victim impact statements into evidence; (4) that the trial court declined to find as a mitigating circumstance Jordan's ability to conform his conduct to the requirements of the law was substantially impaired; (5) that the sentence of death should be reversed under [the Florida Supreme] Court's proportionality review; and (6) that Florida's death penalty statutory scheme is facially unconstitutional under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

Jordan, 176 So. 3d at 927.

The Florida Supreme Court denied relief on each ground as well as on its review of the sufficiency of the evidence to support Mr. Jordan's convictions. *Id.* The Court therefore affirmed the judgment and sentences. Mr. Jordan did not petition the United States Supreme Court for a writ of certiorari.

TIMELINESS OF THIS MOTION

The Florida Supreme Court's opinion affirming Mr. Jordan's judgment and sentences was rendered on October 8, 2015. The judgment and sentence became final on January 6, 2016, when the time for filing a petition for writ of certiorari with the Supreme Court of the United States expired. A motion for postconviction relief is timely if filed within one year of the date the judgment becomes final. *See* Fla. R. Crim. P. 3.851(d)(1). This motion is therefore timely if filed by January 6, 2017. Mr. Jordan reserves the right to amend this document to incorporate any additional postconviction claims that may be identified following this Court's ruling on this pending motion.

STATE AND FEDERAL CLAIMS

All claims for relief raised in this motion are asserted as claims for relief under both the State and Federal Constitutions.

PLEADING REQUIREMENTS

Fla. R. Crim. P. 3.851(e)(1) requires that any motion to vacate the judgment of conviction and sentence of death contain either a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought, or a detailed allegation as to the factual basis for any purely legal or constitutional claim for which an evidentiary hearing is not required and the reason that the claim could not have been raised on direct appeal.[4] Fla. R. Crim. P. 3.851(e)(1)(D), (E). Aside from requiring a copy of the judgment and sentence, the Rule is permissive with regard to

[4] As to those claims which could have been but were not raised on direct appeal due to alleged ineffective assistance of appellate counsel, Florida procedural law requires that claims of ineffective assistance of appellate counsel be raised in a petition for writ of habeas corpus filed simultaneously with the initial brief on appeal of the denial of this motion, if it is denied. A casual comparison of the trial court record in this case with the initial brief on direct appeal shows that there were numerous motions and objections that were made by trial counsel but that were not pursued on appeal. Such claims are cognizable in a petition for writ of habeas corpus.

attachments. *See* Fla. R. Crim. P. 3.851(e)(1).

SUMMARY OF APPLICABLE LAW

Mr. Jordan raises several claims of ineffective assistance of counsel. The general case law for those claims will be addressed here. More specific citations will be utilized under each claim.

The Supreme Court of the United States has held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). Specifically, counsel has a duty to investigate in order to make the adversarial testing process work in the particular case. *See id.* at 690. The *Strickland* two-prong analysis to show ineffective assistance of counsel is as follows:

> First, a petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, whose result is unreliable.

Id. at 687.

To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688. In order to show prejudice, it is not necessary to establish that counsel's deficient conduct more likely than not altered the outcome in the case. *Id.* at 693. Instead, "[t]he defendant must show that 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." *Id.* at 694.

REQUEST FOR EVIDENTIARY HEARING

The Commentary to Rule 3.851 states that the Rule's 2001 amendment "requires an evidentiary hearing on the claims listed in an initial motion [for capital collateral relief] as requiring a factual determination." Claims of ineffective assistance of counsel routinely require a postconviction evidentiary hearing. Mr. Jordan requests an evidentiary hearing on Claims 1 to 8. If a hearing is granted, collateral counsel may offer, *inter alia*, testimony of experts in various fields as well as that of lay witnesses. A witness list and exhibit list will be provided at the Case Management Conference in accordance with Fla. R. Crim. P. 3.851(f)(5)(A).

CLAIM 1

MR. JORDAN'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER *HURST V. FLORIDA*.

On January 12, 2016, in *Hurst v. Florida*, the Supreme Court of the United States held that Florida's capital sentencing scheme violated the Sixth Amendment right to a jury trial in light of *Ring v. Arizona*, 536 U.S. 584. 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002). *Hurst*, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016). Specifically, the Court held, "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id.* at 619.

On March 7, 2016, the governor signed House Bill 7101 (Chapter 2016-13), which was enacted for the specific purpose of complying with the ruling in *Hurst*, into law. *See* Fla. H.R. Judiciary Comm., Crim. Justice Subcomm., Final Bill Analysis to HB 7101 (2016), *available at* https://www.flsenate.gov/Session/Bill/2016/7101/Analyses/h7101z.CRJS.PDF. In addition to requiring unanimous jury fact-finding as to certain aspects of capital sentencing, the new law also imposes the requirement that "a minimum of 10 jurors must concur in the recommendation" before a sentence of death may be imposed." Ch. 2016-13, Laws of Fla. (2016), *available at*

http://laws.flrules.org/2016/13.

On October 14, 2016, the Florida Supreme Court issued its decisions in *Perry v. State*, __ So. 3d __, 2016 WL 6036982 (Fla. October 14, 2016) and *Hurst v. State*, __So. 3d __, 2016 WL 6036978 (Fla. October 14, 2016). The Court in *Perry* declared the ten to two provision contained in Chapter 2016-13 to be unconstitutional under *Hurst v. Florida*. In *Perry*, the Florida Supreme Court concluded that the Sixth and the Eighth Amendments require a unanimous jury verdict recommending a death sentence before one could be imposed. Accordingly, the jury must unanimously find that sufficient aggravators exist to justify a death sentence and that the aggravators outweigh the mitigating factors in the case. Finally, if a unanimous death recommendation is not returned, a death sentence cannot be imposed. Thus, a life sentence is mandated if one or more jurors vote in favor of a life sentence due to a desire to be merciful even if the jury unanimously determined that sufficient aggravators existed and that they outweigh the mitigators. *Perry v. State*, 2016 WL 6036982 at *1 (quoting *Hurst v. State*, 2016 WL 6036978 at *15) ("'the penalty phase jury must be unanimous in making the critical findings **and recommendation** that are necessary **before a sentence of death may be considered by the judge or imposed**.'") (emphasis added). *See also Hurst v. State*, 2016 WL 6036978 at *17 n.18.

I. *Hurst* invalidates Mr. Jordan's death sentence.

In Florida, the maximum punishment for first-degree murder on the basis of a conviction alone is life imprisonment. The Sixth Amendment requires a jury to make the findings necessary to differentiate first-degree murder from first-degree murder for which a defendant may be sentenced to death. *Hurst*, 136 S. Ct. at 621 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and *Ring*, 336 U.S. at 597). In other words, the findings justifying a death sentence are an element of the crime of death-eligible first-degree murder, and

as such, they must be found by a jury beyond a reasonable doubt. *Id.*

Mr. Jordan was sentenced under the scheme declared unconstitutional in *Hurst*. Under that scheme, a person could be sentenced to death if a sentencing proceeding "result[ed] in findings by the court that [he] shall be punished by death." Fla. Stat. § 775.082(1). Sections 921.141(2) and (3), Florida Statutes, set forth a proceeding in which the jury rendered an "advisory vote," and the court independently found and weighed the aggravating and mitigating circumstances before entering a sentence of death.[5]

In *Hurst*, the Supreme Court noted that former Fla. Stat. § 921.141(3) required the trial court *alone* to find "'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" 136 S. Ct. at 622 (emphasis in original). It furthermore specifically rejected the State's argument that the jury's advisory recommendation could serve as the required factual finding. *Id.* Mr. Jordan's death sentence rests upon findings made by the Court as a result of the procedure now held unconstitutional. He was deprived of his Sixth Amendment right to have the jury determine every fact necessary for his capital sentence.

Mr. Jordan's case became final on January 6, 2016. At the time, the Supreme Court had not yet issued the *Hurst* opinion, which affirmed the position Florida defense attorneys and certain members of the Florida Supreme Court had been taking for years – that the *Ring* decision rendered Florida's capital sentencing scheme unconstitutional. Mr. Jordan raised this argument on direct appeal, but Florida Supreme Court case law at the time precluded relief. *See Jordan v. State*, 176 So. 3d at 937 (denying relief on Mr. Jordan's *Ring* claim).

[5] For purposes of clarity, because a new capital sentencing scheme has been enacted, the statutory provisions deemed unconstitutional in *Hurst* will be referenced throughout the remainder of this pleading as "former Fla. Stat. § [ ]."

When the Supreme Court of the United States or the Supreme Court of Florida renders a decision that announces a new rule of law, the new rule typically applies to cases that are not yet final on direct review. *See, e.g., Smith v. State*, 598 So. 2d 1063, 1065-66 (Fla. 1992). A new rule will also apply to cases that are final at the time of the decision if the test for retroactivity set forth in *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980) is met. The threshold question before a retroactivity analysis is implicated, therefore, is whether the decision in question announces a "new" rule. *Hurst v. Florida* was a decision of fundamental significance that has resulted in substantial upheaval in Florida's capital sentencing jurisprudence. The fundamental change in Florida law that has resulted means that under Florida's retroactivity test set forth in *Witt*, the decision in *Hurst* must be given retroactive effect. Under *Witt*, Florida courts apply holdings favorable to criminal defendants retroactively provided that the decisions (1) emanate from the United States Supreme Court or the Florida Supreme Court, (2) are constitutional in nature, and (3) constitute "a development of fundamental significance." *Id. Hurst v. Florida* and the change in Florida law made in its wake satisfy the first two *Witt* retroactivity factors—(1) *Hurst v. Florida* is a decision by the US Supreme Court, and (2) its holding is constitutional in nature: the Sixth Amendment forbids a capital sentencing scheme that provides for judges, not juries, make the factual findings that are statutorily required to authorize the imposition of a death sentence.

In *Witt*, the Florida Supreme Court stated that "[a]lthough specific determinations regarding the significance of various legal developments must be made on a case-by-case basis, history shows that most major constitutional changes are likely to fall within two broad categories." *Falcon v. State*, 162 So. 3d 954, 961 (Fla. 2015) (quoting *Witt*, 387 So. 2d at 929). The third factor under *Witt* is met under the second broad category whereby *Hurst* "constitutes a development of fundamental significance", *i.e.*, it is a change in the law which is "of sufficient

magnitude to necessitate retroactive application as ascertained by the three-fold test of [the United States Supreme Court's decisions in] *Stovall [v. Denno,* 388 U.S. 293, 87 S. Ct. 1967, 18 L.Ed.2d 1199 (1967)], and *Linkletter [v. Walker,* 381 U.S. 618, 85 S. Ct. 1731, 14 L.Ed.2d 601 (1965)]'" *Falcon*, 162 So. 3d at 961, (Fla. 2015) (quoting *Witt*, 387 So. 2d at 929). What must be considered are whether "[c]onsiderations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases'" *Falcon*, 162 So. 3d at 962 (quoting *Witt*, 387 So. 2d at 929). Accordingly, "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." *Witt*, 387 So. 2d at 925.

Certainly, it can be shown that "ensuring fairness and uniformity" in Florida's application of the death penalty means that *Hurst v. Florida* must be applied retroactively. The enactment of Chapter 2016-13 and the decision in *Perry v. State* demonstrate that capital defendants charged with murders that were committed long before *Hurst v. Florida* issued or Chapter 2016-13 was enacted will have *Hurst v. Florida* govern the capital sentencing procedures applicable at a retrial or resentencing occurring in the future, as well as those that have already occurred if a resulting death sentence was not final when *Hurst v. Florida* issued on January 12, 2016.

In *Hurst v. State*, the Florida Supreme Court stated that error under *Hurst v. Florida* "is harmless only if there is no reasonable possibility that the error contributed to the sentence." *Hurst*, 2016 WL 6036978, at *23. Moreover, "'the harmless error test is to be rigorously applied,'" and "the State bears an extremely heavy burden in cases involving constitutional error." *Id.* (quoting *State v. DiGuilio*, 491 So. 2d 1129, 1137 (Fla. 1986)). Therefore, as to *Hurst* error, "the burden is on the State, as beneficiary of the error, to prove *beyond a reasonable doubt* that the jury's failure

to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [the defendant]'s death sentence in this case." *Id.* at 23 (emphasis added).

The Sixth Amendment error under *Hurst v. Florida* cannot be proven by the State to be harmless beyond a reasonable doubt in Mr. Jordan's case. Although Mr. Jordan's ten to two death recommendation was not unanimous, even a unanimous death recommendation would not mandate a finding of harmless error, as that is only one of several inquiries that juries must make under *Hurst v. Florida*. As the Florida Supreme Court explained in *Hurst v. State*, all of the findings necessary for the imposition of a death sentence must be unanimously found by the jury:

> *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death. We equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.

Hurst v. State, 2016 WL 6036978, at *13.

The only document returned by the jury was an advisory recommendation that a death sentence should be imposed by a vote of ten to two. Mr. Jordan's penalty phase jury did not return a verdict making any findings of fact, so we have no way of knowing what aggravators, if any, the jurors unanimously found were proven beyond a reasonable doubt, if the jurors unanimously found the aggravators sufficient for death, or if the jurors unanimously found that the aggravating circumstances outweighed the mitigating circumstances. The fact that only ten jurors recommended death strongly suggests to the contrary. *See Franklin v. State*, No. SC13-1632, slip op. at 14 (Fla. November 23, 2016) ("In light of the non-unanimous jury recommendation to impose a death sentence, we reject the State's contention that any *Ring*- or *Hurst v. Florida*-related

error is harmless. *See id*. at S443. We also reject the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst v. Florida*. *See id*. at S438.")

Furthermore, the jury vote in itself shows that there must be doubt that a properly instructed jury would have unanimously returned a death recommendation. In the wake of *Hurst v. Florida* and the resulting new Florida law, the jury under *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed 2d 231 (1985) must be correctly instructed as to its sentencing responsibility. This means that post-*Hurst* the individual jurors must know that the each will bear the responsibility for a death sentencing resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. *See Perry v. State*, 2016 WL 6036982. As was explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude a death sentence. Indeed because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulted death sentence to be vacated. *See Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."). In Mr. Jordan's case, two jurors voted for a life sentence. In such circumstance, the probability that at least one juror would not join a life recommendation if a resentencing were now conducted is likely given that the proper *Caldwell* instructions would be required. The likelihood of one or more jurors voting for a life sentence increases when a jury is told a death sentence could only be authorized if the jury returned a unanimous death recommendation and that each juror had the ability to preclude a death sentence

simply by refusing to agree to a death recommendation. *See Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.").

Consideration must also be given to the fact that trial counsel would have tried the case differently under *Hurst v. Florida* and the resulting new Florida law. This is further evidence that it is more likely than not that at least one juror would not join a death recommendation at resentencing. Mr. Jordan requests an evidentiary hearing regarding this claim to present the testimony of his trial counsel. Mr. Jordan expects that trial counsel will testify that the *Hurst* decision would have had a dramatic impact on their strategy and decision-making in all aspects of Jordan's case, including but not limited to jury selection and the presentation of mitigation.

II. Even if the Florida Supreme Court determines that *Hurst* does not apply retroactively to cases on collateral review, Mr. Jordan is still entitled to relief.

The question of whether *Hurst* announced a new rule might be answered differently in state court than it would be in a case on federal review. In terms of federal review, *Hurst* did not announce a new rule. According to *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989), which sets forth the federal standard for the retroactive application of new criminal rules, it is "often difficult to determine when a case announces a new rule," and although the Court did not attempt to define what constitutes a new rule for purposes of retroactivity, it recognized that, generally, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." 489 U.S. at 301. The rule in place at the time Mr. Jordan's conviction became final was announced in *Ring* – the failure of a capital sentencing scheme to provide for jury fact-finding, beyond a reasonable doubt, of every fact necessary to make a first-degree murder a crime punishable by the death penalty, is unconstitutional under the

Sixth Amendment. *Ring*, 536 U.S. at 609. Accordingly, when Mr. Jordan's case became final, the *Ring* precedent dictated that the jury make the requisite findings, not the judge. The fact that this did not happen in Mr. Jordan's case does not mean that *Hurst* announced a new rule. The *Hurst* decision simply announced that Florida had misapplied the rule previously announced in *Ring*.

In *Ring*, the Supreme Court overruled *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990), in relevant part on Sixth Amendment grounds, stating,

> [W]e hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," the Sixth Amendment requires that they be found by a jury.

Ring, 536 U.S. at 609 (internal citations omitted).

In *Walton*, the Supreme Court had previously determined that the Sixth Amendment did not require any jury findings before the death sentence was imposed, and it specifically cited *Hildwin v. Florida*, 490 U.S. 638, 109 S. Ct. 2055, 104 L.Ed.2d 728 (1989) (*per curiam*) and *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L.Ed.2d 340 (1984) for their Sixth Amendment holdings as to the constitutionality of Florida's scheme. *Walton*, 497 U.S. at 647-48 ("A Florida trial court no more has the assistance of a jury's finding of fact with respect to sentencing issues than does a trial judge in Arizona."). In *Hurst*, the Supreme Court determined that Florida's continued reliance on the Sixth Amendment holdings of *Hildwin* and *Spaziano* after *Ring* overruled *Walton* on Sixth Amendment grounds was incorrect. The Court stated, "We now expressly overrule *Spaziano* and *Hildwin* in relevant part." *Hurst*, 136 S. Ct. 623.

According to the Supreme Court in *Graham v. Collins*, 506 U.S. 461, 467, 113 S. Ct. 892, 122 L.Ed.2d 260 (1993), "there can be no dispute that a decision announces a new rule if it expressly overrules a prior decision." It may be tempting to conclude then that *Hurst* announced a

new rule because of the Court's use of the phrase "expressly overrule" in relation to *Hildwin* and *Spaziano*. However, when a prior decision (*Ring*, in this scenario) has *dictated* that prior precedent (*Hildwin* and *Spaziano*) be overruled, but a subsequent Supreme Court decision (*Hurst*) is required to correct a state court's misinterpretation of the rule as previously announced, it cannot be said that the latest case announces a new rule. In *Hurst*, the Supreme Court was clear that the relevant rule of law was announced in *Ring:*

> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury. Their conclusion was wrong, and irreconcilable with *Apprendi*. Indeed, today is not the first time we have recognized as much. In *Ring*, we held that another pre-*Apprendi* decision – *Walton* – could not "survive the reasoning of *Apprendi*." *Walton*, for its part, was a mere application of *Hildwin*'s holding to Arizona's capital sentencing scheme.

Hurst, 136 S. Ct. at 623. Following *Apprendi*, if a similar challenge to Florida's capital sentencing scheme had reached the Supreme Court before *Ring*'s challenge to Arizona's scheme, then it might have been *Hildwin* and *Spaziano*, rather than *Walton*, that were mentioned by name and overruled in a 2002 Supreme Court decision.

At the time Mr. Jordan's sentence became final, the *Ring* precedent dictated that every fact necessary to raise the maximum penalty for first-degree murder from life imprisonment to death had to be submitted to the jury and found beyond a reasonable doubt. This rule had been in existence since the *Ring* decision, approximately 13 years before Mr. Jordan's case became final, and the right had been in existence since long before that. *See Danforth v. Minnesota*, 552 U.S. 264, 271, 128 S. Ct. 1029, 169 L.Ed.2d 859 (2008) (explaining that the Constitution is the source of a "new rule" because it grants the underlying right; it is only the timing of the Court's articulation of the rule that makes it "new"). Because the Florida Supreme Court and legislature failed to recognize *Ring*'s applicability to Florida's capital sentencing scheme, it might be said

that, for Florida, the *Hurst* decision announced a "new" rule. The rule set forth in *Ring* should simply be applied in the cases of those who were denied its benefit previously. Mr. Jordan is entitled to relief under *Hurst* because he was entitled to relief under *Ring*. To hold otherwise would constitute a miscarriage of justice.

III. Conclusion

Mr. Jordan's death sentence stands in violation of the Sixth Amendment, *Hurst v. Florida*, Chapter 2016-13, *Perry v. State*, and *Hurst v. State*. His jury did not return any findings of fact, his jury was not instructed that its death recommendation had to be unanimous, the jury's death recommendation was not unanimous, the jury was not told that each individual juror carried responsibility for whether a death sentence was authorized or a life sentence was mandated, and the jurors did not know that they each were authorized to preclude a death sentence simply to be merciful.

The *Hurst* error in Mr. Jordan's case warrants relief. The State simply cannot show the error to be harmless beyond a reasonable doubt that no properly instructed juror would have refused to vote in favor of a death recommendation. The record of this case demonstrates that the evidence of mitigation, including a history of mental illness and hospitalizations, head injuries, brain damage, severe substance abuse, and physical and mental abuse, was extensive and compelling. Unless it is proven beyond a reasonable doubt that no juror would have voted for a life sentence and through such a vote mandated that Mr. Jordan received a life sentence, Mr. Jordan's death sentence must be vacated and a resentencing ordered. Because the State cannot meet its burden here, Rule 3.851 relief is required.

As to Claim 1, Mr. Jordan requests an evidentiary hearing. Mr. Jordan requests that this Court vacate his death sentence.

CLAIM 2

MR. JORDAN'S SENTENCE STANDS IN VIOLATION OF THE EIGHTH AMENDMENT AND SHOULD BE VACATED.

In *Hurst v. State*, the Florida Supreme Court ruled that on the basis of the Eighth Amendment and on the basis of the Florida Constitution, the evolving standards of decency now requires jury "unanimity in a recommendation of death in order for death to be considered and imposed". 2016 WL 6036978 at *17. Quoting the United States Supreme Court, the Court in *Hurst* noted "that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" 2016 WL 6036978at *17. Then from a review of the capital sentencing laws throughout the United States, the Court in *Hurst v. State* found that a national consensus reflecting society's evolving standards of decency was apparent:

> The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances.

2016 WL 6036978 at *17. Accordingly, the Court in *Hurst v. State* concluded:

> the United States and Florida Constitutions, as well as the administration of justice, are implemented by requiring unanimity in jury verdicts recommending death as a penalty before such a penalty may be imposed.

2016 WL 6036978 at *18.

Indeed, as Justice Pariente explained, since the time *Ring* was decided, Florida has gone from "an outlier to an extreme outlier":

> At the time *Ring* was decided, death was not a penalty in twelve states. Since the United States Supreme Court decided *Ring*, seven additional states have eliminated the death penalty as a punishment altogether. *See Hall*, 134 S.Ct. at 1997 (noting that Connecticut, Illinois, Maryland, New Jersey, New Mexico, and New York have eliminated the death penalty since 2002); S.B. 268, 104th Leg. 1st Sess. (Neb.2015) (repealing the death penalty). Therefore, when *Hurst v. Florida* was decided, a total of nineteen states had eliminated the death penalty.

> As to the requirement of jury unanimity, until *Hurst v. Florida*, Florida was one of only three states that permitted capital defendants to be sentenced to death without all twelve penalty phase jurors recommending in unison that the defendant was deserving of the ultimate punishment. *See* majority op. at ——. Of the thirty-one states that still had the death penalty at the time of *Hurst v. Florida*, twenty-eight states required a unanimous vote of twelve jurors with respect to the final verdict or recommendation, making Florida, Alabama, and Delaware glaring outliers. However, Delaware just recently declared its capital sentencing statute unconstitutional. *Rauf v. Delaware*, 145 A.3d 430 (Del.2016). The United States Supreme Court has also vacated the death sentences of four Alabama inmates in light of *Hurst v. Florida*. *See Russell v. Alabama*, No. 15–9918, —– U.S. ——, —–S.Ct. ——, —– L.Ed.2d ——, 2016 WL 3486659 (U.S. Oct. 3, 2016); *Kirksey v. Alabama*, —– U.S. ——, 136 S.Ct. 2409, 195 L.Ed.2d 777 (2016); *Wimbley v. Alabama*, —– U.S. ——, 136 S.Ct. 2387, 195 L.Ed.2d 760 (2016); *Johnson v. Alabama*, —– U.S. ——, 136 S.Ct. 1837, 194 L.Ed.2d 828 (2016).[26]
>
> The current practices of these other states emphasize Florida's outlier status, as this Court expressly acknowledged eleven years ago in *State v. Steele*, 921 So. 2d 538, 548 (Fla.2005). In that case we observed that Florida was then "the *only* state in the country that allows a jury to decide that aggravators exist *and* to recommend a sentence of death by a mere majority vote." *Id.* (first emphasis added). At the time, we acknowledged that even though Alabama and Delaware did not require unanimity as to the jury's final recommendation, they at least required unanimity as to the jury's finding of at least one aggravator. *Id.* at 548–49, n. 4 & 5.
> Taken together, the trend of states either eliminating the death penalty as a punishment or requiring jury unanimity in fact-finding and the final recommendation before sentencing a defendant to death demonstrates "the evolving standards of decency" with respect to the jury's fact-finding role in capital punishment in the United States. *Roper*, 543 U.S. at 561, 125 S.Ct. 1183. This trend solidifies Florida's devolution from an outlier to an extreme outlier.
>
> The United States Supreme Court has also considered international trends when addressing Eighth Amendment claims, and these trends further confirm Florida's outlier status. *Id.* 543 U.S. at 577–78, 125 S.Ct. 1183. Amnesty International's 2015 Report indicates that the United States was the only member of the Organization of American States (OAS)—an organization whose thirty-five member nations aim to uphold the pillars of democracy, human rights, security, and development—to carry out executions, and one of the countries with the most executions in the world.[27] Both Florida and the United States are outliers as to the imposition of the death penalty, and Florida's non-unanimous recommendation for imposing the death penalty only entrenches the State in outlier territory.

Hurst v. State, No. SC12-1947, 2016 WL 6036978, at *28 (Fla. Oct. 14, 2016) (Pariente, J., concurring).

What constitutes cruel and unusual punishment under the Eighth Amendment turns upon

considerations of the "evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 312, 122 S.Ct. 2241, 153 L.Ed. 2d 335 (2002). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)). According to *Hurst v. State*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a penalty-phase jury has voted unanimously in favor of the imposition of death. The United States Supreme Court has explained that the "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Burch v. Louisiana*, 441 U.S. 130, 138, 99 S.Ct. 1623, 60 L.Ed 96 (1979). The near-uniform judgment of the states is that only a defendant who a jury unanimously concluded should be sentenced to death, can receive a death sentence. As a result, those defendants who have had one or more jurors vote in favor of a life sentence are not eligible to receive a death sentence. This class of defendants, those who have had jurors formally vote in favor a life sentence, cannot be executed under the Eighth Amendment.

Mr. Jordan is a member of this protected class. His death sentence rests on the recommendation of only ten jurors. With the enactment of Chapter 2016-13, the Florida Legislature, attempting to comply with *Hurst*, required ten jurors to recommend death before a sentence of death could be imposed. More recently, in *Perry*, the Florida Supreme Court declared the ten to two provision in Chapter 2016-13 unconstitutional and concluded that the Sixth and Eighth Amendment require a unanimous jury verdict recommending a death sentence before one

could be imposed. Under the Eighth Amendment, Mr. Jordan's execution would constitute cruel and unusual punishment. His death sentence must accordingly be vacated.

As to Claim 2, Mr. Jordan does not request an evidentiary hearing. Mr. Jordan requests that this Court vacate his death sentence.

CLAIM 3

TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE BY FAILING TO CHALLENGE THE STATE'S TIMELINE AT TRIAL WITH REGARD TO THE LENGTH OF TIME THE VICTIM WAS BOUND.

The grand jury indicted Mr. Jordan in this case for first degree felony murder and robbery with a firearm and/or deadly weapon. R1/184-85. According to the "Specification of Charge" for the felony murder charge, as stated on the indictment:

> In that JOSEPH EDWARD JORDAN, between on or about June 24, 2009, and on or about June 26, 2009, in the County of VOLUSIA and State of Florida, did knowingly and unlawfully, while engaged in the perpetration of, or in the attempt to perpetrate the felony of robbery, kill and murder Keith Cope, a human being, by restraining him with rope and tape.

R1/184.

The indictment reveals some uncertainty about the time period during which Mr. Jordan was alleged to have restrained Mr. Cope, placing it between the dates of June 24 and June 26, 2009. Mr. Cope was found by Mr. Powell and his companions on June 28 around 6:00 a.m. R10/1981-82.

During his opening statement in the guilt phase of the trial, the prosecutor, Mr. Davis, began setting up the State's version of the timeline by stating: "While Mr. Cope was bound and gagged, lying on his bed, and for three days this defendant proceeded to drive his truck around this area and then down to south Florida." R9/1785-86. He continued, "When Keith Cope was found more than three days after this defendant left him in that condition, the doctors were unable to

overcome the damage that had been caused to Mr. Cope because of being left in that condition." R9/1786.

Later on, during the opening statement, Mr. Davis explained how he arrived at the notion that Mr. Cope had been restrained for three days, which would have meant he was restrained sometime before 6:00 a.m. on June 25:

> You're going to hear – these dates are going to be important. And you'll – we'll be talking about them, but just for our purposes now, I wanted to show you a calendar. . . .
>
> The time frame we're going to be – we're going to be dealing with here . . . is the 24th here through about the 28th with regard to Mr. – Mr. Cope and what Mr. – what the defendant did to him.
>
> The dates are, with regard to starting on the 24th, are important because Maggie Cope will tell you – that's the ex-wife who lived a block or two away – she would drive by the house on a regular basis.
>
> She drove by the evening of the 24th. And Mr. Cope's truck was out there as it normally was. She saw it when she drove by in the evening and went by the house.
>
> And she distinctly remembers, you know, once he was found there, she remembers and talked to the police and will tell you that the morning of the 20 – early on the 25th, six o'clock in the morning, she went by there and the truck was not there.
>
> His truck was not there from that point forward, but she distinctly remembers it was there the evening of the 24th, seven o'clock or so.
>
> And then about six or so on the morning of the 25th, the truck is gone.

R9/1788-89.

The State had no evidence supporting the assertion that Mr. Cope was restrained from the evening of June 24 until the morning of June 28 except for Maggie Cope's observation that the truck was not at Mr. Cope's home on the morning of June 25. Yet, the State consistently throughout the trial emphasized this timeframe to the jury, drawing no objection from the defense, and at times, the defense even appeared to agree with the timeframe, as discussed further below.

The State introduced evidence that Mr. Jordan began withdrawing funds using Mr. Cope's bank card at 8:18 p.m. on June 25 and that he drove to South Florida shortly thereafter. R4/636-

66; R12/2301. Therefore, it is most reasonable to assume that Mr. Cope's restraint did not begin until the evening of June 25, meaning that he would have been restrained through that night, all day on June 26 and 27, and into the morning of the June 28, a time frame that totals less than 2.5 days rather than the three continually emphasized by the State.

The State stressed the time period throughout the trial. During the guilt phase, Mr. Davis asked Dr. Rullan: "If Mr. Cope had been bound and also gagged or duct tape wrapped around his mouth and kept there for a period of three days, could that be a cause of what you just testified to?" R12/2372-73. The defense did not object. He also asked her if, in her opinion, Mr. Cope's condition when he came in to the hospital was "attributable to the fact that he was bound and gagged and left alone for a three-day period." R12/2377. He again raised this point on redirect examination. R12/2386.

The State expanded the time frame when questioning the medical examiner, Dr. Hermann. Mr. Davis asked her, "And was it your understanding that Mr. Cope had been bound and gagged for a period of at least three days?" to which she replied, "Yes." R12/2397. When questioning emergency physician Dr. Tara Wilson during the penalty phase, the State again stretched out the time frame as follows:

> Q [MR. WILL]: Okay. Now, tell us a little bit – let me give you a hypothetical.
>
> For a man that was wrapped around the face and head, taped at the wrists and ankles with rope and tape and bound to his bedposts for a period of three days, maybe a little bit more, but, certainly, no more than five, were these injuries consistent with the description of the hypothetical I've just given you?

R14/2756. The difference of half a day mattered in terms of prejudice to Mr. Jordan during the penalty phase of his trial because of the State's suggestions throughout both the guilt and penalty phases as to Mr. Jordan's mindset. The State, on numerous occasions, suggested that Mr. Jordan should have anticipated that Mr. Cope's life was in danger and even at one point, that he had

knowledge that Mr. Cope was either dead or near death. R16/3038, 3041. It is more reasonable to argue both of those things when the time frame one references is three days or more, rather than less than 2.5. This is shown directly through the testimony of State witnesses, Dr. Melinda Rullan and Dr. Tara Wilson. Dr. Rullan testified, "In my medical opinion, a person requires water. And after three days, the patient will start to develop neurological changes consistent with water deprivation." R12/2383. Dr. Wilson testified that death can occur after three days with no fluids. R14/2761. Thus, a matter of a half day is important in terms of the foreseeability of Mr. Cope being permanently injured or potentially dying as the result of Mr. Jordan's actions.

The fact that trial counsel never corrected the State's time frame becomes more prejudicial because of the sheer number of times the State emphasized it and the nature of their allegations. During closing argument in the guilt phase, Mr. Will again emphasized the three-day time frame and claimed that that rope and tape were deadly weapons in this case "[b]ecause [Mr. Cope] was bound, because he was gagged, because he went three days without water and suffered extreme dehydration." R13/ R13/2522-23, 2528. By doing so, he suggested that even if Mr. Cope had not struggled, it would have been reasonable for Mr. Jordan to assume his life was in danger simply because of the fact that he was restrained and unable to eat or drink. Mr. Will argued, "Three days later, three days without water, three days of sunrises and sunsets, three days of watching the clock and minutes slowly pass by, someone came and found Keith Cope. And it was too late." R13/2544.

He went on to argue that Mr. Jordan "had countless opportunities to place a call for help or send a rescue." R13/2549. This argument relies upon the assumption that Mr. Jordan should have known that Mr. Cope was in danger. Mr. Jordan did alert someone, Mathew Powell, to Mr. Cope's situation. Mr. Jordan also knew that Mr. Powell was going to Mr. Cope's home. When Mr. Powell arrived, Mr. Cope had not been restrained long enough for death due to water deprivation.

Dr. Rullan testified that, hypothetically, if Mr. Cope had remained seated on the bed even for the three-day time frame, he would have survived. R12/2383-84.

In his rebuttal closing argument, Mr. Will continued to argue the State's version of the timeline, with regard to how soon Mathew Powell and his companions could have reached Mr. Cope's home after he was initially restrained:

> Keith Cope – I mean Keith Cope got tied up – the car's – the car's gone and never comes back on Thursday.
>
> They don't even see Joe Jordan until, like, one in the morning or midnight on Saturday. That's two days, two days Keith Cope was tied to the bed.

R13/2577.

During the State's penalty phase closing, Mr. Davis argued:

> So for three days after going to the extent, robbing him at gunpoint, tying him and binding him, gagging him, for over three days, this defendant is enjoying the fruits of Keith Cope's labor.
>
> He took his property and, for three days, while Keith Cope is struggling, fighting for his life, he's out living high on the hog, enjoying Keith Cope's property.
>
> . . .
>
> While Keith Cope, this man here, as he was when he was – shortly after he was found, this man was bound, gagged, hog-tied, according to this defendant's own words from his jail statement or letter, in this bed for over three days.
>
> This defendant is driving his truck, his nice truck, the one that Keith Cope took care of, cleaned, cared about, took it and was doing this for three days.
>
> This is why this was for financial gain.
>
> Starting Thursday – and we know this is in the morning. The truck's not there in the morning.
>
> So this defendant went somewhere, did something during the day locally here because then at 8 p.m. he's in Edgewater, on his way going – you know, heading south. We know he gets there early morning hours.
>
> But here he is, 8 p.m., three withdrawals, a total of 600 dollars, one right after the other, in Edgewater.
>
> So using his debit card, Friday he gets down south. Here he is in Hollywood, Florida. ATM withdrawals, withdrawals here, early morning hours, two-something in the morning.
>
> Then Saturday, he continues. Here we are early morning hours of Saturday, and again, boom, boom, boom.
>
> Some are declined. Some are accepted. He's using that card. A total, we talked earlier and you heard testimony, over 2300 dollars.
>
> Here he is Saturday, all – Saturday, all day, early morning hours all the way

to 3 p.m.

Keith Cope's here, has been here, struggling, fighting, in essence, dying – not in essence. He was dying.

R16/3031-33. Despite Mr. Davis' assertion that Mr. Jordan "went somewhere, did something during the day locally," the State provided no evidence to support that assertion. Mr. Davis then claimed that Mr. Jordan must have known Mr. Cope was either dead or near dead when he sent Mathew Powell to Edgewater. R16/3038, 3041. Referring to Mathew Powell, Mr. Davis argued, "So don't give me this, this was some little plan after three days to send up this thug to go up there and tell him he can rob him." R16/3044.

Mr. Davis further made unsubstantiated claims about Mr. Jordan's mindset, and even invited the jury to consider their personal experiences with the timeframe of the trial in comparison to the timeframe during which Mr. Cope would have been restrained:

> He certainly knew that he could die the more that time went on that he left him in the condition that he left him.
>
> Every moment that passed, the chances of Keith Cope dying increased because, again I – I know I've said this many times, but only he knows how he left him hog-tied to that bed.
>
> This murder, really, look at it. It took – it took three days. I mean, there was a period of three days when this defendant, from the way he tied him as he did and did nothing, three days did nothing, nothing, nothing over those three days.
>
> And think about it. It – the fact of how he left him had to constantly be on this defendant's mind.
>
> He's driving his truck. He's using his card. It's – it's there in his mind. He knows how he left him.
>
> Three days. And it was this defendant's choice whether to keep using his money, driving his truck, partying with his friends, or to help Keith Cope.
>
> That's a choice he had over that three-day period.
>
> And whatever his intent was when he bound him and gagged him and left him, whatever – whatever his intent was when he left that house, left him there helpless, alone, walked out the door, drove off in his truck, whatever his intent was, without question, every second, every minute, every hour, every sunrise, every nightfall, Keith Cope suffered more and more and got closer to his death.
>
> So one thing, without question, is crystal clear. Aside from – aside from whether this defendant intended to actually kill Keith Cope, one thing's without question.
>
> He intended for him to suffer. How can it be said otherwise?

> What kind of person does this to another human being, to leave him bound and gagged, to suffer horribly for three days?
>
> And there's no doubt that Keith Cope's suffering was – it's virtually unimaginable, the suffering he would have gone through in those three days, not only physically, but mentally.
>
> What's going through his mind those three days? Over 73 hours, bound, gagged, no food, no water, urinating on himself.
>
> Just as a reference, think about it. Last week we started our trial.
>
> Actually, a week from today, Wednesday morning, we started with the evidence part of it after jury selection. Wednesday morning.
>
> Wednesday, Thursday, Friday, that time frame, so that time frame, say, until we woke up, everyone, that Saturday morning after the trial concluded, so that's a three-day period.
>
> It was more than that length of time from Wednesday when we began hearing the evidence, that Wednesday morning when opening statements were done, that Wednesday, that Thursday, that Friday, and then when we woke up Saturday morning after the trial had been concluded.
>
> That's at least the length of time that Keith Cope was bound and gagged and laying there in a bed.

R16/3044-47.

The defense should have challenged the time frame if not through cross-examination, at least through reliance during closing arguments on the limitations of the evidence presented by the State. No one asked Magdalene Cope if she had occasion to see Mr. Cope's truck later in the day on June 25. R10/1843-59; R12/2290-92. Furthermore, there was no evidence that anyone from the defense ever spoke to neighbors who may have seen it.

Rather than challenge the State's time frame, the defense agreed with it. During the cross-examination of Dr. Rullan, Mr. Smith asked her, "[H]ypothetically, had Mr. Cope remained seated on the bed between the period of June 25, 2009, at 6:30 in the morning until June 28, 2009 at six in the morning, meaning a three-day – approximately a full three-day period, would he have survived?" R12/2383. Similarly, when cross-examining Dr. Hermann, he asked, "Hypothetically, if Mr. Cope had initially been bound on June 25, 2009, and been placed on that bed, and had he remained there – I'm going to give 6:30 in the morning as the time – until the 28th at six o'clock

in the morning, would that have been fatal in and of itself?" R13/2411. The defense's motion for judgment of acquittal, which was outside the presence of the jury, evidenced their understanding that the "asportation and taking was complete sometime prior to June 25 at 6:30 in the morning." R13/2415. It was trial counsels' failure to investigate that led to this prejudicial conclusion and the failure to challenge the time frame at trial.

The defense apparently recognized that the foreseeability of Mr. Cope's injuries was important. During guilt phase closing argument, Mr. Nielsen refuted the State's argument that Mr. Jordan sending Mr. Cope's truck back with Mathew Powell is evidence of guilt by asking the jury:

> Well, how about this side of the coin:
>
> He's thinking still that Mr. Cope's okay, and he has Powell and those guys take the truck back to him.
>
> That doesn't sound like the actions of a man who feels that he's guilty of committing some heinous crime, returning the truck up to the house.

R13/2557-58. A conclusion that the timeframe was half a day shorter would have helped the defense's theory of the case. During the defense's opening statement in the penalty phase, Mr. Smith emphasized how Mr. Jordan "continued to get more and more anxious as time went on and often would say, you need to go help Keith" and how his first concern once the others arrived to Mr. Cope's was whether Mr. Cope was okay. R14/2745. Clearly, the time that had passed was important, and had trial counsel challenged the State's timeframe before the jury, there is a reasonable probability that the outcome of the penalty phase would have been different.

As to Claim 3, Mr. Jordan requests an evidentiary hearing to present the testimony of trial counsel to show that there was no reasonable trial strategy for failing to challenge the State's timeline during trial. Mr. Jordan also requests that this Court grant him a new penalty phase proceeding.

CLAIM 4

TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE UNDER *STRICKLAND* BY FAILING TO OBJECT TO THE PROSECUTOR'S IMPROPER CLOSING ARGUMENTS.

On direct appeal, Mr. Jordan argued that the State's improper comments in closing argument constituted fundamental error. *Jordan*, 176 So. 3d at 927-30. Regarding the preserved claim "that the prosecutor impermissibly attempted to sway the jury by giving the impression that the State's interpretation of felony murder was supported by caselaw", the Florida Supreme Court held that the trial court properly denied trial counsel's motion for mistrial. *Jordan*, 176 So. 3d at 928. Because trial counsel failed to contemporaneously object to the remaining nine instances of prosecutorial misconduct, the Court applied a fundamental error review. The Court specifically addressed one of the nine instances of unpreserved prosecutorial misconduct, which it found was improper, although it did not rise to the level of fundamental error:

> Jordan also contends that the prosecutor's statement, "Don't let him get away with this," constitutes an improper comment. Because Jordan failed to contemporaneously object to this comment, we apply a fundamental error review. *See Braddy v. State*, 111 So. 3d 810, 837 (Fla.2012) (citing *Brooks v. State*, 762 So. 2d 879, 899 (Fla.2000) (defining fundamental error as that which "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.")). "If this Court finds a comment to be improper, factors to be weighed in determining whether an improper comment rises to the level of fundamental error include whether the statement was repeated and whether the jury was provided with an accurate statement of the law after the improper comment was made." *See Poole v. State*, 151 So. 3d 402, 415 (Fla.2014), *cert. denied*, —— U.S. ——, 135 S.Ct. 2052, 191 L.Ed.2d 960 (2015).
>
> Specifically, Jordan challenges the following statement in the prosecutor's rebuttal closing argument:
>
> > You can find him guilty of first-degree murder or guilty of such lesser-included charges. That's second degree, third degree, manslaughter with a weapon or manslaughter. Ladies and gentlemen, you can go all the way down the list, but the law tells you find him guilty of the highest one that's been proven. Sure. Look at the instructions. They may all apply in this situation because of

> the way this thing developed, they may all apply. I mean, you may be able to technically find him guilty of all of them, but you should find him guilty of the highest one that has been charged and proven beyond a reasonable doubt. And in this case it's first-degree murder, felony murder, first degree. And when you get over here to—to the robbery, count two right up here, count two, robbery with a fire weapon—firearm or deadly weapon, right here on the first line, guilty of the charge of robbery with a firearm or deadly weapon, exactly what he confessed to, exactly what he told you he had done. *Don't let him get away with this.* Yeah. I mean sure. You can come down the list again if you want to. I mean, he's technically guilty of all of them. Robbery with a weapon, yep. Robbery, yep. Grand theft, did he steal something without any force? Well, he stole something, but he—he used force. I mean, yeah. You can come down the list, but there's no reason to. The law says to return it to the highest crime proven beyond a reasonable doubt. And, ladies and gentlemen, it is right there. It is choice number one.

(Emphasis added). Within the context of the argument, the prosecutor told the jury that there were lesser-included offenses, and he listed them. He then beseeched the jury not to let the defendant get away with first-degree felony murder if that was the crime for which they chose to convict him.

While we find the comment was indeed improper, we do not find that the prosecutor's comment rises to the level of fundamental error. The prosecutor mentioned the comment only one time, and after saying, "Don't let him get away with this," the prosecutor still invited the jury to consider the lesser-included offenses. Also, the trial court read the standard jury instructions, which included an accurate statement of the law with regard to first-degree felony murder and the lesser-included offenses. *See Poole*, 151 So. 3d at 418.

Jordan, 176 So. 3d at 929.

Regarding the remaining eight claims of prosecutorial misconduct, the Court found that those claims were "meritless and unpreserved for appellate review", and "that none of the comments, taken individually or cumulatively, constitute fundamental error." *Jordan*, 176 So. 3d at 929-30.

In addition to the two instances of improper prosecutorial argument that were specifically addressed by the Florida Supreme Court on direct appeal, there were several additional instances of unpreserved prosecutorial misconduct, which warrant discussion in the context of an ineffective assistance of counsel claim. Although the Florida Supreme Court on direct appeal stated that the

remaining eight un-objected to claims of prosecutorial misconduct raised by appellate counsel were meritless and did not constitute fundamental error, *Jordan*, 176 So. 3d at 929-30, Mr. Jordan is not precluded from relief based on these findings as, (1) some of the claims of prosecutorial misconduct raised in this motion were not raised on direct appeal and (2) as discussed below, fundamental error is a very different standard than *Strickland* error. These comments, as discussed below, should have been, but were not, objected to by trial counsel.

"The role of the attorney in closing argument is "to assist the jury in analyzing, evaluating and applying *the evidence.*" *Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999) (emphasis contained in original). Emotion and fear have no place in closing arguments. As the Florida Supreme Court explained:

> Closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla.1985). Furthermore, if "comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument." *Garron v. State*, 528 So. 2d 353, 359 (Fla.1988).

King v. State, 623 So. 2d 486, 488 (Fla. 1993).

Golden Rule arguments are those that invite the jurors to place themselves in the victim's position during the crime and imagine the victim's suffering. *Victorino v. State*, 127 So. 3d 478 (Fla. 2013). During guilt-phase closing arguments, the prosecutor evoked an emotional response from the jury by making an improper Golden Rule argument, in which he imagined what it must have been like for Mr. Cope after Mr. Jordan tied him up:

> When he closed the door behind him, it was as if he had put Keith Cope on a raft and set him adrift in an endless sea.
>
> He had absolutely no ability, no tool, to free himself. And he could only hope that someone would come and find him.
>
> Three days later, three days without water, three days of sunrises and sunsets, three days of watching the clock and minutes slowly pass by, someone came and found

> Keith Cope. And it was too late. As the days ticked slowly by, his hope got smaller and smaller, I would imagine. As the days ticked slowly by, he probably knew that no one was coming for him.

R13/2544.

He went on to invite the jurors to imagine the length of time Mr. Cope suffered by using their own experience as jurors as a reference:

> What kind of person does this to another human being, to leave him bound and gagged, to suffer horribly for three days?
>
> And there's no doubt that Keith Cope's suffering was – it's virtually unimaginable, the suffering he would have gone through in those three days, not only physically, but mentally.
>
> What's going through his mind those three days? Over 73 hours, bound, gagged, no food, no water, urinating on himself.
>
> Just as a reference, think about it. Last week we started our trial.
>
> Actually, a week from today, Wednesday morning, we started with the evidence part of it after jury selection. Wednesday morning.
>
> Wednesday, Thursday, Friday, that time frame, so that time frame, say, until we woke up, everyone, that Saturday morning after the trial concluded, so that's a three-day period.
>
> It was more than that length of time from Wednesday when we began hearing the evidence, that Wednesday morning when opening statements were done, that Wednesday, that Thursday, that Friday, and then when we woke up Saturday morning after the trial had been concluded.
>
> That's at least the length of time that Keith Cope was bound and gagged and laying there in a bed.

R16/3044-47.

The prosecutor further appealed to the jury's personal sense of security and injected an element of fear into the trial during closing arguments when he made the dubious comparison between Mr. Cope owing Mr. Jordan money and the jurors owing money to their own debtors:

> Just because the defendant was owed something doesn't mean that he has a right to come up here and demand someone else's money and take it from him when they're not willing to give it , and to use force to do that, use guns and tape and rope.

> If you could do that in America, then we'd all be in trouble because the mortgage companies would have us tied to the bed.

R13/2576.

Additionally, the Florida Supreme Court has held that "lack of remorse should have no place in the consideration of aggravating factors." *Pope v. State*, 441 So. 2d 1073, 1078 (Fla. 1983). During the guilt-phase closing arguments, the prosecutor repeatedly referred to Mr. Jordan's lack of remorse:

> The first point is I'm sorry. The second point is I didn't mean to kill Keith. And the third point is I'm not responsible for the harm that occurred after I left.
>
> That was what was said in opening statement by the defense. That was what was asked to many of the witnesses that were on the stand.
>
> So let's talk about that argument. Let's talk about the defense's argument in this case.
>
> Let's start with I'm sorry. Nowhere in the evidence, nowhere, is there a single fact that demonstrates the defendant is sorry about anything.
>
> He wrote six letters. You listened to them yesterday as they were read. You'll have an opportunity to take them in the back and read them yourself.
>
> Look carefully for the words I'm sorry. I'm sorry doesn't appear anywhere. I'm sorry doesn't come up in the statement to Joanne Winston out at the jail.
>
> There is no I'm sorry. When he told his friends, Raymond Hill and Eddie Yarrow and Matthew Powell and Sadia Hague, not once did he say I'm sorry.
>
> Not once did he say, God, I wish it hadn't happened this way. I – I wish Keith were in better shape or hadn't died.
>
> . . .
>
> You know, nowhere in there, though, was I'm sorry. The most we got was I'm suicidal. I F-ed up. I didn't want to go to jail, but we never heard I'm sorry.

R13/2540-41.

The above statements are misleading. Trial counsel had not yet presented its closing argument. Although trial counsel said during opening statements that <u>he</u> was sorry that Mr. Cope passed

away, he did not say that Mr. Jordan was sorry, and he did not open the door to remorse or lack of remorse being an issue. R10/1816.

Finally, it is improper for a prosecutor to ridicule a defendant or his theory of defense. *Braddy v. State*, 111 So. 3d 810 (Fla. 2012) (Pariente, J., dissenting). The prosecutor in his rebuttal closing argument ridiculed and improperly characterized Mr. Jordan's theory of defense:

> I told you it was coming, and there, there we heard it. It's everybody's fault but the defendant's.
>
> I mean, if he had stayed in the middle of the bed, he would still be alive.
>
> If these guys had come up from south Florida a day and a half earlier, he'd still be alive.
>
> Come on. Everybody's fault but his. I mean, he snapped? Is that a defense? He snapped?

R13/2572-73. The prosecutor's argument mischaracterized and denigrated the defense's theory. On a number of occasions, trial counsel stated that this case was not first-degree murder (V13/2560, 2564, 2567, 2571, 2572), but that it was, at most, third-degree murder (R13/2566) or manslaughter (R23/2566). Trial counsel never said that it was everyone else's fault. The prosecutor's argument was an attempt to ridicule the defense's theory of the case, as opposed to an argument of reasonable inferences, and should have been objected to by trial counsel. *See Valentine v. State*, 98 So. 3d 44, 55-56 (Fla. 2012).

Mr. Jordan is entitled to relief under *Strickland.*

Trial counsel provided deficient performance under *Strickland* when he failed to object to the egregious statements made by the prosecutor during closing arguments as described above, thereby failing to preserve the issue for appellate review. *See Ross v. State*, 726 So. 2d 317 (Fla. 2d DCA 1999) (holding that counsel's failure to object to prosecutor's inappropriate and prejudicial comments during closing argument constituted ineffective assistance of counsel). We

know from the Florida Supreme Court's opinion on direct appeal that, at a minimum, the prosecutor's statement, "Don't let him get away with this" was an improper argument. *Jordan*, 176 So. 3d at 929. Therefore, trial counsel provided deficient performance when they failed to object to that argument. Now, in the context of postconviction, it is Mr. Jordan's contention that the additional instances of prosecutorial misconduct addressed in this claim also constitute deficient performance, and that the cumulative effect of the improper prosecutorial comments, both objected to and un-objected to, undermined confidence in the outcome of the case.

Florida's fundamental error doctrine allows the appellate court to review unpreserved claims on the merits only if the alleged errors "reach down into the validity of the trial itself to the extent that verdict could not have been obtained without the assistance of the error." *Derrick v. State*, 983 So. 2d 443, 463 (Fla. 2008). To demonstrate fundamental error on direct appeal, Mr. Jordan would have had to prove that the verdict could only have been an acquittal if the prosecutor had not gotten away with his improper comments. The standard of prejudice for a postconviction ineffectiveness claim, on the other hand, is a "reasonable probability" of a different result. *Strickland*, 466 U.S. 668. It is a much more "defense-friendly" standard than fundamental error. *See Nolan v. State*, 794 So. 2d 639, 641 (Fla. 2d DCA 2001) (holding that the defendant's claim of counsel's failure to object to prosecutorial misconduct constituted a facially sufficient claim, in spite of the fact that the challenged conduct was raised as a matter of fundamental error on appeal and denied).

In examining prejudice, this Court must consider the cumulative effect of the entire closing argument, including both objected to and un-objected to arguments. *See Braddy v. State*, 111 So. 3d 810 (Fla. 2013). In this case, when looked at cumulatively, the improper statements made by the prosecutor deprived Mr. Jordan of a fair trial and undermined confidence in the outcome of the

case. While these arguments were made during guilt phase rather than penalty phase, jurors in the penalty phase are instructed that they may consider all of the evidence presented during the guilt phase as well as the penalty phase. Therefore, these comments would have a doubly prejudicial effect for Mr. Jordan, both by persuading the jury to find Mr. Jordan guilty of felony murder, and also in penalty phase by persuading the jury to consider lack of remorse as an aggravating factor after he is found guilty, and by injecting elements of emotion and fear into the jury's penalty phase deliberations. Mr. Jordan is entitled to relief on this claim.

As to Claim 4, Mr. Jordan requests and evidentiary hearing to present the testimony of trial counsel to show that there was no reasonable trial strategy for their failure to object to the prosecutor's improper closing arguments. Mr. Jordan further grants that this Court grant him a new trial.

CLAIM 5

TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE BY FAILING TO MOVE TO EXCLUDE A LETTER ALLEGEDLY WRITTEN BY MR. JORDAN IN WHICH HE REFERRED TO HIS CASE AS THE HOG-TIE MURDER, OR ANY OTHER MENTION OF HOG-TYING.

Jeffrey Danziger, M.D. is a psychiatrist who testified on behalf of the defense during the penalty phase trial. During the State's cross examination of Dr. Danziger, the following exchange took place:

> ASA Davis: Now, Dr. Danziger, with regard to the jail records you said you reviewed, did you note in there a letter that this defendant wrote when he – he referred to – in discussing this murder with another person, referred to this being – that he was in there on the hog-tie murder, that those were his words used to describe the murder hat he was in on, do you recall that?
>
> Dr. Danziger: I don't – I don't believe I've seen that letter in the jail file. I may not have – that may not have been included in what I received.
>
> . . .

ASA Davis: Just to make sure, I – just to save some time, I'll just point it out to you.

(Witness perusing document)

Dr. Danziger: Yes.

ASA Davis: And the question simply was that this defendant referred to his case as the hog-tie murder, correct?

Dr. Danziger: Yes, he did.

R15/2943-45.

The idea that Mr. Jordan hog-tied Mr. Cope became a feature of the State's penalty phase closing arguments:

> [T}his man was bound, gagged, hog-tied, according to this defendant's own words from his jail statement or letter, in this bed for over three days." R16/2032.
>
> . . .
>
> You know, there's, hey, he's tied up. And there's, hey, he's bound and gagged and hog-tied.
>
> He's got tape wrapped around his head, around his mouth. His arms are duct-taped and tied behind his back. His legs are bound together. He's tied to the frame of that bed. R16/3036.
>
> . . .
>
> [O]nly he knows how long he left his hog-tied to that bed. R16/3045.
>
> . . .
>
> He's basically to all of the bedposts, hog-tied. R16/3049.
>
> . . .
>
> He's hog-tied, just cramping, his body cramping. R16/3049.

The prosecutor further capitalized on the hog-tying reference with a play on words to describe Mr. Jordan's behavior after leaving Mr. Cope:

> He took his property and, for three days, while Keith Cope is struggling, fighting for his life, he's out living high on the hog, enjoying Keith Cope's property. R16/3031.
>
> [H]ere he is living high on the hog for him, enjoying the fruits of Keith Cope's labor, his money, driving his truck, while he's laying there dying. R16/3034.

In a letter dated April 30, 2013 addressed to Mr. Jordan, Mr. Nielson apologized for a "huge mistake" that he made during his trial:

> Mr. Jordan,
>
> I made a huge mistake during your trial. The letter that Mr. Davis used to cross examine Dr. Danziger was not supposed to be included in the medical records I sent to the Volusia County State Attorney's Office. It was 100% my fault that I did not notice it within the medical documents I sent to the State Attorney. I believe the letter and the repeated reference to "hog tie" by the State Attorney on closing argument, in the penalty phase, played a large role in the jury's recommendation for the death penalty. I am truly sorry for my terrible error. I am filing a copy of this letter with the court file and make sure you keep the original.
>
> As you know every other letter we had was subject to extensive pretrial litigation including motions to suppress and motions in limine. Obviously, if I had known about this letter I would have done the same pretrial motions. In addition, the "hog tie" letter was never sent to a handwriting expert to be authenticated.
>
> Very Truly Yours,
>
> Michael W. Nielson, Esquire

R4/770.

Trial counsel provided deficient performance under *Strickland* when they did not move to exclude the letter and any mention of hog-tying. As a result of trial counsel's deficient performance, Mr. Jordan was prejudiced under *Strickland*, as, in Mr. Nielson's own words, "the letter and the repeated reference to 'hog tie' by the State Attorney on closing argument, in the penalty phase, played a large role in the jury's recommendation for the death penalty." R4/770.

The deficient performance in this case is two-fold. First, trial counsel never should have

provided this document to Dr. Danziger in the first place, which made it discoverable by the State. As he explained to the trial court, he did not even know that Dr. Danziger had the letter because he gave it to him by mistake. SR2/340. Second, trial counsel provided deficient performance by failing to correct his mistake by filing a motion to exclude the letter and any other references to hog-tying. As Mr. Nielson stated in his letter to Mr. Jordan, the letter Mr. Davis used to cross examine Dr. Danziger was included in the medical records trial counsel sent to the State. Trial counsel should have known that the State was in possession of this letter, and he should have anticipated that the State would try to use it against Mr. Jordan. As Mr. Nielson correctly pointed out, every other letter they had was subject to extensive pretrial litigation, including motions to suppress and motions in liminé. If he had known about the letter, Mr. Nielson stated that he would have done the same pretrial motions he did regarding the other letters. Therefore, it is clear that trial counsel's failure to file such a motion was an unfortunate oversight, as opposed to trial strategy.

Trial counsel could have objected under Fla. Stat. § 90.403 on the ground that the probative value of the letter is "substantially outweighed by the danger of unfair prejudice, confusion of issues," or "misleading the jury." There is no probative value, as the State introduced several other letters written by Mr. Jordan in which he discussed his involvement in the case. The media at the time was incorrectly reporting that Mr. Cope was hog-tied, so Mr. Jordan's reference to the crime as "the hog-tie murder" was not in any way an admission, but was rather a reference to his charged crime, as it was commonly being referred to in the media. *See, e.g.*, Patricia G. Balona, *Man Sentenced to Death in Edgewater Hog-Tie* Slaying, DAYTONA NEWS-JOURNAL, September 23, 2013; R4/760 (Kenneth P. Connolly, *Sex Offender Found Guilty in Death of Hogtied Man, May Face Execution*, ORLANDO SENTINEL, April 19, 2013); Frank Fernandez, *State to Seek Death for*

Edgewater Man Accused of Tying Up Roommate, THE DAYTONA BEACH NEWS-JOURNAL, February 14, 2013 ("Prosecutors will seek the death penalty against a man accused in the killing of an Edgewater contractor who was robbed and then left gagged and hogtied in his house in 2009, a state attorney statement said."). Furthermore, the letter was not even mentioned until the penalty phase trial, after Mr. Jordan was already convicted of first-degree murder. When the prosecutor asked Dr. Danziger about the letter, there was no follow up. Therefore, the only purpose in asking Dr. Danziger about the letter was to introduce evidence that Mr. Jordan referred to his case as the "hog-tie murder", a term that confused the issues and misled the jury. Oxford Living Dictionaries defines "hog tie" as "Secure (a person or animal) by fastening the hands and feet or all four feet together." Oxford Living Dictionaries, *available at* https://en.oxforddictionaries.com/definition/hog-tie (last visited December 1, 2016). Although Mr. Cope was tied to the bed, there is no evidence that his hands and feet were tied together- an inaccurate, albeit graphic and highly inflammatory image, which likely would have inflamed the emotions of the jurors a contributed to a recommendation of death.

As to Claim 5, Mr. Jordan requests an evidentiary hearing to present the testimony of Mr. Nielson to show that there was no reasonable trial strategy for his failure to exclude Mr. Jordan's letter referencing hog-tying, or any other reference to hog-tying. Mr. Jordan further requests that this Court grant him a new penalty phase trial.

CLAIM 6

TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL BY PRESENTING A BARE BONES AND/OR DEFICIENT JUDGMENT OF ACQUITTAL ARGUMENT DURING THE GUILT PHASE.

The Florida Supreme Court has clearly held that a bare bones or boiler plate motion for a judgment of acquittal is both unpreserved for appeal and without merit. *See Stephens v. State*, 787 So. 2d 747, 753 (Fla. 2001); *see Woods v. State*, 733 So. 2d 980 (Fla. 1999). The purpose of a judgement of acquittal is to "test the legal sufficiency of the evidence presented by the state." *Harris v. State*, 954 So. 2d 1260, 1261 (Fla. 5th DCA 2007). The Florida Supreme Court demands specificity for motions for judgement of acquittal. *See Stephens*, 757 So. 2d at 753. The Florida Supreme Court clearly stated:

> To preserve and argument for appeal, it must be asserted as the legal ground for the objection, exception, or motion below. *See Archer v. State*, 613 So. 2d 446, 448 (Fla. 1993); *Steinhorst v. State*, 412 So. 2d 332, 338, (Fla. 1982). Florida Rule of Criminal Procedure 3.380 requires that a motion for judgment of acquittal "*fully* set forth the grounds on which it is based." *See* Fla.R.Crim.Pro. 3.380(b) (emphasis added).

Id. *quoting Woods*, 733 So. 2d at 984 (emphasis in original). In order for this Court to grant a judgment of acquittal, the evidence must be "such that no view which the jury may lawfully take to it favorable to the opposite party can be sustained under the law." *Lynch v. State*, 293 So. 2d 44, 45 (Fla. 1974); *see Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002). Mr. Jordan's judgment of acquittal as to the Felony Murder count was lacking, bare bones and without legal support. This constituted prejudicial ineffective assistance of counsel whereby Mr. Jordan was deprived of his rights afforded by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and of his corresponding rights pursuant to the Declaration of Rights under the Constitution of the State of Florida. *See Strickland*, 466 So. 2d 668.

At the close of the State's case, counsel made the following bare bones judgment of

acquittal argument as to the Felony Murder count:

> At this time, on behalf of Mr. Jordan, we would move for judgment of acquittal, asserting that the evidence in the light most favorable to the State has failed to establish first-degree felony murder as to count one.
> Specifically, I'd have the Court note that the indictment returned specifically said that the death had to occur while Mr. Jordan was engaged in the perpetration or the attempted perpetration of the felony robbery.
> Robbery is a felony of taking a piece of property by force or threat of force.
> The asportation (sic) and taking *was complete prior to June 25 at 6:30 in the morning*.
> Subsequent to that, while there has been evidence that a theft was taking place, meaning the use of Mr. Cope's property by Mr. Jordan, there was - - the death did not occur until July 13.
> And while the death certainly - - the evidence is that it was the result of his being bound, both the medical experts, one, Dr. Rullan, initially said that the initial way that Mr. Cope was left there, and we heard testimony by - - I think it was Mr. Powell who said it appeared he had fallen off the bed or he had gotten himself off the bed where he initially had been placed, that that must have occurred sometime during that three-day period It wasn't during the course of the taking of the property. And, therefore, *it's not felony murder first-degree because the robbery was complete*.

R13/2414-16; R1/1874. The foregoing argument is devoid of specificity and case law with regard to the issue of the completion of the felony prior to the death of Mr. Cope and the issue of the "actual" killing.

The indictment SPECIFICATION OF CHARGE as to count one [first degree Felony Murder] states as follows:

> In that JOSEPH EDWARD JORDAN, between on or about June 24, 2009, and on or about June 26, 2009, in the County of VOLUSIA and State of Florida, did knowingly and unlawfully, *while engaged* in the perpetration of, or in the attempt to perpetrate the felony of robbery, *kill and murder Keith Cope*, a human being, by restraining him with rope and tape.

R1/184[6] (emphasis added). Moreover, the instruction charged to the jury as to the felony murder

[6] The State argued in response to the bare bones judgment of acquittal that "the indictment alleges that the first-degree felony murder, that Keith Cope died as a result of harm that fell upon him during this - - this robbery that occurred on the 26th - - the 24th to the 26th." R13/2418. The specific language of the indictment charged does not support what the State argued to the trial court. The language used by the State comes from a portion of the instruction charged to the jury, but leaves out the requirement of "*and* while Joseph Jordan was engaged in the commission or attempting to commit a Robbery". R4/708.

count specifically stated as follows:

> To prove the crime of First Degree Felony Murder, the State must prove the following three elements beyond a reasonable doubt:
> 1. Keith Cope is dead.
> 2. The death occurred as a consequence of *and* while Joseph Jordan was *engaged in the commission* or attempting to commit a Robbery.
> 3. Joseph Jordan was the person who *actually killed* Keith Cope.

R4/708 (emphasis added); *see* Fla. Stat. § 782.04(1)(a)(2)(d).

The evidence at trial clearly demonstrated that Mr. Cope's death did not occur while Mr. Jordan was engaged in the commission or perpetration of the robbery. The Florida Certificate of Death for Mr. Cope clearly states that he died on July 13, 2009, due to complications of being bound and gagged for days, including Ischemic Gangrene of the left upper Extremity, Bilateral Cerebral Infarctions and Bronchopnuemonia. R4/694. *See Jordan*, 176 So. 3d 925. Mr. Jordan was arrested on July 2, 2009, by the United States Marshal's Service on a Volusia County warrant for grand theft. R1/179. The Information and later Indictment clearly specified that the robbery occurred "between on or about June 24, 2009 and on or about June 26, 2009." R1/182; 184. These facts are undisputed and the question becomes whether the felony was complete prior to the death[7] of Mr. Cope. In light of these facts, competent counsel should research the issue of whether the death occurred while Mr. Jordan was engaged in the commission or the perpetration of the felony robbery. [8]

The Florida Supreme Court and the Florida District Court of Appeals have defined the term "in the perpetration of" as requiring the absence of a "definite break in the chain of circumstances" between the felony and the killing in several opinions. *See Parker v. State*, 641 So. 2d 369, 376 (Fla. 1994); *see Mills v. State*, 407 So. 2d 218, 221 (Fla. 3d DCA 1981); *see Wagner v. State*¸921

[7] It is clear that Mr. Jordan did not "actually kill" or "kill and murder" Mr. Cope that is necessary for a Felony Murder conviction.
[8] There is no accomplice or principal issue in this case. *See* Fla. Stat. § 782.04(3).

So. 2d 38, 40-41 (Fla. 2006); *see House v. State*, 831 So. 2d 1230 (Fla. 2002); *see State v. Williams*, 776 So. 2d 1066, 1071 (Fla. 4th DCA 2001); *see Allen v. State*, 690 So. 2d 1332, 1334-35 (Fla. 2d DCA 1997); *see Baines v. State*¸25 So. 3d 1277 (Fla. 2010); *see Estevez v. State*, 127 So. 3d 635 (Fla. 2013); *See Santiago v. State*, 874 So. 2d 617, 620-625 (Fla. 2004). A competent attorney in researching the felony murder statute would have learned the history of the statute, the purpose of the statute, and importance of requiring no definitive break for a conviction under the statute.

The Florida Supreme Court has stated that

> The purpose of the felony-murder statute
>
> > is to protect the public from inherently dangerous situations caused by the commission of the felony. *State v. Hacker*, 510 So. 2d 304, 306 (Fla. 4th DCA 1986). Therefore, "[i]n absence of some definitive break in the chain of circumstances beginning with the felony and ending with the killing, the felony although technically complete, is said to continue to the time of the killing." *Mills v. State*, 407 So. 2d 218, 221 (Fla. 3rd DCA 1981).

Parker, 641 So. 2d at 376 *quoting Parker v. State*, 570 So. 2d 1048, 1051 (Fla. 1st DCA 1990). Moreover, "[t]his purpose is accomplished by imposing appropriate punishment on those who commit felony offenses that cause the death of another, thus deterring the commission of serious crimes in the future." *Santiago,* 874 So. 2d at 621. The punitive aspect of the felony murder statute "is found in the provision that a person may be held responsible for the death of another even though he did not form the intent to kill *if* he was 'engaged in the perpetration of … any felony ….'" *Id*. *quoting* Fla. Stat. § 782.04 (emphasis added). The felony murder statute has been interpreted in light of the purpose of the statute "to protect society by imposing just punishment and, perhaps to some degree, deter future crime by requiring that there be a causal connection between the felony that was committed and the killing of the victim." *Id*.; *see House*; *see Allen*. In other words, "the State must prove that there was no break in the chain of circumstances beginning with the felony and ending with the murder." *Id*. *citing House*, 831 So. 2d at 1232 *citing Parker*.

Thus, "[i]f there is a break in the chain of events between the felony and the killing, the felony murder rule *does not apply*." *Id*. at 621 (emphasis added); *see House; see Lester v. State*, 737 So. 2d 1149, 1151 (Fla. 2d DCA1999); *see Allen*.

It is clear that the term "in perpetration of" includes the time period when a felon is escaping the scene of a crime. *See Allen*, 690 So. 2d at 1334 *citing Parker*, 570 So. 2d at 1051. However, to determine when the flight is terminated, the Court must look to the purpose of the felony murder statute as argued afore (to protect the public from inherently dangerous situations caused by the commission of the felony). *See id*. The Court must review factors such as "[t]he relationship between the felony and the homicide in point of time, place, and causal relationship" in determining if there is a break in the chain of circumstances. *Id*. "Furthermore, when considering flight, a most important factor is whether the fleeing felon has reached a place of temporary safety." *Id*. *citing* LaFave, Substantive Criminal Law, § 7.5 (1986). No reasonable attorney would have ignored the foregoing on point case law that places the burden on the State to show that there is no definitive break in the chain of circumstances that is necessary for a felony murder conviction.

The undisputed evidence in this case, seen in the light most favorable to the State, clearly demonstrates that the robbery was completed on June 26, 2009, at the latest. R1/182; 184. Mr. Cope's death occurred eighteen days after the robbery and twelve days after Mr. Jordan was arrested. Mr. Jordan had reached a place of temporary safety in Hollywood, Florida with Matthew Powell and Sadia Haque and then at the Volusia County Jail upon his arrest, prior to the death of Mr. Cope. There is no question that there was a definitive break in the chain of circumstances between the robbery and Mr. Cope's death. "The fact that an incidental death occurs in conjunction with a felony does not in itself make the perpetrator of the felony guilty of felony murder." *Allen*, 690 So. 2d at 1334 (Allen stole an automobile and was involved in an accident that killed another

driver. The Court found that the evidence did not support the finding that the death occurred as a consequence of and while Allen was engaged in the commission of the grand theft felony. The Court found that there was a break in the chain of circumstances and that Allen was not engaged in the theft at the time of the accident. However, "[i]f the victim . . . had been killed as a result of certain acts occurring during the escape attempt just after the vehicle had been stolen the result would be different."); *see also House*, 831 So. 2d at 1231-33 (The Court specifically rejected the argument that a grand theft is an offense that continues throughout the unauthorized use for a felony murder charge.). In this case, the robbery and any flight from the scene of the crime was completed by Mr. Jordan before the death and therefore, the evidence and foregoing case law do not support a conviction for felony murder. Therefore, a judgment of acquittal is appropriate in looking at the evidence in the light most favorable to the State.

Moreover, trial counsel also failed to make the obvious argument in his motion for judgement of acquittal that Mr. Jordan did not actually kill or kill and murder Mr. Cope that is an element of the crime of felony murder. R1/184; R4/708; *see* Fla. Stat. § 782.04(1)(a)(2)(d)[9]. It is very clear that one of the elements for a conviction under felony murder is that the killing is done by the Defendant. The punitive purpose of the felony murder statute is "to protect society by imposing just punishment and, perhaps to some degree, deter future crime by requiring that there be a causal connection between the felony that was committed and the killing of the victim." *Santiago*, 874 So. 2d at 621; *see House*; *see Allen*. There is great emphasis on the commission of the killing, which is not present in this case at all. Mr. Jordan did not "actually kill" or "kill and murder" Mr. Cope as required by the Indictment, jury instruction, and felony murder statute. There is an argument that the death of Mr. Cope, who was removed from life support, was a consequence

[9] First degree felony murder constitutes a capital felony if the unlawful *killing* of a human being was committed by a person engaged in the perpetration of, or in the attempt to perpetrate any robbery.

of Mr. Jordan's action. However, there is no evidence that Mr. Jordan committed a killing in this case that the felony murder rule seeks to punish. It is clear that the felony murder statute's purpose was not to convict a person of a felony murder where "an incidental death occurs in conjunction with a felony" in itself. ." *Allen*, 690 So. 2d at 1334.

Reasonable counsel would have argued in his motion for judgment of acquittal the actual language and elements for the felony murder count as presented in the Indictment, statute, and jury instruction, along with the foregoing case law regarding the purpose of the felony murder rule as a deterrence to a "killing." On the face of the record, Mr. Jordan's counsel failed to make any such argument in his motion. This falls short of professional norms. *See Strickland*, 466 So. 2d 668. Evidentiary exploration is again necessary in this case to determine whether trial counsel knew about the foregoing argument, case law or whether he researched the issue as a basis for a judgement of acquittal.

The facts in this case present a strong and undisputed basis to show that there was a definitive break between the robbery and Mr. Cope's death. Moreover, the evidence clearly demonstrate that Mr. Jordan did not actually kill or murder Mr. Cope as required by the elements of the crime. The prejudice is clear in this case because a properly argued motion for judgement of acquittal with case law would legally support a grant of the motion as to the first degree felony murder count and Mr. Jordan would be acquitted of the charge and not subjected to a sentence of death. *See Burks v. U.S.*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); *see Santiago*, 874 So. 2d at 624. An evidentiary hearing is necessary to determine whether trial counsel researched or was aware of the foregoing case and as to why he failed to make the above specific arguments in his motion supported with facts and case/statutory law.

As to Claim 6, Mr. Jordan requests an evidentiary hearing to present the testimony of

trial counsel to show that there was no reasonable trial strategy for failing to make a competent motion for judgment of acquittal. Mr. Jordan also requests that this Court grant this Claim and vacate Mr. Jordan's sentence of death and vacate his conviction as to the Felony Murder count with prejudice.

CLAIM 7

TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO MOVE TO EXCLUDE THE STATUTORY AGGRAVATORS THAT THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF A ROBBERY AND THAT THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

> The trial court found the following three statutory aggravators:
> (1) prior violent felony – little weight; (2) the capital felony was committed while the defendant was engaged in the commission of a robbery and the capital felony was committed for pecuniary gain were merged together as one aggravator in order to avoid improper doubling – great weight; and (3) the capital felony was especially heinous, atrocious, or cruel (HAC) – great weight.

Jordan, 176 So. 3d at 926, n.3; R5/807-808. Mr. Jordan's counsel should have moved to exclude or liminé the aggarvator number (2) from being considered by the jury and judge for the penalty phase proceedings. The evidence at trial clearly demonstrated that Mr. Cope's death did not occur while Mr. Jordan was engaged in the commission or perpetration of the robbery and that Mr. Jordan did not do the actual killing (he was not charged with premeditated murder, so there was no intent to kill). In light of the evidence, aggarvator number (2) should not have been presented in the penalty phase proceedings. Failure to move to exclude the aggravators deprived Mr. Jordan of his rights afforded by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and of his corresponding rights pursuant to the Declaration of Rights under the Constitution of the State of Florida. *See Strickland*, 466 So. 2d 668.

The capital felony in Mr. Jordan's case is first degree felony murder, which is defined as the "unlawful killing of a human being" when committed by a person engaged in the perpetration

of, or in the attempt to perpetrate any robbery. Fla. Stat. §782.04(1)(a)(2)(d); R1/184; R4/708. The capital felony is not the underlying felony, in this case the robbery. The specific language of the Fla. Stat. § 921.141(5)(d) aggravator in pertinent part states that "[t]he capital felony was committed *while the defendant was engaged* . . . in the commission of . . . any: robbery." R5/807 (emphasis added). The specific language of the Fla. Stat. § 921.141(5)(f) aggravator requires that "[t]he capital felony was *committed* for the purpose of pecuniary gain." R5/807. Based on the plain meaning of the statute, neither of these aggravators should have been considered by the jury or the judge as they were inapplicable to the facts of the case.

There was no evidence at trial that Mr. Jordan committed the actual killing of Mr. Cope. Mr. Cope died after being removed from life support on July 13, 2009. *See Jordan*, 176 So. 3d at 925; R4/694. Mr. Jordan was in custody on July 2, 2009, for grand theft. R1/179. Therefore, the aggravator that the killing was *committed while* Mr. Jordan was engaged in the commission of the robbery is inapplicable. The evidence clearly showed that Mr. Cope was alive when Mr. Jordan left the house between on or about June 24, 2009, and on or about June 26, 2009, and that Mr. Cope was alive when Matthew Powell and Sadia Haque entered the house on June 28, 2009. R1/184; *see Jordan*, 176 So. 3d at 925. The killing was clearly not committed during the commission of the robbery and Mr. Jordan was no longer engaged in the commission of the robbery when Mr. Cope died. As argued in Claim 6, *supra*, p.43-46, there was a definitive break in the chain of circumstances between the robbery and Mr. Cope's death. *See Griffin v. State*, 639 So. 2d 966 (Fla. 1994); *See Parker v. State*, 641 So. 2d 369, 376 (Fla. 1994); *Parker v. State*, 570 So. 2d 1048, 1051 (Fla. 1st DCA 1990); *see House v. State*, 831 So. 2d 1230 (Fla. 2002); *see State v. Williams*, 776 So. 2d 1066, 1071 (Fla. 4th DCA 2001); *see Allen v. State*, 690 So. 2d 1332, 1334-35 (Fla. 2 d DCA 1997); *see Baines v. State*¸25 So. 3d 1277 (Fla. 2010); *see Estevez v. State*, 127

SO. 3D 635 (Fla. 2013); *See Santiago v. State*, 874 So. 2d 617, 620-625 (Fla. 2004). Furthermore, the evidence at trial at best demonstrated that the robbery was committed for the purpose of pecuniary gain; there was no act of killing done to attain a pecuniary gain in this case.

The trial court's Sentencing Order focused solely on the circumstances surrounding the robbery to support these aggravators. R5/807. The trial court focused on the elements of the robbery in finding the aggravator as follows:

> The evidence produced at the trial by the State clearly showed that the defendant used force, assault, violence or fear to take the truck, US currency and debit card of the victim. Also, the State proved at trial that the defendant admitted to friends that he traveled to Volusia County for the purpose of collecting money he felt owed to him by the victim. The evidence further showed that when the victim either was unable or refused to pay the debt, the defendant armed himself with a firearm and battered and pistol-whipped the victim.
> The evidence also showed that the defendant gagged the victim with duct tape and bound him to a bed with rope and then took the victim's truck, US currency, and debit card.

R5/807; *see* Fla.Stat. § 812.13(2)(a); 775.087(1); (2). It is clear from the trial court's order that the evidence cannot support a finding that Mr. Jordan committed the killing of Mr. Cope during the commission of the robbery or for pecuniary gain. The complete focus on the elements of the robbery count to support these aggravators support the argument that these aggravators were inapplicable in this case.

Based on the plain meaning and unambiguous language of the aforementioned aggravators' statutes, it is clear that they can only be applicable if the killing of Mr. Cope was committed while Mr. Jordan was engaged in the robbery or if the actual killing was committed for pecuniary gain. *See Jones v. State*, 966 So. 2d 319, 326 (Fla. 2007) ("The first step in determining the meaning of a statute is to examine its plain language. *Koile v. State*, 934 So. 2d 1226, 1230 (Fla.2006). When the language is clear and unambiguous, as it is here, we have no need to resort to rules of statutory construction to determine the legislature's intent. *Id.* at 1230–31(citing *Lee County Elec. Coop.,*

Inc. v. Jacobs, 820 So. 2d 297, 303 (Fla.2002)). Further, words must be given their plain meaning and statutes should be construed to give them their full effect. *Id.*"); *see Caminetti v. U.S.*, 242 U.S. 470, 485-486, 37 S. Ct. 192 (1917); *see Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997); *see also Deal v. United States*, 508 U.S. 129, 132, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993) (it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used"); *see United States v. Fisher*, 289 F.3d 1329, 1337–38 (11th Cir. 2002) (If the statute's meaning is plain and unambiguous, there is no need for further inquiry."); *see United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999) ("The starting point for all statutory interpretation is the language of the statute itself."). The evidence just does not support the applicability of these aggravators to the facts of this case. Trial counsel was deficient in failing to move to exclude or liminé these aggravators from consideration as it is clear that they are inapplicable to the facts of this case.

Prejudice is also evident because "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." *See Strickland*, 466 So. 2d at 694. The number of aggravators would be reduced to two. The trial court had found one statutory mitigator and 36 non-statutory mitigators. *See Jordan*, 176 So. 3d at 926, n.4.[10] Furthermore, the proportionality analysis would support a sentence of life instead of death. *See Anderson v. State*, 841 So. 2d 390, 407-08 (Fla. 2003).

As to Claim 7, Mr. Jordan requests an evidentiary hearing to present the testimony of

[10] Mr. Jordan did raise a claim based on *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002) in his direct appeal. *See Jordan*, 176 So. 3d at 937. Mr. Jordan has also raised a *Hurst* claim in this Motion. *See* Claims 1 and 2, *supra*, p.7-21.

trial counsel to show that there was no reasonable trial strategy for failing to move to exclude or liminé these aggravators from consideration in the penalty phase. Evidentiary development will be needed to determine whether trial counsel considered the aforementioned argument or researched the applicable case law. Mr. Jordan also requests that this Court grant this Claim and vacate Mr. Jordan's sentence of death or in the alternative grant him a new penalty proceeding.

CLAIM 8

TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO MOVE TO EXCLUDE OR OBJECT TO THE ADMISSION OF THE VICTIM'S ACTUAL HAIR ON DUCT TAPE INTO EVIDENCE.

The Florida Supreme Court has long followed "the rule that photographs are admissible if they are relevant and not so shocking in nature as to defeat the value of their relevance." *See Czubak v. State,* 570 So. 2d 925, 928 (Fla. 1990). Moreover, "[w]here photographs are relevant, 'then the trial judge in the first [instance] and this Court on appeal must determine whether the gruesomeness of the portrayal is 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.'" *Id*. at 928 *quoting Leach v. State,* 132 So. 2d 329, 331–32 (Fla. 1961). The Florida Supreme Court has "upheld the admission of allegedly gruesome photographs where they were independently relevant or corroborative of other evidence." *Id*. at 928. In this case, trial counsel allowed the admission of the actual hair of the victim on a piece of duct tape into evidence without objection. R10/1889-90. To allow a non-relevant actual part of the victim, without objection or a motion to exclude, to go into the jury room was prejudicial ineffective assistance of counsel. It is not just a photograph, but a part of the victim that is in that jury room for the jurors to look at and to hold. That small piece of evidence is so emotionally charged and certainly creates an undue prejudice in the minds of the jurors. Failure to move to exclude the actual hair on the duct tape form evidence deprived Mr.

Jordan of his rights afforded by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and of his corresponding rights pursuant to the Declaration of Rights under the Constitution of the State of Florida. *See Strickland*, 466 So. 2d 668.

The hair of the victim, Mr. Cope, on the duct tape was introduced by the State during the testimony of law enforcement officer Eric Seldaggio, without objection or a preliminary motion to exclude its admission. R10/1889-90. Officer Seldaggio testified that the item pre-marked as State's Exhibit II, was "the duct tape that was turned over to [him] at the hospital with Mr. Cope's hair on it." R4/1889. It was clear to the jury that the duct tape came from the place where Mr. Cope was taken off life support and that it had his hair on it. The State re-emphasized the presence of the victim's hair a few question later, when he asked, "And is this the tape that you mentioned *actually* having hair of Mr. Cope on it - -" R4/1890 (emphasis added). This leading question was very pointed and emphasized that the presence of the victim's actual hair on the tape. It was clear that the presence of the actual hair of the victim introduced as State's Exhibit 10, would evoke emotion in any juror. Further, the State reminded the jury in closing arguments that "we have pieces picked up around the house that *still have the hair of Keith cope stuck in the adhesive tape*." R13/2543 (emphasis added). Once again, the State emphasized to the jurors the hair of the victim on the tape that was in their possession to inflame their emotions and to evoke sympathy for the victim. This piece of evidence is more than a photograph; it is a part of Mr. Cope that is in the jury room with the jurors. For a juror to be able to hold or see a part of the victim is an emotionally charged moment. Mr. Cope's hair only served to evoke emotion and to inflame a juror. This can never be harmless as it is more evocative than a photograph and there is a reasonable probability that it affected the verdict. *See State v. DiGuilio,* 491 So. 2d 1129, 1138 (Fla. 1986).

Mr. Cope's hair on the duct tape that was admitted into evidence for the jury to look at and

hold had no relevance in this case. *See* C. Ehrhardt, Florida Evidence § 90.403.[11] There was ample evidence from the lay witnesses and law enforcement that Mr. Cope had duct tape upon his face and head at the scene of the crime. There is no issue with regard to the identity of the victim, the use of the duct tape, the manner in which the duct tape was used, or that duct tape was used. There was no DNA or hair analysis conducted. *Cf.* Armstrong v. State, 73 So. 3d 155, 170 (Fla. 2011) (A vial of the victim's blood was found to be relevant because it was used for DNA testing and to show that victim's blood was found inside of Armstrong's vehicle. We do not have this in Mr. Jordan's case). Therefore, it was not corroborative of other relevant evidence. Furthermore, several other photographs of the victim were admitted by the Court as to the injuries suffered by Mr. Cope. Counsel was deficient for failing to move to exclude this specific piece of inflammatory evidence prior to the trial and later for not objecting to its admission as State's Exhibit 10. *See Strickland,* 466 So. 2d 668.

As to Claim 8, Mr. Jordan requests an evidentiary hearing to present the testimony of trial counsel to show that there was no reasonable trial strategy for failing to move to exclude or to object to the introduction of Mr. Cope's hair on the duct tape. Evidentiary development will be needed to determine whether trial counsel considered the aforementioned argument or researched applicable case law. Mr. Jordan also requests that this Court grant this Claim and vacate Mr. Jordan's conviction and judgement of sentence and grant him a new trial.

[11] Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.

CONCLUSION AND RELIEF SOUGHT

Mr. Jordan prays for the following relief, based on his prima facie allegations demonstrating violation of his constitutional rights:

1. That an evidentiary hearing be scheduled so as to allow him to present support for his claims, and that such a hearing be conducted at a reasonable time;

2. That he be allowed leave to supplement this motion should new claims, facts, or legal precedent become available to counsel; and, on the basis of the reasons presented herein,

3. That his convictions and sentences, including his sentence of death, be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH FLA. R. CRIM. P. 3.851(e)(1)(F)

I HEREBY CERTIFY that I have discussed the contents of this motion fully with Joseph Edward Jordan, that I have complied with Rule 4-1.4 of the Rules of Professional Conduct, and that this motion is filed in good faith.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing motion and Appendix in Support of the forgoing motion have been transmitted to this Court through the Florida Courts E-Filing Portal on this 15th day of December, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via electronic mail to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, at Stacey.kircher@myfloridalegal.com and CapApp@myfloridalegal.com and **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, at CalhounR@sao7.org on this 15th day of December, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins**, Chief Judge; Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach, Florida 32114 and **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on 15th day of December, 2016.

/s/ Raheela Ahmed
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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Joseph Edward Jordan, defendant in the above-captioned case by and through undersigned counsel files the following Notice of Supplemental Authority:

(1) ***DERRICK POWELL, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.***, 310, 2016, 2016 WL 7243546 (Del. Dec. 15, 2016).

The Defendant provides the foregoing attached recent Supreme Court of Delaware opinion in *DERRICK POWELL, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee*., 310, 2016, 2016 WL 7243546 (Del. Dec. 15, 2016), as persuasive authority in support of Claims One and Two of his Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851.

On December 15, 2016, the Supreme Court of Delaware found *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Rauf v. States*, 145 A. 3d 430 (Del. 2016), to be retroactive and applicable to capital cases currently in various stages of collateral review. *See DERRICK POWELL, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.*, 310, 2016, 2016 WL 7243546

(Del. Dec. 15, 2016) ("The decision in *Rauf* constitutes a new watershed procedural rule of criminal procedure that must be applied retroactively in Delaware, pursuant to our interpretation of *Teague*'s second exception to non-retroactivity.") The second exception to non-retroactivity of note to Florida Courts under *Teague v. Lane*, 489 U.S. 288 (1989)

> held that a new procedural rule applies retroactively if it is a new "watershed rule of criminal procedure" (1) "implicit in the concept of ordered liberty," implicating "fundamental fairness," and (2) central to an accurate determination of innocence or guilt," such that its absence "creates an impermissibly large risk that the innocent will be convicted." "In the context of a death sentence, where the matter is not one of 'innocence or guilt,' *the second criterion asks whether the new procedure is 'central to an accurate determination' that death is a legally appropriate punishment*."

Id. *quoting Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) (internal footnotes omitted) (emphasis added).

Respectfully submitted,

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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Attachment I

DERRICK POWELL, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee., 310, 2016, 2016 WL 7243546 (Del. Dec. 15, 2016)

2016 WL 7243546

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Delaware.

DERRICK POWELL, Defendant Below, Appellant,
v.
STATE OF DELAWARE, Plaintiff Below, Appellee.

No. 310, 2016
|
Submitted: December 7, 2016
|
Decided: December 15, 2016

Court Below—Superior Court of the State of Delaware
Cr. ID No. 0909000858
Upon Motion to Vacate Death Sentence. **GRANTED.**

Attorneys and Law Firms

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Before STRINE, Chief Justice, HOLLAND, VALIHURA, VAUGHN, and SEITZ, Justices, constituting the Court en Banc.

Opinion

PER CURIAM:

The defendant below-appellant Derrick Powell is appealing the Superior Court's denial of his motion for postconviction relief.[1] However, during the pendency of that appeal, Powell moved to vacate his death sentence based on the United States Supreme Court decision in *Hurst v. Florida*[2] and this Court's recent interpretation of that decision in *Rauf v. State*[3] The only issue addressed in this decision is Powell's motion to vacate his death sentence.

1 *See State v. Powell*, 2016 WL 3023740 (Del. Super. Ct. May 27, 2016).

2 *Hurst v. Florida*, 136 S. Ct. 616 (2016).

3 *Rauf v. States*, 145 A.3d 430 (Del. 2016).

In *Rauf*, we held that, after *Hurst*, the capital sentencing procedures in Delaware's death penalty statute are unconstitutional because the statute improperly permitted the imposition of a death sentence based upon a judicial determination of the necessary findings that the Sixth Amendment requires a jury to make.[4] Specifically, *Rauf* held that those necessary findings must be made by a unanimous jury and beyond a reasonable doubt. *Rauf* also held that it was impossible to sever the constitutional infirmities in Delaware's capital sentencing procedures.

4 *Id.* at 434.

The question presented by Powell's motion is whether the holding in *Rauf* applies to a death sentence that was already final when *Rauf* was decided. We have concluded

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that this Court's decision in *Rauf* applies retroactively to Powell's case. Therefore, Powell's death sentence must be vacated and he must be sentenced to "imprisonment for the remainder of his natural life without benefit of probation or parole or any other reduction." [5]

5 11 *Del. C.* § 4209(d)(2).

Procedural Background

In February 2011, a Superior Court jury found Powell guilty of First Degree Murder for recklessly causing the death of Officer Chad Spicer while in flight from an attempted robbery, four counts of Possession of a Firearm During the Commission of a Felony, Resisting Arrest with Force or Violence, Attempted

Robbery in the First Degree, and Reckless Endangering in the First Degree. Following a penalty hearing, the jury unanimously found beyond a reasonable doubt the existence of two statutory aggravators and, by a vote of seven to five, found by a preponderance of the evidence that the aggravating factors outweighed the

mitigating factors and recommended that a sentence of death be imposed. The trial judge found the existence of several non-statutory aggravating factors and by a preponderance of the evidence that all of the aggravating factors outweighed the mitigating factors and imposed a sentence of death. [6] On August 9, 2012, this Court affirmed Powell's convictions and death sentence. [7]

6 *Powell v. State*, 49 A.3d 1090, 1096 (Del. 2012).

7 *Id.* at 1105.

After this Court affirmed his convictions and death sentence, Powell filed a *pro se* motion for postconviction relief in the Superior Court. The court appointed counsel, who filed an amended motion for postconviction relief on October 1, 2013. Over the next two years, the record was expanded to include attorney affidavits and an evidentiary hearing. On May 24, 2016, the Superior Court denied Powell postconviction relief. [8] Powell's appeal from the denial of his motion for postconviction relief is currently pending before this Court.

8 *State v. Powell*, 2016 WL 3023740 (Del. Super. May 24, 2016).

Hurst and Rauf

On January 12, 2016, the United States Supreme Court issued its decision in *Hurst,* holding that Florida's death penalty statute was unconstitutional. [9] The Superior Court certified five questions to this Court in accordance with Delaware Supreme Court Rule 41. [10] This Court accepted the five questions certified by the Superior Court, but revised the questions to remove any reference to the Delaware Constitution. On August 2, 2016, after briefing and oral argument, this Court, sitting *en banc,* answered the revised certified questions. In *Rauf*, we concluded that the Delaware death penalty statute, 11 *Del. C.* § 4209, is unconstitutional under federal law. [11]

9 *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016).

10 *State v. Rauf*, 2016 WL 320094 (Del. Super. Ct. Jan. 25, 2016).

11 *Rauf v. State*, 145 A.3d 430, 434 (Del. 2016).

In *Rauf*, this Court did not address whether *Hurst* or *Rauf* should be applied retroactively to capital cases currently in various stages of collateral review. Consequently, Powell, whose case is before this Court on appellate review from the denial of postconviction relief, moved to vacate his death sentence. He argues that *Hurst* and *Rauf* should be retroactively applied to his case.

Retroactivity Rules

The normal federal framework for determining whether a new rule applies to cases on collateral review is based upon the United States Supreme Court's plurality opinion in *Teague v. Lane.* [12] *Teague* held that, as a general matter, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." [13] Nevertheless, *Teague* and its progeny recognize two exceptions to the general bar on retroactivity. First, "[n]ew *substantive* rules generally apply retroactively." [14] Second, new "watershed rules of criminal procedure," which are procedural rules

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"implicating the fundamental fairness and accuracy of the criminal proceeding," will also have retroactive effect. [15]

12 *Teague v. Lane*, 489 U.S. 288 (1989); *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016); *see also Penry v. Lynaugh*, 492 U.S. 302, 313 (1989) (affirming and applying *Teague* analysis in a capital case).

13 *Teague*, 489 U.S. at 310.

14 *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) (emphasis in original); *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016); *Teague*, 489 U.S. at 307, 311.

15 *Saffle v. Parks*, 494 U.S. 484, 495 (1990); *Teague*, 489 U.S. at 311.

In *Danforth v. Minnesota*, [16] the United States Supreme Court explained that "*Teague's* general rule of nonretroactivity was an exercise of [its] power to interpret the federal habeas statute" and "cannot be read as imposing a binding obligation on state courts." [17] Nevertheless, more than twenty-five years ago this Court recognized the *Teague* general rule of non-retroactivity and its two exceptions as persuasive authority for deciding whether new state and federal precedents are to be applied retroactively in Delaware postconviction proceedings. [18] In doing so, we noted that the federal *Teague* "new rule" doctrine was evolving and that State courts may grant postconviction "relief to a broader class of individuals than is required by *Teague*." [19] Therefore, we declined to adopt a formal static test for determining the meaning of a "new rule" for the purposes of deciding a Delaware postconviction proceeding.

> In *Danforth*, the Supreme Court stated:
>
> It is thus abundantly clear that the *Teague* rule of nonretroactivity was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings. It was intended to limit the authority of federal courts to overturn state convictions —not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions. [20]

Accordingly, the retroactivity issue that is presented by Powell's motion is a matter of Delaware law. In analyzing that issue we look to *Teague* and its progeny for guidance. [21] However, as the United States Supreme Court held in *Danforth*, the postconviction retroactivity remedy that a state court provides for "violations of the Federal Constitution is primarily a question of state law." [22]

16 552 U.S. 264 (2008).

17 *Id* at 278-79.

18 *Flamer v. State*, 585 A.2d 736, 745 (Del. 1990).

19 *Id.* at 779-80; *Danforth*, 552 U.S. at 282.

20 *Danforth*, 552 U.S. at 280-81 (providing that the *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed "nonretroactive" under *Teague*).

21 Although the *Teague* analysis is instructive, this Court is "free to give [Delaware] citizens the benefit of [the United States Supreme Court's] rule in any fashion that does not offend federal law." *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008).

22 *Id.* But in *Montgomery v. Louisiana*, the Supreme Court recognized that *Danforth* left open the question of whether *Teague* was binding on the states as a matter of constitutional law and held that "when a new substantive rule of constitutional law controls the outcome of the case, the Constitution requires state collateral review courts to give retroactive effect to that rule." 136 S. Ct. 718, 728, 729 (2016).

Rauf Applies Ring, Hurst, and Apprendi

We have concluded that the decision in *Rauf* falls within our interpretation of *Teague's* second exception to non-retroactivity. The State's reliance on *Schriro v. Summerlin's* [23] refusal to find *Ring v. Arizona* [24] retroactive is misplaced. In *Apprendi v. New Jersey*, [25] the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, *and proved beyond a reasonable doubt*" [26] In *Ring,* the United States Supreme Court extended *Apprendi* to find that "[c]apital defendants ... are entitled to a jury [rather than a

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judicial] determination of any fact on which the legislature conditions an increase in their maximum punishment." [27]

23 542 U.S. 348 (2004).

24 536 U.S. 584 (2002).

25 530 U.S. 466 (2000).

26 *Id.* at 490.

27 *Ring*, 536 U.S. at 588.

Ring's claim was "tightly delineated[.] He contend[ed] only that the Sixth Amendment required jury findings on the aggravated circumstances asserted against him." [28] Ring's claim did not implicate the Due Process Clause because "Arizona law already required aggravating factors to be proved *beyond a reasonable doubt and that aspect of Apprendi was not at issue."* [29] Indeed, the *Summerlin* Court took special notice in its first footnote that *Ring* did not address the *burden of proof.* [30] Accordingly, *Summerlin* only addressed the misallocation of fact-finding responsibility (judge versus jury) and not, like *Rauf* the applicable burden of proof. [31]

28 *Id.* at 597 n.4.

29 *Summerlin*, 542 U.S. at 351 n.1; *Ring*, 536 U.S. at 597.

30 *Summerlin*, 542 U.S. at 351 n.1.

31 *Id.*

The Supreme Court began its opinion in *Hurst* by holding that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." [32] The Supreme Court also held, as it had in *Apprendi*, that the Sixth Amendment, in conjunction with the *Due Process Clause,* "*requires that each element of a crime be proved to a jury beyond a reasonable doubt*." [33]

32 *Hurst*, 136 S. Ct. at 619.

33 *Id.* at 621 (citing *Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013)) (emphasis added).

Ring only implicated the Sixth Amendment right to a jury. The same was true in *Hurst* because Florida also already required proof beyond a reasonable doubt. [34] When *Hurst* was remanded, the Florida Supreme Court summarized its law as follows:

> Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors *proven beyond a reasonable doubt*, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances. *These same requirements existed* in *Florida law when Hurst was sentenced in 2012*—although they were consigned to the trial judge to make. [35]

34 *Id.*; *Rauf v. State*, 145 A.3d 430, 433-34 (Del. 2016).

35 *Hurst v. State*, 202 So.3d 40, 53 (Fla. 2016).

Thus, unlike *Rauf*, neither *Ring* nor *Hurst* involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof. This significant distinction in *Ring* and *Hurst* is fatal to the State's reliance upon *Summerlin* and is dispositive of why the *Rauf* holding fits within *Teague's* second exception to nonretroactivity.

The second exception to non-retroactivity in *Teague* held that a new procedural rule applies retroactively if it is a new "watershed rule of criminal procedure" (1) "implicit in the concept of ordered liberty," implicating "fundamental fairness," and (2) central to an accurate determination of innocence or guilt," such that its absence "creates an impermissibly large risk that the innocent will be convicted." [36] "In the context of a death sentence, where the matter is not one of 'innocence or guilt,' the second criterion asks whether the new procedure is 'central to an accurate determination' that death is a legally appropriate punishment." [37]

36 *Summerlin*, 542 U.S. at 359 (Breyer, J., dissenting) (quoting *Teague v. Lane*, 489 U.S. 288, 311-13 (1989)) (internal quotation marks omitted).

37 *Id.* (Breyer, J. dissenting) (quoting *Teague*, 489 U.S. at 313).

Rauf Is Watershed Ruling

Based upon *Hurst*, *Rauf* overruled our prior decision *Brice v. State* [38] and announced a new watershed procedural rule for capital proceedings that contributed to the

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reliability of the fact-finding process.[39] Thus, *Rauf* falls squarely within the second exception set forth in *Teague* requiring retroactive application of "new rules" of criminal procedure "without which the likelihood of an accurate [sentence] is seriously diminished."[40] We also note that *Teague's* holding on the retroactivity of new rules of criminal procedure was based upon the opinion of Justice Harlan, who acknowledged that "some rules may have both procedural and substantive ramifications."[41]

38 815 A.2d 314 (Del. 2003) (upholding the Delaware death penalty statute after *Ring*).

39 *See Saffle v. Parks*, 494 U.S. 484, 495 (1990).

40 *Teague*, 489 U.S. at 313.

41 *Mackey v. United States*, 401 U.S. 667, 692 n.7 (1971) (Harlan, J., concurring).

The burden of proof is one of those rules that has both procedural and substantive ramifications.[42] Prior to our holding in *Rauf* the burden of proof was governed by the lesser standard of a preponderance of the evidence set forth in Delaware's death penalty statute.[43] *Rauf* recognized that, after *Apprendi*, substantive Due Process required the higher "beyond a reasonable doubt" burden of proof. As we observed in *Rauf*, "[t]here is no circumstance in which it is more critical that a jury act with the historically required confidence than when it is determining whether a defendant should live or die."[44]

42 *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *see also, e.g., Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 849 (2014) ("[T]he burden of proof is a 'substantive' aspect of a claim."); *Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016).

43 11 *Del. C.* § 4209(d)(1).

44 *Rauf v. State*, 145 A.3d 430, 481 (Del. 2016).

Rauf Applies Retroactively

The question of whether the new higher burden of proof standard recognized in *Rauf* is retroactive was decided by the United States Supreme Court more than forty years ago.[45] In *Ivan V. v. City of New York*,[46] the Supreme Court held that the new rule announced in *In re Winship*,[47] changing the burden of proof for fact-finding from the "preponderance of evidence" standard to a "beyond a reasonable doubt" standard, must be applied retroactively because that change implicated fact-finding reliability under the Due Process Clause. In *Winship*, the Court had held that juveniles must be afforded the benefit of the reasonable doubt standard when charged with an act that would be a crime if committed by an adult.

45 *Ivan V. v. City of New York*, 407 U.S. 203 (1972).

46 407 U.S. 203 (1972).

47 397 U.S. 358 (1970).

In *Ivan V.*, the Supreme Court concluded that the new rule articulated in *Winship* must be applied retroactively because the reasonable doubt standard is the sort of requirement without which the truth-finding function of a criminal trial is substantially impaired:

> *Winship* expressly held that the reasonable-doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of criminal law."
>
> * * * *
>
> [T]he major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect.[48]

48 *Ivan V.*, 407 U.S. at 204-05.

In *Winship*, the Supreme Court explained that a conviction based upon the civil preponderance standard would amount to "a lack of fundamental fairness."[49] Later, *Teague* incorporated the "fundamental fairness" language from *Ivan V.* into its watershed procedural rule exception to non-retroactivity.[50] In *Hankerson v. North Carolina*,[51] another *pre-Teague* decision, the United States Supreme Court observed "we have never deviated from the rule stated in *Ivan V.* that '[w]here the major purpose of new constitutional doctrine is to overcome

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an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule (is) given complete retroactive effect.' " [52] The change in the burden of proof in *Winship* that was ruled retroactive in *Ivan V.* is no different from the change in the burden of proof that occurred in *Rauf.*

49 *Winship*, 397 U.S. at 363.

50 *Teague v. Lane*, 489 U.S. 288, 312 (1989).

51 432 U.S. 233 (1977).

52 432 U.S. 233, 243-44 (1977) (quoting *Ivan V.*, 407 U.S. at 204).

Conclusion

The decision in *Rauf* constitutes a new watershed procedural rule of criminal procedure that must be applied retroactively in Delaware, pursuant to our interpretation of *Teague*'s second exception to non-retroactivity. Accordingly, we hold that *Rauf* must be applied retroactively to Powell's case. Therefore, Powell's death sentence must be vacated and he must be sentenced to "imprisonment for the remainder of his natural life without benefit of probation or parole or any other reduction." [53]

53 11 *Del. C.* § 4209(d)(2).

This decision is consistent with two prior opinions when this Court held that the extant death penalty statutes were unconstitutional and vacated all death sentences. In 1973, following the United States Supreme Court decision in *Furman*, [54] this Court held that the existing Delaware death penalty statute was unconstitutional. [55] The three remaining prisoners on Delaware's death row at the time had their death sentences vacated and were resentenced to life imprisonment. Four years later, after the United States Supreme Court decision in *Woodson v. North Carolina*, [56] this Court held Delaware's mandatory death-sentencing statute was unconstitutional. [57] *State v. Spence* consolidated the cases of all nine prisoners that had been sentenced to death under the mandatory scheme. [58] We held that the death sentences of all nine should be vacated and each should be sentenced to life imprisonment without parole. [59]

54 *Furman v. Georgia*, 408 U.S. 238 (1972).

55 *See State v. Dickerson*, 298 A.2d 761 (Del. 1973).

56 428 U.S. 280 (1976).

57 *See State v. Spence*, 367 A.2d 983, 986 (1976) (citing *Woodson*, 428 U.S. at 301, 303).

58 *Id.* at 985.

59 *Id.* at 989-90.

All Citations

--- A.3d ----, 2016 WL 7243546

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing motion and Appendix in Support of the forgoing motion have been transmitted to this Court through the Florida Courts E-Filing Portal on this 16th day of December, 2016.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via electronic mail to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, at Stacey.kircher@myfloridalegal.com and CapApp@myfloridalegal.com and **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, at CalhounR@sao7.org on this 16th day of December, 2016.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins**, Chief Judge; Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach, Florida 32114 and **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on 16th day of December, 2016.

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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2019
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

DEFENDANT'S NOTICE OF SUPPLEMENTAL AUTHORITY

The Defendant, Joseph Edward Jordan, by and through undersigned counsel submits as supplemental authority *Mosley v. State*, No. SC14-436 (Fla. December 22, 2016), a copy of which is attached to this notice. The supplemental authority is pertinent to the issue of the retroactivity of *Hurst v. Florida*, 136 S.Ct. 616 (2016), as argued in Claim 1 of his Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851.[1]

Respectfully submitted,

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[1] *See* p. 7 through 17 of Defendant's Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851, filed on December 15, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this 3rd day of January, 2017.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via electronic mail to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, at avalentini@sa18.state.fl.us on this 3rd day of January, 2017.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrance R. Perkins**, Chief Judge, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach, Florida 32114 and to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 3rd day of January, 2017.

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Supreme Court of Florida

No. SC14-436

JOHN F. MOSLEY,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. SC14-2108

JOHN F. MOSLEY,
Petitioner,

vs.

JULIE L. JONES, etc.,
Respondent.

[December 22, 2016]

PER CURIAM.

John F. Mosley was convicted of two counts of first-degree murder for the April 2004 deaths of his girlfriend, Lynda Wilkes, and their infant son, Jay-Quan Mosley. He received a sentence of death for the murder of his son, Jay-Quan, and

a sentence of life imprisonment for the murder of Wilkes. This Court affirmed his convictions and sentence of death. Mosley v. State, 46 So. 3d 510 (Fla. 2009).

Mosley now appeals the denial of his initial motion for postconviction relief, filed pursuant to Florida Rule of Criminal Procedure 3.851, and simultaneously petitions this Court for a writ of habeas corpus. We have jurisdiction. See art. V, §§ 3(b)(1), (9), Fla. Const. For the reasons that follow, we affirm the postconviction court's denial of relief for a new trial but grant Mosley a new penalty phase based on the United States Supreme Court's decision in Hurst v. Florida (Hurst v. Florida), 136 S. Ct. 616 (2016), and our decision in Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016).

FACTS

On direct appeal, this Court summarized the relevant facts as follows:

> Although Mosley was married, he had a number of romantic relationships with other women in the Jacksonville area, including Lynda Wilkes. Because Wilkes was receiving Medicaid benefits for their son, Jay-Quan, she was required to participate in a proceeding to establish paternity. After Mosley failed to answer the petition to determine paternity, a default judgment was entered against him, and he was ordered to pay $35 a week in child support, with an additional $5 a week for retroactive child support. On March 12, 2004, Mosley filed a motion to have the final judgment set aside. A hearing on this motion was set for May 3, 2004.
>
> Around this time period, Mosley, who was thirty-nine, met Bernard Griffin, who was fifteen, and asked Griffin if he would be willing to kill a baby. During his attempts to convince Griffin to kill the child, Mosley pointed out Wilkes's house and gave him a sketch of the house's layout, but Griffin refused.

On April 21, 2004, Mosley went to see Wilkes at her house in Jacksonville and asked Wilkes to meet him the next day at J.C. Penney so he could take Jay-Quan shopping. On April 22, 2004, Wilkes took her other children to school. That afternoon, she and Jay-Quan met Mosley at J.C. Penney, and together they left in Mosley's vehicle, a burgundy Suburban. Mosley picked up Griffin, and eventually drove to a deserted dirt road in another part of Jacksonville. Mosley asked Wilkes to get out and pretended to look for something in the seat. He then turned and strangled Wilkes, who futilely attempted to defend herself. After she stopped moving, Mosley took a plastic shopping bag from the back of the vehicle, put it over Wilkes's head, and put her body in the back of the Suburban. Mosley put a crying Jay-Quan in another garbage bag, tied it, and also placed it in the back of his vehicle. He used a blue tarp to cover Wilkes's body and the bag with the baby in it. Initially, Griffin heard the baby crying, but after a while, the baby stopped. Mosley dropped Griffin off and went to work.

Later that evening, while he was still at work, another of Mosley's girlfriends, Jamila Jones, called and asked him for some gas money. He agreed that he would give her some money before she needed to leave for work the next day. That evening, Mosley clocked out of work at 11:01, and sometime after that picked up Griffin again in his Suburban. Griffin noticed that the vehicle smelled bad. Mosley drove out of Jacksonville towards Waldo, which was approximately sixty miles from Jacksonville. A few miles south of Waldo, Mosley turned and went down a number of dirt roads, eventually finding a suitable spot to dispose of Wilkes's body. After Griffin refused to participate, Mosley pulled Wilkes to a clearing by himself, poured lighter fluid over her body, and then tossed a burning rag on her body. As the body began to burn, Mosley and Griffin ran to the vehicle and left. Mosley then drove approximately forty miles further south to Ocala and dumped the trash bag with the baby in a dumpster behind a Winn-Dixie store. He also threw his shoes and gloves into the dumpster. On the way back to Jacksonville, Mosley gave Griffin $100.

Once they arrived in Jacksonville, it was daylight. After asking Griffin to give him back $20, Mosley stopped by Jones's apartment at approximately six that morning and gave her $20. Jones asked Mosley why he did not answer his cell phone when she tried to call him the previous evening, and Mosley replied that he was "doing

something for his mom." Although Mosley was supposed to be back at work at six that same morning, he called in and said that he would be late because he did not get any sleep that night. He finally arrived at work at 12:49 p.m. on April 23.

The victim's family knew something was wrong when Wilkes failed to pick up her children from school on the afternoon of April 22. The family called the police, reported Wilkes as missing, and began a search for her and Jay-Quan immediately. During the evening hours of April 22, they found her car abandoned at the J.C. Penney's parking lot.

On the morning after her disappearance (April 23), one of Wilkes's daughters (Naquita) and a family friend saw Mosley driving his vehicle and caught up to him while he was stopped at a traffic light. They told Mosley that Wilkes was missing. Initially, Mosley denied seeing her. After Naquita asked Mosley whether he failed to show up at J.C. Penney the previous day, Mosley admitted that he saw Wilkes the day before but claimed that he had dropped her off at her car. They asked Mosley if he could pull over, but he refused and drove away.

On Saturday, April 24, Mosley changed all four tires on the Suburban, despite the fact that the tires could be driven for a few more thousand miles. Mosley was adamant that the mechanic load his old tires into his vehicle.

During the investigation into Wilkes's disappearance, the police attempted to contact Mosley numerous times, trying to arrange for an in-person interview. Mosley never met with any police officer until after he was taken into custody, but he did talk to numerous officers over the phone. He claimed that he and Wilkes met at the J.C. Penney's parking lot on April 22 and left to see some nearby houses that Wilkes was considering renting. He further claimed that he dropped her off back at her car around one that afternoon.

Days after the murder, after seeing news reports about the missing woman and baby, Griffin told his mother that he knew something about the case. He then talked to the police and eventually led police to the locations where Mosley killed Wilkes, where he burned her remains, and where he dumped the baby. Griffin was subsequently convicted of two counts of being an accessory after the fact for his involvement in the murders.

Based on Griffin's assistance, the police were able to recover Wilkes's remains, which were badly burned. Wilkes's watch, which

was found with the burned body, stopped at 2:29. Mosley's cellular phone records established that at 2:24 a.m., on April 23, an outgoing call was made from Mosley's cellular phone, and the cellular antenna used for this call was close to where Wilkes's body was found. Despite a diligent search for the baby's body, the baby's body was never recovered.

Wilkes's DNA was found on a carpet sample from the Suburban. The medical examiner testified that after a person was strangled to death, the body could exude pinkish blood from the nose and mouth.

After Mosley was arrested, he wrote Jones a letter, asking her to tell the police that he was alone when he came to her house on April 23 at 6:08 a.m. He also told her, "It is legal and okay to change your statement in court if you let the jury know the police pressured and coerced you to say something before they took the statement and during the statement." Mosley also talked to his wife, Carolyn Mosley, asking her to "remember" that his mother stayed over that night and that he came home from work that night at 11:30. He told his wife that he needed her, their daughters, and his mother to write notarized statements that he arrived home that night at 11:30 and was there all night.

During his defense at trial, Mosley presented evidence through his wife and daughters that he was at home the night that Griffin claimed they disposed of the bodies. Mosley's doctor also testified that he was treating Mosley for some injuries sustained in a car accident. While the doctor discussed Mosley's injuries in depth, he also admitted that the injuries would not have made it impossible for Mosley to lift a body.

Mosley, 46 So. 3d at 514-16 (footnotes omitted). The jury convicted Mosley of two counts of first-degree murder.

Following the penalty phase, the jury recommended a life sentence for the murder of Lynda Wilkes and, by a vote of eight to four, recommended a sentence

of death for the murder of Jay-Quan Mosley. The court held a Spencer[1] hearing and, after independently weighing the aggravating factors and mitigating circumstances, agreed with the jury's recommendation of death for the murder of Jay-Quan. In imposing the death sentence for the murder of Jay-Quan, the trial court found four aggravators applied, each of which was given great weight: (1) the victim of the capital felony was under twelve years of age; (2) the murder was cold, calculated, and premeditated (CCP); (3) the murder was committed for pecuniary gain; and (4) the defendant had been previously convicted of a capital felony (the contemporaneous murder of Wilkes). Mosley, 46 So. 3d at 517 n.6. The trial court determined that twenty-nine nonstatutory mitigating circumstances applied,[2] but found that they were outweighed by the significant aggravation and

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

2. The trial court found the following mitigators: (1) Mosley was raised in a broken home (little weight); (2) Mosley was an above-average high school student (little weight); (3) Mosley was affected by seeing physical and sexual abuse at an early age (little weight); (4) Mosley has the love and support of family members (some weight); (5) Mosley was a good parent (little to no weight); (6) Mosley was a good and respectful son to his mother, grandmother, and other family members (some weight); (7) Mosley was a good friend to many (some weight); (8) Mosley has shown no homicidal behavior and committed no violent acts since his arrest (little weight); (9) Mosley has the potential to be a productive inmate (some weight); (10) Mosley was a good worker and maintained steady employment throughout his adult life (some weight); (11) Mosley was a patriotic citizen (little weight); (12) Mosley was never disciplined or reprimanded for his performance of his duties while in the Navy Reserve (little weight); (13) Mosley completed an extended program to receive an emergency medical care certificate (some weight); (14) Mosley was a volunteer recreational coordinator for a tenant advisory council

thus sentenced Mosley to death for the murder of his son. On direct appeal, this Court affirmed Mosley's convictions and sentences, including the sentence of death.[3]

(little weight); (15) Mosley completed an extensive program to receive a diploma certificate from the Division of State Fire Marshal for the volunteer basic course (some weight); (16) Mosley successfully completed the certified nursing assistant program from the Department of Health (some weight); (17) Mosley mentored numerous teenagers and helped them with school and other activities (little weight); (18) Mosley is intelligent (little to no weight); (19) the murders were an aberrant act for Mosley that did not fit his life history (little to no weight); (20) Mosley was mentally abused as a child (little weight); (21) Mosley was a Boy Scout in his early years (little weight); (22) Mosley completed law enforcement training (some weight); (23) Mosley coached neighborhood youths in sports and recreation (little weight); (24) Mosley was an active volunteer fireman at two local stations (some weight); (25) Mosley was an active member of the PTA (little weight); (26) the offense and all aggravating factors occurred in an extremely short period of time (little to no weight); (27) Mosley encouraged others to remain in school and complete their education (little weight); (28) Mosley demonstrated appropriate courtroom behavior (little weight); and (29) the State's and the trial court's treatment of Bernard Griffin was mitigating in nature (little weight). As to the last mitigator involving Griffin, the trial court found nothing in the record to suggest that the manner in which the State treated Griffin should mitigate or reduce the sentence imposed against Mosley, particularly since the court found the evidence "quite clear that Bernard Griffin became involved only because the defendant took advantage of a young teenager . . . and turned that teenager into the defendant's assistant." Mosley v. State, 46 So. 3d at 517 n.6.

3. On direct appeal, Mosley raised thirteen claims: (1) [T]he due process clause of the Florida Constitution provides more protection to criminal defendants than the United States Constitution; (2) the prosecutor made improper and inflammatory remarks that deprived Mosley of a fair trial; (3) the trial court erred in admitting the recorded husband-wife jail conversations; (4) the trial court erred in denying Mosley's motion for a continuance and for a mistrial based on a defense witness who failed to appear at trial; (5) the trial court erred in including a videotape of the defendant in shackles and jail garb among the materials delivered to the jury room; (6) the trial court erred in effectively ruling that a double murder

Mosley filed a postconviction motion, raising eighteen claims.[4] The postconviction court held an evidentiary hearing in which the following witnesses

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automatically suffices as the "previously convicted of another capital felony" aggravating circumstance; (7) the trial court erred in denying Mosley's motion for judgment of acquittal; (8) the trial court erred in denying Mosley's motion for a new trial because the guilty verdict was contrary to the weight of the evidence; (9) the trial court erred in denying Mosley's request for the standard jury instruction which concerns pressure or threat against a witness; (10) Florida's death penalty scheme violates the Sixth Amendment and Ring v. Arizona, 536 U.S. 584 (2002); (11) this Court's comparative proportionality review of death sentences is unconstitutional; (12) Mosley's sentence of death is disproportionate; and (13) lethal injection and Florida's lethal injection procedures are unconstitutional. Mosley, 46 So. 3d at 518 n.7.

4. Mosley raised the following postconviction claims: (1) trial counsel was ineffective in failing to request an alibi jury instruction; (2) trial counsel was ineffective in failing to exercise a cause or peremptory challenge to strike a potential juror who was actually biased; (3) trial counsel was ineffective in failing to present testimony of a deoxyribonucleic acid (DNA) expert at trial to rebut the State's DNA results; (4) trial counsel was ineffective in failing to request a United Frye v. United States, 293 F. 1013 (Dist. D.C. 1923), hearing to exclude the State's DNA evidence as unreliable; (5) trial counsel was ineffective in failing to object to prosecutorial misconduct during closing arguments; (6) the State violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to turn over to defense monitoring logs of a Global Positioning Satellite (GPS) device that was attached to the defendant's vehicle; (7) the defendant was entitled to certain sealed records; (8) the defendant's trial was fraught with procedural and substantive errors; (9) the State violated Brady by failing to inform the defense that Griffin was given a favorable plea and preferential treatment in exchange for his testimony against Mosley; (10) the State violated Giglio v. United States, 405 U.S. 150 (1972), by knowingly presenting Griffin's false testimony that he was not given a plea deal during the trial against Mosley; (11) trial counsel was ineffective in failing to investigate and present critical documents at trial or failing to call known and available witnesses; (12) trial counsel was ineffective in discussing Mosley's extramarital relationships in front of the jury; (13) trial counsel was ineffective in failing to file a motion to obtain the transcripts from the grand jury proceedings and failing to file a motion to dismiss the indictment; (14) the evidence used to convict him was insufficient;

testified: John Mosley himself, Bernard Griffin, Mosley's trial attorneys, Mosley's private investigator, various detectives and police officers who worked on the murder investigation, and the State Attorney's investigator.

After considering the testimony, the postconviction court denied relief. This appeal follows. Mosley also petitions this Court for a writ of habeas corpus.

ANALYSIS

I. Rule 3.851 Claims

On appeal to this Court, Mosley raises numerous claims challenging the postconviction court's denial of relief. In his first three claims, Mosley alleges that he is entitled to relief based on violations of Brady and Giglio, and a claim of newly discovered evidence—claims that all involve whether the State's key witness, Bernard Griffin, had an undisclosed plea deal with the State or was given favorable treatment in exchange for his damaging testimony against Mosley. In addition, Mosley alleged that his trial counsel was deficient in failing to move to strike a certain juror, to request an alibi jury instruction, and to object to improper

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(15) trial counsel was ineffective in failing to file motions to suppress irrelevant evidence that misled the jury; (16) trial counsel was ineffective in failing to challenge a material variance in the indictment; (17) Mosley's constitutional rights were violated by a material variance in the indictment; and (18) newly discovered evidence demonstrates that Griffin lied at trial when he testified that he did not have a deal with the State. He also asserted that Florida's capital sentencing statute is unconstitutional.

statements by the prosecutor. Finally, Mosley contends that he is entitled to relief based on cumulative error.

A. Undisclosed Favorable Treatment of the State's Key Witness

Mosley first contends that he recently learned that the State's key witness, Bernard Griffin, was given favorable treatment both before he testified and afterwards—information that was previously not disclosed—and this information entitles him to relief. Mosley brings this claim alternatively under Brady, Giglio, and newly discovered evidence.

In Mungin v. State, 79 So. 3d 726, 734 (Fla. 2011), this Court explained the differences between these three claims. To establish a Brady claim:

> [T]he defendant must demonstrate that (1) favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. Strickler v. Greene, 527 U.S. 263, 281-82 (1999); Way v. State, 760 So. 2d 903, 910 (Fla. 2000). To meet the materiality prong, the defendant must demonstrate "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Way, 760 So. 2d at 913 (quoting United States v. Bagley, 473 U.S. [667,] 682 [(1985))]. A reasonable probability is a probability sufficient to undermine this Court's confidence in the outcome. Id.; see also Strickler, 527 U.S. at 290. However, in making this determination, a court cannot "simply discount[ ] the inculpatory evidence in light of the undisclosed evidence and determin[e] if the remaining evidence is sufficient." Franqui v. State, 59 So. 3d 82, 102 (Fla. 2011). "It is the net effect of the evidence that must be assessed." Jones v. State, 709 So. 2d 512, 521 (Fla. 1998).

Id. (second set of alterations in original). In contrast, under Giglio,

> "[A] defendant must show that: (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material." Rhodes v. State, 986 So. 2d 501, 508-09 (Fla. 2008). As to the knowledge prong, in Guzman v. State, 868 So. 2d 498 (Fla. 2003), we have clarified that Giglio is satisfied where the lead detective testifies falsely at trial because the "knowledge of the detective . . . is imputed to the prosecutor who tried the case." Id. at 505.
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> The materiality prong of Giglio is more defense-friendly than in a Brady claim. See Davis v. State, 26 So. 3d 519, 532 (Fla. 2009) ("[T]he standard applied under the third prong of the Giglio test is more defense friendly than the test . . . applied to a violation under Brady."). While under Brady, evidence is material if a defendant can show "a reasonable probability that . . . the result . . . would have been different," Way, 760 So. 2d at 913 (emphasis added), under Giglio, the evidence is considered material simply "if there is any reasonable possibility that it could have affected the jury's verdict." Rhodes, 986 So. 2d at 509 (emphasis added).

Id. at 738. Finally, in order to prevail under a newly discovered evidence claim, (1) "the evidence must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of the evidence] by the use of diligence"; and (2) the evidence "must be of such nature that it would probably produce an acquittal on retrial." Id. (quoting Jones, 709 So. 2d at 521).

In this case, the postconviction court, after holding an evidentiary hearing, denied this claim based on specific findings that Mosley's witnesses were not as credible as the State's witnesses, including the prosecutor who testified that no deal existed. In an extremely detailed order, the postconviction court explained its findings of fact and conclusions of law in denying the Brady claim as follows:

The State charged Mr. Griffin with two counts of accessory after the fact for the murders of Ms. Wilkes and Jay-Quan. This offense is a first degree felony, punishable by up to thirty years in prison. At the time of Defendant's trial, Mr. Griffin maintained a not guilty plea. Mr. Griffin later pleaded guilty to these charges and was sentenced to two years of community control, followed by eight years of probation.

At Defendant's trial, Mr. Griffin stated he agreed to testify truthfully, he did not know how much time he was facing, no one promised anything in exchange for his testimony, the prosecutors never suggested what sentence the court would impose, and he did not hope to get some benefit from testifying against Defendant. When asked if the State promised to get him a job, Mr. Griffin said, "No. Ain't even bring up nothing like that." Mr. Griffin also testified that the prosecutors did not talk to him about what would happen at the trial.

In a phone call with his aunt, Mr. Griffin said, "Yeah, he said I won't be getting no prison time or nothing like that," and "They going to help me get a job when I get out." At trial, Mr. Griffin admitted that he lied to his aunt to reassure his family that he was fine.

Defendant's postconviction counsel presented an affidavit at the evidentiary hearing that Mr. Griffin signed on January 7, 2013, wherein Mr. Griffin made thirteen assertions, including the following pertinent assertions: (4) Mr. Griffin was brought to the State Attorney's Office "dozens of times" to meet with Ms. Senterfitt, the lead prosecutor on Defendant's case; (5) John Guy, another prosecutor, joined Ms. Senterfitt at four or five of these meetings; (6) Ms. Senterfitt told Mr. Griffin the State would charge him with first-degree murder if he did not cooperate with and testify for the State, and the prosecutors discussed Mr. Griffin's trial testimony and his prior inconsistent statements; (7) Mr. Griffin did not enter a plea before testifying in Defendant's case, and Ms. Senterfitt "repeatedly" assured Mr. Griffin that if he cooperated he would get little jail time and/or probation; (9) Mr. Griffin told his grandmother, prior to trial, the truth when he said he was not going to get prison time and that somebody was helping him; (10) the State gave Mr. Griffin Chinese food for dinner the night before he testified in Defendant's trial, and Defendant ate the food in Ms. Senterfitt's office; (11) Ms. Senterfitt told Mr. Griffin to deny he had a deal with the State if defense counsel asked him because admitting the deal would harm the State's case;

(12) Mr. Griffin's trial testimony that he did not have a deal was false because he did have a deal with the State whereby he was going to get little or no jail time and probably just probation; and (13) Mr. Griffin entered a plea and was sentenced to community control and probation.

At the evidentiary hearing, Mr. Griffin testified the affidavit was accurate. Additionally, he testified that he violated his probation "two or three times" and is currently serving a twenty-year sentence in state prison. Mr. Griffin stated that neither Ms. Senterfitt nor Mr. Guy helped him on his last violation and that they should have helped him. Mr. Griffin also revealed that the prosecutor "John Guy" brought him the Chinese food, that he did not pay for the food, and that he ate the food alone in Ms. Senterfitt's office. Mr. Griffin testified Mr. John Guy, the same state attorney who prosecuted Defendant and who was cross examining Mr. Griffin at the evidentiary hearing, was not the John Guy who brought him the Chinese Food. According to Mr. Griffin, having the Chinese food did not affect his trial testimony. Finally, Mr. Griffin testified that he "didn't lie at all" at trial about Defendant murdering Ms. Wilkes and Jay-Quan or about Defendant disposing of the bodies.

Judge Senterfitt[5] testified at the evidentiary hearing that at the time of trial Mr. Griffin had maintained his not guilty plea. She reported meeting with Mr. Griffin approximately five times prior to trial to discuss his testimony, including his prior inconsistent statements to the police as she would normally do with witnesses. Judge Senterfitt stated that an investigator and/or Mr. Guy would be present at these meetings.

Judge Senterfitt explained that there was no need to tell Mr. Griffin that the State would charge him with a higher crime than accessory after the fact if he failed to cooperate, because Mr. Griffin "was always completely cooperative," and she "certainly wouldn't have threatened him." According to Judge Senterfitt, she would not have put Mr. Griffin on the stand if she "thought maybe he wasn't really being honest" and that the whole point was that she was convinced he was telling the truth.

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5. Ms. Senterfitt became "Judge" Senterfitt after serving as the prosecutor in Mosley's case.

> I told him to tell the truth. Bernard, I can't—I don't know what you're going to get. I can't tell you what you're going to get. I just—you need to keep doing what I think—you know, what you've been doing and that is telling the truth.

Judge Senterfitt testified that she did not tell Mr. Griffin what sentence he would receive because to do so would defeat the whole purpose of using him as a witness as it would cause Mr. Griffin to lose credibility with the jury, but that she and Mr. Griffin's attorney would have told Mr. Griffin his sentencing range—anywhere between probation and thirty years. Judge Senterfitt said that she did not think anyone else would tell Mr. Griffin he could receive more time if he did not cooperate. Judge Senterfitt agreed that she and Mr. Guy were responsible for the prosecution of the case and that "nobody in the State Attorney's Office would have made—had the authority to make any sort of proposals to Mr. Griffin if that had happened[.]"

Judge Senterfitt testified that although she did not remember the details of Mr. Griffin's telephone call with his grandmother, she must have asked Mr. Griffin about it. She also admitted that it sounded vaguely familiar that Mr. Griffin was given Chinese food and that "[i]t's very possible that if we had him a little late in my office that we would—knowing that he was going to miss dinner over at the jail that we would have said, you know, Bernard, we can get you something to eat . . . ." Judge Senterfitt testified that she would have prepared Mr. Griffin to answer truthfully when he was asked on the stand if he had a deal with or promise from the State because she had not promised him anything, and he did not have a deal with the State.

Judge Senterfitt, relying on Mr. Griffin's plea form, acknowledged that Mr. Griffin was sentenced to two years of community control, followed by approximately eight years of probation. According to Judge Senterfitt, when she recommended a sentence for Mr. Griffin, she considered: Mr. Griffin's cooperation with the police and State, Mr. Griffin's age, Mr. Griffin's role in the murders of Ms. Wilkes and Jay-Quan, and Mr. Griffin's prior record. Because she did not know what Mr. Griffin's cooperation at trial would ultimately be, she would not be able to make a sentencing recommendation before trial.

After listening to the testimony of the witnesses, the Court finds that Judge Senterfitt's testimony is both more credible and more

persuasive than Defendant's allegations and Mr. Griffin's testimony. See Griffin v. State, 114 So. 3d 890, 905 (Fla. 2013); Sochor v. State, 883 So. 2d 766, 785 (Fla. 2004); Kight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990).

Neither Ms. Senterfitt nor anyone else on behalf of the State Attorney's Office told Mr. Griffin he would be charged with first degree murder if he did not cooperate; the State reasonably discussed Mr. Griffin's trial testimony and reviewed his prior inconsistent statements to the police; Ms. Senterfitt did not assure Mr. Griffin that if he cooperated by testifying against Defendant at trial, he would receive little jail time and/or probation; Mr. Griffin did not have a deal with the State when he called his grandmother from the jail and, therefore, Mr. Griffin told the truth at trial; whether the State gave Mr. Griffin Chinese food is immaterial and not evidence of lenient treatment; and Ms. Senterfitt did not tell Mr. Griffin to lie at trial to deny he had a plea deal with the State—she told Mr. Griffin to be honest because Mr. Griffin did not have a plea deal with the State at the time of trial. Even though the State prepared Mr. Griffin for trial, which Mr. Griffin denied at trial, this preparation is routine practice for attorneys. There is not a reasonable probability that had the jury known this it would change the outcome of the proceedings.

Defendant is unable to establish Mr. Griffin's trial testimony, denying favorable treatment from the State, was false. The State did not have a plea deal with Mr. Griffin before he testified at Defendant's trial; consequently, the State did not have exculpatory evidence for the defense that would impeach Mr. Griffin's testimony or damage Mr. Griffin's credibility with the jury. Defendant does not satisfy the first prong of Brady and the Court need not address the other prongs. Defendant is not entitled to relief . . . .

(Footnote omitted.) Likewise, the postconviction court relied on these findings to deny Mosley's Giglio claim:

> The Court found, supra, that Defendant's testimony at trial was not false. Defendant is, therefore, unable to establish the first prong of the Giglio analysis. Consequently, there is no need for the Court to address the other two prongs. Defendant is not entitled to relief in [this claim].

Likewise, in denying the newly discovered claim, the postconviction court found:

> As the Court determined in resolving [the Brady claim], supra, Judge Senterfitt's testimony at the evidentiary hearing that Mr. Griffin did not have a plea deal with the State when he testified at Defendant's trial is more credible and persuasive than Mr. Griffin's testimony at the evidentiary hearing and assertions in his Affidavit that he did have a plea deal prior to testifying at Defendant's trial. Consequently, Mr. Griffin's testimony at Defendant's trial that he did not have a plea deal with the State was accurate. Defendant is not entitled to relief . . . .

This Court reviews the trial court's findings of fact and determinations as to the credibility of witnesses and the weight of the evidence for competent, substantial evidence. Porter v. State, 788 So. 2d 917, 923 (2001). Brady claims present mixed questions of law and fact. Where the postconviction court has conducted an evidentiary hearing, this Court will defer to the factual findings of the postconviction court so long as those findings are "supported by competent, substantial evidence, but will review the application of the law to the facts de novo." Mungin v. State, 141 So. 3d 138, 142 (Fla. 2013). As we have explained, this Court is highly deferential to the postconviction court and "will not substitute its judgment for that of the trial court on . . . the credibility of the witnesses and the weight to be given to the evidence." Wyatt v. State, 71 So. 3d 86, 105 (Fla. 2011) (quoting Cherry v. State, 959 So. 2d 702, 709 (Fla. 2007)). This is because the postconviction judge, who is present at the hearing, "has a superior vantage point to see and hear the witnesses presenting the conflicting testimony." Id. (quoting

State v. Spaziano, 692 So. 2d 174, 178 (Fla. 1997)). This case involves the testimony of a recanting witness, which this Court has observed is, "as a general matter, 'exceedingly unreliable.' " Spann v. State, 91 So. 3d 812, 816 (Fla. 2012) (quoting Bell v. State, 90 So. 2d 704, 705 (Fla. 1956)).

Upon a full review of the record, the postconviction court's order, and the parties' arguments, we deny this claim because competent, substantial evidence supports the postconviction court's findings. In attempting to establish this claim, Mosley relied primarily on the testimony of Griffin—a witness who the postconviction court determined was not credible. Not only did Griffin's testimony lack a significant amount of detail concerning any alleged plea or understanding between himself and the prosecutor, but it also lacked any corroboration from other witnesses. For example, although Griffin also stated that his defense attorney, John Whited, "[p]retty much" knew about this deal prior to Mosley's trial, when asked specific questions about what occurred and who was there, Griffin was unable to answer, stating, "I can't remember. It was so long ago." Further, because Mosley's trial attorney, Richard Kuritz, was personal friends with Griffin's attorney, Whited, Kuritz called Whited before Mosley's trial to inquire whether Griffin had been given any plea or whether promises were made. Whited indicated that no promises were made.

Not only was Griffin's new testimony lacking in supporting evidence, but Griffin's own testimony was internally inconsistent in numerous instances. Griffin often contradicted his own testimony or statements made previously in his affidavit. In contrast, the State presented Mosley's former prosecutor, Elizabeth Senterfitt, who is now a circuit court judge. Judge Senterfitt explicitly denied that an undisclosed plea deal existed or that the State provided any favorable treatment.

Determining the merits of this claim involved weighing conflicting testimony, primarily between that of Griffin and Judge Senterfitt. All of Mosley's claims rest on the foundation that there was some promise of leniency in exchange for Griffin's testimony—a claim that the postconviction court found to be not credible. The postconviction court made explicit findings that Judge Senterfitt did not assure Griffin that if he testified against Mosley, Griffin would receive little jail time; that Griffin did not have a deal with the State and therefore told the truth at trial; and whether the State gave Griffin dinner at dinner time was not evidence of lenient treatment. These findings are supported by competent, substantial evidence. While Griffin provided little detail regarding the most relevant parts of his testimony and often contradicted himself, Judge Senterfitt's testimony was clear. This Court is highly deferential to the postconviction court's factual findings and "will not substitute its judgment for that of the trial court on . . . the credibility

of the witnesses and the weight to be given to the evidence." Wyatt, 71 So. 3d at 105 (quoting Cherry, 959 So. 2d at 709).

Mosley is not entitled to relief on these three claims.

B. Ineffective Assistance of Trial Counsel

In his other postconviction claim, Mosley contends that trial counsel rendered ineffective assistance based on three alleged failures. First, Mosley contends that trial counsel was deficient for failing to strike a juror—a claim that the postconviction court summarily denied. Second, Mosley alleges that trial counsel was deficient for failing to request a jury instruction on the alibi defense. Third, he asserts trial counsel was deficient in failing to object to various improper comments made by the prosecutor. We address each claim in turn.

Generally, as this Court has explained, to prevail on a claim that counsel was ineffective, the defendant must demonstrate:

> both that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive him of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. For the second prong, "Strickland places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different." Wong v. Belmontes, 558 U.S. 15 (2009) (quoting Strickland, 466 U.S. at 694). Strickland 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 (2009)

(quoting Strickland, 466 U.S. at 693-94). This Court employs a mixed standard of review, deferring to the postconviction court's factual findings that are supported by competent, substantial evidence, but reviewing legal conclusions de novo. See Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004).

Smith v. State, 126 So. 3d 1038, 1042-43 (Fla. 2013).

1. Failure to Strike a Juror

In Carratelli v. State, 961 So. 2d 312, 320 (Fla. 2007), this Court discussed, in-depth, how the Strickland standard applies to the claim that trial counsel was ineffective in failing to move to strike a juror and contrasted the standard applied during postconviction proceedings with the standard that applies to a similar claim raised on direct appeal:

> [T]he standard for obtaining a reversal upon the erroneous denial of a cause challenge is relatively lenient: a defendant need only show that an objectionable juror—whether or not actually biased—sat on the jury. Our consideration of postconviction claims, however, is more restrictive. As we recently reiterated:
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> > We have emphasized that "once a conviction has been affirmed on direct appeal 'a presumption of finality and legality attaches to the conviction and sentence.' " . . . "[T]he test for prejudicial error in conjunction with a direct appeal is very different from the test for prejudice in conjunction with a collateral claim of ineffective assistance."
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> Sanders [v. State], 946 So. 2d [953, 959 (Fla. 2006)] (citations omitted) (quoting Goodwin v. State, 751 So. 2d 537, 546 (Fla. 1999), and Sanders [v. State,] 847 So. 2d [594, 506 (Fla. 1st DCA 2003)]). A defendant's claim that his counsel offered ineffective assistance at trial, for whatever reason, must be analyzed under the standard the Supreme Court enunciated in Strickland. The purpose of the right to the effective assistance of counsel is to "ensure a fair trial," Strickland, 466 U.S. at 686, defined as "one in which evidence subject

> to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Id. at 685.
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> . . . .
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> Specifically, the Court stressed that "[t]he defendant must show that 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." Id. at 694. Therefore, "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." Witt v. State, 387 So. 2d 922, 925 (Fla. 1980) (quoting United States v. Addonizio, 442 U.S. 178, 184 (1979)).

Carratelli, 961 So. 2d at 320. In order to establish that the defendant suffered prejudice based on counsel's failure to strike a juror during voir dire, the defendant must demonstrate that an actually biased juror served on the jury. Id. at 323.

When this Court previously applied that standard to the facts in Carratelli, this Court held that the defendant failed to prove prejudice—that an actually biased juror served on the jury—even though the defendant did show that one of the jurors read a prior news article about the crime and was exposed to a prior conversation where numerous people had opined to him that the defendant was guilty. While the juror in question acknowledged that it might be more difficult for the defendant to convince the juror of his innocence based on the juror's prior exposure, the juror still stated, "If I come in here as a juror, I will sit down with an open slate and listen to what is said and make up my mind from there." Id. at 327. As this Court concluded, "The record plainly shows that [the juror] held no firm opinion except that he could be fair, listen to the evidence, and follow the law." Id.

This Court has reviewed similar claims involving ineffective assistance of trial counsel pertaining to the failure to challenge a juror for cause and has generally held that in order to amount to actual bias, the juror must indicate something more than mere doubt about that juror's impartiality. See, e.g., Guardado v. State, 176 So. 3d 886 (Fla. 2015) (holding that the record did not show a juror had actual bias even though the juror stated that he was "strongly" in favor of the death penalty, knew three of the police officers who worked on the case, and had family members who knew the victim personally); Johnston v. State, 63 So. 3d 730, 745 (Fla. 2011) (holding that the record did not show a juror had actual bias when the juror stated that he had been exposed to pretrial publicity about the crime and then declined to respond to specific discussion on bias during voir dire); Owen v. State, 986 So. 2d 534, 550 (Fla. 2008) (holding that there was no evidence of actual bias in the record where a juror stated that she "[p]robably" would vote for the death penalty in the circumstance of multiple victims but ultimately stated that mitigating evidence such as testimony about the defendant's mental health could influence her to recommend a life sentence).

Applying that standard, during the voir dire in this case, when the State inquired whether any juror was concerned about whether he or she would be so bothered by photographs of the deceased victim's burned and decomposed body that he or she could not be fair or impartial, Juror R answered that she was not sure

how she would respond and that she did not know, although she thought she would try. Specifically, in response to a compound question, asking the jurors both as to who would be bothered or disturbed by reviewing photographs of the victim's burned, decomposed body and who would feel that such pictures would cause them to not be fair and partial, Juror R responded, stating, "I'm not sure how I would respond. I think the timing of when we see them might determine how I might feel. I just don't know." When the State explained that this was a part of the case and questioned whether she could be fair and impartial in the case, Juror R then replied, "I think I would try but I don't know what I would take home with me at night and sleep with. I don't know."

We deny this claim because Mosley has failed to show actual bias on the face of the record. As this Court explicitly held in Johnston, in order to prevail on a challenge pertaining to whether trial counsel was ineffective in failing to object to certain jurors serving on the jury, the defendant must demonstrate actual bias, which is "more than mere doubt about the juror's impartiality." 63 So. 3d at 745. Based on the full context of Juror R's statement, Juror R was replying to whether those types of pictures would bother her or affect her ability to sit as a juror in the case—she did not clearly indicate that she would have a bias or prejudice against a particular party or determine Mosley's guilt or innocence based on gruesome pictures.

Even if her statements were considered to be a discussion as to whether she could be fair, Juror R's statements merely express doubt, which this Court has held does not establish actual bias against the defendant. As this Court has acknowledged, the standard for establishing prejudice during postconviction claims must be more restrictive in order to recognize "the fundamental differences between review on appeal and review on postconviction." Thompson v. State, 990 So. 2d 482, 489 (Fla. 2008). We stressed in Carratelli that holding otherwise would mean that "[a] defendant asserting ineffective assistance for failing to preserve a cause challenge would have no greater burden than a defendant asserting preserved error on appeal," a result that would lead to the elimination of the contemporaneous objection requirement and permit counsel to save certain arguments for appeal. 961 So. 2d at 325. We thus deny this claim.

2. Failure to Request a Jury Instruction on the Alibi Defense

In his second claim of trial counsel deficiency, Mosley alleges that trial counsel was deficient in failing to request a jury instruction pertaining to an alibi defense. Specifically, at his trial, the State presented evidence that Mosley himself admitted to meeting the victims at J.C. Penney during the time frame within which the police later determined the murders occurred. Mosley presented evidence to challenge his involvement in the murder, and his counsel's theory of defense was that Griffin had killed the victims and blamed Mosley for the crime. Defense

counsel stressed that there was no physical evidence to show that Mosley was present at the scene of the crime and demonstrated the small window of time that Mosley was even available to be able to commit the offenses.

At the postconviction evidentiary hearing, Mosley's lead trial counsel testified, asserting that he researched the case thoroughly and generated a case file of fourteen boxes. Defense counsel explicitly stated that he never believed that this was an alibi case and he was concerned about his credibility with the jury if he attempted to rely on such a defense based on the available evidence. Instead, his defense strategy was to chip away at the State's case, demonstrate its lack of direct evidence against Mosley, and stress that Griffin committed the murder. The postconviction court denied the claim as follows:

> Evidence from cell phone records showed the murders occurred between 12:33 p.m. and 1:21 p.m. JSO Detective Dennis Fuentes—interviewed Defendant after Defendant became a suspect in the disappearance of Ms. Wilkes and Jay-Quan. At trial, Detective Fuentes testified that Defendant told the detective he saw Ms. Wilkes and Jay-Quan between 12:30 p.m. and 1:00 p.m. on the day of the murders. Defendant also told the detective that during this time Ms. Wilkes showed Defendant a house she was thinking about renting and afterwards they returned to the J.C. Penney parking lot where Ms. Wilkes performed oral sex on Defendant.
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> JSO Sergeant Hugh Eason also interviewed Defendant during the investigation into Ms. Wilkes's and Jay-Quan's disappearances. According to Sergeant Eason, Defendant said he called Ms. Wilkes from Quality Tire before meeting her at "around 12:45, 1:00 . . ." and that he never said anything about going back to Quality Tire after leaving Ms. Wilkes and Jay-Quan. At trial Jimmy Holton, the manager of Quality Tire, testified that he was merely guessing that Defendant was in his shop at 1:00 p.m. on the day of the murders and

that he could not say exactly what time Defendant was there that day. Jim Jeanette, the plumber who worked on Defendant's broken toilet, testified that he arrived at Defendant's home at 3:00 p.m. on the day of the murders. Defendant's daughter, Amber Mosley, testified that she saw Defendant at home "[s]ometime around 1:00" the day of the murders. Finally, Defendant's wife, Carolyn Mosley, testified that she was uncertain where Defendant was between 12:00 noon and 1:00 p.m. on the day of the murders.

Mr. Kuritz testified at the evidentiary hearing that he "never thought of this as an alibi case." According to Mr. Kuritz, he could not show Defendant was in a particular place at a specific time. Because he believed he did not have enough evidence for an alibi, counsel tried to "chip away at the state's case and show that their [sic] story wasn't credible." Mr. Kuritz explained that his theory and strategy were to argue that Mr. Griffin committed the murders "either by himself or with a friend of his and that Mr. Mosley was not involved."

Mr. Kuritz believed that had he requested an alibi instruction he would have lost credibility with the jury and that "the state could have really twisted it on me . . . because as I sit here still I don't think we had an alibi to speak." Finally, Mr. Kuritz testified that when he did not have sufficient evidence to sustain an alibi instruction, he relied on the jury finding "plenty of reasonable doubt as to all of this."

At the evidentiary hearing, Quentin Till, co-counsel at Defendant's trial, testified that he focused on the penalty phase. He further testified that he was unsure whether he actually sat down with Mr. Kuritz to discuss the defense's theory for the guilt phase. Mr. Till explained he was very confident with Mr. Kuritz's capabilities to represent somebody. According to Mr. Till, the defense could have put on an alibi defense, but he was unsure whether it would be effective. He further stated that he did not have an answer to whether there was harm in asking for an alibi instruction.

Defendant argues that Mr. Kuritz's reasons for not requesting an alibi instruction is unconvincing because counsel "used the word 'alibi' in describing Mosley's defense to the jury." In his opening statement, Mr. Kuritz made these references to an alibi: "[The plumber is] not going to say Defendant was trying to set up an alibi"; "Nobody is crunching for alibis"; "Not us making up an alibi"; and "That's his alibi?"

> Mr. Kuritz's strategic decision not to request an alibi instruction was clearly within "the broad range of reasonably competent performance" contemplated by Strickland. Although Mr. Kuritz used the word "alibi" during his opening statement, he never directly referred to a specific alibi defense. Counsel considered whether to pursue an alibi defense and reasonably rejected doing so after reviewing the undisputed facts and concluding that Defendant did not have a sufficient alibi.

We affirm the postconviction court's determination that this was a reasonable strategic decision. As this Court has held, "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Peterson v. State, 154 So. 3d 275, 280 (Fla. 2014) (quoting Burns v. State, 944 So. 2d 234, 239 (Fla. 2006)). Even if "arguably trial counsel's strategy may have ultimately been unsuccessful, [the defendant] cannot now properly challenge an informed, strategic decision of counsel in the hindsight of postconviction." Dufour v. State, 905 So. 2d 42, 62 (Fla. 2005). "The defendant bears the burden to 'overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.' " McCoy v. State, 113 So. 3d 701, 707 (Fla. 2013) (quoting Strickland, 466 U.S. at 689).

Mosley now asserts that counsel should have requested this jury instruction even if the evidence was weak, emphasizing that trial counsel presented witnesses who testified that Mosley could have been in a different place during the murder or when the bodies were disposed of and thus he must have been presenting an alibi

defense. As trial counsel testified during the postconviction evidentiary hearing, however, Kuritz never considered the case as one involving an alibi. His stance on this was clear to the jury from the opening argument—he repeatedly emphasized that he was "not going to say Mr. Mosley was trying to set up an alibi" and they are not "making up an alibi."

A review of the trial record very clearly demonstrates why choosing not to use an alibi defense was a reasonable strategic decision. By Mosley's own admissions to numerous people, he could have been present at the very time that the murders occurred. Mosley initially asked the victim to meet him in the J.C. Penney parking lot so he could allegedly buy their son clothing. Wilkes notified others of her plan to meet Mosley at J.C. Penney, and her car was found abandoned in the parking lot where she met Mosley. When the police confronted Mosley about this, he acknowledged that he met Wilkes and their son there and was with her during the relevant time period. Thus, while trial counsel did call various witnesses who would have placed Mosley at home around 1 p.m., if trial counsel focused on using this as a defense, the State would have emphasized that even Mosley himself initially admitted that he was with Wilkes during the time that the police were later able to establish the murders occurred—between 12:57 and 1:21 p.m.

Further, after Mosley was arrested, he contacted numerous people in an attempt to create an alibi. He called his family from jail, explaining what statements he wanted them to provide to the police. Mosley also reached out to one of his other mistresses by letter, encouraging specific testimony that she should recall pertaining to when they saw each other on April 23—the time period when Mosley returned from disposing of the bodies. If trial counsel had attempted to pursue this case as one involving an alibi, the prosecutor had significant evidence to suggest that Mosley was attempting to fabricate an alibi. Instead, trial counsel attempted to downplay this evidence, stressing that Mosley was not trying to create an alibi and that he was just worried that his family and friends would be pressured into lying about important details. Trial counsel focused on how the only evidence that tied Mosley to the murder came from Griffin, who was also being charged with crimes concerning the murder, and that Griffin was trying to blame Mosley for murders that Griffin himself committed.

We deny this claim.

3. Failure to Object to Improper Comments

In his final claim, Mosley contends that trial counsel rendered deficient performance in failing to object to certain statements made by the prosecutor and State witnesses, focusing on four main areas: (1) trial counsel failed to object to improper bolstering of Griffin and the police; (2) the prosecutor denigrated Mosley

and his defense; (3) during the penalty phase, the prosecutor relied on prosecutorial expertise in seeking the death penalty; and (4) the prosecutor implied to the jury that a life recommendation is the "easy way out."[6]

As an initial matter, during the postconviction hearing, trial counsel Richard Kuritz testified that, as a strategic choice, he was generally more conservative in how many objections he raised, objecting only where it was clear that the statement was improper and where his objection would be helpful to the defense. The postconviction court relied on this testimony, summarizing Kuritz's testimony as follows:

> Mr. Kuritz testified that his use of objections is strategic. He testified that forming his strategy is a two-part process: Can I object? Should I object? Mr. Kuritz explained that if he objects too much, he might "get the ire of the court," and he might lose credibility with the jury. He further explained that an objection may draw the jury's attention to particular testimony that is damaging to his client and by not objecting, he does not give the jury a reason to pay attention to the damaging testimony. According to Mr. Kuritz, "the jury can't unhear something or unring the bell." Finally, Mr. Kuritz considers whether to use the prosecutor's statement to his benefit: "I like it when an opposing party says something that I can use to my benefit and oftentimes it's when they say something ludicrous, improper or pushing the envelope that I can twist on that."

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6. In light of granting Mosley relief with respect to relief on his claim under Hurst v. Florida, 136 S. Ct. 616 (2016), and remanding his case for a new penalty phase, we do not address Mosley's claims (3) and (4), which relate to his attorney's failure to object to statements made during the penalty phase of his trial.

Mosley first contends that his attorney was deficient in failing to object to various statements from the State that allegedly constituted improper bolstering and from State witnesses regarding Griffin's credibility and the investigation in the case. This Court has defined improper bolstering as "when the State 'places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony.' " Jackson v. State, 147 So. 3d 469, 486 (Fla. 2014) (quoting Wade v. State, 41 So. 3d 857, 869 (Fla. 2010)). After reviewing each of these arguments, we conclude that these comments, when viewed in context, are not comments placing the prestige of the government behind Griffin's testimony or relying on anything outside of the record to support law enforcement's testimony. Further, even if these comments could constitute improper bolstering, trial counsel was not deficient in failing to object to the comments, but in fact used some of the statements to Mosley's advantage by suggesting that the law enforcement officers had clouded judgment pertaining to Griffin.

Second, Mosley contends that trial counsel was deficient in failing to object to numerous statements in closing arguments wherein the prosecutor argued that Mosley had lied to various people, alleging that such statements denigrated the defendant. This Court has held that while a prosecutor may "not ridicule or otherwise improperly attack the defense's theory of the case," the prosecutor is

permitted to suggest to the jurors that "based on the evidence of the case, they should question the plausibility of the defense's theory." Davis v. State, 136 So. 3d 1169, 1203 (Fla. 2014) (quoting Valentine v. State, 98 So. 3d 44, 55-56 (Fla. 2012)). Accordingly, this Court has previously "determined that the prosecutor's description of the defendant's testimony as 'untruthful[ ]' or of the defendant as a 'liar' was proper argument based on the evidence of the case." Id. at 1204 (quoting Craig v. State, 510 So. 2d 857, 865 (Fla. 1987)); see also Davis v. State, 698 So. 2d 1182, 1190 (Fla. 1997) (concluding that prosecutor's reference to defendant's statements as "bald-faced lies" was not improper). Here, the statements at issue do not rise to the level of denigrating the defense or the defendant.

For the reasons explained above, we hold that trial counsel did not render ineffective assistance of counsel in failing to object to the arguments and statements made by the prosecution and its witnesses.

C. Cumulative Error

In his final postconviction claim, Mosley asserts that the cumulative effect of the guilt phase and penalty phase errors renders his convictions and death sentence fundamentally unfair. We reject this claim without further discussion because we have rejected all of the individual guilt phase claims of error both as to ineffective assistance of trial counsel and the claims of relief under Giglio, Brady, and newly discovered evidence, and do not consider Mosley's penalty phase

claims in light of granting relief under Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016).

II. Habeas Corpus Petition

In his habeas petition, Mosley raises one additional claim—that although his appellate counsel presented thirteen different issues on direct appeal,[7] counsel was ineffective in failing to assert that the trial court committed a fundamental error when it failed to hold a Faretta[8] hearing after Mosley clearly and unequivocally requested to represent himself pro se.

In order to be entitled to relief, Mosley must show: (1) "appellate counsel's performance was deficient because 'the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance' "; and (2) "the petitioner was prejudiced because appellate counsel's deficiency 'compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.' " Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000) (quoting Thompson v. State, 759 So. 2d 650, 660 (Fla. 2000)). Generally, this Court will not find appellate counsel's performance ineffective for failing to raise an issue

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7. See supra note 3 (citing Mosley, 46 So. 3d at 518 n.7) (listing Mosley's thirteen direct appeal claims).

8. Faretta v. California, 422 U.S. 806 (1975).

that would have been found to be procedurally barred if it had been raised on direct appeal or for failing to raise a legal issue that "would in all probability have been found to be without merit" had counsel raised the issue on direct appeal. Id. (quoting Williamson v. Dugger, 651 So. 2d 8, 86 (Fla. 1994)). Moreover, based on the limitations of appellate litigation, this Court has held that "appellate counsel is not necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue." Farina v. State, 937 So. 2d 612, 634 (Fla. 2006) (quoting Valle v. Moore, 837 So. 2d 905, 908 (Fla. 2002)). Instead, counsel will not be considered ineffective simply because he or she limited the appellate arguments to those that were the strongest. Id.

In this case, although Mosley was represented by counsel during the trial proceedings, he often filed pro se filings, including a number of pro se motions that expressed his dissatisfaction with any delays in his case. On December 15, 2004, the trial judge, the Honorable Michael Weatherby, held a hearing on one of Mosley's pro se demands for a speedy trial. The State asserted that Mosley did not have the authority to file such a pleading since he was represented by counsel. At this hearing, the trial court questioned Mosley to ensure that Mosley understood the fact that his attorney was not ready for trial, to which Mosley repeatedly stressed that he was innocent, was unhappy with the fact that he had been in jail for

eight months without a trial, and was ready to go to trial so he could return home to his family. The judge granted the State's motion to strike Mosley's pro se demand. At that point, Mosley stated that he wanted to petition the Court to "go pro se." Based on this statement, however, it was unclear whether Mosley was seeking to represent himself pro se immediately, or if he was merely informing the court that he would be filing a petition for pro se representation in the future. The trial court replied that it would consider Mosley's motion when he filed it and then set the next pretrial hearing.

Shortly after this statement, Mosley filed a pro se Motion for Additional Counsel, requesting the opportunity to participate as cocounsel alongside the attorneys at the Office of the Public Defender. He concluded his motion with, "I am the added counsel requested." New counsel was later appointed, and Mosley never complained about his counsel's performance or mentioned that he wanted to represent himself. Although Mosley filed numerous pro se motions throughout the trial proceedings, he did not file any motion to represent himself and did not orally seek to represent himself pro se.

As this Court has held, "[u]nder the United States Supreme Court's ruling in Faretta, an accused has the right to self-representation at trial. A defendant's choice to invoke this right " 'must be honored out of that respect for the individual which is the lifeblood of the law.' " Tennis v. State, 997 So. 2d 375, 377-78 (Fla.

2008) (quoting Faretta, 422 U.S. at 834). Before the trial court is mandated to hold a Faretta hearing, "the defendant's request for self-representation must be unequivocal." Id. at 378; see State v. Craft, 685 So. 2d 1292, 1295 (Fla. 1996) ("[O]nly an unequivocal assertion of the right to self-representation will trigger the need for a Faretta inquiry."). However, if a defendant unequivocally states that he chooses to represent himself instead of having counsel represent him and the trial court denies the defendant this right, such an error requires reversal. Pasha v. State, 39 So. 3d 1259, 1262 (Fla. 2010).

When this Court has previously determined that a defendant made an unequivocal statement choosing self-representation instead of being represented by an appointed attorney, the request was made more clearly than Mosley's request in this case. Further, this Court has previously considered the entire scope of the defendant's request, instead of focusing on one isolated statement. For example, in Tennis, the defendant informed the trial judge, "I refuse to go to trial with him. I would like to go pro se instead of having two prosecutors against me, I'll do it myself. Even though I don't know what I'm doing, I will have a better fighting chance." 997 So. 2d at 378. The defendant then filed two separate pro se motions requesting self-representation. This Court concluded that "Tennis's statement at the hearing coupled with his pro se motions was an unequivocal and clear request for self-representation." Id. (emphasis added). Likewise, in Pasha, the defendant

stated that while he preferred to have an attorney, so long as it was not his current attorney, his appointed attorney was so ineffective that he would choose to represent himself if the trial judge did not appoint a different attorney. 39 So. 3d at 1262. This Court held that such a statement was a clear, unequivocal request for self-representation, and thus the trial court committed reversible error by not permitting the defendant to represent himself. Id.; see also Raulerson v. Wainwright, 732 F.2d 803, 808-09 (11th Cir. 1984) (holding that the defendant's initial communications, which vacillated between seeking pro se status or being appointed as cocounsel, did not constitute an "unequivocal" assertion of his right to relinquish counsel).

In looking to the full record before us, we conclude that Mosley's brief statement about a future intent to proceed pro se was not an unequivocal request for self-representation. Here, the trial court was in the process of determining whether Mosley could file a pro se demand for speedy trial demand when he was already represented by counsel. Mosley did not mention that he wanted to discharge his counsel. The judge further informed him that he would consider this request, and in an apparent response, Mosley filed a motion requesting to proceed as cocounsel alongside his current counsel. Most importantly, after this filing, Mosley did not request or mention that he sought to represent himself pro se.

Because the request was not an unequivocal request to represent himself pro se, appellate counsel was not deficient in failing to raise such a claim because it would have been found to be without merit. Therefore, we deny Mosley's petition for habeas corpus relief.

III. Hurst v. Florida and Hurst

While Mosley's postconviction case and habeas petition were pending in this Court, the United States Supreme Court issued its opinion in Hurst v. Florida.[9] In Hurst v. Florida, the United States Supreme Court declared our capital sentencing scheme, codified at section 921.141(3)(a)-(b), Florida Statutes (2015), unconstitutional because the "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." 136 S. Ct. at 619.

Pursuant to the Supreme Court's decision in Hurst v. Florida, Mosley filed a motion requesting leave to file supplemental briefing to address the impact of Hurst v. Florida on his case. We granted the motion, and Mosley now contends that he is entitled to relief under Hurst v. Florida and, thus, his sentence of death must be vacated because of the jury's nonunanimous death recommendation.

9. Hurst v. Florida (Hurst v. Florida), 136 S. Ct. 616 (2016).

In Hurst v. Florida, the United States Supreme Court specifically relied, not on new jurisprudential developments in Sixth Amendment case law, but rather, on its 2002 opinion in Ring v. Arizona, 536 U.S. 584 (2002). The Supreme Court determined that "[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's" death penalty:

> Like Arizona at the time of Ring, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3) [2015]. Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." Walton v. Arizona, 497 U.S. 639, 648, 110 S. Ct. 3047 (1990); accord State v. Steele, 921 So. 2d 538, 546 (Fla. 2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").
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> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of Ring, we hold that Hurst's sentence violates the Sixth Amendment.

Hurst v. Florida, 136 S. Ct. at 621-22 (emphasis supplied). Thus, in holding our statute unconstitutional, the United States Supreme Court applied the exact reasoning of Ring to Florida's death penalty sentencing scheme. Id.

On remand from the United States Supreme Court, in Hurst,[10] this Court interpreted the United States Supreme Court's holding in Hurst v. Florida and held "that the Supreme Court's decision in Hurst v. Florida requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. We reach this holding based on the mandate of Hurst v. Florida and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense." Hurst, 202 So. 3d at 44. Reviewing Florida's capital sentencing scheme, the Court concluded that "these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances." Id. Further, we held, based on Florida's independent constitutional right to trial by jury that, in order for the trial court to impose a sentence of death, the jury's recommendation for a sentence of death must be unanimous. Id.

Further, we have now held in Asay v. State, that Hurst does not apply retroactively to capital defendants whose sentences were final before the United

10. Hurst, 202 So. 3d 40 (Fla. 2016).

States Supreme Court issued its opinion in Ring. See Asay v. State, Nos. SC16-223, SC16-102, SC16-628 (slip op. issued Fla. Dec. 22, 2016), at 35. However, our opinion in Asay left open the question of whether Hurst applies retroactively to postconviction defendants, like Mosley, whose sentences of death became final after the United States Supreme Court decided Ring. Id.

We now turn to the issue of whether Hurst should apply retroactively to Mosley. We approach our retroactivity analysis based on the United States Supreme Court's holding in Hurst v. Florida under the United States Constitution's Sixth Amendment right to trial by jury and our opinion in Hurst, interpreting the meaning of Hurst v. Florida as applied to Florida's capital sentencing scheme and considering Florida's independent right to trial by jury in article I, section 22, of the Florida Constitution. We first review our precedent holding that certain decisions should be given retroactive effect on the basis of fundamental fairness, such as James v. State, 615 So. 2d 668 (Fla. 1993). We then review the factors in the Witt v. State, 387 So. 2d 922 (1980), retroactivity framework, explaining the unique jurisprudential conundrum caused by the United States Supreme Court's delay in reviewing the constitutionality of Florida's capital sentencing scheme in light of Ring. After reviewing these considerations, we conclude that Hurst should apply retroactively to Mosley.

A. Fundamental Fairness: James v. State

Mosley, whose crimes occurred in April 2004, raised his entitlement to the application of Ring at his first opportunity at the trial level, arguing the unconstitutionality of Florida's death penalty in light of Ring and that he was entitled to a unanimous jury verdict.[11] Mosley's Ring claims were consistently rejected by the trial court judge. He then raised a Ring claim on direct appeal, which this Court summarily rejected by stating that his remaining claims, including a Ring claim, "are clearly without merit based on this Court's precedent . . . and do not require further elaboration." Mosley, 46 So. 3d at 518; accord id. at 518 n.7. Mosley also filed a petition for certiorari to the United States Supreme Court, which was denied. Mosley v. Florida, 526 U.S. 887 (2010). Since the time this Court denied Mosley's Sixth Amendment claim under Ring, a major development occurred in 2016, when the United States Supreme Court finally held in Hurst v.

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11. In fact, Mosley's Ring-related filings were extensive. See, e.g., State v. Mosley, No. 16-2004-CF-6675-AXXX-MA, 2005 WL 6353490 (Fla. Cir. Ct. 4th Cir. Nov. 29, 2005) (denying Defendant's Motion to Declare Florida's Death Penalty Unconstitutional); id., 2005 WL 8132035 (Fla. Cir. Ct. 4th Cir. Aug. 25, 2005) (denying Defendant's Motion in Limine and to Strike Portions of "Florida Standard Jury Instructions in Criminal Cases" Re: Caldwell v. Mississippi); id., 2005 WL 8132030 (Fla. Cir. Ct. 4th Cir. Aug. 25, 2005) (denying Defendant's Motion to Prohibit Misleading References to the Advisory Role of the Jury at Sentencing).

Florida that the "analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's." 136 S. Ct. at 621-22.

This Court has previously held that fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence. For example, in James, this Court reviewed whether the United States Supreme Court's decision in Espinosa v. Florida, 505 U.S. 1079 (1992), should apply retroactively. James, 615 So. 2d at 669. Although pre-Espinosa this Court had rejected claims that our jury instruction on the extremely heinous, atrocious or cruel (HAC) aggravator was unconstitutionally vague, the United States Supreme Court disagreed and held in Espinosa that our instruction was, indeed, unconstitutionally vague. 505 U.S. 1079. This Court then held that defendants who had raised a claim at trial or on direct appeal that the jury instruction pertaining to the HAC aggravating factor was unconstitutionally vague were entitled to retroactive application of Espinosa. James, 615 So. 2d at 669. While this Court did not employ a standard retroactivity analysis in James, the basis for granting relief was that of fundamental fairness. Id. This Court reasoned that, because James had raised the exact claim that was validated by the United States Supreme Court in Espinosa, "it would not be fair to deprive him of the Espinosa ruling." Id.

The situation presented by the United States Supreme Court's holding in Hurst v. Florida is not only analogous to the situation presented in James, but also concerns a decision of greater fundamental importance than was at issue in James. Id.[12] For fourteen years after Ring, until the United States Supreme Court decided Hurst v. Florida, Florida's capital defendants attempted to seek relief based on Ring, both in this Court and the United States Supreme Court. In this instance, as in James, where Mosley repeatedly raised Ring claims that were rejected, the interests of finality must yield to fundamental fairness. See Witt, 387 So. 2d at 925. Under Hurst v. Florida and Hurst, the fundamental right to trial by jury under both the United States and Florida Constitutions is implicated, and Florida's death

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12. This result is further supported by this Court's precedent, similar to James, holding that other new rules, which had far less impact on the sanctity of a jury's verdict than the rule from Hurst v. Florida, should apply retroactively. See, e.g, Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987) (holding retroactive Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987), which held that instruction to advisory jury to not consider nonstatutory mitigation, and trial judge's refusal to consider nonstatutory mitigation was improper); Harvard v. State, 486 So. 2d 537, 539 (Fla. 1986) (holding retroactive the United States Supreme Court's decision in Lockett v. Ohio, 438 U.S. 586, 608 (1978), which held that the exclusion of nonstatutory mitigating evidence was unconstitutional); State v. White, 470 So. 2d 1377, 1379 (Fla. 1985) (holding retroactive Enmund v. Florida, 458 U.S. 782, 797 (1982), which held that the "imposition of the death penalty on one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed," is improper); Tafero v. State, 459 So. 2d 1034, 1035 (Fla. 1984) (determining, under Witt, that Enmund is "such a change in the law as to be cognizable in post-conviction proceedings").

penalty sentencing procedure has been held unconstitutional, thereby making "the machinery of post-conviction relief . . . necessary to avoid individual instances of obvious injustice." Id. at 925.

Accordingly, because Mosley raised a Ring claim at his first opportunity and was then rejected at every turn, we conclude that fundamental fairness requires the retroactive application of Hurst, which defined the effect of Hurst v. Florida, to Mosley.

B. Retroactivity of Hurst v. Florida and Hurst Under a Witt Analysis

We now turn to a retroactivity analysis under Florida's standard from Witt, which involves a more in-depth consideration of how to analyze when fairness must yield to finality based on changes in the law. We conclude that under a standard Witt analysis, Hurst should be applied to Mosley and other defendants whose sentences became final after the United States Supreme Court issued its opinion in Ring.[13]

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13. The difference between a retroactivity approach under James and a retroactivity approach under a standard Witt analysis is that under James, a defendant or his lawyer would have had to timely raise the constitutional argument, in this case a Sixth Amendment argument, before this Court would grant relief. However, using a Witt analysis, any defendant who falls within the ambit of the retroactivity period would be entitled to relief regardless of whether the defendant or his or her lawyer had raised the Sixth Amendment argument. In this case, we determine that Mosley would be entitled to retroactive application of Hurst under either approach.

Under Witt, a change in the law does not apply retroactively "unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." Witt, 387 So. 2d at 931. Determining the retroactivity of a holding "requir[es] that [this Court] resolve a conflict between two important goals of the criminal justice system—ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in individual cases on the other—within the context of post-conviction relief from a sentence of death." Id. at 924-25. Put simply, balancing fairness versus finality is the essence of a Witt retroactivity analysis. See id. at 925.

First, we address this Court's opinion in Johnson v. State, 904 So. 2d 400, 409 (Fla. 2005), which held that Ring did not apply retroactively. As we stated in our opinion in Asay:

> [O]ur retroactivity analysis in Johnson hinged upon our understanding of Ring's application to Florida at that time. Thus, we did not treat the aggravators as elements of the crime that needed to be found by a jury to the same extent as other elements of the crime. Specifically, because we were still bound by Hildwin[v. Florida, 490 U.S. 638 (1989)], we did not properly analyze the purpose of the new rule in Ring, which was to protect the fundamental right to a jury in determining each element of an offense. With the issuance of Hurst v. Florida, in which the United States Supreme Court overruled its decision in Hildwin, we conclude that this Court must now reconsider its prior decision in Johnson.

Slip op. at 22.

We now turn to a Witt retroactivity analysis in this case. It is undisputed that Hurst v. Florida satisfies the first two prongs of the Witt analysis because it emanates from the United States Supreme Court and is constitutional in nature. Likewise, our recent decision in Hurst is undoubtedly a decision of fundamental constitutional significance because it emanates from this Court and is based on Florida's independent constitutional right to trial by jury under article I, section 22, of the Florida Constitution. However, the third prong of the Witt test turns entirely on whether the new rule, here Hurst v. Florida, is a "development of fundamental significance." Witt, 387 So. 2d at 931. To be a "development of fundamental significance," the change in law must "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties," or alternatively, be "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter." Id. at 929. We conclude that Hurst v. Florida, as interpreted by this Court in Hurst, falls within the category of cases that are of "sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test" from Stovall[14] and Linkletter,[15] which we address below. Id.

14. Stovall v. Denno, 388 U.S. 293 (1967).

15. Linkletter v. Walker, 381 U.S. 618 (1965).

The three-fold test of Stovall and Linkletter requires courts to analyze three factors: (a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that retroactive application of the new rule would have on the administration of justice. Witt, 387 So. 2d at 926; Johnson, 904 So. 2d at 408. Importantly, the purpose of the three-part test is to determine where finality yields to fairness based on a change in the law. There can, therefore, be no precise mathematical formula, and the prongs should not and cannot be mechanically applied. In fact, as this Court explained in adopting Witt, "Unfortunately, drawing or defining the line where finality gives way to fairness based on a change of law is no simple task." Witt, 387 So. 2d at 934. Likewise, no prong is necessarily the most significant factor. Instead, the prongs are intertwined and analyzed as part of a holistic review. Determining when finality of the judgment must yield to fundamental fairness is especially critical when addressing laws that govern the imposition of the ultimate penalty—death.

1. Purpose of the New Rule

The first factor under the Stovall/Linkletter test is the purpose to be served by the new rule. Witt, 387 So. 2d at 926. The purpose of the new rule announced in Hurst is to ensure that capital defendants' foundational right to a trial by jury—the only right protected in both the body of the United States Constitution and the Bill of Rights and then, independently, in the Florida Constitution—under article I,

section 22, of the Florida Constitution and the Sixth Amendment to the United States Constitution—is preserved within Florida's capital sentencing scheme. See Hurst, 202 So. 3d at 57.

The United States Supreme Court stated succinctly in Hurst v. Florida that "[t]he Sixth Amendment protects a defendant's right to an impartial jury." 136 S. Ct. at 624. Expounding on the importance of this constitutional right in Hurst, we explained:

> [T]he Supreme Court has made clear that individualized sentencing is required in which the discretion of the jury and the judge in imposing the death penalty will be narrowly channeled, and in which the circumstances of the offense, the character and record of the defendant, and any evidence of mitigation that may provide a basis for a sentence less than death must be a part of the sentencing decision.
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> The Supreme Court in Hurst [v. Florida] has now [also] made clear that the critical findings necessary for imposition of a sentence of death are the sole province of the jury. And because these findings occupy a position on par with elements of a greater offense, we conclude that all these findings necessary for the imposition of a sentence of death must be made by the jury—as are all elements—unanimously.

Hurst, 202 So. 3d at 57 (footnotes omitted).

Separate from the Federal Constitution, we explained in Hurst that "this Court, in interpreting the Florida Constitution and the rights afforded to persons within this State, may require more protection be afforded criminal defendants than that mandated by the federal Constitution." Id. Finding that such heightened protection was significantly appropriate in this context, we stated: "This is

especially true, we believe, in cases where, as here, Florida has a longstanding history requiring unanimous jury verdicts as to the elements of a crime." Id. Under Florida's independent constitutional right to a trial by jury, this Court concluded: "If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process." Id. at 60.

Thus, because Hurst v. Florida held our capital sentencing statute unconstitutional under the Sixth Amendment to the United States Constitution, and Hurst further emphasized the critical importance of a unanimous verdict within Florida's independent constitutional right to trial by jury under article I, section 22, of the Florida Constitution, the purpose of these holdings weighs heavily in favor of retroactive application.

2. Reliance on the Old Rule

The next factor under the Stovall/Linkletter test is the extent of reliance on the old rule—specifically, in this case, that the rights announced in Ring did not apply to Florida's death penalty sentencing statute. Witt, 387 So. 2d at 926. In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court, with nine separate opinions, found the "imposition and carrying out of the death penalty" in certain states to be unconstitutional based on the Eighth and Fourteenth

Amendments' requirement that the death penalty may not be imposed without adequate guidelines to ensure that defendants are not arbitrarily sentenced to death. Id. at 239. At the time of Furman, with the agreement of the State, all imposed death sentences in Florida were reduced to life. Donaldson v. Sack, 265 So. 2d 499, 505 (Fla. 1972).

Shortly thereafter, Florida revised its death penalty statute, the first in the nation to set forth aggravating factors that would render a defendant eligible for the death penalty. See Hurst, 202 So. 3d at 56. Upon review in State v. Dixon, 283 So. 2d 1, 11 (Fla. 1973), a majority of this Court concluded that the new statute was in conformance with the constitutional requirements of Furman. 283 So. 2d 1, 11 (Fla. 1973). Also in Dixon, this Court concluded that Furman did not render the actual death penalty unconstitutional and that the Florida Legislature, through the new statute, had appropriately "chosen to reserve [the] application [of death] to only the most aggravated and unmitigated of most serious crimes." Id. at 7.

The United States Supreme Court subsequently, in a series of three cases, held that Florida's post-Furman death penalty statute—where the trial judge played the critical, but not sole, role in determining the facts necessary to impose the death

penalty—did not violate the United States Constitution.[16] Therefore, from the time of the Legislature's revision of the death penalty in 1972 until Ring in 2002—a period of three decades—this Court and the State of Florida relied in good faith upon United States Supreme Court precedent for the proposition that Florida's capital sentencing scheme was constitutional.[17]

It was not until Ring that the United States Supreme Court applied its reasoning from Apprendi v. New Jersey, 530 U.S. 466 (2000), holding that a jury must find every fact necessary to increase the maximum punishment, to capital sentencing. Ring, 536 U.S. at 589. In the words of Justice Scalia, Ring brought about "new wisdom":[18]

> The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death.

Id. at 609.

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16. See Walton v. Arizona, 497 U.S. 639, 648 (1990) (reaffirming the validity of Florida's death penalty); Hildwin v. Florida, 490 U.S. 638, 640-41 (1989); Spaziano v. Florida, 468 U.S. 447, 449 (1984).

17. Further, while the reasoning in Apprendi v. New Jersey, 530 U.S. 466, 496 (2000), appeared to challenge the prior reasoning of Walton and similar cases, the Supreme Court expressly excluded death penalty cases from its holding in Apprendi. See id. at 497.

18. Ring, 536 U.S. at 611 (Scalia, J., concurring).

Ring specifically overruled Walton v. Arizona, 497 U.S. 639 (1990), but failed to address the constitutionality of Florida's capital sentencing scheme by not discussing Hildwin or Spaziano, thereby leaving those decisions intact to support an argument that Florida's capital sentencing scheme remained valid. Ring, 536 U.S. at 603. Thus, this Court continued to rely in good faith on precedent supporting the validity of Florida's capital sentencing scheme, despite doubt about its constitutionality.[19] The plurality in Bottoson v. Moore concluded that it was

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19. The several individual decisions in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), reflect this doubt following Ring. Chief Justice Anstead explained the history of unanimity in jury verdicts in Florida and his concerns about the continued constitutionality of Florida's statute:

> Florida has long required unanimous verdicts in all criminal cases including capital cases. Florida Rule of Criminal Procedure 3.440 states that no jury verdict may be rendered unless all jurors agree. Furthermore, in Jones v. State, 92 So. 2d 261 (Fla. 1956), this Court held that any interference with the right to a unanimous verdict denies the defendant a fair trial. However, in Florida, the jury's advisory recommendation in a capital case is not statutorily required to be by unanimous vote. The jury's advisory recommendation may be by mere majority vote. This would appear to constitute another visible constitutional flaw in Florida's scheme when the Sixth Amendment right to a jury trial is applied as it was in Apprendi and Ring.

Bottoson, 833 So. 2d at 710 (Anstead, C.J., concurring in result only).

Justice Shaw also found that jury unanimity was required:

> It is settled in Florida that the State in a criminal prosecution has the burden of proving each element of the charged offense beyond a reasonable doubt. Before jurors can return a guilty verdict, they must unanimously agree that each element of the charged offense has

been established beyond a reasonable doubt. This requirement of unanimity has been an inviolate tenet of Florida jurisprudence since the State was created.

Id. at 714 (Shaw, J., concurring in result only) (footnotes omitted).

Justice Pariente expressed doubt of the continued validity of Florida's capital sentencing scheme after Ring, warning that the Court "must confront the fact that the implications of Ring are inescapable." Id. at 723 (Pariente, J., concurring in result only). She explained:

> Just like the Arizona sentencing scheme at issue in Ring, Florida's sentencing scheme requires additional findings by the judge before the death penalty can be imposed. . . .
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> The additional jury findings of aggravators before imposition of death are mandated not only by the plain language of the capital sentencing statute, but also by the Eighth Amendment to the United States Constitution as interpreted in Furman, and its progeny. Indeed, as recognized by Justice Scalia in his concurring opinion in Ring, "the only reason the fact [the aggravating factor] is essential is that [the United States Supreme] Court has . . . said that the Constitution requires state law to impose such 'aggravating factors.' " 536 U.S. at —— . . . (Scalia, J., concurring). Thus, while the Eighth Amendment requires the findings of aggravating factors in an effort to ensure against the death penalty being imposed arbitrarily, the Sixth Amendment as interpreted by Ring requires that those aggravating factors be found by a jury. As Justice Scalia explained in Ring, the bottom line is that "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by a jury." Id. (emphasis supplied).

Id. at 721-22.

Justice Lewis explained:

within the purview of the United States Supreme Court to overrule Hildwin and Spaziano to the extent they upheld Florida's death penalty statute from Sixth Amendment attacks.[20] Nevertheless, the Florida Legislature did not revise our capital sentencing statute until 2016, after the United States Supreme Court decided Hurst v. Florida. While inaction was clearly within the Legislature's prerogative, it is now for this Court to determine whether to deny relief to those defendants who were sentenced to death under an invalid statute based solely on the United States Supreme Court's delay in overruling Hildwin and Spaziano.

Because Florida's capital sentencing statute has essentially been unconstitutional since Ring in 2002, fairness strongly favors applying Hurst,

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> Thus, our high Court's conclusions in Ring should be viewed through a prism which casts its primary focus upon the actual procedures mandated by the decision. Essentially, this Court cannot focus upon what the U.S. Supreme Court did not say, but must center upon the practical effects of the Ring Court's actual determination. In my view, the absence of a discussion in Ring of Florida's procedures cannot be relied on as solid evidence that the decision has virtually no effect in Florida, a conclusion with which I cannot concur.

Id. at 727 (Lewis, J., concurring in result only).

20. See id. at 695 ("[T]he United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, and although Bottoson contends that there now are areas of 'irreconcilable conflict' in that precedent, the Court in Ring did not address this issue.") (plurality opinion) (footnotes omitted).

retroactively to that time. The "extent of reliance" prong is not a question of whether this Court properly or in good faith relied on United States Supreme Court precedent, but how the precedent changed the calculus of the constitutionality of Florida's death penalty scheme. In Hurst, we explained how the Hurst v. Florida opinion focused on the intricacies of Florida's prior, invalid statute before determining that Ring applied equally in Florida and Arizona:

> Before reaching its conclusion . . . that Florida's capital sentencing scheme violated th[e] guarantee of the right to a jury trial on all elements of the crime of capital murder, the Supreme Court evaluated Florida's existing capital sentencing scheme by first noting that, pursuant to section 775.082(1), Florida Statutes (2012), the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment. [Hurst v. Florida, 136 S. Ct.] at 620. . . . The Supreme Court analyzed Florida's scheme as one in which a jury renders only an advisory verdict without specifying the factual basis of its recommendation, while the judge evaluates the evidence of aggravation and mitigation and makes the ultimate sentencing determinations. Id. at 620. . . .
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> . . . The Supreme Court also distinguished Arizona law and explained that Florida law, similar to the law invalidated in Ring, did not require the jury to make the critical findings necessary to impose death, but required the judge to make these findings—rejecting as significant the distinction that Florida provides for a jury recommendation as to sentence, whereas Arizona law does not. Id. at 622. "A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." Id. (quoting Walton, 497 U.S. at 648). The Court explained that in Florida, the trial judge has no jury findings on which to rely. Id. (citing Steele, 921 So. 2d at 546).

Hurst, 202 So. 3d at 51.

We now know after Hurst v. Florida that Florida's capital sentencing statute was unconstitutional from the time that the United States Supreme Court decided Ring.[21] From Hurst, it is undeniable that Hurst v. Florida changed the calculus of the constitutionality of capital sentencing in this State. Thus, this factor weighs in favor of granting retroactive relief to the point of the issuance of Ring.

3. Effect on the Administration of Justice

The last factor of the Stovall/Linkletter test requires this Court to determine the effect that retroactive application would have on the administration of justice. As the Court stated in Ferguson v. State, like the other prongs, "[t]his [prong] requires a balancing of the justice system's goals of fairness and finality." 789 So. 2d 306, 312 (Fla. 2001). In this analysis, the Court reviews whether retroactive application would "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." Witt, 387 So. 2d at 929-30.

Holding Hurst retroactive to when the United States Supreme Court decided Ring would not destroy the stability of the law, nor would it render punishments uncertain and ineffectual. As we determined in Hurst, the death penalty is still a constitutional punishment, and no defendant will receive a new guilt phase or be

21. Hurst v. Florida, 136 S. Ct. at 621-22 ("The analysis [of] the Ring Court . . . applies equally to Florida's [sentencing scheme].").

released from prison while a new penalty phase takes place. 202 So. 3d at 65 ("After Hurst v. Florida, the death penalty still remains the ultimate punishment in Florida, although the Supreme Court has now required that all the critical findings necessary for imposition of the death penalty be transferred to the jury.").

Of course, any decision to give retroactive effect to a newly announced rule of law will have some impact on the administration of justice. That is not the inquiry. Rather, the inquiry is whether holding a decision retroactive would have the effect of burdening "the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." Witt, 387 So. 2d at 929-30. By embracing this principle as an analytical lynchpin, together with the other two prongs of the three-part test, the Court was attempting to distinguish between "jurisprudential upheavals" and "evolutionary refinements,"[22] the former being those that justify retroactive application and the latter being those that do not.[23]

Thus, we must decide whether interests of fundamental fairness justify the impact on the administration of justice that would result from holding Hurst

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22. State v. Barnum, 921 So. 2d 513, 526 (Fla. 2005); Bunkley v. State, 833 So. 2d 739, 745 (Fla. 2002).

23. See e.g., Barnum, 921 So. 2d at 526 (denying retroactive application of Thompson v. State, 695 So. 2d 691 (Fla. 1997), because it was "a conventional, nonconstitutional concept"); Glenn v. State, 558 So. 2d 4, 8 (Fla. 1990) (denying retroactive relief of Carawan v. State, 515 So. 2d 161, 171 (Fla. 1987), because applying it retroactively would not "cure any individual injustice or unfairness").

retroactive. As we have stated, capital punishment "connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death." Witt, 387 So. 2d at 926. In this case, where the rule announced is of such fundamental importance, the interests of fairness and "cur[ing] individual injustice" compel retroactive application of Hurst despite the impact it will have on the administration of justice. State v. Glenn, 558 So. 2d 4, 8 (Fla. 1990).

We contrast our decision to hold Hurst retroactive with our decision in Chandler v. Crosby, 916 So. 2d 728 (2005), not to hold the United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004), retroactive. In the Witt analysis in Chandler, as to the impact on the administration of justice, we explained:

> [I]f Crawford applied retroactively, the administration of justice would be greatly affected. Retroactive application could require courts to "overturn convictions" and "delve into stale records to" determine whether defendants had a chance to cross-examine unavailable witnesses. Callaway, 658 So. 2d at 987. When new trials were determined necessary to correct errors under Crawford, the justice system would then have to deal with a multitude of problems, including lost evidence and unavailable witnesses. See Windom, 886 So. 2d at 952 (Cantero, J., concurring) (noting similar problems would arise should Ring apply retroactively). Such retroactive application would "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." Witt, 387 So. 2d at 929-30.

Chandler, 916 So. 2d at 730-31.

Chandler was not limited to death penalty cases but, instead, would have affected all criminal cases. This effect could have had a major impact on the administration of justice and the finality of all criminal convictions. Thus, it is clear, in that situation, fairness did not compel us to disturb the finality of fully adjudicated cases. See Witt, 38 So. 2d at 924-25.

By contrast, holding Hurst retroactive would only affect the sentences of capital defendants. Further, in addition to the fact that convictions will not be disturbed, not every defendant to whom Hurst applies will ultimately receive relief. As we determined in Hurst, each error should be reviewed under a harmless error analysis to individually determine whether each defendant will receive a new penalty phase. Hurst, 202 So. 3d at 67-68; James, 615 So. 2d at 669. Additionally, we have declined to find Hurst applicable to those cases where the defendant waived his/her right to trial by jury. See Mullens v. State, 197 So. 3d 16 (Fla.), pet. for cert. filed, No. 16-6773 (Nov. 4, 2016).

Finally, we again emphasize that this decision will only impact the sentence of death, not the conviction. The difference is not guilt or innocence but, instead, life or death.

4. Conclusion of Retroactivity Analysis

After weighing all of the considerations essential to a faithful Witt analysis, we conclude that Hurst should be applied retroactively to Mosley. The purpose of

the holdings in Hurst v. Florida and Hurst is to prevent a violation of the fundamental and critically important right to a trial by jury. See Hurst, 202 So. 3d at 50-51, 55.

Applying Hurst retroactively to Mosley, in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness. And it is fundamental fairness that underlies the reasons for retroactivity of certain constitutionally important decisions, especially those involving the death penalty. Indeed, as we stated in Witt:

> [S]ociety recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."

387 So. 2d at 925 (citations omitted) (emphasis added).

Defendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after Ring should not suffer due to the United States Supreme Court's fourteen-year delay in applying Ring to Florida. In other words, defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by Ring should not be penalized for the United States Supreme Court's delay in explicitly making this determination. Considerations of fairness and uniformity make it very "difficult to justify

depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." Witt, 387 So. 2d at 925. Thus, Mosley, whose sentence was final in 2009, falls into the category of defendants who should receive the benefit of Hurst.

C. Harmless Error

Having concluded that Hurst applies retroactively to Mosley, this Court must next examine whether any Hurst error was harmless beyond a reasonable doubt. On remand from the United States Supreme Court, in Hurst, we explained the appropriate standard for harmless error review:

> Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., Zack v. State, 753 So. 2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," [State v.] DiGuilio, 491 So. 2d [1129,] 1137 [Fla. 1986], and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a Hurst error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate:
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> > The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.

DiGuilio, 491 So. 2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." Id.

Hurst, 202 So. 3d at 68 (alteration in original). As applied to the right to a jury trial with regard to the facts necessary to impose the death penalty, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found all facts necessary to impose death and that death was the appropriate sentence.

Following Mosley's penalty phase, the jury recommended a life sentence for the murder of Lynda Wilkes, and by a vote of eight to four, recommended a sentence of death for the murder of Jay-Quan Mosley. The court held a Spencer hearing and, after independently weighing the aggravating factors and mitigating circumstances, agreed with the jury's recommendation. In imposing the death sentence for the murder of Jay-Quan, the trial court found four aggravators applied, each of which was given great weight: (1) the victim of the capital felony was under twelve years of age; (2) the murder was cold, calculated, and premeditated (CCP); (3) the murder was committed for pecuniary gain; and (4) the defendant had been previously convicted of a capital felony (the contemporaneous murder of Wilkes). Mosley, 46 So. 3d at 517 n.6. The trial court determined twenty-nine nonstatutory mitigating factors[24] applied, but found that they were outweighed by

24. Supra note 2 (listing the twenty-nine mitigators).

the significant aggravation and, thus, sentenced Mosley to death for the murder of his son.

In light of the disparate jury recommendations of life for the murder of Wilkes and the eight-to-four recommendation of death for the murder of Jay-Quan and the twenty-nine mitigating circumstances, the State has failed to show beyond a reasonable doubt that the Hurst error was harmless. The trial court even recognized as much, stating in the sentencing order:

> [I]f there were ever a case which supports the proposition that Florida juries be asked to specify which aggravating factors they find from the evidence, this is the one. Had that been required as a matter of law, this Court would have had a much better understanding of the manner in which the jury reached its diverse recommendations.

Without written findings, any attempt to discern what mitigation the four jurors who recommended against death relied on, what aggravating factors, if any, were found unanimously to be sufficient to impose a sentence of death, and why the jury gave such disparate recommendations in this case would be mere speculation. Thus, we cannot conclude that the Hurst error in Mosley's sentencing was harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, we affirm the postconviction court's denial of relief, and we also deny the claims in Mosley's petition for a writ of habeas corpus with

the exception of his claim for relief under Hurst v. Florida. Accordingly, we vacate the death sentence and remand this case for a new penalty phase.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
CANADY, J., concurs in part and dissents in part with an opinion, in which POLSTON, J., concurs.
PERRY, J., concurs in part and dissents in part with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

CANADY, J., concurring in part and dissenting in part.

I agree with the decision to affirm the denial of relief on Mosley's guilt phase claims. But I strongly disagree with the decision to vacate Mosley's death sentence and to remand for a new penalty phase. Based on the jury's verdict establishing the existence of an aggravator, I would conclude that there was no Hurst v. Florida, 136 S. Ct. 616 (2016), violation. I would also conclude that in any event Hurst v. Florida should not be given retroactive application under the analysis required by Witt v. State, 387 So. 2d 922 (1980). The denial of retroactive application ineluctably follows from this Court's decision in Johnson v. State, 904 So. 2d 400, 412 (Fla. 2005), "hold[ing] that Ring[v. Arizona, 536 U.S. 584 (2002),] does not apply retroactively in Florida." I would also reject Mosley's

other penalty phase claims. The postconviction court's denial of all relief should be affirmed.

I.

I adhere to my view that Hurst v. Florida—like Ring—only requires that the jury find the existence of an aggravator that renders a defendant eligible to be considered for death. See Hurst v. State, 202 So. 3d 40 (Fla. 2016) (Canady, J., dissenting). The majority recognizes that its decision regarding retroactivity involves "determin[ing] whether to deny relief to those defendants who were sentenced to death under an invalid statute based solely on the United States Supreme Court's delay in overruling Hildwin[v. Florida, 490 U.S. 638 (1989) (per curiam),] and Spaziano[v. Florida, 468 U.S. 447 (1984)]." Majority op. at 55. But the majority continues to ignore the limit articulated by the Supreme Court on its overruling of Hildwin and Spaziano. Hurst v. Florida's overruling of Spaziano and Hildwin expressly identifies the absence of a jury finding of an aggravator as the constitutional flaw in Florida's death penalty statute: "The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." Hurst v. Florida, 136 S. Ct. at 624. The majority provides no explanation of how the expansive holding of Hurst v. State can be reconciled with the narrow focus of Hurst v. Florida. The majority fails to offer such an

explanation because no such explanation is possible. The majority's "opinion in Hurst[v. State], interpreting the meaning of Hurst v. Florida as applied to Florida's capital sentencing scheme," majority op. at 41, thus offers an "interpretation" that resolutely ignores the core holding of Hurst v. Florida.

II.

In its analysis of retroactivity, the majority gives a wave-of-the-hand dismissal to the carefully reasoned decision in Johnson.[25] Our decision in Johnson followed the trajectory established by our earlier decision in Hughes v. State, 901 So. 2d 837 (Fla. 2005), which applied a Witt analysis to conclude that the decision in Apprendi[26]—which unquestionably spawned both Ring and Hurst v. Florida—should not be applied retroactively. The majority acknowledges that "in holding our statute unconstitutional, the United States Supreme Court applied the exact reasoning of Ring to Florida's death penalty sentencing scheme." Majority op. at

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25. Prior to Johnson, various justices had expressed the view that Ring should not be given retroactive application. See, e.g., Monlyn v. State, 894 So. 2d 832, 841 (Fla. 2004) (Pariente, C.J., specially concurring) ("Applying Witt's retroactivity test . . . I conclude that Ring is not among the 'fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding.' Witt, 387 So. 2d at 929. As a decision that bears only on the procedure in which eligibility for the death penalty is determined without altering the burden of proof or otherwise increasing the accuracy or fairness of the proceedings, Ring is an evolutionary refinement in capital jurisprudence." (citing Schriro v. Summerlin, 542 U.S. 348 (2004))).

26. Apprendi v. New Jersey, 530 U.S. 466 (2000).

39. But the majority also asserts without explanation that in Johnson "we did not properly analyze the purpose of the new rule in Ring, which was to protect the fundamental right to a jury in determining each element of an offense." Majority op. at 46 (quoting Asay v. State, Nos. SC16-223, SC16-102, & SC16-628 (slip op. issued Fla. Dec. 22, 2016) (plurality opinion)). The detailed reasoning of Johnson concerning "the purpose of the new rule" is rejected without any discussion of that reasoning. Indeed, the majority refuses to address any of the reasoning of Johnson—which held that Ring was an evolutionary refinement in the law and that all three prongs of the Stovall/Linkletter[27] three-part test weighed heavily against retroactive application of Ring. This is not the way any court should treat a carefully reasoned precedent.

Similarly, the majority omits any mention of Witt's undergirding principle—which informed our decisions in Johnson and Hughes—that retroactive application is unwarranted "in the absence of fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding." Witt, 387 So. 2d at 929. In Hughes, focusing on this central element of the Witt framework, we explained the nature of the new rule announced in Apprendi:

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27. Stovall v. Denno, 388 U.S. 293 (1967); Linkletter v. Walker, 381 U.S. 618 (1965).

> Apprendi shifted certain fact-finding from judge to jury and "clarified and extended" the right to a jury trial to require the State to prove convictions beyond a reasonable doubt by applying the standard to certain factors affecting sentencing under certain conditions. United States v. Mora, 293 F.3d 1213, 1219 (10th Cir.), cert. denied, 537 U.S. 961 (2002). But Apprendi does not impugn the "very integrity of the fact-finding process" or present "the clear danger of convicting the innocent." Johnson v. New Jersey, 384 U.S. 719, 728 (1966) (quoting Linkletter, 381 U.S. at 639).

Hughes, 901 So. 2d at 844. In support of our conclusion that Ring should not be given retroactive application, we reached a similar conclusion in Johnson concerning the nature of the rule announced in Ring. See Johnson, 904 So. 2d at 410.

The majority simply fails to consider whether the rule announced in Hurst v. Florida "cast[s] serious doubt on the veracity or integrity," Witt, 387 So. 2d at 929, of the many penalty phase proceedings that the majority now sweeps aside. The majority opinion will be searched in vain for any mention—much less an analysis—of the implications of the new rule for the "veracity or integrity" of those proceedings, which is an integral part of the Witt framework, and figures prominently in the evaluation of the purpose of a new rule under the first prong of our Witt analysis. Id.

Similarly, our retroactivity analysis here should be informed by Johnson's categorization of Ring as an "evolutionary refinement" and thus a new rule that should not be given retroactive application under the Witt framework. Johnson,

904 So. 2d at 405. In Witt we held that "evolutionary refinements in the criminal law" including new rules "affording new or different standards for . . . procedural fairness . . . do not compel an abridgement of the finality of judgments." Witt, 387 So. 2d at 929. In Hughes, we recognized that Apprendi had "announced an emerging right of procedural fairness that does not compel the disruption of final judgments." Hughes, 901 So. 2d at 844. And in Johnson we stated: "Ring was not a sudden or unforeseeable development in constitutional law; rather, it was 'an evolutionary refinement in capital jurisprudence.' " Johnson, 904 So. 2d at 405 (quoting Monlyn v. State, 894 So. 2d 832, 841 (Fla. 2004) (Pariente, C.J., specially concurring)).

If Ring—which involved an application of the logic of Apprendi notwithstanding Apprendi's disavowal of any application to capital sentencing—was an evolutionary refinement, it necessarily follows that Ring's application in Hurst v. Florida, which according to the majority "applied the exact reasoning of Ring," majority op. at 39, also is an evolutionary refinement. The majority, of course, omits any mention of our conclusion in Johnson that Ring was an evolutionary refinement, since the majority gives no attention to the analysis contained in Johnson.

In Johnson, we highlighted Witt's recognition that "once a conviction has been upheld on appeal, the State acquires a strong interest in finality." Johnson,

904 So. 2d at 407. As we stated in Witt: "The importance of finality in any justice system, including the criminal justice system, cannot be understated." Witt, 387 So. 2d at 925. But the majority here does not acknowledge the State's strong interest in finality—an interest that is paralleled by the interest of victims' families—in the postconviction context. The majority's conclusory deliverances on the three prongs of the Stovall/Linkletter test adopted in Witt give no consideration to the circumstances that we held in Johnson strongly weighed against thwarting the State's interest in the finality of death sentences.

Admittedly, the scope of the holding in Hurst v. Florida goes beyond anything contemplated by the Johnson Court when it determined that Ring should not be applied retroactively. In Johnson we observed that Ring claims had "[u]sually . . . failed because the sentence was supported by an aggravating factor found by a jury beyond a reasonable doubt, such as a prior violent felony conviction or a contemporaneous enumerated felony conviction" and stated that "[w]e could easily dispose of Johnson's Ring claim in the same way because his death sentence was supported by an aggravating factor found by a jury beyond a reasonable doubt—namely, his prior convictions of two violent felonies." Johnson, 904 So. 2d at 406. As I have explained, that basis for resolving Ring claims remains a basis for resolving—that is, rejecting—Hurst v. Florida claims. But even under the broader "interpretation" of Hurst v. Florida adopted by the

majority, Johnson's analysis of the three-part test still identifies the considerations that are relevant to determining whether retroactive effect should be given to a new rule defining the way the Sixth Amendment must be applied to penalty phase proceedings. Those considerations weigh decisively against retroactive application.

A.

The first prong of the test we employed in Witt focuses on "the purpose to be served" by the new rule. Johnson, 904 So. 2d at 409 (citing Witt, 387 So. 2d at 926). In Johnson, we analyzed this factor based on elements of the reasoning of the United States Supreme Court in Schriro v. Summerlin, 542 U.S. 348, 358 (2004), which held for purposes of federal law that "Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review." We specifically emphasized the "Supreme Court's characterization of the purpose of Ring," and stated that "[t]o the extent that the purpose of Ring is a factor in our own retroactivity test, a recent discussion of that purpose by the very Court that decided Ring is obviously worthy of our attention and deference." Johnson, 904 So. 2d at 410 n.4. We pointed out that "[t]he Supreme Court cautioned in Ring that its determination of who decides whether a defendant is eligible for the death penalty 'does not turn on the relative rationality, fairness, or efficiency of potential factfinders,' " id. at 409-10 (quoting 536 U.S. at 607), and

that "[t]he Court subsequently stated in Summerlin that 'for every argument why juries are more accurate factfinders, there is another why they are less accurate,' " id. at 410 (quoting 124 S. Ct. at 2525).

Based on the reasoning of Summerlin, we went on to state that "[t]he purpose of the new rule in Ring is to conform criminal procedure to the Sixth Amendment's jury trial guarantee, and not to enhance the fairness or efficiency of death penalty procedures." Id. We further relied on our decision "[i]n Williams v. State, 421 So. 2d 512, 515 (Fla. 1982), [in which] we refused to apply a rule retroactively in part because it 'did not involve an attack on the fairness of the trial.' " Id. We also invoked Witt's statement that retroactive application is inappropriate "in the absence of fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding," id. (quoting Witt, 387 So. 2d at 929), and determined that "Ring casts no such doubt," id. We held that "[t]he first Witt factor therefore disfavors retroactive application." Id.

In Summerlin, the Supreme Court also relied on the pre-Teague[28] retroactivity analysis in DeStefano v. Woods, 392 U.S. 631 (1968) (per curiam).

28. Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion). I agree with Justice Polston that the framework established in Teague is more workable than Witt. See Asay v. State, Nos. SC16-223, SC16-102, & SC16-628 (slip op. issued Fla. Dec. 22, 2016) (Polston, J., concurring); see also Johnson v. State, 904 So. 2d 400, 413 (Fla. 2005) (Cantero, J., concurring) (explaining that this Court should

Applying a test identical to the Witt three-part test, DeStefano denied retroactive effect to Duncan v. Louisiana, 391 U.S. 145 (1968), which held that the Sixth Amendment's jury-trial guarantee was applicable to the States. Summerlin explained the reasoning of DeStefano concerning the purpose served by Duncan:

> We noted [in DeStefano] that, although "the right to jury trial generally tends to prevent arbitrariness and repression[,] . . . '[w]e would not assert . . . that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.' " 392 U.S., at 633-634 (quoting Duncan, supra, at 158). We concluded that "[t]he values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." 392 U.S., at 634.

Summerlin, 542 U.S. at 357 (second, third, and fourth alterations in original). Summerlin concluded that "[i]f under DeStefano a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how" the Sixth Amendment violation condemned in Ring could result in such "impermissibly inaccurate" proceedings. Id.; see also Washington v. State, 907 So. 2d 512, 516 (Fla. 2005) (Lewis, J., concurring) ("[T]he purpose served by a new rule of law is a key factor in determining retroactivity in Florida, and the United States Supreme Court in DeStefano held that the purpose served by the jury-trial guarantee ('to prevent

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apply the Teague standard when determining the retroactivity of United States Supreme Court decisions). But here, analysis under Witt is sufficient to resolve the retroactivity issue.

arbitrariness and repression') 'favor[s] only prospective application' of that guarantee to the states. Therefore, I cannot logically say that the purpose served by the jury fact-finding requirement of Apprendi and Ring favors a different treatment in this regard." (second alteration in original) (footnotes omitted)).

The majority here quietly brushes all this aside—with no explanation of why the reasoning is either wrong or inapplicable—and delivers an analysis under which any new rule regarding the scope of the Sixth Amendment may be deemed to have a purpose that supports retroactive application.

B.

The second prong addresses "the extent of reliance on the prior rule." Johnson, 904 So. 2d at 409 (citing Witt, 387 So. 2d at 926). In Johnson, we concluded that this factor "[l]ike the first factor . . . weighs heavily against retroactive application of Ring" because "Florida has relied to an immeasurably large extent on its capital sentencing scheme." Id. at 410. In Johnson we also emphasized that the State's reliance on the precedents that upheld the validity of Florida's death penalty statute was entirely reasonable: "Based on all of the information available at the time of Ring, Florida had every reason to believe that its capital sentencing scheme was constitutionally sound and worthy of reliance." Id. at 411. The State continued to reasonably rely to "an immeasurably large extent," id. at 410, on the undisturbed holdings of Hildwin and Spaziano

throughout the entire fourteen-year period between the decision in Ring and the decision in Hurst v. Florida—a period in which both this Court and the Supreme Court time after time rejected claims challenging Florida's death penalty statute under Ring.

The majority does not question the extent of the State's reliance on Hildwin and Spaziano after Ring issued. Nor does the majority question the good faith of the State—or this Court—in its post-Ring reliance on those precedents. Instead, the majority changes the subject. The majority states that "[w]e now know after Hurst v. Florida that Florida's capital sentencing statute was unconstitutional from the time that the United States Supreme Court decided Ring" and that "it is undeniable that Hurst v. Florida changed the calculus of the constitutionality of capital sentencing in this State." Majority op. at 57. From this, the majority concludes that the extent-of-reliance-on-the-prior-rule factor "weighs in favor of granting retroactive relief to the point of the issuance of Ring." Majority op. at 57. But this is a non sequitur. The fact that "Hurst v. Florida changed the calculus of the constitutionality of capital sentencing," majority op. at 57, in Florida has no bearing on the extent of the State's reliance on the old rule. Any case announcing a new rule necessarily "change[s] the calculus," majority op. at 57, of the applicable law. By relying on this truism as the basis for its analysis, the majority renders this prong of the Witt test meaningless.

C.

The third prong addresses "the effect that retroactive application of the new rule would have on the administration of justice." Johnson, 904 So. 2d at 409 (citing Witt, 387 So. 2d at 926). The majority errs in concluding that the "analytical lynchpin" of this factor "is whether holding a decision retroactive would have the effect of burdening 'the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.' " Majority op. at 58 (quoting Witt, 387 So. 2d at 929-30). The majority suggests that this supposed "analytical lynchpin" is used "to distinguish between 'jurisprudential upheavals' and 'evolutionary refinements.' " Majority op. at 58 (quoting Witt, 387 So. 2d at 929). From this the majority fashions a rule that the third prong will weigh against retroactive application only if the effect of the new rule will burden the administration of justice "beyond any tolerable limit." Majority op. at 58 (quoting Witt, 387 So. 2d at 930). But this twists the reasoning of Witt beyond recognition.

The point Witt actually makes is that frequently occurring "evolutionary refinements in the criminal law"—as opposed to rare "jurisprudential upheavals" like Gideon v. Wainwright[29]—should not be given retroactive effect because doing

29. Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that each state must provide counsel to every indigent defendant charged with a felony at all critical stages of the proceeding).

so would strain the system of justice "beyond any tolerable limit." Witt, 387 So. 2d at 929-30. From this sensible point concerning the drastic impact of giving retroactive application to all evolutionary refinements—which by their nature occur with great frequency—the majority makes an unreasoned analytical hop to the wholly unwarranted conclusion that concerns about avoiding undue strains on the administration of justice come into play only when retroactive application will strain the system of justice "beyond any tolerable limit." Majority op. at 58 (quoting Witt, 387 So. 2d at 930). In an exercise of fallacious reasoning, the majority thus turns an impact that is sufficient to count against retroactive application into an impact that is necessary to count against retroactive application. But even under the test fallaciously set up by the majority, the strain on the system of justice inflicted by giving retroactive effect to the majority's misinterpretation of Hurst v. Florida is "beyond any tolerable limit." Witt, 387 So. 2d at 930.

In Johnson, we concluded that applying "Ring retroactively in Florida . . . would consume immense judicial resources without any corresponding benefit to the accuracy or reliability of penalty phase proceedings." Johnson, 904 So. 2d at 412. The same conclusion applies concerning retroactive application of Hurst v. Florida. While the system is processing new death cases, the system will also be burdened with new penalty phase proceedings for the vast majority of the death cases that became final after Ring issued in 2002. The difficulties involved in

conducting new penalty phase proceedings for such a large number of cases involving murders committed over such an extended period of time truly beggars description. The impact on the system of justice—courts, prosecutors, and public defenders—will be enormous. Contrary to the majority's suggestion, that impact is not rendered insignificant by the fact that giving full retroactivity would have a greater impact. This factor—as in Johnson—weighs strongly against retroactive application.

III.

I would also reject the majority's reliance on James v. State, 615 So. 2d 668 (Fla. 1993). First, James cannot be reconciled with the balancing process required by Witt. The majority itself recognizes that "balancing fairness versus finality is the essence of a Witt retroactivity analysis." Majority op. at 46 (emphasis added). But in applying James, the majority forsakes the "essence" of retroactivity analysis by jettisoning any thought of the State's interest in finality—no matter how weighty that interest might be. Although James applied a new rule retroactively, it gave no consideration to the framework for retroactivity established in Witt. James said not one word about Witt. In ignoring Witt, James totally disregarded the State's strong interest in finality in the postconviction context. A decision that simply ignored existing precedent will rarely be entitled to any more weight as a precedent than the weight it afforded to the authority it ignored.

Second, the supposed rule of "fundamental unfairness" articulated in James is deeply problematic—if not entirely incoherent—when judged by its own terms. If counsel accepted our decisions at face value and relied on the United States Supreme Court's repeated rejection of Ring claims, the client loses under James. But if counsel raised claims that had been consistently rejected, the client wins. This hardly comports with the notion of fundamental fairness. The concept of fundamental error is based on the recognition that some matters are so important that it is fundamentally unfair for the client to suffer as a result of counsel's oversight. But James says that it is fundamentally fair for a defendant to suffer because counsel had insufficient foresight.

James should be abrogated.

IV.

The new rule articulated in Hurst v. Florida—which simply requires that the jury find an aggravator—is an evolutionary refinement in the law that does not cast doubt on the veracity or integrity of penalty phase proceedings resulting in death sentences that are now final. Nothing in our retroactivity jurisprudence warrants setting aside the State's weighty interest in the finality of these sentences. The State's reliance on the old rule—as articulated in Hildwin and Spaziano—was undeniably immense and entirely in good faith. Based on an indefensible misreading of Hurst v. Florida and a retroactivity analysis that leaves the Witt

framework in tatters, the majority unjustifiably plunges the administration of the death penalty in Florida into turmoil that will undoubtedly extend for years. I strongly dissent from this badly flawed decision.

POLSTON, J., concurs.

PERRY, J., concurring in part and dissenting in part.

I concur with the majority's decision to affirm the postconviction court's denial of relief as it pertains to Mosley's convictions and to deny all claims except Mosley's claim pursuant to Hurst v. Florida, 136 S. Ct. 616 (2016), in Mosley's petition for a writ of habeas corpus. Because I believe that Hurst v. Florida retroactively applies to all capital defendants irrespective of the date on which the defendant's death sentence became final, I likewise concur in the majority's determination that the United States Supreme Court's decision both applies to Mosley and requires that we vacate his death sentence. See Asay v. State, SC16-223, slip op. at 71 (Fla. Dec. 22, 2016) (Perry, J., dissenting).

However, because Florida law requires that Mosley be sentenced to life in prison as a consequence of his unconstitutional death sentence, I disagree with the majority's decision to remand for a new penalty phase proceeding instead of remanding for imposition of a life sentence. See § 775.082(2), Fla. Stat. (2016).

As I explained fully in Hurst v. State, 202 So. 3d 40, 75-76 (Fla. 2016) (Perry, J., concurring in part and dissenting in part), there is no compelling reason

for this Court not to apply the plain language of section 775.082(2), Florida Statutes. Because the majority of this Court has determined that Mosley's death sentence was unconstitutionally imposed, Mosley is entitled to the clear and unambiguous statutory remedy that the Legislature has specified:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

See § 775.082(2), Fla. Stat. (emphasis added). The plain language of the statute does not rely on a specific amendment to the United States Constitution, nor does it refer to a specific decision by this Court or the United States Supreme Court. Further, it does not contemplate that all forms of the death penalty in all cases must be found unconstitutional. Instead, the statute uses singular articles to describe the circumstances by which the statute is to be triggered. Indeed, the statute repeatedly references a singular defendant being brought before a court for sentencing to life imprisonment. I consequently cannot agree that the statute was intended as a fail-safe mechanism for when this Court or the United States Supreme Court declared that the death penalty was categorically unconstitutional. Cf. Hurst v. State, 202 So. 3d at 66.

Two Cases:

An Appeal from the Circuit Court in and for Duval County,
Michael R. Weatherby, Judge - Case No. 162004CF006675AXXXMA
And an Original Proceeding – Habeas Corpus

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for Appellant/Petitioner

Pamela Jo Bondi, Attorney General, and Carine L. Mitz, Assistant Attorney General, Tallahassee, Florida,

for Appellee/Respondent

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Joseph Edward Jordan, defendant in the above-captioned case by and through undersigned counsel files the following Notice of Supplemental Authority as it related to the issues raised pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016):

1) ***Donald Otis Williams v. State of Florida,* --- So. 3d ---. SC14-814 (Fla. January 19, 2017).**

The Defendant provides the foregoing recent Supreme Court of Florida opinion in ***Donald Otis Williams v. State of Florida,* --- So. 3d ---. SC14-814 (Fla. January 19, 2017)**, as authority in support of Claims One and Two of his Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851. *See Attachment I*. Mr. Williams's case was a post-*Ring*[1] sentencing with a special verdict form at penalty phase with a non-unanimous nine-to-three jury recommendation. He was granted a new penalty phase.

[1] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

2) ***William M. Kopsho v. State of Florida*, --- So. 3d ---. SC15-1256 (Fla. January 19, 2017); *William M. Kopsho v. Julie L. Jones, etc.*, --- So. 3d ---. SC15-1762 (Fla. January 19, 2017).**

The Defendant provides the foregoing recent Supreme Court of Florida opinion in ***William M. Kopsho v. State of Florida*, --- So. 3d ---. SC15-1256 (Fla. January 19, 2017); *William M. Kopsho v. Julie L. Jones, etc.*, --- So. 3d ---. SC15-1762 (Fla. January 19, 2017)**, as authority authority in support of Claims One and Two of his Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851. *See Attachment II*. Mr. Kospho's case was a post-*Ring*[2], non-unanimous ten-to-two jury recommendation. He was granted a new penalty phase.

Respectfully submitted,

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[2] *Ring v. Arizona*, 536 U.S. 584, 597.

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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Attachment I

Supreme Court of Florida

No. SC14-814

DONALD OTIS WILLIAMS,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[January 19, 2017]

PER CURIAM.

Donald Otis Williams, who was fifty years old at the time of the crime, was convicted of the 2010 kidnapping, robbery, and first-degree murder of eighty-one-year-old Janet Patrick. A jury recommended that Williams be sentenced to death for the murder by a vote of nine to three, and the trial court, after concluding that the aggravating factors outweighed the mitigating circumstances, imposed the death penalty. Williams appeals his convictions and death sentence. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const.

For the reasons set forth below, we affirm Williams' convictions but reverse the death sentence based on the United States Supreme Court's opinion in Hurst v.

Florida (Hurst v. Florida), 136 S. Ct. 616 (2016), and this Court's opinion on remand in Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016). Although a special verdict form was used in Williams' penalty phase, the jury did not unanimously conclude that there were sufficient aggravating factors to impose death or that the aggravation outweighed the mitigation—critical findings that must be made by a unanimous jury under the Sixth Amendment of the United States Constitution and article I, section 22, of the Florida Constitution. See Hurst, 202 So. 3d at 43-44. Further, the jury's recommendation for death by a vote of nine to three in this case does not satisfy the constitutional requirement explained in Hurst that the jury's final sentencing recommendation be unanimous. Id. Thus, we conclude that the Hurst error in Williams' sentencing was not harmless beyond a reasonable doubt. See id. at 66-69. Accordingly, we reverse Williams' sentence of death and remand for a new penalty phase.

FACTS AND PROCEDURAL HISTORY

The Guilt Phase

The victim, Janet Patrick, was last seen alive on October 18, 2010, after shopping for groceries at Publix near her home in Lake County, Florida. The defendant, Donald Otis Williams, through both security video and eyewitness testimony, was identified as accompanying her at Publix and getting into the passenger seat of her vehicle, a white Chevrolet Impala. Multiple witnesses

testified that they later saw Williams in a white Chevrolet similar to the one owned by the victim. One of the witnesses, an acquaintance of Williams, testified that Williams borrowed his shovel in the days following the victim's disappearance, and never returned it. On October 23, a law enforcement officer found Williams in Polk County, Florida sitting in the victim's car with her credit cards in his pocket.

While in police custody, Williams gave interviews to the media, in which he admitted to being with the victim at Publix but denied harming her. He told the press that he and the victim were abducted by an unidentified assailant. Williams claimed that during the abduction, both he and the victim were in the trunk and prayed together, and the victim told Williams that she was afraid something "too personal" for Williams to discuss with the press was going to happen to her. According to Williams, the assailant beat the victim and eventually stopped the car somewhere in Polk County, where he ordered Williams to put the victim on the ground. Williams claimed that he was then able to escape in the victim's car.

Law enforcement officers investigated Williams' story about an assailant but were unable to corroborate it. Witnesses who interacted with Williams in the days following the victim's disappearance testified that there was no indication that he had been abducted. Williams eventually repudiated the story. The day after Williams' press interviews, law enforcement found the victim's nude, partially

skeletonized remains in Polk County beneath two tires in a wooded area a mile and a half from Williams' former residence, where he lived from 1991 to 1996.

Crime scene investigators documented and processed the scene where the body was found. They found the victim's grocery shopping list next to her remains. There were drag marks that lined up to where the body was found. Officials did not find any jewelry on or near the body or inside the car, nor did they find the victim's wallet or purse. The body itself was unclothed, with the exception of a pair of socks and a medical alert necklace, and severely decomposed.

The medical examiner, Dr. Barbara Wolf, performed the autopsy and reviewed the victim's medical records, photos from the crime scene, Lake County Sheriff's Office reports, laboratory reports, and interviews that Williams gave to the media. Because of the condition of the victim's body when it was found, Dr. Wolf testified that the cause of death could not be determined, but ruled out accidental death and opined that the manner of death was homicide. Carlton Jane Beck Findley, an expert in forensic entomology, determined that the victim most likely died between sunrise on October 19, 2010, and sunset on October 20, 2010. Katie Skorpinski, an expert in forensic anthropology, examined the remains at the C.A. Pound Human Identification Lab at the University of Florida and found that

the body had no fractures from around the time of death, no signs of thermal damage, and no other perimortem damage.

Crime scene investigators processed the victim's automobile. Testifying at trial, they explained the various items that were recovered from the vehicle. In the trunk, they found two separate pieces of trunk carpeting, the spare tire cover from beneath the trunk carpeting, a spare tire locking device, and a piece of plastic irrigation tubing. In the passenger compartment, they found another piece of plastic irrigation tubing on the front passenger floorboard, a towel on the dashboard, one pair of green and white shorts on the backseat, two pairs of underwear briefs—one inside of the other—on the backseat, one pair of jeans on the floor in front of the driver's seat, a walking cane, and various other items.

Later, in a nearby cemetery, where some of Williams' family members were buried, law enforcement found the shovel that Williams had borrowed from his acquaintance in the days after the victim's disappearance. Tubing similar to that which was found in the victim's vehicle was found near the shovel. An expert in the field of trace evidence analysis testified that the tubing found at the cemetery appeared to have been stretched and had characteristics consistent with being connected to the piece of tubing that had been in the trunk.

Dr. Mohammad Amer, an expert in DNA profiling, then testified regarding the scientific significance of these items. He testified that objects recovered from

inside the trunk of the victim's vehicle contained blood stains that matched the victim. Specifically, on the carpeting of the trunk, Dr. Amer testified about a stain that "gave chemical indications for the presence of blood," which had a mixed DNA profile, with the major DNA profile of this stain matching the victim's profile. The other profile was indeterminate. The major DNA profile matching the victim had a frequency of occurrence for unrelated individuals of one in 620 quadrillion Caucasians, one in 45 quintillion African-Americans, and one in 170 quadrillion Southeastern Hispanics.

Dr. Amer testified that the spare tire cover also had a stain giving "chemical indications for the presence of blood" that had a partial DNA profile that matched the victim with statistical chances of the partial profile occurring in the population of one in 12 Caucasians, one in 31 African-Americans, and one in 10 Southeastern Hispanics. The spare tire locking device had four stains that gave "chemical indications for the presence of blood," three of which resulted in partial profiles matching the victim. In two of the stains, the statistical chances of finding the partial profile were one in 470 Caucasians, one in 1.7 billion African-Americans, and one in 290 million Southeastern Hispanics. In the third stain, the statistical chances of the profile being found in the population were one in 1 billion Caucasians, one in 4.1 billion African-Americans, and one in 500 million Southeastern Hispanics. There were also two stains inside the trunk lid, which

both "gave chemical indications for the presence of blood" that matched the victim's DNA profile. In one of those stains, the frequency of occurrence of that DNA profile was one in 2 quadrillion. In the other stain, the frequency of occurrence was one in 310 quadrillion.

Dr. Amer also testified about various items found inside the interior of the victim's vehicle. He tested some of the items and found DNA that matched Williams' DNA profile. These items included the towel that was found on the dashboard, which contained Williams' complete DNA profile. The chances of this DNA profile occurring in the population were one in 2.5 quintillion Caucasians, one in 3.5 quintillion African-Americans, and one in 19 quintillion Southeastern Hispanics. Dr. Amer also tested the pair of green and white shorts found in the backseat, which contained a hair. The shorts contained cells with a partial profile matching Williams, with the chances of appearing in the population of one in 18 quadrillion, and the hair contained a partial profile matching Williams, with the chance of finding it in the population of one in 290,000.

Dr. Amer also testified regarding other items found in the interior of the vehicle that contained the DNA of both Williams and the victim. Specifically, these items were the pair of jeans that was found on the floor in front of the driver's seat and the two pairs of underwear briefs, which had been found lying, one inside of the other, on the backseat. Dr. Amer swabbed the "friction points" of

the jeans—inside of the crotch area, inside the pockets, and the waistband area—and found DNA with a mixed profile matching Williams and the victim. The major contributor to the mixed profile matched Williams, with chances of being found in the population of one in 2.5 quintillion Caucasians, one in 3.5 quintillion African-Americans, and one in 19 quintillion Southeastern Hispanics. The minor contributor matched the victim with chances of being found in the population of one in 160,000 Caucasians, one in 290,000 African-Americans, and one in 160,000 Southeastern Hispanics.

Dr. Amer also testified about hairs that were on both of the pairs of briefs that had been found. One of these hairs matched Williams, and two hairs matched the victim. Inside one of these pairs of briefs, Dr. Amer found a semen stain in the front crotch area, and the DNA profile of the semen stain matched Williams with chances of this profile being found in the population of one in 3.9 quintillion. Dr. Amer noted that it is not uncommon to find semen in the crotch area of a male's underwear. Inside the pair of briefs containing the semen stain, Dr. Amer also found a mixture of epithelial cells (skin cells). The victim and Williams were included as possible contributors to the mixture of skin cells with chances of being found in the population of one in forty.

Inside the crotch area of the other pair of briefs, Dr. Amer found a mixture of skin cells matching the victim and Williams with statistical chances of their

DNA profile being found in the population of one in 2.8 million. On cross-examination, conducted by the defendant, who represented himself for most of the guilt phase, Dr. Amer acknowledged that it could be possible for DNA to transfer if someone touched someone with their hands and then put their hands somewhere else, or if two items of clothing from two different people were commingled. Although the DNA mixture of the defendant and victim was located on the inside of the briefs, Dr. Amer also acknowledged that it is not uncommon to obtain a mixed profile on an outer garment, and this would be possible on an article that was touching a car seat that had been used for a long time.

Dr. Amer was recalled via telephone the day after he testified in person and was asked by the prosecutor whether he could determine if the skin cells resulted from vaginal secretions. He testified that he could not determine whether the skin cells came from that source.

Sally Streeter, Williams' probation officer,[1] testified that Williams did not have a place to live as of October 8, 2010. Williams' brother wired Williams fifty dollars on Saturday, October 16, and told him that he would not be sending any more money. Williams later told a detective that on October 18, the day he was

1. The jury was not told that Sally Streeter was Williams' probation officer during the guilt phase. The jury was informed that Williams was on probation only during the penalty phase.

with the victim at Publix, he was wearing multiple layers of clothing, including two pairs of underwear and shorts under a pair of jeans. This description was consistent with the articles of clothing found inside the vehicle by crime scene investigators and tested for DNA by Dr. Amer.

In his defense case-in-chief, Williams called witnesses to support his position that he was suffering from a mental illness or seizures at the time of the crime. These witnesses included family members, who testified about Williams' behavior and experiences since they had known him, and two people who saw him and the victim in Publix on the day of the victim's disappearance. He also called psychiatrist Dr. Alan S. Berns, who testified that he had diagnosed Williams with bipolar affective disorder with associated psychotic features and post-traumatic stress disorder (PTSD). Dr. Berns testified that, after meeting with Williams in 2012 and reviewing some of Williams' medical records, he determined Williams had a history of alcohol abuse, cannabis use, and possible use of ephedra. On cross-examination, Dr. Berns testified that, in his professional opinion, Williams was not legally insane at the time of the offense.

Williams called forensic psychologist Dr. Steven N. Gold, who also testified—based on his review of Williams' records, a meeting with Williams in 2013, and speaking with Williams' family members—that Williams had bipolar disorder and PTSD. Finally, Williams called neurologist Dr. Jean Cibula, who

specializes in epilepsy and had conducted a week-long epilepsy assessment of Williams in 2012. Dr. Cibula testified that she was unable to document objective evidence of a seizure disorder.

After calling these witnesses, Williams requested that the trial court reappoint the former defense counsel who represented him for approximately two years prior to his decision to represent himself in the beginning of 2013. When defense counsel resumed representation, they recalled two witnesses who had testified during the State's case-in-chief, as well as Corporal Tamara Dale, who reviewed the security footage from the residential development where the victim lived but was unable to verify whether the victim's vehicle entered or exited.

The State presented several witnesses in rebuttal, including individuals who interacted with Williams close to the time of the crime, who testified that he did not appear to be suffering from mental illness or hallucinations. The State also offered its own experts, including Dr. Ava Land, a clinical psychologist, and Dr. Rafael Perez, a psychiatrist, who both disputed the diagnosis of bipolar disorder. Instead, both experts diagnosed the defendant with antisocial personality disorder and alcohol abuse, and Dr. Perez additionally thought Williams might be malingering.

The jury found Williams guilty of one count of robbery, one count of kidnapping, and one count of first-degree felony murder.

The Penalty Phase

During the penalty phase, the State called the victim of Williams' previous carjacking arrest to establish the prior violent felony aggravating factor. The carjacking victim testified that Williams forced himself into her vehicle and sexually assaulted her. She further testified that she had agreed to Williams pleading to carjacking as opposed to sexual battery and kidnapping to avoid testifying in court at that time. The State presented victim impact evidence through testimony of the victim's friends and acquaintances and photographs and a poem that the victim carried with her.

Williams called his brothers, Randy and David Williams, who both testified about Williams' childhood and their abusive father. Additionally, Williams' son, Ron Jon Williams, and Williams' longtime girlfriend, Shirley Kay Harvey, testified in mitigation. Williams also presented mental mitigation. He called Dr. Gold again, who opined that Williams suffered from, among other things, PTSD, severe substance abuse, and bipolar disorder. Dr. Gold also stated that Williams would qualify for the statutory mitigating circumstances that he was under the influence of an extreme mental or emotional disturbance at the time of the crime and that his capacity to appreciate the criminality of his conduct was substantially impaired.

Similar to Dr. Gold, Dr. Berns testified again during the penalty phase, stating that Williams had bipolar disorder as well as brain abnormalities from a history of head injuries. As a result, Dr. Berns opined that Williams might have problems with impulse control and qualifies for the statutory mitigating circumstance that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

Williams called Dr. Eric L. Mings, a neuropsychologist who reviewed Williams' records and performed neuropsychological testing on Williams in 2012. Dr. Mings testified that Williams' MRI and PET scans were consistent with bipolar disorder, and the neuropsychological test results reflected a deterioration in brain functioning that could be the result of seizures or alcohol abuse. He also concluded that Williams suffered from mild neurocognitive disorder as a result of a traumatic brain injury in an area of the brain associated with emotions that control behavior. He concluded that, consistent with the statutory mitigating circumstance, Williams' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

At the conclusion of the penalty phase, the jury recommended that Williams be sentenced to death by a vote of nine to three after completing a special verdict form, which showed that the jury unanimously found the following aggravating factors: Williams was on felony probation at the time of the murder; Williams was

previously convicted of a felony involving the use of violence; the murder was committed while Williams was involved in a kidnapping; and, the victim was particularly vulnerable due to advanced age or disability. However, after being told by the trial court that the jury only needed to fill out the mitigation verdict form if it found the listed mitigating circumstances by a majority of the jury, the jury left that form completely blank.

The trial court held a Spencer[2] hearing during which the State called Dr. Land, who testified that after watching videos from a Dollar General Store depicting Williams approaching another elderly woman and reviewing the statements of the employees at Publix, there was no indication of a reaction consistent with a flashback. Dr. Land, who had interviewed Williams, testified that, during her interviews with him, Williams never told her that he had been sexually abused by his father but, instead, stated that he had been sexually abused by three people, one of whom was his stepmother, who assaulted him inside a white car.

In its sentencing order, the trial court found and gave great weight to each of the following four statutory aggravating factors: (1) Williams was on felony probation at the time of the murder; (2) Williams was previously convicted of a

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

felony involving the use or threat of violence; (3) the murder was committed while Williams was involved in a kidnapping; and (4) the murder victim was particularly vulnerable due to advanced age or disability. These were the same aggravating factors that the jury found unanimously as indicated by its special verdict form. In addition, the trial court found that the State had proven the aggravating factor that the murder was committed for pecuniary gain and afforded it some weight. The jury found this aggravating factor by a vote of nine to three.

The trial court found one statutory mitigating circumstance—that Williams' capacity to conform his conduct to the requirements of the law was substantially impaired. As to this mitigating circumstance, the trial court explained in detail the conflicting experts' testimony and concluded:

> This Court is faced with experts looking at the same facts and coming to very different conclusions. This Court finds, however, that even with the differing diagnoses proffered by the experts, it would be reasonable to conclude that under any of the diagnoses, the Defendant would fulfill the criteria for this mitigator. Dr. Land's definition of antisocial personality disorder being a person who does not conform to what is expected in society. It involves a lot of rule-breaking, deceitfulness and a lack of moral judgment. It is also characterized by a lack of empathy or an inability to feel compassion for the victims of an individual's actions. This Court finds that pursuant to either set of diagnoses, the Defendant has proven this mitigator by the greater weight of the evidence.

However, the trial court rejected the statutory mitigating circumstance that the crime was committed while Williams was under the influence of extreme mental and emotional disturbance, explaining:

> As an initial matter, this Court must address the issue of the Defendant's veracity. The record is replete with instances of the Defendant fabricating stories to serve his purpose. A primary example is his fabrication that Ms. Patrick and he were kidnaped by a black man behind the Publix store. There are numerous other examples . . . . Thus, this Court finds it cannot rely on evidence to support a mitigator if it is solely based on the Defendant's truthfulness. This Court finds there must be some independent evidence other than the words of the Defendant to support the finding of a mitigator.
>
> Respectfully, as stated above, this Court finds this mitigator has not been proven by the greater weight of the evidence. This Court had five very well qualified experts who could not agree on a diagnosis of the Defendant. This Court finds it significant [that] the defense experts did not view the videos showing the interaction of the Defendant and Ms. Patrick on the day Ms. Patrick disappeared. Dr. Gold concluded the Defendant killed Ms. Patrick while under the influence of extreme mental or emotional disturbance. Moreover, Dr. Gold admitted the Defendant never told him what he was thinking or feeling at the time the crime was committed. It is not apparent that any of the experts asked the Defendant about his actions at the time of the crime. Thus, it is mere speculation as to what occurred at the time of the abduction and death of Ms. Patrick. Moreover, the basis for Dr. Gold's, Dr. Bern's and Dr. Ming's diagnoses was, in large part, the Defendant relating of his symptoms. As noted above, this Court finds this to be very problematic and unreliable. This Court finds this mitigator was not proven by the greater weight of the evidence and accords it no weight.

(Footnote omitted.)

The trial court also found thirteen nonstatutory mitigating circumstances and afforded each the following weight: (1) Williams manifested appropriate courtroom behavior (slight weight); (2) he served in the Marines (slight weight); (3) he abused drugs and alcohol from an early age (some weight); (4) he would be a model prisoner (some weight); (5) he suffered physical, mental, and emotional

abuse as a child (some weight); (6) he was involved in a serious collision which resulted in a broken leg (little weight); (7) his father and grandfather were abusive alcoholics (some weight); (8) his father abused his mother in his presence (some weight); (9) he suffered head injuries while growing up (some weight); (10) he was a good father (slight weight); (11) he was a good companion to the mother of his child (slight weight); (12) he was a hard worker (slight weight); and (13) he helped others (some weight).[3] After this evaluation of the aggravating factors and mitigating circumstances, the trial court sentenced Williams to death, concluding that the aggravating factors far outweighed the mitigating circumstances.

ANALYSIS

On direct appeal to this Court, Williams alleges that the trial court erred in (1) failing to give counsel adequate time to properly prepare the case after reappointment; (2) allowing the medical examiner to testify as to matters beyond her medical expertise; (3) allowing the jury to hear that Williams had a criminal past during the guilt phase; (4) permitting prosecutorial misconduct during voir dire and closing arguments; (5) allowing the State to introduce evidence of Williams' prior violent felony and argue for an unsupported aggravating factor in

3. The trial court also found that Williams did not prove that he had been sexually abused as a child and afforded this proposed mitigating circumstance no weight because all of the evidence presented in support of it was based on Williams' "questionable veracity."

the penalty phase; (6) allowing the introduction of improper victim impact evidence; and (7) denying jury instructions and a verdict form enumerating each nonstatutory mitigating circumstance. Williams also alleges that (8) the aggravating factors fail to narrow the field of persons eligible for the death penalty, and (9) he is entitled to relief based on Ring v. Arizona, 536 U.S. 584 (2002). Through supplemental briefing, Williams argues that he is entitled to relief on the Ring claim based on the United States Supreme Court's recent decision in Hurst v. Florida.

Because we determine that Williams is entitled to a new penalty phase proceeding under Hurst, we address only Williams' guilt phase claims and none of the other penalty phase claims. In addition, we address whether the evidence in this case was sufficient to sustain Williams' first-degree felony murder conviction, which this Court is independently obligated to review in death penalty cases.

I. Denial of a Continuance

Williams' first claim is that the trial court erred by not providing an "adequate" continuance during the guilt phase once the Public Defender's Office was reappointed to the case during the middle of the guilt phase. Williams asserts that this caused prejudice, specifically in the guilt phase, because defense counsel was not adequately prepared for the DNA evidence the State presented at trial that Williams asserts was based on a supplemental report dated April 1, 2013, which

was issued after the DNA expert's 2011 report and 2012 deposition, and, more importantly, after counsel was discharged.

On the morning of Wednesday, August 21, 2013—after six days of trial and two and a half days into Williams' defense presentation—Williams moved to re-appoint counsel. After being reappointed, defense counsel moved for a mistrial, or, in the alternative, a continuance, so that it could adequately prepare to represent Williams. Defense counsel requested an expedited transcript of testimony that had already occurred, stating that preparation could take weeks and that it had not worked out a mitigation case by the time it was relieved of duties in February 2013. The trial court denied the motion for mistrial and continued the trial until Monday, August 26. The trial court reasoned that "the Public Defender's Office was representing [Williams] for over two years and we were at the eve of trial when Mr. Williams decided to represent himself, so that had the advantage of getting this case prepared for trial." Defense counsel was provided with audio recordings of the first six days of trial.

At a status hearing on Friday, August 23, defense counsel renewed the motion for mistrial and moved alternatively for a further continuance for the remainder of the guilt phase. Counsel explained that he was "trying to struggle through listening to the tape that the court reporter ha[d] furnished [counsel]." The trial court denied the motions and indicated it had not yet made a decision on

whether to grant a continuance between the guilt and penalty phases. When the parties reconvened for the rest of the guilt phase on Monday, August 26, defense counsel renewed the motions for mistrial and a further continuance. Counsel said that he could not hear the testimony on recall of Dr. Amer, the DNA expert, but did not specify how much time was needed. The trial court again denied the motions.

We have stated that "[a] court's ruling on a motion for continuance will only be reversed when an abuse of discretion is shown." Smith v. State, 170 So. 3d 745, 758 (Fla. 2015) (quoting Snelgrove v. State, 107 So. 3d 242, 250 (Fla. 2012)). As explained in Smith:

> This standard is generally not met "unless the court's ruling on the continuance results in undue prejudice to the defendant." [Snelgrove, 107 So. 3d at 250]. . . . "While death penalty cases command our closest scrutiny, it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance." Doorbal [v. State], 983 So. 2d [464,] 486 [(Fla. 2008)] (quoting Hernandez–Alberto v. State, 889 So. 2d 721, 730 (Fla. 2004)).

Id. at 758-59.

This Court has held that a trial court does not abuse its discretion in denying a continuance "where the requesting party has unjustifiably caused the delay or requests an indefinite suspension of the proceedings." Snelgrove, 107 So. 3d at 251. In Wyatt v. State, 641 So. 2d 1336, 1340 (Fla. 1994), the defendant told his counsel that he did not want to call any witnesses in mitigation, and the night before the penalty phase, knowing of their unavailability, instructed counsel that he

wanted his mother and sister to testify on his behalf. This Court determined there was no abuse of discretion in the trial court refusing to suspend the penalty phase proceedings indefinitely. Id.

In this case, the trial court granted at least one continuance requested by defense counsel before Williams began self-representation. When Williams sought to represent himself, defense counsel had been representing Williams for about two years, and the trial was set to begin less than a month later. After defense counsel was reappointed, the trial court gave defense counsel a short continuance from the day Williams sought reappointment of counsel, which was a Wednesday, to the following Monday. While defense counsel moved for a longer continuance on the basis that it could not hear some of the trial testimony on the audio recordings, defense counsel did not specify a definite time frame that it needed for an additional continuance.

This case is factually distinguishable from Wike v. State, 596 So. 2d 1020, 1025 (Fla. 1992), the case upon which Williams relies, in which this Court determined that the trial court abused its discretion by denying a continuance where the request was for "a short period of time and for a specific purpose." In this case, defense counsel was given a short continuance but then requested additional continuances, not for "a short period of time," but for an unspecified amount of time.

Williams specifically asserts that as a result of being denied a longer continuance, defense counsel could not listen to the testimony of Dr. Amer, the DNA expert, and was unable to review the April 2013 DNA report, and therefore did not know to object to part of the State's rebuttal closing argument in the guilt phase based upon that testimony. Williams claims that defense counsel would have objected to the State's suggestion that a sexual battery had taken place because a mixture of the victim's and Williams' DNA was found inside both pairs of underwear briefs that had been on the backseat, by arguing that the evidence did not support the implication.

However, Williams has failed to demonstrate prejudice. Defense counsel did not inform the trial court that they could not hear the lengthy live testimony of the DNA expert, which involved a discussion of all the DNA findings, including the mixture of Williams' and the victim's DNA on the pairs of underwear briefs, but rather stated that they could not hear the DNA expert's testimony when he was recalled by the State, which was done telephonically. During this telephonic testimony on recall, the DNA expert stated only that he could not determine whether skin cells were from vaginal secretions, and it therefore neither added to nor detracted from his in-person testimony. Even without being granted an additional continuance to allow defense counsel to listen to the telephonic testimony or read the April 2013 report, defense counsel could have objected to the

State's inference that Williams had sexually battered the victim because they knew that the State did not charge Williams with a sexual offense.

We conclude that defense counsel's inability to hear Dr. Amer's telephonic testimony, which did not add to or detract from his live trial testimony, was neither a basis for a further continuance without a specific request to obtain an audible recording or transcript of this brief testimony, nor the basis for a mistrial. There was no undue prejudice to Williams, and any difficulty caused by Williams requesting reappointment of counsel was a result of a conscious choice by Williams to discharge counsel, proceed pro se, and then change his mind again near the end of the guilt phase.

Both the State and Williams were entitled to orderly and timely proceedings. After the trial court granted a short continuance, it did not abuse its discretion in denying the motion for an additional continuance for an unspecified length of time. Because the trial court did not abuse its discretion in denying a longer continuance and acted appropriately in providing time for defense counsel to review the testimony that had already been heard, we conclude that Williams is not entitled to relief with respect to this claim.

II. Medical Examiner's Testimony During the Guilt Phase

In his second claim, Williams contends that the trial court erred by allowing the medical examiner, Dr. Wolf—who testified while Williams was still pro se—to

opine that the manner of death was homicide based on evidence outside her area of expertise, and that such an opinion invades the province of the jury on the ultimate question for the jury's determination. We disagree.

Without objection, Dr. Wolf, who performed the autopsy and was qualified in the field of forensic pathology, testified that she was unable to determine the cause of death because the remains were only bones with some skin attached. Because of the body's condition, Dr. Wolf was unable to observe any apparent injuries that could have accounted for the victim's death. Dr. Wolf explained that "[i]n a case such as this, where the cause of death isn't obvious, we take into account every available information."

Accordingly, Dr. Wolf, in trying to determine the cause and manner of death, reviewed the victim's medical records to familiarize herself with the victim's medical history and condition, and concluded that the victim was not suffering from any life-threatening diseases. She also reviewed photos from the crime scene, Lake County Sheriff's Office reports, laboratory reports, and interviews that Williams gave to the media. She consulted with professionals at the C.A. Pound Human Identification Lab for anthropological assistance due to the body's skeletonized state.

She explained that the "manner of death" refers to whether the death was an accident, suicide, homicide, natural, or otherwise undetermined. Dr. Wolf

determined that the manner of death in this case was, with a reasonable degree of medical certainty, a homicide. She stated, "There was nothing specific that I could say, that's what caused this death," so "the cause of death was certified as homicidal violence of unknown means, meaning that by my review of the circumstances and the scene of death, I was confident that the death was a homicide, but I could not determine specifically how she was killed."

Because of the state of the victim's body, Dr. Wolf could rule out certain possibilities such as being struck in the face or being manually strangled, but could not rule out other causes of death, such as strangulation by ligature, shooting, or stabbing. She concluded that the physical facts did not support the story that Williams gave to the press that the victim was beaten in the passenger's seat or was alive inside the trunk. Dr. Wolf also ruled out accidental death.

Because Williams failed to object to Dr. Wolf's testimony, he must show fundamental error in order to be entitled to relief. See Doty v. State, 170 So. 3d 731, 743 (Fla. 2015). An error is fundamental if it "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Anderson v. State, 841 So. 2d 390, 403 (Fla. 2003). This is a "high burden, which requires an error that goes to the foundation of the case or the merits of the cause of action and is equivalent to a

denial of due process." Bailey v. State, 998 So. 2d 545, 554 (Fla. 2008)(quoting sources omitted).

A. Whether the Medical Examiner Testified Outside Her Area of Expertise

This Court has previously recognized that medical examiners, whether they personally performed the autopsy or not, may testify as to their opinions based upon objective evidence. In Geralds v. State, 674 So. 2d 96, 100 (Fla. 1996), this Court determined that the trial court did not abuse its discretion by allowing the medical examiner to provide an opinion based upon review of slides taken at the murder scene and during the autopsy, the medical examiner's written records, and previous testimony. Similarly, in Capehart v. State, 583 So. 2d 1009, 1013 (Fla. 1991), this Court determined that a proper predicate for the medical examiner's opinion as to the cause of death had been established where her opinion was "based upon the autopsy report, the toxicology report, the evidence receipts, the photographs of the body, and all other paperwork filed in the case."

However, an expert cannot simply rely on baseless assertions or conjecture. See Hawkins v. State, 933 So. 2d 1186, 1188-89 (Fla. 4th DCA 2006) (the medical examiner's opinion that the victim died as a result of an injection of silicone into subcutaneous tissue that travelled into the bloodstream was inadmissible because the medical examiner admittedly did not know whether this conclusion was true, conceded she was not an expert regarding the mechanism or speed that silicone

migrates through the body, did not review any literature regarding the effects of silicone in the body, and could not point to anything to support her conclusion); Fisher v. State, 361 So. 2d 203, 204 (Fla. 1st DCA 1978) (it was error to allow the medical examiner to opine that the victim's knife wounds were more characteristic of those made by a woman than a man because this opinion was "simply based on vague notions of stereotyped characteristics of the men and the women in our culture and it bore no relationship to [the defendant] other than she was a woman"); Wright v. State, 348 So. 2d 26, 30-31 (Fla. 1st DCA 1977) (the medical examiner's testimony went beyond his competence when opining that the victim had severe injuries that were inflicted prior to being buried by the defendant's bulldozer, based in part upon how moist earth would act as an anchor to the body, how far apart the treads of the bulldozer were, and how bulldozers work).

The record in this case does not support Williams' assertion that Dr. Wolf's testimony was based on speculation and conjecture or was "unsupported by any discernible, factually-based chain of underlying reasoning." See Mt. Sinai Med. Ctr. of Greater Miami, Inc. v. Gonzalez, 98 So. 3d 1198, 1202 (Fla. 3d DCA 2012) (quoting Div. of Admin. v. Samter, 393 So. 2d 1142, 1145 (Fla. 3d DCA 1981)). Dr. Wolf stated that when the cause of death is not obvious, as a medical examiner, she takes into account all the available information. To form her opinion, she consulted with an anthropological expert and relied upon the police reports, the

autopsy, the victim's medical records, and photos of the scene. Accordingly, Dr. Wolf did not testify outside her field of expertise.

B. Whether the Medical Examiner's Opinion Testimony Invaded the Province of the Jury

Williams also claims that Dr. Wolf's opinion testimony invaded the province of the jury. However, this claim is without merit because Dr. Wolf's opinion, which was based on her training and experience, assisted the jury in understanding the evidence, and she did not testify to conclusions that the jury was qualified to make or to the ultimate question for the jury's determination—whether Williams was guilty of the crimes for which he was charged.

We have determined that a trial court has not abused its discretion when permitting an expert to testify if the expert's testimony, based on his or her training and expertise outside of the common understanding of the jury, assisted the jury in understanding the evidence or determining a fact in issue. See McWatters v. State, 36 So. 3d 613, 630-31 (Fla. 2010) (concluding that an expert's opinion, based on his training and experience, that a rape occurred helped the jury assess "what" happened); Smith v. State, 28 So. 3d 838, 856 (Fla. 2009) (denying the defendant's claim that the medical examiner's opinion invaded the province of the jury because it assisted jurors in deciding what happened, not who was responsible for the acts perpetrated against the victim). Likewise, in this case, Dr. Wolf provided an

opinion based on her training and experience as a medical examiner, which assisted the jury in understanding the evidence.

Moreover, Dr. Wolf did not opine as to the ultimate question to be determined by the jury. Dr. Wolf did not implicate Williams as being guilty of first-degree murder. Medical examiners have been permitted to opine in many cases that the manner of death was a "homicide," though in those cases, this Court did not address whether that opinion invaded the province of the jury. See, e.g., Larkin v. State, 147 So. 3d 452, 457 (Fla. 2014) (involving a medical examiner who opined that the manner of death of the victim was a homicide); Brown v. State, 143 So. 3d 392, 397 (Fla. 2014) (same); Kalisz v. State, 124 So. 3d 185, 191 (Fla. 2013) (same).

Williams argues that Ruth v. State, 610 So. 2d 9 (Fla. 2d DCA 1992), and Gurganus v. State, 451 So. 2d 817 (Fla. 1984), support his position, but those cases are distinguishable. In Ruth, the defendant was charged with "maintaining an airplane used for keeping or selling drugs." 610 So. 2d at 10. The use of the defendant's aircraft was a necessary element of the crime with which the defendant was charged. Id. The expert witness, a customs agent, testified, "I believe the aircraft was used and was set up to smuggle narcotics." Id. at 11. The Second District held this was inadmissible as this was the "sole evidence" that went to the ultimate act for which the defendant was charged. Id. Here, Dr. Wolf's expert

testimony is not the "sole evidence" of the crimes of which Williams has been charged.

In Gurganus, 451 So. 2d at 821, the trial court had excluded the defense expert's testimony as to whether the defendant's actions were those of a "depraved mind" or a "premeditated plan," legal terms with specific legal definitions. This Court determined that the trial court did not err in excluding this testimony because it was a "legal conclusion no better suited to expert opinion than to lay opinion, and as such, was an issue to be determined solely within the province of the jury." Id.

For all these reasons, Dr. Wolf's testimony as to the manner of death was not error, let alone fundamental error. Accordingly, we deny relief as to this claim.

III. Guilt Phase Testimony Revealing Williams' Criminal Past

In his third claim, Williams argues that the trial court abused its discretion in denying three motions for mistrial made by his newly reappointed counsel when State witnesses referenced Williams' criminal history in the State's rebuttal case. Prior to these three instances, when Williams was acting pro se, Williams and his witnesses referred to his criminal history. First, Williams stated in his opening statement that he had been to trial once before on a misdemeanor, but that he was acquitted. Next, during Williams' direct examination of his brother Randy, Randy stated, "2010, are you speaking about when you were released from prison?"

Additionally, defense expert, Dr. Berns, testified during Williams' direct examination that Williams had told him that he "had been arrested a few times for DUI, and once, I believe for a disorderly intoxication."

After defense counsel resumed representation, defense counsel moved for a mistrial three times due to comments made in the State's rebuttal case. Each motion was denied. In the first instance, the State's rebuttal witness Howard Lawrence, head of the mental health department at the Lake County Detention Center, explained the specific medications prescribed to Williams to rebut the suggestion that they were prescribed to treat a psychiatric condition or a seizure disorder, and explained that these medications were prescribed to Williams for mood stabilization and to aid sleep. In that context, Lawrence explained in general that sociopathy was "another [way] of depicting antisocial personality disorder in a person that's got a lengthy criminal history who looks like he's probably vying for some medicine because he's . . . irritable and disgruntled and probably not sleeping too well." Defense counsel moved for a mistrial after this comment.

The second motion for mistrial occurred during the rebuttal testimony of Dr. Rafael Perez, a psychiatrist who treated Williams beginning in 2010, who was called to rebut the suggestion that Williams had suffered from seizures or bipolar disorder and to also testify regarding the reasons for Williams' prescribed medications. Dr. Perez referred to records from Williams' previous prison stay,

using the term "department of corrections," but was immediately interrupted by the prosecutor, who stated, "Well, we don't want to go into the location." Then, defense counsel moved for a mistrial.

Finally, the last motion for mistrial was also made during direct examination of Dr. Perez, after the prosecutor used the word "inmate" in reference to those records. After the first two references to Williams' criminal history, the trial court instructed the jury to disregard the comments, but defense counsel declined the suggestion for a curative instruction after the third reference.

A trial court should grant a motion for mistrial only "when an error is so prejudicial as to vitiate the entire trial." Smith, 170 So. 3d at 757 (quoting Jackson v. State, 25 So. 3d 518, 528 (Fla. 2009)). "[T]his Court reviews a trial court's ruling on a motion for mistrial under an abuse of discretion standard." Id. (quoting Jackson, 25 So. 3d at 528).

As we have recently explained, "[r]emarks that relate to a defendant's prior imprisonment are to be evaluated in the context of the surrounding circumstances and do not always require reversal." Fletcher v. State, 168 So. 3d 186, 207 (Fla. 2015). Here, during Williams' self-representation, he and his witnesses informed the jury that Williams had been in prison, had been arrested a few times, and had been to trial on a misdemeanor offense. By the time the improper statements were made, the jury was already aware that Williams had at least some criminal history

and had been in prison. See Evans v. State, 800 So. 2d 182, 189 (Fla. 2001) (where a State witness referred to the defendant's prior criminal record, any possible error resulting from this remark was harmless because the defendant admitted on the stand that he had two felony convictions).

In this case, as a result of the defendant's own remarks and those of his witnesses, the jury was aware of some criminal history. The statements that occurred during the State's rebuttal of Williams' defense that his mental illness precipitated the murder were brief; the trial court gave curative instructions after the first two times and the fleeting comments were not the focus of the witnesses' testimony. Accordingly, the trial court did not abuse its discretion in denying a motion for mistrial.

IV. Prosecutor's Comments During Voir Dire and Guilt Phase Closing Arguments

In his fourth claim, Williams alleges that the State engaged in prosecutorial misconduct during voir dire and guilt phase closing arguments. Because no objections were raised to any of these allegedly improper comments, Williams is entitled to relief only if fundamental error occurred as a result of these comments. Mordenti v. State, 630 So. 2d 1080, 1084 (Fla. 1994). "[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due

process." State v. Johnson, 616 So. 2d 1, 3 (citing D'Oleo-Valdez v. State, 531 So. 2d 1347 (Fla. 1988); Ray v. State, 403 So. 2d 956 (Fla. 1981)).

A. Voir Dire

Williams identifies two instances of alleged impropriety made by the prosecutor during voir dire, which occurred when Williams was acting pro se. Neither comment was objected to. First, Williams alleges that the State improperly suggested more evidence of the crime not presented in the guilt phase would be adduced during the penalty phase through the following comments:

> And after you all have returned verdicts on all three counts, then and only then, if the Defendant is found guilty of murder in the first degree, we will present additional evidence and give additional arguments and additional law to help you to make this life and death decision that we were talking about.

(Emphasis added.)

Later, the prosecutor made the statement that the State would present additional evidence two more times during voir dire:

> But if and only if the jury unanimously decides he's guilty of first degree murder, additional evidence presented going to the Defendant's background, going to his character, possibly going to additional factors in the crime itself are allowed per the statute, things that you may not be allowed to hear in the first phase of the trial become relevant when you're trying to decide what is a fair sentence.

These statements mainly reflect what is stated in section 921.141(1), Florida Statutes (2010), which provides that in the penalty proceeding, "evidence may be presented as to any matter that the court deems relevant to the nature of the crime

and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances." We conclude there was no error, much less fundamental error.

Williams also alleges that it was improper for the prosecutor to comment during voir dire that "would you agree that while you have the Defendant's life in your hands, you also have justice for the victim and the victim's family also in your hands?" (Emphasis added.) Later on, the State engaged a specific juror, and told that juror that in addition to Williams' life being at stake, "justice for [a] little old lady," was also at stake.

Florida courts have condemned comments asking for justice for the victim and this Court has reversed a conviction as a result of that type of improper comment. See Cardona v. State, 185 So. 3d 514, 522 (Fla. 2016); Davis v. State, 136 So. 3d 1169, 1197 (Fla. 2014); Crew v. State, 146 So. 3d 101, 110 (Fla. 5th DCA 2014); Edwards v. State, 428 So. 2d 357, 359 (Fla. 3d DCA 1983). Thus it was improper for the prosecutor to appeal to "justice for [a] little old lady." The comments—to which Williams did not object—however, were early in the trial during voir dire and not repeated. Therefore, we conclude that the prosecutor's error in making these comments did not "reach[] down into the validity of the trial itself" to the extent that a verdict of guilt could not have been obtained without the

assistance of the alleged error. Doty, 170 So. 3d at 743 (quoting Snelgrove, 107 So. 3d at 257).

B. Guilt Phase Closing Argument

Next, Williams takes issue with three aspects of the State's guilt phase closing arguments, which occurred after defense counsel was reappointed. First, Williams alleges it was improper for the State to suggest that an uncharged sexual battery took place. Specifically, the prosecutor stated:

> These are the two pair of underwear . . . with their DNA, the numbers were 1 in 2.8 million, inside the crotch of one of the two pair of underwear . . . . Directly north of that particular spot where that DNA was found is his semen, [defense counsel] suggested, well, it wasn't very much. Well, I don't know. I don't recall any testimony about the size of the stain. It was enough to get a clear reading. It's his semen above, towards the fly there, DNA. Her blood inside her trunk . . . . Under those tires she's wearing a pair of those, kneehighs . . . . That's all she's wearing.

The prosecutor went on to say:

> Is it a coincidence that she's naked and a mixture of his and her DNA is found on the inside of the crotch of his briefs, just below a semen stain that happens to be his? Is that just another coincidence? Probably not.

Finally, the prosecutor stated: "[I]t's clear from the evidence that then, after he's won over her trust, he took advantage of her, I would suggest to you, in more ways than one." None of these arguments were objected to and no motion for a mistrial was made on the basis of these comments.

Although prosecutors are "permitted wide latitude in closing arguments" and are allowed to make inferences reasonably drawn from the evidence, they "are not permitted to make improper argument." Merck v. State, 975 So. 2d 1054, 1061 (Fla. 2007). These comments were improper because there was not enough evidence to lead to the reasonable inference that Williams engaged in sexual misconduct, and the State never charged Williams with having committed a sexual offense against the victim.

The evidence of sexual misconduct was insufficient to allow the prosecutor to insinuate it occurred. Specifically, the DNA expert testified that it was not uncommon to find semen inside the crotch area of a man's underwear. And although both of the briefs that were found on the backseat contained a mixture of the victim's and Williams' skin cells inside the crotch area, the DNA expert indicated that it would be possible for skin cells to transfer if the clothing of two people was commingled.

Further, the State never charged Williams with a sexual offense, and courts condemn arguments suggesting a defendant is guilty of an uncharged crime. See Huff v. State, 437 So. 2d 1087, 1090-91 (Fla. 1983) (reversing a conviction where the prosecutor suggested in closing that the defendant was guilty of an uncharged crime); Jackson v. State, 690 So. 2d 714, 717 (Fla. 4th DCA 1997) (same). Thus, the State's innuendo that a sexual battery took place was improper.

Williams also challenges some of the prosecutor's other comments as being unsupported embellishments appealing to the jurors' emotions. However, we disagree and conclude that the rest of the prosecutor's statements were fair inferences reasonably drawn from the evidence and, therefore, not improper.

We must next determine if any of these comments, whether individually or cumulatively, amounted to fundamental error. See Braddy v. State, 111 So. 3d 810, 838 (Fla. 2012). This Court does not "examine the allegedly improper comments in isolation," but examines the totality of errors in the closing argument and determines whether the cumulative effect of the numerous improprieties deprived Williams of a fair trial. Id. at 843 (quoting Card v. State, 803 So. 2d 613, 622 (Fla. 2001)).

The prosecutor's guilt phase closing argument suggestion that Williams had engaged in sexual misconduct did not amount to fundamental error. The error was accompanied by the fact that admissible evidence in the guilt phase showed that Williams stated that the victim feared that something "too personal" for Williams to tell the press would happen to her, that a mixture of Williams' and the victim's DNA was found in both pairs of black briefs that were found in the backseat of the car, and that the victim's body was found in the nude. That evidence was admitted without objection and would have allowed the jurors to potentially reach the

conclusion for themselves that Williams had sexually battered the victim. In this context, the comments did not rise to the level of fundamental error.

We have determined that these comments do not individually constitute fundamental error. We now consider whether the cumulative effect of the improper comments denied Williams his right to a fair guilt phase trial. See id. Considering the prosecutor's remarks, in addition to not individually amounting to fundamental error, we conclude that these improprieties do not cumulatively constitute fundamental error, which would entitle Williams to a new guilt phase proceeding. There were a small number of improper remarks made during the course of the entire guilt phase. Further, there was a substantial amount of evidence to convict Williams on all three of the charges for which he was indicted—kidnapping, robbery, and first-degree felony murder—such that the cumulative effect of these improper comments was not so prejudicial that it vitiated the entire trial. See Chandler v. State, 702 So. 2d 186, 191 n.5 (Fla. 1997).

V. Sufficiency of the Evidence

The Court has a mandatory obligation to independently review the sufficiency of the evidence in every case in which a sentence of death has been imposed. See Davis v. State, 148 So. 3d 1261, 1270 (Fla. 2014); see also Fla. R. App. P. 9.142(a)(5). "In reviewing the sufficiency of the evidence, the question is whether, 'after viewing the evidence in the light most favorable to the State, a

rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt.' " Davis, 148 So. 3d at 1270 (quoting Simmons v. State, 934 So. 2d 1100, 1111 (Fla. 2006)).

The evidence in a capital case is judged to be sufficient when it is both competent and substantial. See Davis v. State, 121 So. 3d 462, 494 (Fla. 2013). This Court "views the evidence in the light most favorable to the State to determine whether a rational trier of fact could have found beyond a reasonable doubt the existence of the elements of the crime." Fletcher, 168 So. 3d at 221 (citing Bradley v. State, 787 So. 2d 732, 738 (Fla. 2001)).

In this case, Williams was the last person to be seen with the victim on Monday, October 18, 2010, at Publix. At the time, Williams was homeless and living on money wired to him by his family. One of his brothers, however, had just informed him that he would no longer send Williams money.

Multiple witnesses testified that, in the days following the victim's disappearance, they saw Williams driving in a white Chevrolet like the one owned by the victim. One witness saw that Williams had a pouch full of credit cards and enough cash to buy beer and fast food, and another witness saw Williams buy several beers with cash. During this time, Williams also borrowed, without returning, a shovel from his acquaintance.

On Saturday, October 23, the victim's white Chevrolet Impala was found in the parking lot of a closed-down restaurant in Polk County, with the license plate obscured by leaves and branches. Williams was found sitting in the car with the victim's credit cards in his pocket. Various items were collected from the vehicle, including irrigation-type tubing on the floor in front of the front passenger seat and in the trunk, two pairs of underwear briefs, jeans, and a cane. The victim had been using a cane the day of her disappearance.

The DNA evidence suggested that Williams was in close contact with the victim. There was DNA inside the "friction points" of the pair of jeans that was found on the floor in front of the driver's seat matching both Williams and the victim. The two pairs of briefs found on the backseat had hairs on them matching Williams and the victim. There were skin cells matching Williams and the victim inside of both pairs of briefs. The DNA evidence also showed that the victim's blood was in the trunk. Specifically, bloodstains found on the trunk carpeting, spare tire cover, and spare tire locking device matched the victim's DNA.

On October 25, Williams gave the press an interview, during which he stated that he was with the victim at Publix, but claimed an unknown assailant abducted them and killed the victim and that Williams was able to escape in the victim's vehicle. However, the physical evidence did not support this story, and Williams eventually admitted that he had fabricated the story.

The victim's body was ultimately discovered underneath two tires in an area a mile and a half from Williams' former residence. The body, which was mostly unclothed aside from socks and a medical alert necklace, was badly decomposed and was devoid of a purse or jewelry. In a nearby cemetery where Williams' family members were buried, law enforcement found the shovel that Williams borrowed. Tubing, which appeared to have been stretched, was found near the shovel and was consistent with the tubing that was found in the victim's vehicle.

The medical examiner opined that the manner of death was a homicide, though she was unable to ascertain the precise cause of death. Although Williams placed his mental health at issue and suggested that he did not recall what happened due to a seizure, hallucination, or blackout, the State presented a significant amount of evidence to cast doubt on that claim.

Therefore, competent, substantial evidence existed to support Williams' convictions.

VI. Hurst v. Florida and Hurst

Williams next argues that the trial court erred in sentencing him to death under Florida's former death penalty statute, which violates the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). After briefing and oral argument had taken place in this case, the United States Supreme Court decided Hurst v. Florida. In Hurst v. Florida, the United States Supreme

Court determined that "[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's." 136 S. Ct. at 621-22. Therefore, Florida's capital sentencing scheme was unconstitutional because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Id. at 619. On remand from the United States Supreme Court, in Hurst, we concluded:

> [W]e hold that the Supreme Court's decision in Hurst v. Florida requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. We reach this holding based on the mandate of Hurst v. Florida and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

Hurst, 202 So. 3d at 44. The decisions in Hurst v. Florida and Hurst apply to this case, which we review on direct appeal. See State v. Johnson, 122 So. 3d 856, 861 (Fla. 2013) (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1986); Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992)).

Following Hurst v. Florida, we ordered that Williams and the State file supplemental briefs to address its impact on this case. Further, Williams requested

and we granted leave to file supplemental briefing based on our holding in Hurst. Through supplemental briefing, Williams argues that his death sentence was imposed in violation of Hurst v. Florida and Hurst, and, as a result, his death sentence must be commuted to a life sentence pursuant to section 775.082(2), Florida Statutes (2010). Alternatively, he argues that he must get a life sentence because Hurst error is structural error and, therefore, not amenable to harmless error review. The State argues that no error occurred at all in this case, but if it has, it is harmless.

In Hurst, we rejected the argument that section 775.082(2) requires commutation to a life sentence of a death sentence that was imposed in violation of Hurst v. Florida. Hurst, 202 So. 3d at 66. We also determined that Hurst errors are capable of harmless error review. Id. at 67. Thus, we must determine whether a Hurst error occurred in Williams' penalty phase and, if so, whether the error was harmless beyond a reasonable doubt.

First, we determine that a Hurst error occurred in Williams' penalty phase. In this case, the special verdict form used for the penalty phase showed that the jury unanimously found that four out of the five aggravating factors presented by the State were proven beyond a reasonable doubt. This only satisfies the first finding the jury must make to impose death in Florida, as explained further in Hurst. See id. at 53-54. The jury did not indicate any findings as to the sufficiency

of the aggravating factors, nor did the jury indicate whether it determined that the aggravating factors outweighed the mitigation presented. See id.

While special verdict forms, like the one used in Williams' penalty phase, provide courts with more information about the jury's decision-making process than usual, the information provided by the verdict form in this case did not meet the constitutional requirements of Hurst. Nor did the jury unanimously recommend a sentence of death, as is required by article I, section 22, of the Florida Constitution under Hurst. Id. at 44. Accordingly, there was a Hurst error in this case. We, therefore, consider whether the error in Williams' penalty phase was harmless beyond a reasonable doubt.

As we explained in Hurst:

> The harmless error test, as set forth in Chapman and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., Zack v. State, 753 So. 2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," DiGuilio, 491 So. 2d at 1137, and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a Hurst v. Florida error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable

> doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate:
>
> > The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.
>
> DiGuilio, 491 So. 2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." Id.

Hurst, 202 So. 3d at 68.

For the following reasons, we conclude that the State in this case has not proven beyond a reasonable doubt that the error was harmless. Although four out of five aggravating factors were found unanimously, due to the jury's nine to three recommendation for death, we cannot conclude beyond a reasonable doubt that the jury also unanimously found that there were sufficient aggravating factors to impose death, or that the aggravators outweighed the mitigation. See § 921.141, Fla. Stat. (2015), invalidated by Hurst v. Florida, 136 S. Ct. 616; Hurst v. Florida, 136 S. Ct. at 621; Hurst, 202 So. 3d at 68.

It is clear that three jurors voted for Williams to receive a life sentence. We cannot speculate why these three jurors did not find that sufficient aggravating factors existed to impose death or that those aggravating factors outweighed the mitigation, or whether the three jurors, in fact, made those findings but were

following the trial court's instructions that they were not required to recommend death. See Hurst, 202 So. 3d at 58 (quoting Fla. Std. Jury Instr. (Crim.) 7.11 Penalty Proceedings—Capital Cases).

In this case, there was a significant amount of mitigation presented during the penalty phase. Williams called his brothers, who testified about their abusive father, and several doctors, who testified about Williams' post-traumatic stress disorder, substance abuse, and other mental mitigation. Williams attempted to establish the statutory mitigating circumstances of being under the influence of extreme mental or emotional disturbance and diminished capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law, as well as nonstatutory mitigation.

The fact that the jury left the mitigation form blank does not affect our analysis. Based on the record, the jury apparently left the form blank because it was following the instructions on the special verdict form, and the trial court's instructions for the jurors to leave the form blank unless a majority of the jury found the listed mitigating circumstances to exist. In other words, the fact that the jury left the form blank does not indicate that no jurors found any of the mitigation.

Furthermore, even if not a single juror found that any mitigation was established, there is still no way to ascertain whether the jury unanimously concluded that sufficient aggravation existed to warrant a death sentence. Based

on the jury vote of nine to three, we cannot conclude that the Hurst error in this case was harmless beyond a reasonable doubt. For these reasons, we grant Williams relief based on Hurst. Accordingly, we reverse the sentence of death and remand for a new penalty phase.

CONCLUSION

After a thorough review of all the issues raised by Williams, as well as a review of whether sufficient evidence supports Williams' convictions, we affirm Williams' convictions for first-degree murder, kidnapping, and robbery, but we reverse his sentence of death and remand for a new sentencing proceeding pursuant to Hurst.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
CANADY and POLSTON, JJ., concur as to the conviction and dissent as to the sentence.
PERRY, Senior Justice, concurs in part and dissents in part with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

PERRY, Senior Justice, concurring in part and dissenting in part.

I concur with the majority's decision to affirm Williams' convictions and its determination that the Sixth Amendment requires that we vacate Williams' death sentence. However, because Florida law requires that Williams be sentenced to life in prison as a consequence of his unconstitutional death sentence, I disagree

with the majority's decision to remand for a new penalty phase proceeding instead of remanding for imposition of a life sentence. See § 775.082(2), Fla. Stat. (2016).

As I explained fully in Hurst v. State, 202 So. 3d 40, 75-76 (Fla. 2016) (Perry, J., concurring in part and dissenting in part), there is no compelling reason for this Court not to apply the plain language of section 775.082(2), Florida Statutes. Because the majority of this Court has determined that Williams' death sentence was unconstitutionally imposed, Williams is entitled to the clear and unambiguous statutory remedy that the Legislature has specified:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

See § 775.082(2), Fla. Stat. (emphasis added). The plain language of the statute does not rely on a specific amendment to the United States Constitution, nor does it refer to a specific decision by this Court or the United States Supreme Court. Further, it does not contemplate that all forms of the death penalty in all cases must be found unconstitutional. Instead, the statute uses singular articles to describe the circumstances by which the statute is to be triggered. Indeed, the statute repeatedly references a singular defendant being brought before a court for sentencing to life imprisonment. I consequently cannot agree that the statute was intended as a fail-

safe mechanism for when this Court or the United States Supreme Court declared that the death penalty was categorically unconstitutional. Cf. Hurst, 202 So. 3d at 64.

An Appeal from the Circuit Court in and for Lake County,
Mark Anthony Nacke, Judge - Case No. 352011CF000105XXXXXX

James S. Purdy, Public Defender, and Nancy Jean Ryan, Assistant Public Defender, Seventh Judicial Circuit, Daytona Beach, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida; and C. Suzanne Bechard, Assistant Attorney General, Tampa, Florida,

for Appellee

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Attachment II

Supreme Court of Florida

No. SC15-1256

WILLIAM M. KOPSHO,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. SC15-1762

WILLIAM M. KOPSHO,
Petitioner,

vs.

JULIE L. JONES, etc.,
Respondent.

[January 19, 2017]

PER CURIAM.

William Kopsho appeals an order of the Fifth Judicial Circuit Court denying his motion to vacate his conviction of first-degree murder and sentence of death, filed under Florida Rule of Criminal Procedure 3.851, and petitions this Court for a writ of habeas corpus. We have jurisdiction. See art. V, § 3(b)(1), (9), Fla. Const.

For the following reasons, we vacate Kopsho's sentence and remand for a new penalty phase. See Hurst v. State, 202 So. 3d 40, 69 (Fla. 2016).

The facts of this case were presented in this Court's opinion on direct appeal. See Kopsho v. State, 84 So. 3d 204, 209-10 (Fla. 2012). After the penalty phase, the jury voted ten to two to impose a death sentence, and the trial court sentenced Kopsho to death. Id. at 210. On direct appeal in 2012, this Court affirmed Kopsho's conviction and sentence. Id. at 211.

Kopsho filed his postconviction motion to vacate the judgment of conviction and sentence on November 19, 2014. After a case management conference held on March 9, 2015, the circuit court determined that no evidentiary hearing was warranted and entered an order summarily denying Kopsho's initial postconviction motion on March 23, 2015.

While Kopsho's appeal from the summary denial of his motion for postconviction relief was pending, the United States Supreme Court issued its decision in Hurst v. Florida, 136 S. Ct. 616 (2016), holding, in short, "that Florida's capital sentencing scheme [is] unconstitutional to the extent that it fail[s] to require the jury, rather than the judge, to find the facts necessary to impose the death sentence." Hurst, 202 So. 3d at 43-44 (citing Hurst v. Florida, 136 S. Ct. at 619).

Because Kopsho was condemned to death by a vote of ten to two, we find that Kopsho's sentence is the result of a Hurst v. Florida error. We therefore must consider whether the error was harmless beyond a reasonable doubt. See Hurst, 202 So. 3d at 67.

> The harmless error test, as set forth in Chapman[v. California, 386 U.S. 18 (1967),] and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

Id. at 68 (quoting State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986)).

The jury in this case recommended death by a vote of ten to two. While three of the aggravators in this case are such that no reasonable juror would not have found their existence,[1] we cannot determine that the jury unanimously found that the aggravators outweighed the mitigation. We can only determine that the jury did not unanimously recommend a sentence of death.

---

1. The trial court found the following aggravators in this case: (1) that at the time of the murder Kopsho was under a sentence of imprisonment or on felony probation; (2) that Kopsho had committed a prior violent felony; (3) that the murder was committed during an armed kidnapping; and (4) that the murder was cold, calculated, and premeditated. Kopsho, 84 So. 3d at 210. The evidence presented at trial included Kopsho's confession that he planned to kill Lynne once she told him that she had slept with her former supervisor but that he had to stay calm until he had the opportunity. Id. at 208. Kopsho repeatedly referred to the crime as premeditated in his multiple confessions. Id. at 209-210.

Because we cannot make these determinations, we cannot say that there is no possibility that the error did not contribute to the sentence. We therefore determine that the error in Kopsho's sentencing was not harmless beyond a reasonable doubt.

Accordingly, we reverse the postconviction court's order and remand for a new penalty phase. See Hurst, 202 So. 3d at 69.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
PERRY, Senior Justice, concurs in part and dissents in part with an opinion.
CANADY and POLSTON, JJ., dissent.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

PERRY, Senior Justice, concurring in part and dissenting in part.

I agree with the majority that the Hurst v. Florida, 136 S. Ct. 616 (2016), error in this case is not harmless beyond a reasonable doubt. However, as I expressed in Hurst v. State, 202 So. 3d 40, 75 (Fla. 2016) (Perry, J., concurring in part and dissenting in part), "[t]here is no compelling reason for this Court not to apply the plain language of section 775.082(2), Florida Statutes." I therefore dissent to the majority's decision to remand for a new penalty phase and would instead remand for the imposition of a life sentence.

Two Cases:

An Appeal from the Circuit Court in and for Marion County,
David Brent Eddy, Judge - Case No. 422000CF003762CFAXXX
And an Original Proceeding – Habeas Corpus

James Vincent Viggiano, Jr., Capital Collateral Regional Counsel – Middle Region, Reuben Andrew Neff, Maria Christine Perinetti, Raheela Ahmed, and Nicholas Arthur Whittle, Assistant Capital Collateral Regional Counsel – Middle Region, Tampa, Florida,

for Appellant/Petitioner

Pamela Jo Bondi, Attorney General, Tallahassee, Florida; and Stacey E. Kircher, Assistant Attorney General, Daytona Beach, Florida,

for Appellee/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing motion and Appendix in Support of the forgoing motion have been transmitted to this Court through the Florida Courts E-Filing Portal on this 23rd day of January, 2017.

I HEREBY CERTIFY that a copy of the foregoing was served through the Florida Court E-filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, at CalhounR@sao7.org on this 23rd day of January, 2017.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins**, Chief Judge; Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach, Florida 32114 and **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 23rd day of January, 2017.

/s/ Raheela Ahmed
Raheela Ahmed
Assistant CCRC
Florida Bar Number 0713457
Email: ahmed@ccmr.state.fl.us
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12973 N. Telecom Parkway
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Tel: (813) 558-1600 ext. 610
Fax: (813) 558-1601

VOLUSIA COUNTY COURT ACTION FORM

CASE: 2009 002872 CFAWS
STATE OF FLORIDA
VS
JOSEPH EDWARD JORDAN
TOT
SPN: 574944
TRIAL DATE:

COURT/SESSION TYPE: Criminal Hearing
DATE: 01/23/2017
TIME: 01:30 PM
JUDGE: PERKINS
ATTY: JAMES V VIGGIANO JR
BNA:
LOCATION: Justice Center Courtroom 1, 251 N. RIDGEWOOD AVENUE , DAYTONA BEACH, Florida

LAURA E. ROTH
CLERK OF THE CIRCUIT COURT
VOLUSIA COUNTY, FLORIDA
P.O. BOX 6043
DELAND, FL 32721-6043

PARTIES PRESENT	RELEASE ACTIONS	Custody/Capias/Estreat	Continued To: ☐ By Def. ☐ By State ☐ By Court ☐ Waived Spdy.Trl
☐ DEF. APPEARED ☐ APP.W/COUNSEL	☐ TOTAL BOND FOR CASE SET	☐ CAPIAS ISSUED-BOND SET	REMARKS: **Status hearing**
☐ DEF. COUNSEL APP. W/OUT DEF.	☐ AT $	☐ AT $	**Cont. SAO to get new hearing date with judge's ja.**
☐ DEF. FAILED TO APPEAR	☐ DEF. ROR'D	☐ BOND ESTREATED	
ATTORNEY STATUS	☐ RELEASE TO PTS	☐ CAPIAS WITHDRAWN	
☐ APP. IND. STATUS - PD APPT.	☐ RELEASE TO PTS W/BOND	☐ BOND REINSTATED	
☐ APP. IND. STATUS - NOT INDIGENT	☐ OTHER:	☐ BOND ESTR. SET ASIDE	
☐ PD APPT. BY COURT	☐ NO CONTACT W/VICTIM	☐ OTHER:	
☐ DEF. TO RETAIN COUNSEL	☐ NO VIOL.CONTACT W/VICTIM	☐ HOLD CAPIAS-PTS INVEST.	
☐ PD WITHDREW ☐ ATTY.TO BE APPT	☐ OTHER:	☐ 48 HRS	
☐ OTHER:			

CT. CHARGE	COURT ACTION	INCARCERATION/PROBATION/COMMUNITY CONTROL INFORMATION	COSTS
1 FIRST DEGREE FELONY MURDER (ADJG)	☐ N.G.PLEA ☐ NO INFO.	☐ VCJ ____ MO ____ DY ☐ PROB.REVOKED	CRT. COSTS $
Statute: 782.04(1)(a)2 LVL:F DEG:C	☐ GUILTY PLEA ☐ NOLLE PROSS.	☐ DOC ____ YR ____ MO ____ DY ☐ C.C. REVOKED	FINE $
	☐ NOLO PLEA ☐ DISMISSED	☐ JAIL CREDIT TIME: ____ DY ☐ PROB. REINSTATE	PD FEE $
	☐ NG.VERDICT ☐ JGMT ACQT.	☐ PROB ____ YR ____ MO ____ DY ☐ C.C. REINSTATE	SAO FEE $
	☐ GLTY.VERDICT ☐ ADJ.WITHHELD	☐ COM.CONT. ____ YR ____ MO ☐ PROB. MODIFIED	LEO FEE $
	☐ MISTRIAL ☐ ADJ.GUILTY	☐ DRUG OFFENDER ☐ SEX OFFENDER ☐ C.C. MODIFIED	PD APP.FEE $
AMENDED CHARGE:		☐ CONCURRENT ☐ CONSECUTIVE TO:	REST. $
	☐ WAIVED PSI	☐ ____ HRS.COM. SERVICE ☐ STANDARD COND.	OTHER:
	☐ PSI ORDERED ☐ PDR ORDERED	☐ SUBST.ABUSE COUNSEL/TREAT. ☐ PREVIOUS COND.	
BOND SET AT $	☐ TO BE SENT:	☐ RANDOM U/A ☐ NO ALCOHOL/ILL.DRUG ☐ COS WAIVED	☐ CONVRT. FINE/COST
2 ROBBERY WITH FIREARM/DEADLY WEAPON (ADJG)	☐ N.G.PLEA ☐ NO INFO.	☐ VCJ ____ MO ____ DY ☐ PROB.REVOKED	CRT. COSTS $
Statute: 812.13(2)(a) LVL:F DEG:F	☐ GUILTY PLEA ☐ NOLLE PROSS.	☐ DOC ____ YR ____ MO ____ DY ☐ C.C. REVOKED	FINE $
	☐ NOLO PLEA ☐ DISMISSED	☐ JAIL CREDIT TIME: ____ DY ☐ PROB. REINSTATE	PD FEE $
	☐ NG.VERDICT ☐ JGMT ACQT.	☐ PROB ____ YR ____ MO ____ DY ☐ C.C. REINSTATE	SAO FEE $
	☐ GLTY.VERDICT ☐ ADJ.WITHHELD	☐ COM.CONT. ____ YR ____ MO ☐ PROB. MODIFIED	LEO FEE $
	☐ MISTRIAL ☐ ADJ.GUILTY	☐ DRUG OFFENDER ☐ SEX OFFENDER ☐ C.C. MODIFIED	PD APP.FEE $
AMENDED CHARGE:		☐ CONCURRENT ☐ CONSECUTIVE TO:	REST. $
	☐ WAIVED PSI	☐ ____ HRS.COM. SERVICE ☐ STANDARD COND.	OTHER:
	☐ PSI ORDERED ☐ PDR ORDERED	☐ SUBST.ABUSE COUNSEL/TREAT. ☐ PREVIOUS COND.	
BOND SET AT $	☐ TO BE SENT:	☐ RANDOM U/A ☐ NO ALCOHOL/ILL.DRUG ☐ COS WAIVED	☐ CONVRT. FINE/COST

LAURA E. ROTH, CLERK OF THE CIRCUIT COURT
Filed in Open Court this 23 day of January , 20 17.

/S/ JUSTY TURBERVILLE

TERENCE R PERKINS

ASSISTANT STATE ATTORNEY

DEPUTY CLERK IN ATTENDANCE

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Joseph Edward Jordan, defendant in the above-captioned case by and through undersigned counsel files the following Notice of Supplemental Authority as it related to the issues raised pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016):

1) ***Lance Uriley Armstrong v. State of Florida*, --- So. 3d ---, SC14-1967 (Fla. January 19, 2017).**

The Defendant provides the foregoing recent Supreme Court of Florida opinion in ***Lance Uriley Armstrong v. State of Florida*, --- So. 3d ---, SC14-1967 (Fla. January 19, 2017)**, as authority in support of Claim One of his Successive motion to vacate sentence of death pursuant to Florida Rule of Criminal Procedure 3.851. *See Attachment I*. Mr. Armstrong's case was a post-*Ring*[1] sentencing with a non-unanimous nine-to-three jury recommendation. He was granted a new penalty phase.

2) ***Tavares David Calloway v. State of Florida*, --- So. 3d ---, SC10-2170 (Fla. January 26, 2017).**

[1] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

The Defendant provides the foregoing recent Supreme Court of Florida opinion in ***Tavares David Calloway v. State of Florida,* --- So. 3d ---, SC10-2170 (Fla. January 26, 2017)**, as authority in support of Claim One of his Successive motion to vacate sentence of death pursuant to Florida Rule of Criminal Procedure 3.851. *See Attachment II*. Mr. Calloway's case was a post-*Ring*[2], non-unanimous seven-five jury recommendation. He was granted a new penalty phase.

3) ***Renaldo Devon McGirth v. State of Florida,* --- So. 3d ---, SC15-953 (Fla. January 26, 2017); *Renaldo Devon McGirth v. Julie L. Jones, etc.*, --- So. 3d ---, SC16-341 (Fla. January 26, 2017).**

The Defendant provides the foregoing recent Supreme Court of Florida opinion in ***Renaldo Devon McGirth v. State of Florida,* --- So. 3d ---, SC15-953 (Fla. January 26, 2017); *Renaldo Devon McGirth v. Julie L. Jones, etc.*, --- So. 3d ---, SC16-341 (Fla. January 26, 2017)**, as authority in support of Claim One of his Successive motion to vacate sentence of death pursuant to Florida Rule of Criminal Procedure 3.851. *See Attachment III*. Mr. McGirth's case was a post-*Ring*[3], non-unanimous eleven-one jury recommendation (The Court held that"[i]n sum, any attempt to determine what findings were made by the one juror who voted for life and the eleven jurors who voted for death would amount to speculation, and cannot rise to the level of proof beyond a reasonable doubt"). He was granted a new penalty phase.

Respectfully submitted,

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/s/Maria Christine Perinetti
Maria Christine Perinetti
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[2] *Ring v. Arizona*, 536 U.S. 584, 597.
[3] *Ring v. Arizona*, 536 U.S. 584, 597.

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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Attachment I

Supreme Court of Florida

No. SC14-1967

LANCELOT URILEY ARMSTRONG,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. SC15-767

LANCELOT URILEY ARMSTRONG,
Petitioner,

vs.

JULIE L. JONES, etc.,
Respondent.

[January 19, 2017]

PER CURIAM.

Lancelot Uriley Armstrong appeals an order of the circuit court denying his motion to vacate his sentence of death filed under Florida Rule of Criminal Procedure 3.851, and petitions this Court for a writ of habeas corpus. We have

jurisdiction. See art. V, § 3(b)(1), (9), Fla. Const. For the following reasons, we vacate Armstrong's sentence and remand for a new penalty phase consistent with Hurst v. State, 202 So. 3d 40 (Fla. 2016).

Armstrong was convicted of the February 17, 1990, first-degree murder of Deputy John Greeney, attempted murder of Deputy Robert Sallustio, and armed robbery. The jury recommended a sentence of death by a vote of nine to three, which this Court affirmed. Armstrong v. State (Armstrong I), 642 So. 2d 730 (Fla. 1994).

On appeal from the denial of postconviction relief, this Court vacated Armstrong's death sentence and remanded for a new penalty phase after concluding that one of his prior violent felony aggravators had since been invalidated. Armstrong v. State (Armstrong II), 862 So. 2d 705, 715 (Fla. 2003). After the second penalty phase, the jury again recommended the death sentence by a vote of nine to three. On his second direct appeal, this Court affirmed the sentence of death. Armstrong v. State (Armstrong III), 73 So. 3d 155, 161 (Fla. 2011).

On May 29, 2013, Armstrong filed a motion to vacate his sentence pursuant to Florida Rule of Criminal Procedure 3.851, raising ten claims. The circuit court denied relief on each of Armstrong's claims. Armstrong now appeals and also petitions for a writ of habeas corpus.

Because Armstrong was condemned by a vote of nine to three, we find that Armstrong's sentence is a result of a Hurst v. Florida, 136 S. Ct. 616 (2016), error. We therefore must consider whether the error was harmless beyond a reasonable doubt. See Hurst, 202 So. 3d at 67.

> The harmless error test, as set forth in Chapman[v. California, 386 U.S. 18 (1967),] and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

Id. at 68 (quoting State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986)).

The jury in this case recommended death by a vote of nine to three. While the aggravators are such that no reasonable juror would not have found their existence,[1] we cannot determine that the jury unanimously found that the aggravators outweighed the mitigation. We can only determine that the jury did not unanimously recommend a sentence of death.

Because we cannot make these determinations, we cannot say that there is no possibility that the error did not contribute to the sentence. We therefore

---

1. The trial court found the following aggravators in this case: (1) Armstrong was convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while Armstrong was engaged or was an accomplice in the commission of or an attempt to commit the crime of robbery; and (3) the victim in this capital felony was a law enforcement officer engaged in the performance of his duties. Armstrong, 73 So. 3d at 165.

determine that the error in Armstrong's sentencing was not harmless beyond a reasonable doubt. Accordingly, we reverse the postconviction court's order and remand for a new penalty phase. See Hurst, 202 So. 3d at 69.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
PERRY, Senior Justice, concurs in part and dissents in part with an opinion.
CANADY and POLSTON, JJ., dissent.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

PERRY, Senior Justice, concurring in part and dissenting in part.

I agree with the majority that the Hurst v. Florida, 136 S. Ct. 616 (2016), error in this case is not harmless beyond a reasonable doubt. However, as I expressed in Hurst v. State, 202 So. 3d 40, 75 (Fla. 2016) (Perry, J., concurring in part and dissenting in part), "[t]here is no compelling reason for this Court not to apply the plain language of section 775.082(2), Florida Statutes." I therefore dissent to the majority's decision to remand for a new penalty phase and would instead remand for the imposition of a life sentence.

Two Cases:

An Appeal from the Circuit Court in and for Broward County,
Michael L. Gates, Judge - Case No. 061990CF005417B88810
And an Original Proceeding – Habeas Corpus

Neal Andre Dupree, Capital Collateral Regional Counsel – Southern Region, Nicole M. Noel, Assistant Capital Collateral Regional Counsel – Southern Region, and Jason Jay Kruszka, Staff Attorney, Capital Collateral Regional Counsel – Southern Region, Fort Lauderdale, Florida,

for Appellant/Petitioner

Pamela Jo Bondi, Attorney General, Tallahassee, Florida; and Leslie T. Campbell, Assistant Attorney General, West Palm Beach, Florida,

for Appellee/Respondent

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Attachment II

Supreme Court of Florida

No. SC10-2170

TAVARES DAVID CALLOWAY,
Appellant/Cross-Appellee,

vs.

STATE OF FLORIDA,
Appellee/Cross-Appellant.

[January 26, 2017]

PER CURIAM.

Tavares David Calloway was convicted of five counts of first-degree murder for the deaths of Derwin Copeland, Frederick McGuire, Adolphus Melvin, Gary St. Charles, and Trenton Thomas, along with armed robbery, armed kidnapping, and armed burglary with an assault or battery. A jury recommended a sentence of death for each count of first-degree murder by a vote of seven to five. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const.

FACTS AND PROCEDURAL HISTORY

1997

On January 21, 1997, eighteen-year-old Anthony Strachan was at home in his family's apartment on 580 Northwest 64th Street in Miami, cutting a friend's hair. Strachan went into the kitchen and, through the kitchen window, saw one of his neighbors, "Shorty," standing outside on 64th Street with two unknown men. One man, who wore a skull cap and a heavy brown coat that resembled a field or military jacket, was taller than Shorty. Strachan saw Shorty walk up the apartment stairs and past the jalousie kitchen door of his family's apartment with one of the unfamiliar men. At some point later in the day, Strachan heard loud booming noises that he assumed were from a neighbor's stereo. He opened the front door to see if anything outside might explain the noise, but saw nothing and closed the door.

Strachan later walked downstairs to retrieve something from his mother's car. On his way back to the apartment, he heard the door of Apartment 8 open and saw the unfamiliar man exiting the apartment complex. He and Strachan nodded at each other as they passed. The unidentified man appeared to be older than Strachan and held a small box the size of a shoe or cigar box that Strachan recognized as one often carried by Shorty. The brown coat he wore struck Strachan as unusually heavy for the weather in Miami.

Elsewhere that day, Latonya Taylor was concerned about her fiancé, Adolphus "Tank" Melvin. He was supposed to pick up their two-year-old son

from day care, but the day care center called her and informed her that Melvin never arrived. She attempted to contact him via his beeper and cell phone, but he did not respond. She called her friend, Gwendolyn James, to ask if she had been in contact with Melvin or his friend Trenton Thomas, James's fiancé. James paged Thomas, who also did not respond.

Taylor drove to an apartment in Liberty City that was the residence of Gary "Shorty" St. Charles, where she had previously dropped Melvin off. She saw Melvin's car in the parking lot, heard loud music playing from one of the upstairs apartments, and assumed that it emanated from St. Charles's apartment. When she opened the door to Apartment 8, she found a grisly scene, ran with her son to the nearby home of Melvin's sister, and called the police.

When the police arrived, they found the bodies of Melvin, Thomas, St. Charles, and Derwin Copeland. Frederick McGuire was still alive, and paramedics transported him to the hospital for treatment, where he died the next day. All five men had been shot once in the head, execution style. Their ankles had been bound with duct tape, and their hands and wrists were bound behind their backs with duct tape. Duct tape also covered their eyes and mouths. The men were clad only in underwear and undershirts; their clothing and shoes were piled in a corner of the living room. Styrofoam containers filled with half-eaten food were found on the

dining room table. Officers noticed that the music on the stereo was very loud, even over the noise of nearby I-95.

The initial investigation of the apartment and surrounding areas lasted for nearly twenty hours. The apartment appeared to have been ransacked before the officers arrived. Although crime scene investigators collected blood samples, they did not specifically search for DNA because DNA collection was not the standard practice of the City of Miami Police Department in 1997. Eighty-nine latent fingerprint cards were lifted from around the apartment, although most of the prints were later found to have matched the victims. All of the pieces of duct tape that were recovered from the apartment were commingled in one plastic bag, but the pieces were later separated. One empty roll of duct tape was found on the floor near the piles of clothing. Investigators also recovered five spent .45 caliber shell casings.

The medical examiner estimated that the time of death for Melvin, Thomas, Copeland, and St. Charles was between 3:00 p.m. and 7:00 p.m. Their wounds were consistent with a .45 caliber firearm, which resulted in an immediate loss of consciousness and death. McGuire was similarly instantly incapacitated, although he did not die until the following day. Additionally, Thomas's head wound featured stippling, which indicated that he was shot at close range. None of the men exhibited defensive wounds.

Although investigators found no significant quantity of drugs in the apartment, they did find marijuana residue and drug paraphernalia. Additionally, a small bag of marijuana was found in the clothing of Melvin. Investigators also recovered cash from under a waterbed mattress and a gold medallion under the body of Melvin, but there was no jewelry or marijuana found on any of the other victims. They concluded that Melvin was the leader of a small group involved in marijuana packaging and distribution. St. Charles, who resided in the apartment, served as his "second-in-command," and Thomas and McGuire oversaw the packaging of the marijuana. Copeland was not believed to have been formally involved in the group's activities, but he had recently been in a car accident and was dependent on Melvin, his uncle, for transportation. Despite several months of investigation by the City of Miami Police Department, the case went cold.

1998

On May 11, 1998, Detective George Law received a phone call from a woman who did not identify herself. Law had investigated the murder of Michael Gosha, whose family and friends had informed Law that Gosha was last seen alive with a man identified as "Black." The woman advised Law that "Black" was Tavares Calloway, who knew Gosha and was involved in the quintuple murders from 1997, along with "Tote."

On May 12, 1998, Detective Kelvin Knowles brought Antonio "Tote" Clark to the police station. Clark signed a Miranda[1] waiver, and eventually told the police that he and Calloway had gone to St. Charles's apartment to commit a robbery at the direction of Dwight Campbell, who was also known as Frank. Clark said he was unarmed and did not expect anyone to die. Calloway had instructed the victims to remove their clothing to be sure they were not armed and told Clark to bind them with duct tape. Calloway shot the men, and he and Clark left the scene.

Based on Clark's statement, Detective Knowles was dispatched to pick up Calloway, who had a bench warrant for driving with a suspended license. Knowles was unable to make contact with Calloway initially, but he left a card indicating that Calloway should call him. When Calloway called, Knowles informed him of the bench warrant and indicated that detectives needed to speak with him about other matters. Calloway agreed to come to the station and asked Knowles for transportation. He was nineteen years old.

Calloway arrived at the station around 3:00 p.m. on May 13 and was directed to an interview room with a two-way mirror. He was not handcuffed, and officers elected not to record the interview. Detectives Law and Alberto Borges

1. Miranda v. Arizona, 384 U.S. 436 (1966).

began to question him, and Calloway signed a Miranda waiver at 3:31 p.m. Law asked Calloway if he wanted water, which Calloway declined, explaining that he was fasting that day because he was a born-again Christian. Calloway appeared relaxed and calm. Although Calloway was nineteen years old, Law thought he looked older and seemed mature for his age.

Law initially questioned him about the Gosha homicide, and Calloway admitted that he and Gosha planned and participated in the home invasion robbery of Shellie Wilson ("Twin"), and that Calloway suspected Gosha was murdered in retaliation for that robbery. Borges then asked him about the quintuple homicides, but Calloway denied involvement and repeatedly told them to "find the facts." When Borges showed Calloway photographs of the victims taken from the apartment, Calloway did not respond, other than to repeat, "find the facts." Around 5:00 p.m., Law and Borges left Calloway alone in the interview room.

Detective Ervins Ford, who had viewed the questioning from the attached observation room, entered the interview room after 7:00 p.m. In an effort to build rapport, Ford asked Calloway about his background and upbringing. Calloway explained that his grandmother had raised him and imposed regular church attendance and nightly Bible study in the household. Ford retrieved a Bible from one of the desks in the homicide office and returned to the interview room. Calloway became noticeably more comfortable and confident with Ford as

Calloway began to recite passages from the Bible. Calloway referenced many passages that concerned God's vengeance and seemed to identify with the Archangel Gabriel, whom Calloway described as God's punisher. When Ford asked him whether the victims had been punished by their deaths, Calloway replied that they should have seen it coming because they had been selling drugs for a long time and "were doing a lot of dirt." After watching Calloway from the observation room, Detective Tony Davis entered, told Calloway that the Bible states "thou shall not kill," and walked out of the room with the Bible. Ford exited the room as well.

Over the course of the evening, several officers asked Calloway if he needed anything, offers which he declined. At approximately 8:00 p.m., Detective Knowles returned to the interview room and listened as Calloway told him that the victims were bad people, drug dealers, and they worked for the devil. Around 11:00 p.m., Detective Juan Gonzalez entered and falsely informed Calloway that his fingerprints were found in Apartment 8 in 1997. Calloway responded that perhaps he had been to a hardware store and touched a door. When Gonzalez pressed him as to how a door with his fingerprints on it ended up in Apartment 8, Calloway became defensive and told Gonzalez to do his job and leave the room, which he did.

Law returned to the interview room at approximately 1:00 a.m. on March 14, along with Detective George Pereira from the Miami-Dade County Police Department to discuss the Twin home invasion robbery, which Pereira had investigated. They did not discuss the quintuple homicides with Calloway at that time. Calloway denied Pereira's request to record the interview. Pereira reminded Calloway of his Miranda rights, and Calloway repeated that he did not want a lawyer and did not indicate that he wished to end the questioning.

Gonzalez returned between 2:30 a.m. and 3:00 a.m., and Calloway provided some biographical information, including that three months before the murders, he had lived next door to Campbell, whom Calloway did not know well. Gonzalez told Calloway that his fingerprints were found on duct tape that was used to restrain the victims, which Gonzalez knew to be false. Calloway responded evasively that he used duct tape for many reasons, but did not know how duct tape with his fingerprints came to be in Apartment 8. When asked if he knew any of the victims, Calloway said that he knew Melvin as an unpopular snitch. Although Borges noticed a shift in Calloway's demeanor at this point, he directed the interview to stop, given the late hour. Several officers slept at their desks, and Calloway was left alone in the interview room to sleep.

Around 8:00 a.m. on May 14, Law checked on Calloway and found him asleep in the interview room. After Calloway was awakened by Law, Calloway

asked to call his girlfriend, Diane Odom. Law directed him to a telephone and observed the phone call, but did not listen to the conversation. He saw Calloway's demeanor change and decided to resume questioning when they returned to the interview room. At some point that morning, one of the officers brought Calloway breakfast, which he eventually ate.

Law began by telling Calloway that he could tell Calloway loved his girlfriend. Law and Detective Willie Everett then began to confront Calloway with inculpatory evidence. Law told Calloway that they knew he was at the crime scene because his fingerprints were found on the door and on duct tape recovered from the scene.[2] Everett also told Calloway that they had information that he wore camouflage clothing and sunglasses that day.[3] Everett also told Calloway that if he was a good Christian, God would want him to confess. The detectives saw him

2. During trial, Law admitted this was a ruse to pressure Calloway to confess. Neither Calloway's fingerprints nor his DNA were ever recovered from the apartment.

3. During their questioning, Sergeant Eunice Cooper slipped a note under the door of the interrogation room. The note contained a list of questions that the detectives should ask, including whether "Black" wore army fatigues, a hat, or sunglasses on the day of the murders; whether he had come from the catwalk adjacent to I-95; if he carried anything, specifically a new jacket, shoe box, or cigar box; and if the "Haitian boy downstairs" was approached near the car. When Everett later asked Cooper where she had obtained the information, she replied that she was not at liberty to disclose her source. He did not question her response.

tear up, put a hand on his shoulder, and told him it would be ok. Calloway said that if they would give him a minute, he would tell them everything.

Around 9:00 a.m. on May 14, Calloway told them that three days before the murders in January 1997, he had gone to Liberty Market to purchase camouflage clothing and sunglasses in preparation for a "lick," meaning a robbery.[4] On January 21, 1997, Michael Gosha came to him and said it was time to do the lick. They went to Campbell's home first, and then Calloway and Clark went to St. Charles's residence on 580 Northwest 64th Street. Calloway wore an Army hat and camouflage clothing.

When they arrived, they saw St. Charles exit a car. Calloway used a .45 caliber gun to place St. Charles in a chokehold and force their way into Apartment 8, where they found Melvin and three other men eating from Styrofoam containers. Calloway demanded to know where the drugs were and ordered everyone to get on the floor and remove their clothing and jewelry. Calloway told Clark to find something to restrain the men, and when Clark turned up empty-handed, he sent Clark to purchase tape. Clark returned with duct tape, and they began to tape everyone. When they ran out of duct tape, Calloway directed Clark to purchase

4. Calloway was eighteen years old in January 1997.

more. Calloway placed tape across the eyes of the victims, "because they were looking" at him.

At a loss for what to do next, Calloway sent Clark to Campbell for further instructions. Clark returned and told him that Campbell said to kill two of the men. Calloway responded that killing only two of them would create problems because they could identify Calloway and would retaliate. Clark returned to Campbell's apartment and reported to Calloway that Campbell said to kill everyone. Calloway increased the volume of the stereo to muffle the sounds of gunshots. He shot each of the victims in the head once. Calloway and Clark took two pounds of marijuana, jewelry, cell phones, beepers, and cash; wiped down any fingerprints they might have left; and fled to Campbell's house. They informed him they had completed the lick and went to the home of another friend. A short time later, Calloway disposed of the gun and provided the stolen jewelry to a relative of Gosha's to pawn.

Law asked Calloway if they could have a stenographer record a formal, sworn statement, and Calloway agreed. Additional details were included in the statement, including that before they settled on Melvin as the target of the lick, Calloway and Campbell discussed other potential targets. Calloway also indicated that Atwon "Twon" Davis waited for Clark and him in the parking lot while they

were in the apartment before driving them to a friend's house.[5] Gosha, Clark, and Calloway distributed the items taken from the apartment among themselves before they parted ways. Calloway later burned his clothing.

Law arranged for Diane Odom to come to the police station. When she arrived, Law and Everett left Odom and Calloway alone and unmonitored in the interrogation room. He was crying and told her he had to come clean and get right with God. Sergeant Cooper later saw Calloway in the homicide office, and he told her that if he had not confessed, they would never have been able to prove his involvement.

Around 1:00 p.m., Calloway agreed to show Law and Everett the area where he disposed of the gun. Calloway, who was not handcuffed because the officers thought he was cooperative, Odom, Everett, and Law drove in a van first to Liberty Market, where Calloway told the detectives he had purchased clothing for the lick. They then drove to the area where Calloway claimed to have disposed of the gun, which was a litter-strewn field. Despite a brief search, the gun was not found.

The officers then proceeded to the home of one of Calloway's relatives, where he spoke to and hugged his family members. The officers left Odom with

5. Officers later learned that Davis was incarcerated at the time of the homicides and therefore could not have driven Calloway and Clark from the crime scene.

Calloway's relatives and eventually returned with Calloway to the police station. Upon their return, Calloway reviewed and signed his transcribed statement, twenty-six hours after he first entered the police station. Ultimately, eleven police officers questioned Calloway over the course of approximately eighteen hours, during which time he was not handcuffed.

On May 26, 1998, a grand jury indicted Calloway and Clark on eight counts: five counts of first-degree murder, one count of armed robbery, one count of armed kidnapping, and one count of armed burglary with an assault or battery. The joint indictment was eventually severed.

Discovery

In 2008, Detective Borges first learned that Strachan may have witnessed some of the events that day. At that point, it was revealed that Sergeant Cooper, the author of the note that was slipped under the door during Calloway's confession, had received information from one of her friends, Val Williams. Williams, the mother of Strachan and who worked in the property department of the City of Miami Police Department, approached Cooper sometime in 1997 and provided Cooper with information that provided the basis for several questions on the note. However, Williams asked Cooper not to share the information because Williams did not want her son to be involved in the investigation. At the time, Cooper did not think the information was sufficient to identify any particular

suspect and incorrectly believed Strachan to be a minor, so she honored Williams's request. Cooper did not reveal the source of her information until 2008, when the note was brought to her attention again. When Borges learned that Strachan may have had information regarding the homicides, he and another officer flew to Arizona, where he then lived, to interview him.

In October 2008, the trial court held a suppression hearing regarding Calloway's confession that lasted several days and was continued until March 2009. At the conclusion of the hearing, the State and Calloway contested whether a Frye[6] hearing was necessary to determine whether Dr. Richard Ofshe, an expert witness in the field of false confessions, could testify for the defense. The trial court ruled that both Dr. Ofshe and Dr. Michael Welner, a rebuttal witness for the State, could testify, but only after Calloway himself testified that his confession was false. However, Calloway did not testify during the suppression hearing; therefore, neither doctor testified at that time.

Guilt Phase

During trial, the State presented testimony from each of the officers who participated in the interrogation. In anticipation of Calloway's defense that his confession was false and "fed" to him by officers, the State presented evidence

6. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

during its case-in-chief to counter that defense. Every officer who testified denied that anyone had threatened, coerced, or promised Calloway anything to obtain a confession. Additionally, each officer testified that Calloway did not request an attorney or otherwise invoke his Miranda rights.[7]

Detective Borges testified that some of the contemporaneous media coverage of the murders did not accurately portray certain details. He explained that he was familiar with many of the details from the January 1997 investigation that he did not disclose to Everett or Law before they obtained the confession. He also offered testimony that Calloway himself provided certain details that were unknown to officers in May 1998, but were later confirmed by Strachan, such as the fact that Calloway first encountered St. Charles downstairs. Further, Borges testified that Clark's fingerprints were found on the sticky side of certain pieces of duct tape, which confirmed both Clark's and Calloway's accounts that Clark taped the victims.[8]

Law denied that he or Everett "fed" Calloway specific details when they questioned him, or that they rehearsed anything with him before his statement was

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7. The videotaped testimony of Detective Everett, taken in 2003 before Calloway testified or Cooper disclosed Strachan as a witness, did not reference either an invocation of Calloway's Miranda rights or Cooper's note.

8. Clark did not testify during trial, but his statement, taken the day before Calloway was arrested, was used for impeachment purposes.

recorded. Law flatly denied that he "tricked [Calloway] into thinking he was a police agent" who would assist the detectives with the apprehension of the "real" murderers. Law also testified that that he did not recognize the note written by Cooper, nor did he remember it from their interrogation of Calloway.

Fabrice Nelson, the lead crime scene investigator in January 1997, testified with respect to evidence recovered from the apartment. Guillermo Martin, a latent fingerprint examiner, testified that latent prints lifted from the freezer door and the sticky side of duct tape pieces recovered from Apartment 8 matched those of Clark. Martin admitted that of the sixty-four latent fingerprint cards of value recovered, thirty-four cards remained unidentified, and none matched the known prints of Calloway. Over objections from the defense, the State also presented the testimony of medical examiner Dr. Bruce Hyma, in the place of Dr. Charles Siebert, the original medical examiner.

Latonya Taylor testified that she recognized her fiancé, Adolphus Melvin, by the underwear that he wore when he was killed, which she had purchased for him. She also described the jewelry that he usually wore, which, along with his wallet, cell phone, and beeper, she never saw after he left for the day on January 21, 1997. Gwendolyn James, the fiancée of Trenton Thomas, also testified that Thomas's pager was never found after that day. Adolphus Thornton, who knew Calloway as "Black" and was a friend of his nephew, Michael Gosha, testified that

Calloway approached him in January 1997 to pawn a distinctive gold bracelet. A few days later, Thornton learned that Melvin had been murdered and recognized the bracelet as belonging to him.

Strachan testified that in January 1997, he assumed the booming noises were music played from loud speakers; however, he had since served in the Marines and thought he recognized the noises to be the sounds of gunshots, although he could not definitely categorize the noises. After he informed his mother of what he had observed, his mother moved their family out of the apartment that very day and they did not return. After he testified that the person he saw in January 1997 seemed to be several years older than himself, he admitted that he was unable to identify Calloway in a photographic array during a police interview in 2008 or during trial in 2009.

The State also presented testimony from Diane Odom, Calloway's girlfriend at the time of his arrest. She testified that she saw Calloway after he confessed and drove with Calloway and the officers to search for the gun. On direct examination, she testified that Calloway did not tell her that her life was in danger when officers dropped her off with members of Calloway's family that day.

After the State rested, defense counsel proceeded on a theory that Calloway's confession was false and induced as part of a plan with the police to lure the real murderers from hiding. In support of this theory, defense counsel

presented testimony from Calloway and Dr. Ofshe, a sociologist who testified as an expert on factors that can cause a false confession.

Calloway's testimony conflicted with that of various police witnesses. For example, he testified that when he signed the Miranda paperwork upon his arrival at the police station, no one explained that he was under arrest or reviewed the protections of the Miranda rights. He also asserted that he requested an attorney several times from several different officers, and at one point, Borges retorted that "the devil in a suit" could not save him and he would "fry for this." He also claimed that Ford, rather than himself, stated that the victims were bad people who worked for the devil. Further, he testified that several officers provided him with nonpublic details about the murders, including that a robbery also occurred; the apartment was a marijuana packaging center; the victims were killed execution style; the stereo volume was high; and the weapon used was a .45 caliber gun.

After being left alone in the interview room, Calloway testified that Law returned at some point in the late night or early morning with a "glazed, crazy" look. Law said he had been speaking with the deceased Gosha, who told Law who had killed him. Calloway thought Law might have experienced a religious vision and replied that if Law had really spoken to Gosha, Gosha would have told him that Calloway was a good person who was not involved in the murders of either Gosha or the five men in 1997. Law returned sometime later, looking calmer, and

explained that the men who killed Gosha intended to target Calloway next. Law implied that Calloway and his family were under surveillance. However, Law said it would help Calloway if he made a false statement and to think about his family before declining this opportunity to help them. After speaking with Odom, Calloway agreed to provide a false confession to protect his family. He testified that he was under the impression that he would spend three months in jail so that the police could apprehend the real murderers. The State extensively impeached Calloway with an earlier interview between Dr. Ofshe and Calloway. Calloway defended inconsistent or incoherent statements by reference to his age at the time of the arrest (19), naivety, ignorance, use of slang, and lack of education.

Dr. Ofshe offered testimony regarding the manner in which a police interview may become a coercive interrogation that results in a confession. He explained that Calloway's account indicated the presence of many sources of "contamination," meaning that Calloway was potentially aware of evidence from either media accounts or the officers themselves. Dr. Ofshe offered his opinion that "[t]he quality of the interrogation was extremely poor throughout"; however, the trial court precluded him from further testifying whether it was his opinion that the confession was false. The court also ruled that Dr. Ofshe could not compare statements in Cooper's note and Strachan's testimony to Calloway's confession.

The State impeached Dr. Ofshe with inconsistences in the notes that Calloway provided to him before their interview. For example, when Dr. Ofshe interviewed Calloway in 2001, Dr. Ofshe told Calloway that it did not make sense that Calloway told the police he had fabricated the story about sending Clark to purchase duct tape, when Clark had recounted the same detail the day before Calloway was arrested. Dr. Ofshe admitted that he disregarded many of the details that Calloway recounted as too confusing until he learned about Cooper's note and the substance of Strachan's testimony.

Defense counsel also presented testimony from Rupert Butcher, a latent fingerprint examiner from the City of Miami Police Department. He testified that the duct tape collected from Apartment 8 was commingled and seized improperly.

During rebuttal, the State presented testimony from several witnesses who disputed Calloway's testimony. Law explained that he was only minimally involved with the 1997 quintuple homicides prior to Calloway's arrest and therefore could not have provided him with details about the homicides. Law and Borges denied that Borges told Calloway that he "would fry" for this and that a lawyer, "a devil in a suit," could not help him, or that they denied him an attorney upon his request. Law denied that he approached Calloway early on the morning of May 14 and told Calloway that he had spoken to Gosha in a dream, or that he arranged a deal with Calloway. The State also presented detectives from the

Miami-Dade County Police Department who had investigated the Twin robbery. Calloway testified that he was a victim of that robbery; however, Detective Pereira countered that Calloway admitted his involvement with that robbery.

Dr. Michael Welner, a psychiatrist, agreed that false confessions do occur, but emphasized that they are a rare phenomenon. He also explained that research has demonstrated that false confessions tend to be made more often by individuals who are compliant or suggestible, particularly those who suffer from mental illness or qualify as intellectually disabled. Dr. Welner stated that he had no evidence to indicate that Calloway was particularly compliant or suggestible, suffered from mental illness, or was actively psychotic at the time of his arrest and confession.

After a trial that lasted over two months, the jury returned a guilty verdict on all counts on July 30, 2009.

Penalty Phase

During the penalty phase, the State presented victim impact testimony from Dorothy White, the mother of Trenton Thomas; Katherine Lowe, the sister of Frederick McGuire; Carolyn Raphael, the sister of Gary St. Charles; Errol Kelly, the nephew of Adolphus Melvin; and Gloria Copeland, the mother of Derwin Copeland. The State then rested.

Diane Odom, Calloway's girlfriend at the time of his arrest, testified that Calloway helped her with her children during their relationship. He picked them

up from school, taught them how to play football and ride bikes, and spent three to five days a week with them. Eugene Anderson, a relative to Calloway by marriage, explained that he occasionally hired Calloway to assist him with his carpet installation business and that Calloway gave his earnings to Eugene's wife, Shante, for their children.

Joan King and Juanita Perry testified that before his arrest, Calloway regularly attended church. In addition to attending services three times a week, he participated in youth activities, helped clean the church, and served as an usher.

Eugene Hill, Calloway's step-grandfather, provided testimony about Calloway's impoverished childhood. His stepdaughter and Calloway's mother, Shirley Hill, moved to Miami to live with him and his wife, Hester Hill. Eugene tried to provide for Calloway and his brother, Reginald, and to discipline them, but he was eventually injured and was unable to continue to support Shirley and her family.

Shante Anderson, Calloway's second cousin, testified regarding Calloway's difficult childhood. When Calloway's mother moved her children to Liberty City, they lived in a crowded two-bedroom apartment with Eugene and Hester Hill, Cherry Hill, and Cherry's two children. Eugene was strict and threatened to discipline the children with his belt. After Shirley moved out of the apartment when Calloway was approximately thirteen years old, she, Calloway, and Reginald

were evicted at least twice from various apartments around Liberty City. It was rare that Shirley kept more than milk and cereal to feed Calloway and Reginald. Calloway would visit his grandparents' home, where Hester would feed him without Eugene's knowledge or permission.

Reginald Calloway further testified to the hardships he and his brother endured. He stated that Eugene frequently beat Calloway with a belt during the time they lived with him and their mother was largely absent during this time. Despite the difficulties, Calloway encouraged his brother to stay in school and served as a surrogate father figure.

Calloway's mother, Shirley, explained that she was often abused by Solomon Calloway, the father of Calloway and Reginald, and that he once attempted to drown her in a bathtub. When Calloway was one or two years old, she moved her children to a small, one-bedroom trailer in Georgia. Despite the move, Solomon visited the trailer and beat Shirley with a switch nearly every day. Solomon would also beat Calloway with the switch. She recounted one incident when she and Solomon were fighting and Calloway, then a toddler, handed her a bat to use in self-defense. The abuse continued until she moved to Miami to live with her mother and stepfather, when Calloway was five or six years old.

After she moved out of their home and into a one-bedroom apartment with her sons, she spent her income on drugs, rather than rent, electricity, groceries, or

other basic needs for her children. When Calloway was approximately fourteen, she moved the family again, this time to the Scott Projects, which she described as a "war zone" where drugs were openly sold and fights occurred regularly. Her drug abuse intensified, and she testified that at that point in her life, nothing but crack cocaine mattered to her, not even her children. Instead of using food stamps to feed her children, she traded the food stamps for drugs.

On February 3, 2010, the jury recommended the death penalty for all five murders, each by a vote of seven to five. On April 13, 2010, the court held a Spencer[9] hearing. Dr. Jethro Toomer, a clinical psychologist, testified for the defense. Dr. Toomer explained that the instability, poverty, and parental abandonment that Calloway experienced throughout his life affected his cognitive processing, impulse control, and ability to engage in personal relationships. However, Dr. Toomer admitted that Calloway's participation in planning the robbery and murders demonstrated that he was capable of controlling his impulses.

The trial court issued its sentencing order on October 1, 2010. The court concluded that the State had established beyond a reasonable doubt the existence of six aggravating circumstances: prior conviction of a capital felony, § 921.141(5)(b), Fla. Stat. (1997) (great weight); capital felony committed in the

9. Spencer v. State, 615 So. 2d 688 (Fla. 1993).

course of a kidnapping, § 921.141(5)(d) (great weight); capital felony committed for the purpose of avoiding arrest, § 921.141(5)(e) (great weight); capital felony committed for pecuniary gain, § 921.141(5)(f) (great weight); capital felony was heinous, atrocious, or cruel (HAC), § 921.141(5)(h) (exceptionally great weight); and capital felony was committed in a cold, calculated, and premeditated manner (CCP), § 921.141(5)(i) (extremely great weight).

The court found one statutory mitigating circumstance, Calloway's age at the time of the murders, section 921.141(6)(g), Florida Statutes, and gave it some weight. The court also acknowledged the existence of the following nonstatutory mitigating circumstances: Calloway had an unstable and impoverished background (slight weight); he was often abandoned by his mother, who was a crack addict (some weight); as a very young child, he witnessed his father physically abuse his mother (slight weight); he demonstrated poor performance in school, has a low-normal IQ, and dropped out of school (minimal weight); he grew up in the Scott Projects, a rough neighborhood rife with narcotics and violence (slight weight); he suffered emotional deprivation at the hands of his caregivers, his mother and step-grandfather (little weight); he was exposed to chronic violence throughout his life (little weight); he was deprived of a nurturing mother (little weight); he grew up in abject poverty (slight weight); he was born into a dysfunctional family (minimal weight); he became normalized to violence (little weight); he lacked guidance and

a father-son relationship (slight weight); he lacked a role model (no weight); he faced unstable living conditions throughout his life (little weight); he was active in his church and exhibited genuine religious beliefs (no weight); his aunt and grandmother passed away while he was in jail, and he was upset because he was unable to attend their funerals (no weight); he did not flee from the police (no weight); his mother still loves him (no weight); he was a good father figure to the children of his former girlfriend, Diane Odom (some weight); he encouraged his cousins to do well (minimal weight); he is considerate, generous, and concerned about his family (some weight); he will die in prison regardless of what sentence he receives (no weight); the police would not have solved the crimes if he had not confessed (some weight); Clark, his codefendant, was sentenced to life imprisonment (no weight); he did not receive recommended psychological counseling (some weight); he was employed at the time of his arrest (slight weight); and he used poor judgment and engaged in impulsive behavior (minimal weight).[10]

10. The court determined that Calloway did not present mitigating evidence that the capital felony was committed while he was under the influence of a mental or emotional disturbance. The court also rejected his claim that it should consider as a mitigating circumstance that he was a follower, when "[t]he evidence proved that he was clearly a leader in the commission of these crimes."

The court concluded that the aggravating circumstances, particularly HAC and CCP, far outweighed the mitigating circumstances. The trial court sentenced Calloway to death for the murders, and imposed life sentences for the armed robbery, armed kidnapping, and armed burglary with an assault or battery convictions. This appeal follows.

DISCUSSION

Voir Dire

The first error that Calloway alleges is that the trial court improperly limited the scope of voir dire. Specifically, defense counsel sought to ask potential jurors whether they would consider a life recommendation when faced with five murder victims and the anticipated multiple aggravating circumstances. During a hearing on this issue, the defense argued that they would be unable to explore juror bias and intelligently exercise preemptory strikes without these questions. The State generally agreed that the defense should be permitted to ask whether jurors would commit to weighing the aggravating and mitigating circumstances. However, the State contended that defense counsel should not be permitted to attempt to commit the jurors to a predetermination by asking if jurors could still consider life after hearing about multiple certain aggravating circumstances, which would convert voir dire into a pretrial of the case.

The trial court explained that prospective jurors had been asked whether they could commit to fairly weighing aggravating and mitigating circumstances before making their recommendation. When defense counsel responded, "The problem is, they don't know what the aggravators are yet," the court answered, "That's the way it is," and reminded defense counsel that the jurors are given similar instructions before deliberation. Defense counsel replied:

> I don't want to find out their attitude towards applying that instruction at the end of the case. It's too late for me to have explored whether they would be overwhelmed by [preconceived] notions of bias against [heinous], atrocious, and cruel.
>
> A case where someone tortured someone[,] tied them up and subject[ed] them to pain, no, I can't give them life. I need to know that at the beginning because they don't know what the aggravators are going to be, either the law or the potential factual scenario. And if they would be overwhelmed that they can't apply the law or they have a bias such that I would use a pre-emptory, I need to know about it in jury selection.

The court stated that defense counsel had failed to present any authority to support that position, and the jury should not be requested to engage in pretrial determinations. It ultimately concluded that the parties could probe the venire about potential bias regarding the number of victims and the potential for financial gain, given that the indictment included the armed robbery charge.

This Court will not disturb a ruling of a trial court regarding the scope of voir dire absent a finding of an abuse of discretion. E.g., Chamberlain v. State, 881 So. 2d 1087, 1095 (Fla. 2004). This standard is only met if no reasonable person

would arrive at the same conclusion as that of the trial court. Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000) (citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990)). This Court has previously found no abuse of discretion in the exclusion of questions pertaining to potential jurors' familiarity with stories about prisoners who had been released from death row, or their views regarding mitigation. Darling v. State, 808 So. 2d 145, 160 (Fla. 2002); Vining v. State, 637 So. 2d 921, 926-27 (Fla. 1994); see also Hoskins v. State, 965 So. 2d 1, 13 (Fla. 2007) (finding no abuse of discretion in excluding the use of autopsy photographs during voir dire). However, we have held that an abuse of discretion occurred when a trial court prevented defense counsel from questioning prospective jurors about whether they would accept voluntary intoxication as a defense in a case that required specific intent to be established. Lavado v. State, 492 So. 2d 1322, 1323 (Fla. 1986); see also Johnson v. State, 590 So. 2d 1110, 1110 (Fla. 2d DCA 1991) (trial court abused its discretion in excluding questions about defendant's status as a convicted felon to probe for potential bias).

It is a well-settled principle in Florida that parties may not question potential jurors during voir dire about evidence that is expected to be presented during trial and request an initial decision from prospective jurors as to how they will rule in the case. Hoskins, 965 So. 2d at 13 ("The purpose of voir dire is to obtain a fair and impartial jury, whose minds are free of all interest, bias, or prejudice, not to

shock potential jurors or to obtain a preview of their opinions of the evidence." (citations omitted)); Franqui v. State, 699 So. 2d 1312, 1322 n.5 (Fla. 1997) (citing Vining, 637 So. 2d at 921; Dicks v. State, 93 So. 137, 138 (Fla. 1922)). "Such a procedure would revolutionize jury trials." Dicks, 93 So. at 137.

We distinguish this case from Lavado, which involved whether the jury could accept the theory of the defense. In Barnhill v. State, 834 So. 2d 836, 846 (Fla. 2002), this Court explained how such a question was critical to the defendant's right to a fair trial:

> If counsel knows nothing more of the jurors, the single thing defense counsel must ascertain is whether the prospective jurors can fairly and impartially consider the defense offered by the defendant. See Lavado v. State, 492 So. 2d 1322 (Fla. 1986). A trial judge abuses his or her discretion if he or she precludes counsel from asking specific questions about bias or prejudice against the defendant or the defense theory, even if the judge permits the general question as to whether the prospective juror can follow the law. Id.

(Emphasis supplied); see also Johnson, 590 So. 2d at 1110. Unlike the circumstances in Lavado or Johnson, the questions here pertained to obtaining a pretrial decision on anticipated aggravating circumstances that could only be explained through a discussion of the underlying facts, rather than an aspect of Calloway or his theory of the case. Therefore, neither Lavado nor Johnson provides support for Calloway's proposition that the trial court abused its discretion.

Here, defense counsel sought to precommit jurors to a recommendation of a life sentence based on expected evidence. Calloway asserts that the trial court's exclusion of such questions was inconsistent with a subsequent ruling that permitted questions regarding the number of victims and the potential pecuniary gain aggravating circumstance. However, the court explained that the potential jurors were aware of the number of victims and that the murders had occurred during the course of a robbery because they had been informed of the crimes with which Calloway had been charged. What they had not been informed of at that time were the particular facts of the crime—namely, that the victims had been duct-taped, blindfolded, and gagged while they listened to Calloway and Clark debate whether to kill some or all of them. The trial court permitted defense counsel to ask hypothetical questions about jurors' general views on aggravation; however, defense counsel could not ask them whether they would precommit to a life sentence in light of specific aggravating circumstances. Such questions would have pretried the case in voir dire. See Hoskins, 965 So. 2d at 13; Franqui, 699 So. 2d at 1322 n.5. Therefore, we conclude that the trial court did not abuse its discretion when it issued the one limitation.

Whether a Frye Hearing Was Necessary

On cross-appeal, the State claims that the trial court erred when it failed to conduct a Frye hearing before it allowed Dr. Ofshe to testify as an expert.[11] The State contends that had a Frye hearing been held, Dr. Ofshe would not have been permitted to testify as an expert. During a pretrial suppression hearing in 2008, the State insisted that Dr. Ofshe be subject to a Frye hearing before he could testify. However, the trial court ruled that his testimony would not become relevant until Calloway testified that his confession was false. Calloway did not testify until trial in 2009, and the trial court ruled that a Frye hearing would not be held at that point, based on United States v. Hall, 93 F.3d 1337, 1342 (7th Cir. 1996), and Boyer v. State, 825 So. 2d 418 (Fla. 1st DCA 2002).

Under the Frye standard, the proponent of the evidence sought to be admitted must prove to the trial court by a preponderance of the evidence that the scientific principles and methodology of the expert witness are generally accepted by the relevant scientific community. Marsh v. Valyou, 977 So. 2d 543, 547 (Fla. 2007); Ramirez v. State, 810 So. 2d 836, 844 (Fla. 2001). Frye hearings only apply to novel scientific methodologies; once the methodology has been established and recognized by the relevant scientific community, a Frye hearing becomes unnecessary. See, e.g., King v. State, 89 So. 3d 209, 228-29 (Fla. 2012)

11. The Frye standard was in place at the time of Calloway's trial in 2009.

(concluding that tool-mark identification did not require a Frye hearing). Frye determinations are legal rulings that are reviewed de novo. Brim v. State, 695 So. 2d 268, 274 (Fla. 1997). Frye errors are subject to being reviewed for harmless error. Ramirez, 810 So. 2d at 845 (citing Hadden v. State, 690 So. 2d 573, 581 (Fla. 1997)). An error is harmless if there is no reasonable possibility that it affected the verdict. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

In Flanagan v. State, 625 So. 2d 827, 828 (Fla. 1993), this Court explained that not all expert testimony requires a Frye hearing:

> [P]ure opinion testimony, such as an expert's opinion that a defendant is incompetent, does not have to meet Frye, because this type of testimony is based upon the expert's personal experience and training. While cloaked with the credibility of the expert, this testimony is analyzed by the jury as it analyzes any other personal opinion or factual testimony by a witness. Profile testimony, on the other hand, by its nature necessarily relies on some scientific principle or test, which implies an infallibility not found in pure opinion testimony. The jury will naturally assume that the scientific principles underlying the expert's conclusion are valid. Accordingly, this type of testimony must meet the Frye test, designed to ensure that the jury will not be misled by experimental scientific methods which may ultimately prove to be unsound. See Stokes[v. State, 548 So. 2d 188], 193-194 [(Fla. 1989)] ("A courtroom is not a laboratory, and as such it is not the place to conduct scientific experiments. If the scientific community considers a procedure or process unreliable for its own purposes, then the procedure must be considered less reliable for courtroom use.").

(Emphasis supplied.) We subsequently concluded that based upon the reasoning in Flanagan, a Frye hearing must be held before an expert could testify about the psychological effects of sexual abuse upon a child. Hadden, 690 So. 2d at 579-80.

We have also previously considered whether Dr. Ofshe's testimony requires a Frye hearing before it may be presented to a jury. In Williamson v. State, 994 So. 2d 1000, 1007-08 (Fla. 2008), the prosecution theorized that the defendant threatened a key State witness, Charles Panoyan. In support of this theory, Dr. Ofshe testified for the State that the threats made by Williamson indicated a degree of control or influence over Panoyan. Id. at 1009. The following exchange occurred during trial:

> Q. [The State] But did you have the opportunity to discern any kind of control or influence that had been exercised by Dana Williamson according to the attestation of Charles Panoyan, which degrees or kinds of control you recognized?
>
> A. [Dr. Ofshe] Yes.
>
> . . . .
>
> Well, in reviewing the history of Mr. Panoyan's experience in connection with the invasion and death and the assaults at the Decker residence, and over the course of the investigation that followed, including his incarceration and ultimate decision to speak about what happened, the pattern that he displays is a pattern of someone who has, for one [sic] of a better word, been terrorized, and someone who is acting in response to a credible threat, not only to himself, but also, and to some degree, more importantly, to members of his family.
>
> And that the manner in which he responds at various points indicates quite clearly that he has a great concern about something happening to his family . . . .
>
> . . . .
>
> The point at which he chose to do certain things reflects the kind of threat and fear he was acting under, and the particular

> decisions that he made to me are completely consistent with what he says about the sort of threats that he was exposed to.

Id. (emphasis supplied). The postconviction court summarily denied Williamson's claim that trial counsel was ineffective for failure to request a Frye hearing before Dr. Ofshe testified. Id. However, on appeal we explained that the court should have determined whether Dr. Ofshe's testimony regarding the effect of the defendant's coercion on the witness was generally accepted by the relevant scientific community. Id. at 1010 (citing Hadden, 690 So. 2d at 575-76; Flanagan, 625 So. 2d at 828). We concluded that the summary denial of the claim was error and remanded to the postconviction court for an evidentiary hearing. Id.

In this case, we hold that under Williamson, a Frye hearing was necessary before Dr. Ofshe was permitted to testify. Although Calloway asserts that the testimony in Williamson is factually distinguishable from the testimony presented below, we disagree. In both Williamson and this case, Dr. Ofshe's testimony ultimately concerned how coercion in the form of threats made to an individual or his family can influence that individual's behavior. Moreover, we have explained that the testimony involved in both Williamson and Hadden involved expert testimony that was more than pure opinion evidence and therefore required a Frye hearing. Williamson, 994 So. 2d at 1010; see also Flanagan, 625 So. 2d at 828 ("Profile testimony, on the other hand, by its nature necessarily relies on some scientific principle or test, which implies an infallibility not found in pure opinion

testimony."). As in Williamson, Hadden, and Flanagan, Dr. Ofshe's testimony consisted of more than a pure opinion from an expert. In fact, Dr. Ofshe was not permitted to offer an opinion as to whether Calloway's confession was false, coerced, or otherwise unreliable, but instead only explained that false confessions occur and what factors might produce a false confession. This evidence was supported by research referenced by Dr. Ofshe during his testimony and included a discussion of the rate of occurrence of false confessions and his model of false confessions. His testimony therefore relied upon a scientific or academic principle or test, which constitutes evidence that requires a review of its underlying methodology and acceptance before it can be presented to a jury. See Williamson, 994 So. 2d at 1009-10; Hadden, 690 So. 2d at 575-76; Flanagan, 625 So. 2d at 828.

However, this error was harmless. The primary witnesses for the defense were Calloway and Dr. Ofshe, whose testimony lent academic credence to Calloway's claim that he was pressured by the police to give a false confession. The central issue of the case was whether Calloway provided a false confession out of fear for himself and his family. Even assuming that the trial court would have entirely excluded testimony from Dr. Ofshe after a proper Frye hearing—which we do not conclude today[12]—the jury nonetheless convicted Calloway of five counts

12. Because no Frye hearing occurred below, we decline to address whether Dr. Ofshe's testimony would have satisfied the Frye standard.

of first-degree murder, armed robbery, armed kidnapping, and armed burglary, after it heard extensive testimony from Dr. Ofshe that the confession may have been the product of coercion and an illicit deal with law enforcement. The State does not allege any harm suffered by this error. Under these circumstances, we conclude there is no reasonable possibility that the failure to conduct a Frye hearing prior to Dr. Ofshe's testimony ultimately affected the verdict.

Limitations on Testimony of Dr. Ofshe

The next error that Calloway alleges occurred is that the trial court so limited the testimony of Dr. Ofshe that it was rendered meaningless. To demonstrate that Calloway's confession was false and coerced, defense counsel sought to introduce Dr. Ofshe's methodology, which requires a comparison between objective facts available beyond what is revealed in a confession and the "facts" developed during the confession. Dr. Ofshe was permitted to explain at length and with few interruptions how an interrogation occurs and what factors an interrogator might use to obtain a confession. During redirect, he was also allowed to discuss studies that examined false confessions and tactics that might induce a false confession. He further stated that he saw the existence of "powerful motivators" that were likely to induce a false confession in Calloway's account of the interrogation. However, the court prevented Dr. Ofshe from comparing what he called "objectively knowable facts," such as the information available from Strachan's

testimony and Cooper's notes, with the "facts" in Calloway's confession. The trial court explained that both the "facts" as framed by Dr. Ofshe and his assessment of witness credibility were matters for the jury.

We review evidentiary rulings by a trial court for abuse of discretion. Frances v. State, 970 So. 2d 806, 813-14 (Fla. 2007). An expert may testify about an opinion developed from facts not in evidence before the jury. § 90.704, Fla. Stat. (1997). However, experts may not comment on the credibility of other witnesses. Frances, 970 So. 2d at 814; Feller v. State, 637 So. 2d 911, 915 (Fla. 1994). This limitation is intended to minimize any effect that the expert status of the witness may have on the jury's reception of the testimony. See Feller, 637 So. 2d at 915; State v. Townsend, 635 So. 2d 949, 958 (Fla. 1994) ("[G]reat care must be taken by a trial judge in determining what testimony of an expert is admissible because a jury often places great emphasis on the testimony of experts . . . .").

In Frances, an expert attempted to testify about the defendant's general knowledge and comment on the credibility of other witnesses. 970 So. 2d at 814. We found no abuse of discretion in excluding such testimony. We noted that expert testimony that did not require specialized knowledge was not admissible, and experts cannot vouch for other witnesses. Id. However, in Boyer, the First District concluded that the wholesale exclusion of Dr. Ofshe's testimony regarding false confessions was harmful error. 825 So. 2d at 419-20. The district court

concluded that the jury should have been allowed to consider evidence relevant to the voluntariness of the defendant's confession, and the jury was free to determine the credibility of Dr. Ofshe's testimony. Id.

However, Dr. Ofshe's excluded testimony here would have exceeded the scope of the testimony contemplated in Boyer. Without the limitations imposed by the trial court below, his testimony would have evaluated the credibility of his fellow witnesses, which is not permitted. Frances, 970 So. 2d at 814; Feller, 638 So. 2d at 915. Unlike in Boyer, Dr. Ofshe was allowed to testify and explain how false confessions might occur. Where the trial court drew the line was when Dr. Ofshe attempted to compare different versions of the facts to each other to suggest that the version provided by Calloway in his confession was not reliable. Allowing Dr. Ofshe to explain that he determined that Calloway's confession was false because it conflicted with Strachan's descriptions of what he observed on January 21, 1997, would have exceeded the permissible scope of expert testimony.[13] His opinion was not simply based upon facts and observations not before the jury, but instead relied upon his assessment of the credibility of witnesses and evidence that were before the jury. Such testimony would allow Dr. Ofshe, not the jury, to

13. Dr. Ofshe himself admitted that he did not fully understand Calloway's confession and description of his confession in their 2001 interview until after he learned about Strachan's observations and Cooper's note several years after the interview.

determine which version of the facts was correct by implying that Strachan provided a more reliable account than Calloway himself provided to the police after his 1998 arrest. See Frances, 970 So. 2d at 814. Therefore, we conclude that the trial court did not abuse its discretion when it placed these specific limitations on the testimony of Dr. Ofshe.

Cross-Examination of Odom

Calloway next alleges that the trial court improperly limited the scope of cross-examination of Diane Odom, who was Calloway's girlfriend at the time of his arrest and who testified during the State's case-in-chief. Calloway spoke to Odom on the phone on the morning of his confession, and she came to the police station that morning at his request. She also rode in the van with Calloway and Detectives Law and Everett while they toured areas that Calloway visited before and after the murders. Calloway proffered that he told Odom that he was concerned for her safety and that of her family, and in response, she temporarily relocated her family. According to Calloway, this demonstrated the validity of the threats revealed by Detective Law before Calloway confessed.

The record does not reflect the exact date of this alleged communication. Before trial, the State suggested that Calloway communicated these threats to Odom two weeks after his arrest. However, during trial, defense counsel proffered that Calloway informed Odom of the threats during the phone call on the morning

of his confession. Calloway himself offered conflicting testimony on this matter. During direct examination, he testified that when he saw her at the police station shortly after he confessed, he told her he needed to "get right with God," and that he had a deal with Detective Law that would resolve everything within three months, but he did not tell her about the threats because he did not want her to panic. During redirect examination, however, defense counsel elicited that Calloway had communicated concerns for her safety at some point that day, and she temporarily moved out of her apartment immediately.

During direct examination, the State asked Odom if she was afraid for her life when she left Calloway, Everett, and Law after the van ride:

> Prosecutor: Were you at that time, Ms. Odom told by Tavares Calloway that your life could be in danger?
>
> Odom: No. Not at that time, no.
>
> Prosecutor: Were you told you needed to be careful and watch out at that time?
>
> Odom: No. I don't remember at that time. No. Not at that time.

(Emphasis supplied.) The court sustained objections from the State when defense counsel asked Odom during cross-examination what she was afraid of when she stayed with family members of Calloway for two weeks following his arrest. Defense counsel argued that the earlier answer from the State's direct examination opened the door to other statements made by Calloway to Odom that showed that

she was afraid. The court ruled that the witness herself added the words, "not at that time," which did not amount to a door being opened to further questioning about hearsay statements made between Calloway and Odom. The court also noted that Calloway was free to recall Odom during his case, which did not occur. Calloway now asserts that these limitations were improper.

Self-serving hearsay statements are generally inadmissible. Kaczmar v. State, 104 So. 3d 990, 1000 (Fla. 2012) (citing § 90.803(18), Fla. Stat. (2007)). However, if a partial statement, writing, or recording is admitted, the rule of completeness permits the opposing party to introduce other portions of that same statement, writing, or recording in the interest of fairness. Id. (citing § 90.108(1), Fla. Stat. (2007));[14] Reese v. State, 694 So. 2d 678, 683 (Fla. 1997) (explaining that the statutory rule of completeness, which only governs writings or recordings, has been applied to testimony). This rule is not an absolute right, but rather a matter of fairness that falls within the discretion of the trial court. Larzelere v. State, 676 So. 2d 394, 402 (Fla. 1996). The trial court should consider the relative reliability of the complete statement in its ruling on the admissibility of the full statement. Jordan v. State, 694 So. 2d 708, 712 (Fla. 1997).

14. Neither section 90.803 nor section 90.108 has been substantially altered since 1997, the year of these crimes.

In Reese, the defendant alleged that the trial court improperly restricted his cross-examination of a witness. 694 So. 2d at 683. The witness testified during direct examination that she visited the defendant in jail after he had been arrested and he confessed to her. However, the defendant was not permitted to ask her about prior jailhouse conversations between them, in which she allegedly refused to speak to the defendant until he confessed to her. We approved the ruling of the trial judge, who indicated that the defendant was free to recall the witness during his case. Id. at 683-84. We held that the rule of completeness was not violated after noting that the conversations were not directly related to each other and were separated by several weeks in time. Therefore, we concluded that no abuse of discretion occurred. Id.

As in Reese, the statements about the purported threats that would complete the allegedly misleading testimony of Odom may have been separated by several weeks in time. The State indicated that Calloway informed Odom of these threats two weeks after his arrest, not on the morning of May 14. Calloway also testified that he did not communicate the threats on the morning of May 14 because he did not want her to panic. However, Calloway later testified during his redirect examination that Odom moved out of her home on May 14, suggesting to the jury that the threats may have been contemporaneously communicated to Odom. This separation in time and apparent contradiction by Calloway as to when he informed

Odom not only render it less likely that the admission of Calloway's complete statement would provide proper context for the jury, but also suggest that his statement is not entirely reliable. Reese, 694 So. 2d at 683-84; Jordan, 694 So. 2d at 712 ("The amount of time that passed between Jordan's first statement and his second statement only increases the unreliability of the hearsay."). Moreover, Calloway was free to recall Odom in his defense and chose not to do so. Therefore, we conclude that the trial court did not abuse its discretion to limit the cross-examination of Odom.

Admission of Collateral Criminal Conduct

Calloway next claims that the State improperly admitted two instances of collateral criminal conduct without proper foundation. According to Calloway, the State first improperly impeached him with evidence of a prior arrest for carrying a concealed firearm. During his direct testimony, Calloway explained that he mixed up the terms "clip" and "hammer" during his statement to Law and Everett, and the officers corrected him. Calloway stated, "I fired five shots and I had two left in the hammer. See there go my ignorance right there. I said [hammer]. So I'm thinking revolver. When he obviously just said clip and I tried to catch, I mean he like, you know the clip. And I'm like, yeah, yeah, yeah, the clip." (Emphasis supplied.)

The trial court agreed with the State that Calloway placed his character and knowledge of weapons at issue with this statement and allowed the State to ask

Calloway if he possessed a .38 caliber firearm on February 2, 1996, which he admitted was true. The State also asked him whether he was charged with carrying a concealed firearm as a result of that possession, which Calloway also admitted was true.

He also alleges that the State improperly impeached him about his involvement in the Twin robbery with Gosha. During his interrogation, Calloway admitted that he and Gosha planned to rob Twin, and that Gosha was murdered a few days after the robbery. Calloway was initially considered a witness in the Gosha homicide and informed officers that he suspected Gosha was killed in retaliation for the Twin robbery. Before trial, the parties stipulated that they would not discuss the Gosha homicide before the jury.

Calloway testified on direct examination that when he was first brought to the police station, he was under the impression that he would sign some paperwork with regard to the bench warrant, offer the police assistance with the Gosha investigation, and be free to leave. He explained Gosha was a friend who drove a nice car, but he did not judge Gosha for choices that Gosha had made in his life. Later, when Law entered the room on the morning of May 14, 1998, to resume questioning, Calloway testified that Law had a "zombie like" look upon his face and told Calloway that he had spoken to Gosha in a dream. Calloway replied:

> [W]ell maybe if you talk to [Gosha], he can tell you about my character. He can tell you what's going on with me. He can tell you,

> man I'm not that type of individual. He can tell you who killed him. He can tell what's going on and he can also tell you I'm not that type of person.

He also testified that he fabricated certain details about the homicides and robbery based on what he had seen in movies because he would not know how to rob someone. Furthermore, when he created the false confession allegedly in collusion with Law and Everett, he admitted that he knew Melvin, St. Charles, and Thomas, and that if he had simply robbed them, they would have been able to identify him. However, he added, "Anyone who knows me knows, you know you ain't got to worry about me because I wasn't living that type of life style. Not in the form of aggressive, ruggish, thuggish type of individual." He also described himself as a hardworking individual who attended church regularly and helped supervise his girlfriend's children.

In rebuttal, the State recalled Law and Pereira to challenge Calloway's account. The court agreed with the State that Calloway opened the door to further questioning about Gosha's homicide and the robbery they had planned together. Law testified that Calloway admitted that he and Gosha planned the Twin robbery, during which Calloway pretended to have been a victim along with Twin. Pereira, who was part of the investigation team from the Miami-Dade County Police Department regarding the Twin robbery, confirmed Calloway's involvement in

that robbery.[15] Before Law and Pereira were recalled in rebuttal, the trial court instructed the jury to only consider their testimony to evaluate witness credibility and that Calloway was not on trial for any crimes beyond those enumerated in the indictment. Before this Court, Calloway asserts that the repeated references to collateral criminal conduct resulted in prejudicial error.

A party can "open the door" to otherwise inadmissible evidence through testimony from a witness. Rodriguez v. State, 753 So. 2d 29, 42-43 (Fla. 2000). In the interests of fairness and "the truth-seeking function of a trial," the opposing party may in turn present inadmissible evidence that qualifies, explains, or limits previously admitted evidence. Id. We have approved of the admission of evidence of prior criminal conduct to impeach a defendant who has opened the door to such evidence. Id. at 42. This door is only opened after the defendant presents misleading testimony, at which point the State may present evidence of prior criminal conduct to prevent the jury from being misled as to the defendant's character. Robertson v. State, 829 So. 2d 901, 913 (Fla. 2002) (citing Bozeman v. State, 698 So. 2d 629, 630 (Fla. 4th DCA 1997)). However, such evidence should

15. The State also presented Detective William Hladky from the Miami-Dade County Police Department, who was the lead investigator on the Twin robbery, but was out of town when Calloway was arrested. Pereira filled in during Hladky's absence and was called to the City of Miami Police Department during Calloway's interrogation. As far as Hladky knew, Calloway was simply a witness to the robbery.

be cautiously admitted, due to concerns that it may unfairly prejudice the defendant. Rodriguez, 753 So. 2d at 42 ("The issue is not always whether the door has been opened, but rather how wide it has been opened."). Moreover, a criminal defendant who chooses to take the stand subjects his or her own credibility to impeachment by the prosecution. Butler v. State, 842 So. 2d 817, 827 (Fla. 2003) (noting that a defendant who testified on direct examination that he would never hurt the victim could be impeached about a prior incident in which he choked the victim).

We agree with the trial court that Calloway opened the door to impeachment by the State on both of these issues. With respect to his prior arrest for carrying a concealed weapon, Calloway broadly claimed to be "ignorant" about guns. To prevent the jury from being misled about his familiarity with guns, the court permitted the State to ask whether he previously possessed and had been arrested for carrying a .38 caliber concealed firearm. However, the court narrowly tailored the admission of evidence of prior criminal conduct to Calloway's familiarity with guns, which was a matter that he himself introduced, and excluded further evidence of his arrest record, which included more than a dozen arrests in the six years prior to the arrest in this case. See Butler, 842 So. 2d at 827; Rodriguez, 753 So. 2d at 42-43. The trial court did not abuse its discretion when it permitted this narrow inquiry into his prior criminal activities.

Likewise, Calloway opened the door to cross-examination about his participation in the Twin robbery. He stated several times on direct examination that he would not know how to commit a robbery and he was not the sort of individual who would engage in violent criminal activity such as robbery or homicides. He also testified that early in the interrogation, he offered to help officers with the Gosha investigation. However, witnesses for the State explained that he actually told them that he and Gosha planned the robbery; as part of that plan, he pretended to be a victim of the robbery; and Gosha was probably murdered in retaliation for that crime. Calloway chose to testify in his defense, and his credibility became a critical issue in this case. We therefore conclude that he placed his credibility at risk of impeachment. See Butler, 842 So. 2d at 827. Accordingly, we find no abuse of discretion by the trial court.

Impeachment by Statement from Nontestifying Codefendant

Calloway also claims that the State violated his rights under the Confrontation Clause when he was impeached by statements made by his codefendant, Clark, who did not testify during Calloway's trial. The day before Calloway was arrested, Clark was arrested and confessed that both he and Calloway were involved in the 1997 homicides. He also admitted that Dwight Campbell directed them to rob the victims, but he did not expect that anyone would be killed. He told officers that Calloway sent him to the store during the robbery to

purchase the duct tape that was used to bind and gag the victims. He also stated that Calloway ordered the victims to remove their clothing to ensure that none of them was armed. Finally, Clark told them that Calloway was the sole shooter.

During his confession, Calloway provided a substantially similar account to detectives, which was admitted into evidence during the State's case-in-chief. Calloway admitted that he directed Clark to purchase something to restrain the victims, and that when Clark ran out of duct tape, he sent Clark back to the store to purchase more. He also admitted that he was the shooter. However, Calloway testified during direct examination that he could not remember if he had fabricated these details, or if officers "fed" him this information in their quest to implicate Campbell via Calloway's confession.

Before Dr. Ofshe interviewed Calloway in 2001, he asked Calloway to write down his account of the interrogation and confession. In the interview, Calloway told Dr. Ofshe that he fabricated details that involved Clark during his confession. Dr. Ofshe was aware that Clark had provided the police with a similar statement and told Calloway it seemed unlikely that he could make up such details that were previously provided to the police by Clark. He testified that he told Calloway to "think about it and see what it is that he actually knows and what it is that he's just telling me."

During his direct examination, Dr. Ofshe indicated that Calloway could have learned of certain details provided in his confession either from local media or from the interrogating officers. During cross-examination, the State asked a series of questions about whether contradictory statements make a confession more or less reliable, according to Dr. Ofshe's theory of false confessions. The State asked whether Dr. Ofshe was aware that Clark had previously informed officers that he and Calloway sought direction from Campbell, or that Clark purchased duct tape on Calloway's instructions. Dr. Ofshe admitted that it would be highly unlikely that Clark would provide the same details the day before Calloway allegedly fabricated them. He testified that the contradiction did not necessarily make Calloway's account less reliable, but he admitted that when he pointed out the potential inconsistency, Calloway became less understandable in their interview. He also agreed with the State that Clark's confession contradicted Calloway's earlier statement that officers told Calloway to include them as a means to inculpate Campbell. Dr. Ofshe ultimately agreed that his opinion regarding Calloway's confession would change if it was proven that Calloway had lied to him about a significant matter.

Calloway insists that when the State impeached Dr. Ofshe with Clark's statement, Calloway's rights under the Confrontation Clause were violated. We review challenges based on the Confrontation Clause de novo. See McWatters v.

State, 36 So. 3d 613, 637 (Fla. 2010). The Confrontation Clause does not permit the admission of a confession of a nontestifying codefendant to be used substantively against the defendant. Bruton v. United States, 391 U.S. 123, 136-37 (1968). Both this Court and the United States Supreme Court have explained that statements of a codefendant should be viewed with particular skepticism, given the motivation to implicate another person. Ramirez v. State, 739 So. 2d 568, 579 (Fla. 1999) (citing Lee v. Illinois, 476 U.S. 530, 541 (1986); Farina v. State, 679 So. 2d 1151, 1155 (Fla. 1996)). In Ramirez, we concluded that it was reversible error to admit extensive details from a codefendant's statement that incriminated Ramirez. 739 So. 2d at 579-81. Although Ramirez opened the door to limited questions regarding whether there was evidence that contradicted his testimony, the door was not so widely opened as to permit the details of the codefendant's confession. Id. at 580-81 (citing Pacheco v. State, 698 So. 2d 593, 595-96 (Fla. 2d DCA 1997)).

However, it is equally clear that a codefendant's incriminating statements that are admitted for nonhearsay purposes, such as impeachment, do not invoke the protections of the Confrontation Clause. E.g., Tennessee v. Street, 471 U.S. 409, 414 (1985); McWatters, 36 So. 3d at 637-38 ("The Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' " (quoting Crawford v. Washington, 541 U.S. 36, 60 n.9

(2004))); see also Kansas v. Ventris, 556 U.S. 586, 594 (2009) (holding that a statement obtained in violation of the Sixth Amendment could nonetheless be used for impeachment purposes).

In this case, limited information from Clark's confession that incriminated Calloway was used to impeach Dr. Ofshe. Dr. Ofshe presented a theory on direct examination that Calloway could have learned many of the details provided in his confession from alternate sources, such as media reports or the interrogating officers, which would make his confession less reliable. To discredit Dr. Ofshe's theory, the State asked Dr. Ofshe whether he was aware that Clark had provided a similar account two days before Calloway was arrested. When Dr. Ofshe admitted that he was aware of these statements, the State then asked Dr. Ofshe about his earlier statement to Calloway that pointed out the apparent contradiction, and when pressed, Dr. Ofshe equivocated. At one point, Dr. Ofshe stated that there could be other reasons for the apparent contradiction, such as memory error; however, he later admitted that if Calloway had indeed lied to him, Dr. Ofshe would have to reevaluate his assessment of Calloway and Calloway's confession.

Moreover, unlike in Bruton, Ramirez, or Pacheco, Clark's full confession was not admitted during trial to prove Calloway's guilt. Instead, the State used two specific details from Clark's confession to conduct a narrow cross-examination of Dr. Ofshe to question his assessment of Calloway's veracity, and

ultimately, Dr. Ofshe's credibility. This use of Clark's incriminating statements did not violate the Confrontation Clause. Street, 471 U.S. at 414; McWatters, 36 So. 3d at 637-38.

Bolstering of Witnesses for the State

Next, Calloway claims that the State improperly bolstered the credibility of Detective Everett, one of the detectives who elicited the confession, and Fabrice Nelson, the lead crime scene technician. During the cross-examination of Sergeant Eunice Cooper, defense counsel asked her about a policy of the City of Miami Police Department, which required felony suspects to be handcuffed during transport. On redirect, Cooper explained that the policy allowed for officer discretion:

> Prosecutor: Was Sergeant Willie Everette [sic] at that time a capable police detective?
>
> Defense counsel: Objection. Calls for an opinion.
>
> Prosecutor: As a supervisor, your Honor.
>
> The Court: Overruled.
>
> Defense counsel: Character evidence of the witness. Bolstering.
>
> The Court: Overruled. It's something that is of her knowledge.
>
> Sergeant Cooper: Yes. Sergeant Everette [sic] was a capable supervisor and Sergeant Everette [sic] used his discretion.
>
> Prosecutor: What about physically, Sergeant Cooper. Was [he] a physical capable adult male?

Sergeant Cooper: Yes.

Prosecutor: Was he a confident police officer?

Defense counsel: Objection. Relevance.

The Court: Sustained.

Calloway also alleges that the State improperly bolstered the testimony of Nelson through the cross-examination of Rupert Butcher, a fingerprint expert who was called by the defense. Nelson was the lead crime scene investigator in 1997 and testified about the forensic evidence collected from the apartment during the State's case-in-chief. At the time of trial, Butcher was a senior latent fingerprint examiner for the City of Miami Police Department, but he was not employed by the city in 1997 and was not involved in the investigation until 2003. He testified on direct examination that the manner in which duct tape was collected and commingled was not a standard collection procedure. During cross-examination, the State elicited testimony from Butcher that because he was not involved in the investigation until at least 2003, he had no way of knowing whether Nelson acted improperly. After the State confirmed with Butcher—without objection—that there was no reason to suggest that Nelson improperly preserved evidence or "did a sloppy job" in 1997, the following exchange occurred:

> Prosecutor: Didn't Fabrice Nelson do an excellent job of collecting [and] preserving evidence from this scene as we can see it in State's Exhibit 28.

> Defense counsel: Objection. He has no way of knowing. He was not there. Calls for improper opinion.
>
> The Court: You can answer, sir if you know.
>
> Butcher: Again, well I wasn't there to know exactly but based on the gravity or amount of evidence that he actually collected and processed, I would say that he did a very good job of processing the evidence.

During redirect examination, defense counsel also elicited from Butcher that Nelson "did a very good job" preserving and documenting the evidence at the crime scene.

Generally, this Court will not reverse a decision regarding the admissibility of evidence absent an abuse of discretion by the trial court. E.g., Hall v. State, 107 So. 3d 262, 273 (Fla. 2012) (citing Ray v. State, 755 So. 2d 604, 610 (Fla. 2000)). However, it is erroneous to permit a witness to comment on the credibility of another witness because the jury alone determines the credibility of witnesses. Tumblin v. State, 29 So. 3d 1093, 1101-02 (Fla. 2010); Knowles v. State, 632 So. 2d 62, 65-66 (Fla. 1993); Page v. State, 733 So. 2d 1079, 1080-81 (Fla. 4th DCA 1999) (citing Barnes v. State, 93 So. 2d 863 (Fla. 1957)). Testimony from a police officer about the credibility of another witness may be particularly harmful because a jury may grant greater credibility to the officer. Tumblin, 29 So. 3d at 1101-02 ("Police officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their

opinions." (citations and ellipses omitted)); Seibert v. State, 923 So. 2d 460, 472 (Fla. 2006). Improper bolstering is reviewed for harmless error. See Johnson v. State, 969 So. 2d 938, 955 (Fla. 2007); Knowles, 632 So. 2d at 66.

Improper bolstering can result in harmful error when the credibility of the bolstered witness is of critical importance to the State. The Fourth District Court of Appeal in Page concluded that the State allowed a police witness to improperly bolster the credibility of a confidential informant. 733 So. 2d at 1080-81. The officer testified that the informant, who was the only witness to the alleged drug transaction, had previously provided "very trustworthy and reliable" information. Id. at 1081. The Fourth District concluded that this erroneous statement was reversible partially because the main goal of the defense was to question the credibility of that informant. Id. at 1080-81; see also Tumblin, 29 So. 3d at 1101-03 (finding an abuse of discretion to permit bolstering by a key witness).

However, in this case, Cooper's testimony did not constitute improper bolstering of Everett. Cooper was not asked whether any particular statements by Everett during his videotaped testimony were incorrect, unreliable, or otherwise untrustworthy. Instead, her testimony explained the department's handcuff policy, which was a matter of officer discretion. The jury viewed videotaped testimony of Everett, who was then undergoing treatment for cancer and passed away by the time of trial. The question from the prosecutor and answer from Cooper merely

informed the jury that during Calloway's interrogation and transport in the van, Everett could have handcuffed Calloway if he felt it was appropriate, but chose not to do so. This did not amount to improper bolstering of Everett's credibility.

Even if we were to conclude that this constituted bolstering, any error in Cooper's testimony would be harmless. Cooper, who testified for a single day in a trial that lasted more than two months, provided a single statement that Everett was capable and used his discretion regarding the handcuff policy. Although there is a general concern that one officer complimenting the professional work of another may improperly influence the jury, see Tumblin, 29 So. 3d at 1101-02, the handcuff policy only tangentially related to the main issue of the trial—whether Calloway's confession was forced or coerced. It was undisputed that Calloway was not handcuffed during his interrogation or the van ride. Thus, whether Everett was capable or used his discretion with regard to the handcuff policy was irrelevant to the question of whether Calloway's confession, which occurred before the handcuff issue during the van ride, was forced or coerced. Unlike the disputed testimony in Page or Tumblin, the State's case against Calloway did not hinge on Everett's credibility regarding the use of handcuffs. Therefore, we conclude that there is no reasonable possibility that any error in Cooper's testimony could have affected the verdict. See DiGuilio, 491 So. 2d at 1135.

Moreover, Butcher's testimony did not constitute bolstering. Defense counsel sought to undermine the credibility of the forensic investigation conducted by Fabrice Nelson through the testimony of Butcher. Defense counsel did not object to several questions regarding the quality of Nelson's work before the aforementioned exchange, nor did defense counsel object to later comments about the quality of Nelson's work. Indeed, during redirect questioning by defense counsel, Butcher repeated that Nelson "did a very good job" in the 1997 investigation. Rather than constitute improper bolstering, this exchange was the product of an unsuccessful attempt to attack the forensic work of Nelson. Defense counsel opened the door to cross-examination regarding Butcher's opinion of Nelson's conduct, and the State sought to rehabilitate Nelson's competency. We conclude that the trial court did not abuse its discretion when it allowed this testimony.

Burden Shifting in Guilt Phase Closing Statements

The next issue raised is whether the State impermissibly shifted the burden of proof to Calloway during its guilt phase closing statements. The State began its guilt phase rebuttal argument with the following statement:

> We know exactly what this case comes down to. We have known this all along. Absolutely nothing. Nothing, nothing has changed. We are still here with the situation of do you believe all the evidence in this case of the officers and civilians alike each of them which supports the other[,] or do you believe his story?

Calloway objected, claiming misstatement of the evidence, which the court overruled; the court instructed the jury to rely on its own recollection of the evidence.[16]

Although parties enjoy wide latitude during closing statements, they may not resort to improper argument. E.g., Merck v. State, 975 So. 2d 1054, 1061 (Fla. 2007) (citing Gore v. State, 719 So. 2d 1197, 1200 (Fla. 1998)). Attorneys must raise contemporaneous objections to preserve the claim for appellate review. Id.

> [W]e consistently have stated that proper preservation entails three components. First, a litigant must make a timely, contemporaneous objection. Second, the party must state a legal ground for that objection. Third, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection . . . below.

Harrell v. State, 894 So. 2d 935, 940 (Fla. 2005) (internal quotation marks and citations omitted) (some emphasis supplied).

Unpreserved errors made in closing statements are reviewed for fundamental error. Merck, 975 So. 2d at 1061. An error so fundamental as to require reversal "must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error."

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16. Defense counsel raised two burden-shifting objections to statements later in the rebuttal closing statement that were overruled, but Calloway challenges only the statement quoted above in his appeal.

Brown v. State, 124 So. 2d 481, 484 (Fla. 1960). Fundamental error must amount to a denial of due process, and consequently, should be found to apply where prejudice follows. J.B. v. State, 705 So. 2d 1376, 1378 (Fla. 1998); see also F.B. v. State, 852 So. 2d 226, 229 (Fla. 2003).

During trial, defense counsel objected to the statement, but only objected on the grounds of misstatement of the evidence. Therefore, Calloway did not preserve this issue and we review it for fundamental error. See Merck, 975 So. 2d at 1061; Harrell, 894 So. 2d at 940.

We conclude that no fundamental error occurred during the State's closing statement. This remark is the only statement that Calloway alleges shifted the burden from the State to prove Calloway's guilt beyond a reasonable doubt. The State's closing statement, which included both an initial and rebuttal statement, continued for more than a day. During this time, the State extensively reviewed all of the evidence placed before the jury during the two-month long trial. Cf. Merck, 975 So. 2d at 1061 (noting that a single improper argument did not mandate reversal). Even when viewed cumulatively with the burden-shifting objections Calloway subsequently raised, which he does not now challenge, this error was not to the level as to fundamentally deny Calloway the right to due process. See J.B., 705 So. 2d at 1378. We therefore deny this claim.

Substitute Medical Examiner

Calloway also claims that the State violated Calloway's rights under the Confrontation Clause when it allowed a substitute medical examiner to testify. In support of this claim, Calloway relies upon the decision of the United States Supreme Court in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310-11 (2009), which concluded that forensic analysts who provide testimonial evidence must be subject to confrontation by the defendant.

The trial court allowed Dr. Hyma to testify in place of Dr. Siebert with regard to the causes of death and injuries to the victims. Dr. Siebert was the medical examiner who performed the autopsies, but moved to North Florida by the time of trial. In a 2007 discovery deposition, Dr. Siebert claimed that the reason for his relocation was that then-Attorney General Charlie Crist had filed complaints against Dr. Siebert, which led to an audit of his records and a temporary lapse in his medical license. Dr. Siebert alleged that this investigation was politically motivated and a retaliation against him for a controversial decision he had made in an unrelated autopsy several years after these homicides, but he was never formally disciplined.

Before and during trial, defense counsel objected that the State had failed to demonstrate that Dr. Siebert was unavailable, in violation of Crawford.[17] Without

17. The State suggested that Dr. Siebert was unavailable because he was in North Florida at the time: "Dr. Siebert no longer works in this jurisdiction and we made a choice not to bring an expert from a remote location back to this

expressly concluding that Dr. Siebert was unavailable, the trial court ruled that Dr. Hyma could offer his own opinion and be subject to cross-examination during trial. Dr. Hyma testified that he reviewed photographs and a descriptive narrative taken from the crime scene; body diagrams and sketches; police records; medical records; and Dr. Siebert's autopsy reports to prepare his opinion regarding the causes of death. He testified that Dr. Siebert was part of the investigative team that responded to the crime scene in 1997, and a homicide officer likely attended the autopsies conducted by Dr. Siebert. During redirect, Dr. Hyma confirmed that he developed his own objective findings regarding the causes of death and stated that he primarily relied on photographs taken from the scene. At the conclusion of his testimony, the court read to the jury that the parties stipulated to the legal identity of the victims.

When there is a Confrontation Clause challenge to an evidentiary ruling of a trial court, we conduct a de novo review. See McWatters, 36 So. 3d at 637. Crawford violations are reviewed for harmless error. Barnes v. State, 29 So. 3d 1010, 1027-28 (Fla. 2010) (citing Rodgers v. State, 948 So. 2d 655, 665 (Fla. 2006)); see also Bullcoming v. New Mexico, 564 U.S. 647, 668 n.11 (2011)

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jurisdiction to testify in this trial." However, the State was willing to transport Anthony Strachan from Arizona and Dr. Richard Welner from New York to Florida during the guilt phase.

(suggesting that a harmless error analysis could apply to violations of the Confrontation Clause (citing Melendez-Diaz, 557 U.S. at 329 n.14)).

Florida law historically permitted a substitute medical examiner to testify in the place of the medical examiner who performed the autopsy. See, e.g., Schoenwetter v. State, 931 So. 2d 857, 870-71 (Fla. 2006) (citing Geralds v. State, 674 So. 2d 96 (Fla. 1996)); Capehart v. State, 583 So. 2d 1009, 1012-13 (Fla. 1991) (permitting a substitute medical examiner to testify as an expert about facts or data that were not admitted into evidence); Ramirez v. State, 542 So. 2d 352, 355 (Fla. 1989). However, the United States Supreme Court in Crawford explained that the Sixth Amendment requires the declarant of a testimonial hearsay statement in a criminal case to testify at trial, unless the witness is unavailable and the defendant is afforded a prior opportunity to cross-examine the witness. 541 U.S. at 68.[18]

In State v. Belvin, 986 So. 2d 516 (Fla. 2008), this Court reviewed the admissibility of forensic reports in light of Crawford. The Court concluded that the reports were testimonial, and their admission violated Crawford because the right to confront the witness during a discovery deposition was not a sufficient substitute for the right to confront a witness in court. 986 So. 2d at 524-25 (citing

18. We did not consider the impact of Crawford in Schoenwetter because the defendant failed to preserve the issue. See 931 So. 2d at 871.

State v. Lopez, 974 So. 2d 340, 349-50 (Fla. 2008); Blanton v. State, 978 So. 2d 149, 155 (Fla. 2008)).

In 2009, the Supreme Court concluded in Melendez-Diaz that affidavits prepared by forensic technicians were testimonial under Crawford. Therefore, the defendant had the right under the Confrontation Clause to confront the analysts who prepared the affidavits, absent (1) a finding that the analysts were unavailable, and (2) the defendant's having had a prior opportunity to cross-examine them. 557 U.S. at 311.

This Court subsequently distinguished both Belvin and Melendez-Diaz and approved of the testimony of a supervising witness who offered her own opinion based on data generated by a team of analysts. Smith v. State, 28 So. 3d 838, 853-55, 855 n.12 (Fla. 2009). The trial court in that case permitted an FBI team supervisor to testify about her conclusion that a DNA sample matched the known profile of the defendant. Id. at 853. This Court explained that unlike the experts in Belvin or Melendez-Diaz, the expert in Smith drew her own conclusions from the raw data generated by several members of her team and—more importantly—testified during trial, where she was subject to cross-examination as to those conclusions. 28 So. 3d at 854-55. Therefore, her testimony did not violate the Confrontation Clause. Id.

Following Melendez-Diaz, the United States Supreme Court further elaborated on the admissibility of forensic laboratory reports in Bullcoming, 564 U.S. 647, and Williams v. Illinois, 132 S. Ct. 2221 (2012). In Bullcoming, a majority of the Court held that a surrogate testifying witness could not be used to admit a forensic report written by a nontestifying technician. 564 U.S. at 663. In that case, the original analyst who had performed a blood alcohol content test was unexpectedly placed on unpaid leave on the eve of trial, but the prosecution did not claim that the analyst was unavailable. Id. at 661-62. In criticizing the use of testimony from a surrogate witness who did not offer an independent opinion, defense counsel was denied the opportunity to question the original analyst about the procedures used, or explore why the analyst had been placed on unpaid leave. Id. The Court concluded that testimony from the surrogate witness did not cure the underlying violation of Bullcoming's right under the Sixth Amendment to confront the original analyst. Id. at 663.

In a concurring opinion, Justice Sotomayor emphasized the narrow scope of Bullcoming:

> [T]his is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue. . . . It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results. . . .
>
> . . . [T]his is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted in evidence. See Fed. Rule Evid. 703

> (explaining that facts or data of a type upon which experts in the field would reasonably rely in forming an opinion need not be admissible in order for the expert's opinion based on the facts and data to be admitted). . . . We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence.
>
> . . . .
>
> This case does not present, and thus the Court's opinion does not address, any of these factual scenarios.

Id. at 672 (Sotomayor, J., concurring in part). Four Justices dissented on the basis that they concluded that the evidence was not testimonial under the Confrontation Clause. Id. at 674-84 (Kennedy, J., dissenting).

In Williams, a plurality of the Supreme Court concluded that an expert witness could offer an opinion about a forensic report without ultimately testifying to the underlying truth of that report. 132 S. Ct. at 2227-28. The report itself was prepared by a nontestifying witness, but was not admitted. Id. The plurality, written by Justice Alito and joined by Chief Justice Roberts and Justices Kennedy and Breyer, further held that the report itself would not have violated the Confrontation Clause, even if it had been admitted. Id. at 2242. The plurality concluded that the report was not testimonial because it was generated at a time when a dangerous, unknown rapist was at large. Id. at 2243-44 (citing Michigan v.

Bryant, 562 U.S. 344, 359-62 (2011)).[19] Justice Thomas concurred in the judgment on the basis that the evidence was admissible "solely because [the report] lacked the requisite 'formality and solemnity' to be considered 'testimonial' for the purposes of the Confrontation Clause." Id. at 2255 (Thomas, J., concurring in the judgment) (citing Bryant, 562 U.S. at 361).

With the exception of Smith, this Court has not considered whether a substitute forensic technician, specifically a medical examiner, may testify in the wake of Melendez-Diaz, Bullcoming, and Williams. Despite the lack of a clear majority opinion in Williams, the factual similarities between this case and Williams, as well as our decision in Smith, lead us to conclude that the surrogate testimony of Dr. Hyma did not violate Calloway's rights under the Confrontation Clause. First, Dr. Hyma was available during trial to testify and was subject to cross-examination. See Smith, 28 So. 3d at 853-55, 855 n.12. Second, unlike in Bullcoming, the autopsy reports of Dr. Siebert were not admitted through the testimony of Dr. Hyma. See Williams, 132 S. Ct. at 2238-40 (plurality opinion) (finding no Confrontation Clause violation in the admission of an expert opinion that relies upon data not directly in evidence); Bullcoming, 564 U.S. at 668

19. In Bryant, the Court explained that statements made to an officer in the course of an active police investigation were not testimonial and therefore not subject to the Confrontation Clause because the primary purpose of such statements was to assist the police in that investigation. 562 U.S. at 359-62.

(Sotomayor, J., concurring in part). Instead, Dr. Hyma clearly explained to the jury that his independent opinion was derived from the photographs taken by investigators at the scene and from Dr. Siebert's autopsy reports. It was this independent opinion that was available during trial and subject to cross-examination. See Smith, 28 So. 3d at 853-55. Although the expert in Smith supervised several analysts, both the expert in Smith and Dr. Hyma testified that they drew their own independent conclusions. See id. Therefore, Calloway was afforded the in-court opportunity to cross-examine the State's expert about the causes of death, and no violation of the Confrontation Clause occurred.

Even if we were to conclude that an error occurred, it would be harmless. The sole purpose of producing Dr. Siebert in this case would be to impugn his credibility by asking about the 2006 audit of his records, which Dr. Siebert claimed had been politically motivated and baseless. During his discovery deposition, Dr. Siebert claimed that many of the errors he had supposedly committed were typos and did not undermine his medical findings; however, defense counsel pointed to at least one instance in which he allegedly mistook the gender of a cadaver. Regardless of such disputes, in this case, the causes of death were not challenged, and the parties stipulated to the legal identity of the victims.[20] Furthermore, Dr.

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20. Additionally, had Dr. Siebert testified, it may have resulted in a collateral discussion as to whether he actually committed significant errors throughout his career. The ultimate result of the audit was unclear: Dr. Siebert

Hyma's testimony was a relatively short component of a lengthy guilt phase of a trial that spanned more than two months. We conclude that any error in allowing Dr. Hyma to testify in Dr. Siebert's place had no reasonable possibility of affecting the verdict and was therefore harmless. See Barnes, 29 So. 3d at 1027-28; DiGuilio, 491 So. 2d at 1135.

Limitations on Penalty Phase Closing Statement

The next issue that Calloway challenges is the limitation imposed on defense counsel during the closing statement of the penalty phase. The only new evidence that the State presented during the penalty phase consisted of victim impact testimony; the State presented no further evidence of aggravating circumstances beyond Calloway's conviction. During closing statements of the penalty phase, the following exchange occurred:

> Defense Counsel: . . . We're here now to discuss the aggravators. We are here to discuss how the aggravators were proven to and we are here to discuss have you really heard sufficient reliable evidence beyond a reasonable doubt that these aggravators have occurred . . . . One of the aggravators is that the crime was cold, calculated[,] and premeditated. . . . Let's look at what was presented to prove it was cold, calculated[,] and premeditated.
>
> Well, we are told that it went on over a period of time. We are told that someone left and got tape and came back, we're told all of

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claimed that he was never formally disciplined, but admitted that he was removed from his professional position. See Williams, 132 S. Ct. at 2236 (plurality opinion) (expressing concern about potential juror confusion).

these facts but other than what Mr. Calloway said in that statement there is no corroborating evidence—

State: Objection.

The Court: Sustained.

Defense Counsel: —to prove the aggravators.

The Court: The jury is to rely on the recollection of the evidence presented.

Defense Counsel: Well, as you rely on it, as you rely on what you heard, you will recall that there was nothing to corroborate—

State: Objection.

The Court: Sustained.

In a subsequent sidebar conference, defense counsel claimed that there was no evidence to corroborate certain details in Calloway's confession, such as the length of time the victims were held captive and duct-taped by Calloway and Clark. The trial court disagreed with that assessment of the evidence in record, sustained objections from the State, and instructed the jury to rely on its recollection of the evidence.

Before this Court, the parties dispute whether this limitation was proper. Calloway asserted that the trial court improperly curtailed statements by defense counsel that challenged whether the State had proven the HAC and CCP aggravating circumstances beyond a reasonable doubt. The State claimed instead that the trial court properly prevented defense counsel from relitigating the guilt

phase because defense counsel sought to establish a lack of evidence that corroborated Calloway's confession.

Parties are afforded wide latitude during their closing statements, subject to the discretion of the trial court. See, e.g., Pham v. State, 70 So. 3d 485, 492 (Fla. 2011). During the penalty phase, the State is required to establish aggravating circumstances beyond a reasonable doubt. Gonzalez v. State, 990 So. 2d 1017, 1029 (Fla. 2008). Although defendants are permitted to challenge evidence of aggravating circumstances presented by the State, they cannot do so in a way that relitigates the underlying determination of guilt by the jury. Duest v. State, 855 So. 2d 33, 40 (Fla. 2003) (citing Way v. State, 760 So. 2d 903, 916 (Fla. 2000); Waterhouse v. State, 596 So. 2d 1008, 1015 (Fla. 1992)). A defendant may not introduce evidence of residual doubt either to challenge a presented aggravating circumstance or establish a nonstatutory mitigating circumstance. E.g., Reynolds v. State, 934 So. 2d 1128, 1152 (Fla. 2006) (noting that this Court has long rejected the use of lingering doubt as a nonstatutory mitigating factor); Duest, 855 So. 2d at 40 (barring the use of a residual doubt argument to challenge an aggravating circumstance); see also Oregon v. Guzek, 546 U.S. 517, 526-27 (2006) (refusing to recognize a constitutional right to consider residual doubt as mitigation evidence).

In England v. State, 940 So. 2d 389, 404-05 (Fla. 2006), the defendant sought to testify on his behalf during the penalty phase. The trial court excluded

this testimony after it concluded that the testimony would relitigate the matter of his guilt, rather than present relevant, mitigating evidence. Id. We concluded that this was not an abuse of discretion. Id.

Here, Calloway asserts that defense counsel did not attempt to relitigate his guilt during penalty phase closing statements; rather, defense counsel sought to challenge whether the State had proven the HAC and CCP aggravating circumstances beyond a reasonable doubt. However, defense counsel presented no specific precedent either during trial or before this Court to support his claim that he could challenge the HAC and CCP aggravating circumstances by questioning the reliability of Calloway's confession presented during the guilt phase in the closing statements of the penalty phase. This proposed argument was not only an inaccurate description of the evidence in record, as noted by the trial court, but it also sought to undermine an issue determined in the guilt phase, the validity of Calloway's confession. The trial court did not prevent defense counsel from making proper arguments before the jury. Therefore, we conclude that the trial court acted within its discretion to prevent this improper argument. England, 940 So. 2d at 404-05; Duest, 855 So. 2d at 40.

Exclusion of Medical Records of Calloway's Father

Next, Calloway submits that the trial court improperly excluded the medical records of his father, Solomon Calloway, as mitigation. When Calloway was five

or six years old, his mother took him and his brother Reginald to live in Miami, and his father remained in Georgia. Solomon was diagnosed with schizophrenia and post-traumatic stress disorder (PTSD) in 2002, while Calloway was in custody and awaiting this trial. The day before the penalty phase commenced, defense counsel presented the State with voluminous evidence of Solomon's medical records. Defense counsel hoped to discuss Solomon's diagnoses to explain his bizarre behavior towards, and ultimate abandonment of, Calloway. The trial court allowed defense counsel to present evidence of Solomon's violence towards Calloway and his mother, and his abandonment of his children, but excluded Solomon's medical records as irrelevant. Calloway argues before this Court that this exclusion improperly limited his presentation of mitigation evidence.

In Lockett v. Ohio, 438 U.S. 586, 604-05 (1978), the Supreme Court concluded that a defendant must be permitted to present any mitigating evidence that concerns "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." More recently, the Court rejected a test that required proposed mitigating evidence to have some "nexus" to the underlying crime to be relevant and therefore admissible. Tennard v. Dretke, 542 U.S. 274, 283-88 (2004). Instead, the Court explained that there was no unique definition of relevancy applicable to capital sentencing:

> When we addressed directly the relevance standard applicable to mitigating evidence in capital cases in McCoy v. North Carolina, 494 U.S. 433, 440-441, (1990), we spoke in the most expansive terms. We established that the meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding than in any other context, and thus the general evidentiary standard—any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence—applies. . . . We quoted approvingly from a dissenting opinion in the state court: "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." Thus, a State cannot bar the consideration of evidence if the sentencer could reasonably find that it warrants a sentence less than death.
>
> Once this low threshold for relevance is met, the Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence.

Id. at 284-85 (some citations omitted).

We have reiterated the role that relevance plays in the admission of potentially mitigating evidence. Farina v. State, 937 So. 2d 612, 619 (Fla. 2006) ("As with all evidence, however, mitigating evidence must meet a threshold of relevance."). Similarly, in Hill v. State, 515 So. 2d 176, 177-78 (Fla. 1987), this Court found no abuse of discretion by a trial court's exclusion of mitigating evidence that concerned the character of the defendant's family members, rather than the character of the defendant himself:

> The record reflects that five persons, including Hill's mother and father, testified as character witnesses for the defense. The judge refused to permit appellant's mother to testify that she cared for appellant's cousins, as well as her own children. Similarly, the judge declined to allow defense counsel to question appellant's father

> regarding his own ill health and past job responsibilities. In our view, the excluded evidence focused substantially more on the witness's character than on appellant's. There has been no showing that the trial court abused his discretion in excluding the testimony . . . .

Id. (emphasis supplied) (citing Hitchcock v. Dugger, 481 U.S. 393 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett, 438 U.S. 586); see also Hess v. State, 794 So. 2d 1249, 1269 (Fla. 2001) ("What Lockett does require is the admission of evidence that establishes facts relevant to the defendant's character, his prior record, and the circumstances of the offense in issue.").

Although the trial court did not allow defense counsel to present evidence of Solomon's medical diagnoses, defense counsel were permitted to elicit vivid, undisputed[21] testimony about the abuse Calloway and his mother suffered at the hands of Solomon, including that (1) Solomon attempted to drown Shirley in a bathtub when Calloway was an infant; (2) Solomon regularly visited the trailer that Shirley lived in with Calloway and beat both of them with a switch; and (3) once when Calloway was a toddler, he handed his mother a bat to defend herself against Solomon. After Shirley relocated her children to Miami, Calloway had little contact with his father.

21. Although Calloway suggests that Shirley's history of drug abuse and neglect may have diminished her credibility before the jury, the State minimally challenged her testimony with limited cross-examination.

The trial court drew the line at the introduction of evidence of Solomon's medical diagnoses, which were not made until 2002, several years after Calloway was arrested in 1998 and long after he lost contact with his father in the 1980s. Furthermore, during trial, defense counsel only provided Solomon's medical records to the State on the eve of opening statements for the penalty phase. In its ruling to exclude the records, the court noted that the State had been denied a fair opportunity to review the evidence and prepare a rebuttal. Defense counsel also admitted that they could not prove that Solomon's violent behavior in the 1980s resulted from either diagnosis. Additionally, Calloway did not present any evidence during the penalty phase that suggested that he suffered from mental health issues himself. Calloway only presented Dr. Toomer during the Spencer hearing, who testified that Calloway's background likely diminished his cognitive processing, but ultimately offered no medical diagnosis for Calloway.

We conclude that Solomon's medical diagnoses were not relevant to Calloway's background. The fact that Solomon was diagnosed with schizophrenia and PTSD decades after abusing Calloway and Shirley does not make the uncontroverted fact that Calloway both witnessed and suffered abuse from Solomon more or less probable. See § 90.401, Fla. Stat. (1997) ("Relevant evidence is evidence tending to prove or disprove a material fact."). The jury heard unchallenged evidence regarding Solomon's abusive behavior, which is a

mitigating factor in Calloway's background. See Lockett, 438 U.S. at 604-05. However, the ultimate cause of that behavior pertained to the character of Solomon, not Calloway. See Hill, 515 So. 2d at 177-78. Therefore, Solomon's medical records were not relevant mitigating evidence of Calloway's background, and the trial court did not abuse its discretion to exclude them.

Sufficiency

Although Calloway does not raise the issue, this Court has an independent obligation to review the record for competent, substantial evidence that supports the defendant's convictions. E.g., Brown v. State, 143 So. 3d 392, 407 (Fla. 2014) (citing Blake v. State, 972 So. 2d 839, 850 (Fla. 2007); Fla. R. App. P. 9.142(a)(5)). If a rational trier of fact may conclude, upon a review of the evidence in the light most favorable to the State, that the elements of the crime have been proven beyond a reasonable doubt, we will affirm the convictions. Id.

Calloway's confession constitutes direct evidence of guilt under Florida law. Simmons v. State, 934 So. 2d 1100, 1111 (Fla. 2006). Although his testimony challenged that confession, it is the duty of the jury, not this Court, to weigh conflicting evidence. See Hertz v. State, 803 So. 2d 629, 646 (Fla. 2001). Calloway admitted that he purchased clothing and planned the robbery with Campbell several days before the crimes occurred. After he and Clark subdued, gagged, and blindfolded Melvin, Copeland, Thomas, McGuire, and St. Charles

with duct tape, he and Clark debated for some period of time about which men to kill. Calloway sent Clark to speak to Campbell for advice, and when Clark informed him that Campbell said they only needed to kill two men, Calloway replied that if only two were killed, the remaining men would identify them. Clark returned to Campbell, who approved of killing all of the men, and before executing them, Calloway increased the volume of the stereo to muffle the sound of gunshots.

Additionally, Calloway confessed that he accosted St. Charles in the parking lot, placed St. Charles in a chokehold, and gained entry to St. Charles's apartment with a .45 caliber gun pointed at St. Charles. He further stated that he and Clark took marijuana, jewelry, phones, beepers, and cash from the victims before they exited the apartment. Anthony Strachan also testified that he saw St. Charles downstairs in the parking lot with two unidentified black men, one of whom he later saw exit St. Charles's apartment with a small box that belonged to St. Charles. Latonya Taylor stated that Melvin frequently wore a gold and diamond bracelet that she never saw after his death. Adolphus Thornton testified that he helped Calloway pawn a distinctive gold bracelet that he recognized as Melvin's a few days after the murders. Calloway's confession, coupled with corroborating testimony from Strachan, Taylor, and Thornton, supplied competent, substantial evidence of the first-degree murders of Melvin, Thomas, Copeland, St. Charles,

and McGuire, as well as for the convictions for armed robbery, armed kidnapping, and armed burglary.

Hurst v. Florida

Finally, Calloway asserts that Florida's death penalty sentencing scheme, which allows a non-unanimous jury to recommend the death penalty, violates the Sixth and Fourteenth Amendments under Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002). During the pendency of this appeal, the United States Supreme Court issued its decision in Hurst v. Florida, in which it held that Florida's capital sentencing scheme violated the Sixth Amendment. See 136 S. Ct. 616, 621 (2016). The Supreme Court concluded that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Id. at 619. On remand from the Supreme Court, we held that "before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." Hurst v. State (Hurst v. State), 202 So. 3d 40, 53 (Fla. 2016). We further held that a unanimous jury recommendation is required before a trial court may impose a sentence of death. See id. Finally, we determined that a Hurst error is capable of harmless error review. See id. at 67.

New rules of law announced by this Court or the United States Supreme Court will apply to all cases that are pending on direct review or are otherwise not finalized. State v. Johnson, 122 So. 3d 856, 861 (Fla. 2013) (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1986); Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992)). This case is before us on direct appeal; therefore, Calloway's appeal is subject to Hurst v. Florida and Hurst v. State.

For the reasons expressed in Hurst v. State, Calloway is entitled to a new penalty phase. The jury in this case made no factual findings regarding the aggravation, mitigation, or relative weight of either before it recommended that Calloway be sentenced to death for each victim by a vote of seven to five. His sentences, therefore, are contrary to the Sixth Amendment as interpreted Hurst v. Florida and Hurst v. State. Further, we cannot conclude that this error was harmless beyond a reasonable doubt in light of the nonunanimous jury recommendation. Compare Hurst v. State, 202 So. 3d at 53-55 (concluding that a new penalty phase was required following a seven-to-five jury recommendation of a death sentence) with King v. State, SC14-1949, slip op. at 41-48 (Fla. Jan. 26, 2017) (noting that any Hurst v. Florida sentencing error was harmless beyond a reasonable doubt in part because the jury unanimously recommended a death sentence). As in Hurst v. State, "We decline to speculate as to why seven jurors in this case recommended death and why five jurors were persuaded that death was

not the appropriate penalty." 202 So. 3d at 69. Therefore, we must remand this matter for new penalty phase. See id.

CONCLUSION

With regard to the State's cross-appeal, we conclude that the trial court erred when it failed to conduct a Frye hearing before Dr. Ofshe was permitted to testify, but this error was harmless. We also reject Calloway's guilt phase claims and conclude that sufficient evidence supported his convictions. We further conclude that, with the exception of the Hurst v. Florida claim, Calloway's penalty phase claims are meritless. However, we reverse and remand this matter to the circuit court for a new penalty phase pursuant to Hurst v. State.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
POLSTON, J., concurs as to the conviction and dissents as to the sentence.
PERRY, Senior Justice, concurs in result as to the conviction and concurs in part and dissents in part as to the sentence.
CANADY, J., concurs in result as to the conviction and dissents as to the sentence.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Miami-Dade County,
Dava J. Tunis, Judge - Case No. 131998CF016016000XX

Scott William Sakin of Scott W. Sakin, P.A., Miami, Florida,

for Appellant/Cross-Appellee

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Melissa Jean Roca, Assistant Attorney General, Miami, Florida,

for Appellee/Cross-Appellant

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Attachment III

Supreme Court of Florida

No. SC15-953

RENALDO DEVON MCGIRTH,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. SC16-341

RENALDO DEVON MCGIRTH,
Petitioner,

vs.

JULIE L. JONES, etc.,
Respondent.

[January 26, 2017]

PER CURIAM.

Renaldo Devon McGirth appeals an order of the circuit court denying his amended motion to vacate judgment of conviction and sentence of death filed pursuant to Florida Rule of Criminal Procedure 3.851. He further petitions this

Court for a writ of habeas corpus. We have jurisdiction. See art. V, § 3(b)(1), (9), Fla. Const. For the reasons that follow, we affirm the denial of postconviction relief. However, we grant the habeas petition and order that McGirth receive a new penalty phase proceeding based on Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016).

FACTS AND PROCEDURAL BACKGROUND

Trial and Direct Appeal Proceedings

McGirth was convicted of the 2006 first-degree murder of Diana Miller, the attempted first-degree murder with a firearm of James Miller, robbery with a firearm, and fleeing to elude a law enforcement officer operating a marked patrol vehicle. McGirth v. State, 48 So. 3d 777, 781-82 (Fla. 2010), cert. denied, 563 U.S. 940 (2011). The jury recommended the death penalty for the murder of Diana by a vote of eleven to one, and the trial court sentenced McGirth to death. Id. at 784-85. The facts of the crimes were described in the opinion on direct appeal:

> James and Diana Miller . . . lived in The Villages, a gated retirement community situated in Marion County, Florida. Their daughter, Sheila Miller, who was in her late thirties at the time, was residing with them while she recovered from injuries sustained in an automobile accident that left her confined to a wheelchair. [n.1]
>
> > [N.1.] Sheila's dependence on her parents had often proven to be a source of contention between her parents as her father opposed supporting her. Sheila had battled drug and alcohol abuse since her teenage years and had been convicted of possession of cocaine and for uttering false or worthless checks. She had stolen from her

> parents and at one point stole her mother's identity to obtain a credit card. Sheila's relationship with her parents deteriorated to the point that her father obtained an injunction against her.

McGirth, a prior acquaintance of Sheila, Jarrord Roberts, and Theodore Houston, Jr., visited Sheila at the Miller home on the afternoon of July 21, 2006. Sheila greeted McGirth with an embrace at the front door, after which the three men followed her inside the residence. . . . After some discussion, Sheila, McGirth, and Houston went into Sheila's bedroom, while Roberts remained in the living room with Diana. Once in the bedroom, McGirth pointed a small, silver gun in Sheila's direction . . . . Diana was then called into Sheila's bedroom where McGirth pushed her onto the bed. Sheila told Diana to give McGirth all of her money. Diana responded that she only had seventy dollars and explained that she did not keep that kind of money at the house. McGirth, in turn, insisted she had money because she lived in The Villages. After agreeing to get the money, Diana raised her hands in the air and was making her way toward the bedroom door to retrieve money when McGirth stood in front of the bedroom door and shot her once in the chest . . . . McGirth then instructed Houston to pick up the shell casing from the floor and wipe down any objects the men had touched to remove fingerprints. As she bled on Sheila's bed, Diana whispered to McGirth, "Please call 911; you just shot me in the heart." However, her pleas for help were ignored.

At some point, Roberts collected wallets and car keys . . . and handed them to McGirth. . . . James had just finished his shower when he was grabbed by the arm and dragged to Sheila's bedroom where he was forced to lie on the floor while one of the men pinned his head with a foot. After the men obtained the couple's credit cards and a personal identification number, Diana, still conscious, was taken to the computer room in an unsuccessful attempt to purchase cell phones online. A few minutes later Diana was able to crawl back into Sheila's bedroom.

McGirth and Houston removed Sheila from the home and Roberts placed her in the Millers' van. . . . McGirth and Houston returned to the home. Soon thereafter, as Houston was leaving the house with some items, McGirth shot James and Diana in the backs of their heads as they lay on the bedroom floor. James survived the

> gunshot wound and was able to climb out of the bedroom window and summon the assistance of a neighbor.
>
> McGirth, Roberts, and Sheila left in the Millers' van, while Houston followed in the silver Ford in which the men arrived. Following McGirth's orders, Sheila withdrew $500 from an automated teller machine (ATM) nearby and gave the money to McGirth, who subsequently divided the money into thirds. The four then drove to a K-Mart store in Belleview where McGirth and Sheila attempted to locate a particular type of cell phone. A few minutes later the men left the silver Ford in the K-Mart parking lot and took Sheila in the van to a mall . . . . At the mall, efforts to withdraw money from various ATMs and purchase items from stores failed.
>
> At the Miller residence, law enforcement officers secured the scene and issued a BOLO ("be on the lookout") alert for a red van occupied by three black males and a possible kidnap victim. A police officer spotted the van at a convenience store in Ocala . . . . When McGirth . . . drove the vehicle out of the parking lot, the police officer activated his siren and lights which prompted McGirth to pull over . . . . When the officer ordered the driver to shut the van off, McGirth sped away. A high-speed chase in excess of 100 miles per hour ensued. As he drove the vehicle . . . McGirth handed the gun to Houston and ordered him to shoot Sheila because she could identify them. Houston, however, did not do so. The police ultimately used stop sticks to slow the van and then disabled it by employing the [Precision Immobilization Technique] maneuver, which caused the van to roll several times. . . . McGirth and Roberts were able to get out of the van and fled in opposite directions, but were apprehended and taken into custody shortly thereafter.
>
> The police found bloody, folded money totaling $259 in McGirth's pocket, and his fingerprints were identified on two paper items from James's wallet.

Id. at 782-83 (some footnotes omitted).

In imposing a sentence of death, the trial court found the existence of five aggravating circumstances: (1) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification

(CCP) (great weight); (2) the murder was heinous, atrocious, or cruel (HAC) (great weight); (3) prior violent felony, based on the contemporaneous conviction for the attempted murder of James Miller (great weight); (4) the murder occurred during the commission of a robbery (great weight); and (5) the murder was committed primarily to avoid arrest (moderate weight). Id. at 784.

The court found McGirth's age (eighteen) to be a statutory mitigating circumstance and assigned it significant weight. Id. The court additionally found fifteen nonstatutory mitigating circumstances: (1) McGirth had a close bond with his siblings (very slight weight); (2) he grew up in a poor family (little weight); (3) he grew up in an abusive home (little weight); (4) neglect by his custodial parents (little weight); (5) substance abuse (very slight weight); (6) intermittent exposure to positive role models (some weight); (7) testimony that characterized McGirth as a follower and not a leader (no weight); (8) a diagnosis of conduct disorder (very little weight); (9) a diagnosis of antisocial personality disorder (very little weight); (10) exposure to people with criminal histories (some weight); (11) a strong religious background (little weight); (12) good courtroom conduct (slight weight); (13) significant family losses (little weight); (14) he can benefit from a structured environment (slight weight); and (15) he was deprived of a relationship with his biological father (some weight). Id. at 785. The trial court found that McGirth's IQ score of 98 was not a mitigating factor, and it also rejected the

proposed nonstatutory mitigating factor that he acted under the influence and domination of another. Id. at 785 n.6. Additionally, while the trial court did not find that letters requesting mercy for McGirth were a nonstatutory mitigating factor, it stated that even if a request for mercy constituted nonstatutory mitigation, only "very slight weight" would be given. Id.

On direct appeal, McGirth raised eight issues: (1) whether the trial court erred in admitting Williams[1] rule evidence during the guilt phase; (2) whether the trial court erred in its response to a jury question concerning the law on principals; (3) whether the trial court erred in admitting victim impact evidence during the penalty phase; (4) whether a prosecutorial remark during closing statements warranted a new penalty phase; (5) whether the trial court erred in finding the CCP aggravator; (6) whether the trial court erred in finding the HAC aggravator; (7) whether the trial court erred in finding the avoid arrest aggravator; and (8) whether Florida's death penalty scheme violates Ring v. Arizona, 536 U.S. 584 (2002), and related cases. 48 So. 3d at 785. This Court rejected all claims and affirmed McGirth's convictions and sentences. Id. at 797.

1. Williams v. State, 110 So. 2d 654 (Fla. 1959).

Postconviction Proceedings

In 2012, McGirth through Capital Collateral Regional Counsel-Middle Region (CCRC-M) filed a Motion to Vacate Judgment of Conviction and Sentence, raising nine claims, some with multiple subparts. The claims, in brief,[2] were: (1) the State committed Brady and Giglio violations;[3] (2) newly discovered evidence; (3) ineffective assistance of counsel during the guilt phase; (4) ineffective assistance of counsel during the penalty phase; (5) cumulative error; (6) a Caldwell violation occurred;[4] (7) McGirth may be incompetent at the time of execution; (8) Florida's capital sentencing statute violates Ring and Apprendi v. New Jersey, 530 U.S. 466 (2000); and (9) Florida's capital sentencing statute fails to prevent arbitrary and capricious imposition of the death penalty, and lethal injection constitutes cruel and unusual punishment. McGirth sought an evidentiary hearing on claims (1) through (4). In its response to the motion, the State conceded that an evidentiary hearing was required on these claims.

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2. McGirth ultimately chose to represent himself and waived an evidentiary hearing on the claims for which a hearing had been granted. Because the claims raised in the motion are not before the Court, we do not discuss them except where relevant to our analysis.

3. Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972).

4. Caldwell v. Mississippi, 472 U.S. 320 (1985).

At the September 23, 2013, evidentiary hearing, McGirth expressed that he and CCRC-M counsel were experiencing conflict. McGirth asked that CCRC-M be discharged, and that the postconviction court either appoint new counsel or permit him to represent himself. The postconviction court conducted a Nelson[5] inquiry and concluded that CCRC-M was not providing ineffective assistance. The court then stated that if McGirth still wanted to discharge counsel, it would treat his request as an exercise of the right to self-representation. McGirth confirmed that he wished to represent himself. Thereafter, the court conducted a Faretta[6] inquiry and concluded that McGirth was competent to make the decision to represent himself, and that his decision was knowing and voluntary.[7] CCRC-M was ultimately appointed as standby counsel.[8]

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5. Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973).

6. Faretta v. California, 422 U.S. 806 (1975).

7. In 2014, Florida Rule of Criminal Procedure 3.851 was amended to preclude capital defendants from representing themselves in postconviction proceedings. See In re Amends. to Fla. Rules of Jud. Admin.; Fla. Rules of Crim. P.; and Fla. Rules of App. P.—Capital Postconviction Rules, 148 So. 3d 1171, 1180-81 (Fla. 2014). The rule as amended applies to postconviction motions filed on or after January 1, 2015, and "[m]otions pending on that date are governed by the version of this rule in effect immediately prior to that date." Id. at 1180. Because McGirth filed his postconviction motion in 2012, this amendment did not impact his ability to represent himself.

8. Capital Collateral Regional Counsel-Southern Region (CCRC-S) was initially appointed as standby counsel. However, it filed a motion for reconsideration, noting that the postconviction court found no actual conflict between McGirth and CCRC-M, and no ineffective representation by CCRC-M.

On the day the evidentiary hearing was due to commence, CCRC-M filed a Motion to Determine Competency. CCRC-M contended that McGirth was exhibiting behavior and symptoms that called his competency into question. The postconviction court appointed Dr. Gregory Prichard and Dr. Robert Berland to evaluate McGirth. During the competency hearing, McGirth expressed the desire to represent himself, and the court conducted another Faretta inquiry. The court concluded that McGirth knowingly and voluntarily waived his right to counsel during the competency hearing and permitted McGirth to represent himself with the assistance of standby counsel. The court subsequently found McGirth competent to proceed, and the evidentiary hearing was rescheduled to commence on February 16, 2015.

McGirth filed pro se motions that amended claims (1) and (3) and added claim (10), which contended that the State engaged in a discriminatory prosecution based upon the fact that the three codefendants were African-American, and Sheila

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CCRC-M also filed a "Motion and Memorandum of Law Regarding Appointment of Standby Counsel," stating that "[a]s a result of . . . discussions with Mr. McGirth, and with the agreement of Mr. McGirth, counsel for CCRC-M is prepared to act as standby counsel for Mr. McGirth." CCRC-M contended that it was in the best posture to serve because "[a]ny other counsel would have to start essentially from ground zero. The sheer bulk of materials in this case, exceeding well over 30,000 pages, would be burdensome on any counsel not already familiar with the materials." The postconviction court granted the motion for reconsideration and reappointed CCRC-M as standby counsel.

Miller was Caucasian. McGirth further asserted that trial counsel was ineffective for failing to raise a claim pursuant to McCleskey v. Kemp, 481 U.S. 279 (1987).[9] On February 5, 2015, McGirth filed a motion for continuance of the evidentiary hearing. On February 9, 2015, he filed a Composite Motion to Appoint Conflict Free Co-Counsel or Conflict Free Counsel, and also a Motion to Stay the Transport of Witnesses.

During a February 13, 2015, hearing, the court held that the motion to transport was moot because the witnesses named in the motion had already been brought to Marion County, and denied the motion for continuance and the composite motion. Once these rulings were announced, McGirth submitted a motion to disqualify. The court orally denied the motion as insufficient and untimely, and later issued an order to that effect.

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9. This Court has described the McCleskey decision as follows:

> [I]n McCleskey v. Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), the Supreme Court held that studies showing disproportionate impact of death sentences on black defendants as compared to white defendants were not sufficient to find the state's administration of the death penalty violated a black defendant's right to equal protection. However, the Court went on to say, "[T]o prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in his case acted with discriminatory purpose." Id. at 292.

Freeman v. State, 761 So. 2d 1055, 1068 (Fla. 2000) (alteration in original).

At the February 16, 2015, evidentiary hearing, McGirth announced that he would waive the presentation of evidence and instead "preserve the right to appeal all rulings up to this point." On April 14, 2015, the postconviction court entered an order that denied McGirth's amended rule 3.851 motion. The order addressed the claims for which an evidentiary hearing had been granted and concluded that, due to McGirth's failure to offer any evidence, the burden of proof had not been met.

This appeal follows. On February 24, 2016, McGirth filed a petition for writ of habeas corpus with this Court.

ANALYSIS

Sufficiency of the Nelson Inquiry

McGirth first contends that the Nelson inquiry conducted by the postconviction court was insufficient. Based upon our thorough review of the record, we disagree. In Nelson, the Fourth District Court of Appeal articulated a procedure to be followed when a defendant seeks to discharge court-appointed counsel based upon incompetence:

> [T]he trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his

> original counsel the State may not thereafter be required to appoint a substitute.

274 So. 2d at 259. We adopted this procedure in Hardwick v. State, 521 So. 2d 1071, 1074 (Fla. 1988). However, we have explained that where a defendant seeks to discharge counsel based upon a difference of trial strategy, and not incompetency, a Nelson inquiry is not required. See McKenzie v. State, 29 So. 3d 272, 282 (Fla. 2010). Based upon the applicable law, our analysis is two-pronged. First, we must determine whether McGirth alleged that CCRC-M was ineffective, thereby triggering a Nelson inquiry. Second, if we conclude that McGirth did allege ineffectiveness as a basis for seeking the discharge of CCRC-M, we must next determine whether the inquiry conducted by the postconviction court was sufficient.

With regard to the first prong, we conclude that McGirth did challenge the effectiveness of his counsel. McGirth clearly expressed to the postconviction court that he felt CCRC-M was raising frivolous issues and refusing to present what McGirth felt were meritorious issues. McGirth expressed frustration that CCRC-M had not presented a McCleskey claim based upon Brady evidence that allegedly would have shown Sheila Miller was a perpetrator of the crimes, and not a victim. He believed that counsel was focusing too much on mental health issues, opining that eighty percent of CCRC-M's time was spent exploring mental health, and only

twenty percent was dedicated to guilt phase issues. He felt that, with regard to any mental health claims, it was going to be a "standoff" between experts.

There are admittedly comments by McGirth that appear to be a difference of opinion as to strategy. For example, McGirth stated that while he recognized the accomplishments of the CCRC-M attorney, this did not mean that the attorney was the "best fit" for him. This comment is very similar to the statement made by the defendant in McKenzie in seeking to discharge counsel:

> I don't think they're incompetent. I mean, they passed the Bar exam, okay? That in itself is an accomplishment. I don't think I could pass the Bar exam. . . . Do I think they're incompetent? No, I don't. But do I think that they have my best interest . . . at hand? No, I don't. I think they have their own best interest at hand.

29 So. 3d at 282. However, whereas the defendant's primary complaint in McKenzie was that counsel waived his right to speedy trial without first consulting him—something counsel could do under the law—McGirth's expressed reasons for seeking the discharge of CCRC-M are more akin to a claim of ineffectiveness. These reasons were: (1) CCRC-M insisted on pursuing claims that McGirth believed had no chance of success, and focusing on mental health issues; and (2) CCRC-M was not presenting claims that McGirth felt were meritorious. Further, McGirth believed that he would be prejudiced by CCRC-M's failure to present claims that he thought had merit:

> [If CCRC-M] come[s] in with these frivolous motions and you deny me, and then I try to come back later and say hey, I want to raise this,

> [the attorneys for the State] or whoever, they gonna say well, why didn't you raise that in post-conviction and [CCRC-M will] be somewhere else representing somebody else . . . and I'll be sitting on death row stuck because, all because I couldn't get the issues in the motion because me and [my] attorney was at a clash on how to best represent me.

We conclude that McGirth's dissatisfaction constituted a challenge to CCRC-M's effectiveness, thereby triggering a Nelson inquiry.

As to the second prong, we conclude that the Nelson inquiry was sufficient. The postconviction court allowed McGirth a full opportunity to explain why he believed counsel was not representing him properly. When McGirth declined to name specific witnesses who CCRC-M was planning to present that he disagreed with, the court stated, "I want to give you every chance to tell me how you think they're being ineffective. I don't want to cut you off if you want to tell me." The court also gave CCRC-M the opportunity to respond to McGirth's complaints. The attorney from CCRC-M stated that (1) he had planned to present one of the claims desired by McGirth in a habeas petition if the motion for postconviction relief was denied, but he could incorporate it into closing statements if permitted by the court; and (2) he had not heard about the McCleskey issue until the morning of the hearing, but it was consistent with the Brady claim that had already been raised in

the postconviction motion; i.e., the State had failed to disclose evidence that indicated Sheila Miller was actually a perpetrator, and not a victim.[10]

Lastly, the court noted that it had reviewed the postconviction motion filed by CCRC-M. That motion presented claims such as: (1) the State failed to disclose to the defense a witness who believed Sheila was involved in the crimes against her parents, and would have testified that Sheila did not seem to care about her parents and spoke about them having money; (2) newly discovered evidence that while in jail, Sheila stated that she had her mother killed; (3) trial counsel was ineffective during the guilt phase for failing to object to the introduction of prejudicial photographs; and (4) trial counsel was ineffective during the penalty phase for failing to present a detective who would have testified that Sheila was concerned the codefendants would implicate her, and for failing to conduct an

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10. McGirth is correct that CCRC-M failed to mention at the hearing that Sheila, during an emergency room interview on the day of the offenses, allegedly stated she shot her mother. This statement purportedly was made in front of a detective, the detective's supervisor, and an assistant state attorney. Further, according to McGirth, a detective who was investigating the crimes against the Millers was allegedly ordered by a supervisor to stop pursuing Sheila as a possible suspect. However, the postconviction court cannot be faulted for failing to inquire deeper into this claim where nothing discussed during the hearing indicated its existence. "[A] trial judge's inquiry into a defendant's complaints of incompetence of counsel can be only as specific and meaningful as the defendant's complaint." Lowe v. State, 650 So. 2d 969, 975 (Fla. 1994). We note that McGirth was allowed to amend his postconviction motion to add both this claim and the McCleskey claim.

adequate investigation into mitigating evidence. With regard to the latter, the motion included allegations such as: (1) McGirth suffers from a seizure disorder that was first recognized while he was an infant; (2) he suffered multiple head injuries for which he never sought treatment; and (3) he was beaten regularly by his aunt, who was forced to care for him while his mother was incarcerated.[11]

Based upon the foregoing, we conclude that the postconviction court conducted a sufficient Nelson inquiry before it determined that CCRC-M was not providing ineffective assistance to McGirth. Accordingly, we reject this claim as without merit.

Adequacy of the Faretta Inquiry

McGirth next contends that the Faretta inquiry conducted by the postconviction court during the September 23 hearing was inadequate. The applicable law with regard to a defendant who seeks to exercise his right to self-representation is as follows:

> It is well settled that the accused has the right to self-representation. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). However, it is also settled that the defendant must unequivocally elect to represent himself. State v. Craft, 685 So. 2d 1292, 1295 (Fla. 1996). Further, after the defendant elects to represent himself, the court must conduct a colloquy to ensure the accused is making a knowing waiver. Hardwick v. State, 521 So. 2d 1071, 1074 (Fla. 1988). This Court approved a standard colloquy for

11. This description does not encompass all claims raised, but is only intended to demonstrate the comprehensiveness of the motion.

> a trial court to employ in Amendment to Fla. Rules of Crim. Pro. 3.111(d)(2)-(3), 719 So. 2d 873 ([Fla.]1998). The standard Faretta inquiry requires the judge to explicitly state the pitfalls of self-representation. The colloquy also requires the judge to state that the defendant's access to legal resources will be limited while in custody and that the defendant is not required to possess special skills in order to represent himself. Amendment, 719 So. 2d at 877.
>
> However, a trial judge is not required to follow the colloquy word for word. See Smith v. State, 956 So. 2d 1288, 1290 (Fla. 4th DCA 2007). Rather, the essence of the colloquy is to ensure the defendant makes a knowing and voluntary waiver of counsel. See Porter v. State, 788 So. 2d 917, 927 (Fla. 2001). In order to ensure the waiver is knowing and voluntary, the trial court must inquire as to the defendant's age, experience, and understanding of the rules of criminal procedure. Id. When reviewing a trial court's handling of a request for self-representation, the standard of review is abuse of discretion. Holland v. State, 773 So. 2d 1065, 1069 (Fla. 2000).

Aguirre-Jarquin v. State, 9 So. 3d 593, 602 (Fla. 2009).

We conclude that the Faretta inquiry here was completely adequate. After McGirth unequivocally articulated his desire to represent himself, the court thoroughly discussed the advantages of representation and the pitfalls of proceeding pro se. The postconviction court warned McGirth that "it's almost always unwise to represent yourself in court," and discussed the disadvantages of self-representation. These included that (1) McGirth would not receive special treatment by the court or the State; (2) he would not be entitled to additional prison library privileges; (3) he would be expected to abide by the law and the rules of procedure; and (4) if he is unsuccessful in his postconviction proceedings, he will

not be able to raise his lack of knowledge or skill as a basis for relief on appeal. The court described the benefits of representation by counsel as follows:

> [T]hey could obviously call witnesses for you, question witnesses against you, present evidence on your behalf, can advise you about whether to testify or not testify, they know the rules of evidence, know what evidence can and cannot come in. And they can also preserve any errors that they believe that I may commit during this hearing so that . . . the Florida Supreme Court can properly review that.

The court stated for the record McGirth's age, education, and IQ score; confirmed that McGirth could read and write; verified that McGirth was not under the influence of drugs, alcohol, or medications; indicated that McGirth followed along during his trial and was not disruptive; and even noted during the Nelson inquiry that McGirth was "clearly conversant with things and talking about McCleskey and . . . a recent case that I dealt with in a different setting a few weeks ago, but I mean, he's on the cutting edge of new US Supreme Court cases, for lack of a better term." Both the State and the court inquired as to any mental health issues which might impede McGirth's ability to represent himself, and McGirth denied that he was experiencing symptoms or that he was on any medication other than ibuprofen. When McGirth misunderstood the limited role of standby counsel, the court clarified that role and reiterated that the limited assistance McGirth would receive from standby counsel was one of the disadvantages of self-representation.

Based upon the foregoing, the postconviction court did not abuse its discretion when it concluded that McGirth was making a knowing and voluntary waiver of counsel and allowed McGirth to represent himself during the postconviction proceedings. We reject this claim.

CCRC-M as Standby Counsel

McGirth asserts that the postconviction court erred when it reappointed CCRC-M as standby counsel. As part of this claim, he notes that CCRC-M failed to provide him with copies of all of the records from his case within the time ordered by the postconviction court. He also appears to assert that CCRC-M interfered with his right to self-representation by filing the motion for determination of competency. With regard to standby counsel, we have explained:

> [T]he appointment of standby counsel under Faretta is constitutionally permissible; it is not constitutionally required. Goode v. State, 365 So. 2d 381 (Fla. 1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979). Faretta recognizes that the trial court may, over a defendant's objection, "appoint 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." 422 U.S. at 835 n.46, 95 S. Ct. at 2541 n.46.

Jones v. State, 449 So. 2d 253, 258 (Fla. 1984). Therefore, although McGirth requested legal assistance, the postconviction court was not constitutionally required to appoint standby counsel. It nonetheless elected to do so. As previously discussed, the court initially appointed CCRC-S as standby counsel. However, the

State, CCRC-S, and CCRC-M all filed pleadings asserting that there was no conflict between CCRC-M and McGirth, and CCRC-M was the entity best suited to serve as standby counsel. CCRC-M's motion specifically noted that McGirth agreed to the reappointment of CCRC-M. Given that the court had previously found no conflict between CCRC-M and McGirth, and the fact that CCRC-M was the entity most familiar with McGirth's case, we conclude that the reappointment of CCRC-M as standby counsel did not constitute an abuse of discretion.

McGirth's further complaints are without merit, in that the actions of CCRC-M did not interfere with his right to self-representation. In its pleading seeking reappointment as standby counsel, CCRC-M acknowledged that preparation of the record materials had taken substantially longer than anticipated. However, nothing in the record indicates that CCRC-M was derelict in its obligation to provide McGirth with the materials so that he could represent himself. Rather, the reason CCRC-M had difficulty complying with the two-week deadline imposed by the postconviction court was the sheer volume of the materials to be produced (well over 30,000 pages, according to CCRC-M). Further, there is no indication that McGirth was prejudiced by CCRC-M's failure to produce the materials within the time period initially ordered by the court because he received extensions of time to file his amended rule 3.851 motion.

With regard to McGirth's assertion that CCRC-M interfered with his right to self-representation by filing a motion to determine competency, we have stated that the role of standby counsel is to assist a court in conducting orderly and timely proceedings. Behr v. Bell, 665 So. 2d 1055, 1056 (Fla. 1996). Logically speaking, if standby counsel has a good-faith concern that a pro se defendant is incompetent to continue with self-representation, counsel should be able to present that concern to the court. We conclude that allowing standby counsel to make such a request, when it is in good faith, would facilitate orderly and timely court proceedings because it would help to prevent a potentially incompetent defendant from representing himself and then challenging his competency on appeal.

As previously noted, CCRC-M filed a pleading suggesting that McGirth was exhibiting behavior and symptoms that called his competency into question. These included increasingly unfocused, distant, and detached attention; odd thinking and inappropriate attention to detail; increasingly severe headaches; bizarre behavior during legal consultations, such as head bobbing; and abruptly jumping from one line of discussion to another. CCRC-M stated that it had a "good faith basis to believe there are reasonable grounds to question Mr. McGirth's present competence to proceed or to represent himself."[12] During the hearing at which

12. This language tracks Florida Rule of Criminal Procedure 3.851(g)(2) with regard to when collateral counsel may request a competency determination: "Collateral counsel may file a motion for competency determination and an

CCRC-M's motion was discussed, the State agreed to a determination in an abundance of caution:

> The safest course of conduct, of course would be, appoint the experts, put off the [evidentiary] hearing, have them examine him, reset the hearing for a later time. The risk of not doing it, obvious to all of us, it goes to the Supreme Court, they say you should have done it, send it back and we do it all over again.
>
> If the Court chooses caution, I certainly am not going to object to that. In part, I would almost suggest caution in this case as opposed to going forward.

Based upon the allegations presented in the motion, and the State's agreement to a determination, we conclude that the postconviction court's decision to have McGirth evaluated for competency did not interfere with his right to self-representation.

Accordingly, McGirth is not entitled to relief on this claim.

Self-Representation at the Competency Hearing

McGirth next contends that the postconviction court erred when it permitted him to represent himself during the competency hearing. He further asserts that the competency hearing was insufficient. We address each argument in turn.

In determining whether a defendant is competent to proceed, a court must consider whether he "has sufficient present ability to consult with counsel with a

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accompanying certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the death-sentenced defendant is incompetent to proceed."

reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the pending collateral proceedings." Hernandez-Alberto v. State, 126 So. 3d 193, 204 (Fla. 2013) (quoting Hardy v. State, 716 So. 2d 761, 763 (Fla. 1998)); see also Fla. R. Crim. P. 3.851(g)(8)(A). The United States Supreme Court in Godinez v. Moran, 509 U.S. 389, 399-401 (1993), concluded that the competence required to stand trial, plead guilty, and waive the right to counsel is the same, although the waiver of a constitutional right must also be knowing and voluntary. We have explained the standard for review of a competency determination as follows:

> "It is the duty of the trial court to determine what weight should be given to conflicting testimony." Alston v. State, 894 So. 2d [46,] 54 [(Fla. 2004)] (quoting Mason v. State, 597 So. 2d 776, 779 (Fla. 1992)). "The reports of experts are 'merely advisory to the [trial court], which itself retains the responsibility of the decision.' " Id. (quoting Hunter v. State, 660 So. 2d 244, 247 (Fla. 1995)). Thus, when the experts' reports or testimony conflict regarding competency to proceed, it is the trial court's responsibility to consider all the relevant evidence and resolve such factual disputes. Id.; see also Hardy, 716 So. 2d at 764.
>
> "Where there is sufficient evidence to support the conclusion of the lower court, [this Court] may not substitute [its] judgment for that of the trial judge." Alston, 894 So. 2d at 54 (quoting Mason, 597 So. 2d at 779). A trial court's decision regarding competency will stand absent a showing of abuse of discretion. Id.; see also Hardy, 716 So. 2d at 764; Carter v. State, 576 So. 2d 1291, 1292 (Fla. 1989). . . . A trial court's decision does not constitute an abuse of discretion "unless no reasonable person would take the view adopted by the trial court." Alston, 894 So. 2d at 54 (quoting Scott v. State, 717 So. 2d 908, 911 (Fla. 1998)).

Hernandez-Alberto, 126 So. 3d at 204-05 (some alterations in original).

We have held that a capital defendant may waive the right to counsel and represent himself during a competency hearing where no reasonable doubt has been raised as to his mental competence. See Larkin v. State, 147 So. 3d 452, 464 (Fla. 2014). The determination that a defendant is competent to represent himself at a competency hearing is reviewed for abuse of discretion. See id. McGirth attempts to factually distinguish Larkin on the basis that Larkin was thirty-eight years old at the time of the proceeding, had attended college for two years, and grew up in a comfortable home with an intact family, whereas McGirth grew up in relative poverty, attained a high school diploma while in jail, had allegedly suffered head injuries, and had been diagnosed with a psychotic disturbance. McGirth also contends that he repeatedly requested new counsel, whereas the defendant in Larkin did not.

Neither of these distinctions warrants a conclusion that the postconviction court abused its discretion when it allowed McGirth to represent himself during the competency proceeding. First, regardless of McGirth's background, the record demonstrates that he understood legal concepts and could articulate his position clearly. Second, the postconviction court had previously found that CCRC-M was not providing deficient representation. Therefore, although McGirth may have requested substitute counsel, he did not have a right to the appointment of alternate counsel. See Weaver v. State, 894 So. 2d 178, 188 (Fla. 2004) ("[I]f a trial court

decides that court-appointed counsel is providing adequate representation, the court does not violate an indigent defendant's Sixth Amendment rights if it requires him to keep the original court-appointed lawyer or represent himself."). Therefore, Larkin is applicable to McGirth.

We conclude that, despite the allegations presented in CCRC-M's motion for a competency determination, no reasonable doubt as to McGirth's competence had been demonstrated to the postconviction court. During the hearing on whether to have McGirth evaluated for competency, the court noted that it had not seen anything over the years that called into question McGirth's competency.[13] In fact, in the order appointing the experts, the court expressly stated it was granting a competency determination only in an abundance of caution. Further, at the beginning of the competency hearing, the postconviction court specifically stated that it had read the evaluations prepared by Dr. Prichard and Dr. Berland. We have similarly reviewed these evaluations, which are part of the record on appeal but are sealed and confidential. Our review of the evaluations, as well as the entire postconviction record, leads us to conclude that a reasonable doubt as to McGirth's competency had not been established. Accordingly, the court did not abuse its

13. The same judge presided over both McGirth's capital trial and the postconviction proceedings.

discretion when it permitted McGirth to represent himself during the competency hearing after it conducted a second full Faretta inquiry.[14]

McGirth next contends that the competency hearing was insufficient. We disagree. During the hearing, two experts testified on direct examination and cross-examination as to their conclusions with regard to McGirth's competency, and the parties were permitted to make closing statements to the court. In determining that McGirth was competent, the court did not rely exclusively upon the expert reports:

> I was the judge that presided over Mr. McGirth's trial . . . and so I've had a chance to see Mr. McGirth over the years, as well as these proceedings. I know we do have conflicting testimony from the doctors regarding the competency of Mr. McGirth . . . . That being said, it's my job to determine what weight is to be given to the conflicting testimony because at the end of the day, it's my decision.
>
> And, you know, I've also had a chance to read Mr. McGirth's various pro se motions throughout the post-conviction proceedings.

14. McGirth relies upon two cases in which federal courts held that where a defendant's competence is reasonably in question, a court may not allow that defendant to waive the right to counsel and proceed pro se until resolution of the issue of competency. See United States v. Klat, 156 F.3d 1258, 1263 (D.C. Cir. 1998); United States v. Purnett, 910 F.2d 51, 56 (11th Cir. 1990). However, in Klat, the trial court made an express finding that there was "reasonable cause" to believe the defendant was incompetent to stand trial. 156 F.3d at 1262. In Purnett, the trial court sua sponte questioned the defendant's competency because it believed the defendant had acted in an inappropriate manner. 910 F.2d at 53. Because the court here saw nothing to indicate that McGirth was incompetent to proceed, these cases are distinguishable.

In the order adjudicating McGirth competent to proceed, the court reaffirmed that it had "never observed any behavior of the Defendant suggestive of incompetence." Based upon the expert evaluations, the pleadings filed and the arguments made by McGirth during the postconviction proceedings, and the court's own observations over the years, we conclude that the court did not abuse its discretion when it determined that McGirth was competent to proceed.

Based upon the foregoing, this claim is without merit.

Motion to Disqualify

McGirth contends that the postconviction court improperly denied the motion to disqualify because during the proceedings, the court allegedly exhibited a pattern of preferential treatment to the State and punitive treatment of McGirth for choosing to represent himself. We have explained:

> A motion to disqualify a judge "must be well-founded and contain facts germane to the judge's undue bias, prejudice, or sympathy." Rivera v. State, 717 So. 2d 477, 480-81 (Fla. 1998) (quoting Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992)). The judge should grant a motion to disqualify if "it shows that the party making the motion has a well-grounded fear that he or she will not receive a fair trial from the presiding judge." Barwick v. State, 660 So. 2d 685, 691 (Fla. 1995). However, the fact that a judge has ruled adversely to the party in the past does not constitute a legally sufficient ground for a motion to disqualify.

Thompson v. State, 759 So. 2d 650, 659 (Fla. 2000). Having reviewed the entire record in this case, there is nothing to indicate that the postconviction court was prejudiced or biased against McGirth. Contrary to McGirth's assertions, the court

was courteous, fair, and accommodating throughout the proceedings. The court granted McGirth multiple extensions of time, appointed an investigator to assist him, and consistently honored McGirth's desire to represent himself after emphasizing during each Faretta inquiry that it was inadvisable for him to do so.

This claim is without merit.

Waiver of the Evidentiary Hearing

McGirth next asserts that his waiver of the evidentiary hearing was not valid. We disagree. A defendant can waive an evidentiary hearing on a claim provided that the waiver is knowing, intelligent, and voluntary. See Gore v. State, 24 So. 3d 1, 13-14 (Fla. 2009). At the beginning of the hearing, and after stating that he did not wish to be represented by CCRC-M, McGirth moved to waive the evidentiary hearing, but "preserve the right to appeal all rulings up to this point." The postconviction court conducted another detailed inquiry in which it first confirmed that McGirth understood he had the right to present evidence. The court then conducted a third Faretta inquiry, during which it articulated the advantages of counsel and the disadvantages of self-representation. The court further informed McGirth that he bears the burden at the postconviction stage to demonstrate the merits of his case, and "by waiving that, you're not putting on any evidence, so there's no evidence for me to rule in your favor on the evidentiary matters." The court also explained that if it found McGirth had knowingly and voluntarily

waived his right to proceed with the evidentiary hearing, it had "no choice, unless there's something in the record right now, other than to deny your notion [sic] on the evidentiary issues." McGirth stated that he understood the implications of his waiver.

With regard to competency, the court confirmed that McGirth was not under the influence of alcohol, drugs, or medication; he had no physical problems that would limit his self-representation; he had not been told not to use a lawyer; and he is able to read, write, and understand the English language. McGirth again confirmed that he did not want CCRC-M to represent him. The State noted:

> And so the record is clear and so Mr. McGirth understands, we've been trying to keep track this morning of the witnesses actually being here, and of the 21 that's listed on the notice of filing that they've been served, almost all of them are actually present outside of the courtroom ready and willing to testify. And that includes nearly all of the whole list as last we were taking roll.

The witnesses included McGirth's codefendants, as well as an individual who allegedly heard Sheila Miller state while in the Marion County jail, "I had my own momma killed." The State had agreed to pay the travel expenses of two experts who were scheduled to testify on the third day of the evidentiary hearing.

The State also confirmed that McGirth understood the implications of his waiver:

> STATE: [I]f you don't put on evidence, then there is no support in the record for those claims that you made; for instance about Brady, that evidence was hid or false evidence was used in your

> trial. Unless you put on evidence of that, there is nothing in the record that either Judge Lambert nor the appellate court can use to uphold those claims that you've made.
>
> You understand that?
>
> McGIRTH: Yeah.
>
> STATE: Your Honor, I think with that I think Mr. McGirth clearly has the legal right and the Constitutional right to choose whether to present evidence or not. The witnesses are here, they're ready to go forward. If he chooses not to do that, I believe that's within his ability and his right.

McGirth confirmed that he understood he could present evidence and appeal any issues previously raised, but still chose to waive his right to an evidentiary hearing. When asked if he wished to provide a reason for the waiver, McGirth replied in the negative. After the inquiry, the court concluded that McGirth was competent to waive his right to an evidentiary hearing, and that his waiver was freely and voluntarily made.

Based upon the colloquy conducted by the postconviction court, we conclude that McGirth was competent to waive his right to present evidence on those claims for which an evidentiary hearing had been granted, and his waiver was knowing, intelligent, and voluntary. Both the court and the State ensured that McGirth understood the consequences of his waiver—that the court would be compelled to deny these claims as unproven, and this Court would be compelled to affirm the denial of those claims for lack of evidence. Further, the court conducted a third full Faretta inquiry to ensure that McGirth did not wish to have the assistance of counsel in deciding whether to waive the evidentiary hearing.

In light of the foregoing, this claim is rejected.

PETITION FOR WRIT OF HABEAS CORPUS

McGirth presents three claims in his petition for writ of habeas corpus. Because we conclude that the Hurst claim is dispositive, we decline to address the others. In Hurst v. Florida, 136 S. Ct. 616, 621 (2016), the United States Supreme Court held that Florida's capital sentencing scheme violated the Sixth Amendment. The Supreme Court concluded that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Id. at 619.

On remand from the Supreme Court, we held that "in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge." Hurst, 202 So. 3d at 54. We further held that a unanimous jury recommendation is required before a trial court may impose a sentence of death. Id. Finally, we determined that the error defined in Hurst is capable of harmless error review. Id. at 67.[15]

15. We rejected Hurst's contention that in light of Hurst v. Florida, section 775.082(2), Florida Statutes (2015), mandates that all sentences of death be commuted to life in prison without the possibility of parole. Id. at 65-66. We

In Mosley v. State, 41 Fla. L. Weekly S629, S640 (Fla. Dec. 22, 2016), we held that Hurst applies retroactively to those postconviction defendants whose sentences became final after the United States Supreme Court's 2002 decision in Ring. There is no dispute that McGirth's death sentence became final during this time frame.[16] Thus, McGirth falls into the category of defendants to whom Hurst is applicable. Accordingly, at issue is whether the error that occurred during McGirth's penalty phase proceedings was harmless beyond a reasonable doubt. In the context of a Hurst error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to the sentence.

We conclude that the State cannot meet this burden. Although the prior violent felony aggravating circumstance was found unanimously by the jury by virtue of McGirth's conviction for attempted first-degree murder of James Miller, whether this aggravating circumstance was "sufficient" to qualify for the death penalty would also be a jury determination. Because the jury vote was eleven to

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reject a similar claim raised by McGirth in his appeal from the denial of postconviction relief.

16. Further, we note that McGirth presented a Ring challenge both on direct appeal and in his motion for postconviction relief.

one, there is no way of knowing if such a finding was unanimous. The same rationale applies to the aggravating factor that the murder occurred during the commission of a robbery. Moreover, there is no way of knowing if the jury found any of the other aggravating circumstances unanimously, or if any aggravators that were unanimously found were also unanimously found to be sufficient to qualify for the death penalty.

Further, this was not a case that completely lacked mitigation. McGirth was only eighteen years old at the time of the murder, the bare minimum age to be eligible for the death penalty. See Roper v. Simmons, 543 U.S. 551, 568 (2005). The trial court gave "significant" weight to this statutory mitigating circumstance. McGirth, 48 So. 3d at 784. Additionally, among the evidence that the jury heard in mitigation was that McGirth did not know his father while he was growing up, he was devastated by the death of his grandmother, and he was a witness to domestic violence. As with the aggravators, there is no way to know whether the jury unanimously found that any mitigation established during the penalty phase was outweighed by the aggravation.

In sum, any attempt to determine what findings were made by the one juror who voted for life and the eleven jurors who voted for death would amount to speculation, and cannot rise to the level of proof beyond a reasonable doubt. Accordingly, the error in this case cannot be considered harmless.

CONCLUSION

For the foregoing reasons, we affirm the denial of postconviction relief. However, we grant the petition for writ of habeas corpus, vacate McGirth's death sentence, and remand for a new penalty phase proceeding.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., and PERRY, Senior Justice, concur.
POLSTON, J., concurs in part and dissents in part with an opinion, in which CANADY, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

POLSTON, J., concurring in part and dissenting in part.

I concur with the majority's decision to affirm the denial of postconviction relief. However, I dissent to the majority's decision to grant the habeas petition and order a new penalty phase proceeding based on Hurst v. State, 202 So. 3d 40 (Fla. 2016).

CANADY, J., concurs.

Two Cases:

An Appeal from the Circuit Court in and for Marion County,
Brian David Lambert, Judge - Case No. 422006CF002999CFAXXX
And an Original Proceeding – Habeas Corpus

Robert Friedman, Capital Collateral Regional Counsel – North Region, Alice B. Copek, Karin Lee Moore, and Stacy Rowell Biggart, Assistant Capital Collateral Regional Counsel – North Region, Tallahassee, Florida,

for Appellant/Petitioner

Pamela Jo Bondi, Attorney General, Tallahassee, Florida; and Stacey E. Kircher, Assistant Attorney General, Daytona Beach, Florida,

for Appellee/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing motion and Appendix in Support of the forgoing motion have been transmitted to this Court through the Florida Courts E-Filing Portal on this 31st day of January, 2017.

I HEREBY CERTIFY that a copy of the foregoing was served through the Florida Court E-filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, at CalhounR@sao7.org on this 31st day of January, 2017.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins**, Chief Judge; Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach, Florida 32114 and **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 31st day of January, 2017.

/s/ Raheela Ahmed
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**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v. **CASE NO.: 642009CF002872XXXAWS**
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

STATE'S MOTION TO DELAY THE FILING OF ITS RESPONSE AND TOLL TIME

COMES NOW, Plaintiff, State of Florida, and moves this Honorable Court to delay the filing of its response for ninety (90) days and to toll time until the resolution of this instant motion and states the following:

1. Currently, the State's Response to Defendant's original Motion for Postconviction Relief is due on February 13, 2017.
2. On December 22, 2016, the Florida Supreme Court decided *Asay v. State/Jones*, 41 *Fla. L. Weekly* S646 (Fla. Dec. 22, 2016) and *Mosley v. State/Jones*, 41 *Fla. L. Weekly* S629 (Fla. Dec. 22, 2016), and ruled that Mosley was entitled to the retroactive effect of the *Hurst*[1] decision, and granted Mosley a new penalty phase, and that Asay was not entitled to the same relief.
3. The State filed a motion for rehearing in the *Mosley* case on January 6, 2017. That motion is still pending and therefore, the *Mosley* decision is not final.
4. The State is also filing a Petition for Writ of Certiorari in the United States Supreme

[1] *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

Court, appealing the decision rendered in *Hurst v. State*, with the petition due to be filed on or about February 13, 2017. (See *Florida v. Hurst*, United State Supreme Court Case No. 16A660).

5. As a result of the State's pending motion for rehearing in *Mosley*, and pending Petition for Writ of Certiorari to be filed in *Hurst*, the State respectfully requests this Honorable Court extend the time in which the State can file its response in this cause for a period of ninety (90) days, in order for the Appellate Courts to finalize *Moseley* and provide clearer guidance to the new constitutional capital sentencing and post-conviction procedure.
6. The instant motion is made in good faith and not for purposes of delay.
7. Undersigned counsel has contacted opposing counsel by email who has authorized the undersigned to advise the Court that Defendant's counsel defers to the discretion of this Court.

WHEREFORE, the State respectfully requests this Court extend the time in which the State can file its response in this cause for a period of ninety (90) days and toll time until the resolution of this instant motion.

Respectfully submitted,

PAMELA JO BONDI
ATORNEY GENERAL

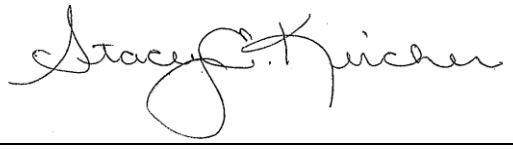
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 6, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send notice of electronic filing to the following: Susan Price, Judicial Assistant, sprice@circuit7.org; Rosemary Calhoun, CalhounR@sao7.org; Cindy Bisland, BislandC@sao7.org, eservicevolusia@sao7.org; Raheela Ahmed and Maria C. Perinetti, Assistants CCRC-Middle, CCRC-Middle, 12973 N. Telecom Parkway, Temple Terrace, FL 33637, ahmed@ccmr.state.fl.us; perinetti@ccmr.state.fl.us; and support@ccmr.state.fl.us, attorneys for the Defendant.

/S/ 

STACEY E. KIRCHER
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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Joseph Edward Jordan, defendant in the above-captioned case by and through undersigned counsel files the following Notice of Supplemental Authority as it related to the issues raised pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016):

1) ***Gerhard Hojan v. State of Florida*, --- So. 3d ---, SC13-5 (Fla. January 31, 2017); *Gerhard Hojan v. Julie L. Jones, etc.*¸ --- So. 3d ---, SC13-2422 (Fla. January 31, 2017).**

The Defendant provides the foregoing recent Supreme Court of Florida opinion in ***Gerhard Hojan v. State of Florida*, --- So. 3d ---, SC13-5 (Fla. January 31, 2017); *Gerhard Hojan v. Julie L. Jones, etc.*¸ --- So. 3d ---, SC13-2422 (Fla. January 31, 2017)**, as authority in support of Claims One and Two of his Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851. *See Attachment I.* Mr. Hojan's case was a post-*Ring*[1] sentencing with a non-unanimous nine-to-three jury recommendation. He was granted a new penalty phase.

[1] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

2) ***Paul Durousseau v. State of Florida,* --- So. 3d ---, SC15-1276 (Fla. January 31, 2017).**

The Defendant provides the foregoing recent Supreme Court of Florida opinion in ***Leo Louis Paul Durousseau v. State of Florida,* --- So. 3d ---, SC15-1276 (Fla. January 31, 2017)**, as authority in support of Claims One and Two of his Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851. *See Attachment II*. Mr. Durousseau's case was a post-*Ring*[2], non-unanimous ten-two jury recommendation. He was granted a new penalty phase.

Respectfully submitted,

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[2] *Ring v. Arizona*, 536 U.S. 584, 597.

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

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NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Attachment I

Supreme Court of Florida

No. SC13-5

GERHARD HOJAN,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. SC13-2422

GERHARD HOJAN,
Petitioner,

vs.

JULIE L. JONES, etc.,
Respondent.

[January 31, 2017]

PER CURIAM.

Gerhard Hojan was convicted of two counts of first-degree murder, one count of attempted first-degree premeditated murder, one count of attempted first-degree felony murder, three counts of armed kidnapping, and two counts of armed

robbery. Hojan was sentenced to death. This Court affirmed his convictions and sentences on direct appeal. Hojan v. State, 3 So. 3d 1204 (Fla.), cert. denied, Hojan v. Florida, 558 U.S. 1052 (2009).

Hojan now appeals the denial of his initial motion for postconviction relief and petitions this Court for a writ of habeas corpus. We have jurisdiction. See art. V, § 3(b)(1), (9), Fla. Const. For the reasons that follow, we affirm the postconviction court's denial of relief but grant Hojan a new penalty phase based on the United States Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016), and our decision in Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016).[1]

FACTS

This Court summarized the relevant facts on direct appeal as follows:

> Gerhard Hojan was charged with armed robbery, armed kidnapping, attempted murder, and murder arising out of the events of Monday, March 11, 2002. The evidence presented at Hojan's trial established that at approximately 4 a.m., Hojan and Jimmy Mickel entered the Waffle House where the victims, Barbara Nunn, Christina De La Rosa, and Willy Absolu worked. Hojan and Mickel had eaten at that Waffle House on several prior occasions, and the victims recognized and knew Hojan and Mickel. Mickel had also previously worked at that Waffle House. Additionally, Nunn knew Mickel and Hojan from attending a club where Mickel and Hojan worked and

1. We previously issued a decision in this case on September 3, 2015. See Hojan v. State, 180 So. 3d 964 (Fla.), reh'g denied, (Dec. 18, 2015). After the United States Supreme Court released Hurst v. Florida, we granted Hojan's motion to recall mandate, re-opened his case numbers SC13-5 and SC13-2422, and permitted supplemental briefing. We withdraw our previous opinion, and replace it with this opinion.

where they had previously admitted Nunn for free.

After eating breakfast, Mickel exited the Waffle House. He returned with a pair of bolt cutters and went toward the employee section of the restaurant. Hojan produced a handgun and ordered Nunn, De La Rosa, and Absolu into the back of the kitchen, where he directed them into a small freezer and shut them inside. While Mickel cut the locks to various cash stores, Hojan returned to the freezer a total of three times. First, Hojan returned and demanded that the victims give him any cell phones they had. Next, he returned and demanded their money. Finally, he returned and ordered the victims to turn around and kneel on the floor. Nunn protested and tried to persuade Hojan not to kill them, but Hojan nevertheless shot each of the victims. . . .

Nunn survived and awoke later with Absolu's legs on top of her body. She crawled out of the freezer and went next door to a gas station. There, with the help of the night attendant, she called 911 and subsequently her mother and sister. . . . Prior to her helicopter flight, Nunn gave law enforcement officers a taped statement, in which she identified Mickel and Hojan as being involved. . . .

Hojan was convicted of two counts of first-degree murder for the death of Absolu and De La Rosa; one count of attempted first-degree premeditated murder as to Nunn; one count of attempted first-degree felony murder as to Nunn; three counts of armed kidnapping; and two counts of armed robbery. State v. Hojan, No. 02-5900CF10B (Fla. 17th Cir. Ct. sentencing order filed Aug. 2, 2005) at 1 (Sentencing Order). The jury recommended death by a vote of nine to three, and the trial court followed that recommendation and imposed two death sentences for the murders of Absolu and De La Rosa. In sentencing Hojan to death, the trial court found six aggravators, one statutory mitigator, and two nonstatutory mitigators. . . .

On appeal, Hojan raises five claims. He argues that (1) the surviving victim's statement to an officer at the scene was not an excited utterance; (2) the trial court improperly treated Hojan's waiver of the opportunity to present mitigating evidence in the penalty phase as a waiver of his opportunity to present motions challenging the death penalty; (3) his confession should have been suppressed; (4) Florida's death penalty statute is unconstitutional; and (5) the trial court committed error under Koon v. Dugger, 619 So. 2d 246 (Fla. 1993), and Muhammad v. State, 782 So. 2d 343 (Fla. 2001). We independently assess the sufficiency of the evidence and the

> proportionality of Hojan's sentence. We find no error under Hojan's five asserted claims, find that sufficient evidence exists, and conclude that the death sentence is proportional. Accordingly, we affirm the trial court's order sentencing Hojan to death.

Hojan, 3 So. 3d at 1207-09 (footnote omitted).

On November 19, 2010, Hojan filed a "Motion to Vacate Judgment of Convictions and Sentences with Special Request for Leave to Amend," raising nine claims, which the circuit court treated as Hojan's initial postconviction motion filed pursuant to Florida Rule of Criminal Procedure 3.851.[2]

2. In his rule 3.851 motion, Hojan raised the following claims: (1) section 119.19, Florida Statutes, and Florida Rule of Criminal Procedure 3.852 are unconstitutional facially and as applied to him (Claim I—amended); (2) the one-year time limit established by rule 3.851 for filing a motion for postconviction relief violates his rights to due process and equal protection under the Fourteenth Amendment of the United States Constitution and article I, section 2 of the Florida Constitution (Claim II); (3) trial counsel was allegedly ineffective during pretrial and the guilt phase (consisting of four subclaims) (Claim III); (4) the trial court erred by permitting the State to present Williams rule evidence consisting of testimony of two witnesses attesting that they had seen Hojan in the past few months with a gun similar to the murder weapon (Claim IV), Williams v. State, 110 So. 2d 654 (Fla. 1959); (5) trial counsel was allegedly ineffective for failing to adequately advise Hojan about the risks of waiving mitigation evidence during the penalty phase (Claim V—amended); (6) Rule Regulating the Florida Bar 4-3.5(d)(4) burdens Hojan's exercise of fundamental constitutional rights—including the right to due process (Claim VI); (7) newly discovered evidence is available to show that the forensic science used to convict and sentence Hojan was unreliable and invalid (Claim VII); (8) Florida's lethal injection protocol is both facially unconstitutional and unconstitutional as applied to Hojan's case (Claim VIII—amended); and (9) Florida's death penalty scheme is unconstitutional because it violates the principles of Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002) (Claim IX).

The circuit court entered an order that summarily denied all of Hojan's claims for postconviction relief. This appeal follows. Hojan also petitions this Court for a writ of habeas corpus.[3]

ANALYSIS

Standard of Review—Postconviction Motion

We have previously established that there is a presumption that claims for relief sought in a rule 3.851 motion are presumptively entitled to a postconviction evidentiary hearing. However, the circuit court's summary judgment denying a defendant's rule 3.851 motion will be upheld if there is a conclusive showing that defendant is not entitled to relief, or the claim(s) is insufficiently pleaded.

> "A defendant is normally entitled to an evidentiary hearing on a postconviction motion 'unless (1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient.' " Valentine v. State, 98 So. 3d 44, 54 (Fla. 2012) (quoting Franqui v. State, 59 So. 3d 82, 95 (Fla. 2011)). An evidentiary hearing must be held on an initial 3.851 motion whenever the movant makes a facially sufficient

3. In the present appeal, Hojan raises the following claims: (1) The circuit court erred in failing to grant an evidentiary hearing on the issue that Hojan's convictions are unreliable; (2) trial counsel provided ineffective assistance for failing to adequately advise Hojan about waiving mitigation evidence during the penalty phase; (3) the circuit court abused its discretion in denying access to records, held by certain state agencies, pertaining to Hojan's case; (4) there is newly discovered evidence establishing that the forensic science used to convict and sentence Hojan was unreliable and invalid; (5) the Bar rule that prohibits his lawyers from interviewing jurors to determine if there was any constitutional error present, unduly burdens his exercise of his rights; and (6) Florida's lethal injection protocol and procedures violate the Eighth Amendment of the United States Constitution.

> claim that requires factual determination. See Amendments to Fla. Rules of Crim. Pro. 3.851, 3.852, & 3.993, 772 So. 2d 488, 491 n.2 (Fla. 2000). "[T]o the extent there is any question as to whether a rule 3.851 movant has made a facially sufficient claim requiring a factual determination, the Court will presume that an evidentiary hearing is required." Walker v. State, 88 So. 3d 128, 135 (Fla. 2012). However, merely conclusory allegations are not sufficient—the defendant bears the burden of "establishing a 'prima facie case based on a legally valid claim.' " Valentine, 98 So. 3d at 54 (quoting Franqui, 59 So. 3d at 96).
>
> "To uphold the trial court's summary denial of claims raised in an initial postconviction motion, the record must conclusively demonstrate that the defendant is not entitled to relief." Everett v. State, 54 So. 3d 464, 485 (Fla. 2010). When reviewing the circuit court's summary denial of an initial rule 3.851 motion, we will accept the movant's factual allegations as true and will affirm the ruling only if the filings show that the movant has failed to state a facially sufficient claim, there is no issue of material fact to be determined, the claim should have been brought on direct appeal, or the claim is positively refuted by the record. See Walker, 88 So. 3d at 135. Finally, "[b]ecause a court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review." Seibert v. State, 64 So. 3d 67, 75 (Fla. 2010) (citing State v. Coney, 845 So. 2d 120, 137 (Fla. 2003) (holding that pure questions of law that are discernable from the record are subject to de novo review)).

Barnes v. State, 124 So. 3d 904, 911 (Fla. 2013). As we explain below, we affirm the circuit court's summary denial of Hojan's motion for postconviction relief.

Merits—Postconviction Motion

Trial Court Error

Hojan raised four subclaims pertaining to alleged trial court error: (1) failure to subject certain analysis of forensic evidence introduced by the State's expert

witness to a Frye[4] hearing; (2) failure to inquire into whether Hojan knowingly, intelligently, and voluntarily waived his Miranda[5] rights; (3) failure to recognize that Hojan was entitled to relief under the Vienna Convention;[6] and (4) failure to disallow the jury selection process, as unorthodox and unconstitutional.

In light of the record before us, we determine that the circuit court found conclusive evidence that Hojan was not entitled to relief based on any of the subclaims under his overall claim of trial court error. Notwithstanding the absence of trial court error, we specifically comment below about Hojan's assertion that the jury selection procedure in his case was unorthodox and unconstitutional.

Frye Hearing

Hojan asserts that he was entitled to an evidentiary hearing to address counsel's ineffectiveness for failing to challenge certain forensic evidence analysis in a Frye hearing. However, the record shows that the circuit court did not err in summarily denying this subclaim as being insufficiently pleaded and lacking merit. Relying on the authority of Ramirez v. State, 810 So. 2d 836 (Fla. 2001), the circuit court rejected as conclusory Hojan's assertion that a 2009 report

4. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

5. Miranda v. Arizona, 384 U.S. 436 (1966).

6. Hojan specifically identifies Article 36(1)(b) of the Vienna Convention on Consular Relations, 596 U.N.T.S. 261 (Dec. 24, 1969) (Vienna Convention).

promulgated by the National Academy of Sciences (NAS), pertaining to forensic science, established that tool mark and bullet rifling evidence did not satisfy the criteria for admissibility under Florida law.

In addition, the circuit court did not err in concluding that Hojan's subclaim was insufficiently pleaded because he never alleged that the 2009 NAS report undermines the reliability of the analyses of forensic evidence in his case.

In Ramirez we explained why the forensic evidence that Hojan challenged is generally admissible in criminal trials:

> The theory underlying tool mark evidence . . . is generally accepted in the scientific community and has long been upheld by courts. Many of the analytical methods that were developed for use with tool marks in general have been applied to knife marks in particular and have similarly been accepted by courts.

Ramirez, 810 So. 2d at 845. Furthermore, the circuit court did not err in summarily denying relief because it is well-established that "the Frye standard is the proper standard for admission of novel scientific expert testimony." Hadden v. State, 690 So. 2d 573, 577 (Fla. 1997) (citing Stokes v. State, 548 So. 2d 188, 194-95 (Fla. 1989)).

Furthermore, the circuit court did not err in summarily denying an evidentiary hearing regarding Hojan's assertion that trial counsel was ineffective for failing to challenge allegedly conclusive testimony given by Carl Haemmerle, the State's expert witness. The circuit court properly ruled that Hojan failed to

specify any information that counsel could have elicited during voir dire that would have warranted Haemmerle's exclusion as an expert. Thus, the circuit court properly concluded that Hojan insufficiently pleaded this sub-issue. See Barnes, 124 So. 3d at 911 (stating merely conclusory statements are insufficient to establish the requirement for a factual determination).

Miranda Waiver

The circuit court did not err in summarily denying as procedurally barred Hojan's assertion that counsel was ineffective for not challenging during the suppression hearing the legal sufficiency of Hojan's waiver of his rights under Miranda. The circuit court correctly recognized that Hojan raised this issue during his direct appeal, where this Court rejected it as an argument of trial court error. Hojan, 3 So. 3d at 1212 ("After hearing the testimony of several law enforcement officers, the trial court denied Hojan's motion . . . . The trial court found that (1) Detective Anton read Hojan his Miranda rights and asked Hojan if he understood those rights; (2) Hojan replied that he was read them and understood them; and (3) after Hojan affirmed that he had been read Miranda warnings, '[t]he Defendant was still willing to talk with [Anton]' on the tape . . . . Ultimately, the trial court held that Hojan was advised of his Miranda rights prior to being questioned and that he voluntarily waived those rights.") (footnote omitted). Contrary to Hojan's assertion that this precise issue presently before us was not previously addressed

during his direct appeal, we disagree with Hojan and conclude, as did the trial court, that a criminal defendant may not relitigate any issue previously decided in his direct appeal, merely guised as an allegation that trial counsel was ineffective.

Vienna Convention

We find that there was conclusive evidence in the record to support the circuit court's finding that: (1) Hojan was born in the United States and he is still a citizen of this nation; and (2) Hojan was arrested and imprisoned for committing crimes in the United States (Florida).

Therefore, despite Hojan's assertion that his father is a German national and his mother a Jamaican national, the circuit court correctly relied on existing case law in concluding that the Vienna Convention does not apply in Hojan's case. Compare Darling v. State, 808 So. 2d 145, 165-66 (Fla. 2002) (holding the Vienna Convention applied where a capital defendant, charged with first-degree murder in the United States, was a foreign national and citizen of the Bahamas), with Lugo v. State, 2 So. 3d 1, 17-18 (Fla. 2008) (holding the Vienna Convention did not apply where the defendant, an American citizen in the Bahamas, sought for crimes committed in the United States, was arrested by Bahamian authorities at the request of United States officials).

The circuit court reasonably concluded that even if Hojan had been able to become eligible for consular assistance from Germany or Jamaica, his rule 3.851

motion failed to allege that he would have sought such assistance under the Vienna Convention. Considering the record before us, the circuit court did not err in ruling that Hojan's rule 3.851 motion was insufficiently pleaded and conclusory. See Knight v. State, 923 So. 2d 387, 403 (Fla. 2005) ("Conclusory allegations without more are insufficient to state a claim for relief in post conviction proceedings." (citing Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989); Freeman v. State, 761 So. 2d 1055 (Fla. 2000))); Freeman, 761 So. 2d at 1061 ("The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden." (citing Kennedy, 547 So. 2d at 912)); Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998) ("We have encouraged trial courts to hold evidentiary hearings on postconviction motions. However, where the motion lacks sufficient factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied.").

Jury Selection Procedure

Hojan's allegation that his defense attorney and the prosecuting attorney colluded to select the jury at a time when he was not present and participating with his defense team initially caused us great concern. It is a well-settled proposition of law, which the circuit court acknowledged in its final order, that a criminal defendant has a right to be present at every critical stage of his or her trial. See

Muhammad v. State, 782 So. 2d 343, 351 (Fla. 2001) ("Criminal defendants have a due process right to be physically present in all critical stages of trial, including the examination of prospective jurors.")

The record before us reflects that Hojan was present during the voir dire of the entire venire that took place in open court, on the record, and before the presiding judge. In addition, Hojan was present for all of the cause challenges of the potential jurors and the trial court's rulings thereon on the record. After reviewing the record before us, we find that the unusual procedure employed in the selection of Hojan's jury did not violate his rights to due process under the law.

The unusual aspect of the jury selection process occurred when counsel for the parties agreed, sometime after the close of the trial proceedings for the day prior to the intervening weekend, to forego the exercise of any peremptory challenges to any of the remaining venirepersons. At that time, off the record and when Hojan and the presiding judge were not present, the attorneys agreed on twelve jurors and four alternate jurors. On the following Monday, counsel informed the trial court, on the record, that they had mutually agreed to the jury and the alternates by way of the aforementioned out-of-court jury selection procedure. The trial court granted defense counsel approximately forty-five minutes to confer with Hojan about the stated jury selection procedure.

Afterward, the trial judge conducted an extensive colloquy with Hojan to ensure that he agreed to the jury and ratified the jury selection procedure that his defense counsel had engaged in with the prosecution.

> THE COURT: Mr. Hojan, the individuals whose names I've called out–you've been sitting here since we started picking this jury last Tuesday; is that correct?
>
> MR. HOJAN: Yes, sir.
>
> THE COURT: And you had an opportunity Tuesday and Wednesday—even though we dismissed the panel that were here Tuesday and Wednesday until we started again in the afternoon—you've been here participating with your lawyers through every stage of the jury selection process; correct?
>
> MR. HOJAN: Yes, Your Honor.
>
> THE COURT: And you've consulted with your lawyers as it relates to the challenges for cause that were raised by the Defense?
>
> MR. HOJAN: Yes, Your Honor.
>
> THE COURT: And you're aware that as of today we have twenty-seven individuals that have not been stricken for cause?
>
> MR. HOJAN: Yes, Your Honor.
>
> . . . .
>
> THE COURT: And of course you were here during all of the questioning with those individuals; correct?
>
> MR. HOJAN: Yes, Your Honor.
>
> THE COURT: Is that an acceptable group of individuals to try your case?
>
> MR. HOJAN: Yes, Your Honor.
>
> . . . .
>
> THE COURT: And they're acceptable to you; correct?
>
> MR. HOJAN: Yes, Your Honor.
>
> THE COURT: Now, you understand in the process of selecting a jury, in addition to challenges for cause, both the State and the Defense have what we call preemptory challenges, which you can utilize to strike individuals from the panel?
>
> MR. HOJAN: Yes, sir.
>
> THE COURT: Your side has ten and the State has ten for a total of twenty.
>
> MR. HOJAN: Yes, Your Honor.

THE COURT: You understand that effectively we have not gone through the process of actually exercising strikes?

MR. HOJAN: Yes, Your Honor.

. . . .

THE COURT: So, effectively, without the exercise of preemptory strikes, effectively both sides were striking certain individuals to get us to the twelve primary, four alternates.

MR. HOJAN: Yes, Your Honor.

THE COURT: And these individuals are acceptable to you to try the case?

MR. HOJAN: Yes, Your Honor.

THE COURT: Are you under the influence of any alcohol or drugs?

MR. HOJAN: No, Your Honor.

THE COURT: Do you need additional time or wish additional time with your lawyers to consult with them on this matter?

MR. HOJAN: No, Your Honor.

THE COURT: And, in fact, you have had an opportunity, at this point it's more like forty-five minutes, to sit, talk with your lawyers, to go through this process?

MR. HOJAN: Yes, Your Honor.

THE COURT: And understand the jury and the selection of the jury has to be acceptable to you?

MR. HOJAN: Yes, Your Honor.

THE COURT: This is your case.

MR. HOJAN: Yes, Your Honor.

THE COURT: And you've involved yourself and participated in this selection process; correct?

MR. HOJAN: Yes, Your Honor.

THE COURT: And again, they are acceptable?

MR. HOJAN: Yes, Your Honor.

The record shows that there was no critical stage of Hojan's trial for which he was not present. There is competent, substantial evidence in the record from which we conclude that all the venirepersons who were not previously dismissed by the trial court for cause by the close of proceedings on the preceding Friday, in

fact, returned to participate in the next day trial court proceedings. Because there is no record evidence that any of the venirepersons were excluded by the out-of-court jury selection procedure and that all were present in court until after the trial court had formally excused them, we are satisfied that Hojan was not deprived of his right to due process by being involuntarily absent from a critical stage in his trial. Because Hojan ratified the jury selection procedure after-the-fact, the circuit court did not err in summarily denying relief as to this subclaim. See Muhammad, 782 So. 2d at 352 ("In State v. Melendez, 244 So. 2d 137, 139 (Fla. 1971), defense counsel consented to the continued examination, challenging, and empaneling of the jury even though the defendant was physically absent from the courtroom. This Court held that no error occurs when the defendant is represented by counsel who waives the presence of the defendant and the defendant later ratifies the action of counsel."); see also Kormondy v. State, 983 So. 2d 418, 429 (Fla. 2007) ("As this Court held in Amazon v. State, 487 So. 2d 8, 11 (Fla. 1986), '[a] capital defendant is free to waive his presence at a crucial stage of the trial. Waiver must be knowing, intelligent, and voluntary. Counsel may make the waiver on behalf of a client, provided that the client, subsequent to the waiver, ratifies the waiver either by examination by the trial judge, or by acquiescence to the waiver with actual or constructive knowledge of the waiver.' "). Furthermore, because the circuit court found that the postconviction record conclusively shows neither party exercised

any of its peremptory challenges, the circuit court properly concluded that Hojan was not entitled to any relief because he was not involuntarily absent during such a critical stage of his trial. See Muhammad, 782 So. 2d at 352.

Notwithstanding the absence of trial court error in the jury selection of Hojan's trial, we caution in the strongest terms that counsel should refrain from engaging in any off-the-record agreements about the selection of the jury in a criminal trial. We especially emphasize this caution in capital murder cases where the defendant is subject to the ultimate and immutable sentence of death. There is no reason for counsel to engage in any trial procedure that gives even an impression—be it ever so slight—that an impropriety has occurred or that the defendant may have been deprived of a fair trial. We will be inflexible and intolerant of any actual violations of defendants' rights that occur as a result of "creative" procedures used during the critical stages of criminal trials.

It is our expectation and charge to the lawyers and judges of Florida that every stage of the criminal trial of any person shall be conducted on the record so that the reviewing courts will have the benefit of the clearest and most complete record from which to evaluate the propriety of the trial proceedings. We put all on notice that we will be ever vigilant to fulfill our role as the oversight body of Florida's Judicial Branch in ensuring that every person is afforded a fair trial and that the proper administration of justice is scrupulously maintained.

Ineffective Assistance of Trial Counsel—Failure to Advise about the Consequences of Waiving Mitigation During the Penalty Phase

The circuit court properly concluded that the issue of Hojan's waiver of his right to present mitigation evidence was procedurally barred because that issue was fully addressed during his direct appeal.

> In summary: (1) Hojan knowingly, intelligently, and voluntarily waived his right to mitigation, and thus Koon was satisfied; (2) there is no evidence in the record that the trial court gave the jury's recommendation "great weight," as was prohibited in Muhammad; (3) it was reasonable for the trial court not to force Hojan's mother to testify when her son had expressly asked her not to testify; (4) Hojan is barred from claiming that [Attorney] Moldof's performance was ineffective in the presentation of mitigating evidence because Hojan waived presentation of mitigation evidence; and (5) there is evidence in the record that the trial court considered the contents of the PSI. Accordingly, we deny all five of Hojan's subclaims in this issue.

Hojan, 3 So. 3d at 1217.

No Competent Mental Health Evaluation

The circuit court properly summarily denied Hojan's subclaim that trial counsel failed to ensure that he had a competent mental health evaluation for purposes of preparing mitigation evidence in accordance with the requirements of Ake v. Oklahoma, 470 U.S. 68, 84 (1985). This subclaim is procedurally barred because Hojan failed to raise the issue on direct appeal. See Floyd v. State, 18 So. 3d at 432, 456 (Fla. 2009) ("Floyd did not raise an Ake claim in his direct appeal and, therefore, this claim is procedurally barred.") (citing Marshall v. State, 854 So. 2d 1235, 1248 (Fla. 2003)).

Reality of Death Row

Similarly, the circuit court did not err in summarily denying Hojan's subclaim that trial counsel was deficient in adequately advising Hojan about the reality of being sentenced to death row. The record demonstrates that trial counsel and the trial court repeatedly discussed with Hojan the consequences of waiving mitigation during the penalty phase and, subsequently, during the Spencer hearing. Spencer v. State, 615 So. 2d 688 (Fla. 1993). Moreover, the record shows that Hojan signed a notarized document attesting that he instructed his defense team to cease any investigation of mitigating circumstances in his case. In that notarized document, Hojan also acknowledged that without presenting mitigation evidence, he was more likely to be sentenced to death. Therefore, the record conclusively shows that Hojan was not entitled to relief because he cannot establish that counsel was deficient.[7] See Barnes, 124 So. 3d at 911; Power v. State, 886 So. 2d 952,

7. Under Strickland v. Washington, 466 U.S. 668 (1984), in order for a defendant to obtain relief based on an allegation of ineffectiveness of trial counsel he or she must

> [f]irst . . . identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Occhicone v. State, 768 So. 2d 1037, 1045 (Fla. 2000) (quoting Maxwell v. Wainright, 490 So. 2d 927, 932 (Fla. 1986)).

959-61 (Fla. 2004) (stating that this Court will not overrule the trial court's conclusion that counsel's performance was not deficient when the record demonstrates that evidence that the defendant interfered with trial counsel's ability to obtain and present mitigating evidence).

Lethal Injection Protocol

The circuit court properly concluded that Hojan's trial counsel was not ineffective for failing to explain the lethal injection protocol and the risks associated with its use of pentobarbital. Specifically, the circuit court reasonably relied on Peede v. State, 955 So. 2d 480, 502-03 (Fla. 2007), in concluding that trial counsel cannot be deemed ineffective for not anticipating a then future change in the lethal injection protocol. Thus, we find no error occurred as to this matter.

No Prejudice

Furthermore, the circuit court concluded that Hojan was not prejudiced concerning the aforementioned subclaims in light of the six aggravating circumstances found in Hojan's case. See Hojan, 3 So. 3d at 1208 ("The aggravators found were: (1) Hojan committed a prior capital felony—the contemporaneous murders and attempted murder; (2) Hojan committed the murders in the course of an armed kidnapping; (3) the murders were committed to avoid arrest; (4) the murders were committed for financial gain; (5) the murders were heinous, atrocious, or cruel (HAC); and (6) the murders were cold,

calculated, and premeditated (CCP)."). The circuit court further noted that even in the absence of a mitigation case, the trial court found one statutory mitigating circumstance—no significant prior criminal history. However, as the circuit court observed, Hojan was only able to articulate that he could offer proof that supported two nonstatutory mitigating circumstances—a history of parental abandonment and neglect, and evidence of child abuse and head trauma. Thus, the circuit court's conclusion that Hojan could not establish the prejudice prong concerning his allegation that trial counsel was ineffective for failing to advise him about the consequences of waiving mitigation during the penalty phase, is based on conclusive record evidence. Therefore, the circuit court did not err in summarily denying Hojan an evidentiary hearing as to this subclaim.

Access to Files and Other Public Records Pertaining to His Case

The record before us shows that the circuit court did not err in concluding that Hojan's public records request was facially insufficient. As presented in this appeal, Hojan's public records requests do not specify: (1) the purpose for which Hojan needs these files and other records, or (2) how he would use the public records to collaterally attack his convictions or sentences. Moreover, Hojan merely alleges that his defense counsel satisfied the requirements of Florida Rule of Criminal Procedure 3.852 "to obtain the requested additional public records" and that "the records sought are relevant to [his] postconviction claims." In

addition, to the extent Hojan raised facial and as-applied constitutional challenges concerning sections 27.7081 and 119.19, Florida Statutes, and rule 3.852 in the postconviction proceeding, these constitutional challenges are waived because Hojan has not raised them in the present appeal. See Rose v. State, 985 So .2d 500, 509 (Fla. 2008) ("Rose has merely stated a conclusion and referred to arguments made below. Thus, we consider the issue waived for appellate review."); see also Hodges v. State, 885 So. 2d 338, 357 (Fla. 2004) ("[T]he substantive issue underlying Hodges' claim is procedurally barred because Hodges could have but did not raise the argument on appeal." (citing Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995)).

Allegation that Newly Discovered Evidence
Affected Forensic Evidence Admitted at Trial

The record shows that in denying an evidentiary hearing on Hojan's claim that the NAS Committee's 2009 report pertaining to forensic science constitutes newly discovered evidence, the circuit court reasonably relied on the requirements established in our prior decisions. See Schwab v. State, 969 So. 2d 318, 325 (Fla. 2007) ("First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial."); Johnston v. State, 27 So. 3d 11 (Fla. 2010) ("As we explain

below, we agree with the postconviction court that the report[, National Academy of Sciences titled, "Strengthening Forensic Science in the United States: A Path Forward" (2009),] presented by Johnston does not constitute newly discovered evidence. . . . The report cited by Johnston does not meet the test for newly discovered evidence. . ."). In light of its application of our precedent, we find that the circuit court did not err in arriving at its conclusion of law that the 2009 NAS report does not constitute newly discovered evidence that could affect the outcome of Hojan's trial.

Bar Rule that Prohibits Post-Trial Juror Interviews

The circuit court provided three reasons why it rejected Hojan's claim that Rule Regulating The Florida Bar 4-3.5(d)(4)[8] unconstitutionally denies him the

8. Rule Regulating the Florida Bar 4-3.5(d)(4) states that a lawyer shall not,

> after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer must file in the cause a notice of intention to interview setting forth the name of the juror or jurors to be interviewed. A copy of the notice must be delivered to the trial judge and opposing counsel a reasonable time before such interview. The provisions of this rule do not prohibit a lawyer from communicating with members of the venire or jurors in the course of official proceedings or as authorized by court rule or written order of the court.

opportunity to fully explore possible misconduct and biases of the jury for purposes of demonstrating the unfairness of the trial. First, relying on Troy v. State, 57 So. 3d 828 (Fla. 2011), the circuit court concluded that the claim was procedurally barred because it should have been addressed on direct appeal. Second, the present claim has been repeatedly analyzed and rejected by this Court. See, e.g., id. at 841; Sweet v. Moore, 822 So. 2d 1269, 1274 (Fla. 2002); Johnson v. State, 804 So. 2d 1218, 1225 (Fla. 2001). Third, Hojan neither alleged that he filed a motion requesting permission to interview any juror nor alleged any specific juror misconduct. We agree with the circuit court's conclusion that Hojan's claim was an attempted fishing expedition in the guise of a constitutional challenge to Bar rule 4-3.5(d)(4); these types of fishing expeditions are prohibited under existing Florida law. See Arbelaez v. State, 775 So. 2d 909, 920 (Fla. 2000) (rejecting the defendant's claim relating to his inability to interview jurors because it amounted to a request to "conduct 'fishing expedition' interviews with the jurors after a guilty verdict is returned"). Thus, the record before us demonstrates that the circuit court neither erred in drawing its legal conclusions nor in entering a summary judgment pertaining to this claim.

Florida's Lethal Injection Protocol

In light of our decisions in Valle v. State, 70 So. 3d 530 (Fla. 2011), and Lightbourne,[9] the circuit court correctly rejected Hojan's claim that this State's current lethal injection protocol violates the Eighth Amendment to the United States Constitution because the administration of the drugs is procedurally inadequate. As the circuit court aptly points out, this specific Eighth Amendment challenge has previously been raised by other defendants and rejected by this Court. See, e.g., Tompkins v. State, 994 So. 2d 1072, 1080-82 (Fla. 2008); Power v. State, 992 So. 2d 218, 220-21 (Fla. 2008); Woodel v. State, 985 So. 2d 524, 533-34 (Fla.), cert. denied, 555 U.S. 1036 (2008); Schwab v. State, 969 So. 2d 318 (Fla. 2007). Furthermore, Hojan has not presented any compelling reason why we should reconsider our position on this matter. Accordingly, we conclude that the circuit court did not err in summarily denying Hojan any relief as to this claim.

Standard of Review—Habeas Corpus

It is well settled in existing case law that

> [c]laims of ineffective assistance of appellate counsel are appropriately presented in a petition for writ of habeas corpus. See Freeman, 761 So. 2d [1055, 1069 (Fla 2000)]. Consistent with the Strickland standard, to grant habeas relief based on ineffectiveness of appellate counsel, this Court must determine first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of

9. Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007).

> professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986); see also Lynch v. State, 2 So. 3d 47, 84-85 (Fla. 2008); Freeman, 761 So. 2d at 1069. In raising such a claim, "[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." Freeman, 761 So. 2d at 1069; see also Knight v. State, 394 So. 2d 997, 1001 (Fla. 1981).

Jackson v. State, 127 So. 3d 447, 476 (Fla. 2013).

Merits—Habeas Corpus

Hojan alleges that his appellate counsel was ineffective during his direct appeal for failing to raise three issues that would have warranted a reversal of the judgments of guilt or the sentences imposed. First, he alleges that appellate counsel unreasonably failed to raise on direct appeal that Hojan was involuntarily absent from the jury selection, which is a critical stage of the trial proceedings. Second, he alleges that appellate counsel unreasonably failed to raise on direct appeal that the trial court erred in admitting remote prior bad acts that were unduly prejudicial. Third, he alleges that appellate counsel unreasonably failed to raise on direct appeal how the Fourth District's decision in Jimmy Mickel's direct appeal should have impacted the review of the trial court's finding of the cold, calculated, and premeditated (CCP) aggravating circumstance and this Court's proportionality analysis.

Involuntary Absence of the Defendant

As we previously discussed, the record is clear about the fact that Hojan subsequently ratified the jury selection procedure that was employed during his trial. Therefore, we do not find any reason that trial counsel acted unreasonably by not doing anything to preserve this sub-issue at trial for subsequent review on direct appeal. See Muhammad, 782 So. 2d at 352. Accordingly, had appellate counsel chosen to raise the issue of Hojan's absence when the jury was selected on direct appeal, such a claim would have been rejected as unpreserved and meritless. See Stephens v. State, 975 So. 2d 405, 426 (Fla. 2007) ("[A]ppellate counsel cannot be deemed ineffective for failing to raise this claim on direct appeal because even if he had done so, this Court would have declined to address the merits of the claim." (citing Lukehart v. State, 776 So. 2d 906 (Fla. 2000))).

Impermissible Admission of Bad Act Evidence

Even though the prior bad acts subclaim was not raised on direct appeal, appellate counsel's failure to do so does not constitute ineffectiveness. The rule governing the admissibility of evidence related to other crimes, wrongs, or acts that was established in Williams v. State, 110 So. 2d 654 (Fla. 1959) has been codified in section 90.404, Florida Statutes.

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is

> inadmissible when the evidence is relevant solely to prove bad character or propensity.

§ 90.404(2)(a), Fla. Stat. (2002).

The circuit court's order denying Hojan's rule 3.851 motion drew the following notable conclusion:

> [T]he testimony of witnesses Kendrick and Burkhardt, which established that [Hojan] possessed a gun similar to the one used to shoot the victims in this case, does not fall within the Williams rule. . . . The testimony was properly admitted to show that [Hojan] possessed the same type of weapon [as used in these crimes] . . . especially since [Hojan] did not want to stipulate that he possessed the murder weapon.

Based on the record before us, we independently conclude that because the testimonial evidence challenged by Hojan is not the kind of evidence that violates the Williams rule, appellate counsel cannot be deemed ineffective for not raising a meritless challenge pertaining to this subclaim during Hojan's direct appeal. See Stephens, 975 So. 2d at 426.

Failure to Consider the Decision in Former Codefendant's Case

Hojan argues that the following excerpt from Mickel v. State, 929 So. 2d 1192 (Fla. 4th DCA 2006), demonstrates appellate counsel's ineffectiveness as to this subclaim because it lends clear support for a conclusion that Mickel substantially dominated Hojan during the entire criminal episode that resulted in Hojan's convictions and sentences:

> The judge, after reviewing the [pre-sentencing investigation report], hearing comments from the victim's families, considering the evidence at Mickel's trial, and considering the state's recommendation, stated:
>
> > There is no question having sat through both Mr. Hojan's trial and your trial that you were the mastermind behind this entire thing. You manipulated Mr. Hojan. He was there, he did your bidding, and the three times that he left that freezer and went back to your location, there was no question what was going on at that point. You were telling him, no witnesses, no witnesses, no witnesses, and he went back and he went forth, and he went back, and he pulled the trigger and that pull of the trigger was a cold, calculated, premeditated act that was precipitated by your direction. No question about that.

The court sentenced Mickel to five consecutive life sentences. Id. at 1195-96.

In Lawrence v. State, 846 So. 2d 440 (Fla. 2003), we considered the claim that the trial court abused its discretion by not recognizing there was sufficient evidence for finding the substantial domination mitigating circumstance. Lawrence, 846 So. 2d at 448-50.

> We, however, do not find support in the record for Lawrence's contentions. There was no evidence presented or proffered indicating how Rodgers' record influenced Lawrence's behavior in the instant crime. While Lawrence argued to the trial court that the time Lawrence and Rodgers spent together in a mental hospital suggested that Lawrence knew the substance of Rodgers' record, no evidence was presented or proffered to further this assertion. The mere possibility that Lawrence might have been able to establish this foundation through his own testimony does not create a constitutional infirmity. See State v. Raydo, 713 So. 2d 996, 1000 (Fla. 1998). Moreover, if the trial court erred in excluding Rodgers' record, that

> error was harmless given the extensive evidence in the record regarding Rodgers' history with Lawrence. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).
>
> Regarding the trial court's finding that the substantial domination mitigator was not established by the evidence, we find that there is competent, substantial evidence to support the trial court's finding.

Id. at 449.

Here, Hojan attempts to establish that appellate counsel was ineffective for failing to raise the issue that is premised on the trial judge's characterization of his former codefendant Jimmy Mickel as the "mastermind" to substantiate his substantial domination subclaim. However, the record in Hojan's case is more reminiscent of that found in Lawrence, namely, Hojan's conclusory claim only points to a "mere possibility" that the trial judge's denomination of Mickel as the mastermind "establish[es] [a] constitutional infirmity." See id. In such light it is unclear how Hojan's claim constitutes a fully developed issue that appellate counsel reasonably could have raised during his direct appeal. Thus, appellate counsel was not ineffective as to this subclaim. See Floyd, 18 So. 3d at 458 ("This Court has held that '[i]f a legal issue "would in all probability have been found to be without merit" had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective.' " (quoting Rutherford v. Moore, 774 So. 2d 637, 643

(Fla. 2000) (quoting Williamson v. Dugger, 651 So. 2d at 84, 86 (Fla. 1994)); Stephens, 975 So. 2d at 426 (same).

Hurst v. Florida & Hurst

After we issued our original opinion in this case and denied rehearing, the United States Supreme Court issued its opinion in Hurst v. Florida. In Hurst v. Florida, the United States Supreme Court declared our capital sentencing scheme unconstitutional because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Hurst v. Florida, 136 S. Ct at 619.

Pursuant to the Supreme Court's decision in Hurst v. Florida, Hojan filed a motion to recall mandate, reopen his habeas corpus case, and permit supplemental briefing. We granted the motion, and Hojan now contends that he is entitled to relief under Hurst v. Florida because of his nine-to-three jury vote recommending death. As we held in Mosley v. State, 41 Fla. L. Weekly S629 (Fla. Dec. 22, 2016), because the Supreme Court specifically found that "[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's" death penalty. Id. at S637. In Mosley, we determined that Hurst v. Florida and Hurst apply retroactively to defendants, like Hojan, whose sentences were not yet final when the Supreme Court issued Ring. See Mosley, 41 Fla. L. Weekly at S636.

Because we conclude that Hurst applies to Hojan, we next examine whether any Hurst error was harmless beyond a reasonable doubt. On remand from the United States Supreme Court, in Hurst we explained the appropriate standard for harmless error review:

> Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., Zack v. State, 753 So. 2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," [State v.] DiGuilio, 491 So. 2d [1129,] 1137 [Fla. 1986], and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a Hurst v. Florida error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate:
>
> > The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.
>
> DiGuilio, 491 So. 2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." Id.

Hurst, 202 So. 3d at 68 (alteration in original). As applied to the right to a jury trial with regard to the facts necessary to impose the death penalty, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found all facts necessary to impose death and that death was the appropriate sentence.

Following Hojan's penalty phase, the jury recommended a sentence of death by a vote of nine to three. For both murders, the trial court found that the following aggravators applied, each of which was given great weight: "(1) Hojan committed a prior capital felony—the contemporaneous murders and attempted murder; (2) Hojan committed the murders in the course of an armed kidnapping; (3) the murders were committed to avoid arrest; (4) the murders were committed for financial gain; (5) the murders were heinous, atrocious, or cruel (HAC); and (6) the murders were cold, calculated, and premeditated (CCP)." Hojan, 3 So. 3d at 1208. Additionally, the trial court found one statutory mitigator and two nonstatutory mitigators, each given little weight. Id. The trial court found that the aggravating factors far outweighed the mitigating factors and sentenced Hojan to death.

Given the jury vote of nine to three to recommend a sentence of death, it is impossible for this Court to conclude that the Hurst error in this case was harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, we affirm the circuit court's summary denial of Hojan's postconviction motion, and we deny the claims in Hojan's petition for a writ of habeas corpus. However, we grant Hojan's supplemental claim for relief

under Hurst v. Florida. Accordingly, we vacate the death sentence and remand this case for a new penalty phase.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
CANADY, J., concurs in part and dissents in part with an opinion, in which POLSTON, J., concurs.
PERRY, Senior Justice, concurs in part and dissents in part.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

CANADY, J., concurring in part and dissenting in part.

I agree that the circuit court's denial of Hojan's postconviction motion should be affirmed and that Hojan's habeas petition should be denied. But I dissent from the decision to vacate the sentence of death. See Mosley v. State, 41 Fla. L. Weekly S629, 2016 WL 7406506 (Fla. Dec. 22, 2016) (Canady, J., concurring in part and dissenting in part).

POLSTON, J., concurs.

Two Cases:

An Appeal from the Circuit Court in and for Broward County,
Paul Lawrence Backman, Judge - Case No. 062002CF005900B88810
And an Original Proceeding – Habeas Corpus

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for Appellant/Petitioner

Pamela Jo Bondi, Attorney General, Tallahassee, Florida; and Lisa-Marie Krause Lerner, Assistant Attorney General, West Palm Beach, Florida,

for Appellee/Respondent

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Attachment II

Supreme Court of Florida

No. SC15-1276

PAUL DUROUSSEAU,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[January 31, 2017]

PER CURIAM.

Paul Durousseau appeals an order of the Fourth Judicial Circuit Court denying his motion to vacate his conviction of first-degree murder and sentence of death, filed pursuant to Florida Rule of Criminal Procedure 3.851. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons discussed below, we affirm the circuit court's denial of postconviction relief but vacate Durousseau's sentences and remand for resentencing in light of Hurst v. Florida, 136 S. Ct. 616 (2016), as interpreted by Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016).

STATEMENT OF FACTS

We discussed the facts of this case in our opinion on direct appeal. See Durousseau v. State, 55 So. 3d 543, 548-50 (Fla. 2010). Paul Durousseau was sentenced to death for the murder of Tyresa Mack. In 1999, Mack's sister and stepfather found Mack's body in her apartment. She was naked from the waist down, and a white cord was wrapped around her neck. Durousseau's DNA was found inside Mack's vagina. In 2003, Durousseau was indicted on five counts of first-degree murder for the deaths of five women. The similar methodology of the crimes caused investigators to conclude that Mack was one of Durousseau's victims. Durousseau was arrested for Mack's murder.

In 2007, Durousseau was found guilty of the first-degree murder of Mack. After the penalty phase, the jury voted ten to two to impose a death sentence. The trial court found four aggravating factors: (1) Durousseau was previously convicted of a felony involving the use or threat of violence; (2) the murder was committed while the defendant was engaged in the commission of a robbery or sexual battery; (3) the murder was committed for pecuniary gain; and (4) the murder was especially heinous, atrocious, or cruel. The trial court did not find any statutory mitigating circumstances, but it did find sixteen nonstatutory mitigating

circumstances.[1] Ultimately, the trial court sentenced Durousseau to death. Id. at 550. On December 9, 2010, this Court rejected all of Durousseau's claims[2] on direct appeal. Id. at 564, cert. denied, 132 S. Ct. 149 (2011).

1. The trial court found the following sixteen nonstatutory mitigators: (1) Durousseau was raised in a broken home (little weight); (2) Durousseau was raised without the benefit of his natural father and lost the love and support of his stepfather at an early age (little weight); (3) Durousseau grew up in poverty and came from a deprived background (little weight); (4) Durousseau was raised in a violent neighborhood and was exposed to violence and the threat of violence to his person on a daily basis (little weight); (5) Durousseau personally witnessed his stepfather physically abuse his mother (moderate weight); (6) Durousseau was beaten as a means of discipline as a child (little weight); (7) Durousseau worked continuously through his adult life (little to moderate weight); (8) Durousseau enlisted and served in the United States Army for approximately six years (moderate weight); (9) Durousseau has supported his two children and is a loving and caring father (little weight); (10) Durousseau has been a loving, respectful son to his mother and cared for her during several periods of illness and incapacitation (moderate weight); (11) Durousseau has been a good brother to his siblings and to other family members, helping to care for and watch over his cousins (moderate to significant weight); (12) Durousseau saved his cousin's life and his brother's life (moderate weight); (13) Durousseau has the support of family and friends who continue to love him (little weight); (14) Durousseau has alcohol abuse issues on both the maternal and paternal sides of his family; despite this, Durousseau has never abused alcohol or illicit drugs (very little weight); (15) society can be protected by a life sentence without parole (very little weight); (16) Durousseau has exhibited good behavior during the trial of this cause (little weight).

2. Durousseau raised the following claims on direct appeal: (1) the trial court erred in admitting Williams rule evidence of the two other murders; (2) the trial court erred in denying Durousseau's motion for judgment of acquittal of felony murder with robbery as the underlying offense and that the evidence is legally insufficient to support the pecuniary gain aggravator; (3) the trial court erred in rejecting an expert's opinion testimony regarding mental mitigation in favor of conflicting lay testimony; (4) the evidence was insufficient to support a first-degree murder conviction; and (5) the trial court erred in denying Durousseau's motion to declare Florida's capital sentencing scheme

On October 1, 2012, Durousseau filed a motion for postconviction relief in the circuit court. Durousseau raised two claims in his postconviction motion: (1) that counsel was ineffective for failing to request additional physical and psychiatric testing; and (2) that counsel was ineffective for failing to conduct a meaningful voir dire. However, before the evidentiary hearing, Durousseau abandoned his first claim. On April 9, 2015, the postconviction court began an evidentiary hearing that lasted two days. Ultimately, the postconviction court denied Durousseau's claim that counsel had failed to secure additional physical and mental testing. Durousseau appealed to this Court, arguing that trial counsel was ineffective because she failed to conduct meaningful voir dire. While his appeal was pending in this Court, the United States Supreme Court decided Hurst v. Florida, 136 S. Ct. 616 (2016), holding that Florida's death penalty sentencing statute violated the Sixth Amendment. In light of Hurst v. Florida, Durousseau filed supplemental briefing, arguing that his death sentence should be vacated.

ANALYSIS

Durousseau alleges that (1) his counsel was ineffective during voir dire, and (2) his death sentence violates Hurst v. Florida. We first reject Durousseau's claim

unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). Durousseau, 55 So. 3d at 550.

that his trial counsel, Ann Finnell, was ineffective during voir dire.[3] We then hold that Durousseau's death sentence is unconstitutional under Hurst v. Florida.

Ineffective Assistance of Counsel

First, Durousseau argues that Finnell was ineffective for asking more collective questions than individual questions. Second, Durousseau argues that the postconviction court erred in finding that Finnell was not ineffective for failing to inquire further of, and move to strike, two specific jurors and one alternate juror. We reject both arguments.

In accordance with Strickland v. Washington, 466 U.S. 668 (1984), we review claims of ineffective assistance of counsel as follows:

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Long v. State, 118 So. 3d 798, 805 (Fla. 2013) (quoting Bolin v. State, 41 So. 3d 151, 155 (Fla. 2010)). Additionally,

3. In light of our decision that Hurst v. Florida requires us to vacate Durousseau's death sentence, we decline to address Durousseau's argument that Finnell was ineffective because she failed to adequately inquire of the venire members about their attitudes toward aggravating and mitigating factors affecting the imposition of the death penalty and did not sufficiently question the voir dire with the specific aggravators and mitigators that applied to Durousseau.

> [t]here is a strong presumption that trial counsel's performance was not deficient. See Strickland, 466 U.S. at 690. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." Id. "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000). Furthermore, where this Court previously has rejected a substantive claim on the merits, counsel cannot be deemed ineffective for failing to make a meritless argument. Melendez v. State, 612 So. 2d 1366, 1369 (Fla. 1992).
>
> In demonstrating prejudice, the defendant must show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Long, 118 So. 2d at 805-06 (parallel citations omitted).

> Because both prongs of the Strickland test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo.

Shellito v. State, 121 So. 3d 445, 451 (Fla. 2013) (citing Mungin v. State, 79 So. 3d 726, 737 (Fla. 2011); Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004)).

With respect to claims that counsel was ineffective during voir dire, the "[e]ffective assistance of trial counsel includes a proficient attempt to empanel a

competent and impartial jury through the proper utilization of voir dire, challenges to venire members for cause, and the proper employment of peremptory challenges to venire members." Nelson v. State, 73 So. 3d 77, 85 (Fla. 2011). The test for competency and impartiality is whether a juror is capable of placing any bias aside and is willing to render a verdict recommendation based exclusively on the evidence and instruction of law presented at trial. Id.

In reviewing an attorney's performance, we must be highly deferential and make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. In light of the challenges in evaluating counsel's performance, we must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. If the defendant fails to make a showing of one Strickland prong, it is not necessary to analyze whether the defendant satisfies the other prong. Id. at 691-692.

To establish deficiency, a defendant must first specifically identify acts or omissions of counsel that were manifestly outside the wide range of reasonably competent performance under prevailing professional norms. Lynch v. State, 2 So. 3d 47, 56-57 (Fla. 2008). Counsel will not be deemed deficient where her actions constituted a strategy within the bounds of professional norms. Occhicone, 768

So. 2d at 1048 (concluding it was a reasonable strategy to not present additional evidence at trial to ensure the defendant would have the first and last word during closing argument). "The issue is not what present counsel or this Court might now view as the best strategy, but rather whether the strategy was within the broad range of discretion afforded to counsel actually responsible for the defense." Id. at 1049.

First, Durousseau argues that Finnell was ineffective for asking more collective questions than individual questions that would have led to an informed method of exercising juror challenges. We affirm the postconviction court's finding that Finnell's collective questioning did not prejudice Durousseau.

Durousseau suggests that he may have been prejudiced by trial counsel's failure to ask individual questions of the venire members or by counsel's failure to follow up with additional questions. Specifically, Durousseau hypothesizes that Finnell lacked a complete understanding of the jury in light of her failure to ask more individual questions. Durousseau likewise hypothesizes that as a consequence, Finnell's jury strikes were based on incomplete information. We have previously rejected ineffective assistance claims like these.

> To show prejudice, [the defendant] argues that [his trial counsel] could possibly have learned more about the jurors' views and used his peremptory challenges in a different manner to obtain a more defense-friendly jury. Such speculation fails to rise to the level of ineffective assistance under Strickland.

Johnson v. State, 921 So. 2d 490, 503-04 (Fla. 2005) (footnote omitted). We have likewise rejected "alleg[ations] that if counsel had 'followed up' during voir dire with more specific questions, there would have been a basis for a for-cause challenge" as "mere conjecture." Reaves v. State, 826 So. 2d 932, 939 (Fla. 2002); see also Wade v. State, 156 So. 3d 1004, 1033 (Fla. 2014) ("Wade's claim that 'there would have been a basis for a for cause challenge if counsel had followed up during voir dire with more specific questions is speculative.' " (quoting Green v. State, 975 So. 2d 1090, 1105 (Fla. 2008))).

Durousseau's arguments are likewise conjectural and speculative. Durousseau asserts that Finnell's failure to ask sufficient individual questions precluded her from obtaining the information necessary to make intelligent use of juror challenges. Durousseau does not identify what information individual questioning would have revealed, nor how that information could have changed his jury make-up or lead to a different result. Accordingly, we affirm the postconviction court's finding that Durousseau did not suffer any prejudice.

Second, Durousseau argues that the postconviction court erred in finding that Finnell was not ineffective for failing to exhaust all of her peremptory challenges, failing to request additional challenges, and failing to challenge the jury panel. We again affirm the postconviction court's findings in denying these claims.

The postconviction court found that Durousseau did not identify any prospective juror that would have been better qualified to sit on the jury than the jury eventually seated. Durousseau's argument on appeal contains the same defect. We have held that this defect is fatal to this type of claim of ineffective assistance of counsel. See, e.g., Peterson v. State, 154 So. 3d 275, 282 (Fla. 2014) ("Peterson does not point to any particular venire member [who] would have been better qualified to serve in place of a seated juror."). Accordingly, we affirm the postconviction court's finding.

Durousseau also specifically argues that Finnell should have further inquired into three of the potential jurors: (1) alternate juror Markley, (2) juror Norrie, and (3) juror Cummins. The postconviction court rejected Durousseau's ineffective assistance of counsel claims regarding Finnell's questioning and challenging of these jurors. We likewise affirm the postconviction court's findings with regard to these three jurors.

As to juror Markley, the postconviction court found that Finnell's actions did not prejudice Durousseau because juror Markley was an alternate juror and never deliberated in Durousseau's trial. We agree. Assuming that further questioning would have revealed information demonstrating, for instance, juror Markley's bias against Durousseau, "prejudice can be shown only where one who was actually biased against the defendant sat as a juror." Carratelli v. State, 961

So. 2d 312, 324 (Fla. 2007) (emphasis added); see also Dillbeck v. State, 964 So. 2d 95, 102 (Fla. 2007) (upholding a postconviction court's finding, which stated, "Two of the complained of jurors were alternates only who did not participate in the jury's verdict. Dillbeck cannot show prejudice based on alternate jurors [who] never served.") Because juror Markley served only as an alternate juror, we affirm the postconviction court's finding.

As to jurors Norrie and Cummins—who served on Durousseau's jury and deliberated as to his guilt and punishment—we likewise affirm the postconviction court's findings that Finnell was not deficient for her allegedly insufficient questioning of these two jurors. Durousseau does not identify the particular information that further questioning of these two jurors would have revealed, and so cannot demonstrate that this undiscovered information would have produced grounds to disqualify either juror. As we earlier noted, a postconviction movant cannot demonstrate counsel's ineffectiveness with speculative assertions that further questioning of a juror during voir dire could have developed more information that may have disqualified the juror. See Wade, 156 So. 3d at 1033; Green, 975 So. 2d at 1105; Johnson, 921 So. 2d at 503-04; Reaves, 826 So. 2d at 939.

Durousseau also argues that Finnell was ineffective for failing to strike alternate juror Markley and jurors Norrie and Cummins from the jury. The

postconviction court also rejected this claim, and we affirm. A postconviction movant "must demonstrate that [a particular juror] was actually biased, not merely that there was doubt about [the juror's] impartiality." Owen v. State, 986 So. 2d 534, 550 (Fla. 2008). Durousseau does not allege that any of the three were actually biased and thus prejudiced Durousseau at trial. Rather, Durousseau merely raises the possibility that alternate juror Markley and jurors Norrie and Cummins might have deserved a for-cause challenge, and counsel was ineffective for failing to strike these potentially problematic jurors. Accordingly, we affirm the postconviction court's rejection of this claim. Id.

Durousseau also argues that we should not apply the "actual bias" standard in this case because Finnell's failure to better inquire of jurors is responsible for Durousseau's inability to point to specific information about juror bias. We reject this contention because it is the postconviction movant's responsibility to demonstrate juror bias, irrespective of the alleged failures of trial counsel. See, e.g., Boyd v. State, 200 So. 3d 685, 699 (Fla. 2015). Once the postconviction movant identifies the juror's bias, the movant must identify the manner in which trial counsel was deficient by failing to uncover information during voir dire that would have demonstrated the bias. See id. Accordingly, we reject Durousseau's argument and determine that we appropriately apply the "actual bias" standard in this case.

Durousseau has failed to demonstrate that his counsel was ineffective during voir dire. Accordingly, we reject his ineffective assistance of counsel claims.

Hurst v. Florida & Hurst

In Hurst v. Florida, the United States Supreme Court held that Florida's capital sentencing scheme is unconstitutional because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." 136 S. Ct. at 619. Durousseau's death sentence was imposed under an unconstitutional capital sentencing statute. Hurst v. Florida and Hurst apply retroactively to Durousseau, whose sentence became final in 2010. See Mosley v. State, 41 Fla. L. Weekly S629 (Fla. Dec. 22, 2016). The remaining question is whether the Hurst error was harmless beyond a reasonable doubt.

A Hurst error is capable of harmless error review. See Hurst, 202 So. 3d at 67. Here we determine that the Hurst error during Durousseau's penalty phase proceeding was not harmless beyond a reasonable doubt. As this Court explained in Hurst:

> The harmless error test, as set forth in Chapman [v. California, 386 U.S. 18 (1967),] and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

Hurst, 202 So. 3d at 68 (quoting State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986)). The Court further discussed the lens through which harmless error should be evaluated:

> Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., Zack v. State, 753 So. 2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," DiGuilio, 491 So. 2d at 1137, and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a Hurst v. Florida error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate:
>
> > The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.
>
> DiGuilio, 491 So. 2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." Id.

Hurst, 202 So. 3d at 68 (alteration in original). Regarding the right to a jury trial, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors and that the aggravating factors outweighed the mitigating circumstances. See id. at 44.

In the present case, the jury did not make any of the requisite factual findings beyond a reasonable doubt. Rather, the jury only issued a recommendation of death by a vote of ten to two. Further, although the aggravating circumstance of a prior violent felony was found unanimously by virtue of Durousseau's previous murder convictions, whether this aggravating circumstance was sufficient to impose death requires a unanimous jury determination. Hurst, 202 So. 3d at 44. Moreover, there is no way of knowing if the jury found any of the other three aggravating circumstances unanimously or, if any aggravators were unanimously found, whether the jury also unanimously found those aggravators sufficient to qualify for a death sentence. Further, we cannot conclude that the two jurors who voted to recommend life found that the aggravation outweighed the mitigation.

Accordingly, we conclude that the Hurst violation was not harmless, and Durousseau is entitled to a new penalty phase. As we have done for other capital defendants, we reject Durousseau's argument that section 775.082(2), Florida Statutes (2015), entitled him to be resentenced to life imprisonment. See Hurst, 202 So. 3d at 44, 63-66.

CONCLUSION

Because Durousseau's death sentence was imposed in violation of the Sixth Amendment right to a jury determination of every critical finding necessary for the

imposition of the death sentence and Florida's independent right to jury trial, and because we conclude that the Hurst error is not harmless beyond a reasonable doubt, we vacate Durousseau's death sentence and remand for a new penalty phase.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
CANADY, J., concurs in part and dissents in part with an opinion, in which POLSTON, J., concurs.
PERRY, Senior Justice, concurs in part and dissents in part with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

CANADY, J., concurring in part and dissenting in part.

I concur with the decision to affirm the denial of relief regarding Durousseau's conviction. But I dissent from the decision to require a new penalty phase. As I have previously explained, Hurst v. Florida, 136 S. Ct. 616 (2016), should not be given retroactive effect. See Mosley v. State, 41 Fla. L. Weekly S629, 2016 WL 7406506 (Fla. Dec. 22, 2016) (Canady, J., concurring in part and dissenting in part).

POLSTON, J., concurs.

PERRY, Senior Justice, concurring in part and dissenting in part.

I concur with the majority's decision to affirm the postconviction court's denial of relief as it pertains to Durousseau's convictions and determination that

the Sixth Amendment requires that we vacate Durousseau's death sentence. However, because Florida law requires that Durousseau be sentenced to life in prison as a consequence of his unconstitutional death sentence, I disagree with the majority's decision to remand for a new penalty phase proceeding instead of remanding for imposition of a life sentence. See § 775.082(2), Fla. Stat. (2016).

As I explained fully in Hurst v. State, 202 So. 3d 40, 75-76 (Fla. 2016) (Perry, J., concurring in part and dissenting in part), there is no compelling reason for this Court not to apply the plain language of section 775.082(2), Florida Statutes. Because the majority of this Court has determined that Durousseau's death sentence was unconstitutionally imposed, Durousseau is entitled to the clear and unambiguous statutory remedy that the Legislature has specified:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

See § 775.082(2), Fla. Stat. (emphasis added). The plain language of the statute does not rely on a specific amendment to the United States Constitution, nor does it refer to a specific decision by this Court or the United States Supreme Court. Further, it does not contemplate that all forms of the death penalty in all cases must be found unconstitutional. Instead, the statute uses singular articles to describe the circumstances by which the statute is triggered. Indeed, the statute repeatedly

references a singular defendant being brought before a court for sentencing to life imprisonment. I consequently cannot agree that the statute was intended as a fail-safe mechanism for when this Court or the United States Supreme Court declared that the death penalty was categorically unconstitutional. Cf. Hurst v. State, 202 So. 3d at 40 (Perry, J., concurring in part and dissenting in part).

An Appeal from the Circuit Court in and for Duval County,
Jack Marvin Schemer, Judge - Case No. 162003CF010182AXXXMA

Richard Adam Sichta of The Sichta Firm, LLC, Jacksonville, Florida; and Billy Horatio Nolas, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Tallahassee, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, Carine L. Mitz, Assistant Attorney General, and Robert James Morris, III, Assistant Attorney General, Tallahassee, Florida,

for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing motion and Appendix in Support of the forgoing motion have been transmitted to this Court through the Florida Courts E-Filing Portal on this 8th day of February, 2017.

I HEREBY CERTIFY that a copy of the foregoing was served through the Florida Court E-filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, at CalhounR@sao7.org on this 8th day of February, 2017.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins**, Chief Judge; Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach, Florida 32114 and **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 8th day of February, 2017.

/s/ Raheela Ahmed
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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

ORDER ON STATE'S MOTION TO DELAY THE FILING OF ITS RESPONSE AND TOLL TIME

THIS CAUSE came before the Court on Plaintiff, State of Florida's motion, requesting this Honorable Court delay the time in which to file the State's Response to Defendant's 3.851 postconviction motion for a period of ninety (90) days and to toll time until the date of this Order. This motion is hereby GRANTED. The State's Response will be due 90 from the date of this Order.

DONE AND ORDERED in Chambers in Volusia County, Florida this 8th day of February, 2017.

Honorable Terence Perkins
Chief Circuit Judge

FILED
17 FEB -8 PM 3:
CLERK OF THE CIRCUIT & CTY COURT VOLUSIA CTY FL
CC18

Copies furnished to:

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Susan Price

Susan Price
Judicial Assistant

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Joseph Edward Jordan, defendant in the above-captioned case by and through undersigned counsel files the following Notice of Supplemental Authority as it related to the issues raised pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016):

1) ***Rasheem Diquoine Dubose v. State of Florida*, --- So. 3d ---, SC10-2363 (Fla. February 9, 2017).**

The Defendant provides the foregoing recent Supreme Court of Florida opinion in ***Rasheem Diquoine Dubose v. State of Florida*, --- So. 3d ---, SC10-2363 (Fla. February 9, 2017)**, as authority in support of Claims One and Two of his Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851. *See Attachment I.* Mr. Dubose's case was a post-*Ring*[1] sentencing with a non-unanimous eight-four jury recommendation. He was granted a new penalty phase.

[1] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

Respectfully submitted,

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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Attachment I

Supreme Court of Florida

No. SC10-2363

RASHEEM DIQUOINE DUBOSE,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[February 9, 2017]

PER CURIAM.

On January 3, 2007, Rasheem Dubose was charged by indictment in Duval County with first-degree murder for the killing of Drewshawna Washington-Davis and with shooting into a building. The charge of one count of possession of a firearm by a convicted felon was later added. The State sought the death penalty. The State originally tried Dubose along with his two brothers, who were charged with the same crimes stemming from the same incident. Though the three brothers were tried together, Dubose had a separate jury. Dubose's first trial resulted in a hung jury and a mistrial was declared. His brothers were convicted on all counts and sentenced to life in prison.

Dubose's second trial began in February 2010. The jury found Dubose guilty of both first-degree premeditated murder and felony murder, with burglary as the underlying felony. He was also found guilty of shooting into a building. The jury voted for imposition of the death penalty by a vote of eight to four. On December 9, 2010, the trial court followed the jury's recommendation and sentenced Dubose to death.

Dubose now appeals his convictions and sentences. We have jurisdiction. See art. V § 3(b)(1), Fla. Const. For the reasons set forth in this opinion, we affirm Dubose's convictions and vacate his sentence of death.

I. STATEMENT OF THE CASE & FACTS

On July 26, 2006, at approximately 4:00 p.m., Willie Davis, Jr., drove his girlfriend, Cinee Tinsley, to the home where she lived with her mother and siblings. As Davis turned onto Tinsley's street, he noticed Dubose's younger brother walking in the street. Davis swerved in an attempt to hit Dubose's younger brother with the car, but was unsuccessful. Dubose's younger brother continued down the street, away from Tinsley's home. Dubose had been on Tinsley's porch with Tinsley's brother and had witnessed the incident. When Davis pulled into Tinsley's yard, Dubose walked toward the car**,** speaking to Davis through the car window. Davis got out of the car and argued with Dubose for approximately one minute and then returned to the car. Davis quickly drove away from Tinsley's

home with Tinsley still inside the car. Davis drove to his father's house, retrieved a gun, and drove back toward Tinsley's home. On the way back to Tinsley's home, Davis told Tinsley "I'm going to make him get naked in the street."

Davis returned to Tinsley's home and saw Dubose still in the front yard with Tinsley's older brother. Davis got out of the car, grabbed Dubose by his shirt, pushed him against a wall, put the gun to the back of his head, and screamed at him to empty his pockets. Dubose complied and emptied his pockets as commanded, after which Davis ridiculed him for not having any money in his pockets. Davis then ordered Dubose to pull his pants down; again, Dubose complied. Tinsley's mother came out of the house and asked Davis to stop what he was doing. He stopped, but Dubose said something that caused Davis to re-engage with him. Tinsley's mother grabbed Dubose and pulled him into her home. Davis and Tinsley left the scene in Davis's car. Dubose left the Tinsley home a short time later on foot.

Dubose went home and told his two younger brothers that Davis had attempted to rob him. After Dubose made a phone call, he threw and shattered his brother's phone and said, "I'm going to kill this nigger." Dubose left his home shortly thereafter. Dubose's younger brother continuously made phone calls to Maxie Wilson, the brothers' cousin, who is a known drug dealer. That day, Maxie Wilson was driving a white Impala rental car, with his friend Sherman Eley in the

passenger seat. After finally answering the phone and speaking with Dubose's younger brother, Maxie Wilson drove to the home of the Dubose brothers. Upon arrival, Dubose's brothers got into the back seat of Wilson's car. One of them was armed with a nine-millimeter firearm. Maxie Wilson drove around the corner where Dubose was standing in front of a house. Dubose got into the back seat of the car.

Then, Dubose instructed Maxie Wilson to drive around the corner to where Davis's mother lived. Once they arrived at the house, they saw Davis's car parked in the front yard. One of the brothers initially prepared to shoot at Davis's car, but was instructed not to by Sherman Eley. The brothers circled the house again and pulled onto a dirt road behind the house. Maxie Wilson parked the car near the backyard fence line of the victim's house and provided the brothers with two more guns, a .45 caliber pistol and a Glock-nine with an extended magazine, which were both in the car with him prior to the incident. Dubose's brothers armed themselves with the nine-millimeter gun and the .45 caliber gun. Dubose armed himself with the Glock-nine. The Dubose brothers exited the vehicle then jumped a fence to enter Davis's mother's backyard.

Davis and Tinsley had gone to his mother's house after the incident. When they arrived, Davis's mother and stepfather were in the dining area of the residence. Davis was seated on a couch by the window on the side of the house.

Three children, including Davis's eight-year-old niece, Drewshawna, were in the bedroom. When the gunfire began, the initial shots were sporadic and then became more continuous. Immediately after the shooting stopped, Tinsley ran to the bedroom to check on the welfare of the children. Drewshawna, who had been shot in the back, lay on top of her younger cousins in a protective position.

After the shooting, the Dubose brothers returned to Maxie Wilson's white Impala. During the car ride, one of the brothers received a phone call that a child had been killed in the shooting. With Sherman Eley still in the passenger seat, Maxie Wilson drove the brothers to a house owned by David Craighton in a secluded, wooded area. Maxie Wilson had previously requested permission to reside at Craighton's home, under the auspices that he needed a place to live with his girlfriend and young child. While at the house, the brothers gave their clothing and weapons to Maxie Williams. Maxie Williams left the brothers at the house, drove Sherman Eley back to his car, which had been parked at an apartment complex in a different neighborhood, and disposed of the clothes and weapons in a dumpster at that apartment complex. The firearms were never recovered. On the evening of July 30, 2006, Craighton came to his house to find the Dubose brothers occupying it. Craighton used a large stick to hold the brothers in the house until the police arrived and arrested them.

Reconstruction of the bullet trajectories revealed that twenty-nine bullets struck the residence, some from the side and some from the rear. Twenty-three of these shots were fired from Dubose's Glock-nine, including the gunshot that killed Drewshawna. The fatal bullet entered the residence through the window on the side of the house, traveled through at least two walls, and entered the bedroom. Someone looking through this window would not have seen the victim in the bedroom, but possibly would have seen someone sitting on the couch near the dining area.

Penalty Phase: State's Witnesses

The penalty phase began on March 9, 2010. The State offered victim impact statements from the victim's grandmothers, the victim's aunt, and the victim's third-grade teacher. The State also offered testimony from Officer Scott Medlock, the officer involved in Dubose's conviction for resisting arrest with violence. Officer Medlock explained his pursuit and subsequent physical altercation with Dubose after he fled following a suspicious person stop. The officer also explained that Dubose apologized and stated that he was not attempting to harm the officer, he just wanted to be free. The officer testified that in hindsight he believed that the defendant was not attempting to harm him, but that belief does not, however, lessen the seriousness of Dubose's actions.

Penalty Phase: Defense Witnesses

In addition to Dubose's family members, who testified on his behalf, Clinical Psychologist and Neurologist, Dr. Hyman Eisenstein, testified as an expert. Dr. Eisenstein testified that Dubose's results on the Comprehensive Test of Basic Skills (CTBS) from first through eighth grade indicate that he scored between the 2nd and 18th percentile (on the low end, 98 percent of the population scored better than him, and on the high end, 82 percent of the population scored better than him). He testified Dubose had academic impairment disability from the first grade through the ninth grade. The doctor also testified that Dubose quit school in the ninth grade but prior to that may have been promoted through special programs or simply promoted despite the fact that he had been failing. Dr. Eisenstein stated there was no indication at all that Dubose was malingering.

Dr. Eisenstein indicated that at the age of 25 years and 11 months, Dubose received an IQ Score of 73 on the Peabody Picture Vocabulary, which is equivalent to a ten year old child. He also testified that Dubose received a grade equivalent to a four year old on the WRAT4 (Wide Range Achievement Test, Fourth Edition); he scored in the sixty-ninth percentile on the reading comprehension portion, with anything below the seventieth percentile being considered mild mental retardation. Dubose's verbal comprehension scores on the WAIS-IV (Wechsler Adult Intelligence Scale, Fourth Edition) equaled 70. A new feature of the WAIS-IV is the GAI (general ability index), upon which the

defendant scored a 75, in the borderline range. Dr. Eisenstein concluded that Dubose's full scale IQ score was 82, which placed him in the low average range. A PET scan was not conducted, but Dr. Eisenstein stated that other factors present in Dubose's life indicated the possibility that he has sustained some brain damage. Dr. Eisenstein assumed that Dubose has frontal lobe damage, which may have made it difficult for him to get over being humiliated by Davis. On cross-examination, Dr. Eisenstein acknowledged that Dubose actually began the tenth grade before he dropped out, and that there were various behavior problem reports in elementary school. On redirect, Dr. Eisenstein opined that Dubose's three-year participation in football and his participation in boxing could have caused brain impairment.

Dr. Alan Fox, professor at Northeastern University, also testified as an expert for the defense. Dr. Fox explained that poor neighborhoods such as the one where Dubose was raised sometimes have a "code," which is the idea of being respected and important, despite the lack of education or employment. He further explained that in this type of environment, "violence is seen as an appropriate, virtually a required response to being disrespected, being humiliated." Dr. Fox reviewed the thirteen DCF reports which contained information that Dubose's father was arrested for abuse; he determined that Dubose always tried to protect the rest of the family from their father. Dr. Fox testified that because Dubose had no

positive role models in his life and because his grandmother worked so much, he modeled himself after other young men in the neighborhood. Associating himself with the people in his neighborhood, opined Dr. Fox, is what taught Dubose the necessity of fighting.

On cross-examination, Dr. Fox acknowledged that on the date of the shooting, Dubose knew right from wrong, he knew that killing was wrong, and that at every step in the events of the day, he could have made different decisions. He also explained that the code of the street may have a different definition of right from wrong than the conventional meaning. Dr. Fox further acknowledged that persons who grow up in rough neighborhoods, may have a better appreciation for the consequences of violence. Dr. Fox stated that the combination of the risk factors in Dubose's life were "tremendous." Dr. Fox opined that the message Dubose may have intended to send was one of deterrence, "Don't mess with us. We're not weak. We won't take it lying down[,]" as opposed to retribution which could have been accomplished by finding Davis and doing something to him personally, one-on-one. Dr. Fox acknowledged that he met with Dubose for a total of forty-five minutes to an hour.

Spencer Hearing

At the conclusion of the penalty phase, the jury recommended by a vote of eight to four that Dubose be sentenced to death for the murder of Drewshawna.

Prior to sentencing, the court held a Spencer hearing on November 10, 2010. In consideration of the time between the penalty phase and the Spencer hearing, some of the witnesses repeated their testimony from the penalty phase. Multiple family members and mental health experts testified at the Spencer hearing, including Dr. Eisenstein and Dr. Waldman.

Dr. Eisenstein and Dr. Waldman restated their conclusions that Dubose suffered from frontal lobe damage that significantly impaired his ability to control his impulses. As further mitigation, the defense offered a report that evaluated the results of Dubose's PET scan. Dubose was administered the PET scan in anticipation of the Spencer hearing. Dr. Ruben C. Gur, who evaluated the results and wrote the report that was admitted into evidence, concluded that Dubose suffered abnormalities in regions of the brain that play a significant role in regulating behavior.

II. ANALYSIS

Juror Misconduct

Dubose argues that the trial court erred in denying his motion for a mistrial based on juror misconduct. On April 23, 2010, Dubose filed a motion for a mistrial based on alleged juror misconduct. Attached to the motion was an affidavit from a juror. The motion alleged that the jurors had conducted internet research regarding the meaning of the defendant's facial tattoo during the penalty

phase deliberations. Also attached were numerous articles regarding the meaning and definition of a teardrop tattoo.[1] The juror's affidavit also stated that the jurors used their cell phones to Google "tear drop tattoos on gang members" to find out what that tattoo meant. Allegedly, they learned that the tattoo is what gang members receive after they kill someone. In addition, the juror alleged that racial references were also made during the deliberations.

The trial judge held a hearing during which he questioned the juror about some of the allegations made in her affidavit. Much of the testimony that the affiant juror provided was related to unauthorized cell phone usage during the trial. She stated that she did not observe anyone using a cell phone during the guilt phase deliberations, but recalled the jury foreperson using his cell phone on breaks and during sidebars, although she could not see what he was doing on his cell phone. The affiant juror also observed the foreperson on the phone during the penalty phase, but she could not hear his conversation. She also admitted that she used her iPod touch device during the breaks, but she stated that she only played games on it because she could not access the internet in the courthouse.

The affiant juror told the judge that no one appeared to be conducting internet research during deliberations. She also testified that another juror, whom

1. Dubose's motion informed the trial court that Dubose's facial tattoo was actually a dollar sign, not a tear drop.

she identified by seat and physical description, used his phone during penalty phase deliberations, but was not observed making a phone call. She further alleged that the jury was not reminded that they were not allowed to have their cell phones during the penalty phase deliberations, and that the phones were not confiscated prior to deliberations.

When questioned regarding her statement that other jurors conducted internet research regarding the meaning of Dubose's facial tattoo, the affiant juror explained that the discussion of Dubose's tattoo occurred during a break and resulted from the defendant cutting his dreadlocks after the guilt phase, thereby making his facial tattoo more visible in the penalty phase. Further, in consideration of the juror's testimony that she could not see what the two jurors who had used their phones were actually doing, the court found her not to be credible on this issue.

When questioned regarding her responses during the polling of the jury in the guilt and penalty phases, the affiant juror inquired as to whether she could be subjected to perjury charges, and ultimately refused to state whether she agreed that the announced verdict reflected her vote. She stated that she did not have a problem with the answer that she gave to the polling question during the guilt phase, but that her answer during the penalty phase bothered her. She explained that she went along with the verdict because she has three children and she did not

want to be singled out in a courtroom filled with spectators and media. She further expressed some concern for her children because gang members were involved.

She stated that after the guilt phase, but before the penalty phase, she attempted to contact the trial judge by email, because she did not want to address her concerns in front of the other jury members. She admitted that her emails did not mention that she was a juror in the case and did not state her name or the purpose of her request for an appointment with the judge. She admitted to contacting the Public Defender's Office, a private attorney, and Dubose's defense counsel, claiming to be a friend of a juror in the Dubose case. She was unclear as to who drafted the finalized affidavit that was presented to the trial court. She explained that a private attorney helped her draft her affidavit, typed it, and emailed it to her. She then explained that she spoke on the phone with Dubose's counsel and ultimately met him for lunch to discuss what she perceived to be juror misconduct. Following this initial meeting, she briefly met Dubose's counsel in a parking lot to sign the affidavit that had already been printed and notarized. When the trial judge attempted to gain some clarity on the drafting of the affidavit, the juror refused to answer any more questions.

After the juror interview, the defense made additional arguments in support of a new trial. The trial court entered a written order denying a mistrial and a request for a new trial. The trial court determined that allegations in the juror's

affidavit and the defense counsel's motions were contradicted by the information that the juror provided at the hearing. The trial court compared the allegations set forth in the juror's affidavit, those raised in the defendant's motions, and the testimony provided by the juror at the hearing, and ultimately found, based in part on the juror's demeanor, that the juror was biased in favor of the defendant and unreliable.[2]

This Court heard oral argument in this case on October 8, 2013. Thereafter, we remanded the case to the trial court for further inquiry of the remaining jurors on the juror misconduct issue, specifically regarding allegations of racial remarks made by jurors; jurors' knowledge of the victim's great-grandmother's burned down house; and cell phone/internet research conducted by the jurors. The trial court subpoenaed the twelve jurors and two alternates. Twelve of the fourteen jurors responded by appearing and giving testimony. One juror had relocated to Georgia and was unable to be served. The affiant juror is the only juror who was served and refused to appear. A significant portion of the proceedings on remand was used to coordinate a date, time and method to interview the affiant juror. The

2. At the hearing, the juror was not questioned concerning her allegations of racial references and that the video of the defendant's police interview needed subtitles in order for the jury to understand Dubose's English.

trial court offered to interview her in person, by telephone, and by video; she refused all methods.

Consistent with its initial denial of a mistrial and the request for a new trial, the trial court ultimately found that the affiant juror was not credible and that the examination of the other jurors did not support the allegations made in the motions and the affidavit. Additionally, the trial judge found that the affidavit submitted to the court alleging juror misconduct was not drafted by the juror, but was drafted by Dubose's counsel and that following Dubose's second trial, which is the subject of this appeal, Dubose's attorney formed an attorney-client relationship with the affiant juror. There is competent, substantial evidence in the record to support the trial court's finding, and we, therefore, deny relief on this issue.

The evidence from the jurors interviewed supports the conclusion that some of the jurors had cell phones and tablet devices during the guilt and penalty phases and during breaks, but not during deliberations. None of the interviewed jurors testified that any of the jurors actually used their electronic devices to conduct research related to the case or made disparaging racial remarks about the defendant. There is evidence that the complaining juror improperly used her electronic device to contact Assistant Public Defender Fred Gazaleh, apparently while court was in session. Gazaleh testified that he assumed that court was in session, based on the time of day that he received the messages, and therefore did

not feel comfortable responding to the messages. Despite the misconduct on the part of the complaining juror, there is no evidence that the use of the electronic devices contributed to the jury verdict.

At the hearing on remand from this Court, none of the jurors recalled any racial remarks or any remarks about the defendant's hair. Some of the jurors had some knowledge of someone involved in the case or the victim's great-grandmother's housing burning down. Others said they had no knowledge of this event or anyone involved in the case. None of the jurors saw any other juror conducting internet research, although several of the jurors had cell phones and other electronic devices. Several of the jurors indicated that remarks were made about the quality of the video and that the defendant's voice was mumbled as he did not speak clearly into the microphone. The testimony on remand did produce evidence that during the penalty phase, one member of the jury stated that a teardrop tattoo indicated that someone had been to jail or was remembering somebody who died. This was not evidence adduced at trial. Furthermore, the evidence indicates that this remark was not made during the course of deliberations nor to the entire jury panel.

Following the trial court's decision on remand, Dubose filed a motion in this Court for additional briefing, alleging that the trial judge had asked the jurors improper questions regarding how the juror misconduct allegations affected their

individual verdicts. Although the trial court indeed conducted an improper inquiry as to matters that inhere to the jury verdict, we find that this error was harmless.

In State v. Hamilton, 574 So. 2d 124 (Fla. 1991), this Court agreed with the test formulated by the Fifth Circuit Court of Appeals[3] and adopted by the Eleventh Circuit Court of Appeals [4] that when questioning jurors regarding allegations of juror misconduct, a judge or counsel is to limit the inquiry to an "objective demonstration of extrinsic factual matter disclosed in the jury room," and "must not inquire into matters relating to the jurors' thought processes." Id. at 129. "Having determined the precise quality of the jury breach, if any, the [trial] court must then determine whether there was a reasonable possibility that the breach was prejudicial to the defendant." Id. (quoting United States v. Howard, 506 F.2d 865, 869 (5th Cir. 1975) (emphasis added)). This test was reiterated by this Court in Keen v. State, 639 So. 2d 597 (Fla. 1994).

During the inquiry of the jurors in Keen, the trial judge asked them whether an article concerning the tactics of defense attorneys in criminal cases found in the jury room influenced their decisions; the jurors stated that it did not. Id. at 599. The trial judge denied the defendant's motion for a new trial, but this Court reversed. Id. at 599-600. We found that the trial judge erred in questioning jurors

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3. See United States v. Howard, 506 F.2d 865 (5th Cir. 1975).

4 . See United States v. Perkins, 748 F.2d 1519 (11th Cir. 1984).

about the items which factored into their decision-making process. Id. at 599. We also found that we could not say beyond a reasonable doubt that the trial court error was harmless, and we concluded that the defendant was entitled to a new trial. Id. at 600 (citing State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986)); see also Devoney v. State, 717 So. 2d 501 (Fla. 1998).

The trial judge in this case also made an inquiry into matters that factored into the jury's decision-making process; such an inquiry was error. Nonetheless, it does not appear that the trial court relied on the improper inquiry to deny the motions for mistrial and for a new trial on remand. The trial judge instead found that none of the other jurors committed juror misconduct, and he denied the motions on this basis. Therefore, the asking of the improper question was not the basis of the denial of the motions. Under the circumstances of this case, the trial court's error was harmless beyond a reasonable doubt. See DiGuilio, 491 So. 2d at 1139.

Additionally, regarding any allegation that racial remarks, unauthorized materials, or outside research affected the verdict, relief is not warranted. No juror testified that any racial remarks were made. While the evidence from the jurors interviewed supports the conclusion that some of the jurors had cell phones and tablet devices during breaks and lunch in the guilt and penalty phases, no juror recalled anyone's use of electronic devices during deliberations. Further, each of

the jurors denied using his or her cell phone to access the internet or to conduct outside research. To the extent that cell phones were inside the jury room and could be considered unauthorized materials in the jury room, based on the evidence in this case, "it is not reasonable to assume that jurors derived any prejudicial legal or factual conclusions" from these devices. Hamilton, 574 So. 2d at 130-31.

Assuming that one juror educated the other jurors on the meaning of a teardrop tattoo during the penalty phase after observing a tattoo on the defendant's face—which apparently was not a teardrop—there was conflicting testimony as to the brevity of the discussion and the source of the juror's knowledge is unclear. Whether or not it could be considered to be improper discussion and not a matter inhering in the verdict, there is no reasonable probability that this breach was prejudicial during the penalty phase of his trial. See id. Dubose had already been convicted of murder and during the penalty phase, the jury was informed that Dubose had a prior violent felony. In addition, through the testimony of Dubose's own witness, the jury learned that Dubose had been incarcerated awaiting the trial of this case.

Sufficiency of the Evidence

The evidence in a capital case is judged to be sufficient when it is both competent and substantial. See Phillips v. State, 39 So. 3d 296, 308 (Fla. 2010). In conducting its review, this Court looks at the evidence in the light most

favorable to the State to determine if a rational trier of fact could find the elements of the crime were proven beyond a reasonable doubt. See Rodgers v. State, 948 So. 2d 655, 674 (Fla. 2006) (quoting Bradley v. State, 787 So. 2d 732, 738 (Fla. 2001)). Furthermore, when a general verdict is rendered by the jury after the jury was instructed on both premeditated first-degree murder and first-degree felony murder, this Court will affirm the conviction if either form of first-degree murder is supported by competent, substantial evidence. See Crain v. State, 894 So. 2d 59, 73 (Fla. 2004). Here, the jury was instructed on both first-degree premeditated murder and first-degree felony murder, with burglary being the underlying felony. The defendant was convicted of first-degree murder under either theory.[5]

First, there is sufficient evidence in this case to support a conviction for first-degree premeditated murder. This Court has stated that

> Premeditation is defined as more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.

Bradley, 787 So. 2d at 738 (quoting Woods v. State, 733 So. 2d 980, 985 (Fla. 1999)). Premeditation may be inferred from such facts as "the nature of the weapon used, the presence or absence of adequate provocation, previous

5. The jury additionally found that the defendant discharged a firearm causing death or great bodily harm during the commission of the offense.

difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." Id. (quoting Norton v. State, 709 So. 2d 87, 92 (Fla. 1997)).

The State introduced competent, substantial evidence of Dubose's guilt. The State proved that the Dubose brothers stealthily drove around the back of Vonnie Frazier's home, jumped a fence to get closer to the house and stood in the yard while relentlessly spraying the house with bullets. Dubose's premeditated design to kill is evidenced by the fact that he armed himself with a weapon, went to the victim's home with the weapon displayed, and shot that weapon, a Glock-nine with the capability to travel through at least two walls, into an open window of an occupied home. One of these bullets ultimately killed Drewshawna. Therefore, we find that the facts of this case provide competent, substantial evidence to support Dubose's first-degree premeditated murder conviction.

Additionally, the State presented sufficient evidence to support the first-degree felony murder conviction. The jury found Dubose guilty of first-degree felony murder, with burglary as the underlying felony. Burglary is a qualifying felony that supports a conviction for first-degree felony murder. See § 782.04(1)(a)2.e., Fla. Stat. (2006). As discussed below, the State's evidence demonstrated that the Dubose brothers unlawfully entered the curtilage of Vonnie Frazier's home, committing burglary, when they shot Drewshawna. Therefore,

because we find that Dubose had premeditated intent to kill, and that he committed a burglary during the shooting, we affirm his conviction for first-degree murder.

Burglary

Dubose argues that the underlying felony, burglary, was not proven at trial, and he therefore cannot be convicted of felony murder. In Dubose's first trial, defense counsel filed a motion in limine with a memorandum of law to prohibit the State from arguing felony murder on the theory of burglary, arguing that the gap in the fence allowing for the driveway prevents the yard from being considered curtilage under this Court's decision in State v. Hamilton, 660 So. 2d 1038 (Fla. 1995). This motion was denied. The defense renewed this motion at the beginning of the second trial. The trial court once again denied this motion. Therefore, this claim was preserved. See Steinhorst v. State, 412 So. 2d 332, 338 (Fla.1982) ("in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.") (emphasis added).

During the jury charge conference, the State moved the trial court to add a sentence to the verdict form at the end of the definition of a structure, to read: "The space of ground immediately surrounding the structure does not have to be totally

enclosed."[6] In objecting to the State's motion, defense counsel argued the standard jury instruction is sufficient. Defense counsel then generally argued that the victim's home did not have a gate and was not capable of being totally enclosed. Relying on this Court's decision in Hamilton, the trial court denied the State's motion.

Dubose's brother raised this same argument in his appeal to the First District Court of Appeal. Dubose v. State, 75 So. 3d 383, 384-85 (Fla. 1st DCA 2011). In finding that "the fencing around the residential yard in the instant case . . . satisfies the enclosure requirement in Hamilton[,]" the First District stated:

> The area surrounding a dwelling or structure must lie within "some form of an enclosure" to be considered part of the curtilage. State v. Hamilton, 660 So. 2d 1038, 1044-45 (Fla. 1995). In this case, the yard of the home Appellant and his brothers fired upon had a chain link fence around it, with an opening in front for the driveway. This court recently held that the enclosure "need not be continuous[,] and an ungated opening for ingress and egress does not preclude a determination that the yard is included in the curtilage of the house."

Id. at 385. We approve the reasoning and decision of the First District in Dubose, and find that the trial court did not commit reversible error by allowing the instruction on felony murder based on burglary to go to the jury.

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6. Based on the statements of the prosecutors, two previous juries had asked this same question. It is not clear from the record whether the prosecutors are referring to the juries that found the other Dubose brothers guilty, or if one of the referenced juries includes the jury in Dubose's first trial, where a mistrial was declared.

Motion for Change of Venue

Dubose argues that the trial court should have granted his motion for change of venue. We find that the trial judge did not err in denying Dubose's motion. Section 47.121, Florida Statutes (2010), states that "[a] change of venue shall be granted when it appears impracticable to obtain a qualified jury in the county where the action is pending." This Court has determined that some knowledge of the case by potential jurors is not sufficient reason standing alone to require a change of venue. In McCaskill v. State, 344 So. 2d 1276 (Fla. 1977), we articulated the test as follows:

> Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. 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 preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom.

Id. at 1278 (quoting Kelley v. State, 212 So. 2d 27, 28 (Fla. 2d DCA 1968)); accord Manning v. State, 378 So. 2d 274, 276 (Fla. 1979).

As this Court made clear in Rolling v. State, 695 So. 2d 278, 285 (Fla. 1997), in ruling on a motion for a change of venue, the trial court should consider: "(1) the extent and nature of any pretrial publicity; and (2) the difficulty encountered in actually selecting a jury." In evaluating the first prong,

> the trial court must consider numerous factors, 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 version; (4) the size of the community in question; and (5) whether the defendant exhausted all of his peremptory challenges.

Id. at 285 (citations omitted).

The first three factors of the first prong can best be addressed collectively. The shooting in this case occurred on July 26, 2006. The first trial, involving all three defendants**,** occurred in January 2010. Jury selection in the second trial began on February 8, 2010. Prior to the first trial, the defense filed a pretrial motion to change venue, citing extensive pretrial publicity. The defense attached a study regarding the effects of pretrial publicity on juror verdicts, along with numerous news articles addressing the story. Most of the news articles attached to the defendant's motion are dated the same week that the crime occurred and contained basic facts obtained as the story developed. The major basis for many of the news articles was the fact that the Mayor of Jacksonville funded a task force to allow the Sheriff to pay police officers more overtime, in order to patrol "high risk" areas in Jacksonville, to deal with the widespread murders in the areas. In these articles, the mayor and the sheriff urged the community to assist in decreasing the crime rate and generally warned all of the criminals that they would be caught.

The news articles published close in time to the crimes also provided information such as who the persons of interest were and the reason for the shooting, as alleged by neighbors. Many of the news reports cited the basis for the shooting as a retaliatory or "respect shooting," indicating that the suspects at that time shot into the house in retaliation for a robbery that occurred earlier that day. The news reports attached to the motion detail the court appearances of the brothers, as well as the person that the brothers were allegedly aiming for, Willie Davis, Jr. On the one-year anniversary of the victim's death, there was an article advertising a memorial service, which a few of the jurors remembered seeing. There were two articles attached, dated early February 2008, which detailed the disciplinary files of all three brothers since they were arrested for the crimes.

In one of these articles, a representative of the Jacksonville Sheriff's Department made multiple disparaging remarks about all three defendants, referring to them as "miscreants," "a menace to society," calling their behavior "despicable," and stating that "they are in the right place." The articles attached that were written in 2009 (the latest dated May 2009) provided information about court hearings and indicated that the state sought to have separate trials, and seek the death penalty for Dubose and life sentences for the other two defendants. The latest dated article attached to the motion was dated the same week as the trial, and

included a detailed timeline of events since the incident and a diagram of the home where the victim was shot.

The attached articles do not indicate that the entire community was biased against Dubose in a manner that would make it impossible to choose an impartial jury. Additionally, the attached articles do not exclude the defendants' version of events; some of the articles even include excerpts from the police interrogation where the defendant denies any involvement in the crime. Further, even considering the disparaging remarks made by the representative of the Sheriff's Department, there was no indication that any of the jurors read that article, or adopted those views to the point that the jurors' ability to be impartial was jeopardized. Although the defense renewed its motion for a change of venue at the beginning of the second trial, there is no evidence that the defense supplemented the record with news reports that occurred after the first trial, but before the second trial.

As to the fourth factor of the first prong, there were no arguments made that the defendants could not receive a fair trial in Duval County, based on the size of the county. During the individual voir dire process, each juror indicated that, if chosen for the jury, he or she could be fair and impartial and only decide the case based on the evidence presented in the trial. Finally, the defense used all ten of its

peremptory challenges, along with three additional challenges that were requested and granted.[7] A fourth additional peremptory challenge was requested, but denied.

As to the second prong, the defense and the State were able to agree on a jury panel and two alternates with approximately five jurors remaining who had not been stricken. The defense counsel did not appear to have any difficulty in selecting jurors who indicated that they could be fair and impartial in this case. In fact, even the potential jurors who had extensive prior knowledge of the case indicated that their knowledge did not result in any bias toward the defendant.

This case is distinguishable from Manning v. State, 378 So. 2d 274 (Fla. 1979), where this Court determined that the trial court abused its discretion in denying the defendant's motion to change the venue of the trial. Manning was a young, Black male from a different county who was arrested in a rural county and charged with murdering two Caucasian sheriff's deputies. Id. at 276. The pretrial

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7. The defense raised a standing objection to any juror that had knowledge that there was a mistrial in Dubose's previous trial. The court consistently denied this motion, reasoning that the jurors are qualified as long as they do not share the information with another juror and as long as the juror states that the knowledge of the previous mistrial will not affect his or her impartiality. The defense sought additional peremptory challenges, reasoning that it used at least three of its peremptory challenges on potential jurors that the defense argues should have been stricken for cause. In recognizing that the trial court had the authority to grant the peremptory challenges "free and liberally," the court granted both sides three additional peremptory challenges, following individual requests by the defense. The court denied the defense's request for a fourth additional peremptory challenge.

publicity included information provided to the media regarding the version of events represented by the state attorney's office and the local sheriff's department, which contradicted the version of events given by the appellant shortly after his arrest. Id. at 275. Every person on Manning's perspective jury "had prior knowledge of the alleged crimes through news media accounts and community discussion." Id.

> The defense attached various newspaper articles to the motion, as well as affidavits of fifteen persons, including the defendant, stating that because of bad feelings and prejudice against the defendant and because of the adverse publicity concerning the case, the affiants were convinced by reason of personal observations and knowledge of the conduct and statements by various persons in Columbia County that the defendant could not receive a fair and impartial trial in that county. In addition, the defendant alleged that local police officers made various threats against his life, physically and verbally abused him, and harassed his mother when she came to visit him in jail.

Id. The jury found the appellant guilty and recommended imposition of the death penalty.

In this case, the defendant lived in the same county where the crime occurred. As expected, the death of an innocent child may draw just as much emotion and media attention as the killing of two police officers. Here, fifty-three of the sixty-nine potential jurors admitted to seeing or hearing media coverage of the case. The individual voir dire sessions revealed that while few potential jurors knew intricate details of the case or had followed the first trial, many of the potential jurors only read or heard from the media reports that a child was killed in

a "drive by" shooting, where she was not the target, which is essentially the same information that was provided to the potential jurors during the court's summary at the beginning of jury selection. One of the alternate jurors had the most information about the case, and was able to recite the basic facts and procedural posture of the case.

Of the 53 jurors who admitted to previously hearing some information about the case, six were chosen to serve on the jury and two were chosen as alternates. The other six jurors indicated that they had not previously heard about the case before reporting for jury duty. Although Dubose claims that the media attention surrounding the incident portrayed Dubose and his brothers in a very negative light, none of the potential or actual jurors indicated that the media attention caused them to view Dubose or his brothers with any preconceived bias or hostile feelings. Therefore, the trial court properly denied Dubose's motion for change of venue.

Cumulative Error

The defense argues that it was denied a fair trial based upon the trial court's failure to grant its motion for change of venue and its motion for mistrial based on juror misconduct. However, where the individual claims of error are without merit, the claim of cumulative error must fail. Griffin v. State, 866 So. 2d 1, 22 (Fla. 2003). It does not appear that the trial court committed error in denying the

defendant's motions for change of venue and for mistrial. Therefore, the defense is not entitled to relief on this claim.

Constitutionality of the Sentencing Statute

Dubose contends that his death sentence is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). During the pendency of Dubose's direct appeal, the United States Supreme Court found Florida's capital sentencing scheme unconstitutional in violation of the Sixth Amendment right to a jury trial. Hurst v. Florida, 136 S. Ct. 616, 619 (2016). In Hurst v. State, we explained that the jury in a capital case must find the following facts unanimously: "the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." 202 So. 3d 40, 53 (Fla. 2016). We have determined that section 775.082(2), Florida Statutes, does not require us to remand all death penalty cases for the imposition of a life sentence. See id. at 63-66. See also Franklin v. State, 41 Fla. L. Weekly S573 (Fla. Nov. 23, 2016). We have also determined that in cases where the jury makes a non-unanimous recommendation of death, the Hurst error is not harmless. See Id. at S575.

Because the recommendation of death in this case was not unanimous, we cannot find beyond a reasonable doubt that the error did not contribute to Dubose's

sentence. Accordingly, Dubose is entitled to relief, and we need not address the proportionality of his sentence or his other claims relating to the penalty phase.[8]

III. CONCLUSION

For the above stated reasons, we affirm Dubose's convictions, vacate Dubose's death sentence, and remand for a new penalty phase proceeding.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
CANADY and POLSTON, JJ., concur as to the conviction but dissent as to the sentence.
LAWSON, J., did not participate.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Duval County,
Lawrence Page Haddock, Jr., Judge - Case No. 162006CF018285AXXXMA

Richard Randall Kuritz, Jacksonville, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, Carolyn Marie Snurkowski, Associate Deputy Attorney General, and Berdene Bevione Beckles, Assistant Attorney General, Tallahassee, Florida; and Lisa-Marie Krause Lerner, Assistant Attorney General, West Palm Beach, Florida,

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8. Dubose also claimed the following related to his penalty phase: (1) trial court erred in refusing to consider as mitigation Dubose's attempt to enter into a plea agreement; and (2) the trial court erred in denying Dubose's motions for continuance based on the defense's request for a PET scan amid suspicions of brain injuries and in denying a continuance of the Spencer hearing to allow a continuance to have testimony regarding the PET scan that was done between the penalty phase hearing and the Spencer hearing.

for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing motion and Appendix in Support of the forgoing motion have been transmitted to this Court through the Florida Courts E-Filing Portal on this 7th day of March, 2017.

I HEREBY CERTIFY that a copy of the foregoing was served through the Florida Court E-filing Portal to the **Honorable Terrence R. Perkins (J.A. Susan Miller)**, Chief Judge; Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach, Florida 32114; to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, at CalhounR@sao7.org on this 7th day of March, 2017.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 7th day of March, 2017.

/s/ Raheela Ahmed
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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Joseph Edward Jordan, defendant in the above-captioned case by and through undersigned counsel files the following Notice of Supplemental Authority as it related to the issues raised pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016):

1) ***Charles L. Anderson v. State of Florida,* --- So. 3d ---, SC12-1252, 2017 WL 930924 (Fla. March 9, 2017); *Charles L. Anderson v. Julie L. Jones etc.*, --- So.3d ----, SC14-881, 2017 WL 930924 (Fla. March 9, 2017).**

The Defendant provides the foregoing recent Supreme Court of Florida opinion in ***Charles L. Anderson v. State of Florida,* --- So. 3d ---, SC12-1252, 2017 WL 930924 (Fla. March 9, 2017); *Charles L. Anderson v. Julie L. Jones etc.*, --- So.3d ----, SC14-881, 2017 WL 930924 (Fla. March 9, 2017)**, as authority in support of Claim One of his Successive motion to vacate sentence of death pursuant to Florida Rule of Criminal Procedure 3.851. *See Attachment I.* Mr. Anderson's case was a post-*Ring*[1] sentencing with a non-unanimous eight-four jury recommendation. He was granted a new penalty phase under *Hurst v. Florida*¸136 S. Ct. 616

[1] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

(2016).

2) ***Howard Steven Ault v. State of Florida*, --- So. 3d ---, SC14-1551, 2017 WL 930926 (Fla. March 9, 2017).**

The Defendant provides the foregoing recent Supreme Court of Florida opinion in ***Howard Steven Ault v. State of Florida*, --- So. 3d ---, SC14-1551, 2017 WL 930926 (Fla. March 9, 2017)**, as authority in support of Claim One of his Successive motion to vacate sentence of death pursuant to Florida Rule of Criminal Procedure 3.851. *See Attachment II*. Mr. Ault's case was a post-*Ring*[2] sentencing with a non-unanimous nine-three jury recommendation as to the first murder count and a non-unanimous ten-two jury recommendation as to the second murder count. He was granted a new penalty phase under *Hurst v. Florida*¸136 S. Ct. 616 (2016).

Respectfully submitted,

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[2] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
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STATE OF FLORIDA,

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v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

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NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Attachment I

Supreme Court of Florida

No. SC12-1252

CHARLES L. ANDERSON,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. SC14-881

CHARLES L. ANDERSON,
Petitioner,

vs.

JULIE L. JONES, etc.,
Respondent.

[March 9, 2017]

PER CURIAM.

Charles Anderson appeals an order denying his motion to vacate his conviction of first-degree murder and sentence of death filed under Florida Rule of Criminal Procedure 3.851. Anderson also petitions this Court for a writ of habeas

corpus. We have jurisdiction. See art. V, § 3(b)(1), (9), Fla. Const. For the reasons expressed below, we affirm the postconviction court's order as to Anderson's conviction and deny Anderson's habeas petition but vacate the death sentence and remand for a new penalty phase.

I. BACKGROUND

In 1999, Anderson was convicted and sentenced to death for the first-degree murder of his stepdaughter, Keinya Smith. The facts of the murder were set forth in this Court's opinion on direct appeal as follows:

> In 1980, Charles Anderson married Edwina. At the time of the marriage, Edwina had a five-year-old daughter (Keinya) from a previous relationship. In 1992, the Miami police became aware that Anderson was sexually abusing Keinya. He subsequently pled to eleven counts of attempted capital sexual battery and was sentenced to probation. One of the conditions of the probation was that he have no contact with Keinya. If Anderson violated probation, he faced the possibility of life in prison.
>
> Despite the conditions of his probation, witnesses testified that Anderson continued to have contact with Edwina and Keinya. Apparently he spent several nights a week at Edwina's house. On Wednesday, January 12, 1994, Keinya was supposed to leave her job at Publix at 6 p.m., yet she did not return home until much later. A Publix employee by the name of Patrick Allen drove Keinya home. After dropping Keinya off, Allen realized that he was being followed by an individual in another car. Allen ultimately eluded the individual. When Allen was later shown photographs of Anderson's car, he was able to verify that the car that chased him belonged to Anderson.
>
> Two nights later, on Friday, January 14, Allen brought Keinya home again. Anderson was sitting in his car waiting for Keinya to return, and as soon as Keinya got out of Allen's car, Anderson's car darted toward Allen. Another chase ensued, and this time Allen fired several gunshots at Anderson during the chase. When Anderson

returned home, he and Keinya got into a heated argument. A neighbor testified that she overheard Anderson say to Keinya, "You told him. Why was he shooting at me?" and that Keinya responded, "I didn't tell him nothing." A cousin who was present during the argument testified that Anderson hit Keinya. Keinya then grabbed a knife and said, "Let me call the police." She proceeded to dial 911, but when the operator picked up, Keinya hung up the phone. The 911 operator called back, but was unable to get an answer and therefore a police car was sent to the house. When the police arrived, both Anderson and Edwina went outside and talked to the police. Keinya locked herself in her room. Anderson and Edwina convinced the police that everything was okay and the police left. Keinya's cousin testified that after the police left, Anderson walked to the room where Keinya was hiding and said that he was going to wait in Publix for twenty-four hours—that if he could not get Patrick, then he would come after her. Although Keinya was supposed to work on Saturday, she did not go to work because she was scared.

Keinya did go to work on Sunday, January 16, 1994. Her time card revealed that she left work at 6:01 p.m. Allen testified that he saw Anderson's car waiting outside Publix.

On that same day, John Gowdy and Amelia Stringer were driving north on U.S. 27. Gowdy testified that he saw someone on the side of the road at approximately 7 p.m. Although it was dark at the time, Gowdy was able to see the person in the grass median between the northbound and southbound lanes. Gowdy observed the car in front of him make a U-turn and he did the same thing. Gowdy then witnessed the car in front of him swerve into the median and then back into the lane, apparently running over the person. Gowdy immediately reported the incident to the police. Gowdy described the suspect's car as a blue/gray four-door. Anderson's car is dark blue with a gray top and has two doors. Stringer, who was in the car with Gowdy, saw the person in the median lie down in the grass and then sit up. She also witnessed the car in front of them run over the person in the median.

When the police arrived at the scene, they discovered blood on the pavement, some clothing items, and a name tag which read "Keinya." Items were found in the northbound lane and in the median near the southbound lane. Four tire impressions were taken from the scene. Keinya's dead body was found on Monday, January 17, by a fishing camp in the Everglades.

About a week after the murder, Anderson voluntarily agreed to be interviewed by the police. At one point during the interview, Anderson responded that he did pick up Keinya from work on Sunday night, but that he did not kill her. Within seconds of making this statement, Anderson recanted, claiming that he was being facetious. Anderson consented to a search of his car, although the police already had a warrant. The police took impressions of the car's tires. An expert testified that of the four impressions taken from the scene, one could not have been made by Anderson's tires, one was consistent with Anderson's tires, and the other two impressions were of no value. There was damage to Anderson's radiator, the splash guard was cracked, and an area under the car appeared to have been wiped. Another expert testified that grease marks found on Keinya's jacket could have been made by two coils from underneath Anderson's car. That expert also stated that two other coils from Anderson's car could not have made the grease marks. Several spots in and under Anderson's car were suspected to have blood. There was a positive presumptive result from the car's splash pan, but the police could not get any DNA results from this spot, meaning that it could have been human blood or animal blood. However, a spot of blood on Anderson's car seat matched Keinya's DNA. Finally, a number of fibers were found under Anderson's car. An expert testified that one of the fibers was consistent with fibers from Keinya's pants. Twelve other fibers taken from the car did not match Keinya's clothing.

During the trial, the parties agreed to the following stipulation, which was read to the jury:

> It has been stipulated between parties that Keinya Smith is dead. That she died on January 16, 1994. And that she died as a result of blunt force trauma inflicted by a motor vehicle. It is further stipulated between parties that the items of evidence found on U.S. 27 by Lieutenant Vaughn and Detective Foley, including jewelry, blood stains, name tags and hair and scalp, originated from Keinya Smith.

The State also presented the testimony of Anderson's probation officer, Lisa White, who stated that Anderson was on probation for eleven counts of attempted capital sexual battery on Keinya. White further stated that shortly after Keinya's body was found, Anderson

contacted her and asked whether he could have his family back now that Keinya was dead.

Anderson did not put on any evidence during the guilt phase. At the conclusion of the guilt phase, the jury convicted Anderson of first-degree murder.

During the penalty phase, the State presented the testimony of the medical examiner, who testified that in addition to various other injuries, Keinya's neck was fractured when she was run over by the car, and the fractured neck led to rapid unconsciousness and death. The medical examiner stated that survival following the incident was seconds to minutes at the most. State witness Mitzy Clark testified that on the night of the murder, she was driving on U.S. 27 when she saw a person lunge at her car, trying to get Clark to stop. Clark stated that she did not stop because she was scared. The State also presented the testimony of Edwina, who described the circumstances of Keinya's sexual abuse. Edwina made it clear that Anderson not only attempted, but actually completed the crime of sexual battery:

> Q: Did [Keinya] tell you that [Anderson] inserted his penis inside her vagina on several occasions?
>
> A: Yes.

Edwina also testified that on the Friday before the murder, Anderson said, "I'm going to prison, but somebody is going to be dead, I bet you that." Finally, Edwina stated that Anderson called her on the day of the murder, asked if Keinya was working that day, and asked what time Keinya got off work. Officer Estopinan, the officer who investigated the previous sexual batteries, also testified about the circumstances of Keinya's sexual abuse.

The defense called a number of penalty-phase witnesses who described Anderson's childhood and subsequent addiction to drugs. Anderson also testified on his own behalf. During the course of his testimony, Anderson admitted that he sexually abused Keinya.

The jury ultimately recommended death by an eight-four vote. The trial court found the following five aggravators: (1) Anderson had a previous conviction of a violent felony (the attempted sexual batteries), (2) the murder was committed while engaged in the commission of a felony (kidnapping), (3) the murder was committed to avoid arrest, (4) the murder was heinous, atrocious, or cruel, and (5) the murder was committed in a cold, calculated and premeditated

> manner without any pretense of legal justification. The trial court concluded that Anderson failed to establish the statutory mental mitigators. The court found the following nonstatutory mitigators: (1) Anderson suffers from sexual dementia (minimal weight), (2) Anderson confessed to his sexual relationship with Keinya during drug addiction counseling (medium weight), (3) Anderson suffered from drug addiction (minimal weight), (4) Anderson comes from a good family (minimal weight), (5) Anderson was a good child (minimal weight), (6) Anderson helped Edwina take care of his three natural children (minimal weight), (7) Anderson loves his children (minimal weight), (8) Anderson sends gifts to his kids while in custody (minimal weight), (9) Anderson is a very caring person (minimal weight), (10) Anderson served in the Coast Guard for five years (minimal weight), (11) society would be protected by Anderson serving a life sentence (minimal weight), (12) Anderson earned money playing the market while in custody and therefore can still be a productive member of society (minimal weight), and (13) Anderson has a gift for poetry and can help men who end up in prison (minimal weight). The trial court sentenced Anderson to death.

Anderson v. State, 841 So. 2d 390, 394-97 (Fla. 2003) (alterations in original).

Anderson raised thirteen claims on direct appeal.[1] Id. at 397 n.1. We affirmed the conviction and sentence of death. Id. at 409.

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1. Anderson's claims on direct appeal were:

> (1) the evidence is insufficient for first-degree murder; (2) the trial court erred in admitting collateral bad act evidence; (3) the trial court erred in allowing a witness to testify concerning other traffic homicides; (4) the trial court erred in allowing nonresponsive opinion testimony as to the intent of the perpetrator; (5) the trial court erred in admitting inflammatory photographs during the guilt phase; (6) the trial court erred in denying Anderson's motion for mistrial during closing argument; (7) the trial court erred in allowing the State to proceed on a theory of felony murder; (8) the State's penalty phase argument was fundamental error; (9) the trial court erred in admitting inflammatory photographs during the penalty phase; (10) the evidence

II. MOTION FOR POSTCONVICTION RELIEF

Anderson initially filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.851 in 2004, and after several amendments to the motion, raised a total of fifteen claims.[2] On May 7, 2011, after an evidentiary hearing, the trial court denied claims 5, 7, and 10. All other claims were summarily denied.

In his postconviction appeal, Anderson asserts that the postconviction court erred in summarily denying the following claims: (1) counsel was ineffective at the guilt phase for failing to utilize forensic experts; (2) the destruction of exculpatory

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> did not support the aggravating circumstances in this case; (11) the sentence is disproportionate; (12) the sentence violates Apprendi v. New Jersey, 530 U.S. 466 (2000); and (13) the murder in the course of a felony aggravator is unconstitutional.

Anderson, 841 So. 2d at 397 n.1.

2. The postconviction claims were: (1) rule 3.852 is unconstitutional; (2) the one-year time limit in rule 3.851 violates due process and equal protection; (3) trial counsel was ineffective for failing to seek a change of venue; (4) guilt-phase counsel was ineffective for failing to utilize forensic experts, failing to call alibi witnesses, stipulating to the cause of death, and failing to visit and consult with Anderson; (5) penalty-phase counsel was ineffective for failing to present sufficient mitigation; (6) penalty-phase counsel was ineffective for failing to properly challenge the medical examiner; (7) a violation of Ake v. Oklahoma, 470 U.S. 68 (1985); (8) the death sentence is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002); (9) denial of juror interviews is unconstitutional; (10) cumulative error; (11) law enforcement's destruction of the murder weapon violated due process; (12) destruction of exculpatory evidence violated due process; (13) Florida's lethal injection protocol is unconstitutional; (14) a violation of the Confrontation Clause; (15) a claim of newly discovered evidence based on a 2009 report from the National Research Council on forensic testing.

evidence by law enforcement violated due process; (3) his death sentence is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002); and (4) newly discovered evidence establishes that the forensic science used at trial is unreliable and invalid.

As to the summary denial of claims raised in a rule 3.851 motion, we have explained:

> "The decision of whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on the written materials before the court, and the ruling of the postconviction trial court on that issue is tantamount to a pure question of law subject to de novo review." Therefore, when reviewing the summary denial of claims raised in an initial postconviction motion below, this Court accepts the movant's factual allegations as true to the extent that they are not refuted by the record. A court may summarily deny a postconviction claim when the claim is legally insufficient, procedurally barred, or refuted by the record. "To uphold the trial court's summary denial of claims raised in an initial postconviction motion, the record must conclusively demonstrate that the defendant is not entitled to relief."

Troy v. State, 57 So. 3d 828, 834 (Fla. 2011) (citations omitted).

A. Ineffective Assistance of Counsel

In his first issue on appeal, Anderson asserts that the postconviction court erred in summarily denying his claim that guilt-phase counsel was ineffective for failing to utilize experts to challenge the physical evidence admitted against him at trial. Specifically, Anderson claims that trial counsel should have consulted experts regarding the tire impression evidence, the blood in his car, the grease mark evidence, and the fiber evidence.

The facial sufficiency of an ineffective assistance of counsel claim is determined by applying the two-pronged test of deficiency and prejudice set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to establish deficient performance, a defendant "must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards." Troy, 57 So. 3d at 834 (quoting Ferrell v. State, 29 So. 3d 959, 969 (Fla. 2010)). To demonstrate prejudice, the "substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined." Id. (quoting Ferrell, 29 So. 3d at 969).

"To be entitled to an evidentiary hearing on a claim of ineffective assistance, the defendant must allege specific facts that are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant." Rhodes v. State, 986 So. 2d 501, 513-14 (Fla. 2008) (quoting Jones v. State, 845 So. 2d 55, 65 (Fla. 2003)). Mere conclusory allegations are insufficient to warrant an evidentiary hearing. The defendant bears the burden of "establishing a 'prima facie case based on a legally valid claim.' " Barnes v. State, 124 So. 3d 904, 911 (Fla. 2013) (quoting Valentine v. State, 98 So. 3d 44, 54 (Fla. 2012)). The burden is also "on the defendant, not the State, to show a 'reasonable probability' that the result would have been different" but for counsel's error.

Crain v. State, 78 So. 3d 1025, 1034 (Fla. 2011) (quoting Wong v. Belmontes, 558 U.S. 15, 27 (2009)). Summary denial is proper where the defendant fails to sufficiently allege both prongs of the Strickland standard. Rhodes, 986 So. 2d at 514.

1. Tire Impression Evidence

At trial, the State presented the testimony of Fred Boyd, a latent print, footwear, and tire-tread analyst. Boyd testified that in the course of his employment with the Broward County Crime Lab, he was asked to compare photos and casts of the tire impressions left at the scene where Keinya Smith's body was found to standards made from the tires on Anderson's car. Boyd concluded that two of the tire impressions left near Keinya's body were of no value, the third "could have been made by" Anderson's right front tire, and the fourth impression "could not have been made by" any of the tires on Anderson's car.

The State laid the foundation for Boyd to be deemed an expert in tire-tread examination by asking Boyd about his training and experience. Boyd testified that he spent the first twenty years of his career as a military policeman in the Army Criminal Investigation Division Crime Lab and retired as chief of the latent print unit in 1988. He was then employed by the Broward County Crime Lab, where he worked in fingerprints, footwear, and tire-tread examination for the next eight and a half years. At the time of Anderson's trial in 1999, Boyd was employed with the

Las Vegas Metropolitan Police Department's crime lab as an analyst of fingerprints, footwear, and tires. Boyd testified that the bulk of his training in these disciplines took place when he was in the Army, but he also received continuous training throughout his thirty-one-year career both on the job and through attendance at numerous FBI schools and other seminars. Prior to Anderson's trial, Boyd testified as an expert in tire-tread impression evidence ten times in Broward County. Boyd was tendered to and accepted by the court as an expert in the field of tire examination without objection.

Anderson now claims that counsel was deficient for failing to object to Boyd being deemed an expert because he was not "certified" in tire-tread examination.[3] This claim is without merit. The Florida Evidence Code provides that a witness may be qualified as an expert based on "knowledge, skill, experience, training, or education." § 90.702, Fla. Stat. (1999). There is no requirement that a witness be "certified" in a particular field in order to be deemed an expert and allowed to give opinion testimony. Boyd's specialized knowledge, training, and extensive experience were sufficient for the trial court to qualify him as an expert. An objection on the basis that he was not "certified" in tire examination would have

3. Anderson does not allege that such certification exists.

been meritless. "[C]ounsel cannot be deemed deficient for failing to make a meritless objection." Raleigh v. State, 932 So. 2d 1054, 1064 (Fla. 2006).

Anderson also claims that trial counsel was deficient for failing to utilize a defense expert to challenge Boyd's testimony. This claim is also without merit because the alleged deficiency is rebutted by the record. During his cross-examination of Boyd, trial counsel brought out the weaknesses in Boyd's testimony and rigorously challenged its significance by pointing out that Boyd could only say that the right front tire on Anderson's car was "pretty consistent" or "relatively consistent, but not a hundred percent consistent" with the type of tire that left one of the impressions near Keinya's body; the impression was not specific to the tire on Anderson's car but only to the type of tire; Boyd did not know how many of that particular type of tire were manufactured, where in the country they were primarily distributed, or which stores carried the tire; while Anderson's right front tire "could have, possibly" made that impression, there was "no question at all" that another one of the impressions was not made by any of the tires on Anderson's car; Boyd's analysis only looked at "the general class design" of the tire; Boyd never went and looked at the actual tires on Anderson's car; and there was no "positive I.D. on the tire."

Anderson did not allege in his motion or on appeal what information could have been obtained from other experts and used to impeach or discredit Boyd's

testimony. He made only the general allegation that experts could have impeached Boyd by testifying to "the inadequacy of the science behind the opinion testimony at Mr. Anderson's trial." Such an allegation is insufficient to warrant an evidentiary hearing. See Lebron v. State, 135 So. 3d 1040, 1060 (Fla. 2014) (affirming summary denial of ineffective assistance claim based on counsel's failure to properly impeach State witnesses as insufficiently pleaded where defendant did not sufficiently allege what information counsel could have used to impeach the witnesses or otherwise refute their testimony); Reaves v. State, 826 So. 2d 932, 939-40 (Fla. 2002) (affirming summary denial of postconviction claim based upon legal insufficiency where defendant merely alleged that counsel failed to prepare for and adequately cross-examine witnesses without indicating what favorable information could have been elicited from those witnesses or how defendant was prejudiced). And the record presents no need for impeachment in light of the admitted inconclusive findings of the State's expert. We therefore affirm the summary denial of this claim.

2. Blood Evidence

Anderson argues that counsel was ineffective for failing to utilize defense experts to challenge the State's evidence regarding the spot of Keinya's blood found on Anderson's car seat as it related to the State's theory that Keinya's body was transported in the car from the location where she was run over to where her

body was dumped on the side of the road fifteen miles away. Specifically, Anderson claims that experts could have testified that there was no way to determine when Keinya's blood was deposited on the seat and that there would have been more blood in the car if it had been used to transport her body.

Anderson's claim that trial counsel should have utilized an expert to testify that there was no way to determine when Keinya's blood was left in his car was not raised in his motion before the trial court and is therefore unpreserved and not properly before this Court for review. See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) ("[F]or an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."). Moreover, even if Anderson raised this claim below, an evidentiary hearing would have been unwarranted because the record demonstrates that counsel elicited testimony during cross-examination of the State's expert that there was no way to date the blood found in Anderson's car. See Reed v. State, 875 So. 2d 415, 427 (Fla. 2004) (affirming denial of claim that counsel was ineffective for failing to retain a defense expert where facts necessary for defendant's defense were established through cross-examination of State's experts).

Anderson also claims that an expert could have testified that if Anderson ran Keinya over and then transported her "bloody body" fifteen miles in his car to the location where it was found, there would have been much more than one drop of

blood in his car. But the fact that a "bloody body" would transfer more than one drop of blood to a car is "within the average person's realm of knowledge." Id. at 423. Trial counsel did not render deficient performance by failing to retain an expert to explain a fact commonly known. See id. Trial counsel drew the jury's attention to the lack of blood in Anderson's car in both his opening statement and closing argument and he argued in closing that a single spot of Keinya's blood on the passenger seat did not prove that her body was transported in the car. It was not necessary to present testimony from a blood expert for counsel to argue a reasonable inference to be drawn from the evidence presented, and Anderson did not specify how trial counsel's challenge to this aspect of the case would have been any different had an expert been utilized.

Because Anderson failed to identify any specific errors or omissions with respect to the blood evidence that show that counsel's performance deviated from the norm such that it fell outside the range of professionally acceptable performance, he was not entitled to an evidentiary hearing on this claim.

3. Grease Pattern Impression Evidence

Anderson also claims that trial counsel performed deficiently in failing to consult experts and challenge the admissibility of the State's expert testimony regarding the grease mark or grease pattern impression evidence. At trial, the State called James Gerhart, an FBI pattern impression expert, to testify regarding his

analysis of the grease marks found on the jacket that Keinya was wearing when she was run over. Gerhart compared the grease marks to four coils taken from the underside of Anderson's car. Gerhart testified that two of the coils from Anderson's car were consistent in size and design and could have made the grease impressions on Keinya's jacket, but that the two other coils were not similar in design and size and could not have made the grease impressions on the jacket. He told the jury that he could not say for certain that Anderson's vehicle made the impressions on the jacket.

According to Anderson, grease pattern analysis is a "suspect field" of forensic science and the validity of such analysis is "highly questionable due to varying methods of testing and examination." Anderson claims that trial counsel should have consulted with other experts in this "suspect field" and had those experts available to testify about the shortcomings of grease pattern impression evidence and to explain why Gerhart's testimony was inadmissible under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

At the time of Anderson's trial, Florida used the Frye standard to determine the admissibility of expert opinion testimony that relied upon a new or novel scientific principle, theory, or methodology.[4] Under Frye, the principle, theory, or

4. Although in 2013, the Legislature adopted the standard announced in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), this

methodology on which the opinion evidence is based must have been scientifically valid, and the procedures followed to apply the technique or process must have been generally accepted in the relevant scientific community. A Frye hearing was "utilized in Florida only when the science at issue [was] new or novel." Overton v. State, 976 So. 2d 536, 550 (Fla. 2007) (quoting Branch v. State, 952 So. 2d 470, 483 (Fla. 2006)). Pattern impression analysis—which falls under the broader category of trace evidence[5]—was not new or novel at the time of Anderson's trial. See, e.g., Cochran v. State, 222 So. 2d 462, 463 (Fla. 2d DCA 1969) (noting the admission of expert testimony that cloth impressions left at crime scene could have been made by defendant's gloves). Thus, Anderson would not have been entitled to a Frye hearing, and counsel therefore did not render deficient performance by failing to request a hearing for which there was no legal basis. Nor is there any reasonable probability that such a meritless request would have yielded a different result at trial.

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legislative change does not apply retroactively. Zakrzewski v. State, 147 So. 3d 531 (Fla. 2014) (table).

5. See David H. Kaye, David E. Bernstein, & Jennifer L. Mnookin, The New Wigmore: A Treatise on Evidence: Expert Trace Evidence § 13.3, at 599 n.1 (2d ed. Supp. 2015) ("[A]ll forms of marks, patterns, impressions, and substances transferred or deposited at a crime scene, on a victim, or on an individual who . . . was present at the location of the crime or had contact with people or objects that were there fall under the broader category of 'trace evidence.' ").

Moreover, trial counsel was able to expose to the jury the "shortcomings" and limited value of the grease impression evidence without retaining another expert. During his cross-examination of Gerhart, counsel pointed out that Gerhart could not positively identify the grease marks on Keinya's jacket as having been made by the coils on Anderson's car due to a lack of identifying characteristics and the best Gerhart could say is that those coils could have made the impressions on the jacket. Gerhart conceded that the other two coils from Anderson's car definitely did not make the impressions on the jacket. Gerhart also admitted that every car has coils and there was nothing unique about the coils in this case.

"Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation." Harrington v. Richter, 562 U.S. 86, 111 (2011). Here, the record demonstrates that the cross-examination conducted by Anderson's trial counsel was sufficient to expose the defects in Gerhart's presentation, and "[t]here is no reasonable probability that re-presenting virtually the same evidence through other witnesses would have altered the outcome in any manner." Atwater v. State, 788 So. 2d 223, 234 (Fla. 2001).

Because we conclude that the alleged deficiencies with regard to the grease pattern analysis are rebutted by the record, we find no error in the summary denial of this claim.

4. Fiber Evidence

Trace evidence expert Bruce Ayala testified at Anderson's trial that one of the thirteen fibers found under Anderson's car "could have originated" from the pants Keinya was wearing when she was killed. He concluded that the twelve other fibers taken from the car did not match any of Keinya's clothing. As in the previous claim, Anderson alleges that counsel was ineffective for failing to consult with experts and secure a Frye hearing with regard to the fiber evidence.

We conclude that trial counsel did not render deficient performance because there was no legal basis to support a request for a Frye hearing. Fiber evidence—which also falls under the broader category of trace evidence[6]—was not a new or novel science at the time of Anderson's trial; it has been admitted in Florida courts since at least 1958. See, e.g., Trimble v. State, 102 So. 2d 738, 739 (Fla. 3d DCA 1958) (noting the admission of expert testimony that fibers found underneath defendant's car were similar to those taken from victim's blouse); see also Bundy v. State, 471 So. 2d 9, 20 (Fla. 1985) (noting that no Frye hearing was held with

6. See David H. Kaye, et al., supra note 5.

regard to fiber evidence); Bottoson v. State, 443 So. 2d 962, 964 (Fla. 1983) ("There was also expert evidence that clothing fibers similar to those in the victim's clothes . . . were found inside the car."); cf. Johnson v. State, 660 So. 2d 637, 644 (Fla. 1995) ("Gathering any fiber evidence is a common object of any murder investigation . . . ."). Thus, the fiber evidence would not have been deemed inadmissible under Frye or even subject to a Frye hearing. Counsel cannot be deemed deficient for failing to make a meritless objection. See Valentine, 98 So. 3d at 55.

Anderson also asserts that the testing of the fiber evidence was done using "poor analysis and improper methodology" and that counsel performed deficiently in failing to present expert testimony that "could have explained what would have constituted proper methodology." This allegation is conclusory and insufficient to warrant an evidentiary hearing. Anderson also failed to establish that there is a reasonable probability that the outcome of the trial would have been different had counsel utilized an expert to challenge the conclusion of the State's expert that one of the thirteen fibers found under Anderson's car "could have originated" from Keinya's pants.

5. Cumulative Prejudice

Even if we were to conclude that trial counsel rendered deficient performance in failing to consult with experts and present expert testimony in

order to more rigorously challenge the tire, blood, grease, and fiber evidence, Anderson would still not be entitled to relief on this claim because he cannot establish prejudice.

The tire, blood, grease, and fiber evidence were equivocal: the tire and grease impressions may or may not have been left by Anderson's car; the drop of blood on the car seat may or may not have been left at the time of the murder; and a single fiber out of the thirteen that were found on the bottom of Anderson's car may or may not have come from Keinya's pants. The other evidence presented at trial established that two eyewitnesses observed a car that they described as similar to Anderson's car running over a person without deviating from its path on the night of the murder in the area where Keinya's hair, scalp, blood, and personal items were found; there was damage to the radiator and splash guard on Anderson's car; an area under the car had been wiped; Anderson's car was seen waiting outside the Publix where Keinya worked just before the murder; Anderson admitted picking Keinya up from work on the night of her murder; Anderson admitted that he had sole control of his car the night Keinya was murdered; within the four days leading up to the murder, Anderson twice used his car to chase after and attack Keinya's co-worker, Patrick, after he drove Keinya home from work; approximately 48 hours before the murder, Anderson hit Keinya and threatened her, and she was so scared that she armed herself with a knife, dialed 911, locked

herself in her room, and did not go to work the next day; despite being on probation for eleven counts of attempted capital sexual battery on Keinya and under a condition that he have no contact with Keinya, Anderson continued to have extensive contact with Keinya in violation of his probation and he faced the possibility of life in prison if Keinya exposed the violation.

In light of the other evidence presented, there is no reasonable probability that had trial counsel more rigorously challenged the equivocal tire, blood, grease, and fiber evidence, Anderson would have been acquitted of first-degree murder. Even if we were to assume that counsel was deficient, our confidence in the outcome would not be undermined.

B. Failure to Preserve Physical Evidence

Anderson next alleges that the State "willfully or with egregious negligence" caused the deterioration of several key pieces of evidence after his trial. Anderson claims that his car, the tire casts, tire "printouts," and Keinya's clothing were "inappropriately stored" after trial in a manner that destroyed or severely diminished their evidentiary value, which rendered postconviction experts unable to "retest" the evidence and resulted in a violation of Brady v. Maryland, 373 U.S. 83 (1963), California v. Trombetta, 467 U.S. 479 (1984), Arizona v. Youngblood, 488 U.S. 51 (1988), and Anderson's due process rights. Anderson further alleges

that the State was aware of the exculpatory or potentially useful value of this evidence and acted in bad faith in allowing the evidence to deteriorate.

In Brady, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires the State to disclose to criminal defendants favorable evidence that is material either to guilt or to punishment. 373 U.S. at 87-88. "As part of establishing a Brady violation, the defendant must show that favorable evidence was willfully or inadvertently suppressed by the State." Tanzi v. State, 94 So. 3d 482, 494 (Fla. 2012). Evidence is not suppressed under Brady if the defense knew about it. Taylor v. State, 62 So. 3d 1101, 1116 (Fla. 2011).

Anderson has not alleged that any evidence was suppressed by the State, and failure to preserve evidence for retesting during postconviction proceedings does not result in a Brady violation. Thus, Anderson failed to sufficiently plead entitlement to relief under Brady.

In Trombetta, the United States Supreme Court held that the State's constitutional duty to preserve evidence is limited to evidence that "both possess[es] an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." 467 U.S. at 489. In Youngblood, however, the Supreme Court held that the Due Process Clause requires a different result when the State fails to preserve evidence that does not

possesses an apparent exculpatory value, but which is merely "potentially useful" to the defense. 488 U.S. at 57. "Potentially useful" evidence is evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." Id. When the State fails to preserve potentially useful evidence, due process is violated only if the defendant can show bad faith on the part of the police or prosecution. Id. at 58; Dufour v. State, 905 So. 2d 42, 68 (Fla. 2005). "Under Youngblood, bad faith exists only when police intentionally destroy evidence they believe would exonerate a defendant." Dufour, 905 So. 2d at 68 (quoting Guzman v. State, 868 So. 2d 498, 509 (Fla. 2003)).

Anderson has not demonstrated that the allegedly deteriorated evidence was of an exculpatory nature that was apparent to the State before it was allowed to deteriorate. As to the car, Anderson makes only the following conclusory and fallacious argument: "Law enforcement and the State were well aware of the exculpatory value of the car, because they examined and tested it on several occasions. Testing of a piece of evidence is a clear indication of its exculpatory value." We reject Anderson's assertion that "testing" evidence is a "clear indication of its exculpatory value." Anderson also failed to provide any explanation of how the tire casts, printouts, or clothing were of an exculpatory

nature. Thus, we conclude that Anderson failed to sufficiently plead entitlement to relief under Trombetta.

Even assuming that Anderson could establish that the evidence was "potentially useful," his allegation that the State acted in bad faith in inappropriately storing the evidence resulting in its deterioration is wholly conclusory. He asserts that "[s]uch a flagrant disregard for the maintenance and location of an alleged murder weapon and other highly exculpatory evidence in a capital case should be seen as a defacto [sic] example of bad faith." But Anderson fails to explain how the items were inappropriately stored, and the only basis he offers to support his claim that the items were inappropriately stored is the fact that they have deteriorated. This argument is circular and insufficient to establish that the State or law enforcement acted in bad faith.

Even assuming that the items were inappropriately stored, "under Youngblood and this Court's precedent, the determination of bad faith does not turn on whether law enforcement officers followed established procedures. Instead, bad faith exists only when law enforcement officers intentionally destroy evidence they believe would exonerate a defendant." Guzman, 868 So. 2d at 509 (citing Youngblood, 488 U.S. at 57). However, Anderson describes the potential usefulness of the items in terms of the results of "independent forensic testing" that he claims possibly would have been done during the postconviction stage.

Therefore, in order to establish entitlement to relief under Youngblood, Anderson would have had to assert that law enforcement believed that independent forensic testing of the items used in obtaining Anderson's conviction would actually exonerate him in the future, and, as a result, law enforcement chose to inappropriately store the items with the intent to allow them to deteriorate so that they would not be able to be retested by Anderson in the future. This Anderson has not done. Even accepting his allegations that the items were potentially useful and inappropriately stored as true, he has not established entitlement to relief under Youngblood.

Because Anderson failed to sufficiently plead entitlement to relief under Brady, Trombetta, or Youngblood, he was not entitled to an evidentiary hearing, and the trial court did not err in summarily denying these claims.

C. National Academy of Sciences Report

Anderson asserts that a report issued in 2009 by the National Academy of Sciences regarding the field of forensic science, titled "Strengthening Forensic Science in the United States: A Path Forward" ("2009 NAS report"), constitutes newly discovered evidence demonstrating that the scientific evidence used to convict him is unreliable. However, we have repeatedly held that the 2009 NAS report does not constitute newly discovered evidence. E.g., Dennis v. State, 109

So. 3d 680, 700 (Fla. 2012); Johnston v. State, 27 So. 3d 11, 21 (Fla. 2010). Accordingly, summary denial of this claim was proper.

D. Ring and Hurst

During the pendency of Anderson's appeal from the denial of his motion for postconviction relief, the United States Supreme Court issued its decision in Hurst v. Florida, 136 S. Ct. 616 (2016), in which it held that Florida's former capital sentencing scheme violated the Sixth Amendment because it "required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty" even though "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." Hurst v. Florida, 136 S. Ct. 616, 619 (2016). On remand in Hurst, we held that

> before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

Hurst v. State (Hurst), 202 So. 3d 40, 57 (Fla. 2016).

We have held that Hurst v. Florida and Hurst apply retroactively to defendants in Anderson's position, who were sentenced under Florida's former, unconstitutional capital sentencing scheme after the United States Supreme Court

decided Ring in 2002. Mosley v. State, 41 Fla. L. Weekly S629, S640, 2016 WL 7406506, at *25 (Fla. Dec. 22, 2016). And in light of the nonunanimous jury recommendation to impose a death sentence, it cannot be said that the failure to require a unanimous verdict here was harmless. See Franklin v. State, 41 Fla. L. Weekly S573, S575, 2016 WL 6901498, at *6 (Fla. Nov. 23, 2016) ("In light of the non-unanimous jury recommendation to impose a death sentence, we reject the State's contention that any Ring- or Hurst v. Florida-related error is harmless."). We therefore reverse Anderson's death sentence and remand for a new penalty phase.

III. PETITION FOR WRIT OF HABEAS CORPUS

In addition to his postconviction appeal, Anderson filed a petition for a writ of habeas corpus in this Court, in which he asserts that: (1) appellate counsel was ineffective for failing to raise a claim under Giglio v. United States, 405 U.S. 150 (1972); (2) appellate counsel was ineffective for failing to challenge the trial court's decision to allow the State to proceed on a theory of felony murder in addition to premeditated murder; (3) his death sentence is unconstitutionally arbitrary as a result of the Florida Legislature's adoption of the Daubert standard in 2013; and (4) his death sentence is unconstitutional under Ring. Because we have already determined that Anderson is entitled to a new penalty phase, we decline to address Anderson's Giglio claim, which is directed at the penalty phase. Nor is

there a need to address the Ring claim in Anderson's habeas petition because we have determined that Anderson is entitled to relief under Hurst. The two remaining claims raised in the habeas petition will be addressed in turn.

A. Felony-Murder Theory

In his direct appeal, Anderson raised a challenge to the trial court's decision to permit the State to proceed on a theory of felony murder in addition to a theory of premeditated murder. In denying relief, we explained:

> In his seventh claim, Anderson argues that the trial court erred in permitting the State to proceed on the theory of felony murder when the indictment only charged first-degree murder. The State brought up felony murder for the first time during the charge conference and Anderson argues that he was prejudiced by a lack of notice. Anderson acknowledges that this claim was decided adversely to him in Knight v. State, 338 So. 2d 201, 204 (Fla. 1976). See also Kearse v. State, 662 So. 2d 677, 682 (Fla. 1995). He offers no valid reason for receding from Knight. Hence there is no merit to this claim.

Anderson, 841 So. 2d at 404. Although the claim was raised and rejected previously, Anderson now contends that appellate counsel was ineffective in raising this claim because the circumstances of his case are different from the circumstances in Knight and appellate counsel "fail[ed] to rely upon the proper due process case law." This claim is insufficiently pleaded because Anderson has not identified the "proper due process case law" on which he claims appellate counsel was ineffective for failing to rely, and we therefore deny relief.

B. Daubert

Anderson claims that his death sentence is unconstitutionally arbitrary in violation of Furman v. Georgia, 408 U.S. 238 (1972), and the Eighth Amendment to the United States Constitution. His argument revolves around the standard used to determine the admissibility of new or novel scientific evidence. In 2013, Florida adopted the federal standard governing the admissibility of scientific evidence, which was first announced by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and which replaced the Frye standard. Ch. 2013-107, at 1461-63, Laws of Fla. Anderson argues that the scientific evidence used against him at his trial in 1999 would not have been admissible under the Daubert standard and because the Frye standard was the relevant standard at the time of his trial, his conviction is arbitrary.

This claim is without merit. What Anderson seems to argue is that because the scientific evidence admitted at his trial was admissible under Frye but would not have been admissible had the Daubert standard been the relevant standard in Florida at the time of his trial, his conviction and death sentence are arbitrary. This argument fails because the scientific evidence admitted at Anderson's trial was not subjected to a Frye analysis because Anderson—as he argues in his postconviction appeal as a claim of ineffective assistance of counsel—did not seek a hearing and determination of admissibility under Frye. Thus, because he failed to seek an

admissibility determination, the evidence would not have been subjected to a Daubert analysis either, had that been the relevant standard at that time. Additionally, we have held that the legislative adoption of the Daubert standard in 2013 does not apply retroactively. Zakrzewski v. State, 147 So. 3d 531 (Fla. 2014) (table).

Moreover, Anderson ignores the fact that we have previously recognized that the Daubert standard is more lenient in terms of admitting novel scientific evidence than Frye. See Brim v. State, 695 So. 2d 268, 271-72 (Fla. 1997) (footnote omitted) ("Despite the federal adoption of a more lenient standard in [Daubert], we have maintained the higher standard of reliability as dictated by Frye."); see also Hernandez v. State, 180 So. 3d 978, 1008 (Fla. 2015) ("[T]he Supreme Court in Daubert actually criticized Frye and its 'exclusive test' imposing a 'rigid general acceptance requirement' as being at odds with the liberal thrust of the Federal Rules and their 'general approach of relaxing the traditional barriers to opinion testimony.' " (quoting Daubert, 509 U.S. at 588-89) (some citations omitted)), cert. denied, 136 S. Ct. 2487 (2016). Thus, any suggestion that a determination of the admissibility of the State's scientific evidence would have been more favorable to Anderson under Daubert than Frye is illogical.

IV. CONCLUSION

For the reasons stated above, we affirm the denial of postconviction relief as to Anderson's conviction and deny the petition for a writ of habeas corpus, but we vacate the death sentence and remand for a new penalty phase.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
CANADY, J., concurs in part and dissents in part with an opinion, in which POLSTON, J., concurs.
LAWSON, J., did not participate.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

CANADY, J., concurring in part and dissenting in part.

I agree with the decision to affirm the denial of relief regarding Anderson's conviction, and I agree that Anderson's habeas petition should be denied. But I dissent from the decision to require a new penalty phase. As I have previously explained, Hurst v. Florida, 136 S. Ct. 616 (2016), should not be given retroactive effect. See Mosley v. State, 41 Fla. L. Weekly S629, S641-44, 2016 WL 7406506, at *27-32 (Fla. Dec. 22, 2016) (Canady, J., concurring in part and dissenting in part).

POLSTON, J., concurs.

An Appeal from the Circuit Court in and for Broward County,
Michael Allen Usan, Judge - Case No. 061994CF015182A8881
And an Original Proceeding – Habeas Corpus

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for Appellee/Respondent

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Attachment II

Supreme Court of Florida

No. SC14-1551

HOWARD STEVEN AULT,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[March 9, 2017]

PER CURIAM.

Howard Steven Ault, a prisoner under sentence of death, appeals from an order denying a motion to vacate convictions for first-degree murder and sentences of death under Florida Rule of Criminal Procedure 3.851. Because the order concerns postconviction relief from a capital conviction for which a sentence of death was imposed, this Court has jurisdiction of the appeal under article V, section 3(b)(1), Florida Constitution. For the reasons that follow, we affirm the postconviction court's denial of postconviction relief on Ault's guilt phase claims and do not address his penalty phase claims because Ault is entitled to a new penalty phase under Hurst v. Florida, 136 S. Ct. 616 (2016).

FACTS AND PROCEDURAL HISTORY

The facts of this case were set forth in Ault's first direct appeal:

Howard Steven Ault was charged with two counts of first-degree murder in the deaths of two young sisters, eleven-year-old Deanne Mu'min and seven-year-old Alicia Jones. Ault was also charged with two counts of sexual battery on a child under twelve years old, two counts of kidnaping a child under thirteen years old, and two counts of aggravated child abuse.

The evidence and testimony presented at trial established the following facts. The two victims were living with their mother Donna Jones and their two-year-old sister in a pop-up trailer attached to the family car. When the mother could afford the camping fee, the family would camp at John Easterlin County Park in Broward County. The family had been camping at the park on and off for many months. Ault met the family at Easterlin Park a few days before the girls disappeared. He offered to let the family shower at his house, and gave Jones a hand-drawn map to his house. Ault also gave the two sisters a ride in his truck the same day and their mother scolded them for getting in his truck. A few days before the two sisters disappeared, a witness saw Ault talking to the girls and buying them snacks at a convenience store which the girls passed on their way home from school.

On Monday, November 4, 1996, the two girls left school at 2:05 p.m. Witnesses saw the girls walking home, but the girls never arrived at the park. Their mother looked for them at school and eventually went to Ault's house later in the evening. Ault stated that he had not seen the girls and asked the mother not to call the police as he had some problems with the police in the past. The mother went to her cousin's house and called the police. The police went to Ault's apartment and asked whether he had seen the girls. Ault stated that he had not seen the girls and allowed the officers to look around his apartment.

Ault and his wife voluntarily agreed to come to the Oakland Park Police Department to give sworn statements the next day. Detective William Rhodes, the lead officer on the case, interviewed Ault and his wife at the police department. Ault stated that he had only met the girls once a few days earlier in Easterlin Park, and that the girls had never been in his truck. Shortly after this interview,

Officer Deborah Cox of the Broward County Sheriff's Department arrested Ault on an unrelated charge of attempted sexual battery of a minor that had occurred eleven months earlier. Ault was taken to the Broward County jail. In the meantime, Rhodes located witnesses who had seen the girls in Ault's truck, had seen Ault with the girls on several occasions, and had seen Ault and his vehicle at the convenience store at the approximate time that the girls were walking home from school on the day they disappeared, all of which contradicted Ault's voluntary statement.

The next day, Rhodes visited Ault at the Broward County jail and explained that his investigation of the girls' disappearance indicated that Ault had lied at the initial interview. When Ault indicated his desire to speak to Rhodes, Rhodes read Ault his Miranda[1] rights and Ault waived these rights. Ault confessed that he had killed the girls within an hour after he had taken them to his apartment. Ault agreed to show Rhodes where the bodies were. Ault led the police to his apartment, confessed that the girls were in the attic, and explained that the officers who had looked around the night before had not looked in the attic. Ault signed a consent-to-search form and the police found the girls' bodies in the attic as Ault had stated.

Ault was taken to the Oakland Park Police Department and insisted that he would only speak to Rhodes. Ault then gave a taped confession in which he revealed the following details. Ault planned to sexually assault the girls when he met them in front of the convenience store about 2:30 p.m. on November 4, 1996. He offered the girls a ride, and lured them to his house with the promise of candy. He sexually assaulted eleven-year-old Deanne with his finger and also penetrated her with his penis. When Deanne started to scream and fight, Ault strangled her until she stopped screaming. He then strangled seven-year-old Alicia to keep her from telling anyone about the incident, but he did not sexually assault her. Ault redressed Deanne and put the bodies of both girls in his attic. Ault said that he killed the girls because he was afraid they would tell someone what he had done. Because he was already on community control for sexual assault on a child under twelve years of age, he feared that he would go to jail for at least twenty-five years. He also stated that he thought

1. Miranda v. Arizona, 384 U.S. 86 (1966).

about the trauma his wife had experienced when he was previously arrested and did not want to put her through that trauma again.

The medical examiner testified that both girls died from manual strangulation, that there was bruising and hemorrhaging of Deanne's vaginal tissue, that Deanne had been dead for approximately two days when her body was found, and that, based on the decomposition of her body, Alicia had died twelve to eighteen hours after Deanne. Based on the lesser state of decomposition of Alicia's body and a white foamy substance coming from her mouth, the medical examiner stated that Alicia appeared to have been alive, albeit comatose, at the time she was placed in the attic.

The defense rested without presenting any evidence, except for two documents: Ault's notice to invoke his rights to counsel and to remain silent in the unrelated attempted sexual battery case, and the court order acknowledging that invocation of rights. The jury found Ault guilty on all charges. At the request of defense counsel, the penalty phase proceeding was scheduled approximately six weeks after the guilt phase concluded.

After the presentation of penalty phase evidence and testimony by witnesses for both the State and the defense, the jury recommended death on both counts of murder by a nine-to-three vote. The trial judge followed the jury's recommendation and imposed two death sentences. The judge found six aggravating circumstances: Ault was previously convicted of a felony and placed on community control (great weight); Ault was previously convicted of a violent felony (great weight); the murders were committed while Ault was engaged in sexual battery, aggravated child abuse, and kidnapping (great weight); the murders were committed to avoid arrest (full weight); the murders were heinous, atrocious, or cruel (great weight); the victims were less than twelve years of age (great weight). The court found no statutory mitigators and six nonstatutory mitigators: family relations and troubled childhood (little weight); prenatal care (little, if any, weight); sexual and physical abuse (some weight); organic brain damage (little weight); pedophilia and compulsive mental disorder (some weight); and remorse (some weight).[2] The trial court concluded that the aggravating factors far outweighed the mitigating

2. The circuit court grouped the seventy-one nonstatutory mitigators proposed by Ault into these six categories.

> factors and that the circumstances of the case and Ault's history placed the case in the category of the most aggravated and least mitigated of first-degree murders. Thus, the court sentenced Ault to death for both murders.
>
> Ault appeals his convictions and sentences to this Court, raising nine issues on appeal. Ault contends that: (1) the trial court erred in denying his motion to suppress his statements to the police; (2) the trial court erred in granting the State's challenge for cause of juror Reynolds; (3) the trial court erred in denying his motion for a penalty phase mistrial based on the prosecutor's questioning of witnesses about collateral crimes; (4) the trial court erred by not allowing a defense expert to express his opinion as to the applicability of a statutory mental mitigating factor; (5) the trial court erred in permitting two penalty phase witnesses to testify about hearsay evidence; (6) the trial court erred in denying his request to discharge penalty phase counsel; (7) the aggravating circumstance that the murder was committed in the course of a specified felony is unconstitutional; (8) his death sentence violates the principles announced in Apprendi v. New Jersey, 530 U.S. 466, (2000); and (9) the trial court erred in sentencing him under the 1995 sentencing guidelines for the noncapital offenses and in imposing a departure sentence without contemporaneous written reasons for the departure. The State addresses one issue relating to this Court's proportionality review of the death sentences on appeal. The State contends that Ault's two death sentences are proportional in light of the six aggravating factors, no statutory mitigating factors, and the weak nonstatutory mitigating factors.

Ault v. State, 866 So. 2d 674, 677-79 (Fla. 2003) (hereinafter "Ault I"). This Court affirmed Ault's convictions, vacated his death sentence, and remanded for a new penalty phase based on the error in jury selection. Id. at 683-88. This Court also remanded for resentencing of the non-capital counts for use of proper guidelines. Id. at 688.

Resentencing began July 30, 2007:

The State began its case by presenting evidence of Ault's criminal history. Three witnesses testified that as young girls they were sexually assaulted by Ault, the first in 1988 when she was twelve years old, the second in 1994 when she was seven years old, and the third in 1995 when she was eleven years old. The last of these three witnesses testified that after the assault Ault told her that what he did was wrong and that she needed to call the police. The jury was also read the testimony of another witness, a police officer, who had testified at the previous trial that Ault and another man attacked him at knifepoint in 1986.

The State also presented evidence relating to the deaths of Deanne Mu'min and Alicia Jones. The original crime scene investigator was called to identify photos of the locations in which the events surrounding the offenses took place. The medical examiner who conducted the victims' autopsies was also called to testify regarding the causes of death. Finally, the State called William Rhodes, who recounted his role in the investigation and identified the audio recording of his interrogation of Ault, which was played to the jury. The State also called witnesses to give victim impact evidence, including the victims' mother, one of the victims' teachers, and other individuals who knew their family.

At the close of the State's case, the defense presented three witnesses to establish mitigation. The first witness, psychiatrist Dr. David Kramer, testified that he had conducted a two-hour psychiatric screening of the defendant and had reviewed mental health reports on Ault written by other doctors. Regarding Ault's family background, Dr. Kramer testified that Ault's family moved frequently when he was a child and that Ault's parents had a dysfunctional marriage. According to Dr. Kramer, Ault reported that his older brother began a pattern of forced sexual abuse when he was seven years old, and that his brother sometimes used a knife or gun. Dr. Kramer testified that such experiences would have a negative effect on a child's mental health and sexual development, and diagnosed Ault with complex posttraumatic stress disorder. Dr. Kramer also diagnosed Ault with pedophilia, which he defined as an intense persistent arousal to inappropriate stimuli, being prepubescent children in an adult, and found that Ault had a history of alcohol abuse and dependency and some history of other substance use.

The next defense witness, neurologist Dr. David Ross, testified that he conducted various tests on Ault and concluded that Ault

suffered from deficiencies in the frontal and temporal lobes of his brain. Dr. Ross testified that someone with these deficiencies may have problems with the execution of complex ideas, impaired judgment, difficulties with impulse control and emotional issues, and possible hypersexuality. He also stated that these deficiencies are consistent with individuals diagnosed with pedophilia.

The final witness presented by the defense was Robert Buckley, a private investigator. Buckley testified that he spoke with Ault's mother, Barbara [Matson], who told him that Ault no longer had a relationship with his older brother Charles due to the sexual abuse that occurred when Ault was younger. According to Buckley, [Matson] stated that she was aware of the molestation but explained that the matter was not talked about in their family. At the end of Buckley's testimony, the defense rested.

In rebuttal, the State read to the jury the transcript testimony of Dr. Sherry [Bourg] Carter, a psychologist who had testified at Ault's previous trial. Dr. Carter testified that, at the time of her initial meeting with Ault, Ault reported that he had heard voices and suffered from hallucinations in the past, but that he was on medications to control these conditions. However, she found that his descriptions of his symptoms were inconsistent with each other and were also not consistent with medical knowledge regarding hallucinations. Based on interviews with Ault and a review of other records, Dr. Carter diagnosed Ault with severe psychopathy. Dr. Carter explained that this was a personality disorder rather than a mental illness. She defined a major mental illness as a condition that causes someone to be out of touch with reality or to lose control of his or her thought process. By contrast, individuals with personality disorders have reasonable control over their actions, but are impaired in their ability to relate to others, experience emotion, or behave in a socially appropriate manner. Such individuals, she explained, view others as objects rather than as people and have difficulty experiencing remorse. Overall, Dr. Carter concluded that Ault was faking mental illness in order to avoid responsibility for his actions. Dr. Carter also found that Ault was inconsistent in his reports of the sexual abuse he claimed to have suffered as a child and that, because he had given so many different versions of the events, it was difficult to evaluate whether any of his claims were truthful.

At the end of the proceedings, the jury recommended death by a vote of nine to three for the murder of Deanne Mu'min and

> recommended death by a vote of ten to two for the murder of Alicia Jones. In his written sentencing order, the trial judge found six aggravating circumstances applicable to both murders: (1) Ault was previously convicted of a felony and placed on community control (significant weight); (2) Ault was previously convicted of another capital felony or of a felony involving the use or threat of violence to another person (great weight); (3) the capital felony was committed while Ault was engaged in the commission of or an attempt to commit the crimes of sexual battery, aggravated child abuse, and kidnapping (great weight); (4) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest (significant weight); (5) the victim of the crime was a person less than twelve years of age; (6) the capital felony was especially heinous, atrocious, or cruel (HAC) (maximum weight).
>
> The court found no statutory mitigating circumstances and three nonstatutory mitigating circumstances: (1) Ault was raised in a dysfunctional family (little weight); (2) Ault was not adequately supervised by the Department of Corrections (little weight); (3) Ault told a victim of a prior sexual assault to call the police and that what he did was wrong (some weight). The court determined that the aggravating circumstances far outweighed the mitigating circumstances, noting specifically that the single aggravator of the murders being especially heinous, atrocious, or cruel was of such a magnitude as to overwhelm the mitigators. Following the jury's recommendation, the trial judge sentenced Ault to death for each count of first-degree murder, and to fifteen years in prison for each of the remaining offenses. Ault appeals, raising numerous claims of error.

Ault v. State, 53 So. 3d 175, 184-86 (Fla. 2010) (footnotes omitted) (hereinafter "Ault II").

In the direct appeal of his new penalty phase, Ault argued that the trial court erred in rejecting mitigating factors. This Court agreed, but found the error harmless beyond a reasonable doubt given the extensive aggravation in Ault's case. Id. at 195-96. Ault also challenged his sentences based on proportionality,

the admission of photographic evidence, the weight given to the jury's recommendation, the failure to prepare a Presentencing Investigation Report, Ault's exclusion from a pretrial conference, a motion to disqualify the judge based on bias, the denial of Ault's pro se motions, and the constitutionality of Florida's death penalty scheme. Id. at 196-207. This Court affirmed his sentences of death. Id. at 207. The United States Supreme Court denied certiorari on October 3, 2011. Ault v. Florida, 565 U.S. 871 (2011).

Ault filed an initial motion for postconviction relief on September 18, 2012, and an amended motion on July 19, 2013, alleging that both guilt and penalty phase counsel were ineffective under Strickland v. Washington, 466 U.S. 668 (1984). In his initial and amended rule 3.851 postconviction motions, Ault alleged the following distinct claims: (1) guilt phase counsel Kevin Kulick's performance was deficient because he made omissions and conceded guilt in the opening statement, failed to cross-examine witnesses, and failed to investigate defenses such that Ault was prejudiced; (2) penalty phase counsel Mitchell Polay was ineffective for failing to raise rejected statutory mental health mitigation as nonstatutory during the 2007 penalty phase; (3) Mr. Polay was ineffective for failing to investigate and raise Ault's low IQ as mitigation; (4) Mr. Polay was ineffective for failing to adequately prepare Dr. Kramer for trial; (5) Mr. Polay was ineffective for failing to investigate and present mitigation; (6) Mr. Polay was

ineffective for allowing the State to read Dr. Bourg Carter's 1999 penalty phase testimony into evidence rather than seeking her live testimony in the 2007 penalty phase; and (7) Mr. Polay was ineffective for failing to move the trial court for dismissal, and appellate counsel was ineffective for failing to make a claim based on Ault's demands for speedy trial.[3] The postconviction court granted an evidentiary hearing on a portion of the claim relating to expert witness Dr. Bourg Carter's prior testimony and summarily denied the other claims. In this appeal, Ault argues that the postconviction court erred in denying each of the claims,

3. In his initial rule 3.851 postconviction motion, Ault alleged the following claims: (1) penalty phase counsel Mitchell Polay was ineffective for failing to object to Dr. Bourg Carter's 1999 testimony being read into evidence and failing to prepare during the 2007 penalty phase; (2) Mr. Polay was ineffective for failing to raise rejected statutory mitigation as non-statutory during the 2007 penalty phase; (3) Mr. Polay was ineffective for failing to investigate Ault's low IQ which should have been found as a mitigating factor; and (4) Mr. Polay was ineffective for failing to adequately prepare Dr. Kramer for trial. Ault alleged the following claims in his amended rule 3.851 postconviction motion: (1) guilt phase counsel Kevin Kulick's performance was deficient because he made omissions and conceded guilt in opening statement, failed to cross-examine witnesses, and failed to investigate defenses such that Ault was prejudiced; (2) Mr. Polay was ineffective for failing to move the trial court for dismissal, and appellate counsel was ineffective for failing to make a claim based on Ault's demands for speedy trial; (3) Mr. Polay was ineffective for failing to object to Dr. Bourg Carter's 1999 testimony being read into evidence and failing to prepare during the 2007 penalty phase; (4) Mr. Polay was ineffective for failing to raise non-statutory mental health mitigation during the 2007 penalty phase; and (5) Mr. Polay was ineffective for failing to investigate Ault's low IQ, which should have been found as a mitigating factor.

except Ault does not challenge the denial of the claim related to his demands for speedy trial.

INEFFECTIVE ASSISTANCE OF GUILT PHASE COUNSEL

When evaluating an initial rule 3.851 postconviction motion, an evidentiary hearing must be held if the movant makes a facially sufficient claim requiring a factual determination. See Amendments to Fla. Rules of Crim. Pro. 3.851, 3.852 & 3.993, 772 So. 2d 488, 491-92 n.2 (Fla. 2000) (hereinafter "Amendments I"). Because the decision to grant an evidentiary hearing on a rule 3.851 motion is based on written materials before the court, the court's ruling is a pure question of law this Court reviews de novo. See State v. Coney, 845 So. 2d 120, 137 (Fla. 2003). When reviewing the summary denial of an initial rule 3.851 motion, this Court must accept the movant's factual allegations as true and affirm the ruling only if the filings show that the movant has failed to state a facially sufficient claim or that there is no issue of material fact to be determined. See generally Amendments I, 772 So. 2d at 491-92 n.2.

Where there is any question that a facially sufficient claim in an initial rule 3.851 motion requires a factual determination, this Court presumes an evidentiary hearing is required. See id. This Court will affirm a summary denial "only when the claim is legally insufficient, should have been brought on direct appeal, or [is] positively refuted by the record." Jackson v. State, 127 So. 3d 447, 460 (Fla. 2013)

(quoting Reynolds v. State, 99 So. 3d 459, 471 (Fla. 2012)); see also Boyd v. State, 200 So. 3d 685, 699 (Fla. 2015). Conclusory, nonspecific allegations are insufficient to obtain an evidentiary hearing on ineffective assistance of counsel in capital cases. See Wilcox v. State, 143 So. 3d 359, 388-89 (Fla. 2014); Doorbal v. State, 983 So. 2d 464, 482-83 (Fla. 2008).

This Court has determined that, in order to succeed on an ineffective assistance of counsel claim under Strickland, two elements must be satisfied:

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986) (citations omitted). Because both prongs of the Strickland test present mixed questions of law and fact, this Court defers to the circuit court's factual findings that are supported by competent, substantial evidence, and reviews the circuit court's legal conclusions de novo. See Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004).

There is a strong presumption that trial counsel's performance was not ineffective. See Strickland, 466 U.S. at 690. This Court must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances

of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." Id. In Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000), this Court held that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct."

In the first claim of Ault's amended motion, Ault argued that guilt phase counsel Kevin Kulick mounted a constitutionally insufficient defense. Ault alleged Mr. Kulick's performance was deficient for conceding guilt when he told the jury in opening statement about Ault's prior crimes, including arrest for rape and sexual battery of a child, and about a news media interview Ault gave. Ault claimed Mr. Kulick's conduct was deficient when he told the jury Ault is borderline intellectually disabled and presented no supporting evidence in the guilt phase. Ault also alleged that counsel was deficient for discussing a voluntary intoxication defense, for telling the jury that an instruction on voluntary intoxication would be given, and for ultimately not securing the instruction. Ault further argued that Mr. Kulick was deficient for only cross-examining State witness Detective William

Rhodes and resting without presenting any evidence. As to Strickland prejudice, Ault alleged generally that Mr. Kulick's alleged deficiencies collectively created a reasonable probability that the outcome of the guilt phase would be different, undermining confidence in the verdict such that Ault was prejudiced.

We affirm the postconviction court's summary denial of this claim because the record conclusively refutes the existence of Strickland prejudice. See Boyd, 200 So. 3d at 699. Regardless of what further investigation, cross-examination, or alternative defenses Mr. Kulick might have conducted, the jury would still have heard Ault's detailed confession, in which he described how he tested the victims' trust by giving them a ride before the assault, the details of the assault, and how he believed he had to kill the victims so that he would not go back to jail and further traumatize his wife. In light of the evidence of Ault's guilt, there is no reasonable probability that the alternative defense strategies Ault suggests in this claim undermine confidence in his convictions. Because Ault failed to establish prejudice, we need not make a specific ruling on the performance component of the Strickland ineffective assistance test. Maxwell, 490 So. 2d at 932. Therefore, we deny relief on this claim.

HURST RELIEF

On remand from the United States Supreme Court, this Court interpreted Hurst v. Florida to "require[] that all the critical findings necessary before the trial

court may consider imposing a sentence of death must be found unanimously by the jury." Hurst v. State, 202 So. 3d 40, 44 (Fla. 2016) (hereinafter "Hurst"). These findings "include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances." Id. This Court has determined that Hurst applies to a sentence that was final in 2009. See Mosley v. State, No. SC14-436, slip op. at 63 (Fla. Dec. 22, 2016). Ault's sentence was final in 2011. See Ault v. Florida, 565 U.S. at 871. Therefore, Hurst is also applicable to Ault's case, and this Court must examine whether any Hurst error was harmless beyond a reasonable doubt.

We explained the appropriate standard for harmless error review in Hurst:

> Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., Zack v. State, 753 So. 2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," [State v.] DiGuilio, 491 So. 2d [1129,] 1137 [Fla. 1986], and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a Hurst v. Florida error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate:
>
> > The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a

> device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.
>
> DiGuilio, 491 So. 2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." Id.

Hurst, 202 So. 3d at 68 (alteration in original). In other words, it must be clear beyond a reasonable doubt that a rational jury would have found all facts necessary to impose death unanimously and would have determined that death is the appropriate sentence. In Ault's case, there is no such clarity for either recommendation of death.

After resentencing, the jury recommended death for the murder of Deanne Mu'min by a vote of nine to three and for the murder of Alicia Jones by a vote of ten to two. The circuit court agreed with the jury, finding three nonstatutory mitigators given some or little weight and six statutory aggravators, each given great, significant, or maximum weight. In light of the nonunanimous recommendations of death and failure of the jury to make any findings as to the aggravating and mitigating factors, any attempt to discern what jurors would have done if properly instructed under Hurst is purely speculative. Therefore, we cannot conclude that the Hurst error in Ault's resentencing was harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, we affirm the postconviction court's denial of relief on Ault's ineffective assistance of guilt phase counsel claim, we do not address his remaining ineffective assistance of penalty phase counsel claims, and we grant relief under Hurst. Accordingly, we vacate his sentences of death and remand his case for a new penalty phase.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
POLSTON, J., concurs in part and dissents in part with an opinion, in which CANADY and LAWSON, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

POLSTON, J., concurring in part and dissenting in part.

I concur with the majority's decision except its vacating of the death sentence pursuant to Hurst.

CANADY and LAWSON, JJ., concur.

An Appeal from the Circuit Court in and for Broward County,
Marc H. Gold, Judge - Case No. 061996CF021248A88810

Young T. Tindall, Fort Lauderdale, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida; and Leslie T. Campbell, Assistant Attorney General, West Palm Beach, Florida,

for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing motion and Appendix in Support of the forgoing motion have been transmitted to this Court through the Florida Courts E-Filing Portal on this 10th day of March, 2017.

I HEREBY CERTIFY that a copy of the foregoing was served through the Florida Court E-filing Portal to the **Honorable Terrence R. Perkins (J.A. Susan Miller)**, Chief Judge; Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach, Florida 32114; to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, at CalhounR@sao7.org on this 10th day of March, 2017.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 10th day of March, 2017.

/s/ Raheela Ahmed
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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Joseph Edward Jordan, defendant in the above-captioned case by and through undersigned counsel files the following Notice of Supplemental Authority as it related to the issues raised pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016):

1) ***Corey Smith v. State of Florida*, --- So. 3d ---, SC12-2466, 2017 WL 1023710 (Fla. March 16, 2017); *Corey Smith v. Julie L. Jones etc*., --- So.3d ----, SC13-2112, 2017 WL 1023710 (Fla. March 16, 2017).**

The Defendant provides the foregoing recent Supreme Court of Florida opinion in ***Corey Smith v. State of Florida*, --- So. 3d ---, SC12-2466, 2017 WL 1023710 (Fla. March 16, 2017); *Corey Smith v. Julie L. Jones etc*., --- So.3d ----, SC13-2112, 2017 WL 1023710 (Fla. March 16, 2017)**, as authority in support of Claim One of his Successive motion to vacate sentence of death pursuant to Florida Rule of Criminal Procedure 3.851. *See Attachment I*. Mr. Smith's case was a post-*Ring*[1] sentencing for four murder convictions, with two life recommendations, one non-unanimous ten-two jury

[1] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

recommendation and another nine-three jury recommendation. He was granted a new penalty phase under *Hurst v. Florida*¸136 S. Ct. 616 (2016).

2) ***Willie James Hodges v. State of Florida*, --- So. 3d ---, SC14-878, 2017 WL 1024527 (Fla. March 16, 2017).**

The Defendant provides the foregoing recent Supreme Court of Florida opinion in ***Willie James Hodges v. State of Florida*, --- So. 3d ---, SC14-878, 2017 WL 1024527 (Fla. March 16, 2017)**, as authority in support of Claim One of his Successive motion to vacate sentence of death pursuant to Florida Rule of Criminal Procedure 3.851. *See Attachment II*. Mr. Hodges' case was a post-*Ring*[2] sentencing with a non-unanimous ten-two jury recommendation. He was granted a new penalty phase under *Hurst v. Florida*¸136 S. Ct. 616 (2016).

Respectfully submitted,

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[2] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Attachment I

Supreme Court of Florida

No. SC12-2466

COREY SMITH,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. SC13-2112

COREY SMITH,
Petitioner,

vs.

JULIE L. JONES, etc.,
Respondent.

[March 16, 2017]

PER CURIAM.

Corey Smith appeals an order of the circuit court denying his motion to vacate his convictions of first-degree murder and sentences of death filed under Florida Rule of Criminal Procedure 3.851 and petitions this Court for a writ of

habeas corpus. We have jurisdiction. See art. V, § 3(b)(1), (9), Fla. Const. For the reasons explained below, we affirm the trial court's denial of postconviction relief as to all claims except Smith's claim relating to the constitutionality of his penalty phase, deny habeas relief, vacate Smith's death sentences, and remand for a new penalty phase.

BACKGROUND

In December 2000, Corey Smith and seven others were indicted by a Miami-Dade County grand jury in a seventeen-count indictment for crimes committed in connection with the John Doe enterprise, which had been the subject of a joint state and federal task force. Smith v. State, 7 So. 3d 473, 479 (Fla. 2009). Smith was alleged to have been the leader of John Doe, which had processed, packaged, and distributed cocaine and marijuana in Liberty City from July 1994 through January 1999. Id. Smith was named in fourteen of the counts, including the first-degree murders of Cynthia Brown, Angel Wilson, Leon Hadley, Jackie Pope, and Melvin Lipscomb, four counts of conspiracy to commit murder, second-degree murder of Marlon Beneby, conspiracy to engage in a criminal enterprise, engaging in a criminal enterprise, conspiracy to traffic in marijuana, and conspiracy to traffic in cocaine. Id.

The facts of this case are set forth in Smith's direct appeal of his first-degree murder convictions and sentences of death:

A number of witnesses who had been involved in John Doe testified about the organization and operation of [its] seven drug holes [where drugs were distributed]. According to their testimony . . . Latravis Gallashaw was the second-in-command, and Julian Mitchell was the third. Smith started out as a member of the Lynch Mob, a drug group that predated John Doe in the same neighborhood. . . . Smith opened his own drug hole across the street from his mother's house . . . in 1994. Smith engaged in intimidation and violence to take over other drug spots or to run competitors out of business.

Each drug hole employed a number of workers, including a "bombman" who sold the drugs, a "watchout" who looked out for the police and marketed the drugs by yelling slogans to potential customers, a "gunman" who kept the peace and enforced the rules, and a "street lieutenant" who dropped off drugs and collected money. In addition, John Doe also employed [individuals] who processed and packaged the drugs for street sale, [people] who tracked the money to provide a count for paying the workers, and . . . "hit men" who carried out the group's violence. The employees worked regular shifts at their jobs and were paid in cash . . . .

Various witnesses and documentary evidence also revealed a type of accounting system through tally sheets which enabled John Doe to keep track of how much and what kind of drugs were sold and how much money was collected and paid out. Letter codes were used to indicate the type of drug and the size of the bags. Witnesses also testified that workers at the drug holes were permitted to buy guns that they might be offered by individuals and pay for them with John Doe money. The guns were kept by the workers at the holes. . . .

. . . The task force executed search warrants for various residences of John Doe members in late October and early November of 1998. The search of Smith's mother's residence revealed two homemade grenades in the attic, a 9-millimeter pistol in Smith's room, various boxes of ammunition, magazines, and clips, a bullet-proof vest, a loaded derringer in the mother's bedroom along with $850, drug residue in the kitchen, and a copy of the police report in the [Dominique] Johnson case in the nightstand of Smith's bedroom. . . . The search of the residence that Smith shared with his girlfriend Crystal Boyd uncovered a radio frequency detector to detect bugs or

wires, a phone guard that was supposed to detect wiretaps, a diamond-studded Rolex watch, $500 in cash in Smith's shorts pocket, a bag containing $185,724 in cash bundled with rubber bands, an AK-47 drum that can hold up to 75 rounds of ammunition, and a small amount of marijuana. . . .

. . . .

Cynthia Brown Murder

Cynthia Brown died from asphyxia after being smothered by a pillow in a room at the Tradewinds Motel . . . . Brown checked into the hotel with her boyfriend Chazre Davis on the evening of July 23, 199[7], and her body was found at midday the next day. Brown's and Davis's prints were found on a mirror in the motel room.

The medical examiner testified that Brown had petechial hemorrhages in her eyes, inside her upper lip, and on her epiglottis. Brown had small abrasions under her left nostril and on her upper lip. Her lungs were full of fluid due to pulmonary edema. She also had postmortem cuts on the left side of her neck. The bed pillow had small smears of blood on the right side from Brown's face, which was consistent with the small abrasions on her face. The medical examiner stated that all of these findings were consistent with death from asphyxia caused by being smothered with the bed pillow. Toxicology showed that Brown had both cocaine and alcohol in her body at the time of death. However, both the medical examiner and the forensic toxicologist testified that the levels were not life-threatening and Brown did not die from an overdose.

During cross-examination, the defense asked the medical examiner about autoerotic asphyxia and if the victim could have died from this rather than being smothered by a pillow. When the defense asked the medical examiner to explain autoerotic asphyxia, the State objected and the court sustained that objection. The court ruled that the defense could ask the medical examiner if it applied in this case, but would have to call its own expert to explain this. The medical examiner opined that it was possible but unlikely that the victim in this case died during a sex act. . . .

Brown was the sole witness against Smith in the murder of Dominique Johnson, a nineteen-year-old drug seller . . . . Johnson was

shot twice in his arms and once through his temple. The gun was one to three inches away when Johnson was shot in the head. . . . No gunshot residue was found on Johnson's hands, indicating that he did not fire a gun. While several people apparently witnessed Johnson's shooting, only Cynthia Brown came forward and identified Smith to the police.

Smith was scheduled to be tried for Johnson's murder on July 28, 1997. David Waksman, the prosecutor in Johnson's case, testified in the instant trial that he had to dismiss the charges against Smith when Brown was discovered dead less than a week before the Johnson trial. Waksman testified that Brown was the State's sole witness in the Johnson case.

At Smith's trial in the instant case, Shaundreka Anderson, who worked with Johnson at a rival drug hole, testified that she saw Smith and Johnson arguing over money earlier in the day on which Johnson was shot. Smith approached Anderson that night and wanted to know where Johnson was. Smith had a Glock 9 gun in his hand. Smith entered the drug hole where Johnson was located and Anderson heard shots. Anderson found Johnson after he was shot. At the scene, Cynthia Brown told Anderson that she knew who killed Johnson because she had been standing behind a pole when it occurred. Anderson told Brown to mind her own business and advised her not to talk. Anderson testified that she was approached by a number of individuals who said that Smith wanted to see her. Smith offered her $2500 to help him. A few days later, Anderson gave a statement to the police in which she falsely identified another individual as Johnson's shooter. Anderson was so fearful for her safety that she cut off her dreadlocks and shaved her head as a disguise. She also left the area.

Demetrius Jones testified that he overheard a heated argument between Smith and Johnson and looked out of his bedroom window to see Smith pull a gun out of his waistband. Jones heard multiple shots and saw Johnson on the ground. Within seconds Brown approached him and said she saw who shot Johnson. Jones also advised Brown to keep silent for her safety. Neither Jones nor Anderson remained at the scene to talk to the police, but Brown did. After Smith was charged with Johnson's murder, Jones agreed to "help" Smith with his case

and gave a deposition to the state attorney in which he lied about Smith's involvement. Jones also admitted that he lied to Smith's defense attorney about the Johnson murder. After Jones gave his deposition and Smith was awaiting trial, Jones did not have to work and was given money from the drug holes.

Several witnesses testified that Smith wanted to get rid of the only witness who was going to testify against him in the Johnson murder case. Anthony Fail overheard a conversation between Smith and his mother about how to kill a woman without shooting her. They discussed poison and strangulation. Fail also testified that Smith offered him $50,000 to kill Brown. However, Smith was adamant that he did not want Brown shot and that he did not want the evidence leading back to him. Smith told Fail that the "junkie bitch had to go," referring to Brown. Fail did not agree to kill Brown because of this limitation and because he was on house arrest and could not move freely about the community. Fail testified that Smith put aside $20,000 to pay Brown's boyfriend for killing her. Herbert Daniels overheard a conversation between Smith and Brown's boyfriend Davis shortly before Brown was killed. Daniels heard Davis ask Smith what he wanted him to do about Brown.

Carlos Walker testified that Smith talked to him about Brown "snitching" on him. . . . Smith told Walker that Brown had to "come up dead for him to win his trial." Walker also heard Smith telling Davis to either suffocate or strangle Brown because he did not want bullets, casings, or other evidence at the scene. Walker admitted that he lied to both Smith's defense attorney and the prosecutors at his deposition when he said that Smith never discussed the Johnson case with him. Walker said he lied out of fear for his life. He said "look what happened to Jackie Pope."

Tricia Geter testified that Demetrius Jones had been paid by Smith's friend Peggy King to testify on Smith's behalf at the Johnson murder. Geter also testified that Smith asked her if she could obtain pure heroin that could be given to Brown to kill her. Smith stated that he was going to take Brown's life because she was trying to take his.

After Brown was killed, Smith told Julian Mitchell that he had to have her killed in order to win his case and now they "wouldn't be

able to take him." The day after the Johnson case was dismissed, Walker heard Smith say that the State could not hold him and that Davis had handled his business. Geter testified that she saw Davis seeking payment from Smith after Brown was killed.

Detective Alphonso testified that he discovered a copy of a deposition and the police report from the Johnson case in the nightstand of Smith's bedroom when he executed a search warrant based on the John Doe investigation. The police report was introduced to prove Smith's knowledge that Brown was the witness against him and his motive for wanting her killed. . . .

Angel Wilson Murder

Angel Wilson was shot multiple times with a semiautomatic assault rifle while she was driving her car . . . in the early morning hours of December 1, 1998. A witness saw someone in a dark older model car with tinted windows pull up beside Wilson's vehicle and heard multiple shots. A number of witnesses saw or heard the dark vehicle speeding away from the shooting. Witnesses also heard a series of multiple shots in rapid succession. Seventeen shell casings were recovered from the scene. The bullets entered the driver's side of the vehicle and struck Wilson sixteen times. Six of these wounds were fatal. The bullet wounds also caused extensive tissue damage . . . . She was also struck by metal fragments as the bullets pierced her vehicle. She died on the scene from massive internal injuries. The medical examiner testified that Wilson's lungs were "peppered" with pieces of the projectiles that fragmented in her body. . . .

Wilson was not the intended victim of this shooting. Her boyfriend Anthony Fail was being sought by members of John Doe who intended to kill him. Wilson and Fail were together in Wilson's car just before the shooting when they arrived at the home of Fail's stepbrother James Harvey. Harvey testified that on the night of Wilson's murder a car occupied by John Doe members Julius Stevens, Eric Stokes, Jean Henry, and "Eddie Bow" drove by his residence ten or eleven times. When Fail and Wilson arrived at Harvey's house, Harvey warned them about the car. Fail sent Wilson home because he feared for her safety. . . . At the penalty phase of trial, Detective

Alphonso testified that Julius Stevens admitted that he and Eddie Harris had shot Wilson.

Carlos Walker testified that Eddie Harris borrowed his Grand Marquis on the day of Wilson's murder. The car was returned by Harris and Eric Stokes the next day and they warned Walker that he should "lay low" with this car. Shots were fired at Walker the next time he drove his car . . . .

Various witnesses described the history between Fail and John Doe that led to these events. Fail testified that he met Smith in 1996 after Fail was released from prison. Smith had taken over Fail's drug hole . . . during Fail's incarceration. Initially, Smith and Fail worked out an arrangement about the drug hole—Fail would receive money from the operation of the hole and was given permission to get drugs and money from the hole. However, this arrangement ended when Smith ordered John Doe workers to cut Fail off. Fail had heated arguments with both Latravis Gallashaw and Smith about being cut off. Fail responded by robbing John Doe holes and shooting at the holes. Fail and his friends were also shot at by John Doe members.

Julian Mitchell, Charles Clark, Eric Mitchell, Antonio Allen, Tricia Geter, and Herbert Daniels each related the same account of a falling out between Smith and Fail over money, which resulted in Fail robbing the John Doe holes. Mitchell was given instructions to watch out for Fail and to kill him. Daniels was instructed to look for Fail and actually rode up and down the block looking for Fail on the day Wilson was killed. Mitchell was instructed by Smith and others to shoot Fail on sight. Allen heard Smith discuss the Fail problem with Julius Stevens . . . . Geter heard Smith instruct Stevens to deal with Fail because he had been robbing his drug holes. . . .

Mitchell and Fail also described a shooting that occurred outside [of a club] . . . in June 1998. In a purported gesture to end the dispute with Fail and his friends, Gallashaw gave Fail money to go out clubbing. Fail and his friends ended up at the [club] that night. While they were leaving the club, someone began shooting at them. Fail's companion Kenwan Maynard was killed. Mitchell testified that he drove a number of John Doe individuals to a night club where Fail had been spotted. These individuals had machine guns and opened

> fire on someone outside the club. . . . The evidence was introduced to prove that John Doe was looking for Fail and intended to shoot him.

Id. at 480-88 (footnote omitted).

Leon Hadley Murder

Leon Hadley was an "enforcer" for a drug organization which predated John Doe. Id. at 482. Smith told his girlfriend that Hadley had threatened to kill him, but that he was going to kill Hadley first. Id. at 483. Smith dreamed that Hadley had killed him. Id. On August 21, 1995, after stating his intent to kill Hadley, Smith put on a ski mask and jumped out of a vehicle to shoot Hadley. Id. Hadley was also shot at by another individual who was with Smith. Id. Hadley was killed, having sustained six gunshot wounds. Id. at 482. Smith told his girlfriend that he "did it" and also admitted to Anthony Fail that he killed Hadley. Id. at 483. After the shooting, Smith took over the area that had been controlled by Hadley. Id.

Jackie Pope Murder

Jackie Pope, who was a John Doe "watchout," stated in a deposition that a member of John Doe shot a police officer at one of the drug holes. Smith was very angry about Pope's deposition and, consequently, he ordered Pope's shooting. Id. at 484-85. On March 31, 1998, Pope was killed after being shot sixteen times by John Doe "hit men." Id. at 484.

Melvin Lipscomb and Marlon Beneby's Manslaughters

On August 27, 1996, Melvin Lipscomb, who was a John Doe customer, broke the rules at a drug hole by talking loudly and arguing with a gunman. Id. at 488-89. Lipscomb was thereafter chased by the gunman across the street to Smith's mother's yard. Id. at 489. Smith came outside following Lipscomb's calling of Smith's name. Id. After learning Lipscomb had "disrespected the hole," Smith told his gunman to "do his ass." Id. Lipscomb sustained eleven gunshot wounds and was killed. Id. at 488.

Marlon Beneby worked as a "bombman" for John Doe. Id. at 489. Because Beneby sold his own drugs at a John Doe drug hole, on July 23, 1998, Latravis Gallashaw shot Beneby in the back. Id. This resulted in Beneby becoming a quadriplegic; Beneby ultimately died from complications due to the shooting. Id.

The defense only presented one witness at trial: the attorney who represented Smith on the first-degree murder of Dominique Johnson. Id. at 479. Smith did not testify at trial. Id. The jury convicted Smith of the first-degree murders of Cynthia Brown, Angel Wilson, Leon Hadley, and Jackie Pope; four counts of conspiracy to commit murder (Brown, Hadley, Pope, and Fail); two counts of manslaughter (Lipscomb and Beneby); Racketeer Influenced and Corrupt Organization ("RICO") conspiracy; racketeering; and conspiracy to traffic cocaine and cannabis. Id. at 489-90. At the conclusion of the penalty phase, by a vote of ten to two, the

jury recommended that Smith be sentenced to death for the murder of Brown. The jury also recommended a death sentence for Wilson's murder by a vote of nine to three. Id. at 490.[1]

In sentencing Smith for Brown's murder, the trial court found three applicable aggravators, with each receiving "great weight": (1) prior violent felony convictions (contemporaneous first-degree murders of Wilson, Hadley, and Pope; conspiracy to commit murder of Brown, Pope, and Fail; and the Beneby and Lipscomb manslaughters); (2) the murder was committed to hinder or disrupt the lawful exercise of a governmental function or the enforcement of laws because Brown was killed to prevent her testimony in the Johnson case; and (3) the murder was cold, calculated, and premeditated ("CCP"). Id. at 490-91. The trial court found that three statutory mitigators applied: (1) the lack of significant history of prior criminal activity; (2) extreme mental or emotional disturbance;[2] and (3)

1. No additional evidence was presented at the Spencer hearing. Id.; see also Spencer v. State, 615 So. 2d 688 (Fla. 1993).

2. However, the trial court stated that "[t]here is no evidence presented to establish [the extreme mental or emotional disturbance] mitigator." Id. at 491 n.6. On direct appeal, we found that the evidence presented actually refuted this statutory mitigator. Id.

Smith's age at the time of the murder (mid-twenties),[3] which were each given "little weight." Id. at 491.[4]

For the murder of Wilson, the trial court found the following three aggravators, assigning each of them "great weight": (1) prior violent felony convictions (contemporaneous first-degree murders of Brown, Hadley, and Pope; conspiracy to commit the murders of Brown, Pope, and Fail; and the Beneby and Lipscomb manslaughters); (2) the murder was committed for pecuniary gain because the John Doe gang members were trying to kill Wilson's boyfriend to protect the drug enterprise; and (3) CCP. Id. at 491. The trial court found the same mitigation and weight which it had found applicable to Brown's murder.[5]

Concluding that "the aggravating circumstances clearly and convincingly outweigh[ed] the mitigating factors," in both the Brown and Wilson murders, the

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3. The trial court found no evidence that Smith's age had any impact on his thoughts, actions, or motivations. Id. at 491 n.6.

4. The trial court also considered a number of nonstatutory mitigating factors—"includ[ing] that Smith was raised in a crime infested neighborhood and a gang-controlled community, was a good family man; exhibited good behavior during trial; was exposed to chronic violence while growing up; and graduated from high school"—which were each given "little" or "some" weight. Id. at 491 & n.7.

5. The trial court additionally considered the fact that Smith did not actually shoot Wilson and never intended for her to be killed, but gave this little weight since Smith ordered the execution of Fail and that Wilson was killed as a result thereof. Id. at 491.

trial court followed the jury's death-sentence recommendations. Id.[6] We affirmed Smith's first-degree murder convictions and sentences of death on direct appeal. Id. at 478.[7]

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6. The jury recommended life sentences for the murders of Hadley and Pope, which the trial court followed. Id. at 490. The trial court also sentenced Smith to consecutive thirty-year prison terms for RICO conspiracy, RICO racketeering, conspiracy to traffic in marijuana, conspiracy to traffic in cocaine, and conspiracy to commit the murders of Brown, Hadley, Pope, and Fail, and to consecutive fifteen-year prison terms for the Lipscomb and Beneby manslaughters. Id. at 492.

7. Smith raised the following claims on direct appeal:

> (1) the security measures ordered by the trial court were prejudicial and violated his right to a fair trial; (2) the trial court erred in striking the jury panel that had been exposed to the out-of-court comment by Smith's mother; (3) the trial court erred in permitting a member of the John Doe organization to testify about the meaning of terms in the recorded conversations; (4) the trial court erred in admitting into evidence a police report concerning the Johnson murder that was found in Smith's bedroom; (5) the trial court erred in limiting defense cross-examination of three State witnesses; (6) the trial court erred in not granting a mistrial after the State solicited the medical examiner's opinion on an improper hypothetical question after two defense objections to this hypothetical question had been sustained; (7) the trial court erred in denying a new trial based on the State's failure to disclose a witness statement that was materially favorable to the defense; (8) the trial court erred in not holding a hearing to determine whether the State failed to disclose that a witness would testify inconsistently with his deposition and to determine whether the defense was prejudiced by this failure; and (9) the trial court erred in not granting a new trial based on prosecutorial misconduct.

Id. at 492.

Postconviction Proceedings

On May 28, 2010, Smith filed a motion to vacate his convictions and sentences pursuant to rule 3.851, setting forth eight claims. In his motion, Smith requested leave to supplement or amend his claims with new or additional evidence as it becomes available as well as to add claims. The motion provided that it was incomplete because the investigation had not yet been completed as there were outstanding public records. Smith requested sixty days from the receipt of all of the records to file an amended rule 3.851 motion. On November 22, 2011, Smith filed a pro se motion to amend his rule 3.851 motion with two additional claims. On December 12, 2011, Smith's postconviction counsel moved to withdraw; Smith did not object. In granting the motion to withdraw, the trial court informed Smith that "it's going to take [new counsel] an extraordinary amount of time to prepare, probably I would say six months to a year. This is a huge case." On April 3, 2012, Smith filed a second pro se motion to amend his rule 3.851 motion.

On April 13, 2012, the trial court appointed Smith new postconviction counsel. At a hearing on May 15, 2012, the trial court asked counsel for Smith when he would be ready for a Huff[8] hearing. Smith's counsel responded that the Huff hearing could occur about six weeks later. Counsel agreed to have the Huff

8. Huff v. State, 622 So. 2d 982 (Fla. 1993).

hearing on July 5, 2012. On June 15, 2012, however, Smith moved to continue the Huff hearing, which was denied by the trial court. At the Huff hearing, the court scheduled the evidentiary hearing for September 24, 2012.

At the conclusion of the evidentiary hearing, the trial court stated that it would allow briefing as to the claims raised in Smith's pro se motion to amend. On October 1, 2012, postconviction counsel moved to adopt the grounds set forth in Smith's pro se motion to amend. On October 5, 2012, Smith moved for permission to amend his rule 3.851 motion and filed an amendment to the motion. On October 10, 2012, the trial court denied Smith's rule 3.851 motion. On October 18, 2012, the trial court also denied Smith's motion for permission to amend his rule 3.851 motion and the amendment, noting that the motion to amend was filed after the evidentiary hearing.

ANALYSIS

RULE 3.851 APPEAL

In his appeal of the trial court's denial of postconviction relief, Smith contends that: (1) the trial court erred in denying his motion to continue the Huff hearing and in refusing to allow him to amend his rule 3.851 motion; (2) the trial court erred in denying his claim of newly discovered evidence; (3) the trial court erred in finding that trial counsel was not ineffective regarding the speedy trial issue; (4) the application of the amendment to section 775.15, Florida Statutes

(Supp. 1996), which extends the statute of limitations for manslaughter, violates the ex post facto clause; (5) the trial court erred in finding that trial counsel was not ineffective regarding the failure to request a Richardson[9] hearing relating to witness Carlos Walker; (6) the trial court erred in finding that trial counsel was not ineffective during opening statements; (7) the trial court erred in not requiring the State to affirmatively disclose any files of cooperating witnesses that had been illegally made secret; (8) the trial court erred in denying an evidentiary hearing regarding the post-trial disclosure of the Tricia Geter tapes; (9) the trial court erred in summarily denying claims based on a 2006 report[10] of the American Bar Association ("ABA"); (10) the trial court erred in affirming that the lethal injection protocol did not violate the Eighth Amendment; (11) the trial court erred in finding that trial counsel was not ineffective in failing to object to the principal jury instruction relating to Smith's conspiracy counts; and (12) the trial court erred in finding that trial counsel was not ineffective in failing to object to the manslaughter jury instruction.

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9. Richardson v. State, 246 So. 2d 771 (Fla. 1971).

10. See American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report (2006).

I. Motion to Continue the Huff Hearing

Smith argues the trial court erred in denying his motion to continue the Huff hearing. The denial of a motion to continue is subject to an abuse of discretion standard. See Gorby v. State, 630 So. 2d 544, 546 (Fla. 1993). "An abuse of discretion is generally not found unless the court's ruling on the continuance results in undue prejudice to the defendant." Doorbal v. State, 983 So. 2d 464, 486 (Fla. 2008).

Smith's postconviction counsel was appointed on April 13, 2012. On May 15, 2012, Smith's counsel agreed to having the Huff hearing on July 5, 2012. But on June 15, 2012, Smith moved to continue the Huff hearing pending a "finalized" rule 3.851 motion. In the motion, counsel stated that it was represented to him that the rule 3.851 motion, when filed, was not complete and that prior postconviction counsel was in the process of receiving more public records from the registry. Counsel further provided that the review of such records might reveal additional grounds for relief, which might need to be investigated. Counsel also noted his intent to meet with Smith regarding the rule 3.851 motion and any amendments or deletions thereto.

At the hearing on the motion to continue, Smith's counsel maintained that when he agreed to the Huff hearing date, he thought it would only be a matter of "getting up to speed" on the issues presented before the court in the rule 3.851

motion. Smith's counsel stated that he had since learned of the ongoing investigation of the outstanding record requests pertaining to the supplementing of the rule 3.851 motion. Counsel requested that the court afford him an opportunity to meet with Smith, review the forty or fifty boxes of material, and review the completed public records, which might reveal additional grounds for relief and require further investigation. Smith's counsel expressed that the rule 3.851 motion might be amended mainly as to mitigation, provided that Smith be evaluated by a forensic psychologist. The trial court informed counsel that it would allow for Smith to be evaluated before the Huff hearing and hold a hearing on the matter. The trial court denied Smith's motion to continue the Huff hearing.

We conclude that the trial court did not abuse its discretion in denying a continuance. We note that Smith has not shown that the claims he eventually sought to add were based on counsel's review of the public records. We also find it important that, at the Huff hearing, the trial court accommodated the defense by granting requests to further brief issues. The trial court told counsel that he could brief whatever issues he desired—including the issues of ineffectiveness of trial counsel pertaining to speedy trial and the suppression of the Tricia Geter tapes—and that it would not make a final ruling until after the evidentiary hearing. The trial court also allowed counsel to brief, following the Huff hearing, the claim of ineffectiveness of penalty phase counsel relating to mitigation. We note that there

is no indication that Smith was evaluated by a forensic psychologist in postconviction for mitigation purposes. Finally, while the trial court told Smith on December 13, 2011, of the "extraordinary amount of time . . . six months to a year" for new counsel to prepare in this case, the trial court was not obligated to afford counsel such an amount of time. The time between appointment of counsel and the evidentiary hearing was approximately five and a half months. We therefore affirm the trial court's denial of a continuance.

II. Motion to Amend the Rule 3.851 Motion

Smith next argues that the trial court erred in denying his motion to amend his rule 3.851 motion, which he filed after the evidentiary hearing. The trial court's denial of a motion to amend is subject to an abuse of discretion standard. Moore v. State, 820 So. 2d 199, 205-06 (Fla. 2002). In Tanzi v. State, 94 So. 3d 482 (Fla. 2012), we explained:

> A trial court does not abuse its discretion in refusing to grant leave to amend when the facts asserted in the amended motion are vague, nonspecific, and fail to suggest how relief may be warranted. Additionally, a trial court does not abuse its discretion when the facts in the amended motion "were readily available to postconviction counsel at the time that [the defendant] filed his initial 3.851 motion and, therefore, these claims should have been raised in that motion."

Id. at 495 (citation omitted) (quoting Lugo v. State, 2 So. 3d 1, 19 (Fla. 2008)). "While defendants should not be given an unlimited opportunity to amend, due process demands that some reasonable opportunity be given to defendants who

make good faith efforts to file their claims in a timely manner and whose failure to comply with the rule is more a matter of form than substance." Bryant v. State, 901 So. 2d 810, 819 (Fla. 2005).

In this case, the evidentiary hearing occurred on September 24, 2012. Thereafter, on October 5, 2012, Smith filed the instant motion to amend his rule 3.851 motion, maintaining that counsel's trial schedule since his August 2, 2012, visit with Smith had only permitted him to prepare for the evidentiary hearing. Under Florida Rule of Criminal Procedure 3.851(f)(4), a motion "may be amended up to 30 days prior to the evidentiary hearing upon motion and good cause shown." Fla. R. Crim. P. 3.851(f)(4) (2012) (emphasis added). Because Smith's motion to amend was filed after the evidentiary hearing, the motion was untimely filed. We conclude, therefore, that the trial court did not abuse its discretion in denying Smith's motion to amend his rule 3.851 motion. We note that the claims Smith sought to raise in his motion to amend were neither based on public records nor involved mitigation evidence—the stated reasons Smith's counsel articulated in requesting a delay of the Huff hearing.[11] Accordingly, we affirm the denial of relief.

11. Smith's motion to amend consisted of claims that his trial counsel was ineffective as to tolling the speedy trial period and in presenting a defense to expert testimony regarding Cynthia Brown's death, and that the State failed to disclose that Demetrius Jones committed perjury in federal court—in a case in which Smith

III. Claim of Newly Discovered Evidence

Smith claims that the trial court erred in denying his claim of newly discovered evidence, which consisted of an affidavit executed by Chazre Davis. To prevail on this clam, Smith must satisfy the following two-prong test:

> Two requirements must be met in order for a conviction to be set aside on the basis of newly discovered evidence. First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence."
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial."
>
> In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility. Once this is determined, an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence.

Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (citations omitted) (quoting Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324-25 (Fla. 1994); Jones v. State, 591 So. 2d 911, 916 (Fla. 1991)). In reviewing the trial court's decision on a newly discovered evidence claim following an evidentiary hearing, where the court's

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was a defendant—and that Jones was not prosecuted for violating his plea agreement.

findings are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact, credibility of the witnesses, or the weight given to the evidence by the trial court. Id. at 532.

For this claim, Smith presented Davis's October 21, 2009, affidavit, which provided as follows:

> I. That there is absolutely no affiliation between me and the so call [sic] "John Doe Boys" or the "John Doe Gang" . . . To which allegedly was headed by this person Corey Smith. II. That this person Corey Smith nor anyone affiliated with the John Doe Gang never advised me, encouraged me, intimidated me nor sought out to pay me to murder or kill anyone . . . To which includes the person known to me as Cynthia "Cookie" Brown whom unfortunately is deceased. III. That prior to Corey Smith being arrested I was approached by Detectives Aguero and [Francisco] Alfonso and was first, encouraged to give false statements regarding Corey Smith, and then later, I was intimidated and threaten [sic] to do so. All the while being told by Detectives [sic] Alfonso that they intend to do what ever [sic] they have to do, and no matter who they have to use to see that Corey Smith will never see the street again, and they will kill him in prison. The affiant states nothing further.

At the September 24, 2012, evidentiary hearing, Davis denied any involvement in the murder or conspiracy to kill Cynthia Brown, who was his girlfriend in the early 1990s. Davis maintained that he never implicated Smith in Brown's murder. He testified that in 1997 he was interviewed by detectives, who wanted him to testify that Smith paid him to take Brown to a hotel so that she could be killed. Davis was promised little or no jail time so long as he would testify as the detectives wanted. If he did not, then the detectives would ensure that

he would receive the electric chair. Davis said he told the detectives that on the night in question he was with Brown at the hotel, but he left the hotel while Brown was alive. Davis asserted that Carlos Walker had a problem with him because Walker thought Davis was after his girlfriend.

Davis also testified that he did not notify Smith or Smith's counsel that he had information pertaining to Brown. Davis claimed to have voluntarily executed the affidavit after he was cautioned by a friend that if he did not clear himself "from them people, they gonna [sic] link[] you to them." Smith did not request that Davis execute the affidavit, nor did anyone else make such a request on Smith's behalf. In August 2010, Davis pleaded guilty to second-degree murder of Brown and conspiracy to commit first-degree murder of Brown. Sergeant Alfonso testified at the evidentiary hearing that he did not promise Davis anything, nor did he threaten or coerce Davis to confess to the murder or implicate anyone else. Sergeant Alfonso further explained that the lead investigator did not threaten Davis, promise him anything, or coerce him to implicate Smith.

The trial court found Davis not to be credible at the evidentiary hearing and observed that Davis did not state that he would have testified at Smith's trial if asked to do so. The trial court concluded that even if Davis had testified at Smith's

trial,[12] Smith failed to establish that the result would have been different, reasoning that the trial testimony was "quite extensive" as to Smith arranging to have Brown killed. Consequently, the trial court denied relief based on this claim of newly discovered evidence.

Assuming arguendo that Smith satisfies the first prong of Jones, we conclude that Smith fails to meet the second prong of Jones. The postconviction evidence shows that Davis denied any involvement in the murder or conspiracy to murder Brown, and denied implicating Smith in the murder. Contrary to Davis's account, Sergeant Alfonso testified that Davis was not promised anything, threatened, or coerced to confess or implicate Smith in the murder. This alleged newly discovered evidence also tends to show that Walker disliked Davis and arguably had a motive to testify falsely at Smith's trial when he implicated Davis in Brown's murder. The trial court's finding that Davis was not credible is supported by competent, substantial evidence.[13]

At trial, the State's evidence of Smith's involvement in Brown's murder was strong. The evidence established that Smith desired to get rid of Brown, who was

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12. The trial court speculated that Davis would "probably" have refused to testify on Fifth Amendment grounds since charges were pending against him at the time.

13. As noted above, Davis pleaded guilty to second-degree murder and conspiracy to commit first-degree murder for the death of Brown.

the sole witness against Smith in the Dominique Johnson murder trial. Smith, 7 So. 3d at 485. Brown was murdered less than a week before that trial was scheduled to begin. Id. A copy of the police report relating to the Johnson case was located in the nightstand of Smith's bedroom. Id. at 487. Anthony Fail testified that he overheard Smith and his mother discuss how to kill a woman without shooting her. Id. at 486. Smith offered Fail money to kill Brown. Id. Smith told Fail that Brown "had to go," and that Smith put aside $20,000 to pay Davis for killing her. Id. Shortly before Brown was murdered, Herbert Daniels overheard Davis ask Smith what he wanted him to do about Brown. Id. Walker testified that Smith talked to him about Brown "snitching" on him, that Smith told him that Brown had to "come up dead for him to win his trial," and that he heard Smith telling Davis to either suffocate or strangle Brown because he did not want bullets, casings, or other evidence at the scene. Id. Moreover, the day following the dismissal of the Johnson case, Walker heard Smith say that the State could not hold him and that Davis "had handled his business." Id. at 487.

Additionally, Tricia Geter testified that Smith said that he was going to take Brown's life because she was trying to take his, that Smith asked her if she could obtain pure heroin that could be given to Brown to kill her, and that she saw Davis seeking payment from Smith after Brown was killed. Id. at 486-87. Finally, after

Brown's murder, Smith told Julian Mitchell that he had to have Brown killed in order to win his case. Id. at 487.

We conclude that the alleged newly discovered evidence is not of such nature that it would probably produce an acquittal on retrial. Accordingly, we affirm the trial court's denial of relief on this claim.

IV. Ineffective Assistance of Trial Counsel Claims

Smith argues that his trial counsel provided ineffective assistance relating to his speedy trial rights, in failing to object to the manslaughter jury instruction, in failing to request a Richardson hearing, in making certain opening statements, and in failing to object to the principal jury instruction in connection with the conspiracy counts.

Following the Supreme Court's decision in Strickland v. Washington, 466 U.S. 668 (1984), this Court explained that the following two factors must be established in order to prevail on ineffective assistance of counsel claims:

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Bolin v. State, 41 So. 3d 151, 155 (Fla. 2010) (quoting Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986)).

There is a strong presumption that trial counsel's performance was not deficient. See Strickland, 466 U.S. at 690. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." Id. In demonstrating prejudice, the defendant must show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

Because both prongs of the Strickland test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo. Shellito v. State, 121 So. 3d 445, 451 (Fla. 2013).

A. Speedy Trial

Smith argues that the trial court erred in summarily denying his claim that his trial counsel was ineffective in failing to preserve his speedy trial rights based on the failure to file a notice of expiration of the speedy trial period. We disagree.

An evidentiary hearing must be held on an initial 3.851 motion whenever the movant makes a facially sufficient claim that requires a factual determination. See Amendments to Fla. Rules of Crim. Pro. 3.851, 772 So. 2d 488, 491 n.2 (Fla. 2000). Because a court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review. See State v. Coney, 845 So. 2d 120, 137 (Fla. 2003).

The record reveals that Smith's trial counsel did in fact file a notice of expiration of time for speedy trial on September 23, 2004. Smith was properly brought to trial on October 4, 2004, which was within fifteen days of the notice of expiration. See State v. Salzero, 714 So. 2d 445, 447 (Fla. 1998) ("We hold that a violation of the five and ten-day periods provided in rule 3.191(p)(3) is harmless if a defendant is actually brought to trial within fifteen days of filing his notice of expiration."). Moreover, Smith failed to allege prejudice, i.e., that the State could not have brought him to trial within the recapture period under Florida Rule of

Criminal Procedure 3.191(p)(3). Based on the foregoing reasons, we affirm the summary denial of this claim.[14]

On October 5, 2012, Smith moved to amend his rule 3.851 motion, contending that trial counsel was ineffective in agreeing to toll the speedy trial clock without authorization and in misrepresenting Smith's position to the trial court. The record reveals that the State informed the trial court that the parties had agreed to a tolling of the speedy trial period, not a waiver, for sixty days, in order to resolve an alleged Interstate Agreement on Detainers Act violation raised in Smith's motion to dismiss. Defense counsel responded that the State's representation of the terms of the agreement was correct, except for its reference to sixty days. Defense counsel believed that the parties had agreed to a thirty-day tolling. The parties then compromised with forty-five days. Smith did not attend this hearing.

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14. Smith's reliance on Gee v. State, 13 So. 3d 68 (Fla. 1st DCA 2009), and Smith v. State, 988 So. 2d 693 (Fla. 2d DCA 2008), is misplaced. Unlike in the instant case, the defendant in Gee alleged that trial counsel failed to file a notice of expiration of speedy trial time, which was not refuted by the record, and included an allegation of prejudice. 13 So. 3d at 69. In Smith, the district court reversed the summary denial and remanded with instructions to strike the legally insufficient claim with leave to amend in light of the then-recent decision from this Court in Spera v. State, 971 So. 2d 754 (Fla. 2007). Smith, 988 So. 2d at 694. Spera does not afford Smith relief because the trial court found that Smith's motion was untimely, not that there was a pleading deficiency.

Defense counsel represented to the court that he spoke with Smith immediately preceding the hearing, that counsel explained to Smith "exactly what we are doing here today," and that Smith had no objection. While it appears that defense counsel informed Smith of a thirty-day tolling period, the fact that the compromised agreement reached in court was for forty-five days should be of no consequence since Smith told counsel that he had no objection to a tolling. Trial counsel is not required to obtain the defendant's consent to "every tactical decision." Florida v. Nixon, 543 U.S. 175, 187 (2004); see also Taylor v. Illinois, 484 U.S. 400, 417-18 (1988) (providing that an attorney has authority to manage most aspects of the defense without obtaining his client's approval). We conclude that even if Smith's amendment to his rule 3.851 motion was timely filed, we would find this claim contained therein to be without merit.

B. Manslaughter Jury Instruction

Smith contends that the trial court erred in denying his claim that his trial counsel was ineffective in allowing the jury instruction on manslaughter because the statute of limitations for the offense had run as to victims Leon Hadley and Melvin Lipscomb. Smith contends that the application of section 775.15(2)(b), which extended the statute of limitations for manslaughter, violated the Ex Post Facto Clause. We initially conclude that Smith's claim as it relates to the killing of Hadley is unpreserved and procedurally barred. See Doyle v. State, 526 So. 2d

909, 911 (Fla. 1988) (finding a claim procedurally barred because it was not presented to the trial court in the defendant's rule 3.850 motion and could not be raised for the first time on appeal).

Effective October 1, 1996, the Florida Legislature amended section 775.15 and provided that a prosecution for "a felony that resulted in a death" may be commenced at any time. Ch. 96–145, § 1, at 130, Laws of Fla. (1996). The Legislature stated that the amendment "shall apply to pending cases the prosecution of which has not been barred prior to this date." Id. § 2.

Because the manslaughter offenses as to Hadley and Lipscomb were not time-barred on October 1, 1996, the statute of limitations had not run for these offenses when Smith was indicted in December 2000. We reject Smith's contention of an Ex Post Facto Clause violation. Further, Smith was convicted of the first-degree murder of Hadley, and there is no statute of limitations for the crime of first-degree murder.[15] Thus, trial counsel cannot be deemed ineffective for failing to raise a nonmeritorious issue. See Johnson v. State, 903 So. 2d 888, 899 (Fla. 2005). Accordingly, we affirm the trial court's denial of relief.

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15. First-degree murder is a capital felony. § 782.04(1)(a), Fla. Stat. (1995). "A prosecution for a capital . . . felony may be commenced at any time." § 775.15(1), Fla. Stat. (1995). "[M]anslaughter as a lesser included offense is two steps removed from first-degree murder." State v. Montgomery, 39 So. 3d 252, 259 (Fla. 2010).

Smith additionally argues that the trial court erred in summarily denying his claim that his trial counsel was ineffective in failing to object to the manslaughter instruction on the ground that it violated our decision in State v. Montgomery, 39 So. 3d 252 (Fla. 2010). Smith raised this claim in his pro se motion to amend, but such motion was a nullity because Smith was represented by postconviction counsel at the time it was filed. See Logan v. State, 846 So. 2d 472, 476-78 (Fla. 2003); Davis v. State, 789 So. 2d 978, 981 (Fla. 2001).

Even if the motion was properly adopted by Smith's postconviction counsel, we find the claim has no merit. In Montgomery, we held that giving the standard jury instruction for the completed crime of manslaughter by act—which required the jury to find that the defendant intended to kill the victim—is fundamental error when the defendant is convicted of an offense not more than one step removed from manslaughter because the manslaughter statute does not require an intent to kill. 39 So. 3d at 259. Smith's manslaughter convictions became final before this Court decided Montgomery. Smith's contention that Montgomery is retroactive is a new basis for his claim, and therefore, it is not properly before this Court. See Griffin v. State, 866 So. 2d 1, 11 n.5 (Fla. 2003) ("On appeal, Griffin alleges a new basis for his claim of judicial bias. . . . However, this new claim is not properly before this Court."). Moreover, we have repeatedly held that trial counsel cannot be deemed ineffective for failing to anticipate changes in the law or jury

instructions. See Walton v. State, 847 So. 2d 438, 445 (Fla. 2003). Finally, we reject Smith's conclusory assertion that the manslaughter instruction affected his murder convictions.

C. Richardson Hearing

Smith also asserts that his trial counsel was ineffective for failing to request a Richardson hearing involving State witness Carlos Walker's trial testimony. Finding it to be procedurally barred, the trial court summarily denied this claim.

On direct appeal, we addressed Smith's claim that the trial court erred in not conducting a Richardson inquiry when Walker testified inconsistently with his deposition. Smith, 7 So. 3d at 504-07. We determined that the preserved claim—that the State called Walker to testify without informing the defense that he had lied in his deposition—was adequate to inform the trial court that a discovery violation had occurred and prompt an inquiry into the circumstances and whether the defense was prejudiced. Id. at 506. We concluded that the State committed a discovery violation by failing to disclose to the defense a material change in Walker's deposition, as he had mentioned to the State before trial that he would implicate Smith in the murders at trial. Id. However, we concluded that the defense was not procedurally prejudiced by the violation and that the error was harmless. Id. at 507.

Having previously addressed the Richardson claim relating to Walker's testimony, we affirm the trial court's rejection of this claim. See Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995) ("[A]llegations of ineffective assistance cannot be used to circumvent the rule that post-conviction proceedings cannot serve as a second appeal.") (quoting Medina v. State, 573 So. 2d 293, 295 (Fla. 1990)).[16]

D. Opening Statements

Smith contended in his rule 3.851 motion that his trial counsel was ineffective during opening statements by explaining that the evidence at trial would show that Cynthia Brown died of a drug overdose, which was inconsistent with the medical examiner's testimony, and by failing to argue that Brown died from sexual asphyxia.[17] In his amendment to his rule 3.851 motion, Smith maintained that trial counsel was ineffective in pursuing the alternative causes of death theories relating to Brown's death. Smith explained that during opening statements, his trial counsel stated that Brown simply died of a drug overdose, which would be refuted by the medical examiner's testimony. Smith also alleged that his trial counsel first

16. We reject Smith's argument that an incorrect standard on direct appeal was employed by this Court. We also note that the Supreme Court's decision in Delaware v. Van Arsdall, 475 U.S. 673 (1986), which Smith relies on, does not involve a Richardson matter.

17. The trial court summarily denied Smith's additional claim that his trial counsel was ineffective in failing to hire a defense expert. Smith does not appeal this ruling.

mentioned autoerotic asphyxiation during the cross-examination of the medical examiner, but the defense was without any factual basis. The trial court found the claim legally insufficient because Smith failed to allege that an expert would have testified that Brown died from a drug overdose or sexual asphyxia.

The record reflects that trial counsel stated during opening statements that there was foam coming out of Brown's mouth—consistent with a drug overdose. Trial counsel told the jury that the evidence would show that Brown was not murdered; rather, that she died simply from a drug overdose. The jury heard evidence that Brown died from asphyxia after being smothered by a pillow. Smith, 7 So. 3d at 485. Brown's manner of death was ruled a homicide, and she did not die from a drug overdose. Although there was evidence of cocaine and alcohol found in Brown's body at the time of her death, such levels were not life-threatening, according to medical examiner Dr. Emma Lew and the forensic toxicologist. Id.

Defense counsel asked Dr. Lew on cross-examination if it was possible that Brown could have suffered a heart attack after having sex and using cocaine. Id. at 499. Dr. Lew answered that it was possible and consistent with the evidence. Id. Dr. Lew responded in the affirmative to the defense counsel's question of whether any level of cocaine could kill a person. Smith's counsel also asked Dr. Lew if it was possible that Brown died from asphyxiation while having sex with her face in

a pillow. Id. Dr. Lew was asked to explain autoerotic asphyxia. Id. at 485. The State's objection was sustained, with the trial court ruling that the defense could ask Dr. Lew if autoerotic asphyxia applied in this particular case, but that the defense would have to call its own expert to explain the term asphyxia. Id. Dr. Lew opined that it was possible—although unlikely—that Brown died during a sex act. Id. Defense counsel never called Dr. Lew or any other expert as a defense witness to testify about autoerotic asphyxiation. Id. at 500. We observed on direct appeal "that defense counsel was able to extensively question Dr. Lew about the cause of Brown's death. Through his questioning, counsel was also able to call into question the manner of death as homicide. He was able to explore his death during sex scenario fairly extensively." Id.

Even if Smith's amendment to his rule 3.851 motion was filed timely, we conclude that Smith has failed to demonstrate that his trial counsel was deficient during opening statements. We note that defense counsel was able to elicit some evidence supporting the opening statement that Brown was not murdered. Trial counsel asked Dr. Lew "if it was possible that Brown could have had a heart attack after having sex and using cocaine and the other person staged her body when he realized she was dead. Dr. Lew stated it was possible and was consistent with the evidence." Id. at 499. In addition, on direct-examination, Dr. Lew described white

foam material coming out of the corner of Brown's mouth. Accordingly, we affirm the denial of relief on this claim.[18]

E. Principal Jury Instruction

Smith further contends that the trial court erred in summarily denying his claim that his trial counsel was ineffective in failing to object to the principal jury instruction in connection with the conspiracy counts brought against him. Because Smith raised this claim in his pro se motion to amend, which he filed while he was represented by postconviction counsel, the pro se motion was a nullity. See Logan, 846 So. 2d at 476-78; Davis, 789 So. 2d at 981. Furthermore, this claim consisted of merely a conclusory allegation; Smith failed to allege how the outcome would have been different had trial counsel objected to the principal jury instruction. See

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18. Robinson v. State, 702 So. 2d 213 (Fla. 1997), does not afford Smith relief. Robinson was "an extremely unusual case," involving a questionable relationship between the trial judge—who was indicted with incidents of bribery during the trial—and the defense counsel, who failed to adequately prepare for trial. Id. at 214, 217. After failing to present any evidence supporting his opening statement, defense counsel argued during closing arguments that he had lied to the jury in order to shock them to get their attention and question the State's case. Id. at 215-16. The defendant's trial counsel was disciplined for his conduct at the trial relating to his opening statement and closing arguments. Id. at 216. Defense counsel put on almost no evidence in mitigation and improperly accepted money from his client's family. Id. at 217. We reversed the defendant's convictions and sentences and ordered a new trial "to maintain the integrity and credibility of the judicial process." Id. at 214, 217. This Court noted that "[w]hile any one of these circumstances taken alone might be insufficient to warrant a new trial or be considered harmless error, when considering these factors combined we cannot conclude that [the defendant] received a fair and impartial trial." Id. at 217.

Jones v. State, 998 So. 2d 573, 584 (Fla. 2008) ("A mere conclusory allegation that the outcome would have been different is insufficient to state a claim of prejudice under Strickland; the defendant must demonstrate how, if counsel had acted otherwise, a reasonable probability exists that the outcome would have been different . . . .").[19] Accordingly, we affirm the summary denial of this claim.

Based on the foregoing, we affirm the trial court's decision to deny the various ineffective assistance of counsel claims raised by Smith.

V. Claim of Secret Files

Smith contends that the trial court erred in not requiring the State to disclose any cooperating witnesses' files that had been illegally made secret. Smith concedes that his rule 3.851 motion failed to include specific instances of hidden files and that he has no way of knowing whether his case has been impacted, but nonetheless argues that the State must have the burden to reveal the existence of all secret dockets.

We conclude that this claim was insufficiently pled and speculative. See Rodriguez v. State, 39 So. 3d 275, 290-91 (Fla. 2010) (denying, as speculative, the defendant's claim seeking the disclosure of secret dockets because the defendant

19. We reject Smith's reliance on Evans v. State, 985 So. 2d 1105 (Fla. 3d DCA 2007), and McKay v. State, 988 So. 2d 51 (Fla. 3d DCA 2008), which involved the granting of relief due to the ineffective assistance of appellate counsel.

failed to present any evidence that a secret docket existed); Maharaj v. State, 778 So. 2d 944, 951 (Fla. 2000) ("Postconviction relief cannot be based on speculation or possibility."). To the extent that Smith contends that the burden of proof for Brady[20] claims should shift to the State, we reject this assertion. See Franqui v. State, 59 So. 3d 82, 101 (Fla. 2011). Accordingly, we affirm the trial court's denial of this claim.

VI. The Tricia Geter Tapes

Smith contends that the trial court erred in summarily denying his Brady claim in postconviction as to the alleged concealment of the Tricia Geter tapes. After appealing his convictions and sentences of death, Smith claimed—in an amended motion for a new trial—that the State recorded a series of telephone calls between him, Geter, and Latravis Gallashaw consisting of thirty-nine tapes. Smith represented that it was not until after his trial concluded when the defense became aware of the recorded telephone calls. The defense claimed that the recorded calls could have been used at trial to cross-examine Geter. The trial court did not rule on the amended motion for a new trial.

In summarily denying this claim, the trial court found that Smith failed to state any impeachment that could have been used at trial and that "[m]ere allegory [sic] conclusions are not grounds for postconviction relief." We conclude that

20. Brady v. Maryland, 373 U.S. 83 (1963).

Smith's claim is facially insufficient because he failed to allege that had the tapes been disclosed to the defense at trial there is "a reasonable probability that . . . the result of the proceeding would have been different." See Guzman v. State, 868 So. 2d 498, 506 (Fla. 2003) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). Accordingly, we affirm the trial court's denial of relief on this claim.

VII. The ABA Report

Smith contends that the trial court erred in summarily denying his claims relating to a 2006 ABA report which, according to Smith, found Florida's death penalty system unconstitutional. During the pendency of Smith's case, the United States Supreme Court found Florida's death penalty scheme unconstitutional in Hurst v. Florida, 136 S. Ct. 616 (2016), as an extension of Ring v. Arizona, 536 U.S. 584 (2002). We have interpreted Hurst v. Florida to require a jury to unanimously find each aggravating factor, that the aggravating factors are sufficient to warrant death, and that the aggravating factors outweigh the mitigation. See Hurst v. State, 202 So. 3d 40, 57 (Fla. 2016), petition for cert filed, No. 16-998 (U.S. Feb. 16, 2017). We have also determined that most defendants sentenced to death after the Ring decision should receive the benefit of Hurst. See Mosley v. State, 41 Fla. L. Weekly S640, S641 (Fla. Dec. 22, 2016). Smith, whose sentence became final in 2009, is one such defendant.

Because Hurst applies to Smith, we must consider whether it is clear beyond a reasonable doubt that a rational jury would have unanimously found all the facts necessary for imposition of death and unanimously recommended death, such that any Hurst error is harmless. See Mosley, 41 Fla. L. Weekly at S641. In this case, the jury's recommendations of death were not unanimous, and the jury made no findings concerning the aggravating and mitigating circumstances. The jury recommended death for the Brown murder by a vote of ten to two and for the Wilson murder by a vote of nine to three. Therefore, we cannot conclude that the error in Smith's penalty phase was harmless beyond a reasonable doubt. Accordingly, Smith is entitled to a new penalty phase.

VIII. Lethal Injection Protocol

Smith argues that the trial court erred in summarily denying his claim that the lethal injection protocol violates the Eight Amendment to the United States Constitution.[21] We have consistently held that the current lethal injection protocol in Florida is not unconstitutional. See Davis v. State, 142 So. 3d 867, 871-73 (Fla. 2014); Henry v. State, 134 So. 3d 938, 946-49 (Fla. 2014); Muhammad v. State, 132 So. 3d 176, 196 (Fla. 2013) ("[W]e reject his constitutional challenge to the use of midazolam hydrochloride in the lethal injection procedure."), cert. denied,

21. Smith further seeks to reserve the right to challenge the constitutionality of the protocol when his death warrant is issued.

134 S. Ct. 894 (2014). Moreover, the United States Supreme Court recently upheld the constitutionality of the use of midazolam in executions under Oklahoma's three-drug lethal injection protocol. Glossip v. Gross, 135 S. Ct. 2726 (2015). We therefore affirm the trial court's denial of postconviction relief on this issue.

HABEAS PETITION

In his petition for a writ of habeas corpus and supplement thereto, Smith claims that his counsel on direct appeal was ineffective by failing to: (1) appeal the denial of the severance of his counts; (2) challenge the standard jury instruction regarding the role of the jury in the penalty phase; (3) challenge the protocol for lethal injection; (4) challenge the manslaughter jury instruction; and (5) raise a claim of double jeopardy.

Claims of ineffective assistance of appellate counsel are properly presented in a petition for a writ of habeas corpus. Wickham v. State, 124 So. 3d 841, 863 (Fla. 2013). "The standard of review for ineffective appellate counsel claims mirrors the Strickland standard for ineffective assistance of trial counsel." Id. Specifically, to be entitled to habeas relief on the basis of ineffective assistance of appellate counsel, the defendant must establish:

> [First, that] the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, [that] the deficiency in performance compromised the

> appellate process to such a degree as to undermine confidence in the correctness of the result.

Bradley v. State, 33 So. 3d 664, 684 (Fla. 2010) (quoting Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986)).

I. Severance

Smith claims that his appellate counsel was ineffective in failing to claim that the trial court should have severed the counts of (1) conspiracy to murder Jackie Pope; (2) murder of Jackie Pope; and (3) murder of Kevin Smalls. Smith moved to sever these counts, claiming that the crimes were not committed in furtherance of the conspiracy. Because Smith did not pursue his motion to sever, his claim was not preserved for appeal. See Richardson, 437 So. 2d at 1094. "Appellate counsel is not ineffective for failing to raise issues not preserved for appeal." Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995).

Smith was convicted of the first-degree murder of Pope and conspiracy to commit Pope's murder.[22] Even if preserved at trial, a claim on appeal that the trial court erred in failing to sever out the Pope counts would have been without any merit. The indictment covered crimes committed in connection with the John Doe enterprise based on its activity occurring from July 1994 through January 1999. Smith ordered the shooting of Pope, who was a John Doe "watchout." Smith, 7

22. Smith was not convicted of murdering Smalls in this case.

So. 3d at 484. In March 1998, Pope's murder was carried out by John Doe "hitmen" because Pope had implicated another member of the organization in a shooting from a drug hole location. Id. at 484-85.

We conclude that the counts at issue were "connected acts or transactions" to the RICO conspiracy. See Fla. R. Crim. P. 3.150(a). The counts are "considered in an episodic sense," and there was a " 'meaningful relationship' between or among the charges" as "the crimes in question [are] linked in some significant way." Lugo v. State, 845 So. 2d 74, 93 (Fla. 2003) (quoting Garcia v. State, 568 So. 2d 896, 899 (Fla. 1990); Ellis v. State, 622 So. 2d 991, 999-1000 (Fla. 1993)). Because the counts were linked, the trial court did not err in failing to grant the motion to sever. See id. Therefore, appellate counsel cannot be ineffective for failing to raise a nonmeritorious issue. Accordingly, we deny this habeas claim.

II. Role of the Penalty Phase Jury

In this habeas petition, Smith also contends that his counsel on direct appeal was ineffective in failing to challenge the standard jury instruction regarding the role of the jury in the penalty phase. Because Smith is entitled to a new penalty phase under Hurst, we do not address this claim.

III. Lethal Injection Protocol

Smith next asserts that his appellate counsel was ineffective in failing to challenge the lethal injection protocol. Smith fails to explain in his habeas petition how the protocol is unconstitutional. We conclude that Smith's claim lacks merit. See Glossip, 135 S. Ct. at 2726; Muhammad, 132 So. 3d at 197. Accordingly, we deny this habeas claim.

IV. Manslaughter Jury Instruction

Smith asserts that his appellate counsel was also ineffective in failing to challenge the jury instruction on manslaughter. We decided Montgomery, however, in April 2010, which was several months after we affirmed Smith's direct appeal of his convictions and sentences. Appellate counsel cannot be deemed ineffective for failing to anticipate the change in law. See Nelms v. State, 596 So. 2d 441, 442 (Fla. 1992).

Smith also relies on the First District's decision in Montgomery v. State, 70 So. 3d 603, 604 (Fla. 1st DCA 2009), approved, 39 So. 3d 252 (Fla. 2010). Because trial counsel for Smith did not object to the manslaughter instruction, appellate counsel would have been required to demonstrate fundamental error. See Daniels v. State, 121 So. 3d 409, 417 (Fla. 2013). "Failing to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error." Id. at 417-18 (quoting Garzon v. State, 980 So. 2d 1038, 1042 (Fla. 2008)). Here, Smith has failed to allege that the intent element was in

dispute. Because we find that this claim would have lacked merit had it been raised by appellate counsel, we conclude that Smith has failed to demonstrate that his appellate counsel was ineffective in this regard. Accordingly, we deny this habeas claim.[23]

V. Double Jeopardy Claim

In a supplement to his habeas petition, Smith lastly claims that his appellate counsel was ineffective for failing to argue that his conviction for RICO conspiracy—along with his separately charged conspiracies—violated his double jeopardy rights.[24] We find that this issue was insufficiently pled. The defendant makes the conclusory allegation of double jeopardy and cites to the Second District Court of Appeal's opinion in Rios v. State, 19 So. 3d 1004 (Fla. 2d DCA 2009), to support his claim. However, the argument fails to demonstrate how in this case the multiple conspiracy counts violated his rights. Therefore, we deny habeas relief on this claim.

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23. To the extent that Smith contends that his appellate counsel was ineffective for failing to challenge the principal jury instruction on the conspiracy charges, we conclude that the claim is facially insufficient. See Conahan v. State, 118 So. 3d 718, 734 (Fla. 2013) ("A habeas petition must plead specific facts that entitle the defendant to relief. Conclusory allegations have repeatedly been held insufficient by this Court because they do not permit the court to examine the specific allegations against the record.").

24. The defendant filed a motion to dismiss various counts of the indictment, but no ruling on the motion was sought in the trial court.

CONCLUSION

In light of the foregoing, we affirm the trial court's denial of postconviction relief as to all claims except Smith's claim related to the constitutionality of Florida's death penalty scheme, and we deny habeas relief. We vacate Smith's death sentence as unconstitutional under Hurst and remand to the trial court for a new penalty phase.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
POLSTON, J., concurs in part and dissents in part with an opinion, in which CANADY, J., concurs.
LAWSON, J., did not participate.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

POLSTON, J., concurring in part and dissenting in part.

I concur with the majority's decision except its vacating of the death sentence pursuant to Hurst.

CANADY, J., concurs.

An Appeal from the Circuit Court in and for Miami-Dade County,
Bertila Ana Soto, Judge - Case No. 132000CF040026A000XX
And an Original Proceeding – Habeas Corpus

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for Appellee/Respondent

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Attachment II

Supreme Court of Florida

No. SC14-878

WILLIE JAMES HODGES,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[March 16, 2017]

PER CURIAM.

Willie James Hodges appeals an order denying his motion to vacate a judgment of conviction of first-degree murder and a sentence of death under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons expressed below, we affirm the postconviction court's order as to Hodges's conviction but vacate the death sentence and remand for a new penalty phase.

I. BACKGROUND

Hodges was convicted of first-degree murder and sentenced to death. On appeal, we affirmed the conviction and the death sentence. Hodges v. State, 55 So.

3d 515, 519 (Fla. 2010). The evidence showed that the victim was bludgeoned and stabbed in her home. Id. Her relatives came to the home while the intruder was still inside. Id. The relatives heard window glass breaking, and one of them saw the intruder run away and scale a fence into a neighbor's yard. Id. A claw hammer and a braided brown leather belt were found by the body. Id. at 520. The victim's purse was missing. Id. at 519. Some photographs and a knife with a black plastic handle were found on the ground outside the broken window. Id. at 520. The hammer and the knife were the probable murder weapons. Id. Police used a canine to track the suspect's path of escape. Id. at 519. Along the path they found a jacket, two shoes, and two white socks. Id. The victim's daughter testified that the jacket looked like the one she had seen on the fleeing intruder. Id. at 520. A witness who was married to Hodges's niece testified that he had previously seen Hodges wearing the jacket and shoes that were admitted into evidence. Id. Another witness testified that Hodges owned a braided leather belt and carried a knife with a black handle and identified the items in evidence as similar. Id. Another witness testified that some of the photographs found outside the victim's window were photographs that she had mailed to Hodges, and she identified her handwriting on the back of one of the photos. Id. The parties also stipulated that Hodges's writing was on another one of the photos, and Hodges's fingerprints were on two of the photos. Id.

A DNA profile developed from blood on one of the socks was compared to Hodges's DNA profile and was found to match on all thirteen available markers, with a random match probability of one in 990 quadrillion. Id at 521. Analysis conducted on mitochondrial DNA collected from a hair found on the victim's clothing and a hair found on the jacket did not exclude Hodges as the donor but would exclude 99.88 percent of randomly selected individuals. Id. Male DNA detected in material from an anal swab of the victim matched Hodges's DNA profile on the six available markers and would exclude 96 percent of the male population. Id. Material from the other sock yielded two separate partial DNA profiles that were consistent with Hodges's DNA but would exclude 99.92 and 99.9 percent of the male population, respectively, and all of the female population. Id. There was also testimony that Hodges admitted his guilt to a cellmate and to the daughter of a woman he had dated. Id. at 522.

Evidence of a collateral murder was admitted under the Williams[1] rule. Id. at 521. The evidence included DNA from sperm cells detected on a vaginal swab, which matched Hodges's DNA profile on five markers. Id. A separate sample of epithelial cells from the swab matched his profile on seven markers. Id. at 521-22. There was also evidence that a bruise on the body of the victim of the collateral

1. See Williams v. State, 110 So. 2d 654 (Fla. 1959).

murder was probably a bite mark, and a forensic dentist testified that the mark was consistent with Hodges's teeth. Id. at 522.

The jury recommended a sentence of death by a vote of ten to two. Id. at 525. The trial court found five aggravating circumstances were proven beyond a reasonable doubt: (1) the defendant was under sentence of imprisonment at the time of the murder; (2) the defendant had previously been convicted of a felony involving violence; (3) the murder was committed while the defendant was engaged in the commission of or an attempt to commit sexual battery; (4) the murder was committed for pecuniary gain; and (5) the murder was especially heinous, atrocious, or cruel. Id. at 542. The court found the following statutory mitigating circumstances: (1) at the time of the murder the defendant was under the influence of an extreme mental or emotional disturbance; (2) the capacity of the defendant to conform his conduct to the requirements of the law was substantially impaired; and (3) the age of the defendant at the time of the crime. Id. The court also found numerous nonstatutory mitigating circumstances having to do with Hodges's low intelligence, difficult upbringing and background, mental and emotional problems, and similar or related matters. Id.

In his direct appeal to this Court, Hodges argued: (1) that the trial court should have allowed the jury to determine the issue of mental retardation; (2) that the trial court erred in finding he was not mentally retarded; (3) that the trial court

erred in ruling that the State could discuss the collateral crime evidence in its rebuttal argument; (4) that the trial court allowed the collateral crime evidence to become a feature of the trial; (5) that the trial court erred in refusing to allow Hodges to waive a penalty-phase jury; and (6) that the death sentence was impermissible under Ring v. Arizona, 536 U.S. 584 (2002). Id. at 526. We rejected all of Hodges's arguments, concluded that the evidence was sufficient to support the verdict and the death sentence was proportionate, and we affirmed the conviction and sentence. Hodges filed a petition for certiorari in the United States Supreme Court, which was denied. Hodges v. Florida, 565 U.S. 846 (2011).

In his motion for postconviction relief, Hodges raised the following claims: (1) trial counsel was ineffective in failing to retain a DNA and statistics expert to help counsel challenge the admissibility of the State's DNA and statistics evidence and cross-examine the State's experts; (2) counsel was ineffective in cross-examining the State's scientific experts regarding their statistical calculations and in failing to present expert testimony to rebut the State's scientific evidence; (3) counsel was ineffective in failing to consult an expert and to object to testimony about DNA from the body of the collateral crime victim on the ground that the testing and analysis did not comply with applicable standards for accuracy and reliability; (4) counsel was ineffective in failing to present the testimony of Hodges, who would have testified that the personal belongings linking him to the

crime scene were stolen from him prior to the murder; (5) counsel was ineffective in failing to cross-examine the State's witnesses who identified the jacket and shoes linking Hodges to the crime scene on their inability to identify the items as the specific items they had seen before; (6) counsel was ineffective in failing to obtain telephone service records to impeach the testimony of a witness who testified that Hodges confessed to her in a telephone conversation; (7) counsel was ineffective in calling a witness whose testimony had the effect of identifying Hodges as the likely perpetrator; (8) counsel was ineffective in failing to rebut the testimony of a forensic dentist who testified about the identification of Hodges from the bite-mark evidence in the collateral crime case; (9) counsel was ineffective in cross-examining a crime scene investigator because the questioning brought out improper and unfavorable opinion testimony about possible or likely events relative to the murder; (10) counsel was ineffective in advising Hodges regarding the impeachment he would face if he testified; (11) counsel was ineffective in failing to object to the trial court's failure to state reasons for denying Hodges's request to waive a penalty-phase jury; and (12) Florida's death penalty statute is unconstitutional.

The trial court held evidentiary hearings on claims 1 through 10, Hodges abandoned claim 11, and the trial court denied claim 12. As to the remaining claims of ineffective assistance of counsel, the trial court ruled that Hodges failed

to establish that counsel's performance was deficient and even if it was, there is no reasonable probability that but for counsel's deficiency, the result of the proceeding would have been different.

II. ANALYSIS

On appeal from the denial of his motion for postconviction relief, Hodges raises the following claims: (1) trial counsel was ineffective in failing to consult experts to assist him to prepare to challenge the State's DNA and bite-mark evidence, cross-examine the State's experts, and present evidence to rebut the State's scientific evidence; (2) trial counsel rendered ineffective assistance by failing to present Hodges as a witness at trial; (3) trial counsel provided ineffective assistance by calling a witness who gave testimony that incriminated Hodges; (4) trial counsel rendered ineffective assistance in failing to obtain telephone records to impeach the testimony of a witness who testified that Hodges confessed his guilt in a telephone conversation; (5) trial counsel was ineffective in failing to cross-examine witnesses who identified articles of clothing linked to Hodges; and (6) trial counsel was ineffective in cross-examining a crime scene technician in a way that brought out testimony that was harmful to the defense.

A defendant challenging a conviction on the ground of ineffective assistance of counsel has the burden of showing that counsel was deficient and that the deficiency prejudiced the defense. See Strickland v. Washington, 466 U.S. 668,

687 (1984); Bolin v. State, 41 So. 3d 151, 155 (Fla. 2010). To establish deficiency, the claimant must show a specific act or omission that falls below an objective standard of reasonableness under prevailing professional norms. See Foster v. State, 132 So. 3d 40, 52 (Fla. 2013); Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). To establish prejudice under Strickland, "the defendant must demonstrate that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " Hoskins v. State, 75 So. 3d 250, 254 (Fla. 2011) (quoting Strickland, 466 U.S. at 694). This standard does not require that a defendant 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, 44 (2009) (alteration in original) (quoting Strickland, 466 U.S. at 693-94).

"Because both prongs of the Strickland test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the trial court's factual findings that are supported by competent, substantial evidence, but reviewing the trial court's legal conclusions de novo." Pagan v. State, 29 So. 3d 938, 949 (Fla. 2009); see also Johnston v. State, 63 So. 3d 730, 737 (Fla. 2011); Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004). "[W]hen a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has

made a showing as to the other prong." Mungin v. State, 932 So. 2d 986, 996 (Fla. 2006) (alteration in original) (quoting Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001)).

"There is a strong presumption that trial counsel's performance was not ineffective." Pagan, 29 So. 3d at 949. "A fair assessment of attorney performance requires" that courts "evaluate the conduct from counsel's perspective at the time" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689.

Claim 1

Hodges asserts that trial counsel was ineffective in failing to consult experts and present expert testimony regarding the State's scientific evidence of DNA and bite-mark analysis. He argues that such experts could have helped him to prepare to challenge the State's evidence, cross-examine the State's experts, and develop and present rebuttal evidence and argument.

At the evidentiary hearing, Hodges presented the testimony of Dr. Kevin Noppinger, an expert in DNA analysis. Dr. Noppinger testified that in their analyses, the State's experts arrived at random match probabilities using the "inclusion principle," but at trial, Dr. Martin Tracey, a population geneticist testifying as an expert witness for the State, improperly relied upon the "exclusion principle" in his random match probability testimony. The "inclusion principle"

expresses the probability of a random match in positive or inclusionary terms, while the "exclusion principle" gives the probability of excluding the random match. Dr. Noppinger testified that under prevailing scientific standards, expressing the random match probability statistics using the exclusion principle is not scientifically accepted and the inclusion principle is the preferred method of presenting match probability statistics. In Dr. Noppinger's opinion, expressing random match probability statistics using the exclusion principle can be misleading because it can make the probability of a random match seem smaller than it actually is. Hodges argues that trial counsel's failure to object or cross-examine Dr. Tracey when he testified about random match probabilities using the exclusion principle can be attributed to counsel's failure to retain a DNA expert to help him prepare for trial. Dr. Noppinger also testified that the other DNA testimony presented at trial did not conform to the applicable standards and on this basis, Hodges argues that counsel should have used available scientific expertise to challenge the accuracy and reliability of the State's testing, lab reports, and expert testimony.

There are two components of DNA analysis and both must be provided to the trier of fact in order for DNA evidence to have probative value: (1) an examination of the biological material in evidence in comparison with a known DNA sample; and (2) statistical analysis to determine the probability of matching

the tested material to random individuals in the general population or specified subgroups. "The first step uses principles of molecular biology and chemistry to determine that two DNA samples look alike. The second step uses statistics to estimate the frequency of the profile in the population." Butler v. State, 842 So. 2d 817, 827 (Fla. 2003); see also Brim v. State, 695 So. 2d 268, 271 (Fla. 1997) ("It is important to recognize, though, that DNA testing is a two-step process. The fact that a match is found in the first step of the DNA testing process may be 'meaningless' without qualitative or quantitative estimates demonstrating the significance of the match."). Hodges contends that the State's expert witnesses testified that their analyses discovered "matches" with Hodges's DNA without providing the necessary random match probability statistics and that trial counsel failed to object because he had not consulted his own DNA expert and therefore had not informed himself about the applicable standards for presenting DNA evidence. However, at Hodges's trial, the State chose to have its laboratory analysts present the biological features of their test results first and then present Dr. Tracey to testify as to the statistical analyses applicable to all the DNA testing. All the DNA tests presented at trial were accompanied by statistical analyses provided separately by Dr. Tracey.[2]

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2. The only exception was the DNA test of the swab from the bite mark on the victim of the collateral murder. The expert only found one marker, which did not exclude Hodges, but the analyst considered the finding to be of little

In the order denying postconviction relief, the trial court discussed Dr. Noppinger's criticisms of the State's scientific experts who testified at trial. The court found that State expert Melton, who performed the mitochondrial DNA analysis on the cuttings from one of the socks as well as the hairs from the jacket and the victim's jeans, had statistical calculations on some but not all of the tested samples in her written report but did not testify about statistics. Melton testified that the mixed DNA sample obtained from the sock was difficult to analyze and she could say only that Hodges could not be excluded as the source. Dr. Noppinger acknowledged that Melton had valid statistical calculations in her report for the samples derived from the hairs.

State expert Hatler performed DNA analysis on other sock cuttings. Based on three markers from the top of the sock and four markers from the heel and toe, she developed partial profiles that were consistent with Hodges's DNA. Dr. Noppinger found fault with the fact that Hatler provided no statistical calculations in her testimony, but he conceded that her written report included the calculations.

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significance and therefore did not include the test result in her written report, and the testing was apparently not reviewed by another analyst in accordance with standard procedures. However, as we discuss below, there is no reasonable probability that an objection by trial counsel on this basis would have made a difference to the outcome.

State expert Johnson performed DNA testing on the anal swab from the body of the victim of the instant murder, the vaginal swab from the victim of the collateral murder, and the swab from the bite mark on the collateral murder victim. Dr. Noppinger said that Johnson's testing of the bite-mark swab was not properly reported in writing and was not reviewed by a second analyst as required by national standards. The trial court found that the anal swab sample was analyzed on six markers, all of which matched Hodges. As for the vaginal swab from the collateral crime victim, the sperm fraction matched Hodges on five markers and the epithelial cells on seven markers. Johnson's written report included frequency calculations for these test results.

State expert Zuleger tested the blood found on one of the socks and developed a profile consisting of thirteen markers, all of which matched Hodges.

Dr. Noppinger did not say there were any errors, fallacies, or miscalculations in any of the experts' laboratory testing or statistical calculations. As the trial court found, Dr. Noppinger could not say that the experts' descriptions of their results as "matching" Hodges was improper. The analysts who conducted the laboratory tests did not testify about their frequency calculations—even though they included such calculations in their written reports for some of their tests—because the State chose to have all of the probability statistics presented by its statistical expert, Dr. Tracey.

Dr. Noppinger found fault with Dr. Tracey's testimony because Dr. Tracey expressed the statistical calculations in terms of exclusion rather than inclusion, which, in Dr. Noppinger's view, can be misleading. However, Dr. Noppinger conceded that neither method is more accurate than the other. Hodges has not directed us to any authority that directly supports the argument that testimony such as Dr. Tracey's is considered misleading according to a consensus of scientific opinion.

Even though the State's DNA analysts did not initially testify about random match probability statistics, trial counsel cross-examined them based on the statistics in their written reports. And although Dr. Tracey testified in terms of exclusion on direct examination, he acknowledged several of the random match probabilities in inclusive terms on cross-examination.

At the evidentiary hearing, trial counsel admitted that his understanding of DNA evidence principles was crude. Nevertheless, the trial court found that the DNA evidence did not go unchallenged and that counsel's performance was not deficient.

Hodges presented Dr. Daniel Spitz, a forensic pathologist, to testify at the evidentiary hearing regarding the bite mark. Dr. Spitz testified that the bite-mark identification evidence presented at trial did not provide a definitive match to Hodges and that bite-mark identification evidence in general is regarded as highly

questionable by the scientific community. On this basis, Hodges argues that trial counsel should have retained a bite-mark expert, learned about the current status of bite-mark evidence, and been prepared to challenge the admissibility and reliability of the bite-mark evidence. The trial court found that while trial counsel did not challenge the admissibility of the bite-mark identification testimony, he did not allow the testimony to go unchallenged. On cross-examination, trial counsel brought out that the witness had prepared no written report, that the number of marks available for comparison was limited, and that diffusion had affected all the points of comparison. The trial court found that trial counsel's performance was not deficient because at the time of the trial, bite-mark identification evidence was considered admissible, see, e.g., Mitchell v. State, 527 So. 2d 179, 181 (Fla. 1988), and that even if the law has changed based on current scientific opinion, an attorney's performance cannot be found deficient for failing to anticipate a change in the law. Walton v. State, 847 So. 2d 438, 445 (Fla. 2003).

As authority for his claim that trial counsel was deficient in failing to consult experts to challenge the State's DNA evidence, Hodges cites State v. Fitzpatrick, 118 So. 3d 737 (Fla. 2013). In Fitzpatrick, trial counsel failed to prepare any challenge to the State's scientific evidence as to the timing of sexual activity in relation to the time of the victim's death, which allowed the State to present an unsound but unrebutted theory of the defendant's guilt of murder. The present

case is different because if counsel had raised the kinds of challenges Hodges claims he should have raised, it would not have undermined the State's case to any significant extent. Counsel admitted that his understanding of DNA evidence was rudimentary, but based on his experience in criminal trials, he thought there was little to be gained by challenging the DNA evidence. He made a strategic decision based on consideration of alternative courses of action. See, e.g., Crain v. State, 78 So. 3d 1025, 1037 (Fla. 2011). Where consulting an expert "would not have changed the statistical numbers in any way," trial counsel's tactic of bringing out the limitations of the expert testimony through cross-examination is reasonably effective representation. Reed v. State, 875 So. 2d 415, 425 (Fla. 2004).

The trial court found that while trial counsel could have done more to challenge the DNA evidence, in light of the defense strategy to concede that the tested items belonged to Hodges, trial counsel's actions were reasonable. Where the defense strategy is such that identification by DNA evidence is not of central importance, a trial court's conclusion that such a tactical decision by counsel was not deficient performance has been upheld. See McDonald v. State, 952 So. 2d 484, 495 (Fla. 2006).

The DNA from the swab of the bite mark did not play a significant role in the trial. The analyst testified that she was able to extract only one marker, which was of extremely limited use in comparison to the known sample. The witness

said only that Hodges could not be excluded as the contributor. Thus, there is no reasonable probability that trial counsel's failure to cross-examine the witness on the lack of probability statistics or the lack of peer review in the laboratory testing process affected the outcome of the trial. Even if trial counsel could have done more to challenge the testimony concerning DNA testing on the swab from the site of the bite mark on the collateral crime victim, we affirm the denial of relief on this point because Hodges failed to establish that he was prejudiced by any deficiency.

The DNA profile from blood found on a sock recovered from the perpetrator's path of escape from the victim's home matched Hodges's DNA, and the statistical frequency of the profile was one in 990 quadrillion. The DNA testing on the anal swab matched Hodges's profile to the exclusion of 96 percent of the male population. As the trial court found, the DNA evidence and statistics presented at trial did not go unchallenged. However, because Hodges told his lawyer that his clothes and other personal items had been in a suitcase that was stolen weeks before the murder, counsel did not focus on the DNA evidence but planned a defense that would account for Hodges's DNA being on the items. Hodges's own expert, testifying at the evidentiary hearing, conceded that all of the State's statistical data was sound. Therefore, Hodges has failed to show that there is any reasonable probability that more thorough preparation on trial counsel's

part, with a view to challenging Dr. Tracey's testimony or cross-examining him on his calculations, would have affected the outcome.

The trial court found that trial counsel did cross-examine the State's experts about their DNA findings, bringing out admissions that other than the blood on one of the socks, the other tests, including mitochondrial DNA analysis of hairs from the jacket and the victim's clothing, merely concluded that Hodges could not be excluded as the contributor of the sample and that the probabilities of matching persons other than Hodges were not infinitesimally small as the probability was with the blood on the sock.

When a defense attorney does not have a strong understanding of the science of DNA evidence, effective representation in a criminal case may call for consultation with experts. However, to prevail on a claim of ineffective assistance of counsel, in addition to showing a deficiency in performance falling below an objective standard of reasonableness, the defendant has the burden of showing that absent the deficiency, there is a reasonable probability that the outcome would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. "In making this determination, a court . . . must consider the totality of the evidence before the judge or jury." Downs v. State, 453 So. 2d 1102, 1108 (Fla. 1984) (quoting Strickland, 466 U.S. at 695).

One of the socks found on the path tracked by the scent-tracking canine had blood on it. DNA extracted from the blood matched Hodges's DNA on all thirteen markers. The probability of the DNA profile matching a randomly selected individual was inconceivably small. Two DNA samples found on the other sock also matched Hodges, with the probability of a random match being no more than one tenth of one percent. DNA from the hairs collected at or near the crime scene matched Hodges with a random match probability of slightly over one tenth of one percent. Material from the anal swab matched Hodges and excluded 96 percent of the male population. Photos that belonged to Hodges were found at the scene. Two witnesses testified that Hodges told them he committed the crime. In light of the totality of the evidence, we affirm the trial court's denial of relief on the ground that there is no reasonable probability that more thorough preparation by trial counsel through consultation with experts would have made any difference to the outcome of the trial.

Claim 2

Hodges argues that trial counsel was deficient in failing to present Hodges as a witness for the defense because the defense strategy depended on his testimony. Hodges asserts that the defense strategy, as revealed in counsel's opening statement, was based on the claim that the jacket, shoes, and photographs found at or near the crime scene were stolen from him weeks before the murder, supporting

the inference that whoever stole the items left them at the crime scene and was the probable perpetrator. In his opening statement, trial counsel told the jury that the evidence would show that these items were stolen from Hodges weeks before the murder. However, the defense did not present any evidence to support that assertion. Hodges argues that after the jury was told in the opening statement that the evidence would show the items had been stolen, trial counsel's failure to put Hodges on the witness stand was an abandonment of the only defense strategy, which left Hodges with no viable defense.

At the evidentiary hearing, Hodges stated that if he had been called to testify at trial, he would have stated that the jacket, shoes, and photographs had been in a suitcase that was stolen shortly before the murder. Hodges also would have testified that while working on a car at his cousin's house, which was next door to the victim's house, he cut his hand and wiped off the blood on a cloth that he left there, which he claims would have explained how a sock with his blood on it had come to be found in the area of the murder.

Hodges argues that his testimony would have created sufficient doubt that the outcome might have been different. He also said he would have denied making the incriminating statements testified to by his ex-girlfriend's daughter and would have told the jury there was no telephone at the house where the ex-girlfriend and

her daughter lived at the time when the daughter claimed the telephone conversation had taken place.

Hodges claims that he decided not to testify in his own defense at trial because of faulty legal advice given to him by trial counsel. Hodges claimed at the evidentiary hearing that trial counsel advised him that if he testified at trial, the prosecutor would be allowed on cross-examination to question him about everything in his past, including pending charges. At the time of the trial, there were pending murder charges against Hodges in Ohio and in Alabama. The facts of the Ohio murder were admitted into evidence at trial under the Williams rule.

Trial counsel testified at the evidentiary hearing that he would not have advised Hodges the State could impeach him through questioning about a pending murder charge if he testified. Trial counsel said that he would have advised Hodges that if Hodges testified, the State would be able to ask him if he had ever been convicted of a felony or a misdemeanor involving an element of fraud and, if so, how many times. Counsel would have told Hodges that only if Hodges denied having been convicted would the State be allowed to introduce evidence of his prior convictions. Counsel said he also advised Hodges that since the facts of the Ohio murder had been admitted under the Williams rule, the State could question him about the Ohio murder and his answers might be used against him in Ohio,

since that case was still pending in Ohio. But trial counsel insisted he would not have advised Hodges that he could be questioned about other pending charges.

The trial court found that counsel provided detailed and thorough advice to Hodges about the benefits and risks of testifying in his own defense and that Hodges's decision, made in consultation with his counsel, was given careful consideration. The trial court found that trial counsel was an experienced criminal trial attorney and would not have given legally erroneous advice on such an elementary question of criminal procedure. The trial court found that Hodges made the decision not to testify upon receiving advice of counsel based on all the circumstances, including counsel's concerns about the effect Hodges's testimony might have on the penalty phase.

The trial court found Hodges's testimony on this point incredible and found as a matter of fact that trial counsel did not advise Hodges that if he testified he could be cross-examined about or impeached with information concerning past misconduct or collateral offenses. This finding was based on the trial court's assessment of the credibility of the witnesses. In judging the credibility of witnesses, the trial court has a superior vantage point. See Moore v. State, 132 So. 3d 718, 727 (Fla. 2013). An appellate court does not substitute its judgment for that of the trier of fact when the finding of fact is supported by competent, substantial evidence. See Porter v. State, 788 So. 2d 917, 923 (Fla. 2001). The

trial court's finding of fact on this point is supported by competent, substantial evidence in the record and must be upheld.

Trial counsel testified at the evidentiary hearing that his opening statement was based on what Hodges told him concerning his personal items being stolen, and Hodges's decision not to testify was made later in the trial. Advising a defendant of the scope and possible consequences of impeachment and cross-examination is reasonable representation. See, e.g., Bell v. State, 965 So. 2d 48, 58-59 (Fla. 2007). Making a reasonable strategic choice after considering possible alternative courses of action is not ineffective assistance. Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000). Trial counsel's advice, as the trial court found, was legally correct and was reasonable advice under the circumstances. We conclude that competent, substantial evidence supports the trial court's finding that trial counsel did not give erroneous advice causing Hodges to decide not to testify when it would have been more advantageous to him to testify.

But whether trial counsel was deficient for telling the jury in his opening statement that the evidence would show that Hodges's personal items were stolen prior to the murder, knowing that there would be no such evidence presented if Hodges did not testify, raises a different question. If Hodges had testified that his personal items had been stolen, this might have explained how these personal items could have been found at or near the crime scene without him being involved in the

crime. Hodges also emphasizes that he would have testified that prior to the murder he was working on a car at his cousin's house next door, cut his hand, and wiped blood on a cloth that he left at his cousin's house. The argument is that Hodges's testimony on these matters might have raised a doubt in the minds of the jurors sufficient to have brought about a different outcome at trial.

At the evidentiary hearing, trial counsel testified that when he gave his opening statement, he believed Hodges might testify, although he knew there was a possibility he would not, and he told the jury so. Hodges's decision not to testify was made later in the trial, after the close of the State's evidence. Defense co-counsel testified that, based on the evidence presented by the State and the need to prepare for a likely penalty phase, he did not think Hodges should testify. Trial counsel testified that even without Hodges's testimony, he believed his opening statement was sound trial strategy because it suggested a plausible scenario for the jury to consider that would constitute a basis for doubt about Hodges's guilt. The trial court found that trial counsel did not render ineffective assistance.

We need not determine whether trial counsel's representation as to the matter of the opening statement and Hodges not testifying was deficient if there is no reasonable probability that trial counsel's course of action, even if deficient, prejudiced the defense. See, e.g., Maxwell, 490 So. 2d at 932. The totality of the

evidence before the jury must be considered in making this determination. See Downs, 453 So. 2d at 1108.

In light of the DNA evidence obtained from the bloody sock, the other sock, the hairs collected from the victim's body, the jacket found along the path taken by the murderer, and the anal swab, as well as the photos left at the crime scene with Hodges's fingerprints and handwriting on them, the testimony of the two witnesses that Hodges confessed to the murder, and the fact that witnesses identified the clothes, knife, and belt as similar to items belonging to or worn by Hodges, we conclude that no prejudice has been demonstrated.

Claim 3

A neighbor of the victim told police that on the day of the murder, he confronted a trespasser who came over a fence into his yard. The neighbor's description was used to create a sketch, which did not look much like Hodges, and the neighbor failed to select Hodges from a photo lineup. Trial counsel planned to call this neighbor as a witness in an attempt to show that the intruder in his yard—who was also likely the murderer—was not Hodges.

Before presenting the neighbor as a witness, trial counsel went to the neighbor's home and displayed a group of photos to him. The neighbor was unable to identify the photo of Hodges as the man he had seen in his yard. On the day the man was to testify at trial, trial counsel, with the court's permission and in

the presence of the prosecutor, had the neighbor look at Hodges in the courtroom, and the neighbor said Hodges resembled the man he had seen in his yard. The State and the defense signed a stipulation to this effect, which was read to the jury.

In his testimony, the neighbor said that Hodges looked like the man he had seen in his yard. Trial counsel then called the neighbor's wife to testify, and she confirmed that the neighbor had been unable to choose Hodges's photo from a lineup. Hodges argues that for trial counsel to present the neighbor as a witness knowing that he might identify Hodges as the man he had seen in his yard, was ineffective assistance because it helped convict Hodges. Hodges argues that trial counsel should have been accompanied by another person when he went to the witness's home so he would have had a third-party witness to testify about what happened. Had he done so, he could have used the third party's testimony to impeach the neighbor by confirming that the neighbor failed to identify Hodges from the group of photos shown to him by trial counsel.

The trial court found that trial counsel was surprised by the neighbor's change of testimony and responded by calling the neighbor's wife to counter the effect of her husband's testimony. The trial court found that calling the neighbor's wife was a reasonable effort at impeachment and the neighbor's wife confirmed that two nights previously her husband had been unable to select Hodges from the group of photos shown to him by trial counsel. The trial court found that trial

counsel did an effective job of addressing the identification testimony in his closing argument to the jury and made reasonable choices as to how to proceed after weighing the risks and benefits of different courses of action, which is reasonable representation under Simmons v. State, 105 So. 3d 475, 487-88 (Fla. 2012). The trial court concluded that counsel's chosen course of action was a reasonable response to the situation and that trial counsel handled the matter as well as possible under the circumstances. The court concluded that there was no substantial deficiency in the representation and that even if counsel had taken any of the actions Hodges now argues were required, there is no reasonable probability that the result would have been different. The trial court's factual findings are supported by competent, substantial evidence and its legal conclusions are correct.

An assessment of an attorney's performance under Strickland requires an effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. The trial court found trial counsel's conduct reasonable under the circumstances, and we affirm the denial of relief on this point.

Claim 4

At trial, a witness for the State testified that Hodges confessed to her in a telephone conversation that he committed the murder. The witness knew Hodges

through her mother, who had dated Hodges. The witness testified that she received the telephone call during which Hodges confessed while she was at her mother's house in the "May timeframe" of 2003. At the evidentiary hearing, Hodges denied both the confession and the telephone conversation. He claimed that the residence where the witness claimed to have received the call did not have a telephone. Hodges showed that the telephone service provider had no record of the call. Hodges contends that trial counsel was deficient in failing to obtain telephone service records to impeach the witness's testimony by showing that there was no phone service in her mother's home in May 2003.

There was testimony at the evidentiary hearing that sometimes the witness's mother's home had telephone service and sometimes it did not. This evidence did not show that the call could not have taken place; it merely showed that the phone company had no record of the call having taken place because the records no longer existed. Hodges's argument that had trial counsel investigated, he would have discovered evidence that could have been used to impeach the witness is speculative.

The trial court found that Hodges did not prove that the residence did not have phone service at the time the witness said she received the call from Hodges, only that there are no records of the service in existence now. The trial court concluded that Hodges failed to show that trial counsel's performance was

deficient. Further, the trial court concluded that even if counsel had been able to show that there was no phone in the home in May 2003, the court could not find that the witness's testimony would have been significantly diminished. The witness stated only that the call occurred in the "May timeframe," and considering that the trial took place nearly five years after the phone call in question, even if records could have been obtained and used at trial to show that there was no telephone service in the home in May 2003, this would not have proven that the conversation did not take place nor would it have necessarily undermined the witness's credibility. Because the jury still could have credited the witness's testimony regarding the content of the conversation, the trial court concluded there is no reasonable probability the jury would have been affected by any impeachment trial counsel could have achieved by showing the home had no phone service, especially in light of the fact that another trial witness also offered testimony that Hodges confessed to him that he committed the murder.

The trial court's factual determinations concerning this claim are supported by competent, substantial evidence, and we therefore defer to them. On de novo review, we hold there is no error in the trial court's legal conclusion that Hodges failed to show deficient performance on this point. We therefore affirm the denial of postconviction relief on this claim.

Claim 5

Hodges claims that trial counsel was ineffective in failing to cross-examine the State witnesses who identified certain items of clothing, referred to by their brand names, as having been worn by the fleeing perpetrator and previously seen in the possession of Hodges. The victim's daughter testified that when she entered her mother's house, she saw through a window someone running away from the house wearing a blue and gray jacket. She identified a jacket that police found outside the house as the jacket she saw the fleeing person wearing. The jacket was described by reference to the designer label, "Members Only." The husband of Hodges's niece testified that the jacket and shoes found near the crime scene and admitted into evidence were the jacket and shoes he had previously seen Hodges wearing. The shoes bore the "Timberland" label.

Hodges argues that effective cross-examination of these witnesses would have forced them to concede that they could not testify with certainty that the items were the same as those previously seen, only that the items in evidence looked like or were similar to the items they had previously seen Hodges wearing. There were no particular identifying marks on the items that would have permitted the witnesses to know that these mass-produced items were the specific items they had seen previously.

As previously mentioned, trial counsel testified at the evidentiary hearing that Hodges told him the personal items found at or near the crime scene had been

in a suitcase that was stolen from him weeks before the murder. Trial counsel planned the defense around this position and therefore did not focus on the issues surrounding the identification of the jacket and shoes.

Hodges's argument is that trial counsel should have cross-examined the witnesses to get them to admit that the most they could say about the jacket and shoes in evidence was that they were the same style, size, color, and possibly brand name as the items the witnesses had seen previously. The trial court observed that counsel certainly could have cross-examined these witnesses with these questions but ultimately concluded that the failure to do so was not deficient representation. The trial court reasoned that jurors are aware that items such as Members Only jackets and Timberland shoes are mass produced by the tens of thousands and that identification testimony such as was received in this case is understood to mean that the items in evidence appeared to be of the same type as the items the witnesses had seen previously.

To be effective it is not necessary for counsel to present evidence explaining facts that are common knowledge. See Reed, 875 So. 2d at 423. Moreover, trial counsel's strategy, based on information given to him by Hodges, was not to contest that the items belonged to Hodges. We agree with the trial court that there was no deficiency and conclude that the trial court did not err in denying relief as to this claim.

Claim 6

Hodges claims that trial counsel was ineffective in cross-examining a crime scene technician who testified for the State because counsel's questioning elicited testimony that was harmful to the defense. Hodges's position now is that trial counsel should have pursued a defense based on the theory that the sock with the blood on it, which was linked to Hodges by DNA evidence, had either been stolen from him with the blood already on it before the crime or had been used to wipe off blood from a cut Hodges sustained while working on a car at the house next door to the murder scene and was then discarded and left in the area where it was later found.

At trial, trial counsel asked the technician if there were similar socks found in the house, and the witness answered yes. Counsel asked the technician whether she believed the perpetrator covered his hands before entering the home, and she answered no. Counsel asked the technician whether she thought the perpetrator covered his hands with the socks after the murder, and she answered yes. Counsel asked the technician whether the blood could have been deposited on the sock before the murder, and the witness answered that it was possible but unlikely.

Hodges asserts that the crime scene technician lacked the expertise to reconstruct the criminal scenario, but that trial counsel's questioning essentially allowed her to do so. According to Hodges, eliciting this testimony was deficient

representation because it helped the State's case by supporting the theory that the murderer had covered his hands with socks he found in the house and cut himself while breaking a window to exit the house when the victim's relatives came to the front door.

In ruling on the postconviction motion, the trial court discussed trial counsel's cross-examination of the crime scene technician in detail and found that, as a whole, it was thorough and effective. Through cross-examination of the crime scene technician, trial counsel brought out that the blood could have already been on the sock for an indefinite period of time before the murder because there is no way to tell the age of a bloodstain. Counsel also brought out that the bloodstain was small, that there was no evidence to show how it got on the sock, and that it might have no connection whatsoever to the case.

The trial court found that the factual inferences that Hodges faults trial counsel for bringing out were already there for the jury to draw. Trial counsel testified at the evidentiary hearing that some of his questioning was intended to lead the witness to overreach, thereby depicting her as a "hired gun" willing to say anything to help the prosecution. The trial court found that trial counsel's tactics in this regard were not unreasonable. Trial counsel made strategic choices from the available courses of action. The trial court concluded that there was no deficiency and no possible prejudice from trial counsel's course of action.

We affirm the denial of relief on the ground that Hodges has failed to show that there is a reasonable probability that any alleged deficiency in counsel's performance affected the outcome.

Cumulative Prejudice Analysis

We have resolved three of Hodges's claims based on a lack of prejudice, without resolving whether counsel's performance was deficient. These three claims are those relating to: (a) the failure to challenge the admissibility of the DNA testing on the swab from the site of the bite mark on the victim of the collateral murder; (b) trial counsel's comment in his opening statement that evidence would show that Hodges's personal effects found at or near the scene of the murder had been previously stolen; and (c) the cross-examination of the crime scene technician regarding the blood on the sock.

Even without the DNA evidence from the collateral murder, without trial counsel's unsupported opening statement, and without the testimony that the blood was not likely deposited on the sock before the murder, the evidence established the following: Hodges's DNA was on both of the socks found on the path taken by the murderer from the victim's home; DNA from the hairs collected at or near the crime scene matched Hodges with a random match probability of slightly over one tenth of one percent; material from the anal swab matched Hodges and excluded 96 percent of the male population; photos that belonged to Hodges and contained his

fingerprints and handwriting were found at the crime scene; a belt and a knife found at the crime scene were identified as similar to a belt and knife owned by Hodges; a jacket found on the path the murderer took away from the crime scene was similar to a jacket that Hodges was seen wearing near the time of the murder; and Hodges confessed that he committed the murder to two witnesses who testified at trial. As a result, Hodges has not demonstrated that any alleged deficiency in these three areas would undermine confidence in the outcome.

Hurst

During the pendency of Hodges's appeal from the denial of his motion for postconviction relief, the United States Supreme Court issued its decision in Hurst v. Florida, 136 S. Ct. 616, 619 (2016), in which it held that Florida's former capital sentencing scheme violated the Sixth Amendment because it "required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty" even though "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." On remand in Hurst v. State (Hurst), 202 So. 3d 40, 57 (Fla. 2016), we held that

> before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the

mitigating circumstances, and unanimously recommend a sentence of death.

Hurst v. Florida and Hurst apply retroactively to defendants in Hodges's position who were sentenced under Florida's former, unconstitutional capital sentencing scheme after the United States Supreme Court decided Ring in 2002. Mosley v. State, 41 Fla. L. Weekly S629, S640 (Fla. Dec. 22, 2016). And in light of the nonunanimous jury recommendation to impose a death sentence, it cannot be said that the failure to require a unanimous verdict here was harmless. See Franklin v. State, 41 Fla. L. Weekly S573, S575 (Fla. Nov. 23, 2016) ("In light of the non-unanimous jury recommendation to impose a death sentence, we reject the State's contention that any Ring- or Hurst v. Florida-related error is harmless."). We therefore reverse Hodges's death sentence and remand for a new penalty phase.

III. CONCLUSION

For the reasons stated above, we affirm the denial of postconviction relief as to Hodges's conviction but reverse Hodges's death sentence and remand for a new penalty phase.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
CANADY, J., concurs in part and dissents in part with an opinion, in which POLSTON and LAWSON, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

CANADY, J., concurring in part and dissenting in part.

I concur with the decision to affirm the denial of relief regarding Hodges's conviction. But I dissent from the decision to require a new penalty phase. As I have previously explained, Hurst v. Florida, 136 S. Ct. 616 (2016), should not be given retroactive effect. See Mosley v. State, 41 Fla. L. Weekly S629, S641-44 (Fla. Dec. 22, 2016) (Canady, J., concurring in part and dissenting in part).

POLSTON and LAWSON, JJ., concur.

An Appeal from the Circuit Court in and for Escambia County,
Terry David Terrell, Judge - Case No. 172003CF005683AXXXXX

Robert A. Norgard of Norgard, Norgard, & Chastang, Bartow, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, and Charmaine M. Millsaps, Assistant Attorney General, Tallahassee, Florida,

for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing motion and Appendix in Support of the forgoing motion have been transmitted to this Court through the Florida Courts E-Filing Portal on this 21st day of March, 2017.

I HEREBY CERTIFY that a copy of the foregoing was served through the Florida Court E-filing Portal to the **Honorable Terrence R. Perkins (J.A. Susan Miller)**, Chief Judge; Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach, Florida 32114; to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, at CalhounR@sao7.org on this 21st day of March, 2017.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 21st day of March, 2017.

/s/ Raheela Ahmed
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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Joseph Edward Jordan, defendant in the above-captioned case by and through undersigned counsel files the following Notice of Supplemental Authority as it related to the issues raised pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016):

1) ***Kenneth R. Jackson v. State of Florida,* --- So. 3d ---, SC13-1232, 2017 WL 1090546 (Fla. March 23, 2017).**

The Defendant provides the foregoing recent Supreme Court of Florida opinion in ***Kenneth R. Jackson v. State of Florida,* --- So. 3d ---, SC13-1232, 2017 WL 1090546 (Fla. March 23, 2017)**, as authority in support of Claim One of his Successive motion to vacate sentence of death pursuant to Florida Rule of Criminal Procedure 3.851. *See Attachment I.* Mr. Jackson's direct appeal case was a post-*Ring*[1] sentencing for first-degree murder, sexual battery with a deadly weapon, second-degree arson, and grand theft motor vehicle. The jury recommendation was eleven-to-one. He was granted a new penalty phase under *Hurst*

[1] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

v. Florida¸136 S. Ct. 616 (2016).

2) ***Cornelius Baker v. State of Florida*, --- So. 3d ---, SC13-2331, 2017 WL 1090559 (Fla. March 23, 2017); *Cornelius Baker v. Julie L. Jones, etc.*, --- So. 3d ---, SC14-873, 2017 WL 1090559 (Fla. March 23, 2017).**

The Defendant provides the foregoing recent Supreme Court of Florida opinion in ***Cornelius Baker v. State of Florida*, --- So. 3d ---, SC13-2331, 2017 WL 1090559 (Fla. March 23, 2017); *Cornelius Baker v. Julie L. Jones, etc.*, --- So. 3d ---, SC14-873, 2017 WL 1090559 (Fla. March 23, 2017),** as authority in support of Claim One of his Successive motion to vacate sentence of death pursuant to Florida Rule of Criminal Procedure 3.851. *See Attachment II*. Mr. Baker's post-conviction appeal case was a post-*Ring*[2] sentencing with a non-unanimous nine-to-three jury recommendation. He was granted a new penalty phase under *Hurst v. Florida*¸136 S. Ct. 616 (2016).

3) ***Randall T. Deviney v. State of Florida*, --- So. 3d ---, SC15-1903, 2017 WL 1090560 (Fla. March 23, 2017).**

The Defendant provides the foregoing recent Supreme Court of Florida opinion in ***Randall T. Deviney v. State of Florida*, --- So. 3d ---, SC15-1903, 2017 WL 1090560 (Fla. March 23, 2017),** as authority in support of Claim One of his Successive motion to vacate sentence of death pursuant to Florida Rule of Criminal Procedure 3.851. *See Attachment III*. Mr. Deviney's direct appeal case was a post-*Ring*[3] sentencing with a non-unanimous eight-to-four jury recommendation. He was granted a new penalty phase under *Hurst v. Florida*¸136 S. Ct. 616 (2016).

Respectfully submitted,

/s/Raheela Ahmed
Raheela Ahmed
Assistant CCRC

[2] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).
[3] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Attachment I

Supreme Court of Florida

No. SC13-1232

KENNETH R. JACKSON,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[March 23, 2017]

PER CURIAM.

Appellant Kenneth R. Jackson was convicted of the first-degree murder of Cuc Thu Tran, sexual battery with a deadly weapon, second-degree arson, and grand theft of a motor vehicle. Jackson was sentenced to death for the murder conviction. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const.

FACTS

At approximately 6:30 a.m. on September 13, 2007, an individual who lived at Bullfrog Court in Gibsonton initially heard noises that sounded like gunshots, which he did not originally consider to be unusual. He walked outside to investigate, but returned inside when he did not observe anything out of the

ordinary. Approximately twenty or thirty minutes later, he heard further noises that sounded like glass breaking or tires exploding. He again walked outside, this time to the sound of an emergency siren, and he saw fire and smoke rising from a burning vehicle. Firefighters from the Hillsborough County Fire Rescue responded to the fire at approximately 7:03 a.m., and in the process of extinguishing the fire, they discovered a body inside the van. Officers from the Hillsborough County Sheriff's Office (HCSO) arrived shortly thereafter. A lighter was recovered a short distance away from the van. After the fire was extinguished, the van was towed to an HCSO garage for further investigation.

Approximately twelve miles northwest of Gibsonton, in Seffner, seventeen-year-old Truong Tran returned home from school that afternoon and found his father, Banh Tran, very distraught. Cuc Tran, Truong's mother and Banh's wife, was not home, but her keys, cell phone, and purse were in their mobile home residence. Truong called the police and reported that Cuc was missing and had not arrived as scheduled at work that morning. Truong also informed officers that his mother usually jogged to and from a local church every morning before work.

HCSO investigators recovered several pieces of evidence found in front of the St. Francis of Assisi Church in Seffner, including a pair of black pants, shoes, socks, and a pink hair roller. The items were found near a patch of grass that

appeared to be covered in blood, and the hair roller also appeared to be covered in blood.

The investigation further expanded to encompass the van found burning in Gibsonton. Luis Carrero owned a 1993 midnight blue Dodge Caravan that he hoped to sell; he left the van with a "For Sale" sign in front of his place of employment, an Advanced Auto Parts Store in Seffner. The van was seen in the business parking lot at 9:30 p.m. on September 12, 2007, but was not in the parking lot by 6:30 a.m. on September 13. In the early morning hours of September 13, 2007, one witness observed a blue minivan driving at five or six miles per hour as she turned from Martin Luther King Boulevard onto State Road 579. Another witness reported that he was cut off by a speeding Chrysler minivan that also ran a red light as it headed west on Martin Luther King Boulevard.

During the course of the investigation, Detective Troy Morgan encountered Christina Elhelw, a clerk at a BP gas station at the intersection of State Road 579 and Martin Luther King Boulevard. Elhelw informed Morgan that on September 14, Jackson, who would regularly stop by the BP gas station and talk to her, had asked her and William Driskell, another regular customer, whether they had heard about the crime. Jackson told them that a Vietnamese woman who lived in a nearby trailer park had been found in a burning van in Gibsonton, and the van had been stolen from the nearby Auto Parts Store in Seffner. He also told them that

law enforcement recovered some articles of clothing near Clay Pit Road. Further, Jackson told them that he had previously seen the victim jogging in the neighborhood. Jackson explained that he learned this information after he had been riding his bicycle and was stopped by law enforcement officers, who asked him whether he had seen anything unusual on September 13. Elhelw thought Jackson seemed more excited than sympathetic about this information, and Driskell thought Jackson appeared to brag about having more information than either of them.

In September 2007, Jackson lived with Linda and Wallace O'Neal. Wallace had known Jackson as a child because Wallace was the live-in boyfriend of Jackson's grandmother, who had custody of Jackson when he was a young child.[1] Jackson did not have a car, cell phone, or steady employment when he lived with the O'Neals in September 2007; he spent part of his days at the local Walmart and a local gas station. According to Linda, Jackson was not home on the morning of September 13. Linda had also received several phone calls from Iris Williams, a friend of hers who had encountered Jackson in Gibsonton earlier that morning walking north. Jackson told Williams that he had been locked out of his home and needed a place to stay. Williams thought it was odd to see Jackson in Gibsonton

1. Jackson's grandmother had passed away when he was a teenager.

and attempted to contact Linda. Linda testified that Jackson walked into their home in Seffner between 1 and 1:30 p.m. that afternoon. Jackson was sweating, and the bike that he usually rode had remained in the home. Jackson moved out of the O'Neals' home the following Monday.

After receiving the phone calls from Williams, Linda contacted Margaret Gofinch, a young woman who had known Jackson from school. In September 2007, Jackson expressed interest in dating Gofinch and contacted her daily, but she was not interested and was dating someone else. On September 12, 2007, she worked at a McDonald's Restaurant in Riverview until 10:00 p.m. and received several phone calls from Jackson throughout the night; the phone calls became more frequent as the night progressed. Jackson wanted to see her that night when she finished work, but she declined and went home.

On September 20, Jackson agreed to be interviewed by Detectives Morgan and Bunten. He told the detectives that on the morning of September 13, he stopped at a Walmart and later met law enforcement officers conducting a traffic stop, but denied that he was in Gibsonton or otherwise involved in Tran's murder. However, when the detectives informed him that Linda O'Neal and Margaret Gofinch had informed them that Jackson was not at home on the night of September 12 or the morning of September 13, Jackson told them that he found himself locked out of the O'Neals' trailer. Upset, he tried contacting Gofinch for a

place to stay for the night, but when she refused, he biked to Gibsonton. He also initially denied encountering Iris Williams in Gibsonton, but later admitted that he had seen her that morning and explained that he did not previously mention that fact because he did not want to be associated with her. Jackson also admitted that he had spoken to a woman at a church in Gibsonton to ask for a ride back to Seffner. He also told them that he had ridden his bike home from Gibsonton, but explained that he had taken his time to get home, a trip that ultimately lasted twelve hours. At the end of the interview, Jackson agreed to provide the detectives the shirt and shoes he was wearing, which he told them were what he had worn on September 13.

Bunten and Morgan interviewed Jackson again on September 27. They confronted Jackson with the fact that they did not believe his account of the events of September 13, but Jackson denied that he had seen the victim or stolen the car. Later that day, Jackson was arrested. On October 10, 2007, a grand jury indicted Jackson for the first-degree murder of Tran, sexual battery with a deadly weapon, second-degree arson, and grand theft of a motor vehicle.

The trial court conducted a pretrial Frye[2] hearing to determine whether the defense could present evidence during the penalty phase pertaining to quantitative

2. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

electroencephalography (qEEG) testing. Both parties produced multiple scientific publications discussing the value of qEEG as a diagnostic tool for neurological and psychiatric conditions. Additionally, both parties presented testimony from psychologists, neurologists, and psychiatrists who debated the relative acceptance of qEEG in their respective fields for the purposes of diagnosing brain injuries. The trial court ruled that the qEEG evidence as used in diagnosing brain injuries or disorders did not satisfy the Frye standard of admissibility.

During trial, the State presented testimony from the emergency responders, crime scene investigators, detectives, and other witnesses who encountered Jackson between September 12 and 14, 2007. A woman who performed community service at First Baptist Church in Gibsonton testified that one morning in September, a man who was on foot approached her and asked for money. She directed him to another individual in the church, who was unable to help him, and he became very upset.

Additionally, the State presented surveillance footage from the Seffner Walmart from the night of September 12 until approximately 6:45 a.m., September 13. Jackson was observed at approximately 5:10 a.m. and again at 5:13 a.m. Further, an individual who matched Jackson's appearance was also visible at approximately 5:40 a.m.

Several forensic investigators also testified on behalf of the State. One detective testified that he observed a notch across the van's door handle, which he had previously seen in other Chrysler vehicles that had been stolen. Randy St. Clair of the State Fire Marshal's Office testified that the fire in the van originated in the center of the vehicle, near the driver and front passenger seats, which excluded the possibility that the origin of the fire was in the engine compartment. Further, he explained that there was an unusual and ultimately unidentified sticky substance covering the victim's hair, skin, and torso that acted as a fire retardant and preserved those parts of the victim. He explained that the fire was ignited by an open flame, such as a match or lighter; the only accelerant present was the upholstery and foam of the van seats. He opined that the apparent motive of the fire was concealment of the victim.

Evelyn Bigford, a forensic analyst for the Florida Department of Law Enforcement, testified that she examined the black pants, pair of shoes, pair of socks, and pink hair roller for the presence of blood, semen, and DNA. The pants testified positive for the presence of blood, but not semen. DNA obtained from the blood on the pants matched Cuc Tran to the exclusion of 1 in 15 quadrillion Caucasians, 1 in 2 quintillion African-Americans, and 1 in 6.8 quadrillion Southeastern Hispanics. Bigford did not further analyze the shoes, socks, or hair roller. Additionally, Bigford detected sperm cells in Tran's vagina, as well as a

mixed DNA profile from vaginal tissue obtained from Tran. After she eliminated Tran's DNA profile, the foreign DNA profile matched Jackson to the exclusion of 1 in 34 quadrillion Caucasians, 1 in 750 quadrillion African-Americans, and 1 in 65 quadrillion Southeastern Hispanics. She also compared the foreign DNA profile to that of Tran's husband, but did not find a match. During cross-examination, Bigford testified that Jackson was a possible donor, and she could not explain how the semen was deposited in Tran.

Dr. Amy Sheil, the assistant medical examiner who responded to the crime scene and performed the autopsy, also testified. She explained that Tran suffered heat amputation of several of her extremities, and it was possible that Tran could have incurred other injuries that were obscured by the thermal injuries. Additionally, Dr. Sheil described how Tran was discovered in a pugilistic stance, another thermal injury that resulted in her fingers being curled into her palms, her elbows flexed, and her left knee slightly bent.

Dr. Sheil explained that Tran was found with four stab wounds and two incised wounds to her neck, although the appearance of some of the wounds had been altered by the thermal injuries. Three of the stab wounds would have been fatal without medical attention, and one of the stab wounds would have made it difficult for Tran to talk or scream. Dr. Sheil opined that the cause of death was stab wounds that penetrated Tran's jugular vein and carotid artery, which resulted

in loss of consciousness and exsanguination. She believed that Tran lost consciousness within seconds to minutes, and death followed within minutes. Additionally, Dr. Sheil examined her larynx and trachea and found no evidence of smoke or soot. Similarly, there was no indication of unusually high levels of carbon monoxide, a byproduct of smoke, in Tran's blood. Accordingly, Dr. Sheil opined that Tran was dead before the fire started.

The State also presented testimony from Antonio Gonzalez and Michael Kennedy, individuals who were temporarily housed together with Jackson during his pretrial incarceration. Gonzalez testified that Jackson became friendly with him and told him that when Jackson returned home one night, he found himself locked out of his home. Angry, Jackson wandered away from his home and stole a van from a store that sold automobile parts. Jackson told them that he drove the van back to his neighborhood, where he knew that a heavyset Asian woman would go out for her regular early morning jog. Jackson told Gonzalez that he parked the van in the parking lot of a church and raped the woman at knifepoint. Jackson bragged to Kennedy that "he fucked her good." According to Kennedy, the woman asked Jackson not to hurt her; in response, Jackson told her to shut up or he would kill her. When the woman started screaming, he stabbed her in the throat with a knife. With her clothes and blood evidence remaining on the grass, Jackson placed the woman in the van and drove away from the area where he lived to

Gibsonton or Riverview, an area that Jackson was familiar with because some friends lived there. Jackson wanted to find a place to conceal the body, but when the van became stuck, he started a fire in the van with a lighter to dispose of the body. He told Kennedy that he thought the fire would destroy any DNA evidence that could inculpate him.

Additionally, the State presented evidence that would preclude the involvement of another individual. During the initial investigation, HCSO officers recovered a wallet with a driver's license in a trash can that was near the van. The individual identified by that license testified that his truck had been stolen on September 11, 2007, between 5:00 and 6:30 p.m.; although his vehicle was recovered that evening, his wallet was not. The State presented testimony from that individual, the law enforcement officers who investigated that matter, and one of the perpetrators of that crime.

Defense counsel proceeded under two related theories. Defense counsel suggested that another party was responsible, specifically, Tran's husband, Banh Tran. During cross-examination, Banh admitted that he did not regularly spend his nights at Cuc's trailer, the title of which was solely in her name.

Alternatively, defense counsel questioned the evidence that connected Jackson to the crime scene. Jackson presented testimony from Anjali Ranadive, a DNA expert. She reviewed the DNA results and testified that although she could

not exclude Jackson as a contributor to the DNA recovered from the sperm found in Tran's vagina, she also could not conclusively identify Jackson as the contributor. Additionally, defense counsel recalled Detective Bunten, who testified that photographs taken of Jackson on September 20, 2007, did not reveal any injuries to his hands or the backs of his legs. Further, during closing statements, defense counsel suggested that the State's timeline was implausible.

Jackson also presented testimony from three witnesses who were interviewed by law enforcement in September 2007 during traffic surveys near the Seffner crime scene. One man who regularly drove a semi-tractor trailer truck through Seffner testified that he saw an older Dodge or Chrysler minivan pull out of the parking lot of a church between Clay Pit Road and Martin Luther King Boulevard. He testified that he saw two Hispanic men in the driver and passenger seats of the van, along with a woman in the back of the van who was moving, but was largely covered by a blanket. Another woman who regularly traveled through Seffner early in the morning testified that she saw an Asian woman jogging along the side of the road in a white shirt and dark pants. She also saw a blue minivan that had been driving erratically pull over to the side of the road where it stopped, and a driver exited the van. Finally, a school bus driver testified that she had observed two young men early one morning in Gibsonton walking away from Bullfrog Creek Road towards Gibsonton Drive, one of whom carried a gas can.

However, the bus driver was unable to provide an exact date when she had seen these men.

Jackson was convicted of first-degree murder under theories of both premeditated murder and felony murder, as well as sexual battery with a deadly weapon, second-degree arson, and grand theft of a motor vehicle. During the penalty phase, the State presented a victim impact statement from Tran's oldest son. The State did not present any additional evidence in support of aggravation.

Jackson presented testimony from two of his former teachers and a school psychologist who had evaluated Jackson. Teresa Gribbon, who taught Jackson in a special education class when he lived in Texas, testified that Jackson struggled academically and did not appear to form any attachments. When she taught Jackson, he was eleven years old in fourth grade, but read at a first-grade level. Jackson lived with Wallace O'Neal and his grandmother, whom Gribbon thought lacked parenting skills and failed to set boundaries for Jackson. At one point during the year, Jackson began taking new medication that escalated his physical aggression. His grandmother became concerned about the side effects of the medication and permitted Jackson to sleep in the same bed with her. Gribbon was concerned about that behavior because of Jackson's age and the fact that Wallace O'Neal lived with Jackson and his grandmother.

Rosemary Borden testified that she taught Jackson in special education classes when he was in fifth grade in Gibsonton, Florida. Jackson was belligerent, defiant, and antagonistic towards other children. He arrived to school dirty and with poorly maintained clothing. She also testified that he had poor attendance. She added that he received Bs and Cs in her class, but he was not instructed at his grade level. Borden further testified that Jackson's disruptive behavior frequently resulted in his removal from class, and although it was regular practice to contact the parents or guardians of a child who had been removed, she never successfully contacted Jackson's guardian. Additionally, after the death of his uncle, Jackson drew a picture of himself, dead on a road, and wrote, "Kenny is dead. Kenny will die." Borden reported this incident to school administrators, and Jackson was detained pursuant to the Baker Act for overnight observation.

Cathy Wetherington, a school psychologist, testified that she evaluated Jackson in April 1995. She conducted a Wechsler Intelligence Scale-III test on Jackson, who received a full scale IQ score of 75, with a 75 verbal score and a 79 performance score. He also obtained low academic achievement scores: 53 in broad reading, 68 in broad math, and 32 in writing, which were low compared to the average range of 90 to 110. She considered his score of 54 in processing speed to be very deficient, and his short term memory score of 84 to be below average. Wetherington attempted to arrange a conference with his grandmother, but that

conference never occurred. She recommended that Jackson be placed in classes designed for severely emotionally disturbed children, but she did not know if her recommendation was ever followed. Her report also indicated that Jackson appeared to use aggression to cope with stress and that Jackson was worried that he and his siblings might grow up to be "killers." However, during cross-examination, she admitted that Jackson was also tested with an older version of the Wechsler Intelligence Scale, the WISC-R, when he was in second grade and received a full scale IQ score of 85. Further, there was no indication in her report that Jackson was malnourished, dirty, or unkempt.

Jackson also presented testimony from Dr. Yolanda Leon, a school psychologist, and Dr. Steven Gold, a trauma psychologist. Dr. Leon reviewed Jackson's school records and interviewed Jackson, his family members, his friends, former teachers, and former school psychologists, but was not asked to conduct neuropsychological testing or provide a diagnosis. Jackson's biological mother, Patricia Helms, reported that she conceived Jackson when she was fourteen years old and his biological father was twenty-eight years old. When Jackson was six months old, Helms left him in the care of his grandmother, who was thirty years old, and her grandmother's boyfriend, Wallace O'Neal. Jackson met his biological father only once, when he was six years old.

When Jackson lived with his grandmother and Wallace, he suffered from instability, chaos, and neglect, as evidenced by school reports that he was dirty and suffered from head lice and ringworm. When he was six or seven years old, he was in a car accident and was ejected from the car that was traveling at 30 miles per hour because he was not wearing a seatbelt. Jackson was encouraged to steal food because the household lacked money to purchase enough food. Both his grandmother and Wallace abused drugs and alcohol. Additionally, an uncle who had lived with Jackson when he was a child died of a drug overdose.

Dr. Leon also testified that Jackson was physically and sexually abused. She received reports that Jackson's stepfather tortured Jackson by placing him in a trailer during the summer and requiring him to repeatedly hit a cemented four-by-four plank with a baseball bat until the plank broke. His stepfather also screwed the windows of the trailer shut and left Jackson inside for several days at a time. Jackson's mother also reported that Jackson's stepfather once threatened that if Jackson did not perform oral sex on him, Jackson would be required to walk home. There were also allegations that Wallace O'Neal sexually abused Jackson.

Further, Dr. Leon testified that Jackson had engaged in self-injurious behavior and exhibited suicidal ideation. Her conclusion was based on reports of Jackson's behavior as a child and as an adult during his incarceration. Dr. Leon opined that an individual who had encountered the traumas that Jackson did would

have extremely poor abilities to regulate his emotions and adopt maladaptive behavioral patterns. She testified that Jackson appeared to exhibit a personality disorder, and she would not be surprised if he had an antisocial personality disorder.

Dr. Gold evaluated Jackson with the Adverse Childhood Experiences (ACE) test, which includes a list of ten experiences that are associated with long-term psychological effects if a child encounters one or more of them. The ten experiences reviewed by the ACE include: physical neglect; emotional neglect; physical abuse; sexual abuse; verbal abuse; at least one household member who abused substances; at least one household member who was incarcerated during the subject's childhood; domestic violence in the household; at least one household member who suffered from severe mental illness, depression, or suicide; and a household without one or both biological parents. Dr. Gold testified that the more factors that a child encounters, the more likely that he or she will have a lower IQ, trouble controlling emotions, poor social and emotional adjustments, depression, disassociative disorders, and a lower life expectancy. He testified that Jackson had experienced all ten ACE factors, which was rare. Dr. Gold also testified that he would not be surprised if a child who encountered all ten ACE factors subsequently developed into a manipulative or violent adult or suffered from a pathological or personality disorder.

In rebuttal, the State presented testimony from Dr. Wade Myers, a forensic psychiatrist. Dr. Myers opined that Jackson has antisocial personality disorder. He also questioned the validity of the sexual abuse allegations because Jackson was the only person who reported those allegations, despite the fact that Jackson was closely monitored by his teachers and school psychologists as a child.

At the conclusion of the penalty phase, the jury recommended the death penalty by a vote of eleven to one. The jury was given instructions on three aggravating circumstances: the murder was committed during the course of a sexual battery; the murder was especially heinous, atrocious, or cruel (HAC); and the murder was cold, calculated, and premeditated (CCP). However, the jury was not instructed to make special findings with respect to aggravation, mitigation, or the relative weight of either.

During the Spencer[3] hearing, Jackson's mother testified on his behalf. She testified that she was a teenager when Jackson was born; Jackson's father made arrangements that either he or her mother would receive custody of Jackson. However, she explained that she had a good relationship with her son, who was also close to and protective of his sister. Jackson also renewed the issue of

3. Spencer v. State, 615 So. 2d 688 (Fla. 1993).

presenting qEEG evidence, but the trial court refused to reconsider its denial of Jackson's previous motion.

On June 5, 2013, the trial court issued its sentencing order. The court found that the State had proven the following two aggravating circumstances beyond a reasonable doubt: the murder was committed during the commission of a sexual battery and HAC. The court afforded each aggravating circumstance great weight. Although the jury was provided an instruction concerning the CCP aggravating circumstance, the court concluded that the State failed to prove this circumstance beyond a reasonable doubt.

The court also found the following mitigating circumstances: (1) Jackson endured a dysfunctional family background that resulted in an unstable environment (moderate weight); (2) he suffered psychological trauma from the deprivation of parental nurturing when he was an infant and toddler (minimal weight); (3) he was abandoned by his parents (minimal weight); (4) he lacked healthy role models (minimal weight); (5) he was sexually abused by his grandmother's boyfriend as a teenager "and his life was pre-determined during the years of his early development based on behavior patterns witness[ed] by former school personnel" (moderate weight); (6) he developed pathological behaviors due to his history of familial dysfunction, which was evidenced by cutting and self-mutilation (minimal weight); (7) his history of familial dysfunction resulted in an

inability to form attachments or regulate his emotions (moderate weight); (8) he suffers from a personality disorder due to his childhood experiences and genetic traits (moderate weight); (9) he grew up in extreme poverty and was encouraged to steal by his family (minimal weight); (10) he was in the care of neglectful guardians who encouraged criminal conduct at a young age (moderate weight); (11) his caregivers had a history of substance and alcohol abuse (minimal weight); (12) as a young child, he was affected by the suicide of a loved one (minimal weight); and (13) he had positive relationships with his mother, younger sister, and grandmother as a child (minimal weight). The court refused to consider the proffered qEEG evidence in mitigation. The court made an additional finding with respect to mitigation:

> The Court, sua sponte, additionally determines by a preponderance of the evidence that the above circumstances cumulatively diminished Jackson's capacity or ability to conform his conduct to the requirements of the law, but does not determine that such circumstances diminished his capacity or ability to appreciate the criminality of his conduct. The Court accords this mitigating circumstance moderate weight.

After weighing the aggravating and mitigating circumstances, the court sentenced Jackson to death for the murder of Tran, life imprisonment without the possibility of parole for sexual battery, a term of fifteen years for second-degree arson, and a term of five years for grand theft of a motor vehicle. The court

directed that the prison terms would be served concurrently and awarded five years, five months, and three days credit for time served.

Following the filing of Jackson's appeal before this Court, the United States Supreme Court issued its decision in Hurst v. Florida (Hurst v. Florida), 136 S. Ct. 616, 619 (2016). This Court ordered supplemental briefing to address that decision. This review follows.

ANALYSIS

Guilt Phase

Peremptory Challenges

Jackson alleges that section 913.08, Florida Statutes (2007), which governs peremptory challenges during voir dire, is both facially unconstitutional and unconstitutional as applied to his case. His primary constitutional challenge is that he would have been entitled to a maximum of thirty-two peremptory challenges if he had been charged separately for each count, and therefore his rights under the Equal Protection Clause of the Fourteenth Amendment were violated because differently situated defendants would receive different numbers of peremptory challenges. He also asserts that the trial court erred by denying his request for additional peremptory challenges. We reject both claims.

Constitutional challenges to the validity of a statute raise questions of pure law and are therefore subject to de novo review by this Court. E.g., State v.

Catalano, 104 So. 3d 1069, 1075 (Fla. 2012). This Court presumes that statutes are constitutional unless and until a party challenging the law proves that the statute is not constitutional under any set of circumstances. See Fla. Dep't of Revenue v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005); Chi. Title Ins. Co. v. Butler, 770 So. 2d 1210, 1214 (Fla. 2000).

Both the United States Supreme Court and this Court have recognized that although there is a constitutional right to an impartial jury, there is no constitutional right to peremptory challenges, which are instead considered creatures of statute. United States v. Martinez-Salazar, 528 U.S. 304, 311 (2000); Ross v. Oklahoma, 487 U.S. 81, 88 (1988); Busby v. State, 894 So. 2d 88, 98 (Fla. 2004). Section 913.08 grants ten peremptory challenges to criminal defendants charged with capital crimes, six peremptory challenges to defendants charged with lesser offenses punishable by imprisonment longer than twelve months, and three peremptory challenges to defendants facing all other charges. A trial court, in its discretion, may grant additional peremptory challenges. Fla. R. Crim. P. 3.350(e); Parker v. State, 456 So. 2d 436, 442 (Fla. 1984). Thus, there is a right under Florida law to a certain number of peremptory challenges, but there is no right or entitlement to additional peremptory challenges beyond those established in section 913.08.

Statutes that abridge a right that is not fundamental or adversely impact a class that is not considered suspect are only unconstitutional if there is no rational relationship between the statute and a legitimate state interest. E.g., Lite v. State, 617 So. 2d 1058, 1060 n.2 (Fla. 1993). Section 913.08 is rationally related to a legitimate interest in providing fair and efficient trials. Further, as there is no right to additional peremptory challenges, Jackson cannot show that any right was violated by the trial court's discretionary refusal to grant additional challenges. Jackson's nebulous equal protection challenge similarly fails. Although "death is different," criminal defendants are not generally considered a suspect class, not even those sentenced to death. See Crump v. State, 654 So. 2d 545, 547 (Fla. 1995); Gov't of Virgin Islands v. Hodge, 359 F.3d 312, 326 (3d Cir. 2004). Finally, Jackson has insufficiently briefed his claim that section 913.08 violates his right to be free from cruel and unusual punishment under the Eighth Amendment. See Heath v. State, 3 So. 3d 1017, 1029 n.8 (Fla. 2009) ("Vague and conclusory allegations on appeal are insufficient to warrant relief."). Therefore, we reject his facial constitutional challenge to section 913.08.

Jackson also alleges that section 913.08 is unconstitutional as applied to him because the trial court erroneously denied several cause challenges, forcing him to exercise his peremptory challenges, and denied his motion for additional peremptory challenges. A party that seeks relief for the wrongful expenditure of a

peremptory challenge must both establish that the trial court's denial of a cause challenge was erroneous and identify a juror who was actually on the panel whom the party would have removed with a remaining peremptory challenge. Busby, 894 So. 2d at 102; Conde v. State, 860 So. 2d 930, 941-42 (Fla. 2003); Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990). A trial court must excuse a juror where there is reasonable doubt whether the juror is impartial. Banks v. State, 46 So. 3d 989, 995 (Fla. 2010) (citing Kopsho v. State, 959 So. 2d 168, 170 (Fla. 2007)). To determine whether such reasonable doubt exists, the trial court should consider the context and entirety of the juror's responses. See Matarranz v. State, 133 So. 3d 473, 484 (Fla. 2013); Kopsho, 959 So. 2d at 170. A reviewing appellate court should ensure that the record provides support in the form of any findings regarding a juror's competence. Matarranz, 133 So. 3d at 484 (citing Trotter, 575 So. 2d at 694; Carratelli v. State, 961 So. 2d 312, 319 (Fla. 2007)). Absent manifest error, we defer to the trial court's determinations on cause challenges to prospective jurors. E.g., Conde, 860 So. 2d at 939.

During voir dire, Jackson sought to dismiss five jurors for cause, including Juror 29, Juror 36, Juror 46, Juror 47, and Juror 71. The trial court denied Jackson's cause challenges to those jurors, and Jackson exercised a peremptory strike on each of those jurors. At the close of jury selection, defense counsel renewed the motion for additional peremptory strikes and identified four additional

jurors who were seated that defense counsel would have removed with additional peremptory challenges. The court denied Jackson's motion. He now asserts that the trial court erroneously denied challenges to Jurors 2, 15, 29, 36, 46, 47, and 71. After reviewing the circumstances of each challenge, we find no error by the trial court.

Jurors 2 and 15: The State and defense counsel agreed to strike both Jurors 2 and 15 for cause because they had been observed sleeping during voir dire. Although the trial court denied the cause challenge, the State exercised peremptory challenges to remove both of these jurors. Jackson is not entitled to relief in connection with these challenges because Jackson was not required to expend a peremptory challenge on either of these jurors. See Busby, 894 So. 2d at 102; Trotter, 576 So. 2d at 693.

Juror 29: Defense counsel moved to strike Juror 29 for cause because she indicated that she had at least two friends or acquaintances who were victims of homicide, and that one of these incidents involved an individual represented by one of the defense attorneys. However, Juror 29 indicated that the incidents occurred five and fourteen years ago; she harbored no resentment toward the perpetrators; and she was unlikely to be shocked by gruesome details presented during trial, having previously encountered similar details in those earlier cases. The trial court

found that Juror 29 indicated that she would be impartial and denied the challenge, and defense counsel exercised a peremptory strike to remove her.

The record supports the trial court's denial of the cause challenge. Each of Juror 29's affirmative responses indicated that she would be impartial in this case. See Banks, 46 So. 3d at 995 ("[I]t does not appear that the juror's unequivocal responses provided any reasonable doubt as to whether the juror possessed an impartial state of mind."). Therefore, we find no merit to Jackson's claim that the trial court improperly denied his cause challenge to this juror.

Juror 36: Defense counsel moved to strike Juror 36 for cause, who had approached the bench several times to privately explain that her aunt had been the victim of murder and attempted sexual battery, and that the defendant in that case was represented by the Public Defender's Office. That defendant pled guilty to murder and received a life sentence. Additionally, Juror 36 indicated that her uncle may have pursued civil litigation involving the death of her aunt, but she was unfamiliar with that matter.

When asked, Juror 36 indicated that she could serve impartially, set any feelings about her aunt aside, and that the present case was different from what had occurred with her aunt. The following interaction occurred during a subsequent bench conference:

> [Juror 36]: This morning when you guys approached me about my situation I was totally caught off guard but I believe I'm a fair

person and I think I could do a [sic] this job even though my situation's kind of a little bit—you know.

The Court: Because of the lawsuit thing?

[Juror 36]: Not the lawsuit but what happened with my aunt in that case. I can't just forget what happened to her and just not give this gentleman a fair chance either. It's not fair at all.

The Court: We discussed that and we had talked about your aunt's situation in front of everybody is that why we're up here?

[Juror 36]: Yeah.

The Court: Based on that do you need to tell us something else about yourself?

[Juror 36]: That I think I could be objective and just concentrate on the evidence and other than that consider all the evidence and not just.

[The State]: Do you think you could give a fair shake to any mitigation they presented would you consider it fairly?

[Juror 36]: Definitely. I would have to that's the only way to be fair.

[The State]: If you felt that it merited great weight of any kind could you assign that weight to it?

[Juror 36]: Yes. I have to be fair on both sides. My situation it's totally nothing to do with this case. I can't just think about that or base my feelings on his situation because it's [a] totally different situation.

The Court: Any questions?

[Defense counsel]: I believe I asked you this earlier today but do you feel like—the facts of this case being somewhat similar and you heard the Judge already say what the charges were if the facts

of this case end up being somewhat similar to the one involving your aunt would you be placed in a very awkward situation trying to be fair to both sides here?

[Juror 36]: No my feelings have nothing to do with this case. I cannot think about my situation, my family's situation. I have to be fair and concentrate on the evidence. That's all.

[The State]: [Juror 36], in the case involving the person who murdered your aunt, there was an agreement whereby he did not receive the death penalty. Were you angry about that?

[Juror 36]: Not at all.

[The State]: You didn't have any care about that at all?

[Juror 36]: No it's not something I think about every day I'm not for or against it. It's not that I'm a cold hearted person but I just have to think about the evidence that's in front of me. And I just need to see what's in front of me and my personal feelings have nothing to do with this at all. My family it's unfortunate what happened to my family but I can't think about that and not be fair to somebody that would be unfair to think about my feelings and what I would do with my family or what we would do. It has nothing to do with this case even though it could be similar. It can't—

[The State]: Do you feel like as you're situated today or this week being here on jury duty and taking a case, the type of case this might be are you saying you want to be on this jury?

[Juror 36]: It's not that I'm eager to be on the jury it just—it's I'm given the chance that's you know I believe I'm meant to be here and that I could do the best job I can for me as a human being I have to have a conscious of what I'm doing and not be guided by my feelings or my situation. It wouldn't be fair. I can never assume.

[Defense counsel]: Okay. So you feel like you could be fair and impartial to both sides in this situation without any kind of he [sic] reservation whatsoever?

> [Juror 36]: I believe so and I want to believe that, that would make me a good human being that I can do that you know just think about my personal feelings and my situation. That's not—that be fair.
>
> [Defense counsel]: All right.
>
> [The State]: Understand your response and I understand you say you like to believe you could do that. Are you sure you could do that?
>
> [Juror 36]: I'm pretty sure, yeah. I mean it's going to be hard. I'm not going to sit here and say it's not going—it's not easy for anyone being here in this situation to see the evidence and what we might be exposed to it's totally, I'm a human being of course it's going to be hard but other than my personal feelings I have to be objective and do a good job you know. That's fair.

The court later denied Jackson's cause challenge to Juror 36, and Jackson later exercised a peremptory strike to remove her.

Although Juror 36 was candid about her personal concerns, we conclude that she unequivocally and repeatedly indicated that she would endeavor to be a fair and impartial juror. Her responses are distinguishable from those cases in which this Court has found error in the denial of cause challenges to jurors who repeatedly expressed a lack of impartiality or inability to follow the law. See Matarranz, 133 So. 3d at 477-81, 485-88 (juror repeatedly indicated that she harbored a bias against criminal defendants because she had previously been the victim of a burglary); Kopsho, 959 So. 2d at 170-72 (juror believed that defendant should testify on his own behalf and expressed disagreement with the right to

silence); Overton v. State, 801 So. 2d 877, 890-93 (Fla. 2001) (finding error in denying cause challenge to one juror who emphatically believed that the defendant's failure to testify indicated guilt); see also Welch v. State, 189 So. 3d 296, 301 (Fla. 2d DCA 2016) (holding that jurors who expressed residual doubt about the defendant's right to silence should have been dismissed for cause). Unlike the jurors in Matarranz, Kopsho, Overton, and Welch, Juror 36 did not affirmatively express a bias against Jackson or indicate that he should testify on his behalf.

Instead, we consider our previous analysis in Banks more comparable to these facts. There, the juror in question twice stated that he would be impartial, despite the fact that his daughter had recently been the victim of a robbery. Banks, 46 So. 3d at 995. We concluded that there was no reasonable doubt regarding the juror's impartiality and affirmed the ruling of the trial court. Id. Similarly, the trial court below did not err in denying Jackson's cause challenge to Juror 36.

Jurors 46 and 47: Defense counsel moved to strike Jurors 46 and 47 for cause because defense counsel were concerned that these jurors lacked neutrality on the death penalty. Juror 46 considered herself "smack in the middle" on the issue of the death penalty, indicating that she thought it may be warranted if the murder was premeditated, but she was also interested in considering any mitigating evidence. Juror 47 indicated that he would be slightly in favor of imposing the

death penalty following a conviction of first-degree murder, but said that he would not definitely recommend a sentence of death. The court denied the challenge to Juror 46, finding that she indicated her willingness to be objective, and defense counsel exercised a peremptory strike to remove Juror 46. With respect to Juror 47, the court noted that he was slightly more in favor of a death sentence following a conviction, but found that nothing that Juror 47 said indicated that he would not be fair or impartial and denied the challenge. Defense counsel subsequently exercised a peremptory strike on Juror 47.

When a potential juror is questioned about his or her views on the death penalty, this Court has explained:

> The standard for determining whether a potential juror should be excused for cause based on his view with respect to the imposition of the death penalty is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' "

Overton, 801 So. 2d at 893 (quoting Wainwright v. Witt, 469 U.S. 412, 424 (1985)).

Under this standard, the record supports the trial court's denial of Jackson's cause challenges to both Jurors 46 and 47. Juror 46, who identified herself as "smack in the middle," informed the court and the parties that she would be willing to impose the death penalty under certain circumstances, but she would also consider mitigating evidence. Similarly, although Juror 47 indicated that he held a

slightly less neutral position on the death penalty than Juror 46, this Court has found no error when jurors ultimately state that they would consider both life imprisonment and the death penalty. Id. at 894 (juror indicated that he was inclined to impose death sentences for defendants convicted of first-degree murder, but also explained that he would follow the court's instructions and could entertain a life sentence); Bryant v. State, 656 So. 2d 426, 428 (Fla. 1995) (five jurors initially "expressed strong support of the death penalty," but later indicated that they would follow the instructions and weigh the aggravation and mitigation). Jackson's challenges to these prospective jurors do not merit relief.

Juror 71: Defense counsel moved to dismiss Juror 71 for cause, who asked if it was common for defendants to sit in the room while potential jurors discussed their thoughts about potentially serving on a jury. The court denied the cause challenge, and defense counsel exercised a peremptory challenge to remove her.

However, we do not believe that there was any reasonable doubt as to the impartiality of Juror 71. Her comments were followed by instructions on the right to silence, and the trial court found her questions were innocuous. After she had asked the question, Juror 71 later indicated that she could not yet decide Jackson's guilt at that point in the trial because the State had not yet presented any evidence, which indicated that she understood the instructions regarding the right to silence and presumption of innocence. Her remarks are distinguishable from those cases

in which jurors repeatedly expressed their views that a defendant should testify to demonstrate his or her innocence. See Kopsho, 959 So. 2d at 170-72; Overton, 801 So. 2d at 891-92. Therefore, we do not find error in the trial court's denial of Jackson's cause challenge to Juror 71.

Accordingly, Jackson has failed to show that the trial court erroneously denied any of the cause challenges to these prospective jurors. See Busby, 894 So. 2d at 102; Conde, 860 So. 2d at 941-42; Trotter, 575 So. 2d at 693. Because we do not believe the trial court erred in any of these denials, we cannot conclude that the trial court abused its discretion when it declined to grant additional peremptory challenges, even acknowledging the difficulties encountered in seating this jury.[4] Therefore, Jackson's as-applied challenge to the constitutionality of section 913.08 also fails.

Motion for Mistrial

Jackson also asserts that the trial court improperly denied his motion for mistrial raised during the State's direct examination of Linda O'Neal. During trial, the State presented evidence from Linda, who was the wife of Wallace O'Neal. Wallace was the former boyfriend of Jackson's grandmother, and Jackson had

4. The initial attempt to seat a jury in this case failed. Additionally, during voir dire, one juror was admonished and dismissed because he had researched Jackson online, and another was released after expressing concern that her brother shared the same name as Jackson.

lived with Wallace and his grandmother from the time that Jackson was three years old until his grandmother passed away. When the State attempted to elicit testimony from Linda regarding the time when Jackson moved in with her and Wallace, the following exchange occurred:

> [The State]: And prior to September 13th of 2007, how long approximately did [Jackson] live with you at the Grand View Mobile Home Park with you and Wally?
>
> [O'Neal]: I believe he was released—

At that point, defense counsel objected, and during a subsequent bench conference, defense counsel moved for a mistrial, which the trial court denied. The trial court instructed Linda to provide only "yes" or "no" answers. The State then attempted to ask Linda whether Jackson maintained a steady job, and when Linda began to answer with a more complex answer beyond "yes" or "no," defense counsel moved for another bench conference, and the court dismissed the jury from the courtroom. The following exchange occurred:

> The Court: Ms. O'Neal, you came within a quarter inch of destroying this entire trial.
>
> Weren't you told not to make any mention of that? Were you told not to make mention of that, yes or no?
>
> [O'Neal]: Of what?
>
> The Court: Of this young man being released from prison.
>
> [The State]: That he was in prison or jail.
>
> [O'Neal]: Yes.

> The Court: And why in the world would you mention that or come close to mentioning it?
>
> [O'Neal]: Because I couldn't figure—I couldn't remember when he was released. I couldn't remember when he was released, and that's when he came to my house. I don't remember.

Following the end of Linda's testimony, defense counsel renewed its motion for mistrial, adding that Linda had "burst openly into tears" when she was asked about the death of her husband. The State strongly disagreed with that characterization and argued that her eyes watered up, but she did not lose her composure. The trial court made no factual findings regarding Linda's emotional state and denied the motion. Jackson now asserts that the denial of his motion for mistrial was erroneous.

A trial court should grant a motion for mistrial only if prejudicial error occurs that vitiates the entire trial. England v. State, 940 So. 2d 389, 401-02 (Fla. 2006) (citing Snipes v. State, 733 So. 2d 1000, 1005 (Fla. 1999)). We review trial court rulings regarding motions for a mistrial for abuse of discretion. Id. at 402 (citing Perez v. State, 919 So. 2d 347 (Fla. 2005)). This standard is satisfied only if no reasonable person would arrive at the same conclusion as that of the trial court. Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000) (citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990)).

Although irrelevant evidence of prior criminal activity is presumptively harmful, see Straight v. State, 397 So. 2d 903, 908 (Fla. 1981), an isolated or stray reference to a defendant's prior incarceration is considered in context of the trial and does not necessarily result in a mistrial. See Fletcher v. State, 168 So. 3d 186, 207 (Fla. 2015), cert. denied, 136 S. Ct. 980 (2016). When determining whether such a remark vitiated the defendant's right to a fair trial, reviewing courts have often considered whether the fact of a prior conviction or incarceration was critical to any facts at issue during the trial. Compare Cox v. State, 819 So. 2d 705, 713-14 (Fla. 2002) (finding no abuse of discretion by trial court's denial of motion for mistrial after witness stated that the defendant already had two sentences of life imprisonment because the jury was aware that the defendant was incarcerated at the time of the events in question) with Brooks v. State, 868 So. 2d 643, 644-48 (Fla. 2d DCA 2004) (holding that witness's suggestion that the defendant "went back to prison" was harmful in part because it affected the defense's theory of self-defense, which would have been undermined in light of evidence of a prior conviction); and Henderson v. State, 789 So. 2d 1016, 1017-18 (Fla. 2d DCA 2000) (concluding that witness's statement that the defendant seemed familiar with criminal activity as though he had "done this before" was harmful because the character of the defendant was a central issue in that case); see also Fletcher, 168 So. 3d at 208 (rejecting claim that a mistrial was warranted in light of inadvertent

references to the defendant's prior incarceration because the defendant was charged with escape and stipulated to the fact that he was in lawful custody at the time of that escape).

Jackson has not satisfied the heavy burden of proving that the trial court abused its discretion when it denied his motion for mistrial after Linda's very limited comment. Because she did not indicate where Jackson had been released from, it was plausible that the jury could have inferred that he had been released from a hospital or from military service. The record in this case indicates that Linda was a nonresponsive witness who required multiple instructions from the trial court. Contrary to Jackson's assertions, her limited, stray remark does not rise to the level of the improper admission of Williams[5] rule evidence.

Moreover, the cases upon which Jackson relies for support of his argument are distinguishable. The district court in Brooks held that the remark that the defendant had been "sent back to prison" was harmful because the defendant had been charged with domestic violence and had relied on a theory of self-defense. 868 So. 2d at 644-46. That court concluded that the comment would have been understood by the jury as a relevant consideration, would have undermined the defense's theory of self-defense, and required defense counsel to present the

5. Williams v. State, 110 So. 2d 654 (Fla. 1959).

defendant to testify on his own behalf, which exposed him to impeachment. Id.; see also Henderson, 789 So. 2d at 1018 ("In this case . . . character was a central issue."). By contrast, Jackson did not assert self-defense, and his character was not an issue in dispute. Likewise, Finklea v. State, 471 So. 2d 596, 597 (Fla. 1st DCA 1985), is distinguishable because the witness in that case indicated that the defendant had previously been involved in two robberies. Linda's limited, vague comment about Jackson having been released was not similar to the affirmative statement regarding the defendant's prior involvement in two specific crimes in Finklea.

Further, we reject Jackson's various claims that this comment undermined other aspects of his trial. He claims that the comment was exacerbated by the previous testimony of Iris Williams, who thought it was unusual to see Jackson in Gibsonton when she knew he lived with the O'Neals in Seffner. However, Williams testified that although she knew the O'Neals well, she did not know Jackson well and had only met him on two or three occasions. We also do not agree that Linda's emotional response—the extent of which was disputed—when asked about the death of her husband had any effect on her earlier comment that Jackson had been released.

We also do not find persuasive the suggestion that the comment affected the jury. Jackson claims that the prejudice is obvious given that several jurors were

dismissed during trial. One prospective juror was dismissed because he researched Jackson on the Internet during voir dire. However, this juror was dismissed a week before Linda testified, and the trial court inquired whether that juror spoke to any other jurors about his research, which he had not. Additionally, prior to Linda's testimony, Juror 89 was released by agreement of the parties after he had approached the bench earlier that day and explained that he suffered a severe fear of heights that was exacerbated by the location of the particular courtroom used in this trial. Jackson also asserts prejudice existed when Juror 10 asked to be excused because she was concerned that she would no longer be able to fairly evaluate the evidence. However, Juror 10 was excused during the penalty phase—over a week after Linda testified and after the jury had convicted Jackson. The record also indicates that Juror 10 informed the court that she became emotional after hearing mitigating evidence about Jackson's difficult childhood in relation to her own young son. In reviewing the effect of the stray remark by Linda O'Neal within the context of this trial, we conclude that the trial court did not abuse its discretion when it denied Jackson's motion for mistrial.

Admission of Post-Mortem Photographs

Jackson next asserts that the trial court improperly permitted the admission of gruesome post-mortem photographs of Tran that he claims were irrelevant because Tran was dead before the fire started. This Court will not disturb a trial

court's ruling on the admissibility of photographic evidence absent an abuse of discretion. Dennis v. State, 817 So. 2d 741, 763 (Fla. 2002). We have held that photographs are admissible if they are relevant and if the shocking nature of the photographs does not outweigh their relevance. Jennings v. State, 123 So. 3d 1101, 1126 (Fla. 2013) (citing Hertz v. State, 803 So. 2d 629, 641 (Fla. 2001); Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990)). We have previously approved the admission of crime scene photographs that were relevant to the manner of the murder or depict the victim as discovered by law enforcement. Douglas v. State, 878 So. 2d 1246, 1255-56 (Fla. 2004); see also Hertz, 803 So. 2d at 642 n.7 (explaining that crime scene photographs of victims whose bodies were burned were relevant to show, among other matters, how damage from the fire hampered the forensic investigation). When the State seeks to admit autopsy photographs of a victim, the photographs must be relevant to an issue in dispute. Almeida v. State, 748 So. 2d 922, 929 (Fla. 1999). Autopsy photographs may also be relevant when they assist the medical examiner in explaining the victim's injuries or manner of death. Hertz, 803 So. 2d at 642 (citing Mansfield v. State, 758 So. 2d 636, 648 (Fla. 2000); Pope v. State, 679 So. 2d 710, 714 (Fla. 1996)). Nonetheless, we have urged trial courts to proceed with caution to ensure that the photographs are not impermissibly prejudicial or inflammatory. Jennings, 123 So. 3d at 1127; Marshall v. State, 604 So. 2d 799, 804 (Fla. 1992); see also Larkins v. State, 655 So. 2d 95,

98 (Fla. 1995) ("While a trial court should exercise caution in admitting particularly gruesome photographs, and in limiting their numbers, such photographs may still be relevant."). This Court reviews the erroneous admission of photographs for harmless error. See Hertz, 803 So. 2d at 643.

In Hertz, this Court reviewed the relevance of several crime scene and autopsy photographs that had been admitted during trial. 803 So. 2d at 641. We concluded that a crime scene photograph that depicted the victims' charred corpses as discovered by law enforcement was relevant to explain: (1) the condition in which the bodies were found; (2) that the victims were killed execution-style; (3) how the position of the bodies preserved clothing for testing for accelerants; (4) the manner in which the accelerant was applied; and (5) how the fire itself interfered with the forensic investigation. Id. at 641-42 & n.7. We also independently noted that the photograph was probative of the avoid arrest aggravating circumstance found in that case. Id. at n.7. We ultimately concluded that the erroneous admission of other autopsy photographs was harmless in light of the extensive evidence of Hertz's guilt. Id. at 643; see also Doorbal v. State, 983 So. 2d 464, 498-99 (Fla. 2008) (noting that trial court abused its discretion when it admitted a photograph that was only relevant to show the rate of decomposition of the victim's body, but finding the error harmless).

During trial, the court conducted a bench conference to permit the State to explain how the medical examiner, Dr. Sheil, expected to rely on photographs Q1-17 during her testimony. Exhibits Q1 and Q2 depicted the full length of Tran's body after suffering heat amputation, but were taken from different sides. Exhibits Q3, Q4, Q5, Q6, and Q7 were photographs of Tran's face and neck, including the injuries to her throat, taken from different angles. Exhibit Q8 presented the extent of thermal injury to her body. Exhibits Q9, Q10, Q12, and Q13 indicated injuries to Tran's left hand, including a suspected defensive wound. Exhibit Q11 was a photograph of debris recovered near Tran's body. Exhibit Q14 was a photograph of bones recovered from the van. Exhibits Q15, Q16, and Q17 included photographs of the victim's pharynx and trachea.

During voir dire, Dr. Sheil indicated that Exhibits Q1-Q5 were necessary to explain the victim's injuries. She also stated that Q9 and Q10 depicted defensive injuries to Tran's hand, but admitted that it was difficult to identify that injury in Q10. She indicated that she would need to explain the thermal injuries so that the jury could understand why Tran's injuries appeared the way they did and that the thermal injuries may have obscured other injuries that Tran might have received. She added that the photographs of Tran's larynx and trachea were relevant to prove that Tran had not inhaled smoke before she died.

Following the voir dire of Dr. Sheil, defense counsel withdrew their objections to Exhibits Q11, Q12, Q14, and Q16. The trial court found that the photographs were not cumulative, although some of the photographs depicted the same image from different angles. The court concluded that the photographs were relevant to show that Jackson attempted to destroy evidence of Tran's murder, found that the photographs were not unduly prejudicial, and admitted them. Jackson now specifically challenges the admission of Exhibits Q3, Q4, and Q5 as repetitive, as well as Q6, Q9, and Q10. See Appellant's Initial Br. 71.[6]

We conclude that the trial court correctly determined that Exhibits Q3, Q4, Q5, and Q6 were relevant to show the fatal injuries that Tran suffered. Dr. Sheil extensively discussed these photographs as she described for the jury the six wounds that ultimately resulted in Tran's death. At least three of these wounds would have been fatal, and one of the wounds would have silenced Tran. Thus, the photographs of these wounds were relevant to the cause of death and were necessary for Dr. Sheil's testimony. Moreover, the nature of Tran's wounds was

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6. To the extent that Jackson contends that any of the remaining photographs were irrelevant and unduly prejudicial, he has failed to sufficiently brief such an argument. See Heath, 3 So. 3d at 1029 n.8 ("Vague and conclusory allegations on appeal are insufficient to warrant relief."). Further, any potential error regarding the admission of Exhibits Q11, Q12, Q14, and Q16 was waived when trial counsel withdrew their objections to these exhibits. See Simmons v. State, 934 So. 2d 1100, 1111 n.12 (Fla. 2006).

also relevant to the HAC aggravating circumstance, which was an issue during the penalty phase. See Boyd v. State, 910 So. 2d 167, 191-92 (Fla. 2005) (noting the admissibility of one photograph was questionable, but ultimately finding no abuse of discretion because the photograph assisted the medical examiner's testimony and was relevant to establish the HAC aggravating circumstance).

Further, we do not find any abuse of discretion in admitting multiple photographs of the same or similar image. Admittedly, the State might have been able to elicit the same testimony from Dr. Sheil through the admission of one or two, rather than four, photographs. See Douglas, 878 So. 2d at 1256 (noting that the prosecution admitted only one photograph of each injured area of the victim's body). However, we have previously approved the admission of multiple gruesome photographs. See Arbelaez v. State, 898 So. 2d 25, 44 (Fla. 2005) (concluding that the trial court did not abuse its discretion when it admitted four photographs of the victim's body after it had been recovered and six autopsy photographs that showed various injuries from different angles); Douglas, 878 So. 2d at 1255-56 (finding no abuse of discretion in admitting thirteen autopsy photographs). Therefore, we cannot say that no reasonable jurist would have admitted Exhibits Q3, Q4, Q5, and Q6.

Moreover, we find no abuse of discretion in the admission of Exhibits Q9 or Q10. These exhibits depicted injuries that Dr. Sheil opined were defensive wounds

to Tran's hands, which were relevant to the HAC aggravating circumstance. See Williams v. State, 37 So. 3d 187, 200 (Fla. 2010); Boyd, 910 So. 2d at 191-92. Therefore, the trial court did not err in admitting these photographs.

We also reject Jackson's suggestion that the gruesome nature of the photographs had an obvious prejudicial effect on the jury, as Jurors 10 and 89 were released following the admission of these photographs. However, as explained above, the record indicates that these jurors were excused from the panel for reasons that were entirely unconnected to the admission of these photographs.

The post-mortem photographs of Tran were undeniably difficult, as one would expect photographs of a victim's body damaged by fire to be. However, the photographs at the focus of Jackson's argument were the photographs that depicted the fatal wounds and defensive wounds that Tran incurred before she died. Although it was undisputed that Tran had died before the fire was started, the State was still burdened with presenting evidence regarding the cause of Tran's death. Additionally, the HAC aggravating circumstance, which can be established by evidence of multiple stabbings and defensive wounds, was an issue in dispute in this trial. Although these photographs were undoubtedly adverse to Jackson, they cannot be said to be so unduly prejudicial that their admission was unfair. See Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613, 618 (5th Cir. 1977) ("Virtually all evidence is prejudicial or it isn't material. The prejudice must be 'unfair.' "). We

cannot conclude that the trial court abused its discretion here, particularly in light of the lengthy voir dire of Dr. Sheil to explain the purpose of these photographs before the jury was permitted to view them. We reject Jackson's claim.

Sufficiency

Although Jackson does not raise this argument, when a defendant is sentenced to death, we have an independent obligation to review the record for competent, substantial evidence that supports the defendant's convictions. E.g., Brown v. State, 143 So. 3d 392, 407 (Fla. 2014) (citing Blake v. State, 972 So. 2d 839, 850 (Fla. 2007); Fla. R. App. P. 9.142(a)(5)). If a rational trier of fact may conclude, upon a review of the evidence in the light most favorable to the State, that the elements of the crime have been proven beyond a reasonable doubt, we will affirm the convictions. Id.

There is both direct and circumstantial competent, substantial evidence in this record to support Jackson's convictions. A confession constitutes direct evidence of guilt in Florida. Simmons, 934 So. 2d at 1111. Jackson admitted to Gonzalez and Kennedy that he knew Tran would jog regularly in their neighborhood. He told them that he stole the van, encountered Tran, raped her, and stabbed her in the throat. Kennedy testified that Jackson waited for Tran and indeed relished his encounter with her, telling Kennedy that "he fucked her good." The State also presented competent, substantial circumstantial evidence of

Jackson's guilt, including the fact that his DNA was found in Tran's vagina. Witness testimony and surveillance footage placed Jackson in Seffner, near the location where the van was stolen early in the morning of September 13, and later in Gibsonton, where the burning van was discovered. Linda O'Neal testified that Jackson returned home to Seffner around 1:00 or 1:30 p.m., on foot and sweating. Additionally, Detective Pettis explained that the van appeared to have been stolen, based on the notch observed on the van's door handle. Randy St. Clair of the State Fire Marshal's Office testified that he believed that the van was set on fire to conceal the evidence of Tran's murder. Thus, we are satisfied that competent, substantial evidence supports Jackson's convictions.

Penalty Phase

Jackson asserts that several errors occurred during the penalty phase of his trial, including: (1) Florida's capital sentencing statute violates the Sixth and Eighth Amendments under Hurst v. Florida and Ring v. Arizona, 536 U.S. 584 (2002); (2) the trial court should have considered qEEG evidence during the penalty phase; (3) the jury should not have been given instructions on the CCP aggravating circumstance; (4) the trial court permitted improper rebuttal testimony from a witness who testified on behalf of the State; and (5) the HAC and felony murder aggravating circumstances are unconstitutional. We only address the issue that we find dispositive, that Jackson's sentence violates the Sixth Amendment

under Hurst v. Florida. Because we conclude that Jackson is entitled to a new penalty phase, we decline to address his remaining claims.

The Sixth Amendment under Apprendi, Ring, and Hurst v. Florida

In recent years, the United States Supreme Court has become increasingly focused on the intersection between criminal sentencing and the right to a jury trial as guaranteed by the Sixth Amendment. In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Court considered whether the Sixth Amendment permitted factfinding by a judge, not a jury, on a matter that increased the maximum sentence for a given offense. The Court had previously held that the Due Process Clause of the Fifth Amendment and the Sixth Amendment right to a jury trial required that any fact that "increase[d] the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Id. at 476 (quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999)). In Apprendi, the Court applied that right to state criminal law via the Due Process Clause of the Fourteenth Amendment. Id. However, the Apprendi Court noted one exception to this rule: a jury is not required to make factual findings that the defendant has a prior conviction. Id. at 487-90 (citing Almendarez-Torres v. United States, 523 U.S. 224 (1998)).

The Court expanded Apprendi to capital punishment in Ring. 536 U.S. at 609. In Arizona, a defendant convicted of first-degree murder could not be

sentenced to death without a separate sentencing procedure that followed his or her conviction and that entailed additional factual findings by a judge. Id. at 592. The judge alone conducted a sentencing hearing to make factual findings regarding the existence of aggravating and mitigating circumstances, and the judge was only authorized to sentence a defendant to death if at least one aggravating circumstance was proven and "there [were] no mitigating circumstances sufficiently substantial to call for leniency." Id. at 592-93 (citing § 13-703(F), Ariz. Rev. Stat. Ann. (West. Supp. 2001)). The Supreme Court held that this procedure was unconstitutional because it removed from the jury the factfinding process that exposed the defendant to an increased punishment, which could not be supported under Apprendi. Id. at 609.

This Court initially concluded that Ring did not apply to Florida. E.g., Johnson v. State, 904 So. 2d 400, 406 (Fla. 2005) (citing Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002)). Bottoson and King were both plurality opinions that concluded that Ring did not apply to Florida because the Supreme Court had previously affirmed Florida's capital sentencing process—notably in Hildwin v. Florida, 490 U.S. 638, 640 (1989), and Spaziano v. Florida, 468 U.S. 447 (1984)—and did not expressly overrule these decisions following Ring. Bottoson, 833 So. 2d at 695 n.4; King, 831 So. 2d at 144 n.4. Additionally, Justices Harding, Wells, Quince, Anstead, Shaw, Pariente, and Lewis

wrote separate opinions in Bottoson, reflecting the deep divisions among the Court regarding the application of Ring. See generally 833 So. 2d 693. Although neither Bottoson nor King constituted majority decisions that represented a clear rule of law from this Court, the ultimate result was that Ring was never applied in this State. See, e.g., Hurst v. State (Hurst), 147 So. 3d 435, 446-47 (Fla. 2014), rev'd, Hurst v. Florida, 136 S. Ct. 616.

Consistent with that precedent, this Court did not grant Hurst relief pursuant to Ring. Hurst, 147 So. 3d at 446. Hurst was resentenced to death following a jury recommendation of seven to five in favor of a death sentence. Id. at 445. His trial counsel requested an interrogatory verdict to specify the aggravating circumstances, which included HAC and the fact that the murder was committed during the course of a robbery, but the trial court denied the request. Id. at 440, 446 n.4. This Court rejected Hurst's claim that Ring required the jury to find the existence of these aggravating circumstances, especially in light of the fact that Hurst had no prior felony conviction, and the jury that recommended his current sentence was not the same jury that convicted him of murder. Id. at 446.

The Supreme Court accepted certiorari jurisdiction and reversed, holding that Ring applies to Florida's capital sentencing statute. Hurst v. Florida, 136 S. Ct. at 619. As was the case in Arizona under Ring, a conviction of first-degree murder alone did not subject a defendant to a potential sentence of death;

additional sentencing procedures were necessary to impose a death sentence. Id. at 620 (citing §§ 782.04(1)(a), 775.082(1), Fla. Stat. (2010)). The sentencing procedure employed in Florida involved the presentation of aggravating and mitigating circumstances to a jury, which then made a recommendation of sentence to the judge, who later made factual findings as to the aggravation, mitigation, and relative weight of each. Id.; see § 921.141, Fla. Stat. (2007). The Supreme Court held that any distinctions between Florida's sentencing statute and that at issue in Ring—such as the fact that in Arizona, there was no jury participation after the conviction—were irrelevant and concluded that Florida's statute was also unconstitutional:

> Had Ring's judge not engaged in any factfinding, Ring would have received a life sentence. Ring, 326 U.S. at 597. Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment.
>
> The analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of Ring, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. [§ 921.141(3), Fla. Stat.]. Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial . . . .
>
> . . . .
>
> Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

Hurst v. Florida, 136 S. Ct. at 621-24.

The Court rejected each of the arguments advanced by Florida in support of its sentencing statute. First, it concluded that the advisory verdict rendered by the jury did not satisfy the factfinding requirement of the Sixth Amendment as articulated in Ring. Id. at 622. Additionally, the Court explained that Hurst did not admit the existence of any aggravating circumstance, rejecting the State's suggestion that Hurst waived any subsequent Ring claim. Id. at 623. The Court further concluded that stare decisis was an insufficient barrier to deny Hurst relief and explicitly overruled Spaziano and Hildwin after noting that it has refused to recognize stare decisis in similar cases under Apprendi. Id. at 623-24. Finally, the Supreme Court remanded to this Court to determine whether any error in Hurst's sentence was harmless. Id. at 624.

Justice Breyer concurred in the judgment, concluding that the Eighth Amendment, rather than the Sixth Amendment, required a jury to sentence a defendant to death. Id. (Breyer, J., concurring in the judgment). Justice Alito dissented, questioning the basis for overruling Hildwin and Spaziano. Id. at 624-27 (Alito, J., dissenting). Further, Justice Alito wrote that any error that occurred during Hurst's resentencing was harmless beyond a reasonable doubt. Id. at 626.

On remand from the Supreme Court in Hurst v. State, we held that "the Supreme Court's decision in Hurst v. Florida requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be

found unanimously by the jury." Hurst v. State (Hurst v. State), 202 So. 3d 40, 44 (Fla. 2016), petition for cert. filed, No. 16-998 (U.S. Feb. 13, 2017). We explained:

> In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances.

Id. We further held, based on Florida's separate right to trial by jury under article I, section 22, of the Florida Constitution, "Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous." Id. Finally, we determined that Hurst error is capable of harmless error review. Id. at 67. In considering this case, we once again explain Hurst v. Florida's application in holding that Jackson is entitled to a new penalty phase.

Whether an Error Occurred in This Case

New rules of law announced by the United States Supreme Court or this Court will apply to all cases that are pending on direct review or are otherwise not finalized. State v. Johnson, 122 So. 3d 856, 861 (Fla. 2013) (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1986); Smith v. State, 598 So. 2d 1063, 1066 (Fla.

1992)). This case is before us on direct appeal; therefore, Jackson's appeal is subject to Hurst v. Florida.

Jackson and the State dispute the scope of Hurst v. Florida. Jackson asserts that Hurst v. Florida requires unanimous jury findings that the aggravation outweighs the mitigation before a defendant can be sentenced to death, while the State insists that the jury must only find the existence of a single aggravating circumstance before death can be imposed. The State argues that Jackson's sentence was unaffected by Hurst v. Florida because Jackson was simultaneously convicted of sexual battery, and the aggravating factor that the murder was committed during the course of a sexual battery was found in this case. On this point, we agree with Jackson that a jury must find that sufficient aggravating circumstances exist and that these aggravating circumstances outweigh any mitigating circumstances.

Ring and Hurst v. Florida simply state that the jury must find "any fact on which the legislature conditions an increase in the maximum punishment." Hurst v. Florida, 136 S. Ct. at 620; Ring, 536 U.S. at 588. Those facts that permit the authorization of a death sentence are a matter of state law. See Hurst v. Florida, 136 S. Ct. at 619 ("Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. . . . We hold this scheme unconstitutional. The Sixth

Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." (emphasis added)); Ring, 536 U.S. at 588 ("In Arizona . . . the trial judge, sitting alone, determines the presence or absence of the aggravating factors required by law for imposition of the death penalty.").

To determine whether Jackson's sentence violated Hurst v. Florida, we discuss only the statutes in effect at the time his sentence was issued, which were sections 775.082(1) and 921.141, Florida Statutes (2007).[7] These statutes detailed the following procedures:

> A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

§ 775.082(1), Fla. Stat. (2007) (emphasis supplied).

> (1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. . . .
>
> (2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

7. These statutes were significantly amended by the Florida Legislature in its 2016 and 2017 terms following the decisions in Hurst v. Florida and Hurst v. State. See Ch. 2016-13, § 13, Laws of Fla.; Ch. 2017-1, § 1, Laws of Fla.

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5); and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

§ 921.141(1)-(3), Fla. Stat. (2007) (emphasis added). Our review of these statutes leads to the conclusion that the facts that were necessary to impose the death penalty in Florida at the time that Jackson was sentenced are those highlighted in section 921.141(3)(a)-(b): that sufficient aggravating circumstances exist and the existing aggravation outweighs the presented mitigation. These are the facts that must be found by a jury under Hurst v. Florida.

Accordingly, we must reject the State's argument that no Hurst v. Florida error occurred because Jackson was simultaneously convicted of sexual battery and the felony murder aggravating circumstance was found below. We recognize that

we have previously refused to apply Ring when a defendant is convicted both of felony murder and the predicate felony, or when the jury has necessarily found facts that support a judge's finding of an aggravating circumstance. See, e.g., Ellerbee v. State, 87 So. 3d 730, 747 (Fla. 2012) (citing Baker v. State, 71 So. 3d 802, 824 (Fla. 2011); Douglas, 878 So. 2d at 1263-64). However, Hurst v. Florida has indicated that a great deal of our previous Ring jurisprudence requires reconsideration, including our understanding of the previous version of section 921.141, which we now believe required findings of "sufficient" aggravating circumstances—not just a single aggravating circumstance, as the State claims. See also Barclay v. Florida, 463 U.S. 939, 954 n.12 (1983) (noting that the language in section 921.141 pertaining to "sufficient aggravating circumstances" suggests that the finding of one aggravating circumstance alone does not necessarily support the imposition of a death sentence).

As a predicate for Jackson's sentence to have been constitutional under Hurst v. Florida, the jury would have been required to find that sufficient aggravating circumstances existed, and that sufficient aggravating circumstances outweighed the mitigating circumstances. This did not occur. The jury in this case did not make any factual findings, but merely recommended by a vote of eleven to one that Jackson be sentenced to death. To the extent that the jury's recommendation can be understood as a proxy for the necessary factual findings—

a matter that the United States Supreme Court cautioned against[8]—at least one juror apparently concluded either that sufficient aggravating circumstances did not exist, that the mitigation outweighed the aggravation, or both. Therefore, Jackson's sentence violated the Sixth Amendment under Ring and Hurst v. Florida.

The Nature of a Hurst Error: Structural or Potentially Harmless

Having established that Jackson's sentence was unconstitutional, we next consider the nature of the error. Jackson asserts that a Hurst v. Florida error cannot be subject to harmless error review, but instead should be considered a structural error that requires relief. We disagree that a Hurst v. Florida error, which pertains to the entity that makes factual findings regarding an individual's eligibility for the death penalty, falls within the "very limited class of cases" that require reversal. Neder v. United States, 527 U.S. 1, 8 (1999). Instead, we agree with the State that such errors are capable of harmless error review.

The United States Supreme Court has explained that "most constitutional errors can be harmless." Arizona v. Fulminante, 499 U.S. 279, 306 (1991). However, it has recognized that there are certain errors that can never be harmless:

> [W]e have found an error to be "structural," and thus subject to automatic reversal, only in a "very limited number of cases." Johnson v. United States, 520 U.S. 461, 468 (1997) (citing Gideon v.

8. Hurst v. Florida, 136 S. Ct. at 622 ("The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that Ring requires.").

> Wainwright, 372 U.S. 335 (1963) (complete denial of counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (biased trial judge); Vasquez v. Hillery, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); McKaskle v. Wiggins, 465 U.S. 168 (1984) (denial of self-representation at trial); Waller v. Georgia, 467 U.S. 39 (1984) (denial of public trial); Sullivan v. Louisiana, 508 U.S. 275 (1993) (defective reasonable-doubt instruction)).
>
> The error at issue here—a jury instruction that omits an element of the offense—differs markedly from the constitutional violations we have found to defy harmless-error review. Those cases, we have explained, contain a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Fulminante, [499 U.S.] at 310. Such errors "infect the entire trial process," Brecht v. Abrahamson, 507 U.S. 619, 630 (1993), and "necessarily render a trial fundamentally unfair," Rose[v. Clark, 478 U.S. 570, 577 (1986)]. Put another way, these errors deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." Id., at 577-578.

Neder, 527 U.S. at 8-9. The Court concluded that the error in Neder did not automatically render the defendant's trial fundamentally unfair and ultimately found that the error in that case was harmless. Id. at 9, 20.

Although the United States Supreme Court has not explicitly held that Ring errors are capable of harmless error review, it has held that similar errors can be harmless. See Washington v. Recuenco, 548 U.S. 212, 221-22 (2006). In Blakely v. Washington, 542 U.S. 296, 303 (2004), a noncapital defendant was sentenced to a term that exceeded the statutory maximum of the standard range of the offense "because he had acted with 'deliberate cruelty.' " Relying on Apprendi and Ring, the Supreme Court held that the sentence violated the Sixth Amendment. Id. at

303-05. Subsequently, the Court reversed a decision from the Washington Supreme Court that a Blakely error was a fundamental error incapable of harmless error review. Recuenco, 548 U.S. at 222; see also United States v. Cotton, 535 U.S. 625, 632 (2002) (reviewing an Apprendi error for plain error under Federal Rule of Criminal Procedure 52(b) and concluding that "the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings").

Moreover, the vast majority of jurisdictions that have addressed the issue have determined that a Ring error is capable of harmless error review. See, e.g., United States v. Allen, 406 F.3d 940, 948 (8th Cir. 2005); United States v. Davis, 380 F.3d 821, 830 (5th Cir. 2004); United States v. Higgs, 353 F.3d 281, 306 (4th Cir. 2003); Ex parte Stephens, 982 So. 2d 1148, 1153 (Ala. 2006); State v. Ring (Ring II), 65 P.3d 915, 933 (Ariz. 2003); People v. Williams, 233 P.3d 1000, 1040-41 (Cal. 2010); Capano v. State, 889 A.2d 968, 977 (Del. 2006); State v. Lovelace, 90 P.3d 298, 300 (Idaho 2004); State v. Whitfield, 107 S.W.3d 253, 262 (Mo. 2003); State v. Jordan, 325 S.W.3d 1, 70 (Tenn. 2010). Additionally, the Supreme Court remanded Hurst v. Florida to this Court to determine whether the Sixth Amendment violation in Hurst's case was harmless. Hurst v. Florida, 136 S. Ct. at 624.

We see no reason to abandon the majority rule or the guidance of the Supreme Court in Recuenco by holding that a Hurst v. Florida error is

fundamental. A Hurst v. Florida error emerges because a judge, rather than a jury, makes findings regarding the facts that render a defendant eligible for a death sentence. See Hurst v. Florida, 136 S. Ct. at 619. The error here did not occur because no findings were made, but rather because the jury did not make the findings as required by the Sixth Amendment. Such an error does not constitute "a defect affecting the framework" of the trial to the extent that any resulting sentence must be deemed fundamentally unfair. Neder, 527 U.S. at 8 (quoting Fulminante, 499 U.S. at 310). Therefore, we hold that a Hurst v. Florida error is capable of harmless error review.

Whether Jackson's Sentencing Error Was Harmless

In Florida, a sentencing error is considered harmless if the State can prove beyond a reasonable doubt that there is no reasonable possibility that a lesser sentence would have resulted without the error. Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987) (citing State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986)). We conclude that the State has failed to satisfy this burden.

The jury in this case was given instructions regarding three aggravating circumstances: HAC, CCP, and the fact that the murder was committed during the course of a sexual battery. The judge instructed the jury that it must render an advisory sentence based on whether sufficient aggravating circumstances existed, and whether those aggravating circumstances outweighed the mitigating

circumstances. Following these instructions, the jury returned a recommendation of death by a vote of eleven to one. The jury made no factual findings regarding whether sufficient aggravating circumstances existed, or whether sufficient aggravating circumstances existed which outweighed the mitigating circumstances, as section 921.141 required at the time of Jackson's trial. The most that can be gleaned from the jury's recommendation is that one juror concluded that sufficient aggravation, if it existed, did not outweigh the mitigation presented. This nonunanimous advisory recommendation cannot be overlooked in our harmless error analysis. The fact that a single juror in this case apparently concluded that the aggravation was not sufficient to outweigh the mitigation is itself evidence of reasonable doubt that a different result might have occurred but for the Hurst v. Florida error.

Following that nonunanimous jury recommendation, the judge found the existence of two aggravating circumstances, the felony murder and HAC aggravating circumstances, and afforded each great weight. We acknowledge that the trial court's finding that the murder was committed during the course of a sexual battery was not erroneous. The United States Supreme Court indicated in Apprendi and Ring that there was one narrow exception to the Sixth Amendment requirement that a jury must find any fact that increases the maximum sentence: the fact of a prior conviction, as established in Almendarez-Torres. Ring, 536 U.S.

at 597 n.4; Apprendi, 530 U.S. at 489-90.[9] Although the Supreme Court has since suggested that the continued validity of Almendarez-Torres may be questionable, it has not directly revisited the exception created in that case. See Alleyne v. United States, 133 S. Ct. 2151, 2160 n.1 (2013) (recognizing the "narrow exception" created by Almendarez-Torres, but noting that it was not directly at issue in Alleyne); Ring, 536 U.S. at 597 n.4 (noting that Almendarez-Torres was not the subject of Ring's challenge); Apprendi, 530 U.S. at 489 ("[I]t is arguable that Almendarez-Torres was incorrectly decided . . . ."). On this matter, we find persuasive the reasoning of the Arizona Supreme Court, which concluded that unless and until the United States Supreme Court expressly overrules Almendarez-Torres, that decision remains a valid, if narrow, exception to Apprendi and Ring. See Ring II, 65 P.3d at 938 ("We cannot ignore a Supreme Court decision interpreting federal law unless the Court expressly overrules or casts cognizable doubt on that decision."); see also Whitfield, 107 S.W.3d at 262 & n.7 (finding no error by judge who found the existence of prior convictions as aggravating circumstances). Therefore, the jury in this case was not required to find the

9. In Almendarez-Torres, a federal immigration case, the Court held that the fact that an individual was previously deported because of a conviction for an aggravated felony, which authorized a potential prison term of twenty years, was considered a penalty provision, not a separate crime that must be charged in an indictment and proven beyond a reasonable doubt. 523 U.S. at 226-27.

existence of the aggravating circumstance that Jackson committed the murder during the course of sexual battery because he had already been convicted of sexual battery at the time he was sentenced.

However, this conclusion does not mean that the finding of the felony murder aggravating circumstance alone was sufficient to support Jackson's sentence. When the jury made a nonunanimous recommendation that Jackson be sentenced to death, it did not make factual findings regarding the existence of any—let alone sufficient—aggravating circumstances, nor did it make any findings regarding the relative weight of the aggravating and mitigating circumstances, as section 921.141, Florida Statutes (2007), required. Thus, we cannot say that the fact that Jackson committed this murder during the course of a sexual battery rendered his unconstitutional sentence harmless beyond a reasonable doubt without considering the other aggravating circumstances at issue here.

Turning to those aggravating circumstances, we cannot conclude that the judge's finding of the HAC aggravating circumstance was harmless beyond a reasonable doubt. The focus of the HAC aggravating circumstance is on the circumstances of the murder, particularly the suffering of the victim, as a finding of HAC can only be supported if the murder was "conscienceless or pitiless and unnecessarily torturous to the victim." Orme v. State, 25 So. 3d 536, 551 (Fla. 2009) (quoting Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998)). Therefore,

the existence of this aggravating circumstance is heavily fact-dependent. Moreover, HAC has been recognized as one of the most weighty aggravating circumstances. See, e.g., Rigterink v. State, 66 So. 3d 866, 900 (Fla. 2011) (citing Johnson v. State, 969 So. 2d 938, 958 (Fla. 2007); Barnhill v. State, 834 So. 2d 836, 849 (Fla. 2002)). Accordingly, this Court has previously concluded that an erroneous finding of HAC by a judge is often harmful because of the associated weight of this aggravating circumstance. See, e.g., Perez, 919 So. 2d at 381-82 (citing Morton v. State, 789 So. 2d 324, 331 (Fla. 2001); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999)). But see Cole v. State, 36 So. 3d 597, 609-10 (Fla. 2010) (concluding that an invalid finding of the HAC aggravating circumstance was harmless beyond a reasonable doubt in light of the remaining valid aggravating circumstances).

In this case, Jackson contested the HAC aggravating circumstance during trial and has asserted before this Court that it was improperly found by the trial court below. This claim was partially predicated on testimony from the medical examiner that Tran could have died within seconds to minutes of receiving the fatal stab wounds; according to Jackson, she would have suffered less if she had died within seconds, rather than minutes.[10] Although we do not address today whether

10. Jackson also asserted that the finding of the HAC aggravating circumstance was improperly based on the fact that Tran's body was burned after she had died. See, e.g., Buzia v. State, 926 So. 2d 1203, 1212 (Fla. 2006)

this aggravating circumstance was properly found below, we conclude that the judicial finding of this contested aggravating circumstance—which is by nature a fact-intensive inquiry—was not harmless beyond a reasonable doubt.

A further complicating matter in this case is the fact that the court read the CCP instruction to the jury, but ultimately concluded that the State failed to prove the existence of this aggravating circumstance beyond a reasonable doubt. Although we do not specifically determine whether the CCP instruction was properly administered in this case, we do note that the standard for giving an instruction on an aggravating circumstance is much lower than the standard for finding that circumstance has been proven beyond a reasonable doubt:

> Although an aggravating factor must be proven beyond a reasonable doubt, Johnson v. State, 438 So. 2d 774, 779 (Fla. 1983), a jury instruction on aggravators need only be supported by credible and competent evidence. See Hunter v. State, 660 So. 2d 244, 252 (Fla. 1995). The fact that the State does not prove an aggravating factor to the [court's] satisfaction does not require a conclusion that there was insufficient evidence to allow the jury to consider that factor. Bowden v. State, 588 So. 2d 225, 231 (Fla. 1991). Indeed, where evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required. Id.; Stewart v. State, 558 So. 2d 416, 420 (Fla. 1990).

Welch v. State, 992 So. 2d 206, 215 (Fla. 2008). The trial court may very well have been correct both in instructing the jury and ultimately concluding that the

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("[N]othing done to the victim after the victim is dead or unconscious can support this aggravator.").

State failed to prove the existence of CCP beyond a reasonable doubt. However, it is impossible for us to conclude that the jury would have found the existence of this aggravating circumstance beyond a reasonable doubt from its simple nonunanimous recommendation to sentence Jackson to death. Thus, we cannot conclude that the trial court's findings, which followed a nonunanimous recommendation by the jury, were harmless beyond a reasonable doubt.

Whether a Life Sentence Pursuant to Section 775.082(2), Florida Statutes, Is the Proper Remedy

Having determined that a harmful error occurred during sentencing, we next consider the appropriate remedy. Jackson insists his sentence must be commuted to life imprisonment pursuant to section 775.082(2), Florida Statutes (2007). This is premised on the argument that Hurst v. Florida left the State of Florida without a valid penalty, similar to the effect that Furman v. Georgia, 408 U.S. 238 (1972), had on capital defendants. However, we disagree with such a broad reading of Hurst v. Florida.

Section 775.082(2) states:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

However, this Court has sparingly applied this statute in the past. After a divided Supreme Court issued Furman, which held that the imposition of the death penalty for defendants convicted of murder or rape violated the Eighth and Fourteenth Amendments, this Court commuted the sentences of the forty inmates who had been sentenced to death under the statute in effect prior to Furman. See Anderson v. State, 267 So. 2d 8, 9 (Fla. 1972). However, Florida's subsequent amendments to its capital sentencing procedures received approval from the Supreme Court, which has not since questioned the validity of capital punishment itself. Proffitt v. Florida, 428 U.S. 242, 247 (1976) (citing Gregg v. Georgia, 428 U.S. 153, 168-87 (1976)); see also Glossip v. Gross, 135 S. Ct. 2726, 2732-33 (2015) (noting, in the context of a challenge to a method of execution, "that because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a constitutional means of carrying it out' " (quoting Baze v. Rees, 553 U.S. 35, 47 (2008) (plurality opinion))). Likewise, after the Supreme Court held that death was an unconstitutional punishment for the crime of rape of an adult woman in Coker v. Georgia, 433 U.S. 584 (1977), this Court invoked section 775.082(2) and vacated a death sentence predicated upon the rape of children. Shue v. State, 366 So. 2d 387, 389-91 (Fla. 1978).

Hurst v. Florida did not hold that the death penalty itself is unconstitutional, nor did it hold that the death penalty was an unconstitutional punishment for the

crimes of which Jackson was convicted. Hurst v. Florida more narrowly held that certain portions of the procedure dictated in section 941.121 were unconstitutional. See 136 S. Ct. at 624 ("Florida's sentencing scheme . . . is therefore unconstitutional." (emphasis added)). More specifically, the decision in Hurst v. Florida only invalidated those provisions of section 921.141 that permitted judicial factfinding rather than factfinding by a jury. See, e.g., State v. Galindo, 774 N.W.2d 190, 213 (Neb. 2009) ("Of all the statutes composing our death penalty scheme and referring to the death penalty as the maximum punishment for first degree murder, only one, § 29-2522, dealt with who should make the determination of the aggravating circumstances. Thus, only § 29-2522 violated the principles of jury factfinding set forth by Ring. It would have been unreasonable to conclude that Ring called into question the remaining provisions of the Nebraska death penalty scheme. The invalidity of a single provision purely procedural in nature does not automatically invalidate the underlying punishment to which that procedure applies."). Thus, section 775.082(2) does not apply.

We also refuse to follow the example of the Colorado Supreme Court, which commuted the sentences invalidated by Ring pursuant to a statute that contained similar language to section 775.082(2), Florida Statutes. Woldt v. People, 64 P.3d 256 (Colo. 2003). The capital sentencing statute in effect in Colorado at the time Ring was announced was similar to the Arizona statute invalidated by Ring. Id. at

258-59. The Colorado Supreme Court held that its capital sentencing statute was facially unconstitutional under Ring and concluded that the proper remedy was to remand for life imprisonment without the possibility of parole after concluding that Colorado law mandated such a result. Id. at 266-67. Specifically, that court analyzed the following statute:

> In the event the death penalty as provided for in this section is held to be unconstitutional by the Colorado supreme court or the United States supreme court, a person convicted of a crime punishable by death under the laws of this state shall be punished by life imprisonment. In such circumstance, the court which previously sentenced a person to death shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment.

Id. at 267 (quoting Colo. Rev. Stat. § 18-1.3-401(5) (2002)). After reviewing the legislative history of the relevant statutes, the Colorado Supreme Court concluded that under Colorado law, the language of section 18-1.3-401(5) and the ex post facto concerns of resentencing left that Court without the discretion to remand for resentencing.

We do not adopt the analysis of the Colorado Supreme Court for several reasons. First, the Woldt Court did not consider the possibility that a Ring error could be harmless beyond a reasonable doubt, which places Colorado in the minority of jurisdictions on this issue. See, e.g., Allen, 406 F.3d at 948; Ex parte Stephens, 982 So. 2d at 1153; Ring II, 65 P.3d at 933; Williams, 233 P.3d at 1040-41; Capano, 889 A.2d at 977; Lovelace, 90 P.3d at 300; Whitfield, 107 S.W.3d at

262; Jordan, 325 S.W.3d at 70. As explained above, we join the majority rule in holding that a Ring/Hurst v. Florida error is capable of harmless error review. We also note that Woldt was decided three years before the United States Supreme Court held in Recuenco that a Blakely error could be harmless.

The Woldt decision also concluded that resentencing the defendants in that case under revised capital procedures would violate the Ex Post Facto Clauses of the United States and Colorado constitutions. 64 P.3d at 270-72. However, this holding is also inconsistent with the majority of jurisdictions which have found no ex post facto violation in resentencing. E.g., Ring II, 65 P.3d at 945; Brice v. State, 815 A.2d 314, 321 (Del. 2003); Lovelace, 90 P.3d at 302-03; People v. Crutchfield, 820 N.E.2d 507, 517 (Ill. App. Ct. 2004) (finding no ex post facto violation in resentencing a defendant under procedures revised pursuant to Apprendi); Ritchie v. State, 809 N.E.2d 258, 264 (Ind. 2004); Galindo, 774 N.W.2d at 210-11.[11]

Finally, this Court has historically chosen to remand for a new penalty phase when a harmful error occurs during the original penalty phase. See, e.g., Perez,

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11. Relatedly, and unusually, the Colorado Supreme Court explained that under Colorado law, subsequent procedural amendments can raise ex post facto concerns. See Woldt, 64 P.3d at 271. By contrast, both the United States Supreme Court and this Court have concluded that procedural amendments to previously invalidated statutes do not violate the Ex Post Facto Clauses of the United States or Florida constitutions. Dobbert v. Florida, 432 U.S. 282, 293 (1977); Shenfeld v. State, 44 So. 3d 96, 100 (Fla. 2010).

919 So. 2d at 381-82 (remanding for new penalty phase after the erroneous finding of HAC was considered harmful in light of the historical weight associated with that aggravating circumstance); Kormondy v. State, 703 So. 2d 454, 462-63 (Fla. 1997) (remanding for new penalty phase for harmful admission of prejudicial, irrelevant evidence in the penalty phase); James v. State, 615 So. 2d 668, 669 (Fla. 1993) (remanding for new penalty phase following invalidation of HAC instruction by Espinosa v. Florida, 505 U.S. 1079 (1992), for defendant who had preserved that error); Atkins v. State, 452 So. 2d 529, 532-33 (Fla. 1984) (remanding for new penalty phase after trial court erroneously considered as an aggravating circumstance an allegation of sexual battery that was not proven for lack of a corpus delicti (citing Elledge v. State, 346 So. 2d 998 (Fla. 1977)). Historically, when evidence has been improperly admitted or excluded in the penalty phase, the jury has been improperly instructed, or the jury recommendation itself has been invalidated, the proper remedy has been to remand for a new penalty phase. See Riley v. Wainwright, 517 So. 2d 656, 658 (Fla. 1987) (concluding that a new jury was required to review penalty phase evidence because prior recommendation, which did not consider nonstatutory mitigation, was invalid); Menendez v. State, 419 So. 2d 312, 314 (Fla. 1982). We conclude that a Hurst v. Florida error is akin to improper jury instructions or an invalid recommendation because the jury was not required to find the existence of the aggravating circumstances or whether

sufficient aggravating circumstances outweighed mitigating circumstances. Therefore, the proper remedy is to remand for a new penalty phase, rather than remand for the imposition of a life sentence.

CONCLUSION

We reject Jackson's guilt-phase claims and affirm his convictions. However, as we did on remand in Hurst v. State, we conclude in this case that the Hurst v. Florida errors that occurred during sentencing are not harmless beyond a reasonable doubt. Jackson's death sentence was based not upon factual findings by a jury of his peers as required by the Sixth Amendment, but upon a nonunanimous recommendation of the jury. Therefore, we remand this matter to the circuit court for a new penalty phase pursuant to Hurst v. Florida.

It is so ordered.

LEWIS and QUINCE, JJ., concur.
PARIENTE, J., concurs in result with an opinion, in which LABARGA, C.J., concurs.
POLSTON, J., concurs as to the conviction and dissents as to the sentence.
CANADY, J., concurs in result as to the conviction and dissents as to the sentence.
LAWSON, J., did not participate.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

PARIENTE, J., concurring in result.

I concur because we cannot conclude that the Hurst[12] error was harmless beyond a reasonable doubt. However, I would reach this conclusion under an analysis consistent with this Court's opinions in Hurst and Simmons v. State, 41 Fla. L. Weekly S622 (Fla. Dec. 22, 2016), as well as Deviney v. State, No. SC15-1903 (slip op. issued Fla. March 23, 2017), which specifically explain the standard for determining whether a Hurst error is harmless beyond a reasonable doubt. The majority's discussion of harmless error in this case (beginning on page 58), while not incorrect, may create confusion as to how to analyze whether a Hurst error is harmless. See majority op. at 58-67.

In Hurst, we explained the standard by which harmless error should be evaluated:

> Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., Zack v. State, 753 So. 2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," [State v.]DiGuilio, 491 So. 2d [1129,] 1137 [(Fla. 1986)], and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a Hurst v. Florida error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for

12. Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), petition for cert. filed, No. 16-998 (U.S. Feb. 13, 2017).

imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.

DiGuilio, 491 So. 2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." Id.

Hurst v. State (Hurst), 202 So. 3d 40, 68 (Fla. 2016) (last alteration in original). In Davis v. State, 207 So. 3d 142 (Fla. 2016), we explained, "As applied to the right to a jury trial with regard to the facts necessary to impose the death penalty, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances." Id. at 174.

Further, I would not reanalyze the scope of or proper remedy for Hurst errors, which the majority discusses on pages 67-73, because we already addressed these issues, including the inapplicability of section 775.082, Florida Statutes, in Hurst, 202 So. 3d at 65-66. I would summarily dispose of this claim, as we have done in several cases, including Deviney, in which we stated that "this Court already rejected [the] argument that section 775.082(2), Florida Statutes (2015),

requires a remand to the trial court for imposition of a life sentence." Slip op. at 15.

As for the harmless error analysis in this case, the jury was given instructions regarding three aggravating factors: HAC, CCP, and that the murder was committed during the course of a sexual battery. Majority op. at 61. The judge instructed the jury that it must render an advisory sentence recommendation based on whether sufficient aggravating factors existed to impose death and whether those aggravating factors outweighed the mitigating circumstances. Majority op. at 61. Following these instructions, the jury returned a recommendation of death by a vote of eleven to one. Majority op. at 62. The jury made none of the requisite factual findings necessary to impose death. See Hurst, 202 So. 3d at 44. In fact, although the CCP aggravating factor was submitted to the jury, the trial court did not even find that this aggravating factor was proven.

With regard to mitigation, Jackson presented a considerable amount of mental health mitigation, including evidence of his low IQ, dysfunctional childhood (his biological mother was fourteen and his father abandoned him), and that he was physically and sexually abused. Jackson also presented the testimony of two mental health experts who testified to the effects of his Adverse Childhood Experiences (ACE's) on his conduct. Majority op. at 15-18. Although there was

contrary mental health testimony from the State, we have no way of determining the effect of this mitigation on the jury's final recommendation for life or death.

It is impossible to determine why one juror dissented from the other members' vote to recommend a sentence of death—whether the juror did not determine that each aggravating factor was proven, that sufficient aggravating factors existed to impose death, or that the aggravation that existed outweighed the mitigation, or if that juror, for some other reason, determined that death was not an appropriate sentence. Thus, we cannot conclude that the Hurst error in Jackson's case was harmless beyond a reasonable doubt, or that the Hurst error "did not contribute to [Jackson's] sentence." Deviney, No. SC15-1903, slip op. at 14.

For all these reasons, I concur in result but would adhere to the harmless error analysis we adopted in Hurst.

LABARGA, C.J., concurs.

An Appeal from the Circuit Court in and for Hillsborough County,
William Fuente, Judge - Case No. 292007CF019884000AHC

Howard L. "Rex" Dimmig, II, Public Defender, and Julius J. Aulisio, Assistant Public Defender, Tenth Judicial Circuit, Bartow, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida; and C. Suzanne Bechard, Assistant Attorney General, Tampa, Florida,

for Appellee

Karen M. Gottlieb of Florida Center for Capital Representation, Florida International University College of Law, Miami, Florida,

for Amicus Curiae Florida Center for Capital Representation at Florida International University College of Law

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Attachment II

Supreme Court of Florida

No. SC13-2331

CORNELIUS O. BAKER,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. SC14-873

CORNELIUS O. BAKER,
Petitioner,

vs.

JULIE L. JONES, etc.,
Respondent.

[March 23, 2017]

PER CURIAM.

Cornelius Baker, a prisoner under sentence of death, appeals an order of the circuit court denying his motion for postconviction relief under Florida Rule of Criminal Procedure 3.851 and petitions this Court for a writ of habeas corpus. We

have jurisdiction. See art. V, § 3(b)(1), (9), Fla. Const. For the reasons stated below, we reverse the trial court's denial of postconviction relief as to Baker's claim relating to the constitutionality of his penalty phase, vacate Baker's death sentence, and remand for a new penalty phase. We deny, however, Baker's petition for a writ of habeas corpus.

FACTUAL AND PROCEDURAL BACKGROUND

Baker was convicted by a jury and sentenced to death for the January 2007 robbery, kidnapping, and murder of Elizabeth Uptagrafft. This Court summarized the case in greater detail on direct appeal. The relevant facts here are as follows:

> At the time of the offenses, Baker was living in Daytona Beach, Florida, with his girlfriend, Patricia Roosa. Baker had recently been released from jail, where he had been incarcerated for several months for selling drugs. Baker and Roosa decided that they wanted to move to New York. To get extra money for their move, they decided to rob a house using a pistol that Baker had recently stolen. On the morning of January 7, 2007, they walked around a Daytona Beach neighborhood until they found a house they could rob. Baker later told police that he and Roosa selected the Uptagrafft residence because it looked nice and they thought there might be money inside. Baker and Roosa walked to the front door. Baker told Roosa to ring the doorbell and that he would do the rest.
>
> Inside the house, Elizabeth Uptagrafft and her mother, Charlene Burns, had just finished eating breakfast. The only occupants of the house at the time were Elizabeth, Burns, and Elizabeth's adult son Joel Uptagrafft. Burns later stated that she thought they finished eating at approximately 8:30 or 9:00 a.m., and that Joel was still asleep at that time. After breakfast, Burns went to her bedroom to take a nap, while Elizabeth sat down on the couch in the living room to read. The doorbell rang a few moments later. When Elizabeth

opened it, Baker came through the door and immediately hit her with his gun. The gun discharged and the bullet grazed Elizabeth's head.

At trial, Burns testified that she heard a noise that sounded like someone kicking in the door, followed by a gunshot. Burns stated that after she entered the hallway outside her room that was connected to the living room, she was attacked by Baker, who beat, choked and kicked her. Burns said that Baker then told her to sit on the couch next to Elizabeth. When Burns saw Elizabeth's head wound, she yelled for her grandson, Joel. Joel came out of his room and was attacked by Baker, who beat Joel with the gun.

Burns estimated that the family was held at gunpoint for between two-and-a-half and three hours while Baker and Roosa searched the house for valuables. Burns stated that there was no money in the house, but said that Baker and Roosa found some jewelry and placed it in a bag. Elizabeth eventually offered Baker her ATM card and PIN code if they would leave. Baker did not believe that the PIN was real and told Elizabeth that she would have to come with them. According to Burns, Baker then said that if Elizabeth did not come with him, he would kill all three members of the family. Because Elizabeth was covered in blood from her head wound, Baker told her that she would have to change clothes before they left. Baker also told her to find a hat to cover the wound. Baker collected Elizabeth's cell phone and all other phones in the house. Before she left the house, Elizabeth whispered to her mother to call the police once Baker and Roosa were gone. Baker then placed Elizabeth, the phones, and the stolen jewelry into Elizabeth's car, and he and Roosa drove away from the house. Joel then walked to a neighbor's house and called the police.

. . . .

. . . Baker decided to drive to a rural area of Flagler County known as the Mondex. Baker told police that it was his intention to drop Elizabeth off in a remote area where it would take her some time to find a phone that she could use to call the police. When they arrived at a spot that Baker thought was sufficiently isolated, Baker told Elizabeth to get out of the car, which she did. He also told her that she was going to live. According to Baker's statement to police,

> he then drove approximately fifteen feet before stopping the car and getting out. Baker said that Roosa told him, "Don't do it. Don't do it." Baker told the officers, "I felt like I done came this far." Baker said that Elizabeth started to run and that he ran after her. She ran into some nearby bushes, then tripped and fell. Baker fired two shots at her. He then went back to the car and drove away.

Baker v. State, 71 So. 3d 802, 808-09 (Fla. 2011). Baker was indicted on charges of first-degree murder, home invasion robbery with a firearm, kidnapping, conspiracy, burglary of a structure or conveyance, and aggravated fleeing and eluding a law enforcement officer. Id. at 811. The jury found Baker guilty of one count each of first-degree murder, home invasion robbery, kidnapping, and aggravated fleeing and eluding a law enforcement officer. Id.

At the penalty phase, Baker's attorney, Matthew Phillips, presented testimony from psychologist Dr. Harry Krop, Baker's mother and two sisters, and Baker himself. At the conclusion of the penalty phase, the jury returned a recommendation in favor of death by a vote of nine to three. Id. at 812. The trial court sentenced Baker to death, making the following findings as to the aggravating and mitigating circumstances:

> [T]he court found that the following aggravating factors had been proven beyond a reasonable doubt: (1) the crime was committed while the defendant was engaged in the commission of, or an attempt to commit, the crime of home invasion robbery or kidnapping; (2) the capital felony was committed for pecuniary gain (great weight); (3) the capital felony was especially heinous, atrocious, or cruel (great weight); and (4) the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (great weight).

> As statutory mitigation, the court found: (1) the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance (some weight); and (2) the age of the defendant (twenty years old) at the time of the crime (some weight). As nonstatutory mitigation, the court found: (1) the defendant suffers from brain damage, low intellectual functioning, drug abuse and that those factors are compounded by each other (some weight); (2) the defendant was born into an abusive household and was neglected as a child (some weight); (3) the defendant is remorseful (little weight); (4) the defendant was well behaved and displayed appropriate demeanor during all court proceedings (little weight); and (5) the defendant's confession and cooperation with police (some weight).

Id. at 813 (footnotes omitted). In addition to its death sentence, the trial court sentenced Baker to life imprisonment for the charge of home invasion with a firearm, life imprisonment for the charge of kidnapping, and fifteen years' imprisonment for the charge of aggravated fleeing and eluding a law enforcement officer. Id.

On direct appeal, Baker raised seven claims.[1] This Court affirmed Baker's convictions and sentences. Id. at 825. The United States Supreme Court denied

1. Baker asserted that: (1) the trial court erred in denying his motion to suppress the recording of his post-arrest interrogation; (2) the trial court erred in refusing to allow Baker to read a letter of apology during the penalty phase; (3) the trial court erred in admitting portions of two victim impact statements; (4) the trial court erred in finding that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP); (5) the trial court erred in finding that the murder was especially heinous, atrocious, or cruel (HAC); (6) death is a disproportionate punishment; and (7) Florida's death penalty scheme is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). Baker, 71 So. 3d 802 at 814-24.

certiorari. Baker v. Florida, 565 U.S. 1237 (2012). Baker filed an initial postconviction motion pursuant to Florida Rule of Criminal Procedure 3.851, raising six claims.[2] On September 16, 2013, the trial court conducted an evidentiary hearing on Baker's ineffective assistance claim. At the evidentiary hearing, Baker called trial counsel to testify regarding his twenty years of experience as a public defender, his recollection of Baker's examination during the penalty phase, and Baker's letter of remorse. Phillips was the only witness called to testify at the hearing. On October 14, 2013, the trial court denied all relief.

Baker has appealed the denial of his postconviction motion to this Court. He has also filed a petition for a writ of habeas corpus with this Court.

RULE 3.851 MOTION ON APPEAL

Baker has raised the following six issues in this appeal: (1) trial counsel rendered ineffective assistance of counsel during the penalty phase of the trial by

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2. Baker asserted that: (1) trial counsel rendered ineffective assistance of counsel for failing to proffer Baker's letter of apology; (2) the Rule Regulating the Florida Bar 4-3.5(d)(4), which prohibits party attorneys from interviewing jurors after the conclusion of the case, violated Baker's right to equal protection; (3) the trial court's instructions to the jury during the penalty phase diminished the jury's sense of responsibility in determining the proper sentence and trial counsel was ineffective for failing to litigate this issue; (4) Florida's sentencing statute is unconstitutional based on Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring, 536 U.S. 584; (5) Florida's capital sentencing statutes and rules unconstitutionally fail to prevent the arbitrary and capricious imposition of the death penalty and Florida's use of lethal injection constitutes cruel and unusual punishment; and (6) cumulative error.

failing to proffer Baker's letter of apology; (2) the trial court erred in denying Baker's claim that Florida's rule prohibiting defense counsel from interviewing jurors is unconstitutional under the federal and state constitutions; (3) section 921.141 is facially vague and overbroad, the trial court's instruction to the jury that its role was advisory was unconstitutional, and trial counsel provided ineffective assistance for failing to litigate these claims; (4) Florida's death sentence statute is unconstitutional as applied; (5) Florida's capital sentencing statute does not prevent the arbitrary and capricious imposition of the death penalty, Florida's method of execution is cruel and unusual under the Eighth Amendment, and trial counsel was ineffective for failing to litigate these claims; and (6) cumulative error.

Penalty Phase Issues

First, Baker claims that because the capital sentencing scheme utilizes aggravating factors to operate as the functional equivalent of an element of a greater offense, they must be found by a unanimous jury under Ring, 536 U.S. 584. During the pendency of Baker's case, the United States Supreme Court found Florida's death penalty scheme unconstitutional in Hurst v. Florida, 136 S. Ct. 616 (2016). We have interpreted Hurst v. Florida, an extension of Ring, to require a jury to unanimously find each aggravating factor, that the aggravating factors are sufficient to warrant death, and that the aggravating factors outweigh the mitigation. See Hurst v. State, 202 So. 3d 40, 57, 66 (Fla. 2016). We have also

determined that most defendants sentenced to death after the Ring decision should receive the benefit of Hurst. See Mosley v. State, 41 Fla. L. Weekly S629, S624 (Fla. Dec. 22, 2016). Baker, whose sentence was final in 2011, is one such defendant.

Because Hurst applies to Baker, we must consider whether it is clear beyond a reasonable doubt that a rational jury would have unanimously found all the facts necessary for imposition of death and unanimously recommended death, such that any Hurst error is harmless. See Mosley, 41 Fla. L. Weekly at S641. In this case, the jury's recommendations of death were not unanimous, and the jury made no findings concerning the aggravating and mitigating circumstances. The jury recommended death for the murder of Elizabeth Uptagrafft by a vote of nine to three. Therefore, we cannot conclude that the error in Baker's penalty phase was harmless beyond a reasonable doubt. Accordingly, Baker is entitled to a new penalty phase.[3]

PETITION FOR WRIT OF HABEAS CORPUS

Baker raises two claims in his petition for habeas corpus filed with this Court. He contends that (1) appellate counsel rendered ineffective assistance by failing to supplement the record on appeal; and (2) appellate counsel rendered

3. Because we find that Baker is entitled to a new penalty phase, we do not address the other penalty phase issues raised.

ineffective assistance by failing to supplement the record on appeal with the full April 24, 2002 ACT Corporation Evaluation Report. As explained below, Baker is not entitled to habeas relief on either claim.

Record on Appeal

For his first habeas corpus claim, Baker argues appellate counsel was ineffective for failing to supplement the record on appeal. Claims of ineffective assistance of appellate counsel are appropriately presented in a petition for writ of habeas corpus. See Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000). Consistent with the standard set forth by Strickland v. Washington, 466 U.S. 668 (1984), to grant habeas relief based on ineffective assistance of counsel this Court must determine:

> first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986); see Freeman, 761 So. 2d at 1069; Thompson v. State, 759 So. 2d 650, 660 (Fla. 2000). In raising such a claim, "[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." Freeman, 761 So. 2d at 1069; see Knight v. State, 394 So. 2d 997, 1001 (Fla. 1981). Claims of ineffective assistance of appellate counsel may not be used to camouflage issues

that should have been presented on direct appeal or in a postconviction motion. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000). "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." Id. (quoting Williamson v. Dugger, 651 So. 2d 84, 86 (Fla. 1994)).

Baker claims that appellate counsel was ineffective for failing to supplement the record on appeal with an exhibit that contained the medical records that defense psychologist, Dr. Harry Krop, relied on during his testimony during Baker's penalty phase.[4] Baker takes issue with the trial court's finding that he was not under the influence of extreme mental or emotional disturbance when the crime was committed. As part of the court's reasoning, it stated that Dr. Krop believed

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4. Both parties agree that an exhibit was admitted into evidence, omitted from the record on appeal, and contained the following documents:

Psychological Evaluation by J. Jeff Oatley, Ph.D., dated April 6, 1994; ACT Corporation Psychiatric Evaluation by Sharon Winters, M.D., dated April 22, 1994; Psychological Evaluation by James D. Upson, Ph.D., dated June 24, 1994; ACT Corporation Psychiatric Evaluation by Ann Mian, M.D., dated April 30, 1998; Psychological Report by Peter Larkin, M.A., N.C.S.P., dated April 14, 2000; two reports of Harry Krop, Ph.D., dated July 6, 2007 and September 7, 2007; PET scan dated February 8, 2008, and an MRI dated September 10, 2007; composite records from Shands Hospital from Baker's 1992 eye surgery; composite of Flagler County school health records from Baker; composite of Flagler County school system assessment reports for Baker; and composite of Flagler County school "other" reports for Baker.

that Baker "suffers from significant brain damage," yet noted "no other of the numerous reports even suggested the possibility of brain damage." Baker argues that this Court was unable to review the trial court's determination of Baker's sentence adequately without these records, which further prevented this Court from performing a competent proportionality review. The State argues that the absence of the exhibit from the record on appeal did not undermine confidence in the result reached in Baker's direct appeal in light of the extensive testimony of defense witnesses that established all of the relevant facts and findings contained within the exhibit.

During the penalty phase, defense counsel presented the testimony of Dr. Krop. Dr. Krop's testimony provided this Court with extensive detail about Baker's difficult childhood as well as all of the medical, psychological, and educational issues that were documented in the exhibit. Dr. Krop explained in detail the dynamics of Baker's difficult childhood as well as his medical and developmental challenges. Dr. Krop also described the findings contained in the psychological evaluation conducted by J. Jeff Oatley, Ph.D., on April 6, 1994, and the ACT Corporation Psychiatric Evaluation conducted by Sharon Winters, M.D., on April 22, 1994.

Dr. Krop then summarized and explained the relevant portions of the psychological evaluation by James D. Upson, Ph.D., dated June 24, 1994, and the

ACT Corporation Psychiatric Evaluation by Ann Mian, M.D., dated April 30, 1998. Dr. Krop's testimony then addressed the psychological report by Peter Larkin, M.A., N.C.S.P., dated April 14, 2000. Next, Dr. Krop summarized the findings contained in his two reports dated July 6, 2007, and September 7, 2007. After explaining the fundamentals of MRI and PET scans, Dr. Krop then explained the results of Baker's PET scan dated February 8, 2008, and Baker's MRI dated September 10, 2007. Finally, Dr. Krop's testimony on direct examination concluded with his overall opinion and diagnoses regarding Baker's mental state.

Dr. Krop's testimony regarding the medical records established that Baker had an inability to concentrate, borderline intelligence, and learning disabilities. Baker also exhibited poor behavior in school, was not learning, and had a serious impairment of social and school functioning. Regarding his own opinion and diagnoses, Dr. Krop testified that Baker had attention deficit disorder and a cognitive disorder due to a frontal lobe brain impairment. None of the other medical records or evaluations found that Baker suffered from brain damage.

The State's cross-examination of Dr. Krop was brief. The State questioned Dr. Krop about his experience serving primarily as an expert witness for the defense. The State then challenged Dr. Krop's opinion that Baker suffered from brain damage, but receded from the line of questioning once Dr. Krop explained that he based his opinion on his own neuropsychological testing and the findings of

Baker's PET scan. The State challenged Dr. Krop's findings of brain damage and borderline intelligence but left the bulk of Dr. Krop's testimony unrefuted. Dr. Krop's conclusions and testimony concerning the contents of the documents within the Exhibit were unimpeached and did not need documentary support or augmentation.

This Court has routinely affirmed death sentences despite there being an incomplete record on appeal. Darling v. State, 808 So. 2d 145, 163 (Fla. 2002) ("Darling has failed to demonstrate what specific prejudice, if any, has been incurred because of the missing transcripts. The missing portion of the transcript has not been shown to be necessary for a complete review of this appeal."); Armstrong v. State, 862 So. 2d 705, 721 (Fla. 2003) ("Armstrong has failed to link a meritorious appellate issue to the allegedly missing record and thus cannot establish that he was prejudiced by its absence."). Baker fails to show how he was prejudiced by the omissions in the record, or how consideration of new information contained within the exhibit would change the result of Baker's direct appeal or otherwise undermine confidence therein. The trial court's finding that only Dr. Krop believed Baker suffered from brain damage was correct. Contrary to Baker's claim, neither the PET scan nor any other defense exhibit submitted into evidence tendered the conclusion that Baker suffered from brain damage.

Furthermore, counsel is not ineffective for failing to present duplicative or cumulative evidence of a single mitigating factor. See Darling v. State, 966 So. 2d 366, 378 (Fla. 2007) (citing Gudinas v. State, 816 So. 2d 1095, 1106 (Fla. 2002)); see also Sweet v. State, 810 So. 2d 854, 863-64 (Fla. 2002). Dr. Krop's extensive testimony[5] regarding Baker's medical reports established all of the relevant facts and findings contained within the exhibit. Dr. Krop's testimony concerning the relevant facts and findings contained in the exhibit was a part of the record on appeal and the State never impeached any defense witness testimony concerning the exhibit's content. The exhibit adds no substantial mitigating evidence to the record.

Baker's appellate counsel did not commit serious error by failing to supplement the record to include the missing exhibit in light of its cumulative nature and relatively minor import. Even if appellate counsel should have supplemented the record, Baker has failed to establish that he was prejudiced by the omission of an exhibit from the record on appeal. For these reasons, we deny Baker relief as to this claim.

5. Dr. Krop's direct examination testimony exceeded fifty pages of trial transcript. The State's cross-examination comprised less than seven pages of trial transcript.

ACT Corporation Evaluation Report

As the second claim in his petition for writ of habeas corpus, Baker argues that his appellate counsel rendered ineffective assistance by failing to supplement the record on appeal with the full April 24, 2002, ACT Corporation Evaluation Report. Again, in order to determine whether Baker is entitled to habeas relief, this Court must determine (1) "whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling outside the range of professionally acceptable performance," and (2) "whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Cox v. State, 966 So. 2d 337, 365 (Fla. 2007) (quoting Pope, 496 So. 2d at 800). "The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." Anderson v. State, 18 So. 3d 501, 520 (Fla. 2009) (quoting Freeman, 761 So. 2d at 1069). "Appellate counsel is not ineffective for failing to raise issues not preserved for appeal." Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991).

Baker argues that an April 24, 2002, history and assessment of Baker prepared by a social worker for the ACT Corporation was discussed during witness testimony but never submitted into evidence. Baker takes exception with the trial court's reference to information contained in the report in its Sentencing Order.

Since Baker did not object to the Sentencing Order on this basis, he is procedurally barred from seeking relief for this trial court error. Schoenwetter v. State, 46 So. 3d 535, 563 (Fla. 2010) ("Claims of ineffective assistance of counsel may not be used to camouflage issues that should have been presented on direct appeal or in a postconviction motion.") (citations omitted).

Baker also fails to establish how he was prejudiced by appellate counsel's failure to supplement the record on appeal with this report. Baker argues that the prognosis that he was at a low to moderate risk of suicide shows proof that Baker suffered from extreme emotional disturbances. This argument is meritless. While the report was made because Baker was allegedly seen tying a sheet around his neck, Baker denied that he ever did so and specifically claimed that the report was false. Moreover, the report indicates that Baker denied any depression, reported that he had a couple of class friends, attended church, denied feeling suicidal, appeared to the evaluator to have normal intelligence and a strong street sense, and liked listening to music. Finally, the relevant portion of the report that the trial court cited in its Sentencing Order that Baker had a "strong street sense" was a part of Dr. Krop's testimony.

This report did little to support Baker's claim of extreme emotional distress and actually contradicted Baker's claim of borderline intelligence. For this reason, appellate counsel cannot be found to have committed serious error by failing to

supplement the record on appeal to include the report. Further, Baker has failed to demonstrate how he was prejudiced by the omission of this report from the record on appeal. Consequently, we deny relief as to this claim.

CONCLUSION

For the reasons stated above, we reverse the trial court's denial of Baker's claim related to the constitutionality of Florida's death penalty scheme, and we deny habeas relief. Accordingly, we vacate Baker's death sentence as unconstitutional under Hurst and remand to the trial court for a new penalty phase.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
POLSTON, J., concurs in part and dissents in part with an opinion, in which CANADY and LAWSON, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

POLSTON, J., concurring in part and dissenting in part.

I concur with the majority's decision except its vacating of the death sentence pursuant to Hurst.

CANADY and LAWSON, JJ., concur.

Two Cases:

An Appeal from the Circuit Court in and for Flagler County,
Joseph David Walsh, Judge - Case No. 182007CF000033XXXXXX
And an Original Proceeding – Habeas Corpus

James V. Viggiano, Jr., Capital Collateral Regional Counsel, Middle Region, and Ann Marie Mirialakis and Ali A. Shakoor, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida,

for Appellant/Petitioner

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Vivian Singleton, Assistant Attorney General, Daytona Beach, Florida,

for Appellee/Respondent

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

Attachment III

Supreme Court of Florida

No. SC15-1903

RANDALL T. DEVINEY,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[March 23, 2017]

PER CURIAM.

This case is before the Court on appeal from the conviction and sentence of death of Randall Deviney for the first-degree murder of Delores Futrell.[1] A jury recommended death by an eight-to-four vote. The trial court accepted that recommendation and sentenced Deviney to death. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons discussed below, we affirm the conviction, vacate the sentence of death, and remand for a new penalty phase

1. Deviney was previously convicted and sentenced to death for the same offense. On his first direct appeal, this Court reversed Deviney's conviction and sentence of death, remanding for a new trial due to Miranda v. Arizona, 384 U.S. 436 (1966), violations. Deviney v. State, 112 So. 3d 57, 79 (Fla. 2013).

proceeding consistent with this Court's opinion in Hurst v. State, 202 So. 3d 40 (Fla. 2016) (Hurst v. State), petition for cert. filed, No. 16-998 (U.S. Feb. 13, 2017).

FACTS

On August 5, 2008, at 10:01 p.m., a Jacksonville police dispatcher received an unverified 911 call from Futrell's residence.[2] Along with another officer, Officer Milowicki of the Jacksonville Sheriff's Office responded to the call.

As the officers approached Futrell's townhome at approximately 10:40 p.m., they noticed that the interior lights were on and heard a television playing. They knocked on the door while calling into an open window; they received no response. Then, the officers attempted to access the backyard, but a tall, locked fence blocked their entrance. Returning to the front, the officers proceeded into the home through the unlocked front door.

Milowicki found Futrell lying on the carpet in front of her television. She recalled:

> It was a petite, elderly female. She was cut ear-to-ear and the cut was so deep that it was hanging by just skin on the back of her neck. Her shirt was pulled over her torso exposing her torso. And her underwear, she just had underwear on and the underwear was sliced at the crotch area and pulled up by her hips. So she was nude from the

2. An unverified 911 call occurs when a police dispatcher receives a call, but the caller is unable to speak, is silent, or disconnects.

> waist down. And her legs had appeared to be posed in a sexual manner showing her genitalia.

Strangely, there was little blood inside the home. Milowicki observed a small table in the dining room with objects knocked over beside a cordless phone base. The phone was on the dining room table and, based on the call log, the police determined that it had been previously used to dial 911. The contents of a purse were emptied onto Futrell's couch; however, Futrell's wallet was across the room on an ironing board. Credit cards laid scattered beside the wallet, which contained a total of fifty-six cents. Behind the ironing board, near the back door, Milowicki saw a pair of bloody blue jeans.

While walking in the backyard, Milowicki heard "what sounded like a squeegee noise around [her] feet." Her flashlight confirmed that she was standing in a pool of blood that engulfed her shoes. From that vantage, in the center of the backyard, Milowicki noticed blood stains on and near a koi pond in the corner along the fence. Further, she noted that although the pond was lit by a white light, the water was "bright red." A blood trail led from the pool of blood toward Futrell's home. Along that path, beside the back door, was a chair with a blood stain on its armrest.[3] The police found no signs of forced entry.

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3. Later, it was determined to be aspirated blood, which has oxygen bubbles in it. This occurs when blood and oxygen mix as they flow in or out of the body.

The crime scene unit, including Detective Gray, arrived around midnight. While examining the backyard, Gray identified the blood on the ledge and side of the koi pond as transfer blood. In multiple areas, both on and near the concrete steps beside the koi pond, Gray found blood stains. Later, when Gray drained the koi pond, he was unable to find a weapon. However, near the large blood pool in the center of the backyard, Gray located a piece of knife blade from a straight-edged knife. From the pool of blood, a blood trail led to the koi pond; another blood trail led to the home.

Inside the home, Gray examined Futrell's body, noting blood on the bottoms of her feet along with grass in her hair and on her left arm. Futrell's bra, shirt, and underwear were cut. There were abrasions and scrapes on Futrell's lower back consistent with being dragged. Gray opined that, based on the evidence, Futrell was killed in the backyard, dragged inside her home, and—possibly—posed in an explicit position to resemble a sexual battery. However, Gray was unsure whether Futrell's clothing was cut and removed outside or inside her home. None of the latent fingerprints lifted from Futrell's home belonged to Deviney.

Dr. Giles, M.D., a forensic pathologist, conducted an autopsy on Futrell's body. Futrell was sixty-five inches tall (5'5"), 138 pounds, and sixty-five years old. Dr. Giles determined that the cause of death was hypovolemic shock with asphyxiation due to an incised wound of the neck, laryngeal transection: "In

layman's terms, she received a large cut across her neck [that] went right through her voice-box and she bled and couldn't breathe." Futrell suffered both blunt- and sharp-force injuries. Based on his examination, Dr. Giles believed that "there definitely was a struggle involved in this death." The manner of death was determined as homicide.

On the left side of Futrell's head were various blunt-force injuries: contusions and abrasions around her eye, forehead, and temple, plus abrasions around the nose and mouth. On the right side of Futrell's head, near her mouth and eye, were different types of abrasions than those on the left. Dr. Giles opined that these particular abrasions occurred later in the course of events, either when Futrell was nearly or already dead, because they were yellow.[4]

According to Dr. Giles, the large cut across Futrell's neck went from right to left. It sliced through Futrell's veins, but not her deeper arteries. However, it partially severed the jugular vein, the major vein on the right side of the neck, which meant that it could not snap shut and continued to bleed. Dr. Giles noted that the incision "completely separated" the upper and lower larynx between the vocal cords. Behind that, the esophagus was partially cut. Taking these together,

4. Dr. Giles explained that normally, as skin breaks, tiny capillaries rush blood to the injury, leaving a red-colored mark; however, near or after death, when there is not much blood left in the body, the skin tissue turns a yellowish tint.

Dr. Giles opined that Futrell was pulling blood into her lungs as she struggled to breathe. Dr. Giles testified that this sharp-force injury was a straight, clean cut, indicating that it was delivered with a non-serrated blade. When asked how long Futrell lived after her throat was cut, Dr. Giles testified that he could not give a definite answer. However, Futrell lived for only "a short time" due to her neck wound, anywhere from seconds to a few minutes.

Coupled with that injury, Dr. Giles found a major blunt-force injury to Futrell's neck. Specifically, Dr. Giles observed evidence of crushing blunt force applied to Futrell's upper neck, fracturing her hyoid bone.[5] The larynx was fractured above the cut as well. Because these fractures stopped at the cut, and there was little hemorrhaging in the fractures, this injury likely occurred after Futrell's neck was cut. In Dr. Giles' opinion, the crushing-type force was applied on both sides of Futrell's neck, consistent with strangulation or a choke hold. Dr. Giles testified that this injury occurred prior to Futrell's death; however, it was late in the process.

Aside from the fatal neck injuries, on Futrell's chest were various blunt- and sharp-force injuries. There were superficial incisions. Further, small pricks indicated where Futrell was poked with a sharp object. Some of the injuries on her

5. The hyoid bone is the horseshoe-shaped bone above the larynx.

chest were consistent with dragging a sharp object against it. One injury on her chest was a pattern injury, an abrasion with an unusual outline. Dr. Giles testified that this pattern was consistent with a serrated knife, but it could have been made by a broken knife blade. Dr. Giles could not definitively testify as to the sequencing of the injuries on Futrell's chest in relation to the fatal neck wound. However, he opined that the superficial cuts and pricks must have occurred at or about the same time due to bruising.

On Futrell's left arm were abrasions and sharp-force injuries. Various contusions and bruises on Futrell's hands and arms appeared to be defensive wounds. However, there was little to no blood on Futrell's hands. Futrell's lower back had a large abrasion, which indicated that she had been dragged. Another abrasion on her lower back suggested that Futrell had a garment on when the injury occurred.

When Dr. Giles conducted the autopsy, Futrell's shirt was still rolled up. There were cuts on the shirt, but when the shirt was rolled down one cut did not align with the injuries on her body; thus, Dr. Giles concluded that the particular injury occurred when Futrell's shirt was rolled up. A sexual battery kit was used to test Futrell's oral, vaginal, anal, and breast areas. There were no injuries to Futrell's sexual organs. This led Dr. Giles to the conclusion that no sexual activity occurred; however, he could not rule out the possibility that attempted sexual

activity occurred. Finally, Dr. Giles took Futrell's fingernail clippings for DNA testing.

Evidence was sent to the Florida Department of Law Enforcement (FDLE) for DNA testing. FDLE conducted tests on the blue jeans from Futrell's house, which tested positive for blood and negative for semen. The test on Futrell's bra yielded the same results. All of the swabs taken as part of the sexual battery kit tested negative for semen. A swabbing from a flashlight found in Futrell's home was tested, but Deviney was excluded as a contributor to the DNA mixture on the flashlight. Preliminary DNA testing of Futrell's right fingernail clippings matched Deviney. When the DNA profiles of Deviney and Futrell were analyzed, FDLE concluded that there was a 1 in 40 billion chance that anyone other than Deviney left the DNA sample.

These results were forwarded to the Jacksonville Sheriff's Office, which necessitated a confirmation sample. So, detectives brought Deviney to the police station to be questioned, tested, and subsequently arrested.[6] In the days following his arrest, Deviney placed two calls to his father, Michael Deviney. The State introduced recordings of these calls into evidence. In one call, Deviney confessed to the murder, saying, "I lost it. It wasn't me. It was another person inside me."

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6. It was during this questioning that Deviney's Miranda rights were violated, which resulted in his retrial. See Deviney, 112 So. 3d at 65-66.

The State called other witnesses during the guilt phase. Through that testimony, the State elicited evidence that Futrell had multiple sclerosis (MS), which prevented her from walking her large dog or doing yard work. Although she could walk up the stairs in her townhome, she had become very frail over the years. Further, Futrell was a grandmother-type figure for Deviney during his childhood; she cared for him from the time he was seven and she would bake cookies for him. One neighbor testified that, following the murder, Deviney told her that "he heard [Futrell] had been violated." However, the lead detective testified that specific crime scene information was not released prior to Deviney's arrest. Also, Deviney's mother, Nancy Mullins, testified that Deviney had asked her for scissors or a knife on the night of the murder. Mullins told him that there was a straight-blade fish fillet knife in their tackle box, which she never saw again.

After the State completed the presentation of its case, Deviney waived his right to remain silent and testified. During his testimony, Deviney admitted to killing Futrell.

Deviney testified that Futrell's house was a safe place for him growing up. With Futrell, Deviney could discuss personal problems, which included speaking about the physical and sexual abuse that he purportedly suffered as a child. Deviney claimed that Mullins abused him and that she would dig her nails into his arm before beating him into submission. On the night of Futrell's death, Deviney

contended that he was using the flashlight to help Futrell look for a leak in her koi pond. With his other hand, Deviney explained that he used the knife to clear cobwebs off the koi pond ledge. According to Deviney, after he refused to report his sexual abuse, Futrell grabbed his arm and dug her nails into him. This caused him to snap and cut her throat, after which he stabbed her three times, breaking his knife.

Deviney explained that Futrell fell and struck the ledge of the koi pond. Then, he pulled her to the middle of the backyard and placed pressure on her neck. Moreover, he admitted that Futrell was aware of her impending death and that he caused it. Deviney testified that—after Futrell died—he attempted to divert suspicion by staging an attempted sexual battery; so, he pulled Futrell into her home and cut off her clothes with his knife. Then, Deviney claimed that he dialed 911 and walked out the front door without touching Futrell's purse.

There were various inconsistencies that the State raised surrounding Deviney's story. For instance, there was no blood on Futrell's underwear, which he claimed to have cut with the broken knife that he used to cut her throat. Also, he testified that there was no struggle involved in the death, directly conflicting with Dr. Giles' opinion. Finally, Deviney testified that Futrell placed her hands over her throat after it was cut; yet, the pictures entered into evidence show that there was little to no blood on her hands.

The jury convicted Deviney of the first-degree murder of Futrell. The jury found that the killing was premeditated and that it was committed during the commission of a felony, with burglary or attempted burglary and attempted sexual battery as the underlying felonies.

Following a penalty phase proceeding, the jury recommended that Deviney be sentenced to death by an eight-to-four vote. The trial court did not provide the jury with a special interrogatory verdict form; thus, the recommendation merely reflected the eight-to-four outcome. In its sentencing order, the trial court found three aggravating circumstances,[7] one statutory mitigating circumstance,[8] and twenty-three nonstatutory mitigating circumstances.[9] After weighing the jury

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7. The trial court found the following aggravators: (1) felony murder with burglary or attempted burglary and attempted sexual battery as the underlying felonies; (2) the crime was especially heinous, atrocious, or cruel; and (3) Futrell was a particularly vulnerable victim due to advanced age or disability. Each was afforded great weight by the trial court in its sentencing determination.

8. The trial court considered four statutory mitigators, but only found one: Deviney's age at the time of the crime—eighteen, but about to turn nineteen. This statutory mitigating circumstance was assigned moderate weight by the trial court. The trial court rejected the three others as not established and, thus, entitled to no weight.

9. The trial court consolidated the nonstatutory mitigators into ten categories, some of which contained numerous subcategories. When counted individually, the trial court found twenty-three and rejected nine. Among those nonstatutory mitigators found by the trial court were Deviney's (1) parents' conviction for killing his brother prior to his birth, (2) well-documented physical abuse, (3) potential sexual abuse, and (4) stabbing by his younger brother as a child. Most of the nonstatutory mitigators found were assigned slight or minimal

recommendation, aggravation, and mitigation, the trial court sentenced Deviney to death. Deviney now seeks review of that sentence in this Court.

On appeal, Deviney raised one guilt phase issue,[10] along with various penalty phase and death sentence issues. We have reviewed all of Deviney's contentions on appeal. In light of this Court's decision in Hurst v. State, the penalty phase and sentencing challenges are rendered moot because Deviney is entitled to a new penalty phase. Therefore, we affirm the conviction, but remand to the trial court for a new penalty phase proceeding.

ANALYSIS

Deviney contends that Florida's capital sentencing scheme is unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002), and Hurst v. Florida, 136 S. Ct. 616 (2016) (Hurst v. Florida), because the jury, which recommended death, failed to find the facts necessary to impose that sentence. We agree. See Hurst v. State, 202 So. 3d at 43-44.

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weight by the trial court. Among those mitigators rejected by the trial court was Deviney's limited cognitive ability, which the defense attempted to demonstrate by introducing his low IQ, history of special education courses, and his speech and language problems as a child.

10. Deviney challenged the trial court's denial of his motion for judgment of acquittal on attempted sexual battery.

New rules of law set down by this Court, or the United States Supreme Court, apply to cases on direct review or those not otherwise finalized. State v. Johnson, 122 So. 3d 856, 861 (Fla. 2013) (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987)). This case is before us on direct appeal; therefore, Deviney's appeal is subject to Hurst v. State. The jury below recommended death by an eight-to-four vote. Thus, Deviney's death sentence violated the central holding of Hurst v. State: all critical findings for the imposition of death must be found unanimously by the jury. See 202 So. 3d at 53-54.

As this Court held in Hurst v. State, such a sentencing error is capable of harmless error review. Id. at 67. Therefore, "[i]n the context of a sentencing error, the relevant question is whether 'there is a reasonable possibility that the error contributed to the sentence.' " Johnson v. State, 205 So. 3d 1285, 1290 (Fla. 2016) (quoting Zack v. State, 753 So. 2d 9, 20 (Fla. 2000)). Considering the nonunanimous jury recommendation and reasoning below, we reject the State's contention that any Hurst v. Florida error was harmless.

To be sure, Deviney's actions were substantially aggravated. During his childhood, Futrell treated Deviney like her own grandchild. However, on the night of August 5, 2008, Deviney walked into Futrell's home and cut her throat. It is undisputed that Futrell, a sixty-five-year-old woman with MS, was aware of her impending death and that the boy she helped raise brought it about.

However, as in Hurst v. State, the record here demonstrates that there was mitigation to be considered. See 202 So. 3d at 69. In fact, along with the statutory mitigator of Deviney's age at the time of the crime, the trial court assigned weight to twenty-three nonstatutory mitigating circumstances. These included circumstances that certainly could have influenced the jury: his parents' convictions for killing his brother prior to his birth, well-documented physical abuse, potential sexual abuse, and stabbing by his younger brother as a child. None of the listed mitigating circumstances included Deviney's asserted mitigation for limited cognitive ability, which the trial court rejected. Again, the jury may have found that evidence compelling.

As in Hurst v. State and Johnson, we cannot conclude—beyond a reasonable doubt—that a Hurst v. Florida error did not contribute to Deviney's sentence. See id.; Johnson, 205 So. 3d at 1290-91. This Court explained in Hurst v. State,

> Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

202 So. 3d at 68. Such concerns apply with equal force here. We can merely conclude that four jurors, for whatever reason, determined that a life sentence was appropriate. This record, coupled with an eight-to-four jury recommendation and

substantial mitigation, simply presents too many unanswered questions. Therefore, we must find reversible error and remand the case for a new penalty phase trial.

Moreover, we reject the State's assertion that Deviney's conviction for felony murder was sufficient to insulate his death sentence from Hurst v. Florida error. See Hurst v. State, 202 So. 3d at 53 n.7. Likewise, in Hurst v. State, this Court already rejected Deviney's argument that section 775.082(2), Florida Statutes (2015), requires a remand to the trial court for imposition of a life sentence. See id. at 63-66.

With regard to Deviney's guilt phase claim, we affirm the denial of Deviney's motion for judgment of acquittal. Because we found no error in the guilt phase, no further discussion is necessary.

CONCLUSION

Accordingly, we affirm Deviney's conviction for first-degree murder, vacate his death sentence, and remand for a new penalty phase.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
POLSTON, J., concurs as to the conviction and dissents as to the sentence.
CANADY, J., concurs in result as to the conviction and dissents as to the sentence.
LAWSON, J., did not participate.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Duval County,
Mallory Durden Cooper, Judge - Case No. 162008CF012641AXXXMA

Clinton Andrew Thomas, Public Defender, and Nada M. Carey, Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, and Jennifer L. Keegan, Assistant Attorney General, Tallahassee, Florida,

for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing motion and Appendix in Support of the forgoing motion have been transmitted to this Court through the Florida Courts E-Filing Portal on this 24th day of March, 2017.

I HEREBY CERTIFY that a copy of the foregoing was served through the Florida Court E-filing Portal to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, at CalhounR@sao7.org on this 24th day of March, 2017.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been e-mailed to the **Honorable Terrence R. Perkins (J.A. Susan Price)**, Chief Judge; Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach, Florida 32114, on this 24th day of March, 2017.

I HEREBY FURTHER CERTIFY that a copy of the foregoing will be mailed to **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on the 27th day of March, 2017.

/s/ Raheela Ahmed
Raheela Ahmed
Assistant CCRC
Florida Bar Number 0713457
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

Law Office of the Capital Collateral
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**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,
Plaintiff,

v. **CASE NO. 64-2009-CF002872XXXAWS**

JOSEPH EDWARD JORDAN,
Defendant,
_____/

NOTICE OF APPEARANCE AND SUBSTITUTION OF CO-COUNSEL

Please take notice that the undersigned, Vivian Singleton, Assistant Attorney General, hereby enters her notice of appearance and substitution of Co-Counsel for the State of Florida in the above-captioned case and states the following:

1. As of April 17, 2017, former Assistant Attorney General Stacey E. Kircher is no longer employed with this office.

WHEREFORE, the undersigned respectfully asks this Court to enter Vivian Singleton as Co-Counsel for the State of Florida.

Respectfully submitted,

ATTORNEY GENERAL
PAMELA JO BONDI

/S/ Vivian Singleton

VIVIAN SINGLETON
ASSISTANT ATTORNEY GENERAL
Florida Bar #728071
444 Seabreeze Blvd., 5th Floor
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vivan.singleton@myfloridalegal.com
capapp@myfloridalegal.com

Co-Counsel for the State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 20, 2017, a true and correct copy of the foregoing was filed via e-Portal to the Volusia County Clerk, and by e-mail/e-service to: The Honorable Terence R. Perkins, sprice@circuit7.org, (Susan Price, JA) 251 N. Ridgewood Avenue, Daytona Beach, FL 32114; Rosemary Calhoun, Assistant State Attorney, eservicevolusia@sao7.org and calhounr@sao7.org, 251 N. Ridgewood Avenue, Daytona Beach, FL 32114; and Maria Christine Perinetti, perinetti@ccmr.state.fl.us; Raheela Ahmed, ahmed@ccmr.state.fl.us; and support@ccmr.state.fl.us, Assistant CCRCs, CCRC-Middle, 12973 North Telecom Parkway, Temple Terrace, Florida 33637-0907 the attorneys for the Defendant.

/S/ Vivian Singleton
Assistant Attorney General
Co-Counsel for the State of Florida

VOLUSIA COUNTY COURT ACTION FORM

CASE: 2009 002872 CFAWS
STATE OF FLORIDA
VS
JOSEPH EDWARD JORDAN
TOT
SPN: 574944
TRIAL DATE:

COURT/SESSION TYPE: Criminal Hearing
DATE: 04/27/2017
TIME: 01:30 PM
JUDGE: PERKINS
ATTY: JAMES V VIGGIANO JR
BNA:
LOCATION: Justice Center Courtroom 1, 251 N. RIDGEWOOD AVENUE , DAYTONA BEACH, Florida

LAURA E. ROTH
CLERK OF THE CIRCUIT COURT
VOLUSIA COUNTY, FLORIDA
P.O. BOX 6043
DELAND, FL 32721-6043

PARTIES PRESENT	RELEASE ACTIONS	Custody/Capias/Estreat	Continued To: ☐ By Def. ☐ By State ☐ By Court ☐ Waived Spdy.Trl
☐ DEF. APPEARED ☐ APP.W/COUNSEL	☐ TOTAL BOND FOR CASE SET	☐ CAPIAS ISSUED-BOND SET	REMARKS: **Status confrence**
☐ DEF. COUNSEL APP. W/OUT DEF.	☐ AT $	☐ AT $	
☐ DEF. FAILED TO APPEAR	☐ DEF. ROR'D	☐ BOND ESTREATED	**New court date case management hearing Aug 1st @ 3:00 (1 hour)**
ATTORNEY STATUS	☐ RELEASE TO PTS	☐ CAPIAS WITHDRAWN	
☐ APP. IND. STATUS - PD APPT.	☐ RELEASE TO PTS W/BOND	☐ BOND REINSTATED	
☐ APP. IND. STATUS - NOT INDIGENT	☐ OTHER:	☐ BOND ESTR. SET ASIDE	
☐ PD APPT. BY COURT	☐ NO CONTACT W/VICTIM	☐ OTHER:	
☐ DEF. TO RETAIN COUNSEL	☐ NO VIOL.CONTACT W/VICTIM	☐ HOLD CAPIAS-PTS INVEST.	
☐ PD WITHDREW ☐ ATTY.TO BE APPT	☐ OTHER:	☐ 48 HRS	
☐ OTHER:			

CT. CHARGE	COURT ACTION	INCARCERATION/PROBATION/COMMUNITY CONTROL INFORMATION	COSTS
1 FIRST DEGREE FELONY MURDER (ADJG) Statute: 782.04(1)(a)2 LVL:F DEG:C AMENDED CHARGE: BOND SET AT $	☐ N.G.PLEA ☐ NO INFO. ☐ GUILTY PLEA ☐ NOLLE PROSS. ☐ NOLO PLEA ☐ DISMISSED ☐ NG.VERDICT ☐ JGMT ACQT. ☐ GLTY.VERDICT ☐ ADJ.WITHHELD ☐ MISTRIAL ☐ ADJ.GUILTY ☐ WAIVED PSI ☐ PSI ORDERED ☐ PDR ORDERED ☐ TO BE SENT:	☐ VCJ ____ MO ____ DY ☐ PROB.REVOKED ☐ DOC ____ YR ____ MO ____ DY ☐ C.C. REVOKED ☐ JAIL CREDIT TIME: ____ DY ☐ PROB. REINSTATE ☐ PROB ____ YR ____ MO ____ DY ☐ C.C. REINSTATE ☐ COM.CONT. ____ YR ____ MO ☐ PROB. MODIFIED ☐ DRUG OFFENDER ☐ SEX OFFENDER ☐ C.C. MODIFIED ☐ CONCURRENT ☐ CONSECUTIVE TO: ☐ ____ HRS.COM. SERVICE ☐ STANDARD COND. ☐ SUBST.ABUSE COUNSEL/TREAT. ☐ PREVIOUS COND. ☐ RANDOM U/A ☐ NO ALCOHOL/ILL.DRUG ☐ COS WAIVED	CRT. COSTS $ FINE $ PD FEE $ SAO FEE $ LEO FEE $ PD APP.FEE $ REST. $ OTHER: ☐ CONVRT. FINE/COST
2 ROBBERY WITH FIREARM/DEADLY WEAPON (ADJG) Statute: 812.13(2)(a) LVL:F DEG:F AMENDED CHARGE: BOND SET AT $	☐ N.G.PLEA ☐ NO INFO. ☐ GUILTY PLEA ☐ NOLLE PROSS. ☐ NOLO PLEA ☐ DISMISSED ☐ NG.VERDICT ☐ JGMT ACQT. ☐ GLTY.VERDICT ☐ ADJ.WITHHELD ☐ MISTRIAL ☐ ADJ.GUILTY ☐ WAIVED PSI ☐ PSI ORDERED ☐ PDR ORDERED ☐ TO BE SENT:	☐ VCJ ____ MO ____ DY ☐ PROB.REVOKED ☐ DOC ____ YR ____ MO ____ DY ☐ C.C. REVOKED ☐ JAIL CREDIT TIME: ____ DY ☐ PROB. REINSTATE ☐ PROB ____ YR ____ MO ____ DY ☐ C.C. REINSTATE ☐ COM.CONT. ____ YR ____ MO ☐ PROB. MODIFIED ☐ DRUG OFFENDER ☐ SEX OFFENDER ☐ C.C. MODIFIED ☐ CONCURRENT ☐ CONSECUTIVE TO: ☐ ____ HRS.COM. SERVICE ☐ STANDARD COND. ☐ SUBST.ABUSE COUNSEL/TREAT. ☐ PREVIOUS COND. ☐ RANDOM U/A ☐ NO ALCOHOL/ILL.DRUG ☐ COS WAIVED	CRT. COSTS $ FINE $ PD FEE $ SAO FEE $ LEO FEE $ PD APP.FEE $ REST. $ OTHER: ☐ CONVRT. FINE/COST

LAURA E. ROTH, CLERK OF THE CIRCUIT COURT
Filed in Open Court this 27 day of April , 20 17.

/S/ JUSTY TURBERVILLE

TERENCE R PERKINS

ASSISTANT STATE ATTORNEY

DEPUTY CLERK IN ATTENDANCE

-1259-

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v. **CASE NO: 2009-002872-CFAWS**

POST-CONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

AMENDED NOTICE OF APPEARANCE OF POST-CONVICTION CAPITAL COLLATERAL COUNSEL

Please take notice of the following amendment to post-conviction Capital Collateral Regional Counsel. Reuben Neff has resigned from the Law Office of the Capital Collateral Regional Counsel – Middle Region, and should be excluded from future filings. The official status of counsel in the instant case should reflect the following:

JAMES V. VIGGIANO, JR.

CAPITAL COLLATERAL REGIONAL COUNSEL – MIDDLE

MARIA CHRISTINE PERINETTI

ASSISTANT CCRC

RAHEELA AHMED

ASSISTANT CCRC

LISA M. BORT

ASSISTANT CCRC

Respectfully submitted,

/s/ Lisa M. Bort

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/s/ Maria Christine Perinetti
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing **Amended Notice of Appearance of Post-Conviction Capital Collateral Counsel** has been transmitted to this Court through the Florida Courts E-Filing Portal on this 8th day of May, 2017.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via the Florida Courts E-Filing Portal to the **Honorable Terence R. Perkins**, Chief Judge, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Room 284, Daytona Beach, Florida 32114 at tperkins@circuit7.org; to **Vivian Singleton**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, at Vivian.Singleton@myfloridalegal.com and capapp@myfloridalegal.com; and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, Seventh Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach, Florida 32114, at calhounr@sao7.org and eservicevolusia@sao7.org, on this 8th day of May, 2017.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to **Mr. Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 8th day of May, 2017.

Respectfully submitted,

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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. **CASE NO.: 642009CF002872XXXAWS**
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

STATE'S RESPONSE TO DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

The State of Florida, by and through the undersigned counsel, hereby responds to Joseph Edward Jordan's (hereinafter, "Jordan" or "Defendant) original motion for postconviction relief (hereinafter, "Mot. to Vacate") and states the following:

PROCEDURAL AND FACTUAL HISTORY

In its direct appeal decision affirming Jordan's convictions and death sentence, the Florida Supreme Court summarized the facts of the case in the following way:

> Joseph Edward Jordan lived with Keith Cope in Edgewater, Florida, and was also an employee of Cope's construction company. On or

about Friday, June 26, 2009, Jordan and Cope partied together, drinking and using drugs. As they partied, Jordan asked Cope for money that Cope owed Jordan for construction work he had completed. Cope claimed that he did not have the money to pay Jordan even though Cope had money to pay for drugs. Jordan then pistol-whipped Cope; tied him up; took his money, guns, and drugs; and drove away with his Ford F–450 truck. Later that evening, Jordan appeared at the Hollywood, Florida, residence of his friend and former coworker Mathew Powell. Mathew's girlfriend, Sadia Haque, was also present when Jordan arrived. Jordan eventually shared with Mathew that Cope was literally tied up and that Mathew could go to Cope's house and clean out his gun safe, but Jordan did not want to go back to the Daytona Beach area or go near Cope's truck. Mathew decided to go, and asked his brother and ex-girlfriend, Marlon Powell and Cassandra Castellanos, to go with him.

Mathew, Sadia, Cassandra, and Marlon left Hollywood and arrived at Cope's house on Sunday, June 28, 2009, at approximately 6 a.m. Mathew and Sadia entered Cope's residence when no one answered the door. Mathew did not immediately see anyone after he entered, so he continued to search the house. When he walked into the back bedroom, he saw Cope at the foot of the bed, suspended by rope that was attached to it. Mathew removed tape from Cope's mouth and cut off the rope from Cope who then fell to the floor. Mathew then attempted to cut the tape from Cope's legs. Sadia called 911, and first responders arrived shortly thereafter.

Detective Eric Seldaggio of the Edgewater Police Department responded with another officer to Cope's house. Mathew, Sadia, Cassandra, and Marlon met the officers and directed them inside to the back bedroom. When Detective Seldaggio entered the bedroom, which strongly smelled of urine, he observed Cope lying at the foot of the bed with his hands bound behind his back and duct tape wrapped around his head and neck. Cope's ankles were also bound with duct tape and rope. Mathew indicated that he had cut a rope that was tied on the bed and wrapped around Cope's arm. Detective Seldaggio also observed rope tied to the four bedposts, a roll of duct tape on the bed, and rope embedded in Cope's left bicep that had turned a greenish color and was cold to the touch due to suspension by that arm for a lengthy period of time. According to a responding

emergency medical technician, Cope initially appeared deceased, but after multiple layers of duct tape were cut from his head to free his airway, Cope opened his eyes and moaned. Cope was later transported by ambulance to the hospital where he underwent emergency surgery to amputate his left shoulder and arm.

A day after the amputation, Cope's treating physician, Dr. Melinda Rullan, learned that Cope had been bound and gagged for three days. Based on her review of Cope's medical records, Dr. Rullan concluded that Cope's body was "literally dying." Dr. Rullan determined that Cope entered the hospital in critical condition with a life-threatening illness related to a compartment syndrome of the left upper extremity. He had little or no blood pressure, suffered from cardiovascular collapse and multiple organ failures, and had multiple clots throughout his body. Cope also developed acute signs of a left-sided stroke and lung complications. His original physical examination evidenced that he had bindings on his right wrist and both ankles and dead tissue on his right wrist, arm, and both feet. Cope was unresponsive upon entering the hospital and remained unresponsive until his death on July 13, 2009, after being removed from life support. Medical examiner Dr. Marie Hermann opined that "Cope died as a result of complications of being bound and gagged for days, including ischemic gangrene of the left upper extremity, bilateral cerebral infarctions, and bronchopneumonia."

Following interviews with the four people who found Cope in his bedroom, Jordan was arrested on July 18, 2009, and indicted by a grand jury for one count of first-degree murder and one count of robbery with a firearm or other deadly weapon in August, 2009. On April 19, 2013, a jury found Jordan guilty of first-degree felony murder of Cope and also convicted him as charged on the robbery count. During the penalty phase, the jury recommended a sentence of death by a vote of ten to two for the murder conviction. Following the August 2013 *Spencer* hearing, the trial court imposed a sentence of death for the murder conviction and a life sentence for the conviction for robbery with a firearm or other deadly weapon. In imposing the death sentence, the trial court concluded that the three aggravating circumstances, which were proven beyond a reasonable doubt, far outweighed the one statutory mitigating factor and thirty-seven nonstatutory mitigators.

Jordan v. State, 176 So. 3d 920, 924-26 (Fla. 2015) (footnotes omitted).

The three aggravators found by the trial court were: (1) prior violent felony—little weight; (2) the capital felony was committed while the defendant was engaged in the commission of a robbery and the capital felony was committed for pecuniary gain were merged together as one aggravator in order to avoid improper doubling—great weight; and (3) the capital felony was especially heinous, atrocious, or cruel (HAC)—great weight. *Id*. at 926 n.3. Only one statutory mitigating factor was proven: the capital felony was committed when the defendant was under the influence of extreme mental or emotional disturbance—moderate weight. The trial court found that thirty-seven nonstatutory mitigating factors were established. *Id*. at 926 n.4.

On appeal, Jordan raised six issues: (1) that the trial court should have declared a mistrial due to the prosecutor's improper statements during closing arguments; (2) that the trial court erred in finding the heinous, atrocious, or cruel aggravating circumstance; (3) that the trial court abused its discretion by admitting the victim impact statements into evidence; (4) that the trial court declined to find as a mitigating circumstance Jordan's ability to conform his conduct to the requirements of the law was substantially impaired; (5) that the sentence of death should be reversed under this Court's proportionality review; and (6) that Florida's death penalty statutory scheme is facially unconstitutional under *Ring v. Arizona,*

536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). *Jordan*, 176 So. 3d at 927. The Florida Supreme Court denied each of Jordan's claims on appeal and found that there was competent, substantial evidence to sustain Jordan's convictions. *Id*.

The case became final on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Florida Supreme Court's affirmance of the judgment and death sentence. Fla. R. Crim. P. 3.851 (d) (1) (A). The Defendant had 90 days after the opinion became final to file a cert petition. None was filed.

Jordan's Rule 3.851 motion was filed on December 15, 2016, and is timely under the rules. Jordan raises the following eight claims in this motion for post-conviction relief:

1. Jordan's death sentence is unconstitutional under *Hurst v. Florida.*
2. Jordan's sentence stands in violation of the Eighth Amendment and should be vacated.
3. Trial counsel provided prejudicial ineffective assistance by failing to challenge the state's timeline at trial with regard to the length of time the victim was bound.
4. Trial counsel provided prejudicial ineffective assistance under *Strickland* by failing to object to the prosecutor's improper closing arguments.
5. Trial counsel provided prejudicial ineffective assistance by failing to move to exclude a letter allegedly written by Jordan in which he referred to his case as the hog-tie murder, or any other mention of hog-tying.

6. Trial counsel provided prejudicial ineffective assistance of counsel by presenting a bare bones and/or deficient judgment of acquittal argument during the guilt phase.

7. Trial counsel provided prejudicial ineffective assistance of counsel by failing to move to exclude the statutory aggravators that the capital felony was committed while the defendant was engaged in the commission of a robbery and that the capital felony was committed for pecuniary gain.

8. Trial counsel provided prejudicial ineffective assistance of counsel by failing to move to exclude or object to the admission of the victim's actual hair on duct tape into evidence.

STANDARD OF REVIEW FOR CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

To prevail on a claim that trial counsel's assistance was "so defective as to require reversal of a conviction or death sentence," a defendant must satisfy both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. 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.

Id. at 687.

Under *Strickland*, for ineffective assistance of counsel claims to be successful, two requirements must be satisfied: First, the claimant must identify

particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied *Ferrell v. State*, 29 So. 3d 959, 969 (Fla. 2010); *citing Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986). The Court refrained from providing specific guidelines to evaluate counsel's performance. Instead, the Court held "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland,* 466 U.S. at 688.

The Court held that prejudice exists only if, "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." *Id*. at 694*; see also Porter v. McCollum*, 558 U.S. 30, 55-56 (2009) (explaining that the Court does not require proof "'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'" (*quoting Strickland*, 466 U.S. at 693-94)).

In evaluating counsel's performance under *Strickland*, there is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. The defendant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. at 689 (*quoting Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Additionally, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689.

Because a court can make a finding on the prejudice prong of *Strickland* without ruling on the deficiency prong, claims of ineffective assistance of counsel are subject to summary denial when the court can determine the outcome of the proceeding would not be affected even if counsel were deficient. *Franqui v. State,* 59 So. 3d 82 (Fla. 2011); *Troy v. State,* 57 So. 3d 828 (Fla. 2011); *Walls v. State,* 926 So. 2d 1156, 1173 (Fla. 2006) (summary denial appropriate on ineffective assistance of counsel claim where evidence was cumulative) *Freeman v. State,* 761 So. 2d 1055, 1063 (Fla. 2000). *See also Duest v. State,* 12 So. 3d 734, 747 (Fla. 2009); *Stewart v. State*, 801 So. 2d 59, 65 (Fla. 2001) (Because the *Strickland* standard requires establishment of both the deficient performance and prejudice

prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong). "Failure to sufficiently allege both prongs results in a summary denial of the claim." *Spera v. State*, 971 So. 2d 754, 758 (Fla. 2007) (*citing Thompson v. State*, 796 So. 2d 511, 514 n. 5 (Fla. 2001)).

SUMMARY DENIAL OF POSTCONVICTION CLAIMS

A postconviction court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on the written materials before the court. A court may summarily deny a postconviction claim when the claim is legally insufficient, procedurally barred, or refuted by the record. *See Franqui*, 59 So. 3d at 101; *Troy*, 57 So. 3d at 840 (*citing Owen v. State*, 986 So. 2d 534, 543 (Fla. 2008). A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. *Moore v. State*, 820 So. 2d 199, 203 (Fla. 2002).

Rule 3.851(e)(1)(D) requires a defendant to include a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought. The burden is on the defendant to establish a legally sufficient claim. *See Franqui*, 59 So. 3d at 96 (citing *Freeman v. State/Singletary*, 761 So. 2d 1055, 1061 (Fla. 2000)); *Nixon v. State/McDonough*, 932 So. 2d 1009, 1018 (Fla. 2006). Conclusory

allegations are not sufficient. *Franqui*, 59 So. 3d at 96 (citing *Freeman*, 761 So. 2d at 1061).

The rule of sufficiency is equally applicable to claims of ineffective assistance of counsel. *See Thompson*, 796 So. 2d at 515; *Knight v. State*, 923 So. 2d 387 (Fla. 2005). The facial sufficiency of an ineffective assistance of counsel claim is determined by applying the two-pronged test of deficiency and prejudice set forth in *Strickland. Troy*, 57 So. 3d at 834 (citing *Duest v. State*, 12 So. 3d at 747). Allegations that counsel was ineffective for not pursuing meritless arguments are legally insufficient to state a claim for postconviction relief. *See Owen v. State*, 986 So. 2d at 543; *Melendez v. State*, 612 So. 2d 1366, 1369 (Fla. 1992) (holding counsel cannot be deemed ineffective for failing to make meritless argument).

When a defendant alleges ineffective assistance of counsel for failure to call specific witnesses, a defendant is "required to allege what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have testified prejudiced the case." *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004), *cited in Bryant v. State/Crosby*, 901 So. 2d 810, 821-22 (Fla. 2005) (concluding that a 3.851 claim of ineffective assistance was legally insufficient where the substance of the testimony was not described in the motion and the motion did not allege the specific facts to which the witness would testify).

A defendant's claim he was denied effective assistance of counsel because counsel failed to present mitigation evidence will not be sustained where the jury was aware of most aspects of the mitigation evidence that the defendant claims should have been presented. *Troy*, 57 So. 3d at 835 (citing *Van Poyck v. State*, 694 So. 2d 686, 692-93 (Fla. 1997)). Further, if the record demonstrates that counsel's decision not to present evidence "might be considered sound trial strategy" the claim may be summarily denied. *Franqui* 59 So. 3d at 99, (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). As the Florida Supreme Court explained in *Winkles v. State*, 21 So. 3d 19, 26 (Fla. 2009): "an ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword." *See also Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004).

If a claim is deemed facially insufficient because of a technical omission, the court should afford the defendant a reasonable opportunity to amend. *See Davis v. State*, 26 So. 3d 519, 527 (Fla. 2009). In the current case, the omissions are not mere technical omissions. Claims I, V, VI, VII, and VIII are legally insufficient to require an evidentiary hearing and summary denial is appropriate.

SUMMARY DENIAL OF PROCEDURALLY BARRED CLAIMS

The trial court must summarily deny claims that are procedurally barred. *Fla. R. Crim. P.* 3.851(e)(1). The Florida Supreme Court has consistently held that a

claim that could and should have been raised on direct appeal is procedurally barred. *Miller v. State*, 926 So. 2d 1243, 1260 (Fla. 2006); *Davis v. State*, 915 So. 2d 95, 129 (Fla. 2005); *Duckett v. State*, 918 So. 2d 224, 234 (Fla. 2005); *Robinson v. State*, 913 So. 2d 514, 523 (Fla. 2005). Further, it is inappropriate to use a different argument to relitigate the same issue. *Willacy v. State*, 967 So. 2d 131, 141 (Fla. 2007). A procedurally barred claim cannot be considered under the guise of ineffective assistance of counsel. *Freeman*, 761 So. 2d at 1067 (holding that claims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel); *see also, Rodriguez v. State/Crosby*, 919 So. 2d 1252, 1280 (Fla. 2005).

SUMMARY DENIAL OF CLAIMS REFUTED BY THE RECORD

The trial court must also summarily deny claims that are conclusively refuted by the record. The State has referenced sections of the record which specifically refute Jordan's claims.

RESPONSE TO REQUEST FOR EVIDENTIARY HEARING

Jordan asserts that several of his claims require a factual determination via an evidentiary hearing. However, Rule 3.851 does not require an evidentiary hearing on a claim that is legally insufficient, is subject to dismissal for insufficient pleading, is a purely legal claim, or is a claim refuted by the record. Such claims remain subject to summary denial. **The state admits no error, and specifically**

asserts that no basis for relief exits. However, it appears that further evidentiary development may be necessary to fully refute Jordan's argument as to Claim 4. The State anticipates that testimony elicited at an evidentiary hearing will support denial of this claim. The remaining claims can be resolved as matters of law and do not require an evidentiary hearing. "To be entitled to an evidentiary hearing on a claim of ineffective assistance of counsel, the defendant must allege specific facts that are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant." *Jones v. State*, 845 So. 2d 55, 65 (Fla. 2003).

ARGUMENT

CLAIM 1

JORDAN'S DEATH SENTENCE IS CONSTITUTIONAL UNDER *HURST V. FLORIDA* BECAUSE HE HAS FAILED TO ESTABLISH HARMFUL ERROR, AND ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT (restated).

Defendant asserts he is entitled to relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). In *Hurst v. Florida*, the United States Supreme Court declared the portion of Florida's capital sentencing scheme requiring the judge, rather than a jury, to find each fact necessary to impose a sentence of death unconstitutional in light of *Ring v. Arizona*, 536 U.S. 583 (2002). The Florida Supreme Court has held that *Hurst v. Florida* can be retroactively applied to cases that were not final when the *Ring* opinion was issued

in 2002. *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). Defendant's convictions and sentences became final after *Ring* was decided; therefore, *Hurst* could be retroactively applied to this case.

However, Defendant is only entitled to relief if the alleged *Hurst* error was not harmless beyond a reasonable doubt. *See Hurst v. State*, 202 So. 3d 40, 67 (Fla. 2016) (recognizing that a *Hurst* error is capable of harmless error review); and *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016) (remanding to the state court to determine whether the error was harmless).

While Defendant claims that the State cannot show beyond a reasonable doubt that the *Hurst* error was harmless, it is not the State's burden to prove. Unlike a direct appeal, the State has no burden of proving harmless error in postconviction proceedings. Rather, it is the movant that must show entitlement to relief. *See Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000) (explaining that in order to obtain postconviction relief, "[t]he defendant bears the burden of establishing a prima facie case based upon a legally valid claim."); *see also Ives v. State*, 993 So. 2d 117, 121 (Fla. 4th DCA 2008) (observing that the burden is generally on the State to prove harmlessness on direct appeal, but rests with the defendant to prove prejudice in postconviction); *but see Mosley*, 209 So. 3d at 1283-4 (Fla. 2016). Thus, it is Defendant's burden to meet, and he has failed to do so in this case.

Even if it were the State's burden to prove, Defendant would not be entitled to relief because any *Hurst* error was harmless. In order to be harmless error, there must be no reasonable possibility that the *Hurst* error contributed to Defendant's death sentence. *Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016), *reh'g denied,* 2017 WL 56089 (Fla. Jan. 5, 2017); *see also Hurst v. State*, 202 So. 3d at 68 (analyzing whether the jury's failure to unanimously find all the facts necessary for imposition of the death penalty contributed to Hurst's death sentence); *and Galindez v. State*, 955 So. 2d 517, 523 (Fla. 2007) (explaining that the harmless error analysis for a violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found penetration when there was a failure to have the jury make the victim injury finding regarding penetration).

A unanimous jury recommendation is not required in order to establish harmless error. Instead, it is necessary to look to what a rational jury would have done and whether the alleged *Hurst* error contributed to the death sentence in this case.

Defendant was convicted of robbery with a firearm or other deadly weapon in addition to first-degree murder. Therefore, the jury unanimously found him guilty of a contemporaneous crime that supports the aggravating circumstance that the murder was committed in the course of a felony.

The Florida Supreme Court has repeatedly found *Ring* not applicable to other cases under similar circumstances. *See Miller v. State*, 42 So. 3d 204, 218–19 (Fla. 2010) (*Ring* is not violated where Miller's aggravating factors were established by prior violent felonies and contemporaneous felonies); *Belcher v. State*, 851 So. 2d 678, 685 (Fla. 2003) (concluding that prior violent felony and murder in the course of a felony aggravators exempted the sentence from the holding in *Ring*); *see also Poole v. State*, 997 So. 2d 382, 396 (Fla. 2008); *Guardado v. State*, 965 So. 2d 108 (Fla. 2007); *Smith v. State*, 866 So. 2d 51, 68 (Fla. 2004); *Johnston v. State*, 863 So. 2d 271, 286 (Fla. 2003).

Given that *Hurst* is an application of *Ring* to Florida, and the Florida Supreme Court has found that contemporaneous convictions and prior violent felonies remove a case from the scope of *Ring*, it should also follow that they remove this case from the scope of *Hurst*.[1]

Even if this Court should disagree, it can still be established that a rational jury would have unanimously found the aggravating factors and recommended death. The jury clearly found that the capital felony was committed in the course of robbery given the contemporaneous conviction.

[1] The State acknowledges that the Florida Supreme Court has rejected this argument in *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) and *Johnson v. State*, 205 So. 3d 1285, 1289 (Fla. 2016); however, it maintains that the cases were wrongly decided, especially given the Court's long history of finding cases not implicated by *Ring* when they involved prior violent felonies and contemporaneous felonies.

Moreover, the aggravation in this case was clear on the facts. The trial court found that three aggravating circumstances were proven beyond a reasonable doubt: (1) prior violent felony conviction—little weight; (2) the capital felony was committed while the defendant was engaged in the commission of a robbery, and the capital felony was committed for pecuniary gain were merged together as one aggravator in order to avoid improper doubling—great weight; and (3) HAC—great weight. In contrast to this strong aggravation, the mitigation was slight, and non-compelling. The trial court concluded that only one statutory mitigating factor applied—the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance—which was accorded moderate weight. The trial court also found thirty-seven nonstatutory mitigators and gave one moderate weight, ten some weight, two minimal weight, and the rest little weight.[2] *Jordan*, 176 So. 3d at 936. A rational jury would have unanimously found the aggravating factors if it had been properly instructed to do so, and it would have unanimously found that the aggravating factors were sufficient for the imposition of death, and that they outweighed the mitigation. Ten (10) jurors already recommended death. Had the jury been told that a unanimous recommendation was

[2] Additionally, the trial court concluded that the nonstatutory mitigator that the crime was committed in a unsophisticated manner was not established and therefore not given any weight.

required to sentence Defendant to death, the jury would have certainly done so in this case.

Defendant's claim that the jury was misled concerning its role in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), is procedurally barred. Claims regarding the adequacy or constitutionality of jury instructions should be raised on direct appeal. *Rodriguez v. State*, 919 So. 2d 1252, 1280 (Fla. 2005), *as revised on denial of reh'g* (Jan. 19, 2006) (citing *Thompson v. State*, 759 So. 2d 650, 665 (Fla. 2000) (stating that substantive challenges to jury instructions are procedurally barred in postconviction challenges because the claims can and therefore should be raised on direct appeal)). Moreover, the Florida Supreme Court will not consider procedurally barred claims under the guise of ineffective assistance of counsel. *See Freeman v. State*, 761 So. 2d 1055, 1067 (Fla. 2000) (holding that claims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel).

Nevertheless, Defendant's *Caldwell* claim is without merit, as it is based on pure speculation. There is nothing in the record to support the proposition that the jury's responsibility in rendering the advisory verdict was diminished. The jury knew and understood their great responsibility in reviewing the evidence and determining whether to recommend death. For all these reasons, relief must be denied.

Defendant is not entitled to an evidentiary hearing.

Defendant's contention that he should be given an evidentiary hearing on the issue of harmless error is completely meritless. Defendant fails to demonstrate how presentation of evidence from his trial counsel could in any way contribute to a harmless error analysis focused on what a rational jury would do. That is because this claim requires no additional factual development. Harmlessness is an appellate concept that should be analyzed based on the record before this Court; it is not a matter for evidentiary development.

Defendant can gain no benefit from testimony about what his counsel would have done differently if *Hurst* had applied at that time. Any such testimony would be based on pure speculation. Additionally, Defendant's counsel cannot be held ineffective for failing to anticipate changes in the law. *Hitchcock v. State*, 991 So. 2d 337, 348 (Fla. 2008). It is proper for this Court to deny Defendant's request for an evidentiary hearing. Fla. R. Crim. P 3.851 (f)(B); and *Ragsdale v. State*, 720 So. 2d 203 208 (Fla. 1998) (finding that the trial judge properly denied an evidentiary hearing where defendant provided insufficient facts as to how the outcome would have changed had such evidence been introduced).

CLAIM 2

THE EIGHTH AMENDMENT DOES NOT REQUIRE THAT DEFENDANT'S SENTENCE BE VACATED. (restated).

Defendant claims that his death sentence violates the Eighth Amendment. He specifically argues that defendants who did not receive a unanimous jury recommendation are not eligible to receive a death sentence and cannot be executed under the Eighth Amendment. This argument is flawed for many reasons.

In *Spaziano v. Florida,* 468 U.S. 447, 463–64, (1984), the United States Supreme Court held that the Eighth Amendment is not violated in a capital case when the ultimate responsibility of imposing death rests with the judge. *Spaziano v. Florida*, 468 U.S. 447, 463–64, (1984) *overruled on other grounds by Hurst v. Florida*, 136 S. Ct. 616 (2016). In deciding *Hurst v. Florida*, the United States Supreme Court only analyzed the case pursuant to Sixth Amendment grounds. The Court did not address the issue of any possible Eighth Amendment violation. Consequently, *Hurst v. Florida,* only overrules *Spaziano* to the extent that it allows a sentencing judge to find an aggravating circumstance independent of a jury's fact-finding. *Hurst v. Florida*, 136 S. Ct. at 618. The Court has never held that a unanimous jury recommendation is required under the Eighth Amendment.

Defendant is correct in his assertion that the Florida Supreme Court initially included the Eighth Amendment as a reason for warranting unanimous jury recommendations in its *Hurst v. State* decision. *Hurst v. State*, 202 So. 3d at 59. However, the Florida Supreme Court did not, and cannot, overrule the United State Supreme Court's surviving precedent in *Spaziano*.

Moreover, the Florida Supreme Court's ruling in *Hurst v. State*, does not support Defendant's proposition that his sentence and execution would violate the Eighth Amendment as well as the Florida Constitution. Even the Florida Supreme Court has acknowledged that any *Hurst* error is capable of harmless error review. *Id.* at 66-68. By the same token, the Florida Supreme Court has not extended *Hurst* to all cases in which alleged Sixth Amendment errors have occurred. *Asay v. State*, 210 So. 3d 1 (Fla. 2016). Defendant's assertion that it is contrary to the Eighth Amendment and the Florida Constitution to execute any defendant who did not receive a unanimous recommendation for death is without merit.

Defendant's reliance on *Walls v. State*, 2016 WL 6137287 (Fla. Oct. 20, 2016), is also misplaced. In *Walls*, the Florida Supreme Court determined that *Hall v. Florida*, 134 S. Ct. 1986 (2014), was retroactive under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *Walls*, 2016 WL 6137287 at *5-*6. *Walls*, however, concerned intellectual disability, not non-unanimous jury recommendations. The Eighth Amendment prohibits executions of the intellectually disabled. *Atkins v. Virginia*, 536 U.S. 304 (2002). Defendant does not belong to any Eighth Amendment protected class that would implicate his death sentence. Accordingly, Defendant is not entitled to postconviction relief. This court should deny relief on this claim.

Defendant does not request an evidentiary hearing on this claim.

CLAIM 3

INEFFECTIVENESS OF COUNSEL WAS NOT PROVEN IN REGARD TO THE LENGTH OF TIME THE VICTIM WAS BOUND. (restated)

Jordan argues that trial counsel was ineffective for not objecting and disputing the State's timeline for how long the victim was bound. Defendant argues that the State made several references throughout the trial to Cope being restrained for three days but that the evidence supported a reasonable assumption that the total time frame was less than 2.5 days. Mot. to Vacate at 23.

Defendant argues that the State's only evidence to support the assertion that Cope was restrained from the evening of June 24 until the morning of June 28 was the observation of the victim's ex-wife, Maggie Cope, that his truck was not at his home on the morning of June 25. However, the record supports the State's arguments that Cope was restrained for three days. Jordan admitted to Detective Joanne Winston that he took the victim's truck, which, along with Maggie Cope's testimony, infers that he had stolen the truck by the time she drove by the victim's house on the morning of June 25. Cope was found by Jordan's friends on June 28. (V10, R1981-82; V11, R2007). Thus, there was substantial evidence that Cope was bound for at least three days and Jordan's argument has no merit.

It was reasonable for Jordan's counsel to choose not to object to references to Cope being bound for three days because the evidence presented at trial supported

the argument. *Strickland* requires that the defendant show deficient performance, which Jordan has not done. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Jordan "must show that counsel's representation fell below an objective standard of reasonableness." *Id*. at 688. Jordan has not met the requirements of *Strickland* because it would have been fruitless for Jordan's trial counsel to object to the argument or the questions that referenced Cope being bound for three days because the evidence supported it and any objection would have been overuled. Allegations that counsel was ineffective for not pursuing meritless arguments are legally insufficient to state a claim for postconviction relief. *See Owen v. State*, 986 So. 2d 534, 543 (Fla. 2008); *Melendez v. State*, 612 So. 2d 1366, 1369 (Fla.1992) (holding counsel cannot be deemed ineffective for failing to make a meritless argument).

While Jordan argues that he was prejudiced by this, it is well settled that it is not necessary for a court to consider the second prong of a *Strickland* analysis if deficiency has not been proven because the standard requires the establishment of both deficiency and prejudice. *See Downs v. State*, 740 So. 2d 506, 518 n.19 (Fla. 1999) (finding no need to address prejudice prong where defendant failed to establish deficient performance prong).

However, even if this Court determines that trial counsel was deficient, Jordan has not demonstrated how he was prejudiced. The United States Supreme Court stated the following in regard to the prejudice prong:

> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.
>
> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Strickland, 466 U.S. at 695-6.

The State's argument that Jordan was bound for 3 days rather than less than 2.5 days did not prejudice him during the guilt phase nor the penalty phase. Regardless of which time frame was used, the jury heard testimony that Jordan

admitted to several people in South Florida that Cope was "tied up" and that Cope owed him money. Jordan alluded to his guilt by telling his friends that he was afraid he would go to jail for what he had done, that he had made bad decisions and wanted to commit suicide. Although he encouraged his friends to go check on Cope, Jordan never told them that Cope's life was in danger. Thus, the jury heard sufficient evidence to determine Jordan's guilt regardless of what time framed was used. Even if the defense had argued that Cope was tied up for 2.5 days instead of 3 days, the difference in the time frame does not negate Jordan's guilt. It is not reasonable that, absent argument that Cope was tied up for three days, the factfinder would have had a reasonable doubt regarding his guilt.

In regard to the penalty phase, there is no reasonable probability that a shortened time period would have led to a conclusion that the balance of aggravating and mitigating circumstances did not warrant death. Regardless of the time frame used, the jury and judge still would have heard how extensive Cope's injuries were, how his left arm and shoulder had to be amputated, about the blood clots that formed throughout his body, the stroke that led to brain damage and the vegetative state that he was in when he arrived at the hospital until his death on July 13th. Although the medical experts testified to changes the body undergoes after being bound or without water for three days, their testimony about the condition Cope's body was in after he was found would not have changed regardless of how

many days he was bound. So even if Jordan's trial counsel had argued that he was bound for 2.5 days, such an argument would not have negated the extensive testimony about his dire medical condition which the jury and judge heard from the emergency medical technician and paramedic who responded to Cope's home, the emergency room doctor who cared for Cope upon arrival at the hospital and the critical care specialist who treated him in the intensive care unit until the day he died. The medical examiner opined that "Cope died as a result of complications of being bound and gagged for days, including ischemic gangrene of the left upper extremity, bilateral cerebral infarctions, and bronchopneumonia." (V12, R2400).

Both the jury and defendant heard four victim impact statements and received proof of Jordan's prior violent felony conviction. Presumably, the mitigation evidence would have remained the same as well.

A challenge to the time frame during which Cope was bound does not invalidate any of the three aggravators. The prior violent felony aggravator was proven through proof of his record. Jordan's theft of Cope's truck and debit card that he used to withdraw $2,345.81 proved beyond a reasonable doubt the capital felony was committed during the commission of a robbery aggravator as well as the pecuniary gain aggravator which were merged as one aggravator. Lastly, regardless of whether Jordan left Cope bound for 2.5 days versus 3 days, the jury and judge would have found that the crime was heinous, atrocious or cruel. Jordan

left Cope hog tied to his bed with ropes and multiple layers of tape wrapped around Cope's head. Emergency medical technicians had to remove the duct tape to create an airway for Cope.

The evidence supported each of the aggravators. There is no reasonable probability that a shortened time frame would have led to a life sentence. As a result, prejudice cannot be proven in regards to the conviction nor the sentence when considering the totality of the evidence. Under *Strickland*, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Strickland*, 466 U.S. at 697. This claim can be denied based on the lack of prejudice alone.

This claim is refuted by the record and is completely meritless. ***It should be summarily denied without an evidentiary hearing.***

The Defendant is not entitled to a new penalty phase proceeding.

CLAIM 4

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENTS (restated)

Defendant argues that his trial counsel was ineffective for failing to object to four instances in which Jordan alleges that the prosecutor made improper closing arguments.

The Florida Supreme Court addressed one of the arguments in the direct appeal:

> Jordan also contends that the prosecutor's statement, "Don't let him get away with this," constitutes an improper comment. Because Jordan failed to contemporaneously object to this comment, we apply a fundamental error review. *See Braddy v. State*, 111 So.3d 810, 837 (Fla.2012) (citing *Brooks v. State*, 762 So.2d 879, 899 (Fla.2000) (defining fundamental error as that which "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.")). "If this Court finds a comment to be improper, factors to be weighed in determining whether an improper comment rises to the level of fundamental error include whether the statement was repeated and whether the jury was provided with an accurate statement of the law after the improper comment was made." *See Poole v. State*, 151 So.3d 402, 415 (Fla.2014), cert. denied, —— U.S. ——, 135 S.Ct. 2052, 191 L.Ed.2d 960 (2015).
>
> Specifically, Jordan challenges the following statement in the prosecutor's rebuttal closing argument:
>
> > You can find him guilty of first-degree murder or guilty of such lesser-included charges. That's second degree, third degree, manslaughter with a weapon or manslaughter. Ladies and gentlemen, you can go all the way down the list, but the law tells you find him guilty of the highest one that's been proven. Sure. Look at the instructions. They may all apply in this situation because of the way this thing developed, they may all apply. I mean, you may be able to technically find him guilty of all of them, but you should find him guilty of the highest one that has been charged and proven beyond a reasonable doubt. And in this case it's first-degree murder, felony murder, first degree. And when you get over here to—to the robbery, count two right up here, count two, robbery with a fire weapon—firearm or deadly weapon, right here on the first line, guilty of the charge of robbery with a firearm or deadly weapon, exactly what he confessed to, exactly

> what he told you he had done. *Don't let him get away with this*. Yeah. I mean sure. You can come down the list again if you want to. I mean, he's technically guilty of all of them. Robbery with a weapon, yep. Robbery, yep. Grand theft, did he steal something without any force? Well, he stole something, but he—he used force. I mean, yeah. You can come down the list, but there's no reason to. The law says to return it to the highest crime proven beyond a reasonable doubt. And, ladies and gentlemen, it is right there. It is choice number one.

(Emphasis added). Within the context of the argument, the prosecutor told the jury that there were lesser-included offenses, and he listed them. He then beseeched the jury not to let the defendant get away with first-degree felony murder if that was the crime for which they chose to convict him.

While we find the comment was indeed improper, we do not find that the prosecutor's comment rises to the level of fundamental error. The prosecutor mentioned the comment only one time, and after saying, "Don't let him get away with this," the prosecutor still invited the jury to consider the lesser-included offenses. Also, the trial court read the standard jury instructions, which included an accurate statement of the law with regard to first-degree felony murder and the lesser-included offenses. *See Poole*, 151 So.3d at 418.

Jordan, 176 So. 3d at 929.

In order to prevail on an ineffective assistance of counsel claim on this ground, Jordan "must first show that the comments were improper or objectionable and that there was no tactical reason for failing to object." *Hildwin v. State*, 84 So. 3d 180, 191 (Fla. 2011) (citing *Stephens v. State*, 975 So.2d 405, 420 (Fla.2007). Second, he must demonstrate prejudice. *Hildwin*, 83 So. 3d at 191.

The Defendant has not proven prejudice here. If the argument had not been made, the jury was presented with substantial evidence to convict Jordan on first-degree murder. He admitted to leaving Cope bound to his bed. Jordan's friends who found Cope testified that the bindings were so tight that they were embedded in the victim's skin. Emergency medical technicians had to cut multiple layers of duct tape from Cope's head to free his airway. The victim was without water for three days. Absent the argument by the prosecutor, the jury still would have convicted Jordan. As a result, the Defendant cannot prove the second prong of *Strickland*.

The Defendant is not going to be able to establish actual prejudice based on the weight of the evidence of his guilt presented against him at trial, but the State concedes to an evidentiary hearing in an abundance of caution.

In regard to the remaining claims of ineffectiveness based upon the closing arguments, the Florida Supreme Court held that they lacked merit.

> Finally Jordan raises eight additional claims of prosecutorial misconduct during closing arguments in the guilt phase. We find those claims meritless and unpreserved for appellate review. *See Riechmann v. State*, 581 So.2d 133, 139 (Fla.1991). We also find that none of the comments, taken individually or cumulatively, constitute fundamental error. *See Braddy*, 111 So.3d at 837 (citing *Card v. State*, 803 So.2d 613, 622 (Fla.2001)); *see also Merck v. State*, 975 So.2d 1054, 1061 (Fla.2007). Accordingly, we deny relief for these claims.

Jordan, 176 So. 2d at 929-30.

Trial counsel cannot be found ineffective for claims that the appellate court has already deemed to be without merit. *See Melendez v. State*, 612 So.2d 1366,

1369 (Fla.1992) (abrogated on other grounds) (when this Court has previously rejected the substantive claim on the merits about which the defendant takes issue during postconviction proceedings in the guise of an ineffective assistance of counsel claim, counsel cannot be deemed ineffective for failing to make the meritless argument).

Nevertheless, the State addresses each of the closing arguments for which the Defendant complains.

Jordan argues that the prosecutor made improper golden rule arguments by imagining what it must have been like for the victim after Jordan tied him up. Mot. to Vacate at 31. The Defendant complains of the following argument:

> When he closed the door behind him, it was as if he had put Keith Cope on a raft and set him adrift in an endless sea.
>
> He had absolutely no ability, no tool, to free himself. And he could only hope that someone would come and find him.
>
> Three days later, three days without water, three days of sunrises and sunsets, three days of watching the clock and minutes slowly pass by, someone came and found Keith Cope. And it was too late.
> As the days ticked slowly by, his hope got smaller and smaller, I would imagine.
>
> As the days ticked slowly by, he probably knew that no one was coming for him.

(V13, R2544).

The Florida Supreme Court has found that "a common-sense inference as to the victim's mental state" may be the basis of proper argument. *Rogers v. State*, 957

So. 2d 538, 549 (Fla. 2007). Such arguments are not improper golden rule arguments because they do not attempt to place the jury in the position of the victim. *Id*.

Here, the prosecutor did not make improper arguments. He simply made inferences as to what the victim must have been experiences based upon facts entered into evidence. There was evidence that Cope had no way to free himself from the ropes and tape and did not have water for three days. As a result, the argument was proper.

Next, Jordan argues that the prosecutor invited the jurors to imagine the length of time the victim suffered by using their own experience as jurors as a reference. Mot. to Vacate at 32. Jordan complains of the following:

> What kind of person does this to another human being, to leave him bound and gagged, to suffer horribly for three days?
>
> And there's no doubt that Keith Cope's suffering was – it's virtually unimaginable, the suffering he would have gone through in those three days, not only physically, but mentally.
>
> What's going through his mind those three days? Over 72 hours, bound, gagged, no food, no water, urinating on himself.
>
> Just as a reference, think about it. Last week we started our trial.
>
> Actually, a week from today, Wednesday morning, we started with the evidence part of it after jury selection. Wednesday morning.
>
> Wednesday, Thursday, Friday, that time frame, so that time frame, say, until we woke up, everyone, that Saturday morning after the trial concluded, so that's a three-day period.

> It was more than that length of time from Wednesday when we began hearing the evidence, that Wednesday morning when opening statements were done, that Wednesday, that Thursday, that Friday, and then when we woke up Saturday morning after the trial had been concluded.
>
> That's at least the length of time that Keith Cope was bound and gagged and laying there in a bed.

(V16, R3046-47).

However, the prosecutor simply invited the jurors to imagine how long three days could feel and was used to show the jurors that three days could be a significant amount of time. Because the prosecutor did not invite the jurors to place themselves in the victim's position, the argument was proper.

Next, the Defendant's argues that the prosecutor appealed to the jury's sense of security through the following:

> Just because the defendant was owed something doesn't mean that he has a right to come up here and demand someone else's money and take it from him when they're not willing to give it, and to use force to do that, use guns and tape and rope.
>
> If you could do that in America, then we'd all be in trouble because the mortgage companies would have us tied to the bed.

(V13, R2576).

This argument is meritless. There is no correlation between fearing for one's safety and owing money to a debtor. Nothing about this argument is improper.

Jordan also argues that the prosecutor argued that he lacked remorse. Mot. to Vacate at 33. The following statements were made during the guilt phase closing arguments:

> The first point is I'm sorry. The second point is I didn't mean to kill Keith. And the third point is I'm not responsible for the harm that occurred after I left.
>
> That was what was said in opening statement by the defense. That was what was asked to many of the witnesses that were on the stand.
>
> So let's talk about that argument. Let's talk about the defense's argument in this case.
>
> Let's start with I'm sorry. Nowhere in the evidence, nowhere, is there a single fact that demonstrates the defendant is sorry about anything.
>
> He wrote six letters. You listened to them yesterday as they were read. You'll have an opportunity to take them in the back and read them yourself.
>
> Look carefully for the words I'm sorry. I'm sorry doesn't appear anywhere. I'm sorry doesn't come up in the statement to Joanne Winston out at the jail.
>
> There is no I'm sorry. When he told his friends, Raymond Hill and Eddie Yarrow and Mathew Powell and Sadia Hague, not once did he say I'm sorry.
>
> Not once did he say, God, I wish it hadn't happened this way. I – I wish Keith were in better shape or hadn't died.
>
> . . .
>
> You know, nowhere in there, though, was I'm sorry. The most we got was I'm suicidal. I F'ed up. I didn't want to go to jail, but we never heard I'm sorry.

(V13, R2540-41).

Although Jordan argues that the statements were misleading and that trial counsel had not presented its closing argument, the prosecutor's arguments were permissible considering the opening arguments that had been made by defense counsel and the questions the defense put forth during witness testimony. The prosecutor was attempting to discredit the defense's theory and simply anticipated the defense trial counsel's closing arguments. There was nothing improper about the argument.

Furthermore, the case cited by the Defendant, *Pope v. State*, 441 So. 2d 1071, 1078 (Fla. 1983), is in reference to comments made during the penalty phase proceeding. The comments that Jordan complains of occurred during the guilt phase. Thus, *Pope* does not apply. The lack of remorse argument was meant to discredit the defense's theory of the case and had nothing to do with aggravation.

Lastly, Jordan complains that the following argument amounted to ridiculing the Defendant or his theory of defense:

> I told you it was coming, and there, there we heard it. It's everybody's fault but the defendant's.
>
> I mean, if he had stayed in the middle of the bed, he would still be alive.
>
> If these guys had come up from south Florida a day and a half earlier, he'd still be alive.
>
> Come on. Everybody's fault but his.
>
> I mean, he snapped? Is that a defense? He snapped?

(V13, R2572-73).

The prosecutor's remarks were not improper. They did not involve ridiculing the defense. The prosecutor merely described the defense's theory of the case. "Indicating to the jury that, based on the evidence of the case, they should question the plausibility of the defense's theory of the case is within a prosecutor's role of assisting the jury to consider and to evaluate the evidence presented." *Valentine v. State*, 98 So. 3d 44, 66 (Fla. 2012). Any objections to these comments would have been meritless.

"Closing argument is an opportunity for counsel to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." *Merck v. State*, 975 So.2d 1054, 1061 (Fla.2007).

In order to require a new trial based on improper prosecutorial comments, the prosecutor's comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise. *Walls v. State*, 926 So. 2d 1156, 1167 (Fla. 2006) (citing *Spencer v. State*, 645 So. 2d 377, 383 (Fla. 1994)).

If this Court finds that the prosecutor's comments were improper, they do not approach the level of warranting a new trial. There was a substantial amount of

evidence that Jordan killed the victim. He told his friends that Cope was tied up. Jordan's statements to them to go check on Cope was an admission to his guilt. None of the statements made by the prosecutor, if found to be improper, rose to the level of inflaming to the jury to the point that they would not have convicted Jordan absent those comments.

While the Defendant argues that the jury is instructed to consider all of the evidence presented during the guilt phase as well as the penalty phase, the comments made by the prosecutor are not evidence. As a matter of fact, juries are instructed that comments made by the attorneys should not be considered as evidence in a trial.

The State does not object to the holding of an evidentiary hearing for this claim.

The Defendant is not entitled to a new trial.

CLAIM 5

THE ADMISSION OF THE LETTER IN WHICH JORDAN REFERRED TO HIS CASE AS THE HOG-TIE MURDER DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL (restated)

The Defendant argues that trial counsel was ineffective by allowing a letter that Jordan had written to be admitted into evidence in which he referenced the victim as being "hog tied." Jordan argues that the phrase was used as a play with

words by the State during closing arguments and became a feature of the State's penalty phase arguments.

The Defendant also includes references to a letter that his trial attorney wrote to him explaining how the letter was disclosed and that it was repeatedly referenced by the State Attorney on closing argument in the penalty phase

Jordan argues that trial counsel provided deficient performance under *Strickland* by not moving to exclude the letter and any mention of hogtying. The Defendant argues that he was prejudiced by this, citing references in his letter from the trial attorney that the hog-tie comments played a large role in the jury's recommendation for the death penalty.

This claim is meritless and should be summarily denied. This claim is legally insufficient because it only involves conclusory statements. A claim of ineffective assistance of counsel, to be considered meritorious, must include two general components. *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989). First, a claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and the reliability of the proceeding that confidence in the outcome is undermined. *Id*.

Here, the Defendant has provided no legal basis for alleging that counsel was deficient by allowing the jury to hear references to "hog tying." The jury heard testimony from several witnesses that the victim was severely bound by his wrists and ankles with tape. Several photographs were admitted into evidence, including photos showing the injuries to his left arm, right hand and wrist, and right ankle. The use of the word "hog-tie" in the letter did not tell the members of the jury anything they did not already know, which was that Jordan tied Cope to the bed and left him there for three days.

The Defendant's argument that "hog-tie" means fastening the hands and feet or all four feet together is irrelevant. The argument that the use of "an inaccurate, albeit graphic and highly inflammatory image" would have inflamed the jury and contributed to its death recommendation is without merit. The defense attorney's statement that the use of the word played a role in Jordan being sentenced to death is also a conclusion made without any legal support.

The jury knew the severity of the victim's injuries. The State's play with words in closing arguments did not prejudice or hurt the Defendant's case. Because references to hog-tying did not inflame the jury in any way, the Defendant cannot prove prejudice. Jordan has provided no factual support for this claim.

This claim should be summarily denied without an evidentiary hearing.

The Defendant is not entitled to a new penalty phase.

CLAIM 6

TRIAL COUNSEL DID NOT PRESENT A BARE BONES OR DEFICIENT JUDGMENT OF ACQUITTAL ARGUMENT DURING THE GUILT PHASE (restated)

The Defendant argues that his trial counsel was ineffective by arguing a bare bones judgment of acquittal argument. Jordan states that the argument made by trial counsel was devoid of specificity and case law with regard to the issue of the completion of the felony prior to the death of Cope and the issue of the actual killing.

Jordan's trial counsel stated the following during his judgment of acquittal argument:

> MR. SMITH: Yes, your Honor. At this time, on behalf of Mr. Jordan, we would move for judgment of acquittal, asserting that the evidence considered in the light most favorable to the State has failed to establish first-degree felony murder as to count one.
>
> Specifically, I'd have the Court note that the indictment returned specifically said that the death had to occur while Mr. Jordan was engaged in the perpetration or the attempted perpetration of the felony robbery.
>
> Robbery is a felony of taking a piece of property by force or threat of force.
>
> The asportation and taking was complete sometime prior to June 25 at 6:30 in the morning.
>
> Subsequent to that, while there has been

evidence that a theft was taking place, meaning the use of Mr. Cope's property by Mr. Jordan, there was -- the death did not occur until July 13.

And while the death certainly -- the evidence is that it was the result of his being bound, both the medical experts, one, Dr. Rullan, initially said that the initial way that Mr. Cope was left there, and we heard testimony by -- I think it was Mr. Powell who said it appeared he had fallen off the bed or he had gotten himself off the bed where he initially had been placed on the bed, so there is evidence that's how he was placed, that that must have occurred sometime during that three-day period.

It wasn't during the course of the taking of the property. And, therefore, it's not felony murder first-degree because the robbery was complete.

Both of these doc -- both Dr. Rullan said that that would not be fatal, specifically.

The medical examiner said she just couldn't say, that it could have been, but she couldn't say one way or the other.

So as such, at most, the State has sustained proof of felony murder third-degree because of the possession of Mr. Cope's truck, that being a theft, which is what the felony murder third-degree statute says.

And we'd ask the Court to reduce count one to felony murder third-degree.

(V13, R2414-16).

The Defendant's recitation of trial counsel's judgment of acquittal argument is not complete and leaves out a few words.

However, this claim is meritless. Contrary to Jordan's assertions, his trial counsel's judgment of acquittal argument did not lack specificity nor would it be considered bare bones. Trial counsel referenced the differences in the dates in which the robbery occurred and the victim's death. He argued that the death did not occur during the taking of the property. Trial counsel specifically set forth the necessary grounds for which relief could be granted and argued that the trial court should reduce the first-degree murder charge to third-degree murder.

The Defendant's argument that trial counsel should have cited caselaw is conclusory because he does not show how citing caselaw would have made a difference.

Although the Defendant did not raise the issue of sufficiency in his direct appeal, the Florida Supreme Court determines if there was sufficient evidence to support the conviction in every death penalty case. Here, the court found that the evidence presented at trial supported the conviction of Jordan. As a result, the Defendant cannot show how he was prejudiced by the judgment of acquittal argument. In *Stephens v. State*, 975 So. 2d 405, 418 (Fla. 2007), the court rejected a similar argument. The court ruled that Stephens failed to meet the *Strickland* standard because he failed to show that had counsel argued motions,

which included a judgment for acquittal motion, more vigorously than simply making a bare-bones motion, the trial court would have granted them. "Because we rejected all three claims on the merits in Stephens' direct appeal, Stephens fails to satisfy the *Strickland* standard for ineffective assistance of counsel." *Id.* The Florida Supreme Court found that there was sufficient evidence to support Stephens' conviction for first-degree murder. *Id*. at 418-9.

The same can be said here. In the direct appeal, the Florida Supreme Court stated the following on the issue of sufficiency of the first-degree murder charge:

> There is also competent, substantial evidence to support the conviction of first-degree felony murder. Felony murder is defined in section 782.04(1)(a)2.d., Florida Statutes (2008), which states:
>
> > [T]he unlawful killing of a human being ... when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any ... robbery ... is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.
>
> Mathew and Marlon Powell testified regarding the manner in which they found Cope at the crime scene. Cope was suspended from the foot of his bed by rope and duct tape. His face, neck, and head were duct taped, and his left bicep was a greenish color and cold to the touch due to Cope being suspended by that arm for a lengthy period of time. A first responder testified that Cope looked deceased when he arrived on the crime scene. Dr. Rullan also testified about Cope's various injuries and stated that he was unresponsive upon entering the hospital and remained unresponsive until he died after being removed from life support. Dr. Hermann opined "that Mr. Cope died as a result of complications of being bound and gagged for days, including ischemic gangrene of the left upper extremity, bilateral cerebral infarctions, and bronchopneumonia."

> Because the underlying felony of robbery with a firearm or other deadly weapon is supported by the record, we conclude that first-degree felony murder is likewise supported by the record.

Jordan, 176 So. 3d at 937-8.

As a result, Jordan cannot prove the prejudice prong of *Strickland*. This claim must be denied. Allegations of ineffective assistance of counsel may be summarily denied when refuted by the record or the allegations are conclusory. *Connor v. State*, 979 So. 2d 852, 868 (Fla. 2007). *See also Troy v. State*, 57 So. 3d 828, 834 (Fla. 2011); *Franqui v. State*, 59 So. 3d 82, 96 (Fla. 2011); Walls v. *State*, 926 So. 2d 1156, 1173 (Fla. 2006); *Knight v. State*, 923 So. 2d 387 (Fla. 2005).

An evidentiary hearing is not warranted for this claim.

This claim should be denied and there is no basis for vacating the conviction or sentence.

CLAIM 7

THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF A ROBBERY AND THE CAPITAL FELONY WAS COMMITTED FOR PECUNARY GAIN AGGRAVATORS WERE PROVEN. TRIAL COUNSEL WAS EFFECTIVE. (restated)

This claim is procedurally barred because it should have been raised on direct appeal. Here, the Defendant argues that trial counsel was ineffective for failing to move to exclude the statutory aggravators that the capital felony was committed while the defendant was engaged in the commission of a robbery and that the capital

felony was committed for pecuniary gain. Mot. to Vacate at 48. Jordan argues that "[i]t is clear from the trial court's order that the evidence cannot support a finding that Mr. Jordan committed the killing of Mr. Cope during the commission of the robbery or for pecuniary gain." Mot. to Vacate at 50.

Claims that an aggravator should not have been presented to the jury or that there was not competent, substantial evidence to establish an aggravator should be raised on direct appeal. Jordan's allegation that trial counsel was ineffective is insufficient to overcome the procedural bar. *See Freeman* 761 So. 2d at 1067-8 (finding that bare assertion of ineffective assistance of counsel does not overcome procedural bar to review of the procedural default).

Moreover, even if the merit of this claim is cognizable in postconviction relief proceedings, no relief is warranted. There was competent, substantial evidence to prove both of these aggravators. The record showed that while Cope was bound to his bed without water for three days, the Defendant stole his truck and wallet and proceeded to withdraw $2,345.81 from Cope's bank account. This claim is refuted by the record and should be summarily denied.

This claim does not warrant an evidentiary hearing.

This claim should be denied. The sentence should not be vacated and there are no grounds for granting a new penalty phase proceeding.

CLAIM 8

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR NOT MOVING TO EXCLUDE OR OBJECT TO THE ADMISSION OF THE VICTIM'S HAIR ON DUCT TAPE INTO EVIDENCE. (restated)

In this final claim, Jordan argues that the trial court allowed the omission of the actual hair of the victim on a piece of duct tape into evidence without objection. Mot. to Vacate at 52. The Defendant argues that the evidence was not relevant and was prejudicial.

This claim is without merit. The duct tape was relevant to the case, especially since medical technicians had to remove the layers of duct tape from Cope's head to give him an airway in which to breath. "Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court." *Henderson v. State*, 463 So.2d 196, 200 (Fla.1985). Furthermore, as the Florida Supreme Court stated in *Henderson*, "[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments."

The same can be said here. Jordan complains that "an actual part of the victim" being allowed to go in the jury room was prejudicial. The Defendant should have expected to be confronted with a part of the body of the victim, who he left tied to his bed for three days without water. This claim is meritless and should be denied.

An evidentiary hearing is not warranted for this claim.

The Defendant is not entitled to a new trial or to have his sentence vacated.

RESPONSE TO CONCLUSION AND RELIEF SOUGHT

The responses and defenses contained in this response are pleaded separately and severally. When a procedural bar is pleaded as a basis for the denial of relief, it is intended to be a sufficient basis, standing alone, to support denying relief.

No averment contained in Jordan's motion is admitted unless expressly stated herein.

Jordan is not entitled to relief based on any claim, sub-claim or averment contained in his motion. Other than Claim 4, the remainder of Jordan's claims should be summarily denied without an evidentiary hearing.

This Court should schedule a case management conference within 90 days of the filing of this response, as provided by Rule 3.851(f)(5)(A) of the Florida Rules of Criminal Procedure.

Respectfully submitted,

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ATTORNEY GENERAL

/S/ Vivian Singleton

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 9, 2017, a true and correct copy of the above has been furnished by e-mail/e-portal to: The Honorable Terence R. Perkins, Chief Judge, sprice@circuit7.org (Susan Price, JA), S. James Foxman Justice Center, 251 N. Ridgewood Avenue, Daytona Beach, FL 33115; Office of the State Attorney, Rosemary L. Calhoun, Assistant State Attorney, calhounr@sao7.org and eservicevolusia@sao7.org, 251 N. Ridgewood Avenue, 3rd Floor, Daytona Beach, FL 32115; and Capital Collateral Regional Counsel-Middle, Maria Perinetti, Assistant CCRC, perinetti@ccmr.state.fl.us, Raheela Ahmed, Assistant CCRC, ahmed@ccrc.state.fl.us, and Lisa Bort, bort@ccmr.state.fl.us, support@ccrc.state.fl.us, CCRC-Middle, 12973 N. Telecom Parkway, Temple Terrace, FL 33637, the attorneys for Defendant.

/S/ Vivian Singleton
VIVIAN SINGLETON

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

DEFENDANT'S MOTION REQUESTING THE COURT TO TAKE JUDICIAL NOTICE OF THE RECORD ON APPEAL AT THE EVIDENTIARY HEARING

COMES NOW, Defendant, Joseph Edward Jordan, by and through undersigned counsel, and pursuant to Fla. Stat. § 90.202 (5) and (6), hereby requests that this Honorable Court take judicial notice of the following item at the evidentiary hearing:

1) The entire Record on Appeal and Exhibits in *State of Florida v. Joseph Edward Jordan*, Circuit Case number 642009CF002873XXXAWS and Supreme Court Case SC13-2091.

2) This Record on Appeal consists of sixteen volumes and two supplemental volumes.

Respectfully submitted,

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Fax: (813) 558-1601 or (813) 558-1602

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing motion has been transmitted to this Court through the Florida Courts E-Filing Portal on this 28th day of July, 2017.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via the Florida Courts E-Filing Portal to **Vivian Singleton**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Vivian.Singleton@myfloridalegal.com and capapp@myfloridalegal.com; and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, at CalhounR@sao7.org on this 28th day of July, 2017.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins**, Chief Judge; Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach, Florida 32114 and **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 28th day of July, 2017.

/s/ Raheela Ahmed
Raheela Ahmed
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Florida Bar Number 0713457
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VOLUSIA COUNTY COURT ACTION FORM

CASE: 2009 002872 CFAWS
STATE OF FLORIDA
VS
JOSEPH EDWARD JORDAN
TOT
SPN: 574944
TRIAL DATE:

COURT/SESSION TYPE: Criminal Hearing
DATE: 08/01/2017
TIME: 03:00 PM
JUDGE: PERKINS
ATTY: LISA M BORT
BNA:
LOCATION: Justice Center Courtroom 1, 251 N. RIDGEWOOD AVENUE , DAYTONA BEACH, Florida

LAURA E. ROTH
CLERK OF THE CIRCUIT COURT
VOLUSIA COUNTY, FLORIDA
P.O. BOX 6043
DELAND, FL 32721-6043

PARTIES PRESENT	RELEASE ACTIONS	Custody/Capias/Estreat	Continued To: ☐ By Def. ☐ By State ☐ By Court ☐ Waived Spdy.Trl
☐ DEF. APPEARED ☐ APP.W/COUNSEL	☐ TOTAL BOND FOR CASE SET	☐ CAPIAS ISSUED-BOND SET	REMARKS:
☒ DEF. COUNSEL APP. W/OUT DEF.	☐ AT $	☐ AT $	**COURT APPOINTS REGIONAL CONFLICT COUNSEL FOR PENALITY PHASE PURP.**
☐ DEF. FAILED TO APPEAR	☐ DEF. ROR'D	☐ BOND ESTREATED	**STATUS CONFERENCE: CLAIM 4 NEEDS EVIDENTIARY HEARING**
ATTORNEY STATUS	☐ RELEASE TO PTS	☐ CAPIAS WITHDRAWN	**CLAIMS 3,6,8: HEARD & DENIED PER COURT**
☐ APP. IND. STATUS - PD APPT.	☐ RELEASE TO PTS W/BOND	☐ BOND REINSTATED	**COURT GRANTS DEF. MOTN. FOR NEW PENALTY PHASE**
☐ APP. IND. STATUS - NOT INDIGENT	☐ OTHER:	☐ BOND ESTR. SET ASIDE	**DEFENSE WAIVES APPERANCE PER DEF. / COURT REQ. SIGNED STATEMENT**
☐ PD APPT. BY COURT	☐ NO CONTACT W/VICTIM	☐ OTHER:	
☐ DEF. TO RETAIN COUNSEL	☐ NO VIOL.CONTACT W/VICTIM	☐ HOLD CAPIAS-PTS INVEST.	
☐ PD WITHDREW ☐ ATTY.TO BE APPT	☐ OTHER:	☐ 48 HRS	
☒ OTHER: **ASA: R. CALHOUN / V. SINGLETON**			

CT. CHARGE	COURT ACTION	INCARCERATION/PROBATION/COMMUNITY CONTROL INFORMATION	COSTS
1 FIRST DEGREE FELONY MURDER (ADJG) Statute: 782.04(1)(a)2 LVL:F DEG:C AMENDED CHARGE: BOND SET AT $	☐ N.G.PLEA ☐ NO INFO. ☐ GUILTY PLEA ☐ NOLLE PROSS. ☐ NOLO PLEA ☐ DISMISSED ☐ NG.VERDICT ☐ JGMT ACQT. ☐ GLTY.VERDICT ☐ ADJ.WITHHELD ☐ MISTRIAL ☐ ADJ.GUILTY ☐ WAIVED PSI ☐ PSI ORDERED ☐ PDR ORDERED ☐ TO BE SENT:	☐ VCJ MO DY ☐ PROB.REVOKED ☐ DOC YR MO DY ☐ C.C. REVOKED ☐ JAIL CREDIT TIME: DY ☐ PROB. REINSTATE ☐ PROB YR MO DY ☐ C.C. REINSTATE ☐ COM.CONT. YR MO ☐ PROB. MODIFIED ☐ DRUG OFFENDER ☐ SEX OFFENDER ☐ C.C. MODIFIED ☐ CONCURRENT ☐ CONSECUTIVE TO: ☐ HRS.COM. SERVICE ☐ STANDARD COND. ☐ SUBST.ABUSE COUNSEL/TREAT. ☐ PREVIOUS COND. ☐ RANDOM U/A ☐ NO ALCOHOL/ILL.DRUG ☐ COS WAIVED	CRT. COSTS $ FINE $ PD FEE $ SAO FEE $ LEO FEE $ PD APP.FEE $ REST. $ OTHER: ☐ CONVRT. FINE/COST
2 ROBBERY WITH FIREARM/DEADLY WEAPON (ADJG) Statute: 812.13(2)(a) LVL:F DEG:F AMENDED CHARGE: BOND SET AT $	☐ N.G.PLEA ☐ NO INFO. ☐ GUILTY PLEA ☐ NOLLE PROSS. ☐ NOLO PLEA ☐ DISMISSED ☐ NG.VERDICT ☐ JGMT ACQT. ☐ GLTY.VERDICT ☐ ADJ.WITHHELD ☐ MISTRIAL ☐ ADJ.GUILTY ☐ WAIVED PSI ☐ PSI ORDERED ☐ PDR ORDERED ☐ TO BE SENT:	☐ VCJ MO DY ☐ PROB.REVOKED ☐ DOC YR MO DY ☐ C.C. REVOKED ☐ JAIL CREDIT TIME: DY ☐ PROB. REINSTATE ☐ PROB YR MO DY ☐ C.C. REINSTATE ☐ COM.CONT. YR MO ☐ PROB. MODIFIED ☐ DRUG OFFENDER ☐ SEX OFFENDER ☐ C.C. MODIFIED ☐ CONCURRENT ☐ CONSECUTIVE TO: ☐ HRS.COM. SERVICE ☐ STANDARD COND. ☐ SUBST.ABUSE COUNSEL/TREAT. ☐ PREVIOUS COND. ☐ RANDOM U/A ☐ NO ALCOHOL/ILL.DRUG ☐ COS WAIVED	CRT. COSTS $ FINE $ PD FEE $ SAO FEE $ LEO FEE $ PD APP.FEE $ REST. $ OTHER: ☐ CONVRT. FINE/COST

LAURA E. ROTH, CLERK OF THE CIRCUIT COURT
Filed in Open Court this 01 day of August , 20 17.

/S/ ANN MARIE MOORE

TERENCE R PERKINS

ASSISTANT STATE ATTORNEY

DEPUTY CLERK IN ATTENDANCE

-1314-

Filing # 60502439 E-Filed 08/16/2017 03:45:55 PM

IN THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

CASE NO: 2009 002872 CFAWS

STATE OF FLORIDA

VS.

JOSEPH EDWARD JORDAN
_____/

NOTICE OF INTENT TO SEEK DEATH PENALTY AND AGGRAVATING CIRCUMSTANCES IN CAPITAL PROCEEDING

COMES NOW, R.J. LARIZZA, the State Attorney for the 7th Judicial Circuit, by an through the undersigned Assistant State Attorney, pursuant to Florida Statute § 782.04(1)(b), and hereby notifies the Defendant of its intention to seek the death penalty in this case, and to offer evidence of the following statutory aggravating circumstances at the penalty phase in this cause:

1. Pursuant to F.S. 921.141(6)(b), that the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

2. Pursuant to F.S. 921.141(6)(d), that the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery and/or burglary.

3. Pursuant to F.S. 921.141(6)(h), that the capital felony was especially heinous, atrocious, or cruel.

4. Pursuant to F.S. 921.141(6)(i), that the capital felony was committed for pecuniary gain.

Respectfully submitted,

s/JASON LEWIS
Jason Lewis
Florida Bar Number: 0495395
Assistant State Attorney
440 Beach Street
Daytona Beach, FL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent by U.S. Mail and electronic delivery to Raheela Ahmed, CCRC – Middle, 12973 N. Telecom Pkwy., Temple Terrace, FL 33637 and ahmed@ccmr.state.fl.us on this __16_ day of August, 2017.

s/JASON LEWIS
Jason Lewis
State Attorney
Florida Bar No. 0495395
440 Beach Street
Daytona Beach, FL 32114
Tel. (386) 239-7710

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF FILING

COMES NOW, the defendant, Joseph Edward Jordan, by and through undersigned counsel, and in accordance with the Court's order hereby files the attached signed and notarized Affidavit in support of the Defendant's Waiver of In Person Appearance at the evidentiary hearing.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar Number 0013837
Email: perinetti@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/ Lisa Marie Bort
Lisa Marie Bort
Florida Bar Number 119074
Email: bort@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region

12973 North Telecom Parkway,
Temple Terrace, Florida 33637
Tel: (813) 558-1600
Fax: (813) 558-1601

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

ATTACHMENT TO NOTICE OF FILING

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

AFFIDAVIT IN SUPPORT OF DEFENDANT'S WAIVER OF IN PERSON APPEARANCE

1. My name is **JOSEPH EDWARD JORDAN**, the Defendant in the above case. I requested in writing that my counsel waive my presence at any scheduled evidentiary hearing.

2. My counsel have explained to me that I have a right to be present for certain hearings related to my post-conviction motion filed pursuant to *Fla. R. Crim. P.* 3.851(c)(3), including an evidentiary hearing to be scheduled by the court. My counsel has reviewed the rule with me.

3. I understand my right to be present at such post-conviction hearings, as well as the benefits of my attending such hearings, and **HEREBY WAIVE MY RIGHT TO BE PRESENT AT THE POST-CONVICTION EVIDENTIARY HEARING.**

4. I have fully discussed my decision with counsel in person at Florida State Prison on Thursday, August 17, 2017, and during a telephonic conference prior to signing of this affidavit.

5. My counsel have explained the benefits to me if I were to be present for the post-conviction evidentiary hearing.

6. I have read this affidavit with my counsel and I understand its contents.

7. I give my counsel permission to file a notice of the waiver of my appearance along with

this affidavit in support before the post-conviction court and to ensure that I am **not transported** for the post-conviction evidentiary hearing on this matter.

FURTHER AFFIANT SAYETH NAUGHT

SIGNED:

Joseph Jordan

8-17-2017
[DATE]

JOSEPH JORDAN
[PRINTED NAME]

SWORN TO AND SUBSCRIBED TO before me this 17 day of August, 2017, by Joseph Jordan, who is personally known to me or who provided the following identification:

ANNA R. DIXON
Commission # FF 936930
Expires November 17, 2019
Bonded Thru Troy Fain Insurance 800-385-7019

Anna R. Dixon
NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires: 17 NOV 2019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this 18th day of August, 2017.

I HEREBY FURTHER CERTIFY that a copy of the PDF document of the foregoing has been served via the Florida Courts E-Filing Portal to **Vivian Singleton**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Vivian.Singleton@myfloridalegal.com and capapp@myfloridalegal.com; and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, at CalhounR@sao7.org on this 18th day of August, 2017.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to the **Honorable Terrence R. Perkins**, Chief Judge; Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach, Florida 32114 and **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on or about this 18th day of August, 2017.

/s/ Raheela Ahmed
Raheela Ahmed
Assistant CCRC
Florida Bar Number 0713457
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
Tel: (813) 558-1600 ext. 610
Fax: (813) 558-1601

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

ORDER GRANTING CLAIM 1 OF DEFENDANT'S MOTION TO VACATE SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

This matter came before this Court on August 1, 2017, for a case management conference on Defendant's Successive Motion to Vacate Death Sentence pursuant to Florida Rule of Criminal Procedure 3.851, filed on December 15, 2016. The State filed a Response to Defendant's Successive Motion to Vacate Sentence filed on May 9, 2017. The Defendant also filed a number of Notices of Supplemental Authority. After considering these pleadings, the records on appeal, the case files, and hearing arguments of counsel at the case management conference, the Court finds as follows as to Claim 1:

FILED
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CLERK OF THE CIRCUIT & CTY. COURT VOLUSIA CTY, FL
CC13

Procedural History

The Defendant was indicted on August 26, 2009, for one count of First Degree Felony Murder in violation of Fla. Stat. § 782.04(1)(a)2 and one count of Robbery with a Firearm and/or Deadly Weapon in violation of Fla. Stat. § 812.13(2)(a) and § 775.087(1) and (2). The voir dire was conducted from April 15-16, 2013. The guilt phase was conducted from April 17-19, 2013. The Defendant was found guilty on all counts. The penalty phase was conducted from April 23-24, 2013. On April 24, 2013, the jury recommended a sentence of death by a 10-2 vote. The trial

court conducted a *Spencer*[1] hearing on August 12, 2013. On September 23, 2013, the Court entered a judgment and sentence imposing death on the felony murder count and life imprisonment on the count of Robbery with a Firearm and/or Deadly Weapon, with the sentences to run concurrently. The Florida Supreme Court's opinion affirming Mr. Jordan's judgment and sentences was rendered on October 8, 2015. *See Jordan v. State*, 176 So. 3d 920 (Fla. 2015). Mr. Jordan did not petition the United States Supreme Court for a writ of certiorari. Therefore, the judgment and sentence became final on January 6, 2016, when the time for filing a petition for writ of certiorari with the Supreme Court of the United States expired. *See* Fla. R. Crim. P. 3.851(d)(1).

CLAIM 1

The Defendant filed his Successive Motion to Vacate Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 in light of the change in Florida law following the decision in *Hurst v. Florida*, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016); *Hurst v. State*, 202 So. 3d 40 (2016); and *Perry v. State*, 210 So. 3d 630 (2016). After the filing of his Successive Motion, the Defendant filed a number of Notices of Supplemental Authorities including the Supreme Court of Florida's decision in *Mosley v. State*, 209 So. 3d 1248 (2016).

This Court finds that the Defendant's case was final after *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), therefore, he is entitled to the retroactive application of *Hurst*. *See Mosley*, 209 So. 3d at 1274-83. This Court now turns to the question of whether the *Hurst* error constituted harmless error and looks to the precedent set by the Supreme Court of Florida in several cases. In every opinion involving cases where *Hurst* was retroactively applicable and the jury did not return a unanimous recommendation of death, the Supreme Court

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

of Florida has held that the *Hurst* error was not harmless. *See Guzman v. State*, 214 So. 3d 625 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 7-5); *see Abdool v. State*, --- So. 3d ---, 2017 WL 1282105 (Fla. April 6, 2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Newberry v. State*, 214 So. 3d 562 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 8-4); *see Heyne v. State*, 214 So. 3d 640 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Robards v. State*, 214 So. 3d 568 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 7-5); *see McMillian v. State*, 214 So. 3d 1274 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Brookins v. State*, --- So. 3d ---, 2017 WL 1409664 (Fla. April 20, 2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Banks v. State*, 219 So. 3d 19 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Altersberger v. State*, 216 So. 3d 621 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 9-3); *see Hampton v. State*, 219 So. 3d 760 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 9-3); *see Card v. State*, 219 So. 3d 47 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 11-1); *see Pasha v. State*, --- So. 3d ---, 2017 WL 1954975 (Fla. May 11, 2017) (*Hurst* error not harmless where the jury vote was 11-1 for each murder); *see Serrano v. State*, --- So. 3d ---, 2017 WL 1954980 (Fla. May 11, 2017) (*Hurst* error not harmless where the jury vote was 9-3); *see Snelgrove v. State*, 217 So. 3d 992 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 8-4 for each murder); *see Davis v. State*, 217 So. 3d 1006 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 8-4 and 10-2); *see Hernandez v. Jones*, 217 So. 3d 1032 (mem) (Fla. 2017) (*Hurst* error not harmless where the jury vote was non-unanimous); *see Caylor v. State*, 218 So. 3d 416 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 8-4); *see Hertz v. State*, 218 So .3d 428 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Okafor v. State*, --- So.3d ---, 2017 WL

2481266 (Fla. June 8, 2017) (Fla. 2017) (*Hurst* error not harmless where the jury vote was 11-1); *see Bevel v. State*, --- So.3d ---, 2017 WL 2590702 (Fla. June 15, 2017) (Fla. 2017) (*Hurst* error not harmless where the jury vote for one count was 8-4); *see Hall v. State*, 219 So. 3d 783 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 8-4); *see Braddy v. State*, 219 So. 3d 803 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 11-1); *see White v. State*, 214 So. 3d 541 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 8-4); *see Bradley v. State*, 214 So. 3d 648 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Orme v. State*, 214 So. 3d 1269 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 11-1); *see Jackson v. State*, 213 So. 3d 754 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 11-1); *see Deviney v. State*, 213 So. 3d 794 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 8-4); *see Baker v. State*, 214 So. 3d 530 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 9-3); *see Hodges v. State*, 213 So. 3d 863 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Smith v. State*, 213 So. 3d 722 (Fla. 2017) (*Hurst* error not harmless with four murder convictions, two life recommendations, 10-2, and 9-3); *see Ault v. State*, 213 So. 3d 670 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 9-3); *see Anderson v. State*, --- So. 3d. ---, 2017 WL 930924 (Fla. March 9, 2017) (*Hurst* error not harmless where the jury vote was 8-4); *see Dubose v. State*, 210 So. 3d 641 (Fla. 2017) (*Hurst* error not harmless where the just vote was 8-4); *see Durousseau v. State*, 218 So. 3d 405 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Hojan v. State*, 212 So. 3d 982 (Fla. 2017) (*Hurst* error not harmless in a case with 9-3 votes for both murder convictions); *see McGirth v. State*, 209 So. 3d 1146 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 11-1); *see Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (*Hurst* error not harmless in a case with 7-5 votes for each of the five murder convictions); *see Kopsho v. State*, 209 So. 3d 568 (Fla.

2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Armstrong v. State*, 211 So. 3d 864 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 9-3); *see Williams v. State*, 209 So. 3d 543 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 9-3, and where the jury completed a special verdict form indicating unanimous votes for four aggravating circumstances); *see Franklin v. State*, 209 So. 3d 1241 (Fla. 2016) (*Hurst* error not harmless where the jury vote was 9-3); *see Simmons v. State*, 207 So. 3d 860 (Fla. 2016) (*Hurst* error not harmless where the jury vote was 8-4, and where the jury completed a special verdict form indicating unanimous votes for three aggravating circumstances); *see Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (*Hurst* error not harmless in a case with 11-1 votes for each of the three murder convictions); *see Mosley*, 209 So. 3d 1248 (*Hurst* error not harmless where the jury vote was 8-4). Further, in all the foregoing opinions in post-*Ring* non-unanimous jury recommendation cases, the Supreme Court of Florida remanded the cases for new penalty phases because the State could not meet its burden that the *Hurst* error was harmless beyond a reasonable doubt. *See id.*

Based on the foregoing controlling, precedential authority by the Supreme Court of Florida, this Court finds that the *Hurst* rulings apply to the Defendant because his death sentence became final after *Ring*. Furthermore, given that the jury recommendation was not unanimous, this Court finds that the State has not met its burden that the *Hurst* error in this case is harmless beyond a reasonable doubt. Therefore, the Defendant is entitled to a new penalty phase.

Based on the foregoing:

1. Claim 1 of the Defendant's Successive Motion to Vacate Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851, is hereby GRANTED.
2. The Defendant's death sentence as to count one is hereby VACATED.

3. The Defendant's request for a new penalty phase is hereby GRANTED.

4. The Clerk of the Court shall promptly serve a copy of this Order upon all parties, including an appropriate certificate of service.

DONE AND ORDERED in chambers at Daytona Beach, Volusia County, Florida, this 22 day of Aug., 2017.

TERENCE R. PERKINS
CIRCUIT JUDGE

Conformed copies to:

Vivian Singleton,
Assistant Attorney General,
Office of the Attorney General,
Vivian.singleton@myfloridalegal.com; and
CapApp@myfloridalegal.com

Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney,
CalhounR@sao7.org; and
eservicevolusia@sao7.org

Raheela Ahmed, Maria Christine Perinetti, and Lisa Marie Bort,
Assistant CCRC,
The Law Office of the Capital Collateral Regional Counsel - Middle Region
ahmed@ccmr.state.fl.us;
perinetti@ccmr.state.fl.us;
bort@ccmr.state.fl.us; and
support@ccmr.state.fl.us

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

STATE OF FLORIDA,
Plaintiff,

v. **CASE NO. 64-2009-CF002872XXXAWS**

JOSEPH EDWARD JORDAN,
Defendant,
_____/

NOTICE OF APPEARANCE AND SUBSTITUTION OF CO-COUNSEL

Please take notice that the undersigned, Tayo Popoola, Assistant Attorney General, hereby enters her notice of appearance and substitution of Co-Counsel for the State of Florida in the above-captioned case and states the following:

On September 28, 2017, Assistant Attorney General Vivian Singleton tendered her resignation and is no longer assigned to this case.

WHEREFORE, the undersigned respectfully asks this Court to enter Tayo Popoola as Co-Counsel for the State of Florida.

Respectfully submitted,

ATTORNEY GENERAL
PAMELA JO BONDI

S/ T Popoola

_____

TAYO POPOOLA
ASSISTANT ATTORNEY GENERAL
Florida Bar #0096101
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118
(386) 238-4990
FAX-(386) 226-0457
tayo.popoola@myfloridalegal.com [and]
capapp@myfloridalegal.com
Co-Counsel for the State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 2, 2017, a true and correct copy of the foregoing was filed via e-Portal to the Volusia County Clerk, and by e-mail/e-service to: The Honorable Terence R. Perkins, sprice@circuit7.org, (Susan Price, JA) 251 N. Ridgewood Avenue, Daytona Beach, FL 32114; Rosemary Calhoun, Assistant State Attorney, eservicevolusia@sao7.org and calhounr@sao7.org, 251 N. Ridgewood Avenue, Daytona Beach, FL 32114; and Maria Christine Perinetti, perinetti@ccmr.state.fl.us; Raheela Ahmed, ahmed@ccmr.state.fl.us; and support@ccmr.state.fl.us, Assistant CCRCs, CCRC-Middle, 12973 North Telecom Parkway, Temple Terrace, Florida 33637-0907 the attorneys for the Defendant.

S/ T Propell

Assistant Attorney General
Co-Counsel for the State of Florida

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, **CASE NO.: 64-2009-CF002872XXXAWS**
DIVISION: 41

v.

JOSEPH EDWARD JORDAN,

Defendant.
_____/

STATE'S NOTICE OF APPEARANCE

COMES NOW Plaintiff, State of Florida, by and through undersigned counsel, hereby files this Notice of Appearance:

1. Undersigned counsel hereby notifies this Court of her appearance in this cause.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

__/S/ Leslie T. Campbell_____
LESLIE T. CAMPBELL
Assistant Attorney General
Florida Bar No. 0066631
1515 N. Flagler Dr. - Suite 900
West Palm Beach, Florida 33401
Office: (561) 837-5000
Facsimile: (561) 837-5108
E-Service:
CAPAPP@MyFloridaLegal.com
E-Mail:
Leslie.Campbell@MyFloridaLegal.com

CO-COUNSEL FOR PLAINTIFF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct PDF copy of the foregoing has been furnished via the Florida E-Portal which will provide a copy of the foregoing by E-Mail to: Maria Christine Perinetti, Assistant Capital Collateral regional Counsel-Middle at perinetti@ccmr.state.fl.us and support@ccmr.state.fl.us; Rosemary L. Calhoun, Esq. Assistant State Attorney at calhounr@sao7.org and eservicevolisia@sao7.org; and Honorable Terence R. Perkins, Circuit Court Judge at sprice@circuit7.org (Judicial Assistant) this 6th day of November, 2015.

_/S/ Leslie T. Campbell_____
LESLIE T. CAMPBELL
Assistant Attorney General

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

CASE NO: 2009-002872 CFAWS
Capital Post Conviction Case

JOSEPH EDWARD JORDAN,
DEFENDANT.
_____/

JOINT MOTION TO CONTINUE RULE 3.851 (f) EVIDENTIARY HEARING

COMES NOW the State of Florida and the Defendant, Joseph Edward Jordan, by and through their undersigned counsel, and hereby move this Honorable Court to enter an Order continuing the evidentiary hearing on Ground IV of the Defendant's Rule 3.851 motion for post-conviction relief now set at 8:30 am on December 1, 2017. In support the State would show:

1. That Mr. Michael Nielsen, defense trial counsel, has advised the Assistant State Attorney assigned to this case that he will be trying a murder case in Orange County date certain the week of November 27, 2017 and is uncertain that it will be concluded by December 1, 2017. Mr. Nielsen was the member of Mr. Jordan's trial defense team who had primary responsibility for the subject of Ground IV, closing arguments. Because this is so, Mr. Nielsen is a necessary witness for both the State and the defense and his testimony is material to resolution of the ineffective assistance of trial counsel claim before the Court in Ground IV of the Defendant's Rule 3.851 motion. He is listed as a witness by both parties in this case. Due to uncertainty over trial counsel's availability as a witness on December 1, 2017, counsel for both parties agree and stipulate to continue and reschedule this matter on the Court's hearing calendar.

2. The case management conference in this matter was held on August 1, 2017. Florida Rules of Criminal Procedure 3.851 (f) (5) (A) states that an evidentiary hearing on an initial post-conviction motion shall be held within one hundred fifty (150) days of the case management conference. One hundred fifty days from August 1 is December 29, 2017.

Rule 3.851 (f) (5) (C) provides that this initial one hundred fifty day period for holding an evidentiary hearing can be extended up to ninety (90) days for good cause. Ninety days from December 29, 2017 is March 29, 2018.

3. Counsel for the State and Mr. Jordan will contact this Court's judicial assistant to reschedule this matter on the Court's hearing calendar at the Court's direction.

WHEREFORE, the State of Florida moves this Honorable Court to continue or reschedule the evidentiary hearing on Claim IV of the Defendant's Rule 3.851 motion for post-conviction relief, for the reasons set forth above.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy hereof has been furnished by electronic mail to the **Honorable Terrence R. Perkins**, Chief Judge, Seventh Judicial Circuit Courts at sprice@circuit7.org; **Leslie T. Campbell**, Assistant Attorney General at CAPPAPP@MyFloridaLegal.com and Leslie.Campbell@MyFloridaLegal.com; **Rosemary Calhoun**, Assistant State Attorney at CalhounR@sao7.org; and to **Raheela Ahmed, Maria Christine Perinetti, and Lisa Bort**, Assistant Capital Collateral Regional Counsel, CCRC-Middle at support@ccmr.state.fl.us; ahmed@ccmr.state.fl.us; perinetti@ccmr.state.fl.us; and bort@ccmr.state.fl.us, this 21st day of November, 2017.

/s/*Rosemary L. Calhoun*

ROSEMARY L. CALHOUN
ASSISTANT STATE ATTORNEY
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IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

CASE NO: 2009-002872 CFAWS
Capital Post Conviction Case

JOSEPH EDWARD JORDAN,
DEFENDANT.
_____/

ORDER REGARDING JOINT MOTION TO CONTINUE RULE 3.851 (f) EVIDENTIARY HEARING

An evidentiary hearing on Ground IV of the Defendant's Rule 3.851 motion for post-conviction relief is currently set for 8:30 am on December 1, 2017. On November 21, 2017 the State of Florida and counsel for the Defendant, Joseph Edward Jordan, filed a Joint Motion to Continue Rule 3.851 (f) Evidentiary Hearing based on the potential unavailability of defense trial counsel Michael Nielson, a necessary witness for both the State and the defense. Having been duly advised of the premises, the Motion to Continue is hereby GRANTED. The hearing scheduled for December 1, 2017 is cancelled. Counsel for the State and Mr. Jordan is further directed to contact this Court's judicial assistant to reschedule this matter on the Court's hearing calendar at the Court's discretion.

DONE and ORDERED in chambers at Daytona Beach, Volusia County, Florida, this ___ day of November, 2017.

11/27/2017 8:55 AM 2009 002872 CFAWS

e-Signed 11/27/2017 8:55 AM 2009 002872 CFAWS

_____
The Honorable Terence R. Perkins
Circuit Court Judge

11/27/2017 08:56:14 AM Clerk of the Circuit Court, Volusia County, Florida

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VOLUSIA COUNTY COURT ACTION FORM

CASE: 2009 002872 CFAWS
STATE OF FLORIDA
VS
JOSEPH EDWARD JORDAN
TOT
SPN: 574944
TRIAL DATE:

COURT/SESSION TYPE: Criminal Hearing
DATE: 02/02/2018
TIME: 08:30 AM
JUDGE: PERKINS
ATTY: LISA M BORT
BNA:
LOCATION: Justice Center Courtroom 1, 251 N. RIDGEWOOD AVENUE , DAYTONA BEACH, Florida

LAURA E. ROTH
CLERK OF THE CIRCUIT COURT
VOLUSIA COUNTY, FLORIDA
P.O. BOX 6043
DELAND, FL 32721-6043

PARTIES PRESENT	RELEASE ACTIONS	Custody/Capias/Estreat	Continued To: ☐ By Def. ☐ By State ☐ By Court ☐ Waived Spdy.Trl
☐ DEF. APPEARED ☐ APP.W/COUNSEL	☐ TOTAL BOND FOR CASE SET	☐ CAPIAS ISSUED-BOND SET	REMARKS:
☒ DEF. COUNSEL APP. W/OUT DEF.	☐ AT $	☐ AT $	
☐ DEF. FAILED TO APPEAR	☐ DEF. ROR'D	☐ BOND ESTREATED	**EVIDENTIARY HEARING: TESTIMONY AS TO GROUND IV**
ATTORNEY STATUS	☐ RELEASE TO PTS	☐ CAPIAS WITHDRAWN	
☐ APP. IND. STATUS - PD APPT.	☐ RELEASE TO PTS W/BOND	☐ BOND REINSTATED	**DEF. WAIVED APPEARANCE**
☐ APP. IND. STATUS - NOT INDIGENT	☐ OTHER:	☐ BOND ESTR. SET ASIDE	
☐ PD APPT. BY COURT	☐ NO CONTACT W/VICTIM	☐ OTHER:	**CONTINUATION OF HEARING TO BE RESET (2 HRS)**
☐ DEF. TO RETAIN COUNSEL	☐ NO VIOL.CONTACT W/VICTIM	☐ HOLD CAPIAS-PTS INVEST.	
☐ PD WITHDREW ☐ ATTY.TO BE APPT	☐ OTHER:	☐ 48 HRS	
☒ OTHER: **ASA: ROSEMARY CALHOUN**			

CT. CHARGE	COURT ACTION	INCARCERATION/PROBATION/COMMUNITY CONTROL INFORMATION	COSTS
1 FIRST DEGREE FELONY MURDER (ADJG) Statute: 782.04(1)(a)2 LVL:F DEG:C AMENDED CHARGE: BOND SET AT $	☐ N.G.PLEA ☐ NO INFO. ☐ GUILTY PLEA ☐ NOLLE PROSS. ☐ NOLO PLEA ☐ DISMISSED ☐ NG.VERDICT ☐ JGMT ACQT. ☐ GLTY.VERDICT ☐ ADJ.WITHHELD ☐ MISTRIAL ☐ ADJ.GUILTY ☐ WAIVED PSI ☐ PSI ORDERED ☐ PDR ORDERED ☐ TO BE SENT:	☐ VCJ MO DY ☐ PROB.REVOKED ☐ DOC YR MO DY ☐ C.C. REVOKED ☐ JAIL CREDIT TIME: DY ☐ PROB. REINSTATE ☐ PROB YR MO DY ☐ C.C. REINSTATE ☐ COM.CONT. YR MO ☐ PROB. MODIFIED ☐ DRUG OFFENDER ☐ SEX OFFENDER ☐ C.C. MODIFIED ☐ CONCURRENT ☐ CONSECUTIVE TO: ☐ HRS.COM. SERVICE ☐ STANDARD COND. ☐ SUBST.ABUSE COUNSEL/TREAT. ☐ PREVIOUS COND. ☐ RANDOM U/A ☐ NO ALCOHOL/ILL.DRUG ☐ COS WAIVED	CRT. COSTS $ FINE $ PD FEE $ SAO FEE $ LEO FEE $ PD APP.FEE $ REST. $ OTHER: ☐ CONVRT. FINE/COST
2 ROBBERY WITH FIREARM/DEADLY WEAPON (ADJG) Statute: 812.13(2)(a) LVL:F DEG:F AMENDED CHARGE: BOND SET AT $	☐ N.G.PLEA ☐ NO INFO. ☐ GUILTY PLEA ☐ NOLLE PROSS. ☐ NOLO PLEA ☐ DISMISSED ☐ NG.VERDICT ☐ JGMT ACQT. ☐ GLTY.VERDICT ☐ ADJ.WITHHELD ☐ MISTRIAL ☐ ADJ.GUILTY ☐ WAIVED PSI ☐ PSI ORDERED ☐ PDR ORDERED ☐ TO BE SENT:	☐ VCJ MO DY ☐ PROB.REVOKED ☐ DOC YR MO DY ☐ C.C. REVOKED ☐ JAIL CREDIT TIME: DY ☐ PROB. REINSTATE ☐ PROB YR MO DY ☐ C.C. REINSTATE ☐ COM.CONT. YR MO ☐ PROB. MODIFIED ☐ DRUG OFFENDER ☐ SEX OFFENDER ☐ C.C. MODIFIED ☐ CONCURRENT ☐ CONSECUTIVE TO: ☐ HRS.COM. SERVICE ☐ STANDARD COND. ☐ SUBST.ABUSE COUNSEL/TREAT. ☐ PREVIOUS COND. ☐ RANDOM U/A ☐ NO ALCOHOL/ILL.DRUG ☐ COS WAIVED	CRT. COSTS $ FINE $ PD FEE $ SAO FEE $ LEO FEE $ PD APP.FEE $ REST. $ OTHER: ☐ CONVRT. FINE/COST

LAURA E. ROTH, CLERK OF THE CIRCUIT COURT
Filed in Open Court this 02 day of February , 20 18.

/S/ ANN MARIE MOORE

TERENCE R PERKINS

ASSISTANT STATE ATTORNEY

DEPUTY CLERK IN ATTENDANCE

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 2009-002872-CFAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

ORDER REGARDING THE BI-FURCATION OF THE EVIDENTIARY HEARING ON GROUND IV OF THE DEFENDANT'S 3.851 MOTION FOR POST-CONVICTION RELIEF

This matter came before this Court, in chambers, on January 30, 2018, by counsel for the State and counsel for the Defendant. An evidentiary hearing was scheduled for February 2, 2018, before this Court, on Ground IV of the Defendant's 3.851 Motion for post-conviction relief. This evidentiary hearing was previously continued pursuant to a Joint Motion to Continue Rule 3.581(f) Evidentiary Hearing, due to the unavailability of defense trial counsel, Mr. Michael Nielsen.

Both parties informed this Court, on January 30, 2018, that Mr. Michael Nielsen had informed them, that he was not available to testify due to a death in his family. Counsel for the State and for the Defendant left it to the Court's discretion as to whether to continue the entire hearing or to bi-furcate the hearing. Defense trial counsel, Mr. Michael Nielsen, is a necessary witness for both parties and his testimony is material to the resolution of the ineffective assistance of counsel claim before this Court.

Having been duly advised of the premises, this Court bi-furcated the evidentiary hearing and permitted evidence to be presented as to Ground IV by all parties, on February 2, 2018.

-1339-
02/09/2018 02:21:53 PM Clerk of the Circuit Court, Volusia County, Florida

Defense trial counsel, Mr. Michael Nielsen, is released from his subpoena to appear for the evidentiary hearing on February 2, 2018, due to his extenuating circumstances. The second part of the evidentiary hearing has been re-scheduled for April 12, 2018. The subpoena previously served on Mr. Michael Nielsen shall hold over and compel his attendance at the evidentiary hearing now scheduled for April 12, 2018. Accordingly, Mr. Nielsen is hereby ordered to appear for the evidentiary hearing on April 12, 2018, to give testimony in this matter.

The Clerk of the Court shall promptly serve a copy of this Order upon all parties, including Mr. Nielsen.

DONE AND ORDERED in chambers at Daytona Beach, Volusia County, Florida.

2/9/2018 2:21 PM 2009
002872 CFAWS

e-Signed 2/9/2018 2:21 PM 2009
002872 CFAWS

TERENCE R. PERKINS
CIRCUIT JUDGE

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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO. 2009-002872 CFAWS

STATE OF FLORIDA

vs.

JOSEPH EDWARD JORDAN,

Defendant.

* *

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE TERENCE R. PERKINS
CIRCUIT COURT JUDGE

* *

DATE TAKEN:	APRIL 12, 2018
TIME:	COMMENCED AT 8:30 A.M. CONCLUDED AT 10:12 A.M.
PLACE:	S. JAMES FOXMAN JUSTICE CENTER 251 NORTH RIDGEWOOD AVENUE DAYTONA BEACH, FLORIDA
STENOGRAPHICALLY REPORTED BY:	MAUREEN M. ELROD, RPR COURT REPORTER and NOTARY PUBLIC

* *

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Attorney for Defendant

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P R O C E E D I N G S

THE COURT: All right. State of Florida versus Joseph Jordan, 2009-002872. Let me have counsel make their appearance on the record, please. State first.

MS. CALHOUN: Yes, Your Honor. Rosemary Calhoun, Assistant State Attorney, appearing on behalf of the State of Florida.

MS. PERINETTI: Maria Perinetti, from CCRC Middle, appearing on behalf of Mr. Jordan.

MS. BORT: Lisa Bort, from CCRC Middle, appearing on behalf of Mr. Jordan.

THE COURT: What was your last name again?

MS. BORT: Bort, B-O-R-T.

THE COURT: Thank you.

MS. BORT: You're welcome.

MS. AHMED: Good morning, Your Honor. Raheela Ahmed, also on behalf of Mr. Jordan.

THE COURT: All right. Very good. Thank you. Welcome. All right. We are in, I guess, the second part of our hearing, right?

MS. CALHOUN: Yes, Your Honor.

THE COURT: Phase two. And just by way of general observation, this is the case that I think we agree we're going to have to redo the penalty

phase. The question is: Do we have to redo the guilt phase? And we're going to continue in on our evidentiary hearing with regard to that, right?

MS. CALHOUN: Yes, sir.

THE COURT: Ready to proceed?

MS. PERINETTI: Yes, sir. And the Defense would call at this time Attorney Michael Nielsen.

THE COURT: Okay.

THE CLERK: Do you solemnly swear or affirm that the testimony given here today will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

Good morning, sir.

THE COURT: Good morning.

WHEREUPON,

MICHAEL W. NIELSEN,

having been duly sworn by the Clerk, was examined and testified upon his oath as follows:

DIRECT EXAMINATION

BY MS. BORT:

Q Good morning.

A Good morning.

Q Could you please state your name, for the record.

A It's Michael William Nielsen.

Q And could you please tell us about your education as it relates to the legal profession?

A Okay. You know, four-year college degree. Went to law school at the University of Tulsa, Oklahoma. After graduating law school, went to work in the public defender's office, for two years. I trained there, so to speak. And then 1990, I opened up my own law firm.

Q And is that where you're currently employed?

A Correct.

Q And what's the name of that firm?

A It used to be Dowdy and Nielsen. I had a partner for 22 years. And now it's Nielsen Law Firm, for the last six years.

Q Okay. What types of law do you practice there?

A Criminal defense.

Q And are you contracted with the Office of Regional Conflict Counsel?

A I am. As part of my business plan, I have a little side agreement, so to speak, with Regional Conflict Counsel. And all I do for them are first degree murder cases either involving the death penalty or not involving the death penalty.

Q And how long has that agreement been going on?

A Since November of 2007.

Q Okay. And how often do they assign you those types of cases?

A I'm trying to come up with an average. It's probably -- since 2007, I'd say, maybe, like, five a year.

Q And are you currently death qualified, in other words, qualified to sit as a first chair on a capital case?

A Yes.

Q And how long have you been trying capital cases?

A First one I did was in 1993.

Q And how many have you tried in your career?

A I have had 26 first degree murder trials. Thirteen of those, the State was seeking the death penalty. Nine of them, the Jury voted for life under the old system. Three of them, the Jury voted 10-2 for death. So they've all come back.

And then the most recent one I had was in October, the Toledo case, and the Jury gave him a 10-2 life. So I don't have anyone anymore on death row. I did have three people.

Q Who are the three cases that you had the previous death recommendations on?

A Troy Victorino, a fellow named Douglas Matthews, and Mr. Jordan.

Q Were all of those cases associated with the Office of Regional Conflict Counsel?

A No.

Q And how many of those cases were you trying as a first chair?

A Well, the first two, it wouldn't have been. And then when I had my partner, we would, kind of, alternate. Since he left, I've only been first chair. I would say, out of the 26 -- well, not all of them take two lawyers. Okay? So I think you're really asking me probably about the death penalty ones and I would say half, I guess.

Q Okay. Do you regularly attend death penalty seminars, such as Life Over Death or Death Is Different?

A Yeah. We have to. To keep the certification with the Supreme Court, you have to do at least one of those every 24 months.

Q Okay. So how many had you attended prior to Mr. Jordan's trial?

A Maybe 30, because we used to do more than we had to.

Q Okay. And about how many capital cases had you tried prior to Mr. Jordan's trial?

A When was his trial?

Q I believe it was -- it was April 15, 2013, is when it started.

A Okay. So of the 26, I would say probably 20 of them, maybe, were done before his.

Q Okay. Now, in this case, the State Attorneys were Edwin Davis and Ryan Will. Did you try any cases against them before Mr. Jordan's trial?

A I believe I had with Mr. Davis but not with Mr. Will.

Q Okay. And did you just have one case against Mr. Davis, or multiple?

A No. Probably more because he was -- he was the heavy lifter here during a lot of my years, you know, doing this stuff.

Q And would you have only been trying capital cases against him?

A Yes.

Q And do you recall anything particular about Mr. Will's style during the closing arguments of Mr. Jordan's trial?

A Well, Ryan Will, I would say, his style -- I kind of describe him as a stealth bomber because he looks younger than he probably is. And he's a nice guy and kind of lull you to sleep, so to speak. When he

comes into court, he puts on another hat. You know, he's a strong advocate for the State. That's how I would describe him.

Q Okay. Is it fair to say that you are familiar with the different ways that a closing argument could be improper?

A Yes, that's fair.

Q And, specifically, are you familiar with Golden Rule arguments?

A Yes, I believe I am.

Q Okay. Are you familiar with inflammatory arguments?

A I believe so.

Q And are you familiar with arguments regarding lack of remorse?

A Yeah, I would say for sure, in the general sense.

Q And are you familiar with arguments that denigrate the theory of defense?

A Yes.

Q And are you aware that all of those types of arguments are improper?

A I'm sure they can be, depending on what exactly is said.

Q Okay. And is it your normal practice to

object when the State makes an improper statement during their closing arguments?

A Well, it depends. I don't know if you've done one of these trial levels where you're defending someone facing the death penalty, but the defense lawyer has a very fine line they need to walk, in my opinion -- at least this is the way I do it -- because you've got to -- you've got to fight for the guilt part, but you've got to maintain some credibility with the Jury that you're shortly thereafter going to ask to not kill your client.

And so I believe that it's extremely important, for the success of the defense, that the defense lawyer keeps what we refer to as clean hands in cases like this, because if you get up there and make some, you know, spurious defense and then object to everything the prosecutor is trying to do, I think some of the Jurors don't appreciate that. And when you're going to come back later and the ask them to not kill your client, I don't think you're in a strong position.

So I'm cognizant of when to object and when not. And, generally, I don't like -- I don't generally like to object a lot during closings because I don't want them to do it to me.

Q Okay.

A I kind of feel like, you know, unless it's way over the top, I'm going to let them probably say what I -- what he thinks -- or what -- I'm going to let him say what he thinks he needs to say, generally.

Q So in what situations would you object?

A Well, some of the examples you cited earlier; the Golden Rule. You know, if it's just too far, I guess, you know -- it's a fine line, like I said, you walk because you're not sure where it really is too far or not too far.

But I can tell you this. I guarantee you, I've missed a million objections, probably, that could have been made, but there's a lot of times, I'll think to myself, I could object and I don't do it on purpose. And then there's times where I probably just missed it because I just missed it, you know.

Q And what would make you more likely to object?

A Well, I mean, I guess I could use this case as an example just because I was looking at it to get ready for the hearing. The part where Mr. Will started citing case law, I don't think that's a proper argument to make to the Jury. That would be an example.

Q Okay. And do you agree that it's important to object to an improper statement during closing arguments in order to preserve the issue for appeal?

A I agree with that general statement, but I condition it with what I just said earlier about strategy and stuff.

Q Okay. And you do understand if you don't object, then it would be waived?

A Yeah, that's, I believe, correct. Although, apparently, if the defense doesn't object and the prosecutor did something that's just so over the top, it can be changed later, even if it's not preserved, according to this opinion that I was reading.

Q And you touched on it a little bit, but do you believe that what happens during guilt phase does affect the penalty phase?

A Oh, absolutely. It's -- that's the whole trick, you know. You're trying to put on a defense during phase one and they come back and ask for life in phase two.

Q And so any testimony or argument made in the guilt phase would carry over into your penalty phase; do you agree?

A Any argument made by who?

Q By either party would carry over into the penalty phase from the guilt phase.

A I guess that's true, in a general sense.

Q At some point, did you come to represent

Joseph Jordan in his capital case?

A I did.

Q And how did you become involved with his case?

A I got a call from the RCC headquarters, and said, hey, got another one for you.

Q Okay. And the record reflects that Mr. Jordan was arrested in July of 2009, and the trial took place in April 2013. At what point did you become involved?

A Usually what happens is they'll initially, like, at first appearance, assign it to the public defender's office if the person is indigent and then they must have had a conflict because there's no co-defendants in the case. So PD must have had a conflict and they had to get out. And then the way it's set up, is RCC would be next in line. If they got a conflict, then they appoint someone off of what's called a wheel.

Q Okay. And if the record reflects that your notice of appearance was dated September 5th, 2009, would that be correct?

A Yeah. That sounds pretty consistent. You said he was arrested in July.

Q Correct.

A It takes a little bit for that to happen.

Q Okay. And how many other cases were you

handling during the time that you were representing Mr. Jordan?

A That was a particularly busy time, because what happened is, 2007, they created the RCC and there wasn't -- initially, for a couple of years there, there were -- we were getting a lot of cases. I may have had as many as eight going at that time.

Q Eight capital cases?

A Yes.

Q And how did Attorney Christopher Smith become involved in Mr. Jordan's case?

A All right. What happened is -- I told you earlier I had a law partner.

Q Yes.

A And he was originally working the case with me. And then -- get into a long story -- he wanted to become a judge. It didn't work out. And the he ended up taking a job in a civil type of a litigation firm.

So I had to, you know, replace him, so to speak. And I just asked Jeff Dean. He runs RCC. And he just told Chris Smith, who had a similar job as I do, that he was going to step in and do it.

Q Okay. And when did Mr. Smith join Mr. Jordan's defense team?

A I'm not sure. But I know Mr. Dowdy left in

November of 2012. His trial was, you said, April 2013?

Q Correct.

A So I would say, probably, like, December or January.

Q Okay. If the record reflects that his notice of appearance as co-counsel was filed on March 25th, 2013, which is three weeks before trial, would that be correct?

A I wouldn't dispute the record.

Q Okay. And why did you ask for a continuance?

A Well, one of the main reasons was because Mr. Smith needed to, you know, get some time to understand the case. Although, I had been working it myself all that time and was, quote, lead counsel, you know, you want your defense partner to be up to speed as best he can.

It was a big contention from the Defense, but the Judge at the time, Judge Hutcheson, he just denied it and so we went forward.

Q And when the Court denied your motion for continuance, how did that affect you?

A It didn't really affect me. It affected Mr. Smith, I would say.

Q Okay. And was that weighing on your mind, at all, at trial?

A I don't -- no, I wouldn't say -- once the trial started, I probably didn't think about it.

Q Okay. And when you were preparing for trial, were you focused more on the guilt phase or the penalty phase?

A Both. But I viewed my overall job is to try to save his life. Mr. Jordan had -- was a serial letter writer, so to speak, and he made many admissions and confesses to this crime over and over. I tried to resolve it. I got him a deal from the Court. If he pled straight up, Judge Hutcheson told us he would give him between 30 and 40 years. Mr. Jordan turned it down, which I thought was a huge mistake.

And so my efforts probably would be more in line with trying to save his life, to be honest with you.

Q Okay. How was the defense team structured?

A How was it structured?

Q Yeah. How did you divide the work load?

A I did, basically, all the heavy lifting because Mr. Smith didn't -- you know, I threw him some witnesses to do in the guilt phase. I don't know if he did anything in the penalty phase. He may have done some lay witness testimony. But all the heavy lifting I did; opening, closing. I believe I opened, if I'm not

wrong, but every -- you know, most of the tough witnesses and so forth. It was my case and it wasn't fair, with Chris only being in it for a short time, to expect him to do too much.

Q So you were responsible for the opening argument -- or, excuse me, opening statement?

A Yes. Yes. I remember I was. It was in this courtroom.

Q And do you write out your opening statement ahead of time?

A What I -- I write an outline, but it's more detailed than an outline would be. But it's basically an outline, is what I'm using.

Q Did you do that in Mr. Jordan's case?

A Yes.

Q And you were also responsible for the closing arguments in his case?

A Yes.

Q And do you write those out ahead of time, as well?

A Similar fashion. I make a -- more than an outline, but I'm not writing what I'm going to say verbatim.

Q Okay. And did you do that in Mr. Jordan's case?

A Yes.

Q And what was the theory of defense for the guilt phase in Mr. Jordan's case?

A Trying to get a lesser, basically. Like I said, he admitted to being involved in the crime through a series of post-arrest letters, as well as he made admissions to lay people shortly after he had left this area. He went down south. And we were trying to get him a second degree, hopefully. I never did think the Jury would let him go, at all, I mean, completely.

But he had an argument that was, at least we could say with a straight face, that he didn't plan to kill Mr. Cope. I don't believe he really ever did plan to kill him.

He certainly was guilty of felony murder, but we were kind of hoping that the Jury would think it wasn't premeditated. And sometimes they'll ignore the felony murder rule and throw a defendant a bone by coming back with a second.

Q And do you have any independent recollection of the guilt phase closing arguments in this case?

A Yeah, I can remember some of it, especially since we're back in here. I don't remember every part of it.

Q Do you have any independent recollection of

your thoughts or your opinions during the guilt phase closing arguments?

A Basically, we were done. I mean, I knew it was coming to an end, yeah. It was just -- the evidence against him was overwhelming, in my mind. The only chance he had was for a lesser.

Q And did you discuss the guilt phase closing arguments with Mr. Smith beforehand?

A Oh, yeah, I'm sure we did. We actually -- yeah, we stayed over here. We both were in Orlando. So even after trial, at night, we were together a lot during the trial.

Q Okay. And whose responsibility was it to object to the State's closing arguments in the guilt phase?

A Well, the way the Judges want you to do it, which is the way, I believe, you know, as an experienced lawyer you do it, is, if I'm going to be the one for the defense doing the closing, I would be the one responsible for objecting to the State's closing.

Now, if you're with, you know, like another lawyer and you're maybe thinking of something else or you're just spacing out and you miss something really egregious, there's no rule that says the other lawyer can't stand up and object. But you try to keep that

protocol: Whoever is going to do the closing will be the one to object to the other side's closing.

Q Did Mr. Smith offer any input or suggestions regarding the objections to the State's guilt phase in this case?

A During their argument?

Q Correct. During the closing argument.

A No, I don't think so.

Q And if you had made an objection during the closing argument in his case, could you have asked for a sidebar with the Judge?

A Yes.

Q And at sidebar, are you permitted to consult with your second chair regarding the objection?

A You could at that time, yeah.

Q Okay. I will get into the statements here. Have you had an opportunity to review claim four of Mr. Jordan's motion for a post-conviction relief?

A Yes.

Q And you're familiar with the comments laid out in the claim?

A I believe I am.

Q And have you also reviewed the Florida Supreme Court opinion on direct appeal in Mr. Jordan's case?

A Yeah. I have it right here.

Q Okay. Did you review the Defense's opening statement?

A No.

Q Okay. And have you reviewed the State's closing arguments?

A Parts of it.

Q Okay. In terms of the opening statements, I'll read you a little snippet from that. And if you need a copy of it, just let me know.

MS. BORT: And, Your Honor, just as we did when we were questioning Attorney Smith, would it please the Court if I read each comment into the record?

THE COURT: Sure.

MS. BORT: Thank you.

BY MS. BORT:

Q I'll go through each comment in order that it appears in the motion. So for the first comment, let me direct you to the State's guilt phase rebuttal closing. That's in Volume 13 of the ROA, on pages 2585 through 2586. And then the comment is also found on pages 29 through 30, of the motion.

And then the comment states -- and let me know if I need to go any slower for you.

"You can find him guilty of first degree

felony murder or guilty of such lesser included charges. That's second degree, third degree, manslaughter with a weapon, or manslaughter. Ladies and Gentlemen, you can go all the way down the list. The law tells you, find him guilty of the highest one that's been proven.

"Sure, look at the instructions. They may all apply in this situation. Because of the way this thing developed, they may all apply. I mean, you may be able to technically find him guilty of all of them. But you should find him guilty of the highest one that has been charged and proven beyond a reasonable doubt.

"And, in this case, it's first degree murder. Felony murder first degree. And when you get over here to -- to the robbery, Count II, right up here, Count II, robbery with a fire weapon, firearm, or deadly weapon, right here on the first line, guilty of the charge of robbery with a firearm or deadly weapon, exactly what he confessed to, exactly what he told you he had done.

"Don't let him get away with this. Yeah, I mean, sure, you can come down the list again if you want to. I mean, he's technically guilty of all of them. Robbery with a weapon? Yep. Robbery? Yep. Grand theft? Did he steal something without any force? Well, he stole something, but he -- he used force.

"I mean, yeah, you can come down the list, but

there's no reason to. The law says to return it to the highest crime proven beyond a reasonable doubt. And, Ladies and Gentlemen, it is right there. It is choice number one."

Do you agree with the Florida Supreme Court that the comment, "don't let him get away with this," was improper?

A Well, no, I don't. But they're the Supreme Court, so they know more than me. I didn't -- I read this again last night. He's advocating for the State, and, you know, we were arguing for him to, you know, either be let go or have a lesser. I don't know. It's my fault completely, but I don't see anything wrong, quite frankly, with that one line, "don't let him get away with this."

But, I guess, if I ever hear it again, since the Supreme Court says it's improper, I probably would object to it.

Q Okay.

A But I didn't at the time. And I still don't see it, just reading it.

Q Okay. For the second comment, let me direct you to the State's guilt phase closing argument, in volume 13 of the ROA, on page 25 through 44. The comment is also found on pages 31 through 32, of the

motion.

The comment states: "When he closed the door behind him, it was as if he had put Keith Cope on a raft and set him adrift in endless sea. He had absolutely no ability, no tool to free himself. And he could only hope that someone would come and find him.

"Three days later; three days without water, three days of sunrises and sunsets, three days of watching the clock and minutes slowly pass by, someone came and found Keith Cope and it was too late.

"As the days ticked slowly by, his hope got smaller and smaller, as you can imagine. As the days ticked slowly by, he probably knew that no one was coming for him."

And why didn't you object to this argument?

A Well, I would say this. First of all, it's, in my mind, a fair comment in the sense of the facts in the case, I don't see anything factually incorrect to your now -- there was no evidence presented that there were three sunrises and three sunsets, or three days of watching the clock. But, I mean, that's just common sense. So I don't really see a problem with that.

And this is the type of example that I was talking to you earlier about with the Jury. So when I get up there and start objecting to this, which, I

believe, is a fair comment on the facts, I'm probably not going to win the objection, number one. And then, number two, I'm losing some credibility with the Jury, which I'm desperately trying not to do. And it's really hard.

This is one of the hardest things about this is to, you know, do what you think may be the ultimate defense and then still have your credibility to ask them to give your guy life. So that's what I would say about this portion of the argument.

Q Okay. Do you agree that if you don't raise the objection, though, it's not preserved for appellate review?

A I would say, yeah, nine times out of ten, that's probably correct. I guess there are some examples where that doesn't apply, but I agree with your statement.

Q Okay. Now, for the third comment, let me direct you to the State's guilt phase rebuttal closing. That's in Volume 13 of the ROA, on page 2576. And the comment is also found on pages 32 through 33, of the motion.

The comment states: "Just because the Defendant was owed something, doesn't mean that he has a right to come up here and demand someone else's money

and take it from him when they're not willing to give it and to use force to do that; use guns and tape and rope. If you could do that in America, then we'd all be in trouble because the mortgage companies would have us tied to the bed."

Why didn't you object to that argument?

A I don't know. It's -- first of all, I guess, I'm not sure I even understand what he was saying there about the mortgage companies in America. But I do agree with this, in hindsight. It's one I probably should have objected and potentially used the argument, what we were talking about earlier, the Golden Rule because the Jury's part of America. Right?

So, you know, I guess my reference would be to include that, potentially. So that, probably -- I would say I missed, probably, a valid objection on that particular one.

Q Okay. Now, for the fourth comment, let me direct you to the State's guilt phase closing, in Volume 13 of the ROA, on pages 2540 through 2541. And the comment is also found on page 33, of the motion.

And the comment states: "The first point is, I'm sorry. The second point is, I didn't mean to kill Keith. And the third point is, I'm not responsible for the harm that occurred after I left. That was what was

said in opening statement by the Defense. That was what was asked to many of the witnesses that were on the stand. So let's talk about that argument. Let's talk about the Defense's argument in this case. Let's start with "I'm sorry".

"Nowhere in the evidence, nowhere, is there a single fact that demonstrates the Defendant is sorry about anything. He wrote six letters. You listened to them yesterday as they were read. You'll have an opportunity to take them in the back and read them yourself. Look carefully for the words "I'm sorry". I'm sorry doesn't appear anywhere. I'm sorry doesn't come up in the statement to JoAnne Winston, out at the jail. There is no I'm sorry.

"When he told his friends, Raymond Hill and Eddie Yarrow, and Mathew Powell, and Sadia Hague, not once did he say I'm sorry. Not once did he say, God, I wish it hadn't happened this way. I -- I wish Keith were in better shape or hadn't died. You know, nowhere in there, though, was I'm sorry. The most we got was, 'I'm suicidal. I F'd up. I didn't want to go to jail.' But we never heard, I'm sorry."

And why didn't you object to this comment?

A Okay. What happened here -- and I remember this well because it was a mistake that I -- well, this

is what I mean by that. For a little time doing these cases, I would do this thing -- I'm not even sure where -- I think I first saw some other lawyer do it during opening. I would sometimes mention -- you know, the victim's family would be sitting right there. And so I would say something to the effect, you know -- this is in opening -- my condolences and -- you know, condolences to the family, or something like that, with respect to the family. Basically, maybe just a point of sympathy, okay, for the family.

So what Mr. Will did -- and this is why I'm not ever doing it again -- is, he burned me with this. And this wasn't -- this wasn't our defense. Okay? But he took that line, that I said on opening, and he stuck it in his pocket and he pulled it out here on closing to argue to the Jury what you just wrote -- I mean, what you just read into the record.

Now, why didn't I object to it? Because I'm the one who said it. And if I -- after I had said it and he burned me with it, I don't know how I really could object to it, with any good faith. I mean, he gets kind of colorful here. But, I guess I just didn't see it cross a line. And, like I said, I'm the one that brought it up. I don't remember saying anything about the letters, per se.

But, look, I don't know what to tell you. I didn't object. Like I said, it was something I did and I'm not doing it -- I haven't done it since then because of this case, actually. So, you know, if that's what got him convicted, I apologize, but I was trying to be nice. I was trying to, you know, show the Defense -- show the Jury that the Defense has a human side, all along trying to get this guy a life sentence. That's what we were trying to do.

So sometimes by throwing that little thing out, you might get one or two Jurors to say, hey, you know, we'll let him go, or something. I don't know, you know.

Q I do know the comments that you're talking about. And I will read those into the record because I have a couple of follow-up questions on what you said about that.

So in your guilt phase opening statement, in Volume 10 of the ROA, on page 1812, you said: "Now, I would stand here and I would like to offer the condolences to Mr. Cope and his family, because, obviously, the man's deceased at a relatively young age and no one wants that to happen."

And then, also, in Volume 10, on page 1816, you said: "Now, he did ultimately pass away in a

hospital. And, again, I'm sorry for that situation. But the question is: What is the level of responsibility in this situation?"

So when you were apologizing, you meant that you were apologizing and not Mr. Jordan?

A I guess just like in a general sense of human compassion. I don't think -- I really don't believe I was relating it to Mr. Jordan. It was more -- when I hear it, it doesn't sound that bad. But, like I said, he burned me with it so I haven't done it since.

But that was the theory, just to try to garner some, perhaps, favor, so to speak, some credibility with the Jury. So when you ask them later to give your guy life, they might be more inclined to do it.

Q In essence, you were trying to build rapport with the Jury? Does that sound correct?

A Yes.

Q And you were just trying to offer your own condolences?

A Well, the Defense -- on behalf of -- I guess Jordan would be included. Let's say on behalf of the Defense team; myself, Mr. Smith, Mr. Jordan.

Q Okay. And were you attempting to argue remorse?

A Not -- I don't believe so, not during the

guilt phase. That may have come up somehow in the penalty phase, but I don't remember that.

Q Okay. And, now, after hearing the comments now, do you believe that you opened the door for the State to be able to argue Mr. Jordan's lack of remorse?

A Well, I guess I did. It was unintentional. And, like I said, if that led to his conviction, it's on me and no one else. So I apologize.

Q Did you -- so you didn't intend to open the door?

A No. I never thought -- I didn't -- that was the first time I ever litigated against Ryan. I know him much better now and I know what he's capable of. I never thought that -- I never thought, by me saying that little statement in the opening about Mr. Cope and his family, that it would come back and burn me later on closing, that's for sure.

Q Now, you mentioned that you don't do this any longer but that was your practice prior to Mr. Jordan's case?

A I probably had done it, let's say, in five or six trials. Because I didn't do it in the beginning. Then you do so many, you're trying to do something, maybe, different for once or whatever. I did it a few times and it never was a problem. You know, this is the

only time it turned out to be some type of issue.

Q All right. For the fifth comment, the last comment, let me direct you to the State's guilt phase rebuttal closing in Volume 13 of the ROA, on pages 2572 through 2573. And the comment is also found on page 34, of the motion.

The comment states: "I told you it was coming. And there, there, we heard it. It's everybody else's fault but the Defendant's. I mean, if he had stayed in the middle of the bed, he would still be alive. If these guys had come up from south Florida a day and a half earlier, he'd still be alive. Come on, everybody's fault but his? I mean, he snapped? Is that a defense? He snapped?"

Do you feel that this is an accurate characterization of the theory of the defense in this case?

A No. Let me look at that one more time, please.

Q Yes.

A I have a copy of this transcript here.

Okay. What is your question?

Q Do you feel it's an accurate characterization of the theory of defense?

A I don't really think so, looking at it on

paper. I mean, I don't know if I did blame these other things on it. I don't remember doing that. The last part is, you know, the snap part was definitely part of the defense. But this issue of everyone else's fault, I don't think it was, to be honest with you.

Q And why didn't you object to this argument?

A I don't know. I honestly don't know why, other than just I was trying not to, you know, unnecessarily object to things that the State was saying. Looking back, in hindsight, perhaps it was something I should have done at the time. I really -- I don't have any independent recollection of it.

Q Okay.

MS. BORT: Your Honor, may I have a moment to confer with co-counsel?

THE COURT: You may.

MS. BORT: Thank you.

Nothing further.

THE COURT: Ms. Calhoun?

MS. CALHOUN: Yes, Your Honor. Thank you.

CROSS-EXAMINATION

BY MS. CALHOUN:

Q Good morning, Mr. Nielsen.

A Good morning.

Q Now, I think there are four specific instances

of the -- well, first of all, let me ask you generally. You've mentioned, a couple of times, that you were trying to build a rapport with the Jury during the opening statement in the guilt phase because you anticipated a penalty phase. Did I understand your testimony correctly?

A Yes, you did.

Q And did you anticipate a penalty phase because of the amount of evidence -- I think at one point you even said the amount of evidence against your client in the guilt phase was overwhelming. Did I understand that correctly?

A That was my take on the case, yes.

Q And what -- I think you mentioned some letters. You say he was a prolific letter writer, or something to that effect?

A I believe there was six or seven of these letters where he would make -- he was admitting to his involvement -- not every detail but admitting to his involvement in the case.

Q Okay. And he made some statements or admissions, I think you said, to a couple of civilian witnesses?

A Yeah. I friend of his and his friend's girlfriend, yes.

Q Okay. And they test -- did they -- they did testify at trial; did they not?

A They sure did.

Q Okay. And did he also make some statements or admissions to a law enforcement officer who testified at trial? JoAnne Winston?

A Yes. That's right. Yeah, he was -- I forgot about that. When he was in south Florida, he was calling her on the phone, talking to her, yeah.

Q Okay. Now, I think when -- you said something to the effect that your strategy was to seek a verdict for a lesser included offense, possibly a second degree murder charge?

A Well, my take on it was that was the only chance he had, other than getting felony first degree murder, was a lesser second. So, yeah, I mean, I felt comfortable arguing that with a straight face.

Q Okay. Now, in the statements, the letters, and the verbal admissions that he made, did he not admit to committing the underlying felony? The robbery or the theft.

A He definitely admitted to the, yeah, taking of the property. You know, one of the famous lines that was horrible, really, for the case was, they said, oh, where's Keith. And he made this flippant comment, "He's

not here. He's tied up at the moment." He literally was hog-tied up in that house. And that was -- that was bad -- that was bad for Mr. Jordan. But that was an example of things that he -- that he would say.

Q The point being that, in order to get a lesser -- to obtain a verdict for a lesser offense of, for example, second degree murder, would you not have to convince the Jury that Mr. Jordan did not intend for death to result, that he did not intend to cause the death?

A Yeah, that's what we were -- that's --

Q So you would have to attack the causation element?

A Yeah. Because he did survive after Mr. Jordan left him. So, you know, if he really wanted to kill him, he certainly had the means and the opportunity to do so. But he left him tied up on that bed. And I believe he was hoping, in his mind, perhaps, that someone may come by and find him, but it never did happen.

So I still -- I'm still not convinced, right now, that he intended to kill the guy. I'm not sure he did. He was his friend. They lived together. They partied together. Mr. Cope gave Jordan work, provided him shelter. They just partied really hard. And I do

believe that Jordan did snap that night. He was just mad that the guy was holding back his pay. So he did this stupid thing; tied him up on the bed and took all his stuff and left. I don't think he intended, initially, to kill Mr. Cope.

Q Okay. Now, for example, there was discussion of the -- what was characterized as a possible Golden Rule argument of what Mr. Cope might have experienced while he was tied up during the three -- the sunrises and the sunsets over the three-day period.

Did Mr. Cope's ex-wife testify during the trial as to when she noticed his vehicle missing and when his body -- when he was discovered?

A Yes.

Q And what kind of time frame did she give?

A Oh, I don't remember.

Q I mean, was it consistent with the three days and the three nights type thing?

A Yes. Yeah. I think so. And, quite honestly, I don't remember a lot of what she said, to tell you the truth, so. But I don't think it was anything majorly different, though.

Q So as far as the length of time, you didn't see any major discrepancy there?

A I'm not really sure I understand the question.

Q Okay. Well, let me see if I can rephrase it to make it clearer.

A All right.

Q Based on the evidence that was presented at trial, was there any major discrepancy between when Mr. Cope's vehicle was noticed to be missing and when his body was discovered and the argument that was given by the prosecutor as to how long he was tied up and suffering before his body -- before he was discovered in the last stages of his life?

I mean, there was a timeline that the State put out there.

A Yeah, I know. I'm trying to remember what he said, but I don't believe there was any major discrepancy, no.

Q Okay.

A They were -- you know, they were separated. They didn't live together.

Q Right.

A The wife and Mr. Cope.

Q Right.

A Although, they were still friends.

Q Right.

A Yeah.

Q Do you recall if she gave testimony about

driving by the house --

A Yeah.

Q -- and noticing -- he had a very distinctive vehicle; did he not?

A I think he had a nice truck.

Q Yeah.

A Yes.

Q And, in fact, your client took that truck and drove it to south Florida; didn't he?

A He did, yes.

Q And then it was returned back by the two civilian witnesses who testified at trial?

A Yeah, that's right.

Q With regard to the statement by Ryan Will about, "don't let him get away with this," in discussing the Jury verdict form with the Jury, was -- do you remember if the Court instructed the Jury on how to properly complete the verdict form?

A Absolutely, yeah. That was all done.

Q Okay. And you mentioned that your client, Mr. Jordan -- I guess the motive, to the extent there was one for this murder, was that your client believed that Mr. Cope owed him money, was holding back pay --

A Yeah.

Q -- for work performed?

A I don't think he just believed it. I think it was undisputed. I don't really remember any -- no one else -- yeah, no one else took a position -- I don't think the State took a contrary position. In fact, I think they argued that, and said that's a stupid reason to do what he did to Mr. Cope.

Q Sure.

A Which it is.

Q And it's your testimony, today, that your comment, in your opening statement, about the Defense team being sorry was not part of the Defense strategy, that you weren't arguing Defendant remorse as part of your strategy, that it was just, basically, part of your opening statement, trying to humanize the Defendant, again, anticipating a guilt verdict.

A Yeah. I don't think there is a defense -- an affirmative defenses of remorse. If there was, it would be a big day for the defense, in general. I don't believe there is such a defense.

Q Right. And you just testified here that you do believe the Defendant did snap because he was upset over his dispute with his former employer, Mr. Cope, over the wage issue or the wage dispute, that he believed Mr. Cope was withholding pay earned?

A Yeah, coupled with the alcohol and cocaine

binge that had been going on.

Q And, again, it was your theory of defense, or your strategy, that you were trying to get a lesser included offense, that it wasn't a premeditated murder, that it was maybe a second degree murder, heat of passion or something like that, maybe?

A My number one strategy was to get the State to give this kid a term of years. They agreed to offer him second. We talked to the Judge. He said he would give him between 30 and 40. I was like, I did it. I saved his life. He didn't want it. He thought he would die in prison during that time and he was upset that the other people in the case weren't charged.

So he bowed up, after he told me he would take that deal, if I could get him anything like that, and then he said no. So now the strategy is, okay, you just made the stupidest decision you made, other than what you did to Mr. Cope. So what are we going to do?

All right. We're going to argue to try to get you a lesser. You might get your second. The Judge could still give you what's called backdoor life. This is a failed strategy. If that's what you want, that's what we're going to do, and that's what we did.

Q Okay. But my question is, is that if you're seeking a verdict for, say, second degree murder as a

lesser included of first degree murder, wouldn't an argument that the client snapped, that he acted in the heat of passion, wouldn't that be consistent?

A Yes. And that was the -- that's what we tried to do -- or I tried to do, is finesse that argument into getting a lesser. The Jury followed the instructions and came back with the highest thing they could find, which is felony murder first degree.

Q And then, also, that he didn't intend for the -- did not intend for the Defendant to actually die as a result of his actions?

A That was -- that was the Defense argument, but it's irrelevant to the way the felony murder rule is.

Q Sure.

A In fact, that's what it's all about, you know, that there is no intent, necessarily, to kill.

Q In light of the extent of the evidence against your client, would it have made a difference whether you objected to Ryan's argument about him snapping or not snapping in the guilt phase, really?

A I don't know. I mean, you don't know what Jurors are thinking. You know, I guess on this whole objection thing, it's -- I don't see how it's possible for a lawyer to nail every one correctly during these proceedings. It's difficult.

But I just would say this: If I missed an objection that was so horrific that it led to him getting this conviction, I don't want that on me. So I'm first to admit it. I just -- you know, these things, like that -- the statement by Ryan, I guess, you know, technically, maybe in law school or some lab, you know, you do more objecting. But, like I said, I've always got one eye on that Jury and, you know...

Q How about the time you were trying the case; did it seem that horrific that you needed to stand up and object? Obviously...

A Well, I would have to say no because I didn't do it.

Q Okay.

A I'm not shy about doing it. I'm just trying to pick and choose my spots and be effective.

Q All right.

MS. CALHOUN: I don't have any further questions at this time for Mr. Nielsen. Thank you, Your Honor.

THE COURT: Okay. Thank you.

Redirect?

MS. BORT: Nothing further, Your Honor.

THE COURT: Thank you. You may step down.

THE WITNESS: All right. Thank you, Judge

Perkins.

THE COURT: Is he released from his subpoenas?

MS. PERINETTI: Yes, Your Honor.

THE COURT: Ms. Calhoun?

MS. CALHOUN: Yes, Your Honor. Thank you.

THE COURT: All right. You may call your next witness.

MS. PERINETTI: The Defense rests.

THE COURT: All right. Ms. Calhoun?

MS. CALHOUN: No witnesses from the State. Thank you.

THE COURT: Just argument?

MS. PERINETTI: Yes, Your Honor.

THE COURT: All right. You may proceed.

MS. PERINETTI: Your Honor, did you want me to stand at the lecturn or stay seated?

THE COURT: Whatever is easiest for you. If you want to argue from there, that's fine.

MS. PERINETTI: Okay. As long as -- yeah, as long as you can hear me, Your Honor.

THE COURT: So far, I haven't had any trouble hearing you.

MS. PERINETTI: Okay. Good.

Your Honor, none of the improper arguments referenced in Mr. Jordan's post-conviction motion

was objected to by the Defense at trial. There were, as we read into the record, five separate comments. The Defense counsel provided deficient performance under Strickland by failing to object to these arguments, which were all presented by Assistant State Attorney Will.

THE COURT: You would agree that he -- this isn't one -- or at least I didn't hear him say, except in one occasion, I should have and didn't. These were ones where he said, I did not and there was a reason why I didn't and here's the reasons. There was one he said, I should have made an objection to that.

But on the others, he said -- he made a conscious -- he said he didn't object and there was a reason why he didn't object. Correct?

MS. PERINETTI: Well, there -- I guess he had different things to say about each one. If it would be okay with Your Honor, I could go through each one. The first statement we -- the first comment we were talking about was the comment that was referred to by the Florida Supreme Court in its opinion on direct appeal. And that was the "don't let him get away with this" comment from --

THE COURT: And let's talk about that, for

just a minute. I mean, the Supreme Court did address all of this, correct?

MS. PERINETTI: Well, Your Honor, they addressed most of these arguments.

THE COURT: And what did they say about them?

MS. PERINETTI: Well, they applied -- because they were un-objected to, they applied a fundamental error standard instead of Strickland error.

THE COURT: It was fundamental.

MS. PERINETTI: Yes, Your Honor. And the fundamental error standard is much stricter than the Strickland error standard. Fundamental error allows the appellate court to review unpreserved claims on the merits only if the errors reached down into the validity of the trial itself to the extent that the verdict could not have been obtained without the assistance of the error.

Whereas, Strickland error was a reasonable probability of a different result, which is a much less strict error -- standard than fundamental error. So they did look at these as far as the -- under a fundamental error standard. And --

THE COURT: And you're saying that under our standard, under Strickland, that it's a lower

standard --

MS. PERINETTI: Yes, Your Honor.

THE COURT: -- than fundamental?

MS. PERINETTI: Yes. Fundamental error is basically the result of the trial -- the guilty verdict could not have been obtained if not for these improper comments. Whereas, the Strickland error is a reasonable probability of a different outcome. So you're looking at it through a completely different lens.

THE COURT: Okay.

MS. PERINETTI: So, for example --

THE COURT: So there's two elements to this, if I understand what you're saying. The first element is that we have to find that it was improper, ineffective, if you will, for him not to object. Right?

MS. PERINETTI: Yes.

THE COURT: Now, where does the strategic or technical decision side of this come in? Because you would agree that it's clearly a lawyer's prerogative to determine what to object to and what not to object to.

MS. PERINETTI: It is. And it's -- and as Mr. Nielsen just testified to, there is a fine

line, and there are a lot of considerations when you're trying to decide, you know, in the moment, especially, whether to object or not. But he had different reasons in the different comments about whether to object.

For example, under the first comment that was -- the Florida Supreme Court specifically said was indeed improper but didn't rise to the level of fundamental error. And, again, they said it wasn't fundamental error. They didn't even -- they did not consider whether it was the level of Strickland error.

Mr. Nielsen said that he didn't agree with the Florida Supreme Court, that the comment, "don't let him get away with this," was improper. He still doesn't see it, he said. But, of course, since the Florida Supreme Court says it's improper, he would now object to it.

So there was no strategy there. This -- regarding this comment, in particular, there was -- it was clearly deficient performance because the Florida Supreme Court, which is the highest court in our state, said it was improper. Mr. Nielsen was mistaken in not thinking it was improper. So it was deficient performance.

There was no strategy. It's not like he said, it was improper and I didn't object to it. So there was no strategy there. He didn't object to it because he didn't think it was improper.

THE COURT: So take me through the trial on that. Mr. Will says, don't let him get away with this. And Mr. Nielsen, in your theory of the defense, would stand up and say objection. Then what?

MS. PERINETTI: There could have been a curative instruction. There could have been --

THE COURT: Which would have been?

MS. PERINETTI: To disregard the last comment.

THE COURT: Okay. And so your argument, here today, is that that would have made the difference in what the Jury did subsequent to that?

MS. PERINETTI: You have to look at not just that one comment, but you have to look at --

THE COURT: Well, let's just stay with the one comment.

MS. PERINETTI: Okay.

THE COURT: We'll talk about cumulative effect as we go.

MS. PERINETTI: Yes.

THE COURT: But is that your argument, that

that comment made the difference?

MS. PERINETTI: Well, my argument is that all five of these un-objected to comments made the difference. You have to look at -- under Braddy versus State, 111 Southern 3d 810, you have to look at the cumulative effect of the entire closing argument, including both objected to and un-objected to arguments.

So you can't -- it's really looking at it in a vacuum. I mean, I think you can't really look at just that one argument. You have to take everything and look at it cumulatively.

THE COURT: Okay. So, again, I come back to my reading and my understanding of Mr. Nielsen's testimony was that, with the exception of the Golden Rule violation about the mortgage companies --

MS. PERINETTI: Yes, sir.

THE COURT: -- that he made a tactical decision. He chose not to object on the other statements. So where does that come into your analysis?

MS. PERINETTI: Well, I think that -- I don't think he chose not to object, Your Honor. I think he did not see the arguments as objectionable;

whereas, maybe, in hindsight, he now does. So I think when there's an argument that is, in fact, objectionable, if he just didn't see it at the time and now -- but it actually was objectionable, that's not a strategy. That would just be missing something.

THE COURT: And I thought he said specifically -- and I wrote down in my notes, under the comment, "don't let him get away with this," he said, I didn't see anything wrong with that comment, but I didn't object because I was preserving my credibility with the Jury.

On the three days of watching the clock, Keith Cope lay there waiting for somebody to find him. He said, I thought that was fair comment on the facts. He said, I would have lost credibility with the Jury by making the objection. Again, he was attempting to preserve the credibility with the Jury for the penalty phase, again, in response to questions that were asked of him about whether or not there's a link between the guilt phase and the penalty phase; the assumption being that there is some link and that's what he was trying to do.

When he was asked about the Golden Rule, he did say, this was a Golden Rule violation and I

should have objected with regard to the mortgage companies would have -- would have us tied to the bed.

And his condolences to the family, to the point of sympathy, he had -- again, he was saying, and my notes indicate, I didn't object because I said it. I said it. He said, if that's what got him convicted, then I'm sorry, but I was trying to be nice to the family and show sympathy. I was expressing a general sense of human compassion to try to garner credibility with the Jury. The condolences were offered on behalf of the Defense team, including the Defendant.

You're not seriously contending that somehow there was something wrong with him saying that he was sorry that the family had to endure the death of a family member?

MS. PERINETTI: Well, the claim isn't that he was ineffective during opening statements. The claim is that he was -- that -- he was clearly -- if you read the opening statements, he's clearly apologizing on behalf of himself. He said, I would like to offer condolences to Mr. Cope. He did not say, Mr. Jordan would like to offer condolences to Mr. Cope. And if he did, we would have had a claim

that he was ineffective during opening statements.

So, in fact, we're arguing he wasn't ineffective during opening statements. He did not open the door to the statement --

THE COURT: I'm sorry, he was ineffective or he wasn't ineffective?

MS. PERINETTI: That he was not -- he was ineffective in failing to -- well, okay.

THE COURT: Object.

MS. PERINETTI: In failing to object, right. If he had -- if it was the case that he opened the door to the State being able to offer lack of remorse, we would have had a claim that he was ineffective in arguing remorse in the opening statements. It's our position that he was not arguing remorse. He was argue -- he was offering his own condolences, not Mr. Jordan.

Mr. Jordan has no control over what his -- his lawyer's, you know, personal feelings, and that it was inappropriate for the State, in closing argument, to argue lack of remorse on --

THE COURT: Wasn't that a fact, though? Wasn't that a fact? There was a complete lack of remorse in that regard, right?

MS. PERINETTI: But it's entirely improper for

the State to argue lack of remorse unless the Defense opens the door. So whether that may or not -- may or may not have been the case. But the State can't argue lack of remorse unless the Defense opens the door.

And it's our contention that the Defense did not open the door to lack of remorse, and that the opening statement did not open the door. And that -- for that reason, that Mr. Nielsen should have objected to that.

THE COURT: Okay.

MS. PERINETTI: And then the fifth -- I'm sorry.

Right. And, again, you have to look at -- when you're looking at strategy, you have to look at the attorney's reason and whether it was reasonable. So -- reason for not objecting and whether it was reasonable. So a mistake in the law would have not been a reasonable reason to not object. So that would be deficient performance.

Now, the fifth argument, that was the mischaracterization of Mr. Jordan's theory of defense. And Mr -- Mr. Nielsen testified that he did not think -- now, he agreed that the argument that Mr. Jordan snapped, he agreed that that part

was a part of his theory of defense. But he did not agree that it was a theory of defense that it was everyone else's fault.

And this was another one where he said he didn't know why he didn't object. In hindsight, maybe he should have. So, again, this is, you know, maybe something where he just didn't see it or was mistaken. I don't think that there was any strategy here.

THE COURT: Again, now, you're not arguing that there wasn't evidence and argument with regard to involvement of others. What you're saying is, that was not the sole defense in the case, right?

MS. PERINETTI: Right. Well, it was that it was a mischaracterization of the defense, that he was -- that it was everybody else's fault but the Defendant's.

THE COURT: Okay.

MS. PERINETTI: So, again, you have to look at all -- you can't just look at one of these arguments on its own. You have to look at all five of these arguments together, along with any objected-to comments during the -- during the closing argument. And you have to look them all together, and you have to look at the cumulative

effect of these un-objected to and objected arguments and their prejudice of the -- in the case.

And as Mr. Nielsen was saying, you know, this clearly wasn't a "who done it" type case. Mr. Jordan clearly was involved, you know. I think that that is undisputed. It was more of a question of his level of culpability, and that they were arguing for something lesser than first degree murder. I know that there was -- a lot of the argument had to do with the technicalities of the felony murder instruction regarding that the murder happened during the course of the felony.

And so, you know, that was somewhat of a nuanced argument. They were arguing for something less than first degree murder, I think it's not unreasonable that the Jury could have given him something less than first degree murder. In which case --

THE COURT: Certainly, that was the hope. Mr. Nielsen --

MS. PERINETTI: Certainly. It was -- and, again, as Mr. Nielsen said, I mean, certainly that was the hope and it was something they could argue with a straight face. I mean, this wasn't a

case -- this wasn't a case where, you know -- like I said, obviously, Mr. Jordan was involved on some level, but this isn't a case where you're making the Hail Mary argument.

I think that there really was a reasonable expectation that he could have gotten something less than first degree murder. And -- especially with a Jury instruction that is somewhat nuanced, especially for a lay person, and that he could have gotten second degree murder or third degree murder or manslaughter and it wouldn't have been a death case.

THE COURT: And isn't that one of the reasons why Mr. Nielsen was so very concerned about preserving his credibility with the Jury, to make that precise argument that you just articulated?

MS. PERINETTI: It is. And, again, it's a fine line. But when you don't even -- when an attorney doesn't recognize that the argument is not objectionable, then they're not making that strategic decision. So his failure to object on most of these arguments was not a result of a strategic -- you know, he wasn't able to make that decision because he didn't recognize them as being objectionable.

So, you know, our argument is, the State's improper arguments injected an element of fear and emotion into the trial that tainted the Jury's decision in this case and that caused them to return a verdict of -- or, again, it's Strickland error. It's not fundamental error. So there's a reasonable probability that but not for these improper arguments, that they would have returned a verdict with something less than first degree murder.

THE COURT: Okay. Ms. Calhoun?

MS. CALHOUN: Yes, Your Honor. We do agree that the standard is reasonable probability versus fundamental error. We do not agree that it's such a vastly different threshold than what the Defense is arguing.

THE COURT: So let me ask this. There's two things the Defense has to show.

MS. CALHOUN: Sure.

THE COURT: First, they have to show, and they spent most of their time, understandably, on the evidence with the showing, that Mr. Nielsen may have done something wrong. And he disagrees on most of that.

MS. CALHOUN: Sure.

THE COURT: But there were a few times where he said, yeah, looking at it, in 20/20 hindsight, maybe I would have done it differently, maybe I should have objected to the Golden Rule, things along those lines. The second thing --

MS. CALHOUN: That's not what Strickland asks us to do, first of all.

THE COURT: Right. We'll get back to that in a minute. What I want to do is -- there's another part of this test, though, isn't there? Second standard -- part of the standard, to show that it wouldn't have made any difference at all.

MS. CALHOUN: Right. And if the Defense can't show prejudice, then we don't even need to get to the performance prong.

THE COURT: So what do we have on prejudice?

MS. CALHOUN: And that is my first part of the argument. And Mr. Nielsen told us, repeatedly, that the proof of Mr. Jordan's guilt in this case was overwhelming. And I think any fair reading of the trial transcript would inform any objective reader that Mr. Jordan -- the evidence of Mr. Jordan's guilt was overwhelming.

So we would argue that none of these comments was so egregious, either individually or

cumulatively, that they would have changed the outcome of the proceeding. And I don't think we ever get to the attorney performance prong of Strickland, truthfully, because I don't think the Defense can show actual prejudice.

So we don't get to the deficient performance prong of the Strickland test.

THE COURT: How do they show that?

MS. CALHOUN: How do I show --

THE COURT: No. How do they show that? I mean, do they bring in an expert that says, you know, I've been a criminal defense lawyer for 30 years and, in my experience, this made a difference, or this wouldn't have made -- I mean, how do they show that? How do they show prejudice?

What's the standard?

MS. CALHOUN: Reasonable probability of a different outcome in the proceeding. I mean, it -- usually, it's -- usually, you get that in a case where the evidence is close or -- in this case, the evidence is not close. The evidence is -- I mean, you've got the Defendant confessing.

THE COURT: Well, usually, it comes up when we're arguing about a piece of evidence, right?

MS. CALHOUN: Right.

THE COURT: In other words, this is the gun and they never should have admitted the gun, or they never -- they should have granted the motion to suppress so the drugs wouldn't have come into evidence. So we can look at it and say, without drugs, there wouldn't have been a conviction and there wouldn't have been a sentence. Without the gun, there wouldn't have been, et cetera. We have objections here. So what do they have --

MS. CALHOUN: We have objections in closing argument and rebuttal closing.

THE COURT: Right. So what do they have to show?

MS. CALHOUN: They have to show that had those objections been made and been sustained, that the outcome of the proceeding would have been different, none of which would have changed the fact that the Jury heard their client make multiple -- he testified he made multiple statements to a law enforcement officer admitting to virtually every element of this crime. He made -- he wrote multiple letters admitting to virtually every element of this crime.

THE COURT: Not virtually. Actually.

MS. CALHOUN: Actually every element of this

crime. He also made statements to two civilian witnesses, who testified at the trial, admitting to virtually every element of this crime. Brought proceeds of the crime to these individuals who then returned them back to the scene of the crime.

I don't understand how you get -- I mean, none of these objections negates any of those facts. So we would contend that -- I mean -- and Mr. Nielsen, being the dedicated criminal defense lawyer that he is, who is very concerned for the welfare of his client, of course, is, you know, perfectly willing to say that if he did something wrong, in hindsight, that he would want to take responsibility because he is a dedicated criminal defense lawyer. But that's not the standard under Strickland.

The standard under Strickland is whether he did something deficient, viewed at the Constitutional level, that essentially amounted to a 6th Amendment depravation of the client's 6th Amendment right to counsel, which, by no means, occurred in this case, that would have reasonably, probably, resulted in a different outcome of this trial.

But given the quantum of evidence in this

case, I don't see how this Court can reach that determination.

THE COURT: Okay. Thank you, Ms. Calhoun.

MS. CALHOUN: Yes, Your Honor.

THE COURT: Ms. Perinetti, I'm going to ask you the same question I asked Ms. Calhoun. So you agree with the standard; it's your burden, you have to show prejudice. So tell me, your best argument, where is the prejudice here. How do I find prejudice based on the totality of the facts in this case?

MS. PERINETTI: And, again, as I said, it's -- you know, the prejudice is the effect on the Jury that they would have returned something less than first degree murder. And, you know, given the complexity of the Jury instructions in this case, and the technicality of it, it's not a reasonable probability that he would have walked. It's a reasonable probability that there would have been something less than -- different result, something less than first degree murder. And you have that in this case.

I think, you know, this is a question for -- you know, a question for Your Honor. I don't think it's something that, you know, somebody could --

you know, an expert attorney could come in and tell you, like, yes, this would have made a difference. I think it goes to the ultimate question in this case.

And if -- you know, let's say that Defense counsel had objected and -- to these comments and they were improper -- or to these improper comments and they were overruled, a reviewing court would have found the objections improper and they would have granted a new trial. So that would have been prejudice too.

So, I mean, I think, you know, as I said, you know, you need to look at -- the Strickland error is different than fundamental error. And it isn't that this verdict could not have -- it's not that the facts could not -- actually, we're not conceding that the facts -- that the facts prove first degree murder, but that's not the standard. It's not that he could not have been convicted of first degree murder.

It's that there is a reasonable probability of a different outcome and it's not so clear in this case. We think that that's -- it's not clear in this case that he's guilty of first degree murder, that we think that a reasonable Jury, if they had

not heard these comments or if they had been objected to, that they could have come back with something less than first degree murder.

THE COURT: All right. Very good. Thank you. Thank you both for the arguments. You know, you put a lot of time in on this. It shows. You knew every aspect of this case. It literally took me weeks to read the entire file. It is a huge file. There's all kind of information in there. Some of it is conflicting, initially. I had to make a chart to keep all the characters and facts and dates and everything straight. And I know you did absolutely the same thing. And I just want to tell you, I sincerely appreciate this.

From the Defense perspective, I can't imagine a more difficult and challenging case than this one. Ms. Perinetti, you've handled every issue in an exemplary fashion. But this is an extremely difficult case from the Defense perspective.

Ms. Calhoun did her normal, excellent job. But this was a lot easier case for her than it was for you.

I don't know that I've ever seen a case where the Defendant did more to assure his conviction than the Defendant did in this case. I couldn't

believe it. As I was reading through it and I came across something else, I was like, oh, my goodness, what the heck is going on here. And how did they find all these people? And could he not keep his mouth shut? I mean, really, could you not keep your mouth shut with all of this? And maybe I shouldn't be saying this, but he -- I mean, I was shocked in how much -- how free he was to incriminate himself in this case.

I listened carefully to Mr. Nielsen's testimony. I understand that his objective in this case -- and he did have a defense. I mean, this is not one of those circumstances where he was just throwing it against the wall, let's see what the Jury does. He had a real defense in this case. And his defense was that Mr. Jordan didn't intend to kill Mr. Cope. He intended to rob him. He intended to tie him up. He intended to hide his escape or assure his escape while Mr. Cope was tied up and unable to report him. He was mad at Mr. Cope, maybe for good reason.

And all of that came out. But -- and Mr. Jordan made sure all of that came out. But there was a real defense, which is, he never intended to kill him and you shouldn't punish him

as if he did. And I commend Mr. Nielsen for his task in this case and I guess just about every other case, if I understand -- I've never had a case with Mr. Nielsen. He's never appeared in this court while I've been on the Bench.

Apparently, he appeared before Judge Hutcheson on more than one occasion, but I've never seen him. My first experience with him was when he came in and testified, here today. And I commend him for his efforts. And his efforts were directed at trying to save Mr. Jordan's life in this case. And he was consumed and focused on that job.

With the exception of one time with regard to an argument about Golden Rule, his testimony, here today, was that he was trying to preserve his credibility with the Jury so he could make those important arguments that he needed to make at the end of the guilt and the penalty phase. That he was directing his efforts in that regard. That he was garnering credibility with everything that he did. And I accept that.

And I not only accept it, I understand it and agree with it. I think that's exactly what he was doing, looking at everything, his whole body of work in this particular case. To suggest somehow

that -- that his expressing condolences to the family, to express some human compassion, to garner the Jury's credibility, to suggest somehow that there was something wrong with that, I think borders on the ridiculous. It was absolutely the appropriate thing to do. And I understand exactly why he did it. And, again, I find nothing wrong with that in this circumstance.

I don't think Judge Hutcheson would have sustained the objection had one been made for most of the things that we're talking about here, with the exception, maybe, of Golden Rule. And he would have sustained the objection and probably left it at that.

So the long and the short is that maybe on one, the objection would have been sustained. On the others, I don't even think the objection would have been sustained. And I think that he, being Mr. Nielsen, would have -- the result would have been exactly what he feared, which is to lose credibility in the eyes of the Jury, to make it seem like he was nitpicking, and that he wasn't concerned with the overall facts and truth of his position.

That being said, even if I found every single

one of them was grossly wrong and error for him not to do and met every standard under Strickland in that regard, it made absolutely no difference in this case. Mr. Jordan was convicted. Mr. Jordan was sentenced based on the facts of this particular case, which are -- and I don't have to tell you. You know better than I do. They're horrendous. They're horrible facts. They're some of the worse I've ever read. They're difficult -- they were difficult for me to read. I can't even imagine how the Jury felt when they were hearing them, for the first time, from the live witnesses. They're just horrible in that regard.

So, again, I want to commend all of you for the hard work that you did. But based on what I've heard, I cannot grant the motion for a new guilt phase under -- I believe it's ground four of the motion at this time.

Ms. Calhoun, if you would draft an appropriate order that reflects the Court's findings.

MS. CALHOUN: Yes, sir.

THE COURT: And if you can circulate it among counsel, and then forward it to me, please.

MS. CALHOUN: Yes, sir.

MS. PERINETTI: And, Your Honor, just so we're

following the rule, under 3.851, I believe it's (f) -- there's so many letters and numbers here -- (f)(1)(e). It's under "procedures after evidentiary hearing."

THE COURT: Yes.

MS. PERINETTI: It says: The trial court may allow written closing arguments. But since we did oral arguments -- let's see.

Had to order a transcript. Okay. Shall order a transcript of the hearing, which shall be filed within ten days if Realtime transcript was utilized. So I think Your Honor would need to order a transcript. And then the order needs to be rendered within 30 days of the filing of the transcript.

THE COURT: Okay.

MS. CALHOUN: Can I also have a little clarity here? I don't think you've actually entered a formal order on the other claims in the motion.

MS. PERINETTI: Yes.

MS. CALHOUN: So how do we want to handle that?

THE COURT: Cover it all. This was the only one.

MS. CALHOUN: Well, this was the only claim

that we had to have an evidentiary hearing on.

THE COURT: Right.

MS. CALHOUN: But the motion had multiple claims.

MS. PERINETTI: Yes.

THE COURT: Okay. I thought I had done an interim order. I didn't?

MS. CALHOUN: No, I don't believe so.

MS. AHMED: No, Your Honor. All you had was have us do the penalty phase grant order and we did that and the Court signed it.

THE COURT: Right. That was ground five, right?

MS. AHMED: I have to look at it.

THE COURT: Okay. And I thought we did an evidentiary hearing on ground four. This was ground four.

MS. AHMED: Right. At the case -- if the Court remembers, at the case management conference, I had argued, with Ms. Calhoun, a number of other claims that we had asked for an evidentiary hearing, that the Court did not grant an evidentiary hearing. We would need an order to those effect, as well.

THE COURT: Did I announce the ruling?

MS. AHMED: Yes.

THE COURT: At the end?

MS. AHMED: Yes.

MS. CALHOUN: I believe --

MS. AHMED: On the record.

MS. CALHOUN: I believe so. It was announced. But there's not a written order. You need a written order in order --

MS. AHMED: We do need a written order.

MS. CALHOUN: Not to be advocating for you. But you need an order to be able to appeal.

THE COURT: Okay. Let's do one. Ms. Calhoun, do it all.

MS. CALHOUN: Okay. What was --

THE COURT: I'm sure I expressed my rationale for why I did what I did at the time.

MS. CALHOUN: Okay. So the case management conference was August 1st of '17.

MS. AHMED: It was claim three.

MS. CALHOUN: Madam Court Reporter, we're good? Is the court reporter going to order that transcript, as well? Because I'm going to need that, as well as today's, so that I can prepare --

THE COURT: At least my findings.

MS. CALHOUN: Right. So that I can accurately

prepare the order encompassing all of that.

THE COURT: Okay.

MS. CALHOUN: I mean, I'm sure I have notes, but I'd rather make sure that I have --

THE COURT: And you know that does -- because I was actually -- when we started the arguments, I was looking through, trying to find my order on Count IV and I couldn't find it. So I pulled up my notes and my findings on Count IV. So I've been going off of my notes. I didn't go back -- I didn't want to be distracted by looking through the file for the actual order. But that makes sense now why I didn't pull it up initially. Okay. Yeah, we do need to do that.

MS. CALHOUN: Yeah.

MS. AHMED: And if it helps, it was claim three, to the extent it was related to guilt phase. Claim six and claim eight were the ones we argued at the case management conference, outside the penalty phase.

THE COURT: All right. So -- okay. That part. And then that gives you certain rights that you have with regard to the Court's denial of those motions and where we go. But we still have a trial that we need to do, so.

MS. CALHOUN: A penalty phase trial.

THE COURT: Right. So can we talk about that for just a minute? Ms. Calhoun, do you have what you need now? Do you understand what I'm asking for?

MS. CALHOUN: You need me to prepare an order denying guilt phase relief on grounds three, four, six, and eight of the Defendant's 3.851 motion.

THE COURT: Right. Correct.

MS. CALHOUN: And I need a transcript, which you are ordering --

THE COURT: I am.

MS. CALHOUN: -- from the August 1st hearing and today's hearing. And the court reporter is acknowledging that she understands that.

COURT REPORTER: August 1st.

MS. CALHOUN: August 1st and today. Because three, six, and eight were discussed on August 1st, and ground four was discussed today.

THE COURT: Yeah. Okay. So how about -- now, let me ask you, on the penalty phase --

MS. AHMED: Yes, sir.

THE COURT: Okay. So we're going to go back and we're going to pick a new Jury, and then we're going to start presenting evidence to them on the

penalty phase. Are you going to do that or is somebody else doing that?

MS. AHMED: No, Your Honor. At the case management conference, it did come up and we informed the Court and Ms. Calhoun that we do not do any penalty phase. The Court had appointed someone. I don't -- I'd like to say it was conflict counsel, but I don't remember. And I'm not sure what happened after that because we would not be involved in the new sentencing.

THE COURT: I don't remember.

MS. CALHOUN: Correct. You all only do post conviction.

THE COURT: Ms. Calhoun, do you remember who we appointed?

MS. CALHOUN: I probably -- I would not likely have been present at the case management conference because usually our trial attorneys handle that.

Madam Clerk?

THE COURT: That would have been Mr. Leb?

THE CLERK: Are we looking for the attorneys that were here on August 1st?

THE COURT: Yeah.

THE CLERK: Calhoun versus Singleton, is what I have on the court action form.

MS. CALHOUN: No. That would have -- no. Case management conference. Because I would not have been present at the case management conference for the sentencing.

MS. AHMED: Ms. Singleton and I did the opening, I remember that.

THE CLERK: And then the Court action form from 2/2 just says it was Ms. Bort. I don't know if that's accurate.

MS. CALHOUN: It doesn't say anybody for the State?

THE CLERK: Yes. Calhoun.

MS. AHMED: I was there. So it was me and Ms. Singleton. And it was I and Ms. Singleton who did the argument at the case management conference.

MS. CALHOUN: Oh, you mean post-conviction case management.

MS. AHMED: Yes, ma'am. I'm sorry.

THE COURT: Right.

MS. AHMED: When we decided what to have hearings on.

THE COURT: Okay. Well, I'll let you all look at your calendars and figure out who was here and who wasn't and whatnot. But here's what I want to do, Ms. Calhoun, is, it seems to me that we're done

now with the post conviction side of this.

MS. CALHOUN: Correct.

THE COURT: We now need to turn our attention to the retrial of the penalty phase.

MS. CALHOUN: That's correct.

THE COURT: So I'd like to at least start with, like, a status conference there so we can go over calendars, we can figure out do you need -- what do you need? Do you just need a trial date? Do you need a -- you know, is there discovery we need to do? Is there -- what do we need to do in that regard? And part of that process is the State has to go back and look at their case and decide how they want to proceed.

MS. CALHOUN: That is correct.

THE COURT: Right. I mean, they may decide, for whatever reason, we're not going to proceed with the death penalty and we'll do something else.

MS. CALHOUN: That's correct.

THE COURT: And that happens as well. So I want to give everybody the opportunity to start that process and come to their own conclusions before we have our next conference.

MS. AHMED: If I may speak on that, Your Honor, I believe -- I don't remember the

prosecutor. Someone did send me a notice of seeking death and I did respond to them, telling them that the Court had appointed somebody for the new penalty phase. And, I'm sorry, I don't remember. It's been a while.

MS. CALHOUN: Okay. Yeah, because originally it was Ryan's case. It might still be Ryan's case.

MS. AHMED: I mean, I did inform the prosecutor that we would not do any penalty phase, and that the Court had appointed somebody.

MS. CALHOUN: Right.

MS. AHMED: So he was going to -- he or she was going to check.

MS. CALHOUN: Well, I mean, I'm in the same building as the homicide unit. So, I mean, I can commit them to a date for a status conference and they can contact your JA and tell you -- I mean, either -- they can work it out amongst themselves, since we're back up to full staff in our homicide unit. So one of them can show up or I can just -- when I get back to my office, because I'm in the same building as them, I can just have them call Susan.

THE COURT: Okay. That would be great. If you could let us know who's involved, that would

help. I'm looking -- I'm pulling up notes and I'm pulling up hearing sheets and every note and every hearing sheet I have -- as you know, I start every hearing by having counsel make their appearance --

MS. CALHOUN: Sure.

THE COURT: -- and I have Calhoun for everything.

MS. CALHOUN: Right. Yeah. I will --

THE COURT: Good or bad, you're in there.

MS. CALHOUN: I understand, for better or for worse, I did my part. I have achieved my objective. I will now be gracefully bowing out as soon as I get you your proposed order, after I run it by counsel for CCRC, who will also be then gracefully bowing out and doing their appeal thing.

MS. PERINETTI: And I think the only -- we will see you again, Your Honor. You're not completely rid of us. Once we -- with all due respect, once we appeal your order, there will be a brief status conference regarding the preparation of the record on appeal.

MS. CALHOUN: That's true.

MS. PERINETTI: So there will be an order from the Florida Supreme Court ordering Your Honor to set that as a status conference.

MS. CALHOUN: And I will be appearing at that, for the --

THE COURT: Can we schedule that now or do we have to wait --

MS. PERINETTI: Yeah. I think we'll have to wait. Once we file the notice of appeal, we have -- we'll have 30 days from the rendition of the order. And then the Florida Supreme Court will send Your Honor an order, ordering you to schedule a notice -- or to schedule a status. So I think it would be premature at this point.

MS. CALHOUN: Right. Because I have to get the transcripts from Moe to prepare the order. Then you have to render the order. Then they have to file their notice. And that's -- the filing of their notice is what's going to trigger the scheduling of the status conference.

THE COURT: Okay. Let me ask one final question.

MS. CALHOUN: Sure.

THE COURT: And, I mean, we're on the record, and everything we do is on the record, but I'm not sure that this rises to that level. But I'm rotating out of this Division effective June 4th, I think is when -- and I'm moving to a different

Division that encompasses both criminal and civil in Flagler.

And I've been trying to make our rulings and move this case forward to the point that we can ultimately have the trial that we've known now, for a while, we're going to actually have.

Is there anything that requires that I try that case versus the next Judge in this Division? Because if there is, I'm not aware of that.

MS. PERINETTI: Not from the Defense standpoint, Your Honor.

THE COURT: Okay.

MS. CALHOUN: Huh-hu.

THE COURT: Okay. Very good.

MS. CALHOUN: No.

THE COURT: All right. Well, again, I want to thank you for your hard work in the case. This may be my last participation in the case, even though you may have one more hearing in that regard. And so, again, I say thank you for that. And drive safe.

(Proceedings concluded at 10:12 a.m.)

REPORTER'S COURT CERTIFICATE

STATE OF FLORIDA)
COUNTY OF VOLUSIA)

I, MAUREEN M. ELROD, RPR, certify that I was authorized to and did stenographically report the foregoing proceedings, and that the transcript is a true record of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, or attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 23rd day of APRIL 2018, at Volusia County, Florida.



MAUREEN M. ELROD, RPR

ORIGINAL

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO.: 2009-002872 CFAWS

STATE OF FLORIDA,

vs.

JOSEPH EDWARD JORDAN,

Defendant.

* *

CASE MANAGEMENT CONFERENCE BEFORE THE HONORABLE TERENCE R. PERKINS, CIRCUIT COURT JUDGE

TRANSCRIPT OF PROCEEDINGS

DATE TAKEN: AUGUST 1, 2017

TIME: COMMENCED 3:10 P.M.
CONCLUDED 4:00 P.M.

PLACE: S. JAMES FOXMAN JUSTICE CENTER
251 N. RIDGEWOOD AVENUE
DAYTONA BEACH, FLORIDA

REPORTED BY: PAMELA S. UNDERWOOD, RPR
COURT REPORTER AND NOTARY PUBLIC

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P R O C E E D I N G S

THE COURT: Good afternoon. Let's start with -- let me make sure we're on the record. I think we are. Yep.

State of Florida versus Joseph Edward Jordan. Counsel all come forward. Okay. This is case 2009-002872.

Counsel makes their appearance on the record. We're going to start first with the state.

MS. SINGLETON: Vivian Singleton with the Attorney General's Office.

MS. CALHOUN: Rosemary Calhoun, C-a-l-h-o-u-n, for the State Attorney's Office.

THE COURT: Okay. And defense?

MS. AHMED: Good afternoon, Your Honor. Raheela Ahmed on behalf of Mr. Jordan, CCRC Middle.

MS. BORT: Lisa Bort from CCRC Middle on behalf of Mr. Jordan.

THE COURT: Can you spell your last name for me.

MS. BORT: B-o-r-t.

THE COURT: All right. Very good.

We're here for a case management conference, right?

MS. AHMED: Yes, Your Honor.

THE COURT: All right. Somebody bring their calendars with them, schedule?

MS. SINGLETON: Yes, Your Honor.

MS. AHMED: Yes, Your Honor.

THE COURT: All right. My schedule is your schedule, so -- or your schedule is my schedule.

So we need to kind of set up a schedule going forward. We've done our status conferences, I think. I don't believe we need any more of those.

MS. AHMED: Perhaps, Your Honor, there's -- I did speak to the state earlier about it. Mr. Jordan does have a right to be at a evidentiary hearing should the court grant one, and he has relayed to us that he does not wish to be present and waive his presence at the evidentiary hearing. Now, I can do a formal motion for the Court. I didn't know if the Court wanted for us to do a notarized affidavit with a waiver or if the Court would want him on the phone from Department of Corrections to --

THE COURT: If you get me a notarized affidavit, then I will certainly allow him to waive his appearance.

MS. AHMED: Certainly, Your Honor.

THE COURT: But if we're going to do it, in

light of the circumstances, I think we have to make sure that we follow both the letter and the spirit, so I want to make sure we get that covered.

MS. AHMED: I will, Your Honor. We will see him in a couple weeks, so we'll have that motion for the Court.

THE COURT: Okay. That will be fine.

Okay. Well, let's talk about what we have to do and then we'll talk about what we might want to do thereafter. Okay.

This is a post-Ring, non-unanimous decision, right?

MS. SINGLETON: Yes, sir.

THE COURT: So we know we're going to have to have a new penalty phase. We're all in agreement on that under Hurst, right?

MS. SINGLETON: No, sir, the state does not concede that. The state is prepared to make arguments today regarding Hurst.

THE COURT: Okay. Have you ever won that argument?

MS. SINGLETON: In this circumstance in which it is --

THE COURT: Post --

MS. SINGLETON: -- post-Ring, non-unanimous,

no, I have not, but we still have to make the argument. We can't concede it.

THE COURT: Okay.

MS. SINGLETON: I'll be brief.

THE COURT: No, no, that's fine. I want you to do your best work, honestly I do, but I just thought that every court that's addressed it, including our Supreme Court, has, basically, said that we have to have a new penalty phase, and under all circumstances where it's post-Ring, non-unanimous it's not a -- it's not anything that we can, basically, get around and call harmless in any fashion. That was my understanding of the case law from other hearings of this nature. I certainly would be willing to hear from you in that regard. So we'll have that argument.

What else do we want to do today?

MS. AHMED: Your Honor, certainly, based on the Court's ruling, that may render a number of four claims that are related to penalty phase in our motion. We would have left four guilt claims.

The state has agreed to an evidentiary hearing on claim six, which is on page -- they've agreed on -- so claim six the state has agreed they have no objection to an evidentiary hearing.

MS. SINGLETON: Your Honor, I'm sorry, I believe that was claim four, which we conceded.

MS. AHMED: Oh, I apologize, claim four. Ms. Singleton's correct, I apologize. I misread my notes. It is claim four, Trial Counsel Provided Prejudicial Ineffective Assistance Under Strickland by Failing to Object to the Prosecutor's Improper Closing Arguments.

THE COURT: All right. Hold on one second. So if I'm looking at your motion, I am looking at page 27, trial counsel was not ineffective for failing to object to prosecutor's closing argument. That is the state's response, correct?

MS. SINGLETON: Yes, Your Honor.

THE COURT: Claim four.

MS. SINGLETON: Yes sir, which is -- we're not objecting to an evidentiary hearing being held on that claim. We still argue that he was not ineffective, we're just conceding that this claim should go to an evidentiary hearing. We're not conceding anything else.

THE COURT: Okay. So that's claim four.

MS. AHMED: Correct. And so that would leave us with an argument as to whether or not to have an evidentiary hearing as to claims three, six and

eight.

MS. SINGLETON: Also claim five, we didn't concede anything with claim five.

MS. AHMED: Claim five in -- in candor, in claim five we asked for a new penalty phase. So based on the Court's ruling at the end of the day, that may be rendered moot.

THE COURT: Right.

MS. AHMED: So that would be claim one, two, five and seven are all pure penalty phase claims.

THE COURT: Four we've agreed on an evidentiary hearing.

MS. AHMED: Correct.

THE COURT: And then three, six and eight you're asking for an evidentiary hearing, but the state's not conceding those points.

MS. AHMED: That's correct, Judge.

THE COURT: All right. And I understand that we have argument on the post-Ring, non-unanimous decision that we need to address, and the penalty phase portion necessary by Hurst.

Okay. So the extent to which we're going to have an evidentiary hearing on claim four, are you prepared to do that today?

MS. SINGLETON: No, sir.

THE COURT: Okay.

MS. SINGLETON: No, sir.

THE COURT: Okay. Are you prepared to make argument on three, six and eight as to whether we get an evidentiary hearing today?

MS. SINGLETON: Yes, sir.

THE COURT: Okay. So what we'll do is we'll have the first argument first and then we'll move to three, six and eight to see if we get an evidentiary hearing and then go from there. All right.

Okay. All right. I know what the argument is for the defense.

MS. AHMED: Yes, Your Honor.

THE COURT: On the new penalty phase.

MS. AHMED: Okay. And that would go to claim one. As the Court knows, the precedents has been set. At the time of the motion we had only Hurst versus Florida and then after that Hurst v. State and then Mosley v. State and almost 40 to 50 --

THE COURT: What Ms. Singleton is going to argue is that it was harmless in this case.

MS. AHMED: That is the state's burden.

THE COURT: She's going to argue that it was harmless --

MS. AHMED: That's correct.

THE COURT: -- and that as a result we don't have to have a new penalty phase.

MS. AHMED: And so --

THE COURT: And I'm not -- you're going to say it much more articulately, and I'm going to give you that opportunity. But my question for you, Ms. Ahmed, is there a case that says that it can't be harmless under these circumstances?

MS. AHMED: Every non-unanimous post-Ring case that has come out of the Florida Supreme Court, Your Honor, has been granted in the penalty phase. There hasn't been a single exception since --

THE COURT: Okay. That's my understanding, as well.

MS. AHMED: Thank you.

THE COURT: All right. Ms. Singleton, I don't want to say that the pressure's on, but the pressure's on.

MS. SINGLETON: Thank you, Your Honor.

The state's argument is, basically, that any Hurst error was harmless if the jury had been told that unanimity was required, the jury would have found unanimity in regards to the recommendation for the death penalty. The aggravators here were

pretty substantial and some of them would have been automatic. Based upon the defendant's record, they would have automatically found the prior violent felony conviction. They also would have found that the capital offense was committed during the course of a robbery because there was proof of the victim's money being stolen. And they also would have found that HVC was proven based upon the circumstances that the victim was left in, that he was left for three days, bound --

THE COURT: Ms. Singleton, let me ask you this. What findings did they make unanimously that they would have been required to make with regard to aggravators and mitigators? What questions did they answer on the verdict form that would have specifically found the same aggravators or mitigators in a unanimous fashion?

MS. SINGLETON: I cannot recall at this point if one of the charges was robbery. If it was, then they would have found that unanimously because they would have been finding someone guilty -- okay. Since robbery was one of the convictions, they did find that aggravator unanimously, the fact that he committed this capital offense while committing a robbery. So that was found unanimously.

THE COURT: Okay. So we have that he was committing another felony and that is an aggravator under the statute, right?

MS. SINGLETON: Yes, sir.

THE COURT: And so there's at least one aggravator that was already proven unanimously and found unanimously by the jury in this case.

MS. SINGLETON: That is correct.

THE COURT: Okay. How about any others? That's it?

MS. SINGLETON: That's it. There were only three aggravators that were found.

THE COURT: And is that enough?

MS. SINGLETON: It is.

THE COURT: One out of three?

MS. SINGLETON: It is. The court has -- the Florida Supreme Court has said in several cases that one aggravator is enough.

THE COURT: Okay. All right.

MS. SINGLETON: So the state would just argue that he's not entitled to a new penalty phase.

THE COURT: All right. Now, I interrupted you a number of times. Did you get out all your argument?

MS. SINGLETON: I did. I did.

THE COURT: You said it was going to be brief, but that was briefer than I was expecting.

MS. SINGLETON: Well, I don't have any case law to support my argument, but we still have to make that argument.

And in regards to the claim --

THE COURT: Well, you do have case law that says if it's already been determined unanimously by the jury in the guilt phase, you don't have to do it again in the penalty phase, right?

MS. SINGLETON: We have some case law in which the court has noted some aggravators that are found automatically. For instance, in one of the cases, and I cannot remember the name, it might have been the Hall case, it was -- the defendant was convicted of killing a law enforcement officer. They automatically found that -- they found that unanimously, and the court ruled that that would have been found automatically. But that was a case that there was a unanimous death recommendation.

THE COURT: Yeah, that doesn't help us.

MS. SINGLETON: No.

THE COURT: We don't have a unanimous death recommendation.

But isn't there a case authority where they

denied the request for a new penalty phase where the -- at least one aggravator was already found in the guilt phase of the case unanimously by the jury? I mean, it would have to be unanimous to be found.

MS. SINGLETON: I don't have any case in which that was found, unless it was a case in which the jury was giving special interrogatories. That's not the case here. But I don't have any case in which -- that was post-Ring, in which there was not a unanimous decision. And the Florida Supreme Court said that that was not harmless error.

THE COURT: Ms. Calhoun, are you aware of any?

MS. CALHOUN: No, Your Honor, I'm not.

THE COURT: Why wouldn't -- I mean, it doesn't seem to me that the jury would have to be asked the same question twice if they found an aggravator through the existence of a prior -- of a felony conviction, a felony occurring simultaneously with the murder in question. Then they've, in essence, already found that aggravator; have they not?

MS. SINGLETON: They have, and we have argued that, but we just have not been successful.

THE COURT: So they said, well, you got to argue it twice, that is, you got to ask the jury

the same question twice, once in the guilt phase, once in the penalty phase?

MS. SINGLETON: In essence. I mean, they don't phrase it that way. But we don't have any case in which -- not in the Florida Supreme Court, in which they've said that one of the aggravators that is automatic is enough by itself, not when this -- when it is a non-unanimous jury recommendation and it is post screening.

THE COURT: Okay. Thank you.

All right. Ms. Ahmed, what about that? Didn't the jury already determine an aggravator unanimously in this case?

MS. AHMED: Well, Your Honor, in this case, and there are other cases similarly situated as Mr. Jordan's case where the Florida Supreme Court still determined that, you know, the error was not harmless given penalty phase.

One example I can give the Court, and we filed a number of supplemental, is Simmons versus State. In that the jury verdict was eight/four. They had a special verdict form, but the court still did not find that the state had met their burden. In that case they did have prior violent felony and it was committed during the -- the capital felony was

committed during the course of a sexual battery.

You know, also, again, in Williams versus State there was a prior violent felony and the defendant was on felony probation. Those aggravators were found, and also it was committed during a kidnapping.

And, again, Armstrong versus State -- and there's, you know, several cases within that. It's also -- there was a prior violent felony and it was during the commission of a robbery, and the victim in that case was a law enforcement officer.

So in all these situations we have de facto, you know, aggravators. But the problem is the case law's changed since Hurst v. State and you now have to find non-unanimous aggravators, that they have to sufficiently outweigh the mitigators and now you have a 12 recommendation. So that's why the state --

THE COURT: So what you're saying in our case is, although they were found guilty of robbery, Mr. Edwards [verbatim] would have been guilty of robbery. There's no unanimous determination by the jury in Mr. Edwards' case that the aggravators outweighed his mitigators.

MS. AHMED: Mr. Jordan's case?

THE COURT: I mean, Mr. Jordan. I'm sorry.

MS. AHMED: Yeah. I mean, we don't have those findings. This is a purely, Judge, independent finding. There is no jury finding here, so we can not speculate, the state cannot speculate, so that's why it fails, you know, the Hurst error view and he should be granted a penalty phase, especially because there are cases that are similarly situated as his trial was in.

THE COURT: Okay. Unfortunately, I think you're right. So on that basis then, I think we're going to have to have a new penalty phase for Mr. Jordan.

Let's get back to that. Before we get there we know we're going to have to have an evidentiary hearing on claim number four. And the question is do we get an evidentiary hearing on claim three, six and eight?

MS. SINGLETON: Yes, sir.

THE COURT: All right. And I guess, Ms. Ahmed, we should start with you as to why.

MS. AHMED: Sure.

I'll start with claim three, Your Honor. It's titled as Trial Counsel Provided Prejudicial Ineffective Assistance by Failing to Challenge the

State's Timeline at Trial with Regard to the Length of Time the Victim was Bound. Most of our argument is in our motion, but I'm going to highlight just a couple of parts.

The main part of the argument is the discrepancy in how many days the victim, Mr. Cope, was tied and gagged. The state argued throughout closing and -- I'm sorry, opening into closing that it was three days when the evidence did not support, as we laid out in our claim, that it was not three days. At best, you might be looking at two and a half days. The only evidence they have is that Mrs. Cope, Maggie Cope, the victim's former wife, was at the house on the morning on June 25th. So the evidence does not support the three days that the state has asserted. And certainly the prejudice that we're arguing at this point is that it sort of prolongs this -- sort of the state's argument about the torture and the circumstances surrounding the victim being gagged.

Certainly in these cases, as the Florida Supreme Court has said, they prefer to have evidentiary hearing. We would put on trial counsel Smith and Nielsen to establish that there was no reasonable strategy, that there -- you know, there

was no competent attorney that noticed that the three days was the wrong time was not supported by the evidence and that it was prejudicial to the client because, in effect, without them challenging it, they failed to be an advocate and, in effect, strengthened the state's case with the state's portrayal of the torture of this victim on 343, which the evidence would support instead of, you know, two and a half days. We have half a day that was missing based on the evidence that was presented at trial.

So we'd ask the Court to grant us an evidentiary hearing so we can put on the attorneys to testify as to whether or not, you know, the strategy was there, whether or not they knew about the discrepancy, whether they were aware of it, and, therefore, to argue to the Court that it would be deficient for their failure to be aware of it and show prejudice.

THE COURT: All right. Ms. Singleton, you may respond to that, or Ms. Calhoun.

MS. SINGLETON: I will, Your Honor.

THE COURT: All right.

MS. SINGLETON: Your Honor, this claim does not need to go to a evidentiary hearing because the

claim is meritless.

The victim's ex-wife, Ms. Cope, testified that the truck was not at home on the morning of June 25th, and the defendant admitted to the police that he took the victim's truck, so we can infer that it had been stolen by the time the victim's ex-wife went by the home, which was June 25th. Mr. Cope was found by the defendant's friends on June 28th, and that is three days, so the record supports the testimony that the victim was bound for three days.

So deficiency isn't proven here. And under Strickland, if deficiency isn't proven, you don't have to go to the prejudice prong. But if you do choose to go to it, the defense hasn't shown how this prejudiced Mr. Jordan. Whether it's 2.5 days, which is what they reference in their motion, or three days, it doesn't negate his guilt. The jury still heard the testimony that Mr. Jordan tied Mr. Cope up, left him tied to the bed for several days --

THE COURT: Is there any medical evidence or testimony that would have established had it been two and a half days instead of three days or two days versus three days, or whatever, it would have

made a difference?

MS. SINGLETON: There was testimony from I believe it might have been the ME that talked about the fact that he was -- that the victim was tied up for several days. I've referenced that in my brief. I don't recall anything in which he specified 2.5 days or three days. Regardless, he still was at the state of, basically, dying. His body was dying by the time he was taken to the hospital. So the defense hasn't proven deficiency nor prejudice.

So there's no point in taking this claim to an evidentiary hearing because it would be meritless. And there's no testimony from either of the counsel as to whether they knew it was supposedly 2.5 days or three days, it still would not have mattered in regards to the guilt.

And I won't go into the penalty phase because you've already decided that he's entitled to a new penalty phase.

So the state just asks the Court to summarily deny this claim.

THE COURT: All right. Any response, Ms. Ahmed --

MS. AHMED: No.

THE COURT: -- that you haven't already covered?

MS. AHMED: I've covered everything and also covered in detail in our claim that was written.

THE COURT: Okay. Can we go to claim six?

MS. AHMED: Certainly, Your Honor.

Claim six begins on page 41 of our motion and page 40 of the state's response. It's titled Trial Counsel Provided Prejudicial Ineffective Assistance of Counsel by Presenting a Bare Bones and/or Deficient Judgment Of Acquittal Argument During Guilt Phase.

Again, this is also written in detail in our claim, but I will highlight that one of the main cases that are cited in our case is Stephens v. State, 787 So2d 747. Just so the court knows, it's different from the Stevens case that the state cites, too. But it's the importance of -- the purpose of a judgment of acquittal is to test the legal sufficiency of --

THE COURT: Ms. Ahmed, let me interrupt you for just a minute. I'm familiar with your argument and the case law that you cited. I guess what I'm uncertain of is what would you attempt to prove in an evidentiary hearing as opposed to raising the

issue as you've done in the motion and handling it as a matter of law?

MS. AHMED: Certainly, Your Honor. Let me go to that part. The purpose of the evidentiary hearing would be, again, to put on both trial counsel, Nielsen and/or Smith, to determine whether or not they were aware of the case law I cited, as the court says, in our claim, all the case law regarding felony murder, so with the break in time and, you know, why is it that --

THE COURT: But isn't the issue whether or not their arguments were legally deficient? Let's assume they testified, oh, we knew all the law, but they still didn't follow the correct standard, does it matter? Or if they said the opposite, which was we didn't know any of the law, but they did follow the correct, does it matter that they didn't know even though they happened to get it right? Why would that be an issue for us?

MS. AHMED: It would be an issue for us because trial counsel does not know the case law regarding the judgment of acquittal and felony murder, particularly in this case where there is a break. And as you look in the jury instruction, they talk about, you know, the killing, that

Mr. Jordan's the one who committed the actual killing and it was committed during the commission of a robbery, that that's the attorney's job, Your Honor, to make these arguments with case law with specific facts to show to the Court that, you know, there's not enough to substantiate the felony murder, the intire felony murder charge, that, you know, it's not a felony murder because the case law supported it. If trial counsel doesn't know the law, doesn't do the research on the law, that's deficient.

THE COURT: Let me make it easy for me. Let's assume that the law is when you're making a JOA you've got to stand on your left foot, okay, that's the law, you got to -- okay. And so we're going to call them in and we're going to stay, were you standing on your left foot? But let's say that, you know, that they were standing on their left foot when they made their argument even though they didn't know that was the law, who cares as long as they were standing on their left foot, right? Isn't that the same analysis here?

MS. AHMED: I submit to the Court, I don't believe so, because in this case they didn't make an appropriate judgment of acquittal, they --

THE COURT: But I guess what I'm trying to find out is I get your argument if they didn't make an appropriate motion as a matter of law, you should be entitled to some relief in that regard, whether it's all the relief you want or not, that's a different question, but you should be entitled to relief. Why does their knowledge concern us? Whether they knew it or not, that's what the standard is, right?

MS. AHMED: I'm sorry, I might be confused by the Court's question, but what I -- I mean, it is our position that what they -- the judgment of acquittal they gave at trial, that was bare bones and not in accordance with what the judgment of acquittal should be under the case law.

THE COURT: Right. As a matter of law. They were supposed to say X, Y and Z, they didn't --

MS. AHMED: Correct.

THE COURT: -- it's deficient, right, I get that. Who cares why?

MS. AHMED: I understand the Court's position, that the Court wants to look at this as a legal argument.

THE COURT: Right. I understand why the state may say why it's a big deal, because we think it

was tactical or strategic, or whatever, I get that part, but that's not your argument.

MS. AHMED: Your Honor, this case, you know, sort of -- because it is our burden and we are the ones that put on the trial attorneys, and that's why in these situations we do ask for the evidentiary to show that they had no strategic reasons, there was no conflict, they had no reasonable reason, it was just a failure for them to put on the case law, putting on, you know, an appropriate and constitutional judgment of acquittal. So that was our position and that's why we should put on the trial attorneys. It is our burden and that's why I think we put on -- we do put on the trial counsel in that situation.

THE COURT: Okay.

MS. AHMED: But certainly, you know, yes, I do understand it's a very legal-based argument and -- but that is why, because it is our burden, we do put on the trial attorneys in that situation.

THE COURT: Okay. Ms. Singleton?

MS. SINGLETON: Yes, sir. There is no need for an evidentiary hearing in part because the record disputes the defense's argument. The trial counsel did argue a JOA that did include

specificity. They referenced the differences in the dates in which the -- in which the robbery occurred and the victim's death, they argued that the death did not occur during the taking of the property, they also set forth the necessary grounds to which relief could be granted, and trial counsel also argued that the trial court should reduce the first-degree murder charge to third-degree murder. So they did -- they did not make a bare-bones JOA argument, which is the argument of the defense.

In addition, the defendant's argument in regards to case law not being used is conclusory, they have not specified how the case law would have made a difference, and that's significant, particularly considering the fact that the Florida Supreme Court found that there was sufficient evidence to support the conviction in direct appeal. So as a result, Mr. Jordan cannot show how he was prejudiced by what the defense says trial counsel did not do.

So the state asks that the Court summarily deny this claim without an evidentiary hearing being held. We don't see how it would be useful in determining this claim.

THE COURT: Okay. And, finally, number eight.

MS. AHMED: Number eight, Your Honor, you might have the same sort of scenario for these.

Claim eight is entitled Trial Counsel Provided Prejudicial Ineffective Assistance of Counsel by Failing to Remove or Exclude or Object to the Admission of the Victim's Actual Hair on the Duct Tape into Evidence.

Again, Your Honor, we were asking for an evidentiary hearing here to put on trial counsel, similar because it is our burden to show that, you know, they failed -- that they had no reasonable strategy and they failed to object to the actual hair, the victim's -- you know, part of the victim to be sent back with the jury.

THE COURT: So you'd be seeking to put on the testimony of trial counsel to show that their failure to object was not tactical or strategic?

MS. AHMED: Correct. That would be our burden and that's why we would put on trial counsel for that limited purpose. It is clear that, you know, a piece of the victim did go back into the jury room.

I know the state cited to the Henderson case, 463 So2d 196 in their response. Henderson dealt more so with use of photographs, not an actual

piece of the victim.

There were other photographs of duct tapes that were introduced during the trial. This was -- you know, there was no relevance to this hair -- the victim's hair being on the duct tape being introduced to the jury and being sent back to the jury room. There was no relevance. The only thing it did would be to prejudice the jury and inflame the jury by sending a piece of the victim back with them. This is not a simple photograph, this is, you know, a piece of the victim. So that is a highly prejudice piece of evidence to go back to the jury room, especially in a case where there's really no similar argument as to the victim being duct taped. I mean, there are plenty of photographs of duct tapes, and I don't think there was any argument that the victim had not been duct taped. And so the only purpose for the state to send this piece of evidence back there was to inflame the jury.

So an evidentiary that we'd ask for is, again, as it is our burden, to put on trial counsel to show that there was no --

THE COURT: And, again, just so I understand what you're saying is that, A, trial counsel should

object -- should have objected to the piece of duct tape that had the hair on it and that going -- A, being received into evidence, and, B, going back to the jury, right?

MS. AHMED: That's correct, Your Honor.

THE COURT: What would be the basis for that?

MS. AHMED: It would be relevance, Your Honor. Their objection should have been relevance. There was no reason for that.

THE COURT: Isn't that hair from the victim?

MS. AHMED: Yes, but --

THE COURT: Wasn't there the presence of residue from the victim on the duct tape adhesive?

MS. AHMED: There was no -- but in this case there was no, you know -- nothing -- there's no contention as to the victim being duct taped in this case, so -- and there were several photographs of duct tape presented throughout the trial. This was actually, you know, the victim's -- you know, a piece of the victim went back to the jury, not a photograph of this duct tape and hair, not testimony that, you know, the victim's DNA was found on the duct tape, it's the actual --

THE COURT: So you're saying they could have sent -- they could have taken a picture of this

piece of duct tape, introduced it into evidence and sent it back to the jury?

MS. AHMED: Should they have the admissibility requirements and relevance requirements, yes. But in this case it wasn't relevant. The only purpose it served was to send a piece of the victim back to the jury, into the jury room, and that's -- I mean, it's just inflammatory, Your Honor, and highly prejudicial to Mr. Jordan during trial.

THE COURT: But -- okay. Weren't they attempting to tie in the use of the duct tape on this victim?

MS. AHMED: There was -- there was plenty of evidence, Your Honor, that he was duct taped. There's no -- I mean, there's no qualms about the fact that the victim, Mr. Cope, was duct taped in this case when he was found by the witnesses -- I'm sorry, I believe medics and the fire department came in first and then law enforcement. But there was no contention about that. So this, at the end of the day, served no relevance besides just, you know, sort of another piece just to sort of inflame the jury. And that's our argument, Your Honor, it's not just a photograph, it's not testimony, it's the victim. So that's why -- and, again, it's

our burden so we'd ask for an evidentiary hearing, but if the Court doesn't wish to grant us that evidentiary hearing, we certainly rely on our arguments, Your Honor.

THE COURT: Okay. And your argument is that it was irrelevant, that's the basis of the objection?

MS. AHMED: Correct.

THE COURT: Okay. All right. Ms. Singleton?

MS. SINGLETON: Your Honor, in regards to claim eight, the duct tape was relevant, particularly considering the fact that the medical technicians had to remove several layers of duct tape from Mr. -- from the victim's head in order to allow him to breathe, so it was definitely relevant, and it was not more prejudicial than probative. There's no reason for the duct tape to not have been allowed to be presented to the jury. They did see photographs of it, but they did actually need to see what was binding the victim. And a criminal defendant should expect the things that he used -- uses to commit a crime to be used against him at trial.

THE COURT: What's in the record that would suggest that the trial court would have sustained

such an objection?

MS. SINGLETON: I haven't seen anything in the record that supports --

THE COURT: Is there a presumption that they would have for our purposes?

MS. SINGLETON: -- Your Honor, but I haven't seen anything specifically --

THE COURT: I'm sorry, I missed it, what did you say?

MS. SINGLETON: I haven't seen anything --

THE COURT: Before that. Did you say yes or no?

MS. SINGLETON: Yes, sir.

THE COURT: Is there a presumption?

MS. SINGLETON: Yes, sir.

THE COURT: So the presumption is had they made this objection, the trial court would have sustained it?

MS. SINGLETON: No. The trial court would have overruled it.

THE COURT: Okay. Right. That's what I thought --

MS. SINGLETON: They would have overruled it because it was definitely relevant. It was used to bind the victim and he couldn't breathe because of

it, the binding. So it was definitely relevant and it should have been admitted. So there was no reason for trial counsel to object because it would have been a meritless objection.

There's no basis for having an evidentiary hearing on this issue, so the state asks that claim four be summarily denied. Claim eight. I'm sorry.

THE COURT: Okay. All right. Ms. Ahmed, brief response.

MS. AHMED: Just briefly. I don't believe there's case law that indicates there's a presumption that the judge would overrule an objection like that.

THE COURT: Who's got the burden on that?

MS. AHMED: The burden is still on us and --

THE COURT: Okay. So what do you have to sustain that burden?

MS. AHMED: That -- Your Honor, that based on the case law that we've cited, the rule of evidence regarding relevance and our arguments in our motion that this would have been granted, that the objection would have been sustained and that this piece of evidence would not have come into evidence before the jury. So we put all those arguments into our motion and our claim.

Specifically, I mean, the rule of evidence, you know, it wasn't relevant as we would argue to this Court, and should -- and the Court would have -- if those objections were properly made, it is our position the court would have sustained the objection and not allowed that -- the victim's hair and the duct tape to come into evidence before the jury. I mean, it was not used for DNA purposes, it had no relevance with regard to --

THE COURT: How did they know it was the victim's hair?

MS. AHMED: They -- I believe there was medical testimony, if I remember right, that it was the victim's hair. And, like I said, Your Honor, there was no contention that the victim was duct taped and that duct tape came from the victim, it's just, you know, there were photographs of it, there was no contention, this was just -- it had no relevance. It didn't need to come in besides simply to inflame the jury.

THE COURT: Wasn't the duct tape really the weapon that was used that caused the injuries that eventually led to a slow death?

MS. AHMED: The -- and forgive me if I get this wrong, but based on the medical examiner

testimony, I believe it was -- when Mr. Cope had come off the bed, the rope that was tied around his arm had cut off circulation. And I'm not a medical person, so I'm going to say this sort of in laymen's way. So that ended up leading to amputation of his arm, and I believe it was a -- he suffered a number of strokes during that period from the shock, so that was what eventually had led to his death, because he had gone into a coma and eventually they did not resuscitate him and that's how Mr. Cope passed away.

THE COURT: Okay. All right. Thank you.

All right. Let's deal with what we have.

We have claim four needs an evidentiary hearing. I've heard arguments of counsel, and having reviewed the defense's original motion entitled Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rules of Criminal Procedure 3.851, and the response filed by the state titled State's Response to Defendant's Motion to Vacate Judgment of Conviction and Sentence of Death, the Court rules as follows.

With regard to the penalty phase, I'm going to grant the defense's motion for a new penalty phase. I understand the argument from counsel for the

state, but in our circumstances, based on Hurst and Ring, and what the jury found, but didn't have an opportunity to find in our case, I think that, reluctantly, we do need another penalty phase.

With regard to claim number four raised by the defense, I do believe they're entitled to an evidentiary hearing on that, and I'll grant their request. I'll defer ruling until we hear the evidence and legal arguments at that time.

With regard to claims three, six and eight, I've listened carefully to those arguments again today, but having reviewed them also in the motions, I find that there is no basis to conduct an evidentiary hearing.

Moreover, with regard to the argument in claim three, I find that there was no deficiency, no ineffectiveness of counsel, nor any prejudice that can be shown in this case by the defense.

With regard to number six, similarly I find no deficiency with performance of counsel, and find further that the judgment of acquittal was appropriately and specifically argued, both factually and legally, as a matter of law. The fact that they were not effective in that regard has more to do with the strength of the case being

presented than it does with any deficiency of counsel.

With regard to argument in claim eight, again the Court finds that there was no deficiency by counsel. I mean, for the life of me, I do not see how that would not be admissible evidence in the case. I think it would have been pointless for defense counsel to make argument with regard to that at trial through objections, so I do not find any deficiency in their performance in that regard. I think they were appropriately effective, as defense counsel and trial counsel in that regard. But, more importantly, no prejudice can be demonstrated because I think that that evidence was appropriately and properly admitted, appropriately considered by the jury in supporting their verdict in the case, and I could see where an argument could be made it was some of the most important of the evidence that was received in the case.

On that basis then, I'll deny the request on claims three, six and eight, preserving claim four with regard to factual and legal arguments for another hearing.

All right. Now, let's talk about timing. We're going to have an evidentiary hearing and then

we're going to have to have a penalty phase, and I suspect we have to do it all in that order, right.

How much time for an evidentiary hearing, do you think? Be all morning, do you think?

MS. AHMED: Just a day, Your Honor.

THE COURT: Okay. Full day or half day?

MS. AHMED: Probably half a day. I mean, half a day. I mean, the rule requires us to have an evidentiary hearing within 150 days. Yeah, I think it's 150 days from today.

THE COURT: Why don't I do this, Ms. Ahmed, I'll rely on you and Ms. Singleton to confer with my JA and find a date and time that works for you and gives you the time that you think you need. It seems to me we should be able to do that in a half a day.

MS. AHMED: I believe so, Your Honor. We've already spoken to Attorney Nielsen, he did give us dates that he had a trial in October that he can do it, but we're waiting to hear from Attorney Smith.

THE COURT: Okay. Just coordinate it however you think it is appropriate and I'll let you pick the date. If it will work for you, I'll try to make it work for me.

What I would suggest to you is maybe, best

practice, pick a Friday morning sometime on a trial week and I'll give you the whole morning. We'll just start at 8:30 and argue and present all the testimony and then arguments from that point.

Okay. Now, we need to do the evidentiary hearing before we do a trial. But I want to get this on the trial docket.

MS. AHMED: Then, Your Honor, we -- obviously, we're postconviction counsel and under the Florida Statute we cannot do the new penalty phase, that would be for new counsel to be appointed and give Mr. Jordan a brand new penalty phase.

THE COURT: Did we not already appoint Office of Regional Conflict Counsel?

MS. SINGLETON: I cannot recall.

THE COURT: I thought we already did. If we didn't, we need to do that.

MS. CALHOUN: But Regional Counsel would not be doing a postconviction evidentiary hearing.

THE COURT: No, I'm talking about the trial -- penalty phase -- the trial, the penalty phase.

MS. CALHOUN: I do not have a record of you doing that and --

MS. AHMED: The Court wouldn't because we didn't decide the penalty claims until today.

MS. CALHOUN: Right. Right. And my index is up to date, so I don't have a record of that.

THE COURT: Okay. Someone want to send me an order. I'll appoint Regional Conflict Counsel to participate in the defense for the penalty phase.

MS. CALHOUN: Well, so they'll be co-counsel, is that how that's going to work?

THE COURT: No.

MS. CALHOUN: They do that?

THE COURT: They'll be primary counsel.

MS. AHMED: They would be counsel for the new penalty phase should the state be seeking the death penalty. We would only do the evidentiary hearing and any appeals of the evidentiary hearing.

THE COURT: Right.

MS. CALHOUN: Right. But my question is can they -- I'm not trying to --

MS. AHMED: I know. I understand.

MS. CALHOUN: Can they -- I'm just asking logistically, are they able to do that until we complete the litigation on the guilt phase claim?

MS. AHMED: Yeah. What we've seen, Your Honor, in all the cases, and certainly the state probably has more cases that I've seen, we've gone through the postconviction phase first before, I

guess, the new penalty phases are done, but --

THE COURT: No, I agree. I think we have to have the evidentiary hearing before the penalty phase.

MS. CALHOUN: Right. But --

THE COURT: No doubt. But what I --

MS. CALHOUN: Right. I'm just asking about the sequence for when you appoint Regional Counsel to start their work. And I understand that they want to be appointed sooner rather than later so they can start working up their mitigation and all of that.

THE COURT: Right. We're probably looking at -- I mean, I don't know what time requirements we have, but we're probably looking out there a year before our penalty phase. We're looking at, what, probably 120 days or so, another four months, before we have the conclusion of the evidentiary hearing on the 3.851. So I'm thinking at least six months after that before everybody's up to speed and running the penalty phase. So I want to dual track it, at least for a little bit, so we can move down, I guess, somewhat parallel courses here. I mean, it would be unfair to throw this in Regional Conflict Counsel's lap and say I'll see you in

three weeks, we're going to -- or three months even, we're going to have to do a new penalty phase and then expect them to get their experts and mitigation and all that together. It's going to take them a long time to do that. So let's appoint them. If they want to sit on their hands for six months, that's okay with me.

MS. CALHOUN: I've never seen that done, but we can certainly give it a try.

MS. AHMED: It doesn't affect us in any way, Your Honor. We'll still continue with the postconviction proceedings in this case.

THE COURT: Yep.

MS. AHMED: And certainly once the Court appoints new counsel, I'm sure they'll focus --

THE COURT: Okay. Are you going to do the order on the new penalty phase?

MS. AHMED: I can do that for Your Honor.

THE COURT: Thank you. Anything else?

MS. AHMED: Oh, just for the record, Your Honor, we already did file our witness and exhibit list in accordance with the rule. It was filed this past Friday and served to the state of Florida. And we did do a motion for judicial notice of the clerk's file in the record of appeal

in this case. I guess the Court has the record of appeal, so we just ask that the Court take judicial notice of the evidentiary hearing of the court's file and record on appeal.

THE COURT: Okay. Yeah, I have most of it. There are some things I don't have, but I have, I would say, 90 percent of the file. I can tell you after December 11th, 2012 I have every pleading that was filed.

MS. AHMED: Thank you, Your Honor.

THE COURT: Before that I have probably 90 percent.

Okay. What else do we need to do?

MS. SINGLETON: The only thing I was going to say, Your Honor, is the Court needs to give the state a deadline for disclosing our witnesses or exhibits. It should be --

THE COURT: How much time do you want?

MS. SINGLETON: It should be 60 days from today.

THE COURT: Okay. Will that work for you, 60 days?

MS. AHMED: Yeah. I think that's what the rule says.

MS. SINGLETON: Yeah.

THE COURT: All right. Then I would suggest you find a date for our hearing maybe 120 days out.

MS. AHMED: Will do, Your Honor. Thank you, Your Honor.

THE COURT: Okay. So that's going to take us probably to November or December, right?

MS. AHMED: That's correct. I think December, end of December.

THE COURT: Okay. All right. Very good I'll look forward to the orders.

Ms. Ahmed, if you run all those orders past Ms. Singleton and Ms. Calhoun. Of course, I suspect you'll share them with Ms. Bort.

All right. Are we done?

MS. AHMED: Oh, yes, Your Honor.

MS. SINGLETON: Yes.

THE COURT: Okay. Thank you.

(The proceedings were concluded at 4:00 p.m.)

REPORTER'S CERTIFICATE

STATE OF FLORIDA)
COUNTY OF VOLUSIA)

I, PAMELA S. UNDERWOOD, RPR, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

Dated this 20th day of April, 2018.

Pamela S. Underwood

PAMELA S. UNDERWOOD, RPR
COURT REPORTER

IN THE CIRCUIT COURT, SEVENTHJUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

2009-002872CFAWS

VS.

CASE NO: 642009CF002872XXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,
DEFENDANT.
_____/

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FINAL ORDER GRANTING CLAIM 1 AND DENYING CLAIMS 2 THROUGH 8 OF DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851 AFTER EVIDENTIARY HEARING ON GROUND 4

This matter came before the Court on August 1, 2017 for a case management conference on the Defendant's initial Motion to Vacate Sentence of Death Pursuant to Florida Rules of Criminal Procedure 3.851, filed December 15, 2016. The Court entered an interim Order on August 22, 2017 setting forth the procedural history of the case and granting the Defendant relief on Claim 1 of his motion, ordering that Mr. Jordan's death sentence be vacated and granting him a new penalty phase proceeding. See August 22, 2017 interim Order, attached hereto as Appendix "A". This Court also heard the arguments of counsel at the August 1, 2017 Case

Management Conference regarding the need for an evidentiary hearing on Claims 2, 3, 5, 6, 7, and 8 of the Defendant's Rule 3.851 motion. This Court heard evidence as to Claim 4 of the Defendant's Rule 3.851 motion in bifurcated proceedings on February 2, 2018 and April 12, 2018. Oral closing arguments from counsel for both parties as to Claim 4 of Mr. Jordan's Rule 3.851 motion was presented to the Court on April 12, 2018. After considering the pleadings, the record on appeal, the case file, the evidence presented at the February 2, 2018 and April 12, 2018 evidentiary hearings, and the arguments of counsel, the Court finds as follows as to the remaining guilt and penalty phase claims in Mr. Jordan's Motion to Vacate Judgments and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851:

CLAIM 2

Mr. Jordan alleged in Claim 2 of his Rule 3.851 motion that he was entitled to have his death sentence vacated and to be granted a new penalty phase based upon the limited basis that *Hurst v. State*, 202 So.3d 40, 59 (Fla. 2016) holds that the Eighth Amendment requires unanimity in a jury recommendation that results in a sentence of death. Mr. Jordan did not request an evidentiary hearing on this claim. Collateral counsel for Mr. Jordan conceded at the August 1, 2017 case management conference that Claim 2 of his Rule 3.851 motion is essentially rendered moot by this Court's grant of relief in Claim 1 of Mr. Jordan's Rule 3.851 motion based upon the United States Supreme Court decision in *Hurst v. Florida*, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), Claim 2 is addressed here solely in the interest of having a complete and final appealable order. As noted in this Court's August 22, 2017 interim Order addressing Claim 1, it is only because Mr. Jordan's case became final after the issuance of the U.S. Supreme Court's opinion

in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) that he is entitled to penalty phase relief. Therefore, Claim 2 is summarily denied as moot.

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Claims 3-8 of Mr. Jordan's Rule 3.851 motion asserted his entitlement to guilt and penalty phase post conviction relief based upon various allegations of ineffective assistance of trial counsel. "Ineffective assistance of counsel claims are evaluated pursuant to ***Strickland*** *v.* ***Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the claimant must demonstrate that his counsel was deficient by identifying particular acts or omissions of his trial counsel that are outside the wide range of reasonably competent performance under prevailing professional standards .... Second, the movant must also allege prejudice by demonstrating a reasonable probability that the result of the proceeding would have been different but for his trial counsel's allegedly deficient performance. .... A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. (citing ***Strickland***, 466 U.S. at 694, 104 S.Ct. 2052)." *Conde v. State*, 35 So.3d 660, 662 (Fla. 2010).

CLAIM 3

In Claim 3 of his Rule 3.851 motion, Mr. Jordan alleged that his former trial counsel, attorneys Michael Nielsen, Esquire and Christopher L. Smith, Esquire, rendered ineffective assistance during the guilt phase of the trial by failing to challenge by objecting or otherwise disputing the State's timeline at trial by which it attempted to establish for the jury the length of

time that the victim, Keith Cope, had been left bound and gagged with rope and tape inside of his home by Mr. Jordan, leading to severe internal and external injuries from which the victim ultimately died. This Court notes that Mr. Nielsen and Mr. Smith are both very experienced criminal defense attorneys and capital litigators. Mr. Jordan did request an evidentiary hearing on Claim 3, which was denied by this Court. Mr. Jordan argues that the State presented insufficient evidence at trial to support their argument that Mr. Jordan had left the victim bound and gagged for three days. As noted above, this Court has reviewed the record in this case including trial transcripts, in addition to hearing the argument of counsel for both parties on Claim 3 of the Defendant's Rule 3.851 motion at the case management conference held on August 1, 2017. The trial record reviewed by this Court reflects that the State presented evidence that the victim's ex-wife, Maggie Cope, testified at trial that she noted the victim's distinctive truck missing from his residence early in the morning of June 25. Additionally, the State presented evidence at trial that Mr. Jordan admitted to Detective Joanne Winston that he took the victim's truck from the Cope residence late on June 24, consistent with Ms. Cope's observation that the truck was missing, and that Mr. Jordan's friends, who also testified at trial, stated that they found Mr. Cope bound with rope and duct tape in obvious distress on June 28 when they returned his stolen truck to his house, three full days after the victim's ex-wife noted his truck to be missing, admittedly taken by Mr. Jordan. This Court finds that there is no basis to conduct an evidentiary hearing on Claim 3 and further finds that Mr. Jordan has failed to establish either deficient attorney performance or actual prejudice as is required to support a finding of ineffective assistance of counsel under *Strickland.*

CLAIM 4

In Claim 4 of his Rule 3.851 motion, Mr. Jordan alleges that his trial counsel was ineffective for failing to object to alleged improper closing arguments by the trial prosecutor. Mr. Jordan requested, and this Court granted, an evidentiary hearing on this claim, taking sworn testimony in a bifurcated proceeding from both of Mr. Jordan's former trial attorneys on February 2, 2018 and April 12, 2018. The Court also considered the totality of the evidence presented during the trial as reflected in the Court's own files and records and the closing arguments of collateral counsel during the post conviction evidentiary hearing on April 12, 2018. Both of Mr. Jordan's former trial attorneys testified regarding the four specific instances of alleged improper closing argument asserted in Mr. Jordan's Rule 3.851 motion. This Court found that there was no reasonable probability that Mr. Jordan suffered actual prejudice as a result of his defense trial counsel's stated strategy regarding building credibility with the jury for an anticipated penalty phase proceeding by being wise and cautious in their use of objections. Additionally, this Court finds that of the four closing argument comments by the trial prosecutor that were identified in Claim 4 of the Rule 3.851 motion as improper, trial defense counsel may realistically only have been successful in having an objection to one, the alleged "Golden Rule" argument, sustained. However, this Court credits Mr. Nielsen's many years of trial experience and accepts his strategic assessment that, if he had chosen to object to the "Golden Rule" comment, he would win a ruling that his objection was sustained at the cost of losing something far more valuable in the overall context of the trial, credibility in the eyes of the jury. The Court does not find defense trial counsel's performance to have been deficient in this case as alleged, but even if it were, the evidence of Mr. Jordan's guilt presented at trial was so overwhelming that there was no

reasonable probability of a different outcome. Based on the foregoing, all sub-claims and issues of ineffective assistance of trial counsel presented in Claim 4 are denied.

CLAIM 5

In Claim 5 of his Rule 3.851 motion, Mr. Jordan alleges that his trial counsel's failure to move pre-trial to exclude a letter in from his jail records in which he referred to his case as the "hog-tie" murder prejudiced him during the original penalty phase proceeding in this case. Because this Court has vacated Mr. Jordan's death sentence and granted him a new penalty phase proceeding by granting relief on Claim 1 of his Rule 3.851 motion, collateral counsel conceded during the August 1, 2017 case management conference that Claim 5 of the Defendant's Rule 3.851 motion is moot. This Court agrees and therefore includes its summary denial of Claim 5 in this Order on that basis solely for purposes of rendering a complete and appealable final Order.

CLAIM 6

In Claim 6 of Mr. Jordan's Rule 3.851 motion, he alleged that his trial counsel rendered ineffective assistance by presenting a deficient "bare bones" motion for judgment of acquittal during the guilt phase proceeding. After hearing the factual and legal arguments of counsel for both parties at the August 1, 2017 Case Management Conference herein, this Court determined that the motion for judgment of acquittal presented by Mr. Jordan's trial counsel in this case was both factually and legally sufficient, i.e., that defense trial counsel's performance was not

deficient. This Court also determined that Mr. Jordan could not establish the actual prejudice prong of his *Strickland* ineffective assistance claim because his trial counsel's lack of success in getting his motion for judgment of acquittal granted in this case was attributable to the quantity and quality of the evidence presented by the State at trial establishing Mr. Jordan's guilt of the crimes charged, rather than any deficiency in defense trial counsel's performance. Accordingly, Claim 6 of the Defendant's Rule 3.851 motion is denied.

CLAIM 7

In Claim 7 of his Rule 3.851 motion, Mr. Jordan alleges that his trial counsel rendered ineffective assistance during the original penalty phase proceeding in this case by failing to move in limine to exclude two statutory aggravators - that the murder was committed while defendant was engaged in the perpetration of a robbery and was committed for committed for pecuniary gain. As discussed at the August 1, 2017 Case Management Conference, because Mr. Jordan has been granted a new penalty phase proceeding based on his *Hurst* claim in Claim 1, his ineffective assistance claim regarding his original trial counsel's handling of the aggravators in the first penalty phase proceeding is moot. The Court agrees and includes its summary denial of this claim in this Order solely for purposes of rendering a complete and appealable final Order.

CLAIM 8

In Claim 8 of the Defendant's Rule 3.851 motion, Mr. Jordan alleges that his trial counsel rendered ineffective assistance by failing to object or move to exclude trace evidence of the victim's hair that was found on duct tape that was used to bind and gag the victim, or the duct tape itself, from Mr. Jordan's first guilt phase jury trial on relevance grounds. Mr. Jordan requested an evidentiary hearing on this claim, which this Court denied. This Court reviewed the trial court record and heard arguments from counsel for both parties at the August 1, 2017 Case Management Conference on the defense claim that sending this physical evidence of the duct tape evidence containing the victim's hair itself, in addition to photographs of the duct tape used to bind, gag, and partially suffocate the victim, unduly inflamed and unfairly prejudiced the jury against Mr. Jordan. During the August 1, 2017 Case Management Conference, this Court ruled that the physical duct tape evidence, including the trace hair evidence was relevant and properly admitted at trial; accordingly Mr. Jordan cannot establish either the deficient attorney performance or actual prejudice prongs of his *Strickland* ineffective assistance of counsel allegation in Claim 8 and relief is summarily denied. It is therefore

ORDERED AND ADJUDGED that relief is GRANTED as to Claim 1 of the Defendant's Motion to Vacate Judgments of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 as previously stated in this Court's August 22, 2017 interim Order. Claim 4 of Mr. Jordan's Rule 3.851 motion is denied after a bifurcated evidentiary hearing held on February 2, 2018 and April 12, 2018. All other claims in the Defendant's Rule 3.851 motion (Claims 2, 3, 5, 6, 7, and 8) are summarily denied for the reasons stated at the August 1, 2017 Case Management Conference and discussed above.

The Defendant is hereby advised that he has thirty (30) days from the date that this Order is rendered in which to file a notice of appeal.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida this 4 day of May, ~~2016.~~ 2018.

TERENCE R. PERKINS
CIRCUIT COURT JUDGE

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Raheela Ahmed, Maria C. Perinetti, and Lisa Marie Bort, Assistant CCRC, Office of CCRC-Middle Region at ahmed@ccmr.state.fl.us; perinetti@ccmr.state.fl.us; bort@ccmr@state.fl.us; and support@ccmr.state.fl.us

APPENDIX A

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
SUPREME COURT NO.: SC13-2091
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

ORDER GRANTING CLAIM 1 OF DEFENDANT'S MOTION TO VACATE SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

This matter came before this Court on August 1, 2017, for a case management conference on Defendant's Successive Motion to Vacate Death Sentence pursuant to Florida Rule of Criminal Procedure 3.851, filed on December 15, 2016. The State filed a Response to Defendant's Successive Motion to Vacate Sentence filed on May 9, 2017. The Defendant also filed a number of Notices of Supplemental Authority. After considering these pleadings, the records on appeal, the case files, and hearing arguments of counsel at the case management conference, the Court finds as follows as to Claim 1:

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& CTY. COURT VOLUSIA CTY, FL
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Procedural History

The Defendant was indicted on August 26, 2009, for one count of First Degree Felony Murder in violation of Fla. Stat. § 782.04(1)(a)2 and one count of Robbery with a Firearm and/or Deadly Weapon in violation of Fla. Stat. § 812.13(2)(a) and § 775.087(1) and (2). The voir dire was conducted from April 15-16, 2013. The guilt phase was conducted from April 17-19, 2013. The Defendant was found guilty on all counts. The penalty phase was conducted from April 23-24, 2013. On April 24, 2013, the jury recommended a sentence of death by a 10-2 vote. The trial

court conducted a *Spencer*[1] hearing on August 12, 2013. On September 23, 2013, the Court entered a judgment and sentence imposing death on the felony murder count and life imprisonment on the count of Robbery with a Firearm and/or Deadly Weapon, with the sentences to run concurrently. The Florida Supreme Court's opinion affirming Mr. Jordan's judgment and sentences was rendered on October 8, 2015. *See Jordan v. State*, 176 So. 3d 920 (Fla. 2015). Mr. Jordan did not petition the United States Supreme Court for a writ of certiorari. Therefore, the judgment and sentence became final on January 6, 2016, when the time for filing a petition for writ of certiorari with the Supreme Court of the United States expired. *See* Fla. R. Crim. P. 3.851(d)(1).

CLAIM 1

The Defendant filed his Successive Motion to Vacate Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 in light of the change in Florida law following the decision in *Hurst v. Florida*, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016); *Hurst v. State*, 202 So. 3d 40 (2016); and *Perry v. State*, 210 So. 3d 630 (2016). After the filing of his Successive Motion, the Defendant filed a number of Notices of Supplemental Authorities including the Supreme Court of Florida's decision in *Mosley v. State*, 209 So. 3d 1248 (2016).

This Court finds that the Defendant's case was final after *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), therefore, he is entitled to the retroactive application of *Hurst*. *See Mosley*, 209 So. 3d at 1274-83. This Court now turns to the question of whether the *Hurst* error constituted harmless error and looks to the precedent set by the Supreme Court of Florida in several cases. In every opinion involving cases where *Hurst* was retroactively applicable and the jury did not return a unanimous recommendation of death, the Supreme Court

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

of Florida has held that the *Hurst* error was not harmless. *See Guzman v. State*, 214 So. 3d 625 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 7-5); *see Abdool v. State*, --- So. 3d ---, 2017 WL 1282105 (Fla. April 6, 2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Newberry v. State*, 214 So. 3d 562 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 8-4); *see Heyne v. State*, 214 So. 3d 640 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Robards v. State*, 214 So. 3d 568 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 7-5); *see McMillian v. State*, 214 So. 3d 1274 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Brookins v. State*, --- So. 3d ---, 2017 WL 1409664 (Fla. April 20, 2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Banks v. State*, 219 So. 3d 19 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Altersberger v. State*, 216 So. 3d 621 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 9-3); *see Hampton v. State*, 219 So. 3d 760 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 9-3); *see Card v. State*, 219 So. 3d 47 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 11-1); *see Pasha v. State*, --- So. 3d ---, 2017 WL 1954975 (Fla. May 11, 2017) (*Hurst* error not harmless where the jury vote was 11-1 for each murder); *see Serrano v. State*, --- So. 3d ---, 2017 WL 1954980 (Fla. May 11, 2017) (*Hurst* error not harmless where the jury vote was 9-3); *see Snelgrove v. State*, 217 So. 3d 992 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 8-4 for each murder); *see Davis v. State*, 217 So. 3d 1006 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 8-4 and 10-2); *see Hernandez v. Jones*, 217 So. 3d 1032 (mem) (Fla. 2017) (*Hurst* error not harmless where the jury vote was non-unanimous); *see Caylor v. State*, 218 So. 3d 416 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 8-4); *see Hertz v. State*, 218 So .3d 428 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Okafor v. State*, --- So.3d ---, 2017 WL

2481266 (Fla. June 8, 2017) (Fla. 2017) (*Hurst* error not harmless where the jury vote was 11-1); *see Bevel v. State*, --- So.3d ---, 2017 WL 2590702 (Fla. June 15, 2017) (Fla. 2017) (*Hurst* error not harmless where the jury vote for one count was 8-4); *see Hall v. State*, 219 So. 3d 783 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 8-4); *see Braddy v. State*, 219 So. 3d 803 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 11-1); *see White v. State*, 214 So. 3d 541 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 8-4); *see Bradley v. State*, 214 So. 3d 648 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Orme v. State*, 214 So. 3d 1269 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 11-1); *see Jackson v. State*, 213 So. 3d 754 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 11-1); *see Deviney v. State*, 213 So. 3d 794 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 8-4); *see Baker v. State*, 214 So. 3d 530 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 9-3); *see Hodges v. State*, 213 So. 3d 863 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Smith v. State*, 213 So. 3d 722 (Fla. 2017) (*Hurst* error not harmless with four murder convictions, two life recommendations, 10-2, and 9-3); *see Ault v. State*, 213 So. 3d 670 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 9-3); *see Anderson v. State*, --- So. 3d. ---, 2017 WL 930924 (Fla. March 9, 2017) (*Hurst* error not harmless where the jury vote was 8-4); *see Dubose v. State*, 210 So. 3d 641 (Fla. 2017) (*Hurst* error not harmless where the just vote was 8-4); *see Durousseau v. State*, 218 So. 3d 405 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Hojan v. State*, 212 So. 3d 982 (Fla. 2017) (*Hurst* error not harmless in a case with 9-3 votes for both murder convictions); *see McGirth v. State*, 209 So. 3d 1146 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 11-1); *see Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (*Hurst* error not harmless in a case with 7-5 votes for each of the five murder convictions); *see Kopsho v. State*, 209 So. 3d 568 (Fla.

2017) (*Hurst* error not harmless where the jury vote was 10-2); *see Armstrong v. State*, 211 So. 3d 864 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 9-3); *see Williams v. State*, 209 So. 3d 543 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 9-3, and where the jury completed a special verdict form indicating unanimous votes for four aggravating circumstances); *see Franklin v. State*, 209 So. 3d 1241 (Fla. 2016) (*Hurst* error not harmless where the jury vote was 9-3); *see Simmons v. State*, 207 So. 3d 860 (Fla. 2016) (*Hurst* error not harmless where the jury vote was 8-4, and where the jury completed a special verdict form indicating unanimous votes for three aggravating circumstances); *see Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (*Hurst* error not harmless in a case with 11-1 votes for each of the three murder convictions); *see Mosley*, 209 So. 3d 1248 (*Hurst* error not harmless where the jury vote was 8-4). Further, in all the foregoing opinions in post-*Ring* non-unanimous jury recommendation cases, the Supreme Court of Florida remanded the cases for new penalty phases because the State could not meet its burden that the *Hurst* error was harmless beyond a reasonable doubt. *See id.*

Based on the foregoing controlling, precedential authority by the Supreme Court of Florida, this Court finds that the *Hurst* rulings apply to the Defendant because his death sentence became final after *Ring*. Furthermore, given that the jury recommendation was not unanimous, this Court finds that the State has not met its burden that the *Hurst* error in this case is harmless beyond a reasonable doubt. Therefore, the Defendant is entitled to a new penalty phase.

Based on the foregoing:

1. Claim 1 of the Defendant's Successive Motion to Vacate Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851, is hereby GRANTED.
2. The Defendant's death sentence as to count one is hereby VACATED.

3. The Defendant's request for a new penalty phase is hereby GRANTED.

4. The Clerk of the Court shall promptly serve a copy of this Order upon all parties, including an appropriate certificate of service.

DONE AND ORDERED in chambers at Daytona Beach, Volusia County, Florida, this 22 day of Aug., 2017.

TERENCE R. PERKINS
CIRCUIT JUDGE

Conformed copies to:

Vivian Singleton,
Assistant Attorney General,
Office of the Attorney General,
Vivian.singleton@myfloridalegal.com; and
CapApp@myfloridalegal.com

Rosemary Calhoun,
Assistant State Attorney,
Office of the State Attorney,
CalhounR@sao7.org; and
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Raheela Ahmed, Maria Christine Perinetti, and Lisa Marie Bort,
Assistant CCRC,
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bort@ccmr.state.fl.us; and
support@ccmr.state.fl.us

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. **CASE NO.: 642009CF002872XXXAWS**
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

NOTICE OF APPEAL

NOTICE IS GIVEN that Joseph Edward Jordan, defendant in the above-captioned case by and through undersigned counsel, appeals to the Supreme Court of Florida, the final order rendered by this Court on May 4, 2018. The nature of the order that Mr. Jordan is appealing is titled, "Final Order granting Claim 1 and denying Claims 2 through 8 of Defendant's Motion to Vacate Judgments of Convictions and Sentence of Death pursuant to Florida Rule of Criminal Procedure 3.851 after Evidentiary Hearing on Ground 4." Specifically, Mr. Jordan appeals this Court's denial of an evidentiary hearing and relief as to Claims 3, 6, and 8, and this Court's denial of relief as to Claim 4 after an evidentiary hearing. All parties to said cause are hereby notified of the entry of this appeal.

Respectfully submitted
/s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
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/s/Maria Christine Perinetti
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this 1st day of June, 2018.

I HEREBY CERTIFY that a copy of the foregoing was served through the Florida Court E-filing Portal to the **Honorable Terrence R. Perkins (J.A. Susan Miller)**, Chief Judge; Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach, Florida 32114; to **Leslie T. Campbell**, Assistant Attorney General, Office of the Attorney General, at Leslie.Campbell@myfloridalegal.com and at CapApp@myfloridalegal.com and to **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, at CalhounR@sao7.org on this 1st day of June, 2018.

I HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 1st day of June, 2018.

/s/ Raheela Ahmed
Raheela Ahmed
Assistant CCRC
Florida Bar Number 0713457
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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

JOSEPH EDWARD JORDAN,
Appellant,

v.

Supreme Court of Florida Case No: SC18-899
Lower Tribunal No: 642009CF002872XXXAWS

STATE OF FLORIDA,
Appellee.
_____/

APPEAL DESIGNATION TO THE COURT REPORTER
AND ACKNOWLEDGMENT OF THE COURT REPORTER

I. APPEAL DESIGNATION TO THE COURT REPORTER

The Appellant, Joseph Edward Jordan, files this Designation to the Court Reporter and directs **Volusia Reporting Company & Videoconferencing Center**, 432 South Beach Street, Daytona Beach, Florida 32114, to transcribe all the hearings conducted during the post-conviction proceedings in this case for the purpose of this appeal before the Supreme Court of Florida. The following hearings will need to be transcribed and provided to the Clerk of the Courts:

(1) Hearing held on **February 12, 2016,** before the Honorable Terrence R. Perkin, Chief Circuit Court Judge, Seventh Judicial Circuit (stenographically reported by Blythe Riggs, RPR Court Reporter and Notary Public).
(2) Hearing held on **May 12, 2016,** before the Honorable Terrence R. Perkin, Chief Circuit Court Judge, Seventh Judicial Circuit.
(3) Hearing held on **September 13, 2016,** before the Honorable Terrence R. Perkin, Chief Circuit Court Judge, Seventh Judicial Circuit.
(4) Hearing held on **October 26, 2016,** before the Honorable Terrence R. Perkin, Chief Circuit Court Judge, Seventh Judicial Circuit.
(5) Hearing held on **January 23, 2017,** before the Honorable Terrence R. Perkin, Chief Circuit Court Judge, Seventh Judicial Circuit.
(6) Hearing held on **April 27, 2017,** before the Honorable Terrence R. Perkin, Chief Circuit Court Judge, Seventh Judicial Circuit.
(7) Hearing (Case Management Conference) held on **August 1, 2017,** before the Honorable Terrence R. Perkin, Chief Circuit Court Judge, Seventh Judicial Circuit.

(8) Hearing (Evidentiary) held on **February 2, 2018,** before the Honorable Terrence R. Perkin, Chief Circuit Court Judge, Seventh Judicial Circuit.

(9) Hearing (Evidentiary) held on **April 12, 2018,** before the Honorable Terrence R. Perkin, Chief Circuit Court Judge, Seventh Judicial Circuit.

(10) Hearing (pending a date) on the status of the record on appeal to be scheduled¸ before the Honorable Dennis Craig, Circuit Court Judge, Seventh Judicial Circuit

The **Volusia Reporting Company** is hereby directed to file the originals with the Clerk of the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida, and in accordance with the directions of the Supreme Court of Florida dated Friday, June 8, 2018.

Undersigned counsel certifies that financial arrangements have been made with **Volusia Reporting Company** for the preparation of the transcripts.

Respectfully submitted

/s/ Raheela Ahmed
Raheela Ahmed
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/s/Maria Christine Perinetti
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/s/ Lisa Marie Bort
Lisa Marie Bort
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Attorneys for JOSEPH EDWARD JORDAN

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

JOSEPH EDWARD JORDAN,
Appellant,

v.

Supreme Court of Florida Case No: SC18-899
Lower Tribunal No: 642009CF002872XXXAWS

STATE OF FLORIDA,
Appellee.
_____/

II. ACKNOWLEDGMENT OF THE COURT REPORTER

1. The Appeal Designation to the Court Reporter in *Joseph Edward Jordan v. State of Florida* was received on this _____ day of _____ of the year 20____.

2. Satisfactory arrangements have [ ] have not [ ] been made for payment of the transcript costs. These financial arrangements were completed on this _____ day of _____ of the year 20____.

3. Number of hearing days to be transcribed: _____ days.

4. Estimated number of pages: _____ pages.

5. I acknowledge receipt of this document and understand that I must prepare the record within the time limits prescribed by the Supreme Court of Florida in accordance with their directions dated Friday, June 8, 2018.

6. Completion and filing of this acknowledgment by the court reporter constitutes submission to the jurisdiction of the Court for all purposes in connection with these appellate proceedings.

7. The undersigned court reporter certifies that the foregoing is true and correct and that a copy has been furnished by mail [ ] hand delivery [ ] on this _____ day of _____ of the year 20____, to each of the parties or their counsel.

DATE: _____

_____
Signature – Official Court Reporter

_____
Printed Signature

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the PDF copy of the foregoing document has been transmitted to this Court through the Florida Courts E-Filing Portal on this 19th day of June, 2018.

I HEREBY CERTIFY that a copy of the foregoing has been through the Florida Courts E-Filing Portal to **Patrick Bobek**, Assistant Attorney General, Office of the Attorney General, and **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, on this 19th day of June, 2018.

I HEREBY CERTIFY, that a copy of the foregoing has been furnished to **Volusia Reporting Company**, 432 South Beach Street, Daytona Beach, Florida 32114 at Appeals@VolusiaReporting.com on this 19th day of June, 2018.

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the **Honorable Dennis Craig**, Circuit Judge, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach, Florida 32114, on this 19th day of June, 2018.

I HEREBY CERTIFY that a copy of the foregoing was mailed to **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 19th day of June, 2018.

Respectfully submitted,

/s/Raheela Ahmed
Raheela Ahmed
Assistant CCRC
Florida Bar Number 0713457
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO.: 2009-002872-CFAWS
DIVISION: 41

STATE OF FLORIDA,

vs.

JOSEPH EDWARD JORDAN,

Defendant.
_____/

ORDER SETTING STATUS CONFERENCE

TO: Rosemary Calhoun, Office of the State Attorney, via email calhounr@sao7.org; bislandc@sao7.org
Leslie T. Campbell, Assistant Attorney General, via email Leslie.Campbell@myfloridalegal.com and CapApp@myfloridalegal.com
Maria C. Perinetti, Asst. CCRC-M, via email perinetti@ccmr.state.fl.us; Lisa Marie Bort, Asst. CCRC, via email bort@ccmr.state.fl.us; Adrienne Joy Shepherd, Asst. CCRC, via email shepherd@ccmr.state.fl.us
Volusia Reporting Company, 432 S. Beach Street, Daytona Beach, FL 32114, via email scheduling@volusiareporting.com
Laura E. Roth, Clerk of Court, via interoffice mail

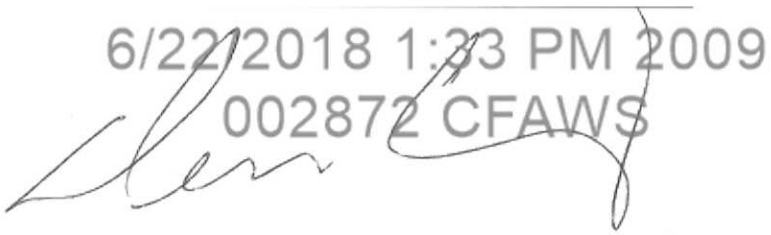
PLEASE TAKE NOTICE that the Court will conduct a Status Conference in this matter on the following date and time before Judge Dennis Craig:

August 2, 2018 at 10:00 a.m.
S. James Foxman Justice Center
Courtroom No. 1
251 N. Ridgewood Avenue
Daytona Beach, FL 32114
(30 Minutes reserved)

PLEASE GOVERN YOURSELVES ACCORDINGLY.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida, this ____ day of June, 2018.

06/22/2018 01:33:57 PM Clerk of the Circuit Court, Volusia County, Florida



e-Signed 6/22/2018 1:33 PM 2009 002872 CFAWS

DENNIS CRAIG
CIRCUIT JUDGE



REQUESTS FOR ACCOMMODATIONS BY PERSONS WITH DISABILITIES **If you are a person with a disability who needs an accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact Court Administration, 125 E. Orange Ave., Ste. 300, Daytona Beach, FL 32114, (386) 257-6096, at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the appearance is less than 7 days; if you are hearing or voice impaired, call 711.**
THESE ARE NOT COURT INFORMATION NUMBERS



SOLICITUD DE ADAPTACIONES PARA PERSONAS CON DISCAPACIDADES
Si usted es una persona con discapacidad que necesita una adaptación para poder participar en este procedimiento, usted tiene el derecho a que se le proporcione cierta asistencia, sin incurrir en gastos. Comuníquese con la Oficina de Administración Judicial (Court Administration), 125 E. Orange Ave., Ste. 300, Daytona Beach, FL 32114, (386) 257-6096, con no menos de 7 días de antelación de su cita de comparecencia ante el juez, o de inmediato al recibir esta notificación si la cita de comparecencia está dentro de un plazo menos de 7 días; si usted tiene una discapacidad del habla o del oído, llame al 711.

ESTOS NUMEROS TELEFONICOS NO SON PARA OBTENER INFORMACION JUDICIAL

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

JOSEPH EDWARD JORDAN,
Appellant,

v.

Supreme Court of Florida Case No: SC18-899
Lower Tribunal No: 642009CF002872XXXAWS

STATE OF FLORIDA,
Appellee.
_____/

AMENDED APPEAL DESIGNATION TO THE COURT REPORTER AND ACKNOWLEDGMENT OF THE COURT REPORTER

I. APPEAL DESIGNATION TO THE COURT REPORTER

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(10) Hearing on the status of the record on appeal to be held on **August 2, 2018,** before the Honorable Dennis Craig, Circuit Court Judge, Seventh Judicial Circuit

The **Volusia Reporting Company** is hereby directed to file the originals with the Clerk of the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida, and in accordance with the directions of the Supreme Court of Florida dated Friday, June 8, 2018.

Undersigned counsel certifies that financial arrangements have been made with **Volusia Reporting Company** for the preparation of the transcripts.

Respectfully submitted

/s/Maria Christine Perinetti
Maria Christine Perinetti
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/s/ Lisa Marie Bort
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Florida Bar Number 119074
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/s/ Adrienne Joy Shepherd
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Attorneys for JOSEPH EDWARD JORDAN

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

JOSEPH EDWARD JORDAN,
Appellant,

v.

Supreme Court of Florida Case No: SC18-899
Lower Tribunal No: 642009CF002872XXXAWS

STATE OF FLORIDA,
Appellee.
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4. Estimated number of pages: _____ pages.

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7. The undersigned court reporter certifies that the foregoing is true and correct and that a copy has been furnished by mail [ ] hand delivery [ ] on this _____ day of _____ of the year 20____, to each of the parties or their counsel.

DATE: _____

_____
Signature – Official Court Reporter

_____
Printed Signature

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the PDF copy of the foregoing document has been transmitted to this Court through the Florida Courts E-Filing Portal on this 27th day of June, 2018.

I HEREBY CERTIFY that a copy of the foregoing has been through the Florida Courts E-Filing Portal to **Patrick Bobek**, Assistant Attorney General, Office of the Attorney General, and **Rosemary Calhoun**, Assistant State Attorney, Office of the State Attorney, on this 27th day of June, 2018.

I HEREBY CERTIFY, that a copy of the foregoing has been furnished to **Volusia Reporting Company**, 432 South Beach Street, Daytona Beach, Florida 32114 at Appeals@VolusiaReporting.com on this 27th day of June, 2018.

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the **Honorable Dennis Craig**, Circuit Judge, Seventh Judicial Circuit Courts, Division 41, 251 North Ridgewood Avenue, Room 284, Daytona Beach, Florida 32114, on this 27th day of June, 2018.

I HEREBY CERTIFY that a copy of the foregoing was mailed to **Joseph Edward Jordan**, DOC# 180632, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 27th day of June, 2018.

Respectfully submitted,

/s/Maria Christine Perinetti
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IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO.: 2009-002872 CFAWS

STATE OF FLORIDA,

vs.

JOSEPH EDWARD JORDAN,

Defendant.

APPEAL

* *

CASE MANAGEMENT CONFERENCE BEFORE THE HONORABLE TERENCE R. PERKINS, CIRCUIT COURT JUDGE

TRANSCRIPT OF PROCEEDINGS

DATE TAKEN: JANUARY 23, 2017

TIME: COMMENCED 1:36 P.M.
CONCLUDED 1:56 P.M.

PLACE: S. JAMES FOXMAN JUSTICE CENTER
251 N. RIDGEWOOD AVENUE
DAYTONA BEACH, FLORIDA

REPORTED BY: PAMELA S. UNDERWOOD, RPR
COURT REPORTER AND NOTARY PUBLIC

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P R O C E E D I N G S

THE COURT: Do we have Mr. Jordan?

MS. CALHOUN: Yes. I'm guessing most of the people are on the phone.

THE COURT: Are they calling in?

MS. CALHOUN: That's my understanding. The hearing notice said that the parties could appear by phone if they so chose.

THE COURT: Sure. I assume they're calling in as opposed to me calling them, or am I supposed to call to join a conference or something?

MS. CALHOUN: Usually that's how it works.

May I approach?

THE COURT: Yeah, sure. Of course. Do you have --

MS. CALHOUN: Usually how it works is that the SUNCOM reservation is conferencing. There is a 1-800 -- or, excuse me, 1-888 number.

THE COURT: Did you get one of those in this case?

MS. CALHOUN: It's on the hearing notice. If you need a copy of the hearing notice --

THE COURT: No. I was just looking at the case.

MS. CALHOUN: Yes. You dial the 888 number

and then you put in the participant pass code to join the conference, and the other parties should already be on the line.

THE COURT: Is there a notice?

MS. CALHOUN: The order says status conference. Looks like it's dated -- I can't tell if that's the 26th or the 28th of October of 2016.

THE COURT: I got that. Does that have the --

MS. CALHOUN: It has the pass code and the toll free number on it.

THE COURT: Okay. Let me look at that. There it is. 888670.

AUTOMATED OPERATOR: Welcome to SUNCOM reservation conferencing. After the tone, please state your name followed by the pound sign.

THE COURT: Terry Perkins.

That's not a good sign.

MS. CALHOUN: No. Usually there would be other persons on there announcing who they are.

(Pause in proceeding.)

THE COURT: Okay. It took ten minutes for your judge to figure out that his pass code was different than yours, but here I am.

MS. PERINETTI: All right. Your Honor, this is Ms. Maria Perinetti from CCRC. I have to admit,

we had the wrong pass code too until five minutes ago, so, apparently, we're on the same wave length today.

THE COURT: Okay. Well, I have no excuse. It's, actually, on my calendar that shows judge pass code in about 25 point font, so -- but here we are.

All right. So --

MS. KIRCHNER: Your Honor, for the record, this is Stacey Kirchner from the Office of the Attorney General on the phone, as well.

THE COURT: Okay. Very good. I was going to ask that we go ahead and go through everybody on the phone and then here in the courtroom on this case. I guess it would probably help if I called the case first.

State of Florida versus Joseph Edward Jordan, Case Number 2009-002872.

Let me starting by having those on the phone identify themselves. And let's start first for the state and then defendant.

MS. KIRCHNER: Good afternoon, Your Honor. This is Stacey Kirchner from the Office of the Attorney General, representing the state.

MS. PERINETTI: Maria Perinetti, and I'm also

here with Raheela Ahmed, but I anticipate I will be doing most of the talking, and we are with CCRC, on behalf of Mr. Jordan.

THE COURT: Okay. Anyone else for the defendant?

MS. PERINETTI: No, Your Honor.

THE COURT: Okay.

MS. CALHOUN: In the courtroom, Rosemary Calhoun, Assistant State Attorney, on behalf of the state.

THE COURT: All right. So I trust everybody's watching the case law here that seems to be changing daily as we go forward.

But we're here for a status conference, I believe; is that right?

MS. PERINETTI: Yes, Your Honor.

THE COURT: All right. So let's start with the state first, Ms. Calhoun, you or Ms. Kirchner. What do we need to address, anything from your perspective?

MS. KIRCHNER: Your Honor, I'm sorry, this is Stacey Kirchner from the Office of the Attorney General. This is a status conference. The CCRC has a notice of supplemental authority on the floor. We are in the process of -- we received

approximately 40 3.851s, either new or successive, that are (indiscernible) --

THE COURT REPORTER: I'm sorry, I can't -- I cannot hear what she's saying.

MS. KIRCHNER: -- but we would stipulate that Mr. Jordan -- I'm sorry?

THE COURT: Hang on just a minute. Is that any better?

THE COURT REPORTER: That's better, yeah. But I missed -- there was a part in there that I didn't hear.

THE COURT: Okay. Hang on just one second then.

All right. Ms. Kirchner?

MS. KIRCHNER: Yes, Your Honor.

THE COURT: Start again, because the court reporter was having a little trouble understanding you. I've moved the microphone and turned up the volume, so I think we can hear you loud and clear. But if you wouldn't mind starting again, please.

MS. KIRCHNER: Sure, no problem. Well, we are here for a status conference, as Your Honor pointed out. We had received approximately 40, either successive or amended, 3.851s, based on the new case law of the stay in Mosely. And, as Your Honor

pointed out, these are continuously coming out every week. We have a little bit of a different argument, or theory, that we have to argue under for these post-conviction motions. We are in the process of answering all of those successive 3.851 motions and also dealing with the ones, as Mr. Jordan, that are into the original 3.851s with those new Hurst and Mosley and stay claims.

There are also currently pending -- the Office of the Attorney General has done motions for a rehearing, a motion for clarification and is seeking cert on Florida's Hurst case. So I assume that there will be new changes coming out, you know, as those are dealt with. But the state would stipulate, of course, that Mr. Jordan is after Ring and would be pre Mosely, but we would be, you know, of course, arguing under Baer and Davis and all of those things.

THE COURT: Okay. So what are you asking for, Ms. Kirchner? Are you asking for an extension of time, or you just want me to know of the conflicts, or what?

MS. KIRCHNER: Well, we're actually not asking for anything at this time, Your Honor. I believe CCRC is the one with the burden of going forward at

this point. And we're just kind of letting the Court know that we're aware that everything is in flux. And each judge is handling the new cases that are in the original 3.851 pipeline a little bit differently. So we're prepared to proceed however the Court wants.

THE COURT: Okay. Ms. Calhoun?

MS. CALHOUN: I believe our response to Mr. Jordan's original 3.851 motion -- and he is in that posture. I believe our response is due sometime in mid February, if I'm not mistaken.

THE COURT: I believe that's true.

MS. CALHOUN: After we file our response, then the Court will be in the posture of scheduling a case management conference.

THE COURT: Right. And I think our case management conference has to be scheduled within 90 days, if I'm not mistaken.

MS. KIRCHNER: That is correct.

MS. CALHOUN: Yes, Your Honor.

THE COURT: That's my understanding. And then at that case management conference is when we really get together and figure out, okay, how much time do we need for the hearing, evidentiary hearing on evidentiary hearing, submission of

briefs, anything else along those lines that the parties may desire.

MS. CALHOUN: Correct.

THE COURT: Are we all on the same page with that?

MS. KIRCHNER: Yes, Your Honor.

MS. PERINETTI: Yes, Your Honor.

THE COURT: Okay. So that's likely to occur, it seemed to me, in doing some rough numbers, probably mid to end of May of this year.

And, then, again, depending on when each side is ready to go and what your schedules look like, that probably means that we'll be doing the actual arguing, conducting the hearing sometime over the summer, maybe as soon as June, as late as whatever you tell me.

Does that schedule seem to work generally with everybody?

MS. PERINETTI: This is Ms. Perinetti from CCRC. I would agree that having the case management conference 90 days after the state files its answer, so roughly May. At that point, the Court would decide if there's any legal claims and set a hearing on the hearings that require an evidentiary hearing. I think it's 150 days --

THE COURT: I think that's true.

MS. PERINETTI: -- under the rule. But I think we would have 150 days to have the hearing.

THE COURT: That's what I think, as well. Now and I understand all of you are involved in multiple cases, so you're going to have conflicts. The last thing I want to do is add to your conflicts, so I would like to work out a schedule that is convenient, I guess, in that respect for everybody. Not that any of this is all that convenient. But at least it doesn't constitute a conflict with all of you. And I guess we'll look at that a little harder when we look at how much time we're going to need for a hearing in May.

All right. What else do we need to do today?

MS. KIRCHNER: I think, Your Honor -- I'm sorry.

MS. PERINETTI: I was just saying, nothing from the defense side, Your Honor.

THE COURT: Okay. Ms. Kirchner or Ms. Calhoun?

MS. KIRCHNER: This is Stacey Kirchner, Your Honor, from the Office of the Attorney General. The only thing left, matter for today, would be to schedule the next status conference.

THE COURT: Okay. All right. And so I'm looking at sometime -- why don't we do this.

Ms. Calhoun, why don't I put the burden on you to contact my judicial assistant. For the status conference, we may need a little more time, so can you schedule us an hour. And let's look at perhaps the -- let me look at my calendar here real quick. The week of May 22nd, somewhere in there.

MS. CALHOUN: Okay. And this is --

MS. PERINETTI: Your Honor, this is Ms. Perinetti. Just to clarify, would that would -- anticipating that the state is going to be filing their answer in mid February, would that be a case management conference, as well as a status hearing?

THE COURT: It would be all of the above.

MS. CALHOUN: Okay. So we're combining a status and a case management in May?

THE COURT: Yeah. And I'm looking at the week of the 22nd, which is a normal hearing week for me. So we'd probably be looking at -- well, whatever's most convenient for all of you.

And just so that we're on the same page, when you say status and a case management, I mean, to the extent that I've already reviewed it and determined that there are legal issues the Court

can resolve, I'll do that in writing. And so I wouldn't announce those at the hearing. I would assume I would do that in advance of the hearing in writing, so you'll know what issues are left. And we would talk about, you know, matters of how many witnesses, how much time, all of that, so that we could appropriately schedule the evidentiary hearing, if necessary, and, of course, argument.

MS. KIRCHNER: And, Your Honor, this is Stacey Kirchner. If we -- the rule just requires that we schedule the status conferences every 90 days until the state files its answer. If Your Honor wants to -- obviously, the state will file their answer timely. So we can just schedule it as a case management conference if Your Honor prefers.

THE COURT: Okay. That's fine with me.

MS. KIRCHNER: Okay.

THE COURT: Ms. Perinetti, any objection to that?

MS. PERINETTI: No, Your Honor. It's the same, I don't think it matters what you call it, as long as it's a case management conference is fine.

THE COURT: Okay. And Ms. Calhoun is going to take the lead in coordinating a date sometime during the week of May 22nd for our case management

or status conference, whatever you want to call it.

MS. CALHOUN: Just so I'm clear, does counsel for the parties wish to appear telephonically or in person? I know traditionally we appear in person for case management conferences. But does anybody need to appear telephonically for that?

MS. PERINETTI: Your Honor, CCRC would be appearing in person, so we would request that hearing -- because we have to travel a few hours, we would request that the hearing be set at 1:30, if possible.

THE COURT: Okay.

MS. KIRCHNER: And the Office of the Attorney General has no objection to that. We'll be appearing in person, as well.

THE COURT: Okay. I'm looking at the calendar. I don't see any big conflicts with that. So however you want to do it is fine with me, as long as it's convenient for everybody. And, you know, I'm not sure there's any big magic that week, so if it turns out the week before, the week after is better for everybody else, that's fine with me, too.

MS. CALHOUN: Yes, sir. Very good.

THE COURT: But I do want an hour, because I

think it may -- it may take a little longer to talk through the issues and things like that.

MS. CALHOUN: Okay. So minimum of one hour?

THE COURT: Yeah. I don't think we'll need any more than that.

MS. CALHOUN: Oh, okay.

THE COURT: Certainly that should be enough.

MS. CALHOUN: Very good.

THE COURT: All right. Anything else?

MS. CALHOUN: Not from the state.

MS. PERINETTI: No, Your Honor. Thank you.

THE COURT: All right. Great. We'll see you all in May.

MS. CALHOUN: Yes, sir.

MS. KIRCHNER: Thank you, Your Honor.

(The proceedings were concluded at 1:56 p.m.)

REPORTER'S CERTIFICATE

STATE OF FLORIDA)
COUNTY OF VOLUSIA)

I, PAMELA S. UNDERWOOD, RPR, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

Dated this 16th day of July, 2018.

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IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO.: 2009-002872-CFAWS

STATE OF FLORIDA,

vs. APPEAL TRANSCRIPT

JOSEPH EDWARD JORDAN,

Defendant.

* *

HEARING BEFORE THE HONORABLE TERENCE R. PERKINS
CIRCUIT COURT JUDGE

TRANSCRIPT OF PROCEEDINGS

* *

DATE TAKEN: FEBRUARY 12, 2016

TIME: COMMENCED AT 9:48 A.M.
CONCLUDED AT 10:12 A.M.

PLACE: 251 NORTH RIDGEWOOD AVENUE
DAYTONA BEACH, FLORIDA

STENOGRAPHICALLY
REPORTED BY: BLYTHE RIGGS, RPR
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P R O C E E D I N G S

THE COURT: All right. We are on the record in the State of Florida versus Joseph Edward Jordan. Case Number 2009-002872. We're here on an order setting status conference set by the court. Let me start by having counsel make their appearances on the record. We start first with State of Florida.

MS. KIRCHER: Stacey Kircher from the Office of the Attorney General on behalf of the State, Your Honor.

MS. CALHOUN: Rosemary Calhoun, Assistant State Attorney.

MS. AHMED: Good morning, Judge. Raheela Ahmed on behalf of Mr. Jordan and Ms. Donna Venable also on behalf of Mr. Jordan and Ms. Maria Perinetti just -- we're all on behalf of Mr. Jordan from CCRC.

THE COURT: Okay. Very good. Thank you. Welcome, Counsel. All right. So I thought it might make some sense for us all to review the file and determine status on this case. We've got kind of a lot going on and I just wanted to kind of make sure we were moving forward towards resolution of all of the issues. So

let me start first with the State. Are you ready to direct or respond to any issues that you see out there?

MS. KIRCHER: Well, Your Honor, we did send the notice of affirmation of death penalty on 11-12 of 2015. The state attorney timely filed their notice of compliance to all the intended agencies on the 12th of November, 2015, and we have had several responses from the agencies. I'm not aware of any outstanding issues at this point. We're pretty early in the process, so I'll leave any impending issues to CCRC counsel to bring up to the court.

THE COURT: Okay.

MS. AHMED: Thank you, Your Honor. As Ms. Kircher indicated, that's correct. They did do the notice, affirmance of death penalty, to looks like 12 agencies and we received a number -- the repository, sorry, has received a number of the records.

THE COURT: It looks like that's document number 464 in the court file and it looks like it was signed by Ms. Calhoun.

MS. AHMED: And at this point, Your Honor, what I can tell you is since it was sent by

mail, the 90 days if it was email service, which it wasn't, would have been February 11th, so I would give them another week for the remaining agencies that still haven't filed or sent up the records to the repository. I can tell the court at this point Fort Lauderdale Police Department is compliant, Edgewater Police Department is compliant, Broward County Sheriff's Office has been compliant, FDLE Crime Labs has been compliant. Obviously, the Office of the State Attorney, as Ms. Kircher indicated, is compliant and Department of Corrections have been compliant.

THE COURT: Been compliant by supplying the requested or necessary records?

MS. AHMED: Correct. And we did -- as the court did an order to the first set of in camera review delivery, there'll be another one coming since I finally heard from the three agencies. And as we get the agencies to send it in, we'll send them as best we can, the orders to the court --

THE COURT: Okay. Well, I was hoping by -- by this point in time and by the date of this hearing really to have two things. One,

is to -- to have some list of those that aren't compliant so that we can discuss, well, what do we do about that. Do you need another order, what do you want to do in that regard. And then the second thing is I do have some records that I think have been sealed and would be, I guess, available. Edgewater Police Department and the Florida Department of Law Enforcement records, I believe I have, that are sealed. Have them here and, I guess, presumably for an in camera inspection?

MS. AHMED: That's correct, Your Honor.

THE COURT: Okay.

MS. AHMED: And once this court issues an order we would get it from the clerk's office once the court determines what can be released to us and what cannot. We have -- obviously ask an opportunity to respond to the court's order if there are certain things that are not disclosed to us.

THE COURT: Okay.

MS. AHMED: And I know obviously for both parties to respond if there's something the court issues not to fully disclose.

MS. KIRCHER: And, Your Honor, on behalf

of the State, Ms. Ahmed did reach out to me. We obviously don't have an objection to the statutory procedure of the repository sending over to Your Honor the exempt records for in camera review. And I am able to provide to the court, as of at least two days ago, the records -- the agencies who have not responded as of yet. If Your Honor would like me to recite those.

THE COURT: Well, let me ask this: All parties agree that we'll give those agencies, what, another week because we are really close to the deadline?

MS. KIRCHER: They still have about another week --

MS. AHMED: Yes.

MS. KIRCHER: -- to comply, Your Honor.

THE COURT: All right. And assuming that they don't and may need some nudging from the court to go ahead and produce, is there any objection to just issuing an order to each of them ask -- giving them whatever time you think is appropriate, 30 days, or whatever to comply?

MS. KIRCHER: No objection from the State, Your Honor.

THE COURT: Anything from you?

MS. AHMED: Perhaps a little sooner, Your Honor. This case --

THE COURT: Two weeks? Twenty days?

MS. AHMED: Yeah. Twenty -- the two weeks would be fine because there is no cert petition that was filed in this court so we're expediting --

THE COURT: Okay. So why don't we do two weeks, Ms. Ahmed, in that regard and then -- so I'll just leave it up to you to confer, let's say, a week from today, so next Friday, identify by mutual agreement those that haven't provided the records and forward to me the appropriate orders. Just label them agreed orders directing a response and, you know, give them another 15 days to respond, but put the actual deadline date in there, if you wouldn't mind, and that will cover that.

Okay. So all I have in front of me now are the two agencies. The records from the two agencies I just identified, FDLE and Edgewater Police Department. I physically have those files right here. Happy to review those. I assume neither of you know the contents. Oh, wait a

minute. What do I have here? FDLE. Autopsy audio/video records. Sixteen CD's, DVD's. And looks like City of Edgewater evidence case files. Is there any contention by either side that the information relating to the autopsy, whether it's audio or video records -- the video may actually -- I haven't looked at them yet, but may actually show portions of the autopsy? Certainly it would show comparisons and results and all of that. Is there any contention that would not be discoverable or relevant in this case?

MS. KIRCHER: Some autopsy photos are exempt from public records, Your Honor. I don't know as to relevancy because I don't know what the claims are at this point. So not knowing what's there yet, I can't make a cogent argument as to that.

MS. AHMED: Your Honor, obviously our position would be that those should be discoverable to the defense. It would go to the terms of -- manner of death. We don't know obviously the claims we have, because it is early on, but we think that we'd be entitled to that since this is a criminal proceeding.

THE COURT: Well, this is a murder case

and this is involving the victim and I guess the reason I'm asking is I don't see why it wouldn't be. And I understand your argument, we don't know all of their arguments and the parameters of those, so it may or may not be directly relevant and admissible, but would it not be discoverable at least at this stage?

MS. KIRCHER: Well --

THE COURT: If you want me to look at 16 audio and video CD's, I'm happy to do that, but I'm just not sure what I'm looking to cull out of there.

MS. KIRCHER: The only problem with that, Your Honor, and, of course, I wouldn't want Your Honor to have to comb through anything unnecessarily, but the way the case law is on that right now, is the things that are discoverable as exempt public records to CCRC in post conviction are only things that are directly relevant to the claims. And so at this point, obviously they don't know what their claims are yet, that's kind of a catch-22 at this point, so -- we actually just filed a motion on this that I believe is in front of the Florida Supreme Court right now as to one

of their claims.

THE COURT: Okay.

MS. KIRCHER: In another case.

THE COURT: In an abundance of caution then, I guess I'll have to get -- I was going to say get a bag of popcorn and a long afternoon and watch 16 video and audio CD's of an autopsy, but I think I actually do need to do that, so I'll leave the popcorn at home and I'll review those. But I just want to put on the record it seems -- I don't see how they wouldn't be relevant under these circumstances, so if I'm missing something, tell me, but I just don't see how they wouldn't be relevant here.

MS. KIRCHER: What we can do as well, Your Honor, and I believe what we had agreed to in another case with a very similar circumstance where I believe it was DOC and the -- or, excuse me, the medical examiner's office and office of the state attorney did not want to release the autopsy photos and the judge in that case had to determine the relevancy before the claims were filed, is we had agreed to release them for discovery purposes, but remain

exempt from public records. And so if we could --

THE COURT: Any objection to that?

MS. AHMED: So long as -- you know, we're not going to release them out of the office. No problem whatsoever.

THE COURT: Okay. Can you send me an order in that regard?

MS. KIRCHER: Yes, Your Honor.

THE COURT: And that will take care of those autopsy -- just so you know, there are 16 CD's and DVD's, audio/video records and autopsy records.

MS. AHMED: And, Your Honor, I'm sorry, and the only caveat would be if we had an expert look at it, but it would be our office expert we hire.

THE COURT: I think that would be permissible. We're not -- but we're keeping them as exempt records at this time. They're being produced to you for discovery purposes, but they're not to be used at this point. I'm not determining that they are admissible at trial or are otherwise public records.

MS. AHMED: I understand.

THE COURT: All right. So I need to look at these. And, I guess, I'm looking at these in a vacuum. Neither of you know what these are going to show or say?

MS. AHMED: We would not know, Your Honor. It's sealed to us.

THE COURT: Okay. Well, why don't we do this. Marva, you got a letter opener down there?

All right. Counsel, wouldn't it be appropriate to allow you to see, perhaps even copy, the Archives Repository, Exempt Document Report so you don't have to -- you know at least what I'm looking at? I mean, these aren't exactly missile codes, but are we breaking any laws here?

MS. KIRCHER: I'm sorry, Your Honor. I'm not sure what you're referring to.

THE COURT: I've got a document that's entitled Archives Repository, Exempt Documents and it is an index of what appears to be exempt documents contained on a CD.

MS. KIRCHER: Oh, okay. That --

THE COURT: And it has a list, but there isn't anything that's confidential or otherwise specific on the list or this index. And if

you're going to be making arguments that you should get it or you shouldn't get it, don't you have to know kind of at least a description of what's there?

MS. KIRCHER: We don't know. If it's what's contained in the sealed exempt --

THE COURT: Yeah.

MS. KIRCHER: -- file we don't have a copy of that at this point.

THE COURT: Okay. So it's not the actual exhibits. Those are here. It's a listing of the exhibits. Would it not aid you in trying to decide whether you need it or are entitled to it or not entitled to it to have this?

MS. KIRCHER: I'm sure it would be something that CCRC would want in discovery and then we would want a copy of that as well, Your Honor.

MS. AHMED: Yes. Because we would also get that list because I believe it's probably inside the sealed envelope. I think what usually happens in these proceedings, Your Honor, is all of that stuff goes to the court and the court does -- sort of looks through the documents in camera and determine -- gives us

an order saying you can have this, you cannot have this and then gives us time to respond because we don't know what are in these records at all.

THE COURT: Okay.

MS. AHMED: Except -- and also gives the agency time to respond, like Edgewater Police Department or whatever the --

THE COURT: I was going to give you this today.

MS. AHMED: That will help us, you know, in terms of --

MS. KIRCHER: And what we can do, Your Honor, is when Your Honor finally, you know, does draft the order as to what is discoverable based on our earlier conversation on discovery versus public records, we can put that the index was discoverable and provided to counsel here in the courtroom.

THE COURT: Great. Chaz, can we get Susan to make -- what do you want, copy each?

MS. KIRCHER: Yes, Your Honor.

THE COURT: Two copies of this. Do you need a separate copy for any reason?

MS. CALHOUN: We can share.

THE COURT: Okay. Two copies.

MS. PERINETTI: Your Honor, if I may, Maria Perinetti with CCRC.

THE COURT: Uh-huh.

MS. PERINETTI: Peter Kenny, an attorney with the conflict office, the regional conflict office is here today. He had no involvement in Mr. Jordan's case, but the conflict office was noticed today and I just wanted to let the court know that he's here so if we don't need him, he can be released.

MR. KENNY: Well, I'm happy to stay around if you need me, but I know nothing about the case.

THE COURT: So you want me to put on the record that we don't need Mr. Kenny, is that what you want?

MS. PERINETTI: No, not at all, Your Honor --

THE COURT: That's a slippery slope. I don't know. Yes. Thank you, Mr. Kenny for coming.

MR. KENNY: Okay. Thank you.

THE COURT: Okay. Having looked through the FDLE records, there are two groups of

records. One group I've reviewed and I'll make subject to a separate order the determination of discoverability. And frankly they're -- the records I'm looking at here are going to be discoverable. But within that list are several copies of pleadings filed in the underlying case, in the 09-02872 case, which is, I guess, our case, but these are pleadings that are filed back in April. Most of them are in that time period. So they're pleadings filed in our case. At this point in time I can't imagine that there's any need to produce, either for discovery or other purposes, these documents. I mean, despite the fact that they're in a sealed envelope, these are clearly public records being contained completely within our case file, which is a public record. So unless -- unless you want me to either articulate on the record which motions they are or make specific findings with regard to each, I do find that they are simply copies of motions that were previously filed in this case, have already been obviously made known and produced to each side. They're filed in the court file. Are not public records of any

kind. But also I'm not going to make them subject to discovery since you already have them and I don't want to add to any burdens that you have in that regard, okay, but I have looked at them.

All right. Now I've also made the determination about FDLE records that I have. Do you want me to put those on the record or -- so that you can prepare an order?

MS. KIRCHER: It's Your Honor's purview. Generally it is in a written order, but either way would suffice.

THE COURT: Okay. All right. So typically do -- do you want me to do the order or do you do it?

MS. AHMED: We usually have the court do the written order, Your Honor, in case there's an appellate issue.

THE COURT: Okay. Got it.

MS. AHMED: Sorry to make more work, but --

THE COURT: Okay. That's fine. I'm fine with that. I do most of my orders, but I didn't -- I didn't mean any disrespect by not allowing you to do it if that's something you

typically do.

All right. Anything else we need to do today?

MS. KIRCHER: Your Honor, I think the final matter is just an administrative one. Generally these status conference hearings are set for about 15 minutes for your court's -- for Your Honor's calendaring purposes and since CCRC is in Tampa, we generally do those by phone. And my office can set those up. If your JA wants to do them, we can do conference call, whatever's easier. So generally we ask for a standing order to appear telephonically at the status conferences because we do have those every 90 days.

THE COURT: Any objection?

MS. AHMED: Absolutely not. She read my mind, Your Honor.

THE COURT: All right. Send it to me. Do we have a new one scheduled?

MS. KIRCHER: That would be the next issue.

THE COURT: Schedule it with my JA, please.

MS. KIRCHER: Okay. Within 90 days we'll -- I've got my handy-dandy wheel so we'll

find out what that is.

THE COURT: That's perfect. All right. What else?

MS. KIRCHER: Nothing from the State.

THE COURT: That's it?

MS. AHMED: Nothing further from the defense as well, Your Honor.

THE COURT: All right. Thank you all. Thanks for coming all the way over.

(Proceeding concluded at 10:12 a.m.)

REPORTER'S CERTIFICATE

STATE OF FLORIDA)
COUNTY OF VOLUSIA)

I, BLYTHE RIGGS, RPR, certify that I was authorized to and did stenographically report the foregoing proceedings; and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

Dated this 16th day of July, 2018.

s/Blythe Riggs_____
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IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO.: 2009-002872 CFAWS

STATE OF FLORIDA,

vs.

JOSEPH EDWARD JORDAN,

Defendant.

APPEAL

* *

CASE MANAGEMENT CONFERENCE BEFORE THE HONORABLE TERENCE R. PERKINS, CIRCUIT COURT JUDGE

TRANSCRIPT OF PROCEEDINGS

DATE TAKEN: AUGUST 1, 2017

TIME: COMMENCED 3:10 P.M.
CONCLUDED 4:00 P.M.

PLACE: S. JAMES FOXMAN JUSTICE CENTER
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DAYTONA BEACH, FLORIDA

REPORTED BY: PAMELA S. UNDERWOOD, RPR
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P R O C E E D I N G S

THE COURT: Good afternoon. Let's start with -- let me make sure we're on the record. I think we are. Yep.

State of Florida versus Joseph Edward Jordan. Counsel all come forward. Okay. This is case 2009-002872.

Counsel makes their appearance on the record. We're going to start first with the state.

MS. SINGLETON: Vivian Singleton with the Attorney General's Office.

MS. CALHOUN: Rosemary Calhoun, C-a-l-h-o-u-n, for the State Attorney's Office.

THE COURT: Okay. And defense?

MS. AHMED: Good afternoon, Your Honor. Raheela Ahmed on behalf of Mr. Jordan, CCRC Middle.

MS. BORT: Lisa Bort from CCRC Middle on behalf of Mr. Jordan.

THE COURT: Can you spell your last name for me.

MS. BORT: B-o-r-t.

THE COURT: All right. Very good.

We're here for a case management conference, right?

MS. AHMED: Yes, Your Honor.

THE COURT: All right. Somebody bring their calendars with them, schedule?

MS. SINGLETON: Yes, Your Honor.

MS. AHMED: Yes, Your Honor.

THE COURT: All right. My schedule is your schedule, so -- or your schedule is my schedule.

So we need to kind of set up a schedule going forward. We've done our status conferences, I think. I don't believe we need any more of those.

MS. AHMED: Perhaps, Your Honor, there's -- I did speak to the state earlier about it. Mr. Jordan does have a right to be at a evidentiary hearing should the court grant one, and he has relayed to us that he does not wish to be present and waive his presence at the evidentiary hearing. Now, I can do a formal motion for the Court. I didn't know if the Court wanted for us to do a notarized affidavit with a waiver or if the Court would want him on the phone from Department of Corrections to --

THE COURT: If you get me a notarized affidavit, then I will certainly allow him to waive his appearance.

MS. AHMED: Certainly, Your Honor.

THE COURT: But if we're going to do it, in

light of the circumstances, I think we have to make sure that we follow both the letter and the spirit, so I want to make sure we get that covered.

MS. AHMED: I will, Your Honor. We will see him in a couple weeks, so we'll have that motion for the Court.

THE COURT: Okay. That will be fine.

Okay. Well, let's talk about what we have to do and then we'll talk about what we might want to do thereafter. Okay.

This is a post-Ring, non-unanimous decision, right?

MS. SINGLETON: Yes, sir.

THE COURT: So we know we're going to have to have a new penalty phase. We're all in agreement on that under Hurst, right?

MS. SINGLETON: No, sir, the state does not concede that. The state is prepared to make arguments today regarding Hurst.

THE COURT: Okay. Have you ever won that argument?

MS. SINGLETON: In this circumstance in which it is --

THE COURT: Post --

MS. SINGLETON: -- post-Ring, non-unanimous,

no, I have not, but we still have to make the argument. We can't concede it.

THE COURT: Okay.

MS. SINGLETON: I'll be brief.

THE COURT: No, no, that's fine. I want you to do your best work, honestly I do, but I just thought that every court that's addressed it, including our Supreme Court, has, basically, said that we have to have a new penalty phase, and under all circumstances where it's post-Ring, non-unanimous it's not a -- it's not anything that we can, basically, get around and call harmless in any fashion. That was my understanding of the case law from other hearings of this nature. I certainly would be willing to hear from you in that regard. So we'll have that argument.

What else do we want to do today?

MS. AHMED: Your Honor, certainly, based on the Court's ruling, that may render a number of four claims that are related to penalty phase in our motion. We would have left four guilt claims.

The state has agreed to an evidentiary hearing on claim six, which is on page -- they've agreed on -- so claim six the state has agreed they have no objection to an evidentiary hearing.

MS. SINGLETON: Your Honor, I'm sorry, I believe that was claim four, which we conceded.

MS. AHMED: Oh, I apologize, claim four. Ms. Singleton's correct, I apologize. I misread my notes. It is claim four, Trial Counsel Provided Prejudicial Ineffective Assistance Under Strickland by Failing to Object to the Prosecutor's Improper Closing Arguments.

THE COURT: All right. Hold on one second. So if I'm looking at your motion, I am looking at page 27, trial counsel was not ineffective for failing to object to prosecutor's closing argument. That is the state's response, correct?

MS. SINGLETON: Yes, Your Honor.

THE COURT: Claim four.

MS. SINGLETON: Yes sir, which is -- we're not objecting to an evidentiary hearing being held on that claim. We still argue that he was not ineffective, we're just conceding that this claim should go to an evidentiary hearing. We're not conceding anything else.

THE COURT: Okay. So that's claim four.

MS. AHMED: Correct. And so that would leave us with an argument as to whether or not to have an evidentiary hearing as to claims three, six and

eight.

MS. SINGLETON: Also claim five, we didn't concede anything with claim five.

MS. AHMED: Claim five in -- in candor, in claim five we asked for a new penalty phase. So based on the Court's ruling at the end of the day, that may be rendered moot.

THE COURT: Right.

MS. AHMED: So that would be claim one, two, five and seven are all pure penalty phase claims.

THE COURT: Four we've agreed on an evidentiary hearing.

MS. AHMED: Correct.

THE COURT: And then three, six and eight you're asking for an evidentiary hearing, but the state's not conceding those points.

MS. AHMED: That's correct, Judge.

THE COURT: All right. And I understand that we have argument on the post-Ring, non-unanimous decision that we need to address, and the penalty phase portion necessary by Hurst.

Okay. So the extent to which we're going to have an evidentiary hearing on claim four, are you prepared to do that today?

MS. SINGLETON: No, sir.

THE COURT: Okay.

MS. SINGLETON: No, sir.

THE COURT: Okay. Are you prepared to make argument on three, six and eight as to whether we get an evidentiary hearing today?

MS. SINGLETON: Yes, sir.

THE COURT: Okay. So what we'll do is we'll have the first argument first and then we'll move to three, six and eight to see if we get an evidentiary hearing and then go from there. All right.

Okay. All right. I know what the argument is for the defense.

MS. AHMED: Yes, Your Honor.

THE COURT: On the new penalty phase.

MS. AHMED: Okay. And that would go to claim one. As the Court knows, the precedents has been set. At the time of the motion we had only Hurst versus Florida and then after that Hurst v. State and then Mosley v. State and almost 40 to 50 --

THE COURT: What Ms. Singleton is going to argue is that it was harmless in this case.

MS. AHMED: That is the state's burden.

THE COURT: She's going to argue that it was harmless --

MS. AHMED: That's correct.

THE COURT: -- and that as a result we don't have to have a new penalty phase.

MS. AHMED: And so --

THE COURT: And I'm not -- you're going to say it much more articulately, and I'm going to give you that opportunity. But my question for you, Ms. Ahmed, is there a case that says that it can't be harmless under these circumstances?

MS. AHMED: Every non-unanimous post-Ring case that has come out of the Florida Supreme Court, Your Honor, has been granted in the penalty phase. There hasn't been a single exception since --

THE COURT: Okay. That's my understanding, as well.

MS. AHMED: Thank you.

THE COURT: All right. Ms. Singleton, I don't want to say that the pressure's on, but the pressure's on.

MS. SINGLETON: Thank you, Your Honor.

The state's argument is, basically, that any Hurst error was harmless if the jury had been told that unanimity was required, the jury would have found unanimity in regards to the recommendation for the death penalty. The aggravators here were

pretty substantial and some of them would have been automatic. Based upon the defendant's record, they would have automatically found the prior violent felony conviction. They also would have found that the capital offense was committed during the course of a robbery because there was proof of the victim's money being stolen. And they also would have found that HVC was proven based upon the circumstances that the victim was left in, that he was left for three days, bound --

THE COURT: Ms. Singleton, let me ask you this. What findings did they make unanimously that they would have been required to make with regard to aggravators and mitigators? What questions did they answer on the verdict form that would have specifically found the same aggravators or mitigators in a unanimous fashion?

MS. SINGLETON: I cannot recall at this point if one of the charges was robbery. If it was, then they would have found that unanimously because they would have been finding someone guilty -- okay. Since robbery was one of the convictions, they did find that aggravator unanimously, the fact that he committed this capital offense while committing a robbery. So that was found unanimously.

THE COURT: Okay. So we have that he was committing another felony and that is an aggravator under the statute, right?

MS. SINGLETON: Yes, sir.

THE COURT: And so there's at least one aggravator that was already proven unanimously and found unanimously by the jury in this case.

MS. SINGLETON: That is correct.

THE COURT: Okay. How about any others? That's it?

MS. SINGLETON: That's it. There were only three aggravators that were found.

THE COURT: And is that enough?

MS. SINGLETON: It is.

THE COURT: One out of three?

MS. SINGLETON: It is. The court has -- the Florida Supreme Court has said in several cases that one aggravator is enough.

THE COURT: Okay. All right.

MS. SINGLETON: So the state would just argue that he's not entitled to a new penalty phase.

THE COURT: All right. Now, I interrupted you a number of times. Did you get out all your argument?

MS. SINGLETON: I did. I did.

THE COURT: You said it was going to be brief, but that was briefer than I was expecting.

MS. SINGLETON: Well, I don't have any case law to support my argument, but we still have to make that argument.

And in regards to the claim --

THE COURT: Well, you do have case law that says if it's already been determined unanimously by the jury in the guilt phase, you don't have to do it again in the penalty phase, right?

MS. SINGLETON: We have some case law in which the court has noted some aggravators that are found automatically. For instance, in one of the cases, and I cannot remember the name, it might have been the Hall case, it was -- the defendant was convicted of killing a law enforcement officer. They automatically found that -- they found that unanimously, and the court ruled that that would have been found automatically. But that was a case that there was a unanimous death recommendation.

THE COURT: Yeah, that doesn't help us.

MS. SINGLETON: No.

THE COURT: We don't have a unanimous death recommendation.

But isn't there a case authority where they

denied the request for a new penalty phase where the -- at least one aggravator was already found in the guilt phase of the case unanimously by the jury? I mean, it would have to be unanimous to be found.

MS. SINGLETON: I don't have any case in which that was found, unless it was a case in which the jury was giving special interrogatories. That's not the case here. But I don't have any case in which -- that was post-Ring, in which there was not a unanimous decision. And the Florida Supreme Court said that that was not harmless error.

THE COURT: Ms. Calhoun, are you aware of any?

MS. CALHOUN: No, Your Honor, I'm not.

THE COURT: Why wouldn't -- I mean, it doesn't seem to me that the jury would have to be asked the same question twice if they found an aggravator through the existence of a prior -- of a felony conviction, a felony occurring simultaneously with the murder in question. Then they've, in essence, already found that aggravator; have they not?

MS. SINGLETON: They have, and we have argued that, but we just have not been successful.

THE COURT: So they said, well, you got to argue it twice, that is, you got to ask the jury

the same question twice, once in the guilt phase, once in the penalty phase?

MS. SINGLETON: In essence. I mean, they don't phrase it that way. But we don't have any case in which -- not in the Florida Supreme Court, in which they've said that one of the aggravators that is automatic is enough by itself, not when this -- when it is a non-unanimous jury recommendation and it is post screening.

THE COURT: Okay. Thank you.

All right. Ms. Ahmed, what about that? Didn't the jury already determine an aggravator unanimously in this case?

MS. AHMED: Well, Your Honor, in this case, and there are other cases similarly situated as Mr. Jordan's case where the Florida Supreme Court still determined that, you know, the error was not harmless given penalty phase.

One example I can give the Court, and we filed a number of supplemental, is Simmons versus State. In that the jury verdict was eight/four. They had a special verdict form, but the court still did not find that the state had met their burden. In that case they did have prior violent felony and it was committed during the -- the capital felony was

committed during the course of a sexual battery.

You know, also, again, in Williams versus State there was a prior violent felony and the defendant was on felony probation. Those aggravators were found, and also it was committed during a kidnapping.

And, again, Armstrong versus State -- and there's, you know, several cases within that. It's also -- there was a prior violent felony and it was during the commission of a robbery, and the victim in that case was a law enforcement officer.

So in all these situations we have de facto, you know, aggravators. But the problem is the case law's changed since Hurst v. State and you now have to find non-unanimous aggravators, that they have to sufficiently outweigh the mitigators and now you have a 12 recommendation. So that's why the state --

THE COURT: So what you're saying in our case is, although they were found guilty of robbery, Mr. Edwards [verbatim] would have been guilty of robbery. There's no unanimous determination by the jury in Mr. Edwards' case that the aggravators outweighed his mitigators.

MS. AHMED: Mr. Jordan's case?

THE COURT: I mean, Mr. Jordan. I'm sorry.

MS. AHMED: Yeah. I mean, we don't have those findings. This is a purely, Judge, independent finding. There is no jury finding here, so we can not speculate, the state cannot speculate, so that's why it fails, you know, the Hurst error view and he should be granted a penalty phase, especially because there are cases that are similarly situated as his trial was in.

THE COURT: Okay. Unfortunately, I think you're right. So on that basis then, I think we're going to have to have a new penalty phase for Mr. Jordan.

Let's get back to that. Before we get there we know we're going to have to have an evidentiary hearing on claim number four. And the question is do we get an evidentiary hearing on claim three, six and eight?

MS. SINGLETON: Yes, sir.

THE COURT: All right. And I guess, Ms. Ahmed, we should start with you as to why.

MS. AHMED: Sure.

I'll start with claim three, Your Honor. It's titled as Trial Counsel Provided Prejudicial Ineffective Assistance by Failing to Challenge the

State's Timeline at Trial with Regard to the Length of Time the Victim was Bound. Most of our argument is in our motion, but I'm going to highlight just a couple of parts.

The main part of the argument is the discrepancy in how many days the victim, Mr. Cope, was tied and gagged. The state argued throughout closing and -- I'm sorry, opening into closing that it was three days when the evidence did not support, as we laid out in our claim, that it was not three days. At best, you might be looking at two and a half days. The only evidence they have is that Mrs. Cope, Maggie Cope, the victim's former wife, was at the house on the morning on June 25th. So the evidence does not support the three days that the state has asserted. And certainly the prejudice that we're arguing at this point is that it sort of prolongs this -- sort of the state's argument about the torture and the circumstances surrounding the victim being gagged.

Certainly in these cases, as the Florida Supreme Court has said, they prefer to have evidentiary hearing. We would put on trial counsel Smith and Nielsen to establish that there was no reasonable strategy, that there -- you know, there

was no competent attorney that noticed that the three days was the wrong time was not supported by the evidence and that it was prejudicial to the client because, in effect, without them challenging it, they failed to be an advocate and, in effect, strengthened the state's case with the state's portrayal of the torture of this victim on 343, which the evidence would support instead of, you know, two and a half days. We have half a day that was missing based on the evidence that was presented at trial.

So we'd ask the Court to grant us an evidentiary hearing so we can put on the attorneys to testify as to whether or not, you know, the strategy was there, whether or not they knew about the discrepancy, whether they were aware of it, and, therefore, to argue to the Court that it would be deficient for their failure to be aware of it and show prejudice.

THE COURT: All right. Ms. Singleton, you may respond to that, or Ms. Calhoun.

MS. SINGLETON: I will, Your Honor.

THE COURT: All right.

MS. SINGLETON: Your Honor, this claim does not need to go to a evidentiary hearing because the

claim is meritless.

The victim's ex-wife, Ms. Cope, testified that the truck was not at home on the morning of June 25th, and the defendant admitted to the police that he took the victim's truck, so we can infer that it had been stolen by the time the victim's ex-wife went by the home, which was June 25th. Mr. Cope was found by the defendant's friends on June 28th, and that is three days, so the record supports the testimony that the victim was bound for three days.

So deficiency isn't proven here. And under Strickland, if deficiency isn't proven, you don't have to go to the prejudice prong. But if you do choose to go to it, the defense hasn't shown how this prejudiced Mr. Jordan. Whether it's 2.5 days, which is what they reference in their motion, or three days, it doesn't negate his guilt. The jury still heard the testimony that Mr. Jordan tied Mr. Cope up, left him tied to the bed for several days --

THE COURT: Is there any medical evidence or testimony that would have established had it been two and a half days instead of three days or two days versus three days, or whatever, it would have

made a difference?

MS. SINGLETON: There was testimony from I believe it might have been the ME that talked about the fact that he was -- that the victim was tied up for several days. I've referenced that in my brief. I don't recall anything in which he specified 2.5 days or three days. Regardless, he still was at the state of, basically, dying. His body was dying by the time he was taken to the hospital. So the defense hasn't proven deficiency nor prejudice.

So there's no point in taking this claim to an evidentiary hearing because it would be meritless. And there's no testimony from either of the counsel as to whether they knew it was supposedly 2.5 days or three days, it still would not have mattered in regards to the guilt.

And I won't go into the penalty phase because you've already decided that he's entitled to a new penalty phase.

So the state just asks the Court to summarily deny this claim.

THE COURT: All right. Any response, Ms. Ahmed --

MS. AHMED: No.

THE COURT: -- that you haven't already covered?

MS. AHMED: I've covered everything and also covered in detail in our claim that was written.

THE COURT: Okay. Can we go to claim six?

MS. AHMED: Certainly, Your Honor.

Claim six begins on page 41 of our motion and page 40 of the state's response. It's titled Trial Counsel Provided Prejudicial Ineffective Assistance of Counsel by Presenting a Bare Bones and/or Deficient Judgment Of Acquittal Argument During Guilt Phase.

Again, this is also written in detail in our claim, but I will highlight that one of the main cases that are cited in our case is Stephens v. State, 787 So2d 747. Just so the court knows, it's different from the Stevens case that the state cites, too. But it's the importance of -- the purpose of a judgment of acquittal is to test the legal sufficiency of --

THE COURT: Ms. Ahmed, let me interrupt you for just a minute. I'm familiar with your argument and the case law that you cited. I guess what I'm uncertain of is what would you attempt to prove in an evidentiary hearing as opposed to raising the

issue as you've done in the motion and handling it as a matter of law?

MS. AHMED: Certainly, Your Honor. Let me go to that part. The purpose of the evidentiary hearing would be, again, to put on both trial counsel, Nielsen and/or Smith, to determine whether or not they were aware of the case law I cited, as the court says, in our claim, all the case law regarding felony murder, so with the break in time and, you know, why is it that --

THE COURT: But isn't the issue whether or not their arguments were legally deficient? Let's assume they testified, oh, we knew all the law, but they still didn't follow the correct standard, does it matter? Or if they said the opposite, which was we didn't know any of the law, but they did follow the correct, does it matter that they didn't know even though they happened to get it right? Why would that be an issue for us?

MS. AHMED: It would be an issue for us because trial counsel does not know the case law regarding the judgment of acquittal and felony murder, particularly in this case where there is a break. And as you look in the jury instruction, they talk about, you know, the killing, that

Mr. Jordan's the one who committed the actual killing and it was committed during the commission of a robbery, that that's the attorney's job, Your Honor, to make these arguments with case law with specific facts to show to the Court that, you know, there's not enough to substantiate the felony murder, the intire felony murder charge, that, you know, it's not a felony murder because the case law supported it. If trial counsel doesn't know the law, doesn't do the research on the law, that's deficient.

THE COURT: Let me make it easy for me. Let's assume that the law is when you're making a JOA you've got to stand on your left foot, okay, that's the law, you got to -- okay. And so we're going to call them in and we're going to stay, were you standing on your left foot? But let's say that, you know, that they were standing on their left foot when they made their argument even though they didn't know that was the law, who cares as long as they were standing on their left foot, right? Isn't that the same analysis here?

MS. AHMED: I submit to the Court, I don't believe so, because in this case they didn't make an appropriate judgment of acquittal, they --

THE COURT: But I guess what I'm trying to find out is I get your argument if they didn't make an appropriate motion as a matter of law, you should be entitled to some relief in that regard, whether it's all the relief you want or not, that's a different question, but you should be entitled to relief. Why does their knowledge concern us? Whether they knew it or not, that's what the standard is, right?

MS. AHMED: I'm sorry, I might be confused by the Court's question, but what I -- I mean, it is our position that what they -- the judgment of acquittal they gave at trial, that was bare bones and not in accordance with what the judgment of acquittal should be under the case law.

THE COURT: Right. As a matter of law. They were supposed to say X, Y and Z, they didn't --

MS. AHMED: Correct.

THE COURT: -- it's deficient, right, I get that. Who cares why?

MS. AHMED: I understand the Court's position, that the Court wants to look at this as a legal argument.

THE COURT: Right. I understand why the state may say why it's a big deal, because we think it

was tactical or strategic, or whatever, I get that part, but that's not your argument.

MS. AHMED: Your Honor, this case, you know, sort of -- because it is our burden and we are the ones that put on the trial attorneys, and that's why in these situations we do ask for the evidentiary to show that they had no strategic reasons, there was no conflict, they had no reasonable reason, it was just a failure for them to put on the case law, putting on, you know, an appropriate and constitutional judgment of acquittal. So that was our position and that's why we should put on the trial attorneys. It is our burden and that's why I think we put on -- we do put on the trial counsel in that situation.

THE COURT: Okay.

MS. AHMED: But certainly, you know, yes, I do understand it's a very legal-based argument and -- but that is why, because it is our burden, we do put on the trial attorneys in that situation.

THE COURT: Okay. Ms. Singleton?

MS. SINGLETON: Yes, sir. There is no need for an evidentiary hearing in part because the record disputes the defense's argument. The trial counsel did argue a JOA that did include

specificity. They referenced the differences in the dates in which the -- in which the robbery occurred and the victim's death, they argued that the death did not occur during the taking of the property, they also set forth the necessary grounds to which relief could be granted, and trial counsel also argued that the trial court should reduce the first-degree murder charge to third-degree murder. So they did -- they did not make a bare-bones JOA argument, which is the argument of the defense.

In addition, the defendant's argument in regards to case law not being used is conclusory, they have not specified how the case law would have made a difference, and that's significant, particularly considering the fact that the Florida Supreme Court found that there was sufficient evidence to support the conviction in direct appeal. So as a result, Mr. Jordan cannot show how he was prejudiced by what the defense says trial counsel did not do.

So the state asks that the Court summarily deny this claim without an evidentiary hearing being held. We don't see how it would be useful in determining this claim.

THE COURT: Okay. And, finally, number eight.

MS. AHMED: Number eight, Your Honor, you might have the same sort of scenario for these.

Claim eight is entitled Trial Counsel Provided Prejudicial Ineffective Assistance of Counsel by Failing to Remove or Exclude or Object to the Admission of the Victim's Actual Hair on the Duct Tape into Evidence.

Again, Your Honor, we were asking for an evidentiary hearing here to put on trial counsel, similar because it is our burden to show that, you know, they failed -- that they had no reasonable strategy and they failed to object to the actual hair, the victim's -- you know, part of the victim to be sent back with the jury.

THE COURT: So you'd be seeking to put on the testimony of trial counsel to show that their failure to object was not tactical or strategic?

MS. AHMED: Correct. That would be our burden and that's why we would put on trial counsel for that limited purpose. It is clear that, you know, a piece of the victim did go back into the jury room.

I know the state cited to the Henderson case, 463 So2d 196 in their response. Henderson dealt more so with use of photographs, not an actual

piece of the victim.

There were other photographs of duct tapes that were introduced during the trial. This was -- you know, there was no relevance to this hair -- the victim's hair being on the duct tape being introduced to the jury and being sent back to the jury room. There was no relevance. The only thing it did would be to prejudice the jury and inflame the jury by sending a piece of the victim back with them. This is not a simple photograph, this is, you know, a piece of the victim. So that is a highly prejudice piece of evidence to go back to the jury room, especially in a case where there's really no similar argument as to the victim being duct taped. I mean, there are plenty of photographs of duct tapes, and I don't think there was any argument that the victim had not been duct taped. And so the only purpose for the state to send this piece of evidence back there was to inflame the jury.

So an evidentiary that we'd ask for is, again, as it is our burden, to put on trial counsel to show that there was no --

THE COURT: And, again, just so I understand what you're saying is that, A, trial counsel should

object -- should have objected to the piece of duct tape that had the hair on it and that going -- A, being received into evidence, and, B, going back to the jury, right?

MS. AHMED: That's correct, Your Honor.

THE COURT: What would be the basis for that?

MS. AHMED: It would be relevance, Your Honor. Their objection should have been relevance. There was no reason for that.

THE COURT: Isn't that hair from the victim?

MS. AHMED: Yes, but --

THE COURT: Wasn't there the presence of residue from the victim on the duct tape adhesive?

MS. AHMED: There was no -- but in this case there was no, you know -- nothing -- there's no contention as to the victim being duct taped in this case, so -- and there were several photographs of duct tape presented throughout the trial. This was actually, you know, the victim's -- you know, a piece of the victim went back to the jury, not a photograph of this duct tape and hair, not testimony that, you know, the victim's DNA was found on the duct tape, it's the actual --

THE COURT: So you're saying they could have sent -- they could have taken a picture of this

piece of duct tape, introduced it into evidence and sent it back to the jury?

MS. AHMED: Should they have the admissibility requirements and relevance requirements, yes. But in this case it wasn't relevant. The only purpose it served was to send a piece of the victim back to the jury, into the jury room, and that's -- I mean, it's just inflammatory, Your Honor, and highly prejudicial to Mr. Jordan during trial.

THE COURT: But -- okay. Weren't they attempting to tie in the use of the duct tape on this victim?

MS. AHMED: There was -- there was plenty of evidence, Your Honor, that he was duct taped. There's no -- I mean, there's no qualms about the fact that the victim, Mr. Cope, was duct taped in this case when he was found by the witnesses -- I'm sorry, I believe medics and the fire department came in first and then law enforcement. But there was no contention about that. So this, at the end of the day, served no relevance besides just, you know, sort of another piece just to sort of inflame the jury. And that's our argument, Your Honor, it's not just a photograph, it's not testimony, it's the victim. So that's why -- and, again, it's

our burden so we'd ask for an evidentiary hearing, but if the Court doesn't wish to grant us that evidentiary hearing, we certainly rely on our arguments, Your Honor.

THE COURT: Okay. And your argument is that it was irrelevant, that's the basis of the objection?

MS. AHMED: Correct.

THE COURT: Okay. All right. Ms. Singleton?

MS. SINGLETON: Your Honor, in regards to claim eight, the duct tape was relevant, particularly considering the fact that the medical technicians had to remove several layers of duct tape from Mr. -- from the victim's head in order to allow him to breathe, so it was definitely relevant, and it was not more prejudicial than probative. There's no reason for the duct tape to not have been allowed to be presented to the jury. They did see photographs of it, but they did actually need to see what was binding the victim. And a criminal defendant should expect the things that he used -- uses to commit a crime to be used against him at trial.

THE COURT: What's in the record that would suggest that the trial court would have sustained

such an objection?

MS. SINGLETON: I haven't seen anything in the record that supports --

THE COURT: Is there a presumption that they would have for our purposes?

MS. SINGLETON: -- Your Honor, but I haven't seen anything specifically --

THE COURT: I'm sorry, I missed it, what did you say?

MS. SINGLETON: I haven't seen anything --

THE COURT: Before that. Did you say yes or no?

MS. SINGLETON: Yes, sir.

THE COURT: Is there a presumption?

MS. SINGLETON: Yes, sir.

THE COURT: So the presumption is had they made this objection, the trial court would have sustained it?

MS. SINGLETON: No. The trial court would have overruled it.

THE COURT: Okay. Right. That's what I thought --

MS. SINGLETON: They would have overruled it because it was definitely relevant. It was used to bind the victim and he couldn't breathe because of

it, the binding. So it was definitely relevant and it should have been admitted. So there was no reason for trial counsel to object because it would have been a meritless objection.

There's no basis for having an evidentiary hearing on this issue, so the state asks that claim four be summarily denied. Claim eight. I'm sorry.

THE COURT: Okay. All right. Ms. Ahmed, brief response.

MS. AHMED: Just briefly. I don't believe there's case law that indicates there's a presumption that the judge would overrule an objection like that.

THE COURT: Who's got the burden on that?

MS. AHMED: The burden is still on us and --

THE COURT: Okay. So what do you have to sustain that burden?

MS. AHMED: That -- Your Honor, that based on the case law that we've cited, the rule of evidence regarding relevance and our arguments in our motion that this would have been granted, that the objection would have been sustained and that this piece of evidence would not have come into evidence before the jury. So we put all those arguments into our motion and our claim.

Specifically, I mean, the rule of evidence, you know, it wasn't relevant as we would argue to this Court, and should -- and the Court would have -- if those objections were properly made, it is our position the court would have sustained the objection and not allowed that -- the victim's hair and the duct tape to come into evidence before the jury. I mean, it was not used for DNA purposes, it had no relevance with regard to --

THE COURT: How did they know it was the victim's hair?

MS. AHMED: They -- I believe there was medical testimony, if I remember right, that it was the victim's hair. And, like I said, Your Honor, there was no contention that the victim was duct taped and that duct tape came from the victim, it's just, you know, there were photographs of it, there was no contention, this was just -- it had no relevance. It didn't need to come in besides simply to inflame the jury.

THE COURT: Wasn't the duct tape really the weapon that was used that caused the injuries that eventually led to a slow death?

MS. AHMED: The -- and forgive me if I get this wrong, but based on the medical examiner

testimony, I believe it was -- when Mr. Cope had come off the bed, the rope that was tied around his arm had cut off circulation. And I'm not a medical person, so I'm going to say this sort of in laymen's way. So that ended up leading to amputation of his arm, and I believe it was a -- he suffered a number of strokes during that period from the shock, so that was what eventually had led to his death, because he had gone into a coma and eventually they did not resuscitate him and that's how Mr. Cope passed away.

THE COURT: Okay. All right. Thank you.

All right. Let's deal with what we have.

We have claim four needs an evidentiary hearing. I've heard arguments of counsel, and having reviewed the defense's original motion entitled Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rules of Criminal Procedure 3.851, and the response filed by the state titled State's Response to Defendant's Motion to Vacate Judgment of Conviction and Sentence of Death, the Court rules as follows.

With regard to the penalty phase, I'm going to grant the defense's motion for a new penalty phase. I understand the argument from counsel for the

state, but in our circumstances, based on Hurst and Ring, and what the jury found, but didn't have an opportunity to find in our case, I think that, reluctantly, we do need another penalty phase.

With regard to claim number four raised by the defense, I do believe they're entitled to an evidentiary hearing on that, and I'll grant their request. I'll defer ruling until we hear the evidence and legal arguments at that time.

With regard to claims three, six and eight, I've listened carefully to those arguments again today, but having reviewed them also in the motions, I find that there is no basis to conduct an evidentiary hearing.

Moreover, with regard to the argument in claim three, I find that there was no deficiency, no ineffectiveness of counsel, nor any prejudice that can be shown in this case by the defense.

With regard to number six, similarly I find no deficiency with performance of counsel, and find further that the judgment of acquittal was appropriately and specifically argued, both factually and legally, as a matter of law. The fact that they were not effective in that regard has more to do with the strength of the case being

presented than it does with any deficiency of counsel.

With regard to argument in claim eight, again the Court finds that there was no deficiency by counsel. I mean, for the life of me, I do not see how that would not be admissible evidence in the case. I think it would have been pointless for defense counsel to make argument with regard to that at trial through objections, so I do not find any deficiency in their performance in that regard. I think they were appropriately effective, as defense counsel and trial counsel in that regard. But, more importantly, no prejudice can be demonstrated because I think that that evidence was appropriately and properly admitted, appropriately considered by the jury in supporting their verdict in the case, and I could see where an argument could be made it was some of the most important of the evidence that was received in the case.

On that basis then, I'll deny the request on claims three, six and eight, preserving claim four with regard to factual and legal arguments for another hearing.

All right. Now, let's talk about timing. We're going to have an evidentiary hearing and then

we're going to have to have a penalty phase, and I suspect we have to do it all in that order, right.

How much time for an evidentiary hearing, do you think? Be all morning, do you think?

MS. AHMED: Just a day, Your Honor.

THE COURT: Okay. Full day or half day?

MS. AHMED: Probably half a day. I mean, half a day. I mean, the rule requires us to have an evidentiary hearing within 150 days. Yeah, I think it's 150 days from today.

THE COURT: Why don't I do this, Ms. Ahmed, I'll rely on you and Ms. Singleton to confer with my JA and find a date and time that works for you and gives you the time that you think you need. It seems to me we should be able to do that in a half a day.

MS. AHMED: I believe so, Your Honor. We've already spoken to Attorney Nielsen, he did give us dates that he had a trial in October that he can do it, but we're waiting to hear from Attorney Smith.

THE COURT: Okay. Just coordinate it however you think it is appropriate and I'll let you pick the date. If it will work for you, I'll try to make it work for me.

What I would suggest to you is maybe, best

practice, pick a Friday morning sometime on a trial week and I'll give you the whole morning. We'll just start at 8:30 and argue and present all the testimony and then arguments from that point.

Okay. Now, we need to do the evidentiary hearing before we do a trial. But I want to get this on the trial docket.

MS. AHMED: Then, Your Honor, we -- obviously, we're postconviction counsel and under the Florida Statute we cannot do the new penalty phase, that would be for new counsel to be appointed and give Mr. Jordan a brand new penalty phase.

THE COURT: Did we not already appoint Office of Regional Conflict Counsel?

MS. SINGLETON: I cannot recall.

THE COURT: I thought we already did. If we didn't, we need to do that.

MS. CALHOUN: But Regional Counsel would not be doing a postconviction evidentiary hearing.

THE COURT: No, I'm talking about the trial -- penalty phase -- the trial, the penalty phase.

MS. CALHOUN: I do not have a record of you doing that and --

MS. AHMED: The Court wouldn't because we didn't decide the penalty claims until today.

MS. CALHOUN: Right. Right. And my index is up to date, so I don't have a record of that.

THE COURT: Okay. Someone want to send me an order. I'll appoint Regional Conflict Counsel to participate in the defense for the penalty phase.

MS. CALHOUN: Well, so they'll be co-counsel, is that how that's going to work?

THE COURT: No.

MS. CALHOUN: They do that?

THE COURT: They'll be primary counsel.

MS. AHMED: They would be counsel for the new penalty phase should the state be seeking the death penalty. We would only do the evidentiary hearing and any appeals of the evidentiary hearing.

THE COURT: Right.

MS. CALHOUN: Right. But my question is can they -- I'm not trying to --

MS. AHMED: I know. I understand.

MS. CALHOUN: Can they -- I'm just asking logistically, are they able to do that until we complete the litigation on the guilt phase claim?

MS. AHMED: Yeah. What we've seen, Your Honor, in all the cases, and certainly the state probably has more cases that I've seen, we've gone through the postconviction phase first before, I

guess, the new penalty phases are done, but --

THE COURT: No, I agree. I think we have to have the evidentiary hearing before the penalty phase.

MS. CALHOUN: Right. But --

THE COURT: No doubt. But what I --

MS. CALHOUN: Right. I'm just asking about the sequence for when you appoint Regional Counsel to start their work. And I understand that they want to be appointed sooner rather than later so they can start working up their mitigation and all of that.

THE COURT: Right. We're probably looking at -- I mean, I don't know what time requirements we have, but we're probably looking out there a year before our penalty phase. We're looking at, what, probably 120 days or so, another four months, before we have the conclusion of the evidentiary hearing on the 3.851. So I'm thinking at least six months after that before everybody's up to speed and running the penalty phase. So I want to dual track it, at least for a little bit, so we can move down, I guess, somewhat parallel courses here. I mean, it would be unfair to throw this in Regional Conflict Counsel's lap and say I'll see you in

three weeks, we're going to -- or three months even, we're going to have to do a new penalty phase and then expect them to get their experts and mitigation and all that together. It's going to take them a long time to do that. So let's appoint them. If they want to sit on their hands for six months, that's okay with me.

MS. CALHOUN: I've never seen that done, but we can certainly give it a try.

MS. AHMED: It doesn't affect us in any way, Your Honor. We'll still continue with the postconviction proceedings in this case.

THE COURT: Yep.

MS. AHMED: And certainly once the Court appoints new counsel, I'm sure they'll focus --

THE COURT: Okay. Are you going to do the order on the new penalty phase?

MS. AHMED: I can do that for Your Honor.

THE COURT: Thank you. Anything else?

MS. AHMED: Oh, just for the record, Your Honor, we already did file our witness and exhibit list in accordance with the rule. It was filed this past Friday and served to the state of Florida. And we did do a motion for judicial notice of the clerk's file in the record of appeal

in this case. I guess the Court has the record of appeal, so we just ask that the Court take judicial notice of the evidentiary hearing of the court's file and record on appeal.

THE COURT: Okay. Yeah, I have most of it. There are some things I don't have, but I have, I would say, 90 percent of the file. I can tell you after December 11th, 2012 I have every pleading that was filed.

MS. AHMED: Thank you, Your Honor.

THE COURT: Before that I have probably 90 percent.

Okay. What else do we need to do?

MS. SINGLETON: The only thing I was going to say, Your Honor, is the Court needs to give the state a deadline for disclosing our witnesses or exhibits. It should be --

THE COURT: How much time do you want?

MS. SINGLETON: It should be 60 days from today.

THE COURT: Okay. Will that work for you, 60 days?

MS. AHMED: Yeah. I think that's what the rule says.

MS. SINGLETON: Yeah.

THE COURT: All right. Then I would suggest you find a date for our hearing maybe 120 days out.

MS. AHMED: Will do, Your Honor. Thank you, Your Honor.

THE COURT: Okay. So that's going to take us probably to November or December, right?

MS. AHMED: That's correct. I think December, end of December.

THE COURT: Okay. All right. Very good I'll look forward to the orders.

Ms. Ahmed, if you run all those orders past Ms. Singleton and Ms. Calhoun. Of course, I suspect you'll share them with Ms. Bort.

All right. Are we done?

MS. AHMED: Oh, yes, Your Honor.

MS. SINGLETON: Yes.

THE COURT: Okay. Thank you.

(The proceedings were concluded at 4:00 p.m.)

REPORTER'S CERTIFICATE

STATE OF FLORIDA)
COUNTY OF VOLUSIA)

I, PAMELA S. UNDERWOOD, RPR, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

Dated this 16th day of July, 2018.

s/PAMELA S. UNDERWOOD, RPR
COURT REPORTER
VOLUSIA REPORTING COMPANY
432 SOUTH BEACH STREET
DAYTONA BEACH, FLORIDA 32114
TELEPHONE: (386) 255-2150

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 642009CF002872XXXAWS
POSTCONVICTION CAPITAL CASE

JOSEPH EDWARD JORDAN,

Defendant.
_____/

DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS AND EMERGENCY MOTION TO PRESERVE EVIDENCE

To: Florida Department of Corrections
501 S. Calhoun Street
Tallahassee, FL 32399

Attention: Records Custodian

The Defendant, **JOSEPH EDWARD JORDAN**, by and through his undersigned counsel, hereby makes demand of the **FLORIDA DEPARTMENT OF CORRECTIONS**, under Florida Rule of Criminal Procedure, 3.852(g) for additional public records pertinent to this case. Mr. Jordan also requests that this Court order DOC to preserve the requested evidence until the close of the appeal in this matter. In support, the Defendant states as follows:

1. Undersigned counsel represents that, after a timely and diligent search, the records specifically described below:
    a. are relevant to a pending proceeding pursuant to rule 3.851; or
    b. appear reasonably calculated to lead to the discovery of admissible evidence; and
    c. have not previously been obtained in discovery or from a previous public records request from the above named agency; and
    d. are not presently available from the repository.

2. The public records requested of Florida State Prison are as follows:

   A. Any and all audio or visual recording from:
      a. July 1, 2018 12:00 pm to 6:00 pm - G-Wing 1200 side
      b. July 2, 2018 8:00 am to 6:00 pm - G wing 1200 side
      c. July 3, 2018 8:00 am to 6:00 pm - G wing 1200 side

   B. All disciplinary and/or incident reports from inmates on G-wing made on or between June 30, 2018 and July 6, 2018;

   C. All use of force reports from inmates on G-wing made on or between June 30, 2018 and July 6, 2018;

   D. A list of all corrections officers and/or DOC personnel working on G-wing from 8:00p.m. on June 30, 2018 through 8:00p.m. on July 2, 2018;

   E. A list of all medical staff working from 8:00 p.m. on June 30, 2018 through 8:00 p.m. on July 2, 2018; and

   F. A copy of Leonardo Franqui's classification file.

3. Mr. Jordan has received credible information from multiple sources that corrections officers at Florida State Prison have assaulted and battered at least one death row inmate. The inmate was beaten and kicked by officers leaving multiple large bruises all over his torso and chest area. Mr. Jordan has an Eighth Amendment right to be free from cruel and unusual punishment which includes the current prison conditions and fear for his own safety that he is experiencing as a result of this assault.

4. The requested records are relevant to the subject matter of the pending post-conviction proceeding and are reasonably calculated to lead to the discovery of admissible evidence in that such records may contain, or, through further investigation, may lead to the discovery of, evidence that Mr. Jordan's current conviction and sentence were obtained in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, including his rights to substantive and procedural due process related to competency proceedings in postconviction, Dusky v. United States, 362 U.S. 402

(1960); Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966); and his right to be free from cruel and unusual conditions of confinement, Lackey v. Texas, 115 S. Ct. 1421 (1995) (Breyer, J., dissenting) and Sireci v. Florida, 137 S. Ct. 470 (2016) (Breyer, J. dissenting). Additionally, as Mr. Jordan has been granted a penalty phase trial, the requested public records may be presented as mitigation on his behalf. Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.")

5. Under rule 3.852, any objection to production, including any claim of exemption, must be filed with the trial court and served on all counsel of record within 60 days of receipt of this demand, or that objection will be considered waived.
6. Under rule 3.852, you shall, within 90 days after receipt of this demand:
    a. Copy, index, and deliver to the records repository of the Secretary of State any additional public records in the possession of your agency that pertain to this case; and
    b. Certify that, to the best of your knowledge and belief, all additional public records have been delivered to the records repository of the Secretary of State; or
    c. Recertify that the public records previously delivered are complete if no additional public records are found.

WHEREFORE, the Defendant requests this Court order DOC to produce the requested records and/or preserve the requested evidence until the close of the appeal in this matter.

AFFIDAVIT OF COLLATERAL COUNSEL

I, Maria Christine Perinetti, having been duly sworn or affirmed, do hereby depose and say that the above statements are true and correct.

Maria Perinetti

Maria Christine Perinetti
Chief Assistant CCRC
Florida Bar Number 0013837
Email: perinetti@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

Sworn to or affirmed and subscribed before me this 20th day of July, 2018, by Maria Christine Perinetti who is personally known to me or has shown the following identification:

NOTARY PUBLIC, STATE OF FLORIDA

My Commission Expires:

COLIN L. KELLY
Commission # GG 146538
Expires September 27, 2021
Bonded Thru Troy Fain Insurance 800-385-7019

CERTIFICATE OF SERVICE

We hereby certify that the foregoing has been served electronically upon the Clerk of the Circuit Court, Ryan Padgett (ryan.padgett@fdc.myflorida.com and CourtFilings@fdc.myflorida.com); Assistant State Attorney Rosemary Calhoun (CalhounR@sao7.org); and Assistant Attorney General Patrick Bobek (capapp@myfloridalegal.com & patrick.bobek@myfloridalegal.com); and the Honorable Dennis Craig (tholder@circuit7.org) on this 20th day of July, 2018.

Respectfully submitted,

/s/Maria Christine Perinetti
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Filing # 75810560 E-Filed 08/01/2018 11:06:08 AM

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO.: 2009 002872 CFAWS

STATE OF FLORIDA

vs.

JOSEPH EDWARD JORDAN,

Defendant.

* *

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE TERRENCE R. PERKINS,
CIRCUIT COURT JUDGE

STATUS CONFERENCE

* *

DATE TAKEN: THURSDAY, APRIL 27, 2017

TIME: COMMENCED AT 1:58 P.M.
CONCLUDED AT 2:06 P.M.

PLACE: S. JAMES FOXMAN JUSTICE CENTER
251 NORTH RIDGEWOOD AVENUE
DAYTONA BEACH, FLORIDA 32114

STENOGRAPHICALLY REPORTED BY: MARY GRAYBOSCH, RPR, CRR, CRC
COURT REPORTER and NOTARY PUBLIC

* *

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Others as may appear in the transcript.

WHEREUPON the following proceedings were had:

P R O C E E D I N G S

THE COURT: All right. Good afternoon. This is Terry Perkins. Who do I have on the phone?

MS. SINGLETON: Vivian Singleton with the attorney general's office.

THE COURT: Hello, Ms. Singleton. How are you today?

MS. SINGLETON: Good. How are you?

THE COURT: Couldn't be better. I've got -- Ms. Calhoun is here in the courtroom with me.

MR. VAZQUEZ: Paul Vazquez for the Department of Corrections, your Honor.

THE COURT: Great. Thank you, Mr. Vazquez.

And I think we're waiting for somebody from regional conflict counsel, or who are we waiting on?

MS. CALHOUN: CCRC, Capital -- Capital Collateral Regional Counsel, which would be the attorney for the defendant, Mr. Jordan.

THE COURT: And who is that in our case? Do you remember?

MS. CALHOUN: I believe that would be Maria Christine Perinetti.

(The phone sounded.)

MS. CALHOUN: Hello?

THE COURT: All right. Somebody just joined us. Who joined us?

MS. PERINETTI: Hi. This is Maria Perinetti from CCRC on behalf of Mr. Jordan.

THE COURT: Okay. Are your ears burning?

MS. PERINETTI: And my palms are itching.

THE COURT: We were just talking about you.

Okay. I have Ms. Singleton, Ms. Calhoun, Mr. Vazquez, and then you, too. Ms. Calhoun is here in person in the courtroom. I have everybody else on the phone.

And we are here to talk about the Joseph Jordan case, right?

MS. PERINETTI: Yes, sir.

THE COURT: All right. We're -- this is not -- this is a status conference, right, not a case management?

MS. CALHOUN: Yes, your Honor. Rosemary Calhoun speaking.

This is noticed as a status conference. The State has not yet filed its response to Mr. Jordan's amended post-conviction motion.

So we are not yet in a posture to have a case management conference.

THE COURT: Okay. All right. So wouldn't

that be the first item of business then is to figure out when the State intends to file a response and when that deadline would be and to plan accordingly?

MS. SINGLETON: The deadline, according to the calendar -- this is Ms. Singleton with the attorney general's office.

My calendar information shows that the deadline is May 9.

THE COURT: Okay. Ms. Calhoun, does that sound right to you?

MS. CALHOUN: Yes, your Honor. That's correct. The Court had previously granted the State an extension of time to file its response, and the extended deadline is May 9.

We are responding to guilt-phase claims as well as penalty-phase claims, just for the Court's information.

THE COURT: Right. I remember that. Okay. So you still expect to be able to respond by May 9th?

MS. SINGLETON: Yes, sir.

MS. CALHOUN: Yes, sir.

THE COURT: Okay. Then what?

MS. CALHOUN: Then at that time --

(Simultaneous speaking.)

MS. PERINETTI: -- from CCRC. I believe under the rules, once the State responds, then we need to set a case management conference within 90 days.

So I think, anticipating when the State's response would be, we could probably set that today.

THE COURT: Okay. So we'd be looking at what, the first week in August? Just doing some math in my head.

MS. PERINETTI: Yes, sir. It looks like it would be around then.

THE COURT: Okay. Hang on a second and I'll get myself to the first week in August, see what I can offer to you.

All right. You know, August 1st, um, I probably have some time then. It's a unpretentious little day, but otherwise not completely booked up or crowded.

How does August 1st work?

MS. PERINETTI: Your Honor, this is Maria Perinetti from CCRC again. I'll be on maternity leave, but my co-counsel, Raheela Ahmed, will be able to appear on August 1st.

And we would prefer the afternoon since we would be coming from Tampa, or she would be.

THE COURT: Okay. And I assume you'd be coming in person for that then, Ms. Ahmed?

MS. PERINETTI: Yes, sir.

MS. AHMED: Yes, your Honor.

THE COURT: Okay. How much time would we need, you think? An hour?

MS. PERINETTI: Yes, your Honor. I think that would be sufficient. This is Ms. Perinetti again.

THE COURT: Okay. Ms. Calhoun, an hour you think?

MS. CALHOUN: Yes, your Honor. I think probably an hour.

MS. SINGLETON: An hour would be fine for the attorney general's office, your Honor. And August 1st is fine. That date's fine with our office.

THE COURT: Thank you, Ms. Singleton.

MS. CALHOUN: And the state attorney's office agrees with the attorney general's office. We think an hour would be fine, as well, and we're also available on August 1st.

THE COURT: All right. So this is going to

be our case management hearing, and I'm thinking three o'clock. How does that sound?

MS. PERINETTI: That's fine with CCRC, your Honor.

MS. SINGLETON: It's also fine for the attorney general's office.

MS. CALHOUN: That's fine with the state attorney's office, your Honor.

THE COURT: All right. And we'll put down for an hour. Who's going to do the notice?

Don't all volunteer at once, now.

Ms. Calhoun, I think you're elected.

MS. CALHOUN: Yes, sir.

THE COURT: So it will be case management conference, August 1st at 3 p.m., for one hour, courtroom number one, all right?

What else can we do?

MS. PERINETTI: Nothing more for CCRC, your Honor. Thank you.

THE COURT: Ms. Calhoun?

MS. SINGLETON: Nothing from the attorney general's office, either.

MS. CALHOUN: Nothing further from the state attorney's office, your Honor.

THE COURT: Well, that's all we did? I feel

guilty even bringing you down for this.

Okay. All right. Well, I guess I'll see everybody on August 1st, and at that point bring your calendars with you. I'll obviously have mine.

And we'll figure out if we need an evidentiary hearing, and if so, when and how long, and if we don't, what we need to do with regard to the legal issues, okay?

MS. PERINETTI: Thank you, your Honor.

THE COURT: Very good. Thank you all very much.

(The hearing concluded at 2:06 p.m.)

REPORTER'S COURT CERTIFICATE

STATE OF FLORIDA)
COUNTY OF VOLUSIA)

I, MARY GRAYBOSCH, Registered Professional Reporter, Certified Realtime Reporter, Certified Realtime Captioner, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true record of my stenographic notes.

Dated this 31st day of July, 2018.

s/Mary Graybosch, RPR, CRR, CRC
Court Reporter
Volusia Reporting Company
432 South Beach Street
Daytona Beach, FL 32114
Telephone: (386) 255-2150

VOLUSIA COUNTY COURT ACTION FORM

CASE: 2009 002872 CFAWS
STATE OF FLORIDA
VS
JOSEPH EDWARD JORDAN
TOT
SPN: 574944
TRIAL DATE:

COURT/SESSION TYPE: Criminal Hearing
DATE: 08/02/2018
TIME: 10:00 AM
JUDGE: CRAIG
ATTY: LISA M BORT
BNA:
LOCATION: Justice Center Courtroom 1, 251 N. RIDGEWOOD AVENUE , DAYTONA BEACH, Florida

LAURA E. ROTH
CLERK OF THE CIRCUIT COURT
VOLUSIA COUNTY, FLORIDA
P.O. BOX 6043
DELAND, FL 32721-6043

PARTIES PRESENT	RELEASE ACTIONS	Custody/Capias/Estreat	Continued To: ☐ By Def. ☐ By State ☐ By Court ☐ Waived Spdy.Trl
☐ DEF. APPEARED ☐ APP.W/COUNSEL	☐ TOTAL BOND FOR CASE SET	☐ CAPIAS ISSUED-BOND SET	REMARKS: **Status hearing**
☐ DEF. COUNSEL APP. W/OUT DEF.	☐ AT $	☐ AT $	**9/12 Docket sounding scheduled for status confrence.**
☐ DEF. FAILED TO APPEAR	☐ DEF. ROR'D	☐ BOND ESTREATED	**Order to follow for new attorney to represent def.for penalty phase**
ATTORNEY STATUS	☐ RELEASE TO PTS	☐ CAPIAS WITHDRAWN	
☐ APP. IND. STATUS - PD APPT.	☐ RELEASE TO PTS W/BOND	☐ BOND REINSTATED	
☐ APP. IND. STATUS - NOT INDIGENT	☐ OTHER:	☐ BOND ESTR. SET ASIDE	
☐ PD APPT. BY COURT	☐ NO CONTACT W/VICTIM	☐ OTHER:	
☐ DEF. TO RETAIN COUNSEL	☐ NO VIOL.CONTACT W/VICTIM	☐ HOLD CAPIAS-PTS INVEST.	
☐ PD WITHDREW ☐ ATTY.TO BE APPT	☐ OTHER:	☐ 48 HRS	
☐ OTHER:			

CT. CHARGE	COURT ACTION	INCARCERATION/PROBATION/COMMUNITY CONTROL INFORMATION	COSTS
1 FIRST DEGREE FELONY MURDER (ADJG) Statute: 782.04(1)(a)2 LVL:F DEG:C AMENDED CHARGE: BOND SET AT $	☐ N.G.PLEA ☐ NO INFO. ☐ GUILTY PLEA ☐ NOLLE PROSS. ☐ NOLO PLEA ☐ DISMISSED ☐ NG.VERDICT ☐ JGMT ACQT. ☐ GLTY.VERDICT ☐ ADJ.WITHHELD ☐ MISTRIAL ☐ ADJ.GUILTY ☐ WAIVED PSI ☐ PSI ORDERED ☐ PDR ORDERED ☐ TO BE SENT:	☐ VCJ ____ MO ____ DY ☐ PROB.REVOKED ☐ DOC ____ YR ____ MO ____ DY ☐ C.C. REVOKED ☐ JAIL CREDIT TIME: ____ DY ☐ PROB. REINSTATE ☐ PROB ____ YR ____ MO ____ DY ☐ C.C. REINSTATE ☐ COM.CONT. ____ YR ____ MO ☐ PROB. MODIFIED ☐ DRUG OFFENDER ☐ SEX OFFENDER ☐ C.C. MODIFIED ☐ CONCURRENT ☐ CONSECUTIVE TO: ____ ☐ ____ HRS.COM. SERVICE ☐ STANDARD COND. ☐ SUBST.ABUSE COUNSEL/TREAT. ☐ PREVIOUS COND. ☐ RANDOM U/A ☐ NO ALCOHOL/ILL.DRUG ☐ COS WAIVED	CRT. COSTS $ FINE $ PD FEE $ SAO FEE $ LEO FEE $ PD APP.FEE $ REST. $ OTHER: ☐ CONVRT. FINE/COST
2 ROBBERY WITH FIREARM/DEADLY WEAPON (ADJG) Statute: 812.13(2)(a) LVL:F DEG:F AMENDED CHARGE: BOND SET AT $	☐ N.G.PLEA ☐ NO INFO. ☐ GUILTY PLEA ☐ NOLLE PROSS. ☐ NOLO PLEA ☐ DISMISSED ☐ NG.VERDICT ☐ JGMT ACQT. ☐ GLTY.VERDICT ☐ ADJ.WITHHELD ☐ MISTRIAL ☐ ADJ.GUILTY ☐ WAIVED PSI ☐ PSI ORDERED ☐ PDR ORDERED ☐ TO BE SENT:	☐ VCJ ____ MO ____ DY ☐ PROB.REVOKED ☐ DOC ____ YR ____ MO ____ DY ☐ C.C. REVOKED ☐ JAIL CREDIT TIME: ____ DY ☐ PROB. REINSTATE ☐ PROB ____ YR ____ MO ____ DY ☐ C.C. REINSTATE ☐ COM.CONT. ____ YR ____ MO ☐ PROB. MODIFIED ☐ DRUG OFFENDER ☐ SEX OFFENDER ☐ C.C. MODIFIED ☐ CONCURRENT ☐ CONSECUTIVE TO: ____ ☐ ____ HRS.COM. SERVICE ☐ STANDARD COND. ☐ SUBST.ABUSE COUNSEL/TREAT. ☐ PREVIOUS COND. ☐ RANDOM U/A ☐ NO ALCOHOL/ILL.DRUG ☐ COS WAIVED	CRT. COSTS $ FINE $ PD FEE $ SAO FEE $ LEO FEE $ PD APP.FEE $ REST. $ OTHER: ☐ CONVRT. FINE/COST

LAURA E. ROTH, CLERK OF THE CIRCUIT COURT
Filed in Open Court this 02 day of August , 20 18.

/S/ JUSTY TURBERVILLE

DENNIS CRAIG

ASSISTANT STATE ATTORNEY

DEPUTY CLERK IN ATTENDANCE

-1603-

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO. 2009-002872 CFAWS

STATE OF FLORIDA

vs. APPEAL TRANSCRIPT

JOSEPH EDWARD JORDAN,

Defendant.

* *

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE TERENCE R. PERKINS
CIRCUIT COURT JUDGE

* *

DATE TAKEN: APRIL 12, 2018

TIME: COMMENCED AT 8:30 A.M.
CONCLUDED AT 10:12 A.M.

PLACE: S. JAMES FOXMAN JUSTICE CENTER
251 NORTH RIDGEWOOD AVENUE
DAYTONA BEACH, FLORIDA

STENOGRAPHICALLY
REPORTED BY: MAUREEN M. ELROD, RPR
COURT REPORTER and NOTARY PUBLIC

* *

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P R O C E E D I N G S

THE COURT: All right. State of Florida versus Joseph Jordan, 2009-002872. Let me have counsel make their appearance on the record, please. State first.

MS. CALHOUN: Yes, Your Honor. Rosemary Calhoun, Assistant State Attorney, appearing on behalf of the State of Florida.

MS. PERINETTI: Maria Perinetti, from CCRC Middle, appearing on behalf of Mr. Jordan.

MS. BORT: Lisa Bort, from CCRC Middle, appearing on behalf of Mr. Jordan.

THE COURT: What was your last name again?

MS. BORT: Bort, B-O-R-T.

THE COURT: Thank you.

MS. BORT: You're welcome.

MS. AHMED: Good morning, Your Honor. Raheela Ahmed, also on behalf of Mr. Jordan.

THE COURT: All right. Very good. Thank you. Welcome. All right. We are in, I guess, the second part of our hearing, right?

MS. CALHOUN: Yes, Your Honor.

THE COURT: Phase two. And just by way of general observation, this is the case that I think we agree we're going to have to redo the penalty

phase. The question is: Do we have to redo the guilt phase? And we're going to continue in on our evidentiary hearing with regard to that, right?

MS. CALHOUN: Yes, sir.

THE COURT: Ready to proceed?

MS. PERINETTI: Yes, sir. And the Defense would call at this time Attorney Michael Nielsen.

THE COURT: Okay.

THE CLERK: Do you solemnly swear or affirm that the testimony given here today will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

Good morning, sir.

THE COURT: Good morning.

WHEREUPON,

MICHAEL W. NIELSEN,

having been duly sworn by the Clerk, was examined and testified upon his oath as follows:

DIRECT EXAMINATION

BY MS. BORT:

Q Good morning.

A Good morning.

Q Could you please state your name, for the record.

A It's Michael William Nielsen.
Q And could you please tell us about your education as it relates to the legal profession?
A Okay. You know, four-year college degree. Went to law school at the University of Tulsa, Oklahoma. After graduating law school, went to work in the public defender's office, for two years. I trained there, so to speak. And then 1990, I opened up my own law firm.
Q And is that where you're currently employed?
A Correct.
Q And what's the name of that firm?
A It used to be Dowdy and Nielsen. I had a partner for 22 years. And now it's Nielsen Law Firm, for the last six years.
Q Okay. What types of law do you practice there?
A Criminal defense.
Q And are you contracted with the Office of Regional Conflict Counsel?
A I am. As part of my business plan, I have a little side agreement, so to speak, with Regional Conflict Counsel. And all I do for them are first degree murder cases either involving the death penalty or not involving the death penalty.
Q And how long has that agreement been going on?

A Since November of 2007.

Q Okay. And how often do they assign you those types of cases?

A I'm trying to come up with an average. It's probably -- since 2007, I'd say, maybe, like, five a year.

Q And are you currently death qualified, in other words, qualified to sit as a first chair on a capital case?

A Yes.

Q And how long have you been trying capital cases?

A First one I did was in 1993.

Q And how many have you tried in your career?

A I have had 26 first degree murder trials. Thirteen of those, the State was seeking the death penalty. Nine of them, the Jury voted for life under the old system. Three of them, the Jury voted 10-2 for death. So they've all come back.

And then the most recent one I had was in October, the Toledo case, and the Jury gave him a 10-2 life. So I don't have anyone anymore on death row. I did have three people.

Q Who are the three cases that you had the previous death recommendations on?

A Troy Victorino, a fellow named Douglas Matthews, and Mr. Jordan.

Q Were all of those cases associated with the Office of Regional Conflict Counsel?

A No.

Q And how many of those cases were you trying as a first chair?

A Well, the first two, it wouldn't have been. And then when I had my partner, we would, kind of, alternate. Since he left, I've only been first chair. I would say, out of the 26 -- well, not all of them take two lawyers. Okay? So I think you're really asking me probably about the death penalty ones and I would say half, I guess.

Q Okay. Do you regularly attend death penalty seminars, such as Life Over Death or Death Is Different?

A Yeah. We have to. To keep the certification with the Supreme Court, you have to do at least one of those every 24 months.

Q Okay. So how many had you attended prior to Mr. Jordan's trial?

A Maybe 30, because we used to do more than we had to.

Q Okay. And about how many capital cases had you tried prior to Mr. Jordan's trial?

A When was his trial?

Q I believe it was -- it was April 15, 2013, is when it started.

A Okay. So of the 26, I would say probably 20 of them, maybe, were done before his.

Q Okay. Now, in this case, the State Attorneys were Edwin Davis and Ryan Will. Did you try any cases against them before Mr. Jordan's trial?

A I believe I had with Mr. Davis but not with Mr. Will.

Q Okay. And did you just have one case against Mr. Davis, or multiple?

A No. Probably more because he was -- he was the heavy lifter here during a lot of my years, you know, doing this stuff.

Q And would you have only been trying capital cases against him?

A Yes.

Q And do you recall anything particular about Mr. Will's style during the closing arguments of Mr. Jordan's trial?

A Well, Ryan Will, I would say, his style -- I kind of describe him as a stealth bomber because he looks younger than he probably is. And he's a nice guy and kind of lull you to sleep, so to speak. When he

comes into court, he puts on another hat. You know, he's a strong advocate for the State. That's how I would describe him.

Q Okay. Is it fair to say that you are familiar with the different ways that a closing argument could be improper?

A Yes, that's fair.

Q And, specifically, are you familiar with Golden Rule arguments?

A Yes, I believe I am.

Q Okay. Are you familiar with inflammatory arguments?

A I believe so.

Q And are you familiar with arguments regarding lack of remorse?

A Yeah, I would say for sure, in the general sense.

Q And are you familiar with arguments that denigrate the theory of defense?

A Yes.

Q And are you aware that all of those types of arguments are improper?

A I'm sure they can be, depending on what exactly is said.

Q Okay. And is it your normal practice to

object when the State makes an improper statement during their closing arguments?

A Well, it depends. I don't know if you've done one of these trial levels where you're defending someone facing the death penalty, but the defense lawyer has a very fine line they need to walk, in my opinion -- at least this is the way I do it -- because you've got to -- you've got to fight for the guilt part, but you've got to maintain some credibility with the Jury that you're shortly thereafter going to ask to not kill your client.

And so I believe that it's extremely important, for the success of the defense, that the defense lawyer keeps what we refer to as clean hands in cases like this, because if you get up there and make some, you know, spurious defense and then object to everything the prosecutor is trying to do, I think some of the Jurors don't appreciate that. And when you're going to come back later and the ask them to not kill your client, I don't think you're in a strong position.

So I'm cognizant of when to object and when not. And, generally, I don't like -- I don't generally like to object a lot during closings because I don't want them to do it to me.

Q Okay.

A I kind of feel like, you know, unless it's way over the top, I'm going to let them probably say what I -- what he thinks -- or what -- I'm going to let him say what he thinks he needs to say, generally.

Q So in what situations would you object?

A Well, some of the examples you cited earlier; the Golden Rule. You know, if it's just too far, I guess, you know -- it's a fine line, like I said, you walk because you're not sure where it really is too far or not too far.

But I can tell you this. I guarantee you, I've missed a million objections, probably, that could have been made, but there's a lot of times, I'll think to myself, I could object and I don't do it on purpose. And then there's times where I probably just missed it because I just missed it, you know.

Q And what would make you more likely to object?

A Well, I mean, I guess I could use this case as an example just because I was looking at it to get ready for the hearing. The part where Mr. Will started citing case law, I don't think that's a proper argument to make to the Jury. That would be an example.

Q Okay. And do you agree that it's important to object to an improper statement during closing arguments in order to preserve the issue for appeal?

A I agree with that general statement, but I condition it with what I just said earlier about strategy and stuff.

Q Okay. And you do understand if you don't object, then it would be waived?

A Yeah, that's, I believe, correct. Although, apparently, if the defense doesn't object and the prosecutor did something that's just so over the top, it can be changed later, even if it's not preserved, according to this opinion that I was reading.

Q And you touched on it a little bit, but do you believe that what happens during guilt phase does affect the penalty phase?

A Oh, absolutely. It's -- that's the whole trick, you know. You're trying to put on a defense during phase one and they come back and ask for life in phase two.

Q And so any testimony or argument made in the guilt phase would carry over into your penalty phase; do you agree?

A Any argument made by who?

Q By either party would carry over into the penalty phase from the guilt phase.

A I guess that's true, in a general sense.

Q At some point, did you come to represent

Joseph Jordan in his capital case?

A I did.

Q And how did you become involved with his case?

A I got a call from the RCC headquarters, and said, hey, got another one for you.

Q Okay. And the record reflects that Mr. Jordan was arrested in July of 2009, and the trial took place in April 2013. At what point did you become involved?

A Usually what happens is they'll initially, like, at first appearance, assign it to the public defender's office if the person is indigent and then they must have had a conflict because there's no co-defendants in the case. So PD must have had a conflict and they had to get out. And then the way it's set up, is RCC would be next in line. If they got a conflict, then they appoint someone off of what's called a wheel.

Q Okay. And if the record reflects that your notice of appearance was dated September 5th, 2009, would that be correct?

A Yeah. That sounds pretty consistent. You said he was arrested in July.

Q Correct.

A It takes a little bit for that to happen.

Q Okay. And how many other cases were you

handling during the time that you were representing Mr. Jordan?

A That was a particularly busy time, because what happened is, 2007, they created the RCC and there wasn't -- initially, for a couple of years there, there were -- we were getting a lot of cases. I may have had as many as eight going at that time.

Q Eight capital cases?

A Yes.

Q And how did Attorney Christopher Smith become involved in Mr. Jordan's case?

A All right. What happened is -- I told you earlier I had a law partner.

Q Yes.

A And he was originally working the case with me. And then -- get into a long story -- he wanted to become a judge. It didn't work out. And the he ended up taking a job in a civil type of a litigation firm.

So I had to, you know, replace him, so to speak. And I just asked Jeff Dean. He runs RCC. And he just told Chris Smith, who had a similar job as I do, that he was going to step in and do it.

Q Okay. And when did Mr. Smith join Mr. Jordan's defense team?

A I'm not sure. But I know Mr. Dowdy left in

November of 2012. His trial was, you said, April 2013?

Q Correct.

A So I would say, probably, like, December or January.

Q Okay. If the record reflects that his notice of appearance as co-counsel was filed on March 25th, 2013, which is three weeks before trial, would that be correct?

A I wouldn't dispute the record.

Q Okay. And why did you ask for a continuance?

A Well, one of the main reasons was because Mr. Smith needed to, you know, get some time to understand the case. Although, I had been working it myself all that time and was, quote, lead counsel, you know, you want your defense partner to be up to speed as best he can.

It was a big contention from the Defense, but the Judge at the time, Judge Hutcheson, he just denied it and so we went forward.

Q And when the Court denied your motion for continuance, how did that affect you?

A It didn't really affect me. It affected Mr. Smith, I would say.

Q Okay. And was that weighing on your mind, at all, at trial?

A I don't -- no, I wouldn't say -- once the trial started, I probably didn't think about it.

Q Okay. And when you were preparing for trial, were you focused more on the guilt phase or the penalty phase?

A Both. But I viewed my overall job is to try to save his life. Mr. Jordan had -- was a serial letter writer, so to speak, and he made many admissions and confesses to this crime over and over. I tried to resolve it. I got him a deal from the Court. If he pled straight up, Judge Hutcheson told us he would give him between 30 and 40 years. Mr. Jordan turned it down, which I thought was a huge mistake.

And so my efforts probably would be more in line with trying to save his life, to be honest with you.

Q Okay. How was the defense team structured?

A How was it structured?

Q Yeah. How did you divide the work load?

A I did, basically, all the heavy lifting because Mr. Smith didn't -- you know, I threw him some witnesses to do in the guilt phase. I don't know if he did anything in the penalty phase. He may have done some lay witness testimony. But all the heavy lifting I did; opening, closing. I believe I opened, if I'm not

wrong, but every -- you know, most of the tough witnesses and so forth. It was my case and it wasn't fair, with Chris only being in it for a short time, to expect him to do too much.

Q So you were responsible for the opening argument -- or, excuse me, opening statement?

A Yes. Yes. I remember I was. It was in this courtroom.

Q And do you write out your opening statement ahead of time?

A What I -- I write an outline, but it's more detailed than an outline would be. But it's basically an outline, is what I'm using.

Q Did you do that in Mr. Jordan's case?

A Yes.

Q And you were also responsible for the closing arguments in his case?

A Yes.

Q And do you write those out ahead of time, as well?

A Similar fashion. I make a -- more than an outline, but I'm not writing what I'm going to say verbatim.

Q Okay. And did you do that in Mr. Jordan's case?

A Yes.

Q And what was the theory of defense for the guilt phase in Mr. Jordan's case?

A Trying to get a lesser, basically. Like I said, he admitted to being involved in the crime through a series of post-arrest letters, as well as he made admissions to lay people shortly after he had left this area. He went down south. And we were trying to get him a second degree, hopefully. I never did think the Jury would let him go, at all, I mean, completely.

But he had an argument that was, at least we could say with a straight face, that he didn't plan to kill Mr. Cope. I don't believe he really ever did plan to kill him.

He certainly was guilty of felony murder, but we were kind of hoping that the Jury would think it wasn't premeditated. And sometimes they'll ignore the felony murder rule and throw a defendant a bone by coming back with a second.

Q And do you have any independent recollection of the guilt phase closing arguments in this case?

A Yeah, I can remember some of it, especially since we're back in here. I don't remember every part of it.

Q Do you have any independent recollection of

your thoughts or your opinions during the guilt phase closing arguments?

A Basically, we were done. I mean, I knew it was coming to an end, yeah. It was just -- the evidence against him was overwhelming, in my mind. The only chance he had was for a lesser.

Q And did you discuss the guilt phase closing arguments with Mr. Smith beforehand?

A Oh, yeah, I'm sure we did. We actually -- yeah, we stayed over here. We both were in Orlando. So even after trial, at night, we were together a lot during the trial.

Q Okay. And whose responsibility was it to object to the State's closing arguments in the guilt phase?

A Well, the way the Judges want you to do it, which is the way, I believe, you know, as an experienced lawyer you do it, is, if I'm going to be the one for the defense doing the closing, I would be the one responsible for objecting to the State's closing.

Now, if you're with, you know, like another lawyer and you're maybe thinking of something else or you're just spacing out and you miss something really egregious, there's no rule that says the other lawyer can't stand up and object. But you try to keep that

protocol: Whoever is going to do the closing will be the one to object to the other side's closing.

Q Did Mr. Smith offer any input or suggestions regarding the objections to the State's guilt phase in this case?

A During their argument?

Q Correct. During the closing argument.

A No, I don't think so.

Q And if you had made an objection during the closing argument in his case, could you have asked for a sidebar with the Judge?

A Yes.

Q And at sidebar, are you permitted to consult with your second chair regarding the objection?

A You could at that time, yeah.

Q Okay. I will get into the statements here. Have you had an opportunity to review claim four of Mr. Jordan's motion for a post-conviction relief?

A Yes.

Q And you're familiar with the comments laid out in the claim?

A I believe I am.

Q And have you also reviewed the Florida Supreme Court opinion on direct appeal in Mr. Jordan's case?

A Yeah. I have it right here.

Q Okay. Did you review the Defense's opening statement?

A No.

Q Okay. And have you reviewed the State's closing arguments?

A Parts of it.

Q Okay. In terms of the opening statements, I'll read you a little snippet from that. And if you need a copy of it, just let me know.

MS. BORT: And, Your Honor, just as we did when we were questioning Attorney Smith, would it please the Court if I read each comment into the record?

THE COURT: Sure.

MS. BORT: Thank you.

BY MS. BORT:

Q I'll go through each comment in order that it appears in the motion. So for the first comment, let me direct you to the State's guilt phase rebuttal closing. That's in Volume 13 of the ROA, on pages 2585 through 2586. And then the comment is also found on pages 29 through 30, of the motion.

And then the comment states -- and let me know if I need to go any slower for you.

"You can find him guilty of first degree

felony murder or guilty of such lesser included charges. That's second degree, third degree, manslaughter with a weapon, or manslaughter. Ladies and Gentlemen, you can go all the way down the list. The law tells you, find him guilty of the highest one that's been proven.

"Sure, look at the instructions. They may all apply in this situation. Because of the way this thing developed, they may all apply. I mean, you may be able to technically find him guilty of all of them. But you should find him guilty of the highest one that has been charged and proven beyond a reasonable doubt.

"And, in this case, it's first degree murder. Felony murder first degree. And when you get over here to -- to the robbery, Count II, right up here, Count II, robbery with a fire weapon, firearm, or deadly weapon, right here on the first line, guilty of the charge of robbery with a firearm or deadly weapon, exactly what he confessed to, exactly what he told you he had done.

"Don't let him get away with this. Yeah, I mean, sure, you can come down the list again if you want to. I mean, he's technically guilty of all of them. Robbery with a weapon? Yep. Robbery? Yep. Grand theft? Did he steal something without any force? Well, he stole something, but he -- he used force.

"I mean, yeah, you can come down the list, but

there's no reason to. The law says to return it to the highest crime proven beyond a reasonable doubt. And, Ladies and Gentlemen, it is right there. It is choice number one."

Do you agree with the Florida Supreme Court that the comment, "don't let him get away with this," was improper?

A Well, no, I don't. But they're the Supreme Court, so they know more than me. I didn't -- I read this again last night. He's advocating for the State, and, you know, we were arguing for him to, you know, either be let go or have a lesser. I don't know. It's my fault completely, but I don't see anything wrong, quite frankly, with that one line, "don't let him get away with this."

But, I guess, if I ever hear it again, since the Supreme Court says it's improper, I probably would object to it.

Q Okay.

A But I didn't at the time. And I still don't see it, just reading it.

Q Okay. For the second comment, let me direct you to the State's guilt phase closing argument, in volume 13 of the ROA, on page 25 through 44. The comment is also found on pages 31 through 32, of the

motion.

The comment states: "When he closed the door behind him, it was as if he had put Keith Cope on a raft and set him adrift in endless sea. He had absolutely no ability, no tool to free himself. And he could only hope that someone would come and find him.

"Three days later; three days without water, three days of sunrises and sunsets, three days of watching the clock and minutes slowly pass by, someone came and found Keith Cope and it was too late.

"As the days ticked slowly by, his hope got smaller and smaller, as you can imagine. As the days ticked slowly by, he probably knew that no one was coming for him."

And why didn't you object to this argument?

A Well, I would say this. First of all, it's, in my mind, a fair comment in the sense of the facts in the case, I don't see anything factually incorrect to your now -- there was no evidence presented that there were three sunrises and three sunsets, or three days of watching the clock. But, I mean, that's just common sense. So I don't really see a problem with that.

And this is the type of example that I was talking to you earlier about with the Jury. So when I get up there and start objecting to this, which, I

believe, is a fair comment on the facts, I'm probably not going to win the objection, number one. And then, number two, I'm losing some credibility with the Jury, which I'm desperately trying not to do. And it's really hard.

This is one of the hardest things about this is to, you know, do what you think may be the ultimate defense and then still have your credibility to ask them to give your guy life. So that's what I would say about this portion of the argument.

Q Okay. Do you agree that if you don't raise the objection, though, it's not preserved for appellate review?

A I would say, yeah, nine times out of ten, that's probably correct. I guess there are some examples where that doesn't apply, but I agree with your statement.

Q Okay. Now, for the third comment, let me direct you to the State's guilt phase rebuttal closing. That's in Volume 13 of the ROA, on page 2576. And the comment is also found on pages 32 through 33, of the motion.

The comment states: "Just because the Defendant was owed something, doesn't mean that he has a right to come up here and demand someone else's money

and take it from him when they're not willing to give it and to use force to do that; use guns and tape and rope. If you could do that in America, then we'd all be in trouble because the mortgage companies would have us tied to the bed."

Why didn't you object to that argument?

A I don't know. It's -- first of all, I guess, I'm not sure I even understand what he was saying there about the mortgage companies in America. But I do agree with this, in hindsight. It's one I probably should have objected and potentially used the argument, what we were talking about earlier, the Golden Rule because the Jury's part of America. Right?

So, you know, I guess my reference would be to include that, potentially. So that, probably -- I would say I missed, probably, a valid objection on that particular one.

Q Okay. Now, for the fourth comment, let me direct you to the State's guilt phase closing, in Volume 13 of the ROA, on pages 2540 through 2541. And the comment is also found on page 33, of the motion.

And the comment states: "The first point is, I'm sorry. The second point is, I didn't mean to kill Keith. And the third point is, I'm not responsible for the harm that occurred after I left. That was what was

said in opening statement by the Defense. That was what was asked to many of the witnesses that were on the stand. So let's talk about that argument. Let's talk about the Defense's argument in this case. Let's start with "I'm sorry".

"Nowhere in the evidence, nowhere, is there a single fact that demonstrates the Defendant is sorry about anything. He wrote six letters. You listened to them yesterday as they were read. You'll have an opportunity to take them in the back and read them yourself. Look carefully for the words "I'm sorry". I'm sorry doesn't appear anywhere. I'm sorry doesn't come up in the statement to JoAnne Winston, out at the jail. There is no I'm sorry.

"When he told his friends, Raymond Hill and Eddie Yarrow, and Mathew Powell, and Sadia Hague, not once did he say I'm sorry. Not once did he say, God, I wish it hadn't happened this way. I -- I wish Keith were in better shape or hadn't died. You know, nowhere in there, though, was I'm sorry. The most we got was, 'I'm suicidal. I F'd up. I didn't want to go to jail.' But we never heard, I'm sorry."

And why didn't you object to this comment?

A Okay. What happened here -- and I remember this well because it was a mistake that I -- well, this

is what I mean by that. For a little time doing these cases, I would do this thing -- I'm not even sure where -- I think I first saw some other lawyer do it during opening. I would sometimes mention -- you know, the victim's family would be sitting right there. And so I would say something to the effect, you know -- this is in opening -- my condolences and -- you know, condolences to the family, or something like that, with respect to the family. Basically, maybe just a point of sympathy, okay, for the family.

So what Mr. Will did -- and this is why I'm not ever doing it again -- is, he burned me with this. And this wasn't -- this wasn't our defense. Okay? But he took that line, that I said on opening, and he stuck it in his pocket and he pulled it out here on closing to argue to the Jury what you just wrote -- I mean, what you just read into the record.

Now, why didn't I object to it? Because I'm the one who said it. And if I -- after I had said it and he burned me with it, I don't know how I really could object to it, with any good faith. I mean, he gets kind of colorful here. But, I guess I just didn't see it cross a line. And, like I said, I'm the one that brought it up. I don't remember saying anything about the letters, per se.

But, look, I don't know what to tell you. I didn't object. Like I said, it was something I did and I'm not doing it -- I haven't done it since then because of this case, actually. So, you know, if that's what got him convicted, I apologize, but I was trying to be nice. I was trying to, you know, show the Defense -- show the Jury that the Defense has a human side, all along trying to get this guy a life sentence. That's what we were trying to do.

So sometimes by throwing that little thing out, you might get one or two Jurors to say, hey, you know, we'll let him go, or something. I don't know, you know.

Q I do know the comments that you're talking about. And I will read those into the record because I have a couple of follow-up questions on what you said about that.

So in your guilt phase opening statement, in Volume 10 of the ROA, on page 1812, you said: "Now, I would stand here and I would like to offer the condolences to Mr. Cope and his family, because, obviously, the man's deceased at a relatively young age and no one wants that to happen."

And then, also, in Volume 10, on page 1816, you said: "Now, he did ultimately pass away in a

hospital. And, again, I'm sorry for that situation. But the question is: What is the level of responsibility in this situation?"

So when you were apologizing, you meant that you were apologizing and not Mr. Jordan?

A I guess just like in a general sense of human compassion. I don't think -- I really don't believe I was relating it to Mr. Jordan. It was more -- when I hear it, it doesn't sound that bad. But, like I said, he burned me with it so I haven't done it since.

But that was the theory, just to try to garner some, perhaps, favor, so to speak, some credibility with the Jury. So when you ask them later to give your guy life, they might be more inclined to do it.

Q In essence, you were trying to build rapport with the Jury? Does that sound correct?

A Yes.

Q And you were just trying to offer your own condolences?

A Well, the Defense -- on behalf of -- I guess Jordan would be included. Let's say on behalf of the Defense team; myself, Mr. Smith, Mr. Jordan.

Q Okay. And were you attempting to argue remorse?

A Not -- I don't believe so, not during the

guilt phase. That may have come up somehow in the penalty phase, but I don't remember that.

Q Okay. And, now, after hearing the comments now, do you believe that you opened the door for the State to be able to argue Mr. Jordan's lack of remorse?

A Well, I guess I did. It was unintentional. And, like I said, if that led to his conviction, it's on me and no one else. So I apologize.

Q Did you -- so you didn't intend to open the door?

A No. I never thought -- I didn't -- that was the first time I ever litigated against Ryan. I know him much better now and I know what he's capable of. I never thought that -- I never thought, by me saying that little statement in the opening about Mr. Cope and his family, that it would come back and burn me later on closing, that's for sure.

Q Now, you mentioned that you don't do this any longer but that was your practice prior to Mr. Jordan's case?

A I probably had done it, let's say, in five or six trials. Because I didn't do it in the beginning. Then you do so many, you're trying to do something, maybe, different for once or whatever. I did it a few times and it never was a problem. You know, this is the

only time it turned out to be some type of issue.

Q All right. For the fifth comment, the last comment, let me direct you to the State's guilt phase rebuttal closing in Volume 13 of the ROA, on pages 2572 through 2573. And the comment is also found on page 34, of the motion.

The comment states: "I told you it was coming. And there, there, we heard it. It's everybody else's fault but the Defendant's. I mean, if he had stayed in the middle of the bed, he would still be alive. If these guys had come up from south Florida a day and a half earlier, he'd still be alive. Come on, everybody's fault but his? I mean, he snapped? Is that a defense? He snapped?"

Do you feel that this is an accurate characterization of the theory of the defense in this case?

A No. Let me look at that one more time, please.

Q Yes.

A I have a copy of this transcript here.

Okay. What is your question?

Q Do you feel it's an accurate characterization of the theory of defense?

A I don't really think so, looking at it on

paper. I mean, I don't know if I did blame these other things on it. I don't remember doing that. The last part is, you know, the snap part was definitely part of the defense. But this issue of everyone else's fault, I don't think it was, to be honest with you.

Q And why didn't you object to this argument?

A I don't know. I honestly don't know why, other than just I was trying not to, you know, unnecessarily object to things that the State was saying. Looking back, in hindsight, perhaps it was something I should have done at the time. I really -- I don't have any independent recollection of it.

Q Okay.

MS. BORT: Your Honor, may I have a moment to confer with co-counsel?

THE COURT: You may.

MS. BORT: Thank you.

Nothing further.

THE COURT: Ms. Calhoun?

MS. CALHOUN: Yes, Your Honor. Thank you.

CROSS-EXAMINATION

BY MS. CALHOUN:

Q Good morning, Mr. Nielsen.

A Good morning.

Q Now, I think there are four specific instances

of the -- well, first of all, let me ask you generally. You've mentioned, a couple of times, that you were trying to build a rapport with the Jury during the opening statement in the guilt phase because you anticipated a penalty phase. Did I understand your testimony correctly?

A Yes, you did.

Q And did you anticipate a penalty phase because of the amount of evidence -- I think at one point you even said the amount of evidence against your client in the guilt phase was overwhelming. Did I understand that correctly?

A That was my take on the case, yes.

Q And what -- I think you mentioned some letters. You say he was a prolific letter writer, or something to that effect?

A I believe there was six or seven of these letters where he would make -- he was admitting to his involvement -- not every detail but admitting to his involvement in the case.

Q Okay. And he made some statements or admissions, I think you said, to a couple of civilian witnesses?

A Yeah. I friend of his and his friend's girlfriend, yes.

Q Okay. And they test -- did they -- they did testify at trial; did they not?

A They sure did.

Q Okay. And did he also make some statements or admissions to a law enforcement officer who testified at trial? JoAnne Winston?

A Yes. That's right. Yeah, he was -- I forgot about that. When he was in south Florida, he was calling her on the phone, talking to her, yeah.

Q Okay. Now, I think when -- you said something to the effect that your strategy was to seek a verdict for a lesser included offense, possibly a second degree murder charge?

A Well, my take on it was that was the only chance he had, other than getting felony first degree murder, was a lesser second. So, yeah, I mean, I felt comfortable arguing that with a straight face.

Q Okay. Now, in the statements, the letters, and the verbal admissions that he made, did he not admit to committing the underlying felony? The robbery or the theft.

A He definitely admitted to the, yeah, taking of the property. You know, one of the famous lines that was horrible, really, for the case was, they said, oh, where's Keith. And he made this flippant comment, "He's

not here. He's tied up at the moment." He literally was hog-tied up in that house. And that was -- that was bad -- that was bad for Mr. Jordan. But that was an example of things that he -- that he would say.

Q The point being that, in order to get a lesser -- to obtain a verdict for a lesser offense of, for example, second degree murder, would you not have to convince the Jury that Mr. Jordan did not intend for death to result, that he did not intend to cause the death?

A Yeah, that's what we were -- that's --

Q So you would have to attack the causation element?

A Yeah. Because he did survive after Mr. Jordan left him. So, you know, if he really wanted to kill him, he certainly had the means and the opportunity to do so. But he left him tied up on that bed. And I believe he was hoping, in his mind, perhaps, that someone may come by and find him, but it never did happen.

So I still -- I'm still not convinced, right now, that he intended to kill the guy. I'm not sure he did. He was his friend. They lived together. They partied together. Mr. Cope gave Jordan work, provided him shelter. They just partied really hard. And I do

believe that Jordan did snap that night. He was just mad that the guy was holding back his pay. So he did this stupid thing; tied him up on the bed and took all his stuff and left. I don't think he intended, initially, to kill Mr. Cope.

Q Okay. Now, for example, there was discussion of the -- what was characterized as a possible Golden Rule argument of what Mr. Cope might have experienced while he was tied up during the three -- the sunrises and the sunsets over the three-day period.

Did Mr. Cope's ex-wife testify during the trial as to when she noticed his vehicle missing and when his body -- when he was discovered?

A Yes.

Q And what kind of time frame did she give?

A Oh, I don't remember.

Q I mean, was it consistent with the three days and the three nights type thing?

A Yes. Yeah. I think so. And, quite honestly, I don't remember a lot of what she said, to tell you the truth, so. But I don't think it was anything majorly different, though.

Q So as far as the length of time, you didn't see any major discrepancy there?

A I'm not really sure I understand the question.

Q Okay. Well, let me see if I can rephrase it to make it clearer.

A All right.

Q Based on the evidence that was presented at trial, was there any major discrepancy between when Mr. Cope's vehicle was noticed to be missing and when his body was discovered and the argument that was given by the prosecutor as to how long he was tied up and suffering before his body -- before he was discovered in the last stages of his life?

I mean, there was a timeline that the State put out there.

A Yeah, I know. I'm trying to remember what he said, but I don't believe there was any major discrepancy, no.

Q Okay.

A They were -- you know, they were separated. They didn't live together.

Q Right.

A The wife and Mr. Cope.

Q Right.

A Although, they were still friends.

Q Right.

A Yeah.

Q Do you recall if she gave testimony about

driving by the house --

A Yeah.

Q -- and noticing -- he had a very distinctive vehicle; did he not?

A I think he had a nice truck.

Q Yeah.

A Yes.

Q And, in fact, your client took that truck and drove it to south Florida; didn't he?

A He did, yes.

Q And then it was returned back by the two civilian witnesses who testified at trial?

A Yeah, that's right.

Q With regard to the statement by Ryan Will about, "don't let him get away with this," in discussing the Jury verdict form with the Jury, was -- do you remember if the Court instructed the Jury on how to properly complete the verdict form?

A Absolutely, yeah. That was all done.

Q Okay. And you mentioned that your client, Mr. Jordan -- I guess the motive, to the extent there was one for this murder, was that your client believed that Mr. Cope owed him money, was holding back pay --

A Yeah.

Q -- for work performed?

A I don't think he just believed it. I think it was undisputed. I don't really remember any -- no one else -- yeah, no one else took a position -- I don't think the State took a contrary position. In fact, I think they argued that, and said that's a stupid reason to do what he did to Mr. Cope.

Q Sure.

A Which it is.

Q And it's your testimony, today, that your comment, in your opening statement, about the Defense team being sorry was not part of the Defense strategy, that you weren't arguing Defendant remorse as part of your strategy, that it was just, basically, part of your opening statement, trying to humanize the Defendant, again, anticipating a guilt verdict.

A Yeah. I don't think there is a defense -- an affirmative defenses of remorse. If there was, it would be a big day for the defense, in general. I don't believe there is such a defense.

Q Right. And you just testified here that you do believe the Defendant did snap because he was upset over his dispute with his former employer, Mr. Cope, over the wage issue or the wage dispute, that he believed Mr. Cope was withholding pay earned?

A Yeah, coupled with the alcohol and cocaine

binge that had been going on.

Q And, again, it was your theory of defense, or your strategy, that you were trying to get a lesser included offense, that it wasn't a premeditated murder, that it was maybe a second degree murder, heat of passion or something like that, maybe?

A My number one strategy was to get the State to give this kid a term of years. They agreed to offer him second. We talked to the Judge. He said he would give him between 30 and 40. I was like, I did it. I saved his life. He didn't want it. He thought he would die in prison during that time and he was upset that the other people in the case weren't charged.

So he bowed up, after he told me he would take that deal, if I could get him anything like that, and then he said no. So now the strategy is, okay, you just made the stupidest decision you made, other than what you did to Mr. Cope. So what are we going to do?

All right. We're going to argue to try to get you a lesser. You might get your second. The Judge could still give you what's called backdoor life. This is a failed strategy. If that's what you want, that's what we're going to do, and that's what we did.

Q Okay. But my question is, is that if you're seeking a verdict for, say, second degree murder as a

lesser included of first degree murder, wouldn't an argument that the client snapped, that he acted in the heat of passion, wouldn't that be consistent?

A Yes. And that was the -- that's what we tried to do -- or I tried to do, is finesse that argument into getting a lesser. The Jury followed the instructions and came back with the highest thing they could find, which is felony murder first degree.

Q And then, also, that he didn't intend for the -- did not intend for the Defendant to actually die as a result of his actions?

A That was -- that was the Defense argument, but it's irrelevant to the way the felony murder rule is.

Q Sure.

A In fact, that's what it's all about, you know, that there is no intent, necessarily, to kill.

Q In light of the extent of the evidence against your client, would it have made a difference whether you objected to Ryan's argument about him snapping or not snapping in the guilt phase, really?

A I don't know. I mean, you don't know what Jurors are thinking. You know, I guess on this whole objection thing, it's -- I don't see how it's possible for a lawyer to nail every one correctly during these proceedings. It's difficult.

But I just would say this: If I missed an objection that was so horrific that it led to him getting this conviction, I don't want that on me. So I'm first to admit it. I just -- you know, these things, like that -- the statement by Ryan, I guess, you know, technically, maybe in law school or some lab, you know, you do more objecting. But, like I said, I've always got one eye on that Jury and, you know...

Q How about the time you were trying the case; did it seem that horrific that you needed to stand up and object? Obviously...

A Well, I would have to say no because I didn't do it.

Q Okay.

A I'm not shy about doing it. I'm just trying to pick and choose my spots and be effective.

Q All right.

MS. CALHOUN: I don't have any further questions at this time for Mr. Nielsen. Thank you, Your Honor.

THE COURT: Okay. Thank you.

Redirect?

MS. BORT: Nothing further, Your Honor.

THE COURT: Thank you. You may step down.

THE WITNESS: All right. Thank you, Judge

Perkins.

THE COURT: Is he released from his subpoenas?

MS. PERINETTI: Yes, Your Honor.

THE COURT: Ms. Calhoun?

MS. CALHOUN: Yes, Your Honor. Thank you.

THE COURT: All right. You may call your next witness.

MS. PERINETTI: The Defense rests.

THE COURT: All right. Ms. Calhoun?

MS. CALHOUN: No witnesses from the State. Thank you.

THE COURT: Just argument?

MS. PERINETTI: Yes, Your Honor.

THE COURT: All right. You may proceed.

MS. PERINETTI: Your Honor, did you want me to stand at the lecturn or stay seated?

THE COURT: Whatever is easiest for you. If you want to argue from there, that's fine.

MS. PERINETTI: Okay. As long as -- yeah, as long as you can hear me, Your Honor.

THE COURT: So far, I haven't had any trouble hearing you.

MS. PERINETTI: Okay. Good.

Your Honor, none of the improper arguments referenced in Mr. Jordan's post-conviction motion

was objected to by the Defense at trial. There were, as we read into the record, five separate comments. The Defense counsel provided deficient performance under Strickland by failing to object to these arguments, which were all presented by Assistant State Attorney Will.

THE COURT: You would agree that he -- this isn't one -- or at least I didn't hear him say, except in one occasion, I should have and didn't. These were ones where he said, I did not and there was a reason why I didn't and here's the reasons. There was one he said, I should have made an objection to that.

But on the others, he said -- he made a conscious -- he said he didn't object and there was a reason why he didn't object. Correct?

MS. PERINETTI: Well, there -- I guess he had different things to say about each one. If it would be okay with Your Honor, I could go through each one. The first statement we -- the first comment we were talking about was the comment that was referred to by the Florida Supreme Court in its opinion on direct appeal. And that was the "don't let him get away with this" comment from --

THE COURT: And let's talk about that, for

just a minute. I mean, the Supreme Court did address all of this, correct?

MS. PERINETTI: Well, Your Honor, they addressed most of these arguments.

THE COURT: And what did they say about them?

MS. PERINETTI: Well, they applied -- because they were un-objected to, they applied a fundamental error standard instead of Strickland error.

THE COURT: It was fundamental.

MS. PERINETTI: Yes, Your Honor. And the fundamental error standard is much stricter than the Strickland error standard. Fundamental error allows the appellate court to review unpreserved claims on the merits only if the errors reached down into the validity of the trial itself to the extent that the verdict could not have been obtained without the assistance of the error.

Whereas, Strickland error was a reasonable probability of a different result, which is a much less strict error -- standard than fundamental error. So they did look at these as far as the -- under a fundamental error standard. And --

THE COURT: And you're saying that under our standard, under Strickland, that it's a lower

standard --

MS. PERINETTI: Yes, Your Honor.

THE COURT: -- than fundamental?

MS. PERINETTI: Yes. Fundamental error is basically the result of the trial -- the guilty verdict could not have been obtained if not for these improper comments. Whereas, the Strickland error is a reasonable probability of a different outcome. So you're looking at it through a completely different lens.

THE COURT: Okay.

MS. PERINETTI: So, for example --

THE COURT: So there's two elements to this, if I understand what you're saying. The first element is that we have to find that it was improper, ineffective, if you will, for him not to object. Right?

MS. PERINETTI: Yes.

THE COURT: Now, where does the strategic or technical decision side of this come in? Because you would agree that it's clearly a lawyer's prerogative to determine what to object to and what not to object to.

MS. PERINETTI: It is. And it's -- and as Mr. Nielsen just testified to, there is a fine

line, and there are a lot of considerations when you're trying to decide, you know, in the moment, especially, whether to object or not. But he had different reasons in the different comments about whether to object.

For example, under the first comment that was -- the Florida Supreme Court specifically said was indeed improper but didn't rise to the level of fundamental error. And, again, they said it wasn't fundamental error. They didn't even -- they did not consider whether it was the level of Strickland error.

Mr. Nielsen said that he didn't agree with the Florida Supreme Court, that the comment, "don't let him get away with this," was improper. He still doesn't see it, he said. But, of course, since the Florida Supreme Court says it's improper, he would now object to it.

So there was no strategy there. This -- regarding this comment, in particular, there was -- it was clearly deficient performance because the Florida Supreme Court, which is the highest court in our state, said it was improper. Mr. Nielsen was mistaken in not thinking it was improper. So it was deficient performance.

There was no strategy. It's not like he said, it was improper and I didn't object to it. So there was no strategy there. He didn't object to it because he didn't think it was improper.

THE COURT: So take me through the trial on that. Mr. Will says, don't let him get away with this. And Mr. Nielsen, in your theory of the defense, would stand up and say objection. Then what?

MS. PERINETTI: There could have been a curative instruction. There could have been --

THE COURT: Which would have been?

MS. PERINETTI: To disregard the last comment.

THE COURT: Okay. And so your argument, here today, is that that would have made the difference in what the Jury did subsequent to that?

MS. PERINETTI: You have to look at not just that one comment, but you have to look at --

THE COURT: Well, let's just stay with the one comment.

MS. PERINETTI: Okay.

THE COURT: We'll talk about cumulative effect as we go.

MS. PERINETTI: Yes.

THE COURT: But is that your argument, that

that comment made the difference?

MS. PERINETTI: Well, my argument is that all five of these un-objected to comments made the difference. You have to look at -- under Braddy versus State, 111 Southern 3d 810, you have to look at the cumulative effect of the entire closing argument, including both objected to and un-objected to arguments.

So you can't -- it's really looking at it in a vacuum. I mean, I think you can't really look at just that one argument. You have to take everything and look at it cumulatively.

THE COURT: Okay. So, again, I come back to my reading and my understanding of Mr. Nielsen's testimony was that, with the exception of the Golden Rule violation about the mortgage companies --

MS. PERINETTI: Yes, sir.

THE COURT: -- that he made a tactical decision. He chose not to object on the other statements. So where does that come into your analysis?

MS. PERINETTI: Well, I think that -- I don't think he chose not to object, Your Honor. I think he did not see the arguments as objectionable;

whereas, maybe, in hindsight, he now does. So I think when there's an argument that is, in fact, objectionable, if he just didn't see it at the time and now -- but it actually was objectionable, that's not a strategy. That would just be missing something.

THE COURT: And I thought he said specifically -- and I wrote down in my notes, under the comment, "don't let him get away with this," he said, I didn't see anything wrong with that comment, but I didn't object because I was preserving my credibility with the Jury.

On the three days of watching the clock, Keith Cope lay there waiting for somebody to find him. He said, I thought that was fair comment on the facts. He said, I would have lost credibility with the Jury by making the objection. Again, he was attempting to preserve the credibility with the Jury for the penalty phase, again, in response to questions that were asked of him about whether or not there's a link between the guilt phase and the penalty phase; the assumption being that there is some link and that's what he was trying to do.

When he was asked about the Golden Rule, he did say, this was a Golden Rule violation and I

should have objected with regard to the mortgage companies would have -- would have us tied to the bed.

And his condolences to the family, to the point of sympathy, he had -- again, he was saying, and my notes indicate, I didn't object because I said it. I said it. He said, if that's what got him convicted, then I'm sorry, but I was trying to be nice to the family and show sympathy. I was expressing a general sense of human compassion to try to garner credibility with the Jury. The condolences were offered on behalf of the Defense team, including the Defendant.

You're not seriously contending that somehow there was something wrong with him saying that he was sorry that the family had to endure the death of a family member?

MS. PERINETTI: Well, the claim isn't that he was ineffective during opening statements. The claim is that he was -- that -- he was clearly -- if you read the opening statements, he's clearly apologizing on behalf of himself. He said, I would like to offer condolences to Mr. Cope. He did not say, Mr. Jordan would like to offer condolences to Mr. Cope. And if he did, we would have had a claim

that he was ineffective during opening statements.

So, in fact, we're arguing he wasn't ineffective during opening statements. He did not open the door to the statement --

THE COURT: I'm sorry, he was ineffective or he wasn't ineffective?

MS. PERINETTI: That he was not -- he was ineffective in failing to -- well, okay.

THE COURT: Object.

MS. PERINETTI: In failing to object, right. If he had -- if it was the case that he opened the door to the State being able to offer lack of remorse, we would have had a claim that he was ineffective in arguing remorse in the opening statements. It's our position that he was not arguing remorse. He was argue -- he was offering his own condolences, not Mr. Jordan.

Mr. Jordan has no control over what his -- his lawyer's, you know, personal feelings, and that it was inappropriate for the State, in closing argument, to argue lack of remorse on --

THE COURT: Wasn't that a fact, though? Wasn't that a fact? There was a complete lack of remorse in that regard, right?

MS. PERINETTI: But it's entirely improper for

the State to argue lack of remorse unless the Defense opens the door. So whether that may or not -- may or may not have been the case. But the State can't argue lack of remorse unless the Defense opens the door.

And it's our contention that the Defense did not open the door to lack of remorse, and that the opening statement did not open the door. And that -- for that reason, that Mr. Nielsen should have objected to that.

THE COURT: Okay.

MS. PERINETTI: And then the fifth -- I'm sorry.

Right. And, again, you have to look at -- when you're looking at strategy, you have to look at the attorney's reason and whether it was reasonable. So -- reason for not objecting and whether it was reasonable. So a mistake in the law would have not been a reasonable reason to not object. So that would be deficient performance.

Now, the fifth argument, that was the mischaracterization of Mr. Jordan's theory of defense. And Mr -- Mr. Nielsen testified that he did not think -- now, he agreed that the argument that Mr. Jordan snapped, he agreed that that part

was a part of his theory of defense. But he did not agree that it was a theory of defense that it was everyone else's fault.

And this was another one where he said he didn't know why he didn't object. In hindsight, maybe he should have. So, again, this is, you know, maybe something where he just didn't see it or was mistaken. I don't think that there was any strategy here.

THE COURT: Again, now, you're not arguing that there wasn't evidence and argument with regard to involvement of others. What you're saying is, that was not the sole defense in the case, right?

MS. PERINETTI: Right. Well, it was that it was a mischaracterization of the defense, that he was -- that it was everybody else's fault but the Defendant's.

THE COURT: Okay.

MS. PERINETTI: So, again, you have to look at all -- you can't just look at one of these arguments on its own. You have to look at all five of these arguments together, along with any objected-to comments during the -- during the closing argument. And you have to look them all together, and you have to look at the cumulative

effect of these un-objected to and objected arguments and their prejudice of the -- in the case.

And as Mr. Nielsen was saying, you know, this clearly wasn't a "who done it" type case. Mr. Jordan clearly was involved, you know. I think that that is undisputed. It was more of a question of his level of culpability, and that they were arguing for something lesser than first degree murder. I know that there was -- a lot of the argument had to do with the technicalities of the felony murder instruction regarding that the murder happened during the course of the felony.

And so, you know, that was somewhat of a nuanced argument. They were arguing for something less than first degree murder, I think it's not unreasonable that the Jury could have given him something less than first degree murder. In which case --

THE COURT: Certainly, that was the hope. Mr. Nielsen --

MS. PERINETTI: Certainly. It was -- and, again, as Mr. Nielsen said, I mean, certainly that was the hope and it was something they could argue with a straight face. I mean, this wasn't a

case -- this wasn't a case where, you know -- like I said, obviously, Mr. Jordan was involved on some level, but this isn't a case where you're making the Hail Mary argument.

I think that there really was a reasonable expectation that he could have gotten something less than first degree murder. And -- especially with a Jury instruction that is somewhat nuanced, especially for a lay person, and that he could have gotten second degree murder or third degree murder or manslaughter and it wouldn't have been a death case.

THE COURT: And isn't that one of the reasons why Mr. Nielsen was so very concerned about preserving his credibility with the Jury, to make that precise argument that you just articulated?

MS. PERINETTI: It is. And, again, it's a fine line. But when you don't even -- when an attorney doesn't recognize that the argument is not objectionable, then they're not making that strategic decision. So his failure to object on most of these arguments was not a result of a strategic -- you know, he wasn't able to make that decision because he didn't recognize them as being objectionable.

So, you know, our argument is, the State's improper arguments injected an element of fear and emotion into the trial that tainted the Jury's decision in this case and that caused them to return a verdict of -- or, again, it's Strickland error. It's not fundamental error. So there's a reasonable probability that but not for these improper arguments, that they would have returned a verdict with something less than first degree murder.

THE COURT: Okay. Ms. Calhoun?

MS. CALHOUN: Yes, Your Honor. We do agree that the standard is reasonable probability versus fundamental error. We do not agree that it's such a vastly different threshold than what the Defense is arguing.

THE COURT: So let me ask this. There's two things the Defense has to show.

MS. CALHOUN: Sure.

THE COURT: First, they have to show, and they spent most of their time, understandably, on the evidence with the showing, that Mr. Nielsen may have done something wrong. And he disagrees on most of that.

MS. CALHOUN: Sure.

THE COURT: But there were a few times where he said, yeah, looking at it, in 20/20 hindsight, maybe I would have done it differently, maybe I should have objected to the Golden Rule, things along those lines. The second thing --

MS. CALHOUN: That's not what Strickland asks us to do, first of all.

THE COURT: Right. We'll get back to that in a minute. What I want to do is -- there's another part of this test, though, isn't there? Second standard -- part of the standard, to show that it wouldn't have made any difference at all.

MS. CALHOUN: Right. And if the Defense can't show prejudice, then we don't even need to get to the performance prong.

THE COURT: So what do we have on prejudice?

MS. CALHOUN: And that is my first part of the argument. And Mr. Nielsen told us, repeatedly, that the proof of Mr. Jordan's guilt in this case was overwhelming. And I think any fair reading of the trial transcript would inform any objective reader that Mr. Jordan -- the evidence of Mr. Jordan's guilt was overwhelming.

So we would argue that none of these comments was so egregious, either individually or

cumulatively, that they would have changed the outcome of the proceeding. And I don't think we ever get to the attorney performance prong of Strickland, truthfully, because I don't think the Defense can show actual prejudice.

So we don't get to the deficient performance prong of the Strickland test.

THE COURT: How do they show that?

MS. CALHOUN: How do I show --

THE COURT: No. How do they show that? I mean, do they bring in an expert that says, you know, I've been a criminal defense lawyer for 30 years and, in my experience, this made a difference, or this wouldn't have made -- I mean, how do they show that? How do they show prejudice?

What's the standard?

MS. CALHOUN: Reasonable probability of a different outcome in the proceeding. I mean, it -- usually, it's -- usually, you get that in a case where the evidence is close or -- in this case, the evidence is not close. The evidence is -- I mean, you've got the Defendant confessing.

THE COURT: Well, usually, it comes up when we're arguing about a piece of evidence, right?

MS. CALHOUN: Right.

THE COURT: In other words, this is the gun and they never should have admitted the gun, or they never -- they should have granted the motion to suppress so the drugs wouldn't have come into evidence. So we can look at it and say, without drugs, there wouldn't have been a conviction and there wouldn't have been a sentence. Without the gun, there wouldn't have been, et cetera. We have objections here. So what do they have --

MS. CALHOUN: We have objections in closing argument and rebuttal closing.

THE COURT: Right. So what do they have to show?

MS. CALHOUN: They have to show that had those objections been made and been sustained, that the outcome of the proceeding would have been different, none of which would have changed the fact that the Jury heard their client make multiple -- he testified he made multiple statements to a law enforcement officer admitting to virtually every element of this crime. He made -- he wrote multiple letters admitting to virtually every element of this crime.

THE COURT: Not virtually. Actually.

MS. CALHOUN: Actually every element of this

crime. He also made statements to two civilian witnesses, who testified at the trial, admitting to virtually every element of this crime. Brought proceeds of the crime to these individuals who then returned them back to the scene of the crime.

I don't understand how you get -- I mean, none of these objections negates any of those facts. So we would contend that -- I mean -- and Mr. Nielsen, being the dedicated criminal defense lawyer that he is, who is very concerned for the welfare of his client, of course, is, you know, perfectly willing to say that if he did something wrong, in hindsight, that he would want to take responsibility because he is a dedicated criminal defense lawyer. But that's not the standard under Strickland.

The standard under Strickland is whether he did something deficient, viewed at the Constitutional level, that essentially amounted to a 6th Amendment depravation of the client's 6th Amendment right to counsel, which, by no means, occurred in this case, that would have reasonably, probably, resulted in a different outcome of this trial.

But given the quantum of evidence in this

case, I don't see how this Court can reach that determination.

THE COURT: Okay. Thank you, Ms. Calhoun.

MS. CALHOUN: Yes, Your Honor.

THE COURT: Ms. Perinetti, I'm going to ask you the same question I asked Ms. Calhoun. So you agree with the standard; it's your burden, you have to show prejudice. So tell me, your best argument, where is the prejudice here. How do I find prejudice based on the totality of the facts in this case?

MS. PERINETTI: And, again, as I said, it's -- you know, the prejudice is the effect on the Jury that they would have returned something less than first degree murder. And, you know, given the complexity of the Jury instructions in this case, and the technicality of it, it's not a reasonable probability that he would have walked. It's a reasonable probability that there would have been something less than -- different result, something less than first degree murder. And you have that in this case.

I think, you know, this is a question for -- you know, a question for Your Honor. I don't think it's something that, you know, somebody could --

you know, an expert attorney could come in and tell you, like, yes, this would have made a difference. I think it goes to the ultimate question in this case.

And if -- you know, let's say that Defense counsel had objected and -- to these comments and they were improper -- or to these improper comments and they were overruled, a reviewing court would have found the objections improper and they would have granted a new trial. So that would have been prejudice too.

So, I mean, I think, you know, as I said, you know, you need to look at -- the Strickland error is different than fundamental error. And it isn't that this verdict could not have -- it's not that the facts could not -- actually, we're not conceding that the facts -- that the facts prove first degree murder, but that's not the standard. It's not that he could not have been convicted of first degree murder.

It's that there is a reasonable probability of a different outcome and it's not so clear in this case. We think that that's -- it's not clear in this case that he's guilty of first degree murder, that we think that a reasonable Jury, if they had

not heard these comments or if they had been objected to, that they could have come back with something less than first degree murder.

THE COURT: All right. Very good. Thank you. Thank you both for the arguments. You know, you put a lot of time in on this. It shows. You knew every aspect of this case. It literally took me weeks to read the entire file. It is a huge file. There's all kind of information in there. Some of it is conflicting, initially. I had to make a chart to keep all the characters and facts and dates and everything straight. And I know you did absolutely the same thing. And I just want to tell you, I sincerely appreciate this.

From the Defense perspective, I can't imagine a more difficult and challenging case than this one. Ms. Perinetti, you've handled every issue in an exemplary fashion. But this is an extremely difficult case from the Defense perspective.

Ms. Calhoun did her normal, excellent job. But this was a lot easier case for her than it was for you.

I don't know that I've ever seen a case where the Defendant did more to assure his conviction than the Defendant did in this case. I couldn't

believe it. As I was reading through it and I came across something else, I was like, oh, my goodness, what the heck is going on here. And how did they find all these people? And could he not keep his mouth shut? I mean, really, could you not keep your mouth shut with all of this? And maybe I shouldn't be saying this, but he -- I mean, I was shocked in how much -- how free he was to incriminate himself in this case.

I listened carefully to Mr. Nielsen's testimony. I understand that his objective in this case -- and he did have a defense. I mean, this is not one of those circumstances where he was just throwing it against the wall, let's see what the Jury does. He had a real defense in this case. And his defense was that Mr. Jordan didn't intend to kill Mr. Cope. He intended to rob him. He intended to tie him up. He intended to hide his escape or assure his escape while Mr. Cope was tied up and unable to report him. He was mad at Mr. Cope, maybe for good reason.

And all of that came out. But -- and Mr. Jordan made sure all of that came out. But there was a real defense, which is, he never intended to kill him and you shouldn't punish him

as if he did. And I commend Mr. Nielsen for his task in this case and I guess just about every other case, if I understand -- I've never had a case with Mr. Nielsen. He's never appeared in this court while I've been on the Bench.

Apparently, he appeared before Judge Hutcheson on more than one occasion, but I've never seen him. My first experience with him was when he came in and testified, here today. And I commend him for his efforts. And his efforts were directed at trying to save Mr. Jordan's life in this case. And he was consumed and focused on that job.

With the exception of one time with regard to an argument about Golden Rule, his testimony, here today, was that he was trying to preserve his credibility with the Jury so he could make those important arguments that he needed to make at the end of the guilt and the penalty phase. That he was directing his efforts in that regard. That he was garnering credibility with everything that he did. And I accept that.

And I not only accept it, I understand it and agree with it. I think that's exactly what he was doing, looking at everything, his whole body of work in this particular case. To suggest somehow

that -- that his expressing condolences to the family, to express some human compassion, to garner the Jury's credibility, to suggest somehow that there was something wrong with that, I think borders on the ridiculous. It was absolutely the appropriate thing to do. And I understand exactly why he did it. And, again, I find nothing wrong with that in this circumstance.

I don't think Judge Hutcheson would have sustained the objection had one been made for most of the things that we're talking about here, with the exception, maybe, of Golden Rule. And he would have sustained the objection and probably left it at that.

So the long and the short is that maybe on one, the objection would have been sustained. On the others, I don't even think the objection would have been sustained. And I think that he, being Mr. Nielsen, would have -- the result would have been exactly what he feared, which is to lose credibility in the eyes of the Jury, to make it seem like he was nitpicking, and that he wasn't concerned with the overall facts and truth of his position.

That being said, even if I found every single

one of them was grossly wrong and error for him not to do and met every standard under Strickland in that regard, it made absolutely no difference in this case. Mr. Jordan was convicted. Mr. Jordan was sentenced based on the facts of this particular case, which are -- and I don't have to tell you. You know better than I do. They're horrendous. They're horrible facts. They're some of the worse I've ever read. They're difficult -- they were difficult for me to read. I can't even imagine how the Jury felt when they were hearing them, for the first time, from the live witnesses. They're just horrible in that regard.

So, again, I want to commend all of you for the hard work that you did. But based on what I've heard, I cannot grant the motion for a new guilt phase under -- I believe it's ground four of the motion at this time.

Ms. Calhoun, if you would draft an appropriate order that reflects the Court's findings.

MS. CALHOUN: Yes, sir.

THE COURT: And if you can circulate it among counsel, and then forward it to me, please.

MS. CALHOUN: Yes, sir.

MS. PERINETTI: And, Your Honor, just so we're

following the rule, under 3.851, I believe it's (f) -- there's so many letters and numbers here -- (f)(1)(e). It's under "procedures after evidentiary hearing."

THE COURT: Yes.

MS. PERINETTI: It says: The trial court may allow written closing arguments. But since we did oral arguments -- let's see.

Had to order a transcript. Okay. Shall order a transcript of the hearing, which shall be filed within ten days if Realtime transcript was utilized. So I think Your Honor would need to order a transcript. And then the order needs to be rendered within 30 days of the filing of the transcript.

THE COURT: Okay.

MS. CALHOUN: Can I also have a little clarity here? I don't think you've actually entered a formal order on the other claims in the motion.

MS. PERINETTI: Yes.

MS. CALHOUN: So how do we want to handle that?

THE COURT: Cover it all. This was the only one.

MS. CALHOUN: Well, this was the only claim

that we had to have an evidentiary hearing on.

THE COURT: Right.

MS. CALHOUN: But the motion had multiple claims.

MS. PERINETTI: Yes.

THE COURT: Okay. I thought I had done an interim order. I didn't?

MS. CALHOUN: No, I don't believe so.

MS. AHMED: No, Your Honor. All you had was have us do the penalty phase grant order and we did that and the Court signed it.

THE COURT: Right. That was ground five, right?

MS. AHMED: I have to look at it.

THE COURT: Okay. And I thought we did an evidentiary hearing on ground four. This was ground four.

MS. AHMED: Right. At the case -- if the Court remembers, at the case management conference, I had argued, with Ms. Calhoun, a number of other claims that we had asked for an evidentiary hearing, that the Court did not grant an evidentiary hearing. We would need an order to those effect, as well.

THE COURT: Did I announce the ruling?

MS. AHMED: Yes.
THE COURT: At the end?
MS. AHMED: Yes.
MS. CALHOUN: I believe --
MS. AHMED: On the record.
MS. CALHOUN: I believe so. It was announced. But there's not a written order. You need a written order in order --
MS. AHMED: We do need a written order.
MS. CALHOUN: Not to be advocating for you. But you need an order to be able to appeal.
THE COURT: Okay. Let's do one. Ms. Calhoun, do it all.
MS. CALHOUN: Okay. What was --
THE COURT: I'm sure I expressed my rationale for why I did what I did at the time.
MS. CALHOUN: Okay. So the case management conference was August 1st of '17.
MS. AHMED: It was claim three.
MS. CALHOUN: Madam Court Reporter, we're good? Is the court reporter going to order that transcript, as well? Because I'm going to need that, as well as today's, so that I can prepare --
THE COURT: At least my findings.
MS. CALHOUN: Right. So that I can accurately

prepare the order encompassing all of that.

THE COURT: Okay.

MS. CALHOUN: I mean, I'm sure I have notes, but I'd rather make sure that I have --

THE COURT: And you know that does -- because I was actually -- when we started the arguments, I was looking through, trying to find my order on Count IV and I couldn't find it. So I pulled up my notes and my findings on Count IV. So I've been going off of my notes. I didn't go back -- I didn't want to be distracted by looking through the file for the actual order. But that makes sense now why I didn't pull it up initially. Okay. Yeah, we do need to do that.

MS. CALHOUN: Yeah.

MS. AHMED: And if it helps, it was claim three, to the extent it was related to guilt phase. Claim six and claim eight were the ones we argued at the case management conference, outside the penalty phase.

THE COURT: All right. So -- okay. That part. And then that gives you certain rights that you have with regard to the Court's denial of those motions and where we go. But we still have a trial that we need to do, so.

MS. CALHOUN: A penalty phase trial.

THE COURT: Right. So can we talk about that for just a minute? Ms. Calhoun, do you have what you need now? Do you understand what I'm asking for?

MS. CALHOUN: You need me to prepare an order denying guilt phase relief on grounds three, four, six, and eight of the Defendant's 3.851 motion.

THE COURT: Right. Correct.

MS. CALHOUN: And I need a transcript, which you are ordering --

THE COURT: I am.

MS. CALHOUN: -- from the August 1st hearing and today's hearing. And the court reporter is acknowledging that she understands that.

COURT REPORTER: August 1st.

MS. CALHOUN: August 1st and today. Because three, six, and eight were discussed on August 1st, and ground four was discussed today.

THE COURT: Yeah. Okay. So how about -- now, let me ask you, on the penalty phase --

MS. AHMED: Yes, sir.

THE COURT: Okay. So we're going to go back and we're going to pick a new Jury, and then we're going to start presenting evidence to them on the

penalty phase. Are you going to do that or is somebody else doing that?

MS. AHMED: No, Your Honor. At the case management conference, it did come up and we informed the Court and Ms. Calhoun that we do not do any penalty phase. The Court had appointed someone. I don't -- I'd like to say it was conflict counsel, but I don't remember. And I'm not sure what happened after that because we would not be involved in the new sentencing.

THE COURT: I don't remember.

MS. CALHOUN: Correct. You all only do post conviction.

THE COURT: Ms. Calhoun, do you remember who we appointed?

MS. CALHOUN: I probably -- I would not likely have been present at the case management conference because usually our trial attorneys handle that.

Madam Clerk?

THE COURT: That would have been Mr. Leb?

THE CLERK: Are we looking for the attorneys that were here on August 1st?

THE COURT: Yeah.

THE CLERK: Calhoun versus Singleton, is what I have on the court action form.

MS. CALHOUN: No. That would have -- no. Case management conference. Because I would not have been present at the case management conference for the sentencing.

MS. AHMED: Ms. Singleton and I did the opening, I remember that.

THE CLERK: And then the Court action form from 2/2 just says it was Ms. Bort. I don't know if that's accurate.

MS. CALHOUN: It doesn't say anybody for the State?

THE CLERK: Yes. Calhoun.

MS. AHMED: I was there. So it was me and Ms. Singleton. And it was I and Ms. Singleton who did the argument at the case management conference.

MS. CALHOUN: Oh, you mean post-conviction case management.

MS. AHMED: Yes, ma'am. I'm sorry.

THE COURT: Right.

MS. AHMED: When we decided what to have hearings on.

THE COURT: Okay. Well, I'll let you all look at your calendars and figure out who was here and who wasn't and whatnot. But here's what I want to do, Ms. Calhoun, is, it seems to me that we're done

now with the post conviction side of this.

MS. CALHOUN: Correct.

THE COURT: We now need to turn our attention to the retrial of the penalty phase.

MS. CALHOUN: That's correct.

THE COURT: So I'd like to at least start with, like, a status conference there so we can go over calendars, we can figure out do you need -- what do you need? Do you just need a trial date? Do you need a -- you know, is there discovery we need to do? Is there -- what do we need to do in that regard? And part of that process is the State has to go back and look at their case and decide how they want to proceed.

MS. CALHOUN: That is correct.

THE COURT: Right. I mean, they may decide, for whatever reason, we're not going to proceed with the death penalty and we'll do something else.

MS. CALHOUN: That's correct.

THE COURT: And that happens as well. So I want to give everybody the opportunity to start that process and come to their own conclusions before we have our next conference.

MS. AHMED: If I may speak on that, Your Honor, I believe -- I don't remember the

prosecutor. Someone did send me a notice of seeking death and I did respond to them, telling them that the Court had appointed somebody for the new penalty phase. And, I'm sorry, I don't remember. It's been a while.

MS. CALHOUN: Okay. Yeah, because originally it was Ryan's case. It might still be Ryan's case.

MS. AHMED: I mean, I did inform the prosecutor that we would not do any penalty phase, and that the Court had appointed somebody.

MS. CALHOUN: Right.

MS. AHMED: So he was going to -- he or she was going to check.

MS. CALHOUN: Well, I mean, I'm in the same building as the homicide unit. So, I mean, I can commit them to a date for a status conference and they can contact your JA and tell you -- I mean, either -- they can work it out amongst themselves, since we're back up to full staff in our homicide unit. So one of them can show up or I can just -- when I get back to my office, because I'm in the same building as them, I can just have them call Susan.

THE COURT: Okay. That would be great. If you could let us know who's involved, that would

help. I'm looking -- I'm pulling up notes and I'm pulling up hearing sheets and every note and every hearing sheet I have -- as you know, I start every hearing by having counsel make their appearance --

MS. CALHOUN: Sure.

THE COURT: -- and I have Calhoun for everything.

MS. CALHOUN: Right. Yeah. I will --

THE COURT: Good or bad, you're in there.

MS. CALHOUN: I understand, for better or for worse, I did my part. I have achieved my objective. I will now be gracefully bowing out as soon as I get you your proposed order, after I run it by counsel for CCRC, who will also be then gracefully bowing out and doing their appeal thing.

MS. PERINETTI: And I think the only -- we will see you again, Your Honor. You're not completely rid of us. Once we -- with all due respect, once we appeal your order, there will be a brief status conference regarding the preparation of the record on appeal.

MS. CALHOUN: That's true.

MS. PERINETTI: So there will be an order from the Florida Supreme Court ordering Your Honor to set that as a status conference.

MS. CALHOUN: And I will be appearing at that, for the --

THE COURT: Can we schedule that now or do we have to wait --

MS. PERINETTI: Yeah. I think we'll have to wait. Once we file the notice of appeal, we have -- we'll have 30 days from the rendition of the order. And then the Florida Supreme Court will send Your Honor an order, ordering you to schedule a notice -- or to schedule a status. So I think it would be premature at this point.

MS. CALHOUN: Right. Because I have to get the transcripts from Moe to prepare the order. Then you have to render the order. Then they have to file their notice. And that's -- the filing of their notice is what's going to trigger the scheduling of the status conference.

THE COURT: Okay. Let me ask one final question.

MS. CALHOUN: Sure.

THE COURT: And, I mean, we're on the record, and everything we do is on the record, but I'm not sure that this rises to that level. But I'm rotating out of this Division effective June 4th, I think is when -- and I'm moving to a different

Division that encompasses both criminal and civil in Flagler.

And I've been trying to make our rulings and move this case forward to the point that we can ultimately have the trial that we've known now, for a while, we're going to actually have.

Is there anything that requires that I try that case versus the next Judge in this Division? Because if there is, I'm not aware of that.

MS. PERINETTI: Not from the Defense standpoint, Your Honor.

THE COURT: Okay.

MS. CALHOUN: Huh-hu.

THE COURT: Okay. Very good.

MS. CALHOUN: No.

THE COURT: All right. Well, again, I want to thank you for your hard work in the case. This may be my last participation in the case, even though you may have one more hearing in that regard. And so, again, I say thank you for that. And drive safe.

(Proceedings concluded at 10:12 a.m.)

REPORTER'S COURT CERTIFICATE

STATE OF FLORIDA)
COUNTY OF VOLUSIA)

I, MAUREEN M. ELROD, RPR, certify that I was authorized to and did stenographically report the foregoing proceedings, and that the transcript is a true record of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, or attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 6th day of August 2018, at Volusia County, Florida.

_____
s/Maureen M. Elrod, RPR
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Filing # 76432159 E-Filed 08/14/2018 03:32:02 PM

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT, IN
AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO.: 2009-002872-CFAWS

STATE OF FLORIDA

vs.

APPEAL
STATUS CONFERENCE HEARING

JOSEPH EDWARD JORDAN,

Defendant.

* *

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DENNIS P. CRAIG,
CIRCUIT COURT JUDGE

* *

DATE TAKEN: AUGUST 2, 2018

TIME: COMMENCED AT 10:07 A.M.
CONCLUDED AT 10:23 A.M.

PLACE: S. JAMES FOXMAN JUSTICE CENTER
251 NORTH RIDGEWOOD AVENUE
DAYTONA BEACH, FLORIDA

STENOGRAPHICALLY
REPORTED BY: CHRISTIE SAMMARO, RMR, CRR
COURT REPORTER and NOTARY PUBLIC

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Heather Brooke, Clerk of Court

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P R O C E E D I N G S

THEREUPON,

THE COURT: Who do we have on the phone?

MS. CALHOUN: Rosemary Calhoun for the State.

THE COURT: Boy, the connection's terrible Is this Rosemary?

MS. CALHOUN: Assistant State Attorney Rosemary Calhoun.

THE COURT: Okay. And then who else --

UNIDENTIFIED FEMALE VOICE: (Unintelligible.)

THE COURT: Okay. And then who else do we have?

COURT REPORTER: Who was it? Rachel?

MS. PERINETTI: Maria Perinetti from CCRC on behalf of Mr. Jordan.

THE COURT: Okay. Your connection's a little better than Rosemary's.

MS. CALHOUN: I apologize, Your Honor. I'm really sick or I would be appearing in person.

THE COURT: All right. We're here for Joseph Edward Jordan. Today is a status conference. Now, keep in mind, I'm new to the case.

Okay. So -- all right. What are we -- where are we in the case?

MS. PERINETTI: This is Ms. Perinetti. This

is just a status conference for the -- regarding the preparation of the record on appeal. This is on appeal from -- they're appealing the denial of the guilt phase portion of the 3.851 that we had had a hearing on.

Mr. Jordan was granted a new penalty phase pursuant to Hurst v. Florida and he's awaiting a new penalty phase trial, but this is regarding the preparation of the record on appeal for the Florida Supreme Court regarding his guilt phase issues.

THE COURT: Okay. All right. All right. So then -- all right. Okay. So where are we on getting the record together?

MS. PERINETTI: Your Honor, the transcript -- pursuant to the Florida Supreme Court's order dated June 8th, 2018, the transcripts, I believe, are due from the court reporter to the Clerk of Court on August 20th, and then after -- thereafter, the Clerk of Court would have 20 days from then to file the record on appeal with the Florida Supreme Court.

THE COURT: Okay. All right. I see that. Yeah, I see that from the docket entry back in June.

All right. Okay. So what do we need to do

today?

MS. PERINETTI: Your Honor, I think this hearing is just to make sure that the preparation of the record on appeal is on track.

I received a proposed (unintelligible) from the Clerk of Court --

COURT REPORTER: A proposed what?

MS. PERINETTI: -- (unintelligible) there are four dates of transcript that were not included in the index from May 12th, 2015; September 13th, 2015; October 26, 2015; and April 27th, 2017. And they would also be -- have to be included in the record on appeal, along with the transcripts from today's status conference hearing.

So the next that would be -- we need to make sure that the court reporter is on track with filing these by August 20th, and then the Clerk of Court would just need to put everything together and send it up to the Florida Supreme Court.

THE COURT: All right. Now, does the court reporter already know that we need those four dates? Okay. Yes. Looks like a yes. All right.

MS. PERINETTI: I don't know if they're -- they received a designation to the court reporter and they've submitted an acknowledgment.

THE COURT: Okay.

MS. TRIGONES: She is present in court, Judge.

THE COURT: She's present and she's shaking her head yes.

MS. TRIGONES: And that was Maria speaking?

THE COURT: Yeah.

MS. TRIGONES: Okay.

THE COURT: Okay. So they're the things we need to make sure that we have transcribed, and my representative says that you already knew all that. Right?

MS. BROOKE: Yes. Once we receive that, we can do the final index.

THE COURT: All right. So it sounds like she's agreeing.

Is there anything else then that we need to make sure of?

MS. PERINETTI: There's a couple things, Your Honor. I think Your Honor, pursuant to the Florida Supreme Court's order, needs to file a status report regarding the record on appeal with the Florida Supreme Court within 20 days of today. I also need to file a status report tomorrow.

And then also I just wanted to bring it to the Court's attention that regarding his new penalty

phase trial, I believe that the Court back in 2017 in court appointed the conflict counsel, CCCRC, the conflict office, to represent Mr. Jordan, because my office cannot represent individuals in trial proceedings; only in postconviction. But I don't believe there was ever an order appointing CCCRC, and I don't believe anybody has ever appeared in court on his behalf for the retrial and he has not been in contact with his new attorney.

So I just want to make sure that he's represented for his -- the purposes of his penalty phase retrial.

THE COURT: All right. So you're not sure that he's got counsel for his penalty phase?

MS. PERINETTI: He has -- nobody has been in touch with him, and I don't believe that there's an order. I spoke with Ms. Calhoun, and neither she nor I are aware of any actual court order notifying CCCRC that they've been appointed.

THE COURT: Okay.

MS. CALHOUN: This is Rosemary Calhoun. I can confirm that what Ms. Perinetti is stating is correct, and the case is currently docketed for September. So that is an issue of some concern, so.

THE COURT: All right.

MS. CALHOUN: We have not received a notice of appearance from anyone on Mr. Jordan's behalf in regards to the retrial of the penalty phase. Because, to our knowledge, no one has formally been appointed to represent him specifically.

THE COURT: All right. I guess I'll go back through the docket entries and see.

Now, when was that -- I guess when was it -- was it reversed by the Supreme Court on the penalty phase already, or was there an agreement or stipulation that there would be a new penalty phase?

MS. PERINETTI: Judge Perkins granted relief pursuant to Hurst v. Florida because this is a post-Ring (unintelligible) --

COURT REPORTER: I can't hear, Judge. I need her to repeat that. I can't hear.

MS. PERINETTI: -- (unintelligible) penalty phase (unintelligible) -- so he has to --

COURT REPORTER: Is there a volume that can go up?

MS. TRIGONES: There is a volume button --

MS. PERINETTI: -- (unintelligible) on the guilt.

But as far as the penalty phase, (unintelligible) whether they were doing -- I think that they filed a cross-appeal.

THE COURT: Now, when would --

COURT REPORTER: Judge, I didn't get any of that, so I need her to repeat all of that.

THE COURT: All right. Repeat what you just said.

MS. PERINETTI: I believe it's only on appeal as far as the guilt phase. Judge Perkins granted a new penalty phase, so it would have to go back for a new penalty phase trial at some point.

MS. CALHOUN: Yes, that's correct. This is Rosemary Calhoun speaking. The State is not appealing on the Hurst issue as to the penalty phase.

THE COURT: Okay. Now, then that means we don't need to wait for the appeal that's before the Supreme Court at this point; right? On the penalty phase?

MS. PERINETTI: Well, Your Honor -- this is Ms. Perinetti. I think -- I mean, if he were to prevail in the Florida Supreme Court, he would get a new guilt phase trial. So I think that it probably would be prudent to wait till his appeal

in the Florida Supreme Court is over, and then just do everything all at once.

So I think that proceeding with the penalty phase trial at this point would be putting the cart before the horse.

And at this point, I think the Florida Supreme Court has jurisdiction as to the case because it's on appeal.

THE COURT: All right. Well, then the next --

MS. PERINETTI: But I also do think appointing counsel right now for his penalty phase would be (unintelligible) so they can start investigating the case. I think it would also be a good thing to do.

THE COURT: All right. So you want me to appoint rather than wait for the Florida Supreme Court on the 3.851 appeal; right?

MS. PERINETTI: Yes, Your Honor. CCC -- or CCRC, my office, can't -- cannot represent him on his penalty -- the penalty phase retrial.

THE COURT: All right. But aren't we putting the cart before the horse? I mean, if we're waiting for the Supreme Court, why don't we wait to appoint?

MS. PERINETTI: That's true. That makes

sense, Your Honor. But it was because he received notice that he had a trial set for September, and I can't represent him in that.

So if -- I mean, I think it would be wise to just put everything on hold for now as far as his retrial and wait until everything is final with the Florida Supreme Court, and then we can formally -- then CCRC can formally withdraw from the case and then trial counsel can be appointed, and I think that that would make sense.

THE COURT: All right. So --

MS. CALHOUN: This is Rosemary Calhoun speaking, Your Honor, if I may be heard.

What has been happening with these cases is that regional counsel, or whomever the trial counsel in the penalty phase retrial, has been appointed so that they can at least begin conducting their investigations because that typically can take up to a year or so before the actual penalty phase retrial takes place, even though the appeal in the guilt phase -- denial on the guilt phase may be ongoing in the Florida Supreme Court. So it is kind of a dual-track procedure.

THE COURT: Okay.

MS. CALHOUN: So that's what typically has been happening in these cases.

THE COURT: All right.

MS. CALHOUN: It's not as though you're going to be proceeding to an actual guilt phase -- excuse me -- a penalty phase retrial in September because it is a rather lengthy process for new counsel to work up a new penalty phase. They have to reinvestigate the case and develop their new mitigation strategy, hire experts, reinvestigate mitigation.

It can take a substantial amount of time. So rather than put that entire process on hold, they can be doing that investigation and building that case while the guilt phase is on appeal. And once that guilt phase appeal is concluded, then they can hopefully be ready to proceed forward with the penalty phase retrial, having completed their investigation into the penalty phase.

That would be the State's preference, for you to at least go ahead and appoint penalty phase counsel so that they can at least begin the investigative phase of their work in this case on the penalty phase.

THE COURT: Okay. I'll go ahead and do that.

So I'll go ahead and do the order appointing counsel, and then -- now, we're currently scheduled for what in September?

THE CLERK: Docket sounding.

THE COURT: Docket sounding? Well, that would be a waste of time, wouldn't it?

MS. TRIGONES: Yes.

THE COURT: Ms. Calhoun, what do you think we should do --

MS. CALHOUN: He won't have defense counsel to appear at the docket sounding on Mr. Jordan's behalf.

THE COURT: Okay. So you want to keep it on for the docket sounding just for them to show up and say we need a continuance for a year?

MS. CALHOUN: Well, there's nobody to appear on his behalf.

THE COURT: Well, there will be by the time we get there.

MS. CALHOUN: Okay.

THE COURT: So you want to keep that scheduled for then just for them to show up without any plan on having any hearing going in September?

THE CLERK: I'm going to appoint that counsel --

MS. CALHOUN: I'm not going to be the one appearing. It's going to be Ryan Will. But I would rather leave it to his preference as to whether he wants to put a scheduling order into place or get a discovery process put into place. I'm not sure how he conducts -- I'm not sure how he conducts his proceedings. I know I like to put scheduling orders in and discovery orders in, so ...

THE COURT: Yeah, no, I -- I would agree with that. But I guess it wouldn't hurt for us to have him show up at docket sounding, we can just treat it as a status conference, since it's already scheduled.

MS. CALHOUN: Okay.

THE COURT: So, yeah. So docket sounding won't be anything ready for any trial or hearing. We'll just keep that date, but we'll consider that a status conference on the penalty phase.

All right. Now --

MS. CALHOUN: I'll let Mr. Will know.

THE COURT: Okay. That will be great.

Now, as far as this goes, do we have to have another status conference for this to make sure that the record gets up to the Supreme Court?

MS. PERINETTI: This is Ms. Perinetti. I would say no, as long as there's no issues as far as the clerk submitting the record on appeal on time. The clerk would submit the record on appeal, and then jurisdiction is with the Florida Supreme Court, and I believe your job is done as far as the guilt --

THE COURT: All right. So as long as I get the status report in in 20 days, and the clerk gets the record up to the Florida Supreme Court, we're golden?

MS. PERINETTI: Yes.

THE COURT: Okay. All right. So we won't schedule anything in regard to this unless something comes up and somebody lets us know that there's an issue.

MS. TRIGONES: And Rosemary --

MS. PERINETTI: Yes, Your Honor. Thank you for letting us appear by phone.

THE COURT: You're welcome.

MS. TRIGONES: Rosemary, this is Heatha Trigones, covering for Ryan Will, so I'll fill him in on what happened.

THE COURT: Do you know -- Ms. Trigones, do you know whether Ryan would like to do a

scheduling, or how does he do it? Or do you know?

MS. TRIGONES: We're flexible. So I think the status conference is a good idea and so we can start communicating with the defense attorney and figure out if they want to come get copies of all of the materials. I think the status conference is wise.

THE COURT: Yeah, so we'll do that. We'll keep it scheduled where it's scheduled and just treat it as a status.

Okay. All right. Anything else we need to discuss this morning?

MS. CALHOUN: Not from the State.

MS. PERINETTI: No, Your Honor.

THE COURT: Okay. All right. Then thank you very much.

We'll see what happens next on the penalty phase and I'll make sure I get my status report in.

MS. PERINETTI: Thank you, Judge.

MS. CALHOUN: Thank you, Your Honor.

THE COURT: All right. Thank you so much.

(The proceedings were concluded at 10:23 a.m.)

REPORTER'S CERTIFICATE

STATE OF FLORIDA)
COUNTY OF VOLUSIA)

I, CHRISTIE SAMMARO, RMR, CRR, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

Dated this 14th day of August 2017.

s/Christie Sammaro
Christie Sammaro, RMR, CRR
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IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO.: 2009-CF002872

STATE OF FLORIDA

vs. MOTION HEARING - APPEAL

JOSEPH EDWARD JORDAN,

Defendant.

* *

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE TERENCE R. PERKINS,
CIRCUIT COURT JUDGE

(STENOGRAPHICALLY TRANSCRIBED VIA DIGITAL RECORDING)

* *

DATE TAKEN: MAY 12, 2016

TIME: AUDIO BEGINS AT 1:34 P.M.
AUDIO ENDS AT 2:20 P.M.

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P R O C E E D I N G S

(Audio begins at 1:34 p.m.)

THE COURT: All right. This is Terry Perkins. Do I have somebody on the line?

MS. PERINETTI: Yes. This is Maria Perinetti and Donna Venable with CCRC on behalf of Mr. Jordan.

THE COURT: Okay. Great. All right. I think I'm the one that set this, if I'm not mistaken. And I have Ms. Calhoun and Ms. Kircher here --

MS. KIRCHER: Yes, Your Honor.

THE COURT: -- in the courtroom. Can you hear the phone okay?

MS. KIRCHER: Yes, sir.

THE COURT: Okay. I'll move the microphone over here to help with that. The reason I'm calling is that I've got a motion for clarification on my order with regard to the in camera inspection, and I've got a stack of documents on my table in my office that I've -- some I've looked at, some I haven't looked at, and I guess I was getting kind of lost in, okay, what are we supposed to be doing here and where is the disagreement, if any, on the documents I have. So let me first start by asking the State and then I'll get to whoever on the phone wants to address it, would that be Ms. Ahmed, would you be the first one or --

MS. PERINETTI: Ms. Ahmed isn't here today. This is Ms. Perinetti speaking. That would be fine if the State wanted to address that first. I think regarding the motion to clarify, I think I could clear that up really quickly, we would strike the motion today. The clerk had contacted us after receiving Your Honor's order to release some previous -- some exempt records, they contacted us on February 18th, I believe any confusion with the clerk's office has been cleared up and we received the records, so we would withdraw our motion at this time.

THE COURT: Boy. Great. Well, that's good. I'm glad I scheduled the hearing if for no other reason than that. Good. Okay. But, again, I've got this big stack of doc -- and I mean a big stack of documents sitting on my table, so let me start first with the --

MS. PERINETTI: Yeah. I'm afraid it's kind of a good news, bad news situation, so I would hope that the rest of it would be that easy, but I don't anticipate that.

THE COURT: Okay. All right. Who wants to start?

MS. KIRCHER: Well, Your Honor, we are here on CCRC's motion. The last filing that I have is the order to deliver the exempt public records, and previous to that --

MS. PERINETTI: I'm sorry, Your Honor, we're having some trouble hearing the State.

THE COURT: Okay. Hang on a minute.

MS. PERINETTI: We can hear Your Honor very clearly, but --

MS. KIRCHER: I'll just talk louder. And before that was Defendant's fourth motion requesting the in camera review of records. It's the State's position, and of course we are here on Defendant's motion, or CCRC's motion as to the public records, but it's our position that it's Your Honor's purview to review the exempt public records to determine whether or not --

MS. PERINETTI: I'm sorry, Your Honor, we still can't hear them.

MS. KIRCHER: Thank you, Judge. It would just be the State's position that it is -- that Your Honor would review the exempt public records and determine whether or not those are discoverable to CCRC in post conviction. But we're here on their motion, so that would just be our position.

THE COURT: Okay. All right. So, Ms. Perinetti, you want to go next?

MS. PERINETTI: Yes, Your Honor. I'm sorry, I think I heard Ms. Kircher said it was her position that Your Honor needs to review the records in camera that

were -- that exemptions were claimed on and issue an order following Your Honor's review; is that correct?

THE COURT: That's pretty much what she said. I didn't really like it, but that's what she said.

MS. PERINETTI: I mean, I would -- I would agree with that. In past cases, you know, judges have conducted their in camera review and issued an order detailing what records we receive, what records we don't. I mean, I think the State -- both the State and the Defense are in a difficult position in that we're, you know, being asked to make arguments about records -- whether we should or should not receive records that we don't know what they are, so it's really difficult to make arguments about whether we should receive them or not when we can't see them, so it's like, you know, there has to be this in camera review.

I can say that a lot of the exemptions that were claimed there's exceptions where either, you know, defense counsel in a capital case can -- is able to receive these records or where the Court is able to, you know, order the disclosure of records upon court order. So, I mean, I think a lot of the -- a lot of these exemptions that were claimed are, you know, intended to protect people's privacy with regard to medical records, autopsy photos, things like that, but they're not

intended to keep, you know, capital defendants from -- you know, from getting the discovery that they're entitled to. And, of course, we would have no objection to any kind of order for, you know, restrictions that the Court would place on us as far as not further disclosing these sensitive materials to outside -- you know, outside agencies.

THE COURT: Okay. Well, give me the handbook version of what you think I'm going to be looking through that you're not entitled to get.

MS. PERINETTI: That we're not entitled to get? Okay. Well, I can just kind of go through, you know, one of the -- one of the things that some of the agencies are claiming is autopsy photos. The Office of the State Attorney and the medical examiner's office, for example, were claiming exemptions on autopsy photos Under Florida statute 406.135. And under that statute it says that the Court, upon showing of good cause, may issue an order authorizing any person to view or copy a photograph or video recording of an autopsy. So this Court, you know, upon showing of good cause could issue an order releasing those records to collateral counsel.

Also regarding the autopsy photos, on March 15, 2016, in the Campbell versus State case, number SC15-2185, the Florida Supreme Court issued an order

finding that the denial of autopsy photographs and crime scene photographs depicting the victim which were sought by collateral counsel under rule 3.852, quote, departed from the essential requirements of law and directed the circuit court to provide Campbell's counsel with the photographs he was seeking. So with regard to -- (indiscernible) with regard to the autopsy photos we would argue that we are entitled to those.

THE COURT: Does that mean that you're entitled to them regardless of the protections under 406.135?

MS. PERINETTI: Yes, because 406.135(4)(a) creates an exemption -- the exemption for a court to issue a court order allowing us to have the photographs. And there is good cause in a -- you know, in a homicide case there's good case for the capital defendant, you know, in order to be able to defend himself to have access to these photographs. And I think, you know, the purpose of the statute I'm sure is to protect the privacy of victims, and, you know, of course we would not disseminate those photographs.

THE COURT: Well, and that's really -- this gets to the heart of why I was asking. And number one is I got a lot of documents, so I'm trying to figure out where the lines are. But number two is in a case like this I can certainly see why autopsy photographs may be of a

benefit either to the State or the Defense depending on what they depict, but the burden in this case at this stage to produce autopsy photographs would that not fall on the defendant to show good cause?

MS. PERINETTI: Well, Your Honor, without -- without having the information, you know, we don't know what it shows. It could be Brady material. It could be -- without having an expert examine the photographs or examine, you know -- one of the other things that I'm going to get into is medical information regarding -- regarding the victim, without having an expert evaluate these things we don't know, you know, whether or not it could be relevant to a 3.85 motion.

THE COURT: Well, I'm not even talking about the admissibility, I'm just talking about the discovery of those. You still have to show good cause under the statute, don't you?

MS. PERINETTI: Well, and I think good cause, Your Honor, you know, it's a homicide case, this is material that would have been disclosed I would think to defense counsel at trial, so I don't see any reason, you know, in evaluating whether trial, you know, provided -- or trial counsel provided deficient performance, I would think that we should be able to get whatever trial counsel was entitled to.

THE COURT: If they did, do you not already have it or no? It doesn't work that way?

MS. PERINETTI: I mean, we don't know -- there's no way to know whether defense counsel's trial -- whether defense counsel had everything unless we get the -- you know, unless we get the information from the agency as well.

THE COURT: Okay. How am I supposed to know when I'm looking at a bunch of photographs? I'm not even saying there's autopsy photos in there, I don't remember seeing any to be honest, but how am I supposed to know, oh, this was --

MS. PERINETTI: Well, one of the exemptions claimed by -- for example, by the Office of the State Attorney and by the medical examiner's office, they claimed an exemption for autopsy photos.

THE COURT: All I was asking is how am I supposed to know by looking at them as to whether or not that was produced or even used in the underlying trial?

MS. PERINETTI: Whether it was -- well, I don't think that Your Honor has to make that determination.

THE COURT: Okay. I guess I'm not any clearer on how you just showed good cause for autopsy photos, but maybe I have to look at them to see.

Okay. What else? What other bright-line standards

you think are out there?

MS. PERINETTI: One of the other exemptions that was -- that was claimed by the Office of the State Attorney as well as the Broward County Sheriff's Office and -- I'm sorry, there were two offices of the State Attorney, I believe one was from Volusia County, one was from Broward County. They both claimed exemptions for medical records and the sheriff's office -- medical records of the victim, I'm sorry. And this would be under Florida statute 395.3025, patient records are confidential and must not be disclosed without the consent of the patient, but appropriate disclosure may be made without the consent to -- such consent. And then one of the exceptions is in a civil or criminal action. So this is one of the -- obviously this is a -- well, this is kind of a civil action, but a criminal action as well. So upon order from the Court under Florida statute section 395.3025(4)(d) it says upon a court order that victim's medical information can be released.

And we would argue that again because this is a homicide case in order to evaluate -- fully evaluate the case and defend Mr. Jordan he has to be able to review the victim's medical -- you know, medical records pertaining to the murder and have an expert, if he so

chooses, review these medical records. This could be -- this could be relevant to guilt -- not only guilt phase, but also to penalty phase and the aggravating factors as well. So we would ask --

THE COURT: And is the standard could or is, or what's the standard?

MS. PERINETTI: Whether it's relevant to a 3.851 motion.

THE COURT: Okay. So, I mean, where does that end? Is there any limit to what would be relevant? I mean, let's assume -- let's assume that there's some medical records that say the victim was treated for veneral disease; do you get that?

MS. PERINETTI: Well, I think -- I think that's why there's an in camera review, Your Honor. I mean, I think that if there was something in those medical records that had absolutely nothing to do with the murder that that's why there's an in camera review. On the other hand, I don't know if Your Honor would be in a position to say, you know, not being an expert or a doctor, whether if the victim did have a venereal disease whether it had anything to do with his death.

THE COURT: Okay. And I couldn't agree with you more. Can you understand why I'm feeling a little insecure about applying the right standard in reviewing

records when I -- okay.

MS. PERINETTI: Yeah, Your Honor, I agree it's difficult.

THE COURT: Okay. All right. What else?

MS. PERINETTI: Another thing that both State Attorney's Offices, both from Volusia County and Broward County were claiming exemptions on attorney notes, I just wanted to make the distinction between -- under Arbelaez versus State, it's A-R-B-E-L-A-E-Z versus State, 775 So.2d 909, it was cited by the Broward county Sheriff's -- or, I'm sorry, Broward County State Attorney's Office.

THE COURT: What's the citation?

MS. PERINETTI: 775 So.2d 909, it's a Florida Supreme Court case.

THE COURT: Uh-huh.

MS. PERINETTI: And they cite in this case, it says that pretrial materials which include notes from the attorneys to themselves designed for their own personal use in remembering certain things or preliminary guides intended to aid the attorneys when they later formalize their knowledge are not within the term public record. So, you know, any notes that the attorneys made for themselves, you know, preparing for trial or, you know, notes that were just notes to themselves would not be

public record. I just wanted to make the distinction when Your Honor is going through these records the distinction between that and emails, which are public record, or interoffice memorandum and things of that nature, which are public record.

THE COURT: Okay. All right. Anything else?

MS. PERINETTI: Another thing that came up with both State Attorney's Offices is criminal history, and that was under Florida statute 943.0525. I'm not really sure what the exemption is here. I read over the statute. It has to do with an agreement that the state agencies have with regard to running these criminal background checks. My main concern here is I'm not sure exactly what this is. My main concern here is that there might be Brady material, possible impeachment evidence regarding witnesses in the trial, and that would be my concern about any information contained under the criminal history, so I don't know if the State can shed any light on that.

THE COURT: Okay. I'm going to ask them when you're done.

MS. PERINETTI: The next thing is death certificate, that would be under the State Attorney's Office for Volusia County. They are claiming exemption under Florida statute 382.025, and death certificates

are confidential. There is an exemption that death certificates can be released upon order of any court of competent jurisdiction, so we would ask that this Court, you know, disclose that. I would assume it's just like one piece of paper.

The next thing is under -- the last thing from the Office of the State Attorney from Volusia County I believe is sex offender registration exempt under Florida statute 943.053. I would assume it has to do with Mr. Jordan's sex offender registration, but I'm not exactly sure, and we would ask that that be disclosed to us as well.

THE COURT: Well, if it's Mr. Jordan's, then obviously you represent him --

MS. PERINETTI: Yes.

THE COURT: -- so I would assume that you'd be entitled. Suppose it's for a witness or somebody else, victim, anything else?

MS. PERINETTI: I mean, if it's relevant to -- we would ask that it would be disclosed if it's relevant to a three -- possible 3.851 motion or if it's Brady material, but without knowing -- I mean, I do think it probably is pertaining to Jordan, but if not, you know, we would ask Your Honor to review that.

THE COURT: Okay. All right. Thank you. Let me

hear from the State.

MS. PERINETTI: I have more, but if you want to --

THE COURT: Okay.

MS. PERINETTI: I'm sorry. I had more exemptions, but if you want to just talk about -- those have to do with the ones from the State Attorney's Office, and then I can do any additional ones.

THE COURT: No. Go ahead and tell me all of them, and then I'll ask the State to respond to all of them.

MS. PERINETTI: Okay. From the Broward County Sheriff's Office the first thing was DNA analysis information, they are claiming exemption per Florida statute 943.325(14), and there's an exemption under that statute with regard to the results of DNA analysis. And, let's see, they say the results of DNA analysis shall be released to criminal justice agencies as defined in 943.045. So I went to 943.045, criminal justice agency means, and one of the things is a court, so DNA analysis information can be disclosed to a court, and we would argue that this is definitely -- well, also another thing is under (e), any other government agency or subunit therefore (verbatim) that performs the administration of criminal justice pursuant to a statute or rule of court. I mean, we're a government agency, I would argue any defense -- capital defense attorney

would be able to get these records, but we would argue, again, that, you know, we would be entitled in order to defend Mr. Jordan and adequately, you know, assess the case and what trial counsel did in the case that we should be entitled to these records.

THE COURT: Okay.

MS. PERINETTI: The next thing is Social Security numbers under the Broward County Sheriff's Office, we have no -- you know, we have no interest in having people's Social Security number, we would just ask that when Your Honor reviews these records that all that is redacted is the Social Security number, that if there's a Social Security number on one page to just redact that and not the whole page.

THE COURT: Okay.

MS. PERINETTI: The next thing is under Broward County Sheriff's Office, and I believe this also appears under the Broward County State Attorney's Office is the identity of victim of sexual battery, and that's exempt per Florida statute 119.071(2)(h), and I would think that this probably has to do with a prior sex offense charge down in Broward County involving Mr. Jordan, there is an exception for this, that these records may be released to any -- to another governmental agency in the furtherance of its official duties and

responsibilities. And CCRC is a government agency and the release of these records regarding this aggravator case might have relevance to Mr. Jordan's 3.851 motion.

Let me just see if there's anything else that I'm missing. The Department of Public Protection was claiming an exception under Florida statute 401.20 subsection 4 regarding records of emergency calls which contain patient information or treatment information. Section (f) under that statute provides an exception for civil or criminal action. It's very similar to the argument I just made regarding the victim's medical records, it would be the same argument, the same exception.

And then there's -- oh, juvenile records are claimed by I believe the Office of the State Attorney -- of the State Attorney in Broward County. I have no idea what these are, so I don't know how they would be relevant, but I believe that they can be -- under Florida statute 985.04 they can be disclosed upon order of the Court, so they are confidential but there is an exception for that.

And so other -- the other thing is the Department of Corrections records, and under the Department of Corrections -- and also there are some Department of Corrections records that were claimed exempt by the

Office of the State Attorney in Broward County, and my co-counsel, Donna Venable, because there was a lot of exemptions claimed by the Department of Corrections, so she looked into that, so if it would please the Court Ms. Venable is going to address those records.

THE COURT: Okay.

MS. VENABLE: Thank you, Your Honor. So the Department of Corrections claimed a host of exemptions. I think that's in our third motion for in camera review, it's attached on their transmittal sheet to the repository, just what their statutory authority is for the redaction or exclusion of each type of record. Some of these fall into the same category, so the first thing that they've claimed exemptions for is the medical, psychological and dental information of I'm assuming Mr. Jordan. And there is actually a Florida Supreme Court opinion that's on point about this, which is -- it's in re amendment to Florida rule of criminal procedure 3.852, and that's 163 So.3d 476, it's a memorandum opinion. And it basically just says that when -- when the Department of Corrections provides records to the repository as part of a 3.852 response that we do get -- that the defendant does get a copy of his own medical records and -- upon, you know, signing the necessary waivers, that we as legal representatives

would be able to have access to those records as well.

I think that also relates to the HIV/AIDS testing information and substance abuse information that they've claimed an exemption for, those would be part of his medical records. And additionally there's some specific exceptions in the statutory rules that they cite for the exclusion of those records as well. So they have cited Florida statute 381.004, 397.501, and 397.752. So the 381.004 has an exception in subsection (e), I guess sub -- subsection (1) that these records can be released to the subject of the test, which is -- this is about the HIV or AIDS testing, or the subject's legally authorized representative, which it's our position that we are his legally authorized representative, we're his counsel.

And then the other two statutory provisions that they've cited have -- are related to the substance abuse records. Both of those it's 397.501 and then 397.752, which direct you right back to 397.501, it says that a person has the right to confidentiality of their records and that they may not be disclosed without the written consent of the individual. So it's our position that we'd be willing to obtain consent, whatever consent the Department deems is necessary for us to receive the records from Mr. Jordan himself.

They have claimed statutory authority for the redaction and exclusion of information relating to cause of death. I'm not actually sure what this is pertaining to, if it's cause of death of the victim, I think we -- I think someone testified about that at the trial, so we would defer to Your Honor's judgment in conducting the in camera review as to whether or not that's something that should be disclosed.

There's an exception -- the next one is for pre or post sentence investigation and/or violation report. They cited 945.10(1)(b), and there's actually within 945.10 it is subsection -- I think Ms. Perinetti mentioned this as well -- it's subsection (2)(c), which says information specified in paragraph (1)(b) is able to be released to an attorney representing an inmate under sentence of death. So -- and then there's exceptions to that, but that's not -- except for the portions of the record containing a victim's statement or address, or the statement or address of a relative of the victim, which that's not applicable here.

So it's just our -- it's our position that the statute that they've cited itself provides a specific exception for release to Mr. Jordan's legal representative, which is us.

They've also claimed an exception -- or an

exemption of the educational records of Mr. Jordan under 1002.22. It's our position that Mr. Jordan has the right to obtain his own educational records. And, again, we would be willing to have him execute any waiver or release in order to get those records.

THE COURT: Has he?

MS. VENABLE: I'm sorry, Your Honor?

THE COURT: Has he? Has he executed the appropriate waivers or releases for any of this?

MS. VENABLE: He has for the medical records, I'm sure. I'm not totally sure about any of the other things. And quite frankly we have some of his educational records, so we would have to be -- we would need to figure out whether we would even -- would even need those from the Department of Corrections. What we would ask Your Honor to do is just to order that they be released upon him executing, you know, the appropriate waiver or release.

THE COURT: Let me get this straight. You want me to go through that bundle of records so that you can then determine whether or not you're going to have your client sign a release so he gets them?

MS. VENABLE: I think the purpose of the in camera review is just to ensure that nothing is going to come to us that isn't -- that doesn't -- that shouldn't come

to us. It's hard to, you know, explain.

THE COURT: Well, how about this, do we all agree he doesn't get them if he doesn't sign a waiver?

MS. VENABLE: I would agree to that, Your Honor, yes.

THE COURT: Okay. Well, I'm not looking at them unless he signs a waiver.

MS. VENABLE: Okay. That's very --

MS. PERINETTI: Your Honor, this is Ms. Perinetti. And it's really -- it is kind of confusing as far as the medical records of our client because in the past they've taken the position that they're really not public records at all. I mean, this is -- it's kind of weird because we're treating -- we're dealing with this under section -- or under rule 3.852, which has to do with -- deal with public records, and the Department of Corrections sent them as public records as part of the public records request, but, you know, it's been our position in the past that these aren't really public records at all, they're medical records that aren't public and that we should be able to receive them with a -- you know, just with a waiver from our client that it's his records and he's entitled to them. So we're fine with that if Your Honor would like us to just, you know, have him execute a -- you know, execute a records

release, whatever the Department of Corrections requires. The only thing is, you know, if the Department of Corrections refuses to furnish them pursuant to a records release -- or with a records release we would just ask that Your Honor at that point if it would become necessary to issue a court order that he's entitled to his own medical records.

THE COURT: Okay. Yeah, just do the release and that's step one to getting the records. I assume they're going to maintain that they're -- otherwise you don't get them and they're confidential for the reasons they've indicated, and then we can rule on that, but we all agree that without a release you're not going to get them. There's no reason for me to review them if we all agree you don't get them. I'm not looking to get out of work, but I'm looking to get out of work.

MS. PERINETTI: No, I agree, Your Honor, it's just typical because it made -- we've been doing these cases for a long times -- time and it seems like it changes every -- the Department of Corrections' position changes from time to time as to whether it will just provide the records with a release or whether they require a court order or, you know, whether they're under seal and exempt records. So I do agree with Your Honor, I think that they're his records, he's entitled to them with a

release.

THE COURT: All right. So what other issues do we need to address with the DOC records?

MS. VENABLE: This is Ms. Venable again. So the next thing that they claimed exemption for is biometric identification information, including fingerprints, and quite frankly I don't know what this is. I mean, I'm assuming it's just his fingerprints and we've -- I would defer to Your Honor's judgment on that. If it is his fingerprints, I'm sure we have those and probably not even necessary --

THE COURT: Okay.

MS. VENABLE: -- to have them. Juvenile records, I think Ms. Perinetti already addressed with relation to the State Attorney's Office, and we would have the same argument about that.

The next thing that they have claimed is exempt is information regarding a victim's statement and/or identity. I'm not sure what this relates to either. We clearly know who the victim is in this case. I don't know if it's a prior -- the prior conviction case. We also know who that person is. So, again, I would defer to Your Honor's judgment on that.

THE COURT: Okay.

MS. VENABLE: The next thing that they have on here

is parole commission records, so they've cited 945.10(1)(d), and I believe that says that such things are exempt from public disclosure. And it's our position that this is not public disclosure. And I'm assuming that these are, again, Mr. Jordan's records, I don't know who else's records they would be, but, again, we would --

THE COURT: Are these probation records? Are these probation records? You said parole, but I assume these are from --

MS. VENABLE: Yeah, it just says parole commission records, and I have -- I don't have any idea what they are.

THE COURT: Okay.

MS. VENABLE: But if they are his records, again, I think it's the same type of situation we just discussed about the educational records and the medical records that if we do need them we'll ask him to sign the appropriate release.

MS. PERINETTI: I'm sorry, just to jump in, this is Ms. Perinetti again, as far as the procedures for having him sign the release and obtaining these records, they are with the court -- with the clerk's office right now, would we obtain the records that the Department of Corrections already copied from the clerk's office when

we provide our release or would we get them from the Department of Corrections because I would guess that the Department of Corrections is not going to be happy about having to make copies of these records again?

THE COURT: We're not talking about records, we're talking about the release.

MS. PERINETTI: Right. So who do we provide the release to?

THE COURT: You can either provide it to the -- to the records provider, or I guess you could provide it to the Court conditioned on the Court ordering that the records be produced. You can do it either way, I don't care, as long as --

MS. PERINETTI: Okay. So like just a motion for a court order and we can attach the records release -- or records release.

THE COURT: Yeah, that would work. That would be fine. Or supplement your current motion, or however you want to do it.

MS. PERINETTI: Thank you, Your Honor. I think that would be a lot easier than asking the Department of Corrections, you know, just in the interest of the economy.

THE COURT: That's fine. Okay.

MS. PERINETTI: Thank you.

THE COURT: All right. What else on the DOC records?

MS. VENABLE: The exclusion of -- they provided statutory authority for the exclusion of FCIC slash NCIC or criminal justice information under 943.053. And kind of going with that the last thing that they've provided the statutory authority for is computer printout, or maybe it's not the last thing, but they also provided the same statute for computer printout. I don't know -- I'm sorry, Your Honor, I need to go back.

THE COURT: Well, let me tell you, I reserved 30 minutes for the hearing and we're 40 minutes into it, and my next hearing that started 10 minutes ago is sitting in the courtroom. So tell me what you want to tell me, and then I need to give the State some time, but we're running out of time.

MS. VENABLE: Okay. I'm sorry, I just got confused between FCIC, NCIC and FDLE, FBI numbers, which I think are related, but I think Ms. Perinetti actually addressed the FCIC, NCIC and we would have the same position --

THE COURT: Okay.

MS. VENABLE: -- as we do for the other agencies on that.

THE COURT: Okay.

MS. VENABLE: The FBI numbers and the FDLE numbers and the computer printout we're actually not sure what that is either, they've claimed 943.053 for those exemptions, and our position is just that it might be Brady material, potential impeachment information, or it might just be Mr. Jordan's own criminal, you know, information. So we would need Your Honor to look at it, and we would defer to your decision on whether it's relevant of course.

The other thing they've claimed exemption for is Social Security information, we don't have a problem with that. I don't think we need anybody's Social Security number. We probably have Mr. Jordan's Social Security number.

And then they've claimed -- they've claimed exemptions for sensitive information under 945.10, again, we're not sure what that is, but it kind of has a general thing that says if it's, you know, sensitive information that it's exempt from disclosure. That sounds to me like a judgment call that Your Honor would have to make as far as whether it's relevant to a 3.851 motion.

And the same thing with the home addresses, phone numbers and personal information of DOC employees, I can't imagine that we would need that either. We would

just ask that if anything is redacted that it's only -- we would like to make sure that only the sensitive information itself is redacted, that it's not like a blanket redaction of like an entire page of something just because there's a phone number on there.

And the last -- this is the very last thing is the -- there's something in there that they've claimed exemption about security photos relating to buildings, I don't know if this is like security information about DOC facilities, but, again, we would just ask that Your Honor look at that, and if it does appear to be relevant to a 3.851 motion we would ask that it be disclosed, but I doubt that it is.

THE COURT: Okay. All right. Very good. Let me ask the State to respond. And -- okay. So I assume, Ms. Kircher, you're going to respond for the State.

MS. KIRCHER: Well, Your Honor, there's a couple of issues at play here. I'll let Ms. Calhoun speak specifically --

THE COURT: So the answer is no, you're going to have both of you.

MS. KIRCHER: I'll be as brief as possible.

THE COURT: All right. Here's all I need from you.

MS. KIRCHER: Yes, Your Honor.

THE COURT: Tell me only those areas that you think

they're wrong about and that shouldn't be produced in this case.

MS. KIRCHER: Well, I can't speak specifically to the exemptions claimed by Broward County and Department of Corrections. And Rana Wallace I believe -- and candidly we do have two hearings so it may have been on the other, but I believe it was on this case she was noticed and asked if she could be excused from the hearing because there would be no outstanding public records issues. I don't think this was noticed as a substantive public records hearing or else we would have the records custodian from those agencies that are in question here present. I can only speak generally. Ms. Calhoun will speak quickly on behalf of the State Attorney's Office's exemptions, but I think the underlying issue that we're missing here is Your Honor hit the nail on the head in terms of looking at these voluminous documents and determining what is relevant to a 3.851 motion.

The question in producing these exempt documents, which are per se not public records documents, so the burden is on the defendant to show that they are relevant to production because they're relevant to a 3.851 claim. Obviously CCRC wants all of the documents because they want to see if there's a claim that can be

produced from those documents, but that's simply not the standard. The standard is whether they can point to the relevancy of these particular documents because they're relevant to a claim that they are developing. It's not whether, you know, it's relevant to any 3.851 claim. And I heard a lot of, you know, it might be, it could be, it's possible, I'm not sure what it is, then they're not entitled to disclosure of those non-public record documents because the good cause shown as required under that subsection of the statute is because it's relevant to a 3.851 claim and there's no other vehicle for them to have that disclosure. If it's something relevant to a claim, presumably it would already be in CCRC's file because it's in trial counsel's file. Obviously their own independent investigation of mitigation paired with what is in trial counsel's file is what's relevant to a 3.851 motion, but I'll let Ms. Calhoun speak specifically to the State Attorney's Office's position on that.

THE COURT: Thank you. Ms. Calhoun?

MS. CALHOUN: Yes, Your Honor. Again, I apologize for being caught a little short because I was not noticed that we were going to have a substantive public records discussion. As to the NCIC, FCIC request, again, I haven't heard a specific argument as to why

those records are necessary other than that maybe possibly they might be Brady material, which we would argue does not rise above the good cause shown and would definitely lead to a substantive claim as opposed to a fishing expedition, which is not allowed under our rules. Also --

THE COURT: And are we talking specifically about Mr. Jordan's NCIC or FCIC?

MS. CALHOUN: We're talking about any NCIC, FCIC, which leads me to my second argument is that we're not authorized to disclose NCIC, FCIC printouts. Our agency can lose its accreditation and its ability to access the NCIC, FCIC system.

THE COURT: Well, not if the Court orders that it be produced.

MS. CALHOUN: They don't care.

THE COURT: Okay.

MS. CALHOUN: So we would ask that the Court consider that.

THE COURT: All right.

MS. CALHOUN: Because that would inhibit our ability to perform our essential functions in the State Attorney's Office. Now, what were -- I'm trying to remember now because that was the main one that set off alarm bells in my mind. What were the other ones, the

death certificate was I think one that --

THE COURT: Medical -- yeah, medical records, attorney's notes, criminal history we talked about, death certificate, sex offender registration, juvenile records.

MS. CALHOUN: I think -- I think the juvenile records were from Broward County, and I can't address anything out of Broward County because I'm not the custodian of their records, but --

THE COURT: Do we have autopsy photos?

MS. CALHOUN: I would imagine certainly that the State Attorney's Office in Volusia County has autopsy photos. And why we would submit those under seal as exempt from public records disclosure is obviously because we're required to under statute because they're not for dissemination to the general public as public records, but obviously if -- certain autopsy photos I would imagine would have been introduced into evidence at trial or disclosed to the Defense as a part of pretrial discovery disclosure, and to the extent Your Honor determines that they're relevant to provide to the Defense we would not object to those being disseminated to the Defense with the appropriate order ordering them not to further disclose to persons outside of the defense team.

THE COURT: Okay. All right. Thank you very much.

MS. CALHOUN: You're welcome.

THE COURT: All right. Normally I'd give a time for response back, Ms. Perinetti, to you, but I don't think I need a response. I think I understand what the issues are, and it's not going to help me a whole lot more until I break the seal and look at the documents. So it sounds like that's what I'm going to do.

MS. PERINETTI: Okay, Your Honor. If I could just take one more minute of your time. We would ask -- normally in these cases we like to go to the clerk's office to inspect the evidence from the trial, so we would ask, I'm not sure whether the State has any objection to it, but we would ask the Court for an order allowing us to inspect the evidence at the clerk's office, and we would have no objection to giving notice --

THE COURT: Any objection to such an order?

MS. PERINETTI: -- to the State when we were going to do that.

THE COURT: They want to go look at the evidence.

MS. CALHOUN: We're talking about the trial evidence --

THE COURT: The trial of this case, yeah, Mr. Jordan's case.

MS. CALHOUN: No objection to inspection of the evidence if it is a trial.

THE COURT: No objection. Get me an order.

MS. CALHOUN: We would like to have someone from the State present during that inspection process.

THE COURT: Whatever you want to do.

MS. CALHOUN: Thank you.

THE COURT: Get me an order that sets up a time and date for you to do it, and the State can attend.

MS. CALHOUN: Thank you.

MS. PERINETTI: Thank you, Your Honor.

THE COURT: All right. Thank y'all.

(Audio ends at 2:20 p.m.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF VOLUSIA)

I, DEBBIE A. SINER, RPR, do hereby certify that the foregoing pages constitute a true and complete transcript of the proceedings transcribed via digital recording by me to the best of my ability in the aforementioned cause at the time and place herein set forth.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

Witness my hand this 15th day of August, 2018.

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IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO.: 2009-CF002872

STATE OF FLORIDA

vs. STATUS HEARING - APPEAL

JOSEPH EDWARD JORDAN,

Defendant.

* *

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE TERENCE R. PERKINS,
CIRCUIT COURT JUDGE

(STENOGRAPHICALLY TRANSCRIBED VIA DIGITAL RECORDING)

* *

DATE TAKEN: OCTOBER 26, 2016

TIME: AUDIO BEGINS AT 4:15 P.M.
AUDIO ENDS AT 4:48 P.M.

PLACE: S. JAMES FOXMAN JUSTICE CENTER
251 NORTH RIDGEWOOD AVENUE
DAYTONA BEACH, FLORIDA

STENOGRAPHICALLY TRANSCRIBED BY: DEBBIE A. SINER, RPR,
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C O N T E N T S

STATUS HEARING 4

CERTIFICATE OF REPORTER 28

P R O C E E D I N G S

(Audio begins at 4:14 p.m.)

THE COURT: All right. Y'all ready for our 4:00? Can you hear that okay?

MS. CALHOUN: Yes, sir.

THE COURT: All right.

(Court makes phone call.)

THE COURT: All right. Hello. This is Terry Perkins. I got anybody else on the phone?

I guess that was just a break in the music. Silly me.

MS. AHMED: Hello?

THE COURT: Hello. Okay. This is Terry Perkins, and we are here in State versus Joseph Jordan, Case Number 2009-002872. I am here in courtroom one in the Justice Center in Daytona. We are being digitally recorded. I'm going to start by having counsel make their appearances on the record, and we're going to start with counsel that are right here in my courtroom -- our courtroom.

MS. KIRCHER: Stacey Kircher representing the Office of the Attorney General, Your Honor.

MS. CALHOUN: Rosemary Calhoun representing the Office of the State Attorney.

THE COURT: All right. So now I'll turn it over to

those of you on the phone, and I'm not sure how you're supposed to know when you're supposed to go, but let's see how that works.

MS. AHMED: Good afternoon, Your Honor. It's Raheela Ahmed and Maria Perinetti on behalf of Mr. Jordan and CCRC, and I believe we're the only people on the phone.

THE COURT: Oh, well, that works --

MS. ROBINSON: No, actually -- well, actually got one more, Judge.

MS. AHMED: Okay. Sorry.

MS. ROBINSON: It's Janine Robinson on behalf of the Florida Department of Law Enforcement.

THE COURT: Okay. Well, actually happy to have y'all on the phone.

All right. So we're actually here on a status hearing, and my recollection is that the only thing that I think I'm working on is I have one other packet of information that I'm looking at doing an in camera inspection on. And I know that because it's literally sitting on the middle of my desk right now waiting for me to get out of court so I can look at it. But as we sit here I don't even remember which provider it relates to, but I know I have one. And it's sealed so I haven't even unsealed it yet. So let's start with that, is

there anybody that thinks that I'm supposed to be doing anything else at this time?

MS. AHMED: Your Honor, this is Raheela Ahmed on behalf of Mr. Jordan. Your Honor's correct, the two agencies that have sent sealed and exempt records from the repository was the State Attorney's Office from the 17th Judicial Circuit and the medical examiner's office, those should be the packets that the Court has. All we're -- we're waiting for the Court obviously to do the in camera review on that. The only other issue for the Court is we had done the additional records request, certain agencies have filed objections, we just I think need the Court's ruling as to those objections. I mean, we don't have any further I think argument as to those objections.

THE COURT: Okay. Well, let's take it one step at a time because you lost me there at the end. With regard to the records that I'm reviewing right now, you have records from the State Attorney's Office, you said 17th, do you mean 7th Circuit?

MS. CALHOUN: No. She means --

THE COURT: 17th?

MS. CALHOUN: -- 17th.

THE COURT: Okay. So that's from a different prosecution?

MS. CALHOUN: No. It's -- well, the Defendant had a case down in Broward County, he had records from the Broward County State Attorney's Office, and those records were in part of our file, so those were sent.

THE COURT: What are they, do you know? Are they notes, attorney notes, are they -- what are they?

MS. CALHOUN: It's a copy of an entire case file from the Broward County State Attorney's Office relating to a prior case.

THE COURT: Okay. And who's objecting to producing them?

MS. CALHOUN: I don't know that the objection that you've been asked to rule on relates to that.

THE COURT: Well, I don't remember seeing the 17th Circuit State Attorney Office records. I thought what I had was the medical examiner records, but maybe it's all together, I don't know. I have one packet, one file, and it's probably, I don't know, a quarter inch thick.

MS. CALHOUN: We were served with an order signed by you on October 5th directed to the records repository to deliver exempt public records to Office of the State Attorney 17th Judicial Circuit.

THE COURT: So I've already ruled on it.

MS. CALHOUN: Yeah. And they -- the records repository served the notice of delivery of exempt

public records --

THE COURT: Okay. So what's left on the State Attorney 17th Circuit records? Do we all agree I'm done with that?

MS. CALHOUN: You haven't reviewed it yet. It just got to you.

THE COURT: Oh, so that's what's sitting on my desk?

MS. KIRCHER: It might be, Your Honor. I can help with that as well. We've got the Broward County State Attorney filing their notice of compliance for the demand for additional public records on 9/19/16, so I believe that was forwarded to Your Honor.

THE COURT: Hang on one second. Let's make this easy. I thought this was easy.

(Court calls secretary.)

MS. PRICE: Hello?

THE COURT: Hey.

MS. PRICE: Hey.

THE COURT: On the Jordan case -- and you're on the speaker phone, by the way.

MS. PRICE: Okay.

THE COURT: And everybody is waiting for your --

MS. PRICE: Uh-oh.

THE COURT: No. On the Jordan case I have a packet

of information that I need to review that's -- can you pull it off there and bring it to me?

MS. PRICE: Yes, I will bring it right there.

THE COURT: And if it -- can you open it if it's not opened?

MS. PRICE: Okay. Sure.

THE COURT: That's great because I don't have scissors. Thank you.

MS. PRICE: Got you. All right. Bye.

THE COURT: Bye.

MS. KIRCHER: And, Your Honor, just for clarification I don't believe there's an objection on the floor as to the Broward County, I believe that's the one Ms. Robinson from FDLE's on the phone, I think that's the objection, for FDLE additional public records, I believe, so --

THE COURT: Okay. So with regard to the records that I have, if any, for the State Attorney of the 17th Circuit, no one's objecting to producing all of those records, right?

MS. KIRCHER: That's correct, Your Honor. And they have been provided, they're just in camera.

THE COURT: Okay. So what do I do, send those back to the repository and say produce them all, copy them all?

MS. CALHOUN: They've been produced, you need to inspect them. I don't know that there's --

MS. AHMED: Hello?

MS. PERINETTI: Hello?

THE COURT: Yeah, we're here. Somebody hit the static button, it wasn't me, as tempting as it was.

MS. CALHOUN: It's a matter of determining which -- if there's any exemptions claimed -- because there's exemptions claimed, so --

THE COURT: Who's claiming the exemption?

MS. CALHOUN: The Broward County State Attorney's Office, so --

THE COURT: Okay.

MS. KIRCHER: -- you have to review the ones where there are exemptions claimed and determine whether or not you're going to grant the exemptions or whether --

THE COURT: Are they going to argue it?

MS. KIRCHER: No, Your Honor. By statute, it's exempt by statute.

MS. CALHOUN: Right.

MS. KIRCHER: So just the procedure in 3.851 is if CCRC is requesting those for the purpose of development of a claim, they have to request those. The Broward County State Attorney's Office complied and sent the in camera records, Your Honor now has to go through those

and see whether they are discoverable in the development of a claim, but they still maintain their exemption and non-public record status under statute. It could be things like medical records, victim information, Social Security numbers, that type thing.

THE COURT: Okay. And actually what I do have here is I have the file material from the 17th Circuit State Attorney's Office, and it looks like they are claiming in the case of State V Matthew Powell, I don't know why that would -- is that what the case was called? They are claiming certain exemptions, including prosecutorial notes, prosecutor notes, criminal history, NCIC, FCIC, medical records, Department of Correction records, first draft case filing recommendations, pharmacy records, and DMV records. That's what they're claiming as exempt material, I believe, so that's what I'm going to find in here, right?

MS. KIRCHER: Yes, Your Honor.

THE COURT: Okay.

MS. KIRCHER: My understanding. We don't have a copy of those.

THE COURT: So just so I make sure that I understand what we're doing here, are these records unequivocally and unquestionably exempt records, or are they -- is that a conclusive presumption, or is this

just something that they can raise and the Court if it finds them relevant can require that they produced -- be produced?

MS. KIRCHER: Well, and we're looking at two different standards just to be clear, Your Honor, they can be duplicated -- and we have several of these kind of in the works right now -- they can be duplicated and provided to CCRC and maintain their exempt status because they still would be non-public records, and, of course, I don't know what the State Attorney's Office put in there, it's up to each agency's Sunshine Law representative to determine whether or not that particular record is exempt or not, but under statute those should be exempt and non-public records, and they would maintain that confidentiality regardless of whether they were presented to CCRC in development of a claim or not. And the way that that order is usually --

THE COURT: Stop right there for just a second --

MS. KIRCHER: Yes, Your Honor.

THE COURT: -- just so I know. All right. So I've got CCRC on the phone, right?

MS. AHMED: Yes, Your Honor.

THE COURT: All right. Do you care if these records that I'm looking at here from the State Attorney's Office, do you care if they maintain their

confidentiality when I have them produced to you? In other words, you get to look at them, you get to read them, you get to figure out if you need them for purposes of your appeal, but they still maintain their confidential character; do you care?

MS. AHMED: Not in -- no, not in that sense, Your Honor, no. And we would maintain the confidentiality should we -- should it become discovery. Obviously the burden's on us to determine relevance towards the claim.

THE COURT: Does that mean I don't have to look at them?

MS. KIRCHER: Unfortunately, Your Honor, that's if the records are deemed discoverable in the development of CCRC's claims in post conviction. We've had this argument in front of Your Honor before, the State's position is that case law is clear you can't have a fishing expedition, you are only entitled to the records if they are in development of a claim. And CCRC's position, not to speak for them, but we don't know if we have a claim until we see the records.

THE COURT: Aren't they right?

MS. KIRCHER: Well, the case law is on our side for this, you're not entitled to a fishing expedition, you don't get carte blanche any record provided to you just because you want them, you have to show why it is

relevant to a claim that you are pursuing on 3.851.

THE COURT: All right. Hang on just a second. Ms. Perinetti, are you on the phone with us?

MS. AHMED: I'm sorry, Your Honor?

THE COURT: Who do I have --

MS. AHMED: Yes, Your Honor.

THE COURT: Okay. And you're representing the Defendant in the case, right?

MS. AHMED: That's correct, Your Honor.

THE COURT: Okay. So do you believe, reasonably believe as an officer of the court that you need the prosecutorial notes, the prosecutor notes to develop your claim?

MS. AHMED: Yes, Your Honor. And let me explain to the extent. When we did the additional records request, Matthew Powell was a witness in this case as the Court -- I'm sorry, the Court was not the trial court, but he was a witness in this case against Mr. Jordan.

THE COURT: Okay. How about the criminal history?

MS. AHMED: For Mr. Powell, we definitely would ask for Mr. Powell's criminal history. (Indiscernible.)

THE COURT: Medical records?

MS. AHMED: I'm sorry, Your Honor, I missed the last part.

THE COURT: Medical records?

MS. AHMED: For Mr. Powell, no. For Mr. Jordan, yes.

THE COURT: These are medical records for Mr. Powell. Department of Correction records?

MS. AHMED: Yes, because he was on probation, and part of what we're looking for is whether there's impeachment issues there, Giglio issues, offers --

THE COURT: Filing --

MS. AHMED: -- before his testimony.

THE COURT: -- filing recommendation with regard to Mr. Powell?

MS. AHMED: If it's with regard to the case that's in Broward County, I don't believe so.

THE COURT: All right. And pharmacy records for Mr. Powell?

MS. AHMED: That one I don't know, Your Honor. I have no idea what --

THE COURT: DMV records or driver's license digital imaging for Mr. Powell?

MS. AHMED: I would say probably driver's license record perhaps.

THE COURT: How does that come in?

MS. KIRCHER: Again, Your Honor --

THE COURT: Hang on. Hang on. Hang on. It's her turn. How does that come in? Why do you need the

driving records?

MS. AHMED: I'm not sure, Your Honor, that (indiscernible) driving, if there's anything there, I'm not sure, that's why we leave it to the Court's discretion looking at these exempt records.

THE COURT: Okay.

MS. AHMED: My inclination's probably not, but I don't know as to that one.

THE COURT: Okay. All right. Great. So I'm going to order produce prosecutor notes, criminal history, Department of Correction records. I'm going to deny the request with regard to medical records for Mr. Powell, Department of Correction records with -- oh, I'm sorry, Department of Correction records for Mr. Powell are discoverable. Medical records for Mr. Powell are not. Pharmacy records for Mr. Powell are not. Driver's license and driver's license digital imaging for Mr. Powell are not. And filing recommendations are. All right.

MS. KIRCHER: May I, Your Honor?

THE COURT: Uh-huh.

MS. KIRCHER: My question for CCRC would be I don't think we're operating under the exact right standard here, but my question would be what claim of post conviction relief for Mr. Jordan would Mr. Powell's DMV

records and filing recommendation go toward?

THE COURT: Well, it doesn't matter, I've already said they don't get that.

MS. KIRCHER: I believe Your Honor said the medical records they don't get.

THE COURT: Powell medical records, Powell pharmacy records, Powell driver's license DMV records, and driver's license digital imaging.

MS. KIRCHER: Okay.

THE COURT: They get prosecutor notes, criminal history, Department of Correction records, and that's it.

MS. KIRCHER: Okay. I guess my question would be the same for the filing recommendation on a case where he was a witness, what claim to Mr. Jordan's case would the prosecutor notes on an unrelated case assist in?

THE COURT: For which one now, the criminal history records?

MS. KIRCHER: Well, criminal history, and that's under a different standard, the State Attorney's Office shouldn't produce NCIC and CCIC because that's under contract, that's a different standard, but I'm not representing the Office of the State Attorney, that's just something that comes up every time. But, for example, the prosecutor's notes, I would just ask CCRC

because it's their burden to show what claim the prosecutor's notes on Mr. Powell's case is going to assist with?

THE COURT: She said they're looking for a deal, they think there was a deal, there was a quid pro quo, I get that.

Okay. Anyway, so, Ms. Perinetti is it, am I saying that right?

MS. AHMED: I'm sorry, Ahmed, A-H-M-E-D.

THE COURT: Okay. There was two of you.

MS. AHMED: I think Ms. Rob -- Ms. Perinetti is with me here, and Ms. Robinson is here for FDLE.

THE COURT: All right. Okay. So you want to draft me an order?

MS. AHMED: I can, Your Honor.

THE COURT: Okay. Can you run it by Ms. Kircher and Ms. Calhoun and everybody else?

MS. AHMED: Certainly, Your Honor, I will.

THE COURT: Consistent with what we just ruled.

MS. AHMED: Yes, Your Honor.

THE COURT: Okay. Send it my way. Thank you. Anything else we need to do?

MS. AHMED: Yes, Your Honor. Just so the Court is aware with regard to the disclosed seal and exempt the records that the Court had already looked at, that has

already been shipped to the repository and we've been in touch with the repository, and as of last Friday they're in the process of copying it, so hopefully we'll get those soon from the repository.

THE COURT: Okay.

MS. AHMED: Otherwise we just need to I think set another status hearing date in January.

THE COURT: Okay. Contact Susan and set up a status hearing for whenever you need it.

MS. AHMED: Will do, Your Honor.

MS. KIRCHER: And, Your Honor, I'm sorry, just one other thing, I know that Ms. Robinson is here on behalf of FDLE on the phone, I'm not sure if CCRC had an outstanding issue with production of records through FDLE.

THE COURT: Ms. Robinson?

MS. ROBINSON: Your Honor, Janine Robinson for FDLE, the only thing I guess we're waiting on is in August, late August FDLE filed our response and objections to a demand for additional records regarding lethal injection, and I believe we're just waiting for Your Honor to rule on the demand.

THE COURT: On which part now?

MS. AHMED: I agree with --

THE COURT: Ms. Robinson, say it one more time.

MS. ROBINSON: Your Honor, CCRC filed a demand for additional records regarding lethal injection back in -- in June.

THE COURT: Okay.

MS. ROBINSON: And FDLE submitted, we submitted our response and objections on August 26th. And, CCRC, correct me if I'm wrong, but I think we're still waiting on an order for that.

MS. AHMED: And this is Raheela Ahmed for the record, I agree with Ms. Robinson, Your Honor, we're just waiting for the Court's ruling on that.

THE COURT: All right. Hang on. Let me look at this again because I thought we were just done, and I don't have any records that I'm supposed to be looking at, any package of records, this was the last group.

MS. ROBINSON: Your Honor, Janine Robinson again, it wouldn't have been review of records, there was a demand for FDLE to produce additional public records specifically regarding lethal injection.

MS. KIRCHER: I have a copy if Your Honor wants to look at that pleading.

THE COURT: Hang on one second. Let me just see if I can find it.

MS. AHMED: And if I may just --

THE COURT: Do you have the date on that

description?

MS. KIRCHER: Yes, Your Honor. It was e-filed on 8/26.

THE COURT: Order Department of Law Enforcement response and objections to demand for additional public records; motion Florida Department of Law Enforcement; motion for extension of time; motion for reconsideration; order determining discovery; motion requesting in camera review of additional records with proposed order, Volusia County; sixth motion requesting the in camera review of proposed orders; order granting; order granting; order denying part; order to deliver exempt public records. I guess I'm going to have to take you up on that and look at it. I don't see it in the court file.

MS. KIRCHER: Permission to approach, Your Honor?

THE COURT: Yes, please. Thank you. I'll give it right back to you. Thanks, AnnMarie. Hopefully it's short. So much for that. Okay. So you have the response. I do have that response by the Florida Department of Law Enforcement. Okay. So what is the Regional Conflict Counsel's, what is it that they are seeking with regard to the lethal injection protocol?

MS. AHMED: Your Honor, for the record this is Raheela Ahmed, there was an additional demand for

additional public records, and if I can just have a moment so I can pull it up.

THE COURT: Can you give me the date of that because I can't see it.

MS. AHMED: Around June 20th that we filed it. I can see the one we did of the medical examiner's office.

THE COURT: Okay.

MS. AHMED: I think we did one with Department of Correction on June 20th on the lethal injection, and we did one medical examiner's office.

MS. ROBINSON: And FDLE, we received it on the 20th as well.

THE COURT: Yeah, I have a pleading that's called request for additional records, it looks like it's June 20th. It's loading now. It must be long.

MS. AHMED: Right. They're all similar, and they were about June 20th, June 21st, I know it was around those dates we filed them.

MS. ROBINSON: Your Honor, if counsel for Mr. Jordan doesn't have any objection, perhaps you'd like to take some time to go through them instead of doing it from the bench because they are rather lengthy.

MS. AHMED: I don't have any objection, Ms. Robinson.

THE COURT: Well, I guess here's what I'm trying to

figure out, what I thought we were doing here is deciding what potentially relevant material from the prior trial file, or related trials, was discoverable for purposes of the Defendant's counsel's review so that they could prepare an adequate request for relief. What I didn't think we were doing is going beyond to get discovery on constitutional issues, you know, broad based constitutional issues that related to the death penalty, the manner of death, things that were not case specific but related to more, I don't know, public interest matters, things along those lines, that's where I thought we were. So all I was asking -- the reason I was bringing it up is to find out whether or not that's something that is subject to discovery in these proceedings in that regard. I guess I'm trying -- I'm tying to figure out why is it that you get that in this context?

MS. AHMED: If I may, Your Honor, Raheela Ahmed for CCRC, we did ask for the lethal injection information from Department of Corrections, the medical examiner's office, and Florida Department law Enforcement as indicated in our additional records request demand, we do believe we're entitled to these records especially in light of, as we indicated in our motion -- in our demand, in light of Glossip and the burden being on us

to determine alternative methods of execution, we think this information is vital important in that sense as our client is under sentence of death.

MS. ROBINSON: Your Honor, this is Janine Robinson with FDLE, and we take the 180 degree position that Mr. Jordan is not remotely entitled to any of this information as they haven't met their -- met their burden in order to get this type of information because the constitutionality -- I mean, it's a different issue in light of Hurst, but -- which is why I suggested that the Court, you know, take some time and read the submissions because they are -- they are lengthy and a bit involved.

THE COURT: Okay. I'll read it and we'll take it up at the next status conference.

Ms. Kircher, let me give this back to you. Thank you. And I did find -- I think the record's now in the court file. For future reference it looks like the initial demand is document number 511, and then the response is document number 521.

MS. ROBINSON: Your Honor, this is Janine Robinson again, just an administrative clarification, I emailed Susan Price a courtesy copy of the response, was that the appropriate person to send the copy to?

THE COURT: Yeah. That's my JA. Susan is my JA.

MS. ROBINSON: Oh, okay.

THE COURT: So that's --

MS. ROBINSON: Because it was emailed to her.

THE COURT: Yeah, that's fine. That will work out just fine. But I have what I need with regard to those two things, I've got the request and I've got your response, and I assume that based on those two things I can review them and then tell you what we're going to do at the status conference.

MS. ROBINSON: Yes, sir.

MS. AHMED: And, Your Honor, this is Raheela Ahmed again, from CCRC, just so the Court is aware as we did with FDLE regarding lethal injection, we also had a demand to Florida Department of Corrections also filed around June 20th, and also one for the medical examiner's office district 8, also filed on June 21st -- or 20th, sorry. And there were objections filed by I think Ms. Kircher for the medical examiner's office and Sarah Rumph from Department of Corrections, so I just wanted the Court to be aware of those pleadings because they're all --

THE COURT: Is there an order out there that requires an in camera inspection and directs the repository to send them to me?

MS. AHMED: No, Your Honor, it's the same thing as

what we're doing with FDLE now, it's the exact same thing for Department of Corrections and also district 8 medical examiner's office.

THE COURT: And you're talking about the lethal injection issue?

MS. AHMED: Yes, Your Honor.

THE COURT: Okay. All right. Hold up on all those. I need to philosophically look at that first before I do any in camera review.

MS. AHMED: There's no in camera review as to lethal injection at this point, I just wanted the Court to be aware there were two other objections out there.

THE COURT: Got it. Thank you. I made note of that, and, you know, it would seem to me it's going to be a consistent ruling with regard to all of the records request that deal with that particular issue.

MS. KIRCHER: And, Your Honor, just for the record I'm sure that Ms. Perinetti and Ms. Ahmed would agree that this is something that's requested in pretty much every 3.851 and the same responses are always found, but they're not entitled to it and they generally don't get it, but they ask for it.

THE COURT: Right. Can't blame them for asking. Okay. Very good. Thank y'all. Somebody's -- who's going to schedule the follow-up, the status conference?

MS. AHMED: This is Raheela Ahmed on behalf of CCRC, I can go ahead and speak to Ms. Price, I know we have a hearing in January, so -- and I will go and speak to Ms. Kircher and Ms. Calhoun to make sure the dates are okay with them.

THE COURT: All right. Very good. Thank you-all.

MS. AHMED: Thank you.

THE COURT: All right. Bye-bye. Thank you.

(Audio ends at 4:48 p.m.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF VOLUSIA)

I, DEBBIE A. SINER, RPR, do hereby certify that the foregoing pages constitute a true and complete transcript of the proceedings transcribed via digital recording by me to the best of my ability in the aforementioned cause at the time and place herein set forth.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

Witness my hand this 15th day of August, 2018.

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IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO.: 2009-002872 CFAWS

STATE OF FLORIDA,

vs.

JOSEPH EDWARD JORDAN,

Defendant.

APPEAL TRANSCRIPT HEARING

* *

HEARING BEFORE THE HONORABLE TERENCE R. PERKINS,
CIRCUIT COURT JUDGE
TRANSCRIPT OF PROCEEDINGS

DATE TAKEN: **SEPTEMBER 13, 2016**

TIME: COMMENCED AT 9:15 A.M.
CONCLUDED AT 9:58 A.M.

PLACE: S. JAMES FOXMAN JUSTICE CENTER
251 NORTH RIDGEWOOD AVENUE
DAYTONA BEACH, FLORIDA

STENOGRAPHICALLY REPORTED BY: PAULITA E. KUNDID, RPR, FAPR, FPR
REGISTERED PROFESSIONAL REPORTER
AND NOTARY PUBLIC, STATE OF FLORIDA

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P R O C E E D I N G S

THE COURT: Okay.

MS. KIRCHER: Everyone is on the line. This is Stacy Kircher from the Attorney General's Office. We have Rosemary Calhoun from the Office of the State Attorney, and Maria Perinetti and Raheela Ahmed from CCRC on the line as well.

THE COURT: Okay. Great. What I would ask -- I have court reporter here and you're all on the speaker phone here in the courtroom. Since I can't see your faces, if you wouldn't mind when you're contributing to our issues, just tell me your name so that the court reporter can get that down accurately, so we can have a good record of what we're doing here today.

Okay. Let me outline I think why we're having the hearing this morning and then I'll give anyone that wishes an opportunity to add to that before we actually get into the argument.

My understanding is that first there was some -- I made a ruling with regard to the discovery of certain documents. I think August 1st was my order that I sent out, and my understanding is that there was either some confusion or some request to reconsider portions of that.

And then the second thing was, assuming we get all the rulings squared away, there was some confusion on the logistics of who was supposed to make copies and where they were supposed to send them and things like that.

So let me start first by asking are we all in agreement that those are pretty much the two general issues that we're going to talk about?

MS. PERINETTI: This is Maria Perinetti with CCRC. The reason why we requested the hearing, and thank you, Your Honor, for -- (indiscernible)

THE COURT REPORTER: I can't hear her.

THE COURT: Okay. Do what you can.

MS. PERINETTI: -- what was in the order (indiscernible). We have been in contact with her, and it's our understanding that these records are still in Your Honor's office and that many of these records are subject to discovery by the Defendant. And the problem is how we actually obtain these records.

So it's the clerk's position that they do not make the copies, that the individual agencies need to make the copies and send them to CCRC, and I don't even (indiscernible) what the confusion --

THE COURT: Okay. Hang on just one second.

We are going to off the record for one second. And the reason for doing that is because we're actually moving the phone and microphone so that you can be heard more clearly by our court reporter. Okay.

So let me go ahead and just tell me your name again and who you're working for.

MS. PERINETTI: Sure. Maria Perinetti with CCRC on behalf of Mr. Jordan.

THE COURT: Can you hear that okay?

THE COURT REPORTER: That is much better.

THE COURT: Does that help with adding that to the beginning. That's what she said and introduced herself at the very beginning and started her argument.

THE COURT REPORTER: I didn't hear the beginning of the argument.

THE COURT: Okay. All right. The court reporter is saying that she didn't hear the beginning part of the argument. I know I did. Do you want to just paraphrase what you're telling me just so the record is clear.

MS. PERINETTI: Yes, Your Honor. So the issue is that Your Honor in the August 1st order, ordered that certain sealed and exempt records (indiscernible) by the Defendant. And the issue

that we requested the hearing for today is how we actually receive these records. Apparently they're still sitting in Your Honor's office, and we have been in contact with the clerk of court and her name is -- the clerk that we have been in contact is Ann (phonetic).

As CCRC's position and what we were requesting is that the clerk make copies of the records that Your Honor said were discoverable and provide to CCRC, and CCRC would be willing, per the rules, that we would provide our UPS number to the clerk's office to send them to us, and we would bear all the costs of copying.

However, again, I don't mean to speak for the clerk and I hope there's a representative there from the clerk of court, but it's their position that this isn't their responsibility and that the individual agencies need to make copies and send them to CCRC.

We, again, we would request that the clerk make those copies, as the agencies already have fulfilled their duty under the rules in sending these records to the repository, and it would be difficult for them to look through that order and determine what we get and what we don't get, and I

think it's the easiest and the quickest and straightforward way, also given that we have a deadline for our 3.851 ruling and that is for Your Honor to issue an order ordering for the clerk to copy these records and to provide them to CCRC at CCRC's expense.

THE COURT: Okay. So the documents that I have here that are in these envelopes, that I opened, those are the original documents?

MS. PERINETTI: Yes, Your Honor. I believe the agency sent those documents under seal to the repository and then the repository sent the documents to you.

So normally what we do is then the clerk, or sometimes the judicial assistant does it, but somebody makes copies for the CCRC and sends the copies to CCRC, seals them back up and then sends the sealed originals back up to the repository.

THE COURT: Okay.

MS. PERINETTI: And, Your Honor, apparently there was some confusion -- there was a first and original round of sealed and exempt records that there was some confusion about that and that Your Honor cleared up, and that was what we did, we got copies of the records and that's how CCRC obtained

the records. But basically, we just need a clarification on the order and Your Honor said that we can get these and we are entitled to these records, but we need a mechanism for how we actually can get them.

THE COURT: Okay. So, let's use this as an example. I have -- it looks like records from the secretary of state, and I have a letter dated February 29, 2016, to the clerk of the court actually, indicating that the secretary of state receives notice that the following boxes contain sealed exempt public records from Joseph Edward Jordan, and that it's been shipped to the above listed judge or clerk of the circuit order, and then boxed 7103 from the Medical Examiner of District 7. Okay? And then it's signed by Cheryl Spicer, I guess, archived it from the Florida Department of State.

What's enclosed with that, and that actually was not sealed in any way, it was just in a folder. And what's enclosed with that is a notice of delivery of exempt public records to judge -- clerk of the circuit court, and again it's directed to the clerk of the Seventh Circuit, here Diane Matousek.

What's attached to it is a Transmittal Transfer of Capital Collateral Post Conviction Records Form, and then attached to that is a CD. And the CD is sealed or was sealed, I guess I should say, containing copies of records. So -- and that's part of what I opened, and then resealed as part of what I was doing.

So what you would be proposing is that the clerk is supposed to then open the CD, somehow take the records that I have described that are discoverable from that CD, make copies of that, and then what? Send those copies to you for distribution and everybody else is that --

MS. PERINETTI: Our understanding is that they just make copies of the records send them to CCRC and then seal them back up and send them back to the repository.

MS. CALHOUN: Your Honor, this is Rosemary Calhoun from the State Attorney's Office. What you've described is actually what I was going to point out to the court. It sounds like the secretary of state sent these records to the clerk who then transmitted them or delivered them to your chambers for you to open and inspect.

So the clerk would then be technically be the

actual custodian of the records while they're not in the custody of the records repository for the secretary of state.

THE COURT: I, again, without getting into a long discussion of what constitutes the record, whether they're paper copies or digital copies, the only thing I have here is a CD, and most of these are medical examiner photographs.

MS. CALHOUN: My point in that is that the clerk would be the appropriate party as the custodian of these records that were transmitted to them by the secretary of state to make these copies and then re-seal them and transmit them back to the secretary of state.

You are -- they're simply the custodian of them. Granted they are housed in your chambers for the time being as you are or were examining them for the purpose of your in camera inspection. But the clerk was the custodian -- is the custodian of them while they're not actually housed at the records repository of the secretary of state in Tallahassee while they're down here from Tallahassee for the purpose of your in camera inspection.

THE COURT: Anybody have case law on that?

MS. PERINETTI: Your Honor, this is Ms. Perinetti from CCRC. I don't know of any case law off the top of my head, but we would agree with Ms. Calhoun's explanation that they are the custodians and that it would be their responsibility to copy those records.

THE COURT: Well, here's why I wanted to hear it because as you might imagine in every division not just the criminal division, but in every division the court is asked from time to time to conduct an in camera inspection of the record. That happens in divorce cases, civil cases, criminal cases, across the board, we do it all the time.

In no circumstance am I aware of where those records become either the property of or the records of the clerk, and the clerk never becomes the custodian. What I do is I look at the record. I determine what's discoverable. Once I make that decision, I return the records to the parties, and they produce it in accordance with the order entered by the court.

More typically what happens is I don't even get the originals, I get copies of what is being withheld, and I look at those and say, document 6,

document 18, those are all discoverable and the others aren't, and then the parties do their discovery with accordance with that order, and I'm just wondering conceptually why this is any different? Why should this be treated any differently? Why does this impose additional burdens on the clerk that we don't have in any other circumstance?

MS. CALHOUN: May I speak. This does not apply to divorces or other civil proceedings (indiscernible) like capital post conviction, public records production. Your Honor, this is Rosemary Calhoun from the State Attorney's Office speaking, for the court reporter.

THE COURT: Thank you. But that doesn't tell us this either. It doesn't require that the clerk do this.

MS. PERINETTI: Your Honor, this is Ms. Perinetti. I would just add that prior to rule 3.852 that the parties in capital cases would designate records or the public records request under section 119, and 3.852 is enacted in order to streamline the process and they created the records repository so that all of the records, you can look through the records repository.

And all the records that we have that CCRC obtains are obtained in the records repository just so that everybody is on the same page and the agencies only have to produce the records once, to streamline the process. So the capital cases are unique and that's why you know, as Mr. Jordan's attorneys, that we have to formally request public records, we have to go through 3.852.

We can't just do a 119 records request that any average citizen could do. We have to go through this 3.852. This rule was specifically created for capital cases.

I wish, Your Honor, that there was more specific language in the rule regarding how the records are to be copied and reviewed, and I agree that it's lacking in any language about that, but I would think in keeping with the spirit of 3.852 that everything has to go through the repository.

THE COURT: So doesn't the repository become the custodian.

MS. CALHOUN: Yes, Your Honor. This is Rosemary Calhoun for the State Attorney's Office speaking again. Your Honor, the custodian is the repository. The repository, as the custodian, pursuant to your court order shipped these sealed

and exempt records down here to the clerk of the court for the Seventh Judicial Circuit so the clerk can then transmit those sealed and exempt records to you pursuant to rule 3.852(f)(2) for an in camera inspection.

The clerk then, once the repository ships the records to the clerk of court per the rule, the container is delivered to you so that you can conduct your in camera inspection. You've apparently completed your in camera inspection. You've entered an appropriate court order designating which sealed and exempt records are to be made available to defense counsel for their review, for their discovery.

And now we're at the stage where we should determine how to implement your order. The only language in rule 3.852 (f)(2) that gives us any guidance is that the rule states, "The moving party," which is CCRC, "shall bear all costs associated with the transportation and inspection of the records by the trial court. The trial court shall perform the unsealing and inspection without ex parte communications and in accord with procedures for reviewing sealed documents."

But it doesn't tell us, once Your Honor has

entered the appropriate order stating which records are to be made available for inspection and copying, which agency is to actually implement the copying.

But as Ms. Perinetti has said, the purpose of the rule is that the producing agencies are only supposed to do this one time, it would make sense that the person -- that the agency that at least as temporary guardians, we'll use the word guardian rather than custodian, of these records that would be the clerk of court for Volusia County could make these copies, and they would be reimbursed for their costs of copying and shipping these records that you ordered (indiscernible) for CCRC --

THE COURT: Say that again, Ms. Calhoun.

MS. CALHOUN: I'm saying that it would make sense under rule 3.852(f)(2) that the clerk of court for Volusia County would implement your order by making copies of the records that you ordered disclosed to CCRC. That CCRC reimburse them for their costs in copying and shipping records that you ordered disclosed to CCRC, and that they then return the original records to the records repository, and then again CCRC would reimburse them for the costs of shipping the original sealed

records back to the records repository in Tallahassee.

THE COURT: Ms. Calhoun, let me ask you this. Let's assume that there's a records request made to the repository, and there's no objection of any kind. Everybody agrees. These are not confidential and clearly discoverable and the defense needs them to prepare their motion, and there's no in camera inspection, everybody just agrees. Okay. You get them. How do they get them? Where do they come from?

MS. CALHOUN: My understanding is that happens routinely. I don't get involved in that process. Ms. Perinetti actually would probably be a better person to answer that question because I know she routinely does get records from the records repository without any involvement by my agency or any other agency.

MS. KIRCHER: Your Honor, maybe I can shed some light on this. This is Stacy Kircher from the Office of the Attorney General.

In the hypothesis that Your Honor proposes what will happen, normally the way that records are retrieved from the repository, during the 3.851 process, or 3.852 process rather, we send out a

notice to the state attorney, the state attorney then sends out notice of averment that it's a death penalty. The state attorney then notifies every agency that was involved in that case. That puts all those agencies on record to do their original obligation to send any of their records to the repository. At the point that -- and then we get a notice that they've complied with that, and then CCRC also gets a notice that they've complied with it.

At the point that they want one of the records, they get those records, if there's no in camera review and no objection which is kind of where this case gets harried because we send them -- you know, from the repository to Your Honor in the county seat where the clerk then delivers them to Your Honor's chambers to perform the in camera inspection and that's when the passing off of custodian of records --

THE COURT: Wait a minute. Wait a minute. Wait, wait, wait, wait, wait. Take a step back. Forget about the in camera inspection. Forget about the objection. There's no objection made. The records are at the repository. The defense wants them.

MS. KIRCHER: (Indiscernible)

THE COURT: What happened?

MS. KIRCHER: Sorry, I took the roundabout way to get there, but what I was saying is if there is no situation of an in camera inspection, no objection, it comes straight from the repository. Once the agencies sends those records to the repository, CCRC is then noticed that those records that they're requesting from those particular agencies are being held by the repository, they can get them directly from the repository.

THE COURT: And when you say "they can get them from the repository," the repository sends them, makes copies of the records, sends them to them along with a bill for the copies and delivery?

MS. KIRCHER: That part, Ms. Perinetti or Ms. Ahmed should get more involved in. I don't request those records so I don't know that part.

MS. PERINETTI: Your Honor, this is Ms. Perinetti. Basically whenever we get the case we send a notice to the repository, that we are counsel on the case and that we want to obtain all the records. So the agency will send the records to the repository and the repository then will automatically send the records to us.

THE COURT: And who pays for that?
MS. PERINETTI: I'm sorry?
THE COURT: Who pays for that?
MS. PERINETTI: I am not sure.
THE COURT: Where is the copying --
MS. PERINETTI: The record is simply -- it will be a CD, and they're on disk. I can't -- it used to be faxes but now it's just disks, so if you do pay for it, it's not (indiscernible) -- so then sometimes we'll be going through the records and we'll say -- oh, there appears to be a page missing from the police report or something, and we can contact the repository and say, there appears to be a page missing here, can you look at the records and see if you have this. And then sometimes it was copied wrong or it was scanned wrong or something and they'll send us what's missing, but it is a streamline process that prevents us from coming to -- you know, bother the agencies whenever we have a question about the records. They produce the records once, and then after that everything goes through the repository.
THE COURT: Okay. All right. So, Ms. Calhoun, why shouldn't we follow that same process here only as amended by the order that

determines what is and what is not discoverable.

MS. PERINETTI: Your Honor -- I'm sorry, this is Ms. Perinetti. I'm not sure if Ms. Calhoun would know this because we're the ones who deal with the repository, but the repository's position is they will not open or copy any sealed and exempt records. So their position is that they send the sealed and exempt records to the clerk of court and then the court deals with it, and they get sent back to the repository never to be opened by the repository. So once they're sealed at the repository, they will not open them. Although (indiscernible).

MS. KIRCHER: Your Honor, this is Stacy Kircher from the Office of the Attorney General. Just in a general manner of speaking because, as I said before, CCRC is the one who is actually requesting the records or the repository was set up for the benefit of CCRC in post conviction. But I do know that one of the concerns of the repository for not opening or coping any sealed or exempt records after there has been a in camera inspection, is because then once Your Honor has made those rulings and opened the documents, they have to be resealed before they can be sent back to

the repository, and then we have the situation of co-mingling the documents that Your Honor has specifically flagged as discoverable to CCRC back with the documents that are not discoverable. So the repository's position from my understanding is that they cannot be responsible for determining what Your Honor has flagged as discoverable and what he has flagged as not?

THE COURT: So what they're saying is that the clerk has to be responsible for that.

MS. KIRCHER: Correct. The clerk in the seat where the judge hearing the case has made that ruling.

THE COURT: Okay. Again --

MS. KIRCHER: In some cases it has been the JA, candidly. But in my understanding the clerk is generally the one who is responsible, you know, for that but with that being said as well, CCRC, and I believe in this case there's no objection to that, CCRC does bear the cost of that, so we have had situations in the past where the clerk or the JA has issued an invoice for the copying time and paper and ink and all that good stuff to CCRC because it's clear that they bear the cost of that. But it's more of an issue, it seems to me in this

case, of who actually physically has to do the administrative duty of copying it.

THE COURT: Okay. One final question, and I don't know who's best to address this, but I mean in all fairness, what we're trying to do is make sure that the records that we think are relevant or at least that I thought were relevant after looking actually at the records themselves either on the CD or some of them were actually in paper form, and I did sit down and look through each and every one of them, what we're trying to do is make sure that the defense has the documents that they need, the information and evidence that is relevant to the case to prepare the appropriate motions in this case.

So we're all moving towards the same goal I think, it's just a question of logistics, how is this supposed to work. Now I can't imagine that Daytona Beach, the little Seventh Circuit is the first circuit in the history of this state to address this issue. How do they do it in the big circuits? How do they do it in any other circuits? Do you have any experience in that regard?

MS. KIRCHER: Your Honor, this is Stacy Kircher from the Office of the Attorney General

speaking again. We haven't had this exact issue because generally that standard of protocol is followed where either the clerk or the JA is the one to do the copying and CCRC pays the invoice. We haven't really had an objection to that issue before since I've done this work throughout the state.

THE COURT: Okay. Well, that's not much help unfortunately.

MS. KIRCHER: I am sorry.

THE COURT: No, no, I understand. And, again, I am just trying to make this as easy as I can and also develop a process by which, again, I don't think this is the last time this is ever going to happen. We're going to have to deal with this on an ongoing basis.

Here's the problem that I have. I think from a legal perspective and if you take a step back and look at this in the broadest possible way, the repository is clearly the custodian of the record. There isn't anything in the rules or the statutes, and I looked at them generally as well, I mean I started at the 3.850 and worked my way through all of them that apply, but we get very little guidance on practically how that's supposed to work, other

than, I think, we were looking at 3.852(f)(2) gives us a little bit of direction I guess but it doesn't say logistically who's supposed to do all this.

More importantly though there isn't anything that I can use to make this the obligation of the clerk of the court. There is just isn't. And I understand practically why that makes some sense where you have a small amount of records or whatnot, but under circumstances like this where we're talking literally boxes of records, most of which I think are pretty clearly discoverable in the case, I can't find any legal authority that I can impose this obligation on the clerk. To the contrary it appears the obligation is supposed to be with the custodian of the record.

Now I agree with what you're saying the concept of setting up the repository is that each agency only has to assemble and then produce the records once. That's great. That's going to save time and money for everybody involved. But somebody has to actually produce the record, and I think that the way this is designed to work whether there is an in camera inspection or not, it's the same process by which there's a request made. If there's no objection, the repository produces it.

If there is an objection, there is a detour where we determine, okay, what documents have to be produced. But once we make that determination, it's got to go back to the repository to make that production.

MS. KIRCHER: And, Your Honor, I don't mean to dominate the conversation here. This is Stacy Kircher from the Office of the Attorney General again.

I understand where Your Honor is coming from and I believe this was Ms. Perinetti and CCRC's point as well though, we're going to have a logistical problem because following the hypothetical through, the documents that Your Honor has flagged as discoverable under the rule, those would have to be resealed, because they're still sealed and exempt document and resent to the repository, and if Your Honor had the order that those are then to be produced at CCRC, we have no mechanism to do that because the agency -- you know, the representative for the repository is going to say, we don't have the authority to open these sealed documents.

THE COURT: I can't -- you know, they're going to have to review the same law and requirements

that we are, and they're going to have to make their own determinations on how they think they're required to follow the law. All I can do is impose what I think is a common sense reasoned way that this is supposed to work.

Again, not only looking at the little details but looking at the broad concept. The broad concept to me says they're supposed to do that. Now, let me ask this. You know, I have let's say -- well, a good example is where we started which is, I have medical examiner photographs that came from the secretary of state. Now, I don't know how they got in the secretary of state's file, and I'm not sure that it makes all that much difference, but I have the -- what I think is a CD of those photographs. I don't know if that's original CD. I don't know if the secretary of state prepared that. I don't know if the repository prepared that, you know, but all I know is that I have this CD.

Once I've looked at it, my job is done and I make a ruling. I don't need the CD anymore. I assume that it came to the clerk from the Florida Department of State because that's the letterhead that accompanied it. Do I send this back to them?

I mean, how did I get it? Did somebody collect it and send it to me? I don't even know. I guess they all came from the clerk at one point in time from the court file. So how do we redistribute these or send them back.

MS. KIRCHER: They all go back to the repository, Your Honor. This is Stacy Kircher from the Office of the Attorney General.

All those documents came from the repository and the repository compiles them from the different agencies. So the repository takes those documents back.

THE COURT: Okay. Well, what I'm looking at, this CD again of the medical examiner photographs that we talked about, that actually has a cover letter from the Florida Department of State, signed by Cheryl Spicer an archivist. So is that the repository?

MS. PERINETTI: Yes, sir. That would be the repository. This is Ms Perinetti.

THE COURT: Okay. So I would have to send that back. You know, I don't know how we get to phase 2 of this because if we send this all back, and then the repository, Ms. Spicer or whoever it is that's up there says, what the heck are we

supposed to do with this because some crazy judge in Daytona Beach sent it all back to us, and we're not going to open these sealed documents. I mean I don't know where we go from that. I've entered an order that says what's discoverable and what should be produced, and you know I don't know where we go from that perspective.

MS. PERINETTI: Perinetti. I just tell you that you have a 3.851 is coming up to you I think in January, and if Your Honor does send them up to the repository, I would anticipate that they will not open the sealed in camera records, and it's (indiscernible) and their policy is that they never open sealed and exempt records. And that we'll be in a position where they have to get them back to the clerk's office, and we will need to do something, and then we'll end up having to possibly amend our motion because I don't anticipate -- in that scenario, I don't think we will be able to get the records in time to (indiscernible).

THE COURT: Right. And, again, I'm trying to prevent that from happening, but I'm also trying to follow the guidance in the rules and the requirements as I understand them under the law.

I don't think that finding the repository is

the custodian is the easy part of all this. Since they're the custodian of all the records including the confidential and sealed records then they're the ones that have to review it and produce the records that are found to be discoverable.

MS. KIRCHER: Your Honor, this is Stacy Kircher from the Office of the Attorney General.

With respect to Your Honor, the repository is not setup to determine what records are discoverable. They were set up purely, as Your Honor stated, as a custodian of records to hold those records so that CCRC can easily retrieve them from the agencies without requesting them from each particular agency purely for death penalty cases.

It would have been helpful for us to have because if we knew that this was going to be the issue, we would have had the agency records -- the repository on the line so that she could speak to Your Honor about -- I anticipate that there would be a motion for rehearing if Your Honor's ruling was to have them be the party that determines what CCRC gets as discoverable because (indiscernible) --

THE COURT: No, no, no.

MS. KIRCHER: -- the only way is if Your Honor

were to send them back and CCRC had to get them from the repository, the only mechanism for them to do that would be then to request under -- it wouldn't be under 3.852, it would have to be under section 1.9 -- 119 from each individual agency the documents that Your Honor has flagged as discoverable, and that's not the process that we go through in a death penalty cases.

THE COURT: No, no, no. The repository is never going to determine what privileged records are produced. That's why you send them to me. I've made that determination.

The question is who is legally charged with the obligation of carrying out and following the court's order in that regard. Is it the clerk or is it the repository. I think it's pretty clear that under this circumstance, it's the repository.

If they don't want to do their duty in that regard or they think that they're not the proper one, then there's mechanisms that they can use to challenge that. And you know I think you're probably right, they should have been involved and participated in this hearing.

Maybe they have some authority or some guidance from some other provisions of the rules

that help them under these circumstances where they've done this in other circuits. Like I said, I can't imagine that we're the first to address this issue, although it's a first for those of us who are on the phone.

Again, I'm not trying to delay the process. All I am trying to do is follow what appears to be a mechanism that is supposed to be less cumbersome not more cumbersome, and under that mechanism the repository is the custodian and is required to produce the record. So that's what my ruling is going to be, and logistically if that means that I need to return all this to the repository, I'm happy to do it.

If you want me to return it to one of the lawyers to return to the repository, I'll do that. Again, I'm not trying to make it more complicated, but I think they're the ones that are required to do it, not the individual clerks of each circuit.

MS. PERINETTI: Your Honor, this is Ms. Perinetti again.

I think it's rare that the State and the Defense is in total agreement, but I think (indiscernible).

THE COURT REPORTER: I can't hear.

MS. PERINETTI: As far as who to give the records to, I would just object to any records going to any of the parties or any of the attorneys. I think they have to either be at the clerk's office or at the repository, but I think specifically CCRC would not be -- (indiscernible).

MS. AHMED: Good morning Judge. Raheela Ahmed for the court reporter.

At this time I think inspecting by the court to perhaps hold off to the records, and we should have another hearing and have Ms. -- or the representative from the records repository. 3.852(b)(3) defines the repository as just the location designated by the secretary of state for the purpose of archiving these post conviction records in capital cases and would not be considered the records custodian, and likely the clerk of the court would be. Perhaps that might be something that you could address.

THE COURT: Okay. Why don't we do this. Why don't you see if you can set up a hearing with whoever wants to participate. There's a representative of our local clerk that's here, but I'll also ask that they participate and they probably want to bring their legal counsel to look

at the issue as well, and you can attend by telephone. I'll keep all the records here. Everything that we've done here today is taken down by our court reporter, so there's a transcript that's available should anybody want it.

I think you understand kind of at least what my thinking is. I am not asking you to agree with me, but I think you at least understand, and I will just hang onto everything. I won't make any written rulings or anything until we have this follow-up hearing.

MS. PERINETTI: That sounds good Your Honor.

THE COURT: Do you think you can set it up this week?

MS. KIRCHER: Your Honor, this is Stacy Kircher from the Office of the Attorney General.

If we need to do that, I'll have to have another attorney stand in for me. I'll be available again after the 22nd of this month, or I can have another person from our office stand in.

THE COURT: Well, since you're familiar with it, I prefer that you remain involved, but I also don't want to push it so far out that the issues that we have to review where we are on the issues. I mean, they're all fresh in our minds right now.

I would like to keep it that way, so send it up as quickly as you can.

MS. KIRCHER: Yes, Your Honor. It will be in about one week's time. I'll try to get it on that Friday.

THE COURT: That would be great. If I can impose on you -- usually at lunch time just about everyday I'm available, and as much as I like to eat, I'm willing to sacrifice my lunch hour on a convenient date so we can address this issue.

MS. KIRCHER: Okay. I will ask Danette (phonetic) to set that up and I'll send out a notice of hearing to everyone.

THE COURT: All right. Very good. Anything else?

MS. PERINETTI: Not at this point, Your Honor. This is CCRC.

THE COURT: Okay. I'm holding onto the box then.

MS. KIRCHER: Thank you. Have a good day.

MS. PERINETTI: Thank you, Your Honor.

THE COURT: Thank you.

(Proceedings concluded at 9:58 a.m.)

REPORTER'S COURT CERTIFICATE

STATE OF FLORIDA)
COUNTY OF VOLUSIA)

I, PAULITA E. KUNDID, Registered Professional Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

Dated this 17th day of August, 2018.

/s/ *Paulita E. Kundid*
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IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO.: 2009-002872 CFAWS

STATE OF FLORIDA,

vs.

JOSEPH EDWARD JORDAN,

Defendant.

APPEAL TRANSCRIPT
EVIDENTIARY HEARING

* *

HEARING BEFORE THE HONORABLE TERENCE R. PERKINS,
CIRCUIT COURT JUDGE
TRANSCRIPT OF PROCEEDINGS

DATE TAKEN: **FEBRUARY 2, 2018**

TIME: COMMENCED AT 8:31 A.M.
CONCLUDED AT 9:34 A.M.

PLACE: S. JAMES FOXMAN JUSTICE CENTER
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DAYTONA BEACH, FLORIDA

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(The following proceedings were digitally recorded beginning at 8:31 a.m.:)

THE BAILIFF: All rise.

THE COURT: Please be seated. We are on the record in Case 2009-008272 [sic], State of Florida vs. Joseph Jordan and we'll have counsel make their appearances on the record. Start with the State.

MS. CALHOUN: Rosemary Calhoun, assistant state attorney for the State of Florida.

MS. PERINETTI: Maria Perinetti from CCRC Middle on behalf of Mr. Jordan.

MS. BORT: Lisa Bort from CCRC Middle, also on behalf of Mr. Jordan.

MS. AHMED: Good morning, Your Honor. Raheela Ahmed, on behalf of Mr. Jordan and CCRC.

THE COURT: Good morning, welcome. All right. So was Mr. Jordan not transported for any of this?

MS. PERINETTI: Your Honor, he waived his right to be present at the other hearing.

THE COURT: Okay. All right. So, what I would like is to give each of you about two minutes, kind of remind me of where we are. As you know, I'm taking a fair amount of notes. I understand that we had two witnesses that were set for today and only one was able to make it.

Thank you for making it.

I'd like to go forward at least so that we don't inconvenience the witness any further and take the testimony here today, understanding that we're going to have to reschedule as quickly as we can, at least the other witness and anything else that we need to do.

But so give me kind of a forest description of where we are. I'll start with the State. And then we'll talk about the trees.

MS. CALHOUN: Yes, Your Honor, there were various claims raised in the Defendant's motion for post conviction relief. The only claim that was set for hearing today was ground 4 which was the allegation that trial counsel was ineffective for failing to object to certain comments in prosecutor's guilt phase closing argument.

The Defendant has already getting a new penalty phase based on Hurst, so those comments I don't believe are before the court today. We're focusing on the guilt phase closing argument. So that's where we'll be focusing on the part of the forest pertaining to the guilt phase closing argument, and so that would be the part that we would be directing the courts to in this case.

So of course the defense may have a different prospective but we would submit that's really the key issue here would be the guilt phase closing argument because --

THE COURT: Okay. And the significance, Ms. Calhoun, that if I was to find counsel ineffective for failing to make appropriate or timely objections in that regard, and that it was an appropriate prejudice under the statute and case law, then I would grant not only a new penalty phase, as I already have, but I would grant a new guilt phase.

MS. CALHOUN: That's correct. Your Honor.

THE COURT: So we would have a complete retrial of the case?

MS. CALHOUN: Yes. Under Strickland, the ineffectiveness of counsel claim, yes, Your Honor.

THE COURT: All right, thank you.

And, Ms. Perinetti, if you want to respond.

MS. PERINETTI: Thank you, Your Honor, for the most part I agree with the State. I would also add that claim 4 relates -- does relate to both guilt and penalty phase, but as Your Honor has already been granted a new penalty phase. The penalty portion of the claim is now moot. So we're only

looking at guilt phase with the comments made during the guilt phase and the prejudice to the guilt phase.

There's only one comment I believe that was made during the penalty phase closing argument and that comment again wouldn't be relevant here. That was from the record on appeal Volume 16, Page 3044 to 3047, and it's argued in our motion, and it starts with "What kind of person does this to another human being to leave him bound and gagged to suffer horribly for a few days." We would concede that is no longer relevant because that comment was made during the penalty phase.

The remaining arguments were identified in Mr. Jordan's post conviction motion held during the State's guilt phase closing arguments.

And in order to aid everyone in following along during the questions of the attorneys, I have provided copies and that's what I've provided to Your Honor that's on Your Honor's desk.

THE COURT: Okay. I'm looking through that here. There's some highlighting.

MS. PERINETTI: Yes, Your Honor, it's copied with the State's guilt phase closing and guilt phase rebuttal closing arguments.

THE COURT: So I have one that starts 1674.

MS. PERINETTI: Is it 2572 and 2520 -- I may have given you the wrong thing. You're looking at the top, I'm sorry, Your Honor. It says 1674, so that's record on appeal, just for the record, Volume 13, page 2520 to 2551. That's the State's guilt phase closing argument.

THE COURT: Right. My highlighting starts on page 1694 of that exhibit.

MS. PERINETTI: Yes, Your Honor. And I've highlighted the relevant arguments just to make it easier for everybody to follow along and provided a copy to the State.

THE COURT: All right. And so that we accurately refer to it on the record, that's actually page 2540 and 2541 of the transcript, correct?

MS. PERINETTI: The highlighted copy, yes, Your Honor. And --

THE COURT: Okay. And then there's some more highlighting on 2544 I've noticed.

MS. PERINETTI: And if it would aid to the court, Your Honor, maybe we can at the end just introduce a copy of that into the record as evidence. Even though it's part of the record on

appeal, if the State would have no objection to --

THE COURT: I don't need that. I know what you're looking at because I have it here.

MS. PERINETTI: Okay. And then I also provided His Honor with the copy of the State's guilt phase penalty -- or guilt phase rebuttal closings, which is record on appeal, Volume 13, page 2572 to 2588, and I've also highlighted the relevant portions in that also.

THE COURT: And I have that as well. All right, so my understanding is that we're going to continue with the taking of evidence in this case, and we have at least one witness; is that right?

MS. PERINETTI: Yes, Your Honor. Even though we have one witness today, we'd invoke the rule of sequestration as far as that nobody can discuss with Mr. Nielsen what Mr. Smith is going to testify to today.

THE COURT: All right. Okay. So you don't want this witness discussing with the other witness the testimony here at the hearing?

MS. PERINETTI: Yes, Your Honor. Or the State or the Defense discussing with him -- with Mr. Nielsen what Mr. Smith has testified to --

THE COURT: Well, the sequestration is not

going to prevent him from talking to you or to Ms. Calhoun, you have the absolute right to do that; correct?

MS. PERINETTI: Yes, correct. Although I would argue that the rule of sequestration would prevent us from going to Mr. Nielsen and providing him with a transcript of Mr. Smith's testimony. Mr. Smith said this in court -- but, however of course we would have the right to talk to him.

THE COURT: So I understand the rule of sequestration has been invoked. So I'll ask both counsel to conduct themselves accordingly. If you see a witness come in, let me know and I'm happy to instruct the witness.

For our witness today, the rule of sequestration has been invoked. As an attorney, I know that you understand exactly what that means.

All right. Are we ready to go?

Ms. Calhoun, call your witness.

MS. PERINETTI: Your Honor, I believe this is a 3.851 hearing, so it's our hearing. So we will call Mr. Smith.

THE COURT: All right.

THE CLERK: Do you solemnly swear or affirm that the testimony you are about to give in this

cause shall be the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: I do.

MS. PERINETTI: And before we start, Your Honor, do we have a court reporter?

MS. CALHOUN: That's right, we don't. I don't see one.

THE COURT: I don't either. Yep, we're going to need a court reporter and we're on digital right now.

And, Mr. Smith, you can take a seat right here.

Let me find out what we did in that regard. It's going to be easier if I just walk down there. I'll be right back.

MS. PERINETTI: Thank you.

(Court recessed at 8:40 a.m.)

(Court resumed at 8:47 a.m.)

THE BAILIFF: All rise.

THE COURT: Keep your seats. They're checking. I don't know why they're not here.

(Court recessed at 8:48 a.m.)

(Court reporter entered courtroom at 8:52 a.m. and the proceedings continued as follows:)

THE COURT: Let's go back on the record. Case

2009-002872, State of Florida vs. Joseph Jordan. Counsel will make your appearance. We'll start with the State.

MS. CALHOUN: Rosemary Calhoun, assistant state attorney, for the State of Florida.

MS. PERINETTI: Maria Perinetti with CCRC Middle on behalf Mr. Jordan.

MS. BORT: Lisa Bort from CCRC Middle on behalf of Mr. Jordan.

MS. AHMED: And Raheela Ahmed on behalf of Mr. Jordan.

THE COURT: Thank you. I know we had a brief interchange before we stopped and discovered that we didn't have a court reporter, in which I asked for kind of a general summary of why we're here, and we're here I think to receive the testimony of one of two witnesses originally scheduled by defense counsel. Mr. Smith is here, and we'd like to take his testimony while we are here, and his testimony relates specifically to Count 4 of the motion asking for a new guilt phase based on improper closing arguments.

Is there anything else that we need to put on the record before we get to Mr. Smith's testimony?

Ms. Calhoun?

MS. CALHOUN: Nothing from the State, Your Honor.

THE COURT: Ms. Perinetti?

MS. PERINETTI: Just that we have invoked the rule of sequestration.

THE COURT: You did invoke the rule of sequestration. The other thing I wanted to mention to you is although we didn't have our court reporter present initially, we were being digitally recorded and of course that is available for us to listen to in an audio format, or we can have that transcribed. So I'm going to ask that that portion be transcribed and also affixed to the transcript from our court reporter here today just to make sure that we get a completely accurate record of everything that occurred this morning. All right.

So that being said, Mr. Smith, if you come forward. We'll swear you in.

MR. SMITH: Yes, sir.

THE CLERK: Do you solemnly swear or affirm that the testimony you are about to give in this cause shall be the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: I do.

THE COURT: You may proceed, Ms. Perinetti.

MS. PERINETTI: Thank you, Your Honor.

THEREUPON,

CHRISTOPHER LILLARD SMITH,

having been duly sworn by the court clerk, was examined and testified upon his oath as follows:

DIRECT EXAMINATION

BY MS. PERINETTI:

Q Mr. Smith, can you please state your full name for the record.

A Christopher Lillard, L-i-l-l-a-r-d, Smith.

Q And can you please tell us about your education as it relates to the legal profession?

A I received a juris doctorate from the University of Florida in December of 1982.

Q And since that time have you attended various continuing legal education seminars?

A Yes.

Q And have you attended death penalty seminars, which is life over death and death --

A I'd go to both. I used to. When I was a defense attorney I went to both every year.

Q And would you please tell us about your work experience as it relates to the legal profession?

A Prior to graduating law school, I was an intern, a senior intern with the public defender's

office of the 8th Circuit. Subsequent to graduating law school, I worked for three criminal defense attorneys in Gainesville, Florida.

I opened my office in Seminole County in August of 1983. The first 15 years were somewhat of a general practice. They always included criminal law and they did include civil and family law.

For the last approximately 20 years of my practice I was almost exclusively practicing in the area of criminal law, and I'm currently an assistant state attorney with the 9th Judicial Circuit. I'm the homicide attorney for Osceola County.

Q And do you handle death penalty cases currently?

A I have -- well, the one case that I had filed a notice, we did waive in exchange for a plea for first degree murder. I have several cases pending before the grand jury that will probably in all likelihood be cases that we file notices on.

Q Okay. So I guess -- I'm not sure the answer to this question, but I know for defense counsel, you have to be death qualified to be a first chair in a death penalty or capital case, is it the same when you're a state attorney?

A I don't think the Bar requires us to be death

qualified but I am death qualified. I actually handled death penalty cases prior to there being a requirement that there be death qualifications, and sat first chair on a number of death penalty cases.

Q How many death penalty cases have you handled as a defense attorney?

A I would say -- cases where the state has sought death although we never got necessarily to the penalty phase, somewhere between 65 and 75.

Q And how many of your cases that you handled resulted in a death penalty?

A How many what? I'm sorry.

Q How many death penalty cases that you handled resulted in the death penalty?

A This is the only one in my whole career.

Q Thank you for not sending us the business.

All right. Mr. Ryan Will gave the guilt phase argument -- I'm sorry, the guilt phase closing argument for the State in this case, did you try any other cases against Mr. Will before Mr. Jordan's trial?

A I have tried a number of cases where Mr. Will was involved in either as first or second chair. I couldn't tell you the exact quantity, but yes, I have had cases with Mr. Will previously.

Q Are you familiar with his style?

A Yes.

Q How would you describe Mr. Will's style in closing arguments?

A He's aggressive.

Q And what do you mean by "aggressive"?

A He's -- the only way I can describe it -- I have a more laid back style as I do closing and he's a little more animated.

Q And is it your normal practice to object when a State makes a statement that you believe is improper during closing arguments?

A It's not always my practice to object during closing argument when a prosecutor makes an objectionable statement. There is a number of reasons why, but with respect to -- if there is something that I deem objectionable, I will often object.

Q And do you have a different take as far as death penalty cases versus non death penalty cases and whether you would object or not in closing argument?

A I might be less likely to object during the guilt phase of a death penalty case if I felt that the fight was about the penalty and not about the guilt. So there are times, yes, it's case by case where I might not interrupt a prosecutor during a guilt phase closing argument.

Q And when a prosecutor is making an argument, how much analysis actually goes on as far as whether to object or not?

A Well, you're sitting there and you're doing it at the time, you know, hindsight is always very easy. There are times when I may not want to draw attention to it, so I might not object. There are times where something is slipped in among proper argument, and I just don't get to my feet on time. And there are times, I just -- at the time just said I'm going to let that go, and there were times that I feel it's so important that I need to get up and object and maybe approach the bench and discuss it.

Q And in death penalty cases that are being in guilt phase and penalty phase, are you concerned in the guilt phase that things that happened in the guilt phase might affect the penalty phase?

A Yes.

Q The record reflects that Mr. Jordan was arrested in this case in July of 2009 and the trial took place in April of 2013, do you recall at what point in this case that you became involved in?

A I know came in very late as second chair. The previous second chair ended up closing his office and taking a job with the public defender's office. I'd

have to rely on my notice of appearance whenever it was filed, but I am going to venture to say January or thereafter because I know we tried to get a continuance because I got in so late.

Q Was Mr. Nielsen considered the first chair?

A He was definitely the first chair and did predominantly most of the work in the case because I got in so late. He basically assigned me witnesses and some legal tasks and that's kind of how we handled it although certainly we did discuss the case together and worked the case up together.

Q Was one phase primarily -- like the guilt phase or the penalty phase primarily one or the other, or did you both work on both phases?

A We both worked on both phases. I had some witnesses in guilt and I had witnesses in penalty that I prepped and presented.

Q And did you both discuss each other's witnesses and the trial strategy as a whole?

A Yes.

Q And who was responsible for guilt phase closing argument?

A Mr. Nielsen was.

Q Did you and Mr. Nielsen discuss the guilt phase closing arguments before the trial?

A I'm sure we did, yes.

Q Do you recall what your theory of defense was in the guilt phase?

A I know we were trying to get a lesser. I know that we were arguing that Mr. Jordan had tried to get someone -- there were two things. First of all, the victim's wife usually went over there everyday, and it was Mr. Jordan's belief that if she had gone over, he would have been freed, intervened in the cause of death.

And I know Mr. Jordan also tried to get -- and in fact did eventually get people from South Florida to come up to check on his well-being. So based on that we were trying to convince the jury to come back with a lesser defense than first degree murder.

Q Would you agree with me that this wasn't a case where you were saying Mr. Jordan wasn't involved at all or "who done it" kind of case?

A No, no. I mean there was no question that the evidence was sufficient to establish Mr. Jordan had committed the underlying offense, that was the basis for felony murder. There was no question that Mr. Jordan had tied up the victim in the case and had caused his death. It was more of a situation which you always do hope to maybe obtain a lesser so we wouldn't have to go to penalty phase.

Q Whose responsibility was it to object to the State's closing arguments?

A It was Mr. Nielsen's responsibility, but the protocol is when you're handling a witness and if the attorney on the other side is asked a question that is objectionable, you're the one who is supposed to object. Likewise if you're doing an opening, you're the one who is supposed to object, and Mr. Nielsen handled both closings.

Q And were there times when maybe if you thought something was objectionable, you would alert Mr. Nielsen that he should object?

A There's no question that when you're co-counsel in a case, that during any event whether it be a witness or a closing, if you hear something, you would nudge or maybe lean over and tell counsel, hey, you might want to object to that or should you object. I have no independent recollection of whether I did that during this case, but that would be something that I would certainly normally do.

Q And were there other times where maybe if you got a little excited, I think you might have in this case, there was an issue where you and Mr. Nielsen asked both -- jumped up simultaneously and asked for a mistrial. Is that something that maybe happened from

time to time?

A If that's in the transcript I yield to that. There might have been something that got my attention that I didn't follow the protocol.

Q Now do you have any independent recollection of the closing arguments in this case?

A No, I don't have an independent recollection.

Q Have you been able to review the closing arguments in this case prior to testifying?

A Yes.

Q And have you reviewed the Florida Supreme Court case under right to appeal in Mr. Jordan's case?

A I didn't review the whole case, but I did review your section 4 of your motion.

Q Claim 4?

A Yeah, claim 4 of your motion, yes.

Q Okay. And then there was a portion, an excerpt from the Florida Supreme Court opinion about the closing argument?

A I did review those, yes.

Q Have you brought a copy with you of the State's guilt phase closing argument?

A I brought a copy actually of your -- not a copy of the transcript of the closing, just a copy of your claim 4.

MS. PERINETTI: Your Honor, may I approach the witness?

THE COURT: You may.

BY MS. PERINETTI:

Q (Tenders)

And I just provided you a copy of the transcripts of the State's guilt phase closing argument and rebuttal closing argument so that you can follow along. It's all been produced in the motion however, so whichever you would prefer to refer to, that will be fine.

A If it's all right with the court, I'll just refer to the motion because I've reviewed that and marked it with various errors.

THE COURT: That's fine.

BY MS. PERINETTI:

Q That sounds good. And I don't know how the court would prefer it. I would like to make sure the record is clear and I'm going to read the statements into the record to make sure that we all know we're all still on the same page. I just don't want to bore anybody.

And if I go too fast, Madam court reporter, please let me know.

So the first statement I want to talk about is

on page -- Volume 13 of the record on appeal, page 2685 to 86 and it's also on page 29 to 30 of the motion, and this is also from the Florida Supreme Court opinion. And it starts with it says, "You can find him guilty of first degree murder --" and, again, this is from the State's guilt phase closing argument -- "You can find him guilty of first degree murder or guilty of such lesser-included charges. That's a second degree or third degree manslaughter with a weapon or manslaughter.

"Ladies and Gentlemen, you go all the way down the list, but the law tells you to find him guilty of the highest one that's been proven.

"Sure, look at the instructions. They may all apply in the situation because of the way this thing developed. They may all apply. I mean you may be able to technically find him guilty of all of them, but you should find him guilty of the highest one that he has been charged and proven beyond a reasonable doubt. And in this case it is first degree murder, felony murder, first degree.

"And when you get over here to the robbery, count 2 right up here, count 2, robbery with a firearm, or deadly weapon, right here on the first line, guilty of the charge with firearm with -- robbery with a firearm or deadly weapon exactly what he confessed to.

Exactly what he had told you he had done. Don't let him get away with this."

And that's a key phrase.

"Don't let him get away this. Yeah, I mean sure, you can come down the list again if you want to. I mean he's technically guilty of all of them. Robbery with a weapon, yep; robbery, yep; grand theft. Did he steal something without any force? Well, he stole something but he used force. I mean, yeah, you can come down a list but there's no reason to. The law says to return it to the highest crime proven beyond a reasonable doubt. And Ladies and Gentlemen it is right here. Right there. It is choice number one."

So you said you've had an opportunity to review the portion from the Florida Supreme Court, do you agree with the Florida Supreme Court that the comments don't let him get away with this was improper?

A I'm always going to agree with the Florida Supreme Court, but, yeah, clearly that's an improper comment and it warranted an objection.

Q And did you have any strategic reasons for not objecting to this argument?

A I didn't have a strategic reason. Again, it wasn't my place to object. What I would probably say is given that comment sandwiched among proper legal

argument, it might have been that we elected to let it pass. It might have been that it just slipped passed candidly, but that's the best I can tell you.

Maybe not to even draw attention to it, is another reason sometimes that I don't object. But again, as to why Mr. Nielsen didn't object, I don't know. I don't recall specifically saying, Hey, you need to object to that.

Q I guess -- in respect that he said it might have slipped past. When you're sitting there listening to closing argument, are you sometimes writing notes or shoveling through papers or doing other things?

A If I was the one that was going to be doing the closing myself, I would definitely be taking notes. I am listening too. I think I was just listening, candidly. I'm sure I wasn't making notes and would have shown him notes but not as aggressively as I would if I was the one actually doing it.

Q Are there times when you just missed things and you don't hear them when you're doing something else?

A Absolutely. In trials that's happened many times where something has slipped by me. There's no question about it.

Q Now the second argument that I want to talk

about is record on appeal Volume 13, page 2544. And it's also in the motion on page 31 through 32.

The argument is when he closed the door behind him, it was as if he had put Keith Cope on a raft and sent him adrift in an endless sea. He had absolutely no ability, no tools to free himself, and he could only hope that someone would come and find him.

Three days later. Three days without water. Three days of sunrises and sunsets. Three days of watching the clock and minutes slowly pass by, someone came and found Keith Cope and it was too late. And as the days ticked slowly by his hope got smaller and smaller I would imagine. As the days ticked slowly by, he probably knew that no one was coming from.

Do you believe that that argument was improper?

A I believe it warranted an objection.

Q And what objection would you have made to this argument?

A That it was appealing to the sympathy of the jury. I saw you cited it as the Golden Rule. I didn't that portion would be Golden Rule, but that would have been the objection I would have made, if I would have made it.

Q Did he have any strategic reason for not

objecting to that argument?

A Again, I didn't particularly have a strategic reason. That being said, I don't know what Mr. Nielson's strategic reason was. Well, I actually do have an understanding of what it was, but I won't speculate on it.

Q Okay. The next argument is -- and again, have you spoken with Mr. Nielsen about this recently?

A I did, after I talked to you. I was able to speak to him, and I do have an understanding of why he did not make the objections. I don't know if you want me to answer that.

Q No.

A It's hearsay.

Q We'll talk about you and we'll ask Mr. Nielsen when he comes what his reasons was, --

A Yes, ma'am.

Q -- but I just wanted to clarify that.

The third statement is found on the record on appeal Volume 13, page 2576 and it's also on page 32 to 33 of our motion.

"Just because the Defendant was owed something doesn't mean that he has a right to come up here and demand someone else's money and take it from him when they're not willing to give it and to use force to do

that, use guns and tape and rope. If you could do that in America, then we all would be in trouble because the mortgage companies would have us tied to the bed."

Do you believe that argument was improper?

A Yes, that's Golden Rule.

Q Did you have any strategic reason for not objecting to that argument?

A Again, I wasn't the one who was going to object, but I don't recall a specific strategic reason for not objecting to that.

Q And do you recall any strategy that you discussed beforehand with Mr. Nielsen when you were going to let the State make this kind of argument and not object to it?

A That would have never been a discussion, you know, we are going to let the State get away with anything they want during closing. There might be things that we might have been looking for. There's some things that are just like the -- any kinds of trauma, right to remain silent. I often regretted that during this trial because basically things was going so well -- that you can't sit down, you just bounce up.

Q All right. There is a fourth statement on Volume 13, page 2540 to 41, and it's also on page 33 of the motion. This one is a little bit longer. I'll read

it.

"The first point is, I'm sorry. The second point is, I didn't mean to kill Keith. And the third point is, I'm not responsible for the harm that incurred after I left. That was what was said in opening statement by the defense. That was what was asked many of the witnesses that were on the stand.

"So let's talk about that argument. Let's talk about the defense's argument in this case.

"Let's start with I'm sorry. Nowhere in the evidence, nowhere, is there a single fact that demonstrates the Defendant is sorry about anything.

"He wrote six letters. You listened to them yesterday as they were read. You'll have an opportunity to take them in the back and read them yourself. Look carefully for the words I'm sorry. I'm sorry doesn't appear anywhere. I'm sorry doesn't come up in the statement to Joanne Winston out at the jail. There's no I'm sorry.

"When he told his friends, Raymond Hill and Eddie Yarrow and Matthew Powell and Sadia Hague, H-a-g-u-e, not once did he say, I'm sorry.

"Not once did he say, God, I wish it hadn't happened that way. I wished Keith were in better shape or hadn't died."

And then it goes on to say, "You know, nowhere in there, though, was I'm sorry. The most we got was I'm suicidal. I F'ed up. I don't want to go to jail, but we never heard, I'm sorry."

Do you believe that argument was improper?

A Yes.

Q And why do you believe it was improper?

A Well, I believe it -- mainly in hindsight. I think initially when I read it, I discussed with you, that we may have invited it because Mr. Nielsen did make some type of statement in opening.

After having had a chance to review the opening statement transcript, apparently we did invite it, but in hindsight after reviewing that, it appears that it was objectionable and not invited.

Q And do you believe that was a comment on his lack of remorse?

A Yes.

Q Was it -- you just referred to the opening statement -- was it yours and Mr. Nielsen's intention to argue in opening statement that Mr. Jordan had remorse?

A That wasn't necessarily something that was discussed. Mr. Nielsen has a very unique style which he is actually quite successful with, but I would never in an opening statement or closing statement apologize to

the jury, but that's something he did during and did in opening, so I don't necessarily think it was an expression of remorse, it's just his style.

Q And would you agree that it was Mr. Nielsen's own expression of remorse and not Mr. Jordan's?

A Yes, after reviewing the transcript it was Mr. Nielsen's expression of remorse, but I did not recall that. Probably during the course of trial, I might not have recalled it, probably thought it was invited by us.

Q All right. The final statement is on Volume 13, page 2572 and it's also on page 34 of the motion. And it reads, "I told you it was coming in there, they already heard it. It's everyone's fault but the Defendant's. I mean if he stayed alive in the middle of the bed, he would still be alive. If these guys came up from south Florida a day and a half earlier, he'd still be alive. C'mon, everybody's fault but his. I mean he snapped. Is that a defense? He snapped."

Do you feel that that was an accurate characterization of your theory of defense in this case?

A Well, it was an aggressive characterization of it as described, that it was somewhat what our defense was. So I think in that sense it was probably an invited comment. It may have been objectionable, but I thought it might have been an invited comment.

Q And you said it might have been objectionable, did you have any strategic reason for not objecting to that argument?

A All I can say is that I would have probably -- if it had been me siting there, felt that was an invited comment.

MS. PERINETTI: Can I have a moment, Your Honor?

THE COURT: Yes.

MS. PERINETTI: Pass to Ms. Calhoun.

THE COURT: All right. Ms. Calhoun.

MS. CALHOUN: Yes, Your Honor, thank you.

CROSS EXAMINATION

BY MS. CALHOUN:

Q Good morning, Mr. Smith.

A Good morning.

Q I think you testified earlier that there are some cases where the issue is more of guilt or innocence and in other cases the issue is more what the penalty is going to be?

A That's correct.

Q What was your assessment in this case?

A In this case our assessment was we were concentrating more on the penalty. We felt that the guilt phase was -- I never want to say this, it's a done

deal because we always try to get a lesser and have, and I have on many cases been able to get a lesser so we didn't get to penalty phase, but, you know, so we're not rolling over.

Q Of course.

A But our assessment was that we were concentrating on the penalty phase and that was the focus. I'm not going to say that we were not defending him but that was the focus.

Q Does that assessment of what the evidence is as you come into the case, does that color how you make your objections? That is how I understood your initial response to Ms. Perinetti's question?

A Yes.

Q Or how you make objections or how you maybe withhold or how you strategize your objections?

A Yes, the credibility with the jury is highly important and there are times that I wouldn't object to something because I don't want them to think I'm making a frivolous objection. That's not to say that some of these objections were not necessarily warranted, but yeah, I might not interrupt opposing counsel, just because I think that -- well, jurors are instructed not to base their decision on that, I think sometimes it does affect how they look at you and your credibility.

Q Some of the things that Mr. Will was listing in his argument, specifically the argument on Bates number 2540 of the trial transcript which has court reporter number 1694 were six letters that were written by your client and also a statement that he gave to Joanne Winston. Were those items of evidence that you had to contend with in the case against your client?

A Yes. I would say that the letters written by Mr. Jordan were the most devastating evidence that we had to contend with in the case.

Q Were those letters inculpatory against your client?

A They were inculpatory and they were also offensive.

Q And those letters, were they admitted at trial?

A They were.

Q In light of that evidence and in addition to the testimony of Matthew Powell, Sadia Hague and the other individuals, was it your assessment that these specific statements that we're looking at here today, that those were likely to sway the jury or materially influence them?

A Yes.

Q The letters or the statements made by Mr. Will

in his closing argument?

A No, the letters. To me the most damaging evidence in the case were the letters.

Q Now, Ms. Perinetti asked you if you felt that Mr. Nielsen your co-counsel had missed or overlooked any specific objection. Do you have any opinion as you sit here today that your co-counsel missed or overlooked an objection?

A No, I don't think he missed or overlooked an objection. That very first one that we discussed, the one, if I may refer to, Your Honor, the one where it's sandwiched into the legal discussion about "Don't let him get away with this." What I was merely saying is when something briefly is said within a long correct argument it may be that it was missed. I have no knowledge that he missed it.

I also know that he may not have wanted to highlight it, or he may have just chosen not to object to it because it was so brief. I don't have any knowledge that he overlooked something.

Q At the time that these comments were made, did you have the opinion that these comments -- referring to the closing argument comments made by Mr. Will -- did you have the opinion that they were specifically improper and they should not be objected to, or at the

time that you were hearing them did you have the opinion that they might be arguably proper closing argument? I mean are you reaching the conclusion now that in hindsight that they were improper?

A Correct, I -- Your Honor, I have no independent recollection of what my reaction was during the closings of this trial. I have reviewed the materials that were provided to me and had a chance to go through the opening. As I said, I thought that might have been something that we invited until I read the actual opening transcript. So all of my comments now about objections were warranted are in hindsight.

Q You don't have an independent recollection now as to whether at the time that you tried the case whether you made a decision that a comment might not have been proper, but you made a strategic decision to let it go and not object, or what your reactions were at the time?

A I do not have an independent recollection of what my reactions were at the time, no, ma'am.

MS. CALHOUN: Your Honor, I do not have any further questions for this witness. I pass the witness. Thank you.

THE COURT: Redirect?

MS. PERINETTI: Yes, Your Honor.

REDIRECT EXAMINATION

BY MS. PERINETTI:

Q When you're trying a capital case, would you agree that preserving objections for the record on appeal is important?

A I agree, and sometimes there are cases that I've tried where my whole strategy is trying to either create or preserve an issue for appeal because the facts are so -- I don't know want to say bad but the evidence may be so overwhelming, so yes.

Q So in cases where you believe that you're going to get a conviction, is it even more important to preserve the case for appellate review?

A It is. I'm not going to say it's more important, it's just as important. I will say that in doing these trials, your best opportunity is the first time, and so sometimes you don't make an objection that you might make in another case.

I can't say that's what Michael was doing at the time that he didn't object, but your best opportunity to win any criminal case is the first time it's tried and certainly in a case that's this serious. So we try to win them, or at least not to get the worse outcome. So I can't speculate on whether that's why Mr. Nielsen didn't want to object to these comments.

Q And now, since Mr. Jordan is going to be getting a new penalty phase, the penalty phase prejudice isn't an issue in this claim anymore, but at the time when you were in guilt phase making objections, when you were deciding whether or not to object to something, were you concerned about the prejudice that the statements that were made by Mr. Will would have in the penalty phase?

A I would always be concerned about that. So I guess that's the best way I can answer it.

MS. PERINETTI: Nothing further, Your Honor.

THE COURT: All right. Thank you.

All right, Mr. Smith, you may step down. Thank you, sir.

THE WITNESS: Thank you, Your Honor. May I be released?

THE COURT: Is he released from any subpoena?

MS. PERINETTI: Yes, Your Honor.

MS. CALHOUN: Yes, Your Honor.

THE COURT: If you're driving back to Gainesville, have a safe drive.

MR. SMITH: Kissimmee.

THE COURT: Where is it?

MR. SMITH: Kissimmee.

THE COURT: Counsel, what else are we going to

do today?

MS. PERINETTI: Your Honor, that's the only witness we have today, but we can look at dates for rescheduling.

THE COURT: Okay. We have Mr. Nielsen.

MS. CALHOUN: Yes.

THE COURT: We need to present his testimony. Any other testimony or evidence that we're going to need?

MS. PERINETTI: No, Your Honor, Mr. Nielsen and/or closings.

THE COURT: Okay. Mr. Smith was about an hour with direct, cross and redirect. Plus we didn't start exactly at 8:30 and I had us go into some other things while we're doing it. So you think an hour would be sufficient for Mr. Nielsen?

MS. PERINETTI: I think an hour for Mr. Nielsen and an hour for closing argument would be more than enough.

THE COURT: So we're looking at two hours coming up.

Okay. Let's pick a date. So what I'm going to ask is that you follow me down the hallway and I'm going to turn you over to my judicial assistant. My calendar is yours, so the earliest

date we can pick is better for me.

(Simultaneous conversation)

THE COURT: We're done as far as the hearing goes.

(Proceedings concluded at 9:34 a.m.)

REPORTER'S COURT CERTIFICATE

STATE OF FLORIDA)
COUNTY OF VOLUSIA)

I, PAULITA E. KUNDID, Registered Professional Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

Dated this 17th day of August, 2018.

/s/ *Paulita E. Kundid*
PAULITA E. KUNDID, RPR, FAPR, FPR
Registered Professional Reporter
Volusia Reporting Company

CERTIFICATE OF CLERK

H.T. CASE NO.: SC18-899
L.T. CASE NO.: 2009 002872 CFAWS

STATE OF FLORIDA
COUNTY OF VOLUSIA

I, Laura E. Roth, Clerk of the Circuit Court for the County of Volusia, State of Florida, do hereby certify that the foregoing pages 1-1847, inclusive, contain a correct transcript of the record of the judgment in the case listed above and are a true and correct recital and include all such original papers and proceedings in said cause as appear from the records and files of my office that have been directed to be included in said record by the directions furnished to me.

Laura E. Roth
CLERK OF THE CIRCUIT COURT

Heather Brooke
Deputy Clerk