

No. SC19-1624

Lower Tribunal No. 2008-CF-10726

IN THE
Supreme Court of Florida

KIM JACKSON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

*On Appeal from the Circuit Court, Fourth
Judicial Circuit, in and for Duval County, Florida*

*Honorable Judge James Daniel
Judge of the Circuit Court*

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

Kim Jackson has been sentenced to death. Resolution of the issues presented in this appeal will determine whether he lives or dies. This Court has allowed oral argument in other capital cases in a similar posture. A full opportunity to address the issues through oral argument is appropriate, given the seriousness of the claims at issue and the stakes involved. Mr. Jackson respectfully requests this Court hear oral argument in this appeal.

PRELIMINARY STATEMENT

The following symbols will be used to designate references to the record: “T” refers to the transcript of trial proceedings; “R” refers to the record on appeal to the Florida Supreme Court; “PCR” refers to the postconviction record on appeal.

STANDARD OF REVIEW

*Strickland*¹ claims present mixed questions of law and fact, so this Court defers to the circuit court’s factual findings that are supported by competent substantial evidence but reviews the circuit

¹ *Strickland v. Washington*, 466 U.S. 667 (1984).

court's legal conclusions *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

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

When multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because "even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and nation." *McDuffie v. State*, 970 So. 2d 312, 328 (Fla. 2007).

STATEMENT OF THE CASE

The victim, Debra Pearce, was murdered in her home between October 16-18, 2004. Mr. Jackson was indicted four years later, on July 24, 2008, for one count of premeditated murder with a weapon.

(R.1-3). At that time, he was incarcerated in Georgia. He was arrested on a capias warrant almost one year later on June 16, 2009.

(R.3-4). Gregory Messore and Todd Niemczyk of the Fourth Judicial Circuit Public Defender's Office were appointed to represent him.

(R.16). Mr. Messore was transferred to Nassau County in October 2012, and Mr. Jackson's case was reassigned to Michael Bateh, Alphonse Perkins, and James Armstrong. (R.395-96).

His trial began April 15, 2013. The jury found him guilty as charged on April 17. (R.585). The penalty phase was held on April 26. The jury first determined through a special interrogatory by a unanimous vote that Mr. Jackson played a significant role in the victim's murder. (R.611). The jury then recommended death by a vote of 8-4. (R.605). Following a *Spencer*² hearing, the trial court followed the jury's recommendation and sentenced Mr. Jackson to death. (R.714-62).³

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

³ The trial court found the following aggravating factors: (1) Mr. Jackson was convicted of another felony involving the use or threat of violence to another person (great weight); (2) he was under felony probation at the time of the murder (great weight); and the murder was especially heinous, atrocious, or cruel (HAC) (great weight). (R.720-30). The trial court found 66 nonstatutory mitigating factors

This Court affirmed Mr. Jackson's conviction and sentence on direct appeal. *Jackson v. State*, 180 So. 3d 983 (Fla. 2015). The following issues were raised in his direct appeal: (1) the State's evidence was insufficient to prove Mr. Jackson's guilt of premeditated murder; (2) the prosecutor's comments during the guilt-phase closing argument, impugning the testimony of the defense expert with personal opinion, facts unsupported by the evidence, and the authority of his office destroyed Mr. Jackson's right to a fair trial, requiring a new one; (3) the evidence is insufficient to support the especially heinous, atrocious or cruel aggravating circumstance where assuming Mr. Jackson's complicity in the murder, there was

and grouped them into twelve categories: (1) Mr. Jackson is a good father and husband and shares the love of his family; (2) he is a good sibling/son and he shares the love of relatives in Georgia; (3) he experienced a difficult childhood and upbringing; (4) he is a nice, generous, helpful person and friend; (5) he is athletic, dependable, and helped children learn sports; (6) he is a polite respectful person; (7) he is religious; and (8) he is a hard worker. The final four categories of nonstatutory mitigation each consist of one mitigating circumstance: (9) he had a positive outlook on life; (10) his friends and associates will continue to foster a relationship with and visit him while he is incarcerated, which the trial court found to be established as to his family, but not as to his friends; (11) he has low-average intelligence; and (12) he respects the judicial process and has been polite and cooperative throughout the proceedings. (R.751-54).

no evidence Mr. Jackson had knowledge or control over the manner of death; (4) the death penalty is not proportionate in this case; and (5) Mr. Jackson's death sentence is unconstitutional based on *Ring v. Arizona*. All claims were denied.

The United States Supreme Court denied certiorari review on May 16, 2016. *Jackson v. Florida*, 136 S. Ct. 2015 (2016).

On May 9, 2017, Mr. Jackson filed his initial Rule 3.851 motion. The State filed its Answer on October 6, 2017. (PCR.340-627). Mr. Jackson filed an amended Rule 3.851 motion on January 28, 2018. (PCR.766-837). He filed a second amended Rule 3.851 motion as to Claim 7 only on September 14, 2018. (PCR.1226-63). Mr. Jackson raised the following claims for relief: (1) trial counsel failed to educate the jury on the burden of proof; (2) trial counsel failed to ask the jury about racial bias; (3) trial counsel failed to conduct a meaningful death qualification; (4) trial counsel failed to educate the jury on the penalty phase process; (5) trial counsel failed to object and raise a *Neil* challenge; (6) *Caldwell* error in jury selection; (7) trial counsel failed to investigate the DNA evidence; (8) trial counsel failed to investigate the fingerprint evidence; (9) trial counsel failed to object to the prosecutor's improper closing arguments; (10) trial counsel

failed to prepare Mr. Jackson for his testimony at trial; (11) trial counsel failed to investigate or file a motion to dismiss for pre-indictment delay or pre-arrest delay; (12) trial counsel failed to investigate and present an effective alibi defense; (13) trial counsel failed to investigate alternative suspects and challenge the thoroughness of the police investigation; (14) trial counsel failed to make objections and invited harmful comments; (15) trial counsel failed to develop and present compelling social history mitigation; (16) trial counsel failed to develop and present compelling mental health mitigation; (17) trial counsel failed to investigate the prior violent felony aggravator; (18) trial counsel failed to present mitigating evidence at the *Spencer* hearing; (19) the State overstated the value of the DNA evidence on the steering wheel cover; (20) cumulative error; and (21) Mr. Jackson's death sentence is unconstitutional under *Hurst v. Florida* and *Hurst v. State*. (PCR.766-837).

At a case management conference on December 15, 2017, the circuit court granted Mr. Jackson a new sentencing hearing upon stipulation by the State, pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2017). As a result, claims 3, 4, 6, 15, 16, 17, 18 and 22 were

rendered moot. The circuit court granted an evidentiary hearing on claims 7, 8, 10, 11, 12, 13, and 14. The court determined it could resolve claims 1, 2, 3 (in part), 5, 9, 19, and 20 without an evidentiary hearing. (PCR.1573).

The evidentiary hearing began on March 13, 2018, with the testimony of Mr. Jackson's initial attorneys, Gregory Messorre and Todd Niemczyk. (PCR.1957-2024). The hearing continued with trial counsel on April 26, 2018. (PCR. 2025-2163). After it became evident that trial counsel did not produce their entire file pursuant to Fla. R. Crim. P. 3.851(c)(4), the hearing was continued. (PCR.2146; 2157). The Court ordered trial counsel to provide the entire file to postconviction counsel immediately and permitted postconviction counsel to amend Mr. Jackson's Rule 3.851 motion based on any new revelations from trial counsel's records. (PCR.2158-59; 1219-20). The hearing was completed on December 17-18, 2018. (PCR.2193-2493). On August 26, 2019, the circuit court denied Mr. Jackson's guilt phase claims. (PCR.1566-1662).

Mr. Jackson timely appealed the circuit court's order. (PCR.1663-64). After this Court issued the briefing schedule, the State filed a motion to permit cross-appeal and supplemental briefing

and a notice of cross-appeal, pursuant to this Court's decision in *State v. Poole*, 297 So.3d 487 (Fla. 2020), requesting reinstatement of Mr. Jackson's death sentence. Mr. Jackson filed a motion to strike the State's motion. This Court issued an order staying the proceedings pending the disposition of *State v. Jackson*, SC20-257, and *State v. Okafor*, SC20-323. On February 16, 2021, this Court denied the State's motion to permit cross-appeal and struck the State's notice of cross-appeal. This Court lifted the stay and issued a new briefing schedule for Mr. Jackson's appeal.

STATEMENT OF THE FACTS

The circuit court granted Mr. Jackson a new penalty phase pursuant to *Hurst v. State*. (PCR.762-65). His postconviction evidentiary hearing was limited to the guilt phase issues raised in his Rule 3.851 motion. This Statement of the Facts will be limited to the guilt phase of Mr. Jackson's trial and the testimony at his postconviction evidentiary hearing relevant to the issues before this Court.

I. THE GUILT PHASE OF MR. JACKSON'S TRIAL

A. The State's Case

The victim's mother, Bobbi Jenkins, testified she last spoke to Debra Pearce on October 16, 2004, around 1:00 a.m. (T.388-89).

Chester Narvell, the victim's neighbor, testified that he walked by her house around midnight on October 18 and noticed the gate was open. (T.372). He had not seen her van in several days. (T.372). Mr. Narvell entered her house through the open back door and found her face down in the kitchen in a pool of blood. (T.371, 377). He returned home and called 911. (T.372). The victim was a drug dealer and he bought and smoked crack at her home several times a week. (T.378-79).

Before police arrived, several people looted the victim's house, carrying out TVs, VCR's, DVD's and other items. (T.568). Police identified some of those people, including Leron and Lydon Faust and Jacobi Huff. (T.608). The Faust brothers admitted being there but Mr. Huff was never questioned. (T.609, 613-14). During the investigation, many names came up, including Catab Robinson, Billy Carol, Jamie Shiver, "Red," and Amber Martinez. (T.598). Some people were ruled out as suspects, while others were never located,

such as Catab Robinson. (T.598-99). None were asked to submit a DNA sample.

The medical examiner Dr. Jesse Giles performed the autopsy. (T.624). He testified that the victim bled to death from stab wounds. (T.639). A knife with a 5-inch blade, which was still in her chest, delivered one of two fatal blows. (T.636, 640). The second fatal wound was a stab wound under the chin that cut the jugular vein. (T.632). There were two other stab wounds to the neck, one into cartilage, and one superficial. (T.638). Dr. Giles described a superficial laceration to the forehead, a shallow stab to the chin, and a shallow laceration to the left cheek. (T.630-31). There was also a deep cut across the little finger, possibly a defensive wound, and an incision on the forearm, possibly from warding off a blow. (T.635). There were other minor blunt force injuries to the head and face, evidencing a struggle. (T.637-38). The estimated time of death was early morning of October 17 or late evening of October 16. (T.645)

1. The DNA Evidence

Michael Knox, the crime scene investigator, retrieved a small dark hair from the victim's right calf. (T.405). He also collected five additional hairs that looked out of place. (T.439). According to

Investigator Knox, blood spatter indicated the killing took place in the kitchen. (T.409). The knife in the victim's chest came from the knife block on the kitchen counter. (T.411). On the edge of the kitchen sink, just above the body, was a fingerprint in blood. DNA markers from the blood on the sink matched the victim's known markers. (T.441). Investigator Knox opined the print on the kitchen sink was left after the bloodshed.

Leigh Clark, a DNA analyst with the Florida Department of Law Enforcement, testified that DNA profiles extracted from the root of the hair found on the victim's calf matched Mr. Jackson's DNA profile. (T.461-62). Without objection, Ms. Clark testified because of the amount of DNA present on the hair recovered from the victim's leg, Ms. Clark believed the hair was actively growing and not naturally shed. (T.465). An actively growing hair would require some degree of force to dislodge. (T.472). Once pulled, the hair could be transferred from one place to another. (T.472). Ms. Clark could not say how long the hair had been present or from what area of the body it originated. (T.473).

A small knife was recovered from under the victim's body. (T.412). Ms. Clark testified that the knife handle had a DNA profile

consistent with the victim. (T.467). The blade had a mixture of 2-3 individuals, which included the victim but excluded Mr. Jackson as a contributor. (T.467). No evidence was recovered from the knife in the victim's chest. (T.608).

There was red staining on the carpet and tile floors, that when enhanced with luminol, indicated blood, and revealed footprints going from the kitchen to the back bedroom, where the drawers were open and poured out. (T.414-15, 431). The footprints included a distinctive shoe impression as well as a sock-clad impression, which Investigator Knox said could mean there were two people, or that a person removed a shoe. (T.424-25). Fingerprints from the master bedroom and a palm print from the doorjamb of the master bedroom closet were collected. (T.426). A television from the living room entertainment center had been removed (T.432), and a DVD player and VCR had been removed from the second bedroom. (T.443). Investigator Knox testified that if people came into the house after the murder and stole things, they may have contaminated the crime scene. (T.448). Animals may have contaminated the scene. (T.447).

The victim's van was located 1 ½ miles from her home. (T.765). Ms. Clark testified that blood on the armrest and steering wheel cover

contained a mixture of DNA consistent with the victim. DNA from a second donor was male. (T.468). Ms. Clark testified she could not exclude Mr. Jackson from the mixture.

2. The Bloody Fingerprint

The latent prints were submitted to Michelle Royal at the Jacksonville Sheriff's Office. (T.569). Ms. Royal indicated that the print from the kitchen sink was of no value for comparison purposes. (T.586). When Detective Waldrup heard Pinellas County had special equipment that could enhance the print, he took the sink there. He was informed that the print was of value but the computer could not identify it. (T.585-86). The print was then submitted to the FBI, who agreed the print was of value but the computer could not identify it. (T.571).

Two fingerprint analysts testified for the State. FBI analyst Jacqueline Slebrch testified that a print is "of value" for identification when Ms. Slebrch believes "there is sufficient quantity and quality of information that if at any point we were given the corresponding known print we would be able to make an identification." (T.486). The first examiner in this case was Laura Hutchins. She received

photographs of the print, decided there was a fingerprint “of value,” and searched the database, but no match was returned. (T.492).

Ms. Slebrch took over after Ms. Hutchins left the FBI and conducted her own independent analysis after Mr. Jackson’s prints were sent to compare to the latent print. (T.491-92). Ms. Slebrch concluded the print from the sink was Mr. Jackson’s. (T.496). The palm print was excluded as Mr. Jackson’s. (T.497). On cross-examination, Ms. Slebrch testified the sink print was of “average” quality. (T.503). Ms. Slebrch had not seen a situation where a fingerprint left on an object was preserved by blood going on top of it but testified that this could occur. (T.506).

William Schade, records manager at the Pinellas County Sheriff’s Office, began fingerprint training in 1971. (T.516). As recently as 15 years ago, fingerprint examiners did not always adhere to the principles of science. (T.518). Fingerprint people were trained to examine the evidence carefully, come to a conclusion, and stand by it, “come hell or high water.” (T.518). Now, “we can no longer say we’re 100% certain.” (T.518). It’s a preponderance of evidence, it can be possible or plausible conclusions but science never says 100%. (T.518). The Pinellas lab received the photo of the print in 2004.

(T.526) The lab determined the print was of value for comparison purposes, ran it through the Automated Fingerprint Identification System (AFIS), and then packaged it and filed it away. (T.526). When asked to examine the photo again in May 2012 and compare it to a known print, the lab identified the print as Mr. Jackson's. (T.527). The lab did not know what the FBI had done. (T.527). Mr. Schade testified that the latent print was made by Mr. Jackson's right ring finger. (T.535). Ten years ago, Mr. Schade would have said, "I'm 100% certain," but that's not scientific. Now, he says, "I'm 100% confident." (T.535).

On cross-examination, Mr. Schade explained that in the past 10-15 years, some testimony was discovered to have been wrong. (T.538-39). Analysts have not changed how they examine or analyze, what has changed is "the way we present our testimony." (T.538). He can have 100% confidence but not scientific certainty. (T.539). Asked if it were possible he could be wrong, Mr. Schade said, "No." (T.539). If he followed protocols, "it's not possible I made a mistake." (T.539).

3. Mr. Jackson's Statement

On January 22, 2008, after receiving the fingerprint and DNA results, Investigator Waldrup interviewed Mr. Jackson in Georgia and showed him photos of the victim, her house, and the neighborhood. (T.575-76). The brief recorded interview was played for the jury. (T.579-82). After reading Mr. Jackson his rights, the officers said they were investigating a homicide in Jacksonville and asked if he recognized the woman in the blurry, black-and-white photograph. (T.580, 589). Mr. Jackson said, no, and denied murdering her. (T.580). When police identified the woman as Debra Pearce, Mr. Jackson said he did not know her. (T.580-81). Shown photos of her house and neighborhood, Mr. Jackson said he had been in the area but not the house. (T.582).

B. Motion for Judgment of Acquittal

After the State's presentation, the defense moved for a judgement of acquittal. (T.648-56). Counsel argued the State had not proven the elements of first-degree murder, and based his argument on *Ballard v. State*, 923 So. 2d 475 (Fla. 2006). In *Ballard*, this Court held that purely circumstantial evidence that the defendant's fingerprint was found on a bed frame near one of the

victims and that a hair found on another victim was consistent with the defendant's arm hair was insufficient to support conviction. The circuit court challenged defense counsel to offer a reasonable explanation for Mr. Jackson's hair on the victim's calf. (T.653). Counsel argued the hair could have been in the victim's house prior to the murder and her cat transferred the hair to the victim's body. (T.654). The circuit court said, "That doesn't sound very reasonable to me" and denied the motion for judgment of acquittal. (T.654).

C. The Defense's Case

Mr. Jackson's defense at trial was that he could not have committed the murder because he was in Adel, Georgia, on the date of the murder, celebrating his birthday with friends and family. The defense presented four alibi witnesses: (1) Deborah Jackson, (2) Penny Williams, (3) Lilly Rose Franklin, and (4) Walter Jackson. Mr. Jackson also challenged the State's fingerprint evidence with the testimony of Michelle Royal, a latent print examiner with the Jacksonville Sheriff's Office who examined the print on the sink in the early stages of the investigation and determined the print was not of value for comparison purposes. The defense concluded their presentation with Mr. Jackson's testimony.

1. Mr. Jackson's Alibi Defense

a. Deborah Jackson

Deborah and Kim Jackson have been married since June 2000. (T.659). In October 2004, they were living at the Diamond Inn off Lane Avenue. (T.665). Every year, her husband went home to Adel, Georgia, around the time of his birthday, October 13. (T.661). In 2004, October 13 was a Wednesday, and he left for Adele that Friday, October 15, with his cousin, Lucy Baker. (T.661-62). Lucy came back on Sunday night, October 17. (T.662). Mr. Jackson got back the following Friday, October 22, by bus, and Deborah saw him as soon as he got back. (T.663-64). She was first asked to recall that weekend four years later in 2008. (T.666-67). She remembered that particular birthday because there was no money for the trip, and she was furious with him for going. (T.663). She did not see her husband leave with his cousin. (T.669). She knew his whereabouts from the 15th until the 22nd from his phone calls. (T.669). He called her from his father's house, which is a 229 number, meaning he was in Georgia. (T.669). He called on Monday morning, the 18th, and said he missed his ride and needed bus fare to get home. (T.670). She refused to send money. (T.670). She received calls from him

throughout the week as he tried to make arrangements to get back. (T.670).

On cross-examination, the prosecutor impeached Ms. Jackson with her prior record. (T.665). She has one conviction for passing a bad check twenty years ago. (PCR.2307).

b. Penny Williams

Penny Williams is Kim Jackson's sister. (T.673). In 2004, Penny lived in Georgia with their grandfather. (T.674). Birthdays were a big thing for her brother to be home and celebrate with his friends and family. (T.674). That year, on the Wednesday after his birthday, he came by to visit and asked Penny to take him to the bus station because he had missed his ride. (T.674-75). She first took him to see his friend, Rose Franklin, at her workplace to get money for the bus ticket. (T.675). He met Ms. Franklin on the porch because visitors were not allowed in the facility. (T.675). Penny then took him to the bus station, but the bus had already left, so she brought him back to Adel. (T.676). Penny had to work the next day, so his father took him to the bus station. (T.676). Kim was close to his grandfather, and during that week, he came in and out, visiting his grandfather and Penny's boys. (T.677). She was sure about the

weekend because Kim brought his daughter to see her. (T.679). She was not asked to remember that week in October 2004 until 2010. (T.679).

c. Lilly Rose Franklin

Lilly Rose Franklin has been Mr. Jackson's friend for eighteen years. (T.682). In October 2004, Mr. Jackson came by to borrow money for a bus ticket. (T.684). His sister was out in the car. (T.684). Ms. Franklin does not remember the specific day he came by but she remembers it was around his birthday because she had heard he was in town but did not see him until he came by asking for money. (T.685). She was first asked about this particular encounter with Kim 4-5 years later. (T.685).

d. Walter Jackson

Walter Jackson, Mr. Jackson's father, saw his son in October 2004. (T.687). He always came home for this birthday. (T.688). As best Walter Jackson could recall, his son came home a few days after his birthday that year. (T.688). Most of the time, Kim stayed with Walter. (T.688). If not, he would be with other relatives. (T.689). Walter Jackson did not recall the date Kim left but remembered taking him to the bus station in Valdosta, which is thirty minutes

away, on a Wednesday or Thursday evening. (T.690). Walter saw him get on the bus. (T.690).

2. The Bloody Fingerprint Was of No Value for Comparison Purposes

The defense challenged the identification of the fingerprint on the sink through the testimony of Michelle Royal, a latent print examiner with the Jacksonville Sheriff's Office. (T.702).

In October 2004, Ms. Royal was asked to review twelve latent lift cards in this case. (T.703-04). At a later time, she was asked to evaluate a latent print that came off a sink. (T.705). Ms. Royal determined that the print was of no value for comparison purposes. (T.705). The image appeared to have a double tap, i.e., the finger touched the surface and may have touched it again right next to it. (T.707). There were two prints that covered more area, with several other impressions surrounding those two. (T.707). In her expert opinion as a veteran latent print examiner, she determined there were no prints of value to compare to other prints. (T.708).

On cross-examination, Ms. Royal said she did not compare the print on the sink to Mr. Jackson because there was not enough information to take that step. (T.709). If enough information is

present, such as a pattern type, a person may be excluded even if there are not enough characteristics present to actually compare a print. (T.710).

When shown State's Exhibit 84 and asked to look at the two prints quickly, Ms. Royal agreed the latent print and the known print had similarities. (T.712). Based on the flow of the ridges, she could not immediately say the two prints did not come from the same person. (T.712). She did not agree that the plotting on the latent print corresponded to similar characteristics on the known print. (T.712). They were the same as far as the pattern type and the flow of ridges but some of the individual characteristics were plotted on the unknown print appeared to be white ridges and some appeared to be black ridges, and when dealing with a print that is color-reversal, some of the points may be off. (T.712-13). If giving her opinions specifically in reference to exclusion, she would not exclude the print as coming from Mr. Jackson. (T.715). Ms. Royal agreed that when she testified that a print matches a person, she is one hundred percent certain. (R.713-15). Ms. Royal agreed it was possible for digital enhancement to make a print of no value a print

of value and that this is scientifically accepted in the fingerprint community. (T.716).

On redirect, Ms. Royal testified that when she first analyzed the print in 2004, she was not one hundred percent certain it was a print of no value. (T.717). She initially received a photograph taken by the evidence technician. (T.717). She requested a better photo and was given the opportunity to photograph the latent print herself. (T.717). She reviewed that photo and felt there were a lot of things going on that would not allow her to plot a sufficient number of individual ridges characteristics that could be used to identify the latent to a set of known prints. (T.717).

3. Mr. Jackson's Testimony

Mr. Jackson testified in his own defense. He told the jury he had five felony convictions. (T.728). He denied killing Ms. Pearce. (T.722). He met her through her boyfriend, Michael Brown. (T.722). He bought crack cocaine from both the victim and Mr. Brown. (T.724). He knew the victim as "Peppermint Pattie," had seen her between five and ten times, and had been to her house about five times. (T.722-23). A friend of the victim's named "Red" was usually there. (T.726). Mr. Jackson bought drugs from Mr. Brown seven to

eight times and from the victim four to five times. (T.724). He met them at the BP station or walked into the neighborhood to buy from the victim because his ex-son-in-law lived across the street from her. (T.725). While at her home months before the homicide, he had moved a couch and removed a rag from her kitchen sink disposal. (T.726). When Mr. Jackson helped with the disposal, he looked up under the sink to see if there was some kind of mechanism to make it unwind. (T.727). He also vacuumed her car once at the BP station so they would not look suspicious during their drug deal. (T.727-28).

In 2004, his birthday, October 13, was on Wednesday. (T.728). He went straight to his dad's house in Adel the Friday after his birthday with his cousin, Lucy Baker. (T.728). His sister, his grandfather, his cousin, and other relatives were also in Adel. (T.729). His wife did not go with him because she had been complaining about money being short and was against the trip. (T.729). He was supposed to come back on Sunday but wanted to stay longer and enjoy his friends. (T.730). He came back late Thursday by Greyhound. (T.730). His father took him to the bus station. (T.730). He left Valdosta around 9:00, 9:30, stopped in Waycross, Georgia, where he waited for another bus, and got back to

Jacksonville around midnight. (T.730-31). He got off at Martin Luther King and Myrtle Street, walked to Lucy's house, and called his wife to come get him around 12:45 a.m. (T.731). In October 2004, Mr. Jackson kept his hair in a low cut. (T.732). Although he would grow it out sometimes, he was working construction so he did not have much hair on his head. (T.732).

Mr. Jackson never fought with the victim or Mr. Brown. (T.734). As far as he knew, the victim did not do drugs, she just sold them. (T.735). He would call her, and she would meet him at the BP with the drugs or tell him to come to the house. (T.735). When he got back from Georgia that year, his son-in-law told him the victim had been murdered. (T.737). He did not hear anything about her again until the detectives visited him. (T.737). At first, he did not recognize the picture of the victim. (T.738). Her hair was usually red, and she never looked "raggedy." (T.738). The photo they showed him looked like an older lady, and the face and eyes made her look dead. (T.738). When they showed him the photos of her house, he recognized her house, but Detective Waldrup had said he was a homicide detective, and Mr. Jackson felt they were trying to "implement" him in something he had nothing to do with, so he lied. (T.738-39).

On cross-examination, the prosecutor emphasized his close relationships with his alibi witnesses. (T.740). Mr. Jackson also admitted that although his hair was close-cut back in October 2004, he did have facial, armpit, chest and pubic hair. (T.743). Mr. Jackson disagreed that he was in a difficult financial condition back in 2004. (T.748). He often worked, and when he did not have a job, he would use his other skills, like shooting pool. (T.748). He would also buy drugs and flip them on the street when he needed money. (T.748-49). When he heard about the victim's murder, he was curious about it, but did not make any further inquiries about it. (T.752). He just went on with his life. (T.752).

D. The State's Rebuttal

In brief rebuttal, the State recalled Detective Waldrup to testify that the victim's van was located at Londontowne Aparments at 1591 Lane Avenue South, roughly 1 ½ miles from the intersection of Ramona Boulevard and Lane Avenue. (T.765).

On cross-examination, Detective Waldrup admitted there was no evidence that tied Mr. Jackson to the victim's van. (T.766).

II. THE POSTCONVICTION EVIDENTIARY HEARING

The evidentiary hearing began on March 13, 2018, with the testimony of original counsel, Gregory Messore and Todd Niemczyk. (PCR.1957-2024). The hearing continued on April 26, 2018. (PCR.2025-2163). After it became evident that trial counsel did not produce their entire file pursuant to Fla. R. Crim. P. 3.851(c)(4), the hearing was continued. (PCR.2146; 2157). The court ordered trial counsel to provide the entire file to postconviction counsel immediately and permitted postconviction counsel to amend Mr. Jackson's Rule 3.851 motion based on any new revelations from trial counsel's records. (PCR.2158-59; 1219-20). The hearing was completed on December 17-18, 2018. (PCR.2193-2493).

A. Mr. Jackson's first legal team: Gregory Messore and Todd Niemczyk

Mr. Jackson was arrested on a capias June 17, 2009, for the October 2004 murder. The Public Defender's Office was appointed to represent Mr. Jackson. (R.14, 16). Assistant Public Defender Gregory Messore was assigned as first chair, and Todd Niemczyk assisted as second chair. (PCR.1972, 2012).

Mr. Niemczyk had previously represented clients in cases with DNA evidence. (PCR.2017). He volunteered to investigate the forensic evidence, including the DNA evidence. (PCR.2013). At the evidentiary hearing, Mr. Niemczyk's best recollection was that the defense was waiting on disclosure of the documentation (bench notes) for the DNA testing that had been conducted. (PCR.2017). He did not think the time was ripe to ask for a DNA expert at the time he left the office. (PCR.2017-18).

In the three years and four months that Mr. Messoro represented Mr. Jackson he took four depositions: Detective Waldrup, Deputy Paul, Chester Narvell, and Linda Waddell, (the victim's sister). (R.357-58).

Mr. Jackson's alibi defense was conceived while Mr. Messoro was still his attorney. Mr. Messoro filed the alibi notice on February 1, 2011, roughly eighteen months after he was appointed to Mr. Jackson's case. (R.369-70). He conceded that Mr. Jackson's alibi defense was "already stale since it was a five-year-old murder." (PCR.1998).

Although Mr. Messoro did not represent Mr. Jackson at trial, he did represent him for several years before the case was transferred to

Mr. Bateh. Although Mr. Messore could not recall his discussions with Mr. Jackson about his right to testify, his general practice was “to keep [his] client off the stand whenever possible.” (PCR.1995). Mr. Messore viewed Mr. Jackson’s criminal record and potential for impeachment as a problem. (PCR.1996).

Mr. Niemczyk left the office for private practice in September 2012. Mr. Messore was reassigned to the Nassau County office in late October or early November of 2012. (PCR.1989-90). When Mr. Messore was transferred to Nassau County, he did not believe the case was ready for trial. (PCR.1990). In Mr. Messore’s opinion, more investigation needed to be done on the DNA and latent print evidence. (PCR.1990-91).

At the time Mr. Messore transferred out of Duval County in October of 2012, Mr. Jackson’s case was set for trial on December 3, 2012. (R1.Clerk’s Notes.15). Mr. Messore’s last appearance in court with Mr. Jackson was on October 31, 2012, at a pretrial conference.

B. Trial Counsel: Michael Bateh, Alphonse Perkins, and James Armstrong

Assistant Public Defender Michael Bateh was assigned to Mr. Jackson’s case to replace Mr. Messore. Mr. Bateh first appeared in

court with Mr. Jackson at a pretrial conference on November 7, 2012, and filed a motion to continue requesting additional time to consult with defense experts and take depositions. He wrote that he “would be ineffective for proceeding to trial without proper consultation with defense experts.” (R.395-97). His motion was granted and the trial was continued until April 15, 2013, with a pretrial conference set for January 15, 2013. The court urged counsel to be prepared to discuss at the January 2013 pretrial conference deadlines for disclosure of aggravating and mitigating circumstances and witnesses to be called in the case. (R.994).

At the January 15, 2013 pretrial conference, Mr. Bateh represented that he was “on track” for the April 15 trial date and that he and the prosecutor were looking at “a month out” to figure out if anything was outstanding. (R.1000-01). Mr. Bateh told the court depositions were not scheduled, but that he would confer with the prosecutor “this week” to set them. (R.1001). The court instructed counsel to complete depositions of experts for both sides by February 29, 2013. (R.1003-04). Another pretrial conference was scheduled for February 12, 2013, and a final pretrial was set for March 29, 2013. (R.1004).

Chief Judge Arnold heard the pretrial conference February 12, 2013. Mr. Bateh represented to the court that depositions were set “this month.” (R.1012).

Actually, no depositions were scheduled in February of 2013. Defense deposition notices were not filed until March 1 and March 26. (R.400-01). No attempt to coordinate deposition dates was made with the State until February 28, 2013. (PCR.2211).

1. Trial counsel’s investigation of the DNA evidence

On February 25, 2013, Mr. Bateh retained DNA consultant Nancy Peterson to review the DNA evidence in the case. (PCR.2225). On that date, Ms. Peterson confirmed her availability and attached a two-page sample “discovery request” of records she needed from FDLE to conduct the evaluation. (PCR.1270-72). On February 25, 2013, Mr. Bateh also emailed the prosecutor and requested the bench notes for the first time. (PCR.2221; 1211).

On April 2, 2013, less than two weeks before trial, Mr. Bateh sent another email to the prosecutor requesting the FDLE bench notes. (PCR.2054-55; 1565). The prosecutor then asked FDLE examiner Clark to deliver the bench notes to the prosecution, and the notes were finally delivered to Mr. Bateh on April 3 or 4. (PCR.2235).

On April 4, Mr. Bateh sent the DNA bench notes to Ms. Peterson. (PCR.2236; 1279).

On April 13, the Saturday before trial, Mr. Bateh asked Ms. Peterson to review some photographs. (PCR.2238; 1280).

On April 14, the day before jury selection, Ms. Peterson began her review of the FDLE bench notes. (PCR.2281).

On April 15, the day of jury selection, Ms. Peterson completed her examination around 3 p.m. (PCR.2283). She emailed Mr. Bateh at 1:57 p.m. and asked him to call her about the DNA mixture on the small knife. (PCR.2283, 1280). She has no record of him responding and did not remember talking to him after the Sunday phone call. (PCR.2284). Mr. Bateh did not recall speaking to her on April 15, either, but thought he probably did. (PCR.2239-40).

Mr. Bateh first testified at the evidentiary hearing on April 26, 2018. Based on Mr. Bateh's earlier representations and his failure to disclose to postconviction counsel any documentation related to his engagement of a DNA expert, postconviction counsel filed a claim in Mr. Jackson's Rule 3.851 motion for failure to retain a DNA expert.

At the April 26, 2018, evidentiary hearing, Mr. Bateh testified that he first spoke to DNA consultant Nancy Peterson on February 5,

2013, and retained her on February 7, 2013. (PCR.2143-44). He testified that he spoke to her again on April 3, 2013, and she could not help. (PCR. 2144, 2218). The day before Mr. Bateh was scheduled to testify at the April 26 evidentiary hearing, he learned from the prosecutor that postconviction counsel alleged that Mr. Bateh had not retained a DNA expert in Mr. Jackson's case. (PCR.2215). Mr. Bateh asked his paralegal to contact Ms. Peterson and obtain a letter from her that she had been unable to assist him in Mr. Jackson's case. (PCR. 2215). Mr. Bateh's testimony was contrary to information he had previously provided to postconviction counsel. (PCR.2143, 2145).

The April 2018 hearing was adjourned because of Mr. Bateh's surprise testimony and his failure to previously provide any documentation regarding his trial DNA expert to Mr. Jackson's postconviction counsel.

James Armstrong, the third chair, conducted the cross-examination of FDLE DNA analyst Leigh Clark at trial. (R.471-75). Mr. Armstrong also testified at the April 2018 evidentiary hearing before Mr. Bateh. (PCR.2034-2100). He testified that he received all the FDLE summary reports and documentation when Mr. Bateh

assigned him the task and had sufficient time to prepare. (PCR.2046, 2048-49). He was assigned the cross-examination of Ms. Clark by Mr. Bateh approximately 2 ½ months before trial. When he was shown an email dated February 25, 2013, from Mr. Bateh to the prosecutor asking for the FDLE bench notes, Mr. Armstrong acknowledged that he could not have had the bench notes when he initially got involved and could not have had them before early April. (PCR.2053, 2055; 1565). Mr. Armstrong testified that he never worked with a DNA expert to help him prepare for Mr. Jackson's trial and that, if an expert was involved, it would have been before he became involved in the case. (PCR.2056, 2051).

Mr. Armstrong did not receive copies of any of the emails or letters between Mr. Bateh and Ms. Peterson. (PCR.2243). Mr. Armstrong was not party to any phone conversations between Mr. Bateh and Ms. Peterson. (PCR.2243). Ms. Peterson does not think she ever spoke to Mr. Armstrong. (PCR.2295).

Mr. Jackson presented testimony at the evidentiary hearing from Candy Zuleger, a DNA expert retained by postconviction counsel. She was a DNA analyst at the FDLE Pensacola lab from 1996 to 2004. (PCR.2310, 2313). She left FDLE to open her own lab

where she conducted DNA testing and served as a consultant on DNA issues for lawyers. (PCR.2314-15).

Ms. Zuleger testified about the accuracy and propriety of Ms. Clark's trial testimony that Mr. Jackson could not be excluded as the minor donor to the DNA on the steering wheel cover. (PCR.2367). Ms. Zuleger testified that Ms. Clark wrote in her February 20, 2007 report that the minor donor to the blood on the steering wheel cover "could not be conclusively determined." (PCR.2372). Ms. Zuleger called it a "play on words" from the FDLE definition of "inconclusive/no results" contained in FDLE FSQM (Forensic Science Quality Manual) standard 3.11, which was defined as, "Any finding that cannot support a clear conclusion as to the genotypes present shall be considered as inconclusive or no result." (PCR.2371; 1419-30).

In Ms. Zuleger's opinion, Ms. Clark's testimony at trial that Mr. Jackson could not be excluded as the minor donor to the blood on the steering wheel cover was a change in calls from what Ms. Clark wrote in her report. (PCR.2372-73).

Moreover, Ms. Zuleger testified that Ms. Clark's trial testimony that Mr. Jackson could not be excluded as the minor donor to the

steering wheel sample at genetic markers D3, amelogenin, and VWA violated FDLE standards because the peaks Ms. Clark saw at those markers were below the thresholds required by FDLE. (PCR.2374-79).

Ms. Zuleger would have excluded Mr. Jackson at the VWA marker. (PCR.2378). When she analyzed the data, she found a 17 allele at VWA that did not match either the victim who was a 16, 18 or Mr. Jackson who was a 15, 15 at that marker. (PCR.2378).

Ms. Zuleger also testified that it was possible to obtain a full marker profile from a shed hair and that she had done so in her own testing. (PCR.2346-47). She testified that at the time the test was conducted only about 1 nanogram was needed to obtain a full marker profile. (PCR.2343-44).

Ms. Zuleger also testified about hair transfer. According to Ms. Zuleger, hair “has the lowest priority in cases” for testing because it is so easily transferred. (PCR.2354-55). She testified that hair can be transferred from person to person, through the air-conditioning system, if doors were left open, by animals, by individuals walking through the house and around the body. (PCR.2355-56).

Ms. Zuleger also testified that Ms. Clark failed to follow FDLE protocols regarding the testing kits. FDLE used commercially produced DNA test kits called Profiler Plus and Cofiler. Ms. Clark failed to run the Cofiler kit on the victim's known standard. Ms. Zuleger testified that Ms. Clark should have obtained results from Cofiler on the victim's standard under FDLE protocols. (PCR.2328-29). Ms. Zuleger testified that the victim's sample was an important piece of evidence and should have been tested with both kits to add discrimination with the extra markers found in Cofiler and the overlapping markers in each kit act as a "source control." (PCR.2326-27). Ms. Zuleger testified that she could have pointed that error out to defense counsel had she been retained as an expert in Mr. Jackson's case and would have pointed out the weaknesses in Ms. Clark's explanation for why she did not run the test again. (PCR.2331).

The State called Leigh Clark in rebuttal to Ms. Zuleger's testimony. Ms. Clark defended her trial testimony. She acknowledged her written report was different from her trial testimony about the blood on the steering wheel, and confirmed the minor donor results were still inconclusive. (PCR.2445-46).

Regarding the hair on the victim's leg, Ms. Clark testified the amount of DNA from the hair was approximately thirty-four nanograms, and based on that amount of DNA she still believes the hair was not naturally shed. (PCR.2439).

2. Mr. Jackson's Alibi Defense

Alphonse Perkins, the second chair trial attorney, was responsible for the direct examinations of Mr. Jackson and his wife, Deborah Jackson. At the evidentiary hearing, Mr. Perkins could not recall preparing Ms. Jackson to testify at trial.

Ms. Jackson testified that Mr. Perkins met with her "15 minutes maybe" outside the courtroom before her testimony. (PCR.2303). He gave her "general questions" and told her he would ask how she could remember Mr. Jackson's trip to Adel in October 2004. (PCR.2303).

Mr. Perkins also did not recall preparing Ms. Jackson for cross-examination on her prior conviction for a bad check from decades before trial. (PCR.2121). Ms. Jackson testified that Mr. Perkins knew about her prior conviction but did not tell her she could be impeached with it as a crime of dishonesty. (PCR.2303). She told him the circumstances surrounding the check prior to trial. (PCR.2304). The conviction dated back over twenty years when Ms. Jackson was a

single parent with three children, attending school full-time and working part-time, and she “just missed it.” (PCR.2304). The check was written for less than \$50. (PCR.2305). Ms. Jackson was “shocked” when she was questioned about the check on cross-examination because Mr. Perkins told her “it was 20 years old; it was not an issue.” (PCR.2304, 2307).

Mr. Perkins agreed that he could have re-directed Ms. Jackson and asked her specific questions about the circumstances of the check to ameliorate the impact. (PCR.2123).

Mr. Jackson’s sister, Penny Williams, also testified about the preparation she received to testify as an alibi witness at trial. On the day she testified, Ms. Williams met with counsel for five to ten minutes. (PCR.2412). They instructed her not to talk about Mr. Jackson’s incarceration in Georgia. (PCR.2412). Ms. Williams testified at the evidentiary hearing that the brief meeting was not enough to “flush out all of the facts of what [she] was able to contribute in [her] testimony.” (PCR.2417).

Ms. Williams also remembered Mr. Jackson’s visit in October 2004 because of significant events in her life that had nothing to do with Mr. Jackson’s incarceration. (PCR.2413). Ms. Williams lost her

job shortly after Mr. Jackson's visit, and that was the only year she could not afford to buy Christmas presents for her kids. (PCR.2413). Her father had to step in and buy gifts for her children, and that particular year stands out for her because she "felt like [she] failed her kids." (PCR.2414). She got a new job in early 2005, and shortly thereafter met her husband. (PCR.2414). They were married in July 2005. (PCR.2414). The last time she saw Mr. Jackson as a free man was in October 2004.

3. Preparation for Mr. Jackson's trial testimony

Ms. Jackson testified that she was in the Public Defender's Office dropping off court clothes for her husband the night before trial and observed a Polycom conference between Mr. Perkins and Mr. Jackson. (PCR.2301). Mr. Perkins told Mr. Jackson that he needed to testify to explain how his fingerprint and hair were found in the victim's home. (PCR.2302). Her husband never expressed a desire to testify. (PCR.2302). During the Polycom conference, Mr. Perkins did not prepare Mr. Jackson for any questions he would be asked on direct or cross-examination. (PCR.2302).

SUMMARY OF THE ARGUMENT

ISSUE 1: Defense counsel was ineffective because they failed to effectively investigate and challenge the DNA evidence at trial. Trial counsel waited until the eve of trial to obtain critical FDLE records and retain a DNA expert. Trial counsel did not utilize the expert to assist with cross-examination of the State's DNA witness at trial, and missed critical opportunities to challenge the State's evidence. Had counsel timely retained a DNA expert and had her in court to observe the State's witness's testimony, trial counsel would have learned that the witness violated FDLE protocols for testifying outside the bounds of her report, that Mr. Jackson was excluded as a donor to the steering wheel cover, explained to the jury a naturally shed hair with a root could produce a full DNA profile, and explained how easily hair is transferred and how, under innocent circumstances, Mr. Jackson's hair could be found on the victim's leg. Had counsel effectively investigated and challenged this linchpin evidence, there is a reasonable probability that the outcome of Mr. Jackson's trial would have been different.

ISSUE 2: Defense counsel was ineffective for their deficient handling of the fingerprint evidence at trial, which shows their lack of

preparation and haphazard approach to defending Mr. Jackson. Trial counsel promised the jury in opening statement that they would hear testimony that there were no prints of value for comparison purposes, and then abruptly reversed course moments later and conceded during the print on the sink above the victim's body was Mr. Jackson's. Trial counsel repeated this ill-conceived strategy in closing argument. Had counsel effectively investigated and challenged the fingerprint evidence, there is a reasonable probability that the outcome of Mr. Jackson's trial would have been different.

ISSUE 3: Defense counsel was ineffective for failing to prepare Mr. Jackson to testify at trial. Counsel did not investigate his prior record and allowed him to testify to the wrong number of felony convictions. He was not prepared for an aggressive prosecutor. He testified poorly and painted himself as a selfish man who get money when he needed it by selling drugs or borrowing from family and friends. He seemed callous towards the victim and unaffected by her death, even though he testified they were acquaintances. Had counsel effectively prepared Mr. Jackson for his testimony, there is a reasonable probability the outcome of his trial would have been different.

ISSUE 4: Defense counsel was ineffective for failing to investigate and present an effective alibi defense. Counsel did not investigate Mr. Jackson's alibi for approximately eighteen months after he was appointed. Counsel had a haphazard disjointed strategy—they cautioned witnesses not to mention Mr. Jackson's Georgia incarceration, which was the primary reason they remembered Mr. Jackson's October 2004 visit. Counsel claimed they did not want the jury to know his prior record, yet he testified on his own behalf and his record came in anyway. Counsel also failed to prepare the alibi witnesses for their testimony, culminating in the testimony of Penny Williams, who could have given a detailed and very personal explanation for why she remembered Mr. Jackson's visit to Adel in October 2004 had counsel properly prepared for her testimony. Had counsel investigated and presented an effective alibi defense, there is a reasonable probability the outcome of his trial would have been different.

ISSUE 5: Defense counsel was ineffective for failing to prepare Deborah Jackson for cross-examination about her prior conviction twenty years before trial for a passing a worthless check. Had defense counsel properly prepared for her testimony, he would have

ameliorated the damage from the prosecutor's impeachment on redirect by bringing out the circumstances surrounding the bad check. As a result of defense counsel's deficient performance, the prosecutors emphasized Ms. Jackson's conviction during closing arguments in an effort to destroy her credibility as an alibi witness. Had counsel effectively prepared Ms. Jackson for cross-examination on her prior conviction, there is a reasonable probability the outcome of Mr. Jackson's trial would have been different.

ISSUE 6: Defense counsel was ineffective for failing to file investigate or file a motion for pre-indictment delay. The investigative delays were unreasonable and led to the loss of valuable evidence in support of Mr. Jackson's alibi. The delay in investigating the crime and processing the evidence was a denial of due process.

ISSUE 7: The circuit court erred in finding that cumulative error did not deprive Mr. Jackson of a fair trial.

ARGUMENT

The Strickland Standard

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

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

Caroway v. Beto, Texas DOC, 421 F. 2d 636, 637-38 (5th Cir. 1979).

Trial counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Specifically, counsel has a duty to investigate in order to make the adversarial testing process meaningful. *Id.* at 690. "An ineffective assistance of counsel claim has two components: A petitioner must show that counsel's performance was deficient and that the deficiency prejudiced the defense. To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'"

Id. at 687-88 (internal citations omitted). Prejudice is defined as “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome.” *Id.* at 694.

The Eighth Amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. *Beck v. Alabama*, 477 U.S. 625 (1980). The United States Supreme Court noted, in the context of ineffective assistance of counsel that the correct focus is on the fundamental fairness of the proceeding:

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

Strickland, 466 U.S. at 696.

One of the primary duties defense counsel owes his client is the duty to prepare himself adequately prior to trial. Pretrial preparation,

principally because it provides a basis upon which most of the defense case must rest, is perhaps the most critical of stage of the lawyer's preparation. *See Magill v. Dugger*, 824 F. 2d 879, 886 (5th Cir. 2012).

Also critical is the duty to consult and present expert testimony in cases where the jury's interpretation of it is imperative. *See Williams v. Thaler*, 684 F.3d 597, 604 (5th Cir. 2012) (defense counsel's performance fell below an objective standard of reasonableness when counsel failed to obtain independent ballistics or forensics experts and was therefore unable to offer any meaningful challenge to the findings and conclusions of the state's experts, many of which proved to be incorrect.) *See Ege v. Yukins*, 485 F.3d 364, (6th Cir. 2007) (explaining how trial counsel's failure to object to bite mark evidence and the statistical probability that someone other than the defendant bit the victim was ineffective assistance of counsel that undermined confidence in the verdict under both prongs of *Strickland*); *Elmore v. Ozmint*, 661 F.3d 783, 851-56 (4th Cir. 2011) (holding that trial counsel's gross failure to investigate the State's forensic evidence, including the time of death estimate, hairs found on the victim's body, and other evidence had a "palpably adverse

effect on the defense” that satisfied both prongs of the *Strickland* test); and *State v. Fitzpatrick*, 118 So. 3d 737, 753-59 (Fla. 2013) (explaining that counsel’s failure to properly investigate and challenge forensic evidence related to the timing of the defendant’s sexual encounter with the murder victim in a capital murder case was deficient conduct under *Strickland* and the severity of the errors undermined the court’s confidence in the verdict). And in *Pickel v. State*, 32 So. 3d 638 (Fla. 4th DCA 2009), Judge Farmer explained the importance of DNA evidence as follows:

In the world of trial evidence, DNA may well be the whole megillah. It is the single, most formidable evidence in proving many sexual offenses. Because of its scientific reliability, it is often regarded as conclusive. Once inculpatory DNA evidence is well and truly laid before a jury, a guilty verdict is all but a downhill slide on a glacier.

Id. at 638.

Importantly, trial counsel cannot be found to have made a strategic decision when he failed to fully investigate the evidence. *Strickland*, 466 U.S. at 690-91; *Wiggins v. Smith*, 539 U. S. 510, 527 (a reviewing court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further); and *Henry*

v. State, 862 So. 2d 679, 685 (Fla. 2003) (“A reasonable strategic decision is based on informed judgment.”).

ISSUE 1:

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO EFFECTIVELY INVESTIGATE AND CHALLENGE THE DNA EVIDENCE

I. Introduction

At Mr. Jackson’s trial, the State presented critical testimony from Florida Department of Law Enforcement (FDLE) DNA examiner Leigh Clark that the DNA profile from a single hair recovered from the victim’s leg was a full marker match with the known DNA profile of Mr. Jackson and that Mr. Jackson could not be excluded as the minor contributor to a mixture of DNA recovered from the steering wheel of the victim’s van. The State argued her van was stolen near the time of the murder and abandoned at an apartment complex not far from the Diamond Inn where Mr. Jackson lived. (T.461-62, 468, 833).

The circuit court found that “aspects of defense counsels’ overall performance related to the investigation and challenges to the State’s DNA evidence in this case were not what would reasonably be expected of an attorney defending a capital case,” but declined to find

that the deficient conduct met the level of prejudice required by *Strickland*. (PCR.1574, 1582). The circuit court misapprehends how critical this patently deficient conduct was to the reliability of the verdict rendered at trial and overlooks or tacitly excuses how unreasonable counsel's conduct was. The truth of the matter is that trial counsel waited until the literal eve of trial to discuss the DNA evidence with an expert who had not even completed her evaluation of the evidence until 3:00 p.m. the next day, while counsel was in jury selection. (PCR.2283).

The importance of the DNA evidence in this case cannot be overstated. It was the linchpin evidence and from it all other evidence flowed. Indeed, the prosecutor told the jury in his opening statement that the DNA evidence solved this case. (R.361). The trial lawyers should have investigated the DNA evidence, timely hired an expert, and challenged it at every turn. Failure to do so was unreasonable, the prejudice was severe, and Mr. Jackson's conviction is unreliable as a result.

II. Counsel's deficient conduct

Deborah Pearce was stabbed to death in her home on or between October 16, 2004, and October 18, 2004 (Saturday, Sunday

and Monday). Her body was discovered on October 19, 2004, at approximately 12:30 a.m., by her neighbor, Chester Narvell, who called the police and reported that he had not seen Ms. Pearce or her van for several days.

Evidence was collected from the scene, including a hair found on the victim's leg, and from the victim's autopsy and was delivered to the FDLE lab on October 27, 2004.

The victim's van was located through an anonymous tip on November 16, 2004 and evidence collected from it was sent to the FDLE lab for processing and testing, including blood on the steering wheel cover.

It was not until August 24, 2006, that FDLE DNA examiner Leigh Clark conducted short tandem repeat (STR) DNA testing on the hair found on the victim's leg and developed a full marker profile. (PCR.953). The profile was uploaded to the FBI's Combined DNA Index System (CODIS) to compare to other profiles in the CODIS databanks. On December 26, 2006, a match was found with Mr. Jackson's DNA profile. (PCR.878). Ms. Clark wrote the report with her findings on the hair analysis and other items of evidence on February 20, 2007 (PCR.1416-18), and submitted a report on the

cold hit on February 22, 2007. (PCR.870).

Ms. Clark conducted DNA testing on blood from the steering wheel cover and the armrest of the victim's car on October 13, 2006. A mixture for the blood on the steering wheel was found with at least two donors with the victim as the major donor. Ms. Clark reported that the DNA profile for the minor donor could not be determined. (PCR.947-48).

On May 15, 2012, prosecutor Mizrahi asked Ms. Clark to conduct DNA testing on other items of evidence collected from the victim's home, including the small knife found under Ms. Pearce and swabbings taken from the handle and blade of the knife for "possible subject DNA." (PCR.940). The swab from the blade of the small knife handle produced a mixture of DNA from at least two individuals. (PCR.944-45). The major donor from the swab was the victim. (PCR.944-45). Mr. Jackson was excluded as a contributor to the DNA on the knife blade. (PCR.944-45). A swab from the handle of the same knife produced a partial profile matching the victim's profile. (PCR.944-45).

Kim Jackson was arrested on a capias June 17, 2009, for the October 2004 murder. The Public Defender's Office was appointed

to represent Mr. Jackson on June 17, 2009, almost five years after the victim died. (R.16). Assistant Public Defender Gregory Messoro was assigned as first chair, and Todd Niemczyk assisted as second chair. (PCR.1972, 2012). A standard Rule 3.220 defense request for discovery was filed by Mr. Messoro on June 22, 2009, (R.21) and the State filed its initial discovery disclosure on July 27, 2009, which included FDLE DNA analyst Leigh Clark as a Category B witness. The medical examiner's report and one of Ms. Clark's DNA reports were attached. (R.23-25).

Mr. Messoro filed a motion requesting the FDLE DNA bench notes and underlying data on January 10, 2010, and that motion was granted by Judge Senterfitt on January 28, 2010. (R.97-103). The State did not comply with the order until April 3, 2013, twelve days before the trial was scheduled to start, long after Mr. Messoro and Mr. Niemczyk were removed as Mr. Jackson's counsel of record.

There is no record of the appointment of a replacement second chair on Mr. Jackson's case after Mr. Niemczyk left the office for private practice in September 2012. Mr. Messoro was reassigned to the Nassau County office in late October or early November of 2012 and replacement counsel was assigned to represent Mr. Jackson.

(PCR.1989-90).

In the three years and four months that Mr. Messore represented Mr. Jackson he took four depositions: Detective Craig Waldrup, the lead detective, and Deputy Paul on October 18, 2010; Chester Narvell, the neighbor who found the victim's body, on October 19, 2010; and Linda Waddell, the victim's sister, on October 19, 2010. (R.357-58). Neither Mr. Messore nor Mr. Niemczyk took the deposition of the FDLE DNA examiner, Leigh Clark, or any of the other forensic examiners or technicians in the case. Mr. Niemczyk testified that he was still waiting for the DNA discovery and did not think the time was ripe to ask for a DNA expert at the time he left the office. (PCR.2017-18). Mr. Niemczyk never spoke to any of the lawyers who took over the case from Mr. Messore. (PCR.2021).

When Mr. Messore was transferred to Nassau County, he did not write a transfer memorandum to Mr. Jackson's new attorneys (PCR.1992), and he did not believe the case was ready for trial. (PCR.1990). In Mr. Messore's opinion, more investigation needed to be done on the DNA and latent print evidence against Mr. Jackson. (PCR.1990-91). Mr. Messore could not recall whether he planned to retain a DNA expert to help him prepare for trial and at no time did

he request funds from his supervisors for a DNA expert. (PCR.1982-83, 1988). Mr. Messore and Mr. Niemczyk could not recall ever being denied funds for experts by their office. (PCR.1971, 2017).

At the time Mr. Messore transferred out of Duval County in October of 2012, Mr. Jackson's case was set for trial on December 3, 2012. (R1. Clerk's Notes, p. 15). Mr. Messore's last appearance in court with Mr. Jackson was on October 31, 2012, at a pretrial conference. At that hearing, when asked by the circuit court if he was ready to start trial in a month, he responded, "I'm still hopeful, Your [sic] Honor, that I can be ready by December 3rd. I am not positive I can be but I'm going to work as hard as I can to be ready on that date." (R.976). Mr. Messore asked for another week to confirm his readiness for trial, and added that Mr. Jackson had just advised him that his wife Deborah Jackson, who he believed was an important witness in the case, might not be available the week of the trial. (R.977).

Assistant Public Defender Michael Bateh was assigned to Mr. Jackson's case after Mr. Messore was transferred to Nassau County. Mr. Bateh first appeared in court with Mr. Jackson at a pre-trial conference on November 7, 2012, and filed a motion to continue

requesting additional time to consult with defense experts and take depositions. He represented in his motion that he “would be ineffective for proceeding to trial without proper consultation with defense experts.” (R.395-97). That motion was granted and the trial was continued until April 15, 2013, with a pretrial conference set for January 15, 2013. The circuit court admonished counsel to be prepared to discuss deadlines for disclosure of aggravating and mitigating circumstances and witnesses to be called in the case at the January 2013 pretrial conference. (R.994). Mr. Bateh suggested the January pretrial date and advised the circuit court that would give him time to catch up. (R.994). Mr. Bateh did not set any depositions or retain a DNA expert before the next pretrial conference.

At the January 15, 2013, pretrial conference, the trial court asked whether counsel had prepared a pretrial plan for getting the case to trial in April. (R.1000). Mr. Bateh represented that he was “on track” for the April 15 trial date and that he and the prosecutor were looking at “a month out” to figure out if anything was outstanding. (R.1000-01). The circuit court asked Mr. Bateh what depositions needed to be taken, and Mr. Bateh could not recall and

apologized for not having his notes with him. (R.1001). The court asked Mr. Bateh if depositions were scheduled, and Mr. Bateh said they were not, but that he would confer with the prosecutor “this week” to set them. (R.1001). The trial court instructed counsel to complete depositions of experts for both sides by February 28, 2013, and ordered counsel to clear time on their calendars for that purpose. (R.1003-04, 1007). Another pretrial conference was scheduled for February 12, 2013, and a final pretrial was set for March 29, 2013. (R.1004). Mr. Bateh did not set any depositions that week.

Chief Judge Arnold heard the pretrial conference on February 12, 2013. Mr. Bateh represented to the court that he had only been on the case for “about a month and a half, two months” and stated there were “just some last minute things to get done.” (R.1012). This was a misrepresentation to the court. In fact, Mr. Bateh had been on the case for more than three months at that time and two of the “last minute things” he had not done were retaining a DNA expert and scheduling depositions.

Mr. Bateh further represented to the court that depositions were set “this month.” (R.1012). However, no depositions were scheduled in Mr. Jackson’s case in February of 2013. Defense deposition

notices were not filed until March 1 and March 26, 2013. (R.400-01). According to defense emails and inter-office communications, no attempt to coordinate deposition dates was made with the State until February 28, 2013. (PCR.2211).

Mr. Bateh testified on two separate occasions at Mr. Jackson's evidentiary hearing. He first testified at the hearing on April 26, 2018. During the postconviction process, Mr. Jackson's postconviction counsel wrote Mr. Bateh and requested his entire case file numerous times. Based on Mr. Bateh's earlier representations at a meeting at his office with postconviction counsel and his failure to disclose to postconviction counsel any documentation related to his engagement of a DNA expert for Mr. Jackson's trial, postconviction counsel filed an ineffective assistance of counsel claim in Mr. Jackson's 3.851 motion for failure to retain a DNA expert.

At the April 26 hearing, Mr. Bateh testified that he had retained and "consulted with [a DNA expert], but just was not given the information." (PCR.2143). He testified that he first spoke to DNA consultant Nancy Peterson on February 5, 2013, and retained her on February 7, 2013. (PCR.2143-44). He testified that he spoke to her again on April 3, 2013. (PCR.2144). He testified that she could not

help. (PCR.2144, 2218).

Mr. Bateh's testimony at the April 26 hearing was contrary to information he had previously provided to postconviction counsel that he had not retained a DNA expert. (PCR.2143, 2145). When Mr. Bateh testified that he had retained a DNA expert, it was clear that this information had not been disclosed to postconviction counsel and the circuit court adjourned the hearing and admonished Mr. Bateh to turn over "every scrap of paper", "every byte" to postconviction counsel and to make himself available for a deposition. (PCR.2158-59). After a review of Mr. Bateh's complete file and further investigation, postconviction counsel filed an amended claim alleging ineffective assistance of counsel for failing to investigate and challenge the DNA evidence. (PCR.1226-63).

Mr. Bateh's testimony was continued on December 17, 2018, and the truth finally came out. On April 25, 2018 Mr. Bateh met with the prosecutor, Mr. Mizrahi, to prepare for his testimony at the April 26, 2018 evidentiary hearing. At that meeting, he learned from Mr. Mizrahi that postconviction counsel alleged an ineffective assistance of counsel claim that Mr. Bateh had not retained a DNA expert in Mr. Jackson's case. (PCR.2215). Mr. Bateh left the prep

session with Mr. Mizrahi and directed his paralegal to contact Ms. Peterson and obtain a letter from her that she had been unable to assist him in Mr. Jackson's case. (PCR.2215). Mr. Bateh received an email from Ms. Peterson the next day and testified that she had reviewed the file and could not provide any help with the DNA evidence. (PCR.2144)).

At the December 17, 2018 hearing, Mr. Bateh was confronted with his records and Ms. Peterson's records, and he was forced to concede it was not until February 25, 2013 that Ms. Peterson confirmed her availability to review the DNA evidence and consult with the defense and attached a two-page sample "discovery request" of records she needed from FDLE to conduct the evaluation. (PCR.1270-72). On February 25, 2013, Mr. Bateh emailed the prosecutor and requested the FDLE DNA bench notes for the first time. (PCR.2053; 1211).

On February 27, 2013, Mr. Bateh sent Ms. Peterson a disk containing copies of latent fingerprint reports from FDLE, the Jacksonville Sheriff's Office (JSO), the Pinellas County Sheriff's Office, along with the JSO evidence technician's report, two supplemental reports by JSO Detective Waldrup, the lead

investigator in the case, and one final report by FDLE DNA analyst Leigh Clark. (PCR.1274).

On March 8, 2013, Mr. Bateh mailed Ms. Peterson the FBI's case file on the latent print examinations of questioned and known fingerprints in the case along with the FBI's standard operating procedures for latent print examination. (PCR.2231; 1275).

On March 24, 2013, Ms. Peterson sent an email to Mr. Bateh and stated that most of the materials she received from him related to the latent print exams and explained that was not her area of expertise. (PCR.2232-34; 1276-78). As to the one DNA report she received, she explained that the DNA profile developed from Mr. Jackson's buccal swabs matched Item 2, but that she could not tell from the report what Item 2 was. (PCR.1276-78). She explained what a CODIS cold hit was and assumed the DNA profile from Item 2 was a CODIS match with Mr. Jackson's DNA that might have been in the offender or arrestee database. *Id.* Ms. Peterson again asked Mr. Bateh to obtain various records from FDLE for her so she could conduct a case file review; she again attached the discovery request itemizing the records she needed, including the raw data from the testing. (PCR.1276-78).

It was not until nine days later on April 2, 2013, less than two weeks before trial, that Mr. Bateh sent another email to prosecutor Mr. Mizrahi requesting the FDLE bench notes. (PCR.2222-23; 1565). Mr. Mizrahi then asked FDLE examiner Ms. Clark to deliver the bench notes to the prosecution, and the notes were finally delivered to Mr. Bateh on April 3 or 4. (PCR.2235).

On April 4, 2013, Mr. Bateh sent the DNA bench notes to Ms. Peterson with a cover letter. (PCR.2236; 1279). Nowhere in the letter did Mr. Bateh urge Ms. Peterson to review the records quickly or ask her about her availability for the trial that was to start in eleven days. (PCR.1279).

On April 13, 2013, the Saturday before the trial started, Mr. Bateh emailed Ms. Peterson and asked her to review some photographs. (PCR.2238; 1280). He did not mention that the trial was starting in two days. (PCR.1280).

On April 14, 2013, the day before jury selection, Ms. Peterson finally began her review of the FDLE bench notes. (PCR.2281). According to Ms. Peterson's records and testimony at the evidentiary hearing, she spoke on the phone to Mr. Bateh on that date for a little more than an hour, but at that time she had not yet completed her

review of the records. (PCR.2281; 1443.)

Mr. Bateh claimed Ms. Peterson was aware of the trial date, but acknowledged he had not subpoenaed her or requested funding from his office for her travel arrangements or appearance at trial. (PCR.2237-38). She lived in Sanford, Florida at the time. (PCR.2237-38). Ms. Peterson testified at the evidentiary hearing that Mr. Bateh never gave her a deadline to complete her evaluation or a date certain for Mr. Jackson's trial. (PCR.2289).

When asked what reaction he expected from the trial judge had he appeared in court the next morning at jury selection and disclosed a DNA expert, Mr. Bateh said, "Judge Daniel would have probably been a little upset." (PCR.2240-41).

On April 15, 2013, while Mr. Bateh was in jury selection, Ms. Peterson completed her examination of the FDLE bench notes around 3 p.m. (PCR.2283). She sent an email to Mr. Bateh at 1:57 p.m. on April 15 and asked him to call her about the DNA mixture on the small knife. (PCR.2283; 1280). She has no record of him responding and did not remember talking to him after the Sunday phone call. (PCR.2284). Mr. Bateh did not recall speaking to her on April 15, either, but thought he probably did. (PCR.2239-40).

Mr. Bateh was the only member of the defense team who testified with any knowledge about the DNA investigation. Astoundingly, James Armstrong, the third chair, conducted the cross-examination of Ms. Clark at trial, yet knew nothing about Mr. Bateh's consultations with Ms. Peterson. Mr. Armstrong testified at the April 26, 2018 evidentiary hearing before Mr. Bateh. (PCR.2034-2100). He got involved in Mr. Jackson's case a few months before the trial. (PCR.2037). He was assigned the task of conducting the cross-examination of Ms. Clark by Mr. Bateh in February, approximately two to two and a half months before trial. (PCR.2040-41).

Mr. Armstrong testified that he received all the FDLE reports and documentation when Mr. Bateh assigned him the task and had sufficient time to prepare. (PCR.2046, 2048-49). However, when he was shown an email dated February 25, 2013, from Mr. Bateh to the prosecutor asking for the FDLE bench notes, Mr. Armstrong acknowledged that he could not have had the bench notes when he initially got involved and could not have had them before early April when they were finally obtained by the defense. (PCR.2053, 2055; 1565). Mr. Armstrong further testified that he never worked with a

DNA expert to help him prepare for Mr. Jackson's trial and that, if an expert was involved, it would have been before he became involved in the case. (PCR.2056, 2051).

Mr. Armstrong was not copied on any of the emails or letters between Mr. Bateh and Ms. Peterson. (PCR.2243). Mr. Armstrong mentioned receiving a memorandum from someone about Ms. Clark (PCR.2057), but no such memorandum was ever disclosed by trial counsel to postconviction counsel prior to or at the evidentiary hearing. Mr. Armstrong was not a party to any phone conversations between Mr. Bateh and Ms. Peterson. (PCR.2243). Ms. Peterson does not think she ever spoke to Mr. Armstrong. (PCR.2295).

Trial counsel's preparation and performance before and during trial with respect to the forensic DNA evidence was objectively unreasonable and deficient and renders the jury's guilty verdict unreliable. Mr. Bateh and Mr. Armstrong were not sufficiently prepared to recognize or understand the science and methodology involved or the weaknesses of FDLE DNA analyst Clark's testimony and lacked the requisite knowledge to effectively cross-examine her, nor were they prepared to offer testimony from their own expert to counter Ms. Clark's testimony. Mr. Bateh represented to the trial

court on November 7, 2012, five months before trial, that he would be ineffective if he could not have additional time to consult with experts. He waited until the literal eve of trial to discuss the DNA evidence with an expert he retained who had still not completed her review of the FDLE DNA records.

Had trial counsel timely retained an expert, timely obtained records that had been ordered disclosed more than three years earlier, timely disclosed those records to their expert, taken Ms. Clark's deposition with the assistance of the defense's DNA expert, and had the defense expert present at trial to observe the testimony of the State's DNA analyst and assist with her cross-examination, trial counsel could have challenged the DNA evidence as follows:

A. The blood on the steering wheel cover

At trial, the State presented testimony by FDLE DNA analyst Clark that there was blood recovered from the steering wheel cover of the victim's van and that Mr. Jackson could not be excluded as a minor donor to the mixture through DNA testing. (T.468). This evidence was particularly damning because it appeared to link Mr. Jackson to the theft of the victim's van and would have put him in the victim's house at or near the time of her death. Prosecutor

Mizrahi also told the jury that it was important because the van was abandoned near Mr. Jackson's home. (T.833).

Had counsel timely hired a DNA expert and had that expert in court to observe Ms. Clark's testimony, that expert could have alerted counsel that Ms. Clark's testimony that Mr. Jackson could not be excluded from the DNA mixture on the steering wheel cover was contrary to her findings in her February 20, 2007, report in which she concluded that "[T]he DNA profile for the minor contributor could not be determined." (PCR.1416-18).

At the evidentiary hearing, Ms. Clark claimed her trial testimony that she could not exclude Mr. Jackson as the minor donor to the blood on the steering wheel cover did not constitute a change from her prior call that the minor donor could not be determined. (PCR.2445).

Mr. Jackson also called the State's trial expert, Nancy Peterson, as a witness at the evidentiary hearing. Ms. Peterson, a former DNA examiner at FDLE for twenty years, testified at the evidentiary hearing that Ms. Clark's trial testimony that Mr. Jackson could not be excluded as the minor donor to the mixture found on the steering

wheel cover did constitute a change in calls and that change in calls was improper. Ms. Peterson explained:

It was inconclusive in [Clark's] report and then [Clark] testified that she could not exclude. There's – standards. You have to have a certain amount of DNA to make the call at all and it was below that level. So she - - in her report, she correctly said it was inconclusive - - . . . - - and then in court she said that she couldn't eliminate him. And you can't do that. That's wrong.

(PCR.2295). Ms. Peterson said she could have pointed out the improper change in calls to the defense team at trial had she been there. (PCR.2295).

Mr. Jackson also presented testimony at the evidentiary hearing by Candy Zuleger, a DNA expert retained by postconviction counsel. Ms. Zuleger holds a bachelor's degree in biology and a master's degree in microbiology. (PCR.2310). She was a DNA analyst at the FDLE Pensacola lab from 1996 to 2004. (PCR.2310, 2313). She left FDLE to open her own lab in Milton where she conducted DNA testing and served as a consultant on DNA issues for lawyers. (PCR.2314-15).

Ms. Zuleger was asked about the accuracy and propriety of Ms. Clark's trial testimony that the Mr. Jackson could not be excluded as the minor donor to the DNA on the steering wheel cover. (PCR.2367).

Ms. Zuleger's testimony was consistent with the postconviction testimony provided by Ms. Peterson. Ms. Zuleger testified that Ms. Clark wrote in her February 20, 2007, report that the minor donor to the blood on the steering wheel cover "could not be conclusively determined." (PCR.2372). Ms. Zuleger called it a "play on words" from the FDLE definition of "inconclusive/no results" contained in FDLE FSQM (Forensic Science Quality Manual) standard 3.11, which was defined as, "Any finding that cannot support a clear conclusion as to the genotypes present shall be considered as inconclusive or no result." (PCR.2371; 1419-30).

In Ms. Zuleger's opinion, Ms. Clark's testimony at trial that Mr. Jackson could not be excluded as the minor donor to the blood on the steering wheel cover was a change in calls from what Ms. Clark wrote in her report. (PCR.2372-73).

Ms. Zuleger added that Ms. Clark's inconclusive finding in her report had been reviewed by technical and administrative reviewers at the lab before the report was issued pursuant to FDLE standards. (PCR.2372). She testified that FDLE examiners may not change a call without first submitting an amended report that must go through a new technical and administrative review. (PCR.2372-73).

Ms. Zuleger testified to two violations of FDLE protocols by Ms. Clark. First, Ms. Clark violated her lab's protocol by making a change in calls and not submitting an amended report for a new technical and administrative review. Ms. Clark testified at trial that FDLE has a standard operating procedure and that her work was reviewed in every case. (R.454). A qualified person reviewed her technical work to ensure her findings were correct and that another qualified analyst then reviewed "every single page, observation, notes, the results, the report to make sure that my observations and conclusions are in keeping with what's being recorded and that I performed all the tests necessary." (R.454-55). The reports were subjected to an administrative review. (R.455).

Second, by testifying to FDLE's strict review protocols at trial and claiming that she followed those protocols, she misled the jury. (R.454). She led the jury to believe that the change in calls and the conclusions that Mr. Jackson couldn't be excluded were confirmed by another qualified analyst. They were not.

Moreover, Ms. Zuleger testified that Ms. Clark's trial testimony that Mr. Jackson could not be excluded as the minor donor to the steering wheel sample at genetic markers D3, amelogenin, and VWA

violated FDLE standards because the peaks Ms. Clark saw at those markers were below the thresholds required by FDLE. (PCR.2374-79). Ms. Zuleger cited to FDLE FSQM 5.1 from July 2006 that prohibits analysts from going below the reporting threshold to include someone. (PCR.2375). Ms. Clark's testimony that Mr. Jackson could not be excluded at those markers connotes or implies that she could include him as the donor. (PCR.2449).

Ms. Zuleger explained that the Y marker at the amelogenin locus (determines the gender of the donor) was an 82, which was below the reporting threshold of 100. (PCR.2374, 1439). Ms. Clark should not have testified that she could not exclude Mr. Jackson at that marker because of the presence of that below threshold peak. (T.468). Ms. Clark's testimony otherwise was contrary to the FDLE standards.

Moreover, Ms. Zuleger would have excluded Mr. Jackson at the VWA marker. (PCR.2378). When she analyzed the data, she found a 17 allele at VWA that did not match either the victim who was a 16, 18 or Mr. Jackson who was a 15, 15 at that marker. (PCR.2378). Had defense counsel retained a defense expert for trial who was properly prepared, Mr. Jackson's jury would have learned that Mr.

Jackson was excluded as a donor to the DNA mixture on the victim's steering wheel cover.

In his order denying postconviction relief, the circuit court found that trial counsel's conduct was deficient, but that there was no resulting prejudice. The circuit court's finding is not based upon substantial, competent evidence.

The circuit court is mistaken that Mr. Bateh received his DNA expert's final opinions on the same day as jury selection. (PCR.1582). Mr. Bateh never received Ms. Peterson's final opinions. (PCR.2284). Mr. Bateh spoke with Ms. Peterson on Sunday, April 14, 2013 in the afternoon. (PCR.2281) Ms. Peterson did not complete her review of the records until 3 p.m. the following day when Mr. Bateh was selecting Mr. Jackson's jury. (PCR.2283). Mr. Bateh could not recall speaking to Ms. Peterson after jury selection. (PCR.2239-40).

Ms. Peterson testified that she had been retained on numerous occasions to assist counsel at trial and would have done that for trial counsel had she been asked. (PCR.2273). Had she been in the courtroom she would have alerted defense counsel that Ms. Clark's testimony was "wrong" that Mr. Jackson could not be excluded as the minor donor to the DNA mixture on the steering wheel cover, that

Ms. Clark's testimony violated FDLE protocols that Ms. Peterson was very familiar with as a 20-year DNA examiner for FDLE, and could have undermined the argument the State made linking the location where the van was found to Mr. Jackson.

The circuit also overlooked that Mr. Mizrahi called Deputy Waldrup in rebuttal specifically to testify that the victim's van was found near Mr. Jackson's home. In his closing argument, Mr. Mizrahi emphasized Deputy Waldrup's testimony, and told the jury:

The defense makes a point about the van being processed and nothing linking to the defendant. I guess that's true. There was, remember, an allele or some male DNA, she could not call it for sure, but she could not exclude the defendant as being the contributor. So there is something that at least must give you some pause, there is some link between him and the car. It's also interesting that the defendant – the only other place the defendant admits being besides in her kitchen fixing her disposal is in her car which was taken and found on the same street just down the road from where the defendant lived. The reason why we called Detective Waldrup back was to point that out, that the van was found on Lane. He was living on Lane and Ramona right there, about a mile or so down the road. And the van was processed and we found the victim's blood, which then links it back to the murder.

(T.833).

B. The hair on the victim's leg

Critical evidence against Mr. Jackson was a hair found on the

victim's leg that yielded a DNA profile that was a full marker match with Mr. Jackson's DNA profile. Ms. Clark testified at trial that she had studied hair growth and that she "could extrapolate" that the hair was not naturally shed because she obtained a full marker profile from it. (T.465). Without objection, she testified that it was her *judgment* that the hair was in a growth stage. (T.465).

The State then argued that Mr. Jackson's hair was pulled in a violent struggle with the victim. Prosecutor Simak argued in closing that "this is a pulled hair" and it indicates there was a struggle. (T.797-98). Prosecutor Mizrahi told the jury that the hair was pulled. (T.830, 842). Ms. Clark never said it was pulled; she said it was not naturally shed. (T.465, PCR.2432-33).

Nowhere in her written report of February 20, 2007 did Ms. Clark state that the hair was pulled, not naturally shed or was in the resting stage. (PCR.1416-18).

During cross-examination, Mr. Armstrong did not challenge Ms. Clark's opinion that the hair found on the victim's leg was not naturally shed or that a naturally shed hair could not contain sufficient DNA to yield a full marker profile. (T.472). Mr. Armstrong did not object when Ms. Clark bolstered her opinion by testifying that

articles in the Journal of Forensic Sciences supported her opinion. (T.465). At the evidentiary hearing, Mr. Armstrong agreed that Ms. Clark's reference to other publications supporting her conclusion was objectionable under Fla. Stat. §90.706 (2018). That section, entitled "Authoritativeness of literature for use in cross examination," permits the use of published treatises or periodicals in cross-examination of experts. Ms. Clark testified to the journal articles during direct examination. (T.465). See *Phillip Morris, Inc. v. Janoff*, 901 So. 2d 141, 144 (Fla. 3d DCA 2004) ("[A]uthoritative publications can only be used during cross-examination of the expert and cannot be used to bolster the credibility of an expert or to supplement an opinion of the expert that has already been formed.") quoting *Erwin v. Todd*, 699 So. 2d 275, 278 (Fla. 5th DCA 1997). Accord, *Schwarz v. State*, 695 So. 2d 452, 455 (Fla. 4th DCA 1997) ("Experts cannot, on direct examination, bolster their testimony by testifying that a treatise agrees with their opinion.").

Mr. Armstrong said he had done no specific research on DNA issues for Mr. Jackson's case. (PCR.2071). He acknowledged that it was possible that a DNA expert could have recommended literature and texts that could have helped him prepare for the cross-

examination of Ms. Clark, but he neither sought assistance from Ms. Peterson or another DNA expert, nor conducted his own research to educate himself on scientific issues relevant to Ms. Clark's testimony. (PCR.2074).

Mr. Armstrong was not aware of a 2001 study by Lee and Ladd that found that a shed hair with a root typically contains between 1 and 10 nanograms of DNA. (PCR.2074, 1212). At the time the testing was conducted, 1 nanogram of DNA was generally sufficient to produce a full marker profile. (PCR.2343). Ms. Clark calculated that she had obtained around 33-34 nanograms of DNA from the hair. (PCR.2439). Mr. Armstrong was not aware that Lee and Ladd's findings were also published in a text called *Advanced Topics in DNA Typing: Methodology* by John Butler (2012). He was not familiar with Dr. Butler's work or that Dr. Butler was mentioned as having written the "canonical text on forensic DNA typing" in *District Attorney's Office for the Third Judicial Circuit v. Osborne*, 129 S. Ct. 2308, 2327 (2009). (PCR.2047).

Trial counsel's failure to investigate this critical DNA evidence was a serious error that undermines confidence in the verdict. The evidentiary value of the hair was overstated by the prosecution, and

the defense was ill-prepared to point out the weaknesses in the testimony or counter it with their own expert.

Had counsel timely retained a DNA expert they would have discovered a full marker profile may be obtained from a naturally shed hair and that there is no scientific consensus that a hair must be forcibly removed to yield a full marker profile. They could have cross-examined Ms. Clark on that issue. Additionally, had counsel timely retained a DNA expert and taken the deposition of Ms. Clark before trial, they might have learned that Ms. Clark would testify that the hair was not naturally shed and could have prepared to challenge her with the Lee and Ladd article and Dr. Butler's text adopting Lee and Ladd's findings. (PCR.2342, 2344-45). Both publications were available for review well before Mr. Jackson's trial.

Indeed, Ms. Zuleger testified that it was possible to obtain a full marker profile from a shed hair and that she had done so in her own testing. (PCR.2346-47). She testified to the Lee and Ladd article from 2001 finding shed hairs with roots could produce between 1 to 10 nanograms of DNA, typically, and that at the time the test was conducted only about 1 nanogram was needed to obtain a full marker profile. (PCR.2343-44). Ms. Zuleger also that Dr. Butler was very

well regarded in the forensic DNA community and was the first scientist to write a text on forensic DNA methodologies. (PCR.2344-45). She referred to his texts as “Butler’s Bibles.” (PCR.2345).

Additionally, Ms. Clark’s report on the hair contained no reference as to whether the hair was naturally shed or forcibly pulled. (Exh. 15). Her opinions were beyond the bounds of her report and those opinions were not reviewed and approved by other FDLE analysts or administrators.

Mr. Armstrong did not give a strategic reason for his failure to object to Ms. Clark’s improper bolstering of her own opinions. The circuit court dismissed the failure of trial counsel to object to the inadmissible bolstering as harmless, but had trial counsel done its job it could have prevented the jury from hearing that reputable scientists agreed with Ms. Clark’s findings, especially had counsel known that a naturally shed hair could yield a full marker profile as Ms. Zuleger had observed in her own lab. The hair in question was the linchpin evidence against Mr. Jackson. The failure of trial counsel to obtain the FDLE bench notes in a timely manner, retain an expert well in advance of trial and work with the expert to prepare for Ms. Clark’s deposition and trial testimony was patently

unreasonable in this capital murder case. A defense expert could have explained to the jury that a naturally shed hair with a root could produce a full DNA profile.

C. Hair is easily transferred

In his order denying postconviction relief, the circuit court found that trial counsel's conduct was deficient, but that there was no resulting prejudice. The circuit court's finding is not based upon substantial, competent evidence.

Had trial counsel timely retained a DNA expert, they would have been better able to argue that the hair on Ms. Pearce's leg that was a full marker match with Mr. Jackson's DNA profile was innocently transferred to her body.

At the evidentiary hearing, Mr. Bateh was asked if a DNA expert might have helped him explain to the jury how easily hair is transferred in a home, in a car, or at a crime scene. (PCR.2244). He replied, "If they were able to speak about that, yes," but he could not recall asking Ms. Peterson about it. *Id.*

This was clearly deficient performance by counsel and resulted in tremendous prejudice to Mr. Jackson. Many people entered and left the crime scene before the victim's body was found. The home

was looted. Animal Control Services removed two cats walking around the crime scene and one cat was returned to the victim's mother. (PCR.1288-92, 1305-10). People and animals may easily transfer hairs around a crime scene. (PCR.2355).

An expert could have assisted trial counsel with cross-examination on this issue and offered testimony at trial about the innocent transfer of hair at a crime scene. Ms. Peterson agreed that there are multiple reasons why DNA can be present at a crime scene that having nothing to do with criminal conduct. (PCR.2278). The transfer of hair is one of the reasons why DNA can be innocently present at a crime scene. (PCR.2278-79).

Ms. Zuleger testified at the evidentiary hearing that hair "has the lowest priority in cases" because it is so easily transferred. (PCR.2354-55). She testified that hair can be transferred from person to person, through the air-conditioning system, if doors were left open, by animals, by individuals walking through the house and around the body, which was not discovered for at least two days after the murder. (PCR.2355-56).

From her review of the FDLE report and Ms. Clark's testimony, Ms. Zuleger did not think the hair had blood on it that might have

made it stick to the victim's leg. (PCR.2355). Although at trial Ms. Clark acknowledged that the hair could have been transferred to the victim's leg, her passing testimony was insufficient, as legal rulings show. The trial court concluded in his denial of Mr. Jackson's motion for judgment of acquittal that the contamination/innocent transfer argument by the defense was unreasonable (T.654) and this Court agreed. *Jackson v. State*, 180 So. 3d 938, 953 (2015).

Had Mr. Bateh adequately and timely consulted with a DNA expert, the defense could have offered testimony from their expert how easily hair is transferred and how, under innocent circumstances, Mr. Jackson's hair could have been found on the victim's leg.

D. Ms. Clark did not run all required tests on some of the DNA samples

At all material times, FDLE used commercially produced DNA test kits called Profiler Plus and Cofiler. Each kit tests at the amelogenin marker for the determination of the sex of the donor. Profiler Plus tests for nine markers and Cofiler tests for six markers. Additionally, both overlap by testing at two identical markers. Testing with both kits acts as a control—the results should be the

same at the common markers in both kits — and the additional markers tested in each kit give additional discriminatory assurance.

Ms. Clark failed to get results on the Cofiler markers. She did not run the Cofiler kit on the victim's known standard. Had defense counsel timely hired an expert, adequately consulted with her, and had her available for trial, they could have challenged the reliability of all of Ms. Clark's testing by showing she again failed to follow protocols designed to ensure the accuracy and reliability of this most damning of all evidence. The defense expert could have explained to the jury the importance of following lab procedures designed to ensure accurate results. Additionally, the expert could have pointed out to the jury that the technical and administrative reviews failed to identify the omissions, casting further doubt on the lab's oversight of testing.

At trial, Ms. Clark testified she had too much DNA to get results at all of Ms. Pearce's markers and obtained results at only nine of the thirteen markers. (T.459). At the evidentiary hearing, Ms. Clark agreed that the victim's sample was a single-source sample and an easy test to conduct. (PCR.2451). She could have tested it again, but she declined to do so. (PCR.2452). She said she did not see the

need to do so. (PCR.2430).

Ms. Clark testified at trial that the procedures are in place protect the integrity of the testing. (T.454, 458). She added that a qualified person reviewed her technical work to ensure her findings were correct and that another qualified analyst then reviewed “every single page, observation, notes, the results, the report to make sure that my observations and conclusions are in keeping with what’s being recorded and that I performed all the tests necessary.” (T.454-455). She then noted the reports were subjected to an administrative review. (T.455).

Ms. Zuleger testified that Ms. Clark should have obtained results from Cofiler on the victim’s standard under FDLE protocols and did not understand how the sample worked with Profiler but not with Cofiler. (PCR.2328-29). Ms. Zuleger testified that the victim’s sample was an important piece of evidence and should have been tested with both kits to add discrimination with the extra markers found in Cofiler and the overlapping markers in each kit act as a “source control.” (PCR.2326-27).

Ms. Zuleger testified that she could have pointed that error out to defense counsel had she been retained as an expert in Mr.

Jackson's case and would have pointed out the weaknesses in Ms. Clark's explanation for why she did not run the test again. (PCR.2331).

Again, trial counsel should have investigated this evidence before the eve of trial and its failure to do so was objectively unreasonable. Informing the jury of Ms. Clark's inability to get results on a simple test could have cast doubt on her other testimony and helped the defense mount a convincing reasonable doubt argument for the jury. The circuit court's ruling was not based on substantial, competent evidence.

E. Ms. Clark did not run proper positive controls during DNA testing of certain items of evidence

Ms. Clark had a problem with positive controls in testing she conducted on samples taken from a bloodstained dish rag. (PCR.2335-36). Ms. Zuleger explained that the purpose of positive controls is to ensure that the testing is correct. (PCR.2335-36). Positive controls are included in the test kits with known genetic profiles. (PCR.2335). If the test is properly conducted, then the positive controls should produce their known profiles. (PCR.2335). The positive controls that were run by Ms. Clark had a loss of

resolution as evidenced by abnormal peaks and additional peaks. (PCR.2337). There was not a minor donor in the positive control (it was a single source sample) and this should have been identified by Ms. Clark and the analyst who reviewed her work, but it was not. If controls do not work properly then the evidence profiles cannot be used or reported. (PCR. 2337-38). A simple fix would have been to simply start over and run the test again. (PCR.2337).

Again, a defense expert could have educated the jury on the need to follow protocols established to ensure the accuracy and reliability of results, as well as the evidentiary concerns of Ms. Clark's failure to follow protocols. Ms. Clark's credibility was critical and trial counsel should have pointed out her repeated violations of protocol to undermine her testimony on other findings, especially as Ms. Clark had testified that she followed protocols and all her work was reviewed by others at the lab.

Ms. Clark also tested several hairs recovered from Ms. Pearce's hands. Five hairs had sufficient DNA and produced a DNA profile consistent with Ms. Pearce. However, one hair had a third allele at the FGA marker that was not from Ms. Pearce or Mr. Jackson. Instead of declaring a mixture of DNA from two people, Ms. Clark

decided to call it inconclusive instead, even after running the test again and obtaining the third allele again. In her notes, she opined that it was probably a mosaic tri-allele. At the evidentiary hearing she insisted it was a somatic point mutation, a rare anomaly in DNA testing.

Ms. Zuleger testified that she would have called the result a mixture and excluded Mr. Jackson as the contributor. The State argued there was a violent struggle. The police bagged Ms. Pearce's hands to preserve evidence. The hair had an extra allele that did not match Mr. Jackson's profile. This evidence indicated someone else was the killer. Trial counsel was unprepared to challenge this evidence.

III. Conclusion

The DNA evidence was critical evidence in this case. The circuit court commented in his sentencing order that the State's entire case was based on forensic evidence and the Defendant's denial to detectives that he did not know the victim and had not been in her house. (R.718).

The importance of the DNA evidence in this case cannot be overstated. It was the linchpin evidence and from it all other evidence

flowed. The trial lawyers should have investigated it, timely hired an expert, and challenged it at every turn. Failure to do so was unreasonable and undermined any confidence this Court can have in the reliability of the verdict.

The circuit court's findings that there was no prejudice from defense counsel's deficient investigation of the DNA evidence because Ms. Peterson and Ms. Zuleger did not dispute that the hair was Mr. Jackson's misses the point and the circuit court's attribution of reasonable strategy decisions by trial counsel is unavailing. There can be no reasonable strategy without a thorough investigation and no other case demands thorough investigation than a capital murder case. And the State's spoon-fed strategy justifications to trial counsel during cross-examination are without merit. For example, Mr. Mizrahi suggested to Mr. Bateh that taking the deposition of the DNA analyst would alert the State to defense strategy. It is axiomatic under *Strickland* and *Henry, supra*, that sound strategy is based upon reasonable investigations and informed judgment. Neither existed here.

The evidence in this case was not overwhelming. There were no eyewitnesses, there was no confession, there was DNA from two

people other than Mr. Jackson on the tip of a knife found in the victim's hand, there was a host of alternate suspects, and the home was looted by at least three people.

Had trial counsel established a reasonable, innocent explanation for the presence of Mr. Jackson's hair on the victim's leg and challenged the testimony of Ms. Clark that Mr. Jackson could not be excluded as the minor donor to the DNA mixture on the steering wheel cover of the victim's van, then counsel could have effectively argued that the other evidence in the case—the fingerprint on the sink and Mr. Jackson's denial that he knew the victim and had not been in her house—was not proof that he was the killer. It simply put him in the house with a host of other people who were never DNA tested.

DNA evidence is daunting evidence to learn and effectively challenge for defense counsel, which makes it imperative for trial counsel to retain an expert and the laboratory case file, raw data from the testing, and standard operating procedures setting forth quality assurance and control measures used by the testing lab at the earliest possible time.

Mr. Bateh did not bother to obtain a DNA expert until almost four months after he stated he would be ineffective if he did not. He sent the expert fingerprint reports instead of the FDLE DNA records she specifically advised she needed to evaluate the reliability of the evidence. He did not bother to arrange for her appearance at trial. He spoke to her on the literal eve of trial before she had even finished her review of the evidence and did not respond to her email that she had information about the small knife. Mr. Bateh did not bother to include the attorney he assigned to cross-examine Ms. Clark in his last-minute investigation. He knew the trial judge would be upset if he disclosed a DNA expert on the morning of trial so it appears that he simply checked the box that he conferred with a DNA expert. That is not good enough.

In *Pickel v. State*, 32 So. 3d 638, Fla. 4th DCA 638 (2009), the State disclosed a DNA expert to testify to the statistical significance of a DNA match the morning of jury selection in a capital sexual battery trial. *Id.* at 639. Defense counsel moved for a continuance in the third day of trial when the State offered the witness. *Id.* After a *Richardson* inquiry, the trial court ruled that the discovery violation was inadvertent and denied defense counsel's motion to continue,

citing to defense counsel's failure to attempt to take the deposition of the expert any night after the preceding three days of trial. *Id.* The expert witness testified and the Defendant was convicted. He appealed.

The First District Court of Appeal reversed the Defendant's conviction, holding that it was unreasonable to deny the Defendant's motion to continue when the State disclosed the expert witness the morning of trial after having months to prepare his testimony. *Id.* The court found that requiring an exhausted attorney to take a deposition of an expert after long days in trial was unreasonable, that it sent "defense counsel into battle without arms" and added, "If the State is to send an accused to prison for the rest of his life, the least it can do is give him and his lawyer fair notice of all particulars of the DNA evidence it."

In Mr. Jackson's case, defense counsel's own deficient conduct sent them "into battle without arms" in a capital trial against this compelling evidence.

ISSUE 2

TRIAL COUNSEL WAS DEFICIENT FOR FAILING TO EFFECTIVELY INVESTIGATE AND CHALLENGE THE STATE'S FINGERPRINT EVIDENCE

The match of the latent fingerprint from the kitchen sink with the known print of Mr. Jackson was critical evidence that needed to be thoroughly investigated and challenged. Defense counsels' handling of this evidence shows their lack of preparation and their haphazard approach to defending Mr. Jackson.

The State offered the testimony of FBI latent print examiner Jaqueline Slebrch and William Schade, a latent print examiner from the Pinellas County Sheriff's Office ("PCSO"), who both identified the print as Mr. Jackson's. (T.496, 527).

Mr. Messore and Mr. Niemczyk did not investigate the fingerprint evidence. Mr. Bateh took a telephone deposition of Ms. Slebrch on March 28, 2013, less than 3 weeks before trial, but did not take a deposition of Mr. Schade.

At the evidentiary hearing, Mr. Bateh testified that he consulted with a fingerprint expert who could not help him. (PCR.2265).

At trial, Mr. Bateh promised the jury in his opening statement that they would hear from a JSO fingerprint examiner who would tell

them that there were no prints of value for comparison purposes.

(T.364). He added,

You're going to hear a lot of that statement. No prints of value. Prints of value. Unidentifiable, identifiable, compared, not compared. You're going to hear those words throughout this entire trial. She will tell you that - - not that they weren't comparable, it's that there were no latent prints of value so she [sic] could not be compared.

(T.364-65).

However, in the next breath, Mr. Bateh told the jury:

The State also told you that there was a print of Mr. Jackson, a fingerprint, and a hair, a pulled hair, that were collected from Ms. Pearce's home and they've told you that they belong to Mr. Jackson. I'm going to tell you they did. They were. They were Mr. Jackson's.

(T.365).

Then the defense called as a witness JSO latent fingerprint examiner Michelle Royal who testified that the fingerprint from the sink had insufficient information present to identify it and that she had classified it as a latent print of no value for comparison purposes.

(T.705).

On cross-examination, Mr. Mizrahi displayed side-by-side photographs of Mr. Jackson's known print and the latent print recovered from the sink to Ms. Royal. (T.711-12). She acknowledged

that she had never compared Mr. Jackson's known print with the latent print from the sink because she did not find the latent print of value for comparison purposes. (T.712).

After viewing the known and latent prints in the presence of the jury, Ms. Royal acknowledged that she could not exclude Mr. Jackson as having left the latent print on the sink and that the prints shared some similarities. (T.712). Apparently, defense counsel did not anticipate Mr. Mizrahi's line of cross-examination.

In his closing argument, Mr. Bateh conceded the latent print from the sink was Mr. Jackson's. (T.805). Then Mr. Bateh argued that Ms. Royal was an experienced latent print examiner with 28 years of experience whose findings the detectives did not like so they "went to somebody else and then to somebody else and then to somebody else. ... They went to two different agencies multiple times.... And she still stands by her decision. No latent print of value." (T.816).

The defense's contradictory claims about the latent print—the print was not of value for comparison purposes and the print was Mr. Jackson's—were confounding. Prosecutor Mizrahi put it best in his closing argument,

First of all, the print issue. ... [t]he points they made are so wildly inconsistent I have to point them out to you. They stood up there and said that's his print, see, he was over there several months before fixing her garbage disposal. So, yeah, of course that's his print. But Michelle Royal says it's not a print of value so you're not to think it's his print? Wildly inconsistent. Why did we hear from Michelle Royal if it's his print? That doesn't make any sense.

(T.830-31).

Defense counsel should have decided well in advance of trial what they would present and argue about the latent print on the sink—either the defense would concede it was Mr. Jackson's print or the defense would challenge the State's assertion that it was. If the defense theory was that it was not Mr. Jackson's print, then counsel should not have conceded the print was his in opening statement and closing argument and should not have challenged the opinions of Mr. Schade and Ms. Slebrch, much less put Ms. Royal on the stand to provide another opinion from another expert that the print could be Mr. Jackson's.

In his order denying Mr. Jackson's motion for postconviction relief, the circuit court ruled that "it was reasonable for defense counsel to call Ms. Royal to the stand and rely on her as an expert," and that she would have more credibility than an expert they hired

for that purpose. (PCR.1607). That finding was not supported by competent, substantial evidence. Defense counsel had already conceded that the fingerprint was Mr. Jackson's in opening. Ms. Royal's testimony on direct that the print was not of value was of no help to the defense as they had already conceded the print was Mr. Jackson's.

Reasonably competent counsel would have recognized the inconsistency and not served up more proof against their client. All defense counsel did here was provide additional evidence that the print was their client's. It is axiomatic that defense counsel should not present proof against their client.

The circuit court also found no deficient conduct because defense counsel pointed out through the various experts who testified that that the initial AFIS runs failed to raise Mr. Jackson's prints as a possible match. (PCR.1607). Defense counsel had already conceded in the first two minutes of its opening statement that the print was Mr. Jackson's. Arguing the print was of no value to compare to other prints and then arguing it was their client's print was preposterous strategy, if it can be called strategy. It was an irrational, "fly by the seat of your pants" kind of strategy that was

not informed by a deep understanding of the facts of their case and should not be tolerated by this Court.

Defense counsel could have pointed out that neither examiner identified Mr. Jackson's print as a possible match on the multiple AFIS runs they made and that it was only after they were asked to compare the known prints of Mr. Jackson's (who obviously had been identified as a suspect through some other investigative means) that the identifications were made. Defense counsel could have taken issue with Mr. Mizrahi's old school versus new school theories of latent print examinations—that Ms. Royal was old school and would never change her opinion no matter what evidence she was shown and the new school objectivity of Mr. Schade who claimed he could no longer testify to opinions with certainty (despite that he was certain he had not made an error and that the print was Mr. Jackson's).

For example, Mr. Schade discussed how examiners no longer testified to absolute certainty on matches, but then made these comments:

We pulled the fingerprint card on the individual, made the comparison and identified the right ring finger with the individual as having made the latent print in the jacket.

(T.527).

The latent print was made was made by the right ring finger of the individual compared. (T.527).

When Mr. Schade was asked by the prosecutor if the latent print was just similar to the known print of Mr. Jackson, Mr. Schade replied, "That latent print was made by his right ring finger. Based on what I'm seeing, there is no other plausible conclusion." (T.535). When asked to explain, Mr. Schade said, "I'm saying it's him, I'm a hundred percent confident, but science always leaves the door open." (T.535).

When asked if he could be wrong, he replied, "If I have made a comparison properly and have followed protocols, procedures, and I can demonstrate to the scrutiny of the fingerprint community, then it's not possible I made a mistake." (T.539). It is not clear from the record that Mr. Schade actually conducted the comparison. It appears that PCSO examiner Carol Beauchamp made the comparison and Mr. Schade simply testified to another examiner's findings. He used the pronoun "we" throughout his testimony when referring to the match. Ms. Slebrch, the FBI examiner, was permitted to talk about examiner Laura Hutchins's examination without

objection. The jury could have easily inferred that these non-testifying examiners were in agreement with the calls without the opportunity to observe and weigh their testimony. No confrontation clause objections, relevance or bolstering objections were made. See *Schwarz v. State*, 695 So. 2d 452, 455-456 (Fla. 4th DCA 1999).

And to make matters worse, defense counsel did not object to the prosecutor's comments attacking Ms. Royal in closing argument as an analyst who would never back down even if she was wrong and would always be 100 percent certain even when she was not, because that was what she was trained to do, while inferring that he had personal knowledge of how she operated and her shortcomings.

If the defense theory was that the print on the sink was Mr. Jackson's and he left it there innocently months or weeks before the murder, then they should have stuck with it. To argue both theories was confusing at best and is evidence of their failure to prepare for trial and prepare and present a cogent, cohesive defense. The failure was unreasonable, and the prejudice was enormous. The State's evidence was not subjected to the level of adversarial testing contemplated by *Strickland*.

ISSUE 3:

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO EFFECTIVELY PREPARE MR. JACKSON FOR HIS TRIAL TESTIMONY

A criminal defendant has a fundamental constitutional right to testify in his defense. *Beasley v. State*, 18 So. 3d 473 (Fla. 2009). Mr. Jackson faced this critical decision at his capital trial. Mr. Jackson's attorneys bore the responsibility of advising him of the risks and benefits of testifying at his trial, and "if counsel believes that it would be unwise for [Mr. Jackson] to testify, counsel may, and indeed should, advise [Mr. Jackson] not to testify." *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 2009).

Indeed, Mr. Jackson's former first chair attorney and his first chair attorney at trial both advised Mr. Jackson not to testify. Although Mr. Messoro did not represent Mr. Jackson at trial, he did represent Mr. Jackson for several years before the case was transferred to Mr. Bateh. Mr. Messoro advised Mr. Jackson not to testify because the jury would learn he had a criminal record. (PCR.2302). Mr. Bateh did not want Mr. Jackson to testify either (EH3.74), but he delegated the job of counseling Mr. Jackson about his right to testify to Mr. Perkins. (PCR.2266). Mr. Perkins countered

the advice Mr. Jackson received from his current and past first chair attorneys and advised Mr. Jackson to testify to explain the presence of his fingerprint and hair at the scene of the crime.

At the evidentiary hearing, Mr. Perkins could not recall preparing Mr. Jackson for his testimony. (PCR.2113). He testified about his general practice of telling clients that testify that they must answer the questions unless there is a sustained objection, how to answer questions about their prior felony convictions, and “to be honest about what happened.” (PCR.2114).

In its order denying Mr. Jackson’s claim, the circuit court misapprehended Mr. Jackson’s claim, and summarized it as a failure to *rehearse* his testimony before trial. (PCR.1618). However, Mr. Jackson’s claim is that trial counsel did not *prepare* him to testify, and pretrial preparation entails much more than doing a mock examination. The circuit court accepted Mr. Perkins’ testimony about his general practices and relied on *Taylor v. State*, 3 So. 3d 986 (Fla. 2009), in which this Court held trial counsel was not ineffective where counsel testified at the evidentiary hearing that he did not rehearse his client’s testimony and just told him to tell the truth. (PCR.1618). According to the circuit court, “[i]t is difficult to see in

the instant case how counsel was ineffective for not better preparing Defendant to follow his oath to tell the truth once he took the stand.” (PCR.1618).

Unlike Mr. Perkins, Mr. Taylor’s attorney did remember the circumstances surrounding his client’s trial testimony. Although he did not “rehearse” his client’s testimony, Mr. Taylor’s attorney testified that he prepared his client for his testimony. The circuit court’s citation states that Mr. Taylor’s attorney testified that he “merely told defendant to tell the truth” (PCR.1618), but that is not how this Court described his attorney’s testimony. *Taylor*, 3 So. 3d at 996. Mr. Taylor’s attorney does testify that he told his client to tell the truth, but nothing in the opinion indicates that his preparation of his client’s testimony was limited “merely” to this single piece of advice.

The circuit court’s reliance on *State v. Avila*, 43 So. 3d 936 (Fla. 3d DCA 2010) is also distinguishable from Mr. Jackson’s case. In *Avila*, the sentencing judge testified at a postconviction hearing and could not recall if the defendant’s immigration status was discussed at his plea. The *Avila* court held that the judge’s testimony about his habit and routine could be relied on by the court without

corroborative evidence. (PCR.1618). In Mr. Avila's case, even the defendant did not remember if his immigration status was discussed at his plea. At Mr. Jackson's evidentiary hearing, Deborah Jackson did recall what little preparation her husband received for his testimony, but the circuit court relegated her testimony to a footnote. (PCR.1618).

Mr. Jackson was prejudiced by counsel's deficient pretrial preparation for his testimony. Mr. Jackson was not prepared for an aggressive cross-examination by the prosecutor. He testified poorly and painted himself as a selfish man who could get money when he needed it by selling drugs or borrowing from family and friends. He told the jury, "I have friends in the drug business, that is I need anything, I can get it." (T.749). He was callous towards the victim and told the jury that "other than being curious about it" he was unaffected by her death. (T.752). He "just went on with [his] life when he learned that she had been murdered. (T.752).

Trial counsel's failure to prepare Mr. Jackson for his testimony was underscored by the fact that counsel did not investigate Mr. Jackson's criminal record prior to putting him on the stand at his capital trial. Mr. Jackson testified to more felony convictions than

he actually had because defense counsel erroneously advised him that he had five felony convictions. (T.728, 756). After the jury had convicted Mr. Jackson of first-degree murder, the prosecutor notified the court and defense counsel that Mr. Jackson had four felony convictions, not five. (T.898). As a result of the initiative by the prosecutor—not defense counsel—to correct the record, at the beginning of the penalty phase, the jury was informed of the accurate number of convictions (T.1115), but the guilt phase damage was done.

Mr. Jackson received conflicting legal advice from his trial attorneys about whether he should testify on his own behalf, and once Mr. Perkins' position prevailed, it was incumbent on him to ensure Mr. Jackson was prepared to not only testify truthfully, but to handle difficult cross-examination questions from the prosecutor, and to testify in such a way that he would not alienate the jurors, who are told during their instructions that they should consider the demeanor of the witness to evaluate their credibility. And the jury was seriously considering Mr. Jackson's alibi defense, evidenced by their request to see the testimony of Deborah Jackson, Penny Williams, and Walter Jackson during their deliberations. (T.876).

But for trial counsel's failure to prepare Mr. Jackson for his testimony, there is a reasonable probability Mr. Jackson would have been acquitted of first-degree murder.

ISSUE 4:

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT AN EFFECTIVE ALIBI DEFENSE

One of the primary duties defense counsel owes his client is the duty to adequately prepare himself for trial. Pretrial preparation is critical because it provides a basis for the defense's case at trial. See *Magill v. Dugger*, 824 F.2d 879, 886 (5th Cir. 2012). Trial counsel cannot be found to have made a strategic decision when he failed to fully investigate. *Strickland v. Washington*, 466 U.S. at 690-91; *Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (holding that a reviewing court must consider not only the quantum of evidence already known to counsel, but also whether the unknown evidence would lead a reasonable attorney to investigate further); and *Henry v. State*, 862 So. 2d 679, 685 (Fla. 2003) ("A reasonable strategy decision is based on informed judgment.").

Mr. Jackson's main defense at trial was an alibi defense. He was in Adel, Georgia, visiting his family to celebrate his recent

birthday when the victim was killed. The Public Defender's Office had Mr. Jackson's case for approximately eighteen months before Mr. Messore filed the alibi notice on February 1, 2011. (R.369-70). At that point, Mr. Jackson's case had been set for trial four times. Trial was set for February 2010, April 2010, November 2010, and February 2011, and all the dates were continued at Mr. Messore's request before he filed the alibi notice. (R1.Clerk's Notes, pp. 2, 3, 11, 13).

Ms. Jackson gave Mr. Messore names, phone numbers and addresses of alibi witnesses. (PCR.2209). She also gave him a report card that Mr. Jackson's daughter gave him the week he was in Georgia in October 2004. (PCR.2209). Ms. Jackson was in contact with all of the alibi witnesses, and they continued to report that they had no contact with Mr. Jackson's lawyers. (PCR.2209). With the assistance of his wife, Mr. Jackson filed a grievance against Mr. Messore with the Florida Bar. It was only then that Mr. Messore began his investigation of Mr. Jackson's alibi defense. (PCR.2301).

At the evidentiary hearing, Mr. Messore conceded that Mr. Jackson's alibi defense was "already stale since it was a five-year-old murder." (PCR.1998). The defense team was dealing with "pretty stale memories." (PCR.1998). Mr. Messore compounded the problem

by putting off his investigation until he was under the scrutiny of the Florida Bar.

After Mr. Messore was reassigned, Mr. Jackson's new trial team decided to move forward with the alibi defense at his capital trial. Mr. Jackson's trial attorneys agree that alibi defenses are very difficult to present. (PCR.1976, 2140). Memories fade over time. (PCR.1977, 2015, 2043). Alibi witnesses are usually not neutral and are often people familiar with the defendant and are impeachable because of their love and affection towards him or her. (PCR.1977, 2015). Mr. Jackson's alibi witnesses are family members and friends that recalled he visited Adel to celebrate his birthday in October 2004. (T.658-94; PCR.2140). They remembered that particular weekend because shortly after that Mr. Jackson went to prison in Georgia and it was the last birthday he was home for. (PCR.2043). His defense team instructed the witnesses not to discuss Mr. Jackson's incarceration because "him being in custody in another jurisdiction for another crime was not something we could put forward as far as during the guilt phase." (PCR.2043).

Although alibi defenses are challenging, trial counsel had a duty to thoroughly investigate and present Mr. Jackson's defense in a

cohesive manner. In his opening statement, Mr. Bateh promised the jury he would prove Mr. Jackson was in Adel for his birthday when the victim was murdered. At the evidentiary hearing, Mr. Bateh agreed that there is a danger of losing credibility with the jury by making promises you cannot keep. (PCR.2246-47). The alibi witnesses offered at trial, with the exception of Deborah Jackson, were inexact about when Mr. Jackson had been in Adel. They could not recall the exact date or even the exact date he was there. (PCR.2247). They were easily cross-examined on their uncertainty about the dates of his visit and their affection for Mr. Jackson.

Trial counsel met with Penny Williams for five to ten minutes on the day she testified. (PCR.2412). They instructed her not to associate the visit with Mr. Jackson's Georgia incarceration, but did not take the time to flush out any other reasons why she would remember Mr. Jackson's Adel visit in October 2004. (PCR.2415). If trial counsel had adequately prepared for Penny Williams' testimony at trial, they would have known that Ms. Williams was actually their best alibi witness because she had other reasons besides Mr. Jackson's Georgia incarceration for remembering that particular visit in October 2004. Ms. Williams lost her job shortly after Mr. Jackson's

visit, and 2004 was the only year Ms. Williams could not afford Christmas presents for her children. (PCR.2413). Her father stepped in and bought gifts for her children, and that year particularly stands out for because it was the year “she felt like [she] failed her kids.” (PCR.2414). She got a new job in early 2005, and shortly thereafter met her husband. They were married in July 2005. (PCR.2409-10).

Trial counsel’s failure to prepare their witnesses “until the very morning they were to testify demonstrates counsel’s lack of preparedness.” *State v. Dougan*, 202 So. 2d 363, 388 (Fla. 2016). It is also evidence of a disorganized and disjointed defense team. The alibi witnesses’ memories were fuzzy at trial and their credibility was weakened because they were urged by trial counsel not to discuss exactly why they were able to recall Mr. Jackson’s birthday trip to Adel in October 2004. However, the testimony at the evidentiary hearing is clear that Mr. Perkins was in discussions with Mr. Jackson prior to the start of the trial about his need to testify at trial and explain to the jury why his fingerprint and hair were found at the crime scene. (PCR.2302). If Mr. Perkins had communicated his strategy to the other members of the team, they would have known Mr. Jackson’s record was coming in anyway. (PCR.2118).

if Mr. Jackson's defense strategy was discussed and agreed upon by all members of the team prior to trial, then trial counsel's explanation for instructing the witnesses not to mention Mr. Jackson's incarceration in Georgia is nonsensical because all three attorneys would have known that the jury would learn Mr. Jackson's criminal history when Mr. Jackson took the stand. And any concern trial counsel had about the jury learning Mr. Jackson was incarcerated in Georgia on an armed robbery when they were trying a case for another violent crime could have been dealt with pretrial, if they had a cogent, well-prepared defense. (PCR.2091-92). This illustrates why it is important for trial counsel to actually prepare their witnesses for trial and file appropriate pretrial motions to prevent the State from asking questions about why Mr. Jackson was incarcerated.

In the circuit court's order denying this claim, the court does agree Mr. Messore was "less than aggressive in investigating [Mr. Jackson's] alibi claim." (PCR.1637). The court also claims that whether Mr. Messore's seventeen-month delay in locating and contacting Mr. Jackson's alibi witnesses was deficient performance "is a close question." (PCR.1637). The court found that had Mr.

Messore immediately investigated Mr. Jackson's alibi defense, it would not have mattered because Mr. Jackson's bloody fingerprint was on the sink above the victim's body and his hair was on her calf. (PCR.1639). The court places unreasonable emphasis on this evidence. All the hair and fingerprint could possibly prove beyond a reasonable doubt was that Mr. Jackson's was in the victim's home at some time, just like Chester Narvell, the Faust brothers, and the other looters who trampled her home after her death and stole her property.

The court also claimed Mr. Jackson did not provide any testimony at the evidentiary of an alibi witness that did not testify at trial with a better recollection of Mr. Jackson's birthday trip to Adel. (PCR.1636). The circuit court overlooks that Mr. Jackson provided testimony of an alibi witness at the evidentiary hearing that did testify at trial, Penny Williams, who actually had a more detailed recollection of why she recalled her brother's October 2004 visit, but trial counsel did not adequately prepare for her testimony. The circuit court ignores Mr. Jackson's argument that had Ms. Williams been better prepared to testify, she could have provided more compelling testimony.

The court also footnotes Ms. Jackson's argument about the amount of time attorneys spent with Ms. Williams to prepare her testimony, and points out that Ms. Williams "stated this did not affect the truthfulness of her testimony." (PCR.1638). Again, the circuit court misapprehended Mr. Jackson's claim. Ms. Williams' lack of preparation had nothing to do with her truthfulness. She did tell the truth at trial, but she could have provided significantly more detailed testimony based on personal life experiences of why she remembered that particular birthday visit.

Trial counsel's completely inadequate investigation and preparation of Mr. Jackson's alibi defense at trial resulted in a weak and ineffective presentation to the jury that convicted Mr. Jackson of first-degree murder. The trial team gave Mr. Jackson conflicting advice, and they were not communicating with each other if Mr. Bateh and Mr. Armstrong advised their alibi witnesses based on the assumption that Mr. Jackson would not testify and his felony record would not come out to the jury.

Mr. Jackson's jury was seriously considering his alibi defense, evidenced by their request to view the testimony of Deborah Jackson, Penny Williams and Walter Jackson during their deliberations.

(T.876). If Mr. Jackson's trial team had a cohesive, unified trial strategy for the presentation of the alibi defense, there is more than a reasonable probability that the outcome of his trial would have been different.

ISSUE 5

TRIAL COUNSEL WAS DEFICIENT FOR FAILING TO EFFECTIVELY PREPARE DEBORAH JACKSON FOR THE CROSS-EXAMINATION ON HER PRIOR CONVICTION

According to Mr. Messore, Deborah Jackson was the best alibi witness. (PCR.1980). Trial counsel failed to prepare Deborah Jackson for her testimony and allowed her to be impeached with a twenty-year-old conviction without making any effort to ameliorate the damage on redirect. At the evidentiary hearing, Mr. Perkins could not recall preparing Ms. Jackson to testify at trial. He testified that Ms. Jackson "already knew what – basically the stuff we asked her is about her relationship to him, which I knew what that relationship was. And the fact that, you know, where he was." (PCR.2121). He met with Ms. Jackson fifteen minutes before she testified and told her generally that he would ask her about the alibi and how she could remember Mr. Jackson's trip to Adel in October 2004. (PCR.2303).

Ms. Jackson testified at the evidentiary hearing that Mr. Perkins knew about her prior conviction and did not tell her she could be impeached with it. (PCR.2303). Ms. Jackson was “shocked” when she was questioned about the check on cross-examination because Mr. Perkins told her “it was twenty years old, it was not an issue.” (PCR.2304, 2307). Mr. Perkins conceded that he could have re-directed Ms. Jackson and ameliorated the damage done by the State’s cross-examination by asking her specific questions about the circumstances of the check. (PCR.2123). Ms. Jackson would have told the jury that the conviction was twenty years old, and dated back to when Mr. Jackson was a single mother with three children, attending school full-time and working part-time, and she “just missed it.” (PCR.2304).

In his order denying this claim, the circuit court found that defense counsel was not deficient for failing to prepare Ms. Jackson for “what was, in the overall presentation of evidence, a very minor point.” (PCR.1639). The court claimed the prosecutor’s questions were “short, to the point, and not a highlight of her testimony. In no way did this influence the outcome of this trial or weaken the Defendant’s alibi defense.” (PCR.1640).

The court overlooked the fact that both prosecutors emphasized Ms. Jackson's prior conviction in their closing arguments. In attacking Mr. Jackson's alibi defense, Ms. Simak reminded the jury that Ms. Jackson had been convicted of crimes of dishonesty. (T.799). Mr. Mizrahi also attacked Ms. Jackson's credibility in his closing argument. He told the jury that "worthless checks are not accounting mistakes. They're theft." (T.838). He also insinuated to the jury that it was "interesting that the accounting mistake was made by an accountant. (T.838-39). Contrary to the circuit court's findings, Ms. Jackson's prior conviction was hardly a minor point in the State's attack on Mr. Jackson's alibi defense. The State argued to the jury that Ms. Jackson could not be trusted and Mr. Jackson's alibi was false because Ms. Jackson had a conviction for passing a worthless check.

It was also clear that Mr. Jackson's jury was seriously considering Mr. Jackson's alibi defense, as evidenced by their request to view the testimony of Deborah Jackson, Penny Williams and Walter Jackson during their deliberations. (T.876). If counsel had better prepared for Ms. Jackson's testimony and made an effort to ameliorate the damage caused by her impeachment on redirect, he

could have cut off the State's attack on Ms. Jackson's credibility at the knees, and there is more than a reasonable probability that the outcome of his trial would have been different.

ISSUE 6

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE OR FILE A MOTION TO DISMISS FOR PRE-INDICTMENT DELAY

The circuit court denied Mr. Jackson's claim for ineffective assistance of counsel for its failure to move for dismissal on due process grounds for the unreasonable preindictment and prearrest delays of nearly five years. (PCR.1621-27).

The circuit court found the delays reasonable because the first real break came when FDLE was able to obtain a DNA profile from the hair recovered from the victim's leg during the crime scene investigation on October 18, 2004. The circuit court ignores that the hair was delivered to the lab for processing on October 27, 2004, but that it was not until August 24, 2006 that the hair was DNA tested at the lab. It took another five months for Ms. Clark to file her report and upload the profile to CODIS. FDLE received notice of the cold hit match from the FBI on February 22, 2007. On that date, JSO was on notice that Mr. Jackson was incarcerated in a Georgia

prison. It was not until January 22, 2008, eleven months later, that Mr. Jackson was interrogated by detectives from Duval County. Another seven months passed before an indictment was obtained on July 24, 2008 and it was almost another year before Mr. Jackson was arrested on the capias.

The delays were unreasonable and no explanation appears of record for them as justification.

Defense counsel all acknowledged the difficulty of presenting an alibi defense, especially such a stale one. The investigative delays were unreasonable and led to the loss of valuable evidence in support of Mr. Jackson's alibi. Records for Mr. Jackson's bus trip to Jacksonville were no longer available. Witnesses had difficulty remembering the exact days they saw Mr. Jackson in Georgia. A key witness, Mr. Jackson's grandfather with whom he visited on the weekend in question, died before the trial.

In *Hope v. State*, 89 So. 3d 1132, 1134 (Fla. 1st DCA 2012), an information charging the defendant with sale of a controlled substance in Gainesville was filed nearly three years after a sworn complaint for the offense was made. The defendant's motion to

dismiss on due process grounds for the unreasonable delay was granted, and the State appealed.

The district court affirmed the trial court's order, finding that the defendant had proved actual prejudice because his alibi witness could not determine the actual time and date she was with the defendant because of the passage of time. *Id.* at 1137. The court rejected the State's argument that the defendant had to prove the State intentionally delayed filing the charge to gain an advantage and stated that the test to be employed was whether the defendant suffered actual prejudice, and if so, balance the reasons for the State's delays. *Id.* at 1136. Balancing the defendant's actual prejudice against the reasons for the State's delay, a pending federal investigation with the same informant, the district court found that the trial court's decision was not an abuse of discretion. *Id.* See also *Howell v. State*, 418 So. 2d 1164 (Fla. 1st DCA 1982), (holding that a fourteen-and-a-half month delay from filing of information and arrest was presumptively unreasonable).

Although Mr. Messoro conceded that Mr. Jackson's alibi defense was over five years old and stale and witnesses' memories were fading as the months and years passed, he did not file a motion

to dismiss for pre-indictment delay. This was not a strategic decision. Mr. Messore testified at the evidentiary hearing that “I can’t say it was ever a serious consideration I had.” (PCR.1998-99). Mr. Bateh took over the case when Mr. Messore transferred out of the Jacksonville office, and he did not file a motion to dismiss for pre-indictment delay either. He did not think there was a basis for it. (PCR.2252).

Failure to research whether there were grounds for a dismissal of a capital murder charge is unreasonable. The circuit court’s findings that the delays were reasonable and there was no prejudice are not supported by substantial, competent evidence. Indeed, the jury came back with questions about the alibi defense and wanted the testimony of the alibi witnesses to be read to them. The alibi was the main defense.

ISSUE 7:

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

Mr. Jackson did not receive the fundamentally fair trial to which he was entitled under the Fifth, Sixth, Eighth, and Fourteenth Amendments. *See Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991);

Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors in Mr. Jackson's guilt phase, when considered as a whole, virtually dictated his conviction. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the state or federal constitution against an improperly imposed conviction. Repeated instances of ineffective assistance of counsel significantly tainted Mr. Jackson's trial. The errors as claimed in this brief are hereby specifically incorporated into this claim and include claims of ineffective assistance of counsel during pretrial preparation and Mr. Jackson's capital trial.

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

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

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

A series of errors may accumulate a very real prejudicial effect. The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict. *Chapman v. California*, 386 U.S. 18 (1967); *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). This Court is required to analyze prejudice not only individually, but also cumulatively. See *Parker v. State*, 89 So. 3d 844, 867-68 (Fla. 2011); *State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996). Mr. Jackson was on trial for his life, and his attorneys had a duty to prepare for trial and present the best defense they could. They failed miserably.

The circuit court's reliance on *Griffin v. State*, 866 So. 2d 1 (Fla. 2003) is misplaced. This Court in *Griffin* denied cumulative error relief where the claims were barred or without merit. Here, the circuit court found deficient conduct by counsel with the handling

of the DNA evidence and was equivocal about other conduct. These claims were timely filed, appropriate for a Rule 3.851 proceeding, and supported by the record and evidence presented at the evidentiary hearing.

The errors that occurred in Mr. Jackson's case were caused by counsel's incompetent, disorganized defense team and their failure to adequately prepare for Mr. Jackson's capital trial, present a cohesive defense, and hire appropriate experts. These errors had a calamitous effect and prejudiced Mr. Jackson because Mr. Jackson's jury was seriously considering his alibi defense, evidenced by their request to view the alibi witnesses' testimony during their deliberations. (T.876). All the State's evidence could prove was that Mr. Jackson had been at the victim's house at some time. This Court found in *Williamson v. State*, 123 So. 3d 1060 (Fla. 2013) that the weaker the evidence, the greater the prejudice. This Court quoted *Strickland*:

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury [and] 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.

Id. at 1065-66, quoting *Strickland*, 466 U.S. at 695-66.

Defense counsel had a duty to challenge the State's case, not make its case for them. This was not the "guiding hand of counsel" envisioned under *Powell v. Alabama*, 287 U.S. 45, 69 (1932). But for defense counsel's collection of errors, there is a reasonable probability that the outcome of Mr. Jackson's trial would have been different.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Jackson respectfully urges this Court to reverse the circuit court, set aside his conviction and sentence, and remand his case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of the Appellant has been furnished via electronic service to Jason Rodriguez, Assistant Attorney General, on this 5th day of April, 2021.

s/ Stacy R. Biggart
STACY R. BIGGART

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Initial Brief of Appellant was generated in Bookman Old Style 14-point font and contains 24,533 words, pursuant to Fla. R. App. P. 9.210.

s/ Karin L. Moore
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