IN THE SUPREME COURT OF FLORIDA

LEON DAVIS, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE No. SC21-1779
L.T. No. 2007-CF-009613
DEATH PENALTY CASE

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

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

PRELIMINARY STATEMENT

Citations to the record on direct appeal (SC13-1) will be referred to by the appropriate volume, indicated with either a "V" or "SV", and page number. The corrected transcripts of the trial are contained in the supplemental volumes referred to as "SV." Citations to the postconviction record on appeal (SC21-1779) will be referred to as "R" followed by the appropriate page number.

Citations to the direct appeal record in the companion case commonly referred to as the "Headley Case" will be referred to as "Headley/CF07-009386-XX; SC11-1122" followed by the volume and page number. Citations to the companion case postconviction record will be "Headey/CF07-009386-XX; SC21-1778" followed by "R" and page number.

STATEMENT REGARDING ORAL ARGUMENT

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

STATEMENT OF THE CASE AND FACTS

Davis was convicted and sentenced for the murders of Pravinkumar Patel and Dashrath Patel and the attempted murder of Prakashkumar Patel committed during the course of the attempted armed robbery of a Polk County BP station. In addition to the convictions and sentences at issue in this case, "Davis was convicted of three counts of first-degree murder, one count of attempted first-degree murder, and one count each of armed robbery and first-degree arson. The convictions arose from a series of events at the Headley Insurance Agency in Lake Wales. Davis was sentenced to death for two of the murders. The murders in the Headley case occurred within several days of the murders in this case. A limited scope of evidence from the Headley trial was introduced during the guilt phase of the BP trial, and the entire Headley record was admitted for purposes of the penalty phase." Davis v. State, 207 So. 3d 177, 182–83 (Fla. 2016). The facts underlying the attempted armed robbery, the murders of Pravinkumar Patel and Dashrath Patel, and the attempted murder of Prakashkumar Patel are detailed in this Court's direct appeal opinion.

> On the evening of December 7, 2007, Davis drove to the vicinity of a BP gas station and convenience store (BP) with the intent to commit robbery. The BP was located near the intersection of Highway 557 and Interstate 4 in Polk County.

Around 8:51 p.m. that evening, BP employee Dashrath Patel (Dashrath) and his friend Pravinkumar Patel (Pravinkumar) walked out of the convenience store's front door and across the parking lot to change the gas price sign.

The BP had closed for the evening, and the convenience store lights were turned off. While talking on the telephone, another BP employee, Prakashkumar Patel (Prakashkumar), remotely locked the store's front door and began to change the gas prices on the cash register. Seconds later, the surveillance camera captured a person who appeared to be a black man, about six feet tall, who approached the front door of the store and pulled on the door. The man, who had a large build, was dressed in dark clothing and wore a hood and a face mask.

Prakashkumar indicated to the man that the store was closed. The man then raised a gun to the window and fired one shot into the store towards Prakashkumar. Suddenly, the shooter's attention was drawn to Dashrath and Pravinkumar, and he ran across the parking lot toward them. Surveillance footage showed both men with their hands in the air, and Prakashkumar reported hearing two gunshots that occurred about five to ten seconds apart. According to the surveillance footage, the gunshots were fired at approximately 8:53 p.m. After firing the gunshots, the shooter ran back to the store's locked front door and tried in vain to open it. He raised his gun again, but he then turned and ran away from the scene.

In the meantime, Prakashkumar had activated the silent alarm, called 9–1–1, and sheltered in the storeroom. Upon arrival at the scene, the responding deputies learned that there were two missing people. Following a brief search, the bodies of Dashrath and Pravinkumar were located. Both victims were shot in the head execution-style with .38 caliber bullets.

With the assistance of a trained K–9 search dog, law enforcement searched the immediate area for the scent of a person who may have recently left the scene. The K–9 detected a scent that tracked about one quarter of a mile to the north of the gas station. Footprints led in the same direction that the K–

9 tracked, up to the point where a set of tire tracks began. A crime scene technician photographed and made casts of the tire tracks.

In the days following the murders, law enforcement conducted traffic stops in the area of the BP to question drivers who may have seen something pertinent on the evening of the murders. During the course of these stops, four people provided information regarding a car that was parked that evening in an isolated area near the gas station. The witnesses described a dark-colored car, possibly a black Nissan, backed up against a gate. One of the witnesses described the car as having a distinctive grille on the front end.

Davis was not identified as a suspect in the December 7 BP murders until after the December 13 robbery, arson, and shootings at the Headley Insurance Agency in Lake Wales (Headley). Davis was positively identified as the perpetrator of those crimes. The lead detective in both the BP and the Headley investigations was Detective Ivan Navarro. Detective Navarro requested an analysis of the ballistics evidence obtained during the course of the BP and Headley investigations. The results of the analysis demonstrated that the same gun was used in the crimes at the BP and at Headley.

During the Headley investigation, a black Nissan Altima with a distinctive grille was seized from the parking lot of a local nightclub, and during a search of the car, Davis's driver license was found inside. Additionally, two dark-colored jackets were found in the car's trunk, and a pair of black gloves was found in the glove compartment. In light of the witness reports that a possibly black Nissan was parked near the BP on the evening of December 7, Detective Navarro requested an analysis of the BP tire casts and the tires from the Nissan Altima linked to Davis to look for similarities. The tires from Davis's Nissan Altima were consistent with the BP tire casts.

A grand jury later indicted Davis for multiple counts stemming from the BP events: two counts of first-degree murder, one count of attempted first-degree murder, one count of attempted

armed robbery, and one count of possession of a firearm by a convicted felon.

Guilt Phase

Davis waived a jury trial in favor of a bench trial. The State's theory was that Davis was a man burdened by significant financial distress and that he committed the murders of Dashrath and Pravinkumar during the course of an attempted armed robbery of the BP.

Evidence admitted at the trial revealed the following. At the time of the murders, Davis and his wife, Victoria, were in debt and unemployed. Victoria was pregnant at the time and was on a leave of absence from work due to pregnancy complications. The mortgage payment for the couple's home was delinquent, and the couple had given up driving one of their vehicles and cancelled their cell phone accounts because of their financial troubles. The couple shared Victoria's black Nissan Altima.

On the day of the BP murders, Davis purchased a Dan Wesson .357 magnum revolver from his cousin, Randy Black. Black also gave Davis .38 caliber bullets which were compatible with the .357 magnum. Davis returned home after purchasing the revolver, but he left home again that evening between 6 and 7 p.m. Davis was alone when he left, and he was driving the black Nissan Altima. Davis did not return home until between 9 and 9:30 p.m. Davis's home was a twenty-two to twenty-three minute drive from the BP.

Two days after the murders, Davis showed his mother the revolver that he purchased from Black. The known rifling characteristics of Davis's revolver, six lands and six grooves with right twists, were consistent with the characteristics of the projectiles obtained during the BP investigation, including the projectiles removed from the heads of the victims. The State's ballistics expert testified that .38 caliber projectiles could be fired from a .357 magnum firearm, and that the projectiles obtained during the BP investigation were consistent with having been fired from a Dan Wesson .357 magnum revolver.

The State introduced evidence from the Headley trial during the guilt phase of the BP trial. To prevent the introduction of improper evidence, the trial court entered a pretrial order that sharply limited the admissibility of Headley evidence. The limited Headley evidence revealed that on the morning of December 13, 2007, Davis went to the Lake Wales Walmart to make a purchase. Surveillance video footage obtained from the store depicted a tall black man entering the store around 7 a.m., and both a store manager and an employee positively identified the man in the video as Davis. While at Walmart, Davis purchased an orange lunch cooler.

That afternoon, Davis went to Headley, where he encountered Headley employee Yvonne Bustamante and shot her in her left hand. Shortly thereafter, Davis encountered Brandon Greisman near the Headley building. Greisman and his neighbors, who lived nearby, had walked towards the Headley building upon noticing the presence of smoke in the area. Greisman, who saw Davis and thought that he was there to offer help, saw Davis pull a gun out of an orange lunch bag and point it in his direction. Greisman tried to get away but was unable to do so before Davis shot him in the nose. Greisman was transported to Lake Wales Hospital, where he underwent surgery and remained in the hospital overnight.

When Greisman was released, his mother drove him to the Lake Wales Police Department to speak to detectives. Greisman was shown a photographic lineup and asked if he recognized the man who shot him the day before. Greisman recognized Davis's photograph almost immediately and identified him as the shooter. At trial, Greisman also identified Davis from the witness stand.

Eyewitness Carlos Ortiz, who saw Davis place the gun into a lunch bag shortly after Greisman was shot, also identified Davis as the Headley shooter. At trial, Ortiz testified that in addition to getting an extended look at Davis at the scene, he recognized Davis because he previously saw Davis at Florida Natural Growers, where both men used to work. A few days after the Headley incident, Ortiz identified Davis's photograph from a

photographic lineup. Ortiz also identified Davis from the witness stand.

Another Headley eyewitness, Fran Murray, testified that as she approached the Headley building, she saw a tall black man carrying an orange collapsible lunch pail, and she saw him place what appeared to be a gun inside of it.

Evelyn Anderson, a Headley customer, saw a tall black man exit the Headley building with a bag under his arm.

Ortiz and Murray also testified that they saw a black car in the area of the Headley building around the time of the shooting. The car was parked near a vacant house. Murray described the car as mid-sized, and Ortiz identified it as a Nissan.

Davis was also identified by the dying declaration of Yvonne Bustamante. Upon arriving at the Headley scene, Lt. Joe Elrod asked Bustamante if she knew the perpetrator's identity, and she responded, “Leon Davis.” Bustamante told Lt. Elrod that Davis was a former Headley customer. In addition to Lt. Elrod, two emergency medical responders and eyewitness Anderson heard Bustamante identify Davis as the perpetrator.

The State's ballistics expert testified that the same gun was used in the BP murders and in the shootings at Headley.

Davis's Defense

Davis's defense was misidentification. He offered an alibi for the time of the murders and attacked the eyewitness identifications made during the course of the Headley investigation.

Testifying in his own defense, Davis stated that on December 7, 2007, he brought his son to his home. Around 7:15 p.m., he left home alone to go Christmas shopping at the mall. Davis admitted that he was driving the black Nissan Altima at the time. While shopping, Davis did not see anyone that he recognized. Davis testified that although he spent around $150 in cash on clothing purchases, he did not have documentation

for the purchases. He also testified that the money that he used to go shopping came from money that he had at home and a paycheck he had received the day before.

Davis testified that he left the mall around 8:30 p.m. and returned home around 9 p.m. He stated that he spent the rest of the evening at home with his family, leaving only briefly with his family between 9 and 10 p.m. to get dinner.

Davis also testified that less than one week later, he left the Nissan Altima parked at a nightclub, and that the gloves and jacket that the police later found in the car belonged to his wife, Victoria. Davis testified that he kept an unloaded gun in a toolbox in the garage that may have been unlocked, and that neither Victoria nor his son knew about the gun.

Davis was convicted as charged.

Penalty Phase

Davis's bench trial proceeded to the penalty phase, where he waived his right to a penalty phase jury. The State sought to prove four aggravating circumstances: (1) the capital felony was committed by a person previously convicted of a felony and on felony probation; (2) the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person; (3) the capital felony was committed while the defendant was engaged in a commission of, or an attempt to commit, or flight after committing a robbery; and (4) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

The parties stipulated to Davis's July 2007 convictions for grand theft. Additionally, the State presented three witnesses who testified about the facts of the Headley murders, which were the basis for the prior capital/violent felony aggravating circumstance. Lt. Elrod, who previously testified that Headley shooting victim Bustamante identified Davis as the perpetrator and explained that Davis tried to rob her, testified during the

penalty phase that Bustamante explained how Davis threw gasoline on her and set her on fire when she told him that she did not have any money.

The medical examiner in the Headley case, Dr. Stephen Nelson, testified regarding the injuries and causes of death of the three deceased victims, Bustamante, Juanita Luciano, and Luciano's newborn son, Michael. Bustamante and Luciano both died from thermal burns. Bustamante's burns covered eighty to ninety percent of her body, and Luciano's burns covered ninety percent of her body. Luciano's son, Michael, was delivered prematurely on the day of the events at Headley and died from extreme prematurity three days later. Additionally, crime scene technician Stacy Greatens testified regarding photographs of the Headley crime scene, including photographs of a cigarette lighter, duct tape, a burnt gas can, burnt shoes, and a burnt chair.

Davis's Mitigation

As mitigation, Davis presented evidence of a sexual assault when he was eight years old, severe physical abuse by a caretaker in the years following the sexual assault, ongoing depressive and mood episodes, and a suicide attempt while he was in the military. Davis submitted for the court's consideration the testimony of the three mitigation witnesses from the Headley trial: Dawn Henry, the mother of Davis's son; Linda Davis, Davis's mother; and India Owens, Davis's sister. Davis also introduced his medical records from his military service.

Davis's mother described her relationship with Davis as very close. Although Davis's father moved out of the family home when Davis was about one year old, his father maintained a relationship with Davis.

From elementary through high school, Davis suffered an ongoing pattern of bullying. When Davis was eight years old, another boy beat and sexually assaulted him. Although Davis's family members were aware of the assault, they did not talk about it.

Additionally, when Davis was around eight or nine years old, a woman named Ms. Clark came to live in the family home as a roommate. Eventually, Davis and his brother moved out of the family home and into another home with Clark. Clark was an alcoholic and was physically and verbally abusive. She taunted and verbally abused Davis because he was bullied, and she also beat him with extension cords and water hoses and punched him in the chest in order to try and make him "be a man." On one occasion, Clark severely beat Davis with an extension cord. Davis ran home to his mother, who observed severe injuries to his back. Family members observed physical injuries such as welts, bleeding, and scabs and sores on Davis's body.

In middle school, Davis contemplated suicide, and his mother encouraged him not to take his life. Davis received mental health counseling for two to three months. Davis later joined the military and while enlisted, he attempted suicide by hitting a concrete pole while driving at a high rate of speed. Thereafter, he was discharged from the military.

After Davis was discharged from the military, he met Dawn Henry. Henry and Davis eventually had a son who was born with Down Syndrome. Henry testified that while she had trouble adjusting to being a mother of a child with special needs, Davis immediately accepted his son and was consistently and frequently present in his life. Around the time of the Headley robbery, Davis was depressed and upset that he could not afford to do anything for his son's approaching birthday. When Davis purchased the gun shortly before the robbery, his mother was concerned that he might use the gun to commit suicide.

Spencer Hearing and Sentencing

Prior to sentencing Davis for the BP crimes, the trial court held a Spencer hearing. Although no additional evidence was introduced, the defense made additional argument, and Davis made a statement to the Court that he was not near the BP gas station on December 7. The trial court ultimately sentenced Davis to death for the murders of Dashrath and Pravinkumar.

Each sentence of death was based on the following aggravating circumstances: (1) the capital felony was committed by a person previously convicted of a felony and on felony probation (moderate weight); (2) the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person (very great weight); and (3) the capital felony was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing a robbery (great weight). The trial court rejected as not proven that either capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

The trial court also considered statutory and nonstatutory mitigating circumstances. The trial court found the existence of one statutory mitigating circumstance: the crime was committed while Davis was under the influence of extreme mental or emotional disturbance (little weight). Due to Davis's convictions for grand theft several months before the BP murders, the trial court rejected as statutory mitigation that Davis had no significant prior criminal history. The trial court also considered fifteen nonstatutory mitigating circumstances: (1) victim of bullying throughout childhood (moderate weight); (2) victim of sexual assault as a child (moderate weight); (3) victim of child abuse, both physical and emotional, by a caretaker (moderate weight); (4) overall family dynamics (little weight); (5) military service in the U.S. Marine Corps (little weight); (6) history of being suicidal both as a child and as an adult (slight weight); (7)diagnosed personality disorder (slight weight); (8) history of depression (slight weight); (9) stressors at the time of the incident (little weight); (10) good person in general (very slight weight); (11) good worker (little weight); (12) good son, good sibling, good husband (moderate weight); (13) good father to a child with Down Syndrome (moderate weight); (14) good behavior during trial as well as other court proceedings (slight weight); and (15) good behavior while in jail and in prison (little weight).

In addition to the sentences of death, the court also sentenced Davis to life imprisonment with a twenty-year minimum

> mandatory sentence for the attempted murder of Prakashkumar, twenty years' imprisonment with a twenty-year minimum mandatory sentence for attempted armed robbery, and fifteen years' imprisonment with a three-year minimum mandatory sentence for possession of a firearm by a convicted felon.

Davis v. State, 207 So. 3d 177, 183–88 (Fla. 2016).

Davis filed a motion for postconviction relief under Fla. R. Crim. P. 3.851 on May 19, 2018, and several amendments thereto, ultimately raising twenty-two claims. After holding case management conferences, the court granted an evidentiary hearing on seven claims.

On June 8, 2021, the court granted the State's motion to strike from the evidentiary hearing the claims related to Davis's mental health mitigation because even though the case was pending for almost three years, Davis never provided any discovery related to his mental health claims.

The evidentiary hearing was held on August 23, 2021, and August 24, 2021. Written closing arguments were filed on November 1, 2021.

Evidentiary Hearing Testimony

Robert Norgard and Andrea Norgard represented Davis in both this case and the Headley case. The Norgards worked as a team, but Mr.

Norgard[1] handled most of the motion hearings, jury selection, trial, and other in-court matters. (R3325). Norgard has been a practicing attorney since 1981. He began his career with a private firm for which criminal law was about 40% of the practice. (R3326). In 1993, he began working for the Office of the Public Defender for the Sixth Judicial Circuit. During his approximately three and a half years with that office, he handled three death penalty cases. He was lead counsel in at least one of those cases. (R3327). After his time with the Office of the Public Defender for the Sixth Judicial Circuit, Norgard worked for the Office of the Public Defender for the Tenth Judicial Circuit, where he spent ten years. During his tenure at the Office of the Public Defender for the Tenth Judicial Circuit, Norgard was routinely assigned death penalty cases and was a member of the office's capital division. (R3328). After leaving the Office of the Public Defender, Norgard started his own firm, which exclusively handles criminal defense. (R3321).

Over the course of his career, Norgard has represented 150 to 200 death penalty defendants. (R3331). Norgard is board certified in criminal trial practice and served for twelve years on the Florida Bar's Criminal Law

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

Committee Board. (R3330). He has testified as an expert in criminal trial practice in 20 to 25 criminal postconviction cases and has personally handled about a dozen death penalty postconviction cases. (R3332).

Norgard was involved in the movement to formalize qualifications for defense attorneys who handle death penalty cases. (R3325, 3329). He has been "death qualified" since the inception of the rule. (R3325). From 1992 to 2004 he was responsible for summarizing and updating death penalty cases for the Florida Association of Criminal Defense Lawyers' (FACDL) quarterly publication, "The Defender." (R3333). He wrote two chapters in the first edition of FACDL's death penalty manual. He continues to obtain and review the updated manuals as they are published. He helped establish FACDL's "Death is Different" yearly seminar and was its chair from 1992 to 2004 and has been co-chair two or three times since then. (R3334). He served on the FACDL's board of directors in 2005 or 2006. (R3335). He has attended or presented at numerous death penalty seminars throughout the country. (R3336).

During the course of representing Davis in the BP case, Norgard received and reviewed all of the BP station's surveillance footage from the night of the murders. He discussed the surveillance with Davis. (R3428-29). At the evidentiary hearing, Norgard was shown still photographs taken from

the video depicting a person running toward the store from the area of where the two men were shot and killed. Within a short period of time, a black car appears on the screen. The car did not appear to be moving. (R3430). According to the time stamp on the video, the car does not begin to move until six minutes after the person is last seen on the video. (R3440). Norgard testified that it was difficult to tell from what he was shown whether the car turned or was traveling in a straight line. (R3432). Norgard did not think that pointing out the presence of the car would have assisted him in challenging the State's case nor assisted him in establishing that there was another person involved with the murders. (R3433).

Norgard retained a video expert, Richard Smith, to review and analyze all of the video in both cases. (R3443-45). Mr. Smith never advised Norgard that the video depicted the car moving at or near the time the person appeared on the screen. Also, Norgard himself, as well as other attorneys and investigators on the defense team, viewed the videos numerous times. No one believed that it was reasonable to argue that the presence of the car indicated either that Davis was not involved, or that more than one person was involved in the murders. (R3442, 3445). Additionally, Norgard was aware that the bullets retrieved from the victims

matched the bullet that was shot into the BP station, which indicated the bullets were all shot from the same gun. (R3446). Ultimately, the surveillance video showed only one person was involved in the murders. (R3447).

Norgard agreed that the State's case against Davis relied heavily on ballistics evidence. He was aware that at the time of Davis's trial there was a school of thought that the uniqueness of firearms-related toolmarks had not been fully demonstrated. (R3471). In preparing to address the ballistic evidence in this case, Norgard researched both legal and technical issues regarding the admissibility of firearm identification evidence and testimony. (R3470, 3474). He reviewed numerous articles and familiarized himself with cases around the country challenging firearms identification testimony. (R3472). He hired a firearm examiner who independently compared the evidence and confirmed Florida Department of Law Enforcement's (FDLE) finding. (R3472, 3474). He expanded his search for an expert beyond firearms examiners. He understood that those who work in the field believe in the science and may not be inclined to debunk it. Despite his search, he did not find a "viable expert" who would discredit the firearms evidence. (R3472, 3483, 3487). Norgard testified that he would not hesitate to challenge any forensic evidence if he had a valid basis for doing so.

(R3487).

When asked if he would have presented expert testimony about "the accuracy and error rate regarding firearms identification" Norgard stated, "The short answer is no." (R3489). He elaborated by stating that if he was not able to show that the conclusion regarding the firearm identification in this case was actually wrong, generalized testimony about accuracy and error rates would not have been helpful. (R3490).

Norgard did not object to the State's closing argument that all the bullets were fired from the gun that Davis purchased from his cousin. He testified at the evidentiary hearing that he believed the argument was a fair comment on the evidence. Norgard also testified that he did not think it was necessary to object to James Kwong's testimony that the bullets from the Headley case were fired from the same gun that was used in the BP case. (R3477).

In his closing argument at trial, Norgard noted that the State's argument that a gun belonging to Davis was used at both crime scenes was not an accurate reflection of the facts presented. (R3477). Norgard emphasized that the firearms testimony did not identify a specific gun that was used. Additionally, Norgard argued that even if the same gun was used at both crime scenes, the gun was never connected to Davis.

(R3473).

James Kwong, a firearm and toolmark examiner with FDLE, testified at Davis's trials and at the postconviction evidentiary hearing. Kwong has been with FDLE for approximately 15 years. (R3146). Prior to that, he worked for the Philadelphia Police Department, first as a patrol officer, and then he trained to be a firearms examiner. (R3147). After three years of training, he became a firearms examiner for the Philadelphia Police Department. He worked in that capacity for six years before joining FDLE. (R3147). He also holds a Bachelor of Science Degree in mechanical engineering and technology. (R3132).

Firearm identification is a subsection of tool mark identification. When a projectile travels through the barrel of a gun, the barrel transfers markings onto the projectile. This is so because the projectile is made of a softer material than the barrel. The projectile is made of lead, sometimes encased in a brass, copper, or nickel jacket, all of which are softer than the barrel, which is made out of steel. (R3159). Gun barrels are manufactured with a specific number of lands and grooves. Each land and groove may have up to 30 or 50 individual microscopic markings. (R3178). The lands and grooves spiral around the interior of the barrel with either a right or left twist. This is referred to as rifling. The spirals cause the projectile to spin as

it is expelled from the barrel. The spin, or gyroscopic stability, improves the projectile's accuracy and range. (R3163). To a firearms examiner the rifling, or number of lands and grooves and direction of twist, is a "class characteristic," which is determined by the manufacturer. (R3164). The projectiles in Davis's cases were all fired from a barrel with six lands and grooves with a right twist. (R3178-79). Since the inception of the discipline, firearm examiners have never been required to count and compare each microscopic marking in each land and groove. (R3179).

In addition to class characteristics, examiners also look for subclass and individual characteristics. Subclass characteristics, like class characteristics, are a result of the manufacturing process. For example, if a machine's cutting edge is damaged, it will impart a subclass characteristic to all the barrels manufactured with that machine. Individual characteristics are specific to each barrel. Even barrels produced consecutively using the same machinery have individual characteristics. (R3166).

Over the years, Kwong has attended numerous training sessions and seminars hosted by the Association of Firearms and Toolmarks Examiners (AFTE). (R3149). Kwong has toured a number of firearm manufacturing facilities. He has participated in three studies involving consecutively manufactured barrels, which validated that barrels made consecutively by

the same machine have individual characteristics that impart unique microscopic marks on the projectiles fired from them. (R3151-52).

Kwong explained the AFTE's "Theory of Identification as it Relates to Toolmarks," which states: "The theory of identification as it pertains to the comparison of tool marks enables opinions of common origin to be made when the unique surface contours of two tool marks are in 'sufficient agreement.'" (R3133). Surface contours consist of peaks, ridges, and furrows. Kwong explained that according to the AFTE the term "sufficient agreement" relates to the duplication of random tool marks indicating a pattern or combination of patterns of surface contours. The relative height, depth, width, curvature, and spatial relationship of the individual peaks, ridges, and furrows, on one set of surface contours are compared to the corresponding features in the second set of surface contours. (R3133). According to the AFTE:

> Agreement is significant when the agreement in individual characteristics exceeds the best agreement demonstrated between tool marks known to have been produced by different tools and is consistent with agreement demonstrated by tool marks known to have been produced by the same tool. The statement that 'sufficient agreement' exists between two toolmarks means that the agreement of individual characteristics is of a quantity and quality that the likelihood another tool could have made the mark is so remote as to be considered a practical impossibility.

(R3135).

While there is no official database of every firearm ever made or that will ever be made, firearm and toolmark examiners compare hundreds of bullets during their training. (R3138). Some of the bullets have been fired from different guns with the same class characteristics, and other bullets have been fired from different guns. Throughout the examiner's career and continued training, he or she will compare hundreds more bullets fired from the same gun or fired from different guns. All of this training, knowledge, and experience aides the examiner in recognizing unique patterns attributable to a specific firearm. (R3140).

When comparing two projectiles, an examiner can reach between three to five conclusions – identification, meaning both projectiles were fired from the same barrel; exclusion, meaning the projectiles were fired from different barrels; inconclusive, meaning the examiner cannot determine one way or the other. An examiner can also state an inconclusive opinion as inconclusive positive - leaning toward identification, or inconclusive negative - leaning toward exclusion. (R3169). Those practicing in the field of firearm and toolmark examination do not consider inconclusive findings to be errors. (R3168).

When a firearm and tool mark examiner identifies that two projectiles were fired from the same gun, that conclusion is peer reviewed by another

examiner. This is standard operating procedure in every forensic lab in the country. (R3155). Additionally, FDLE requires its firearm and tool mark examiners to undergo internal and external proficiency testing once a year. (R3156).

Davis presented the testimony of Dr. Jeffery Salyards. Dr. Salyards holds a Ph.D. in Analytical Chemistry and a Master's Degree in Forensic Science. He also participated in a year-long fellowship in forensic medicine. (R3188). His previous experience includes being the Chief Scientist at the U.S. Army Crime Lab (April 2009 – December 2012) and being the director of the Defense Forensic Science Center[2] (December 2012 – May 2017). Prior to that, he was a chemistry assistant professor at the U.S. Air Force Academy. (R3188). He has held positions on various boards and has participated in designing and monitoring research projects. (R3190).

Dr. Salyards testified that he believed the U.S. Army firearms examiners' training was similar to the training provided by AFTE, if not the same. (R3222). Dr. Salyards does not know of any other competing theory regarding firearms examination, or any other organization that trains qualified firearm examiners. (R3222). Like state labs, the U.S. Army

[2] The United States Army Crime Lab changed its name to the Defense Forensic Science Center. (113).

required firearms examiners to be proficiency tested and required peer review of the examiners' work. (R3224). Many, and possibly all, of the U.S. Army firearm examiners Dr. Salyards supervised when he was Director were members of the AFTE. (R3227). Although he was Director of a lab that included, among other disciplines, trained and experience firearms examiners, Dr. Salyards himself has no training or experience as a firearms examiner. (R3227).

Dr. Salyards was involved in was what is referred to as the Ames I study, published in April 2014, which sought to establish an error rate for methodology used for firearm and toolmark comparison. (R3192, 3218). The study utilized 9mm cartridge casings for comparison. According to Dr. Salyards, the study revealed a "reasonable error rate" of roughly 2-3%. (R3192). In 2016, the President's Council of Advisors on Science and Techology (PCAST) issued a report that recognized the Ames I study as a properly designed study of firearm and toolmark identification error rate. (R3192).

Dr. Salyards testified that the Ames I study revealed a "strange use of the inconclusive conclusion." (R3192). Examiners more often reached an inconclusive conclusion when the known truth, referred to by Dr. Salyards as the "ground truth", was an exclusion. (R3193). Regardless, the study did

not consider an inconclusive finding to be an error. The Ames II study, which was published shortly before the evidentiary hearing, involved bullet comparison. Like the Ames I study, the Ames II study did not include inconclusive results in the calculation of the error rate. (R3211, 3218).

Dr. Salyards testified that the larger scientific and statistical community would treat the failure to exclude as a false positive. But, in his opinion, that is "probably too harsh." He testified the Ames I study raised "important questions about how inconclusive is being used," but he admitted that the scientific community does not know what affect, if any, inconclusive findings have on the error rate. (R3196, 3231). Unlike "ground truth" known inclusions or exclusions, Dr. Salyards acknowledged that it would be difficult to design a study with a "ground truth" inconclusive, "so there is no ground truth inconclusive." (R3192).

As a scientist and statistician, Dr. Salyards is critical of the AFTE's Theory of Identification because the word "significance has special meaning in the lexicon of science and statistics." (R3196). Dr. Salyards was also critical of the AFTE theory because it does not require examiners to measure the relative depth, height, and width of the surface contours being compared. (R3198, 3211). He also disliked the use of the term "practical impossibility." A "mainline scientist" would not use such language when

expressing an opinion, according to Dr. Salyards. (R3206).

Dr. Salyards testified that Davis's case involved damaged bullets, not casings as in the Ames I study. Dr. Salyards acknowledged that the Ames II study involved bullets, but they were pristine. (R3218). Additionally, the examiner in Davis's case did not have a gun from which to obtain additional test fires. Dr. Salyards admitted he did not know how or whether these variables would affect the error rate. (R3211). Finally, Dr. Salyards testified that he would like to see some annotation on the images from the comparison microscope noting similarities or dissimilarities and their significance to the examiner. He admitted that "maybe a qualified firearms and toolmarks examiner in their black box way is trained to know which ones to give more weight and which ones to ignore." His preference, though, would be that the examiner annotate the images. (R3212).

Dr. Salyards testified that had Norgard hired him for Davis's case he would have testified about the concerns of the larger scientific community as it relates to the AFTE's "Theory of Identification" and the lack of information about error rates. He admitted he would not have testified about the Ames I or Ames II studies, or the PCAST report, because they did not yet exist. He would have discussed with Norgard the absence of such studies. Dr. Salyards has never testified in front of a jury. He has

testified at various pretrial hearings. On at least one occasion, Dr. Salyards was precluded testifying at trial regarding ballistics evidence because he is not a firearm and toolmark examiner. (R3249).

Dr. James Hamby has been a trained and qualified firearm and toolmark examiner since 1970. (R3253). He began his training with the U.S. Army Criminal Laboratory in 1970, one year after the AFTE was formed. (R3253). His initial training consisted of a two-year program of daily instruction and training. (R3254). In 1982, the first AFTE training manual was published. (R3254). The discipline of firearm and toolmark examination is much older than that, though. The first recorded case using firearm examination was in 1907. (R3255). Prior to the publication of the AFTE training manual, there were other authoritative publications dedicated to the study of firearm examination. (R3256). Dr. Hamby was involved in the assimilation of information and literature that eventually led to the AFTE training manual. (R3257). He served as the AFTE president in 1982, the same year the manual was published. (R3257). The AFTE is presently an international organization with approximately 1,200 members from 40 different countries. (R3260).

Dr. Hamby has been continually involved in firearm and toolmark analysis since 1972. (R3259). He has testified about firearm and toolmark

identification approximately 500 times in state, federal, and international tribunals. (R3259). He has been asked to train firearm examiners for the United States State Department and other governmental agencies, as well as for the United Nations. (R3259). Dr. Hamby has trained over 60 examiners from 15 different countries. (R3261). He has attended firearm examiner conventions, visited crime labs, and taught various aspects of firearm examination at universities all over the world. (R3260, 3262). He was the Director of the Indianapolis-Marion County Forensic Services Agency for 20 years. (R3265). To Dr. Hamby's knowledge, all forensic labs in the United States, including those with a firearms section, are accredited by the ANSI National Accreditation Board (ANAB)[3], which is a national accreditation board. (R3274).

The firearm examiner's primary tool is the comparison microscope. Dr. Hamby testified that other tools are beginning to emerge in the field, such as virtual comparison microscopes and confocal microscopes, which hopefully will aid the science. (R3256). Similarly, Dr. Hamby testified that the AFTE seizes opportunities to test its methodology. In the literature that he has reviewed, studies have revealed the AFTE's method has a 1-2%

[3] The parent organization of ANAB is the American National Standards Institute (ANSI).

error rate.[4] (R3267). None of the studies of which he is aware consider inconclusive findings to be errors. (R3269). Further, damage to the projectile or casing does not necessarily prevent an examiner from determining if it was fired from a particular gun or if two projectiles were fired from the same gun so long as there are enough areas for comparison. (R3257).

Dr. Hamby testified that, at present, it is not practical to require examiners to count and measure each mark on every land and groove. Advancements in microscopes and computer technology may make it possible for an examiner to do so some time in the future. (R3272). Dr. Hamby acknowledged that there is a subjective component to firearm examination. (R3273).

Officer Lynette Townsel[5] testified that the first time she became aware that the photo-pack she had shown to Brandon Greisman was not in evidence was at the evidence review on May 7, 2010, approximately two years after the Headley murders. (R3289-90). As a result of the evidence review, there was a department-wide search for the photo-pack. On June 2,

[4] It is not clear if Dr. Hamby was referring to pretrial or posttrial studies, or both.

[5] Now known as Officer Lynette Schwarze. She will be referred to as Townsel for consistency.

2010, Officer Townsel found the original photo-pack in her home storage shed and placed it into evidence at the Lake Wales Police Department on June 3, 2010. (R3311).

She explained that at the time of the murders she was a detective and had a desk at the department where she would keep copies of material in cases she was working. (R3291, 3306, 3308). When she left the detective division, she took the copies she retained in her desk and put them in her storage shed. Apparently, in doing so she inadvertently placed the original photo-pack she showed Greisman in her shed. She knew it was the original because of the appearance of the ink from the pen Greisman used to initial Davis's photograph. (R3310).

On June 4, 2010, Officer Townsel was notified of the commencement of disciplinary action as a result of her failure to place the photo-pack into evidence. On June 10, 2010, a written memorandum finding her in violation of police department operating procedures was placed in her personnel file. (R3293).

Norgard was aware that the original photo-pack was missing between the time of the identification until June 2010. He was also aware that a copy of the photo-pack was not entered into evidence at the police department. Obviously, he attended the evidence review on May 7, 2010, where it was

discovered that the photo-pack shown to Greisman was not in evidence, nor was a copy. (R3452). Norgard understood that Greisman was a key identification witness. He wanted to view the photo-pack shown to him to determine if it was unnecessarily suggestive. When it was discovered that the photo-pack was not in evidence, Norgard filed a Motion to Suppress Greisman's in-court identification arguing, in part, that the fact the photo-pack was missing violated a number of Davis's Constitutional rights. The motion was filed on May 28, 2010, a few weeks after the evidence review.[6] (R3464).

The motion to suppress hearing was conducted on June 7, 2010. Officer Townsel testified about, among other things, the discovery of the photo-pack and the initiation of disciplinary action against her as a result of failing to enter the photo-pack into evidence at the Lake Wales Police Department. (V15/2565-2610; V16/2612-16)[7]. She specifically testified that disciplinary action had already been commenced against her for her failure

[6] The motion was filed in the Headley case (Headley/CF07-009386-XX; SC11-1122: V10/1584), but the hearing was held for both cases. Had the motion been granted the ruling would have applied to both cases. The point, for purposes of this argument, is that Norgard knew that neither the original nor a copy of the photo-pack was entered into evidence and that Officer Townsel was disciplined as a result of her actions.

[7] On May 15, 2012, Norgard filed a motion to suppress the identification alleging the photophack was unnecessarily suggestive. (V25/4282).

to properly handle the photo-pack. (V15/T2594-95). The trial judge found that Officer Townsel's testimony was credible and that Greisman's identification was not tainted "by anything improper done by the female detective, (Officer Townsel), and I don't find anything really improper in this photo lineup." (V16/-2736-37).

The trial in this case began in October 2012, two years after the motion to suppress hearing and the discovery of the photo-pack. At trial, Officer Townsel was asked on cross examination if in her opinion the photo-pack introduced was an original or a copy. (V40/T945). She testified that the exhibit was the original. (V40/T945). Norgard asked Officer Townsel if at some point the original photo-pack that was shown to Greisman went missing. Officer Townsel affirmed that it had. (V40/T947).

On redirect the prosecutor asked Officer Townsel, ". . . tell the Judge how it turned out that the original of the photo-pack ended up in a file folder in your garage with just a copy being put into evidence, explain how that happened?" (V40/T947). Norgard objected to the questions stating, *"Well, first of all that assumes facts not in evidence. There wasn't even a copy in evidence."* (V40/T947). The prosecutor then asked, "Did you have a copy put actually into the Lakes Wales Police Department property room?" Officer Townsel responded, "Yes." (V40/947).

On re-cross, Norgard showed Officer Townsel a list of evidence that he and the prosecutor reviewed in May 2010. Norgard asked Officer Townsel where on the list it showed that a copy of the photo-pack had been entered into evidence at the Lake Wales Police Department. Officer Townsel admitted that the list did not show that a copy was in evidence. (V40/T950). Officer Townsel explained that when she was informed of the error it was her understanding that the defense had a copy of the photo-pack, but that the original was missing. (V40/T950). Norgard objected to and moved to strike the portion of Officer Townsel's testimony that the defense had a copy of the photo-pack. Norgard argued that the testimony was based on hearsay. The court sustained the hearsay objection. (V40/T952).

At the evidentiary hearing, Norgard testified that he knew that neither a copy nor the original of the photo-pack was in evidence until June 3, 2010. He had no reason to doubt that what was eventually found was the original photo-pack. (R3459). Even so, he considered challenging the authenticity of the photo-pack through ink or handwriting analysis. After considering various options, Norgard concluded there was no way to prove that the photo-pack placed into the evidence room on June 3, 2010, was not, indeed, the original photo-pack shown to Greisman. (R3466).

Norgard testified that independent of whether Officer Townsel was reprimanded as a result of her failure to place the original photo-pack into the evidence room, her testimony showed that she was careless and negligent with the handling of evidence. (R3467). Norgard was asked if he "had any sort of document that would prove that there was in fact no copies in evidence, is that something [he] could have used to either impeach her or refresh her recollection . . . ?" (R3459). He responded that he considered Officer Townsel's testimony that a copy of the Greisman photo-pack was placed into the evidence room a collateral issue and impeaching her further with evidence of the reprimand would not have assisted Davis's defense. (R3459).

Postconviction Order Denying Relief

The postconviction court denied relief on all claims. The postconviction court found that choosing not to challenge the State's theory of the case by asserting that the surveillance video somehow supports that another person was involved in the crimes was not deficient performance and Davis failed to establish prejudice. The postconviction court noted that Norgard hired an expert to review all of the video footage. Additionally, Norgard and his defense team viewed the surveillance video numerous times. The footage, in conjunction with the other evidence, did not support

a theory that more than one person was involved. The postconviction court concluded that any argument to the contrary was pure speculation. (R3656-57).

Similarly, the postconviction court noted that Norgard hired a ballistics expert whose conclusions were not favorable to Davis's defense and concluded that any argument that Kwong's testimony was questionable due to his use of the industry term "sufficient agreement" would have been misleading. (R3658, 3661).

As to Davis's Giglio[8] claim, the postconviction court determined, based on the trial and evidentiary hearing testimony, that Officer Townsel's testimony regarding a copy of the photo-pack being entered into evidence was incorrect. Even so, her testimony was addressed and clarified on cross examination at the trial. Additionally, Davis did not present any evidence that the photo-pack was altered in anyway. (R3668).

Similarly, the postconviction court rejected Davis's Brady[9] claim, which asserted that the State suppressed impeachment evidence contained in Officer Townsel's personnel file. The postconviction court noted that the trial transcripts established Norgard was aware that the

[8] Giglio v. United States, 405 U.S. 150 (1972).

[9] Brady v. Maryland, 373 U.S. 83 (1963).

photo-pack was not in evidence and cross examined the officer on that point. The information in her personnel file did not provide additional impeachment. Additionally, the postconviction court accepted Norgard's testimony that the issue was collateral and not helpful to Davis's case. The original photo-pack was found and there was no evidence of tampering. (R3669).

The postconviction court determined that Norgard's investigation regarding the ballistics evidence was not deficient. Norgard hired a ballistics expert whose conclusions were not helpful to Davis's defense. He researched legal and technical challenges to firearm-related toolmark evidence. Furthermore, he was aware of the school of thought that argued that the uniqueness of firearm-related toolmarks had not been fully demonstrated. Even so, Norgard testified that he was unable to find a witness who could have viably challenged the firearms evidence. According to the postconviction court, Davis failed to establish that Norgard's investigation into the ballistic evidence was unreasonable. (R3676).

Similarly, the postconviction court determined that Norgard's cross examination of Kwong was not deficient. The postconviction court noted that Norgard did cross examine Kwong on the fact that the lands and grooves and direction of twist was consistent with more than 21 possible

firearms. Norgard also had Kwong admit that he could not determine if the bullets were fired from a .357 or a .38 caliber firearm. The court concluded, "[a]ny allegations now raised by Mr. Davis questioning Mr. Kwong's individual findings were not proven by any substantial evidence." (R3675-76).

The postconviction court also determined that it reasonable for Norgard to not present an expert witness to challenge Kwong's conclusions and/or the scientific basis underlying toolmark comparison. Notably, Dr. Salyards did not testify that he was available and willing to testify at the time of Davis's trial. (R3676). Futher, Norgard knew about the concerns regarding firearm-related toolmark evidence. Finally, the court noted that had Norgard hired an expert such as Dr. Salyards, the State would have countered with Dr. Hamby's testimony. The court concluded that Norgard's performance was not deficient, and Davis suffered no prejudice. (R3677).

Order Precluding Evidence of Davis's Mental Health and Striking Claim 15 from the Evidentiary Hearing

The initial case management conference in this case was held on June 7, 2019. (R3214). At the hearing, the State alerted the court that Davis had not provided a witness and exhibit list as required by Florida Rule of Criminal Procedure 3.851(5)(a). (R4082-83). Without objection, the Court granted Davis an extension of time to file a witness and exhibit list.

(R4085). Davis filed a witness and exhibit list on June 25, 2019. (R1901). Dr. Michele Quiroga was listed a "defense mental health expert," but Davis did not provide a report from Dr. Quiroga as required by the rule. At a subsequent telephonic status hearing, the State alerted the court that it had not received a report from Dr. Quiroga. (R4267-68).

Shortly thereafter, on July 16, 2019, the court received a letter from Davis wherein he claimed he wanted to waive his postconviction penalty phase claims. (R1909-10). The parties agreed that it would be appropriate for the court to conduct a colloquy regarding Davis's stated desire to waive his penalty phase claims. On October 4, 2019, Davis appeared before the court and lodged various complaints about his attorneys' representation and the pleading filed on his behalf. (R4383). Davis informed the court that there were claims that he wanted his attorneys to raise, which were not raised. (R4393-4406). The State advised that the purpose of the hearing was to determine if Davis wanted to waive his penalty phase claims. (R4407). The court directed Davis's attention to the first line of the letter, which stated: "I would like to inform the court that I am voluntarily waiving my rights to any penalty phase claims raised in the cases." (R4414). Davis claimed that he wrote the letter based on a misunderstanding of the issues that his attorneys raised. (R4415). Based on that representation, the State

again alerted the court that Davis had not provided Dr. Quiroga's report or any other mental health mitigation information. (R4415-16). In response, Davis's counsel stated: "We are not going to call her." (R4416).

Although the State had no reason to doubt counsel's representation that Dr. Quiroga would not be called as a witness, the State filed a "Motion to Exclude Dr. Quiroga and Motion to Exclude Any and All Expert Mental-Health Testimony" on October 9, 2019, which the court granted. (R1943). On December 24, 2019, Robert Berry, Davis's counsel, filed a "Motion to Continue Huff Hearing and Evidentiary Hearing" notifying the court that he was resigning from CCRC-N and the office would be reassigning Davis's cases. (R2266, 4094-95). The case management conference for Davis's Second Amended Postconviction Motion was to be held on December 30, 2019, and the evidentiary hearing was scheduled to commence on January 9, 2020. At the December 30, 2019, hearing the court recognized that the case had already been continued on more than one occasion. (R4096-97, 4120). Even so, the court permitted Mr. Berry to withdraw from the case and, over the State's objection, continued the evidentiary hearing (though the case management conference proceeded as scheduled.) The evidentiary hearing was rescheduled for August 31, 2020. (R2288).

On May 29, 2020, Davis's new counsel filed a Motion to Continue the August evidentiary hearing. Counsel cited the voluminous nature of Davis's case files, the COVID-19 pandemic and related restrictions, and the discovery of potentially meritorious claims some of which would require the "assistance of experts" including claims related to Davis's possible brain damage and a significant family history of mental illness. (R2292). The State filed a written objection noting, among other things, that the Court had granted the State's motion to preclude mental health expert testimony based on Davis's failure to provide any relevant discovery. (R2337). The State also noted that it had previously expressed concerns that Davis was attempting to manipulate the proceedings by claiming he wanted to waive or assert claims and then saying the opposite at a later date. (R2337). The court agreed to bifurcate the hearing to permit at least some of the claims to be heard in anticipation of Davis amending his motion. (R2497-98).

Davis filed a Motion to Amend on July 16, 2020, which did not include any mental health mitigation or penalty phase claims. (R2372). About 10 days later Davis filed a "Motion to Strike the August 31, 2020, Evidentiary Hearing" primarily citing the COVID-19 epidemic. (R2442). Over the State's objection, the court granted the motion to strike the evidentiary hearing. (R2494, 2497). The hearing was rescheduled for January 6-8, 2021. That

hearing date was also continued due to the ongoing COVID-19 epidemic. (R2544). After a number of status hearings, the evidentiary hearing was rescheduled for August 23-24, 2021. On May 3, 2021, the State filed a "Motion to Dismiss Portions of Claim 15 and to Exclude any and All Mental Health Testimony from Any Source." (R2558) The State also contemporaneously filed motions to compel production of Davis's medical and mental health records from various entities. (R2594, 2599, 2604).

At the hearing on the motions, the State explained that since the inception of Davis's postconviction case, the State had not been provided with any discovery related to Davis's alleged brain damage and mental health issues, including medical records, school records, psychological records, etc. (R4193-94). Nonetheless, there was an order requiring an evidentiary hearing on the mental health mitigation claims. The State proposed that the court could either strike from the evidentiary hearing or summarily deny the claims related to investigation and presentation of Davis's mental health mitigation because the allegations were conclusory and lacking factual support. (R4194-95).

Davis's postconviction counsel informed the court that Davis did not want to present evidence related to his penalty phase claims at the August 2021 evidentiary hearing; though he previously allowed postconviction

counsel to conduct a mitigation investigation. Counsel stated that she "told [Davis] that [the court] may want to do a colloquy with him, may want to do competency evaluation . . . and so that's what I am asking the court to do at this time." (R4196-97). Counsel admitted that Davis was not seeking to waive his postconviction proceedings or discharge his postconviction counsel. (R4197).

In response, the State pointed out that the postconviction motion had been pending for almost three years and that Davis had previously claimed he wanted to waive his penalty phase claims only to revoke that request after he had been transported to Polk County for a colloquy. (R4201-02). The State asserted that the issue was a matter of lack of evidence regardless of whether Davis's actions could be considered a waiver of the penalty phase claims. (R4202). The State also pointed out that if Davis belatedly decided to proceed with the penalty phase claims and produced an expert report, the State would be obligated to hire an expert to evaluate Davis, which could postpone the evidentiary hearing yet again. (R4203). The State argued that the court should summarily deny the penalty phase claims because they were factually and legally insufficient. (R4203).

On June 8, 2021, the postconviction court issued an order striking from the evidentiary hearing claims related to defense counsel's

investigation and presentation of mental health mitigation but permitting evidence regarding the allegation that counsel was ineffective for failing to speak to various family members and friends of Davis. (R2676).

In its final order denying relief, the court noted that the reason it struck portions of Claim 15 from the evidentiary hearing was due to Davis's failure to provide mental health discovery. (R3666-67). The court also observed that, though permitted to do so, Davis did not present any evidence regarding counsel's alleged failure to speak to certain family and friends. The court noted that Norgard had conducted a mitigation investigation as evidenced in the record of the Headley case. Davis refused to participate in a mental health evaluation. (R3666-67; Headley/CF07-009386-XX; SC11-1122: V97/5249). The court denied relief.

SUMMARY OF THE ARGUMENTS

ISSUE I: Davis failed to prove that the State knowingly presented false testimony. The fact that Officer Townsel was mistaken as to whether a copy of the photopack was placed into evidence and whether the defense was provided with a copy does not rise to the level of a Giglio violation. Further, the testimony was immaterial. The relatively minor discrepancy in Officer Townsel's recollection of events did not affect the verdict.

ISSUE II: Officer Townsel's personnel file confirms what Norgard already knew – that no copy of the photopack was placed into evidence. The personnel file was not impeachment evidence as defined by Brady and the State had no obligation to disclose it. Officer Townsel's testimony was sufficiently impeached with information counsel possessed.

ISSUE III: The postconviction court correctly determined that counsel was not deficient in his cross examination of the State's ballistics expert. Counsel elicited on cross examination that the expert could not definitively state that the .38 caliber bullet was fired from a .38. The expert also conceded that there was no evidence linking Davis to the firearm that may have fired the bullets as no firearm was ever found.

ISSUE IV: Counsel retained a firearm and toolmark expert to evaluate the State's evidence. The postconviction expert did not testify that he was

available to testify at trial. Even if he were, it is doubtful that his testimony would have been admissible nor would it have changed the result of the trial.

ISSUE V: Counsel retained a video expert who reviewed the surveillance video and did not recommend that counsel attempt to argue that more than one person was involved in the crimes. Counsel had no basis for arguing that the video is evidence of more than one person was involved in the crimes and that argument was contradicted by the evidence.

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

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

ineffective because he did not "aggressively litigate" the motion with respect to the late return. However, Davis failed to advance any additional argument that Norgard should have made. Therefore, the postconviction court properly summarily denied relief.

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

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

ISSUE X: This issue was not properly preserved. Davis's request was not in writing as required by Florida Rule of Criminal Procedure 3.851(4).

Moreover, the oral request did not specify what observations of and conversations with Davis formed the basis of the request or what factual matters required competent consultation. Further, the postconviction court's order does not address the competency issue and counsel did not request a ruling. This claim is without merit and should be rejected by this Court.

ARGUMENT

Ineffective Assistance of Counsel

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

To prove deficient performance, the defendant must establish that his counsel made errors so serious that he was deprived of "counsel" as contemplated by the Sixth Amendment. Reviewing courts must keep in mind that "the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." Bobby v. Van Hook, 558 U.S. 4 (2009). Further, courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . ." Strickland, 466 U.S. at 689 (quotation marks omitted).

Defense counsel is entitled to rely on the advice of qualified experts. Johnson v. State, 135 So. 3d 1002, 1030 (Fla. 2014); see also Stewart v. State, 37 So. 3d 243, 252–53 (Fla. 2010) ("[T]rial counsel's reliance on his retained experts is not proven unreasonable simply because another expert

. . . questions the thoroughness of the prior evaluations."). Furthermore, trial counsel is not deficient because the defendant is able to find postconviction experts that reach "different and more favorable conclusions" than the experts trial counsel consulted. Asay v. State, 769 So. 2d 974, 986 (Fla. 2000); see also Knight v. State, 211 So. 3d 1, 10 (Fla. 2016).; State v. Mullens, SC19-1587, 2022 WL 3904326, at *4 (Fla. Aug. 31, 2022) (stating "we and other courts have made clear that counsel is entitled to rely on a qualified expert's opinion, and that such reliance is not rendered unreasonable just because a new expert in postconviction proceedings disagrees with trial counsel's expert.).

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

Occhicone v. State, 768 So. 2d 1037, 1049 (Fla. 2000) (citations omitted); Strickland, 466 U.S. at 694.

Because a successful ineffective assistance of counsel claim requires proof of both deficient performance and prejudice "[w]hen a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001); Zakrzewski v. State, 866 So. 2d 688, 692 (Fla. 2003).

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

ISSUE I

OFFICER TOWNSEL'S TESTIMONY WAS NOT FALSE NOR MATERIAL; THEREFORE, THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED DAVIS'S CLAIM THAT THE STATE COMMITTED A GIGLIO VIOLATION.

Presentation of a valid Giglio claim requires the defendant to show that the State knowingly presented false testimony against the defendant at trial. See Giglio, 405 U.S. at 154–55. Additionally, the alleged false testimony must be material. "Under Giglio . . . false evidence is material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the [fact finder].'" Guzman v. State, 868 So. 2d 498, 507 (Fla. 2003) quoting United States v. Agurs, 427 U.S. 97, 103 (1976).[10] The defendant bears the burden of proving the State knowingly introduced false testimony before the burden shifts to the State to establish that the testimony was not material. Guzman, 868 So. 2d at 506.

On cross examination of Officer Townsel, Norgard asked "Okay, and what occurred with the photo pack is that – the one involving Mr. Greisman . . . it disappeared for a while; right?" Officer Townsel admitted that it had. (SV6/987). During re-direct examination, the prosecutor asked Officer Townsel to tell the judge "how it turned out that the original of the photo-

[10] The State maintains that the claim is procedurally barred because it could have been raised on direct appeal.

pack ended up in a file folder in your garage with just a copy being put into evidence, explain how that happened," (SV6/988). In fact, neither a copy nor the original of the photo-pack was placed into evidence. At trial, Norgard objected to the question noting that the question's premise - that a copy of the photo-pack was placed into evidence - was not supported by the facts. (SV6/988). In response to the objection, the prosecutor asked Officer Townsel if a copy was placed into evidence, and Officer Townsel said yes. (SV6/988).

On re-cross examination, Norgard asked Officer Townsel to review the list of evidence that had been previously viewed by the State and the defense, which did not indicate that either a copy or the original of the photo-pack was placed into evidence. When asked if either a copy or the original of the photo-pack was listed, Officer Townsel stated, ". . . all I know is what the defense had in their – in their possession. As far as being in evidence itself, that's why we knew that there was something missing." (SV6/991). Norgard raised a hearsay objection to the portion of the testimony regarding what the defense had been provided and asked that the testimony be struck from the record. The court sustained the hearsay objection. (SV6/993).

Davis has failed to establish any of the Giglio elements. First, Officer

Townsel did not present false testimony. While Officer Townsel may have been confused or mistaken as to whether a copy of the photo-pack was entered into evidence, this is not the type of false testimony contemplated by Giglio. Phillips v. State, 608 So. 2d 778, 781 (Fla. 1992) (stating that the witness "seemed confused over whether he was an informant for Metro–Dade. Ambiguous testimony does not constitute false testimony for the purposes of Giglio," citing Routly v. State, 590 So. 2d 397, 400 (Fla. 1991) (stating "[e]quivocal testimony . . . does not constitute false testimony for purposes of Giglio."); Franqui v. State, 59 So. 3d 82, 105 (Fla. 2011) (citing Maharaj v. State, 778 So. 2d 944 (Fla. 2000)) (stating inconsistent testimony is not the equivalent of false testimony under Giglio); Conahan v. State, 118 So. 3d 718, 729 (Fla. 2013) (holding that a witness's testimony about what she thought she told law enforcement was incorrect, but not false for purposes of a Giglio violation).

In Conahan, the victim's mother testified at trial that the victim told her that he had met a man named Conahan who was a Navy vet and a nurse. Defense counsel cross examined the victim's mother asking her why she did not tell that to law enforcement during the investigation. The witness testified that she "thought" that she had told law enforcement. On postconviction, Conahan raised a Giglio claim alleging that the victim's

mother's testimony about what she told law enforcement was false. During the postconviction proceedings, the State stipulated that Conahan's name does not appear in the witness's recorded statement. This Court affirmed the denial of relief finding that the witness's testimony about what she "thought" she told law enforcement was mistaken, but not false as required by Giglio. This Court noted that the witness had multiple contacts with law enforcement before trial.

Similarly, here, Officer Townsel believed that the defense had been provided with a copy of the photo-pack in discovery. She would not have known this from personal knowledge. Indeed, this is why Norgard objected. The fact that Officer Townsel thought that the defense was provided with a copy of the photo-pack does not make her testimony false for purposes of a Giglio violation.

Second, Davis has not shown that the State knew that Officer Townsel's testimony was incorrect, let alone false, at the time of her testimony. The challenged testimony occurred two years after the evidence review and five years after Davis was identified as the perpetrator of the Headley murders. There had been multiple pretrial hearings and depositions in both cases. The photo-packs shown to both Ortiz and Greisman had been discussed and introduced into evidence at the Headey

murder. Norgard filed more than one motion to suppress the Greisman photo-pack. (Headley/CF07-009386-XX; SC11-1122: V10/1584, V14/3070). The fact that memories fail as to immateral details does not give rise to a Giglio violation; particularly when the defense challenges the mistaken testimony on cross examination.

Finally, the testimony was not material. Contrary to Davis's argument, the question is not whether Davis could have used the information to support his theory of defense. The question is whether the testimony itself could have affected the verdict. Here, the relatively minor discrepancy in Officer Townsel's recollection of events regarding whether a copy of the photo-pack was placed into evidence did not affect the verdict or sentence in this case. Whether or not a copy of the photo-pack was placed into evidence had no bearing on Davis's guilt or the appropriateness of his sentence.

Davis argues that the postconviction court relied on testimony that was struck from the record in reaching its conclusion on this issue. The postconviction court's order mentions Officer Townsel's testimony that she believed that the defense had been provided with a copy of the photo-pack, but that testimony was not critical to the court's conclusion that Davis failed to prove a Giglio violation. Further, the record is not clear that the testimony

was struck from the record. Even if it were, that does not mean that the postconviction court could not consider it for purposes of a Giglio claim.

A motion to strike is sometimes used as an after-the-fact objection. Generally, an objection is lodged as to a question. Once the question is answered, though, counsel can move to strike the answer based on an evidentiary objection. Alternatively, a motion to strike can be utilized to remove from the jury's consideration an objectionable response even when the question itself was proper. Overall, the purpose of the motion to strike is to prevent the jury from considering the objectionable evidence or testimony in determining its verdict. Putnal v. State, 47 So. 864, 866 (Fla. 1908) (superseded by statute on other grounds as stated in Johnson v. State, 67 So. 100 (Fla. 1914)).

Here, the trial court sustained a hearsay objection as to what Officer Townsel may have been told about the defense having in their possession a copy of the photo-pack. Hence, the court could not, and presumably did not, utilize that testimony in determining Davis's guilt. In the context of a Giglio claim, though, the testimony is not hearsay because it is not being offered for the truth of the matter stated. In fact, we know that the matter stated, that the defense had a copy of the photo-pack, is not true. The testimony is relevant to the question of whether Officer Townsel's trial

testimony was false, as opposed to just mistaken, for purposes of a Giglio claim.

Davis had a full and fair opportunity to develop his Giglio claim at the evidentiary hearing. Davis did not prove that the State knowingly presented false material testimony. This Court should affirm the denial of relief.

ISSUE II

OFFICER TOWNSEL'S PERSONNEL FILE WAS NOT EXCULPATORY NOR IMPEACHING AND WAS NOT SUPPRESSED BY THE STATE; THEREFORE, THE POSTCONVICTION COURT'S SUMMARY DENIAL OF DAVIS'S BRADY CLAIM WAS PROPER.

Davis failed to prove the State committed a Brady violation by not providing the defense a copy of the reprimand in Officer Townsel's personnel file. In Brady, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment. . . ." 373 U.S. at 87. There are three components to a Brady violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281–82 (1999).

In order to establish prejudice, the evidence must be material and the defendant must show that the nondisclosure was so serious that there is a reasonable probability of a different verdict had the evidence been disclosed. Id. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Strickler, 527 U.S. at 289–90, quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995) (emphasis added).

There is no Brady violation when a defendant is aware of the alleged exculpatory or impeachment evidence. Roberts v. State, 568 So. 2d 1255, 1260 (Fla. 1990) (defendant was aware of evidence that would show he was under the influence of drugs or alcohol during the crime) citing James v. State, 453 So. 2d 786, 790 (Fla. 1984) (defendant was aware of existence of photographs contained in confidential juvenile records). A defendant's knowledge of the evidence claimed to represent a Brady violation "would in and of itself defeat his Brady claim, since by definition such evidence would not have been unlawfully 'suppressed' by the State." Jimenez v. State, 265 So. 3d 462 (Fla. 2018).

It is clear from the record that Norgard knew that neither the original nor a copy of the photo-pack had been placed into evidence until June

2010. When Officer Townsel testified at trial to her belief that a copy of the photo-pack was in evidence, Norgard specifically stated ". . . there wasn't even a copy in evidence." Officer Townsel's personnel file merely confirms what Norgard already knew. Additionally, Norgard did not merely question Officer Townsel about the photo-pack, he confronted Officer Townsel with the evidence list, which contradicted her testimony that a copy of the photo-pack was placed into evidence. (SV6/991).

At the evidentiary hearing, Norgard testified that it was not helpful to Davis's defense to attempt to impeach Officer Townsel further about the copy/original discrepancy. He considered it a collateral matter that was adequately addressed through his cross and recross examination of Officer Townsel. Norgard did not specify if he meant that he believed the testimony to be collateral in the sense that extrinsic evidence would have been inadmissible for impeachment. Generally, when a witness testifies regarding a collateral matter, the attorney must "take" the answer as given and cannot introduce extrinsic evidence to impeach the witness. Wilson v. State, 72 So. 3d 331, 334 (Fla. 4th DCA 2011) (citing Correia v. State, 654 So. 2d 952, 954 (Fla. 4th DCA 1995)). The rule is not strictly enforced when the impeachable testimony occurs on direct examination[11] because the

[11] Officer Townsel's testimony occurred on redirect examination.

court may determine that the witness "opened the door." See Mills v. State, 681 So. 2d 878, 880 (Fla. 3d DCA 1996). Nonetheless, it is unlikely that Norgard would have been permitted to introduce Officer Townsel's personnel file in order to impeach Officer Townsel's testimony that a copy of the photo-pack was entered into evidence at the police department.

Regardless, the impeachment evidence is not the fact that Officer Townsel was reprimanded for her failure to put the Greisman photo-pack into evidence at the Lake Wales Police Department – it is the fact that, contrary to her testimony, neither a copy nor the original was in evidence at the Lake Wales Police Department prior to June 2010. That contradiction was fully explored at trial.

There is no question that Davis received a fair trial resulting in a verdict worthy of confidence regardless of whether defense counsel had received Officer Townsel's personnel file. The file was not exculpatory, and to the extent it was impeachment, counsel confronted Officer Townsel with the fact that a copy of the photo-pack was not entered into evidence. Davis has failed to carry his burden.

ISSUE III

THE POSTCONVICTION COURT CORRECTLY DETERMINED COUNSEL DID NOT PERFORM DEFICIENTLY DURING CROSS EXAMINATION OF JAMES KWONG AND DAVIS DID NOT SUFFER PREJUDICE.

Davis claims that Norgard deficiently performed during his cross examination of Kwong. Specifically, Davis alleged Norgard should have cross examined Kwong about the scientific underpinnings of firearm comparisons. Norgard testified that he was aware of various challenges to firearms evidence. He testified that, in his opinion, if he was not able to show that the conclusion regarding the firearm identification in this case was actually wrong, generalized testimony about accuracy and error rates would not have been helpful. Instead, he concentrated his efforts on emphasizing the limitations of Kwong's testimony as it related to the identification of Davis as the shooter. (R3490).

During the cross examination of Kwong, Norgard elicited an admission that Kwong could not definitively state that the .38 caliber class bullet was fired from a .38. It is possible that a .38 caliber bullet can be fired from a .357. (SV6/931). Further, Norgard had Kwong reiterate that there are at least 21 possible types of firearms that would produce six lands and grooves with a right twist. (SV6/931). Norgard also emphasized that no gun was ever found. Additionally, he pointed out that the State was unable to

link Davis to the purchase or acquisition of any ammunition. This was significant because Davis's cousin testified that the gun was unloaded when he sold it to Davis. His cousin further testified he gave Davis only two bullets, one of which Davis fired when testing the gun before purchasing it. (SV5/743).

Norgard's cross examination of Kwong's testimony was not objectively unreasonable. Additionally, Davis suffered no prejudice. Davis failed to prove that had the Court heard the evidence that was presented at the evidentiary hearing, that the result of the trial would have been different.

ISSUE IV

COUNSEL EFFECTIVELY INVESTIGATED THE FIREARM AND TOOLMARK EVIDENCE AND RETAINED A QUALIFIED EXPERT.

This Court has explained that counsel does not necessarily perform deficiently by failing to retain an expert witness to rebut the State's expert testimony at trial. King v. State, 260 So. 3d 985, 1000–01 (Fla. 2018) citing Crain v. State, 78 So. 3d 1025, 1041 (Fla. 2011); Belcher v. State, 961 So. 2d 239, 250-51 (Fla. 2007). See also Harrington v. Richter, 562 U.S. 86, 111 (2011) (". . . Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense.").

Additionally, the admissibility of expert testimony is governed by § 90.702, Fla. Stat., which reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
> (2) The testimony is the product of reliable principles and methods; and
> (3) The witness has applied the principles and methods reliably to the facts of the case.

At the postconviction evidentiary hearing, Davis presented the testimony of Dr. Jeffery Salyards. Currently, Dr. Salyards is the Principal Analyst for Compass Scientific Consulting, LLC. At the time of the bench trial in this case (September 18 – October 9, 2012), Dr. Salyards was the Chief Scientist at the United States Army Criminal Investigations Laboratory. (R3187, 3190, 2887). Dr. Salyards testified about the various criticisms and concerns the larger scientific community has as it relates to the AFTE's "Theory of Identification" and the method's error rate. He testified that had he been consulted at the time of trial, he would have told Norgard that there was need to further study the theory and the method's error rate.

The majority of Dr. Salyards's postconviction testimony concerned

posttrial research studies – specifically the Ames I. The Ames I study concluded that the AFTE's methodology had a 2-3% error rate, which Dr. Salyards testified was "reasonable." (R3192). Dr. Salyards testified that the Ames I study revealed a "strange use" of the inconclusive findings. Dr. Salyards admitted that he does not know what impact, if any, inconclusive findings have on the error rate. The most he could say is that the "larger scientific and statistical community" would consider the failure to exclude a false positive. (R3195-96, 3231). He had other criticisms of the AFTE's methods and reporting, but he never testified that the conclusions in this case were wrong, or that the field as a whole has been discredited.

Davis failed to prove that Dr. Salyards was a viable expert for the purpose of challenging the ballistics evidence. First, Davis failed to establish that Dr. Salyards, who was the Chief Scientist at the United States Army Crime Lab at the time of the trial, was available and able to consult with or testify about his concerns regarding the science of firearm and toolmark comparison. Furthermore, it is doubtful that Dr. Salyards's testimony would have been admissible. He is not a firearm or toolmark examiner and has no training in the field. His proposed testimony about the need for further study into the error rate of the AFTE's methods was not relevant and could not have been applied to the facts of the case. See

Stano v. State, 473 So. 2d 1282, 1286 (Fla. 1985) (holding generalized expert testimony that some people falsely confess was not relevant because it did not tend to prove or disprove that the defendant falsely confessed).

Importantly, Norgard was aware of questions regarding the AFTE's Theory of Identification. He researched both legal and technical issues regarding ballistic evidence. He testified that despite an extensive search he was unable to find an expert who would undermine the science of firearm and toolmark comparison. (R3476). In addition to searching for an expert to challenge the scientific underpinnings of the discipline, Norgard hired a firearm and toolmark expert, Terry LaVoy, to review Kwong's results and independently compare the bullets. (R3472, 3474). Norgard testified he did not think it would be helpful to the defense to present testimony regarding generalized concerns about firearm comparison unless he was able to prove that Kwong's conclusion was incorrect. (R3490).

Norgard's performance cannot be deficient when he thoroughly investigated various types of experts and decided on whom to hire and whether to present expert testimony related to the ballistics evidence. Additionally, the theory of defense was that the Headley scene witnesses misidentified Davis as the person who committed those offenses.

Therefore, it was a reasonable, tactical decision not to challenge Kwong's testimony that bullets found at the two scenes matched. See Sheppard v. State, 338 So. 3d 803, 824 (Fla. 2022) (finding, "[c]ounsels' strategy not to challenge the science behind . . . ballistics examinations was reasonable given the defense's theory that Defendant was not the shooter regardless of whether the murders were related.").

Moreover, if Norgard were to present an expert such as Dr. Salyards, or otherwise have challenged the AFTE's methodology, the State would have countered any such testimony with an expert such as Dr. Hamby who would explain the history and underlying scientific basis of firearm and toolmark comparison. Unlike Dr. Salyards, Dr. Hamby is an expert in firearm and toolmark examination. He has been involved with firearm and toolmark identification since the 1970s. (R3253). Since then, he has continually been involved in research and advancements in the field. (R3259). In all of the literature that he has reviewed regarding error rates, the AFTE's methodology has a 1-2% error rate. (R3267-69).

Davis has failed to prove deficient performance. Further, Davis did not establish that Norgard's failure to utilize the opinions of an expert such as Dr. Salyards would have resulted in a different verdict in this case or has otherwise rendered the verdict unreliable.

ISSUE V

THE POSTCONVICTION COURT PROPERLY DENIED DAVIS'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO UTILIZE THE SURVEILLANCE VIDEO TO CHALLENGE THE STATE'S CASE.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . " Strickland, 466 U.S. at 690–91. Davis alleged that Norgard was ineffective for failing to argue, based on the surveillance video, that Davis was not the perpetrator, or that more than one person was involved in the attempted robbery and murders.[12] Norgard testified that he received and reviewed all of the station's surveillance tape from the night of the murders and discussed them with Davis. (R3428-29). In May 2010, Norgard retained a video expert, Richard Smith, to review and analyze all of the video in both cases. Smith never advised Norgard that the video depicted the car moving at or near the time the person appears on the screen. (R3443-45). Additionally, Norgard himself, as well as other attorneys and investigators on the defense team, viewed the videos numerous times. No one believed that it was reasonable to argue that the presence of the car indicated that either Davis was not involved, or that more than one person was involved in the

[12] The postconviction motion references a number of still photographs taken from the surveillance video, but Davis only presented evidence as to the image of the car.

murders. (R3442-45).

Norgard investigated the videotape evidence, including hiring an expert consultant, and made strategic choices based on the evidence. Davis failed to prove either deficient performance or prejudice.

ISSUE VI

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

A defendant is not entitled to an evidentiary hearing based on conclusory allegations trial counsel was ineffective. State v. Coney, 845 So. 2d 120, 135 (Fla. 2003). If a defendant's conclusory allegations are not supported by a properly pled factual basis, the claim is facially insufficient and should be summarily denied. See Davis v. State, 875 So. 2d 359, 368 (Fla. 2003).

In the order summarily denying this claim, the postconviction court found that there is "nothing to indicate any of the contents of this video are exculpatory or helpful in any way to Mr. Davis and any such assertions are based on mere speculation. The claim that law enforcement's failure to preserve this video shows a lack of evidence or improper conduct in preserving evidence would have had any effect on the outcome of the trial is also wholly speculative." (R3671).

In summarily denying this claim in the Headley case, the postconviction court attached Officer Crosby's deposition, which was taken by Norgard on June 2, 2010, and filed with the clerk's office on June 4, 2010, to the order denying postconviction relief. Officer Crosby described what he saw on Officer Hampton's dash cam video prior to placing it in property/evidence. He testified it ". . . just shows him pulling into the west side of the Headley parking lot. It shows the vehicle – I mean the building burning, and then you can see him run across the front of the screen. That's really about all it shows. And then, of course, you can see the firefighters and other personnel running around." (Headley/CF-07-009386-XX: SC21-1778; R3015, 3089-90).

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

Additionally, Davis's prejudice argument is speculative and

generalized. Davis must prove that had counsel utilized the fact that the dash cam video was missing that the result of his trial would have been different. There is no reasonable interpretation of the facts that would allow the postconviction court to reach that conclusion. The court rightly determined that the video was insignificant, which the State would have pointed out had counsel attempted to undermine the investigation based on the missing video. Additionally, the video was irrelevant to the issues to be decided. Davis failed to prove both the deficiency and prejudice prongs of Strickland, and the postconviction court properly denied relief. This Court should affirm.

ISSUE VII

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

Norgard did file a motion to suppress in the Headley case and alleged, in part, that suppression was necessary because the return was not done within ten days. The trial court rejected that argument. (Headley/CF07-009386-XX; SC11-1122; V18/2912-13, 2918, 2924-28). This claim could have been summarily denied on these bases alone. Nonetheless, the postconviction court addressed Davis's claim that trial

counsel was ineffective because he did not "aggressively litigate" the motion to suppress with respect to the late return. However, Davis failed to advance any additional argument that Norgard should have made. (R3670).

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

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

Here, there was no meritorious Fourth Amendment challenge to the search of the Nissan Altima based on the delayed return. Davis is correct that § 933.05, Fla. Stat. states that a search warrant shall be returned

within 10 days of issuance. The question is whether failure to do so would require the court to exclude the evidence obtained. The answer to that question is no. In State v. Featherstone, 246 So. 2d 597 (Fla. 3d DCA 1971) the Third District Court of Appeal was presented with the questions of "whether a search warrant is void because of an improper or late return and whether the evidence seized thereunder becomes inadmissible." 246 So. 2d at 558.

In Featherstone, the warrant was issued on June 1, 1970, and was executed on June 3, 1970, but the return was not made until more than 10 days after issuance, on June 12, 1970. The district court noted that the state rule tracks the language of the federal rule. Federal courts had held that the making of a return is a ministerial task. Id. citing Joyner v. City of Lakeland, 90 So. 2d 118, 122 (Fla. 1956) (holding, this "matter, it has been frequently decided by the federal courts and on the basis of the federal decisions we are inclined to hold, as we do, that the delay of eight days was not unreasonable.) (citing Dixon v. United States, 211 F. 2d 547 (5th Cir. 1954). The court found that the great weight of authority, state and federal, held that the failure of law enforcement to make a timely return does not invalidate the search "because these acts are ministerial and do not affect the validity of the search." Featherstone, 246 So. 2d at 599.

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

Even if a motion to suppress would have or should have been granted, it would not have changed the result of the trial. Davis was positively identified as the person who shot Bustamante in the hand at the Headley scene. Davis purchased Dan Wesson .357 magnum revolver from his cousin the day of the murders of Pravinkumar Patel and Dashrath Patel. The State presented testimony that the rifling characteristics of a Dan Wesson .357 magnum revolver are consistent with the markings left on the bullets removed from the heads of the victims in this case. The bullets from this case are also consistent with the bullet removed from Bustamante’s hand. Davis’s wife’s car was seen backed into a secluded spot a short

distance away from the BP around the time of the murders and Davis's whereabouts were unaccounted for. The tire casts from the area where the car was parked were consistent with the tires on Davis's wife's car.

ISSUE VIII

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

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

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

Even assuming a photo-pack could be subject to a chain of custody

challenge, "[a] mere break in the chain of custody is not in and of itself a basis for exclusion of physical evidence." State v. Jones, 30 So. 3d 619, 622 (Fla. 2d DCA 2010) citing Bush v. State, 543 So. 2d 283, 284 (Fla. 2d DCA 1989). Instead, the defendant must prove that there is a "probability that the evidence has been tampered with during the interim for which it is unaccounted." Id. Proof of probable tampering is necessary before the State is required to establish a chain of custody or other evidence that tampering did not occur. Taylor v. State, 855 So. 2d 1, 25 (Fla. 2003) citing Taplis v. State, 703 So. 2d 453, 454 (Fla. 1997).

Davis did not present evidence that the photo-pack was tampered with, or that there was a probability that the evidence was tampered with, during the time it was stored in Officer Townsel's shed. Officer Townsel testified that no one, other than herself, had access to the shed where she kept her case files. Murray v. State, 838 So. 2d 1073, 1083 (Fla. 2002) (stating the appellant's allegations regarding tampering amount to mere speculation.). Consequently, even assuming a court could find a break in the chain of evidence, the photo-pack would have still been admissible because there was no proof of tampering.

Furthermore, Norgard pointed out to the court that "the chain of custody log on the photo lineup of Brandon Greisman reflects that it "was

received by the Sheriff's Office on June 4th, 2010." (SV8/1327-28). The court knew that the photopack had been stored in Officer Townsel's shed for a period of time. The court also stated, ". . . just for the purposes of records I always consider that chain of custody, the marking, as part of whatever the exhibit is. So, that is in evidence by being attached." (SV8/1328). Norgard also presented the testimony of Dr. William Gault to challenge the identification in this case. Norgard asked Dr. Gault, "Once you administer a photo pack is it safe to say you want to maintain a chain of custody?" (SV9/1468). Dr. Gault agreed with that assertion and also agreed that "it would not be a good idea to accidentally have a photo pack disappear and then later turn up in your shed in the back of your house." (SV9/1469). Hence, the record establishes that Norgard reasonably addressed the issue of the missing photopack.

Finally, an in-court identification is prohibited only if an impermissibly suggestive pretrial identification procedure "gives rise to a very substantial likelihood of irreparable mistaken identification." State v. Sepulvado, 362 So. 2d 324, 327 (Fla. 2d DCA 1978) citing Simmons v. United States, 390 U.S. 377, 384 (1968). Norgard unsuccessfully moved to suppress Greisman's in-court identification in this case claiming that the photo-pack was unduly suggestive. (V25/4282). The location of the photo-pack during

the pretrial period has no bearing on whether the procedure was impermissibly suggestive or on the reliability of Mr. Greisman's in-court identification. Therefore, there is no merit to the claim that the location of the photopack rendered Greisman's in-court identification inadmissible.

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

ISSUE IX

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

Claims of cumulative error do not warrant relief where each individual claim of error is "either meritless, procedurally barred, or [does] not meet the Strickland standard for ineffective assistance of counsel." Schoenwetter v. State, 46 So. 3d 535, 562 (Fla. 2010); quoting Israel v. State, 985 So. 2d 510, 520 (Fla. 2008) (other internal citation omitted). All of Davis's claims are either meritless, procedurally barred, or do not satisfy the Strickland standard for ineffective assistance of counsel. Therefore, this Court should

reject his claim of cumulative error.

ISSUE X

THERE WERE NO REASONABLE GROUNDS TO BELIEVE THAT DAVIS WAS NOT COMPETENT TO PROCEED WITH HIS POSTCONVICTION MOTION AND POSTCONVICTION COUNSEL NEVER SOUGHT A RULING ON THE SUGGESTION THAT THE COURT CONDUCT A COLLOQUY TO DETERMINE IF THERE WAS A REASONABLE BASIS FOR A COMPETENCY EVALUATION.

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

Florida Rule of Criminal Procedure 3.851(4) states: "The motion for competency examination shall be in writing and shall allege with specificity the factual matters at issue and the reason that competent consultation with the defendant is necessary with respect to each factual matter

specified. To the extent that it does not invade the lawyer-client privilege with collateral counsel, the motion shall contain a recital of the specific observations of, and conversations with, the death-sentenced defendant that have formed the basis of the motion."

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

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

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

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

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

factual basis of his penalty phase claims, but was unwilling to allow his postconviction attorneys to present evidence to support the claims. This position is consistent with his refusal to allow trial counsel to present mental health mitigation, other than that contained in his military records, at either the penalty phase or the Spencer[13] hearing. Postconviction counsel may not have believed Davis made a wise decision, but it was Davis's decision to make.

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

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

CONCLUSION

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

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

CERTIFICATE OF SERVICE

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

Respectfully submitted,

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CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Arial, and the word count is 18,022 words in compliance with Fla. R. App. P. 9.045.

/s/ Marilyn Muir Beccue
COUNSEL FOR APPELLEE