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No. SC21-1779

Lower Tribunal No. CF07-009613-XX

IN THE

Supreme Court of Florida

LEON DAVIS, JR.
Appellant,

v.

STATE OF FLORIDA,
Appellee.

On Appeal from the Circuit Court, Tenth Judicial Circuit, in and for Polk County, Florida

Honorable Donald G. Jacobsen, Presiding Judge

CORRECTED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is the appeal of the denial of Mr. Davis's Rule 3.851 motion for postconviction relief. The following symbols will be used to designate references to the record: "S" followed by the volume number/page number(s) refers to the corrected transcripts of trial proceedings from the supplemental record on direct appeal; "R" followed by the volume number/page number(s) refers to the record on direct appeal to the Florida Supreme Court; "PCR" followed by the page number(s) refers to the postconviction record on appeal. Any citations to the record on appeal from the trial for the crimes at Headley Insurance Company are referred to as "Headley" followed by "R" and the volume number/page number(s). All other references are self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Davis has been sentenced to death. The resolution of this appeal will determine whether he lives or dies. This Court has allowed oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims and the

stakes involved. Mr. Davis respectfully requests this Court grant oral argument.

STANDARD OF REVIEW

Mr. Davis raises claims of ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984), as well as claims that the State withheld material evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and that the State presented, or failed to correct, false or misleading testimony in violation of *Giglio v. United States*, 405 U.S. 150 (1972).

Strickland claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

Brady and *Giglio* claims also present mixed questions of law and fact, so this Court defers to the circuit court's findings that are supported by competent, substantial evidence but reviews the circuit court's application of the law to the facts *de novo*. *Wickham v. State*, 124 So. 3d 841, 852 (Fla. 2013).

When the circuit court denies Rule 3.851 claims without an evidentiary hearing, this Court accepts the appellant's allegations as true to the extent they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009). Further, the Court "review[s] the trial court's application of the law to the facts *de novo*." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). A postconviction court's decision regarding whether to grant an evidentiary hearing depends upon the actual material before the court, not the court's innate belief about the evidence, and the ruling as to whether a hearing is appropriate is subject to *de novo* review. *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

When multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because

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

McDuffie v. State, 970 So. 2d 312, 328 (Fla. 2007).

This brief also raises a claim that the circuit court erred in denying postconviction counsel's request for a competency hearing

before the court granted the State's motion to dismiss portions of Claim 15 and to exclude any and all mental health testimony from any source. "A court's decision as to whether a competency hearing or a new evaluation is necessary is reviewed for abuse of discretion." *Trueblood v. State*, 193 So. 3d 1060, 1061 (Fla. 1st DCA 2016), *citing Rodgers v. State*, 3 So. 3d 1127, 1132 (Fla. 2009).

STATEMENT OF THE CASE

Pravinkumar Patel and Dashrath Patel were murdered at the BP station located at CR 557 and I-4 in Polk County on December 7, 2007.

The Polk County Grand Jury indicted Mr. Davis on January 9, 2008, on two counts of first-degree murder, one count of attempted armed robbery, and one count of possession of a firearm by a convicted felon for the crimes at the BP station. (R1.46-50).

That same day, the grand jury also indicted Mr. Davis on three counts of first-degree murder, attempted first-degree murder, armed robbery, first-degree arson, and possession of a firearm by a convicted felon for crimes that occurred at the Headley Insurance Agency in Lake Wales on December 13, 2007. (Headley R2.73-78).

The Headley case was tried first, with Judge Michael Hunter presiding. On February 15, 2011, the jury returned a verdict finding Mr. Davis guilty on all counts. (Headley R64.10697-702).

The Headley penalty phase began on February 17, 2011. On February 18, 2011, the jury voted 8-4 to recommend a death sentence for the murder of Michael Bustamante, and unanimously recommended death sentences for the murders of Yvonne Bustamante and Juanita Luciano. (Headley R64.10714-16). After a *Spencer*[1] hearing on March 29, 2011, the court followed the jury's recommendation and sentenced Mr. Davis to death for the murders of Ms. Bustamante and Ms. Luciano. The court overrode the death recommendation and sentenced Mr. Davis to life in prison for the murder of Michael Bustamante. (Headley R66.10843-64).

After the Headley trial, the State filed a motion to use testimony and evidence from the Headley case in the BP trial and argued that the Headley and BP cases were inextricably entwined and in order to prove Mr. Davis committed the BP crimes, it must rely on evidence from the Headley crimes. (R25.4263). Judge Jacobsen did not preside over the Headley case, so the State gave

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

him transcripts from the trial and an outline indicating the significance of each witness's testimony. (R25.4365,4414-15,4454,4467;S118.12031-37).

The defense objected (R25.4263-65,4330), and after lengthy hearings, Judge Jacobsen granted the State's motion. (R26.4479). He ruled that Ms. Bustamante's dying declaration and her bullet wound were admissible in the instant case, but forbade the State from getting into the events that occurred inside the agency involving the fire or Ms. Bustamante's condition. Judge Jacobsen took judicial notice of the Headley appellate record, adopted Judge Hunter's rulings in that case, and denied defense motions in the instant case challenging the State's Headley testimony. (R25.4388-96).

On the day his jury trial was to begin in September 2012, Mr. Davis requested a bench trial. (R27.4720-33). He was convicted on all counts by Judge Jacobsen on October 4, 2012. (R27.4759).

Mr. Davis also waived his right to a penalty phase jury. (S10.1632). On November 30, 2012, Judge Jacobsen sentenced Mr. Davis to death for the murders of Dashrath Patel and Pravinkumar

Patel and sentenced him to life in prison, twenty years, and fifteen years for the noncapital counts. (R34.5946-51).

The trial court found the following aggravating factors: (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). (R34.5969-71).

The court found the existence of one statutory mitigating circumstance: the crime was committed while Mr. Davis was under the influence of extreme mental or emotional disturbance, and assigned little weight. (R34.5972).

The court also considered fifteen nonstatutory mitigating factors: (1) Mr. Davis was the victim of bullying as a child (moderate weight); (2) he was the victim of sexual assault as a child (moderate weight); (3) he was the victim of physical and emotional child abuse by a caretaker (moderate weight); (4) his overall family dynamics

(little weight); (5) he served in the U.S. Marine Corps (little weight); (6) he had been suicidal as a child and as an adult (slight weight); (7) he had a diagnosed personality disorder (slight weight); (8) he had a history of depression (slight weight); (9) he was experiencing stressors at the time of the incident (little weight); (10) he was a good person (very slight weight); (11) he was a good worker (little weight); (12) he was a good son, sibling, and husband (moderate weight); (13) he was a good father to a child with Down Syndrome (moderate weight); (14) he displayed good behavior in court (slight weight); and (15) he displayed good behavior while incarcerated (little weight). (R34.5972-76).

This Court affirmed Mr. Davis's convictions and sentences on direct appeal. *Davis v. State*, 207 So. 3d 177 (Fla. 2016). The following issues were raised in Mr. Davis's direct appeal: (1) whether the trial court erred in admitting evidence of the Headley events during the guilt phase; (2) whether the trial court relied on facts not in evidence to find Mr. Davis guilty; (3) whether the trial court erred by allowing the impeachment of Victoria Davis; (4) whether the trial court improperly shifted the burden of proof to Mr. Davis; (5) whether the trial court erroneously used Mr. Davis's prior theft

convictions as circumstantial evidence of his guilt for all charges; (6) whether the trial court erred in denying the motion for judgment of acquittal; (7) whether the evidence was sufficient to support Mr. Davis's attempted robbery conviction; (8) whether the trial court erred in admitting the hearsay statement of Yvonne Bustamante as a dying declaration; (9) whether the trial court erred in allowing the prosecution to introduce the pretrial and in-court identifications made by Brandon Greisman and Carlos Ortiz; (10) whether the trial court abused its discretion and distorted the weighing process by improperly diminishing the weight assigned to two mitigating factors and attributing the greater weight to one aggravator than was previously assigned; (11) whether Mr. Davis's death sentences were proportionate; and (12) whether the Florida death penalty statutory schedule is facially unconstitutional under *Ring v. Arizona*. *Davis v. State*, 207 So. 3d 177 (Fla. 2016). Rehearing was denied on January 5, 2017.

The United States Supreme Court denied certiorari review on June 5, 2017. *Davis v. Florida*, 137 S. Ct. 2218 (2017).

On May 19, 2018, Mr. Davis filed his initial Rule 3.851 motion. (PCR.675-1080). He filed amended motions on November 6,

2018 (PCR.1217-762); October 14, 2019 (PCR.2099-142); and July 16, 2020. (PCR.2372-440).

Mr. Davis raised 22 claims for relief:

(1) trial counsel failed to move to dismiss the indictment based on the fact that the elements needed to charge a capital felony were not found by the grand jury;

(2) trial counsel failed to move to bar the State from seeking the death penalty when there is no allegation of aggravators in the indictment;

(3) trial counsel failed to seek to bar prosecution of this case on a felony murder theory when the grand jury only found the elements of first-degree premeditated murder;

(4) trial counsel failed to seek a change of venue and a jury trial in this case given its notoriety;

(5) trial counsel failed to advise Mr. Davis regarding the consequences of waiving his right to a jury trial and the bias of any judge from Polk County serving as the trier of fact as well as the fundamental strategic advantages of a jury trial;

(6) trial counsel failed to aggressively litigate a motion to suppress based on a key false statement in the affidavit for search warrant;

(7) trial counsel failed to show through the available evidence that the State's hypothesis of prosecution was critically flawed;

(8) trial counsel failed to call specific witnesses and present specific documentary evidence that Mr. Davis wanted admitted and which was in fact admissible;

(9) trial counsel failed to request a special jury instruction on circumstantial evidence;

(10) trial counsel failed to seek a special instruction on dying declarations;

(11) trial counsel failed to argue that aggravators should be tried in the "guilt" phase of the trial;

(12) trial counsel failed to argue that the maximum sentence allowed under the jury's verdict was life;

(13) trial counsel failed to insist on an instruction regarding a presumption that a life sentence was appropriate in the absence of proof beyond a reasonable doubt to the contrary;

(14) trial counsel failed to argue Mr. Davis's sentence violated the Eighth Amendment and Florida Constitution prohibition against cruel and unusual punishment since the execution process itself meets the Florida Supreme Court definition of especially heinous, atrocious and cruel;

(15)(A) trial counsel failed to thoroughly investigate Mr. Davis's background and complete social history mitigation;

(15)(B) trial counsel failed to thoroughly investigate Mr. Davis's background and present sufficient mental health mitigation;

(15)(C) based on trial counsel's failure to fully investigate Mr. Davis's background, his waiver of a mental health evaluation cannot be knowing, intelligent and voluntary;

(16) trial counsel was ineffective for failing to ensure either a PSI or provide all mitigation evidence in his possession to the court directly;

(17) the State committed *Brady* and *Giglio* violations by withholding Officer Townsel's file;

(18) trial counsel was ineffective for failing to aggressively litigate a motion to suppress based on a stale search warrant pursuant to Fla. Stat. 933.05;

(19) trial counsel was ineffective for failing to show through the available evidence that the State's hypothesis of prosecution was critically flawed;

(20)(A) trial counsel failed to effectively investigate the firearms identification evidence in this case;

(20)(B)(1) trial counsel failed to file a motion in limine to exclude the firearm identification evidence or limit such testimony, or in the alternative, for a *Frye* hearing;

(20)(B)(2) trial counsel failed to object to Mr. Kwong's overstatements of the evidence and the State's overstatements of both the evidence and the testimony by Mr. Kwong;

(20)(B)(3) trial counsel failed to effectively cross-examine Mr. Kwong regarding his qualifications, methods, protocols, and the basis for his conclusions;

(20)(B)(4) trial counsel failed to present a defense expert to challenge Mr. Kwong's conclusions and scientific basis for his testimony regarding the firearms comparison evidence;

(21) trial counsel failed to file a motion to suppress the photopack shown to Mr. Greisman based upon chain of custody violations; and

(22) cumulative error.

The court granted an evidentiary hearing on claims 7, 15, 16, 17, 20A, 20B-3, and 20B-4.

On October 9, 2019, the State filed a motion to exclude the testimony of Mr. Davis's mental health expert Dr. Quiroga, and any and all expert mental-health evidence by way of testimony, reports, or medical, psychological or other records. (PCR.1943-47). The court granted the State's motion, and ordered that "[a]ny testimony from Dr. Michele Quiroga as a mental health expert shall be excluded at the evidentiary hearing. (PCR.2240).

On May 3, 2021, the State filed a motion to dismiss portions of Mr. Davis's Claim 15 and to exclude any and all mental health testimony or evidence from any source. (PCR.2558-68). At the hearing on June 4, 2021, postconviction counsel asked the court to reserve ruling on the State's motion and requested that Mr. Davis be transported to the next status conference so the court could conduct an in-person colloquy to determine the necessity for a court-ordered mental health evaluation. (PCR.4198-99). The court granted the State's motion. The court struck from his previous order granting an evidentiary hearing those portions of Claim 15

that addressed trial counsel's mental health investigation and presentation. (PCR.2676-79).

The evidentiary hearings for the BP and Headley cases were consolidated and held on August 23-24, 2021. The circuit court issued an order denying all postconviction claims on November 29, 2021. (PCR.3624-814).

This timely appeal follows.

STATEMENT OF THE FACTS

I. The guilt phase of Mr. Davis's trial

A. The State's case

1. The BP station murders and investigation

On December 7, 2007, the BP station at CR 557 and I-4 in Polk County was staffed by Prakashkumar "Peter" Patel, Dashrath Patel, and Pravinkumar Patel. Peter worked the cash register until the station closed at 9:00 p.m. (S4.540-41). After closing, Dashrath and Pravinkumar went outside to change the prices on the sign. (S4.545). Peter locked the front door using a switch behind the counter. (S4.546). He was at the counter on the telephone (S4.547) when he heard a noise at the front door. An individual tried to open the door and pointed a gun at him. (S4.549). The person fired once

into the store. Peter dropped to the floor, pushed a silent alarm, and called 911. He stayed on the phone with the 911 operator as he made his way to the back storage room to wait for the police. (S4.552-54). On his way to the storage room, he looked outside and saw the person going toward the diesel pump. (S4.554-55). He heard two gunshots five to ten seconds apart. (S4.557).

The perpetrator was around six feet tall, on the heavier side, and wore dark clothing and a mask. (S4.551-52,565,560). Peter was not sure if the person was male or female, and although he thought the person was black, he could not tell if the person was African-American, dark-skinned Hispanic, or Indian. (S4.558,567-69).

The bodies of Dashrath and Pravinkumar were located in an area southeast of the store. (S3.347). Each had a single gunshot wound to the left side of the head. (S2.174,177). A K-9 search team circled the entire property and the dog stopped near an access road about a quarter of a mile north along Highway 557. (S3.348-49). Footprints led in the same direction that the K-9 tracked and went no further than a set of tire tracks. (S3.350). Crime scene technicians photographed the shoe and tire impressions, and casts were made of the tire impressions. (S2.232).

Detective Ivan Navarro testified that an unsmoked cigarette was collected near the shoe impressions and sent off for DNA testing. The lab returned a male DNA profile, but it did not match Mr. Davis. (S6.1034).

Crime scene technicians processed the store. The projectile and pieces of the bullet jacket were collected. (S2.161;163-66). Prints of value were recovered from around the front door, but they did not match Mr. Davis or the three BP employees. (S6.1032-33). The bullets recovered at the autopsies, the projectile from inside the store and the fragments recovered from the scene were sent to the lab as well. (S6.1035).

The BP station had a video surveillance system with thirteen motion-activated cameras that recorded onto a computer. (S2.307-08;S4.599-600). The system only recorded when motion was detected and showed a blue screen when a camera was not recording. A forensic computer technician removed the blue screens from the recordings and created individual movies and still pictures. (S2.314-19).

2. Mr. Davis became a suspect

Mr. Davis was arrested on December 13, 2007, for crimes that occurred at the Headley Insurance Agency in Lake Wales. The Headley and BP cases both involved shootings, and after the bullets and fragments collected from both crimes scenes were tested and compared, Mr. Davis became a suspect in the BP case. (S7.1046).

FDLE analyst James Kwong opined that the bullets from the BP case were .38 caliber class and consistent with the .38 special or the .357 magnum. (S6.921-22). Although Mr. Kwong concluded that all of the bullets from the BP case were fired from the same gun, he could not determine the type of gun. He also opined that the bullets from the Headley case were shot from the same unidentified gun as the bullets fired at the BP scene. (S6.925).

Mr. Davis acquired a .357 Dan Wesson firearm from his cousin Randy Black when he visited him on December 7, 2007. (S5.730-31). The .357 Dan Wesson Mr. Black had recently purchased was lying on a table. (S5.728,740). Mr. Black agreed to sell it to Mr. Davis for $220. (S5.731). Mr. Black also gave Mr. Davis either a "small amount" or two .38 bullets and Mr. Davis went to

the field behind the house to fire the gun. Mr. Black heard one shot. (S5.732-34,743-44).

Mr. Davis showed a gun to his mother, Linda Davis, in his garage one Sunday afternoon. (S6.1002). Afraid that he would violate his probation, she told him to get rid of it. (S6.1004). The gun Ms. Davis saw was a .45 automatic and not a .357. (S6.1003). She had been in the military and knew the difference. (S6.1002).

After Mr. Davis turned himself in on December 13, police searched his home for a handgun and ammunition. They found neither. (S3.456;S4.590). A gun was never recovered in connection with the Headley or BP crimes. (S6.970). A pair of 3-X large athletic pants and several pairs of shoes were seized from the master bedroom. (S3.457,459). The clothes and shoes tested negative for blood. (S6.1036). The shoes were not sent to the lab for forensic comparison because they did not resemble the shoe impressions from the BP scene. (S7.1098-99).

Victoria Davis's Nissan Altima was seized on December 14 from the Lagoon Nite Club. (S3.458;S6.946). The car, clothing seized from the car, as well as the clothes and shoes Mr. Davis was

wearing when he turned himself in, all tested negative for blood. (S7.1038,1036-37;S7.1048).

The Altima's tires were submitted to FDLE for comparison to the impressions taken from the BP scene. (S6.1035-36). FDLE examiner Teresa Stubbs concluded that any of the Altima's tires could have made the impressions (S7.1065,1070-71), but "due to the lack of observable individual characterizes, a more conclusive association could not be made. (S6.1088-89).

A week after the BP shooting, the police set up a roadblock near the BP station to look for drivers who had been traveling that way the night of the shooting. (S3.354,370,403,406). Four drivers shown a photograph of the Altima thought it was similar to a car parked near the gas station on the night of December 7. (S3.358-59,370-71,388-89,422-23).

3. The Headley evidence admitted at the BP trial

Mr. Davis had a Nationwide automobile insurance policy through Headley Insurance Agency that was written on June 3, 2004, and canceled on August 21, 2007. (S6.952,954,959). He then purchased a Victoria Insurance automobile policy effective August 21, 2007, through February 21, 2008. (S6.954). He last conducted

business with Headley when he canceled his Victoria Insurance policy on his Nissan Maxima on October 18, 2007 because it was too expensive. (S6.956-57,1018).

a. Ms. Bustamante's dying declaration

On December 13, Evelyn Anderson arrived at Headley around 3:00 p.m. to make her insurance payment. The door was locked. (S4.604-06). While she was standing outside, the door opened and a young, neatly-dressed black man with a bag under his arm exited and walked around the building. (S4.607-09,617). After the man disappeared, a seriously injured Yvonne Bustamante exited the front door. Ms. Anderson stayed with her until medical personnel arrived. (S4.609-10). Ms. Anderson heard Ms. Bustamante tell the paramedics that Leon Davis did it. (S4.611).

In December 2007, Fran Murray was living on Stuart Avenue with her friend Carlos Ortiz. (S3.461). She worked at the antique shop behind Headley. (S3.465). On her way home from work on the afternoon of December 13, she noticed a mid-sized black car parked down Phillips Street at the next road crossing after Stuart Avenue. (S3.475). She was sitting outside with her neighbor Vicky Rivera when she saw smoke across the street. Ms. Murray and Ms. Rivera

went across the street, through the alleyway beside the antique shop, to the back of the Headley building. Ms. Murray saw Ms. Bustamante walking down the chain link fence behind the Headley building, towards Phillips Street. (S3.466-67). She heard three "pops" and saw Mr. Greisman fall back into a gator crawl on Phillips Street. (S3.484). She also saw a black man behind Ms. Bustamante, about ten to fifteen feet away. (S3.468). He was around six-foot four with a stocky build. As he headed down Phillips Street, he put what could have been a gun in his lunch pail. (S3.469,471).

Mr. Greisman was holding his nose and there was a lot of blood. (S3.488). She took off her t-shirt to pack his nose and walked him home. (S3.489). Mr. Ortiz met them at the end of Mr. Greisman's driveway and sat Mr. Greisman down in a plastic chair. (S3.394).

Ms. Murray went back to Headley to check on Ms. Bustamante. There was a man and an older lady with her. She was complaining about being hot so Ms. Murray went to Havana Nights to get her some water. (S3.497). Ms. Bustamante told her a black male hurt her and he should be on camera. She did not name the perpetrator. (S3.498-99).

When Lieutenant Elrod arrived at the scene, he found Ms. Bustamante in the Headley parking lot. There were two EMTs with her. (S4.621). She was alert and Lieutenant Elrod did not have any difficulty communicating with her. (S4.622). He asked her if she knew who did this to her, and she said it was Leon Davis. She said he was a prior client of the agency. (S4.623-24).

EMTs Ernest Froehlich and John Johnson treated Ms. Bustamante at the scene. When Mr. Froehlich was in the ambulance with Ms. Bustamante, an officer stepped up on the back of the vehicle and asked her who did this. She said it was Leon Davis. (S6.636). Mr. Johnson heard her say "Davis did this to me." Mr. Johnson could not recall the first name. She said "Davis" had been a client of Headley. (S4.640).

b. Mr. Greisman's identification

Brandon Greisman was outside his home when he saw smoke coming from behind the Headley building. (S1.68). He went to investigate. (S1.71). After he walked around the antique store, he saw an injured woman (Yvonne Bustamante). (S1.72). Mr. Greisman was trying to help her when he glanced up and saw a black male six paces away pull a gun from an orange and black bag. (S1.106,109).

The man was approximately six feet tall with a big build and a small afro. (S1.127,128).

Mr. Greisman tried to get out of the line of fire, but he was shot in the nose. (S1.75-76). He walked back home and his neighbors Carlos Ortiz and Fran Murray came over to help him when he reached his driveway. (S1.77-78,123). Mr. Ortiz grabbed a chair and sat him down. (S1.124). Ms. Murray took off her shirt and gave it to him to stop the blood. (S1.121). Mr. Ortiz stayed with Mr. Greisman until he went to the hospital. (S1.78).

Mr. Greisman had surgery to save his nose. (S1.79). When he woke up, he was told not to watch TV or read the paper, and his room did not even have a television remote. (S1.81). He was discharged from the hospital the next day and his mother drove him to the Lake Wales Police Department. (S1.80).

Officer Lynette Townsel showed him a photopack. (S1.83, State's Exhibit 4467). He picked out Mr. Davis's photograph. (S1.85). At the BP trial, Mr. Greisman said he was 100% sure it was Mr. Davis that shot him, but at the Headley trial a few years prior Mr. Greisman said he was "pretty certain." (S1.91).

c. Mr. Ortiz's identification

Carlos Ortiz was outside talking on his phone when his neighbor Vicky Rivera said she saw smoke coming from the Headley building across the street. (S5.758,757). Ms. Rivera, Fran Murray, and Brian Greisman were already heading that way. (S5.758,772). He locked his door and went after them. He heard shots when he was on Stuart Avenue. (S5.774). He met Mr. Greisman at the corner of Phillips Street and Stuart Avenue. (S5.776). His nose was injured and there was blood everywhere. (S5.780). Mr. Ortiz grabbed Mr. Greisman and helped him across the street. Mr. Greisman told him "that guy" shot him in the face, and pointed to a black male twenty to twenty-five feet away putting what looked like a gun inside a red lunch bag. (S5.759-60,766,777). The man had a goatee and a small curly afro. (S5.786,787). Mr. Ortiz could not recall what kind of shirt the man was wearing, if he had tattoos, or if he was wearing gloves. (S5.802). The man quickly walked past them and headed north on Phillips Street. (S5.760,763,778).

Mr. Ortiz claimed he recognized the man from his temporary job at Florida Natural. (S5.761). He had seen the man outside the gate during shift changes along with hundreds of other people.

(S5.762,810,811). He had never spoken to the man and did not know his name. (S5.762-63).

Mr. Ortiz had noticed a black Nissan Maxima backed in behind a nearby house, and approached Officer Black of the Lake Wales Police Department at the Headley scene to tell him about the car. (S5.803-05). Officer Black told Mr. Ortiz to give him a minute, but Officer Black forgot about him. (S6.965). Mr. Ortiz did not tell any of the officers at the scene that he recognized the man who shot Mr. Greisman. (S5.806).

Four days later on December 17, Officer Black set Mr. Ortiz up to speak with Officer Townsel. She met with him at this apartment. (S5.765). He told her he had not watched the news or read any newspaper articles about the crime. However, Mr. Ortiz previously stated that he saw the news the day after the crime, and learned Mr. Davis's name from the newspaper. (S5.810,808).

She showed him six photographs on one piece of paper and asked if he recognized anyone. (S5.766,767). He pointed out Mr. Davis's photograph even though he did not have an afro or goatee, and the man he described as the shooter had both. (S5.767,798).

Officer Townsel did not prepare the photopacks she showed to Mr. Ortiz and Mr. Greisman, but it was not a double-blind procedure. She knew Mr. Davis's photograph was in the photopack. (S6.985). Also, neither Mr. Ortiz nor Mr. Greisman were under police surveillance to monitor their exposure to news media before they identified the perpetrator. (S6.983).

Officer Townsel claimed that she placed a copy of the Greisman photopack in the property room. However, when she reviewed the evidence prior to a pretrial hearing, she realized the original photopack was not in evidence. The original photopack was eventually located in June 2010 in a shed in her backyard. (S6.987-88,990).

d. Surveillance videos and testimony regarding Mr. Davis's actions on December 7 and 13

Mark Gammons, manager of the Lake Wales Wal-Mart, was asked by a tall black man where to find gloves. (S4.642-43,644-45). Later that day, he saw the news about the incident at Headley and recognized the photograph of Mr. Davis as the person who asked about gloves that morning. (S4.647-48).

Sometime later, an officer came to the store and asked him if bullets were purchased by either Mr. Davis or Randy Black. (S4.649-50). Mr. Gammons did not find a record of an ammunitions purchase, but he told the officer that Mr. Davis had been in the store the morning of the Headley incident. (S4.652). He assembled a fifteen-minute video from the cameras that captured the black male on December 13. Asset protection manager James Riley researched the UPC code on the receipt from the man's purchase and determined he purchased an orange six-can cooler. (S4.661).

Jennifer Debarros, manager of the Wal-Mart automotive department, also saw Mr. Davis in the store that morning and they discussed his son's birthday party. (S5.690). Ms. Debarros was invited to the party by Dawn Henry and planned to attend. (S5.691). Ms. Debarros did not tell anyone about her interaction with Mr. Davis for approximately two and a half years until Mr. Gammons asked her to back him up about Mr. Davis's presence in the store the morning of December 13, 2007. (S5.695-96).

The State also presented surveillance from Enterprise Rent-A-Car in Haines City from December 13 that showed Mr. Davis inside the business. (S3.439-40, State's Exhibit 9031). Enterprise

employee Mary Knight talked with Mr. Davis and his sister for fifteen or twenty minutes because their car had to be delivered from another Enterprise office. (S3.444,446). Ms. Knight had never met Mr. Davis, but she found him friendly and funny. (S3.445). They discussed the recent robbery at the BP station, and Mr. Davis retold a friend's story about a robbery at a Burger King. (S3.445,451).

The State also entered video from Mid-Florida Credit Union that showed Mr. Davis made a deposit inside the bank at 4:21 p.m. on December 13. (S5.837,842,839).

4. Mr. Davis's family

The State also called Dawn Henry, and Victoria Davis to testify about Mr. Davis's actions in the days surrounding the BP and Headley crimes.

a. Dawn Henry

Ms. Henry's son Garrion was with Mr. Davis (his father) the night of December 12, and Mr. Davis dropped him off at her house between 6:30 or 7:00 on the morning of December 13. It was Garrion's eighth birthday. (S5.850,851). She talked to Mr. Davis around 8:30 a.m. about the party at Garrion's school. (S5.852,860).

She knew there was a chance Mr. Davis would not make it to the party because he was helping his sister. (S6.861).

b. Victoria Davis

In December 2007, Ms. Davis was on bedrest due to a difficult pregnancy. She was on leave from her job at the Olive Garden. (S6.867-69). Money was tight, but not “we’re-going-to-lose-everything-tight.” (S6.873). Her credit cards were maxed out and they were a few months behind on their mortgage payments. (S6.871). Mr. Davis was driving her Altima to save money. He turned in the tag for his car and canceled the insurance. (S6.872-73). They canceled their cell phones because it was considered an extra. (S6.873). They were current on their car payments. (S6.893).

On December 7, Ms. Davis saw Mr. Davis throughout the day. (S6.875). He was wearing a t-shirt and baggy gray basketball shorts. (S7.885-86). He brought Garrion home, and went shopping between 6:00 or 7:00 p.m. (S7.875-876,883). He returned possibly around 9:00 p.m.. (S7.877,833,898-903). He took Ms. Davis and Garrion to get dinner and buy milk and was home the rest of the night. (S7.878).

B. The defense's case

The defense called witnesses from Spartan Staffing and Florida Natural Growers to challenge Mr. Ortiz's testimony that he recognized Mr. Davis from the entrance gate to the citrus plant. Florida Natural Growers was a large facility that covered at least 50 acres and had plant had six different access points. The entry/exit areas were not visible from each other. (S7.1196-97).

Spartan Staffing employed Carlos Ortiz and staffed him as temporary labor at Florida Natural. (S7.1151). Mr. Ortiz did not work for Spartan Staffing at Florida Natural at all in 2007. (S7.1184). Representatives from Spartan Staffing scanned their workers in at the east gate. (S7.1161-63,1196). Although some permanent employees used the east gate, most used other gates. (S7.1197).

Mr. Davis was employed by Florida Natural on two separate occasions. The first time was June 7, 1999, to October 21, 2005. He resigned, but came back three weeks later on November 15, 2005. He resigned again on September 7, 2007. (S7.1192). He worked in warehouse W and his entrance was through the northwest parking

lot and northwest turnstile, at least 500 yards away from the east gate used by the temporary workers. (S7.1199,1200).

Mr. Davis testified in his own defense. On December 7, 2007, he left home around 5:00 p.m. in his wife's Altima to pick up Garrion. (T9.1476,1482). He returned home around 6:15 p.m. (T9.1475-77). He left Garrion with Ms. Davis and drove to the mall around 7:15 p.m. to do some Christmas shopping. (T9.1478). He was wearing gray shorts, a sleeveless white t-shirt, and flip-flops. (T9.1479). His payday was the previous day and he had $300 in cash. (T9.1484-85). He paid cash for four shirts for his son at Dillard's and baby items for his pregnant wife. (T9.1479,1483-84). He left the mall at 8:30 or 8:35 p.m., and returned home close to 9:00 p.m. to pick up Ms. Davis and Garrion to go to Wendy's. (T9.1481). They got home after 10:00 p.m., and Mr. Davis did not go anywhere else that evening. (T9.1481-82). Mr. Davis was not familiar with the area of CR 557 where the BP station was located. (T9.1480-81).

Mr. Davis also testified that the jackets and gloves found in the Altima (State's Exhibit Nos. 120 and 121) belonged to his wife. (S9.1479,1480).

The defense also called several experts to challenge the State's eyewitness testimony.

1. Dr. Richard Marshall

Dr. Marshall was an associate professor at the University of South Florida and a child and adolescent psychologist specializing in brain function. He explained how the brain processes what the eyes see. (S8.1260-90).

2. Dr. John Brigham

Dr. Brigham was an Emeritus Professor of Psychology at Florida State University. (S8.1367-68).

Dr. Brigham testified about the five factors that affect the accuracy of eyewitness memory: stress, weapon focus, the forgetting curve, confidence, and cross-racial identification.

High stress usually interferes with the ability to encode accurate memory. (S8.1378). The ability to encode an accurate memory is diminished if stress is high. (S8.1379).

"Weapon focus" also affects eyewitness identification. When a weapon is involved in an event, a person's ability to encode an accurate memory is diminished because the weapon is likely to increase the level of stress in the situation, and people are likely to

focus their attention on the weapon rather than on the face holding the weapon. (S8.1383).

The research on cross-racial identification shows that people tend to recognize faces of persons of their own race better than faces of persons of another race. (S8.1384).

The relationship between confidence and accuracy for eyewitness memory is weaker than it is for other kinds of memory. Just because an eyewitness is confident does not necessarily mean they are accurate. (S8.1385-86).

A time lapse between the observation of a suspect and the actual identification procedure affects the accuracy of the identification for two reasons. The first is simply forgetting. When somebody perceives a situation and stores a memory, that memory starts to decay immediately. This is called the "forgetting curve."

The second reason is that the longer the time period, the greater the chance that post-event information will influence the original memory. Memory is constantly being changed by the external information that a person is exposed to, as well as by the person's own thoughts and imaginations. The longer the time period

before the memory is accessed, the more opportunity for post-event information to affect its accuracy. (S8.1388-89).

3. Dr. William Gaut

Dr. Gaut had a Ph.D. in criminal justice and worked as a consultant in the areas of security, the criminal justice system, and police work. (S9.1439).

Dr. Gault testified that a double-blind showing was the proper procedure sanctioned by the Commission on Accreditation for Law Enforcement Agencies when showing photopacks to eyewitnesses to avoid contamination of their identification. (S9.1449).

In a double-blind showing, the detective working the case procures a photo of the suspect, and then another detective unrelated to the case pulls at least five additional photographs that are similar in height, weight, clothing and general description. The prepared photopack should be administered to the witness by a detective that has no involvement in the case and has no idea who the suspect is. (S9.1449).

The photos should be shown sequentially, rather than a photospread of six at one time, to avoid the possibility that the

witness identifies a suspect through the process of elimination. (S9.1450).

All photopack and line-up showings should be recorded so it is clear what the officer administering the photopack says to the witness. (S9.1445). Voice inflection, suggestive body language, physical characteristics can also affect a showing, especially if the person administering the photopack knows the suspect is in the photopack. (S9.1446). If the officer even stares at one of the photos for an undue amount of time, that could influence the witness. (S9.1447). When a witness picks out somebody in a photopack, they should not be told if they have picked out the suspect. (S9.1448).

According to Dr. Gaut, the photopack shown to Carlos Ortiz and Brandon Greisman contained information that should not have been there. Each photo had a number associated with it. There was only one photo that had a 2007. All the others had '93 and '94. Those numbers should not have been on the photopacks. The crime occurred in 2007 and Mr. Davis is the only suspect with 2007 under the photograph. (S9.1452).

Dr. Gaut also reviewed the booking information for the individuals in the photopack. Mr. Davis was twenty-eight years old,

and the other individuals' ages ranged from seventeen to nineteen. If the suspect is in his late twenties, the photopack should have photographs of suspects that are twenty-five to thirty years old, not teenagers. (S9.1453).

The photos selected for the showing should be similar in age, weight, dress, height, marks, scars, tattoos, facial hair, etc., but not so close that the average person would not be able to tell the difference. (S9.1451). Four of the suspects in the photopack had facial hair and two did not. Mr. Davis was one of the suspects that did not. (S9.1453-54). Mr. Greisman testified that the person who shot him wore a gray shirt. There were only two people in the photopack with a gray shirt, and one of them was Mr. Davis. The other four suspects wore white shits. And the other person with a gray shirt had facial hair, and Mr. Davis did not. (S9.1454).

This photopack was in black and white, but color photographs would have been better. Black and white photos can be misleading because they do not show shades of skin and contrast. (S9.1450). In the Greisman photopack, the suspect with the darkest complexion was Mr. Davis. (S9.1455).

Once the photopack has been shown to a witness, it should be placed in a secure evidence locker or facility. (S9.1468-69).

4. Richard Smith, Jr.

Mr. Smith is the president of Media Concepts in St. Petersburg, a full-service video house dealing in equipment sales, production, duplication, and editing. (S8.1291). He was retained by defense counsel to attempt to enhance video from Enterprise Rental Car, Wal-Mart, and the BP Station.

According to Mr. Smith, the quality of the BP video was pretty bad and it was not worthwhile to attempt to enhance the video. (S8.1315-16). The Wal-Mart video was also poor quality, but he showed the video to the jury on a high-resolution monitor, and testified that if the black man in the video had tattoos on his arms, he could expect to see contrast. Mr. Smith had observed the tattoos on Mr. Davis's arms, and there was a high degree of contrast between the tattoos and Mr. Davis's skin. (S8.1310).

II. Penalty Phase

Mr. Davis waived his right to a penalty phase jury. (S10.1632).

Trial counsel stipulated to the testimony of Mr. Davis's probation officer Angela Bryson from the Headley penalty phase

that he was on probation. (S10.1640-42, State's Penalty Phase 1), as well as his certified convictions for grand theft. (S10.1642-43, State's Penalty Phase 2).

The State did not present victim impact evidence for the BP victims. Instead, the State called the medical examiner to explain the injuries the Headley victims suffered before they died (S10.1647-63), a crime scene technician to discuss the burnt skin and blood trails left behind at the Headley scene (S10.1663-72), and a police officer to recount Ms. Bustamante's dying declaration. (S10.1674-78).

Defense counsel's penalty phase presentation was limited to the transcripts of Dawn Henry's, Lynda Davis's, and India Decosey Owens's testimony from the Headley penalty phase, as well as a portion of Mr. Davis's military records related to mental health issues. (S10.1684, Defense Exhibits 1 and 2).

A. Dawn Henry

Dawn Henry and Leon Davis were in a relationship for five years and have one child together named Garrion. He born with Down Syndrome. (R33.5799). She ended their romantic relationship when Garrion was three or four years old, but Mr. Davis continued

to play a big part in Garrion's life. Mr. Davis provided for his son and Ms. Henry never had to ask for anything. (S33.5801-02). Mr. Davis was a great father, and supported her as they raised their special-needs son. (S33.5810).

Ms. Henry was a licensed practical nurse. She did not have any specialized training in mental health issues, but she knew that Mr. Davis had gotten out of the military because he tried to harm himself. (S33.5804). She had also observed his obsessive-compulsive behaviors and mood swings. He was very down and depressed on Garrion's birthday in 2007 because he could not do anything big for him. (S33.5805-06). She was afraid he was going to harm himself, even take his own life. (S33.5807). Mr. Davis called her at 5:00 p.m. on December 13. Ms. Henry confronted him with the news she had heard about Headley. He sounded so lost and confused, not at all like himself. (S33.5309). He did not seem to know what he had done. (S33.5310).

B. Linda Davis

Mr. Davis's father moved out of the home and to another state when Mr. Davis and was a toddler. Mr. Davis saw his father on vacations and holidays. (S33.5812-13). He was a "soft" skinny child

and the victim of bullying in school. One particular bully, Travis, jumped him all the time. His mother talked to plenty of parents to try to stop it. (S33.5814). When Mr. Davis was eight, he came home from school crying and very upset because Travis had sexually assaulted him. Travis held him down and put his penis in his mouth. (S33.5815). Ms. Davis spoke to Travis's mother, but she told Ms. Davis, "They are boys, you know. They was playing." (S33.5816). Despite Ms. Davis's interventions, the bullying continued. (S33.5817).

Deneen Clark moved into the Davis home when Mr. Davis was eight or nine. When Mr. Davis was twelve or thirteen, Ms. Davis moved out of the house and left Mr. Davis and Gary with Ms. Clark. (S33.5817-18). One day Mr. Davis came to visit her. He was crying and took his shirt off. "His whole back was busted." Mr. Davis told her that Ms. Clark had beaten him with an extension cord. She tried to calm him down, but he tried to run away because he thought she was going to take him back to Ms. Clark. Eventually she quieted him down and cleaned his back. She did not take him to the emergency room, even though his back looked like "a slave being whipped." She was afraid they would think she abused her

son. (S33.5821). She had a hard time getting Mr. Davis to talk about life with Ms. Clark, but once he was a grown man he told her that Ms. Clark whipped him all the time. (S33.5822).

Mr. Davis never wanted to discuss his pain and sadness, and Ms. Davis "spent [her] whole life trying to save him,"… "trying to convince Leon that that [suicide] is something you just don't want to do." (S33.5824). His suicidal ideation started in middle school, and she took Mr. Davis and Gary to a family counseling crisis center. (S33.5825). She thought he improved, but when Mr. Davis was in the Marines, he called her and told her that he wanted to kill himself. She talked to him for six hours and thought she had made a breakthrough, but she got a call from one of his friends in boot camp that Mr. Davis was in the hospital in a coma because he "ran his car up to over 100 miles per hour and hit a concrete pole." (S33.5827-28). Mr. Davis got a medical discharge from the Marines and came home. (S34.5836). His mood swings and suicidal ideation got worse after his discharge. She tried to convince him that if he killed himself, he would harm her too because they were very close. He always tried to hide his emotional breakdowns. (S34.5837-38). When he showed her the gun in his garage in December 2007, her

first reaction was fear that he would kill himself. She did not want to put that thought in his head, so she told him to get rid of it to avoid getting in trouble with probation. (S34.5839).

Mr. Davis's mental health took another turn when he got married. Ms. Davis did not think her son was ready for marriage, and Mr. Davis and Vicky both had their own personal issues that "just [didn't] go together." (S34.5840).

When Ms. Davis and Noniece picked Mr. Davis up at McDonald's on December 13, Ms. Davis confronted him with what she had heard about the Headley crimes as soon as he got in the car. Mr. Davis held his head and cried. She told him the media said he had hurt somebody. Leon asked, "I hurt somebody?" (S34.5841). He cried uncontrollably and said, "Ma, I didn't hurt nobody" and put his head in her lap. He did not stop crying from the time she picked him up until they reached the police station. (S34.5843-44).

C. India Decosey Owens

Ms. Owens had witnessed many of Mr. Davis's obsessive-compulsive behaviors, but she had never seen anything like his behavior on December 13 when he locked all her doors inside her

house from the inside, and even locked her out of her bathroom.. (S34.5846).

When Ms. Owens and Barry picked up Mr. Davis at the Circle K, he was crying "like a seven-year-old, laying in my mom's arms." He was hysterical, asking several times "Did I hurt somebody?" He mumbled and cried during the drive to the police department, but she could not hear what he said. (R34.5848).

According to Ms. Owens, her "kid brother" was a compassionate, loving, selfless man who helped her through two miscarriages. She was a disabled vet with a back injury. He helped her get through her first Christmas alone after her husband left her. Mr. Davis was always there for her. (S34.5849).

After their father left home, the family was "somewhat busted up." Ms. Owens and her sister ended up in Fort Walton Beach with her stepfather, and then they were separated in foster care. Mr. Davis and Garry were not with them, but she did not remember what happened to them. (S34.5851).

Ms. Owens was out of foster care and back at her mother's home when Deneen Clark moved in. (S34.5852). Ms. Clark was an alcoholic who consumed a twelve-pack or more daily. (S34.5854).

She was a hateful woman. She beat them, punched them in the face, and kicked them. (S34.5855). She called Mr. Davis a punk, a fagot, and told him he was a pussy because he could not stand up for himself and fight. She beat him with extension cords and water hoses and punched him in the chest. Her abuse would leave him bleeding with welts, open scabs, and sores on his back, legs, chest and ribs. (S34.5856-57). Ms. Clark's abuse got so bad that Ms. Owens once pulled a gun on her. After this incident, her mother moved her in with a family friend, but the boys continued to live with Ms. Clark. (S34.5857). Mr. Davis was finally taken out of the house and away from Ms. Clark when she beat him so bad that the skin on his back, his legs and his butt was ripped wide open. (S34.5859).

Mr. Davis and his brother were smaller than the other kids and bullied from kindergarten through high school. Mr. Davis was even sexually assaulted by one of his bullies. (S34.5852-53). He tried to pretend it never happened. His obsessive-compulsive behavior and desire for everything to be perfect were consequences of living in an abusive environment all those years. (S34.5860-61).

III. The postconviction evidentiary hearing

At Mr. Davis's evidentiary hearing, the circuit court heard testimony from defense witnesses Robert Norgard, James Kwong, Dr. Jeff Salyards, Leon Davis, and Officer Lynette Townsel. The State called one witness, Dr. James Hamby.

Robert Norgard is an attorney at Norgard, Norgard & Chastang in Bartow, Florida. (PCR.3323). He has been an attorney since 1981. He has been in private practice since 1995. His practice is entirely criminal defense work, and he predominantly handles more serious cases. (PCR.3324). He is board certified in criminal trial practice. (PCR.3330). He worked on his first death penalty case when he was employed with the Public Defender's Office for the Sixth Circuit. After three-and-a-half years at the Sixth Circuit, he worked at the Public Defender's Office for the Tenth Circuit for ten years. He was in the capital division for most of his time at the Tenth Circuit and was routinely assigned first-degree murder cases. (PCR.3327-28). Mr. Norgard has tried more than thirty-five death penalty cases. (PCR.3331). He has also served as an expert witness in capital postconviction cases, as well as postconviction counsel in approximately twelve cases. Although he has done a few capital

appeals, his wife does a lot of capital appellate work and advises him on appellate issues that deal with first-degree murder cases. (PCR.3332-33).

Mr. Norgard was involved with the Florida Association of Criminal Defense Lawyers in the formalization of qualifications to handle court-appointed capital cases. Mr. Norgard has been "death qualified" since 1995 or 1996. He described the requirements for death qualification as "pretty minimal." (PCR.3329).

Mr. Norgard was court-appointed to represent Mr. Davis. His wife, Andrea Norgard, was co-counsel. He performed the courtroom work. She performed legal research, reviewed the discovery, and took the lead on penalty phase preparation. They conferred on tactics and strategy. (PCR.3325-26).

A. The BP surveillance video

Mr. Norgard testified that he received the BP station's surveillance video evidence from the State prior to trial and his investigator reviewed the video with Mr. Davis. (PCR.3428-29). At timestamp 20:53:55, a person walked towards the camera. Within two seconds after the person walked by, a vehicle appeared in the camera's view. (PCR.3430). The vehicle looked like an SUV.

(PCR.3431). The vehicle appeared to keep going out of the view of the camera in the same direction as the person. (PCR.3432). Mr. Norgard did not think he could have used this video to argue that the SUV was a possible getaway driver that picked up the individual involved in the crime. (PCR.3433).

Mr. Davis testified at the evidentiary hearing about the BP station surveillance video. Mr. Norgard's investigator Jack Miller tried to show the footage to him on a portable DVD player at the county jail. (PCR.3503). Unfortunately, the disk was in a format that would not play on a DVD player. No further attempts were made to show Mr. Davis the video. He never saw the footage before trial. (PCR.3504).

B. The Greisman photopack

Officer Lynette Townsel testified at the evidentiary hearing about the photopack she showed to Mr. Greisman. She admitted that during an evidence review in the property room at the State Attorney's Office on May 7, 2010, she realized that the Greisman photopack was missing *entirely*. There was not even a copy of the photopack in evidence. This resulted in a department-wide search

for the missing evidence. The photopack was eventually discovered on June 2, 2010, in a box in her backyard shed. (PCR.3290-91).

Officer Townsel was disciplined by the department for her mishandling of this critical evidence. The disciplinary report and related materials were placed in her personnel file. (PCR.3291-92; Defense Exhibit 2). The documents included memos written by Captain Foy and Chief Gillis, regarding the missing photopack and Officer Townsel's failure to follow department procedure. (PCR.3292-94). The final disciplinary report was issued on June 10, 2010, prior to Mr. Davis's trial. (PCR.3294).

Officer Townsel agreed that her trial testimony in September 2012 was not true. (PCR.3296). She testified that she placed a copy of the Greisman photopack in evidence at the Lake Wales Police Department property room, when in fact she had not. The Greisman photopack was completely missing from December 14, 2007, until June 2, 2010, when she found it in her shed. (PCR.3317-18).

Mr. Norgard recalled the evidence viewing where the parties discovered that the Greisman photopack was missing. (PCR.3452). He had no independent recall of Officer Townsel's testimony at trial about placing a copy of the photopack in evidence. He also had no

knowledge of whether or not she had been disciplined for mishandling the evidence. (PCR.3454). He disagreed that had he known at trial that Officer Townsel was disciplined for negligently stashing the critical piece of evidence in a box in her backyard storage shed, that he would have used that to impeach her. (PCR.3457). He also would not have impeached her over her false testimony that there was always a copy of the photopack in evidence even though he felt it was "pretty much self-evident" that "independent of the reprimand it shows that she was careless and negligent with handling of evidence." (PCR.3459,3467).

C. The ballistics evidence

Mr. Norgard used Google to research the firearms and toolmarks evidence to prepare for trial. (PCR.3470). He was familiar with "various thoughts and efforts on how to attack the science of ballistics," but had not attended any professional seminars or CLEs that discussed those methods. He might have reviewed the 2008 report by the National Research Council titled "Ballistic Imaging" that concluded that assumptions of uniqueness and reproducibility of firearms-related toolmarks have not yet been fully demonstrated. Although he was aware "there's a school of thought that feels this

way," he did not feel there were any experts he could bring in to debunk the "science" of ballistics. (PCR.3471-72).

Rather than challenge the pseudoscience of firearms and toolmarks examination, he embraced it. According to Mr. Norgard, no defense attorney in his circuit had challenged the scientific basis for a firearms examiner's testimony. (PCR.3485). He was not concerned that no gun was recovered for the examiner to test-fire because the State's expert compared the bullets. (PCR.3473). According to Mr. Norgard, "I mean if the bullets match, they could not have come from different guns. They would have to come from the same gun." (PCR.3474).

Mr. Norgard consulted with firearms and toolmarks examiner Terry LaVoy to perform the same bullet comparison performed by Mr. Kwong. He would have called Mr. LaVoy as a witness if he disagreed with Mr. Kwong's findings, but that was not the case. (PCR.3472-73). Mr. Norgard looked for an expert to challenge the science behind firearms and toolmarks examination, but he could not find anyone for Mr. Davis's trial. According to Mr. Norgard, he is still looking for someone. (PCR.3474-75).

The prosecutor argued in closing that all the bullets in the Headley case and the BP case were fired from the same gun, and they were fired from the gun that Mr. Davis bought from his cousin. (S9.3477). Mr. Norgard did not object to the comments, even though he thought it was an obvious exaggeration of the evidence. Mr. Davis's trial was a bench trial with a very experienced judge, and Mr. Norgard felt the judge knew the prosecutor's argument was an overstatement. He did not object even though he agreed that contemporaneous objections are the best way to preserve the record for appeal. (PCR.3478-79).

1. James Kwong

James Kwong was the State's firearms and toolmarks expert at trial. Mr. Davis's postconviction counsel called him as a witness at the evidentiary hearing. Mr. Kwong examined the bullets and bullet fragments from the BP and Headley crime scenes. He determined that all of the intact bullets were .38 caliber class. He could not determine the caliber of the fragments because the diameter of a fragment cannot be measured. (PCR.3120). The .38 caliber class includes the .38 Special, the .357 Magnum, the .380 Auto, and the 9mm calibers. (PCR.3121). Mr. Kwong could not narrow it down any

further. (PCR.3128). There was no gun recovered, so he could not perform test fires to compare the specimen bullets. (PCR.3129).

Mr. Kwong photographed his bullet comparisons, and noted that there were good areas of correspondence, but also conceded there were some areas that did not correspond. There were striations within the areas of good correspondence. Striations are "basically pilar marks or scratching marks or scraping marks on the side of the bullet as the bullet travel[s] through the barrel coming in contact with [the] interior surface of the barrel." (PCR.3130). He did not measure the distance between each single striation. (PCR.3131).

Mr. Kwong had been a regular member of the Association of Firearms and Toolmarks Examiners since 1999. (PCR.3131). There were no educational requirements for membership in the organization. (PCR.3132). Mr. Kwong testified that he "absolutely" agrees with the AFTE theory of identification. (PCR.3133-36).

Mr. Kwong also testified about specific terms in the AFTE theory of identification, such as "practical impossibility" which means that examiners cannot compare the bullets to every gun that has ever been made, or even every gun currently in existence. He

could not attach a number to “practical impossibility” because there were no statistical studies of the firearms and toolmarks examination discipline. (PCR.3137).

Firearms and toolmarks comparison is a discipline of pattern recognition and pattern matching. (PCR.3140). When Mr. Kwong looked through his microscope and compared two bullets, he visually compared the spatial relationship between each line. (PCR.3143). He did not measure them to get a precise number because there are just too many to measure. (PCR.3144). It would take too long to make such precise measurements on any specific case and he did not have time. He was required to work 180 cases a year by the Legislature or he would be fired. (PCR.3145).

Firearms and toolmarks examiners did not have a database that held the agreements demonstrated between toolmarks produced by different tools. Examiners were required to hold in their minds the hundreds of comparisons they made during their training and throughout their careers. (PCR.3138). Each examiner had to come up with their own criteria for the best agreements of bullets fired from different guns. Because of this, comparisons were subjective in nature. (PCR. 3139).

2. Dr. Jeff Salyards

Although Mr. Norgard claimed that he still had not found an expert who could challenge the science behind forensic firearms and toolmarks examination, postconviction counsel hired forensic scientist Dr. Jeff Salyards to do just that at the evidentiary hearing. Dr. Salyards had a Ph.D. in analytical chemistry, a master's degree in forensic science, and a year-long fellowship in forensic medicine. (PCR.3188). Dr. Salyards was a consultant with Compass Scientific Consulting and provided education to the legal and law enforcement communities in such forensic disciplines as firearms and toolmarks, drug chemistry, toxicology, and microscopic hair comparisons. (PCR.3187,3217). He was also employed by Iowa State University's Center for Statistics and Applications in Forensic Evidence. (PCR.3188).

Dr. Salyards served as the director of the Defense Forensic Science Center and supervised over 350 employees, including various examiners in the forensic science disciplines. He was also the director of the Defense Forensic Computer Forensics Lab, assistant chemistry professor at the United States Air Force Academy, and a special agent and forensic science consultant in the

Air Force Office of Special Investigations. (PCR. 3188). He also served as the chief scientist at the United States Army Crime Lab. He designed research projects, selected performers of those projects, monitored their work, and helped those projects reach fruition. (PCR.3188,3190).

Dr. Salyards served on various boards and committees related to forensic science. He was a member of the National Commission of Forensic Science. He was also on the subcommittee on forensic science from the White House Office of Science and Technology Policy and held a seat on the American Society of Crime Laboratory Directors board of directors. Dr. Salyards was a fellow of the American Academy of Forensic Sciences. (PCR.3189).

Dr. Salyards had experience with firearms and toolmarks research. He helped design a validation study on firearms and toolmarks, funded by the Department of Energy, known as the Ames Study. The goal was to design a clean validation study to establish error rates among firearms and tool marks examiners. The 2016 Presidential Commission of Advisors in Science and Technology (PCAST) Report commended the Ames Study for its proper design. (PCR.3191-92).

Dr. Salyards was not a firearms and toolmarks examiner by trade, but that was not required to design and conduct studies to measure error rates. (PCR.3207). In fact, firearms and toolmarks examiners were not the best group to run an error rate study of their own field. Most firearms and toolmarks examiners have a vested interested. It was their profession, they were taught this dogma, and they wanted it to work. (PCR.3208).

If Dr. Salyards had been retained as an expert by Mr. Davis's trial counsel in 2011, he would have been able to testify to the concerns of the larger scientific community about the limitations of firearms and toolmarks examination as a scientific discipline. He also could have testified about why an error-rate study of firearms and toolmarks examiners was necessary. (PCR.3247-48). According to Dr. Salyards, the firearms and toolmarks community was divorced from the methods and tools of the larger scientific community that would make identification much more robust. (PCR.3200).

Dr. Salyards testified that there were some real challenges with the AFTE's theory of identification that would make any mainstream scientist raise their eyebrows. The theory of

identification used the phrase “sufficient agreement.” In science, there were measures for agreement and correlation. The AFTE defined “sufficient agreement” as a significant duplication. “It’s sufficient when the duplication is significant if the agreement is sufficient and round and round you go.” (PCR.3196).

Dr. Salyards was also concerned with the AFTE’s use of the word “significance.” It suggested to people who have been around science and statistics that the examiner had done something where they now had a measure of that significance and triggered that threshold, and that it was rigorous, universal, and repeatable. Unfortunately, that sort of analysis had not actually been completed and was missing from the AFTE’s current practice. (PCR.3197).

Moreover, the language “practical impossibility” was not scientific. Mainline scientists did not boast about how well they knew things; rather, they boasted about how well they did not know them. Scientists always disclosed their error rates. (PCR.3206-07). In a criminal case where a jury had to consider reasonable doubt, the examiner’s error rate was important. (PCR.3234).

The AFTE theory of identification was also problematic in criminal cases because the theory required the examiner to hold in

their mind a database of all the cartridge cases, bolts, and toolmarks they have reviewed, and then compare them to a specific case and determination if this one was similar than the most similar ground truth exclusion. (PCR.3205). According to Dr. Salyards, that was like asking a DNA examiner to remember all the cases they have worked on in their career in order to make a match. However, such an expectation was commonplace within the AFTE community. "[I]t suggests to the fact finder that some database has been compared to that doesn't really exist." (PCR.3206).

Dr. Salyards expressed concern about Mr. Kwong's testimony about the practicality of taking measurements of marks seen on the grooves and on the lands. Dr. Salyards considered that to be "an inconvenient truth." If the examiner's findings are based on width, depth, and height of certain things, they should actually be measured. (PCR.3211-12). Dr. Salyards conceded that maybe a qualified firearms and toolmarks examiner was trained to know which marks to give more weight and which ones to ignore, but he would still expect the comparison to be annotated to explain the dissimilarity and why certain similarities were more important than the parts that did not match. (PCR.3212).

According to Dr. Salyards, relying on the depth and width of striations was a step in the right direction for the AFTE, because those were all measurable qualities and it suggested those widths and depths would actually be measured with something as simple as a ruler. However, the AFTE did not require examiners to measure those qualities. (PCR.3198). Further, Dr. Salyards disagreed with Mr. Kwong's testimony that the "bar code of striations" was impossible to measure. According to Dr. Salyards, it just required nuance and mathematical algorithms that were not new technology. (PCR.3199-200).

Forensic labs have quality assurance programs where second examiners provide a verification, but those are easily confused with error versus mistake/nonconforming work. Even if the comparison was done perfectly according to the AFTE theory of identification, there would be a false positive and a false negative rate. (PCR.3202). Error rates were not measured by quality control programs. Errors reflected the fundamental limitation of the method that was used, not some random misbehavior by the examiner. (PCR. 3203). And the ethics and integrity of the examiner in a subjective discipline

does not overcome a method that has an error rate. The error rate is what it is. (PCR.3232).

Proficiency testing is not a good substitute for a properly formatted error rate study. (PCR.3239). With proficiency tests, there is often not a large enough sample and there is some indication across all forensic science disciplines that proficiency tests are too easy. (PCR. 3209). They are also testing more than just an error rate of the examiner. They are testing the entire process of the larger laboratory. (PCR.3209-10).

The bullets in Mr. Davis's case were damaged. (PCR.3210). Dr. Salyards testified that a research study was needed that evaluated what happened to the examiner's false positive rate when they encountered degrees of damaged bullets and various sizes of fragments. (PCR.3235-36). As a physical scientist, Dr. Salyards would want to graph the accuracy rate based on the amount of bullet or the distortion of the bullet to be examined. Under the AFTE theory of identification, the decision rested with the individual examiner to determine if there was enough jacketing to make a comparison. (PCR.3236).

Also, there was no weapon recovered in the BP and Headley cases. The examiner could not make test fires, and that removed the ability for the examiner to determine if something was really an individual characteristic or a subclass characteristic. That could not be determined without test fires. Nobody knows how that would have affected the error rate of Mr. Kwong's identification, but Dr. Salyards testified that studying error rates and learning how good examiners actually were at making comparisons was something that should be well-known before they were allowed to testify in a criminal case that two questioned bullets matched. (PCR.3211).

3. Dr. James Hamby

The State called retired firearms and toolmarks examiner Dr. James Hamby as a rebuttal witness to defend his profession and rebut Dr. Salyards's testimony. (PCR.3252). He started his training with the United States Army Criminal Laboratory on August 1, 1970, and was certified on August 1, 1972. (PCR.3253,3259). He wrote his Ph.D. thesis in forensics firearms examination in 2001. (PCR.3263).

Dr. Hamby had been a member of the AFTE since 1971. (PCR.3257). The AFTE was formed in 1969, but firearm and

toolmarks examination were first used in the United States as early as 1907. (PCR.3254-55). AFTE did not create a new theory of examination, it merely codified what firearms and toolmarks examiners had been doing for years. (PCR.3259). Dr. Hamby was one of the authors of the AFTE training manual published in 1982. (PCR.3256-57). He trained examiners around the world. (PCR.3262).

Dr. Hamby insisted that examiners can distinguish between a bullet from one consecutively manufactured barrel versus the second one, and “differentiate between one to two to three all the way up to ten or however many.” (PCR.3263-64).

Dr. Hamby claimed the literature he had reviewed suggested that the error rate for firearms and toolmarks examiners was “under 1 percent, 1 to 1.2.” (PCR.3267). He did not identify the source(s) of the literature.

Dr. Hamby conceded that the determination of whether there was an identification, elimination, or an inconclusive result was the subjective opinion of the examiner. (PCR.3273).

SUMMARY OF ARGUMENT

ISSUE 1:

At Mr. Davis's trial, the State knowingly presented false and misleading testimony from Officer Townsel that she placed a copy of the Greisman photopack into the property room at the Lake Wales Police Department. That was simply not true, the State knew it was not true, and this testimony violated *Giglio v. United States*.

ISSUE 2:

The State withheld Officer Townsel's personnel file from trial counsel in violation of *Brady v. Maryland*. The file contained valuable impeachment information that showed Officer Townsel lied at trial when she testified that there was always a copy of the Greisman photopack in the property room at the police department, even when the original was misplaced in her backyard shed. The suppressed records also showed that Officer Townsel was disciplined for her misconduct.

ISSUE 3:

Trial counsel was ineffective because he failed to investigate the ballistics evidence and effectively cross-examine the State's

ballistics expert at trial. But for counsel's deficient conduct, the outcome of the trial would have been different.

ISSUE 4:

Trial counsel was ineffective because he failed to effectively investigate and challenge the ballistics evidence at trial. Trial counsel failed to hire an expert who could help challenge the pseudoscience of firearms and toolmarks examination and assist in his preparation to cross-examine the State's ballistics expert. But for counsel's deficient conduct, the outcome of the trial would have been different.

ISSUE 5:

Trial counsel was ineffective because he failed to use the available BP station surveillance video to challenge the State's theory that there was only one perpetrator of the BP crimes. But for counsel's deficient conduct, the outcome of the trial would have been different.

ISSUE 6:

Trial counsel was ineffective because he failed to cross-examine the State's law enforcement witnesses about the existence of dash cam video of the Headley scene that mysteriously

disappeared before trial. The motions, files, and records in this case do not conclusively show that Mr. Davis is entitled to no relief. But for counsel's deficient conduct, the outcome of the trial would have been different.

ISSUE 7:

Trial counsel was ineffective because he allowed the State to use the floor mats from the Nissan Altima against Mr. Davis even though the search warrant was stale and improperly executed. The motions, files, and records in this case do not conclusively show that Mr. Davis is entitled to no relief. But for counsel's deficient conduct, the outcome of the trial would have been different.

ISSUE 8:

Trial counsel was ineffective because he allowed the State to use the Greisman photopack against Mr. Davis, that also bolstered Mr. Greisman's in-court identification of Mr. Davis, even though it was improperly stored in a backyard shed for almost three years. The motions, files, and records in this case do not conclusively show that Mr. Davis is entitled to no relief. But for counsel's deficient conduct, the outcome of the trial would have been different.

ISSUE 9:

Repeated instances of ineffective assistance of counsel so tainted Mr. Davis's trial that he did not receive the fundamentally fair trial he was entitled to under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution.

ISSUE 10:

The circuit court erred in granting the State's motion to summarily deny Mr. Davis's Claim 17 of his Rule 3.851 motion and exclude all mental health testimony or evidence from any source without conducting a colloquy with Mr. Davis to determine the necessity for a competency evaluation.

ARGUMENT

ISSUE 1:

THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS'S CLAIM THAT THE STATE PRESENTED FALSE AND/OR MISLEADING EVIDENCE IN VIOLATION OF *GIGLIO V. UNITED STATES*

I. Applicable law

The State violates a defendant's right to due process when the prosecutor presents false or misleading evidence and/or argument. *Giglio v. United States*, 405 U.S. 150, 152 (1972), *citing Mooney v. Holohan*, 294 U.S. 103, 112 (1935) ("deliberate deception of a court and jurors by the presentation of false evidence is incompatible with 'rudimentary demands of justice.'")

To establish a violation under *Giglio v. United States*, the defendant must show that: (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the evidence was material. *See Tompkins v. State*, 994 So. 2d 1072, 1091 (Fla. 2008); *Guzman v. State*, 868 So. 2d 498 (Fla. 2003). Knowledge of false testimony is imputed to everyone in the state attorney's office. *Giglio v. United States*, 405 U.S. at 154.

"If there is a reasonable possibility that the false testimony may have affected the judgment of the jury, a new trial is required." *Craig v. State*, 685 So. 2d 1224, 1226 (Fla. 1996). The State, as the beneficiary of the *Giglio* violation, bears the burden of proof that the presentation of the false testimony at trial was harmless beyond a reasonable doubt. *Guzman v. State*, 868 So. 2d at 506.

This Court applies a mixed standard of review for *Giglio* claims, deferring to the factual findings made by the circuit court to the extent they are supported by competent, substantial evidence, but reviewing *de novo* the application of those facts to the law. *See Duckett v. State*, 231 So. 3d 393 (Fla. 2017).

II. The State violated *Giglio v. United States* when the prosecutor allowed Officer Townsel to give false and misleading testimony that she placed a copy of the Greisman photopack in evidence

At Mr. Davis's trial, the State knowingly presented false and misleading testimony from Officer Townsel that she placed a copy of the Greisman photopack into the property room at the Lake Wales Police Department in compliance with department procedures. That was simply not true, and the Sate knew it was not true.

The following exchange occurred at trial:

BY MR. WALLACE:

Q: Briefly. Um, **Lynette, tell the Judge how it turned out that the original of the photopack ended up in a file folder in your garage with just a copy being put into evidence**, explain how that happened?

MR. NORGARD: Well, first of all that assumes facts not in evidence. There wasn't even a copy in evidence.

Q: (By Mr. Wallace) **Did you have a copy put actually into the Lake Wales Police Department property room?**

A: **Yes.**

Q: Not the original?

A: Right.

***

Q: **And did someone from you agency make you aware of that fact that what they had did not appear to be the original?**

A: **Yes.**

Q: Did you look at that to determine in your own mind whether or not what you were looking at was the original or not the original?

A: Yes.

Q: **And what conclusion did you come to by looking at what actually was in property?**

A: **That all we had was copies.**

(S6.988-90) (emphasis added).

The first prong of *Giglio* is satisfied because this entire line of questioning was misleading and false. Officer Townsel did not put a copy of the Greisman photopack into the Lake Wales Police Department property room. Officer Townsel never looked at the "copy" of the photopack that was in evidence and determined that it was not the original because there was not a copy in evidence for her to look at. The conclusion that "all we had was copies" was not true. The conclusion that Officer Townsel would have reached when she reviewed the evidence in the property room was that the photopack she showed to Brandon Greisman was *entirely* missing and she better find it fast.

The second prong of *Giglio* is satisfied because this information was known by the Lake Wales Police Department, and that knowledge was imputed to everyone in the Tenth Circuit State Attorney's Office. Moreover, the prosecutor was present during the evidence review in May 2010, and there was not a copy of the photopack in evidence during that review.

The third prong of *Giglio* requires that the evidence is material. Mr. Greisman proved to have a very poor memory and it was necessary for the State to bolster his identification of Mr. Davis with the photopack. This testimony was material because it was used to bolster the authenticity of the photopack used at trial, and bolster Mr. Greisman's in-court identification of Mr. Davis. If the trier of fact had known the truth, that the photopack used to identify Mr. Davis had been missing since December 14, 2007, it would have undermined confidence that the mishandled evidence was in its original condition.

The circuit court misapprehended the trial record when he denied this claim. The trial court cited to Officer Townsel's testimony during re-cross that "her reason for believing a copy had been entered into evidence was that someone had informed her the defense had a copy of this photopack." (S6.992;PCR.3668). This testimony was *stricken from the record* after the following exchange between trial counsel, the prosecutor, and the court:

MR. NORGARD: The only thing I want to do, to clean up the last piece of the alleged - - of the testimony, she said that whether or not the defense had a photo copy of the photo pack was something

	she was told by somebody. That's obviously based on hearsay. She had no first-hand knowledge of that, so I would ask that that be - - that objection be granted, and that testimony be stricken.
THE COURT:	Any comments, Mr. Wallace?
MR. WALLACE:	Your Honor, I have no objection to that, My recollection is she's talking about there being a copy in the property room. She would have no idea what was provided to defense counsel.
THE COURT:	So I'll sustain the objection concerning her hearsay statement about anything that might have been said about the defense being provided a copy.

(S6.992-83).

Officer Townsel's false and misleading testimony at trial that a copy of the photopack was entered into evidence was not "immediately clarified upon questioning by Mr. Norgard." (PCR.3668). The court actually struck the testimony he relied on in his postconviction order, and the prosecutor reinforced Officer Townsel's testimony that she was "talking about there being a copy in the property room. She would have no idea what was provided to defense counsel." (S6.993).

III. Prejudice

The State's failure to correct this false and misleading testimony at trial prejudiced Mr. Davis and violated his due process rights. In the order denying this claim, the circuit court used Officer Townsel's testimony at the evidentiary hearing to excuse any *Giglio* violation with that the photopack found in the shed in her backyard was unaltered. (PCR.3668). However, Officer Townsel's testimony is not credible. She gave false testimony during Mr. Davis's trial, and she was confronted with this on the stand at Mr. Davis's evidentiary hearing. There is a reasonable possibility that this false testimony affected the judgment of the factfinder in this case, as it improperly bolstered Mr. Greisman's identification of Mr. Davis. His identification was critical in this case because there was no physical evidence placing Mr. Davis at the scene of the crime. The State cannot prove that the presentation of this false testimony was harmless beyond a reasonable doubt.

ISSUE 2:

THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS'S CLAIM THAT THE STATE WITHHELD MATERIAL AND EXCULPATORY EVIDENCE IN VIOLATION OF *BRADY V. MARYLAND*

I. Applicable law

Mr. Davis's trial was afflicted with violations of *Brady v. Maryland*, 373 U.S. 83 (1963). In order to prove a *Brady* violation, a defendant must establish that the government possessed evidence that was suppressed, that the evidence was "exculpatory" or "impeachment" in nature, and that the evidence was "material." *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527 U.S. 263 (1999). Evidence is "material" and a new trial or sentencing is warranted "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different." *Kyles v. Whitley,* 514 U.S. at 533-34; *Hoffman v. State*, 800 So. 2d 174 (Fla. 2001); *Rogers v. State*, 782 So. 2d 373 (Fla. 2001); *Young v. State*, 739 So. 2d 553 (Fla. 1999). "It is irrelevant whether the prosecutor or police is responsible for the nondisclosure; it is enough that the State itself fails to disclose." *Garcia v. State*, 622

So. 2d 1325, 1330 (Fla. 1993). The State is charged with constructive knowledge and possession of evidence withheld by other state agents, including law enforcement officers." *Jones v. State*, 709 So. 2d 512, 520 (Fla. 1998) (internal citations omitted).

A proper materiality analysis under *Brady* must also contemplate the cumulative effect of all the suppressed information. The burden of proof for establishing materiality is less than a preponderance. *Williams v. Taylor*, 529 U.S. 362 (2000); *Kyles v. Whitley*, 514 U.S. at 434. The suppressed information must be evaluated in light of the effect on the prosecution's case as a whole and the "importance and specificity" of the witnesses' testimony. *United States v. Scheer*, 168 F.3d 445, 452-53 (11th Cir. 1999).

The determination of whether a *Brady* violation has occurred is subject to independent appellate review. *See Cardona v. State*, 826 So. 2d 968 (Fla. 2002). "A *Brady* claim presents a mixed question of law and fact. Therefore, the Court will defer to the lower court's factual findings if they are supported by competent, substantial evidence, but will review the court's application of law to the facts *de novo*." *Barwick v. State*, 88 So. 3d 85, 102 (Fla. 2011).

II. The State violated *Brady v. Maryland* when it withheld Officer Lynette Townsel's personnel file

At Mr. Davis's trial, the State presented the testimony of Officer Townsel of the Lake Wales Police Department. She administered a photopack to Headley victim Brandon Greisman. Mr. Greisman identified Mr. Davis from this photopack as the individual who shot him in the face. Prior to trial, the parties discovered that this photopack was missing. After an exhaustive search by Officer Townsel and the police department, this critical piece of evidence was discovered with boxes of old case files in Officer Townsel's shed. At trial, she testified that although the original photopack was missing, she had placed a copy in the property room. (S6.989-90). If the jury believed Officer Townsel, the stowing of critical evidence with old case files in her shed was no big deal, especially since she claimed there was a copy of the photopack in evidence during the time that the original was missing.

The records Mr. Davis received during his postconviction investigation tell a different story. Mr. Davis received a copy of Officer Townsel's personnel file. This file was not in the records Mr.

Davis's postconviction counsel received from trial counsel, which indicates that trial counsel never received the file. Officer Townsel's personnel file contained memos by Captain Foy and Chief Gillis stating that after an exhaustive search of all records and files within the Lake Wales Police Department and the evidence section of the Polk County Sheriff's Office, the photopack in question did not exist. (PCR.3292-94). The postconviction investigation clearly showed that the Greisman photopack was missing—with no available copies—from the day Officer Townsel showed it to him at the Lake Wales Police Department on December 14, 2007, until the day she found it in a storage shed in her backyard on June 2, 2010.

The undisclosed documents show that there was never a copy of the photopack in evidence, and Officer Townsel was punished by the police department for her careless handling of evidence. She was suspended for three days in June 2010. (PCR.3291).

The first prong of a *Brady* violation requires that the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching. The documents in Officer Townsel's personnel file are impeachment evidence. It contradicted her testimony at trial that she had placed a copy of the Greisman

photopack in evidence. Had this evidence been provided to trial counsel, he could have impeached her testimony and shown the jury the extent of her mishandling of this critical evidence.

The second prong of a *Brady* violation is satisfied because Officer Townsel was an employee of the Lake Wales Police Department, one of the investigative agencies involved in the Headley case. The police knew that she was punished for violating procedure, and that documentation of her misconduct and punishment was in her personnel file. *Brady* requires that the prosecutor learn of any favorable evidence known to the officers investigating the case.

The circuit court's order denying this claim was based on the same misapprehension of the trial record as in the *Giglio* claim discussed in Issue 1, *supra*. Although trial counsel attempted to elicit testimony that showed there was never a copy of the photopack in evidence, the last word to the trier of fact was the prosecutor's insistence that when Officer Townsel talked about the defense having a copy, "she's talking about there being a copy in the property room." (S6.993).

III. Prejudice

Finally, the third prong of a *Brady* violation is satisfied because Mr. Davis was prejudiced by State's withholding of valuable impeachment evidence. "Evidence is prejudicial or material under *Brady* if there is a reasonable probability that had the evidence been disclosed, the result of the trial would have been different." *Jones v. State*, 998 So. 2d 573, 579 (Fla. 2009), *citing Bagley*, 473 U.S. 667, 668. "The critical question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence the verdict." *Jones*, 998 So. 2d at 580; *see also Strickler*, 527 U.S. at 290; *Kyles,* 514 U.S. at 435.

This was not a "no harm, no foul" situation. The Lake Wales Police Department failed to maintain custody of a critical piece of evidence. The State Attorney's Office failed to disclose Officer Townsel's personnel file which documented the extent of the failure. This evidence, when taken together with all the evidence in this case, especially the haphazard way the Lake Wales Police Department handled other critical evidence in this murder

investigation, demonstrates that Mr. Davis's conviction is unreliable.

Officer Townsel could have been impeached and the credibility of the police investigation could have been undermined by this evidence. In this circumstantial case, the State's ability to identify the perpetrator was key. Because the surveillance footage from the BP gas station was grainy and the perpetrator's face was concealed, the State used evidence from the Headley case to identify Mr. Davis as the perpetrator in the BP case. Brandon Greisman's identification of Mr. Davis as the individual who shot him in the face at the Headley scene was critical to the State's case. When this suppressed information is evaluated in light of its effect on the prosecution's case as a whole, it weakens an already weak circumstantial case against Mr. Davis.

"The question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same." *Kyles*, 514 U.S. at 453 (1995). Certainly, in this case, confidence that the jury's verdict would have been the same cannot

survive a recap of the suppressed evidence and its significance for the prosecution.

ISSUE 3:

THE CIRCUIT COURT ERRED IN FINDING TRIAL COUNSEL WAS NOT INEFFECTIVE BECAUSE HE FAILED TO EFFECTIVELY CROSS-EXAMINE JAMES KWONG

I. Applicable law

Trial counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Specifically, counsel has a duty to investigate in order to make the adversarial testing process meaningful. *Id.* at 690. An ineffective assistance of counsel claim has two components. The defendant must show that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687. Prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Id.* at 694.

The Eighth Amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. *Beck v. Alabama*, 447 U.S. 625 (1980). The United States Supreme Court noted, in the context of ineffective assistance of counsel that the correct focus is on the fundamental fairness of the proceeding:

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

Strickland, 466 U.S. at 696.

One of the primary duties defense counsel owes his client is the duty to prepare himself adequately prior to trial. Pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is perhaps the most critical of stage of the lawyer's preparation. *See Magill v. Dugger*, 824 F.2d 879, 886 (11th Cir. 1987).

Importantly, trial counsel cannot be found to have made a strategic decision when he failed to fully investigate the evidence. *Strickland*, 466 U.S. at 690-91; *Wiggins v. Smith*, 539 U. S. 510, 527 (2003) (a reviewing court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further); and *Henry v. State*, 862 So. 2d 679, 685 (Fla. 2003) ("A reasonable strategic decision is based on informed judgment.").

II. Trial counsel was ineffective because he failed to prepare for and effectively cross-examine the State's firearms and toolmarks examiner

At Mr. Davis's trial, the State called James Kwong, a firearms and toolmarks examiner with the Florida Department of Law Enforcement ("FDLE") to testify that the bullets recovered from the scene at the BP station were fired from the same gun as the bullets recovered from the Headley scene. Mr. Kwong's ballistics testimony was the State's linchpin evidence against Mr. Davis at the BP trial. Without Mr. Kwong's testimony, the State had no case.

Trial counsel clearly did not investigate and prepare for his cross examination of Mr. Kwong. His cross-examination consumed little more than four pages of the trial transcript and fell below the

acceptable standards. Trial counsel could have cross-examined Mr. Kwong about the scientific limitations of the AFTE theory of identification, including error rates, repeatability, the subjective nature of a match, the number of striations required for a match, and how to distinguish class and subclass characteristics. Trial counsel could have used available literature on firearms comparison to challenge Mr. Kwong's conclusions that the same gun fired the bullets at Headley and the BP station. Trial counsel could have confirmed that Mr. Kwong could not exclude a .9mm as the weapon that fired the bullets he examined. Trial counsel could have cross-examined Mr. Kwong about the specific measurements he made when he compared the bullets. However, to Mr. Davis's detriment, trial counsel failed to cross-examine Mr. Kwong on any of these critical issues.

Postconviction counsel called Mr. Kwong as a witness at the evidentiary hearing and questioned him about the AFTE Theory of Identification. (PCR.3133-36; Court's Exhibit 2).

Postconviction counsel asked Mr. Kwong questions that trial counsel could have asked that illustrated that the AFTE theory of identification is problematic not only because it is subjective, but

because there are no objectively identifiable standards in order to declare a match.

Dr. Kwong testified that practical impossibility means

> that we cannot compare the bullets to every gun that has never been made. There are many guns that have been destroyed, no longer exist. We cannot compare them. And, also, we cannot compare to every gun there is in existence. If we do that, I will be still working on maybe gun number 1234 and I will not be sitting here.

Dr. Kwong also testified that he could not attach a number to practical impossibility because, as a discipline, firearms and toolmarks examination does not have a statistics study. Firearms and toolmarks examiners do not have a database of former comparisons and any "database" would be in the examiner's mind. Therefore, he agreed that comparisons are subjective in nature. (PCR.3137-39).

Postconviction counsel also asked Mr. Kwong about the measurements of the bullets he examined:

> Q: Okay, let me ask you this. So a .357 is called that because the bullet diameter is .357 inches; is that correct?
>
> A: That's correct.
>
> …

Q: Okay. And a .38 caliber is also .357 inches in diameter?

A: In diameter, yes.

Q: Correct? Okay, now, a 9mm, if we convert that to inches, it's a .353 diameter, correct?

A: It's .355.

(PCR.3123).

Mr. Kwong admitted he could not exclude a .9mm as the gun that fired the bullets at the BP or Headley crime scenes. (PCR.3122-24,3125,3128-29).

Trial counsel also failed to question Mr. Kwong at all about the scientific underpinnings of firearms identification. He failed to cross-examine on issues such as error rates; repeatability; the subjective nature of determining a match; how many striations were required for sufficient agreement in his mind; and how to distinguish subclass and individual characteristics.

For example, trial counsel failed to cross-examine Mr. Kwong about the specific measurements he takes when he makes a comparison. Postconviction counsel asked Mr. Kwong about this at the evidentiary hearing and learned that when he looks down the microscope and compares two separate bullets, he *visually*

compares the spatial relationships between each line. (PCR.3143-44). When asked if it was possible to actually measure those distances and get numbers mathematically compare those distances, Mr. Kwong stated that it would take too long to do such a thing and there are "just too many to measure." According to Mr. Kwong he did not have time to make such precise measurements because the Florida Legislature required him to work 180 cases per year. (PCR.3144-45).

III. Prejudice

If trial counsel had bothered to investigate the AFTE theory of identification, he could have asked the same questions asked by postconviction counsel and shown the trier of fact that the "science" of firearms and toolmarks comparison was based on visual measurements and that the Legislature prioritized efficiency over accuracy in an examination that could determine if someone is convicted of first-degree murder and sentenced to death.

Given the publicly available literature on this problematic evidence, it was incumbent upon trial counsel to do his due diligence and research ways in which to challenge this at trial, especially since this was the only evidence linking Mr. Davis to the

BP murders. Mr. Davis was prejudiced because had trial counsel exposed the scientific shortcomings of firearms comparison evidence and Mr. Kwong's conclusions, it would have raised a reasonable doubt as to Mr. Davis's guilt. But for counsel's errors, the result of Mr. Davis's trial would have been different.

ISSUE 4:

THE CIRCUIT COURT ERRED IN FINDING TRIAL COUNSEL WAS NOT INEFFECTIVE BECAUSE HE FAILED TO RETAIN A DEFENSE EXPERT TO CHALLENGE THE STATE'S FIREARMS AND TOOLMARKS EVIDENCE

I. Applicable law

One of the primary duties trial counsel owes his client is the duty to adequately prepare himself prior to trial. Pretrial preparation provides a basis for the defense's case at trial. *See Magill v. Dugger*, 824 F.2d 879, 886 (11th Cir. 1987). Also critical is the duty to consult and present expert testimony in cases where the jury's interpretation of the evidence is imperative. *See Williams v. Thaler*, 684 F.3d 597, 604 (5th Cir. 2012) (holding that trial counsel's performance fell below an objective standard of reasonableness when counsel failed to retain independent forensics experts and was unable to offer any meaningful challenge to the

findings of the State's experts, many of which proved to be incorrect).

Trial counsel cannot be found to have made a strategic decision when he failed to fully investigate. *Strickland v. Washington,* 466 U.S. 558, 690-91 (1984); *Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (explaining that a reviewing court must consider not only the quantum of evidence already known to counsel, but also whether the unknown evidence would lead a reasonable attorney to investigate further); and *Henry v. State*, 862 So. 2d at 685 ("A reasonable strategy decision is based on informed judgment.").

II. Trial counsel was ineffective because he failed to investigate and retain a forensic science expert to counter the State's firearms and toolmarks examiner's testimony

The State had no direct evidence placing Mr. Davis at the BP station on the night of December 7, 2007, so the State's linchpin evidence against Mr. Davis at trial was the testimony of witnesses that identified Mr. Davis as the shooter at the Headley scene and the testimony of Mr. Kwong that the same gun was used to fire the bullets at the BP station and Headley Insurance Agency. It was paramount that trial counsel challenge this evidence at trial.

Although trial counsel should have effectively cross-examined Mr. Kwong as discussed in Claim 3, *supra*, it was unlikely that Mr. Kwong would have admitted to the shortcomings of firearms identification evidence. To that end, trial counsel should have hired his own expert to assist with: (1) pretrial motions seeking to exclude or limit Mr. Kwong's firearms identification testimony; (2) anticipating objectionable statements from Mr. Kwong during his direct testimony; (3) preparing for cross-examination of Mr. Kwong; and (4) the defense case itself, inasmuch as such an expert could have provided testimony to challenge the State's evidence.

An expert could have explained to the factfinder why firearms examination was not a generally accepted science; why the validity of the fundamental assumption of uniqueness and reproducibility of firearms-related toolmarks had not yet been demonstrated; why firearms identification evidence was not reliable; and how this was relevant to the testimony offered by Mr. Kwong. Trial counsel claimed he could not locate such an expert, so instead he consulted with an expert who relied upon the same unreliable and unscientific methodology as Mr. Kwong.

Postconviction counsel retained such an expert, Dr. Jeff Salyards, and he testified at the evidentiary hearing. Dr. Salyards participated in firearms and toolmarks research and validation studies. (Defense Exhibit 1). As chief scientist at the U.S. Army Crime Lab, he helped design the Ames I Study, funded by the Department of Energy, to study error rates in firearms and toolmarks examiners. (PCR. 3191-92).

Dr. Salyards provided testimony at the evidentiary hearing that would have undermined Mr. Kwong's opinions. Dr. Salyards testified that the AFTE theory of identification was not scientifically valid. If Dr. Salyards or a similar expert had testified for the defense at Mr. Davis's trial, he could have testified that the AFTE's idea of "sufficient agreement" was scientifically problematic. The language in the AFTE's theory was "sort of just a play on words. They define it as significant duplication. But that sounds very circular most of it. It's agreement. It's sufficient when the duplication is significant if the agreement's sufficient and round and round you go." (PCR.3196).

Dr. Salyards also could have testified that the word "significance" used in the AFTE theory of identification had special meaning in the lexicon of science and statistics. (PCR.3196-97).

> It has to do with sort of setting a threshold value for how high you're going to score on a test or what the mass of something is, is it greater or less than this or how much correlation do these two cartridge cases share and then talking about how rare that measured number is, is the significance. And so when I read that theory and I get to the word significance, I, I become encouraged and think, okay, good, we're going to talk about statistical significance but then it's not defined that way.
>
> …
>
> [This] suggests to people who have been around science and statistics that the examiner has done something where they now have a measure of that significance and triggered that threshold and that it would be rigorous and universal and repeatable. And that seems to be missing from the current practice.

(PCR.3197).

Dr. Salyards could have testified that the AFTE's theory of identification did not utilize the available tools for image capture in order to mathematically analyze those samples. (PCR.3200).

Dr. Salyards could also have testified about the danger of the AFTE's use of "practical impossibility" in criminal cases because it suggested a zero-error rate. To mainline scientists, that is a red flag.

A scientist always says plus or minus a number, and gives a range. (PCR.3206-07).

Dr. Salyards testified that the AFTE theory of identification adversely affects reporting in criminal cases because “we’re asking the examiner to hold in their mind this database for all the cartridge cases or bullets, all the toolmarks they’ve looked at, and then compare it to the instant case and make a determination if this one is more similar than the most similar ground truth exclusion.” (PCR.3205). “It suggests to the fact-finder that some database has been compared that really doesn’t exist.” (PCR.3206).

In Mr. Davis’s case, there were a few complications. One, the bullets were damaged. (PCR.3210). Second, this was a no-gun recovered case, and therefore, no gun to test fire and compare characteristics. (PCR.3211). This took another piece of information away from the examiner because test fires were necessary to determine whether a toolmark was an individual characteristic or merely a subclass characteristic. (PCR.3211).

Finally, Dr. Salyards pointed to Mr. Kwong’s lack of notations on the images from the comparison microscope:

> [M]aybe a qualified firearms and toolmarks examiner in their black box way is retained to know which [areas] to give more weight and which ones to ignore. But I would suspect that to be annotated. My requirement as a scientist if that was my grad student would be you go to at least draw some circles and errors and tell me why the dissimilarity, why do you get to pay attention to it, why is this similarity more important than that nonmatching part of it… You would want more information.

(PCR.3212).

III. Prejudice

Trial counsel's performance fell below prevailing professional norms in this instance. Counsel's failure to effectively investigate and discover the considerable scrutiny placed on the scientific underpinnings and reliability of firearms identification evidence led to his failure to consult with an expert who could have challenged the State's ballistics evidence. In this wholly circumstantial case, Mr. Kwong's testimony that the bullets fired at Headley were fired from the same gun as the bullets fired at the BP station was the State's linchpin evidence against Mr. Davis. Had counsel retained a forensic science expert to assist him challenging the State's firearms and toolmarks evidence, there is a reasonable probability that the outcome of Mr. Davis's trial would have been different.

ISSUE 5

THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO UTILIZE THE BP SURVEILLANCE VIDEO TO CHALLENGE THE STATE'S CASE

I. Applicable law

Trial counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Specifically, counsel has a duty to investigate in order to make the adversarial testing process meaningful. *Id.* at 690. An ineffective assistance of counsel claim has two components. The defendant must show that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687. Prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Id.* at 694.

The Eighth Amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. *Beck v. Alabama*, 447 U.S. 625 (1980). The United States Supreme Court

noted, in the context of ineffective assistance of counsel, that the correct focus is on the fundamental fairness of the proceeding:

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

Strickland, 466 U.S. at 696.

One of the primary duties defense counsel owes his client is the duty to prepare himself adequately prior to trial. Pretrial preparation, principally because it provides a basis upon which most of the defense's case must rest, is perhaps the most critical of stage of the lawyer's preparation. *See Magill v. Dugger*, 824 F.2d 879, 886 (11th Cir. 1987).

Importantly, trial counsel cannot be found to have made a strategic decision when he failed to fully investigate the evidence. *Strickland*, 466 U.S. at 690-91; *Wiggins v. Smith*, 539 U. S. 510,

527 (2003) (a reviewing court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further); and *Henry v. State*, 862 So. 2d at 685 ("A reasonable strategic decision is based on informed judgment.").

II. Trial counsel was ineffective because he failed to utilize the BP surveillance video to challenge the State's case

During Mr. Davis's trial, the State offered into evidence video and still photographs taken from the surveillance cameras at the BP gas station. Although the State turned over all images from the surveillance system to the defense prior to trial, the State only introduced video and photographs that supported the State's theory of the case—that there was only one perpetrator, that he parked his car down the road, that he walked to the gas station alone, and then returned to the vehicle after committing the crime. At the evidentiary hearing, the complete video evidence that defense counsel received in pretrial discovery was admitted as Defense Exhibit 5. (PCR.3428). The still photographs from the video were admitted as Defense Exhibit 6. (PCR.3428).

The portions of the video that the State did not introduce at trial included images of a person running back towards the convenience store from the BP sign. The individual ran out of the frame and towards the back of the store. (PCR.3429). A second later, video from the same camera showed a black SUV drive past the front of the store and turn towards the back of the store, where the person had just gone out of the frame. (PCR.3430-31; Defense Exhibits 5-6). Although these images contradicted the State's theory, defense counsel did not introduce them at Mr. Davis's trial.

At the evidentiary hearing, trial counsel testified that he reviewed all of the surveillance evidence that he received from the State prior to trial. (PCR.3428). Despite evidence that the SUV was in close proximity to the individual on camera, and headed in the same direction as the individual who just shot the two BP employees, trial counsel denied that this evidence could have been used to argue that there was potentially another suspect who served as a getaway driver. (PCR.3433).

In denying Mr. Davis's claim, the circuit court relied on defense counsel's testimony that he retained Richard Smith to review all video surveillance footage, and that defense counsel and

his team reviewed the video multiple times and formed the opinion that the BP surveillance footage did not support a theory that multiple perpetrators could have been involved. (PCR.3657). The circuit court acknowledged that trial counsel instructed Mr. Smith to attempt to enhance the video to identify the perpetrator. (PCR.3434). But the circuit court is silent on the fact that trial counsel did not ask Mr. Smith to analyze the video or the sequential still images to develop alternate theories of the case. Moreover, trial counsel could not recall his thought process or discussions with his team to develop his strategy regarding the surveillance video, so he speculated that he must have seen the videos and determined they could not help his defense. He claimed that to use the video to argue that the car in the video could have been the get-away car would have been "pure speculation" because the "evidence in the videos is one person." (PCR.3447). That was a post-hoc rationalization spoon-fed to defense counsel by the prosecutor during cross-examination at the evidentiary hearing. There is no evidence that trial counsel actually considered and rejected this theory prior to trial.

III. Prejudice

Mr. Davis was prejudiced by counsel's failure to challenge this evidence at trial. The surveillance footage was evidence that could have been used by trial counsel to challenge the State's theory of the case. The State argued that Mr. Davis parked his black Nissan sedan down the road and walked to the BP station, and that he acted alone. This footage showed a vehicle parked near the front of the store, which traveled in the same direction as the shooter after he ran away from the BP sign. The individual and the SUV appeared on camera within mere seconds of each other. This evidence could have been used to show that Mr. Davis was not the shooter, and that there was more than one individual involved in this crime.

This was a circumstantial evidence case, with no direct evidence linking Mr. Davis to this crime. The State had to prove each and every element of the charge against Mr. Davis beyond a reasonable doubt. It was incumbent on trial counsel to challenge every piece of the State's evidence, especially that which contradicted its theory of the case. Trial counsel was deficient for failing to present this evidence to the trier of fact. There is a

reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.

ISSUE 6:

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. DAVIS'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO PRESENT EVIDENCE TO THE JURY THAT WOULD RAISE REASONABLE DOUBT

Trial counsel should have confronted the State's law enforcement witnesses with the evidence that there was dash cam footage recorded at the Headley scene that disappeared before trial. The circuit court should have granted an evidentiary hearing on this claim. Postconviction counsel should have been allowed to ask trial counsel about his strategies, or lack thereof, to challenge this evidence. The motions, files, and records in the case do not conclusively show that Mr. Davis is entitled to no relief.

I. Applicable law

The United States Supreme Court has explicitly stated that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime which he is charged." *In re*

Winship, 397 U.S. 358 (1970). Defense counsel is required to engage in rigorous adversarial testing of the State's evidence at trial.

II. Trial counsel was ineffective because he failed to present evidence that there was dash cam video of the Headley scene and the police lost it

On December 27, 2007, Sergeant Griffin Crosby filed a supplemental incident report in the Headley case that stated:

> On 12/27/2007, I recovered the video hard drive from Officer Hampton's in-car video system. I then transferred the video images to the Digital Eyewitness Media Manager (DEMM). The server is secured with limited access. I then transferred the video images from the DEMM, to a Digital Video Disc (DVD). The disc was turned over to the Property/Evidence Custodian. At this time, I have no further information regarding this case.

(PCR.2201).

If the circuit court had granted an evidentiary hearing on this claim, postconviction counsel could have examined trial counsel and confirmed he received all of the police reports in Mr. Davis's case, and therefore would have been in possession of Sergeant Crosby's supplemental report from December 27, 2007.

Mr. Davis filed a request under Rule 3.852(g) during his postconviction investigation to obtain a copy of the dash cam video referenced in Sergeant Crosby's report. (See Headley PCR.265-69).

Postconviction counsel was informed that all the Lake Wales Police Department evidence was transferred to the Polk County Sheriff's Office. The Polk County Sheriff's Office filed a response to Mr. Davis's Rule 3.852(g) request that represented they were not in possession of any dash cam videos. (See Headley PCR.315-19).

On December 17, 2007, the circuit court held a hearing on Mr. Davis's Rule 3.852 requests, and Jason Reuters, Esquire, of the Polk County Sheriff's Office informed the circuit court, "Our – our vehicles did not and do not have dashboard cameras. So we would have no records for dashcam or video surveillance. There are no policies and procedures regarding the same." (See Headley PCR.3432). This was a technical answer that "our vehicles" did not have dashboard cameras, and if the Polk County Sheriff's Office indeed to not have dashboard cameras, it was clear that Lakes Wales Police Department did. Otherwise, Sergeant Crosby filed a fictitious report in a murder case.

If the circuit court had granted an evidentiary hearing on this claim, postconviction counsel would have had to put up witnesses and ask them the questions that Mr. Davis claims trial counsel should have asked. Postconviction counsel could have called

Sergeant Crosby and Officer Hampton to testify at the evidentiary hearing about the existence of the dash cam video that Sergeant Crosby turned over to the Property/Evidence Custodian of the Lake Wales Police Department.

The missing dash cam video issue could have allowed defense counsel to contest the testimony of the Headley witnesses at the BP trial. Regardless of whether there was a video or not, the report that the video existed provided fertile ground for cross examination of the State's witnesses. It would have provided the defense with the opportunity to show law enforcement failed to preserve critical evidence.

III. Prejudice

The State had to prove its case against Mr. Davis beyond a reasonable doubt. It was incumbent upon defense counsel to chip away at every piece of the State's evidence and challenge every aspect of the State's theory of the case.

There was no direct evidence that connected Mr. Davis to the BP crime scene, so the Headley evidence played a critical role in the State's case against Mr. Davis for the BP crimes. There was already evidence that the Lake Wales Police Department used evidence from

a stale search warrant and a grossly mishandled photopack to charge Mr. Davis with multiple murders. Trial counsel had evidence that at least one of the police officers who responded to the Headley scene had a dash cam video that mysteriously disappeared. Trial counsel could have used this evidence to undermine the credibility of the Lake Wales investigation.

The circuit court should have granted an evidentiary on these claims and allowed postconviction counsel to examine trial counsel about his strategy, or lack thereof, for failing to utilize critical evidence that could have raised a reasonable doubt. The files and records in the case do not conclusively show that Mr. Davis is not entitled to relief on these claims

ISSUE 7:

TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO FILE A MOTION TO SUPPRESS THE EVIDENCE FROM A STALE SEARCH WARRANT AND THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS'S CLAIM WITHOUT AN EVIDENTIARY HEARING

Trial counsel should have filed a motion to suppress the evidence seized from the search of Victoria Davis's Nissan Altima. The circuit court should have granted an evidentiary hearing on

this claim. Postconviction counsel should have been allowed to ask trial counsel about his strategic decisions, or lack thereof, not to challenge this evidence. The motions, files, and records in the case do not conclusively show that Mr. Davis is entitled to no relief.

I. Applicable law

The Fourth Amendment of the United States Constitution "protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *Carpenter v. United States*, 138 S.Ct. 2206 (2018), *quoting Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967). In 1914, the United States Supreme Court established the "exclusionary rule" when it held that the federal government could not use evidence obtained in an illegal search to convict a defendant in federal court. *Weeks v. United* States, 232 U.S. 383 (1914). In *Mapp v. Ohio*, the United State Supreme Court made the exclusionary rule the national standard when it held that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments" and is also protects citizens "against rude invasions of privacy by state officers." 367 U.S. 643, 657 (1961).

Pursuant to Section 933.05, Florida Statutes, a search warrant cannot be issued except upon probable cause supported by affidavit or affidavits, naming or describing the person, place, or thing to be searched and particularly describing the property or thing to be seized; no search warrant shall be issued in blank, and any such warrant shall be returned within ten days after issuance thereof. *See e.g., Spera v. State*, 467 So. 2d 329 (Fla. 2d DCA 1985).

II. Trial counsel was ineffective because he failed to file a motion to suppress the evidence from a stale search warrant

On December 14, 2007, Detective Benjamin Metz requested a warrant to search Victoria Davis's Nissan Altima from Judge Robert Griffin. (PCR.1811). It was returned to the clerk on January 8, 2008, with a blank Inventory and Receipt, as well as a blank Return.. (PCR.1802-08).

On September 19, 2008, Detective Benjamin Metz was contacted by Assistant State Attorney Robert Antinello and advised that the clerk had the original search warrant for the Nissan Altima, but the property section page and the return page were still blank. (PCR.1810).

Finally, on September 23, 2008, Detective Metz filled out the blank return page and took what he claimed to be the original property receipt page along with a copy of the rest of the warrant and returned it to Judge Griffin nine months after he authorized the warrant. (PCR.1812-14).

Florida law required that the Return be filed within ten days of the execution of the warrant. The search warrant for the Nissan Altima was stale and incomplete and trial counsel failed to argue the evidence seized during the vehicle search should be suppressed. The motion to suppress filed by trial counsel was skeletal at best and abandoned by counsel at the hearing. No specific arguments were ever made by the defense. Trial counsel's abandonment of a constitutionally significant issue did not advance Mr. Davis's interests in any way and was certainly not strategic. The evidence seized from the Altima, including the floor mats, played a major role in this case. The floor mats were used to convict Mr. Davis of the Headley crimes, and the Headley conviction was used to convict him of the BP crimes.

In his opening statement during the Headley trial, the prosecutor told the jury:

> [T]he State Fire Marshal did testing to determine whether or not there was a presence of gasoline in the interior of the car. Now, the car was recovered early the very next morning. And the Fire Marshall used a dog, a canine that has been trained in detecting the presence and odor of gasoline. And he had the dog take a look at the floor mats from the car, laid them out, and the dog alerted on various car mats. So those things were sent off to the laboratory for the State Fire Marshall. And you'll hear testimony from the analyst that they determined that, yes, on some of those mats there was in fact the presence of gasoline.

(Headley T79.2183).

Deputy Fire Marshal Kurt Lanthrop testified that his accelerant detection canine, Lucky, was trained to alert on petroleum hydro carbon, which includes gasoline, lighter fluid, mineral spirits, lamp oils, candle oils, and anything else with a petroleum substance. (Headley T90.4047). On December 14, 2007, the Davis's Nissan Altima was impounded in the garage at Bartow Air Base and Deputy Lanthrop and Lucky were asked to do an interior examination of the vehicle. (Headley T90.4044). Deputy Lanthrop removed the floor mats from the Altima and put them in a multipurpose room free of petroleum products. (Headley T90.4044-45). The floor mats were placed on brown freezer paper in the order they were removed from the vehicle driver, passenger front,

passenger back, driver's back. (Headley T90.4046-47). Lucky alerted to the driver's floor mat and the passenger rear floor mat. (Headley T90.4047; R61.10154, State's Exhibit 7099).

Ryan Bennett, a crime laboratory analyst with the State Fire Marshal's laboratory, received the following items from the search of the Nissan Altima:

State's Exhibit 20:	carpet and rubber matting
State's Exhibit 21:	carpet and rubber matting
State's Exhibit 22:	rubber matting
State's Exhibit 23:	rubber matting
State's Exhibit 24:	rubber matting

(Headley T91.4122).

Each item tested positive for gasoline. (Headley T91.4128). The State used this evidence to argue to that jury that Mr. Davis transported gasoline to the Headley scene with the plan to set the victims on fire. This evidence was used to convict Mr. Davis of the Headley crimes, and his conviction for the Headley crimes was used to convict him for the BP murders and sentence him to death.

III. Prejudice

The State was required to prove its case against Mr. Davis beyond a reasonable doubt. It was incumbent upon defense counsel to chip at away at every piece of the State's evidence and challenge

every aspect of the State's theory of the case. Trial counsel already had evidence that the Lake Wales Police Department used evidence from a stale search warrant and a grossly mishandled photopack to charge Mr. Davis with multiple murders. A Lake Wales Police Officer, Lieutenant Elrod, was the witness who testified that he determined that Ms. Bustamante was not going to survive her injuries, asked her who harmed her, and she told him it was Leon Davis. This evidence was admitted at the BP trial. It was critical that defense counsel use whatever evidence that was at his disposal to undermine Lieutenant Elrod's credibility.

The postconviction investigation uncovered evidence that trial counsel had police reports that showed at least one of the LWPD officers who responded to the Headley scene had a dash cam video that mysteriously disappeared. The circuit court should have granted an evidentiary hearing on this claim and allowed postconviction counsel to explore why trial counsel failed to use this critical information to chip away at the State's case, undermine the credibility of the LWPD, and raise reasonable doubt.

ISSUE 8:

TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO FILE A MOTION TO SUPPRESS THE GREISMAN PHOTOPACK BASED ON OFFICER TOWNSEL'S CHAIN OF CUSTODY VIOLATION, AND THE CIRCUIT COURT ERRED IN DENYING THIS CLAIM WITHOUT AN EVIDENTIARY HEARING

Trial counsel was ineffective for failing to protect Mr. Davis's due process rights under the Fifth Amendment and file a motion to suppress the Greisman photopack based on Officer Townsel's chain of custody violation. The trial court should have granted an evidentiary hearing on this claim. Postconviction counsel should have been allowed to ask trial counsel about his strategic reasons, or lack thereof, for not challenging this evidence. The motions, files, and records in the case do not conclusively show that Mr. Davis is entitled to no relief.

I. Applicable law

"Relevant physical evidence is admissible unless there is an indication of probable tampering." *Peek v. State*, 395 So. 2d 492, 495 (Fla. 1980). In order to demonstrate probable tampering, the party attempting to bar the evidence must show that there was a probability that the evidence was tampered with—the mere

possibility is insufficient. *Murray v. State (Murray I)*, 838 So. 2d 1073, 1082-83 (Fla. 2002). Once the party moving to bar the evidence has met its burden, the burden shifts to the nonmoving party to establish a proper chain of custody or submit other evidence that tampering did not occur. *Id.*

A sufficient showing of the chain of custody is made where the object has been kept in proper custody since the time it was under possession and control until the time is produced at trial. *See Murray v. State (Murray II),* 3 So. 3d 1108 (Fla. 2009) (concluding that there was no break in the chain of custody where lotion was missing from an evidence bag, but was later found to have been intentionally removed from the bag by a print examiner so it would not contaminate other evidence).

II. Trial counsel was ineffective because he failed to file a motion to suppress the Greisman photopack and his in-court identification of Mr. Davis

Brandon Greisman was shot in the face when he tried to help Yvonne Bustamante at the Headley scene. When EMTs arrived, he was taken to the hospital for treatment. Upon his release from the hospital on December 14, 2007, he was taken to the Lake Wales

Police Department, where Officer Townsel administered a photopack to him. (S6.977-78; State's Exhibit 4467).

After administering the photopack to Mr. Greisman, Officer Townsel was required to turn that evidence into the property room. However, Officer Townsel failed to do so, in violation of Section 13-1, Evidence and Property, Lake Wales Police Department Standard Operating Procedures. (PCR.2682-89).

Nobody knew the Greisman photopack was not in evidence for two and a half years. Law enforcement performed a file and evidence review and discovered that the Greisman photopack was missing, There was an exhaustive search of all records and files within the Lake Wales Police Department and the evidence section of the Polk County Sheriff's Office. In June 2010, Officer Townsel searched through boxes of files in her backyard shed and discovered the Greisman photopack. (PCR.2901). It had been missing from the day Officer Townsel showed it to Mr. Greisman on December 14, 2007, until the day she found it in her shed.

Despite the obvious chain of custody violation, trial counsel failed to investigate and file a motion to suppress the photopack at

trial, and to suppress Mr. Greisman's in-court identification of Mr. Davis.

The photopack was not turned into the property room in violation of the department's own standard operating procedures. Rather, it disappeared for approximately two- and one-half years before being found in Officer Townsel's shed. Moreover, this photopack was not even secured in an evidence bag until *after* it was found in her shed. She was unable to provide an explanation for its disappearance, and could not account for how it ended up in her shed except that she had been up for three days straight. (Headley T92.4326).

The unexplained disappearance of this critical evidence in Mr. Davis' capital murder case, especially where identification of the perpetrator was at issue, was certainly suspect and indicative of tampering. *See Murray I*, 838 So. 2d at 1082-83 (concluding that the trial court abused its discretion in admitting the evidence because Murray met his burden of demonstrating probable evidence tampering and the State failed to meet its burden of proving that such tampering did not occur) and *Dodd v. State*, 537 So. 2d 626, 627 (Fla. 3d DCA 1988).

Further, an in-court identification may not be admitted "unless it's found to be reliable and based solely upon the witness's independent recollection of the offender at the time of the crime," uninfluenced by any intervening illegal confrontation. *Edwards v. State*, 538 So. 2d 440, 442 (Fla. 1989). Mr. Greisman did not identify Mr. Davis in court until after he was shown the photopack. This photopack evidence was unreliable, and therefore, Mr. Greisman's in-court identification was also tainted and should have been suppressed as well.

III. Prejudice

The circuit court should have granted an evidentiary hearing on this claim and allowed postconviction counsel to explore why trial counsel failed to protect Mr. Davis's due process rights under the Fifth Amendment and move to suppress the Greisman photopack and Mr. Greisman's in-court identification. Mr. Davis was prejudiced by trial counsel's deficient conduct because Mr. Greisman's identification of Mr. Davis was critical to the State's case. There is a reasonable probability that if the Greisman photopack had been thrown out and Mr. Greisman was prohibited

from identifying Mr. Davis in court, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

ISSUE 9:

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

Mr. Davis did not receive the fundamentally fair trial to which he was entitled under the Fifth, Sixth, Eighth, and Fourteenth Amendments. *See Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991); *Derden v. McNeel*, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors in Mr. Davis's trial, when considered as a whole, virtually dictated his conviction. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the state or federal constitution against an improperly imposed conviction. Repeated instances of ineffective assistance of counsel significantly tainted Mr. Davis's trial. The errors as claimed in this brief are hereby specifically incorporated into this claim and include ineffective assistance of counsel for failing to prepare for and effectively cross-examine the State's ballistics expert, failure to hire a forensic science expert to challenge the scientific basis of the

State's ballistics evidence, failure to utilize surveillance video evidence to challenge the State's theory of the case, failure to challenge the chain of custody of a critical piece of the State's evidence, and all others listed in Mr. Davis's initial brief and presented at the evidentiary hearing.

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

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

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

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

Mr. Davis was on trial for his life, and his attorneys had a duty to prepare for trial and present the best defense they could. Instead, trial counsel failed to investigate and challenge the ballistics evidence that linked Mr. Davis to the BP case; failed to use the surveillance video from the BP station to challenge the State's theory that there was only one perpetrator of the BP crimes; allowed the State to use the floor mats from the Nissan Altima against Mr. Davis even though the search warrant was stale and improperly executed; allowed the State to use a photopack that was improperly stored in a backyard shed for almost three years; and failed to use evidence of the existence of dash cam video at the Headley scene to undermine the credibility of the State's law enforcement witnesses.

As a result, Mr. Davis did not receive the fundamentally fair trial to which he was entitled under the Fifth, Sixth, Eighth and Fourteenth Amendments. Addressing these errors on an individual basis will not afford adequate standards required by the Constitution. These errors cannot be harmless. The cumulative effect of these errors denied Mr. Davis his fundamental rights under the United States and Florida constitutions.

ISSUE 10:

THE RECORD SUFFICED TO CREATE BONA FIDE DOUBT IN MR. DAVIS'S COMPETENCE TO PROCEED. THE CIRCUIT COURT THUS ERRED IN DENYING MR. DAVIS'S MOTION FOR A COMPETENCY EVALUATION BEFORE GRANTING THE STATE'S MOTION TO EXCLUDE ALL MENTAL HEALTH TESTIMONY AND EVIDENCE AND SUMMARILY DENYING CLAIM 17

I. Applicable law

The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right not to be tried or convicted while incompetent. *See Drope v. Missouri*, 420 U.S. 162, 172 (1975). The test for whether a defendant is competent to stand trial is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a

rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U. S. 402, 402 (1960). Further, a trial court must sua sponte make a competency determination once sufficient evidence exists to raise a bona fide doubt as to the defendant's competency. *Pate v. Robinson*, 383 U.S. 375, 385 (1966).

In *Carter v. State*, this Court guaranteed the right to a judicial determination of a defendant's competency during postconviction proceedings. 706 So. 2d 873, 875 (Fla. 1997). In doing so, this Court reasoned:

> There can be no question that a capital defendant's competency is crucial to a proper determination of a collateral claim when the defendant has information necessary to the development or resolution of that claim. Unless a death-row inmate is able to assist counsel by relaying such information, the right to collateral counsel, as well as the postconviction proceedings themselves, would be practically meaningless.

Id. (internal citation omitted). The Florida legislature codified *Carter* when it amended Fla. R. Crim. P. 3.851(g), which governs the procedure for evaluating and determining legal competence during capital postconviction proceedings:

> If, at any stage of a postconviction proceeding, the court determines that there are reasonable grounds to believe

> that a death-sentenced defendant is incompetent to proceed and that factual matters are at issue, the development or resolution of which require the defendant's input, a judicial determination of incompetency is required.

3.851(g)(3). This statute limits halting proceedings to those in which "there are factual matters at issue, the development or resolution of which require the defendant's input." 3.851(g)(1). The postconviction court's determination of competency is normally initiated by collateral counsel filing a written motion. *See* 3.851(g)(2) ("Collateral counsel **may** file a motion for competency determination . . . .") (emphasis added); *but see* 3.851(g)(4) ("The motion for competency examination shall be in writing and shall allege with specificity the factual matters at issue . . . ."). However, the onus for finding reasonable grounds to conduct a competency evaluation remains with the court. *See Pate*, 383 U.S. at 385 ("We believe that the evidence introduced on Robinson's behalf entitled him to a hearing on this issue. The court's failure to make such an inquiry thus deprived Robinson of his constitutional right to a fair trial."); *see also* 3.851(g)(5) ("If the court finds that there are reasonable grounds to believe that a death-sentenced defendant is incompetent to proceed . . . .").

II. The circuit court erred when he failed to hold a hearing to evaluate Mr. Davis's competency before he granted the State's motion to summarily deny Mr. Davis's Claim 15 and bar Mr. Davis from presenting any and all mental health testimony and evidence at the evidentiary hearing

After Mr. Berry left CCRC-North in early January 2020, Mr. Davis's evidentiary hearing was set for August 2020. Throughout several orders, the court had granted evidentiary hearings on Claims 7, 15, 16, 17, 20(A), 20(B)(3), and 20(B)(4). However, on January 20, news broke of the first confirmed cases of COVID-19 in the United States. On March 1, Governor Ron DeSantis ordered the State Health Officer to declare a public health emergency. (PCR.2302-05). On March 11, 2020, the Chief Justice of this Court issued an Order authorizing the chief justices of the district and circuit courts to "take such mitigating measures as may be necessary to address the effects of the COVID-19 outbreak on their respective courts." (PCR.2328-33). Governor DeSantis restricted travel for state employees like Mr. Davis's attorneys at CCRC-North, the Department of Corrections restricted the transportation of inmates, and it became impossible for Mr. Davis's postconviction counsel to interview and prepare witnesses and consult with Mr. Davis. (PCR.2335-36).

Although Judge Jacobsen was very patient with Mr. Davis during the early days of the postconviction proceeding, he appeared increasingly stressed about the delays in Mr. Davis's case as the COVID-19 pandemic began to impact the circuit courts. Mr. Davis's new postconviction counsel filed a motion to continue the evidentiary hearing when it became evident it was unlikely the courts would be open for an in-person hearing. (PCR.2292-36). Even then, Judge Jacobsen was hesitant to grant a continuance over the State's objection. (PCR.2337-44;4355-58). The Court assured the State, "I can sense your frustration, and I share the frustration. These cases seem to linger far longer than they ever should with what's at stake. That's part of what's in the back of my mind." (PCR.4358).

The hearing was tentatively rescheduled for January 6-8, 2021. (PCR.3928). The circuit court commented on the chaos in the felony division due to the pandemic and a temporary scheduling calendar. (PCR.3927). He was also under pressure because the criminal docket was backed up and the courts were under pressure to get as many jury trials "up and running and done" as possible. (PCR.3924).

Although Polk County courts were in Phase II of the COVID protocols established by this Court in January 2021, the Polk County Jail was reluctant to transport inmates due to the high transmission rates at the jails and prisons. However, the court stated that "takes second chair to the need to move the matter forward." (PCR.3961). Although he ultimately conceded to continue the evidentiary hearing (PCR.3965), he apologized profusely to the State. "I know every time I feel almost grim because I know how anxious you are with all the cases that you have that are kind of, you know, kind of jammed up in a log jam. I know things are difficult for you." (PCR.3962).

In January 2021, the COVID-19 cases in Polk County had been increasing significantly and the courts were "on the cusp of falling back into Phase I." (PCR.4219). The hearing was eventually rescheduled for eight months later on August 23-26, 2021. (PCR.4173).

At the June 4, 2021, hearing on the State's motion to bar any mental health testimony or evidence of any kind at the evidentiary hearing, Ms. Macready alerted the court that she was concerned about Mr. Davis's competency:

> I will say that I'm in a bit of a difficult position with regards [to] Mr. Davis, and I know Your Honor, as well as other counsel, have been on this case for a while and are familiar with the issues concerning Mr. Davis. But when I took over the case as counsel, he initially agreed to cooperate and allow us to conduct a mitigation investigation despite it being very late in the game. You know, it was already set for an evidentiary hearing, this was just maybe a month before this COVID global pandemic began. So despite that, we've been doing our best to conduct a mitigation investigation. However, at this point Mr. Davis is – I believe he's back to where he was at mid-2019 in not wanting to present any penalty phase testimony or evidence.
>
> We've spoken with him on several occasions about this, and we recently spoke with him again in person, and I told him that Your Honor may want to do a colloquy with him, may want to do a competency evaluation, because I believe that's where it was going in 2019. And so that is what I'm asking the Court to do at this time.

(PCR.4196-97).

Ms. Macready was concerned that Mr. Davis's mental illness caused him to vacillate between allowing his postconviction attorneys to conduct a mental health investigation, and sending letters to the court voluntarily waiving his penalty phase claims. (PCR.4197). Ms. Macready requested that Mr. Davis be transported to the next status hearing on June 25, 2021, so the circuit court could conduct a colloquy to determine the necessity for a

competency evaluation before the court granted the State's motion and terminated his ability to seek penalty phase relief. (PCR.4199).

The State objected to Ms. Macready's request because if court determined that Mr. Davis did need to be evaluated for competency, the decision would delay the August 2021 evidentiary hearing and require the State to find a mental health expert of its own:

> And the problem, of course, is that if we start addressing the mental health issue and he gets evaluated or there is a report existing regarding his mental health in postconviction, then the State would be obligated to go ahead and hire its own expert and get him evaluated, and I don't think that's something that we really could do in two months. Maybe we could, but I don't think we should be placed in a position to do that now, when we've been litigating this motion since 2018.

(PCR.4203). Although the court was not obligated to accept Ms. Macready's representations concerning Mr. Davis's competence without question, "an expressed doubt in that regard by one with 'the closest contact with the defendant' is unquestionably a factor which should be considered." *Scott v. State*, 420 So. 2d 595, 598 (Fla. 1982), *quoting Drope v. Missouri*, 420 U.S. 162, 177-78 (1975).

Even if Judge Jacobsen was hesitant to accept Ms. Macready's representations about Mr. Davis's competence, he was well-acquainted with Mr. Davis. He presided over the BP and Headley

postconviction proceedings, and he also presided over Mr. Davis's bench trial in the BP case. The postconviction record was replete with numerous instances that should have alerted the court that a hearing was necessary, including Mr. Davis's battles with Robert Berry (PCR.1166-67; 1171-72; 4007-15; 4090-122; 4300-06; 4386-415), his pro se filings and prolific written communications with the court (PCR.1157-64; 1175-76; 1865-68; 1876-79; 1909-14; 2237-38; 2243-45), and his paranoia that Mr. Berry was not telling him the truth about his case. (PCR.1166; 1876-79; 4401).

Once the court had reasonable grounds to question Mr. Davis's competency, the court was required to "hold a competency hearing and make an independent determination of whether [Mr. Davis] [was] competent to proceed. *Sheheane v. State*, 228 So. 3d 1178, 1180 (Fla. 1st DCA 2017). "[A]n independent competency finding is a due-process right that cannot be waived" *Zern v. State*, 191 So. 3d 962, 965 (Fla. 1st DCA 2016); likewise, a defendant may not stipulate to the ultimate issue of competency . . . ." *Dougherty v. State*, 149 So. 3d 672, 678 (Fla. 2014).

In deciding that a competency hearing was unwarranted, the circuit court was guided solely by the length of time Mr. Davis's

case was on the docket, the state's sense of urgency in adhering to the schedule, and the judicial backlog created by the COVID pandemic. The circuit court was overwhelmingly sympathetic of the State's point of view, and commented on the "long in the lengthy delay in getting [this case] scheduled for a[n] [evidentiary] hearing" when he granted the State's motion. (PCR.4208). The circuit court did not make any findings regarding Mr. Davis's competency or give any explanation for his decision to deny Ms. Macready's motion at the hearing or in his written order that followed. (PCR.2676-79).

Further, the record is deplete of any evidence to show that Mr. Davis knowingly, voluntarily, and intelligently waived his right to present this mental health mitigation evidence to support the trial court's granting of the State's motion to preclude any and all mental health evidence. The trial court cannot have it both ways – if the court failed to conduct a competency determination, then the court is obligated to ensure that the waiver of this mental health evidence was constitutionally sound. *See Lonchar v. Zant*, 978 F.2d 637, 641 (11th Cir. 1992), *citing Rees v. Peyton*, 384 U.S. 312, 314 (1966) ("Competency to forego further legal proceedings depends on whether the person whose competency is in question 'has capacity

to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises'").

The circuit court violated Mr. Davis's due process rights when he refused to hold a hearing to evaluate Mr. Davis's competency before he granted the State's motion to preclude any and all mental health evidence. The court failed to make any findings for the record regarding Mr. Davis's competency and his decision was based on pressure by the State to hold Mr. Davis's evidentiary hearing in August 2021. This Court has been clear that "in ruling on a motion to determine a defendant's competency to stand trial, the question before the court is whether there is reasonable ground to believe the defendant *may* be incompetent, not whether he *is* incompetent. The latter issue should be determined after hearing." *Scott v. State*, 420 So. 2d at 597, *quoting Walker v. State*, 384 So. 2d 730, 733 (Fla. 4th DCA 1980). "The competency rule states that upon reasonable ground the court *shall* fix a time for a hearing." *Id.* at 597. The circuit court prioritized expediency over Mr. Davis's constitutional due process rights, and this Court must reverse the circuit court's

order barring mental health evidence from the evidentiary hearing and remand Mr. Davis's case for a competency hearing.

CONCLUSION AND RELIEF SOUGHT

Mr. Davis respectfully urges this Court to reverse the circuit court, set aside his convictions and sentences and remand his case for a new trial; or in the alternative, reverse the circuit court's order barring mental health evidence from the evidentiary hearing and remand Mr. Davis's case for a competency hearing and a new evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Corrected Initial Brief of the Appellant has been furnished via electronic service to Marilyn Beccue, Assistant Attorney General, on this 8th day of August, 2022.

s/ *Stacy R. Biggart*
STACY R. BIGGART

CERTIFICATE OF FONT

I hereby certify that the foregoing Initial Brief of Appellant was generated in Bookman Old Style 14-point font and 25,097 words excluding the title page, tables, certificates and signature block, pursuant to Fla. R. App. P. 9.210 and this Court's order dated July 7, 2022, allowing Mr. Davis a 350-word enlargement for his initial brief.

s/ *Stacy R. Biggart*
STACY R. BIGGART