

CAPITAL CASE NO. SC22-1286

In the

Florida Supreme Court

JOHNNY MACK SKETO CALHOUN,

APPELLANT,

v.

STATE OF FLORIDA,

APPELLEE.

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL
CIRCUIT IN AND FOR HOLMES COUNTY, FLORIDA

APPELLEE'S ANSWER BRIEF

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INTRODUCTION

Johnny Mack Sketo Calhoun killed Mia Chay Brown in 2010. Below, Calhoun filed a successive 3.851 motion alleging newly discovered evidence that Doug Mixon confessed to the killing while in prison to Keith Ellis. The lower court held an evidentiary hearing on the claim and ultimately found that Doug Mixon did not confess to Keith Ellis, whose testimony was unreliable and suspect. In rejecting Calhoun's claim, the trial court also found Doug Mixon's alleged confession would not be admissible on retrial and (even if it was admissible) would not probably produce an acquittal on retrial in light of (as this Court described it) the "overwhelming" evidence of Calhoun's guilt.

JURISDICTION

This Court has jurisdiction under its precedent even though Calhoun presently has no capital sentence. *E.g.*, *State v. Fourth Dist. Ct. of Appeal*, 697 So. 2d 70, 71 (Fla. 1997).

STATEMENT REGARDING ORAL ARGUMENT

The State opposes Calhoun's request for oral argument in this case because the issues presented by Calhoun are straightforward and would not be materially benefited by oral argument. *See Fla. S.*

Ct. Internal Op. Proc. II.A.3.(a) (explaining successive capital postconviction appeals are treated “in the same manner as” cases “in which review is granted without oral argument”). Calhoun has no sentence on an over decade-old murder conviction and oral argument will only serve to delay justice for the victims further. Alternatively, the State urges this Court to expedite any oral argument.

CITATIONS

The single volume record below will be referred to as “R.” and then the PDF page number, i.e., “(R. at 1.)” Calhoun’s initial brief shall be referred to as “I.B.” followed by the page number. The evidentiary hearing from Calhoun’s prior appeal (SC18-340, *Calhoun v. State*, 312 So. 3d 826 (Fla. 2019) (*Calhoun II*)) will be cited as SC18-340 T. at [page number].

STATEMENT OF THE CASE AND FACTS

I. STATEMENT OF THE CASE

A jury convicted Calhoun of first-degree murder and kidnapping in 2012 and recommended death by a 9-to-3 vote. *Calhoun v. State*, 138 So. 3d 350, 358 (Fla. 2013) (*Calhoun I*). The trial court sentenced Calhoun to death, and this Court affirmed. *Id.* at 359, 368. In 2015, Calhoun filed his initial 3.851 motion. *Calhoun II*, 312 So. 3d at 836.

The trial court vacated Calhoun’s sentence under the then-controlling precedent in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) while denying guilt-phase relief. *Calhoun II*, 312 So. 3d at 836. This Court affirmed that decision as well. *Id.* at 856.

Calhoun filed his successive 3.851 motion on August 17, 2018, claiming (in part) that Doug Mixon confessed to Keith Ellis. (R. at 53-67.) The State responded to the motion on June 7, 2021. (R. at 277-83.) After a *Huff*¹ hearing, the postconviction court granted Calhoun an evidentiary hearing on his newly discovered evidence claim that Doug Mixon confessed to Keith Ellis that he murdered the victim. (R. at 300, 305-28, 342-46, 348.) The evidentiary hearing was held on May 17, 2022. (R. at 437.)

Calhoun presently has no sentence on his first-degree murder conviction.

II. STATEMENT OF THE FACTS

A. Trial Evidence

“The facts of this case, including the overwhelming evidence of Calhoun’s guilt, were fully set out in” this Court’s “opinion on direct appeal.” *Calhoun II*, 312 So. 3d at 834–35:

¹ *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993).

Johnny Mack Sketo Calhoun and Mia Chay Brown were both reported missing on December 17, 2010. On December 20, Brown's remains were found bound and burnt in her car, which had been lit on fire in the woods of Alabama. Calhoun, thought to be the last person to see Brown alive, was found hiding in the frame of his bed inside his trailer on December 20.

Guilt Phase

Brown worked at Charlie's deli and grocery store in Esto, Florida. Harvey Glenn Bush saw Brown working at Charlie's deli around 1 to 1:30 p.m. on December 16, 2010, and knew Brown drove a white car. Bush heard Calhoun ask Brown for a ride that evening and Brown responded that she would pick him up after work at approximately 8 to 9 p.m.

Brown drove to Jerry Gammons' trailer in a light colored, four-door car and knocked on his door at about 8:40 p.m. on December 16. Brown asked for Calhoun, and Gammons told her that Calhoun did not live there. America's Precious Metals junkyard, where Calhoun's trailer was located, is approximately one road down from Gammons' trailer.

Brandon Brown, Brown's husband, talked with Brown at lunch time on December 16 while she was working at Charlie's deli. Brown usually got off of work at approximately 9 p.m. Brandon called Brown at 10 p.m. because she was not home. Brandon fell asleep on the couch at about 10:30 p.m., and when he woke up at 2 a.m., his wife was still not home. It was unusual for Brown not to come home; Brandon started calling family members to find her.

Sherry Bradley, the manager at Gladstone's convenience store located between Enterprise and Hartford, Alabama, testified that Calhoun came into her

store between 5:30 and 6:00 a.m. on December 17, 2010, and bought cigarettes. Bradley noticed scratches and dried blood on his hands and sores on his face. Calhoun was wearing a white shirt that had spots of blood on it and there was something black underneath his fingernails. She asked Calhoun about his appearance, and he responded that he had been deer hunting. Calhoun was driving a white, four-door car with a Florida license plate. Darren Bratchelor, a former schoolmate of Calhoun's, also saw Calhoun at the convenience store at about 6 a.m. After that day, Bradley left town for a few days, but when she returned, another employee had posted a missing persons flyer in the store, on which she recognized Calhoun's photograph.

Chuck White, a patrol officer for Holmes County, Florida, arrived at America's Precious Metals at 8 a.m. on December 17. White looked in Calhoun's trailer and found clothes and trash scattered everywhere. Calhoun was not there. On cross-examination, White testified that Sketo Calhoun ("Sketo") and Terry Ellenburg, co-owners of America's Precious Metals, told him that there had been a break-in at the junkyard, that there were pry marks on Calhoun's trailer door, and that the skid steer loader, or Bobcat, had been hot-wired and moved. White noticed many tire tracks around the yard. White acknowledged that he did not secure Calhoun's trailer before he left the yard.

Brett Bennett, a cattle broker in Geneva, Alabama, noticed smoke from the highway on December 17 at approximately 11 a.m. Keith Brinley, a school maintenance employee in Geneva, Alabama, also saw a big fire behind the Bennett residence at about that same time.

Tiffany Brooks, a resident of Hartford, Alabama, found Calhoun in her family's shed on the morning of December 18, 2010. Calhoun was on the ground wrapped in sleeping bags that the family kept around the freezer.

Calhoun was wearing overalls and a white t-shirt and was wet and dirty. Brooks brought Calhoun into the house and the family washed his clothes, gave him new clothes, let him shower and nap, and gave him some food. Steven Bledshoe, Tiffany's boyfriend, called the Brooks' residence and told them about the missing persons flyer he saw with Calhoun and Brown's pictures on it. Calhoun told the Brooks he did not know Brown but she was probably the person who was supposed to pick him up at his trailer the night before. Calhoun had the Brooks drop him off at a dirt road. Glenda Brooks, Tiffany's mother, also testified to these events.

Brittany Mixon,^[2] Calhoun's ex-girlfriend, testified that she went to school with Brown and that Brown knew Calhoun through her and from working at the convenience store. On December 16, Mixon stayed at her father's house and expected Calhoun to come over that night but he never came. Mixon drove to America's Precious Metals on the morning of December 17 to find Calhoun because he did not have a phone to call. Mixon used to live in Calhoun's trailer with him but moved out in October of that year. She testified that they had lost the key to the trailer so they had had to pry the door open to get inside the trailer. Mixon asked Sketo if he had seen Calhoun, but he had not. Mixon looked inside Calhoun's trailer; no one was inside, but the trailer was ransacked. Lieutenant Michael Raley of the Holmes County Sheriff's Office investigated Brown's missing persons report. He called Mixon, who told Raley about a campsite in Hartford, Alabama, approximately ten miles from America's Precious Metals, where Mixon and Calhoun would camp. The campground was on the property of Charlie Skinnard, Calhoun's brother-in-law. Mixon met the Brooks family once while camping with Calhoun. She took Raley to the campsite.

² Brittany Mixon is Doug Mixon's daughter. *Calhoun II*, 312 So. 3d at 840. Calhoun directed his counsel not to call Doug Mixon as a witness in his trial. *Id.* at 837.

Raley noted that the burnt car was off of Coleman Road, approximately 1,488 feet away from Calhoun's campsite. The Brooks' residence was approximately 1.5 miles from the burnt car.

Angie Curry, Priscilla Strickland, and Mixon went to Calhoun's trailer around 4 p.m. on December 17. Mixon went into the trailer and found wine, a purse, and menthol cigarettes. They took the items and called the police. Brandon identified the purse as belonging to Brown. When Mixon gave Brown's purse to Raley, Raley sent a police officer to Calhoun's trailer to secure it until they got a search warrant. On cross-examination, Mixon acknowledged that Sketo and Ellenburg told her that the trailer had been broken into and not to go in it, but she did anyway. She stated that Calhoun did not smoke cigarettes and did not have cable television service in his trailer.

Dick Mowbry, former game warden for Geneva County, Alabama, participated in a search for Brown and Brown's vehicle on December 20, 2010. He found a burnt, white Toyota with no license plate. The entire inside of the car was burnt and while he was looking through the front of the car, he saw a rib cage in the trunk, so he called the police.

Mike Gillis, with the Alabama Bureau of Investigation, responded on December 20 to the call regarding the burnt vehicle. Remains of a body were in the trunk of the car. There was what looked like coaxial cable wrapped around the wrists of the body; duct tape was also found in the car.

On December 21, 2010, Dr. Stephen Boudreau, a medical examiner for Alabama, received the human remains found inside the burnt car. The remains were badly burnt; the hands and lower limbs had been burnt off. Dr. Boudreau was able to identify the remains as

female because the uterus and vagina were not destroyed, but the sex organs were denatured, or heated, to such an extent that there was no way to analyze them. He found coaxial cable wrapped around what was left of the remains' upper arms and tape on the neck. Dr. Boudreau determined that the cause of death was smoke inhalation and thermal burns and that the death was a homicide. He found soot embedded in the airway of the lungs' mucus blanket and carbon monoxide in the back tissue, meaning that the victim had inhaled smoke. Dental x-rays matched those of Brown's. On cross-examination, the defense elicited that no foreign DNA was found in Brown's vagina. Dr. Boudreau also acknowledged that no ends of the coaxial cable were found, and that he could not determine whether Brown was conscious or not when she inhaled the smoke or at what point in time she would have lost consciousness.

On December 20, 2010, Jeffery Lowry, deputy state fire marshal with the Alabama Fire Marshal's Office, took debris samples from the burnt car and sent them to the Alabama and Florida laboratories. Jason Deese, an arson investigator for the Florida Bureau of Fire and Arson, testified that on December 22, 2010, he inspected the car. The vehicle identification number (VIN) was matched to a 2000 Toyota Avalon. Brown owned a four-door 2000 Toyota Avalon. The fire originated in the driver's seat and passenger compartment; it was not an engine fire. Perry Koussiafes, senior crime laboratory analyst for the Florida Fire Marshal's Office, received six samples from the car on December 30, 2010. The samples from the right front quarter and left quarter of the car tested positive for ignitable liquid.^[3]

Trevor Seifret, a crime lab analyst for the Florida

³ Forensic evidence identified the accelerant used to burn the victim's vehicle as "light petroleum distillate," such as camp fuel and lighter fluid, and ruled out gasoline. *Calhoun II*, 312 So. 3d at 838 n.3.

Department of Law Enforcement (FDLE), testified that blood found on the cardboard of a roll of duct tape taken from Calhoun's trailer was a major donor match to Brown and a minor donor partial match to Calhoun. Blood found on blankets taken from Calhoun's trailer were total matches to Calhoun and Brown. DNA from hair found in Calhoun's trailer also matched Brown; Seifret testified that DNA is found on hair only when the hair is pulled out of the scalp.

Jennifer Roeder, a digital evidence crime analyst for FDLE, testified that an SD memory card found in Calhoun's trailer was from Brown's camera, and based on the time and date stamps of other pictures on the camera, the last picture was taken between 3:30 and 4:00 a.m. on December 17, assuming no one reset the clock on the camera.

On December 20, 2010, Harry Hamilton, captain of the Holmes County Sheriff's Department, seized Calhoun's trailer pursuant to a search warrant. He noticed that the evidence tape on the door had been broken. He found Calhoun hiding under his mattress in the bed frame in his trailer. Calhoun had scratches on his hands, arms, and neck.

Raley executed a second search of Calhoun's trailer on December 28 at the impound yard of the Holmes County Sheriff's office after Brown's remains had been found. He found a TV face down on the mattress of the bed and a DVD player. A VCR was on the floor and the top was off, with wires tangled in the corner. A converter box with outputs for a coaxial cable and a TV with a coaxial coupling were found, but no coaxial cable was found in the trailer.

The State rested, and the defense provided witnesses as follows. José Martinez, owner of the Friendly Mini-Mart, testified that Calhoun came to his store on December 16

and bought a pack of cigars, wine, and apple cider. He never knew Calhoun to buy cigarettes.

Matt Crutchfield who lived near America's Precious Metals was awakened on December 17 between 1 and 3:30 a.m. by a loud bang. He had heard the noise before and thought it came from the recycling plant. Monica Crutchfield, his wife, was also awakened by a loud noise that came from America's Precious Metals, but she testified that she had never heard that noise before. Darlene Madden, who lived one block from America's Precious Metals, awoke to a loud noise that sounded like cars colliding at approximately 2:30 to 3:00 a.m. She testified that she may have heard a second noise but did not get up to investigate it.

John Sketo, Calhoun's father and co-owner of America's Precious Metals, testified that Calhoun's trailer was located beside the scrap yard. Sketo arrived at the scrap yard at approximately 7:30 a.m. on December 17 and noticed that the Bobcat was missing from the place it had been the day before. He also noticed that the door to Calhoun's trailer was open. Sketo testified that none of this was like that the day before. Ellenburg called the police. Ellenburg and Sketo found the Bobcat by the loading dock, and they thought it had pushed something off of the dock. Tread marks on the ground had not been there the day before. Sketo looked in Calhoun's trailer and it looked like someone had searched it; drawers were open and things were strewn about. Sketo saw a small grill on Calhoun's bed, which usually remained outside the trailer. Sketo did not see anyone in the trailer. He did not see a purse on the floor of the trailer. Sketo exited the trailer and left the door open.

Mixon arrived at the junkyard and asked if Sketo had seen Calhoun. Sketo replied that he had not and told Mixon not to go into the trailer because someone had broken into it, but Mixon went into the trailer anyway.

Mixon was in the trailer for about one minute. Then Mixon left the junkyard. Sketo went back into the trailer and found Calhoun's gun leaning against the couch on the floor. Sketo testified that if the gun had been there the first time he went into the trailer he would have noticed it. He stated that the gun was not there before Mixon went into the trailer. On cross-examination, the State elicited from Sketo that he did not see Mixon carry the gun or anything else into the trailer.

Ellenburg testified that he arrived at the junkyard at approximately 7:30 a.m. on December 17. He stated that Calhoun's door did not have pry marks on it the day before, and Calhoun's trailer was not in disarray the day before. He did not see a gun in the trailer the first time he looked. He stated that the tire tracks near the loading dock and next to the Bobcat looked like they were made by a dual-wheeled vehicle. A corner of the cement steps was also knocked off, and had not been like that the day before.

Lieutenant Raley searched a barn in Pine Oak Community in Geneva, Alabama, and a license tag bracket matching the description of one on Brown's car was found at the property. There was also a piece of cardboard that had oil and tire marks on it. Brown's family told Raley that her car had a small oil leak. However, Raley could not trace the oil stain or the bracket to Brown's car.

Calhoun I, 138 So. 3d at 354–58.

B. Prior Relevant Postconviction Claims

Calhoun's successive proceedings below are not the first time he has tried to pin his victim's murder on Doug Mixon. He previously pointed out that Mixon was a possible contributor to DNA found on a shirt in Calhoun's trailer at the conclusive match-ratio of 1 in 800

Caucasians. See SC18-340 at 201. The FDLE report that included Doug Mixon as a “possible contributor” had a statistical weight of “1 in 800” for Caucasians. Doug Mixon’s daughter (who lived with Calhoun sometimes) was also a possible contributor to that sample. See SC18-340 at 201-02.

Calhoun raised two prior newly discovered evidence claims on this front too: (1) a newly discovered evidence claim that Doug Mixon confessed to Robert Vermillion; (2) a newly discovered evidence claim that Doug Mixon had a suspicious encounter with Natasha Simmons. Calhoun also raised an ineffective assistance of counsel claim that counsel ineffectively failed to discover Doug Mixon’s confession to Jose Contreras.

During the previous evidentiary hearing (held in September 2017), Doug Mixon testified that he had never confessed to anyone that he had any part in the victim’s murder. (SC18-340 T. at 320.) Because these past claims are relevant to Calhoun’s present newly discovered evidence claim, the State recounts the facts undergirding them below.

(1) Vermillion Claim

Calhoun previously argued that Doug Mixon’s “confession” to Vermillion was newly discovered evidence. *Calhoun II*, 312 So. 3d at 836. This claim was developed at a prior evidentiary hearing. (SC18-340 T. at 307–21 (Doug Mixon’s testimony), *id.* at 355–72 (Vermillion’s testimony).)

The postconviction court correctly denied this claim, as this Court explained:

Calhoun contends that Mixon, who is the father of Calhoun’s former girlfriend, told Robert Vermillion, who is related to the victim’s husband, that Mixon murdered the victim.

....

In this case, as the circuit court ruled, the newly discovered evidence poses both admissibility and credibility problems. Regarding Vermillion, Mixon’s alleged statements to Vermillion requesting forgiveness for doing a lot of things he is not proud of are hearsay and, thus, not admissible as substantive evidence. Moreover, in light of Calhoun’s direction not to call Doug Mixon as a witness at trial, it would not be possible to impeach Mixon—who testified at the evidentiary hearing and denied that he was involved in or had confessed to the victim’s murder—with his alleged statement to Vermillion. But, even if this evidence were admissible, Vermillion testified at the postconviction evidentiary hearing that he could not say that Mixon had confessed to killing the victim, only that Vermillion believed Mixon implied it. After hearing testimony at the evidentiary hearing from both Vermillion

and Mixon, who denied any involvement in the victim's murder and denied having confessed to it, the circuit court found that Vermillion's testimony is "false."

Calhoun II, 312 So. 3d at 836.

(2) Simmons Claim

Likewise, Calhoun previously argued that Natasha Simmons had a suspicious encounter with Doug Mixon around the time the victim disappeared. This claim was also developed at the prior evidentiary hearing. (SC18-340 T. at 307–21 (Doug Mixon's testimony), *id.* at 322–35 (Simmons' testimony)).

This Court affirmed the postconviction court's denial of this claim as well:

Calhoun also claims that Natasha Simmons, whose former boyfriend is acquainted with Mixon, had a suspicious encounter with Mixon near the Alabama-Florida line around the time of the victim's disappearance that tends to implicate Mixon in the victim's murder.

. . . .

Similar credibility problems exist with Simmons' account. Simmons testified at the postconviction evidentiary hearing that she picked up Doug Mixon and her then-boyfriend near the Alabama-Florida line around the time of the victim's disappearance and that Mixon had blood on his chest and was running with a gas can.³

[footnote 3] To the extent that Simmons' statement that Mixon had an empty gas can

suggests that Mixon used gas as an accelerant to burn the victim's vehicle, this conflicts with the evidence presented at trial. At trial, a crime laboratory analyst with the State Fire Marshal's Office testified that ignitable liquid—"light petroleum distillate"—had been used as an accelerant and was found in samples of fire debris from the victim's car. He further testified that examples of light petroleum distillate include "camp fuel" and "lighter fluid," but exclude "anything that's contained in a vehicle [like] oil or gas or anything like that."

Although Simmons' account of her suspicious encounter with Mixon—aside from any hearsay statements by Mixon—would be admissible as substantive evidence, competent, substantial evidence supports the circuit court's finding that Simmons did not relay this information to law enforcement despite Simmons' claim that she had, severely undermining her credibility. Specifically, Simmons testified at the evidentiary hearing that she reported the incident to the then-sheriff of Geneva County, Alabama, Greg Ward, but Ward told her she was wasting her time because the killer had already been caught and had confessed. However, Ward testified at the evidentiary hearing that he did not recall getting any information from Simmons about anything and that he did not recall Simmons reporting any encounter with Mixon. Ward was adamant that he never told Simmons to forget about her encounter with Mixon because the killer had been caught and had confessed. Rather, Ward testified that if someone had reported something like that, he would have given the information to the Alabama Bureau of Investigation (ABI) because the case was turned over to ABI after the victim's body and vehicle were found in Geneva County, Alabama. The lead investigator for the State of Florida, Lieutenant Michael Raley of the Holmes County Sheriff's Office, testified at the postconviction evidentiary hearing that neither Ward nor the ABI had

provided any information about statements from Simmons regarding Doug Mixon's involvement in the victim's murder. Thus, despite its admissibility, as the circuit court found, there are credibility concerns with Simmons' testimony.

Calhoun II, 312 So. 3d at 836.

(3) Cumulative Review of Simmons and Vermillion Claims

Despite the admissibility and credibility issues with the Simmons and Vermillion claims, this Court analyzed them together and determined this evidence did not raise a reasonable doubt as to Calhoun's guilt.

[E]ven assuming no admissibility or credibility problems with Vermillion's testimony and no credibility problem with Simmons' testimony, when the newly discovered evidence from Simmons and Vermillion regarding Doug Mixon is considered cumulatively with all of the evidence that would be admissible on retrial, it does not so weaken the State's case against Calhoun as to give rise to a reasonable doubt as to Calhoun's culpability. The evidence shows that the victim was going to pick up Calhoun, not Mixon, when she disappeared on the evening of December 16, 2010. DNA evidence places Calhoun's blood, not Mixon's, near the victim's blood on a blanket in Calhoun's trailer. DNA evidence also establishes that blood found on the cardboard of a roll of duct tape taken from Calhoun's trailer was a major donor match to the victim and a minor donor partial match to Calhoun. An eyewitness places a scratched and bloody Calhoun, and no one else, driving a car that matched the description of the victim's vehicle in the early morning hours of December 17, the day after the victim disappeared, just hours before witnesses saw smoke from the highway near

where the victim's burned car and body (which had tape on the neck) were eventually found. The next morning, on December 18, Calhoun's acquaintance found him, and no one else, wrapped in sleeping bags and lying on the ground in her family's shed approximately 1.5 miles from where the victim's burned car and body were found. And Calhoun, not Mixon, evaded law enforcement and was found hiding under his bed.

Calhoun II, 312 So. 3d at 838.

(4) Contreras Claim

In his prior postconviction proceeding, Calhoun also argued that his counsel ineffectively failed to discover that Mixon confessed to Jose Contreras. This claim was developed at Calhoun's last evidentiary hearing. (SC18-340 T. at 307–21 (Doug Mixon's testimony), *id.* at 338–47 (Contreras' testimony 340–50).)

This Court found the postconviction court correctly rejected this claim on appeal after reciting the underlying evidence, including the evidence supporting the lower courts determination that Contreras' testimony was false. *Calhoun II*, 312 So. 3d at 840. The Court also determined that Calhoun suffered no prejudice. *Id.* at 841.

C. Current Ellis Newly Discovered Evidence Claim

Around October 24, 2017, Karon Matheny contacted Calhoun's counsel (Capital Collateral Regional Counsel North ("CCRC-N")) to

alert them to alleged incriminating statements made by Doug Mixon to Keith Ellis. (R. at 62.) Keith Ellis executed a notarized affidavit on October 30, 2017, that stated Doug Mixon confessed that he murdered the victim instead of Calhoun. (R. at 94.) This affidavit read as follows:

Affidavit of Keith Shawn Ellis

I, Keith Shawn Ellis, am over the age of 18 and am currently incarcerated in Graceville Correctional Facility.

In Late July or Early August of 2017, I was housed in B-Dorm. Around that time, a man was placed into the cell next to me, B103. I was in B104. Shortly after him being moved in, I noticed two younger black males confront this man about the “88” tatoo [sic] on his arm. I stepped up and told them to leave the man alone.

From there on, this man realized I was someone he could trust. We spoke about our lives and how we got here but he was mainly sharing more of himself. These stories ranged from him cooking meth and dealing drugs to setting stuff on fire. He bragged about setting multiple things on fire and not getting caught. Saying they didn’t have enough evidence to convict him.

During this same conversation, we started talking about money and medical copayments that get taken from your canteen account. This conversation brought up the nurse, Ms. Matheny. By this time, I was told to call him Doug. Doug then began to elaborate how she was involved in one of his burnings. Ms. Matheny owned the land and her nephew or friend of the family was who Doug framed.

Doug continued to say this all happened because the

relationship this guy had with his daughter went bad, he dogged her out and screwed her over. Doug never went into detail about what happened between them but he said he had to do something to fix the problem.

Doug then stated to me, to get back at the kid, I burned the girl up in the car and made it look like the kid did it. Now the kids [sic] on Death Row.

This conversation continued but we didn't talk more about that incident until after he was transferred out of my Dorm (B) weeks later.

I saw him in the medication line and asked him where did he go. Doug said he had court and people were telling on him for what he had done. He even told me people from Alabama were telling on him. Doug also said Ms. Matheny was the one causing all the problems and he was going to deal with her. If he wasn't going to take care of her, his kids were going to.

I didn't see Doug again until he was leaving yard and I told him I wanted to talk. Doug never met with me again.

I decided to tell Ms. Matheny after Doug didn't meet with me because I was worried for her safety. After telling her, I was escorted to tell the assistant warden.

I relayed this information to the assistant warden along with Ms. Newman and another captain.

I have never spoke about this with anyone else until I met with Jayson Shannon, an investigator that represents an inmate on Death Row. He wrote this statement for me and have not misinterpreted my words. I swear to and affirm everything in this affidavit. I was not promised anything or coerced into signing this statement.

(R. at 94.)

D. Current Evidentiary Hearing

Three witnesses testified at the evidentiary hearing held before the postconviction court on May 17, 2022: Doug Mixon, Keith Ellis, and Karon Matheny. (R. at 437–522.)

Doug Mixon—a serial felon—testified first. (R. at 444–80.) While he was in prison, he knew and was on friendly terms with a man named Keith Ellis who lived in a nearby cell. (R. at 447–49.) During one of their conversations, he told Keith Ellis that he burned things. (R. at 449.) Doug Mixon stated he was, “Bragging, bragging on stuff, most of it was all, trying to look bigger than what you are in prison. Because like I said, I was having a hard time there” due to some black inmates giving him grief over his tattoos. (R. at 448–49.) At one point, Mixon noted that he was “the biggest liar in that prison” because he was “trying to get by from day to day.” (R. at 455.) “[I]f it’d get me through to the next day, I’d have said anything,” including lying about his “past criminal history.” (R. at 456, 468, 481.)

Lying about criminal history is a common protection method in prison. (R. at 468–49.) Both in Holmes County and in prison, Doug Mixon has a reputation for not telling the truth. (R. at 461–62, 467–

69.) He is a “compulsive liar.” (R. at 462.)⁴

He did not, however, tell Keith Ellis that he burned a girl in Alabama. (R. at 450, 472.)⁵ He only told Keith Ellis that “my future ex-son-in-law of mine killed a young lady and burned her in a car and they trying to blame me with it.” (R. at 450.)⁶ He made this statement after the evidentiary hearing held September 15, 19, and 20, 2017. (R. at 451; *see* SC18-240 T. at 1–4 (evidentiary hearing dates and listing Doug Mixon as testifying on September 19)). Keith Ellis was “a liar” for stating that he burned the victim and her car on Matheny’s property. (R. at 454.) He did mention to Keith Ellis that people from Alabama were testifying against him.⁷ (Id. at 458.)

⁴ Some of his lies include: (1) having an affair with the Geneva County Sheriff’s wife; (2) going to “Mexico and killing the drug cartel”; (3) that someone tried to eliminate him as a cooperating witness in a federal case by shooting him (he actually shot himself). (R. at 467–68.)

⁵ Doug Mixon did, however, note that “I got a bad memory and I told a lot of lies, and I may have said something similar to that.” (R. at 473.)

⁶ During this hearing, Doug Mixon referred to Calhoun as Johnny Mack ten different times. (R. at 451–54, 458–59, 463, 465, 479.) In the prior evidentiary hearing, he referred to Calhoun as “Johnny Mack” five different times, including when the State referred to him as “Mr. Calhoun.” (SC18-340 T. at 308, 311, 315.)

⁷ Natasha Simmons and Jose Contreras—both from Alabama—gave testimony implicating Mixon at the prior evidentiary hearing. (SC18-

Doug Mixon “hated” the victim “got burned” because she was helping his daughter, the victim was a good girl, and he felt somewhat responsible for her. (R. at 450–51.) He did not know the victim was burned until after she was found. (R. at 451.) He did not know where the victim was found until his daughter gave him that information. (R. at 451–52.) He believed that the victim was killed because she was trying to help his daughter. (R. at 457.) He would never confess to her murder because he did not do it and because she was helping his daughter. (R. at 457.) He does not lie when it comes to the victim. (Id. at 478.)

Calhoun and Doug Mixon’s daughter had an on again off again relationship. (R. at 457–58.) When asked if he told Keith Ellis that Calhoun “dogged” his daughter, Doug Mixon replied, “That he dated her. That’s dogged mean, ma’am?” (R. at 458.) Doug Mixon then clarified that Calhoun and his daughter lived together sometimes, that they were back and forth, “if that’s what dogged means.” (R. at 458.) At times Calhoun did not treat her well, other times “it was the

340 T. at 322–334, 340–47.) Doug Mixon testified he did not see Contreras. (R. at 459.) But he testified there was “that girl” who testified against him and implicated him. (R. at 459.)

best.” (R. at 458.) When the money and drugs were there, Calhoun and Mixon’s daughter got along great. (R. at 458.)

While imprisoned, Doug Mixon also interacted with a nurse, Karon Matheny. (R. at 452.) He claimed that—before he knew who she was—she yelled at him and filed a report against him. (R. at 452–3.) This led to an incident where Doug Mixon claimed the assistant warden threatened him because Keith Ellis told Matheny that Mixon had threatened Matheny. (R. at 452.) Doug Mixon stated he had never threatened Matheny’s life. (R. at 452.) He also claimed that she later tried to sell him property and that she told him her daughter went to school with Calhoun. (R. at 453.) That was how Doug Mixon found out she lived in Alabama. (R. at 456.) He did not know who Matheny was and had no ill will towards her when he was in the same pod as Keith Ellis. (R. at 472.)

Doug Mixon also recounted his memories of the time shortly before the victim was murdered. (R. at 463.) His daughter and Calhoun were on good terms when the murder occurred. (R. at 464.) Prior to learning the victim was missing, Doug Mixon was “cooking dope in Geneva County at Jose Contreras’ home,” while Contreras was out. (R. at 464.) His daughter was continually crying while the

victim was missing and trying to help law enforcement because “it near killed” his daughter that the victim was missing. (R. at 465.)

Doug Mixon admitted that he has a lot of memory problems and was on a lot of medication. (R. at 466.) He was diagnosed with PTSD, had a pacemaker and defibrillator, had several heart scans done, experienced two heart attacks, and done “a lot of drugs over the years.” (R. at 466.) His memory problems were due to both illegal drugs and legal medications. (R. at 467.)

When asked if he killed the victim, Doug Mixon responded, “No. Lord god, no” twice. (R. at 473-74.) He confirmed that it was hard for him to believe that Calhoun killed the victim back in 2010. (R. at 474.) And he reiterated that the victim’s murder almost “killed his daughter,” who the victim had been helping. (R. at 475.)

Keith Ellis—a serial felon who has spent the last twenty-six years in prison—testified next. (Id. at 480–505.) During his prison stay, he stopped a gang from putting “down” on Doug Mixon and extorting him. (R. at 483.) He and Doug Mixon lived in close proximity to one another while in prison and exchanged stories about their charges. (R. at 483.) Doug Mixon “tended to try to make himself look bigger and badder than” what “he appears to be in sight, physical

sight.” (R. at 487.) During this conversation, Doug Mixon mentioned that he set fires. (R. at 483.) According to Keith Ellis, Doug Mixon also “expressed about a situation that he had done involving one of the nurses at Graceville, Ms. Matheny. And he had told me about the young man that he had set up because the young man had dogged his daughter, Brittany.” (R. at 484.) “Dogged” means used and dumped for someone else. (R. at 484.)

Doug Mixon—according to Keith Ellis—initially was going to “burn I guess this kid up in the trailer,” but decided that was too hard. (R. at 484.) Doug Mixon could not go after “the kid” for “some odd reason.” (R. at 484.) So instead, Keith Ellis claimed that Doug Mixon took the “easier” route, went over to the “guy’s new girlfriend,” drugged her with “Visine,” put her in the trunk of a car, “threwed two cans of gasoline^[8] on the car and set it on fire.” (R. at 484 (emphasis added); see also R. at 492 (“He said he had dumped two gas cans on

⁸ As this Court recognized in the prior appeal, forensic evidence from Calhoun’s trial identified the accelerant used to burn the victim’s vehicle as “light petroleum distillate,” such as camp fuel and lighter fluid, and ruled out gasoline. *Calhoun II*, 312 So. 3d at 838 n.3. Later, on redirect, Keith Ellis stated that Doug Mixon never specified “what was in the gas cans,” despite his earlier testimony that it was “two cans of gasoline.” (*Compare* R. at 484 *with* R. at 504.)

the car.”.) During this same conversation, Doug Mixon said Ms. Matheny “had caused him some problems” and that “somebody in Alabama” was “snitching on him.” (R. at 486.) Keith Ellis “guess[ed]” that Doug Mixon had an issue with nurse Matheny because the place he “opted to burn this vehicle with this person in it was part of Ms. Matheny’s land.” (R. at 494.) But the only motive Doug Mixon actually voiced to him was that nurse Matheny “was spreading lies.” (R. at 501.) Matheny, a prison nurse, came up because they were discussing medical issues and co-payments being taken from their accounts by medical staff. (R. at 489, 503.)

Keith Ellis testified all this information came out in “the very first conversation” they had where they were talking about their charges. (R. at 489–90.) Doug Mixon’s alleged confession is the “first thing” he talked to Keith Ellis about. (R. at 490.) Keith Ellis did not initially believe Doug Mixon’s statement because this was common prison talk. (R. at 487.) When Doug Mixon “first told” this story, Keith Ellis went to nurse Matheny to verify it.⁹ (Id. at 485–86.) She told

⁹ Keith Ellis testified he received insulin shots from nurse Matheny on a twice-daily basis. (Id. at 490–91.)

him, “yeah, he was involved in something of that nature. And there was a guy on death row but it wasn’t none of her family, it was supposed to have been some part of, her son’s friend or something that was close to the family.” (R. at 485.) After that conversation, Keith Ellis supposedly told Doug Mixon to leave the nurse alone, since Mixon had previously threatened her. (R. at 485–86.) He also began telling people to “watch” Doug Mixon “because he’s definitely dangerous.” (R. at 492.)

Doug Mixon then “disappeared for awhile” and the next time Keith Ellis saw him was in the prison medicine line. (R. at 486.) According to Keith Ellis, Doug Mixon went back to the “same thing of talking about people telling on him and everything.” (R. at 486.) He then renewed his threat to kill nurse Matheny or have his “kids”¹⁰ do it. (R. at 486–87, 459.)

On cross, Keith Ellis admitted that several details he testified to were not in his affidavit despite their importance, including: (1) what

¹⁰ According to Keith Ellis, “kids” is a term the Unforgiven gang use to describe their “younger ones.” (R. at 496.) He also claimed Doug Mixon told him that he was part of the Unforgiven. (R. at 493.) Doug Mixon testified he was not in the Unforgiven gang. (R. at 468.)

happened between Doug Mixon’s daughter and Calhoun; (2) that Doug Mixon allegedly told him he drugged the victim with Visine; (3) that Doug Mixon told him he used gas cans and poured gasoline on the victim’s car. (R. at 498–99.) He confirmed that he executed this affidavit in September “less than three or four months after this conversation” with Doug Mixon took place. (R. at 499.)

Finally, Keith Ellis testified that he had no issues testifying and no medication-related issues impaired his ability to do so. (R. at 502.)

Karon Matheny testified last. (R. at 505.) She met Calhoun when he was around fifteen because he was a friend of her children. (R. at 506.) She owns land that adjoined Charlie Skinner,¹¹ “just across the fence where” the victim’s car was found. (R. at 506.) The victim’s car was not found on Matheny’s property, just nearby. (R. at 511.)

In 2016/2017, she worked as a nurse in Graceville Correctional. (R. at 506.) At some point, Keith Ellis—who would come to medical three times a day due to a medical issue—told her Doug Mixon threatened to kill her and knew who she was, her family

¹¹ This appears to be the man referenced as “Charlie Skinnard, Calhoun’s brother-in-law,” in Calhoun’s direct appeal. *Calhoun I*, 138 So. 3d at 356.

members, where she lived, and where her family lived. (R. at 507-08.) Keith Ellis said Doug Mixon knew she lived on Coleman Road in Hartford, Alabama. (R. at 508, 511.) Prior to this point, she had never heard of Doug Mixon. (R. at 508.) Sometime after her conversation with Ellis, Doug Mixon walked into her office, introduced himself, said he knew where she lived, that he was not going to be in jail for a long time, and that he knew she knew Calhoun. (R. at 508, 512.)

When she learned from Keith Ellis that Doug Mixon was allegedly threatening her, she “followed the protocol” and “immediately” reported the matter to her administrator and left for several days because she was upset. (R. at 508–10, 513.) The assistant warden promised to speak with both inmates. (R. at 509.) Matheny then contacted CCRC-N because Keith Ellis also told her that Doug Mixon had confessed to murdering the victim instead of Calhoun. (R. at 509.) She could not remember what year this happened. (R. at 511–12.)¹² She confirmed that she was never questioned about, nor testified in, Calhoun’s case. (R. at 512–13.)

¹² Below, the State accepted without further proof, CCRC-N’s representation that Karon Matheny contacted them around October 24, 2017.

She never claimed to know anything about Calhoun's case. (R. at 513-14.) She never claimed Doug Mixon had anything to do with Calhoun's case. (R. at 514.) She could not figure out why Doug Mixon would threaten to kill her and only knew about that through Keith Ellis. (R. at 515-16.) She did, however, feel threatened when Doug Mixon walked into her nursing lab and stated he knew where she and her family lived. (R. at 516.)

E. Postconviction Court's Ruling

The postconviction court issued a written order denying Calhoun's claims. (R. at 583-597). The court made two critical factual and legal determinations after considering the "demeanor and credibility of the witnesses." (See R. at 583.) Factually, the postconviction court found Keith Ellis' testimony was "unreliable and suspect," and "Doug Mixon did not confess to Keith Ellis." (R. at 587, 590-92.) Legally, the postconviction court found Keith Ellis' testimony would not be admissible under *Chambers v. Mississippi*, 410 U.S. 284 (1973) and (alternatively) it would not probably produce an acquittal on retrial even if admissible. (R. at 592-96.)

F. Post-Denial Demand for Additional Public Records

Nearly a week *after* the postconviction court denied his successive 3.851 motion, Calhoun demanded additional public records from Graceville Correctional Institution/GEO Group to supplement his already-denied claim.¹³ (See R. at 596, 724-5.) Specifically, Calhoun sought: “An incident report (or any sort of report) dating from sometime between July of 2017-October of 2017, that documents Ms. Matheny reporting threats to Assistant Warden Dudley.” (R. at 725.) His demand noted that sometime *before* the May 17, 2022, evidentiary hearing, he learned that Graceville Correctional

¹³ In 2018, Calhoun made three prior 3.852(i) demands to the Florida Department of Corrections and Holmes County Sheriff’s Office relating to his Keith Ellis/Doug Mixon confession claim. (R. at 106-07, 113-14, 116-17, 119-20.) These demands requested (1) “Classification records for Keith Ellis (098905) and Charles Mixon (Q31073); to include their institutional housing history, dormitory assignments, and job assignments”; (2) “a. Any and all phone calls placed by Charles Doug Mixon (Q31073) while incarcerated at Graceville CF” and “b. Visitation history and/or documentation as to who came to see him”; and (3) the “Entire Holmes County Jail file, including visitation logs, phone records, mail records, education records, and disciplinary records for CHARLES DOUGLAS MIXON, for 2/21/17 to 5/24/17 and 9/13/2017 to 9/21/2017.” (R. at 106-07, 113-14, 116-17, 119-20.) None of these demands remotely included an incident report written while Mixon and Ellis were in Graceville. Calhoun does not specify what prior demand he believes encompassed this incident report but continually states there was one.

institute or the GEO group would have this report. (R. at 725.) The lower court denied the demand in an unelaborated order. (R. at 737.)

Calhoun timely appealed to this Court requesting reversal on his newly discovered evidence claim and the lower court's order denying his public records' demand.

This is the State's Answer Brief.

SUMMARY OF THE ARGUMENT

Issue I: Hearsay Confession Admissibility

The postconviction court correctly rejected Calhoun's newly discovered evidence claim by finding that Doug Mixon's supposed confession to Keith Ellis is not admissible under *Chambers*. While two of *Chambers*' factors (corroborating evidence and declarant availability) weigh slightly in favor of admission, they are qualitatively outweighed by the remaining two factors (statement truly against interest and spontaneously made to a close acquaintance shortly after the crime). Since Doug Mixon's alleged confession to Keith Ellis is inadmissible on retrial, his newly discovered evidence claim fails without further inquiry.

Issue II: Probability of Acquittal

Alternatively, the postconviction court correctly found that Doug Mixon's supposed confession to Keith Ellis would not probably produce an acquittal on retrial. The postconviction court found Keith Ellis' testimony unreliable, suspect, and not credible. Competent, substantial evidence supports that determination. And an incredible witness would not likely produce an acquittal on retrial since all other evidence Calhoun offers did not meet that standard in his prior

appeal. Indeed, even without the lower court's credibility determination, the evidence available on retrial would not probably produce an acquittal in light of the (as this Court put it in 2019) overwhelming evidence against Calhoun.

Issue III: Public Records Denial

The postconviction court did not abuse its discretion while denying Calhoun's belated, post-denial public records demand. The evidence was not relevant to any postconviction claim Calhoun raised and, more importantly, Calhoun could not properly utilize new evidence for the first time on rehearing to dispute the postconviction court's analysis. A motion to reopen would not likely have been granted since Calhoun waited until after an adverse ruling, knew about this evidence earlier and did not pursue it, and the evidence he wanted to introduce would have had minimal effect on the outcome anyway. Calhoun was aware that Graceville/the GEO Group would be the ones with these records before the evidentiary hearing and he cannot permissibly wait until after an adverse ruling to secure and admit this evidence.

This Court should affirm on all issues.

ARGUMENT

Calhoun appeals to this Court raising three issues: (I) the lower court erred by determining an alleged confession by Doug Mixon to Keith Ellis was not admissible and would not produce an acquittal on retrial; (II) the lower court erred in determining Keith Ellis' testimony—combined with all other admissible evidence—would not produce an acquittal on retrial; and (III) the lower court erred by denying a demand for additional public records.

The State will address each of Calhoun's issues in turn, but (for analytical clarity) reserves its arguments regarding the probability of acquittal (including Keith Ellis' credibility) for Issue II rather than Issue I. Admissibility is a predicate to any newly discovered evidence analysis,¹⁴ there is no requirement that the newly discovered evidence standing alone produce an acquittal,¹⁵ credibility of the

¹⁴ *Dailey v. State*, 329 So. 3d 1280, 1288 (Fla. 2021) (The “alleged newly discovered evidence must be admissible not only to satisfy the newly discovered evidence standard and constitute newly discovered evidence under the law but also to warrant a cumulative review of the evidence.”).

¹⁵ *See Calhoun II*, 312 So. 3d at 836 (the second prong of the newly discovered evidence test requires showing new evidence would probably produce an acquittal when considered with all evidence admissible on retrial).

person who heard the alleged confession is not part of the *Chambers* admissibility analysis,¹⁶ but credibility that same person is a part of the newly discovered evidence analysis.¹⁷

- I. THE POSTCONVICTION COURT CORRECTLY REJECTED CALHOUN’S NEWLY DISCOVERED EVIDENCE CLAIM BECAUSE DOUG MIXON’S ALLEGED CONFESSION TO KEITH ELLIS WAS INADMISSIBLE UNDER *CHAMBERS V. MISSISSIPPI*, 410 U.S. 284 (1973).

Issue & Ruling Below

Calhoun’s first issue contests the lower court’s determination that Doug Mixon’s confession to Keith Ellis was inadmissible under *Chambers*. The postconviction court made a purely legal determination that Keith Ellis’ testimony would not be admissible under *Chambers v. Mississippi*, 410 U.S. 284 (1973).

Standard of Review

This Court determines the admissibility of an alleged third-

¹⁶ *Bearden v. State*, 161 So. 3d 1257, 1263 (Fla. 2015) (holding, on direct appeal, the court was precluded from evaluating the credibility of a witness testifying to a third-party confession and was limited to determining the reliability of the hearsay statement itself).

¹⁷ *Marek v. State*, 14 So. 3d 985, 994, 996–97 (Fla. 2009) (determining the probative value of newly discovered evidence of prison hearsay confessions was “negligible” and determining that those statements would “not be credited by either the jury or” judge in a new penalty phase).

party confession under *Chambers* de novo. See *Bearden*, 161 So. 3d at 1263.

Merits

A meritorious newly discovered evidence claim requires Calhoun to establish two elements: (1) *admissible* evidence unknown during trial that could not have been discovered through due diligence; and (2) that the newly discovered evidence would probably produce an acquittal when considered with all evidence that would be admissible on retrial. *Calhoun II*, 312 So. 3d at 836. Cumulative review on the second prong of the newly discovered evidence test is only warranted if the newly discovered evidence in the present claim is in fact admissible. *Dailey v. State*, 329 So. 3d 1280, 1288 (Fla. 2021). *Admissible* evidence is therefore a predict to any newly discovered evidence analysis. *Dailey*, 329 So. 3d at 1288. If the alleged newly discovered evidence is not in fact admissible, then a newly discovered evidence claim fails without further inquiry. *Id.*

Any statements by Doug Mixon to Keith Ellis are inadmissible hearsay under Florida's Evidence Code because Mixon was available during Calhoun's trial. See § 90.804(2)(c), Fla. Stat. (statement against interest exception only applies if the declarant is

unavailable); *Calhoun II*, 312 So. 3d at 837 (“[A]t Calhoun’s insistence, Mixon did not testify at trial.”).

But the United States Supreme Court has recognized that due process may require the admission of evidence regardless of a state’s hearsay rules. *Chambers*, 410 U.S. at 298. The Supreme Court held due process required the admission of a third-party confession—state hearsay rules notwithstanding—after performing a factors analysis of whether: “(1) the confession or statement was made spontaneously to a close acquaintance shortly after the crime occurred; (2) the confession or statement is corroborated by some other evidence in the case; (3) the confession or statement was self-incriminatory and unquestionably against interest; and (4) if there is any question about the truthfulness of the out-of-court confession or statement, the declarant must be available for cross-examination.” *Bearden*, 161 So. 3d at 1265 (citing *Chambers*, 410 U.S. at 300–01.) However, the primary consideration in determining admissibility under *Chambers* is the reliability of the underlying hearsay statement. *Id.* at 1265 & n.3.

It appears this Court has never held jailhouse hearsay

confessions are admissible under *Chambers*.¹⁸ Instead, this Court has generally viewed jailhouse hearsay, third-party confessions with suspicion because of their lacking reliability and held that due process does not compel their admission.

This Court held *Chambers* was distinguishable when the underlying alleged third-party confession was jailhouse hearsay in *Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996). There, in relevant part, the defendant raised a newly discovered evidence claim alleging two inmates stated Schofield confessed to the murder to them. *Id.* at 311–12. The trial court determined this evidence was newly discovered, but not admissible under either Florida’s hearsay rules or *Chambers*. *Id.* at 312–13.

On appeal, the defendant argued these confessions were admissible under Florida’s hearsay rules or, regardless, under

¹⁸ This Court has, however, sidestepped the issue in one case by finding the statement admissible as a statement against interest and once, in another case, remanded for an evidentiary hearing without deciding the issue of *Chambers*’ admissibility. *Johnson v. Singletary*, 647 So. 2d 106, 111 (Fla. 1994) (granting evidentiary hearing without deciding *Chambers*’ admissibility); *Carpenter v. State*, 785 So. 2d 1182, 1203 & n.18 (Fla. 2001) (holding jailhouse hearsay admissible as a statement against interest without deciding *Chambers*’ admissibility).

Chambers. Id. at 313. This Court first found that these alleged jailhouse third-party confessions were not admissible under Florida's hearsay rules because the third-party confessor was available as a witness. *Id.* at 313. While not deciding the issue, this Court also noted that these statements may not have truly been against the declarant's interest and may not have been sufficiently trustworthy to warrant admission even if the third-party confessor was available:

Even if Jones had established that Schofield was unavailable for purposes of section 90.804(2)(c), Jones also had the burden of establishing that Schofield's alleged confessions were statements against penal interest within the meaning of section 90.804(2). *Rivera v. State*, 510 So.2d 340, 341 (Fla. 3d DCA 1987); *see also United States v. Seabolt*, 958 F.2d 231, 233 (8th Cir.1992), *cert. denied*, 507 U.S. 971, 113 S. Ct. 1411, 122 L.Ed.2d 782 (1993) (concluding that "a statement by one criminal to another criminal ... is more apt to be jailhouse braggadocio than a statement against his criminal interest"). Moreover, Jones had the burden of presenting corroborating circumstances demonstrating the trustworthiness of Schofield's alleged confessions. *Rivera*, 510 So.2d at 341.

Jones, 678 So. 2d at 314.

This Court next dealt with *Chambers* and held it was distinguishable. *Id.* at 315. This Court appeared to incorporate the statement-against-interest and trustworthiness discussion in the prior section and held that Schofield's alleged jailhouse confessions

were not admissible under *Chambers* because they did not bear “persuasive assurances of trustworthiness.” *Id.*

Two years later, this Court revisited its decision and issued the same holding. *Jones v. State*, 709 So. 2d 512, 523 (Fla. 1998). But this time, four additional inmates had testified at a new evidentiary hearing that Schofield confessed to killing the victim. *Id.* at 524. The trial court permitted this evidence solely for impeachment instead of substantive evidence of Schofield’s guilt and Jones argued this was error under *Chambers*. *Id.*

This Court disagreed:

[U]nlike the confessions in *Chambers*, the alleged confessions in this case lack indicia of trustworthiness. The fact that more inmates have come forward does not necessarily render the confessions trustworthy. The confessions were not made prior to the original trial in circumstances indicating trustworthiness, such as spontaneously to a close acquaintance as in *Chambers*, or to his own counsel or the police shortly after the crime.

Id. at 525. The delay in coming forward, the extensive felony records of the inmate witnesses, their general statements about the confessions, and small contradictions in their testimony, all indicated a lack of trustworthiness. *Id.*

This Court also noted the unique nature of the prison

environment in its trustworthiness analysis:

While it may be that the inmates were testifying falsely, it may also be that Schofield bragged about a killing he did not commit. An individual's alleged confession to a capital murder would generally be considered to be against one's penal interest. However, in a prison environment, statements concerning involvement in the murder of a police officer may be viewed differently. We noted in Jones' previous 3.850 appeal that a statement by one criminal to another criminal ... is more apt to be jailhouse braggadocio than a statement against his criminal interest. In fact, one inmate testified that Schofield told him that he "got his stripes" by killing a police officer. As Judge Soud observed in his 1992 order, among prisoners a claim of involvement in a police officer's murder may in fact elevate the inmate's status or reputation.

Id. at 525–26 (Fla. 1998) (cleaned up).

Likewise, in *Sliney v. State*, 699 So. 2d 662 (Fla. 1997), the Court excluded alleged third-party jailhouse confessions under *Chambers*. There, during a jury trial, the defendant proffered the testimony of "Witteman and several inmates who were incarcerated with Witteman." *Id.* at 670. Witteman invoked his privilege against self-incrimination and was thus unavailable. *Id.* But two inmates would have testified that Witteman once confessed to killing someone else. *Id.* The trial court excluded this evidence, and this Court affirmed under both hearsay rules and *Chambers*, because there was not sufficient reliability. *Id.*

This Court dealt with the admissibility of a third-party jailhouse confession more recently in *Marek v. State*, 14 So. 3d 985, 990 (Fla. 2009). There, the capital defendant raised a newly discovered evidence claim seeking a new trial/penalty phase based on the testimony of five inmates who came forward reporting that Marek's co-defendant, Wigley, stated he was the one who actually killed the victim instead of Marek (who was an accomplice). *Id.* at 989–90, 92–94. This contradicted Wigley's original statement that Marek was the one who strangled the victim. *Id.* at 990. Wigley's alleged statements included: (1) he (not Marek) choked the victim to death for fear she would identify him; (2) he (not Marek) choked the victim to death after she laughed at his failure to achieve erection or passed out and awoke to find her dead; (3) he "already killed somebody else"; (4) "I killed before, I'll kill again"; (5) he "killed the victim by strangling her." *Id.* at 992–93.

The inmates themselves doubted the reliability of these statements. While one inmate "believed Wigley because of the details," he "also said that he thought Wigley was boasting about his heterosexuality and dangerousness to keep other inmates from pursuing him for homosexual sex." *Id.* at 992. Another noted that

Wigley's accounts were inconsistent. *Id.* Still another noted that talk like this was normal in prison; "a lot of prison inmates say things like this out of anger or fear." *Id.* at 992–93.

This Court began its analysis by noting the minimal value of this testimony "even if we assume the witnesses accurately recounted what Wigley" said to them. *Id.* at 994:

[T]here is no reason to believe that Wigley was being truthful when he made the statements which lessened the culpability of Marek. Certain of Wigley's statements are vague statements ("I've killed before") that have no express connection with the murder of Ms. Simmons. Other statements which are connected with Simmons' death reveal specific details that Wigley would have known by virtue of his being present at the crime for which he was convicted (e.g., the victim was strangled). Furthermore, most of the witnesses considered Wigley's statements to have been boasting or otherwise self-interested, rather than unadulterated expressions of guilt. The testimony suggests that Wigley's acquaintances did not necessarily believe Wigley, and the evidence showed that Wigley's statements were either calculated to garner favor or were "tough talk" for prison as a means of self-protection, intimidation, or braggadocio. The testimony that Wigley was a small, "wimpy" man was uncontradicted, and several witnesses suggested that he may have made the claims for his own personal protection. Wigley made the statements in situations in which he was being questioned about his sexual orientation and thus felt a need to brag, was arguing or talking to his lover, or was under the influence of alcohol or drugs. Even his statements to Conley—which contain the admission that Wigley strangled the victim—were made after he had denied killing the victim and feared that Conley would not help

him obtain legal assistance to challenge his murder conviction. In addition, when speaking to Pearson, Wigley equivocated about whether he remembered strangling the victim. Given the inconsistencies in Wigley's statements and the strong inference that the statements constituted prison "tough talk" and were calculated by Wigley to obtain some advantage for himself, the probative value of the testimony recounting Wigley's statements is negligible.

Id.

After holding Wigley's statements were inadmissible hearsay, this Court also held they were inadmissible under *Chambers*. This Court incorporated its discussion about the lack of reliability of these statements—along with other reasons they were not truly against interest—and held they were not admissible under *Chambers*. *Id.* at 995. "*Chambers* provides for the admission of hearsay only where the confession sought to be admitted bears indicia of reliability." *Id.* Even in a new penalty phase—where these statements would be admissible—this Court determined that they would not likely yield a less severe sentence because the statements were "tough talk" necessary for self-protection or simply everyday parlance in prison. Further, some of Wigley's statements contradicted his own previous statements and others conflicted with otherwise unchallenged trial testimony." *Id.* at 996.

With this background in mind, the State will evaluate the four *Chambers*' factors to determine whether Doug Mixon's alleged statement to Ellis is sufficiently reliable for due process to displace Florida's well-established hearsay rules and compel its admission. In the State's view, the answer is no.

(1)Whether the statement was made spontaneously to a close acquaintance shortly after the crime occurred.

This factor weighs against admission. According to Keith Ellis, Doug Mixon confessed to murdering the victim in the "very first conversation" they had where they were talking about their charges. (R. at 489–90.) This conversation occurred sometime in July or August 2017 in Graceville Correctional Facility while Keith Ellis and Doug Mixon were housed in B Dorm, sometime after Keith Ellis stopped gang members from extorting Mixon. (R. at 94, 482–83, 499.)

Clearly, this statement was not made shortly after the crime occurred. The victim was killed in mid-December 2010, around seven years before this statement was allegedly made. *Cf. Chambers*, 410 U.S. at 292-93 (four statements made between the night of the shooting and through the following week).

This Court's holding in *Aguirre-Jarquin* does not alter the

correct analysis of this sub-factor. There, this Court noted that the third party made statements “in close proximity to *the postconviction DNA testing*” in support of its reliability. *Aguirre-Jarquin v. State*, 202 So. 3d 785, 793 (Fla. 2016). But this Court also recognized that the confessions were not made shortly after the crime. *Id.* It is unclear exactly how this Court’s statements fit within *Chambers*’ analysis, which requires the statement to be made close in time to the crime, not postconviction litigation or DNA testing.

There may, however, be a way to reconcile this Court’s statement with *Chambers*. The two critical statements in *Aguirre-Jarquin* were made around DNA testing *that the declarant was aware of*. *Id.* In other words, the declarant had reason to believe that completely objective testing might inculcate her in the victim’s murder when she made these statements. *See id.* The prospect of known, objective testing inculcating a declarant might be sufficient to bring a declarant’s statements from around that time within the spirit (though certainly not the letter) of *Chambers* “shortly after the crime” subfactor.

But that is not the case here. Calhoun has made no showing that Mixon was *aware* of any DNA testing that could potentially

inculcate him and, therefore, this subfactor still weighs against admission. Calhoun seeks to expand this Court's fairly limited statement into a broad rule that alleged confessions made during ongoing postconviction litigation automatically fit within *Chambers'* close-in-time subfactor. Calhoun's analysis would cause this subfactor to fall in favor of displacing Florida's Evidence Code in the vast majority of capital cases, where postconviction litigation practically never ends. This Court should not further broaden its already broader interpretation of an extremely narrow sub-factor laid out by the United States Supreme Court. Correctly analyzed, this sub-factor falls against admission.

Nor was this statement made to a close acquaintance. While Keith Ellis had helped Mixon with his gang troubles, this statement was made in their "very first conversation." (R. at 489-90.) Keith Ellis and Doug Mixon can hardly be considered close in the sense used by the Supreme Court. *Cf. Chambers*, 410 U.S. at 289, 292-93 (statements made to three friends, including one 25-year friend, one "lifelong friend," and one friend who was allegedly drinking beer with the third-party confessor when the murder occurred).

The only portion of this factor that potentially weighs in favor of

admission is its spontaneity. And even that is somewhat doubtful in light of the greater, coercive environment Doug Mixon found himself in after being targeted by gang members in prison. But in any event, this minor potentially favorable sub-factor is overwhelmed by the other two sub-factors addressed above. Therefore, this factor weighs strongly against admission.

(2) Whether the statement is corroborated by some other evidence in the case.

This factor weighs in favor of admission, but only slightly in light of the evidence in Calhoun's case.

Calhoun argues (with very little explanation) that circumstantial evidence corroborates Mixon's alleged confession, including: (1) Ellis' testimony that Calhoun "dogged out" Mixon's daughter; (2) Calhoun and Mixon's daughter were no longer living together and had a deteriorating relationship; (3) the victim's marriage was having difficulties; (4) the victim's husband lied about calling her and why he did not go out looking for her. None of this evidence does much to corroborate Ellis' account of Mixon killing the victim. At most, through stacking inferences, it provides a conceivable motivation, but is extremely lacking in true corroborative

detail. It also strongly pales in comparison to the circumstantial evidence linking Calhoun to the crime.

Next, Calhoun triumphantly says physical evidence ties Doug Mixon to the crime: Mixon was a *possible contributor* to an item found in Calhoun's trailer. But being a *possible contributor* to an item is extremely weak evidence connecting Mixon to the crime. And, as it turns out, the evidence making Doug Mixon a *possible contributor* is as weak as it sounds: 1 in every 800 Caucasians is a possible contributor to the sample Calhoun emphasizes (including Doug Mixon's daughter who Calhoun had a relationship with). See SC18-340 at 201-02 (The FDLE report that included Doug Mixon as a "possible contributor" had a statistical weight of "1 in 800" for Caucasians). That weak corroboration contrasts strongly with the physical evidence linking Calhoun to the crime.

The only factors truly corroborating Doug Mixon's alleged statement in this case are (1) Natasha Simmons' discredited testimony from the prior 3.851 hearing and (2) Jose Contreras' discredited testimony from the prior 3.851 hearing. (SC18-340 T. at 322–35 (Simmons' testimony that she had a suspicious encounter around the time of the victim's disappearance with Mixon near the

Florida/Alabama line where Mixon had gas cans), *id.* at 340–50 (Contreras’ testimony that Mixon confessed to him).¹⁹

Calhoun finally urges this Court to consider the sheer number of times Mixon “confessed” to individuals throughout this case. There is at least one obvious problem with this argument. Doug Mixon’s other “confessions” have already been litigated and decided against Calhoun. Doug Mixon did not confess to Vermillion and the lower court found Vermillion’s testimony false. *Calhoun II*, 312 So. 3d at 837. Jose Contreras’ confession-related testimony was deemed false by the postconviction court before. *Id.* at 840. Two confessions (to discredited Contreras and the present one to Keith Ellis) and one non-specific apology (to discredited Vermillion) contrasts strongly with the un-discredited “five separate” confessions “to four different people” that this Court found corroborating in *Aguirre-Jarquin*. 202 So. 3d 793-94.

Based on the low standard articulated by this Court, this factor weighs in favor of admission. But this factor should be given little

¹⁹ Robert Vermillion does not factor into the corroborating evidence calculus because Mixon did not actually confess to Vermillion. *Calhoun II*, 312 So. 3d at 837.

weight in determining whether Doug Mixon's alleged statements are sufficiently reliable for *Chambers* to override Florida's Evidence Code and compel admission. The postconviction court has already (permissibly) discredited both Simmons' and Contreras' testimony in prior proceedings, and there was significantly more evidence tying Calhoun to the crime:

The evidence shows that the victim was going to pick up Calhoun, not Mixon, when she disappeared on the evening of December 16, 2010. DNA evidence places Calhoun's blood, not Mixon's, near the victim's blood on a blanket in Calhoun's trailer. DNA evidence also establishes that blood found on the cardboard of a roll of duct tape taken from Calhoun's trailer was a major donor match to the victim and a minor donor partial match to Calhoun. An eyewitness places a scratched and bloody Calhoun, and no one else, driving a car that matched the description of the victim's vehicle in the early morning hours of December 17, the day after the victim disappeared, just hours before witnesses saw smoke from the highway near where the victim's burned car and body (which had tape on the neck) were eventually found. The next morning, on December 18, Calhoun's acquaintance found him, and no one else, wrapped in sleeping bags and lying on the ground in her family's shed approximately 1.5 miles from where the victim's burned car and body were found. And Calhoun, not Mixon, evaded law enforcement and was found hiding under his bed.

Calhoun II, 312 So. 3d at 837–839, 840–41.

Further, the portion of Doug Mixon's alleged confession to Keith Ellis indicating he "threwed two cans of gasoline" on the victim's car

and set it on fire is contradicted by the evidence. (R. at 484); *Calhoun II*, 312 So. 3d at 838 n.3. Therefore, while this factor weighs in favor of admission, it should only factor slightly into this Court’s analysis. See *Pittman v. Sec’y, Fla. Dept. of Corr.*, 871 F.3d 1231, 1249 (11th Cir. 2017) (holding the circumstances fell short of *Chambers*’ reliability requirement considering, among other matters, the “evidence that undercut the [declarant]-as-perpetrator theory”); cf. *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006) (holding a rule was arbitrary and constitutionally impermissible where it only looked to the strength of one party’s evidence). *But cf. Curtis v. State*, 876 So. 2d 13, 22 (Fla. 1st DCA 2004) (rejecting the State’s argument that a third-party confession was not reliable because it was contradicted by some evidence in the case).²⁰

(3) Whether the confession is self-incriminatory and unquestionably against self-interest.

This factor weighs strongly against admission. While normally

²⁰ To be clear, the State is not arguing (as it was in *Curtis*) that this factor weighs against admission or compels exclusion under *Chambers*. However, when determining the *weight* to accord this factor, the strength of the State’s evidence contradicting the statement should be considered as well. The State’s argument here is thus different from the one rejected in *Curtis*.

an admission to killing someone is a statement against interest, that is simply not generally the case with jailhouse hearsay confessions. See *Marek v. State*, 14 So. 3d 985, 994–97 (Fla. 2009); *Jones v. State*, 709 So. 2d 512, 525–26 (Fla. 1998); *Sliney v. State*, 699 So. 2d 662, 670 (Fla. 1997); *Jones v. State*, 678 So. 2d 309, 314–15 (Fla. 1996).

A brief word of background. According to Keith Ellis, shortly before Doug Mixon allegedly made this statement, he had just had a gang attempt to “put down” and “extort him.” (R. at 483.) Doug Mixon was an “older gentleman” who “tended to try to make himself look bigger and badder than he” appeared to be based on “physical sight.” (R. at 483, 487.) At first, Keith Ellis did not believe Doug Mixon was being truthful. (R. at 487.) After Keith Ellis talked to nurse Matheny, and began believing Doug Mixon’s statement, he started telling people to “watch” Doug Mixon “because he’s definitely dangerous.” (R. at 492.)

Even if Doug Mixon made statements claiming responsibility for the victim’s death, it simply was not “unquestionably against” his “interest” to do so while in prison and having just been threatened by a gang. Cf. *Chambers*, 410 U.S. at 300–301 & n.20 (murder confessions were unquestionably against interest in a non-prison

setting when no other reason for them was analyzed and the declarant “stood to benefit nothing” by confession). Doug Mixon’s situation contrasts strongly with *Chambers*, where the Supreme Court noted that none of Mississippi’s bases for declining to adopt a statement against interest exception—fear of false confessions given for reasons other than guilt—were applicable, and there was no basis “for doubting” the declarant’s statements. *Id.* at 300 n.20.

Here, however, assuming he made inculpatory statements, Doug Mixon’s statements were almost certainly exactly what Keith Ellis originally thought them to be: attempts by an older man with significant health issues to protect himself while in prison after he had been targeted by gang members. (R. at 466–67, 483, 487); see *Marek*, 14 So. 3d at 994 (noting alleged confessions were likely “tough talk,” particularly since the declarant was a “small, ‘wimpy’ man”). This was actually Doug Mixon’s explanation for the statement if he did make it and simply could not remember it. (R. at 456, 467, 473, 480.) To the extent Mixon made statements claiming responsibility for the victim’s death, they indisputably had the effect of protecting him. Keith Ellis began telling inmates to watch out for Doug Mixon

because he was dangerous. (R. at 492.).²¹

In *Chambers*, the United States Supreme Court found it particularly noteworthy that the statements were “unquestionably against interest” and there was no reason to doubt the confessor was telling the truth in his confessions. *Chambers*, 410 U.S. at 300–301 & n.20. By contrast here, there are abundant reasons to believe that admitting to a murder he did not commit was actually *in* Doug Mixon’s then-immediate best interest due to prison’s unique environment, his age, and his health conditions. Additionally, there is no shortage of reasons to believe Doug Mixon is unreliable and would admit to something he did not do in general. Therefore, this factor—the very heart of *Chambers*’ holding—weighs heavily against admission in this case.

(4) Whether the declarant is available for cross-examination.

This factor weighs in favor of admission. Doug Mixon testified at the evidentiary hearing and was available for cross-examination.

²¹ Calhoun seems to miss the point by arguing Mixon had no reason to make himself bigger to Keith Ellis, who he wasn’t afraid of. But the fact remains that Keith Ellis could be—and according to Ellis in fact was—a conduit to reach other inmates (like the ones who attacked him) and make Doug Mixon appear “bigger and badder” to them.

It is noteworthy, however, that he both denied making the statement and, to the extent he made it and did not remember it, explained it in quite reasonable fashion. This factor should only weigh slightly in favor of admission.

When weighed together, this Court should hold Keith Ellis' hearsay testimony would not be admissible under *Chambers* in any retrial. The reliability of the underlying statement is simply not present in this case. That ends the *Chambers* analysis and compels denial of Calhoun's successive 3.851 motion. *See Dailey v. State*, 329 So. 3d 1280, 1288 (Fla. 2021) (holding cumulative is only warranted if the newly discovered evidence in the present claim is in fact admissible). This Court should affirm for this reason alone.

II. THE POSTCONVICTION COURT CORRECTLY REJECTED CALHOUN'S NEWLY DISCOVERED EVIDENCE CLAIM BECAUSE DOUG MIXON'S ALLEGED CONFESSION TO KEITH ELLIS WOULD NOT PROBABLY PRODUCE AN ACQUITTAL WHEN VIEWED CUMULATIVELY WITH ALL ADMISSIBLE EVIDENCE.

Issue & Ruling Below

Calhoun's second issue contests the lower court's determination that Doug Mixon's confession to Keith Ellis would not probably produce an acquittal on retrial when considered with all other admissible evidence. Factually, the trial court found Keith Ellis'

testimony was “unreliable and suspect,” and “Doug Mixon did not confess to Keith Ellis.” (R. at 587, 590-92.) Legally, the court found that Ellis’ testimony would not probably produce an acquittal on retrial even if it was admissible. (R. at 592-96.)

Standard of Review

This Court employs a two-tiered standard of review to the postconviction court’s post-evidentiary hearing denial of Calhoun’s newly discovered evidence claims: (1) de novo review of the postconviction court’s legal analysis; (2) competent, substantial evidence review of factual questions and credibility. *Calhoun II*, 312 So. 3d at 837.

Merits

The second prong of the newly discovered evidence test requires Calhoun to establish that the newly discovered evidence would probably produce an acquittal when considered with all evidence that would be admissible on retrial. *Calhoun II*, 312 So. 3d at 836. It is Calhoun’s burden to meet this standard rather than the State’s burden to show he does not meet it. *See Taylor v. State*, 62 So. 3d 1101, 1117 (Fla. 2011).

This Court should affirm for two reasons. First, competent,

substantial evidence supports the lower court's credibility determinations. Second, Ellis' testimony would not probably produce an acquittal on retrial when considered with all other admissible evidence.

A. Competent, Substantial Evidence Supports the Lower Court's Determination that Keith Ellis Is Not Credible.

Calhoun argues at various points that there was no competent, substantial evidence supporting the postconviction court's incredibility determination on Keith Ellis. His arguments evince a clear misunderstanding of both Florida law and the role of an appellate court.

“The [lower] court is the *sole arbiter of the credibility and weight of the evidence presented*” in a hearing; “that is the *exclusive province of the [lower] court judge.*” *Maurer v. State*, 668 So. 2d 1077, 1078–79 (Fla. 5th DCA 1996). While acting as factfinder, a lower court is not necessarily required to accept even uncontradicted testimony. *Lewis v. State*, 979 So. 2d 1197, 1200 (Fla. 4th DCA. 2008).²²

²² Florida Courts have recognized a narrow exception to this rule that requires trial judges to accept testimony that is not impeached, discredited, controverted, self-contradictory, or physically impossible. *E.g.*, *Guardian ad Litem Program v. K.H.*, 276 So. 3d 897, 902 (Fla. 2d DCA 2019).

This Court has long held that it is “bound by” a lower court’s “factual findings if they are supported by competent, substantial evidence.” *E.g., Pagan v. State*, 830 So. 2d 792, 806 (Fla. 2002).

The deference that appellate courts afford findings of fact based on competent, substantial evidence is an important principle of appellate review. In many instances, the trial court is in a superior position to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of the witnesses. When sitting as the trier of fact, the trial judge has the superior vantage point to see and hear the witnesses and judge their credibility. Appellate courts do not have this same opportunity.

Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999) (cleaned up).

Competent, substantial evidence review is not a freewheeling license for appellate courts to, on a cold record, second guess the credibility of witnesses who have never appeared before them. *See id.* Indeed, competent, substantial evidence does not “relate to the quality, character, convincing power, probative value or weight of the evidence but refers to the existence of some evidence (quantity)” supporting “each essential element and” to “the legality and admissibility of that evidence.” *Schreiber v. Schreiber*, 331 So. 3d 874, 877 (Fla. 5th DCA 2021).

The substantial requirement is met if there is “some (more than

a mere iota or scintilla), real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical, speculative or merely theoretical evidence or hypothetical possibilities) having definite probative value.” *Id.* The fact that contradictory evidence appears in the record is also not sufficient to reject a lower court’s factual findings or credibility determinations. *E.g., Honeywell, Inc. v. Scully*, 289 So. 2d 393, 395 (Fla. 1974) (“directly contradictory” testimony that could have supported a different factual determination insufficient to depart from lower court’s factual findings).

Since contradictory evidence in the record is irrelevant, the State will solely focus on the competent, substantial evidence that supports the lower court’s credibility determination. First, Doug Mixon explicitly denied telling Keith Ellis that he murdered the victim. (R. at 450, 454, 472.) That alone is competent, substantial evidence supporting the lower court’s determination Keith Ellis is not credible. Second, Keith Ellis was impeached as a serial felon. That is competent, substantial evidence supporting the lower court’s credibility determination. Third, Keith Ellis testified Doug Mixon used “gasoline” to burn the victim’s car (when gasoline was excluded as

the accelerant used on the victim's car) and then attempted to walk back his clear testimony when confronted with its obvious falsity. See *Calhoun II*, 312 So. 3d at 838 n.3; R. at 484, 492, 504. That is also competent, substantial evidence supporting the lower court's credibility finding. Fourth, as the postconviction judge noted, Keith Ellis significantly embellished his testimony and included numerous incredibly important details that did not appear in his affidavit made closer in time to Doug Mixon's alleged confession. (See R. at 494-500.) The list goes on.

There is also intangible evidence that cannot be viewed on a cold record, such as the demeanor and inflections of Keith Ellis/Doug Mixon while they testified, that are known only to the parties and postconviction judge. That is why appellate courts defer to lower courts to resolve factual disputes between conflicting witnesses. There is no reason to depart from that deference in this case. Since the lower court's credibility determination is supported by competent, substantial evidence, this Court is bound to it.

B. Keith Ellis' Testimony—Combined with All Other Admissible Evidence—Would not Probably Produce an Acquittal on Retrial.

Particularly in light of the postconviction court's credibility

findings, Ellis' testimony would not probably produce an acquittal when evaluated with all admissible evidence that could be introduced on retrial.

The postconviction court weighed the witnesses' credibility and found both that Mixon never confessed to Ellis and that Ellis' testimony was not credible or reliable. These findings should independently end the newly discovered evidence analysis. A confession that (as a factual matter) did not take place cannot give rise to a reasonable probability of an acquittal. When the only newly discovered evidence presented by a defendant is an outright lie about a confession that the postconviction judge determines did not occur, Florida law should not require additional lengthy analyses of all the remaining evidence in the case to determine whether a jury would probably acquit based (at least in part) on a lie. *Cf. Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (a defendant suffered no prejudice as a matter of law when his attorney compelled him not to perjure himself on the stand regardless of whether the jury might have believed the defendant's lie).

But there is also no need to stop there in this case. Based on this Court's caselaw, combined with the postconviction court's

findings, the probative value of Mixon's alleged statements to Ellis is miniscule. *See Marek v. State*, 14 So. 3d 985, 994, 996–97 (Fla. 2009) (holding the probative value of newly discovered evidence of prison hearsay confessions was “negligible” and determining that those statements would “not be credited by either the jury or” judge in a new penalty phase in part because the statements were prison “tough talk”).

This is particularly true since the State would be able to call Doug Mixon and use both his and Keith Ellis' testimony to explain the prison environment and situation Doug Mixon found himself in considering his health issues. As it did below, the State would be able to utilize Ellis' lack of credibility, the holes in his story, and the flat contradictions between his testimony and the evidence as reasons for the jury to find (as the court below did) that this confession never occurred. The State would also be able to utilize Doug Mixon's poor reputation for honesty and need to protect himself while in prison as a key reason to discount any statements he supposedly made. All told, any statement by serial felon Doug Mixon to serial felon Keith Ellis claiming responsibility for the victim's death would matter very little if Calhoun obtained a new trial. Such statements would not

probably sway any jury to acquit him.

Simmons', Contreras', and Vermillion's, testimony do not help Calhoun in a newly discovered evidence analysis. The postconviction court has already determined and assigned weight to their testimony. *Calhoun II*, 312 So. 3d at 836–41 (finding Contreras' statements "false," Vermillion's account of the Doug Mixon's non-confession "false," and Simmons' not credible). Calhoun cannot relitigate prior credibility and weight determinations every time he files a successive claim with admissible evidence.

This Court's current analysis must therefore utilize the past credibility and weight determinations—including the credibility problems with Simmons' testimony and the falsity of Contreras' and Vermillion's testimony—in determining whether the newly discovered evidence of Doug Mixon's supposed confession would probably produce an acquittal. Particularly in light of the postconviction court's past findings, Keith Ellis' testimony—combined with the other evidence Calhoun has used to pin his victim's murder on Doug Mixon—would simply not probably produce an acquittal on retrial in light of the strength of the State's case.

The simple reality is that Calhoun's newest evidence does little,

if anything, to alter this Court's prior direct appeal analysis of Calhoun's similar newly discovered evidence claims:

But even assuming no admissibility or credibility problems with Vermillion's testimony and no credibility problem with Simmons' testimony, when the newly discovered evidence from Simmons and Vermillion regarding Doug Mixon is considered cumulatively with all of the evidence that would be admissible on retrial, it does not so weaken the State's case against Calhoun as to give rise to reasonable doubt as to Calhoun's culpability. The evidence shows that the victim was going to pick up Calhoun, not Mixon, when she disappeared on the evening of December 16, 2010. DNA evidence places Calhoun's blood, not Mixon's, near the victim's blood on a blanket in Calhoun's trailer. DNA evidence also establishes that blood found on the cardboard of a roll of duct tape taken from Calhoun's trailer was a major donor match to the victim and a minor donor partial match to Calhoun. An eyewitness places a scratched and bloody Calhoun, and no one else, driving a car that matched the description of the victim's vehicle in the early morning hours of December 17, the day after the victim disappeared, just hours before witnesses saw smoke from the highway near where the victim's burned car and body (which had tape on the neck) were eventually found. The next morning, on December 18, Calhoun's acquaintance found him, and no one else, wrapped in sleeping bags and lying on the ground in her family's shed approximately 1.5 miles from where the victim's burned car and body were found. And Calhoun, not Mixon, evaded law enforcement and was found hiding under his bed.

Calhoun II, 312 So. 3d at 838; see also *Calhoun I*, 138 So. 3d at 354–58 (detailing the overwhelming evidence against Calhoun).

The same analysis applies today. Even if Ellis' testimony had no

admissibility or credibility problems (which it does), his testimony would not probably produce an acquittal on retrial in light of the evidence against Calhoun. Therefore, this Court should affirm the postconviction court's denial of Calhoun's successive 3.851 motion.

III. THE POSTCONVICTION COURT DID NOT ABUSE ITS DISCRETION WHILE DENYING CALHOUN'S FLORIDA RULE OF CRIMINAL PROCEDURE 3.852(i) DEMAND FOR ADDITIONAL PUBLIC RECORDS.

Issue & Ruling Below

Calhoun's third issue contests the lower court's order denying his demand for additional public records (specifically, an incident report documenting Matheny's report of Doug Mixon's threats to the assistant Warden) under rule 3.852(i). (See R. at 725.) The lower court denied the demand in an unelaborated order. (R. at 737.)

Standard of Review

This Court reviews "denials of rule 3.852(i) public records requests under the abuse of discretion standard." *Sweet v. State*, 293 So. 3d 448, 454 (Fla. 2020). "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." *Tundidor v. State*, 221 So. 3d 587, 601 (Fla. 2017). Postconviction

courts have discretion to deny records' demands "of questionable relevance." *Moore v. State*, 820 So. 2d 199, 204 (Fla. 2002).

Merits

Florida Rule of Criminal Procedure 3.852 governs public records demands in capital cases. This rule limits demands for additional public records. See Fla. R. Crim. P. 3.852(i). A court may not grant a demand for additional public records without finding:

- (A) collateral counsel has made a timely and diligent search of the records repository;
- (B) collateral counsel's affidavit identifies with specificity those additional public records that are not at the records repository;
- (C) the additional public records sought are either relevant to the subject matter of a proceeding under rule 3.851 or appear reasonably calculated to lead to the discovery of admissible evidence; and
- (D) the additional records request is not overly broad or unduly burdensome.

Fla. R. Crim. P. 3.852(i)(2). But the rule imposes no requirement on postconviction courts to make findings/hold hearings before *denying* such a request. Fla. R. Crim. P. 3.852(i). Unless required by rule or statute, Florida law does not generally require specific findings or hearings before deciding an issue. *Johnson v. State*, 696 So. 2d 326,

331 (Fla. 1997), *holding modified on other grounds by State v. Evans*, 770 So. 2d 1174 (Fla. 2000).

This Court should find the postconviction court did not abuse its discretion. A reasonable jurist could find the records Calhoun sought were of questionable relevance because their content would not help Calhoun, evidence already closed on his successive 3.851 motion, and Calhoun waited to file this demand until after the court denied his 3.851 motion.

Keith Ellis testified that he spoke with Karen Matheny *twice* after Doug Mixon made threats against her in two separate conversations (before and after Calhoun's last evidentiary hearing). R. at 486 (Ellis testifying Mixon made threats *before* he first told the story about framing Calhoun while they were living together and *before* Mixon "disappeared for awhile" and that he verified Mixon's story with Matheny); R. at 486-87, 495-96 (*after* Mixon disappeared they met in the medication line and he renewed his threat against Matheny). The problem for Calhoun—which the postconviction court recognized—is that Ellis testified to two conversations with Matheny after Doug Mixon made threats against her while Matheny only testified to having one before she reported Mixon's alleged threats.

(R. at 507-10, 513, 592.) The State accepted, without further proof, CCRC-N's representation that Karon Matheny contacted them around October 24, 2017.

Viewed in this light, the existence of an incident report is not relevant to Calhoun's claims. No one disputed Matheny's account of the events and the State accepted without proof CCRC-N's representation that she contacted them around October 24, 2017. The existence of this report does not help Calhoun establish that Mixon confessed to Keith Ellis or diminish the fact that Ellis testified he spoke with Matheny twice after Doug Mixon made threats against her while she (the only non-felon testifying) said it was only once, and that she contacted CCRC-N soon after that *one* conversation.

A reasonable jurist could find the records Calhoun sought were of questionable relevance for another, independent reason. It does not appear Calhoun *ever* sought the incident report before the postconviction court ruled against him, despite knowing of its existence and where to find it before the evidentiary hearing. (See R. at 725.) None of his prior public records demands encompassed it. (See R. at 106-07, 113-14, 116-17, 119-20.) And even if one of his demands encompassed this report, by the time he sought the records

from the correct source (Graceville/the GEO Group rather than the Department of Corrections), the circuit court had already denied his postconviction claim related to Keith Ellis and the alleged Mixon confession. By his own admission, Calhoun knew the report was kept by Graceville/the GEO Group *before* the evidentiary hearing and months before the postconviction court denied his claim. (See R. at 725.) But he waited until after the postconviction court denied the claim to pursue these records.

Since Calhoun's incident-report demand did not occur until *after* his claim was denied, the report was no longer relevant to that claim unless it could be introduced for the first time on rehearing or evidence could be reopened.²³ But Florida law does not generally permit parties to supplement already-denied claims with evidence readily available to them if they had been diligent earlier. See Fla. R. Crim. P. 3.851(7) ("A motion for rehearing shall be based on a good faith belief that the court has overlooked *a previously argued issue of*

²³ Calhoun has never argued, either before this Court or below, that this report is relevant to anything other than his Keith Ellis claim. He cannot do so for the first time in his reply brief (when the State will be unable to respond) and any such argument would be unpreserved anyway.

fact or law or an argument based on a legal precedent or statute not available prior to the court's ruling”) (emphasis added); *Cleveland v. Crown Fin., LLC*, 212 So. 3d 1065, 1068 (Fla. 1st DCA 2017) (holding the civil rehearing rule does not permit parties to offer new evidence omitted by inadvertence or oversight). And it is highly unlikely a motion to reopen evidence after an adverse ruling would have been successful when Calhoun knew about the incident report and where to find it months beforehand.

Calhoun made a choice not to seek records related to the Matheny incident report from the correct source until *after* the postconviction court denied his claims on the merits. This new evidence could not be utilized for the first time on rehearing, and a motion to reopen would have likely gone nowhere. The incident report was therefore of very questionable relevance to his already-denied claim. At minimum, a reasonable jurist could have viewed it this way, which means the lower court did not abuse its discretion.

For the same reasons, the denial of Calhoun’s demand was completely harmless error. Even if the Court had granted Calhoun’s demand, Calhoun could not properly utilize the incident report to gain relief on his already-denied claim.

CONCLUSION

Over a decade ago, the State conclusively proved beyond a reasonable doubt that Calhoun murdered Mia Chay Brown. The evidence Calhoun has marshaled with years of hindsight is inadmissible and would not probably produce an acquittal as a matter of law when evaluated against the facts of his case. The postconviction court also did not abuse its discretion in declining to let Calhoun belatedly seek new evidence that was not relevant to his already-denied claim. Therefore, this Court should affirm the postconviction court's denial of Calhoun's successive 3.851 motion and its denial of his 3.852(i) demand for additional public records.

Respectfully submitted and certified,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of December, 2022, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Elizabeth Spiaggi and Alice Copek, Assistants CRC-North, 1004 DeSoto Park Drive, Tallahassee, Florida 32301, **elizabeth.salerno@ccrc-north.org**, **alice.copek@ccrc-north.org**, **copeklaw@gmail.com**.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style, in compliance with Fla. R. App. P. 9.045.

/s/ Jason W. Rodriguez _____
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