IN THE SUPREME COURT OF FLORIDA

Case No. SC22-1286

Lower court Case No. 2011-CF-11A

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, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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REQUEST FOR ORAL ARGUMENT

Johnny Mack Sketo Calhoun has been sentenced to death. Resolution of the issues presented will determine whether he lives or dies. A full opportunity to address the issue through oral argument would be more than appropriate, given the seriousness of the claims at issue and the stakes involved. Calhoun, through counsel, respectfully requests this Court hear oral argument in this appeal.

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the various records on reposit with this Court:

"RDA" - record on direct appeal to this Court;

"T" - trial transcript on direct appeal to this Court;

"PCRI" - initial post conviction record on appeal to this Court;

"EHI" - transcript on appeal to this Court from initial PCR proceedings;

"PCRII" - successive post conviction record on appeal to this Court.

Additional citations will be self-explanatory.

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

The Circuit Court of the Fourteenth Judicial Circuit in and for Holmes County, Florida entered the judgments of conviction and sentence at issue.

On December 20, 2010, Calhoun was arrested in Bonifay, Florida, four days after he and the victim, Mia Brown, were reported missing. Calhoun was indicted for the first-degree murder of Mia

Brown on February 18, 2011. The circuit court appointed the Office of the Public Defender to represent Calhoun.

Calhoun pled not guilty to all charges. (RDA. 42). Trial commenced on February 20, 2012, merely a year after Calhoun was indicted. (T. 2). On February 28, 2012, the jury returned a verdict finding Calhoun guilty as charged. (RDA. 960). The penalty phase of Calhoun's trial started the next day on February 29, 2012. (T. 1276). The jury recommended death by a vote of 9-3 the same day. (T. 1373). A *Spencer*[1] hearing was held on August 4, 2012. (T. 1251). The circuit court followed the jury's recommendation and sentenced Calhoun to death on May 8, 2012. (T. 1308). This Court affirmed Calhoun's convictions and sentence on direct appeal. *Calhoun v. State*, 138 So. 3d 350 (Fla. 2013). Relying on the mostly unchallenged evidence of the State, this Court, applying a special standard of review unique to cases based wholly on circumstantial evidence, found that the evidence was inconsistent with Calhoun's hypothesis of innocence that another individual committed the murder. *Id.* at 367. Calhoun filed a Petition for Writ of Certiorari in

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

the United States Supreme Court, which was denied on October 6, 2014. *Calhoun v. Florida*, 135 S. Ct. 236 (Fla. 2014).

Calhoun filed his Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend pursuant to Fla. R. Crim. P. on September 25, 2016. (PCRI. 460).[2] The State filed its response on November 24, 2015. (PCRI. 1138). The circuit court held a *Huff*[3] hearing on April 21, 2016. (PCRI. 3928). Following the *Huff* hearing, the circuit court issued an order, granting Calhoun an evidentiary hearing on some issues and denying a hearing on the remaining issues. (PCR. 1343).

An evidentiary hearing commenced on September 15, 2017, and continued on September 19 and 20. On November 1, 2017, Calhoun filed a sixth Motion to Supplement and Amend, seeking to

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[2] Calhoun filed the following Motions to Amend: (1) February 11, 2016 Motion to Amend with a claim premised upon *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616 (2016) (PCRI. 1138); (2) August 16, 2016 Motion to Amend with a claim based on a conflict of interest (PCRI. 1378); (3) May 22, 2017 Motion to Amend with an additional claim of ineffective assistance of counsel (PCRI. 1535); (4) June 22, 2017 Motion to Amend seeking to add one claim based on a *Brady v. Maryland*, 83 S. Ct. 1194 (1963) violation and a second claim based on newly discovered evidence (PCRI. 1845); (5) September 1, 2017 Motion to Amend with a claim based on newly discovered evidence. (PCRI. 2003).

[3] *Huff v. State*, 495 So. 2d 145 (Fla. 1986).

amend with a claim of newly discovered evidence based on evidence he received after the evidentiary hearing that alternative suspect, Doug Mixon, had made additional incriminating statements about this case; that evidence is the newly discovered evidence at issue in this appeal. (PCRI. 2418). Calhoun also sought to reopen the evidentiary hearing to present evidence related to the claim. The trial court denied the motion to amend and reopen the hearing to allow the new claim to be presented. (PCRI. 2437-2438)

The circuit court filed an order denying relief on all guilt phase claims on January 3, 2018. (PCRI. 2557). The circuit court granted penalty phase relief pursuant to *Hurst.* Calhoun appealed to this Court and filed his initial brief on July 18, 2018 as well as a state Habeas Petition.

On August 18, 2018 Calhoun filed a Successive 3.851 motion based on newly discovered evidence with the circuit court and a motion to stay proceedings in the lower court until completion of the appeal. This Court granted the motion to stay on August 22, 2018. This successive motion relates to the newly discovered evidence at issue in this appeal.

This Court affirmed the circuit court's order and denied the state Habeas Petition on November 21, 2019. Calhoun filed a motion for rehearing that was denied on February 12, 2020. On February 13, 2020 the State filed a motion in the circuit court to reinstate Calhoun's death sentence. Calhoun filed a response in the circuit court on February 19, 2020. This Court issued its mandate on February 28, 2020 and Calhoun filed a motion to enforce the mandate on March 5, 2020. The state filed a motion to recall the mandate on March 9, 2020. This court issued an order staying the proceedings below pending the disposition of *Jackson* and *Okafor*[4]. On July 13, 2020 Calhoun filed a Petition for Writ of Certiorari with the US Supreme Court. The Petition for Writ of Certiorari was denied on October 9, 2020. This court issued an order on February 18, 2021 denying the State's Motion to Recall the Mandate in light of the decision in *State v. Jackson*, 306 So. 3d 936 (Fla. 2021).

The State filed their response to the Successive 3.851 Motion in the circuit court on June 7, 2021. A *Huff* hearing was held on November 3, 2021. Following the *Huff* hearing, the circuit court issued an order, granting Calhoun a limited evidentiary hearing on

[4] *State v. Okafor*, 306 So. 3d 930 (Fla. 2020).

one issue and denying a hearing on the other issue. The evidentiary hearing was held on May 17, 2022. Written closing arguments were submitted on June 23, 2022. On July 27, 2022 the circuit court issued its Order denying defendant's motion for postconviction relief. Based on some of the findings in the order, the defendant submitted a public records demand on August 2, 2022 and filed a Motion for Rehearing on August 10, 2022. Both of these motions were denied on August 29, 2022.

II. 2022 Limited Evidentiary Hearing

At Calhoun's 2022 limited evidentiary hearing, housing records for Doug Mixon and Keith Ellis were introduced as Defense's Ex. 1 and Defense's Ex. 2 respectively. (PCRII. 432-436). The court received testimony from Doug Mixon, Keith Ellis, and Karon Matheny. (PCRII. 438).

Mixon's records indicate that he was housed in B1-103L until August 4, 2017. (PCRII. 432). Mixon testified that Ellis was in the cell neighboring his own. (PCRII. 448). Mixon also testified that he had an 88 tattoo and agreed that African-American inmates find it offensive, explaining "the Aryan Nation, it's supposed to be 1488, and is for Heil Hitler, the eighth letter in the alphabet." (PCRII.

448-449). Mixon denied being a member of Unforgiven, Aryan Nation, or any gang. (PCRII.468). He also testified that he has never been around black people and was scared when he went to prison. (PCRII. 469).

Mixon acknowledged his testimony from the first evidentiary hearing, where he said he had a reputation for burning things. (PCRII. 449). Mixon had been transferred to the county jail during Calhoun's previous evidentiary hearing. (PCRII. 450). Mixon said the day he was transported back to Graceville he ran into Ellis while he was heading back into the pod with his mat and personal effects. (PCRII. 450-451). Mixon told Ellis how folks at Calhoun's evidentiary hearing were testifying against him (Mixon) and that this was the "only time" he discussed the Calhoun case and burning of Mia Brown with Ellis. (PCRII. 450).

Mixon also told the court that he was the biggest liar in Graceville Correctional Facility. (PCRII. 455). He routinely would lie about many criminal dealings he had been involved in. (PCRII. 467). Mixon claimed he would lie about things in prison in order to survive. (PCRII. 469). However, on cross he admitted that he never

felt intimidated by Ellis and did not feel like he had to "survive" with Ellis (PCRII. 478-479).

Through the State's questioning of Mixon, it came out that when Mixon met with the state the day before the hearing to go over his testimony, he denied even knowing Keith Ellis. (PCRII. 471). The State also brought out that when they previously spoke with Mixon and confronted him with whether he had confessed to killing Mia Brown and framing Calhoun for the crime, he admitted he told lots of lies and "may have said something similar to that." (PCRII. 473). Mixon would do anything to protect himself and his family. During a large federal drug trafficking case, Mixon went so far as to shoot himself and then lie to the government that he was shot by his co-defendants in an effort to eliminate himself as a cooperating witness and informant. (PCRII. 467; 476-478).

Ellis' records indicate that, from April 22, 2017 to September 18, 2017, he was housed in B1-104L (PCRII. 434). The records also indicate that he was housed in Y-Dorm, administrative confinement, from September 18, 2017 through October, with the exception of a couple hours on September 21, 2017. (PCRII. 434). Ellis testified that in 2016/2017 he was incarcerated at Graceville

Correctional Facility. (PCRII. 482). While housed in B-Dorm, he was in a cell neighboring Doug Mixon. (PCRII. 483). Ellis testified that when Mixon was initially placed in B-Dorm, he was approached by a gang member that had an issue with the '88' Mixon had tattooed on his arm. (PCRII. 483). Ellis interceded and told the gang member to leave Mixon alone. (PCRII. 483). After that, Ellis and Mixon would talk regularly. (PCRII. 483).

In the course of their conversations, Mixon told Ellis he would often set fires and burn things. Mixon told Ellis about one situation involving a nurse at Graceville, Karon Matheny, where Mixon set up a young man who had dumped his daughter. (PCRII. 483-484). He said that Mixon's daughter, Brittany, looked bad "to the community or whatever" and Mixon "felt like this is not going to go down like this." (PCRII. 498). Mixon retaliated against the young man, telling Ellis he initially intended to burn the young man in his trailer. (PCRII. 484). Ultimately Mixon decided it would be easier to go after the guy's new girlfriend, so he drugged her, put her in the trunk of a car, dumped two gas cans on it, and set it on fire. (PCRII. 484).[5] Ellis testified that at first he did not think Mixon's story was

[5] On re-direct Ellis clarified that Mixon was not specific about what was in the gas cans. (R. 504).

true, but after talking to Nurse Matheny and having her verify parts of it, he accepted it as true. (PCRII. 487).

Ellis also testified that Mixon claimed to be a member of a gang called "Unforgiven"[6] and was an enforcer for the gang. (PCRII. 493). Mixon claimed to have burned a house in Alabama and stuff in Georgia. (PCRII. 493). "He told me all kinds of crazy things. They always involved fire, he painted a picture of him being a pyro tech." (PCRII. 493). On cross, Ellis testified he believed Mixon associated Nurse Matheny with the situation because the land where Mixon burned the vehicle with the girl in it was part of Ms. Matheny's property. (PCRII. 494).

Ellis testified that Mixon first told him he burned the girl up on Nurse Matheny's property prior to Mixon going out to court for the 2017 Evidentiary Hearing. (PCRII. 494). Mixon brought the issue up again after returning from court, saying that people in Alabama were snitching on him and he was going to send some "kids" after them. (PCRII. 496). Ellis interpreted this to mean that

[6] Unforgiven is a white supremacist gang affiliated with the Aryan Brotherhood.

Mixon was going to send fellow members of Unforgiven to deal with them. (PCRII. 496).

Lastly, Ellis testified that he did not know the defendant in this case, nor had he ever heard his name or the victim's name until he became involved in CCRC-North's investigation. (PCRII. 504). Ellis acknowledged that not all of the details he was testifying to were contained in the affidavit he filled out for CCRC-North. When he realized he may have to testify under oath in court, he went over all his conversations with Mixon again in his head to prepare for his testimony. (PCRII. 496; 499). He also testified that he had been directed by the Assistant Warden at Graceville to make a sworn statement after Ms. Matheny reported the issue to her supervisor. (PCRII. 504).

Nurse Karon Matheny was the last to testify. She confirmed that she owns property that adjoins Mr. Calhoun's sister and brother-in-law's property where Mia Brown and her car were found. (PCRII. 506). Though she lived in Alabama, she worked just over the state line into Florida as a nurse at Graceville Correctional Facility from 2008 to 2020. (PCRII. 506).

In the fall of 2017, Keith Ellis came to her to tell her there was an evil inmate, Doug Mixon, on his pod threatening to kill her. (PCRII. 507-508). Nurse Matheny knew Keith Ellis well because he had a medical condition that required him to see the nurse three times per day. (PCRII. 507). At the time Mr. Ellis told Matheny about Mixon's threat, she did not know who Doug Mixon was or the fact that he may have had any involvement with the body discovered near her property. (PCRII. 508).

Nurse Matheny immediately went and reported the threat to her supervisor, who arranged for her to meet with the Assistant Warden. She was crying, very nervous, and upset. (PCRII. 509). She could not understand how Doug Mixon knew her or the fact that she lived right by where Mia Brown's body was found. (PCRII. 515). Matheny was so unnerved by the threat to her safety that she stayed away from work for several days. When she returned to work, she was confused that Doug Mixon was not in confinement. (PCRII. 510). She went to ask the Assistant Warden why Mixon was out in the general population, but the Warden did not have much time to talk to her. He simply told her that he talked to both Ellis and Mixon and told Mixon he needed to shut his mouth or he was

going to be held liable for the death of Mia Brown if he kept talking. (PCRII. 516.)

Several weeks after Keith Ellis told her that Doug Mixon had threatened her life and she reported the same to the Assistant Warden, Mixon came into her lab. She had never had a conversation with Mixon. In a threatening manner, he asked Matheny if she knew who he was. He then told her who he was and that he knew where she and her family lived. He also told her he had connections with Holmes County law enforcement and he never stayed incarcerated for very long. (PCRII. 516-517). Mixon's behavior unnerved her and she had to have a guard remove him from her lab. (PCRII. 516).

III. CALHOUN'S TRIAL AND 2017 EVIDENTIARY HEARING[7]

A. The State's Case

The State's key witness, Brittany Mixon, is Doug Mixon's daughter and Calhoun's ex-girlfriend. At trial, Brittany Mixon

[7] The circuit court granted Calhoun a new penalty phase pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Accordingly, Calhoun's recitation of the facts and argument are all focused on the guilt phase of his capital trial.

testified that Calhoun was supposed to be coming to her house the night of December 16, 2010. (T. 733-734). Harvey Glenn Bush testified that he was in Charlie's Deli, where Mia Brown (the victim) worked as a clerk, on December 16, 2010. He said he was talking with Mia Brown when Calhoun arrived around 1:30 p.m. and interrupted Bush's conversation with Mia to ask Mia for a ride later that evening, which she agreed to provide. (T. 593-94). In December of 2010, Jerry Gammons testified that on the evening of December 16, around 8:40 p.m., a young lady in a light-colored car knocked on his door looking for Calhoun's residence. (T. 606; 612).

The State's theory was that Calhoun asked Mia Brown for a ride to Brittany Mixon's house in Alabama, and when she came to pick him up he proceeded to kidnap and murder her. The State did not introduce any evidence of a motive. The State told the jury that, "We can't know what happened that night; the evidence doesn't tell us." (T. 1151). Motive aside, the State did not introduce any direct evidence implicating Calhoun, either in the form of eyewitness testimony, an admission, or otherwise.

Bush was the only witness who testified to actually seeing Calhoun and Mia together, twelve hours before they both went

missing. (T. 595). The State put on the testimony of Jerry Gammons to place Mia in the vicinity of Calhoun's trailer that evening. No witnesses placed Mia Brown inside Calhoun's trailer.

To place Mia inside Calhoun's trailer the State relied upon DNA evidence, a photo found on an SD card, and her purse which was found in the trailer by Brittany Mixon. Trevor Seifret, a crime laboratory analyst with the Florida Department of Law Enforcement (FDLE) testified regarding the DNA evidence collected from Calhoun's trailer. (T. 862). Seifret testified that there was no way to establish when DNA is deposited on an item, nor is there any way to establish how long DNA has been on an item. (T. 892-93). Seifret also testified there is no way to establish where an item was located when the DNA in question was deposited on it. (T. 893).

Seifret testified that, through known samples, he was able to develop DNA profiles for Brittany Mixon, Calhoun, and Mia Brown. Seifret was also able to develop a DNA profile for Doug Mixon through a buccal swab taken by law enforcement. (2017EH. 174). *Mixon was included as a possible contributor to the DNA mixture found on State's exhibit 21-X, a pink shirt that also yielded four hairs belonging to Mia Brown.* (T. 886-87; 2017EH. 176). *The jury*

remained unaware of this fact throughout the trial. Seifret testified that Mia Brown's DNA was on a duct tape roll and a quilt found inside Calhoun's trailer. Calhoun was included as a possible minor contributor to the mixture found on the roll of duct tape, as well as another possible third contributor.(T. 872). Both items tested positive during presumptive testing for the presence of blood. (T. 870, 876). Mia Brown's DNA was found on roughly eight hairs from various pieces of clothing taken from Calhoun's trailer. (T. 881, 883, 885, 887, 890). No witnesses testified as to how the hairs came to be in Mr. Calhoun's trailer. The DNA evidence was the only evidence the State introduced to put Calhoun and Mia Brown together, and to support its theory that Brown made it inside Calhoun's trailer, where a violent struggle then ensued.

The State presented a photograph taken from an SD card belonging to Mia. Brown. (T. 937). The lead investigator, Lt. Raley testified that he located the SD card during a search of Calhoun's trailer. By the time the SD card was seized, at least four people, including Brittan Mixon, had been inside Calhoun's trailer, if not

more. (T. 628, 1011, 1013, 1018).[8] None of those four people reported seeing an SD card. The SD card was found just lying on the floor of the trailer and the camera that had held the SD card was never located.

After seizing the SD card, Lt. Raley placed it in his laptop and accessed the photographs. (T. 936). At trial. Lt. Raley testified, without objection, that the photograph in question was of the ceiling of Calhoun's trailer. (T. 937). The State then called FDLE analyst Jennifer Roeder, who worked in the digital evidence section as a crime laboratory analyst. (T. 915). Roeder, using the date of a known photo, opined that the photo purported to be of Calhoun's trailer was taken on December 17, 2010, between 3:30 and 4:00 a.m. (T. 921). This evidence, which helped form the basis of the State's timeline, went unchallenged by the defense.

Brittany Mixon testified that when Calhoun did not show up at her house on December 16, she drove down to check on him the morning of December 17. (T. 704-707). She said that even though she had moved out of Calhoun's trailer in October, she still had him

[8] John Sketo, Terry Ellenburg, Brittany Mixon and Deputy Chuck White, in that order, all made entry into Calhoun's trailer before Lt. Raley seized the SD card.

over to her house sometimes, and even admitted she was mostly using him for money. (T. 705, 750) When she showed up at Calhoun's trailer on the morning of December 17, she testified that she did not go in, but Calhoun's cousin and Calhoun's father testified that she *did* go inside the trailer that morning when she was looking for Mr. Calhoun. (T. 707, 1018, 1057). Brittany Mixon testified that she returned to Calhoun's trailer in the afternoon of December 17, and at that time she located Mia's purse in the trailer and took it out. (T. 715-717).

Ms. Mixon additionally testified that a few days before the incident she had gone to Mia's house to try on some clothes and that same day Mia had dinner with her at her house. (T.728) Calhoun was supposed to take Mia Brown one-hundred dollars for the clothes Mixon had bought from Mia. (T.728). When asked whether those clothes ended up at Calhoun's trailer she stated "Not that I believe," but was confronted with a previous statement she had made, that indicated Calhoun was supposed to pick-up these clothes from Ms. Brown.(T. 729).[9]

[9] This would be an innocent explanation for why Ms. Brown's hairs were found on a woman's shirt in Calhoun's trailer.

Mia Brown's car and body were both found in Alabama. No witnesses testified to seeing Calhoun in Alabama with Mia. The State called Sherri Bradley, a clerk who worked at a convenience store located between Enterprise, Alabama and Hartford, Alabama.[10] Bradley testified that on the morning of December 17, 2010, Calhoun came into her store to buy a pack of cigarettes.[11] She testified that he was covered in scratches and dried blood, and that he was driving a white car with Florida plates. (T. 649, 651-52).[12] The State also presented Darren Batchelor, who testified that he too saw Calhoun at the convenience store on the morning of December 17. (T. 677). Batchelor claimed to know Calhoun from school, despite the fact that Batchelor was 12 years older than Calhoun. (T. 677).[13]

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[10] This is approximately 13 miles north of the site where Mia Brown's car was found and almost 30 miles north of Calhoun's home in Esto, Florida.

[11] Brittany Mixon testified that Calhoun does not smoke cigarettes. (T. 740).

[12] Bradley provided this information to law enforcement on December 29, 2010, over a week after Calhoun's arrest and after she had both seen the missing persons flier and read about the case in the newspaper. (EHI. 107-108; EHI. Exhibit 12).

[13] The jury never knew about the vast age difference between Batchelor and Calhoun, which would have placed Calhoun in kindergarten while Batchelor was a senior in high school. (EHI. 113).

Calhoun was arrested on December 20, 2010, after he was located in his trailer by Officer Harry Hamilton. (T. 928). After he was taken into custody, he was subjected to an interrogation by Ofc. Hamilton and Lt. Raley. (T. 952). It was during this interrogation that Calhoun told Lt. Raley, "[Y]'all was tightening up the noose last night [December 19, 2010] when I was in the woods man" and "I'd say more than three times a deputy could have reached out and done like that." (EHI. Exhibit 5). Lt. Raley asked Calhoun where he was when this happened, to which Calhoun responded that he was "Down there, close to the Bethlehem Campground" in Florida. (EHI. Exhibit 5). However, this is not what the jury heard.

The State elicited a handful of lines from Calhoun's interrogation and objected to the entire interrogation being entered into evidence. Lt. Raley testified that Calhoun confessed to evading and hiding from law enforcement. (T. 955). Lt. Raley also testified that Calhoun "leaned over when he made the statement that there were three times that he was close enough to (tapping on desk) he tapped the side of my leg with his foot." (T. 955). Calhoun's counsel did not cross examine Lt. Raley as to when and where Calhoun said

this occurred. Without that clarification, the State argued in closing that Calhoun confessed to being in the woods with law enforcement the afternoon of December 17, 2010, close to Mia Brown's car, hours after it was set on fire. (T. 1210-11).

Additionally, the State also presented two witnesses who testified to seeing smoke in Alabama on December 17, 2010, during the late morning hours. (T. 752, 759). The State argued that the smoke these witnesses spotted was from Mia Brown's burning car. The State did not introduce any other evidence to link the smoke these witnesses saw with Brown's burning car.

The State relied on the above-mentioned witnesses, as well as several law enforcement witnesses who conducted various searches and seizures, to prove its case. The State did not present the jury with a motive, nor did it present the jury with an admission or any direct evidence to tie Calhoun to Mia Brown's murder.

B. The Defense's Case

Calhoun was represented by the Office of the Public Defender for the Fourteenth Judicial Circuit. At the time of appointment, Walter Smith was the de facto chief of capital, yet Kimberly Jewell was assigned to Calhoun's case. (EHI. 12).

The defense theory of the case was that Doug Mixon and his daughter Brittany were responsible for Mia Brown's murder. (2017 EH. 54; 170-72; 216; 221; 289-91). At trial, Calhoun called ten witnesses in his defense, two of which were state witnesses that counsel re-called in the defense's case. Through these witnesses, Calhoun presented evidence that there were suspicious activities at the junkyard where Calhoun lived on the evening of December 16 and the early morning hours of December 17, 2010. Three neighbors testified to hearing loud noises coming from the junkyard. (T. 992, 996, 998). One of these neighbors, Darlene Madden, testified that the noise sounded like "a car wreck." (T. 999).

Calhoun's father, John Sketo, testified that there was evidence of foul play at the junkyard when he arrived at work on the morning of December 17, 2010.[14] According to Sketo, the door to Calhoun's trailer was wide open, as was the door to a truck parked in front of the trailer. The door of the trailer had pry marks on it that had not been there the day before. (T. 1006-07). It appeared that somebody

[14] Terry Ellenburg, John Sketo's nephew and business partner, testified to similar information. (T. 1049).

had thrown the contents of the truck on the ground. (T. 1007). The junkyard's Bobcat had been hotwired and moved, and there were suspicious tire tracks that indicated a vehicle had been pushed off the loading dock. (T. 1010).

When Mr. Sketo inspected the inside of Calhoun's trailer, it looked like it had been ransacked. (T. 1011). As he was waiting for law enforcement to arrive, Brittany Mixon showed up. (T. 1016). Despite telling Brittany not to go into the trailer because it had been burglarized, she went in and remained inside for a minute or two. (T. 1019). After emerging from the trailer, Brittany grabbed a puppy, threw it in the back of her truck, and left. (T. 1020).

After Brittany left, Deputy White arrived. (T. 1022). Sketo asked Deputy White to take fingerprints from the Bobcat, which he failed to do. (T. 1023). Sketo then took Deputy White into Calhoun's small trailer and noticed for the first time, a shotgun. (T. 1026). Sketo testified that the shotgun was not in the trailer before Brittany went inside. (T. 1026).

At no point during the Defense's case did counsel call Doug Mixon or anybody related to Doug Mixon's alibi.

C. Newly discovered evidence implicates Doug Mixon as a viable suspect

At Calhoun's evidentiary hearing, numerous witnesses testified to actions and statements of Doug Mixon, which tend to implicate him in the murder of Mia Brown. Natasha Simmons testified to a suspicious encounter she had with Mixon during the time surrounding Mia Brown's murder. (EHI. 328). According to Simmons, she picked up Mixon and her ex-boyfriend, Charley Utley, close to the Florida-Alabama line. When she arrived, Mixon came running to the car, shirtless, covered in blood, with an empty gas jug in hand. (EHI. 328). Mixon appeared agitated and kept repeating "That goddamn Gabby" as she drove the men to Geneva, Alabama, per their demand. (PCRI. 2439; EHI. 329).

Additionally, Robert Vermillion, a cousin of Brandon Brown (Mia Brown's husband), testified to statements made by Mixon in July of 2016. (EHI. 362). According to Vermillion, Mixon told him, "I know I've done a lot of things I'm not proud of" and asked Vermillion to forgive him. (EHI. 362). Assuming Mixon's statement to be related to Mixon's suspected involvement in Mia Brown's murder, Vermillion told Mixon that he could not forgive him for

anything, instead directing him to seek forgiveness from Brandon Brown. (EHI. 362). Mixon did not respond, but grew hysterical. (EHI. 364). Mixon then suffered from a heart attack and was removed from the house via ambulance, a fact that Mixon himself confirmed at the evidentiary hearing. (EHI. 310-11).

D. Doug Mixon's alibi has been conclusively refuted and his alleged alibi witness says Mixon confessed to murdering Mia Brown

Jose Contreras served as Doug Mixon's alibi when he was questioned by law enforcement as to his whereabouts during the time period surrounding Mia Brown's disappearance and murder. (EHI. Exhibit 12). According to Mixon, he was with his girlfriend, Gabby Faulk, at Contreras' house in Alabama the night Mia Brown disappeared. (EHI. Exhibit 12).

Contreras testified at Calhoun's evidentiary hearing. Contreras was adamant that Doug Mixon was not with him the night Mia Brown went missing, nor had Mixon ever spent the night at Contreras' house. (EHI. 342, 343). What's more, Contreras testified that Mixon actually confessed to him that he was responsible for Mia Brown's murder. (EHI. 345). Counsel testified that she never investigated Mixon's alibi, though her strategy was to

blame the murder on Doug Mixon. (EHI. 54; 170-72; 216; 221; 289-91).

E. Expert witnesses have cast doubt on the veracity of the State's evidence and arguments

At trial, the State highlighted the scratches found on Calhoun's body and argued to the jury that they were fingernail scratches, inflicted by Mia Brown while she was fighting for her life. (T. 1168, 1153). Counsel told the jury the scratches were caused by thorns, an argument the State easily cast aside.

At his evidentiary hearing, Calhoun presented the testimony of Dr. Edward Willey, a forensic pathologist. Dr. Willey testified as to the specific characteristics generally associated with fingernail scratches. (EHI. 245, 247, 260). After reviewing a number of photographs provided to him by Calhoun, and utilizing his computer to enhance those photographs, Dr. Willey was able to opine that it was not at all probable that any of the scratches were caused by fingernails. (EHI. 249-256). What's more, Dr. Willey testified that thorns were a perfectly reasonable explanation of how Calhoun obtained the scratches. (EHI. 257).

Calhoun also presented the testimony of John Sawicki, an expert in digital forensic evidence to discuss the SD card taken into evidence and the calculation that stemmed from photographs discovered on it. Sawicki testified that by improperly accessing the SD card, Lt. Raley altered the metadata of the photographs. (EHI. 380). According to Sawicki, this was problematic because the metadata in Calhoun's case was "critical". (EHI. 379). Sawicki went on to testify that Lt. Raley's alteration of the evidence affected the calculation method employed by the State, which it used to argue that Mia Brown was inside Calhoun's trailer on December 17, 2010, in the early morning hours.

F. Trial counsel was unable to articulate strategic reasons or a strategy based on sound, professional judgment, for most of the alleged errors and omissions

During the evidentiary hearing, counsel addressed Calhoun's allegations that she was deficient in her performance. In many instances, counsel was unable to articulate a strategy for why she failed to take certain actions or why she chose to pursue the actions she did take. (EHI. 156; 170-71, 184-85). In some instances, counsel conceded that she probably should have taken the course

of action Calhoun alleged she should have done. (EHI. 105, 115, 132, 135, 176).

In other instances, counsel advanced a strategic reason for her actions. (EHI. 57-60; 73; 84; 138; 145; 148-152; 177-78). In each instance where counsel articulated a strategic reason, the circuit court's order denying postconviction relief did not contain any analysis of whether counsel's decision was based on sound, professional judgment.

G. The circuit court's denial of relief and denial of records

On July 27, 2022, the circuit court entered an order denying Calhoun's postconviction motion in its entirety. In the circuit court's order, the court took issue with the timing of various events, and in denying relief, cited heavily to inconsistencies between Mr. Ellis's initial affidavit and his testimony. (PCRII. 590-92). For this reason Calhoun filed an additional demand on August 2, 2022 for records in a (second) attempt to locate the incident report completed by the correctional institution about Dough Mixon's threats against Nurse Matheny when Mr. Ellis

first reported the issue.[15] (PCRII. 724-726). The circuit court denied the demand without a hearing and without making any specific findings. (PCRII. 737).

SUMMARY OF THE ARGUMENT

Argument 1: The Circuit Court erred in finding that the newly discovered evidence of Doug Mixon's confession to Keith Ellis would not be admissible, and even if it were, would not produce an acquittal on retrial.

Argument 2: The Circuit Court erred in finding that Keith Ellis' testimony, combined with all the other admissible evidence available, would not produce an acquittal on retrial.

Argument 3: The Circuit Court erred in denying Defendant's Demand for Additional Public Records from GEO Group.

ARGUMENT

I. NEWLY DISCOVERED EVIDENCE OF DOUG MIXON'S CONFESSION TO KEITH ELLIS CREATES A REASONABLE DOUBT AS TO CALHOUN'S GUILT

[15] While a demand for records had previously been filed it had been directed to the Department of Corrections instead of to the private organization that ran Graceville Correctional in 2017. It was only in preparing for the hearing that the Defendant became aware that the Department of Corrections may not retain Incident Reports within the reporting inmate's file.

The standard for relief on a claim of newly discovered evidence is whether the newly discovered evidence would likely produce an acquittal on retrial. *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013). The circuit court recognizes that the confession of Mr. Mixon is newly discovered under *Swafford*. However, the circuit court found that Ellis's confession would likely be inadmissible under *Chambers v. Mississippi*, 410 U.S. 284 (1973). Under Chambers there are four factors to consider: 1) whether the confession is spontaneously made to a close acquaintance shortly after the crime, 2) whether the confession is corroborated 3) whether the confession is against interest, 4) whether the declarant was made available.

While the confession was not made shortly after the crime, it was made during the pendency of Calhoun's post-conviction litigation. In *Aguirre-Jarquin v. State*, this Court found that while the confession by the victim's daughter was not made shortly after the crime, it *was made close in time to the post-conviction DNA testing* and the declarant was aware of that testing. *Aguirre-Jarquin v. State*, 202 So. 3d 785, 793 (Fla. 2016). Similarly here, Mr. Mixon had been interviewed and subpoenaed for the post conviction

evidentiary hearing. It was also spontaneous in the sense that Mr. Ellis was not attempting to solicit the testimony. Mr. Ellis and Mr. Mixon were not exactly close acquaintances, but they did have a unique bond after Mr. Ellis intervened on Mr. Mixon's behalf while he was being intimidated by gang members.

The confession is corroborated by ample testimony and physical evidence. Mr. Ellis testified that Mr. Calhoun had "dogged out" Mr. Mixon's daughter, or cheated on her. At the time of Mia's murder, Mr. Calhoun and Mr. Mixon's daughter were no longer living together and their relationship appeared to be deteriorating. Ms. Mixon admitted that she was mostly using Mr. Calhoun for money. Additionally, there was testimony that tended to suggest Mia Brown's own marriage was also experiencing difficulties. Mia's husband lied about having called her on the night of the disappearance and lied about his reasons for not going to look for her. (EHI. 82-85, 87-89).

There was also physical evidence linking Doug Mixon to the crime as his DNA was a possible contributor for certain items found in Mr Calhoun's trailer mixed with the victim's DNA.

A confession to a crime is generally considered against interest. However, in its order the court reasons that the confession is "tough talk." (PCRII. 593). At the hearing though, Mr. Mixon admitted that he was not afraid of Mr. Ellis and would not have needed to "survive" Mr. Ellis. (PCRII. 478). There would be no reason for him to tell a friend a story that makes him appear "bigger and badder." (PCRII. 593). The circuit court's determination that the confession was not against interest is erroneous when looking at the totality of the circumstances of the confession.

As to the last factor (is the declarant made available), Mr. Mixon, the declarant, testified extensively. In his testimony, he admitted he was a well known liar, and acknowledged being at least a five time convicted felon stating "If I was wanting to bet on it, that I'd say three or four more than that." (PCRII. 461). He also admitted he felt responsible for Mia's death and acknowledged his previous testimony of having a propensity for burning things. (PCRII. 451,449).

The rationale of *Chambers* and the reason behind the consideration of multiple factors is that a confession by another party is such powerful evidence that it would be a violation of due

process for a confession not to be admitted. "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 (1973). Just as the hearsay rule should not be applied mechanically, nor should the factors become a checklist where each one must be checked off before the confession can be admitted.

Doug Mixon's confession should be admissible because it is corroborated by such a myriad of evidence, not just in the form of testimony, but physical evidence that was available at the time of trial.

In *Bearden* this court gave particular consideration to the importance of corroborative evidence, stating the following:

> Corroborative evidence is admissible "to strengthen a witness' testimony by evidence of matters showing its consistency and reasonableness and tending to indicate that the facts probably were as stated by the witness." *Chaachou v. Chaachou,* 73 So.2d 830, 837 (Fla.1954). Corroborating evidence is defined as "***[e]vidence that differs from but strengthens or confirms*** what other evidence shows (esp. that which needs support)." *Black's Law Dictionary* 674 (10th ed. 2014).

Bearden v. State, 161 So. 3d 1257, 1266 (Fla. 2015).

Calhoun would emphasize the diverse nature of the corroborative evidence in this case: testimony from multiple witnesses at trial that supports the facts from Mr. Mixon's confession involving a possible love triangle with the victim, other confessions or admissions from Mr. Mixon, physical evidence that incriminates both Mr. Mixon and his daughter, Mr. Mixon giving a false alibi to police, Ms. Simmons' testimony that she picked up Mr. Mixon from somewhere in Alabama, covered in blood and carrying gas cans around the time of the crime, Doug Mixon's apology to a relative of Mia Brown's family immediately prior to Mr. Mixon's heart attack.

In addition to the *Chambers* analysis in *Aguirre-Jarquin v. State*, this court also considered "the sheer number of times Samantha confessed-five separate times to four different people" as additional corroboration. *Aguirre-Jarquin v. State*, 202 So. 3d 785, 793–94 (Fla. 2016). The same is true of this case. Mr. Mixon's confession to Mr. Ellis at Graceville Correctional Institution is not the first confession he has made. At the 2017 evidentiary hearing Calhoun presented Jose Contreras, who testified that Mr. Mixon confessed to him. Mr. Contreras also denied that Mr.Mixon was at

his house with Gabby Faulk on the night of the murder. (EHI. 342, 343). Additionally, trial counsel admitted that she never investigated Doug Mixon's alibi of being with Gabby Faulk at Mr. Contreras' house. (EHI. 54; 170-72; 216; 221; 289-91).

Mr. Mixon also confessed to Robert Vermillion, a cousin of Brandon Brown, the victim Mia's husband. During the summer of 2016, a woman living with Vermillion's aunt, Linda Thames, began to hang out with Doug Mixon. (EHI. 361). One evening, Mixon started divulging things about his past to Vermillion. (EHI. 362). During the course of this conversation, Mixon said "I know I've done a lot of things I'm not proud of" and asked Vermillion to forgive him. (EHI. 362). Vermillion responded, telling Mixon that he could not forgive him for anything and directed him to seek forgiveness from Brandon Brown. (EHI. 362). Mixon did not protest Vermillion's direction. (EHI. 362).

Mixon became "hysterical." (EHI. 364). Vermillion believed Mixon was having a heart attack. (EHI. 363). Mixon confirmed at the 2017 hearing that he did, in fact, have a heart attack at Linda Thames' house in July of 2016, that Vermillion was present and that he was taken from the house by ambulance. (EHI. 310, 311).

While not a perfect confession, an apology can be construed as an admission of guilt. *Pieczynski v. State,* 516 So.2d 1048, 1051 (Fla. 3d DCA 1987); *Perera v. State*, 873 So. 2d 389, 392 (Fla. 3d DCA 2004); *State v. Gad*, 27 So. 3d 768, 770 (Fla. 2d DCA 2010).

While this Court defers to the circuit court's factual findings when they are supported by competent, substantial evidence, the circuit court's assessment–that Mr. Ellis is *not* credible and Mr. Mixon is credible–is not supported by competent *substantial* evidence and is in fact refuted by competent substantial evidence. In its order, the circuit court finds that while Mr. Mixon is a notorious liar, he has "been consistent in this court that he never confessed to killing Mia Brown." (PCRII. 593). However, when asked whether he had ever confessed to killing Mia Brown, Mr. Mixon admitted in this proceeding that he "may have said something similar to that." (PCRII. 473).

Additionally, Mr. Mixon attempted to attribute this confession to a conversation he had with Mr. Ellis immediately upon his return from the first evidentiary hearing. Mixon said the day he was transported back to Graceville from the Holmes County Jail, he ran into Ellis while he was heading back into the pod with his mat and

personal effects. (PCRII. 450-451). At this point he had a discussion with Mr. Ellis about Mr. Calhoun's case. However, Mr. Ellis's housing record (Def. Ex. 2) indicates that on September 18, 2017 Mr. Ellis was moved out of B-Dorm and placed in Y-Dorm. (PCRII. 434). It is notated next to his Y cell assignment that he was in AC confinement, or administrative confinement.[16] Mr. Ellis remained in administrative confinement until October 20, 2017. There is a brief two-hour period on September 21, 2022 where he was removed from Y-Dorm at 15:20, but the record indicates he was placed back in Y-Dorm that same day at 17:25.

These records refute Mr. Mixon's version of events, where he ran into Ellis upon returning from Mr. Calhoun's evidentiary hearing.

> But I can tell you how that come about. Y'all had brung me out from prison to outside court, is what we call here, to the hearing, and on the way, I was up here in the county jail for a few days, and when they took me back, I'm walking from the front there with my stuff, my mat and everything, and Keith was coming this way and wondered well the hell you been? And I told him, I said my future ex-son-in-law of mine killed a young lady and

[16] The other option would be DC, or disciplinary confinement. Typically, inmates are placed in administrative confinement for their own safety, while disciplinary confinement is for inmates who are being disciplined.

> burned her in a car, and they trying to blame me with it or say I know something about it, I said maybe it's over with now. That's where that come from. (PCRII. 450)

As Mr. Ellis was in confinement during that period of time, Mr. Mixon would not have been able to run into him "with my stuff, my mat and everything." The prior evidentiary hearing was held September 15, 19-20, 2017. Mr. Mixon testified at that hearing on September 19, 2017. While the housing documents that were introduced do not indicate when Mr. Mixon was returned to Graceville, it is reasonable to assume that it was prior to October 20, 2017 the day on which Mr. Ellis was released from confinement.

Additionally, Mr. Mixon has proven that he will do whatever it takes to protect himself and his family. He testified that while working as an informant against the Alreds, he went as far as to shoot himself and reported that someone else had shot him, in order to avoid testifying as an informant or try and get into the witness protection program. (PCRII. 477-478).[17] He also testified in 2017 that he would do anything for his daughter. (PCRII. 668).

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[17] It is interesting to note that Ms. Matheny testified that when Mr. Mixon threateningly told her he knew where she lived and wouldn't be in prison very long, he also informed her he was an informant, a fact she would be unlikely to learn from anyone but Mr.Mixon himself.

Mr. Ellis does not have a vested interest in the case one way or another. He does not know Mr. Calhoun and as he pointed out, until he was interviewed by Jayson Shannon and others at CCRC-North, he did not even know Mr. Calhoun's name, referring to him only as "the kid." (PCRII. 504). The court takes issue with the fact that Mr. Ellis's testimony was more detailed than his initial affidavit, however he explained that he went over all his conversations with Mixon again in his head to prepare for his testimony. (PCRII. 496; 499-500).

Additionally, the circuit court takes issue with the timeline for Mr. Ellis. Stating that Ms. Matheny did not report any threats until October, but Mr. Ellis believes the conversation occurred before Mr. Mixon left for outside court. Mr. Ellis reported two conversations with Mr. Mixon–one before he left for outside court and one when he returned. The only conversation with Mixon that contained a threat to Matheny occurred after Mixon returned from court. The court's assessment that Mr. Ellis's testimony was not credible mischaracterizes Mr. Ellis's testimony about when Mixon threatened Matheny and does not take into account the records that were put into evidence.

Calhoun argues that under *Chambers* and *Aguirre-Jardin* Mr. Mixon's confession would be admissible as it is corroborated by ample evidence, was made around the time of post-conviction litigation, and is corroborated by ample evidence already before the circuit court. The circuit court erred in finding that the confession was not admissible and given the nature of the testimony it would lead to reasonable doubt and produce an acquittal on retrial.

II. NEWLY DISCOVERED EVIDENCE OF DOUG MIXON'S CONFESSION TO KEITH ELLIS, IN COMBINATION WITH ALL OTHER EVIDENCE THAT COULD BE INTRODUCED AT A RETRIAL, WOULD GIVE RISE TO REASONABLE DOUBT AS TO CALHOUN'S CULPABILITY

"[T]he postconviction court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that could be introduced at a new trial." *Hildwin*, 141 So. 2d 1178, 1184 (2014), *citing Swafford v. State*, 125 So. 3d 760, 775-76 (2013). "In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so there is a 'total picture' of the case and 'all the circumstances of the case'." *Id.* In conducting its analysis, this Court must examine the evidence presented at trial, together with

all the evidence that has been developed through Mr. Calhoun's post-conviction proceedings. *Swafford*, 125 So. 3d at 762. It is only through the lens of these new revelations "that there is a 'total picture' of the case and 'all the circumstances of the case.'" *Swafford*, 125 So. 3d at 778 (quoting *Lightbourne v. State*, 742 So. 2d 238, 247 (1999)); see also *Jones v. State*, 709 So. 2d 512, 521 (1998).

Jones requires that the newly discovered evidence "probably produce an acquittal on retrial." *Jones*, 709 So. 2d at 514. The critical question is, does the new evidence "weaken the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Id.* at 526.

As postconviction proceedings in this case have revealed, the account of this crime that was delivered to Mr. Calhoun's jury was incomplete and, in some instances, false. It is evident from the post conviction court's evaluation of the entirety of the evidence that the only way newly discovered evidence of Doug Mixon's guilt could weaken the case so as to give rise to a reasonable doubt as to Mr. Calhoun's guilt is if Mr. Mixon himself was to take the stand and

actually admit under oath that he killed Mia Brown. The admitted compulsive liar who will do anything to protect himself and his family will maintain credibility over anyone else, regardless of their lack of motive or interest in the case, so long as he continues to tell the court he is not guilty. Mr. Mixon has a choice in these proceedings and it is not a Hobson's choice: Deny and go home, or confess to killing Ms. Brown and face his own prospect of life on death row.

In evaluating the newly discovered evidence in this claim, it is imperative for this Court to recollect the testimony from the prior evidentiary hearing wherein trial counsel stated that her whole strategy for trial was to cast doubt on the State's case and imply that Doug Mixon was the actual killer. (EHI. 54; 170-72; 216; 221; 289-91). Through the course of post-conviction proceedings, Calhoun has developed strong evidentiary support to implement that strategy to great effect in influencing the jury.

At a new trial, Mr. Calhoun could begin to sow the seeds of doubt in opening statement to the jury with an account that truly

and completely describes the evidence and the weakness of the case against Mr. Calhoun:

The State has just told you what they expect the evidence to prove. While listening to the actual evidence the State produces, we ask that you keep in mind the question: is this evidence consistent with a frame job against Mr. Calhoun.

You will hear testimony that at least two people knew that Ms. Brown was going to give Mr. Calhoun a ride that night. He asked her for that ride in a public place and, in fact, Harvey Glen Bush will tell you that Mr. Calhoun interrupted a conversation he was having with Ms. Brown to ask for that ride. (T. 594; 637). Mr. Calhoun's on-again off-again girlfriend, Brittany Mixon, also assumed that Mr. Calhoun was getting a ride to her house from Ms. Brown that night of the 16th. (RDA. 638-39; 642-43).

As the State told you, Ms. Brown went to the wrong trailer on the way to Mr. Calhoun's residence. (T. 522). Jerry Gammons will tell you she stopped at his trailer at approximately 8:40 p.m. that night. (T. 606). Ms. Brown presumably arrived at Mr. Calhoun's trailer

shortly thereafter. The State tells you once she was there, she was attacked and abducted. (T. 519).

Approximately six and a half to seven hours later, Ms. Brown's camera captured the image the State told you about: a picture of what appears to be the ceiling of Mr. Calhoun's trailer from the vantage point of a fold-out bed in the living room. (T. 534). An analyst with FDLE will tell you that this picture was taken between 3:30 a.m. and 4:00 a.m. on December 17th. (T. 921). When you listen to this evidence, ask yourself if the State can prove that it was Ms. Brown who took that picture.

As you learned from the State's opening, the reason they know that this image of the ceiling was taken was because the SD card from Ms. Brown's digital camera was found on the floor of Mr. Calhoun's trailer. (T. 526-27). The camera itself was never found, just the SD card. You will hear that an SD card does not simply pop or fall out of a camera, it takes effort to open the camera and remove it. (EHI. 140-41). Here it was removed and left on the floor.

You will hear testimony that the image of the ceiling was the last picture taken from Ms. Brown's camera and the only image from

Mr. Calhoun's trailer. (T. 918). That image will not show the condition of Mr. Calhoun's trailer, Mr. Calhoun himself, or Ms. Brown.

The evidence will show that Mr. Calhoun's trailer was ransacked with things thrown all over. (T. 707; 629; 638; 1011). The trailer was not in that condition the day before. (T. 1069). The State told you this is evidence of a struggle and Mr. Calhoun incurred injuries from it. (T. 518-19). You will hear testimony from a forensic pathologist that the injuries Mr. Calhoun exhibited upon his arrest days later had none of the characteristics associated with fingernail scratches. (EHI. 245-60).

You will hear testimony from Mr. Calhoun's father, John Sketo. Mr. Sketo arrived at his junkyard, Americas Precious Metals (APM), at approximately 7:30 a.m. on Friday, December 17th. Mr. Calhoun's trailer sat on the property of APM. (T. 1004-05). When he first arrived, he noticed his Bobcat was gone and he thought it was stolen. He also noticed that the door to his son's trailer was open. Mr. Sketo's nephew, Terry Ellenburg, arrived shortly thereafter and Terry will tell you that he noticed the Bobcat had been moved to the area by their loading dock. (T. 1005-08; 1051-52).

Given the unusual circumstances, Mr. Sketo and Mr. Ellenburg went to try and find Mr. Calhoun to see if he knew what had happened. They noted pry marks on the front door. (T. 1054). They went into Mr. Calhoun's trailer and immediately noticed it was in disarray. Mr. Sketo walked the length of the trailer trying to find Mr. Calhoun, but discovered he was not there. (T. 1011-14).

Mr. Sketo and Mr. Ellenburg went down to the dock and noticed fresh tire tracks that were not present the day before and saw that part of the dock had been damaged. They also noticed that the starter on the Bobcat had been stripped. (T. 1032-36; 1061-65).

When law enforcement spoke with area neighbors of APM, they were told by several that they were awakened in the middle of the night to a very loud noise that sounded like it came from the area of APM. One neighbor described the noise as sounding like a car wreck. You will hear from those neighbors and they will tell you that the noise startled them so much that they got out of bed to try and see if they could tell what had happened. With the darkness and brush surrounding their homes and APM, they were not able to see what it was that caused the loud noises. (T. 991-1002).

Believing he had been burglarized, Mr. Sketo called law enforcement. (T. 1015-16). While awaiting the officer, Brittany Mixon, Mr. Calhoun's on-again off-again girlfriend, arrived on the property. Mr. Sketo told her there had been a burglary and not to go into the trailer. Ms. Mixon ignored him and entered the trailer. She remained in the trailer for several minutes and then departed the property. (T. 1016-20; 1057-58).

Mr. Sketo will tell you that when he walked into the trailer after Ms. Mixon had been it, he found his shotgun laying on across the bench seat. Had it been there the first time he walked through the trailer, he would have fallen over it. (T. 1025-28).

At the request of Ms. Brown's family, Brittany Mixon returned to Mr. Calhoun's trailer later that same Friday. She again went in the trailer and exited within seconds. When she came out, she had Ms. Brown's purse in her hand. (T. 1093-95).

Ms. Mixon also worked with the lead investigator, Michael Raley, in his attempts to find Ms. Brown and Mr. Calhoun. Ms. Mixon told Raley that Mr. Calhoun had a campsite on his brother-in-law, Charlie Skinner's, property in Alabama. At approximately 2:00 p.m. on Friday, Ms. Mixon took Raley to that campsite. Officer walked

around the property and saw a small campsite in the woods, but did not see or smell anything odd and left. (T. 764-67). Three days later, Ms. Brown's car was found approximately 1500 feet away from Mr. Calhoun's campsite. (T. 531).

About three and a half to four hours before Raley and Ms. Mixon were at the campsite, Brett Bennett was driving in the area of Hartford, Alabama, and saw a lot of smoke coming from the general direction nearby Mr. Skinner's property. (T. 753-57). Another area man, David Brinley also saw a big fire coming from the same general direction. (T. 760-61).

As the State made clear to you in their opening statement, they believe that fire is Ms. Brown's car burning. (T. 523). We ask you to keep an open mind when listening to that testimony and ask yourself if they have actually proven the fire those two gentlemen saw was actually Ms. Brown's car burning.

As the State told you, you will hear testimony that Mr. Calhoun was purportedly seen at a convenience store approximately five hours before Mr. Bennett and Mr. Brimley saw the fire on Friday morning. (T. 522-23). That store is not far from Mr. Skinner's property. We ask you to pay close attention to Sherri Bradley's

testimony and her description of Mr. Calhoun in considering whether it was him she saw that morning.

Ms. Bradley called law enforcement when she arrived at work on Sunday, December 19, and saw a missing persons flier on the door of the store. (T. 656). She believed the man in the flier was in her store at approximately 5:30 – 6:00 a.m. the morning of December 17. You will see that missing person flier and be able to see for yourself what Mr. Calhoun looked like in the flier. (T State Exh. 9-A).

Ms. Bradley will describe Mr. Calhoun's appearance in the store as near identical to the image in the flier, to include long hair that may have been in a ponytail when she saw him. (T. 659; 666). You will also see pictures for yourself of how Mr. Calhoun looked just days after Ms. Bradley says she saw him. (T Def Exh. 7). In the time period of December 17th, Mr. Calhoun's hair was short. (RDA. 236).

You will also see in that missing person flier that Ms. Brown's car was described as a white Toyota Avalon with a Florida license plate. Ms. Bradley describes the man coming to her store in a white car with Florida plates, and particularly drawing her attention because he parked in a handicap spot. The man was wearing a plain white undershirt and a flannel shirt that was open to allow for the

undershirt to be seen. The man was in a hurry and asked to buy the cheapest pack of cigarettes she sold. (T. 649-660). You will hear testimony that Mr. Calhoun does not smoke. (T. 740-41).

In waiting on the gentleman, Ms. Bradley noticed scratches on his hands, with a black substance and dried blood. She asked him if he needed anything for the wounds and how he had gotten them. The man replied that he had been deer hunting. (T. 650). As I mentioned earlier, you will hear testimony from a forensic pathologist that the injuries Mr. Calhoun had upon his arrest were not consistent with fingernail scratches.

As the State told you, you will hear testimony from another customer in the store that morning, Darren Batchelor. Mr. Batchelor was interviewed by law enforcement and gave a description of the man he saw that morning that was vastly different from Ms. Bradley's. Mr. Batchelor will tell you that it was Mr. Calhoun he saw that morning and he knows Mr. Calhoun because he went to school with him. (T. 676-77). You will hear that Mr. Batchelor and Mr. Calhoun are not peers, Mr. Batchelor is twelve years older than Mr. Calhoun. (EHI. 113).

As the State told you in opening, Mr. Calhoun was found in the shed of the Brooks home on Saturday morning. The Brooks knew Mr. Calhoun so they invited him in, let him shower and rest, and washed his clothes. (T. 527-28; 781-82). You will see pictures of the clothing Mr. Calhoun was wearing. You will not see a white undershirt, but a white t-shirt with a distinct logo in the center and bright bubbles covering the front of the shirt. (EHI, Def. Exh. 18).

While Mr. Calhoun was at their home, they learned of the missing person flier that included Mr. Calhoun.(T. 528-29; 784). Law enforcement spoke with the Brooks shortly after Mr. Calhoun was at their home and you will hear that, in that interview, both Ms. Brooks told law enforcement that they asked who the woman on the flier was and Mr. Calhoun told them it was the girl who was supposed to pick him up. (T. 787; 796-97).

The Brookses later dropped Mr. Calhoun off on a dirt road near a bunch of woods at the Florida line. (T. 785-86). Mr. Calhoun was arrested two days later and had numerous injuries all over his body. Law enforcement took photographs of those injuries and you will be able to see them. (T. State Exh. 10). The forensic pathologist that testifies will tell you that the injuries Mr. Calhoun sustained are not

consistent with fingernail scratches, but are consistent with scratches from thorns. (EHI. 257).

At the beginning of our opening, we asked you to listen to the evidence with a question of whether it was consistent with a frame-up.

You will hear testimony that a man named Doug Mixon, while in prison, told another inmate, Keith Ellis, that he killed Mia Brown and framed his daughter's boyfriend for it. He told Ellis that he burned her in her car up in Alabama on a property owned by a nurse in the facility they were incarcerated in. (PCRII. 483-484). You will hear that Nurse Karon Matheny owns property that borders Charlie Skinner's property. (PCRII. 506).

Doug Mixon is the father of Brittany Mixon, Mr. Calhoun's on-again off-again girlfriend. Recall Ms. Brown was supposed to be taking Mr. Calhoun to Ms. Mixon's house that evening of the 16th.

Recall Ms. Mixon is the same person who went into Mr. Calhoun's trailer the morning of the 17th, despite being told not to. Recall Mr. Sketo said that after Ms. Mixon went in Mr. Calhoun's trailer, there was a shotgun stretched across the trailer that was not there before she entered. Recall Ms. Mixon is the one who found Ms.

Brown's purse. And recall that Ms. Mixon is the one who led Officer Raley to Mr. Calhoun's campsite.

As the State told you, Ms. Mixon and Ms. Brown went to school together and were friends. She was the connection between Ms. Brown and Mr. Calhoun. (T. 523). Ms. Mixon assumed Ms. Brown was supposed to be giving Mr. Calhoun a ride to her house the night of the 16th. Mr. Calhoun never showed up.

You will be able to see Ms. Brown's phone records from December 16th and the following day. (EHI. Def. Exh. 10). Despite Mr. Calhoun's no-show, you will see in Ms. Brown's phone records that Ms. Mixon never once tried to call Ms. Brown to find out where they were.

You will see in Ms. Brown's phone records that her husband, Brandon Brown, tried to call her two times that evening, once at 10:15 and again at 10:25 p.m. You will hear, however, that he told law enforcement he never tried to call her that evening. (EHI. 82-85). You will also hear that when he awoke in the middle of the night and Ms. Brown still had not arrived home, he tried again with no success and then called her parents. While her parents went out looking to see if they could find Ms. Brown, Brandon Brown did not. He told law

enforcement it was because he did not have reliable transportation, but you will also hear that he drove that same unreliable transportation to a friend's house earlier in the day. (EHI. 87-89).

Recall the SD card from Ms. Brown's camera that was found on the floor of Mr. Calhoun's trailer. When the Florida Department of Law Enforcement accessed that card, they were able to recover not only saved images, but also deleted images. (T. 917). Within the deleted images, FDLE recovered pictures that were taken nine days prior to Ms. Brown's disappearance that were taken in her home documenting bruising and injuries. (EHI. 96-98; 226-33).

You will hear from Keith Ellis that Doug Mixon told him his motive for killing Mia Brown and framing Mr. Calhoun: Mr. Calhoun dogged his daughter. He felt that Mr. Calhoun had just used his daughter and moved on to someone else. He was initially going to burn Mr. Calhoun up in his trailer, but then decided to go after the girl. He drugged her, put her in the trunk of her car, and threw two gasoline cans on the car and set it on fire. (PCRII. 484).

Law enforcement had talked to Doug Mixon in the course of their investigation. Mr. Mixon told them that he was with his girlfriend, Gabby Faulk, on Thursday evening/Friday morning. He

later expounded on his alibi to say that he and Gabby had stayed at her ex-father-in-law, Jose Contreras's, house. (EHI. 163; Def. Exh. 19; EHI. 171; Def. Exh. 21). Law enforcement interviewed Gabby Faulk and, in her report to law enforcement, she told them that Mr. Mixon was not with her the evening of the 16th or the following day. She did not see Mr. Mixon during the time Ms. Brown and Mr. Calhoun were missing until Saturday evening. (EHI. 165; Def. Exh. 20).

Law enforcement never interviewed Jose Contreras, but you will hear from him. Mr. Contreras will tell you that, not only did Mr. Mixon never stay at his house, he also told Mr. Contreras that it was he who killed Mia Brown. (EHI. 342-45).

You will also hear from Robert Vermillion. He is the cousin of Brandon Brown, Mia Brown's husband. He will tell you he suspected Doug Mixon was involved in Ms. Brown's death. During the summer of 2016, Mr. Mixon was around Mr. Vermillion's aunt's house a lot and while Mr. Vermillion did not want to be around Mixon, he tried to remain civil for his aunt's sake.

On one evening, there was tension between the two and Mr. Mixon told Vermillion that he had done things he was not proud of

and asked Mr. Vermillion for his forgiveness. When Mr. Vermillion responded by saying he needed to ask Brandon for forgiveness, Mr. Mixon panicked, kicked out an air conditioning unit, stabbed Mr. Vermillion, and suffered a heart attack. (EHI. 356-64).

You will hear from Natasha Simmons. She will describe to you a strange encounter she had with Doug Mixon on the morning of Friday, the 17th or Saturday, the 18th. She received a call from her ex-boyfriend, Charlie Utley. Utley said he had run out of gas in Bonifay and needed her to come and help him. As Ms. Simmons arrived where Utley told her to go, Utley and another man sprinted to her car. Utley had scratches on his shoulder with a blood smear. Utley immediately told her to get out of there and drive. The other man introduced himself as Doug Mixon. He was shirtless and had blood all over his chest. He was carrying a gas can. (EHI. 323-28).

As Ms. Simmons went to pull into a gas station to get gas for Utley's truck, they repeatedly told her to keep driving. Utley was frantic and really, really, really nervous. Mixon remained relatively calm but kept cursing "Gabby." Ms. Simmons drove the two to an apartment complex in Geneva, Alabama, and left them there. (EHI. 328-330).

And finally, you will hear from Doug Mixon himself. I believe he will admit to you that he has a reputation for burning things. (PCRII. 449). And while I expect he will tell you that he did not kill Mia Brown, you will also hear from him that he is a compulsive liar and will say anything it takes to protect himself and his family. (PCRII. 455-456; 462; 467-469).

While you are listening to the State's evidence, as well as the evidence we intend to provide you, we ask you to listen with an open mind and consider:

- *Is there a motive on Mr. Calhoun's part to kill Ms. Brown?*
- *Did Mr. Calhoun ever confess to killing Ms. Brown?*
- *Why would Mr. Calhoun allow people to know he would be with Ms. Brown that evening if he was going to attack and abduct her?*
- *Why would he leave her purse in the trailer?*
- *Why would he take her camera, but remove the SD card and leave it on his floor?*
- *Why were there pry marks on his trailer?*
- *Why was his trailer ransacked?*
- *Why would he go to public places with a body in the trunk?*

- *Why would he stop at a convenience store to buy cigarettes he does not smoke?*
- *Why would he burn the car, having no way to get back home?*
- *Why would he choose his brother-in-law's property as the location to burn the car?*
- *Why choose a place he is known to regularly go to camp and get away?*
- *Why did Doug Mixon lie to the police about where he was the night and morning that Mia disappeared?*
- *Why would these witnesses who have told you that Doug Mixon told them he killed Mia Brown lie?*

We submit the evidence will show that those questions cannot be satisfactorily answered and the evidence will demonstrate that Mr. Calhoun was framed for the murder of Mia Brown. After hearing all the evidence, you cannot have an abiding and unwavering conviction that it was Mr. Calhoun that killed Mia Brown and you must acquit.

While Mr. Mixon continues to deny in court that he killed Mia Brown, he has not stopped admitting his involvement to third parties outside of court. In resting its reasoning for denying Mr.

Calhoun a new trial almost entirely on Doug Mixon's denials to the courts, the court simply ignores another critical denial. Not only did Mr. Calhoun adamantly deny to law enforcement that he killed Ms. Brown, the State is unable to produce one single witness who will say that Mr. Calhoun ever even suggested that he played a role in the death of Mia Brown. Both men have an interest in how this case was decided, only one man has claimed credit.

In light of the foregoing, there is a very strong and reasonable doubt that Mr. Calhoun killed Mia Brown. The post conviction erred in denying Mr. Calhoun's successive motion and a new trial is warranted.

III. THE CIRCUIT COURT'S DENIAL OF CALHOUN'S DEMAND FOR ADDITIONAL RECORDS UNDER 3.852(i) WAS UNREASONABLE AND PREJUDICIAL TO THE INVESTIGATION OF HIS CASE.

On August 2nd, 2022, Calhoun filed a demand for additional public records pursuant to 3.852(i) from GEO Group. Calhoun had previously requested records (back in 2018) that should have included the incident report, however upon further investigation it was discovered that an incident report would not be included in an

inmate's file, but rather in an institutional file. When the court issued its order denying the successive 3.851 and took issue with the timeline of events as articulated by Mr. Ellis, Calhoun filed the demand for the incident report that would clarify and further corroborate Mr. Ellis's timeline. The circuit court denied the demand without holding a hearing or making specific findings as to the following factors articulated by the rule.

> (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).

The incident report was specifically identified by what the content of the report would be as well as containing dates (July 2017-October 2017) to further identify the report with specificity. This is consistent with this Court's case law in *Mills v. State*, 786 So. 2d 547, 552 (Fla. 2001); *Moore v. State,* 820 So. 2d 199, 204

(Fla. 2002); *Diaz v. State*, 945 So. 2d 1136, 1150 (Fla. 2006) where demands were denied for being overly broad.

The incident report would detail Mr. Ellis's reporting of Doug Mixon's threats against Nurse Matheny. These threats came about due to Doug Mixon's perception that Ms. Matheny had knowledge of his involvement in the crime Calhoun is currently convicted of. The content of the report is relevant to Calhoun's claim of newly discovered evidence of Doug Mixon's confession to Mr. Ellis. The confession to Mr. Ellis happened shortly prior to Mr. Mixon's related threats against Nurse Matheny. Additionally, the date of the incident report would help establish a timeline for these events as opposed to relying on witnesses' foggy memories of an incident that happened five years ago.

Collateral counsel has not only made a timely search of the repository, but has already attempted to obtain these records from the Department of Corrections by filing a demand for both Mr. Ellis and Mr. Mixon's classification file back in 2018. (PCRII. 106). Additionally, the demand was timely filed as collateral counsel filed the demand shortly after discovering that an incident report of this

nature would not be retained within an inmate's file, but rather would be retained within a file specific to the institution.

Denying Calhoun access to this record not only prejudices his post conviction proceedings, but it infringes upon his rights under the Florida Constitution, Article 1, Section 24; §119.011(12). Indeed, in *Sims v. State*, 753 So. 2d 66, 72 (Fla. 2000), Justice Anstead warned, "We need to be very careful that we not end up with an outcome where a death-sentenced defendant, whose life may literally be affected is barred from enforcing his constitutional right as a citizen to access public records than any other citizen could routinely access." *Sims v. State,* 753 So. 2d 66, 72 (Fla. 2000).

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing and the record before this Court, Calhoun respectfully urges this Court to reverse the circuit court, grant a new trial, and grant such other relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief has been electronically filed with the Clerk of the Florida

Supreme Court, and electronically served upon Jason Rodriguez, Assistant Attorney General on the 18th day of November, 2022.

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CERTIFICATE OF FONT

I hereby certify that the foregoing Initial Brief was generated in Bookman Old Style 14 point font, pursuant to Fla. R. App. P. 9.045 and 9.210.

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