Filing # 15630324 Electronically Filed 07/07/2014 08:17:25 PM

RECEIVED, 7/7/2014 20:19:01, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 13-2092

CLEMENTE JAVIER AGUIRRE-JARQUIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, STATE OF FLORIDA

BRIEF OF APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

Clemente Javier Aguirre-Jarquin has been sentenced to death. Resolution of the issues presented will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. Given the seriousness of the claims at issue and the stakes involved, Aguirre, through counsel, respectfully requests this Court hear oral argument in this appeal.

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INTRODUCTION

Twice in the last year alone, this Court has vacated a murder conviction and death sentence based on newly discovered forensic evidence developed on post-conviction review. In *Swafford v. State*, 125 So. 3d 760, 768 (Fla. 2013), the Court held that new forensic tests showing the absence of seminal fluid in the victim "so significantly weakened" the State's theory that the defendant sexually battered and murdered the victims "that it g[ave] rise to a reasonable doubt as to his culpability." And just last month, in *Hildwin v. State*, __ So. 3d __, No. SC12-2101, slip op. at 29 (Fla. June 26, 2014), the Court held that new DNA results identifying a third party (and not the defendant) as the provider of biological material found at the crime scene "change[d] the entire character of the case" and created reasonable doubt as to the defendant's guilt, requiring a new trial.

This case follows directly from those; indeed, the post-conviction record here is more substantial than those in either *Swafford* or *Hildwin*. New DNA test results and other unrebutted forensic evidence now lend powerful new credence to Clemente Javier Aguirre-Jarquin's longtime claim that he is innocent of the two murders for which he stands condemned. Moreover, the new DNA evidence not only tends to exculpate Aguirre but also points to another suspect, who has a long history of mental illness and has made numerous inculpatory post-trial statements,

including at least one clear admission that "demons in her head" made her "kill[]" these victims—thus further undermining confidence in the jury's verdict.

STATEMENT OF THE CASE

Clemente Javier Aguirre-Jarquin has been on death row since 2006 for the June 2004 stabbing deaths of Cheryl Williams and Carol Bareis. Aguirre, a Honduran immigrant and the victims' next-door neighbor, was arrested after he voluntarily came forward, admitted that he had found the victims' bodies, and directed the police to the clothes that he had been wearing, which were stained by the victims' blood. He had no previous criminal history and has consistently maintained his innocence, contending that he found the victims only after their deaths and that their blood had gotten onto his clothes when he checked them for signs of life.

This Court affirmed Aguirre's convictions and sentence on direct appeal, holding that the evidence then in the record established that Aguirre killed the victims after a "violent struggle" in which his clothes were stained with the victims' blood "through motion, not contact." *Aguirre-Jarquin v. State*, 9 So. 3d 593, 606 (Fla. 2009). Relying chiefly on the opinion testimony of a State expert regarding the bloodstain patterns on Aguirre's clothing, the Court concluded that the State had met its heavy burden in this "circumstantial evidence case" of disproving "every reasonable hypothesis except that of guilt." *Id.*

Factual development on post-conviction review has now called Aguirre's conviction "into serious question." *State v. Fitzpatrick*, 118 So. 3d 737, 741–42 (Fla. 2013). Most notably, newly discovered—and previously untested—DNA evidence creates grave and substantial doubt about Aguirre's guilt, while tending to inculpate another suspect. Of the 150 crime-scene bloodstains that now have been tested, ***none*** contained Aguirre's DNA. By contrast, ***eight*** bloodstains—all taken from areas close to the victims' blood, in high-traffic areas (indicating a high likelihood of recent deposit), or the bathroom where the State argued at trial that the killer would have cleaned up—contain the DNA of Samantha Williams, the victims' daughter and granddaughter, respectively.

Newly discovered documents and testimonial evidence cast further doubt on Aguirre's conviction because they corroborate Samantha as a viable suspect. The State has produced new records—which its attorney "stumbled across" during post-conviction proceedings—showing that Samantha has been involuntarily committed under the Baker Act more than 60 times. Those records reveal chilling details about Samantha's life, including her long history of mental-health issues, substance abuse, and previous violence toward her parents. More pointedly, the newly discovered evidence strongly suggests Samantha's culpability in this case. Several witnesses have now come forward and testified that Samantha has

admitted that she killed Cheryl and Carol—*e.g.*, that "demons in her head" caused her to "kill her mom . . . and her grandmother."

None of this evidence came out during Aguirre's trial because it was unknown. Despite Aguirre's persistent claims of innocence—and his repeated pleas to have the DNA evidence tested—his appointed trial counsel never sought any DNA testing, investigated alternative suspects, or consulted with a single forensic expert to determine whether their client's account could be corroborated. (Indeed, Aguirre's lawyers never even considered hiring a forensic expert—in their words, a "whore" or a "CSI Las Vegas blood whisperer.") This is ***not*** a case in which counsel made a strategic decision to forgo DNA testing for fear that it would inculpate their client. Trial counsel now say only that they didn't see how forensic evidence possibly could have aided an innocence defense.

Evidence developed on post-conviction review has shown how. The new DNA results provide powerful new evidence of Aguirre's innocence, tend to inculpate another suspect, and would alone warrant a new trial under this Court's precedents. But there is more. Unrebutted testimony offered during the post-conviction hearing by reputable forensic experts undermines the very "linchpin" of the State's case. *Swafford*, 125 So. 3d at 769. Barie Goetz, a 35-year veteran of bloodstain analysis and former analyst for the Colorado Bureau of Investigation, testified unequivocally—and without contradiction from the State—that, in fact,

Aguirre's blood-stained clothes could not have been worn by the killer. He concluded that a bloodstain on the leg of a chair in the victims' home that the State theorized was knocked over as the killer went to clean up in the bathroom was caused by cotton or denim fabric, not the nylon shorts that Aguirre wore that night. And the bloodstains on Aguirre's nylon shorts, Goetz concluded—again, without contradiction—were not caused "through motion," as the State argued at trial, but rather by direct contact with the victims' bodies, just as Aguirre described. A second new expert, Dr. Daniel Spitz—an experienced medical examiner—further explained that the bloodstain patterns on Cheryl's body were consistent with Aguirre's explanation of how he found and briefly moved her body to check for signs of life. Goetz's and Spitz's powerful new testimony not only corroborates Aguirre's insistence that he found the victims' bodies after they were already dead but also highlights trial counsel's ineffectiveness.

* * *

This overwhelming new evidence requires that Aguirre's convictions and sentence be vacated. *See Jones v. State*, 709 So. 2d 512 (Fla. 1998). The circuit court clearly erred when it held otherwise. Aguirre's powerful array of new evidence—DNA test results that tend to exculpate him while inculpating another suspect; numerous incriminating statements made by that alternative suspect, the victims' mentally ill relative whose blood was found throughout the crime scene;

and unrebutted forensic testimony—exceeds the new evidence presented in other capital cases in which this Court has granted relief under *Jones*. *See, e.g.*, *Hildwin*, No. SC12-2101 (granting new trial based on new DNA test results even though defendant was found in possession of victim's stolen property); *Swafford*, 125 So. 3d 760 (granting new trial based on new forensic test results despite evidence linking defendant to the murder weapon and indicating that he had made incriminating statements). Indeed, the remaining evidence against Aguirre is so weak that it arguably fails even the more stringent legal-insufficiency test that this Court has applied to reverse other circumstantial-evidence-based capital convictions on direct review. *See, e.g.*, *Dausch v. State*, __ So. 3d __, No. SC12-1161 (Fla. June 12, 2014); *Ballard v. State*, 923 So. 2d 475 (Fla. 2006).

Of course, the newly discovered evidence also highlights appointed trial counsel's ineffectiveness, which provides a separate and independent basis for relief. Like the defendant's trial counsel in *Fitzpatrick*, in which this Court granted a new trial, Aguirre's appointed counsel failed to engage in any sort of forensic investigation, for no strategic reason whatsoever. Counsel's errors marred not only the guilt phase of Aguirre's trial, but also the penalty phase, where they called only two witnesses and made no effort to "humanize" Aguirre for the jury. *See, e.g.*, *Walker v. State*, 88 So. 3d 138 (Fla. 2012). Counsel's failure was not for lack of volunteers: they received 43 letters from Aguirre's friends and family in Honduras

who expressed their fondness for Aguirre and their willingness to explain his difficult upbringing in Honduras.

For all of these reasons, and for others explained below, this Court should reverse the circuit court, vacate Aguirre's convictions and death sentence, and remand to the circuit court for a new trial.

STATEMENT OF FACTS

I. THE MURDERS OF CHERYL WILLIAMS AND CAROL BAREIS

In June 2004, Clemente Aguirre lived in a mobile-home park called Mobile Manor, on Vagabond Way, in Seminole County. He lived with two roommates, next door to Cheryl Williams and her wheelchair-bound mother, Carol Bareis. Cheryl's two adult children, Samantha and Eric, also had rooms in the mobile home and lived there from time to time.

On the evening of June 16, 2004, Cheryl and Samantha began to argue after Samantha's boyfriend, Mark Van Sandt, spilled ice on the mobile home's kitchen floor while making strawberry daiquiris. Cheryl was angry because she had just mopped the floor and Van Sandt failed to clean up the ice. Sometime between 11:00 p.m. and 11:30 p.m., Samantha and Van Sandt left the mobile home to stay the night at his parents' house because, as Van Sandt put it, Cheryl stayed upset

about the ice and was not going to give them "any peace and quiet." R11:2008 (time 12:04).[1]

Around 8:45 a.m. the next morning, Van Sandt left his parents' house and drove the short distance back to the Williams's mobile home, ostensibly to retrieve Samantha's work clothes from the washing machine. R11:2008 (time 4:11); TR9:732. The Williams's dryer was broken, Van Sandt later told authorities, so Samantha asked him to bring the clothes to his parents' house to dry. *Id.* (We now know—although Aguirre's jury did not—that before Van Sandt left, Samantha told him that "she had a bad feeling about" her mother and grandmother. R22:1926.)

When Van Sandt arrived at the Williams's home, the door was unlocked (as usual) but difficult to open. TR9:733. He pushed the door open just enough to enter and found that Cheryl's body was partially blocking the doorway. She was dead, lying face down in a pool of blood. *Id.* Van Sandt called 911 from his cell phone and reported that Cheryl's body was "cold" and "very stiff." R19:1238. Deputies from the Seminole County Sheriff's Office arrived a few minutes later.

[1] Citations to the record are in the following form: "R[#]" refers to the volume number within the post-conviction record on appeal. Numbers that follow colons in the record citations are page references. Accordingly, "R11:2008" refers to page 2008 of volume 11 of the record on appeal. "TR[#]" refers to the trial record on appeal. For the Court's convenience, counsel has hyperlinked some of the record citations in this brief, which means that, by clicking on a particular record citation, the reader can view the specific, underlying evidentiary material.

They found Cheryl's body as Van Sandt had described and discovered Carol Bareis's body in an adjacent room. TR9:748–49.

Officers interviewed Van Sandt and took his sworn statement. R11:2008. Van Sandt told them that, the night before, after an argument with Cheryl, he and Samantha had left the mobile home to stay with his parents and that he had returned that morning to pick up Samantha's work clothes. *Id.* The officers photographed Van Sandt's hands and arms before they released him, and they took his clothes. (No one looked inside the washing machine or asked Van Sandt about the clothes hanging on a clothesline, which appeared to be Samantha's work uniform. R9:1721.)

The authorities also interviewed Samantha, who arrived at the scene with Van Sandt's father.[2] R11:2007. When officers asked where she and Van Sandt had gone after leaving the night before, Samantha paused a full 27 seconds before answering that they had gone to the home of Van Sandt's friend, Phil Keidaish. *Id.* The officers did not question Samantha about why she had paused before

[2] Van Sandt's father found Samantha hiding in Mark's bedroom when he went to tell her about the murders. Once she finally came out of hiding and heard the news, she paused to smoke a cigarette before heading to the mobile home. R24:2240.

answering or probe the inconsistency with Van Sandt's account.[3] Nor did the officers take any photographs of Samantha. R23:2197.

Around 11 a.m., one of the officers went next door to interview Aguirre and his roommates. The officer was not a fluent Spanish speaker, and at that time Aguirre (like his roommates) spoke only halting English. TR13:1431. The men initially denied knowing anything about the murders.[4] But later that afternoon, Aguirre approached the officers and requested a Spanish speaker. He then told them the truth: He had gone to the Williams's mobile home at approximately 6 a.m. to ask for some beer. That was not an uncommon occurrence; he was friendly with his neighbors and had been inside the Williams's mobile home numerous times in social settings. When he arrived that morning, the front door was partially open, so he walked in. He found Cheryl's body in the entry hall, with "blood everywhere." Unsure whether she was still alive, Aguirre bent down, rolled

[3] Van Sandt has since testified that he and Samantha went to Keidaish's house before going to his parents' house. R22:1924. Van Sandt had been staying with Keidaish because Van Sandt was on sex offender probation and could not live at his parents' house. R11:2008 (23:18). Keidaish was alive at the time of Aguirre's arrest and trial but passed away in September 2008. Samantha and Van Sandt also gave different stories about the whereabouts of Van Sandt's cell phone the night of the murders. Van Sandt used that phone to call 911 when he discovered the victims' bodies, but Samantha testified that the cell phone was on the table beside the bed at his parents' house. R11:2008; R21:1776–77.

[4] At trial, Aguirre explained that he initially failed to report his discovery of the bodies because he was trying to avoid further contact with the authorities; he was in the country illegally and feared deportation. TR13:1432.

Cheryl's body onto his knee to check for a pulse, and then rolled her back down once he realized that she was already dead. He went home and took a shower, put his now-bloody clothes into a plastic bag, and tossed them onto his roof. When the officers asked him why he hadn't called the authorities immediately, Aguirre explained that he had been afraid that he would be deported. And when asked if he would allow them to retrieve his bloody clothes, he told them, "to just go pick it up [off the roof] and check it, that he [had] nothing to fear." TR13:1436.

Although Aguirre repeatedly told the officers that he had found the victims already dead, the officers arrested him that day and charged him with evidence tampering. He remained a person of interest in the homicides and was held without bond until he was charged 10 days later with the double murders. Aguirre had no previous criminal history.

II. AGUIRRE'S TRIAL

A. The State's Case

The State's theory at trial was that Aguirre killed Cheryl and Carol because he was afraid that they would report him to the immigration authorities. TR13:1508. Even aside from the utter implausibility that someone would commit a double murder as a way to avoid the authorities' radar, no evidence suggested that either victim ever indicated a plan or desire to report him. Motive aside, the State never introduced any direct evidence implicating Aguirre, either in the form

of eyewitness testimony, an admission, or otherwise. Aguirre has resolutely maintained his innocence from day one.

Instead, the State's case against Aguirre was entirely "circumstantial." *Aguirre-Jarquin*, 9 So. 3d at 605. Virtually all of the limited forensic evidence that the State offered was consistent with Aguirre's statement that he had found the victims' bodies on the morning of June 17, briefly rolled Cheryl's body onto his lap to check for a pulse, and then walked through the mobile home to check for others who might be present or harmed. But even so, the State lacked the sort of inculpatory evidence that one might expect to find in a case in which "a violent struggle took place leaving blood on the floor, walls, and door." *Id.* Indeed, although the State proved that Cheryl was stabbed 129 times with a kitchen knife during a "vigorous" struggle (TR12:1365), the evidence at trial showed ***none*** of Aguirre's blood on ***any*** of the items the State tested from the scene.

In any event, the State's forensic evidence fell into three basic categories: (1) bloodstains on Aguirre's clothes; (2) footwear impressions left in the victims' residence; and (3) fingerprints on the murder weapon.

1. The State's bloodstain evidence

Of the more than 100 items of forensic evidence that the State collected, the knife and the clothes that Aguirre was wearing when he found the bodies—a black cotton t-shirt, orange nylon shorts, white socks, and black tennis shoes—were the

only items submitted for DNA testing before trial. R10:1908–14. State witnesses explained that testing had revealed both victims' blood on the knife and on Aguirre's clothes. TR11:1159–67. But that was the extent of the State's DNA evidence—which was entirely consistent with Aguirre's statements to authorities about how he found the bodies.

The State called a crime laboratory analyst, Scott Henderson, to testify about the bloodstain patterns on Aguirre's clothes. Henderson acknowledged that, at the time of trial, he was "being trained in . . . bloodstain pattern analysis," for which he had taken only four 40-hour classes over the course of "approximately three years." TR12:1266. Henderson first explained to the jury that there are four basic types of bloodstains: (1) cast-off stains, which "are flown from an object as a result of change of speed and/or direction," (2) pooled blood, which is "a volume of blood in excess of one drop and is acted upon by gravity alone," (3) contact stains, which are "blood transfer[s] from a bloody object to a non-bloody object," and (4) spatter stains, which are "like the spokes of a wheel" and are created when a "stabbing force caus[es] it to radiate out." *Id.* at 1268–70. He then explained that he had analyzed the bloodstains on each item of Aguirre's clothing. *Id.* at 1282.

Aguirre's socks, he testified, had "some contact bloodstains." *Id.* at 1285–86. He also testified that the t-shirt had contact stains but no "impact spatter that [he] could identify." *Id.* at 1303–04. As to Aguirre's nylon shorts, Henderson

testified that they had "some circular or oval shaped stains" on the back, but he conceded that he could not determine whether those were "caused by cast off or impact spatter." *Id.* at 1306; *see also id.* at 1284, 1312, 1915–18. While explaining that the two stains on the back of the shorts were "possibl[y]" one or the other—and thus caused "by movement," *id.* at 1312–13—Henderson conceded that it would have been "unusual" for those stains to get on the back of the killer's clothes. *Id.* at 1313–14. He also acknowledged that the shorts had "some void patterns . . . , which indicates that the shorts may have been folded in those areas." *Id.* at 1309. That, of course, was consistent with Aguirre's explanation that he bent down and rolled Cheryl's body onto his lap to check her pulse and later put his bloody clothes into a plastic bag.

2. The State's footwear evidence

The State also introduced bloody footwear impressions taken from inside the victims' residence. TR11:1014, 1091–92. Christine Craig, a crime-scene analyst with the Seminole County Sheriff's Office, testified that she had analyzed the impressions and determined that they were consistent with the tread pattern on Aguirre's shoes. *Id.* at 1091–92. Again, that testimony was consistent with Aguirre's explanation of how he found the bodies. Notably, Craig conceded that there were no impressions in the southeast bathroom where—as explained below—the State argued that Aguirre had cleaned up after the murders.

3. The State's evidence about the knife

The State argued that the murder weapon matched other common kitchen knives found in Aguirre's home. TR13:1426–27. Other evidence showed boxes from the knife manufacturer, Sysco, inside the Williams's mobile home at the time of the murders. R9:1721. Donna Birks, a latent-print examiner, testified that she had examined a palm print on the murder weapon and determined that the print matched Aguirre's *left* palm-print. TR10:968. Aguirre is *right*-handed. TR13:1421. During direct appeal, the State admitted that Birks's testimony was incorrect and that the prints were insufficient for comparison.

4. The State's lay witness evidence

To supplement this limited circumstantial forensic evidence, the State called several lay witnesses, including Mark Van Sandt and Samantha Williams.

Van Sandt testified first, about his encounter with the victims on the night of June 16 and what he discovered when he found the victims' bodies on the morning of June 17. TR9:726-41. Incredibly, even though Van Sandt was the last person to see the victims alive and the first to report their deaths—and even though he and Samantha had given inconsistent statements in their initial interviews—Aguirre's trial counsel did not cross-examine him. *Id.* For that matter, trial counsel never even talked to Van Sandt or investigated him in any way. R24:2378. They subpoenaed Van Sandt for deposition, but when Van Sandt failed to show—even

though he was on probation at the time—trial counsel made no effort to compel his appearance, nor did they try to contact him to arrange an interview. R19:1378–80; R24:2219. (We now know—although Aguirre's jury did not—that the deposition notice was served on *Samantha*, who never told Van Sandt about it. R22:1927.)

The State then called Samantha. She testified that the front door to the mobile home usually stayed unlocked and that she and Aguirre had been invited social guests in each other's homes. TR9:772–84. She told the jury about her interactions with Van Sandt and the victims on the night of June 16. She also explained the placement of certain furniture in the mobile home, including, importantly—a mirror that she insisted had been removed from the wall of her bathroom between the time she left the home and when the victims' bodies were discovered. TR11:1117–18. The evidence included a visible smear of blood on the wall where the mirror had previously been mounted, as well as one on the floor where it was found unbroken the next day. R10:1902–03.

Critically, Samantha was the only witness to testify that Aguirre had ever entered the family's home without permission. She recited an incident (which Aguirre denied) that painted Aguirre as a potential menace she had reason to fear, contending that one night a few months before the murders, she had awoken to find Aguirre standing next to her bed, at which point she screamed and ordered him to leave (which she said he did). Samantha was the only witness to this alleged

incident,[5] and she acknowledged that even afterward she and Aguirre entered each other's homes as invited guests. TR9:772–84.[6]

5. The State's closing argument

In closing, the State emphasized the forensic evidence, arguing that it was "important, important evidence" that two stains on the back of Aguirre's shorts "had to be placed there by motion." TR13:1525–26. The State conceded that its expert, Scott Henderson, "couldn't say" precisely what caused those stains, but stressed that they "had to have gotten there by motion"—that they "weren't contact stains." *Id.* at 1518, 1526. The State then discussed all of the physical evidence and argued Aguirre "cleaned up" in the southeast bathroom after the murders. *Id.* at 1519–20, 1526.

B. Aguirre's Case

Aguirre testified on his own behalf as the lone defense witness. He explained the events of June 17 in detail. Sometime "around six in the morning," after "it was daylight," he went next door to get some beer. TR13:1422. When he got there, the front door was "a little bit open, half-closed." As he pushed the door

[5] Samantha has since admitted that she was prone to hallucination and blackouts, and that she was drinking and using drugs during the time of this alleged incident. R21:1754–56.

[6] Aguirre told the jury that on one occasion he had gone to the mobile home for drinks, and Samantha told him not to enter without knocking. He left and, from that point forward, honored her request that he knock upon arrival. TR13:1437.

open, he "found Cheryl Williams on the floor with blood everywhere." He "asked her to wake up around three times but she didn't wake up," so he bent down on the ground and "lifted her" and "put her over [his] legs." When she did not respond, he put her back on the ground. He went toward the living room where Carol Bareis stayed. The door to that room was open, and he went in and saw Carol lying underneath a table. He touched her to see if she was still breathing, and then went back to Cheryl's body. At that point, he was "in a panic." He picked up a knife that was lying close by and started walking through the house, searching for the perpetrator, screaming "[I]s anybody here?" He went into Samantha's room and saw that everything had been thrown about. Finding no one in the house, he left, threw the knife into the backyard, and went home. He took off his clothes—which were covered in blood—put them in a plastic bag, and threw them onto his roof because he planned to burn them. He then took a shower to wash off the blood. He testified that he didn't know why he took the knife with him and that he decided not to call the police because he feared deportation. *See id.* at 1422–36.

Aguirre admitted that when he initially talked to the police around 11:00 a.m. on June 17, he told them that he didn't know anything about the murders. He did so, he said, because he feared being deported. But he also explained that, later that same day, he voluntarily approached the police "to tell them that [he] had some information" and that "on the roof of the room there was some clothing" that

they could "just go pick . . . up and check" because he "had nothing to fear." *Id.* at 1436; *see also id.* at 1431–36.

In their closing argument, Aguirre's appointed lawyers—Timothy Caudill and James Figgatt—simply asserted that the State hadn't carried its burden, and one of them specifically faulted the State for failing to conduct testing that might have been exculpatory. *See* TR12:1551. ("Somewhere in that house, ladies and gentlemen, was evidence that could have . . . proven who did it."). The evidence of who committed these crimes, he argued, was "right there staring [the State] in the face." *Id.* at 1552.

Despite Aguirre's insistence that he didn't commit the crimes, his appointed lawyers failed to investigate those claims. A few key examples—

- Trial counsel never went to the crime scene or viewed any of the evidence, much less had it independently tested. R19:1358–59; R20:1484. We now know that if they had, they would have learned that ***none*** of Aguirre's DNA was at the crime scene. They would have discovered, instead, eight recent deposits of Samantha's blood in key locations. *See infra* 23–25.

- Counsel never consulted with any forensic experts. R19:1359, 1366. In their words, they did not want to go on "a whore search" for "CSI Las Vegas, a blood whisperer." R19:1343; R24:2299–2300. We now know that if they had consulted an expert, they could have (1) rebutted the only forensic evidence offered by the State and (2) presented an array of new forensic evidence that supported Aguirre's innocence claim. *See infra* 33–38.

- Counsel never tried to rebut the State's claim about the bloodstains on Aguirre's clothes and how those stains might have been transferred.

We now know that if they had, they would have learned that the killer could not have been wearing Aguirre's clothes. *See infra* 34–35.

- Because they never viewed any of the physical evidence or consulted an expert, counsel also failed to analyze the fabric pattern in the swipe of Cheryl's blood on a chair in the kitchen. We now know that if they had, they would have discovered that the transfer could not have come from Aguirre's clothing. *See id.*

- Counsel never investigated any alternative suspects. We now know that if they had, they would have learned that Samantha—one of the last people to see the victims alive—gave inconsistent statements to authorities, had a volatile (and at times violent) relationship with her mother, and had been involuntarily committed to psychiatric care. *See infra* 25–33.

- Counsel never interviewed Van Sandt, even though he and Samantha were the last people to see the victims alive, he was the first to report their deaths, and he had failed to appear for his deposition. We now know that if they had done so, they would have learned that Samantha told him just before he discovered the bodies that she "had a bad feeling about" her mother and grandmother. R22:1926. They also would have learned that Samantha received his deposition notice but never told him about it. *See supra* 15–16.

- Counsel never took the most basic step of going to the last place that Aguirre was seen on the night of June 16, a bar called Pretzel's. R19:1336–37, 1367. We now know that if they had, they would have learned not only that Aguirre was well-liked, respected, and peaceful, but also that Samantha, who had worked there and was a patron, had a reputation for dishonesty and that her mother may have been prostituting her for alcohol and drugs. *See infra* 31–32.

- Counsel never contacted anyone in Honduras, where Aguirre had spent his entire life except for the 16 months immediately preceding his arrest. R13:84; R15:409, 426, 490–91. We now know that if they had, they would have been able to explain Aguirre's initial failure to report the murders—that he had personally witnessed brutal murders as a teenager and that Honduran police had failed to investigate (and possibly colluded with) the violent gangs that committed them. R14:308. *See infra* 85–91.

C. Verdict And Penalty Phase

The jury convicted Aguirre on two counts of first-degree murder and one count of burglary. TR13:1591.

The penalty phase was short. Aguirre's trial counsel put on only two witnesses: a psychologist who testified primarily about Aguirre's drug and alcohol use, and a sheriff's officer who, based on a brief conversation that he had with Aguirre on the morning the bodies were discovered, testified to Aguirre's "possible" intoxication at the time of the murders. TR14:100–TR15:210. Despite their claim during post-conviction proceedings that their pre-trial preparation and strategy had been focused principally on convincing the jury to spare Aguirre's life, trial counsel conducted virtually no investigation into possible mitigating evidence—

- They never spoke with anyone in Honduras, including Aguirre's own mother, despite the fact that she had written them offering her assistance and providing her phone number. We now know that if they had, they would have learned that Aguirre grew up in an extremely impoverished environment marked by pervasive violence and police corruption. *See infra* 85–91.

- They never followed up on any of the 43 letters that they received from Aguirre's family and friends in Honduras. Those who had offered to speak on Aguirre's behalf included reputable community members—including, for instance, an attorney and faculty member at a Honduran university with whom Aguirre had worked for more than seven years. Trial counsel never contacted any of these people and simply made their letters "available for" the jury. TR14:110.

- Trial counsel failed to explain to the jury that as a teenager, Aguirre had to flee Honduras because of the extreme gang violence that persisted there, that he feared being forced to return there, and that his actions upon discovering the bodies are consistent with his past experiences. R14:262, 294.

At the close of the evidence, the jury recommended death by a vote of 7–5 for the murder of Cheryl Williams and 9–3 for the murder of Carol Bareis. TR16:405.

D. Direct Appeal

In his direct appeal, Aguirre made numerous arguments, including (1) that the trial court erred in denying his motion for a new trial based on the State's concession that its fingerprint analyst falsely identified Aguirre's palm print on the murder weapon and (2) that he was due a judgment of acquittal on the burglary charge. *See Aguirre-Jarquin v. State*, 9 So. 3d 593 (Fla. 2009). This Court rejected each of Aguirre's arguments. Ultimately, this Court concluded that the State had met its burden of presenting "substantial, competent evidence" to make out a "circumstantial evidence case," based in significant part on the Court's conclusion that the bloodstains on Aguirre's clothes "arrived through motion, not contact," as the State's witness had testified and as the State had argued during closing argument. *Id.* at 599, 606, 609.

III. POST-CONVICTION PROCEEDINGS AND EVIDENCE

The case against Aguirre now looks very different. Numerous "facts and conclusions" that were "developed during trial" have been "called into serious question" during postconviction proceedings. *Fitzpatrick*, 118 So. 3d at 741–42.

First, and most notably, a series of post-conviction DNA tests provide powerful new evidence that Aguirre is actually innocent of these crimes. The circuit court ordered approximately 150 bloodstains tested; ***none*** contained Aguirre's DNA. Instead, the new DNA evidence "points to another viable suspect"—namely, Samantha Williams. *Swafford*, 125 So. 3d at 776. Second, and relatedly, once the DNA results led to questions about Samantha's involvement, post-conviction counsel investigated Samantha's past—something trial counsel never did—and discovered evidence that further tends to inculpate her. Third, and finally, Aguirre's newly hired—and first—forensic expert testified without contradiction that the State's expert had improperly analyzed Aguirre's nylon shorts, and that, in fact, the shorts do not contain projected blood—and thus could not have been worn by the killer. R20:1523–24, 1531.

A. New DNA Results Show None Of Aguirre's DNA At The Crime Scene But Identify Samantha Williams's Blood In Key Locations.

In February 2011, pursuant to Florida Rule of Criminal Procedure 3.851, Aguirre timely moved the circuit court to vacate and set aside his judgments of convictions and death sentences. R1:1. His motion raised 10 claims, most of

which included sub-claims. Those claims rested, in part, on the ground that his appointed trial counsel was constitutionally ineffective because he never sought DNA testing on any of the forensic evidence collected at the crime scene as Aguirre had repeatedly urged. In conjunction with his motion, Aguirre twice moved under Rule 3.853 to release evidence for DNA testing. R3:404–34; R7:1216–40. He wanted to show—consistent with his actual-innocence defense—that none of his blood was at the crime scene, but that blood from an alternative suspect might be present.

That is ***exactly*** what the testing showed. The circuit court ordered DNA testing on 150 bloodstains, along with certain other forensic evidence, collected from the crime scene; ***none*** contained Aguirre's blood. R3:518; R7:1310; R10:1919–24; R11:1925–77. By contrast, ***eight*** bloodstains contained the DNA profile of Samantha Williams. *Id.* All eight stains came from high-traffic areas in close proximity to the victims' blood and/or from the bathroom where the State had argued the killer had cleaned up—thus indicating a high likelihood of deposit close in time to the murders. R20:1594–96.

One of the bloodstains that contained Samantha's DNA had been taken from the kitchen floor, which Cheryl had mopped the night just before the bodies were discovered. Blood from both victims was found nearby. R10:1869, 1875; R11:1987. Another blood stain containing Samantha's DNA had been taken from

the southeast living room, in the middle of the floor, on the way to the southeast bathroom where the State had argued that the killer cleaned up. R20:1560. Cheryl's blood was found nearby. R10:1893–94; R11:1985. Four other blood stains containing Samantha's DNA—one from the door and three from the middle of the floor, within inches of Cheryl's blood—had been taken from the southeast bathroom. R10:1881, 1883, 1885, 1887; R11:1978. The final two blood stains containing Samantha's DNA had been taken from the half bathroom in Samantha's bedroom: one from the wall, near where Samantha insisted that a full-length mirror had been hanging when she and Van Sandt left the house the night before the bodies were discovered (R10:1902),[7] and the other from the floor, next to the mirror, (R10:1903; R11:1986; R20:1562–63). Other bloodstains taken from Samantha's bedroom and bathroom belonged to Cheryl. R20:1568, 1573–74, 1582.

B. Newly Discovered Evidence Concerning Samantha Williams Implicates Her As A Viable Suspect.

In the wake of the DNA test results, Aguirre's post-conviction counsel sought discovery and conducted their own investigation into Samantha's potential motive and culpability. Trial counsel's files contained a 2001 police report

[7] The mirror was 4'1 ½" long (R10:1816), and the stain is at 6'2" from the floor, (R20:1563), which makes it likely that the stain was caused by someone removing the mirror from the wall.

describing involuntary-commitment proceedings initiated by Cheryl under the Baker Act. R11:2073–74.[8] In addition to that report, the State has since (on post-conviction review) produced numerous records that it "stumbled across." R27: 2840. Those records, supplemented by Samantha's own testimony, show that Samantha has been involuntarily committed under the Baker Act more than 60 times; that she and her mother fought frequently; that she has a long and well-documented history of substance abuse, serious mental illness (including impulse control disorder and intermittent explosive disorder), blackouts, and irrational anger, all of which she suffered from at the time of the murders; and that she arguably had a motive to kill her mother. R11:1988, Defense Exh. 90, at 1040–41, 1066, 1082 (sealed).

1. Samantha Williams has made statements intimating that she is the killer.

Most critically, post-conviction counsel learned that Samantha has repeatedly made statements that the circuit court acknowledged "may be fairly interpreted as admissions" that she is the true killer. R8:1436.

[8] Trial counsel conceded that they had this report in their file, that they never followed up on it, and that they never researched either how to obtain a court order to view Baker Act records or whether the mental-health history of a witness is relevant to assessing credibility, including the witness's ability to perceive and remember events. R19:1384.

a. Admissions to Nichole Casey in 2010

On one occasion in August 2010, authorities responded to the Williams's mobile home after Samantha set fire to a blanket inside. R11:2006, Defense Exh. 96, at 161–62 (sealed). Neighbors reported that Samantha had been "complaining of 'demons' in her head and [had] stated that the 'demons' caused her to kill her family (approximately 9 yrs ago)." *Id.* One of those witnesses, Nichole Casey—a longtime friend of Samantha's—testified at the May 2013 evidentiary hearing that she heard Samantha say "[t]hat the demons in her head" "[m]ade her kill her mom . . . [a]nd her grandmother." R22:1981; *see also id.* at 1990 ("Q: Do you have any doubt whether or not she told you that demons made her kill her family? A: No.").

Records show that Samantha was experiencing homicidal ideations at the time, that she threatened to "burn down the hospital" where she was taken, and that she told others that the demon caused her to try to burn down her house. R99:2009, Defense Exh. 99, at 569, 577, 736, 738 (sealed). The records note a "history of violent behaviors" in which she had "hit her mother, shoved her father, busted windows out of cars, [and] knocked holes in wall." *Id.* at 773. Two months before, she had "busted [her] ex-boyfriend's auto windshield." *Id.*

Casey also described a separate incident that occurred three months later, in which Samantha showed her—by pantomiming a stabbing motion—how she had "hurt her mom":

> A: I observed Sam putting a stabbing motion towards her chest, and she told me that the demons had made her do it and she was crying.
>
> Q: Did she say anything about whether she hurt anyone?
>
> A: Yeah. She said that she had hurt her mom.

R22:1984.

b. Statements made during December 2007 arrest

Post-conviction counsel also obtained a video taken from a patrol car's dashboard camera after Samantha was arrested in 2007 for causing a disturbance at a bar. The video shows Samantha threatening to "murder" the arresting officer. She then told him repeatedly that her mother and grandmother "died from me," that she is "sorry that I'm alive," and that nobody has cared about her for 10 years.[9] R11:2001. In the video, Samantha is seen screaming, cursing, spitting, foaming at the mouth, and banging her head against the patrol car's divider.

c. Statements to Candace Nagata in 2008

On another occasion in March 2008, Samantha was involuntarily committed after she started smashing objects, banging her head against the wall, and threatening to hurt others when she became intoxicated. Candace Nagata—one of Samantha's neighbors and Cheryl's friend—witnessed the outburst and wrote a

[9] The arresting officer, who testified at the May 2013 evidentiary hearing, is seen and heard on the video reading Samantha her *Miranda* rights. He explained that he did so because he thought that Samantha was confessing to something. R23:2083–84 (proffer).

sworn statement that Samantha told her that she was "responsible for" her mother's death:

> [O]bserved Samantha Williams beating her head repeatedly against concrete wall. Stated, *'I am responsible for my mom dying,'* 'It's all my fault,' 'I want to die,' 'I don't have anything to live for.' Also observed Samantha throwing glass objects across the room (glasses and plates) when I offered to take her home she stated 'I will kill you.'

R11:1989 (emphasis added).

d. Other Baker Act records

Other newly produced Baker Act records include statements and conduct that could lead a reasonable juror to infer Samantha's guilt. For instance, in October 2010, Samantha was involuntarily committed after she struck her wheelchair-bound father. The responding officer noted that there was a substantial likelihood that Samantha would cause harm to others, R23:2034, and heard Samantha say that she "deserve[d] to f**** die." *Id.*; R11:2009, Defense Exh. 99, at 870 (sealed).

Post-conviction counsel also learned of new, relevant information based on records that Aguirre's trial counsel had but did not pursue. The 2001 police report that trial counsel possessed refers to involuntary-commitment proceedings brought against Samantha by her mother in September 2001, almost three years before the murders. If trial counsel had pursued that lead, they would have learned that while

in the hospital, with her mother at her bedside, Samantha was screaming, spitting at people, and threatening, "I'm going to f**** kill you, I'll kill all of you if I get out." R11:1988, Defense Exh. 90, at 1066 (sealed).

e. Post-hearing admissions

Additionally, *since* the May 2013 evidentiary hearing, counsel has learned about three more statements in which Samantha unambiguously admitted committing the murders.[10] Notably, she made each admission when DNA testing to determine the true killer's identity was underway—the first came after the initial round of testing had begun, and the other two occurred in close proximity to law enforcement's collection of her DNA. In one statement, Samantha told her neighbor, "'I am crazy. I killed my mother. . . . I killed them.'" In another, she told different neighbors, "'I killed my mother and grandma, I'm not worried about you.'" And in the third, she yelled at another neighbor that she had "killed her mother and grandmother." *See* Motion to Relinquish Jurisdiction (filed May 22, 2014).

[10] Aguirre has filed a successive motion to vacate his judgments of conviction and sentence under Rule 3.851, supported by affidavits, on the basis of these new admissions. On May 22, 2014, Aguirre asked this Court to relinquish jurisdiction so that the circuit court could hear the new evidence in the first instance; that motion remains pending.

2. Additional witness testimony about Samantha Williams

In addition to Samantha's inculpatory statements, new evidence also sheds important light on Aguirre's good character, Samantha's questionable character, and—most significantly—on Samantha's potential motive.

a. Evidence from Pretzel's Bar

Despite Aguirre's explicit request that they do so, trial counsel never went to Pretzel's, the neighborhood bar where Aguirre was playing pool until 3:15 a.m. on the morning the bodies were discovered. R21:1623. If they had, they would have learned that Samantha Williams worked there for a period of time and that Cheryl Williams was a patron. *Id.* at 1899–1900.

Bartender Jamie Bernard testified at the post-conviction hearing that Aguirre had been in the bar until 3:15 a.m. on the morning of June 17 and that he had been "friendly and nice and polite" on that night, just the "same as he always was." *Id.* at 1624. Bernard also testified it was common knowledge within the community that Cheryl and Samantha's relationship was strained. *Id.* at 1653. The reason that Samantha "hated her mother so much," Bernard explained, "*was because [Cheryl] made [Samantha] have sex with her drug dealers*." *Id.* (emphasis added).

Monica George, part owner of Pretzel's at the time of the murders, also testified that the staff knew Aguirre as someone who was "well liked and easygoing and very friendly." R22:1897. She also testified that she knew

Samantha, both from Samantha's time working at Pretzel's and as a patron, and that she had fired Samantha after six months for being dishonest and stealing tips from other waitresses. *Id.* at 1899, 1902. George testified that Samantha had a reputation for dishonesty. *Id.* at 1904. She also testified that in the six months leading up to the murders, she had observed Samantha and Cheryl arguing, sometimes while Cheryl was drunk. *Id.* at 1900–01.

b. Mark Van Sandt's testimony

Trial counsel never spoke with Mark Van Sandt, either in an informal interview, by deposition, or through cross-examination. R22:1927; TR9:741. As noted above, Aguirre's trial counsel noticed Van Sandt's deposition, but when Van Sandt failed to appear, trial counsel never moved to compel him to testify—and thus never discovered that *Samantha* had accepted service of Van Sandt's deposition notice but failed to inform him of the date. *See supra* 15–16.

At the May 2013 evidentiary hearing, Van Sandt testified that the night before the bodies were discovered, Cheryl was cleaning the kitchen—

> I think I had gone outside, but Samantha ended up spilling some ice on the floor in, I guess an obscure place. I didn't notice it.
>
> And when the mom had come back in, they got into an argument about the mom had just got done cleaning, she's already making a mess, and that argument turned into us, you know, leaving, and from there, that's how we left.

Id. at 1920–21; *see also id.* at 1921 ("[S]he would definitely mop the kitchen area where the tile was in the trailer when she would clean that part and wipe the counters."). Mark also testified that on the morning that he discovered the bodies, as he was leaving his parents' house to pick up Samantha's clothes, Samantha asked him to check on her mother and grandmother because "she had a bad feeling about them." *Id.* at 1926. He testified that if he had been asked about these events at trial, he would have given these same answers. *Id.* at 1927.

C. New Forensic Evidence Corroborates Aguirre's Claim Of Innocence.

Aguirre also contended in the 3.851 proceedings before the circuit court that his trial counsel failed to consult with any forensic experts who could have corroborated his account through examination of crime-scene evidence that could have undermined the State's case and aided his defense. Post-conviction counsel hired Barie Goetz, a 35-year-veteran crime scene reconstructionist and former Colorado Bureau of Investigation bloodstain-pattern analyst.[11] Although trial counsel *never even considered* retaining a crime-scene-reconstruction expert, Goetz was able to show that the crime-scene evidence was perfectly consistent with Aguirre's claim of actual innocence. Goetz's testimony went totally

[11] Goetz was accepted without voir dire or objection by the State as an expert in crime-scene analysis and reconstruction, bloodstain pattern analysis, and forensic serology. R20:1502.

unrebutted: Scott Henderson, the forensic analyst who had offered the State's bloodstain-pattern opinions at trial, was listed as a State witness but was never called to testify. ROA Index at 64.

1. Testimony about the bloodstain evidence

Most critically, Goetz testified about the bloodstain patterns on Aguirre's nylon shorts. Goetz first explained that nylon absorbs blood differently from cotton, a fact that the State's analysts should have taken into account, but failed to, when they examined the bloodstain patterns. R20:1521. In particular, he explained that because nylon is "a very tightly woven fabric and it's somewhat water-repellent," when blood gets on it the blood "spreads out" and leaves a distinct pattern that is a "much bigger stain than a drop of blood on cotton." *Id.* at 1525.

Based on that fact, Goetz explained that "all the stains that are present on" Aguirre's nylon shorts resulted from "a transfer of blood," ***not*** projected blood. *Id.* at 1523. Indeed, he concluded that Aguirre could not have killed the victims while wearing the shorts, as the State argued at trial, because "the perpetrator in this case would have had projected blood present . . . on the clothes that they were wearing." *Id.* at 1523–24, 1531.[12] "[W]hoever was the perpetrator," Goetz testified, was not

[12] Goetz also concluded, consistent with the State's evidence at trial, that there was no projected blood on Aguirre's other articles of clothing. *Id.* at 1524.

"wearing those shorts." *Id.* at 1524, 1531. He further explained that the bloodstain patterns on the nylon shorts are consistent with Aguirre's testimony at trial that he lifted Cheryl Williams's body onto his lap to check her pulse. *Id.* at 1523. Goetz also testified that a swipe of Cheryl's blood on an overturned kitchen chair could not have been caused by the nylon shorts worn by Aguirre. *Id.* at 1588. The pattern was more consistent with fabric made "with a coarser weave" than the nylon shorts. *Id.* He testified that it was "a fabric transfer of blood, but not consistent with nylon," meaning that someone else carrying Cheryl's blood brushed against the chair. *Id.*

Goetz further explained that Samantha Williams's blood was "fresh" and was deposited at the same time as the victims' blood. R23:2141. He based his conclusion on (1) his 35 years of experience in crime-scene investigation, (2) the notes of the crime-scene analyst who documented, collected, and photographed the stains, and (3) the color of the bloodstains. Goetz testified that "obvious signs of aging would be a darkening of the color," which is caused when the stain oxidizes as a result of being exposed to sunlight. *Id.* at 2147. Goetz explained that the stains caused by Samantha's blood did not appear darker than the stains caused by the victims' blood, meaning that they were likely deposited at the same time.

2. Testimony about the footwear evidence

With respect to the footwear impressions, Goetz testified that if trial counsel had retained him, he would have explained that "the physical evidence at the scene of the shoe impressions" is "consistent with [Aguirre's] testimony . . . that he did walk into the trailer and walked into those three rooms, four rooms around the bodies of the deceased." R20:1594. Goetz based that opinion on the fact that the shoeprints were very clear transfers, and not transfers that evidenced excessive movement—all of which indicates someone passively, deliberately walking around the scene after the blood had time to pool, rather than hurried or frantic movement. *Id*. at 1516–17.

3. Testimony about the bloodstains on Cheryl Williams's body

Aguirre also called Dr. Daniel Spitz, the chief medical examiner for Macomb County, Michigan, in part to rebut State witness Dr. Thomas Beaver. Beaver had testified that Cheryl Williams's body had not been moved before he arrived on the scene the evening of June 17—contrary to Aguirre's explanation that he found the body, lifted it to check for a pulse, and then laid it back down. R19:1278. Beaver contended that "sparing" on Cheryl's body—that is, portions of the body that showed an absence of blood—supported his theory because sparing is typically seen when a corpse is in a resting position and blood pools around (but does not run across) the areas touching the ground. *Id.* at 1275–77. He explained

that when he arrived, there was some sparing on Cheryl's body where it was touching the floor. *Id.* at 1280. On cross-examination, Beaver conceded that "if the body was moved five to six hours after death . . . you would [still] see the same type of marks." *Id.* at 1294. On redirect, he clarified that if the body had been moved before he arrived, he would have expected to see "another ring around that area of skin." *Id*. at 1298.

Spitz rebutted Beaver's conclusions. In particular, he pointed out something Beaver had failed to observe—that, in fact, there *was* "another ring" on Cheryl Williams's body in that same area. *Id.* at 1307–08. This double ring is *exactly* what Beaver testified he would expect to see if the body had been moved (*id.* at 1297; R9:1626), and Spitz explained that it is consistent with Aguirre's account that he rolled the body onto his lap and then placed it back down. R19:1307–08. And if the body was in rigor mortis when Aguirre arrived at the scene, Spitz explained that the body would have "roll[ed] as a unit" and "not mov[ed] independently," thus allowing it to be put back in substantially the same place. *Id.* at 1308.

Spitz also identified other forensic evidence corroborating Aguirre's account and rebutting Beaver's initial opinion that the body had not been moved. He noted the presence of two "well-defined blood drips which are parallel to one another on the lower portion of [Cheryl's] back." *Id.* at 1310–11. These blood lines, he

testified, further "indicate that the body was moved at some point . . . prior to the medical examiner's office arriving on scene." *Id*. Spitz explained—again, consistent with Aguirre's testimony that he rolled the body onto his lap, and then rolled it back—that gravity caused blood to flow from puncture wounds on the left side of her back. *Id*. After some hours, the blood has dried in that position and was no longer pulled down by gravity. *Id.* Spitz testified that the body was *not* found in a position that would have caused the blood to flow in that direction on its own and that the blood lines stop mid-way across the back.[13] *Id.* Thus, Spitz explained that the body must have been briefly moved *before* the medical examiner arrived, causing blood to flow out of the wounds and to dry in parallel lines once it was lowered back down. TR4:614 R9:1721; R19:1311.

Because trial counsel never consulted with a forensic expert, the jury heard none of this evidence.

D. Circuit Court Denies Relief

On August 28, 2013, the circuit court denied Aguirre's post-conviction motion in its entirety. The court dismissed the new DNA evidence as "not compelling." R12:2221. The court also concluded that "[a]ll of the evidence presented at the evidentiary hearings"—the DNA evidence, Samantha's

[13] The crime scene video clearly shows the dried blood drips and the angle of Cheryl's body on a roll of roofing tile. Counsel has hyperlinked pictures showing both the "double ring" and the parallel blood lines.

admissions, the records documenting Samantha's repeated mental-health issues, and the new forensic testimony—"either lacked credibility or was cumulative evidence and did little to bolster the Defendant's testimony." *Id.* at 2202. In the circuit court's view,

> [t]he only evidence that [Aguirre] had to support his theory that Samantha Williams was the real murderer was inadmissible character evidence, a Baker Act proceeding from three years prior to the murders for injuring herself, and a few drops of her blood found in her residence. This evidence is insufficient to cast doubt on the verdict in his case.

Id. at 2202–03. "Aside from" all that, the court held that Aguirre's account "defie[s] logic and reason" and "completely defies common sense." *Id.* at 2203.

SUMMARY OF THE ARGUMENT

Clemente Aguirre's convictions and death sentence should be vacated. This appeal follows directly from the recent cases in which this Court has granted relief to capital defendants based on newly discovered forensic evidence developed on post-conviction review.

i. Newly discovered evidence—DNA test results that tend to exculpate Aguirre and inculpate Samantha Williams, numerous incriminating statements by Samantha, and unrebutted forensic testimony—creates reasonable doubt as to Aguirre's guilt. Indeed, Aguirre's new evidence is even more compelling than the evidence presented in *Swafford* and *Hildwin*, two circumstantial-evidence cases—

like this one—in which this Court has recently granted capital defendants relief under the *Jones* standard on post-conviction review.

ii. This new evidence also underscores the ineffectiveness of Aguirre's appointed lawyers at the guilt phase of his trial. Counsel failed to consider *any* DNA testing, failed to conduct *any* reasonable investigation of Samantha Williams, and failed to consult *any* forensic expert that could have corroborated his defense. Those failings—just like the failure of the constitutionally deficient counsel in *Fitzpatrick* to meaningfully investigate DNA testing—undermine confidence in the outcome and independently warrant a new trial.

iii. Aguirre's appointed lawyers also failed to provide effective assistance of counsel during the penalty phase of his trial. Counsel failed to investigate—much less present to the jury—facts about Aguirre's upbringing in Honduras that were easily discoverable (indeed, 43 of Aguirre's friends and family sent letters to trial counsel) and that would have "humanized" Aguirre for the jury. Their omission prejudiced Aguirre and provides a separate basis for a new trial.

iv. This Court should grant Aguirre relief for numerous other reasons in the record—(1) Aguirre's counsel failed to object to Aguirre being shackled during his trial; (2) because Aguirre is actually innocent, his incarceration and death sentence violate the United States and Florida Constitutions; and (3) Aguirre is

entitled to have his case remanded for additional DNA testing on the hair that was clutched in one of the victim's hands.

This Court should vacate Aguirre's convictions for first-degree murder, vacate his death sentence, and remand for a new trial.

STANDARD OF REVIEW

For claims based on newly discovered evidence, this Court reviews a circuit court's findings of fact, credibility determinations, and the conclusions about weight of the evidence to determine whether they are supported by competent, substantial evidence. *See Swafford v. State*, 125 So. 3d 760, 767–68 (Fla. 2013). Legal conclusions and application of law to those facts are reviewed *de novo*. *See id.* Both standards apply equally to claims based on ineffective assistance of counsel. *See State v. Fitzpatrick*, 118 So. 3d 737, 748 (Fla. 2013).

ARGUMENT

Aguirre's case is extraordinary, but the issues presented are not. Indeed, within the last year alone, the Court has twice vacated capital defendants' convictions and sentences based on newly discovered forensic evidence, including DNA evidence, in cases with compelling parallels to this one. *See Hildwin v. State*, __ So. 3d __, No. SC12-2101 (Fla. June 26, 2014); *Swafford*, 125 So. 3d 760. And just over a year ago, the Court unanimously rejected another defendant's conviction and death sentence because his trial counsel—like Aguirre's—failed to

consult readily available forensic experts who could have corroborated his defense. *See Fitzpatrick*, 118 So. 3d 737.

This case presents the same two salient concerns—namely, protecting a defendant's right to a fair trial when (1) newly discovered evidence strongly suggests his innocence and (2) his trial counsel fails to conduct any forensic investigation in the face of a compelling reason to do so—but even more starkly. Unlike the defendants in *Swafford* or *Fitzpatrick*, Aguirre has new DNA evidence that ***both*** tends to exculpate him ***and*** points toward another suspect as the likely perpetrator. And the DNA evidence here is even more compelling than in *Hildwin* too; the DNA there—biological material from the victim's live-in boyfriend—bore a far less evident connection to the murder than do the numerous deposits of Samantha Williams's blood here, which were found near the victims' blood in multiple locations throughout the crime scene.

This compelling new DNA evidence creates at least reasonable doubt as to Aguirre's guilt—particularly given the circumstantial nature of the State's case—which is all that *Jones* requires. Add to that appointed trial counsel's abject failure to investigate the case, conduct requested testing, and even consider necessary experts, and it is clear that Aguirre's conviction and death sentence cannot stand.

I. NEWLY DISCOVERED EVIDENCE, INCLUDING UNREBUTTED FORENSIC EVIDENCE, SO WEAKENS THE CASE AGAINST AGUIRRE THAT IT CREATES REASONABLE DOUBT ABOUT HIS GUILT.

A defendant's conviction may be set aside based on newly discovered evidence on two conditions. First, the new evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known of it by the use of diligence." *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). Second, the new evidence must sufficiently "'weaken[] the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability.'" *Swafford*, 125 So. 3d at 763 (quoting *Jones*, 709 So. 2d at 526). This analysis requires a court to "consider all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Jones*, 709 So. 2d at 521.

Aguirre's new evidence clearly satisfies the *Jones* standard. In addition to new DNA results that tend to exculpate Aguirre and inculpate Samantha Williams, the circuit court had evidence of four separate statements in which Samantha either directly admitted or made comments that the circuit court concluded "may be fairly interpreted as admissions to committing the murders." R8:1436. Moreover, new testimony and Baker Act records discovered on post-conviction review further

implicate Samantha and reveal a history of mental illness and violence, as well as a possible motive to kill her mother.

Taken together, this new evidence "completely changes the character of" the case and unquestionably leads to "reasonable doubt as to [Aguirre's] culpability." *Swafford*, 125 So. 3d at 778.

A. The DNA Test Results, Samantha's Statements, And The Baker Act Records Are All "Newly Discovered Evidence."

Neither the State nor the circuit court ever disputed that the evidence that Aguirre has discovered on post-conviction review—the DNA test results, Samantha Williams's admissions and statements to others in the time surrounding the murders, and the Baker Act records—is "newly discovered" under the first part of the *Jones* test.

B. The New Evidence Gives Rise To Reasonable Doubt About Aguirre's Guilt.

Substantively, *Jones* requires that any newly discovered evidence "probably produce an acquittal on retrial." *Jones*, 709 So. 2d at 514. That standard is easily satisfied here.

1. Taken together, the newly discovered evidence—the DNA results, Samantha Williams's statements, and the Baker Act records—creates reasonable doubt about Aguirre's guilt.

The fundamental question under *Jones* is whether the newly discovered evidence "'weakens the case against [the defendant] so as to give rise to a

reasonable doubt as to his culpability.'" *Hildwin*, slip op. at 3 (quoting *Jones*, 709 So. 2d at 526) (alteration in original). The Court must "conduct a cumulative analysis of all the evidence"—that is, weigh the new evidence, "in combination with the evidence developed in postconviction proceedings," and the evidence presented at trial viewed through the lens of these new revelations—"so that there is a 'total picture' of the case and 'all the circumstances of the case.'" *Swafford*, 125 So. 3d at 776, 778 (quoting *Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999)); *see also Jones*, 709 So. 2d at 521.

Swafford, decided just last year, is remarkably similar to this case. The case, like this one, came to this Court following a denial of post-conviction relief. At Swafford's trial—as in Aguirre's—the State put on a "circumstantial evidence case" from which the jury inferred guilt. 125 So. 3d at 766. And on post-conviction review, Swafford—again, like Aguirre here—based his claims on both new, exculpatory forensic evidence as well as new testimonial evidence that pointed toward "another viable suspect" about whose potential culpability the "jury [had] never heard." *Id.* at 762, 778. This Court granted a new trial, holding that the new forensic tests showing the absence of seminal fluid in the victim—along with "the evidence as to the new suspect, which completely change[d] the character" of the State's evidence—"so significantly weakened the case" that the

defendant sexually battered and murdered the victim "that it g[ave] rise to a reasonable doubt as to his culpability." *Id.* at 768, 778.

This case also mirrors *Hildwin* in key respects. Also a circumstantial-evidence case arising on post-conviction review, *Hildwin* held that "newly discovered evidence that identifies the donor of DNA left at the crime scene"—*i.e.*, someone other than the defendant—"compels that a new trial be granted." *Hildwin*, slip op. at 3. As here, the "uncontradicted" new DNA results in *Hildwin* tended to exculpate the defendant and inculpate a third person who lived with the victim. *Id.* at 18. Importantly, this Court made clear that a defendant need not prove a third party's guilt to obtain a new trial. Rather, the "significant" new DNA evidence was enough to allow a jury "to decide between two suspicious people[,] both of whom had a motive." *Id.* at 28.

Aguirre's claim is even more compelling than the claims in *Swafford* and *Hildwin*. In *Hildwin*, the defendant still had to contend with evidence that he had a motive, had confessed, and had stolen from the victim. The State has none of that evidence against Aguirre. As for *Swafford*, the new forensic evidence does more here: whereas in *Swafford*, only testimonial evidence pointed to "another viable suspect" that the jury "never heard" about, 125 So. 3d at 778, here, *both* new forensic *and* testimonial evidence tend to exculpate Aguirre and incriminate someone else. In particular, that new evidence shows that the suspect, Samantha

Williams, is mentally unstable, had a history of violence toward her mother, and has made statements that strongly suggest (and, at least once, flatly admit) that she, in fact, committed the crimes.

As explained below, when these new facts—together with all of "the evidence that defense counsel could present at a new trial," including forensic expert testimony that Aguirre's jury never heard—are weighed against the State's circumstantial-evidence case, the "total picture" is so different that there is reasonable doubt as to Aguirre's guilt. *Id.*

a. The newly discovered evidence creates reasonable doubt about Aguirre's guilt, particularly when considered in conjunction with the new forensic expert evidence developed on post-conviction review.

The new evidence here does not just severely undercut the State's case, it gives rise to a "reasonable doubt as to [Aguirre's] culpability." *Hildwin*, slip op. at 29. Numerous roadblocks now stand in the way of the State carrying its burden in a new trial.

First, the DNA results, which tend to exculpate Aguirre, would be extremely compelling to a new jury. *See, e.g.*, *Hayes v. State*, 660 So. 2d 257, 262 (Fla. 1995) ("[T]he probative power of DNA typing can be so great that it can outweigh all other evidence in a trial."). Numerous courts in Florida and elsewhere have granted post-conviction relief based on new, favorable DNA test results. *See, e.g.*,

Hildwin, No. SC12-2101.[14] But the evidence is particularly powerful here. The results tend to corroborate Aguirre's repeated claims of actual innocence by highlighting the implausibility of how a killer could engage in a "violent struggle" in which one victim is stabbed 129 times with a kitchen knife, and yet leave behind ***no*** DNA at the crime scene.

Second, the DNA evidence not only tends to exculpate Aguirre (which, of course, is all the law requires) but also tends to implicate Samantha Williams as another viable suspect in the case. The fact that Samantha's blood was found in eight places at the crime scene—all high-traffic areas, in close proximity to the victims' blood, and likely deposited close-in-time to the murders—is crucial because Aguirre's jury "never heard that there was another viable suspect." *Swafford*, 125 So. 3d at 778; *see also Hildwin*, slip op. at 21 (explaining significance of DNA evidence that potentially inculpates an identifiable third person). Notably, Samantha testified against Aguirre at trial, but has intimated to

[14] *See also, e.g.*, *Commonwealth v. Bedingfield*, 260 S.W.3d 805 (Ky. 2008) (vacating rape conviction on post-conviction review based on new, "quasi-exculpatory" DNA test results); *People v. Davis*, 2012 WL 697236 (Ill. Ct. App. Mar. 5, 2012) (same, murder conviction); *State v. Pope*, 80 P.3d 1232 (Mont. 2003) (same, rape conviction); *State v. Armstrong*, 700 N.W.2d 98 (Wis. 2005) (same, murder and sexual assault convictions); *cf. State v. Caldwell*, 322 N.W.2d 574 (Minn. 1982) (vacating murder conviction based on re-analysis of enhanced crime scene fingerprint). Other courts have granted post-conviction evidentiary hearings based on new DNA test results that tended to exclude the defendant as the perpetrator. *See, e.g.*, *Brewer v. State*, 819 So.2d 1169 (Miss. 2002); *Commonwealth v. Reese*, 663 A.2d 206, 210 (Pa. 1995).

numerous credible witnesses (and at least once expressly admitted) that she committed the crimes.

Third, the new testimonial and documentary evidence pointing toward Samantha mirrors the evidence that this Court relied on in *Swafford* and *Hildwin*. Just as in *Swafford*, 125 So. 3d at 778, other witnesses have testified to circumstances that could connect Samantha to the crimes—that she had a volatile, sometimes violent, relationship with her mother, who had reportedly prostituted her in exchange for alcohol and drugs. And as in *Hildwin*, slip op. at 25, documentary evidence further points toward Samantha by chronicling a long history of mental illness, substance abuse, and rage.

Finally, a new trial would provide a jury its first opportunity to consider new forensic expert evidence. The State's limited forensic evidence was uncontested at trial. It has since been rebutted by Barie Goetz's testimony that Aguirre's clothes were stained by direct contact with the victims, ***not*** "through motion," as the State originally asserted. R20:606, 609. Goetz's testimony undermines the very "linchpin" of the State's circumstantial case. *Swafford*, 125 So. 3d at 769. Indeed, Goetz's testimony that there were no bloodstains caused by motion on Aguirre's shorts and that any reasonable bloodstain analysis should have accounted for the fact that the shorts were nylon—a factor that the State's trial expert, Scott Henderson, never considered—significantly "discredits the [State's]

scientific evidence." *Hildwin*, slip op. at 2. And Aguirre's other new expert, Dr. Daniel Spitz, has presented unrebutted evidence, based on blood flow from Cheryl Williams's wounds, showing—consistent with Aguirre's account—that someone moved her body before the State's medical examiner arrived.

All of that evidence taken together so "weakens the case against" Aguirre, *id*. at 29, that a new trial is necessary.

b. The new evidence is particularly compelling given that the State's case against Aguirre was purely circumstantial.

The State's case against Aguirre was a "circumstantial evidence" case. *Aguirre-Jarquin v. State*, 9 So. 3d 593, 606 (Fla. 2009). Accordingly, just as in *Swafford* and *Hildwin*, the State will bear a particularly heavy burden in a new trial.

In light of the new evidence, the State's case now gives the jury "nothing stronger than a suspicion" from which to infer Aguirre's guilt. *Ballard v. State*, 923 So. 2d 475, 482 (Fla. 2006). No eyewitnesses or DNA evidence linked Aguirre to the murders in any way, and far from confessing, Aguirre has always adamantly denied any wrongdoing. Not only is there no evidence that Aguirre had "any hatred or ill feelings towards the victims," *id*. at 485, the evidence, to the contrary, shows that Aguirre and his neighbors were on friendly, social terms. TR9:772, 781–82, 784; TR13:1422; R22:1855–56, 1858. Although now-

discredited fingerprint evidence shows that Aguirre handled the murder weapon, that evidence squares perfectly with Aguirre's account of discovering the victims' bodies (and his trial testimony).

To be clear, Aguirre need not prove in this appeal that his conviction was based on insufficient evidence. The point is simply that, in a circumstantial case, the State will bear a particularly high burden of proof at any new trial—*i.e.*, all of the facts "must be inconsistent with innocence" and must "lead to a reasonable and moral certainty that [Aguirre] and no one else committed the offense charged." *Dausch v. State*, __ So. 3d __, No. SC12-1161, slip op. at 10 (Fla. June 12, 2014); *Ballard*, 923 So. 2d at 486 (evidence must exclude "all other inferences" than guilt).

In light of Aguirre's new evidence, that will be exceedingly difficult. With the exception of its at-best-debatable theory about the blood spatter on Aguirre's shorts, the State can do nothing more than place Aguirre inside the victims' home—which is not only not "inconsistent with innocence," but is precisely what Aguirre told the authorities from day one. The State's other trial evidence—contact stains of the victims' blood on Aguirre's clothes, his fingerprints on the knife, and his footprints in the house—puts Aguirre at the *crime scene*, but it does not connect him to the *crimes themselves*. By contrast, the post-conviction record powerfully corroborates Aguirre's account of how he found the victims.

This Court has vacated convictions based on similar evidence, even under a far more demanding standard than the *Jones* newly-discovered-evidence test that applies here. *See, e.g.*, *Dausch*, No. SC12-1161 (directing judgment of acquittal because the physical evidence only linked the defendant to the crime scene, not to the murder); *Ballard*, 923 So. 2d 475 (directing judgment of acquittal even though the defendant's DNA was at the crime scene). Because the State's already-tenuous theory has been seriously undercut—and because there is no credible evidence that is inconsistent with Aguirre's defense—an acquittal is at least "probable" under the *Jones* standard.

c. The circuit court clearly erred by denying relief.

The circuit court erroneously concluded that the new evidence is "not compelling" and that none of it "strengthened [Aguirre's] theory of the case." R12:2181, 2221. That conclusion is based on an inappropriately narrow reading of the facts. The court disregarded Aguirre's new forensic experts, Goetz and Spitz, concluding, without explanation, that their opinions "strain[] the bounds of reason" and "completely def[y] common sense." *Id.* at 2197–98, 2200, 2203. Yet during the May 2013 evidentiary hearing, both experts' opinions went totally unrebutted. The State never countered Goetz's finding that the bloodstains on Aguirre's nylon shorts were ***not*** caused by movement, and it never disputed Spitz's testimony about

the blood patterns on Cheryl Williams's back, both of which directly corroborate Aguirre's account.

The circuit court also misapplied *Jones* when dismissing the evidence that points to Samantha Williams as a suspect. The court reasoned that "[t]he only evidence [Aguirre] had to support his theory that Samantha Williams was the real murderer was inadmissible character evidence, a Baker Act proceeding from three years prior to the murders for injuring herself, and a few drops of her blood found in her residence." *Id.* at 2202–03. That assertion fails on several levels. First, as explained below, all of the new evidence is admissible. Second, the new testimonial and documentary evidence reveals Samantha's history of violence and mental illness, a volatile relationship with (and prior threat to "kill") her mother, and an arguable motive to kill her mother, who was (by one witness's account) forcing Samantha to prostitute herself for alcohol and drugs. Finally, the DNA evidence in this case cannot fairly be characterized as "a few drops of blood," given (1) the location and nature of the blood, which Aguirre's expert explained (without rebuttal) seemed to be "fresh," and (2) the fact that even Samantha herself could not recall a recent instance in which she would have bled inside the mobile home.

The circuit court seemed to discount the DNA evidence on two bases, neither of which precludes relief. First, the circuit court emphasized what it called

Samantha's "solid alibi," *id.* at 2175, 2181, which the court concluded the DNA evidence did not "weaken[]," *id.* at 2224. But that "solid alibi" finding is not supported by competent, substantial evidence. Indeed, the record shows only minimal evidence that might plausibly qualify as an alibi.

Mark Van Sandt is the only witness who has corroborated Samantha's "alibi" that she was asleep at Van Sandt's parents' house during the murders. Van Sandt's father has testified that he had no idea that Samantha was in his home until well after the victims' bodies were discovered. R24:2244. Setting aside the fact that Van Sandt had an obvious interest in protecting Samantha—and the fact that he and Samantha have told inconsistent stories—Van Sandt plainly admitted that he was "dead to the world" asleep during most of the night before the victims' bodies were discovered. *Id.* at 2222. He also admitted that Samantha had previously snuck out at night without his knowledge. *Id.* at 2223.[15] In any event, whatever the evidence about Samantha's alibi, whether that evidence "trumps" Aguirre's new DNA and testimonial evidence is a question for a jury. *See*

[15] Where Samantha was during the night could be important because the precise time of death is unknown. The State alleged that the time of death was 6:00 a.m. Spitz's testimony calls that conclusion into question. He has opined that the time of death was likely earlier, based in part on Van Sandt's 911 call in which he stated that the bodies were "cold" and "very stiff," the fact that the victims appeared to be wearing the clothes that they had been wearing night before, and Cheryl's blood alcohol level. R19:1243–44.

Hildwin, slip op. at 16 (holding that weighing between new evidence and evidence of third party's alibi is for a new jury).

Second, the circuit court discounted the return of Samantha's DNA in "only" eight bloodstains by reasoning that the mobile home where the victims and Samantha lived was "filth[y]." R12:2181–82. But the facts about those eight bloodstains tell a very different story. One bloodstain was found in the kitchen, where Cheryl Williams had mopped the floor *the night before* the murders. R22:1920–21. Two bloodstains were found in the southwest bathroom, one of the wall near the top of the mirror that was removed and the other on the floor near Cheryl's blood. R20:1563. Four were found in the southeast bathroom, where the State alleged that the killer cleaned up after the murders. And all of the other bloodstains containing Samantha's DNA profile were found in close proximity to the victims' blood and/or in high-traffic areas where there is little chance that old blood would have remained for long, let alone in visible "drops" like those here. Indeed, as Goetz explained—without contradiction—factors like exposure to sunlight and foot traffic (particularly across a kitchen floor) would have washed away any "old" blood traces long ago. R23:2141–49.

In the end, though—even if the evidence pointing toward Samantha were not so compelling—the circuit court's theory requires a series of implausible inferences: (1) that Aguirre happened to drip the victims' blood within inches of

Samantha's old blood, (2) in four separate rooms throughout the mobile home, (3) including in the southeast bathroom, (4) where there is no evidence that Aguirre entered, and (5) in the recently mopped kitchen. Goetz's testimony regarding blood's oxidization and transfer is the ***only*** evidence about the bloodstains' age; according to his well-reasoned and unrebutted opinion, the eight bloodstains that contain Samantha's DNA were deposited at or near the same time as the victims' blood. R23:2148. At the very least, that unrebutted evidence provides some indication of Samantha's culpability.

2. All of the new evidence is admissible.

No one disputes the admissibility of the new DNA test results or Aguirre's new forensic expert evidence. The circuit court concluded, however, that Samantha's admissions and other statements were inadmissible hearsay. The circuit court also held that Samantha's Baker Act records were inadmissible character evidence, even though the circuit court had previously recognized that the records contain "references to statements that may be fairly interpreted as admissions." R8:1436. All of those conclusions were erroneous.

a. Samantha Williams's post-trial statements are admissible under the U.S. Supreme Court's decision in Chambers v. Mississippi *and its progeny.*

Samantha's statements are admissible under *Chambers v. Mississippi*, 410 U.S. 284 (1973), and its progeny, which clearly establish a defendant's right to

present evidence suggesting a third party's guilt. *See, e.g.*, *Holmes v. South Carolina*, 547 U.S. 319 (2006); *Davis v. Alaska*, 415 U.S. 308 (1974). In *Chambers*, the Court held that the hearsay-based exclusion of critical exculpatory evidence—like here, third-party admissions of guilt—deprived the defendant of a fair trial and required reversal of his conviction. 410 U.S. at 302–03.

Here, the circuit court declined to consider Samantha's statements under *Chambers* because they were made years after the murders, while Samantha was "intoxicated and barely coherent," and lacked "any specificity, detail, or corroboration." R12:2221. That was error. *Chambers* embodies no rigid temporal or specificity requirement. *See Jones*, 709 So. 2d at 525; *Curtis v. State*, 876 So. 2d 13, 21 (Fla. 1st DCA 2004). Rather, under *Chambers*, criminal defendants may introduce third-party admissions of guilt that bear "persuasive assurances of trustworthiness" when their exclusion would deny "the defendant a trial in accordance with due process standards." *Jones*, 709 So. 2d at 525; *see also*, *e.g.*, *Bearden v. State*, 62 So. 3d 656, 661 (Fla. 2d DCA 2011) ("primary consideration" is whether statement "bears sufficient indicia of *reliability*").

Samantha's post-trial admissions of guilt have "persuasive assurances of trustworthiness," and due process requires their admission. Samantha made several of these inculpating statements to either a "close acquaintance" or law enforcement. *Jones*, 709 So. 2d at 525. Other evidence—including her DNA at

the crime scene—"provide[s] additional corroboration" for the statements, as does the sheer number of her consistent statements. *Chambers*, 410 U.S. at 300. And there "can be no doubt," that statements intimating responsibility for a gruesome double murder are self-incriminatory and unquestionably against interest. *Curtis*, 876 So. 2d at 22. Indeed, the circuit court *itself* noted that Samantha's statements "may be fairly interpreted as admissions." R8:1436. *But see* R12:2221 ("They were not clearly self-incriminatory and can more readily be interpreted as expressions of survivor's guilt.").

As just one example of its error, the circuit court contended that "it is unclear" from Nichole Casey's testimony what Samantha meant when she said "'demons made her do it'"; the court "d[id] not find credible" Casey's "attempt[] to interpret [that] statement to mean the demons made her kill her family." R12:2220–21. But there was no "interpretation" required. Casey simply repeated what she had told police—that Samantha had told her that "demons in her head" "made her kill her mom . . . [a]nd her grandmother." *Id.* at 1981. The Baker Act records reflect similar statements—that Samantha was saying that "the 'demons' caused her to kill her family (approximately 9 yrs ago)." R11:2006, Defense Exh. 96, at 161–62 (sealed).[16] The circuit court's explanation for this statement—that it

[16] This statement in the Baker Act records that witnesses reported that Samantha was saying that she had killed her mother and grandmother "approximately 9 yrs ago" also answers the circuit court's charge that the admissions lack any

was "not a statement against interest, but instead indicated for a defense of insanity"—is not only confusing but also inconsistent with the court's conclusion that Samantha might be suffering from "survivor's guilt." R12:2221–22.

In sum, Samantha's post-trial statements to her friends, neighbors, and law enforcement that even the circuit court recognized "may be fairly interpreted as admissions," R8:1436, are sufficiently reliable to be admissible at trial. And if there is "any question as to the[ir] truthfulness," *Jones*, 709 So. 2d at 524, that is for a jury to evaluate at a new trial.

b. The Baker Act records and statements of the Pretzel's employees are admissible evidence about Samantha Williams.

The remaining Baker Act records and the testimony of Pretzel's employees are admissible, as well. The records contain statements about Samantha's history of violence, her mental health history, and additional statements—such as, "I am responsible for my mom dying" and "I'm going to f**** kill you, I'll kill all of you if I get out"—that could lead a reasonable jury to infer her guilt, or at the least, motive. The testimony of a Pretzel's employee that Cheryl may have been

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"specificity [or] detail." R12:2222. That statement explains both who died (her mother and grandmother), when they died (approximately nine years before), and why they died (because Samantha killed them). Similarly, the circuit court concluded that Samantha "never specified how she 'hurt her mom,'" *id.*, but Casey's powerful testimony that Samantha pantomimed stabbing herself in the chest while saying that "the demons made her do it" explains the "how" of the victims' deaths.

prostituting Samantha to support her drug and alcohol addictions (R21:1653) further suggests a motive and is admissible as substantive evidence for that purpose. *See* FL. STAT. § 90.404(2)(a).

Moreover, Samantha testified at trial, so her credibility was relevant. *See United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983); FL. STAT. §§ 90.609, 90.801(2)(b). These records and the testimony of Pretzel's employees directly impeached Samantha's reputation for truthfulness, and her claim that she had "the best mother in the world" (R21:1759), with whom she had a close relationship. R22:19–01, 1904. Accordingly, even if Samantha's admissions would not come in substantively—which Aguirre does not concede—the Baker Act records still could be admitted as impeachment evidence.

* * *

All of the newly discovered evidence is admissible and—combined with "the evidence developed on postconviction proceedings"—when weighed against the evidence presented at trial, makes clear that there is at least "reasonable doubt as to [Aguirre's] culpability." *Swafford*, 125 So. 3d at 778. Because Aguirre's new evidence "completely changes the character" of the State's circumstantial-evidence case against Aguirre, *id.*, this Court should vacate Aguirre's convictions and sentence and remand for a new trial.

II. AGUIRRE'S APPOINTED TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE DURING THE GUILT PHASE OF HIS TRIAL.

A Sixth Amendment claim for ineffective assistance of counsel must satisfy two criteria: (1) counsel's performance must have been deficient, and (2) the deficient performance must have prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687–89 (1984). When determining deficiency, the Supreme Court has applied an "objective standard of reasonableness" based on "prevailing professional norms." *Id.* at 688. Although courts generally give great weight to strategic decisions, *see, e.g.*, *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000), a court may not defer to a *post hoc* rationalization in lieu of examining the attorney's actual decision-making process, *Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003). As for prejudice, a court must evaluate the "totality of the evidence" to determine whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694–95. At the guilt phase, the question is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt"—that is, the evidence is "sufficient to undermine confidence in the outcome." *Id*. Prejudice may be shown "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694.

A. *Fitzpatrick*'s Application Of The "Reasonable Investigation" Standard Is On-Point And Compels Reversal.

Strickland makes clear that a claim for ineffective assistance of counsel may turn on the failure to conduct a reasonable investigation. Indeed, "[o]ne of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial." *Fitzpatrick*, 118 So. 3d at 753. As this Court has recognized, "[p]retrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps the most critical stage of a lawyer's preparation." *Id.*

In light of that most essential and basic duty of preparation, counsel is required either to make reasonable investigations or to "make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690–91. In other words, if counsel decides not to investigate an issue, that decision "must be directly assessed for reasonableness in all the circumstances." *Id.* What's more, even when counsel conducts some investigation, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. A "cursory investigation" does not "automatically justif[y] a tactical decision." *Id.*

Applying those principles just last year in *Fitzpatrick*, this Court held that trial counsel's failure to uncover available exculpatory evidence was

constitutionally deficient because he had not made "a sufficient effort to understand the forensic details of the physical evidence" that purportedly incriminated his client. 118 So. 3d at 757. The defendant, who was convicted of sexual battery and murder, admitted that he had sex with the victim several hours before the murder, but vehemently denied that he was involved in her death. At trial, the State presented experts who testified that the defendant's version of the events was "scientifically impossible" because the forensic evidence showed that the defendant had sex close to her time of death.

This Court ordered a new trial because "[d]espite the scientific evidence that would implicate his client if not refuted, counsel failed to retain any forensic or medical experts." *Id.* at 754. Counsel sought to justify that decision by arguing that he had consulted for 30 minutes with a medical examiner who stated that he would "end up agreeing with the State's analysis that it was likely that the intercourse had happened a short period of time before [the victim] was found." *Id.* This Court held that this "single undocumented thirty-minute conversation" concerning the highly technical aspects of the trial could not constitute a reasonable investigation. *Id.* at 754–55. That was so because, in hindsight, the State's case had "significant weaknesses," but counsel had no way of knowing that without conducting a reasonable investigation. Importantly, this Court explained that had counsel "consulted a qualified expert, he would have been able to provide

evidence to refute the State's case"—and corroborate his client's account—through testimony that the sexual intercourse could have happened 24 hours before the victim's body was found. *Id.* at 755. Counsel also failed meaningfully to consider DNA retesting of certain evidence that could have exculpated his client. This Court recognized that trial counsel is not always required to conduct forensic testing, but held that counsel's failure there to "meaningfully consult an expert or conduct anything more than a cursory investigation into the benefits and potential risks" of testing constituted deficient performance that prevented him from conveying to the jury that the defendant's "version of the events, as well as his fervent assertions of innocence, were not as farfetched as the State attempted to portray the facts." *Id.* at 755–56.

As explained below, trial counsel's failure to investigate here bears a striking resemblance to the failures this Court condemned in *Fitzpatrick*. Notably, even though Aguirre notified the circuit court of the *Fitzpatrick* decision before the denial of post-conviction relief, the circuit court never mentioned it. That was error. Had the circuit court properly considered *Fitzpatrick*, it would have concluded that trial counsel failed to conduct a reasonable investigation.

Specifically, as explained below, trial counsel (1) failed even to consider DNA testing (2) failed meaningfully to investigate Samantha Williams, and (3) failed to consult any forensic expert to challenge the State's interpretation of the

physical evidence. Because each of those failings, even standing alone, prejudiced Aguirre, the "totality of the evidence" standard, *Strickland*, 466 U.S. at 695, is easily met.

B. Counsel's Failure To Consider Or Conduct DNA Testing Was Deficient Performance That Prejudiced Aguirre.

1. Counsel's failure to consider or conduct DNA testing constitutes deficient performance.

Like the constitutionally deficient counsel in *Fitzpatrick* who failed meaningfully to investigate DNA testing, trial counsel here failed to consider or conduct DNA testing on any of the 197 pieces of evidence collected at the crime scene. In fact, counsel never even viewed the evidence—on their own, much less with an expert to assist them—even though it was stored across the street from their offices. R19:1338–40, 1358; R20:1484. That failure is extraordinary for at least two reasons. ***First***, trial counsel recognized—given the violent nature of the crimes—that the killer's blood could well be at the scene. *See, e.g.*, TR13:1551 (arguing in closing that "[s]omewhere in that house, ladies and gentlemen, was evidence that could have . . . proven who did it."). ***Second***, trial counsel knew that Aguirre had consistently maintained his innocence and repeatedly urged them to pursue DNA testing. As counsel have conceded, their failure to do so was not based on any concern that the results might be inculpatory. R19:1362.

To be clear at the outset, the circuit court's suggestion that trial counsel ***did*** "retain" an expert to evaluate the benefits and risks of testing is not supported by substantial, competent evidence. It is true that trial counsel hired Candy Zuleger, a DNA expert, to address potential DNA *contamination* issues in this and other cases. R19:1361; R9:1705–20. But trial counsel ***never*** asked her to help them decide whether to conduct DNA testing in hopes of exculpating Aguirre, inculpating someone else, or both. R19:1362.

Conspicuously, trial counsel offered no strategic justification for failing to consider DNA-testing the evidence. When asked about it, Aguirre's lead attorney stated, "Well I still didn't see the amount of blood that could be associated with someone other than [the victims] in the house that would warrant independent DNA testing in the hopes of finding someone else's DNA." R19:1390–91. But of course, it would have been impossible for trial counsel simply to look at pictures and determine whether blood came from the victims or from the killer—much less the "amount" of each and whether that amount would prove significant—without actually conducting the DNA tests. That is precisely the sort of "*post hoc* rationalization" that the Supreme Court has forbidden, and the circuit court misapplied the law when it credited that testimony. *Wiggins*, 539 U.S. 526–27. Counsel's inexplicable failure to DNA test the evidence, in the face of their client's

repeated pleas and the violence of the crime scene, constituted deficient performance. *See Fitzpatrick*, 118 So. 3d at 753.

2. Counsel's failure to consider or conduct DNA testing prejudiced Aguirre.

Counsel's failure to consider DNA testing prejudiced Aguirre. Barie Goetz, who for 35 years has worked primarily with law enforcement agencies, explained how testing could have aided Aguirre's defense: the absence of Aguirre's blood at the crime scene, coupled with the presence of Samantha's blood in numerous high-traffic areas close to the victims' blood (indicating a high likelihood of recent deposit) and in the bathroom where the State argued that the killer would have cleaned up, at the very least gives rise to reasonable doubt about Aguirre's guilt and raises legitimate questions about Samantha's involvement. The circuit court's holding otherwise does not withstand scrutiny.

First, the circuit court concluded that Goetz erred in "assuming" that the killer was bleeding. R12:2178. But Goetz made no such "assumption." He simply concluded that this was a *likely* scenario and that he would have urged counsel to investigate had he been consulted before trial. R20:1503, 1594–96. Moreover, that scenario squares with uncontroverted record evidence. The State's own medical examiner testified at trial that Cheryl Williams engaged in a "life and death" struggle with the killer, a struggle "more violent than anyone in this room has seen before." TR12:1365. Cheryl was stabbed 129 times, and the murder

weapon was a kitchen knife, which would have been particularly likely to slip and injure the person wielding it, especially in a protracted struggle.[17] Although no one could be certain that the killer was injured in that struggle—at least before DNA testing the evidence—trial counsel's failure even to consider the *possibility* that the scene would bear some evidence of that injury is inexplicable.

Second, the circuit court reasoned that there is "no evidence" of any injury to Samantha. R12:2179. But of course there isn't. Unlike Aguirre and Van Sandt, Samantha was never examined for any injuries. R23:2197. The circuit court's conclusion about Samantha's lack of any injuries merely begs the question.

Third, and perhaps most significantly, the circuit court faulted Goetz for not considering whether Samantha had cut herself in the mobile home *years before* the murders and whether, given the general "filth" of the residence, the blood could have remained there years later. R12:2179. But as already explained, the "old blood" theory fails for two reasons. For starters, Goetz testified without contradiction that Samantha's blood was fresh. *See supra* 35. Second, it is simply inconceivable that the killer walked around the residence dripping the victims' blood *within inches* of Samantha's old blood in *four different rooms* of the house. Moreover, Samantha's blood was found near both victims' blood on the kitchen

[17] *See, e.g.*, "Self-Wounding of Assailants during Stabbing and Cutting Attacks," *SWAFS J.*, 17-1, 19, 1995 (reprinted in *CAC News*, 1995, and in *IABPA News*, 12-3, 1996).

floor, *which all agree Cheryl Williams had mopped the night before the bodies were found*. In fact, Van Sandt testified that Cheryl was angry at him for spilling some ice because it meant that she would have to clean the floor a *second* time that night. R22:1920. In light of that testimony, the State's theory about "old" blood is simply not credible.

Fourth, and finally, the circuit court reasoned that none of the DNA evidence undermines Samantha's "solid" alibi. R12:2181. As already explained, that conclusion finds no sound support in the record. Van Sandt is the only person who corroborated Samantha's story, and even he could not account for her whereabouts most of the night. *See supra* 9–10, 15–16; *see also* R24:2222–23.

In sum, none of the circuit court's conclusions about the prejudice resulting from trial counsel's failure even to consider DNA testing can withstand scrutiny. The jury never heard that although 150 items of evidence were tested for DNA, ***none*** of Aguirre's blood was found at the scene, while Samantha's blood was found near the victims' blood in four separate rooms, including the bathroom where the State argued that Mr. Aguirre had cleaned up after the murders. Although prejudice must be analyzed based on "the totality of the evidence before the judge or jury," *Strickland*, 466 U.S. at 695, trial counsel's unexplained—and inexplicable—failure to conduct DNA testing, standing alone, unquestionably prejudiced Aguirre.

C. Counsel's Failure To Meaningfully Investigate Samantha Williams Was Deficient Performance That Prejudiced Aguirre.

Trial counsel's woefully deficient performance is underscored by their total failure to investigate Samantha Williams's connection to the murders. Counsel should have done so because they had evidence in their files that showed Samantha's propensity for violence—as well as a possible motive to harm or kill her mother—and because Samantha was one of the State's most important witnesses against Aguirre. Because Samantha's culpability and credibility were central to Aguirre's case, trial counsel rendered prejudicially deficient assistance by completely failing to investigate either one.

1. Counsel's failure to meaningfully investigate Samantha Williams constitutes deficient performance.

Counsel should have pursued numerous leads that arguably pointed to Samantha's culpability. Particularly when the identity of the killer is in question, "motive is key." *House v. Bell*, 547 U.S. 518, 540 (2006). Prevailing norms require counsel to approach an investigation of other suspects in the same manner that police would. R20:1439. Specifically, trial counsel must determine who had motive, means, and opportunity. *Id.* In other words, as Robert Norgard, the former chair of the death penalty committee of the Florida Association of Criminal Defense Lawyers explained in unrebutted testimony at the post-conviction hearing,

counsel should examine "people that the victim or victims had prior difficulties with, prior problems with, prior threats, things of that nature." *Id.*

Counsel missed two bright red flags about Samantha's potential culpability. ***First***, trial counsel had *in their file* a 2001 police report describing involuntary-commitment proceedings against Samantha. R19:1382. The report explains that officers found Samantha intoxicated, banging her head against the wall, and shouting, "I wouldn't care if I f**** (sic) die." R11:2073–74. The underlying Baker Act records describe a threat to "kill" her mother. *See supra* 29–30. Trial counsel have admitted that they never even looked into how to obtain a court order to view Baker Act records, nor did they consider whether the mental-health history of a witness is relevant to assessing credibility, perception, or memory. R19:1384. ***Second***, trial counsel had *in their files* transcripts of the crime-scene interviews of Mark Van Sandt and Samantha Williams. *Id.* at 1370. Those interviews detailed Samantha's volatile relationship with her mother and her history of mental illness, including her diagnosis of intermittent explosive disorder. Indeed, the interviews recount the fight Samantha had with her mother the night before the bodies were discovered.

All of this evidence would have "lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527; *see also Cunningham v. Zant*, 928 F.2d 1006, 1018 (11th Cir. 1991). But counsel failed to pursue those and other obvious leads

that would have led them to key information about the case, including a possible motive for Samantha. For example, if they had gone to Pretzel's, the neighborhood bar where Aguirre socialized with friends until 3:15 a.m. on the morning the bodies were discovered (*i.e.*, immediately before he allegedly went home and committed a double murder), they would have learned that Aguirre had been his usual self—calm, friendly, and polite. R21:1624. They also would have learned that Samantha had a reputation for dishonesty and that she disliked—and, indeed, had a volatile relationship with—her mother, in part because Cheryl *reportedly prostituted her for alcohol and drugs*. *Id.*; R22:1904. And these witnesses would have told them that after the homicides, Samantha was "very nonchalant about it," that "it didn't seem like it bothered her." R21:1655. That information—particularly about a possible motive—would have been doubly important given that Aguirre had no apparent motive and repeatedly stated that he was innocent.

Counsel also should have pursued leads that could have undermined Samantha's credibility. Samantha provided the only testimony that gave any impression that Aguirre (who by all accounts was hard-working, peaceful, and easygoing) might have been capable of committing the crimes—namely, her story about waking up during the night and seeing Aguirre next to her bed. R12:2173–74. Prevailing norms require counsel to follow up on information that a primary

witness against the client is mentally unstable or had a volatile relationship with the victims, for purposes of obtaining impeachment evidence. R20:1441. In particular, trial counsel failed to follow up on the discrepancies between Van Sandt's and Samantha's accounts of what happened the night before the bodies were discovered, including Samantha's 27-second pause before answering a question about where she had gone the night before and the fact that when she responded, her response conflicted with Van Sandt's. *See supra* 9–10 & n.3. Such an obvious discrepancy would lead any reasonable attorney to investigate further.

Neither of trial counsel's justifications for failing to investigate Samantha holds water. ***First***, they have since claimed that they declined to pursue Samantha because she had an alibi. R24:2291. But that was unreasonable. They admit that the only witness to that alibi was Van Sandt, whom they also failed to interview, depose, or cross-examine at trial. R24:2369. We now know that Samantha accepted service of the deposition subpoena for Van Sandt, yet never told him about it. ***Second***, trial counsel have sought to justify their failure to investigate Samantha as a strategic decision: they did not pursue her, they said, because they believed she "appeared to be an extremely sympathetic victim." *Id.* at 2305. The circuit court's acceptance of that excuse (R12:2175–76) contravenes this Court's decision in *Fitzpatrick*, which makes clear that counsel cannot decide "critical issue[s]" in a case based only on "impressions," "assumptions," and appearances.

118 So. 3d at 756. Trial counsel could not ignore red flags and fail to make a basic investigation just because Samantha "appeared" to them to be sympathetic. Like the constitutionally deficient counsel in *Fitzpatrick*, Aguirre's trial counsel could not "operate[] on assumptions and impressions, while conducting virtually no meaningful investigation" into key evidence and witnesses. *Id.* at 756 n.14.

2. Counsel's failure to meaningfully investigate Samantha Williams prejudiced Aguirre.

The circuit court erroneously concluded that "[e]ven if the decision" not to pursue the 2001 police report "was not a reasonable strategic decision," Aguirre was not prejudiced because trial counsel might not have been able to obtain the underlying Baker Act records. R12:2171–72. To obtain Baker Act records, a party must make a threshold showing that the records are likely to contain relevant evidence. *C.L. v. Judd*, 993 So. 2d 991, 995 (Fla. 2d DCA 2007). If that threshold is met, the court will conduct an *in camera* inspection of the records to determine whether they should be disclosed. *Id.* The circuit court concluded that it could not assess whether trial counsel could have met the threshold requirement for obtaining an *in camera* review because the 2001 police report that referred to the Baker Act commitment was not in evidence. R12:2170. That is incorrect. The police report was marked for identification and is part of the record. R11:2073–74.

The circuit court also reasoned that there was no prejudice because the underlying Baker Act records do not "contain relevant information" and are only

"impermissible character evidence." R12:2171–72. But, as already explained, the records contain information that is probative of Samantha's potential motive. *See supra* 59–60, 71–72. The same is true of counsel's failure to investigate at Pretzel's—where counsel would have learned of one witnesses' belief that Cheryl was prostituting Samantha out for alcohol and drugs, R21:1624—which the circuit court likewise held was not prejudicial. R12:2183. But even assuming that this investigation would have yielded only propensity and character evidence (*id.* at 2171–73), the circuit court ignored the fact that this information could be admitted as impeachment evidence. For example, counsel could have argued that Samantha's disputed (and uncorroborated) claim that Aguirre crept into her home and stood next to her bed in the middle of the night was the delusional product of her mental illness, a fabrication by a volatile and troubled young woman, or an unreliable "memory" from someone with a long history of drug and alcohol abuse (which, by her own admission, had led to blackouts and memory loss).

In short, trial counsel's decision to ignore all available leads about Samantha—supported by little more than their impression that Samantha "appeared" to be "sympathetic"—was objectively unreasonable, and the circuit court erred as a matter of law in concluding otherwise. Moreover, counsel's failure to investigate deprived Aguirre of evidence pointing toward another viable suspect with a possible motive, as well as evidence undermining the credibility of one of

the State's key witnesses. That evidence, standing alone, would be more than enough to undermine confidence in the outcome.

D. Counsel's Failure To Consult With Forensic Experts Was Deficient Performance That Prejudiced Aguirre.

Trial counsel also failed to consult with any forensic experts who could have corroborated Aguirre's account of how he found the bodies. That deficient performance prejudiced Aguirre.

1. Counsel's failure to consult with forensic experts constitutes deficient performance.

Here, just as in *Fitzpatrick*, the State argued at trial that the forensic evidence showed that Aguirre's claim of innocence was scientifically impossible. First, the State presented testimony about the bloodstain patterns on Aguirre's clothes. Scott Henderson testified that two stains on the ***back*** of Aguirre's nylon shorts had been caused "by movement." TR12:1312–13. The State seized on that testimony, arguing in closing that it was "important, important evidence" that the two stains on the back of Aguirre's shorts "had to be placed there by motion." TR13:1525–26. This Court likewise acknowledged the importance of that evidence three separate times in the published opinion on direct appeal.[18] Second, the State introduced bloody footwear impressions that were consistent with the tread pattern on Aguirre's shoes. In closing, the State emphasized that Aguirre's

[18] *See Aguirre-Jarquin*, 9 So. 3d at 599, 606, 609.

"[f]ootwear impressions all over the house" implicated him as the killer. TR13:1513. Indeed, the State relied almost exclusively on that physical evidence to establish its case against Aguirre. *Cf. Aguirre-Jarquin*, 9 So. 3d at 603 ("There was extensive evidence produced at the trial which linked Aguirre to the murders, including his bloody footprints at the crime scene and blood on his clothes.").

Despite the presence of that "scientific evidence that would implicate [their] client if not refuted," counsel here—just as in *Fitzpatrick*—"failed to retain any forensic or medical experts" to rebut that evidence. 118 So. 3d at 754. In fact, Aguirre's counsel did even less than the lawyers in *Fitzpatrick*, who at least consulted with a medical examiner for 30 minutes before concluding that an expert would not be able to corroborate his client's version of events. Trial counsel here admitted that they *never even considered* hiring a forensic expert. R19:1359, 1365. Instead, they explained that they did not want to engage in what they dismissively called a "whore search" (R24:2299) for a "CSI Las Vegas . . . blood whisperer" (R19:1343). Counsel's cavalier—and uninformed—comments vividly show the depth of their ignorance of prevailing norms in capital-defense litigation. *See* R20:1435 (testimony of Robert Norgard); *see also Fitzpatrick*, 118 So. 3d at 754–55.

2. Counsel's failure to consult with forensic experts prejudiced Aguirre.

As in *Fitzpatrick*, had Aguirre's trial counsel "consulted a qualified expert, [they] would have been able to provide evidence to refute the State's case." 118 So. 3d at 755. The new testimony of Barie Goetz and Dr. Daniel Spitz demonstrates that if trial counsel had consulted with an expert before trial, they could have shown that all of the State's physical evidence was completely consistent with Aguirre's claim of innocence.

Goetz testified that "all the stains that are present on" Aguirre's nylon shorts reflect "a transfer of blood," not projected blood. R20:1523. Accordingly, he concluded that Aguirre could not have killed the victims while wearing those shorts, as the State argued at trial. *See supra* 34–35. Goetz testified that the contrary conclusion by the State's expert—who at the time had only three years of experience examining bloodstain patterns—failed to account for differences in the way cotton and nylon absorb blood. Goetz also explained that a swipe of Cheryl Williams's blood on the leg of an overturned kitchen chair could not have been made by Aguirre's nylon shorts. R20:1588. Notably, all of Goetz's post-conviction bloodstain testimony went unrebutted; Henderson was listed as a witness and was available to defend his earlier conclusions, but the State never called him.

The circuit court erroneously concluded that Goetz's bloodstain-analysis testimony would have been cumulative. R12:2201. Specifically, the circuit court believed that Goetz's testimony would not have changed things because Henderson admitted at trial that the stains on the back of Aguirre's shorts were "insufficient to render an opinion as to whether they were caused by impact spatter." R12:2201. That is true, but Henderson also testified that those stains "***had to*** have gotten on the shorts by movement somehow other than direct touching." TR12:1313 (emphasis added). The State seized on precisely that point in its closing argument, and this Court relied on that fact in finding the evidence sufficient to affirm Aguirre's convictions and sentences on direct appeal. *See Aguirre-Jarquin*, 9 So. 3d at 609. Goetz's testimony flatly rebuts Henderson's "movement" opinion; it is not remotely cumulative.

The circuit court also incorrectly stated that Aguirre's trial counsel's closing argument "repeatedly" emphasized that there was no evidence of projected blood. That is incorrect; in fact, trial counsel *conceded* that Henderson testified that "there was either cast off . . . or impact stain[s] on the back of those shorts," *i.e.*, stains that got on the shorts through motion. TR13:1546. In any event, lawyer argument is no substitute for expert witness testimony. *Cf. Abichandani v. Related Homes of Tampa, Inc.*, 696 So. 2d 802, 803 (Fla. 2d DCA 1997). The jury never heard—as Goetz later explained—that all of the stains came from "a transfer of blood," ***not***

from motion. R15:1523. The jury never heard—as Goetz later explained—that Aguirre could not have killed the victims while wearing the nylon shorts because, in light of the victims' injuries, the true killer would have projected blood on his or her clothes. *Id.* at 1524. And the jury never heard—as Goetz later explained—that there was a blood swipe on a kitchen chair that could only have been made by someone wearing cotton or denim pants, not by Aguirre's nylon shorts. *Id.* at 1586–88.[19] Goetz's testimony regarding the bloodstain patterns was far from cumulative; it was never-before-heard evidence that directly rebutted the State's key trial evidence.

Goetz also explained that the footwear impressions supported Aguirre's account of discovering the bodies. Specifically, he explained that the shoeprints were very clear transfers—not transfers that evidenced excessive movement—which suggests that Aguirre slowly, deliberately (rather than frantically) walked around the scene after the blood had time to pool. *See supra* 36.

[19] The circuit court's conclusion that the blood smear on the chair leg "failed to aid the defense" because Aguirre "was of an extremely short stature" and was wearing a "long cotton t-shirt" is completely unsupported by the evidence. R12:2202. Based on the unrebutted testimony presented at the May 2013 evidentiary hearing, Aguirre's shirt would have had to have been a full eight inches longer that it actually was to make that stain. Either that, or Aguirre would have had to have been crawling around on the floor when he swiped the chair leg with his shirt. There is absolutely no evidence in the record to support such a theory.

The circuit court offered a litany of reasons to justify its refusal to credit Goetz's testimony, but none withstands scrutiny. First, the court concluded that Goetz "lack[ed] the required expertise" because he used different terminology than used by the State's trial expert, Christine Snyder (then Christine Craig). R12:2198. According to the circuit court, the footwear patterns Goetz described as "passive transfers in blood" were more correctly called "positive impressions." R12:2199. What the court failed to understand is that Goetz and Snyder were talking about two different things. The "positive impression" Snyder described is merely the technical term for the impression that occurs when a shoe steps into a pool of liquid and then steps onto a clean surface. Goetz described a completely different aspect of the footwear pattern: that because the shoeprints were very clear transfers—not transfers that evidenced excessive movement—those prints suggested "a passive walking around the body of Cheryl Williams." R20:1516–17. Notably, the State never rebutted Goetz's conclusion that the prints belied a struggle, which would have involved "the sliding of feet, hands, knees . . . in this liquid blood on a surface." R20:1516.

The court also erroneously believed that Aguirre's account requires an assumption that the killer murdered the victims without leaving any footwear impressions, an explanation that the court believed would "strain the bounds of reason." R12:2200. But a killer who was not wearing any shoes would not have

left any footwear impressions. Far from "strain[ing] the bounds of reason," it is entirely possible that a killer might not be wearing shoes inside a residence during summertime in central Florida. (Notably, when Van Sandt went into the residence at Samantha's request and discovered the bodies, he did not leave any footwear impressions because he was barefoot. TR11:1111–12.) What's more, it is also reasonable to conclude that the real killer did not leave any visible footwear impressions because it took quite some time for enough blood to pool to make a footwear transfer possible. The court's rejection of Goetz's testimony regarding the footwear impressions was erroneous.

Spitz testified that the patterns of blood on Cheryl's body were consistent with Aguirre's account of having lifted up her body upon finding it. Trial counsel did not present any evidence at trial to show that the bodies had been moved. Spitz could have shown that there were two rings of blood on the body in the same area—*i.e.*, exactly what the State's expert, Beaver, now says he would expect to see if the body had been moved slightly, R19:1298. Spitz also could have shown two "well-defined blood drips which are parallel to one another on the lower portion of the back," which "indicate[d] that the body was moved at some point . . . prior to the medical examiner's office arriving on the scene." R19:1310–11. That testimony would have provided powerful corroboration of Aguirre's account—but the jury never heard it.

In sum, had Goetz and Spitz been consulted at the time of trial, they would have both bolstered Aguirre's consistent account and rebutted the State's key evidence. Their testimony standing alone is ample evidence from which a jury could have found reasonable doubt about Aguirre's guilt. Unfortunately, Aguirre's jury heard nothing like it because, his trial counsel never even considered hiring a forensic expert. Accordingly, just as in *Fitzpatrick*, counsel's deficient investigation prevented counsel from conveying to the jury that Aguirre's "version of events, as well as his fervent assertions of innocence, were not as farfetched as the State attempted to portray the facts." 118 So. 3d at 755.

* * *

As explained above, even standing alone, each of counsel's failures—to consider DNA testing, to investigate Samantha Williams, and to consult with forensic experts—resulted in prejudice to Aguirre. That is significant because *Strickland* requires the Court to consider the "totality of the evidence" when analyzing prejudice. 466 U.S. at 695. Notably, the circuit court never did so. Instead, it simply rejected each piece of new evidence as either not credible, cumulative, or inconsistent with Samantha's "solid alibi." If the totality of the evidence detailed above is properly considered, it is clear that counsel's failure to consider—much less conduct—*any* DNA testing, failure to conduct *any* reasonable investigation of alternative suspects, and failure to consult with *any* experts

deprived Aguirre of significant evidence that could have created reasonable doubt about guilt, and certainly undermines confidence in the outcome.

III. AGUIRRE'S APPOINTED TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE DURING THE PENALTY PHASE OF HIS TRIAL.

Aguirre's trial counsel also failed to provide effective assistance of counsel, as required by the Sixth Amendment, in the penalty phase of trial. That failure is particularly inexplicable because trial counsel have contended that their pre-trial "preparation" and "trial strategy" focused on the goal of saving Aguirre's life.

A. Trial Counsel's Penalty-Phase Performance Was Deficient Because They Failed To Conduct A Reasonable Investigation Or Present A Meaningful Mitigation Case.

Aguirre's trial counsel provided deficient representation during the penalty phase in two ways. First, they failed to engage in anything more than a "cursory investigation" of Aguirre's family history and background. *Wiggins*, 539 U.S. at 527. Their failure was constitutionally deficient because it resulted from "inattention, not reasoned strategic judgment." *Id.* at 526. Second, trial counsel failed to use even the minimal evidence that they had to present an effective mitigation case. *See Porter v. McCollum*, 558 U.S. 30, 40 (2009); *see also Rose v. State*, 675 So. 2d 567 (Fla. 1996).

1. Trial counsel failed to investigate Aguirre's past or to talk to anyone in his native Honduras.

The Supreme Court has long held that life history is "relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 535; *see also, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). Trial counsel in a capital case thus has an "obligation to conduct a thorough investigation of the defendant's background," *Williams v. Taylor*, 529 U.S. 362, 396 (2000), so that they might "find witnesses to help humanize the defendant," *Hardwick v. Crosby*, 320 F.3d 1127, 1163 (11th Cir. 2003). *See State v. Lewis*, 838 So. 2d 1102, 1113 (Fla. 2002) ("[T]he obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated—this is an integral part of a capital case.").

Under the Sixth Amendment, a reviewing court must determine whether the "investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background was *itself reasonable*." *Wiggins*, 539 U.S. at 523. Counsel must make an adequate investigation of a defendant's background and family history. *See Rompilla v. Beard*, 545 U.S. 374, 377 (2005); *see also Porter*, 558 U.S. at 39; *Wiggins*, 539 U.S. at 527; *Rose*, 675 So. 2d at 571.

Applying these principles, this Court recently held in *Walker v. State*, 88 So. 3d 128, 138 (Fla. 2012), that trial counsel was deficient when the sum total of mitigation investigation involved "conducting five phone conversations with [the defendant's] mother and sister and by talking to some mostly unidentified 'local

people.'" Counsel "did not seek background information from any other immediate or extended family members prior to trial," "did not do any research regarding the family's background," and "did not attempt to speak with any former neighbors, correctional officers, or teachers familiar with" the defendant. *Id.*; *see also Ragsdale v. State*, 798 So. 2d 713, 716 (Fla. 2001) (vacating death sentence for "fail[ure] to investigate . . . an abundance of potential mitigating evidence"); *Rose*, 675 So. 2d at 571–72 (same).

Aguirre's trial counsel performed no better—and probably worse—than the deficient counsel in *Walker*. As in *Walker*, counsel spoke with only two members of Aguirre's family, his two sisters who live in Orlando. R14:398. No one on Aguirre's defense team ever contacted any of Aguirre's other family members or friends. R15:424. They certainly could have. Aguirre's mother in Honduras, for example—despite being illiterate and speaking only Spanish—had a friend help her write trial counsel a letter with her address and phone number. *Id.* at 541, 551. Although her letter was in counsel's files, they never once contacted her, in person or by telephone. *Id.* at 424.

Indeed, some 43 family members and friends from Honduras—one a university lawyer who had worked with Aguirre for several years—sent unsolicited letters to trial counsel explaining the conditions in which Aguirre had grown up. The letters gave trial counsel leads to witnesses who could have provided

additional poignant background—like when police pried a weeping Aguirre off of his friend Edwin's murdered body and then threw the body into a van like "it was trash." R17:838, 854. When brought to testify at the post-conviction hearing, these witnesses explained that Aguirre had grown up in abject poverty, surrounded by gang violence. One testified that Aguirre had refused an offer to join a gang. R14:310; R15:568. Several others testified that Aguirre had witnessed murders as a child. R15:566. His sister also explained why many Hondurans like Aguirre may distrust police and often do not report crimes because the police often refuse to investigate. *Id.* at 352–53.[20]

The record indicates that trial counsel might not have even read these letters.[21] But even if they did, they never followed up on any of them: they never contacted any of the writers, even by phone or mail; never traveled to Honduras; and never hired anyone familiar with Honduras (or conditions in Central America generally) to help them understand the environment that the letters described. And

[20] This history, of course, would also have assisted counsel at the guilt phase, by helping the jury understand why Aguirre's repeated exposure to extreme violence and police corruption as a child may explain his failure to immediately report his discovery of the victims' bodies to police in this case.

[21] For example, one of the letters that trial counsel made "available" to the jury (TR14:110) mocked the American legal system and the "so-called American Dream." R6:1043. Caudill has since conceded that a juror would not react well to such a letter (R15:437), and Robert Norgard confirmed in his post-conviction hearing testimony that such a letter would have been very damaging (R18:1182).

to be clear, counsel were never told that the costs of such an investigation were prohibitive: they simply never requested funding to travel to their client's home country, either themselves or by sending an investigator. R13:72. *Cf. Hinton v. Alabama*, 134 S. Ct. 1081 (2014) (per curiam) (unanimously granting *Strickland* relief where counsel failed to request funds to retain a qualified expert to evaluate the State's ballistics evidence).

In short, Aguirre's trial counsel failed to engage in even the most minimal investigation about Aguirre's background and life story. In holding otherwise, the circuit court simply misunderstood what *Strickland* and its progeny require. For example, the circuit court found trial counsel's decision not to call the authors of the letters as witnesses was reasonable "because he did not have sufficient contact with them to make a decision to have them brought to testify." R12:2208. But that flatly contradicts what the Supreme Court has repeatedly made clear over the last decade: trial counsel cannot make a reasonable, strategic decision about his trial presentation without information gathered through some investigation. *See Wiggins*, 539 U.S. at 534; *see also, e.g.*, *Rose*, 675 So. 2d at 572–73.

2. Trial counsel failed to present an effective mitigation case at trial or to read into evidence any of the 43 letters they received on Aguirre's behalf.

Aguirre's trial counsel also failed to present at trial even the minimal evidence that they had at their disposal that could have performed the crucial task of "humanizing" Aguirre for the jury. *Porter*, 558 U.S. at 41.

Trial counsel called just two witnesses during the penalty phase. One, Sergeant John Negri of the Seminole County Sheriff's Office, was asked to describe his impressions of Aguirre on the morning that the bodies were discovered. Counsel asked whether Aguirre appeared to be "under the influence of alcohol or drugs," and Negri responded, "it's possible that he . . . may ha[ve] been drinking or something." TR14:105. That left a retained psychologist, Dr. Deborah Day, as the only witness who could offer any mitigating evidence. Dr. Day did not address any information in the letters, nor did counsel ask her to speak with anyone from Honduras as part of her evaluation. Instead, she described parts of Aguirre's past in only the most general terms, without the powerful, specific stories that we now know that the letter-writers could have provided.[22] Dr. Day also failed to tell

[22] For example, Dr. Day told the jury only about Aguirre finding his murdered friend, Edwin, and gave the jury no indication of how traumatic that incident had been. *See, e.g.*, TR14:147 ("[Aguirre] reports his first incident of violence occurred when his neighbor and friend was murdered by one of the gangs and he was *in the general location when that happened* and was exposed to that." (emphasis added)). She did not describe how police pried a sobbing Aguirre off his friend's murdered body and then threw the body away "like it was trash."

the jury effectively about the effects that Aguirre's past had on his mental health. On post-conviction review, new expert testimony has revealed that Aguirre fits the diagnostic criteria for PTSD based on his experiences in Honduras, and suffered brain damage as a child based on environmental toxins and a traumatic birth. R16:777, 797; R17:871.

Inexplicably, even though trial counsel knew of numerous friends and family—including Aguirre's two sisters—who would have testified on Aguirre's behalf, they did not call any lay witnesses. For example, Aguirre's sister later testified at the May 2013 evidentiary that she would have testified that she and Aguirre had been raised by their older sister and that she had been a victim of three violent crimes in Honduras. R14:348–53, 363. His family members also would have testified that when Aguirre bravely refused to join one of the local gangs, he was harassed to such an extent that his family had to send him to live with distant relatives in Nicaragua to protect his safety. R14:309–10; R15:534.

Nor did trial counsel to read into the record any of the 43 letters that they received.[23] Instead, they simply introduced translated versions of the letters into evidence and made them "available for [the jury] to consider along with all the

[23] The trial court gave counsel leave to read the letters into evidence, but they failed to do so. TR:14:97–99. Figgatt testified post-conviction that if he had been lead counsel, he would have had the letters "read by the most attractive secretary in [his] office." R14:91.

other evidence." TR14:110. They never explained that some of the letters were written by lawyers and others respected in the community, but introduced them simply as letters "from Honduras written to us" by "family and other people who knew [Aguirre] in Honduras." *Id.*

For all of these reasons, trial counsel's penalty-phase performance was constitutionally deficient. Lay witnesses are often able to "speak to the jury with particular credibility" and can "provide vivid first-hand accounts of the poverty and abuse that characterize the lives of many capital defendants." ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES § 10.11, commentary (2003). It violated prevailing norms for counsel to fail to contact *any* of the authors of these 43 letters to determine whether any of them might have provided compelling live testimony on Aguirre's behalf. R18:1179–87. This case is thus indistinguishable from prior decisions of this Court, in which counsel was deficient for failing to present easily identifiable lay witnesses that could have humanized the defendant. *See, e.g.*, *Ragsdale*, 798 So. 2d at 716; *Rose*, 675 So. 2d at 571–72.

B. Trial Counsel's Failure To Humanize Aguirre Prejudiced Aguirre During The Sentencing Phase.

Trial counsel's deficient performance during the penalty phase led to prejudice because "there is a reasonable probability" that "but for counsel's unprofessional errors," Aguirre would not have been sentenced to death.

Strickland, 466 U.S. at 694–95. Once the Court "reweigh[s] the evidence in aggravation against the totality of available mitigating evidence," the prejudice to Aguirre of his trial counsel's deficiencies is clear. *Wiggins*, 539 U.S. at 534.

As an initial matter, aside from the few generalized references that Dr. Day made to Aguirre's past, the jury in this case heard nothing during the penalty phase that would have humanized Aguirre. That alone is strong evidence of prejudice. *See, e.g.*, *Porter*, 558 U.S. at 41; *Walker*, 88 So. 3d at 141. Humanizing Aguirre was of utmost importance in this case because the State argued that he killed the victims to avoid deportation, and because some members of the jury may have harbored certain stereotypes about undocumented immigrants that counsel needed to overcome in order to convince them to spare his life. But the jury heard nothing about the reasons why Aguirre came to the United States and what he had experienced prior to doing so.

Aguirre has developed compelling evidence on post-conviction review that would have given the jury a different picture had it reached the penalty phase. On a remand for a new sentencing, a jury would hear for the first time that:

- Aguirre grew up in abject poverty in Honduras, with no running water and raw sewage running through the streets of his neighborhood. R15:529–36; R16:741–44. These conditions were documented in family photographs that could have been shown to the jury. R5:823, 825. As a child, Aguirre was also exposed to dangerous environmental toxins that are banned in the United States. R16:739–760, 763.

- More than 40 people in Honduras cared about Aguirre and would have asked the jury to spare his life, including an attorney friend, his fiancé, and his illiterate mother who sought out a friend to help her write a letter on his behalf. R15:541; R16:678–80.

- Gang violence was prevalent in Aguirre's neighborhood. Aguirre witnessed several murders in his early years. When he was 14 years old, he saw a stabbing while waiting at the bus stop. R17:838. Another time, while Aguirre was playing soccer, a gunman carrying an AK-47 chased a man across the field and shot him multiple times in the back and in the head. R17:838. Aguirre also arrived on the scene shortly after his close friend, Edwin, was shot to death, and he knew that his sister had been the victim of several violent crimes. R15:566–67; R14:363.

- Aguirre fled to Nicaragua for several months as a teenager because he was being harassed for refusing to join a gang. R14:310.

- Police corruption in Honduras frequently leads to non-reporting of crimes. R14:308, 352–53.

- Because of all of these incidents, Aguirre met the diagnostic criteria for PTSD and the exposure to environmental toxins likely caused the brain damage that was found by the sentencing court. R16:788–90; R17:871.

All of this evidence, viewed in its "totality," *Wiggins*, 539 U.S. at 534, is enough to undermine confidence in the verdict that was rendered by a jury that heard very little similar evidence. Two factors are particularly relevant to that conclusion. First, other than the heinous nature of the crimes themselves—for which Aguirre has always argued that he is innocent—the State put on very little in the way of aggravating evidence. Second, the jury's votes for death were split by the thinnest of margins: 7–5 for the murder of Cheryl Williams, and 9–3 for the murder of Carol Bareis.

In light of these facts, and all of the new evidence that Aguirre has presented for the first time on post-conviction review, there is at the very least a "reasonable probability" that "but for counsel's unprofessional errors," Aguirre would not have been sentenced to death. *Strickland*, 466 U.S. at 694–95; *Walker*, 88 So. 3d at 142 ("Considering the lack of background evidence produced at trial, [and] the wealth of such evidence produced at the postconviction hearing . . . , our confidence in the outcome of the penalty phase trial is undermined.").

Finally, it bears noting that trial counsel's deficient performance at the penalty phase may also bear on this Court's evaluation of their conduct at the guilt phase. In particular, counsel's claim in these proceedings that they focused their efforts in the nearly two-year period between Aguirre's arrest and trial on preparing a case that would convince the jury and Court to spare Aguirre's life, R28:2288, when in fact they failed to contact any of the more than 40 friends and family who had offered their assistance, certainly provides cause to question counsel's diligence and credibility.

Trial counsel has given other reasons to question their credibility. For example, they testified that they asked the Honduran consulate to contact Aguirre's family about the charges (R15:422–23), but their files show (and family members' testimony confirms) such a conversation only *after* Aguirre had been sentenced to death (R4:760–61). Caudill also testified that he had asked his interpreter to

provide background information on Honduras, but the interpreter, Etienne VanHissenhoven, recalled no such conversations. R17:808–12. These examples not only undermine counsel's credibility but provides reason to question counsel's recollection and assessment of their own strategy.

IV. AGUIRRE'S CONVICTION AND SENTENCE SHOULD BE VACATED AND A NEW TRIAL GRANTED FOR OTHER REASONS.

A. Trial Counsel Was Ineffective For Failing To Object To Aguirre Being Shackled In Leg Irons During His Trial.

Aguirre was also deprived of effective assistance of counsel when trial counsel failed to object to the court's order that, pursuant to court policy, he be shackled in leg irons throughout his trial. Well-settled precedent prohibits routine shackling. *See Deck v. Missouri*, 544 U.S. 622, 624 (2007) (holding that the United States Constitution "forbids the use of visible shackles" unless the use is "justified by an essential state interest"). As this Court has held, "[s]hackling is an 'inherently prejudicial practice,' and must not be done absent at least some showing of necessity." *Bello v. State*, 547 So. 2d 914, 918 (Fla. 1989). A hearing on necessity must precede any decision to shackle if a defendant timely objects and requests an inquiry into the necessity of the restraints. *Id.*

Trial counsel explained in the post-conviction hearing that he was aware of the case law requiring an evidentiary hearing if a defendant objects to being shackled, but that he didn't object because "it wasn't worth his time." R15:476.

That statement is yet another example of trial counsel's cavalier attitude toward Aguirre's case. Counsel's failure was particularly prejudicial to Aguirre because he had no prior criminal record, and the State had no other aggravators to offer. As such, shackling implied a dangerousness that was entirely inconsistent with Aguirre's actual history, and thus undermines confidence in the outcome.

Counsel also deprived Aguirre of effective assistance of counsel by failing to move for a mistrial after Aguirre was escorted past the jury while still shackled. TR15:313–16; R5:947. Specifically, Aguirre became upset and stood up during the penalty phase after hearing what he believed was false testimony by the State's expert. Without sending the jury out of the room or otherwise attempting to contain the situation, the courtroom deputies grabbed the 4'11" Aguirre by the arms and took him from the courtroom through a door that, by all accounts, was directly across from the jury box and within plain view of the jurors. R15:439; R18:1013; R13:156. Even then, trial counsel failed to move for a mistrial or otherwise object to the jury having seen Aguirre in shackles.[24] R15:439. That failure to object violated Aguirre's constitutional right to counsel.

[24] Aguirre also argued in his 3.851 motion that his shackling violated his right to due process, violated his Sixth Amendment right to counsel, and constituted fundamental error. The circuit court did not consider any of those arguments in denying post-conviction relief.

B. Because Aguirre Is Actually Innocent, His Incarceration And Death Sentence Violate The United States And Florida Constitutions.

In addition, this Court should grant relief because the current record provides "clear and convincing evidence" of Aguirre's actual innocence. As such, his continued incarceration and his death sentence violate the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 417 (1993) (presuming that the execution of a defendant who presents "truly persuasive" evidence of actual innocence after conviction would be unconstitutional); *House*, 547 U.S. at 554 (same). In addition, permitting Aguirre's conviction and sentence to stand despite the fact that the jury never heard the persuasive DNA and other forensic evidence supporting his innocence (and was told, incorrectly, that the bloodstains on his clothing were inconsistent with his account) would violate the Eighth Amendment's heightened-reliability requirement in capital cases. *See Beck v. Alabama*, 477 U.S. 625, 643 (1980); *Woodson v. North Carolina*, 428 U.S. 280, 306 (1976). Thus, to the extent that this Court chooses to address the issue, Aguirre submits that the new DNA and other evidence supporting Aguirre's claim

of innocence renders his conviction and sentence unconstitutional under both the United States and Florida Constitutions.[25]

The circuit court's finding that this claim was untimely because Aguirre failed to include it in his initial Rule 3.851 motion, *see* R12:2225, is incorrect. The new evidence of Aguirre's innocence was unavailable at the time he filed his initial petition in February 2011: at that time, the DNA testing at issue here had not yet been conducted, and the State did not disclose the information it possessed regarding Samantha Williams's admissions until June 2012. After all of the DNA testing and court-ordered discovery regarding Samantha Williams was complete, Aguirre was directed to amend his 3.851 motion in January 2013 to include this new evidence, at which time he raised this actual-innocence claim. *See* R8:1403–07. It is therefore timely.

C. If This Court Finds The Current Record Insufficient, The Court Should Reverse The Circuit Court's Order Denying DNA Testing On A Hair That Was Clutched In Cheryl Williams's Hand.

For the reasons stated above, Aguirre respectfully submits that the new DNA and other evidence already in the record more than justify a new trial based on

[25] This Court has not yet recognized a "freestanding" innocence claim under the State Constitution, as numerous other states have done. *Compare, e.g., Tompkins v. State*, 994 So. 2d 1072, 1089 (Fla. 2008); *Rutherford v. State*, 940 So. 2d 1112, 1117 (Fla. 2006) *with Montoya v. Ulibarri*, 163 P.3d 476 (N.M. 2007); *State v. Graham*, 57 P.3d 54, 57 (Mont. 2002); *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996); *Summerville v. Warden*, 641 A.2d 1356 (Conn. 1994). The Court should recognize such a claim, which Aguirre would surely satisfy.

newly discovered evidence and ineffective assistance of trial counsel. To the extent this Court does not believe the current record is sufficient, this Court should reverse the circuit court's order denying Aguirre's request to test a long blonde/light brown hair found clutched in victim Cheryl Williams's hand when her body was discovered, and remand with instructions to permit such testing. Should the hair prove to be Samantha Williams's—whose hair was of similar length and color at the time of the murders—the results would provide still more evidence of Aguirre's innocence and his counsel's ineffectiveness in failing to seek testing on the hair at trial.

It was undisputed that a violent struggle took place inside the Williams's mobile home. What's more, Samantha admitted during the post-conviction hearing that she and her mother Cheryl had gotten into physical fights that specifically included pulling one another's hair. R21:1774. It is therefore reasonable to conclude that as Cheryl was fighting off her attacker, she grabbed the hair of the perpetrator. *See Partin v. State*, 82 So. 3d 31 (Fla. 2011) (upholding the sufficiency of the evidence in a capital murder conviction based in part on DNA evidence from a hair belonging to the defendant embedded in the victim's defensive wounds).

Moreover, the circuit court's conclusion that the hair may have been unrelated to the crime scene because it could have come from a "scrunchie" around

Cheryl's wrist is belied by the record. Specifically, photographs and testimony from the medical examiner show that the hair in question was *wrapped* around Cheryl Williams's fingers, strongly suggesting it got there through a struggle, not by happenstance. R3:506. Accordingly, because DNA results showing that the hair clutched in Cheryl Williams's hand belonged to Samantha would provide additional evidence exculpating Aguirre, should this Court not grant Aguirre's request for a new trial, the Court should at least remand for testing of this evidence.

CONCLUSION

This is an extraordinary case. Powerful new evidence, including DNA evidence—none of which trial counsel ever even attempted to discover—strongly tends to exculpate Aguirre of the double murder for which he now sits on death row, and at the same time tends to incriminate another individual for the crimes. Reversal here follows directly from this Court's recent decisions in *Hildwin*, *Swafford*, and *Fitzpatrick*. This Court should vacate Aguirre's convictions for first-degree murder, vacate his sentence of death, and remand for a new trial.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellant has been electronically filed with the Clerk of the Florida Supreme Court, and electronically served upon Mitchell Bishop, Assistant Attorney General, on the 7th day of July, 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Brief of Appellant, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210**.**

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