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December 21, 2021

Dr. Jim Hamby
5159 Rubber Tree Circle, #430
New Port Richey, FL 34653

Re: Court's ruling in State v. Leon Davis

Dear Jim,

Attached please find the judge's order in this case. As you will read Judge Jacobsen was not in any way impressed with the defense evidence or argument concerning the issue of the reliability of firearms analysis testimony.

Again, thanks for your assistance in this case.

Have a Merry Christmas.

Paul Wallace
Assistant State Attorney

Filing # 139222429 E-Filed 11/29/2021 09:50:36 AM

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

STATE OF FLORIDA,
Plaintiff,

v. **CASE NO.:** 2007-CF-009613-XX

LEON DAVIS, JR.,
Defendant.

_____/

FINAL ORDER ON MOTION FOR POSTCONVICTION RELIEF

THIS MATTER is before the Court upon Defendant's "Motion to Vacate Judgments of Conviction and Sentence with Special Request For Leave to Amend," filed on May 19, 2018; the "State's Response to Defendant's Motion to Vacate Judgment and Sentence," filed on July 18, 2018; the Defendant's "First Amended Motion to Vacate Judgments of Convictions and Sentence with Special Request for Leave to Amend," filed on November 6, 2018; the "State's Response to Defendant's Amended Motion to Vacate Judgment and Sentence" filed on November 13, 2018; The State's "Notice of Supplemental Authority" and "Amended Notice of Supplemental Authority" filed on December 11, 2018; the Defendant's "Response to Notice of Supplemental Authority" filed on January 18, 2019; the Court's Order on Case Management Conference," entered on June 7, 2019; the "Motion to Amend 3.851 Motion to Include Additional Claims" filed on October 14, 2019; the "Order Granting Defendant's Motion to Amend 3.851 Motion to Include Additional Claims" entered on October 18, 2019; the "State's Response to Defendant's Second Amended Motion to Vacate Judgment and Sentence" filed on November 8, 2019; the Court's "Order on Case Management Conference" entered on January 7, 2020; the Defendant's "Motion to Amend Defendant's Motion to Vacate Judgments of Conviction and Sentence" filed on July 16, 2020; the "State's Response to Defendant's Third Amended Motion to Vacate Judgment and

Sentence" filed on July 31, 2020; the Court's Order on Defendant's Motions to Amend Defendant's Motion to Vacate Judgments of Conviction and Sentence and Order Scheduling Hearing and Case Management Conference" entered on August 10, 2020; the Court's "Amended Order on Third Case Management Conference" entered on August 19, 2020; The State's "Motion to Dismiss Portions of Claim 15 in Case Number 07-CF-9613 and to Exclude Any and All Mental Health Testimony or Evidence From Any Source" filed on May 3, 2021; the "Notice of Supplemental Authority" filed on June 3, 2021; the "Order on the State's Motion to Dismiss Portions of Claim 15 in Case Number 07-CF-9613 and to Exclude Any and All Mental Health Testimony From Any Source" entered on June 8, 2021; and the "Notice of Filing" filed on June 9, 2021. An evidentiary hearing was conducted on August 23, 2021, and August 24, 2021. Written closing arguments were filed on November 1, 2021. The Court having reviewed the various postconviction motions, amendments, responses, and notices of supplemental authority filed by the parties in the matter; having heard the testimony and reviewed the evidence presented at the evidentiary hearing; having heard the arguments of legal counsel; having reviewed the written closing arguments from all parties; having reviewed the case file, the applicable case and statutory law; and being otherwise fully advised in the premises, now finds as follows:

STATEMENT OF PROCEDURAL HISTORY

On January 8, 2008, the Defendant, Leon Davis, Jr., (hereinafter referred to as Mr. Davis), was charged by indictment with two counts of First Degree Murder for the murders of Pravinkumar Patel (hereinafter referred to as Pravinkumar) and Dashrath Patel (hereinafter referred to as Dashrath); Attempted First Degree Murder of Prakashkumar Patel (hereinafter referred to as Prakashkumar); Attempted Armed Robbery and Possession of a Firearm by a Convicted Felon.

Mr. Davis waived a jury trial in favor of a bench trial. On October 4, 2012, Mr. Davis was found guilty as charged on all counts.

The penalty phase of the trial commenced on October 9, 2012. A *Spencer*[1] hearing was held on November 2, 2012. The Defendant was sentenced to death for the murders of Pravinkumar and Dashrath. The Defendant was also sentenced to life in state prison for the attempted murder of Prakashkumar, 20 years in state prison for the attempted armed robbery, and 15 years in state prison for the possession of a firearm. The Court found that the following aggravators were established, and assigned the following weights in its consideration: (1) Mr. Davis was previously convicted of a felony and on felony probation (moderate weight); (2) Mr. Davis was previously convicted of another Capital Felony or of a Felony involving the use of threat of violence to the person (very great weight); and (3) the murders were committed while Mr. Davis was engaged in the commission of an attempt to commit, or flight after committing, or attempting to commit a robbery (great weight).

The Court found one statutory mitigating circumstance, that the murders were committed while Mr. Davis was under the influence of extreme mental or emotional disturbance, and assigned it little weight. The Court found that the following fifteen non-statutory mitigators were established: (1) Mr. Davis was the victim of bullying through his childhood (moderate weight); (2) Mr. Davis was the victim of sexual assault as a child (moderate weight); (3) Mr. Davis was the victim of both physical and emotional child abuse by a caretaker (moderate weight); (4) Mr. Davis was the victim of overall family dynamics (little weight); (5) Mr. Davis served in the U.S. Marine Corps (little weight); (6) Mr. Davis has a history of being suicidal, both as a child and as an adult (slight weight); (7) Mr. Davis was diagnosed with a personality disorder (slight weight); (8) Mr.

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

Davis has a history of depression (slight weight); (9) Mr. Davis was dealing with stress at the time of the incident (little weight); (10) Mr. Davis was a good person in general (little weight); (11) Mr. Davis was a good worker (little weight); (12) Mr. Davis was a good son, good sibling, and good husband (moderate weight); (13) Mr. Davis was a good father to a child with Down syndrome (moderate weight); (14) Mr. Davis exhibited good behavior during the trial as well as other Court proceedings (slight weight); (15) Mr. Davis exhibited good behavior while in jail (little weight).

On November 10, 2016, on direct appeal, the Supreme Court of Florida affirmed the convictions and sentences. *Davis v. State*, 207 So. 3d 177 (Fla. 2016). Mr. Davis filed a motion for rehearing which was denied on January 5, 2017. The Mandate was issued on January 23, 2017. On June 5, 2017, the United States Supreme Court denied certiorari. *Davis v. Florida*, 137 S.Ct. 2218, 198 L.Ed.2d 663, 85 USLW 3569 (2017).

STATEMENT OF THE CASE FACTS

The underlying facts of the case are set forth in *Davis v. State*, 207 So. 3d 177, 182-186 (Fla. 2016), and are presented below:

> On the evening of December 7, 2007, Davis drove to the vicinity of a BP gas station and convenience store (BP) with the intent to commit robbery. The BP was located near the intersection of Highway 557 and Interstate 4 in Polk County. Around 8:51 p.m. that evening, BP employee Dashrath Patel (Dashrath) and his friend Pravinkumar Patel (Pravinkumar) walked out of the convenience store's front door and across the parking lot to change the gas price sign.
>
> The BP had closed for the evening, and the convenience store lights were turned off. While talking on the telephone, another BP employee, Prakashkumar Patel (Prakashkumar), remotely locked the store's front door and began to change the gas prices on the cash register. Seconds later, the surveillance camera captured a person who appeared to be a black man, about six feet tall, who approached the front door of the store and pulled on the door. The man, who had

a large build, was dressed in dark clothing and wore a hood and a face mask.

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

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

With the assistance of a trained K–9 search dog, law enforcement searched the immediate area for the scent of a person who may have recently left the scene. The K–9 detected a scent that tracked about one quarter of a mile to the north of the gas station. Footprints led in the same direction that the K–9 tracked, up to the point where a set of tire tracks began. A crime scene technician photographed and made casts of the tire tracks.

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

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

Headley investigations. The results of the analysis demonstrated that the same gun was used in the crimes at the BP and at Headley.

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

Guilt Phase

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

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

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

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

that the projectiles obtained during the BP investigation were consistent with having been fired from a Dan Wesson .357 magnum revolver.

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

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

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

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

Another Headley eyewitness, Fran Murray, testified that as she approached the Headley building, she saw a tall black man carrying

an orange collapsible lunch pail, and she saw him place what appeared to be a gun inside of it.

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

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

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

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

Davis's Defense

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

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

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

Davis also testified that less than one week later, he left the Nissan Altima parked at a nightclub, and that the gloves and jacket that the

police later found in the car belonged to his wife, Victoria. Davis testified that he kept an unloaded gun in a toolbox in the garage that may have been unlocked, and that neither Victoria nor his son knew about the gun.

POSTCONVICTION MOTIONS

Mr. Davis filed his "Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend" on May 19, 2018. The State filed the "State's Response to Defendant's Motion to Vacate Judgment and Sentence" on July 18, 2018.

On October 15, 2018, Mr. Davis filed the "Unopposed Motion for Extension of Time to File Proposed Amended 3.850 Motion." An "Order Regarding October 17, 2018, Status Conference" was entered on October 22, 2018, providing Mr. Davis leave to file an Amended Motion for Postconviction Relief on or before October 26, 2018. Mr. Davis filed the "Defendant's First Motion to Amend Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend" on October 26, 2018. The proposed amendments consisted of more specific claims regarding trial counsel's alleged deficient performance at sentencing, as set forth in claims 15 and 16; and raising one additional claim (claim 17) alleging a *Giglio* violation by the State during the testimony of Officer Lynette Townsel. An "Order Granting the Defendant's First Motion to Amend Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend" was entered on November 6, 2018. On November 6, 2018, the Defendant filed the "First Amended Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend". The State filed the "State's Response to Defendant's Amended Motion to Vacate Judgment and Sentence" on November 13, 2018.

On December 11, 2018, the State filed the "Notice of Supplemental Authority" and the "Amended Notice of Supplemental Authority," attaching the opinion of *Foster v. State*, 2018 WL

6379348 (Fla. Dec 6, 2018). On January 18, 2019, Mr. Davis filed the "Response to Notice of Supplemental Authority."

On May 30, 2019, the Court filed the "Notice of Filing" with the letter/correspondence dated May 22, 2019, from Mr. Davis. This letter included proposed amendments to the pending postconviction claims. On June 6, 2019, counsel for Mr. Davis filed the "Corrections to Amended 3.851 Motion".

A "Motion to Amend 3.851 Motion to Include Additional Claims" was filed on October 14, 2019, raising two additional claims. An "Order Granting Defendant's Motion to Amend 3.851 Motion to Include Additional Claims" was entered on October 18, 2019. The State filed the "State's Response to Defendant's Second Amended Motion to Vacate Judgment and Sentence" on November 8, 2019.

On December 24, 2019, counsel for Mr. Davis, Mr. Robert R. Berry, Esq., filed a "Motion to Continue *Huff* Hearing and Evidentiary Hearing." In the motion and at the hearing held on December 30, 2019, Mr. Berry represented he was resigning from his position from Capital Collateral Regional Counsel (CCRC) and new counsel from CCRC would be assigned to Mr. Davis's cases. Mr. Berry's *ore tenus* Motion to Withdraw was granted on December 30, 2019. On January 3, 2020, current counsel for Mr. Davis (Ms. Dawn B. Macready, Esq.) and Ms. Stacy R. Biggart, Esq., filed a Notice of Appearance.

An Order Setting Evidentiary Hearing was entered on February 14, 2020, scheduling a four-day evidentiary hearing to begin on August 31, 2020. Due to the public health emergency as

a result of the Coronavirus Disease 2019 (COVID-19), the parties agreed only claim 17 could be heard at that time.[2]

Mr. Davis filed a "Motion to Amend Defendant's Motion to Vacate Judgments of Conviction and Sentence" on July 16, 2020, amending one claim and raising three additional claims. At a status conference held on July 17, 2020, the State objected to the Motion to Amend, but agreed to file a response within 20 days pursuant to rule 3.851(f)(4). The State's Response was filed on July 31, 2020.

Mr. Davis filed a "Motion to Strike August 31, 2020, Evidentiary Hearing Date" on July 27, 2020. Citing COVID-19 and the inability of counsel to confer with Mr. Davis, this motion sought to continue the evidentiary hearing until an in-person evidentiary hearing could be conducted. Following a hearing held on August 19, 2020, this Court entered the "Order Continuing Evidentiary Hearing and Order Scheduling Status Conference" on August 19, 2020. An Amended Order, amended only as to the Certificate of Service, was entered that same day.

On May 3, 2021, the State filed the "Motion to Dismiss Portions of Claim 15 in Case Number 07-CF-9613 and to Exclude Any and All Mental Health Testimony Evidence From Any Source". Following a hearing held on June 4, 2021, this Court entered the "Order on the State's Motion to Dismiss Portions of Claim 15 in Case Number 07-CF-9613 and to Exclude Any and All Mental Health Testimony From Any Source" on June 8, 2021. In this order, the Court struck from the evidentiary hearing any portions of claim 15 which addressed trial counsel's mental health investigation and presentation. This order specifically stated that the remaining portions of the

[2] Mr. Davis had moved for a continuance of the evidentiary hearing, which was denied. The Court directed the parties to determine which claims, if bifurcated, could be addressed at the originally scheduled evidentiary hearing through a remote hearing.

claim dealing with counsel's alleged ineffectiveness for failing to speak to family members and friends would be addressed at the evidentiary hearing.

CASE MANAGEMENT CONFERENCE

A Case Management Conference for Defendant's "First Amended Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend" was held on June 7, 2019, pursuant to Rule 3.851, Fla. R. Crim. P. In the "Order on Case Management Conference" the Court found that it would be appropriate to have an evidentiary hearing on claims 7, 15, 16, and 17.

A Case Management Conference for Defendant's second amended motion was held on December 30, 2019. In the "Order on Case Management Conference" entered on January 7, 2020, the Court found it was not necessary to have an evidentiary hearing on either of the two additional claims alleged in the second amended motion.

A Case Management Conference was held on August 19, 2020, on Defendant's third amended motion. In the "Amended Order on Third Case Management Conference" entered on August 19, 2020, this Court found it was necessary to have a hearing on claims 17, 20A, 20B-3, and 20B-4; but not on claims 20B-1, 20B-2, and 21. The Court reserved ruling on claim 22, which alleged cumulative error.

EVIDENTIARY HEARING – WITNESSES

Robert Norgard

Mr. Davis was represented at trial by Robert and Andrea Norgard. Mr. Norgard was appointed as lead counsel and did most of the "courtroom work," while Mrs. Norgard researched,

reviewed discovery, and was primarily responsible for developing the penalty phase workup. Tr. 222-223.[3] Although Mr. Norgard testified at the evidentiary hearing, Mrs. Norgard was not called as a witness.

Mr. Norgard has been a member of the Florida Bar since 1981. Tr. 223. Mr. Norgard has been death-qualified since the inception of the rule for the minimum standards for attorneys in capital cases (having met those qualifications as far back as 1985 or 1986) and has been board certified in criminal trial practice since 1995. Tr. 222; 226-227. Mr. Norgard began his career in private practice, with criminal work comprising about 40 percent of his practice. Tr. 223. Mr. Norgard was next employed by the Office of the Public Defender for the Sixth Judicial Circuit, beginning in 1983. Mr. Norgard was employed there for three-and-a-half years and was assigned to three death penalty cases. Tr. 224. Following the Sixth Circuit, Mr. Norgard was employed by the Office of the Public Defender for the Tenth Judicial Circuit for ten years. Tr. 225. Mr. Norgard was assigned to the capital division and routinely handled first-degree murder cases. Tr. 225.

Mr. Norgard established his own law firm in 1995, where he exclusively handles "serious" criminal matters. Tr. 221. Throughout his career, Mr. Norgard has tried between 35-40 death penalty trials. Tr. 228. Including cases where the death penalty was waived and those that resulted in pleas, Mr. Norgard estimates he has handled at least 150-200 death penalty cases. Tr. 228. Mr. Norgard has testified as an expert witness in postconviction matters approximately 20-25 times and has handled about a dozen death penalty postconviction cases. Tr. 229.

From 1992 until 2004, Mr. Norgard prepared a Florida Supreme Court death penalty update, summarizing every death penalty case, which was published quarterly in the Florida

[3] This order will reference testimony from the evidentiary hearing in this format. Pre-trial and trial testimony will be referenced by the volume and page numbers as they appeared in the record on appeal for the direct appeal, case number SC13-1, and attached to this order.

Association of Criminal Defense Lawyers magazine. Tr. 230. Since then, Mr. Norgard reviews the Florida Law Weekly and obtains and reviews the updated death penalty manual published by the Florida Public Defender's Association. Tr. 231. Mr. Norgard authored two chapters of this manual's initial publication. He established the "Death is Different" seminar for the Florida Association of Criminal Defense Lawyers (FACDL) in 1992 and was the chair of this seminar until 2004 or 2005. Tr. 231-232. He has co-chaired the seminar two or three times since then. Tr. 231. Mr. Norgard has been an active member of the FACDL since the early '90s, was chairman of their death penalty committee for approximately 15 years and was on the board of directors in 2005 or 2006.

Mr. Norgard and Mr. Davis reviewed all of the BP surveillance footage. Tr. 326. The BP surveillance footage shows the shooter walk towards the store, go off frame, and within two seconds a vehicle appears. Tr. 326-327. Mr. Norgard believes the vehicle resembles an SUV, while Mr. Davis drove a black Nissan sedan at the time. Tr. 328. Mr. Norgard does not believe this could have shown a get-away driver. Tr. 329-330. Mr. Norgard hired a video expert to enhance the footage to determine if there were any identifying features that could be seen. Tr. 331. The surveillance system only captures images when it detects movement. The next image of the vehicle appears six minutes after it arrived, suggesting it parked and remained stationary for that amount of time. Tr. 337-338. Mr. Norgard, along with numerous others on the defense team, viewed the surveillance footage multiple times. Tr. 339. Nothing in the footage suggested there was a vehicle in motion close to the time when the suspect is seen near the front door, or by the area where the two men were killed; or that two people were involved in the commission of this crime. Tr. 339-342. Mr. Norgard believed any argument that a get-away driver was involved would have been pure speculation. Tr. 344. He was also aware that the evidence indicated the

bullets that killed the two men were fired from the same gun that the suspect used to shoot inside the store. Tr. 343.

Mr. Norgard recalled first discovering that the photo pack shown to Mr. Greisman was missing during an evidence viewing. Tr. 348. Mr. Norgard did not recall a copy of the photo pack being placed in evidence as an issue, as ". . . the litigation related to it was pretty extensive and it was kind of a sub issue of thousands of issues in this case." Tr. 350. When asked if Officer Townsel could have been impeached on her statement that a copy of the photo pack had been entered into evidence, Mr. Norgard stated "it was such a collateral issue. I mean they found what legitimately was the original photopack and it would have been a much different legal issue if we didn't have a photopack at all. . . I mean I'm trying – I mean I'm just trying to be straight here. I mean I'm trying to win a trial, impeaching her on that point is like so what." Tr. 356.

Mr. Norgard conducted legal and technical research into the possible ways to exclude or challenge the firearms evidence in this case. Tr. 366-367. Prior to Mr. Davis's trial, Mr. Norgard was aware of the various methods in challenging ballistic evidence. Tr. 368. Mr. Norgard knew of a school of thought that concludes the uniqueness and reproducibility of firearms-related tool marks has not yet been fully demonstrated, but he did not feel there were any experts he could use to discredit the evidence in this case. Tr. 368-369.

Mr. Norgard hired his own firearm expert to perform an independent analysis of the evidence. Tr. 369-370. The expert's conclusions were not favorable to Mr. Davis. *Id.* In closing, Mr. Norgard argued that even if the same firearm were used to commit both crimes, it did not link Mr. Davis to the BP case. Tr. 370. Mr. Norgard stated if he was aware of any expert that would reach a different conclusion, he would have hired that expert. Tr. 371. Mr. Norgard did his own research and consulted with other people, but did not think there was any viable claim either

through *Daubert* or *Frye* to challenge the science of firearm and toolmark identification. Tr. 383. Mr. Norgard does not believe an expert to testify as to the accuracy or error rate in firearms identification would have been useful, unless the expert could testify as to error in this particular case. Tr. 386-387.

Lynette Townsel[4]

Officer Townsel testified that she became aware of the missing photo pack when it could not be located during Mr. Norgard's evidence viewing on May 7, 2010. Tr. 187-188; 192. Officer Townsel kept copies of files related to her investigations in her shed and found the original photo pack among those copies on June 2, 2010. Tr. 188; 192. Officer Townsel recalled her testimony during the trial in this case that a copy of the photo pack had been placed in evidence. Tr. 193. This was an incorrect statement, as only the original photo pack was ever placed into evidence. Tr. 194. She placed the original into evidence on June 3, 2010. Tr. 212-213. The photo pack had not been damaged or altered in any way. Tr. 209. Prior to being stored in her shed, Officer Townsel kept all of her files in her desk at the Lake Wales Police Department. Tr. 209-210. Once placed in the shed, no one else had access to her files. Tr. 210.

James Kwong

James Kwong has been a firearms analyst with the Florida Department of Law Enforcement for 15 years. Tr. 43-44. Prior to this, Mr. Kwong was a firearm examiner for the Philadelphia Police Department for approximately six years, after having worked as a police officer for five-and-a-half years. Tr. 44. Mr. Kwong has been a member of the Association of

[4] Officer Townsel is now known as Lynette Schwarze. For clarity and consistency with the record and references in Mr. Davis's motions, this order shall continue to reference her as Officer Townsel.

Firearms and Toolmark Examiners (AFTE) since 1999. Tr. 28. Mr. Kwong also has a Bachelor of Science degree in mechanical engineering and technology. Tr. 29. Throughout his career, Mr. Kwong has participated in three validation studies which confirmed that consecutively manufactured barrels made with the same tools impart unique characteristics which can be used to identify bullets fired from each individual barrel. Tr. 48-50. As a standard operating procedure in every firearm laboratory in the United States, any positive conclusion must be verified by another examiner or analyst. Tr. 52.

Mr. Kwong examined bullets and bullet fragments in this case. Tr. 16. Mr. Kwong determined the bullets were all .38-caliber class. Tr. 17. This class consists of the .38 special, the .357 magnum, the .380 auto, and the 9mm calibers. Tr. 18. Several bullets were consistent with the .38 special or the .357 magnum calibers but could not be further distinguished nor excluded as 9mm caliber. Tr. 19-22. The AFTE's ". . .theory of identification as it pertains to the comparison of tool marks enables opinions of common origin to be made when the unique surface contours of two tool marks are in 'sufficient agreement.' " Tr. 30. The theory continues:

> This 'sufficient agreement' is related to the significant duplication of random tool marks as evidence by the correspondence of a pattern or combination of patterns of surface contours.
>
> Significance is determined by the comparative examination of two or more sets of surface contour patterns comprised of individuals peaks. . . .
>
> Specifically, the relative height or depth, width, curvature, and spatial relationship of the individual peaks, corresponding features in the second set of service contours.
>
> Agreement is significant when the agreement in individual characteristics exceeds the best agreement demonstrated between tool marks known to have been produced by different tools and is consistent with agreement demonstrated by tool marks known to have been produced by the same tool.

> The statement that 'sufficient agreement' exists between two tool marks means that the agreement of individual characteristics is of a quantity and quality that the likelihood another tool could have . . . made the mark is so remote as to be considered [a] practical impossibility.

Tr. 32-33. Mr. Kwong testified that the science of tool mark comparison does not have a statistics study, akin to DNA comparisons. Mr. Kwong stated that what different examiners consider as sufficient agreement could vary, but the difference would not be "big." Tr. 37.

In this case Mr. Kwong examined fired bullets and fired bullet jacket fragments. Tr. 57; 65; 70-71. Mr. Kwong first looked to identify class characteristics, determine the caliber and direction of twist, and count the lands and grooves on the spent projectiles. Tr. 60-62. Next, Mr. Kwong checked for subclass and individual characteristics. Tr. 63-64. From his examination Mr. Kwong concluded that the bullets used in the Headley case were fired by the same firearm in this case. Tr. 71-72.

Mr. Kwong is aware of industry studies on error rates in this field, and none of them found more than a three percent rate of error. Tr. 78. The FDLE laboratory does not have its own study of error rate and individual firearm examiners do not keep track of personal error rates. *Id.*

Dr. Jeff Salyards

Dr. Jeff Salyards is a consultant with Compass Scientific Consulting, and is also a forensic scientist with Iowa State University. Tr. 85. Dr. Salyards has a Ph.D. in analytical chemistry, a master's degree in forensic science, and completed a year-long fellowship in forensic medicine. *Id.* Dr. Salyards previously directed the Defense Forensics Science Center, was the chief scientist at the U.S. Army Crime Lab, was the director of the Defense Computer Forensics Lab, was previously a chemistry assistant professor at the Air Force Academy and had worked in the Air

Force as a special agent in the OSI and as a forensic science consultant. *Id.* Dr. Salyards has been a member of various committees and has won several awards related to forensic sciences. Tr. 86.

Dr. Salyards was involved in the validation study for firearms and tool marks known as the "Ames I" or "Baldwin" study. Tr. 88. This study showed a "pretty reasonable error rate" of approximately 2-3 percent, based on smaller 9mm cartridges. Tr. 89. It also showed a "strange use of the inconclusive conclusion" which might be affecting error rate studies. *Id.* This conclusion was used more often when the ground truth was actually an exclusion. Tr. 90. The study was limited to cartridge cases and did not involve bullets, damaged bullets, or cases where reference samples were not available. Tr. 91-92. A more recent "Ames II" study did involve bullets; however, they were undamaged and in pristine condition. Tr. 107.

Dr. Salyards believes the AFTE theory of identification has challenges to its validity. Tr. 93. First, Dr. Salyards states the AFTE definition of "sufficient agreement" is circular. *Id.* Second, Dr. Salyards disagrees with the AFTE's use of the term "significance" as it is not defined in terms of statistical significance. Tr. 94-95.

Dr. Salyards believes the FDLE laboratory has the standard quality control measures in place to make sure individual examiners have not made a mistake. Tr. 123-124. Dr. Salyards explained this is different from the error rate, which is present in the methodology and not in the procedures utilized by the individual examiner. Tr. 122-123.

Dr. Salyards believes there is need for further research to determine how accuracy is affected with damaged bullets. Tr. 132-133. Dr. Salyards also believes there is an impact on accuracy in comparisons where the firearm is not available. Tr. 134-135.

Dr. James Hamby

Dr. James Hamby is a retired forensic scientist who first began his training in firearms comparison and analysis with the United States Army Criminal Laboratory in 1970. Tr. 149-150. Although Dr. Hamby's initial training predated the AFTE manual, the methods he was trained in were part of the theory included in their first training manual in 1982. 151; 153. Dr. Hamby first joined AFTE in early 1971 and was the fourteenth president of AFTE in 1982. Tr. 154. Dr. Hamby was first certified in firearms examination in 1972 and has been doing firearms and tool mark identification since that time. Dr. Hamby has testified approximately 500 times and has trained over 60 examiners. Tr. 156; 158. Dr. Hamby has been involved in studies looking at consecutively manufactured objects and has found examiners can differentiate between them. Tr. 160-161.

Throughout his work in this field, Dr. Hamby has made efforts to determine the error rate in analyzing whether two bullets came from the same firearm. Tr. 164. Based upon the literature, Dr. Hamby believes the error rate is approximately 1-1.2 percent. *Id.* The higher error rate referenced earlier was conducted by Collaborative Testing Services, which is a test available to any person regardless of qualifications. Tr. 164-165. Dr. Hamby disagrees that inconclusive findings should be counted as errors. Tr. 165-166. No scientific study has considered inconclusive findings by examiners as errors. Tr. 166-168.

In his experience, Dr. Hamby seldom finds undamaged bullets that have been fired. Tr. 171-172. Dr. Hamby testified damage to bullets does not prevent an individual from examining marks and making comparisons. Tr. 172.

ANALYSIS OF DEFENDANT'S CLAIMS

Strickland Standard:

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), set forth the standard for determining ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must prove two elements. First, the defendant must show that counsel's performance was deficient. The defendant must show that counsel's representation fell below an objective standard of reasonableness. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. Second, the defendant must show that counsel's deficient performance prejudiced the defense. This occurs when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland*, 466 U.S. at 687. The *Strickland* standard requires establishment of both prongs. Where a defendant fails to make a showing as to one prong, it is not necessary to delve in whether he has made a showing as to the other prong. See *Waterhouse v. State*, 792 So. 2d 1176 (Fla. 2001).

In *Douglas v. State*, 141 So. 3d 107, 117 (Fla. 2012), the Florida Supreme Court discussed prejudice in the penalty phase, and stated:

> Penalty phase prejudice under the *Strickland* standard is measured by whether the error trial counsel undermines the Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the Trial Court . . . That standard does not "require a defendant to show 'that counsel's deficient conduct more likely than not

described the car as a dark colored Nissan. (V37/349-350). Mr. Norgard did cross-examine Mr. Adkinson on the fact that his headlights would have "hit" a more wooded area. (V37355).

Failing to examine any witness regarding rubber floor mats.

Mr. Davis claims Mr. Norgard failed to examine either himself or his wife regarding the positioning of rubber floor mats in his vehicle. Mr. Davis alleges this would have shown no accelerants could have been detected on the carpets. This Court finds no reason to conclude that placing rubber floor mats over carpeted floor mats would make it an impossibility for any minute but detectable amounts of accelerants or other substances to reach the carpeted floor mats. More importantly, the State did not present any evidence that accelerants were found on the floor mats of Mr. Davis's vehicle in this case. As such, this testimony would not help Mr. Davis's case, but would provide the State with reason to rebut with the same witnesses regarding the detection of accelerants in Mr. Davis's vehicle that were used in the Headley case.

Failing to more aggressively cross examine Mr. Kwong.

As with the preceding claim, Mr. Davis again alleges Mr. Norgard should have more aggressively cross-examined Mr. Kwong regarding the conditional language used in his report, when his in-court testimony was that the ballistic evidence showed the same firearm used in the Headley case was also used in this case. As Mr. Kwong testified at the evidentiary hearing, his use of "sufficient agreement" in his report is an industry term as identified by AFTE in their established theory of identification, and is not a conditional term to lessen the degree of certainty of his conclusion.

Claim 20: **MR. DAVIS WAS DENIED HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL, DUE PROCESS, AND RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION WHEN TRIAL COUNSEL FAILED TO EFFECTIVELY INVESTIGATE AND CHALLENGE THE FIREARMS IDENTIFICATION EVIDENCE USED AGAINST MR. DAVIS AT HIS CAPITAL TRIAL.**

In setting forth claim 20, Mr. Davis alleges two enumerated subclaims. Subclaim 20A alleges Mr. Norgard was deficient in his investigation of the ballistic evidence in this case. Subclaim 20B alleges the prejudice in four sub-subclaims. Specifically, these sub-subclaims allege:

1. Trial counsel failed to file a motion in limine to exclude the firearm identification evidence or limit such testimony, or in the alternative, for a *Frye* hearing.

2. Trial counsel failed to object to Kwong's overstatements of the evidence and the State's overstatements of both the evidence and the testimony by Kwong.

3. Trial counsel failed to effectively cross-examine Kwong regarding his qualifications, methods, protocols, and the basis for his conclusions.

4. Trial counsel failed to present a defense expert to challenge Kwong's conclusions and scientific basis for his testimony regarding the firearms comparison evidence.

Subclaim A: **Trial counsel failed to effectively investigate the firearms identification evidence in this case.**

Mr. Norgard testified that he conducted both technical and legal research to determine how he could challenge the ballistics evidence in this case. Tr. 366-367. Mr. Norgard is familiar with various methods in attacking the science of ballistics and was aware of how the defense bar was raising such challenges prior to this trial. Tr. 368. Mr. Norgard did not recall if the various material he reviewed included the 2008 report published by the National Research Council titled Ballistic

Imaging, or the 2009 report commonly referred to as "a path forward". Tr. 368-369. However, he was aware that there existed a school of thought which concluded the assumption of uniqueness and reproducibility of firearms-related tool marks had not yet been fully demonstrated. Tr. 368. Based on his review, Mr. Norgard did not feel there were any experts he could call to discredit the science of the ballistic comparisons in this case. Tr. 369. Mr. Norgard was aware that a rate of accuracy or error rate is not given in ballistics. Tr. 387. Mr. Norgard did not believe an expert that could testify this is problematic would have been a viable way to attack the evidence at trial, as "different sciences have different standards that have been accepted." Tr. 387-388.

Mr. Norgard also hired his own expert that conducted his own comparison, which was not favorable to Mr. Davis. Tr. 369-370. At trial, Mr. Norgard argued that even if the same firearm was used in the commission of both crimes, there was insufficient circumstantial evidence to link Mr. Davis to the firearm in both crimes. Tr. 370.

Although this Court will address the sub-subclaims alleging prejudice separately below, the Court notes that Mr. Davis has failed to establish Mr. Norgard was deficient in his investigation. "Under *Strickland*, 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' " *Marshall v. State*, 854 So. 2d 1235, 1247 (Fla. 2003) (quoting *Strickland*, 466 U.S. at 691). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v. State*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (quoting *Strickland*, 466 U.S. at 690-91). Mr. Norgard testified that he conducted both technical and legal research to explore avenues to challenge the ballistic evidence in this case. Although Mr. Norgard

did not recall the specific articles cited by postconviction counsel, Mr. Norgard did say he was familiar with the various methods in attempting to cast doubt on the science of firearm and toolmark comparison. Despite his efforts, Mr. Norgard was unable to find anyone he felt could raise a viable challenge to this science. Aside from attempting to challenge the science of this evidence, Mr. Norgard hired an independent expert to conduct a comparison that reached the same conclusion as Mr. Kwong. Mr. Davis has failed to show this investigation was unreasonable or deficient.

Subclaim B: Trial counsel failed to effectively challenge the firearms and toolmark comparison evidence at trial.

1. Trial counsel failed to file a motion in limine to exclude the firearm identification evidence or limit such testimony, or in the alternative, for a *Frye* hearing.

" 'By definition, the *Frye* standard *only applies* when an expert attempts to render an opinion that is based upon *new or novel scientific techniques*.' Therefore, we have recognized that *Frye* is inapplicable in the 'vast majority' of cases." *King v. State*, 89 So. 3d 209, 228 (Fla. 2012) (quoting *Marsh v. Valyou*, 977 So. 2d 543, 547 (Fla. 2007) (internal citations omitted)). Toolmark examination in ballistics is not a new or novel methodology, and therefore a motion in limine to exclude the evidence or a request for a *Frye* hearing would have been denied. See *Foster v. State*, 132 So. 3d 40, 69 (Fla. 2013); *Amaro v. State*, 272 So. 3d 853, 855 (Fla. 5th DCA 2019).

2. Trial counsel failed to object to Kwong's overstatements of the evidence and the State's overstatements of both the evidence and the testimony by Kwong.

In this sub-subclaim, Mr. Davis faults Mr. Norgard for not objecting to Mr. Kwong's conclusion that the bullets fired at the BP gas station were fired from the same firearm used in the Headley case. Mr. Davis equates this conclusion with the statement of " a match 'to the exclusion of all other firearms in the world.' " Mr. Kwong never made such a statement or conclusion. Mr. Kwong provided no statistical certainty as to his conclusion. Mr. Norgard was aware of this, and also that "different sciences have different standards that have been accepted." Mr. Norgard's own independent expert reached the same conclusion. Mr. Davis has failed to set forth any basis for Mr. Norgard to have objected. Furthermore, any comments in closing by the State that the same firearm was used by Mr. Davis in the commission of both crimes was a fair inference based upon the evidence presented.

3. Trial counsel failed to effectively cross-examine Kwong regarding his qualifications, methods, protocols, and the basis for his conclusions.

Mr. Davis claims Mr. Norgard was ineffective for failing to question Mr. Kwong on his qualifications; the scientific underpinnings of firearms identification; and Mr. Kwong's conclusion. Mr. Kwong testified as to his qualifications at the evidentiary hearing. He has been a member of AFTE since 1999, and a firearm examiner for 21 years. He has a Bachelor of Science degree in mechanical engineering and technology. Throughout his career as a firearm examiner, he has participated in three validation studies. Mr. Norgard did question Mr. Kwong at trial to clarify that Mr. Kwong could not determine whether the bullets were fired from a .357 or .38 firearm. (V40/891-892). Even on direct examination at trial, Mr. Kwong was clear on the limitations of his determination that the bullets were in the .38 caliber class. (V40/881-882). Mr. Norgard also confirmed with Mr. Kwong that the lands, grooves, and direction of twist was consistent with more than 21 possible firearms. Tr. 892. Any allegations now raised by Mr. Davis

questioning Mr. Kwong's individual findings were not proven by any substantial evidence. Mr. Norgard testified his own independent examiner corroborated Mr. Kwong's findings, which would in fact refute this claim.

4. Trial counsel failed to present a defense expert to challenge Kwong's conclusions and scientific basis for his testimony regarding the firearms comparison evidence.

At the evidentiary hearing, Mr. Davis presented testimony from Dr. Jeffery Salyards. At the time of trial Dr. Salyards was the Chief Scientist at the United States Army Criminal Investigations Laboratory. Dr. Salyards testified that if Mr. Norgard had consulted with him at that time, he would have advised him there is further need to study AFTE's theory of identification and the method's error rates. Dr. Salyards did not testify that at the time of trial, he was available and willing to testify or consult on this case on his concern with the science of firearm and toolmark comparison. Most of Dr. Salyards criticism was lodged on the need for more information to establish error rates. Mr. Norgard testified he was aware of such generalized concerns on firearm and toolmark comparison at the time and did not feel such challenges would be successful, unless he was able to prove Mr. Kwong's conclusions were incorrect. Dr. Salyards has been involved with and is aware of studies which sought to establish error rates in this field. Those studies found error rates of approximately 2-3%. Dr. Salyards noted one of the studies involved only 9mm cartridges with undamaged bullets.

Even if Dr. Salyards was called at trial and provided the same testimony, the State likely would have rebutted with the testimony of Dr. Hamby. Dr. Hamby has been a firearm examiner since 1972. Based upon his review of the literature, he believes the error rate in the methodology to compare and determine whether two bullets were fired from the same firearm to be approximately 1-1.2%.

The Court finds no error in failing to present an expert such as Dr. Salyards, nor has Mr. Davis shown any prejudice as a result.

Finding no merit in any of the allegations above, **claim 20 is DENIED.**

Claim 21: MR. DAVIS WAS DENIED HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL, DUE PROCESS, AND RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION WHEN TRIAL COUNSEL FAILED TO FILE A MOTION TO SUPPRESS THE PHOTO PACK OF MR. GREISMAN BASED UPON A CHAIN OF CUSTODY VIOLATION.

In claim 21, Mr. Davis faults Mr. Norgard for failing to file a motion to suppress alleging a chain of custody violation of the photo pack identified by Mr. Greisman. Mr. Greisman went to a police station upon his discharge from the hospital, where he was shown a photo pack line up. (V35/79-80). Almost immediately, Mr. Greisman identified Mr. Davis. (V35/82-83). Prior to making this identification, Mr. Greisman did not talk to any officers, and did not watch any television or other media accounts of the events. (V35/79-80). The photo pack shown to Greisman was temporarily misplaced by Officer Lynette Townsel. (V40/946-947). After Officer Townsel was informed the photo pack could not be found, she searched her shed where she kept copies of case files. *Id.* The original photo pack, unaltered, was found in her shed, and entered into evidence. (V35/85-86; V40/945-948).

> Relevant physical evidence is admissible unless there is an indication of probable tampering. This is a test for determining whether the chain of custody is established. In order to demonstrate probable tampering, the party attempting to bar the evidence must show that there was a probability that the evidence was tampered with – the mere possibility is insufficient. Once the party moving to bar the evidence has met its burden, the burden shifts to the nonmoving party to establish a proper chain of custody or submit other evidence that tampering did not occur.

Armstrong v. State, 73 So. 3d 155, 171 (Fla. 2011) (internal citations removed). Clearly, Officer Townsel did not follow the proper procedure by failing to place the photo pack securely in evidence immediately after Mr. Greisman made the identification. However, Mr. Davis has offered only speculation that the location of the photo pack prior to being placed into evidence resulted in tampering. Such bare allegations are insufficient to render the evidence inadmissible. See *Terry v. State*, 668 So. 2d 954, n.4 (Fla. 1996); *Bush v. State*, 543 So. 2d 283, 284 (Fla. 2d DCA 1989). Instead, the testimony from Officer Townsel and Mr. Greisman reflect the original was entered into evidence at the time of trial. As Officer Townsel testified at the evidentiary hearing, the photo pack was unaltered in any way.

As Mr. Davis has failed to raise any grounds upon which such a motion could have been granted, **claim 21 is DENIED**.

Claim 22 **CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. DAVIS OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION.**

Mr. Davis's final claim alleges the cumulative effect of all previously alleged claims entitle him to relief. Having determined each individual claim to be without merit, there are no errors to cumulate. **Claim 22 is DENIED**.

Therefore, it is **ORDERED AND ADJUDGED** that Defendant's Motion to Vacate Judgments of Conviction and Sentence is **DENIED**. Defendant has thirty (30) days to appeal this Order to the Florida Supreme Court.

DONE AND ORDERED at Bartow, Polk County, Florida, this 29th day of November, 2021.

DONALD G. JACOBSEN
Circuit Court Judge

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DGJ/jwl

I HEREBY CERTIFY the foregoing is a true copy of the original as it appears on file in the office of the Clerk of the Circuit Court of Polk County, Florida, and that I have furnished copies of this order and its attachments to the above-listed on this _____ day of _____, 2021.

CLERK OF THE CIRCUIT COURT

By: _____
Deputy Clerk