IN THE SUPREME COURT OF FLORIDA

JAMES E. STEPHENS,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

Case No. 92,639

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

DAVID R. GEMMER
PO Box 390
St. Petersburg, Florida 33731
(813)-323-3511
Florida Bar # 370541

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITY

STATEMENT OF THE CASE AND FACTS

A jury found Mr. Stephens guilty of battery on a law enforcement officer and resisting arrest without violence. R6-16. He waived his right to direct appeal and sought relief from the trial court on a claim of ineffective assistance of counsel. R17-51. The trial court granted the relief after a hearing. R292-527. The state appealed and the Second District Court of Appeal reversed the order for new trial.

Mr. Stephens was riding as a passenger in his own automobile at about 2:20 a.m. on March 6, 1996. A Tarpon Springs police officer recognized the driver, Lisa Stewart, whom he knew to have a suspended drivers license. T3-5. The officer pulled the car over. T5. A third person in the car, Jerry Insco, was riding in the back seat on the passenger side. T48.

Two other Tarpon Springs officers showed up as back up. T5. One of the bak up officers observed what appeared to be a pool cue or stick in the back seat. One officer hit the side of the car with his hand and ordered the passengers to place their hands on the dashboard or the seatback. T6, 51. Although the officers testified that Mr. Stephens did not comply with this instruction, The officers testified that Mr. Stephens was belligerent when they first spoke to him, asking them “What the fuck are you hitting my car for?” T52, and, when ordered out of the car, saying “Fuck you asshole.” T52. The police testified Mr. Stephens began

flailing his arms. T52. Eventually, Officer Young reached in to unbuckle Mr. Stephens' seatbelt. T97. Officer Young testified that Mr. Stephens struck him on his arm with his closed fist. T97. The other two officers said they saw Mr. Stephens take a swing at Officer Young, but neither saw a blow land. T35, 78-79. Neither of the other people in the car saw a blow land.

Police testimony was that Mr. Stephens then resisted arrest in a five-minute struggle. T9-10. The police denied punching, striking or kicking Mr. Stephens during the arrest. T14, 68. The back seat passenger, who had been removed to a patrol car, testified he could see no beating. T123.

The police testified that Mr. Stephens suffered only a scrape to his nose and elbow. T12, 66. One officer testified that Mr. Stephens told the officers he also had a cut to his arm and a bruise on his leg which were old injuries. T66, 101.

The police took Mr. Stephens to the hospital before taking him to jail.

The basis of Mr. Stephens' defense at trial was that he suffered a large bruise to his leg because of excessive force by the police. This would impeach the police officers, the only witnesses who supported the charges of battery and resisting arrest. It would also raise a police brutality defense.

The driver, Lisa Stewart, testified Mr. Stephens initially reached into the glove box on his side of the car to comply with the investigating officer's request for registration and insurance. T130. One of the officers hit the car on the

passenger side with his hand when he ordered the passengers to place their hands in view. T130-31. Mr. Stephens raised his hands in compliance. T131. Then an officer ordered Mr. Stephens out of the car. When Mr. Stephens reached to undo his seatbelt, the officer ordered him to put his hands on the dashboard. T131. She never saw Mr. Stephens strike the officer. She testified she saw the officers jerk Mr. Stephens by the arm out of the car, then slam him against the car and throw him to the ground within seconds after they pulled him out of the car. T132 & 137. Asked if she saw the officers beating Stephens, she testified "I seen them on him." Asked if she saw them strike him with any objects, she said "I seen one had his foot on the side of his face and then one had his knee on his leg." T132. Ms. Stewart said the police beat Mr. Stephens because of his initial belligerent vocal responses to the officers. T132. She only saw him pull away his arm one time from the police, T133. Before and during the beating, he was asking the police what was going on, but the police said nothing. T132.

Robert King, a coworker with Mr. Stephens, testified he saw no bruise on Mr. Stephens' leg when Mr. Stephens greeted at his apartment door as he was dressing for work the day before the arrest. T140. Later in the week, several days after the arrest, he saw Mr. Stephens limping at work. When he asked about it, Mr. Stephens eventually showed him the bruise and said the police had caused it. T141.

William Robb, a friend of Mr. Stephens', testified he picked up Mr. Stephens at the jail March 8, 1996, and took pictures of the bruise on his thigh. T144. Robb then drove Mr. Stephens to Mr. Stephens' personal physician, Dr. L. Michael Weiss. T144. The confusion regarding the bruise evidence started at this point. Mr. Robb erroneously testified he took the picture on March 6, 1996,(the day of the arrest) "right after he was released from jail before he went to see Dr. Weiss." T144. The state objected on the basis that pictures taken two days after the injury would reflect the injury at the time it was inflicted. T145. The trial court admitted the testimony and photographs when the defense argued the witness testified the photographs were taken March 6, the day of the injury. T147. The state then cross-examined Robb and established that the photographs had indeed been taken March 8, two days after the arrest. T148-49. The state did not renew its objection regarding the timeliness of the photographs.

Defense counsel's final witness was Dr. Weiss. The doctor testified that the photographs accurately reflected the bruise on March 8, 1996, the date he examined Mr. Stephens. Dr. Weiss testified on direct defense questioning that Mr. Stephens told him the police had inflicted the bruise during his arrest the day before. T153. He said the bruise in the photographs was "probably less than 24 hours" old, based on his observations of the photographs at trial. T154. On cross examination, the state explored the timing of the bruise reported by Mr. Stephens.

The doctor did not have his notes with him in court, but said his recollection was that Mr. Stephens had told him the bruise had been inflicted the day before when he was arrested. T156. He admitted that it was hard to say when the bruise was inflicted, but "I would guess sometime within the past 24 hours." T157.

In rebuttal, the state called Dr. Wilks, the physician who examined Mr. Stephens at the hospital the night of the arrest. Dr. Wilks testified that he found abrasions on Mr. Stephens' face and elbow and a large bruise on his thigh. T177. Dr. Wilks examined the photographs taken by Robb and testified that the bruise in the photograph was "at least a day plus old." T178. He said the bruise was consistent with someone "repeatedly smack[ing] him with a board or object like a flashlight . . . ." T188. Dr. Wilks was never told the photographs were made two days after the injury. T176-89. He testified that the bruise in the photograph was not consistent with a bruise only an hour old. T179. He testified on direct that the bruise in the photographs was the same as what he saw in the emergency room the night of the arrest. T183.

The jury found Mr. Stephens guilty of battery on a law enforcement officer and resisting arrest without violence, a lesser included offense of resisting with violence.

Only days after the trial, a juror told the assistant state attorney who tried the case that the jury convicted Mr. Stephens because they believed the state's

witness, Dr. Wilks, the emergency room physician, had rebutted Mr. Stephen's claim that the bruise was inflicted when he was arrested.

> The juror said that once they heard Lisa admit to having a felony conviction they didn't believe anything said. So, I guess it would have been the same for you, had y taken the stand. She said they did not believe your doctor and because he testified that you had a liver problem they assumed you were a chronic alcoholic that ran with trash. They did believe the police and did not believe the police put the bruise on you because Dr. Wilks backed them up.

R37-38 (letter from defense counsel to Mr. Stephens relating the information provided by the assistant state attorney), R703 (assistant state attorney's ratification).

The trial court held a full hearing on the 3.850 claim. Additional evidence presented at the hearing supported the conclusion that the bruise had been inflicted at the time of arrest. This included the medical reports which showed the bruise had doubled in size and begun to swell from the time Dr. Wilks saw it shortly after the arrest, R25 ("moderate [bruise] approximately 15x20 cm,") to six hours later in the jail infirmary, R27 ("very large (30 cm) . . . with edema [swelling]"). The reports also showed that Mr. Stephens complained on both occasions that the bruise had been caused by the police during his arrest. Also, a defense investigator testified that when he interviewed Dr. Wilks before trial, Dr. Wilks had no independent recollection of Mr. Stephens and had to consult the chart to determine that he saw Mr. Stephens for a facial injury, a contusion, a hip injury. The chart

showed that Mr. Stephens said the injuries had been inflicted by the police. R327-28.

The trial judge, who presided over both the trial and the hearing on the claim only six weeks later, ruled that trial counsel's ineffective representation had deprived Mr. Stephens of a fair trial pursuant to the standard of *Strickland v. Washington*, 466 U.S. 668 (1984). The trial judge ordered a new trial.[1]

In his order granting the motion, the trial judge found there was competent substantial evidence that:

- Trial counsel failed to correct the witness who photographed the bruise at issue in this case when he testified he took the pictures on the day of the injury rather than two days later. The trial court found that a correction made during the state's cross-examination of the witness was insufficient to cure the deficiency.
- Trial counsel failed to recognize the existence, let alone the gravity of the error compounded in Dr. Wilks' testimony. The trial judge found that Dr. Wilks' testimony at trial showed the doctor was testifying from the photographs rather than his independent recollection of the nature and

[1] The opinion of the Second District and a copy of the motion for rehearing with attachments including a copy of the trial court's order granting relief, record excerpts and the principal case law, are appended hereto pursuant to Florida Rule of Appellate Procedure 9.220.

quality of the bruise as he observed them on the night of the arrest. The two-day-old photographs showed a bruise more than a day old, therefore "at the time Dr. Wilks examined the defendant, the bruise was conceivably fresh and not at least one (1) day old. Mr. Martin [trial counsel] was ineffective for failing to recognize that Dr. Wilks was testifying from the photographs and failing to communicate this crucial error to the jury." R295. The trial judge's order specifically notes the doctor's testimony that the brown tinge to the bruise in the photographs showed it to be more than a day old. *Id*.

- The trial judge found the error was compounded when the prosecutor confirmed with Dr. Wilks that the yellow discoloration in the bruise in the photographs would not have been present if the bruise had been recent. R296. Trial counsel was ineffective for failing to correct the confusion, conceivably prejudicing the defendant by allowing Dr. Wilks' testimony to adversely affect the outcome of the verdict. R296.

The trial judge concluded:

> [T]his Court finds that the Defendant is entitled to relief on his claim that his counsel, Mr. James Martin, was ineffective in presenting Dr. Wilks medical testimony to the jury and that this prejudiced the Defendant to the extent that the Defendant was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984).

R296. A new trial was ordered. The state appealed.

The Second District reversed the trial court's order.

> A review of the attachments to the trial court's ruling on the 3.850 motion, together with the record of the evidentiary hearing, reveals that there was indeed confusion concerning when Stephens received the bruises depicted in the photographs. Stephens' counsel probably was less than effective in presenting this evidence or in cross-examining Dr. Wilks. Nevertheless, to prevail on a 3.850 motion, the defendant must prove not only that his attorney made errors so serious that he could not be said to have been acting truly as his "counsel," the defendant must also establish that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Rose v. State, 675 So.2d 567, 569 (Fla. 1996) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). **Our assessment of the evidence leads us to the conclusion that any alleged deficiency on the part of Stephens' counsel did not affect the fairness and reliability of the trial so as to undermine confidence in the outcome.** *See Kennedy v. State*, 547 So.2d 912 (Fla .1989). **Our conclusion is only bolstered by the extremely weak nature of Stephens' questionable police brutality defense, which was uncorroborated by any other evidence.**

State v. Stephens, 707 So.2d 758, 759 (Fla. 2nd DCA 1998) (emphasis added).

On motion for rehearing, the court's attention was directed to the new case law from this Court holding that an appellate court is obliged to affirm a trial court's ruling on a 3.850 motion when the trial court has properly applied the appropriate law, and when there is competent substantial evidence to support the order. *Grossm an v. State*, 708 So.2d 249 (Fla. 1997); *Blanco v. State*, 702 So.2d 1250 (Fla.1997). The Second District denied the motion for rehearing without comment.

The petitioner sought discretionary review in this Court based on conflict with *Grossman* and *Blanco*.

SUMMARY OF THE ARGUMENT

Grossman and *Blanco* require an appellate court to affirm a trial court's determination as to ineffective assistance of counsel provided the correct rule of law is applied, and competent substantial evidence supports the finding. The appellate court is specifically estopped from substituting its judgment for that of the trial court on questions of fact, the credibility of witnesses, or weight to be given the evidence. In this case, the Second District opinion declares that it reassessed the evidence and reached a decision contrary to the trial court, i.e. that trial counsel's errors did not prejudice the defendant.

The trial court concluded that trial counsel's confusion about the date when photographs of the bruise were made, compounded by his failure to recognize that the state's witness, Dr. Wilks, was testifying from the photographs when he testified that the bruise he saw the night of the arrest was more than a day old, adversely affect the verdict.

The juror's report that the jury rejected Mr. Stephens' theory because they believed Dr. Wilks had rebutted the claim clearly shows that the jury had fallen victim to the confusion engendered by the defense. Had defense counsel been clear about the timing of the photographs and that the basis for Dr. Wilks' opinion that the bruise was more than a day old was his examination of the photographs on

the stand, he would have been able to show the jury, and argue in closing, that Dr. Wilks actually supported the defense theory.

Had defense counsel effectively established that the bruise was or could have been inflicted during the arrest, the rest of the case would have opened up for the defense. The only evidence of battery on an officer and resisting arrest was the testimony of the police. The police denied using excessive force, and also testified that Mr. Stephens had specifically told them the bruise was a preexisting injury. Proving that the bruise was inflicted during arrest would have impeached the police. The driver's testimony would have carried additional weight in such a circumstance. The jury could have concluded Mr. Stephens complied with police orders, but also responded with verbal epithets which brought on the unjustified beating.

The Second District's review of the facts in its opinion shows that it chose only facts supporting the state's theory. The Second District relied on the police testimony and the testimony of an eyewitness who was out of sight of the arrest to conclude there was no evidence Mr. Stephens was beaten. By relying on these witnesses, and even concluding that Mr. Stephens' theory was uncorroborated, the Second District blatantly ignored the testimony of the driver, who was in a position to see Mr. Stephens abused by the police. The duty of an appellate court

is to view the evidence in the light most favorable to the prevailing party, the appellee, not the appellant.

The Second District also erred by characterizing Mr. Stephens' defense as a weak, questionable, uncorroborated police brutality defense. Police brutality was not even argued as a specific ground for acquittal at trial. The evidence of a beating served to impeach the police who claimed no excessive force was used. The driver of the car corroborated the defense. The bruise evidence refuted the police denials that they did not inflict the injury. And a police brutality defense is a legitimate theory for relief, apparently grounded on the principle of a jury pardon.

ARGUMENT

The decision below is in error in reversing the trial court's decision which is supported by competent substantial evidence.

This Court set out the standard for review of an ineffective assistance of counsel claim in *Grossman v. State,* 708 So.2d 249 (Fla. 1997):

> Grossman first claims that trial counsel provided ineffective representation during the penalty phase of the trial. We disagree. This Court set out the standard for reviewing such claims following an evidentiary hearing in *Blanco v. State,* 702 So.2d 1250 (Fla.1997):
>
> > In reviewing a trial court's application of the [relevant] law to a rule 3.850 motion following an evidentiary hearing, this Court applies the following standard of review: As long as the trial court's findings are supported by competent substantial evidence, "this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.' "
>
> *Id*. at 1252 (*quoting Demps v. State,* 462 So.2d 1074, 1075 (Fla. 1984)). In the present case, the trial court addressed this first claim at length . . . :
>
> . . . .
>
> The trial court applied the right rule of law governing ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), and competent substantial evidence supports its finding. We find no error.

Grossman, 708 So.2d at 251.[2]

---

[2] Although not addressed in the Second District opinion below, Mr. Stephens had also raised a claim of ineffective assistance of counsel for failure of

(continued...)

The Second District's decision expressly and directly conflicts with *Grossman* and *Blanco*. The Second District's opinion below does not state that the record lacks competent substantial evidence. Instead, it states that the Second District's own reassessment of the evidence fails to support a finding of prejudice by the Second District. Despite these provisos, the Second District substituted its judgment for that of the trial court on questions of fact, the credibility of the witnesses, and the weight to be given to the evidence. Given this conclusion, the decision below is in direct and express conflict with *Grossman* and *Blanco*.

---

[2](...continued)
trial counsel to make a motion for new trial based on the confusion of about the timing of the bruise. This claim was rejected by the trial court. Had trial counsel made the motion, and relief been granted, the Second District would have been bound by the additional proviso outlined in *Jones v. State*, 709 So.2d 512, 515 (Fla. 1998):

> In reviewing the trial court's decision, we are mindful that "this Court, as an appellate body, has no authority to substitute its view of the facts for that of the trial judge when competent evidence exists to support the trial judge's conclusion." *State v. Spaziano*, 692 So.2d 174, 175, 177 (Fla.1997); *see also Blanco v. State*, 702 So.2d 1250 (Fla.1997). A trial court's order on a motion for new trial will not be reversed absent an abuse of discretion. *Spaziano*, 692 So.2d at 178.

Whether an abuse of discretion standard is a higher hurdle for the state to clear in a case such as this may be academic. However, the petitioner urges that the hurdle should be the same height, where, as here, the record so clearly shows ineffective assistance both at trial and in post-trial matters.

The trial judge found trial counsel to be deficient regarding three areas of confusion about the time the bruise was inflicted: the day the photographs were taken; the fact that the state's rebuttal witness, Dr. Wilks, was testifying from the photographs, and testifying under the mistaken belief they showed the bruise on the date of the arrest rather than two days later; and that Dr. Wilks' testimony that the bruise in the photographs was more than a day old, in conjunction with the error as to the date of the photographs, adversely affected the verdict.

The evidence appearing in the record, some of which is recounted *supra* in the Statement of the Case and Facts, clearly shows there was substantial competent evidence to support the trial judge's conclusion of ineffective assistance and prejudice. Besides the matters specifically mentioned in the trial court's order, the conclusion is supported by the entire record.

The effect of defense counsel's confusion is difficult to state clearly and succinctly. The trial judge's order sets out some of the matters. In addition, defense counsel's examination of the <u>defense</u> witness, Dr. Weiss, aggravated the prejudice. Dr. Weiss, Mr. Stephens' personal physician, testified the photographs showed a bruise less than 24 hours old, T153 (based on defense counsel's mis-taken belief that the photographs had been taken less than 24 hours after the arrest). The state, in turn, put on Dr. Wilks in rebuttal who testified that the bruise

in the photographs was more than 24 hours old. T153. The defense witness aided the state, while the state's witness corroborated the defense theory.

The state benefitted from the error created by defense counsel's blunder when it cross-examined Dr. Weiss, the defense witness, and reiterated two things – the bruise was less than 24 hours old, and the photo was more than 24 hours after the arrest T157-58. The only possible rehabilitation attempted by the defense was to elicit on redirect a concession from Dr. Weiss that bruise age is not an exact science, and the bruise could have been older. T159. The damage was so severe that defense counsel could only argue in closing that his expert, Dr. Weiss, testified that the bruise was "fresh," which refuted the defense theory. T163. The argument is less than a page. The state, in its final argument, went on for four pages about the bruise evidence, T181-84, arguing every negative piece of evidence from the defense's expert (two pages), and the state's expert (two pages).

Trial counsel's problems with the bruise evidence appear to have developed well before trial. As brought out in the record of the 3.850 hearing below, Mr. Stephens had possession of several Polaroid photographs taken at the jail infirmary mere hours after the arrest. Trial counsel had them in his possession, yet returned them along with the regular photographs taken two days later, with instructions to Mr. Stephens to blow up only the later photographs for trial R668. The reason he did not want to use the Polaroids was because the later photographs

were better because they were closer up "and depicted the bruises a lot better." R668. Obviously, if the bruise got larger and darker between the time of the injury and two days later, the Polaroids, which did not show the bruise as well, would corroborate that the injury was recent in time to the time they were taken, i.e. a few hours at most. Trial counsel may have wanted the most gruesome photos for jury sympathy, as exemplified by the state's objection to one of the photographs on that ground, T146-47. However, he apparently failed to understand how the Polaroid photographs showing the bruise in its fresh, less developed stage, so soon after the injury would buttress the claim that the bruise was caused by the altercation during the arrest.

The most compelling evidence of the prejudice was the statement of one of the jurors that the jury believed Mr. Stephens' theory of defense had been refuted by the state's medical witness, Dr. Wilks. The juror also said the jury did not believe the defense expert, Dr. Weiss, apparently because they believed Dr. Wilks contradicted him.[3] The juror made this statement after trial to the prosecutor who tried the case. The prosecutor properly informed the defense of the encounter and the content of the statement. Defense counsel then related the fact to Mr. Stephens in a letter. The letter was included in the 3.850 motion. R37-38. [A copy of the

[3] Ironically, if the date confusion is sorted out, Dr. Weiss in fact supported the police, Dr. Wilks supported the defendant.

letter is included in the appendix.] The prosecutor expressly attested to the truth of the matter asserted in the letter at the 3.850 hearing, R703, i.e. that a juror told her the jury believed Dr. Wilks' testimony refuted the defendant. This evidence was properly[4] before the trial court but it was not cited in the trial judge's order granting relief. However, this Court is free to rely upon it to affirm. *Caso v. State*, 524 So.2d 422, 424 (Fla. 1988) (duty to affirm if **any** theory or record support exists, regardless of trial court's theory or choice of facts–see quotation from *Caso infra*), *Grossman*.

---

[4] This compelling evidence of prejudice, from a juror who said the erroneous testimony caused her to disbelieve the defendant, may have been slighted because of its hearsay nature. However, there can be no discounting of the evidence under these circumstances.

> [H]earsay evidence not objected to becomes part of the evidence in the case and is usable as proof just as any other evidence, limited only by its rational, persuasive power. *Tri-State Systems, Inc. v. Department of Transportation*, 500 So.2d 212, 215 (Fla. 1st DCA 1986), *rev. denied*, 506 So.2d 1041 (Fla.1987). Further, an appellate court may consider only the objections to admissibility of evidence on the grounds specifically stated at trial, and will not consider those objections to admissibility urged for the first time on appeal. *Tabasky v. Dreyfuss*, 350 So.2d 520, 521 (Fla. 3d DCA 1977).

Tallahassee Furniture Company, Inc. v. Harrison, 583 So.2d 744, 754 (Fla. 1st DCA 1991). There was no objection to the use of the letter as evidence and the prosecutor ratified the truth of the assertion. The statement from the juror is, therefore, competent substantial evidence of the truth of the matter asserted, i.e. that the jury believed Dr. Wilks' testimony refuted the defendant's claim that the police inflicted the bruise.

The juror's report of the reason the defense theory was rejected is important on several grounds. It shows the jury considered the defense theory to merit consideration. It shows the jury rejected the defense theory because of the deficient representation of defense counsel, who failed to show the jury how the evidence, properly considered, clearly showed a bruise which had been inflicted in the time frame of the arrest. Dr. Wilks testified as the state's sole rebuttal witness after Mr. Stephens had made out his case impeaching the officers. Mr. Stephens' defense case included the testimony of the driver of the car that Mr. Stephens had complied with police, that he had not struck an officer or resisted arrest, and that he had been the victim of excessive force.[5] It included a "before and after" witness who established that the bruise had not been present during the day before the arrest, and that it was present later in the week. The photographs were intro-

[5] While the juror also told the prosecutor that the jury did not believe the driver of the car because of her felony conviction, this does not mean the driver's testimony cannot be considered in support of the order for new trial. The juror stated that the jury disbelieved all of the driver's testimony because of her conviction. If the bruise evidence had been properly presented, proving the bruise had been inflicted during the arrest, the jury would have had cause to believe the driver when she said she saw an officer with his knee on Mr. Stephen's thigh. The police testimony would also have been impeached. Under such circumstances, with impeached police testimony and corroboration of at least one element of the driver's testimony, the jury could well have believed the additional elements of the driver's testimony.

duced amidst confusion about the day they were taken. And the testimony of Dr. Weiss was egregiously botched.

The only evidence of battery on the officer was the uncorroborated testimony of the officer who claimed to have been hit. The other two officers could not back him up on whether Mr. Stephens' arm movements actually connected in a battery, and the alleged victim officer had no photographs or medical evidence to show he had suffered any bruising. The only evidence of the resisting charge was the testimony of the officers. The driver's testimony supported the conclusion that the police used excessive force, apparently in reaction to the vocal but nonphysical protestations of Mr. Stephens.

The Second District recognized in its opinion in this case that proof that the bruise was inflicted at the time of arrest was essential to the defense to impeach the credibility of the police officers. When the other two officers did not back up Officer Young that a blow actually landed on his body, the only evidence supporting the battery on a law enforcement officer was the sole testimony of Officer Young. And, in turn, the only evidence that the physical violence which followed was not police overreaction to the vocal objections by Mr. Stephens is the testimony of the officers. The credibility of the officers was the dispositive question in the case. When a juror says she did not believe Mr. Stephens was injured by the police because Dr. Wilks' testimony refuted the defense theory that the bruise was

suffered at the date and time of arrest, then confidence in the jury verdict has been undermined. This is especially so since Dr. Wilks' testimony that the bruise could not have been inflicted that night because of the yellowish shading of the bruise in the photographic evidence was based on the confusion engendered by the defense error.

The jury believed Dr. Wilks' conclusion, based on the erroneous assumption that the photographs showed the bruise the night of the arrest rather than two days later. Had defense counsel not created the confusion and labored under the mistake, he would have been able to completely turn around Dr. Wilks' testimony by leading him and the jury to the correct conclusion, that the photographs showed a bruise which was inflicted at the time of the arrest. The jail infirmary records also showed a bruise doubling in size in the six hours after arrest, yet the jury did not hear evidence or argument on this corroborating evidence. Even if the juror's statement is not considered to be competent substantial evidence, it certainly corroborates the trial judge's perception that the errors were highly prejudicial to the defendant's case, denying him a fair trial on the merits rather than confusion and mistake.

The Second District's opinion is problematical not only because of its failure to abide by the dictate of *Grossman* and *Blanco*, but by its apparent failure to abide by another principal of appellate review. An appellate court's "duty on

appeal is to **review the record in the light most favorable to the prevailing theory** and to sustain that theory if it is supported by competent substantial evidence." *Orme v. State,* 677 So.2d 258, 262 (Fla. 1996), *cert. denied*, 117 S.Ct. 742 (1997) (emphasis added). In the opinion below, the Second District's rendition of the facts completely ignored the testimony of the driver. While noting that the police "testified that they used the least amount of force necessary to arrest the defendant; no one struck, punched, or kicked Stephens at any time", *State v. Stephens*, 707 So.2d 758, 759 (Fla. 2nd DCA 1998), the court ignored the testimony of the driver that the police jerked Mr. Stephens' arm, pulled him from the car, slammed him against the car, threw him to the ground, held his face to the ground with a foot, and had a knee down on his leg. While none of this evidence shows the police "struck, punched, or kicked" Mr. Stephens, he might well have preferred the omitted actions to the jerking, slamming, throwing down, face-grinding and thigh-bruising behavior he actually did suffer.

The Second District's observation that "The third passenger also testified that he did not see the officers beat Stephens", *id*., is especially frustrating, as it shows the District Court looking to the eyewitnesses who refute the excessive force argument, while completely ignoring the eyewitness who corroborated the defense theory. The Second District's failure to account for the driver's testimony corroborating Mr. Stephens' theory of defense is a failure to take the evidence in

the record in "the light most favorable to the prevailing theory." Reliance on the third passenger's failure to observe a beating is doubly frustrating because the third passenger was in no position to observe a violent police encounter – he had been removed to a vantage point out of sight of the arrest. T122-24. However, the passenger was in the car when Mr. Stephens was alleged to have struck Officer Young, yet there was no testimony from the passenger that he saw such a blow.

The Second District's statement in its opinion below that it found trial counsel probably less than effective based on a "review of the attachments to the trial court's ruling on the 3.850 motion, together with the record of the evidentiary hearing" suggests that the Second District's review of the record below was limited solely to these documents, and failed to include review of the trial transcript which is included in the record on appeal as Volumes 7 and 8.

While an appellate court may well be limited to the attachments to an order in a summary denial of relief on a 3.850 motion, the petitioner can find no rule or case law which limits an appellate court from considering the entire appellate record on appeal from an order on a 3.850 motion after an evidentiary hearing. The transcript of the trial was part of the record before the trial court at the evidentiary hearing and was properly before the Second District. *Blanco* and *Grossman* would appear to require a reviewing court to look to the entire record for competent substantial evidence to support the trial court's ruling.

The Second District observed that "Our conclusion is only bolstered by the extremely weak nature of Stephens' questionable police brutality defense, which was uncorroborated by any other evidence." This statement embodies several misconceptions:

- that Mr. Stephens' defense theory was solely police brutality;
- that this defense was extremely weak;
- that such a defense is somehow questionable;
- and that it was uncorroborated.

None of these observations is accurate.

Police brutality was not the sole theory of defense – the excessive force issue also served to impeach the police officers, who denied using excessive force. If the officers were impeached on this point, then the state's entire case, which was based solely on the testimony of the police officers, would have fallen. The impact of the issue is emphasized by the juror's post-trial statement that the jury did not believe Mr. Stephens' claim because they thought Dr. Wilks had refuted the claim that the bruise was inflicted at the time of arrest. Thus, if Dr. Wilks' testimony had been properly handled by defense counsel, the jury would have known the bruise was inflicted within the time frame of the arrest, they would have believed Mr. Stephens' witnesses, and they would have concluded that he was innocent.

The impeachment went beyond simply arguing over the justification and degree of force used to arrest. The police officers testified that Mr. Stephens volunteered to them at the arrest scene that he suffered some injuries during the arrest, but that he had a preexisting leg injury. R66, 101. If the jury were to believe the police inflicted the bruise, then they would have to believe the police had fabricated Mr. Stephens' volunteered absolution. A verdict tainted by perjury is not entitled to protection. *State v. Glover*, 564 So.2d 191 (Fla. 5th DCA 1991).

The Second District relied on the officers' testimony when observed that Mr. Stephens "stated that an unobserved bruise on his leg and the cut on his arm were old injuries." While it would be appropriate to rely on this fact to **affirm** an order, viewing the evidence in the light most favorable to the prevailing party, the Second District, instead, viewed the evidence in the light most favorable to the state, the **losing** party.

The defense of police brutality was not extremely weak or uncorrobo-rated. The driver of the car said Mr. Stephens complied with police as best he could (the victim-officer gave conflicting orders to keep hands on the dashboard and to exit the vehicle, which would have required reaching to unbuckle the seatbelt), that she did not see him strike at the officer, that she saw police jerk Mr. Stephens from the car, slam him against the car, throw him to the ground, and that they were "on him," one officer with a foot on Mr. Stephens' face, another with

his knee on Mr. Stephens' leg. T131-37. For the Second District to find this did not amount to corroboration can only mean the Second District reweighed the credibility of this witness and found her not credible. There was further corroboration as to the timing of the bruise in the testimony of the "before and after" witness, T140-41, and medical reports which showed the bruise had doubled in size and begun to swell from the time Dr. Wilks saw it shortly after the arrest, R25 ("moderate [bruise] approximately 15x20 cm,") to six hours later in the jail infirmary, R27 ("very large (30 cm) . . . with edema [swelling]"). The reports also showed that Mr. Stephens complained on both occasions that the bruise had been caused by the police during his arrest. For the Second District to ignore these corroborating contemporaneous reports and to rely, instead, on the testimony of the police that Mr. Stephens told them the bruise was a preexisting injury is to once again view the record in the light most favorable to the non-prevailing party.

Finally, a police brutality defense is not "questionable." The theory of relief apparently would be grounded on the principle of jury pardon, a principle which is not "questionable." *Hayes v. State*, 564 So.2d 161 (Fla. 2d DCA 1990).

Despite all the corroborating evidence before the trial court, and the trial court's application of the correct rule of law, the Second District undertook a de novo review of the evidence, listed the evidence most favorable to the state in its

opinion, and found the trial court's order wanting. Quoting once again the opinion below:

> **Our assessment of the evidence** leads us to the conclusion that any alleged deficiency on the part of Stephens' counsel did not affect the fairness and reliability of the trial so as to undermine confidence in the outcome. *See Kennedy v. State*, 547 So.2d 912 (Fla. 1989). Our conclusion is only bolstered by the **extremely weak nature** of Stephens' **questionable** police brutality defense, which was **uncorroborated** by any other evidence.

Stephens, 707 So.2d at 759 [emphasis added].

The only "assessment" a reviewing court is permitted under this Court's standard in *Blanco* and *Grossman* is to review the record to determine whether competent, substantial evidence supports the trial court's factual findings.

> The record shows that the trial court properly applied the law, and its findings are supported by competent substantial evidence. Consequently, this Court is precluded from substituting its judgment for that of the trial court on this matter. *See Blanco*, 702 So.2d at 1252 (*citing Demps v. State*, 462 So.2d 1074 (Fla. 1984)).

Melendez v. State, 23 Fla. L. Weekly S350 (Fla. June 11, 1998). Instead, the Second District reweighed the evidence and reached its own de novo and independent decision that the errors of trial counsel did not result in *Strickland* prejudice. The Second District directly and expressly states that a trial court's finding of prejudice under *Strickland* may be overturned if the appellate court's own assessment of the facts leads to a contrary conclusion. This directly and

expressly conflicts with this Court's holding in *Blanco* and *Grossman* that such a reassessment is not allowed.

CONCLUSION

The Second District Court of Appeal opinion is in direct and express conflict with opinions of this Court. By assessing the evidence de novo rather than by determining whether the trial court's findings of ineffective assistance of counsel and prejudice are supported by competent substantial evidence, the lower appellate court has brought itself into conflict with the new standard of review announced by this Court in *Blanco* and *Grossman*.

The appellate court agrees with the trial court that Mr. Stephens suffered from mistakes his lawyer made at trial. The question the Second District addressed was whether the mistakes deprived Mr. Stephens of a fair trial. There should be no debate on this issue. The only debate should have been whether there was substantial competent evidence to support the trial judge's finding that Mr. Stephens was deprived of a fair trial. In this case, the courts have been especially blessed with the evidence of a juror that the crucial errors actually affected the reasoning of the jury. Yet, in the face of a limiting standard of review and profound evidence of prejudice, the Second District has thwarted the will of the circuit judge who sat in judgment at trial and, a short while later, at the 3.850 hearing, who was in the best position to know whether the crucial errors by trial counsel affected the verdict.

Mr. Stephens respectfully urges that jurisdiction should be exercised in this case to correct the Second District's error, and to prevent a fundamental injustice.

Mr. Stephens faces a substantial number of years of incarceration in this case. To impose this burden after the Second District incorrectly thwarted the decision of the trial judge would amount to a fundamental injustice and deprivation of due process. The decision below should be quashed and the case remanded to the district court to affirm the trial court order.

Respectfully submitted,

_____

DAVID R. GEMMER
PO Box 390
St. Petersburg, Florida 33731
(813)-323-3511
Florida Bar # 370541

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this date, October 12, 1998, to:

Robert A. Butterworth
Attorney General
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

_____

DAVID R. GEMMER
Counsel for Petitioner

IN THE SUPREME COURT OF FLORIDA

JAMES E. STEPHENS,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

Case No. 92,639

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

APPENDIX
TO
PETITIONER'S INITIAL BRIEF ON THE MERITS
CONTAINING:

1. Copy of opinion below, *State v. Stephens*, 707 So.2d 758, 759 (Fla. 2nd DCA 1998)**,** and order on motion for rehearing, (Fla. 2d DCA Feb. 17, 1998)**.**

2. Copy of Motion for Rehearing filed in *State v. Stephens*, 707 So.2d 758, 759 (Fla. 2nd DCA 1998).

DAVID R. GEMMER
PO Box 390
St. Petersburg, Florida 33731
(813)-323-3511
Florida Bar # 370541

COUNSEL FOR PETITIONER

David R. Gemmer
Attorney at Law

2701 Fifth Avenue North
St. Petersburg, Florida 33713

Office: 813-323-3511

Address all correspondence to:
Post Office Box 390
St. Petersburg, Florida 33731
Fax: 813-323-3255

October 12, 1998

The Honorable Sid J. White
Clerk of the Court
Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 32399-1925

RE: Stephens v. State, No. 92,639

Dear Mr. White,

Enclosed please find the original and seven copies of the Petitioner's Initial Brief for filing in the above-referenced case.

Thank you.

Sincerely,

David R. Gemmer
Florida Bar Number 370541

The Honorable Sid J. White
Clerk of the Court
Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 32399-1925

Robert A. Butterworth
Attorney General
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366

Kimberly D. Nolen
Assistant State Attorney
PO Box 5028
Clearwater, Florida 34618