IN THE SUPREME COURT OF FLORIDA

JAMES E. STEPHENS, Petitioner, v. **STATE OF FLORIDA**, Respondent.	Case No. **92,639**

ON APPEAL FROM THE COURT OF APPEAL
IN AND FOR THE SECOND DISTRICT
STATE OF FLORIDA

MERITS BRIEF OF RESPONDENT

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STATEMENT REGARDING TYPE

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STATEMENT OF THE CASE

James E. Stephens was charged by information, filed March 25, 1996, with one count of battery of a law enforcement officer, one count resisting an officer with violence, one count possession of cocaine, and one count unauthorized possession of a driver's license or identification card. (V 1 R 3-5) The defense moved to sever counts one and two from counts three and four on June 14, 1996. The motion to sever was granted by order of the trial court on July 10, 1996. Following a jury trial held on October 2, 1996, Stephens was found guilty as charged on count one and guilty of the lesser included offense of resisting arrest without violence on count two. (V 1 R 6-16)

Stephens was sentenced to 41 months incarceration on count one and two days jail time on the misdemeanor to run concurrently with the sentence on count one. On that same date, Stephens changed his plea to guilty on counts three and four and was sentenced to 41 months prison. The prison terms were ordered to run concurrently.

On October 11, 1996, trial counsel, James Martin, moved to withdraw and the motion was granted. Subsequently, attorneys Joseph M. Diaz and N. Christian Brown appeared on Stephens' behalf. Stephens did not appeal his convictions. On October 31, 1996,

Stephens filed a motion for new trial and/or motion to vacate judgment and sentence and motion to withdraw plea. (V R 17-51) On December 8, 1996, the state filed a motion to strike contending that the motion for new trial was untimely. (V R 59-61)

On December 16, 1996, the trial court denied the state's motion to strike and held an evidentiary hearing.[1] Following the two-day hearing, the trial court ordered both parties to submit a written memorandum in support of their positions. (V 1 R 64-65) Stephens filed his memorandum on December 30, 1996 (V 1 R 66-76), and on January 21, 1997, the state filed its response. (V 2 R 93-289)

On January 27, 1997, the trial court issued an order granting Stephens' motion to vacate judgment and sentence as to counts one and two. (V 3 R 292-527) On January 29, 1997, the state filed a motion for clarification contending that relief should not be granted as to the battery of a law enforcement officer charge. The state's motion for clarification was denied by order dated February 7, 1997. (V 4 R 528-529, 533) The state filed a timely notice of appeal on February 7, 1997. (V 4 R 534)

Prior to the state's filing of the notice of appeal, on February 3, 1997, Stephens filed a motion to reconsider in which he

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[1]A written order denying the state's motion to strike followed on January 24, 1997. Therein, the trial court held that the motion for new trial was not heard; rather, the court heard Stephen's alternative motion to vacate judgment and sentence, which was timely. (R 290)

sought to withdraw his guilty plea to counts three and four. (V 4 R 530-532) By order of February 10, 1997, the trial court denied the unsworn motion without prejudice. (V 4 R 536-537) On February 19, 1997, Stephens filed a sworn motion for hearing, again seeking to withdraw his plea to counts three and four. (V 4 R 538-540) By order dated February 25, 1997, the trial court determined it had jurisdiction during the pendency of the appeal and granted Stephens' motion for rehearing. (V 4 R 541-543)

The district court reversed the order granting relief and remanded for reinstatement of the convictions, holding, inter alia, that any alleged deficiency on the part of Stephens' trial counsel did not affect the fairness and reliability of the trial so as to undermine confidence in the outcome. State v. Stephens, 707 So. 2d 758, 759 (Fla. 2d DCA 1998). Stephens filed a motion for rehearing which was denied on February 17, 1998.

Stephens filed a notice to invoke discretionary jurisdiction dated March 13, 1998. Jurisdictional briefs were filed by the parties. This Court accepted jurisdiction and ordered briefing on the merits by order dated September 16, 1998.

STATEMENT OF THE FACTS

On March 6, 1996, at approximately 2:20 a.m., Tarpon Springs Police Officer Clyde Thornton was on routine patrol and observed Lisa Stewart driving a car. (V 7 T 3-4) Officer Thornton was aware that Stewart's license was suspended at that time and called dispatch to confirm this fact. Upon confirmation, Officer Thornton pulled the automobile over. (V 7 T 4-5) The car belonged to Petitioner, James Stephens, who at that time was a passenger in the front seat of the vehicle. (V 7 T 48, 120) A third person, Jerry Insco, was in the back seat passenger side of the vehicle. (V 7 T 48)

Officer Thornton approached Stewart and requested her license, registration and insurance. (V 7 T 5) Stewart responded that she did not have a license. At approximately this time, Officers Young and Trill arrived on the scene as standard operating procedure requiring back up at night when stopping a vehicle with several people. (V 7 T 5, 47-49, 94) Officer Trill approached the passenger side of the vehicle where Stephens was seated, and Officer Young was a bit behind him. At that time, Officer Trill observed a broken pool cue or a stick in the back seat of the car which could possibly be used as a weapon. (V 7 T 6, 49-50)

Officers Trill and Young instructed the passengers to place their hands on the dashboard or the back of the front seat. (V 7 T 6, 51) When neither passenger complied, Officer Trill wrapped on

the window with his open left hand and advised the occupants to open the door. (V 7 T 51-52) Passenger Jerry Insco confirmed that one of the officers tapped on the window and said to put up their hands, and he complied. (V 7 T 122)

Stephens opened the door, and as Officer Trill was explaining to Stephens to let him see his hands, Stephens asked, "What the fuck are you hitting my car for?" (V 7 T 52) Stephens began to flail his arms, and when Trill advised him to step out of the vehicle, Stephens responded, "Fuck you asshole." (V 7 T 52) Trill had requested the passengers exit the vehicle strictly for purposes of officer safety. (V 7 T 53)

As Officer Young reached over with his left arm to unbuckle Stephens' seat belt in order to get him out of the car, Stephens punched Young in the arm with a closed fist. (V 7 T 7, 9, 21, 97) No one had touched Stephens prior to that point. (V 7 T 42) This precipitated Stephens' arrest for battery of a law enforcement officer.

Stephens, very drunk and belligerent, told the officers they were not going to arrest him. He struggled and violently resisted being arrested at that time. (V 7 T 9-10) After a five minute struggle, the three officers were eventually able to handcuff him. (V 7 T 10) Despite being handcuffed, Stephens kept trying to get up and come toward the officers, while continuing to yell obscenities at them. (V 7 T 11) Eventually, Stephens had to be restrained

by hobble restraints, used to tie his legs and arms behind him so that he could not hurt himself or the officers. (V 7 T 11-12)

At the end of the arrest, Stephens had a scrape on his nose and one on his elbow. (V 7 T 12, 66) These were the only injuries observed by Officer Thornton and the only injuries of which Stephens complained at the time. (V 7 T 13) While Trill was speaking to Sergeant Kochen, who had arrived at the scene, about Stephens injuries, Stephens advised that the cut on his arm and an unobserved bruise on his leg were old injuries. (V 7 T 66-67, 101) The officers took him to Helen Ellis Memorial Hospital as standard procedure before taking him to jail. (V 7 T 13) Later at the station, Officer Thornton prepared his report, which indicated Stephens sustained injuries to his nose, his elbow, and thigh during the struggle with the officers. (V 7 T 37-38)

Officer Thornton testified that no officer punched, struck, or kicked Stephens at any time, and the least amount of force necessary to arrest was used. (V 7 T 14) Officer Trill confirmed that he never struck or beat Stephens with a night stick and that he had never kicked or punched him, or anything along those lines. (V 7 T 68) Trill further testified that he never observed any other officers punch, kick or strike Stephens in any inappropriate fashion. (V 7 T 68)

Jerry Insco, the back seat passenger in Stephens' car, testified that he could not see what was transpiring in the front

seat because he had up his hands. (V 7 T 122) After Stephens got out of the car, Insco heard Stephens "hollering and cussing" at the officers. (V 7 T 122) When Insco got out of the car, he observed that Stephens was handcuffed on the ground. (V 7 T 122-123) Insco testified that he did not see the officers beat, hit, or punch Stephens. (V 7 T 123) On cross-examination, Insco testified that he did not see any fighting and did not see Stephens strike or resist an officer with violence. (V 7 T 124)

The defense's case included the testimony of the driver, Lisa Stewart, who confirmed that Officer Thornton pulled her over because he knew she did not have a driver's license. (V 7 T 130) Stewart testified that Thornton asked for her license, registration, and insurance, and Stephens reached in the glove box for those items. (V 7 T 130) At this point, Stephens was not belligerent to the officers. (V 7 T 130)

Stewart testified that Officer Trill came to the passenger side and hit the car with his hand, ordering Stephens to put his hands up. According to Stewart, Stephens put his hands on the dash and stated, "what the fuck is going on." (V 7 T 131-132) Stewart testified that Stephens could not get his seat belt unbuckled and keep his hands up at the same time, he tried to undo the belt, and the officer told him to put his hands on the dash. (V 7 T 131) Stewart observed Stephens get out of the car. According to Stewart, the officers slammed Stephens against the back of the car

and handcuffed him. (V 7 T 131-132) When asked if she saw the officers beating on him, she stated "I seen them on him." (V 7 T 132) Stephens said she saw one officer with his foot on the side of Stephens' face and then, one had his knee on Stephens' leg. (V 7 T 132) After the officers handcuffed him and he was on the ground, Stephens pulled away only one time, according to Stewart. (V 7 T 133)

Stewart had three prior felony convictions had been arrested previously by Officers Young and Trill.[2] (V 7 T 133-134) Stewart initially indicated that Stephens was not too drunk to drive but would have gone to jail if stopped. However, upon being confronted with her deposition, Stewart agreed that she was driving Stephens home on the night in question because he was too drunk to drive. (V 7 T 135-136) The only injury to Stephens observed by Stewart was a scrape on his nose. She did not see any other injuries on Stephens, who was wearing pants. (V 7 T 137-138)

Defense counsel also called Robert King, a co-worker of Stephens. King testified that he saw Stephens on the Monday preceding the incident and saw no bruises on Stephens' right leg. (V 7 T 140). On Friday, following the incident, King observed, at work, that Stephens was limping and had a big scratch on his nose.

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[2]On cross-examination, Stewart denied that Trill had previously arrested her. (Vol 7 T 134) Testifying on rebuttal, Officer Trill confirmed he had arrested Stewart. (V 7 T 166) On sir rebuttal, Stewart acknowledged Trill had previously arrested her. (V 7 T 190)

(V 7 T 141) Stephens showed King the bruise on his thigh at the time. (V 7 T 141) King did not see Stephens on March 5, the day preceding arrest, and did not know how Stephens received any of his injuries, other than what Stephens told him. (V 7 T 142)

The defense also called William Robb, another friend of Stephens, who testified he picked Stephens up from jail and took photos of Stephens' injuries. (V 7 T 144) Robb initially indicated that these photographs were taken on March 6 "...right after he was released from jail before he went to see Dr. Weiss." (V 7 T 144-145) Defense counsel moved to introduce the four photographs and a bench conference ensued.

The state objected on the basis that Robb testified in his deposition that the photographs were taken on March 8 and, therefore, did not actually depict what the injuries looked like at the time of the arrest two days earlier. (V 7 T 145-146) The state also objected to the photographs as unduly prejudicial, and the court noted that the photographs appeared to be repetitive. Based on Robb's testimony that he took the photos on March 6 and defense counsel's agreement to remove one photograph depicting Stephens' leg, the state's objection was overruled. Defense photographs depicted Stephens' arm and leg were admitted. (V 7 T 145-147)

On cross-examination, the state established that Robb actually took the photos the day the Stephens bonded out of jail. While he was not exactly sure whether it was two or three days after

Stephen's arrest, Robb testified that Stephens did not bond out immediately and that the pictures were taken several days after the incident. (V 7 T 148-149) Although he did not know how Stephens' injuries actually occurred, Robb did not believe the bruises existed prior to the incident. In his opinion, Stephens, whom he knew a long time and regarded as a brother, would have advised if he had been hurt before. (V 7 T 149-150) Robb had six or seven prior felony convictions. (V 7 T 150)

The final witness in the defense's case in chief was Dr. L. Michael Weiss, Stephens' personal physician. (V 7 T 151-152) Dr. Weiss, a board certified internist, examined Stephens on March 8 and testified that the photos taken by Robb accurately reflected the thigh bruise as it looked on March 8. (V 7 T 152-153) Dr. Weiss said Stephens explained that he had received these injuries in an altercation with the police the day before, and they had either hit or rough-housed to cause the bruising. (V 7 T 153, 156) Dr. Weiss later testified he did not know specifically the date Stephens said the incident occurred.[3] (T 156)

Dr. Weiss testified the thigh bruise was probably a fresh bruise and probably less than 24 hours old from the date of the examination. (V 7 T 153-154, 156-158) His opinion was based on the

[3]On cross-examination Dr. Weiss testified that he did not write down in his notes the day Stephens said he incurred the injury. All he knew was that Stephens came in complaining of leg pain and Dr. Weiss examined the injury. (V 7 T 156) He could not locate the log book which would reflect the time of day of the examination, and his notes did not reflect such. (V 7 T 158)

amount of swelling as well as the dark purple color of the bruise. (V 7 T 153-154) While Dr. Weiss noted some yellow areas which reflected blood seepage, the deep dark purple color indicated an acute, or less old, injury. He opined that if the bruise was an older one, the swelling would have gone down and the bruise would not have been deep purple.[4] (V 7 T 157-158)

On redirect examination, when asked if the bruise could be older, Dr. Weiss indicated that in the field of medicine, there are no absolutes and one just goes by common sense. Dr. Weiss did not believe there could be medical testimony as to the exact age of a bruise by looking at it. (V 7 T 159)

On rebuttal, the state called Dr. Abraham Wilks who, qualified as an expert in the area of bruises, was the doctor who treated Stephens in the emergency room on March 6, 1996, at 3:10 a.m., immediately after the arrest. (V 7 T 175) The chart reflected that Dr. Wilks initiated the examination at 3:10 a.m. (V 7 T 176) Dr. Wilks testified that upon examination, he noticed Stephens he had some abrasions on his face and elbow and a very large ecchymotic bruised area on his thigh.[5] (V 7 T 177)

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[4]Though Stephens had some underlying liver problems, Stephens shouldn't have bruised easier than anyone else, as his blood platelet count had never been abnormal according to Dr. Weiss. (V 7 T 154)

[5]Appended to Stephens' rule 3.850 motion is Dr. Wilks' written report. (V 1 R 25) In Dr. Weiss' report, he documented, inter alia, the following:

EXTREMITIES: Moderate right hip ecchymosis was present;

Dr. Wilks, shown the defense photographs, indicated that Stephens' injuries were pretty similar to those depicted in the photographs. (V 7 T 178) Testifying from the photos taken by Robb, Dr. Wilks opined that the bruise appeared "at least a day plus old" based on yellowish area and diffuse discoloration. (V 7 T 178) Dr. Wilks also testified that if a patient had been brought into the emergency room an hour after injury to the leg, he would not have seen bruises of that nature. (V 7 T 179) He believed the injury to Stephens' nose and scrape on his elbow were probably fresh, having no crust. (V 7 T 182) Dr. Wilks testified that injuries depicted in the defense photographs were the injuries Stephens had when he was brought into the emergency room, including the thigh bruise. (V 7 T 178, 183)

Dr. Weiss did not make note at the time that there was swelling to the bruise.[6] (V 7 T 184) Observation of swelling a

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approximately 15 by 20 cm without laceration or skin abrasion noted. Full active flexion of right hip. No pain to percussion of greater trochanter. Mild superficial abrasion 3 by 3 cm without active hemorrhage noted. (V 1 R 25)

The report lists the patient's name as John Hill. At the time of Stephens' plea to counts three and four of the information, the prosecutor indicated Stephens had possessed a fictitious driver's license with the name Thomas Hill. (V 1 R 25; V 2 R 24; V 6 T 211)

[6]Defense counsel queried Dr. Weiss thus:

> Q. Okay. Was it swelling up like that?
> A. Yes.
> Q. Did you put that in your report?
> A. I don't know. I put down it was black and blue.
> Q. All right. You didn't put swelling, did you?

date later would be consistent with a fresh bruise. (V 7 T 184) He could not testify whether or not the leg injury was consistent with being caused by a smooth hard object, like a flashlight, although it "could be" consistent with such. (V 7 T 184) Weiss said that light bluish-like purple coloring but not yellowish coloring, might appear several hours after being struck forcefully by a flashlight several times. (V 7 T 185)

The jury found Stephens guilty as charged of battery of a law enforcement officer and as to count two, the lesser offense of resisting arrest without violence. Following the verdict, Stephens pled to counts two and three (possession of cocaine and unauthorized possession of a driver's license). An aggregate prison term of 41 months was imposed. (V 1 R 6-16) Stephens did not appeal.

Postconviction proceedings

> A. I didn't put what?
> Q. You didn't put that it was swollen up?
> A. No ecchymosis which means bruising, yes.

It would appear that in transcription, a comma was omitted after the word "No" in the last answer quoted above; Dr. Weiss's report contains a notation of "Moderate right hip ecchymosis," but not swelling. (V 1; R 25 and V 7; T 184) The apparent punctuation error is repeated as to Dr. Wilks' ensuing testimony regarding moderate right hip ecchymosis thus:

> Q. You didn't note any bruising in your report, did you?
> A. Ecchymosis means bruise, sir, moderate right hip ecchymosis.
> Q. I am sorry, swelling?
> A. No ecchymosis. (Vol 7; T 185)

On October 31, 1996, Stephens filed a rule 3.850 motion alleging, inter alia, that trial counsel was ineffective for failing to investigate and call additional witnesses to prove that Stephens did not have an injury prior to his arrest and further, that Stephens could only have sustained his injury during the arrest. (V 1 R 17-51) An evidentiary hearing was held on December 16-17, 1997.[7]

At the hearing, Stephens' collateral counsel pointed to portions of the trial transcripts containing William Robb's testimony regarding the date photos of Stephens' injuries were taken. (V 3 R 98-312-314) Collateral counsel also highlighted the trial testimony of emergency room physician Dr. Abraham Wilks, and argued that Wilks was testifying from the defense photographs rather than his emergency room report. (V 3 R 315-319)

Investigator Troy Hitchcox was called by collateral counsel at the hearing. Hitchcox was employed by trial counsel, James Martin, to investigate this case. (V 3 R 326) According to Hitchcox, he interviewed Dr. Wilks, who initially had no independent recollection of Stephens and had to look at his chart. (V 3 R 327) After reviewing Stephens' chart, Dr. Wilks indicated that Stephens had a facial injury, a contusion, and a hip injury,

[7]Additional issues, with corresponding testimony or evidence, were raised at the evidentiary hearing and denied by the trial court. For purposes of clarity and brevity, this testimony has been excluded from the Statement of Facts, but is included in the appellate record.

and the chart reflected Stephens said he received these injuries from the police. (V 3 R 328) Hitchcox did not show photos to Dr. Wilks to refresh his recollection. (V 3 R 331)

The state called Stephens' trial counsel, James Martin, who confirmed that Robb testified at trial that he took the photos of Stephens' injuries after he was released from jail. (V 3 R 420) Martin believed witness Robb, not Martin, made the mistake at to the date the photos were taken. (V 3 R 421-422) Martin did not dispute the trial record as to whether he tried to rehabilitate Robb. (V 3 R 422)

According to Martin, Dr. Wilks' trial testimony indicated that when Wilks saw Stephens, his bruises were old. Further, Dr. Wilks' testimony was not simply from the photographs. (V 3 R 423-424) Martin explained that he cross-examined the police officers about Stephens' bruised leg, and they said they did not do it. (V 3 R 431) Additionally, Martin questioned Dr. Wilks about his emergency room report which indicated the Defendant received his injuries as a result of the incident with police one hour prior to being brought to the hospital. (V 3 R 431-432)

By order dated January 24, 1997, the trial court held that trial counsel was ineffective in presenting Dr. Wilks' medical testimony to the jury, as follows:

> The Defendant also claims that Mr. Martin was ineffective for failing to accurately inform the jury of the correct date that the photographs in evidence were taken. Mr. Martin failed to correct the witness, Mr.

Robb, who testified that the photographs were taken on March 6, rather than on March 8. (State's Exhibit 4, pp. 144-145). The State argues that the Assistant State Attorney, Ms. Lynn Flagler corrected the date on cross-examination of Mr. Robb. (State's Exhibit 4, pp. 148-149). However, the State's argument that this cured Mr. Martin's deficiency is not persuasive.

Dr. Wilks testified to the age of the Defendant's bruise as being at least over one (1) day old, by looking at the photographs of the bruise which were taken on March 8, and not from his notes or his independent recollection of his physical examination of the Defendant. This is evident when Dr. Wilks testified that the photographs were similar to the injury that the Defendant had when he examined him, and then went further to point out to the jury that the yellow discoloration seen in the photographs supported his opinion that the bruise was at least one (1) day old. (Exhibit B, pp. 177-179) Since these photographs were taken two (2) days after the incident, then at the time Dr. Wilks examined the Defendant, the bruise was conceivable [sic] fresh and not at least one (1) day old. Mr. Martin was ineffective for failing to recognize that Dr. Wilks was testifying from the photographs and failing to communicate this crucial error to the jury.

This error was further compounded when the Assistant State Attorney confirmed with Dr. Wilks that the yellow discoloration that he pointed out to the jury on the photographs would not have been present if the bruise was recent. (Exhibit B, p. 189, lns. 5-8). This deficiency on Mr. Martin's part conceivable prejudiced the Defendant by allowing Dr. Wilks' testimony to adversely affect the outcome of the verdict for the Defendant.

This Court adopts the State's Response in part, refuting the Defendant's claims concerning Mr. Martin's failure to interview and present witnesses, his failure to procure and secure the photographs taken at the jail, his failure to protect the Defendant during the plea colloquy on counts three (3) and four (4) of the Information and during post-trial proceedings, and incorporates and attaches it and its exhibits to this Order.

> Further, this 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 prejudice the Defendant to the extent that the Defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2064, 80 L.Ed. 2d 674 (1984).

(V 3 R 292-297)

Collateral appeal

The state appealed, raising the following issues:

> **ISSUE I** Whether counsel's performance rose to the level of ineffective assistance justifying post-conviction relief with respect to the testimony related to the date of photographs taken of the Defendant's injuries;
>
> **ISSUE II** Whether the motion for new trial should be limited to the charge of resisting arrest without violence.

The Second District Court reversed, holding as follows:

> 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. 688 (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. 2d DCA 1998).

SUMMARY OF THE ARGUMENT

The trial court did not apply the correct rule of law. Speculation improperly formed the basis for the granting of relief, and neither Blanco nor Grossman precluded the district court's de novo review of the trial court's legal conclusions. No factual findings were disturbed by the district court's proper resolution of Stephens' ineffective assistance claim on the prejudice prong.

Trial counsel's performance was not constitutionally deficient. Any confusion as to the date photographs of Stephens' thigh bruise were taken was sufficiently addressed by trial counsel's eliciting testimony in support of the defense's claim that the thigh bruise was a fresh injury resulting from the incident. Alternatively, any alleged deficiency did not prejudice Stephens, and the trial court improperly allowed conjecture to influence the determination as to prejudice.

When viewed in the nature of impeachment evidence, the bruise evidence did not contradict officer testimony that Stephens battered Officer Young in the car, the basis for count one of the information. Nor did such refute police testimony showing that Stephens resisted the ensuing arrest, as the jury determined in returning a verdict on the lesser charge of resisting arrest without violence as to count two.

When viewed as evidence in support of self-defense, the impact of such is speculative at best. There was no testimony that the

officers struck Stephens in the car, and bruise evidence would not have shown that Stephens was justified in initially punching the officer's arm. Further, there was a dearth of eye witness testimony as to infliction of any blows by police upon removal of Stephens from the car. Assuming, arguendo, the bruise evidence was shown to have been caused by the police, such did not establish that the force used was excessive under the circumstances presented by Stephens' resistant efforts.

The district court properly regarded the brutality defense as weak, questionable, and uncorroborated, without disturbing any factual or credibility determination below. Neither driver Stewart nor occupant Insco testified that the police had struck, punched, or kicked Stephens, and the latter chose not testify at trial. Further, Stewart was susceptible to impeachment with her prior record, and her bias as a friend of Stephens and her status as a former arrestee of two of the testifying officers. In light of the lack of evidence of a beating and the inconclusive testimony as to the age or causation of the bruise, confidence in the outcome of the trial is not undermined by the asserted deficiency in counsel's presentation of the bruise evidence.

ARGUMENT

ISSUE I: THE DISTRICT COURT DID NOT ERR IN REVERSING THE ORDER GRANTING RELIEF WHERE THE TRIAL COURT DID NOT PROPERLY APPLY THE LAW AND THE DISTRICT COURT, IN REVERSING, DID NOT DISTURB FACTUAL FINDINGS BASED ON COMPETENT SUBSTANTIAL EVIDENCE. (restated)

The trial court granted relief on Stephens' claim that trial counsel was ineffective in presenting Dr. Wilks' medical testimony to the jury. In doing so, the trial court held that deficiency of counsel "conceivably" prejudiced Stephens "by allowing Dr. Wilks' testimony to adversely affect the outcome of the verdict." (V 3 R 296) Stephens argues that the district court was required to affirm provided the correct rule of law was applied and competent substantial evidence supported the "finding." (Initial Merits Brief at p. 10)

The state contends that the "competent substantial evidence" standard applies to factual findings, and sub judice, the district court did not disturb such in reversing and reinstating the convictions. The trial court misapplied the law in granting relief by allowing speculation and conjecture to result in a conclusion of prejudice. The district court properly reversed upon conducting plenary review of the trial court's application of the law to the settled facts.

Ineffective Assistance Standard

The correct rule of law which governs Stephens' ineffective

assistance claim is well settled. The test for whether counsel has provided the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments was articulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under Strickland, a person asserting a claim of ineffective assistance must satisfy a two-prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. 104 S. Ct. at 2064.

In order to satisfy his burden of demonstrating that his trial counsel was ineffective, Stephens must demonstrate that his "representation fell below an objective standard of reasonableness." Id., 104 S. Ct. at 2064. As this Court stated in Robinson v. State, 707 So.2d 688, 694 (Fla. 1998):

> The Supreme Court has afforded attorneys wide latitude in conducting the defense of a case and, accordingly, has placed a significant burden on those petitioners alleging ineffective assistance of counsel. To that end, the Court observed that:
>
> > A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in

> making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id., citing Strickland, 104 S.Ct. at 2065.

When applying Strickland, the court is to dispose of the ineffectiveness claim on either of its two grounds. Id., 104 S. Ct. at 2069. Where there is no prejudice, no relief is due. Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). It is not enough for Stephens to show that the errors had some conceivable effect on the outcome of the proceeding, for virtually every act or omission of counsel would meet that test. Strickland, 104 S.Ct. at 2067. This prong requires Stephens to show that there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Breedlove v. State, 692 So.2d 874, 877 (Fla. 1997), citing Strickland, 104 S.Ct. at 2055-56. "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." Lockhart v. Fretwell, 113 S. Ct. at 842-43.

Standards of Review

The state submits the following principles govern review of

factual determinations made by the trial court. The appellate 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." Demps v. State, 462 So.2d 1074, 1075 (Fla. 1984), citing Goldfarb v. Robertson, 82 So.2d 504, 506 (Fla. 1955). When the evidence adequately supports two conflicting theories, the appellate court's duty is to review the record in the light most favorable to the prevailing theory. Steinhorst v. State, 695 So.2d 1245, 1248 (Fla. 1997). The appellate court will not alter a trial court's factual findings if the record contains competent substantial evidence to support those findings. Id., citing Johnson v. State, 660 So. 2d 637, 642 (Fla. 1995), cert. denied, 116 S. Ct. 1550 (1996)).

In contrast to factual findings, questions of law are reviewed de novo, and therefore, the trial court's conclusions of law are not entitled to the same deference. See, e.g., Porter v. State, 23 Fla. L. Weekly S548, 550 (Fla. October 15, 1998)(on review of determination that trial judge was an impartial sentencer, deference was accorded to the present trial judge's resolution of issues of fact; however, the issue as to whether, based upon the facts presented at the evidentiary hearing, the sentencing judge met the required standard of impartiality was an issue of law subject to review as a matter of law); Blanco v. State, 706 So. 2d

7, 10 (Fla. 1997)(whether particular mitigating circumstance is truly mitigating in nature at death sentencing is question of law and subject to de novo review; whether a mitigating circumstance has been established by the evidence is question of fact and subject to the competent substantial evidence standard); Files v. State, 613 So. 2d 1301, 1304 (Fla. 1992)(review of whether the trial court has applied the correct legal rule is de novo, because application of an incorrect rule is erroneous as a matter of law).

In accordance with these principles, the state asserts that review of a determination of ineffectiveness of counsel is not limited to whether there is competent substantial evidence to support factual determinations. In Strickland, the Supreme Court stated:

> Ineffectiveness is not a question of "basic, primary, or historical fac[t]," Townsend v. Sain, 372 U.S. 293, 309, n. 6, 83 S.Ct. 745, 755, n. 6, 9 L.Ed.2d 770 (1963). Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. See Cuyler v. Sullivan, 446 U.S., at 342, 100 S.Ct., at 1714.

Strickland, 104 S.Ct. at 2070. The Supreme Court stated that "[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." Id.

Following Strickland's lead, the Eleventh Circuit Court of Appeal, along with other federal courts, has held that whether a criminal defendant has received the effective assistance of counsel

is a mixed question of law and fact and is subject to de novo review. See, e.g., Collier v. Turpin, 12 Fla. L. Weekly Fed. C98, 102, (llth Cir. 1998) citing, Bolender v. Singletary, 16 F.3d 1547, 1558 n.12 (11th Cir. 1994).[8] See also, Horton v. Zant, 941 F.2d 1449, 1462 (llth Cir. 1991)(the question of whether a decision by counsel was a tactical one is a question of fact; whether the tactic was reasonable, however, is a question of law and is reviewed de novo).

The state submits that, in Florida, de novo review of the trial court's application of the law to the evidence, while according deferential review of factual findings, is the proper standard of review of a determination of ineffectiveness of trial counsel. Support for this conclusion lies in this Court's decision in Rose v. State, 675 So.2d 567, 573 (Fla. 1996), wherein this Court quoted the Eleventh Circuit's statement in Bolender that "an ineffective assistance of counsel claim is a mixed question of law and fact subject to plenary review under the test set forth in Strickland."[9]

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[8]See also, e.g., Amos v. Scott, 61 F.3d 333, 348 (5th Cir. 1995)(a state habeas court's findings of fact made in the course of deciding such a claim are entitled to §2254(d) presumption of correctness, but state habeas court's ultimate conclusion that counsel did not render ineffective assistance, therefore, is not a factual finding to which the presumption of correctness applies, but is a legal question that must be reviewed de novo).

[9]See also, e.g., Hildwin v. Dugger, 654 So.2d 107, 110 (Fla. 1995),(trial court concluded that it could not find as a matter of law, there was a reasonable probability that the outcome of the case would have been different; the Court held that in view of the

In Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997), this Court, quoting Demps v. State, 462 So. at 1075, stated:

> In reviewing a trial court's application of the above 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.

The state does not dispute that in Blanco, this Court followed the well-settled principle in this state's jurisprudence that the factual findings will not be disturbed and the court will review such for competent substantial evidence. However, the state argues that contrary to Stephens' contention, this Court's above decision in Blanco did not narrow the scope of review of conclusions of law made by the trial court after an evidentiary hearing.

In Blanco, this Court set forth findings of the trial court, including credibility determinations as well as legal conclusions as to the admissibility of evidence and improbability of an acquittal on retrial with allegedly newly discovered evidence. After setting forth the trial court's rulings, this Court held as follows:

> The record shows that the trial court properly applied

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substantial mitigating evidence presented at the 3.850 hearing, including testimony of two mental health experts, counsel's errors deprived Hildwin of a reliable penalty phase).

> the above law, and its findings are supported by competent substantial evidence. Consequently, we are precluded from substituting our judgment for that of the trial court on this matter. See Demps v. State, 462 So. 2d 1074 (Fla. 1984).

Id. at 1252.

This decision reflects that, on review of order denying Blanco's newly discovered evidence claim, the Court applied the competent substantial evidence standard to the facts determined below. The state submits that this Court reviewed the conclusions of law without particular deference to determine whether the applicable law was properly applied to the determined facts.

In Grossman v. Dugger, 708 So. 2d 249 (Fla. 1997), this Court addressed, inter alia, Grossman's claim that trial counsel provided ineffective assistance during the penalty phase of the trial. This Court quoted the Blanco and Demps decisions regarding review for support of the trial court's findings by competent substantial evidence, as well as the principle that the Court will not substitute its judgment on questions of fact, credibility, and weight to be given the evidence Grossman, 708 So. 2d at 250. The Court then set forth the trial court's conclusions of lack of deficiency and prejudice, as well as its factual determinations, including such matters as availability of affidavits of possible witnesses available at the time of trial and counsel's reasons for not using witnesses.

This Court concluded as follows as to the ineffective

assistance claim:

> The trial court applied the right rule of law governing ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and competent substantial evidence supports its finding. We find no error.

Id. at 251. The state submits that the Grossman decision did not restrict or narrow review of legal conclusions of lack of deficiency and lack of prejudice. The decision reflects that this Court independently determined that the law was properly applied. And, in doing so, the Court did not substitute the competent substantial evidence standard for de novo review of the conclusions of law.

In this case, Stephens suggests the standard of review is equivalent to "an abuse of discretion," relying on Jones v. State, 709 So. 2d 512, 515 (Fla. 1998). (Initial Merits Brief, p. 13 n.2) On review of a determination that newly discovered evidence would not probably produce an acquittal on retrial, this Court in Jones stated that a trial court's order on a motion for new trial will not be reversed absent an abuse of discretion. Id. This case, however, involves a determination of ineffective assistance of counsel, and the correct rule must be applied. The state submits that the appellate court is not required to accord particular deference to a legal conclusion of constitutional deficiency or prejudice under the Strickland test for evaluating the effectiveness of counsel.

Further, and alternatively, the state submits that assuming, arguendo, a deferential review of the trial court's legal conclusions is required, such cannot insulate a trial court's incorrect application of the law governing ineffective assistance of counsel to the evidence.

Deficiency prong

With these principles in mind, the state first examines counsel's presentation of the photographic evidence before the jury under the deficiency prong. At trial, Stephens' attorney argued to the jury that there was no fight between Stephens and police. Rather, there was an alleged beating by police, and Stephens was the only one battered. (V 6 T 131, 136, 138, 166) While trial counsel did not argue that Stephens used force to defend himself, counsel did request an instruction on justifiable use of force, and the state did not object to the requested instruction. (V 6 T 138) Accordingly, the district court did not err in stating that the primary thrust of Stephens' defense was that he was the victim of police brutality and that which the police denominated resisting arrest was in actuality self-defense. State v. Stephens, 707 So. 2d 758, 759 (Fla. 2d DCA 1998).

In seeking post-conviction relief, Stephens did not fault his counsel for alternative or inconsistent defenses. Nor did the trial court, in granting relief, question the soundness of the selected defense(s). Rather, the trial court determined that

counsel was deficient in failing to correct a defense witness, William Robb, regarding the date photographs depicting injuries of Stephens were taken. (V 3 R 295)

It is inferential from the trial record that trial counsel was aware that the defense photographs used at trial were taken two days after the arrest, and counsel, with that knowledge, did not correct his witness on this matter. Robb testified that photographs were taken "immediately, it was on the 6th, it was right after he was released from jail before he went to see Dr. Weiss." (V 7 T 144-145) The state objected on the basis that Robb had testified in deposition that he took the photographs on March 8 and, therefore, the photographs did not depict the injuries on the date of arrest. (V 7 T 145-146) Trial counsel pointed out twice during the bench conference that Robb testified to the date as being on March 6, and the court subsequently overruled the state's objection. (V 7 T 144-145) It would appear that trial counsel, while on notice of the deposition testimony, seized the accessible sword of expediency upon the state's attack, thereby avoiding a skirmish over the proper predicate and admissibility of the desired photographs.

The evidentiary testimony further indicates that counsel's actions were not the product of mere oversight. Counsel testified he did not believe he made the mistake as to the date the pictures were taken; rather, witness Robb made the mistake. (V 5 R 678)

Further, trial counsel testified that he knew that the photographs used at trial were not enlargements of the first set of photographs, instant developing photographs, taken while Stephens was still in jail. (V 5 R 678) At the hearing, counsel said that he did not object at trial "because" Robb testified he took the photos on March 6. (V 5 R 679)

In the order granting relief, the trial court found that counsel "failed to correct the witness, Mr. Robb, who testified that the photographs were taken on March 6, rather than on March 8." (V 3 R 295) The court did find persuasive the state's argument that counsel strategically decided not to use other photographs taken while Stephens was in jail. (V 3 R 293) Even if the trial court had inherently determined, as a matter of fact, that counsel did not correct witness Robb for strategic reasons, the district court, in reversing, did not disturb an express or implied finding that the failure to correct was a matter of oversight and not tactics.

The state contends that even if counsel failed to appreciate that Robb was mistaken, such did not rise to deficient performance under Strickland. On cross-examination, the state elicited Robb's testimony that the photographs were taken when Stephens bonded out, which he indicated was two days later and not immediately after the incident. (V 7 T 148-149) It cannot be said that no reasonable attorney could have concluded that Robb's direct testimony,

together with his cross-examination testimony, sufficed to show to the jury that the photographs were taken on the date of his release from jail, the same day Stephens was examined by the defense expert, Dr. Weiss, and not immediately after the incident. (V T 144-145, 148-149)

The test is not what the best lawyers would have done or what most good lawyers would have done, but only whether some reasonable attorney could have acted in the circumstances as this attorney did. White v. Singletary, 972 F.2d 1218, 1220 (llth Cir. 1992). The trial court disregarded this guiding principle in concluding that counsel was deficient in failing to correct Robb. Stated otherwise, while according deference to the factual finding that counsel did not correct Robb, the trial court's legal conclusion of deficiency was improper. The court failed to consider that one reasonable attorney could have considered the state's cross-examination sufficient on the matter of the timing of the photographs.

The trial court determined that counsel was ineffective for allowing Dr. Wilks, the emergency room physician who examined Stephens, within hours of the incident, to testify from the defense photographs. According to the trial court, 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." (V 3 R 295) The trial court's legal conclusion that

counsel was ineffective is improper in view of the entirety of Dr. Wilks' trial testimony and trial counsel's evidentiary testimony.

Dr. Wilks did testify from the defense photographs, but only after he had already provided testimony indicating that Stephens had a large thigh bruise. The trial court overlooked that Dr. Wilks had testified to Stephens' injuries from the emergency room chart. (V 7 T 175) Prior to being shown the photographs, Dr. Wilks testified that Stephens' injuries included abrasions to his face and an elbow as well as "a very large ecchymotic bruised area of his thigh, very large area." (V 7 T 177)

After being shown the photos, Dr. Wilks indicated that Stephens' injuries were "pretty similar" to those depicted. While Dr. Wilks did point to yellow discoloration and diffusiveness of the bruise shown in the photos as indicative of at least a day to day and a half old bruise, the expert also testified he probably would not have seen bruises of this nature an hour after the injury had occurred. (V 7 T 178-179)

On cross-examination, counsel pointed out that Dr. Wilks' report indicated both Stephens and the police were sources, and that Stephens had injured his right hip, right elbow, and his nose approximately one hour prior to the examination. (V 7 T 183) Further, trial counsel did attempt to elicit from Dr. Wilks that he did not actually observe the bruise in the same condition as depicted in the photographs of Stephens' thigh. (V 7 T 183-184)

While Dr. Wilks had noted the bruise was black and blue at the time, Dr. Wilks acknowledged that he noted no swelling of the bruised area, which would develop the day after the bruise was received. (V 7 T 183) Further, in closing argument, counsel pointed out that there was swelling of the bruise, according to the opinion of Dr. Weiss, who had examined Stephens two days after the arrest. And, during his closing remarks, counsel stated that the photographs were taken a day or two later. (V 6 T 163)

In addition, counsel's evidentiary testimony reflects his assessment that Dr. Wilks was testifying from his recollection of seeing Stephens' injuries and not totally from the photographs. (V 3 R 424) Counsel recalled and read Dr. Wilks' trial testimony to be that when he saw Stephens, the bruises were old, and the opinion testimony was not based simply on the photographs. (V 3 423)

Viewing counsel performance at the time, rather than from hindsight, counsel's performance was not constitutionally deficient. From his perspective, the cross-examination testimony of Dr. Wilks brought out some support for the defense's position to contradict written documentation which indicated a well-developed bruise was observed just after the arrest. As noted in Waters v. Thomas, 46 F.3d 1506, 1514 (11th Cir. 1995)(en banc), "[t]he widespread use of the tactic of attacking trial counsel by showing what 'might have been' proves that nothing is clearer than hindsight--except perhaps the rule that we will not judge trial

counsel's performance through hindsight." See also Atkins v. Singletary, 965 F.2d 952, 958 (llth Cir. 1992)(“Most important, we must avoid second-guessing counsel’s performance.”)

The entirety of Dr. Wilks’ testimony, together with counsel’s evidentiary testimony, undeniably indicates that Dr. Wilks observed bruising which could not have occurred within just a few hours prior to the examination. And, this was how counsel perceived and handled the testimony. Such was not constitutionally unreasonable at the time. To hold counsel to any other perception would be to ignore the distortion of hindsight.

Under these circumstances, counsel’s conduct fell within the wide range of reasonable professional assistance. The appropriate legal standard is not error-free representation, but "reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Jennings v. State, 583 So.2d 316, 321 (Fla. 1991).

Stephens mistakenly contends that the district court substituted its judgment on questions of fact, credibility of witnesses, and the weight of the evidence. (Initial Merits Brief at p.13) The district court, upon review of the record, determined there “was indeed confusion concerning when Stephens received bruises depicted in the photographs.” Stephens, 707 So. 2d at 759. Such observation, if anything, indicates deference to the trial court’s factual finding that “counsel failed “to recognize that Dr.

Wilks was testifying from the photographs." (V 3 R 295) However, the district court was not required to defer to the ensuing legal conclusions that the error was "crucial" and that counsel was "ineffective. (V 3 R 295)

The district court determined that "Stephens' counsel probably was less than effective in presenting this evidence or in cross-examining Dr. Wilks." Id., 707 So. 2d at 759. Such was not a redetermination of any settled fact below.[10] Nor was such, the state submits, a definitive determination that counsel was constitutionally deficient. The district court was not required to make a determination on both prongs, and could properly resolve the claim on one of the two prongs established in Strickland. Provenzano v. State, 616 So. 2d 428, 432 (Fla. 1993).

Prejudice Prong

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Strickland, 104 S.Ct. at 2066.

> **It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test**, cf. United States v.

[10]Stephens complains that the district court decision does not state that the record lacks competent substantial evidence. (Initial Merits Brief at p. 13) The state responds that the district court did not reject the factual determinations below, and therefore, it is not surprising that the district did not hold that the record lacked competent substantial evidence.

> Valenzuela-Bernal, 458 U.S. 858, 866-867, 102 S.Ct. 3440, 3446-3447, 73 L.Ed.2d 1193 (1982), **and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding**.

Strickland, 104 S.Ct. at 2067. (emphasis added)

Here, speculation improperly formed the basis for granting relief. This is evident from the trial court's statement in the order granting relief that deficiency on counsel's part "conceivably prejudiced" Stephens by allowing Dr. Wilks' testimony to adversely affect the outcome of the verdict. (V 3 R 296) This is not the correct standard for determining prejudice, as Strickland so teaches. The district court properly reversed because Stephens did not demonstrate that he was prejudiced by his trial counsel's performance regarding the bruise evidence.

The trial court overlooked that counsel effectively utilized the bruise evidence to secure a verdict of a lesser offense on the resisting charge. Stephens' strategist called witness Robert King, who testified he saw no bruise prior to the date of arrest but did so afterwards. (V 7 T 140-142) Further, counsel elicited from Officer Thornton the fact that his report stated Stephens sustained injuries to his nose, his elbow and thigh during the struggle, and counsel argued such to the jury. (V 5 R 701; V 6 T 160; V 7 T 37) In addition, counsel presented defense expert Dr. Weiss, who observed swelling two days later, and then elicited from Dr. Wilks that he did not document any bruise swelling upon seeing the injury

just after the arrest. (V 6 T 164; V 7 T 157, 184)

Stephens argues that counsel's examination of defense expert, Dr. Weiss, "aggravated" the "prejudice." (Initial Merits Brief at p. 14) However, Stephens did not, in his rule 3.850 motion, fault counsel for calling an expert with potentially harmful testimony. Rather, he faulted counsel therein for failing to bring out additional facts regarding a liver condition. (V 1 R 22) Moreover, Stephens mistakenly characterizes the presentation of Dr. Weiss' testimony as prejudicial. Stephens ignores that Dr. Weiss provided helpful testimony to the defense which indicated that the bruise was "fresh" rather than "old," and therefore a basis upon which counsel could argue to the jury that the bruise did not predate the arrest.

While Dr. Weiss offered an opinion, in the form of a "guess," that the bruise was less than twenty-four hours old, Dr. Weiss also testified that the thigh bruise's deep dark purple coloring reflected a "more acute" and "less old wound." (V 7 T 158) It cannot be said that Dr. Weiss' testimony, viewed in entirety, was prejudicial in nature, for such served to counterbalance the state's theory of a preexisting injury. The potential negative aspect of Weiss' testimony, namely, the "guess," was effectively diminished by counsel's eliciting from Dr. Weiss the concept that there were no absolutes in medicine, as well as by counsel's highlighting the lack of expert ability to determine the exact age

of a bruise by looking at such. (V 7 T 159)

Stephens simply engages in second guessing counsel's strategy in opining that the testimony of Dr. Weiss was "egregiously botched." (Initial Brief at p. 18) Likewise, he second guesses counsel's strategic decision not to use jail personnel and the first set of photographs, which were taken from a greater distance. (V 5 R 668, 691) ("The Supreme Court has recognized that because representation is an art and not a science, '[e]ven the best criminal defense attorneys would not defend a particular client in the same way.'" Waters v. Thomas, 46 F.3d 1506, 1522 (11th Cir. 1995)(en banc)(quoting Strickland, 466 U.S. at 689).

Further, Stephens overestimates the impact of the evidence concerning the thigh bruise upon the state's case. When viewed in the nature of impeachment evidence, the bruise evidence did not substantially impeach the officers' testimony that they did not strike, kick, or punch Stephens. And, Stephens fails to show that there was a reasonable probability of a "jury pardon" with this evidence given the conflicting medical testimony as to the age of the bruise.

While Stephens is now dissatisfied with the implemented strategy of calling Dr. Weiss on behalf of the defense, he cannot distance himself from that there was disparity in opinion as to the age of his bruise. On the one hand, Dr. Wilks opined that the bruise depicted in the photograph as a day to day and a half old,

and in contrast, Dr. Weiss felt that the bruise was probably less than twenty-four hours old. (V 7 T 153) If both doctors were, according Stephens' collateral theory, testifying from the same photographs, then there was no reasonable medical certainty as to when the bruise depicted in the photographs had occurred.

Moreover, the bruise evidence did not contradict officer testimony that Stephens, while in his car, struck Officer Young's forearm as the officer reached across to unbuckle Stephens' seat belt, i.e., the factual basis for count one of the information. (V 7 T 97) Officer Thornton saw Stephens strike Young with a closed fist, and Officer Trill, though not seeing where the blow landed, saw Stephens swing at Young. (V 7 T 21, 54) Even if Stephens sustained a thigh injury, there was no evidence to show that such was sustained while he was still in the car. Stephens merely speculates that the bruise evidence would have necessarily impeached officer testimony in totality.[11]

Moreover, the bruise evidence does not refute police testimony that Stephens had offered resistance during the ensuing arrest process, as the jury determined in returning a verdict of a lesser offense as to count two. Proof that Stephens may have been bruised in the struggle did not show that officer testimony was perjurious

[11]The state argued alternatively to the trial court and on appeal, and the state does here, that any determination of ineffectiveness should be limited to the resisting charge. (V IV; R 528-529) The offense of battery of a law enforcement officer clearly occurred prior to any altercation between Stephens and the officers.

on the point that Stephens defied an arrest. Stephens' collateral theory of substantial impeachment of the officers is conjecture at best.

Assuming, arguendo, expert testimony had established Stephens suffered a large thigh bruise during the arrest, such testimony did not resolve the matter of causation with any degree of certainty. Dr. Weiss did not offer such an opinion, and while Dr. Wilks acknowledged the injury "could" be consistent with infliction by means of a smooth, hard object, such as a flashlight, he was not prepared to testify that it "was or was not" consistent with such. (V 7 T 184)

When viewed, alternatively, as evidence in support of excessive police force justifying self-defense, the bruise evidence alone did not establish that force used was excessive under the circumstances presented by Stephens' manner of resistance in thrashing, flailing, kicking, struggling, and contorting to avoid arrest. (V 7 T 78-79, 86, 88, 99, 113) Further, the bruise evidence, viewed along with the remaining defense testimony, did not present a significant threat to the state's case on the basis of self-defense.

Driver Lisa Stewart, also known to the police as Lisa Hedgecock, testified to seeing an officer jerk Stephens' arm, slap him on the car, and throw him to the ground, and one officer with a knee on his leg and one a foot on his head. She did not testify,

however, that the officers beat or struck Stephens. (V 7 T 132, 166) Moreover, Stewart's credibility was certainly at issue, given her three felony convictions and her bias as a former arrestee of two of the three testifying officers and an acquaintance of Stephens'.[12] (V 7 T 134, 137, 166)

Stephens chose not to testify at trial. (V 7 T 164) While Insco, the third occupant, testified he did not see Stephens strike the officer, he said he couldn't really see what Stephens was doing because his own hands were high up. (V 7; T 122) He did see Stephens cuffed on the ground, cursing and yelling at the officers, and Insco observed no violence on the part of the police. (V 7 T 122-124) Robb, who took the photos, and professed that Stephens, his longtime friend, would have confided as to any prior injury, was at least a six-time convicted felon. (T V 7 149-150)

The district court did not disturb factual findings in determining that any alleged deficiency did not affect the fairness and reliability of the trial so as to undermine the confidence in the outcome. Stephens, 707 So. 2d at 750. Stephens mistakenly argues that the district court reassessed evidence in characterizing the police brutality defense as "questionable," "weak," and "uncorroborated." The order of the trial court does not reflect credibility determinations or assigned weight to testimony in support of the brutality defense, whether described as

[12]Trill had arrested her, after Stephens' arrest, in August 1996. (V 7 T 166)

a matter of impeachment, self defense, or simply a jury pardon.

Further, the district court's assessment of the police brutality issue was not inaccurate. In sum, there was a dearth of testimony of a beating by police, and the bruise evidence did not begin to surmount the strengths of the state's case and establish that the police were lying, as Stephens suggests. The officers all testified that they did not strike Stephens and inflict the leg bruise. In fact, Officers Trill and Young testified that Stephens volunteered at the scene that the injuries to his elbow and his thigh were old injuries. (V 7 T 66, 101) This is compelling evidence since his thigh injury would have been unobservable to the officers at the time when Stephens was wearing pants. Stephens mistakenly states the officers' testimony on this point was uncorroborated. The officers' account of Stephens' revelation was supported by Dr. Weiss' documented observation of a large bruise just after Stephens' arrest. (V 1 R 25)

Stephens improperly charges the district court with failing to review the trial transcript, failing to consider driver Stewart's testimony, and taking a view of the evidence unfavorable to him. The state responds that the decision reflects that the trial testimony was considered, including the defense promoted, and it cannot be concluded that the district court disregarded such by not specifically commenting on various defense witnesses.

Further, viewing the evidence favorably to the defense, it is

apparent that there was a lack of eyewitness testimony of a beating by police. Moreover, there was ample bias evidence pertaining to the defense lay witnesses. In light of the officers' testimony and in contrast, inconclusive testimony as to the age and causation of the thigh bruise, there was no reasonable probability of a different outcome had counsel corrected Robb or Wilks on the date of the photographs were taken.

Stephens promotes prejudice based on a juror's comments on testimony in a conversation initiated by a juror with the prosecutor subsequent to the trial. (V 3 R 706-707) The prosecutor simply reported such to Stephens' trial counsel as a matter of commendable ethics, and in turn, counsel reported the conversation to Stephens in a letter after the trial. (V 3 R 708) That collateral counsel cast a net over the matter at the evidentiary hearing, and the prosecutor then felt compelled to testify to the circumstances of the conversation, did not make such relevant to the legal conclusion of whether Stephens suffered prejudice from the asserted omission of counsel. (V 5 R 702-708)

The trial and district courts could properly disregard these statements, whether hearsay or nonhearsay. Such were intrinsic matters--that is, the internal, mental processes by which the verdict was reached, which should not be used to impeach the outcome of the trial. See Devoney v. State, 23 Fla. L. Weekly S323, 324 (Fla. June 12, 1998)("...our courts have been vigilant in

prohibiting inquiry into jury deliberations of matters necessarily arising out of the trial"). That a juror may have believed the state's witnesses, or found defense testimony to be incredible or contradicted, is to be expected in any verdict of guilt in a criminal prosecution. Such subjective views inhere in the verdict and should not operate as a factor in determining, pursuant to Strickland, the reliability of the trial outcome.

Stephens contends the district court "thwarted" the will of the circuit judge. The district court decision does not reflect any thwarting of the trial court's judgments on the facts, credibility of witnesses, or weight of the evidence. The district court was entitled to review the legal conclusions to determine whether the correct rule of law was applied, as set forth in Strickland. The will of the trial judge should not override the necessity of proper application of the controlling principles of law.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, the state respectfully requests that this Honorable Court approve the district court decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to David R. Gemmer, Esq., P.O. Box 390, St. Petersburg, Florida 33731, this 1st day of November, 1998.

COUNSEL FOR RESPONDENT