IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-1252

CHARLES L. ANDERSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R. ___" - Record on direct appeal to this Court from the 1986 trial;

"PC-R. ___" - Record on appeal to this Court from the Rule 3.851 proceedings;

All other citations will be self-explanatory or will otherwise be explained.

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REPLY TO STATE'S "STATEMENT OF THE CASE AND FACTS"

In the 10-page Statement of the Case and Facts set forth in its Answer Brief, the State presents a 5-page block quote from this Court's direct appeal opinion.[1] The State introduces the 5-page block quote saying: "On direct appeal, the Florida Supreme Court found the following facts." (Answer Brief at 1).[2] However,

[1]This 5-page block is lifted from the State's response to the amended Rule 3.851 motion (PC-R. 1549). In the circuit court pleading, the State introduced the 5-page block quote as it does in its answer brief asserting that the block quote is what this Court found as a matter of fact. It is clear that this Court did not make fact finding that is binding in collateral proceedings, but was merely summarizing what the record reflected when applying the appropriate standard of review in a direct appeal and viewing the evidence in the light most favorable to the State. What is not clear is whether the circuit court in summarily denying Mr. Anderson's guilt phase issues erroneously believed that the block quote set forth by the State constituted factual findings by this Court that bound the circuit court.

[2]The first sentence of the block quote from this Court's direct appeal opinion seemingly conflicts with the State's claim that this Court "found the following facts." Instead, this Court wrote: "The record reveals the following facts." (Answer Brief at 2). While the distinction may appear to be subtle, it is a critically important one. The factual recitation was premised upon what the record revealed when on direct appeal the evidence was viewed in the light most favorable to the State. The factual recitation in the direct appeal opinion did not constitute factual findings written in stone that are not subject to being revisited in light of new information presented in collateral proceedings. See Swafford v. State, 125 So.3d 760, 763 (Fla. 2013) (when granting Mr. Swafford a new trial on the basis of newly discovered evidence, this Court did quote from its 25-year-old direct appeal opinion and introduced the quote saying, "We previously recounted the evidence presented to the jury as follows."); Hildwin v. State, 141 So.3d 1178, 1181 (Fla. 2014) (when granting Mr. Hildwin a new trial on the basis of newly

the 5-page block quote was actually a summary of the facts distilled from the record when the evidence was viewed in the light most favorable to the State. Simmons v. State, 105 So.3d 475, 512 (Fla. 2012); Bradley v. State, 787 So.2d 732, 738 (Fla. 2001). In the present appeal, an entirely different standard of review applies. Rivera v. State, 995 So.2d 191, 195 (Fla. 2008) ("where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record.").

Of course, the factual recitation this Court set forth in its opinion denying Mr. Anderson's direct appeal was also prepared long before Mr. Anderson's Rule 3.851 motion was filed. At the time of this Court's direct appeal opinion, the factual allegations contained in the Rule 3.851 motion were not before the Court and were not addressed or included in this Court's discussion of the facts revealed by the record. Since there was no evidentiary hearing on Mr. Anderson's guilt phase issues, the factual allegations in the Rule 3.851 motion must be accepted as true in the current appeal. Included in the factual allegations were assertions that exculpatory evidence was available to trial counsel that he was either unaware of or insufficiently understood due to his failure to familiarize himself with the

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discovered evidence, this Court did quote from its 26-year-old opinion and introduced the quote saying, "this Court summarized the facts presented at trial as follows.").

files that were developed by his predecessor counsel. The exculpatory evidence that counsel unreasonably failed to present undercut and rebutted significant portions of the circumstantial evidence presented by the State on which this Court relied upon in the factual recitation appearing in the direct appeal opinion.

The 5-page block quote from this Court's direct appeal set forth in the State's Statement of the Case and Facts did not and could not have included consideration of the factual allegations in Mr. Anderson's guilt phase claims set forth in his Rule 3.851. Given that the factual allegations Mr. Anderson made in support of his guilt phase claims must be accepted as true, the State's reliance on the 5-page block quote as setting forth binding factual findings is erroneous.

When the State in its Answer Brief turns its attention to the Rule 3.851 motion, short shrift is given to the factual allegations that Mr. Anderson made in the guilt phase claims in his Rule 3.851 motion that he listed as requiring a factual determination.[3] See Rule 3.851(f)(5)(A)(i). As to Mr. Anderson's

[3]Certainly under the version of Rule 3.851 that governed before October 1, 2001, the factual allegations set forth in Mr. Anderson's guilt phase ineffectiveness claim must be accepted as true when this Court reviews a summary denial of the claim. Rivera v. State, 995 So.2d 191, 195 (Fla. 2008). Since Argument I of Mr. Anderson's Initial Brief concerned his guilt phase ineffectiveness claim, the relevant facts are the factual allegations that this Court must accept as true. And, those facts are entirely missing from the Statement of the Case and Facts appearing in the Answer Brief.

guilt phase ineffectiveness claim (Claim IV of the Rule 3.851 motion and Argument I of the Initial Brief), the entirety of the State's discussion of the factual allegations on which this claim was based is the following:

> IV) ineffective assistance of guilt phase counsel for (a) failing to investigate/challenge forensic evidence; (b) stipulating to cause of death; (c) failing to call alibi witnesses; (d) failing to consult with Anderson[.]

(Answer Brief at 7). While in the ensuing pages of its Statement of the Case and Facts the State notes that Mr. Anderson was permitted to amend his guilt phase ineffectiveness claim (Claim IV), there is no further discussion of the claim and there is no acknowledgment of Mr. Anderson's factual allegations.

The State's description of the allegations made in the claim in its circuit court response to the amended Rule 3.851, though incomplete, was considerably more detailed than what the State has provided here. There, the State wrote:

> It is Anderson's claim he was denied a reliable adversarial testing at his guilt phase due to counsel's ineffective assistance in the manner he investigated, challenged, presented, or protected the case regarding: (1) **tire evidence** (a) by agreeing that Fred Boyd was an expert in tire tread analysis; (b) by failing to utilize forensic experts to prepare for cross-examination/impeachment of the State's experts, Fred Boyd and Mark Suchomel, and to challenge the expertise, opinions, and collection techniques of these experts; and (c) failing to object to the admission of tire tread evidence; (2) **blood evidence** (a) by failing to utilize an[] expert and argue that there should have been more blood in the car based on [the] State's theory; (b) by failing to argue that Anderson's car had not been cleaned so blood should have been present; (3)

> **grease pattern evidence** (a) by failing to challenge the "science" of grease pattern evidence; (b) by failing to use an expert to challenge the analysis conducted by State experts; and (c) b[]y failing to seek a Frye hearing on grease pattern evidence; (4) **fiber evidence**(a) by failing to seek a Frye hearing; (5) **State's forensic investigation** (a) by failing to challenge/impeach the State's forensic technicians who analyzed the evidence and testified in court regarding their findings; (b) by failing to question the limited photographic documentation; and (c) by challenging the technician's failure to make a diagram of the car or provide complete documentation; (6) **time and manner of death** by stipulating that the victim, Keinya Smith ("Keinya") was dead as a result of blunt force trauma and that the items found on U.S. 27 by Lt. Vaughn and Det. Foley were Keinya's property and/or blood, hair, and scalp; (7) **evidence for subsequent testing**; and (8) failure to **visit/consult with Anderson**.

(PC-R. 1560-61) (footnote omitted) (underscoring and bold typeface in original).[4] While Mr. Anderson submits that even this

[4]Also missing from the Statement of the Case and Facts appearing in the Answer Brief is any acknowledgment of the State's ultimate argument in favor of summary denial of the guilt phase ineffectiveness claim that was presented in the State's response to the amended Rule 3.851 motion. After straining mightily to argue that the specific factual allegations of trial counsel's deficient performance weren't specific enough, the State did an abrupt about-face and wrote:

> **Prejudice analysis** - As noted above, the best Anderson could hope for is that there is no evidence in, on, or under his car linking him to the murder of Keinya. Given the evidence that has remained unchallenged, Anderson has not shown prejudice. The trial result would be the same even had: (1) counsel done everything Anderson now suggest should have been done and all of the tire, blood, grease pattern, and fiber evidence been excluded from the trial; and (2) it was shown that the State's forensic technicians missed other inculpatory evidence from Anderson's car or did not document well through photographs and diagrams the evidence remove[d]. Anderson has not attempted to

fails to do justice to the factual allegations made in his guilt phase ineffective assistance of counsel claim, this summary of the claim set forth in its trial court response to the amended Rule 3.851 motion shows that the Statement of the Case and Facts in the Answer Brief misrepresents Mr. Anderson's claim. The Statement of the Case and Facts in the Answer Brief fails to address the facts as alleged by Mr. Anderson in his guilt phase ineffectiveness claim even though the factual allegations must be accepted as true in an appeal from the summary denial of the claim without granting an evidentiary hearing on the claim.

Similarly, there is no discussion of the factual allegations

> explain how the result of his trial would have been different absent this evidence and in light of the remaining, unchallenged evidence of his guilt.

(PC-R. 1579-80) (footnotes omitted) (underscoring and bold typeface in original). After arguing what evidence was left after striking that which Mr. Anderson had asserted was introduced because of counsel's deficient performance, the State wrote:

> This evidence was sufficient to show motive, opportunity and criminal agency. The import of this evidence would not have been diminished had counsel successfully excluded the challenged forensic evidence obtained from the car and tire track casts from the roadway. Anderson had failed to show how the outcome of his case would have been different, thus he has failed to show prejudice under Strickland, and summary denial is required.

(PC-R. 1581). Thus, the State argued for a summary denial on the basis of: 1) the sufficiency of the remaining evidence to support a conviction, and 2) Mr. Anderson's failure to show that the outcome of his trial would have been different. These arguments were actually contrary to case law. Kyles v. Whitley, 514 U.S. 519 (1995), and Strickland v. Washington, 466 U.S. 668 (1984).

made in Claim XI and Claim XII of the Rule 3.851 motion which are at issue in Argument III of the Initial Brief.[5] (Answer Brief at 9). Nevertheless, this Court's standard of review requires this Court to accept those factual allegations as true.

Similarly, there is no discussion of the factual allegations made in Claim XV of the Rule 3.851 which is at issue in Argument IV of the Initial Brief (Answer Brief at 9-10). Yet, this Court's standard of review requires the factual allegations in a claim denied without an evidentiary hearing to be accepted as true.

REPLY TO APPELLEE'S STATEMENT REGARDING STANDARD OF REVIEW

The State provides a statement of the "Standard of Review" within its "Argument" as to "Claim I" (Answer Brief at 15). This statement of the "Standard of Review" is 8 pages in length. However, the standard of review argued by the State in those 8 pages is entirely the wrong standard of review applicable to Mr. Anderson's guilt phase ineffective assistance of counsel claim. Mr. Anderson's guilt phase ineffectiveness claim was summarily

[5]In his Initial Brief, Mr. Anderson at one point mistakenly indicated that Argument III concerned "Claim XII and Claim XIII" (Initial Brief at 90 n.52). Argument III actually concerned the circuit court's summary denial of Claim XI and Claim XII of the Rule 3.851 motion without conducting an evidentiary hearing on those claims. At another point in the Initial Brief, another typographical error appeared when the claims at issue in Argument III are erroneously identified as "Claim XII and Claim III of the Rule 3.851 motion." (Initial Brief at 95). Counsel apologizes for these typographical errors.

denied **without an evidentiary hearing.**

Historically when a circuit court summarily denied an ineffective assistance of counsel claim in a Rule 3.851 motion without conducting an evidentiary hearing, this Court's jurisprudence made clear that the claim pled in the Rule 3.851 motion was heard by this Court de novo, and the factual allegations set forth in the Rule 3.851 motion were accepted as true unless conclusively refuted by the record. Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989).[6] "Since no evidentiary hearing has been held, we must accept these allegations as true to the extent they are not refuted by the record." Rivera v. State, 995 So.2d 191, 195 (Fla. 2008).[7] In another capital collateral case, this Court wrote:

> To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. See Fla. R.Crim. P. 3.850(d). Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record. *See Lightbourne v. Dugger*, 549 So.2d 1364, 1365 (Fla.1989).

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[6]Lightbourne was a capital case. The successive motion to vacate that was presented under warrant in that case was filed in 1989 under Rule 3.850. This was before Rule 3.851 was adopted and set forth the procedure to be followed in a capital case in which the defendant presented a motion to vacate.

[7]Rivera was also a capital case. The successive motion to vacate that was filed there in September of 2001 was filed under the version of Rule 3.851 that governing motions to vacate in capital cases and in effect prior to the October 1, 2001, amendment to Rule 3.851.

* * *

> *** Because there is a factual dispute as to whether defense counsel was ineffective for failing to discover and produce evidence as to Peede's personal history of mental problems, we find that an evidentiary hearing is required on this claim.

Peede v. State, 748 So.2d 253, 257, 259 (Fla. 1999).

In Gaskin v. State, 737 So.2d 509, 516 (Fla. 1999),[8] this Court wrote:

> Under rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief. See Fla. R. Crim P. 3.850(d); Rivera v. State, 717 So.2d 477 (Fla.1998); Valle, 705 So.2d at 1333; Roberts v. State, 568 So.2d 1255, 1256 (Fla.1990). **The movant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel if he alleges specific "facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant.**" Id. at 1259. * * * Upon review of a trial court's summary denial of postconviction relief without an evidentiary hearing, we must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record. Valle, 705 So.2d at 1333
>
> **While the postconviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief.** In essence, the burden is upon the State

[8]The initial motion to vacate filed by Mr. Gaskin was under Rule 3.851 - the version in effect from January 1, 1994 until October 1, 2001. Under that version of Rule 3.851, the procedure set forth in Rule 3.850 governed once a Rule 3.851 motion to vacate was timely filed. Thus, this Court in addressing whether a summary dismissal was erroneous relied upon its Rule 3.850 jurisprudence which controlled under that version of Rule 3.851 that then governed motions to vacate filed in capital cases.

> to demonstrate that the motion is legally flawed or that the record conclusively demonstrates no entitlement to relief. The rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion. To the contrary, the "rule was promulgated to establish an effective procedure in the courts best equipped to adjudicate the rights of those originally tried in those courts." Roy v. Wainwright, 151 So.2d 825, 828 (Fla.1963).

(Emphasis added). Justice Pariente wrote a separate specially concurring opinion in which she joined Justice Wells in supporting an amendment to Rule 3.851 that would require evidentiary hearings on all factually based claims such as ineffective assistance of counsel:

> I write separately to reiterate my agreement with Justice Wells' suggestion in his concurring opinion in Mordenti v. State, 711 So.2d 30, 33 (Fla.1998), that rule 3.851 be amended to require an evidentiary hearing on "initial [3.850} motions which assert ineffective assistance of counsel, Brady, or other newly discovered evidence claims, or other legally cognizable claims which allege an ultimate factual basis." Because such claims so frequently require an evidentiary hearing for resolution, I agree with Justice Wells that the better practice would be to require trial courts to hold evidentiary hearings on the initial 3.850 motion in death penalty cases, in order to help prevent the delay exemplified here.

Gaskin v. State, 737 So.2d at 519.

It is worth noting that when Rule 3.850 was first adopted, it applied to all Florida criminal cases, capital and non-capital. It provided the procedure for addressing constitutional issues arising from either new law or new facts after a criminal conviction was returned and affirmed on appeal. The collateral

proceedings in Lightbourne v. Dugger in 1989 were under Rule 3.850 even though Mr. Lightbourne was under a sentence of death.

It was in 1993 that it was announced that effective January 1, 1994, Rule 3.851 would split off from Rule 3.850 and govern collateral proceedings in capital cases. The purpose for the change was to provide a one-year statute of limitation for filing a motion to vacate under Rule 3.851, while Rule 3.850 retained its two-year statute of limitation in non-capital cases. The reason the time period was shortened in capital cases was due to the existence of the Office of the Capital Collateral Representative (CCR).[9] Beyond the shortened time period for filing a motion to vacate, the procedure on a Rule 3.851 motion was to comport with Rule 3.850. The new Rule 3.851 provided:

> (5) The provisions of rule 3.850, to the extent they are not inconsistent with this rule, remain applicable to postconviction or collateral relief.

Effective October 1, 2001, Rule 3.851 was substantially revised. In re Amendments to Florida Rules of Criminal Procedure

[9]Capital defendants had CCR counsel and CCR resources to investigate, develop and present collateral claims. Accordingly, this Court determined a shorter statute of limitation was appropriate in capital cases. In re Rule of Criminal Procedure 3.851, 626 So.2d 198, 199 (Fla. 1993)("There is a justification for the reduction of the time period for a capital prisoner as distinguished from a noncapital prisoner, who has two years to file a postconviction relief proceeding. A capital prisoner will have counsel immediately available to represent him or her in a postconviction relief proceeding, while counsel is not provided or constitutionally required for noncapital defendants to whom the two-year period applies.").

3.851, 3.852 & 3.993, 802 So.2d 298 (Fla. 2001). In this revision, Rule 3.851 shifted dramatically away from Rule 3.850. The procedure for Rule 3.851 motions became much more defined with time tables and disclosure requirements that were not present in Rule 3.850. One of the most dramatic changes in Rule 3.851 was the adoption of the position first announced by Justice Wells in Mordenti v. State, 711 So.2d 30, 33 (Fla.1998), and then joined by Justice Pariente in Gaskin v. State. Amended Rule 3.851(f)(5)(A)(i) provided that the trial court was to "schedule an evidentiary hearing, to be held within 90 days, on claims listed by the defendant as requiring a factual determination." Justice Harding writing for the Court observed:

> Amended rule 3.851, as did our proposals, **requires that an evidentiary hearing be held on claims identified in an initial motion as requiring a factual determination.** We have considered the comments in opposition to this requirement but continue to believe that "[i]n light of the large number of summary denials of initial motions which the Court has been compelled to reverse under the current rules ... this change will reduce unwarranted delay in many cases." 772 So.2d at 489.

In re Amendments to Florida Rule of Criminal Procedure 3.851, 3.852 & 3.993, 797 So.2d 1213, 1219 (Fla. 2001) (emphasis added).

Mr. Anderson's motion to vacate was filed under the revised version of Rule 3.851 that became effective on October 1, 2001. The State in discussing the standard of review for Mr. Anderson's guilt phase ineffectiveness claim does not acknowledge the language set forth in Rule 3.851(f)(5)(A)(i), nor does it

acknowledge what Justice Harding, on behalf of this Court, wrote regarding the requirement that an evidentiary hearing be granted on claims "**identified in an initial motion as requiring a factual determination.**" In re Amendments to Florida Rule of Criminal Procedure 3.851, 3.852 and 3.993, 797 So.2d at 1219.

REPLY TO SUMMARY OF ARGUMENT

In the Summary of the Argument section of the Answer Brief, the State addresses Mr. Anderson's arguments as claims - delineating them as "Claim I," "Claim II," "Claim III," and "Claim IV." (Answer Brief at 10-11). This may create confusion. Mr. Anderson presented "claims" to the circuit court in the Rule 3.851 motion. These claims were numbered. The State's use of the word "claim" and its numbering of these "claims" to reference the arguments that Mr. Anderson made in his Initial Brief should not be permitted to confuse this Court since these numbered claims set forth in the Answer Brief do not correlate to the number claims that Mr. Anderson set forth in his Rule 3.851 motion and the subsequent amendments to that motion.

As to Argument I (identified by the State as "Claim I," the State employs the same scattershot argument that was first employed in the response to the motion to vacate filed in circuit court. "Anderson's claim that his counsel was ineffective for failing to utilize forensic experts were either insufficiently pled, refuted by the record or otherwise without merit." (Answer

Brief at 10). And just as it did in its circuit court response to the motion to vacate, the State then inconsistently argues: "What is more, in light of the record, Anderson could not show prejudice by **trial counsel's action/inaction**." (Id.) (emphasis added). In arguing that Mr. Anderson could not show prejudice arising from "trial counsel's action/inaction," the State clearly demonstrates that the deficient performance prong of the claim was sufficiently pled.[10]

REPLY TO ARGUMENT I

The State begins its discussion of Argument I of the Initial Brief with a synopsis of that argument. The State then asserts:

> The trial court properly denied relief without an evidentiary hearing where Anderson **failed to make key allegations** to satisfy the deficiency and prejudice prongs of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). Since Anderson's claims were insufficiently pled, not to mention without merit altogether, the trial court properly denied it without an evidentiary hearing.

(Answer Brief at 14-5) (emphasis added).[11] From there, the

[10]In the trial court, the State argued that striking all the evidence that Mr. Anderson claims counsel unreasonably failed to exclude, refute or impeach, the remaining evidence was sufficient to support his conviction (PC-R. 1579-80). This amply showed that Mr. Anderson had pled trial counsel's deficient performance with sufficient specificity as to identify what trial evidence should have been excluded, refuted, or impeached because the State did just that. Of course as to the prejudice prong, the State argued in violation of Kyles v. Whitley that the proper analysis was whether sufficient evidence remained to support the conviction.

[11]It is entirely unclear what the State is talking about

State's argument jumps the tracks and demonstrates a lack of knowledge of the different standards of review that this Court applies: 1) in a direct appeal, 2) in an appeal of the summary denial of an ineffective assistance of counsel claim, and 3) in the appeal of the denial ineffectiveness claim following an evidentiary hearing.[12] The State also evinces its unfamiliarity with the differences between a Rule 3.850 motion and a motion under Rule 3.851 after its 2001 revision.

A. The October 1, 2001, Amendment to Rule 3.851.

In the comments to Rule 3.851, it is noted that the 2001 Amendment to the rule made a number of significant changes. One of those changes was "New subdivision (f), Procedure; Evidentiary Hearing; Disposition, sets forth general procedures." The comment then addressed the significance of this subdivision:

> Most significantly, that subdivision requires an evidentiary hearing on claims listed in an initial motion as requiring a factual determination.

When the 2001 Amendment to Rule 3.851 was adopted, this Court explained why the amended rule required an evidentiary

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when it claims that Mr. Anderson "failed to make key allegations to satisfy the deficiency and prejudice prongs" of the Strickland test for ineffective assistance of counsel.

[12]The standard of review to be used in an appeal is the foundation upon which arguments to this Court must be grounded. When counsel use the wrong standard of review in constructing their arguments, the arguments cannot withstand scrutiny and collapse like a building lacking a proper foundation.

hearing on all factual claims:

> Another important feature of our proposal is the provision addressing evidentiary hearings on initial postconviction motions. As previously noted, we have identified the denial of evidentiary hearings as the cause of unwarranted delay, and we believe that in most cases, **requiring an evidentiary hearing on initial postconviction motions** will avoid that delay.

In re Amendments to Florida Rules Criminal Procedure 3.851, 3.852 & 3.993, 772 So.2d 488, 491 (Fla. 2000) (emphasis added). At the end of this quote, this Court in a footnote set forth:

> This is consistent with our recently expressed view that evidentiary hearings should be required on initial capital postconviction motions presenting factually based claims:
>
> > Justice Wells, in a specially concurring opinion, recently recognized our concerns in postconviction proceedings and suggested amending the rule to require courts to hold evidentiary hearings on initial postconviction motions in capital cases:
> >
> > > I write to advocate an amended rule 3.851. I believe the rule should be amended to require that **an evidentiary hearing is mandated on initial motions which assert ineffective assistance of counsel**, Brady, or other newly discovered evidence claims, or other legally cognizable claims which allege an ultimate factual basis. Too much judicial and counsel time and resources have been wasted in determining whether to hold an evidentiary hearing. This has added to the inordinate amount of time prisoners remain on death row.
> >
> > Mordenti v. State, 711 So.2d 30, 33 (Fla.1998) (Wells, J., concurring). We agree with that portion of Justice Wells' concurring opinion calling for a presumption in favor of evidentiary hearings in initial 3.850 motions asserting claims for ineffective assistance of counsel, Brady, and other newly discovered evidence claims in capital

> cases and more stringent review of subsequent motions.

Gaskin v. State, 737 So.2d 509, 517 n. 17 (Fla.1999). Id. (emphasis added).

Thus, the standard for determining when the circuit court should grant an evidentiary hearing on claims set forth in an initial motion to vacate filed under Rule 3.851 changed effectively on all initial motions filed after October 1, 2001. At issue in this appeal is Mr. Anderson's initial motion to vacate filed under the amended version of Rule 3.851 on October 14, 2004.

The State does not acknowledge the 2001 amendment to Rule 3.851 in its Answer Brief.[13] Virtually all of the cases cited by the State did not arise from a motion to vacate filed in a capital case after October 1, 2001, the effective date of the amended version of Rule 3.851. See Arbelaez v. State, 898 So.2d 25 (Fla. 2005) (the motion at issue was filed in July of 1996);

[13]When Mr. Anderson relied upon Rule 3.851(f)(A)(i) in the circuit as requiring an evidentiary hearing on his guilt phase ineffectiveness claim (PC-R. 3083), the State cited Windom v. State, 886 So.2d 915 (Fla. 2004), as indicating that the 2001 amended version of Rule 3.851 did "not overturn[] any of the prior precedence which sa[id] there must be a legally sufficient claim" (PC-R. 3086). However as Mr. Anderson's counsel pointed out, Mr. Windom's motion to vacate had been filed in 1996, well before the effective date of the 2001 amendments to Rule 3.851. Thus, the amended Rule 3.851 motion did not apply in Windom as the amended rule indicated on its face that it did not apply to any motion to vacate filed in a capital case prior to October 1, 2001. See Rule 3.851(a).

Orme v. State, 896 So.2d 725 (Fla. 2005) (the motion at issue was filed in 1997); Gamble v. State, 877 So.2d 706 (Fla. 2004) (the motion at issue was filed in 1997); Davis v. State, 875 So.2d 359 (Fla. 2003) (the motion at issue was filed in 1998); State v. Coney, 845 So.2d 120 (Fla. 2003) (the motion at issue was filed in 1997); Lucas v. State, 841 So.2d 380 (Fla. 2003) (the motion at issue was filed in 1994); McLin v. State, 827 So.2d 948 (Fla. 2002) (the motion to vacate was filed in a non-capital case in 1996 under Rule 3.850);[14] Reaves v. State, 826 So.2d 932 (Fla. 2002) (motion at issue was filed in 1996); Waterhouse v. State, 792 So.2d 1176 (Fla. 2001) (the motion at issue was filed in

[14]This Court's opinion in McLin v. State made specific reference to the different standard for determining whether an evidentiary hearing should be granted in capital cases governed by the 2001 amended version of Rule 3.851. In a footnote, this Court's opinion stated:

> This is in contrast to recently amended rule 3.851, governing postconviction motions filed after a death sentence has been imposed and affirmed on direct appeal. Rule 3.851, as amended by Amendments to Florida Rules of Criminal Procedure 3.851, 3.852, & 3.993, 802 So.2d 298 (Fla.2001), now mandates an evidentiary hearing "on claims listed by the defendant as requiring a factual determination." Fla. R.Crim. P. 3.851(f)(5)(A)(i). **Prior to this amendment, the language in Anderson, 627 So.2d at 1171, and Florida Rule of Criminal Procedure 3.850(d) applied to the summary denial of postconviction motions in both death and non-death cases.**

McLin v. State, 827 So.2d at 954 n.3 (emphasis added). Though it cited McLin in its Answer Brief, the State failed either to notice footnote 3 or recognize its import.

1994); Valle v. State, 778 So. 2d 960 (Fla. 2001) (the motion at issue was filed in 1991 under Rule 3.850); Patton v. State, 784 So.2d 380 (Fla. 2000); (the motion at issue was filed in 1994); Peede v. State, 748 So.2d 253 (Fla. 1999) (the motion at issue was filed in 1988 under Rule 3.850); Cherry v. State, 659 So.2d 1069 (Fla. 1995) (the motion at issue was filed in 1991 under Rule 3.850); Anderson v. State, 627 So.2d 1170 (Fla. 1993) (the motion at issue was filed in 1992); White v. State, 559 So.2d 1097 (Fla. 1990) (the motion at issue was filed in 1987 under Rule 3.850); Kennedy v. State, 547 So.2d 912 (Fla. 1989) (the motion at issue was filed in 1986 under Rule 3.850).

Because the 2001 amendment to Rule 3.851 changed the standard for determining when an evidentiary hearing on claims set forth in a motion to vacate in a capital case was required, the 16 decisions by this Court set forth in the Answer Brief and identified in the preceding paragraph do not control and are not applicable when evaluating whether Mr. Anderson was entitled to an evidentiary hearing on his guilt phase ineffectiveness claim. See McLin v. State, 827 So.2d at 954 n.3.

Only one decision cited in the Answer Brief concerned a Rule 3.851 motion filed in a capital case after October 1, 2001. This was Bryant v. State, 901 So.2d 810 (Fla. 2005). There, this Court affirmed the summary denial of the motion to vacate. This was after registry counsel for Mr. Bryant admitted to this Court

during oral argument that she had not talked to any witnesses nor retained any experts before filing the Rule 3.851 motion on Mr. Bryant's behalf. She explained that she had assumed that she would speak to witnesses and investigate the case after the circuit court scheduled an evidentiary hearing on her conclusory claims.[15] Given that counsel had not investigated and had no basis for any of her claims, this Court affirmed the summary denial of the motion to vacate. Bryant v. State, 901 So.2d at 819 ("Again, we stress that we do not intend to authorize 'shell motions' —those that contain sparse facts and argument and are filed merely to comply with the deadlines, with the intent of filing an amended, more substantive, motion at a later date.").[16]

[15]After Mr. Bryant's registry attorney's appearance at oral argument before this Court in November of 2004, Justice Cantero referenced her work and complained that the legal representation provided by some registry attorneys was "[s]ome of the worst lawyering" he had ever seen. Jan Pudlow, Justice Rips Shoddy Work of Private Capital Case Lawyers, *The Florida Bar News* (Mar. 1, 2005). Justice Cantero said, "some of the registry counsel have little or no experience in death penalty cases. They have not raised the right issues...[and] [s]ometimes they raise too many issues and still haven't raised the right ones." Id.

[16]Mr. Anderson recognizes that within the Bryant opinion there is reference to pleading requirements discussed by this Court in Nelson v. State, 875 So.2d 579, 583 (Fla. 2004). However, Nelson involved a pro se motion to vacate filed in a non-capital case under Rule 3.850. Within the Nelson opinion reference was made to this Court's ruling in Gaskin v. State, a capital case. While the motion to vacate in Gaskin was filed in 1995 under Rule 3.851, the version of that governed at the time indicated that the pleading requirements of Rule 3.850 applied to Rule 3.851 motions. In that context, the reference to Gaskin in Nelson made sense. However, the reference to Nelson in Bryant makes no sense and is contrary to Rule 3.851(f)(5)(A)(i), the

Nowhere in Bryant was there any indication by this Court of an intent to recede from Rule 3.851(f)(5)(A)(i), and the requirement set forth therein that evidentiary hearings be held "on claims listed in an initial motion as requiring a factual determination."

Further, representatives of the State have in a number of cases advised circuit courts that Rule 3.851 requires evidentiary hearing to be granted on fact claims such as ineffective assistance of counsel and newly discovered evidence. In the Charlotte County capital case, State v. Ford, Case No. 97-351-CF, the State, on July 18, 2003, filed a response to Mr. Ford's initial motion to vacate that had been filed on May 28, 2003. See Ford v. State, Case No. SC14-1011, currently pending before this Court. In its response, the State wrote: "Although Ford may be entitled to an evidentiary hearing in accordance with Rule 3.851(f)(5)(A), his motion as pled is clearly insufficient for the granting of any further relief." (Ford PC-R 55). While the response challenged the adequacy of the pleading, the State did concede that Mr. Ford was entitled to an evidentiary hearing because Rule 3.851 created a right to an evidentiary hearing: "Notwithstanding the obvious factual and legal insufficiency of Ford's motion, the State acknowledges that, as previously noted,

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comments to the Rule, this Court's opinion adopting the amended version of Rule 3.851 in 2001, and this Court's statement in McLin v. State, 827 So.2d at 954 n.3.

Rule 3.851 establishes the right to an evidentiary hearing to insure full consideration of Ford's ineffective assistance of counsel claim." (Ford PC-R. 60).[17]

Nowhere in its Answer Brief does the State acknowledge this Court's adoption of an amended Rule 3.851 effective on October 1, 2001, changed the standard for determining when an evidentiary hearing is warrant on a guilt phase ineffectiveness on which the defendant asserts an evidentiary hearing is required because factual determinations are necessary. Nor does the State ever attempted to explain why, under Rule 3.851(f)(5)(A)(i), Mr. Anderson was not entitled to an evidentiary hearing on his guilt phase ineffective assistance of counsel claim.

B. Appellate Standard of Review in Cases in Which an Evidentiary Hearing Is Conducted Is Different Than the Standard of Review Used in Appeal of Summary Denial.

In addition to ignoring Rule 3.851(f)(5)(A)(i), the State relies upon case law employing the standard of appellate review where an ineffectiveness claim was denied after an evidentiary hearing was held on the claim. The State is seemingly unaware of

[17]Another case in which the State's representative has agreed that Rule 3.851 requires evidentiary hearings on claims requiring a factual determination is from Escambia County, State v. Melton, Case No. 91-373. In responding to a newly discovered evidence claim that Mr. Melton presented in a Rule 3.851 motion in June of 2014, the State, while disputing the adequacy of the pleading and the merits of the claim, conceded that an evidentiary hearing was required.

the difference between what a defendant must prove to establish an ineffectiveness claim at an evidentiary hearing, and what a defendant is required to plead in order for an evidentiary hearing to be required. In the standard of review section of the State's discussion of argument, it begins by setting forth what a defendant **must prove**:

> To establish ineffective assistance of counsel, a defendant must demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different.

(Answer Brief at 15) (emphasis in original).

The State then relies on decisions of this Court when it was reviewing the denial of ineffectiveness claims on which an evidentiary hearing was held. See Arbelaez v. State, 898 So.2d 25 (Fla. 2005) (affirmance of denial of ineffectiveness claim after evidentiary hearing this Court ordered when reversing an earlier summary denial);[18] Orme v. State, 896 So.2d 725 (Fla.

[18]In Arbelaez v. State, 775 So.2d 909 (Fla. 2000), this Court reversed the summary denial of a penalty phase ineffectiveness claim saying:

> we conclude that the trial court erred by failing to conduct an evidentiary hearing as to Arbelaez's claim that trial counsel was ineffective during the penalty phase of his trial for failing to present expert testimony as to his epilepsy and other mental health mitigation and for failing to introduce evidence of his family history of abuse.

Id. at 912. This Court's decision remanding for an evidentiary hearing in Arbelaez is more relevant to Mr. Anderson's appeal

2005) (relief granted on a penalty phase ineffectiveness claim that the trial court had denied after an evidentiary hearing);[19] Gamble v. State, 877 So.2d 706 (Fla. 2004) (affirmance of denial of the effectiveness claims after an evidentiary hearing); Davis v. State, 875 So.2d 359 (Fla. 2003) (affirmance of denial of ineffectiveness claims after an evidentiary hearing); State v. Coney, 845 So.2d 120 (Fla. 2003) (affirmance of the grant of relief on penalty phase ineffectiveness claim after evidentiary hearing); Lucas v. State, 841 So.2d 380 (Fla. 2003) (affirmance of denial of ineffectiveness claims after an evidentiary hearing); Valle v. State, 778 So. 2d 960 (Fla. 2001) (affirmance of denial of ineffectiveness claims after evidentiary hearing); White v. State, 559 So.2d 1097 (Fla. 1990) (affirmance of the denial of ineffectiveness claims after evidentiary hearing).[20]

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than is this Court's affirmance the denial of relief after the evidentiary hearing had been conducted.

[19]In citing Orme, the State failed to note that as to the prejudice prong this Court explained: "the failure to present this evidence deprived Orme of a reliable penalty phase in which we have confidence." Orme, 896 So.2d at 732.

[20]The State's Answer Brief also includes a number of federal decisions in the standard of review section of Argument I. Some of the cited federal decisions employed the appellate standard of review applicable to ineffectiveness claims on which an evidentiary hearing had been conducted. See Cullen v. Pinholster, 131 S.Ct. 1388 (2011); Williams v. Taylor, 529 U.S. 362 (2000); Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000). The other decisions concerned the deference that federal courts must accord state court adjudications of the merits of a Strickland claim. See Harrington v. Richter, 131 S.Ct. 770 (2011); Wong v. Belmontes, 558 U.S. 15 (2009); Yarborough v. Gentry, 540 U.S. 1

As these decisions make clear, the standard for appellate review of a claim that was denied after an evidentiary hearing was conducted gives deference to the trial court's findings of fact. In Arbelaez v. State, 898 So.2d at 32, this Court explained:

> After an evidentiary hearing on a claim of ineffective assistance of counsel, we review the deficiency and prejudice prongs as "mixed questions of law and fact subject to a de novo review standard but ... **the trial court's factual findings are to be given deference.** So long as the [trial court's] decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence."

(Emphasis added).

Similarly, this Court in Davis v. State, 875 So.2d at 365, explained the standard of appellate review in an appeal from the denial of an ineffectiveness claim on which the circuit court conducted an evidentiary hearing:

> Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review. See Stephens v. State, 748 So.2d 1028, 1033 (Fla.1999). This requires an independent review of the trial court's legal conclusions, **while giving deference to the trial court's factual findings.**

(Emphasis added). See Lucas v. State, 841 So.2d at 384; Valle v. State, 778 So.2d at 966.

(2003). These cases simply do not address the standard of review of the summary denial of claim in a Rule 3.851 motion.

In State v. Coney, 845 So.2d at 132-33, this Court explained the standard of appellate review in an appeal from the grant of relief on an ineffectiveness claim:

> As noted above, a circuit court's ruling on an ineffectiveness claim is a mixed question of law and fact, and a reviewing court must defer to the circuit court's factual findings as long as those findings are supported by competent, substantial evidence in the record. Competent, substantial evidence is tantamount to legally sufficient evidence, and a reviewing court must assess the record evidence for its sufficiency only, not its weight. Evidence contrary to the circuit court's ruling is outside the scope of the inquiry at this point, for a reviewing court cannot reweigh the "pros and cons" of conflicting evidence. In other words, an appellate court cannot use its review powers as a mechanism for reevaluating conflicting evidence and exerting covert control over the factual findings. When evaluating an ineffectiveness claim, an appellate court may review de novo only the trial court's assessment of the law, not its assessment of the facts.

(Footnotes omitted).

In the decisions of this Court upon which the State's Answer Brief relied in defending the circuit court's summary denial of Mr. Anderson's claim, an evidentiary hearing had been conducted. As a result, the issue before this Court in those cases concerned whether the various defendants had proven their ineffectiveness claim. That is an entirely different issue than whether a defendant like Mr. Anderson adequately pled his ineffectiveness claim under Rule 3.851(f)(5)(A)(i). In the cases relied upon by the State, deference was given to factual determinations made by the circuit court. However where there is no evidentiary hearing and no opportunity to present proof on the ineffectiveness claim,

no deference is accorded to the circuit court order summarily denying the claim. The case law that the State relied upon set forth herein, is simply inapplicable to the standard of review this Court must employ when reviewing the order summarily denying Mr. Anderson's guilt phase ineffectiveness claim. Again, the issue here is whether Mr. Anderson adequately pled his claim under Rule 3.851(f)(5)(A)(i).

C. Stephens v. State, 748 So.2d 1028 (Fla. 1999), and Its Impact of the Standard of Review in an Appeal from a Summary Denial of an Ineffectiveness Claim.

The State does not address this Court's decision in Stephens v. State, 748 So.2d 1028 (Fla. 1999), regarding the standard of appellate review that is to be employed when reviewing an ineffectiveness claim. In Stephens (a non-capital case), this Court determined that it had been at times inconsistent in its standard of review of Strickland claims, and had often afforded too much deference to circuit courts' denials of relief.

> The less deferential standard of review inescapably follows from Strickland, the seminal ineffective assistance of counsel case, as well as other decisions of the United States Supreme Court on the appropriate standard of appellate review for issues of constitutional magnitude.

Stephens v. State, 748 So.2d at 1032.

There had been an evidentiary hearing in Stephens, and the decision dealt primarily with the standard of appellate review in cases in which the circuit court denied relief after an

evidentiary hearing had been conducted. However, this Court noted that confusion regarding the appropriate standard of review could be traced back to Kennedy v. State, 547 So.2d 912 (Fla. 1989).[21]

After Stephens, it is clear that pre-Stephens decisions by this Court may not reflect the proper Strickland standard of review.

D. Mr. Anderson Was on Notice of the Language of the Amended Rule 3.851(f)(5)(A)(i) When He Filed His Motion to Vacate.

Rule 3.851 was amended effective October 1, 2001, to require an evidentiary hearing to be scheduled "on claims listed by the defendant as requiring a factual determination." Rule 3.851(f)(5)(A)(i). Mr. Anderson relied upon that provision as

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[21]Kennedy is one of the cases relied upon by the State, and on which the circuit court relied when it summarily denied Mr. Anderson's guilt phase ineffectiveness claim. In Kennedy, the trial court summarily denied an ineffectiveness claim, finding as a matter of fact that the counsel's performance had been the result of a trial strategy: "we agree with the trial judge that counsel's decision not to present the videotape of Kennedy's surrender and arrest to the jury was a matter of trial strategy." Id. at 914. This factual finding was made even though no evidentiary hearing had occurred. This Court used language showing deference to the trial court's decision and that its review was limited to whether there was record support for it:

> We find the record supports the trial judge's conclusion that there was no reasonable probability that the admission of this evidence would have altered or affected the outcome of the trial.

Id. However, this Court has since Kennedy repudiated the notion that a summary denial can be premised upon factual findings made without an evidentiary hearing or that this Court accords any deference to the summary denial of a Strickland claim.

meaning what it said. He relied upon this Court's opinion discussing the requirement arising from this language that an evidentiary hearing was required on claims requiring a factual determination (PC-R. 3083). In re Amendments to Florida Rules Criminal Procedure 3.851, 3.852, & 3.993, 772 So.2d at 491. See McLin v. State, 827 So.2d at 954 n.3. Despite this clear language, despite the State's concession in other cases in other parts of the State that this language required evidentiary hearing on a guilt phase ineffectiveness claim no matter how it was pled, Mr. Anderson was denied what the amended rule promised.[22] This violated due process. Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985) (the touchstone of due process is notice and reasonable opportunity to be heard).

E. In Any Event, Mr. Anderson Properly Pled a Guilt Phase Ineffectiveness Claim on Which an Evidentiary Hearing Was Required.

Under the standard pre-dating the 2001 amendment to Rule 3.851, an evidentiary hearing was required on Mr. Anderson's guilt phase ineffectiveness claim. That standard required this Court to review the denial of the claim de novo, meaning without regard to the circuit court's summary denial. Thus, the question before this Court under that standard of review is whether

[22]Moreover, the State arbitrarily took different positions in different parts of the State as to import of Rule 3.851(f)(5)(A).

accepting the factual allegations as true, the movant alleged facts that are not conclusively rebutted by the record and that demonstrate a deficiency in trial counsel's performance that was prejudicial. Gaskin v. State, 737 So.2d at 516 ("**an evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief.**").

Here despite arguing that the guilt phase ineffectiveness claim was insufficiently pled, the State acknowledged in its Response in circuit court that:

> It is Anderson's claim he was denied a reliable adversarial testing at is guilt phase due to counsel's ineffective assistance in the manner he investigated, challenged, presented, or protected the case regarding: (1) **tire evidence** (a) by agreeing that Fred Boyd was an expert in tire tread analysis; (b) by failing to utilize forensic experts to prepare for cross-examination/impeachment of the State's experts, Fred Boyd and Mark Suchomel, and to challenge the expertise, opinions, and collection techniques of these experts; and (c) failing to object to the admission of tire tread evidence; (2) **blood evidence** (a) by failing to utilize an[] expert and argue that there should have been more blood in the car based on [the] State's theory; (b) by failing to argue that Anderson's car had not been cleaned so blood should have been present; (3) **grease pattern evidence** (a) by failing to challenge the "science" of grease pattern evidence; (b) by failing to use an expert to challenge the analysis conducted by State experts; and (c) b[]y failing to seek a Frye hearing on grease pattern evidence; (4) **fiber evidence**(a) by failing to seek a Frye hearing; (5) **State's forensic investigation** (a) by failing to challenge/impeach the State's forensic technicians who analyzed the evidence and testified in court regarding their findings; (b) by failing to question the limited photographic documentation; and (c) by challenging the technician's failure to make a diagram of the car or provide complete documentation; (6) **time and manner of**

> **death** by stipulating that the victim, Keinya Smith ("Keinya") was dead as a result of blunt force trauma and that the items found on U.S. 27 by Lt. Vaughn and Det. Foley were Keinya's property and/or blood, hair, and scalp; (7) **evidence for subsequent testing**; and (8) failure to **visit/consult with Anderson**.

(PC-R. 1560-61)[23] (footnote omitted) (underscoring and bold typeface in original).[24] These facts must be accepted as true under Gaskin v. State; yet, the State refuse to so in its brief.

Mr. Anderson's claim was that guilt phase trial counsel

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[23]In its Answer Brief (at 34), the State does not acknowledge its own statement in the trial court of Mr. Anderson's ineffectiveness claim. Worse, it tries to skirt the Frye allegations by citing United States v. Hope, 714 F.2d 1084 (11th Cir. 1983), which addressed the federal rules of evidence (and not Florida's) and which is no longer good law. See Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. (1993). The State also tries to side-step the import of Ramirez v. State, 810 So.2d 836 (Fla. 2001), first by erroneously asserting in a section of its argument addressing "grease pattern" evidence that Mr. Anderson did not argue in his motion to vacate that the testimony of the State's "tire experts" should have been challenged because they were unqualified in any recognized field (PC-R. 1008, 1010). The State then without any citation to the record or basis in fact says "there are no *Ramirez*-like concerns here" (Answer Brief at 37) ("To begin, no new testing procedure was conducted."). Mr. Anderson alleged otherwise in his motion (PC-R. 1013), and his factual allegation, like all of his factual allegations, must in this appeal be accepted as true. And finally, the State's assertion that Mr. Anderson "confuses the concept of a piece of evidence's weight with that evidence's admissibility" (Answer Brief at 36), shows it is in denial as to the fact that Mr. Anderson alleged both that counsel unreasonably failed to make Ramirez-like challenges to the admissibility of the testimony, and if unsuccessful, impeach it as unreliability (PC-R. 1013).

[24]While this shows that a fact specific claim detailing trial counsel's deficient performance at the guilt phase was pled, the State's Response significantly understated the scope and the extent of the allegations of counsel's deficient performance in failing to prepare, know the contents of his files, and investigate on Mr. Anderson's behalf.

"unreasonably failed to investigate and prepare" for trial (PC-R. 1002). Predecessor counsel assigned to represent Mr. Anderson had retained forensic experts. Yet, trial counsel "failed to consult with these experts" and utilize their services (PC-R. 1001). Mr. Anderson pled: "Counsel's unpreparedness indicates only a superficial understanding of this concept and a failure to grasp the reasonable hypothesis negating guilt" (PC-R. 1006). In the claim, Mr. Anderson alleged that trial counsel's failure to utilize the information developed by predecessor counsel which was contained in the files in his possession was unreasonable. And in fact, there is specific support in the record for this assertion when trial counsel tried to suggest that there were no records verifying Patrick Allen's claim that he was working at the time of the homicide and could not have committed it. Because he was unfamiliar with the content of his own file, the prosecution was able to point out that trial counsel was making an assertion that his own files demonstrated was false.[25]

The State in its Response below conceded that the prejudice

[25]Mr. Anderson detailed this event in his Initial Brief because the record clearly documents that trial counsel was unfamiliar with his own file and the information that predecessor counsel investigated and found (Initial Brief at 72) ("In the trial transcript, an obvious and glaring example of Mr. Hoeg's failure to investigate and know not just the facts of the case, but also the facts actually contained in his trial file was revealed as he finished his cross-examination of Patrick Allen."). The State in the reply tries to argue that this is a new procedurally barred ineffectiveness claim (Answer Brief at 14, n.3). It is not. It is record support for the claim pled.

prong analysis began by excluding the evidence that counsel had allegedly unreasonably failed to exclude, refute and/or impeach:

> **Prejudice analysis** - As noted above, the best Anderson could hope for is that there is no evidence in, on, or under his car linking him to the murder of Keinya. Given the evidence that has remained unchallenged, Anderson has not shown prejudice. The trial result would be the same even had: (1) counsel done everything Anderson now suggest should have been done and all of the tire, blood, grease pattern, and fiber evidence been excluded from the trial; and (2) it was shown that the State's forensic technicians missed other inculpatory evidence from Anderson's car or did not document well through photographs and diagrams the evidence remove[d]. Anderson has not attempted to explain how the result of his trial would have been different absent this evidence and in light of the remaining, unchallenged evidence of his guilt.

(PC-R. 1579-80) (footnotes omitted) (underscoring and bold typeface in original). The State made no mention of this Court's ruling in Gaskin v. State, 737 So.2d at 516, that "**an evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief.**"

The State simply asserted that prejudice could not be shown:

> **This evidence was sufficient to show motive, opportunity and criminal agency.** The import of this evidence would not have been diminished had counsel successfully excluded the challenged forensic evidence obtained from the car and tire track casts from the roadway. **Anderson had failed to show how the outcome of his case would have been different, thus he has failed to show prejudice under Strickland**, and summary denial is required

(PC-R. 1581). The State's arguments for a summary denial came down to: 1) the sufficiency of the remaining evidence to support

a conviction, and 2) Mr. Anderson's failure to meet his burden of proving that the outcome of his trial would have been different. First, the US Supreme Court has specifically held that the prejudice prong analysis is not a sufficiency of the evidence test. Kyles v. Whitley, 514 U.S. 519 (1995) ("The second aspect of [United States v.]Bagley[, 473 U.S. 667(1985)] materiality bearing emphasis here is that it is not a sufficiency of evidence test.").[26] Second, Strickland v. Washington, 466 U.S. at 694, itself holds that Mr. Anderson's burden is not a demonstration that the result of his trial would have been different.

Under the analysis this Court set forth in Gaskin v. State, the State did not make in the trial court a "**conclusive demonstration that the defendant is entitled to no relief**" without resorting to analyses contrary to law. In its Answer Brief, the State at no point employs the proper standard of review and overcomes the Gaskin presumption that an evidentiary hearing is required on the guilt phase ineffectiveness claim.

The State also inexplicably argues that trial counsel cannot be found to have rendered ineffective assistance in failing to object to evidence "where there has been an earlier appellate court finding that an unpreserved error did not rise to the level

[26]The Bagley materiality test is the prejudice prong analysis that was formulated in Strickland. Kyles, 514 U.S. at 434.

of fundamental error." (Answer Brief at 22). The United States Supreme Court held otherwise in Kimmelman v. Morrison, 477 U.S. 365, 385 (1986), writing:

> The trial record in this case clearly reveals that Morrison's attorney failed to file a timely suppression motion, not due to strategic considerations, but because, until the first day of trial, he was unaware of the search and of the State's intention to introduce the bedsheet into evidence. Counsel was unapprised of the search and seizure because he had conducted no pretrial discovery. Counsel's failure to request discovery, again, was not based on "strategy," but on counsel's mistaken beliefs that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense and that the victim's preferences would determine whether the State proceeded to trial after an indictment had been returned.

REPLY TO ARGUMENT IV

In addressing Argument IV, the State ignores the legislative concern regarding reliability that led to the adoption of the Daubert standard. It ignores reliability concerns arising in light the recent decisions in Hildwin v. State, 141 So.3d 1178 (Fla. 2014), and Swafford v. State, 125 So.3d 760 (Fla. 2013). In both cases, bad science was used to obtain convictions. See Johnson v. Mississippi, 486 U.S. 578, 584 (1986).

CONCLUSION

Based upon the record and the arguments presented herein and in his Initial Brief, Mr. Anderson respectfully urges the Court to reverse the trial court and remand for furthering proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing reply brief motion has been furnished by email service to Katherine.McIntire@MyFloridaLegal.com, the primary email address given for opposing counsel, Assistant Attorney General, Katherine Y. McIntire, on November 11, 2014.

CERTIFICATE OF FONT

This is to certify that this Reply Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

/s/ Martin J. McClain

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