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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NUMBER: SC17-1486

LOWER TRIBUNAL CASE NUMBER: 16-2010-CF-001450-AXXX-MA

CECIL SHYRON KING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. King's Third Amended Motion to Vacate Judgments of Conviction and Sentence. The Motion was brought pursuant to Fla. R. Crim. Pro. 3.851.[1]

STATEMENT ON JURISDICTION

As previously stated in the initial brief, IB, p. 1, this appeal addresses the guilt phase claims, not the penalty phase relief granted by the circuit court due to error under *Hurst v. Florida*, 136 S. Ct 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Appellee asserts "there is no final judgment and sentence in King's case" and as such, "his appeal is untimely and this Court lacks jurisdiction to hear it." AB, p. 14-15. Appellee is wrong. In *Calhoun v. State*, SC18-340 (Fla. 2018), before this Court currently, the circuit court granted the appellant penalty phase relief under the *Hurst* decisions, while denying relief under his guilt phase issues. The appellant is appealing his guilt phase issues, as Mr. King is in this case. Appealing now is also in the interest of judicial economy.

[1] References to the record of the direct appeal of the trial judgment and sentence in this case are designated DIR. ROA, followed by the appropriate page number, e.g. (DIR. ROA, p. 123). Citations to the record from the post-conviction evidentiary hearing are designated as PC, followed by the appropriate page number, e.g. (PC, p. 123). References to Exhibits are designated by the record, followed by the exhibit number, followed by the appropriate page. number, e.g. (DIR. ROA, Exh. 1, p. 1). References to the Appellee's Answer Brief are designated as AB, followed by the appropriate page number, e.g. (AB, p. 123). References to Appellant's Initial Brief are designated as IB, followed by the appropriate page number, e.g. (IB, p.1).

Furthermore, Appellee's misstates that Mr. King can "potentially relitigate [his guilt phase] claims after his sentence is re-imposed." This juncture is the sole avenue available for Mr. King to litigate his guilt phase issues in this Court.[2]

ARGUMENT

Issue 1: Trial counsel was ineffective for failing to present evidence and for failing to challenge the State's case.

I. Trial counsel was deficient in failing to adequately redact inflammatory statements during the interrogation video of Mr. King.

Appellee argues that Mr. King's reliance on *Martinez v. State*, 761 So. 2d 1074 (Fla. 2000) is misplaced, because the facts of *Martinez* are far different from the present case. According to Appellee, "a jury may hear an interrogating detective's remarks about a crime when they provoke a relevant response from the defendant." AB, p. 19. This assertion is illogical and blatantly ignores the facts of this case. Here, as in *Martinez*, the investigating officers' opinions as to the defendant's guilt should have been inadmissible. The officers' comments here failed to elicit *any* relevant responses from Mr. King—rather, the sum of the

[2] The State cites to cases with no relevance to the issue at hand. In *Berman v. United States*, 302 U.S. 211 (1937), the execution of the sentence in petitioner's case was suspended and petitioner was placed on probation. Petitioner then appealed from the sentence. In *Magwood v. Patterson*, 561 U.S. 320 (2010), the petitioner appealed from a habeas application challenging a new judgment for the first time in federal court. Similarly, in *Insignares v. Florida*, 755 F.3d 1273 (Fla. 11th Cir.), the petitioner filed a second habeas petition challenging a new judgment entered after resentencing in federal court. These cases do not provide insight into Mr. King's ability to adjudicate his guilt phase claims in the Court now.

comments amounted to a narrative of the detectives' opinions and theories in the case. The jury then heard this narrative, which likely affected their verdict.

In this case, the detectives' comments damaged Mr. King's credibility and inserted the detectives' opinion as to the value of the State's circumstantial evidence. Similarly, in *Jackson v. State*, 107 So. 3d 328 (Fla. 2012), the Court noted that "the detectives' adamant belief in Jackson's guilt could have augmented the value of the State's circumstantial evidence, validated by the credibility of State witnesses, and damaged Jackson's credibility before he was afforded the opportunity to testify or present his case." *Jackson v. State*, 107 So.3d 328, 343-44 (Fla. 2012). The Court further noted that the jury's reasonable doubt regarding Jackson's guilt would have been obviated by recalling the detective's adamant belief in Jackson's guilt. *Id.* at 344.

Further, as discussed in the initial brief, IB, pg. 20, in *Martinez*, the Court held that an investigating officer's opinion as to the defendant's guilt was inadmissible. *Martinez*, 761 So. 2d at 1079. In this case, the jury heard around two dozen statements from the detectives, ranging from the detectives' clear disbelief in Mr. King's testimony (DIR. ROA, Vol. XIV, p. 972), to their outright allegations of Mr. King's guilt (DIR. ROA, Vol. XV, p. 996). Trial counsel's failure to object to the clearly inflammatory statements played in front of the jury likely impinged the jury's reasonable doubt regarding Mr. King's guilt.

Additionally, Appellee's assertion that trial counsel's representation was not deficient is contradicted by the facts of the case. Appellee asserts that Quentin Till spent a significant amount of time redacting the tape and then worked with the state prosecutor, *the opposing counsel prosecuting Mr. King*, in identifying what the State conceded as inadmissible. These discussions did not benefit Mr. King. Furthermore, although Mr. Till stated he spent a "hundred" hours working with the State on specific redactions, he never reviewed the redactions line by line. (PC, pg. 4954-55).

Finally, it was unreasonable of Mr. Till not to object *a single time* as the interview with Mr. King were played to the jury. Mr. Till testified at the evidentiary hearing that he thinks excessive objections are strategically unsound and only saves his objections for things that are actually prejudicial. (PC, p. 4979). This "strategy" is unreasonable as these statements were highly prejudicial to Mr. Till. Mr. Till's failure to object allowed the jury to hear the following inflammatory comments:

- "And what's it going to look like, okay, when the day of reckoning comes, like I said, you know what it's going to look like? This motherfucker has no remorse for what he's done. Okay? And you know what happens to guys who have absolutely no remorse for doing what happened to that lady? (DIR. ROA, Vol. XV, p. 1000)

- "That alibi is shot. I know you did it." (DIR. ROA, Vol. XV, p. 996).

- "[T]o see what you're looking and man up sitting in that corner because you look like a cold-blooded murderer." (DIR. ROA, Vol. XV, p. 1014).

- "We sit in this room all the time, man, and talk to people. But you got to tell us the truth, man. What you've told us is not the truth. We know that. No doubt about it. You can sit there and shake your head and it's going to go away. Okay? Because it's worse with you shaking your head with no explanation. Just tell us why." (DIR. ROA, Vol. XV, pg. 1050-51).

Mr. King was prejudiced by trial counsel's failure to object to these damaging and inaccurate statements. Any probative value the jury may have received from listening to the police interview was substantially outweighed by the evidence elicited and should have been inadmissible under Florida law.

II. Trial counsel was deficient in failing to object to State witness Detective Cayenne's hearsay testimony at trial.

Appellee argues that Mr. King's trial counsel's decision "not to object was strategic, many of the statements were admissible, and admitting the statements was not prejudicial to King." AB, p. 21. This argument ignores that Mr. Till failed to object a *single time* to well over two dozen troubling statements made by Detective Cayenne during his direct and redirect testimony. Mr. Eler's and Mr. Till's "strategy" to not object a *single* time during Detective Cayenne's testimony during direct and redirect at trial was neither logical nor reasonable under *Strickland*. Detective Cayenne's statements were not, as Appellee argues, "not objectionable." AB, p. 22. Detective Cayenne testified to a great variety of

inadmissible statements ranging from his belief in the credibility of the State's witnesses (DIR. ROA, Vol. XIV, p. 886) to his opinion of "normal" behavior after someone committed a murder (DIR. ROA, Vol. XV, p. 1169) to information he was not personally privy to (DIR. ROA, Vol. XV, p. 1174). These numerous statements were not only clearly hearsay; they were also irrelevant, speculative, and offered improper opinions. Mr. Till's failure to object *a single time* and protect his client's rights was not a reasonable strategy and it completely deprived Mr. King of an adversarial trial. *See U.S. v. Cronic*, 466 U.S. 648, 659 (1984). After Detective Cayenne testified to these statements, trial counsel had no means of questioning the veracity of the comments. Because the statements at issue were the detective's opinions or personal theories, counsel could not attack the statements with other witnesses or with the use of other evidence. Had Mr. Till acted appropriately, he would have kept these statements out.

Furthermore, Appellee fails to note the absurdity of Mr. Till's utter refusal to object, based on his belief that only young attorneys readily object to obvious constitutional violations, as the prosecution lodged numerous hearsay objections pertaining to what various witnesses told Cayenne, all of which were sustained by the trial court. (DIR. ROA, Vol. XV, pgs. 1080-100, 1099). Simply invoking the word "strategy" to describe Mr. Till's actions here does not automatically explain away counsel's errors; rather, the determination must be based on reasonableness

in light of the all of the circumstances. *Horton v. Zant*, 941 F.2d 1449, 1461 (11th Cir. 1991). A "strategic" decision cannot be deemed reasonable when trial counsel fails to consider the options and make a reasonable decision. *Id.* at 1462. In *Horton*, the defendant's trial counsel failed to call certain witnesses and justified this failure as a "tactical decision." *Id*. at 1462. The Eleventh Circuit Court of Appeals determined this "tactical" decision to be unreasonable and ultimately found that this failure amounted to deficient performance. *Id*. The court noted "[i]n the case at hand, the attorneys began to follow one path, based upon a misinterpretation of the law, without ever evaluating the merits of alternative paths." *Id*. Because of this failure, the court explained, trial counsel's decisions could not have been reasonable under the circumstances and were, therefore, deficient. *Id*. Here, Mr. Till did not consider the effect on the jury of over two dozen statements, all of which were clearly hearsay, irrelevant, speculative, and/or improper opinion, being offered by Detective Cayenne.

Though Appellee argues that, as many of these statements were admitted through other witnesses, even if trial counsel had objected, the statements would have been presented to the jury through other witnesses. Appellee ignores that the undue prejudice in this case was heightened as the comments came from a member of law enforcement, e.g., a man the jury likely trusted, believed to be experienced, and assumed had access to evidence and information not presented to the jury that

would support the charges against Mr. King. *See* Stephen Garvey et al., *Juror First Votes in Criminal Trials*, 1 J. EMPIRICAL LEGAL STUD. 371, 396 (2004). Additionally, having Detective Cayenne reiterate what the other witnesses testified to, despite not having firsthand knowledge, was further prejudicial. By adopting the testimony of other witnesses, the detective was vouching for the credibility of other witnesses. *United States v. Ellis*, 547 F.2d 863, 869 (5th Cir. 1977). As such, Mr. King was thus prejudiced and deprived of an adversarial trial. *See U.S. v. Cronic*, 466 U.S. 648, 659 (1984).

III. Trial counsel was deficient in failing to object to the introduction of a bloody shirt found in Mr. King's residence and failed to object to repeated inferences about the shirt.

Mr. King proved at the evidentiary hearing that counsel was ineffective for failing to file a comprehensive pretrial motion to suppress a bloody shirt found at Mr. King's apartment. (IB at 32-34). In Florida, all relevant evidence is admissible, unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. *Miller v. State,* 42 So.3d 204, 224 (Fla. 2010); 90.404 Fla. Stat. (2017). According to Florida Statute 90.404 "evidence of a person's character or a trait of character is inadmissible to prove action in conformity with it on a particular occasion."

Here, the shirt was not relevant to the murder as it was not worn during the commission of the crime or found at the scene. Furthermore, the shirt was not relevant to prove that Mr. King was the person who committed the crime. Like many of the failures and commissions discussed above, it is hard to imagine any "strategic" or "tactical" reason for failing to challenge this highly prejudicial evidence. Indeed, *despite the State conceding that the shirt had no relevance to the case*, (DIR. ROA, Vol. XV, ps. 1021-22), the shirt was not suppressed and served no other purpose than to confuse and mislead the jury into thinking the bloody shirt was somehow involved in the crime or that he had the propensity to commit other violent crimes. At best, the jury used the shirt as improper character evidence and assumed that Mr. King was a dangerous or violent person because a bloody shirt was found at his home. At worst, the jury believed that the shirt was connected to the offense and assumed that, as it was found in Mr. King's residence, he was connected to the offense.

Though Appellee states that the shirt only played a small role in the trial, (AB p. 25), this assertion is undercut by the trial record. This same bloody shirt was referred to on numerous occasions throughout trial, including during closing argument. (PC, p, 4961). Mr. Till recognized that the shirt hurt Mr. King, and he attempted to argue that the shirt showed the police were careless with their investigation by virtue of them making the bloody shirt a part of the case.

However, had Mr. Till made even a *single* objection, the bloody shirt would not have played *any* role in the case. As Appellee noted, strategic decisions are generally insulated from *Strickland* unless they are "'so patently unreasonable that no competent attorney would have chosen it.'" *Dingle v. Sec'y for Dep't of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007). Here, Mr. Till understood that the "bloody shirt was a smoke screen. It had nothing to do with this case." (PC, ps. 4960-61). Thus, trial counsel was well aware of the impropriety, irrelevance, and prejudice of the bloody shirt and yet chose to do nothing to seek its suppression. The absence of thought is not a "strategy," but rather an utterly unreasonable decision under the circumstances. This failure amounted to ineffective assistance of counsel, which prejudiced Mr. King's case, as the jury likely thought the shirt had some relevance to Mr. King as prejudicial collateral evidence was shown to them repeatedly and discussed throughout the entirety of the trial.

IV. Trial counsel was deficient in failing to investigate and present expert witnesses at Mr. King's trial, prejudicing the outcome of the proceedings.

Counsel has a duty to ensure an adequate and meaningful investigation into a client's case. *See Kimmelman v. Morrison*, 477 U.S. 365 (1986); *see also Wiggins v. Smith*, 539 U.S. 510 (2003); *Hinton v. Alabama*, 134 S. Ct. 1081, 1090 (2014). Trial counsel here was ineffective for failing to provide *a single* expert witness at trial. In contrast, the State presented numerous forensic experts, all of

whom testified to significant technical aspects of the case such as DNA, fingerprints, shoeprints, and cellphones. Without a rebuttal presentation from the defense, there was no reliable alternate source on which the jury could rely or challenge the State's evidence.

Experts, as defined by Florida law, are people with "scientific, technical, or other specialized knowledge" that will "assist the trier of fact in understanding the evidence or in determining a fact in issue." Section 90.702, Fla. Stat. (2017). Here, the jury did not hear from a technical defense expert or acquire any sort of specialized information from the defense throughout the *entirety* of the trial. The State presented expert forensic testimony regarding DNA, fingerprint, shoe imprinting, and cell phones. Trial counsel failed to provide any of their own experts. This is discussed in more depth below. *See*, *supra* pgs. 11-20, Section V-VIII.

V. Trial counsel was deficient in failing to present a DNA expert at Mr. King's trial and use a DNA expert to rebut the State's expert witness.

Trial counsel was ineffective for failing to present any sort of DNA expert at Mr. King's trial. Though Appellee argues that trial counsel acted reasonably by undertaking reasonable investigation and consulting with experts, the mere fact that trial counsel consulted with an expert does not mean that was sufficient. Much more is required to ensure a capital defendant received effective assistance

guaranteed by the Sixth Amendment and, ultimately, a fair trial. A capital defendant cannot, as here, be deprived of experts when the State puts on several experts, unchallenged on technical scientific matters, like DNA.

The State claims that trial counsel originally consulted with a DNA expert, Mr. Budowle, AB, pgs. 28-31, but then reasonably decided to forego going forth with Mr. Budowle's help after Mr. Budowle expressed some concerns about addressing the DNA at trial. (PC, pgs. 4782-94). However, some concerns do not alleviate trial counsel of the responsibility to represent the client and rebut the State's DNA expert. In fact, trial counsel's consultation with Mr. Budowle should have made any competent attorney aware of the fact that the DNA evidence presented at trial played an integral role in the case.

Furthermore, it should be noted that the discussion trial counsel had with Mr. Budowle was limited to a maximum of one or two phone calls. Mr. Eler testified Mr. Till made as much as one phone call to confirm that we should not do any more testing. Neither was sure, however, if Mr. Budowle ever reviewed the notes of Mr. Hitt, the State's expert, to see if his testing was accurate before the defense decided not to hire Mr. Budowle. Additionally, the decision not to hire him was made merely 20 days before trial, meaning there is no conceivable way Mr. Budowle could have reviewed Mr. Hitt's deposition transcript or findings to determine whether to challenge the testing results or methods at trial. Mr. Eler

himself testified that it would have been important for Mr. Budowle to look at Mr. Hitt's results, as Mr. Hitt testified in the guilt phase of trial as to the DNA results. (PC, p. 4785). Counsel's action of contacting Mr. Budowle demonstrates that counsel recognized the need for a DNA expert. The failure to retain Mr. Budowle, or any other DNA expert, however, was not due to his lack of helpful findings or opinions on the case—Mr. Budowle never did a full assessment of the case.

Mr. Kevin Noppinger's testimony at the post-conviction evidentiary hearing demonstrates that if a defense DNA expert—like Mr. Budowle or Mr. Noppinger—had been asked by trial counsel to rebut the State's DNA expert, or provide a consultation regarding Mr. Hitt's testimony, a DNA expert would have been able to assist the jury and provide insight into the DNA evidence used in trial. As Mr. Noppinger testified at the post-conviction hearing, the DNA profile obtained from the victim's socks had foreign alleles on them that did not match the victim or Mr. King. (*Id.* at 3310). Mr. Noppinger testified that more testing could have been done on the socks than what was done by FDLE, who had found that there was insufficient DNA to be able to include Mr. King as a contributor. (*Id.* at 3308-10). Had trial counsel retained a DNA expert, such an expert could have testified, as Mr. Noppinger did, that the foreign alleles found on the socks could have excluded certain individuals. Mr. Noppinger could have provided insight into

the location of where the swabbing on the sock was done, which could have provided information into where the foreign alleles came from. (*Id.* at 3311).

In addition to testifying about the socks, a defense DNA expert could have testified about the bloody shirt. The bloody shirt that was paraded in front of the jury was never tested for DNA or searched in Combined DNA Index System ("CODIS"). (*Id.* at 5646). Had the shirt been tested, Mr. Noppinger testified that a qualified lab technician would have been able to determine if the shirt was of evidentiary value in this case and whether such testing was necessary. (*Id.* at 3312).

Trial counsel had no tactical reason for neglecting to retain a DNA expert. Had trial counsel obtained a DNA expert, trial counsel's "good guy" theme at trial would not have been undermined; rather, finding an alternative suspect through proper testing would have bolstered the defense's theme. (*Id.* at 4800).

The post-conviction court did not allow Mr. King to retest these items. Mr. Noppinger testified that had there been testing done on the shirt, it may have produced a better profile from a minor contributor that could have been used to link another individual to the victim's killing since the identity of the killer was a genuine issue at trial.

Additionally, Mr. Noppinger testified that the particular part of a cantaloupe that was used at trial against Mr. King could have been frozen for further testing at

a later time. Mr. Noppinger was not able to determine the source of the DNA on the cantaloupe and noted that it was never tested to conclusively show it was specifically saliva DNA found on the cantaloupe. (*Id.* at 3306-07). Because the evidence has been destroyed, Mr. King can no longer retest it to determine if there was another person, or even a second or third person at the crime scene. (*Id.* at 3307, 3340).

Contrary to the State's assertion, AB, p. 29, cross-examination of Mr. Hitt alone was not a proper "strategic" or "tactical" decision nor sufficient to challenge the State's case. The State's DNA testing of the socks, hairs and fibers, bloody shirt, and cantaloupe went unchallenged at trial. As Mr. Hitt's testimony was the only testimony provided to the jury regarding DNA, the jury was left with no other possible conclusion other than Mr. King's DNA was found on a piece of cantaloupe, he was the killer. Trial counsel's representation fell well below accepted professional standards in several respects, and there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different.

VI. Trial counsel was deficient in failing to obtain a shoe impression expert and rebut the State's expert.

Trial counsel was ineffective for failing to present a defense shoe impression expert at trial. Appellee alleges that trial counsel made a "strategic" decision not to call a shoe print expert to testify and King was not prejudiced by trial counsel's

choice. AB, p. 32. The Appellee also alleges that Mr. Bodziak, Mr. King's post-conviction shoeprint expert, did not identify any material evidence that would have affected the outcome of his case had it been produced at trial and that his testimony did not support King's claim that the State's evidence was inaccurate or flawed. AB, p. 33. This contention is contradicted by the evidence presented at the post-conviction evidentiary hearing.

Mr. Bodziak's testimony at the post-conviction evidentiary hearing highlights that the door to the victim's house itself was not seized or preserved for further testing, despite finding several shoe impressions on the door. (*Id.* at 3355-57). Neither the State nor trial counsel sought to identify the brand of shoe impression on the victim's door. Additionally, trial counsel allowed the State's expert, Detective Pfister, an unqualified shoe print expert, to testify to the dimensions of the shoeprint, which was estimated to be around 11.81 inches, implying that this measurement corresponded with a larger shoe size like the one Mr. King wore. (*Id.* at 3359). Mr. Bodziak, or a similar expert, would also have been able to rebut the State's testimony regarding the shoe size and testify that the shoeprint did not match Mr. King's larger shoe size, instead measuring the shoeprint to be around 11.41 inches, which is equivalent to a size 8 or 9 shoe. (*Id.* at 3359-62). Had trial counsel retained a defense expert at the time of Mr. King's guilt phase, rebutting Detective Pfister's testimony would have been possible,

especially in accurately measuring what shoe size the shoe prints collected from the scene were. An expert could have also testified that those shoeprints weren't Mr. King's. In lieu of rebutting Detective Pfister's testimony, trial counsel allowed the State to wholly guide the narrative of trial, allowing inaccurate conclusions of the size of the footprints found at the scene of the crime, the use of inaccurate scales, and the lack of preservation of a door as evidence. Furthermore, no expert was used to rebut Detective Pfister's misleading heel to toe dimensions of the footprints found on the scene.

Due to the trial counsel's failure to obtain a defense shoeprint expert, the jury was misled to believe that the shoe prints found on the scene belonged to Mr. King when, in fact, they were too small to have been Mr. King's shoeprints. Trial counsel's failure rose to the level of ineffectiveness and severely prejudiced Mr. King. No reasonable trial attorney would have failed to challenge the State's evidence with exonerating testimony.

VII. Trial counsel was ineffective in failing to obtain a latent print expert and rebut the State's expert testimony.

Trial counsel was ineffective for failing to retain a defense fingerprint expert. A "strategic" decision cannot be deemed reasonable when trial counsel does not consider options and make a reasonable decision. *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991). Here, Appellee's argument that trial counsel

made a reasonable "strategic decision to not use such experts," AB, p. 35, is invalid.

Mr. King's post-conviction fingerprint expert was able to exclude Mr. King from a fingerprint left on a ziplock container lid found on the counter of the east wall in the kitchen, (PC, p. at 2711), a lid that the State's latent expert said had no value. Had trial counsel retained an expert, this exonerating evidence could have been considered by the jury. Additionally, such an expert could have been consulted and used to rebut other inaccurate information presented by the State. However, because of trial counsel's unreasonable fears that the ziplock container might lead to evidence implicating Mr. King in a robbery, no fingerprint expert was retained and Mr. King was deprived of exonerating forensic testimony to rebut his implication in a murder.

VIII. Trial counsel was ineffective in failing to object to Detective Cayenne's improper and unqualified cellphone testimony and in failing to present a cell phone expert at trial.

Appellee argues Detective Cayenne's testimony was not improper, relying on *Gordon v. State*, 862 So. 2d 1215, 1219 (Fla. 2003), holding that witnesses need not be experts to testify about phone records and the comparison of cellular tower site location maps. However, *Gordon* is easily distinguishable. Mr. King was able to rebut Appellee's argument at the evidentiary hearing during post-conviction. In Mr. King's case, the detective testified to information that far exceeded the

confines of *Gordon*, and specifically discussed evidence that only a person who work for a cell phone company would have known or could have testified to. Detective Cayenne testified regarding the directionality of cell phone towers, where Mr. King was located when the phone calls were made, from the cell phone records the State obtained. As such, the detective held himself out as an expert and provided "scientific, technical or other specialized knowledge" to assist the trier of fact in rendering its decision. This information was beyond the knowledge of the jury. The average juror does not know how a cell phone company transmits location data from its network to its records. Therefore, trial counsel should have objected and provided its own defense witness to rebut Detective Cayenne's testimony.

Mr. Wyman, who was retained by post-conviction counsel, testified regarding his expertise in GPS and cell phones. He noted that contrary to Detective Cayenne's conclusions, there was no data as to the direction within the records provided to the officer. Only someone from a phone company could determine the directionality of the tower or location at the time Mr. King used his cell phone, not a detective, and not from the records he was provided. (PC, p. 3400-03). In stark contrast to Detective Cayenne's testimony, Mr. Wyman testified that a dish has nothing to do with determining what direction a call was

coming from or the directionality of the signal. (PC, p. 3412). Thus, Detective Cayenne's testimony was grossly misleading to the jury.

Additionally, though Mr. Till was able to obtain some favorable information on cross-examination, Mr. Till did not object or move to exclude Detective Cayenne's testimony, believing the state could have simply brought in someone more qualified than Detective Pfister if he objected. (*Id.* at 2982). A decision based on ignorance or fear deserved no deference by this Court. Trial counsel's failure to talk to or retain an expert to discuss GPS/cell phones was negligent and limited Mr. Till's ability to question Detective Cayenne on his misleading testimony because he did not know it was false.

Had trial counsel retained a cell phone expert, counsel could have rebutted Detective Cayenne, could have effectively questioned Detective Cayenne, and could have provided the jury with accurate testimony regarding cell phone towers and their ability to determine cell phone locality. Ultimately, had trial counsel retained a cell phone expert, trial counsel could have shown that the cell phone records did not even suggest, much less prove, that Mr. King was where Detective Cayenne said he was. Trial counsel's failure to retain an expert greatly prejudiced Mr. King's trial with inaccurate and false information.

Issue 2: Trial counsel was ineffective for failing to raise objections.

I. The post-conviction court's finding that the outcome of the proceeding would not have been different even if trial counsel obtained a favorable ruling on trial counsel's objections to the State's leading questions of Montfort, that the questioning of Montfort was permissible and not misleading, and that trial counsel did not act deficiently is supported neither by the law nor competent substantial evidence.

Appellee claims that the State's questions were not leading, that Rashad Montfort's testimony was not misleading, and the trial counsel's decision not to object to portions of the State's questions was a reasonable strategic decision. (AB, p. 39). Appellee specifically believes that the line of questioning Mr. King complains of did not "mislead" the jury into believing that Mr. Montfort was lent the Cadillac by Mr. King. Appellee does not address the significance of the State only playing *parts* of the wire tap conversations and then telling the jury that this was the only part of the conversation that was relevant. (DIR. ROA, Vol. XIII, pgs. 726-27). It was during this examination that the State asked Mr. Montfort several questions, including, whether Mr. Montfort would lie for Mr. King. (DIR. ROA, Vol. XIII, p. 732). Trial counsel failed to object here. Further on, trial counsel again failed to object when the State fed Mr. Montfort answers to questions, including asking if Mr. King loaned him the car. (DIR. ROA, Vol. XIII, pgs. 734-35).

Appellee's argument that Mr. Till's failure to object to "a few isolated leading questions" was reasonable is entirely off base; Mr. Till failed to object *entirely*. Mr. Till testified that he thinks excessive objections are strategically unsound and that he saves his objections for things that are actually prejudicial. (AB, p. 42). Trial counsel's utter failure to protect Mr. King here, resulted in prejudicial testimony that led the jury to believe that Mr. King lent the vehicle to Mr. Montfort and that he may have lied for Mr. King. The State also bolstered its case by feeding Mr. Montfort the answers to the questions they sought. An improper leading question is one which "suggests the specific answer desired." 3 Wigmore, Evidence (Chadbourn rev), § 771. Here, where the State directed Mr. Montfort to ask if Mr. King loaned him the car, the State further mislead the jury into believing Mr. King lent Mr. Montfort the vehicle. Trial counsel's failure to object is thus highly prejudicial.

II. The post-conviction court's finding that the questions of Detective Cayenne did not mislead the jury and that there is not a reasonable probability that the result of the proceeding would have been different even if trial counsel was ineffective in failing to object to these questions and failing to cross-examine Detective Cayenne is supported neither by the law nor competent substantial evidence.

Appellee claims that the State's redirect questioning accurately summarized the relevant evidence, that there was no lawful basis to object, and that it was reasonable for trial counsel to avoid questions that focused the jury's attention on

unfavorable evidence. (AB, pgs. 43-44). Appellee further says that the questioning was very limited and was not misleading and that the jury heard the relevant portions of the audio records, allowing the jury to make its own determination about the meaning of Mr. King's and Mr. Montfort's conversation. *Id.* However, a jury cannot accurately determine facts it does not hear. Due to trial counsel's failure to cross-examine Detective Cayenne about this testimony, trial counsel was unable to establish these facts were not present on the wire tapes *as Mr. Montfort did not make a statement to Mr. King about lending him the Cadillac on the wire tapes*. The jury was led to believe Mr. King played a role in the victim's murder because Detective Cayenne testified that Mr. King loaned the vehicle to Mr. Montfort. This was not true and not on the wire tape. Because counsel failed to object and did not cross-examine Detective Cayenne on this issue, the jury was led to falsely believe Mr. King played a role in the victim's murder, prejudicing him in the guilt phase of trial.

III. The post-conviction court's finding that trial counsel was not deficient in failing to object and respond to the State's first and second closing argument in the guilt phase of Mr. King's trial and in finding Mr. King not prejudiced is not supported by the law or substantial, competent evidence.

Appellee's contention that the State's characterization of evidence was accurate during the closing arguments and trial counsel's approach to closing argument was reasonable is not valid. (AB, p. 45). Appellee also accuses Mr.

King of isolating statements in which the State described evidence to the jury and made arguments regarding the meaning of evidence. (AB, pg. 46). Appellee's position is not supported by the record. The prosecutor at trial made improper comments in closing, and trial counsel did not protect Mr. King or show the jury that the comments were improper. (IB, pgs. 68-69). In closing, the State deceived the jury into thinking Mr. King admitted guilt, loaned a vehicle to Mr. Montfort, and gave keys to Mr. Montfort. Because of trial counsel's failure to object, the jury was left with the false facts that Mr. King loaned Mr. Montfort the vehicle, which was an important issue discussed at trial. In contrast, Mr. Montfort *never* testified that he told Mr. King, "[d]on't worry, I'm not going to tell them to implicate you;" nor was there any evidence on the wire tapes that Mr. King admitted to loaning Mr. Montfort the vehicle, having possession of the vehicle, or having the keys to the vehicle. Mr. King's fingerprints were also never found inside the vehicle.

It is clear the State's closing argument was intended to and did inject elements not in evidence and ventured outside the scope of proper argument. There can be no doubt that the comments were severely damaging, warranting an objection from any reasonable trial counsel. Mr. King was unduly prejudiced due to trial counsel's failure to object.

Issue 3: The trial court's denial of King's cumulative error should be reversed.

Appellee alleges Mr. King received a fundamentally fair trial to which he was entitled under the Sixth, Eighth, and Fourteenth Amendments, because his other claims are meritless. (AB, p. 48). This argument, however, is not accurate. There were numerous, repeated instances of ineffective assistance of counsel, all of which are meritorious and severely tainted Mr. King's guilt. From trial counsel's failure to redact Mr. King's interrogation video to the failure to introduce a *single* forensic expert witness to rebut false testimony in the State's case in chief—which was significantly bolstered by testimony from several of the State's experts—to failure to object to the State's misleading and false statements in both the State's first and second closing arguments in the guilt phase of trial, the errors in Mr. King's trial were not harmless. Trial counsel's failures to object emboldened detectives to take liberties, which allowed the State to exaggerate the evidence and introduce false and misleading testimony. Here, trial counsel's failures allowed the officers to endorse and repeat other witnesses' inaccurate testimony. Additionally, trial counsel's failure to speak to or engage experts allowed the detectives to offer unsubstantiated opinions on exaggerated expertise they did not have, allowing their credibility to grow. Mr. King has been prejudiced by multiple errors on the part of both trial counsel and the prosecution, which resulting in the high penalty from an

uninformed jury. Such a sham of a trial led to the infringement of Mr. King's constitutional rights.

CONCLUSION

For the foregoing reasons, Cecil Shyron King prays this Honorable Court reverse and remand the trial court's denial of his guilt phase claims under the Third Amended Motion to Vacate Judgments of Conviction and Sentence Under Rule 3.851, entered on July 11, 2017, thereby entitling Mr. King to a new trial.

Respectfully submitted,

BY: **/s/ Gonzalo Andux**
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by electronic service to the parties listed below and via U.S. Mail to Cecil Shyron King at Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026 on this **13th** day of April, 2018.

BY: **/s/ Gonzalo Andux**_____

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CERTIFICATE OF COMPLIANCE AS TO FONT

I HEREBY CERTIFY that this brief is submitted by Petitioner, using Times New Roman, 14-point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Petitioner, pursuant to Florida Rules of Appellate Procedure Rule 9.210(a)(2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

/s/ Gonzalo Andux
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