

No. SC21-1779

Lower Tribunal No. CF07-009613-XX

IN THE
Supreme Court of Florida

LEON DAVIS, JR.
Appellant,

v.

STATE OF FLORIDA,
Appellee.

*On Appeal from the Circuit Court, Tenth
Judicial Circuit, in and for Polk County, Florida*

Honorable Donald G. Jacobsen, Presiding Judge

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Davis's motion for postconviction relief under Fla. R. Crim. P. 3.851. The State has filed its answer to Mr. Davis's initial brief, and this reply follows. This reply will address only the most salient points argued by the State. Mr. Davis relies upon his initial brief in reply to any argument or authority argued by the State that is not specifically addressed in this reply.

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the record: "S" followed by the volume number/page number(s) refers to the corrected transcripts of trial proceedings from the supplemental record on direct appeal; "R" followed by the volume number/page number(s) refers to the record on direct appeal to the Florida Supreme Court; "PCR" followed by the page number(s) refers to the postconviction record on appeal. Any citations to the record on appeal from the trial for the crimes at Headley Insurance Company are referred to as "Headley" followed by "R" and the volume number/page number(s). "AB" followed by the page

number(s) refers to the State's answer brief. All other references are self-explanatory.

REPLY TO REQUEST FOR ORAL ARGUMENT

Mr. Davis objects to the State's claim that oral argument should not be granted in this case. According to Fla. R. App. P. 9.142(a)(4), "[o]ral argument *will* be scheduled after the filing of the defendant's reply brief." (emphasis added). Mr. Davis respectfully requests that this Court follow the Florida Rules of Appellate Procedure and hear oral argument on Mr. Davis's appeal.

ARGUMENT IN REPLY TO ISSUE 1:

THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS'S CLAIM THAT THE STATE PRESENTED FALSE AND/OR MISLEADING EVIDENCE IN VIOLATION OF *GIGLIO V. UNITED STATES*

The State violated *Giglio v. United States* when the prosecutor allowed Officer Townsel to give false and misleading testimony that she placed a copy of the Greisman photopack in evidence even though she misplaced the original in her backyard shed. As a result of the State's misconduct, Mr. Davis was denied his constitutional right to a fair trial.

The State's argument that Mr. Davis failed to establish any of the *Giglio* elements is refuted by the record. (AB. 50). Officer Townsel's testimony was misleading and false. Officer Townsel was not confused or mistaken when she testified that she put a copy of the Greisman photopack in evidence. (AB. 51).

The State's reliance on *Conahan v. State* is misplaced. (AB. 51-52). In *Conahan*, the victim's mother gave qualified testimony at trial that she "thought" she told law enforcement certain information when she gave her recorded statement. In postconviction, the State argued mistake, that her testimony was not false, and there was also evidence that she spoke to law enforcement outside of her recorded statement. This Court found that Conahan was unable to establish that the witness's testimony was false.

The State's comparison between *Conahan* and Mr. Davis's case fails because Officer Townsel was not an unsophisticated lay witness. She was a police detective assigned to work on a double-homicide. Officer Townsel should have been aware of her duty to handle evidence carefully and promptly place it in the property room in a sealed evidence bag as soon as she collected it. It is not

credible that she was confused or mistaken about whether she put at least a copy of the Greisman photopack in evidence after he signed and dated it, especially considering she conducted the interview at the police station.

The State's argument that Mr. Davis has not proven that the State knew Officer Townsel's testimony was false is without merit. (AB. 52). Officer Townsel and the Lake Wales Police Department knew that she never placed a copy of the Greisman photopack in evidence, and that knowledge was imputed to everyone in the Tenth Circuit State Attorney's Office. *Giglio v. United States*, 405 U.S. at 154.

The State's argument that Officer Townsel and the prosecutors forgot about her failure to place even a copy of the Greisman photopack in evidence because a lot of time had passed between Officer Townsel's testimony, the evidence review, and Mr. Davis's arrest is meritless. Officer Townsel was suspended without pay as a result of her mishandling of evidence. How does a person forget a formal discipline at work? Besides, "memories fail" does not excuse a *Giglio* violation. (AB. 53).

Officer Townsel's false testimony was material. (AB. 53). Her testimony was used to bolster both the authenticity of the photopack at trial and Mr. Greisman's in-court identification of Mr. Davis. If the trier of fact had known the truth, that the Greisman photopack had been missing since December 14, 2007, it would have undermined confidence that the mishandled evidence was in its original condition. Officer Townsel gave false testimony during Mr. Davis's trial, and this Court should not find that her testimony at the evidentiary hearing that the photopack was unaltered was credible. The State cannot prove that the presentation of this false testimony was harmless beyond a reasonable doubt.

ARGUMENT IN REPLY TO ISSUE 2:

THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS'S CLAIM THAT THE STATE WITHHELD MATERIAL AND EXCULPATORY EVIDENCE IN VIOLATION OF *BRADY V. MARYLAND*

The State committed a *Brady* violation by failing to provide to defense counsel a copy of the reprimand in Officer Townsel's personnel file. As a result of the State's misconduct, Mr. Davis was denied his constitutional right to a fair trial.

Whether or not trial counsel knew that the photopack was not in evidence until after the evidence review does not excuse a *Brady* violation by the State for withholding material evidence from Officer Townsel's personnel file. (AB. 56-57). Trial counsel might have been aware that neither the original Greisman photopack nor a copy were placed into evidence until after the evidence review in June 2010. However, trial counsel was *not* informed that Officer Townsel was disciplined for mishandling the evidence. The distinction is important because at Mr. Davis's trial, the State represented her misconduct as "no harm no foul" because the State claimed there was always at least a copy of the photopack in evidence. That was not true, and the State knew it was not true because Officer Townsel was written up and suspended without pay as a result of misplacing the evidence in her backyard storage shed with no back-up copies in evidence.

The Lake Wales Police Department failed to maintain custody of a critical piece of evidence. The State Attorney's Office failed to disclose Officer Townsel's personnel file which documented the extent of the failure. Officer Townsel could have been impeached and the credibility of the police investigation could have been

undermined by this evidence. This evidence, when taken together with all the evidence in this case, especially the haphazard way the Lake Wales Police Department handled other critical evidence in this murder investigation, demonstrates that Mr. Davis's conviction is unreliable.

ARGUMENT IN REPLY TO ISSUE 3:

THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO EFFECTIVELY CROSS-EXAMINE JAMES KWONG

Trial counsel was deficient for his failure to prepare for and conduct an effective cross-examination of the State's firearm and tool mark examiner James Kwong. As a result of counsel's deficient performance, Mr. Davis was denied his constitutional right to a fair trial.

The State had no direct evidence placing Mr. Davis at the BP station on the night of December 7, 2007, so the State's linchpin evidence against Mr. Davis at trial was the testimony of witnesses that identified Mr. Davis as the shooter at the Headley scene and the testimony of Mr. Kwong that the same gun was used to fire the bullets at the BP station and Headley Insurance Agency.

The State's answer brief relied on trial counsel's testimony that since he could not find an expert to challenge the scientific underpinnings of firearm and tool mark comparisons, his strategy was to emphasize that Mr. Kwong could not identify Mr. Davis as the shooter. (AB. 59). Trial counsel's strategy failed to take into consideration that eyewitnesses that testified in the Headley case identified Mr. Davis as the gunman. The State used the Headley eyewitness identifications at the BP trial to link Mr. Davis to the shootings. It was imperative for trial counsel to challenge the ballistics evidence because it was the only physical evidence linking Mr. Davis to the BP crimes.

Although trial counsel did elicit testimony that it was possible for a .38 caliber bullet to be fired from a .357, he failed to establish that Mr. Kwong could not exclude a 9mm. (S6. 931; AB. 59). This is important because Mr. Davis bought a .357 Magnum from his cousin, not a 9mm.

Trial counsel's deficient cross-examination of Mr. Kwong was the product of a deficient pretrial investigation of the ballistics evidence. (AB. 63). Although trial counsel testified that he was "familiar with various thoughts and efforts on how to attack the

science of ballistics,” he did not have an independent recall of the various materials he reviewed. (PCR. 3471) Trial counsel was specifically asked about the National Academy of Science’s 2008 Ballistics Imaging report, as well as the 2009 report “A Path Forward”:

Q: [A]re you aware that this report concluded that assumptions of uniqueness and reproducibility of firearms-related toolmarks have not yet been fully demonstrated?

A: I know that there’s a school of thought that feels that way. I, based on my review, didn’t feel there were any experts that I could bring in to debunk the science of ballistics unlike, for example, hypnotically-enhanced testimony, bite mark evidence, other areas of science which have been discredited.

Q: And, again, let me just ask were you – had you read the 2009 report, it’s commonly referred to as “A Path Forward” that’s also discussing this ballistics information? Were you aware of that report at the time?

A: I can’t say I was or wasn’t. I reviewed numerous articles on the topic, tried to familiarize myself with what was being done in courts throughout the country in terms of attacking firearm analysis – type of evidence and came to the conclusion I did not see any viable expert I could call to come in and actually discredit the firearm evidence.

(PCR. 3471-72). Trial counsel's claim that he would not have been able to discredit firearm and tool mark comparison is undermined by the caselaw that was available prior to Mr. Davis's case. See *United States v. Green*, 405 F. Supp. 2d 104, 124 (D. Mass. 2005) (holding the firearms examiner could only describe the ways in which casings were similar but not that the casings came from a specific weapon "to the exclusion of every other firearm in the world."); *United States v. Hines*, 55 F. Supp. 2d 62 (D. Mass 1999) (permitting testimony only regarding an examiner's observations without any accompanying conclusions about the source of a projectile); *United States v. Glynn*, 478 F. Supp. 2d 567, 571, 575 (S.D.N.Y. 2008) (noting that, given the lack of data supporting the discipline, "ballistics lacked the rigor of science," and limiting testimony of a match to a conclusion of "more likely than not" instead of even "reasonable ballistics certainty" to ensure that "a conviction in a criminal case may not rest exclusively on ballistics testimony.").

Trial counsel failed to utilize the available caselaw and literature on firearm and tool mark comparison to challenge Mr. Kwong's testimony that the same firearm was fired at Headley

Insurance and the BP station. Such an overstatement of the evidence was exactly what the two NAS reports cautioned against. Trial counsel could have challenged the identification of Mr. Davis as the shooter as well as called into question the scientific reliability of the AFTE Theory of Identification. Had trial counsel exposed the limitations of firearm and tool mark comparison and the unreliability of Mr. Kwong's conclusions, trial counsel could have raised reasonable doubt as to Mr. Davis's guilt.

ARGUMENT IN REPLY TO ISSUE 4:

THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO RETAIN A DEFENSE EXPERT TO CHALLENGE THE STATE'S FIREARM AND TOOL MARK EVIDENCE

Trial counsel was deficient for failing to retain a defense expert to challenge the State's firearm and tool mark evidence. As a result of trial counsel's deficient performance, Mr. Davis was denied his constitutional right to a fair trial.

The State's answer brief relied on trial counsel's testimony that he searched for a viable expert to challenge the science of firearm and tool mark comparison but was unable find one. (AB. 63). Trial counsel's testimony was not credible. Had trial counsel

conducted a thorough investigation of the scientific unreliability of firearm and tool mark comparison as discussed in Issue 3, *supra*, he would have discovered the cases cited in Issue 3 and other relevant cases, which no doubt had experts testifying on behalf of the defense. Trial counsel's claim that he did not see "any viable expert" that he could call to "come in and actually discredit the firearm evidence" is belied by this caselaw, as well as the reports put out by the NAS, which actually list the experts who created the reports.

The fact that trial counsel hired Terry LaVoy to review Mr. Kwong's results does not excuse his deficient performance. (AB. 63). Mr. LaVoy employed the same AFTE theory of identification as Mr. Kwong. Mr. Davis's claim was not that trial counsel should have hired a competing firearm and tool mark examiner. Rather, Mr. Davis's claim was that trial counsel should have challenged the scientific reliability of firearm and tool mark comparison and the AFTE theory of identification.

This Court should also disregard the State's claim that had trial counsel presented Dr. Salyards or a similar expert, or otherwise challenged the AFTE's methodology, the State would have

called an expert like Dr. Hamby to explain the history and scientific basis of firearm and tool mark comparison. (AB. 64). At the evidentiary hearing, Dr. Hamby was a cumulative witness used to bolster Mr. Kwong's testimony. If the State called him at trial as a rebuttal witness, his testimony would likely be excluded as cumulative and improper bolstering. *See Rhodes v. Asplundh Tree Expert Co.*, 528 So. 2d 459 (Fla. 3d DCA 1988) (holding that the trial court committed no reversible error in excluding rebuttal evidenced which would have been cumulative in nature; *see also Thomas v. Lumbermens Mut. Cas. Co.*, 424 So. 2d 36 (Fla. 3d DCA 1982) (holding that the trial judge did not err in excluding a rebuttal witness because the proffered rebuttal testimony would merely have expressed an opinion as to the validity of the opinion expressed by the defendant's witness, was cumulative to the testimony preceding it, and would not have served in any fashion to impeach the defendant's witness).

The only non-cumulative testimony provided by Dr. Hamby was his rebuttal of Dr. Salyards's testimony about the error rates of firearm and tool mark examiners. His rebuttal testimony was not credible. Although Dr. Hamby claimed that based on all the

literature he has reviewed the AFTE's methodology has a 1-2% error rate, Dr. Hamby never actually named the sources of this statistic. (PCR.3267-69; AB. 64). Dr. Hamby's claim was basically an unsubstantiated "many people say" argument.

Finally, the State's claim that Dr. Salyards's testimony would have been inadmissible at trial is not supported by the record. (AB. 62). Dr. Salyards did not need to be a firearm or tool mark examiner to testify about validation studies and error rates for various forensic disciplines. Dr. Salyards was asked at the evidentiary hearing if you need to be a firearm and tool mark examiner to design and conduct studies to measure error rates. Dr Salyards testified that:

[S]o I think that question gets at who's really the relevant scientific community. The firearms and tool marks examiners, there are certainly some great professionals and very smart people individually practicing that, no question.

As a group, the requirements to be a firearms and tool mark examiner are relatively, from an educational point of view, a relatively lax, right. You don't need a Ph.D in – or a bachelor of science degree like Mr. Kwong has in mechanical engineering.

So the skills that you develop to design research projects for most of us happened during a Ph.D. education, or at least in my case by doing it wrong and having your

advisor say that's not how that works and learning the painstaking detail that has to go in to putting a properly formatted research project.

So, I don't think you need to be a firearms and tool marks examiner and maybe that's not the best group. In fact, you could also consider just the sort of biasing effect.

Even if you're an M.D. Ph.D. working at a pharmaceutical company and you design a drug, I think we'd all agree that the person who designed that drug with the M.D. Ph.D. is not the best person to run the randomized control trial on the drug they developed.

And so most firearms and tool marks examiners they have vested interest in this, this is their profession, they've been taught this dogma, they want this to work. And so they might not be the best people to design the experiment.

(PCR. 3207-08).

Finally, the State's reliance on *Stano v. State*, 473 So. 2d 1282 (Fla. 1985) to argue that Dr. Salyards's testimony would be excluded at trial was misplaced. (AB. 62-63). In *Stano*, the defense proffered generalized testimony from a psychiatrist that some people confess to crimes that they did not commit. This is hardly analogous to Dr. Salyards's specialized testimony as a scientist who studies the error rates of forensic disciplines that challenged the scientific basis and reliability of firearm and tool mark comparison.

ARGUMENT IN REPLY TO ISSUE 5:

THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO UTILIZE THE BP SURVEILLANCE VIDEO TO CHALLENGE THE STATE'S CASE

Mr. Davis relies on the arguments pled in Issue 5 of his initial brief for further argument in reply to the State's answer brief.

ARGUMENT IN REPLY TO ISSUE 6:

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. DAVIS'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO PRESENT EVIDENCE TO THE JURY THAT WOULD RAISE REASONABLE DOUBT

Trial counsel was deficient for failing to confront the State's law enforcement witnesses with evidence that there was dash cam footage recorded at the Headley scene that mysteriously disappeared. As a result of trial counsel's deficient performance, Mr. Davis was denied his constitutional right to a fair trial.

The State's reliance on Officer Crosby's deposition testimony was misguided. (AB. 67). The best evidence of the footage from the dash cam video was the dash cam video itself. Witnesses do not always tell the truth. That is why trial lawyers are trained to impeach witnesses with prior inconsistent statements and other

evidence – like videos – that contradict their testimony. Trial counsel’s reliance on Officer Crosby’s testimony rather than actually requesting a copy of the dash cam video was deficient performance.

Trial counsel had knowledge that there was video footage of the events that took place in the parking lot immediately following the crime. Evidence from the Headley trial was critical to the State’s BP case. The video could have been valuable during the cross-examination of Lt. Elrod if it showed that the actions in the Headley parking lot did not play out the way he claimed. That video could have provided footage of Lt. Elrod’s actions at the scene and provided impeachment evidence to challenge his testimony that he spoke to Ms. Bustamante and heard her dying declaration. (AB. 67). The circuit court’s order and the State’s argument that the dash cam video footage was “wholly speculative” and that Mr. Davis’s claim was “generalized” was unfair. (AB. 66,68). Mr. Davis does not know what is on the dash cam video because trial counsel failed to request it, and the State failed to preserve it.

The circuit court should have granted an evidentiary hearing on this claim and allowed postconviction counsel to explore why

trial counsel failed to use this critical information to chip away at the State's case, undermine the credibility of the investigation by the Lake Wales Police Department, and raise reasonable doubt.

ARGUMENT IN REPLY TO ISSUE 7:

TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO FILE A MOTION TO SUPPRESS THE EVIDENCE FROM A STALE SEARCH WARRANT AND THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS'S CLAIM WITHOUT AN EVIDENTIARY HEARING

Trial counsel was deficient for failing to protect Mr. Davis's right to unreasonable searches and seizures under the Fourth Amendment and file a motion to suppress the fruits of the search warrant for Victoria Davis's Nissan Altima. As a result of trial counsel's deficient performance, Mr. Davis was denied his constitutional right to a fair trial.

Mr. Davis's initial brief incorrectly stated that the warrant was returned January 8, 2008. (IB. 108). Actually, the search warrant was not returned until May 14, 2008. Not only was it late, but the Inventory and Receipt and the Return were *completely blank* when the warrant was returned. The State's answer brief only addressed the delay of the return and was silent on the fact that it was

completely blank. (AB. 68-70). Detective Metz did not fill out the blank return page and what he claimed to be the original property receipt and return it to the court until nine months after Judge Griffin authorized the warrant. (PCR. 2193-95).

The State's cases are distinguishable from Mr. Davis's case. (AB. 70). The facts in *State v. Featherstone*, 246 So. 2d 597 (Fla. 3d DCA 1971) were not as egregious and the facts in Mr. Davis's case. In *Featherstone*, the return was not made for ten days after the issuance of the search warrant, a much shorter length of time than the nine months it took law enforcement to provide a completely blank return to the issuing court in Mr. Davis's case.

In *Joyner v. City of Lakeland*, 90 So. 2d 118 (Fla. 1956), the return and property receipt were not *completely blank* when filed. The inventory in *Joyner* was simply missing a statement that it "contain[ed] a true and detailed account of all the property taken under the warrant. *Id.* at 122.

The *Joyner* Court's citation to *Dixon v. United States*, 211 F.2d 547 (5th Cir. 1954) referred to the fact that eight days passed between the issuance and the execution of the search warrant. It is not analogous to the facts in Mr. Davis's case where a completely

blank return and inventory page were provided to the court nearly nine months after the warrant was issued.

This Court should also disregard the State's argument that items seized from the Nissan Altima did not affect the results of Mr. Davis's trial. (AB. 71). The State used the floormats seized from the search to attempt to connect Mr. Davis to the gasoline used to douse the victims and set them on fire. This evidence was critical to the State's case because prosecutors had no other physical evidence to link Mr. Davis to the Headley crime scene. Trial counsel's abandonment of a constitutionally significant issue did not advance Mr. Davis's interests in any way and was certainly not strategic. The evidence seized from the Altima, including the floor mats, played a major role in this case.

The evidence the State cited in its answer brief was not enough to convict Mr. Davis in a new trial. (AB. 71-72). On postconviction, Mr. Davis elicited testimony from Mr. Kwong that the bullets fired at the Headley and BP scenes could have been fired by a 9mm, not a .357 magnum. Mr. Davis also challenged Mr. Kwong's conclusions that the bullets at the Headley and BP scenes were fired from the same gun during postconviction. The State's

witness who compared the tire tracks at the BP scene with Victoria Davis's Nissan Altima could only conclude that the tire tracks were consistent with the very common type of brand of tire on the Alima. The State did not acknowledge that a Newport cigarette found in the area where witnesses saw a car parked was DNA tested and Mr. Davis was excluded as a contributor. (S6. 1046-47). The State also failed to acknowledge that several pairs of Mr. Davis's shoes were seized during the search of his home but they were not compared to the footprints found at the BP scene because it was obvious to the investigating officer that they were not a match. (S6. 1104-05).

The circuit court should have granted an evidentiary hearing on this claim and allowed postconviction counsel to explore why trial counsel failed to move to suppress this damaging evidence. Mr. Davis was prejudiced by trial counsel's deficient conduct because the evidence seized from the Nissan Altima was critical to the State's case. There is a reasonable probability that if the State's lone physical evidence that possibly linked Mr. Davis to the Headley crime scene was suppressed, the result of the proceeding would have been different.

ARGUMENT IN REPLY TO ISSUE 8:

TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO FILE A MOTION TO SUPPRESS THE GREISMAN PHOTOPACK BASED ON OFFICER TOWNSEL'S CHAIN OF CUSTODY VIOLATION, AND THE CIRCUIT COURT ERRED IN DENYING THIS CLAIM WITHOUT AN EVIDENTIARY HEARING

Trial counsel was deficient for failing to file a motion to suppress the Greisman photopack based on Officer Townsel's chain of custody violation. As a result of trial counsel's deficient performance, Mr. Davis was denied a fair trial.

The State claimed that “[a] photo-pack created by law enforcement for the purpose of an after-the-fact identification is not the type of ‘physical evidence’ usually requiring a chain of custody.” (AB. 72). Perhaps, but that is because it is unusual for an investigator in a capital murder case to take evidence home and store it in a backyard shed.

At trial, Mr. Davis's identification expert William Gaut criticized Detective Townsel's mishandling of the Greisman photopack: According to Mr. Gaut:

Q: [O]nce you administer a photo pack is it safe to say you want to maintain chain of custody?

A: Yes, sir, absolutely.

Q: Okay. Once you actually administer the photo pack, the appropriate procedure would be to actually place it into a secure evidence locker, or facility; correct?

A: Yes, sir, that's correct.

Q: Okay. Would it be safe to say it would not be a good idea to accidentally have a photo pack disappear and then later turn up in your shed in the back of your house?

A. Oh, absolutely not, no sir.

(S9. 1468-69).

Officer Townsel's handling of the photopack was governed by the Lake Wales Standard Operating Procedure, Section 13-1, which required that all evidence in possession of department members be appropriately handled and stored in a sealed evidence bag in the property room at the end of their shift. Officer Townsel's testimony that the photopack was not tampered with while it was in her garage is not credible because she testified untruthfully at Mr. Davis's trial that there was always a copy of the Greisman photopack in evidence even if the original was misplaced in her garage for several years. *See* Claim 1, *supra*.

The circuit court should have granted an evidentiary hearing on this claim and allowed postconviction counsel to explore why trial counsel failed to protect Mr. Davis's constitutional rights regarding the tainted photopack.

ARGUMENT IN REPLY TO ISSUE 9:

THE CIRCUIT COURT ERRED IN FINDING THAT CUMULATIVE ERROR DID NOT DEPRIVE MR. DAVIS OF A FUNDAMENTALLY FAIR TRIAL

The State contends that this Court does not need to undertake a cumulative prejudice analysis because "all of Mr. Davis's claims are either meritless, procedurally barred, or do not satisfy the *Strickland* standard for ineffective assistance of counsel. (AB. 75).

This Court should properly examine the issues raised in Mr. Davis's initial brief, despite the State's erroneous assertions that there was no deficient performance and therefore no need to examine cumulative prejudice. And because this is a case of ineffective assistance of counsel, "any analysis of prejudice must be done on a cumulative basis." *Parker v. State*, 89 So. 3d 844, 860 (Fla. 2011).

This Court should be mindful that it

must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors [resulting from ineffective assistance of counsel], and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have an isolated effect. A verdict or conclusion only weakly supported by the record is more likely to have been affected by the errors than one with overwhelming record support.

Strickland, 695-96. Finally, this Court should focus on “the fundamental fairness” of Mr. Davis’s trial because “despite the strong presumption of reliability, the result of [his trial] is unreliable because of a breakdown in the adversarial process our system counts on to produce just results. *Id.*”

Trial counsel’s representation of Mr. Davis at trial was not the “meaningful adversarial testing” or “guiding hand of counsel” envisioned under *Powell v. Alabama*, 287 U.S. 45, 69 (1932), *United States v. Cronin*, 466 U.S. 648, 654-656 (1984) and *Strickland*. There is no confidence in the verdict and Mr. Davis’s case should be remanded for a new trial.

ARGUMENT IN REPLY TO ISSUE 10:

THE RECORD SUFFICED TO CREATE BONA FIDE DOUBT IN MR. DAVIS'S COMPETENCE TO PROCEED. THE CIRCUIT COURT THUS ERRED IN DENYING MR. DAVIS'S MOTION FOR A COMPETENCY EVALUATION BEFORE GRANTING THE STATE'S MOTION TO EXCLUDE ALL MENTAL HEALTH TESTIMONY AND EVIDENCE AND SUMMARILY DENYING CLAIM 17

The circuit court erred in denying Mr. Davis's motion for a competency evaluation before granting the State's motion to exclude all mental health testimony and evidence and summarily denying Claim 17. The court prioritized expediency over Mr. Davis's constitutional rights.

This Court should disregard the State's argument that Mr. Davis's claim should be denied because the request for a competency evaluation was not in writing. (AB. 77). Although Rule 3.851(g) requires a written motion, the request for a competency evaluation of Mr. Davis arose during postconviction counsel's oral response to the State's argument in favor of its motion filed a month prior to the hearing. The circuit court ruled on the State's motion during this hearing, so there was no opportunity for postconviction counsel to file a written motion for a competency evaluation.

The State's argument that the oral request did not specify what observations of, and conversations with, Mr. Davis formed the basis of the request was misleading. (AB. 77). Postconviction counsel addressed Mr. Davis's demonstrated history of mental illness, the fact that prior counsel had not conducted any mental health-related mitigation investigation, the fact that postconviction counsel had some mental health evidence but that Mr. Davis did not want it introduced at the hearing, and postconviction counsel also specified that Mr. Davis's waffling between allowing or disallowing mitigation was the reason for the request.

This Court should also disregard the State's claim that postconviction counsel did not specify what factual matters required competency consultation. (AB. 77). Mr. Davis's history of mental illness coupled with his contradictory stances regarding mitigation should sufficiently specify the factual matter in question, i.e., was Mr. Davis competent to waive his penalty phase claims.

Regarding the State's claim that the circuit court's order did not address the competency issue and counsel did not request a ruling (AB. 77), this Court should focus on the fact that the circuit

court gave its ruling orally at the hearing before asking the State to draft a written order capturing the court's rulings.

Postconviction counsel did not request a colloquy to assess Mr. Davis's competency at the evidentiary hearing because this request was made during the hearing on the State's motion to exclude all mental health evidence and was firmly denied by the court. (AB. 79).

Finally, even if this Court finds that postconviction counsel did not meet the requirements of Fla. R. Crim. P. 3.851(g), the circuit court still had an obligation under Fla. R. Crim. P. Rule 3.210(b) to *sua sponte* order a competency evaluation of Mr. Davis. "The meaning of the rule is clear and unambiguous. The plain meaning of the rule requires the court on its own to immediately order a hearing regarding a defendant's competence, but only if there exists a reasonable ground to believe appellant is not competent." *Laster v. State*, 212 So. 3d 392, 393-94 (Fla. 2017). As detailed in Mr. Davis's initial brief on page 129, Mr. Davis's case presented "facts that would trigger the obligation" for the circuit court to *sua sponte* order a competency evaluation." *Id.* at 395.

CONCLUSION AND RELIEF SOUGHT

Mr. Davis respectfully requests that this Court reverse the circuit court, set aside his convictions and sentences and remand his case for a new trial; or in the alternative, reverse the circuit court's order barring mental health evidence from the evidentiary hearing and remand Mr. Davis's case for a competency hearing and a new evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant has been furnished via electronic service to Marilyn Beccue, Assistant Attorney General, on this 25th day of October, 2022.

s/ Stacy R. Biggart
STACY R. BIGGART

CERTIFICATE OF FONT

I hereby certify that the foregoing Reply Brief of Appellant was generated in Bookman Old Style 14-point font and 5550 words excluding the title page, tables, certificates and signature block, pursuant to Fla. R. App. P. 9.210(a)(2)(C).

s/ Stacy R. Biggart
STACY R. BIGGART