

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC2024-1128

TONEY DERON DAVIS,

APPELLANT,

VS.

STATE OF FLORIDA,

APPELLEE.

.....

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL
CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA,
(CRIMINAL DIVISION)

.....

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Toney Deron Davis, defendant below will be referenced as Davis and Appellee, State of Florida will be referenced as State.

Reference to the appellate records will be:

ROA-R/T Direct Appeal case SC1960-86363 *Davis v. State*, 703 So. 2d 1055 (Fla. 1997), *cert. denied*, *Davis v. Florida*, 524 U.S. 930 (1998);

1PCR Postconviction record in SC2012-0115 *Davis v. State*, 136 So. 3d 1169 (Fla. 2014);

2PCR first successive postconviction records SC-2016-0264; *Davis v. State*, 42 Fla. L. Weekly S235; 2017 WL 656307 (Fla. Feb. 17, 2017);

3PCR second successive postconviction/"2dState-Habeas" SC2017-1711 *Davis v. Jones*, 235 So. 3d 301 (Fla. 2018), *cert. denied*, *Davis v. Jones, Sec'y, Fla. Dep't of Corr.*, 139 S. Ct. 170 (2018) (mem.);

4PCR third successive postconviction motion *Davis v. State*, 304 So. 3d 281 (Fla. 2020)"

5PCR - instant appellate record;

Supplemental records will be identified with an "S"

The record citation will be followed by the appropriate volume and page number(s). Davis's initial brief will be referenced as "IB."

STATEMENT OF THE CASE AND FACTS

This is an appeal from Davis's fourth successive postconviction motion and the sixth time Davis is before this Court. A limited procedural history and statement of the facts are presented here which includes that Davis was indicted on February 25, 1993, for first-degree murder, aggravated child abuse, and sexual battery of two-year old "CC" (initials used due to the victim's age and sexual nature of the crime). The injuries were inflicted on December 9, 1992, and CC died the next day. On May 11, 1995, Davis was found guilty as charged; and on July 18, 1995, sentenced to death and this Court affirmed. *Davis v. State*, 703 So. 2d 1055 (Fla. 1997). On direct appeal, this Court found:

... On the day of the murder, the mother left her child—then in good health and without injuries—in Davis's care while she ran an errand.

Thomas Moore, an acquaintance of Davis's, testified that he arrived at the apartment at around 12:45 p.m. and that Davis answered the door with the victim draped over his arm. Moore said Davis told him [CC] had choked on a french fry. Moore said that after he called 911 and returned to the apartment, Davis was giving the victim mouth-to-mouth resuscitation. Moore went to the hospital with Gwen Cunningham when she returned.

Davis testified that he had left [CC] and his friend Moore alone in the apartment at about 12:30 p.m. and went to make some phone calls. He said that when he returned, Moore was gone and [CC] was having a seizure. He says he administered CPR, put her in the shower to revive her, and accidentally dropped

her in the shower. Davis said that when Moore returned, he had him call 911. Davis said that Moore asked him not to mention that he had been with [CC] because Moore had marijuana in his possession. Sergeant Phillips testified that Davis told him he was alone with the child.

A neighbor, Janet Cotton, testified that she heard a child crying in Cunningham's apartment and a lot of thumping noises coming from the apartment at approximately noon. She heard Davis say in a loud, angry voice, "Sit down." She said that thirty minutes after the "ruckus" ended, rescue personnel arrived.

The victim was wet, unconscious, and had blood in her mouth when she was examined in the apartment. She was naked from the waist down, although she had been fully clothed when left with Davis. Davis said that the victim was choking on a french fry and he had been trying to revive [CC].

The emergency-room doctor who treated the victim, Doctor DeNicola, testified that the victim was brought in at around 1:40 p.m. with bruising, swelling of the brain, and pools of blood in the skull. Doctor Whitworth, who examined the child at the request of state child welfare authorities, testified that the injuries indicated vaginal penetration by a penis, a finger, or an object. The medical examiner, Doctor Floro, testified that there was no injury to the vaginal area, but that it could have healed quickly. He said the victim had suffered four separate blows to the head, causing cerebral hemorrhage. This was the cause of death.

There was additional bruising, and there was a large collection of blood at the back of the head which was not consistent with being accidentally dropped. The child was revived but died shortly afterward on December 10, 1992.

In the bed shared by Davis and Gwen Cunningham, police found a hair bow which had been placed in the victim's hair before she was left with Davis. There was blood on the toilet seat and tank, on a sheet in the bedroom, and on the floor where the victim had been lying. There was also blood on the

sink counter, on a grocery bag, on a washcloth, and on a blanket and pillowcase. There was blood which was found to be the victim's on the crotch region of the shorts Davis was wearing and on his underwear.

Gwen Cunningham testified that there were no blood stains anywhere when she left, that [CC] did not sleep in bed with her, and that there were no hair ribbons in the bed when she left. She said [CC] was clothed when she left.

The jury recommended the death penalty by a vote of eleven to one. After considering a presentence report and memoranda from both sides, the court followed the jury's recommendation and imposed the death penalty.

The judge found two aggravators: that the murder was committed during the course of a sexual battery and that it was heinous, atrocious, or cruel (HAC). The judge rejected the statutory mitigator of "no significant prior criminal history," based on Davis's three prior convictions. The judge evaluated the following nonstatutory mitigating factors suggested by the defense: Davis's family background (from evidence offered to show Davis was a good student, was a good child, had musical talent, wrote poetry, and attended church), that he was a good person who did not smoke or drink, that he was not violent, and that the evidence against him was circumstantial only. The judge found that the "good student" mitigating circumstance was not established, but considered the rest of the family background factors and gave them some weight. He found that the prior criminal history disproved the contention that Davis was a "good person," and that his not smoking and drinking were irrelevant. Also, the prior history included a crime of violence, so the "not violent" factor was not found to exist. Also, the circumstantial evidence mitigator was found not proven and irrelevant as a mitigator or an aggravator.

Davis, 703 So. 2d at 1056–57. The case became final on June 15, 1998, with the denial of certiorari. See *Davis v. Florida*, 524 U.S. 930 (1998).

Over the next 12-years, Davis litigated his original postconviction challenge raising 14 claims and of import here, he asserted on appeal: (1) *Brady v. Maryland*, 373 U.S. 83 (1963) violation for failing to disclose notes regarding CC's alleged prior head trauma, asthma, and vaginal discharge and *Giglio v. United States*, 405 U.S. 150 (1972) regarding witnesses Olivia Williams and Janet Cotton; (2) ineffective assistance for not calling Dr. Edward Willey regarding whether a sexual battery had occurred. Both claims were rejected by the trial court and those decisions were affirmed. See *Davis v. State*, 136 So. 3d 1169, 1184-92 (Fla. 2014).

On October 8, 2014, Davis filed his first successive postconviction motion where he argued entitlement to relief based on newly discovered evidence consisting of opinions, affidavits and articles related to Shaken Baby Syndrome/Abusive Head Trauma, to undermine the State's theory that blunt force trauma to CC's head caused her death and to support the defense theory that the injuries resulted from an accidental fall. (2PCR 1-99) See *Davis v. State*, 2017 WL 656307, at *1 (Fla. Feb. 17, 2017). The trial court summarily denied the claims as untimely, procedurally barred, and meritless because the "research [was] not of such a nature" likely to result in acquittal on retrial. (2PCR 139-62) In affirming that ruling, this Court stated:

. . . Davis asserts that the circuit court erred in summarily denying his guilt phase claim that newly discovered evidence related to the study of Shaken Baby Syndrome/Abusive Head Trauma undermines the State's trial theory that Davis murdered the victim by beating her unconscious and, instead, supports his own theory that the victim's fatal injuries resulted from an accidental fall or prior abuse. The claim is procedurally barred because it does not meet any of the three exceptions that would permit judicial review of this untimely claim under Florida Rule of Criminal Procedure 3.851(d)(2). Regardless, we conclude that the articles and affidavits submitted by Davis in support of his newly discovered evidence claim do not constitute newly discovered evidence. . . . We also conclude that Davis has failed to demonstrate that the alleged newly discovered evidence is of such nature that it would probably produce an acquittal on retrial. The State presented ample evidence at trial that Davis committed each of the acts charged, and there is no reasonable probability that the jury would have acquitted Davis of first-degree felony murder based on the alleged newly discovered evidence.

Davis v. State, 2017 WL 656307 (Fla. Feb. 17, 2017) (c.o.).

In his January 2017, second successive postconviction motion, Davis argued his *Brady*, *Giglio*, *Strickland v. Washington*, 466 U.S. 668 (1984) and newly discovered evidence claims must be reevaluated for prejudice given *Hurst v. Florida*, 577 U.S. 92 (2016). The trial court ruled:

Taken together, the *Asay/Mosley/Gaskin* triad creates a categorical bar against the retroactive application of *Hurst v. Florida* and *Hurst [v. State]* to capital cases that became final before *Ring* was decided. Therefore, Defendant's belated *Hurst* claims do not fall within the newly-established retroactive constitutional right exception in subdivision (d)(2)(B) because the right "has [not] been held to apply retroactively" to capital cases that became final before *Ring* was issued.

(Postconviction Court Order dated February 17, 2017).

Davis did not appeal the denial of his second successive postconviction relief motion, but instead, on September 22, 2017, filed a second state petition for writ of habeas corpus under case number SC2017-1711. There, Davis again sought *Hurst* relief arguing he was entitled to retroactive application under *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). This Court denied *Hurst* relief holding *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), was dispositive because “*Hurst* [did] not apply retroactively to Davis’s sentence,” where the non-unanimous jury recommendation and his death sentence became final in 1998. *Davis v. Jones*, 235 So. 3d 301 (Fla. 2018), *cert. denied*, *Davis v. Jones*, Sec’y, Fla. Dep’t of Corr., 139 S. Ct. 170 (2018) (mem.)

After a third successive postconviction motion was stricken, Davis filed an amendment on June 3, 2019, in which he claimed the State violated *Giglio* by knowingly presenting Janet Cotton’s allegedly false trial testimony and violated *Brady* by withholding impeachment evidence. (4PCR 104-31) Davis included an appendix with: declarations of Janet Dassie ("Cotton"), Tanji Williams, Rickey Love, Terry Brown, Adrienne Washington and Nakia Taylor and reports by Dr. Janice J. Ophoven and **Dr. Johnathan L. Arden**, Davis's present expert. *Id.* at 132-83.

The 2019 postconviction claims were based primarily on Cotton's declaration recanting her trial testimony that she heard a baby cry, thumping sounds and a man's voice coming from CC's apartment on December 9, 1992. (4PCR 32-36) With the exception of Cotton's declaration, the successive motion raised similar *Giglio* and *Brady* claims to those in the 2006 postconviction motion and based on the same underlying facts. The trial court summarily denied relief. (4PCR 207-589) For purposes of *Giglio*'s first prong, the trial judge assumed that Cotton's testimony was false. (4PCR 209) However, as to *Giglio*'s second and third prongs, the postconviction court ruled that Davis failed to establish materiality, he did not prove the State knew Cotton's testimony was false and there was "no reasonable possibility that Cotton's testimony influenced the verdict." (4PCR 210-13); *Davis*, 136 So. 3d at 1189-91. The court denied Davis's *Brady* claim, applying the detailed findings made in the *Giglio* claim. The court ruled nothing in Cotton's declaration established the State suppressed her "true" testimony, the testimony was not material and prejudice was not demonstrated. (4PCR 213)

On appeal, this Court upheld the trial court's denial of the *Giglio* and *Brady* claims, finding them to be meritless. *Davis v. State*, 304 So. 3d 281 (Fla. 2020). Also, this Court held that Cotton's testimony was not material,

was harmless beyond a reasonable doubt, and would not have affected the verdict. *Id.* at 284.

Davis's fourth successive postconviction motion was filed on July 12, 2023, (5PCR 17-45) and after prior postconviction counsel was permitted to withdraw (5PCR 106-17, 121-22), Capital Collateral Regional Counsel – North was appointed and permitted to file an amended motion (5PCR 123-276). Two claims were raised. The first asserted a *Brady* violation under the assumption the State did not disclose that an examination of the slides collected during the autopsy established CC had pneumonia before she was admitted to the emergency room. The second claim again challenged the cause of death suggesting it was pneumonia instead of head trauma/Shaken Baby Syndrome.

Following the May 31, 2024, Case Management Hearing (5PCR 741-83), the postconviction court denied relief summarily (5PCR 315-699) and denied rehearing (5PCR 71011). This appeal followed.

SUMMARY OF THE ARGUMENT

Issue I – The postconviction court summarily denied relief properly as the State did not commit a *Brady* violation. Davis was provided the autopsy report which showed that the Medical Examiner generated slides attendant to the autopsy. That report was provided Davis during pre-trial discovery. As such, the evidence was not suppressed. The mere fact that Davis has a new expert, some 30-years later, examine the slides and come to a different conclusion as to what they reveal does not show a *Brady* violation.

Issue II – The summary denial of Davis's newly discovered evidence claim was proper. The claim was untimely as it has been more than a year since his case became final. It is also procedurally barred as he challenged the cause of death previously. Finally, Davis did not meet the standard for relief under the newly discovered evidence standard. First, he did not use due diligence to investigate the autopsy slide evidence, known to the defense and available since 1992, which Davis now claims shows his victim suffered from pneumonia before her admission to the hospital on December 9, 1992. Further, even if CC suffered from pneumonia, such does not weaken the State's case in the least as the evidence remains that CC suffered multiple blunt force trauma to her head resulting in her death. Likewise, nothing related to pre-admission pneumonia weakens the State's

case in the least that CC was sexually battered on December 9, 1992. Taking both the trial and postconviction evidence into account, the pre-admission pneumonia would not produce an acquittal or yield a less severe sentence on retrial.

ARGUMENT

ISSUE I

The summary denial of the alleged *Brady* claim was proper because Davis was provided the 1992 autopsy report indicating slides of biological material/organs were made, thus, no information was withheld and materiality was not proven.

Davis asserts that it was error to summarily deny his claim of a *Brady* violation. He maintains that he did not have the 1992 autopsy slides and that his new expert's review of the slides rebuts Dr. Floro's, the State's Medical Examiner's, conclusions as to cause of death and supports the defense claim that CC died from pneumonia. The State disagrees. The autopsy report, disclosed during pre-trial discovery, establishes that the defense was advised that autopsy slides were prepared.

A. Standard of Review

This Court has provided:

A postconviction motion may be summarily denied only "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Fla. R. Crim. P. 3.851(f)(5)(B), (h)(6); see also *Parker v. State*, 904 So. 2d 370, 376 (Fla. 2005) ("As a general proposition, a defendant is entitled to an evidentiary hearing on any well-pled allegations in a motion for postconviction relief unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient."). "Because a postconviction court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its

ruling is tantamount to a pure question of law, subject to de novo review.” *Marek v. State*, 8 So. 3d 1123, 1127 (Fla. 2009). In reviewing a trial court's summary denial, “this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record.” *Tompkins v. State*, 994 So. 2d 1072, 1081 (Fla. 2008). However, mere conclusory allegations do not warrant an evidentiary hearing. *Anderson v. State*, 220 So. 3d 1133, 1142 (Fla. 2017); see also *LeCroy v. Dugger*, 727 So. 2d 236, 238 (Fla. 1998) (“[S]peculation and conjecture about what ... letters and notes and opinions and cryptic references may suggest is not sufficient to warrant an evidentiary hearing, much less relief.”) (quoting trial court's order).

Jimenez v. State, 265 So. 3d 462, 480–81 (Fla. 2018)

In *Sheppard v. State*, 338 So. 3d 803 (Fla. 2022), this Court reiterated that it is the defendant's burden to prove a *Brady* claim and:

To establish a *Brady* violation, the defendant has the burden to show that: (1) the evidence was either exculpatory or impeaching; (2) the evidence was willfully or inadvertently suppressed by the State; and (3) because the evidence was material, the defendant was prejudiced.” *Duckett v. State*, 231 So. 3d 393, 400 (Fla. 2017) (quoting *Davis v. State*, 136 So. 3d 1169, 1184 (Fla. 2014)). To establish materiality or prejudice under *Brady*, the defendant “must demonstrate ... a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial.” *Smith v. State*, 931 So. 2d 790, 796 (Fla. 2006) (citing *Strickler v. Greene*, 527 U.S. 263, 289, 119 S. Ct. 1936, 144 L.Ed.2d 286 (1999)).

Sheppard, 338 So. 3d at 827.

B. Postconviction Court’s Order

The postconviction court quoted the report of Davis’s new expert, Dr. Arden. The court then cited the standard of review of *Brady v. Mayland*,

373 U.S. 83 (1963) claims citing *Riechhmann v. State*, 966 So. 2d 298, 307-08 (Fla. 2007) and *Floyd v. State*, 18 So. 3d 432, 451 (Fla. 2009). The court stated:

... the Defendant does not allege that the State failed to disclose the autopsy slides of the victim – the slides were disclosed in the medical examiner’s report in 1992. Rather, the Defendant alleges that the State suppressed “the evidence revealed by the examination of the slides.” The Defense argues that it retained Dr. Arden in 2018-2019. Dr. Arden reviewed the autopsy slides and concluded that the cause of death was not as the medical examiner had testified in trial. He concluded that the child had pneumonia before she went to the hospital, as outlined in his report.

(5PCR 317) (emphasis supplied)

The court concluded that the State disclosed the autopsy slides to the defense in this case, thus, Davis failed to carry his burden under *Brady*.

(5PCR 318) Further, “[t]he slides have at all times been available for examination by the defense” and merely because Davis retained a new expert in 2018-2019 to examine the autopsy slides that have been available since 1993 that does not create a *Brady* violation. The procurement of a new expert 25-years later does not create a *Brady* violation. “No evidence of the slides was willfully or inadvertently suppressed by the State.” (5PCR 318)

C. Argument

As provided in *Jimenez v. State*, 265 So. 3d 462, 480–81 (Fla. 2018),

this Court should consider whether the claim is untimely given that it has been more than 25 years since the case became final. The claim is untimely as the defense, any time from receipt of the pre-trial discovery of the autopsy report or during the initial postconviction litigation, could have asked for a review of the autopsy slides. Waiting some 30-years to have an expert review the autopsy slides and challenge the cause of death renders the claim untimely. Nonetheless, Davis's claim fails on the merits as well.

Here, Davis asserts that he has now obtained results from Dr. Arden's¹ review of the autopsy slides which shows that CC had pneumonia at the time she entered the hospital and that this amounts to suppression of material evidence under *Brady*. The pith of this claim is that Davis has asked his new expert to review autopsy slides which produced an opinion different from what the Deputy Chief Medical Examiner, Dr. Bonifacio T. Floro, found in December 1992. No *Brady* violation occurred.

From at least the time of the discovery submission of Dr. Floro's autopsy report on CC (5PCR 304-09), Davis was aware of the existence of

¹ Dr. Jonathan L. Arden is Davis's forensic expert who, on November 22, 2022, produced a supplement to his February 2019 report (included in the appendix to the 2019 Third Successive Postconviction Motion) and now asserts he has conducted a review of the autopsy slides and renders an opinion different from Dr. Floro.

the autopsy slides/microscopic examinations of CC's lungs and other organs and could have investigated the instant claim. The slides were available since 1992. The fact that Davis has waited some 30-years to have them examined and that examination produced a new opinion from a new doctor does not establish a *Brady* violation. See *Peek v. State*, 395 So. 2d 492, 495 (Fla. 1980) (recognizing under *Brady* defendant has a right to inspect physical evidence, but that right may be waived where defendant does not request the inspection) *superseded by statute on other grounds*, *Merck v. State*, 763 So. 2d 295 (Fla. 2000)). Davis should not be permitted to transform his discovery of a new expert to review evidence available since the 1992 autopsy and provide a more favorable opinion into a claim that the State withheld evidence under *Brady*. The evidence is the autopsy slides themselves, not an opinion rendered some 30-years after the fact. The slide evidence was disclosed and the new, more favorable opinion does not transform the matter into a *Brady* claim or “newly discovered evidence.” Any information contained within the slides was there in 1992; an expert’s interpretation of that information is not new evidence. Cf. *Elledge v. Dugger*, 823 F.2d 1439, 1446 (11th Cir.) (opining “[m]erely proving that someone--years later--located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel or

some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort”), *modified on other grounds*, 833 F.2d 250 (11th Cir. 1987).

Davis challenges the postconviction court’s ruling by claiming there is no competent, substantial evidence that the State “disclosed the actual slides.” (IB 23). However, the State does not have to turn over the physical evidence itself to comply with its obligation under *Brady*. See, *Simmons v. State*, 105 So. 3d 475, 500 (Fla. 2012) (reiterating “a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.”) (quoting *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000)). *Simmons* undercuts Davis’s complaint that there is no evidence that the actual slides were turned over to the defense (IB 23) as the physical evidence need not be turned over under *Brady*, only that the defense be provided notice of its existence and be given an opportunity to inspect. The State advised the defense, via the autopsy report, that the Medical Examiner made slides during the autopsy. Hence, the defense was in the position to have an expert examine them in 1993, just as it did in the original postconviction litigation where it challenged the

cause of death, and again in 2018, for the successive postconviction litigation. Davis's failure to seek additional testing in 1992/1993 waives the claim here. See *Peek*, 395 So. 2d at 495. Clearly, the claim is untimely under Florida Rule of Criminal Procedure 3.851(d)(2), but more importantly, the State did not suppress any evidence, exculpatory or otherwise.

Moreover, whether CC had pneumonia at the time she entered the hospital does not undercut the testimony of the law enforcement officer, paramedic, and medical doctors that CC was found nude from the waist down as she lay unconscious on the floor of her apartment, after suffering blunt force trauma and vaginal penetration, and that blood was found all over the apartment (Davis's bed, bathroom, and on his shorts/underwear). CC presented with at least three blunt force injuries to her head, at least one to her back, and had been penetrated vaginally on the day she was admitted to the hospital. (ROA-T 570-73, 587, 590-92, 608-16, 638-45, 650-53)

Emergency room doctor, Dr. DeNicola ordered a CAT scan after seeing bruising to CC's head. The CAT scan showed: (1) blood pooling along the back of CC's skull and a little bit along the membrane that separates the two brain hemispheres; (2) swelling of CC's brain indicating a "significant brain injury" the nature of which was a traumatic brain injury.

Both Dr. DeNicola and Dr. Whitworth agreed that CC's injuries were inconsistent with choking on a French fry or suffering an asthma attack. (ROA-T 613-16, 650) Dr. Whitworth found: (1) a prominent bruise to CC's left temporal area/face; (2) a bruise to CC's forehead above her right eye; (3) bleeding in both retinas; (4) fresh bruises to CC's left upper buttocks; and (5) fresh bruises to two areas of CC's hymen. (ROA-T 638-45, 650-51) The doctor explained that the location of the bruises could not be explained by a single accidental drop from Davis's arms; instead, the injuries show that the blows were inflicted individually, i.e., CC was struck in the head at least three times. (ROA-T 650-51) Medical Examiner Dr. Floro found at least four separate head injuries and that there was subdural hemorrhaging. The brain hemorrhaging observed corresponded to the bruising found during the external examination. (ROA-R 832-42) The blunt force inflicted on CC's head was severe enough to lacerate the bridging veins of the brain and kill CC. Such could not have been caused by a single fall; CC had four separate blunt force impacts to her head. (ROA-T 841-42)

Whether or not CC had pneumonia before her admission to the hospital would not account for the multiple bruises to her head and back/buttocks inflicted through blunt trauma which was the cause of death. Also, the fresh blood drops and spatter that was observed on the bed, in

the bathroom, on the carpet where CC was found, and in the crotch area of Davis's shorts and underwear undercuts any suggestion that pneumonia was the cause of CC's death. (ROA-T 573) *Davis*, 703 So. 2d at 1057. Instead, CC died as a result of one or more of the blows to her head and Davis's recent review of 30-year-old slides does not establish *Brady* materiality. (ROA-T 573, 651-53, 835-42)

Furthermore, the jury rejected the defense theories that CC was dropped while Davis was attempting to alleviate an asthma attack by putting her under the shower or that she was choking on a French fry. The paramedic noted that when he intubated CC at the scene, there was no evidence CC had ingested a French fry. He saw no French fry in her throat or in her stomach; there was no cereal in CC's stomach. (ROA-R 593-97, 601) Given this evidence, whether CC had pneumonia is not material under *Brady* and would not put this case in such a different posture resulting in a different verdict or sentence. The summary denial should be affirmed.

ISSUE II

The claim of newly discovered evidence based on the new defense expert's opinion developed after examining the 1992 autopsy slides was denied properly.

Below, Davis claimed his new forensic expert's review of the 1992 autopsy slides showed CC had pneumonia before her admission to the

hospital and that rebutted the State's theory of the case that CC died from blunt force trauma to the head. He pointed to the report as his newly discovered evidence. The postconviction court summarily denied relief. Here, Davis appears to argue that he met the first prong of a newly discovered evidence claim by producing the new doctor's report and that the review was timely as he did not have a reasonable basis to have his expert review the 1992 autopsy slides earlier given the Medical Examiner's trial testimony. Davis also asserts that had the postconviction court considered all the evidence produced during his multiple prior postconviction cases, he has shown that he would have been acquitted on retrial. The State disagrees.

The claim is untimely, having been brought more than 25-years after Davis's case became final and four years after Dr. Arden, Davis's "new expert," examined, among other things, the Medical Examiner's file and autopsy report. (5PCR 303-14 1992 Autopsy Report and Dr. Arden's 2019 Report). It is also procedurally barred as Davis previously challenged CC's cause of death collaterally and Davis has not shown that he could not have raised this claim in his initial Rule 3.851 motion. Not only was the autopsy report provided in pre-trial discovery, but it also noted a microscopic examination of the lungs showed pneumonia, thus, Davis has not shown

diligence in bringing this claim forward. Finally, the evidence offered, Dr. Arden's report, does not meet the definition of "newly discovered evidence" and even if considered, would not weaken or probably produce an acquittal or less severe sentence on retrial.

A. Standard of Review

This Court has reiterated that a decision to grant or deny an evidentiary hearing in a successive Rule 3.851 motion is a question of law which will be reviewed "de novo". *Harvey*, 260 So. 3d at 906–07; *Mann v. State*, 112 So.3d 1158, 1162 (Fla. 2013). Quoting Rule 3.851(f)(5)(B) this Court has reaffirmed that a successive motion may be denied summarily, "[i]f the motion, files and records in the case conclusively show that the movant is entitled to no relief...." *Harvey*, 260 So. 3d at 906–07. "A second or successive motion for postconviction relief can be denied on the ground that it is an abuse of process if there is no reason for failing to raise the issues in the previous motion." *Owen v. Crosby*, 854 So. 2d 182, 187 (Fla. 2003) (citing *Pope v. State*, 702 So. 2d 221, 223 (Fla. 1997)). While claims which could have been raised in an earlier Rule 3.851 motion are procedurally barred, a defendant may file a successive motion if based on "newly discovered evidence." See *White v. State*, 664 So. 2d 242, 244 (Fla.1995).

Dailey v. State, 329 So. 3d 1280, 1285 (Fla. 2021) *cert. denied sub nom. Dailey v. Florida*, 143 S. Ct. 272 (2022) provides:

In order to obtain relief based on newly discovered evidence, a defendant must establish: (1) that the newly discovered evidence was unknown by the trial court, by the party, or by counsel at the time of trial and it could not have been discovered through due diligence, and (2) that the evidence is of such a nature that it would probably produce an acquittal or yield a less severe sentence on retrial. ... Newly discovered evidence satisfies the second prong of the test if it “weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability.”

Dailey, 329 So. 3d at 1285. *See also, Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). The burden rests on the defendant “to demonstrate that his claims could not have been raised in the initial postconviction motion through the exercise of due diligence.” *Rivera v. State*, 187 So. 3d 822, 831–32 (Fla. 2015) (*citing Zeigler v. State*, 632 So. 2d 48, 51 (Fla.1993)).

B. Postconviction Court’s Order

After citing the proper standard of review for claims of newly discovered evidence, the postconviction court determined that Davis did not show that (1) the “new” evidence was unknown or could not have been found using due diligence and (2) that the “new” evidence probably would produce an acquittal. (5PCR 318-23) The court determined the autopsy slides were made available to the defense in 1992; “the evidence was and could have been known by the use of due diligence at the time of trial.”

(5PCR 320) Davis’s suggestion the autopsy report is inaccurate, therefore, Dr. Arden’s report assessing his review of the autopsy slides is timely, newly discovered evidence was rejected as not the proper standard for such claims. Instead, “[t]he Defendant must show that their expert could not have ‘discovered’ the victim’s pneumonia through due diligence.” The court found that Dr. Arden did not rely on any “new scientific reports in making his findings and “[o]ther than broad assertions about advances in the field of forensics, nothing in the Defendant’s motion suggests that the Defendant could not have discovered the alleged inaccuracies in the thirty years since the medical examiner filed the report.” The court noted that “Dr. Arden’s report is similar to evidence already rejected by the Florida Supreme Court” in *Davis*, 42 Fla. L. Weekly S235, S236. (5PCR 320-21)

Additionally, the court recognized that a claim of newly discovered evidence does not avoid any procedural bars and merely finding a new expert to offer a more favorable opinion does not establish newly discovered evidence. The postconviction court found “no meaningful difference between Defendant’s original argument that the victim suffered from respiratory distress when she choked on a French fry and his current argument that she suffered from respiratory distress because she had pneumonia.” Continuing, the court reasoned:

And, just as the facts presented at trial rebutted the French fry defense, the facts rebut the Defendant's current argument that the victim died of pneumonia. Pneumonia does not explain why the child was naked from the waist down. ... Pneumonia does not explain why there was blood on the toilet, on the sheets, on the sink, on a grocery bag, on a washcloth, on a blanket, and on a pillowcase. ... Pneumonia does not explain why the victim's blood was *in* Defendant's shorts and Pneumonia does not explain why the victim had bruising on her buttocks and hemorrhages on her hymen.

The victim's injuries have never been consistent with accident or illness. ... First responders noticed blood coming from the child's "vaginal canal outwardly down to the carpet." ... Multiple doctors examined her in the hospital. ... The emergency room physician saw bruising, swelling of the brain, and pools of blood in the skull. Another doctor found evidence of "vaginal penetration by a penis, a finger, or an object." ... Because the report does not weaken the State's case in any material way, it does not create a reasonable probability of an acquittal or a life sentence. Consequently, the Defendant has failed to fulfill his burden of establishing that Dr. Arden's report and opinions based on his examination of the autopsy slides qualify as newly-discovered evidence.

(5PCR 323) The court also rejected the suggestion of manifest injustice.

C. Argument

This is Davis's fourth successive motion for postconviction relief. In his first successive Rule 3.851 motion filed in 2014, he challenged the finding of blunt force head trauma as the cause of death alleging shaken baby syndrome is no longer generally recognized. See *Davis v. State*, 42 Fla. L. Weekly S235; 2017 WL 656307 (Fla. Feb. 17, 2017) (finding (1) "it does not meet any of the three exceptions that would permit judicial review

of this untimely claim under Florida Rule of Criminal Procedure 3.851(d)(2);" (2) finding offered evidence of new opinions on shaken baby syndrome do not constitute newly discovered evidence; and (3) that challenging the cause of death/how CC's brain became damaged would not have produced an acquittal on retrial; and (4) successive motion challenging cause of death procedurally barred. (February 17, 2017, Postconviction Court Order).

In his third successive Rule 3.851 motion, Davis again challenged the evidence used to establish CC died as a result of blunt force trauma from blows Davis inflicted upon her. Attached to his motion was the 2019 report of **Report of Dr. Johnathan L. Arden**, the same forensic expert Davis relies upon here. In 2019, Dr. Arden asserted he had reviewed the "Medical Examiner file, including Autopsy Report for" CC. (5PCR 311-14) In the Autopsy Report, Dr. Floro referenced microscopic examination of the lungs showed pneumonia. (5PCR 308-09).

Timeliness.

The third successive motion was untimely as it is more than 25-years since this case became final. See Rule 3.851(d)(2). It is nine years since the denial of the original postconviction challenging *Brady* violations and ineffective assistance of counsel related to cause of death was affirmed on

appeal. *Davis*, 136 So. 3d at 1184-95. Additionally, it is more than four years since Dr. Arden reviewed the Medical Examiner's file and Autopsy Report. Davis has not shown that some medical doctor/forensic expert or Dr. Arden could not have reviewed earlier the slides referenced in the 1992 Autopsy Report under microscopic results earlier. As such, the postconviction court's determination that Davis did not establish due diligence for his newly discovered evidence claim was proper and supports the summary denial of relief. This alone provides the basis for affirming the summary denial.

Procedural Bar.

This is the third time Davis has challenged who caused CC's injuries and/or her cause of death. The original motion raised claims that CC was injured during her stay with her father and was sick and out of day care for days before December 9, 1992. He also claimed that CC was not shown to have been sexually battered and that someone else, Thomas Moore, was the perpetrator. *Davis*, 136 So. 3d at 1184-95. In his first successive motion Davis again challenged CC's cause of death based on medical articles on shaken baby syndrome and here he suggests CC died from pneumonia. Davis's piecemeal attack on the cause and manner of CC's death is improper. This claim could have been presented with the initial

postconviction motion. This Court should find it barred under Rule 3.851. See *Davis*, 2017 WL 656307.

Diligence has not been shown to overcome the time bar.

Davis asserts that it was Dr. Arden's recent examination of the slides generated during the 1992 autopsy that established "newly discovered evidence." If every new review of evidence known by a defendant since trial could establish "newly discovery evidence," then there would be no finality to postconviction litigation and Rule 3.851(d)(2) would be of no effect. That is not the case. It is well settled that the presentation of a new defense expert with a more favorable opinion does not establish newly discovered evidence. See *Elledge v. Dugger*, 823 F.2d 1439, 1446 (11th Cir.) (opining "[m]erely proving that someone--years later--located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort"), *modified on other grounds*, 833 F.2d 250 (11th Cir. 1987); *Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007); *accord Long v. State*, 271 So. 3d 938, 941-43 (Fla. 2019); *Branch v. State*, 236 So. 3d 981, 985-87 (Fla. 2018); *Davis v. State*, 142 So. 3d 867, 874-76 (Fla. 2014); *Fuster v. State*, 664 So.

2d 18, 20 (Fla. 3d DCA 1995) (noting merely finding a new expert with a more favorable opinion does not establish newly discovered evidence) (citing *Elledge v. Graham*, 432 So. 2d 35 (Fla. 1983)). In the ineffective assistance of counsel analysis, a new expert's opinion does not establish a basis for relief. See *Wyatt v. State*, 78 So. 3d 512, 533 (Fla.2011); *Peede v. State*, 955 So. 2d 480, 494 (Fla. 2007); *Damren v. State*, 838 So. 2d 512, 517 (Fla. 2003); *Asay v. State*, 769 So. 2d 974, 986 (Fla. 2000).

Moreover, the autopsy slides have been available for more than 30-years. The fact that Davis only now has decided to ask one of his experts to look at those slides shows anything but diligence. Pneumonia was reported in the 1992 autopsy and Davis chose not to investigate that finding even though he had forensic experts for pre-trial and prior postconviction matters including Dr. Edward Willey, Dr. Janice Ophoven, and Dr. Johnathan L. Arden, Davis's current expert. Davis has not carried his burden of proving diligence as the postconviction court concluded. Relief was denied properly and this Court should affirm.

The evidence would not produce an acquittal or lesser sentence; the State's case is not weakened.

Here, Davis asserts that the postconviction court erred in focusing on the trial evidence to the exclusion of prior postconviction evidence/testimony. (IB 30-39). The trial evidence was that CC was not

suffering from any illness/breathing problems prior to Davis's attack. (ROA-T 490). Dr. Arden admits that:

The medical records for the final admission of 12/9/1992-12/10/1992 contained notations that initially, [CC's] lungs were clear (i.e., did not exhibit abnormal breath sounds indicative of pneumonia), although later in her hospital course some observers noted breath sounds consistent with pneumonia or edema (i.e., accumulation of fluid in the airspaces). Her chest radiographs ("X-rays") were also initially interpreted as being clear; during her admission, her chest X-rays developed indications of areas of collapse of lung tissue and possible edema, which improved somewhat before death.

(5PCR 136 Dr. Arden's 2022 report, pg 2) Dr. Arden suggests that because pneumonia was found during the autopsy and because he saw "acute bronchopneumonia" when he reviewed the slides, the hospital records/readings must have been insufficient or misinterpreted. *Id.* Yet, Dr. Arden admits "pneumonia could have developed during the one day in the hospital when the child was comatose on the ventilator." *Id.* Dr. Arden concluded "[t]herefore, the medical records do not reasonably exclude that [CC] had pneumonia prior to her admission to the hospital, which could have been a cause of her respiratory distress and collapse." *Id.*

The claim that pneumonia pre-dated CC's hospitalization and as Dr. Arden opines only "**could have been a cause**" of respiratory distress fails to address the obvious head injuries suffered by CC at the hands of the sole person, Davis, in whose care she was left. As noted in the State's

response to Claim 1 and incorporated here, the testimony of the law enforcement officer, paramedic, and medical doctors on December 9, 1992, was that CC was found nude from the waist down,² as she lay unconscious on the floor of her apartment suffering from blunt force trauma to her head and with blood coming from her vaginal canal, having been sexually abused. CC presented with four blunt force injuries to her head, at least one to her back, and had been penetrated vaginally on the day she was admitted to the hospital. Those head injuries were inflicted separately and caused severe brain damage as seen on the CAT scan and during the autopsy.

Davis suggests here that “pre-admission pneumonia does not exclude the chance CC was choking on French fries.” (IB 30) However, the records show there was no evidence CC was choking on French fries. The responding paramedic arrived within one minute of the 911 call and testified CC’s throat was devoid of obstructions. Instead, the record established the injuries were inconsistent with an asthma attack or a fall from the arms of a man (ROA-T 570-73, 587, 590-92, 608-16, 638-45, 650-

² There was no blood in her diaper which was found in the shower. *Davis*, 136 So. 3d at 1185. “Paramedic Raymond Patrick Wade, Jr., testified that upon his arrival - approximately one minute after the 911 call - the child was ‘lifeless’ and had a small amount of ‘blood coming from her vaginal canal.’ “ *Id.*

53, 832-42).

Again, whether CC had pneumonia before her admission to the hospital would not account for the multiple bruises to her head and back/buttocks inflicted through four blunt force trauma blows sufficient to cause death. Also, the fresh blood drops and spatter that was observed on the bed, in the bathroom, on the carpet where CC was found, and on Davis's shorts and underwear (ROA-T 573) undercuts any suggestion that pneumonia was the cause of CC's death. Instead, CC died as a result of one or more of the blows to her head. (ROA-T 651-53, 835-42) Davis's suggestion here that CC or some other person may have bled in the apartment before December 9, 1992, is not well taken or exculpatory in this case. The blood observed throughout the apartment was fresh, including on CC's hair ribbon and bed, and CC was found to be exuding blood from her vagina when law enforcement/paramedics arrived. This evidence was provided the jury. (ROA-T 508-13) The jury rejected the defense theory when it found Davis guilty as charged.

In response to the claim of a *Brady* violation for not presenting notes/reports of CC's prior injuries/sickness, this Court stated in the original postconviction appeal that even without testimony from Gwen Cunningham, CC's mother, about prior injuries/sicknesses:

Overwhelming evidence established that the victim's fatal injuries must have occurred on December 9, 1992, not several days before when the victim was visiting her father.

Retired patrol sergeant Lloyd K. Phillips testified that when he arrived at the scene, he saw “fresh blood” on the bathtub, the toilet seat, and the bed. Paramedic Raymond Patrick Wade, Jr., testified that upon his arrival—approximately one minute after the 911 call—the child was “lifeless” and had a small amount of “blood coming from her vaginal canal.” Evidence technician Richard Coffee testified that he was called to the crime scene around 2:30 p.m. on December 9, 1992, and that when he arrived, there were blood spots in many locations in the apartment but not in the diaper that the victim had been wearing earlier in the day. Coffee described the blood spots in the hallway as “[f]resh red.” Dr. Whitworth testified that when he examined the victim around 4:30 or 4:40 p.m. that day, he saw two “fresh” hemorrhages to the victim's hymen, which he opined were created “less than 12 to 18 hours prior to this examination.” Dr. Whitworth similarly opined that an injury to the victim's forehead above her right eye was likely inflicted “less than 30 or 48 hours” before the examination and that an injury to the left side of the victim's head and an injury to the victim's buttock likely were inflicted no more than twenty-four to forty hours prior to the examination. When asked about an injury to the victim's head, Dr. Whitworth explained that the victim “would have lost consciousness or maybe begin to have seizures or maybe stop breathing or some combination of those symptoms, but that she would be obviously neurologically symptomatic almost immediately after injury.” When asked if the victim's response to the injury could have been delayed for a period so that she could eat something, Dr. Whitworth answered, “No.”

In light of this evidence of recent severe injury, any doubt about the veracity of Cunningham's testimony about the victim's health and the state of the apartment on the morning of December 9, 1992, does not undermine confidence in the jury's verdict. Davis thus has not satisfied the third prong of *Brady*.

Davis, 136 So. 3d at 1185–86. Dr. Whitworth’s testimony that CC would have lost consciousness almost immediately upon receiving the blow to her head or started seizing, *Davis*, 136 So. 3d at 1186, undercuts Davis’s reliance on when CC may have received other bruises and Dr. Ophoven’s report that the bruising may have been older than reported at trial. (IB 33-34) Nothing in Dr. Arden’s 2109 and 2022 reports nor any of the prior postconviction assertions come anywhere close to refuting the facts CC was physically and sexually attacked on December 9, 1992, when under Davis’s sole care. The testimony of the first responders, the forensic investigation, and the State’s medical expert testimony at trial and postconviction firmly establishes the fact CC received her fatal wounds on December 9, 1992. Whether or not she had pre-existing bruises or sickness would not result in an acquittal on re-trial.

Moreover, with respect to Janet Cotton’s allegedly false testimony, this Court has stated:

And even if Cotton's testimony that Wiley was in her apartment on December 9, 1992, was false, the State's failure to correct the testimony was harmless. As set out above, the State presented ample evidence that the victim was severely beaten on December 9, 1992—regardless of whether she was also beaten earlier in the week. In light of this evidence, there is no reasonable possibility that the portion of Cotton's testimony about Wiley hearing noises affected the jury's guilty verdict or the trial court's finding of HAC.

Davis, 136 So. 3d at 1189–90.

In the third successive postconviction litigation, Cotton recanted her testimony with respect to when she heard sounds emanating from CC’s apartment claiming she had been pressured by the State. In rejecting the *Giglio v. United States*, 405 U.S. 150 (1972) claim, this Court reasoned:

Regardless of whether Cotton heard noises coming from Davis's apartment on December 9, 1992, the State presented ample evidence that the victim's injuries were not accidental and occurred while she was in Davis's care. This includes the testimony “that Davis was alone in the apartment with the victim,” “the bloodstain evidence,” the medical testimony regarding the nature of the victim's injuries, “the fact that there were no french fries found in the victim's stomach,” and Davis's inability to explain how the victim fell or why blood was found in certain areas of the apartment. *Davis I*, 703 So. 2d at 1059. Accordingly, there is no reasonable possibility that Cotton's testimony affected the jury's verdict.

...

... even if Cotton had not testified, “[t]he jury would still be left with the impression ... that Davis's defense evolved after he had time to contemplate the situation.” *Id.* at 1188. “Davis did not begin to assert that someone else harmed the victim until after his conversations with the first responders and his interview with the investigating detectives.” *Id.* He “spoke to seven people in six separate statements about what happened to the victim without ever asserting that Moore—or anyone else—was left alone with” her.

Davis, 304 So. 3d at 284-85. Continuing, this Court also reasoned:

Further, Davis claimed “that when he returned to the apartment after leaving the victim with Moore,” there appeared to be nothing wrong with the victim. *Id.* He recalled that “[s]he looked normal, except for she wasn't breathing.” *Id.* Yet medical

testimony “render[ed] Davis's claim that the child appeared uninjured patently implausible.” *Id.*

Finally, Davis failed to provide a credible “explanation of why he did not immediately implicate Moore.” *Id.* At trial, Davis “testified that he promised not to inform law enforcement about Moore's presence—and thus risked implicating himself in the murder—because Moore was afraid of being charged with drug possession.” *Id.* at 1188-89.

The circuit court correctly determined that there is no reasonable possibility that Cotton's testimony affected the jury's verdict.

Davis, 304 So. 3d at 284-85.

With respect to the claim of ineffective assistance for not calling Dr. Willey to support the defense CC was not sexually battered, this Court rejected the matter. This Court pointed to the fact two first responders testified to CC's state of undress and her bleeding vaginally supported the sexual battery along with the trial testimony from Dr. Whitworth and Dr. Floro. *Davis*, 136 So. 3d at 1190. Further evidence that Dr. Willey's opinion would not assist Davis in his claim of ineffective assistance was that:

Dr. Willey conceded that his opinion regarding the victim's hymen injuries relied on photographs and not on an in-person examination. Despite being a forensic pathologist, not an OB/GYN or pediatric physician, Dr. Willey opined that the victim's injuries were likely the result of irritation due to poor hygiene. Additionally, Dr. Willey disagreed with the State's trial witnesses' opinions that injuries to the victim's hymen could have healed in roughly twenty-six hours, especially since the victim had been brain dead for a portion of that time. Dr. Willey cited several scholarly articles regarding the healing time

necessary for genital injuries to support this assertion.

In rebuttal, the State called Dr. Randall Curtis Alexander, a professor of pediatrics and the statewide Medical Director for the Child Protection Teams in Florida. Dr. Alexander testified that he agreed with Dr. Whitworth's conclusion that the injuries described were indicative of sexual battery and further opined that physical injury in a child sexual abuse case is not common. Dr. Alexander also agreed with Dr. Whitworth's conclusion that the hemorrhages had healed by the time the autopsy was conducted. Dr. Alexander explained that "flame-shaped" hemorrhages—like the ones found on the victim—are very thin superficial injuries that are not the type to last for several days, especially in a quick healing area of the body like the vagina.

Dr. Alexander disagreed with Dr. Willey's opinion that no sexual battery occurred for several reasons. First, Dr. Alexander explained that the photographs of the victim were not of sufficient quality to reveal details that would be evident at an in-person examination. Second, Dr. Alexander distinguished the scholarly articles relied on by Dr. Willey to show that the injuries could not have healed in twenty-six hours. Dr. Alexander explained that the articles primarily addressed lacerations, not superficial hemorrhages. Third, Dr. Alexander criticized Dr. Willey's claim that healing would have stopped once the victim was brain dead. Dr. Alexander testified that healing occurs so long as there is a heartbeat and blood pressure, or else transplants would not be possible.

Davis, 136 So. 3d at 1191. Dr. Alexander's postconviction testimony cited by this Court, *Id.* at 1191, along with Dr. Whitworth's testimony that the catheter used on CC was far above the hymen and that the vaginal injuries observed on December 9, 1992, had healed by the time of the autopsy rebut Dr. Arden's 2019 report and Dr. Hariton's opinion challenging the finding CC was sexually battered. (IB 34)

Given the above, even with the alterations in the testimony of Gwen Cunningham and Janet Cotton and the challenges to the evidence of sexual battery, blunt force trauma/shaken baby syndrome, and pneumonia are considered, Davis has not carried his burden under the newly discovered evidence standard. The evidence obtained on December 9, 1992, and through the autopsy establish that there was a sexual and physical attack upon CC on December 9, 1992, when she was in Davis's sole care and such led to her death. The death was not caused by pneumonia or choking, but by blunt force trauma from multiple blows to CC's head inflicted when she was alone with Davis. The sexual battery was committed by Davis as evidenced by CC being nude, with blood coming from her vagina and the observed vaginal injuries/hemorrhaging. This is supported by the blood evidence found in the home and on Davis's shorts and underwear. CC succumbed to those injuries the next day.

Davis's defense was that CC was choking on a French fry and he tried to revive her by putting her in the shower. In so doing, he dropped CC once, thus, she was not abused, was not raped, and did not die from shaken baby syndrome. Later the defense became "someone else did the crimes," namely Thomas Moore. *Davis*, 136 So. 3d at 1184-95. However, the State's evidence established that while in Davis's care, CC suffered

blows to her head and one to her back/buttocks, along with vaginal penetration. When found by the police and paramedic, she was bleeding into her brain, bleeding from her vagina, and was unable to breathe on her own. The medical testimony was that CC's head trauma was not the result of a single accidental fall, but one which was caused by four separate blows to her head. Likewise, the defense that CC had choked on a French fry was inconsistent with the evidence. (ROA-T 570-73, 587, 590-92, 608-16, 638-45, 650-53, 832-42). As such, there is no basis for relief. This Court concluded: "[w]hether or not Cotton heard noises coming from Davis's apartment on December 9, 1992, the State presented ample evidence that Davis intentionally injured the victim on that date." *Davis*, 304 So. 3d at 285–86. Davis is unable to establish that the four blows he inflicted upon two-year old CC and the vaginal penetration he committed on December 9, 1992, are at all undermined by a suggestion CC may have had pneumonia on that day or that shaken baby syndrome is not as well accepted in 2023 as it was in 1992. The fact remains that CC was killed by blows to her head which would have almost immediately caused her to be “obviously neurologically impaired,” lose consciousness, have seizures, or stop breathing on December 9, 1992, and resulted in severe brain injury and subsequent death. Furthermore, nothing Davis has presented here

refutes the evidence that at some time during the December 9, 1992, attack she was sexually battered while in the sole care and at the hands of Davis. The summary denial of relief was proper and should be affirmed.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the denial of postconviction relief sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the e-portal filing system to: Alice Copek, Assistant Capital Collateral Regional Counsel – North at Alice.Copek@ccrc-north.org and Nida Imtiaz, Assistant Capital Collateral Regional Counsel – North at Nida.Imtiaz@ccrc-north.org this 13th day of November, 2024.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Arial and is under 20,000 words or 75 pages excluding cover sheet, tables of contents and citations, certificates, and signature block in compliance with Fla. R. App. P. 9.100 and 9.210(a)(2).

Respectfully submitted,

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