IN THE SUPREME COURT OF FLORIDA

Case No. SC24-1128
Lower Court Case No. 1992-CF-13193

TONEY DERON DAVIS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is Mr. Davis' appeal of the circuit court's order summarily denying his successive motion for postconviction relief under Fla. R. Crim. P. 3.851. The following symbols are used to designate references to the record: "T. __" refers to the transcript of the trial proceedings; "R. __" refers to the record on direct appeal; "PCR. __" refers to the initial postconviction record on appeal. References to the successive postconviction appeal records are designated "PCR1.__" for the first successive record, "PCR2.__" for the second successive record, and "PCR3.__" for the instant record on appeal for the third successive motion. All other references are self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Davis has been sentenced to death. The resolution of this appeal will determine whether he lives or dies. This Court has allowed oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims and the stakes involved. Mr. Davis respectfully requests this Court grant oral argument.

STANDARD OF REVIEW

The circuit court summarily denied Mr. Davis' successive rule 3.851 motion without holding an evidentiary hearing. Therefore, this Court should review the circuit court's decision de novo, accepting Mr. Davis' factual allegations as true to the extent they are not refuted by the record. *Walton v. State*, 3 So. 3d 1000 (Fla. 2009).

"An evidentiary hearing on a rule 3.851 motion should be held whenever the movant makes a facially sufficient claim that requires a factual determination." *Pardo v. State*, 108 So. 3d 558, 560 (Fla. 2012) (quoting *Parker v. State*, 89 So. 3d 844, 855 (Fla. 2011) and *Gore v. State*, 24 So. 3d 1, 11 (Fla. 2009)) (internal quotations omitted). Evidentiary hearings are held to establish the historical facts and to resolve factual disputes. *Truehill v. State*, 358 So. 3d 1167, 1186 (Fla. 2022). In denying all of Mr. Davis' claims, the circuit court based its ruling solely on facts within the record.

Because these claims require facts extrinsic to the record and required factual development, an evidentiary hearing is proper. *See Walker v. State*, 88 So. 3d 128, 135 (Fla. 2012) (when there is "any question as to whether a rule 3.851 movant has made a facially sufficient claim requiring a factual determination, the Court will

presume that an evidentiary hearing is required"); "[B]ecause a 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." *Dennis v. State*, 109 So. 3d 680, 690–91 (Fla. 2012).

STATEMENT OF THE CASE

The Circuit Court for the Fourth Judicial Circuit in and for Duval County, Florida, entered the judgments of conviction and sentence at issue. On February 25, 1993, a grand jury indicted Mr. Davis on Count I, first degree murder; Count II, aggravated child abuse; and Count III, sexual battery. (R. 38-39). Mr. Davis was indicted on the same three counts again in September 29, 1994, and December 15, 1994. (R. 60-61, 261-62).

Mr. Davis proceeded to trial before the Honorable L.P. Haddock on May 8, 1995. The jury found Mr. Davis guilty on all counts. (R. 348-50). On July 18, 1995, Mr. Davis was sentenced to death on the murder conviction, with the jury recommending death by an 11-1 vote. (R. 414-32). The Florida Supreme Court affirmed on direct

appeal. *Davis v. State*, 703 So. 2d 1055 (Fla. 1997), *cert. denied*, *Davis v. Florida*, 524 U.S. 930 (1998).[1]

Mr. Davis timely filed a motion for postconviction relief on May 3, 1999. (PCR. 2559-61).[2] Mr. Davis filed an appeal to the Florida Supreme Court, concurrently with a state habeas corpus petition. The Florida Supreme Court affirmed the denial of postconviction relief on April 10, 2014. *Davis v. State*, 136 So. 3d 1169 (Fla. 2014), *reh'g denied*, August 28, 2014.[3]

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[1] Mr. Davis raised eight claims: (1) trial court error for not following *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973), and *Faretta v. California*, 422 U.S. 806 (1975), when he moved to discharge court-appointed counsel before trial; (2) trial court erred in denying his motion for judgment of acquittal; (3) insufficient evidence of sexual battery; (4) trial court erred in admitting victim impact evidence; (5) the court erred in considering and finding HAC aggravator; (6) trial court erred in finding HAC proven; (7) trial court erred in finding "committed during the course of sexual battery" aggravator; and (8) the death penalty is disproportionate. *Davis*, 703 So. 2d at 1057-58.

[2] Mr. Davis also filed a pro se supplemental 3.851 motion on April 30, 2009, alleging newly discovered evidence. The trial court denied this and other pro se motions on August 30, 2010. (PCR. 2561). Davis filed a pro se newly discovered evidence claim on October 31, 2011, but it is unclear whether the court ruled on it. (PCR. 2475, 2561).

[3] Regarding the appeal, Mr. Davis raised eight claims: (1) the State violated *Brady v. Maryland*, 373 U.S. 833 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972); (2) trial counsel was ineffective for failing to present an expert to refute the sexual battery charge; (3) trial counsel was ineffective for presenting an unreasonable defense

On October 8, 2014, Mr. Davis filed his first successive motion for postconviction relief. PCR2. 1-28. The trial court summarily denied the motion. (PCR2. 132-62). On February 17, 2017, the Florida Supreme Court denied relief. *Davis v. State*, 2017 WL 656307 (Fla. Feb. 17, 2017), *reh'g denied* 2017 WL 1833179 (Fla. May 8, 2017).[4]

On January 30, 2018, the Florida Supreme Court denied Mr. Davis' second petition for state habeas corpus, seeking relief under *Hurst v. Florida*, 577 U.S. 92 (2016) and *Hurst v. State*, 202 So. 3d

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theory; (4) trial counsel was as ineffective for failing to impeach witnesses; (5) trial counsel was ineffective for failing to object to numerous improper prosecutorial comments; (6) trial counsel was ineffective at the penalty phase; (7) trial counsel was ineffective for or failing to object to comments that minimized the role of the jury in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985); and (8) cumulative error. Regarding the state habeas petition, Davis raised two claims: (1) appellate counsel was ineffective for failing to argue fundamental error based on numerous instances of prosecutorial misconduct; and (2) appellate counsel was ineffective for failing to supplement two handwritten letters from om Davis unequivocally requesting the discharge of trial counsel.

[4] Mr. Davis raised three claims: (1) newly discovered evidence related to Shaken Baby Syndrome undermined the prosecution; (2) trial counsel was ineffective failing to investigate and present newly discovered mitigation evidence; and (3) he was entitled to relief based upon *Hurst v. Florida*, 577 U.S. 92 (2016).

40 (Fla. 2016). *Davis v. Jones*, 235 So. 3d 301 (Fla. 2018), *cert. denied Davis v. Jones*, 139 S. Ct. 170 (2018).

On April 23, 2019, Mr. Davis filed a second successive motion for postconviction relief. (PCR3. 1-28). On May 13, 2019, the trial court struck the motion as facially invalid. (PCR3. 102-03). On June 3, 2019, Mr. Davis filed an amended motion, which was summarily denied. (PCR3. 104-31, 207-15).[5] On August 27, 2020, the Florida Supreme Court affirmed the denial of relief. *Davis v. State*, 304 So. 3d 281 (Fla. 2020), *reh 'g denied* 2020 WL 6375596 (Fla. Oct. 30, 2020).

Mr. Davis filed a third successive Rule 3.851 motion for postconviction relief on July 12, 2023. (PCR3. 17-46). Mr. Davis' postconviction counsel withdrew on October 5, 2023, and Capital Collateral Regional Counsel, Northern Region, was appointed to represent Mr. Davis. (PCR3. 121-24). Current counsel then filed an amended Rule 3.851 motion on April 30, 2024. (PCR3. 241-69). A case management conference was held on May 31, 2024. (PCR3. 741-

[5] Mr. Davis raised two claims: (1) the State violated *Giglio* when it knowingly presented the false testimony of witness Janet Cotton; and (2) the State violated *Brady* when it failed to disclose evidence that impeached Ms. Cotton.

84). The circuit court denied relief on all claims, without holding an evidentiary hearing, on June 10, 2024. (PCR3. 315-700). A motion for rehearing was denied on June 28, 2024. (PCR3. 710-11). This appeal timely follows.

STATEMENT OF THE FACTS

On the morning of December 9, 1992, Mr. Davis was left to care for Caleasha Cunningham ("C.C.") in the apartment that her mother, who he was dating at time, leased. (T. 489). C.C.'s mother, Gwen Cunningham, had kept C.C. home from daycare that morning, as well as the three business days prior to the 9th, because C.C. was sick. (PCR-SR. 94-95). Cunningham also told a representative of Family Builders, an agency working with the Department of Health and Rehabilitative Services ("HRS"), that "the only reason [C.C.] was not in daycare that day and needed [Mr. Davis] to watch her was because the child's asthma was acting up, and Cunningham did not want her to go to daycare." (PCR-SR. 45-48).

Cunningham testified at trial that she believed C.C. suffered from asthma and that she had previously given C.C. medicine for asthma. (T. 509-11). Cunningham clarified, however, that no doctor had ever diagnosed C.C. with asthma and that, when C.C. was given

medicine, it was for a cold she had a few months before her death. (T. 512). Though Cunningham had told the daycare and HRS that she kept C.C. home because she was sick, she told the jury that C.C. appeared healthy and denied that C.C. was suffering from a cold or "any respiratory ailments" that morning when she left her with Mr. Davis. (T. 489). In a pre-trial deposition, Cunningham testified that before she left, she told Mr. Davis she would not be gone long and planned to return within thirty minutes. (PCR. 753).

Around midday, C.C. stopped breathing. (T. 911-12). Mr. Davis believed that C.C. was choking on a French fry or suffering from an asthma attack, and he tried to revive her. (T. 923). Mr. Davis held the child under the shower to try and revive her from her respiratory distress. (T. 722-23). Law enforcement found C.C.'s soaking wet diaper in the bathroom, and the diaper did not have any signs of blood in it. (T. 685). Mr. Davis told law enforcement that he accidentally dropped C.C. while in the shower when he was trying to ease her breathing. (T. 723-24; 913, 920).

At trial, next door neighbor Janet Cotton told the jury that she heard a child crying around noon that day, as well as thumping noises coming from C.C.'s apartment. (T. 518). Cotton said she

recognized Mr. Davis saying "sit down" in a loud, angry voice. (T. 519). She told the jury that 30 minutes after the "ruckus" ended, rescue personnel arrived. (T. 520).

In the course of postconviction proceedings, Cotton executed an affidavit stating that the crying and screaming she heard from a neighboring apartment was not on December 9, but a day or two prior. Cotton did not hear anything unusual on the morning of December 9 until she heard a commotion outside and saw rescue personnel and police speaking with Mr. Davis. She did not hear a child crying, no thumping noises, and no angry voices that morning prior to seeing rescue personnel. She told the jury that she did because she was naïve, wanted to do the right thing, and was pressured by the State to give the testimony, despite it not being true. (PCR3. 149-153).

Thomas Moore testified that he arrived at the apartment on December 9 to find Mr. Davis opening the door and holding a lifeless C.C., who appeared wet "like she had took a bath." (T. 536). Mr. Davis told Moore that C.C. had choked on a French fry and had an asthma attack, and he directed Moore to call 911. (T. 537). When Moore returned from the pay phone, he found Mr. Davis trying to resuscitate

C.C. (T. 542). Moore did not observe any bleeding but did notice that the shower was running and there was a plate of French fries on the floor. (T. 549-50).

A neighbor, Ronald Gordon, testified that he first saw Mr. Davis with C.C. at 11:45 a.m. on December 9, and later, that he was with Mr. Davis from approximately 12:30 - 12:50 p.m. Mr. Davis came to Gordon's apartment to use his telephone and then stayed and chatted a while. (T. 867-69, 873-74). Around 1:15 p.m., Gordon saw a man running "to the phone booth … [t]o dial 911" and saw Mr. Davis "standing in the back of the apartment with the child in his hands." (T. 870-71).

Cunningham described C.C. when she saw her at the hospital—that she had seen swelling on C.C.'s head, bruises on her face, red marks on her chest and that her eye appeared to be "shaken out of place". (T. 494). Cunningham said that C.C. had not had any of those injuries earlier that day. (T. 494).

Upon examination at the hospital, emergency room doctor Dr. Lucian DeNicola found C.C. had "significant" brain swelling which he believed showed traumatic brain injury. (T. 614-16). In a pretrial deposition, Dr. DeNicola testified that swelling does not occur

instantaneously, but occurs over time as oxygen is unable to get to the tissue. (PCR. 1214-16). Within hours of admission to the hospital, C.C.'s brain was swollen to the point that she had to undergo surgery to place a ventriculostomy and intracranial pressure monitor. Due to complications, the surgeon, Dr. Walter Faillace, had to drill into C.C.'s skull three times to place the monitor. Within a few hours of admission, C.C.'s brain had swelled to such an extent that when Dr. Faillace drilled a hole into her skull, hematomatous fluid and brain exuded through the burr hole. (PCR3. 215-16)

Given the progression of C.C.'s brain swelling, Mr. Davis submitted an expert report in postconviction proceedings from Dr. Janice Ophoven, M.D. Dr. Ophoven opined that C.C. died from hypoxia, which occurs when a part of the body does not receive enough oxygen and causes the brain to swell. Dr. Ophoven further explained that "[w]hen there is a head injury, brain swelling progresses and peaks at cardiac arrest." (PCR2. 146-47). As C.C.'s hospital records indicate, she was in complete cardiac arrest when

rescue personnel arrived on scene. (PCR3. 209-10).[6] Given the condition of C.C.'s brain at the time of admission and autopsy, her brain had already swollen to a point that, if C.C. had suffered a fatal head injury, she would have had to have hit her head before she was left alone with Mr. Davis." (PCR2. 146-47).

Dr. DeNicola also found evidence of retinal hemorrhages, which he testified indicated shaking and trauma. (T. 610, 612). Dr. DeNicola noted a bruise to C.C.'s right temple and explained that the injury to the brain caused C.C. to stop breathing. (T. 612, 615-16). With respect to the retinal hemorrhages, Dr. Ophoven's expert report demonstrated that advancements in science have shown that they are of little diagnostic value at all, except as an indicator of increased intracranial pressure. They can occur in traumatic and non-traumatic instances, and C.C.'s retinal hemorrhages were not consistent with C.C. being violently shaken. (PCR2. 157).

Dr. J.M. Whitworth, from the Child Protection Team, also examined C.C. at the hospital. He observed retinal hemorrhages as

[6] C.C.'s mother testified in a pretrial deposition that she suffered through periods of cardiac arrest throughout her life and her heart would simply stop beating. (PCR. 749-50).

well as noting a bruise to her left temporal area, forehead, and buttocks. (T. 638-39). Dr. Whitworth testified that the bruises were consistent with being caused within 24 or 30 to 48 hours before his examination by a direct blow. (T. 641-44). Dr. Whitworth testified that the retinal hemorrhages could have been caused by shaking, i.e., "an acceleration/deceleration injury that you can see with the head rotating and hitting an object", or a fall from a significant height of at least two to three stories, or a direct blow. (T. 645-46, 659).

Dr. Whitworth also testified about two "fresh hemorrhages" to C.C.'s hymen, which he believed were caused 12 to 18 hours before his examination and were the result of an attempted penetration. (T. 644). Throughout postconviction proceedings, Mr. Davis has submitted expert testimony that the alleged injuries were not consistent with sexual abuse. In the instant successive 3.851, Mr. Davis submitted an expert report from an obstetrics and gynecology physician, Dr. Theodore Hariton. In reviewing all the medical information, Dr. Hariton "did not find any evidence of a sexual act of any sort, at or near the time of the respiratory arrest and demise. (PCR3. 225). Dr. Hariton concluded that any marks on C.C.'s hymen "were most likely digital pressure marks from the nurse holding labia

open to facilitate the placing of the Foley catheter in this little girl." The only injuries Dr. Hariton found were attributable to medical intervention in inserting the catheter without any lubrication. (PCR3. 233-34).

C.C. died at the hospital the day after her collapse. (R. 13). Dr. Bonifacio Floro, the medical examiner, conducted C.C.'s autopsy on December 11. (T. 826). Dr. Whitworth, from the Child Protection Team, also attended the autopsy and observed a major head injury on the back of C.C.'s head, which he had not observed in his evaluation of C.C. on December 9. With the two head injuries he had observed in the hospital, he opined that there were at least three separate incidences of C.C.'s head hitting something. (T. 650-51). According to Dr. Whitworth, one or more of those injuries caused C.C.'s death, and she would have been unresponsive almost immediately (T. 651-52). Dr. Whitworth testified that the injuries to C.C.'s hymen had healed by the time of the autopsy. (T. 653). Ultimately, Dr. Whitworth concluded that C.C. was the victim of child abuse. (T. 653). Dr. Floro, conducting the autopsy, saw no signs of injury to C.C.'s vaginal or anal area, but he rationalized that the injury may have healed after two days. (T. 834-35). Introduced in

postconviction, Dr. Hariton's report noted that "[a] genital injury was not identified either pre or postmortem." (PCR3. 226).

Dr. Floro also indicated that it was important to obtain the history of what had happened so that he had an idea of what to do and what to expect. (T. 830). Dr. Floro mentioned that he was aware that C.C. may have choked on a French fry, but he did not testify to any other information relating to C.C.'s health. (T. 830). In order to refute Mr. Davis' description of C.C. choking on a French fry, Dr. Floro testified that there was no way that C.C. could have "eaten a number of French fries, either before suffering or after suffering the injury. (T. 841). He further noted that the contents in C.C.'s stomach were consistent with cereal. (T. 848). In the instant successive motion, Mr. Davis submitted expert reports from forensic pathologist Dr. Jonathan Arden, M.D. As it related to C.C.'s stomach contents, Dr. Arden opined that Dr. Floro's conclusion "ignores the passage of a day of life in which the food could have been broken down and/or passed into the intestines, and that he documented in the autopsy that a nasogastric tube had been inserted, which would allow for suctioning of material from the stomach prior to death." (PCR3. 240).

Dr. Floro also refuted that C.C. was suffering from asthma, and he testified that he saw "no evidence of lung disease". (T. 842). This, despite his finding of pneumonia during his autopsy. While he found pneumonia, he testified in a pretrial deposition that he believed C.C. contracted the pneumonia while in the hospital. (PCR. 1250-51). No evidence of C.C.'s pneumonia was given to the jury.

As to her injuries, Dr. Floro noted bruises to C.C.'s face, ear, and left buttock which he indicated were caused by blunt trauma and were consistent with being caused on December 9. (T. 832-34). Forensic pathologist Dr. Arden noted "that the only cutaneous injuries that were sampled for microscopic examination were older than the day of [C.C.'s] collapse, and therefore, those injuries were not fresh as represented by the medical experts who testified at trial, and in fact were thus not related to the causation of the death of [C.C]." (PCR3. 138).

At trial, Dr. Floro conceded that the subcranial injuries to C.C.'s head could have come from her being dropped, though he maintained it was not consistent with a fall of less than four feet. (T. 845, 847-48). Upon further internal examination, Dr. Floro observed "extensive hemorrhaging to the back of C.C.'s scalp which was indicative of a

"serious head injury". (T. 836). Dr. Floro opined that the injury was consistent with the December 9 timeline. (T. 837). The extensive hemorrhaging appeared to be the result of a subdural hematoma which caused the brain to swell to the extent it caused a herniation that killed all the vital centers of the brain. (T. 839-40). Dr. Floro testified that such an injury would cause immediate unconsciousness. (T. 840).

In refuting Dr. Floro's claim that the subdural hematoma would have caused immediate unconsciousness, Dr. Ophoven's report, submitted in postconviction, documented that "[i]t is now generally accepted that a child can be lucid and appear essentially symptom-free (at least to a layperson) for up to 72 hours after suffering injuries that manifest as cerebral edema, subdural hematoma and retinal hemorrhages." (PCR2. 163). Dr. Arden's report concurs with Dr. Ophoven's opinion and notes that the lucid interval "is especially worth of consideration in this instance, where no intrinsic brain trauma was identified as autopsy." (PCR3. 239).

And with respect to Dr. Floro's testimony that Mr. Davis' accidental drop of C.C. in the shower would not have been a far enough drop to cause fatal injury, Dr. Ophoven stated that "[t]his

opinion is contrary to known biomechanical science and studies." (PCR3. 160). "Since Mr. Davis's 1995 trial, the science in this area has evolved so that it has now been shown that falls of a relatively short distance [3 feet] can cause severe, and sometimes fatal, injury in small children and toddlers." (PCR3. 160).

In contrast to Dr. Floro's testimony regarding the extensive nature of the subdural hemorrhage that he believed killed C.C., Dr. Arden noted that the autopsy report indicated the hemorrhage was measured at 6-8 cubic centimeters, which Dr. Arden stated is "a small volume, even relative to the cranial cavity of a 2-year-old child." Dr. Arden further explained: "This small volume of blood spread out over both sides of the brain would not exert significant pressure on the brain, and in fact, the autopsy does not describe shifting or compression of the brain from an external source, as would be necessary for a subdural hemorrhage to be a lethal mechanism. (PCR3. 238).

Given the small volume of the subdural hemorrhage that Dr. Arden concluded could not be the cause of death, he went to the Medical Examiner's Office and microscopically reviewed the slides that Dr. Floro had obtained during his autopsy. In reviewing the

slides of C.C.'s lungs, he found that C.C. had acute bronchopneumonia. While Dr. Floro had stated in a pretrial deposition that C.C. contracted it while in the hospital, Dr. Arden's review of the slides revealed that "the exuberant, acute inflammatory exudate contained some macrophages, which are inflammatory cells that increase in the subacute phase, which is consistent with the pneumonia having predated, and contributed to, the respiratory distress reported in association with the collapse and admission to the hospital." (PCR3. 136).

The scientific medical evidence revealed by the slides indicated that the process of C.C.'s pneumonia was present before admission and Dr. Arden noted that the hospital records did not exclude pre-admission pneumonia. Pneumonia can cause respiratory collapse, as C.C. tragically suffered on December 9. (PCR3. 138). As noted, *supra*, C.C. was in complete cardiac arrest when rescue personnel arrived and attempted to revive her. And as also noted, *supra*, brain swelling after a head injury progresses over time and peaks at cardiac arrest. Mr. Davis was alone with C.C. for little more than an hour before she collapsed in full cardiac arrest. Dr. Arden's microscopic examination of C.C.'s lungs explains that collapse and how her brain could be so

swollen within hours of being left alone with Mr. Davis, providing more than reasonable doubt as to Mr. Davis guilt.

SUMMARY OF ARGUMENT

ISSUE 1: The circuit court erred in summarily denying Mr. Davis' claim that the State violated Mr. Davis' rights under the Fourteenth Amendment by suppressing favorable, material evidence. The undisclosed, material information contained in the autopsy slides, that pre-admission pneumonia caused C.C.'s respiratory collapse and subsequent death, creates a reasonable probability of a different result, such that Mr. Davis did not receive a fair trial.

ISSUE 2: The circuit court erred in summarily denying Mr. Davis' claim that newly discovered evidence establishes that C.C. suffered from pneumonia prior to being admitted to the hospital. The evidence disproves the State's theory of the case, including the cause of death, entitling Mr. Davis to new trial proceedings.

The pre-admission pneumonia is new evidence of the actual cause of C.C.'s death that could not be discovered before Dr. Arden's evaluation of the slides. With a proper analysis of the actual circumstances surrounding C.C.'s respiratory collapse and a presentation of medical evidence that is actually grounded in science,

not the flawed and unreliable evidence heard at trial, there is more than a reasonable probability that a jury of his peers would acquit Mr. Davis. Given all the errors and omissions that have been identified through the course of postconviction proceedings, executing Mr. Davis for this alleged crime would be the utmost due process violation and constitute a manifest injustice.

ARGUMENT

ISSUE 1: The circuit court erred in summarily denying Mr. Davis' claim (1) that the State violated his rights under the Fourteenth Amendment by suppressing favorable, material evidence.

"[A] defendant is entitled to an evidentiary hearing on a [postconviction] motion unless (1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient." *Franqui v. State*, 59 So. 3d 82, 95–96 (Fla. 2011) (internal citations omitted).

The State is obligated to disclose evidence or information in its possession that is favorable to the defense, both exculpatory and impeachment evidence. *Brady v. Maryland*, 373 U.S. 83 (1963); *Mordenti v. State*, 894 So. 2d 161, 168 (Fla. 2004); *see United States v. Bagley*, 473 U.S. 667 (1985). Relief is warranted if the undisclosed information creates a reasonable probability of a different result.

Bagley, 473 U.S. at 680. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

> To establish a *Brady* violation, the defendant has the burden to show (1) that favorable evidence, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *see also Way v. State*, 760 So.2d 903, 910 (Fla.2000); *Cardona v. State*, 826 So.2d 968, 973 (Fla.2002). To meet the materiality prong, the defendant must demonstrate a reasonable probability that had the suppressed evidence been disclosed the jury would have reached a different verdict. *Strickler*, 527 U.S. at 289, 119 S.Ct. 1936. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Way*, 760 So.2d at 913; *see also Strickler*, 527 U.S. at 290, 119 S.Ct. 1936.
>
> When reviewing *Brady* claims, this Court gives deference to the trial court on findings of facts and reviews de novo the application of law and independently reviews the cumulative effect of the suppressed evidence. *See Mordenti*, 894 So.2d at 169–70; Way, 760 So.2d at 913.

Dennis v. State, 109 So. 3d 680, 696 (Fla. 2012).

The Circuit Court denied claim (1) because Mr. Davis failed to establish the second prong of the *Brady* analysis. (PCR3. 318). The Court stated that the evidence was not "willfully or inadvertently

suppressed by the State" because the State had disclosed the slides in the autopsy report during the original trial. (*Id.*). However, Mr. Davis' *Brady* claim is centered on the *information* revealed by the slides and on the fact that the State suppressed the information contained within the slides.

While there is evidence to support the disclosure of the existence of the slides, there is no competent, substantial evidence for the Court's claim that the State disclosed the actual slides. And the Court's finding entirely ignores that Dr. Floro, who conducted the autopsy, essentially testified in a pretrial deposition that the fact that C.C. suffered from pneumonia was irrelevant because he believed she contracted it after admission to the hospital. (PCR. 1250-51). The finding also ignores the crucial and misleading, or outright false, testimony of Dr. Floro at trial when he told the jury that he did not see "any evidence of lung disease" and that C.C. died due to blunt trauma. (T. 842-43).

It was not discovered until Dr. Arden microscopically reviewed the evidence contained within the slides that Mr. Davis learned that Dr. Floro's conclusion that C.C. contracted pneumonia in the hospital was erroneous. When Dr. Arden was first retained, he merely

determined that the subdural hemorrhage that Dr. Floro identified at trial as the cause of death was not scientifically possible. Because the hemorrhage only measured a small volume of 6-8 cubic centimeters, the subdural hemorrhage was too small to be a lethal mechanism that caused the death of C.C. (PCR3. 238).

Given the inability for the subdural hemorrhage to be the cause of C.C.'s death, Dr. Arden was retained further to ascertain whether he could determine a cause of death supported by medical science. It was only then that, for the first time in this case, the information contained in the slides obtained during C.C.'s autopsy was revealed to Mr. Davis. It was only then that, contrary to what he had been told by Dr. Floro, that he learned that the slides of C.C.'s lungs revealed that "the exuberant, acute inflammatory exudate contained some macrophages, which are inflammatory cells that increase in the subacute phase, which is consistent with the pneumonia having predated, and contributed to, the respiratory distress reported in association with the collapse and admission to the hospital." (PCR3. 136).

The fact that a defense expert reviewed the autopsy slides later in time does not mean that the information within the slides was not

suppressed. Dr. Floro had obtained a "history" of what had happened to C.C. prior to the autopsy (T. 829-30), and Dr. Whitworth, from the Child Protection Team, had examined C.C. before she passed and was at her autopsy (T. 654, 667). Prior to performing his autopsy, Floro reviewed investigative materials that created a narrative that C.C. was abused and colored the autopsy, to include the fact that Mr. Davis had been previously arrested for sexual battery of a child. (PCR. 1235-37). Dr. Floro's autopsy report and testimony omit that the victim could have contracted pneumonia pre-admission and that pneumonia could not be reasonably excluded as her cause of death. Therefore, this information was "suppressed by the State."

The materiality of this suppressed information cannot be overstated. What Mr. Davis' successive motion at issue in this case has revealed is a cause of death that is actually grounded in sound, reliable, and scientific medical evidence. Through the course of his postconviction proceedings, Mr. Davis has demonstrated that the medical evidence the jury relied on in convicting Mr. Davis has proven to be flawed and unreliable, with much of it having no basis in current medical science.

What Mr. Davis' postconviction investigations have further revealed is that the lay witness testimony the State utilized to buttress the flawed and unreliable medical testimony that C.C. died as a result of child abuse was false. While the jury viewed the medical evidence through the lens of a neighbor telling them she heard C.C. crying, thumping noises, and Mr. Davis' angry voice, shortly before rescue personnel arrived that morning, she has since recanted that testimony and says she heard nothing unusual that morning until the commotion caused by rescue personnel and law enforcement arriving for C.C. (PCR3. 149-53).

The undisclosed information contained in the autopsy slides, that pre-admission pneumonia caused C.C.'s respiratory collapse and subsequent death, creates a reasonable probability of a different result, such that Mr. Davis did not receive a fair trial as contemplated under *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

Mr. Davis' claim (1) is facially sufficient and relies on facts discovered during the postconviction investigation. Claim (1) requires factual determinations, and in order to properly assess the claim, the circuit court needs to hear and make determinations about those

facts at an evidentiary hearing. Mr. Davis requests this Court remand his case in order for an evidentiary hearing to held.

ISSUE 2: The circuit court erred in summarily denying Mr. Davis' claim (2) that newly discovered evidence establishes that C.C. suffered from pneumonia prior to being admitted to the hospital, disproving the State's theory of the case, including the cause of death.

"[A] defendant is entitled to an evidentiary hearing on a [postconviction] motion unless (1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient." *Franqui v. State*, 59 So. 3d 82, 95–96 (Fla. 2011) (internal citations omitted).

Newly discovered evidence is analyzed under the *Jones*[7] test, such that, "the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence." *Walton v. State*, 246 So. 3d 246, 249 (Fla. 2018). The evidence must be material, which requires that it "be of such nature that it would probably produce an acquittal on retrial." *Jones*, 591 So. 2d at 915. Evidence satisfies the test if it creates "a reasonable

[7] *Jones v. State*, 709 So. 2d 512, 526 (Fla. 1998); *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991).

doubt as to his culpability." *Id*. A defendant is entitled to a new sentencing proceeding if "evidence would probably yield a less severe sentence" at a new penalty phase trial. *Walton*, 246 So. 3d at 249.[8]

In analyzing materiality, a court must "consider all newly discovered evidence which would be admissible" at a new trial and "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial." *Jones*, 591 So. 2d at 916. A court must "conduct a cumulative analysis of all the evidence so that there is a total picture of the case and all the circumstances of the case, including evidence "excluded as procedurally barred or presented in another postconviction proceeding[.]" *Hildwin v. State*, 141 So. 3d 1178, 1187-88 (Fla. 2014).

The circuit court denied this claim on both *Jones* prongs: First, that the slides were available to the defense at trial, and that new scientific evidence or a new expert does not constitute newly discovered evidence, relying on *Henry v. State*, 125 So. 3d 745, 750 (Fla. 2013), and *Howell v. State*,145 So. 3d 774, 775 (Fla. 2013),

[8] If there is dispute regarding whether evidence is newly discovered, or about the quality of the newly discovered evidence, an evidentiary hearing is necessary. *See Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996); *Card v. State*, 652 So. 2d 344, 346 (Fla. 1995).

respectively. (PCR3. 320-321). Second, that the evidence would not produce a different result in a retrial. (PCR3. 321-23).

As stated in Issue 1, *supra*, the information within the slides constitutes the basis for the newly discovered evidence, not the slides themselves. Mr. Davis had no reasonable basis to think the slides contained any exculpatory information until the slides were actually examined. Counsel would not have reasonably requested the slides be examined when Dr. Floro repeatedly stated under oath that the pneumonia was caused post-admission, not pre-admission, to the hospital and that C.C.'s cause of death was specifically a subdural hemorrhage. Dr. Arden's reports make clear that the opinion given by the medical examiner as to the cause of death was scientifically incorrect.

In reviewing both the autopsy report and the slides Dr. Floro created, Dr. Arden would testify at a new trial that it is medically impossible that the subdural hemorrhage observed and described was large enough to be a lethal mechanism that caused the death of the victim. (PCR3. 238). Therefore, a different result would be produced at trial because there is no "suspect" to blame C.C.'s unfortunate death on. The evidence would show that an ill child

suffered cardiac arrest while in the care of Mr. Davis, who did his best to resuscitate her and seek immediate help.

The Circuit Court lifted the facts written in the direct appeal opinion, and relied on the "facts presented at trial." (PCR3. 322-23). The Court then listed facts presented at trial that Mr. Davis has since rebutted and discredited during postconviction. However, the circuit court failed to engage in the proper *Jones* analysis, that would require a cumulative review of the newly discovered evidence, the evidence admitted at trial, *and* evidence that would be admissible at a retrial. *See*, *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014).

The Court first stated there was no "meaningful difference" between Mr. Davis asserting that C.C. was choking from a French fry and that she was in respiratory distress. (PCR3. 323). Pre-admission pneumonia does not exclude the chance that C.C. was choking on French fries.[9] Mr. Davis was not aware that C.C. had pneumonia at

[9] While Dr. Floro had testified that C.C. had not eaten French fries and her stomach contents looked like "cereal" (T.841, 848), Dr. Arden had remarked that this testimony "ignores the fact that there had been the passage of a day of life in which the food could have been broken down and/or passed into the intestines ... ." (PCR3. 173). Additionally, Moore noticed that there was a plate of French fries on the floor. (T. 549-50). It is reasonable for Mr. Davis to assume

the time he noticed her troubled breathing. The fact that C.C. had pre-admission pneumonia was *only* known when Dr. Arden completed his review of the slides on July 21, 2022. (PCR3. 244). Mr. Davis relied on only the facts he knew at the time C.C. was in distress and has consistently asserted his innocence from the start of this tragic event.

The court further claims that pneumonia does not explain certain facts presented at trial. First, "why the child was naked from the waist down." (PCR3. 323). Thomas Moore was the first person to see C.C. with Mr. Davis after she collapsed and he testified that he heard the shower running. (T. 549-50). Detective Hallam testified at trial that Mr. Davis reported that "the diaper had fallen off while he was holding her under the shower" (T. 723), Officer Coffee testified that the diaper was collected from the bathtub and "saturated with water" (T. 685, 691), and Capitan Wade testified C.C. was wet when he arrived on the scene. (T. 587). A reasonable jury would understand that Mr. Davis had tried to revive C.C. and, in the process, her diaper had fallen off.

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that C.C.'s respiratory problems were due to her choking on the food he had provided her.

Second, "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." (PCR3. 323). Neighbor Gordon testified that Mr. Davis was with him from approximately 12:30-12:50P.M. (T. 873-74), leaving a twenty-minute period where C.C. was alone with her actions unaccounted for.

While the State's theory at trial was that C.C. was unconscious, that theory relied on the testimony of neighbor Cotton, who testified she heard crying, thumping, and a loud and angry voice for a period of approximately thirty minutes, from noon to 12:30 p.m. Since then, Cotton has recanted and executed an affidavit stating that she heard no such noises. (PCR3. 32-36). At a new trial, the State will not be allowed to rely on that timeline, and C.C.'s unknown actions could explain the blood found at the scene. Alternative sources are also possible. Cunningham had testified that she and C.C.'s brother were bleeding in the apartment and that C.C. would scratch herself in her diaper and around her face. (T. 508-513). Cunningham also testified that she and Mr. Davis engaged in sexual intercourse that morning in her bedroom. (T. 510). Cunningham had blood type B, the same as C.C. (T. 784-85). This evidence would be admissible at a new trial.

Third, "why the victim's blood was in Defendant's shorts and underwear. (Ex. A at 812-14.)" (PCR3. 323). Again, it is possible that the blood found on Mr. Davis's clothing did not belong to C.C. The blood type was consistent with Cunningham, and she and Mr. Davis were intimate that morning. (T. 510).

Fourth, "why the victim had bruising on her buttocks and hemorrhages on her hymen." (PCR3. 323). Facts rebutting this assertion were investigated and raised in postconviction. *Davis v. State*, 304 So. 3d 281 (Fla. 2020). Dr. Floro testified at trial that the bruise on the buttocks was consistent with being inflicted the day C.C. was admitted to the hospital. (T. 834).

The State's expert in postconviction conceded the timing of the bruises can be "overstate[d]" and that "the data they had been coming in said you are not as good as dating these bruises as you think you are," (PCR. 3769), and that C.C.'s bruises at the time of her autopsy included both fresh and old bruises. (PCR. 3771). Dr. Ophoven's report indicated that the bruising could be much older that Dr. Floro claimed or that the bruises could have been caused by medical intervention after C.C. was hospitalized, because "[r]ecent literature confirms the absolute unreliability of attempting to date bruises with

the naked eye and state unequivocally that it should not be done." (PCR3. 44-45). Dr. Arden noted in his 2022 report that the only cutaneous injuries that were sampled for microscopic examination were older than the day of C.C.'s collapse and, therefore, not fresh as represented by the medical experts who testified at trial. (PCR3. 138).

Regarding the hymeneal hemorrhage, Dr. Arden's 2019 report verified that Dr. Floro's timing and analysis of the healing of the injury were incorrect:

> First, he has miscalculated and misrepresented the applicable interval, since the child died one day after having been examined, so the only interval available for healing was one day, not two … Injuries to the hymen, especially non-disrupting injuries (as were found in this child) can heal quickly, but I would not expect all signs of hemorrhage to disappear in one day.

(PCR3. 71-72).

Further, Dr. Hariton, an OBGYN physician, reviewed all the records and "did not find any evidence of a sexual act of any sort, at or near the time of the respiratory arrest and demise." (PCR3. 225). Dr. Hariton concluded that any marks on C.C.'s hymen "were most likely digital pressure marks from the nurse holding labia open to facilitate the placing of the Foley catheter in this little girl." The only

injuries Dr. Hariton found were attributable to medical intervention in inserting the catheter without any lubrication. (PCR3. 233-34).

Fifth, that "[t]he victim's injuries have never been consistent with accident or illness." In support of this finding, the court notes: (a) "blood coming from the child's 'vaginal canal outwardly down to the carpet,'" (b) "the bruising, swelling of the brain, and pools of blood in the skull," and (c) "vaginal penetration by a penis, a finger, or an object." (PCR3. 323) (internal citations omitted).

Regarding the blood coming from the child's vaginal canal and any vaginal penetration, no medical expert ever identified the source of the blood or any laceration to the child's vagina that could explain vaginal bleeding. Dr. Hariton's report states that the volume of blood reported at the scene would have to be caused by "a hymeneal injury unless the injury was so severe it would lead to obvious identification"; however, "[n]o genital injury of any sort was seen." (PCR3. 226). The State dismissed the lack of injury by saying it would have healed by the time of autopsy. Yet, "an injury of this type would not heal in 24 hours." (*Id.*). Dr. Hariton's report also reviews the flame-shaped hemorrhage observed by Dr. Whitworth, stating that they were most likely digital pressure marks from the nurse holding

the child's labia open to facilitate the placing of an unlubricated Foley catheter. (PCR3. 227).

Regarding Dr. DeNicola's observations of bruising, brain swelling, and pools of blood in the skull, several facts and experts in the trial and postconviction records explain that these injuries were not caused by blunt force trauma. As stated earlier, Mr. Davis accidentally dropped the child in the shower when attempting to revive her. Dr. Arden's report invalidates Dr. Floro's opinion that a short fall could not have caused these injuries. (PCR3. 155-84). There is consensus in the medical community is now that short falls can cause death in small children. (PCR3. 159-60). Dr. Ophoven also noted the advancements in science to acknowledge that short distance falls can be fatal to a small child. (PCR. 3. 160).

Dr. Ophoven also addressed C.C.'s brain swelling in her expert evaluation. Dr. Ophoven opined that C.C. died from hypoxia, which occurs when a part of the body does not receive enough oxygen and causes the brain to swell. Dr. Ophoven further explained that "[w]hen there is a head injury, brain swelling progresses and peaks at cardiac arrest." (PCR2. 146-47). As C.C.'s hospital records indicate, she was in complete cardiac arrest when rescue personnel arrived on scene.

(PCR3. 209-10).[10] Furthermore, Mr. Davis, from the start, has stated that C.C. had trouble breathing which prompted him to perform CPR and call for help. Given the condition of C.C.'s brain at the time of admission and autopsy, her brain had already swollen to a point that, "[i]f C.C. had suffered a fatal head injury, she would have had to have hit her head before she was left alone with Mr. Davis." (PCR2. 146-47).

The bruising and "pools" of blood in the skull are also tied to the brain swelling. Within hours of admission to the hospital, C.C.'s brain was swollen to the point that she had to undergo surgery to place a ventriculostomy and intracranial pressure monitor. Due to complications, the surgeon, Dr. Walter Faillace, had to drill into C.C.'s skull three times to place the monitor. Within a few hours of admission, C.C.'s brain had swelled to such an extent that when Dr. Faillace drilled a hole into her skull, hematomatous fluid and brain exuded through the burr hole. (PCR3. 215-16).

[10] C.C.'s mother testified in a pretrial deposition that she suffered through periods of cardiac arrest throughout her life and her heart would simply stop beating. (PCR. 749-50).

In addition to the foregoing, Dr. Willey's expert report from initial postconviction proceedings noted that intracranial pressure causes abnormal blood clotting and that C.C.'s bruises likely resulted from that. (PCR. 2503-04). The report also noted that "it is notable that no bruises appear to have been cut, the standard method to determine if they are genuine, and sampled for tissue changes that may suggest times at which they occurred." (*Id.*). While Dr. Floro testified to four separate impacts to the head, he did not identify which impact was lethal, and he also provided no testimony about any injuries that were sustained due to medical intervention, such as the fact that the victim's skull was drilled into three separate times. Last, Dr. Willey's report remarks that the internal hemorrhages were only 6-8 cubic centimeters each, which is insignificant, and could have been a result of hypoxia, prolonged resuscitation, and life support. (*Id.*). This is consistent with Dr. Arden's conclusion that the small volume of hemorrhage was not sufficient to be fatal.

As the foregoing shows, Mr. Davis has advanced evidence throughout his postconviction proceedings to show the evidence the jury relied on was, in fact, unreliable and sometimes actually false or

misleading. All of this information would be relevant to show the jury in order for them to accurately assess C.C.'s cause of death, including but not limited to: a) the fact that she suffered from pneumonia at her death; b) all the medical interventions undertaken that may have been injurious - not the least of which is the fact that she had her skull drilled into three times; and c) that the extent of brain swelling at the time of her admission was inconsistent with a head injury inflicted within mere hours of being treated.

The above evidence needs to be developed and presented at an evidentiary hearing. The pre-admission pneumonia is evidence that could not be discovered before Dr. Arden's evaluation of the slides. In conducting a *Jones* analysis, the evidence at trial, developed in prior postconviction, and any other evidence admissible at a retrial, needs to be considered cumulatively. With the above evidence explaining or rebutting the problems identified by the circuit court in its order denying relief, a different result would be produced at a retrial.

With a proper analysis of the actual circumstances surrounding C.C.'s collapse and a presentation of medical evidence that is actually grounded in science, not the flawed and unreliable evidence heard at

trial, there is more than a reasonable probability that a jury of his peers would acquit Mr. Davis. Given all the errors and omissions that have been identified through the course of postconviction proceedings, executing Mr. Davis for this alleged crime would be the utmost due process violation and constitute a manifest injustice.

Mr. Davis' claim (2) is facially sufficient and relies on facts discovered during the postconviction investigation. Claim (2) requires factual determinations, and in order to properly assess the claim, the circuit court needs to hear and make determinations about those facts at an evidentiary hearing. Mr. Davis requests this Court remand his case in order for an evidentiary hearing to held.

CONCLUSION AND RELIEF SOUGHT

Mr. Davis respectfully requests this Honorable Court reverse the circuit court's denial of his claims and remand for an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service to Leslie Campbell, Assistant Attorney General, (capapp@myfloridalegal.com; Leslie.Campbell @myfloridalegal.com), and Sheila Loizos, Assistant State Attorney (SLoizos@coj.net), on this date, November 1, 2024.

/s/ Alice Copek

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CERTIFICATE OF COMPLIANCE

This is to certify that the Reply Brief of Appellant was generated in Bookman Old, 14-point font and is under 20,000 words or 75 pages excluding certificates, pursuant to Fla. R. App. P. 9.100 and 9.210.

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