IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-433

ERIC SCOTT BRANCH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT I

THE TRIAL COURT ERRED IN FINDING THAT DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO FILE A MOTION TO SUPPRESS THE ITEMS TAKEN FROM THE PONTIAC BECAUSE THE MOTION WOULD NOT HAVE BEEN SUCCESSFUL

Appellant contends that the trial court, as well as the Appellee, relied upon inadmissible prior testimony of witnesses who did not testify at the Evidentiary Hearing in an attempt to establish probable cause. Specifically, the trial court in its order at page 7 refers to Officer Harbuck's and Robert Branch's trial testimony about the missing Pontiac. Further, Appellee refers to trial testimony of Appellant, Appellant's brother, and Appellant's cousin at Answer Brief (AB) page 25, 26, 27, and 33.

It is the Appellant's understanding that when an evidentiary hearing is granted to test a failure to file a Motion to Suppress, the Evidentiary Hearing is to be conducted as if a Motion to Suppress were being conducted. At the Evidentiary Hearing, apparently the State was unaware of the necessary procedure to prove ineffective counsel for failure to file a Motion to Suppress, although the trial court did (PC-T. Vol. I, p47).

MR. PITRE: I would object for the record. Judge, the issue about the search warrant goes to defendant counsel's failure to follow Motion to Suppress. These questions would go to a suppression hearing which would be an issue for direct appeal.

THE COURT: Indeed. How do I rule on whether defense counsel did not provide adequate representation in failing to file a Motion to Suppress without making a determination as to whether or not it would make a difference?

MR. PITRE: Here is what I would suggest. Regardless of what Mr. Allbritton testifies to, let's say the worse case scenario as it affects Mr. Branch, you, know, is he completely dropped the ball, didn't file, didn't look at it, whatever the case may be, if we were in a pending case, you would receive in section two affidavits because there was two separate affidavits on the car, you would receive the documents and under the law I believe the Court would be limited to the four corners of the documents. If there was not probable cause there, the Court can make a ruling.

If the defense was to bring up some allegation that there was misleading information or overt admission to the Court, then the court could expand outside the four corners of the search warrant. But those are all issues that typically we deal with on direct appeal. As it affects a 3.850, I don't see how this witness can testify or shed any light on defense counsel's failure to file a Motion to Suppress as it relates to the search warrant.

THE COURT: Well, it seems to me there would be three steps, and correct me if I'm wrong, assuming that what we are getting to is not the adequacy of the search warrant based on the affidavit itself, but rather than allegation that the affidavit that obtained the search warrant was misleading, Mr. Reiter would need to show that there were misleading representations in the affidavit, that had the judge who signed the

> warrant had the correct information the warrant would not have been issued or should not have been issued, and that Mr. Allbritton knew of those things or should have known of them at the time of the original trial. If you could prove all three of those things, wouldn't that make an appropriate 3.850 motion? (PC-T. Vol. I, p47-49).

At the Evidentiary Hearing the State did not call any witnesses about the veracity of the affidavits or their contents. However, the trial court and Appellee attempt to rely upon trial testimony to refute the Evidentiary Hearing testimony. This Court set out the requirements for the admission of prior testimony in Thompson v. State, 619 So.2d 261, 265 (Fla. 1993).

> The use of previous testimony is permitted if (1) the testimony was taken during a judicial proceeding; (2) the party against whom the testimony is being offered was a party in the previous proceeding; (3) the issues in the previous proceeding are similar to those in the instant case; and (4) there is a substantial reason why the original witness is not available.

While the first two prongs have been met, the third and fourth have not. Appellee certainly could not argue that the testimony of the witnesses at trial was based on the same issue at the Evidentiary Hearing. A Motion to Suppress was not raised at trial, which is one of the reasons for conducting the Evidentiary Hearing. Therefore, the issue was not the same. Further, the State failed to call any witness or establish that the witnesses were

unobtainable. The first time prior testimony of witnesses who did not appear at the Evidentiary Hearing was mentioned was by the Court in its order.

See also Marquard v. State, 850 So.2d 417 (Fla. 2002) (Marquard contends that he was denied a full evidentiary hearing when the trial judge failed to take judicial notice of witness Harrison's prior testimony from the codefendant's original trial proceeding. Marquard posits that this would be permissible under sections 90.803(22) and 90.804(2)(a) of Florida Statutes (1999). (We disagree.)

However, assuming for the moment that prior testimony is admissible, the following argument is made alternatively to the Answer Brief.

Appellee's Answer Brief sets out five basic components: (1) Testimony of Earl Loveless, at page 20, (2) John Allbritton's testimony, at page 23, (3) Issue of the Search Warrants, at page 30, and (5) Inevitable Discovery, at page 34.

(1) Testimony of Earl Loveless

At page 23 of the Answer Brief, Appellee states: "Thus contrary to appellant's representation, IB at 17, the trial court did not, based upon an erroneous view of the record,

reject former trial counsel's representation that he would have expected to file a motion to suppress."

Appellee must have overlooked the trial court's statement at page 8 of its order: "The court does not find persuasive Public Defender Loveless' testimony that he 'would expect' to have filed motions to suppress the evidence in question." Perhaps Appellee did not find the court's word "persuasive" a rejection. Yet, the Appellee pointed out at page 24 of the answer brief: "And the lower court observed, former counsel, who represented appellant and had the affidavits from June to late October or November, did not himself file any motion to suppress." The lower court did not only "observe" it, but found Mr. Loveless' testimony "unpersuasive."

During Mr. Loveless' testimony at the Evidentiary Hearing about filing a Motion to Suppress, he stated:

> Q. And given those affidavits, would you have filed motions to suppress the evidence that was obtained from the Pontiac?
>
> A. I would expect that I would have, yes.

(PC-T. Vol. II, p296, L19).

At the time of Appellant's trial, Mr. Loveless had conducted more than a dozen capital trials (PC-T. Vol. II, p291, L13); however, this case was Mr. Allbritton's first

capital trial with a death penalty phase (PC-T. Vol. I, p116). This is important because, in determining ineffective assistance of counsel, this Court has considered counsel's experience, as well as time spent in investigation. Rose v. State, 675 So.2d Fla. 1996); State v. Lewis, 838 So.2d 1102 (Fla. 2002); Brown v. State, 894 So.2d 137 (Fla. 2004).

At the Evidentiary Hearing Mr. Loveless testified he had not completed everything he intended to do in this case (PC-T. Vol. II, p300-301). Mr. Loveless also testified he read the affidavits the day before his testimony (PC-T. Vol. II, p294), as well as before trial. Time for filing a Motion to Suppress is set out in F.R.Crim.P. 3.190(h)(4): "…shall be made before trial…" Trial didn't commence until March 7, 1994.

The trail court's finding that Mr. Loveless' testimony unpersuasive was not supported by competent substantial evidence. Clearly, Mr. Loveless' experience exceeds that of Mr. Allbritton.

(2) John Allbritton's Testimony

Appellee references Mr. Allbritton's Evidentiary Hearing testimony at page 24 of the answer brief as: having

reviewed the affidavits, talked with former counsel, and appellant agreed with counsel's advice.

Mr. Allbritton was asked if he had performed any research concerning probable cause. He responded: "I don't know if I did or not. If I felt it was necessary, I did…" (PC-T. Vol. I, p139). Given Mr. Allbritton's opinion about whether the affidavits contained probable cause: "when I read it, I read it to believe that there was – it was sufficient, the facts were sufficient to indicate that there may be evidence of the crime" (PC-T. Vol. II, p138), it is reasonable therefore; to conclude Mr. Allbritton didn't feel it was necessary to research probable cause. "A fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Honors v. State, 752 So.2d 1234, 1235 (Fla. 2nd DCA 2000). There is no question that law enforcement's actions in this case should have been subjected to adversarial testing.

As for the point about appellant agreeing with counsel's advice, if the advice was legally erroneous and led to appellant's agreement, appellant is entitled to postconviction relief. McGee v. State, 696 So.2d 787 (Fla.

2nd DCA 1997)(Concurring opinion). Mr. Allbritton's advice was made without the benefit of investigation or research.

(3) Warrantless Seizure of the Pontiac

Appellant has previously conceded that he didn't own the Pontiac. However, his aunt testified at the Evidentiary Hearing that Appellant's grandfather gave the Pontiac to his grandson to drive, which provided Appellant a possessory interest in the car and ownership of the property within, which went undisputed (PC-T. Vol. III, p457).

In footnote 5, at page 25 of AB, Appellee states: "[A]ppellant made no such showing as to his later use of the vehicle." Appellant certainly doesn't cite any evidence that his right to the Pontiac ceased, or that someone, other than his grandfather, had a greater possessory right to the Pontiac. Further, Appellee noted that Appellant's brother and Appellant's cousin retrieved the Pontiac from the impound lot, giving rise to the question as to what authority law enforcement had to impound the vehicle in the first place. Even assuming abandonment, it could well be argued that Appellant parked the car at the airport, rather than at his cousin's apartment, because the police would again illegally impound

the vehicle. State v. Williams, 751 So.2d 170 (Fla. 2nd DCA 2000)(We acknowledge, however, that where a defendant **abandons** property as a direct result of unlawful police conduct, he does not relinquish his reasonable **expectation** of **privacy** in his property, and retains standing to challenge the introduction of the abandoned items into evidence.)

Appellant is loose with the facts by stating: the trial court noted that appellant **had** abandoned the car, AB at p26. The trial court actually stated "may have," not "had" abandoned the car. In fact, the trial court did not make a specific finding, but merely noted same (PC-R. Vol. IX, p1597, n.7).

Further, Appellee again states that Appellant failed to inform his family that he was taking the vehicle in footnote 7 at AB p26. Since Appellant was entitled to possess the vehicle, continually mentioning this fact doesn't create an obligation on the Appellant's part to inform his aunt that he took the vehicle.

At AB p27, on the issue of abandonment, Appellee argues that Appellant's intent must be established by objective evidence, citing State v. Lampley, 817 So.2d 991 (Fla. 4th DCA 2002) as support. However, the Court actually

stated: The Supreme Court has "applied this principle to hold that a Fourth Amendment search does not occur . . . unless `the individual manifested a **subjective** expectation of privacy in the object of the challenged search,' and `society [is] willing to recognize that expectation as reasonable.” Id. at 991. (emphasis added). Further, Appellee argues a negative fact to establish that Appellant’s intent was not expressed, by stating that neither Appellant’s brother nor his cousin testified that Appellant told them to take the car. Since no Motion to Suppress was held, there appeared to be no reason to ask that question. However, Appellant’s testimony went undisputed as to what his intent was (R. Vol. V, p816).

Again, at page 27 of Appellee’s AB, there is a reliance upon a negative to prove a positive. Appellee argues that because Appellant didn’t argue that law enforcement didn’t observe blood or any other visible evidence of a crime, it was conceded. Well, Appellant didn’t argue that law enforcement didn’t find aliens or monsters either, but that doesn’t mean their existence was conceded. Appellant contends the lack of testimony to the existence of blood or any other visible evidence of a crime

means there wasn’t any, until established positively to the contrary.

4. Issuance of Search Warrant

Appellee argues at pages 31 and 33 that Appellant did not call Agent Griffith to testify at the Evidentiary Hearing. That statement is true, the State didn’t call Agent Griffith either. However, Appellant would like to believe there wasn’t any reason to doubt the veracity of sworn testimony provided in a deposition. If Appellee didn’t like Agent Griffith’s deposition testimony, they should have called Agent Griffith. Rather, the Appellee would prefer to speculate that Agent Griffith’s deposition testimony was “forgotten or confused.” (AB at 31).

Appellee conveniently fails to mention that Agent Fairburn, who swore to the second affidavit, did testify at the Evidentiary Hearing. His deposition also contained his sworn statement that he was assigned to the case on January 13 (PC-R. Vol. III, p1396), while his affidavit speaks to functions he performed on January 12, 1993. If the State speculates that during his deposition Agent Fairburn had “forgotten or was confused” when he was assigned to the case, why didn’t the State ask him? Perhaps Appellee thought his deposition testimony was accurate.

In summarizing the alleged probable cause at pages 33 and 34 of the AB, Appellee mentions the same "red herrings" accepted by the trial court. Nowhere in the Appellee's summary do they establish any nexus between the Pontiac and the death of the victim, especially since law enforcement's belief at the time of the affidavits was that the Pontiac was parked at the airport prior to the victim's death.

5. Inevitable Discovery

Appellee argues at page 35 of the AB, that Appellant misconstrues the trial court's order concerning its reference to "inevitable discovery." Regardless of whether the trial court's order refers to the warrantless seizure of the vehicle and contents, or probable cause, the trial court incorrectly applied the inevitable discovery doctrine for the reasons expressed in Appellant's initial brief.

Appellee correctly points out Appellant's complaint that the State did not argue "inevitable discovery" and "abandonment" to the trial court. Appellant acknowledges that this Court may consider an alternative theory, even if the trial court was incorrect. This Court in Muhammad v. State, 782 So.2d 343, 359 (Fla. 2000), held:

> In an alternative argument, not raised in the trial court, the State supports the admission of this testimony on the grounds that it was nonhearsay because it was not offered to prove

> the truth of the matter asserted. Although this Court has disapproved of the tactic of arguing for the first time on appeal that evidence was admissible because it was nonhearsay, see Hayes v. State, 581 So.2d 121, 124 n.8 (Fla. 1991), the trial court's ruling on an evidentiary matter will be affirmed even if the trial court ruled for the wrong reasons, as long as the evidence or an alternative theory supports the ruling.

However, it is Appellant's contention that allowing the Appellee to argue an alternative theory of abandonment, prejudices Appellant. At a Motion to Suppress hearing, the burden to establish a legal authority to justify search and seizure of property rests upon the State. When law enforcement seized the Pontiac they apparently didn't believe the Pontiac was abandoned or they wouldn't have been required to obtain a warrant to search the vehicle. But even if obtaining a warrant was to be on the safe side, the affidavits do not even mention their belief that the vehicle was abandoned. Det. Fairburn testified that the State Attorney's office typed the affidavit. One would have expected if the State Attorney believed Appellant had abandoned the vehicle, they would have added that fact to the affidavit. Further, the State did not argue in the response to Appellant's 3.850 Motion or in their memorandum to the court at the close of the Evidentiary Hearing that Appellant had abandoned the Pontiac. Even the trial court

didn’t find that the vehicle was abandoned. Appellee might even argue that Appellant was put on notice by this Court’s opinion that the factual statement by this Court included a statement that the Pontiac was abandoned. However, that statement was not a finding by this Court, and might be argued that this Court, having reviewed the record, was expecting a 3.850 Motion and was giving a hint to the State. If so, the State didn’t get the hint because they didn’t argue abandonment. Had they expressed this theory, Appellant would have attempted to present evidence at the Evidentiary Hearing to establish that he did not abandon the vehicle.

However, case law permits this Court to make a *de novo* determination of alternate theories without the benefit of Appellant presenting evidence at the Evidentiary Hearing to establish the contrary. Appellant contends this deprives him the opportunity for a full and fair hearing before the trial court.

> Although this point was not argued by the State at the hearing on the motion, the concept of standing has been subsumed into Fourth Amendment issues and can be raised for the first time on appeal. *State v. Abeles,* 483 So.2d 460, 461 (Fla. 4th DCA 1986); *St. John v. State,* 400 So.2d 779, 780 (Fla. 1st DCA 1981). Because McCauley was not given an opportunity to prove his interest in the premises below due to the State's

> tacit concession of standing, we conclude that he is entitled to a hearing on the matter.

McCauley v. State, 842 So.2d 897, 900 (Fla. 2nd DCA 2003).

Further, Appellant was prejudiced by failure to suppress the evidence retrieved from the Pontiac, which would have painted a substantially different face on the State's case. The State would have only possessed circumstantial evidence that Appellant stole the victim's vehicle. Trial counsel was ineffective for failing to file a Motion to Suppress, which would have established many key points: Appellant had standing, the affidavits did not establish probable cause, inevitable discovery does not apply, and the Appellant did not abandon the vehicle or the property within. However, to the extent this Court would consider abandonment, Appellant requests this court remand this cause to the trial court for further evidence.

ARGUMENT II

THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT MITIGATION AT THE PENALTY PHASE BECAUSE IT WOULD HAVE MADE NO DIFFERENCE IN THE COURT'S SENTENCING

Appellee asserts at p36 of their AB that Appellant claimed one reason for ineffective assistance of counsel was failure to properly prepare Robert and Alfred Branch to

testify. Actually, Appellant claimed that trial counsel failed to prepare any of the many witnesses who came to testify (PC-T. Vol. III, p458-461).

Appellee correctly states that the court is not required to rule on the performance prong if the court finds that the prejudice prong fails. However, it is fair to assume the trial court chose not to address trial counsel's performance because it was deficient per se: (1) failure to investigate, (2) failure to hire or consult with mental health expert, (3) obtain background records, (4) speak to family, friends, or employers prior to trial, (5) prepare witnesses for trial, (6) lack of experience, and (7) lack of time to prepare. Wiggins v. Smith, 539 U.S. 510 (2003)(In evaluating petitioner's claim, this Court's principal concern is not whether counsel should have presented a mitigation case, but whether the investigation supporting his decision not to introduce mitigating evidence of Wiggins' background was itself reasonable.)

The trial court in its order[1] (PC-R. Vol. IX, p1612-1614) and Appellee in its AB at page 54 assess Dr. Dee's

[1] It is important to note that the trial court made no finding that one person's testimony was more credible than another, or that any witnesses' testimony was incredible, except, perhaps, the finding of the statutory mitigator extreme emotional distress as "absurd."

and Dr. Larson's testimony of antisocial disorder as nullifying, as well as damaging, the mitigator of good personality traits. However, the trial court and Appellee both fail to acknowledge that this Court has held that antisocial personality disorder is a mitigator, not an aggravator. Morton v. State, 789 So.2d 324, 330 (Fla. 2001)(Both the United States Supreme Court and this Court have determined that a defendant's **antisocial personality disorder** is a valid mitigating circumstance for trial courts to consider and weigh.) In Morton this Court found the error as harmless because the case was a double murder with five aggravators, and the events precipitating the disorder where heard.

In the instant case, no experts testified, nor were any consulted, and a substantial number of events were not heard by the jury: (a) appellant's alcohol dependency (72), (b) alcoholic parents (72), (c) physical abuse (72, 75-76), (d) inconsistent parenting (75), (e) abandonment (73), (f) hyperactivity (73), (g) head trauma (78), (h) lost of child, (i) sexual abuse (80), (j) juvenile incarceration, and (k) low self esteem (PC-T. Vol. I). Much of this testimony was presented by Dr. Dee, and through affidavits and reports from family members.

While, many of those family members were present to testify at the trial to the events specified by Dr. Dee. trial counsel failed to utilize them as witnesses.

At the beginning of the Evidentiary Hearing, the trial court was informed that many of the witness were unable to attend because of financial constraints (PC-T. Vol. I, p7). The trial court's response to hearsay questions posed to Connie Branch was as follows:

> THE COURT: Or could have taken a deposition from them if they weren't available to come here this week. Last time I checked, depositions of people who live outside the state are admissible in evidence provided the testimony is otherwise admissible. There have been numerous depositions taken for this 3.850 proceeding.
>
> Why should I have a witness come – why should I allow a witness to come in here and give on a hearsay basis, here's what other family members could have testified to, when those people were available? Could have either been brought here to testify or their testimony obtained by deposition? (PC-T. Vol. III, p473).

First, the trial court was wrong. No depositions were taken for this 3.850 proceeding. In fact, the trial court denied counsel's request to take the deposition of the fingerprint expert. Also, the trial court erred in disallowing the hearsay testimony of Connie Branch to establish testimony, which would have been presented at trial by the other family members. Marquard v. State, 789 So.2d 324, 333 (Fla. 2001)(Florida law provides that the

usual rules of evidence are relaxed during the penalty phase and that **hearsay** evidence is permitted so long as a fair opportunity of rebuttal is permitted.)

The trial court was correct in assessing both Connie Branch's testimony and Dr. Dee's testimony as hearsay. However, it is not unreasonable to attach lesser credibility of the doctor who is testifying to facts stated by witnesses in contemplation of a trial, than that of a family member who is testifying to events related over a normal lifetime when no reason to fabricate is established.

The trial court erred in finding the additional mitigation, including antisocial personality disorder, would have made no difference to him in his sentencing decision, without considering what impact such evidence would have had upon the jury. Counsel's performance was deficient and notwithstanding the trial court's finding of no prejudice, Appellant was, in fact, prejudiced by counsel's deficient performance.

ARGUMENT III

THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO HIRE EXPERTS BECAUSE THEY WERE OF QUESTIONABLE VALUE, COUPLED WITH THE TACTICAL DECISION TO MAINTAIN FIRST AND LAST CLOSING ARGUMENT

Appellee states at page 56 of the AB, that Appellant's reliance on Williams v. State, 507 So.2d 1122 (Fla. 5th DCA 1987) ignores that trial counsel had the State's expert depositions, had conducted research, and could effectively cross-examine the State's witnesses. True, trial counsel testified that he performed those functions. However, the facts at trial establish otherwise. Dr. Kish (defense spatter expert) and Dr. Cumberland (State's pathologist) both testified that trial counsel asked the wrong questions.

The trial court in its order, at page 10, and Appellee in the AB at p60 conclude that because Dr. Daniel (defense pathologist) did not rule out Dr. Cumberland's findings, trial counsel could not be ineffective. They fail to discuss or consider the factors set out by this Court in State v. Riechmann, 777 So.2d 342 (Fla. 2000).

The trial court's assessment concluded that an expert was required in order to rebut Dr. Cumberland's testimony.

> However, Dr. Cumberland continued to opine that the debris and body movement was unlikely to have caused the stick to become lodged in the victim's vagina. Thus, without calling an expert witness (causing the defense to lose the tactical advantage of first and last closing arguments) counsel could not have elicited any further favorable testimony regarding this circumstance. The Court cannot disagree with Mr. Allbritton's conclusion that any advantage gained from such

> testimony was outweighed by the tactical loss in closing argument.

(PC-R. Vol. IX, p1599-1600).

The trial court fails to discuss Dr. Cumberland's inconsistent finding that body movement was unlikely to cause insertion of the twig, while he acknowledged that other similar debris was found in the vagina (TT. Vol. IV, p751-752). Further, the trial court's approval of trial counsel's not giving up the tactical advantage of opening and closing argument for this testimony ignores the fact that trial counsel made only one statement in closing about Dr. Cumberland's testimony, which didn't include Dr. Cumberland's inconsistent findings.

As to the blood spatter expert, Appellee restated Ms. Johnson's conclusion at p62 of AB as: Ms. Johnson testified that the blood splatter evidence supported a conclusion that it was the result of a beating and that the victim was on the ground and the person "wearing the boots was actually straddling the victim when the bloodshed was occurring." This statement is exactly why the defense needed an expert. Dr. Kish testified that Ms. Johnson's factual conclusion of events was pure speculation. He further testified that the spatter evidence would support a

number of conclusions, including the scenario described by the Appellant (PC-T. Vol. III, p403).

Appellee at p62 of their AB argues that a portion of Ms. Johnson's testimony supported the Appellant's defense. Appellant can find nothing within Ms. Johnson's conclusion above that supports the Appellant's defense. The fact that she testified the spatter was at a 90-degree angle didn't dispute her conclusion. In fact, on cross-examination by trial counsel, Ms. Johnson reiterated her conclusion (TT. Vol. III, p549-551).

Where an expert's testimony relies on some scientific principle or test, the jury will naturally assume that the scientific principles underlying the expert's conclusion are valid. Flanagan v. State, 625 So.2d 827 (Fla. 1993). Although Flanagan dealt primarily with a Frye analysis, the analogy is proper here, since a jury would find Dr. Cumberland's opinion and Ms. Johnson's opinion valid. Opposing experts were absent, so the jury would be more inclined to accept Dr. Cumberland's and Ms. Johnson's undisputed conclusions. Especially since pathology and spatter are based in science.

Even if trial counsel was justified in not calling an expert to testify, trial counsel certainly should have at

least consulted with experts since he lacked the experience and knowledge to rebut the State's experts. The jury was left with only the uncontradicted conclusions of the State's experts. Appellant was prejudiced by not having his own experts test the State's case. This poorly considered and, so called, strategy was made to maintain an open and close during closing argument, which was not used to the Appellant's advantage.

ARGUMENT IV

THE TRIAL COURT ERRED IN FINDING THAT THE INDIANA CONVICTION AMOUNTED TO A VALID PRIOR VIOLENT FELONY THAT SATISIFIED SECTION 921.141(5)(B), FLORIDA STATUTES

Appellee cites Carpenter v. State, 785 So.2d 1182 (Fla. 2001), at p66 of their AB, for the proposition that "whether a crime constitutes a prior violent felony is determined by the surrounding facts and circumstances of the prior crime." Appellee is correct. In Mann v. State, 603 So.2d 1141 (Fla. 1992), the State presented a witness who testified to the circumstances of the crime.

However, here the State presents to this Court reliance upon pleadings submitted to the trial court at the Spencer hearing to prove the circumstances surrounding the offense, AB at p68. No testimony regarding the

circumstances surrounding the offense was introduced at the penalty phase or the Spencer hearing. Appellee supplies no authority for the admission of "bare allegations" in a pleading to establish the existence of a prior violent felony.

Appellee argues at pages 69 and 70 of AB that even if error existed, it was harmless because of two aggravators and marginal mitigators. However, Appellee fails to consider what impact a jury would consider the additional mitigation established in Claim II above in light of only two aggravators.

Appellee attempts to mislead this Court regarding whether antisocial personality disorder is a mitigator. Appellee cites at p70 in AB Cummings-El v. State, 863 So.2d 246, 268 (Fla. 2003)("The consensus of the expert testimony is that Defendant has an antisocial personality disorder, which *is not a mitigating factor*…[A]ntisocial personality disorder does not cause criminal behavior, it explains it.") The clause cited is not a holding of this Court. The phrase was a holding of the trial court included as an appendix to the opinion. Asay v. State, 769 So.2d 974, 986 (Fla. 2000)(antisocial personality disorder is an unfavorable diagnosis). Again, the clause cited is not a

holding of this Court. The clause was a reiteration of what the trial counsel stated for his decision not to present the evidence. Moreover, in Ragsdale v. State, 798 So.2d 713, 719 (Fla. 2001), this Court distinguished Asay in that trial counsel in Asay had performed substantial investigation, while in Ragsdale, like in this case, trial counsel did not conduct investigation. Hamilton v. State, 875 So.2d 586, 593 (Fla. 2004)(failure to present mental health expert which would have included antisocial personality disorder diagnosis not ineffective). Again, not a holding of this Court, but merely a reassertion of trial counsel's decision.

Morton, Supra, 789 So.2d 324, 330 (Fla. 2001), is still valid law, which means that antisocial personality disorder is still a mitigator. Therefore, the absence of the prior violent felony aggravator would have had great impact on the jury given the additional mitigation established in Claim II. Counsel was ineffective for failing to properly attack that aggravator.

ARGUMENT V

THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE INTRODUCTION OF THE ABSTRACT OF JUDGMENT DURING THE PENALTY PHASE BECAUSE THE STATE INTRODUCED ADDITIONAL DOCUMENTS AT THE SPENCER HEARING

Appellee attempts to distinguish Sinkfield v. State, 592 So.2d 232 (Fla. 1st DCA 1992), and related cases as not applicable here because those cases dealt with the *element of the offense charged* and not for purpose of sentencing AB at pages 73-74. However, Appellee fails to distinguish how the identification issue is different. The mere identity between the name appearing on the prior judgment and the name of the defendant on trial does not satisfy the State's obligation to present affirmative evidence that they are the same person. Killingsworth v. State, 584 So.2d 647 (Fla. 1st DAC 1991). Appellee fails to discuss the fact that in order to prove beyond a reasonable doubt to the "jury" that the defendant was convicted of a prior violent felony, an element thereof is his identity.

ARGUMENT VI

THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL'S FAILURE TO IMPEACH WAS REASONABLE STRATEGY AND THEREFORE, NOT INEFFECTIVE

Appellee states at page 77 of the AB, Appellant's failure to impeach a witness who had changed their testimony at trial was deficient performance and prejudicial is nothing more than conclusory. Utilizing the Appellee's logic, an attorney can never be deficient or prejudicial for failing to impeach witnesses who changed their testimony. However, conclusory statements are made to persuade the trier of fact. It is clear that where the record does not indicate otherwise, trial counsel's failure to impeach a key witness with inconsistencies constitutes ineffective assistance of counsel and warrants relief. Richardson v. State, 617 So.2d 801, 803 (Fla. 2d DCA 1993); Kegler v. State, 712 So.2d 1167, 1178 (Fla. 2d DCA 1998).

Appellee argues at page 77 of AB that no prejudice can be assessed because Appellant testified at trial as to his involvement and presence at the crime scene. Appellee cites Duckett v. State, 2005 Fla. LEXIS 1986 *20-21 (Fla. Oct. 6, 2005). First, Duckett does not stand for the proposition cited by Appellee. Second, Appellee fails to consider that a defendant's decision to testify or not will contain

extreme consideration for what has or has not been introduced into evidence during the State's case.

Even assuming that Ms. Cowden and Mr. Flaum were not key witnesses, taken in conjunction with other deficient performances by counsel, Appellant is entitled to a new trial. However, failure to impeach was the straw that broke the camel's back.

ARGUMENT VII

THE TRIAL COURT ERRED IN FINDING APPELLANT'S CLAIM THAT TRIAL COUNSEL FAILED TO INVESTIGATE IS WITHOUT MERIT

At pages 80-81 of the AB, Appellee suggests that Mr. Loveless' few months of effort in Appellant's representation impugns Appellant's claim that his defense counsel only had approximately 4 and one-half months to prepare. However, these efforts are irrelevant as it relates to Mr. Allbritton's representation, unless Mr. Allbritton was able to absorb all that Mr. Loveless learned by osmosis. Mr. Allbritton still had to start at the beginning in order to adequately represent, by himself, a defendant facing a murder charge and death penalty. Any effort short of that cheats the judicial system and denies a defendant's constitutional right to competent counsel. Appellee asserts that Mr. Allbrittion began his

representation on November 22, 1993, AB at page 81, and the trial began on March 7, 1994 (R. 1). According to Appellee's calendar, Mr. Allbritton represented Appellant for only three and one-half months. However, in fairness, Mr. Allbritton's first Motion for Continuance (R. Vol. I, p115) indicated he began representing Appellant on November 1, 1994, which calculates to four months and seven days.

Appellee asserts at p82 of the AB that Mr. Allbritton did not hire another psychiatrist because he was aware of the opinion of the mental health professional who had previously examined the Appellant. There are two problems with this argument. First, Mr. Allbritton, as well as Dr. Larson, both testified at the Evidentiary Hearing that they had never spoken to each other regarding the Appellant. Second, if Appellee's argument is true, then Mr. Allbritton lied to the court on at least four occasions when he asked for a continuance to hire a mental health expert.

Appellee totally discounts Mr. Fred Wimberly's testimony in preference of Mr. Allbritton's testimony. The trial court fails to make mention of Mr. Wimberly's testimony at all in its order, except to say:

> "However, the Defendant failed to present any substantive evidence at the hearing to support this claim, instead relying on speculation. This is especially significant because the Defendant

> has had over ten years between the time of his trial and the date of the evidentiary hearing to further investigate his case. Yet, the Defendant could not produce one single piece of material evidence which went undiscovered by his trial counsel." (PC-R. Vol. IX, p1606).

However, Mr. Allbritton's complete failure to subpoena Eric St. Pierre when he was available at the time of trial only supports the trial court's statement above. Eric St. Pierre was "a bird in hand" that Mr. Allbritton chose to let go. Mr. Wimberly's testimony is diametrically opposed to Mr. Allbritton's. While neither the trial court nor Appellee asserted or established that Mr. Wimberly had any motive to lie or that he wasn't credible, Mr. Allbritton certainly had a stake in the race.

ARGUMENT VIII

THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL'S FAILURE TO OBJECT AT THE GUILT AND PENALTY PHASE WAS REASONABLE

Inasmuch as Appellee's argument is merely that reasonable people can differ as to what constitutes reasonable strategy and prosecutorial misconduct, Appellant will rely upon his argument in his Initial Brief in support of this claim.

ARGUMENT IX

THE TRIAL COURT ERRED IN NOT ADDRESSING CUMULATIVE ERRORS BECAUSE NOT A SINGLE ERROR WAS FOUND BY THE COURT

Again, Appellant concedes the trial court did not find any error and is therefore not required to review cumulative errors. However, inasmuch as this Court may find errors, which by themselves individually may not constitute harmful error, Appellant requests this Court review those errors cumulatively.

CONCLUSION AND RELIEF SOUGHT

Appellant prays for the following relief, based on his prima facie allegations demonstrating violation of his constitutional rights:

Appellant's convictions and sentences, including his sentence of death, be vacated and a new trial and/or a new penalty phase be granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by hand to Casandra Dolgin, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050 on December 30, 2005.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is Courier New 12 point.

_____
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