ORIGINAL

**IN THE SUPREME COURT OF FLORIDA**
**CASE NO. SC12-407**



WILLIAM JAMES DEPARVINE,
Appellant,

vs.

THE STATE OF FLORIDA,
Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

# REPLY BRIEF OF THE APPELLANT

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## ISSUE 1

## FAILURE TO CALL DARYL GIBSON

The State argues at footnote 5 that defense counsel's performance in this case must be doubly presumed to be reasonable. First, from *Strickland v. Washington*, 466 U.S. 688, 694 (1984), there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." But the State relies on an elevated presumption from the Eleventh Circuit:

> The presumption that counsel's performance is reasonable is "even stronger" when counsel is particularly experienced.

*Reed v. Sec'y, Fla. DOC*, 593 F.3d 1217, 1244 (11th Cir. 2010). *Reed* cites to *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000) (en banc). But *Chandler* only holds that:

> Just as we know that an inexperienced lawyer can be competent, *United States v. Cronic*, 466 U.S. 648 (1984) (inexperienced does not mean ineffective), so we recognize that an experienced lawyer may, on occasion, act incompetently. Our point is a small one: Experience is due some respect.

218 F.3d 1316 & n.18. The better contra-paraphrase of "inexperienced does not mean ineffective," *United States v. Cronic*, 466 U.S. 648 (1984), would be "experienced does not mean effective."

The 11th Circuit has propounded this dicta for years, but it has only been noted in the Eleventh Circuit. The Eleventh Circuit has already been rebuffed in an attempt to elevate deference for experience – the Supreme Court in *Strickland* rejected the Eleventh Circuit's attempt in that case to incorporate an experience element, i.e. "factors relevant to deciding whether particular strategic choices are reasonable are the experience of the attorney, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense." 466 U.S. at 681. The *Strickland* Court shied from endorsing specific standards:

> When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.
>
> More specific guidelines are not appropriate. ... The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.
>
> ... .
>
> ... . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance ... .

466 U.S. at 688-89. The presumption to be indulged is not variable depending on experience.

This Court similarly does not go beyond *Strickland* to offer obeisance to experienced counsel. *See, e.g., Nelson v. State*, 43 So. 3d 20, 28 (Fla. 2010) (strong presumption); *Coleman v. State*, 64 So.3d 1210, 1217 (Fla. 2011) (same).

In *Henry v. State,* 948 So. 2d 609, 619 (Fla. 2006), this Court noted trial counsel's 15 years of experience, not to reinforce the presumption, but only to provide context for why a trial strategy was de facto, not presumptively, reasonable.

Experience is no more deserving of "due respect" with a stronger presumption than inexperience is deserving of disrespect with a lesser presumption. *Strickland's* "strong presumption" tempers the temptations of hindsight and second-guessing. It does nor offer respect, certainly not based on counsel's experience.

The State argues at page 26 of the Answer Brief that defense counsel was reasonable in rejecting Gibson as a witness in part because Mr. Deparvine never told counsel about a backpack Gibson said he saw Mr. Deparvine wearing. To the contrary, only a few pages later in the transcript, Mr. Skye recanted and testified that Mr. Deparvine had told him about the backpack. PCR 33/421-22.

The State and the lower court also endorse trial counsel's post hoc speculation that Gibson fabricated the alibi to avoid testifying for the State. There is no evidence of that.[1] In a circumstantial case such as this, the jury should hear Mr. Gibson and make its own decision whether his observations, all of them

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[1] Gibson explained his initial silence resulted from his mother's and his girlfriend's requests that he not become involved. PCR 17/3026 (State exhibit, Detective Esquinaldo's report of interview with Gibson). Mr. Deparvine was not under arrest, and Mr. Gibson would want to protect himself and his girlfriend from possible reprisals if Mr. Deparvine learned he had talked to investigators.

corroborative of or consistent with Mr. Deparvine's statements, inculpated Mr. Deparvine or, with the alibi, totally exonerated him.

The State also claims that Gibson's postconviction testimony that he would not testify at trial makes him an unavailable witness, citing to *White v. State*, 964 So.2d 1278, 1286 (Fla. 2007), for the principle that counsel cannot be ineffective for failing to call an unavailable witness. However, in *White* the witness could not be found. The *White* opinion relied on *Nelson v. State*, 875 So. 2d 579, 583-84 (Fla. 2004), regarding unavailable witnesses. *Nelson* recognizes true unavailability, not untested reluctance: "There are, of course, numerous reasons that a witness would not have been available, including a witness who had asserted his or her right to remain silent or a witness who could not be located or served with a subpoena." 875 So.2d at 583 n.3. And, of course, "unavailability" is defined by this Court in the Florida Evidence Code as

> (1) DEFINITION OF UNAVAILABILITY.--"Unavailability as a witness" means that the declarant:
> (a) Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
> **(b) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;**
> (c) Has suffered a lack of memory of the subject matter of his or her statement so as to destroy the declarant's effectiveness as a witness during the trial;
> (d) Is unable to be present or to testify at the hearing because of death or because of then-existing physical or mental illness or infirmity; or

> **(e) Is absent from the hearing, and the proponent of a statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means.**

§ 90.804(1) Fla. Stat. (emphasis added). Unavailability of a reluctant witness requires, in this case, testing, i.e. compelling a jailed witness' attendance by subpoena and refusal to testify after an order of the court to do so. Trial counsel never put Gibson to the test with subpoena or court order. Postconviction counsel put him to the test, and he testified. There is no evidence whatsoever that any circumstance changed between trial and the postconviction hearing suggesting Gibson would have behaved differently at trial. It did not even take an order of the court to testify – Mr. Gibson, put to the test on the stand under oath, told the truth and gave Mr. Deparvine an absolute alibi.

## ISSUE 2

## FINGERPRINTS ON SULLIVAN ID

The State argues that the postconviction court correctly found that Skye made a strategic choice about the besmirched ID card:

> The Court finds Mr. Skye considered his alternatives and made a reasonable tactical decision in not submitting the identifiable latent print for further identification. Mr. Skye considered the defense of a sloppy investigation as well as the defense of an unknown print belonging to the real killer, and strategically opted for the latter.

PCR 10/1689. All well and good, except for the fact that Skye never used his postconviction post hoc excuse at trial – he never argued to the jury that the real killer was the one who left an unidentified print. Also, attacking the investigation for its destruction of evidence (planting a thumb on critical evidence) would have meshed with the other lapses in the investigation Mr. Deparvine has pointed out.

The court ruled that the *Brady/Giglio*[2] claim of failure to disclose the identity of the officer who fouled up the ID card failed because it was not raised until after the evidentiary hearing. PCR 10/1690. However, the facts establishing the violation, i.e. the fact that a deputy's fingerprint had tainted the ID card in a manner directly contrary to the police reports, was not known to the defense until the eve of the postconviction hearing. The fingerprint report issued February 3,

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[2] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

2011, PCR 19/3441, the hearing began February 7, 2011. There was no way Mr. Deparvine could have known of the facts supporting the *Brady/Giglio* violation until the analyst's report. The case the State relies upon, *Darling v. State*, 966 So.2d 366 (Fla. 2007), does not address a claim made when the facts to support the claim are unknown until developed in the evidentiary hearing.

The pleadings are deemed amended to include the claim when the evidence to support the claim is admitted without objection.

> [H]abeas corpus proceedings and other postconviction relief proceedings are classified as civil proceedings. Unlike a general civil action, however, wherein parties seek to remedy a private wrong, a habeas corpus or other postconviction relief proceeding is used to challenge the validity of a conviction and sentence.

*Allen v. Butterworth*, 756 So. 2d 52, 61 (Fla. 2000). *See also O'Neal v. McAninch*, 513 U.S. 432, 440 (1995) (habeas corpus a civil proceeding). Because postconviction motions are a civil action, Florida's Rules of Civil Procedure apply. *State v. White*, 470 So. 2d 1377 (Fla. 1985) (3.850 motions are independent collateral civil actions governed by the practice of appeals in civil actions).

Florida Rule of Civil Procedure 1.190(b) provides:

> (b) Amendments to Conform with the Evidence: When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time,

but failure to so amend shall not affect the result of the trial of these issues.

An issue is tried by consent under Rule 1.190(b) when parties fail to object to the introduction of evidence on the issue. A formal amendment of the pleadings is not required. *Rosenberg v. Guardian Life Insurance Co.*, 510 So. 2d 610, 611 (Fla. 3d DCA 1987) (issue tried by implied consent); *Twenty-Four Collection, Inc. V. M. Weinbaum Construction, Inc.*, 427 So. 2d 1110, 1112 (Fla. 3d DCA 1983) (issue tried by implied consent without the necessity of motion to amend). In the instant case, the facts supporting a *Brady/Giglio* claim were presented without objection at the evidentiary hearing. The issue must be addressed on the merits.

## ISSUE 3

## WENDY DACOSTA

The State misleads by omission when it says at p. 32 n. 13 that Ms. Dacosta "saw the red truck pull out of a shopping plaza parking lot." This omits the fact that Ms. Dacosta testified that the shopping plaza parking lot was only feet from where the Jeep was parked: "the very next driveway," "right next to Artistic Doors," "immediately next door." PCR 32/303, 305. The business was closed, so any vehicle pulling out of the parking area was there for some reason other than transacting business.

The State and the court justify Skye's decision as reasonable after he investigated and determined that Ms. Dacosta's testimony would not be beneficial. However, Mr. Deparvine established at the evidentiary hearing that the investigation was insufficient. A tactical decision based on insufficient investigation is not reasonable: "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland v. Washington*, 466 U.S. 668, 690-691 (U.S. 1984).

In this case, the evidence shows that Mr. Deparvine made it clear to counsel that Ms. Dacosta needed to be shown a picture of the victim's truck from an angle

she had actually seen the truck. Counsel failed to correct this oversight, and he conceded he had no recall of attempting to do so. PCR 34/597.

The court found no prejudice because trial testimony established that the Jeep had been parked long enough to have condensation (apparently dew) develop before the time Dacosta saw the red truck. PCR 9/1664. But the trial court mischaracterized the nature of Ms. Dacosta's siting of the truck – the court termed it as "the similar red truck driving by" when Dacosta's testimony was that she saw the truck pulling out of the parking area of a closed business immediately adjacent to where the Jeep was parked. This wasn't a casual passing on the road, this was eyewitness evidence of a red truck like the victims' but not the victims' emerging from a parking area within feet of the Jeep.

The State and court then fail to give Skye his due as to his persuasive ability to raise a reasonable doubt scenario wherein the perpetrator exchanged the Jeep for the truck earlier in the morning, but returned after the dew fell, perhaps to plant the ID card or to look for or retrieve some item the perpetrator thought had been left behind.

## ISSUE 4

## ARMED CARJACKING

The State argues Skye made a reasonable tactical decision to forego a motion for a statement of particulars as to which vehicle was carjacked because counsel did "extensive" research and made a tactical decision based on that extensive research. The problem is, counsel did a lot of research and got the wrong answer. He came up with a ridiculous theory that the indictment could be successfully challenged somewhere, somehow. He claimed to have avoided a motion for a statement of particulars because the State would have to reexamine the indictment and it might identify and cure the "error."

But the Appellee, no more than the lower court, supports Skye's absurd theory with case law or logic. In fact, the State inexplicably cites to this Court's prior opinion, *Deparvine v. State*, 995 So.2d 351, 372-74 (Fla. 2008)., This Court rejected any claim the indictment was defective, rejecting any claim that Skye's theory had any legitimacy. This Court also noted that counsel actually filed motions for particulars as to aggravating factors and as to the theory of the case. *Id.* A demand for designation of the vehicle deemed carjacked would have no more directed the State to flaws in the indictment than the motions counsel actually filed.

Death is different. Skye hung his hopes on this principle. But the courts have long left behind any requirement for the type of specific pleading Skye says he believed was necessary. When an attorney does a lot of research and comes up with the wrong answer, no resulting tactical decision can ever be deemed "reasonable."

The State obfuscates the postconviction claim by asserting that the defense made similar arguments at trial. "Similar" arguments do not address the claim here – the State argued the Jeep was the object of the carjacking when the judge, not the jury, had to make a decision, and defense counsel had to respond on that theory of the case. Then the State abandoned the Jeep and argued the truck to the jury. The trial court never ruled on whether the State met its burden to prove the truck was carjacked.

## ISSUE 5

## PAUL LANIER

### A.

A critical element of the defense case was the Defendant's testimony that he drove the Jeep Cherokee back to the Van Dusen's home on Sunday, November 23, 2003, after running out of gas in the Chevy pickup truck. This was Defendant's explanation of how his blood got on the Jeep steering wheel.

At trial Lanier testified that he followed Defendant and Rick Van Dusen back to the house in Van Dusen's pickup truck on Tuesday evening, November 18, 2003. ROA 34/ 2724-27. At that time, he made Rick Van Dusen a $13,000 offer. ROA 34/2728-30.

The November 18th date was not harmful to Defendant's case. But defense counsel proceeded to eliminate that date under the mistaken impression that Rick Van Dusen was in North Carolina on that date.[3] Defense counsel elicited Detective Hoover's testimony that Lanier told him he only went to the Van Dusen house on Sunday, November 23, 2003. ROA 37/3191-94. If Lanier was at the house only

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[3] At trial, Karla Van Dusen's brother testified that Rick flew to Raleigh on November 19th. Thus, Mr. Van Dusen could have been home on November 18th. ROA 32/2437-8. At the evidentiary hearing, defense counsel testified that Lanier could not have seen the truck driving down the street on Tuesday, November 18, 2003, because Rick Van Dusen was in North Carolina on that day. PCR 33/438. Trial counsel thus relied on incorrect facts when he decided to not call ms. Fisher.

on Sunday, November 23rd, then the jury could reasonably conclude that must have been the day that Lanier witnessed defendant driving the Chevy pickup truck back to the house. Hence, Defendant's testimony about running out of gas and driving the Jeep Cherokee back to the house was undermined.

Defense counsel was ineffective when he failed to elicit Detective Hoover's testimony negating Lanier's claim to have seen Mr. Deparvine driving the truck. Detective Hoover testified at the evidentiary hearing that Lanier told him he saw the red pickup truck parked in the driveway for sale and that he and Fisher stopped then. Lanier never mentioned anything to him about following the truck back to the house. PCR 31/223.

At the evidentiary hearing, Assunta Fisher testified that the truck was sitting in front of the house and somebody was there looking at it. PCR 32/357-58. When asked, "You never saw the truck being driven?" Fisher replied, "No. Not that I remember, no." PCR 32/361-62.

Both the postconviction court and the State overlooked Lanier's trial testimony that Assunta Fisher was not with him on the day that he said he saw Mr. Deparvine and Rick Van Dusen in the Chevy pickup truck. ROA 34/2759-60.

Therefore, at the time of the trial, if defense counsel had established through Detective Hoover and Assunta Fisher that Assunta Fisher had stopped by the Van Dusen's home with Lanier on Sunday the 23rd, the jury would have seen that

Sunday could not have been the day that Lanier witnessed the truck driving down the street – Fisher was with Lanier on Sunday and Lanier himself testified that she was not with him when he witnessed the truck driving down the street.

The State implies in footnote 21 at p. 44 of the Answer Brief that Mr. Deparvine's failure to initially tell Skye about driving the Jeep with a cut finger indicates he fabricated the story after reading police reports. However, Detective Hoover testified at the evidentiary hearing that Mr. Deparvine had told him at the post-arrest interrogation, before the Defendant ever spoke to Skye, that he had driven the Jeep Cherokee and that he had also cut his finger. PCR 31/247.

**C.**

At trial, Paul Lanier testified that on Tuesday evening, November 18, 2003, he followed the Defendant and Rick Van Dusen in the pickup truck back to the house. Once there, he said he offered Rick Van Dusen $13,000 for his 1971 Chevy pickup truck. ROA 34/2724-30. Lanier admitted on cross examination that his girlfriend, Assunta Fisher, was not with him on this occasion. ROA 34/2759-60. Lanier denied that he was at the Van Dusen's home on Sunday, November 23, 2003. ROA 34/2754-55.

At the evidentiary hearing, Lanier testified that he was at the Van Dusen's home on Sunday, November 23, 2003. He said he was there only twice, the 23rd and Tuesday, November 25, 2003. Both times he was there with Assunta Fisher.

Furthermore, Lanier testified that he witnessed Mr. Deparvine and Rick Van Dusen driving down the street in the Chevy pickup truck on Tuesday, November 25, 2003, as opposed to his trial testimony of Tuesday, November 13, 2003. PCR 32/333-43.

Assunta Fisher said that she went to the Van Dusen's home for the first time on Sunday, November 23, 2003, accompanied by Paul Lanier. PCR 32/360-61, 365. She further testified that when they got there the pickup truck was sitting in the front yard and someone was there looking at it. She did not recall ever seeing the truck being driven. PCR 32/361-62.

Fisher's testimony would have aided the defense thus:

1) It would have supported Lanier's testimony that Fisher was not with him when he saw the truck going down the street on Tuesday, November 18th since Sunday the 23rd was her first visit.

2) It corroborated Mr. Deparvine's trial testimony that the Chevy pickup truck was sitting in the driveway when Lanier and Fisher arrived at the Van Dusen's home on Sunday, refuting any implication that Sunday was the day that Lanier followed the truck back to the house. ROA 38/3320-22.

3) It would have refuted Lanier's trial testimony that he was not at the Van Dusen's home on Sunday, November 23, 2003.

Any changed testimony by Lanier at the evidentiary has no bearing on trial strategy – the jury was presented with Lanier's inculpatory testimony. and Ms. Fisher rebuts the evidence the jury heard.

Defense counsel should have let the November 18, 2003, date stand, as it did not implicate the Defendant or undermine his testimony that he drove the Jeep back to the house on Sunday. Instead, Skye acted on his erroneous belief that Mr. Van Dusen could not have been at home November 18. PCR 33/438. Skye destroyed this advantage. leaving the State free to argue in closing that Lanier saw Mr. Deparvine driving the pickup truck back to the house on Sunday, November 23, 2003.

## ISSUE 7[4]

## NEWLY DISCOVERED EVIDENCE OF THE VALUE OF THE TRUCK

The critical fact established by the sale of the truck is that arm's length buyers offered only $10,000 and $6,000 for the truck, in essentially the same condition as when Mr. Deparvine struck a deal. Someone eager to sell the truck, whether motivated by necessity to tie up loose ends before a move or to settle an estate, was willing to accept $6,000 to $6,500 for the truck.

The State persists in arguing that trial counsel could have known about the disposal of the truck through due diligence. The argument in the initial brief, in presenting the due process violations resulting from the State's deliberate and knowing thwarting of the proper procedure for disposition of evidence, establishes that trial counsel did not and could not have discovered the illicit State activity through due diligence. Trial counsel can only rely on the law and court rules which establish the process due a defendant when the State acts to dispose of evidence. Counsel cannot be expected to anticipate every possible contingency by which the State could deviate from that due process and to account for same during the pendency of the case. Such an expectation would impermissibly burden all parties as counsel exercising undue diligence would be forced to try to cover all

[4] Appellant stands on the Initial Brief regarding Issue 6.

bases, which in turn would result in broad, frequent, and repeated inquiries of the State and its agents. As to the alleged waiver of the due process claim, Mr. Deparvine relies on the argument in Issue 2 relating to amending the pleadings to conform to the evidence. Mr. Deparvine's motion for postconviction relief also included a claim to protection under the Fourteenth Amendment for all claims made. PCR 3/430.

At a new trial, the defense would not call Ms. Kroeger, but would simply introduce the public record showing the $6,000 sale, presumably in conjunction with the defense expert from the first trial. Ms. Kroeger's motivations, if the State were to use her testimony, parallel the motivations of her father, i.e. motivated seller, and arm's length purchase offers consistent with Mr. Deparvine's defense.

The State also argues at page 58 n.27 that Ms. Kroeger essentially gave the truck away for $6,000 because of some fear for her own safety. This ignores the fact that she delegated the sale to a male relative who sold it in a safe commercial environment. Her motive was to settle the estate which was of sufficient value that the return on the sale of the truck was of little concern. Mr. Van Dusen had the same motive – settle financial affairs in St. Petersburg when he was sufficiently well off to not have to maximize the return on the sale of the truck (a motive he

did not have when he was merely trying to auction the truck off earlier, without the time pressure of moving).

In the closing arguments, the State argued to the jury for five pages that the truck was worth far more than $6,500. The prosecutor directed the jury's attention to the State expert who had said the truck was worth $15,000 and that he personally would pay in that range. ROA 40/3688-92.

The inflated value of the truck was thus an important element of the State's case. The jury could easily dismiss the defense expert as an element of a self-serving defense. But a jury fully informed of the actual cash value of the truck as demonstrated by the unauthorized sale of the truck would have been much more likely to have found a price in the $6,000 range to be credible, which in turn raised the credibility of Mr. Deparvine's defense that he bought the truck for that price and had no motive to steal it.

## ISSUE 8

## BILLIE FERRIS IMPEACHMENT

The court and the State make much of defense counsel's strategic decision to avoid attacking Mrs. Ferris, a sympathetic elderly witness. However, counsel did challenge Mrs. Ferris' testimony, he did so without appearing unkind to Mrs. Ferris. But he did not utilize his skill in cross examining a sensitive witness to bring out the impeaching evidence which would have allowed the jury to properly weigh her testimony.

Skye said he expected Mrs. Ferris to testify that her daughter told her the sale had been completed and the buyer had paid cash. PCR 33/404. This was consistent with what she told Detective Hoover days after the murders and it was corroborative of Mr. Deparvine's statements that he had paid cash and completed the purchase at his apartment building. This was consistent with the defense that the truck sale was final before the Van Dusen's left St. Petersburg, without Mr. Deparvine. But Mrs. Ferris's trial testimony indicated the sale was not final, it was in progress. Asked why he failed to cross examine Mrs. Ferris about her prior inconsistent statement to Detective Hoover corroborative of the defense theory, counsel wrongly claimed he had done so: "I think I did that ... , and I think that we also put on Detective Hoover to impeach her to the extent that we could with any

prior inconsistent statements she may have made on the witness stand." PCR 33/405.

Even in the post-conviction hearing, Skye recognized the value of Mrs. Ferris' statement to Detective Hoover and the importance of impeaching her contrary trial testimony, and claimed to have done so. The record shows he did not.

The postconviction court quoted this Court's opinion in the direct appeal holding that Karla Van Dusen's statement that she was following her husband and the guy who bought the truck was the damning element of her testimony. However, with her memory impeached as to the discrepancy between"paid cash" and "paying cash," other elements of Mrs. Ferris' recollection could also be open to interpretation. Ms. Ferris' statement to Detective Hoover raises the possibility that Karla Van Dusen was following the truck around to the rear parking area at Mr. Deparvine's apartment building when she made the statement, as Mr. Deparvine testified at trial.

Mr. Deparvine testified at trial that he watched the Van Dusens depart, with a similar red truck. He also said he spent the rest of the evening at home. The claim is not simply that impeaching Mrs. Ferris would necessarily alone establish prejudice, but that it was one of several elements of a defense Skye failed to

present to the jury. If defense counsel had competently developed and presented Wendy Dacosta's evidence of the second red truck in proximity spatially and temporally to one of the crime scenes, and competently developed and presented Daryl Gibson's testimony, a complete alibi defense consistent with Mr. Deparvine's testimony would have been presented. The discrepancies in Mrs. Ferris' testimony accepted as imperfect recollections, as demonstrated by her inconsistent statements to Detective Hoover and at trial.

## ISSUE 9

## BILLIE FERRIS TESTIMONY

The cell phone tower evidence at trial established that the Van Dusens were near their south Pinellas home at 5:30 p.m., and that twenty minutes later, at 5:50 p.m., Mr. Van Dusen made a call in downtown St. Petersburg, where Mr. Deparvine's apartment was located. ROA 36A/3038-42. Four minutes later, Karla Van Dusen initiated the call to her mother, Mrs. Ferris, from downtown St. Petersburg. ROA 36A/3022-23.

Mrs. Ferris testified that Karla Van Dusen said she was following the truck near the beginning of the conversation. ROA 28/1879. Mr. Deparvine testified the purchase took only about five minutes, ROA 38/3329-39. The subsequent cell tower history is consistent with this time frame. Detective Hoover also testified in the postconviction hearing that Mr. Deparvine told him about driving around the block to the parking area, and seeing the second red truck depart with Rick Van Dusen as a passenger, before Hoover spoke to Mrs. Ferris. This information was in his report provided to the defense. PCR 31/224-25.

Armed with all this knowledge, Skye testified in the evidentiary hearing that he believed at the time of trial that Karla Van Dusen commented on following the truck as she drove around to the rear of the apartment building, and he may have

told Mr. Deparvine he planned to argue that in closing. He claimed in the evidentiary hearing that his failure to argue this to the jury arose because he had more important arguments to make. PCR 33/407-08.

Failure to argue this aspect of the defense, and failure to bring out with Detective Hoover the fact that Mr. Deparvine advised the police of these facts from the very start, deprived the jury of essential information which would have contributed to a reasonable doubt in this highly circumstantial case.

## ISSUE 10

## PETER WILSON

The State is disingenuous when it asserts that crime scene detective Peter Cashwell testified in the evidentiary hearing that a flashlight was not necessary to observe most of the bloodstains from an arm's length distance. Some of the blood stains could not be seen without a flashlight and minute examination.

Q How big were the spots on the wheel that you swabbed?
A Some of the spots were larger than the others. Some of the spots were probably less than — I couldn't give you an exact size. They were small.

Q Small as in dull pencil size small?
A Some of them were that, some were – like I said earlier, some of them were visib to get with a flashlight to actually see.
Q So even up close at reading length, you had to use the flashlight to see?
A Correct.

PCR 32/287. Cashwell did not note which samples he took were from small spots versus large areas. Nor would it be possible to distinguish when blood sources were deposited when the swabs produced a mixture of sources. PCR 32/288.

Trial counsel knew Mr. Deparvine left only a small amount of blood, and he knew from Cashwell that the small deposits on the steering wheel would not have been visible to the casual observation of Peter Wilson. Wilson got close to the steering wheel only one time, when his attention was directed forward, not back towards the steering wheel, to examine the GPS device. He was not looking for

blood spots, and he did not have the flashlight needed to actually see the small spots on the wheel.

When the State argues that Cashwell testified that a passenger could, conceivably, see blood on the steering wheel, it fails to note that the questioning at that point was in the context of the visibility of the gross blood stains covering large areas of the wheel. PCR 32/292. In cross examination, Cashwell conceded that not all of the blood was visible from the passenger seat – some required the flashlight and, presumably, the closeness of reading distance he testified to earlier.

Q But without the flashlight from the passenger side view when you said earlier that you were able to see blood on the steering wheel from the passenger side looking over and you said —
A They were not all visible from the passenger side.
Q So it would have taken a flashlight to be able to see?
A Correct.

PCR 32/295.

Mr. Deparvine's blood spot from his test drive mishap was a small deposit, such that it was either one of the dots not invisible without a flashlight at reading distance, or it was subsumed into the larger blood stains resulting from the murders. Trial counsel was ineffective for failing to cross examine Wilson to illustrate the limited view he had of the steering wheel, and for failing to examine

Cashwell to establish the very limited visibility of many of the blood spots such that Wilson nor any other casual observer would have been able to see them.

Instead, the State had a powerful tool to argue that Mr. Deparvine never left a blood spot on the wheel during a test drive, and the prosecutor did so in closing, even pointing out the defense's failure to address Wilson's testimony:

> Peter Wilson testifies -- another reason you should not believe that story. Peter Wilson.
>
> ... . [Paraphrasing Wilson's testimony] He drove that Jeep all day and I remember that G.P.S. there because it had the female voice. Mr. Wilson, did you observe any – any stains on that jeep's stearing [sic] wheel?
>
> There was no hesitancy. There was no reluctance. There was no impeachment attempted or completed. What was his response? None whatsoever. Absolutely not.

ROZ 40/3676.

> Peter Wilson would had to be absolutely wrong about being absolutely certain there wasn't any blood."

ROA 40/3708.

Cashwell, the same as Peter Wilson, saw no small spots on the wheel from the passenger seat. But Cashwell had any number of advantages to detect the small dots. He knew there was blood on the wheel from the large readily visible stains from the murder, he knew there was a murder and collecting blood samples is critical. Cashwell saw no small spots until he got close up and minutely examined

the wheel with a flashlight. He saw them then because his job was to look for all the blood on the wheel.

The postconviction court's reliance on evidence that a single blood stain was visible to justify Skye's alleged tactical decision to not challenge the evidence is absurd. The testimony even the court recognizes was that the larger blood stains were visible, but the smaller ones (such as one left by a minor nick on a finger) were invisible to the naked eye without a flashlight and minute examination.

Counsel was ineffective for failing to impeach Wilson and develop the evidence which rendered his testimony irrelevant.

## ISSUE 12[5]

## LIMITING INSTRUCTION

The jury should have been instructed that there was insufficient evidence that the Defendant confined, abducted, or imprisoned the Van Dusens. The evidence shows that the Van Dusens, who were heavy cell phone users, ceased all call activity about 6:30 p.m., as they arrived in the area of the homicides. The medical examiner placed time of death no earlier than 10:00 pm., and other evidence suggests the homicides occurred around 2:30 a.m.

Several hours passed between the time the Van Dusens presumably were rendered unable to use their phones, and when they were killed. Presumably the killer held them against their will. Since the court ruled as a matter of law that there was no evidence Mr. Deparvine confined the victims during this period, there should have been instruction to the jury and argument by the defense about this failure of proof. The jury could then have reasonably concluded that the Van Dusens had to have been confined, abducted or imprisoned to explain the phone silence for hours before their deaths. If Mr. Deparvine stood acquitted as a matter of law for this act essential to explain the timeline of the murders, then the jury

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[5] Appellant relies on his Initial Brief as to Issue 11.

could have concluded that Mr. Deparvine was not the killer, and that someone else, who actually kidnaped the Van dusens, was the kidnapper and killer.

## ISSUE 14[6]

## FLAWED INVESTIGATION

The defense never questioned the detectives or otherwise presented to the jury facts suggesting a flawed investigation such as:

- Investigators rushed to the media and canvassed the area seeking leads for the Van Dusen's truck, but when Mr. Deparvine told them about the second truck early n the investigation, they made no further efforts.
- Further investigation looking for a second red truck would have led to a re-interview of Ms. Dacosta and discovery of her observation of the second red truck at one of the crime scenes at a time and place exculpatory to Mr. Deparvine.
- While they searched the Van Dusen home shortly after the murder, they were looking for evidence of foul play or theft, not for cash, and could well have overlooked a secure location. After Mr. Deparvine informed them of the cash transaction, the police should have searched again.

The State sets up a straw man argument when it argues that trial counsel cannot be ineffective for failing to address the flawed interrogation because no statements were introduced. The claim is not that the investigation compels

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[6] Mr. Deparvine relies upon his Initial Brief as to Issue 13.

suppression of statements. The claim is that the interrogation demonstrates the flaws in the investigation. The detectives focused solely on Mr. Deparvine, they misrepresented facts such as where his blood or DNA had been found which resulted in the failure of law enforcement to learn early on that the blood got on the steering wheel as a result of the nicked finger.

These and other flaws n the investigation, if brought to the jury's attention, would have caused the jurors to question what evidence was

- lost (e.g. failure to re-search the house),
- undiscovered (e.g. Ms. Dacosta's siting of the second truck or other possible evidence of the truck),
- destroyed (e.g. the investigative value of the ID was destroyed by unconscionably clumsy and unprofessional evidence collection which destroyed fingerprints, and deliberately covered up by the false police reports), or
- ignored.

Investigators focused too soon and exclusively on Mr .Deparvine.

Defense counsel also failed to address Detective Hoover's incorrect rebuttal testimony at trial that Mr. Deparvine never contacted investigators to correct the arrival time of the Van Dusens from 5:00 p.m. to 5:30 p.m. ROA 40/3557.

Detective Keene testified at the postconviction hearing that Mr. Deparvine did indeed advise law enforcement of the correct the arrival time, a fact he recorded from the first affidavit, ROA 1/26, onward. PCR 33/391.

Evidence challenging Detective Hoover's credibility as to his reporting of statements by the defendant would have raised a reasonable doubt that Detective Hoover was correct in stating that Mr. Deparvine at one time said Karla Van Dusen drove the Jeep when they refueled the truck on the test drive, when Mr. Deparvine's testimony is that he always advised that he drove the Jeep back to the house.

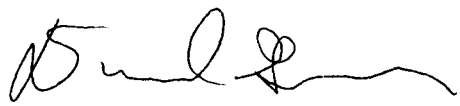
The cumulative effect of the discrepancies and failure of investigation would have all contributed to increased credibility for Mr. Deparvine, and the raising of a reasonable doubt as to his guilt.

## CONCLUSION

Based on the arguments and citations herein, this Court should reverse the order and remand to the circuit court to provide all appropriate and necessary relief.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by e-mail to: Steven Ake at capapp@myfloridalegal.com on February 4, 2013.



/s/ DAVID GEMMER

## CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman 14 point.

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