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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC13-632

DERRICK MCLEAN
Appellant,

v.

Capital Postconviction Case
Lower Tribunal No. 2004-CF-015923

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT

The Appellant relies on the arguments presented in his Initial Brief. He expressly does not abandon the issues and claims not specifically addressed herein. This reply brief addresses some of the arguments advanced by the Appellee.

Ineffective Assistance for Failure to Employ an Expert in Eyewitness Identification

The lower court ruled and the State now argues that defense counsel's failure to consult with, let alone call as a witness, an expert in eyewitness identification, was the product of an informed strategic decision. The record simply does not bear that out. Defense counsel cross-examined Shirley and Theothlus Lewis about their identification of co-defendant Lewin during a bond hearing as the shooter in an obvious effort to discredit the identification of McLean. This is an excerpt from the defense closing argument:

> Theo gives a description. What's the first description? Five-nine, five-ten, medium build, a little buff. He gives another description later on, five-eight, five-nine. Now the shooter is stocky. Now the shooter is 220 pounds.
>
> He goes down and he creates a photo with the police sketch artist and he -- and he looks at that photo and he says, yeah, it looks like him. Looks like him isn't beyond a reasonable doubt. And they put together these lineups. And Detective Wright told you, you know, he shows him the lineup and Theo says, not a hundred percent sure,

maybe I'm 90 percent sure. I submit to you 90 percent sure isn't beyond a reasonable doubt.

But now he's been shown a picture of Derrick and he says, I need to see him in a live lineup. In the meantime, he goes to court for a proceeding and he sees Maurice Lewin and he says, that's the shooter. And then he goes to the live lineup that's held out at the jail. And there were 18 people that he's been shown pictures of but only one of those 18 is in the live lineup. They don't redo the photo lineup and let him see it live. What they do is they put Derrick in, who they've now shown him in a photo, and they take the only person they've shown him a photo of and put him in a live lineup. And now finally he says, well, now I'm sure. Sure of what? Sure that this is the person you've been shown multiple times? Sure that's the shooter? How sure are you?

He thought the person looked like the photo and when he saw him live suddenly looked like became it is the photo.

Decide whether the burden of proof has been met. Decide about the conflicts in Theo's testimony. Decide whether Theo lied to you.

Detective Wright, again, good job, thorough job, good detective. Talks to Shirley, Shirley Lewis, and -- and I would submit to you independent is kind of a stretch. It's her now husband that gets shot.

And -- and she wants someone caught. She wants someone arrested. She can't really give a description of the shooter. She can give a description of someone running by, isn't really able to give very many details .

Detective Wright goes on and what does he have? He still has a 90 percent sure from Theo, lies from Jaggon, lies

> from Lewin, information that his officers couldn't gather because it wasn't there. And, unfortunately, that goes on.

ROA V23, 1567-69.

This is unquestionably a defense predicated on misidentification. It touches on a few of the points made by Dr. Brigham, but it lacks the credibility, thoroughness, and expertise that his testimony would have provided. Any argument that defense counsel strategically chose not to argue that the eyewitness identification should not have been relied on is belied by this excerpt alone from the closing argument, but everything in the record of this case compels the conclusion that the primary defense strategy was to argue that McLean was not the one who did the crime. McLean has never conceded guilt to any credible source. In fact, he complained in a series of letters that he was being pressured by his defense lawyers to take the State's offer to have him plead to life. Reasonable defense counsel would have done everything possible to attack identification in this case.

The lower court and now the State also take issue with McLean's argument that defense counsel did not employ an eyewitness identification expert because of a mistaken view regarding the status of the law. But, as noted in the initial brief, defense counsel confirmed the following exchange that occurred during a discovery deposition taken shortly before the evidentiary hearing:

> Q. Did you and [co-counsel]McClellan ever consider employing an eyewitness identification expert in this case?
>
> A. The case law at that time and at this time does not allow you to put on an expert in front of the jury in eyewitness identification, period.

PC-R7, 1051. That was a broad, open-ended question. The response was unequivocal. It was also corroborated by co-counsel's testimony. Co-counsel said, "I recall discussions in that regards the identification of Mr. McLean, how it came about, the issues surrounding that. Was there a specific conversation about hiring an expert, no . . ."

> Q. Was there a belief at the time with regard to the admissibility or inadmissibility of such testimony or did that even factor in?
>
> A. At that point it didn't even factor in. It wasn't an issue that was contemplated.

RC-R6, 895-96.

In any event, counsel's failure to at least explore the use of an eyewitness expert whether due to a mistaken view of the status of the law or simply because no one thought of it was deficient performance under the first prong of *Strickland*. It also cannot be explained away as a strategic decision because, under *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003), a reasonable strategic decision cannot be based on an inadequate investigation. The arrest and trial in this case took place between 2007

and 2008. The expert who testified here, Dr. Brigham, was the expert witness in question in *McMullen v. State,* 714 So.2d 368 (Fla. 1998), which held that expert testimony regarding eyewitness identifications is (and always has been) admissible subject to the court's sound discretion. He has been publishing professional articles, testifying in criminal cases, giving presentations to judges and lawyers and for many years. In this case the court could not have exercised its discretion to admit the testimony he would have provided because the attempt to provide it was never made.

The argument that defense counsel somehow would have undermined her credibility by calling an eyewitness identification expert is unpersuasive. According to the lower court's order, defense counsel "reasoned that under the facts of this case, such an expert would provide little additional value and could actually and could actually undermine the overall defense strategy." PC-R7, 1167. An expert's testimony would have provided additional, independent, scientifically backed reasons for doubting the identification of McLean as the shooter. That ***was*** defense counsel's overall strategy, at least in the guilt phase, as shown by the excerpt from defense counsel's closing argument quoted above.

As a reason for denying relief on this claim the lower court cited the basic rule from *Simmons v. State,* 934 So.2d 1100 (Fla. 2006) that admission of such testimony is discretionary with the trial court. The lower court did not explain why that fact

warranted denying relief based on an a claim of ineffective assistance of counsel.

The ABA Guidelines recognize counsel's obligation to assert legal claims at every stage of the case:

> GUIDELINE 10.8—THE DUTY TO ASSERT LEGAL CLAIMS
>
> A. Counsel at every stage of the case, exercising professional judgment in accordance with these Guidelines, should:
>
> 1. consider all legal claims potentially available; and
>
> 2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and
>
> 3. evaluate each potential claim in light of:
>
> a. the unique characteristics of death penalty law and practice; and
>
> b. the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence; and
>
> c. the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited; and
>
> d. any other professionally appropriate costs and benefits to the assertion of the claim.

> B. Counsel who decide to assert a particular legal claim should:
>
> 1. present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and
>
> 2. ensure that a full record is made of all legal proceedings in connection with the claim.
>
> C. Counsel at all stages of the case should keep under consideration the possible advantages to the client of:
>
> 1. asserting legal claims whose basis has only recently become known or available to counsel; and
>
> 2. supplementing claims previously made with additional factual or legal information.

GUIDELINE 10.8, 31 Hofstra L. Rev. 913, 1028 (2003). If defense counsel had sought to present Dr. Brigham's testimony, or testimony like it, the worst that could have happened is that the judge would have denied the request. In that case, the issue would have been raised and preserved for review on direct appeal as a question of whether the trial court acted within its discretion. There would have been no "downside" to doing so; it is routine defense practice. The fact that defense counsel followed this practice with regard to many of the other issues in the case shows, not that the failure to try to present such evidence was an informed strategic decision, but rather that it was because of a mistaken belief that the law absolutely precluded doing

so. The basic rule that a trial judge has discretion to admit or not admit favorable evidence is a reason for defense counsel to proffer it, not abandon it.

Both the State and the lower court argue at length that the existence of other evidence in the case offered to show that McLean was the shooter somehow excuses the failure to explore the use of an expert eyewitness identification expert. Dr. Brigham did not review this other additional evidence; doing so would have been outside the scope of his expertise. As far as the deficiency prong of *Strickland* is concerned, the fact that the prosecution has some corroborating circumstantial evidence would be a reason for defense counsel to more vigorously attack the eyewitness identification, not a reason for failing to do so. As to prejudice, the corroborating physical evidence is less compelling than the State makes it out to be. The point is made that McLean's DNA was found on the pillowcase containing stolen marijuana in the car occupied by the co-defendants shortly after the crime. But the car belonged to Maurice Lewin, McLean along with any number of other people had been in and out of it numerous times. When the police searched the car they took the marijuana out of the pillow case, placed it on top of the case on the back seat in the car and took a picture of it. In other words, the marijuana, the container it was in, and the whole interior of the car were hopelessly contaminated. A cell phone and articles of clothing which were connected to McLean were found near where the car was

stopped, but there was no crime scene evidence connecting Derrick McLean to the apartment where the shooting took place. Defense counsel challenged this evidence consistently with the overall strategy of raising a reasonable doubt as to the identity of the shooter. Using expert eyewitness identification testimony would have supplemented the defense strategy and would have provided a reasonable probability of a different outcome.

Institutional Destruction of Potentially Exculpatory Evidence

The institutional problem identified in this claim, the routine destruction of obviously relevant evidence as a matter of policy and expediency, was not directly addressed in the Appellee's brief. This is not an argument predicated on bad faith destruction of evidence under *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988). Rather, the contention here is that Appellant's rights were violated by the institutional, i.e. common practice, destruction of relevant and potentially exculpating evidence. A duty to preserve evidence is simply a logical extension of the Supreme Court's rulings in *Brady v. Maryland*, 373 U.S. 83 (1963) and progeny. The ineffective assistance of counsel component of the claim relies in part on the second situation identified in *United States v. Agurs*, 427 U.S. 97 (1972), involving pretrial requests for specific evidence. In that regard it does not matter who was representing the defendant so long as he was actually being represented. The function of the

request is to give the prosecution notice that the defense considers the evidence material. In those situations, evidence is deemed material if it "might have affected the outcome of the trial". *Id*., at 104. When such requests are made and the evidence is material or there is a "substantial basis" for believing it to be so, the prosecutor must disclose it or submit the matter to the trial court. *Id*., at 106. Obviously these requirements will go unfulfilled if the police routinely destroy the evidence early on in the case, which is evidently what happened here. When the State routinely destroys evidence, in this case of a person claiming to have relevant knowledge of the identity of a murder suspect and who received a monetary reward for informing on the defendant, the judiciary is excluded entirely and forever from any sort of oversight role, and the prosecution is freed from even any sense, let alone reality, of accountability.

Ineffective Assistance of Counsel During the Penalty Phase from Failure to Investigate and Present Available Mental and Developmental Mitigation.

At trial Dr. Eisenstein provided favorable mental health mitigation testimony on Mr. McLean's behalf, however defense counsel failed to present to present any evidence regarding Dr. Eisenstein's diagnosis of Attention Deficit Disorder (ADHD) and failed to offer any argument as to why this condition was mitigating. In fact, it was presented only as a part of the State's cross-examination of Dr. Eisenstein in an effort to discredit the rest of his testimony. ADHD is potentially a significant

mitigator where it is backed up by the appropriate testing, institutional records review, and other appropriate developmental background data. During the postconviction proceedings Dr. Eisenstein conducted a number of tests to further evaluate McLean with regard to his ADHD diagnosis. One of them was the T.O.V.A. (Test of Variables of Attention) to McLean which reflected a score "in the range of individuals independently diagnosed with attention deficit disorder." PC-R6, 848-49. Dr. Eisenstein also interviewed some of McLean's family members who provided information which could support his attention deficit disorder diagnosis. *Id.* 854-55. His conclusion was that there was a nexus between the crime and the ADHD diagnosis.

> [T]hat the lack of ability on his part to -- to follow-through on his -- on what is his own stated goal or plan in this -- in this case, the robbery, the inability to just walk out of the house after taking the bag of marijuana and walking away, leads me to believe that there was something that -- that went on in -- in his own thinking processes that somehow disrupted that plan.
>
> Again, all the attributes of the ADHD, especially the impulsivity, the lack of self-regulatory behavior, the inability to think things through, the inattention, they're heightened under that stressful situation at the very -- at the very maximal level. And the inability to weigh the options, to think about quickly and efficiently under those circumstances needs -- leads me to the -- to the opinion that I hypothesize that he's -- his inability to think it through is because he lacks the ability to do that. Things are moving

> at a very rapid rate and then the response is something counterintuitive to what he would have wanted to do.

PC-R6, 863. McLean lacked the "emotional flexibility to think things through in a -- in a clear and in a better way." *Id.* 864. As described in the initial brief his report and supporting test data were also admitted in evidence.

Defense counsel argued in their *Spencer* memorandum that ADHD was diagnosed by Dr. Eisenstein and that it should be viewed as a mitigating circumstance. Aside from that, as Dr. Eisenstein said at the postconviction hearing, he had no further discussions with defense counsel about his ADHD diagnosis between the time he mentioned it at his deposition and when he was cross examined about it at the time of trial. PCR-6, 825. He said that neither of the defense attorneys asked him to look further into the issue. *Id*. Moreover, defense counsel did not contact him about ADHD or anything else between the time he testified at trial and the *Spencer* hearing, where he could have offered further testimony clarifying or explaining his views. Id.

The outcome of these deficiencies as well as prejudice under the second prong of Strickland are demonstrated by the Court's finding in the sentencing order:

> NON-STATUTORY MITIGATING CIRCUMSTANCES
>
> In addition to the statutory mitigating circumstances, the defendant argues the existence of 46 non-statutory mitigating circumstances. They fall generally into several separate categories: (1) mental health issues; (2) substance

> abuse issues; (3) disparate treatment of co-defendants; (4) family; (5) brain injury; and (6) miscellaneous factors.
>
> 1. Mental Heath Issues.
>
> Numbers 4, 9, 10,14, 16, 19, 29, 30, 31, 32, 37, 40, 42, 45, and 46 all address the defendant's mental and emotional health. In number 30, the defendant argues that Dr. Eisenstein diagnosed him as suffering from ADHD. ***The record in this case does not establish that the doctor made that diagnosis; thus this mitigator had not been established.*** The court has considered each of these claims in finding the existence of statutory mitigators and, having reconsidered them under the guise of non-statutory mitigators, finds that they should be accorded no additional weight.

R11, 1776 (emphasis added)." In other words, counsel's failure to investigate and present the testimony that was later presented at the evidentiary hearing had a clearly identifiable and significant impact on the sentencing in this case.

The fact that the Court declined to find the existence of the proffered mitigating circumstance rather than finding that it existed but assigning it reduced weight is itself significant. Counsel's failure to investigate, prepare and present any of the available evidence to support the proffered mitigator had an adverse impact on the entire sentencing analysis. "Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings."

Gaskin v. State, 737 So.2d 509, 516 n. 14 (Fla.1999) receded from in part on other grounds by *Nelson v. State*, 875 So.2d 579, 582-83 (Fla.2004), *see Hoskins v. State*, 75 So. 3d 250, 254 (Fla. 2011).

CONCLUSION

Based on the foregoing, the circuit court improperly denied Mr. McLean relief on his Rule 3.851 motion. Relief is warranted in the form of a new trial, a new sentencing proceeding, or any other relief that this Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been electronically filed with the Clerk of the Court, and furnished by E-MAIL to Scott A. Browne, Assistant Attorney General at: Scott.Browne@myfloridalegal.com, capapp@myfloridalegal.com, and by U.S. Mail to Derrick McLean, DOC #996584, Union Correctional Institution, 7819 NW 228th Street, Raiford, FL 32026.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Reply Brief of Appellant was generated in Times New Roman 14-point font pursuant to Fla. R. App. P. 9.210.

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