IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC14-1925

STATE OF FLORIDA,

Petitioner,

v.

ERIC LUCAS,

Respondent.

ON DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL, STATE OF FLORIDA

RESPONDENT'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

STATEMENT OF THE CASE AND FACTS

Mr. Lucas was convicted of Aggravated Battery, in violation of section 784.045, Florida Statutes. (R 4). After his conviction, he filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 (the "Motion"). In the Motion, Mr. Lucas alleged his trial attorney was ineffective for failing to consult an expert witness in the field of ophthalmology. He noted that the State had to prove the victim suffered a permanent injury to obtain a conviction, and explained the only evidence adduced by the State on this element was the testimony of Dr. Clark, an Oral Maxillofacial surgeon. (R 4-5).

Mr. Lucas argued Dr. Clark's testimony regarding permanency was equivocal. Dr. Clark testified that (1) he did not believe the victim needed surgery because the eye was functioning and moving; (2) he had reviewed the report prepared by the victim's attending ophthalmologist, which stated the victim's eyesight would "be okay" and; (3) that an ophthalmologist would be better suited to examine the victim regarding permanent damage to her eyesight. (R 4-6).

Mr. Lucas claimed his trial counsel was ineffective "by failing to *consult and/or hire* an expert witness in the area of eye injuries (Opthalmologist) to rebut the State's claim of 'permanent damage' as an element of Aggravated Battery." (R 4) (emphasis added). According to Mr. Lucas, the ophthalmologist's report, standing alone, should have "sufficiently apprised counsel that a consultation was in order as nothing conclusively established the element of permanent injury." (R 6).

The State, in its response, did not address Mr. Lucas's claim that his trial lawyer was ineffective for failing to *consult* an expert. (R 17-19). Rather, the State argued that Mr. Lucas's claim was facially insufficient, because in "order to succeed in a claim of ineffective assistance of counsel for failing to *call* a particular witness," Mr. Lucas needed to comply with the requirements outlined in *Nelson v. State,* 875 So. 2d 579 (Fla. 2002). (R 18) (emphasis added). The State urged the trial court to strike Mr. Lucas's claim, with leave to amend to comply with *Nelson*. (R 19).

Before ruling on the facial sufficiency of Mr. Lucas's motion, the trial court allowed Mr. Lucas an opportunity to reply to the State's argument. Mr. Lucas argued this Court could not have intended for *Nelson* to apply to

claims involving a lawyer's failure to consult an expert or to investigate the defense's need for expert testimony prior to trial: "It would be an impossible task to require a Defendant to 'identify a specific person to testify as an expert at trial' when the ground is premised on counsel's failure to *consult* an expert in a particular area of science or the medical profession." (R 23) (emphasis in original). Further, it "would defy logic to make this a requirement" for claims based on a failure "to consult and/or investigate the need for an expert." *Id*.

The trial court ruled Mr. Lucas's claim was facially insufficient, and struck his motion without prejudice, offering him leave to amend within 30 days. Rather than amending, Mr. Lucas filed a notice of appeal. (R 36). The Fourth District Court of Appeal relinquished jurisdiction, and the trial court entered a final order which adopted its prior ruling that Mr. Lucas's motion was facially insufficient. *Lucas v. State*, 147 So. 3d 611, 612 (Fla. 4th DCA 2014).

The Fourth District Court of Appeal reversed because the trial court did not follow its decision in *Terrell v. State*, 9 So. 3d 1284 (Fla. 4th DCA 2009), which held:

> As a threshold matter, the state asserts that this claim was facially insufficient because the defendant did not name the expert whom he wished to testify. Although the defendant is usually required to identify fact witnesses by name, we are aware of no authority requiring the defendant to provide the name of a particular expert where the defendant claims that trial counsel failed to secure an expert in a named field of expertise. We thus do not agree that the defendant's postconviction claim was facially insufficient.

Terrell, 9 So. 3d at 1289. The State asked this Court to accept jurisdiction to resolve a conflict between *Lucas* and *Nelson*. This Court has jurisdiction. *See* art. V, § 3(b)(3), Fla. Const.

SUMMARY OF THE ARGUMENT

The State argues that the pleading requirements described in *Nelson* apply to defendants alleging ineffective assistance based on counsel's failure to call an expert at trial. According to the State, in order to plead a facially sufficient claim, *Nelson* requires such a defendant to (1) identify the expert who should have testified; and (2) swear under oath that the expert would have been available at trial had he been called. (IB at 7). This is not *Nelson*'s holding.

As the Fourth District Court of Appeal correctly determined in this case and in *Terrell*, *Nelson*'s holding does not apply to claims involving

expert witnesses. It is confined to ineffective assistance claims based on counsel's failure to call an exculpatory fact witness at trial. At issue in this case is counsel's failure to investigate a defense by securing "an expert in a named field of expertise," which would have negated an element of the charged crime. *Lucas*, 147 So. 3d at 612.

Mr. Lucas was not required to satisfy the pleading requirements established in *Nelson*. He needed only to satisfy the test provided in *Strickland v. Washington*, 466 U.S. 668 (1984). He did. Without identifying an expert by name or claiming that an expert was available to testify at trial, Mr. Lucas sufficiently alleged deficient performance (failure to consult an expert) and prejudice (consulting an expert would have discredited Dr. Clark's equivocal testimony on permanency). Mr. Lucas is entitled to an evidentiary hearing.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE HEIGHTENED PLEADING STANDARDS ESTABLISHED IN *NELSON* DO NOT APPLY TO AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BASED ON THE FAILURE TO CONSULT AN EXPERT WITNESS

A. STANDARD OF REVIEW

This case presents a pure question of law which is subject to *de novo* review. *Nelson*, 875 So. 2d at 580.

B. ARGUMENT

In its Initial Brief, the State argues that in order to plead a facially sufficient claim that counsel was ineffective for failing to call an expert, *Nelson* requires (1) identification of the expert who should have testified; and (2) a sworn allegation that the expert would have been available at trial had he been called. (IB at 7) (The Fourth District Court of Appeal's opinion in this case "ignores two of the four elements set forth in *Nelson*: that a defendant must name a witness and allege the witness would have been available to testify at trial."). That is not the holding in *Nelson*.

In *Nelson*, this Court exercised its discretionary jurisdiction to review the Fifth District Court of Appeal's decision in *Nelson v. State*, 816 So. 2d 694 (Fla. 5th DCA 2002), based on an express and direct conflict with the

Second District Court of Appeal's decision in *Odom v. State*, 770 So. 2d 195 (Fla. 2d DCA 2000). The point of conflict was whether "a defendant alleging that counsel was ineffective for failing to call, interview, or investigate witnesses at trial must specifically allege in his or her postconviction motion that the witnesses would have been available to testify at trial had counsel called them." *Nelson*, 875 So. 2d at 581. Neither of the conflicting district court decisions mentions the word "expert."

This Court affirmed the Fifth District Court of Appeal's decision, holding that "as part of the requirement to show that counsel's ineffectiveness prejudiced the defendant's case, a facially sufficient postconviction motion alleging the ineffectiveness of counsel for failing to call certain witnesses must include an assertion that those witnesses would in fact have been available to testify at trial." *Nelson*, 875 So. 2d at 584.

While the State does not mention it in its Initial Brief, footnote 4 of the *Nelson* decision refers to a "blood splatter expert" the defendant asserted counsel should have called, along with 3 other fact witnesses. *Nelson*, 875 So. 2d at 586 n. 4. However, there is no discussion of the nature of the defendant's claim regarding the expert or any facts alleged in support.

Likewise, there is no legal analysis which suggests the Court meant for its holding to apply equally to claims involving expert witnesses.

Other aspects of the *Nelson* opinion indicate that the Court had fact witnesses in mind, and not expert witnesses, when it rendered its decision. For instance, in footnote 3, the Court describes a few of the myriad reasons for witness unavailability at trial, 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." *Id*. at n. 3. These are obviously reasons a fact witness would be unavailable at trial. They are not pertinent to expert witnesses.

Based on the foregoing, it is not surprising that in *Terrell*, immediately after applying *Nelson* to assess the facial sufficiency of an ineffective assistance claim involving fact witnesses, the Fourth District Court of Appeal held: "Although the defendant is usually required to identify fact witnesses by name, we are aware of no authority requiring the defendant to provide the name of a particular expert where the defendant claims that trial counsel failed to secure an expert in a named field of expertise." The Fourth District Court of Appeal did not consider *Nelson*

applicable to claims involving expert witnesses because the *Nelson* holding does not discuss expert witnesses.

This Court's decision in *Bryant v. State*, 901 So. 2d 810 (Fla. 2005), supports the conclusion that *Nelson* did not require Mr. Lucas to identify an expert by name, or allege that the expert was available for trial. In *Bryant*, a death penalty case, the defendant alleged his attorney was ineffective because he failed to obtain an expert on confessions. *Bryant*, 901 So. 2d at 821-22. The trial court summarily denied his claim. *Id*.

This Court affirmed the summary denial. While the Court cited to *Nelson*, it did not affirm because the defendant failed to identify an expert by name, or because the defendant failed to allege the expert would have been available for trial. Rather, it quoted the portion of *Nelson* which describes how the basic *Strickland* test should be applied to failure to call a witness claims. *Id*. at 821. Specifically, this Court stated that "when a defendant alleges ineffective assistance of counsel for failure to call specific witnesses, a defendant is 'required to allege what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview,

or present the witnesses who would have testified prejudiced the case.'" *Id*. (quoting *Nelson*, 875 So. 2d at 583).

The *Bryant* Court applied the *Strickland* test to the defendant's failure to call an expert witness claim. The defendant's conclusory and cryptic statement that an "expert could testify" that his "confession is typical of those which are false," failed the test because the defendant did not "allege specific facts about which a confession expert would testify." *Id*. at 821-822. The *Bryant* court did *not* mention the portion of the *Nelson* test which requires identification of a witness by name and an allegation that the witness was available for trial. The *Bryant* Court's application of the *Strickland* test to the defendant's failure to call an expert claim, rather than the heightened pleading requirements described in *Nelson*, suggests strongly that *Nelson*'s holding should only be applied to failure to call a fact witness claims.

The *Bryant* Court got it right. To state a facially sufficient ineffective assistance claim for failure to obtain an expert, a defendant should not be required, in *every* case, to identify an expert by name and swear the expert would have been available to testify at trial. Instead, the defendant should

be held to *Strickland*'s well-established test: a defendant is only entitled to an evidentiary hearing on an ineffective assistance of counsel claim if the defendant pleads, with sufficient factual allegations, how counsel was deficient, and how that deficiency was prejudicial. As held by the *Bryant* Court, to adequately plead prejudice in cases involving the failure to call an expert at trial, a defendant will need to "allege specific facts about which [the] expert would testify." *Id*. at 821-822.

In some cases, a defendant may not be able to pass *Strickland*'s test without identifying an expert by name and alleging the expert could have testified. For instance, if a defendant's claim is that his attorney failed to call a known and readily identifiable expert after a consultation, or that his attorney erroneously chose one known and identifiable expert to testify at trial over another, it makes sense that a defendant should identify the expert his lawyer should have called in order to plead a facially sufficient claim.

But in other cases, such as this one, where a defendant's claim is based on the failure to consult with an expert at all, it is possible to plead facts sufficient to entitle him to an evidentiary hearing without specifying the identity of the expert. It is beyond dispute that, "counsel has a duty to

make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Mr. Lucas's claim is that his trial attorney breached his duty to investigate a defense by failing to secure "an expert in a named field of expertise." *Lucas*, 147 So. 3d at 612. Thus, under *Strickland*, he properly alleged deficient performance.

Likewise, Mr. Lucas adequately pled prejudice under *Strickland* and *Bryant*. He alleged specific facts about which an expert could have testified: "that the injury was not one of permanence, but could be corrected via surgery and/or medicated." He also specifically alleged why that testimony would have been critical. Mr. Lucas identified an element of his charged crime and pointed to weaknesses in the only evidence adduced by the State on that element. Unless the record conclusively refutes his claim, Mr. Lucas should be entitled to an evidentiary hearing.

Nelson's heightened pleading requirements are proper for claims alleging a failure to call an exculpatory fact witness. A defendant who alleges his lawyer should have called an exculpatory fact witness will always be able to identify the witness and will usually be able to make a good faith

assessment of whether the fact witness would have been available at trial. Thus, a more exacting pleading requirement to establish a facially sufficient claim for failure to call fact witnesses is not problematic. The "one size fits all" approach works for fact witnesses because the defendant will always be the source of knowledge.

This is not the case for failure to consult or failure to call an expert at trial claims. The reason is simple. A fact witness has unique personal knowledge of the events in question, and the unavailability of that witness at the time of trial would foreclose any possibility of establishing prejudice stemming from the failure to call that witness.

An expert witness, on the other hand, does not have personal knowledge of the events in question. Thus, a defendant need not call one particular expert; there might be fifteen experts who could testify to the same effect, and whose testimony could serve the same purpose. Therefore, in some cases, a defendant can establish prejudice simply through a showing that there is a reasonable likelihood that consulting with an expert - it does not matter which one - would have changed the outcome at trial. That is the test for prejudice under *Strickland*, and that test should govern here.

As this case demonstrates, there is a wide range of claims that fall between a failure to *consult* an expert, which presents a challenge to counsel's decision not to investigate, and a failure to *call* an expert at trial after counsel investigates, which presents a challenge to a strategic choice made by counsel. Holding defendants at both sides of this range to the same standard is inequitable.

As Mr. Lucas argued in his Motion, it is nonsensical to put the onus of finding an expert on a defendant whose entire claim is based on his attorney's failure to consult an expert in the first place, just to state a facially sufficient claim for postconviction relief.[1] On the other hand, the requirement is not so taxing for the defendant who questions counsel's strategic decision not to *call* a witness after consultation and investigation. In that scenario, the defendant can readily identify the expert and state whether the expert would have been available to testify at trial.

This Court should reject the State's invitation to hold that the heightened pleading requirements described in *Nelson* apply to *every* claim

[1] This is especially true given that most postconviction defendants are incarcerated and "the reality that ninety-nine percent of rule 3.850 claims are filed pro se." *Nelson*, 875 So. 2d at 584 (Fla. 2004) (Anstead, J., dissenting).

of ineffective assistance of counsel based on a failure to use an expert. Instead, this Court should hold that as long as a defendant pleads sufficient facts to describe why counsel was deficient for failing to consult or call an expert witness (i.e. what the expert could have done), and how it was prejudicial, an evidentiary hearing is in order unless the record conclusively refutes the defendants claim.

CONCLUSION

This Court should affirm the decision of the Fourth District Court of Appeal and remand this case for an evidentiary hearing.

DATED this 25th day of March, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 25, 2015, a true and correct copy of the foregoing was electronically served to Luke R. Napodano, at CrimAppWPB@myfloridalegal.com.

/s/ Michael M. Brownlee
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/Michael M. Brownlee
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