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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ERIC LUCAS,

Respondent.

Case No. SC14-1925

****

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

****

REPLY BRIEF ON MERITS

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PRELIMINARY STATEMENT

Petitioner is the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court. Respondent is Eric Lucas, the Appellant in the DCA and the defendant in the trial court.

In this brief, the parties will be referred to as they appear before this Honorable Court, except that the Petitioner may also be referred to as the State.

The following symbols will be used:

R = District Court Summary Record

STATEMENT OF THE CASE AND FACTS

Petitioner relies upon the statement of the case and facts set forth the Initial Brief.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal erred in holding that a defendant does not need to name an expert or allege the expert would have been available to testify at trial. Nothing in *Nelson v. State*, 875 So. 2d 579 (Fla. 2004) limits its holding to lay witnesses. *Bryant v. State*, 901 So. 2d 810 (Fla. 2005)'s requirement of specific factual allegations when claiming failure to call an expert necessarily requires an expert to be consulted prior to filing a postconviction motion. Allowing defendants to allege the substance of expert testimony without naming an expert will allow defendant to obtain an evidentiary hearing by inventing testimony.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT A POSTCONVICTION MOVANT NEED NOT ALLEGE ALL THE ELEMENTS SET FORTH IN *NELSON V. STATE*, 875 SO. 2D 579 (FLA. 2004) IN CLAIMING TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO CONSULT OR CALL AN EXPERT WITNESS.

In his Answer Brief, Respondent asserts that the requirements of *Nelson v. State*, 875 So. 2d 579 (Fla. 2004) do not apply to expert witness claims and should not apply to every claim involving expert witnesses.

First, Respondent argues that nothing in *Nelson v. State*, 875 So. 2d 579 (Fla. 2004) suggests that its holding applies to expert witnesses. However, nothing in *Nelson* suggests the opposite; as Respondent points out, the defendant in *Nelson* claimed ineffective assistance for failing to call both fact and expert witnesses. *See id.* at 586 n.4. Respondent claims this Court's decision in *Bryant v. State*, 901 So. 2d 810 (Fla. 2005) applying *Nelson* to expert witness claims supports his reading of *Nelson* because *Bryant* turned on the defendant's failure to "allege specific facts about which a confession expert would testify." *Id.* at 821–822. Respondent overlooks that this Court in *Bryant* also noted the defendant's failure to even claim to have obtained an expert, *id.* at 821, which was noted in denying a similar claim in *Derrick v. State*, 983 So. 2d 443, 451 (Fla. 2008).

Even if *Bryant* is narrowly viewed in the manner Respondent suggests, his argument begs the question of how a defendant can allege specific facts about which an expert would testify without first consulting an expert. If there are "fifteen experts" that could testify to the same opinion (Ans. Br. at 13), then the defendant can surely name one to demonstrate to the trial court that the claim has merit and warrants an evidentiary hearing. If no expert is consulted prior to filing a motion seeking postconviction relief, from where does the defendant's proposed expert testimony come? Respondent's position would allow defendants to obtain evidentiary hearings on proposed expert testimony with no basis in fact. Such an evidentiary hearing will be a waste of the trial court's time if an expert is not produced that can testify to the facts or opinions alleged in the postconviction motion and can testify that if trial counsel had hired the expert, he would have been able to testify to the facts or opinions at trial. Thus, a postconviction movant should be required to name an expert that could have testified at his trial in accordance with *Nelson* in order to state a facially sufficient claim for failure to call or consult an expert witness at trial.

CONCLUSION

WHEREFORE, based on the arguments and authorities cited in this brief, the State respectfully requests this Honorable Court quash the decision of the Fourth District Court of Appeal and remand for further proceedings.

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CERTIFICATE OF TYPEFACE COMPLIANCE AND SERVICE

I CERTIFY that (1) this brief has been prepared in Times New Roman font, 14 point, and double spaced, and (2) a true and accurate copy of this brief was served on Michael March Brownlee, Esq., Fisher Rushmer, P.A., 390 N. Orange Ave., Ste 2200, Orlando, FL 32801 through the Florida Courts E-Filing Portal at mbrownlee@fisherlawfirm.com on April 16, 2015.

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