IN THE SUPREME COURT OF FLORIDA

WILLIE JAMES HODGES
Appellant,

v.

CASE NO. SC14-878
Lower ct. 2003-CF-005683

STATE OF FLORIDA
Appellee.
_____/

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

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

Mr. Hodges will respond to the State's argument in the Answer Brief on each issue. Mr. Hodges will continue to adhere to the arguments and citations of authority contained in the Initial Brief as well.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING RELIEF WHEN TRIAL COUNSEL WAS INNEFFECTIVE IN FAILING TO CONSULT, RETAIN, AND PRESENT EXPERT TESTIMONY IN BOTH DNA AND BITEMARK ANALYSIS TO REBUT EVIDENCE PRESENTED BY THE STATE AND TO UTILIZE SUCH EXPERTS TO ASSIST IN THE CROSS-EXAMINATION OF THE STATE'S DNA AND BITEMARK EXPERTS.

Mr. Hodges argued in the Initial Brief the trial court erred in denying relief on his claims that trial counsel, Mr. Allred, was ineffective in failing to take the necessary steps to challenge the State's DNA and bite mark expert witnesses through cross-examination and through the use of defense experts. The State argues there was no error because the DNA obtained from blood on a sock found in the area surrounding the crime scene was a 990 quadrillion match.[Answer Brief, p.11-13] The State asserts "The DNA results that Hodges is the perpetrator at one 900 quadrillion remains intact."[*sic*] Contrary to the State's argument, however, the conclusive presence of Hodges' DNA on the sock only proves his blood is on the sock, but does not prove he is the perpetrator "1 in 990 quadrillion."

The sock containing the 990 quadrillion match to Mr. Hodges' DNA was not found inside the residence of the victim. It contained no biological evidence linking the sock to the victim or to the murder scene. The sock was found outdoors in a wooded area and outside the curtilage of the victim's home.[V,781] The sock was not tied to the crime scene and there was no proof linking the sock to the victim. The sock is only linked to Mr. Hodges. The blood stain on the sock was described as "a very minute transfer stain. We are not talking about a very large volume."[V,740]

The presence of Mr. Hodges' DNA on a sock may be considered circumstantial evidence, of which the strength is subject to debate, but it is not conclusive proof Mr. Hodges was the perpetrator. There is little doubt why the State chooses to focus on the sock and ignores the significantly smaller DNA associations between Mr. Hodges and evidence found on the victim in this case and the *Williams* Rule case. The DNA evidence actually found at both crime scenes falls far short of the DNA profile on the sock.

Dr. Melton testified she tested various hairs collected from a Members Only Jacket and a hair found on the victim's blue jeans.[V,R827] Mr. Hodges and his maternal relatives could not be excluded from the hairs based on mtDNA testing.[V,827-828] Dr. Melton also tested a second sock found in the neighbor's

yard where Mr. Hodges' relatives lived.[V,829] The heel and toe of the sock had three DNA markers consistent with a male and were also consistent with 3 genetic markers for Mr. Hodges.[v,829] Dr. Melton did not offer statistical calculations for her results, which is a very significant problem in this case.

Anal swabs taken from the victim were analyzed using YSTR DNA testing.[V,833] Six of ten possible markers were identified in a sperm fraction found in the swab.[V,833] Mr. Hodges could not be excluded from the sperm fraction.[V,834] The statistical range was 1 in 71 for African Americans.[V,654] This figure does not even closely approximate the 1 in 990 quadrillion association with the blood on the sock.

YSTR DNA testing was done on the vaginal swab from Ms. Jansen, the *Williams* Rule victim.[V,837] A partial profile of a sperm fraction with five out of a possible ten markers at one location and seven out of ten at a second location were identified.[V,R837] Mr. Hodges could not be excluded.[V,R838] The statistical range was 1 in 214 persons.[V,654] The profile is very common, as is also the case with the DNA profile from the bite mark.

The DNA evidence found within the bite mark from Ms. Jansen was 1 in 18 or 3 in 214 African Americans, which according to Mr. Noppinger, was a very common profile.[III,362-

363] YSTR DNA was found at only one location in the bite mark.[V,836]

The State's argument of overwhelming DNA evidence of 1 in 990 quadrillion pointing irrefutably to Mr. Hodges as the perpetrator does not exist in the DNA evidence surrounding the anal swabs, the vaginal swabs, and the bite mark. The State cannot demonstrate Allred's failure to prepare for trial, to conduct adequate cross-examination of the State's witnesses, and to present testimony on the commonality of the 1 in 18, the 1 in 71, or 3 in 214 profiles did not fall below reasonable professional norms and result in prejudice sufficient to undermine confidence in the outcome of the trial. Allred's failure to cross-examine Dr. Melton, Ms. Johnson from Cellmark and Dr. Tracey on the methods and statistical calculations used with such a common profile constituted ineffective assistance of counsel under State v. Fitzpatrick, 118 So.3d 737, 753 (Fla. 2013).

The State asserts Murray v. State, 692 So.2d 157 (Fla. 1997), requires the use of "an expert in population frequency statistics to testify as to the DNA statistics."[Answer Brief, p.10] The State argues that Murray requires them to call a genetics expert, such as Dr. Tracey. This assertion is incorrect. In Murray this Court rejected the qualifications of a particular expert, but the opinion does not require the use of

geneticist or an expert in population frequency statistics. Murray required the expert have familiarity with the database from which to derive the statistical calculation is derived. According to Murray the requisite familiarity may come from review and knowledge of authorities detailing the creation of the database.

The State's argument in this case that a population frequency geneticist was required was specifically rejected in Butler v. State, 842 So.2d 817, 828 (Fla. 2003). In Butler this Court emphasized it found a specific expert to be unqualified in Murray, but did not specify a particular type of required expert. Butler upheld the testimony of an FDLE expert who was not a population geneticist, but who had sufficient knowledge of the relevant authorities on the creation and composition of the relevant database used to derive the statistical calculations. Thus, the FDLE expert had an adequate basis to render her opinion. There was no testimony in this record to establish Dr. Melton, Cassie Johnson, or Jennifer Hatler lacked similar expertise and would not have been qualified to from testify about the statistical calculations they reached in compliance with SWIGDAM guidelines.

Dr. Tracy did not testify he had the specific qualifications of having created or been involved with the creation of any database. His credentials were no greater than

the state witnesses who actually performed the testing. There was no "controlling Florida Supreme Court precedent", as the State argues, which required the State to call a population geneticist such as Dr. Tracy, particularly when his testimony was based on no greater basis of knowledge than the actual experts who performed the testing.[Answer Brief, p.10]

The State was not required to call a population frequency geneticist, but defense counsel was required to educate himself on the forensic and scientific issues in the case, identify any impeaching or exculpatory evidence which might assist the defense, properly prepare for trial, cross-examine state witnesses to ensure proper adversarial testing of the State's case, and explore the need for and call defense witness to rebut the State's expert witnesses and advance the theory of defense. Allred failed to carry out the duties this Court outlined in Fitzpatrick to the detriment of his client, Mr. Hodges.

The State maintains there was no prejudice resulting from Allred's failure to challenge the bite mark evidence because "The bite mark evidence was not the centerpiece of the State's evidence against Hodges; the DNA evidence was." This argument underscores the need for Allred to have actually challenged the DNA evidence, but does not excuse his complete failure to familiarize himself with the State's bite mark expert and his conclusions prior to trial and to be prepared to rebut the

fantastical statements made by Dr. Levine, the State forensic odontologist. Mr. Hodges will rely on the arguments from the Initial Brief directed at Dr. Levine and the failure to rebut his testimony with the use of proper cross-examination and/or a defense expert.

Contrary to the State's central argument in this case, the minute amount of blood belonging to Mr. Hodges on a sock found in a wooded area apart from the victim's house did not establish Mr. Hodges as the perpetrator to the degree of 1 in 990 quadrillion. The minute amount of blood on the sock meant Mr. Hodges had contact with the sock, but it did not mean he was the perpetrator. The sock was not linked in any fashion to the crime. Allred's failures are not only related to the sock, the State overlooks the obvious failures of Allred to challenge the DNA evidence actually found on the victim's bodies. The trial court's denial of relief on Claims I, II, III, and VIII was error.

ISSUE II

THE TRIAL COURT ERRED IN DENYING MR. HODGES'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CALL HIM AS A WITNESS WHEN THE ENTIRE DEFENSE CASE, INCLUDING OPENING STATEMENT, WAS CONDITIONED ON MR. HODGES' TAKING THE STAND. MR. HODGES' DECISION TO REMAIN SILENT WAS PREMISED ON MISAVICE BY TRIAL COUNSEL.

In this case trial counsel Allred built the entire defense case on Mr. Hodges' testifying. The defense case was laid out

in opening statement. Mr. Allred told the jury Mr. Hodges would take the stand and testify his belongings, including his clothing and personal photographs, were stolen from him prior to the murder. Mr. Hodges' would deny making any inculpatory statements to Debra Silvers and Inmate Breedlove. However, after years of pretrial preparation, opening statements, and the presentation of the majority of the State's case, Allred inexplicably changed his mind and advised Mr. Hodges' he should not testify. Allred had no alternative theory of defense and no means of presenting the theory of defense without Mr. Hodges' testimony. Mr. Hodges claimed Allred told him if he testified the State could impeach him about the *Williams* Rule case, an uncharged Alabama case, and his prior record. Based on the misadvice about the extent of impeachment, Mr. Hodges testified he decided he would not testify.

The State argues a claim for ineffective assistance of counsel can never be predicated on the failure to testify, citing to United States v. Wines, 691 F.3d 599, 605 (5th Cir. 2012). Wines did not reach that holding. In Wines the defendant alleged his federal counsel was ineffective for failing to call him as a witness, despite his instruction to do so. The Court did not address the prong of deficient performance, but instead disposed of Wines' claim by finding there was no prejudice. The Court did so, first noting Wines'

would have undergone "scorching cross-examination" about his prior record which included so many prior convictions the Court termed them "clowder of cats in the bag that had yet to escape". Secondly, the Court found Wines' proposed testimony was cumulative to the evidence in the trial record, and contradicted testimony from witnesses favorable to Wines, including his own mother. The Court observed, in dicta, they were not aware of any defendant successfully proving prejudice under Strickland on a claim premised on counsel's advice to not testify at trial, but the Court did not find such a claim to be incapable of being established.

Unlike Wines, Mr. Hodges did suffer prejudice as a result of his failure to testify. There was no testimony in the record to establish the defense Mr. Allred promised the jury they would hear. Without Mr. Hodges' testimony there was no evidence in the record to explain the presence of his clothing and personal photographs at the victim's yard and surrounding area. Mr. Hodges' testimony would not have been cumulative to the evidence in the record.

Neither did Mr. Hodges' have a "clowder" of impeachable offenses. Mr. Hodges' had only two prior convictions, both known to Allred before trial. Allred did not testify he advised Mr. Hodges to forgo testifying because he was concerned about the two prior convictions, thus the State's speculation that

"Some defense attorneys advise every one of their clients with a criminal record not to testify regardless of any other considerations and think that any defendant with a criminal record who testifies is merely convincing himself" was not a concern voiced by Allred.

The State's reliance on United States v. Terry, 366 F.3d 312 (4th Cir. 2004) is likewise misplaced because the facts are substantially different from this case. In Terry the defendant claimed counsel was ineffective for advising him not to testify where his testimony might have impacted the sentence he received. Terry did not argue there was any prejudice suffered at trial due to his failure to testify or the outcome at trial might have been different if he had testified. Ibid, at 315. The Court affirmed the denial of relief because Terry had given only a cursory outline of what his testimony about the drug transaction would have been, whereas the other testimony relied on by the lower court in sentencing was specific and detailed and the lower court had previously determined the witness who gave the testimony to be very credible. Ibid., at 316. Mr. Hodges gave specific testimony to the trial court. Mr. Hodges' testimony was the only testimony which could establish a defense to the charges, unlike the testimony in Terry.

The State cites to Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995), as part of the same argument that a claim

premised on advising a client to forgo testifying cannot be sustained under Strickland, however that issue was not before the Court in Waters. The issue in Waters was how defense counsel had conducted the penalty phase, the failure to introduce mitigating evidence, and the introduction of mental health testimony during guilt phase. No claim asserting ineffective assistance of counsel for failing to have the defendant testify or for misadvising the defendant about the parameters of impeachment was before the Waters court.

Claims of ineffective assistance for the failure to call a witness to testify are assessed for prejudice by weighing the State's case against the defense case considering the evidence that would have been admitted had counsel called the witness at issue. *See*, Anderson v. Johnson, 338 F.3d 382, 393 (5th Cir. 2003)[finding prejudice under Strickland with the application of the standard of weighing the State's case against the defense case with the omitted testimony]. Mr. Hodges submits he has demonstrated sufficient prejudice since without his testimony there was no defense at all.

The State relies on Jones v. Sec'y, Dep't. of Corr., 487 Fed. Appx. 563, 565; 2012 WL 3641549, 1 (11th Cir. 2012), claiming the appellate court found "no competent counsel" would have advised Jones to testify. That is not what the Court stated. The exact quotation is:

> "There is, at the very least, a reasonable argument that Jones' counsel was not deficient for advising Jones not to take the stand to show the jury his tattoos and teeth. He cannot establish that "no competent counsel" would have advised him not to take the stand, Chandler, 281 F.3d at 1315, particularly because the State would have challenged his credibility on cross-examination and the jury would have learned he had five felony convictions." Ibid., at 567.

Jones had argued his attorney was ineffective for failing to call him as a witness to show his "full sleeve" tattooed arms and his three gold teeth in light of testimony from the victims the robber had one gold tooth and the testimony of one victim that he did not see tattoos on the arms of the perpetrator. However, the Court pointed out the same witnesses stated the presence of full sleeve tattoos would not change his identification because he concentrated on the face, not the arms, of the perpetrator and noted the three victims all identified Jones from a photo pack. There is no suggestion in the opinion that Jones' lawyer told the jury in opening statements Jones would testify or show his tattoos and teeth. There is no suggestion in the opinion that Jones' lawyer conceded evidence linking Jones to the crime scene belonged to Jones, then failed to present any evidence to explain the presence of Jones' personal belongings at the crime scene other than Jones being the perpetrator.

The Court found no prejudice because Jones' counsel was able to present the mistaken identity defense through cross-examination and argument based on the lack of evidence. In this case Allred wholly failed to present evidence of the theory of defense and could made no argument based on the lack of evidence after conceding Mr. Hodges' personal property and clothing were found at the crime scene without any evidence to show how those items could have been brought there by a perpetrator other than Mr. Hodges.

Jones further recognized the failure to advise a defendant correctly on the scope of impeachment permitted by the State regarding prior convictions could constitute deficient performance and cited to several Florida cases. However, the Court found Jones had failed to establish prejudice given the prior analysis of the evidence establishing guilt. Jones was able to present his defense of mistaken identity without testifying, Mr. Hodges had no defense unless he testified.

The State heavily relied on a misstatement of the evidence in their argument Mr. Hodges' suffered no prejudice. There were no photographs found in the jacket, as the State asserts.[Answer Brief, p. 21] Crime Scene Technician Johnson testified the photographs were found in the victim's yard outside the "exit window."[V,721-22;753] The photographs were in plastic sleeves.[V,722-23] The "sleeve" was about the size of a billfold

with a trifold.[V,754-55] The jacket was found in a swampy wooded area.[V,755] The jacket had dried mud on it.[V,756] There was no blood on the jacket.[V,756-7] Some transient hairs were found sticking to the mud on the jacket and the jacket was vacuumed.[V,763-68] A Newport cigarette package containing three cigarettes was found in the jacket pocket.[V,768] CST Johnson did not testify any personal photographs or any photographs at all were found in the jacket. Only a cigarette pack was found in the jacket and only hairs were found on the jacket.

Based on the record, the trial court's denial of relief on Claim X is subject to reversal.

ISSUE III

THE TRIAL COURT ERRED IN DENYING RELIEF ON CLAIM VII WHICH ALLEGED TRIAL COUNSEL WAS INEFFECTIVE WHEN HE CALLED WINTESS WILLIE McCASKILL, WHO THEN IDENTIFIED MR. HODGES IN AN INCRIMINATING MANNER, AND THEN COULD NOT IMPEACH MR. McCASKILL.

Mr. Hodges argued trial counsel Allred was ineffective when he called Mr. Willie McCaskill as a defense witness in light of Mr. McCaskill's identification of Mr. Hodges as the man he saw in his yard shortly after the crime. Allred told the jury in opening statements the man Mr. McCaskill encountered in his yard was the perpetrator.

The State argues there was no error or prejudice as a result of Allred's actions, citing to Mountjoy v. State, 750 S.W.2d 471 (Mo. App. Ct. 1988). [Answer Brief, p. 25] Besides

being a case from outside this jurisdiction and with no binding authority on this Court, Mountjoy is clearly distinguishable from this case. In Mountjoy the defendant claimed his lawyer was ineffective when he called a police officer to testify without deposing him, despite the fact counsel had interviewed the officer on two occasions. The officer's testimony contradicted Mountjoy's testimony on only one minor point- Mountjoy claimed he dropped money off at a bar parking lot at 10th and Central Street in Kansas City, MO and the officer testified the money drop occurred at an apartment at 10th and Central in Kansas City, MO. The appellate court found the small discrepancy in the testimony was not sufficient to establish the requisite prejudice, since the remainder of the officer's testimony corroborated Mountjoy.

In this case Allred did not call a defense witness who disagreed with the defendant's testimony on a very minor point. Mr. Hodges had not testified. Mr. McCaskill did not corroborate the defense other than for a very minor point as did the officer in Mountjoy, Mr. McCaskill incriminated Mr. Hodges and identified him, according to trial counsel, as the perpetrator. Mountjoy does not address the issue that arises when counsel calls a witness who establishes, according to defense counsel, that his client is the perpetrator.

The State's argument that trial counsel is not ineffective when he stipulates to facts that were much more damning than live testimony is not applicable to this case under Simmons v. State, 105 So.3d 472, 491-92 (Fla. 2012). The State's argument overlooks the entire reason for the stipulation in this case was caused by the deficient performance of trial counsel. This is not a case where the lawyer stipulated to facts possessed by the State, such as the undisputed lab results in Simmons. The stipulation in situations like Simmons do not result from the actions of defense counsel in assisting the State, but stem from evidence already in possession of the State which would be admitted irrespective of trial counsel's conduct. The stipulation benefits the defendant where the stipulation is less harmful than live testimony. In this case the stipulation might have been less damaging than Mr. McCaskill's testimony, but any gain in the stipulation was obliterated when Allred called Mr. McCaskill as a witness after the stipulation was entered into evidence. Thus, the goal of Simmons was defeated.

Allred called Mr. McCaskill as a witness *after* entering into the stipulation. Mr. McCaskill's actual testimony then proved more damaging than the stipulation. If the basis for the stipulation was to lessen the impact of damaging testimony, Allred's calling Mr. McCaskill as a witness vitiated any

reasonable basis for entering into the stipulation under Simmons.

Mr. Hodges' has demonstrated both prongs of Strickland. The trial court's order denying relief should be reversed.

ISSUE IV

THE TRIAL COURT ERRED IN DENYING RELIEF ON CLAIM VI WHICH ALLEGED TRIAL COUNSEL WAS INEFFECTIVE BY FALIING TO PROCURE THE PHONE RECORDS OF IDA MAY LEWIS HIBLER IN ORDER TO IMPEACH WITNESS DEBRA SILVER. SILVER CLAIMED MR. HODGES CALLED HER AT THE HOME OF MS HIBLER AND CONFESSED TO HER IN MAY 2003.

In his testimony at the evidentiary hearing Mr. Hodges denied talking to Debra Silver in May 2003. Mr. Hodges testified he had been in a relationship with Ida Mae Lewis Hibler. Mr. Hodges testified Ms. Hibler did not have a telephone in May 2003. AT&T, in response to a defense subpoena, responded there were no phone records for Ms. Hibler in May 2003. The subpoena requested AT&T provide documentation of all calls to and from the Hibler residence, as well as any documentation of cancellation or disruption of service for the Hibler address in May 2003. Ms. Silver had admitted in her trial testimony phone service at the Hibler residence was not always continuous. In fact, sometimes different numbers were given for the address as a result of the service disruption.

The State argues AT&T's response means there were once records, but the records were no longer available. That is not what AT&T's response stated. Both the interpretation advanced by the State in the Answer Brief and the trial court's conclusion are based on speculation that the response of AT&T meant something other than the actual response. Just as Mr. Hodges may not successfully raise a claim based on speculation, a claim may not be denied based on speculation. The State's speculation about how Ms. Silver's might have responded if confronted with evidence there was no phone [Answer Brief, p.28] would have given the jury important information to judge her credibility, her memory, and her ability to recall. The lack of impeachment deprived the jury of the tools necessary to evaluate Silver's credibility.

Allred's failure to obtain the statement from AT&T coupled with the failure to have Mr. Hodges testify resulted in a break-down of the adversarial system. *See*, Chandler v. State, 702 So.2d 186, 195 (Fla. 1997). Under the totality of the circumstances, the trial court erred in denying relief. *See*, Long v. State, 118 So.3d 798 (Fla. 2013).

ISSUE V

THE TRIAL COURT ERRED IN DENYING RELIEF ON CLAIM V WHICH ALLEGED TRIAL COUNSEL WAS IN-EFFECTIVE WHEN HE FAILED TO CROSS-EXAMINE STATE WITNESSES JIMMY WILLIAMS AND DEBRA TAYLOR ON THEIR IDENTIFICATION OR A JACKET

AND SHOES FOUND NEAR THE SCENE.

Mr. Hodges argued trial counsel Allred's performance was deficient when he failed to cross-examine witnesses Jimmy Walters and Debra Taylor on the absence of any unique or distinguishing features on the shoes and jacket they identified as being either the actual belongings of Mr. Hodges or the actual clothing of the perpetrator.

The State alleges there was no prejudice because "Based on the personal photograph in the jacket, the jury would have concluded the jacket was Hodges' jacket, regardless of any such questions."[Answer Brief, p.29] and "But, more importantly, counsel would have looked silly cross examining [*sic*] a witness in a vain attempt to establish that the jacket was not Hodges' jacket. Hodges' personal photographs with his fingerprints were found inside the jacket."[Answer Brief, p.30] This argument must fail because it is not supported by the facts.

Crime Scene Technician Johnson testified the personal photographs were found in the victim's yard outside the "exit window."[V,R721-22] The photographs were in a plastic "sleeve" roughly the size of a wallet with a trifold.[V,753-55] The jacket was found in a swampy area.[V,755] Johnson processed the jacket.[V,717] The jacket had a lot of mud on it.[V,755] A vacuum sweeping of the jacket yielded transient hair and fibers that were in stuck in the mud.[V,763-67] A Newport cigarette

package containing three cigarettes was found in the pocket of the jacket.[V,768] There was no blood on the jacket.[V,717-18;756-57] Johnson did not testify any photographs were found in the jacket. [V,717-18] There is no evidence any of the photographs were found in the jacket.

Cross-examination of both witnesses to establish the jacket could not be identified as belonging to Hodges' was important because there was nothing unique about the jacket and nothing belonging to Hodges was found in the jacket. Allred testified he didn't cross-examine on these points because he was going to call Mr. Hodges as a witness to testify his jacket, shoes, and personal photographs had been stolen. The failure to cross-examine on the absence of unique features was only reasonable if Mr. Hodges' testified. If Mr. Hodges did not testify, counsel's job was to make sure evidence was presented to the jury that the jacket was similar, at best, to a jacket Hodges had once worn and similar to the jacket seen by Ms. Taylor. When Allred abandoned the defense strategy contingent upon Mr. Hodges' testifying, his decision to forgo cross-examination of Williams and Taylor was unreasonable and not supported by any tactical or strategic basis. The jury was left with a positive identification by both Williams and Taylor of the jacket and shoes as belonging to both Mr. Hodges and the perpetrator.

The failure to cross-examine these witnesses was deficient performance and Mr. Hodges suffered the requisite prejudice. Under the totality of the circumstances, reversal is required.

ISSUE VI

THE TRIAL COUT ERRED IN DENYING RELIEF ON CLAIM IX WHICH ALLEGED TRIAL COUNSEL WAS INEFFECTIVE WHEN CROSS-EXAMINING CST JANICE JOHNSON LEADING TO THE INTRODUCTIONS OF TESTIMONY THAT WAS CONTRARY TO THE DEFENSE AT TRIAL.

Mr. Hodges' issue focused on CST Janice Johnson's testimony on cross-examination that is was her opinion the perpetrator entered the victim's house bare handed, obtained socks from inside the house, and used the socks to cover his hands after the murder based on the presence of Mr. Hodges' blood on the sock found in the wooded area.[I,47] Johnson testified on cross-examination she believed it was not probable the blood got on the sock prior to the murder.[I,48] The defense theory of the case was contingent on the blood being on the sock prior to the murder.

The State responds "Regarding the lack of Hodges' fingerprints inside the house, there is no point in impeaching the crime scene tech on this point because the State could have easily rehabilitated her by merely asking a series of questions about whether fingerprints are always left by a person. The State could have easily established that even if Hodges did not

wear gloves at any point, his fingerprints would not necessarily be found inside the house. There was no point quibbling about this."[Answer Brief, p.33] The State's response fails to address the claim. Mr. Hodges did not raise a claim centered on the lack of cross-examination on the question of whether or not Mr. Hodges' fingerprints were inside the house or not. Mr. Hodges challenged the CST Johnson's testimony about the timing and source of the blood deposit on the sock and the origins of the sock.

Allred did cross-examine CST Johnson about fingerprints.[V,724-727;733;761] Mr. Hodges did not allege Allred was ineffective for failing to cross-examine CST Johnson about the fingerprint evidence because he did conduct cross-examination about fingerprints. No incriminating evidence and no evidence that was contrary to the defense theory of the case was elicited by Allred during the cross-examination of CST Johnson on issues related to the fingerprints, so Mr. Hodges did not allege Allred was ineffective for introducing incriminating evidence during his cross-examination about fingerprints.

Mr. Hodges raised a claim of ineffective assistance of counsel that is supported by the trial transcripts premised on the cross-examination of CST Johnson on the source of the socks, her opinion on when and how the perpetrator used the socks, and whether the blood got on the sock prior to or after the murder.

The State's response does not address the issue raised by Mr. Hodges.

Allred's introduction of evidence which was contrary to the defense theory of the case satisfies both prongs of Strickland when considered in conjunction with the other errors in this case. Relief on this Issue is warranted.

CONCLUSION

Reversal is warranted in this case. Based upon the arguments and citations of law and other authorities, the order of the trial court should be set aside and the case remanded for further proceedings.

Respectfully submitted,

/s/Robert A. Norgard
ROBERT A. NORGARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forging REPLY BRIEF has been furnished to the Office of the Attorney General, ASA Charmaine Millsaps at capapp@myfloridalegal.com and charmaine.millsaps@myfloridalegal.com , The Capital, PL-01, Tallahassee, FL 32399 via the e-portal this **6th** day of February, 2015.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style font used in the preparation of this Reply Brief is Courier New-12 point in compliance with Fla. R. App. P. 9.210.

/s/Robert A. Norgard

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