No. SC21-1778

Lower Tribunal No. CF07-009386-XX

IN THE

Supreme Court of Florida

LEON DAVIS, JR.
Appellant,

v.

STATE OF FLORIDA,
Appellee.

On Appeal from the Circuit Court, Tenth Judicial Circuit, in and for Polk County, Florida

Honorable Donald G. Jacobsen, Presiding Judge

REPLY BRIEF OF APPELLANT

STACY R. BIGGART
Special Assistant CCRC-North
Fla. Bar No. 0089388
3495 SW 106th Street
Gainesville, FL 32608
stacybiggart@gmail.com

COUNSEL FOR APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Davis's motion for postconviction relief under Fla. R. Crim. P. 3.851. The State has filed its answer to Mr. Davis's initial brief, and this reply follows. This reply will address only the most salient points argued by the State. Mr. Davis relies upon his initial brief in reply to any argument or authority argued by the State that is not specifically addressed in this reply.

CITATIONS TO THE RECORD

The following symbols are used to designate references to the record: the trial proceedings in volumes 67 through 99 are designated with "T" followed by the volume and page number(s); "R" followed by the volume and page number(s) refers to the record on appeal; "PCR" refers to the postconviction record on appeal. Citations to the record on appeal from the BP trial are as follows: "BP" followed by the volume and page number(s). All other references are self-explanatory.

REPLY TO REQUEST FOR ORAL ARGUMENT

Mr. Davis objects to the State's statement that oral argument should not be granted in this case. According to Fla. R. App. P. 9.142(a)(4), "[o]ral argument *will* be scheduled after the filing of the

defendant's reply brief." (emphasis added). Mr. Davis respectfully requests that this Court follow the Florida Rules of Appellate Procedure and hear oral argument on Mr. Davis's appeal.

ARGUMENT IN REPLY TO ISSUE 1

THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO SEEK A CHANGE OF VENUE FOR TRIAL

Trial counsel was deficient for failing to request a change of venue from Polk County for Mr. Davis's trial. As a result of trial counsel's deficient performance, Mr. Davis was denied his constitutional right to a fair and impartial jury and trial. There was no assurance that Mr. Davis's jurors were not polluted by the significant and entirely pro-prosecution pretrial publicity in Polk County.

The State's argument that Mr. Davis failed to establish that a motion for change of venue would have been granted (AB. 51-52) ignored Judge Hunter's extensive comments about the extent of the publicity surrounding the mistrial of this case and his search for a new venue. Judge Hunter reported the following to the State and defense counsel:

> I can tell you that I went home that night that I declared the mistrial and my wife had Channel 9 on. And before I could pour a glass of water, it came on television and I watched it. And after I watched it, I hit the mute button and sat down at the kitchen table where I could still see the television and had several more glasses of water and it was being shown every 30 minutes.
>
> And then the next day I went to the gym, as I do every day, and I get on the treadmill first before I - - for about five minutes to warm up before I start working out, and there's television sets up there and there it was again.
>
> And then someone told me you could get on The Ledger's website and they had a version of it you could click on and watch.
>
> And I can tell you that I went to the post office and a lady waited on me that I have never laid eyes on before in my life, and she said something to the effect that – I don't remember how she worded it, but—
>
> ***
>
> And, you know, here she sees me out of context. I'm not wearing a robe obviously at the post office, so I have real concerns as to whether we can get a jury here. And so I have already started looking at options. And I have already made some phone calls.

(R56. 9259-60).

Judge Hunter even acknowledged that "people that may not have been paying attention to this case that much, because they don't like reading or watching about crime, when he flew over the railing, it got everybody's attention. You can't imagine how many

people have called me or told me they saw that on television. . .” (R56. 9268).

As evidenced by Judge Hunter’s own comments, the publicity after the mistrial was not just “some publicity” as characterized by the State. (AB. 53-54). The declaration of the mistrial and the attack on Mr. Davis and Andrea Norgard by members of the victims’ family was not a small event in Polk County. Rather, the event was extensively covered in the local press and the judge could not leave his home without encountering someone who wanted to discuss it.

The State’s reliance on *Bundy v. State*, 471 So. 2d 9 (Fla. 1985) was misplaced. (AB. 52). Bundy was tried for the murder of Kimberly Leach after he was convicted for the January 1978 murders of the Chi Omega Sorority members in Tallahassee. His trial was originally set in Suwanee County where the victim’s body was discovered. Bundy’s motion for a change of venue was *granted* and the case was transferred to the circuit court in Orange County. *Bundy v. State* is easily distinguishable from Mr. Davis’s case because the issue in Bundy’s appeal was whether trial court should have granted *another* change of venue because some jurors in Orange County were familiar with the Chi Omega murders in Tallahassee. Mr. Davis argued that,

like Bundy, his case should have been moved from the county where the crimes occurred, and that counsel should have made a motion for change of venue due to the intense and entirely pro-prosecution publicity in Polk County, especially after the trial court declared a mistrial and the victims' family attacked Mr. Davis and Ms. Norgard.

The record is clear that Judge Hunter was willing to grant a motion for change of venue, and had trial counsel made such a motion, the outcome of Mr. Davis's trial would have been different. A jury outside of Polk County that was not exposed to the intense and inflammatory local pretrial publicity would have considered the State's evidence *and* Mr. Davis's compelling defenses instead of making a decision based on bias and preconceived opinions rooted in the community's knowledge of the crime.

ARGUMENT IN REPLY TO ISSUE 2:

THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO OBJECT TO COMMENTS BY THE TRIAL COURT TO THE VENIRE THAT THE PHOTOS OF THE VICTIMS WERE UNIQUELY GRAPHIC AND HE WAS HANDLING MR. DAVIS'S CASE DIFFERENTLY FROM ALL OTHER DEATH PENALTY CASES

Trial counsel was deficient for failing to object to the trial court's prejudicial and needless comments about the photographs of the victims that telegraphed to the jury that Mr. Davis's case was worse than all the other cases he had handled during his sixteen years on the bench. The prejudice was exacerbated when trial counsel failed to object to the court's gratuitous comments about the State Attorney's decision to seek the death penalty in Mr. Davis's case. As a result of trial counsel's deficient performance, Mr. Davis was denied his constitutional right to a fair and impartial jury and trial.

This Court should disregard the State's claim that this issue was not preserved for appeal. (AB. 54-56). Mr. Davis did not change his claim on appeal. Mr. Davis's claim on appeal, as well as his claim in the circuit court, argued that Judge Hunter's comments about the victim's photographs communicated to the jury that the photographs

of the victims in Mr. Davis's case were graphic and that in his sixteen years on the bench, and three and a half years of handling all the murder cases in his circuit, he had never had to publish photographs to the jury pretrial like he did in Mr. Davis's case. Judge Hunter told the jury:

> - This case is truly not for the faint of heart. The photographs alone in this case are graphic.
>
> - For the last three and a half years, I have handled all of the first-degree murder cases in this circuit, and I have been doing this for 16 years, so I have seen a lot in my service on the bench.
>
> - I don't normally give this kind of presentation for my other cases, we just simply tell folks there may be some semi-graphic photographs, if you have a weak stomach, let us know, we'll talk about it. But I don't do it quite like we're doing this.

(R71. 803-06). What interpretation of Judge Hunter's words makes sense other than that the photographs of the victim's injuries in Mr. Davis's case were the worst he had ever seen?

This Court should also disregard the State's argument that the trial court's deleterious comment about the charging discretion of the State Attorney's Office was "merely as statement of fact." (AB. 59). The State's characterization of the trial court's comment as a statement of fact is a misrepresentation of the judge's unnecessary

and prejudicial commentary to the venire. There was no justifiable purpose for telling the venire that sometimes the State does not seek death in first-degree murder cases. A common sense inference from the court's comment was that the State only sought the death penalty in the worst of the worst cases, and since the State sought a death sentence in Mr. Davis's case, his case must have been among the worst of the worst.

Mr. Davis was prejudiced by trial counsel's failure to object to these comments. Trial council should have argued that although the jurors should be shown photographs of the victims during individual voir dire, no comments should be made that singled Mr. Davis's case out as worse than any other cases. But for the trial court's gratuitous comments and trial counsel's failure to object to them, the result of the proceeding would have been different.

ARGUMENT IN REPLY TO ISSUE 3:

THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO ENGAGE IN A CASE-SPECIFIC VOIR DIRE

Trial counsel was deficient for failing to engage in case-specific voir dire in Mr. Davis's capital trial. As a result of trial counsel's

deficient performance, Mr. Davis was denied a fair and impartial jury and trial.

This Court should disregard the State's reliance on the mere fact that trial counsel had a strategy for jury selection. (AB. 61-62). Mr. Davis did not dispute that trial counsel articulated a strategy at the evidentiary hearing. However, trial counsel's strategy for jury selection was lazy and objectively unreasonable. He did not consider the ABA Guidelines or the widely-accepted theory among capital defense practitioners that capital jury selection is a "highly specialized and technical procedure." 31 Hofstra L. Rev. 913 (2003).

Strickland requires that "[t]he trial strategy itself must be objectively reasonable." *Strickland*, 466 U.S. at 681. Trial counsel failed to conduct a voir dire that was tailored to expose those prospective jurors who were predisposed to vote for guilt no matter what because of the victims' horrible injuries. Trial counsel failed to ask questions that would expose jurors who would not be able to keep an open mind and consider Mr. Davis's mitigation. It was critical that trial counsel discover any jurors for which no mitigating circumstances would ever outweigh the victim's injuries.

The guilt and penalty phases of Mr. Davis's capital trial were not bifurcated. It was incumbent upon trial counsel to plan for a possible penalty phase during jury selection because that was his one shot at picking a jury for both phases. Trial counsel's strategy to refrain from asking the prospective jurors if they could still consider a life sentence for Mr. Davis if they were to find him guilty does not make sense. After all, when Mr. Davis's venire was asked about their thoughts and feelings on the death penalty during voir dire, they were already being asked to consider what they would do if Mr. Davis was found guilty.

Trial counsel's failure to ask critical questions during voir dire to discover jurors who would never be able to vote for life in Mr. Davis's case no matter how compelling Mr. Davis's mitigation deprived Mr. Davis of a fair and impartial jury.

ARGUMENT IN REPLY TO ISSUE 4:

TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO FILE A MOTION TO SUPPRESS THE GREISMAN PHOTOPACK BASED ON OFFICER TOWNSEL'S CHAIN OF CUSTODY VIOLATION, AND THE CIRCUIT COURT ERRED IN DENYING THIS CLAIM WITHOUT AN EVIDENTIARY HEARING

Trial counsel was deficient for failing to file a motion to suppress the Greisman photopack based on Officer Townsel's chain of custody violation. As a result of trial counsel's deficient performance, Mr. Davis was denied his constitutional right to a fair trial.

The State claimed that "[a] photo-pack created by law enforcement for the purpose of an after-the-fact identification is not the type of 'physical evidence' usually requiring a chain of custody." (AB. 63). Perhaps, but that is because it is unusual for an investigator in a capital murder case to take evidence home and store it in a backyard shed.

At trial, Mr. Davis's identification expert William Gaut criticized Detective Townsel's misplacing the original photopack shown to Brandon Greisman by taking it home. According to Mr. Gaut:

> That is the kind of mistake that should not happen. The detective should not take original evidence home, or anywhere else. Original evidence has to stay with the case folder, and has to be properly documented so that when

> you have a case in 2007, and you have a trial that occurs in 2011, there is no question about chain of evidence as to where things went, who had them, you know, where it is, who had possession, and where it was supposed to be.

(R94. 4774).

Officer Townsel's handling of the photopack was governed by the Lake Wales Standard Operating Procedure, Section 13-1, which required that all evidence in possession of department members be appropriately handled and stored in a sealed evidence bag in the property room at the end of their shift. Officer Townsel's testimony that the photopack was not tampered with while it was in her garage is not credible because she testified untruthfully at Mr. Davis's trial that there was always a copy of the Greisman photopack in evidence even if the original was misplaced in her garage for several years. *See* Headley Initial Brief, Claim 1.

The circuit court should have granted an evidentiary hearing on this claim and allowed postconviction counsel to explore why trial counsel failed to protect Mr. Davis's constitutional rights regarding the tainted photopack.

ARGUMENT IN REPLY TO ISSUE 5:

TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO FILE A MOTION TO SUPPRESS THE FRUITS OF A STALE SEARCH WARRANT, AND THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS'S CLAIM WITHOUT AN EVIDENTIARY HEARING

Trial counsel was deficient for failing to protect Mr. Davis's right to unreasonable searches and seizures under the Fourth Amendment and file a motion to suppress the fruits of the search warrant for Victoria Davis's Nissan Altima. As a result of trial counsel's deficient performance, Mr. Davis was denied his constitutional right to a fair trial.

Mr. Davis's initial brief incorrectly stated that the warrant was returned January 8, 2008. (IB. 85). Actually, the search warrant was not returned until May 14, 2008. Not only was it late, but the Inventory and Receipt and the Return were *completely blank* when the warrant was returned. The State's answer brief only addressed the delay of the return and was silent on the fact that it was completely blank. (AB. 66-69). Detective Metz did not fill out the blank return page and what he claimed to be the original property receipt and return it to the court until *nine months after* Judge Griffin authorized it. (PCR. 1812-14).

The State's cases are distinguishable from Mr. Davis's case. (AB. 67-68). The facts in *State v. Featherstone*, 246 So. 2d 597 (Fla. 3d DCA 1971) were not as egregious and the facts in Mr. Davis's case. In *Featherstone*, the return was not made for ten days after the issuance of the search warrant, a much shorter length of time than the nine months it took law enforcement to provide a completely blank return to the issuing court in Mr. Davis's case.

In *Joyner v. City of Lakeland*, 90 So. 2d 118 (Fla. 1956), the return and property receipt were not completely blank when filed. The inventory in *Joyner* was missing a statement that it "contain[ed] a true and detailed account of all the property taken under the warrant. *Id*. at 122.

The *Joyner* Court's citation to *Dixon v. United States*, 211 F.2d 547 (5th Cir. 1954) referred to the fact that eight days passed between the issuance and the execution of the search warrant. It is not analogous to the facts in Mr. Davis's case where a completely blank return and inventory page were provided to the court nearly nine months after the warrant was issued.

The State used the floormats seized from the search to attempt to connect Mr. Davis to the gasoline used to douse the victims and

set them on fire. This evidence was critical to the State's case because prosecutors had no other direct physical evidence that linked Mr. Davis to the Headley crime scene.

This Court should also disregard the State's argument that items seized from the Nissan Altima did not affect the outcome of Mr. Davis's trial. (AB. 68-69). Trial counsel's abandonment of a constitutionally significant issue did not advance Mr. Davis's interests in any way and was certainly not strategic. The evidence seized from the Altima, including the floor mats, played a major role in this case.

The circuit court should have granted an evidentiary hearing on this claim and allowed postconviction counsel to explore why trial counsel failed to move to suppress this damaging evidence. Mr. Davis was prejudiced by trial counsel's deficient conduct because the evidence seized from the Nissan Altima was critical to the State's case. There is a reasonable probability that if the State's lone physical evidence that possibly linked Mr. Davis to the crime scene was suppressed, the result of the proceeding would have been different.

ARGUMENT IN REPLY TO ISSUE 6:

TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO PRESENT EVIDENCE TO THE JURY THAT WOULD RAISE REASONABLE DOUBT, AND THE CIRCUIT COURT ERRED IN DENYING MR. DAVIS'S CLAIM WITHOUT AN EVIDENTIARY HEARING

Trial counsel was deficient for failing to confront the State's law enforcement witnesses with evidence that there was dash cam footage recorded at the Headley scene that mysteriously disappeared. As a result of trial counsel's deficient performance, Mr. Davis was denied his constitutional right to a fair trial.

The State's reliance on Officer Crosby's deposition testimony was misguided. (AB. 70). The best evidence of the footage from the dash cam video was the dash cam video itself. Witnesses do not always tell the truth. That is why trial lawyers are trained to impeach witnesses with prior inconsistent statements and other evidence – like videos – that contradict their testimony. Trial counsel's reliance on Officer Crosby's deposition testimony rather than actually request a copy of the dash cam video was deficient performance.

Trial counsel had knowledge that there was video footage of the events that took place in the parking lot immediately following the crime. The video could have been valuable during the cross-

examination of Lt. Elrod if it showed that the actions in the Headley parking lot did not play out the way he claimed. That video could have provided footage of Lt. Elrod's actions at the scene and provided impeachment evidence to challenge his testimony that he spoke to Ms. Bustamante and heard her dying declaration. (AB. 71). The State's argument that the dash cam video footage was "inconsequential" and that Mr. Davis's claim was "entirely speculative" were unfair. (AB. 72). Mr. Davis does not know what is on the dash cam video because trial counsel failed to request it, and the State failed to preserve it.

The circuit court should have granted an evidentiary hearing on this claim and allowed postconviction counsel to explore why trial counsel failed to use this critical information to chip away at the State's case, undermine the credibility of the investigation conducted by the Lake Wales Police Department, and raise reasonable doubt.

ARGUMENT IN REPLY TO ISSUE 7:

THE CIRCUIT COURT ERRED IN FINDING THAT CUMULATIVE ERROR DID NOT DEPRIVE MR. DAVIS OF A FUNDAMENTALLY FAIR TRIAL

The State contends that this Court does not need to undertake a cumulative prejudice analysis because "all of Mr. Davis's claims are

either meritless, procedurally barred, or do not satisfy the *Strickland* standard for ineffective assistance of counsel. (AB. 73).

This Court should properly examine the issues raised in Mr. Davis's initial brief, despite the State's erroneous assertions that there was no deficient performance and therefore no need to examine cumulative prejudice. And because this is a case of ineffective assistance of counsel, "any analysis of prejudice must be done on a cumulative basis." *Parker v. State*, 89 So. 3d 844, 860 (Fla. 2011).

This Court should be mindful that it

> must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors [resulting from ineffective assistance of counsel], and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have an isolated effect. A verdict or conclusion only weakly supported by the record is more likely to have been affected by the errors than one with overwhelming record support.

Strickland, 695-96. Finally, this Court should focus on "the fundamental fairness" of Mr. Davis's trial because "despite the strong presumption of reliability, the result of [his trial] is unreliable because of a breakdown in the adversarial process our system counts on to produce just results. *Id.*

Trial counsel's representation of Mr. Davis at trial was not the "meaningful adversarial testing" or "guiding hand of counsel" envisioned under *Powell v. Alabama*, 287 U.S. 45, 69 (1932), *United States v. Cronic*, 466 U.S. 648, 654-656 (1984) and *Strickland*. There is no confidence in the verdict and Mr. Davis's case should be remanded for a new trial.

ARGUMENT IN REPLY TO ISSUE 8:

THE RECORD SUFFICED TO CREATE BONA FIDE DOUBT IN MR. DAVIS'S COMPETENCE TO PROCEED. THE CIRCUIT COURT THUS ERRED IN DENYING MR. DAVIS'S MOTION FOR A COMPETENCY EVALUATION BEFORE GRANTING THE STATE'S MOTION TO EXCLUDE ALL MENTAL HEALTH TESTIMONY AND EVIDENCE AND SUMMARILY DENYING CLAIM 17

The circuit court erred in denying Mr. Davis's motion for a competency evaluation before granting the State's motion to exclude all mental health testimony and evidence and summarily denying Claim 17. The court prioritized expediency over Mr. Davis's constitutional rights.

This Court should disregard the State's argument that Mr. Davis's claim should be denied because the request for a competency evaluation was not in writing. (AB. 74). Although Rule 3.851(g) requires a written motion, the request for a competency evaluation of

Mr. Davis arose during postconviction counsel's oral response to the State's argument in favor of its motion filed a month prior to the hearing. The circuit court ruled on the State's motion during this hearing, so there was no opportunity for postconviction counsel to file a written motion for the evaluation.

The State's argument that the oral request did not specify what observations of, and conversations with, Mr. Davis formed the basis of the request is misleading. (AB. 74). Postconviction counsel addressed Mr. Davis's demonstrated history of mental illness, the fact that prior counsel had not conducted any mental health-related mitigation investigation, the fact that postconviction counsel had some mental health evidence but that Mr. Davis did not want it introduced at the hearing, and postconviction counsel also specified that Mr. Davis's waffling between allowing or disallowing mitigation was the reason for the request.

This Court should also disregard the State's claim that postconviction counsel did not specify what factual matters required competency consultation. (AB. 74). Mr. Davis's history of mental illness coupled with his contradictory stances regarding mitigation

should sufficiently specify the factual matter in question, i.e., was Mr. Davis competent to waive his penalty phase claims.

Regarding the State's claim that the circuit court's order did not address the competency issue and counsel did not request a ruling (AB. 74), this Court should focus on the fact that the circuit court gave its ruling orally at the hearing before asking the State to draft a written order capturing the court's rulings.

Postconviction counsel did not request a colloquy to assess Mr. Davis's competency at the evidentiary hearing because this request was made during the hearing on the State's motion to exclude all mental health evidence and was firmly denied by the court. (AB. 79).

Finally, even if this Court finds that postconviction counsel did not meet the requirements of Fla. R. Crim. P. 3.851(g), the circuit court still had an obligation under Fla. R. Crim. P. Rule 3.210(b) to *sua sponte* order a competency evaluation of Mr. Davis. "The meaning of the rule is clear and unambiguous. The plain meaning of the rule requires the court on its own to immediately order a hearing regarding a defendant's competence, but only if there exists a reasonable ground to believe appellant is not competent." *Laster v. State*, 212 So. 3d 392, 393-94 (Fla. 2017). As detailed in Mr. Davis's

initial brief on page 104, Mr. Davis's case presented "facts that would trigger the obligation" for the circuit court to *sua sponte* order a competency evaluation." *Id.* at 395.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Davis respectfully urges this Court to reverse the circuit court, set aside his convictions and sentences, and remand his case for a new trial; or in the alternative, reverse the circuit court's order barring mental health evidence from the evidentiary hearing and remand Mr. Davis's case to the circuit court for a competency hearing and a new evidentiary hearing.

Respectfully submitted,

/s/ Stacy R. Biggart
STACY R. BIGGART
Special Assistant CCRC-North
Florida Bar No. 0089388
3495 SW 106th Street
Gainesville, FL 32608
(850) 459-2226
stacybiggart@gmail.com
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant has been furnished via electronic service to Marilyn Beccue, Assistant Attorney General, on this 25th day of October, 2022.

s/ *Stacy R. Biggart*
STACY R. BIGGART

CERTIFICATE OF FONT

I hereby certify that the foregoing Reply Brief of Appellant was generated in Bookman Old Style 14-point font and 4346 words excluding the title page, tables, certificates and signature block, pursuant to Fla. R. App. P. 9.210(a)(2)(C).

s/ *Stacy R. Biggart*
STACY R. BIGGART