No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT NATHANIEL BROWN,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the Florida First District Court of Appeal

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR THE PETITIONER

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Supreme Court of Florida

THURSDAY, SEPTEMBER 22, 2022

CASE NO.: SC22-675
Lower Tribunal No(s).:
1D20-2213; 162014CF000122AXXXMA

ROBERT NATHANIEL BROWN vs. STATE OF FLORIDA

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

CANADY, POLSTON, LABARGA, COURIEL, and GROSSHANS, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

lc
Served:

MICHAEL L. SCHAUB
MICHAEL R. UFFERMAN
HON. KRISTINA SAMUELS, CLERK
HON. MARIANNE LLOYD AHO, JUDGE
HON. JODY PHILLIPS, CLERK

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

April 26, 2022

CASE NO.: **1D20-2213**
L.T. No.: 16-2014-CF-000122-AX

Robert Nathaniel Brown	v.	State of Florida
Appellant / Petitioner(s),		Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion docketed February 03, 2022, for rehearing is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Hon. Ashley Moody, AG
Michael Ufferman

Michael L. Schaub, AAG

th

KRISTINA SAMUELS, CLERK

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-2213

ROBERT NATHANIEL BROWN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Duval County.
Marianne L. Aho, Judge.

January 19, 2022

LONG, J.

Robert Brown appeals the trial court's order denying relief on all seven of the claims raised in his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We affirm the order on all grounds and write only to discuss Ground Three, an ineffective assistance of counsel claim which was summarily denied.

To successfully establish an ineffective assistance of counsel claim, the claimant must show that counsel's representation was deficient, and that the deficiency so affected the proceeding that confidence in the outcome is undermined. *Johnston v. State*, 70 So. 3d 472, 477 (Fla. 2011). Deficient representation means "errors so serious that counsel was not functioning as the 'counsel'

guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The State charged Brown with one count of DUI manslaughter and two counts of DUI causing serious bodily injury. One of the key issues at trial was a dispute over whether it was Brown's or the victim's vehicle that was travelling the wrong way into oncoming traffic. The State asserted that it was Brown and presented the testimony of two crash reconstruction experts to support this theory. The experts explained their reconstruction methodologies and concluded that Brown's vehicle was driving against traffic, resulting in the crash. On cross-examination, Brown's trial counsel highlighted several inconsistencies in witness accounts of the crash. He pointed out that some witnesses believed it was the victim's car that was driving in the wrong direction. Trial counsel also challenged the experts' analysis of the crash and highlighted the uncertainties inherent in a reconstruction.

Brown alleged that his trial counsel was ineffective for failing to retain and present an independent accident reconstruction expert to refute the State's witness testimony. Brown argued that, had trial counsel retained a defense expert, the expert would have opined that it was the victims' vehicle driving in the wrong direction. On appeal from the trial court's summary denial, Brown argues this claim was facially sufficient and not conclusively refuted by the record and so it should have been heard at an evidentiary hearing. We disagree.

First, Brown's claim is pure speculation. He assumes a hypothetical third expert would have analyzed the crash differently than the first two and that the new analysis would have been favorable. "Relief on ineffective assistance of counsel claims must be based on more than speculation and conjecture." *Connor v. State*, 979 So. 2d 852, 863 (Fla. 2007). There is no need to hear from trial counsel at an evidentiary hearing when the claim is legally insufficient.

Second, regardless of the speculative nature of the claim, "*Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and

opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation." *Harrington v. Richter*, 562 U.S. 86, 111 (2011). This is exactly what happened here. Even if the claim were facially sufficient, the trial strategy of Brown's trial counsel is both obvious and sufficient. The record conclusively refutes the claim.

AFFIRMED.

MAKAR and NORDBY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Michael Ufferman of Michael Ufferman Law Firm, P.A., Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Michael L. Schaub, Assistant Attorney General, Tallahassee, for Appellee.

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2014-CF-00122-AXXX

DIVISION: CR-H

STATE OF FLORIDA

v.

ROBERT NATHANIEL BROWN,
Defendant.
_____/

ORDER DENYING DEFENDANT'S RULE 3.850 MOTION

This matter came before this Court on Defendant's "Rule 3.850 Motion," filed through counsel on November 9, 2018, pursuant to Florida Rule of Criminal Procedure 3.850. This Court Ordered the State to Respond to certain grounds of Defendant's Motion on February 22, 2019. On June 11, 2019, this Court Granted Defendant an Evidentiary Hearing on Ground One of the instant Motion. The evidentiary hearing was held on November 15, 21, and 26, 2019.

On July 2, 2015, a jury found Defendant guilty of one count of Driving Under the Influence Manslaughter (Count One) and two counts of Driving Under the Influence with Serious Bodily Injury (Counts Two and Three). (Ex. A.) On August 28, 2015, the trial court sentenced Defendant to a fifteen-year term of imprisonment on Count One, and consecutive two-and-a-half-year terms of imprisonment on Counts Two and Three. (Ex. B.) Through a Mandate issued on November 9, 2016, the First District Court of Appeal affirmed Defendant's convictions and sentences. (Ex. C.)

In the instant Motion, Defendant raises six grounds of ineffective assistance of counsel and one ground of cumulative error. To prevail on a claim of ineffective assistance of counsel, a

defendant must show counsel's performance was outside the wide range of reasonable professional assistance and counsel's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995). Counsel's performance need not be perfect but must not fall below the required standard. Bruno v. State, 807 So. 2d 55, 68 (Fla. 2001). This involves a "context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." Jones v. State, 928 So. 2d 1178, 1186 (Fla. 2006) (citing Wiggins v. Smith, 539 U.S. 510, 523 (2003)); see Strickland, 466 U.S. at 689. A defendant making a claim of ineffective assistance must identify with specificity the acts or omissions he or she alleges to be outside the range of professional conduct and bears the burden to overcome the presumption that the challenged conduct "might be considered sound trial strategy." Strickland, 466 U.S. at 690.

In addition to demonstrating that counsel's performance fell below reasonable standards, a defendant must also demonstrate prejudice. Id. at 687; Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999). Generally, to show prejudice, a defendant must show there is a reasonable probability that, but for counsel's deficiency, the outcome of the proceeding would have been different. Strickland, 466 U.S. at 694.

Ground One

Defendant suggests counsel was ineffective for failing to investigate and litigate issues with the State's blood evidence. This Court will address the allegations as segmented by Defendant. This Court held an evidentiary hearing to address the allegations of this Ground.

a. Discovery of Blood Evidence

Defendant avers there is no evidence to suggest counsel sought or examined even the basic documentation regarding the blood draw, such as: accreditation certificates; laboratory

policies; information and maintenance reports regarding the equipment used; or the search warrant leading to the blood draw. Defendant further asserts counsel did not interview the State's expert prior to trial to investigate these matters.

In the instant Motion, other than listing those potential issues, Defendant does not explicitly argue how trial counsel's alleged deficiency resulted in any prejudice that alone could have affected the outcome of the trial. "Relief on ineffective assistance of counsel claims must be based on more than speculation and conjecture." Connor v. State, 979 So. 2d 852, 863 (Fla. 2007). The State's Tenth Supplemental Discovery Exhibit lists Kristie Shaw, from the Florida Department of Law Enforcement ("FDLE"), as an expert witness, as well as the FDLE Toxicology Results. (Ex. D.) Defendant's contention that counsel did not seek or examine such evidence is speculative. Trial counsel would have had access to the FDLE Toxicology Results, and Defendant has presented no concrete evidence showing trial counsel did not examine any of the items listed in Defendant's Motion.

Further, based on testimony from the evidentiary hearing, Defendant has not sufficiently proven ineffectiveness under this subclaim. At an evidentiary hearing, Defendant has the burden of presenting evidence to prove his claims. See Fla. R. Crim. P. 3.850(f)(8)(B); Pennington v. State, 34 So. 3d 151, 154-55 (Fla. 1st DCA 2010). Defendant, in his Motion, argues that trial counsel's file contained no evidence that they sought or examined critical blood test evidence. Defense witness and attorney, Ms. Annemarie Rizzo, testified regarding the blood alcohol content ("BAC") results, noting that she saw nothing indicating an investigation by trial counsel into how Kristie Shaw came to her conclusion of a 0.85 blood alcohol level. (Ex. E at 72.) Ms. Rizzo then opined the bare minimum a defense lawyer should do is obtain the litigation packet from FDLE, which would contain all information regarding the tested blood sample, including

chain of custody, work bench notes, and the chromatograms which would show the alcohol within the blood sample. (Ex. E at 73-74.) During cross-examination, Ms. Rizzo acknowledged that: she did not know if the blood test results were incorrect; she did not obtain or review the FDLE records to verify whether the testing procedures were carried out correctly or not; a defendant could still be found guilty by a jury even when all of her recommended discovery procedures were carried out, and; she could not think of a particular instance when FDLE test results were excluded or suppressed because of improper analysis found in a litigation packet. (Ex. E at 121-26.)

Ms. Rizzo's testimony did not establish that trial counsel was ineffective regarding the blood testing discovery evidence. Ms. Rizzo testified about her own experience, what she would have done if she were the defense attorney on this case, and how she felt about trial counsel's representation given her review of the case file and transcripts. However, Ms. Rizzo gave no testimony as to what trial counsel actually did or did not do at each step of their investigation, nor how the allegedly omitted acts prejudiced Defendant. Ms. Rizzo did not obtain or review the FDLE file in this case. She could not refute the veracity of the test results, point to any specific abnormalities with the testing procedures in this case, or think of a time where FDLE test results were excluded or suppressed due to improprieties found with the testing procedures. See Crain v. State, 78 So. 3d 1025, 1034-38 (where the defendant argued ineffective assistance of counsel because trial counsel failed to challenge the veracity of DNA testing as insufficient and not independently carried out, that court found the defendant failed to establish prejudice when "[t]he postconviction record does not disclose any definitive evidence of invalid or even questionable . . . test results."). Ms. Rizzo acknowledged that even if trial counsel had carried out discovery as she would have done a jury could still find a defendant guilty. Defendant has not

proven, either through submitted evidence or witness testimony, that trial counsel acted below a standard of reasonable professional assistance or how, but for the alleged deficiency in this subclaim, the result of Defendant's trial would have been different. Therefore, Defendant is not entitled to relief under this subclaim.

b. Suppression of Blood Evidence

Defendant avers counsel in whole failed to investigate the lawfulness of the blood draw, move to suppress those results, and advise Defendant that such an issue existed. Defendant avers counsel could have moved to suppress these results based on lack of probable cause, lack of evidence that Defendant was in actual physical control of a vehicle, or based on the fact that the blood draw occurred five hours after the accident. Defendant maintains counsel's ineffectiveness is demonstrated by the fact that it was not until after trial in counsel's Motion for New Trial that he mentions an issue with Defendant's refusal being admitted and erroneously argues that the implied consent laws did not apply because he would have had to be "lawfully arrested" for such to apply.

This Court finds any motion to suppress blood results on the basis of lack of probable cause would have been meritless. Corporal Jason Tolman ("Corporal Tolman") of Florida Highway Patrol testified that when he encountered Defendant at the hospital, Defendant had a "very strong odor of an alcoholic beverage emanating from his person and his mouth each time he was exhaling." (Ex. F at 440-41, 442, 447-48.) Corporal Tolman further noted Defendant's eyes were glassy and watery and his speech was mumbled. (Ex. F at 441, 444, 447-48.) Corporal Tolman also described Defendant's inability to stay awake when talking to him and testified he had difficulty rising Defendant to speak to him. (Ex. F at 442, 447-48.) Corporal Austin Bennett ("Corporal Bennett") of Florida Highway Patrol noted these same observations from his

encounter with Defendant at the hospital. (Ex. F at 478, 479.) The witnesses testified that taking these factors together along with the fact that Defendant had been in an accident where a vehicle was driving the wrong way led Corporal Bennett to believe Defendant was under the influence of alcohol and request search warrant for Defendant's blood. (Ex. F at 447-48, 479-81.) Moreover, Defendant was the only injured individual at the crash who was not in the victims' car. Accordingly, although no witness testified that they observed Defendant in the car, the troopers still had sufficient probable cause to warrant a blood draw. See State v. Brown, 725 So. 2d 441, 445 (Fla. 5th DCA 1999) ("The odor of alcohol on a driver's breath is a critical (if not the only) factor in many cases involving admissibility of a blood test under the statute.").

This Court likewise finds the blood test would not have been excluded based on the passage of time between the accident and the blood draw. "The inability of the state to 'relate back' blood alcohol evidence to the time the defendant was driving a vehicle is a question of credibility and weight-of-the-evidence, not admissibility, provided the test is conducted within a reasonable time after the defendant is stopped." Miller v. State, 597 So. 2d 767, 770 (Fla. 1991). Time is generally unreasonable if the results of the test do not tend to prove or disprove a material fact or if the evidence's probative value is outweighed by its potential to cause confusion. Id.; State v. Banoub, 700 So. 2d 44, 45-46 (Fla. 2d DCA 1997). In Banoub, the court found blood evidence admissible that was drawn four hours after the defendant was pulled over. Here, this Court finds five hours is not unreasonable, particularly considering that Trooper Tolman believed he could get a consensual blood draw from Defendant who then changed his mind, prompting the troopers' need to go retrieve a search warrant. (Ex. F at 443-44.) Moreover, the results indeed tended to prove a material fact, especially considering the State's expert had sufficient information to perform retrograde extrapolation to estimate Defendant's blood alcohol

level at the time of the crash. (Ex. F at 573-74.) Accordingly, this Court finds no reasonable probability the result of the proceeding would have been different even had counsel filed a motion to suppress on those grounds.

Lastly, contrary to Defendant's current assertions, counsel indeed objected to the State's mentioning of Defendant's refusal of the blood draw when the State first mentioned in during opening arguments. (Ex. F at 235-37.) Counsel then renewed her objection again when Corporal Tolman began testifying regarding Defendant's refusal. (Ex. F at 443.) The trial court overruled defense counsel's objections both times. Counsel then further preserved the issue for appeal in the Motion for New Trial. (Ex. G.) Despite any erroneous arguments that may have been made in the Motion for New Trial, the trial had already occurred and the trial judge had already overruled counsel's objections to the testimony regarding Defendant's refusal. Thus, there is no reasonable probability the result of the proceeding would have been different without such arguments. Accordingly, this Court finds counsel was not ineffective on these bases.

c. Hospital Blood Evidence

Defendant avers it was improper for the hospital blood evidence to be admitted at trial where there was a legal blood draw and analysis. Defendant avers counsel should have objected because the evidence was cumulative, irrelevant, and only served to bolster the State's position that Defendant's BAC was over the legal limit. Defendant states there is no evidence in counsel's file that he ever researched the issue of the admissibility of hospital results. Defendant, however, outlines several issues he asserts are generally raised regarding such tests and results. Defendant states these issues could have been raised to exclude these results for trial, or in the least, be used through cross examination or the use of their own expert to refute the evidence, none of which occurred in this case. Rather, Defendant states counsel's cross examination of this witness

showed the lack of preparation on the issues and opened the door to testimony regarding the equipment having been calibrated properly.

Initially, this Court notes that this evidence was not cumulative because it is a test from a different time, closer to the time of the crash than Defendant's legal blood draw. Moreover, it was relevant because it tended to prove his blood alcohol level was above the legal limit, as well as relevant to give another data point to the State's expert who conducted the retrograde extrapolation. This is especially necessary where Defendant asserts the legal blood draw from five hours later was too remote in time to be relevant. Additionally, these records are admissible medical records entered appropriately at trial. Moreover, while hospital blood test results generally yield higher results, the State's expert openly admitted and presented this evidence at trial, converting the results into legal comparisons. (Ex. F at 575-76.) This Court finds an attempt to exclude this evidence would have likely been unsuccessful. See Baber v. State, 775 So. 2d 258 (Fla. 2000) (finding hospital record of blood test made for medical purposes was admissible as medical or business record); Robertson v. State, 604 So. 2d 783 (Fla. 1992) (holding that blood drawn for medical purposes, independent of the implied consent statute, are admissible); Laws v. State, 145 So. 3d 937 (Fla. 2d DCA 2014) (medical blood test admissible even where defendant refused to take blood or breath test). Even if the hospital blood draw results were independently inadmissible as evidence, it could have been presented through the expert as the data relied upon. See § 90.704, Fla. Stat.

Additionally, this Court notes that Defendant's medical blood draw would have resulted in a lower extrapolated BAC of .11 to .12 at the time of the accident, while his legal blood draw would have resulted in an extrapolated BAC range of .14 to .21. (Ex. F at 573-74.) Accordingly, such results only lessened his potential extrapolated BAC from that which it would have been

using only the legal blood draw results, lessening any potential prejudice from the evidence. Further lessening any potential prejudice and deficiency is counsel's elaborate cross examination of the expert testifying to these results and the retrograde extrapolation. (Ex. F at 586-90, 601-02, 604, 607.) For these reasons, this Court finds Defendant is not entitled to relief on this basis.

d. Retrograde Extrapolation

Defendant states counsel should have moved to exclude the testimony regarding retrograde extrapolation of Defendant's BAC levels. Defendant avers this process is rarely deemed reliable under the facts and that counsel may not have even been aware that this evidence was going to be presented since he failed to depose the FDLE analyst, Kristie Shaw, prior to trial. Defendant posits it was prejudicial that Shaw was able to extrapolate on Defendant's legal blood results and hospital test to estimate Defendant's BAC to be at .14 at the time of the accident.

Defendant's contention that trial counsel likely did not know RE evidence would presented because they failed to interview Kristie Shaw before trial is unconvincing. Counsel likely knew to expect extrapolation testimony despite not deposing Shaw because she and her extrapolation evidence were cited within the arrest and booking report. (Ex. H.)

Professor Paul Doering testified about retrograde extrapolation ("RE") and the metabolizing of alcohol generally. Professor Doering testified that the liver can process one alcoholic beverage an hour, with the postabsorbative state occurring once drinking has ceased while the body continues to process the alcohol previously consumed; the alcohol remains in the body to be processed after one stops physically drinking. (Ex. E at 26-27.) Contrary to Defendant's contention in the instant Motion about RE being rarely deemed reliable, Professor Doering testified RE is a reliable scientific method assuming that certain factors, such as the time

the last drink was consumed, what type of drink it was, and whether any food was eaten during the applicable time frame, are accounted for. (Ex. E at 28, 30.) While Prof. Doering agrees with RE as a concept, he did not think it well utilized in this case. (Ex. E at 31.)

On cross-examination, Prof. Doering testified that: at some point after drinking ceases, blood alcohol level will reach a peak before dropping at a rate of approximately .015 per hour; he had not reviewed the FDLE notes, the litigation packet, or the extrapolation report; a BAC of .085 and .086, which Defendant had five hours after the crash, is above the legal limit of .08 in Florida, and; he was not in court to perform his own RE analysis, and was not testifying that it could not have been done at all, but rather that he did not know if Ms. Shaw had enough information to perform valid RE herself. (Ex. E at 42, 44-45, 47.) Also, Prof. Doering stated that had Ms. Shaw used Prof. Doering's .015 figure and performed RE, her result would have fallen above a .08. (Ex. E at 49-50.) Prof. Doering acknowledged that based on Ms. Shaw's numbers and methods the calculations and math appeared to be correct, and that he would not opine that Defendant had a BAC below 0.08 at the time of the crash. (Ex. E at 52.)

Based on the testimony at the evidentiary hearing, Defendant has not proven trial counsel was ineffective under this subclaim. Even if counsel was deficient for allowing RE evidence to be admitted, Defendant was not prejudiced. Defendant's blood test results following the legal blood draw at the hospital, taken five hours after the crash, show BAC levels of .085 and .086. (Ex. H at 3.) Those values are both over the legal limit of 0.08 BAC. See § 316.193, Fla. Stat. (2014). Even without RE, Defendant's blood test proved he was above the legal limit to operate a motor vehicle *five hours after* the crash occurred. Given Professor Doering's testimony, it stands to reason that Defendant's body would have been processing one drink per hour (or .015 BAC per hour) during that five-hour period between the crash and his legal blood draw. Yet his BAC

was still over the legal limit after five hours of not drinking any alcohol. Defendant's facial area smelling of alcohol when he spoke and his bloodshot and watery eyes lent probable cause to the attesting officers that Defendant was under the influence of alcohol. Even if the RE values had been suppressed or excluded from evidence, the BAC test results and the officers' notes and testimony would still have been available to the jury for consideration. Because Defendant has not proven that but for the alleged ineffectiveness the result of his trial would have been different, Defendant is not entitled to relief under this subclaim.

Ground Two

Defendant maintains counsel acted ineffectively by entering into a signed stipulation that Defendant was in actual physical control of the vehicle during the accident. Defendant avers counsel never advised him of this stipulation or explained the importance thereof. Defendant states the paramedic who dealt with Defendant first saw Defendant on the ground on a stretcher and the only civilian witness who may have seen Defendant at the scene was not interviewed until two months after the accident, was never asked to identify the driver in the accident, and was not able to be located by the State. Defendant, therefore, avers there was no reason for counsel to stipulate to the actual physical control element.

This Court finds the record refutes Defendant's allegations. Approximately two weeks before trial, the trial court conducted a status hearing during which the parties addressed this stipulation. (Ex. I at 4-7.) Counsel explained that the State was considering a continuance after having witness difficulties and that Defendant wished to avoid a continuance, which led them to agree to the stipulation. (Ex. I at 4.) Counsel explained that he discussed it with his Defendant, had Defendant "sleep on it," and then asked him again whether he wanted to enter the stipulation, and that Defendant indicated each time that he wished to proceed with the

stipulation. (Ex. I at 4.) The trial court then conducted a colloquy with Defendant in which Defendant assured the court that he understood the stipulation, had sufficient time to discuss the stipulation with counsel and consider whether to enter it, and was "fully comfortable agreeing to this stipulation of facts." (Ex. I at 5-7.) Moreover, at trial, the State presented the 911 call from a corrections officer who reported a male was stuck in the Nissan (Defendant's car). (Ex. F at 401-03.) Accordingly, this Court finds no deficiency on the part of counsel and finds Defendant is not entitled to relief on this Ground.

Ground Three

Defendant alleges counsel was ineffective for failing to fully investigate his own defense. Defendant avers counsel's only defense was based on causation and despite the State presenting two witnesses to testify Defendant was traveling the wrong way in the road and two accident reconstruction experts, counsel never conferred with its own accident reconstruction expert. Defendant asserts he even discussed his displeasure regarding this issue when the court asked if there was anything else he expected counsel to present at trial.

Initially, this Court notes the defense is not required to hire expert witnesses to rebut the State's expert witnesses. The United States Supreme Court stated: "Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation." Harrington v. Richter, 562 U.S. 86, 111 (2011).

As Defendant mentions, the State presented two experts who opined Defendant's car was traveling in the wrong direction. (Ex. F at 463, 467-73, 502-04, 507-11, 685, 697, 714-15, 729-32, 738.) The State also presented cell phone data which helped corroborate the directions of

each vehicle. (Ex. F at 502, 626-31, 643-55, 665-73.) Therefore, this Court finds it completely speculative for Defendant to assert an expert hired by the defense would have come to an opposite and defense-favorable position. Such speculation cannot warrant relief. See Maharaj v. State, 778 So. 2d 944, 951 (Fla. 2000) ("Postconviction relief cannot be based on speculation or possibility."). Moreover, this Court finds counsel indeed used cross-examination of these witnesses to point out potential flaws in their conclusions. (Ex. F at 514-17, 519-27, 738-49, 753-54.)

Additionally, while Defendant states he expressed his displeasure to the court, this Court finds that allegation to be refuted by the record. After counsel presented two witnesses on Defendant's behalf, the trial court conducted a colloquy with him regarding his decision regarding taking the stand and whether he had the desire to present additional information. (Ex. F at 855-58.) During this colloquy, Defendant stated that there were no other witnesses he wanted his attorneys to call and no other evidence he wished for counsel to present. (Ex. F at 857-58.) Defendant may not now go behind that sworn testimony. For these reasons, this Court denies Ground Three.

Ground Four

Defendant states counsel was ineffective for stipulating to the State's omnibus motion in limine. Defendant specifically mentions there was no reason for counsel to stipulate to paragraph two regarding the age of the case and paragraph three regarding Defendant refraining from wearing his military uniform. (Exs. J; K.) Defendant further avers counsel was deficient for failing to object to paragraph ten of the motion which precluded Defendant from making arguments that the State was required to show Defendant's faculties were impaired to prove the charged offenses.

As to paragraph two of the motion in limine, the State only asked that Defendant not be allowed to argue the "inherent weakness" of the case due to its age. As this case was not precluded by statute of limitations and because this did not preclude the defense from highlighting why such actions took so long to be completed by the investigators, this Court finds counsel had no reason to object to this paragraph. (Ex. F at 518, 519-20.) Moreover, this Court finds no reasonable probability the result of the proceeding would have been different even had counsel made such an objection. As to paragraph three of the motion in limine, this Court finds there is no reasonable probability the result of the proceeding would have been different even had counsel objected and Defendant had been able to wear his military uniform. This is true because the jury is instructed to make its ruling on only the evidence presented.

As to paragraph ten, the State was required to prove *either* impairment *or* that Defendant's blood alcohol level was above the legal limit. § 316.193, Fla. Stat.; Fla. Std. Jury Instr. (Crim) 7.8; 28.3. This motion in limine request only limited Defendant from arguing the State was required to show impairment to prove the case, which would not be an accurate argument if the jury found Defendant guilty under the theory related to Defendant's blood alcohol level. Contrary to Defendant's assertions, this did not deprive Defendant of arguing that he was not impaired. Indeed, counsel attempted to suggest any signs of impairment or intoxication observed by the troopers could have been side effects from being in the accident or medication from his treatment at the hospital. (Ex. F at 445, 448-49, 517-19, 784-86.) Thus, counsel was not ineffective for stipulating to that request. Based on the above, this Court finds counsel was not ineffective on this basis.

Ground Five

Defendant asserts the State presented "vast amounts" of cell phone data and the testimony of several witnesses to establish that Defendant was driving in the wrong direction and the other car was traveling in the correct direction. Defendant maintains counsel was ineffective for failing to interview or depose these witnesses. Moreover, while Defendant notes the State did not list this evidence until weeks before trial, counsel never objected to its untimeliness or move to continue the trial to review it. Defendant contends counsel also failed to interview possible experts to refute the cell phone witnesses presented by the State.

Once a court believes a discovery violation occurred, it must complete a Richardson inquiry "to address whether the violation was inadvertent or willful, trivial or substantial, and whether it caused prejudice or harm to the opposing party. Comer v. State, 730 So. 2d 769, 774 (Fla. 1st DCA 1999). If the court believes a remedy is necessary, exclusion of the evidence should be considered as a "last resort." McDuffie v. State, 970 So. 2d 312, 322 (Fla. 2007).

Here, the State disclosed the cell tower history records through a discovery exhibits filed on June 8, 2015 and June 11, 2015. (Ex. L.) As trial did not begin until June 30, 2015, the State provided this evidence over two weeks in advance. Accordingly, this does not likely qualify as a discovery violation, let alone a willful or substantial one which would have prejudiced Defendant. Even if the court found a remedy necessary based on the time of disclosure, exclusion would have been the last resort and very improbable. Rather, the court would have likely granted a continuance to allow the defense more time to review the documents and prepare. However, Defendant had indicated prior to trial that he did not wish for a continuance. (Ex. I at 4.)

Moreover, the witnesses who testified regarding these records were records custodians who testified generally about how cell phones work and then the specifics about what the records indicated, but did not draw any conclusions of what that data meant. (Ex. F at 621-31, 638-55, 664-73.) Counsel elicited testimony that how cell phones "typically work" does not mean they always work that same way and that the records may not indicate the tower to which each cell phone was closest. (Ex. F at 656-59.) This Court cannot fathom any reasonable probability the result of the proceeding would have been different if counsel had deposed these witnesses ahead of time or hired an expert to review these records. This is especially true considering the eyewitness testimony and the testimony of the crime scene reconstruction experts that Defendant's vehicle was travelling in the wrong direction at the time of the crash. For the above reasons, Defendant is not entitled to relief on this Ground.

Ground Six

Defendant avers counsel acted deficiently in failing to object to "several pieces" of inadmissible hearsay evidence presented at trial. This Court will address each in turn.

a. Use of Report by Trooper Fachko

Defendant first asserts counsel should have objected to Trooper Fachko being allowed to use his report under the past recollection recorded exception without the State laying the proper foundation. This Court finds the proper foundation was laid to enable Trooper Fachko to use her report to refresh her memory. (Ex. F at 425-27.) Accordingly, counsel cannot be deemed deficient for failing to object. Moreover, this Court finds Trooper Fachko's testimony to be limited and assuming arguendo she was not able to testify, the result of the proceeding would not have been different.

b. Hearsay by Corporal Bennett

First, Defendant avers counsel should have objected when Bennett was permitted to testify that Defendant refused to provide a blood sample because it was hearsay and because it is inadmissible where the dictates of Florida's Implied Consent laws are not followed. (Ex. F at 480.) Second, Defendant states counsel was ineffective for failing to object to Bennett's testimony regarding how the search warrant was obtained and what was said between the on-call prosecutor and the judge who signed the warrant. Lastly, Defendant avers counsel should have objected to Bennett's testimony that another officer found Defendant's cell phone in Defendant's car and that someone who knew Defendant verified that it was indeed Defendant's phone.

Initially, this Court notes counsel objected to testimony regarding Defendant's refusal during the State's opening, as well as when Corporal Tolman began to testify regarding the subject. (Ex. F at 235-37, 443.) Both objections were overruled. Counsel stated the Florida Implied Consent laws were not followed in this regard and there had been no warrant at the point of refusal. (Ex. F at 235-37.) While counsel did not argue the statement should have been excluded on hearsay grounds, this Court finds that argument to be meritless under section 9.803(18). Accordingly, this Court finds counsel was not deficient in this regard.

As to Bennett's testimony regarding how the warrant was obtained, this Court finds there was not testimony as to what was said between the on-call prosecutor and the judge. (Ex. F at 481.) The testimony given was not inadmissible hearsay to which counsel should have objected and, even assuming arguendo that it was, there is no reasonable probability the result of the proceeding would have been different without the brief testimony.

Lastly, as to the testimony given by Bennett that another officer found Defendant's cell phone in the Nissan and that it was confirmed to be Defendant's phone, this Court likewise finds

no ineffective assistance of counsel. First, the officer that did find the phone testified to such independently. (Ex. F at 429-30.) Thus, there was can be no prejudice in that testimony from Bennett. As to the testimony that Bennett contacted a Navy investigator who confirmed the number was known to be Defendant's phone number, this Court finds even assuming arguendo counsel should have objected, this information could still be presented through other means. Also, there is no reasonable probability the result of the proceeding would have been different considering the multitude of circumstantial evidence presented that Defendant was the individual in the Nissan Altima at the time of the car. Moreover, as the defense stipulated that Defendant was the one in control of the vehicle at the time of the accident, it would not matter if the phone was his or not, it still was found inside his car and shows the relative movements of the car based on the cell phone records. Accordingly, this Court finds counsel is was not ineffective and Defendant is not entitled to relief on this Ground.

Ground Seven

While Defendant does not allege a seventh ground specifically, at the end of his Motion Defendant avers the cumulative effect of counsel's alleged errors also warrants relief. "Claims of cumulative error do not warrant relief where each individual claim of error is either 'meritless, procedurally barred, or [does] not meet the Strickland standard for ineffective assistance of counsel.'" Schoenwetter v. State, 46 So. 3d 535, 562 (Fla. 2010) (quoting Israel v. State, 985 So. 2d 510, 520 (Fla 2008)). Having found that all of Defendant's previous claims were either meritless, procedurally barred, or did not meet the Strickland standard of ineffective assistance of counsel, Defendant is not entitled to relief.

Accordingly, it is:

ORDERED AND ADJUDGED that Defendant's "Rule 3.850 Motion," filed on November 9, 2018, is hereby **DENIED**. Defendant shall have **thirty (30) days** from the date this Order is entered to take an appeal by filing a Notice of Appeal with the Clerk of the Court.

DONE in Jacksonville, Duval County, Florida, on June 18, 2020.

Marianne Lloyd Aho

MARIANNE L. AHO
Circuit Judge

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Order has been furnished to legal counsel for both parties via the addresses listed above and to Defendant by United States mail on June 25, 2020.

Deputy Clerk

Case No.: 16-2014-CF-00122-AXXX
Attachments: Exhibits A- L
/bjj
/js

Filing # 80626181 E-Filed 11/09/2018 03:19:59 PM

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2014-CF-000122
DIVISION: CR-H

STATE OF FLORIDA

vs.

ROBERT N. BROWN,
Defendant
_____/

RULE 3.850 MOTION

COMES NOW, the Defendant, by and through undersigned counsel and pursuant to Rule 3.850, Florida Rules of Criminal Procedure, and along with the below mentioned authority, moves this Honorable Court to set aside the convictions in the above matter and as grounds would show:

FACTUAL HISTORY

1. The defendant was charged by Information with three counts involving DUI Manslaughter and two counts of DUI Serious Bodily Injury arising out of an automobile accident occurring on July 7, 2013.

2. The defendant was represented by the Office of The Public Defender all throughout the pre trial phase as well as trial. The jury trial in this case began on June 29, 2015 and concluded on July 2, 2015 wherein the Defendant was convicted on all counts. Mr. Brown was sentenced to a total of twenty years in prison. An appeal to the First DCA was subsequently denied and the Mandate was issued 11/9/16. No other post conviction motions have been

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 11/13/2018 08:23:21 AM

previously filed in this case.

3. The time of the accident was 4:14 a.m. and the blood draw was obtained from Mr. Brown via a search warrant occurring some five hours later. Counsel for the defense never sought any records from the FDLE lab that tested Mr. Brown's blood, nor were there any pre trial motions challenging the admissibility of Mr. Brown's blood test. The blood test results (.08) were admitted at trial without objection.

4. The state listed Kristie Shaw, a lab analyst at FDLE to offer testimony not only surrounding the testing of Mr. Brown's blood, but also to offer an opinion as to what his blood alcohol level would have been five hours earlier at the time of driving through a procedure known as retrograde extrapolation. Despite knowing of this likely expert testimony, counsel for Defense never sought to depose her, nor was there an attempt to exclude this testimony pre-trial, or at trial. Additionally, counsel for the defense never sought to refute this expert testimony with any experts of it's own.

5. The only evidence of possible impairment that existed prior to the securing of the search warrant for Mr. Brown's blood was that there was an odor of an alcoholic beverage, and bloodshot/watery eyes. However, such observations are nothing more than mere signs of alcohol consumption, not impairment. Despite this very critical, obvious issue, the defense never filed any motions challenging the lawfulness of the blood draw.

6. The state listed two experts in the area of accident reconstruction. The defense in this case placed great emphasis on a defense involving causation. Despite that being the preferred line of defense, defense counsel elected not to call any experts in accident reconstruction. George Rotolou was listed as one of the two experts in this area, yet the defense failed to take his

deposition.

7. The state listed and called at trial several witnesses from cell phone companies in an effort to bolster their position that Mr. Brown was the one driving the wrong way before the accident. Without objection, these state witnesses were able to testify and offer testimony that suggested it was the victim's vehicle that was driving in the correct direction of travel

8. The Defense called no witnesses to refute the cell phone witnesses, nor was there any pre-trial challenges to the admissibility of this evidence. The defense attorney made no effort to depose these very important witnesses.

9. The Defense attorney, for no known reason, entered into a stipulation at trial (dated 6/6/15) that his client, Mr. Brown, was in actual physical control of the vehicle at the time of the accident. There is no known witness that could have put Mr. Brown behind the wheel, or otherwise in actual physical control of a vehicle involved in the crash.

10. Defense counsel in this case failed in his duties to consult with Mr. Brown on these important decisions and failed to keep Mr. Brown informed of the important developments in the course of the prosecution and was not properly advised about various defenses that were abandoned.

LEGAL GROUNDS

11. To demonstrate ineffective assistance of counsel, a movant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *Cousino v. State*, 770 So.2d 1258 (4th DCA 2000); *Strickland v. Washington*, 466 U.S. 668 (1984). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample

opportunity to meet the case of the prosecution' to which they are entitled." *Strickland* (citing *Adams v. U.S. ex rel. McCann*, 317 U.S. 269).

12. A defendant is entitled to the reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984); *Powell v. State of Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 159 (1932).

Ground One: Failure To Investigate/Litigate: Blood Evidence

13. Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. A particular decision not to investigate must be directly assessed for reasonableness. *Strickland v. Washington*, 104 S.Ct. at 2066. Here, counsel for Mr. Brown failed to investigate key issues surrounding the basic elements of the offenses of DUI Manslaughter and DUI Serious Bodily injury. One major issue, as is with any DUI case involving a blood draw, is the lawfulness of the blood draw and the blood test results admissibility at trial. Because it is not possible to prove DUI Manslaughter or DUI Serious Bodily Injury ("DUBAL Theory–.08 or above) under Sections. 316.193 (3), Florida Statutes without the blood sample[1], it is incumbent on any attorney handling a DUI blood draw to investigate not only the lawfulness of the blood draw, but the testing methods used as well.

1(a): Blood Evidence Discovery

The Public Defender's file contained zero evidence that defense counsel in this case sought, or examined critical blood test evidence such as:

a. Accreditation Certificates from the lab that tested Mr. Brown's blood.

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[1]Although the impairment prong is available to the state as well, this case did not involve traditional impairment evidence as Mr. Brown was unconscious after the accident. Therefore little, if any evidence of impairment existed.

b. Said laboratory's standard or general policies, protocol and procedures concerning testing, quality control, quality assurance, and. calibration, achievement of the calibration curve, and administrative or technical review.

c. The lab's policies, protocols, and procedures as to testing, quality control, quality assurance, calibration.

d. The identity, make, model, and brand or manufacturer of all equipment and other supporting equipment used during the analysis and/or preparation of the samples in this case and the variables used in its installation and operation.

e. The source and type of all consumables used in collection, preparation, and analysis of the samples run in the batch.

f. The calibration curve and chromatograms related thereto and all chromatograms generated in the batch in which the sample in this case was tested.

g. All logs, spreadsheets, or other documents reflecting the sequence, order and or analytical results of all calibrators, samples, standards, controls, and blanks in the batch containing the sample in this case.

h. The particular records maintained for this testing and calibration event.

i. If the lab received more than one vial or container of blood or other substance, records reflecting which vial was tested in this case.

j. The full reporting and the underlying validation of the valuation of the uncertainty measurement (UM) in the ultimate reported result.

k. The identification and source of all internal standards, standard mixtures (separation matrix), verifiers, blanks, and controls that were run within the batch in which the sample in this

case was run as well as all certificates relating to the foregoing obtained from outside vendors.

l. Maintenance and repair records (internal and external) for all equipment used in this case to test the blood samples.

m. The Search Warrant that led to the blood draw.

The aforementioned list of documents are the bare essentials needed to build a defense to a charge of DUI Manslaughter involving a blood draw. Without this basic information, an attorney will never know whether or not the blood test results are reliable or admissible. It's no different than an attorney not examining breath test machine monthly inspections or department inspections in a DUI Breath case. There would be no way of knowing if the breath test results are admissible and that attorney would clearly be found deficient in his duties as counsel. Requesting such discovery is basic and the failure to request and review such evidence prevents any attorney from rendering effective assistance of counsel.

The mere fact that defense counsel in this case neither interviewed or sought the deposition of the state's main expert witness on the blood evidence, Kristie Shaw, is a reflection of how pervasive the deficient performance was in this case. Not only did defense counsel fail to speak to this witness, but at trial the duties of cross examining this expert was passed off to a much less experienced attorney who only became involved with the case right before trial.

1(b):Blood Evidence Suppression Issues

In any DUI case involving a blood test, other matters that must be investigated are the lawfulness of the blood draw. Quite obviously if the blood draw were unlawful, the results would be suppressed. Here however, not only were there no pre-trial challenges to the blood test, defense counsel made no effort to examine the search warrant for the blood to determine what

issues, if any, existed. A review of Mr. Brown's file obtained from the Public Defender's Office offers no evidence that defense counsel was even in possession of said search warrant, let alone any meaningful review of it's legal sufficiency. Motions To Suppress blood test evidence are common-place in DUI cases, especially DUI Manslaughter cases, and the fact that defense counsel here neither investigated this issue, nor filed any motions falls well below the reasonable range of professional assistance.

The suppression issue here (lack of probable cause) is strong and the failure on the part of defense counsel to investigate and properly advance this issue only heightens the need for relief here. Section 316.1932 (1)(c), Florida Statutes requires that an officer have probable cause to believe that a person's normal faculties are impaired prior to requesting a blood draw. Here, there was virtually no evidence of impairment at the time the search warrant for blood was obtained. Since Mr. Brown was sedated, and/or lethargic from the accident and for the most part not awake during interactions with law enforcement, the only observations were an odor of an alcoholic beverage, and bloodshot/watery eyes–of a man who's eyes had been closed for hours. While these observations may indicate alcohol consumption, they do not indicate alcohol impairment. *Shaw v. State,* 783 So.2d 1097 (Fla. 5th DCA 2001); *State v. Kliphouse,* 771 So.2d 16 (Fla. 4th DCA 2000). The mere fact that defense counsel didn't even have a copy of the search warrant is enough to satisfy the prejudice prong. But for the deficient performance in not proceeding on this issue, a meritorious motion to suppress critical evidence would have been filed. Mr. Brown was never told by defense counsel that such a suppression issue existed.

This blood evidence could likewise have been challenged on the basis that at the time of the blood draw, there was no admissible evidence that Mr. Brown was in actual physical control

of a vehicle. As is outlined in greater detail below, no witnesses pointed to Mr. Brown, or otherwise identified him as being in actual control of any vehicle. Not only was this issue not raised, but the defense actually stipulated to actual physical control via a written stipulation on June 16, 2015 just weeks before the trial.

Another suppression issue that was not adequately investigated or researched was the blood collection time issue. The blood draw in this case occurred five full hours after the accident and therefore the blood test evidence was clearly subject to suppression. *State v. Banoub,* 700 So.2d 44 (Fla. 2nd DCA 1997); *Miller v. State,* 597 So.2d 767 (Fla. 1991). Although the blood tests in *Banoub* and *Miller* were ultimately admitted because the passage of time was not found to be unreasonable in those cases, neither dealt with a five hour lapse of time as we have here. As our supreme court in *Miller* stated, "As a general rule, we believe a test is conducted at an *unreasonable time* if the results of that test do not tend to prove or disprove a material fact, or if the probative value of the evidence is outweighed by its potential to cause prejudice or confusion." Here, not only did defense counsel not file a motion on this issue, counsel failed to even investigate or research the issue, nor was Mr. Brown ever made aware of this defense.

Evidence that the defense was ineffective on this issue can be found in the Motion For New Trial filed on 7/22/15 by defense counsel. In paragraph eleven, not only does counsel complain that Mr. Brown's refusal was wrongfully admitted for the first time (no objection at trial when his refusal was discussed), but counsel erroneously argues that the "Defendant must have been lawfully arrested" in order for the implied consent statutes to apply. Unlike breath and urine cases, blood draws are specifically permitted without an arrest, and such knowledge is

widely known amongst all defense attorneys. Sec. 316.1932, Florida Statutes. The objection to the refusal should have come at trial, not in a Motion For New Trial. This only added to the level of ineffectiveness and prejudice.

1(c):Hospital Blood Evidence

Defense counsel's deficient performance in dealing with these important blood test issues spilled over into the issue of the hospital blood test results. Generally, this type of blood test is not admissible as it does not comport with Florida's Implied Consent laws. Hospital blood analysis, unlike legal blood analysis, does not involve the more reliable processes required of FDLE in determining the blood alcohol content of a particular sample. Hospital blood alcohol results are not admissible under the Implied Consent statutes and are typically only used by the state where a legal blood draw was not taken. Here however a legal blood draw and analysis did occur. Thus, the hospital blood test results were improperly admitted at trial without objection from the defense. Said evidence was cumulative, irrelevant and only served to bolster the state's position that Mr. Brown's blood alcohol content was indeed over the legal limit. A review of Mr. Brown's file obtained from the Public Defender's office reveals no evidence that defense counsel investigated or researched the hospital blood test in this case, nor was any legal research performed to determine its admissibility. Had such investigation or research been performed, defense counsel would have learned the many arguments that need to be presented in any DUI case involving hospital blood. They include:

1. Most hospitals do not test whole blood samples, they test serum instead, which is not considered reliable from a forensic testing standpoint. Legal blood analysis is based on whole blood.

2. Serum ethanol results are nearly always unpredictably higher than whole blood results–sometimes up to 150% higher.

3. Hospital blood draws likely involve arterial blood instead of venous blood.

4. Arterial blood may be up to 40% higher in ethanol concentration versus venous blood.

5. Hospitals typically do not follow any forensically reliable chain of custody procedures increasing the possibility that the blood could be from another patient.

6. Sample and testing in hospitals do not follow the usual general forensic rules for forensic reliability nor are the samples tested using gas chromatography.

7. Hospitals do not typically use anticoagulants, a major violation of most forensic lab rules.

8. Preservatives are not typically used causing routine fermentation in the sample.

By failing to adequately defend against this blood evidence, the defense lost a crucial "gem" in that Mr. Brown's legal blood alcohol content was barely over the legal limit at a .085. By allowing the jury to also hear that blood taken earlier in time was higher than his legal blood, the jury was left with the impression that there really was no issue with Brown's blood alcohol content after all. Counsel for Mr. Brown wholly ignored the blood test defenses and instead put all of their eggs in the "causation basked" as will be outlined below.

Had the defense in this case sought litigation pre-trial on the admissibility of the hospital blood analysis, its likely said results would have been excluded at trial. However, even at trial the defense was deficient in it's failure to explain to the jury the deficiencies in hospital blood testing either through their own expert to refute the state's expert, or through effective cross-examination of the state's expert, which did not occur in this case.

The defense attorney who had represented Mr. Brown all throughout the pre trial phase elected, for no known strategic reason, to allow a less experienced attorney who had not been involved in the case until trial to cross examine this very important state witness on the blood issues outlined herein. (See CORE, Line/Document Item no. 435, "Index and Record on Appeal", Volume 7 of 10). From the outset it was apparent this less experienced attorney did not have the ability to effectively cross examine Ms. Shaw. At one point during the cross examination, defense counsel's lack of preparation and/or inexperience was highlighted during the following exchange:

> Q. Is your absorption rate going to slow down, is it going to go faster? Again, I want the jury to be clear on how the absorption rate, the style of drinking, the types of alcohol, exactly what you're telling them about absorption?
>
> MR. GAULDEN: Your Honor, I'm going to object. The question is confusing. The question is extremely confusing. I don't understand a word of this. (P.591, Volume 7 of 10, Record on Appeal, CORE).

Sadly for Mr. Brown, Mr. Gaulden was right. The objection was sustained.

Defense counsel later in the same cross examination makes another critical error in front of the jury by exposing her complete lack of understanding of how blood alcohol testing works by actually asking the witness what the blood testing machine is called. (P. 602). Defense counsel then, for no known reason or purpose, began a line of questioning regarding the calibration of the Gas Chromatograph. This line of questioning allowed the jury, for the first time, to hear how the machine was purportedly calibrated properly. (Pp. 602,603). This only bolstered the reliability of the state's blood test evidence and prejudiced the defense substantially. There was no strategy

involved in this line of questioning.

Later in the same cross, defense counsel again displays her lack of knowledge in this critical area by continuously using the wrong terminology and at one point had to be corrected by the witness:

Q. Let's go back to pharmacokinetics. So it's fair to say that Mr. Gazaleh and I would react differently . . . would react differently to absorption and expulsion, is that correct?

A. You're going to have to rephrase that.

Q. We would absorb and expel alcohol, everybody who's seated here, at a different rate, is that correct?

A. You're going to eliminate –

Q. Excuse me. Eliminate is the correct term.

Prior to the day of trial, Mr. Brown had not been introduced to this younger attorney and was never advised that she was going to assist at trial, nor was Mr. Brown advised as to what role she would play at trial.

1(d): Retrograde Extrapolation

The ineffective representation in handling the blood evidence continued at trial when it came time for Ms. Shaw's retrograde extrapolation testimony. Again, there were no pre trial attempts to exclude this controversial area of testimony. Retrograde extrapolation is rarely deemed reliable under the facts in Mr. Brown's case and only serves to deflate any momentum a defense team would have when dealing with such low blood test results (.085). Again, there was no objection to this evidence and there was no strategy behind not objecting. It's also likely that the defense had no idea that this line of testimony was even coming as defense counsel never

deposed Ms. Shaw pre-trial. Such failure is ineffective and caused severe prejudice to the defense. Not only was the state witness permitted, without objection, to perform a retrograde extrapolation on Mr. Brown's legal blood, but on the hospital blood test as well. Said evidence was very damning as the retrograde result put Mr. Brown's blood alcohol results much higher, at a .14.

"A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland.* Here, the acts and omissions dealing solely with the blood evidence alone is enough to prevail in establishing the claim of ineffective assistance of counsel. There can be no argument that the failures and mistakes outlined in this section could fall anywhere near what one would consider "reasonable professional judgment". Additionally, because these claims are not, and cannot be refuted by anything in the record, courts cannot reject said claims when analyzing claims filed under Rule 3.850. *Feldpausch v. State,* 826 So.2d 354 (Fla. 2nd DCA 2002). While courts should never second guess sound strategy in these proceedings, there is no strategy at play here at all, much less "sound strategy".

Allowing, without objection or any pre trial challenges to the admission into evidence of the legal blood alcohol test, the hospital blood test, as well as the retrograde extrapolation testimony did not involve any reasonable tactical reasons by defense counsel, and therefore these claims are cognizable in proceedings involving ineffective assistance of counsel. *Mohanlal v. State,* 162 So.2d 1043 (Fla. 2015).

Ground Two: Actual Physical Control

In an inexplicable move, counsel for the defense entered into a written, signed stipulation on June 6, 2015 that Mr. Brown was in actual physical control of the vehicle during the accident. (CORE Line/Document item 233, "Agreement of Facts"). In any case involving a DUI accident, actual physical control can be a hotly contested issue. This is because often times drivers are no longer inside a vehicle when authorities arrive forcing law enforcement to obtain admissible (outside of the accident report privilege) evidence that a suspect was in fact driving or in actual physical control. It is a main element of the DUI statute, Sec. 316.193(1), Florida Statutes.

Without evidence of actual physical control, the state cannot survive motions to suppress or a Judgment of Acquittal at trial and it would be highly unlikely that a case such as this would even be brought to trial without this evidence. A concession on this important element of the offense is unprecedented and amounts to ineffectiveness and extreme prejudice given the facts of this case. Not only was Mr. Brown not advised of this stipulation, his attorney never explained the importance of this issue, nor was Mr. Brown told that it was an actual element to all the charges he was facing. Had Mr. Brown been adequately advised on this issue, he would have urged counsel not to enter into the stipulation.

The responding paramedic to the scene who primarily dealt with Mr. Brown was Mr. Mcphilomy. However, it is evident from the report and statements that McPhilomy never saw Mr. Brown in a vehicle as he was already on the ground strapped into a stretcher. There was only one known civilian witness who may have seen Mr. Brown at the scene, but he was never interviewed until September 2013 some two months after the accident and was never asked to identify the driver of either vehicle involved in the accident. Additionally, the state advised the

defense that it was not able to locate this witness and it was also known that he lived out of state. As a result, the actual physical control element was a likely "game changer" and no tactical reasons or strategy was involved in stipulating to actual physical control. Not only was there a stipulation at trial to the actual physical control element, but there was no attempt pre-trial to advance this issue via a motion to suppress evidence. An attorney is considered ineffective for conceding evidence that lends itself to the guilt of the client where no reasonable tactical reason exists for such a concession. *Monhanlal v. State,* 162 So.3d 1043 (Fla. 4th DCA 2015). Even if it were deemed somewhat possible that the state could have established actual physical control at trial, there was absolutely no reason not to put the state to the "test" and require them to put on this evidence and meet their burden. No witness at trial was called to identify Mr. Brown as the driver.

Ground Three: Accident Reconstruction and Causation

It is clear from the record and a review of defense counsel's file that the causation defense was the only real defense advanced at the trial. Although there were two witnesses that suggested the car traveling the wrong way more closely resembled the alleged victims car (Jack, Williams, Cason), the state put on two accident reconstruction experts at trial that offered testimony that was un-refuted by any defense experts on the same topic. From the opening to closing, the defense's main theory of defense was that Mr. Brown was traveling in the correct direction on I-295 and that it was Ms. Jack who was traveling the wrong way at impact.

An attorney cannot be effective who realizes in the pre trial phase what their defense will be at trial yet conducts no independent investigation of its own regarding that theory of defense. Counsel for defense never conferred with it's own expert in accident reconstruction nor did he

retain one to review the case or to testify at trial in a manner that would have not only refuted the state's experts, but that would have also supported their defense. Additionally, Mr. Brown was left in the dark as to this decision and even attempted to relay this displeasure to the court at trial when he was asked if there was anything else he expected from his defense counsel at trial.

Ground 4: Stipulation to State's Motion in Limine

Before the trial began, counsel for defense stipulated to the "State's Omnibus Motion In Limine", resulting in an Order granting same. This motion covered very critical areas of evidence that should have been objected to, not stipulated to. For instance, there was no need to agree to paragraph two's unsupported argument that the defense should steer clear of arguing the age of the case. Additionally, there was no need to stipulate to paragraph three's claim that Mr. Brown should refrain from wearing his military uniform.

Probably the most glaring area of ineffectiveness with regards to this ground can be found in paragraph ten of the motion. In it, the state sought to strip the defense of a vitally important defense, that of impairment, or lack thereof. In any DUI case, it is nearly always going to come down to impairment. That is why it is so crucial that the defense, where appropriate, to effectively argue lack of impairment.

In attempting to support the argument that the defense should not be allowed to assert such a defense, the state cited to only one case, *Euceda v. State,* 711 So.2d 122 (Fla. 3d DCA 1998). However, *Euceda* dealt with a different issue–one involving a defense request to amend the jury instruction, not pertaining to the issue raised in paragraph ten of the state's motion in limine. The controlling statute on this issue is Section 316.1934, Florida Statutes. In it, it refers to the DUBAL prong as creating a "presumption", not an irrebuttable presumption. To the contrary,

said statute states, in pertinent part, "The presumptions provided in this subsection do not limit the introduction of any other competent evidence bearing upon the question of whether. . . his or her normal faculties were impaired." Thus, the defense should have objected to this ground and argued that impairment could be raised under both theories.

Ground 5: Cell Phone Evidence and Witnesses

In an effort to support their theory that Mr. Brown was driving the wrong way during the accident, the state admitted vast amounts of cell phone data and called several witnesses to establish that based on cell phone tower contacts, the alleged victim and his driver were in traveling in the correct direction and that Mr. Brown was not. Defense counsel neither interviewed these witnesses nor sought their depositions. In fact the state did not even list this evidence until a supplemental discovery exhibit was filed just weeks before trial, on June 8th, 2015. The defense never objected to it based on its untimeliness, nor did they move to continue the trial to review it. Defense counsel also failed to interview any possible expert witnesses to refute the claims made by the cell phone witnesses called by the state.

Additionally, defense counsel only received cell phone records from Jasmine Jack's phone on June 11, 2015 with no effort to review them or schedule any depositions. The failure to investigate and/or counter this critical evidence resulted in prejudice.

Ground 6: Failure to Object to Hearsay Evidence

At trial, several pieces of inadmissible hearsay testimony were allowed in without objection from defense counsel. Trp. Fachko was permitted to use a report, without objection, under the past recollection recorded exception to the hearsay rule under Sec. 90.803(5), Florida Statutes. However, the state failed to lay a proper foundation in that there was no testimony from

Fachko that the report reflected her knowledge correctly, nor was there any assertion that the facts in the report would not have been written unless they were true. As a result, key evidence very harmful came out that otherwise could have been excluded.

Other inadmissible hearsay evidence that came out at trial and was not objected to occurred when Cpl. Bennett offered double hearsay evidence alleging Mr. Brown had refused to provide a blood sample. (CORE, p. 480 of Transcript Line/Document No. 421). In addition to being hearsay, this refusal evidence is not admissible unless the dictates of Florida's Implied Consent are followed, and therefore the allegation of refusal should have been objected to on that ground as well. Now the jury had not only been exposed to all the blood test evidence outlined above, but now there was evidence that Mr. Brown initially refused to submit. Prejudice resulted due to this area of ineffectiveness as well.

Later in Bennett's testimony, he was permitted to offer hearsay testimony about how it was that the search warrant was obtained and what was said between the on-call prosecutor and his interactions with the Judge who signed it. Counsel for defense never objected.

The defense continued to allow Bennett to offer additional hearsay evidence when it came time to discuss where Mr. Brown's cell phone was found. Without objection, he testified that another officer found it in Mr. Brown's car. (P. 501). Bennett then testified, without objection, someone who knew Mr. Brown verified that the phone found was in fact Mr. Brown's. (p. 501). This key evidence for the state was widely used in the presentation of the cell phone data evidence discussed above.

"Counsel's effectiveness is determined according to the totality of the circumstances." *Grosvenor v. State*, 874 So.2d 1176 (Fla. 2004). While the defense maintains that any of the

grounds asserted here are sufficient to grant the requested relief, the cumulative effect of all the errors had a profound negative impact on this case which undermines the confidence in the outcome.

WHEREFORE, the Defendant respectfully pray this Honorable Court to set aside the convictions for the reasons set forth herein.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, via email SAO4DuvalCriminal@coj.net this 7 day of November, 2018.

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lee@lockettlaw.net
1548 The Greens Way Ste. 2
Jacksonville Beach, Florida 32250
904-858-9818
Attorney for Defendant

STATE OF FLORIDA
MIAMI-DADE COUNTY

Before me, the undersigned, this day personally appeared, ROBERT N. BROWN, who first being duly sworn, says that he is the defendant in the above-styled cause, that he has read the foregoing motion and has personal knowledge of the facts and matters therein set forth and alleged, and that these facts and matters are true and correct.

Robert N. Brown
ROBERT N. BROWN

Sworn to and subscribed before me on the 7th day of November, 2018 by the affiant, ROBERT N. BROWN, who produced FL. DOC ID#555592 as identification.

Ruby Campbell
Florida Notary Public (signature)

Notary Public State of Florida
Ruby Campbell
My Commission GG 206650
Expires 04/12/2022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, 311 West Monroe Street, Jacksonville, Florida 32202, this 9 day of November, 2018.

LOCKETT LAW

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