IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,816

ALLEN LEE DAVIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Mr. Davis was sentenced to death by the Duval County Circuit Court in 1983 (R. 1876). The Florida Supreme Court affirmed his convictions and sentences. Davis v. State, 461 So. 2d 67 (Fla. 1984); *cert. denied*, 105 S. Ct. 3540 (1985). Subsequently, Mr. Davis filed a motion for post-conviction relief, which the circuit court denied. This Court affirmed that denial. Davis v. State, 496 So. 2d 142 (Fla. 1986). The Florida Supreme Court also refused to grant his Petition for Writ of Habeas Corpus. Davis v. Wainwright, 498 So. 2d 857 (Fla. 1986). The United States Supreme Court denied his Petition for a Writ of Certiorari. Davis v. Dugger, 484 U.S. 873 (1987). The United States district court denied Mr. Davis' Petition for a Writ of Habeas Corpus. Davis v. Wainwright, 644 F. Supp. 269 (M.D. Fla. 1986), but the Eleventh Circuit Court of Appeals reversed that denial and remanded the petition to the district court. Davis v. Dugger, 829 F.2d 1513 (11th Cir. 1987). The district court dismissed the petition without prejudice, directing Mr. Davis to prosecute his "Hitchcock" claim in the state courts. Davis v. Dugger, 703 F. Supp. 916 (M.D. Fla. 1988); see Hitchcock v. Dugger, 481 U.S. 393 (1987). The circuit court again denied Mr. Davis' motion for post-conviction relief on February 28, 1990, and the Florida Supreme Court affirmed

that denial. Davis v. State, 589 So. 2d 896 (Fla. 1991). The district court, after an evidentiary hearing, denied Mr. Davis the relief prayed for in his Petition for Writ of Habeas Corpus. Davis v. Singletary, 853 F. Supp. 1492 (M.D. Fla. 1994); *aff'd*, 119 F.3d 1471 (11th Cir. 1997); *cert. denied*, 118 S. Ct. 1848 (1998); *reh'g denied*, 67 U.S.L.W. 3154 (1998). On July 15, 1998, the circuit court denied Mr. Davis' third motion for post-conviction relief, and that summary denial is the subject of this appeal.

STATEMENT OF THE FACTS

An FBI analyst, Donald Havekost, provided important testimony at Mr. Davis' trial (R. 1588-1604). That testimony was based upon an analysis of bullets found at the crime scene and was used by the prosecution to link the bullets to Mr. Davis (R. 1603).

In 1995, a former FBI supervisory agent, Frederic Whitehurst, alleged in the media that the FBI laboratory was contaminated and that unnamed analysts were incompetent (PC-R. 18).

On April 14, 1997, the Justice Department issued a report of its investigation of Mr. Whitehurst's allegations: **"THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRACTICES AND ALLEGED MISCONDUCT IN EXPLOSIVES-RELATED AND OTHER CASES"** {hereinafter "Report"}. Mr. Havekost is specifically named in the Report (PC-R. 393, 395-396).

As of March 10, 1998, documents related to the Report were released pursuant to a FOIA request and lawsuit by the National Association of Criminal Defense Lawyers in Washington D.C., where the documents are currently being indexed (PC-R. 31-35). Not all of the 60,000 documents which the government has represented as responsive to the FOIA request have yet to be produced (PC-R. 31-35).

On April 14, 1998, Mr. Davis also served a Freedom of Information Act Request for the production of any information about

the FBI Laboratory investigation specifically related to Mr. Havekost and Mr. Davis. The request was made to obtain existing material and to "red flag" Mr. Davis's case in the hopes that a specific review of his case, if not undertaken, would be initiated. The FBI has notified Mr. Davis that the request may take a year or more in which to respond.

SUMMARY OF ARGUMENT

I. Under the provisions of Rule 3.851(c) of the Florida Rules of Criminal Procedure, Mr. Davis is entitled to a Huff hearing on the claims raised in his post-conviction motion.

II. The circuit court erred in summarily denying Mr. Davis' post-conviction motion without a Huff hearing on the grounds that he was procedurally barred and that his motion was insufficiently pled. Mr. Davis filed his motion, based on newly discovered evidence, as soon as he had a reasonable basis following the release of the FBI Report. Moreover, Mr. Davis' 3.850 motion was as fully pled as possible pending receipt and review of additional records pursuant to his FOIA Request and review and analysis of voluminous documents released to various interest groups, which are attempting to index the information.

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED IN FAILING TO ORDER A HUFF HEARING ON MR. DAVIS' RULE 3.850 CLAIM.

Mr. Davis timely filed his post-conviction motion on April 14, 1998, thus initiating these proceedings so that he could meet the due diligence standard of a newly discovered evidence claim. The newly discovered evidence entailed the contents of an FBI Report on the investigation into allegations of corruption and negligence in its crime lab.

On July 15, 1998 the circuit court, summarily denying the motion without holding a hearing, ruled that, "[a]fter reviewing the defendant's motion and the 517 page report, this Court has determined that a response from the State is unnecessary and that a hearing pursuant to Huff v. State is equally unwarranted. Groover v. State" (R. 611) (citations omitted).

In Huff v. State, 622 So. 2d 982, 983 (Fla. 1993), this Court, considering whether the lower court should permit the appellant a hearing on his 3.850 motion, stated:

> Because of the severity of punishment at issue in a death penalty postconviction case, we have determined that henceforth the judge must allow the attorneys the opportunity to be heard on an initial 3.850 motion.

Id.

Mr. Davis acknowledges that his motion is not an initial 3.850 motion and that, in Groover v. State, 703 So. 2d 1035, 1038 (Fla. 1997), this Court confirmed that the "holding in Huff was limited to initial death penalty postconviction motions." Id. However, as the Court noted in footnote 2 of the Groover decision, "this Court recently amended Florida Rule of Criminal Procedure 3.851 to require Huff hearings prior to ruling on any rule 3.850 motion filed by a death row inmate. Id. (Citations omitted) (emphasis added); Fla. R. Crim. P. 3.851(c); Court Commentary to Rule 3.851(c) regarding 1996 amendment ("Subdivision (c) is added to make the Court's decision in Huff v. State, 622 So.2d 982 (Fla. 1993), applicable to all rule 3.850 motions filed by a prisoner who has been sentenced to death."). On its face, that rule change applies to all 3.850 motions that had not been ruled on as of January 1, 1997. Groover, 703 So. 2d at 1038; Fla. R. Crim. P. 3.851(c).

Since Mr. Davis' 3.850 motion was filed after January 1, 1997, and had not been ruled on prior to the specific, unambiguous triggering date of the Rule, under the applicable provisions of Rule 3.851, a Huff hearing was required.

Contrary to the explicit requirements of Rule 3.851(c), the

circuit court did not grant Mr. Davis a hearing. As a result, Mr. Davis was not given "fair notice and a reasonable opportunity to be heard." See Huff, 622 So. 2d at 983, quoting Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990). Thus, this cause should be remanded back to the circuit court for a Huff hearing.

ARGUMENT II

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. DAVIS' 3.850 MOTION ON THE GROUNDS THAT HE WAS PROCEDURALLY BARRED AND THAT HIS MOTION WAS INSUFFICIENTLY PLED.

In his 3.850 motion, Mr. Davis alleged that newly discovered evidence has surfaced which could undermine confidence in the outcome of his trial.

Mr. Davis' claim was based on the lengthy and detailed FBI Report on the investigation into three sections of the FBI crime Laboratory in Washington, D.C. (the Explosives Unit, the Material Analysis Unit, and the Chemistry-Toxicology Unit). On April 15, 1997, the United States Department of Justice's Office of Inspector General issued the Report titled **"THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRACTICES AND ALLEGED MISCONDUCT IN EXPLOSIVES-RELATED AND OTHER CASES".** A copy of the Report is incorporated in the circuit court's order as Exhibit "A".

The Elemental Analysis Unit of the FBI Laboratory participated in the testing of evidence relied on by the State at Mr. Davis' trial (R. 1589). This unit was later merged into the Material Analysis Unit, which was one of the sections investigated by the Justice Department (PC-R. 514). Additionally, one of the analysts mentioned in the FBI Report, Donald Havekost, provided critical testimony against Mr. Davis at his trial (R. 1588-1604). Based on his lab analysis, Mr. Havekost testified that it was unlikely that the lead fragments found at the scene came from any source other than from the box of bullets obtained from Mr. Davis' father (R. 1603).

Despite allegations that Mr. Havekost was specifically mentioned in the Report, the circuit court summarily denied Mr. Davis' 3.850 motion without granting a Huff hearing. The lower court based its summary denial on Groover v. State, 703 So. 2d at 1035, and found that Mr. Davis' claim was procedurally barred and that his motion was facially insufficient. Mr. Davis contends that both of these findings were erroneous for the reasons discussed below.

a. Summary Denial Based On A Procedural Bar Was Erroneous

In its order denying Mr. Davis' 3.850 motion, the circuit court ruled that Mr. Davis' claim is procedurally barred as

untimely (PC-R. 612). The court stated that:

> Although a claim of newly discovered evidence can be brought beyond the two year filing time limit provided for by Fla.R.Crim.P. 3.850(b), such claims must be raised within two years of the date that the newly discovered evidence could have been discovered using due diligence. Bolender v. State, 658 So. 2d 82, 85 (Fla. 1995); Adams v. State, 543 So. 2d 1244 (Fla. 1989). A review of the report relied upon by the defendant as the basis of his instant claim demonstrates that the report not only fails to support the defendant's instant allegation, it substantially refutes his allegation (by logical deduction). Accordingly, the defendant's claim of newly discovered evidence can only be based on speculative conjecture derived from a mere *general allegation* of misconduct at the F.B.I.'s crime laboratory. The report shows that the allegations of misconduct were made public through Dr. Frederic Whitehurst's appearances on "Prime Time Live," on September 13, 1995, "The Larry King Show," on September 14, 1995, "The Today Show," on September 25, 1995, and through an article in the September 25, 1995, edition of Newsweek magazine. (Exhibit "A," page 18). Indeed, the F.B.I. issued its own press release on September 13, 1995, in response to the media attention that was being given to Dr. Whitehurst's allegations. (Exhibit "A", page 18.) Therefore, this Court finds that the evidence supporting the defendant's claim was discoverable, using due diligence, at the time of the F.B.I.'s press release on September 13, 1995, and no later that September 25, 1995, and that his instant claim is untimely, in that it was not filed within two years of when the "evidence" allegedly supporting his claim was discoverable. Bolender, supra; Adams, supra.

(PC-R. 612).

The court's ruling is erroneous. Although allegations may have been made in 1995 in sensationalistic media forums regarding the functioning of the F.B.I.'s crime laboratory, these public pronouncements or, more accurately, these allegations of public pronouncements, are an insufficient basis for starting the proverbial "clock" on Mr. Davis' newly discovered evidence claim. Further, the contents of these media sources do not appear to be in the record at all.

Any claims announced by Mr. Whitehurst to the press in 1995, absent record evidence of content, credibility and adequate public saturation, could not put Appellant on notice that he had the obligation to file a newly discovered evidence claim within a year of such publicity in order to avoid a procedural bar on claims derived therefrom. At that time, an investigation had not been undertaken and a report had not been issued. More importantly, documentation of the basis for the conclusions in the Report had not been made public. Ironically, had Mr. Davis filed a motion in that initial year after the "story" broke in the broadcast media, his motion might well have been attacked as premature.

Upon review of the voluminous Report released in April, 1997,

Mr. Davis learned that Mr. Havekost was mentioned in the Report.[1]

Mr. Davis, thus, reasonably filed his motion, including a claim for leave to amend when the underlying documents have been examined, within a year of the release of the Report.

b. Denial Of Motion Based On A Facially Insufficient Pleading

The circuit court stated in its order that:

> In addition to the procedural bar to this claim, this Court will note that a review of the defendant's motion, and the report upon which he bases his claim, demonstrates that the defendant's claim is not only facially insufficient, it constitutes nothing more than a fishing expedition.
>
> There are two main factors about the report that demonstrate that the report not

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[1]Unfortunately, Mr. Davis now needs to examine the documentation regarding the Report to determine how the authors of the Report reached their conclusions, why Mr. Havekost was mentioned, and whether Mr. Havekost's evidence analysis in the Davis case was scrutinized or flawed. As Mr. Davis established by affidavit incorporated in his motion, the National Association of Criminal Defense Lawyers (NACDL) is attempting to index the documents disclosed to date. Jack King, Director of Public of Affairs of NACDL, averes that the government will release 60,000 documents. However, to date the NACDL has received only approximately 32,000 of these documents and the indexing of those documents is incomplete. Mr. Davis' own FOIA Request is pending on these, and perhaps other, supporting documents.

> only fails to support the defendant's claim that Analyst Donald Havekost's (Havekost) testimony was "unreliable, misleading and false," it actually refutes that claim (by logical deduction). The first factor is the fact that Havekost is not the subject of a single complaint raised by any of the analysts. Indeed, of the 517 pages of the report, Havekost is mentioned in only three of those pages-as the analyst who performed an analysis which was the precursor of an analysis performed by another analyst (in another analysis unit) who was the subject of a complaint. (Exhibit "A," pages 393, 395-396).
>
> The second factor, is that Havekost was not a member of the three principle analysis units that were the subjects of the complaints (the EU, MAU, and CTU). The report shows that Havekost was a member of the Elements and Metals Analysis Unit (EMAU). (Exhibit "A," pages 393, 432). Further, the Report shows that the Elements and Metals Analysis Unit (EMAU) was not merged into the Materials Analysis Unit (MAU) until sometime in 1993-1994. (Exhibit "A," pages 431-432.)

(PC-R. 613-614).

In fact, Havekost <u>was</u> a member of one of the three principal analysis units that were the subjects of the complaints. According to the Report, Havekost's unit, the Elements and Metals Analysis Unit (EMAU), was merged into the Materials Analysis Unit (MAU) in 1994 (PC-R. 514). The Material Analysis Unit was one of the units that was investigated by the Department of Justice (PC-R. 46). The Report does not specify whether the MAU was investigated as it

exists at the present time, or whether it was investigated in its pre-merger incarnation. Without more information and documentation, Mr. Davis cannot determine whether the investigation considered the activities of these units as a single unit, or as separate pre-merger units.

In denying Mr. Davis the right to investigate this startling critique of FBI forensic lab work, the circuit court seems to have based its conclusion on its deduction that Mr. Havekost was not directly implicated in wrong-doing by the Report. However, since Mr. Havekost was mentioned in the report, and work which he had performed was noted, there must be underlying documentation regarding him and his work which was gathered and analyzed during the investigation. Neither the Appellant nor the Court can know to what extent Mr. Havekost was the subject of the investigation or what editorial compromises may have been made in the Report's evolution. Thus, it is imperative that Mr. Davis be given time to access this foundational information regarding Mr. Havekost.

In sum, the circuit court's conclusion that the Report exonerates Mr. Havekost is without proper evidentiary foundation. Thus, Mr. Davis' post-conviction motion was sufficiently pled to withstand a summary denial. Further, the due process requirement of fundamental fairness militates for a finding by this Court that

Mr. Davis should be allowed to pursue his FOIA request and to review the underlying reports and documents that are the basis for the conclusions in the Report. After he has had a fair chance to examine those reports and documents, he should be allowed to have a Huff hearing to determine if an evidentiary hearing is warranted.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Davis respectfully urges this Court to reverse the lower court, allow Appellant leave to amend his 3.850 after fair opportunity to review documents produced pursuant to the FOIA, order a Huff hearing be held in due course, and grant such other relief as the Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October 30, 1998.

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