IN THE SUPREME COURT OF FLORIDA

ALLEN LEE DAVIS,

Appellant,

vs. CASE NO 93,816

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

On May 27, 1982, Davis was indicted in Duval County for the May 11, 1982 first-degree murders of Nancy Weiler, her ten-year old daughter Kristina and her five year daughter Katherine. A jury trial began on February 1, 1983, and concluded on February 4, 1983 with a verdict of guilty as charged. A penalty proceeding was held on February 9, 1983. The jury recommended death on all three counts of murder. On March 2, 1983, then circuit judge Major B. Harding imposed three sentences of death, finding no mitigating circumstances and numerous aggravating circumstances.[1]

This Court unanimously affirmed the convictions and sentences of death. Davis v. State, 461 So.2d 67 (Fla. 1984). The United States Supreme Court denied certiorari. Davis v. Florida, 473 U.S. 913, 105 U.S. 3540, 87 L.Ed.2d 663 (1985). The Governor of Florida signed a death warrant for Davis on August 20, 1986. Thereafter, Davis filed a 3.850 motion for postconviction relief in the circuit court, and a habeas petition in this Court. Following a hearing, 3.850 relief was denied by the circuit court. This Court affirmed that judgment, Davis v. State, 496 So.2d 142 (Fla. 1986), and also denied habeas relief. Davis v. Wainwright, 498 So.2d 857 (Fla.

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[1] The aggravating circumstances included: (1) the crimes were committed while the defendant was under sentence of imprisonment; (2) the defendant had a prior record of conviction for violent felonies; (3) the murders were committed during the course of a burglary; (4) the murders were especially heinous, atrocious, or cruel; and (5) the murders were committed in a cold, calculated and premeditated manner.

1986). Meanwhile, Davis had also filed a federal habeas corpus petition. The district court denied relief without a hearing, in part because the petition contained unexhausted claims. Davis v. Wainwright, 644 F. Supp. 269 (M.D. Fla. 1986). The Eleventh Circuit Court of Appeals reversed and remanded, finding, inter alia, that the presence of unexhausted claims was not jurisdictional. Davis v. Dugger, 829 F.2d 1513 (11th Cir. 1987). On remand, the district court dismissed the petition without prejudice, directing Davis either to prosecute his unexhausted "Hitchcock" claim[2] in state court, or to refile his federal habeas petition without that claim. Davis v. Dugger, 703 F. Supp. 916 (M.D. Fla. 1988).

Davis filed a second 3.850 motion in the state circuit court, raising ten claims, including a Hitchcock claim. The circuit court, finding that the Hitchcock claim was meritless and that the remaining claims were procedurally barred, denied relief. This Court affirmed. Davis v. State, 589 So.2d 896 (Fla. 1991).

On February 12, 1992, the Governor signed a second death warrant (1R 1). Davis thereafter filed a second federal habeas corpus petition, raising 25 claims, including a Hitchcock claim and also claims alleging ineffectiveness of trial counsel. Following an evidentiary hearing, the district court denied relief. Davis v.

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[2] See Hitchcock v. Dugger 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed. 2d 347 (1987).

Singletary, 853 F. Supp. 1492 (M.D. Fla. 1994). The Eleventh Circuit Court of Appeals affirmed. Davis v. Singletary, 119 F.3d 1471 (11th Cir. 1997), rehearing denied, 130 F.3d 446. The United States Supreme Court denied certiorari. Davis v. Singletary, 118 S.Ct. 1848 (1998), rehearing denied 67 U.S.L.W. 3154 (1998).

On April 15, 1998, Davis filed the instant 3.850 motion for state postconviction relief (his third). In this motion, Davis claims that newly-discovered evidence (which allegedly was suppressed by the State) may exist which would discredit the testimony of a state witness, FBI analyst Donald Havekost. Referring to a report submitted by the Department of Justice's Office of the Inspector General (hereafter OIG), entitled "The FBI Laboratory: An Investigation Into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases" (hereafter, the OIG Report), Davis contends he "is currently investigating whether the tainted FBI crime laboratory and its practices rendered Donald Havekost's testimony questionable and whether he had a scientifically sound basis for rendering his opinion" (1R 11). Davis contends that Havekost's testimony "may" not satisfy the test for scientific evidence and "possibly" should have been excluded (1R 24). He contends that he needs "an opportunity" to review federal records containing some 60,000 pages of documents to see if he can support his newly-discovered-evidence/Brady claim with actual facts (1R 16). By order dated June 4, 1998, the circuit

court directed Davis to supplement his motion with a copy of the OIG Report (1R 39-40). Davis did so (1R, 2R, and 3R 44-598). By order dated July 15, 1998, the circuit court denied the motion, finding that Davis' claim was procedurally barred (4R 612). In addition, the circuit court found that Davis' claim was, at best, facially deficient, being factually unsupported and amounting to no more than "a fishing expedition" (4R 613-14).

STATEMENT OF THE FACTS

The State presented 34 witnesses at Davis' trial, one of whom was FBI analyst Donald Havekost. Davis' father lived next door to the victims, the Weilers, who were preparing to move to Pennsylvania as the result of John Weiler's job reassignment. The murders occurred while John Weiler, husband and father of the three victims, was in Pittsburgh (7TR 837).[3]

The testimony presented at trial included the following:

John Weiler testified that he had called his wife Nancy Weiler from Pittsburgh at 5 p.m. on May 11, 1982 (the evening of the murders), but that when he had tried to call again at 7:28 p.m., no one had answered (7TR 837-39). At some point after his return to Jacksonville following the murders, he discovered that a Nikon model M 35 millimeter camera was missing from his home (7TR 840-41).

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[3] Citation "TR" is to the original trial record.

Richard Padon, a friend of the defendant, testified that at 6:30 p.m. on May 11, Davis had stated he was out of a job and thinking of committing a burglary in the neighborhood where his father lived (11TR 1520-21). Padon agreed to drive Davis to his father's house, drop him off, and return to pick him up (11TR 1522). They arrived at Davis' father's house at around 7 p.m. (11TR 1525). At 9 p.m., Davis called Padon to come get him (11TR 1528). Padon returned, parked some distance away from the father's house and waited. Davis showed up, carrying three paper bags, one of which had a 35 millimeter camera in it (11TR 1529-31). Davis admitted to Padon that he had committed a burglary (11TR 1533).

Davis' father Donald Davis testified that he and his wife had gone bowling the evening of May 11 (10TR 1261). Before they left, defendant Davis had called to ask if it was all right for him to come over while they were gone. Donald Davis told him it was (10TR 1261). When he and his wife returned sometime after 9 p.m., Donald Davis noticed that someone had been in the house, but there was no sign of a forced entry (10TR 1261-62). Donald Davis testified that he had purchased a .357 Ruger Black Hawk pistol on November 5, 1970, but had never fired it (10TR 1263-64). A week or two before the murder, he had placed the pistol on top of his refrigerator, intending to return it to the manufacturer for a safety recall (10TR 1265-67). The day after the murder, he noticed the Ruger was missing (10TR 1270). He gave police a box of ammunition that he

had bought the same day he had bought the gun (10TR 1268-69). Donald Davis testified that the Ruger had five rounds in it; the gun was a six-cylinder revolver, but, for safety reasons, he kept the chamber empty (10TR 1267-68).

Defendant Davis was interviewed by police. Davis admitted being in the Weiler's house (to repair a sticking door, he claimed); he admitted taking his father's gun off the top of the refrigerator; he admitted that he "could have" taken his father's gun with him; but he claimed he did not remember everything that had happened in the Weiler home (10TR 1200-01, 1212-16). When asked how he would tie someone's hands, Davis said he would "probably wrap the rope around each wrist, tie them together, and then tie a knot in it" (10TR 1234). In fact, Kristy Weiler had been tied in just such a manner (10TR 1235).

Three persons saw Davis walking near the victim's residence shortly after 8 p.m. the evening of the murder; two of them saw him carrying something; one of them thought he was carrying a gun (10TR 1315-18, 1330-33, 1339-45).

A length of rope was seized from Davis' truck (8TR 1067). Mary Henson, a microanalyst employed by the Florida Department of Law Enforcement (FDLE), testified that this rope "fracture" matched the rope tied around the wrists of Kristy Weiler; i.e., in Henson's opinion, the rope around Kristy's hands had been cut from the rope found in Davis' truck (12TR 1578-82).

FDLE firearms examiner David Warniment testified that five bullets had been fired in the Weiler home (11TR 1507), all from the same gun--most probably a .357 Ruger Blackhawk single-action revolver (11TR 1483-84). In addition, Warniment examined broken pieces of a firearm left at the scene (11TR 1489).[4] These pieces included a medallion with a Ruger Blackhawk trademark, pieces of a wooden grip handle, pieces of a trigger guard, and a main spring set, all of which were consistent with having come from a Ruger Blackhawk revolver (11TR 1491, 1497-1501). Warniment testified that the black hawk trademark had been replaced in mid-1972 with a new trademark, a white ball (11TR 1497).

Paul Doleman, FDLE serologist, testified that blood on the defendant's boots could not have been his own (or Kathy's or Kristy's), but was consistent with having come from Nancy Weiler (it matched by type and two enzymes) and also approximately 2.4% of the total population (11TR 1429-30, 1434, 1438). Blood on the defendant's shirt could not have been his (or Kathy's or Kristy's), but was consistent with having come from Nancy Weiler (matching by type and four enzymes) and also approximately .86% of the

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[4] Nancy Weiler died as the result of multiple blunt impacts to the head, while Kristy had been shot in the head and chest, and Kathy had been shot in the lower back (8TR 975, 997, 1010-12). It was the state's theory that Davis had not realized there were only five rounds in the Ruger, had expended five shots on the two children, and then had to beat the mother to death with the gun (12TR 1694-95).

population (less than one in a hundred) (11TR 1430-31, 1434, 1437).[5]

The final State's witness was Donald Havekost, a special agent with the Federal Bureau of Investigation (12TR 1589). Havekost was a specialist in "neutron activation analyses" (12TR 1589). Neutron activation analysis involves placing material in a nuclear reactor and converting that material to radioactive forms of the original chemical elements. The radioactivity emitted by these elements can then be measured, and the chemical makeup of the material can be identified (12TR 1589-90). In this case, Havekost examined a box of eighteen live .357 cartridges (which the defendant's father had furnished to police, 10TR 1268) and a sealed package containing lead bullet fragments from the Weiler home (12TR 1593-94), to determine the chemical content of the lead in them (12TR 1598). Bullet manufacturers use secondary or used lead which is generally contaminated. In addition, manufacturers may intentionally add other elements to the lead to, for example, add hardness to the bullet (12TR 1598). The bullets Havekost examined in this case were "half lead," combining lead and an alloy of copper and zinc called "guild metal" (12TR 1599). Using a microscope and a surgical scalpel, Havekost cut tiny slices out of each of the bullets and fragments, placed them in a nuclear reactor with

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[5] In addition, Doleman testified that fingernail scrapings taken from Davis revealed the presence of blood which could not be further identified due to the small amount of the sample (11TR 1427).

additional samples called standards, and subsequently analyzed them (12TR 1599-1600). Havekost concluded that the bullet fragments were composed of five distinct compositions of lead, and had been manufactured from five different batches of molten lead (12TR 1602-03). The 18 bullets from the box of ammunition were composed of these five distinct lead compositions plus five additional ones (12TR 1601, 1603). In Havekost's opinion, the bullet fragments probably came from the box of bullets. Although thousands of bullets can be manufactured from a given batch of molten lead, the manufacturing code on the box indicated the bullets had been loaded in the box on January 30, 1970. It was unlikely that those same five compositions existed 12 years later (12TR 1604). Thus, it was possible, but unlikely, that the bullet fragments came from a source other than the box of bullets (12TR 1603).

A dozen years after trial, complaints about alleged wrongdoing and improper practices within certain sections of the FBI Laboratory, lodged by one Frederic Whitehurst, an analyst for the FBI Laboratory, became public in the late summer and early fall of 1995 (1R 46, 69). According the OIG Report submitted to the circuit court by Davis, Whitehurst was called as a defense witness first in the World Trade Center bombing case and then in the O.J. Simpson case in the late summer and early fall of 1995. In the next several weeks, Whitehurst appeared on the television programs "Prime Time Live" (September 13, 1995), "The Larry King Show"

(September 14, 1995), and "The Today Show" (September 25, 1995). In addition, an article about Whitehurst's allegations also appeared in the September 25, 1995 issue of Newsweek magazine. On September 13, 1995, the FBI issued a press release acknowledging that serious concerns had been raised, and promising full cooperation with the OIG investigation into those allegations (1R 69).

Following an investigation, the OIG issued its report on April 15, 1997 (1R 10). The OIG did not investigate or make findings about the unit for which agent Havekost worked (1R 46). In addition, although Havekost's name is mentioned in connection with a preliminary analysis (3R 474, 476-77), his work is not questioned in the report.[6]

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[6] In his brief, Davis erroneously cites the pagination of the OIG Report instead of the pagination of the record on appeal. Initial Brief of Appellant at vi. Pages 393 and 395-96 of the OIG Report are found at pages 474 and 476-77 of the record on appeal.

SUMMARY OF THE ARGUMENT

1. Any error in failing to hold a Huff hearing was harmless as no evidentiary hearing is required and no relief is warranted on Davis' third 3.850 motion.

2. The circuit court correctly denied Davis' motion on grounds of procedural bar. Although Havekost's testimony in this case has been public knowledge since February of 1983, and Whitehurst's allegations about the FBI laboratory have been public knowledge since 1995, Davis has never attempted to present any testimony or other evidence which might credibly call into question Havekost's specific testimony and conclusions in this case. Furthermore, even if Davis could in the exercise of reasonable diligence have waited until the OIG issued its report before doing anything, he still waited for more than a year from the date the report was issued to file a properly verified 3.850 motion.

In addition, the circuit court correctly determined that Davis' motion is not sufficiently pled. Davis has neither presented nor even alleged anything in support of his attack on Havekost's credibility except an OIG Report which does not address the performance of either Havekost himself or the unit to which he was assigned--not even generally, much less with respect to this case. Even Davis concedes as much, because he does not allege that Havekost's analysis or conclusions were unreliable; he only alleges that they might have been. Even Davis does not contend that he is

entitled to relief at this point; he merely seeks additional time to conduct a fishing expedition in the hopes that he might some day discover something which might entitle him to relief.

Finally, Davis overstates the importance of Havekost's testimony to his trial. Even if Havekost could be completely discredited (and the State does not think this will ever happen), Davis still cannot demonstrate that the jury probably would have reached a different verdict in light of the very strong--if not overwhelming--evidence of Davis' guilt presented by the State at trial.

ARGUMENT

ISSUE I

BECAUSE THE RECORD CONCLUSIVELY DEMONSTRATES THAT DAVIS IS NOT ENTITLED TO RELIEF ON HIS THIRD STATE MOTION FOR POSTCONVICTION RELIEF, NO REVERSIBLE ERROR OCCURRED WHEN THE CIRCUIT COURT DENIED THE MOTION WITHOUT FIRST HOLDING A HUFF HEARING.

Because this was not Davis' initial 3.850 motion, the trial court determined that no Huff hearing[7] was necessary, relying upon Groover v. State, 703 So.2d 1035 (Fla. 1997). Davis correctly points out that recently amended Rule 3.851 applies to all 3.850 motions filed by death-sentenced prisoners, not just initial 3.850 motion. As noted in footnote 2 of Groover, this new rule did not apply to Groover's 3.850 petition because it had been ruled on prior to January 1, 1997, while under the explicit terms of new Rule 3.851, the new rule applies "only to Rule 3.850 motions that have not been ruled on as of January 1, 1997." Fla.R.Crim.P. 3.851.

Because Davis' 3.850 motion obviously had not been ruled upon as of January 1, 1997 (it had not even been filed as of that date), the trial court erred in relying on Groover v. State, supra, for the proposition that no Huff hearing was required. Nevertheless, this case need not be and should not be remanded, as any error in failing to hold a Huff hearing was harmless. Davis fails to

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[7] See Huff v. State, 622 So.2d 982 (Fla. 1993).

acknowledge this Court's alternative holding in Groover: "Moreover, even if a Huff hearing had been required in the instant case, the court's failure to do so would be harmless as no evidentiary hearing was required and relief was not warranted on the motion." Id. at 1038.

This Court has full access to the record in this case, and the question of the necessity for an evidentiary hearing is a matter which essentially may be reviewed de novo by this Court. This very appeal has provided Davis with the "reasonable opportunity to be heard" which he claims he was denied. Initial Brief at p. 3. Particularly in light of the time that already has elapsed in litigating Davis' many postconviction claims, jucidial economy would seem to counsel against remanding this case to the trial court merely to allow Davis a chance to present oral argument to the trial court, for relief that he clearly is not entitled to. The State submits that, as in Groover, any error in denying Davis' counsel a Huff hearing is harmless.

ISSUE II

THE CIRCUIT COURT DID NOT ERR IN SUMMARILY DENYING DAVIS' THIRD 3.850 MOTION. DAVIS' CLAIM IS PROCEDURALLY BARRED, INSUFFICIENTLY PLED, AND MERITLESS

The trial court found Davis' claim procedurally barred as untimely. The trial court reasoned that because the OIG Report ostensibly the basis of Davis' claim contains no specific allegations of misconduct by Havekost, Davis' claim "can only be

based on speculative conjecture derived from a mere general allegation of misconduct at the F.B.I's crime laboratory" (4R 612). But the very OIG Report Davis relied upon to support his claim shows that allegations of misconduct within the FBI crime lab were made public in the late summer of 1995 when Whitehurst was called as a defense witness in two high-profile cases--the O.J. Simpson case and the World Trade Center bombing case--followed by Whitehurst's appearances on the television shows "Prime Time Live," "The Larry King Show," and "The Today Show," and by an article in Newsweek magazine. In addition, the FBI itself issued a press release on the issue (1R 69, 4R 612). Thus, the trial court found, evidence supporting Davis' claim was discoverable no later than September 25, 1995, and Davis' claim is untimely because it was not filed until almost three years later (4R 612).

Davis does not dispute the facts contained in the OIG report as to when all this became public knowledge. He merely argues that he is not procedurally barred because in the late summer of 1995 the OIG had not yet conducted its investigation or issued its report. In effect, he contends he was entitled to do nothing until the investigation was completed and the report issued. Davis' counsel, however, were put on notice of potential problems with FBI crime lab testimony in 1995. By their own admission, however, they did nothing to determine whether these problems (or any other) might call reasonably call into question Havekost's testimony and

conclusions. Davis' counsel have nowhere alleged that they were precluded from talking to Whitehurst about Havekost or his unit. Indeed, inasmuch as Havekost testified in significant detail about his methodology and conclusions, and that testimony is a matter of public record and has been since February of 1983, Davis' attorneys could have consulted any expert about Havekost's methodology and conclusions--before or after criticisms of the FBI crime lab were made public. He does not allege that he has ever done so. Nor has he alleged that he was in any way prohibited from conducting his own tests of the chemical compositions of the bullets. See Buenoano v. State, 708 So.2d 941, 948 (Fla. 1998)(noting that Buenoano had not alleged that she was in any way prohibited from testing the pills in question; if she had contested Roger Martz's findings, she could have conducted her own examination at the time of her trial). The burden is on Davis to show in his motion for 3.850 relief "both that this evidence could not could not have been discovered with the exercise of reasonable diligence and that the motion was filed within one of the discovery of evidence upon which avoidance of the time limit was based." Mills v State, 684 So.2d 801, 804-05 (Fla. 1996).[8] As in Mills, Davis has "failed to meet this threshold requirement." Id at 805. Therefore, the trial

[8] The trial court applied the former two year time limit rather than the one-year time limit applicable to this 3.850 motion. See Mills v. State, supra at 805 (fn. 7). Applying either time limit in this context achieves the same result, however.

court correctly determined that Davis is procedurally barred.

There is an additional reason Davis is procedurally barred, not addressed by the trial court, but nevertheless supporting the trial court's conclusion of procedural bar. See Caso v. State, 524 So.2d 422, 424 (Fla. 1988)("A conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it."). Even if Davis was entitled in the exercise of reasonable diligence to await the issuance of the OIG Report to take action, and to the extent that his claim is based upon that report, he still was required to file his motion within a year of the issuance of the report. He claims to have done so, Initial Brief at p. 7; however, the record shows otherwise. Davis does not dispute the trial court's finding (4R 611) that, as Davis alleged in his motion (1R 10), the OIG Report was issued on April 15, 1997. See Initial Brief at 3 (stating that the OIG report was issued on April 15, 1997). While the record shows that attorneys representing Davis filed a Motion to Vacate Judgment and Sentence on or about April 14, 1998,[9] it also shows, however, that such motion was not

[9] The certificate of service on the motion states that the motion was mailed to counsel on April 14, 1997 (1R 29). The clerk of court stamped the motion as filed on April 15, 1997 (1R 7). Undersigned counsel would note that although the certificate of service indicates that "all counsel" was served, it also shows that Davis sent copies only the state attorney; the Attorney General was not served with notice of this pleading and was unaware of its existence until this appeal was filed.

verified when filed and that verification was not filed until at least April 21, 1998.[10] Rule 3.850 requires that all motions be verified, even where the motion merely amends a previously verified motion. Groover v. State, supra, 703 So.2d at 1038. Nonverified motions are subject to dismissal. Ibid. Thus, Davis failed to file a properly verified motion until more than a year had elapsed following the issuance of the OIG Report. His motion is therefore procedurally barred.

In addition, the motion is facially insufficient, as the trial court found (4R 613). A motion for postconviction relief must set forth facts which, if believed, would support the grant of relief. Jenkins v. State, 633 So.2d 553 (Fla. 1st DCA 1994). Conclusory allegations are not sufficient to warrant and evidentiary hearing. Kennedy v. State, 547 So.2d 912 (Fla. 1989). Even Davis does not contend that evidence exists which would discredit Havekost. Instead, he only claims such evidence "may" exist and that Havekost's testimony "possibly" should have been excluded (1R 11, 24). Whether such evidence does exist and whether or not Havekost's methodology and conclusions are unreliable Davis cannot even allege at this time, much less prove.

As Davis must concede, the OIG Report itself provides no

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[10] The verification itself is not dated. However, the letter enclosed with the verification is dated April 21, 1998. The clerk of court stamped the letter and verification as filed on April 24, 1998 (1R 36-37).

support for any attack upon Havekost's testimony. In fact, as the trial court found, the report tends to refute such attack, by logical deduction. As the trial court noted, in this 500-some-odd page report is not a single complaint about Havekost (4R 614). Davis does not contend otherwise, but merely speculates that Havekost might have been the subject of some investigation or complaint not mentioned in the OIG Report. However, the OIG report itself states that the OIG investigation focused on, but was not limited to, Whitehurst's allegations. The investigation, according to the OIG Report "would not be restricted to Whitehurst's specific allegations, [but] would also address any other pertinent issues identified in the course of the investigation" (1R 52). Since the OIG did not address any allegations of misconduct by Havekost, or for that matter, anyone in his unit,[11] it is logical to conclude (1) that Whitehurst has never alleged any misconduct or incompetence on the part of Havekost and (2) the OIG did not independently turn up such evidence. Although none of this conclusively proves that Havekost's testimony in this case was reliable,[12] it certainly fails to support, and as a matter of fact tends logically to refute, any

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[11] Davis notes that Havekost's unit, the Elements and Metals Analysis Unit (EMAU), was merged into the Materials Analysis Unit (MAU) in 1994--some eleven years after Havekost testified--and that the MAU was the subject of investigation. Nothing in the report, however, indicates that the EMAU was ever the subject of any complaints.

[12] As noted in the OIG Report, the OIG did not attempt to review the FBI lab as a whole (1R 52).

claim that Havekost and/or his testimony in this case cannot be relied upon.

Davis presents a weaker case for relief than Judy Buenoano. She at least had some evidence directly implicating Roger Martz's reliability, although she had no basis to assert that his conclusions in her particular case were erroneous. 708 So.2d at 950. Here, as the trial court recognized, Davis can present only "speculative conjecture derived from a mere general allegation of misconduct at the F.B.I.'s crime laboratory" (4R 612), by persons other than Havekost. There is no reasonable probability that the result of Davis' trial would have been different had the OIG Report been introduced at Davis' trial.

Finally, pretermitting the procedural bars and the insufficiency of his pleading, Davis has not and cannot demonstrate that he would be entitled to relief even if he were to succeed at some point in discrediting Havekost's testimony. The State did not need Havekost's testimony to present an exceptionally strong case: Davis admitted taking his father's .357 Ruger Blackhawk off the top of the refrigerator the evening of the murder; pieces of a .357 Ruger Blackhawk were found in the Weiler home; the murder bullets were identified as probably having been fired from a .357 Ruger Blackhawk; a 35 millimeter Nikon camera was taken from the Weiler home; Davis was in possession of a 35 millimeter Nikon camera after the murders; the Weilers, who lived next door to the defendant's

father, were murdered during the commission of a burglary; Davis told a friend he was going to commit a burglary near his father's home, and solicited that friend to drive him to that area, drop him off, and return for him later; Davis was seen near the Weiler home shortly after the murders had been committed; Davis admitted being in the Weiler home the evening of the murders, and acknowledged that he might have taken his father's gun there; Davis' description of how he would have tied someone up exactly matched how one of the victims was tied up; a rope found in Davis' truck was fracture-matched to the rope found tied around Kristy Weiler's wrists; the .357 Ruger belonging to Davis' father had five bullets in it; five shots had been fired in the Weiler home; and blood on Davis' shirt and shoes was matched to a high degree of exclusivity to one of the victims.[13] Eliminating testimony about the source of the bullets

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[13] In addition to all the above, it should be noted that although Davis did not confess, he made many statements that, by their inconsistencies and otherwise, were significantly incriminating. As noted above, Davis was able to describe how one of the victims had been tied; he also had admitted having taken his father's gun off the top of the refrigerator, having been in the Weiler home the evening of the murder, and having committed a burglary. In addition, Davis told police knew he knew that Kathy was taking a bath (10TR 1214), even though he claimed never to have left the kitchen area of the Weiler home (10TR 1218). He claimed that he had entered the Weiler home because Kristy had told him her mom wanted him to come into their home to fix a bathroom door (10TR 1200). However, another neighbor had already fixed the door more than an hour before Kristy had returned home from a dance recital shortly before 8 p.m. (10TR 1252, 1284-86). Moreover, Davis had never before been in the Weiler home (7TR 843). As the prosecutor argued, if the neighbor had already fixed the door, it would not have made sense for Kristy's mom to have sent a nine-year-old child to invite someone into her home who did not live in the

would not in reasonable probability have caused the jury to acquit the defendant.

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neighborhood and had never before been inside the Weiler home to fix a door that already had been fixed (12TR 1682-83).

Following the discovery of rope in Davis' truck (which he witnessed), Davis said, "I know it doesn't look good, does it?" As the prosecutor argued, Davis could not have known that the discovery of rope was incriminating unless he knew that one of the victims had been tied up (12TR 1684-85).

Davis also claimed he could only remember "bits and pieces" of his stay in the Weiler home, even though he remembered relatively insignificant matters as having to step over a tricycle in the garage as he was leaving (10TR 1214).

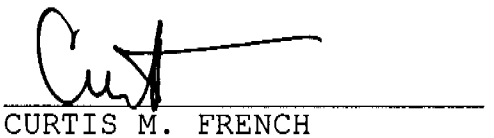
Although Davis told police that "Allen Lee Davis" could not have committed such a crime (10TR 1214), when asked if the "other" Allen Lee Davis could have done it, Davis answered, "I don't know" (8TR 1087). Upon hearing the suggestion that he should "get right" with the Lord, Davis answered, "I'm afraid it's too late for that" (10TR 1212). Upon being told he should do right, Davis said, "I know if this doesn't work, then I will try something else" (10TR 1223).

CONCLUSION

Davis has presented nothing which discredits Havekost. He cannot even present any reasonable possibility that he can ever discredit Havekost. Nor can he demonstrate a reasonable probability that, even if he could discredit Havekost, he would be entitled to a new trial. What he does present--an OIG Report which fails to support his claim--was not presented in a timely manner. This claim is procedurally barred and meritless. The judgment of the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to John Moser, Harry Brody and John Abatecola, 405 N. Reo Street, Suite 150, Tampa, FL 33609-1004, this 14th day of December, 1998.

BARBARA J. YATES
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