No. _____

IN THE

Supreme Court of the United States

PAUL ALFRED BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

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Appendix A

Florida Supreme Court opinion affirming the lower court's denial of *Hurst* relief. *Brown v. State*, 235 So. 3d 289 (Fla. 2018).

235 So.3d 289
Supreme Court of Florida.

Paul Alfred BROWN, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–1001
|
[January 29, 2018]

Synopsis

Background: Motion was filed for post-conviction relief following affirmance of death sentence, 565 So.2d 304. The Circuit Court, Hillsborough County, Michelle Sisco, J., No. 291986CF004084000AHC, denied motion.

[Holding:] The Supreme Court held that Supreme Court's *Hurst*, 136 S.Ct. 616, decision invalidating capital sentencing scheme did not apply retroactively to death sentence that became final in 1990.

Affirmed.

Pariente, J., concurred in result and filed statement.

Lewis and Canady, JJ., concurred in result.

An Appeal from the Circuit Court in and for Hillsborough County, Michelle Sisco, Judge—Case No. 291986CF004084000AHC

Attorneys and Law Firms

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Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Stephen D. Ake, Senior Assistant Attorney General, Tampa, Florida, for Appellee

Opinion

PER CURIAM.

***290** We have for review Paul Alfred Brown's appeal of the circuit court's order denying Brown's motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. See art. V, § 3(b)(1), Fla. Const.

Brown's motion sought relief pursuant to the United States Supreme Court's decision in Hurst v. Florida, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and our decision on remand in Hurst v. State (Hurst), 202 So.3d 40 (Fla. 2016), cert. denied, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). This Court stayed Brown's appeal pending the disposition of Hitchcock v. State, 226 So.3d 216 (Fla. 2017), cert. denied, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017). After this Court decided Hitchcock, Brown responded to this Court's order to show cause arguing why Hitchcock should not be dispositive in this case.

After reviewing Brown's response to the order to show cause, as well as the State's arguments in reply, we conclude that Brown is not entitled to relief. Brown was sentenced to death following a jury's recommendation for death by a vote of seven to five. Brown v. State, 565 So.2d 304, 308 (Fla. 1990). Brown's sentence of death became final in 1990. Brown v. Florida, 498 U.S. 992, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990). Thus, Hurst does not apply retroactively to Brown's sentence of death. See Hitchcock, 226 So.3d at 217. Accordingly, we affirm the denial of Brown's motion.

The Court having carefully considered all arguments raised by Brown, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

LABARGA, C.J., and POLSTON, and LAWSON, JJ., concur.

PARIENTE, J., concurs in result with an opinion.

LEWIS and CANADY, JJ., concur in result.

QUINCE, J., recused.

PARIENTE, J., concurring in result.

I concur in result because I recognize that this Court's opinion in Hitchcock v. State, 226 So.3d 216 (Fla. 2017), cert. denied, — U.S. —, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in Hitchcock.

All Citations

235 So.3d 289, 43 Fla. L. Weekly S48

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Appendix B

Final Order of the Thirteenth Judicial Circuit Court in and for Hillsborough County, Florida, denying relief on Mr. Brown's successive motion to vacate death sentence. Circuit Court Case No. 86-CF-004084 (May 2, 2017).

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA **CASE NO.: 86-CF-004084**

v.

PAUL ALFRED BROWN, **DIVISION: J**
Defendant.
_____/

ORDER DENYING SUCCESSIVE DEFENDANT'S MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

THIS MATTER is before the Court on "Successive Defendant's Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851," filed on January 10, 2017, pursuant to Florida Rule of Criminal Procedure 3.851. On January 27, 2017, the State filed a motion for extension of time. On January 30, 2017, the Court granted the State thirty days to file its response. On March 1, 2017, the State filed its response to Defendant's motion. On March 14, 2017, the State filed a notice of supplemental authority. On March 23, 2017, the Court held a case management conference. Defendant's claims are purely legal and do not require an evidentiary hearing. After considering Defendant's motion, the State's response, the court file and record, as well as the arguments of counsel presented during the March 23, 2017, case management conference, the Court finds as follows.

A jury found Defendant guilty of first-degree murder, armed burglary, and attempted first-degree murder, and it recommended a sentence of death by a vote of seven to five. On March 2, 1987, the trial court imposed a death sentence. The Florida Supreme Court affirmed Defendant's conviction and death sentence. *See Brown v. State,* 565 So. 2d 304 (Fla. 1990), *rehearing denied* June 11, 1990. The United States Supreme Court denied Defendant's petition for writ of certiorari on November 26, 1990. *See Brown v. Florida*, 498 U.S. 992 (1990).

Defendant filed a motion for postconviction relief, which was subsequently denied, and the Florida Supreme Court affirmed the denial. *See Brown v. State*, 755 So. 2d 616 (Fla. 2000). Defendant filed a petition for habeas corpus relief, which was subsequently denied by this Court, and the Florida Supreme Court affirmed the denial. *See Brown v. Moore*, 800 So. 2d 223 (Fla. 2001). Defendant then filed another motion for postconviction relief, which was denied by this Court, and the Florida Supreme Court affirmed the denial. *See Brown v. State*, 959 So. 2d 146 (Fla. 2007).

In this successive motion, Defendant asserts various claims in light of the United States Supreme Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the Florida Supreme Court's decisions in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016); *Perry v. State*, No. SC16-547, 2016 WL 6036982 (Fla. October 14, 2016), *Mosley v. State*, No. SC14-436 and No. SC14-2108, 2016 WL 7406506 (Fla. December 22, 2016), and *Asay v. State*, 2016 WL 7406538, No. SC16-223, No. SC16-102, No. SC16-628, 2016 WL 7406538 (Fla. December 22, 2016), and the enactment of Chapter 2016-13, Law of Florida. Defendant requests that the Court vacate his death sentence and grant a new penalty phase or sentence him to life in prison.

CLAIM I

MR. BROWN'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER *HURST V. FLORIDA*

In claim I, Defendant asserts his death sentence is unconstitutional and in violation of the Sixth Amendment pursuant to *Hurst v. Florida* and *Hurst v. State.* Defendant asserts *Hurst v. Florida* should be applied retroactively to his case under the *Witt*[1] analysis as well as principles of fundamental fairness as set forth in *Mosley.* Defendant acknowledges that *Asay* suggests that cases final before *Ring*[2] was decided are not entitled to retroactivity, but asserts that his case should be decided on an individual basis. Additionally, Defendant posits that in *Mosley*, the court found two classes of

[1] *Witt v. State*, 387 So. 2d 922 (Fla. 1980).
[2] *Ring v. Arizona*, 536 U.S. 584 (2002).

defendants are entitled to retroactive application of the *Hurst* decisions: those whose sentences were final after *Ring*, and those who preserved a *Ring*-type error (regardless of when their death sentences became final). Defendant asserts he falls into the latter category. Defendant contends considerations of fairness and uniformity require retroactive application of *Hurst*. Defendant further contends he has a federal constitutional right to retroactive application of *Hurst* pursuant to *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Defendant also asserts the State cannot establish beyond a reasonable doubt any *Hurst* error was harmless here. Defendant further asserts that the jury vote itself demonstrates doubt that a properly instructed jury would have unanimously returned a death recommendation, and that pursuant to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the jury must be correctly instructed as to its sentencing responsibility, and must know that they will bear the responsibility for a death sentencing resulting in a defendant's execution. Defendant additionally alleges that consideration must be given to the fact that trial counsel would have tried the case differently under *Hurst* and the new Florida law, which evidences that it is more likely than not that at least one juror would not join a death recommendation at resentencing.

In its response, the State asserts Defendant's motion is untimely, procedurally barred and without merit. The State contends a reasonable reading of *Mosley, Asay, Gaskin v. State*, No. SC15-1884, 2017 WL 224772 (Fla. January 19, 2017), and *Bogle v. State*, SC-11-2403 and SC12-2465, 2017 WL 526507 (Fla. Feb. 9, 2017) reflect that *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to Defendant's case, and that Defendant's motion is therefore untimely and procedurally barred. The State further contends it does not bear the burden of proving harmless error, but even if it did, any *Hurst* error here is harmless. The State contends that as to Defendant's *Caldwell* argument, any complaint about jury instructions is untimely and procedurally barred. The State requests that the Court summarily deny claim I. On March 14, 2017, the State filed a notice of supplemental authority citing to *Lambrix v. State*, 2017 WL 931105 (Fla. Mar. 9, 2017), which rejected death relief

in death warrant proceeding where the defendant's conviction and sentence were final prior to the issuance of *Ring v. Arizona.*

The Court disagrees with Defendant's interpretation of *Mosley.* The *Mosley* court specifically noted that its decision in *Asay* held *Hurst* does not apply retroactively to defendants whose sentences were final before *Ring* but left unanswered the question of whether *Hurst* applies retroactively to defendants whose death sentences became final after *Ring*. *Mosley*, 2016 WL 7406506, at *18. The Court finds the Florida Supreme Court has held *Hurst v. Florida* and *Hurst v. State* simply do not apply retroactively to cases that were final at the time of *Ring*.[3] *See Asay*, 2016 WL 7406538, at *4-13 (conducting a retroactivity analysis and concluding that *Hurst* should not be applied to defendant's case, which became final before *Ring*); *Mosley*, 2016 WL 7406506, at *18 ("[W]e have now held in *Asay v. State*, that *Hurst* does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in *Ring.*"); *Gaskin*, 2017 WL 224772, at *2 (citing *Asay* and finding defendant is not entitled to relief under *Hurst v. Florida* because his sentence became final in 1993); *Bogle v. State*, No. SC11-2403 and No. SC12-2465, 2017 WL 526507, *16 (Fla. February 9, 2017) (citing *Asay* and finding defendant is not "entitled to *Hurst* relief because *Hurst* does not apply to retroactively to cases that were final before *Ring* was decided."); *Davis v. State*, No. SC16-264, 2017 WL 656307, *2 (Fla. February 17, 2017) (citing *Asay* and denying defendant's *Hurst v. Florida* claim); *Lambrix v. State*, SC16-8 (Fla. March 9, 2017) (citing *Asay* and concluding defendant is not entitled to a new penalty phase based on *Hurst v. Florida* or *Hurst v. State*). This Court is bound by the decisions of the Florida Supreme Court.

Here, Defendant's sentence became final when the United State Supreme Court denied certiorari on November 26, 1990. *See* Fla. R. Crim. P. 3.851(d)(1)(B) ("For purposes of this rule, a judgment is final . . . on disposition of the petition for writ of certiorari by the United States Supreme

[3] *Ring* was decided on June 24, 2002. *See Ring*, 536 U.S. at 584.

Court, if filed."). Because Defendant's sentence was final before *Ring* was decided in 2002, the Court finds *Hurst v. Florida* and *Hurst v. State* do not retroactively apply to the instant case.[4] **No relief is warranted on claim I.**

CLAIM II

SOCIETY'S STANDARDS OF DECENCY HAVE EVOLVED SUCH THAT A DEATH SENTENCE CANNOT CONSTITUTIONALLY REST UPON A BARE MAJORITY RECOMMENDATION OF DEATH.

In claim II, Defendant asserts that in *Hurst v. State*, the Florida Supreme Court held the Eighth Amendment requires jury unanimity in recommending a death sentence and that the jury be informed of its right to recommend a life sentence even if it unanimously makes the necessary factual findings. Defendant argues that failure to properly instruct the jury and the jury's non-unanimous advisory recommendation in this case violate the Eighth Amendment, and asserts that the *Hurst* error is not harmless here. Defendant argues that what constitutes cruel and unusual punishment under the Eighth Amendment turns upon evolving standards of decency, and that according to *Hurst*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when the jury has voted unanimously in favor of the imposition of death. Defendant argues that he is a member of a protected class because his death sentence rests on the recommendation of only seven jurors, and that the near-uniform judgment of the states is that only a defendant who a jury unanimously concludes should be sentenced to death can receive a death sentence.

In its response, the State asserts the Eighth Amendment has never required a unanimous jury sentencing recommendation, and the United States Supreme Court has never held the Eighth Amendment requires a unanimous jury sentencing recommendation. The State contends in *Spaziano v. State*, 468 U.S. 447 (1984), the United States Supreme Court held the Eighth Amendment is not

[4] Because the *Hurst* decisions are not retroactively applicable to Defendant's case, the Court does not further address the issue of harmless error.

violated when the ultimate sentencing responsibility rests with the judge. The State further contends *Hurst v. Florida* overruled *Spaziano* only to the extent *Spaziano* allows a sentencing judge to find an aggravating circumstance independent of the jury's fact-finding, but the Court did not overrule *Spaziano* on Eighth Amendment grounds. The State also contends the conformity clause of the Florida Constitution requires this Court to construe Florida's prohibition against cruel and unusual punishment consistently with the United States Supreme Court's precedent on Eighth Amendment claims. The State again argues *Hurst* is not retroactive to Defendant's case. The State urges the Court to summarily reject this claim.

As previously discussed in claim I above, the *Hurst* decisions do not retroactively apply to Defendant's case. **No relief is warranted on claim II.**

It is therefore **ORDERED AND ADJUDGED** that "Successive Defendant's Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851" is hereby **DENIED**.

DONE AND ORDERED in Chambers in Hillsborough County, Florida this ____ day of May, 2017.

MICHELLE SISCO
Circuit Judge

ORIGINAL SIGNED
MAY 02 2017
MICHELLE SISCO
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this order has been furnished to Reuben Andrew Neff, Esquire, Maria Christine Perinetti, Esquire, and Raheela Ahmed, Esquire, CCRC-M, 12973 North Telecom Parkway, Temple Terrace, FL 33637; Stephen Ake, Esquire, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, FL 33607; and Jay Pruner, Esquire, Office of the State Attorney, 419 North Pierce Street, Tampa, FL 33602, by U.S. mail, on this 2nd day of ~~April~~ May, 2017.

Valerie Adkison
Deputy Clerk

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Appendix C

Florida Supreme Court opinion affirming Mr. Brown's judgment and sentence. *Brown v. State,* 565 So. 2d 304 (Fla. 1990) (Barkett and Kogan, JJ., concurring as to the convictions, but dissenting as to the sentence of death), *cert. denied*, 498 U.S. 992 (1990).

565 So.2d 304
Supreme Court of Florida.

Paul Alfred BROWN, Appellant,
v.
STATE of Florida, Appellee.

No. 70483.
|
March 22, 1990.
|
Rehearing Denied June 11, 1990.

Synopsis

Defendant was convicted in the Circuit Court, Hillsborough County, Guy W. Spicola, J., of first-degree murder, and was sentenced to death. On appeal, the Supreme Court held that: (1) arresting officer was not required to communicate right to cut off questioning when giving defendant *Miranda* warnings; (2) standard reasonable doubt instruction did not improperly dilute quantum of proof required to meet reasonable doubt standard; and (3) evidence at penalty phase was sufficient to establish that murder was committed in cold, calculated and premeditated manner, as aggravating circumstance.

Affirmed.

Barkett and Kogan, JJ., concurred in part and dissented in part.

Attorneys and Law Firms

*305 James Marion Moorman, Public Defender, and Douglas S. Connor, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., and William I. Munsey, Jr., Asst. Atty. Gen., Tampa, for appellee.

Opinion

PER CURIAM.

Paul Alfred Brown appeals his conviction of first-degree murder and sentence of death.[1] We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution, and affirm both his conviction and sentence.

Around 1:30 a.m., March 20, 1986 two gunshots woke Barry and Gail Barlow. Upon entering the Florida room of their home they found Gail's seventeen-year-old sister, Pauline Cowell, dead in her bed. Pauline's friend, Tammy Bird, had also been shot, but was still alive. The room's outside door stood open, missing the padlock with which it had been secured. Pursuant to information indicating Brown might be a suspect, sheriff's deputies began searching for him in places he was known to frequent and found him hiding behind a shed in a trailer park where Brown's brother lived. They arrested Brown and seized a handgun, later linked to the shootings,[2] from his pants pocket.

Brown lived with the murder victim's mother, and the victim had only recently moved into her sister's home. Brown confessed after being arrested and, at the sheriff's office, stated that he had broken into the victim's room to talk with her about some "lies" she had been telling. Although he entered the room armed, Brown claimed that he had not intended to kill the girl, but that he planned to shoot her if she started "hollering."

The jury convicted Brown of armed burglary, first-degree murder, and attempted first-degree murder and recommended the death sentence. The trial court found that the mitigating evidence did not outweigh the aggravating circumstances and sentenced Brown to death.

As his first point on appeal, Brown claims that the detective who arrested him did not immediately advise him of his complete rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Specifically, he claims the detective failed to tell him that he could stop answering questions at any time. Therefore, Brown argues that his confessions should have been suppressed and that he should now be given a new trial.

At the suppression hearing the detective testified that, immediately upon apprehending him, the deputies directed Brown to lie on the ground, whereupon they removed the handgun from his pocket and handcuffed him. From memory the detective advised Brown of his rights, but did not tell Brown that he could cut off questioning at any time. Brown, however, appeared to understand his rights and immediately stated that he had

committed a murder and an armed robbery.[3] Within minutes the deputies took Brown to a patrol car where the detective readvised him pursuant to *Miranda* from a printed rights card. He then arrested Brown for armed robbery and questioned him about the murder. Brown ***306** confessed again on the ride to the sheriff's office. After again being read his *Miranda* rights from a printed card at the sheriff's office, Brown agreed to make another statement, but asked that it be recorded rather than written.

On cross-examination the detective said he initially told Brown he did not have to speak with him,[4] but that Brown said he wanted to talk. Brown testified that he could not remember ever being given the *Miranda* warnings.[5] The court held that Brown had confessed freely and voluntarily and that, even if a line of the *Miranda* warning had been omitted initially, the confessions would not be suppressed because Brown never tried to stop talking and never requested an attorney.

[1] In *Miranda* the United States Supreme Court held that a person

> taken into custody or otherwise deprived of his freedom by the authorities in any significant way ... must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement.

384 U.S. at 478–79, 86 S.Ct. at 1630. The right to cut off questioning is implicit in the litany of rights which *Miranda* requires to be given to a person being questioned. It is not, however, among those that must be specifically communicated to such a person. The rights card which the detective used contained no mention of cutting off questioning, but, because *Miranda* does not require such a warning, the warnings given Brown were sufficient.

[2] *Miranda* was designed to deter police coercion and to ensure that confessions are given freely and voluntarily. "The prophylactic *Miranda* warnings are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory incrimination [is] protected.' " *Duckworth v. Eagan,* 492 U.S. 195, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989), *quoting Michigan v. Tucker,* 417 U.S. 433, 444, 94 S.Ct. 2357, 2363, 41 L.Ed.2d 182 (1974). There is absolutely no indication of coercion in this case. The United States Supreme Court has held that

> absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.

Oregon v. Elstad, 470 U.S. 298, 314, 105 S.Ct. 1285, 1295, 84 L.Ed.2d 222 (1985). Brown did not begin to talk until after being told his rights. In the absence of any coercion his claim that he had been without sleep and was exhausted does not overcome the voluntariness of his statement.[6]

[3] Brown relies on *Caso v. State,* 524 So.2d 422, 425 (Fla.), *cert. denied,* 488 U.S. 870, 109 S.Ct. 178, 102 L.Ed.2d 147 (1988), where we held "that the failure to advise a person in custody of the right to appointed counsel if indigent renders the custodial statements inadmissible in the prosecution's case-in-chief." *Caso* is distinguishable ***307** because the detective told Brown at least three times that he could have appointed counsel if indigent. In *Caso,* however, we went on to state that *Miranda* violations are subject to a harmless error analysis. Even assuming that a technical *Miranda*

violation occurred here, we find it harmless beyond any reasonable doubt. Within minutes of being given the allegedly incomplete list of his rights, Brown received them again in their entirety. Brown immediately began talking when apprehended and, apparently, never stopped. He also never requested an attorney, never asked that any questioning be stopped, and never refused to answer a question.

We therefore hold that the trial court did not err in refusing to suppress Brown's statements.

[4] Brown also argues that the court erred in not excusing a prospective juror for cause, claiming that this person believed death the proper penalty for anyone convicted of premeditated murder unless mitigating circumstances existed. In *Hill v. State,* 477 So.2d 553, 556 (Fla.1985), we stated: "When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause." Our review shows that the record does not support Brown's claim, but, rather, that this person would have been an impartial juror regarding the death penalty.[7] Therefore, we hold that the court did not err in refusing to excuse this prospective juror for cause.

[5] As the last challenge to his conviction, Brown argues that the court erred in overruling defense counsel's objection to the standard jury instruction on reasonable doubt.[8] According to Brown the standard instruction dilutes the quantum of proof required to meet the reasonable doubt standard. We disagree. This Court has previously approved use of this standard instruction. *In re Standard Jury Instructions (Criminal),* 431 So.2d 594 (Fla.), *as modified on other grounds,* 431 So.2d 599 (Fla.1981). *See also Rotenberry v. State,* 468 So.2d 971 (Fla.1985), *receded from on other grounds, Carawan v. State,* 515 So.2d 161 (Fla.1987); *Williams v. State,* 437 So.2d 133 (Fla.1983), *cert. denied,* 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984). The standard instruction, when read in its totality, adequately defines "reasonable doubt," and we find no merit to this point.

Turning to the sentencing portion of Brown's trial, the trial court found that ***308** three aggravating circumstances had been established, i.e., committed during commission of a felony, previous conviction of a violent felony, and committed in a cold, calculated, and premeditated manner. The court found several items of evidence in mitigation (mental capacity, mental and emotional distress, social and economic disadvantage, nonviolent criminal past), but considered them of so little weight as not to outweigh even any one of the aggravating factors. Brown now claims that: 1) the court erred in instructing the jury; 2) a seven-to-five vote for the death penalty is statistically unreliable; 3) the standard instruction does not adequately define the cold, calculated, and premeditated aggravating circumstance; 4) the cold, calculated, and premeditated aggravating factor should not be found in his case; and 5) death is a disproportionate penalty here.

[6] Several of Brown's arguments merit little discussion. In *Alvord v. State,* 322 So.2d 533 (Fla.1975), *cert. denied,* 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976), we held that the jury's advisory recommendation as to sentence need not be unanimous and that a simple majority would suffice to recommend the death penalty. Brown's statistics do not convince us to rule otherwise.

[7] We also find no merit to his argument about the trial court's rulings on the penalty phase instructions. Brown requested an instruction on the jury's role based on *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).[9] We have previously rejected this claim and approved the pertinent standard jury instruction, *Combs v. State,* 525 So.2d 853 (Fla.1988); *Grossman v. State,* 525 So.2d 833 (Fla.1988), *cert. denied,* 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989), and refuse to reconsider it here. Brown also asked that the following language be stricken from the standard instruction: "If you are reasonably convinced that a mitigating circumstance exists, you may consider it established." Contrary to Brown's contention, we do not find that, on their totality, the standard instructions impermissibly put any particular burden of proof on capital defendants. Instructions which establish no guidance for the consideration of mitigating circumstances would activate the admonition against a procedure that would "not guide sentencing discretion but [would] totally unleash it." *Lockett v. Ohio,* 438 U.S. 586, 631, 98 S.Ct. 2954, 2975, 57 L.Ed.2d 973 (1978) (Rehnquist, J., concurring in part and dissenting in part).

[8] Based on *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), Brown also argues that the standard instruction on the cold,

calculated, and premeditated aggravating circumstance is unconstitutional. In *Maynard* the Court held the Oklahoma instruction on heinous, atrocious, and cruel unconstitutionally vague because it did not adequately define that aggravating factor for the sentencer (in Oklahoma, the jury). We have previously found *Maynard* inapposite to Florida's death penalty sentencing regarding this state's heinous, atrocious, and cruel aggravating factor. *Smalley v. State,* 546 So.2d 720 (Fla.1989). We find Brown's attempt to transfer *Maynard* to this state and to a different aggravating factor misplaced. *See Jones v. Dugger,* 533 So.2d 290 (Fla.1988); *Daugherty v. State,* 533 So.2d 287 (Fla.1988). We therefore find no error regarding the penalty instructions.

[9] Brown also challenges the trial court's finding the murder to have been committed in a cold, calculated, and premeditated manner. Although Brown told the authorities that he did not intend to kill the victim, he also said that he intended to shoot her if she made any noise. Moreover, Brown took boltcutters with him to the victim's home late at night, removed the padlock, returned the boltcutters to the car, and then entered the victim's room armed with a handgun. The psychologist who testified on Brown's behalf at sentencing admitted that Brown made a statement ***309** to him indicating he had considered shooting the victim before going to her residence. The psychologist conceded that the homicide may well have been preplanned rather than impulsive. *Remeta v. State,* 522 So.2d 825 (Fla.), *cert. denied,* 488 U.S. 871, 109 S.Ct. 182, 102 L.Ed.2d 151 (1988); *Rogers v. State,* 511 So.2d 526 (Fla.1987), *cert. denied,* 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The trial court characterized this killing as "nothing less than an execution." On the totality of the circumstances this case demonstrates the heightened premeditation necessary to finding the murder to have been committed in a cold, calculated, and premeditated manner.

There was mitigating evidence to the effect that Brown was under a severe mental strain at the time of the homicide, due, in part, to trying to support the mother of the victim and her children. His earning capacity was limited and there had been threats to his girlfriend from the Department of Health and Rehabilitative Services that she would lose the children if living conditions did not improve. His father and brother suggested that these factors contributed to Brown's actions and that it was out of character for him to act violently. The jury and the trial judge heard this testimony and it is apparent that the trial judge considered it in his weighing process.

[10] We disagree with Brown's claim that the death penalty is disproportionate in this case. The trial judge found three valid aggravating circumstances which, after careful consideration, he concluded had not been overcome by the mitigating evidence.[10] Compared with other cases where the jury has recommended and the judge has imposed the death sentence, Brown's case warrants that penalty. *Compare, e.g., Hudson v. State,* 538 So.2d 829 (Fla.1989) (death sentence affirmed, two valid aggravating factors with trial court giving little weight to mitigating evidence), *cert. denied,* 493 U.S. 875, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989), *with Smalley v. State,* 546 So.2d 720 (Fla.1989) (death sentence vacated, one valid aggravating factor, substantial and compelling mitigating evidence); *Songer v. State,* 544 So.2d 1010 (Fla.1989) (death sentence vacated, one aggravating factor, more than three mitigating circumstances); *Proffitt v. State,* 510 So.2d 896 (Fla.1987) (death sentence vacated, burglary without more in aggravation, no prior criminal history); *Wilson v. State,* 493 So.2d 1019 (Fla.1986) (death sentence vacated, heated domestic confrontation).

We therefore affirm Brown's convictions and sentences.

It is so ordered.

EHRLICH, C.J., and OVERTON, McDONALD, SHAW and GRIMES, JJ., concur.

BARKETT and KOGAN, JJ., concur in conviction, but dissent as to sentence only.

All Citations

565 So.2d 304, 15 Fla. L. Weekly S165

Footnotes

1 The jury also convicted Brown of armed burglary and attempted first-degree murder, for which the court sentenced him to consecutive terms of life imprisonment. Although Brown does not appeal those convictions and sentences, our review shows them to be supported by the record.

2 Tests showed that bullets found at the murder scene had been fired from the handgun seized from Brown.

3 While at the murder scene, the detective received notice of an armed robbery and shooting at a convenience store. The description of the robber matched the description of Brown that the detective had been given. He met with a supervisor and several deputies who discussed both crimes as well as the fact that Brown's car, containing both items taken in the robbery and boltcutters, which could have been used to remove the padlock from the victim's door, had been found. The robbery is not involved in this case.

4 He told Brown this before warning him from memory when Brown was apprehended.

5 Conversely, Brown also could not remember not being given his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

6 The United States Supreme Court "has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion." *Oregon v. Elstad,* 470 U.S. 298, 312, 105 S.Ct. 1285, 1294, 84 L.Ed.2d 222 (1985). *See also Colorado v. Connelly,* 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

7 The pertinent part of the voir dire reads as follows:

> Mr. Benito [assistant state attorney]:
>
> Correct me if I am wrong, yesterday you did not think that every first degree murder case warrants the death penalty, did you, sir?
>
> Mr. Scalfari [prospective juror]: That's correct.
>
> Mr. Benito: You are willing, if you are seated as a juror, to listen to all of the evidence, aggravating and mitigating circumstances, and if a man is found guilty, determine whether or not the death penalty should be imposed?
>
> Mr. Scalfari: Yes, sir.
>
> Mr. Benito: You're not going to think that if a man is convicted of first degree murder that he should get the death penalty, are you?
>
> Mr. Scalfari: No, sir.
>
> * * * * * *
>
> [Mr. Chalu, defense counsel]: Mr. Scalfari, for example, if you find as a matter of fact that my client, Mr. Brown, did in fact commit a murder or a homicide, you would not automatically consider that to be first degree murder, would you?
>
> Mr. Scalfari: No.
>
> Mr. Chalu: All right. You would be capable of listening to the Judge's instruction about the different degrees of homicide and decide based on the facts and law given you by the Judge which type of homicide was the appropriate one?
>
> Mr. Scalfari: Yes.

8 The standard instruction on reasonable doubt, given at Brown's trial, reads as follows:

> Whenever the words "reasonable doubt" are used you must consider the following:
>
> A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.

9 The requested instruction reads as follows: "The fact that your recommendation is advisory does not relieve you of your solemn responsibility for the Court is required to and will give great weight and serious consideration to your verdict in imposing sentence."

10 The trial judge stated that even without the cold, calculated finding the remaining aggravating circumstances outweighed the mitigating.

No. _____

IN THE

Supreme Court of the United States

PAUL ALFRED BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix D

Florida Supreme Court opinion affirming the lower court's denial of Mr. Brown's initial postconviction motion. *Brown v. State,* 755 So. 2d 616 (Fla. 2000).

755 So.2d 616
Supreme Court of Florida.

Paul Alfred BROWN, Jr., Appellant,
v.
STATE of Florida, Appellee.

No. SC90540.
|
March 9, 2000.
|
Rehearing Denied April 26, 2000.

Synopsis

After defendant's conviction and death sentence for first-degree murder were affirmed on appeal, 565 So.2d 304, the Circuit Court, Hillsborough County, Diana M. Allen, J., denied defendant's motion for postconviction relief. Defendant appealed. The Supreme Court held that: (1) defense counsel was not ineffective for failing to object to penalty-phase closing argument by prosecutor that described positive aspects of life in prison; (2) defense counsel for guilt phase adequately investigated defenses relevant to defendant's mental condition; (3) defense counsel could make informed decision to concede guilt to lesser homicide charge in light of defendant's confession; and (4) defense counsel was not ineffective in penalty phase for failing to provide defendant's mental health experts with background materials.

Affirmed.

Anstead and Pariente, JJ., concurred in the result only.

Attorneys and Law Firms

***619** Terri L. Backhus, Tampa, Florida; and John Moser, Capital Collateral Regional Counsel, Harry P. Brody, Assistant CCRC and John Abatecola, Assistant CCRC, Office of the Capital Collateral Regional Counsel-Middle Region, Tampa, Florida, for Appellant.

Robert A. Butterworth, Attorney General, and Robert J. Landry, Assistant Attorney General, Tampa, Florida, for Appellee.

Opinion

PER CURIAM.

Paul Brown, a prisoner under sentence of death, appeals the trial court's denial of his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm the trial court's denial.

I. PROCEDURAL HISTORY

Brown was found guilty and sentenced to death in 1987 for the murder of seventeen-year-old Pauline Cowell on March 20, 1986. The factual circumstances of this case are set forth in our opinion on direct appeal, in which this Court affirmed Brown's conviction and sentence. *Brown v. State,* 565 So.2d 304, 304-06 (Fla.1990). On November 26, 1990, a petition for writ of certiorari was denied by the United States Supreme Court. *Brown v. Florida,* 498 U.S. 992, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990). In 1992, Brown filed his initial postconviction motion under Florida Rule of Criminal Procedure 3.850. The circuit court dismissed the initial motion without prejudice, and Brown filed two amended rule 3.850 motions in 1992. Public records litigation pursuant to chapter 119, Florida Statutes, was ongoing in the case. On October 12, 1994, the circuit court granted Brown's motion to disqualify the Hillsborough County State Attorney's Office because of potential conflict in that Brown's former defense counsel had become employed there as an assistant state attorney. The State appealed, and this court quashed the order without opinion on January 31, 1995. Brown filed his third amended rule 3.850 motion in 1996. [1]

***620** The circuit court summarily denied twelve of Brown's sixteen claims. *State v. Brown,* No. 86-4084 (Fla. 13th Cir. Ct. order filed Nov. 12, 1996) (Order I). The court found six of the claims to be procedurally barred because they were raised or could have been raised on direct appeal. [2] *Id.* at 5. The court found three of the claims to be procedurally barred because Brown had attempted to circumvent the procedural bar by couching the issues as ineffective assistance of counsel. [3] *Id.* After setting forth analysis and record attachments, the court found three other claims to be without merit. [4] *Id.* at 6-8. The court reserved for an evidentiary hearing the

remaining four claims: lost or destroyed evidence, claim 3; prosecutorial misconduct, claim 6; ineffective assistance of counsel at the guilt phase of Brown's trial, claim 7; and ineffective assistance of counsel at the penalty phase of Brown's trial, claim 8. *Id.* at 6.

A week before the date of the evidentiary hearing, the then-presiding circuit judge recused himself because he had not yet attended the required "Handling Capital Cases" course. The hearing before another circuit judge took place on March 3, 1997. Following the evidentiary hearing, the court issued a five-page written order denying relief on the four claims upon which the evidentiary hearing was held. *State v. Brown,* No. 86-4084 (Fla. 13th Cir. Ct. order filed Apr. 8, 1997) (Order II). In her order, the circuit judge found no basis for disturbing the previous circuit judge's order denying the remaining twelve claims without an evidentiary hearing. *Id.* at 2. The circuit judge noted ***621** in her order that she had given Brown an opportunity to present evidence and argument on any of the sixteen claims but that Brown had declined to do so except for the four claims reserved for evidentiary hearing. *Id.*

II. ISSUES ON APPEAL

[1] In this appeal, Brown raises fourteen claims.[5] Within those claims, he contends that the circuit court failed to adequately address the twelve issues summarily denied by the previous circuit judge and disputes the circuit court's findings and rulings on three of the four issues[6] considered at the evidentiary hearing. We find no error in the circuit court's order. Nine of Brown's claims raised in this appeal in this Court are procedurally barred,[7] and we find no need to discuss them. We will address only claim I, a portion of claim II, and claims III, IV, and X.

Claim I. CCP Jury Instruction

[2] In his first claim, Brown argues that his conviction must be reversed because the jury instruction given as to the aggravating factor of cold, calculated, and premeditated (CCP) was unconstitutionally vague. Brown points out that, in the direct appeal in this case, this Court rejected Brown's constitutionality argument on the basis that *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), did not apply to Florida and to this aggravating factor. *See Brown,* 565 So.2d at 308. Brown also notes that, subsequent ***622** to *Brown,* the United States Supreme Court in *Espinosa v. Florida,* 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), and *Hodges v. Florida,* 506 U.S. 803, 113 S.Ct. 33, 121 L.Ed.2d 6 (1992), undercut the efficacy of this Court's reasoning in the *Brown* decision.

Although Brown does not refer to it in the present appeal, *Jackson v. State,* 648 So.2d 85 (Fla.1994), was a decision subsequent to *Brown* in which we discussed *Brown* and acknowledged that this Court's opinion as to the inapplicability of *Maynard* to CCP instructions had been "discredited in *Espinosa* " and "undercut by *Hodges.*" *Jackson,* 648 So.2d at 88. In *Jackson,* we held that:

> Florida's standard CCP jury instruction suffers the same constitutional infirmity as the HAC-type instructions which the United States Supreme Court found lacking in *Espinosa, Maynard,* and [*Godfrey v. Georgia,* 446 U.S. 420, 428-29, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)].

648 So.2d at 90. However, we then held:

> Claims that the instruction on the cold, calculated, and premeditated aggravator is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal. *James v. State,* 615 So.2d 668, 669 & n. 3 (Fla.1993).

648 So.2d at 90. We followed *Jackson* with *Walls v. State,* 641 So.2d 381 (Fla.1994), in which we held in respect to *Jackson* constitutional error as to the CCP instruction:

> To preserve the error for appellate review, it is necessary both to make a specific objection or request an alternative instruction at trial, *and* to raise the issue on appeal.

Walls, 641 So.2d at 387. In *Pope v. State,* 702 So.2d 221 (Fla.1997), we again addressed the preservation issue and held:

> However, we have made it clear that claims that the CCP instruction is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal. The objection at trial must attack the instruction itself, either by submitting a limiting instruction or making an objection to the instruction as worded.

702 So.2d at 223-24. Since our decision in Brown's direct appeal on this issue was reached on the basis of our holding that *Maynard* did not apply, we did not reach the issue of preservation of the claim at trial. We have in this appeal reviewed the trial record to determine whether the issue was preserved by an objection to the instruction as worded or by a request for a limiting instruction. We find that defense counsel's only objections to the CCP instruction were presented at the jury instruction conference and the allocution hearing:

> I object to that one. There is no basis in the evidence before the Court. It is insufficient evidence to border [sic] on the instruction on that.

Later, at the allocution hearing before the court prior to sentencing, defense counsel argued against the application of the CCP aggravator as follows:

> The case law is quite clear that aside from legal premeditation, the proof that a capital felony is committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification requires proof of much greater weight than does the mere premeditation required to prove a first degree murder case.... I do not believe that the evidence is weighty enough or convincing enough to show that this capital felony was committed in a cold, calculated and premeditate[d] manner within the meaning of the aggravating circumstance in the statute.

Defense counsel neither submitted a limiting instruction nor specifically objected that the CCP instruction was unconstitutionally vague, as we required in *Pope*. Accordingly, we find that defense counsel's objection did not preserve this issue for ***623** appellate review in accord with *Jackson, Walls,* and *Pope*.

Claim II. Ineffective Assistance by Penalty-phase Counsel in Failing to Object to Closing Argument

[3] In this subclaim of claim II, Brown contends that his penalty-phase counsel, Craig Alldredge, was prejudicially ineffective in that he failed to object to a portion of the penalty-phase closing argument by Assistant State Attorney Michael Benito that described positive aspects of life in prison in support of the prosecutor's argument against a life sentence. In her order, the circuit judge held in respect to this claim:

> Evidence relating to [this claim] was presented by testimony of Wayne Chalu, ... lead trial counsel for the defense, and Craig Alldredge, ... penalty phase trial counsel for the defense. The claim is essentially that trial counsel was ineffective for failing to object to the prosecutor's improper closing argument in the second phase ...:
>
> > What about life imprisonment, ladies and gentlemen? What about life imprisonment? Now I am not saying that I would like to spend one day in jail, all right, don't get me wrong, but what about life imprisonment? What can one do in prison? You can laugh; you can cry; you can eat; you can sleep; you can participate in sports; you can make friends; you can watch TV; you can read; in short, you live to learn-you live to learn about the wonders that the future holds. In short, it is life.
>
> It is undisputed that counsel for the defense did not object. Mr. Chalu was familiar with the prosecutor's use of this argument and was also aware that such argument had not been found to be improper at that time. Mr. Alldredge testified that he was not aware that such argument was improper, that he would have objected had he known, and that he did not object. Assuming without deciding that penalty phase counsel was deficient in his performance for failing to object to this portion of the prosecutor's argument, this Court

> cannot and does not find that the alleged deficient performance resulted in prejudice which meets the prejudice prong of *Strickland v. Washington,* 466 U.S. 688[668, 104 S.Ct. 2052, 80 L.Ed.2d 674] (1984), that is, a reasonable possibility that the outcome would have been different.

Order II at 2-3 (citations omitted).

[4] Based upon our review of the trial record, we agree with the circuit court that Brown's claim in respect to this portion of the State's argument fails to meet the prejudice prong of *Strickland,* as recently reiterated by this Court in *Jones v. State,* 732 So.2d 313 (Fla.1999).[8] The circuit court's ruling is consistent with this Court's holding in *Jackson v. State,* 522 So.2d 802, 809 (Fla.1988), that a similar unobjected-to argument would not be grounds for reversal for a new penalty phase. *See also Hodges v. State,* 595 So.2d 929, 933 (Fla.1992); *Hudson v. State,* 538 So.2d 829, 832 n. 6 (Fla.1989). Although we did find a similar claim as to the denial of an objection to be harmful error in *Taylor v. State,* 583 So.2d 323 (Fla.1991), we did so on the basis of harmless error record review.[9] In sum, under the circumstances ***624** of this case, we do not find that the failure to object to this argument was conduct by counsel that deprived the defendant of a trial whose result was reliable.

Although we agree that Brown's claim fails to meet the prejudice prong of *Strickland,* we also have reviewed the evidentiary record to evaluate whether counsel's failure to object violates the first prong of *Strickland.* In this case, both defense counsel Wayne Chalu, who had primary responsibility for the entire case, and defense counsel Craig Alldredge, who handled the penalty phase, testified at the postconviction evidentiary hearing. Chalu, who is now an assistant state attorney in the Thirteenth Judicial Circuit, was at the time of this trial an experienced felony litigator who had been an assistant public defender in the Thirteenth Circuit for about eight years, had received special training in handling capital cases, and had handled several prior capital cases. Chalu had overall responsibility for preparing and presenting Brown's entire case. Throughout the proceedings, Chalu worked closely with Alldredge, who was assigned to handle the penalty phase. At the time of the trial, Alldredge had been an assistant public defender in the Thirteenth Circuit for about six years and had handled the guilt phases of two other capital cases. This was the first case in which Alldredge had lead responsibility for the penalty phase. Alldredge subsequently became an assistant federal public defender.

In the evidentiary hearing below, Chalu described his working relationship with Alldredge during this case as follows:

> [W]e talked to each other constantly. We're in the same office. We're just a few feet away from each other, and we talked about the case probably daily.... [B]asically, I was working on the guilt phase and [Alldredge] was working on the penalty phase. Of course ... we both pretty much knew what the other was doing in terms of preparation because we talked about it all the time.

Chalu testified that at time of the trial he understood that no case law had found reversible error in a court's allowing the challenged penalty-phase closing argument. Chalu further testified:

> I personally don't think it was so bad. I think we capitalized on it, too. Mr. Alldredge sort of capitalized on that. In their closing, it seemed closest to me innuendo if you're alive, you can do these things; if you are not, you can't. I didn't think it was that prejudicial.

Alldredge testified at the evidentiary hearing that he saw no reason to object during the prosecutor's presentation of the now-challenged portion of the closing argument because he did not consider the argument to be improper. The trial record reflects that Alldredge, in arguing for a life sentence, presented in penalty-phase closing argument a grim description of life in prison in order to counter the prosecutor's positive characterization of life in prison. Alldredge answered the prosecutor's argument by describing prison life in these contrasting terms:

> Mr. Benito tells you life in prison ain't that bad. The number one cause of death in [the] Florida State Prison system is suicide, so if it ain't that bad, there are a lot of men who are obviously making terrible mistakes.

> It's a world of reinforced concrete, and steel, and steel doors, and coils of razor wire, and electric fences, and machine guns, and shotguns. Mr. Benito says he'll make friends and be able to enjoy sports. He will spend the rest of his life with men who society has found *625 their presence so abhorred that they have to be locked away.
>
> Paul Brown will most likely get out of prison when he dies....
>
> He is going to die. We all have to die. His life has been garbage. If he spends the rest of his life in prison, the rest of his life is going to be garbage, too, but it will be life.
>
> ....
>
> ... If Judge Spicola sentences him to life in prison, he will spend life in prison. He's not going to harm another innocent person, again.

We find that defense counsel's failure to object does not fall below the standard of constitutionally effective counsel as provided in *Strickland.* Moreover, we find no basis in the evidence to reject trial counsel's opinion that Alldredge capitalized upon the complained-of closing argument in presenting his own argument for a sentence of life in prison. [10] Accordingly, we find no merit in Brown's claim that trial counsel was ineffective in failing to object to the prosecutor's penalty-phase closing argument.

Claim III. Guilt-phase Ineffective Assistance of Counsel

A. Ineffective Assistance of Counsel Claims

Brown contends within this claim that he was denied a full and fair hearing in that the postconviction circuit court did not address all the points he raised concerning ineffective assistance of counsel during the guilt phase of his trial. Brown contends that the record demonstrates the following ineffective assistance of counsel: (a) defense counsel failed to present to the jury certain exculpatory evidence; (b) defense counsel failed to attack the credibility of certain State witnesses; (c) due to the State's failure to disclose to defense counsel until the first day of trial the location of two of the State's witnesses, defense counsel was rendered unable to investigate exculpatory evidence these witnesses could have contributed; (d) defense counsel failed to present exculpatory evidence as to Brown's mental instability, alcohol abuse, and delusional thinking; (e) defense counsel failed to inform the jury that Brown's courtroom demeanor was affected by antidepressant and antipsychotic drugs administered to him at the Hillsborough County Jail; (f) defense counsel conceded guilt without Brown's consent; (g) defense counsel failed to object or move for a mistrial after learning that the jury had been exposed to a newspaper article concerning the trial; (h) defense counsel's efforts were hampered because the investigator assigned to Brown's case failed to undertake the requested investigation; (i) defense counsel failed to explore a diminished capacity defense showing that Brown was psychotic, sleep-deprived, and intoxicated at the time of the offense; and (j) the cumulative effect of an incomplete investigation, overwhelming public defender caseload, and concealment of key witnesses by the State deprived Brown of his due process rights. In reviewing these claims, we have considered the trial record and the record of the postconviction evidentiary hearing, including the circuit court's order.

B. Trial Record

The trial record reflects the following as to the guilt phase of Brown's trial. The State presented eleven witnesses, four of whom were cross-examined by Chalu. Among the State witnesses was Hillsborough County Sheriff's Detective Paul Davis, who testified as to Brown's statements to police at Brown's residence and in a patrol car on the day of the murder. Brown told Davis that he had gone to the house where the victim was staying with her sister and that he had parked nearby. *626 Brown cut away a padlock on a door of the house with a pair of bolt cutters that he was carrying. He went back to his car, moved his car to the front of the house, and retrieved his gun from under the seat of the car. With the gun in his belt, Brown walked up to the residence where he had cut the padlock, walked through the door he had unlocked, woke the victim, and told her he wanted to talk to her. She shouted at him to leave. Brown immediately shot her in the head and then shot in the head a child who was sleeping in the same bed. [11] Upon cross-examination of Detective Davis, Chalu established that Brown had told Davis he did not enter the house and awaken the victim with the intent to kill her.

Chalu presented no evidence during the guilt phase. By declining to put on evidence, defense counsel gained the right to present an additional guilt-phase closing argument in rebuttal to the State's closing argument. The judge instructed the jury on armed burglary and lesser offenses including armed trespass. He also instructed upon first-degree felony murder, premeditated murder, and lesser homicide charges including second and third-degree murder.

C. Postconviction Evidentiary Hearing

The record of the postconviction evidentiary hearing reflects the following. Chalu was responsible for presentation of the entire case and represented Brown during the guilt phase of the trial. As stated previously in discussing claim II, Chalu worked closely throughout the trial with co-counsel Alldredge, who represented Brown during the penalty phase only.

Chalu testified at the postconviction hearing that, upon his appointment to represent Brown, he immediately engaged the services of psychologist Dr. Robert Berland because of "certain red flags" noticed by Chalu, such as Brown's appearing to be of "sub-average intelligence" and possibly exhibiting signs of "sub-clinical mental illness." Chalu testified that both he and Alldredge talked with Berland and other mental-health experts in order to decide upon their defense strategy and to facilitate data collection as to Brown's history. Chalu determined that nothing the experts found before the trial relevant to Brown's mental state would be useful in support of Brown's case during the guilt phase of the trial. Thus, mental health expert testimony was used only in the penalty phase. Chalu testified that he and the mental health experts knew that Brown was receiving anti-psychotic medication at the Hillsborough County Jail but that he did not present this information to the judge or jury because he had decided not to employ a mental health defense in the guilt phase.

Chalu testified that his theory of defense was dictated by three factors: Brown's account to Chalu of how the murder had occurred; mental health experts' accounts of what they understood to be Brown's mental state at the time of the offense; and the fact that the trial court had denied the defense motion to suppress Brown's confession. Chalu explained that, once he knew the confession would be admitted into evidence, he determined that the only viable defense as to felony murder was to argue for a lesser offense of armed trespass, rather than armed burglary, which would support a verdict of third-degree murder. As to premeditated murder, Chalu's strategy was to argue, as Brown stated in his confession, that he shot the victim only on an impulse and had no preformed intent to kill her when he entered the room where she was sleeping and woke her.

Chalu stated that he interviewed several of Brown's relatives, including Brown's father, before the trial and determined that they could offer no testimony in support of Brown's guilt-phase defense. Chalu testified that, if he had discovered any information ***627** from family members or others relevant to premeditation, he would have presented such testimony at the guilt phase. As to his strategy of declining to present defense evidence, Chalu explained:

> [W]e had an uphill battle because once the motion to suppress confession was denied, we had to figure out some way to try to prevent the case from going into penalty phase, to try to get a lesser.
>
> So all my efforts were directed to and all the tactics that I employed in my first phase were directed to maximizing the possibility of getting a lesser, and one of those was to try to keep the opening and closing argument and not put on any evidence in the first phase.

Upon cross-examination, Chalu stated that his strategy of declining to present evidence and seeking a conviction of a lesser offense had been successful in at least one other first-degree murder trial in which he had faced prosecutor Benito.

Chalu testified that in communicating this trial strategy to Brown,

> I always took great pains to try to make sure that Mr. Brown understood what we were saying because he was a little slow.... We were trying to get him to understand everything we were saying and the rationale for what we were doing as much as we were able to.

Chalu testified that the prosecutor had not offered any plea bargain for a life sentence but that he had offered to

allow Brown to plead guilty to first-degree murder and proceed directly to the penalty phase. Chalu testified that he informed Brown of this option, and Brown chose to reject it. As to Brown's consent to the defense strategy of conceding guilt to a lesser degree of murder, Chalu testified, "Mr. Brown was pretty much agreeable to pretty much everything we did, to be honest with you."

Chalu testified that he had no problem receiving information requested from the investigator assigned to the case. As to school and jail records, Chalu stated that it was ultimately his responsibility to retrieve any relevant records and that he believed at the time of the trial that all relevant records had been gathered. As to the State witnesses made known to defense counsel for the first time on the first day of trial, Chalu testified that he asked the judge for time to depose them, took brief depositions, and determined that their testimony was not "of any great consequence to the case."

Chalu testified that he saw no reason to move for a mistrial after learning that at least one juror had been exposed to pretrial publicity, because he was satisfied after the judge's inquiry that the jurors had not read the article in question or had only read the headline. Therefore, he stated, it was "inconsequential and not worth pursuing any further because there was no prejudice to the jury or to Mr. Brown because of the incident."

On cross-examination by the State, Chalu testified that he had been able to keep the jury from hearing any evidence as to the State's theory of Brown's motive for this offense, which was that Brown wanted to keep the seventeen-year-old victim, who was the daughter of his girlfriend, from reporting to authorities the fact that she and Brown had had a sexual relationship. Chalu also was able to exclude evidence of a robbery and shooting allegedly committed by Brown later on the day of the instant murder.

During the postconviction evidentiary hearing, Brown also presented the testimony of Dr. Steven Szabo, a psychiatrist who evaluated Brown in the Hillsborough County Jail where Brown was awaiting trial in March 1986. Dr. Szabo testified that he diagnosed Brown as schizophrenic and prescribed Mellaril, an antipsychotic medication, but that this medication was never forced upon Brown. Szabo testified that he would have presented this testimony at Brown's trial in 1987 but that he was not contacted by counsel for Brown.

***628** After considering this evidence and argument based on this evidence, the circuit court denied Brown the relief he requested in his guilt-phase ineffective assistance claims, concluding that Brown failed to meet both the ineffectiveness and prejudice prongs of the *Strickland* test. The circuit court order stated in relevant part:

> The testimony of Mr. Chalu, guilt phase counsel for the defense, refutes any deficiency in investigation, objections, or preparation and the Defendant has failed to show any deficiency. Guilt phase counsel had a clear theory of defense, i.e., lack of intent, and the record shows that he meticulously prevented the introduction of highly prejudicial evidence against his client. Assuming once again that the Defendant could show some deficient performance, he does not show how such resulted in prejudice. Even with the benefit of hindsight, it does not appear that guilt phase counsel would have done things differently.

Order II at 4.

D. Discussion of Circuit Court Postconviction Order

[5] **[6]** Brown challenges the sufficiency of the circuit court's order denying postconviction relief on alleged ineffective assistance of counsel at the guilt phase. Brown claims that the court erred by failing to attach relevant portions of the record in support of its denial of this claim and by failing to address certain points raised in his postconviction motion. We have recently clarified that record attachments are not required for a postconviction order if a court has stated its rationale in its written order denying postconviction relief. *Diaz v. Dugger,* 719 So.2d 865, 867 (Fla.1998); *see also Mills v. State,* 684 So.2d 801, 804 (Fla.1996); *Roberts v. State,* 678 So.2d 1232, 1236 (Fla.1996). Here, the record reflects that the circuit judge entered her order after hearing testimony relevant to this postconviction claim from defense counsel Chalu and Alldredge, as well as from Brown's childhood neighbor and Brown's brother and stepbrother. Brown himself did

not testify at the postconviction evidentiary hearing. The record reflects that the circuit judge held a full evidentiary hearing, addressed the relevant points raised by Brown, and adequately explained the rationale for her decision denying relief. We find no error in the circuit court's postconviction proceedings and order.

E. Discussion of Guilt Phase Ineffective-Assistance Claims

1. Exculpatory Evidence

[7] **[8]** **[9]** We begin our inquiry into whether the performance of Chalu was deficient by recognizing: (1) there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052; and (2) Brown bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. *Id.* at 688-89, 104 S.Ct. 2052. Brown argues that Chalu failed to adequately investigate the possibility of an intoxication defense and failed to question others, including Brown's brother, Jimmy Brown, who could have testified as lay witnesses as to Brown's condition immediately preceding the crime. After the court denied the defense motion to suppress Brown's confession, Chalu determined that the only viable defense was to concede that Brown had committed the murder and argue for a conviction of a charge less than first-degree murder. In considering his strategy, Chalu concluded that the available potential witnesses, such as Jimmy Brown, could not present evidence of Brown's state of mind prior to the murder such that an insanity or diminished capacity defense would be viable. The record reflects that Chalu also made strategic decisions not to present to the jury certain witnesses who might have revealed to the jury prejudicial information about Brown's criminal history. ***629** Chalu made an informed evaluation of his options and then presented a defense of lack of intent to commit premeditated murder. Chalu also argued that the State failed to prove intent to commit armed burglary. If successful, these defenses would have left only armed trespass as the underlying felony to support a felony murder conviction, which would not have been first-degree felony murder. In view of the trial record and the testimony of Chalu, we agree with the circuit court that Brown failed to demonstrate that the performance of Chalu fell below the *Strickland* standard. *See Strickland,* 466 U.S. at 691, 104 S.Ct. 2052; *Sims,* 155 F.3d at 1306.

2. State Witnesses

[10] Brown contends that Chalu failed to make an effective attack on the credibility of State witnesses Gail and Barry Barlow, who were in the house with the victim at the time of the murder, and to investigate mitigating evidence the Barlows might have provided as to Brown's mental instability, alcohol abuse, and delusional thinking. At trial, Chalu objected to their testimony because he had not been notified that the State would call them as witnesses, and the prosecutor argued that they should be allowed to testify because he had only recently discovered their location. The trial court allowed Chalu to depose these witnesses after the end of the first day of trial, and they subsequently testified without cross-examination by Chalu. In the postconviction hearing, Chalu stated that during deposition he found the Barlows to be hostile to Brown and stated, "I don't think they would have assisted me at all in any manner." On this record, we conclude that the strategic decision of Chalu not to cross-examine the Barlows or present their testimony during the penalty phase was well within the range of professional assistance. *See Strickland,* 466 U.S. at 690, 104 S.Ct. 2052 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.")

3. Prescription Drugs

[11] Brown argues that Chalu was ineffective in failing to inform the jury that Brown's inability to react during trial was caused by antidepressant and antipsychotic medication administered at the Hillsborough County Jail. Brown argues that counsel should have either notified the jury of Brown's medicated state, requested that the medication be stopped, or requested a medical reason for Brown's involuntary medication. Brown contends that information about this medication was critical for the jury to consider in assessing whether Brown could have formed sufficient specific intent to support his guilt or premeditation and in deciding how to weigh potential mental health mitigators when recommending Brown's sentence. The record reflects that Chalu testified in the postconviction hearing that he and the defense mental

health experts knew that Brown was being administered the drugs but that Chalu chose not to present this information to the judge or jury during the guilt phase because he was not presenting a mental health defense and Brown did not testify This claim does not meet either prong of *Strickland.*

4. Concession of Guilt

[12] Brown contends that Chalu failed to act as an advocate for Brown at the guilt phase of the trial and did not adequately inform him of the trial strategy of conceding guilt. The record reflects that the State's primary evidence was a confession from Brown, in which he told police officers that he entered the house where the victim was sleeping and shot her when she began shouting for him to leave. Chalu testified in the postconviction evidentiary hearing that, once the motion to suppress Brown's confession was denied, defense counsel made the tactical decision to argue during the guilt phase for a conviction of the lesser offense of armed trespass, rather than armed burglary, which ***630** would enable Brown to avoid a first-degree murder conviction. As to premeditation, Chalu presented the defense that Brown did not have an intent to kill when he entered the house where the victim was sleeping and encountered her there, and thus he was guilty at most of second-degree murder.

During cross-examination, Chalu established that Brown had told Detective Davis he did not enter the house and awaken the victim with the intent to kill her. In his guilt-phase closing argument, Chalu told the jury:

> The fact is Mr. Brown is guilty of homicide, but he is not guilty of murder in the first degree.
>
> ....
>
> ... I have raised a reasonable doubt, several reasonable doubts as to Mr. Brown's intent when he went over to the house that night and committed those crimes, because his intent is what this case boils down to.
>
> If he did not have a fully formed conscious intent to kill, then he is not guilty of first-degree murder.
>
> If he did not have a fully formed conscious intent to commit a crime when he entered that home, then he is not guilty of armed burglary.
>
> ....
>
> [Second-degree murder] is an act or a series of acts that, one, a person of ordinary judgment would know is reasonabl[y] certain to kill or do serious bodily injury to another, and is done from, and here is the Defendant's intent, ill will, hatred, spite, or an evil intent. "I went in there to find out why she was lying about me." Murder in the second degree. An impulsive act out of ill will, spite, or an evil intent. That is a depraved mind, second degree murder.
>
> ... [B]eyond any reasonable doubt Mr. Brown is guilty of murder in the second degree, a most serious crime as the Judge will instruct you. It carries up to life in the Florida State Prison.
>
> ....
>
> ... [I]f you find the Defendant guilty of first degree murder, you're finding him guilty of the charge which has not been proven beyond a reasonable doubt.
>
> Has second degree murder been proven beyond a reasonable doubt? It most certainly has.

Thus, the record reflects that Chalu did not concede first-degree premeditated murder or felony murder, but rather, the record supports that Chalu set upon a strategy to do what he reasoned he could do in light of Brown's confession to convince the jury to find Brown guilty of a lesser offense. Faced with the overwhelmingly inculpatory evidence of Brown's confession, Chalu made his informed decision to argue for a lesser conviction in an effort to avoid a death sentence. *See McNeal v. Wainwright,* 722 F.2d 674 (11th Cir.1984). In this case, we find that Chalu provided full representation to Brown and made reasonable, informed tactical decisions as to his defense. Thus, we find that Chalu did act as an advocate for Brown, who has failed to demonstrate that Chalu's tactical decision to argue for a conviction on a lesser charge constitutes ineffective assistance of counsel under either prong of *Strickland.*

On this record, it is clear that Chalu repeatedly informed Brown of his strategy, believed that Brown understood it, and concluded that Brown agreed with the strategic approach. As to trial strategy, Chalu testified that Brown was cooperative and "agreeable to pretty much everything we did." We note that Brown did not testify as to this or

any other claim during the postconviction hearing. Thus, on this record, we find that Brown has demonstrated no ineffectiveness because the evidence presented during the postconviction hearing was that Chalu insured Brown's understanding of the implications of conceding guilt to a lesser homicide charge and that Brown consented to Chalu's trial strategy.

*631 5. Voir Dire as to Newspaper Article

This claim is discussed separately in the subdivision dealing with Claim X, Brown's claim of ineffective assistance of counsel as to an inquiry concerning juror misconduct.

6. Diminished Capacity Defense

[13] Brown contends that Chalu was ineffective in that he failed to present evidence of Brown's mental psychosis as well as sleep deprivation, exhaustion, or intoxication at the time of the murder. According to the trial record, Brown told police detectives that he was not intoxicated on drugs or alcohol at the time of the murder and that he had a clear memory of the murder and events surrounding it. At the evidentiary hearing, Chalu testified that he conferred at length with Brown as to his mental state at the time of the murder and with mental health experts who had examined Brown. From these conversations and reports, Chalu concluded that there was no evidentiary support for an insanity defense or a lack of specific intent based on intoxication. Thus, based on evidence in this record, we find that the performance of Chalu as to this claim did not fall below the *Strickland* standard.

7. Prejudice

[14] We agree with the circuit court that, even assuming that Chalu was ineffective, Brown did not demonstrate prejudice. Any defense that Chalu chose to present would have been overshadowed by the overwhelmingly inculpatory evidence at trial of Brown's confession to police. Not only did Chalu present a potentially viable defense within the parameters dictated by the confession, he also prevented the jury from learning of evidence of a subsequent robbery and shooting allegedly committed by Brown and the State's theory of Brown's motive for this offense, which was Brown's desire to silence the seventeen-year-old victim, with whom he had had a sexual relationship.[12] Although Chalu did not succeed in preventing a first-degree murder conviction, he did succeed in preventing even more prejudicial evidence from reaching the jury. On this record, we conclude that Brown has failed to establish a reasonable probability that, absent the claimed errors, the jury would have found him not guilty of first-degree murder. Competent, substantial evidence supports the circuit court's factual findings. Thus, we do not disturb those findings. Based on our review of the record, we agree with the circuit court that Brown failed to demonstrate the required prejudice.

Claim IV. Penalty-phase
Ineffective Assistance of Counsel

A. Introduction

Brown contends in his fourth claim in this appeal that he was denied effective assistance of counsel during the penalty phase of his trial. Brown bases this claim upon the following allegations: (1) counsel failed to perform an adequate investigation in order to obtain necessary background information for mitigation; (2) counsel conceded aggravating circumstances without notice to Brown; (3) counsel failed to object to an improper closing argument; and (4) counsel failed to inform the jury that Brown's courtroom demeanor was affected by antidepressant and antipsychotic prescription drugs administered at the Hillsborough County Jail or, alternatively, to request that the medication be terminated. In our review of this claim, we have considered the trial record, the record of the postconviction evidentiary hearing, and the circuit court's postconviction order.

B. Trial Record

The trial record reflects the following. At the request of defense counsel, the trial court appointed Dr. Robert Berland and Dr. Walter Afield to evaluate Brown's mental state for purposes of the guilt phase and then to help in developing evidence of statutory and nonstatutory mitigation for the penalty phase. Dr. Berland *632 is a clinical psychologist specializing in forensic psychology

who had been licensed to practice psychology for ten years at the time of the trial. He had worked for eight years with criminally committed mentally ill patients at Florida State Hospital at Chattahoochee, and at the time of the trial in 1987, he was engaged in private practice performing court-ordered evaluations of criminal defendants. At the time of the trial, Dr. Afield had been a physician specializing in psychiatry for twenty-six years. Dr. Afield was board certified in adult psychiatry, child psychiatry, and mental health administration and had previously served on the medical school faculties at Harvard University, Johns Hopkins University, and the University of South Florida. At the time of the trial, he had been engaged in the private practice of psychiatry for twelve years.

Dr. Berland testified during the penalty phase that, in preparing to make an evaluation as to Brown's mental and emotional status, he reviewed Brown's jail medical records, police reports, and depositions related to this case. He also reviewed a 1980 psychological profile and administered several standardized psychological tests, including an intelligence test, to Brown. Dr. Berland interviewed Brown on at least five separate occasions. Based on these interviews, his test results, and his review of the relevant documents, Dr. Berland testified during the penalty phase that he found Brown to be operating mentally below normal with an IQ of 81. Dr. Berland concluded that Brown had organic brain damage and opined that Brown was psychotic and probably was suffering from bipolar disorder. Dr. Berland stated that he believed Brown was under the influence of a mental or emotional disturbance but that he could not say whether the disturbance was extreme at the time of the crime. Dr. Berland opined that Brown's capacity to appreciate the criminality of his conduct was not impaired but that his capacity to conform his conduct to the requirements of the law was impaired, although not substantially impaired, at the time of the crime. He testified that the impairment resulted from interaction between Brown's low intelligence and his psychotic disturbance, which had the effect of increasing his impulsiveness and diminishing his ability to make sound judgments. Dr. Berland also stated that his test results indicated that Brown did not have tendencies toward being a "cold-blooded" killer.

Defense counsel also presented during the penalty phase the testimony of Dr. Afield, who testified that he reviewed jail records and Dr. Berland's test results and interviewed Brown once. During this interview, Brown told Afield he was abused as a child, married at age sixteen, had been knocked unconscious in several accidents, and lived a marginal existence as a junk man and "street person." Based on this history and his review of the records, Afield opined that Brown was mentally retarded, suffered from organic brain damage, and was psychotic. He further testified that he believed that, although Brown had an antisocial personality disorder, he knew right from wrong. In contrast to Dr. Berland, Afield opined that Brown's ability to conform his conduct to the requirements of the law was *substantially* impaired at the time of the murder.

Defense counsel also presented during the penalty phase as lay witnesses Brown's father, his stepmother, and his brother, who testified as to Brown's childhood. Brown's father testified that he did not live with Brown and his mother when Brown was a child. He stated that juvenile authorities removed Brown from his mother's custody when he was five or six years old because the family was living in "pure filth." Brown and his brother went to live on a farm in the custody of their great aunt, who beat Brown with wet rags and corn shucks. Three years later, Brown began living with his father and stepmother in Tampa, where he attended school. Brown's father testified at trial that his son was not a good student but that he did ***633** not get into trouble in school. As an adult, Brown fathered and supported children, helped his neighbors, and held jobs, including his most recent occupation of collecting cans for recycling. Brown's stepmother, Wanda Brown, testified that Paul was "always sweet" and that he was a slow learner. Brown's brother, Jimmy Lee Brown, testified that Brown was beaten as a child and was a slow learner who helped others and was never violent.

C. Postconviction Evidentiary Hearing Record

The record of the postconviction evidentiary hearing before the circuit court reflects the following. With the assistance of Chalu, defense counsel Alldredge represented Brown during the penalty phase. We have previously set forth the relevant legal experience of Chalu and Alldredge. Chalu testified that he was initially appointed to handle Brown's case, and about three months before the trial, Alldredge was appointed solely to handle the penalty phase. Both Chalu and Alldredge worked with the investigator who was assigned to assist them. Immediately after his appointment to Brown's case, Chalu hired Dr. Berland and later Dr. Afield to assess Brown's

mental status for purposes of planning both the guilt and penalty-phase defense strategies. After Alldredge became involved in the case, both Chalu and Alldredge helped Dr. Berland and Dr. Afield with data collection, including retrieval of reports as to Brown's prior psychological testing. When these mental health experts informed Chalu and Alldredge that no mental health defense was available for the guilt phase, Alldredge began working with the experts in preparing for the penalty phase. Chalu testified that he, Alldredge, and Dr. Berland interviewed family and friends of Brown in preparation for the penalty phase. Chalu testified that, by the time the trial began, he believed he and Alldredge and their investigator and experts had gathered "pretty much all the data that was available to us" concerning Brown's history.

Alldredge testified that after he was assigned to Brown's case, he first read the depositions and discussed the case with Chalu and Drs. Berland and Afield. He then met with Brown and interviewed the penalty-phase witnesses. He requested that his investigator retrieve "[e]verything and anything" as to Brown's childhood, his past criminal records, any prior mental health evaluations, and school records. Alldredge testified that finding information as to Brown's history and locating witnesses was particularly difficult and that he was not satisfied with the level of investigation provided for the penalty phase. Alldredge testified that he did not recall reviewing any of Brown's school records but that such records could have been useful during the penalty phase. Upon cross-examination, Alldredge conceded that Brown had begun school sometime after age six and had dropped out at age fourteen so that the extent of his school records would have been limited. Alldredge also testified that Dr. Berland, the most thoroughly prepared forensic psychologist he knew, did not indicate the need for further data in order to render his opinion of Brown's mental status. Alldredge testified that he did not request further neurological testing to confirm organic brain damage. [13]

During the postconviction evidentiary hearing, Brown also presented the testimony of Dr. Szabo, the psychiatrist who evaluated Brown in the Hillsborough ***634** County Jail where Brown was awaiting trial in March 1986; Dr. Henry L. Dee, a psychologist who evaluated Brown in 1992 as part of an earlier postconviction effort; Dr. Jerry J. Fleischaker, a psychiatrist who evaluated Brown at a child guidance clinic in Tampa when Brown was a teenager; Dr. Fay Ellen Sultan, a clinical psychologist who evaluated Brown's mental status in 1996 for postconviction evidentiary purposes; and Dr. Berland, one of the two mental health experts who had testified at Brown's penalty phase.

Dr. Szabo testified that he diagnosed Brown as having schizophrenia, a form of psychosis, and prescribed Mellaril, an antipsychotic drug, to prevent Brown from deteriorating into a state in which he might harm others or himself while incarcerated at the jail. Dr. Fleischaker testified that he performed a psychiatric evaluation on Brown at the request of a court when Brown was about fifteen years of age, but Dr. Fleischaker did not testify as to the contents of the report. Dr. Dee testified as to his conclusion that, consistent with the opinions of Drs. Berland and Afield, Brown suffered organic brain syndrome and a longstanding major emotional disturbance manifested as schizophrenia. Dr. Sultan testified that she interviewed Brown as well as his father, stepmother, brother, and Dr. Dee, and reviewed the historical records as to Brown that were not available to Dr. Berland at the time of the trial. Dr. Sultan concluded that Brown was operating under severe and extreme psychiatric and organic mental conditions at the time of the murder. Dr. Berland testified that Brown was probably exaggerating but not malingering during his conversations with the psychologist and in his answers to test questions. Dr. Berland testified that nothing in Dr. Dee's report or Brown's 1967 presentence investigation report, neither of which were in his possession at the time of the trial, convinced him to change his findings as to Brown. Dr. Berland stated that he would not have presented the 1967 presentence investigation report to the jury because it would have documented Brown's history as a sex offender. Dr. Berland testified that access to additional collateral information would not have changed his opinion at trial that Brown was disturbed but not under *extreme* emotional disturbance at the time of the murder. Dr. Berland testified that additional historical information such as school records showing that Brown was a nervous child who beat his head against a table would have been helpful in conveying to the jury the nature of Brown's psychosis for purposes of the jury's weighing process during the penalty phase.

Brown also presented during the postconviction hearing the testimony of Bessie Conway, who was related by marriage to Brown and lived next door to him when he was a child in Tampa; Daniel Jackson, Brown's stepbrother;

and Jimmy Lee Brown, Brown's brother. Conway testified that Brown's father once beat him with a belt. Jackson testified that Brown's father often beat Brown as well as his brother, stepbrother, sister, and mother. Jackson testified that he was contacted by an investigator prior to Brown's trial and told the investigator of the beatings and that, as a child, Brown was accused of "messing with other little kids in the neighborhood." Jackson stated that the investigator said he was not interested in finding out what Jackson meant by "messing around" and that he was not interested in pursuing Jackson as a witness. Jackson also stated that Brown's stepmother cooked for the children, helped them with their homework, and saw that they went to school. Jimmy Lee Brown testified, as he did at trial, that all the children in the family were abused. He testified that Paul Brown was beaten by his father, babysitters, relatives, and other children in the children's homes where the Brown children stayed when Brown's father was out driving a truck and his stepmother was incapacitated with a nervous breakdown.

After considering this evidence and argument based on this evidence, the circuit ***635** court denied Brown the relief he requested in his penalty-phase ineffective assistance claims, concluding that Brown failed to meet the prejudice prong of the *Strickland* test. The circuit court order states in relevant part:

> Most of the evidence presented addressed this [ineffective assistance] issue, but it boils down to defense counsel failing to discover an earlier "presentence investigation report," and some school records. While Mr. Alldredge expressed dissatisfaction with the level of investigation provided by his office, the records eventually located by the Defendant did not in any way change the opinion of the mental health experts and the opinion of the defense's mental health experts at the evidentiary hearing did not differ from the opinions offered at trial. The essence of the Defendant's allegation seems to be that the experts' opinions would have been given greater weight if they had additional records upon which to base their opinions at trial, but the psychologist who testified at the hearing stated that although the additional information might have been helpful, his opinion was unchanged. Counsel for the defense further claims that penalty phase counsel was ineffective for failing to call as lay witnesses family members and friends to testify concerning the Defendant's abuse as a child and low intelligence, but, in fact, two family members did testify to neglect and abuse and low intelligence....
>
> No reasonable probability has been shown that but for deficient performance by counsel at the guilt or penalty phase, the result would have differed.

Order II at 4-5.

D. Discussion of Brown's Claims

1. Penalty Phase Investigation

As we have delineated in reviewing Brown's claims of ineffective assistance of counsel in the penalty phase of his trial, we have reviewed the trial record and the record of the postconviction evidentiary hearing. We recognize, as we did in our discussion of the guilt-phase claims, that under *Strickland* we must presume that counsel provided reasonable professional assistance and that Brown bears the burden of proving that such representation was unreasonable. 466 U.S. at 688-89, 104 S.Ct. 2052. Similar to *Jones v. State,* 732 So.2d 313 (Fla.1999), this is not a case in which trial counsel engaged in no investigation at all. The issue here is whether the investigation into mitigating circumstances undertaken by Chalu and Alldredge was so unreasonable that defense counsel "was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052.

[15] Brown contends in this appeal that counsel failed to provide Brown's mental health experts with a 1967 presentence investigation report and other background materials such as school records, juvenile records, or family background. Brown argues that such collateral data would have helped to refute the State's focus on Dr. Berland's statement that Brown seemed to be malingering or faking his psychiatric symptoms during interviews with the mental health experts. Actually, however, Dr. Berland only testified at trial that in his opinion Brown was exaggerating. In the postconviction hearing, he stated that he took this tendency into account when drawing his conclusions as to Brown's true mental state.

Brown also argues that the trial judge's failure to find statutory mental mitigators was due to conflicting and insubstantial penalty-phase testimony from Drs. Berland

and Afield as to Brown's mental state at the time of the murder. However, both experts arrived at essentially the same conclusion: Brown was suffering from organic brain damage and psychosis, manifested as paranoia or schizophrenia. Dr. Berland testified at the postconviction hearing that he had interviewed Brown in 1986 prior to his trial and had testified in Brown's penalty phase that Brown was ***636** psychotic. Also at the postconviction hearing, Dr. Berland testified that, if he had been able to review Brown's presentence investigation report and his school records before Brown's trial, "all that information would have done was to corroborate what I had already concluded, that he was psychotic."

[16] Brown also argues ineffectiveness in that counsel did not call as lay witnesses additional family members and friends to testify concerning Brown's abuse as a child and his low intelligence. Upon their appointment to represent Brown, Chalu and Alldredge began inquiring into Brown's family history and mental state at the time of the murder. The investigator assigned to their case contacted various relatives and acquaintances of Brown. Alldredge testified that it was difficult to find and secure them as witnesses partly because the investigator assigned to Brown's case was not as aggressive as Alldredge would have preferred in uncovering Brown's history. However, Alldredge also testified that, based on conversations with potential witnesses, he made a strategic decision not to call certain lay witnesses because their testimony as to Brown's history, which included other convictions and a history as a sex offender, would have produced aggravating rather than mitigating factors. Alldredge determined that he had sufficient evidence of Brown's background even without the school records and presentencing investigation report. In view of the fact that Dr. Berland stated at the postconviction evidentiary hearing that such collateral data would not have changed his testimony, we conclude that the performance of Brown's penalty-phase counsel did not fall below the *Strickland* standard. *See Mills v. Singletary,* 63 F.3d 999, 1023-26 (11th Cir.1995).

2. Conceding Aggravators

[17] This subclaim is procedurally barred in that Brown did not present it in his postconviction motion below. *See Medina v. State,* 573 So.2d 293 (Fla.1990).

3. Prosecutor's Closing Argument

Pursuant to our previous discussion in this opinion, we conclude that Alldredge was not ineffective in failing to object to the prosecutor's closing argument.

4. Prescription Drugs

[18] We conclude that defense counsel's decision not to inform the jury that Brown was being administered antipsychotic drugs by jail personnel was strategic and did not violate the standard of *Strickland. See Sims v. Singletary,* 155 F.3d 1297, 1306 (11th Cir.1998).

5. Prejudice

We agree with the circuit court that Brown did not show a reasonable probability that, absent a deficient performance, the outcome at sentencing would have been different. *Strickland,* 466 U.S. at 695, 104 S.Ct. 2052; *Bertolotti v. State,* 534 So.2d 386, 389-90 (Fla.1988). The relevant facts of this case are similar to those in *Breedlove v. State,* 692 So.2d 874, 877 (Fla.1997), in which two psychologists who testified at the penalty phase stated at a postconviction hearing that, although additional information from Breedlove's counsel might have been helpful, the experts' opinions were unchanged as to matters about which they had testified. *Id.* at 877. In *Breedlove,* this Court found that any deficient performance by counsel did not create the prejudice which meets the prejudice prong of the *Strickland* analysis. *Id.*

[19] Similarly, we affirm the circuit court's ruling in this case that Brown did not demonstrate prejudice under *Strickland.* Based on the postconviction testimony of Brown's trial expert, Dr. Berland, we agree with the circuit court's conclusion that, even without the alleged deficient performance of trial counsel in respect to the presentence investigative report and the school records, there is no reasonable probability that the result of the penalty phase would have been different. We also ***637** conclude that the circuit court was correct in its conclusion that the failure to present additional lay witnesses to describe Brown's childhood abuse and low intelligence was not prejudicial to Brown in accord with the requirements of *Strickland.* Such evidence would have been cumulative

in that substantially the same information had been presented by other witnesses and was potentially harmful to Brown's case. As we have stated previously, we also conclude that no prejudice resulted from Alldredge's failure to object to the prosecutor's penalty-phase closing argument.

The State proved three aggravating circumstances beyond any reasonable doubt: (1) the murder was committed during commission of a felony; (2) Brown had a previous conviction of a violent felony; and (3) the murder was committed in a cold, calculated, and premeditated manner. The trial court found some points of nonstatutory mitigation (mental capacity, mental and emotional distress, social and economic disadvantage, nonviolent criminal past) but considered them of so little weight as not to outweigh even one of the aggravating factors. On this record, we conclude that Brown has failed to establish a reasonable probability that, absent the claimed errors, the sentencer would have concluded that the balance of the aggravating and mitigating circumstances did not warrant a death sentence.

Claim X. Ineffective Assistance of Counsel as to Juror Misconduct

[20] In his tenth claim, Brown contends that his guilt-phase counsel was deficient in failing to question a juror as to the extent of her knowledge of a newspaper account of the trial. This claim is procedurally barred in that it should have been raised on direct appeal, and Brown attempts here to circumvent the procedural bar by couching the issue as ineffective assistance of counsel. *See Kight v. Dugger,* 574 So.2d 1066, 1073 (Fla.1990). However, the circuit judge who originally presided over these postconviction proceedings discussed the merits of this issue in his postconviction order (Order I) and found the claim to have no merit in that Brown had not proven both ineffective assistance and prejudice under *Strickland.*[14] As the circuit judge correctly found in his postconviction order, defense counsel made an appropriate request for the court to inquire of the jury concerning the article. Order I at 7-8. The trial court then made an inquiry as to whether any jurors had read the article or discussed it with anyone. *Id.* Only one juror had read the headline of the article.[15] *Id.* No other jurors had read the headline or the article. *Id.* Competent, substantial record evidence supports the trial court's factual findings concerning this issue. We find that neither ineffectiveness nor prejudice has been demonstrated pursuant to *Strickland.* Thus, we find no merit in this claim.

III. CONCLUSION

Accordingly, we affirm the circuit court's order denying Brown's motion for postconviction relief.

It is so ordered.

HARDING, C.J., and SHAW, WELLS and LEWIS, JJ., concur.

ANSTEAD and PARIENTE, JJ., concur in result only.

QUINCE, J., recused.

All Citations

755 So.2d 616, 25 Fla. L. Weekly S193

Footnotes

1 Brown raised the following claims in his postconviction motion: (1) Brown's death sentence was the product of invalid jury instructions and improper application of statutory aggravators; (2) the prosecutor's improper comments and arguments, the introduction of nonstatutory aggravators, and the court's reliance on these aggravators rendered the conviction and sentence fundamentally unfair and unreliable; (3) ineffective assistance of counsel and the prosecutor's improper argument and comment rendered the conviction and sentence fundamentally unfair and unreliable; (4) an unconstitutional automatic aggravator (felony murder) was applied; (5) sentencing was unreliable because the judge refused to find mitigation established by the record; (6) records in the possession of state agencies were withheld in violation of chapter 119, Florida Statutes, and the United States and Florida Constitutions; (7) Brown received ineffective assistance of counsel in the guilt phase because counsel failed to investigate, object, and prepare a challenge to the State's case or because the State withheld material evidence or both; (8) Brown received ineffective assistance of counsel at the penalty phase when background information was not obtained and the State failed to turn over material information;

(9) Brown received ineffective assistance of counsel during voir dire in that trial counsel was rendered ineffective by the trial court's refusal to grant additional peremptory challenges; (10) penalty phase jury instructions improperly shifted the burden to Brown to prove that death was inappropriate, and failure to object rendered counsel ineffective; (11) the sentencing jury was misled by an argument that unconstitutionally diluted its sense of responsibility for sentencing; (12) Brown received ineffective assistance of counsel because counsel failed to move for mistrial regarding jury misconduct; (13) cumulative errors were not harmless; (14) rules prohibiting defense counsel from interviewing jurors to evaluate whether juror misconduct existed are unconstitutional; (15) the court erroneously instructed the jury as to the standard for judging expert testimony; and (16) execution of Brown, a mentally retarded and brain-damaged offender, would constitute cruel and unusual punishment.

2 The court found the following rule 3.850 claims were procedurally barred because they either could have been raised on direct appeal or were raised on direct appeal and found to be without merit: claims 1, 2, 5, 11, 13, and 16. *See Harvey v. Dugger,* 656 So.2d 1253 (Fla.1995).

3 The court found that claims 4, 10, and 15 were procedurally barred because Brown attempted to circumvent the procedural bar by couching the issues as ineffective assistance of counsel, *see Kight v. Dugger,* 574 So.2d 1066, 1073 (Fla.1990). The court also found that Brown did not adequately prove in these three claims both prongs of the test for ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

4 The court found claim 9, concerning ineffective assistance of counsel during voir dire, to be a claim that should have been raised on direct appeal and which was recast as ineffective assistance of counsel. As to claim 12, the judge attached portions of the record supporting his conclusion that Brown had not met the ineffective assistance test under *Strickland* in respect to ineffectiveness and prejudice in his claim that counsel was deficient in failing to voir dire a juror as to exposure to publicity during trial. The court found no merit in claim 14, arguing the unconstitutionality of Florida Rule of Professional Conduct 4-3.5(d)(4), which prohibits a lawyer from communicating with a juror regarding a trial. The judge adopted by reference the State's response, which cited *Tanner v. United States,* 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987).

5 Brown claims in this postconviction appeal that: (I) Brown's death sentence was the product of a constitutionally invalid jury instruction on the cold, calculated, and premeditated (CCP) aggravator; (II) the trial court erred in denying Brown a full and fair hearing regarding his prosecutorial misconduct claim; (III) the trial court erred in denying Brown a full and fair hearing regarding effective assistance of counsel at the guilt phase of his trial; (IV) Brown was denied effective assistance of counsel at the penalty phase of his trial; (V) Brown was denied effective assistance of counsel in the guilt phase during voir dire of prospective jurors; (VI) Brown's death sentence rests upon an unconstitutional automatic aggravating circumstance (felony murder); (VII) Brown was denied a reliable sentencing because the sentencing judge failed to find mitigation established by the record; (VIII) the trial court erred in instructing the jury that its duty was to render an advisory sentencing opinion by deciding whether mitigating circumstances were sufficient to outweigh aggravating circumstances; (IX) the trial court erred in signaling to jurors that their recommendation was of an advisory nature only and was less important than the court's decision; (X) Brown was denied effective assistance of counsel during the trial as to potential juror awareness of a newspaper account of the trial; (XI) Brown was denied a fair trial because of cumulative errors; (XII) Florida Rule of Professional Conduct 4-3.5(d)(4), which prohibited Brown's counsel from interviewing jurors to investigate claims of juror misconduct, is unconstitutional; (XIII) the trial court erroneously instructed the jury on the standard for judging expert testimony; and (XIV) the execution of Brown, a mentally retarded offender, would violate the constitutional prohibition against cruel and unusual punishment.

6 Brown presents no claim in this Court in respect to claim 6 of the postconviction motion, in which he unsuccessfully argued at the evidentiary hearing that he was denied access to files and records in the possession of certain state agencies. As to the portion of claim 6 alleging missing evidence, Brown mentions here a missing audiotape of his confession as part of his second claim in this appeal concerning alleged prosecutorial misconduct.

7 The following claims in this Court are procedurally barred because they either were or should have been presented on direct appeal: claims VI through IX, claims XI through XIV, and the portion of claim II that challenges the prosecutor's penalty-phase closing argument. *See Urbin v. State,* 714 So.2d 411, 418 n. 8 (Fla.1998). We reject without discussion that portion of claim II concerning alleged prosecutorial misconduct prior to the evidentiary hearing in that we find no abuse of discretion by the circuit judge in not disqualifying the state attorney's office. *See Farina v. State,* 680 So.2d 392, 395 (Fla.1996). Claim V is procedurally barred because the issue of whether Brown was entitled to additional peremptory challenges had to be raised on direct appeal and Brown has attempted to circumvent the procedural bar by couching this issue as a claim of ineffective assistance of counsel. *See Valle v. State,* 705 So.2d 1331, 1336 n. 6 (Fla.1997).

8 In *Jones,* we recognized that to prove ineffective assistance of counsel, a defendant must show: (1) that counsel made errors so serious that counsel was not operating as the "counsel" guaranteed the defendant by the Sixth Amendment;

and (2) that such deficient performance prejudiced the defense by depriving the defendant of a trial whose result was reliable. 732 So.2d at 319 (quoting *Rutherford v. State,* 727 So.2d 216, 219 (Fla.1998) (quoting *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052)). Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that rendered the result unreliable. *Id.*

9 Brown's trial took place in 1987. A year later, in *Jackson,* this Court found that a nearly identical argument by Benito was not misconduct so egregious that it tainted the jury's recommendation. 522 So.2d at 809. In *Hudson,* this Court found no reversible error in a similar argument by Benito. 538 So.2d at 832 n. 6. Four years after Brown's trial, this Court remanded for resentencing in *Taylor* after finding the trial court's allowing the same argument by Benito to be harmful error. 583 So.2d at 330. However, subsequently, this Court found in *Hodges* that allowing the same argument was harmless error. 595 So.2d at 934.

10 See *Sims v. Singletary,* 155 F.3d 1297, 1306-07 (11th Cir.1998); *Davis v. Singletary,* 119 F.3d 1471, 1477 (11th Cir.1997); *Spaziano v. Singletary,* 36 F.3d 1028, 1039 (11th Cir.1994), in which the federal courts held that counsel's decisions as to trial strategy and tactics were within the bounds of reasonably competent representation.

11 In count three of this same indictment, Brown was charged attempted first-degree murder for this offense. The jury convicted him as charged on count three.

12 The record indicates that Brown's age was 36 at the time of the murder.

13 Dr. Berland testified in the postconviction hearing that he did not recommend a CAT scan for Brown because this neurological test was imprecise in measuring organic brain damage and, if the test showed no brain damage, that result could be used against Brown at trial. Dr. Berland testified that a PET scan was not recommended because, at the time of Brown's trial in 1987, the test was not available in Hillsborough County, and furthermore, no research data existed at the time as to how to interpret the test. Dr. Berland testified that the PET scan was not widely accepted until recently and still is not approved by the Food and Drug Administration as a medical diagnostic tool.

14 This was claim 12 in Brown's rule 3.850 motion.

15 The record reflects that on the third day of trial defense counsel requested that the judge question jurors as to their knowledge of a newspaper article containing information about the trial and about other crimes for which Brown had been charged but not convicted. One alternate juror admitted that she had "read at it." When the trial judge asked her whether she had read anything pertaining to Brown's case, she responded, "Only the headline."

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No. _____

IN THE

Supreme Court of the United States

PAUL ALFRED BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix E

Sentencing order of the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County. Circuit Court Case No. 86-CF-004084 (March 2, 1987).

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA

VS

Case No. 86-4084

Division II

PAUL ALFRED BROWN, JR.

SENTENCE OF DEATH; FINDINGS IN SUPPORT THEREOF; SENTENCE ON OTHER CONVICTIONS; CLEAR AND CONVINCING REASONS TO EXCEED THE GUIDELINES, AND ADVISEMENT OF RIGHT TO APPEAL

The defendant, PAUL ALFRED BROWN, JR., was personally before the Court, represented by Assistant Public Defenders, Wayne Chalu and Craig Alldredge; the defendant was tried and found guilty by a jury of the crimes of armed burglary (Count I), murder in the first degree (Count II) and attempted murder in the first degree (Count III); the Court adjudicated the defendant guilty of these crimes; further, the jury rendered an advisory sentence of death by a vote of seven to five on the charge of murder in the first degree, and hearing all of the evidence during the trial and the sentencing phase and argument of counsel, the Court has considered the following aggravating factors and finds as follows:

1. Capital felony committed during the attempted perpetration, or in assisting the perpetration, or the actual perpetration, or while fleeing therefrom of designated felonies. Section 921.141(5)(d), Fla.Stat.

There is no question from the evidence and the State has proven beyond a reasonable doubt that the capital felony was committed during the actual perpetration of a felony, i.e., armed burglary, of which the jury found the defendant guilty. There was clear evidence of a breaking and entering and the defendant freely, knowingly and voluntarily incriminated himself as to these acts. The State has proven beyond a reasonable doubt that the defendant by his own statements and the surrounding circumstances, contemplated that life would be taken or, at least, anticipated lethal force might be used. This constitutes an aggravating circumstance, and the Court gives it great weight.

2. Previous conviction of a capital felony or a felony involving the use or threat of violence. Section 921.141(5)(b), Fla.Stat.

Again, there is no question from the evidence and the State has proven beyond a reasonable doubt that the defendant has a previous conviction of a felony involving the use of violence, i.e., the attempted murder in the first degree of Tammy Bird, of which the jury found him guilty. Under the law of this State, the defendant's simultaneous conviction of attempted first degree murder can be considered such a previous conviction. King v. State, 390 So.2d 315 (Fla. 1980) and Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983). This constitutes another aggravating circumstance, and the Court also gives it great weight.

The Court does not need to go further and consider any additional aggravating circumstance in resolving this matter in favor of the death penalty. In fact, either one of the aggravating circumstances discussed above far outweighs all of the claimed mitigating circumstances (discussed below) that were considered in this case. However, there is one additional aggravating circumstance.

3. Homicide committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Section 921.141(5)(i), Fla. Stat.

The State has proven beyond a reasonable doubt that this homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The State has proven beyond a reasonable doubt that there was a heightened degree of premeditation, calculation and planning. There was, from the evidence, a lengthy, methodic and involved series of events that showed a substantial period of reflection and thought by the defendant. These include, among others, the defendant's securing bolt cutters, going to the victims' residence in the middle of the night, cutting the lock, going back to the car to get the weapon, returning and entering where the victims slept, the defendant's confessed knowledge about what

knew he would have to do, the fact that he armed himself to "talk" to a seventeen year old girl, and the shot to the head to "make it quick." The defendant's act was nothing less than an execution. This constitutes an aggravating circumstance.

The Court has considered the following mitigating circumstances:

1. The defendant has no significant history of prior criminal activity. Section 921.141(6)(a), Fla. Stat.

This mitigating circumstance does not exist.

2. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Section 921.141(6)(b), F.S.

The evidence on this factor was conflicting. Dr. Berland could not say the defendant's mental or emotional disturbance was "extreme." The credibility of Dr. Afield's testimony under the circumstances of this case was suspect, and therefore, the Court did not give this circumstance great weight.

3. The victim was a participant in the defendant's conduct or consented to the act. Section 921.141(6)(c), Fla. Stat.

This mitigating circumstance does not exist.

4. The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. Section 921.141(6)(d), Fla. Stat.

This mitigating circumstance does not exist.

5. The defendant acted under extreme duress or under substantial domination of another person. Section 921.141(6)(e). Fla. Stat.

This mitigating circumstance does not exist.

6. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Section 921.141(6)(f), Fla. Stat.

Again, the evidence from the expert witnesses was conflicting. Dr. Berland had some difficulty with finding "substantial" impairment, through his examination and testing of

the defendant over a period of time. Dr. Afield, who examined the defendant on one occasion, for forty-five minutes, long after the shooting, found that the defendant was "substantially impaired." Again, for purposes of this decision we can consider this circumstance and Section 921.141(6)(b), Fla. Stat., as established, but the Court does not give them great weight under the circumstances of this case.

7. The age of the defendant at the time of the crime. Section 921.141(6)(g), Fla. Stat.

The defendant's age of thirty-six years at the time of the crime is not a mitigating factor except that the defendant was, to a limited extent, deprived mentally and environmentally during those thirty-six years. This consideration brings the Court to the final mitigating circumstances the Court reviewed in considering any possible aspect of the defendant's character and record, and any other circumstance of the offense that has been presented during the course of these proceedings. The evidence indicates that the defendant is socially and economically disadvantaged and has a below average mental capacity. He also has a non-violent criminal past, and may have been under some stress at the time of the shootings. However, these circumstances combined with the mitigating circumstances contained in Section 921.141(6)(b), (f) and (g), Fla. Stat., do not outweigh any one of the aggravating circumstances discussed above. As a consequence thereof, it is the sentence of the Court that PAUL ALFRED BROWN, JR., be taken into custody by the Department of Corrections and there at an appointed place and time as the Governor of this State shall by his warrant decide, be put to death.

May God have mercy on his soul.

The defendant is advised that he has an automatic appeal to the Supreme Court of Florida from the judgment and sentence of this Court.

The defendant has also been found and adjudicated guilty of armed burglary. The Court finds that the extent of the victims'

injuries, namely, the death of Pauline Cowell and the serious and permanent injury to the twelve year old Tammy Bird, along with the defendant's conviction of first degree murder, which could not be scored pursuant to statutory guidelines, are clear and convincing reasons for departing from the guideline sentence in this case. The defendant, PAUL ALFRED BROWN, JR., is hereby sentenced to life imprisonment in the Florida State Prison, in the event the aforesaid death sentence imposed upon the defendant is vacated on appeal. This sentence shall run consecutively with the sentence of life imprisonment in the Florida State Prison, without parole eligibility for twenty-five years.

The defendant was also found and adjudicated guilty of attempted murder in the first degree. In addition to the reasons stated above, the Court finds that this crime was committed during the course of an armed burglary with the premeditated intent to commit murder. This is a further clear and convincing reason to depart upward from the applicable sentencing guideline. The defendant, PAUL ALFRED BROWN, JR., is hereby sentenced to thirty years in the Florida State Prison. This sentence shall run consecutively with the life imprisonment sentence for the armed burglary.

The defendant, PAUL ALFRED BROWN, JR., is hereby advised of his right to appeal the judgments and sentences for armed burglary and attempted murder in the first degree by filing a notice of appeal within thirty days from this date.

The Public Defender is hereby appointed to represent the defendant in any appeals of these sentences.

DONE AND ORDERED at Tampa, Hillsborough County, Florida, this 2nd day of March, 1987.

GUY W. SPICOLA, CIRCUIT JUDGE

Copies furnished to:
Michael Benito, Assistant State Attorney
Wayne Chalu, Assistant Public Defender
Craig Alldredge, Assistant Public Defender

No. _____

IN THE

Supreme Court of the United States

PAUL ALFRED BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix F

Mr. Brown's motion to declare Florida Statute 921.141 as amended in 1979 to be unconstitutional. Circuit Court Case No. 86-CF-004084 (October 31, 1986).

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA)
)
v.)
)
PAUL ALFRED BROWN)
)

CASE NO. 86-4084

DIVISION X

MOTION TO DECLARE FLORIDA STATUTE 921.141 AS AMENDED IN 1979 TO BE UNCONSTITUTIONAL

COMES NOW the Defendant, PAUL ALFRED BROWN, by and through his undersigned attorney, and moves this Court to declare Florida Statute 921.141, as amended in 1979, to be unconstitutional, or in the alternative, to declare the death penalty not to be a possibility in this case, and as grounds therefore would state the following:

1. Florida Statute 921.141 was amended in 1979 to add an additional aggravating factor which reads as follows:

> "The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification."

F.S. 921.141(5)(i).

2. Such an aggravating factor makes premeditated murder inherently an aggravating factor.

3. Felony murder has always been an aggravating circumstance. F.S. 921.141(5)(d).

4. The combination of the new aggravating circumstance, and the felony murder aggravating circumstance means that virtually any first degree murder will entail at least one aggravating circumstance.

5. Under established Florida case law, death is presumed [illegible] there is at least one aggravating

circumstance and no mitigating circumstance. State v. Dixon, 283 So.2d 1 (Fla. 1973).

6. The effect of the amendment in light of this rule is to create a presumption in favor of the death sentence in every first degree murder case unless the Defendant is able to show a mitigating factor.

7. This creates a situation where the burden of proof is on the Defendant to demonstrate that death is an inappropriate sentence. As a result the Defendant is deprived of the right to Due Process of Law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 9 of the Florida Constitution.

8. Furthermore, the 1979 amendments have created, in essence, a mandatory death sentence for first degree murders in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 9, 16, and 17 of the Florida Constitution. Such a mandatory death sentence has already been condemned by the United States Supreme Court in Woodson v. North Carolina, 428 U.S. 280 (1976).

WHEREFORE, the Defendant requests that this Court declare Florida Statute 921.141 as amended in 1979 to be unconstitutional.

Respectfully submitted,

JUDGE C. DUCKET, JR.,
PUBLIC DEFENDER
13TH JUDICIAL CIRCUIT

By A. Wayne Chalu
A. Wayne Chalu
ASSISTANT PUBLIC DEFENDER

No. _____

IN THE

Supreme Court of the United States

PAUL ALFRED BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix G

Mr. Brown's motion to declare Florida Statute 921.141 unconstitutional. Circuit Court Case No. 86-CF-004084 (October 31, 1986).

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA

vs.

PAUL ALFRED BROWN

CASE NO. 86-4084

DIVISION X

MOTION TO DECLARE FLORIDA STATUTE 921.141 UNCONSTITUTIONAL

COMES NOW the Defendant, PAUL ALFRED BROWN, and moves this Court to declare Florida Statute 921.141 in violation of the Florida and Federal Constitutions, or in the alternative to declare the death penalty to be unconstitutional as applied in this particular case, and as grounds therefor would state the following:

1. In Enmund v. Fla., _____U.S._____, 73 L.Ed 2d 1140 (1982), the United States Supreme Court ruled that a death sentence violates the Eighth Amendment to the United States Constitution if the Defendant "does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed".

2. Florida's death penalty statute is almost totally insensitive to the critical matter of personal culpability and intent to kill. Of the sixteen (16) aggravating and mitigating factors, only one (F.S. 921.141(6)(d)) even takes note of whether the accused actually caused the death of a human being. Even that mitigating circumstance would not be established if the accused's participation in the capital felony were not "minor". Further, only one circumstance (F.S. 921.141(5)(i)) focuses on the issue of intent to kill.

3. The entire process from jury recommendation to sentencing to appellate review is misdirected. At no point does the system focus on the accused's intent to cause death. This method of analysis flies in the face of the doctrines of pro-

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YOU ARE ADVISED THAT YOU HAVE A RIGHT TO APPEAL THIS ORDER WITHIN 30 DAYS AFTER THIS ORDER IS FILED.

JUDGE

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portionality and channeled discretion which lie at the heart of modern analysis of the death penalty.

WHEREFORE, the Defendant prays that this Court declare Florida Statute 921.141 unconstitutional on its face or, in the alternative, to declare the death penalty to be unconstitutional as applied to the Defendant in this particular case on the grounds that there is no specific intent to cause death shown by the evidence.

Respectfully submitted,

JUDGE C. LUCKEY, JR.
PUBLIC DEFENDER
THIRTEENTH JUDICIAL CIRCUIT

By A. Wayne Ohalu
A. Wayne Ohalu
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Motion to Declare Florida Statute 921.141 Unconstitutional has been furnished to the Office of the State Attorney, Courthouse Annex, Tampa, Florida, by hand delivery, this 31st day of October, 19 86.

A. Wayne Ohalu
ATTORNEY

No. _____

IN THE

Supreme Court of the United States

PAUL ALFRED BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix H

Mr. Brown's motion to vacate the death penalty which argues that Florida Statute section 921.141 is unconstitutional. Circuit Court Case No. 86-CF-004084 (October 31, 1986).

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA)
)
v.) CASE NO. 86-4084
)
PAUL ALFRED BROWN) DIVISION X
)

MOTION TO VACATE THE DEATH PENALTY

COMES NOW the Defendant, PAUL ALFRED BROWN, by and through his undersigned attorney, and moves this Court to vacate the indictment against him or in the alternative to declare invalid the death penalty as stated in Florida Statute Section 921.141, as it applies to the Defendant, in this cause. As grounds the Defendant states the following:

I. a) Florida's death penalty as contained in Florida Statute Section 921.141 is unconstitutional on its face in that it violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 2 and 9 to the Constitution of the State of Florida.

b) The State of Florida is unable to justify the death penalty as the least restrictive means available to further its compelling goals, as is required under Roe v. Wade, 410 U.S.113,115 (1973), where a fundamental right, such as life, is involved. Studies indicate that the death penalty is not an effective deterrent and that there are other less offensive methods of punishment available which serve the same "compelling" goals of the State. The imposition of the death penalty on the Defendant would be patently violative of the Constitutions of the United States and of Florida, and should be vacated.

II. a) Florida's death penalty statute, Section 921.141, is unconstitutional as it has been applied in that it violates the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 2, 9, and 17 of the Constitution

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ORDER WITHIN 30 DAYS AFTER THIS ORDER IS FILED.

JUDGE

b) Although the Supreme Court of Florida and the Supreme Court of the United States have upheld the facial constitutionality of Florida's death penalty against attacks under the Cruel and Unusual Punishment Clause, the death penalty has in fact been administered and applied in a manner which is inconsistent with the premises of these Courts' decisions. It is clear that the Equal Protection Clause requires that harsh punishments be fairly and evenhandedly imposed. See Skinner v. Oklahoma, ex rel Williamson, 316 U.S. 535 (1942).

c) The "sentencing decision patterns of juries [and judges under the 1972 Florida Statue have in fact exhibited], a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman v. Georgia, 408 U.S. 238 (1972)." Gregg v. State, 428 U.S. 195. Death sentences in Florida are imposed irregularly, unpredictably, and whimsically in cases which are not more deserving of capital punishment, under any rational standard that considers the character of the offender and the offense, than many other cases in which sentences of imprisonment are imposed. Inconsistent and arbitrary jury attitudes and sentencing verdicts, uneven and inconstant prosecutorial practices in seeking or not seeking the death penalty, divergent sentencing policies of trial judges and erratic appellate review by the Supreme Court of Florida all contribute to produce an irregular and freakish pattern of life or death sentencing results.

III. Under the 1972 Florida death penalty statute it has been, and is, the regular and uniform pattern and practice of prosecuting attorneys and courts to decline to seek or impose the death sentence in cases where the defendant pleads guilty to a capital offense or some lesser offense; although those cases are factually indistinguishable from those in which the death sentence is sought and imposed upon other defendants; convictions following trial upon a plea of not guilty. This systematic practice is designed and effective to encourage capitally-charged defendants to plead guilty, and it employs the death sentence as a penalty for the exercise of such defendants' rights to plead not guilty.

The imposition of the death penalty on the Defendant pursuant to this systematic pattern and practice violates the Fifth, Sixth, and

Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 9, 16, and 21 of the Constitution of the State of Florida.

IV. a) Florida's death penalty as contained in Florida Statute Section 921.141 is unconstitutional as it has been applied in that it violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and Article I, Section 7, of the Constitution of the State of Florida.

b) Statistical studies show conclusively that the probability of the death penalty being applied in a capital case is significantly higher with a white victim than a black victim.

c) The alleged victim in this case is white.

d) The Defendant in this case has a significantly greater chance of receiving the death penalty solely because of a constitutionally impermissible factor: the race of the victim.

The Defendant will proffer proof of each of the allegations contained herein, specifically with reference to the arbitrary imposition of the death sentence, the nearly complete restriction of the death penalty to cases in which defendants have exercised their right to a trial by jury, and the strong correlation between the race of the victim and the likelihood of the death sentence if the Court desires an evidentiary hearing. However, if the Court rules that these allegations, even if proven, do not affect the constitutionality of Florida's death penalty, the Defendant will put on no evidence in the interest of judicial economy.

WHEREFORE, the Defendant prays that this Court vacate the death penalty as it applies to this cause, and declare that the death penalty is not a possible sentence in this cause.

Respectfully submitted,

JUDGE C. LUCKEY, JR.
PUBLIC DEFENDER
13TH JUDICIAL CIRCUIT

By A. Wayne Chalu
A. Wayne Chalu
ASSISTANT PUBLIC DEFENDER

849

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Motion To Vacate the Death Penalty has been furnished to the Office of the State Attorney, Courthouse Annex, Tampa, Florida, by hand delivery, this 31st day of October, 1986.

A. Wayne Chalu
ASSISTANT PUBLIC DEFENDER

850

No. _____

IN THE

Supreme Court of the United States

PAUL ALFRED BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix I

Mr. Brown's motion to declare the death penalty unconstitutional as applied.
Circuit Court Case No. 86-CF-004084 (February 24, 1987).

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA)
)
vs.)
)
PAUL ALFRED BROWN)

CASE NUMBER 86-4084

DIVISION Trial Div-2

MOTION TO DECLARE THE DEATH PENALTY UNCONSTITUTIONAL AS APPLIED

COMES NOW the Defendant, PAUL ALFRED BROWN, by and through his undersigned attorney, and moves this Honorable Court to declare the Death Penalty to be unconstitutional as applied to the Defendant, and as grounds therefore would state the following:

1. The Defendant was found guilty of the First Degree Murder of Pauline Cowell.

2. The jury recommended a Death Sentence by a seven-to-five margin after deliberations of approximately one hour.

3. Under Florida law, a six-to-six vote in the Penalty Phase is a life recommendation.

4. This presumably reflects a belief that if there is an even split on the question of whether a human being ought to be put to death, that human being ought to live.

5. If we assume that the population is in fact evenly split the probability of a death recommendation is approximately thirty-nine percent (see Affidavit).

6. Assuming the death recommendation is followed, it can be estimated that there is a thirty-nine percent probability of an inappropriate Death Sentence (assuming a seven-to-five recommendation).

7. Such a probability is unacceptably high in light of modern Death Penalty analysis which focuses in large part on the concept of reliability.

8. If the probability of a Death Sentence is approxi-

MOTION HEARD, CONSIDERED AND Denied
EXCEPTION NOTED THIS March 2, 19 1987.
YOU ARE ADVISED THAT YOU HAVE A RIGHT TO APPEAL THIS ORDER WITHIN 30 DAYS AFTER THIS ORDER IS FILED.

Lacy R. Harwell
JUDGE

897

mately .39 when a life sentence is appropriate, the underlying assumption of reliability is not being met.

9. Unless more than seven votes are required for a death recommendation, Death Sentences will be incorrectly imposed with such an unacceptably high probability that they violate the Eighth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, the Defendant prays that this Honorable Court declare the Death Penalty unconstitutional as applied to him.

Respectfully submitted,

JUDGE C. LUCKEY, JR.
PUBLIC DEFENDER
13TH JUDICIAL CIRCUIT

BY A. Wayne Chalu
A. WAYNE CHALU, ESQUIRE
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, Courthouse Annex, Tampa, Florida, this 24 day of February, 1987.

A. Wayne Chalu
A. WAYNE CHALU, ESQUIRE
ASSISTANT PUBLIC DEFENDER

A F F I D A V I T

The undersigned received a Bachelor of Science degree in Mathematics from Bucknell University in 1967. In 1971, the undersigned earned a Master of Statistics at the University of Florida, continuing his studies for one more year in pursuit of a Ph.D. in Statistics.

If a sample of size twelve is drawn from an infinite population and each of the twelve takes the value of zero or one with some fixed probability, the sum of the twelve forms a binomial population. The possible results range from zero to twelve with predictable probabilities depending on the probability of each member of the sample being a one.

The most familiar example would be the number of heads in twelve coin flips. If one assumes a true coin, the probabilities are as follows:

Number of Heads	Probability
0	1/4096 = .0002
1	12/4096 = .0029
2	66/4096 = .0161
3	220/4096 = .0537
4	495/4096 = .1208
5	796/4096 = .1934
6	924/4096 = .2259
7	792/4096 = .1934
8	495/4096 = .1208
9	220/4096 = .0537
10	66/4096 = .0161
11	12/4096 = .0029
12	1/4096 = .0002

Simple addition yields the result that with a true coin, the probability of seven or more heads is .3871. Similarly, eight or more heads occur with .1937 probability, 9 or more

with .0729 chance, 10 or more with probability .0192.

This model is a decent approximation to the following experiment. Assume the populace would be split precisely, fifty-fifty, on the proposition of whether a given murder defendant should live or die. Choose twelve members of that population and let them vote. Approximately thirty-nine percent of the time seven or more would vote for death, resulting in a death recommendation, while the true sentiment is evenly split, making a life recommendation appropriate.

Most of the underlying assumptions of the binomial distribution are met. The population is essentially infinite and the jurors must opt for death (one) or life (zero). The assumption of independence is somewhat undermined by the interaction between the jurors. However, the normal human desire for consensus, plus the normal tendency to break ties should make the probabilities in the tails (zero, one, two, ten, eleven, twelve) somewhat higher while reducing the probabilities in the center, especially the probability of a six-to six tie. The considered opinion of the undersigned, based on his training and experience, is that the above estimate of thirty-nine percent is a good one, perhaps even a conservative one.

Brian Donerly

BRIAN DONERLY

Sworn to and subscribed before
me this 24th day of February,
1987.

Patricia G. Cooper

No. _____

IN THE

Supreme Court of the United States

PAUL ALFRED BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix J

Judgment and sentence of the Thirteenth Judicial Circuit Court, in and for Hillsborough County, Florida. Circuit Court Case No. 86-CF-004084 (March 2, 1987).

☐ PROBATION VIOLATOR

(Check if Applicable)

IN THE CIRCUIT COURT, THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

DIVISION TRIAL DIVISION II (TWO)

CASE NUMBER 86-4084-X

STATE OF FLORIDA

— vs —

PAUL ALFRED BROWN
Defendant

JUDGMENT

The Defendant, PAUL ALFRED BROWN, being personally before this Court represented by ASSISTANT PUBLIC DEFENDER WAYNE CHALU, his attorney of record, and having:

(Check Applicable Provision)

XXX Been tried and found guilty of the following crime(s)
☐ Entered a plea of guilty to the following crime(s)
☐ Entered a plea of nolo contendere to the following crime(s)

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	CASE NUMBER
ONE	ARMED BURGLARY	810.02	1F	
TWO	FIRST DEGREE MURDER	782.04 777.04	CF	
THREE	ATTEMPTED FIRST DEGREE MURDER	782.04	1F	

and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

* * * * * * * * * * * * * * * * * * *

The Defendant is hereby ordered to pay the sum of twenty dollars ($20.00) pursuant to F.S. 960.20 (Crimes Compensation Trust Fund). The Defendant is further ordered to pay the sum of three dollars ($3.00) as a court cost pursuant to F.S. 943.25(4).

(Applicable if checked)

☐ The Defendant is ordered to pay the sum of two dollars ($2.00) pursuant to F.S. 943.25(8). (Optional)

☐ The Defendant is ordered to pay a fine in the sum of $_____ pursuant to F.S. 775.0835. (Optional)

☐ The Defendant is ordered to pay the sum of two hundred dollars ($200.00) costs pursuant to F.S. 27.3455 and will not receive gain time, if incarcerated, until said costs are paid.

☐ The Defendant is declared indigent and required to perform community service in lieu of the costs prescribed by F.S. 27.3455. Each hour of community service shall be credited at a rate equivalent to the minimum wage.

☐ The Defendant is ordered to pay additional costs in the sum of $_____

PAUL A. BROWN JR.

1a

(Applicable if checked)

☐ The Court hereby stays and withholds the imposition of sentence as to count(s) _____.

☐ The Court hereby defers imposition of sentence until _____.

☐ The Court places the Defendant on Probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in separate order).

☐ The Court places the Defendant in Community Control for a period _____ under the supervision of the Department of Corrections (conditions of community control set forth in separate order).

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation/community control is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

FINGERPRINTS OF DEFENDANT

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
6. L. Thumb	**7. L. Index**	**8. L. Middle**	**9. L. Ring**	**10. L. Little**

Fingerprints taken by:

[illegible], D.S.

Name and Title

DONE AND ORDERED in Open Court at Hillsborough County, Florida, this 2nd day of MARCH A.D. 19 87. I HEREBY certify that the above and foregoing fingerprints are the fingerprints of the Defendant PAUL ALFRED BROWN and that they were placed thereon by said Defendant in my presence in Open Court this date.

JUDGE

905

Defendant PAUL ALFRED BROWN
TRIAL DIVISION II (TWO)
Case Number 86-4084-X

SENTENCE

(As to Count ONE)

The Defendant, being personally before this Court, accompanied by his attorney, ASSISTANT PUBLIC DEFENDER WAYNE CHALU, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown.

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

(Check either provision if applicable)

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein.

☐ and the Court having placed the Defendant in community control and having subsequently revoked the Defendant's community control by separate order entered herein.

IT IS THE SENTENCE OF THE LAW that:

☐ The Defendant pay a fine of $_____, plus $_____ as the 5% surcharge required by F.S. 960.25

XXX The Defendant is hereby committed to the custody of the Department of Corrections

☐ The Defendant is hereby committed to the custody of the Sheriff* of Hillsborough County, Florida

(Name of local corrections authority to be inserted at printing, if other than Sheriff)

To be imprisoned (check one; unmarked sections are inapplicable)

XXX For a term of Natural Life WITH CREDIT TIME

☐ For a term of _____

☐ For an indeterminate period of 6 months to _____ years.

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

If "split" sentence complete either of these two paragraphs

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this action.

Firearm - 3 year mandatory minimum ☐ It is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

Drug Trafficking - mandatory minimum ☐ It is further ordered that the _____ year minimum provisions of F.S. 893.135(1)( )( )( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction ☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender ☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit XXX It is further ordered that the Defendant shall be allowed a total of 348 DAYS credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

Consecutive/ Concurrent It is further ordered that the sentence imposed for this count shall run XXX consecutive to ☐ concurrent with (check one) the sentence set forth in count TWO above.

Defendant PAUL ALFRED BROWN
TRIAL DIVISION II (TWO)
Case Number 86-4084-X

Consecutive/ Concurrent (As to other convictions)

It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run ☐ consecutive to ☐ concurrent with (check one) the following:

☐ Any active sentence being served.

☐ Specific sentences: _____

In the event the above sentence is to the Department of Corrections, the Sheriff of Hillsborough County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of this Judgment and Sentence.

The Defendant in Open Court was advised of his right to appeal from this Sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

In imposing the above sentence, the Court further recommends DEPARTURE FROM GUIDELINES - SENTENCING GUIDELINES FILED - PLEA AND CONVINCING REASONS FOR DEPARTURE FILED IN A SEPARATE ORDER

* IN THE EVENT THE DEATH SENTENCE ON COUNT TWO (2) IS VACATED AND THE DEFENDANT IS SENTENCED TO LIFE IMPRISONMENT WITHOUT PAROLE ELIGIBILITY FOR TWENTY-FIVE (25) YEARS; THE LIFE SENTENCE SENTENCE ON COUNT ONE (1) SHALL RUN CONSECUTIVELY TO THE SENTENCE OF COUNT TWO (2). *

DONE AND ORDERED in Open Court at Hillsborough County, Florida, this 2nd day of MARCH A.D., 19 87.

JUDGE

Defendant PAUL ALFRED BROWN
TRIAL DIVISION II (TWO)
Case Number 86-4084-X

SENTENCE

(As to Count TWO)

The Defendant, being personally before this Court, accompanied by his attorney, ASSISTANT PUBLIC DEFENDER WAYNE CHALU, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown.

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

(Check either provision if applicable)

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein.

☐ and the Court having placed the Defendant in community control and having subsequently revoked the Defendant's community control by separate order entered herein.

IT IS THE SENTENCE OF THE LAW that:

☐ The Defendant pay a fine of $_____, plus $_____ as the 5% surcharge required by F.S. 960.25

XXX The Defendant is hereby committed to the custody of the Department of Corrections

☐ The Defendant is hereby committed to the custody of the Sheriff of Hillsborough County, Florida

(Name of local corrections authority to be inserted at printing, if other than Sheriff)

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life

XXX For a term of DEATH

☐ For an indeterminate period of 6 months to _____ years.

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

If "split" sentence complete either of these two paragraphs

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this action.

Firearm – 3 year mandatory minimum ☐ It is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

Drug Trafficking – mandatory minimum ☐ It is further ordered that the _____ year minimum provisions of F.S. 893.135(1)( )( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction ☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender ☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit XXX It is further ordered that the Defendant shall be allowed a total of 348 DAYS credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

Consecutive/ Concurrent It is further ordered that the sentence imposed for this count shall run ☐ consecutive to ☐ concurrent with (check one) the sentence set forth in count _____ above.

908

Defendant PAUL ALFRED BROWN
TRIAL DIVISION II (TWO)
Case Number 86-4084-X

SENTENCE

(As to Count THREE)

The Defendant being personally before this Court, accompanied by his attorney, ASSISTANT PUBLIC DEFENDER WAYNE CHALU, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

(Check either provision if applicable)

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein.

☐ and the Court having placed the Defendant in community control and having subsequently revoked the Defendant's community control by separate order entered herein.

IT IS THE SENTENCE OF THE LAW that:

☐ The Defendant pay a fine of $_____, plus $_____ as the 5% surcharge required by F.S. 960.25

XXX The Defendant is hereby committed to the custody of the Department of Corrections

☐ The Defendant is hereby committed to the custody of the Sheriff* of Hillsborough County, Florida

(Name of local corrections authority to be inserted at printing, if other than Sheriff)

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life

XXX For a term of THIRTY (30) YEARS WITH CREDIT TIME

☐ For an indeterminate period of 6 months to _____ years.

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

If "split" sentence complete either of these two paragraphs

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this action.

Firearm - 3 year mandatory minimum ☐ It is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

Drug Trafficking - mandatory minimum ☐ It is further ordered that the _____ year minimum provisions of F.S. 893.135(1)( )( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction ☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender ☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit XXX It is further ordered that the Defendant shall be allowed a total of 348 DAYS credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

Consecutive/ Concurrent It is further ordered that the sentence imposed for this count shall run XXX consecutive to ☐ concurrent with (check one) the sentence set forth in count ONE above.

1

Rule 3.988(a)
Category 1: Murder, Manslaughter
Chapter 782 [except subsection 782.04(1)(a)]
and subsection 316.1931(2)

1. DOCKET NO. (PRIMARY OFFENSE)	3. COUNTY	4. JUDGE	5. DATE OF SENTENCE
86-4084	HILLSBOROUGH	GUY W. SPICOLA	3/2/87

2. DOCKET NO. (ADDITIONAL CASES)	6. NAME	7. DATE OF BIRTH	8. SEX
	PAUL ALFRED BROWN	2/26/50	☑ M ☐ F

9. DATE OF OFFENSE	10. PRIMARY OFFENSE AT CONVICTION	11. DEGREE
3/20/86	ATTEMPTED FIRST DEGREE MURDER	1ST

12. ☐ PROBATION VIOLATION ☐ COMMUNITY CONTROL VIOLATION	13. ☐ PLEA ☑ TRIAL	14. ☐ GUIDELINE SENTENCE IMPOSED ☐ DEPARTURE FROM GUIDELINE

I. Primary offense at conviction

Degree	Number of Counts 1	2	3	4	Points
Life	165	226	286	346	
1st punishable by life	150	195	276	336	
1st	136	165	226	286	136
2nd	77	93	106	121	
3rd	45	55	65	75	

Primary offense counts in excess of four (from back) ____

II. Additional offense at conviction

Degree	Number of Counts 1	2	3	4	Points
Life	61	73	79	85	1
1st pbl	45	54	58	63	45
1st	29	35	38	41	
2nd	16	19	21	22	
3rd	10	12	13	14	
MM	2	3	4	5	

Additional offense counts in excess of four (from back) ____

III. Prior record

Degree	Number of Prior Convictions 1	2	3	4	Points
Life	50	110	180	270	
1st pbl	40	88	138	216	40
1st	30	66	96	162	30
2nd	15	33	48	81	
3rd	5	11	18	27	
MM	1	2	4	6	

Prior convictions in excess of four (from back) ____

IV. Legal status at time of offense

No restrictions	0
Legal constraint	21 ____

V. Victim injury (physical)

None	0
Slight	7
Moderate	14
Death or severe	21 21

Reasons for departure: Total 272

See Order re sentencing in file.

Guideline Sentence: (17-22)

Sentence imposed, indicating length and type (Please print or type)

armed burglary - life consec
Attempted 1° murder -
30 yrs. consecutive

FOR OFFICE USE ONLY

Offense Code ____
T.S. ____
S.P. ____
Prob. ____
C.C. ____
C.J. ____

Sentencing Judge

State Attorney

Defendant/Defense Counsel

MICHAEL L. BENITO
Scoresheet Preparer

910

1

SG1 - effective 7/1/84

DISTRIBUTION
White — Court File
Green — Sentencing Guidelines Commission
Canary — State Attorney
Pink — Defendant/Defense Counsel
Goldenrod — Scoresheet Preparer

911

No. _____

IN THE

Supreme Court of the United States

PAUL ALFRED BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix K

Order of the Florida Supreme Court staying the appeal pending the disposition of *Hitchcock v. State. Brown v. State,* Appeal No. SC17-1001 (June 6, 2017).

Filing # 57390677 E-Filed 06/06/2017 04:16:23 PM

Supreme Court of Florida

TUESDAY, JUNE 6, 2017

CASE NO.: SC17-1001
Lower Tribunal No(s).:
291986CF004084000AHC

PAUL ALFRED BROWN vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

This appeal is stayed pending disposition of Hitchcock v. State, SC17-445. The record on appeal in this case shall still be transmitted in accordance with this Court's June 1, 2017, order on the preparation of the record on appeal.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

jat
Served:

MARIA CHRISTINE PERINETTI
RAHEELA AHMED
STEPHEN D. AKE
LISA MARIE BORT
HON. MICHELLE SISCO, JUDGE
JAY PRUNER
CRIMINAL COURT REPORTING
HON. PAT FRANK, CLERK

HON. RONALD N. FICARROTTA, CHIEF JUDGE

No. _____

IN THE

Supreme Court of the United States

PAUL ALFRED BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix L

Order of the Florida Supreme Court directing the Appellant to show cause as to why the trial court's order denying *Hurst* relief should not be affirmed in light of *Hitchcock v. State*. *Brown v. State*, Appeal No. SC17-1001 (September 27, 2017).

Filing # 62067092 E-Filed 09/27/2017 01:22:46 PM

Supreme Court of Florida

WEDNESDAY, SEPTEMBER 27, 2017

CASE NO.: SC17-1001
Lower Tribunal No(s).:
291986CF004084000AHC

PAUL ALFRED BROWN vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant shall show cause on or before Tuesday, October 17, 2017, why the trial court's order should not be affirmed in light of this Court's decision Hitchcock v. State, SC17-445. The response shall be limited to no more than 20 pages. Appellee may file a reply on or before Wednesday, November 1, 2017, limited to no more than 15 pages. Appellant may file a reply to the Appellee's reply on or before Monday, November 13, 2017, limited to no more than 10 pages.

Motions for extensions of time will not be considered unless due to a medical emergency.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

tw
Served:

LISA MARIE BORT
RAHEELA AHMED
MARIA CHRISTINE PERINETTI
STEPHEN D. AKE

No. _____

IN THE

Supreme Court of the United States

PAUL ALFRED BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix M

Appellant's response to the Florida Supreme Court's September 27, 2017 order to show cause. *Brown v. State*, Appeal No. SC17-1001 (October 17, 2017).

Filing # 62906160 E-Filed 10/17/2017 07:38:55 AM

No. SC17-1001

IN THE

Supreme Court of Florida

PAUL ALFRED BROWN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
Lower Tribunal No. 86-CF-4084-A

APPELLANT'S RESPONSE TO SEPTEMBER 27, 2017 ORDER TO SHOW CAUSE

LISA MARIE BORT
FLORIDA BAR NUMBER 0119074
EMAIL: BORT@CCMR.STATE.FL.US

MARIA CHRISTINE PERINETTI
FLORIDA BAR NUMBER 013837
EMAIL: PERINETTI@CCMR.STATE.FL.US

RAHEELA AHMED
FLORIDA BAR NUMBER 0713457
EMAIL: AHMED@CCMR.STATE.FL.US

LAW OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL - MIDDLE REGION
12973 NORTH TELECOM PARKWAY
TEMPLE TERRACE, FLORIDA 33637
TELEPHONE: (813) 558-1600
FAX NO. (813) 558-1601
SECONDARY EMAIL: SUPPORT@CCMR.STATE.FL.US
Counsel for Appellant

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PRELIMINARY STATEMENT

Appellant, Paul Alfred Brown ("Brown"), is currently incarcerated at Union Correctional Institution, 25636 NE SR-16, Raiford, Florida 32083, under a sentence of death. Page references to the record on appeal are designated with "R" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

The death sentence of Appellant, Brown, was imposed after a 7-5 jury recommendation pursuant to a capital sentencing scheme that was ruled unconstitutional by the United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). But for the date his sentence became final, Brown would be one of the many death row prisoners in Florida who have been granted new penalty phase proceedings.[1]

The issue left at least partially unresolved in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017), is whether this Court will continue to apply its unconstitutional "retroactivity cutoff" to deny *Hurst* relief to Brown on the ground that his sentence did not become final at least one day after the 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

This Court has already applied *Hurst* retroactively as a matter of state law and granted relief in numerous collateral-review cases where the defendant's sentence became final after *Ring*. However, this Court has never addressed *Hurst* retroactivity as a matter of federal law. Instead, the Court has consistently applied a state-law cutoff at the date *Ring* was decided—June 24, 2002—to deny relief in dozens of other collateral review cases. *See Asay v. State*, 210 So. 3d 1 (Fla. 2016). Brown

[1] In fact, in a fair number of those cases, the State has opted not to seek the death penalty, and the individuals have subsequently been sentenced to life. *See* Emilia L. Carr, John M. Buzia, Arthur Barnhill, III, Richard T. Robards, and Maurice L. Floyd.

maintains that those cases were wrongly decided on both state and federal grounds. The *Ring*-based cutoff is unconstitutional and should not be applied to Brown. Denying Brown *Hurst* relief because his sentence became final in 1990, rather than some date between 2002 and 2016, is a violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Brown is entitled to *Hurst* retroactivity as a matter of federal law and *Hitchcock*[2] should not deny Brown relief.

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

This appeal addresses whether federal law requires this Court to extend *Hurst* retroactivity to death sentences that became final prior to *Ring*, rather than arbitrarily granting *Hurst* relief solely to post-*Ring* death sentences. Brown respectfully requests oral argument on this and related issues pursuant to Fla. R. App. P. 9.320. Brown also respectfully requests that the Court permit full briefing in this case in accord with the normal, untruncated rules of appellate practice.

Brown's life is at stake and depriving Brown of his opportunity for full briefing in this case would constitute an arbitrary deprivation of the vested state right to a mandatory plenary appeal in capital cases. *See Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015) ("[T]his Court has a mandatory obligation to review all death penalty cases to ensure that the death sentence is imposed in accordance with constitutional

[2] Brown notes that a petition for a writ of certiorari is pending in *Hitchcock* (No. 17-6180).

and statutory directives."); *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

RELEVANT PROCEDURAL HISTORY AND FACTS

Brown has challenged the constitutionality of Florida's death penalty scheme since 1986. As such, Brown has properly preserved his claims. Prior to his trial, Brown filed a Motion for Statement of Aggravating Circumstances and *three* motions to declare Fla. Stat. § 921.141 unconstitutional. R8/842-50. After his trial in 1987, but prior to sentencing, Brown filed *another* motion to declare Florida's death penalty unconstitutional as applied, arguing that only requiring seven votes for a death recommendation was unconstitutional. R8/897-900.

On direct appeal, Brown argued that a bare majority jury recommendation was unconstitutional and that the trial court erred in denying a requested jury instruction[3] on the role of the jury based on *Caldwell*,[4] but in a 5-2 decision, this Court affirmed Brown's convictions and sentences of death. *Brown v. State*, 565 So. 2d 304 (Fla. 1990). Two members of the Court dissented to Brown's sentence. The United States Supreme Court denied certiorari on November 26, 1990. *Brown v. Florida,* 498 U.S. 992 (1990).

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[3] "The requested instruction reads as follows: "The fact that your recommendation is advisory does not relieve you of your solemn responsibility[,] for the Court is required to and will give great weight and serious consideration to your verdict in imposing sentence."" *Brown v. State*, 565 So. 2d 304, 308 n.9 (Fla. 1990).
[4] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

In addition, Brown raised an *Apprendi*[5] claim in his state habeas petition. *Brown v. Moore*, 800 So. 2d 223, 224–25 (Fla. 2001). Brown also raised the *Apprendi/Ring* issue in his federal habeas petition. *Brown v. Sec'y, Dept. of Corr.*, 8:01-CV-2374-T-23TGW, 2009 WL 4349320, at *41-44 (M.D. Fla. Nov. 25, 2009).

ARGUMENT

I. This Court's "retroactivity cutoff" at *Ring* is unconstitutional and should not be applied to Brown.

As will be discussed further below, to deny Brown retroactive relief under *Hurst v. Florida*, 136 S.Ct. 616 (2016), on the ground that his death sentence became final before June 24, 2002 under the decision in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), while granting retroactive *Hurst* relief to inmates whose death sentences were not final on June 24, 2002 under the decision in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), violates Brown's right to Equal Protection of the Laws under the Fourteenth Amendment to the Constitution of the United States (*e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)) and his right against arbitrary infliction of the punishment of death under the Eighth Amendment to the Constitution of the United States (*e.g.*, *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam)).

As a matter of state law, this Court has applied *Hurst* retroactively and granted

[5] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

relief where the defendant's sentence became final after the date *Ring* was decided–June 24, 2002. *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). The Court recently reaffirmed its retroactivity cutoff in *Hitchcock.* However, even in *Hitchcock* this Court has never addressed *Hurst* retroactivity as a matter of federal law. This Court is bound by the federal constitution; therefore, it has the obligation to address Brown's federal retroactivity arguments. *See Testa v. Katt*, 330 U.S. 386, 392-93 (1947) (state courts must entertain federal claims in the absence of a "valid excuse").

This Court's current *Ring*-based retroactivity cutoff violates the United States Constitution and should not be applied to deny Brown the same *Hurst* relief being granted in scores of materially indistinguishable collateral cases. Denying Brown *Hurst* retroactivity because his death sentence became final in 1990, while affording retroactivity to similarly-situated defendants whose sentences became final between 2002 and 2016, some solely due to resentencing, would violate the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty, as well as the Fourteenth Amendment's guarantee of equal protection and due process.

A. This Court's retroactivity cutoff violates the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty.

It has long been established that the death penalty cannot "be imposed under sentencing procedures that create[] a substantial risk that it would be inflicted in an

arbitrary or capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman v. Georgia*, 408 U.S. 238, 310 (1972) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.") (Stewart, J., concurring). This Court's current *Hurst* retroactivity cutoff results in arbitrary and capricious denials of relief to similarly situated capital defendants.

The bright line cutoff for *Hurst* retroactivity established by this Court has created demonstrably arbitrary results. Experience has already shown the arbitrary results inherent in this Court's application of the *Ring*-based retroactivity cutoff. The date of a particular death sentence's finality on direct appeal in relation to the June 24, 2002 decision in *Ring* has at times depended on whether there were delays in transmitting the record on appeal to this Court for the direct appeal;[6] whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with this Court's summer recess; how long the assigned Justice of this Court took to submit the opinion for release;[7] whether a rehearing motion was filed and whether

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[6] *See, e.g.*, *Lugo v. State*, 845 So. 2d 74 (Fla. 2003) (two-year delay between the time defense counsel filed a notice of appeal and the record on appeal being transmitted to this Court, almost certainly resulting in the direct appeal being decided post-*Ring*).

[7] *Compare Booker v. State*, 773 So. 2d 1079 (Fla. 2017) (this Court's opinion issued within one year after all briefs had been submitted, before *Ring*), *with Hall v. State*, 201 So. 3d 628 (Fla. 2016) (opinion issued twenty-three months after the last brief was submitted). If this Court had taken the same amount of time to decide *Booker* as it did *Hall*, Mr. Booker's death sentence would have become final after *Ring*.

an extension was sought; whether there was a scrivener's error necessitating issuance of a corrected opinion; whether counsel chose to file a petition for a writ of certiorari in the United States Supreme Court or sought an extension to file such a petition; and how long a certiorari petition remained pending in the United States Supreme Court.

In one striking example, this Court affirmed Gary Bowles' and James Card's unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both inmates petitioned for a writ of certiorari in the United States Supreme Court. Mr. Card's sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). However, Mr. Bowles's sentence became final seven (7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). This Court recently granted *Hurst* relief to Mr. Card, ruling that *Hurst* applied retroactively to him because his sentence became final after the *Ring* cutoff. *See Card*, 219 So. 3d at 47. However, Mr. Bowles, whose case was decided on direct appeal on *the same day* as Mr. Card's, falls on the other side of this Court's current retroactivity cutoff.[8]

[8] Adding to the "fatal or fortuitous accidents of timing", Mr. Card's Petition for Writ of Certiorari was actually docketed 28 days before Mr. Bowles' Petition and was scheduled to go to conference first. However, for reasons unknown, Mr. Card's

Moreover, under the Court's current approach, "older" cases dating back to the 1980s with a post-*Ring* resentencing are subject to *Hurst*, while other less "old" cases are not. *See, e.g.*, *Johnson v. State*, 205 So. 3d 1285, 1285 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was granted relief on a third successive post-conviction motion in 2010, years after the *Ring* decision); *Card*, 219 So. 3d at 47 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was afforded relief on a second successive post-conviction motion in 2002; *cf. Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (granting *Hurst* relief in a case where the crime occurred in the late 1990s, but interlocutory appeals resulted in a ten-year delay before the trial). Under this Court's arbitrary approach, a defendant originally sentenced to death before Brown, but later resentenced to death after *Ring*, would receive *Hurst* relief and Brown would not, solely because Brown's trial and representation did not have issues substantial enough to warrant a new penalty phase.

Even if this Court were to maintain its unconstitutional retroactivity "cutoff" at *Ring*, individuals who preserved the substance of the *Hurst* decisions before *Hurst*

Petition was redistributed to a later conference, thus placing his denial within the *Ring* cut-off. Compare *Card v. Florida*, Case No. 01-9152, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/01-9152.htm (last visited Oct. 17, 2017), with *Bowles v. Florida*, Case No. 01-9716, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/01-9716.htm (last visited Oct. 17, 2017).

should receive the retroactive benefit of *Hurst* under this Court's "fundamental fairness" doctrine, which the Court has previously applied in other contexts, *see, e.g.*, *James v. State*, 615 So. 2d 668, 669 (Fla. 1993), and which the Court has applied once in the *Hurst* context, *see Mosley*, 209 So. 3d at 1274, but inexplicably never addressed since. Justice Lewis recently endorsed this preservation approach in *Hitchcock*. *See* 2017 WL 3431500, at *2 (Lewis, J., concurring) (stating that the Court should "simply entertain *Hurst* claims for those defendants who properly presented and preserved the substance of the issue, even before *Ring* arrived."). As noted above, Brown's trial and appellate counsel challenged the constitutionality of Florida's death penalty statute and preserved claims under both *Apprendi* and *Ring*.

B. This Court's retroactivity cutoff violates the Fourteenth Amendment's guarantee of equal protection and due process.

This Court's retroactivity cutoff violates the Fourteenth Amendment's guarantee of equal protection and due process. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture—on collateral review—differently without "some ground of difference that rationally explains the different treatment." *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). When two classes are created to receive different treatment by a state actor like this Court, the question becomes "whether there is some ground of difference that rationally explains the different treatment . . . ." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *see also McLaughlin*, 379 U.S. at 191. The Fourteenth Amendment requires that distinctions in state

criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Capital defendants have a fundamental right to a reliable determination of their sentences. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). This Court's *Hurst* retroactivity cutoff lacks a rational connection to any legitimate state interest. *See Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

To deny Brown "relief when other similarly situated defendants have been granted relief amounts to a denial of due process." *Hitchcock*, 2017 WL 3431500, at *3 (Pariente, J., dissenting). Denying the benefit of Florida's new post-*Hurst* capital sentencing statute to "pre-*Ring*" defendants like Brown violates the Fourteenth Amendment because once a state requires certain sentencing procedures, it creates Fourteenth Amendment life and liberty interests in those procedures. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (due process interest in state created right to direct appeal); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (liberty interest in state-created sentencing procedures); *Ford v. Wainwright*, 447 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (liberty interest in meaningful state proceedings to adjudicate competency to be executed); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288-89 (1998) (O'Connor, J., with Souter, Ginsburg, & Breyer, JJ., concurring) (life interest in state-created right to capital clemency proceedings). "Considerations of fairness and uniformity make it very 'difficult to justify depriving

a person of his liberty or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases.'" *Falcon v. State*, 162 So. 3d 954, 962 (Fla. 2015) (quoting *Witt v. State*, 387 So. 2d 922, 929 (Fla.1980)).

Although the right to the particular procedure is established by state law, the violation of the life and liberty interest it creates is governed by *federal* constitutional law. *See id.* at 347; *Ford*, 477 U.S. 399, 428-29 (O'Connor, J., concurring), *Evitts*, 469 U.S. at 393 (state procedures employed "as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant'" must comport with due process). Instead, defendants have "a substantial and legitimate expectation that [they] will be deprived of [their] liberty only to the extent determined by the jury in the exercise of its discretion . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Hicks*, 447 U.S. at 346 (O'Connor, J., concurring). Courts have found in a variety of contexts that state-created death penalty procedures vest in a capital defendant life and liberty interests that are protected by due process. *See. e.g.*, *Ohio Adult Parole Authority*, 523 U.S. at 272; *Ford*, 477 U.S. at 427-31 (O'Connor, J., concurring). In *Hicks*, the Supreme Court held that the trial court's failure to instruct the jury that it had the option to impose an alternative sentence violated the state-created liberty interest (and federal due process) in having the jury select his sentence from the full range of alternatives available under state law. 477 U.S. at 343.

C. Brown's death sentence also violates the Eighth Amendment.

This Court held in *Hurst v. State* that there is an Eighth Amendment right to have a jury unanimously recommend a death sentence before a death sentence is permissible. *Hurst v. State*, 202 So. 3d at 59 ("we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment."). The right to a unanimous jury recommendation of death requires full retroactivity and anything less is unreliable and violates the Eighth Amendment.[9]

II. Because the *Hurst* decisions announced substantive constitutional rules, the Supremacy Clause of the United States Constitution requires state courts to apply those rules retroactively to all cases on collateral review.

A. The Supremacy Clause requires state courts to apply substantive constitutional rules retroactively to all cases on collateral review.

In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), the United States Supreme Court held that the Supremacy Clause of the Constitution requires state

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[9] *See Lambrix v. State*, No. SC17-1687, 2017 WL 4320637, at *2 (Fla. Sept. 29, 2017) (Pariente, J., dissenting) ("As I stated in *Hitchcock*, "[f]or the same reasons I conclude that the right announced in *Hurst* under the right to jury trial (Sixth Amendment and article I, section 22, of the Florida Constitution) requires full retroactivity, I would conclude that the right to a unanimous jury recommendation of death announced in *Hurst* under the Eighth Amendment requires full retroactivity." *Id.* at *4. "Reliability is the linchpin of Eighth Amendment jurisprudence, and a death sentence imposed without a unanimous jury verdict for death is inherently unreliable." *Id.* at *3. The statute under which Lambrix was sentenced, which only required that a bare majority of the twelve-member jury recommend a sentence of death, was unconstitutional, and therefore unreliable, under both the Sixth and Eighth Amendments.").

courts to apply "substantive" constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis.

In *Montgomery*, a Louisiana state prisoner filed a claim in state court seeking retroactive application of the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment). The state court denied the prisoner's claim on the ground that *Miller* was not retroactive as a matter of state retroactivity law. *Montgomery*, 136 S. Ct. at 727. The United States Supreme Court reversed, holding that because the *Miller* rule was substantive as a matter of federal law, the state court was obligated to apply it retroactively. *See id.* at 732-34.

Montgomery clarified that the Supremacy Clause requires state courts to apply substantive rules retroactively, notwithstanding state-law analysis. *Montgomery*, 136 S. Ct. at 728-29 ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, *the Constitution* requires state collateral review courts to give retroactive effect to that rule.") (emphasis added). Thus, *Montgomery* held, "[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Id.* at 731-32.

Of note for purposes of *Hurst* retroactivity analysis, the Supreme Court found the *Miller* rule substantive in *Montgomery* even though the rule had "a procedural

component." *Id.* at 734. *Miller* did "not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Court] did in *Roper* or *Graham*." *Miller*, 132 S. Ct. at 2471. Instead, "it mandate[d] only that a sentence follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* Despite *Miller*'s procedural mandates, the Court in *Montgomery* warned against "conflat[ing] a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the *manner of determining* the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)) (first alteration added). Instead, the Court explained, "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish," and that the necessary procedures do not "transform substantive rules into procedural ones," *Id.* at 735. In *Miller*, the decision "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*." *Id.* at 734.

B. The *Hurst* decisions announced substantive rules that must be applied retroactively to Brown under the Supremacy Clause.

The *Hurst* decisions announced substantive rules that must be applied retroactively to Brown by this Court under the Supremacy Clause. At least two substantive rules were established by *Hurst v. Florida* and *Hurst v. State*.

First, a Sixth Amendment rule was established requiring that a jury find as fact: (1) each aggravating circumstance; (2) that those particular aggravating circumstances together are "sufficient" to justify imposition of the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. Each of those findings is required to be made by the jury beyond a reasonable doubt. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person "whose crimes reflect the transient immaturity of youth" is a substantive, not procedural, rule). As in *Montgomery*, these requirements amounted to an "instance[] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish." *Id.* at 735.

Second, an Eighth Amendment rule was established which requires those three beyond-a-reasonable-doubt findings to be made unanimously by the jury. The substantive nature of the unanimity rule is apparent from this Court's explanation in *Hurst v. State* that unanimity (1) is necessary to ensure compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders, and (2) ensures that the sentencing determination "expresses the values of the community as they currently relate to the imposition of the death penalty." *Hurst v. State*, 202 So. 3d at 60-61. The function of the unanimity rule is to ensure

that Florida's death-sentencing scheme complies with the Eighth Amendment and to "achieve the important goal of bringing [Florida's] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law." *Id.* Therefore, as a matter of federal retroactivity law, the rule is substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"). This is true even though the rule's subject concerns the method by which a jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (noting that state's ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).[10]

The same reasoning applies in the *Hurst* context. The Sixth Amendment

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[10]In *Welch*, the Court held that *Johnson*'s ruling was substantive because it "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied"—therefore it must be applied retroactively. *Welch*, 136 S. Ct. at 1265. The Court emphasized that its determination whether a constitutional rule is substantive or procedural "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive," but rather whether "the new rule itself has a procedural function or a substantive function," i.e., whether the new rule alters only the procedures used to obtain the conviction, or alters instead the class of persons the law punishes. *Id.* at 1266. In *Welch*, the Court pointed out that, "[a]fter *Johnson*, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence." *Id.* Thus, "*Johnson* establishes, in other words, that even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause." *Id.* "It follows," the Court held, "that *Johnson* is a substantive decision." *Id.* (internal quotation omitted).

requirement that each element of a Florida death sentence must be found beyond a reasonable doubt, and the Eighth Amendment requirement of jury unanimity in fact-finding, are substantive constitutional rules as a matter of federal law because they place certain murders "beyond the State's power to punish," *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, "[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on" the judge-sentencing scheme. *Id.* And in the context of a *Welch* analysis, the "unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment*," *Hurst*, 202 So. 3d at 60 (emphasis added), i.e., the new law by necessity places certain individuals beyond the state's power to impose a death sentence. The decision in *Welch* makes it clear that a substantive rule, rather than a procedural rule, resulted from the *Hurst* decisions. *See Welch*, 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes.").

Hurst retroactivity is not undermined by *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), where the United States Supreme Court held that *Ring* was not retroactive in a federal habeas case. In *Ring*, the Arizona statute permitted a death sentence to be imposed by a finding of fact that at least one aggravating factor existed. *Summerlin* did not review a statute, like Florida's, that required the jury not only to conduct the

fact-finding regarding the aggravators, but also as to whether the aggravators were *sufficient* to impose death and whether the death penalty was an appropriate sentence. *Summerlin* acknowledged that if the Court itself "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. Such a change occurred in *Hurst* where, for the first time, the Court found it unconstitutional for a judge alone to find that "sufficient aggravating factors exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 136 S. Ct. at 622 (internal citation omitted).

Moreover, *Hurst,* unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the United States Supreme Court has always regarded proof-beyond-a-reasonable-doubt decisions as substantive. *See, e.g.*, *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (explaining that "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in [*In re Winship*, 397 U.S. 358 (1970)] was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect."); *Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware's state retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof.").

III. Brown's death sentence violates *Hurst*, and the error is not "harmless".[11]

Brown was sentenced to death pursuant to a Florida scheme that has been ruled unconstitutional by both the United States Supreme Court and this Court. In *Hurst v. Florida*, the United States Supreme Court held that Florida's scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. 136 S. Ct. at 620-22.

On remand in *Hurst v. State*, this Court applied the holding of *Hurst v. Florida*, and further held that the Eighth Amendment requires *unanimous* jury fact-finding as to each of the required elements, and also a *unanimous* recommendation by the jury in order to impose the death penalty. 202 So. 3d at 53-59.

During the penalty phase, Brown's jury was never asked to make unanimous findings of fact as to any of the required elements. Instead, after being instructed that its decision was an advisory recommendation and that the ultimate responsibility for imposing a death sentence rested with the judge, the jury rendered a non-unanimous, generalized recommendation that the judge sentence Brown to

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[11] Although this Court's state-law precedent is sufficient to resolve any harmless-error inquiry in this case, it should be noted that the United States Constitution precludes application of the harmless error doctrine because any attempt to discern what a jury in a constitutional proceeding would have decided would be impermissibly speculative. *See, e.g., Caldwell,* 472 U.S. at 328-29 (explaining that a jury's belief about its role in death sentencing can materially affect its decision-making); *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993) (foreclosing application of the harmless-error doctrine to deny relief based on jury decisions not comporting with Sixth Amendment requirements).

death. This Court's precedent makes clear that *Hurst* errors are not harmless where the defendant's pre-*Hurst* jury recommended death by a non-unanimous vote. *Dubose v. State*, 210 So. 3d 641, 657 (Fla. 2017) ("[I]n cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless.").[12]

To the extent the aggravators applied to Brown were based on contemporaneous convictions, the judge's finding of such aggravators does not render the *Hurst* error harmless. This Court has consistently rejected the idea that a judge's finding of prior-conviction aggravators is relevant in the harmless-error analysis of *Hurst* claims, and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g.*, *Franklin v. State,* 209 So. 3d 1241, 1248 (Fla. 2016) (rejecting "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst*").

CONCLUSION

This Court should hold that federal law requires the *Hurst* decisions to be applied retroactively to Brown, vacate his death sentence, and remand to the circuit court for a new penalty phase or imposition of a life sentence.

---

[12] This Court has declined to find harmless error in every case where the pre-*Hurst* jury's recommendation was not unanimous. *See, e.g Calloway v. State*, 210 So. 2d 1160 (Fla. 2017) (7-5 jury vote); *Guzman v. State*, 214 So. 3d 625 (Fla. 2017) (7-5 jury vote); *Robards v. State*, 214 So. 3d 568 (Fla. 2017) (7-5 jury vote); and *Peterson v. State*, 221 So. 3d 571 (Fla. 2017) (7-5 jury vote).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the PDF copy of the foregoing document has been transmitted to this Court through the Florida Courts E-Filing Portal on this 17th day of October, 2017.

WE HEREBY FURTHER CERTIFY that a true copy of the foregoing was served via electronic mail to **Stephen D. Ake**, Assistant Attorney General, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607-7013, at Stephen.Ake@myfloridalegal.com and capapp@myfloridalegal.com on this 17th day of October, 2017.

WE HEREBY FURTHER CERTIFY that a copy of the foregoing was mailed to **Paul Alfred Brown**, DOC# 019762, Union Correctional Institution, P.O. Box 1000, Raiford, Florida 32083, on or about this 17th day of October, 2017.

Respectfully submitted,

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WE HEREBY CERTIFY, pursuant to Fla. R. App. P. 9.210, that the foregoing document was generated in Times New Roman fourteen-point font.

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Counsel for Appellant

No. _____

IN THE

Supreme Court of the United States

PAUL ALFRED BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix N

Florida Supreme Court opinion denying relief on Mr. Brown's state habeas petition. *Brown v. Moore*, 800 So. 2d 223 (Fla. 2001).

800 So.2d 223
Supreme Court of Florida.

Paul Alfred BROWN, Petitioner,
v.
Michael W. MOORE, Respondent.

No. SC01-884.
|
Nov. 1, 2001.

Synopsis
Petitioner was convicted in the Circuit Court, Hillsborough County, Guy W. Spicola, J., of first-degree murder, and was sentenced to death. On appeal, the Supreme Court, 565 So.2d 304, affirmed. Petitioner sought writ of habeas corpus. The Supreme Court held that: (1) petitioner's claim that he could be incompetent to be executed was premature, and (2) he was not entitled to have the aggravating circumstances charged in the indictment, submitted to the jury during the guilt phase, and found by the jury in a unanimous verdict.

Petition denied.

Attorneys and Law Firms

***224** Dwight M. Wells, Assistant CCRC, Capital Collateral Regional Counsel-Middle Region, Tampa, FL, for Petitioner.

Robert A. Butterworth, Attorney General, and Robert J. Landry, Assistant Attorney General, Tampa, FL, for Respondent.

Opinion

PER CURIAM.

Paul Alfred Brown petitions this Court for a writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(9), Fla. Const. We deny the petition.

Brown was convicted for the shooting murder of seventeen-year-old Pauline Cowell, for which he was sentenced to death. He was also convicted of armed burglary and attempted first-degree murder. The facts of the case are more fully set forth in our opinion in Brown's direct appeal. *See Brown v. State,* 565 So.2d 304, 305 (Fla.1990). Brown filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. The trial court denied relief, and we affirmed that denial. *See Brown v. State,* 755 So.2d 616 (Fla.2000). Brown now claims that "[s]ignificant errors which occurred at Mr. Brown's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel." Brown makes two arguments for relief in this habeas petition.

[1] Brown first argues that he may be incompetent to be executed. Brown agrees that this claim is premature under Florida Rule of Criminal Procedure 3.811. However, Brown asserts that he makes the argument to preserve his ability to pursue a similar claim in the federal system on account of *In re Provenzano,* 215 F.3d 1233, 1235 (11th Cir.), *cert. denied,* 530 U.S. 1256, 120 S.Ct. 2710, 147 L.Ed.2d 979 (2000). We agree with his concession that this issue is not yet ripe, and we therefore find it to be without merit. *See Hall v. Moore,* 792 So.2d 447, 450 (Fla.2001); *Mann v. Moore,* 794 So.2d 595, 600 (Fla.2001).

[2] Brown's second argument is that the death sentence in his case is unconstitutional as applied to him in light of the United States Supreme Court's decision in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). He argues that at the time of his penalty phase, section 775.082(1), Florida Statutes (1983), provided the maximum sentence was life in prison without the possibility of parole for twenty-five years.[1] Brown further ***225** argues that the aggravating circumstances were required to be charged in the indictment, submitted to the jury during the guilt phase, and found by the jury in a unanimous verdict. Brown claims that his appellate counsel was ineffective for not raising these issues.

We have previously rejected identical arguments. *See Mills v. Moore,* 786 So.2d 532, 536-38 (Fla.), *cert. denied,* 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001); *Mann,* 794 So.2d at 600. For the same reasons explained in those opinions, we reject Brown's arguments. Thus, we find that Brown's appellate counsel was not ineffective for failing to raise these issues. Accordingly, we deny the petition for writ of habeas corpus.

It is so ordered.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, and LEWIS, JJ., concur.

QUINCE, J., recused.

All Citations

800 So.2d 223, 26 Fla. L. Weekly S742

Footnotes

1 The murder occurred in 1986; therefore, Brown's citation to the 1983 version of section 775.082(1) is in error. However, the 1985 version and the 1987 version (the year of his penalty phase) were identical to the 1983 version. We have rejected Brown's challenge to the 1979 version in *Mills v. Moore,* 786 So.2d 532 (Fla.), *cert. denied,* 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001), and the 1989 version in *Mann.* The 1983, 1985, and 1987 versions of section 775.082(1) are identical to the 1979 and 1989 versions of the statute.

End of Document

No. _____

IN THE

Supreme Court of the United States

PAUL ALFRED BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
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APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix O

Middle District Court of Florida opinion denying relief on Mr. Brown's federal habeas petition. *Brown v. Sec'y, Dept. of Corr.*, 8:01-CV-2374-T-23TGW, 2009 WL 4349320 (M.D. Fla. Nov. 25, 2009).

2009 WL 4349320
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Tampa Division.

Paul Afred BROWN, Petitioner,
v.
SECRETARY, DEPT. OF
CORRECTIONS, Respondent.

No. 8:01–cv–2374–T–23TGW.
|
Nov. 25, 2009.

Attorneys and Law Firms

Carol C. Rodriguez, Robert Thomas Strain, Capital Collateral Regional Counsel, Tampa, FL, for Petitioner.

Stephen D. Ake, Office of the Attorney General, Tampa, FL, for Respondent.

ORDER

STEVEN D. MERRYDAY, District Judge.

***1** Paul Alfred Brown, a Florida prisoner under sentence of death, petitions for the writ of habeas corpus pursuant to 28 U.S.C. § 2254. Brown proceeds on his timely amended petition (Doc. 59) (the "petition"). Because Brown was tried and sentenced in Hillsborough County, Florida, venue properly lies in the Middle District of Florida.

PROCEDURAL AND FACTUAL BACKGROUND

Paul Alfred Brown was convicted of the first-degree murder of Pauline Cowell, an armed burglary, and the attempted murder of Tammy Bird. The Florida supreme court affirmed the judgment and sentence of death in *Brown v. State,* 565 So.2d 304 (Fla.), *cert. denied,* 498 U.S. 992, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990), which includes the pertinent facts of the murder:

> Around 1:30 a.m., March 20, 1986 two gunshots woke Barry and Gail Barlow. Upon entering the Florida room of their home they found Gail's seventeen-year-old sister, Pauline Cowell, dead in her bed. Pauline's friend, Tammy Bird, had also been shot, but was still alive. The room's outside door stood open, missing the padlock with which it had been secured. Pursuant to information indicating Brown might be a suspect, sheriff's deputies began searching for him in places he was known to frequent and found him hiding behind a shed in a trailer park where Brown's brother lived. They arrested Brown and seized a handgun, later linked to the shootings, [F N2] from his pants pocket.
>
> [F N2] Tests showed that bullets found at the murder scene had been fired from the handgun seized from Brown.
>
> Brown lived with the murder victim's mother, and the victim had only recently moved into her sister's home. Brown confessed after being arrested and, at the sheriff's office, stated that he had broken into the victim's room to talk with her about some "lies" she had been telling. Although he entered the room armed, Brown claimed that he had not intended to kill the girl, but that he planned to shoot her if she started "hollering."
>
> The jury convicted Brown of armed burglary, first-degree murder, and attempted first-degree murder and recommended the death sentence. The trial court found that the mitigating evidence did not outweigh the aggravating circumstances and sentenced Brown to death.

Brown, 565 So.2d at 305.

The Florida supreme court also states:

> Turning to the sentencing portion of Brown's trial, the trial court found that three aggravating circumstances had been established, i.e., committed during commission of a felony, previous conviction of a violent felony, and committed in a cold, calculated, and premeditated manner. The court found several items of evidence in mitigation (mental capacity, mental and emotional distress, social and economic disadvantage, nonviolent criminal past), but considered them of so little weight as not to outweigh

> even any one of the aggravating factors.

565 So.2d at 308.

The United States Supreme Court denied Brown's petition for the writ of certiorari. *Brown v. Florida,* 498 U.S. 992, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990). Brown filed a Rule 3.850 motion for post-conviction relief and two amended Rule 3.850 motions in the state court. He proceeded on his 1996 third amended Rule 3.850 motion in which he raised sixteen claims. A list of the claims appears at Appendix B to the response. (Doc. 66) The post-conviction court granted an evidentiary hearing on grounds 3, 6, 7, and 8 and summarily denied relief on the remaining claims. (Exhibit Q1, pp. 298–355) After the evidentiary hearing (Exhibit Q4–Q8, pp. 1–502), the post-conviction court denied the remaining grounds in Brown's third amended Rule 3.850 motion. (Exhibit Q3, pp. 449–53) Brown appealed that adverse ruling to the Florida supreme court and argued fourteen issues. (*See* Exhibit C to Doc. 66) The Florida supreme court affirmed the post-conviction court's rejection of Brown's claims and denied rehearing. *Brown v. State,* 755 So.2d 616 (Fla.2000).

***2** Seeking state habeas corpus relief in the Florida supreme court, Brown raised two issues. The Florida supreme court denied both claims and found (1) that Brown's claim of incompetence to be executed was premature and not ripe for review and (2) that Brown's claim that the death sentence is unconstitutional and that appellate counsel was ineffective, based on *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), had no merit. *Brown v. Moore,* 800 So.2d 223 (Fla.2001). (*See* Appendix D to Doc. 66)

Brown filed a successive Rule 3.851 motion to vacate sentence, in which he challenged the unconstitutionality of Section 921.137, Florida Statutes, which states:

> A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant has mental retardation.

Brown objected to provision eight of the statute, which states: "This section does not apply to a defendant who was sentenced to death prior to the effective date of this act." The effective date of the statute is June 12, 2001, and Brown was sentenced in 1987. (Exhibit AA–1, pp. 17–77) The State filed its Response. (Exhibit AA–1, pp. 78–163) The post-conviction court conducted an evidentiary hearing at which Dr. Valerie McClain and Dr. Greg Prichard testified regarding whether Brown met the standard for mental retardation under Section 912.137. (Exhibit AA–6, pp. 843–911 and 913–68) Both the defense and the State submitted written final arguments. (Exhibits AA–1, pp. 169–209 and AA–3, pp. 376–517, respectively) The court appointed Dr. Michael Maher to examine Brown and held another evidentiary hearing at which Dr. Maher testified. (Exhibit AA–6, pp. 981–1039) This latter evidentiary hearing was continued until a month later at which time Dr. Maher concluded his testimony and Dr. McClain testified again. (Exhibit AA–7, pp. 1044–1120) Both the State and Brown simultaneously filed a final argument from the trifurcated evidentiary hearing on mental retardation. (Exhibits AA–3, pp. 376–83 and AA–5, pp. 717–77, respectively) The post-conviction court denied Brown's successive Rule 3.851 motion. (Exhibit AA–5, pp. 778–82) Brown appealed and the Florida supreme court affirmed the denial of relief. *Brown v. State,* 959 So.2d 146 (Fla.2007).

Filing yet another successive Rule 3.851 motion to vacate, Brown challenged the state's lethal injection protocol. The post-conviction court dismissed the successive motion without prejudice to Brown's re-filing the motion within sixty days. Brown re-filed his successive motion to vacate, which he amended claiming that his sentence of death is unconstitutional because Florida's method of execution by lethal injection violates the Eighth Amendment prohibition against "cruel and unusual punishment." The court denied the successive Rule 3.851 motion and Brown appealed. The Florida supreme court affirmed the post-conviction court's denial of relief.

***3** This federal case, commenced in December, 2001, was stayed six months later and not re-opened until September, 2007. A month later, Brown filed the present amended 28 U.S.C. § 2254 petition for the writ of habeas corpus raising nine grounds for relief. At the same time Brown filed the latter Rule 3.851 motion to vacate challenging the State's lethal injection protocol, a proceeding that concluded a few months ago.

THE GOVERNING LEGAL PRINCIPLES

Because Brown filed his petition after April 24, 1996, this case is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Penry v. Johnson,* 532 U.S. 782, 792, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001); *Henderson v. Campbell,* 353 F.3d 880, 889–90 (11th Cir.2003). The AEDPA "establishes a more deferential standard of review of state habeas judgments," *Fugate v. Head,* 261 F.3d 1206, 1215 (11th Cir.2001), in order to "prevent federal habeas 'retrials' and to ensure that state court convictions are given effect to the extent possible under law." *Bell v. Cone,* 535 U.S. 685, 693, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *see also Woodford v. Visciotti,* 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (recognizing a highly deferential standard for a federal habeas evaluation of a state court ruling).

A. Standard of Review Under the AEDPA

The AEDPA precludes habeas relief from an adjudication on the merits in state court unless the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The phrase "clearly established Federal law" encompasses only the holdings of the United States Supreme Court "as of the time of the relevant state-court decision." *Williams v. Taylor,* 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

"[S]ection 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Secretary for Dep't of Corr.,* 432 F.3d 1292, 1308 (11th Cir.2005), *cert. denied,* 549 U.S. 819, 127 S.Ct. 348, 166 L.Ed.2d 33 (2006). The meaning of the clauses was discussed in *Parker v. Head,* 244 F.3d 831, 835 (11th Cir.2001):

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

***4** If the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable." *Parker,* 244 F.3d at 835.

Finally, under Section 2254(d)(2), a federal court may grant the writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A determination of fact by a state court enjoys a presumption of correctness, and a habeas petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. *See Parker,* 244 F.3d at 835–36; 28 U.S.C. § 2254(e)(1).

Exhaustion of State Court Remedies and Procedural Default

Federal review by a motion under Section 2254 remains unavailable until a petitioner "has exhausted the remedies available in the courts of the State ...." 28 U.S.C. 2254(b)(1)(A); *Snowden v. Singletary,* 135 F.3d 732, 735 (11th Cir.1998). "In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *O'Sullivan v. Boerckel,* 526 U.S. 838, 842, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). *See also Henderson,* 353 F.3d at 891 ("A state prisoner seeking federal habeas relief cannot raise a federal constitutional claim in federal

court unless he first properly raised the issue in the state courts.") (quoting *Judd v. Haley,* 250 F.3d 1308, 1313 (11th Cir.2001)); *Snowden v. Singletary,* 135 F.3d at 735 ("Exhaustion of state remedies requires that the state prisoner fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights.") (quoting *Duncan v. Henry,* 513 U.S. 364, 365, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995)).

Exhaustion of state court remedies generally requires a petitioner to pursue discretionary appellate review. "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process, including review by the state's court of last resort, even if review in that court is discretionary." *Pruitt v. Jones,* 348 F.3d 1355, 1358–59 (11th Cir.2003) (citing *O'Sullivan,* 526 U.S. at 845).

"The teeth of the exhaustion requirement comes from its handmaiden, the procedural default doctrine." *Smith v. Jones,* 256 F.3d 1135, 1138 (11th Cir.2001). Under the procedural default doctrine, "[i]f the petitioner has failed to exhaust state remedies that are no longer available, that failure is a procedural default which will bar federal habeas relief, unless either the cause and prejudice or the fundamental miscarriage of justice exception is applicable." *Smith,* 256 F.3d at 1138. "The doctrine of procedural default was developed as a means of ensuring that federal habeas petitioners first seek relief in accordance with established state procedures." *Henderson,* 353 F.3d at 891 (quoting *Judd v. Haley,* 250 F.3d at 1313).

***5** As stated above, only two, narrow circumstances excuse a procedural default. First, a petitioner may obtain federal habeas review of a procedurally defaulted claim upon demonstrating both "cause" for the default and actual "prejudice" resulting from the default. "Cause" ordinarily requires the demonstration of an objective factor external to the defense that impeded the effort to raise the claim properly in the state court. *Henderson,* 353 F.3d at 892; *Marek v. Singletary,* 62 F.3d 1295, 1302 (11th Cir.1995). To show " 'prejudice," Brown must show "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his factual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Hollis v. Davis,* 941 F.2d 1471, 1480 (11th Cir.1991) (quoting *United States v. Frady,* 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)). Brown must show at least a reasonable probability of a different result absent the default. *Henderson,* 353 F.3d at 892.

Second, without a showing of cause or prejudice, a petitioner may obtain federal habeas review of a procedurally defaulted claim if review is necessary to correct a fundamental miscarriage of justice. *Edwards v. Carpenter,* 529 U.S. 446, 451, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000); *Henderson,* 353 F.3d at 892. This exception is available only "in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is actually innocent." *Henderson,* 353 F.3d at 892. The fundamental miscarriage of justice exception requires a petitioner's "actual" innocence rather than his "legal" innocence. *Johnson v. Alabama,* 256 F.3d 1156, 1171 (2001) (citing *Calderon v. Thompson,* 523 U.S. 538, 559, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998)); *Murray v. Carrier,* 477 U.S. 478, 495–96 (1986) (explaining that a "fundamental miscarriage of justice" occurs "in an extraordinary case, if a constitutional violation has resulted in the conviction of someone who is actually innocent"). To meet this standard, a petitioner must "show that it is more likely than not that no reasonable juror would have convicted him" of the underlying offense. *Schlup v. Delo,* 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). In addition, " '[t]o be credible,' a claim of actual innocence must be based on [new] reliable evidence not presented at trial." *Calderon,* 523 U.S. at 559 (quoting *Schlup,* 513 U.S. at 324) (explaining that "[g]iven the rarity of such evidence, in virtually every case, the allegation of actual innocence has been summarily rejected") (internal quotation marks omitted).

Schlup requires the petitioner to show constitutional error coupled with "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup,* 513 U.S. at 324. This fundamental miscarriage of justice exception is unavailable unless "the petitioner shows, as a factual matter, that he did not commit the crime of conviction." *Ward v. Cain,* 53 F.3d 106, 108 (5th Cir.1995) (denying certificate of probable cause) (footnote omitted).

***6** "[A]n ineffective assistance of counsel claim being used for cause to excuse a procedural default of another

claim is not itself excepted from the doctrine of procedural default." *Henderson,* 353 F.3d at 896. In *Carpenter,* 529 U.S. at 451–52, a habeas petitioner argued ineffective assistance of counsel as cause for his procedural default of other constitutional claims in the Section 2254 petition. Because he failed to raise this ineffective assistance claim in state court, Carpenter was procedurally barred from raising the claim in federal court. The Supreme Court held that, unless the petitioner could establish cause and prejudice to excuse his procedural default of the ineffective assistance claim, Carpenter was barred from using the ineffective assistance claim as a basis for cause to excuse his procedural default of the underlying claim. *Carpenter,* 529 U.S. at 451–53.

No Presumption that the State Court Ignored Its Procedural Rules

Finally, no presumption exists that a Florida court ignores Florida's procedural default rule by issuing only a summary denial of relief. A summary denial creates no suggestion that the state court resolved the federal claim rather than the independent and sufficient state claim. *See Coleman,* 501 U.S. 722, 735–36, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Kight v. Singletary,* 50 F.3d 1539, 1544–45 (11th Cir.1995) (applying procedural bar notwithstanding the state court's summary dismissal); *Tower v. Phillips,* 7 F.3d 206, 209 (11th Cir.1993) (applying bar absent the state court's ruling on claims presented).

B. Standard for Ineffective Assistance of Counsel

Under *Strickland v. Washington,* 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a claim of ineffective assistance of counsel requires a demonstration (1) that counsel's performance was deficient and "fell below an objective standard of reasonableness" and (2) that the deficient performance prejudiced the defense. *Lockhart v. Fretwell,* 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), clarifies that the prejudice prong of the *Strickland* test, which focuses not merely on outcome determination, requires that the putatively deficient representation rendered the trial fundamentally unfair or the result unreliable.

A strong presumption persists that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 689–90. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland,* 466 U.S. at 690. *Accord Gates v. Zant,* 863 F.2d 1492, 1497 (11th Cir.1989).

White v. Singletary, 972 F.2d 1218, 1220–21 (11th Cir.1992), instructs:

> The test [for ineffective assistance of counsel] has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. *Strickland* encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

*7 (citation omitted). Under the principles expounded in *White,* "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant,* 13 F.3d 384, 386 (11th Cir.1994).

DISCUSSION

Brown's petition stands fully briefed and ripe for decision. No evidentiary hearing is necessary because the record is fully developed and the claims in the petition raise issues of law, not issues of fact. *See Breedlove v. Moore,* 279 F.3d 952, 959 (11th Cir.2002).[1] Because of the deference due the state courts' findings of fact and conclusions of law, the state courts' determination of Brown's claims largely governs review of those same claims. Consequently,

in determining the reasonableness of the state courts' determinations, the review of Brown's claims includes a recitation of the pertinent state court's analysis.

Ground One

> The Execution of Paul Alfred Brown, a Mentally Retarded and Brain Damaged Offender, Would Constitute Cruel and Unusual Punishment Under the Constitution of the State of Florida and the United States.

Ground one is a claim under *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which holds that execution of a mentally retarded offender constitutes "excessive" punishment under the Eighth Amendment to the United States Constitution. Because the post-conviction court held a full evidentiary hearing on this issue,[2] and the Florida supreme court affirmed the denial of relief on appeal, *Brown v. State,* 959 So.2d 146 (Fla.2007), ground one is exhausted.

Legal Standards for Determining Mental Retardation

A. Atkins' Mental Retardation Definition

Atkins declines to furnish a definitive legal definition of "mental retardation" or "mentally retarded" and offers instead two clinical definitions:

> The American Association on Mental Retardation (AAMR) defines mental retardation as follows: "Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly sub-average intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18."
>
> The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly sub-average general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system."

***8** *Atkins,* 536 U.S. at 308 n. 3. (citations omitted). An IQ of 75 is "typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." Atkins, 536 U.S. at 309 n. 5. Further, "clinical definitions of mental retardation require not only sub-average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Atkins,* 536 U.S. at 318.

B. Florida Law on Mental Retardation

Section 921.137, Florida Statutes, which was signed into law on June 12, 2001, a year before the Supreme Court's June 20, 2002, ruling in *Atkins,*[3] exempts the mentally retarded from the death penalty and defines mental retardation as "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." § 921.137(1), Fla. Stat. (2008) ("Section 921.137"). The Florida supreme court has consistently interpreted the statute's definition of "significantly sub-average general intellectual functioning" to require a defendant seeking exemption from execution to establish an IQ of 70 or below. *See Phillips v. State,* 984 So.2d 503, 510 (Fla.2008) (citing *Cherry v. State,* 959 So.2d 702, 711–14 (Fla.2007) (finding that Section 921.137 provides a definitive demarcation at an IQ of 70), *Jones v. State,* 966 So.2d 319, 329 (Fla.2007) ("Under the plain language of the statute, significantly sub-average general intellectual functioning correlates with an IQ of 70 or below."), and *Zack v. State,* 911 So.2d 1190, 1201 (Fla.2005) (exempting from execution a defendant meeting Florida's standard for mental retardation, which requires establishing an IQ of 70 or below)). Section 921.137(8) excludes a defendant sentenced to death before the statute's effective date. However, both the post-conviction court and the Florida

supreme court used the statutory definition to decide Brown's mental retardation claim.

Brown's Alleged Facts in Support of Ground One

Paul Brown scored 72 (in the mentally retarded range) at age 10 on a standardized Wechsler Intelligence Test. Evidence of concurrent deficits in his adaptive functioning were documented in teachers' reports. Most recently, Paul Brown scored two standard deviations below the mean on three Wechsler Intelligence Tests as defined in F.S. § 921.137 in 2001, 2003, and 2004. Mr. Brown's score on the 1960 intelligence test is of great significance because it establishes the onset of significant sub-average intellectual functioning (one prong necessary to establish mental retardation) as existing prior to age 18.

The State court did not address the evidence presented relevant to the 1960 test. Brown's initial IQ score of 72 was rejected although all experts agree that a score of 72 falls within the accepted IQ range for mental retardation.

***9** The trial court stated that Florida Statute requires an IQ score of 70 or less for a finding of mental retardation and stated that Florida Statute, Section 921.137 "suggests a three prong test to determine whether a defendant is mentally retarded. Prong one requires an IQ of 70 or less." (S. ROA, Vol. 5, p. 778–782, Order Denying Relief, April 22, 2005, p. 779). The Statute itself does not specify that an intelligence quotient must automatically fall at a specific point score (i.e.) 70 or below. The Statute adopts broader language that requires a score "two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services. Fla. Stat. § 921.137 (2003). Experts at Paul Brown's evidentiary hearing explained that the DSM–IV–TR is the diagnostic manual used by experts in treating and diagnosing mental retardation and while the manual adopts the two standard deviation cut off it also instructs that a standard error of measure of plus or minus five (5) points is applicable (emphasis added).[4] Therefore, an individual who scores within the [ ] range of 70 to 75 can be diagnosed as mentally retarded.

The trial court erred when stating, "Drs. Prichard and Maher each tested the Defendant and found that the recent IQ scores suggesting a range of mild mental retardation were a result of malingering." (S. ROA, Vol. 5, p. 778–782, Circuit Court's Order Denying Relief, April 22, 2005, p. 780). This finding is contrary to the record. Neither Dr. Prichard or Maher te[sted] Brown for malingering. Furthermore, Dr. Maher did not testify that the test results supported a conclusion that Brown gave less than a full effort. (S.ROA, Vol.6, p. 1077).

Only one expert, Dr. Valerie McClain, tested Brown on a Rey 15 for objective evidence as to malingering. Dr. McClain testified that there are 16 indicators used to clinically assess for malingering and that the results of her testing does **not** support evidence of malingering (emphasis added). (S.ROA, Vol.6, pp. 907, 908). According to Drs. McClain and Maher, objective test results do not support any evidence of malingering. (S.ROA, Vol.6, p. 1080). Therefore the State court's finding that both experts Prichard and Maher tested Mr. Brown and found that the mild mental retardation scores resulted from Brown's malingering is clearly error that is refuted by the record.

Dr. McClain described the retrospective analysis of Brown's adaptive functioning that is conducted in such cases to establish onset. She stated that she looked at his environment from conception to age 18. She reviewed his academic records, interviewed teachers and relatives, gathered information about his daily living activities during this period, and considered his severely abusive environment. (S.ROA, Vol.6, pp. 907, 908). Dr. McClain stated that a clinical decision is made based upon the criteria of mental retardation looking at adaptive functioning in conjunction with the intellectual functioning. (S.ROA, Vol.6, p. 908). All experts concurred with Dr. McClain's testimony that a diagnosis of mental retardation cannot be made based upon either intellectual or adaptive functioning **alone** as each [ ] prong must be **individually evaluated** (emphasis added).

***10** The definition of mental retardation in Fla.Crim. R. 3.203(b) is "significantly sub-average general intellectual functioning existing concurrently

with deficits in adaptive behavior and manifested during the period from conception to age 18." It is identical to Fla. Stat. § 921.137(1) that defines mental retardation as "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18."

Dr. McClain properly referred to Mr. Brown's early history to establish that his mental retardation manifested prior to age 18 as required by rule and by Florida's Statute. She reviewed not only Brown's early tests but all tests administered throughout his lifetime, the trial testimony at trial and adaptive functioning evaluations completed by Dr. Prichard. Dr. McClain was the only evaluator who undertook to retrospectively evaluate Brown, in accordance with the criteria set forth by the U.S. Supreme Court in *Atkins.*

The trial court stated, "Dr. Prichard explained that due to the fact that Defendant's present adaptive functioning did not meet the criteria for mental retardation, there was no need to address the third prong of the test for retardation." (The third prong referred to is that statutory requirement for the onset of deficits to be established prior to age 18). (S. ROA, Vol. 5, p. 778–782, Order Denying Relief, April 22, 2005, p. 780). The trial court's statement is not supported by the record.

Dr. Prichard testified that he did not evaluate Brown's adaptive functioning prior to age 18 "because [I] had so much data when Mr. Brown was an adult that said intellectually he's not below 70. So ... if that's demonstrated there's really no need to get the adaptive behavior stuff prior to the age of 18." (S.ROA, Vol.6, pp. 954, 955). As an example Dr. Prichard stated "[I]f I have enough information to say he's not MR in terms of IQ, I have really no need to do anymore." (S.ROA, Vol.6, p. 958). Clearly, Dr. Prichard was referring to Brown's intellectual testing (IQ) tests and was not referring to his current adaptive skills. Dr. Prichard never testified that it was a lack of deficits in Brown's adaptive behavior that kept him from going forward. He testified that test results showing Brown's intellectual functioning above 70 as an adult were the reason he did [sic] decided not to test adaptive skills prior to age 18.

Dr. Prichard's report (admitted in evidence at the evidentiary hearing) shows that: Mr. Brown scored at 57 on the SIDR (78 in communication, 53 in personal living, 64 in community living, and 54 with a broad independent support score of 57) he determined Mr. Brown to have "an overall measure of adaptive behavior, **comparable to that of the average individual at age 10 years 11 months.** His functional independence is **limited to very limited"** and **"limitations in twelve adaptive skills areas:** fine-motor skills, social interaction, language comprehension, language expression, eating and meal preparation, dressing, personal self-care, domestic skills, time and punctuality, money and value, work skills, and home/community orientation" based on information received from Mr. Brown. Dr. Prichard scored Mr. Brown at 80 (Standard score of 87, communication of 77, personal living of 85 and community living of 81) "an overall measure comparable to that of the **average individual at age 15 years 10 months.** His functional independence is limited to age-appropriate" and he found **"limitations in ten adaptive skills areas:** fine-motor skills, social interaction, language comprehension, language expression, eating and meal preparation, dressing, domestic skills, time and punctuality, money and value, and home/community orientation" based upon information received from Sgt. Young at Union Correctional. (S.ROA, Vol.6, pp. 947, 948) (S. ROA, Vol. 2, pp. 261, 262, Report of Adaptive Behavior Testing, March 3, 2003, Gregory A. Prichard, Psy. D.). Dr. Prichard's report confirms the presence of current deficits in numerous areas of Brown's adaptive functioning. The state court's findings to the contrary are not support[ed] by the record.

*11 After the State and Defendant presented evidence on the mental retardation issue at Evidentiary Hearings, the Court sua sponte appointed a third expert—Dr. Maher to render an opinion [in] this case. Dr. Maher administered another intelligence test on Brown and again his score was in the mentally retarded range for intellectual functioning. He found the 14 point difference between the verbal and performance IQ scores noted in Brown's test consistent with some organic brain damage or developmental impairment. (S.ROA, Vol.7, pp. 1081,82). [Dr.] Maher agreed that mentally retarded individuals have a prevalence

of having a co-morbid mental disorder four to five times greater than the population and can have superimposed mental health problems, (i.e.) brain damage and still be diagnosed as mentally retarded. (S.ROA, Vol.7, pp. 1083, 1084, 1110). Dr. Berland testified at Brown's trial that he suffers from brain damage. (S.ROA, Vol.7, p. 1081). Dr. Afield testified at Brown's trial that he believed him to be mentally retarded. (S.ROA, Vol.5, p. 781). The evidence presented at Brown's evidentiary hearing supports the presence of a co-morbid diagnosis in this case of mental illness and mental retardation and the state court's contrary findings are not supported by the record below.

Dr. Maher testified that he took all of Paul Brown's test scores and averaged them. The highest score of 99 and the lowest score of 57 were taken off and he computed an average of 77.6. (S.ROA, Vol.6, p. 1004). He stated that the 77.6 average score he obtained was inconsistent with the score of 69 that he obtained from his own testing of Paul Brown. (S.ROA, Vol.6, p. 1009). He testified that based upon his averaging of scores 77.6 must be considered the most reliable and accurate IQ score for Paul Brown, even though Mr. Brown has never tested at 77.6 on a current version of any IQ test administered to him during his lifetime. (S.ROA, Vol.6, pp. 1024, 1025). Dr. Maher testified that he had no information as to which edition of the California Achievement Test was given to Paul Brown, whether it was administered individually or even scored correctly. (S.ROA, Vol.6, pp. 1026, 027). Dr. Maher testified that he had no information to identify the tests, how they were administered, or raw material relating to tests identified in his report—Kent (score 57), Department of Corrections (score 94), Fl. Dep't Corrections/Beta (score 97), DOC (test type not reported) (score 99). (S.ROA, Vol.26, pp. 1027–1030).

Dr. Michael Maher testified that he was familiar with the provisions of Florida Administrative Code Rule 65 B–4.032. (S.ROA, Vol.6, p. 1019). In order to establish that tests other than those specified in the rule (Stanford–Binet Intelligence Scale or Wechsler Intelligence Scale) can be considered by the court as valid and reliable measures of intelligence, the rule states that such evaluations are to be submitted to the court and that they **shall** be accompanied by the published validity and reliability data for the examination. Furthermore, Dr. Maher did not provide any information relative to several tests that he used or literature to support his averaging of Brown's various test scores. No published validity and reliability data, as required by the rules before the court can consider them was presented for BETA tests that the court considered in evaluat[ing] Brown's mental retardation claim.

***12** Expert testimony was presented that BETA tests are not synonymous with intellectual assessment instruments, that they are primarily non-verbal, are only one part of the full scale IQ used as a general screening measure and are not a full scale intellectual measure. BETA'S were described as short in comparison to Wechsler instruments and instruments that do not appropriately assess a comprehensive range of different intellectual skills and abilities. (S.ROA, Vol.6, pp. 856, 857). BETA tests are not used Developmental Services in establishing mental retardation." [sic][5] (S.ROA, Vol.7, p. 1106). Expert testimony was presented that BETA tests should not be accorded the same weight as a Wechsler or Stanford Benet Intelligence tests with respect to establishing mental retardation because BETA tests can give the impression of greater ability than actually possessed by the individual. Dr. McClain testified that it is not permissible to use a BETA to test for mental retardation because it is not one of the specified tests allowed by Developmental Services in the State of Florida for diagnosis [sic] for diagnosing mental retardation as both verbal and non verbal abilities must be assessed. (S.ROA, Vol.7, 1105, 1106).

Dr. McClain testified that it is inappropriate to consider BETA tests equivalent to intellectual assessment instruments and to average these scores to reach a conclusion for the purpose of diagnosing mental retardation. (S.ROA, Vol.6. pp. 856,857). Literature in the psychological community that questions the use of BETA tests as intelligence tests was referenced. *See:* Dr. George Barroff, *"Establishing Mental Retardation In Capital Cases: A Potential of Life and Death,"* **AAMR Vol. 29, No. 6 (1991),** that notes a common discrepancy of 20 to 30 points with respect to revised Beta measure as compared to either the Stanford Benet, Version IV, Wechsler Intelligence Scale, Version III. (S.ROA, Vol.7, p. 1105). Dr. Maher agreed that BETA tests are a limited non-verbal test and did not testify that BETA

and WAIS are comparable. (S.ROA, Vol.7, pp. 1049, 1050). In cross examination, Dr. Prichard conceded that BETA tests are not [ ] specified for use in measuring intellectual abilities. (S.ROA, Vol.6, p. 934).

Dr. Maher added up several IQ test scores and divided them up to arrive at a full scale intelligence score. He testified that he was "making a strongly and statistically validated educational guess." (S.ROA, VOL.7, p. 1047).[Dr.] Maher provided no professional literature to support his decision to averag[e] all of Brown's tests or any literature to support that averaging intelligence test scores over an individual's lifetime to determine actual full scale IQ is an acceptable practice in the scientific community. (S.ROA, Vol.7, p. 1048). Dr. McClain testified that averaging is not a permissible practice in the psychological community. It is not possible to average the same test let alone varied intelligence tests due to the different reliability and validity levels of each test opinions based upon some averaging method without documentation to support the validity of his assertions as required by the rule. (S.ROA, Vol.6, pp. 856, 857).

***13** Mr. Brown has significant sub-average intellectual functioning as reflected on Intelligence Tests that are specified as instruments for use in Florida Administrative Code Rule 65 B–4.032(1) for determining mental retardation pursuant to Fla. R.Crim. P. 3.203 in Florida. A school psychiatrist gave ten-year-old Paul Brown a Wechsler Intelligence Scale in September, 1960 and recorded his full scale IQ in the mentally retarded range at 72 at age 10. In 1962, he was recommended for special placement with slow learners and the severity of his problems was documented in psychological reports and records that reveal that he repeated the fifth grade three times before quitting school in the sixth grade at age 14. (S.ROA, Vol.2, p. 223). In 1987, Dr. Berland, Ph.d. characterized him as "slow cognitively" (S.ROA, Vol.2, p. 294) and Dr. Dee, Ph.d. noted "bilateral cerebral involvement or brain damage." (S. ROA, Vol. 2, State's Exhibit 3, p. 219). Dr. Berland and Dr. Dee reported that Mr. Brown was functioning at a low intellectual level and both documented adaptive behavior deficits within their respective reports.

The record reflects that outdated test versions skewed some of Mr. Brown's test results. The American Educational Research Association and the National Counsel on Measurements in Education, 1990 Standard for Educational and Psychological Testing states that it is inappropriate to use dated tests and norms. When test scores are properly adjusted as recommended by the professional literature, (Dr. Berland's score in 1986 is 70 and Dr. Dee's score in 1993 is 72 .) Brown's testing near the time of the crime is then consistent with the sub-average intellectual functioning level reflected in his 1960 test (72) and with all of Brown's most recent test scores (2001–63, 2003–68 and 2004–69).

A Wechsler Adult Intelligence Scale (3rd Ed) given by Dr. Valerie McClain, Ph.D., on July 2, 2001 recorded Mr. Brown as having a verbal IQ performance at 61 and a performance IQ at 73 with full scale IQ at 63. (S.ROA, Vol.6, p. 863). Dr. Gregory Prichard administered the same test on March 3, 2003, recording Paul Brown's verbal IQ performance at 69, performance IQ at 73 and full scale IQ score at 68. Dr. McClain testified that the results in both tests are very consistent in result and cited a "practice effect" (recognized by psychologists when a subject is repeatedly tested on the same instrument) as the basis for a difference of five to six points noted on the verbal portion of the test. (S.ROA, Vol.6, p. 867). When tested a third time on the same testing instrument, the Wechsler Adult Intelligence Scale (3rd Ed.), Dr. Michael Maher also reported Paul Brown's full scale IQ score at 68 or 69. (S.ROA, Vol.7, p. 1071). Mr. Brown has tested in the mentally deficient range [only] once prior to age 18 and on three individually administered intelligence tests. He has clearly established the fact that his intellectual functioning falls within the mentally deficient range.

***14** Mr. Brown is complex because he has also established a co-morbid diagnosis. He suffers from mental illness, brain damage and mental retardation. In rejecting his claim for relief the State Court failed to recognize professional standards used by psychologists when determining mental retardation as recognized by the U.S. Supreme Court in *Atkins v. Virginia.* Denial of Mr. Brown's claim that he is mentally retarded claim [sic] resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law and/ or resulted in a decision that was based on an

unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

(Petition, pp. 11–22).

Ground One Lacks Merit

Affirming the post-conviction court's finding that Brown is not mentally retarded, the Florida supreme court noted the post-conviction court's consideration of the conflicting testimony of Dr. Valerie McClain, Dr. Gregory Prichard, and Dr. Michael Maher:

> In September of 2001, Brown filed a successor motion to vacate sentence, [F N1] asserting that he is mentally retarded based on the definition provided in section 921.137, and hence the penalty of death must be vacated. The trial court held an initial evidentiary hearing in the case, at which time the State and the defendant presented conflicting expert opinions as to whether Brown was mentally retarded. Brown presented Dr. Valerie McClain, and the State presented Dr. Gregory Prichard. The court then appointed its own expert, Dr. Michael Maher, and an additional evidentiary hearing was conducted. On April 25, 2005, the lower court entered an order denying relief as follows:
>
> > As in *Bottoson [v. State,* 813 So.2d 31 (Fla.2002)], three doctors were enlisted to evaluate the mental capacity of Defendant in regard to the instant motion. Drs. Valerie McClain, Gregory Prichard, and Michael Maher each submitted an evaluation on defendant's mental capacity and testified as to their findings. Drs. Prichard and Maher determined Defendant to be mentally competent, but Dr. McClain found Defendant to be mildly mentally retarded.
> >
> > The Court has struggled with the determination made by Dr. McClain. Recent testing suggests that Defendant's IQ is near the mildly mentally retarded range. However, Dr. McClain's report of Defendant's adaptive functioning indicates that Defendant would be classified in the severely mentally retarded range. It is this inconsistency in Dr. McClain's reporting that gives the Court pause.
> >
> > It seems that Dr. McClain relies very heavily on the language of the rule regarding the onset of mental deficits prior to age 18, ignoring the fact that mental deficits must manifest by age 18 and exist presently. Dr. Prichard specifically addresses this point during his testimony. Furthermore, on cross-examination, defense counsel inquired into Dr. Prichard's reasoning for failing to interview individuals to comment on Defendant's adaptive functioning prior to age 18. Dr. Prichard explained that due to the fact that Defendant's present adaptive functioning did not meet the criteria for mental retardation, there was no reason to address the third prong of the test for retardation.
>
> ***15** Dr. McClain testified regarding Defendant's ability to maintain a five-year intimate relationship, "I do believe that was after he was 18." That Defendant may have been described at an early age as having socialization issues, does not mean that he satisfies the statutory definition of mentally retarded if he is currently able to socialize and adapt at an acceptable level. The mental deficits have to manifest prior to 18 and continue to exist presently, or concurrently with significant sub-average general intellect. Dr. McClain failed to report on Defendant's current adaptive functioning.
>
> Contrary to Dr. McClain's assessment, Drs. Prichard and Maher each tested the Defendant and found that the recent IQ scores suggesting a range of mildly mentally retarded were a result of malingering.[n.1] Dr. Prichard believes Defendant to be in the "high end of the borderline range or at the low end of the average range." According to Drs. Prichard and Maher, it is reasonable to believe that a person in Defendant's situation has a strong motivation to perform poorly on examinations in order to be declared mentally retarded.

[n.1] Dr. Prichard testified that he did not believe Defendant's IQ score of 68 represented an accurate reporting. Specifically, Dr.Prichard felt that Defendant was purposely hesitating in giving responses.

> Dr. Maher testified that he believed the testing he performed on Defendant did not accurately reflect Defendant's true intellectual capabilities.
>
> Likewise, the results of the Vineland test administered by Dr. Prichard suggest Defendant is not mentally retarded in terms of adaptive functioning. [n.2] Dr. Prichard commented on the

> level of support needed by an individual that scores 29 in adaptive functioning—the value attributed by Dr. McClain in her examination:
>
> An adaptive functioning of 29 would correspond to a support level of extensive. It would mean the person would need extensive support, which is characterized by individuals requiring extensive or continuous support and supervision. For example, an individual may attain beginning self-care skills, but may need continuous supervision from someone within the same room or nearby.

[n.2] Dr. Prichard testified that he has administered the Vineland test approximately 300 times. Dr. Prichard's results from the administration of the Vineland test was accepted by the trial court in *Bottoson v. State,* 813 So.2d 31 (Fla.2002).

> Dr. Prichard's examination supports the fact that Defendant is clearly capable of caring for himself and places extreme doubt on the validity of Dr. McClain's assessment. [n.3] Therefore, the Court finds Dr. Prichard's and Dr. Maher's analysis to be accurate. Based on Dr. Prichard's, Dr. Maher's, and the Court's observations of the Defendant and on the doctors' determination that Defendant is not mentally retarded, the Court finds that Defendant is not entitled to the relief requested.

[n.3] Dr. Prichard lists the tasks Defendant has been able to perform and continues to do.

[F N1.] The motion also requested the trial court to declare a provision of section 921.137, Florida Statutes (2001), unconstitutional since section (8) of the statute stated that it was not to be applicable to defendants who were sentenced to death prior to the effective date of the act. Following *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), we adopted Florida Rule of Criminal Procedure 3.203, which adopted the statutory definition of mental retardation and recognized that *Atkins* applies to defendants currently on death row. *See Phillips v. State,* 894 So.2d 28, 39–40 (Fla.2004) (holding that one may file an *Atkins* claim under rule 3.203 even if section 921.137 did not exist at time of sentencing). This renders moot the claim that the statute is unconstitutional. Moreover, the trial court determined Brown's claim of mental retardation using the statutory definition.

***16** *Brown v. State,* 959 So.2d at 147–48 (Fla.2007).

The Florida supreme court next concluded that Brown's claim invited the appellate court both to attribute greater weight to testimony rejected by the post-conviction court and to discredit testimony found more credible by the post-conviction court. The court found:

> To establish mental retardation, Brown must demonstrate all three of the following: (1) significantly sub-average general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. Fla. R.Crim. P. 3.203(b). The trial court determined that based on the three experts' evaluations, Brown did not come within the definition of mental retardation. When reviewing the trial court's findings relative to the existence of mental retardation, this Court looks to whether competent, substantial evidence supports the trial court's findings. *See Trotter v. State,* 932 So.2d 1045, 1049 (Fla.2006). This Court does not re-weigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses. *Id.* at 1050. As stated in *Tibbs v. State,* 397 So.2d 1120 (Fla.1981):
>
> As a general proposition, an appellate court should not re-try a case or re-weigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the (decision).

Id. at 1123 (footnote omitted).

The testimony presented at the evidentiary hearing showed that Brown has seen numerous mental health experts since he was ten years old. Several IQ tests placed Brown in the mildly mentally retarded range, and there were references as to some deficits in his adaptive functioning skills. On the other hand, some of his IQ scores were higher than what a mentally retarded person would have, particularly as to Brown's performance IQ. Dr. McClain offered one explanation of this disparity, contending that the higher scoring tests were not the proper tests or they were outdated and needed to be adjusted. The other experts disagreed that an adjustment was needed and further asserted that these higher IQ scores established that Brown was

capable at times of performing better than one who is mentally retarded. As a result, they concluded that any deficits in Brown's IQ were not caused by mental retardation but were caused by malingering and mental disorders which appeared on a sporadic basis.

In *Cherry v. State,* No. SC02–2023, 959 So.2d 702, 2007 WL 1074931 (Fla. Apr.12, 2007), we held that the statutory definition of mental retardation required a showing that a defendant had an IQ score of 70 or below. Here, the trial court found that there was a question as to the accuracy of the IQ testing and proceeded to the evaluation of the second prong of the statutory definition of mental retardation, i.e., concurrent deficits in adaptive behavior. As to this second prong, the case became a conflict between the opinions of the experts which had to be resolved by the trial judge after weighing the evidence, listening to the expert testimony, and judging overall credibility of each. The trial judge's order denying relief clearly showed that the court was troubled with the testimony of Brown's expert, Dr. McClain, particularly in regard to her report that Brown's adaptive functioning indicates that he is in the severely mentally retarded range and would need extensive or continuous support. This report was contradictory to the evidence that Brown was engaged in a five-year intimate relationship prior to the crime, that he had his driver's license and drove a car, and that he was employed in numerous jobs including as a mechanic.

***17** In this appeal, the defendant essentially argues that the trial court should have weighed Dr. McClain's testimony more heavily and discounted the testimony of Drs. Prichard and Maher based on the testimony of Dr. McClain. However, questions relating to evidentiary weight and credibility of witnesses are reserved to the trial court. *See, e.g., Trotter,* 932 So.2d at 1050 ("[T]he question of evidentiary weight is reserved to the circuit court, and this Court does not re-weigh the evidence.... The determination of the credibility of witnesses also is reserved to the trial court."); *Bottoson v. State,* 813 So.2d 31, 33 n. 3 (Fla.2002) ("We give deference to the trial court's credibility evaluation of Dr. Pritchard's and Dr. Dee's opinions."); *Porter v. State,* 788 So.2d 917, 923 (Fla.2001) ("We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact."). In this case, the trial court clearly found that Dr. McClain's testimony was not as credible as the testimony presented by the other expert witnesses. After all conflicts in the evidence and all reasonable inferences have been resolved in favor of the trial court's decision, there is competent, substantial evidence to support this decision.

As the record provides competent, substantial evidence supporting the trial court's findings, we affirm the decision that Brown is not mentally retarded.

Brown v. State, 959 So.2d at 148–50 (Fla.2007) (footnote omitted).

Brown fails to satisfy his burden, required by AEDPA, to show that the state court determination is contrary to or an unreasonable application of governing federal law as determined by the Supreme Court. Brown may not obtain federal habeas corpus relief merely because he asserts that the trial court should have accorded greater weight to the testimony of a defense witness than to a witness for the State. The state court's credibility determination (that the defense's expert witness was not credible compared to both the State's expert witness and the court's appointed expert witness) and the factual determination (Brown's IQ score) bind this court. Federal jurisprudence is in accord with the Florida supreme court's deference to the judge who heard the witnesses testify. *Baldwin v. Johnson,* 152 F.3d 1304, 1316 (11th Cir.1998) ("We must accept the state court's credibility determination and thus credit [counsel's] testimony over [petitioner's]."), *cert. denied,* 526 U.S. 1047, 119 S.Ct. 1350, 143 L.Ed.2d 512 (1999), and *Devier v. Zant,* 3 F.3d 1445, 1456 (11th Cir.1993) ("Findings by the state court concerning historical facts and assessments of witness credibility are, however, entitled to the same presumption accorded findings of fact under 28 U.S.C. § 2254(d)."), *cert. denied,* 513 U.S. 1161, 115 S.Ct. 1125, 130 L.Ed.2d 1087 (1995). *See also* 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.").

***18** Ground one warrants no habeas corpus relief.

Ground Two

Florida's lethal injection statute and the existing procedure that the State uses for lethal injection violates the Eighth Amendment to the United States

> Constitution as it will subject Mr. Brown to Cruel and Unusual Punishment.

Ground two is fully exhausted. Brown presented this ground in a successive Rule 3.851 motion to vacate.

The post-conviction court denied relief and the Florida supreme court affirmed. The order reads, in pertinent part:

> Paul Alfred Brown, a prisoner under sentence of death, appeals the circuit court's order summarily denying his successive postconviction motion. *See* Fla. R.Crim. P. 3.851. We have previously affirmed appellant's conviction and sentence of death. *See Brown v. State,* 565 So.2d 304 (Fla.1990). We have also affirmed the denial of his first postconviction motion, *see Brown v. State,* 755 So.2d 616 (Fla.2000), denied his petition for writ of habeas corpus, *see Brown v. Moore,* 800 So.2d 223 (Fla.2001), and affirmed the denial of his second postconviction motion. *See Brown v. State,* 959 So.2d 146 (Fla.2007).
>
> In this appeal, Brown first claims that the circuit court erred in assessing the constitutionality of Florida's lethal injection execution procedures under the legal standard set forth in *Lightbourne v. McCollum,* 969 So.2d 326 (Fla.2007), rather than under the legal standard set forth in *Baze v. Rees,* 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). This issue, however, has already been decided adversely to Brown. *See Ventura v. State,* 2 So.3d 194 (Fla.2009); *Henyard v. State,* 992 So.2d 120 (Fla.2008); *Schwab v. State,* 995 So.2d 922 (Fla.2008).
>
> Brown next contends that the circuit court erred in failing to hold an evidentiary hearing on his claim that Florida's lethal injection execution procedures are unconstitutional in various respects. Because the underlying claim has already been rejected by this Court, however, the circuit court did not err in summarily rejecting this claim. *See Lightbourne; Schwab.*
>
> And finally, Brown claims that section 945.10, Florida Statutes (2008), which protects the executioners' identity, is unconstitutional in various respects. This issue, however, has already been decided adversely to Brown. *See Henyard; Bryan v. State,* 753 So.2d 1244 (Fla.2000).
>
> Accordingly, we affirm the circuit court's order summarily denying Brown's successive postconviction motion.

Brown v. State, No. SC08–939, 2009 WL 1990022, at *1 (Fla. July 2009).

Ground Two Lacks Merit

"Substantial risk" is the generally accepted standard across the country for determining whether a lethal injection protocol violates the Eighth Amendment's prohibition against cruel and unusual punishment. *See, e.g., Baze v. Rees,* 217 S.W.3d 207, 209 (Ky.2006) (holding that a method of execution constitutes cruel and unusual punishment if "a substantial risk of wanton and unnecessary infliction of pain, torture, or lingering death" necessarily arises), *aff'd, Baze v. Rees,* 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (plurality); *Taylor v. Crawford,* 487 F.3d 1072, 1080 (8th Cir.2007) ("If Missouri's protocol as written involves no inherent substantial risk of the wanton infliction of pain, any risk that the procedure will not work as designated in the protocol is merely a risk of accident, which is insignificant in our constitutional analysis."); *LaGrand v. Stewart,* 173 F.3d 1144, 1149 (9th Cir.1999) (holding that the Arizona district court's findings of "extreme pain, the length of time this extreme pain lasts, and the substantial risk that inmates will suffer this extreme pain for several minutes require the conclusion that execution by lethal gas is cruel and unusual").

***19** The Supreme Court's most recent pronouncement on the topic is *Baze v. Rees,* 553 U.S. 35, 128 S.Ct. 1520, 1531, 170 L.Ed.2d 420 (2008) (plurality), in which the main decision describes the test as a "substantial risk of serious harm," a term the court defined as "an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.' " (quoting *Farmer v. Brennan,* 511 U.S. 825, 842, 846, and n. 9, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)). The decision further explained: "State efforts to implement capital punishment must certainly comply with the Eighth Amendment, but what that Amendment prohibits is wanton exposure to 'objectively intolerable risk,' ... not simply the possibility of pain." *Baze,* 128 S.Ct. at 1537 (citation omitted). *Ventura v. State,* 2 So.3d 194, 198–201

(Fla.2009) (footnotes omitted), recently held that Florida's lethal injection protocol complies with *Blaze:*

> Ventura's Lethal–Injection Claim
>
> i. Ventura has Merely Reiterated the Claims Presented by *Lightbourne* and *Schwab*
>
> We have repeatedly and consistently rejected Eighth Amendment challenges to Florida's current lethal-injection protocol. *See Tompkins v. State,* 994 So.2d 1072, 1080–82 (Fla.2008); *Power v. State,* 992 So.2d 218, 220–21 (Fla.2008); *Sexton v. State,* 997 So.2d 1073, 33 Fla. L. Weekly S686, S691 (Fla. Sept. 18, 2008); *Schwab v. State,* 995 So.2d 922, 924–33 (Fla.2008); *Woodel v. State,* 985 So.2d 524, 533–34 (Fla.2008), *cert. denied,* —— U.S. ——, 129 S.Ct. 607, 172 L.Ed.2d 465 (2008); *Lebron v. State,* 982 So.2d 649, 666 (Fla.2008); *Schwab v. State,* 982 So.2d 1158, 1159–60 (Fla.2008); *Lightbourne v. McCollum,* 969 So.2d 326, 350–53 (Fla.2007). In his post-conviction motion and brief to this Court, Ventura has simply re-alleged the criticisms of Florida's revised protocol that Lightbourne and his expert, Dr. Heath, presented in 2007. *See Lightbourne,* 969 So.2d at 347–49. Ventura has not presented any allegations beyond those of Lightbourne and Schwab (who predicated his claims upon those of Lightbourne).
>
> > This Court has thus previously rejected each of these challenges to Florida's lethal-injection protocol and-based upon the sound principle of stare decisis-we continue the same course here. *See, e.g., Lightbourne,* 969 So.2d at 349–53; *Schwab,* 969 So.2d at 321–25. As we stated in *Schwab,* "Given the record in *Lightbourne* and our extensive analysis in our opinion in *Lightbourne v. McCollum,* we reject the conclusion that lethal injection as applied in Florida is unconstitutional." *Schwab,* 969 So.2d at 325.
>
> ii. *Baze* Does Not Require Reconsideration of *Lightbourne* and Related Decisions
>
> The only "new" contention Ventura presents is that our recent lethal-injection decisions, including *Lightbourne,* have not applied the standard articulated by the *Baze* plurality. However, Ventura overlooks that we explicitly held in *Lightbourne:*
>
> > ***20** In light of the[ ] additional safeguards [present in the August 2007 lethal-injection protocol] and the amount of the sodium *pentothal* used, which is a lethal dose in itself, we conclude that [the petitioner] has not shown a substantial, foreseeable or unnecessary risk of pain in the DOC's procedures for carrying out the death penalty through lethal injection that would violate the Eighth Amendment ....
>
> 969 So.2d at 352–53. (footnote omitted) (emphasis supplied). Our analysis thus provided that Florida's current lethal-injection protocol is constitutional under either a substantial-risk, foreseeable-risk, or unnecessary-risk standard. This Court also recently observed in *Tompkins* that "we have rejected contentions that *Baze* set a different or higher standard for lethal injection claims than *Lightbourne."* 994 So.2d at 1081. We now take this occasion to explain why this is so.
>
> The disjunctive phrasing of our holding in *Lightbourne* has proven prescient because the United States Supreme Court has not yet adopted a majority standard for determining the constitutionality of a mode of execution. *See generally Baze v. Rees,* 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). Specifically, the *Baze* plurality adopted a version of the substantial-risk standard, while Justice Breyer, concurring in the judgment, and Justices Ginsburg and Souter, dissenting, adopted a version of the unnecessary-risk standard. *See id.* at 1525–38 (Roberts, C.J., joined by Kennedy and Alito, JJ.); *id.* at 1563–67 (Breyer, J., concurring in the judgment); *id.* at 1567–72 (Ginsburg, J., dissenting, joined by Souter, J.). In contrast, Justices Thomas and Scalia renounced any risk-based standard in favor of a rule of law that would uphold any method of execution which does not involve the purposeful infliction of "pain and suffering beyond that necessary to cause death." *Id.* at 1556–63 (Thomas, J., concurring in the judgment, joined by Scalia, J.). Justice Stevens did not provide a separate standard but, instead, expressed general disagreement with (1) the death penalty based upon his long experience with these cases and the purported erosion of the penalty's theoretical underpinnings (deterrence, incapacitation, and retribution), and (2) the allegedly unnecessary use of the paralytic drug

pancuronium bromide. *See id*. at 1542–52 (Stevens, J., concurring in the judgment).

Hence, the *Baze* Court did not provide a majority opinion or decision. In turn, this lack of consensus has complicated our duty to interpret article I, section 17 of the Florida Constitution "in conformity with the decisions of the United States Supreme Court" concerning the Eighth Amendment's bar against "cruel and unusual punishments." Under normal circumstances, we would resort to the "narrowest grounds" analysis presented in *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), which provides that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " (quoting *Gregg v. Georgia,* 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion)). However, there are no reliable means of determining the "narrowest grounds" presented in *Baze* because three blocks of Justices provided three separate standards for determining the constitutionality of a mode of execution. We addressed this issue in *Henyard v. State,* 992 So.2d 120 (Fla.2008):

> ***21** We have previously concluded in *Lightbourne* and *Schwab* that the Florida protocols do not violate any of the possible standards, and that holding cannot conflict with the narrow holding in *Baze.* Furthermore, we have specifically rejected the argument that Florida's current lethal injection protocol carries "a substantial, foreseeable, or unnecessary risk of pain." *Lightbourne,* 969 So.2d at 353. Accordingly, we reject [appellant's] argument [that we should reconsider *Lightbourne* and *Schwab* in light of *Baze*].

Id. at 130 (emphasis supplied). Consequently, Florida's current lethal-injection protocol passes muster under any of the risk-based standards considered by the *Baze* Court (and would also easily satisfy the intent-based standard advocated by Justices Thomas and Scalia).

We also recently upheld and adopted a trial court's analysis concluding that Florida's lethal-injection protocol is "substantially similar" to that of Kentucky. *See Schwab,* 995 So.2d at 924–33. This holding brings Florida's lethal-injection protocol squarely within the safe harbor created by the *Baze* plurality. *Baze,* 128 S.Ct. at 1537 (Roberts, C.J., joined by Kennedy and Alito, JJ.) ("A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard." (emphasis supplied)); *see also Baze,* 128 S.Ct. at 1569–71 (Ginsburg, J., dissenting, joined by Souter, J.) (favorably contrasting Florida's consciousness assessment with that of Kentucky and strongly indicating that even the *Baze* dissenters would have approved Florida's current lethal-injection protocol under an Eighth Amendment analysis).

In its current form, Florida's lethal-injection protocol ensures unconsciousness through a pause between the injection of a lethal dose of sodium pentothal (a potent coma-inducing barbiturate) and the injection of the second and third drugs, during which time the warden engages in a thorough consciousness assessment (brushing the condemned's eye lashes, calling the condemned's name, and shaking the condemned). Further, we have held that the condemned inmate's lack of consciousness is the focus of the constitutional inquiry. *See generally Lightbourne,* 969 So.2d 326 (repeatedly stressing the significance of the undisputed fact that a sufficient dose of sodium pentothal renders the condemned unconscious and that this lack of consciousness precludes the perception of any pain associated with the later injection of pancuronium bromide and potassium chloride).

Brown fails to establish, as required by AEDPA, that the state courts' determination was contrary to, or an unreasonable application of, federal law as determined by the Supreme Court. The Florida supreme court analyzed Brown's claims and applied the correct legal standard prescribed by *Baze.*

Ground two lacks merit and warrants no habeas corpus relief.

Ground Three

***22** Mr. Brown was denied the effective assistance of counsel during the guilt/innocence phase of his trial.

> Counsel failed to adequately object, investigate, and prepare a challenge to the State's case in violation of the Sixth, Eighth, and Fourteenth Amendment to the U.S. Constitution.

Brown fully exhausted this claim. The post-conviction court held an evidentiary hearing, denied the claim, and the Florida supreme court affirmed the denial of relief. *Brown v. State,* 755 So.2d 616 (Fla.2000).

Brown alleges that on the second day of the evidentiary hearing Brown presented the neuropsychological testimony of Dr. Henry Dee, who both presented the evidence of organic brain damage and explained the consequences to Brown's ability to form specific intent. Dr. Dee testified to Brown's borderline retardation with learning deficiencies and inability to cope with stress. Also, Brown alleges that attorney Alldredge, Brown's penalty phase trial counsel, testified that he would have used Dr. Dee's opinion, if available.

Brown contends that "using a wealth of independent corroborative evidence identified at post-conviction, Dr. Faye Sultan testified that she found the presence of statutory and non-statutory mitigating factors." (Petition, p. 30) Again, Alldredge testified that he would have used Dr. Sultan's opinion, if available.

Brown alleges that, if counsel had questioned others at the trailer (where Brown lived) on the night of the crime, counsel would have discovered that Jimmy Brown observed his brother Paul displaying bizarre behavior immediately before the crime. Brown contends that evidence of Brown's severe brain damage, intoxication, and mental illness would have precluded the jury from finding beyond a reasonable doubt the necessary heightened premeditation. Brown claims that defense counsel Chalu was ineffective in failing to investigate fully and discover this evidence or to recognize the evidence's utility during the guilt phase to disprove Brown's ability to form specific intent and to premeditate the murder.

Further, Brown claims that his jury heard neither that Brown's demeanor was influenced by a potent anti-depressant and mood-altering medication (Mellaril) nor that an understanding of Brown's mental state was critical for the jury's assessing whether Brown could form the requisite intent or sustain sufficient premeditation to support the aggravating factors necessary to a death sentence.

Brown further claims that counsel was ineffective for failing to identify the medical reason warranting administration of involuntary medication to Brown, for failing to request discontinuation of the medication, and for failing to notify the jury of Brown's medicated state.

Although ground three alleges counsel's ineffectiveness during the guilt phase of the trial, Brown includes a claim of ineffective assistance of counsel during the penalty phase. Brown alleges that during the penalty phase closing argument Assistant State Attorney Michael Benito was allowed to present without objection a "day in the life argument," which was subsequently condemned by the court as improper. Brown contends that attorney Alldredge, Brown's counsel during the penalty phase, testified that he anticipated a "day in the life" argument but interposed no objection and that Alldredge offered no strategic reason for withholding objection to an allegedly improper argument. Brown concludes that Alldredge was ineffective.

***23** Brown claims prejudicially ineffective assistance of counsel because (1) during the guilt phase the defense presented no evidence of Brown's severe brain damage, intoxication, and mental illness and (2) during the penalty phase counsel failed to object to the "day in the life argument" and the jury voted only seven to five for the death sentence.

Ground Three Lacks Merit

In ground three, Brown relies both on the testimony of Dr. Dee, Dr. Faye Sultan, and attorney Alldredge at the post-conviction evidentiary hearing and on his criticism of prosecutor Benito's closing argument in the penalty phase. In essence, Brown continues his state court argument that the defense witnesses testified credibly at the evidentiary hearing and deserve preemptive acceptance to the exclusion of all contrary evidence.

Brown v. State, 755 So.2d at 625–31, affirms the trial court's rejection of Brown's claim of ineffective assistance of counsel and explains:

> C. Post-conviction Evidentiary Hearing

The record of the post-conviction evidentiary hearing reflects the following. Chalu was responsible for presentation of the entire case and represented Brown during the guilt phase of the trial. As stated previously in discussing claim II, Chalu worked closely throughout the trial with co-counsel Alldredge, who represented Brown during the penalty phase only.

> Chalu testified at the post-conviction hearing that, upon his appointment to represent Brown, he immediately engaged the services of psychologist Dr. Robert Berland because of "certain red flags" noticed by Chalu, such as Brown's appearing to be of "sub-average intelligence" and possibly exhibiting signs of "sub-clinical mental illness." Chalu testified that both he and Alldredge talked with Berland and other mental-health experts in order to decide upon their defense strategy and to facilitate data collection as to Brown's history. Chalu determined that nothing the experts found before the trial relevant to Brown's mental state would be useful in support of Brown's case during the guilt phase of the trial. Thus, mental health expert testimony was used only in the penalty phase. Chalu testified that he and the mental health experts knew that Brown was receiving anti-psychotic medication at the Hillsborough County Jail but that he did not present this information to the judge or jury because he had decided not to employ a mental health defense in the guilt phase.
>
> Chalu testified that his theory of defense was dictated by three factors: Brown's account to Chalu of how the murder had occurred; mental health experts' accounts of what they understood to be Brown's mental state at the time of the offense; and the fact that the trial court had denied the defense motion to suppress Brown's confession. Chalu explained that, once he knew the confession would be admitted into evidence, he determined that the only viable defense as to felony murder was to argue for a lesser offense of armed trespass, rather than armed burglary, which would support a verdict of third-degree murder. As to premeditated murder, Chalu's strategy was to argue, as Brown stated in his confession, that he shot the victim only on an impulse and had no pre-formed intent to kill her when he entered the room where she was sleeping and woke her.

***24** Chalu stated that he interviewed several of Brown's relatives, including Brown's father, before the trial and determined that they could offer no testimony in support of Brown's guilt-phase defense. Chalu testified that, if he had discovered any information from family members or others relevant to premeditation, he would have presented such testimony at the guilt phase. As to his strategy of declining to present defense evidence, Chalu explained:

> [W]e had an uphill battle because once the motion to suppress confession was denied, we had to figure out some way to try to prevent the case from going into penalty phase, to try to get a lesser.
>
> So all my efforts were directed to and all the tactics that I employed in my first phase were directed to maximizing the possibility of getting a lesser, and one of those was to try to keep the opening and closing argument and not put on any evidence in the first phase.

Upon cross-examination, Chalu stated that his strategy of declining to present evidence and seeking a conviction of a lesser offense had been successful in at least one other first-degree murder trial in which he had faced prosecutor Benito.

Chalu testified that in communicating this trial strategy to Brown:

> I always took great pains to try to make sure that Mr. Brown understood what we were saying because he was a little slow.... We were trying to get him to understand everything we were saying and the rationale for what we were doing as much as we were able to.

Chalu testified that the prosecutor had not offered any plea bargain for a life sentence but that he had offered to allow Brown to plead guilty to first-degree murder and proceed directly to the penalty phase. Chalu testified that he informed Brown of this option, and Brown chose to reject it. As to Brown's consent to the defense strategy of conceding guilt to a lesser degree of murder, Chalu testified, "Mr. Brown was pretty much agreeable to pretty much everything we did, to be honest with you."

Chalu testified that he had no problem receiving information requested from the investigator assigned to the case. As to school and jail records, Chalu stated that it was ultimately his responsibility to retrieve any relevant records and that he believed at the time of the trial that all relevant records had been gathered. As to the State witnesses made known to defense counsel for the first time on the first day of trial, Chalu testified that he asked the judge for time to depose them, took brief depositions, and determined that their testimony was not "of any great consequence to the case."

Chalu testified that he saw no reason to move for a mistrial after learning that at least one juror had been exposed to pretrial publicity, because he was satisfied after the judge's inquiry that the jurors had not read the article in question or had only read the headline. Therefore, he stated, it was "inconsequential and not worth pursuing any further because there was no prejudice to the jury or to Mr. Brown because of the incident."

***25** On cross-examination by the State, Chalu testified that he had been able to keep the jury from hearing any evidence as to the State's theory of Brown's motive for this offense, which was that Brown wanted to keep the seventeen-year-old victim, who was the daughter of his girlfriend, from reporting to authorities the fact that she and Brown had had a sexual relationship. Chalu also was able to exclude evidence of a robbery and shooting allegedly committed by Brown later on the day of the instant murder.

During the post-conviction evidentiary hearing, Brown also presented the testimony of Dr. Steven Szabo, a psychiatrist who evaluated Brown in the Hillsborough County Jail where Brown was awaiting trial in March 1986. Dr. Szabo testified that he diagnosed Brown as schizophrenic and prescribed Mellaril, an antipsychotic medication, but that this medication was never forced upon Brown. Szabo testified that he would have presented this testimony at Brown's trial in 1987 but that he was not contacted by counsel for Brown.

After considering this evidence and argument based on this evidence, the circuit court denied Brown the relief he requested in his guilt-phase ineffective assistance claims, concluding that Brown failed to meet both the ineffectiveness and prejudice prongs of the *Strickland* test. The circuit court order stated in relevant part:

> The testimony of Mr. Chalu, guilt phase counsel for the defense, refutes any deficiency in investigation, objections, or preparation and the Defendant has failed to show any deficiency. Guilt phase counsel had a clear theory of defense, i.e., lack of intent, and the record shows that he meticulously prevented the introduction of highly prejudicial evidence against his client. Assuming once again that the Defendant could show some deficient performance, he does not show how such resulted in prejudice. Even with the benefit of hindsight, it does not appear that guilt phase counsel would have done things differently.

Order II at 4.

....

E. Discussion of Guilt Phase Ineffective–Assistance Claims

1. Exculpatory Evidence

We begin our inquiry into whether the performance of Chalu was deficient by recognizing: (1) there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland,* 466 U.S. at 689; and (2) Brown bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. *Id.* at 688–89. Brown argues that Chalu failed to adequately investigate the possibility of an intoxication defense and failed to question others, including Brown's brother, Jimmy Brown, who could have testified as lay witnesses as to Brown's condition immediately preceding the crime. After the court denied the defense motion to suppress Brown's confession, Chalu determined that the only viable defense was to concede that Brown had committed the murder and argue for a conviction of a charge less than first-degree murder. In considering his strategy, Chalu concluded that the available potential witnesses, such as Jimmy Brown, could not present evidence of Brown's state of mind prior to the murder such that an insanity or diminished capacity defense would be viable. The record reflects that Chalu also

made strategic decisions not to present to the jury certain witnesses who might have revealed to the jury prejudicial information about Brown's criminal history. Chalu made an informed evaluation of his options and then presented a defense of lack of intent to commit premeditated murder. Chalu also argued that the State failed to prove intent to commit armed burglary. If successful, these defenses would have left only armed trespass as the underlying felony to support a felony murder conviction, which would not have been first-degree felony murder. In view of the trial record and the testimony of Chalu, we agree with the circuit court that Brown failed to demonstrate that the performance of Chalu fell below the *Strickland* standard. *See Strickland,* 466 U.S. at 691; *Sims,* 155 F.3d at 1306.

2. State Witnesses

***26** Brown contends that Chalu failed to make an effective attack on the credibility of State witnesses Gail and Barry Barlow, who were in the house with the victim at the time of the murder, and to investigate mitigating evidence the Barlows might have provided as to Brown's mental instability, alcohol abuse, and delusional thinking. At trial, Chalu objected to their testimony because he had not been notified that the State would call them as witnesses, and the prosecutor argued that they should be allowed to testify because he had only recently discovered their location. The trial court allowed Chalu to depose these witnesses after the end of the first day of trial, and they subsequently testified without cross-examination by Chalu. In the post-conviction hearing, Chalu stated that during deposition he found the Barlows to be hostile to Brown and stated, "I don't think they would have assisted me at all in any manner." On this record, we conclude that the strategic decision of Chalu not to cross-examine the Barlows or present their testimony during the penalty phase was well within the range of professional assistance. *See Strickland,* 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.").

3. Prescription Drugs

Brown argues that Chalu was ineffective in failing to inform the jury that Brown's inability to react during trial was caused by antidepressant and antipsychotic medication administered at the Hillsborough County Jail. Brown argues that counsel should have either notified the jury of Brown's medicated state, requested that the medication be stopped, or requested a medical reason for Brown's involuntary medication. Brown contends that information about this medication was critical for the jury to consider in assessing whether Brown could have formed sufficient specific intent to support his guilt or premeditation and in deciding how to weigh potential mental health mitigators when recommending Brown's sentence. The record reflects that Chalu testified in the post-conviction hearing that he and the defense mental health experts knew that Brown was being administered the drugs but that Chalu chose not to present this information to the judge or jury during the guilt phase because he was not presenting a mental health defense and Brown did not testify. This claim does not meet either prong of *Strickland.*

....

6. Diminished Capacity Defense

Brown contends that Chalu was ineffective in that he failed to present evidence of Brown's mental psychosis as well as sleep deprivation, exhaustion, or intoxication at the time of the murder. According to the trial record, Brown told police detectives that he was not intoxicated on drugs or alcohol at the time of the murder and that he had a clear memory of the murder and events surrounding it. At the evidentiary hearing, Chalu testified that he conferred at length with Brown as to his mental state at the time of the murder and with mental health experts who had examined Brown. From these conversations and reports, Chalu concluded that there was no evidentiary support for an insanity defense or a lack of specific intent based on intoxication. Thus, based on evidence in this record, we find that the performance of Chalu as to this claim did not fall below the *Strickland* standard.

7. Prejudice

***27** We agree with the circuit court that, even assuming that Chalu was ineffective, Brown did not demonstrate prejudice. Any defense that Chalu chose to present would have been overshadowed by the overwhelmingly inculpatory evidence at trial of Brown's confession to police. Not only did Chalu present a potentially viable defense within the parameters dictated by the confession, he also prevented the jury

from learning of evidence of a subsequent robbery and shooting allegedly committed by Brown and the State's theory of Brown's motive for this offense, which was Brown's desire to silence the seventeen-year-old victim, with whom he had had a sexual relationship. [n.12] Although Chalu did not succeed in preventing a first-degree murder conviction, he did succeed in preventing even more prejudicial evidence from reaching the jury. On this record, we conclude that Brown has failed to establish a reasonable probability that, absent the claimed errors, the jury would have found him not guilty of first-degree murder. Competent, substantial evidence supports the circuit court's factual findings. Thus, we do not disturb those findings. Based on our review of the record, we agree with the circuit court that Brown failed to demonstrate the required prejudice.

[n.12] The record indicates that Brown's age was 36 at the time of the murder.

The Florida supreme court also disposed of Brown's claim that counsel failed to object to the prosecutor's closing argument during the penalty phase. *Brown v. State,* 755 So.2d at 623–25:

Claim II. Ineffective Assistance by Penalty-phase Counsel in Failing To Object to Closing Argument

In this subclaim of claim II, Brown contends that his penalty-phase counsel, Craig Alldredge, was prejudicially ineffective in that he failed to object to a portion of the penalty-phase closing argument by Assistant State Attorney Michael Benito that described positive aspects of life in prison in support of the prosecutor's argument against a life sentence. In her order, the circuit judge held in respect to this claim:

Evidence relating to [this claim] was presented by testimony of Wayne Chalu, ... lead trial counsel for the defense, and Craig Alldredge, ... penalty phase trial counsel for the defense. The claim is essentially that trial counsel was ineffective for failing to object to the prosecutor's improper closing argument in the second phase ...:

What about life imprisonment, ladies and gentlemen? What about life

imprisonment? Now I am not saying that I would like to spend one day in jail, all right, don't get me wrong, but what about life imprisonment? What can one do in prison? You can laugh; you can cry; you can eat; you can sleep; you can participate in sports; you can make friends; you can watch TV; you can read; in short, you live to learn—you live to learn about the wonders that the future holds. In short, it is life.

It is undisputed that counsel for the defense did not object. Mr. Chalu was familiar with the prosecutor's use of this argument and was also aware that such argument had not been found to be improper at that time. Mr. Alldredge testified that he was not aware that such argument was improper, that he would have objected had he known, and that he did not object. Assuming without deciding that penalty phase counsel was deficient in his performance for failing to object to this portion of the prosecutor's argument, this Court cannot and does not find that the alleged deficient performance resulted in prejudice which meets the prejudice prong of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), that is, a reasonable possibility that the outcome would have been different.

***28** Order II at 2–3. (citations omitted).

Based upon our review of the trial record, we agree with the circuit court that Brown's claim in respect to this portion of the State's argument fails to meet the prejudice prong of *Strickland,* as recently reiterated by this Court in *Jones v. State,* 732 So.2d 313 (Fla.1999). [n.8] The circuit court's ruling is consistent with this Court's holding in *Jackson v. State,* 522 So.2d 802, 809 (Fla.1988), that a similar unobjected-to argument would not be grounds for reversal for a new penalty phase. *See also Hodges v. State,* 595 So.2d 929, 933 (Fla.1992); *Hudson v. State,* 538 So.2d 829, 832 n. 6 (Fla.1989). Although we did find a similar claim as to the denial of an objection to be harmful error in *Taylor v. State,* 583 So.2d 323 (Fla.1991), we did so on the basis of harmless error record review.[n.9] In sum, under the circumstances of this case, we do not find that the failure to object to this argument was conduct by counsel that deprived the defendant of a trial whose result was reliable.

[n.8] In *Jones,* werecognized that to prove ineffective assistance of counsel, a defendant must show: (1) that counsel made errors so serious that counsel was not operating as the "counsel" guaranteed the defendant by the Sixth Amendment; and (2) that such deficient performance prejudiced the defense by depriving the

defendant of a trial whose result was reliable. 732 So.2d at 319 (quoting *Rutherford v. State,* 727 So.2d 216, 219 (Fla.1998) (quoting *Strickland,* 466 U.S. at 687)). Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that rendered the result unreliable. *Id.*

[n.9] Brown's trial took place in 1987. A year later, in *Jackson,* this Court found that a nearly identical argument by Benito was not misconduct so egregious that it tainted the jury's recommendation. 522 So.2d at 809. In *Hudson,* this Court found no reversible error in a similar argument by Benito. 538 So.2d at 832 n. 6. Four years after Brown's trial, this Court remanded for resentencing in *Taylor* after finding the trial court's allowing the same argument by Benito to be harmful error. 583 So.2d at 330. However, subsequently, this Court found in *Hodges* that allowing the same argument was harmless error. 595 So.2d at 934.

Although we agree that Brown's claim fails to meet the prejudice prong of *Strickland,* we also have reviewed the evidentiary record to evaluate whether counsel's failure to object violates the first prong of *Strickland.* In this case, both defense counsel Wayne Chalu, who had primary responsibility for the entire case, and defense counsel Craig Alldredge, who handled the penalty phase, testified at the post-conviction evidentiary hearing. Chalu, who is now an assistant state attorney in the Thirteenth Judicial Circuit, was at the time of this trial an experienced felony litigator who had been an assistant public defender in the Thirteenth Circuit for about eight years, had received special training in handling capital cases, and had handled several prior capital cases. Chalu had overall responsibility for preparing and presenting Brown's entire case. Throughout the proceedings, Chalu worked closely with Alldredge, who was assigned to handle the penalty phase. At the time of the trial, Alldredge had been an assistant public defender in the Thirteenth Circuit for about six years and had handled the guilt phases of two other capital cases. This was the first case in which Alldredge had lead responsibility for the penalty phase. Alldredge subsequently became an assistant federal public defender.

***29** In the evidentiary hearing below, Chalu described his working relationship with Alldredge during this case as follows:

> [W]e talked to each other constantly. We're in the same office. We're just a few feet away from each other, and we talked about the case probably daily.... [B]asically, I was working on the guilt phase and [Alldredge] was working on the penalty phase. Of course ... we both pretty much knew what the other was doing in terms of preparation because we talked about it all the time.

Chalu testified that at time of the trial he understood that no case law had found reversible error in a court's allowing the challenged penalty-phase closing argument. Chalu further testified:

> I personally don't think it was so bad. I think we capitalized on it, too. Mr. Alldredge sort of capitalized on that. In their closing, it seemed closest to me innuendo if you're alive, you can do these things; if you are not, you can't. I didn't think it was that prejudicial.

Alldredge testified at the evidentiary hearing that he saw no reason to object during the prosecutor's presentation of the now-challenged portion of the closing argument because he did not consider the argument to be improper. The trial record reflects that Alldredge, in arguing for a life sentence, presented in penalty-phase closing argument a grim description of life in prison in order to counter the prosecutor's positive characterization of life in prison. Alldredge answered the prosecutor's argument by describing prison life in these contrasting terms:

> Mr. Benito tells you life in prison ain't that bad. The number one cause of death in [the] Florida State Prison system is suicide, so if it ain't that bad, there are a lot of men who are obviously making terrible mistakes.
>
> It's a world of reinforced concrete, and steel, and steel doors, and coils of razor wire, and electric fences, and machine guns, and shotguns. Mr. Benito says he'll make friends and be able to enjoy sports. He will spend the rest of his life with men who society has found their presence so abhorred that they have to be locked away.
>
> Paul Brown will most likely get out of prison when he dies....

> He is going to die. We all have to die. His life has been garbage. If he spends the rest of his life in prison, the rest of his life is going to be garbage, too, but it will be life.
>
> ....
>
> ... If Judge Spicola sentences him to life in prison, he will spend life in prison. He's not going to harm another innocent person, again.

We find that defense counsel's failure to object does not fall below the standard of constitutionally effective counsel as provided in *Strickland.* Moreover, we find no basis in the evidence to reject trial counsel's opinion that Alldredge capitalized upon the complained-of closing argument in presenting his own argument for a sentence of life in prison.[n.10] Accordingly, we find no merit in Brown's claim that trial counsel was ineffective in failing to object to the prosecutor's penalty-phase closing argument.

[n.10] *See Sims v. Singletary,* 155 F.3d 1297, 1306–07 (11th Cir.1998); *Davis v. Singletary,* 119 F.3d 1471, 1477 (11th Cir.1977); *Spaziano v. Singletary,* 36 F.3d 1028, 1039 (11th Cir.1994), in which the federal courts held that counsel's decisions as to trial strategy and tactics were within the bounds of reasonably competent representation.

***30** The Florida supreme court also considered the testimony of Dr. Dee and Dr. Faye Sultan in its analysis of the claim of ineffective assistance of counsel at the penalty phase. *See Brown,* 755 So.2d at 631–37. Although Brown may be dissatisfied with the result announced by the state courts, he fails to establish, as required by AEDPA, that the state courts' determination was contrary to, or an unreasonable application of, federal law as determined by the Supreme Court. The Florida supreme court analyzed Brown's claims and applied the correct legal standard prescribed in *Strickland.*

Ground three warrants no habeas corpus relief.

Ground Four

> Ineffective assistance of counsel at penalty phase and the prosecutor's improper conduct and argument rendered defendant's conviction and resulting death sentence fundamentally unfair and unreliable in violation of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

Brown's Alleged Facts in Support of Ground Four

Brown claims that Prosecutor Benito urged jurors to sentence Brown to death on the basis of numerous impermissible and improper factors. Brown contends trial counsel was ineffective for failing to object to the prosecutor's allegedly improper closing argument.

> What about life imprisonment, ladies and gentlemen? What about life imprisonment? Now I am not saying that I would like to spend one day in jail, all right, don't get me wrong, but what about life imprisonment? What can one do in prison? You can laugh; you can cry; you can eat; you can sleep; you can participate in sports; you can make friends; you can watch TV; you can read; in short, you live to learn—you live to learn about the wonders that the future holds. In short, it is life.
>
> People want to live. Life imprisonment is life. If Pauline Cowell, if she had it, she would have given Paul Brown the world if he would have just let her live. People want to live.
>
> Life imprisonment is life, but Pauline Cowell is dead, and she is dead for one reason. She is dead because Paul Alfred Brown decided for himself, that she should die. That man, right there, made that decision, for making that decision—for making that decision he also deserves to die.
>
> The punishment must fit the crime.
>
> If it wasn't for Paul Alfred Brown, ladies and gentlemen, Pauline Cowell, 17 years old, would have almost her entire life ahead of her. She was 17, but Pauline Cowell is no more. On this earth for 17 years and now she is gone. (R. 636–37)

Brown claims that the prosecutor's telling the jury that Brown should be shown the "same mercy" that Brown had shown the victim was improper. Brown also alleges that, even though the evidence demonstrated that Pauline Cowell's murder was triggered by her screaming and was not "in an execution manner," the prosecutor improperly argued:

> Pauline Cowell was not simply killed, all right. She wasn't simply killed, Pauline Cowell was executed. She was executed. (R 634–35)

*31 Brown contends that the prosecutor argued that the system of justice would not "function properly" unless Brown received a death sentence. (R. 635)

In the amended petition (Doc. 59 at pp. 34–35), Brown also contends:

> Trial counsel Alldredge was responsible of [sic] handling the penalty phase of Mr. Brown's case and making the appropriate objections. At Brown's evidentiary hearing he admitted knowing that Benito would make this argument, testified that he did not object and offered no strategic reason for his failure to do so. (PC–R, Vol.V, 151) Mr. Benito's argument was meant to evoke an emotional response from the jury. Trial counsel's failure to object is not reasonable. There should be no question that the argument was improper as the Florida Supreme Court later ruled this exact argument objectionable. It is significant to note that the substance of Benito's argument had already been found improper and objectionable prior to Brown's jury trial. Counsel's failure to object prevented Mr. Brown from preserving a viable issue at direct appeal and was ineffective assistance of counsel. In the context of a 7 to 5 vote for death, Brown suffered prejudice as the jury decided his fate on factors that were clearly outside the scope of deliberations. Contrary to the State court's holding, Brown met the prejudice prong enunciated by the U.S. Supreme Court in *Strickland v. Washington,* establishing a probability sufficient to undermine confidence in the outcome. Federal Habeas relief is warranted.

The State contends that ground four is exhausted. However, ground four is only partially exhausted because the present federal petition for the writ of habeas corpus raises new claims not raised in state court. Specifically, in his amended Rule 3.850 motion for post-conviction relief (Exhibit Q–2, R 158–59), Brown argued only that:

> 4. During Mr. Benito's impassioned closing argument, he urged the jurors to sentence Mr. Brown to death on the basis of numerous impermissible and improper factors including the [now] infamous argument:
>
> What about life imprisonment, ladies and gentlemen? What about life imprisonment? Now I am not saying that I would like to spend one day in jail, all right, don't get me wrong, but t[sic] what about life imprisonment? What can one do in prison? You can laugh; you can cry; you can eat; you can sleep; you can participate in sports; you can make friends; you can watch TV; you can read; in short, you live to learn—you live to learn about the wonders that the future holds. In short, it is life.
>
> People want to live. Life imprisonment is life. If Pauline Cowell, if she had it, she would have given Paul Brown the world if he would have just let her live. People want to live.

Nowhere in his amended Rule 3.850 motion did Brown include the claim that Prosecutor Benito argued either 1) "the punishment must fit the crime" or 2) "Pauline Cowell was not simply killed, all right. She wasn't simply killed. Pauline Cowell was executed. She was executed" or 3) the system of justice would not "function properly" unless Brown received a death sentence. These new claims were not raised at the state evidentiary hearing and were not discussed in the Florida supreme court's order affirming the trial court's denial of Rule 3.850 relief. Therefore, these specific claims of improper prosecutorial argument are unexhausted and procedurally barred. Brown fails to show cause and prejudice to overcome the procedural bar and fails to show that manifest injustice results if these new claims remain unaddressed.

*32 The Florida supreme court affirmed the post-conviction court's denial of Brown's remaining claim that attorney Alldredge was ineffective for failing to object to the "day in the life of a prisoner" argument. Brown

fails to establish, as required by AEDPA, that the state courts' determination was contrary to, or an unreasonable application of, federal law as determined by the Supreme Court. The Florida supreme court analyzed and applied the correct legal standard prescribed in *Strickland v. Washington,* 486 U.S. 668 (1984).

Ground four warrants no habeas corpus relief.

Ground Five

> Mr. Brown was deprived his right to a reliable adversarial testing and effective assistance of counsel and mental health experts at the penalty phase of his capital trial, when the necessary background information was not obtained and the State failed to turn over material information which would have led counsel to discover substantial mitigating evidence, all in violation of [Brown's] rights to due process and equal protection under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

Brown's Alleged Factual Basis for Ground Five

Due to a lack of independent corroboration, the defense was unable to establish at trial Brown's lifelong history of mental disability. At the evidentiary hearing, Dr. Sultan testified that Brown is not a malingerer, and Dr. Dee testified that Brown suffers organic brain damage among other mental disturbances.

Penalty phase counsel Alldredge testified that he was dissatisfied with the caliber of the work of investigator Webb and testified that Alldredge would not use investigator Webb in the future. Alldredge testified that Webb was unable to locate school records, a complete Department of Corrections file, records of prior offenses, records of Dr. Fleischaker, or report cards in the possession of Brown's family. Alldredge testified that these records were important to corroborate the mental health experts' testimony.

Alldredge testified that obtaining these records became Alldredge's responsibility when Webb failed to obtain them and that, had Alldredge obtained the records, he would have presented them to Brown's jury. Alldredge stated that neither tactics nor strategy explained the failure to obtain these records.

Brown claims that during the penalty phase both mental health experts lacked background information to provide a complete mental health evaluation. Dr. Berland believed that severe psychosis was present but lacked the background information necessary to resolve the confusion surrounding the MMPI result or to find statutory mitigation. Dr. Afield believed Brown was schizophrenic but lacked the background information needed to corroborate his opinion.

The records that Alldredge failed to obtain and failed to provide to mental health experts included the requisite proof that Brown was neither malingering nor exaggerating symptoms arising from chronic psychological problems present since early childhood. The school records introduced in the post-conviction proceedings described Paul Brown in the fourth grade as "an extremely nervous child. He bangs his head on the desk, makes noises imitating a moving train, crawls on the floor, lies on benches and tables in the rear of the classroom, wanders around aimlessly picking up books, plants, chalk, etc., occasionally speaks to inanimate objects and sits facing [an] open window for long periods of time pulling and playing with a venetian blind cord and speaking to himself."

***33** In 1965, Dr. Jerry J. Fleischaker, Director of the Guidance Center of Hillsborough County, described fifteen-year-old Paul Brown as a "psychotic boy." The prognosis for Brown was very poor, and Dr. Fleischaker noted that Brown might eventually require hospitalization and that medication "should be attempted."

Brown contends that, although Dr. Berland opined at the penalty phase of the trial that the statutory mental health mitigators probably applied, Berland testified that he lacked "enough information to really give you—give that. I think there is a probability that he was, but I can't verify it to my satisfaction." (R 566) The additional background information would have bolstered the credibility of Drs. Berland and Afield before the trial court.

Due to the lack of information, Dr. Berland struggled to characterize Brown's "mental or emotional disturbance [as] extreme" and struggled to find substantial impairments, and Dr. Afield lacked this information to corroborate his opinion. Consequently, Brown claims, statutory mitigators available to Brown under Section

921.141(6)(b)(f) were not given great weight by the sentencing judge. (R 914)

Ground Five Lacks Merit

To the extent Brown contends that trial counsel rendered ineffective assistance of counsel at the penalty phase, the claim was properly rejected by the post-conviction court after an evidentiary hearing, as explained in *Brown v. State,* 755 So.2d at 631–37, affirming the denial of relief:

> Claim IV. Penalty-phase Ineffective Assistance of Counsel
>
> A. Introduction
>
> Brown contends in his fourth claim in this appeal that he was denied effective assistance of counsel during the penalty phase of his trial. Brown bases this claim upon the following allegations: (1) counsel failed to perform an adequate investigation in order to obtain necessary background information for mitigation; (2) counsel conceded aggravating circumstances without notice to Brown; (3) counsel failed to object to an improper closing argument; and (4) counsel failed to inform the jury that Brown's courtroom demeanor was affected by antidepressant and antipsychotic prescription drugs administered at the Hillsborough County Jail or, alternatively, to request that the medication be terminated. In our review of this claim, we have considered the trial record, the record of the post-conviction evidentiary hearing, and the circuit court's post-conviction order.
>
> B. Trial Record
>
> The trial record reflects the following. At the request of defense counsel, the trial court appointed Dr. Robert Berland and Dr. Walter Afield to evaluate Brown's mental state for purposes of the guilt phase and then to help in developing evidence of statutory and nonstatutory mitigation for the penalty phase. Dr. Berland is a clinical psychologist specializing in forensic psychology who had been licensed to practice psychology for ten years at the time of the trial. He had worked for eight years with criminally committed mentally ill patients at Florida State Hospital at Chattahoochee, and at the time of the trial in 1987, he was engaged in private practice performing court-ordered evaluations of criminal defendants. At the time of the trial, Dr. Afield had been a physician specializing in psychiatry for twenty-six years. Dr. Afield was board certified in adult psychiatry, child psychiatry, and mental health administration and had previously served on the medical school faculties at Harvard University, Johns Hopkins University, and the University of South Florida. At the time of the trial, he had been engaged in the private practice of psychiatry for twelve years.
>
> ***34** Dr. Berland testified during the penalty phase that, in preparing to make an evaluation as to Brown's mental and emotional status, he reviewed Brown's jail medical records, police reports, and depositions related to this case. He also reviewed a 1980 psychological profile and administered several standardized psychological tests, including an intelligence test, to Brown. Dr. Berland interviewed Brown on at least five separate occasions. Based on these interviews, his test results, and his review of the relevant documents, Dr. Berland testified during the penalty phase that he found Brown to be operating mentally below normal with an IQ of 81. Dr. Berland concluded that Brown had organic brain damage and opined that Brown was psychotic and probably was suffering from bipolar disorder. Dr. Berland stated that he believed Brown was under the influence of a mental or emotional disturbance but that he could not say whether the disturbance was extreme at the time of the crime. Dr. Berland opined that Brown's capacity to appreciate the criminality of his conduct was not impaired but that his capacity to conform his conduct to the requirements of the law was impaired, although not substantially impaired, at the time of the crime. He testified that the impairment resulted from interaction between Brown's low intelligence and his psychotic disturbance, which had the effect of increasing his impulsiveness and diminishing his ability to make sound judgments. Dr. Berland also stated that his test results indicated that Brown did not have tendencies toward being a "cold-blooded" killer.
>
> Defense counsel also presented during the penalty phase the testimony of Dr. Afield, who testified that he reviewed jail records and Dr. Berland's test results and interviewed Brown once. During this interview, Brown told Afield he was abused as a child, married

at age sixteen, had been knocked unconscious in several accidents, and lived a marginal existence as a junk man and "street person." Based on this history and his review of the records, Afield opined that Brown was mentally retarded, suffered from organic brain damage, and was psychotic. He further testified that he believed that, although Brown had an antisocial personality disorder, he knew right from wrong. In contrast to Dr. Berland, Afield opined that Brown's ability to conform his conduct to the requirements of the law was substantially impaired at the time of the murder.

Defense counsel also presented during the penalty phase as lay witnesses Brown's father, his stepmother, and his brother, who testified as to Brown's childhood. Brown's father testified that he did not live with Brown and his mother when Brown was a child. He stated that juvenile authorities removed Brown from his mother's custody when he was five or six years old because the family was living in "pure filth." Brown and his brother went to live on a farm in the custody of their great aunt, who beat Brown with wet rags and corn shucks. Three years later, Brown began living with his father and stepmother in Tampa, where he attended school. Brown's father testified at trial that his son was not a good student but that he did not get into trouble in school. As an adult, Brown fathered and supported children, helped his neighbors, and held jobs, including his most recent occupation of collecting cans for recycling. Brown's stepmother, Wanda Brown, testified that Paul was "always sweet" and that he was a slow learner. Brown's brother, Jimmy Lee Brown, testified that Brown was beaten as a child and was a slow learner who helped others and was never violent.

C. Post-conviction Evidentiary Hearing Record

*35 The record of the post-conviction evidentiary hearing before the circuit court reflects the following. With the assistance of Chalu, defense counsel Alldredge represented Brown during the penalty phase. We have previously set forth the relevant legal experience of Chalu and Alldredge. Chalu testified that he was initially appointed to handle Brown's case, and about three months before the trial, Alldredge was appointed solely to handle the penalty phase. Both Chalu and Alldredge worked with the investigator who was assigned to assist them. Immediately after his appointment to Brown's case, Chalu hired Dr. Berland and later Dr. Afield to assess Brown's mental status for purposes of planning both the guilt and penalty-phase defense strategies. After Alldredge became involved in the case, both Chalu and Alldredge helped Dr. Berland and Dr. Afield with data collection, including retrieval of reports as to Brown's prior psychological testing. When these mental health experts informed Chalu and Alldredge that no mental health defense was available for the guilt phase, Alldredge began working with the experts in preparing for the penalty phase. Chalu testified that he, Alldredge, and Dr. Berland interviewed family and friends of Brown in preparation for the penalty phase. Chalu testified that, by the time the trial began, he believed he and Alldredge and their investigator and experts had gathered "pretty much all the data that was available to us" concerning Brown's history.

Alldredge testified that after he was assigned to Brown's case, he first read the depositions and discussed the case with Chalu and Drs. Berland and Afield. He then met with Brown and interviewed the penalty-phase witnesses. He requested that his investigator retrieve "[e]verything and anything" as to Brown's childhood, his past criminal records, any prior mental health evaluations, and school records. Alldredge testified that finding information as to Brown's history and locating witnesses was particularly difficult and that he was not satisfied with the level of investigation provided for the penalty phase. Alldredge testified that he did not recall reviewing any of Brown's school records but that such records could have been useful during the penalty phase. Upon cross-examination, Alldredge conceded that Brown had begun school sometime after age six and had dropped out at age fourteen so that the extent of his school records would have been limited. Alldredge also testified that Dr. Berland, the most thoroughly prepared forensic psychologist he knew, did not indicate the need for further data in order to render his opinion of Brown's mental status. Alldredge testified that he did not request further neurological testing to confirm organic brain damage.[n.13]

[n.13] Dr. Berland testified in the post-conviction hearing that he did not recommend a CAT scan for Brown because this neurological test was imprecise

in measuring organic brain damage and, if the test showed no brain damage, that result could be used against Brown at trial. Dr. Berland testified that a PET scan was not recommended because, at the time of Brown's trial in 1987, the test was not available in Hillsborough County, and furthermore, no research data existed at the time as to how to interpret the test. Dr. Berland testified that the PET scan was not widely accepted until recently and still is not approved by the Food and Drug Administration as a medical diagnostic tool.

***36** During the post-conviction evidentiary hearing, Brown also presented the testimony of Dr. Szabo, the psychiatrist who evaluated Brown in the Hillsborough County Jail where Brown was awaiting trial in March 1986; Dr. Henry L. Dee, a psychologist who evaluated Brown in 1992 as part of an earlier post-conviction effort; Dr. Jerry J. Fleischaker, a psychiatrist who evaluated Brown at a child guidance clinic in Tampa when Brown was a teenager; Dr. Fay Ellen Sultan, a clinical psychologist who evaluated Brown's mental status in 1996 for post-conviction evidentiary purposes; and Dr. Berland, one of the two mental health experts who had testified at Brown's penalty phase.

Dr. Szabo testified that he diagnosed Brown as having schizophrenia, a form of psychosis, and prescribed Mellaril, an antipsychotic drug, to prevent Brown from deteriorating into a state in which he might harm others or himself while incarcerated at the jail. Dr. Fleischaker testified that he performed a psychiatric evaluation on Brown at the request of a court when Brown was about fifteen years of age, but Dr. Fleischaker did not testify as to the contents of the report. Dr. Dee testified as to his conclusion that, consistent with the opinions of Drs. Berland and Afield, Brown suffered organic brain syndrome and a longstanding major emotional disturbance manifested as schizophrenia. Dr. Sultan testified that she interviewed Brown as well as his father, stepmother, brother, and Dr. Dee, and reviewed the historical records as to Brown that were not available to Dr. Berland at the time of the trial. Dr. Sultan concluded that Brown was operating under severe and extreme psychiatric and organic mental conditions at the time of the murder. Dr. Berland testified that Brown was probably exaggerating but not malingering during his conversations with the psychologist and in his answers to test questions. Dr. Berland testified that nothing in Dr. Dee's report or Brown's 1967 presentence investigation report, neither of which were in his possession at the time of the trial, convinced him to change his findings as to Brown. Dr. Berland stated that he would not have presented the 1967 presentence investigation report to the jury because it would have documented Brown's history as a sex offender. Dr. Berland testified that access to additional collateral information would not have changed his opinion at trial that Brown was disturbed but not under extreme emotional disturbance at the time of the murder. Dr. Berland testified that additional historical information such as school records showing that Brown was a nervous child who beat his head against a table would have been helpful in conveying to the jury the nature of Brown's psychosis for purposes of the jury's weighing process during the penalty phase.

Brown also presented durihg the post-conviction hearing the testimony of Bessie Conway, who was related by marriage to Brown and lived next door to him when he was a child in Tampa; Daniel Jackson, Brown's stepbrother; and Jimmy Lee Brown, Brown's brother. Conway testified that Brown's father once beat him with a belt. Jackson testified that Brown's father often beat Brown as well as his brother, stepbrother, sister, and mother. Jackson testified that he was contacted by an investigator prior to Brown's trial and told the investigator of the beatings and that, as a child, Brown was accused of "messing with other little kids in the neighborhood." Jackson stated that the investigator said he was not interested in finding out what Jackson meant by "messing around" and that he was not interested in pursuing Jackson as a witness. Jackson also stated that Brown's stepmother cooked for the children, helped them with their homework, and saw that they went to school. Jimmy Lee Brown testified, as he did at trial, that all the children in the family were abused. He testified that Paul Brown was beaten by his father, babysitters, relatives, and other children in the children's homes where the Brown children stayed when Brown's father was out driving a truck and his stepmother was incapacitated with a nervous breakdown.

***37** After considering this evidence and argument based on this evidence, the circuit court denied Brown the relief he requested in his penalty-phase ineffective

assistance claims, concluding that Brown failed to meet the prejudice prong of the *Strickland* test. The circuit court order states in relevant part:

> Most of the evidence presented addressed this [ineffective assistance] issue, but it boils down to defense counsel failing to discover an earlier "presentence investigation report," and some school records. While Mr. Alldredge expressed dissatisfaction with the level of investigation provided by his office, the records eventually located by the Defendant did not in any way change the opinion of the mental health experts and the opinion of the defense's mental health experts at the evidentiary hearing did not differ from the opinions offered at trial. The essence of the Defendant's allegation seems to be that the experts' opinions would have been given greater weight if they had additional records upon which to base their opinions at trial, but the psychologist who testified at the hearing stated that although the additional information might have been helpful, his opinion was unchanged. Counsel for the defense further claims that penalty phase counsel was ineffective for failing to call as lay witnesses family members and friends to testify concerning the Defendant's abuse as a child and low intelligence, but, in fact, two family members did testify to neglect and abuse and low intelligence....
>
> No reasonable probability has been shown that but for deficient performance by counsel at the guilt or penalty phase, the result would have differed.

Order II at 4–5.

D. Discussion of Brown's Claims

1. Penalty Phase Investigation

As we have delineated in reviewing Brown's claims of ineffective assistance of counsel in the penalty phase of his trial, we have reviewed the trial record and the record of the post-conviction evidentiary hearing. We recognize, as we did in our discussion of the guilt-phase claims, that under *Strickland* we must presume that counsel provided reasonable professional assistance and that Brown bears the burden of proving that such representation was unreasonable. 466 U.S. at 688–89, 104 S.Ct. 2052, 80 L.Ed.2d 674. Similar to *Jones v. State,* 732 So.2d 313 (Fla.1999), this is not a case in which trial counsel engaged in no investigation at all. The issue here is whether the investigation into mitigating circumstances undertaken by Chalu and Alldredge was so unreasonable that defense counsel "was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674.

Brown contends in this appeal that counsel failed to provide Brown's mental health experts with a 1967 presentence investigation report and other background materials such as school records, juvenile records, or family background. Brown argues that such collateral data would have helped to refute the State's focus on Dr. Berland's statement that Brown seemed to be malingering or faking his psychiatric symptoms during interviews with the mental health experts. Actually, however, Dr. Berland only testified at trial that in his opinion Brown was exaggerating. In the post-conviction hearing, he stated that he took this tendency into account when drawing his conclusions as to Brown's true mental state.

***38** Brown also argues that the trial judge's failure to find statutory mental mitigators was due to conflicting and insubstantial penalty-phase testimony from Drs. Berland and Afield as to Brown's mental state at the time of the murder. However, both experts arrived at essentially the same conclusion: Brown was suffering from organic brain damage and psychosis, manifested as paranoia or schizophrenia. Dr. Berland testified at the post-conviction hearing that he had interviewed Brown in 1986 prior to his trial and had testified in Brown's penalty phase that Brown was psychotic. Also at the post-conviction hearing, Dr. Berland testified that, if he had been able to review Brown's presentence investigation report and his school records before Brown's trial, "all that information would have done was to corroborate what I had already concluded, that he was psychotic."

Brown also argues ineffectiveness in that counsel did not call as lay witnesses additional family members and friends to testify concerning Brown's abuse as a child and his low intelligence. Upon their appointment to represent Brown, Chalu and

> Alldredge began inquiring into Brown's family history and mental state at the time of the murder. The investigator assigned to their case contacted various relatives and acquaintances of Brown. Alldredge testified that it was difficult to find and secure them as witnesses partly because the investigator assigned to Brown's case was not as aggressive as Alldredge would have preferred in uncovering Brown's history. However, Alldredge also testified that, based on conversations with potential witnesses, he made a strategic decision not to call certain lay witnesses because their testimony as to Brown's history, which included other convictions and a history as a sex offender, would have produced aggravating rather than mitigating factors. Alldredge determined that he had sufficient evidence of Brown's background even without the school records and presentencing investigation report. In view of the fact that Dr. Berland stated at the post-conviction evidentiary hearing that such collateral data would not have changed his testimony, we conclude that the performance of Brown's penalty-phase counsel did not fall below the *Strickland* standard. *See Mills v. Singletary,* 63 F.3d 999, 1023–26 (11th Cir.1995).

Brown fails to show, as AEDPA requires, that the state court ruling is contrary to, or an unreasonable application of, Supreme Court law.

Ake v. Oklahoma

If Brown contends that the trial court violated his right to due process by failing to provide a psychiatrist upon Brown's request, as required in *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the claim lacks merit.

Ake holds that if the defendant's sanity at the time of the offense significantly affects the trial, the defendant enjoys a due process right to the assistance of a psychiatrist in preparing an effective defense. *Duren v. Hopper,* 161 F.3d 655, 664 (11th Cir.1998). If the trial court had denied Brown's request for psychiatric assistance, Brown could have raised an *Ake* claim on direct appeal. Brown's failure to raise an *Ake* claim on direct appeal precludes his collateral challenge on that issue in this habeas corpus petition.

***39** Further, the claim is frivolous that the trial court denied the defense the opportunity to utilize a mental health expert at the penalty phase. As the Florida supreme court stated in *Brown v. State,* 755 So.2d at 631–32:

> The trial record reflects the following. At the request of defense counsel, the trial court appointed Dr. Robert Berland and Dr. Walter Afield to evaluate Brown's mental state for purposes of the guilt phase and then to help in developing evidence of statutory and nonstatutory mitigation for the penalty phase. Dr. Berland is a clinical psychologist specializing in forensic psychology who had been licensed to practice psychology for ten years at the time of the trial. He had worked for eight years with criminally committed mentally ill patients at Florida State Hospital in Chattahoochee, and at the time of the trial in 1987, he was engaged in private practice performing court-ordered evaluations of criminal defendants. At the time of the trial, Dr. Afield had been a physician specializing in psychiatry for twenty-six years. Dr. Afield was board certified in adult psychiatry, child psychiatry, and mental health administration and had previously served on the medical school faculties at Harvard University, Johns Hopkins University, and the University of South Florida. At the time of trial, he had been engaged in the private practice of psychiatry for twelve years.

No *Ake* violation occurred. *See Provenzano v. Singletary,* 148 F.3d 1327, 1333–34 (11th Cir.1998). Consequently, Brown is not entitled to habeas corpus relief on the claim that—because the necessary background information was not obtained and because the State failed to disclose information essential to the discovery of substantial mitigation evidence—he was deprived of his right to (1)

a reliable adversarial testing, (2) effective assistance of counsel, and (3) a mental health expert at the penalty phase of his capital trial.

Ground five warrants no habeas corpus relief.

Ground Six

> The prosecutor's inflammatory and improper comments and argument, the introduction of non-statutory aggravating factors, and the sentencing court's reliance on these non-statutory aggravating factors rendered [Brown's] conviction and resulting death sentence fundamentally unfair and unreliable in violation of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

Brown's Allegations in Support of Ground Six

The objectionable comments and arguments by Prosecutor Benito are detailed in ground four above. During the penalty phase, Brown presented witnesses whose testimony probed statutory and non-statutory mitigation. The State presented no witnesses at the penalty phase of the trial. Drs. Berland and Afield testified for Brown regarding Brown's mental illness, psychotic behavior, and brain damage. Family members testified that Brown suffered severe learning disabilities and consequent "retardation," that Brown was characteristically non-violent, that at the time of the offense Brown was under great economic pressure to support his children, and that Brown had not slept in two to three days before the murder. (R 522–97)

***40** Acknowledging that some evidence of mitigation had been presented but affording little or no weight to the mitigation, the trial judge concluded that the mitigation "did not outweigh any *one* of the three aggravating circumstances." Brown contends that the judge's conclusion is sustainable only if the prosecutor's improper arguments were accepted by the trial court as non-statutory aggravating evidence to tip the scale in favor of death. Consequently, Brown claims he was denied an individualized sentencing.

Ground Six Lacks Merit

Brown acknowledges that he failed to raise ground six on direct appeal but asserts that he raised ground six in his state post-conviction motion. In claim two of the Rule 3.850 motion for post-conviction relief, Brown asserts improper prosecutorial comment and argument and the introduction of non-statutory aggravators. The post-conviction court found that claim procedurally barred because Brown could have raised the issue on direct appeal. *See Brown v. State,* 755 So.2d at 619–20 nn. 1 and 2. On his appeal from the post-conviction court's adverse ruling, Brown did not include this issue among the fourteen issues he presented to the Florida supreme court. *See Brown,* 755 So.2d at 621 n. 5. Brown's failure to present this issue to the Florida supreme court constitutes an additional procedural default. Brown's failure to raise the claim on appeal of the denial of the Rule 3.850 motion constitutes an abandonment and precludes presentation of the claim in Brown's habeas corpus petition unless Brown shows cause and prejudice, which he has not shown. *See also Atkins v. Singletary,* 965 F.2d 952, 955 n. 1 (11th Cir.1992); *Doyle v. Dugger,* 922 F.2d 646, 649–50 n. 1 (11th Cir.1991).

Furthermore, to the extent Brown raises the substantive claim of improper prosecutorial comment and argument, the claim is procedurally barred because this claim must be raised on direct appeal and not raised initially in a collateral challenge. As the Florida supreme court stated in *Brown v. State,* 755 So.2d at 621 n. 7:

> The following claims in this Court are procedurally barred because they either were or should have been presented on direct appeal: claims VI through IX, claims XI through XIV, and the portion of Claim II that challenges the prosecutor's penalty phase closing argument. *See Urbin v. State,* 714 So.2d 411, 418 n. 8 (Fla.1998).

Failing to object timely to improper prosecutorial comment forecloses the issue on direct appeal.

> The State correctly points out that because there was no contemporaneous objection to the prosecutor's argument, this issue should be procedurally barred. We have long held that allegedly improper[ ] prosecutorial comments are not cognizable on appeal absent a contemporaneous objection. *See Kilgore v. State,* 688

> So.2d 895, 898 (Fla.1996), *cert. denied,* 522 U.S. 832, 118 S.Ct. 103, 139 L.Ed.2d 58 (1997); *Gibson v. State,* 351 So.2d 948, 950 (Fla.1977); *State v. Jones,* 204 So.2d 515 (Fla.1967). The only exception to this blanket procedural bar is where the comments constitute fundamental error, defined as error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Kilgore,* 688 So.2d at 898. Urbin's appellate counsel suggested at oral argument that the lack of objection to the numerous instances of clear misconduct revealed the quality of defense representation at trial. We tend to agree on this record, especially as to defense counsel's extremely brief and unfocused penalty-phase closing argument. Indeed, defense counsel opened his argument by assuring the jury that, "I'll try and keep what [the prosecutor] may not have covered in my argument within ten minutes." In that goal, defense counsel succeeded, proudly closing his abbreviated remarks by stating, "I did it in ten minutes."

***41** *Urbin v. State,* 714 So.2d 411, 418 n. 8 (Fla.1998). *See also* "Order Denying in Part Amended Motion to Vacate Judgment and Sentence with Special Request for Leave to Amend" dated November 12, 1996. (Exhibit Q3, pp. 298–306) The prosecutor neither introduced nor relied on a non-statutory aggravating factor and the sentencing court relied on no improper, non-statutory aggravating factor.

Brown fails to demonstrate cause and prejudice to overcome the procedural default of ground six. *See Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1997). Finally, Brown fails to demonstrate that the state court decisions are contrary to, or an unreasonable application of, Supreme Court law.

Ground six warrants no habeas corpus relief.

Ground Seven

> Paul Brown's Eighth Amendment right against cruel and unusual punishment will be violated as Mr. Brown may be incompetent at the time of execution.

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, enacted in response to *Ford v. Wainwright,* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), a prisoner may not be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." Brown acknowledges a death warrant must be signed by the Governor of Florida before he can raise ground seven in any court. Brown raised ground seven in state court and in his amended federal petition to preserve the claim for later review.

Ground Seven Is Premature

Brown raised this claim in his state habeas corpus petition, and the Florida supreme court agreed with his concession that the claim was not ripe. *Brown v. Moore,* 800 So.2d 223, 224 (Fla.2001), states:

> Brown first argues that he may be incompetent to be executed. Brown agrees that this claim is premature under Florida Rule of Criminal Procedure 3.811. However, Brown asserts that he makes the argument to preserve his ability to pursue a similar claim in the federal system on account of *In re Provenzano,* 215 F.3d 1233, 1235 (11th Cir.), *cert. denied,* 530 U.S. 1256, 120 S.Ct. 2710, 147 L.Ed.2d 979 (2000). We agree with his concession that this issue is not yet ripe, and we therefore find it to be without merit. *See Hall v. Moore,* 792 So.2d 447, 450 (Fla.2001); *Mann v. Moore,794* So.2d 595, 2001 Fla. LEXIS 1405, 26 Fla. L. Weekly S490, S491 (Fla. July 12, 2001).

This claim remains premature and unripe at this time, because the Governor has not signed a death warrant; however, the claim is otherwise currently exhausted.

Ground seven warrants no habeas corpus relief.

Ground Eight

> The Florida Death Penalty Statute is unconstitutional as applied under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States

> Constitution. Appellate counsel was ineffective for failing to raise this error on appeal and the appellate court's ruling denying Mr. Brown's claim resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law.

***42** Brown incorrectly contends that he raised this ground in a state petition for writ of habeas corpus. His claim in the state petition for writ of habeas corpus reads:

> The Florida Death Sentencing Statute as Applied Is Unconstitutional Under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Corresponding Provisions of the Florida Constitution.

(Respondent's Exhibit X; Petition for Writ of Habeas Corpus, p. 7) Brown cited *Jones v. United States,* 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), and *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Although Brown's state petition for the writ of habeas corpus neither cites *Strickland v. Washington* nor raises appellate counsel's ineffectiveness, the Florida supreme court read his petition to include a claim of ineffective assistance of appellate counsel:

> Brown's second argument is that the death sentence in his case is unconstitutional as applied to him in light of the United States Supreme Court's decision in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). He argues that at the time of his penalty phase, section 775.082(1), Florida Statutes (1983), provided the maximum sentence was life in prison without the possibility of parole for twenty-five years. [n.1] Brown further argues that the aggravating circumstances were required to be charged in the indictment, submitted to the jury during the guilt phase, and found by the jury in a unanimous verdict. Brown claims that his appellate counsel was ineffective for not raising these issues.
>
> [n.1] The murder occurred in 1986; therefore, Brown's citation to the 1983 version of section 775.082(1) is in error. However, the 1985 version and the 1987 version (the year of his penalty phase) were identical to the 1983 version. We have rejected Brown's challenge to the 1979 version in *Mills v. Moore,* 786 So.2d 532(Fla), *cert. denied,* 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001), and the 1989 version in *Mann.* The 1983, 1985, and 1987 versions of section 775.082(1) are identical to the 1979 and 1989 versions of the statute.
>
> *Brown v. Moore,* 800 So.2d at 224–25.

The Florida supreme court rejected ground eight:

> We have previously rejected identical arguments. *See Mills v. Moore,* 786 So.2d 532, 536–38 (Fla.), *cert. denied,* 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001); *Mann,* 794 So.2d at 600. For the same reasons explained in those opinions, we reject Brown's arguments. Thus, we find that Brown's appellate counsel was not ineffective for failing to raise these issues. Accordingly, we deny the petition for writ of habeas corpus.

Brown v. Moore, 800 So.2d at 225.

The Florida supreme court expansively discussed its rejection of *Apprendi* claims in *Mills v. Moore,* 786 So.2d 532, 536–38 (Fla.2001), and *Mann v. Moore,* 794 So.2d 595, 599 (Fla.2001), which states:

> Mann's first claim is that the death sentence is unconstitutional as applied to him in light of the Supreme Court's decision in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Mann argues that at the time of his penalty phase, the maximum sentence under section 775.082, Florida Statutes (1989), was life in prison without the possibility for parole for twenty-five years. Mann further argues that *Apprendi* requires aggravators to be charged in the indictment and submitted to the jury for its determination beyond a reasonable doubt. Mann alleges that his appellate counsel was ineffective for failing to raise this issue on direct appeal along with the trial court's denial of Mann's request that the jury's recommendation of death be unanimous.

***43** This Court recently rejected the argument that *Apprendi* applied to capital sentencing schemes. *See Mills v. Moore,* 786 So.2d 532, 26 Fla. L. Weekly S 242, S243–44 (Fla. Apr. 12, 2001), *cert. denied,* 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001).

In *Mills,* we also rejected the argument that the maximum penalty under section 775.082(1), Florida Statutes (1979), was life in prison without the possibility of parole for twenty-five years. *See* 786 So.2d 532, 26 Fla. L. Weekly at S 244. Instead, we wrote that "[t]he plain language of section 775.082(1) is clear that the maximum penalty available for a person convicted of a capital felony is death." *Id.* The 1989 version of section 775.082(1) argued by Mann is identical to the 1979 version. Thus, Mann's *Apprendi* arguments are without merit.

We also find no merit in Mann's other arguments alleging ineffective assistance of appellate counsel regarding appellate counsel's failure to raise as appellate points the necessity of charging the aggravators in the indictment and the necessity of requiring a unanimous jury recommendation. At the time of his direct appeal, this Court, as we still do today, routinely rejected these arguments. *See e.g., Medina v. State,* 466 So.2d 1046, 1048 n. 2 (Fla.1985) (State need not provide notice concerning aggravators); *James v. State,* 453 So.2d 786, 792 (Fla.1984), *cert. denied,* 469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984) (rejecting argument that jury verdict recommending death must be unanimous). Appellate counsel cannot be ineffective for not raising on appeal an issue with little or no merit. *See Rutherford v. Moore,* 774 So.2d 637, 643 (Fla.2000).

In *Apprendi,* the United States Supreme Court ruled a jury must find any fact that increases a sentence beyond the statutory maximum. The Court stated that the holding did not affect a capital case. *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), determines that *Apprendi* applies to Arizona's capital sentencing scheme, which is based on the Arizona Supreme Court's determination that the statutory maximum for a capital offense based on a guilty verdict alone was life. *Schriro v. Summerlin,* 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), determines that *Apprendi*' s rule (requiring a jury to find any fact that increases a sentence beyond the statutory maximum) was a new rule of law not retroactively applicable. *Accord Turner v. Crosby,* 339 F.3d 1247, 1279–86 (11th Cir.2003); *Johnson v. State,* 904 So.2d 400 (Fla.2005). Because Brown's conviction became final with the denial of certiorari on November 26, 1990, *Apprendi,* which was decided in 2000, is inapplicable to his case. *See also Varela v. United States,* 400 F.3d 864, 868 (11th Cir.2005) (*Apprendi* is not retroactive on collateral review).

Ground eight warrants no habeas corpus relief.

Ground Nine

The trial court's instructions regarding the statutory aggravating factors: cold, calculated and premeditated circumstance was unconstitutionally vague in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution.

Brown's Alleged Facts in Support of Ground Nine

***44** Brown's counsel objected to the jury instruction as to the "aggravating circumstance," prescribed in Section 921.141(5)(i), Florida Statutes, that the offense was committed in a "cold, calculated, and premeditated" (CCP) manner. (R 616–17) In his direct appeal, Brown argued that *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) (finding unconstitutional an Oklahoma instruction on heinous, atrocious, and cruel) invalidates Florida's jury instruction on the CCP aggravating circumstance. The Florida supreme court rejected Brown's constitutional argument on the basis that *Maynard* is inapplicable to Florida and to the CCP aggravator. *See Brown v. State,* 565 So.2d 304 (Fla.1990). Four years later, the Florida supreme court conceded in *Jackson v. State,* 648 So.2d 85 (1994), that Florida's standard CCP jury instruction suffered the same constitutional infirmity as the "heinous, atrocious and cruel" instruction (HAC) found constitutionally infirm in *Espinosa v. Florida,* 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992).

Brown claims that his jury failed to receive complete and accurate instructions defining the aggravating circumstances in a constitutionally narrow fashion. The penalty phase instruction states in pertinent part:

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence. The Defendant has been previously convicted of a felony involving the use of violence to some person. The crime of attempted murder of Tammy Bird is a felony involving the use of violence to another person.

> The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of burglary.
>
> The crime for which the Defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(Exhibit A–5, R 658–59)

The jury recommended death by a vote of seven to five. Imposing the death sentence, the trial court found three aggravating circumstances (Exhibit A–8, R 912–16) and insufficient mitigation to outweigh any one of the aggravators. (Exhibit A–8, R 912–16) Under *Espinosa,* Brown's capital sentencing was tainted with Eighth Amendment error because the jury improperly considered an invalid aggravating circumstance, "cold, calculated, and premeditated." (Exhibit A–5, R 658–59) The standard jury instruction contains none of the Florida supreme court's limiting constructions for this aggravator, and Brown argues that the instruction is vague, overbroad, and without sufficient guidance to the jury in recommending a sentence.

Brown challenged the validity of Section 921.141(5)(i), Florida Statutes, in his direct appeal and raised the issue in his Rule 3.850 post-conviction motion. Rejecting Brown's claim, the Florida supreme court held the vagueness claim procedurally barred absent a specific objection at trial and presentation on direct appeal. *James v. State,* 615 So.2d 668 (Fla.1993); *Walls v. State,* 641 So.2d 381 (Fla.1994); *Pope v. State,* 702 So.2d 221 (Fla.1997). Brown's counsel failed to object at trial.

***45** The record shows that Brown filed several motions to declare provisions of Section 921.141(5)(i), Florida Statutes, unconstitutionally overbroad. On appeal, Brown challenged the vague language of the statute and cited *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). Brown sought re-sentencing on this issue after the Florida supreme court acknowledged that *Maynard* applied, and Brown sought relief pursuant to *Espinosa v. Florida,* 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). Brown claims that the state courts' denial of relief resulted in a decision that is contrary to, or involved an unreasonable application of, clearly established federal law and resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Ground Nine Warrants No Habeas Relief

Brown inaccurately asserts that he raised this claim both on direct appeal and in his state post-conviction motion. (Petition, pp. 48–49) Brown urged on direct appeal that the instruction on the CCP aggravating circumstance was unconstitutionally vague because the instruction omitted a limiting construction. However, the Florida supreme court found *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), inapposite to Florida's heinous, atrocious, or cruel aggravating factor and found the attempt to "transfer *Maynard* to this state and to a different aggravating factor misplaced." *Brown v. State,* 565 So.2d at 308.

Following the denial of post-conviction relief in the trial court, Brown appealed and argued both that the CCP instruction was unconstitutionally vague and that *Espinosa v. Florida,* 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), and *Hodges v. Florida,* 506 U.S. 803, 113 S.Ct. 33, 121 L.Ed.2d 6 (1992), undermined the previous ruling on the inapplicability of *Maynard.* The Florida supreme court found the claim procedurally barred by counsel's failure either to object at trial to the vagueness of the statute or to request a limiting instruction (rather than merely objecting on the basis of evidentiary insufficiency). *Brown v. State,* 755 So.2d at 622–23, states:

> Although Brown does not refer to it in the present appeal, *Jackson v. State,* 648 So.2d 85 (Fla.1994), was a decision subsequent to *Brown* in which we discussed *Brown* and acknowledged that this Court's opinion as to the inapplicability of *Maynard* to CCP instructions had been "discredited in *Espinosa*" and "undercut by *Hodges.*" *Jackson,* 648 So.2d at 88. In *Jackson,* we held that:
>
> > Florida's standard CCP jury instruction suffers the same constitutional infirmity as the HAC-type instructions which the United States Supreme Court found lacking in *Espinosa, Maynard,* and [*Godfrey v. Georgia,* 446 U.S. 420, 428–29, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)].

648 So.2d at 90. However, we then held:

> Claims that the instruction on the cold, calculated, and premeditated aggravator is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal. *James v. State,* 615 So.2d 668, 669 & n. 3 (Fla.1993).

***46** 648 So.2d at 90. We followed *Jackson* with *Walls v. State,* 641 So.2d 381 (Fla.1994), in which we held in respect to *Jackson* constitutional error as to the CCP instruction:

> To preserve the error for appellate review, it is necessary both to make a specific objection or request an alternative instruction at trial, and to raise the issue on appeal.

Walls, 641 So.2d at 387. In *Pope v. State,* 702 So.2d 221 (Fla.1997), we again addressed the preservation issue and held:

> However, we have made it clear that claims that the CCP instruction is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal. The objection at trial must attack the instruction itself, either by submitting a limiting instruction or making an objection to the instruction as worded.

702 So.2d at 223–24. Since our decision in Brown's direct appeal on this issue was reached on the basis of our holding that *Maynard* did not apply, we did not reach the issue of preservation of the claim at trial. We have in this appeal reviewed the trial record to determine whether the issue was preserved by an objection to the instruction as worded or by a request for a limiting instruction. We find that defense counsel's only objections to the CCP instruction were presented at the jury instruction conference and the allocution hearing:

> I object to that one. There is no basis in the evidence before the Court. It is insufficient evidence to border [sic] on the instruction on that.

Later, at the allocution hearing before the court prior to sentencing, defense counsel argued against the application of the CCP aggravator as follows:

> The case law is quite clear that aside from legal premeditation, the proof that a capital felony is committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification requires proof of much greater weight than does the mere premeditation required to prove a firstdegree murder case .... I do not believe that the evidence is weighty enough or convincing enough to show that this capital felony was committed in a cold, calculated and premeditate[d] manner within the meaning of the aggravating circumstance in the statute.

Defense counsel neither submitted a limiting instruction nor specifically objected that the CCP instruction was unconstitutionally vague, as we required in *Pope.* Accordingly, we find that defense counsel's objection did not preserve this issue for appellate review in accord with *Jackson, Walls,* and *Pope.*

Consequently, the state courts properly found the claim in ground nine procedurally barred. Brown fails to establish cause and prejudice to excuse the procedural default as required by *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1997). In his reply to the response, Brown fails to rebut the State's contention that ground nine is procedurally barred.

Furthermore, any error related to ground nine is harmless. The Florida supreme court recognizes the applicability of the harmless error doctrine to an improper CCP instruction. *See Walls v. State,* 641 So.2d 381 (Fla.1994) (approving CCP finding for execution-style murder despite vague instruction). *Accord Foster v. State,* 654 So.2d 112 (Fla.1995) (harmlessness exists if the record supports a finding that the murder was, beyond a reasonable doubt, cold, calculated, and premeditated without any pretense of moral or legal justification under any definition of those terms); *Henderson v. Singletary,* 617 So.2d 313 (Fla.1993) (no statutory mitigating factor was established and the non-statutory mitigating factors presented deserved comparatively little weight).

***47** In Brown's case, the trial court judge stated in his sentencing order:

> There was, from the evidence a lengthy, methodic, and involved series of events that showed a substantial period of reflection and thought by the defendant. These include, among others, the defendant's securing bolt cutters, going to the victim's home in the middle of the night, cutting the lock, going back to the car to get the weapon, returning

> and entering where the victims slept, the defendant's confessed knowledge of what [sic] knew he would have to do, the fact that he armed himself to "talk" to a seventeen year old girl and the shot to the head to "make it quick". The defendant's act was nothing less than an execution.

(Exhibit A, pp. 913–14).

And as the Florida supreme court found on direct appeal:

> The psychologist who testified on Brown's behalf at sentencing admitted that Brown made a statement to him indicating he had considered shooting the victim before going to her residence. The psychologist conceded that the homicide may well have been preplanned rather than impulsive. The trial court characterized this killing as "nothing less than an execution." On the totality of the circumstances, this case demonstrates the heightened premeditation necessary to finding the murder to have been committed in a cold, calculated and premeditated manner.

Brown v. State, 565 So.2d at 308–09 (citation omitted).

The United States Supreme Court has not found Florida's CCP jury instruction unconstitutional. Even if that Court finds the instruction invalid, Brown could obtain no relief because of the non-retroactivity principle of *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *See Lambrix v. Singletary,* 520 U.S. 518, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) (holding *Espinosa v. Florida,* 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (Fla.1992), not retroactive regarding the HAC instruction); *Glock v. Singletary,* 65 F.3d 878 (11th Cir.1995) (en banc), *cert. denied,* 519 U.S. 888, 117 S.Ct. 225, 136 L.Ed.2d 157 (1996). Furthermore, Brown may not obtain relief in a federal habeas corpus petition for a violation of state law. Finally, because Brown cannot show that the state court ruling on ground nine is contrary to, or an unreasonable application of, United States Supreme Court precedent, ground nine warrants no habeas relief.

CONCLUSION

Accordingly, Brown's petition for the writ of habeas corpus (Doc. 59) is **DENIED.** The Clerk shall enter a judgment against Brown and close this case.

CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL IN FORMA PAUPERIS DENIED

Brown is not entitled to a certificate of appealability. Without an absolute entitlement to appeal, a disappointed petitioner for the writ of habeas corpus may acquire a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). A petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke,* 542 U.S. 274, 282, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004) (quoting *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further,' " *Miller–El v. Cockrell,* 537 U.S. 322, 335–36, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 n. 4, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)). Because Brown fails the requisite showing, a certificate of appealability is **DENIED.**

***48** Finally, because Brown is not entitled to a certificate of appealability, he is not entitled to appeal *in forma pauperis,* leave for which is **DENIED.**

ORDERED.

All Citations

Not Reported in F.Supp.2d, 2009 WL 4349320

Footnotes

1 The post-conviction court conducted evidentiary hearings on Brown's ineffective assistance of counsel and mental retardation claims. The court's findings are "presumed to be correct," 28 U.S .C. § 2254(e)(1), and there is no showing that its decision "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).

2 The evidentiary hearing testimony is found at Respondent's Exhibits AA–4 through AA–7.

3 Recognizing that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus," a state is permitted to develop "appropriate ways to enforce the constitutional restriction." *Atkins,* 536 U.S. at 317.

4 The petition does not show any emphasis in this section of the factual allegations.

5 This incomplete, incoherent sentence is as written in the amended petition at pp. 18–19 (Doc. 59).

No. _____

IN THE

Supreme Court of the United States

PAUL ALFRED BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix P

Transcript of Sentencing in the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County. Circuit Court Case No. 86-CF-004084 (March 2, 1987).

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY
CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA,

Plaintiff,

vs.

PAUL ALFRED BROWN,

Defendant.

Case No.: 86-4084X

Trial Division II

TRANSCRIPT OF SENTENCING

BEFORE: HONORABLE GUY W. SPICOLA

PLACE: Hillsborough County
Courthouse Annex
Tampa, Florida

DATE: March 2, 1987

TIME: 9:00 a.m.

REPORTED BY: Sandra Satterwhite
Deputy Court Reporter
Notary Public
State of Florida at Large

BETTY M. LAURIA
Official Court Reporter

APPEARANCES:

On behalf of the State:

JOHN BENITO, ESQUIRE
Assistant State Attorney
State Attorney's Office
North Tower - Fifth Floor
Tampa, Florida 33602

On behalf of the Defendant:

STEPHEN CRAIG ALLDREDGE, ESQUIRE
and
WAYNE A. CHALU, ESQUIRE
Assistant Public Defeneders
Public Defender's Office
North Tower - Fifth Floor
Tampa, Florida 33602

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P R O C E E D I N G S

THE COURT: State of Florida vs. Paul Alfred Brown.

There are some pending motions. You want to talk about those at this time? I have a Motion to Declare the Death Penalty Unconstitutional as Applied, and I also have been handed a Motion for New Trial. Give me a moment, here.

Okay. Which would you like to take up first, Mr. Chalu?

MR. CHALU: Your Honor, with the Court's permission, I think the first order of business is under Florida Rule of Criminal Procedure 3.380, Subsection (c), I am permitted to renew my Motion for Judgment of Acquittal within ten days after the verdict, and I believe we are timely since the ten days would have been yesterday, Sunday.

So, again, Your Honor, I move for a Judgment of Acquittal as to the charge of first degree murder, attempted first degree murder, and armed burglary, and as I did during the trial, request the Court to reduce those judgments, notwithstanding the verdict found by the jury to murder in the second degree, attempted murder in the second degree, and armed trespass as to those respective counts.

I reiterate the same arguments and argue the same law that I did in the course of the trial in support of my motions.

THE COURT: Motion denied.

MR. CHALU: Your Honor, that being the case, I think that the next motion I would urge upon the Court is my Motion for New Trial, which the Court has read?

THE COURT: I read the motion. Any further argument on it?

MR. CHALU: Your Honor, without, of course, waiving anything, I waive nothing in respect for the Motion of the New Trial for the record. I urge each and every ground, the fourteen listed grounds, in my Motion before the Court, and again, in support of those grounds reiterate all of the argument I made to the Court when I argued each of those particular grounds at trial and at the penalty phase of the trial.

THE COURT: What is today, the 2nd or 3rd?

THE CLERK: 2nd.

THE COURT: Motion for New Trial denied.

Do you have the Motion to Declare the Death Penalty Unconstitutional as Applied. Is that what you want to take up next?

MR. CHALU: Yes, sir.

THE COURT: For the record I also read that

Motion.

MR. CHALU: Your Honor, I do have --

THE COURT: It's an interesting Motion. It is a speaking Motion, which is interesting, and --

MR. CHALU: Judge, I do have --

THE COURT: It somewhat bothers me about its effect on the Cannon 5, Code Of Professional Responsibility, where a member in the, especially in the Public Defender's Office, is testifying.

MR. CHALU: Your Honor, I would like to have him testify live and subject him to the Court's questioning. The reason I have done this is because Mr. Donerly has experience in this area.

THE COURT: Does he also have expertise in psychiatry and psychology?

MR. CHALU: Your Honor, my -- I would simply offer his as an expert in the field of statistics and statistical inference, which he is qualified in. I could so qualify him because he has experience and educational background to be so qualified.

THE COURT: I noticed in a statement in his Affidavit, it says, "However, the normal human desire for consensus puts the normal tendency to break ties." Is that an expert opinion or lay opinion?

MR. CHALU: Your Honor, as to that particular

aspect, that would be a lay opinion, but I am offering it merely as an expert in a statistical analytical inference.

THE COURT: Is he going to testify to more than is in the Affidavit?

MR. CHALU: Your Honor I would -- yes to the extent that he could explain how it is that he -- that these statistics were arrived at and what the implication of those statistics are from the status point of the statistician. He does have expertise in that area, Your Honor, and that is all I am offering him for. If there are aspects of the Affidavit that don't fall within that area of expertise certainly the Court is free to disregard that portion of it, sever that out without disregarding the Affidavit in its entirety.

THE COURT: Have you considered the Cannon 5 question that arises if Mr. Donerly testifies in this case?

MR. CHALU: I am not sure what portion the Court is making particular reference to, Your Honor.

THE COURT: The Public Defender's Office, has it not, in case law been considered a law firm?

MR. CHALU: Yes, sir.

THE COURT: You understand the responsibility of

counsel of record if a member of the law firm has to testify?

MR. CHALU: Your Honor, my -- the obvious position would be I might be in the position to request the Court to allow me to withdraw for the purpose of being a witness. However, Your Honor, this is not involved testimony before a jury. The trial is over. This concerns purely a matter of law as to distinguish from a matter of facts, because there is no factual testimony involved here. We're not asking Mr. Donerly to prepond facts or evidence to the jury or to the trier of facts. We're simply offering --

THE COURT: The statistics contained in his Affidavit are --

MR. CHALU: Do not bear a reflection of guilt or innocence on the Defendant, Your Honor. It simply bears on the narrow legal question that is the constitutionality of the death penalty as applied to this case. We're not offering Mr. Donerly as a witness to testify as to any facts or as to any piece of evidence before the trier of the facts. This is purely a legal question, Your Honor. It has nothing to do with facts or evidence before a trier of facts.

THE COURT: The only thing that he would testify to, then, in addition to what is in the Affidavit is

how mechanically he arrived at these figures?

MR. CHALU: And whether or not the difference between a 6 to 6 recommendation of life and 7 to 5 recommendation of death are considered to be statistically significant within the realm -- within the scope of his expertise as a statistician. This is statistically significant, Your Honor, is what this boils down to, Your Honor. If it is not statistically significant, then we're contending that the death sentence, as it applies it, in the 7 to 5 recommendation of death lacks the liability that is necessary in the stand of past constitutional mustered under the 8th and 14th Amendments.

THE COURT: Isn't the problem you have in assuming that the jury's recommendation is something more than a recommendation that would be -- that will be given great weight by the Judge? Are you assuming that the jury's recommendation is dispositive of the case?

MR. CHALU: No, sir, not by any means. I'm saying, though, that a 7 to 5 recommendation given the statistical differences which are small between that and a 6 to 6 recommendation should be given far, far less weight than a 12 to 0 or 11 to 1 or 10 to 2 recommendation. That a 7 to 5 recommendation, that being a death recommendation by the narrowest possible

margin, should be given much less weight than a more lopsided recommendation. Particularly, in view of the statistical aspect of the 7 to 5 versus a 6 to 6 recommendation.

THE COURT: Mr. Benito, do you feel compelled to cross examine Mr. Donerly in any aspect of his Affidavit?

MR. BENITO: No, sir, I don't.

THE COURT: All right. So you will just limit his testimony to matters specifically outside of the Affidavit, correct?

MR. CHALU: No. Yes, to the extent that he will explain how it is that these figures are arrived at, and statistically what the significance of --

THE COURT: Well, for the purposes of this hearing, can we not assume that the numbers there are correct for you and explain if they are correct or not and how he arrived at them. I don't understand this procedure.

MR. CHALU: How he arrived at them. More importantly, Your Honor, what the -- what significance, if any, there is to statistically what difference there is between a 6 to 6 recommendation and 7 to 5 recommendation as it appears on the question of the statistical significance.

I will argue briefly that it is statistically insignificant, and therefore, there is not a significant enough difference between a 6 to 6 life recommendation and a 7 to 5 death recommendation to justify the Court giving a 7 to 5 recommendation any kind of weight as opposed to a 10 to 2, or 11 to 1 recommendation.

THE COURT: So is the bottom line of your argument that a 7/5 recommendation should not be given any weight one way or the other?

MR. CHALU: My argument is that, Your Honor, it's close enough to a life recommendation that it should not be considered -- considered to be weight at all.

THE COURT: Therefore, it is not weight at all, following your argument it would be something that the Judge then would determine?

MR. CHALU: And that's --

THE COURT: Ultimately is he would determine anyway.

MR. CHALU: Yes, Your Honor. I am asking the Court not to consider the 7 to 5 death recommendation as a death recommendation.

I would also offer to the Court, although I do not have the statistics here, that there were other states that have the death penalty. Several other states that

have the death penalty require a much more lopsided recommendation for there to be a death recommendation. I think there are states that require a unanimous death recommendation. There are other states that require a 10 to 2. There is another one that requires 9 to 3.

THE COURT: That is a matter that you might want to visit with the Legislature of Florida when they convene the first Tuesday after the first Monday in April of this year, correct?

MR. CHALU: Judge, I might accept the Court's invitation. What I am saying, though, is as the law stands a 7 to 5 recommendation considered to be a death recommendation, I don' think that has a degree of liability nor should it be given any kind of weight when deciding to sentence the Defendant to life or death.

THE COURT: All right. Bring Mr. Donerly up if he chooses to testify under the circumstances.

MR. CHALU: Thank you, Judge.

Thereupon,

BRIAN DONERLY,

being first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CHALU:

Q Mr. Donerly, please state your name for the record.

A Brian Donerly.

Q Brian Donerly. Okay. Your occupation?

A I am an attorney.

Q All right. And prior to your -- you're licensed to practice in the State of Florida?

A I am.

Q And prior to obtaining your training as an attorney and you're licensed as such, would you please give the Court your prior educational background?

A I received a Bachelor's Degree in Science with a major in mathematics in 1967. I then went to the University of Florida to work on my PhD in statistics. After that was interrupted by a stint in the Army, I received a Master's in Statistics, and this is also '71.

I spent another three quarters working on the PhD before I switched to journalism. While I was in journalism school, I was a half-time assistant doing essentially statistics, which is designing statistical studies and tests for the school of the communications.

Then I entered law school in 1974.

Q All right. So in addition of having a Master's in Statistics, you did pursue a PhD to some extent in that

area?

THE COURT: All right. For the purposes of this hearing, we can assume without objection in this case that he is qualified to give opinion testimony during the course of these proceedings in the area of statistics?

MR. CHALU: Thank you, Your Honor.

Q (By Mr. Chalu) Mr. Donerly, may I show you this without marking it, Your Honor, for the purposes of the sentencing hearing?

THE COURT: Sure.

Q (By Mr. Chalu) Let me show you an Affidavit which has been attached to the Motion to Declare the Death Penalty Unconstitutional, and ask if you recognize that particular document?

A I do.

Q And how do you recognize that document?

A I prepared it.

Q And what does that document reflect?

A That is an Affidavit giving, among other things, the probability for the number of -- the number of heads in a flip of either twelve true coins or flip of one coin twelve times, and analogizing it to the second phase proceeding as it is in Florida.

Q And what significance, if any, does that

particular experiment reflected in that Affidavit have in relation to twelve jurors to impose the life or death penalty in a capital case?

A I think it's a rather good approximation. The twelve -- the twelve coin flip is a good approximation to the vote if one assumes that the population, the relevant population from which the jurors are drawn, which in this case would be those registered voters who believe in the death penalty, if that population is evenly split, then these would be -- then these probabilities would reasonably accurately reflect the number of death votes between zero and twelve.

Q All right. Now in this case, assuming that we are concerned only with the difference between the probabilities concerning the 6 to 6 recommendation versus a 7 to 5 recommendation of death, would you explain how you arrived at those two particular items, 6/6 and 7/5, and explain what, if any, significant difference there is?

A The individual probabilities on here, just calculated standard by -- with the standard by a known probability, I used a calculator, I did everything by hand exactly and used a calculator for the division. The -- and then the 39 percent, actually the .3871, is gained simply by adding 7, the probability associated with the numbers through 12, and the significance of that 39 percent is that

the probability of seven or ore heads, or by analogy, seven or more death votes, given that population is evenly divided. In other words, if we make the assumption that the population is evenly divided and we are going to reject that idea and decide that there is a death recommendation, the death recommendation comes with an evenly divided population 39 percent of the time.

I found that to be important for following reasons: Statisticians, when they're testing two brands of fertilizer, typically choose what we call alpha levels, which is to say what the probability of rejecting a fertilizer incorrectly is in the neighborhood of .025, .05, .10 is a relatively loose experiment. This one effectively has an alpha level, a probability of an incorrect decision of 39 percent, which would be unacceptably high to a practicing statistician.

Q So that would be a 39 percent probability of what happened specifically?

A Of a death recommendation in this case of an experiment of seven or more has, assuming the population is evenly split or by analogy, the coin is true.

Q All right.

A So in other words, you're going to decide -- if you flip a coin, you have to make a decision whether its a true coin based on one set of twelve flips. You can reject

it any time it's seven or more. You can throw out a true coin 39 percent of the time.

Q So if there is a 39 percent possibility, then the life recommendation by a 6/6 vote may be appropriate rather than a 7 to5 recommendation of death?

A That is my conclusion.

MR. CHALU: Okay. That is all I have.

THE COURT: Any cross examination?

MR. BENITO: No, sir.

THE COURT: You may step down. Thank you.

MR. DONERLY: Thank you, sir.

THE COURT: Further argument?

MR. CHALU: Your Honor, all I have to say in addition to that is that on the basis of that being the status statistically the degree of probability of error in this case as a life or death recommendation that therefore given a 7 to 5, and all I am talking about is a 7 to 5 recommendation of death, that does not bear sufficient significance of the liability for the Court to give it any weight at all in imposing the death penalty, and in fact, the Florida Legislature allows that it makes this death penalty of ours unconstitutional as it applies to this particular case in the 8th and 14th Amendments. It lacks reliability.

THE COURT: Motion denied.

MR. CHALU: Your Honor, that is all the pending motions that I have. At this point I would ask that the Court have the State present its argument as to the sentencing. First, it's the State's burden to show that the death penalty is appropriate, and ask that I be allowed to rebut that without additional rebuttal from the State Attorney.

THE COURT: All right. Let me go over, before we do that, let me touch on preliminary matters, if I could gentlemen.

First off, as to the attempted first degree murder and the armed burglary, has counsel prepared a score sheet?

MR. BENITO: Judge, I did not prepare a score sheet. I couldn't prepare a score sheet of the -- since I will be asking the Court to depart from the guidelines, obviously.

THE COURT: We still have to know what they are. In other words, we have to agree to the guidelines before we can do anything on that. I wonder how long it will take you folks to get that together?

MR. BENITO: Ten minutes.

THE COURT: All right. Let me see if we can touch on some other things, too.

Is my understanding correct, Mr. Chalu, that the

Defense in this case is not urging as a mitigating circumstance that the Defendant has no significant history of prior criminal activity?

MR. CHALU: It is correct that we are not urging that.

THE COURT: So for the purpose of this sentencing we can assume, then, that this mitigating circumstance does not exist?

MR. CHALU: Under the applicable case law, Your Honor, it is my evaluation of the case that does not exist.

THE COURT: All right. Let me ask you, gentlemen, another preliminary question, and that is -- well, other than argument, do you plan to put on any testimony?

MR. BENITO: No.

THE COURT: Other than argument, do you plan any testimony?

MR. CHALU: Yes, Your Honor. I have two brief witnesses.

THE COURT: All right. During the trial of this case, I did limit somewhat the testimony relating to victim injury, particularly as it relates to Tammy --

MR. BENITO: Bird.

THE COURT: (Continuing) -- Bird. Where are we

on that as far as anything in the record on victim injury on Tammy Bird other than a gun shot wound to the head?

MR. BENITO: In the record, the doctor stated that she suffered extensive brain damage.

THE COURT: Is that correct?

MR. CHALU: Yes, Your Honor, that is my recollection.

MR. BENITO: What you stopped me from doing was from asking him what her condition was after the operation, which would be --

THE COURT: I think I stopped you going into the prognosis in those matters.

MR. BENITO: Exactly.

THE COURT: Okay. Am I correct in assuming that armed burglary is a life felony?

MR. BENITO: Yes, sir.

MR. CHALU: First degree punishable by life.

THE COURT: Punishable by life, and am I correct in assuming that attempted murder one is a first degree felony?

MR. BENITO: Yes, sir.

MR. CHALU: Yes, Your Honor.

THE COURT: Interesting. All right. You gentlemen prepare the guideline score sheet and I am

prepared -- do you want to -- do you want to present the testimony and then let him argue, or do you want to have him argue then -- well, I think it is only fair if you've got testimony to let him argue after testimony you have.

MR. CHALU: That's fine.

MR. BENITO: For the purpose of the score sheet, I'm having the secretary bring me a copy of the score sheet right now. I don't know if Mr. Chalu -- I don't know if he's going to ask the Court to sentence him to the guideline sentence, I mean, it's 7 to 12. Are you asking the Court to sentence your man --

THE COURT: Well, I think for the record and way it's been going in the appellate proceedings, I want a score sheet and I want both of you guys to initial it, and we can do that before we get to the actual sentencing, but we can proceed now with taking any testimony you have, Mr. Chalu.

Call your first witness.

MR. CHALU: I would like to call Paul Brown, Sr., Your Honor.

THE COURT: All right.

Thereupon,

PAUL BROWN, SR.,

being first duly sworn to tell the truth, the whole truth,

and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CHALU:

Q Paul, state your full legal name, please.

A Paul Brown.

Q And you are the Defendant's father?

A Yes, sir.

Q And you testified in Paul's trial during the sentencing portion of his trial two weeks ago, is that right, sir?

A Right.

Q Sir, if you would, please, if you would, Mr. Brown, tell the Court what sentence you feel should be imposed in this case and why.

A Well, the boy was under mental strain at the time, so he never done anything like that before. He really surprised me, you know, and I tried to keep up with him as much as I could, and I still, you know -- he never was that kind of a boy. He was always, you know, kind and tried to help people out, but this is something else.

Q In the time that you have known Paul and had contact with him, had you ever known him to have a violent character?

A Oh, no, sir. He never had a violent character.

Q In the time that you have known him and had contact with him, had you known him to be violent towards anybody?

A Nobody. He was -- he tried to help them out. He would go out of his way to help them rather than start a fight or trouble.

Q Tell the Court what his character was like if it was not violent. What was it like?

A It was peaceful, and easy to get along with -- with anyone. Other people depend, you know, really didn't depend on anybody, you know, really. Anything he did he would try to help somebody out.

Q What type of pressures was Paul under right before he committed this offense or within a few weeks before he committed this offense?

A Well, they had been travelling back and forth to Whigham, Georgia, to try and locate a home and job, you know, to get away from over here. It's a pretty bad place to live over there, and at the time they were trying to take the children away from her, so, you know, in time he put the children all over the neighborhood, basically trying to keep them from being taken away from her and thought, well, they ought to go to Georgia and try and establish a home and job up there, you know, and they would be better off. He already made three or four trips up there and the Sunday

just before the shooting he came back tired and give out, you know, exhausted, really, and he still has to get out Monday and try and pick up some more cans and stuff, you know, to try and make more money for groceries; and Tuesday afternoon he hadn't picked up very much, so he was still under mental strain, you know, no sleep, tired, trying to figure out if he was going to get up enough money to go back to Georgia that same weekend, move into the house they had applied for. He was really in a mental strain trying to do all of that and trying to keep the kids together and try and get the groceries in the house and all of that.

Q How was he supporting himself during this period of time?

A Picking up junk, aluminum cans, whatever he could find in the dumpster and sell it and make a few dollars off it. In the meantime, every time he could get a chance to get a job somewhere, he would have that to help him along, too.

Q Had he found a job up in Georgia?

A No, sir. Well, he had one established. They told him that he would get a job whenever he came back up and rented the house. It was right close by in a lumber yard. So he had prospects of a job if he could have made it back.

Q He was trying to support his kids?

A Oh, yeah.

Q Was he trying to support his girl friend?

A Yeah, and her problems, too.

Q Paul, is there anything else you want to say to the Court about your son that I haven't asked you?

A Well, I believe this was just a spur of the moment. Or something he was under a mental strain. I don't feel that he has ever been under a strain that bad before. Of all of the problems he has and trying to keep the car together, which I helped him a whole lot trying to keep his car to where he could stay on the road out there picking up junk, one thing or another. I loaned him my trailer to help him out to where he could make a little bit more money. I mean, you know, man gives you a bunch of stuff and you don't have no way of hauling it except in a station wagon, so I gave him the trailer, and he was doing really the best he could under the circumstances, and then trying to keep the kids together, trying to keep food in the house, pay the light bill, and stuff like that, you know, keep the car together, and every time you turn around the car was blowing up. I had a problem with myself trying to keep it up, you know, because what I was doing, see, and then he was just really under a mental strain.

MR. CHALU: All right. Thank you, Paul. That is all I have.

THE COURT: Any cross examination?

MR. BENITO: No, sir.

THE COURT: Call your next witness.

Thank you, sir.

MR. CHALU: Jimmy Brown.

Thereupon,

JIMMY BROWN,

being first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CHALU:

Q Jimmy, can you state your full and correct name, please.

A Jimmy Lee Brown.

Q And how are you related to Paul Brown, the Defendant?

A He's my brother.

Q All right. You testified at trial a couple of weeks ago?

A Yes, sir.

Q All right. I want you to tell the Court what sentence you feel should be imposed in this case and why.

A Well, I don't think he should get the death penalty, because I lived with my brother. And his woman, the kids, the whole time he was there with them. He done

many things to help out that family like going to school when the kids have a problem with other kids, they would get in fights, or the teacher would give them problems. He always went to the school to help them. He was always going around getting junk and helped support the food and helped with the bills, stuff like that.

Like my father said, he would make many trips to Georgia and stuff like that for housing and jobs, and he was supposed to have in a lumber yard, but they come back down here, and I guess just decided not to go back up there for something. There are many times that Paul would furnish them, he would go down the road, my brother would get plenty of junk, stuff like that, to help them out, and food, and stuff.

My brother, in my opinion, he has done everything he could to help out, especially her in the kind of the way the house is. The roof has a bad hole in the top of it where he tried to get money to help and get it fixed. So he would try and get up enough money and she would be using the money for something else, because HRS, you know, was behind her trying to get the kids on kind of the way the house was. They gave her either 30 or 60 days, something like that, to get it fixed. She didn't do it, so they would come out and get the kids. My brother helped her take them and hide them out.

THE COURT: Mr. Chalu, let me interrupt for a minute. I am not sure who she is.

A That is Louise.

Q (By Mr. Chalu.) Explain who that is.

A Louise is Pauline's mother, sir.

Q Mr. Brown's girl friend?

A Yes, sir.

Q He was living with her?

A Yes.

Q And he was doing the best he could to help and support --

A Help her out and support her and the kids.

Q Okay. How far did your brother go in school?

A I believe he went to about 8th grade.

Q Was he a slow learner in school?

A Very slow.

Q He couldn't make it through school?

A No, sir.

Q He felt like he was doing the best he could to support his girl friend and children?

A The very best he could.

Q He didn't have a regular job?

A No, sir.

Q How did he support himself?

A Junking, because I helped him a lot of times

myself when I wasn't working my job at Woody's Appliance. We would fix a bunch of old refrigerators and stoves, and stuff like that. He must have had 15 or 20 loads or junk out of there, you know, to help the family getting what he could to fix the house and everything.

Q Before this incident where Paul committed these crimes that he has been charged with and has been convicted of, have you ever known you brother to be a violent person?

A No.

Q Or have a violent character?

A No, sir, never. He has always been gentle to everyone I have known him to be around.

Q Would he go out of his way to help people when he could?

A Yes, sir, many times.

Q Is there anything else that you would like to tell the Court today about your brother?

A The only thing I know is that he is a very gentle kind of person to anybody that needed help. Because there was a guy -- a man across the street from him, my brother had done some work for him, cutting trees down and putting them in the trailer. He didn't charge nothing. He was just helping out, being neighborly.

He has done things like that for Paul Bircham, and Mr. Hammer down the street. He helped build a chicken coop.

He didn't charge them nothing. He always did different kinds of things for people to help them out. He was just helping out friends.

Q Would you say that these offenses he made would be out of character for him, normally?

A It just don't sound like my brother. He was under a lot of stress or something. That's all I can figure out.

MR. CHALU: Thank you, Jimmy. That is all I have, Your Honor.

THE COURT: Any cross examination?

MR. BENITO: No, sir.

MR. CHALU: That is all the witnesses I have, Your Honor.

MR. BENITO: I have prepared a score sheet if Mr. Chalu would like to go over it.

THE COURT: Can you go over it right now and see if we can agree on it.

MR. BENITO: Your Honor, the guideline sentence is 17 to 22 years.

THE COURT: Seventeen to twenty-two years?

MR. BENITO: The 17 to 22 year range.

THE COURT: Okay. And both Mr. Chalu and Mr. Benito have signed it. All right. We're using attempted first degree murder as a primary offense as opposed to armed burglary.

MR. BENITO: That's fine with the State, Judge.

THE COURT: Even though armed burglary is a first degree felony punishable by life, and first degree murder -- attempted first degree murder is a first degree felon?

MR. BENITO: Yes, sir.

THE COURT: Anyway, Counsel, stipulate that the guideline sentence is 17 to 22 years?

MR. CHALU: Yes, sir.

THE COURT: As to both of the attempted first degree murder and armed burglary?

MR. BENITO: Yes, sir. Yes, sir.

THE COURT: All right. We need to put this in the court file after I finish up.

THE CLERK: Yes, sir.

THE COURT: All right. Argument from the State.

MR. BENITO: Judge, to touch briefly on the, I'm not going to rehash all of the argument we had in the past. You heard all of the arguments.

Count 1, the armed burglary carries a maximum sentence of life imprisonment.

Count 3, attempted first degree murder, carries a 30 year term of imprisonment.

There are ample case authorities, and I don't believe the Defense will object to, and this is one

case I want to describe to the Court, and that is McFall, M-c-F-a-l-l, the fact of the case was in front of Judge Coe which a man was convicted of first degree murder and armed robbery and other contemporaneous convictions that went along with the first degree murder conviction.

That time Judge Coe imposed the death sentence and maximum sentences on all of the contemporaneous convictions.

The Second District Court sent the case back and said the majority of the reasons cited by the Court were invalid except for one, and one valid reason was the fact that the man stood convicted of a capital offense which had not been scored in the score sheet. That is now the law as the State would see it in the State of Florida. The man stands convicted before a Court convicted of first degree murder, and that first degree murder not being scored in the score sheet, the Court can depart from the guideline sentence as to any other crimes he is going to be sentenced on contemporaneous with a murder conviction.

Based on the McFall reasoning and the Second District Court of Appeals, I will be asking the Court to sentence him to life imprisonment on the armed burglary, and 30 year imprisonment on the attempted

first degree murder of Tammy Bird.

The testimony you heard --

THE COURT: What was the citation on the McFall? Do you have it?

MR. BENITO: I apologize to the Court. I thought I had it in the file. I can get it for the Court, but it's a Second District Court of Appeals case.

THE COURT: You'll get it to me shortly, right?

MR. BENITO: Yes, sir.

THE COURT: Go ahead.

MR. BENITO: As to the testimony as shown, and I told the Court before, I do sympathize with the family of Mr. Brown. The man has had a rough childhood, but it would be the State's position, Your Honor, that many people have endured a rough childhood and did not develop into a man who in the middle of the night would use a pair of bolt cutters to break into a home armed with a gun and put a bullet in two young girls' brains, Judge. That is exactly what Mr. Brown has done.

He has destroyed two young lives, and in speaking of those lives, one is 12 and one was 17, what about those lives, Judge? Would either of those young girls have married? Would they have had children? Would they have careers? Would they become somebody important?

I am concerned with the lives of Tammy Bird and Pauline Cowell.

Their childhood was cut short by that man right there. And now he asks you to spare his life. I don't follow the reasoning.

Mr. Alldredge in his closing argument to the jury talked about showing compassion. Show Mr. Brown compassion. I ask the Court what compassion did he show Pauline Cowell? What compassion did he show Tammy Bird?

Mr. Alldredge argued stop the killing about a vicious cycle. Mr. Brown kills, and the State kills Mr. Brown, and it's a vicious cycle, never ending. Well, I don't buy that, Judge. I don't buy the circle of violence.

What Mr. Brown did in killing Pauline Cowell and attempting to kill Tammy Bird was extremely violent. It was extremely evil, but what this Court will be doing in accepting the recommendation of this jury would be to simply administer justice. That is what this Court would be doing. The form of justice that is needed in a case such as this. Justice with a message, Judge, and the message is extremely clear. If you destroy our children, if you destroy our children in this fashion, in this cold-blooded fashion, you too

must be destroyed, and I ask this Court to send out that message.

I ask the Court to accept the jury's recommendation of death and impose the death penalty upon Mr. Brown as to Count 2. As to Count 1, impose a life sentence, and run that consecutively to Count 2; and as to Count 3, impose a 30 year sentence, and run that consecutive to Count 1 of the indictment.

Thank you, Judge.

THE COURT: Mr. Chalu.

MR. CHALU: Thank you, Your Honor.

Interestingly enough, Mr. Benito appeals to you by simply stating hard and fast rules that if you destroy our children, you too shall be destroyed. I fail to see how that goes into the weighing process of aggravating and mitigating circumstances, and interestingly enough Mr. Benito did not state to you what aggravating circumstances he feels applies, nor did he state to you why those aggravating circumstances outweigh any mitigating circumstances found to exist.

I will do so, Your Honor, because I think that that bears most importantly on the question of life or death.

As to aggravating circumstances, Your Honor, it established by the jury's verdict that my client

committed these crimes in the course of the burglary. I certainly do not dispute that fact, but I ask you to take into consideration this factor. That is one of the ways by which a Defendant may be found guilty of first degree murder in the state of Florida, felony murder, and in that respect, Your Honor, I think that the aggravating circumstance be given very little weight because of the fact that perhaps but for that factor of felony murder, there would not be a first degree murder at all.

It seems incumbent to me that you can take a factor which makes a homicide a first degree murder in the first place, and then use it, again, as an aggravating circumstance to justify the ultimate penalty.

Mr. Benito argued at trial that the Defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to a person, but, Your Honor, that previous conviction, and I just put the words previous in quotation marks, was the shooting of Tammy Bird. I think what the Legislature meant when they passed this statute was to penalize a Defendant for having a violent criminal past, because the word previous means previous. It does not mean contemporaneous, and indeed the

Legislature justifiably defines that a person who had a history of a violent criminal behavior should be treated differently than a person who did not.

Mr. Brown does not have a violent criminal past. If he had, we would most assuredly understand that the State brought that to your attention, and the jury's attention, as it would have the right to do.

Mr. Brown does not have a violent criminal past, and I feel that this aggravating circumstance does not apply, because Mr. Brown does not have a previous violent criminal history.

The sole ground the State uses to rely on this aggravating circumstance is the shooting of Tammy Bird, which happened at the same criminal transaction, on the same night Mr. Brown committed the capital felony for which he has been convicted.

Mr. Brown -- I'm sorry, Mr. Benito argued thoroughly the capital felony was committed in a cold, calculated, and premeditated manner.

I reject that, Your Honor, and hope the Court does too, because I don't feel that the homicide rose to this level. The case law is quite clear that aside from legal premeditation, the proof that a capital felony is committed in a cold, calculated and premeditated manner without any pretense of moral or

legal justification requires proof of much greater weight than does the mere premeditation required to prove a first degree murder case, and the case law is clear on that. Mr. Benito will not dispute that, and while it may be argued that the evidence was sufficient to prove premeditation sufficient to prove a first degree murder conviction for the sake of argument, Your Honor, I do not believe that the evidence is weighty enough or convincing enough to show that this capital felony was committed in a cold, calculated and premeditate manner within the meaning of the aggravating circumstance in the statute.

As to mitigating circumstances, Your Honor, I ask you to find that the capital felony was committed while the Defendant was under the influence of an extreme mental or emotional disturbance, because, in fact, he was. We have expert testimony to support that fact.

Dr. Afield testified that the Defendant was in fact under the influence of an extreme mental or emotional disturbance. He outlined for you the basis for that opinion, which is substantial. Consider amount of psychological testing by Dr. Berland, interviews with the Defendant, reading of the police reports, and Defendant's prior criminal history, the Defendant's prior psychological testing, and the

Defendant's mental state at the time the offenses were committed.

Dr. Berland further testified that the Defendant was under the influence of a mental or emotional disturbance, and he could not say extreme. I ask the Court to define this mitigating circumstance taking the testimony of both gentlemen in conjunction with each other.

I ask the Court further, using the same rational of argument that I just made, to find the capacity of Mr. Brown to conform his conduct to the requirements of law to be substantially impaired when he committed this offense, because in fact, I believe it was. I think the testimony of Dr. Berland and Dr. Afield substantiate that quite clearly, and their data base was quite complete, and urge the same markings upon the Court as I had with regard to the previous mitigating circumstance.

The psychological testing, the interviews, the review of all of the reports on each count in this case by the police department on Mr. Brown, and I think that it is quite clear that Mr. Brown's capacity to appreciate the criminality was indeed substantially impaired on the night in question.

Your Honor, I further ask you to consider his age.

Now while he is 36 years old, and he is not in tender years or an elderly gentleman, I think the Court can consider his age in conjunction with his mental condition.

Mr. Brown has a lack of education. He is a slow learner, border line mentally retarded, and has been diagnosed as having a psychotic illness both by Dr. Berland and Dr. Afield.

I ask the Court to find age a mitigating circumstance in considering in conjunction with the other factors.

More importantly, Your Honor, I think the Court can consider non-statutory mitigating factors. The Court has heard testimony both during the sentencing portion of the jury trial and during the proceedings here today before Your Honor. Mr. Brown does have a violent criminal past. Mr. Brown has the criminal past, and that is why I cannot argue that he has no substantial history of prior criminal activity, but that does not stop me from arguing that he is not a violent person because his history bears that out. His prior history bears that out.

Why do I ask you to consider that? Quite simply, Your Honor, in State vs. Dixon, which is a Florida Supreme Court case, upheld the constitutionality of the

death penalty statute. It was urging the Court to engage in a character analysis of the Defendant charged with capital crimes, and significantly one of the things that the State vs. Dixon says is that the Court should consider the mitigating circumstances to determine whether one total explosion of criminality on the part of the Defendant warrants the extinction of life.

I submit to you, Your Honor, that it does not, and in this case it does not because that is what we have here. We have one total explosion of criminality in the life of Mr. Brown who has not in the past in any manner whatsoever exhibited a violent character, violent tendencies, or committed any violent acts.

This was an offense which was committed by a man suffering from a psychotic illness from brain damage, from a learning disability, from a pre-existing mental illness, from the pressures of life, basically with a loss of his children, deprived of the sleep for three or four days that caused him to commit these offenses.

The total explosion of the criminality committed by Mr. Brown was a function not of his normal character, but it was a function of him acting out of character as a result of all those pressures and all of those factors that came together during that night.

You have heard his family testify what his character is. We have talked about what his character is not. You have heard his family testify that his character is one of gentleness and of kindness and consideration of others, a person would go out of his way to help others, even when it is inconvenient for him to do so.

In short, Your Honor, I ask you to weigh the totality of circumstances, not just one or two, but the totality of circumstances. I ask you to weigh the aggravating circumstances against both the statutory and non-statutory mitigating circumstances, and I ask you to spare Mr. Brown's life.

Your Honor, mercy has been defined as undeserved leniency, undeserved leniency. It is my contention that Mr. Brown does not deserve to die, but if the Court differs with me, then I ask for mercy.

Thank you, Your Honor.

THE COURT: Bring the Defendant forward.

You are Paul Alfred Brown, Jr.?

MR. BROWN: Yes, sir.

THE COURT: And Mr. Brown, you are represented here by Mr. Chalu, your attorney?

MR. BROWN: Yes, sir.

THE COURT: Mr. Brown, is there anything that you

would like to say on your own behalf before I pronounce sentence?

MR. BROWN: No, sir.

THE COURT: Paul Alfred Brown, Jr., you were found guilty of the crime of first degree murder by a jury of twelve of your peers. Thereafter the jury recommended, rendered an advisory sentence of death.

Mr. Chalu, is there any legal cause why Judgment and Sentence should not be pronounced?

MR. CHALU: The Court having denied all my Motions before the Court, there is no legal reason why sentence cannot be pronounced, Your Honor.

THE COURT: Mr. Brown, the Court has considered the aggravating and mitigating circumstances presented and the evidence in this case it determines that sufficient aggravating circumstances exist, and there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

There being no legal cause shown why the Judgment and Sentence of the law should not be pronounced, the Court adjudges that you are guilty of the crime of first degree murder. It is the sentence of the Court that you be taken into custody by the Department of Corrections, and there at an appointed place and time be put to death.

May God have mercy on your soul.

You have an automatic appeal to the Supreme Court of Florida from the judgment of guilt and sentence the Court has imposed.

As to the Count for armed burglary, the Court finds clear and convincing reason to depart from the recommended guideline sentence, 17 to 22 years. One reason that the depart would be extent of the victim's injury, and there the Court is considering other reasons to depart which will all be in a prepared order that should be available within 24 hours.

As to that count, the Court will also adjudicate you guilty, and sentence you to life, to run consecutive to the sentence of life without possibility of parole for 25 years in the event that the death sentence is vacated on appeal.

As to the count of attempted murder in the first degree, the Court finds an additional reason to depart, besides that which I have previously mentioned, and may be others that the Court is considering at this time, but the reason to depart here in addition to the one previously stated would be that the crime was committed during the course of an armed burglary with the premeditated intent to commit murder.

The Court has also taken into consideration the

time and place of the offense, the victim's vulnerability, being 12 years old and female, and other factors that the Court will outline in its written order in this case.

As to that charge of attempted murder in the first degree, the Court also adjudicates you guilty, and sentences you to 30 years in the Florida State Prison consecutive to the life sentence imposed in the armed burglary count.

You are advised at this time, sir, that you have 30 days to appeal the judgment and sentence of this Court in reference to the armed burglary and attempted murder in the first degree. As stated before, written sentence of death, findings in support thereof, sentence on the two other counts, and the reasons for departure will be signed within the next 24 hours.

Is there any other business to come before this Court at this time?

MR. BENITO: No, sir.

THE COURT: Take him into custody.

(Whereupon the proceedings were concluded.)

STATE OF FLORIDA)

COUNTY OF HILLSBOROUGH)

I, BETTY M. LAURIA, Official Court Reporter for the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County.

DO HEREBY CERTIFY that I was authorized to and did, through my undersigned Deputy, report in shorthand the proceedings and evidence in the above-styled cause, as stated in the caption hereto, and that the foregoing pages, numbered 1 through 46, inclusive, constitute a true and correct transcript of my said Deputy's shorthand report of said proceedings and evidences.

IN WITNESS WHEREOF, I have hereunto set my hand in the City of Tampa, County of Hillsborough, State of Florida, this 18 day of June, 1987.

BETTY M. LAURIA
OFFICIAL COURT REPORTER

By: Sandra Satterwhite
Sandra Satterwhite
Notary Public
Deputy Official Court Reporter

My commission expires:
4-15-89

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