CAPITAL CASE

DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

KONSTANTINOS X. FOTOPOULOS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

APPENDIX

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APPENDIX

A

Appendix A: The unreported opinion of the Circuit Court in and for Volusia County denying Successive Motion for Postconviction under Florida Rule of Criminal Procedure 3.851 issued April 27, 2017.

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

v.

KONSTANTINOS X. FOTOPOULOS,

Defendant.
_____/

CASE NOS.: 1989-007632 CFAES
1990-001995 CFAES
1990-006668 CFAES

ORDER DENYING DEFENDANT'S FIRST SUCCESSIVE MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE

This matter came before the Court for consideration of the Defendant's "First Successive Motion to Vacate Judgment of Conviction and Sentence," filed on January 10, 2017. The Court, having considered the motion, the State's response, and the case management conference held on February 27, 2017 and on March 27, 2017, having reviewed the court file, and being fully advised in the premises, hereby finds as follows:

PROCEDURAL HISTORY

On October 25, 1990, after a jury trial, Defendant was convicted of two counts of first-degree murder, one count of conspiracy to commit first-degree murder, two counts of attempted first-degree murder, two counts of solicitation to commit first-degree murder, and one count of burglary of a dwelling while armed. The jury recommended a sentence of death by a vote of 8-4. The trial judge, upon the finding of aggravating and mitigating factors, imposed a death sentence on Defendant for each count of first-degree murder. On direct appeal, Defendant's sentence of death was affirmed. *Fotopoulos v. State*, 608 So. 2d 784 (Fla. 1992), *cert. denied*, 508 U.S. 924, 113 S.Ct. 2377, 124 L.Ed.2d 282 (1993). On May 17, 1993, the United States Supreme Court

denied Defendant's petition for certiorari. *Fotopoulos v. State*, 508 U.S. 924, 113 S.Ct. 2377, 124 L.Ed.2d 282 (1993).

On February 28, 1995, Defendant filed a motion for postconviction relief, which was denied by the trial court and affirmed on appeal. *Fotopoulos v. State*, 838 So. 2d 1122 (Fla. 2002). Defendant subsequently filed a petition for writ of habeas corpus under 28 U.S.C. §2254, which was granted in part and denied in part by the United States District Court. On appeal, the United States Circuit Court of Appeals for the Eleventh Circuit reversed the judgment of the district court. *Fotopoulos v. Sec'y, Dept. of Corr.*, 516 F.3d 1229 (11th Cir. 2008), *cert. denied,* 555 U.S. 899, 129 S.Ct. 217, 172 L.Ed.2d 171 (2008). Defendant's petition for writ of certiorari was denied. *Fotopoulos v. McNeil*, 555 U.S. 899, 129 S.Ct. 217, 172 L.Ed.2d 171 (2008). On January 10, 2017, Defendant filed the instant successive motion for postconviction relief in light of *Hurst v. Florida*, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016).

ANALYSIS & RULING

In his motion, Defendant claims that in light of *Hurst*, *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), his death sentences violate the Fifth, Sixth, Eight, and Fourteenth Amendments of the United States Constitution, and the corresponding provisions of the Florida Constitution.

The Florida Supreme Court has held that *Hurst*, which implicated *Ring* and *Apprendi*, should not be applied retroactively to defendants whose death sentences became final before the issuance of *Ring*, or before June 24, 2002. *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), *reh'g denied,* SC16-102, 2017 WL 431741 (Fla. Feb. 1, 2017). In the instant case, Defendant's death sentence became final on May 17, 1993, when the United States Supreme Court denied

Defendant's petition for writ of certiorari. Thus, Defendant is not entitled to relief under *Hurst* because his death sentence became final before *Ring*.

The undersigned judge has the utmost respect and admiration for the highest court of the state and is legally duty-bound to follow the law as specified in *Asay*. The undersigned judge, however, agrees with the dissenting opinions of Justice Pariente and Justice Perry in *Asay*, in that *Hurst* should be applied retroactively to all death sentences considering the finality of death and that "death is different." The retroactive application of *Hurst* to a certain date results in an arbitrarily drawn line for death sentences which became final before and after June 24, 2002. Nonetheless, as an officer of the court, I must follow the law of the land.

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that Defendant's motion is **DENIED**.

DONE AND ORDERED in DeLand, Volusia County, Florida, this 27 day of April, 2017.

JAMES R. CLAYTON
CIRCUIT JUDGE

Note: Defendant is advised that he has the right to appeal within 30 days of the rendition of this final order.

Copies to:

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Hon. Laura E. Roth, Clerk of the Circuit Court

APPENDIX

B

Appendix B: The opinion of the Florida Supreme Court affirming the denial of postconviction relief, reported at 237 So.3d 911 (Fla. 2018).

237 So.3d 911
Supreme Court of Florida.

Konstantinos X. FOTOPOULOS, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–971
|
[January 29, 2018]

Synopsis

Background: Defendant who had been sentenced to death filed a motion for collateral relief. The Circuit Court, Volusia County, Nos. 641989CF007632XXXAES, 641990CF001995XXXAES and 641990CF006668XXXAES, James R. Clayton, J., denied the motion. Defendant appealed.

[Holding:] The Supreme Court held that *Hurst v. State*, 202 So. 3d 40, which required a jury to unanimously find that aggravating factors were sufficient to impose death, did not apply retroactively to defendant's death sentence.

Affirmed.

Pariente, J., filed an opinion concurring in result.

Lewis and Canady, JJ., concurred in result.

An Appeal from the Circuit Court in and for Volusia County, James R. Clayton, Judge—Case Nos. 641989CF007632XXXAES, 641990CF001995XXXAES and 641990CF006668XXXAES

Attorneys and Law Firms

James Vincent Viggiano, Jr., Capital Collateral Regional Counsel, James L. Driscoll, Jr., David Dixon Hendry, and Gregory W. Brown, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida, for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Leslie T. Campbell, Senior Assistant Attorney General, West Palm Beach, Florida, for Appellee

Opinion

PER CURIAM.

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

Fotopoulos'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 Fotopoulos'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, Fotopoulos responded to this Court's order to show ***912** cause arguing why Hitchcock should not be dispositive in this case.

After reviewing Fotopoulos's response to the order to show cause, as well as the State's arguments in reply, we conclude that Fotopoulos is not entitled to relief. Fotopoulos's jury found him guilty of two counts of first-degree murder and recommended a sentence of death for both murders by a vote of eight to four. [1] Fotopoulos v. State, 608 So.2d 784, 787 (Fla. 1992). Following the jury's recommendations, the trial court sentenced Fotopoulos to death on both counts. Id. Fotopoulos's sentences of death became final in 1993. Fotopoulos v. Florida, 508 U.S. 924, 113 S.Ct. 2377, 124 L.Ed.2d 282 (1993). Thus, Hurst does not apply retroactively to Fotopoulos's sentences of death. See Hitchcock, 226 So.3d at 217. Accordingly, we affirm the denial of Fotopoulos's motion.

1 Although our decision affirming Fotopoulos's death sentences does not specify the number of Fotopoulos's jurors who voted to recommend death, he represents in his response to this Court's order to show cause that the jury recommended death for both murders by a vote of eight to four. Resp. to Order to Show Cause, Fotopoulos v. State, No. SC17–971, 2017 WL 4791738, at 2 (Fla. Oct. 17, 2017).

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

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

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

LEWIS and CANADY, JJ., concur in result.

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

237 So.3d 911, 43 Fla. L. Weekly S47

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APPENDIX

C

Appendix C: The February 26, 2018 Order of the Florida Supreme Court striking motion for rehearing.

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Supreme Court of Florida

MONDAY, FEBRUARY 26, 2018

CASE NO.: SC17-971
Lower Tribunal No(s).:
1989-7632, 1990-1995, 90-6668

KONSTANTINOS X FOTOPOULOS vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby stricken.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

tw
Served:

LESLIE T. CAMPBELL
DAVID DIXON HENDRY
JAMES L. DRISCOLL JR.
GREGORY W. BROWN
HON. JAMES R. CLAYTON, JUDGE
ROSEMARY CALHOUN
HON. LAURA E. ROTH, CLERK

APPENDIX

D

Appendix D. The unreported opinion of the United States District Court for the Middle District of Florida issued January 29, 2007. Case 6:03-cv-01578-GAP-KRS (Doc. 45)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

KONSTANTINOS X. FOTOPOULOS,

Petitioner,

-vs- **Case No. 6:03-cv-1578-Orl-31KRS**

JAMES V. CROSBY, JR., et al.,

Respondents.
_____/

ORDER

I. Introduction

On October 29, 1990, Konstaninos X. Fotopoulos ("Petitioner") was convicted in state court on two counts of first-degree murder, two counts of attempted first-degree murder, two counts of solicitation to commit first-degree murder, one count of conspiracy to commit first-degree murder, and one count of burglary of a dwelling while armed. Following the penalty phase, the jury returned a recommendation of death by a vote of eight to four. The state trial court sentenced Petitioner to two death sentences for the two first-degree murder convictions and six concurrent life sentences for the remaining convictions. Petitioner's appeals and petitions for post-conviction relief have been denied by the state courts. He now seeks relief in this Court pursuant to 28 U.S.C. § 2254, claiming that his federal constitutional rights have been violated. A hearing on his petition was held on October 27, 2006, at which the Court heard argument of counsel.

Petitioner has asserted sixteen claims for relief, several of which contain various sub-issues. After a review of the record and careful consideration of the pleadings, this Court determines that claims 1 through 9, 10(a) through 10(c), 10(e), 11(a) through (f), and 12 through 16 are without merit. However, this Court finds that claims 10(d) and 11(g) are meritorious; therefore, Petitioner is entitled to new sentencing proceedings. The rejected claims will be analyzed before consideration of the claims which entitle Petitioner to relief.

II. The Facts

The Supreme Court of Florida's opinion disposing of Petitioner's direct appeal set out the facts of the case, as follows:

> During the summer of 1989, Fotopoulos began an affair with Deidre Hunt, a bartender at Fotopoulos' bar. Hunt testified that one day in mid-to-late October 1989 [sic] Fotopoulos, Hunt, and Kevin Ramsey drove out to an isolated rifle range. According to her testimony, after they arrived Fotopoulos told Hunt she was going to have to shoot Ramsey or she would die. Ramsey, who had been led to believe he was being initiated into a club, was tied to a tree. While Fotopoulos videotaped, Hunt shot Ramsey three times in the chest and once in the head with a .22. Fotopoulos then stopped taping and shot Ramsey once in the head with an AK-47. According to testimony, Ramsey was chosen as the victim because he was blackmailing Fotopoulos concerning Fotopoulos' alleged counterfeiting activities. The videotape of Hunt shooting Ramsey was recovered from Fotopoulos' residence pursuant to a search warrant. The voice on the tape was identified as that of Fotopoulos.
>
> According to Hunt, Fotopoulos later used the videotape as leverage to insure that she would murder his wife, Lisa. Hunt was warned that if she did not cooperate the videotape of the Ramsey murder would be turned over to police. Hunt testified that Fotopoulos wanted Lisa dead so he could recover $700,000 in insurance proceeds. Fotopoulos later instructed Hunt that rather than kill Lisa herself she should hire someone to do the job. Prior to enlisting Bryan Chase to kill Lisa, Hunt offered three different individuals $10,000 to do the job. For various reasons, either the plans never materialized or the attempts to murder Lisa were unsuccessful. Chase then agreed to do the job for $5,000. He too botched several attempts to murder Lisa. However, on November 4, 1989, Chase entered the Fotopoulos home and shot Lisa once in the head. The shot was not fatal. After Chase shot Lisa, Fotopoulos shot Chase repeatedly in an attempt to make it appear that Chase was killed during a burglary.

> Fotopoulos and Hunt eventually were charged with two counts of first-degree murder, two counts of attempted first-degree murder, two counts of solicitation to commit first-degree murder, one count of conspiracy to commit first-degree murder, and one count of burglary of a dwelling while armed. Hunt pled guilty to all charges. She was given two death sentences prior to testifying at Fotopoulos' trial. *See Hunt v. State*, 1992 WL 289670, No. 76,692 (Fla. Oct. 15, 1992).
>
> Fotopoulos testified in his own defense. He acknowledged his relationship with Hunt, but maintained that he had nothing to do with Ramsey's murder. He stated that he had loaned Hunt his business partner's video camera and she later gave him a tape as a surprise but he never looked at it. He admitted shooting Chase, but denied that he knew Chase was coming to shoot Lisa.
>
> A jury found Fotopoulos guilty of all charges and recommended that he be sentenced to death for each murder. The trial court followed the jury's recommendation. In connection with the Ramsey murder, the court found that 1) Fotopoulos was previously convicted of another violent felony; 2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; and 3) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. As to the Chase murder, the court found the three aggravating factors found in connection with the Ramsey murder plus 4) the murder was committed while Fotopoulos was engaged or was an accomplice in the commission or an attempt to commit a burglary; and 5) the murder was committed for pecuniary gain. Although no statutory mitigating factors were found, the following nonstatutory mitigating factors were found as to both murders: 1) Fotopoulos was a good son; 2) he came from a good family; 3) he was hard-working; 4) he had good manners and he had a good sense of humor; and 5) he completed his education through the master's level. Fotopoulos was sentenced to concurrent life sentences in connection with the remaining convictions.

Fotopoulos v. State, 608 So. 2d 784, 786-87 (Fla. 1992).

III. The Prior Proceedings

Petitioner and Ms. Hunt were indicted on December 6, 1989, for two counts of first-degree murder, one count of conspiracy to commit first-degree murder, one count of attempted first-degree murder, and one count of solicitation to commit first-degree murder. On March 12, 1990, Petitioner and Ms. Hunt were charged with one count of armed burglary, one count of attempted murder, and one count of solicitation to commit first-degree murder.

On May 7, 1990, Ms. Hunt entered pleas of guilty to all the charges. The State and Ms. Hunt agreed to waive a jury for the penalty phase and agreed that any information that arose during Petitioner's trial could be used at her sentencing. At the change of plea hearing, counsel indicated that Ms. Hunt intended to testify truthfully at Petitioner's trial.

On July 24, 1990, ten days before Petitioner's trial was scheduled to begin, Ms. Hunt refused to appear at a deposition even after the State offered to grant her use immunity. As a result, the State filed a motion to set her sentencing. Ms. Hunt sought to withdraw her guilty plea, but was denied. The state trial court set a sentencing hearing for October 29, 1990. Upon motion by the State, the sentencing proceeding was subsequently moved to early September of 1990. Petitioner's trial was reset to October 1, 1990.

On August 31, 1990, Ms. Hunt filed a motion to dismiss counsel, which was denied. Ms. Hunt's sentencing proceeding began on September 4, 1990; and on September 13, 1990, the trial court sentenced her to death for the murders of Mark Kevin Ramsey and Bryan Chase. Ms. Hunt filed a motion for a new trial, which was denied on October 5, 1990.

Petitioner's trial commenced on October 1, 1990, and his trial counsel deposed Ms. Hunt on October 6, 1990. Ms. Hunt testified at Petitioner's trial between October 9, 1990, and October 11, 1990. A jury found Petitioner guilty of all charges and recommended that he be sentenced to death for each murder.

Petitioner appealed his convictions and sentences, and the Florida Supreme Court affirmed. *See Fotopoulos v. State*, 608 So. 2d 784 (Fla. 1992). The United States Supreme Court denied Petitioner's petition for writ of certiorari on May 17, 1993. *Fotopoulos v. Florida*, 508 U.S. 924 (1993).

Ms. Hunt also appealed her convictions and sentences. The Florida Supreme Court affirmed her convictions, but vacated her death sentences and remanded for resentencing. *See Hunt v. Florida*, 613 So. 2d 893, 894 (Fla. 1992).

Before Ms. Hunt's resentencing began, the Florida Supreme Court determined that Ms. Hunt's trial attorney had a material conflict of interest at the time she entered her pleas of guilty. Ms. Hunt's new counsel moved to withdraw the pleas, and the trial court granted the request.

Ms. Hunt's trial began on April 6, 1998, and on April 23, 1998, she was convicted by a jury on all counts. Ms. Hunt waived a jury trial in the penalty phase. On May 7, 1998, the trial court sentenced her to consecutive terms of life imprisonment on the two murder charges. Ms. Hunt appealed, and the appellate court affirmed. *See Hunt v. Florida*, 753 So. 2d 609 (Fla. 5th DCA 2000).

Petitioner filed a Florida Rule of Criminal Procedure 3.850 motion for post-conviction relief, which the state trial court denied. Petitioner appealed, and the Florida Supreme Court affirmed in part and remanded the case for the presentation of a proper Rule 3.850 motion for consideration by the trial court. *Fotopoulos v. State*, 741 So. 2d 1135 (Fla. 1999). On remand, Petitioner filed an amended Rule 3.850 motion in November of 1999. The state trial court held a hearing on the amended motion, and subsequently denied relief. Petitioner appealed, and the Florida Supreme Court affirmed. *See Fotopoulos v. State*, 838 So. 2d 1122 (Fla. 2002). Petitioner also filed a petition for writ of habeas corpus, which the Florida Supreme Court denied. *Id.*

IV. The State's Position in Ms. Hunt's Sentencing Proceedings

In opening statements during her first sentencing proceeding, the prosecutor argued that Ms. Hunt in a "cold[-]blooded and premeditated fashion took the lives of both Mark Kevin Ramsey and Bryan Chase." (Transcript of Deidre Hunt's September 4, 1990, Penalty Phase Hearing at 25-26.)

The State then presented various witnesses to support its contention that Ms. Hunt was not dominated by Petitioner and, in fact, acted in her own self-interest. Newman Lee Taylor, Lori Henderson, and Teja James all testified that Ms. Hunt participated in the killings for money and power.[1] Specifically, she killed Mr. Ramsey to prove to Petitioner that she could kill and to be able to assume the responsibility for killing Lisa Fotopoulos.

Richard Gilman, a New Hampshire police officer, testified that Ms. Hunt manipulated men, was never dominated, and was a leader. He also provided testimony regarding an incident when Ms. Hunt made a false rape report to avoid getting into trouble for her actions.

Dr. Robert Davis, a psychiatrist, testified that Ms. Hunt was an antisocial sociopath who had no conscience and did not feel guilt. He opined that Petitioner did not coerce Ms. Hunt to kill Mr. Ramsey and stated that sociopaths can usually withstand dominance. He also testified that Ms. Hunt was motivated by money, power, and position.

Dr. Umesh Mhatre, another psychiatrist, testified that Ms. Hunt was an antisocial sociopath who was not easily dominated. Based on the tape of the Ramsey murder and Ms. Hunt's quick, willing confession, Dr. Mhatre concluded that Ms. Hunt was not dominated by Petitioner.

Holly Ayscue, who worked with both Petitioner and Ms. Hunt, testified that Ms. Hunt was aggressive and had physically attacked her. She also stated that Petitioner had no control over Ms. Hunt, rather she told him what to do.

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[1]The testimony established that Lisa Fotopoulos had a substantial amount of life insurance that Petitioner planned to collect after her murder and that Ms. Hunt intended to benefit from the proceeds.

To contradict Ms. Hunt's assertion that Petitioner pointed a gun at her to force her to shoot Mr. Ramsey, the State presented evidence that the person who videotaped the Ramsey murder held the light in one hand and the camera in the other hand.

During closing argument at Ms. Hunt's first penalty phase proceeding, the prosecutor strenuously argued that Ms. Hunt was the ruler of her own destiny, who willingly chose to facilitate and participate in the murders:

> Deidre Hunt wanted money. She wanted what Kosta Fotopoulos[2] had to offer her and she chose her path. She chose to go with Kosta Fotopoulos. She chose to set about the cruel and heinous killings of these people. She chose her path clearly and precisely, coldly and calculatingly. Unfortunately for all of those involved in this case her path brings us to here. When Deidre Hunt chose her victims, she chose who would live and who would die. She chose the method and the manner of their deaths and how the pain would be inflicted upon them. She chose that those deaths would be violent and they would be of great pain and with great suffering. She chose in essence to be the messenger of death on one occasion, to lure Bryan Chase to his death knowing that he would be killed at the hands of Kosta Fotopoulos and she chose to be actually the bearer of death in the homicide of Mark Kevin Ramsey.

(Transcript of Deidre Hunt's September 13, 1990, Sentencing at 13-14.)

V. The Fotopoulos Trial, Ms. Hunt's Testimony, and the Prosecution's Contention Regarding Her Culpability

In his zealous effort to obtain the death penalty in Petitioner's trial, the same prosecutor painted an entirely different portrait of Ms. Hunt's relative culpability. Through the testimony of Ms. Hunt, who was a key witness against Petitioner, the prosecutor brought forth various incidents of domination and control of Petitioner over Ms. Hunt. In essence, Ms. Hunt was portrayed as a "battered woman" whose conduct was fueled by her fear of Petitioner.

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[2]A review of the record reveals that Petitioner's nickname was "Kosta."

Ms. Hunt testified that Petitioner pointed a machine gun at her and forced her to kill Mr. Ramsey. Through intimidation, which included threats to expose the videotape of the murder, Petitioner coerced her involvement in the plot to kill his wife and Mr. Chase. Ms. Hunt's testimony included the recounting of an incident, prior to the murders, when she attempted to leave, but was stopped when Petitioner put a gun to her ear and pulled the trigger.[3] She also testified that Petitioner threw knives at her "all the time" to see how close he could get without hitting her. (Exh. A-4 at 751.)[4]

During cross-examination, defense counsel attempted to impeach Ms. Hunt's credibility by implying that her testimony was fueled by the desire to reduce her sentence. In this effort, he elicited testimony from her that she had received a death sentence for each of the two murders. (Exh. A-6 at 1076.)

The prosecutor used Ms. Hunt's trial testimony during closing argument to portray Petitioner as the dominant culprit. In addition, he reminded the jury that notwithstanding the fact that

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[3]In arguing for the admissibility of this evidence, the prosecutor stated:

> [T]he testimony will reveal a significant beginning of a pattern of intimidation and terror inflicted upon the witness to terrorize her and break down her will ultimately and obtain complete control of her, ultimately resulting in her carrying out the various crimes with which she has pled guilty. Even though it does mention other criminal conduct of the defendant, it is not offered for that purpose. It is offered for the purpose to show a clear pattern of physical assault, abuse, intimidation and coercion and – and the direct and primary cause for Deidre Hunt's criminal activity.

(Respondents' Advance Appendix, Exhibit A-4 at 729.)

[4]References to the record will be made by citing to the particular volume and page of Respondents' Advanced Appendix. For example, "Exh. A-1 at 2" refers to page two of the volume labeled Exhibit A-1.

Petitioner's conduct caused her to suffer as a "battered woman," Ms. Hunt had received the death penalty for her role in the two murders. As acknowledged by the prosecutor during his rebuttal closing argument, this portrayal had a profound effect on the jury:

> Well, we know that one of the witnesses is on death row, already sentenced . . . Deidre Hunt. I saw some of your faces when you found out that she has the death penalty and I don't know that I didn't see some harsh looks over towards the prosecution, but you didn't know everything, you didn't know all that would be presented. The battered woman syndrome, I don't know that any man can ever understand it. I don't know that many women understand it unless they are subjected to it, but sometimes in our society women, particularly, become so victimized and so intimidated and so beat down over a period of time by events in their lives that finally they are totally manipulated by men beyond all reason and whether or not you want to believe that she was a fully, voluntary co-killer or whether she was the tool of her co-murderer makes very little difference. Her case is over. It's not your case to consider. The fact is, he put her up to it, he orchestrated it, he set it up and he fell [sic] it and she did it and then he finished the job.

(Exh. A-14 at 2734-35.)

VI. The Governing Legal Principles

Because Petitioner 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 (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 (2002); *see also Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (recognizing that the federal habeas court's evaluation of state-court rulings is highly deferential and that state-court decisions must be given the benefit of the doubt).

A. Exhaustion and Procedural Default

One procedural requirement set forth in the AEDPA precludes federal courts, absent exceptional circumstances, from granting habeas relief unless the petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842-22 (1999); *Picard v. Connor*, 404 U.S. 270, 275 (1971). Specifically, the AEDPA provides, in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1).

Thus, a federal court must dismiss those claims or portions of claims that have been denied on adequate and independent procedural grounds under state law. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In addition, a federal habeas court is precluded from considering claims that are not exhausted but would clearly be barred if returned to state court. *Id.* at 735 n.1 (stating that if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, there is a procedural default for federal habeas purposes regardless of the decision of the last state court to which the petitioner actually presented his claims).

In order to satisfy the exhaustion requirement, a state petitioner must "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." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (citing *Picard v. Conner*, 404 U.S. 270, 275-76 (1971)) (internal quotation marks omitted). The petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. *Snowden v. Singletary*, 135 F.3d 732 (11th Cir.), *cert. denied*, 525 U.S. 963 (1998). The United States Supreme Court has observed that "Congress surely meant that exhaustion be serious and meaningful." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). Furthermore, the Court explained that

> [c]omity concerns dictate that the requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court. Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claims on the merits.

Id.; *see also Henderson v. Campbell*, 353 F.3d 880, 898 n.25 (11th Cir. 2003) ("Both the legal theory and the facts on which the federal claim rests must be substantially the same for it to be the substantial equivalent of the properly exhausted claim.").

Procedural default will be excused only in two narrow circumstances. First, a petitioner may obtain federal review of a procedurally defaulted claim if he can show both "cause" for the default and actual "prejudice" resulting from the default. "To establish 'cause' for procedural default, a petitioner must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in the state court." *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). To establish "prejudice," a petitioner must show that there is at least a reasonable probability that the result of the proceeding would have been different. *Henderson*, 353 F.3d at 892 (citations omitted).

The second exception, known as the "fundamental miscarriage of justice," only occurs in an extraordinary case, where a "constitutional violation has probably resulted in the conviction of one

who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Actual innocence means factual innocence, not legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998). 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 (1995). In addition, "'[t]o be credible,' a claim of actual innocence must be based on [new] reliable evidence not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup*, 513 U.S. at 324).

B. Standard of Review Under the AEDPA

Pursuant to the AEDPA, habeas relief may not be granted with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim:

> (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 (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*, 127 S. Ct. 348 (2006). The meaning of the clauses was discussed by the Eleventh

Circuit Court of Appeals in *Parker v. Head*, 244 F.3d 831, 835 (11th Cir.), *cert. denied*, 534 U.S. 1046 (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.

If the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable." *Id.*

Finally, under § 2254(d)(2), a federal court may grant a 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 a factual issue made by a state court, however, shall be presumed correct, and the habeas petitioner shall have 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).

C. Standard for Ineffective Assistance of Counsel

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient

performance prejudiced the defense.[5] *Id.* at 687-88. A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* 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." *Id.* at 690; *Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir.), *cert. denied*, 493 U.S. 945 (1989).

As observed by the Eleventh Circuit Court of Appeals, 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.

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992) (citation omitted), *cert. denied*, 514 U.S. 1131 (1995). Under those rules and presumptions, "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).

It is well established that the right to effective counsel extends to a defendant's direct appeal. *Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir.), *cert. denied*, 469 U.S. 956 (1984). The Eleventh Circuit Court of Appeals has applied the United States Supreme Court's test for ineffective

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[5]In *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993), the United States Supreme Court clarified that the prejudice prong of the test does not focus solely on mere outcome determination; rather, to establish prejudice, a criminal defendant must show that counsel's deficient representation rendered the result of the trial fundamentally unfair or unreliable.

assistance at trial to guide its analysis of ineffective assistance of appellate counsel claims. *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991), *cert. denied*, 502 U.S. 1077 (1992); *Matire v. Wainwright*, 811 F.2d 1430, 1435 (11th Cir. 1987). Thus, in order to establish ineffective assistance of appellate counsel, Petitioner must show (1) that counsel's performance was deficient and "fell below an objective standard of reasonableness" and (2) that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687-88.

VII. The Claims Which Do Not Have Merit

A. Claims One, Two, Three, and Nine

In claims one through three and nine, Petitioner asserts various arguments that his rights under the United States Constitution were violated. Specifically, Petitioner argues: Respondents violated the Fourteenth Amendment by excluding African-Americans from the jury (claim one); the state trial court's refusal to sever count one of the indictment, the charge of first-degree murder of Mr. Ramsey, from the remaining counts of the indictment violated the Fifth, Sixth, Eighth, and Fourteenth Amendments (claim two); the introduction of certain evidence violated the Fifth, Sixth, Eighth, and Fourteenth Amendments (claim three); and the denial of the opportunity to interview jurors to determine if constitutional error occurred violated the First, Sixth, Eighth, and Fourteenth Amendments (claim nine). Respondents maintain that claims one, two, and three are procedurally barred because they were not raised as violations of federal law in the state courts. Additionally, Respondents contend that claim nine is procedurally barred because it was not raised on appeal from the denial of Petitioner's Rule 3.850 post-conviction motion.

Claims one, two, and three of the instant habeas petition were raised as state law claims on direct appeal from Petitioner's convictions and sentences. *See* Exh. B at 16-44. These claims,

however, were never raised as federal claims. Thus, all three claims are procedurally defaulted because the state court never had an opportunity to consider them.

Similarly, claim nine was not exhausted because Petitioner failed to appeal the denial of the claim. The failure to appeal the denial results in a procedural default. *See Leonard v. Wainwright*, 601 F.2d 807, 808 (5th Cir. 1979) (exhaustion requires not only the filing of a Rule 3.850 motion, but also an appeal of its denial); *see also Farrell v. Lane*, 939 F.2d 409, 410 (7th Cir.), *cert. denied*, 502 U.S. 944 (1991); *Smith v. Jones*, 923 F.2d 588 (8th Cir. 1991) (claims presented in post-conviction motion and not appealed were procedurally barred in subsequent federal habeas proceedings).

In the present case, Petitioner has neither alleged nor shown either cause or prejudice that would excuse the defaults. Likewise, Petitioner has neither alleged nor shown the applicability of the actual innocence exception. A review of the record reveals that Petitioner is unable to satisfy either of the exceptions to the procedural default bar. Therefore, claims one, two, three, and nine are procedurally barred.

B. Claim Four

According to Petitioner, he was denied due process of law and a fair trial when the state trial court overruled his objection and permitted the State to present hearsay testimony during the penalty proceedings. Specifically, Mr. James and Ms. Henderson testified that Mr. Ramsey told them that he knew things about Petitioner and was going to blackmail him. *See* Exh. A-18 at 3232-33 & 3241. This information was used to support a finding of the aggravating factor of "avoiding or preventing a lawful arrest" in determining Petitioner's death sentence.

Petitioner raised this claim on direct appeal as Point VIII, *see* Exh. B at 56-59 , but the Florida Supreme Court found that it "was not preserved by contemporaneous objection." *Fotopoulos*, 608 So. 2d at 792. Because the state court found that the claim was procedurally barred, the claim is also barred from consideration by this Court, unless one of the exceptions applies.

Petitioner states in a conclusory fashion that "trial counsel's failure to preserve this issue was ineffective assistance." (Doc. No. 18 at 21.) A claim of ineffective assistance of counsel may support a finding of cause only if counsel's performance was "so ineffective as to violate the Federal Constitution." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). Before ineffective assistance of counsel may serve as cause for a procedural default, the petitioner must be able to satisfy the two elements of the *Strickland* analysis. *Brownlee v. Haley*, 306 F.3d 1043, 1066 (11th Cir. 2002). Thus, if Petitioner "cannot prevail on a separate ineffective assistance of counsel claim, then he cannot prevail on an argument that ineffective assistance caused the procedural default." *Id.* In addition, the claim of ineffective assistance of counsel must have been "presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Murray*, 477 U.S. at 489. A procedurally defaulted claim of ineffective assistance of counsel may not serve as cause to overcome the procedural bar of a separate claim, unless Petitioner can satisfy the cause and prejudice standard with respect to the ineffective assistance of counsel claim. *Edwards*, 529 U.S. at 453.

A review of the record shows that Petitioner has not exhausted this ineffective assistance of counsel claim. Because it is procedurally defaulted, this claim cannot serve as cause to overcome the procedural bar of claim four. Petitioner is unable to satisfy either of the exceptions to the procedural default bar; therefore, claim four is procedurally barred.

C. Claim Five

Petitioner contends that his death sentence violates the Eighth and Fourteenth Amendments of the United States Constitution because he did not kill, attempt to kill, or intend that a killing take place or that lethal force be employed. In particular, Petitioner ascribes error to the trial court's failure to instruct the jury accordingly. Petitioner raised this claim in his direct appeal as Point IX, *see* Exh. B at 59-60. The Florida Supreme Court found that the claim was not cognizable on appeal because "[t]here was no objection to the instructions as given and no request for a special instruction." *Fotopoulos*, 608 So. 2d at 792. In addition, the Florida Supreme Court noted that the claim was without merit.

The Florida Supreme Court's determination that this claim was procedurally defaulted necessarily bars this Court's consideration of the same claim unless Petitioner satisfies one of the exceptions. Petitioner has not demonstrated either cause and prejudice or a fundamental miscarriage of justice.

Petitioner contends that this Court may reach the merits of claim five, notwithstanding the procedural default, because the state court ignored the default and decided the merits of the claim. This contention is flawed. Even if the state court also addressed the merits, this claim is still procedurally barred. The Eleventh Circuit Court of Appeals has specifically determined that "where a state court has ruled in the alternative, addressing both the independent state procedural ground and the merits of the federal claim, the federal court should apply the state procedural bar and decline to reach the merits of the claim." *Alderman v. Zant*, 22 F.3d 1541, 1549 (11th Cir.), *cert. denied*, 513 U.S. 1061 (1994). Claim five must be denied on procedural default grounds.

D. Claims Six and Seven

In claims six and seven, Petitioner asserts that his death sentences violate his rights under the Eighth and Fourteenth Amendments to the United States Constitution. Specifically, Petitioner argues: for the Ramsey death sentence, the "cold, calculated and premeditated and avoiding arrest aggravating elements are not supported by sufficient evidence to establish each beyond a reasonable doubt" (claim six); and for the Chase death sentence, the "during the commission of a felony and pecuniary gain aggravating elements are not supported by sufficient evidence to establish each" (claim seven). (Doc. No. 16 at 12-14; Doc. No. 18 at 24-30.) According to Petitioner, the absence of sufficient evidence regarding aggravating elements violates the Eighth and Fourteenth Amendments because it results in death sentences that are "standardless, overbroad and arbitrary." (Doc. No. 16 at 12-14.)

Respondents maintain that claims six and seven are procedurally barred because they were not raised as violations of federal law in the state courts. (Doc. No. 27 at 38-42.) Additionally, Respondents contend that Petitioner's argument regarding the "pecuniary gain aggravator" for the Chase death sentence "was not raised on direct appeal to the Florida Supreme Court." *Id.* at 42.

As noted *supra*, the United States Supreme Court has determined that in order to satisfy the exhaustion requirement, a state petitioner must "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." *Duncan*, 513 U.S. at 365. Under the law, Petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. Petitioner contends that this "procedural bar" is satisfied because claims six and seven were raised either specifically as federal issues in Points VIII, X, and XII of Petitioner's brief on direct appeal, or were "fairly presented" through Point XVI on direct appeal. (Doc. No. 35 at 7 & 17-18).

Petitioner argues further that his appellate counsel's citation to state law exclusively "does not mean that [Petitioner] was merely raising State law violations." (Doc. No. 35 at 6.)

As a preliminary matter, the Court notes that in Point VIII of Petitioner's brief on direct appeal he argued that the trial court erred in permitting the introduction of hearsay statements during the penalty phase. (Exh. B at 15 & 56-59.) This argument did not "fairly present" Petitioner's instant claim that the "avoiding arrest" aggravator was not "supported by sufficient evidence" with regard to the Ramsey murder. In contrast, Points X and XII of Petitioner's brief on direct appeal do correspond to claims six and seven of the instant petition; however, Points X and XII were raised by Petitioner, and were considered by the Florida Supreme Court, solely on state law grounds.[6] (Exh. B at 60-63); *see also Fotopoulos*, 608 So. 2d at 787 (summarizing sixteen claims raised on direct appeal, including Points X and XII that the trial court improperly found that the Ramsey homicide was committed in a cold, calculated, and premeditated manner and that the Chase murder was committed while Petitioner was engaged in a burglary).

Finally, a review of the arguments at Point XVI of Petitioner's direct appeal reveal that the constitutional arguments set forth in claims six and seven of the instant petition were not "fairly presented." *Compare* Exh. B at 67-77, *with* Doc. No. 18 at 24-30. Point XVI of Petitioner's brief

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[6]Petitioner's argument that this Court should disregard the fact that he cited only state law in support of Points X and XII ignores the fact that the remainder of his brief on direct appeal is replete with specific arguments that Petitioner's rights under the United States Constitution were violated. *See* Exh. B at 54-57 (citing federal case law and referencing due process rights in relation to points seven and eight) and 63 (arguing in support of point eight that "[u]nreasonable weighing of the same aspect of the offense also violates due process and the heightened reliability required in the death sentences by the Cruel and Unusual Punishment clauses as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.") Clearly, Petitioner's appellate counsel knew how to set forth a federal constitutional claim, and chose not to assert such claims in relation to Points X and XII. *See* Exh. B at 60-63.

on direct appeal recites a litany of perceived systemic problems with Florida's death penalty, including problems in appellate review, selection of counsel, and the absence of special verdicts, without reference to how and whether any specific problem impacted Petitioner's case. Petitioner himself describes the arguments as being "those made in virtually all death appeals, for which proper credit is acknowledged, and the arguments have been routinely denied." (Exh. B at 67 n.24.) Such generic arguments cannot be construed as a "fair presentation" of the constitutional arguments set forth as claims six and seven of the instant petition.

In short, a review of the record establishes that claims six and seven were not raised as federal claims at Points VIII, X, XII, or XVI as Petitioner asserts. Because claims six and seven were not fairly presented on direct appeal, the state court never had an opportunity to consider them; thus, the claims are procedurally defaulted. Similarly, Petitioner's argument regarding the "pecuniary gain aggravator" in claim seven was not exhausted because Petitioner failed to raise the issue in his direct appeal to the Florida Supreme Court.

Because Petitioner failed to present claims six and seven to the state court, this Court must disregard the claims unless he establishes the existence of either of the two exceptions to the procedural default bar. Petitioner has not done so. He has not alleged or shown that cause and prejudice exists to excuse the defaults, nor has he demonstrated any claim of actual innocence that might support the fundamental miscarriage of justice exception. Therefore, claims six and seven are procedurally barred.

E. Claim Eight

Petitioner avers that the jury's recommendations of death were constitutionally tainted by improper and inadequate instructions and that to the extent that his counsel failed to litigate and

preserve this claim he received ineffective assistance of counsel. Petitioner specifically finds error in three areas of the penalty phase instructions: (a) the jury was not given the "limiting constructions that the Florida Supreme Court has given [the] vague [cold, calculated, and premeditated] instruction to cure its unconstitutionality" (Doc. No. 18 at 31); (b) the instructions unconstitutionally shifted the burden of proof to Petitioner; and (c) the instructions unconstitutionally led the jury to believe that the responsibility for determining the appropriateness of Petitioner's death sentence rested elsewhere.

Claims 8(a) and (c) were raised on direct appeal in Point XVI. *See* Exh. B at 67-70. The Florida Supreme Court found that these two issues were procedurally barred because they were not presented to the state trial court. In addition, these two issues were determined to be without merit. *Fotopoulos*, 608 So. 2d at 794. All three issues were raised in Petitioner's amended Rule 3.850 motion, *see* Exh. M-1 at 761-65, 770-71, and the trial court rejected all three of them as procedurally barred and meritless. *See* Exh. M-3 at 1047-48, 1049. On appeal of the Rule 3.850 motion, Petitioner raised eight claims, only one of which is relevant to the analysis of this claim.

In his first appellate claim, Petitioner stated that the substantive components of these three issues were not being made within the appeal. He then merely cited the proposition that "one of the clear justifications for a Rule 3.850 motion is the ineffective assistance of counsel." (Exh. O at 26.) In deciding Petitioner's appeal, the Florida Supreme Court addressed this claim:

> In his first claim, that the trial court erred in finding that certain of his claims were procedurally barred, [Petitioner] presents absolutely no substantive issue for this Court to address. Therefore, we find that this claim is insufficiently presented for review and without merit.

Fotopoulos, 838 So. 2d at 1127 n.4.

Because these issues were found to be procedurally barred by the state courts, all three issues set forth in claim eight are also procedurally barred from consideration by this Court. Again, Petitioner has not shown either cause and prejudice or a fundamental miscarriage of justice. Therefore, claim eight must be denied.[7]

F. Claim Ten

Petitioner asserts that his trial counsel was ineffective for (a) not objecting to the reasons offered by the State to exclude two African-American jurors and for failing to preserve the issue for appeal; (b) not seeking to exclude the admission of a particular .38 caliber pistol into evidence; (c) not obtaining a transcript of Petitioner's pre-trial indigency hearing and for failing to properly advise Petitioner after reading it; (d) not challenging the State's case with Ms. Hunt's inconsistent testimony and the State's own arguments at Ms. Hunt's sentencing proceedings;[8] and (e) not contesting Petitioner's standing to challenge the purported illegal search resulting in the discovery of a brown bag containing the videotape of Mr. Ramsey's murder and nude pictures of Ms. Hunt and a black bag filled with weapons.

a. Issue (a)

Petitioner alleges that trial counsel was ineffective for failing to object to the State's factual reasons for dismissing African-American jurors and for failing to preserve the issue for appeal. The

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[7]Even if the ineffective assistance of counsel components of the claim were not procedurally barred, Petitioner would still not be entitled to relief on this claim. In addition to the procedural bar, the state court found the substantive portions of the claim to be meritless. Petitioner has not demonstrated that these findings were contrary to or an unreasonable application of clearly established federal law. Since the substantive claims are meritless, Petitioner is unable to satisfy the prejudice element of the *Strickland* analysis and his assertions of ineffective assistance of counsel must fail.

[8]Issue (d), which this Court finds to have merit, will be discussed in section VIII(A) of this Order.

Florida Supreme Court rejected this ineffective assistance of counsel claim because it had earlier determined (on direct appeal) that there was no merit to Petitioner's contention that the jurors were unconstitutionally excluded. *Fotopoulos,* 838 So. 2d at 1128 n.4 (citing *Fotopoulos v. State*, 608 So. 2d 784, 787-88 (Fla. 1992)). As such, any failure to object to the exclusion or to preserve the objection could not constitute ineffective assistance. *Id.*

The Florida Supreme Court determined, pursuant to state law, that there was no merit to Petitioner's claim that the State unconstitutionally used its peremptory challenges to exclude two African-American jurors. *Fotopoulos*, 608 So. 2d at 787-88. Because the prosecution gave race-neutral reasons for its challenge of these jurors, the juror exclusion issue was found to be meritless. *Id.* The record reflects that the prosecution's reasons for challenging these jurors were that they had family members who had faced or were facing criminal charges and one was opposed to the death penalty. The state court's determination that this claim was without merit is objectively reasonable. As such, trial counsel's failure to object to the State's proffered reasons for dismissing these jurors and failure to preserve the issue for appeal does not establish that counsel's performance was deficient or that Petitioner was prejudiced by counsel's performance.

b. Issue (b)

Petitioner asserts that his trial counsel was ineffective because he did not attempt to preclude the admission into evidence of a particular .38 caliber pistol. Petitioner contends that the probative value of the admission of the pistol was outweighed by its prejudicial effect.

The state court denied this claim, determining that Petitioner did not make a credible argument explaining why the pistol should have been suppressed, or what prejudice he suffered as a result of the pistol's admission into evidence. The state court noted that Ms. Hunt testified that the

pistol was an untraceable weapon that she planned to retrieve from its hiding place for use in the murder of Mrs. Fotopoulos. Therefore, facts were in evidence connecting the weapon to the Hunt-Fotopoulos conspiracy to murder Mrs. Fotopoulos. The state court concluded that Petitioner provided no theory under which the pistol was wrongfully admitted into evidence, and his trial counsel did not render ineffective assistance by not seeking to bar its admission. *Fotopoulos,* 838 So. 2d at 1130-31.

At trial, Matthew Chumbley testified that Ms. Hunt approached him about killing Mrs. Fotopoulos and during the course of their discussions Ms. Hunt told him that she would supply him with an unmarked .38 pistol. (Exh. A-9 at 1706-13.) Accordingly, evidence was admitted concerning the pistol and its potential use as the murder weapon in the conspiracy to murder Mrs. Fotopoulos. Petitioner has provided no basis why the admission of the pistol into evidence was improper, other than conclusory assertions that the prejudicial effect of the admission of the pistol outweighed its probative value.[9] The Court finds that Petitioner has not established that the prejudicial effect of the admission of the pistol outweighed its probative value. As such, counsel's failure to object to the admission of the pistol was not deficient performance. Moreover, in light of the evidence presented at trial, trial counsel's failure to object did not result in prejudice to Petitioner. Thus, the state court's determination is neither contrary to nor an unreasonable application of federal law.

c. Issue (c)

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[9]Petitioner did not raise this argument on appeal from the state trial court's denial of his Rule 3.850 motion.

The State used Petitioner's statements during a pre-trial indigency hearing to impeach him when he testified at trial. Petitioner asserts that his trial counsel was ineffective for failing to obtain a transcript of the hearing and for failing to properly advise him after reading it.

The Florida Supreme Court denied this claim because Petitioner failed to establish that he was prejudiced by counsel's failure to obtain the transcript or to request a recess to review it. The court noted that Petitioner "adamantly insisted that he be permitted to testify. As a result, the damaging evidence from his indigency hearing was certain to be used to impeach him during the State's cross-examination, regardless of his attorney's pretrial investigation, advice, or trial tactics." *Fotopoulos*, 838 So. 2d at 1128. The court concluded, that "even if the preparation and conduct of appellant's trial counsel were deficient, they were still irrelevant to the impeachment of Fotopoulos through the use of his prior testimony. This impeachment was unavoidable, even by a superb attorney." *Id.*

At the Rule 3.850 evidentiary hearing, trial counsel testified that he repeatedly advised Petitioner not to testify, but Petitioner insisted on taking the stand. (Exh. N-3 at 307-10.) Trial counsel further advised Petitioner that if he testified, the State would be permitted to impeach him. *Id.* at 310.

Despite trial counsel's advice, Petitioner insisted on testifying. Consequently, the state court's determination that Petitioner was not prejudiced by trial counsel's failure to obtain the indigency hearing transcript or to request a recess to review the transcript was not objectively unreasonable.

d. Issue (e)

Petitioner asserts that trial counsel was ineffective for failing to properly assert Petitioner's standing to challenge the purportedly illegal search that resulted in the discovery of a brown bag containing the videotape of Mr. Ramsey's murder and nude pictures of Ms. Hunt and a black bag filled with weapons. Petitioner contends, *inter alia*, that counsel erroneously failed to call Angelo Katsouleas to testify at the suppression hearing.

The Florida Supreme Court denied relief on this claim, stating:

> Fotopoulos's argument here is twofold. First, he asserts that an effective trial counsel would have located Angelo Katsouleas, a friend of Fotopoulos's, and had him testify that the brown bag seized from the family garage (inside of which the videotape was found) belonged to Fotopoulos. This testimony would have certainly assisted the defense in establishing the argument that Fotopoulos had a privacy interest in the contents of the bag -- an interest violated when the bag and its contents were seized by the police.
>
> On its face, this argument creates the impression that trial counsel must have fallen below acceptable standards by failing to obtain Katsouleas's name from his client. It is what Fotopoulos has failed to include in his argument, however, that is key here. When Fotopoulos and his counsel originally discussed the brown bag, *Fotopoulos told his attorney that the bag was not his.* It is absolutely untenable to assert now that trial counsel rendered ineffective assistance of counsel by not searching for witnesses to testify regarding Fotopoulos's ownership of the bag, when Fotopoulos himself foreclosed such investigation. Just as counsel will not be considered ineffective for honoring his client's wishes, he cannot be deemed ineffective for relying on his client's statements when he had no reason to doubt his client's veracity. Fotopoulos's trial attorney performed properly under the circumstances, despite initially laboring under a completely incorrect assumption. As Fotopoulos himself misled his trial counsel, he cannot be heard to complain now of the consequences which followed.
>
> The second argument advanced by Fotopoulos here is that the consent given the authorities by Mary Paspalakis and Lisa Fotopoulos to search their home following the attempted murder did not properly cover the two bags belonging to Fotopoulos that were located within the house. Since defense counsel failed to properly argue this in the trial court, Fotopoulos contends that he rendered ineffective assistance. The foundation for this assertion is primarily Justice O'Connor's concurring opinion in *United States v. Karo*, 468 U.S. 705, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984). There, Justice O'Connor stated that "[a] homeowner's consent to a

search of the home may not be effective consent to a search of a closed object inside the home." 468 U.S. at 725, 104 S.Ct. 3296 (O'Connor, J., concurring); *see also United States v. Basinski*, 226 F.3d 829 (7th Cir. 2000) (detailing the factors for deciding when third-party consent to search a closed container is valid). When applied to the instant case, however, the persuasive value of Justice O'Connor's words is significantly diminished. First, the brown bag was not closed when Detective Adamy looked inside it and spotted the videotape. Pursuant to the consent he had been given, the detective was looking through the garage area, where he spotted the videotape "in an open bag, like a satchel-type bag or something like that, which was unzipped." As the officer was in the home pursuant to the consent of two residents and observed the videotape in plain view, seizure was entirely proper. *See Illinois v. Rodriguez*, 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990); *Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). Because Fotopoulos's suppression arguments regarding the brown bag have no merit, we find no fault with trial counsel's failure to present them. *See Engle*, 576 So. 2d at 699-701; *Card*, 497 So. 2d at 1177.

With respect to the black bag that Fotopoulos had stowed in the family barbeque pit, the success or failure of a suppression effort here revolves around an analysis of whether the consent to search granted by Mrs. Paspalakis and Lisa Fotopoulos extended to properly cover this bag. In the absence of evidence showing that the owner of a closed container has affirmatively forbidden the possessor from consenting to a search, the law is clear that a person having joint control of a dwelling with an absent resident may validly consent to the search of all areas under mutual control. *See United States v. Matlock*, 415 U.S. 164, 170-71, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974).

In the hearing below, when Fotopoulos was asked about his living situation at the time of the search, the following exchange occurred:

> Q: And you had an agreement with your mother-in-law that you would stay in the [her] house until your other house was built and you would move out?
>
> A: Was built and finished, yes.

Clearly, from this anecdote, it appears that Fotopoulos and his wife were living in his mother-in-law's home. As residents of the home, both Mrs. Paspalakis and Mrs. Fotopoulos had the requisite authority to grant the police permission to search their home. *See Rodriguez*, 497 U.S. at 181, 110 S.Ct. 2793. In addition, Fotopoulos's description of the circumstances surrounding his storage of the black bag in the barbeque area makes it clear that he never forbade anyone to allow a search of it. Thus, Paspalakis and Fotopoulos had actual authority to consent to a search of

> the property, and gave their consent to the police. Under the Supreme Court's present jurisprudence, arguments in favor of suppression at trial would have failed; thus, counsel's failure to raise them is certainly not "outside the broad range of reasonably competent performance under prevailing professional standards." *Maxwell*, 490 So. 2d at 932.

Fotopoulos, 838 So. 2d at 1131-32 (footnotes omitted) (emphasis added).

The record reflects that Mrs. Fotopoulos and Mrs. Paspalakis consented to the search of the home where they and Petitioner resided. (Exh. A-16 at 3009-34; Exh. A-17 at 3047.) The law is clear that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *United States v. Matlock*, 415 U.S. 164, 170 (1974). Thus, Mrs. Fotopoulos and Mrs. Paspalakis, who lived in the home, had authority to consent to the search of the home.

The brown bag containing the videotape of Mr. Ramsey's murder and the nude pictures of Ms. Hunt was found in the garage and was open. (Exh. A-17 at 3038.) One of the officers who searched the house testified that when he looked at the bag, he was able to see inside it. *Id.* at 3037-38. Items that are in plain view and discovered subject to a valid consent to search are admissible into evidence. *See Illinois v. Rodriguez*, 497 U.S. 177 (1990). Furthermore, prior to the suppression hearing, Petitioner told his attorney that the brown bag did not belong to him. (Exh. N-2 at 237-38.) Accordingly, counsel had no basis to assert that Petitioner had the authority to prohibit the police from searching and seizing the brown bag. Nor did counsel have any reason to investigate or call witnesses concerning ownership of the brown bag.

With respect to the black bag found buried under the barbeque pit, Mrs. Fotopoulos testified that she saw Petitioner bury the bag in that area. (Exh. A-17 at 3049-50.) Furthermore, Petitioner admitted that Mrs. Fotopoulos saw him put the bag in the barbeque pit. (Exh. N-4 at 486.) Petitioner

never testified that he forbade Mrs. Fotopoulos from looking in the bag he buried. Given these circumstances, Mrs. Fotopoulos had authority to consent to the search of the barbeque pit and the black bag. Thus, the state court's determination that counsel was not ineffective regarding the suppression of the two bags and their contents was neither contrary to nor an unreasonable application of federal law.

G. Claim Eleven

Petitioner contends that prosecutorial misconduct rendered his convictions and sentences fundamentally unfair and unreliable. In particular, Petitioner states that the prosecutor (a) improperly argued that Petitioner was Greek and a trained terrorist; (b) falsely argued that $10,000.00 found in Petitioner's car was intended as payment for the murder of his wife; (c) coerced witnesses to testify against Petitioner; (d) linked Ms. Hunt's convictions to her relationship with Petitioner implying that because she was guilty, so was Petitioner; (e) vouched for Ms. Hunt's credibility and implied that God also vouched for her credibility; (f) suppressed evidence and offered false testimony; and (g) "unconstitutionally misrepresented the facts the very same prosecutors asserted at [Ms.] Hunt's penalty phase one month earlier, and . . . urged the jury to convict [Petitioner] and sentence him to death based on those misrepresented facts."[10] (Doc. No. 18 at 77.)

Issues (a) through (f) were raised in claim IV of Petitioner's amended Rule 3.850 motion. *See* Exh. M-1 at 751-60. The state trial court found that claim IV was procedurally barred. *See* Exh. M-3 at 1047. Petitioner then abandoned the prosecutorial misconduct arguments set forth in claim IV in

[10]Issue (g), which this Court finds to have merit, will be discussed in section VIII(B) of this Order.

his appeal of the trial court's order.[11] *See* Exh. O at 26. Thus, absent a showing of cause and prejudice or actual innocence, issues (a) through (f) of claim eleven are procedurally barred.

Petitioner appears to assert that ineffective assistance of counsel constitutes cause to excuse the procedural bar. As discussed earlier, a claim of ineffective assistance of counsel may support a finding of cause if counsel's performance was constitutionally deficient under the *Strickland* analysis. In addition, the particular claim of ineffective assistance of counsel must have been exhausted in the state courts before it can serve as cause to excuse a procedural default.

Petitioner did not exhaust this claim of ineffective assistance of counsel in state court. Therefore, he has not shown cause to excuse the procedural default. Furthermore, a review of the record reveals that Petitioner is unable to satisfy either of the exceptions to the procedural bar. Issues (a) through (f) of claim eleven are procedurally barred from consideration by this Court.

H. Claim Twelve

According to Petitioner, he is a citizen of both Greece and the United States. Because Greece has no death penalty, Petitioner contends that executing him would "violate the laws of Greece, as well as those of numerous international treaties, customary international law, jus cogens norms, and international comity." (Doc. No. 18 at 78.) He seeks to have his death sentences commuted to life imprisonment. In addition, he ascribes error to law enforcement's failure to provide him access to the Greek consulate upon his arrest.

Petitioner raised this claim in his amended Rule 3.850 motion. *See* Exh. M-1 at 777. The trial court found that the claim was procedurally barred because it could have been, but was not, raised

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[11]The failure to appeal the denial results in a procedural default. *Leonard*, 601 F.2d at 808.

on direct appeal. *See* Exh. M-3 at 1051. In addition, the trial court noted that the claim lacked merit. *Id.* On appeal, Petitioner abandoned this claim. *See* Exh. O at 26-27.

This claim is clearly procedurally barred from consideration by this Court. The trial court specifically determined that the claim was procedurally barred, and Petitioner failed to appeal the denial of the claim. Furthermore, Petitioner has not asserted either cause and prejudice or a fundamental miscarriage of justice to overcome the bar. Claim twelve must be denied.

I. Claim Thirteen

Petitioner argues that he received ineffective assistance of counsel because appellate counsel failed to raise the following issues on direct appeal: (a) that the State knowingly presented false and misleading testimony in violation of *Giglio v. United States*, 405 U.S. 150 (1971); (b) that trial counsel was ineffective for not admitting the State's judicial admissions at Ms. Hunt's trial; and (c) that evidence of Ms. Hunt's state of mind was improperly admitted into evidence.

a. Issue (a)

In essence, Petitioner is arguing that appellate counsel should have raised a due process claim regarding the prosecution's inconsistent positions at Ms. Hunt's sentencing and Petitioner's proceedings. This claim was raised in Petitioner's state petition for writ of habeas corpus as claim I(2). *See* Exh. S at 7-23. The Florida Supreme Court found that since the facts and argument underlying this claim were identical to those rejected during Petitioner's Rule 3.850 appeal, his claim of ineffective assistance of appellate counsel was without merit. *Fotopoulos v. State*, 838 So. 2d 1122, 1134 (Fla. 2002).

Petitioner has failed to demonstrate that his appellate counsel rendered ineffective assistance regarding this claim. Defense counsel did not raise a prosecutorial misconduct objection at trial

relating to this matter. Under Florida law, all errors, except fundamental errors, are waived unless timely raised in the trial court. *Clark v. State*, 363 So. 2d 331, 333 (Fla. 1978) ("[E]ven constitutional errors, other than those constituting fundamental error, are waived unless timely raised in the trial court."), *overruled in part, State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). "Prosecutorial misconduct constitutes fundamental error when, but for the misconduct, the jury could not have reached the verdict it did." *Miller v. State*, 782 So. 2d 426, 432 (Fla. 2nd DCA 2001).

Having reviewed the record, it does not appear that absent the alleged misconduct "the jury could not have reached the verdict it did." Therefore, this was not fundamental error and appellate counsel was not ineffective for failing to raise this issue.

b. Issue (b)

Petitioner next argues that appellate counsel should have raised "the obvious, on the record ineffective assistance of trial counsel. Trial counsel was ineffective for not admitting the state's judicial admissions at Hunt's trial." (Doc. No. 18 at 91.) In essence, Petitioner is arguing appellate counsel should have argued that trial counsel was ineffective for failing to use the State's arguments at Ms. Hunt's original sentencing proceedings regarding her role in the offenses to undermine the State's position at Petitioner's trial that he dominated and controlled Ms. Hunt.

Petitioner raised this issue in his state petition for writ of habeas corpus as claim I(3). *See* Exh. S at 24-26. The Florida Supreme Court found that the facts and arguments underlying the claim were identical to those set forth during Petitioner's Rule 3.850 appeal, which was denied. Therefore, the Court held that the habeas claim was without merit and procedurally barred. *Fotopoulos*, 838 So. 2d at 1134.

Under Florida law, generally, the adequacy of trial counsel's representation cannot be raised for the first time on direct appeal. *Bruno v. State*, 807 So. 2d 55, 63 (Fla. 2001). Instead, the proper vehicle for such a claim is through a motion for post-conviction relief pursuant to Rule 3.850. *Baker v. State*, 937 So. 2d 297, 299 (Fla. 4th DCA 2006). "An exception to the general rule exists where both counsel's deficient performance and the prejudice to the defendant are apparent on the face of the record." *Grant v. State*, 864 So. 2d 503, 505 (Fla. 4th DCA 2004).

In this case, the inadequacy of trial counsel that Petitioner asserts should have been raised on direct appeal was not apparent on the face of the record. To pursue trial counsel's failure to exploit the State's different positions at Petitioner's and Ms. Hunt's proceedings, Petitioner had to present evidence of the State's arguments during Ms. Hunt's sentencing proceedings. Thus, the inadequacy of counsel's performance was not "apparent on the face of the record" of Petitioner's trial. Furthermore, Petitioner was free to pursue this claim during the Rule 3.850 proceedings; therefore, he cannot show that appellate counsel's failure to pursue the argument prejudiced him.

c. Issue (c)

Petitioner argues that appellate counsel failed to challenge the improper admission of evidence regarding Ms. Hunt's state of mind. This issue was raised in Petitioner's state petition for writ of habeas corpus as claim I(4). (Exh. S at 26-30.) The Florida Supreme Court denied the claim on the merits. *Fotopoulos*, 838 So. 2d at 1134-35.

During the guilt phase of Petitioner's trial, Ms. Hunt testified that she attempted to leave Petitioner at one point before the murders. As she was packing her things, Petitioner appeared, told her she was not leaving, and directed her to unpack. When she failed to comply, he put a gun to her ear and "pulled the trigger – or I thought he did." (Exh. A-4 at 727-28.) Ms. Hunt then began to

unpack. As she was unpacking, she came across a picture of her ex-boyfriend, which Petitioner told her to rip up. When she refused, Petitioner backhanded her and stuck a gun to her cheek. She then ripped up the picture. *Id.* at 728.

After defense counsel objected, the State argued that the testimony showed a pattern of intimidation and terror designed to gain control over Ms. Hunt in order to facilitate her involvement in the charged criminal activities. The trial judge overruled the objection, stating that "[t]o the point that you [defense counsel] made in your opening statement that you contend that [Ms. Hunt is] the principal cause behind these crimes, I feel testimony regarding their relationship and her state of mind would be relevant. So, I think the relationship is one of the central issues in this case and will allow the question." *Id.* at 730.

After the objection was overruled, Ms. Hunt continued testifying about the incident involving Petitioner. She recounted how Petitioner bound her hands behind her neck with a wire coat hanger and burned her right breast with a cigarette. On that same occasion, he threatened to kill her if she told anyone. *Id.* at 731-32.

Petitioner contends that Ms. Hunt's state of mind was not relevant to prove the charges against him and that it was improperly admitted into evidence. He also argues that these collateral crimes against Ms. Hunt became a feature of the trial and that his convictions were likely based, in large part, on this testimony. Thus, he ascribes error to appellate counsel's failure to challenge the admission of the evidence.

Since the state court addressed this claim on the merits, federal habeas review is circumscribed by § 2254(d). In assessing Petitioner's habeas claims, the Florida Supreme Court did not specifically cite to any United States Supreme Court case for the standard to be applied.

However, in the portion of the order addressing Petitioner's Rule 3.850 appeal, the Court specifically cited *Strickland* as the standard for judging the adequacy of counsel's performance. *Fotopoulos*, 838 So. 2d at 1127-28. Thus, this Court presumes that the state court also utilized the *Strickland* standard in assessing the ineffective assistance of counsel claims set forth in the state habeas petition.[12] Therefore, the state court's decision is not contrary to established federal law.

Similarly, Petitioner cannot demonstrate that the state court's decision was an unreasonable application of *Strickland*. Even if this Court may have reached a different decision, it cannot be said that the reasoning set forth by the Florida Supreme Court was objectively unreasonable. As recognized by the state courts, Petitioner's defense involved shifting the blame to Ms. Hunt. The defense put the relationship between Ms. Hunt and Petitioner at issue, and evidence regarding the relationship and her state of mind was permissible. Furthermore, there is no showing that the evidence became a feature of the guilt phase of Petitioner's trial. Under the standards set forth in § 2254(d), Petitioner cannot prevail on this claim.

J. Claim Fourteen

Petitioner asserts that his death sentence is unconstitutional because (a) newly discovered evidence of Ms. Hunt's life sentence rendered his death sentence disparate and disproportionate, and (b) Florida's capital sentencing scheme, as applied to him, denied him equal protection. This claim was raised in Petitioner's amended Rule 3.850 motion as claim III. (Exh. M-1 at 746-51.) After conducting an evidentiary hearing, the state trial court rejected this claim, as follows:

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[12]This Court notes that the state court is not required to cite United States Supreme Court cases or even be aware of the cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002).

> This Court also rejects [Petitioner's] assertion that Deidre Hunt's 1998 re-sentencing to life imprisonment constitutes "newly discovered evidence" justifying a resentencing proceeding for [Petitioner]. As previously noted the evidence originally presented in this cause, and uncontroverted by any new evidence adduced by [Petitioner], demonstrates that [he] was the prime movant and dominant actor in the killings at issue. He carried the motive that caused the deaths of Mark Kevin Ramsey and Bryan Chase and the near death of his wife Lisa. Under the circumstances in this case [Petitioner] presents no basis for this court to determine under a "proportionality" analysis that a resentencing is warranted. [Petitioner] was the most culpable and the most deserving of the death penalty. See Jennings v. State, 718 So. 2d 144 (Fla. 1998). The overwhelming evidence of guilt adduced against [Petitioner] for the crimes at issue and the great weight of the numerous aggravating circumstances which exist against a minimum of mitigation does not warrant re-visiting [Petitioner's] death penalties.
>
> Here, unlike the case of Ms. Hunt, [Petitioner] did not come forth with evidence which assisted the State in the prosecution; rather, he held fast in his denial of any involvement against the overwhelming weight of the evidence. There was no evidence of Ms. Hunt's domination of [Petitioner] while there was arguable evidence to the contrary. Furthermore, [Petitioner] presents few if any mitigating circumstances compared to those asserted by his co-defendant in her separate sentencing proceeding. Recognizing that each sentencing proceeding is an individualized determination this court finds no basis for determining that the death penalties imposed on [Petitioner] were disproportional or otherwise provided any basis for relief.

(Exh. M-3 at 1055-56.) Petitioner appealed the denial of this claim, *see* Exh. O at 61-69, and the Florida Supreme Court found that the trial court's opinion that the roles Petitioner and Ms. Hunt each played in the murders justified the imposition of differing sentences was supported by competent evidence. Therefore, the Florida Supreme Court refused to substitute its view of the facts for that of the trial court, and the trial court's determination was affirmed. *Fotopoulos*, 838 So. 2d at 1134.

The Eleventh Circuit Court of Appeals has held:

> [A] federal habeas court should not undertake a review of the state supreme court's proportionality review and, in effect, "get out the record" to see if the state court's findings of fact, their conclusion based on a review of similar cases, was supported by the "evidence" in the similar cases. To do so would thrust the federal judiciary into the substantive policy making area of the state.

Moore v. Balkcom, 716 F.2d 1511, 1518 (11th Cir. 1983). In considering this claim, the state trial court conducted a proportionality analysis and determined that no resentencing was warranted. This procedure was not done arbitrarily or capriciously and provided an adequate safeguard of Petitioner's rights. This Court does not have the authority to infringe on the state court's determination. *See Bush v. Singletary*, 99 F.3d 373 (11th Cir. 1996) (finding that proportionality review based on the vacating of a co-defendant's death sentence was not required by the federal constitution); *see also United States ex rel. Thomas v. Haws*, No. 97 C 7992, 2002 WL 199778, at *4 (N.D. Ill. February 7, 2002) (stating that the petitioner's "complaint concerning the alleged disparity between his sentence and that of his co-defendant is not a basis for habeas relief").

K. Claim Fifteen

Petitioner asserts that Florida's death penalty statute, as applied in this case, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002). Specifically, Petitioner asserts that the judge, not the jury, made the necessary findings as to the aggravating factors which determined his eligibility for the death penalty. (Doc. No. 18 at 101-04.) Petitioner raised this basic claim in a petition for writ of habeas corpus filed with the Florida Supreme Court, Exh. S at 37-44, and the Court denied relief. *See Fotopoulos*, 838 So. 2d at 1136.

In *Ring*, the United States Supreme Court held that "a sentencing judge, sitting without a jury, [may not] find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609. Instead, "the Sixth Amendment requires that [those circumstances] be found by a jury." *Id.* However, *Ring* does not apply retroactively to cases which were already final on direct appeal at the time *Ring* was issued. *See Schriro v. Summerlin*, 542 U.S. 348, 358 (2004).

In the instant case, Petitioner's case became final on direct appeal in 1993, nearly ten years before the Supreme Court's decision in *Ring*. The holding in *Ring*, therefore, cannot be applied to this case, and this claim must be denied.

L. Claim Sixteen

Petitioner asserts that the combination of procedural and substantive errors deprived him of a fair trial and penalty phase. The Eleventh Circuit Court of Appeals has recognized that in reviewing a habeas petition, "[a] piecemeal review of each incident does not end our inquiry. We must consider the cumulative effect of these incidents and determine whether, viewing the trial as a whole, appellants received a fair trial as is their due under our Constitution." *United States v. Blasco*, 702 F.2d 1315, 1329 (11th Cir. 1983). After reviewing the guilt phase proceedings and considering the claims collectively, this Court cannot say that the guilt phase of Petitioner's "trial, as a whole, was fundamentally unfair and outside the bounds of the Constitution." *Conklin v. Schofield*, 366 F.3d 1191, 1210 (11th Cir. 2004). Therefore, this claim must be denied.

VIII. The Claims Which Do Have Merit

A. Claim Ten, Issue (d)

Petitioner contends that constitutionally effective counsel would have impeached the State's case with Ms. Hunt's inconsistent testimony and the State's own arguments at Ms. Hunt's sentencing proceedings. Specifically, Petitioner contends that at Ms. Hunt's sentencing the State portrayed her as a willful, cold-blooded murderer who was not dominated by Petitioner and who acted solely for her love of power and money.[13] In contrast, during Petitioner's trial, the State portrayed Petitioner

[13]As a consequence, Ms. Hunt was initially sentenced to death.

as the dominant force who used threats and physical assault to intimidate, coerce, and terrorize Ms. Hunt.

This issue was raised in Petitioner's amended Rule 3.850 motion as claim I(C). *See* Exh. M-1 at 717-22. After conducting an evidentiary hearing, the state trial court rejected this contention:

> Carmen Corrente [Petitioner's trial counsel] testified, without contradiction, that he did in fact attend Deidre Hunt's 1999 sentencing proceeding as part of his preparation for Mr. Fotopoulos' defense. In addition, he conducted a lengthy hours long deposition of Ms. Hunt prior to arriving at his trial strategy of dealing with Ms. Hunt through cross-examination. This Court finds that none of the evidence adduced at the evidentiary hearing in this cause could have led to a reasonable conclusion by the jury in this case that anyone other than [Petitioner] was the prime motivator, leader, and dominate [sic] member of this group of co-conspirators and bore prime responsibility for the deaths of Kevin Ramsey, Bryan Chase, and the attempted murder of Lisa Fotopoulos . . . .
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> Any evaluation of the ages of the parties involved, their respective educations, as well as their positions within the community, as well as a review of the evidence adduced as to [Petitioner's] ongoing criminal activities in counterfeiting, fascination with offensive weapons and his predilection for commando-like activities in hiding weapons and other paraphernalia around his home and in the woods, as well as his obvious motive in eliminating witnesses and affecting [sic] the death of the wife who was trying to divorce him and cut him off of his financial well-being, all point to [Petitioner], not Deidre Hunt, as the dominating influence in this reprehensible plan of multiple murders. Certainly, the physical evidence adduced in this case, the videotape with [Petitioner's] voice located at [his] home, the discovery of the spent cartridge apparently from the AK-47 in [Petitioner's] vehicle and the testimony from all of the coconspirators at the original trial dovetailed to present a picture of [Petitioner] as the instigator and cause of the deaths in this case. None of the co-conspirators called to testify by [Petitioner] at the evidentiary hearing in any way recanted their prior substantive testimony that it was in fact [Petitioner] who suggested, planned, and implemented the killings at issue; to the contrary they reaffirmed that prior sworn testimony.

(Exh. M-3 at 1053-54.) Petitioner appealed the denial of this issue, *see* Exh. O at 36-45, and the Florida Supreme Court affirmed the denial, finding that trial counsel had made a strategic decision not to use the information he received during Ms. Hunt's sentencing hearing. *Fotopoulos*, 838 So.

2d at 1130. As to witnesses that could have been called at trial, the Court found that the evidence offered at the hearing was extremely tangential information that even the most diligent investigator would not have uncovered. *Id.* In addition, the Court found that the probative and strategic value of the testimony at trial was extremely dubious. *Id.*

Because this issue was adjudicated on the merits in the state court, this Court may grant habeas corpus relief only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." *See* 28 U.S.C. § 2254(d)(1) and (2). In assessing Petitioner's ineffective assistance of counsel claims, the state trial court correctly utilized the standard set forth in *Strickland.* Accordingly, the state court's decision was not "contrary to" clearly established federal law. The next question, then, is whether the state court's application of *Strickland* was objectively unreasonable. *See Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) ("Where, as here, the state court's application of governing federal law is challenged, it must be shown to be not only erroneous, but objectively unreasonable.").

As a preliminary matter, this Court shares Florida Supreme Court Justice Lewis' "grave concerns as to the State's conduct during the trials of the separate but related Hunt and Fotopoulos charges." *Fotopoulos*, 838 So. 2d at 1137 (Lewis, J., concurring in result only). The United States Supreme Court has long recognized that a prosecutor's preeminent duty is not to win a case, but to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88 (1935). As a representative of the sovereign, a prosecutor must earnestly and vigorously prosecute actions; however, "while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from

improper method calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.*

In the instant case, it is clear that the State presented starkly inconsistent positions as to Ms. Hunt's relative culpability in the crimes. During her initial sentencing proceedings, the State vigorously argued that she was a cold-blooded, premeditated murderer who was not dominated or coerced by anyone. In contrast, at Petitioner's trial, the State presented evidence that he dominated and controlled Ms. Hunt to the point that she was essentially a "battered woman."

Based on the testimony at the Rule 3.850 hearing, there can be no doubt that Petitioner's trial counsel had ample bases upon which to establish the inconsistencies in the State's positions regarding Ms. Hunt's relative culpability. During the Rule 3.850 hearing, Officer Gilman confirmed his testimony from Ms. Hunt's first sentencing hearing. Bridget Riccio testified about a time she saw Ms. Hunt shoot another woman point blank without remorse. Ms. Hunt then made a deal with the prosecution in that case and named Ms. Riccio as the shooter. The charges against Ms. Riccio were ultimately dropped because the victim identified Ms. Hunt, rather than Ms. Riccio, as the shooter. Ms. Riccio also indicated that Ms. Hunt was manipulative and a leader, rather than a follower. She testified that she was interviewed extensively by Petitioner's trial counsel and was prepared to testify at trial, but was never called to do so.

Mr. Boisvert, Ms. Hunt's former boyfriend, testified that he never abused or mistreated her. He stated that she was manipulative and was not likely to be dominated.

Ms. Ayscue confirmed her testimony at Ms. Hunt's sentencing hearing that Ms. Hunt was aggressive and that Petitioner had no control over Ms. Hunt. She also testified that Ms. Hunt once pointed a gun at her.

Defense counsel testified at the Rule 3.850 hearing that he attended Ms. Hunt's sentencing hearing and acknowledged his awareness that the State portrayed Ms. Hunt as a cold-blooded killer who was not dominated or controlled by Petitioner. He stated that he did not call the witnesses who testified at Ms. Hunt's sentencing because he did not believe that the witnesses would have been as effective as watching and listening to the videotape of Ms. Hunt telling her story. He could not recall his thought process as to why he did not argue that the State was being inconsistent in its portrayal of Ms. Hunt's role in the murders. However, he did state that he did not think that Ms. Hunt's role in the murders was the major thrust of the State's case against Petitioner. It was more of a conspiracy theory -- Ms. Hunt and Petitioner were co-conspirators. Furthermore, he thought that Ms. Hunt was fairly impeached at trial and that her testimony was not as critical as some of the other evidence that was introduced.

This issue comes down to whether the state court's determinations that counsel made a strategic decision and that Petitioner was not prejudiced were objectively unreasonable. During the course of the Rule 3.850 hearing, defense counsel testified as to the extensive investigation and time he devoted to this case. He interviewed all the witnesses Petitioner now contends should have been presented to challenge Ms. Hunt's testimony. Defense counsel indicated that he felt that the best strategy was to impeach Ms. Hunt on cross-examination and let the jury judge her by watching the videotape of her telling her story. Strategic choices made after a thorough investigation are virtually unassailable. *Strickland*, 466 U.S. at 690.

Unlike counsel's choice to impeach Ms. Hunt via cross-examination, his failure to focus on the State's inconsistent portrayal of Ms. Hunt was not a "strategic decision." Rather, Petitioner's trial counsel inexplicably decided to ignore or abandon a critical opportunity to impeach the State's case

against Petitioner. The critical issue here is not of Petitioner's guilt, but rather his relative culpability from a sentencing standpoint. After determining Petitioner's guilt, a jury that "knew" Ms. Hunt had been dominated by Petitioner and nonetheless had received the death penalty had little rational choice but to impose that same penalty on Petitioner. And, as recognized by the prosecutor in his closing arguments, this information had a profound impact on Petitioner's jury. Even so, the jury vote to impose death was eight to four – a two-vote swing between life and death.

Petitioner's dominant role in the murders was a major theme of the State's case against him, especially in relation to the death sentence. Yet, defense counsel failed to exploit the blatantly inconsistent evidence offered by the State in the Ms. Hunt's case. Had defense counsel done so, it would not only have impeached Ms. Hunt's testimony, it would have brought into question the integrity and credibility of the prosecution itself. There can be no more powerful defensive tactic than the impeachment of one's opponent.[14] And defense counsel offered no particular explanation for declining to do so. Thus, it cannot be said that this was a mere strategic decision. Rather, it was a critical failure, and like Justice Lewis, this Court finds trial counsel's failure to pursue this line of attack to be outside prevailing professional standards. *Fotopoulos*, 838 So. 2d at 1139 (Lewis, J., concurring in result only). Therefore, the first prong of the *Strickland* standard has been satisfied, and the state courts' determination to the contrary was objectively unreasonable.

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[14]The powerful impact of such an approach is underscored by the state trial judge's findings regarding Ms. Hunt's resentencing. In determining that Ms. Hunt had established the mitigating circumstance of extreme duress or the substantial domination of another person, the trial court stated that the "defense offers as further evidence and virtual admissions by the State of this mitigating circumstance, statements made by the prosecution during the Fotopoulos trial . . . ." (Doc. No. 44, May 7, 1998, Judgement and Sentence of Deidre Michelle Hunt at 1220.)

With respect to the prejudice element, the State argues that, under either theory, Petitioner was the "general" and Ms. Hunt merely his "lieutenant" and therefore, regardless of whether the jury was aware of the contradictory characterizations of Ms. Hunt, it still would have found that Petitioner deserved the death penalty. However, there is a significant difference between a willing, enthusiastic lieutenant who chooses to cooperate with her leader, and one who has been brainwashed, threatened, and coerced into going along with the commands of a cruel and dominating general. Therefore, it seems at least reasonably probable that the presentation of the State's "blatantly inconsistent evidence and arguments," *Fotopoulos*, 838 So. 2d at 1139 (Lewis, J., concurring in result only), would have affected the jury, because it would have fundamentally changed the calculus concerning Petitioner's sentence. The prosecution's closing argument at least implied that Ms. Hunt received the death penalty *because* of Petitioner's actions. Ms. Hunt was portrayed as yet another victim -- not only had Petitioner abused and terrorized her, he was now, in essence, responsible for her death as well.[15] And if Petitioner's "victim" was being sentenced to death, how could any jury be expected not to sentence him to death as well?

The State argues that it could have successfully rebutted any attack by the defense because it only learned of Ms. Hunt's victimization after her sentence had been determined, when she was deposed. However, regardless of whether the State could have excused its contradictory arguments in this fashion, the revelation of these arguments to the jury would have cast the whole situation in a different light. Ms. Hunt's level of participation in the crimes would have been unclear, and her

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[15]During closing arguments, the prosecutor stated that "Deidre Hunt is much like the person who has had a bullet put to their chest and is lying there bleeding to death and knowing that she is about to go down to the count, points that accusing finger to the person that put her where she is." (Exh. 14 at 2683-84.)

death sentence may have been excused by misinformation. The presentation of this information could have fundamentally changed the jury's sentencing deliberations. Certainly, there is a reasonable probability that the additional information could have swayed the votes of two jurors. While this Court is reluctant to disagree with the findings of the Florida Supreme Court, it is simply unreasonable to say that the failure to undermine the State's theory of the crimes did not prejudice Petitioner at sentencing. Accordingly, this Court concludes that the failure to raise the State's inconsistent portrayal of Ms. Hunt constituted ineffective assistance of counsel.[16]

B. Claim Eleven, Issue (g)

Petitioner contends that the prosecutor "unconstitutionally misrepresented the facts the very same prosecutors asserted at Hunt's penalty phase one month earlier, and . . . urged the jury to convict [Petitioner] and sentence him to death based on those misrepresented facts." (Doc. No. 18 at 77.) This issue was raised in claim III of Petitioner's amended Rule 3.850 motion.[17] *See* Exh. M-1

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[16]This conclusion is only with regard to Petitioner's death sentences. This Court finds that the evidence of Petitioner's guilt was so overwhelming that counsel's failure regarding this issue caused Petitioner no prejudice in the guilt proceedings.

[17]Specifically, Petitioner's amended Rule 3.850 motion states:

> Government representatives took inconsistent positions on Hunt's dominance in the murders, depending on whether Hunt or [Petitioner] was on trial and the state's [sic] best interest to obtain a conviction and the ultimate punishment. During Hunt's sentencing, the state [sic] portrayed Hunt as an instigator and acting in her own best self[-]interests. The State vehemently argued Hunt was not dominated by [Petitioner], and she acted completely voluntarily for her own financial gain. The state [sic] presented evidence that Hunt actually devised some of the plans alone. During [Petitioner's] trial, however, the state [sic] portrayed Hunt as a meek abused girl who [Petitioner] terrorized and dominated. The state's [sic] intentional inconsistent argument violates the state's [sic] professional responsibility to seek the truth and

(continued...)

at 749-50. The state trial court rejected the merits of claim III. *See* Exh. M-3 at 1055-56. On appeal, the Florida Supreme Court affirmed the trial court's decision. *Fotopoulos*, 838 So. 2d at 1132-34.

The Eleventh Circuit Court of Appeals has recognized that separate prosecutions for the same crime under contradictory theories or inconsistent factual premises can implicate due process concerns. *United States v. Dickerson*, 248 F.3d 1036, 1043-44 (11th Cir. 2001), *cert. denied*, 536 U.S. 957 (2002). However, it appears that the mere presence of factual inconsistency alone is not sufficient to give rise to a due process violation. "To violate due process, an inconsistency must exist at the core of the prosecutor's cases against the two defendants for the same crime," and the inconsistency "must have rendered unreliable" the resulting conviction. *Clay v. Bowersox*, 367 F.3d 993, 1004 (8th Cir. 2004), *cert. denied*, 544 U.S. 1035 (2005).

The Court recognizes that the inconsistencies alleged in the instant case were presented in two different contexts. During Ms. Hunt's original sentencing, the prosecutor presented this evidence to rebut Ms. Hunt's attempt to establish the mitigating factors of duress/domination and her relatively minor role. At Petitioner's trial, the prosecutor presented contradictory evidence to establish Petitioner's dominant role in the murders, particularly the Ramsey murder. In both proceedings, the prosecutor asserted that Petitioner was the leader or captain and Ms. Hunt was his lieutenant.

Thus, it appears that the State's theory of the case regarding guilt was consistent -- Petitioner and Ms. Hunt were co-conspirators working together, and with others, to commit these crimes. Given

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[17](...continued)

> justice and [Petitioner's] rights under the Sixth, Eighth, and Fourteenth Amendments.

(Exh. M-1 at 749-750.)

the wealth of evidence against Petitioner, this Court finds that the evidence of the bad acts against Ms. Hunt cannot be said to have contributed to his guilty verdicts. The prosecutor's inconsistent positions were not at the core of the guilt phase case against Petitioner and did not render his convictions unreliable. *Compare Boyd v. United States*, 908 A.2d 39, 51-54 (D.C. 2006) (finding that the identity of the driver of the vehicle used to perpetuate various crimes did not go to the core of the Government's theory of the case; therefore, the prosecution's inconsistent presentations at the trials of two co-defendants as to which of them drove the vehicle did not violate due process).

A different conclusion, however, is warranted when the markedly inconsistent positions are considered in the context of Petitioner's penalty phase proceedings. The United States Supreme Court has recognized that a prosecutor's use of allegedly inconsistent theories may have a direct effect on a defendant's sentence. *Bradshaw v. Stumpf*, 545 U.S. 175 (2005). In *Stumpf*, the prosecution first tried Mr. Stumpf under the theory that he was the principal actor and had actually shot the victim. Based on evidence discovered after Mr. Stumpf was convicted and sentenced, the same prosecutor took the inconsistent position, in front of a different jury, that Mr. Stumpf's co-defendant was the principal actor in the shooting. *Id.* at 179-80. The co-defendant countered the argument by noting that the prosecution had taken a contrary position at Mr. Stumpf's trial and that Mr. Stumpf had already been sentenced to death for the murder. The co-defendant received a life sentence. *Id.* at 180. The United Supreme Court recognized that it was "at least arguable that the sentencing panel's conclusion about the petitioner's role in the offense was material to its sentencing determination" and remanded the case to determine what impact the State's inconsistent positions had on Mr. Stumpf's sentence and whether the imposition of the death penalty violated due process. *Id.* at 186-188.

In the instant case, the sentencing jury was well aware of Petitioner's bad acts against Ms. Hunt. In addition, the same jury was also reminded that Ms. Hunt, who was in essence another of Petitioner's victims, had already been sentenced to death for her role in the murders. As noted earlier, this information clearly had a profound impact on the jury. This Court concludes that the inconsistencies were at the core of the State's penalty phase case and rendered Petitioner's death sentences unreliable. Consequently, this Court finds that the prosecutor's misconduct regarding this matter amounted to a due process violation which prejudiced Petitioner's right to a fair sentencing proceeding.

IX. Conclusion

This Court finds that two of the claims raised in the instant petition have merit – Petitioner's claims that he was denied the effective assistance of counsel during the sentencing phase of his trial (claim 10(d)) and his claim that prosecutorial misconduct rendered his sentence unfair and unreliable (claim 11(g)). Any of Petitioner's allegations not specifically addressed herein are determined to be without merit.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Amended Petition for Writ of Habeas Corpus filed by Konstaninos X. Fotopoulos (Doc. No. 16) is **GRANTED in part and DENIED in part**.

2. The Court determines that claims 1 through 9, 10(a) through 10(c), 10(e), 11(a) through 11(f), and 12 through 16 are without merit and that habeas relief is **DENIED** with regard to those claims.

3. The writ of habeas corpus will be conditionally **GRANTED** with regard to claims 10(d) and 11(g), for the reasons discussed above, within **NINETY (90) DAYS** from the date of this

Order, unless the State of Florida initiates new sentencing proceedings in state court consistent with the law.

4. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

DONE and **ORDERED** in Orlando, Florida on January 29, 2007.

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record

APPENDIX

E

Appendix E. The opinion of the United States Circuit Court of Appeals for the Eleventh Circuit reported at 516 F.3d 1229 (11th Cir. 2008).

516 F.3d 1229
United States Court of Appeals,
Eleventh Circuit.

Konstantinos X. FOTOPOULOS, Petitioner–Appellee,
v.
SECRETARY, DEPARTMENT OF CORRECTIONS, Attorney General, State of Florida, Respondents–Appellants.

No. 07–11105.
|
Feb. 14, 2008.

Synopsis

Background: Following affirmance, 608 So.2d 784, of state convictions for first-degree murder and related offenses, and sentence of death, and following exhaustion of state postconviction remedies, state prison inmate sought federal habeas relief. The United States District Court for the Middle District of Florida, No. 03-01578-CV-GAP-KRS, Gregory A. Presnell, J., granted petition, and state appealed.

Holdings: The Court of Appeals, Pryor, Circuit Judge, held that:

[1] defendant's trial attorney's failure to challenge state's inconsistent theories as to defendant's domination of codefendant was not ineffective assistance, and

[2] state court's finding of no due process violation in inconsistent theories of prosecution was not contrary to clearly established federal law.

Reversed and rendered.

Attorneys and Law Firms

***1230** Kenneth Sloan Nunnelley, Dept. of Legal Affairs, Daytona Beach, FL, for Respondents–Appellants.

James L. Driscoll, Jr. (Court–Appointed), Capital Collateral Regional Counsel–Middle Region, Tampa, FL, for Fotopoulos.

Appeal from the United States District Court for the Middle District of Florida.

Before BIRCH, BLACK and PRYOR, Circuit Judges.

Opinion

***1231** PRYOR, Circuit Judge:

The two issues in this appeal by the Secretary of the Department of Corrections of Florida involve whether the Supreme Court of Florida unreasonably applied clearly established federal law when it upheld the death sentence of Konstantinos X. Fotopoulos entered after the State of Florida had presented an allegedly inconsistent theory of Fotopoulos's relative

culpability in a co-conspirator's sentencing trial. The district court granted a writ of habeas corpus on two grounds: (1) Fotopoulos's trial counsel rendered ineffective assistance by failing to impeach the inconsistent theories presented by the State of Florida; and (2) the use of the inconsistent theories by the State of Florida violated Fotopoulos's right to due process. The district court reached its conclusion by revisiting, without so stating, the finding of fact by the Florida courts that Fotopoulos's counsel made a strategic decision. The district court then concluded that Fotopoulos's right to due process was also violated even though the Supreme Court of the United States has never held that the prosecution of two defendants based on inconsistent theories violates due process. We disagree with the decision of the district court on both grounds and conclude that the decision of the Supreme Court of Florida was not objectively unreasonable. We reverse and render judgment in favor of the Secretary.

I. BACKGROUND

In 1989, Fotopoulos and Deidre Hunt, with whom Fotopoulos was having an extramarital affair, escorted Kevin Ramsey to an isolated rifle range. At the rifle range, Fotopoulos and Hunt tied Ramsey to a tree. Hunt, at the direction of Fotopoulos, shot Ramsey three times in the chest with a twenty-two-caliber rifle. Fotopoulos recorded the shooting on a videotape, but later stopped the recording and shot Ramsey in the head with an AK–47 assault rifle.

Fotopoulos used the videotape of Ramsey's murder to force Hunt to arrange the murder of Fotopoulos's wife, Lisa. Hunt eventually hired Bryan Chase to murder Lisa for $5000. Chase entered the Fotopoulos home and shot Lisa once in the head. Fotopoulos then shot Chase repeatedly and killed him. Lisa survived the attempted murder. Fotopoulos and Hunt were indicted on two counts of first-degree murder, two counts of attempted first-degree murder, two counts of solicitation to commit first-degree murder, one count of conspiracy to commit first-degree murder, and one count of burglary of a dwelling while armed.

Hunt pleaded guilty to all charges. In her initial penalty proceeding, which occurred before Fotopoulos's trial, Hunt argued that her involvement in these crimes was the result of domination and torture by Fotopoulos. The State of Florida responded that Hunt's involvement in these crimes was the result of her love for power and money and not domination by Fotopoulos. Hunt was sentenced to death on September 13, 1990. Hunt eventually received a new trial and was sentenced to life in prison on May 7, 1998.

Fotopoulos's trial began on October 1, 1990. The State argued that Fotopoulos was the mastermind behind the murders of both Ramsey and Chase and the attempted murder of Lisa. The State argued that Fotopoulos dominated Hunt. The jury found Fotopoulos guilty of all charges and recommended a sentence of death. The trial court sentenced Fotopoulos to death.

Fotopoulos's conviction was affirmed on direct appeal. Fotopoulos filed a motion under Florida Rule of Criminal Procedure 3.850 that sought collateral relief. After an evidentiary hearing, in which Carmen Corrente, Fotopoulos's trial counsel, testified, ***1232** the trial court denied the motion and the Supreme Court of Florida affirmed. Fotopoulos also filed a state habeas petition that was denied.

Fotopoulos filed a petition for a writ of habeas corpus in federal district court. 28 U.S.C. § 2254. The district court granted Fotopoulos habeas relief on two grounds. First, the district court held that Fotopoulos's trial counsel was ineffective because Corrente failed to utilize the inconsistent domination theories presented by the State to impeach the case of the State. Second, the district court held that the inconsistent positions by the State violated the Due Process Clause of the Fourteenth Amendment.

II. STANDARDS OF REVIEW

[1] We review the grant of habeas corpus relief by the district court *de novo. Sims v. Singletary,* 155 F.3d 1297, 1304 (11th Cir.1998) (citing *Byrd v. Hasty,* 142 F.3d 1395, 1396 (11th Cir.1998)). Fotopoulos's habeas petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996, "which limits our review of the decisions of the state courts and establishes a 'general framework of substantial deference' for reviewing 'every issue that the state courts have decided.' " *Crowe v. Hall,* 490 F.3d 840, 844 (11th Cir.2007) (quoting *Diaz v. Sec'y for the Dep't of Corr.,* 402 F.3d 1136, 1141 (11th Cir.2005)). We will affirm the decision of the Supreme Court of Florida unless its decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), or there was an "unreasonable determination of the facts," *id.* § 2254(d)(2). "[A] determination of a factual issue made by a State court [is] presumed to be correct. The applicant [has] the burden of rebutting the presumption of correctness by clear and convincing evidence." *Id.* § 2254(e)(1); *Marquard v. Sec'y for the Dep't of Corr.,* 429 F.3d 1278, 1303 (11th Cir.2005).

[2] **[3]** **[4]** "The 'contrary to' and 'unreasonable application' clauses of § 2254(d)(1) are separate bases for reviewing a state court's decisions." *Putman v. Head,* 268 F.3d 1223, 1241 (11th Cir.2001) (citing *Williams v. Taylor,* 529 U.S. 362, 404–05, 120 S.Ct. 1495, 1519, 146 L.Ed.2d 389 (2000)). "A state court decision is 'contrary to' clearly established federal law if either (1) the state court applied a rule that contradicts the governing law set forth by Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached in a Supreme Court case." *Id.* (citing *Bottoson v. Moore,* 234 F.3d 526, 531 (11th Cir.2000)). The decision of the Florida court is an "unreasonable application" of federal law if the state court applied the correct legal rule from the Supreme Court in an "objectively unreasonable" manner. *Woodford v. Visciotti,* 537 U.S. 19, 25, 123 S.Ct. 357, 360, 154 L.Ed.2d 279 (2002). The federal case law relevant to this analysis is Supreme Court precedent "in existence at the time the conviction became final." *Schwab v. Crosby,* 451 F.3d 1308, 1324 (11th Cir.2006), *cert. denied,* 549 U.S. 1169, 127 S.Ct. 1126, 166 L.Ed.2d 897 (2007).

III. DISCUSSION

Both issues in this appeal involve the inconsistent positions of the State of Florida in the trials of Hunt and Fotopoulos regarding whether Fotopoulos dominated Hunt. First, we consider whether Corrente was ineffective when he failed to impeach the case of the State with the inconsistent theories. Second, we consider whether the use by the State of the inconsistent theories violated Fotopoulos's right to due process.

*1233 *A. Ineffective Assistance of Counsel*

The Secretary of Corrections contends that the district court did not defer, as required by section 2254(d)(2), to the finding of the Supreme Court of Florida that Corrente made a strategic decision not to challenge the inconsistent theories of the State of Florida regarding whether Fotopoulos dominated Hunt. Fotopoulos responds that Corrente was ineffective for failing to challenge the inconsistent theories of the State and the district court correctly concluded that the application of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), by the Florida courts was "objectively unreasonable." We agree with the Secretary.

[5] The Supreme Court of Florida rejected Fotopoulos's argument that his trial counsel was ineffective for failing to impeach the theory of the State because it found that trial counsel "simply made a strategic decision" not to use that information. *Fotopoulos v. State,* 838 So.2d 1122, 1130 (Fla.2003). "The question of whether an attorney's actions were actually the product of a tactical or strategic decision is an issue of fact, and a state court's decision concerning that issue

is presumptively correct." *Provenzano v. Singletary,* 148 F.3d 1327, 1330 (11th Cir.1998). The Supreme Court of Florida also held that, because the strategic decision by Corrente was reasonable, Corrente's performance was not deficient. *Fotopoulos,* 838 So.2d at 1130. This application of *Strickland* was reasonable. As the district court stated in its order, "Strategic choices made after a thorough investigation are virtually unassailable." *See Strickland,* 466 U.S. at 690, 104 S.Ct. at 2066.

[6] Under the guise of concluding that the Supreme Court of Florida had unreasonably applied *Strickland,* the district court, without so stating, substituted an alternative reading of the factual record for the finding of the Supreme Court of Florida. During the evidentiary hearing of his motion for post-conviction relief under Rule 3.850, Fotopoulos asked Corrente, "Why not make the argument that the State is not being consistent here?" Corrente responded, "I don't really recall the thought process on that. I can't answer that." Relying on this testimony, the district court found that Corrente's "failure to focus on the State's inconsistent portrayal of Ms. Hunt was not a 'strategic decision.' " The district court did not mention whether or how Fotopoulos had presented "clear and convincing evidence" to rebut the factual finding of the Supreme Court of Florida that Corrente made a strategic decision. 28 U.S.C. § 2254(e)(1).

A review of Corrente's entire testimony, instead of the snippet relied upon by the district court, amply supports the finding of the Supreme Court of Florida that Corrente made a strategic decision. Corrente explained that the domination theory was not a central component of the case against Fotopoulos; Corrente presented evidence that rebutted the domination theory; and the domination theory of the State was not necessarily inconsistent with the theory advanced in Hunt's sentencing proceeding. Corrente testified that Fotopoulos's suggestion that he should have rebutted the domination theory "presupposes that [the State] was really trying to prove that [Fotopoulos] dominated [Hunt]. I don't think that that's how it came down in our trial." Corrente did not think that the domination theory "was a major thrust of [the State's] case." Corrente testified that "any emphasis placed on the fact that she was dominated ... was rebutted by a lot of other evidence." He "thought the evidence in the video tape and the other evidence in the trial disproved that theory on its own." Corrente also did not perceive the two theories as necessarily inconsistent. He "felt that the theory of the prosecution in [Hunt's sentencing] fit the ***1234** evidence that they presented and that there was another interpretation."

The Supreme Court of Florida reasonably concluded that Corrente's "strategic" decision was not deficient performance. Evidence that the State presented inconsistent theories, on the one hand, would have detracted from Fotopoulos's main defense of actual innocence in the guilt phase of his trial. Had Fotopoulos introduced evidence in his trial that the State argued at Hunt's sentencing that she was not controlled by Fotopoulos, that evidence still would have confirmed that the State consistently argued in both trials that Fotopoulos had a role in the murders. If Corrente had challenged the inconsistent theories, on the other hand, in the penalty phase, which did not focus on the alleged domination, Corrente would have opened the door for the State to review all of the evidence of Fotopoulos's domination of Hunt that had been successfully advanced during the guilt phase. Corrente reasonably believed that in the guilt phase he had sufficiently rebutted the domination theory but that in the penalty phase the subject was better left alone. In the light of this record, we cannot say that the decision of the Supreme Court of Florida was an unreasonable application of *Strickland.*

[7] **[8]** Even if we were to assume that Corrente's assistance was deficient, Fotopoulos has not established that he was prejudiced. Fotopoulos argues that the jury, if presented with the inconsistent theories of the State, may not have recommended a sentence of death, but the Supreme Court instructs us to "consider the totality of the evidence before the judge or jury" when evaluating whether deficient performance has prejudiced a defendant. *Strickland,* 466 U.S. at 695, 104 S.Ct. at 2069. The deficient performance is prejudicial if "there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. Fotopoulos does not dispute that he was the "prime motivator" and "bore prime responsibility" for two murders and the attempted murder of his wife. *Fotopoulos,* 838 So.2d at 1129. Our confidence in Fotopoulos's sentence of death is not undermined when he does not dispute his primary responsibility for the orchestration of these bizarre and grisly crimes.

B. Due Process Violation

[9] The Secretary of Corrections argues that the district court compounded its error when it concluded that the State had violated Fotopoulos's right to due process by presenting inconsistent theories about Fotopoulos's domination of Hunt in the trials of Fotopoulos and Hunt. The Secretary contends that the decision of the Supreme Court of Florida was not contrary to "clearly established" federal law. Fotopoulos responds that *Berger v. United States,* 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), supports the decision of the district court that the inconsistent theories of the State violated his right to due process. Again, we agree with the Secretary.

The district court concluded that the use by the State of inconsistent theories was prosecutorial misconduct that "amounted to a due process violation." In support of its conclusion, the district court relied on the decisions of circuit courts and the decision of the Supreme Court in *Bradshaw v. Stumpf,* 545 U.S. 175, 125 S.Ct. 2398, 162 L.Ed.2d 143 (2005). This analysis is contrary to our precedents.

[10] "Clearly established federal law 'refers to the holdings, as opposed to the dicta, of the Supreme Court's decisions as ***1235** of the time of the relevant state court decision.' " *Putman,* 268 F.3d at 1241 (quoting *Williams,* 529 U.S. at 412, 120 S.Ct. at 1523 (alterations omitted)). Fotopoulos's conviction became final on May 17, 1993. *Fotopoulos v. Florida,* 508 U.S. 924, 113 S.Ct. 2377, 124 L.Ed.2d 282 (1993) (denying cert.). It is fanciful to suggest that the decision of the Supreme Court of Florida was somehow "contrary to ... clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), when the only decision of the Supreme Court of the United States mentioned by the district court was decided twelve years later. Moreover, the *Bradshaw* Court did not hold that the use of inconsistent theories in the prosecution of two defendants violates the right to due process.

After the Secretary filed a motion for the district court to amend its judgment, Fed.R.Civ.P. 59(e), the district court recognized its error and referenced *Berger v. United States,* 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), as the decision of the Supreme Court that supported its conclusion. This post-hoc rationale also failed to give the proper deference to the decision of the Supreme Court of Florida. In *Berger,* the Supreme Court ordered a new trial after it determined that the prosecutor had struck "foul" blows. *Id.* at 88, 55 S.Ct. at 633. The Court described the conduct of the prosecutor as "indecorous and improper" because he, among other things, bullied witnesses and misstated facts, but the *Berger* Court did not mention any issue about the use of alleged inconsistent theories. *Id.* at 84, 55 S.Ct. at 631.

The conduct of the State in this appeal is in no way similar to the misconduct of the prosecutor in *Berger.* Moreover, as Justice Thomas explained in his concurrence in *Bradshaw,* "[the Supreme] Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories." 545 U.S. at 190, 125 S.Ct. at 2409 (Thomas, J. concurring). For that reason, we cannot say that the decision of the Supreme Court of Florida "was contrary to ... clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

IV. CONCLUSION

The judgment of the district court is REVERSED and judgment is RENDERED in favor of the respondent.

All Citations

516 F.3d 1229, 21 Fla. L. Weekly Fed. C 399

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