CAPITAL CASE

DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAY LAMAR JOHNSTON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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INDEX OF APPENDICES

APPENDIX A

949 F.3d 619
United States Court of Appeals, Eleventh Circuit.

Ray Lamar JOHNSTON, Petitioner-Appellant,
v.
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, Attorney General, State of Florida, Respondents-Appellees.

No. 14-14054
|
(February 3, 2020)

Synopsis
Background: After affirmance, 841 So.2d 349, of state prisoner's murder conviction and death sentence, prisoner petitioned for federal habeas relief, alleging that counsel were ineffective at guilt and penalty phases in failing to investigate and present a witness who could have undermined prosecution's theory that prisoner had a monetary motive for the murder and who could have offered mitigation testimony about everything prisoner had done for her during her hospitalization in intensive care unit (ICU). The United States District Court for the Middle District of Florida, D.C. Docket No. 8:11-cv-02094-EAK-TGW, Elizabeth Kovachevich, J., denied relief. Prisoner appealed.

Holdings: The Court of Appeals, Ed Carnes, Chief Judge, held that:

prisoner was not prejudiced by counsel's allegedly deficient performance at guilt phase, and

prisoner was not prejudiced by counsel's allegedly deficient performance at penalty phase.

Affirmed.

Martin, Circuit Judge, filed an opinion concurring in the result.

Attorneys and Law Firms

***622** David Dixon Hendry, James L. Driscoll, Jr., Capital Collateral Regional Counsel, Middle Region, TEMPLE TERRACE, FL, for Petitioner - Appellant.

Timothy A. Freeland, Attorney General's Office, Criminal Division, TAMPA, FL, for Respondents - Appellees.

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 8:11-cv-02094-EAK-TGW

Before ED CARNES, Chief Judge, MARTIN, and ROSENBAUM, Circuit Judges.

Opinion

ED CARNES, Chief Judge:

LeAnne Coryell had a mother and father, two brothers, and a six-year-old daughter. She was her parents' only daughter. She was her brothers' only sister. And, of course, she was her young daughter's only mother. LeAnne had recently celebrated her

thirtieth birthday, and her family and friends had every reason to believe that she would be with them for a long time. She was in the prime of her life and had decades of living ahead of her. Or she should have.

I. JOHNSTON'S CRIMES AGAINST LEANNE CORYELL AND THE TOTAL HARM THOSE CRIMES CAUSED

Tuesday, August 19, 1997, began as a typical day for LeAnne. That afternoon she went to work at Dr. Gregory Dyer's orthodontic office where she was a clinical orthodontic assistant. Johnston v. State, 841 So. 2d 349, 351 (Fla. 2002). He knew her to be someone who took pride in what she did, was exceptional at it, and had a good career ahead of her. She was warm and intelligent, positive, and passionate about all that she did. Dr. Dyer had been constantly reminded of "how incredibly fortunate and blessed [he] was" to have had her on his staff. That is the kind of person she was.

Around 6:00 p.m. that Tuesday evening, LeAnne called a good friend and told her that she was going to leave work around 8:00 p.m. and stop by the local supermarket to pick up a few items. She told the friend she'd call again when she got home.

LeAnne clocked out of work at 8:38 p.m. She and her co-worker, Melissa Hill, tried to set the security system before leaving but had trouble with it. LeAnne called Dr. Dyer's wife for instructions. During their conversation Ms. Dyer asked about LeAnne's daughter Ansley, who was to start first grade the next week, and LeAnne told her: "She's with grandma, you know, doing the shopping and things before school." Before their mother hung up, Ms. Dyer's young sons insisted on talking with LeAnne and telling her goodnight because they liked her so much. That is the kind of person she was.

After setting the alarm and leaving work, LeAnne stopped by the grocery store and bought, among other things, milk, grapes, fish, and green beans. Johnston, 841 So. 2d at 351. She also got a Nickelodeon toothbrush for Ansley, some goldfish crackers, and some oatmeal cookies. The kind of things a mother buys. One of the employees at the grocery store who saw her that night described LeAnne as "happy [and] smiling." She and the cashier chatted about their kids, as they usually did, and LeAnne told the woman about the plans she and Ansley had for the next day. The store's surveillance cameras showed ***623** her leaving the store at 9:23 p.m. Johnston, 841 So. 2d at 351.

That was the last time anyone saw LeAnne alive. Anyone other than Ray Lamar Johnston. LeAnne had the misfortune of living in the same apartment complex as him, although they were not acquainted. Johnston, 841 So. 2d at 351. Before LeAnne arrived at the apartment building that Tuesday night, Johnston had gotten into an argument with one of his two roommates about his failure to pay his share of the utilities. After that argument Johnston went outside, which is where he was when LeAnne pulled into the parking lot and started unloading her groceries. Id. at 354–55.

Johnston walked up to LeAnne, said "hello," and offered to help her carry the groceries to her apartment. She either said "hello" back and declined his offer, or she didn't respond at all. Johnston didn't like being turned down or ignored by a woman. As he would later tell it, "I just wanted her attention, and I didn't get it and I grabbed her .... I just grabbed her around the neck ...." He threw LeAnne into the back seat of her own car and drove her to a dark field nearby, a field next to St. Timothy's Church. While a religious meeting was being conducted inside the church, Johnston was violently brutalizing LeAnne outside of it.

After he got her out of the car, Johnston removed all of LeAnne's clothes. He then either raped her or used a blunt object to penetrate her with such force that it caused both internal and external lacerations to her vaginal area. During his demeaning assault of her, Johnston whipped LeAnne repeatedly across the buttocks with her own belt. He whipped her with enough force that the blows left distinct bruises on her body in the shape of the metal design on the belt. He also beat her on her buttocks with another blunt object. Some of the bruising on LeAnne's body was so deep that it invaded the underlying muscle and soft tissue. Her chin and the inside of her lip were lacerated, which could have been caused by a punch to the face or by her being thrown to the ground. Johnston inflicted all of the blows, beating, and injuries to LeAnne while she was alive. He made her suffer.

Johnston could have stopped and left LeAnne there. She would have been naked, beaten, violated, and in pain alone in a dark

field. But she would have been alive. She could have made her way to the church and been rescued and gotten medical help; she could have been returned to the care of her family and friends; she could have seen her daughter again. Johnston could have let her live. But he chose, instead, to fasten his hands around LeAnne's neck and slowly strangle her to death in that field. She was conscious for up to two minutes as Johnston choked the life out of her. Johnston, 841 So. 2d at 353. She fought to live. While Johnston killed her, LeAnne scratched at his hands, trying desperately to free herself. She clawed at the ground, grabbing a handful of grass in her desperate attempt to escape. But Johnston wouldn't let her.

After he choked the last breath of life from LeAnne, Johnston grabbed her body by the legs and dragged her into a nearby retention pond. (The reason he did that became evident later when he told detectives they would not find any DNA evidence, hair, or saliva linking him to the murder, and they didn't.) Johnston, 841 So. 2d at 353. Johnston left LeAnne in four inches of water, face down and nude, with her back and bruised buttocks exposed above the water level. Before leaving her body and personal effects behind, Johnston stole her ATM card and a piece of paper with her PIN on it.

***624** A man walking his dogs found LeAnne's body at 11:00 p.m. and called 911 within minutes. In addition to all of the injuries already described, the medical examiner found extensive bruising around her neck. There were also scratches on her neck, which may have been caused by her own fingernails as she tried to free herself from Johnston's grip while he strangled her. And there was that grass still clutched in her hand, bearing witness to how desperately she had struggled. As the state trial judge would later write in describing LeAnne's final minutes of life: "the photograph of the grass clawed and grasped in her hands speaks louder than words that this victim fought for her life and was aware of her impending death after having been beaten with her own belt and sexually battered."

LeAnne's car, which Johnston had used to take her to the field, was found in the church's parking lot with the keys in the ignition. Johnston, 841 So. 2d at 352. One of his fingerprints was found on the outside of the car. Id. Some, but not all, of the groceries LeAnne had bought on the way home were in the back seat. Id. The milk and grapes she had bought were on the pavement of the parking lot where Johnston had grabbed her.

Soon after leaving LeAnne's body in the retention pond, Johnston used her ATM card at 10:53 p.m. to withdraw $500 from her bank account. At that same machine, he attempted three more withdrawals (two for $500 and one for $400) over the next two minutes, but those efforts were thwarted by the daily limit on withdrawals. Johnston drove to a second ATM machine in an effort to withdraw money there, but that failed again. He eventually returned to his apartment and threw some cash at the roommate who had argued with Johnston about money and yelled, "That's all you're getting from me, you son-of-a-bitch." Id. at 351.

The next morning, Johnston took LeAnne's card to an ATM machine at a McDonald's and withdrew another $500 from her bank account. He then tried twice to withdraw $500 more but was thwarted by the daily limit on withdrawals. After making an account balance inquiry at the same ATM and seeing that there was more money in LeAnne's account, he tried again to withdraw more cash — $100 and then $500 — but was again unsuccessful.

The night before, while Johnston was stealing money from LeAnne's bank account, her family learned that she had been murdered. The police told her parents, who had to tell Ansley. LeAnne's father said: "Telling a six-year-old granddaughter that her mommy went to be with Jesus and she will never see her again" was "not an experience that my wife and I would wish on anyone."

According to her father, LeAnne was "the love of [Ansley's] life." She was a devoted mother who went to great efforts to be a positive influence on her young daughter. She was active in the PTA at Ansley's school. She baked cookies and cupcakes for kindergarten parties. Even after a long day of work, she would prepare a home-cooked meal for Ansley, and help her with her homework, and play games with her, and read her a story, and give her a bath, and tuck her into bed. That is the kind of mother she was.

Reverend Hartsfield, LeAnne's pastor, considered her a "model" for other parents in the church. He recounted how involved she was in the church and the positive impact she had on other parishioners. He described her as a "bright light of joy, energy, love, generosity and graciousness." She was, he said, "an encourager and an inspiration to all of Ansley's teachers and ***625** the entire teaching and administrative staff" at her school. Reverend Hartsfield recalled that just weeks before she was murdered, LeAnne had met with him to discuss how she could "get even more involved in the ministries of the church

and how her life could be used in an even greater way to make a difference in this world." She was: "Always improving. Always looking to the interests of others; never settling for mediocrity or comfort." That is the kind of person she was.

Dr. Dyer, LeAnne's boss, described being constantly reminded of how blessed he was to have her on his staff, and how his young patients, through the news of her death, were "exposed to a violent, life changing experience."

As Clarence the angel told George Bailey, each person's life touches so many other lives that when she is no longer around it leaves an awful hole.[1] About the hole that LeAnne's death left in the lives of her family and friends, a number of people spoke eloquently, none more so than her father. He described how he, her mother, and her younger brother "no longer hear the front door open" with a greeting from LeAnne "followed by the giggling of granddaughter Ansley." "No more nightly phone calls to discuss the day[']s happenings." "No more visits" to her apartment. "No more family outings." "Just a missing void" in "a close knit family." Her death left such an awful hole in the lives of so many people because that is the kind of person she was.

[1] "Each man's life touches so many other lives. When he isn't around he leaves an awful hole, doesn't he?" It's a Wonderful Life (Liberty Films 1946).

II. JOHNSTON'S VIOLENT CRIMES AGAINST FIVE OTHER WOMEN

The same cannot be said of the man who murdered her. LeAnne Coryell was not the first woman Ray Johnston brutally attacked and sadistically beat, she was not the first woman he raped, and she was not the first woman he murdered. In fact, the 18 years that Johnston has been on death row without access to women is the longest period of time in his adult life he has ever gone without brutally attacking one.

Between the ages of 19 and 20, Johnston assaulted three different women. In 1973, when he was 19 years old, he was charged with robbing an Alabama convenience store twice in one week and raping a store clerk during one of those robberies.

In 1974, he was charged with robbing and sexually assaulting a woman named Judy Elkins in Georgia as she was getting out of her car. The indictment stated that he raped her, struck her with a belt — as he would strike Coryell with a belt more than 20 years later — and stole $15 cash and two credit cards from her at knifepoint.

That same year Johnston also attacked a woman named Susan Reeder in Alabama. He followed her as she drove to her fiancé's apartment one night. When she got out of the car, Johnston grabbed her, put one hand over her mouth and nose, and used his other hand to hold a six-inch hunting knife to her throat. He told Reeder that if she made a sound, he would cut her throat. He then put her in the back seat of her car, made her lie down, and started the car as she was terrified and crying. Johnston drove to a deserted area where a number of houses were under construction.

Fearing that Johnston was going to rape her, Reeder told him that she was having her period, hoping that "maybe things wouldn't happen." Not believing her, Johnston ordered her to undress and he touched her. When he found that she had ***626** lied to him, he got angry. He took his belt off and told Reeder, who was nude, to lean over the hood of her car. He beat her with his belt and said he was doing it because she lied to him. He whipped her with the belt from her "waistline down on the back side," just as he would Coryell two decades later. After beating Reeder, Johnston took her into the garage area of a partially built house. She tried to talk, to have a conversation, in an attempt to "make it all go away." But Johnston didn't want it to go away.

Still holding his hunting knife, Johnston tried to rape Reeder. When he was unable to perform, he "got mad and made [her] get on top." He then made "her body go in motion." This went on, Reeder estimated, for about two hours. After he finished raping her, Reeder begged him to let her go, promising him that if he let her live she would never tell anybody what had happened. He said he would take her to her fiancé's place — whether Johnston actually intended to do that or not is unknown

— but he accidentally hit a curb and rendered the car undrivable, giving Reeder a chance to escape, which she managed to do.

For the robberies and rape he committed at a convenience store in Alabama in 1973 and against Susan Reeder in 1974, Johnston was convicted of two counts of robbery and one count of rape. He was sentenced to 10 years for each robbery count, to be served concurrently, and 10 years for the rape count. For the crime he committed in Georgia against Judy Elkins in 1974, he was convicted of robbery by intimidation and sentenced to 15 years.

Johnston started serving the 15-year sentence in Georgia first, in September 1974, but after spending less than seven years in prison there he was released on parole and transferred to Alabama to serve out his ten-year sentences for the robbery and rape convictions. In March of 1986, five years after he was transferred to Alabama, the Alabama Central Review Board recommended that Johnston not be granted parole because he was a "dangerous man to have released" due to his history of violent criminal behavior. Three months later, in June of 1986, he was paroled anyway. He had served only five-and-a-half years of his sentence for the two robberies and rape.

Unfortunately, but not surprisingly, the Alabama Central Review Board's March 1986 assessment that Johnston was too dangerous to be released proved correct. In January 1988, less than two years after his early release on parole, Johnston — this time in Jacksonville, Florida — broke into the house of Julia Maynard, a woman he didn't know. When she came home one night, she entered through the foyer, went toward her kitchen and looked up. She saw Johnston on the stairwell, staring at her. He was wearing a jumpsuit, ski mask, and surgical gloves. Maynard was terrified.

She tried to run out, but Johnston grabbed her and backed her into the corner. He pulled out a knife, and while holding it to her throat told her that he was not there to hurt her but had been paid by somebody to attack her. He led her into her bedroom, "where he had made preparations" by removing all of her lingerie from her drawers and placing it on the bed. Then he took photos of her in various stages of dress and undress for 45 minutes. At one point, Johnston touched her "in the vaginal area."

When Johnston was finished with Maynard, he used her own panty hose to tie her to the bed, face down. He warned her that if she told anybody about what happened he would come back. Before walking out he placed the knife to her head, patted her, told her she was a nice lady, and said that it was too bad this had to happen to ***627** her. After Johnston left, she managed to free herself and call for help.

The police didn't catch Johnston right away. Unfortunately. Within six months he abducted another woman in Florida, Carolyn Peak, as she was getting out of her car at her apartment complex, just as he would abduct Coryell years later. Johnston held a knife to Peak's throat and told her that if she screamed he would cut her. He eventually ordered her to lie on the floor in the back seat, used an Ace bandage to tie her hands together, and drove away. When she asked him why he was doing this to her, he said he would tell her later and swore that if she went to the police, "he would hunt her down and kill her."

Before Johnston could assault Peak, a police officer pulled the car over because the front headlight was out and the tag that had been propped up in the back window had fallen down. Following that stop, one thing led to another and it ended with Peak being rescued and Johnston being arrested. Inside the car the officer found a camera, surgical gloves, and a mask.

In addition to being charged with the crimes that he had committed against Peak, Johnston was also linked to the attack on Maynard and charged in connection with it. In combination, the charges included one count of armed kidnapping and two counts of burglary with assault. In September 1988, Johnston pleaded guilty to or was found guilty of all three charges and was sentenced to 18 years in Florida state prison.

While in prison, Johnston was disciplined for, among other things, lying and failing to report for work, as well as disorderly conduct. After he was transferred to a new prison in 1993, he was disciplined for a variety of offenses and was put into "admin confinement" at one point. The report about the disciplinary action that caused him to be put in admin confinement states that an inmate had reported another inmate's "plan to attack and rape a female staff member." Johnston was released from prison in May 1996 even though he had served barely half of his sentence.

III. JOHNSTON'S BRUTAL MURDER OF JANICE NUGENT

Within nine months after he was released from prison, Johnston invaded Janice Nugent's home in Florida, beat her with a belt, and slowly strangled her to death. Johnston v. State, 863 So. 2d 271, 274 (Fla. 2003). Within six months after doing that, he kidnapped, beat, sexually assaulted, and strangled to death Coryell, the victim in this case. We have already discussed in detail the crimes Johnston committed against Coryell. The crimes he committed against Janice Nugent are similar, although the circumstances leading up to the two crimes are somewhat different.

Janice Nugent was friends with a woman named Frances Aberle, who was dating Johnston in 1997. Id. at 275. All three of them were regulars at a bar called "Malio's." Id. Aberle told Johnston that she could no longer go to Malio's with him because Nugent did not want her to be with Johnston. Id. A short time later, Johnston attacked Nugent in her own home. Id. at 274. During the attack he inflicted what the medical examiner would describe as "three to five blunt impact" injuries on her buttocks and hips. Id. The medical examiner also found "within a reasonable medical probability, one or more of the patterned injuries on Nugent's buttocks were made by a belt." Id. Just like the injuries on Coryell's buttocks. He also found that: "The other pattern type injuries could have been made by a belt or some other implement, possibly a vacuum cleaner hose." Id. Johnston killed Nugent ***628** by strangling her with his hands. Id. Just like he did Coryell. The medical examiner explained that the "extensive bruising to Nugent's neck and shoulder area" showed that the strangulation "was not by constant, continuous compression," but "more of a manual throttling ... meaning it was more pressure, release, pressure, release." Id. In other words, it was done in a way that prolonged her suffering and terror.

Like LeAnne Coryell, Janice Nugent did not die without a fight. Id. She had defensive bruising on her arms and hands and defensive fingernail injuries on her nose, indicating that she had struggled with Johnston and tried to pull his hands off her face. Id. But she was not strong enough to fight him off. After Johnston killed Nugent, he wrapped her body in a bed comforter and submerged her in water that he ran in her bathtub. Id. at 274, 275, 283. Under the comforter her body was clad in only underwear and a bra. Id. at 274.

Several days after the murder of Janice Nugent, their mutual friend Aberle said to Johnston: "I just can't understand someone doing that. Why? No matter what somebody did, why somebody would do that." Id. at 275. Johnston agreed and then said "Well, now there's no reason you can't go to Malio's with me." Id. Six months later, before he was charged with murdering Nugent, Johnston kidnapped, beat with a belt, and strangled Coryell and put her body into water.[2] Much as he had Janice Nugent.

[2] Although Johnston beat and strangled Nugent to death six months before he beat and strangled Coryell to death, he was charged, convicted, and sentenced for the murder of Coryell first. See Johnston v. State, 863 So. 2d 271, 277 (Fla. 2003). And the jury that unanimously agreed Johnston should be sentenced to death for murdering Coryell heard nothing about his murder of Nugent. We include a description of that crime in this opinion for the sake of completeness.

For all of the brutal crimes that Johnston had committed against the Alabama convenience store clerk in 1973, against Judy Elkins in 1974, against Susan Reeder in 1974, against Julia Maynard in 1988, and against Carolyn Peak in 1988, he was sentenced to a total of at least 43 years in prison. He served less than 20 years in all. Every time he was imprisoned for violently attacking women Johnston was released early, and every time he was released early, he used that leniency as an opportunity to violently attack other women, culminating in the murder of two women six months apart.

IV. JOHNSTON'S ARREST FOR THE MURDER OF LEANNE CORYELL

The day after LeAnne Coryell's murder, the police publicized pictures captured by the ATM machines that Johnston had used to withdraw money from Coryell's account. Johnston, 841 So. 2d at 352. After learning that he had been identified as a suspect, Johnston went to the police station to give a voluntary statement. Id. He told Detectives Iverson and Walters that he had known Coryell for several weeks, that they were friends, and that they had gone out to dinner a few times. Id. He told the detectives that the night of the murder he had met her for drinks at Malio's at 6:15 p.m. and the two of them had then gone to a restaurant called Carrabba's about an hour later and stayed there until 8:30 or 9:00 p.m. Id. He also claimed that he had loaned Coryell approximately $1,200 over the course of the several weeks that he had known her. According to Johnston, before they parted ways, Coryell gave him her ATM card and PIN so that he could withdraw $1,200 to repay the loan he had ***629** made to her. Id. He said that after he left Carrabba's restaurant he went home, changed clothes, went jogging, and then withdrew $500 from her account. Id. He said he withdrew another $500 the next morning. Id. The ATM photographs and records showed that he also unsuccessfully attempted to withdraw more cash from her account three times the night of the murder and four more times the next day.

After Johnston admitted that he withdrew the $1,000 from Coryell's account, the detectives arrested him for grand theft and read him his Miranda rights. Then one of the detectives confronted Johnston with the fact that Coryell did not leave work until 8:38 p.m. Johnston's response was that one of her co-workers must have clocked out for her because he was with her at that time. He was, however, unable to provide the names of anybody who could corroborate that he was out with Coryell that evening.

The detectives then told Johnston that while executing a search warrant at his apartment earlier that day, they found his tennis shoes and they were completely wet. He tried to explain the wet shoes by claiming that he jumped into the hot tub, shoes and all, to wash off after jogging. During the interview, one of the detectives noticed scratches on Johnston's wrist. When asked about those scratches, Johnston claimed that he had been moving some boxes earlier at work and that he had also fallen while jogging. The detectives asked him several times whether he was involved in Coryell's death. He responded that they would not find any DNA evidence, hair, or saliva linking him to the crime. Johnston, 841 So. 2d at 353. He had taken care to wash that evidence off Coryell's body by putting it into the retention pond, but he did leave his fingerprint on her car. See id. at 352.

While he was in jail awaiting trial, Johnston wrote to his pen pal, Laurie Pickelsimer, and asked her to provide a false alibi for him. Id. Johnston asked her to tell his attorneys that on the night of the murder the two of them were working out in the gym at his apartment complex from 9:00 p.m. until about 10:30 p.m., except for a short time when he walked back to his apartment to get them a drink. Id. He told Pickelsimer in the letter that if she would lie for him she might get some money from his family. She refused and later told the prosecutor about Johnston's letter.

V. THE STATE COURT PROCEEDINGS

A. The Guilt Stage of the Trial

After a lengthy guilt stage trial with 56 witnesses, and after hearing overwhelming evidence against Johnston, a Florida jury found him guilty of these crimes against LeAnne Coryell: first degree murder, kidnapping, robbery, sexual battery, and burglary of a conveyance with assault. See Johnston, 841 So. 2d at 351–53.

B. The Sentence Stage of the Trial

During the sentence stage that followed, the State introduced testimony from three of the victims Johnston had violently assaulted: Susan Reeder, Julia Maynard, and Carolyn Peak, all of whom testified in detail about how Johnston had attacked them. Id. at 353. The State also called Dr. Vega, the medical examiner who conducted Coryell's autopsy. Id. at 352. The jury had already heard during the guilt stage the details of Johnston's brutal attack and murder of Coryell. See Part I, above. At the sentence stage the State added to that evidence more testimony from Dr. Vega. Johnston, 841 So. 2d at 353. Among other things, he told the jury that Coryell was likely conscious at the time Johnston raped and beat her, and that she was likely conscious ***630** for up to two minutes while Johnston strangled her. Id.

The State called three people to give victim impact evidence: Coryell's father, Dr. Dyer, and Matthew Hartsfield (her pastor). Id. We have already summarized their testimony about how Coryell's death had affected her family, her colleagues, and her parish. See Part I, above.

Defense counsel called a number of witnesses to provide mitigating evidence. Four mental health experts: Dr. Frank Wood, Dr. Diana Pollock, Dr. Michael Maher, and Dr. Harry Krop, testified about Johnston's mental health problems. Id. at 353–54. Three of them testified that in their opinion he had frontal lobe brain damage, which impaired his decision-making. Id. But Dr. Pollack admitted on cross-examination that despite conducting an MRI and a recording of brain waves (EEG), she did not find any abnormal structural defects, lesions, tumors, or similar abnormalities in Johnston's brain. And Dr. Maher testified that in his opinion, Johnston was aware of what he was doing, including "the likely result of his actions," when he murdered Coryell. He also testified that Johnston did not suffer from schizophrenia or split personality disorder. Dr. Krop testified that Johnston had an IQ of 104 and performed within or above normal limits on memory, speech, and information reception tests.

The defense also called Sara James (Johnston's mother), Susan Bailey (one of his ex-wives), and Rebecca Vineyard (his younger sister) to testify on his behalf. Johnston's mother talked about his positive characteristics and good behavior, and she begged the jury not to execute him. Id. at 354. His ex-wife testified that while they were married Johnston cooked, cleaned, and took an active role in her two daughters' lives, and that he was a model husband. Id. She also said that little things could make him suddenly angry and cause him to "snap." His sister told the jury that since Johnston was a child, he had tried too hard to win other people's approval and could not handle being rejected or feeling humiliated. Id.

Five other people testified on Johnston's behalf. Three of them — Gloria Myer, William Jordan, and John Field — were people who had worked in prisons where Johnston served time. They testified about how he was a good worker, followed instructions, got along with other inmates, and did not cause any disciplinary problems. Id. John Walkup, Johnston's probation officer, told the jury that he had recommended that his probation be ended early because Johnston had a good family life, had a good job, reported regularly, and paid his fees. Id. Finally, Bruce Drennan, the president of the Brandon Chamber of Commerce, told the jury that Johnston represented a company that was a member of the Chamber. Id.

Johnston decided to testify. Id. He admitted to killing Coryell. Id. According to his testimony, on the night of the murder he had just gotten out of the hot tub and was walking back to his apartment when he saw Coryell pull into the parking lot and begin taking groceries out of her back seat. Johnston walked up to her and asked if he could help. Coryell either didn't respond or "just said hi or hello" and didn't take him up on his offer. So he "grabbed her arm" and asked again. What happened next, Johnston described as follows:

> And I don't know, Joe,[3] it was like I reached for her and I was going to grab both of her shoulders, but I grabbed her by the neck and it didn't seem like it took but just a short time. I mean, it ***631** wasn't — I don't even remember her — I don't even remember her reaching for me, it didn't seem like. It took just a short time.

When defense counsel asked Johnston why he put his hands around Coryell's neck, Johnston said: "I wanted her attention and I didn't get it and I just — I just wanted her attention, and I didn't get it and I grabbed her. It wasn't — I just grabbed her around the neck, Joe."

[3] Joe was the name of Johnston's sentence stage attorney.

Johnston then explained that after he had strangled Coryell, she "was kind of bent," "her legs just gave out and she hit her lip on the edge of the door ... and then her chin hit the ground." Johnston said he got down, rolled her over, and saw that her eyes and mouth were open. He "tried to breathe in her mouth and she just laid there." So he picked her up and put her in the back seat of her car. He said that he thought he "broke her neck because" when he had his hands around her neck, he felt something "push in."

According to Johnston, once he had Coryell in her car, he got into the front seat and drove out of the apartment complex. He decided not to take her up to her apartment because "there are security things" in the apartments and he didn't know the code to hers, and because he "didn't want to be seen." Instead, he took her to the field next to St. Timothy's Church. When he pulled into the field, he "got in the back seat and [he] put her head in [his] lap." Her eyes were still open and she wasn't breathing. He held her face, and he was "just so mad" and "squeezed her head." When asked why he was so mad, Johnston said: "Cause I walked up to her and I just — I don't know. She just didn't respond to me, Joe."

Johnston testified that he lifted Coryell's body and sat it up by a tree. He explained that he was still "angry." He said: "I can't — I don't know how — you just have to feel it. You just have to feel it. It's like you know exactly what you're doing; you're aware of exactly what you're doing, you know what's going on around you; you just can't stop." Johnston said that after he sat Coryell by the tree, he took off all her clothes and scattered them on the ground. He picked up her right leg and "dragged her" away from the tree. Then he lifted up her leg and "kicked her .... [i]n her crotch." After that he struck her with her belt "about four" times.

When asked why he did those things to Coryell's body, Johnston claimed that he wanted to "make her look like she was assaulted." He said: "I'm trying to make her look like, when somebody finds her at the church, that she had been assaulted and yet cover my ownself up."

Johnston recounted how he next "dragged her to the pond," "laid her down," and "rolled her on her stomach." Then he "laid down there with her in the dirt on [his] stomach." He gave no explanation for that. After a few minutes went by, a car passed through the church parking lot, so Johnston "took off running." He ran to a pool, sat on the edge, and "tried to get the dirt off [his] legs." Then he hid his shirt behind some bushes and ran home. Once inside, he washed his shoes off in the bathtub, took a shower, and put his shoes in the dryer.

Johnston said that after he was dressed in new clothes, he went back to the church parking lot to "check on her to see if anybody found her yet." When he pulled in, he stopped at Coryell's car, reached in, and took her purse. Inside he found a wallet and an address book. He said he may have found "a brush or something" too. Johnston took Coryell's ATM card from her wallet and her PIN from her address book.

***632** Johnston recounted that he immediately drove to the Barnett Bank ATM machine and, using Coryell's ATM card, withdrew from Coryell's account the limit of $500. Then he drove to another bank and tried to use the card there, he explained, "to see if there was any transactions left to be made" for that day. There weren't, so he left. When asked if he knew that his picture was being taken at the ATM machines, he said he did. He added: "I think at that time, like every other time, it's like — it's like you do this stupid stuff and then you sit down and you say what have I done. Then you got to hide yourself. You got to hide what you've done. You got to cover it up. And I think — I think when I showed my — I think I wanted to show my picture."

During cross-examination, the prosecutor asked Johnston: "You're telling this jury that you wanted to get Leanne Coryell's attention and you didn't get it, so you killed her; is that what you're telling them?" Johnston said: "Yes, sir." The prosecutor rephrased the question: "You killed her because she didn't respond to your hello; is that what you're telling this jury?" Johnston again said, "Yes, sir."

The prosecutor also asked Johnston about the series of lies that he had told the police and the media following the murder. The prosecutor asked: "You lied to Detective Walters ... that you had loaned Leanne Coryell twelve hundred dollars over

several, several weeks, didn't you?" Johnston replied: "Yes, sir, I did." The prosecutor asked: "And you lied to Detective Walters when you said Leanne Coryell voluntarily gave you that ATM card at Carrabba's Restaurant to pay you back this money, didn't you?" Johnston replied: "Yes, sir, I did."

The prosecutor asked: "After you were arrested, you not only lied to Detective Walters, you lied to all the television stations you called up, didn't you?" Johnston replied: "Yes, sir, I lied to everyone." The prosecutor asked: "You made it a point to call the stations and tell them that you had known Leanne Coryell for several weeks, didn't you?" Johnston replied: "Yes, sir." The prosecutor asked: "And that was a lie, obviously, right?" Johnston replied: "Yes, sir."

The prosecutor continued, asking: "And you lied to the television stations when you told them that you couldn't kill such a sweet, sweet girl?" Johnston replied: "Yes, sir." The prosecutor asked: "And you lied to the television stations when you told them that you had gone dancing with her at Malio's?" Johnston replied: "Yes, sir." The prosecutor asked if Johnston had tried to get his pen pal to lie about his alibi in front of the jury. Johnston replied: "Yes, sir." The prosecutor asked if Johnston "wanted to manipulate the media" to "get [his] defense out." Johnston replied: "Yes, sir."

During cross-examination, Johnston also admitted to attacking Susan Reeder. He admitted that he ambushed her at knifepoint, drove her to an isolated area, made her undress, beat her with a belt, and raped her. When asked if he was acting on impulse during his attack, Johnston said: "It's the same old thing, same old story, same old action." When asked if there were a lot of similarities between his attack of Susan Reeder and his murder of Coryell, Johnston said: "They're all the same. They're all the same old things."

Johnston also admitted to attacking Julia Maynard. He admitted that he broke into her house, took photographs of her, and tied her up. When the prosecutor asked him if he had to climb through a window to get in, he explained that "you do whatever it takes because you don't have the power to stop whatever it takes." When asked why he wore a mask and ***633** gloves, he said: "Again, it goes back to the means, that you do the things that you — that it takes to do whatever it is that you're going to do. If it's a mask, if it's gloves, if it's clothes, if it's a car, if it's hair, it doesn't matter."

Johnston also admitted to attacking Carolyn Peak. He admitted that he ambushed her as she was getting out of her car. And when asked, "Much like you did Ms. Coryell and much like you did Ms. Reeder, right," he replied, "Same old thing."

The jury unanimously recommended that Johnston be sentenced to death. Johnston, 841 So. 2d at 355. After holding a Spencer hearing,[4] the trial court found the following aggravators: (1) Johnston was previously convicted of violent felonies; (2) the crime was committed while Johnston was committing sexual battery and kidnapping; (3) the crime was committed for pecuniary gain; and (4) the murder was especially heinous, atrocious, or cruel. Id. at 355 n.3. The court found one statutory mitigator: Johnston's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired. Id. at 355 n.4. It also considered all of the nonstatutory mitigating circumstances the defense offered and in its order indicated the weight, if any, it gave each alleged mitigating circumstance. Sentencing Order, State v. Johnston, Case No. 97-13379, 2000 WL 35771916 (Fla. Cir. Ct., Crim. Div. March 13, 2000) (available in Johnston, 841 So. 2d 349, Appeal Record, Ex. A-18 at 1833–39).[5] The court followed the jury's recommendation ***634** and imposed the death penalty. Johnston, 841 So. 2d at 355.

[4] "A Spencer hearing occurs after the jury has recommended a sentence but before the judge imposes a sentence." Kormondy v. Sec'y, Fla. Dep't of Corr., 688 F.3d 1244, 1271 n.29 (11th Cir. 2012) (citing Spencer v. State, 615 So. 2d 688, 691 (Fla. 1993) (per curiam)).

[5] The State trial court's order, which it read into the record, stated: "The defense offered and this Court considered each of the following factors: (A) The time passing between the decision to cause the victim's death and the time of the killing itself was insufficient under the circumstances to allow Defendant's cool and thoughtful consideration of his conduct. This was given no weight. (B) It is unlikely that the Defendant would be a danger to others while serving a sentence of life in prison. This is given no weight. (C) Defendant has shown remorse. This is given slight weight. (D) The Defendant did not plan to commit the offense in advance, it was an act of a man out of control, and in an irrational frenzy. This was given no weight. [E] The Defendant has a long history of mental illness. His mother and sister testified about his hospitalization as a child at the Hillcrest Institution in Alabama, where as a teenager he received electro shock treatments and was thought to be schizophrenic. This was given slight weight. (F) As

testified to by Dr. Michael Maher, the Defendant suffers from a disassociative disorder. This was given no weight. (G) The Defendant suffers from seizure disorder and blackouts, but there is no evidence that any such disorder contributed to this crime. This was given no weight. (H) The murder was the result of impulsivity and irritability. This was given no weight. (I) The Defendant is capable of strong loving relationships. His mother, sister and former wife testified at length as to his ability to love and be loved. He lavished affections on his ex-wife, Susan Bailey. She believed they would have still been together if not for his mental problems. This was given slight weight. (J) The Defendant is a man who excels in a prison environment. Chaplain Fields and Gloria Myers established this in mitigation, and Dr. Maher also testified that he would do well in the structured environment of prison. This was given slight weight. (K) The Defendant could work and contribute while in prison, as he has done in the past. He could teach and be an example to other prisoners not to follow the same life-course he has. This was given slight weight. (L) The Defendant has extraordinary musical skills and is a gifted musician, according to the testimony of Chapl[a]in Fields. This was given no weight. (M) The Defendant obtained additional education from the University of Florida while he was in prison in 1992. This was given no weight. (N) The Defendant served in the United States Air Force and was honorably discharged in 1974. This was given slight weight. (O) The Defendant refused workman's compensation and wanted to work for a living despite constant headaches and seizures he was having. This was given no weight. (P) During the time that the Defendant was on parole, he excelled and was recommended for early termination, showing a propensity and desire to do well in the world. This was established by his former probation officer. This was given slight weight. (Q) The Defendant was a productive member of society after his release from prison and took care of his wife and daughter with a good job and supported the household. This was given slight weight. (R) When notified that the police were looking for him, he did not flee, but turned himself in and otherwise offered no resistance to his arrest. This was given slight weight. (S) The Defendant demonstrated appropriate courtroom behavior during trial. This was given slight weight. (T) The Defendant has tried to conform his behavior to normal time after time, but has been thwarted by his mental illness and brain disfunction. This was given slight weight. (U) The Defendant has a special bond with children, as testified to by his sister and ex-wife. This was given no weight. (V) The Defendant has the support of his mother and sister who will visit him in prison. This was given slight weight. (W) The Defendant can be sentenced to multiple consecutive life sentences in addition to the sentence for first degree murder. He will die in prison and the death sentence is not necessary to protect society. This was given no weight. (X) The totality of circumstances do not set this murder apart from the norm of other murders. This was given no weight. (Y) Defendant might be subject to Jimmy Ryce Act involuntary commitment. This was given no weight. (Z) The Defendant offered to be a kidney donor for his ex-wife. This was given slight weight."

C. The Direct Appeal

Johnston appealed his convictions and death sentence to the Florida Supreme Court. He contended that one of the jurors from his trial should have been disqualified and that his trial counsel was ineffective for not individually questioning jurors who had exposure to pretrial publicity. See Johnston v. State, 841 So. 2d 349, 355–58 (Fla. 2002). He also contended that his death sentence was invalid because the trial court did not instruct the sentence stage jury about, or address in its sentencing order, the mitigating circumstance of "extreme mental or emotional disturbance at the time of the offense." Id. at 358–61. The Florida Supreme Court rejected each of those contentions, and it added that his death sentence was proportional to the circumstances of his crime. Id. at 360–61.

D. The State Post-Conviction

Johnston then filed a motion for state post-conviction relief. He raised twelve claims, most of which asserted ineffective assistance of counsel. The Florida circuit court denied relief on all of those claims. See Florida v. Johnston, Case No. 97-13379 (Hillsborough Cty. Cir. Ct. Feb. 5, 2009). Johnston appealed to the Florida Supreme Court, and while that appeal was pending, he also filed a state habeas petition with it. The Florida Supreme Court affirmed the denial of his state post-conviction motion and denied his state habeas petition. Johnston v. State, 63 So. 3d 730 (Fla. 2011).

VI. THE FEDERAL DISTRICT COURT PROCEEDINGS

Having failed in state court, Johnston filed a 28 U.S.C. § 2254 petition in the Middle District of Florida, and then amended it. In the amended petition he claimed that he was entitled to habeas relief on grounds of juror misconduct, defects in the jury instructions and in the sentence order, and because of ineffective assistance of counsel. The district court denied his petition, his later Rule 59(e) motion to alter or amend the judgment, and his motions for a certificate of appealability.

***635** VII. DISCUSSION

We granted Johnston a certificate of appealability on two issues: (1) whether he was denied effective assistance of counsel because his attorneys failed to investigate and call Diane Busch as a witness at the guilt stage, and (2) whether he was denied effective assistance of counsel because his attorneys failed to investigate and call Diane Busch as a witness at the sentence stage. We will begin our discussion of those issues with a description of the relationship between Johnston and Busch.

A. The Facts Involving Diane Busch and Johnston

Diane Busch was a friend of Johnston for a short period of time. After meeting in the beginning of June 1997, they began seeing each other socially. Two weeks later, Busch fell ill and was admitted to the intensive care unit for treatment. She was in the hospital for four months. Johnston continued seeing Busch for a few weeks while she was in the hospital, but their relationship ended shortly before he murdered LeAnne Coryell in August of that same year.

After the police arrested Johnston on August 21, Detective Taylor interviewed Busch at the hospital four days later. According to Detective Taylor, Busch told her that she had started dating Johnston after meeting him at church, and that he was "very polite and nice to her." Busch recounted how he was "overly anxious to please, even offering to watch her children for her," and that she had called Johnston when she suffered an asthma attack and needed to go to the hospital.

Things changed, however, after Busch was admitted to the hospital. Johnston began acting possessive of her and became "verbally abusive to her family and the nurses." When Busch "finally realized how out of control things were getting, she requested that Johnston not be permitted to enter her ICU room any longer" and asked the hospital staff to stop accepting his phone calls to her.

After interviewing Busch, Detective Taylor interviewed her mother and sister and three of the nurses who had treated Busch. They told her that Johnston was controlling, would not abide by hospital rules, had threatened the nurses, had threatened Busch's parents, and had threatened her friends. Each nurse recalled instances in which Johnston had made sexual comments or advances toward Busch while she was heavily medicated and they were attempting to treat her. One of them told Detective Taylor how she had once found Johnston on top of Busch in the hospital bed while the medical alarms were going off, and when the nurses tried to attend to her, Johnston wouldn't allow them to do it. Only a nurse's threat to call hospital security got him to leave. All three nurses told the detective that they were uncomfortable around Johnston, and two of them were so disturbed by his behavior that they asked hospital security to walk them to their cars at the end of their shifts.

Busch's mother told Detective Taylor that she had met Johnston for the first time at the hospital and was "very upset over his behavior, his language, and his treatment of Diane and the nurses." She told her that Johnston had used Busch's car while

Busch was in the ICU. She also told her about finding in the car while Johnston was using it a bag containing "a pair of surgical gloves, an elastic type wristband, and a knife ... with an approximate 2 [inch] pointed blade." Busch's mother had filed a report with the Sheriff's Office about the bag and its contents, but the Sheriff's Office took no action after determining that "no crime had been committed."

***636** Diane Busch's sister told Detective Taylor that Johnston took Busch's "vehicle without anyone's permission and that Diane was very heavily medicated at the time." The family "had to request the vehicle back from Johnston." She remembered that in response Johnston "threw the keys at her parents." Three weeks later, Detective Willette interviewed Busch over the phone. She told him that Johnston had used her car while she was in the hospital, but that "he did not have permission" to do so.

After those interviews, the State listed Diane Busch as a witness who might have information relevant to the case. It gave that list, along with a copy of the detective reports, to the defense team before trial. Defense counsel gave those documents to Johnston, and Johnston reviewed them and gave his attorneys written notes about them.

In those notes Johnston wrote that there was "[a] lot of history" between himself and Busch, and she "need[ed] to be interviewed by herself." He explained that he "stayed with her for 15 days and nights and saved her life 3 times." He claimed that while he was "very protective of her" in the hospital, it was "not to the point where [he] was rude to others." He also noted that the "deposition [he] gave for her divorce [would] more closely explain the role [he] played in her life." He listed her phone number and added her name to two lists of potential witnesses. One list was: "Witnesses to the fact that we drove their cars on dates and not mine. The same as I did w/ Leanne." The second list was: "Women I had personal relationships with."

Johnston testified during state post-conviction proceedings that he didn't just give his attorneys notes about Busch, he discussed her with his defense team several times before trial. He recalled telling them that he "protected her and her possessions," that he "took ten thousand dollars of hers" and "watched over it in her house," and that he "gave all of [it] back to her when the proper time came." Although there are no records corroborating those discussions, one of his former attorney's handwritten notes reflect that Johnston showed her "the depo from Diane Busch's divorce/custody case," told her that "he had been with Diane when she was ill" and "helped her out," and said that he was "trying to have positive relationships [with] women" and "wanted to overcome his past behavior."

Neither of the attorneys who represented Johnston at trial (one was lead counsel during the guilt stage and the other during the sentence stage) contacted Diane Busch to investigate whether she would be a favorable witness. Johnston's lead attorney at the guilt stage said he could not remember who Busch was or whether he ever spoke with her. And Johnston's lead attorney at the sentence stage stated that because Johnston never told him about Busch, he did not attempt to contact her.

During state post-conviction proceedings, Busch testified that had defense counsel reached out to her, she could (and would) have testified on Johnston's behalf. She denied that Johnston was verbally abusive to her family and claimed not to recall telling the nurses or the detectives that he was. She also claimed that she did not recall telling anybody that she thought things were "getting out of control" or requesting that Johnston be banned from visiting or calling her in the ICU.

Instead, Busch testified in the state post-conviction proceeding that while she was in the hospital, Johnston "managed all of [her] medical care" and that "[h]is role was nothing short of a caring, loving individual wanting the best possible care for the success of recovery." She even went as ***637** far as crediting Johnston with saving her life. She explained that "nobody in the hospital would listen to the pain [she] was in" and that "by the minute [she] was failing." Johnston "was very, very concerned and protective and listened to everything that [she] said." He was "the only one that shook people up and gave attention to" the fact that her "organs were shutting down." She claimed that he "got [her] to another hospital and orchestrated the doctors to coordinate what [was] going on," and "complete[ly] manage[d]" the situation. "Without him," she thought, "[she] would have died."

Busch also testified that on her second day in the ICU, she asked Johnston to help her remove $10,000 from her home so that her estranged husband could not take it. Johnston agreed and went to Busch's house with one of her friends. He retrieved the money from under Busch's mattress, counted it, and gave it to the friend, who immediately deposited the money into her own bank account for safekeeping. Busch added that while she was in the hospital, Johnston had access to her vehicle, her credit

cards, and her home, and he never stole from her.

Busch acknowledged that her family made her cut off all contact with Johnston when they became involved with her care and that they retrieved her personal belongings from him. But she asserted that her family took those steps not because they were upset with Johnston's behavior in the hospital, but because they found out about his violent past and did not want him around her. Busch also testified that while watching the news in the hospital, she saw that law enforcement was looking for Johnston in connection with the Coryell murder (based on an ATM photo of him) and in response she called the Crimestoppers number to identify him.

During cross-examination, the State asked Busch about some statements she had made to either the prosecutor or detectives before trial about a sexual encounter she had with Johnston:

> Q: [D]idn't you [state] that you were shocked and frightened either during or as a result of Mr. Johnston's behavior during [a] sexual encounter?
>
> A: I don't recall saying that. But I was in an 18-year stale marriage, and the encounter was different.
>
> Q: And do you recall [stating] that the defendant used phrases that shocked you such as, excuse my language, bitch and fucking bitch?
>
> A: I don't recall exactly.
>
> Q: Do you recall indicating that the defendant turned into a mean character during that encounter?
>
> A: I don't recall.
>
> Q: Do you recall [stating] in words or substance, because I don't know if this is a direct quote or my interpretation as I'm writing my notes, that the defendant either loved or was enamored or obsessed with the buttock area?
> A: I don't recall.[6]

[6] When asking Busch about these statements, the prosecutor said he was reading from his notes about her pretrial deposition. But neither his notes, nor a transcript of any pretrial deposition, is in the record. During oral argument before us, the attorney for the State said that it is unlikely that there ever was a pretrial deposition, and that the prosecutor was probably reading from notes about a pretrial interview of Busch by the police.

On redirect, Johnston's post-conviction attorney asked Busch if she remembered "any instance when Ray Lamar Johnston frightened [her] in any manner or mistreated [her] in any way." She answered, "[n]o." Later Johnston's attorney asked if there was anything that she had "left out" that she "wish[ed] to comment on." She ***638** responded: "As I sit here in reflection of the encounter that I had with Mr. Johnston ten years ago sexually, to this date, that encounter is not unusual. I feel that it's kind of the norm of a lot of gentlemen, so I just wanted to add that."

B. The Two Claims Relating to Diane Busch

In his state post-conviction motion, Johnston claimed that it was ineffective assistance of counsel not to investigate what Diane Busch could testify to and not to call her as a witness at both the guilt and sentence stages of trial. As for the guilt stage, he claimed that Busch's testimony about how he did not steal the $10,000, her credit cards, or her car would have undermined the State's theory that he murdered LeAnne Coryell in part for monetary gain. And as for the sentence stage, he claimed that Busch's testimony about how he cared for her and saved her life in the hospital would have provided powerful non-statutory mitigating evidence and swayed the jury not to impose the death penalty.

The Florida trial court rejected both claims and denied Johnston's post-conviction motion. The Florida Supreme Court affirmed. Johnston v. State, 63 So. 3d 730, 741 (Fla. 2011). It held that Johnston's trial counsel was not deficient in failing to investigate and call Busch as a witness "[g]iven the slight value of her proffered testimony and the likelihood that it would have opened the door to the prosecution's highly damaging cross-examination and impeachment evidence." Id.

We review a state court's denial of a claim on the merits only to determine if the state court's decision (1) "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) "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)(1)–(2).

There are two showings that a petitioner must make to have a valid ineffective assistance of counsel claim: deficiency and prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Where a state court denies an ineffective assistance of counsel claim for failure to show that counsel performed deficiently, without reaching the prejudice issue, we may skip over the deficiency issue and deny the claim if we determine for ourselves that the petitioner has not established prejudice. See Rompilla v. Beard, 545 U.S. 374, 390, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) ("Because the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the Strickland claim de novo."); Reaves v. Sec'y, Fla. Dep't of Corr., 872 F.3d 1137, 1151 (11th Cir. 2017); Ferrell v. Hall, 640 F.3d 1199, 1224 (11th Cir. 2011).

That is the course we will follow here. We will not pass on the Florida Supreme Court's decision that counsel did not perform deficiently regarding Diane Busch as a potential witness at the guilt or sentence stage because, even if they did, Johnston cannot show prejudice. That is true as to both stages.

To show prejudice, the petitioner must establish that his counsel's errors were so serious that they deprived him of a fair trial or sentence proceeding, or in other words, one whose result is reliable. Strickland, 466 U.S. at 686–87, 104 S.Ct. 2052. That occurs if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. 2052. And "reasonable probability" ***639** means "a probability sufficient to undermine confidence in the outcome." Id. In gauging that, we must consider "the totality of the evidence before the judge or jury." Id. at 695, 104 S.Ct. 2052.

1. The Guilt Stage Ineffective Assistance of Counsel Claim

Johnston contends that if trial counsel had called Diane Busch at the guilt stage, there is a reasonable probability that the jury would have found him not guilty of murdering LeAnne Coryell. See Strickland, 466 U.S. at 694–95, 104 S.Ct. 2052. Johnston cannot make that showing.

We begin by noting an intriguing question arising from the fact that during the sentence stage Johnston took the stand and under penalty of perjury confessed that he had murdered Coryell. (He hoped that strategy would make a favorable impression on the jury and help him escape a death sentence, but it did not.) The question is whether his confession at the sentence stage washes back to the prejudice determination regarding the guilt stage ineffective assistance of counsel claim he is pursuing. The prejudice inquiry, after all, is "focuse[d] on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

One could certainly argue that a guilty verdict is not an unreliable result and a conviction is not fundamentally unfair where the defendant has taken the stand in a later stage of the same trial and under oath voluntarily confessed that he is guilty of the crime. As intriguing as that question is, we have no need to answer it. Even disregarding entirely Johnston's sentence stage confession, he has not carried his burden of establishing that if Diane Busch had testified at the guilt stage, there is a reasonable probability that the jury would not have convicted him of murdering Coryell.

This claim of ineffective assistance of counsel at the guilt stage is related to the prosecution's theory at trial that Johnston's motive for murdering Coryell was that he needed money, which he obtained by using her ATM card and PIN after he killed her. Busch testified at the state post-conviction hearing about Johnston helping her get $10,000 from her house while she was bedridden in the hospital. Johnston argues that her testimony undermines the motive the prosecution put forward because if he had been desperate for money he would have stolen that $10,000. Motive "is not an essential element of the crime of first degree murder and a person may be convicted of this crime even if no motive is established." See Bedoya v. State, 779 So. 2d 574, 578 (Fla. 5th DCA 2001). In any event, the testimony that Busch could have given as a guilt stage witness would not have refuted the prosecution theory that Johnston needed money and killed Coryell to get it.

According to Busch, in order to keep her estranged husband from getting it, she wanted $10,000 that she had hidden under her mattress put into a bank. She could not move the money because she was in the ICU. So she asked Johnston and a woman who was a friend of hers to do it for her. They agreed and went to Busch's house. Johnston got the money from under Busch's mattress, counted it, and gave it to Busch's friend who was standing there, and who immediately deposited the money into her own bank account for safekeeping. Busch added that while she was in the hospital, Johnston had access to her vehicle, her credit cards, and her home, but he never stole from her.

***640** Testimony that Johnston did not steal the $10,000 from Busch would not have persuaded a jury that he did not need money. First, when Johnston had temporary access to Busch's money, credit cards, and car, he was trying to establish a romantic relationship with her. That gave him an incentive not to steal from her; had he stolen from her, Busch surely would have broken things off with him, not to mention reported him to law enforcement. By contrast, Johnston was not having a relationship with Coryell; they were strangers, and he had no incentive to be nice to her.

Second, even if Johnston had been willing to jeopardize his budding relationship with Busch by stealing from her, he would have known that he could not get away with it. Busch sent Johnston to get the $10,000 cash and to see that it was deposited in a bank. If he had stolen any of it she would have known. Johnston was accompanied by another friend of Busch's who stood by as he removed the money from under the mattress and counted it. She would have known if he had stolen it and would have reported the theft to Busch or the police, or both. There is no way Johnston could have prevented Busch from knowing. Busch, after all, had sent Johnston and her friend to her home together while she stayed in the ICU where she was surrounded by hospital staff.

As for Busch's credit cards and her car, she and her family knew that Johnston was driving her car while she was in the hospital, and Busch knew that he had access to her credit cards. Had he stolen either the credit cards or the car, he would have been identified as the thief in no time. The point is that the fact Johnston did not steal from a woman he had a relationship with when he almost certainly would have been caught does not mean that he did not have a need for money that motivated him to rob and kill a stranger when he had a chance of not getting caught.

Besides, the evidence proved beyond any doubt that Johnston did badly need money. In 1997, the year in which Coryell was murdered and robbed, Johnston was "in and out of work." That year alone he had written 53 insufficient funds checks, resulting in $1,537 in fees. The month before the crime Johnston had prepared an affidavit for use in his divorce proceeding stating that his monthly expenses ($1,709) exceeded his total monthly income ($1,680). One of his roommates had to loan him money. On the night of the murder, when Johnston had only $53.55 in his bank account, one of his roommates had dunned him for the $163.92 he owed for his share of the cable and phone bills. After Coryell was murdered and her ATM card was used to get cash, Johnston paid the roommate in cash part of what he owed.

It is undisputed that Johnston used Coryell's ATM card to obtain $500 within an hour and a half after she was murdered. And he unsuccessfully attempted to use it to make three more withdrawals that night, all within minutes after successfully withdrawing the $500. It is also undisputed that at 7:27 a.m. the morning after the murder Johnston used Coryell's ATM card to withdraw another $500 from her bank account. And he then used the ATM card four more times in the next four minutes that same morning in unsuccessful attempts to get $500 more, then $500 more, then $100 more, and then $500 more. Johnston was desperate for money. Nothing that Diane Busch could say about Johnston not stealing from her two months earlier could change the fact that he had a motive for robbery on the night Coryell was murdered. There is no reasonable probability that if Busch had testified the jury would not have convicted Johnston of the murder.

***641** 2. The Sentence Stage Ineffective Assistance of Counsel Claim

The theory underlying Johnston's sentence stage claim is that Diane Busch would have been a powerful mitigating witness because she would have testified about their brief relationship and spoken in glowing terms about everything that he did for her while she was hospitalized. In her state post-conviction testimony she described how, while she was in the hospital, Johnston "managed all of [her] medical care" and "[h]is role was nothing short of a caring, loving individual wanting the best possible care for the success of recovery." She even credited Johnston with saving her life. She explained that "nobody in the hospital would listen to the pain [she] was in" and that "by the minute [she] was failing." Johnston, she believed, "was very, very concerned and protective and listened to everything that [she] said." He was "the only one that shook people up and gave attention to" the fact that her "organs were shutting down." She claimed that he "got [her] to another hospital and orchestrated the doctors to coordinate what [was] going on," and "complete[ly] manage[d]" the situation. "Without him," she thought, "[she] would have died."

Johnston argues that, in spite of all of the violent crimes he has committed against women throughout his adult life, culminating in his brutal murder of Coryell, Busch's favorable testimony could have turned everything around for him in the sentence stage.

To decide whether there is a reasonable probability of a different sentencing result if Busch had testified as a mitigation witness for Johnston, we combine the evidence that was not presented with the evidence that was presented at both stages of the trial. Then we reweigh the totality of the mitigating circumstances against the totality of the aggravating circumstances. See Williams v. Taylor, 529 U.S. 362, 397–98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (explaining that we must consider "the totality of the available mitigation evidence — both that adduced at trial, and the evidence adduced in the habeas proceeding" and then "reweigh[ ] it against the evidence in aggravation"); see also Porter v. McCollum, 558 U.S. 30, 41, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). But there is another, important, aspect of the analysis.

In reweighing the aggravating and mitigating circumstance evidence to gauge prejudice, we must take into account any unfavorable evidence that could have come in if the additional mitigating evidence had been presented. See Wong v. Belmontes, 558 U.S. 15, 20, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009) (per curiam) (explaining that "it is necessary to consider all the relevant evidence that the jury would have had before it if [the petitioner] had pursued the different path — not just the mitigation evidence [the petitioner] could have presented, but also the [aggravating] evidence that almost certainly would have come in with it"); Jones v. Sec'y, Fla. Dep't of Corr., 834 F.3d 1299, 1313 (11th Cir. 2016) (finding no prejudice because if the witness had testified at the sentence stage about the defendant's mental illness, "that testimony would have opened the door to a significant body of unfavorable and damaging evidence"). And when reweighing the circumstances, we focus on their weight, rather than their sheer number. Boyd v. Allen, 592 F.3d 1274, 1302 n.7 (11th Cir. 2010).

For more than forty years it has been established Eighth Amendment law that a defendant convicted of a capital crime has the constitutional right to put before the jury as a mitigating circumstance "any aspect of a defendant's character or record and any of the circumstances ***642** of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). But nothing in the Constitution requires juries to look in only one direction. Just as the circumstances of the crime and the defendant's character may weigh in favor of a life sentence, they may also weigh in favor of a sentence of death. The defendant's character can be shown in his criminal history, by the other crimes he has committed. Tuilaepa v. California, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) (noting that a jury can consider "evidence of the character and record of the defendant" during the sentence stage); Simmons v. South Carolina, 512 U.S. 154, 163, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (explaining that a defendant's "prior criminal history" is just one "of the many factors ... that a jury may consider in fixing appropriate punishment"). That is why we have described what the jury heard about the brutal crimes Johnston committed against five other women before he murdered Coryell. See Part II, above.

In making "an individualized determination" of whether a capital murderer should live or die, the circumstances of the crime are important. Zant v. Stephens, 462 U.S. 862, 879, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); see also Proffitt v. Florida, 428 U.S. 242, 251, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (upholding Florida's capital sentencing statute in part because the

determination of sentence "requires the trial judge to focus on the circumstances of the crime and the character of the individual defendant"). That is why we have set out in detail how Johnston abducted, brutalized, and murdered Coryell, and the pain and suffering he inflicted on her. See Part I, above; Payne v. Tennessee, 501 U.S. 808, 822, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (rejecting the idea "that the defendant, entitled as he was to individualized consideration, was to receive that consideration wholly apart from the crime which he had committed").

A critical part of the circumstances of the crime is the amount of harm it caused. This is not a new concept. As the Supreme Court has explained, "the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment." Id. at 819, 111 S.Ct. 2597. It informs sentencing discretion. Id. at 820, 111 S.Ct. 2597. A State may properly conclude, as Florida has, "that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." Id. at 825, 111 S.Ct. 2597. The specific harm to the murder victim herself is, of course, the ultimate loss — the extinction of her life, the complete removal of self from everything she was and ever hoped to be, and the separation of her from everyone in this existence. That is not the only lasting harm a murderer inflicts on the innocent. The harm extends beyond the murder victim herself to the emotional suffering and loss inflicted on her family, her friends, and her community.

It is constitutionally permissible and appropriate for a jury to consider all of that harm when arriving at a proper sentence. See Jones v. United States, 527 U.S. 373, 395, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999) ("[T]he Eighth Amendment ... permits capital sentencing juries to consider evidence relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family in deciding whether an eligible defendant should receive a death sentence.") (plurality ***643** opinion). As the Supreme Court explained in its Payne decision, victim impact evidence is a good "form or method of informing the sentencing authority about the specific harm caused by the crime in question." 501 U.S. at 825, 111 S.Ct. 2597. It shows "the loss to the victim's family and to society which resulted from the defendant's homicide," id. at 822, 111 S.Ct. 2597, and it illustrates the "full reality of human suffering the defendant has produced." Booth v. Maryland, 482 U.S. 496, 520, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) (Scalia, J., dissenting).

Justice Souter, concurring in the Payne decision, explained it this way: "Murder has foreseeable consequences. When it happens, it is always to distinct individuals, and, after it happens, other victims are left behind." 501 U.S. at 838, 111 S.Ct. 2597 (Souter, J., concurring). "Every defendant knows," he continued, "that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, 'survivors,' who will suffer harms and deprivations from the victim's death." Id. It is therefore "morally both defensible and appropriate to consider such evidence when penalizing a murderer, like other criminals, in light of common knowledge and the moral responsibility that such knowledge entails." Id. at 839, 111 S.Ct. 2597.

For whatever reason, prosecutors don't always put in victim impact evidence. But the ones in this case did. They introduced extensive evidence about LeAnne Coryell's character and about the survivors she left behind. Her father, her employer, and her pastor all testified that LeAnne was a model parent, daughter, sibling, employee, coworker, and parishioner. They described her as "passionate," "intelligent," "social," "positive," "loving," and "warm." They recounted all that she had done for her little daughter Ansley and for others, and they recounted all that she was planning to do. For example, her pastor testified that just weeks before she was murdered, she had visited him to "discuss how she could get even more involved in the ministries of the church and how her life could be used in an even greater way to make a difference in this world." Her father and her employer told the jury what a bright future she had both in her personal and her professional life.

The testimony of LeAnne's father painted a heartbreaking picture about the pain her family had suffered and continues to suffer as a result of her horrific death. He told the jury about how the death of his daughter devastated her family. About how he, his wife, and two sons "no longer hear the front door open with the greeting" from LeAnne and "the giggling" of Ansley. About how there are "[n]o more nightly phone calls to discuss the day[']s happenings." "No more visits" to her apartment. "No more family outings." "Just a missing void of one sixth of what was a close knit family."

Her father also told the jury about how LeAnne's six-year-old daughter, Ansley, was with him and his wife when the police came to his house with the news that LeAnne had been murdered. He described how difficult it was to tell a child that young she would never see her mother again.

LeAnne's father also recounted for the jury how her death has caused her one brother to become "an angry young man" and her other brother to withdraw from some of life's everyday experiences. How it has caused her mother "to become an emotional basket case," and how it has caused him to become a "sarcastic and caustic old man long before [his] time." He spelled out for the jury that he and his wife will have to suffer for "approximately twenty-five ***644** years," that LeAnne's brothers will have to suffer for "approximately fifty years," and that "little Ansley can expect to live with this loss of her mother about seventy-five years." And "[t]hat's a long, long time. In fact, it's a lifetime." His final words to the jury were that his family's loss was "great — Ansley's loss even greater," and that he doubted "that any of the family will ever recover from the shock of that knock on the door in the early morning hours of August 20, 1997." The murder of LeAnne left an awful hole in the lives of her brothers, parents, six-year old daughter, church, and community.

Evidence about all of that loss was before the jury and weighed heavily in favor of a death sentence. And there was more, of course. The jury also heard the details of Johnston's brutal abduction, assault, and murder of LeAnne. See Part I, above. The jury heard about his attack on Judy Elkins and his rape of Susan Reeder and his assault of Julia Maynard and his armed kidnapping of Carolyn Peak and his robbery and sexual assault of the Alabama store clerk.[7] See Part II, above. And the jury heard everything Johnston had to say about those crimes when he took the stand at the sentence hearing, including his matter-of-fact confessions as well as his dismissals of his horrific attacks on one woman after another as "the same old thing, the same old story, same old action." See pages 630–33, above. They heard Johnston refer dismissively to his abduction, robbery, and murder of LeAnne as "stupid stuff." See page 631–32, above. Not terrible, horrible, vicious crimes, but merely "stupid stuff."

[7] The jury did not hear any evidence about Johnston's brutal assault and murder of Janice Nugent six months before he brutally raped and murdered LeAnne. He has since been convicted for murdering Nugent. Johnston, 863 So. 2d 271. If there were a future trial in this case the prosecution likely could present evidence about Johnston's murder of Nugent.

To overcome the extensive and weighty aggravating circumstances in this case Johnston would have had to introduce equally powerful mitigating circumstances. See Ray v. Ala. Dep't of Corr., 809 F.3d 1202, 1210–11 (11th Cir. 2016) (concluding petitioner could not show prejudice despite "profound and compelling" mitigating evidence because of the "heinous nature of the offense and prior convictions"). He did not. During the sentence stage Johnston called four mental health experts, three family members, and five other character witnesses. See Part V.B, above. He also testified himself. See id.

We know that the jury did not find Johnston's mitigating circumstance evidence compelling when compared to the facts of the crime, his violent criminal history, and other aggravating circumstances because they heard all of it and still unanimously sentenced him to death. The addition of the Diane Busch evidence would not have been strong enough to tip the scale in Johnston's favor. In fact, when all was said and done, it probably would have caused him more harm than good.

Had defense counsel called Diane Busch as a mitigation witness, the prosecutor would have had the opportunity to cross-examine her and call rebuttal witnesses. See Dawson v. Delaware, 503 U.S. 159, 167–68, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) (explaining that if a capital defendant introduces "good" character evidence, the State is entitled to introduce "bad" character evidence in rebuttal); Chandler v. United States, 218 F.3d 1305, 1321 (11th Cir. 2000) (explaining that calling character witnesses could be "counterproductive" because it "might provoke harmful cross-examination ***645** and rebuttal witnesses"). That would have allowed the prosecution to add more courses of damaging facts to the wall of aggravating evidence it had already built against Johnston.

If trial counsel had called Busch as a witness at the sentence stage, as petitioner insists he should have, the prosecutor could have cross-examined her regarding statements she had made about Johnston's behavior when she was interviewed by Detective Taylor and again by Detective Willette while she was in the hospital. According to the detectives' reports, she made a number of statements to them that were extremely unfavorable to Johnston and that contradicted the good things she would have had to say in her direct testimony about his good nature and character. See pages 635–37, 637–39, above.

In the state post-conviction hearing, Busch testified that she did not recall either of the interviews happening, and when asked about each statement testified that she did not recall making it. Under Florida law, if a witness "denies making or does not distinctly admit making the prior inconsistent statement, extrinsic evidence of such statement is admissible" for impeachment purposes. Pearce v. State, 880 So. 2d 561, 570 (Fla. 2004). If Busch had been called as a witness for Johnston at the sentence

hearing and had testified on cross-examination that she did not recall making those derogatory statements about him, the detectives could have testified to her prior inconsistent statements. Their testimony would have impeached her own testimony and undermined anything good that she had to say about Johnston.

In addition to destroying Busch's credibility by cross-examining her about her inconsistent prior statements, the prosecutor would have been able to bring out why Busch's family had made her cut all of her ties to Johnston. She testified in the state post-conviction proceeding that her family had made her quit seeing him because of his violent past. The prosecutor would have presented the fact that Busch identified Johnston to law enforcement after learning of LeAnne's murder. And if Busch had testified at the sentence hearing about how kind Johnston had been to her, the prosecutor surely would have asked Busch about her prior statements concerning her sexual encounter with Johnston, which cast Johnston in an entirely negative light. She testified in the state post-conviction hearing that she did not recall those statements. That would have opened the door for the prosecutor to introduce evidence of Busch's statement that during sex Johnston turned into a "mean character," called her a "bitch" and "fucking bitch," and was "enamored or obsessed with the buttock area." Which would have undermined Busch's testimony and would have been devastatingly harmful to Johnston.

In addition, the prosecutor would have been able to call as witnesses all of the people Detective Taylor interviewed concerning Johnston's behavior while he was with Busch in the hospital. The testimony of the ICU nurses and Busch's mother and sister would have all corroborated the negative statements that Busch made about Johnston to Detective Taylor. They could have testified, as they stated in their interviews with Detective Taylor, that Johnston was controlling, that he would not abide by the hospital's rules, that he threatened the nurses, and that he threatened Busch's parents and friends.

Even worse, the nurses also could have recounted to the jury that Johnston made sexual comments and advances toward Busch while she was lying in a hospital bed in the ICU, sick and heavily medicated. Nurse Davis could have testified, as she told Detective Taylor, that on one occasion ***646** she even found Johnston lying on top of Busch while Busch's medical alarms were going off, and that when the nurses tried to attend to Busch he would not allow them to do it. She could have testified that once when he was interfering with Busch's care she asked Johnston to leave and he refused and was abusive. She had to threaten to call security to force him to get out. And she could have testified, as Nurse Anderson would have, that the nurses asked security to escort them to their cars because of Johnston's abusive behavior and the threats that he made to them, to Busch's parents, and to Busch's friends.

Not only that, but if the defense had attempted to inject Johnston's "good deeds" toward Busch, her mother could have told the jury that Johnston started using her daughter's car like it was his own while she was in the hospital. And her mother also might have been permitted to recount how, after Johnston used her daughter's car, she found in the back seat a paper bag containing a pair of surgical gloves, an elastic wristband, and a knife. After all, the jury had heard from a number of other witnesses that Johnston had used a knife when attacking Judy Elkins, had used a knife when attacking Susan Reeder, had used a knife and surgical gloves when attacking Julia Maynard, and had used a knife and surgical gloves when attacking Carolyn Peak. See Part II, above.

And Busch's sister could have testified that Johnston not only did not have the family's permission to use Busch's car, as he had been doing, but he also was so enraged when they asked for him to give it back that he threw the keys at her parents, even as they were attending to their daughter in the ICU.

It is no wonder Johnston's sentence stage attorney, after hearing all of that evidence come out during the state post-conviction proceedings, stated: "The testimony from this woman would have been bad, ... very bad, based on what's in [Detective Taylor's] report." He was emphatic that if he had investigated using Busch as a witness, he wouldn't have called her. He recognized that the net effect of putting Diane Busch on the stand at the sentence stage would have made a bad situation even worse for Johnston. It would have opened more doors leading to a death sentence.

Any favorable testimony that Diane Busch might have given if she had been called as a witness was open to impeachment with her prior statements to detectives, as we have already discussed. Not only that, but as the Supreme Court said in another case, it "would have triggered admission of ... powerful ... evidence in rebuttal," which "would have made a difference, but in the wrong direction." Wong, 558 U.S. at 22, 130 S.Ct. 383. And what we have held in another case fits here as well: "Prejudice is ... not established when the evidence offered in mitigation is not clearly mitigating or would open the door to powerful rebuttal evidence." Ledford v. Warden, GDCP, 818 F.3d 600, 649 (11th Cir. 2016). Busch's testimony would have

opened the door to a lot of evidence harmful to Johnston instead of altering the sentencing balance in favor of him.

The brutal details of Johnston's abduction, beating, and murder of LeAnne, the lifelong pattern of his violent attacks against other women, and the victim impact evidence about the devastating loss suffered by the family members and friends LeAnne left behind still weigh overwhelmingly in favor of a death sentence. See Krawczuk v. Sec'y, Fla. Dep't of Corr., 873 F.3d 1273, 1297 (11th Cir. 2017) (concluding that there was no reasonable ***647** probability of a different result given the "substantial weight due to aggravation").

VIII. CONCLUSION

Because Johnston has not shown that his counsel's failure to investigate and call Diane Busch as a witness prejudiced his defense at either the guilt or sentence stage, we affirm the district court's denial of his ineffective assistance claims.

AFFIRMED.

MARTIN, Circuit Judge, concurring in the result:

I agree with the majority's decision to affirm the District Court's dismissal of Mr. Johnston's ineffective assistance of counsel claim. Mr. Johnston failed to show he suffered prejudice from the exclusion of Ms. Busch's testimony in both the guilt phase and penalty phases of his trial.

All Citations

949 F.3d 619, 28 Fla. L. Weekly Fed. C 810

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APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-14054-P

RAY LAMAR JOHNSTON,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents - Appellees.

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

Before: ED CARNES, Chief Judge, MARTIN, and ROSENBAUM, Circuit Judges.

BY THE COURT:

Appellant's motion for reconsideration of the October 9, 2019, panel order denying motion to remand this case to the district court or, in the alternative, to expand the certificate of appealability and to allow supplemental briefing and motion to stay appellate proceedings is DENIED.

MARTIN, Circuit Judge, concurring in the result:

I recognize that we are bound by our precedent holding that Hurst v. Florida, 577 U.S. ___, 136 S. Ct. 616 (2016) is not retroactive. See Knight v. Fla. Dep't of Corr., 936 F.3d 1322, 1337 (11th Cir. 2019). For that reason, I concur in the Majority's decision to deny Mr. Johnston's motion for reconsideration.

Nonetheless, I write separately because I share the concerns expressed by Justice Sotomayor in her dissent from the denial of certiorari in Reynolds v. Florida, 586 U.S. ___, 139 S. Ct. 27, 32–36 (2018) (Sotomayor, J., dissenting from the denial of certiorari). Following the Supreme Court's decision in Hurst, the Florida Supreme Court has consistently concluded that any claim of error pursuant to Hurst is harmless if the jury unanimously recommended a sentence of death. See Reynolds v. State, 251 So. 3d 811, 815, 818 (Fla.) (per curiam), cert. denied, 586 U.S. ___, 139 S. Ct. 27 (2018); Davis v. State, 207 So. 3d 142, 174–75 (Fla. 2016) (per curiam). It is particularly troubling that, "[b]y concluding that Hurst violations are harmless [when] jury recommendations were unanimous, the Florida Supreme Court transforms those advisory jury recommendations into binding findings of fact." Reynolds, 139 S. Ct. at 33 (Sotomayor, J., dissenting) (quotation marks omitted). I therefore subscribe to Justice Sotomayor's view that this line of cases from the Florida Supreme Court raises substantial Eighth Amendment concerns and may be invalid under Caldwell v. Mississippi, 472 U.S. 320, 105 S.

Ct. 2633 (1985), in which the Supreme Court held "it is 'constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.'" Reynolds, 139 S. Ct. at 33 (quoting Caldwell, 472 U.S. at 328–29, 105 S. Ct. at 2639); see id. at 35 ("I would grant review to decide whether the Florida Supreme Court's harmless-error approach is valid in light of Caldwell."). Like Justice Sotomayor, I believe "the stakes in capital cases are too high to ignore such constitutional challenges." Id. (quotation marks omitted). So, while I concur in the denial of Mr. Johnston's motion for reconsideration, I am concerned that this precedent raises serious constitutional concerns for petitioners asserting Hurst claims.

APPENDIX C

April 13, 2017

Via Electronic and U.S. Mail

Subject: Content Analysis of *Johnston v. State*

David D. Hendry, Esquire
Capital Collateral Regional Counsel-Middle
12973 N. Telecom Parkway
Temple Terrace, FL 33637

Dear Mr. Hendry:

You have asked me to evaluate the trial transcript of the sentencing phase in *Johnston v. State 841 So.2d 349 (2002)* from a social science perspective based on guidance derived from *Caldwell*.[1] A simple method of applying a non-legal perspective to this transcript is to conduct a content analysis of the text in terms of two principles in *Caldwell* which frame the inquiry you seek:

> "It is constitutionally impermissible to rest death a sentence on a determination made by a sentencer who has been led to believe that responsibility for determining the appropriatcness of defendant's death rests elsewhere."[2]
>
> "There are specific reasons to fear substantial unreliability as well as bias in favor of death sentences where there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court."[3]

The results of this analysis are summarized in Table I, attached at Tab A.

Method. "Content Analysis" is a methodology common to many disciplines in the social and behavioral sciences including Sociology, Psychology, Social Psychology, Information and Library Sciences. Typically, it is used for the evaluation of text, video, audio and other observational data and may include both qualitative, quantitative and mixed modes of research frameworks.[4] At its most fundamental level, the technique provides a systematic means of codifying and counting references based on explicit coding standards executed by multiple coders. "Basic content analysis

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[1] *Caldwell v. Mississippi 472 U.S. 320 (1985).*
[2] *Caldwell v. Mississippi, 472 U.S. at 328 (1985).*
[3] *Caldwell v. Mississippi, 472 U.S. at 330 (1985).*
[4] White, M., & Marsh, E. (2006), Content Analysis: A Flexible Methodology, *Library Trends, 55*(1 Summer); or, Babbie, E. R. (2007), *The Basics of Social Research* (4th ed., p.416), Belmont: Wadsworth Publications.

relies mainly on frequency counts of low-inference events that are manifest or literal and that do not require the researcher to make extensive interpretive judgements."[5]

A panel of four coders read the trial transcript and recorded observations which fit any of the following categories derived from *Caldwell*:

- Any suggestion the jurors might make with respect to the ultimate recommendation for punishment can be corrected on appeal by the sitting judge, appellate court or executive decision-making; or,
- Any suggestion that only a death sentence and not a life sentence will subsequently be reviewed; or,
- Any *uncorrected* suggestions the jury's responsibility for any ultimate determination of death will rest with others, *e.g.* an alternative decision maker such as the judge or a higher state court.

The unit of analysis chosen for this review was the sentence. Reviewers were asked to count any comment uttered before the jury which either directly, or, implicitly fell into the categories above in the judgment of the four coders.[6] Disagreements were adjudicated in a review by the full panel. Inter-coder reliability was established by identifying *miscodes* reflecting judgments that could not be corrected by review of the panel due to a fundamental disagreement over the meaning of the comment and *mistakes* or *errors* (*e.g.*, accidental oversights or misreads which were identified by a vote on review). The inter-coder reliability rate for miscodes was 96% with 65 comments (three discrepancies) out of a total of 68 observations. (See Table I at Tab A.) Coding mistakes which were resolved upon review and did not reflect disagreement on content included 11% (29) of the 260 judgments.

The resumes of these coders are attached at Tab B. Two of the coders (Ms. Deery and Mr. Ali) respectively are graduate and undergraduate Psychology majors at the University of South Florida, Tampa, Florida. Mr. Brennan, the fourth coder, is a journalist who actually covered the *Caldwell* case for *The Meridian Star* before the Mississippi Supreme Court.

Results. Table I identifies 65 sentence-long statements by the Judge Diana M. Allen, the State Prosecutor, Jay Pruner, or, by jurors who directly or implicitly repeated questions posed by the State during voir dire which the coders found to fit the categories described above. On their face, these sentences appear to diminish the role of jurors or the jury as the final arbiter of the punishment in accord with existing Florida law. A total of 61 sentences or 94% ***directly*** reflected the juror's inferior position in setting punishment while 4 or 6% ***implicitly*** asserted sentencing would actually be determined by some other party. Finally, 43% (28) of these statements were made to the jury before the trial began and 57% (37) were made after the presentation of evidence concluded. (See Table I at Tab A.)

Analysis. These results are not surprising given that Florida law directly tasked the sitting judge in the trial with the actual sentencing decision in death penalty cases. However, inasmuch as *Caldwell* was decided on the basis of a single assertion the U.S. Supreme Court held was sufficient

[5] Drisko, J. W., & Maschi, T. (2015). *Content analysis*. New York: Oxford University Press, 2015.

[6] Implicit comments were those which included restatement of the question, in whole or in part, by one party to another before the larger audience as within the case when the prosecution partially repeats a question or response made by a juror in an attempt to ensure common understanding.

was sufficient to establish a constitutional flaw, the sheer number of such statements in this case provides support for the conclusion jurors might well apply themselves to the awesome responsibility of addressing the question of life or death for the defendant with either more or less intensity for reasons unrelated to either evidence or testimony.
Two concepts common to the social sciences and education accelerate the impact of any statements which suggest the jury, or jurors, hold a responsibility for sentencing inferior to that of other actors. These include (1) the role of repetition in learning and (2) the concept of primacy-recency.

The value of repetition in learning and education is apparent to all readers who have mastered the multiplication tables in arithmetic. Repetition is common to all disciplines of learning whether manual or intellectual in nature. The mechanism of repetition in learning is addressed frequently in both education and social psychology.[7] Repetition as used in this review merely reflects a count of the number of sentences identified by the four coders in comparison to the standard set by the United States Supreme Court in *Caldwell*—a single statement by the prosecutor. In light of this standard, the more frequent repetition of sentences underscoring the fact juror decision-making will *not* determine the punishment in Mr. Johnston's trial is far more than in Mr. Caldwell's trial and works against the sense of responsibility for process outcome in the jury.

A second concept in social psychology concerns the primacy-recency effect in learning.[8] In short, respondents are most likely to retain those statements made early in the learning process and those heard late in the experience. As noted above, 43% (28) of the sentences identified were found at the beginning of the trial during the court's opening remarks and voir dire by the prosecution before the presentation of evidence and testimony. Based on this view, both the *placement* and *repetition* of the sentences counted in Table I further accelerated the impact of those sentences in reducing the jury's attention to its responsibility in recommending life or death for a defendant.

A standard jury instruction at the start of Florida jury trials and given in this case holds that statements made by the attorneys during opening of counsel are *not* evidence and should not be considered by the jury in reaching its decision. Here, the judge herself announced the fact the jury's

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[7]See, for example, see the discussion in Jensen, E. (2005), *Teach with the Brain in Mind,* Alexandria, Virginia: The Association for Supervision and Curriculum Development, which references the importance of repetition as part of seven factors critical for learning due to the nature of neural networking and the strengthening of conditioned responses through repetition leading to increased recall and application; see also Cacioppo, J., & Petty, R. (1989), Effects of Message Repetition on Argument Processing, Recall, and Persuasion, *Basic and Applied Social Psychology, 10*(1), 3-12; or, Melton, A. (1970), The Situation with Respect to the Spacing of Repetitions and Memory, *Journal of Verbal Learning and Verbal Behavior, 9*(5), 596-606; or, Wogan, M., & Water, R. H. (1959), The Role of Repetition in Learning, *The American Journal of Psychology, 72*, 612-613; or, Rock, I. (1957), The Role of Repetition in Associative Learning, *The American Journal of Psychology, 70*(2), 186-193; or, Repovs, G., & Baddely, A. (2006), The Multi-Component Model of Working Memory: Explorations in Experimental Cognitive Psychology, *Neuroscience, 139*(1), 5-21.

[8] Murdock, B. B. (1962), The Serial Position Effect of Free Recall. *Journal of Experimental Psychology, 64*(5), 482-488; or, Troyer, A. (2011), Serial Position Effect, *Encyclopedia of Clinical Neuropsychology*, 2263-2264; or, Lind, E., Kray, L., & Thompson, L. (2001), Primacy Effects in Justice Judgments: Testing Predictions from Fairness Heuristic Theory, *Organizational Behavior and Human Decision Processes, 85*(2).

decision would only be a recommendation rather than an affirmation of its responsibility for the actual sentence of life or death as opposed to its previous verdict concerning guilt. The "story model" of juror decision-making now dominant among trial scientists and attorneys underscores the seriousness of such framing effects in determining trial outcomes.[9] Statements by the court and prosecution frame the jury's orientation to the tasks in its subsequent performance. In short, a jury which is told its work will not determine the outcome of sentencing necessarily is less likely to take its role as seriously as would be the case if it actually bore more direct responsibility for execution of sentence.

Conclusion. Based on the socio-legal standard established in *Caldwell v. Mississippi* we may conclude to a reasonable degree of sociological certainty the jury which recommended a sentence of death for Mr. Johnston in *Johnston v. State* was persuaded against the requisite level of attention to its responsibility through comments made by the court and prosecutor.

Harvey A. Moore, Ph.D.

[9] See Krauss, Daniel A.; Sales, Bruce D. "The effects of clinical and scientific expert testimony on juror decision making in capital sentencing." *Psychology, Public Policy, and Law*, Vol 7(2), Jun 2001, 301; or, Pennington, N., & Reid, H. (1993), *Inside the Juror*. Cambridge: The Press Syndicate of the University of Cambridge; see also, Bennett, W., Feldman, M. (1984), *Reconstructing reality in the courtroom*, Rutgers: New Jersey.

Tab A

Table I
Content Coding for Johnston Analysis

Transcript			Coders			
Page	Line	Sentence	Moore	Deery	Brennan	Ali
24	1	Once a jury is sworn in this case to try the defendant, if he is found guilty of the crime of First Degree Murder, after that, the jury will be asked to give a recommendation to the Court on penalty.	1	1	1	1
24	21	Such a second phase of trial would be for the purpose of having the jury recommend to the court which of the two possible penalties should be imposed upon the defendant.	1	1	1	1
25	1	At such a second phase, both parties may present additional evidence relative to the issue of what penalty should be recommended.	1	1	1	1
25	4	The jury would hear the attorneys' positions and the court would give instructions on legal standards to be considered in considering and recommending a penalty.	1	1	1	1
25	7	The court must place great weight on the jury's recommendation when deciding the penalty to impose upon the defendant.	1	1	1	1
135	18	We are going to be talking about your opinions and beliefs and whether under certain circumstances, you could vote to recommend the imposition of the death penalty.	1	1	1	1
150	20	It is incumbent upon you as a juror to weigh the aggravating circumstances and the mitigating circumstances, that evidence in favor of the death penalty and that evidence that weighs in favor of the death penalty and that evidence that weighs in favor of a life recommendation.	1	1	0	1
151	1	Before you vote recommending the imposition of the death penalty or vote to recommend life in prison, do you believe there are cases that you can vote for the imposition of the death penalty, or is your view such that you can never, under any circumstance, vote for the imposition of the death penalty.	1	1	0	1
152	23	Do you believe you would be able, as a juror, to weigh the aggravating circumstances, that evidence in support of the death penalty, and weigh that against the mitigating circumstances, evidence in favor of life under appropriate case, recommend the imposition of the death penalty.	1	1	1	1
154	1	Do you feel such, ma'am, under no circumstances could you vote to recommend the death penalty?	1	1	1	1
155	2	Is there anyone here in this panel that has any concern that if the trial was all said and done and that you had voted to recommend the imposition of the death penalty, that you would be subject to criticism, either family or home, or at work, or at church?	1	1	1	1
155	9	Does everyone here believe you can vote your individual conscience on the recommendation of the proper penalty after weighing the aggravating circumstances with the mitigating circumstances.	1	0	1	1
155	17	is there anyone on this side who believes that if you, after the trial is said and done and that you have voted, if you have voted to recommend the imposition of the death penalty, is there anyone here who believes that you may be subject to criticism at home, at work, in church, at the golf course, anything like that?	1	1	1	1
155	24	And it's-you would think I would have your names down by now, wouldn't you?	1	0	1	0
156	3	And, Ms. Fuchs?	1	0	1	0
156	5	You have concerns you would be subject to criticism?	0	0	1	0

Mistakes

Table I
Content Coding for Johnston Analysis cont.

Transcript			Coders			
Page	Line	Sentence	Moore	Deery	Brennan	Ali
157	7	If you're selected to serve and go in that jury room and determine whether to vote for or against the imposition of the death penalty and if assuming for this question, you believe the aggravating circumstances do outweigh the mitigating circumstances and that the death penalty is called for by law in this case, and according to your view of the evidence, if you assume all of that, your view of the evidence and the law supports the death penalty in the weighing progress, could you vote for the recommendation of the imposition of the death penalty?	1	1	1	1
158	10	Could you vote under the appropriate circumstances to recommend the imposition of the death penalty?	0	1	1	1
222	3	Is there possibility of re-trial where he can come back and get a lesser sentence?	0	0	1	0
222	9	Even though this court here finds him guilty, isn't there another court he can go to and say, I want to go to a higher court and overrule what this judge says here, lessen the sentence to twenty-five of life and provide for parole and I can get out of here earlier	0	0	1	0
225	24	Do you understand the law does not require a death recommendation in any case?	1	1	1	1
226	1	You understand that?	1	1	0	0
226	3	That in the first part of the trial, Her Honor is going to tell you that if you have no reasonable doubt, okay, that you should find him guilty, but she's not going to tell you, I don't believe, that there are any circumstances in which you should recommend the death penalty?	1	1	0	1
226	17	There is no case in which you're told you should recommend the death penalty; understand that?	1	1	1	1
226	21	Everybody understand that?	1	0	0	1
1406	6	It is the judge's job to determine a proper sentence if the defendant is guilty.	1	0	1	0
1468	18	The final decision as to what punishment shall be imposed rests solely with the judge of this court.	1	1	1	1
1468	20	However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.	1	1	1	1
1468	23	You advisory sentence must be given great weight by the Court in determining what sentence to impose upon the defendant, and it is only under rare circumstances that the Court could impose a different sentence.	1	1	1	1
1469	21	After the instructions are given, you will then retire to consider your advisory sentence.	1	1	1	1
1474	9	At the close of all evidence, both counsel and I will have an opportunity to suggest to you why the evidence presented on each party's behalf either merits a vote to recommend the imposition of the death penalty or to recommend a life sentence.	1	1	0	1
1806	7	Member of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the defendant for his crime of Murder in the First Degree.	1	1	1	1
1806	11	As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge,	1	1	1	1

Mistakes

Table I
Content Coding for Johnston Analysis cont.

Transcript			Coders			
Page	Line	Sentence	Moore	Deery	Brennan	Ali
1806	13	However, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.	1	1	1	1
1806	23	Your advisory sentence is entitled by law and will be given great weight by this court in determining the sentence to impose in this case.	1	1	1	1
1807	1	It is only under rare circumstances that this court could impose a sentence other than what you recommend.	1	1	1	1
1807	4	Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings.	1	1	1	1
1809	5	If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without the possibility of parole.	1	1	1	1
1811	17	The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law	1	1	1	1
1811	19	You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be based on these considerations.	1	1	0	1
1811	23	The fact that your recommendation is advisory does not relieve you or your solemn responsibility for the court is required to and will give great weight and serious consideration to your recommendation in imposing sentence.	1	1	1	1
1812	3	In these proceedings, it is not necessary that the advisory sentence of the jury be unanimous.	1	1	1	1
1812	14	Your recommendation to the court must be based only on the aggravating circumstances and the mitigating circumstances about which I have instructed you.	1	1	1	1
1812	17	The fact that that determination of whether you recommend a sentence of death or sentence to life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings.	1	1	1	1
1812	23	Before you ballot, you should carefully weigh, sift and consider the evidence and all of it, realizing that a human life is at stake and bring to bear your best judgment in reaching your advisory sentence.	1	1	1	1
1813	3	If the majority of the jury determine that Ray Lamar Johnston should be sentenced to death, your advisory sentence will be a majority of the jury by a vote of blank to blank advise and recommend to the court that it impose the death penalty upon Ray Lamar Johnston.	1	1	1	1
1813	9	On the other hand, if by six or more votes the jury determines that Ray Lamar Johnston should not be sentenced to death, your advisory sentence will be the jury advises and recommends to the court that it impose a sentence of life imprisonment upon Ray Lamar Johnston without the possibility of parole.	1	1	1	1
1813	16	You will now retire to consider your recommendation.	1	1	1	1

Mistakes

Table I
Content Coding for Johnston Analysis cont.

Transcript			Coders			
Page	Line	Sentence	Moore	Deery	Brennan	Ali
1813	17	When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreperson and returned to the court.	1	1	1	1
1813	23	And you will have two advisory sentence forms, one of each as I have read to you.	1	1	1	1
1816	22	Has the jury reached an advisory sentence?	1	0	1	0
1817	3	The clerk will publish the advisory sentence.	1	1	0	0
1817	11	Advisory Sentence	1	1	1	1
1817	12	A majority of the jury by a vote of 12 to 0 advise and recommend to the Court that it impose the death penalty upon Ray Lamar Johnston.	1	1	1	1
1817	20	Members of the jury, we are going to ask each of you individually concerning the advisory sentence.	1	1	1	1
1817	22	It is not necessary that you state how you personally voted or how any other person voted, but only if the advisory sentence as read was correctly stated.	0	0	0	1
1818	1	Do you, Mr. Alicea, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1818	6	Do you, Mr. Jeffreys, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1818	11	Do you, Ms. Divincenzo, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1818	16	Do you, Mr. Macallister, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1818	21	Do you, Ms. Maciel, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1819	1	Do you, Mr. Ursetti, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1819	6	Do you, Mr. James, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1819	11	Do you, Ms. Puet, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1819	16	Do you, Mr. Terrero, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1819	21	Do you, Ms. Lewis, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1820	1	Do you, Mr. Rutherford, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1820	6	Do you, Mr. Pateracki, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
		Total	68	68	68	68
		Observed	63	58	59	59
		Miscodes	1	1	2	0
		Mistakes	4	9	7	9
		Implicit	4	4	4	4
		Direct	61	61	61	61

Mistakes

Tab B

RESUME

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Education: Ph.D., Case Western Reserve University, 1972.

M.S., Illinois State University, 1969.

B.A., Knox College, 1968.

EMPLOYMENT:

1988 - President, Trial Practices, Inc., a litigation consulting firm.

1974-1993 University of South Florida (USF), Department of Sociology, 4202 E. Fowler Avenue, Tampa, Florida 33620. Taught Sociology of Law, Deviant Behavior, Social Problems, Community Analysis, Criminology, Juvenile Delinquency. Tenured.

1984-1989 Director, MacDonald Center Project. University of South Florida/MacDonald Center for Developmental Disabilities.

1984-1986 Deputy Director for Research, Florida Mental Health Institute.

1982-1984 Publisher, Tampa Bay Monthly Magazine, Tampa, FL (G. Steinbrenner, owner)

1982-1985 Assistant to the President, USF.

1979-1983 Director, Human Resources Institute, College of Social and Behavioral Sciences, USF. Developed Institute consisting of five multi-disciplinary research centers which paralleled the structure of the College: Community Analysis and Development, Applied Anthropology, Community Psychology, Applied Gerontology, and the Center for Evaluation Research.

1971-1974 U.S. Army. Final assignment: HQ, Continental Army Command, Special Programs Division (DCSPER), Fort Monroe, Virginia. Responsible for system management of continental U.S. drug and alcohol rehabilitation/treatment programs; Organizational Development Pilot Test Program, and the Personnel Control Facilities for problems of indiscipline.

1969-1972 Research Associate and Project Director, Case Western Reserve University, Institute on the Family and the Bureaucratic Society; also taught courses on social problems, race relations, and social satisfaction.

1968-1969 Psychiatric Social Worker, Galesburg State Research Hospital, Galesburg, Illinois.

Honors: Outstanding Professor, University of South Florida Senior Class, 1990; NDEA Fellow, 1970-1971; Alpha Kappa Delta; Order of Omega; Student Government Professor of the Year, 1983.

Robert L. Hindman Award for Public Service, Pinellas County Criminal Defense Lawyer's Association, 1999

Florida Public Defenders Association, Inc. "Award for Public Service," 2001

U.S. Attorneys Office Recognition in Prosecution of U.S. v. Ahmed Mohamed and U.S. v. Yousseff Megahed. 2009

Dissertation: *Client Interests and Organizational Goals.* Case Western Reserve University, Normal, Illinois, 1972.

Thesis: *The Significant Others of a College Population.* Illinois State University, Normal, Illinois, 1969.

Books, Monographs and Reports: *Television Advertising by Attorneys: An Evaluation of Its Impact on the Public,* Tallahassee: The Florida Bar, September 12, 1989.

Treatment Programs for Sex Offenders: Report of the Governor's Task Force on Mentally Disordered Sex Offenders and their Victims, (with J. Zusman). Tampa, April, 1984.

Employment Training Needs in Pinellas County, (with D. Stenmark, A. Wolf, T. Northcutt, R. Wheeler). Private Industry Council, Clearwater, Florida, 1981.

CETA and the Private Sector: On-the-Job Training in Manatee County, (with A. Wolf, R. Hansen, T. Northcutt). Private Industry Council, Bradenton, Florida, 1981.

The Chiropractic Component in Health Planning: A Twelve State Survey of Practice Characteristics and Utilization Patterns. Congress of Chiropractic State Associations, Sarasota, Florida 1981 (with R. Francis and M. Kleiman).

Landsat and Crop/Labor Demand Estimation: A Preliminary Study, (with E. Nesman and T. Northcutt). Florida Department of Labor and Employment Security, Tallahassee, Florida, 1981.

Drug Use and Emergent Organizational Responses. Gainesville: The University of Florida Press, 1977. Reviewed in *Social Work*, January 1979, and Contemporary Sociology, Vol. 5, No. 2, March 1979.

Organizing State and Local Health Services: A Comparative Study, (with T. Northcutt, L. Bowman and V. Getting). Department of Health and Rehabilitative Services, Tallahassee, Florida, 1978.

Community Approaches to Drug Abuse (with Marie Haug). Administration of Justice Committee, Greater Cleveland, Ohio, 1972.

Selected References: Studies on Drug Abuse. Administration of Justice Committee, Cleveland, Ohio, 1972.

Papers and Articles:

"Developing Effective Graphic Communications", presented at the Defense Research Institute Seminar on Products Liability, San Diego, California, January 22-24, 1997.

"The Trial is 30 Days Away: Surrogate Jurors and Witness Preparation", presented at the American Bar Association 1997 Annual Meeting, Section of Litigation, Washington, DC, April 17, 1997.

"Qualitative Research, Thematic Development & Jury Selection in Mass Tort Litigation," presented at the Defense Research Institute Seminar, Tampa, Florida, April 1996.

"Multidisciplinary Development of Trial Strategy in Complex White Collar Criminal Defense: A Review and Case Study," *in White Collar Crime 1995.* American Bar Association: Chicago, 1995. Pp. G12 to G22 (with Bennie Lazzara, Jr., Esquire).

"Courtroom Observation and Applied Litigation Research: A Case History of Jury Decision Making," *The Clinical Sociology Review* (with J. Friedman), pp. 123-141, September, 1993.
"Television Advertising by Attorneys: An Evaluation of Its Impact on the Public." Paper presented at the American Board of Trial Advocates, November 5, 1992, Mauna Kea, Hawaii.

"Applied Sociology and Corporate Legal Practice," *The Florida Bar Journal*, Volume LXIII, No. 6, pp. 81-83, June, 1989.

"Youth and Deviance: Punishment, Treatment and the Sexual Offender," *Youth in the Contemporary World*, edited by Yedla Simhadri, Delhi: Mittal Publications, pp. 35-55, 1989.

Harvey A. Moore and Jennifer Friedman. "Applied Sociology and Courtroom Intervention: Participant Observation and Jury Decision-Making." Presented at the National Social Science Association Meeting, New Orleans, LA November 2, 1989.

D. Paul Johnson and Harvey A. Moore. "Focus Groups, Mock Trials and Jury Technique. Presented at the National Social Science Association Meetings, New Orleans, LA, November 2, 1989.

I. Jeff Litvak, Erik Skramsted and Harvey A. Moore. "Computing and Communicating Economic Damages," presented at the National Social Science Association Meetings, New Orleans, LA, November 2, 1989.

Roy Hansen and Harvey A. Moore. "Survey Research and Litigation Consulting," presented at the National Social Science Association Meetings, New Orleans, LA, November 2, 1989.

"Social Science Consultation in the Courtroom" and "Tactical Use of Parallel Juries" presented at the Florida/Georgia Academy of Trial Lawyers Annual Meeting, Snowmass, Colorado, December 10, 1988.

"The Concept of Youth and Applied Sociology," Special Inaugural Address, International Seminar on Youth (UNESCO), February 17, 1986, Visakhapatnam, Andhra Pradesh, India.

"Youth and Deviance: Punishment, Treatment and the Sexual Offender," paper presented at the International Seminar on Youth (UNESCO), February 21, 1986, Visakhapatnam, Andhra Pradesh, India.

"Private Sector Mass Transit Option For Hillsborough County: A Concept Paper," presented to the Florida High Speed Rail Commission and the Hillsborough County High Speed Rail Task Force, Tampa, Florida, 1986.

"Noninstitutional Treatment for Sex Offenders in Florida, *American Journal of Psychiatry,* 142: 964-970 1985. (with J. Zusman).

"Athletes and Academics: The Integration of Leisure and Occupation," presented at the Annual Conference of Transitions to Leisure, St. Petersburg, Florida, February 1985.

"The Decision to Treat Sex Offenders: Policy Implications for Florida." Presented at the Annual Conference of the Florida Council for Community Mental Health, 1983.

"Nobody's Clients: Females, Alcohol, and Skid Row," (with B. Yegidis). *Journal of Drug Issues,* 12:2 (Spring, 1982).

"Chiropractic Utilization in the United States" (with R. G. Francis and M. Kleiman). *The New Zealand Medical Journal,* Vol. 93, Winter, 1981, pp. 43-46.

"Rehabilitation and Protection: The Goals of Probation and Parole Workers" (with M. Donnelan). *Journal of Offender Rehabilitation,* Vol. 3, No. 3, Spring 1979, pp. 207-218.

"Reference Others and Family Influence: A Re-Examination," *Sociological Symposium,* No. 20, Fall 1979, pp. 45-60, (with R. Schmitt and S. Grupp).

"Youth, Leisure and Post-Industrial Society: Implications for the Family," *The Family Coordinator,* (with B. G. Gunter), 24 (2) April 1975, pp. 199-207. Reprinted in D. Rogers (ed.), *Issues in Adolescent Psychology,* Englewood Cliffs, NJ: Prentice-Hall Inc., 1977.

"Examining the Flat Ego: The Problem of Self Concept, Race and Social Myth," paper presented at a conference entitled *Demythologizing the Inner-City Child,* sponsored by the Urban Life Foundation and Georgia State University, Atlanta, Georgia, March 26, 1976. Reprinted in Granger and Young (eds.) Demythologizing the Inner-City Child. Washington, D.C.: National Association for Education of Young Children, 1976.

"Observations on the Role-Specific and Orientational Others" (with R. Schmitt and S. Grupp). *Pacific Sociological Review,* Vol. 16 (3) October, 1973, pp. 509-517.

"Grappling with Deviance: Informal Treatment Modalities for Drug Abuse" (with M. Haug), paper presented at the annual meeting, Midwest Sociological Society, Chicago, Illinois, April 11, 1975.

"Reference Relationships and the Family," (with R. Schmitt and S. Grupp), paper presented at the annual meeting, Southern Sociological Society, Washington, D.C., April 9-12, 1975.

"Developing Professional Roles in Drug Abuse," presented at the Second Army Conference on Alcoholism and Drug Abuse Treatment and Rehabilitation, Atlanta, Georgia, June 1973.

"Doctor, Lawyer, and Indian Chief: The Public and the Professions" (with G. Kitson). Presented at the annual meeting, OVSS, Cleveland, Ohio, April 1971.

"Role Specific and Orientational Others," presented at the annual meeting, Ohio Valley Sociological (OVSS), Akron, Ohio, April 1970.

Research and Training: Grants/Contracts:

Co-Principal Investigator and Project Director, Swine Influenza Immunization Program Evaluation, (with T. J. Northcutt) Center for Disease Control, DHEW, Atlanta, Georgia, $54,157 (1978).

Co-Principal Investigator and Project Director, "Comparative Analysis of Public Health Organization and Structure," (with T. J. Northcutt, Jr. and R.L. Bowman), Florida Department of Rehabilitation Services, $67,500 (1977).

Co-Principal Investigator (with Marie Haug), "Drug Treatment Evaluation Program,: The Associated Cleveland Foundations, $63,400 (1972).

Principal Investigator, Staff Development and Technical Assistance Project, Big Brothers of Tampa, Inc., $7,500 (1975).

Principal Investigator, Evaluation Training Program, Tampa Area Mental Health Board, $15,400 (1974)

Co-Principal Investigator and Project Director, (with T. J. Northcutt), Florida Public Health Immunization Project, State of Florida, Department of Health and Rehabilitative Services, $24,900 (1976).

Co-Principal Investigator (with D. Stenmark), City of Tampa, CETA Training Project, $5,307 (1979).

Co-Principal Investigator (with R. Francis and M. Kleiman), National Survey of Chiropractors, Congress of Chiropractic State Associations, $14,797 (1979).

Principal Investigator, "A Planning and Program Base for Employment Generating Services in Manatee County," U.S. Department of Labor, $33,420 (1980).

Principal Investigator, "Private Industry Council Labor Market Analysis: Pinellas County, "U.S. Department of Labor, $52,320 (1980).

Co-Principal Investigator (with E. Nesman and T. Northcutt) "Periodic Estimates of Florida's Seasonal Migrant Farm Workers," Florida Department of Labor and Employment Security, $40,440 (1980).

Principal Investigator, "In Service Training Audio-Visual Slide/Tape Instructional program Development, Florida Department of Health and Rehabilitative Services, $140,318 (1980).

Principal Investigator, "Management of Hostility and Violence," Florida Department of Health and Rehabilitative Services (District IX, West Palm Beach), $9,680 (1980).

Principal Invcstigator, "Training Project for Children and Youth Workers," Florida Department of Health and Rehabilitative Services (District XIII, Fort Myers) $22,094 (1981).

Principal Investigator, "Individual and Group Counseling Training Project," Florida Department of Health and Rehabilitative Services (District III, Gainesville) $8,900 (1981).

Principal Investigator, "Medicaid Program Pre-Service Training Module Development," Florida Department of Health and Rehabilitative Services, $85,210 (1981).

Co-Principal Investigator (with J. P. Doyle), "Training Primary Care Health Providers," National Institute of Mental Health, $10,000 (1982).

Project Director, "The Retired Retarded: Evaluating Day Care for the Elderly Developmentally Disabled." Hillsborough County Government funded at J. Clifford MacDonald Center, Tampa, FL $10,000 (1987).

Project Director/ Principal Investigator, Supported Employment Conversion Project. Florida Department of Health and Rehabilitative Services, funded at the J. Clifford MacDonald Center, Tampa, FL $51,200 (1988).

Project Director/Principal Investigator: Retired Retarded: Evaluating Adult Day Care. Hillsborough County, $42,499 (1988-89), funded at JCMC.

Recent Seminars and Presentations:

"Once Upon a Time: The Development of Successful Trial Stories," The Southern Trial Lawyers Association Conference, (New Orleans) 2005

"Use of Experts and The Development of Successful Trial Stories," The Academy of Florida Trial Lawyers Workhorse Seminar, (Orlando, FL) 2005

"Tassel Top Loafer Lawyers and the Damages Crisis," American Association for Justice, (Columbus, OH) 2006

"The Business Model of Voir Dire and Trial," Indiana Trial Lawyers Association Seminar, (Indianapolis, IN) 2006

"Using the Social Sciences to Prepare Killer Questioning," PESI Seminars, Depositions Fantasy Camp, (Taos, NM) 2007

"Managing The Art of Video Depositions and Audience Responses," The Academy of Florida Trial Lawyers (Orlando, FL) 2007

"Multi-Camera Video Depositions," The Ohio Academy of Trial Lawyers (Columbus, OH) 2007

"Understanding the Psychology and Sociology of Persuasion in Jury Trials: What All Jurors Need to Hear in the Courtroom," The Absolute Litigators Conference (Las Vegas, NV) 2007

"Focus Groups and Other Preliminary Work to Get Ready for the Deposition," PESI Deposition Fantasy Camp (Taos, NM) 2007

"Modulating Persuasion in Jury Trials: Communicating with Conservative Jurors," International Society of Primerus Law Firms (Charleston, SC) 2007

"Understanding the Psychology and Sociology of Conservative Jurors," Idaho Trial Lawyers Association (Sun Valley, ID) 2007

"Accelerating Risk: Developing and Telling the Trial Story," The Florida Bar CLE Special Topics and Eminent Domain Seminar, (Tampa, FL) 2007

"Voir Dire: Using a Jury Consultant in the Cyber-Age," National Association of Criminal Defense Lawyers, (Key West, FL) 2007

St. Petersburg Bar Association Seminar on Jury Selection, (Clearwater, FL) 2008

"Jury Psychology: Developing and Telling the Defense Story Before Trial Instructor," Current Topics in Liability and Insurance Defense, (Orlando, FL) 2009
"Tassel Top Loafer Lawyers and the Real Problem with Juries Today," National CLE Conference – Litigation, (Vail, CO) 2009
"Jury Consultant Negotiation," Negotiation & Settlement Planning Seminar, Champions Gate, FL (2009)
"The Focus Group Speaks," 360 Seminar, Teton Village, WY (2011)
"Voir Dire, Vorpal Swords and the Cheap Whore: Pre-trial Research and the Trucking Voir Dire," Association of Plaintiff Interstate Trucking Lawyers of America, (St. Louis, MO) 2011
"There is No Such Thing as a Bad Jury: The 5 Must Do's to Effectively Communicate with Conservative Jurors," Trial Lawyers Summit, (South Beach, FL) 2012
"How to Theme Your Case, Then Use the Theming to Develop Damages," Attorneys Information Exchange Group, (Charleston, S.C.) 2012
"Effectively Communicating with Conservative Jurors - Lessons in Psychology and Sociology," Nevada Justice Association, (Las Vegas, NV) 2012
"Jury Selection: Overview," University of Miami Criminal Law Symposium, (Miami, FL) 2012
Private Brain Injury Seminar, (Melbourne, FL) 2013
"Witness Preparation," American Inns of Court, (Tampa, FL) 2013
"Jury Appeal: How to Obtain a Not Guilty Verdict During Voir Dire," Trial Lawyers Association, (Miami, FL) 2014
"Gravitational Pull in Advocacy, What to Do, What to Say, and How to Say It from the Start," Connectionology Seminars, Columbus, OH 2014
"How to Make a Jury Listen: Pearls of Wisdom on use of Focus Groups, Visual Aids, and Technology in Malpractice Cases," Florida Justice Association Medical Malpractice Seminar, Orlando, FL 2014
"Essential Components of Jury Persuasion and Voir Dire Steps in Traumatic Brain Injury Cases," Florida Justice Association Workhorse Seminar, (Orlando, FL) 2015
The Consumer Product Safety Commission Regulatory Panel, Perrin Conferences-The Product Liability Conference, (Miami, FL) 2015
"Job Interviews with the Willfully Unemployed," Florida Justice Association Workhorse Seminar, (Orlando, FL) 2015

"Trying to Determine or Measure the Impact of testing the Results on Jurors in Brain Injury and Spinal Injury Cases," Traumatic Brain and Spinal Injury Medical/Legal Symposium, (Las Vegas, NV) 2015

"The Crazy Things Jurors Think About and How to Deal With It," South Carolina Association for Justice Auto Torts Seminar, (Atlanta, GA) 2015

"Using Data to Prepare Arguments for Jury Selection and Trial," Manasota Trial Lawyers Board, (Lakewood Ranch, FL) 2016

The Duodenal Theory of Damages at Trial: Jury Persuasion on Damages Issues," Barney Masterson Inn of Court, (Clearwater, FL) 2016

"Maximize Your Client's Recovery Without Litigation," Central Florida Trial Lawyers Association, (Orlando, FL) 2016

"From Jury Selection to Robot Lawyers: Big Data Changes are Coming," Invited Lecture, Stetson College of Law, (Gulfport, FL) 2017

"Data Applications and Communication in the Courtroom," Florida Bar, Annual Intellectual Property Law Symposium. (Fort Lauderdale, FL) 2017

Other Service:

Reporter, Florida Bar Special Committee to Study the Integration of Law Graduates into Practice of Law (Germany Committee), 1979-81.

Florida Bar Standing Committee on the Unauthorized Practice of Law, 1982-1994.

Founding Chairman and Member, Museum of Science and Industry Foundation, Board of Directors, 1985-; also Advisory Board, Hillsborough County Department of Museums, 1979-1984, President, 1983.

J. Clifford MacDonald Center, Tampa, Florida, Board Committees on Planning, Programs and Training, 1981-89.

President, Board of Trustees, The Downtown Retirement Center, 1987-2002.

Chair, Vice-Chairman and Member, Board of Directors, National Conference of Christians and Jews (Tampa Bay Region) 1987-91.

2012 Pilot of the Year, Central Florida West, Angel Flight Southeast, Inc.

2013 Transplant Pilot of the Year, Angel Flight Southeast, Inc.

2013 Above & Beyond Award, Angel Flight Southeast, Inc.

2014 Pilot of the Year Award, Angel Flight Southeast, Inc.

2015 Pilot of the Year Honoree, Central Florida West, The Dr. Franklin G. Norris Pilot Awards Gala, Angel Flight Southeast, Inc.

2016 Pilot of the Year Honoree, Above & Beyond, Central Florida West, The Dr. Franklin G. Norris Pilot Awards Gala, Angel Flight Southeast, Inc.

Thomas Brennan
Tampa, FL
101 East Kennedy Blvd.
Tampa, FL 33602
813-523-1865
tbrennan@trialpractice.com

Professional Experience

Harvey Moore & Associates, Tampa, FL (2011 to present):

Senior Trial Consultant for a litigation consulting firm

The Tampa Tribune, Tampa, FL (1987 to 2011):

Senior Staff Writer. Researched and conducted interviews, condensing and compiling the information into accessible and engaging stories. Collaborated across news platforms using print, online and television. Interacted with the public and officials in person, by phone and electronically. Recently have covered the state court system but have also been responsible for the federal court system, transportation, planning, code enforcement, zoning and consumer issues. I have spent more than a decade in community journalism, covered northeastern and eastern Hillsborough County through the Northeast and Brandon bureaus. I filled in for the editors in both bureaus as needed and ran the Brandon bureau for months while the paper searched for a bureau chief. I have dealt with issues affecting the residents the residents and explored ones that they have raised. I have mentored younger reporters and edited less-experienced writers.

The Clarion-Ledger, Jackson, MS (1983-1987):

Staff Writer: Responsible for covering the state legal system including the Mississippi Supreme Court and its trial courts. Covered the legal profession and issues confronting it. Filled in as Assistant Metro Editor as needed.

The Meridian Star, Meridian MS (1979-1983):

Assistant Managing Editor, Metro Editor, State Editor and reporter. Responsible for the content of a 24,000-circulation daily covering eastern Mississippi and western Alabama. As a report covered courts and legal affairs.

Contract Legal Research, Meridian MS (1978-1979):

Performed legal research for attorneys and law firms.

Miscellaneous:

Have written for The National Law Journal, The New York Times, The Wall Street Journal, and Financial Times of London. Was State Correspondent for the Wall Street Journal while in Mississippi. Have been interviewed as an expert by the CBC, BBC and RTE Radio. Have been asked to server as an expert commentator by CNN and MS-NBC. Have appeared on public affairs programs on public television in Mississippi and Florida.

Awards:

Have received national awards in writing on race relation and business writing. Regional and state awards for news, news feature and investigative writing.

Education

Bachelors of Arts (BA) from the University of Mississippi, Oxford, MS, 1974 with majors in Political Science and History.

Course work towards a Juris Doctor (JD) from University of Mississippi School of Law, and a M.A. in American Constitutional from University of Mississippi, Oxford, MS.

Jenna Deery

50 Pelican Place ◦ Palm Harbor, FL 34683
Phone: 727-470-1454 ◦ E-Mail: jennadeery@mail.usf.edu

Objective

Highly motivated psychology student seeking internship opportunities dealing with forensic psychology, as I have prior volunteer experience in the criminal justice system. I also have an interest in counseling, specifically abuse counseling. Intermediate in Spanish, studied for 5 years, including 2 summers abroad in Spain.

Experience

Pinellas County Sheriff's Office **2009-2013**

Participated in the Explorer Program throughout high school and into college with the Sheriff's Office. Studied law, leadership, integrity, and devotion. Completed over 400 community service hours while in the program.

Education

St. Petersburg College **2011-2013**

Accepted into Early College Program at SPC and graduated high school with AA degree.

University of South Florida **2014-present**

Transferred into USF in 2014, will graduate in the fall of 2016 with a Bachelor's in Psychology.

Skills

Excellent interpersonal skills, fairly conversational in Spanish (reading and writing), willingness to learn, competent computer literacy, great time management and multi-tasking skills, open and flexible attitude, and also attended leadership trainings with Sheriff's Office.

AMYN ALI

407-259-1027
amynali@mail.usf.edu

6604 Duncaster St.
Windermere, FL 34786

Profile

An accomplished, dedicated, and well-rounded individual with a variety of leadership, computer, and interpersonal skills, along with extensive volunteer experience with a wish to expand his talents, broaden his education in forensic psychology, and improve his skills as well as make new connections.

Education

University of South Florida, Honors Student — 2015-Present
Major: Psychology and Criminology GPA: 3.94

Cypress Creek High School, IB Diploma Recipient — 2011-2015
GPA: 4.5510, Top 10% SAT/ACT: 2210/33

Work and Volunteer Experience

Tutor, The Tutoring Center; Orlando, FL — 2015
Tutored children one-on-one from ages five to seventeen in different skill areas involved with reading, writing, and math. Is experienced with individuals with attention and learning disabilities.

Volunteer, Give Kids The World; Orlando, FL — 2012-2014
Was involved with greeting guests, food delivery to various locations, serving meals to children from all over the world, along with cleanup afterwards in order to help children with compromised living conditions and/or fatal diseases.

Volunteer, Cypress Creek Peer Tutoring; Orlando, FL — 2013-2015
Tutored high school students at Cypress Creek High School since junior year. In senior year, partnered with two other peers and ran the peer tutoring for the school.

Volunteer, Partnership Walk; Orlando, FL — 2011-2015
Worked annually to prepare for the Aga Khan Foundation's Partnership Walk, a non-profit walk that working to alleviate global poverty. Worked mainly with the set up, registration, and management teams.

Teacher, EXCITE! Program; Orlando, FL — 2014
Volunteered as an EXCITE! Teacher, teaching middle-schoolers biweekly over the summer, in reading, mathematics, and critical thinking for six weeks.

Leadership Experience

Pre-Student Osteopathic Medical Association (Pre-SOMA) Fall 2016-Spring 2017
Public relations officer for Pre-SOMA at USF. In charge of social media outlets as well as recruiting members and informing others about the organization

USF Quidditch Team Fall 2016-Spring 2017
Historian and International Relations officer for the USF Quidditch team, as well as a player. In charge of taking meeting notes, keeping record of practices and competitions, and getting involved with international tournaments

Honors and Awards

National Forensic League Member
Placed second in a Florida Debate competition for Varsity level Lincoln Douglas

Business Professionals of America Member
Placed first in regional competition for Entrepreneurship and Financial Math & Analysis Concepts

Received President's Volunteer Service Award Gold Level
Received award twice for continuous dedication to service to the community

National Society of High School Scholars Member

Microsoft Office Specialist in Word, Powerpoint, and Excel

Adobe Certified Associate in Visual Communication using Adobe Photoshop CS3

Skills

Microsoft Office and Works

Problem Solving

Work with Mac and PC platforms

Adroit and Motivated

Great Time Management

Quick to Adapt to New Environments and Situations

Out-Going and Sociable

References Available Upon Request

APPENDIX D

IN THE UNITED STATES CIRCUIT COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

RAY LAMAR JOHNSTON
Petitioner, **Appeal No.14-14054-P**

v. **Lower Case No. 8:11-cv-02094-EAK-TGW**

SECRETARY, Florida
Department of Corrections, et al.,
Respondents.
_____/

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION FOR STAY AND ABEYANCE OF THIS CASE PENDING THE FLORIDA SUPREME COURT'S RULING ON THE IMPLICATIONS OF *HURST V. FLORIDA*

DAVID DIXON HENDRY
ASSISTANT CCRC-M
FLORIDA BAR NO. 0160016

CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE
12973 N. TELECOM PARKWAY
TEMPLE TERRACE, FL 33637
(813) 558-1600 ext. 624
hendry@ccmr.state.fl.us

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

C-1of 1

JOHNSTON V. SEC. DEPT. OF CORR., APPEAL NO. 14-14054-P

There are no corporations to involved in this case.

Bondi, Pamela Jo (Attorney General State of Florida)

Coryell, Leanne (Victim deceased)

Driscoll Jr., James L. (Attorney for Appellant/Petitioner)

Freeland, Timothy A. (Assistant Attorney General, Counsel for the Respondent).

Johnston, Ray Lamar (Petitioner/Appellant)

Jones, Julie L. (Secretary, Dept. Of Corrections)

Hendry, David D. (Attorney for Appellant/Petitioner)

Kovachevich, Elizabeth A. (United States District Court Judge, United States District Court, Middle District of Florida)

MOTION FOR STAY AND ABEYANCE OF THIS CASE PENDING THE FLORIDA SUPREME COURT'S RULING ON THE IMPLICATIONS OF *HURST V. FLORIDA*

1. COMES NOW the Appellant, Ray Lamar Johnston, by and through undersigned counsel, and moves for stay and abeyance of this case pending the Florida Supreme Court's decision on the implications of the United States Supreme Court's decision in *Hurst v. Florida*, --U.S.--, 136 S. Ct. 616 (2016).

2. The instant case is a death penalty case originating out of the State of Florida. The Appellant filed a principal brief on ineffective assistance of counsel issues unrelated to *Hurst* on January 26, 2016. The State filed its answer brief 31 days later on February 26, 2016.

3. The briefing schedule was issued in this case on December 17, 2015. On January 12, 2016, the United States Supreme Court ruled in *Hurst* that:

> A penalty-phase jury recommended that Hurst's judge impose a death sentence. Notwithstanding this recommendation, Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. The judge so found and sentenced Hurst to death.
>
> We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough.

Hurst, Id. at 619.

4. The Appellant was sentenced to death under the very same unconstitutional death penalty scheme as Mr. Hurst. In the case at bar, in *Johnston v. State*, 841 So. 2d 349 (Fla. 2002), the Florida Supreme Court acknowledged that:

> The jury unanimously **recommended** the death penalty. After holding a *Spencer* hearing, **the trial court found** four aggravating factors, one statutory mitigator, and numerous nonstatutory mitigators, and followed the jury's **recommendation**.

Johnston, Id. at 355 (emphasis added). In the case at bar, countless times the jury was informed that their verdict was merely advisory, a mere recommendation, all in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633 (1985).

5. Currently the Florida Supreme Court is deciding the implications of *Hurst*. Some of the issues to be decided by the Florida Supreme are:

> Whether *Hurst* is retroactive to cases in postconviction?
>
> Whether the doctrine of harmless error can be applied?
>
> If harmless error can be applied then under what standard and by what court?
>
> And, do principles of double jeopardy prevent retrial of defendants for capital offenses who were found guilty of the lesser offense of first degree murder?

6. At the time of the filing of this motion, the Florida Supreme Court has unanimously stayed two scheduled executions based on *Hurst* (*See* Case of Cary Michael Lambrix, Florida Supreme Court Case Nos. SC 16-8 and 16-56; date of execution was

scheduled for February 11, 2016; Oral Argument was held and Stay of Execution was Ordered on the same day: February 2, 2016. *And see Asay v. State*, Florida Supreme Court Case Nos. SC 16-223 and SC 16-102; date of execution scheduled for March 17, 2016; Oral Argument was held and Stay of Execution was Ordered on the same day: yesterday, March 2, 2016). In addition, Timothy Lee Hurst recently filed a motion on February 19, 2016 asking the Florida Supreme Court to remand his case back to the trial court for imposition of a life sentence following the United States Supreme Court decision in *Hurst*. (Florida Supreme Court Case SC 12-1947). That motion is currently pending.

7. Yesterday, on the same day the Florida Supreme Court granted a second stay of execution based on *Hurst* just hours after hearing oral argument (*Asay v. State*, Florida Supreme Court Case Nos. SC 16-223 and SC 16-102), this Court granted a motion for stay in another Florida death penalty case: Harry Franklin Phillips v. Secretary, Florida Department of Corrections, Case No. 15-15714-P.

8. The *Hurst* opinion has skewed the entire legal analysis concerning postconviction claims involving the ineffective assistance of counsel in the penalty phase. Proving the prejudice prong of a penalty phase ineffectiveness claim involves an analysis of whether there is a reasonable probability that the outcome would have been different absent

the ineffectiveness. Under the usual pre-*Hurst* analysis, this would involve a determination of whether the jury would have recommended a life sentence if the available mitigation been presented to them. However, the entire scheme of jury "recommendation," with no findings, is unconstitutional.

9. Post-*Hurst* issues that necessarily must be resolved include:

a) What standard would be applied?

b) What would a properly instructed jury would have found?

c) What would a jury do under a new statute?

10. Should the Florida Supreme Court vacate the approximate 400 current death sentences based on the *Hurst* decision, the Appellant's pending penalty phase issues in this case will decidedly become moot. In any event, even if the Appellant's death sentence is not vacated by the Florida Supreme Court, this Court will have more guidance after the high state court determines the full implications of *Hurst*.

11. Wherefore, the Appellant respectfully urges that this Court stay this case and hold it in abeyance until the Florida Supreme Court decides the full implications of the *Hurst* decision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of March, 2016, I electronically filed the foregoing by using the CM/ECF system which will send notice of electronic filing to the following: capapp@myfloridalegal.com and timothy.freeland@myfloridalegal.com and by U.S. mail to Ray Lamar Johnston.

/S/DAVID D. HENDRY
DAVID D. HENDRY
ASSISTANT CCRC-M
FLORIDA BAR NO. 0160016
hendry@ccmr.state.fl.us
12973 N. TELECOM PARKWAY
TEMPLE TERRACE, FL 33637
(813)558-1600 ext. 624

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-14054-P

RAY LAMAR JOHNSTON,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents - Appellees.

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

ORDER:

Appellant's motion to stay further appellate proceedings pending the ruling of *Hurst v. Florida*, Case No. 12-1947, is DENIED insofar as it involves the filing of the reply brief. Otherwise, a ruling on the motion will issue in due time.

CHIEF JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

May 05, 2017

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 14-14054-P
Case Style: Ray Johnston v. Secretary, FL DOC, et al
District Court Docket No: 8:11-cv-02094-EAK-TGW

At this time the Court does not intend to schedule oral argument in this case until after there is a ruling on Ray Johnston's successive Fla. R. Crim. P. 3.851 motion to vacate, which was filed in the Hillsborough County circuit court on January 5, 2017.

The attorneys are instructed to keep this Court informed of the status of that case and rulings in it. The attorneys should file a report every 45 days or whenever a dispositive ruling is issued, whichever is sooner.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

MP-1

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

RAY LAMAR JOHNSTON,
Petitioner, **APPEAL NO. 14-14054-P**

v. **LOWER CASE NO.8:11-cv-02094-EAK-TGW**

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,
Respondents.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
District Court Number: 8:11-cv-02094-EAK-TGW

MOTION TO REMAND CASE TO THE FLORIDA MIDDLE DISTRICT COURT TO PERMIT ADDITION OF A *HURST* CLAIM, OR, IN THE ALTERNATIVE, MOTION FOR OPPORTUNITY TO MOVE TO EXPAND THE CURRENT COA AND FOR SUPPLEMENTAL BRIEFING ON *HURST V. FLORIDA*

DAVID D. HENDRY
Fla. Bar No. 0160016
ATTORNEY FOR THE APPELLANT
Asst. CCRC-M
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
Phone # (813) 558-1600 ext. 624
Fax# (813) 558-1601
hendry@ccmr.state.fl.us

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

C-1of 1

JOHNSTON V. SEC. DEPT. OF CORR., APPEAL NO. 14-14054-P

There are no corporations to involved in this case.

Bondi, Pamela Jo (Attorney General State of Florida)

Coryell, Leanne (Victim deceased)

Driscoll Jr., James L. (Attorney for Appellant/Petitioner)

Freeland, Timothy A. (Assistant Attorney General, Counsel for the Respondent).

Johnston, Ray Lamar (Petitioner/Appellant)

Jones, Julie L. (Secretary, Dept. Of Corrections)

Hendry, David D. (Attorney for Appellant/Petitioner)

Kovachevich, Elizabeth A. (United States District Court Judge, United States District Court, Middle District of Florida)

PAST ACTION IN THE DISTRICT COURT

The District Court's order at issue was a final order disposing of all claims. United States District Judge A. Elizabeth Kovachevich denied the Appellant's amended petition for writ of habeas corpus filed pursuant to Title 28, United States Code, Section 2254 and supporting memorandum of law on April 17, 2014. At the time of the denial of the petition in the district court in this case, *Hurst v. Florida*, 136 S. Ct. 616 (2016) had yet to be decided. As such, the Petitioner was not able to cite *Hurst*, and was not able to raise the unconstitutionality of Florida's death penalty scheme as a basis of relief from the death sentence.

Consequently, the issue of the unconstitutionality of Florida's death penalty scheme pursuant to *Hurst* is not currently before this Court.

STATEMENT OF THE ISSUES CURRENTLY BEFORE THIS COURT

1. Whether Mr. Johnston's death sentence violates the Sixth and Fourteenth Amendments to the United States Constitution because trial counsel failed to investigate Diane Busch who could have been called at the guilt and penalty phases of his trial, and whether the lower court's decision was based on an unreasonable determination of facts?

2. Whether Mr. Johnston's death sentence violates the Sixth and Fourteenth Amendments to the United States Constitution because trial counsel failed to investigate Diane Busch who could

have been called at the guilt and penalty phases of his trial, and whether the state court decisions were contrary to, or were an unreasonable application of clearly established federal law?

PETITIONER'S REQUEST FOLLOWING THE JANUARY 7, 2019 DENIAL OF HIS PETITION FOR REHEARING FOLLOWING THE DENIAL OF HIS PETITION FOR WRIT OF CERTIORARI

In fairness, and to ensure that the Appellant has an opportunity to present and exhaust all current issues regarding the constitutionality of Florida's capital sentencing scheme in the federal courts, the Appellant asks this Court to remand this case back to the district court to permit him the opportunity to amend his petition for writ of habeas corpus to include a claim under *Hurst v. Florida*, 136 S. Ct. 616 (2016).

A *Hurst* claim was not previously raised in the original petition because the *Hurst* opinion had yet to be released. The Appellant is hoping that the district court will consider the vital scientific evidence rejected by the Florida courts that supports his contention that the *Hurst* errors that occurred at trial were harmful rather than harmless beyond a reasonable doubt. The scientific sociological evidence was certainly admissible under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Yet the evidence was rejected. The state courts' refusals to consider his long-established, generally accepted scientific evidence in support of harmful *Hurst* error amounted to additional violations

of due process in the state courts.

After remand, should the district court reject these arguments, the Appellant would be seeking a COA on these more broader issues concerning the constitutionality of the ***entire*** Florida capital sentencing scheme, rather than just the current issues pending before this Court involving witness Diane Busch.

CONCLUSION

This Court should remand this case back to the district court to permit him the opportunity to amend his petition for writ of habeas corpus to include a claim under *Hurst v. Florida*, 136 S. Ct. 616 (2016). In the alternative, the Appellant asks for an opportunity to move to expand the current COA and for supplemental briefing on *Hurst v. Florida*.

S/David D. Hendry
DAVID D. HENDRY
Florida Bar No. 0160016
Assistant CCRC-M
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
(813) 558-1600 ext. 624
hendry@ccmr.state.fl.us

CERTIFICATE OF FONT AND WORD COUNT

Undersigned counsel certifies that this Motion is in 12 point courier new with certificates of Interested Persons and Corporate Disclosure Statement, contains 965 words.

S/David D. Hendry
DAVID D. HENDRY
Florida Bar No. 0160016
Assistant CCRC-M
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
(813) 558-1600 ext. 624
hendry@ccmr.state.fl.us

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 11, 2019 a true copy of the foregoing was sent to the Clerk of Court by United States Mail, postage paid and filed electronically which caused a copy to be served on opposing counsel Timothy A. Freeland, Assistant Attorney General, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, Florida 33607 by e-mail to: timothy.freeland.@myfloridalegal.com and CapApp.@myflorida.com.

S/David D. Hendry
DAVID D. HENDRY
Florida Bar No. 0160016
Assistant CCRC-M
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
12973 N. Telecom Parkway
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APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

October 07, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 14-14054-P
Case Style: Ray Johnston v. Secretary, FL DOC, et al
District Court Docket No: 8:11-cv-02094-EAK-TGW

Counsel must acknowledge receipt of the attached calendar by docketing the *"Calendar Receipt Acknowledged"* event in ECF.

Oral argument in the above capital appeal has been scheduled for **Tuesday, November 12, 2019**, at the Elbert P. Tuttle Building at the above referenced address. The hearing will commence at approximately **12:00 noon.** Counsel presenting oral argument should check-in at **Rm.339 no later than 11:30 a.m.** Counsel will be allotted thirty (30) minutes oral argument per side.

Court-appointed counsel who must travel for argument should contact the undersigned deputy clerk to provide travel information in order to receive travel authorization in a timely manner.

Counsel for each party must present oral argument unless excused by the court for good cause shown. *Please note that after the date of this letter, any changes in or addition to counsel in the appeals listed on the attached calendar requires leave of the court. See General Order 36.*

The names of the judges of the oral argument panel may be obtained by calling the Courtroom Deputy shown below, no earlier than **10/29/2019**.

If you have questions or concerns, please do not hesitate to contact the Calendaring/Court Sessions Section in Atlanta, Georgia at (404) 335-6141 or (404) 335-6200 Capital Cases Main line.

Personal electronic devices, such as cellular telephones, "smart phones," laptop computers, and tablet computers are not allowed beyond the courthouse's security checkpoint unless prior approval has been obtained from a judge of the Court.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

CAL-1 Oral Argument Calendar Issued

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-14054-P

RAY LAMAR JOHNSTON,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents - Appellees.

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

---

Before: ED CARNES, Chief Judge, MARTIN, and ROSENBAUM, Circuit Judges.

BY THE COURT:

Appellant's motion to remand this case to the district court or, in the alternative, to expand the certificate of appealability and to allow supplemental briefing is DENIED. Appellant's motion to stay appellate proceedings pending the Florida Supreme Court's ruling on the implications of Hurst v. Florida, 136 S. Ct. 616 (2016), is also DENIED.

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

RAY LAMAR JOHNSTON,
Petitioner, **APPEAL NO. 14-14054-P**

v. **LOWER CASE NO.8:11-cv-02094-EAK-TGW**

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,
Respondents.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
District Court Number: 8:11-cv-02094-EAK-TGW

MOTION FOR RECONSIDERATION OF THE DENIAL OF THE MOTION TO REMAND CASE TO THE FLORIDA MIDDLE DISTRICT COURT TO PERMIT ADDITION OF A *HURST* CLAIM, OR, IN THE ALTERNATIVE, MOTION FOR OPPORTUNITY TO MOVE TO EXPAND THE CURRENT COA AND FOR SUPPLEMENTAL BRIEFING ON *HURST V. FLORIDA*

DAVID D. HENDRY
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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

C-1of 1

JOHNSTON V. SEC. DEPT. OF CORR., APPEAL NO. 14-14054-P

There are no corporations involved in this case.

Bondi, Pamela Jo (Attorney General State of Florida)

Coryell, Leanne (Victim deceased)

Driscoll Jr., James L. (Attorney for Appellant/Petitioner)

Freeland, Timothy A. (Assistant Attorney General, Counsel for the Respondent).

Johnston, Ray Lamar (Petitioner/Appellant)

Jones, Julie L. (Secretary, Dept. Of Corrections)

Hendry, David D. (Attorney for Appellant/Petitioner)

Kovachevich, Elizabeth A. (United States District Court Judge, United States District Court, Middle District of Florida)

INTRODUCTION

The Appellant Ray Lamar Johnston is housed on Florida's Death Row. On January 11, 2019 he filed a MOTION TO REMAND CASE TO THE FLORIDA MIDDLE DISTRICT COURT TO PERMIT ADDITION OF A *HURST* CLAIM, OR, IN THE ALTERNATIVE, MOTION FOR OPPORTUNITY TO MOVE TO EXPAND THE CURRENT COA AND FOR SUPPLEMENTAL BRIEFING ON *HURST V. FLORIDA*. The Court denied this motion on October 9, 2019. The Appellant now moves this Court pursuant to 11th Circuit Rule 27-2 for reconsideration of this denial.

STATEMENT OF THE ISSUES CURRENTLY BEFORE THIS COURT

1. Whether Mr. Johnston's death sentence violates the Sixth and Fourteenth Amendments to the United States Constitution because trial counsel failed to investigate Diane Busch who could have been called at the guilt and penalty phases of his trial, and whether the lower court's decision was based on an unreasonable determination of facts?

2. Whether Mr. Johnston's death sentence violates the Sixth and Fourteenth Amendments to the United States Constitution because trial counsel failed to investigate Diane Busch who could have been called at the guilt and penalty phases of his trial, and whether the state court decisions were contrary to, or were an unreasonable application of clearly established federal law?

APPELLANT'S BASIS FOR RECONSIDERATION

This case involves unique circumstances that warrant this Court's careful consideration of the rejected sociological scientific evidence that Ray Johnston attempted to present in the Florida state courts to establish that the trial errors that occurred in this case were ***harmful*** rather than harmless beyond a reasonable doubt. Specifically, following *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Appellant sought the assistance of sociologist and jury trial scientist Harvey Moore, Ph. D. of Trial Practices, Inc. to evaluate whether certain errors at the Johnston trial were harmful or harmless. Ultimately, after performing a content analysis, Dr. Moore concluded that the errors were harmful rather than harmless (see report attached). This report was largely the Appellant's focus of his argument in the state courts in attempts to persuade the courts that the *Hurst* errors were harmful rather than harmless.

The Supreme Court of Florida has continued to find *Hurst* errors harmless beyond a reasonable doubt in all cases where the advisory panel recommendation was unanimous (12-0 for death), including the case at bar (*see Johnston v. State*, 246 So. 3d 266, 266 "Johnston received a unanimous jury recommendation death and, therefore, the *Hurst* error in this case is harmless beyond a reasonable doubt."). Dr. Harvey Moore's report, attached to this

motion, compellingly illustrates that the *Hurst* errors at the Johnston trial were harmful rather than harmless.

THE RELATIONSHIP BETWEEN *CALDWELL*[1], *RING*[2], *HURST*, *STRICKLAND*[3], THE TWO ISSUES BEFORE THIS COURT, AND THE NEED FOR A REMAND TO THE DISTRICT COURT

The Appellant acknowledges that he is currently limited to the two sole issues before this Court. But at the crux of his argument is the issues of deficient performance and prejudice. Specifically, was Ray Lamar Johnston prejudiced when trial counsel failed to call Diane Busch as a witness to trial, and whether the lower court's decision in this regard was based on an unreasonable determination of facts, and whether the state court decisions were contrary to, or were an unreasonable application of clearly established federal law.

Following *Hurst*, the Appellant's arguments on the two issues before this Court have become much stronger. To make the strongest argument possible in this case, the Appellant needs this Court (or the District Court) to consider the contents of Dr. Moore's attached report. The Appellant's position is that he was denied due process when the state courts refused to consider the contents of Dr. Moore's report.

[1] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).
[2] *Ring v. Arizona*, 536 U.S. 584 (2002).
[3] *Strickland v. Washington*, 466 U.S. 668 (1984).

At issue currently before this Court is whether Mr. Johnston was prejudiced at trial. He certainly was. Not only did trial counsel fail to call a vital witness to trial (Diane Busch), but the State of Florida's entire capital system, which was once thought to be constitutional at the time of this trial, has been found unconstitutional by the United States Supreme Court in *Hurst*. Mr. Johnston had a right for a ***jury*** to consider the testimony of an available witness who would testify that Mr. Johnston saved her life. Instead, Mr. Johnston was provided a ***mere advisory panel*** who was informed unconstitutionally approximately 65 times that they would not be making the decision of whether Mr. Johnston would live or die, the trial judge would. In addition to the prejudice resulting from the advisory panel failing to hear the mitigating testimony of available witness Diane Busch, the advisory panel was instructed in unambiguous terms that they would ***not*** be responsible for the decision to sentence Mr. Johnston to death, contrary to *Caldwell* and *Hurst*.

Following *Hurst*, properly instructed juries now make the life and death decisions in capital cases in the State of Florida, not trial judges. Also following *Hurst*, Florida juries' decisions must now be unanimous. Though this trial resulted in a unanimous recommendation for death, it was the decision of a mere advisory panel, not a constitutionally and properly instructed jury. Had just one member of the advisory panel recommended life, Mr.

Johnston would have received *Hurst* relief from the State of Florida. It is the Appellant's position that until he is permitted to return to the District Court to present the information contained within Dr. Moore's report (or at least have this Court consider the contents of Dr. Moore's report), he will not be permitted to make the strongest arguments available against this unconstitutionally imposed death sentence.

Lack of diligence is not the reason for these issues not being included in the Appellant's 28 U.S.C §2254 Petition. Rather, lack of availability of caselaw at the time of the filing of his §2254 Petition in District Court is the reason. *Hurst* did not issue until 2016, long after the filing of the §2254 Petition. *Hurst* holds that juries rather than judges must make necessary factual findings impose the death penalty. "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id.* at 619. Although *Hurst* did not specifically raise *Caldwell* concerns with the prior Florida jury instructions, it said that advisory recommendations are not enough. It is the appellant's position that a *properly instructed* jury must make the necessary factual findings in capital cases. The appellant only received an improperly instructed advisory panel at his trial rather than a properly instructed jury.

Had Mr. Johnston's advisory panel heard the testimony of Diane Busch, at least one of the members of the advisory panel would have recommended life over death. Had Mr. Johnston's advisory panel been actual jury members who were constitutionally informed that they were the actual decision makers at the penalty phase, the decision would have been different. One cannot have confidence in the outcome of this case under *Strickland* when the advisory panel's decision was diminished approximately 65 times at trial. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694.

The current issues before this Court come into clear focus when analyzed keeping the mandates of *Hurst* and *Caldwell* in mind. Confidence in the outcome of this case for the failure to call Diane Busch as a witness is clearly undermined considering that the advisory panel's role was undermined approximately 65 times at trial. The Appellant once again requests a remand and the opportunity to present his arguments and scientific evidence refuting harmless error beyond a reasonable doubt in the district court.

CONCLUSION

This Court should reconsider its decision denying the motion to remand this case back to the district court to permit him the opportunity to amend his petition for writ of habeas corpus to include his scientific evidence and arguments under *Hurst* and *Caldwell.* In the alternative, the Appellant renews his request for an opportunity to move to expand the current COA and for supplemental briefing on *Hurst v. Florida*.

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CERTIFICATE OF FONT AND WORD COUNT

Undersigned counsel certifies that this Motion is in 12 point courier new with certificates of Interested Persons and Corporate Disclosure Statement, contains 1781 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 11, 2019 a true copy of the foregoing was sent to the Clerk of Court by United States Mail, postage paid and filed electronically which caused a copy to be served on opposing counsel Timothy A. Freeland, Assistant Attorney General, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, Florida 33607 by e-mail to: timothy.freeland.@myfloridalegal.com and CapApp.@myflorida.com.

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ATTACHEMENT A

See Appendix C starting on page App 27

APPENDIX K

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

STATE OF FLORIDA **CASE NO.: 97-CF-013379**
99-CF-011338

v.

RAY LAMAR JOHNSTON, **DIVISION: J**
Defendant.
_____/

AMENDED[1] ORDER GRANTING STATE'S MOTION TO STRIKE DEFENDANT'S WITNESS/EXHIBIT LIST AND ATTACHMENTS AND ORDER STRIKING JUNE 15, 2017 EVIDENTIARY HEARING

ORDER VACATING ORDER GRANTING STATE'S MOTION TO STRIKE DEFENDANT'S WITNESS/EXHIBIT LIST AND ATTACHMENTS AND ORDER STRIKING JUNE 15, 2017 EVIDENTIARY HEARING AS TO CASE 99-CF-011338 ONLY

THIS MATTER is before the Court on the State's "Motion to Strike Defendant's Witness/Exhibit List and Attachments," filed on April 14, 2017. On May 3, 2017, Defendant filed his "Response to the State's Motion to Strike." On May 18, 2017, the Court held a hearing on the State's motion.

State's Motion to Strike Defendant's Witness/Exhibit List and Attachments

In the State's "Motion to Strike Defendant's Witness/Exhibit List and Attachments," it raises concerns about Dr. Harvey Allen Moore's ability to testify at an evidentiary hearing. (*See* State's Motion to Strike Defendant's Witness/Exhibit List and Attachments, attached.) Specifically, the State argues that "[i]t would be improper to elicit the speculative testimony of [Defendant's] expert at an evidentiary hearing, and it would be equally improper to consider the speculative conclusions found

[1] The Court notes its original "Order Granting State's Motion to Strike Defendant's Witness/Exhibit List and Attachments and Order Striking June 15, 2017 Evidentiary Hearing," rendered on June 8, 2017, incorrectly included case 99-CF-011338. This order is intended to amend the previous order by vacating the June 8, 2017, order as to case 99-CF-11338 only.

in his expert's report." *Id.* The State argues that Dr. Moore should not be qualified as an expert witness due to the speculative nature of his testimony and report. *Id.* The State contends that Dr. Moore's testimony and his report lack new facts for the Court to consider and are irrelevant to the issues before the Court. *Id.*

Defendant's Response to the State's Motion to Strike

In response, Defendant argues that Dr. Moore's report "is full of facts necessary for this court to consider." (*See* Response to the State's Motion to Strike, attached.) The Defendant further argues that "[t]he question of whether Dr. Moore's methods are simply speculative or grounded in sound scientific principles is an issue of fact that needs to be explored at an evidentiary hearing." *Id.* As such, Defendant contends that his claims should not be summarily denied. *Id.*

Evidentiary Hearing

On May 18, 2017, an evidentiary hearing was held on the State's motion. (*See* Hrg. Trans., attached). Dr. Moore was called to testify. At the close of the hearing, both parties presented oral closing arguments. Based on the State's motion, the Defendant's response, the record, and the testimony and argument presented at the evidentiary hearing, the Court finds as follows:

Legal Standard for Expert Testimony in Florida

On February 16, 2017, the Florida Supreme Court declined to adopt the *Daubert* standard as part of the Florida Evidence Code to the extent that it is procedural. *See In re: Amendments to the Florida Evidence Code*, 210 So. 3d 1231 (Fla. 2017). The Florida Supreme Court has the authority and obligation to adopt rules of practice and procedure for the courts of Florida. *See* Fla. Const. art. 5, § 2(a); *see also Perez v. Bell South Telecommunications*, 138 So. 3d 492, 498 n.12 (Fla. 3d DCA 2014).

In Florida, novel scientific methods are admissible when the relevant scientific community has generally accepted the reliability for the underlying theory or principle. In *Ramirez v. State*, 651

So. 2d 1164, 1166-67 (Fla. 1995) (internal citations omitted), the Florida Supreme Court enumerated the following four-step process in determining the admissibility of expert opinion testimony concerning a new or novel scientific principle:

> [T]he admission in evidence of expert opinion testimony regarding a new or novel scientific principle is a four-step process...First, the trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue...Second, the trial judge must decide whether the expert's testimony is based on a scientific principle or discovery that is 'sufficiently established to have gained general acceptance in the particular field in which it belongs'...The third step in the process is for the trial judge to determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue...Fourth, the judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject.

The second-prong of *Ramirez*, commonly known as the *Frye* test, requires the court to determine whether the testing procedure or device utilized to apply a scientific principle or discovery is sufficiently established to have gained general acceptance in the relevant scientific community. The *Frye* test is used to guarantee the legal reliability of new or novel scientific evidence in that the trial judge is required to "determine the level of agreement or dissension" within the relevant scientific community. *Brim v. State*, 779 So. 2d 427, 434 (Fla. 2d DCA 2000). In *Hadden v. State*, 690 So. 2d 573, 578 (Fla. 1997), the Florida Supreme Court explained the reliability prong of the *Frye* test as follows:

> [W]e firmly hold to the principle that it is the function of the court to not permit cases to be resolved on the basis of evidence for which a predicate of reliability has not been established. Reliability is fundamental to issues involved in the admissibility of evidence...novel scientific evidence must also be shown to be reliable on some basis other than simply that it is the opinion of the witness who seeks to offer the opinion. In sum, we will not permit factual issues to be resolved on the basis of opinions which have yet to achieve general acceptance in the relevant scientific community; to do otherwise would permit resolutions based upon evidence which has not been demonstrated to be sufficiently reliable and would thereby cast doubt on the reliability of the factual resolutions.

"In utilizing the *Frye* test, the burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedure used to apply that principle to the facts at hand." *Ramirez,* 650 So. 2d at 1168. "The trial judge has the sole responsibility to determine this question." *Id.* at 1168; *see also Brim v. State*, 695 So. 2d 268, 272 (Fla. 1997) (holding the *Frye* determination is a question of law for the judge rather than a matter of weight for the jury). "[G]eneral acceptance in the scientific community can be established 'if use of the technique is supported by a clear majority of the members of that community.'" *Brim*, 695 So. 2d at 272 (internal citation omitted). In determining the general acceptance in the scientific community, the court "must consider the quality, as well as quantity, of the evidence supporting or opposing a new scientific technique." *Id.*

"Although the *Frye* standard may be designed to 'guarantee the reliability' of new scientific evidence, the trial judge is not actually called upon to determine whether various principles and procedures are 'reliable' from a scientific perspective." *Brim*, 779 So. 2d at 434. Trial judges must determine the "legal reliability, as a threshold test of legal relevance, by judging – as an objective outsider – the level of acceptance that a principle or procedure has achieved within a scientific community." *Id.*

Analysis and Ruling

After reviewing the State's motion, Defendant's response, and the evidence and argument presented at the May 18, 2017, hearing, the Court finds that Dr. Moore's testimony is not needed to resolve the outstanding issues in Defendant's Rule 3.851 motion. The Court recognizes that Dr. Moore testified he has previously been certified in one criminal case as an expert in content analysis, with the one case being in this judicial circuit. (*See* Hrg. Trans. p. 23-26, attached). However, this Court must still consider whether Dr. Moore's testimony regarding content analysis and his report in the above-listed cases can meet the necessary standard to be allowed at the evidentiary hearing. Dr.

Moore testified that content analysis is a "well-established methodological technique" and that it has "provided the approach [to] developing theory in the social and behavioral sciences since the mid sixties." (Hrg. Trans. p. 5, attached). Dr. Moore's testimony is that content analysis is commonly used in the social sciences to study and collect empirical data from various forms of media. *Id.* Dr. Moore states that he used content analysis to find sentences and phrases used during Defendant's trial and sentencing that would have improperly influenced the jury. *Id.*

The Court does not take issue with the use of content analysis as a means of researching and collecting data. However, there was little to no evidence presented to show that content analysis is widely accepted or used as a means to investigate a trial for biased language or undue prejudice. Dr. Moore's analysis and report may be useful for research purposes, but it is unable to meet the second prong of the *Frye* test. *See Ramirez*, 651 So.2d at 1166 ("[T]he expert's testimony is[must be] based on a scientific principle or discovery that is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'").

The Court finds that even if Dr. Moore's testimony and methods could meet the required standards, his testimony is still inadmissible as it enters into the purview of the Court's decision making ability. Dr. Moore's content analysis report is based on lay persons' reviews of the record. (*See* Hrg. Trans. p. 33, attached). It does not provide any additional knowledge or ability that the Court does not also possess. *Id.* Dr. Moore advised the Court that the ability to read the English language is "about all that's required" of the individuals reviewing the record. (Hrg. Trans. p. 40, attached). While grateful for the assistance offered by Dr. Moore and his staff, the Court finds it is not necessary, as it is the Court's duty to review the record and draw appropriate conclusions based on the arguments and the law.

Due to the Court's ruling above, it finds that Defendant's remaining claims are purely legal and can be resolved by the Court's own review of the record. As such, the Court finds no additional

hearings are required. Consequently, the June 15, 2017, evidentiary hearing currently scheduled for the above-listed case numbers will be stricken.

It is therefore **ORDERED AND ADJUDGED** that the State's "Motion to Strike Defendant's Witness/Exhibit List and Attachments" is **GRANTED**.

It is further **ORDERED** that the Clerk **SHALL STRIKE** the June 15, 2017, evidentiary hearing.

It is further **ORDERED AND ADJUDGED** that the "Order Granting State's Motion to Strike Defendant's Witness/Exhibit List and Attachments and Order Striking June 15, 2017 Evidentiary Hearing" is hereby **VACATED** as to case 99-CF-011338 only.

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

ORIGINAL SIGNED

MICHELLE SISCO CIRCUIT JUDGE

MICHELLE SISCO, Circuit Judge

Attachments:

Motion to Strike Defendant's Witness/Exhibit List and Attachments
Response to the State's Motion to Strike
Hearing Transcript

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this order has been furnished to Timothy Freeland, Esquire, and C. Suzanne Bechard, Esquire, Office of the Attorney General, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607-7013; and to David Dixon Hendry, Esquire, James Driscoll, Jr., Esquire, and Gregory W. Brown, Esquire, CCRC-M, 12973 North Telecom Parkway, Temple Terrace, FL 33637, by U.S. mail; and to Jay Pruner, Esquire, Office of the State Attorney, 419 Pierce Street, Tampa, FL 33602, by inter-office mail, on this 14th day of June, 2017.

Deputy Clerk

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

STATE OF FLORIDA,

Plaintiff,

v.

Case No. 97-CF-013379
Death Penalty Case

RAY LAMAR JOHNSTON,

Defendant.
_____/

STATE'S MOTION TO STRIKE DEFENDANT'S WITNESS/EXHIBIT LIST AND ATTACHMENTS

The State of Florida, through the undersigned co-counsel, moves to strike the Defendant's Witness/Exhibit List and attachments and as grounds therefore, states the following:

On April 13, 2017, Johnston filed a Witness/Exhibit List attaching a report from Trial Practices, Inc. dated April 13, 2017 and authored by Harvey A. Moore, Ph.D.. This document was filed for consideration prior to a case management conference to be held by this court on Johnston's successive postconviction motion pursuant to Hurst v. State of Florida, 202 So. 3d 40 (Fla. 2016). *See* Fla. R. Crim. R. 3.851 (f)(5) (where the purpose of a case management conference is to hear argument based on "purely legal claims not based on disputed fact").

Johnston has now filed the report to support his purely legal claim, but in doing so, he has introduced a speculative analysis of the transcript of Johnston's sentencing phase "from

a social science perspective" by conducting a "content analysis...of two principles" in Caldwell v. Mississippi, 472 U.S. 320 (1985). It would be inappropriate for this court to consider the contents of the report in determining the outcome of this purely legal claim. The report is based entirely on speculation, and it includes the wrong standard for reviewing Johnston's claim. Johnston urges entitlement to relief because his jury was not instructed according to the current state of the law which, in his view, amounts to a violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). The Florida Supreme Court has expressly rejected Johnston's claim in this regard. Hall v. State, ___ So. 3d ___ 2017 WL 526509 at *25 (Fla. Feb. 9, 2017).

In sum, regardless of Johnston's protestations, the Florida Supreme Court has consistently found harmless those post-Ring[1] cases where the jury's sentencing recommendation was unanimous, as is the case here. This Court must follow that precedent, and strike Johnston's witness and report.

Johnston is not entitled to Hurst relief because his jury unanimously recommended death as the appropriate sentence in this case. The correct harmless error analysis would be based on whether the record demonstrates beyond a reasonable doubt that a rational jury would have unanimously found all facts necessary to impose death and that death was the appropriate sentence.

[1]Ring v. Arizona, 536 U.S. 584 (2002).

Mosely v. State, 209 So. 3d 1248 at 1284 (Fla. Dec. 22, 2016). Because his jury's sentencing recommendation was unanimous, any Hurst error was clearly harmless. See, e.g., Davis v. State, 207 So. 3d 142 (Fla. 2016); Hall v. State, ___ So. 3d ____, 2017 WL 526509 (Fla. Feb. 9, 2017); Kaczmar v. State, ___ So. 3d ____, 2017 WL 410214, at *4 (Fla. Jan. 31, 2017); Knight v. State, ___ So. 3d ____, 2017 WL 411329 at *15 (Fla. Jan. 31, 2017), and King v. State, ___ So. 3d ____, 2017 WL 372081 at *19 (Fla. Jan. 26, 2017).

It would be improper to elicit the speculative testimony of Johnston's expert at an evidentiary hearing, and it would be equally improper to consider the speculative conclusions found in his expert's report when deciding whether an evidentiary hearing is warranted.

Given the inappropriate and irrelevant speculation as well as the incorrect legal theories included in the report, this court should strike the witness and exhibit. Moreover, since this is a purely legal Hurst claim which does not warrant an evidentiary hearing, or any relief for that matter, this Court should reject Johnston's arguments and motions and enter an order summarily denying review. Even if this court should desire to include the contents of the report within its consideration of Johnston's Hurst claim, the motions, files, and records in this case would still conclusively show that Johnston is

entitled to no relief, and his motion should be denied without an evidentiary hearing.

CONCLUSION

In sum, the Florida Supreme Court has consistently held that no Hurst relief is warranted in cases, like Johnston's, where the jury's sentencing recommendation was unanimous. Johnston is therefore not entitled to relief as a matter of law. Accordingly, Johnston's Witness/Exhibit list and attachments should be stricken and Johnston's motion summarily denied.

Respectfully submitted,

PAMELA JO BONDI

ATTORNEY GENERAL
STATE OF FLORIDA

s/ Timothy A. Freeland
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CO-COUNSEL, STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of March, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal filing system which will

send a notice of electronic filing to the following: Honorable Michelle D. Sisco, Circuit Judge, 401 No. Jefferson Street, Tampa, Florida 33602, **heckshsl@fljud13.org**; James Driscoll, Jr., David Dixon Hendry and Gregory W. Brown, Assistants CCRC-M, Law Office of the Capital Collateral Regional Counsel, 12973 No. Telecom Parkway, Temple Terrace, Florida 33637, **driscoll@ccmr.state.fl.us**, **hendry@ccmr.state.fl.us**, **brown@ccmr.state.fl.us** [and] **support@ccmr.state.fl.us**; and Jay Pruner, Assistant State Attorney, Office of the State Attorney, 419 No. Pierce Street, Tampa, Florida 33602, **pruner_j@sao13th.com**, **stapleton_a@sao13th.com** [and] **mailprocessingstaff@sao13th.com**.

s/ Timothy A. Freeland
CO-COUNSEL, STATE OF FLORIDA

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

STATE OF FLORIDA,

Plaintiff,

v.

RAY LAMAR JOHNSTON,

Defendant.

_____/

CASE NO. 97-CF-013379

DIVISION J

RESPONSE TO THE STATE'S MOTION TO STRIKE

COMES NOW, Defendant, Ray Lamar Johnston, by and through the undersigned counsel, and responds to the State's Motion to Strike Defendant's Witness / Exhibit List and Attachments filed April 14, 2017. Defendant responds to the State's Motion as follows:

At page 1 of the motion the State claims that "Johnston has now filed the [Harvey Moore] report to support his purely legal claim, but in doing so, he has introduced a speculative analysis of the transcript."

This claim is not purely legal in nature. It is a mixed question of fact and law. Death is different. This Court should not simply accept the advisory panel's mere recommendation in this case and ignore the United States Constitution. Death sentences cannot be carried out in an arbitrary and capricious manner. Such death sentences violate the Eighth Amendment prohibition against cruel and unusual punishment. To deny Mr. Johnston relief simply because of a mere advisory panel recommendation is the very definition of an arbitrary and capricious death sentence.

As the United States Supreme Court recognized in *Hurst v. Florida*, 136 S. Ct. 616 (2016), the "advisory recommendation" at a Florida sentencing phase cannot be substituted for an actual

jury verdict. The United States Supreme Court has already held in *Hurst* that "The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Hurst*, 136 S. Ct. at 622. Therefore, this Court should not treat Mr. Johnston's advisory recommendation as such, even when the recommendation was unanimous. This is especially true in a case that has so severely violated the dictates of *Caldwell v. Mississippi*, 472 U.S. at 328 (1985).

Dr. Harvey Moore will assist the trier of fact in this case, the Court, to understand that the analysis of Mr. Johnston's Eighth Amendment claims in this case requires much more than a quick check of the advisory recommendation at the penalty phase. Any current adverse case law that suggests that a quick advisory recommendation check can swiftly dispose of Mr. Johnston's claims is ill-advised, ill-reasoned, and unconstitutional.

Dr. Harvey Moore's report is full of facts necessary for this Court to consider and analyze if it is to conduct a robust analysis of Mr. Johnston's Eighth Amendment claims, one that comports with due process. Dr. Moore did not perform "a speculative analysis of the transcript." Rather, he performed a scientific analysis of the transcript. This Court is free to judge the weight to be afforded Dr. Moore's analysis and testimony once it hears the scientific methods employed. The question of whether Dr. Moore's methods are simply speculative or grounded in sound scientific principles is an issue of fact that needs to be explored at an evidentiary hearing. Mr. Johnston's claims should not be summarily denied.

At page 2 of its Motion to Strike the State claims that "the report is based entirely on speculation." This is not the case at all. Dr. Moore's report is based on record transcript that is part of the record on appeal in this case. It is also based on an analysis of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) as it relates to the transcript in the case at bar. In his report, Dr. Moore identifies

some 65 instances from actual trial transcript in this case wherein the jury was "led to believe that responsibility for determining the appropriateness of defendant's death sentence rests elsewhere." *See Caldwell v. Mississippi*, 472 U.S. at 328 (1985). The report and the conclusions therein is not based entirely on speculation. It is based on decades of established social science research. Based on a review of the Johnston trial transcripts and the United States Supreme Court case of *Caldwell v. Mississippi*, Dr. Moore ultimately concluded:

> Statements by the court and prosecution frame the jury's orientation to the tasks in its subsequent performance. In short, a jury which is told its work will not determine the outcome of the sentencing necessarily is less likely to take its role as seriously as would be the case if it actually bore more direct responsibility for execution of sentence.
>
> **Conclusion**: Based on the socio-legal standard established in *Caldwell v. Mississippi* we may conclude to a reasonable degree of sociological certainly the jury which recommended a sentence of death for Mr. Johnston in *Johnston v. State* was persuaded against the requisite level of attention to its responsibility through comments made by the court and the prosecutor.

Report from Dr. Harvey Moore, page 4.

The State also claims that the report "includes the wrong standard for reviewing Mr. Taylor's claim." The United States Constitution is not the wrong standard for reviewing Mr. Taylor's claim. *Caldwell* is still good law. Mr. Taylor's death sentence must comport with the dictates of *Caldwell* and the Eighth Amendment. The State's suggestion at page 2 that "The Florida Supreme Court has expressly rejected Johnston's claim in this regard. Hall v. State, __ So. 3d __ 2017 WL 526509 at *25 (Fla, Feb. 9, 2017)" is wrongly cited and misplaced by the State. The Florida Supreme Court never expressly rejected Mr. Johnston's current claim in *Hall*. *Hall* merely addressed an ineffective assistance of appellate counsel claim involving *Caldwell*, but analyzed the claim only in a pre-*Hurst* procedural posture. *Hurst* has now changed everything.

Death sentences must also comport with the Sixth Amendment. In *Hurst v. Florida*, 136 S.

Ct. 616, 619 (2016), the United States Supreme Court held that "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Mr. Johnston's advisory panel did not engage in any required fact finding at the penalty phase. Dr. Moore's report identifies numerous instances where the jury was informed at the penalty phase that they were simply making a mere "recommendation" to the trial judge in Mr. Johnston's case. As a matter of standard Florida capital sentencing law at the time, there were numerous "suggestions that the sentencing jury [] shift its sense of responsibility to [the] court." *Caldwell v. Mississippi*, 472 U.S. at 330 (1985). Mr. Johnston's death sentence is a result of a death penalty system that violated both *Caldwell* and *Hurst*.

Contrary to the State's arguments in this case, the errors are harmful, not harmless. Regardless of the advisory recommendation in this case, this case clearly does not meet Eighth Amendment scrutiny. *Caldwell* reversed a death sentence based on a prosecutor's isolated comments during closing arguments. The United States Supreme Court concluded in *Caldwell*:

> This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its "truly awesome responsibility." In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated. Accordingly, the judgment is reversed to the extent that it sustains the imposition of the death penalty, and the case is remanded for further proceedings.

Caldwell, Id. at 341. By ignoring the established Eighth Amendment mandates of *Caldwell* (1985), courts will leave clearly established Eight Amendment violations unrectified.

Any close question of whether this Court should grant an evidentiary hearing should be resolved in Mr. Johnston's favor, in favor of an evidentiary hearing. An evidentiary hearing was denied in the case of *Cook v. State*, 792 So. 2d 1197 (Fla. 2001). The Florida Supreme Court remanded the case back to the trial court to hold an evidentiary hearing. *Id.* at 1205. In a special

concurrence in *Cook*, Justice Pariente joined by Justice Anstead, stated the following:

> I write separately for two reasons. First, I write to express my continued belief in the importance of trial judges erring on the side of granting an evidentiary hearing on an initial postconviction motion. Second, I write in response to Chief Justice Wells' concerns about the length of time this case has been in postconviction proceedings.
>
> As to the fact that no evidentiary hearing has yet been held, the failure to conduct an evidentiary hearing unless the record conclusively shows that the defendant is not entitled to relief is not only contrary to the law, but also is in itself a cause of delay in the postconviction process. *See Gaskin v. State*, 737 So. 2d 509, 519 (Fla. 1999) (Pariente, J., specially concurring) (explaining that failure to conduct an evidentiary hearing "causes delay and undermines our goal of providing a simplified, complete and efficacious remedy for postconviction claims"); *Mordenti v. State*, 711 So. 2d 30, 33 (Fla. 1998)(Wells, J., concurring) (noting that "[t]oo much judicial and counsel time and resources have been wasted in determining whether to hold an evidentiary hearing. This has added to the inordinate amount of time prisoners remain on death row"). We have urged trial judges to err on the side of granting an evidentiary hearing on the first postconviction motion on all factually-based claims such as ineffective assistance of counsel, *Brady* [footnote omitted] and newly discovered evidence. *See Gaskin*, 737 So. 2d at 516; *Ragsdale v. State*, 720 So. 2d 203, 206 (Fla. 1998). If the trial court in this case had granted an evidentiary hearing in 1996, the initial postconviction process would now likely be at an end. Instead, we face the specter of yet another delay as we return this case to the trial court.

Cook, Id. at 1205.

Contrary to the State's arguments, this Court should consider the contents of the report and permit Dr. Harvey Moore to testify on June 15, 2017.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on May 3, 2017, we electronically filed the forgoing Response with the Clerk of the Court by using Florida Courts e-portal filing system which will send a notice of electronic filing to all parties and to Circuit Court Judge Michelle Sisco.

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

STATE OF FLORIDA

Case No.: 99-CF-011338

vs.

Division: J

RAY LAMAR JOHNSTON,
Defendant.
_____/

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS

This case came on to be heard before the Honorable Michelle D. Sisco, Circuit Judge, at the Hillsborough County Courthouse Annex, Tampa, Florida, on May 18, 2017, commencing at approximately 8:35 a.m., reported by Mary E. Blazer, RPR.

APPEARANCES:

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Also Present:

Staff Attorneys

I N D E X

EXHIBITS

PROCEEDINGS

THE BAILIFF: Court is back in session.

THE COURT: Hello. Good morning.

All right. So are we ready to proceed now?

Okay. All right. We're going to combine Johnston, and is it Taylor?

MS. BECHARD: Perry Alexander Taylor, yes.

THE COURT: Okay. So, do you want to call your witness?

MR. HENDRY: Yes, Your Honor.

We would call Dr. Moore.

THE COURT: Okay. Dr. Moore, come on up.

MR. HENDRY: And for the record, David Hendry from CCRC Middle. I'm here, along with James Driscoll, from CCRC on behalf of both Mr. Perry Taylor and Mr. Ray Lamar Johnston.

And, Your Honor, also we spoke in the hallway with the attorney general's office, and we are in agreement that the best way to go about both of these hearings, since they involve basically the same issue, is to consolidate the transcripts.

THE COURT: Okay.

MR. HENDRY: Because it's the same direct examination on both cases, basically.

THE COURT: Okay. Is that correct, State?

MR. FREELAND: Yes, it is, Your Honor.

MS. BECHARD: Yes, Your Honor.

THE COURT: Very good.

All right. And if you would please raise your right hand.

(Witness sworn.)

HARVEY ALLEN MOORE,

called as a witness by the Defendant, having been first duly sworn, testified as follows:

THE WITNESS: I do.

THE COURT: Okay. Very good.

You may proceed.

MR. HENDRY: Thank you.

DIRECT EXAMINATION

BY MR. HENDRY:

Q Could you please state your name for the record.

A Harvey Allen Moore. M double O-R-E.

Q Could you detail for the Court your formal educational experience.

A Yes, sir. I received a bachelor's degree from Knox College in Galesburg, Illinois, in 1968; masters's degree in social psychology from Illinois State University in 1969; and a Ph.D., in sociology from Case Western Reserve University in 1972.

Q Okay. And did you complete in those studies a master's thesis and a dissertation?

A Yes, sir.

Q Okay. And did those papers both involve the matter of content analysis?

A Yes, sir. Both, and many of my publications have involved content analysis in one form or another.

Q Okay. If you could describe for us what exactly is content analysis.

A Content analysis is a very old well-established methodological technique for doing one of two things. There are two polar ends for which it is used. Principally it's used in the development of theory, grounding theory and observations of a variety types of files, text files, audio files, video files, and so forth, with the purposes to develop theory by looking for, identifying, counting concepts to see and manipulate those as variables in some subsequent analysis. It's called grounded theory development and it's been the principle -- provided the principle approach developing theory in the social and behavioral sciences since the mid sixties.

At the other end we have a quantitative, as opposed to a qualitative, approach in which case -- in those cases where a theory or concepts are already well

developed, and the question then becomes to what extent do those concepts, variables appear in the variety types of files; as I mentioned, text files or audio files, video files, to -- to test essentially or count the concept already established.

Q Okay. When was the first time that you became involved with work that involved content analysis?

A I believe in the very first publication on reference groups of college students where we looked at the statements that people made about themselves in response to a series of questionnaires and developed categories inferring from those statements different ways in which people might apprize -- appraise their own self-concepts.

Q And is content analysis utilized regularly in social and behavioral sciences?

A Yes, sir. It's probably the most frequently used method or methodological technique employed. In the field of healthcare alone there have probably been well over 2000 refereed articles employing that method in the last ten years.

Q And was content analysis utilized in the cases of William Taylor and Ray Johnston?

A Yes, sir.

Q Okay. And in your written reports -- you

completed written reports in the Taylor and Johnston cases?

A Yes, sir.

Q Okay. And in the Taylor case, you did an amended written report?

A Yes, sir. Well, those were affidavits. I believe those were the first steps in study in establishing a principle.

Q Okay. And in those written reports, did you cite to content analysis studies in those cases?

A Yes, sir. I provided a variety of references from the different disciplines. This is something that has been used widely, of course, in sociology, my field of training, but also in psychology, anthropology, social psychology, information sciences, library sciences, business, and virtually every discipline that involves empirical study, it employs that approach in one form or another.

Q Okay. If you could tell us what professional positions have you held in your career?

A Yes, sir. I was a lecturer in sociology at Case Western Reserve University. I was a research associate in the institute in the Family of the Bureaucratic Society in 1970 at Case Western Reserve. I was and -- are you referring -- excuse me, only academic

positions?

Q Actually, everything.

A All right. I was a general staff officer in the U.S. Army between 1966 and 1974, with the rank of captain in Signal Corps. That was in a period between the Ph.D., and the end -- the award of the Ph.D., and the beginning of my teaching career -- or continuation of that career at the University of South Florida where I was an assistant professor -- an associate professor, director of the University's institute -- Human Resources Institute, which was a multidisciplinary institute in applied sociology, applied psychology. We had various centers that I was responsible for.

At the University I also became the assistant to the president and -- and essentially chief of staff under Jack Brown. I was director of the graduate program of sociology in the Department of Sociology. I was the deputy director for research for the Florida Mental Health Institute, a statewide research institute. That's 19 -- I'm up to 1989.

Throughout that period I was also a -- working as a private consultant in this field working on a variety of legal cases, again beginning in 1968 and continuing episodically throughout that period in which the same techniques were used.

MR. FREELAND: Your Honor, if I may, we would be willing to stipulate to the contents of his resumé. And I think what he's doing is basically reviewing.

THE COURT: Okay. That's fine. So you just want to go ahead and admit it as an exhibit?

MR. FREELAND: Yes.

THE COURT: Okay.

MR. HENDRY: Can I provide Your Honor with a copy?

THE COURT: Sure.

MR. HENDRY: Okay.

THE COURT: So mark it as Defense 1.

(Defendant's Exhibit 1 received in evidence.)

THE WITNESS: Thanks.

BY MR. HENDRY:

Q Okay. In your -- in your CV you say that from 1974 to 1993 you taught several subjects at the University of South Florida, one of those was sociology of law. If you could describe the course teachings of that course.

A Yes, sir. The sociology of law, which I taught at Case Western Reserve and University of South Florida, involves the study of legal institutions.

Our studies were primarily focused on the role

of the jury. Within the social sciences, historically they've taken a continental approach to law looking at it in terms of institutions. We looked at it in the social sciences in terms of the unique operations of the American jury system.

Q Okay. What about criminology?

A Yes, sir. I also taught criminology, which historically was rooted in the Department of Sociology up until it became a separate discipline at USF. I taught juvenile delinquency deviant behavior. And on both the sociology of education and the -- where I had a -- which arose -- an interest arose from a fellowship at Case, and medical sociology.

So I have a wide variety of applied research interests that are reflected in teaching.

Q Okay. Now, as an educator, is it important and do you utilize the technique of repetition with your students?

A Repetition, that's a very simple concept. Again, it's something that is -- the repeating of an action or a thought or a tone is used in teaching almost everything from -- as I mentioned in the affidavit, simple arithmetic. One learns arithmetic by repetition, and then master's number theory. You're not discover a number theory and then derive arithmetic or

multiplication from it. It's used in every manual skill. It's reflected in a number of common sense aphorisms that people use. Practice makes perfect. My mother told me if I've told you once, Harvey, I've told you a thousand times. The role of repetition in life is -- is extremely basic. It seems obvious. It's taken for granted, but its effect in learning has been well studied for many years.

Q And the purpose of repetition, is that to embed certain concepts and theories in the listener?

A It is the principle mechanism of learning in humans. When we apply it to a mechanical task, we call it muscle memory. It's neither purely intellectual, but it's -- reflects itself in every form of human interaction.

So whether you're learning golf or you're learning calculus, repetition is the key to learning.

Q Would an example of such an example be in sports for a golfer, keep your head down, is that repeated, to your knowledge?

A I don't play golf, but yes, these people who are golfers watch videos endlessly and practice with the videos playing in front of them. It's simple repetition. The count of the repetition as it goes up is a good reflection of -- of learning. For instance,

in various Olympics sports it's often reflected by commentators that it takes roughly ten thousand repetitions to master a dive or a technique or a batting skill. Repetition has a direct correlation to the effective learning.

Q Okay. You're not familiar with golf, you don't play golf, but are you familiar with voir dire?

A Yes, sir.

Q And how are you familiar with voir dire?

A Well, I've prepared text scripts for voir dire in perhaps well over 1400 trials for attorneys. I assist in writing voir dire. I study voir dire in terms of its impact in communicating concepts to jurors; how to structure it in terms of assisting parties to gain more information from voir dire. It's -- I could go on for an awful long time about the function of voir dire, but it is essentially a fundamental area of study in the social and behavioral sciences in a legal context.

Q Okay. Is repetition -- well, before I get into that. Do you work with attorneys in actual cases in designing, constructing, and utilizing certain themes during voir dire?

A Yes, sir.

Q Okay. And is repetition utilized in that endeavor?

A Well, the theme is in organizing principle first, which is used to connect different features of a story or court presentation. And the identification of themes which most effectively organize that presentation as heuristic is something that we infer through qualitative methods such as -- such as content analysis from simulations, from interviews with potential jurors, and study of the case facts themselves.

Q Okay. Are you familiar with jury instructions; and if so, tell us how you are familiar with jury instructions in cases.

A Yes, sir. Principally the jury instructions serve as -- serve a function for anyone preparing a case whether a prosecutor or a defendant or a plaintiff or -- in a civil case, provides a basic structure for understanding the law to jurors. In that sense we like to rely on pattern jury instructions, but often they're -- they're inadequate to the peculiar features of a case.

And so I've been involved in many, many, many trials, it's hard to count, in drafting prospective jury instructions from a social science perspective, to aid the triers of fact in understanding what the basic issues are that we're trying to achieve in the case no matter which side we might be on.

Q Okay. Do you work with attorneys to draft or change or suggest certain jury instructions in legal cases?

A Yes, sir. Both -- both jury instructions and verdict forms. There's often broad latitude within a case as to the type of verdict form that would be most effective from your respective position.

In a civil case, for example, it's often preferable to have a single line response with a verdict or in some states just a level of award. If they make an award as a plaintiff, it would be a single line verdict. In other cases it might be preferable to have as many lines as possible in a civil case, or as few depending on whether I'm a plaintiff or a defendant.

And so not only do we attempt to structure that or look at the structure of the verdict forms, we also empirically test their effects in simulations.

Q Okay. So when -- in the civil arena when a plaintiff's attorney hires you, typically what is the objective at a civil trial?

A The objective for a plaintiff in a civil trial is to prevail --

THE COURT: To win money.

THE WITNESS: Well, I think it --

THE COURT: Okay. We're getting a little far

afield here, okay.

BY MR. HENDRY:

Q Dr. Moore, with regards to a criminal case, a capital trial, a death penalty trial, have you been consulted by criminal defense attorneys and public defenders in a capital case?

A Yes, I have.

Q Okay. And are you familiar with the bifurcated procedure in the state of Florida?

A Yes, I am, sir.

Q Okay. And with regards to the penalty phase, okay, what are criminal defense attorneys typically -- what is their typical objective at the penalty phase in a capital case?

A It's hard to generalize and cross all the variety. I'm of the school that believes that every case is unique to its own facts and should be approached in that fashion, but one issue, for instance, of concern in the penalty phase is the balancing of mitigation effects with the general defense that's already been offered and failed. Where at a sentencing phase the party has lost, and now the issue of mitigation becomes relevant where otherwise it wasn't.

Q Okay. Is typically the objective in your experience for the defense to get a life recommendation

rather than a death recommendation?

A Yes, sir. Generally.

Q Okay. And have you assisted attorneys in these capital cases to work with repetitive claims during voir dire?

A Yes, sir.

Q And what about jury selection?

A Yes, sir.

Q And what about crafting jury instructions?

A Well, I don't practice law, so I assist attorneys in crafting their nonpattern jury instructions, I suppose. You basically try to find how, through your simulations, jurors can better understand some issues. Mitigation is a good example. It's raised at the last phase of trial when it probably would have the least effect on the outcome.

Q Okay. Are you familiar with the -- the law in the state of Florida in capital cases with regards to the advisory nature of the jury?

A Yes, sir.

Q Okay.

A From a lay perspective.

Q And have you -- have you advised attorneys on how best to navigate that situation that we encounter here in the state of Florida?

A Yes, sir.

Q Okay. Describe that.

A Well, from a defense point of view, typically we emphasize the -- the specific act which an attorney -- a juror, rather, is going to be participating in its most -- most frank sense, it is taking the life of another person, and that's a very significant responsibility.

And so we attempt, of course, to reinforce every opportunity to bring that to the attention of jurors.

Q That is a very solemn duty?

A Yes, sir.

Q A serious responsibility?

A Yes, sir.

Q Okay. Now, in your work at Trial Practices, are you qualified to -- because of your experience there, are you qualified to offer the opinions you have offered in reports in Johnston and Taylor?

A Well, I do not think that my employment at a consulting company is a qualifier. I'm qualified because of basic training, terminal training in social and behavioral sciences. What I'm talking about in this affidavit is not a function of -- of consultation, it's basic journeyman-level social science research.

Q Okay. Have you reviewed the Caldwell case?
A Yes, sir. When -- when I was asked to consult in this case I read the Caldwell decision.
Q Okay. And do you feel familiar, comfortable with the stated principles in Caldwell versus Mississippi?
A Well, yes, sir. The opinion as written by Justice Marshall is fairly simple.
Q Do you have to be a lawyer to understand the principles of Caldwell versus Mississippi?
A Well, it depends on which perspective. I do not think -- I think everyone is qualified to read the law. I'm not offering opinions about the law. I'm merely reflecting in this work statements made -- held in the opinion that are gained to be significant.
Q Okay. Now, with regards to -- with regards to statements in a capital case, which in your opinion might violate Caldwell, is the placement of these statements important in your opinion?
A Yes, sir. It's the second, in addition to repetition, well-established principle in the social and behavioral sciences and in the law, that placement affects learning. In -- in the law there probably isn't an attorney whose been to a continuing education seminar in the past 40 years where the concepts of primacy and

recency have not been discussed in some detail by a presenter. Whether one hears something first in a present complex presentation or last, both place -- both placements enhance the learning or the impact of that which is being taught on a student.

Q Okay. What are the concepts of primacy and recency in relation to this?

A Well, primacy and recency simply, as I mentioned backwards I suppose, what you are most likely to retain what you hear first and then what you hear last. It differs by individual, but the placement in a complex organization. It's a concept that first emerged in 1966 and has been employed and reflected in numerous legal journals as since its morphed a bit in psychology, social psychology, and has come under a number of different labels nominally the same.

Focalism is another way of describing it but focusing the issue to be learned at the beginning or at the end is the same principle as -- as primacy and recency, but within the legal community at least those are very well-established concepts.

Q Okay. Have social scientists like yourself worked to help draft jury instructions in capital cases?

A Yes, sir.

Q Describe that.

A Well, there's a long body of research in the social sciences on the crafting of -- of legal instructions in particular because of the tenancy in law to use language which is complicated and is not easily understood by the lay audience. And so whether one approaches as a psycholinguistics expert, for instance, in analyzing word patterns or simply applying common sense. Social scientists have been involved in almost all features of the development of instructions.

Q As a part of your experiences in this case, on these cases, Taylor and Johnston, did you have a chance to review a 1989 law review article by a law professor Michael Mellow entitled "Taking Caldwell versus Mississippi Seriously, the Unconstitutionality of Capital Statutes that Divides Sentencing Between Judge and Jury"?

A I've read that.

Q Okay.

A I've read that after, of course. I have done the work, I found nothing in it that is new from my substantive point of view in terms of the study of sociology or its application to this case.

Q Okay.

A But it illustrates, I'm sorry, the breadth of things that you are talking about in terms of how the

law might be. The triers of fact may be assisted by the application of social science research.

Q To your -- to your knowledge, how long have social scientists like yourself been studying this issue of Caldwell in relation to capital sentencing?

MR. FREELAND: Your Honor, I object on the grounds of relevance.

THE COURT: I'm going to sustain the objection.

BY MR. HENDRY:

Q That article we mentioned was 1989?

A Yes, sir. This goes back to 19 -- the early sixties.

Q Have you presented lectures in your career?

A Yes, sir.

Q Okay. On what topics?

A They're all reflected in the resumé. I think I've lectured on virtually every feature of trial, from voir dire to jury instructions, from the order of proof to the structure of opening and closing -- opening statements and closing arguments. I think --

Q Did --

A -- this approach in the social sciences applies equally to all phases of trial.

Q Did those lectures include topics involving

how and why juries reach certain decisions in legal cases?

MR. FREELAND: Again, Your Honor, I would object on the grounds of relevance. I think that his expertise is documented by his resumé, which is before the Court. I don't know that additional discussions about lectures he may have given would help the Court.

THE COURT: I'm going to sustain the objection.

BY MR. HENDRY:

Q Dr. Moore, were judges and lawyers attendee -- attending those lectures regularly?

A Yes, sir. They're very often either presentations or publications in legal journals. They are all offered for credit in continuing legal education. I think without exception all of those presentations were offered for credit in legal education.

Q Okay. In these presentations and through your education, training and experience, have you come to profess to people in the legal profession what is helpful in a legal case and what is not helpful in a legal case?

MR. FREELAND: Again, objection, Your Honor,

on the grounds of relevance.

THE COURT: He can answer yes or no.

Go ahead.

A Yes.

Q Have attorneys regularly consulted you seeking advice on the strength and weakness of their cases?

A Yes, sir. Virtually every case involves that advice.

Q Okay. Have you been qualified as an expert in this circuit before?

A Yes, I have, sir.

Q Okay.

THE COURT: On what topic?

THE WITNESS: Well, in the case of Martinez -- State versus Martinez, I testified regarding the quantity of information in a text that was required for a trier of fact to understand the message itself. In that case, Martinez -- Mr. Martinez was recorded in a listening device that was placed in a television. And when he came home to speak to his wife, who had reason to believe he had been involved in some criminal activity, a murder, they were attempting to get back together again and the children came in and were talking daddy -- they had

been separated at the time, and Mr. Martinez told his children that mommy and daddy are trying to talk to each other, why don't you watch TV. Well, that's where the bug had been placed by the sheriff's department. And we hear that conversation, and then the rest of the tape is largely Bugs Bunny. It was "That's all folks," at the end.

And the issue whether that transcript would be admitted was whether there was sufficient information in the text to -- to make -- to conclude that Mr. Martinez had actually confessed as the State argued.

So, for instance, you hear the first colloquy with the children, and then you hear Bugs Bunny for a while, and throughout that text which didn't -- the tape, rather, which didn't reflect much except "That's all folks," you could intermittently hear Mr. Martinez say things such as I -- I shouldn't have done it. It was wrong for me do that. I'll never do it again. That transcribed portion was put before the court as evidence of guilt.

Mr. Martinez said that he was simply telling his wife the reason they were separated and going through a divorce was that he had been having

relationships with her best friend and had been caught in this affair, and that's what he was referring to, I'll never do it again. But she had told her father, who was a retired police captain that -- in Tampa --

THE COURT: Okay. Well, I just want to know the area.

What was the area you --

THE WITNESS: It's content analysis. It's basically a content analysis and an evaluation of -- from a communications perspective. The sufficiency of a message to understand its content.

THE COURT: You said you actually testified as an expert before a jury or just a judge in a pretrial motion?

THE WITNESS: I've testified as an expert in the Johnston case applying --

THE COURT: In the Martinez case, was it before a jury?

THE WITNESS: It was before Judge Padgett.

THE COURT: Okay. In a pretrial motion?

THE WITNESS: Yes.

BY MR. HENDRY:

Q And what was the results of that hearing?

A The transcript was excluded --

Q Okay. If my understanding is correct --

A -- from evidence.

Q -- in a nutshell, law enforcement listened to a tape and came up with a transcript which included a confession -- alleged confession of the defendant; is that right?

A Yes, sir.

Q Okay. And you reviewed the content on this audiotape?

A Yes, sir.

Q And you reviewed the transcript --

A And the transcript of that.

Q Okay. And what was your opinion?

A That you couldn't conclude anything from the transcript. It was high proportionate but was completely unintelligible. And an analysis of that content and the intelligibility of that was -- was insufficient to meet any test.

And so I used a variety of studies applied to this that are brought to the Court's attention, rather, the number of studies that illustrated how varying levels of information in a message can dramatically change its interpretation.

Q Okay. And this was an exercise in content analysis?

A Yes, sir.

Q Is that the same thing that you've done -- basically the same thing that you've done in a different media but that you've done here in Taylor and Johnston?

A Well, it was a text file in the Martinez case. At one point in that trial the State came up with a 30-page verbatim transcript that reflected material I couldn't hear, no one else could seemingly hear, and there were a variety of transcripts.

So we looked at both the text files and the audio files and analyzed the content, which is essentially the same method employed in Johnston and Taylor.

Q Okay. Now, in criminal cases, did you -- do you work with just the defense or do you work with the prosecution? I don't want you to get into the cases, but if you could tell us your last ten cases, how is it divided between defense and prosecution?

A I would say in the last two years there have been 12 capital cases, if 13, 14. If I count, I think there are three in which I've been involved on the defense and perhaps -- well, certainly more than 11 for the prosecution.

Q Okay. How many capital death-penalty cases have you been involved in in your career?

A Slightly under 100; 96 or so.

Q Have you offered advice to capital attorneys in the past about how to better prevail in a capital case given jury instructions that keep repeating the terms "advisory" and "recommendation"?

A Yes, I have.

Q Okay. Is your written report in Taylor and Johnston based on sufficient facts and data?

A I'm sorry? Is it my -- yes -- yes, is my answer, but I don't understand the question. So, it would be hard --

Q But --

A I'm not sure I understand. Yes, I've offered my conclusions based on empirical facts that can be counted and manipulated and have traditionally done so in the social behavioral sciences.

Q Okay.

A This is a very simple method. You know, sometimes people -- and it's particularly true of the social behavioral sciences, excuse me, where often we are in a position of trying to establish as a fact something which seems obvious to everybody.

MR. FREELAND: Your Honor, I --

THE COURT: I'm going to sustain the objection.

MR. FREELAND: Thank you.

THE COURT: Nonresponsive.

What's your next question?

BY MR. HENDRY:

Q Dr. Moore, have you utilized reliable content analysis principles and methods in Taylor and Johnston?

A Yes, I have.

Q Have you applied content analysis principles and methods reliably to the facts of these particular cases?

A Yes, I have, in accord with a well-established methodological principles.

MR. HENDRY: May I have a moment, Your Honor?

THE COURT: Yes.

(Pause.)

MR. HENDRY: I just want to clarify, Your Honor, I think we might have William Taylor in the record, but just to clarify --

THE COURT: Perry.

MR. HENDRY: -- it's Perry Taylor.

THE COURT: Yes, Perry Taylor.

MR. HENDRY: Okay.

BY MR. HENDRY:

Q Dr. Moore, can you use your training, education, experience to offer an opinion in these cases

as to the effect of the instructions and statements on the advisory panel's sense of responsibility in determining whether to recommend a death sentence and how that would differ from an actual jury?

A Well, it differs for that jury itself in the two phases of trial. In an actual trial, in phase one, it reaches a verdict. A verdict means "to speak the truth" in Latin.

In the second phase, it does not reach a verdict. It provides an advisory sentence. It does not even make a decision as to -- whether life or death is the alternative.

MR. HENDRY: That's all I have, Your Honor.

THE COURT: Okay. Cross-examination.

CROSS-EXAMINATION

BY MR. FREELAND:

Q Good morning, Dr. Moore.

A Good morning, sir.

Q What is sociology?

A It's the study of humans in groups in society.

Q In this particular case, your -- and for the record, Timothy Freeland -- you attempted to apply the principles of Caldwell to this case --

A Yes, sir.

Q -- based upon your reading of Caldwell?

A Based on specific statements or concepts that Justice Marshall inserted in his opinion.

Q So yes?

A Yes, sir.

Q The answer is yes?

A Yes, I'm sorry.

Q Did you confer with counsel regarding Caldwell, particularly counsel in this case?

A He gave me the first copy of it to read; so yes, sir. I'm sorry.

Q Caldwell involved -- well, explain to me what your understanding is of the holding in Caldwell?

A Well, basic, essential tenet in Caldwell I believe is that there is a risk, an unacceptable risk that a juror's sense of responsibility will be diminished by statements which -- which reduce their responsibility for the outcome.

Q There was another ground in Caldwell, was there not, that the court addressed?

A There may be, but I'm focused on that statement.

Q Do you remember there being an issue with regard to whether or not counsel accurately advised the jury as to the state of the law in Mississippi?

A It may be another feature of it, yes, sir.

Q Are you aware whether in this case, based upon your examination of the transcript, whether counsel correctly or incorrectly advised the jury as to the state of the law at the time of Mr. Johnston's case?

MR. HENDRY: Objection; relevance.

THE COURT: Overruled. Go ahead.

A Do I -- I wouldn't offer an opinion on legal -- a legal conclusion.

Q So you didn't consider that, you weren't asked to consider that?

A I did not analyze this from a legal perspective.

Q What you did then specifically was -- I've read your report. And what you did specifically then is to read through the transcript of the trial; am I correct?

A Yes, sir.

Q Did you read the transcript of the entire trial?

A Yes, sir.

Q And did you -- who else assisted you in -- well, your report refers to coders. Who are the coders and what is a coder?

A Yes, sir. A coder -- and the objective here is to assess the accuracy of a count. If I were to read

a transcript and look for sentences, the sentence was the unit of analysis here that fit the definition of the risk the court was calling attention to, I would -- my opinion would be suspect. I'm -- for any number of reasons. And so you -- content analysis requires methodologically to have a panel of naive observers who read that. And the first question that you're addressing is whether other people readily see the same match, if you will, between a statement and its meaning.

Q A coder is someone that you use to review the transcript and make a judgment about whether this transcript violates Caldwell, specifically in this case?

A No, sir. We're not concluding whether it violates Caldwell. The method is simply to see whether there are statements, which given the definition or the concept that is propagated in Caldwell is reflected in a lay understanding of what they are reading, do other people see the same thing.

Q Who were the coders that were used in this case?

A Well, the coders were one undergraduate student, one graduate student in psychology, a journalist formerly with The Tampa Tribune, and myself.

Q So four individuals --

A Four coders, yes, sir.

Q -- reviewed the transcript to see if they could determine if there were any -- anything in the transcript that might suggest that the jury's role as a decision-maker was being minimized?

A No, sir. We're not evaluating whether the role was diminished. We're taking an established concept, not one we're inferring, but an established concept which says any statement essentially, which tends to diminish the role.

Q I'm trying --

A So the question is whether such statements appear in the text. The concept is established that one mention, one sentence such as that in Caldwell is sufficient to undermine the jury's responsibility.

So the question first is how many such sentences, if any, appear in that text.

Q And how did you go about deciding the baseline, determining whether a sentence should be selected?

A Well, that's the purpose of the method to see whether common observers, naive observers reading it, knowing the definition, see a sentence which they believe correlates with that concept that the court --

Q The basic concept --

A -- that legal concept --

Q -- minimizing the jury's role as a decision-maker?

A Yes, sir. And so the point is whatnot -- number one, whether there is -- other people see it, whether there's agreement, where's a high level of agreement. And the high level of agreement is -- is important.

Q So as I understand the methodology that you used was to review the entire transcript and pull out any sentence that you felt merited attention in terms of what you understand Caldwell to be?

A Well, I don't want to --

Q That's a yes or no. Did I get it wrong?

A I'm trying to remember the sentence. I'm being cautious about the meaning of Caldwell.

Q Understandably.

A There is a very narrow --

Q Understandably. But your understanding of what Caldwell means --

A The understanding of -- of the statement, the concept that there are sentences which would tend to diminish the role of the juror in deciding a capital case.

Q And based upon that, you and your coders went through the transcript to see if you found any

statements that met that criteria?

A Yes, sir. Simple match. Here's the statement. Is there a sentence that fits that category in the text; and if so, where is it and how many are there.

Q And my understanding is that you used essentially lay people to do this?

A Yes, sir.

Q Now, you have -- would you say that the majority of your work in terms of capital cases involves juries?

A Yes, sir.

Q Mock juries?

A No, sir.

Q You do use mock juries in some circumstances, though?

A Well, I would have to say every case involves typically simulations with mock jurors and involves real jurors as well. There are methods for study that are applied to all phases of trial. And so I consulted on many capital cases where we have no simulations, where we are developing strategy, for instance, based on social science techniques.

Q Your specific expertise today deals with whether you found evidence that the precepts of Caldwell

might be implicated. I'm being deliberately vague.

A It's simply yes, it's analysis of text files to see whether there's common agreement reflecting a meaning. A meaning that is established in a concept that's already law.

Q Have you been qualified as an expert to testify on this specific incident, this specific criteria contract we're talking about, Caldwell violations?

A No, sir. This is not a study of Caldwell violations. It is a sentence -- Caldwell violation in the legal sense is a statement which tends to do it. I'm simply performing a text analysis that counts the number of sentences that fall under that heading. A little more than that.

MR. FREELAND: If I may have a minute, Your Honor?

THE COURT: Okay.

(Pause.)

BY MR. FREELAND:

Q Dr. Moore, you were not asked to -- are you familiar with the term "retroactivity"? Generally what the means?

A No, sir.

Q Are you familiar with it?

A I probably am, if you'll just described it to me.

Q Something that occurs now is also applied in the past. Were you asked to address -- since you don't know the specifics of what I'm talking about --

A If you are asking about the meaning of the word "retroactive," yes, I'm pretty --

Q I'm sure you know what "retroactivity" means.

You were not asked to address the issue of retroactivity with regard to whether the current state of law applies in the past, were you?

A No, I'm asked to --

Q It's a simple yes or no.

A No.

Q That's fine.

MR. HENDRY: Your Honor, I'd ask that the witness be able to explain his answer.

THE COURT: Well, you've have redirect.

Any further questions?

MR. FREELAND: No, Your Honor.

THE COURT: Go ahead.

MR. HENDRY: Your Honor, just to begin, I would like to mark as an exhibit to the hearing Dr. Moore's corrected report in Taylor and his report in Johnston, and have them introduced in the

record.

THE COURT: Any objection?

MR. FREELAND: He should have done that during his initial --

THE COURT: Okay. Any objection other than that?

MR. FREELAND: Other than that, no.

THE COURT: Okay. It will be admitted.

(Defendant's Exhibit 2 received in evidence.)

MR. HENDRY: Thank you.

Can I give Your Honor a courtesy copy --

THE COURT: Sure.

MR. HENDRY: -- of the reports?

They're attached to the notice of filing.

THE COURT: I have reviewed them.

MR. HENDRY: Okay.

REDIRECT EXAMINATION

BY MR. HENDRY:

Q Dr. Moore, on cross you were asked about the coders. Tell us who -- are these employees in your office?

A Two student interns, students of the University; and another consultant.

Q Do you feel that they were qualified to engage in this exercise?

A Yes, sir. They read the English language, that's about all that's required.

Q Okay. Would these people be your average, typical jurors in a capital case, possibly?

A I could make that claim, but it's unnecessary. The question is simply whether there's agreement, do other people see it, your mileage may vary, but it is unlikely if we find 69 statements in -- in Johnston that someone will conclude --

MR. FREELAND: Your Honor, I will object as being nonresponsive.

THE COURT: I'm going to sustain the objection. Anyone over the age of 18 who is not a convicted a felon could be a potential juror. So I'll take judicial notice of that fact, all right?

BY MR. HENDRY:

Q Okay. Dr. Moore, Mr. Brennan was one of the coders. Did he have an experience personally in Mississippi with Caldwell?

A He covered the Caldwell trial before the Supreme Court.

Q In what capacity?

A As a newspaper reporter.

Q Okay. Now, with regards to the coders and the exercises that were engaged in, was there an agreement

amongst the four coders about particular statements which were identified in these transcripts?

A Was there an agreement?

Q Yes.

A No, there is not perfect agreement.

Q Not perfect agreement, but was there a general agreement or --

A Yeah, the method is very straightforward. By having independent coders, reviewers, judges that are referred variously in the literature, you are simply establishing whether there are -- whether there is, first, agreement and where there are differences, whether they can revolved.

So, for instance, there's disagreement when somebody misses something. For instance, in this study I think at least two jurors missed the fact that the verdict form itself said "advisory sentence," indicating that in a plain reading it -- it wouldn't be there.

So we -- we meet and you bring up the disagreements to see whether they can be resolved. And most often they're resolved because people simply missed something.

Q Approximately how many statements were identified in the Taylor case?

A In the Taylor case, approximately 130.

Q Okay. And with regards to any disagreements, do you remember approximately how many disagreements there might have been out of that number?

A There's roughly 96 percent agreement, that's what I recall. I didn't come today to compare the studies, but it would be -- there are obvious differences in the outcome between the two.

Q Okay. In your opinion in this exercise, the fact that the Taylor verdict was labeled "advisory verdict," did you find that to be significant in relation to Caldwell?

A Well, at first I found the sentence to be counted. Second, I do have an understanding of why, depending on which side I'm on, I emphasize advisory or do not emphasize it. And this is one of the reasons a content analysis like this that is right down the question of whether these statements reflect a certain meaning as identified in the concept are important.

If you are on one side, you emphasize significance of the responsibility as being undertaking. If you are on the prosecution side, you are more likely to emphasize, depending on the strength of evidence, for example, advisory versus -- versus just ordinary sentence.

And one of the problems in the analysis is to disentangle the issues of -- that are often completed when one talks about sentencing instructions.

For instance, when someone confesses to a crime, or where there's powerful evidence of DNA or something like that, there's less need to emphasize from a prosecution point of view the advisory nature of the decision. It's clear. In a case involving joinder trials --

MR. FREELAND: Your Honor --

THE COURT: Sustain the objection; nonresponsive.

Go ahead.

What's the next question?

BY MR. HENDRY:

Q Dr. Moore, with regards to the Ray Lamar Johnston case, approximately how many statements did the coders identify in that case?

A Approximately 60.

Q And as far as the agreement, what was the agreement rate?

A I recall very high; 94, 96 percent.

Q And is that of concern to you that it wasn't 100 percent agreement between the four coders?

A No, sir. Meaning varies by individual.

Q Okay.
A The significance of disagreement is -- is more important, the smaller that number becomes.
Q Okay. With regards to you were asked about your practice and mock juries, I just want to make clear, is your practice limited to performing mock jury trials?
A No, sir.
Q Okay. And is the Martinez case, which you've previously referenced, was that a mock jury trial?
A Yes, sir.
Q So you did do a mock jury trial?
MR. FREELAND: Your Honor, that's beyond the scope. I didn't talk about Martinez at all.
THE COURT: Well, go ahead. You can get into it if you feel it's necessary.
BY MR. HENDRY:
Q Dr. Moore, you did a mock trial in the Martinez case?
A Yes.
Q I want to talk about specifically the other exercise, which was the content analysis with the transcript and the audio file.
A Yes, sir.
Q Okay. All right. So that wasn't just a mock

jury trial?

A No, sir. The attention to it and its significance was raised in the simulation. The reason for expending effort on it was significant in the simulation.

MR. HENDRY: Okay. May I have a moment, Your Honor?

A In other --

THE COURT: Yes.

BY MR. HENDRY:

Q I'm sorry if I cut you off.

A No.

MR. HENDRY: No further questions, Your Honor.

THE COURT: Okay. All right. Thank you. You may step down.

THE WITNESS: Thank you.

THE COURT: All right. Any additional witnesses?

MR. HENDRY: No, Your Honor.

THE COURT: Okay. For purposes of this hearing?

All right. Argument?

MR. HENDRY: State's the movant, so we would like to respond.

THE COURT: Okay, sure.

Let me ask you just this question before we get going. As far as -- go ahead, Dr. Moore, you're fine, you can keep walking.

As far as -- I'm unfamiliar with content analysis. There's never a trial that I've presided over where that's been -- or even a pretrial motion where an expert has been qualified to testify regarding content analysis.

So I just need to know, from your purposes are you just as a general feel of expertise, are you agreeing that content analysis is recognized as a field of expertise that an expert could testify to, to a fact finder, or you're not even there?

MR. FREELAND: I'm not even there, Your Honor.

THE COURT: Okay. And so under Daubert or Frye, is that where we're starting?

MR. FREELAND: We're still using Frye.

THE COURT: Okay. All right.

MR. FREELAND: So, yeah, we don't -- I mean, there isn't -- they hadn't -- there isn't any case that I'm aware of where content analysis --

THE COURT: Okay. That's fine. That's why I'm asking. So -- because I'm unfamiliar with it as well, so I just wanted to make sure I was understanding where you were coming from.

So this is essentially a Frye challenge, right?

MR. FREELAND: It is.

THE COURT: From your perspective?

MR. FREELAND: It is, Your Honor. I'm giving the Court a copy of Hildwin versus State.

THE COURT: Okay.

MR. FREELAND: I've given a copy of that to opposing counsel.

Hildwin, interestingly enough, involved this very witness in the context of a mock trial.

THE COURT: And for the record, it's 951 So.2d 784.

MR. FREELAND: Yes. And I'm looking at page 791. Exclusion of mock jury evidence. Dr. Moore testified in terms of a mock jury. And -- that the Court here -- obviously, this is not a mock jury setting.

THE COURT: Right.

MR. FREELAND: But the court looked at certain specific criteria in determining whether mock jury evidence would be admissible in a postconviction setting. And it said specifically that, first of all, postconviction court determining whether newly discovered evidence warrants a new trial is not a

trier of fact. This is something -- so we're not -- the testimony that we got from the witness and today is not in any way going to help this Court in deciding whether these facts justify a new trial.

The court also -- I mean, goes through the Frye standard which, of course, this Court is going to have to consider. It's generally accepted.

THE COURT: Right.

MR. FREELAND: My problem with his testimony is that he used content analysis -- and by his own statement used lay witnesses -- lay people to go through the transcript and determine what things were -- I'm using the phrase "violative of Caldwell" even though he was cautious enough to say "violative of Caldwell."

My -- my position is that if a layperson can do it, that does not inform the Court in any way, shape, or form.

THE COURT: Why can't the Court do it?

MR. FREELAND: I'm pretty sure that the Court can do it. I have confidence.

And so he is -- he may well be an expert in some areas, but this is not a test -- the form of expertise that would assist the Court in advancing

anything. That's my argument.

THE COURT: Okay. Ms. Bechard, do you have anything to add?

MS. BECHARD: Yes, Your Honor, just for purposes of the Perry Alexander Taylor case.

And for the record, I'm Suzanne Bechard with the Attorney General's Office for the State on Perry Alexander Taylor.

Dr. Moore's testimony derived from this content analysis, it's just inappropriate for the purposes of determining the purely legal matter that we have in this case, and that is the matter of retroactivity.

And under Hildwin the court said that it violates the province of the court, of the judge, on a purely legal matter to consider this kind of -- this kind of evidence.

So, the State would submit in this case that this does not at all reach the threshold issue of retroactivity, and it simply is irrelevant for that purpose.

Thank you.

THE COURT: Okay. Mr. Hendry.

MR. HENDRY: Thank you, Your Honor.

One issue, Your Honor, is that heretofore the

State has never cited to this Hildwin case. They filed a motion to strike. Hildwin is mentioned nowhere in there.

With regards to the Hildwin case, Your Honor, and the record on appeal will show in Hildwin is that we didn't even get an opportunity to go through this exercise. This was a Hernando County case, and it was Judge Tombrink. And what we did is, we had a case where there was newly discovered DNA evidence to show that it belonged to the perpetrator, didn't belong to Paul Hildwin.

The State argued in the eighties with the best science that they had that they -- they said that the biological fluid, the semen and saliva left at the crime scene belonged to Paul Hildwin. Even in light of newly discovered DNA evidence, the State took the position that this newly discovered DNA evidence was irrelevant. Eventually, fortunately, Hildwin obtained a new trial. He's pending in Hernandez County right now. He's represented by Lyann Goudie.

So, Your Honor, I was confronted in that case in Hildwin where I have to meet the Jones standard and I have to meet that newly discovered DNA evidence is such that there would be a different

result on retrial, and that's why I consulted Dr. Moore.

We went through these exercises, Your Honor. And -- and the Court should have -- should have considered the evidence. They didn't. Fortunately, he received a new trial, so it's kind of moot, but, Your Honor, we bussed in dozens of jurors, mock jurors from Hernando County to Dr. Moore's office in downtown Tampa to present them with this newly discover DNA evidence to see if, indeed, the jurors would rule that the newly discovered DNA evidence was significant. They all say it was. They all said you should acquit Paul Hildwin. We tried to use that evidence -- that evidence to say that Mr. Hildwin should be afforded a new trial.

Judge Tombrink, he -- the State told him don't look at those tapes, Your Honor. Those are irrelevant. Don't let your province be invaded. You can make the decision. Judge Tombrink didn't even give us an opportunity to go through this exercise. He said I'm not going to even look at the tapes. I'm going to rule that Dr. Moore can't testify. I'm going to rule that the tapes aren't admissible, and that's what Hildwin was, Your

Honor.

Several -- we went through the oral argument and the oral argument we had newly discovered DNA evidence.

THE COURT: Okay. I understand. I get it. Okay. I understand -- I understand what you're making -- the argument that you're making.

MR. HENDRY: This is apples and oranges, Your Honor.

THE COURT: Okay.

MR. HENDRY: This is a completely different situation. And here's why Hildwin shouldn't be used to grant State's motion to strike in this case, which is -- which is because there was the reasoning in the Hildwin case that -- that Dr. Moore just does mock trials, was the notion. This is a trial practice tool. You can't use this in a postconviction arena, but, Your Honor, this is different. This is content analysis. And in this circuit, in Hillsborough County, Dr. Moore's testimony was granted by Judge Padgett in that hearing in Martinez, which you've heard described.

THE COURT: What was the first name of that defendant?

MR. HENDRY: I don't know, Your Honor.

THE COURT: Was it a homicide case?

MR. HENDRY: It was a first-degree murder case.

THE COURT: Which would be homicide. So, I would assume.

MR. HENDRY: Judge Padgett was the judge. I believe Ken Littman was the defense counsel. I believe Jay Pruner was the state attorney on the case.

THE COURT: And was there a Frye hearing before he gave his opinion?

Do we know?

MR. HENDRY: It's probably been a long time, so that's a good question, Your Honor.

But, yeah, Dr. Moore has been qualified in this very --

THE COURT: Let me ask you this question, I'm sorry. Because now I would be going outside the record, because I'm just curious, because again I'm unfamiliar with this content analysis.

Anybody care if I could find it, if I took a look at the transcript in Martinez?

MR. HENDRY: No objection from the defense, Your Honor.

THE COURT: From the AG's office?

MR. FREELAND: Frankly, Your Honor, I think it's not relevant --

THE COURT: Okay.

MR. FREELAND: -- what the transcript --

THE COURT: Okay.

MR. FREELAND: I mean, the case is what it is.

THE COURT: Okay.

MR. DRISCOLL: Your Honor, it's Joaquin is the first name of Mr. Martinez.

THE COURT: Okay. All right.

MR. DRISCOLL: There's a number of ways you could spell that, but --

THE COURT: Right. Now, may I just -- I was just curious for my own education if there was, in fact, a Frye hearing that was conducted, and if, in fact, Judge Padgett found that Dr. Moore qualified as an expert in this content analysis. And then if he then, in fact, utilized that as part of the decision that he made so -- because it's a two-part test, so -- anyway...

MR. FREELAND: If I -- my objection would be that we are really bound by the four corners of Martinez.

THE COURT: Right.

MR. FREELAND: I don't know that we can go

behind, but that's my position, anyway.

THE COURT: Right. No, I understand. Understand.

So anyway, okay, go ahead.

MR. HENDRY: Thank you.

Your Honor, with regards to relevant evidence, the definition of relevance, 90.401, says that relevant evidence is evidence tending to prove or disprove a material fact.

And I think it's clear that Dr. Moore's testimony is relevant to the issue in these cases about whether there was harmful error. He identified all the statements which appeared to have violated Caldwell. And for the Florida Supreme Court to say that in a typical 12-0 case that there is no harmless -- there is no harmful error based on a 12 to 0, for the court to say that, and for the court to rule just in a counting fashion and not consider the gravity of these errors which occurred at trial. In Hurst, 2016, U.S. Supreme Court, said it's got to be juries, not judges, who make the decision in these death-penalty cases.

The whole foundation -- this whole foundation in the state of Florida is based on juries not

making decisions. These are the instructions. These are the trials which were -- which were conducted in Taylor and Johnston, and all of the other 400 people on death row, Your Honor.

Now, this evidence is relevant. This evidence should be admissible because it goes to the issue, in fact, of were there errors at, Mr. Johnston's trial and Mr. Taylor's trial, which were harmful.

And if you look at the Caldwell, the interesting thing about Caldwell, that error occurred so late in trial of the guilt phase. It occurred on rebuttal argument by the State because it was just -- the defense attorney was telling the judge -- telling the jury please, don't kill Mr. Caldwell. Don't do it. Don't let that be your decision. So the State objected, and they said, you know, Your Honor, they can't do that because the Mississippi Supreme Court is going to review this decision. And so the judge said yeah, you can tell -- you can the jury that. So the prosecutor said, you know, your decision will be reviewed by an appellate court.

And these two cases, Taylor and Johnston, the jury was repeatedly over and over and over again instructed that it was not their decision. If

Caldwell can get relief on one error that happened just by an offhanded comment by a prosecutor in his rebuttal argument, for the voir dire, the repeated statements in voir dire, the verdict form in itself, it didn't say "verdict form," it just said "advisory recommendation," Your Honor.

The errors in this case, these cases are absolutely harmful, not harmless. Hurst versus 2016 told us that you can't have -- they didn't tell me us specifically, but we can't sustain a 12-0 death recommendation just based on the number 12-0. If one juror, just one juror in the Johnston case would have voted for life rather than death, if it was a 11 to 1 decision, we wouldn't be here on Johnston. Johnston would receive a new trial.

Is there a risk that just one juror in the Johnston case, was there a risk that just one juror was -- had his sense of responsibility diminished based on 60 some-odd repeated statements about diminished role and shared sentencing for this judge.

Your Honor, what this comes down to is denial to the access of the courts. And I filed in a supplemental authority the other day, we're not a Daubert state. There was an attempt -- there was

an attempt to move to try to get to a Daubert state but the Florida Supreme Court rejected that.

One thing they cited, interestingly, is that there was going to be the risk -- there was going to be the risk that the constitution would be violated. One of the constitutional rights, which would be violated, is the right to a jury trial. The right to present your evidence.

And what the State is trying to do here, Your Honor, they're trying to prevent the defense from presenting common sense evidence against their move to strike our expert.

They're taking an unreasonable position here, Your Honor. Dr. Moore's testimony should be admitted because under 90.702 clearly we've met the standard that is Dr. Moore's testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, the witness has applied the principles and methods reliably to the facts of this case.

Now, Your Honor, this is a death case. And all the jurisprudence -- years and years and years of jurisprudence says that death is different. If death is different, and if this is going to be such serious, serious matter, we're talking about taking

the life of an individual, just to put a date cut off of June 24th --

THE COURT: That's a whole different -- listen, that's a whole different topic about whether picking a date in 2004 and saying anybody before or anybody after, whether or not that's arbitrary and capricious, ultimately the United States Supreme Court is going to decide that issue. So the Florida Supreme Court has spoken. I am bound by its controlling precedent upon me. There's no point in really discussing that any further as far as I'm concerned, okay.

MR. HENDRY: Just as an aside to that, Your Honor, because there is the adverse case law about that date, June 24, 2002, but I just want to remind the Court that in our filing on the Taylor case, we raised the issue of James because there is still good case law under James which says that it would be fundamentally unfair to deny relief to somebody when such a huge change in the law has occurred.

Mr. Taylor raised the issues of the unconstitutionality of Florida's death penalty system. He raised the lack of unanimous requirements. And he should be afforded relief under James which is still good case law.

And I think the case law, which we cited in our supplemental authority on Mr. Taylor's case, it's clear that the Florida Supreme Court has made a decision that a nonunanimous verdict is harmful error -- presumptively harmful error.

One of the cases that I cited in the Johnston case with the supplemental authority, what I submitted, Your Honor, was the 11 to 1 cases. There are about three or four 11 to 1 cases.

MR. FREELAND: Your Honor, are we arguing the merits of --

THE COURT: Okay. We need to stick to just this motion, okay.

So, anyway, talking about Dr. Moore.

MR. HENDRY: So, Your Honor, Dr. Moore's testimony goes to the very relevant question of whether the errors at Mr. Johnston's trial were harmful or not. So Dr. Moore is prepared to testify. You've seen, you've read his written reports that there's not just one error that occurred just in passing in the rebuttal argument of the State, all throughout jury selection, all throughout the voir dire, all throughout the opening statement, all throughout the evidence presented, the jury instructions, the verdict form

itself.

So, Dr. Moore should testify, should be permitted to testify that the errors were harmful, not harmless because Hurst said you can't just take the jury's recommendation as the necessary finding of fact necessary to permit a death sentence.

So just to sum up, Your Honor --

THE COURT: Okay. Well, you don't need to sum up. I've heard all the argument. I guess my one final question would be for you, why is the Court not able to read the transcript and see this purported repetition, and then the Court make the decision whether or not the error -- we're really focusing on the -- on the post-Ring 12-0 death rec., any one of those cases. Why is the Court not able itself just to read the transcript and determine if, in fact, the error was harmless or not.

MR. HENDRY: The Court, as the trier of facts, would be capable of making that decision, but what we're trying to do as the defense is to have access to the Court to present our case to make sure you are fully informed before you might render a decision which -- which denies Mr. Johnston relief on this issue.

We want to make sure that we have been able to come to court and present our witness, to present evidence, and to present arguments against you making a decision adverse to Mr. Johnston. You're fully capable of doing that, Your Honor, and that is your job, but we're just simply asking that you consider our evidence, you consider his testimony, and you consider our arguments, which will be made after Dr. Moore has an opportunity to testify.

So, just in closing, based upon Dr. Moore's education, training, experience, he should testify about the matters contained in the written reports. He has applied sound scientific and sociologic methods and principles in his analysis here that are well-established and accepted in the scientific, sociological and educational community. He is qualified to analyze the trial transcripts, analyze the principles announced in Caldwell and reach conclusions that the jury's sense of responsibility was erroneously diminished over 50 and 100-fold times in these particular cases.

His distinguished career as an educator and a jury trial consultant make him qualified to offer opinions about how the jury was instructed, educated in these cases regarding the role as an

advisory panel to recommend the appropriate sentence in these cases.

He has educated the legal community, including attorneys, judges, and litigants about how to best prepare for and present a case to a jury. And how a jury -- and how and why a jury reaches particular decisions.

And I think that he could truly aid this Court in making -- because death is different, in making a fully informed decision before it rules adversely against Mr. Johnston.

THE COURT: Okay. Thank you.

Okay. So, you-all will get an order from me in the not too distant future. And we're still on the books for evidentiary hearings on June 15th at 1:30.

MR. FREELAND: Correct.

MS. BECHARD: Yes, Your Honor.

THE COURT: Unless you hear otherwise, I'll see you June 15th at 1:30.

All right. Okay. Thank you.

MS. BECHARD: Thank you.

(Concluded at 9:54 a.m.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

I, Mary E. Blazer, Registered Professional Reporter, AOC Circuit Court, hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true record.

I further certify that I am not employed by or related to any of the parties in this matter, nor am I financially or otherwise interested in this action.

IN WITNESS WHEREOF, I have hereunto set my hand in Tampa, Hillsborough County, Florida, this 18th day of May, 2017.

Mary E. Blazer

Mary E. Blazer, RPR
AOC Circuit Court Reporter

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-14054-P

RAY LAMAR JOHNSTON,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents - Appellees.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: ED CARNES, Chief Judge, MARTIN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

APPENDIX M

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RAY LAMAR JOHNSTON,

Petitioner,

v.

Case No. 8:11-cv-2094-T-17TGW
DEATH CASE PETITION

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent.

ORDER

This cause is before the Court upon a petition for writ of habeas corpus filed pursuant to Title 28, United States Code, Section 2254 and supporting memorandum of law. Petitioner is proceeding on his amended petition (hereinafter "Petition") (Doc. 11).

A review of the record demonstrates that, for the following reasons, the petition must be **denied.**

PROCEDURAL HISTORY

The facts adduced at trial are summarized in the Florida Supreme Court's opinion on direct appeal, *Johnston v. State*, 841 So. 2d 349 (Fla. 2002):

> Leanne Coryell, a clinical orthodontic assistant for Dr. Gregory Dyer, went to work at 1 p.m. on August 19, 1997. At approximately 8:15 p.m., Dr. Dyer went home, leaving Melissa Hill and Coryell to close the office. Coryell clocked out at 8:38 and, after some difficulty setting the office's alarm, left within the next ten minutes. Coryell picked up groceries at Publix Super Market where the store's surveillance cameras documented her checking out at 9:23. She was not seen alive again.
>
> Ray Johnston, Gary Senchak, and Margaret Vasquez shared a three-bedroom apartment at the Landings Apartment Complex-the same

apartment complex in which Coryell lived. On the evening that Coryell was murdered, Johnston argued with his roommates over the utility bills and left the apartment between 8:30 and 9:30 p.m. Vasquez noted that around 9:45, Johnston's car [FN1] was still in the parking lot although Johnston had not returned. Sometime after 10:00, Johnston came back to the apartment and threw $60 at Senchak, telling him, "That's all you're getting from me, you son-of-a-bitch."

> FN1. Johnston drove a Buick Skyhawk that had recently been in a collision, causing one of his headlights to be out of adjustment. One of the taillights was also out.

Coryell's body was discovered around 10:30 p.m. on the evening of August 19 by John Debnar, who was playing catch with his dogs in a field close to St. Timothy's Church. While there, he noticed that a car with an out-of-place headlight entered St. Timothy's property and stopped briefly beside an empty black car. When Debnar walked his dogs home, one of his dogs stopped at a pond on the church's property, causing Debnar to notice the body of a woman floating in the water.

Hillsborough County sheriff's officers arrived at St. Timothy's Church shortly before 11:30 p.m. and found Coryell's body lying face down in the pond, completely nude. Her clothes were found on a nearby embankment. Dental stone impressions were taken of some shoe prints that were in the general area where the clothing was found. Coryell's empty black Infiniti was in the church's parking lot with the keys in the ignition and the engine still warm. Some, but not all, of her groceries were sitting in the back seat. Although the police were unable to lift any prints from the interior of the car, they did lift a fingerprint matching Johnston's from the exterior.

Dr. Russell Vega performed the autopsy and opined that the victim died sometime after 9 p.m. Based on the extensive bruising of the external and internal neck tissues, Dr. Vega concluded that the victim died from manual strangulation, as opposed to the use of a ligature. Dr. Vega also observed a laceration on the left side of the victim's lower lip and a laceration on her chin, both of which were caused by blunt impact. There were vertical scrapes on the victim's back which suggested that she was dragged to the pond. There were two unusually shaped bruises on Coryell's buttocks which were similar to the metal appliques on her belt, causing Dr. Vega to believe that she was hit with her own belt while still alive. Finally, the victim suffered both internal and external injuries to her vaginal area, injuries which were consistent with vaginal penetration. Her hand still clutched strands of grass.

In the late evening hours of August 19 and again early the next morning, the victim's ATM card was used to withdraw the $500 daily limit. The police

used the ATM surveillance videos to capture pictures of the person who was using the victim's card, and these photographs were provided to the news media, which aired them. Juanita Walker, a friend of Johnston, saw the televised pictures and called the authorities, identifying Johnston as the person in the photos. She also told police that she and Christine Cisilski saw Johnston a little before 10 p.m. on the night of the crime, driving a black, mid-size car out of the Landings Apartment Complex.

Based on telephone calls identifying Johnston as the person in the photos, the police obtained a warrant to search his apartment and found a pair of wet tennis shoes and shorts. The imprints from the tennis shoes matched three partial impressions that were found at the scene of the crime. However, the shoes did not have any individual characteristics which would enable an expert to conclude that Johnston's shoes were the exact shoes which made the impressions.

Johnston saw his picture on television and volunteered to give a statement in which he initially told police that he was a friend of Coryell and that they had gone out to dinner a few times. He told Detective Walters that on the evening of the 19th, he had met Coryell at Malio's for drinks at 6:15 p.m. The pair then went to Carrabba's and left around 8:30 or 9:00. According to Johnston, the victim indicated that she needed to stop at a grocery store before she went home, but before they parted, the victim gave Johnston her ATM card and PIN so that he could withdraw $1200 in repayment of a loan she had obtained from him. When he arrived home, he changed, went jogging, and then withdrew $500 from her account. He withdrew another $500 the following day.

Johnston was placed under arrest for grand theft, was read his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and agreed to continue the interview. The detective confronted Johnston with the fact that Coryell did not leave work until 8:38. Johnston's response was that other employees must have covered for her because he was with her at that time, but he was unable to provide the names of anybody who could corroborate this explanation. The detective then told Johnston that they had found his jogging shoes, which were completely wet. Johnston justified the wet shoes by claiming that he jumped into the hot tub, shoes and all, to wash off after his run. The detective asked several times whether Johnston was involved with Coryell's death and Johnston responded by saying that they would not find any DNA evidence, hair, or saliva which would link him to the victim.

In response to Johnston's contention that he loaned Coryell money, the State introduced several witnesses who testified that Johnston near the time of the murder did not have the financial ability to make a $1200 loan. The State

also called Laurie Pickelsimer, the defendant's pen pal in prison, who testified that Johnston asked her to provide a false alibi for him. Johnston suggested that she tell his attorneys that on the night of the murder, she and Johnston were working out in the gym at the apartment complex from 9:00 until about 10:30, except for a short time when he walked back to his apartment to get them a drink for the hot tub. The jury found Johnston guilty of first-degree murder, kidnapping, robbery, sexual battery, and burglary of a conveyance with assault.

The penalty phase of the trial began on June 16, 1999. The State introduced testimony from three victims of prior violent felonies that Johnston had committed against total strangers. Susan Reeder was the first witness to testify and recalled how Johnston grabbed her when she was stepping out of her car, put a hunting knife to her throat, drove her to an isolated area, and then beat her with his belt and raped her. Julia Maynard recounted how Johnston broke into her home, and when she arrived, grabbed her, held a knife to her neck, and took her to her bedroom so he could take pictures of her in various states of dress and undress and touch her sexually. Carolyn Peak testified that in June 1988, while she was getting out of her car, Johnston put a knife to her throat, forced her back into the car, and tied her hands with an Ace Bandage. She escaped when a police officer pulled the car over because a head light was out.

Dr. Vega, the medical examiner who performed the autopsy on Coryell, opined that Coryell was conscious at the time she was beaten and received her vaginal injuries. He believed the last injury to the victim was manual strangulation and that she was likely conscious for up to two minutes while being strangled. Finally, the State introduced three witnesses to provide victim impact evidence: the victim's father, Thomas Morris; her employer, Dr. Dyer; and her pastor, Matthew Hartsfield.

Defense counsel introduced four experts to testify that Johnston had frontal lobe brain damage and mental health problems. Dr. Diana Pollack, a neurologist, treated Johnston a few months before the murder because Johnston suffered from blackouts, headaches, a tingling sensation down one side of his body, and spells of confusion. She administered various neurological tests, including an MRI and an EEG, but was unable to find any structural deficiencies in his brain.

Dr. Harry Krop, a clinical psychologist, testified that he performed a neuropsychological evaluation on Johnston. When Johnston performed poorly, Dr. Krop recommended that a PET scan be performed. Based on Johnston's documented history and further testing, he concluded that Johnston suffered from a frontal lobe impairment and that this problem has three main manifestations: (1) difficulty starting an action; (2) difficulty stopping an existing

action; and (3) being too impulsive or acting without thinking.

Dr. Frank Wood, a neuropsychologist, examined Johnston and reviewed the results of his PET scan. He concluded that Johnston's frontal lobe area had substantially less activity than was normal (below the first percentile) and that this deficiency correlates with poor judgment, impulsivity, and "disinhibited" behavior. Based on Johnston's medical and behavioral record, Dr. Wood concluded that this was a chronic condition.

Dr. Michael Maher, a physician and psychiatrist, evaluated Johnston and reviewed his history and medical records. Dr. Maher agreed that it was evident from the PET scan that Johnston suffered from impairments of the frontal lobe of his brain, making it extremely hard for him to resist any strong urges. He also believed that Johnston suffered from seizures that were related to his brain abnormality and had dissociative disorder (a psychiatric disorder in which some aspect of a person's total personality or awareness is unavailable at certain times).

Several character witnesses testified in Johnston's behalf. According to Gloria Myer, a placement specialist for a correctional institution, Johnston was dedicated to his job, very organized, and followed Myer's instructions. She also recalled a time when she thought he was having a stroke because "his whole side of his face had fallen, had drooped." John Walkup, Johnston's probation officer, recommended Johnston for early termination because he had a stable family life, worked at a steady job, reported regularly, paid his fees, and was doing fine. William Jordon, a case manager for the Department of Corrections, knew Johnston while he was in prison and asserted that he got along well with other inmates and was not a disciplinary problem. John Field, a chaplain with the Department of Corrections, knew Johnston when he was incarcerated in the early 1990s and declared that Johnston was one of the chapel's best clerks. Bruce Drennen, the president of the Brandon Chamber of Commerce, testified that Johnston was a designated representative of a company that was a member of the chamber.

Johnston's family provided mitigation. His mother, Sara James, testified that at the age of three or four, Johnston had fallen out of a car and hit his head on the curb, resulting in an injury which required stitches. Johnston did not perform well in school, and by the time he was in the seventh grade, he became disruptive in class and was sometimes sent home. Problems became more serious the older he grew, and eventually he was sent to the Hillcrest Institution for treatment. Normally, Johnston had a sweet disposition, but he could get explosive at times. Susan Bailey, Johnston's ex-wife, testified that while she was married to him, Johnston was the perfect husband -- he cooked, cleaned, and helped raise her two daughters. She described him as very tenderhearted, remembering how it would upset him if she had to paddle her

girls for misbehaving. She also stated that even though he would occasionally snap over minor issues, he would not vent his anger towards his family. Rebecca Vineyard, Johnston's younger sister, stated that Johnston never acted normal -- he would try too hard to make people love him and would go overboard trying to get positive responses. However, his personality could quickly change, and he did not like being rejected or humiliated.

Finally, Ray Johnston took the stand and admitted that he killed the victim. According to Johnston, he saw Coryell drive in after he had just gotten out of the hot tub. He asked her if he could help carry her groceries to her apartment, but she ignored his request. Johnston stated that he just wanted her attention and meant to reach for her shoulders but grabbed her neck instead. He thought he held her for just a few seconds, but then her legs gave out. She hit her lip on the edge of the door, and her chin hit the ground, causing two lacerations on her face. When he rolled her over, he saw her eyes and mouth were open. He tried reviving her by giving CPR, but it had no effect. Thinking that he had broken her neck, Johnston put her in the back seat of her car and drove her to the church. To make it look like she had been assaulted, Johnston took off her clothes and scattered them out, kicked her in the crotch, beat her with her belt, and dragged her to the pond. A car drove into the parking lot, prompting Johnston to run home. After he took a shower, Johnston drove back to the church to see if anybody had discovered the body. While there, he found the victim's ATM card and its PIN, which was written on the cover of her address book. He took her ATM card and drove to Barnett Bank to withdraw some money. The next day, after Johnston learned his picture was being broadcast on the news, he turned himself in and made up the story that Coryell had given him the ATM card.

The jury unanimously recommended the death penalty. After holding a Spencer hearing, [FN2] the trial court found four aggravating factors, [FN3] one statutory mitigator, [FN4] and numerous nonstatutory mitigators, and followed the jury recommendation. Johnston raises four claims on appeal.

FN2. *See Spencer v. State*, 615 So.2d 688 (Fla.1993).

FN3. The trial court found the following aggravators: (1) the defendant was previously convicted of violent felonies; (2) the crime was committed while Johnston was engaged in the commission of sexual battery and a kidnapping; (3) it was committed for pecuniary gain; and (4) it was especially heinous, atrocious, or cruel.

FN4. The court found defense counsel proved that Johnston's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired

and gave it moderate weight.

Johnston, 841 So. 2d at 351-355.

DIRECT APPEAL

On December 5, 2002, the Florida Supreme Court affirmed Johnston's first-degree murder conviction and death sentence for the murder of Coryell. The court also affirmed his convictions and sentences for kidnaping, robbery, sexual battery, and burglary of a conveyance with assault. *Johnston v. State*, 841 So. 2d 349, 361 (2002). Rehearing was denied on March 13, 2003. The mandate issued March 13, 2003.

STATE POSTCONVICTION PROCEEDINGS

On March 11, 2004, Johnston filed a Rule 3.851 motion for postconviction relief in the state trial court. (Ex. B1/171-193). On May 7, 2004, the State filed a motion to strike Johnston's motion to vacate (on the grounds that Johnston's motion failed to comply with the requirements of Rule 3.851(e)), without prejudice to his filing a proper motion to vacate. (Ex. B1/194-197; 198-201).

On June 11, 2004, Johnston filed an amended motion to vacate. (Ex. B2/203-267). On October 11, 2004, the State filed a response to the amended motion to vacate. (Ex. B2/276-342). A second amended motion was filed on December 8, 2005. Johnston's amended motion raised twelve claims and multiple sub-claims. (Ex. B2/203-267, 355-404). The state trial court held postconviction evidentiary hearings on December 1, 2006; June 14-15, 2007; and July 12-13, 2007 on eight of Johnston's postconviction claims. (Ex. B52/601–B62/1804). All postconviction relief was denied in the trial court's 136-page written order of February 5, 2009. (Ex. B16/3102-B17/3237).

Petitioner appealed the order denying postconviction relief to the Florida Supreme

Court. *Johnston v. State,* 63 So. 3d 730 (Fla. 2011).

Simultaneously with his initial postconviction brief, Petitioner filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court, Case No. SC10-75.

On March 24, 2011, the Florida Supreme Court affirmed the denial of postconviction relief and denied Petitioner's state habeas petition. *Johnston v. State,* 63 So.3d 730 (Fla. 2011) (Ex. B71). Petitioner's motion for rehearing was denied June 3, 2011, and the mandate issued June 20, 2011. (Ex. B73; B74). Johnston did not petition the United States Supreme Court for a writ of certiorari.

FEDERAL HABEAS PROCEEDINGS

On September 15, 2011, Petitioner Johnston filed a Petition for Writ of Habeas Corpus in this Court (Doc. 1), which was amended on October 28, 2011. (Doc. 11). Petitioner filed a Memorandum of Law on January 8, 2012. (Doc. 18).

TIMELINESS OF THE FEDERAL PETITION

Having considered the arguments of the parties, and the applicable case law, this court assumes, without deciding, that the present petition was timely filed.

Respondent's Argument as to Timeliness

Johnston's habeas petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Lindh v. Murphy*, 521 U.S. 320, 326–27, 117 S. Ct. 2059 (1997); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 127 S. Ct. 1654, 1664 (2007). The AEDPA requires a state prisoner whose conviction has become final to seek federal habeas corpus relief within one year. 28 U.S.C. § 2244(d)(1)(A). The AEDPA tolls this 1-year limitations period for the "time during which a properly filed application for State postconviction or other collateral review . . . is pending." § 2244(d)(2).

In this case, the one-year statute of limitations commenced when Johnston's conviction became final upon "the conclusion of direct review or the expiration of the time for seeking such review." See, 28 U.S.C. § 2244(d)(1)(A). *See also, Bond v. Moore*, 309 F.3d 770, 772 (11th Cir. 2002); *Clay v. United States*, 537 U.S. 522 (2003); *San Martin v. McNeil*, 633 F.3d 1257, 1266 (11th Cir. 2011), *citing* 28 U.S.C. § 2244(d)(1)(A).

On direct appeal, the Florida Supreme Court denied Petitioner's motion for rehearing on March 13, 2003. The 90th day thereafter -- June 11, 2003 -- was the Petitioner's last day to file a petition for writ of certiorari to the United States Supreme Court. *See, Clay*, 537 U.S. 522; *Sibley v. Culliver*, 377 F.3d 1196, 1199 (11th Cir. 2004) (noting AEDPA one year "commences" on the "deadline" for seeking certiorari in the Supreme Court).

At that point, Johnston had one year from June 11, 2003, in which to either file his § 2254 habeas petition with this Court or file a "properly filed" application for postconviction relief in state court. Because 2004 was a leap year, calculating 365 days from June 11, 2003 results in an end date of June 10, 2004. However, using the "anniversary" method (even though it includes the intervening leap day), the "one year" anniversary "end" date was June 11, 2004.

Statutory Tolling

To statutorily toll the running of the limitations period, an application for state collateral relief must be "properly filed" under state law. See 28 U.S.C. § 2244(d)(2); *Allen v. Siebert*, 552 U.S. 3, 128 S. Ct. 2 (2007). Title 28 U.S.C. § 2244(d)(2) provides for tolling the limitation period for "[t]he time during which a properly filed application for State post conviction or other collateral review with respect to the pertinent judgment or claim is pending." Once the petitioner has a filed a "properly filed" application for post-conviction relief in state court, "the

AEDPA clock stops." It "resumes running when the state's highest court issues its mandate disposing of the motion for post-conviction relief." *San Martin*, 633 F. 3d at 1266, *citing Lawrence v. Florida*, 549 U.S. 327, 331–32, 127 S. Ct. 1079 (2007).

On March 11, 2004, Johnston filed a Rule 3.851 Motion to Vacate in the trial court, but the motion failed to comply with the requirements of Rule 3.851(e). (Ex. B1/171-193). On May 7, 2004, the State filed a motion to strike Johnston's motion to vacate on the grounds that it failed to comply with the requirements of Rule 3.851(e), without prejudice to Johnston's filing a proper motion to vacate.[1] (Ex. B1/194-197; 198-201). On June 11, 2004, Johnston filed an amended motion to vacate. (Ex. B2/203-267). On October 11, 2004, the State filed a response to the amended motion to vacate. (Ex. B2/276-342). After the Florida Supreme affirmed the denial of postconviction relief, the postconviction mandate issued on June 20, 2011.

In *Artuz v. Bennett*, 531 U.S. 4, 121 S. Ct. 361 (2000), the United States Supreme Court determined that whether a motion is "properly filed" is based on whether the state court pleading's delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. *Id.* at 8. Under *Artuz,* postconviction motions that do not comply with state law regarding

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[1] There is no order in the postconviction record on the State's motion to strike. However, the defense promptly filed an "amended" motion; thus, it appears that Johnston did not dispute the State's motion to strike, without prejudice, on the grounds that the initial motion failed to comply with the requirements of Rule 3.851(e). The trial court's postconviction orders did not address the motion filed in March of 2004, but, instead, referred only to the "amended" motions filed in June of 2004 and in 2005.

the form of such motions are not "properly filed." *See, Artuz*, 531 U.S. at 8; *Melson v. Allen*, 548 F.3d 993, 997-98 (11th Cir. 2008), *vacated on other grounds*, 130 S. Ct. 3491 (2010) (unverified motion for post-conviction relief not properly filed); *Sibley v. Culliver*, 377 F.3d 1196, 1203-04 (11th Cir. 2004) (pleading that was not on proper form, accompanied by proper number of copies, nor submitted with proper filing fee not properly filed).

Under Florida law, the requirements regarding the form of a motion for postconviction relief in a capital case are set out in Fla. R. Crim. P. 3.851. The requirements were enacted in response to criticism of the practice of filing "shell" motions merely to meet a time limit and were designed to prevent the filing of such motions. *See*, Amendments to Fla. R. Crim. P. 3.851, 3.852, and 3.993 and Fla. R. Jud. Admin. 2.050, 802 So. 2d 298 (Fla. 2001); Amendments to Fla. R. Crim. P. 3.851, 3.852, and 3.993 and Fla. R. Jud. Admin. 2.050, 797 So. 2d 1213 (Fla. 2001); Amendments to Fla. R. Crim. P. 3.851, 3.852, and 3.993, 772 So. 2d 488 (Fla. 2000).

Johnston's incomplete "shell" motion to vacate was filed on March 11, 2004. However, because that motion did not comply with the requirements of Rule 3.851(e)(1), it was not "properly filed" under *Artuz* and *Pace*; therefore, it did not toll the statute of limitations. Once the limitations period expires, no state collateral proceedings filed thereafter will toll the statute of limitations, because there is no longer anything left to toll. *Sibley v. Culliver*, 377 F.3d 1196, 1204 (11th Cir. 2004).

Respondent contends that Johnston's federal 28 U.S.C. § 2254 petition is untimely regardless of the fact that there was no written order on the State's motion to strike and that the Florida Supreme Court, in *Gore v. State*, 24 So. 3d 1, 15-16 (Fla. 2009), ruled that an amended motion related back to the date of the initial motion. *Id., citing Bryant v. State*, 901

So. 2d 810, 818 (Fla. 2005) (noting that when an initial motion is stricken with leave to amend, a subsequent amended motion relates back to the date of the original filing).

Respondent contends that under Eleventh Circuit's precedent, Petitioner's initial incomplete "shell" motion was not "properly filed" so as to toll the federal limitations period under § 2244(d)(2). *See, Melson v. Allen*, 548 F. 3d 993, 998 (11th Cir. 2008), *vacated on other grounds*, 130 S. Ct. 3491 (2010); *Sibley v. Culliver*, 377 F.3d 1196, 1204 (11th Cir. 2004) ("Petitioner may not attempt to resurrect a terminated statute of limitations by subsequently filing documents that purport to "relate back" to previously submitted documents that were, in themselves, insufficient to toll the statute."); *See also, Gonzalez v. Secretary, Florida Dept. of Corrections*, 629 F.3d 1219, 1221 (11th Cir. 2011) (finding no need to address the timeliness issue where the state's own filing rules incorporated the relation back doctrine because habeas petitioner's substantive claims were without merit).[2]

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[2] The first issue of whether Gonzalez's federal habeas petition was timely turns on whether his "shell" motion was "properly filed" so as to toll the federal limitations period under § 2244(d)(2). Gonzalez argues that, although his "shell" motion was stricken by the trial court, his amended Rule 3.850 motion was deemed to have "related back" and thus rendered his "shell" motion "properly filed." Gonzalez relies on *Gore v. State*, where the Florida Supreme Court indicated that the relation back doctrine rendered an initially-stricken state post-conviction motion "properly filed" under Florida law for purposes of § 2244(d)(2). 24 So.3d 1, 15-16 (Fla.2009). The state responds that this argument is foreclosed by our case law. *See Melson v. Allen*, 548 F.3d 993, 998 (11th Cir. 2008), vacated on other grounds, —— U.S. ——, 130 S.Ct. 3491, 177 L.Ed.2d 1081 (2010); *Sibley v. Culliver*, 377 F.3d 1196, 1204 (11th Cir. 2004). Gonzalez suggests that our cases are inapplicable because none of them involved a situation where the state's own filing rules incorporated the relation back doctrine. We need not address this issue here, however, because we find Gonzalez's two substantive claims to be without merit. *See Holland v. Florida*, —— U.S. ——, 130 S.Ct. 2549, 2560, 177 L.Ed.2d 130 (2010) ("[T]he AEDPA statute of limitations defense is not jurisdictional.") (alteration, citation, and quotation marks omitted). Thus, even if Gonzalez's federal habeas petition was timely filed, he is not entitled to relief.

The determination of the meaning and operation of a federal statute is a question of federal law upon which a federal court is not bound by a state court's decision. *Johnson v. United States*, 130 S. Ct. 1265, 1269 (2010). Instead, federal courts are only bound by state court decisions on issues of state law. *Id.; Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S. Ct. 1881, 1886 (1975).

The Supreme Court has held that a postconviction motion is only "properly filed" if it complies with the applicable laws and rules governing filings. *Artuz*, 531 U.S. at 8. The determination of whether a motion that did not comply with a state's laws and rules could nevertheless toll the federal habeas statute of limitations is a question regarding the meaning of 28 U.S.C. 2244(d)(2), a federal statute. As a result, under *Johnson*, it is a question of federal law to which this Court owes the state court's determination in *Gore* no deference. *See, Johnson*, 130 S. Ct. at 1269.

In this case, absent tolling, the one-year limitations period ended on June 11, 2004 (using the anniversary date, including leap day), and any collateral application filed after that date had no tolling effect. As the Eleventh Circuit has explained:

> . . . Melson may not attempt to resurrect a terminated statute of limitations by subsequently filing documents that purport to relate back to previously submitted documents that were, in themselves, insufficient to toll the statute. *Sibley v. Culliver*, 377 F.3d 1196, 1204 (11th Cir. 2004). Because Melson's unverified petition filed on 4 March 2002 was insufficient to toll the statute of limitations, his amended petition filed on 25 March 2002 does not relate back to the earlier filing date to toll the statute either. The district court correctly determined that Melson's one year limitations period was not statutorily tolled by either his unverified or verified Rule 32 petitions, rendering his federal habeas petition untimely under 2244(d)(1)(A).

Melson, 548 F.3d at 997-98, *vacated on other grounds; Sibley*, 377 F.3d at 1204; *Moore v. Crosby*, 321 F.3d 1377, 1380-81 (11th Cir. 2003). The fact that a state court gives a

defendant more time to file state postconviction motions than is available under 2244(d) does not extend the statute of limitations under AEDPA. *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000). Thus, the issue of whether a state court motion can toll the statute of limitations when it was not "properly filed" is an issue of federal law and meritless under *Melson* and *Sibley*.

If the March 11, 2004, "shell" motion were "properly filed," then the one-year limitation period remained tolled until the Florida Supreme Court issued its postconviction mandate. *San Martin*, 633 F.3d at 1266; *Lawrence*, 549 U.S. at 331-32, 127 S. Ct. 1079. The Florida Supreme Court's postconviction mandate issued on June 20, 2011. At that point, Johnston clearly no longer had an application for state collateral relief pending. *See, Lawrence v. Florida*, 549 U.S. 327. If any days arguably remained under AEDPA's statute of limitations, the remaining time period began to run again when the mandate issued on June 20, 2011.

Johnston's federal habeas petition was filed on September 15, 2011 (Doc. 1) and amended on October 28, 2011. The postconviction mandate issued on June 20, 2011. If the "shell" postconviction motion filed March 11, 2004 is considered "properly filed," then the instant habeas petition, filed on September 15, 2011, would appear to be timely filed. If the "amended" motion, filed on June 11, 2004, is the first "properly filed" postconviction motion, then the petition is untimely.

Petitioner's Argument as to Timeliness

Petitioner disagrees with the Respondents' argument that the March 11, 2004 postconviction motion was not properly filed. Noting that the State acknowledges that "There is no order in the postconviction record on the State's motion to strike. . .The trial court's postconviction orders did not address the motion [to strike] filed in March of 2004," Petitioner

contends that the lack of an order actually striking the Petitioner's 3.851 motion is fatal to the State's procedural default argument. The motion was never stricken; it was amended and then denied after an extensive evidentiary hearing. Petitioner contends that he properly filed his postconviction motion in state court, tolling AEDPA's one year statute of limitations, making this petition timely. Petitioner argues that no state court has ever made a finding that Johnston's initial 3.851 motion was not properly filed, and this Court should not find this to be the case either.

Petitioner argues that a procedural default defense is not available to the State and he claims that *Artuz v. Bennett*, 531 U.S. 4 (2000) does not support the State's position: "Like in *Artuz,* the Petitioner's Initial 3.851 Motion was not improperly filed for purposes of 2244(d)(2). *Artuz* at 11. In fact, Petitioner claims that *Artuz* actually supports the Petitioner. *Artuz* held that in the absence of a written order, the postconviction motion was still pending under § 2244(d)(2). There was no written order ever dismissing Johnston's Initial 3.851 Motion.

Petitioner claims that *Melson v. Allen*, 548 F. 3d 993 (11th Cir. 2008) is inapplicable because Johnston actually did provide a written, sworn verification to his Initial 3.851 Motion. Although *Melson* was decided adversely by the 11th Circuit Court of Appeals, *Melson* is an Alabama case, not a Florida case. Therefore *Melson* was decided without the benefit or control of Florida law.

In *Bryant v. State*, 901 So. 2d 810 (2005), the Florida Supreme Court held:

> Bryant's initial motion was sixty-nine pages in length. It was stricken for mostly technical deficiencies in form. (FN 5). For example, the motion failed to attach a copy of the judgment and sentence as required under rule 3.851(e)). Such a lengthy motion can hardly be characterized as a 'shell motion.'. . . .[the] failure to comply with the rule is more a matter of form than substance.

Bryant, at 819. Petitioner claims that Bryant is right on point and should control this issue. Even if the trial court had stricken Johnston's motion as the court did in *Bryant*, which the trial court did not in Johnston's case, Johnston's federal habeas petition would not be time-barred. The more recent Florida case of *Gore v. State*, 24 So. 3d 1 (Fla. 2009), also on point, stated:

> Finally, although the trial court did not err in striking Gore's motion without leave to amend, we conclude that because this Court granted an extension of time pursuant to rule 3.851(d)(5) in which to file an amended motion, Gore's amended motion in this case relates back to the date of the initial motion filed on June 18, 2002. *See generally Bryant v. State*, 901 So.2d 810, 818 (Fla. 2005) (noting that when an initial motion is stricken with leave to amend, a subsequent amended motion relates back to the date of the original filing). Accordingly, although the trial court did not err in its ruling, in our view this Court's order granting an extension of time in which to file an amended motion rendered Gore's motion timely for purposes of federal review.

Gore, at 16. Florida is different.

At least one federal court in Florida has decided the issues discussed in *Melson* differently:

> Petitioner corrected his original error. The amended motion was a copy of the original with the oath added at the end. Under Florida law, an amendment that does not change the original claims relates back to the original filing. Fla. R. Civ. P.1.190(c) ("When the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment shall relate back to the date of the original pleading."); *Bryant v. State*, 901 So.2d 810, 818 (Fla.2005) ("Had the circuit court stricken the [Rule 3.851] motion with leave to amend, the amended motion Bryant filed in March 2003 would have been timely because it would have related back to the original filing," quoting Rule 1.190(c)); *Schwenn v. State*, 958 So.2d 531, 532 (Fla. 4th DCA 2007) (Rule 3.850 motion, explaining that an amended motion would relate back, citing *Bryant*). *See also, Mederos v. United States*, 218 F.3d 1252, 1253-1254 (11th Cir.2000) (district court erred by not finding that a second 2255 motion, identical to the first except that it corrected the lack of a signature under penalty of perjury, related back to the date of filing of the first § 2255 motion; the court relied upon Fed. R. Civ. P. 15(c)(2), providing relation back much the same as the Florida rule). Since Petitioner amended his motion and corrected

> the problem, Petitioner is entitled to AEDPA tolling from March 27, 2005, when he originally filed the motion without an oath. Thus, his § 2254 petition was timely filed.

Patrick v. McDonough, 4:06CV543-SPM/WCS, 2007 WL 3231740 (N.D. Fla. Oct. 29, 2007). Johnston's amended motions related back to the original motion.

The State cites *Sibley v. Culliver*, 377 F.3d 1196 (11th Cir. 2004) in support of dismissal for lack of timeliness. This case is inapplicable because Johnston's pleading actually contained meaningful state and federal analysis. "One fair inference of this holding is that where a petitioner fails to include any meaningful federal or state legal analysis, we need not consider his filing an application for state post-conviction review." *Sibley, Id.* at 1200. The State does not allege here that the Petitioner's Initial 3.851 Motion lacked "meaningful state and federal analysis." They simply allege that it is a "shell" and that a document from the original record on appeal was not attached to the pleading. Unlike *Sibley,* Johnston did not file in the "wrong court." *See Sibley, Id.* at 1203. The holding in *Sibley* was very narrow and is inapplicable to the case at bar:

> All we are holding is that there is an outer limit to the nonsense a petitioner may include in a purported "application for post-conviction or other relief" and still have it count as such. Ramblings about how Sibley is not a "serf," is not "in trade or business with any enemy of the Constitutional United States," does not have a social security number, does not believe in self-representation yet rejects all court-appointed attorneys, and for unspecified reasons was somehow beyond the jurisdiction of any Alabama court, are insufficient for a court to consider something a legitimate filing.

Sibley, Id. at 1201. Johnston never made any such allegations in his Initial 3.851 Motion.

Gonzalez v. Secretary, Florida Dept. Of Corrections, 629 F. 3d 1196 (11th Cir. 2011), cited by the State, is distinguishable here because in that case, the court actually did strike an incomplete "shell" motion, and the substantive claims had no merits. Mr. Johnston's Initial

3.851 Motion was never stricken by the court, and his claims actually have merit. Also the State cites to *Johnson v. United States*, 130 S. Ct. 1265, 1269 (2010) to support its position that the federal courts are not bound by the relation back doctrine found in *Gore*.

The Petitioner alleges that the federal courts "are, however, bound by the Florida Supreme Court's interpretation of state law." *Johnson, Id.* at 1269. Johnston tolled the time for the filing of his federal habeas petition under both state and federal law.

The State makes the following erroneous claim: "this Court owes the state court's determination in *Gore* no deference." If this Court is inclined to agree with the State's position regarding untimeliness, which the Petitioner obviously disputes, Johnston should still be permitted to proceed with his federal claims under the recent ruling in *Martinez v. Ryan,*132 S. Ct. 1309 (2012).

Respondent's Sur-Reply in Regard to Timeliness

Respondent argues that the instant habeas petition is time-barred and contends that *Bryant v. State*, 901 So. 2d 810 (Fla. 2005) is not "right on point and should [not] control." (Doc. 25 at 3). In *Bolin v. Dept. of Corr.*, 2013 WL 3327873 (M.D. Fla. July 1, 2013), the District Court, citing *Jones v. Dept. of Corr.*, 499 Fed. Appx. 945, 952 (11th Cir. 2012), rejected another inmate's similar reliance on *Bryant*:

> Bolin's reliance on *Bryant v. State*, 901 So.2d 810 (Fla. 2005) is misplaced. Although the Florida Supreme Court in Bryant observed in dicta that an amended Rule 3.851 motion would have related back to an original filing which had been stricken because of deficiencies, that is a matter of Florida law and procedure. Whether Bolin's corrected Rule 3.851 motion relates back to his initial motion for purposes of the AEDPA "rest[s] on the nature of the federal limitations period and federal law." *Jones v. Secretary, Florida Dept. of Corrections*, 499 Fed. Appx. at 945, 952 (11th Cir. 2012). As noted, precedent in this Circuit compels a conclusion that Bolin's corrected Rule 3.851 motion did not, as a matter of federal law and application of the AEDPA, relate back to his improperly filed initial Rule 3.851 motion and accordingly, Bolin's federal

habeas petition is time barred.

Here, as in Bolin[3], Petitioner's reliance on *Bryant* is misplaced.

Petitioner cannot proceed with his federal habeas claims under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), even if his petition is untimely. (Doc. 25 at 5). *Martinez* does not address timeliness; it addresses failure to exhaust state court remedies and procedural default of an ineffective-assistance-of-trial-counsel-claim in two limited situations: 1) counsel was not appointed in the initial-review collateral proceeding or 2) appointed postconviction counsel in the initial-review collateral proceeding was ineffective, pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), and failed to raise a "substantial" claim of ineffective assistance of trial counsel. *Martinez*, 132 S. Ct. at 1318, 1321. In *Gore v. Crews*, 720 F.3d 811 (11th Cir. 2013), the Eleventh Circuit emphasized that "[b]y its own emphatic terms, the Supreme Court's decision in *Martinez* is limited to claims of ineffective assistance of trial counsel that are otherwise procedurally barred due to the ineffective assistance of post-conviction counsel." *Id.* at 816. *See also Arthur v. Thomas*, 739 F.3d 611, 629 (11th Cir. 2014) (addressing limitation of *Martinez* exception); *Chavez v. Dept. of Corr.*, 742 F. 3d 940, 945 (11th Cir. 2014) (repeating the narrow scope of *Martinez* and noting that Chavez's initial § 2254 petition was dismissed as untimely because it was filed more than one year after his convictions became final on direct review, see 28 U.S.C. § 2244(d)(1)(A), and "nothing in *Martinez* alters that fact").

Notably, Petitioner Johnston does not make any claim for equitable tolling of the §

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[3] On September 20, 2013, the Eleventh Circuit denied Bolin's application for certificate of appealability (COA). *Bolin v. Dept. of Corr.*, Case No. 13-13539-P (11th Cir. Sept. 20, 2013).

2244(d) statute of limitations period under *Holland v. Florida*, 560 U.S. 631. Furthermore, in *Cadet v. Dept. of Corr.*, 742 F.3d 473 (11th Cir. 2014), the Eleventh Circuit, citing *Maples v. Thomas*, 132 S. Ct. 912 (2012), held that "attorney negligence, however gross or egregious, does not qualify as an "extraordinary circumstance" for purposes of equitable tolling; abandonment of the attorney-client relationship, such as may have occurred in *Holland,* is required." Petitioner has never alleged that "his attorney. . . abandoned him, thereby supplying the 'extraordinary circumstances'" necessary to warrant equitable tolling of the §2244(d) statute of limitations period." *Cadet,* 742 F.3d at 481-82.

As stated above, this Court assumes, without deciding, that the present petition was timely filed. Furthermore, Johnston's grounds for relief have no merit, as discussed below.

STANDARDS OF REVIEW

In *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011), the United States Supreme Court reiterated the following standards of review under 28 U.S.C. § 2254:

> As amended by AEDPA, 28 U.S.C. § 2254 sets several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner. Section 2254(a) permits a federal court to entertain only those applications alleging that a person is in state custody "in violation of the Constitution or laws or treaties of the United States." Sections 2254(b) and (c) provide that a federal court may not grant such applications unless, with certain exceptions, the applicant has exhausted state remedies.
>
> If an application includes a claim that has been "adjudicated on the merits in State court proceedings," § 2254(d), an additional restriction applies. Under § 2254(d), that application "shall not be granted with respect to [such a] claim ... 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."
>
> This is a "difficult to meet," *Harrington v. Richter*, 562 U.S. ——, ——, 131 S.Ct. 770, 786, 178 L.Ed.2d 624 (2011), and "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt," *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam) (citation and internal quotation marks omitted). The petitioner carries the burden of proof. *Id.*, at 25, 123 S.Ct. 357.

Cullen v. Pinholster, 131 S. Ct. 1388, 1398.

AEDPA altered the federal court's role in reviewing state prisoner applications in order to "prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693, 122 S. Ct. 1843 (2002).

Federal Question

A federal court may only entertain an application for a writ of habeas corpus from a state prisoner who claims his custody violates the "Constitution or the laws or treaties of the United States." 28 U.S.C. § 2254(a). Questions of state law are generally insufficient to warrant review or relief by a federal court under § 2254. *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S. Ct. 475 (1991); *Carrizales v. Wainwright*, 699 F.2d 1053, 1055 (11th Cir. 1983); *Cabberiza v. Moore*, 217 F.3d 1329, 1333 (11th Cir. 2000). A violation of a state rule of procedure, or of state law itself, is not a violation of the federal constitution. *Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1989).

Exhaustion and Procedural Bar

Under the exhaustion requirement, a habeas petitioner challenging a state conviction must first attempt to present his claim in state court. 28 U.S.C. § 2254(b). If the state court rejects the claim on procedural grounds, the claim is barred in federal court unless one of the exceptions to *Wainwright v. Sykes*, 433 U.S. 72, 82–84, 97 S. Ct. 2497 (1977) applies. To

excuse a procedural default, a petitioner must demonstrate either (1) "cause for the default and prejudice attributable thereto" or (2) "that failure to consider [the defaulted] claim will result in a fundamental miscarriage of justice." *Harris v. Reed*, 489 U.S. 255, 262, 109 S. Ct. 1038 (1989).

Furthermore, a claim "is procedurally defaulted if it has not been exhausted in state court and would now be barred under state procedural rules." *Mize v. Hall*, 532 F.3d 1184, 1190 (11th Cir. 2008). Under the procedural default doctrine, "[i]f the petitioner has failed to exhaust state remedies that are no longer available, that failure is a procedural default which will bar federal habeas relief." *Smith v. Jones*, 256 F.3d 1135, 1138 (11th Cir. 2001).

A procedural default for failing to exhaust state court remedies will only be excused in two narrow circumstances. First, a petitioner may obtain federal habeas review of a procedurally defaulted claim if he shows both "cause" for the default and actual "prejudice" resulting from the asserted error. *House v. Bell*, 547 U.S. 518, 536–37, 126 S. Ct. 2064 (2006). Second, under exceptional circumstances, a petitioner may obtain federal habeas review of a procedurally defaulted claim if such review is necessary to correct a fundamental miscarriage of justice. *House*, 547 U.S. at 536, 126 S. Ct. 2064; *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S. Ct. 1587 (2000).

Retroactive Application of New Law

In *Teague v. Lane*, 489 U.S. 288, 297-98, 109 S. Ct. 1068 (1989), the Supreme Court held that constitutional claims may not be raised on collateral review if they are based upon a new rule that was enunciated after the conviction and sentence became final. 489 U.S. at 311, 109 S. Ct. at 1075. The Court has explained that *Teague* validates reasonable good faith interpretations of existing precedent. *Butler v. McKellar*, 494 U.S. 407, 110 S. Ct. 1212

(1990). A precedent sets forth a new rule unless "reasonable jurists" would have "felt compelled" at the time the petitioner's conviction became final to rule in the petitioner's favor on the issue. *Graham v. Collins*, 506 U.S. 461, 467, 113 S. Ct. 892, 898 (1993). The precedent will be considered a new rule even if the issue is "governed" or "controlled" by existing precedent, *Butler*, 494 U.S. at 415, 110 S. Ct. at 1217 and will be considered as a collateral claim only if the relief sought was "dictated" by prior precedent.

Deference to State Court Decisions

On habeas review, the state court's application of the facts to the law may not be overturned unless it contradicts a decision of the United States Supreme Court, or involves an unreasonable factual finding. 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). These provisions bar de novo review in federal court. A decision of a state court is only contrary to clearly established Supreme Court precedent if a state court has applied the wrong legal standard or has applied the right legal standard but reached a different conclusion than the United States Supreme Court did on materially indistinguishable set of facts. *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 1522 (2000). In order for the state court's determination of the merits of the claim to be unreasonable, the determination must be objectively unreasonable. *Id.* "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant

state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must be unreasonable." *Id.* at 411.

Further, the state courts' factual findings are subject to a presumption of correctness under 28 U.S.C. §2254(e)(1). The state court's factual conclusions must be accepted by the federal courts on habeas review, unless the petitioner demonstrates by clear and convincing evidence that they are incorrect. Id. The AEDPA imposes a "'difficult to meet,' and 'highly deferential standard for evaluating state-court rulings, which demands that the state-court decisions be given the benefit of the doubt.'" *Cullen v. Pinholster*, —— U.S. ——, 131 S. Ct. 1388, 1398 (2011) (internal quotations and citations omitted). Moreover, review "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen*, 131 S. Ct. at 1398.

"The question under AEDPA is not whether a federal court believes the state court's determination was correct but whether that determination was unreasonable - a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 1939 (2007). In sum, in order to obtain any relief, Petitioner must show that the state courts' rejection of his claims was contrary to, or an unreasonable application of, clearly established United States Supreme Court precedent.

Brecht v. Abrahamson

In *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710 (1993), the Supreme Court set forth the standard for relief where error is determined, on habeas review, to exist. This test is "less onerous" then the harmless error standard enunciated in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824 (1967). "The test is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.' Under this standard, habeas

petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" 507 U.S. at 637, 113 S. Ct. at 1722. The United States Supreme Court has reaffirmed that this standard applies and does so even if the state court did not find error. *Fry v. Pliler*, 551 U.S. 112, 127 S. Ct. 2321 (2007).

Ineffective Assistance of Counsel

For an ineffectiveness of counsel claim, the "clearly established" standard is set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Under *Strickland*, "[a] convicted defendant making a claim of ineffective assistance of counsel must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." 466 U.S. at 690, 104 S. Ct. at 2066. Counsel "is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.*

Even if deficient performance is demonstrated, a petitioner must also show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S. Ct. at 2068. It must be "reasonably likely" the result would have been different; "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington*, 131 S. Ct. at 793 (citations omitted). The failure to demonstrate either prong of *Strickland* is dispositive of the claim against the petitioner. 466 U.S. at 697, 104 S. Ct. at 2069.

The standards created by *Strickland* and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. When § 2254(d) applies, the question

is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard. *Harrington*, 131 S. Ct. at 788 (citations omitted).

The "Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009) (internal quotations and citations omitted). It is petitioner who bears the heavy burden to "prove, by a preponderance of the evidence, that counsel's performance was unreasonable." *Jones v. Campbell*, 436 F.3d 1285, 1293 (11th Cir. 2006), *cert. denied sub nom., Jones v. Allen*, 549 U.S. 1030, 127 S. Ct. 619 (2006). Moreover, a court must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct," *Roe v. Flores–Ortega*, 528 U.S. 470, 477, 120 S. Ct. 1029 (2000) (quoting *Strickland*, 466 U.S. at 690), applying a "highly deferential" level of judicial scrutiny.

DISCUSSION

GROUND ONE

THE STATE COURTS ERRED IN FAILING TO GRANT GUILT PHASE RELIEF BASED ON FOREPERSON JUROR MISCONDUCT, INCLUDING HER FAILURE TO DISCLOSE MATERIAL INFORMATION DURING VOIR DIRE RELATED TO HER CAPIAS STATUS AT THE TIME OF JURY SERVICE. THIS DEPRIVED MR. JOHNSTON OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE STATE COURT DECISIONS ON THIS ISSUE WERE CONTRARY TO FEDERAL LAW AND AN UNREASONABLE APPLICATION OF THE SAME. THE COURTS' DECISIONS WERE ALSO BASED ON AN UNREASONABLE FINDING OF FACT. THIS COURT SHOULD GRANT THE WRIT.

Petitioner's Allegations

The Foreperson of the Petitioner's jury, Tracy Neshell Robinson, failed to reveal her own criminal arrest history under direct questioning during voir dire, thus depriving the

Petitioner of due process. Because Robinson had been arrested before, she was correct to check the box on the short jury questionnaire form informing the parties and the court that either she or a family member had been arrested. But when questioned directly about this by the State, she failed to reveal her own arrest. She stated that her child's father had been arrested, but she failed to mention that she herself had also been arrested. As a matter of fact, unknown to the parties and the court, she pled guilty to the criminal charges less than a year before Johnston's trial. Also unknown to the parties and the court, she was ordered to pay court costs after her plea; she was informed that a capias would issue for failure to pay the court costs by a certain date; and she failed to pay the court costs. She was actually sitting on the panel during voir dire with an active capias for her arrest, withholding material information about her criminal case and arrest while being questioned directly about this recent court case. Robinson's withheld arrest history was material information that would have affected the decision of whether or not to move to strike her from the panel.

When a juror, especially one who serves as foreperson, withholds such material information about an arrest that happened less than a year prior to trial, the verdict that led to the sentence of death should be vacated. When material information is either falsely represented or concealed by a juror upon voir dire, the entire proceeding is tainted and the parties are deprived of a fair and impartial trial. This is especially the case when the withheld information relates to that juror's criminal case, and a capias exists for that juror's arrest based on that undisclosed criminal case. Although the juror's intent is not dispositive, and even an unintentionally false or materially incomplete response deprives a defendant of a fair and impartial jury. The circumstances of the instant case show rather convincingly that Robinson's concealment was deliberate, though under the law in the State of Florida, the

non-disclosure need not be intentional for the verdict to be overturned. Robinson's concealment during voir dire amounts to juror misconduct that offends the United States Constitution. This sitting foreperson juror's capias in this case was not purely civil in nature as characterized by the State courts. She was simply incompetent to serve on the Petitioner's jury .

The state court decisions on this issue were contrary to federal law and an unreasonable application of the same. The courts' decisions were also based on an unreasonable finding of fact.

Allegations in Petitioner's Reply

In his reply to the state's response to the petition, Petitioner alleges: At page 43 the State makes the following conclusory argument: "Because the substantive 'juror non-disclosure' claim is procedurally barred, this Court cannot address the merits of this claim, absent a showing of cause and prejudice. *Coleman v Thompson*, 501 U.S. 722, 111 S. Ct. 2546 (1991)." This claim is not procedurally barred. Johnston raised this claim in his 3.851 motion as ineffective assistance of counsel and it was fully litigated in state court. Johnston attempted to raise it on direct appeal but the Florida Supreme Court found that the specific issue was not preserved. It was raised in his postconviction motion and fully litigated in postconviction. (See Ground III.) The ineffective assistance of counsel claim shows cause and prejudice to overcome the procedural bar.

Just because this issue was initially deemed procedurally barred on direct appeal does not forever bar it from federal review. Trial counsel should have raised this specific issue in the motions for new trial. Because of the ineffective assistance of counsel, the claim had to be litigated in postconviction. This is not a successive habeas -- Mr. Johnston is entitled to

his bite of this apple here in federal court on this issue. *See Owen v. Sec'y for Dept.of Corrections*, 568 F. 3d 894, 914-915 (11th Cir. 2009)(rejecting the use of a procedural bar where the state courts had decided an issue on the merits). There is no procedural default option available to the State.

In *Murray v Carrier*, 477 U.S. 478, 488 (1986), the United States Supreme Court held that "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State." The reason this underlying claim was deemed procedurally barred originally was because trial counsel failed to raise it in a motion for new trial. The Petitioner is entitled to have this claim heard in federal court.

The State claims that "Johnston failed to establish prejudice because defense counsel would not have moved to strike juror Robinson even if she had disclosed her criminal history." Trial counsel did not actually know about the failure of the juror to reveal her arrest and capias status. There is no way strategy could have been employed at the time that trial counsel and the state trial court were duped by this juror. Attributing a strategy for an unknown is an unreasonable finding of fact. Had juror Robinson revealed her criminal history, this would have led to the discovery that she had an active capias, she would have been arrested and not permitted to serve as foreperson of the jury. (Doc. 25 at 18-29).

Exhaustion, Procedural Bar and Disposition of Ground One in State Court

Under the exhaustion requirement, a habeas petitioner challenging a state conviction must first attempt to present his claim in state court. 28 U.S.C. § 2254(b). If the state court rejects the claim on procedural grounds, the claim is barred in federal court unless one of the exceptions to *Wainwright v. Sykes*, 433 U.S. 72, 82-84, 97 S. Ct. 2497 (1977) applies. To

excuse a procedural default, a petitioner must demonstrate either (1) "cause for the default and prejudice attributable thereto" or (2) "that failure to consider [the defaulted] claim will result in a fundamental miscarriage of justice." *Harris v. Reed*, 489 U.S. 255, 262, 109 S. Ct. 1038 (1989).

On direct appeal, Johnston raised a claim of alleged "concealment" by juror Robinson in sub-claim I(D) of his amended initial brief. (Ex. A27 at 50-57). The claim of alleged "concealment" by juror Robinson was not raised at trial and the Florida Supreme Court applied a procedural bar on direct appeal. *Johnston*, 841 So. 2d at 357. On direct appeal, Johnston argued that he was entitled to a new trial because juror Robinson (1) was under prosecution at the time of the trial; (2) withheld a material fact during voir dire; and (3) may have been abusing drugs during the trial. *Johnston*, 841 So. 2d at 355. The Florida Supreme Court ruled that the sub-claim of juror Robinson's alleged "failure to disclose" [her prior misdemeanor plea] was procedurally barred:

> Johnston next asserts that he is entitled to a new trial because juror Robinson deliberately failed to disclose that she pled nolo contendere to a misdemeanor charge within the past year. **Appellate counsel concedes that defense counsel failed to specifically raise this claim with the trial court. As this specific ground for a new trial was not raised with the lower court, it will not be considered on appeal.** [FN8] To the extent that Johnston is claiming his counsel was ineffective, we find that this issue should be addressed in a rule 3.850 motion-not on direct appeal. [FN9]
>
> > FN8. *See Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

Johnston, 841 So. 2d at 357.

Because the substantive "juror non-disclosure" claim is procedurally barred, this Court cannot address the merits of this claim, absent a showing of cause and prejudice. *Coleman*

v. Thompson, 501 U.S. 722, 111 S. Ct. 2546 (1991).

Johnston failed to show cause and prejudice to excuse his procedural default. On postconviction appeal, the Florida Supreme court rejected Johnston's IAC claims based on the alleged failure to sufficiently question juror Robinson during voir dire and failure to allege juror Robinson's misconduct in his motion for new trial. The Florida Supreme Court denied these IAC sub-claims as follows:

> **A. Failure to sufficiently question juror Robinson at voir dire**
>
> Johnston first claims that counsel was ineffective for failing to sufficiently question juror Tracy Robinson at voir dire, suggesting that a targeted "follow-up" question would have brought out additional facts not disclosed by Robinson. He also asserts that such information would have caused defense counsel to move to strike Robinson for cause or to peremptorily exclude Robinson. We disagree.
>
> Juror Robinson, who served as the jury foreperson, was arrested for a drug-related offense during the penalty phase. *Johnston,* 841 So. 2d at 355. [FN7] Her arrest revealed that she pled nolo contendere approximately ten months before Johnston's trial to misdemeanor charges of obstructing a police officer without violence. *Id.* During voir dire, juror Robinson did not reveal her prior plea and charges. *Id.* Robinson also failed to pay her court costs in that obstruction case; therefore, at the time of Johnston's trial she was the subject of an active capias for civil contempt charges. *Id.* at 357. On direct appeal, Johnston argued that he was entitled to a new trial because of Robinson's nondisclosure and active capias. *Id.* at 355-57. This Court rejected Johnston's argument, holding that the capias did not statutorily disqualify Robinson and that Johnston had failed to raise the issue of Robinson's nondisclosure with the trial court. *Id.* at 357–58.
>
> FN7. This Court's opinion on direct appeal fully set out the facts regarding juror Robinson. *See id.* at 355–56.
>
> Following the United State Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court has held that for ineffective assistance of counsel claims to be successful, the defendant must demonstrate both deficiency and prejudice:
>
> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of

> reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Bolin v. State, 41 So. 3d 151, 155 (Fla. 2010) (quoting *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986)).

There is a strong presumption that trial counsel's performance was not deficient. *See Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 104 S.Ct. 2052. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). Furthermore, where this Court previously has rejected a substantive claim on the merits, counsel cannot be deemed ineffective for failing to make a meritless argument. *Melendez v. State*, 612 So. 2d 1366, 1369 (Fla. 1992).

In demonstrating prejudice, the defendant must show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo. *See Sochor v. State*, 883 So. 2d 766, 771–72 (Fla. 2004).

First, in this case, counsel was not ineffective for failing to sufficiently question juror Robinson regarding the capias. *See Ferrell v. State*, 29 So. 3d 959, 976 (Fla. 2010) ("Trial counsel cannot be deemed ineffective for failing to raise a meritless argument."). **As this Court held on direct appeal, Robinson's civil contempt charge did not disqualify her from service under section 40.013(1), Florida Statutes (1999).** *Johnston*,

841 So. 2d at 356-57. **Therefore, even if Robinson was aware of the capias and disclosed it upon questioning, such disclosure would not have provided a reason for Robinson to be removed for cause.**

Second, counsel was not deficient because in keeping juror Robinson, defense counsel was following its strategy of seeking a young and minority jury. After conducting a mock trial and soliciting pretrial advice from a professional jury consultant, defense counsel decided to pursue a strategy of seating jurors matching the profile shared by juror Robinson. Defense counsel testified at the evidentiary hearing that Robinson's prior misdemeanor and active capias would not have made her any less desirable to the defense. Counsel was not ineffective for pursuing this reasonable strategy. *See Dillbeck v. State*, 964 So. 2d 95, 103 (Fla. 2007) ("Dillbeck's trial counsel adopted a reasonable trial strategy of avoiding a death sentence by attempting to seat jurors likely to recommend a life sentence.").

Additionally, Johnston has failed to establish prejudice; given that defense counsel would not have moved to strike juror Robinson even if counsel had further questioned Robinson and she had disclosed her criminal history, our confidence in the outcome is not undermined. In fact, after learning of juror Robinson's arrest, the defense verbally objected to her removal, expressing a preference for juror Robinson over the alternate juror.

Accordingly, because Johnston cannot demonstrate deficiency and prejudice, this ineffectiveness claim is without merit.

B. Failure to cite juror Robinson's misconduct in motion for new trial

Johnston next claims that defense counsel was ineffective for failing to include in the motion for new trial a claim of juror misconduct based on juror Robinson's nondisclosure. Because Johnston cannot demonstrate prejudice, we disagree.

This Court has explained that

> [i]n determining whether a juror's nondisclosure of information during voir dire warrants a new trial, courts have generally utilized a three-part test. First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence.

> *De La Rosa v. Zequeira*, 659 So. 2d 239, 241 (Fla. 1995) (citations omitted); *see also Lugo v. State*, 2 So. 3d 1, 13 (Fla. 2008).

Under the first prong of *De La Rosa*, Johnston must establish that the nondisclosed information is relevant and material to jury service in this case. *De La Rosa,* 659 So. 2d at 241; *see also Murray v. State*, 3 So. 3d 1108, 1121–22 (Fla. 2009). "There is no per se rule that involvement in any particular prior legal matter is or is not material." *Roberts v. Tejada*, 814 So. 2d 334, 345 (Fla. 2002); *see also State Farm Fire & Cas. Co. v. Levine*, 837 So. 2d 363, 366 n. 2 (Fla. 2002). Factors that may be considered in evaluating materiality include the remoteness in time of a juror's prior exposure, the character and extensiveness of the experience, and the juror's posture in the litigation. *Roberts,* 814 So. 2d at 342.

But "materiality is only shown 'where the omission of the information prevented counsel from making an informed judgment -- which would in all likelihood have resulted in a peremptory challenge.'" *Levine*, 837 So. 2d at 365 (internal quotation marks omitted) (quoting, 814 So. 2d at 340). In other words, "[a] juror's nondisclosure ... is considered material if it is so substantial that, if the facts were known, the defense likely would peremptorily exclude the juror from the jury." *Murray*, 3 So. 3d at 1121–22 (quoting *McCauslin v. O'Conner*, 985 So. 2d 558, 561 (Fla. 5th DCA 2008)).

In *Lugo*, we held that a juror's nondisclosure was not sufficiently material where the juror, sitting on a death penalty case, had been a victim of theft. *Lugo*, 2 So. 3d at 14. In evaluating materiality, this Court observed that the juror's "one-time isolated incident" did not resemble the murder victim's "extended torture and captivity." *Id.* Thus, we concluded that the sheer disparity between the experiences made the juror's experience insufficiently material or relevant to service on that jury. *Id.*

Similarly, here, Johnston has failed to satisfy materiality under *De La Rosa*'s first prong. We find nothing about the character and extensiveness of Robinson's own experience -- she committed a nonviolent offense and then pled nolo contendere -- that suggests she would be biased against a defendant pleading not guilty in a death penalty case or against legal proceedings in general. *See Lugo*, 2 So. 3d at 14; *cf. De La Rosa*, 659 So. 2d at 241. The capias, furthermore, was not issued for a criminal offense. *Johnston*, 841 So. 2d at 357. In fact, juror Robinson's positioning as a prior defendant makes bias against Johnston especially unlikely. *See Garnett v. McClellan*, 767 So. 2d 1229, 1231 (Fla. 5th DCA 2000) (finding that prior litigation experience was immaterial, in part, because the juror had been similarly situated to and was therefore more likely to be sympathetic to the complaining party).

> Neither was there any evidence to suggest that here, "if the facts were known, the defense likely would [have] peremptorily exclude[d] the juror from the jury." *Murray,* 3 So. 3d at 1121-22 (quoting *McCauslin*, 985 So. 2d at 561). In fact, as explained above, **Robinson matched the profile of the optimal juror sought by the defense. Defense counsel also testified at the evidentiary hearing that in his experience, the substance of Robinson's nondisclosure would have caused the prosecution -- not the defense -- to exclude or strike a juror.**
>
> **Accordingly, because Johnston could not have demonstrated materiality, any motion for new trial based on Robinson's disclosure would not have been successful. And because the claim lacked merit, counsel cannot be deemed ineffective for failing to raise it. Therefore, denial of this ineffectiveness claim is affirmed.**
>
> *Johnston*, 63 So. 3d at 736-739 (e.s.).

In addition, in his state habeas petition, Johnston alleged that appellate counsel was ineffective for failing to raise the juror non-disclosure claim as alleged "fundamental error." The Florida Supreme Court rejected this claim in *Johnston v. State*, 63 So. 3d 730, 745-746 (Fla. 2011) as follows:

> **B. Juror Tracy Robinson**
>
> Next, Johnston claims that his appellate counsel was ineffective for failing to frame the issue of juror Tracy Robinson's nondisclosure as one involving fundamental error. We disagree.
>
> Consistent with the *Strickland* standard, to grant habeas relief based on ineffectiveness of counsel, this Court must determine first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.
>
> *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986); *see also Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000); *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000).
>
> In raising such a claim, "[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective

assistance of counsel can be based." *Freeman*, 761 So. 2d at 1069 (citing *Knight v. State*, 394 So. 2d 997, 1001 (Fla. 1981)). Claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been presented on direct appeal or in a postconviction motion. *See Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000). "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." *Id.* (quoting *Williamson v. Dugger,* 651 So. 2d 84, 86 (Fla. 1994)).

We deny relief for two reasons. First, Johnston's claim is procedurally barred. Johnston's argument that he is entitled to a new trial based on juror Robinson's alleged misconduct was raised in direct appeal to this Court, *Johnston,* 841 So. 2d at 357, and as the first issue in his rule 3.851 motion. Johnston is not permitted to camouflage the underlying argument as an ineffective assistance of appellate counsel claim. *See Schoenwetter v. State,* 46 So. 3d 535, 562 (Fla. 2010) ("Because every argument raised in this portion of appellant's habeas petition either could have been or in fact was raised in his motion filed pursuant to rule 3.851, this claim is rejected as procedurally barred."); *Blanco v. Wainwright*, 507 So 2d 1377, 1384 (Fla. 1987) ("By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material.").

Second, even if the claim were not procedurally barred, it is meritless. Contrary to Johnston's assertion, appellate counsel did raise on direct appeal the unpreserved issue of entitlement to a new trial based on juror misconduct. *See Johnston*, 841 So. 2d at 357 ("Johnston next asserts that he is entitled to a new trial because juror Robinson deliberately failed to disclose that she pled nolo contendere to a misdemeanor charge within the past year."). Inherent in this Court's treatment of the claim on direct appeal was the determination that Johnston's claim was not fundamental error. *See Carratelli*, 961 So. 2d at 325 ("If an appellate court refuses to consider unpreserved error, then by definition the error could not have been fundamental.").

Accordingly, we deny relief.

Johnston, 63 So. 3d 730, 745-746 (e.s).

CONCLUSION AS TO GROUND ONE

Ground One Is Procedurally Barred and Has no Merit.

Johnston's juror non-disclosure claim is procedurally barred, as the Florida Supreme

Court ruled on direct appeal. Because the state court found this claim to be barred, it is barred in this Court. *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497 (1977). Because the claim is barred, this Court cannot address the merits of this claim, absent a showing of cause and prejudice. *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497 (1977). The burden is on Petitioner to make that showing. *United States v. Frady*, 456 U.S. 152, 102 S. Ct. 1584 (1982). Petitioner Johnston attempts to show cause and prejudice by asserting that his trial counsel was ineffective or his appellate counsel was ineffective for not raising the juror non-disclosure claim as "fundamental" error.

Here, Johnston's claim of ineffective assistance of counsel does not establish cause and prejudice because it is not meritorious, which is true because the Florida Supreme Court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established United States Supreme Court prejudice. *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S. Ct. 1495 (2000). On post conviction appeal, the Florida Supreme Court correctly identified *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), as providing the standard for adjudicating claims of ineffective assistance of counsel and accurately enunciated that standard. Moreover, the facts underlying this claim are not materially indistinguishable from the facts of *Strickland* or any of its United States Supreme Court progeny. As such, the rejection of this claim was not contrary to *Strickland. Williams*, 529 U.S. at 412-13.

The rejection of this claim was not an unreasonable application of *Strickland*. The Florida Supreme Court rejected the claim of ineffective assistance of counsel for failure to sufficiently question juror Robinson at voir dire because Robinson's non-disclosure of her

capias status would not have provided a reason for Robinson to be removed for cause; trial counsel was pursuing a reasonable strategy of seating jurors who matched the profile shared by juror Robinson; and Johnston failed to establish prejudice because defense counsel would not have moved to strike juror Robinson even if she had disclosed her criminal history. The Florida Supreme Court also rejected Johnston's claim of ineffective assistance of counsel for failing to include a claim of juror nondisclosure in the motion for new trial because Johnston could not demonstrate prejudice. Because Johnston could not have demonstrated materiality, any motion for new trial based on Robinson's disclosure would not have been successful; and, because the claim lacked merit, counsel cannot be deemed ineffective for failing to raise it.

Additionally, Johnston's current expanded claim is procedurally barred because it was not raised in state court. On direct appeal, Johnston raised the juror non-disclosure sub-claim as issue I(D) of his amended initial brief as a matter of state law. (Ex. A27 at 50-57). Although Johnston quoted one sentence from a state case which included that the Florida Constitution and "the Sixth amendment to the United States Constitution guarantee the criminally accused the right to a trial by an impartial jury," (Ex. A27 at 52), Johnston's juror non-disclosure claim otherwise was predicated exclusively on state law.

Now, Johnston's theory relies on the United States Supreme Court's decision *McDonough Power Equipment, Inc. v. Greenwood,* [464 U.S. 548,] 104 S. Ct. 845 (1984). (Doc. 18 at 5-6). The United States Supreme Court has recognized that presenting one legal theory in support of a claim does not exhaust a different theory for the same claim. *Gray v. Netherland*, 518 U.S. 152, 161-65, 116 S. Ct. 2074 (1996); *Anderson v. Harless*, 459 U.S. 4, 5-7, 103 S. Ct. 276 (1982); *Picard v. Connor*, 404 U.S. 270, 92 S. Ct. 509 (1971). Any

claim based on an alleged broader theory is unexhausted and procedurally barred. Under Florida law, a defendant is procedurally barred from raising a claim that was previously raised and rejected based on a different argument. *State v. Riechmann*, 777 So. 2d 342, 365 (Fla. 2000); *Teffeteller v. Dugger*, 734 So. 2d 1009, 1018 (Fla. 1999).

Even if the claim were not barred, Petitioner would still be entitled to no relief. On direct appeal, Johnston argued that he was entitled to a new trial because juror Robinson (1) was under prosecution at the time of the trial; (2) withheld a material fact during voir dire; and (3) may have been abusing drugs during the trial. *Johnston*, 841 So. 2d at 355. The Florida Supreme Court rejected Johnston's arguments, holding that (1) the capias did not statutorily disqualify Robinson from jury service and (2) Johnston had failed to raise the issue of juror Robinson's nondisclosure with the trial court and, therefore, this sub-claim would not be considered on appeal. *Id.* at 357–58. In state court, Johnston sought to adjudicate this claim under the state law standard in *De la Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995). This standard only requires a litigant to show is that (1) "the information is relevant and material to jury service in the case;" (2) "the juror concealed the information during questioning;" and (3) "the failure to disclose the information was not attributable to the complaining party's lack of diligence." *De la Rosa v. Zequeira*, 659 So. 2d 239, 241 (Fla. 1995). Moreover, under this standard, information is considered material if the litigant "may have been influenced to peremptorily challenge the juror from the jury," and the information is considered concealed even if the failure to provide the information was unintentional. *Roberts v. Tejeda*, 814 So. 2d 334, 341, 343 (Fla. 2002).

The United States Supreme Court has rejected this standard in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S. Ct. 845 (1984), the case now cited by

Johnston in his habeas memorandum. Instead, it has required a demonstration that a juror was biased and subject to removal for cause before an incorrect or incomplete answer during voir dire would serve as a basis for vacating a judgment. *Id.* at 556; *see also, Smith v. Phillips*, 455 U.S. 209, 102 S. Ct. 940 (1982). Given these circumstances, the claim that Petitioner presented to the state courts was a claim under state law. However, a claim is not exhausted when the claim presented to the state courts was a state law question. *See, Baldwin v. Reese*, 541 U.S. 27, 124 S. Ct. 1347 (2004). As such, the substantive federal claim now presented by Johnston is unexhausted and procedurally barred. Furthermore, claims of ineffective assistance of counsel regarding an alleged error and claims regarding the underlying error are separate and distinct claims. *Hammond v. Hall*, 586 F.3d 1289, 1321-23 (11th Cir. 2009); *LeCroy v. Sec'y, Florida Dept. of Corrections*, 421 F.3d 1237, 1260-61 & n.24 (11th Cir. 2005).

The Florida Supreme Court also rejected Petitioner's IAC claim because he did not show prejudice. Rejecting a claim of ineffective assistance of counsel because a defendant did not show prejudice is in accordance with *Strickland,* 466 U.S. at 691-92. As the United States Supreme Court has recognized, the focus of a prejudice inquiry regarding a claim of ineffective assistance of counsel is to determine whether counsel's alleged deficiency deprived the defendant of a fair trial. *Strickland*, 466 U.S. at 696; *see also, Lockhart v. Fretwell*, 506 U.S. 364, 368-39, 113 S. Ct. 838 (1993); *Nix v. Whiteside*, 475 U.S. 157, 175, 106 S. Ct. 988 (1986) (noting that under *Strickland,* the "benchmark" of the right to counsel is the "fairness of the adversary proceeding").

Finding that a defendant did not show prejudice because he did not make a showing necessary to find that he did not receive a fair trial is not an unreasonable application of

Strickland. Williams, 529 U.S. at 411. Since the Florida Supreme Court's rejection of the claim of ineffective assistance of counsel was not contrary to, or an unreasonable application of Strickland, the claim is meritless. As such, it does not establish cause and prejudice to overcome the bar to relief on the substantive claim. Johnston's juror non-disclosure claim remains procedurally barred.

Petitioner is incorrect in insisting that his juror "non-disclosure" claim "is not procedurally barred" because he litigated a claim of ineffective assistance of trial counsel in state post-conviction. (Doc. 25 at 6). Petitioner's reply conflates the substantive "juror non-disclosure" (trial) claim, which is procedurally barred, with the IAC claim as alleged "cause" to excuse his procedural default. A substantive claim is "separate and distinct" from an ineffective assistance of counsel claim based on the substantive claim. *See Pietri v. Dept. of Corr.*, 641 F.3d 1276, 1289 (11th Cir. 2011); *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). Petitioner's juror non-disclosure claim was raised on direct appeal, but it was not considered by the Florida Supreme Court because it was not raised in the trial court; therefore, it was not preserved for appeal. *See Johnston v. State*, 841 So. 2d 349, 357 (Fla. 2002). As a result, it is procedurally barred. The "refusal to consider" this claim as procedurally barred rests on an independent and adequate state ground that precludes federal habeas consideration of this substantive issue. *See LeCroy v. Dept. of Corr.*, 421 F.3d 1237, 1260 n.25 (11th Cir. 2005). Because the substantive "juror non-disclosure" claim is procedurally barred, this Court cannot address the merits, absent a showing of cause and prejudice. *Coleman v. Thompson*, 501 U.S. 722 (1991).

Ineffective assistance of counsel, if established, can be cause to excuse a procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Although Petitioner raised an IAC/juror

non-disclosure claim in state post-conviction, and repeats his IAC claim in Issue III of his federal habeas petition, Petitioner failed to demonstrate any basis for relief under *Strickland*. In other words, his IAC claim failed both as a separate claim for relief and as cause to excuse the procedural default. As a result, Petitioner's juror non-disclosure claim remains procedurally barred. Petitioner's IAC claim does not establish cause and prejudice because it is not meritorious, which is true because the Florida Supreme Court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established United States Supreme Court precedent.

Ground one does not warrant habeas corpus relief.

GROUND TWO

THE STATE COURTS ERRED IN FAILING TO GRANT GUILT PHASE RELIEF BASED ON FOREPERSON JUROR MISCONDUCT, INCLUDING HER DRUG ARREST AND LIKELY DRUG ABUSE AT THE TIME OF JURY SERVICE. THIS DEPRIVED MR. JOHNSTON OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE STATE COURT DECISIONS ON THIS ISSUE WERE CONTRARY TO FEDERAL LAW AND AN UNREASONABLE APPLICATION OF THE SAME. THE COURTS' DECISIONS WERE ALSO BASED ON AN UNREASONABLE FINDING OF FACT. THIS COURT SHOULD GRANT THE WRIT.

Petitioner's Allegations

Robinson had an active capias for her arrest. But she was not arrested at the time of jury service on the capias. She was arrested mid-penalty phase on drugs and weapon charges. A police officer smelled burning marijuana outside her residence, and obtained consent for entry into her residence. Following the first day of penalty phase testimony, that night, jury foreperson Robinson was arrested and jailed for possession of crack cocaine, marijuana, and an illegal firearm. (Vol. XVIII R.1687; Vol. V R. 781). Though she attempted

credit her child's father with ownership of the contraband, he was actually incarcerated and therefore could not have lighted the marijuana cigarette.

The defense requested that the court bring Robinson from jail and inquire of her under oath whether she was smoking crack cocaine at any time during the trial or guilt phase deliberations, but this request was denied. (Vol. XVIII R. 1765). The court then replaced Robinson with an alternate juror over the objection of the defense, because the defense had seen this alternate juror shaking hands with the victims' family after the verdict of guilty was read, and feared bias. Caught between the prospect of Robinson or a possibly biased juror for the penalty phase, the defense had a difficult decision to make. The defense request to keep Ms. Robinson on the jury was denied. Later a written motion was filed by the defense for an interview of this juror to see if she was using drugs during the trial, and if she knew there was a capias out for her arrest. This motion was denied.

Based on the fact that crack cocaine is highly addictive, Robinson was likely abusing the drug during the trial. Based on the fact that she was provided notice that "FAILURE TO PAY [COURT COSTS] ON TIME OR APPEAR IN COURT WOULD RESULT IN A WARRANT FOR YOUR ARREST," Robinson likely knew there was a warrant for her arrest. That is why she failed to disclose the arrest upon direct questioning, and that is unacceptable.

The juror misconduct in this case is egregious. The state court decisions on this issue were contrary to federal law and an unreasonable application of the same. The courts' decisions were also based on an unreasonable finding of fact.

Petitioner's Allegations in the Reply

Petitioner argues that the State's contention that this claim involves only state law, not

federal law, is incorrect. The Sixth Amendment right to a trial by jury is a federal constitutional right. The Petitioner had a right to a jury foreperson who was not impaired through crack cocaine abuse. Although there is no evidence of juror Robinsons' ingesting drugs or appearing intoxicated during trial, there is record evidence showing that she was arrested at her apartment mid-trial and that during the incident the officer smelled the odor of burning marijuana in her apartment. As far an external influences, this is the same juror who failed to disclose her prior arrest during voir dire, failed to pay court costs, and was actually serving as foreperson under an active capias for her arrest. These are external influences.

Johnson alleges that if there can be no review of the performance of appellate counsel, then *Martinez v. Ryan* allows the claim to be raised on federal habeas corpus. Johnston is entitled to the effective assistance of appellate counsel on direct appeal as a matter of right. This is apart from the ineffective assistance of trial counsel that is addressed in ground III which raises a claim for relief that trial counsel was ineffective. Here appellate counsel's ineffectiveness overcomes the alleged procedural bar and allows this Court to determine the claim itself.

Exhaustion, Procedural Bar and Disposition of Ground Two in State Court:

Ground two is not subject to *de novo* review in this Court. The distinction between mere error and an objectively unreasonable application of Supreme Court precedent creates a substantially higher threshold for obtaining relief than *de novo* review. The AEDPA imposes a highly deferential standard for evaluating state-court rulings, and demands that state-court decisions be "given the benefit of the doubt." *Renico v. Lett*, 130 S. Ct. 1855, 1862 (2010).

On direct appeal, Johnson argued that he was entitled to a new trial or, at a minimum, a juror interview, to determine whether juror Robinson abused drugs during the guilt phase

of the trial. (Amended Initial Brief, claim I(E), Ex. A27 at 58-72). Johnston's amended initial brief (Ex. A27 at 66) recognized that the State would likely argue that the United States Supreme Court's decision in *Tanner v. United States*, 483 U. S. 107, 107 S. Ct. 2739 (1987) overruled Florida case law regarding juror inquiry on drug and/or alcohol use. In *Tanner*, the Supreme Court discussed the extraneous information exception to the rule of juror incompetency contained in Fed. R. Evid. 606(b). The Supreme Court held that juror alcohol and drug use during the trial was not an external influence, and thus, evidence of alcohol and drug use was not admissible to impeach the verdict.

On direct appeal, the Florida Supreme Court denied this claim as follows:

> Finally, the defendant asserts that he is entitled to a new trial, or at a minimum, a juror interview, to determine whether juror Robinson abused drugs during the guilt phase of the trial. Specifically, he contends that based on the addictive nature of crack cocaine and the timing of Robinson's arrest for drug possession, she may have been under the influence of illegal substances during the guilt phase. In order to be entitled to juror interviews, a party must present "sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings." *Johnson v. State*, 804 So. 2d 1218, 1225 (Fla. 2001). **In this case, Johnston is not entitled to relief because his request for an interview was based on mere speculation. [FN10] Johnston never alleged that any juror, party, or witness observed Robinson appearing to be intoxicated during the course of the trial, nor did anybody see Robinson abusing drugs. Accordingly, the trial court did not err in its decision to deny the motion to interview Robinson.**
>
> > FN10. *See Hackman v. City of St. Petersburg,* 632 So. 2d 84, 85 (Fla. 2d DCA 1993) ("The motion to interview and supporting affidavits are speculative at best. As such, they fail to establish a legally sufficient reason to interview the jurors."); *Walgreens, Inc. v. Newcomb,* 603 So. 2d 5, 6 (Fla. 4th DCA 1992) ("A request to interview a juror requires something more than conjecture and speculation by movant's counsel.").

Johnston, 841 So. 2d at 355-58 (e.s.)

In postconviction, Johnston sought to interview juror Robinson (on her motives or

intent during *voir dire)* based on a state rule of criminal procedure. The postconviction court denied Johnston's request for a juror interview and the Florida Supreme Court affirmed the trial court's ruling in *Johnston v. State*, 63 So. 3d 730, 739-740 (Fla. 2011) as follows:

> **C. The postconviction court's denial of motion for juror interview**
>
> Johnston claims that the postconviction trial court should have permitted him to conduct an interview of juror Robinson under Florida Rule of Criminal Procedure 3.575. Johnston told the postconviction court that he sought to question juror Robinson on her motives or intent during voir dire. [FN8] We affirm the trial court's denial.
>
> > FN8. To the extent that Johnston alleges entitlement to a juror interview on the same grounds advanced on direct appeal -- the issue of Robinson's active capias—the trial court correctly denied an interview because the subject claim was procedurally barred. *See, e.g., Green v. State*, 975 So. 2d 1090, 1106 (Fla. 2008) ("Because the ... issue was raised on direct appeal, Green is not permitted to relitigate it on postconviction appeal.").
>
> "A trial court's decision on a motion to interview jurors is reviewed pursuant to an abuse of discretion standard." *Anderson v. State*, 18 So. 3d 501, 519 (Fla. 2009). The trial court does not abuse its discretion in denying motions to interview jurors based on juror bias or misconduct where there is no indication of bias or misconduct in the record. *See id.* **Here, the trial court did not abuse its discretion in denying Johnston's rule 3.575 motion because a juror interview was unnecessary given that the substance of Robinson's nondisclosure was already known.**
> *Johnston*, 63 So. 3d at 739-740 (e.s.)

CONCLUSION AS TO GROUND TWO

Ground Two Has no Merit

In his amended initial brief on direct appeal (Ex. A27, Claim IE, at 58-72), Johnston relied primarily on state law; he argued that juror inquiry on drug/alcohol use was permissible under state law and he sought to distinguish *Tanner's* prohibition on juror inquiry as not applicable to Florida law. (Ex. A27 at 66-70). In postconviction, Johnston again sought to question juror Robinson, this time on her motives or intent during *voir dire*. His postconviction

motion for juror interview was based on a state rule of procedure.

The principle is well-settled that a federal court may only entertain an application for a writ of habeas corpus from a state prisoner who claims his custody violates the "Constitution or the laws or treaties of the United States." 28 U.S.C. § 2254(a). Questions of state law are generally insufficient to warrant review or relief by a federal court under § 2254. *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S. Ct. 475 (1991); *Cabberiza v. Moore*, 217 F.3d 1329, 1333 (11th Cir. 2000). A violation of a state rule of procedure, or of state law itself, is not a violation of the federal constitution. *Wallace v. Turner*, 695 F.2d 545, 548 (11th Cir. 1982); *Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1989). Moreover, "state courts are the final arbiters of state law, and federal habeas courts should not second-guess them on such matters." Herring v. Sec'y. *Dep't of Corr.*, 397 F.3d 1338, 1355 (11th Cir. 2005). Petitioner's juror misconduct/juror interview claims in state court were based, primarily, on state law and are not cognizable on federal habeas review.

To the extent Petitioner arguably exhausted a federal law claim in state court, he must demonstrate either that the state court's determination was contrary to, or involved an unreasonable application of federal law, or show that the state court's denial of this claim resulted in an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. In his memorandum of law on this ground, Johnston cites one United States Supreme Court case - *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912). (Doc. 18 at page 31). Although the United States Supreme Court's subsequent decision in *Tanner v. United States*, 483 U.S. 107, 107 S. Ct. 2739 (1987), a case in which both the majority and the dissent addressed *Jordan*, 483 U.S. at 126-27, 134 was cited by the defense on direct appeal, Johnston now conspicuously omits any mention of *Tanner*. In

Tanner, the majority ruled that jurors would not be permitted to testify on jury conduct during deliberations, including juror intoxication. Under *Tanner*, juror intoxication is not an "outside influence" about which jurors may testify to impeach their verdict.

Johnston's speculative allegation of possible use of intoxicating substances did not support a juror interview. On direct appeal, the Florida Supreme Court rejected Johnston's speculative claim because "Johnston never alleged that any juror, party, or witness observed Robinson appearing to be intoxicated during the course of the trial, nor did anybody see Robinson abusing drugs. Accordingly, the trial court did not err in its decision to deny the motion to interview Robinson."

On direct appeal, Johnston sought to distinguish *Tanner*, based on *Tanner*'s reliance upon the legislative history of Federal Rule of Evidence 606(b), from the Florida Supreme Court's discussion in *Devoney* v. State, 717 So. 2d 501, 503 (Fla. 1998). The *Devoney* decision discussed, with approval, federal decisions which use the external/internal distinction to decide the admissibility of juror testimony to impeach the verdict. The Florida Supreme Court has analyzed a request to interview jurors based upon the distinction between external and internal influences. In *Devoney*, 717 So. 2d at 503, the Florida Supreme Court cited *Tanner*, 483 U.S. 107, with approval, and explained that even allegations of juror misconduct including consuming alcohol and ingesting and selling narcotics during court recess did not constitute external influences on the jury which would violate a defendant's Sixth Amendment right to a fair trial. The *Tanner* Court reasoned that intoxication was similar to mental incompetency which had previously been found to be an internal influence. See, *Tanner*, 483 U.S. 107, 118, 107 S. Ct. 2739. According to *Tanner*, "drugs or alcohol voluntarily ingested by a juror seems no more an 'outside influence' than

a virus, poorly prepared food, or a lack of sleep." *Devoney*, at 504, citing *Tanner*, 483 U.S. at 122, 107 S. Ct. 2739.

Johnston failed to demonstrate that any improper external influence acted upon the jury's deliberations. In *Tanner*, the Supreme Court placed drug or alcohol use squarely in the realm of internal influences: "However severe their effect and improper their use, drugs or alcohol voluntarily ingested by a juror seems no more an "outside influence" than a virus, poorly prepared food, or a lack of sleep." *Id.* at 122. Thus, the allegation of possible drug or alcohol use constitutes an internal influence that did not require a hearing and into which court inquiry is not appropriate under *Tanner*.

Moreover, if Petitioner Johnston suggests that counsel was ineffective in his handling of the allegation of juror misconduct, Johnston is not entitled to relief. Again, to establish that he received ineffective assistance of counsel, a petitioner must show, first, that counsel's performance was deficient and, second, that counsel's deficient performance prejudiced the petitioner. *Strickland*, 466 U.S. 668, 687, 104 S. Ct. 2052. A petitioner may show that counsel's performance was deficient by establishing that counsel's performance was "outside the wide range of professionally competent assistance." *Id.* at 689. This "requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687. To satisfy the prejudice prong, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "[T]he focus should be on whether the result of the trial was 'fundamentally unfair or unreliable.'" *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S. Ct. 838 (1993).

As noted above, Supreme Court law did not require the trial judge to conduct any inquiry of the juror because the nature of the influence was intrinsic, which did not require an evidentiary hearing. See, *Tanner*, 483 U.S. at 120. Thus, Johnston's counsel could not be deemed ineffective where no hearing was warranted. In addition, Johnston has not shown that he was prejudiced by counsel's action where the alleged influence on the jurors was internal rather than external. Counsel is not required to proceed in a manner inconsistent with controlling Supreme Court precedent. Petitioner has not demonstrated that the state court's determination was contrary to, or involved an unreasonable application of federal law, nor has he shown that the state court's denial of this claim resulted in an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

In his amended initial brief on direct appeal (Ex. A27, Claim IE, at 58-72), Johnston relied primarily on state law; he argued that juror inquiry on drug/alcohol use was permissible under state law and he sought to distinguish the prohibition on juror inquiry, derived from *Tanner v. United States*, 483 U.S. 107 (1987), as not applicable to Florida law. (Ex. A27 at 66-70). In postconviction, Johnston again sought to question juror Robinson, this time on her motives or intent during *voir dire*. His postconviction motion for juror interview was based on a state rule of procedure. As a result, Petitioner's juror misconduct/juror interview claims in state court were based, primarily, on state law.

Even if the juror misconduct claim asserted in state court is viewed as fairly presenting a federal constitutional claim, Petitioner still fails to demonstrate any basis for relief under AEDPA. In his reply, Petitioner still fails to mention *Tanner*, in which the Supreme Court concluded that juror intoxication is not an "outside influence" about which jurors may testify to impeach their verdict. In short, Supreme Court precedent did not require the trial judge to

conduct any inquiry of the juror because the nature of the influence was intrinsic, which did not require an evidentiary hearing. *See Tanner*, 483 U.S. at 120. As a result, Petitioner failed to show how the state court's determination was contrary to, or involved an unreasonable application of, federal law.

Petitioner argues "[i]f there can be no review of the performance of appellate counsel, then *Martinez v. Ryan* allows the claim to be raised on federal habeas corpus." (Doc. 25 at 8). *Martinez* is **limited to claims of ineffective assistance of trial counsel that are otherwise procedurally barred due to the ineffective assistance of postconviction counsel.** If Petitioner is renewing a claim of ineffective assistance of appellate counsel, such a claim was raised in state habeas and the Florida Supreme Court denied relief in *Johnston v. State*, 63 So. 3d 730, 746 (Fla. 2011) as follows:

> We deny relief for two reasons. First, Johnston's claim is procedurally barred. Johnston's argument that he is entitled to a new trial based on juror Robinson's alleged misconduct was raised in direct appeal to this Court, *Johnston*, 841 So.2d at 357, and as the first issue in his rule 3.851 motion. Johnston is not permitted to camouflage the underlying argument as an ineffective assistance of appellate counsel claim. *See Schoenwetter v. State*, 46 So.3d 535, 562 (Fla. 2010)("Because every argument raised in this portion of appellant's habeas petition either could have been or in fact was raised in his motion filed pursuant to rule 3.851, this claim is rejected as procedurally barred."); *Blanco v. Wainwright*, 507 So.2d 1377, 1384 (Fla. 1987)("By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material.").
>
> Second, even if the claim were not procedurally barred, it is meritless. Contrary to Johnston's assertion, appellate counsel did raise on direct appeal the unpreserved issue of entitlement to a new trial based on juror misconduct. *See Johnston*, 841 So.2d at 357 ("Johnston next asserts that he is entitled to a new trial because juror Robinson deliberately failed to disclose that she pled nolo contendere to a misdemeanor charge within the past year."). Inherent in this Court's treatment of the claim on direct appeal was the determination that Johnston's claim was not fundamental error. *See Carratelli*, 961 So.2d at 325 ("If an appellate court refuses to consider unpreserved error, then by definition

the error could not have been fundamental.").

Accordingly, we deny relief.

Johnston, 63 So. 3d at 746.

Ground two does not warrant habeas corpus relief.

GROUND THREE

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FAILING TO RAISE THE SPECIFIC ISSUE OF JUROR NON-DISCLOSURE IN THE MOTIONS FOR NEW TRIAL. MR. JOHNSTON WAS DEPRIVED OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE STATE COURT DECISIONS ON THIS ISSUE WERE CONTRARY TO FEDERAL LAW AND AN UNREASONABLE APPLICATION OF THE SAME. THE COURTS' DECISIONS WERE ALSO BASED ON AN UNREASONABLE FINDING OF FACT. THIS COURT SHOULD GRANT THE WRIT.

Petitioner's Allegations

Johnston did not receive the effective assistance of counsel, violating his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution when counsel failed to include the claim of failure to disclose in the post-trial amended motion for new trial. The law is clear in Florida that when material information is withheld by a juror, a petitioner should receive a new trial free from the taint of a non-disclosing juror. Although the issue of juror non-disclosure was raised on direct appeal, the Florida Supreme Court ruled that the specific issue of juror non-disclosure had not been raised at the trial level, and therefore was procedurally barred, and could be raised in postconviction.

Had the specific issue been raised, it would have been granted under Florida law. In their motions for new trial, counsel only raised 2 of 3 available issues concerning juror Robinson: her active *capias* and probable drug use. The attorneys who represented the

Petitioner at trial basically abandoned their client and the non-disclosure issue, leaving another attorney not familiar with the trial or the issues to draft the motions for new trial. The postconviction court denied this claim primarily because Johnston did not inform anyone on the defense team that he did not want Robinson on the jury. (*See* postconviction court's final Order at Vol. XVI PCR 3110). The real issue was: Why did trial counsel fail to raise the juror non-disclosure issue in the motions for new trial? Instead of answering this question, the postconviction court sought to blame the Petitioner for failing to request a strike of this juror after she failed to disclose material information. Johnston should not be blamed for allowing Robinson to wrongly serve on the jury. Juror Robinson deceived everyone in her responses during *voir dire*. The biggest victim of this deceit was Johnston. To blame Johnston for his failure to voice an objection to this untruthful juror is to victimize him once again. Just as everyone in the courtroom was duped into believing that Robinson was free from any criminal accusations, so was Johnston. To engage in *post-hoc* rationalization for the defense's retention of this juror as the postconviction court justifies at Vol. XVI PCR. 3110, and to cite a lack of "prejudice" here is just wrong. "*Voir Dire*" translated literally to English means "to tell the truth." Robinson *failed* to tell the truth, and that is no fault of the Petitioner.

Capital defendants whose literal lives and liberties are placed in the hands of these people should be afforded jurors who provide truthful and complete answers during the *voir dire* process. When there is a breakdown in this process like what occurred here at trial, the trial process lacks reliability and due process. Trial counsel and the state courts inexplicably continue to fail to understand this concept. To deny this claim as the postconviction court did in this fashion is to abandon simple, fair and constitutional notions of fairness and due process.

This Florida Supreme Court stated the following on first direct appeal regarding this claim: "To the extent that Johnston is claiming his counsel was ineffective [for failure to raise the issue that the juror failed to 'disclose that she pled nolo contendre to a misdemeanor charge within the past year'], we find that this issue should be addressed in a rule 3.850 motion - - not on direct appeal." The postconviction court then unreasonably denied this claim in part because the Petitioner never informed his trial team he wanted to request a new trial based on the juror's non-disclosure. (*See* Order at Vol. XVI PCR. 3114).

Johnston did not represent himself *pro se* at trial. He was represented by attorneys who should have raised this issue, if they were exercising due care in their legal representation of Johnston. The lead trial attorney should have included this specific claim in the motion for new trial rather than quickly returning to Palm Beach County and leaving the task to Gerod Hooper, an attorney who did not even observe the trial or have the benefit of the trial transcripts. To deny this claim as the postconviction court did; to blame the Petitioner for some failure to advise his attorneys that he wanted this issue raised in the motion for new trial, is tantamount and analogous to denying a litigant's medical malpractice claim based on his failure to instruct the doctors how to properly and precisely perform a certain surgical procedure that was botched.

The postconviction court stated in its Order at Vol. XVI PCR. 3114-3115 that the juror did not *deliberately* lie about her arrest. Johnston did not have to establish a "deliberate lie" as the postconviction court suggests. Moreover, partial or inaccurate disclosure is concealment in the *voir dire* process which warrants a new trial. The postconviction court here failed to follow the law and applied flawed reasoning in denying this claim.

The postconviction court in its Order denying relief found at Vol. XVI PCR. 3115 that

the information concerning juror Robinson's criminal history was not material. To the contrary, the information *was* material, especially considering the active *capias* stemming from her undisclosed criminal history. The postconviction court concluded at Vol. XVI PCR. 3115 that there was no prejudice following trial counsel's failure to include the "deliberate" non-disclosure issue in the motions for new trial. This finding was unreasonable because case law is clear that when material information is withheld during *voir dire*, be it withheld deliberately or unintentionally, relief should be granted.

The prejudice here is clear. Johnston should have been afforded a new trial based on this issue. Because of trial counsel's failures and omissions, the issue was not raised at trial and was not preserved for direct appeal. Now that it has been shown in postconviction that an attorney who was not even present for the *voir dire* or the trial prepared grossly inadequate motions for a new trial, and not surprisingly missed this vital issue, this Court should grant relief. The state court decisions on this issue were contrary to federal law and an unreasonable application of the same. The courts' decisions were also based on an unreasonable finding of fact.

Petitioner's Argument in his Reply

Petitioner again contends that this issue is not procedurally barred. He claims that trial counsel should have raised the juror nondisclosure issue in the motions for new trial. There would have been absolute, unequivocal prejudice considering the fact that at the time the motions for new trial were drafted, the jury had already deliberated on guilt. Juror Robinson was dismissed prior to the conclusion of the penalty phase. It was completely irrelevant that Juror Robinson may have been a favorable member of the jury. The jury had already voted for guilt and death at the time the motions for new trial were drafted. There could have been

no strategic reason to fail to raise a meritorious issue in a motion for new trial. The jury was already gone, and the defense had nothing to lose but a meritorious appellate issue in failing to raise the issue of nondisclosure. To accept a "strategy" in accepting this juror is unreasonable. One has to look on the prejudice to the appeal. The current claim was properly raised as a state and federal claim in order to exhaust the claim. *McDonough Power Equipment, Inc.* is not a different theory for relief. This is further development in federal court, not expansion. Petitioner claims that the denial of a juror interview of juror Robinson was evidence that Florida's process for seeking review of juror misconduct was inadequate.

This is an ineffective assistance of counsel claim. On direct appeal the Florida Supreme Court found that the specific claim of juror nondisclosure was not raised in the trial court in a motion for new trial. Had counsel raised the juror nondisclosure, the outcome of this case would have been different. This is a free-standing ineffective assistance of counsel claim. Prior to the revelation that juror Robinson had failed to disclose, perhaps she may have been an ideal juror. But once the nondisclosure was discovered, the nondisclosure became ideal subject matter for a motion for new trial, yet was not utilized. Johnston's alleged approval of this juror was irrelevant. Johnston had the right to the effective assistance of counsel and this right was violated when this issue was not raised. While Johnston would not know the standard for a new trial for nondisclosure, the postconviction motion showed that he would have wanted to raise a proper and fully pled motion for new trial that would have been granted. He did not want juror Robinson on his jury once it was revealed she was smoking crack and she lied during jury selection. It was unreasonable for the state courts to fail to analyze this claim from the perspective of the prejudice to the appeal, or, from the standpoint of getting a new trial. Attributing fault here to the Petitioner for his failure to

request her removal prior to the discovery of her nondisclosure is absolutely unreasonable.

As acknowledged by the Eleventh Circuit Court of Appeals, sometimes a case has to be evaluated from the standpoint of the prejudice to the appellate issue. *See Davis v. State*, 341 F. 3d1310, 1315-1317 (11th Cir. 2003)("the relevant focus in assessing prejudice may be the client's appeal" *Id.* at 1315). Any failure of trial counsel to raise all specific issues relating to this juror prejudiced the appeal.

The State argues that under *McDonough Power Equipment, Inc. v. Greenwood* that the Petitioner's argument fails because there is a "required [] demonstration that a juror was biased and subject to removal for cause before an incorrect or incomplete answer during voir dire would serve as a basis for vacating a judgment." The Petitioner meets this standard. *McDonough Power Equipment, Inc.* specifically requires the following in order to obtain relief: "a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire,* and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556. Juror Robinson's answer during *voir dire* obviously was dishonest, and had she answered truthfully, this would have led to this discovery of the *capias* on the failure to pay court costs. At this point, either party, including the State, would certainly have a reasonable argument to make a cause challenge.

Under Florida law at the time, jurors under prosecution were statutorily disqualified to serve. Someone would have made a cause challenge, and it would have been granted in an abundance of caution. There should be a presumption of prejudice here, and any decision to the contrary is unreasonable.

Exhaustion, Procedural Bar and Disposition of IAC Ground Three in State Court

Johnston raised the IAC/juror non-disclosure sub-claim in his Rule 3.851 post-

conviction motion to vacate. After an evidentiary hearing, the postconviction court entered a detailed, fact-specific order denying this post-conviction claim. (Ex. B16/3104-3115). The post-conviction court found, *inter alia*, that (1) Ms. Robinson was not statutorily disqualified from serving on the jury; (2) Johnston failed to present any evidence that he advised anyone on the trial team that he wanted to request a new trial based on juror Robinson's deliberate failure to disclose that she pled *nolo contendere* to a misdemeanor charge within the preceding year; (3) Robinson did not deliberately lie about the existence of the prior misdemeanor, but failed to disclose such information and the failure to disclose was not material to the extent of warranting a new trial; (4) based on trial counsel Ken Littman's testimony, the fact that Ms. Robinson had pled *nolo contendere* within a year before the trial to a misdemeanor of obstructing or opposing an officer was not something the defense would have raised in the motions because she fit the profile of a young, minority juror profile recommended by Dr. Harvey Moore, the individual who conducted Johnston's mock trial; (5) even after Robinson was arrested between the guilt and penalty phases, the defense team still wanted her to remain on the jury for the penalty phase; and, (6) Johnston failed to demonstrate how he was prejudiced by trial counsel's failure to include juror Robinson's alleged deliberate failure to disclose her *nolo contendere* plea to a misdemeanor charge as such information was not material to the extent of warranting a new trial. (Ex. B16/3104-3115).

On post-conviction appeal, the Florida Supreme Court denied this IAC sub-claim because Johnston failed to demonstrate any prejudice. The Florida Supreme Court concluded that "because Johnston could not have demonstrated materiality, any motion for new trial based on Robinson's disclosure would not have been successful. And because the

claim lacked merit, counsel cannot be deemed ineffective for failing to raise it." *Johnston*, 63 So. 3d at 739. On post-conviction appeal, the Florida Supreme Court stated, in pertinent part:

> ***B. Failure to cite juror Robinson's misconduct in motion for new trial***
>
> **Johnston next claims that defense counsel was ineffective for failing to include in the motion for new trial a claim of juror misconduct based on juror Robinson's nondisclosure.** Because Johnston cannot demonstrate prejudice, we disagree.
>
> This Court has explained that
>
> > [i]n determining whether a juror's nondisclosure of information during voir dire warrants a new trial, courts have generally utilized a three-part test. First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence.
>
> *De La Rosa v. Zequeira,* 659 So. 2d 239, 241 (Fla. 1995) (citations omitted); *see also Lugo v. State,* 2 So. 3d 1, 13 (Fla. 2008).
>
> Under the first prong of *De La Rosa,* Johnston must establish that the nondisclosed information is relevant and material to jury service in this case. *De La Rosa,* 659 So. 2d at 241; *see also Murray v. State,* 3 So. 3d 1108, 1121–22 (Fla. 2009). "There is no per se rule that involvement in any particular prior legal matter is or is not material." *Roberts v. Tejada,* 814 So. 2d 334, 345 (Fla. 2002); *see also State Farm Fire & Cas. Co. v. Levine,* 837 So. 2d 363, 366 n. 2 (Fla. 2002). Factors that may be considered in evaluating materiality include the remoteness in time of a juror's prior exposure, the character and extensiveness of the experience, and the juror's posture in the litigation. *Roberts,* 814 So. 2d at 342.
>
> But "materiality is only shown 'where the omission of the information prevented counsel from making an informed judgment--which would in all likelihood have resulted in a peremptory challenge.'" *Levine,* 837 So. 2d at 365 (internal quotation marks omitted) (quoting *Roberts,* 814 So. 2d at 340). In other words, "[a] juror's nondisclosure . . . is considered material if it is so substantial that, if the facts were known, the defense likely would peremptorily exclude the juror from the jury." *Murray,* 3 So. 3d at 1121–22 (quoting *McCauslin v. O'Conner,* 985 So. 2d 558, 561 (Fla. 5th DCA 2008)).

In *Lugo,* we held that a juror's nondisclosure was not sufficiently material where the juror, sitting on a death penalty case, had been a victim of theft. *Lugo,* 2 So. 3d at 14. In evaluating materiality, this Court observed that the juror's "one-time isolated incident" did not resemble the murder victim's "extended torture and captivity." *Id.* Thus, we concluded that the sheer disparity between the experiences made the juror's experience insufficiently material or relevant to service on that jury. *Id.*

Similarly, here, Johnston has failed to satisfy materiality under *De La Rosa*'s first prong. We find nothing about the character and extensiveness of Robinson's own experience -- she committed a nonviolent offense and then pled nolo contendere -- that suggests she would be biased against a defendant pleading not guilty in a death penalty case or against legal proceedings in general. *See Lugo,* 2 So. 3d at 14; *cf. De La Rosa,* 659 So. 2d at 241. The capias, furthermore, was not issued for a criminal offense. *Johnston,* 841 So. 2d at 357. In fact, juror Robinson's positioning as a prior *defendant* makes bias against Johnston especially unlikely. *See Garnett v. McClellan,* 767 So. 2d 1229, 1231 (Fla. 5th DCA 2000) (finding that prior litigation experience was immaterial, in part, because the juror had been similarly situated to and was therefore more likely to be sympathetic to the complaining party).

Neither was there any evidence to suggest that here, "if the facts were known, the defense likely would [have] peremptorily exclude[d] the juror from the jury." *Murray,* 3 So. 3d at 1121–22 (quoting *McCauslin,* 985 So. 2d at 561). **In fact, as explained above, Robinson matched the profile of the optimal juror sought by the defense. Defense counsel also testified at the evidentiary hearing that in his experience, the substance of Robinson's nondisclosure would have caused the prosecution -- not the defense -- to exclude or strike a juror.**

Accordingly, because Johnston could not have demonstrated materiality, any motion for new trial based on Robinson's disclosure would not have been successful. And because the claim lacked merit, counsel cannot be deemed ineffective for failing to raise it. Therefore, denial of this ineffectiveness claim is affirmed.

Johnston, 63 So. 3d at 738-39 (e.s.).

CONCLUSION AS TO GROUND THREE

Ground Three Has no Merit

Petitioner has not demonstrated that the state court's determination was contrary to,

or involved an unreasonable application of federal law, nor has he shown that the state court's denial of this claim resulted in an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The Florida Supreme Court denied this IAC claim for lack of prejudice. The Florida Supreme Court found that (1) Johnston failed to satisfy materiality; (2) there was "nothing about the character and extensiveness of Robinson's own experience -- she committed a nonviolent offense and then pled nolo contendere -- that suggests she would be biased against a defendant pleading not guilty in a death penalty case or against legal proceedings in general;" (3) the capias was not issued for a criminal offense; (4) juror Robinson's positioning as a prior *defendant* made bias against Johnston especially unlikely; (5) there was no evidence to suggest that, "if the facts were known, the defense likely would [have] peremptorily exclude[d] the juror from the jury;" (6) Robinson matched the profile of the optimal juror sought by the defense; and (7) defense counsel testified at the evidentiary hearing that in his experience, the substance of Robinson's nondisclosure would have caused the prosecution -- not the defense -- to exclude or strike a juror. The Florida Supreme Court concluded that because "Johnston could not have demonstrated materiality, any motion for new trial based on Robinson's disclosure would not have been successful. And because the claim lacked merit, counsel cannot be deemed ineffective for failing to raise it." *Johnston*, 63 So. 3d at 738-39.

Rejecting a claim of ineffective assistance of counsel because a defendant did not show prejudice is in accordance with *Strickland*, 466 U.S. at 691-92. This IAC claim is the same IAC claim addressed in Ground One above, on the issue of cause and prejudice relating to the procedurally defaulted substantive claim of juror non-disclosure. This Court

addressed Petitioner's ineffective assistance of trial counsel claim in Ground One. In sum, in state court, Johnston sought to adjudicate this substantive claim under the state law standard in *De la Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995). This standard only requires a litigant to show that (1) "the information is relevant and material to jury service in the case"; (2) "the juror concealed the information during questioning"; and (3) "the failure to disclose the information was not attributable to the complaining party's lack of diligence." *De la Rosa v. Zequeira*, 659 So. 2d 239, 241 (Fla. 1995). Moreover, under this standard, information is considered material if the litigant "may have been influenced to peremptorily challenge the juror from the jury," and the information is considered concealed even if the failure to provide the information was unintentional. *Roberts v. Tejeda*, 814 So. 2d 334, 341, 343 (Fla. 2002).

The United States Supreme Court has rejected this standard in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S. Ct. 845 (1984), the case now cited by Johnston in his habeas memorandum. Instead, it has required a demonstration that a juror was biased and subject to removal for cause before an incorrect or incomplete answer during voir dire would serve as a basis for vacating a judgment. *Id.* at 556; *see also, Smith v. Phillips*, 455 U.S. 209, 102 S. Ct. 940 (1982). Given these circumstances, the substantive claim Petitioner presented to the state courts was a claim under state law. Furthermore, on direct appeal, the state court specifically found that the juror was not subject to removal for cause. Robinson's failure to pay her misdemeanor court costs meant only that she faced the possibility of civil contempt; she was not statutorily disqualified from jury service. See § 40.013(1), Fla. Stat. (1999); *Johnston*, 841 So. 2d at 357-358. Petitioner's statement that "jurors under prosecution were statutorily disqualified to serve" is a red herring. (Doc. 25 at 10). The Florida supreme Court explicitly ruled that "Robinson did not commit a criminal

offense when she failed to pay her fine and, accordingly, was not statutorily disqualified from serving on the jury."

In postconviction, trial counsel Littman confirmed that Robinson's misdemeanor plea would not have caused the defense to strike Robinson because Robinson fit the profile of the defense-preferred juror and the State is the party who typically tries to strike those individuals with a prior involvement with law enforcement. (Ex. B59/1487; 1491-1492). Attorney Littman informed Johnston, prior to trial, of the mock jury trial results and the recommended strategy of seeking a young and minority jury. (Ex. B59/1487-1488). Juror Robinson fit the profile of a defense-preferred juror, as recommended by their mock trial specialist, Dr. Harvey Moore. (Ex. B59/1491-1492). Any juror that Johnston did not like was stricken; and, even after Robinson was arrested, the defense still wanted to keep Robinson on the jury panel. Trial counsel's decision was reasonable under the norms of professional conduct and the state courts properly rejected this IAC claim under *Strickland*.

Petitioner has not demonstrated that the state court's determination was contrary to, or involved an unreasonable application of federal law, nor has he shown that the state court's denial of this claim resulted in an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Ground three does not warrant habeas corpus relief.

GROUND FOUR

THE STATE COURTS ERRED IN FAILING TO GRANT RELIEF BASED ON TRIAL COUNSEL'S INEFFECTIVENESS FOR FAILING TO FOLLOW THROUGH WITH INDIVIDUAL AND SEQUESTERED VOIR DIRE. MR. JOHNSTON WAS DEPRIVED OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE STATE COURT DECISIONS ON THIS ISSUE WERE CONTRARY TO FEDERAL

LAW AND AN UNREASONABLE APPLICATION OF THE SAME. THE COURTS' DECISIONS WERE ALSO BASED ON AN UNREASONABLE FINDING OF FACT. THIS COURT SHOULD GRANT THE WRIT.

Petitioner's Allegations

In the instant case, it is abundantly clear that in order to receive a fair trial, Mr. Johnston was in need of, and entitled to, individual and sequestered *voir dire*. Eight jurors indicated that they had some knowledge of the case from the media. The media coverage focused relentlessly on inflammatory and inadmissible material, including (but not limited to) (1) Johnston's prior arrests and convictions for multiple rapes, robberies, burglaries, kidnaping, and assaults; (2) his three prior long terms of imprisonment, his early releases on all three occasions, and the anguish of the victim's father and Mr. Johnston's own brother that he was put back on the streets to commit this murder; (3) his being a prime suspect in the beating and strangulation murder of Janice Nugent, and in the slashing attack upon Gillian Young; (4) his history of violence toward women and his predilection for kinky sexual practices, with specifics involving his ex-wife Bambi Lynne Neal (including a threat of what was coming), his girlfriend Diane Busch in the hospital, and the dominatrix Madame Raven; (5) police reports that he had received treatment as a sexual predator; (6) the consistent portrayal of Mr. Johnston as a con man who preyed on women, and a smooth talker and habitual liar whose alibi was full of holes; (7) the suggestions that Johnston was stalking Coryell days before her murder, and (8) the opinions of Johnston's own family that he was a ticking time bomb -- violent, dangerous, and guilty of the charged crime. The remaining questions are whose fault was it that nobody ever found out what information these jurors (including two who actually served on the jury) had, and whether it matters who is at fault.

The trial judge was well aware of the inadmissible and extraordinarily prejudicial

content of the publicity, and she was -- or clearly should have been -- well aware of the need to find out what these eight prospective jurors knew or had been exposed to, before any of them could be allowed to serve on Johnston's capital jury. The judge granted the motion for individual and sequestered *voir dire* on the issue, *inter alia*, of the juror's knowledge of the case (through publicity or otherwise). (Vol. XIX R.1931-32).

At the beginning of jury selection, the defense -- perhaps unnecessarily -- renewed its motion for individual *voir dire*. (Vol. VI R. 8). This time, inexplicably, the judge denied that request, but she left the door open to individual questioning at the bench in the event that particular jurors indicated they had knowledge of the case. (Vol. VI R. 8-9). Even during the trial itself, in making the decision to sequester the jury during deliberations, the trial judge noted that Johnston's prior record was in every newspaper. (Vol. XIV R. 1243).

Whether with reference to Johnston's prior record or all of the other inadmissible and highly prejudicial reports, noone asked the jurors if they knew about it, and defense counsel actually told a venire man who served on the jury (Mr. Ursetti) that he did not want to know, because he did not want anything said in front of the other people. (Vol. VII R. 179). All we know about the media exposure of the other juror who served (Mr. James) is that he simply remembered it from the news. (Vol. VII R. 180). Clearly defense counsel was deficient here, or seriously misunderstood the judge's ruling, but that does not mean the trial court did not abuse its discretion in failing to ensure that a fair and impartial jury was seated, and in failing to ascertain whether prospective jurors (including the two who served) possessed prejudicial information that was not admissible in the trial. The judge knew exactly what the media had broadcast to the community about Johnston, and her comments make it clear that she knew how this could destroy his right to a fair trial, yet (after issuing an arguably confusing set of

rulings) she "sat on her hands" while defense counsel evidenced the mistaken belief that he could not ask the jurors what they knew without tainting the remaining jurors. The denial in this case of Johnston's constitutional right to be tried by a fair and impartial jury is attributable to a combination of judicial error and counsels' inattentiveness or misunderstanding.

On direct appeal, appellate counsel argued that trial counsel was ineffective for failing to ask to approach the bench and that the Florida Supreme Court could reach this issue on direct appeal. The Florida Supreme Court ruled that such a claim would have to be raised in postconviction. From the trial record, the purposes of the contemporaneous objection rule were satisfied, the grounds were fully argued, the judge from her own comments plainly understood the reasons why individual *voir dire* was necessary in this case, and she had more than enough information before her to trigger her obligation to ascertain what the jurors knew from the publicity. To the extent that counsel's inaction amounts to a waiver, then it also amounts to ineffective assistance. After arguing strenuously pre-trial that individual *voir dire* was constitutionally necessary in the face of the overwhelmingly prejudicial media coverage, and after renewing the motion (even after it had been granted pre-trial), saying we would especially like to do it on the ... pretrial publicity part, it would be unreasonable to believe that the defense attorneys changed their minds as some sort of strategic decision. Moreover, any such strategy would be indefensible as a matter of law and logic. Is there any conceivable way, in a trial where the defense was identity, that counsel could have wanted jurors who might know about Johnston's life history as a sexually violent criminal, or the fact that he was a prime suspect in the beating and strangulation murder of another woman, or that his own family was sure he was guilty?

In the instant case -- which involves the death penalty and the heightened due process

protections that are constitutionally mandated -- there was overwhelming hostile and inflammatory publicity which presumed Johnston's guilt of the charged murder (as well as an uncharged murder and an uncharged assault), and relentlessly informed the community of his prior criminal record, his previous imprisonments and early releases, his propensities to violence, kinky sexual practices, and con artistry. To preserve his right to a trial by a fair and impartial jury, Johnston had a right to individually question the jurors to determine the extent of their exposure, and whether they possessed any inadmissible information from the media. The trial court's announced denial of individual *voir dire* on publicity (Vol. VI R. 8) was error, but she did leave the door open for defense counsel to ask to approach the bench, and not only did defense counsel inexplicably fail to take the opportunity that was given, he went so far as to tell a juror who actually served that he did not want to know what the juror knew about the case, because he did not want it spoken in front of the other jurors. (Vol. VII R. 179). Despite the Florida Supreme Court's apparent recognition of the prejudice that Johnston suffered because of counsel's deficiency in dropping the ball, the court failed to grant relief and instead found that the trial court did not abuse its discretion by refusing to independently *voir dire* the jury.

Based on the facts of the case and the Florida Supreme Court apparently acknowledging that the pre-trial publicity was prejudicial, Johnston raised an ineffective assistance of counsel claim for failing to individually question the jurors familiar with the highly-prejudicial pretrial publicity. This claim was denied because Johnston could not prove actual bias. Given the extent and nature of the pre-trial media in this case, prejudice should be presumed and relief should be given.

Attorney Littman could offer no explanation why he failed to individually *voir dire* the

members of the venire who had been exposed to the media. (Vol. LIX PCR. 1438).

The test for prejudice is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. There can be no confidence in the outcome of this case where at least two of the *sitting* jurors were exposed to the completely prejudicial news media in this case. The common thread in all the media reports was not the lack of evidence and the circumstantial nature of the evidence against Johnston. The common thread was that Johnston was a career criminal who repeatedly engaged in violent crimes against women, and who was repeatedly released early from prison for his crimes.

Front page newspaper articles and television news broadcasts highlighted Johnston's criminal past in sensational fashion. There can be no confidence in the outcome of the verdict and jury's 12-0 death recommendation in this case due to the pervasively prejudicial media content and extent to which the jury knew of Johnston's criminal past. It is unreasonable to say that the Petitioner has failed to prove prejudice due to media exposure, when it was trial counsel who failed to question these jurors about the media exposure.

The State court decisions on these issues were contrary to federal law and an unreasonable application of the same. The court decisions were also based on an unreasonable finding of fact.

Petitioner's Allegations in the Reply

The media coverage in this case is just as, if not *more* extensive and prejudicial as in *Irvin v. Dowd*, 366 U.S. 717 (1960). The United States Supreme Court has noted that when the media coverage in a capital case is so extensive: "As one of the jurors put it, 'you can't

forget what you hear and see.' With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion." *Irvin, Id.* at 728. *See also Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) ("Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.").

Johnston claims that the state court's reliance on *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007) is misplaced. According to Johnston "the Florida Supreme Court held that a defendant had to establish a biased juror sat to establish prejudice under *Strickland*." *Carratelli* is contrary to *Irvin* and *Rideau* in that it fails to acknowledge cases where media coverage can become so prejudicially pervasive in a community that prejudice can be presumed, thus violating a defendant's right to due process and a fair trial. The standard in *Carratelli* is unreasonable and unconstitutional, imposing a standard on a petitioner greater than *Strickland*. *Irvin* and *Rideau* recognize cases where juror bias can be presumed. *Strickland* would require only a reasonable probability of juror bias due to media coverage. *Carratelli* is contrary to federal law in that it requires *actual* juror bias to be proven rather than a *reasonable probability* of juror bias to establish the ineffective assistance of counsel. At the very least, trial counsel owed a duty to individually question jurors Ursetti and James, who actually served on the jury, when they revealed that they had been exposed to the media coverage in this case.

Johnston alleges that the State's reliance on *McDonough Power Equipment, Inc.* at 556 is misplaced. He claims that, as seen in *Irvin* and *Rideau,* the United States Supreme Court reasonably recognizes that juror bias in a community so infected by extensive media coverage can be presumed, thus violating a defendant's right to due process and a fair trial.

Johnston claims that trial counsel's failures during *voir dire* were not based on strategy

or reason, because there obviously was no strategy or reason involved. He claims that the State's argument that "Attorney Littman verified that, in light of this response by Juror Ursetti, there was no reason why [he] would be asked about this privately. (Ex. B 59/1437))" ignores trial counsel's testimony on the following page, wherein, when asked why he did not perform individual and sequestered *voir dire* regarding the jurors' exposure to the media, he answered, at the evidentiary hearing, "I don't recall it at all. At all." (Ex. B 59/1438). He further argues that given the extent of the media coverage, and the content, bias can be presumed here. Trial counsel did nothing to prevent biased jurors from serving on this case. The state court decisions here are contrary to *Irvin, Rideau,* and Strickland.

Exhaustion and Disposition of Ground Four in State Court

Johnston's IAC sub-claim was raised both on direct appeal and in postconviction. On direct appeal, Johnston argued that he was entitled to a new trial based on the failure of the trial court and trial counsel to ascertain the extent of the exposure of eight prospective jurors (including two who served on the jury) to inflammatory pretrial publicity.

On direct appeal, the Florida Supreme Court ruled that the trial court did not abuse its discretion by refusing to independently voir dire the jury. The Florida Supreme Court denied Johnston's IAC claim (for failing to individually question those jurors who had exposure to pretrial publicity) without prejudice, because it should be raised in a postconviction motion. *Johnston*, 841 So. 2d at 358. On direct appeal, the Florida Supreme Court stated:

> **Johnston's second claim raises the issue of whether he is entitled to a new trial based on the failure of the trial court and counsel to ascertain the extent of the exposure of eight prospective jurors (including two who served on the jury) to the inflammatory pretrial publicity which focused almost entirely on inadmissible material.** The record reveals that both the television media and the newspapers closely followed the progress of the murder investigation and the criminal proceedings

in the case. Media reports included numerous inadmissible details of Johnston's criminal history and early releases, his purported proclivities for violence against women, and statements from some of Johnston's own family that they believed Johnston was guilty and was "a ticking time bomb." Prior to the trial, the trial judge granted defense counsel's request to individually question prospective jurors at the bench relative to the jurors' prior knowledge about the case. Despite this ruling, however, defense counsel never asked to individually question the several jurors who indicated that they recalled hearing something about the case.

Johnston recognizes that defense counsel "dropped the ball" by not requesting individual voir dire for these jurors, but asserts that he is entitled to a new trial because the trial judge also had an independent obligation to address this issue, especially in light of the fact that defense counsel had initially alerted the court to the potential problem. This Court has never created an independent obligation on the part of the trial judge to question prospective jurors sua sponte, in the absence of a request by counsel. In fact, the Court has recognized that the trial court is not required to grant individual voir dire, even with a request by counsel. Specifically, this Court described the legal standard as follows:

> [A] trial court has broad discretion in deciding whether prospective jurors must be questioned individually about publicity the case has received. Individual voir dire to determine juror impartiality in the face of pretrial publicity is constitutionally compelled only if the trial court's failure to ask these questions renders the trial fundamentally unfair. The mere existence of extensive pretrial publicity is not enough to raise a presumption of unfairness of constitutional magnitude. A prospective juror is presumed impartial if he or she can set aside a preformed opinion or impression and return a verdict based on evidence presented in court.

Bolin v. State, 736 So. 2d 1160, 1164 (Fla. 1999) (citations omitted). **We find that the trial court did not abuse its discretion by refusing to independently voir dire the jury and hence this claim is denied.**

Alternatively, Johnston asserts he is entitled to a new trial because his trial counsel was ineffective for failing to individually question those jurors who had exposure to pretrial publicity. We deny this claim without prejudice because it should be raised in a postconviction motion, as opposed to direct appeal. *See Teffeteller v. Dugger*, 734 So. 2d 1009, 1020 (Fla. 1999) (addressing this type of postconviction motion); *Loren v. State*, 601 So. 2d 271, 272 (Fla. 1st DCA 1992) ("[C]laims of ineffective assistance of counsel are generally not reviewable on direct appeal, but are properly raised

in a motion for postconviction relief.").

Johnston, 841 So. 2d at 358 (e.s.)

Thereafter, Johnston raised this IAC sub-claim in postconviction and the trial court denied relief after an evidentiary hearing. The trial court ruled that Johnston failed to demonstrate any deficiency of counsel and resulting prejudice under *Strickland*. The trial court's order of February 4, 2009 states, in pertinent part:

> Defendant alleges ineffective assistance of counsel due to counsel's failure to individually voir dire members of the jury venire about pretrial publicity. Specifically, Defendant alleges prior to trial, the trial court granted Defendant's request to individually question prospective jurors at the bench relative to the juror's prior knowledge about the case. Defendant further alleges that of the fifty prospective jurors, eight prospective jurors, including Mr. Guntert (27), Ms. Welch (34), Mr. McMinn (45), Ms. McGee (6), Mr. Ursetti (18), Mr. Arnold (15), Mr. James (20), and Mr. Rice (39), recalled that they had read or heard about the case after limited information gained from the reading of the indictment and voir dire. Defendant alleges that based on the trial court's granting of Defendant's request to individually question prospective jurors, these jurors could have been questioned individually to determine the extent of their knowledge of the case from the media reports, and whether they had been exposed to prejudicial and inadmissible information. However, Defendant alleges counsel failed to individually question the eight potential jurors.
>
> Of the eight potential jurors, only jurors Ursetti and James served on Defendant's jury. "The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984). With respect to juror Ursetti, the record reflects the following transpired during voir dire:
>
> LITTMAN: First row over here, which is the third row?
>
> URSETTI: I recall something.
>
> LITTMAN: I don't want to know what you think the details are because I don't want you to say this in front of the other people. What that fact alone, Mr. Ursetti, keep you from being fair and impartial?
>
> URSETTI: It would not.

LITTMAN: You can put aside anything? As I said, it may have been reported accurately or inaccurately.

(See trial transcript, p. 179, attached). With respect to juror James, a review of the record reflects the following transpired during voir dire:

LITTMAN: Because as the judge has already told you, those who are chosen as jurors are not permitted to discuss the case while the case is pending. In the future sometime, you might. You might say no, that's not what happened at all because you have been a juror on the case.

LITTMAN: Next row?

JAMES: I just remember it from the news.

LITTMAN: One person feels they were influenced by it. Next row, which would be Row 4?

(See trial transcript, p. 180, attached.)

At the evidentiary hearing, when asked whether there was any reason why he did not individually voir dire members of the jury panel about pretrial publicity, he responded as follows:

REGISTRATO: Well, as I recall, there was a laundry list - - there was - - there's a lot of ground that was covered on each juror, and whether they had been exposed to pretrial publicity I'm sure was covered by somebody. And I may not have done it myself, but either they had done it on the written questionnaires or Mr. Pruner had done it or Mr. Littman had done it or I did it. I don't remember who did it, but I'm sure somebody went over that with them, pretrial publicity. I'm basically almost certain. I don't have a specific recollection of it, but I can't imagine that it wasn't done somewhere along the line, they weren't asked about whether they were - - had been exposed to pretrial publicity on this case. I'm sure somebody did. Again, it's not something that you hammer four or five times. If they were asked about it and they said they didn't know about the case, I'm - - you know, you don't want to start reminding them that, well, now, you know, there was a lot of publicity about this thing. That's not something you would do.

(See January 31, 2008, transcript, p. 743, attached). He further testified that he did not remember whether or not the trial team individually voir dired the panel about pretrial publicity. (See January 31, 2008, transcript, p. 744, attached).

Mr. Littman testified if Judge Allen granted individual voir dire, they

would have done it, and would have covered pretrial publicity. (See January 31, 2008, transcript, p. 861, attached). After having his recollection refreshed with portions of the trial transcript, Mr. Littman testified there was a pretrial written motion to have individual voir dire, but Judge Allen denied the motion stating if any jurors indicated they had heard about the case, she would question them individually at the bench. (See January 31, 2008, transcript, p. 864, attached). He admitted he did not know if either Mr. Ursetti or Mr. James heard about Defendant's prior criminal record. (See January 31, 2008, transcript, p. 875, attached). **He also testified Defendant contributed to the pretrial publicity by giving an interview over the phone from jail to a news reporter**. (See January 31, 2008, transcript, pps. 932 and 943, attached).

After reviewing claim 3, the testimony, evidence, and argument presented at the January 28, 2008, January 29, 2008, January 30, 2008, January 31, 2008, February 1, 2008, March 6, 2008, and March 7, 2008, evidentiary hearings, the written closing arguments, the notice of supplemental authority, the applicable law, the court file, and the record, the Court finds with respect to the eight jurors Defendant is challenging, the Court finds only jurors Ursetti and James actually served on the jury that convicted Defendant. Therefore, the Court finds Defendant is unable to demonstrate prejudice with respect to jurors Mr. Guntert (27), Ms. Welch (34), Mr. McMinn (45), Ms. McGee (6), Mr. Arnold (15), and Mr. Rice (39).

Defendant's request to individually question prospective jurors at the bench relative to the juror's prior knowledge about the case. Defendant further alleges that of the fifty prospective jurors, eight prospective jurors, including Mr. Guntert (27), Ms. Welch (34), Mr. McMinn (45), Ms. McGee (6), Mr. Ursetti (18), Mr. Arnold (15), Mr. James (20), and Mr. Rice (39), recalled that they had read or heard about the case after limited information gained from the reading of the indictment and voir dire. Defendant alleges that based on the trial court's granting of Defendant's request to individually question prospective jurors, these jurors could have been questioned individually to determine the extent of their knowledge of the case from the media reports, and whether they had been exposed to prejudicial and inadmissible information. However, Defendant alleges counsel failed to individually question the eight potential jurors.

Of the eight potential jurors, only jurors Ursetti and James, served on Defendant's jury. "The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984). With respect to juror Ursetti, the record reflects the following transpired during voir dire:

LITTMAN: First row over here, which is the third row?

URSETTI: I recall something.

LITTMAN: I don't want to know what you think the details are because I don't want you to say this in front of the other people. What that fact alone, Mr. Ursetti, keep you from being fair and impartial?

URSETTI: It would not.

LITTMAN: You can put aside anything? As I said, it may have been reported accurately or inaccurately.

(*See* trial transcript, p. 179, attached). With respect to juror James, a review of the record reflects the following transpired during voir dire:

LITTMAN: Because as the judge has already told you, those who are chosen as jurors are not permitted to discuss the case while the case is pending. In the future sometime, you might. You might say no, that's not what happened at all because you have been a juror on the case.

LITTMAN: Next row?

JAMES: I just remember it from the news.

LITTMAN: One person feels they were influenced by it. Next row, which would be Row 4?

(*See* trial transcript, p. 180, attached).

At the evidentiary hearing, when asked whether there was any reason why he did not individually voir dire members of the jury panel about pretrial publicity, he responded as follows:

REGISTRATO: Well, as I recall, there was a laundry list - - there was - - there's a lot of ground that was covered on each juror, and whether they had been exposed to pretrial publicity I'm sure was covered by somebody. And I may not have done it myself, but either they had done it on the written questionnaires or Mr. Pruner had done it or Mr. Littman had done it or I did it. I don't remember who did it, but I'm sure somebody went over that with them, pretrial publicity. I'm basically almost certain.

I don't have a specific recollection of it, but I can't imagine that it wasn't done somewhere along the line, they weren't asked about

> whether they were - - had been exposed to pretrial publicity on this case. I'm sure somebody did. Again, it's not something that you hammer four or five times. If they were asked about it and they said they didn't know about the case, I'm - - you know, you don't want to start reminding them that, well, now, you know, there was a lot of publicity about this thing. That's not something you would do.

(*See* January 31, 2008, transcript, p. 743, attached). He further testified that he did not remember whether or not the trial team individually voir dired the panel about pretrial publicity. (*See* January 31, 2008, transcript, p. 744, attached).

Mr. Littman testified if Judge Allen granted individual voir dire, they would have done it, and would have covered pretrial publicity. (*See* January 31, 2008, transcript, p. 861, attached). After having his recollection refreshed with portions of the trial transcript, Mr. Littman testified there was a pretrial written motion to have individual voir dire, but Judge Allen denied the motion stating if any jurors indicated they had heard about the case, she would question them individually at the bench. (*See* January 31, 2008, transcript, p. 864, attached). He admitted he did not know if either Mr. Ursetti or Mr. James heard about Defendant's prior criminal record. (*See* January 31, 2008, transcript, p. 875, attached). He also testified **Defendant contributed to the pretrial publicity by giving an interview over the phone from jail to a news reporter.** (*See* January 31, 2008, transcript, pps. 932 and 943, attached).

After reviewing claim 3, the testimony, evidence, and argument presented at the January 28, 2008, January 29, 2008, January 30, 2008, January 31, 2008, February 1, 2008, March 6, 2008, and March 7, 2008, evidentiary hearings, the written closing arguments, the notice of supplemental authority, the applicable law, the court file, and the record, **the Court finds with respect to the eight jurors Defendant is challenging, the Court finds only jurors Ursetti and James actually served on the jury that convicted Defendant.** Therefore, the Court finds Defendant is unable to demonstrate prejudice with respect to jurors Mr. Guntert (27), Ms. Welch (34), Mr. McMinn (45), Ms. McGee (6), Mr. Arnold (15), and Mr. Rice (39).

Moreover, the Court finds "[a] prospective juror is presumed impartial if he or she can set aside a performed opinion or impression and return a verdict based on evidence presented in court." *Johnston v. State*, 841 So. at 358. **With respect to Ursetti, the record clearly reflects Mr. Ursetti assured Mr. Littman that what he recalled about the case would not keep him from being fair and impartial. (See trial transcript, pps. 179-180, attached). Therefore, the Court finds Mr. Ursetti was competent to serve as a juror, and Defendant failed to demonstrate**

prejudice as a result of counsel's failure to individually voir dire Mr. Ursetti about pretrial publicity.

With respect to Mr. James, the record reflects the following transpired during voir dire:

> LITTMAN: Anyone here think they've heard, or read, or seen anything about this particular case?
>
> [Several prospective jurors raise their hands.]
>
> LITTMAN: My question to you, sir - - I believe, Mr. MacMinn, you already answered it. You have read something that you feel would prevent you from being a fair and impartial juror.
>
> MACMINN: More in the line of news report, not read but seen.
>
> LITTMAN: Of course, we know if something's in the newspaper, it must be accurate because they wouldn't make a mistake. I say that, in large, tongue and cheek. Mr. Pruner and I have done this for a long time, so has Ms. Stanley and Mr. Registrato, and we say we know that's not what we have heard, so had Judge Allen, who's presiding over this case. Do you think you can be fair and impartial in giving this man a fair trial?
>
> MACMINN: I think I'm already predisposed with a feeling in my gut.
>
> LITTMAN: Let me ask the folks over here. Anyone in the first row heard or read about the case?
>
> MCGEE: I just remember the face.
>
> LITTMAN: The face?
>
> MCGEE: I didn't remember him at first, but I remember his face. I just remember he was in the news or in the newspapers.
>
> LITTMAN: You don't remember anything specifically?
>
> MCGEE: But I don't remember what was developed.
>
> LITTMAN: The reason we ask these questions, I guess. gee, if I read about the case, I guess I can't be a juror. That's not true at all.

The follow-up question in your case, which you answered the fact you read and think you know something about the case, does not prevent you from being a fair and impartial juror and listening to the evidence with an open mind?

Now, if you say no, I can't do that, then, of course, you can't be a juror. But if you said, look, I can make up my mind based on what's presented in court, which is what you're supposed to do, I don't care what they said on some network channel or newspaper, that's okay.

If you think of all the famous cases in this country in the last years, you can't say none of the jurors have ever heard of it. That's not the test. The test is, you keep an open mind and judge what the State presents, or what they don't present in court. Can you do that?

MCGEE: (Indicating affirmatively.)

[Prospective jurors indicating affirmatively.]

LITTMAN: Anybody in the second row heard anything about the case?

[Prospective jurors indicating negatively.]

LITTMAN: First row over here, which is the third row?

URSETTI: I recall something.

LITTMAN: I don't want to know what you think the details are because I don't want you to say this in front of the other people. Would that fact alone, Mr. Ursetti, keep you from being fair and impartial?

URSETTI: It would not.

LITTMAN: You can put aside anything'? As I said, it may have been reported accurately or inaccurately. Sir, I'm sorry. Your name?

ARNOLD: David Arnold. I have seen him before in a different setting and heard information about the case, and I didn't recall until just now.

> LITTMAN: All right. Now, as the case goes on, certain things may refresh your recollection or may not, but the question is, simply, can you put that aside and judge the case just on what's presented here?
>
> ARNOLD: Yes.
>
> LITTMAN: Because as the judge has already told you, those who are chosen as jurors are not permitted to discuss the case while the case is pending. In the future sometime, you might. You might say no, that's not what happened at all because you have been a juror on the case.
>
> LITTMAN: Next row?
>
> **JAMES: I just remember it from the news.**
>
> LITTMAN: One person feels they were influenced by it. Next row, which would be Row 4?

(*See* trial transcript, pps. 176-180, attached). **Therefore, Mr. Littman was referring to juror MacMinn as the individual who felt he was influenced by the pretrial publicity, not Mr. James. Mr. James simply stated that he remembered it from the news.**

Moreover, "[t]he mere existence of extensive pretrial publicity is not enough to raise a presumption of unfairness of constitutional magnitude." *Johnston*, 841 So. 2d at 358. **The Court finds Mr. James simply stated he remembered it from the news, and did not express any preformed opinion or impression regarding the case. The Court further finds when it came time to determine whether Mr. James was accepted by the defense, the defense still had some remaining peremptory challenges and chose not to exercise them on juror James.** (*See* trial transcript, pps. 236-242, attached). **Therefore, the Court finds Mr. Littman and the State were satisfied that Mr. James' ability to be fair and impartial was not impacted by what he remembered from the news. Consequently, the Court finds Defendant failed to demonstrate that counsel acted deficiently in failing to request individual voir dire of Mr. James. Lastly, the Court finds Defendant failed to demonstrate prejudice as a result of counsel's failure to individually voir dire Mr. James. As such, no relief is warranted upon claim 3.**

(Ex. B16/3115-3122)(e.s.).

Johnston repeated this IAC claim on postconviction appeal and the Florida Supreme Court affirmed the denial of this IAC sub-claim as follows:

> ***K. Pretrial publicity***
>
> Johnston claims that trial counsel was ineffective for failing to sufficiently question members of the venire regarding their exposure to pretrial publicity. **Because Johnston has not shown that the jurors were actually biased, our confidence in the outcome is not undermined.** *See Carratelli v. State*,961 So. 2d 312, 324 (Fla. 2007).
>
> During voir dire, two eventual jurors indicated that they had heard about the case on the news. Trial counsel asked one of those jurors directly whether, given exposure to media reports, he could be fair and impartial. That juror responded that he could. While counsel did not directly question the other juror, the second juror gave no indication as to what he had heard on the news or whether he was at all influenced by the news report, even after defense counsel invited jurors to respond to his repeated explanation of the requirement that jurors must be fair and impartial.
>
> In *Carratelli*, we explained:
>
> > [W]here a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased.
> >
> > A juror is competent if he or she "can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." Therefore, actual bias means bias-in-fact that would prevent service as an impartial juror. Under the actual bias standard, the defendant must demonstrate that the juror in question was not impartial -- i.e., that the juror was biased against the defendant, and the evidence of bias must be plain on the face of the record.
>
> 961 So. 2d at 324 (citations omitted) (emphasis supplied) (quoting *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984)). To be entitled to relief, the defendant must show that the juror "was actually biased, not merely that there was doubt about her impartiality." *Owen v. State*, 986 So. 2d 534, 550 (Fla. 2008).
>
> In *Carratelli*, we held that the defendant failed to demonstrate actual bias where the challenged juror represented during voir dire that he could be

> fair, listen to the evidence, and follow the law. *See* 961 So. 2d at 327. And in *Lugo*, we found that the defendant could not demonstrate actual bias where, after the trial court's specific discussion on improper bias, the juror simply did not indicate that his ability to be impartial was affected by a prior experience. 2 So. 3d at 16.
>
> **Johnston has failed to demonstrate actual bias. *See id.; Owen*, 986 So. 2d at 550; *Carratelli*, 961 So. 2d at 324. One juror, like the juror in *Carratelli*, indicated that he retained the ability to be impartial. The other juror, like the one in *Lugo*, simply declined to respond to specific discussion on bias during voir dire. There is no evidence that either juror was biased.**
>
> **Because Johnston must show more than mere doubt about the juror's impartiality and because there is no evidence of actual bias, we affirm denial of this claim.** *See Owen*, 986 So. 2d at 549–50.
>
> *Johnston*, 63 So. 3d 730, 744-745 (e.s.).

CONCLUSION AS TO GROUND FOUR

Ground Four Has no Merit

Petitioner has not demonstrated that the state court's determination was contrary to, or involved an unreasonable application of federal law, nor has he shown that the state court's denial of this claim resulted in an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

In reviewing this IAC claim on postconviction appeal, the Florida Supreme Court considered whether Petitioner was entitled to relief under *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007). *Carratelli* concerns resolution of a claim of ineffective assistance of counsel regarding the seating of a juror. *Carratelli*, 961 So. 2d at 315, 317-18, 323-24. In *Carratelli*, 961 So. 2d at 324, the Florida Supreme Court held that a defendant had to establish that a biased juror sat on the jury to establish prejudice under *Strickland*. Therefore, the Florida Supreme Court rejected Petitioner's claim because he did not show prejudice.

Rejecting a claim of ineffective assistance of counsel because a defendant did not show prejudice is in accordance with *Strickland*, 466 U.S. at 691-92. Moreover, determining that prejudice is not shown unless a biased juror sat on the jury is consistent with United States Supreme Court precedent. As previously noted, the United States Supreme Court has required a showing that a biased juror sat on the jury in order to demonstrate that a trial was unfair and should be reversed. *McDonough Power Equipment, Inc.*, 464 U.S. at 556; *see also, Smith v. Phillips*, 455 U.S. 209, 102 S. Ct. 940 (1982). As the United States Supreme Court has recognized, the focus of a prejudice inquiry regarding a claim of ineffective assistance of counsel is to determine whether counsel's alleged deficiency deprived the defendant of a fair trial. *Strickland,* 466 U.S. at 696; *see also, Lockhart v. Fretwell*, 506 U.S. 364, 368-39, 113 S. Ct. 838 (1993). Thus, finding that a defendant did not show prejudice because he did not make a showing necessary to find that he did not receive a fair trial is not an unreasonable application of *Strickland. Williams*, 529 U.S. at 411.

Only two of the prospective jurors who indicated some prior knowledge of the case actually served on the jury: Ursetti and James. After Ursetti indicated that he recalled "something" about the case, he stated that his prior knowledge would not keep him from being fair and impartial. (Ex. A7/179). During the postconviction evidentiary hearing, attorney Littman verified that, in light of this response by Ursetti, there was no reason why Ursetti would be asked about this matter privately. (Ex. B59/1437). The context of the questioning and defense counsel's comments at trial demonstrate that only one person, [MacMinn] not James, felt influenced by pretrial publicity. (Ex. A7/179-180). Counsel's perspective at the time of trial is paramount; *Strickland* requires the reviewing court "to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689; *see also, Wainwright v. Witt*, 469

U.S. 412, 435, 105 S. Ct. 844, 867 (1985) (reasons which may not be crystal clear from the printed record may have been readily apparent to those viewing the jurors as they answered questions during voir dire).

Moreover, Johnston does not dispute that when it came to jurors Ursetti and James, the defense still had four remaining peremptory challenges and specifically chose not to exercise them on either Ursetti or James. Thus, the responses of Jurors Ursetti and James indicated to counsel, at the time of trial, that any prior knowledge of the case would not impact their ability to be fair and impartial.

On postconviction appeal, the Florida Supreme Court found that Johnston failed to demonstrate actual bias. "One juror, like the juror in *Carratelli*, indicated that he retained the ability to be impartial. The other juror, like the one in *Lugo*, simply declined to respond to specific discussion on bias during voir dire. There is no evidence that either juror was biased." *Johnston*, 63 So. 3d at 744-745. Because Johnston must show more than mere doubt about the juror's impartiality and because there is no evidence of actual bias, the Florida Supreme Court affirmed the denial of this claim. A finding regarding whether a juror is biased is a finding of fact. *Witt v. Wainwright*, 469 U.S. 412, 426-29, 105 S. Ct. 844 (1985); *see also, Uttecht v. Brown*, 551 U.S. 1, 127 S. Ct. 2218 (2007). This Court must presume that finding to be correct unless Petitioner presents clear and convincing evidence showing that it is incorrect or unreasonable in light of the record. *Gilliam v. Sec'y for the Dept. of Corrections*, 480 F.3d 1027, 1032 (11th Cir. 2007). Petitioner has not met his burden of overcoming the presumption of correctness regarding the factual finding of a lack of bias.

In *Owen v. Department of Corrections*, 686 F.3d 1181, 1201 (11th Cir. 2012), the Eleventh Circuit rejected an IAC/jury selection claim in another Florida death penalty case

and also addressed *Carratelli*. In *Owen*, the Eleventh Circuit concluded, in pertinent part:

> Therefore, to the extent the Florida Supreme Court affirmed the denial of Owen's jury-selection ineffective assistance claim based on a finding of no deficient performance by trial counsel's not moving to strike the three jurors during trial, we conclude that finding was not contrary to Supreme Court precedent, did not unreasonably apply Supreme Court precedent, and was not based on an unreasonable determination of the facts in light of the state court evidence.
>
> 5. Prejudice Prong
>
> To the extent the Florida Supreme Court's denial of Owen's jury-selection ineffective assistance claim was limited to an analysis of the *Strickland* prejudice prong, Owen still is not entitled to relief. [FN26] *Carratelli*'s actual bias test is arguably consistent with *Strickland*. To "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, Owen must show that at least one juror was biased; if no juror were biased, then there is no "reasonable probability that...the result of the proceeding would have been different." *Id.*
>
> [FN26.] The facts of Strickland are obviously distinguishable from *Owen V*, as *Strickland* did not concern a jury-selection ineffective assistance of counsel claim. Indeed, *Strickland* did not involve a jury at all, for the petitioner, Washington, pled guilty and then waived his right to an advisory sentencing jury. *See Strickland*, 466 U.S. at 672, 104 S.Ct. at 2056-57.
>
> Ultimately, we need not decide whether the *Carratelli* actual-bias test for prejudice imposes a higher burden or contradicts the governing *Strickland* prejudice standard. Even if the *Carratelli* prejudice test applied by the Florida Supreme Court in *Owen V* were contrary to *Strickland*, and thus our review were de novo, we conclude that Owen cannot prevail on his ineffective assistance claim.

Owen, 686 F.3d at 1201.

In the instant case, as in *Owen*, Petitioner Johnston is not entitled to federal habeas relief under AEDPA or de novo review.

Petitioner has not demonstrated that the state court's determination was contrary to, or involved an unreasonable application of federal law, nor has he shown that the state

court's denial of this claim resulted in an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Ground four does not warrant habeas corpus relief.

GROUND FIVE

THE TRIAL COURT VIOLATED MR. JOHNSTON'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY FAILING TO INSTRUCT THE JURY ON, FIND, OR EVEN DISCUSS IN ITS SENTENCING ORDER THE STATUTORY MITIGATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED WHILE MR. JOHNSTON WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE. THE STATE COURT DECISIONS ON THIS ISSUE WERE CONTRARY TO FEDERAL LAW AND AN UNREASONABLE APPLICATION OF THE SAME. THE STATE COURT DECISIONS WERE ALSO BASED ON AN UNREASONABLE FINDING OF FACT. THIS COURT SHOULD GRANT THE WRIT.

Petitioner's Allegations

The trial court refused to instruct the jury on this statutory mental mitigator (Vol. XVII R. 1671-72; see Vol. XVIII R. 1809). The refusal to do so violated Johnston's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Although it is true that Dr. Maher stated on cross-examination that the homicide occurred during a mild dissociative episode (Vol. XXI R. 1608), he also testified that Johnston (while not incompetent to stand trial), suffers from significant mental illness (Vol. XVII R.1594).

At the *Spencer* hearing, Dr. Harry Krop testified that Johnston suffered from a serious emotional disorder at the time of the offense. (Vol. XXI R. 2271, 2273). He also testified that the conditions were chronic and permanent. (Vol. XXI R. 2271).

In light of this testimony, especially considered in combination with the penalty phase testimony of Dr. Maher that Johnston suffers from significant mental illness (Vol. XVII R.1594), as well as testimony concerning his psychiatric history, his dissociative disorder,

and his frontal lobe impairment, the trial court should have found and weighed, or at least considered, the statutory mitigating factor that the homicide was committed while Johnston was under the influence of extreme mental or emotional disturbance. The trial court's failure to find, weigh, or discuss the "extreme mental or emotional disturbance" mitigator, coupled with the court's unexplained finding on "background" mitigators was given no weight violated Johnston's rights under the Eighth Amendment to the United States Constitution. The Florida Supreme Court could not be assured that the trial court properly considered all mitigating evidence. This omission was especially critical in light of the fact that the extreme mental or emotional disturbance mitigator (along with the impaired capacity mitigator, which the trial court did discuss and find) are two of the weightiest mitigating factors -- those establishing mental imbalance and loss of psychological control.

Based on the testimony of Drs. Maher, Wood, and Krop, along with Johnston's psychiatric history, and the lay testimony of his sister concerning his inability to cope with rejection, the instruction should have been given. In view of the importance of this mitigating factor and the fact that Petitioner's mental and emotional condition was the focus of his penalty phase defense, the jury should have been instructed on this statutory mitigating factor.

Johnston was denied a full and fair penalty phase when the trial court failed to consider this important statutory mitigating factor. The State court decisions on this matter were contrary to federal law and an unreasonable application of the same. The state court decisions on this matter were also based on an unreasonable finding of fact. (In his reply, Johnston claims that his jury instruction claim is not procedurally barred.) (Doc. 25 at 13).

Exhaustion, Procedural Bar and Disposition of Ground Five in State Court

Next, the Petitioner argues that the trial court erred in failing to instruct the penalty phase jury, or find, the statutory mitigating circumstance of "extreme mental or emotional disturbance at the time of the offense." (Petition, Doc. 11 at 21-23; Memo, Doc. 18 at 57-59). This claim is procedurally barred. On direct appeal, Johnston argued that the trial court erred by failing to instruct the penalty phase jury on the mitigating factor of "extreme mental or emotional disturbance at the time of the offense." The Florida Supreme Court found that defense counsel abandoned this mental health mitigator during the penalty phase jury charge conference and acquiesced in the trial court's decision that the evidence did not support this mental health mitigator. The trial judge ultimately gave the jury instructions which addressed non-statutory mitigation and the statutory mitigator that "the defendant may have had impaired capacity to conform his conduct to the requirements of the law," but did not address the "extreme mental or emotional disturbance mitigator." *See Johnston*, 841 So. 2d at 358-59.

On direct appeal, the Florida Supreme Court denied this claim as follows:

> In his third claim of error, Johnston contends that the trial court committed reversible error by failing to instruct the penalty phase jury on the mitigating factor of "extreme mental or emotional disturbance at the time of the offense." **The record reveals that during the penalty phase jury charge conference, defense counsel abandoned this mitigator:**
>
> The Court: What are you going to ask for?
>
> Mr. Registrato: Mental health mitigators.
>
> The Court: The statutory mental health mitigators?
>
> Mr. Registrato: Yes, ma'am.
>
> The Court: Who are you planning to call to establish them?
>
> Mr. Registrato: Well, I-I mean, they may not have said the word,

but I believe they've already been established.

The Court: Which they?

Mr. Registrato: Dr. Maher and Dr. Krop.

The Court: No, no, which statutory mitigators do you believe have been established?

Mr. Registrato: I would ask for the mitigator 7(b), the capital felony was committed while the defendant was under the influence of extreme or mental emotional disturbance, as well as 7(g), the defendant could not have reasonably foreseen his conduct in the course of the commission of the offense would cause-wait a minute. That's not it, Judge. 7(e) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired.

The Court: Well, as to (b), the only evidence in this case that the crime was committed while the defendant was under the influence of mental or emotional disturbance is the testimony of Dr. Maher who said that at the time of the crime, he was in a mild dissociative-having a mild dissociative episode triggered by the initial approach and rejection by the victim. I don't know how you can get extreme mental or emotional disturbance out of that testimony. You can certainly argue the nonstatutory mental mitigator.

Mr. Registrato: Yes, ma'am.

The Court: But that's-unless you can point to some other testimony, that's the only testimony that I heard on that mitigator.

Mr. Registrato: All right, Judge. I would ask for 7(e) as well.

The Court: Well, I think it's (f), the capacity of the defendant to appreciate the criminality of his conduct or to conform his or her conduct to the requirements of the law was substantially impaired.

Mr. Registrato: Yes, ma'am.

Defense counsel never presented further arguments relative to what testimony supported the extreme mental disturbance mitigator but

> **instead acquiesced in the trial court's decision that the evidence did not support this mitigator. The trial judge eventually gave the jury instructions which addressed nonstatutory mitigation and the statutory mitigator that "the defendant may have had impaired capacity to conform his conduct to the requirements of the law," but did not address the extreme mental or emotional disturbance mitigator.**
>
> **Accordingly, we deny this claim.**
>
> *Johnston,* 841 So. 2d at 358-59 (e.s.)

CONCLUSION AS TO GROUND FIVE

Ground Five Is Procedurally Barred AND Has no Merit

This claim is procedurally barred. As the Florida Supreme Court found, defense counsel acquiesced in the trial court's decision that the evidence did not support this mitigator. *Johnston*, 841 So. 2d at 358-59. Furthermore, the trial judge eventually gave the jury instructions which addressed nonstatutory mitigation and the statutory mitigator that "the defendant may have had impaired capacity to conform his conduct to the requirements of the law." Johnston never argued the statutory mitigator involving extreme emotional or mental disturbance at the time of the murder to the trial court. Defense counsel filed a Motion to Override Jury's Recommendation with Attachments (Ex. A5/795-832), and a Supplement to Defendant's Motion to Override Jury's Death Recommendation (Ex. A5/844-847), both outlining the statutory and non-statutory mitigators urged on Johnston's behalf. Neither of these motions mentioned the statutory mitigator related to extreme mental or emotional disturbance at the time of the crime. Moreover, defense counsel never argued for consideration of this statutory mitigator in his opening or closing remarks in penalty phase (Ex. A16/1475-1481; A18/1779-1806), or his closing argument to the trial court at the *Spencer* hearing. (Ex. A21/2294-2319).

Because this claim is barred, this Court cannot consider the merits of the claim, absent a showing of cause and prejudice. *Coleman v. Thompson*, 501 U.S. 722, 11 S. Ct. 2546 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497 (1977). The burden is on Petitioner to make that showing. *United States v. Frady*, 456 U.S. 152, 102 S. Ct. 1584 (1982). Petitioner makes no attempt to address cause and prejudice to overcome the procedural bar. Furthermore, as the United States Supreme Court has recognized, a claim of ineffective assistance of counsel may itself be barred, and a petitioner must overcome the bar to the ineffective assistance claim independently. *Edwards v. Carpenter*, 529 U.S. 446, 450-53, 120 S. Ct. 1587 (2000).

Even if this claim were not procedurally barred, the claim has no merit.[4] No evidence supported the consideration of the "under extreme mental or emotional disturbance" statutory mitigator. Of the four mental health experts who testified on Johnston's behalf, at either the penalty proceedings or the *Spencer* hearing, no one testified that Johnston was acting under an "extreme mental or emotional disturbance" when he killed the victim.

During the penalty phase, the only expert who even mentioned Johnston's behavior at the time of the crime was Dr. Maher. Dr. Maher testified simply that, at the time of the murder, Johnston was "experiencing a mild dissociative episode. I don't think it was severe. I don't think it was to the point where he didn't know who he was or she was or what the likely

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[4] Because the court finds the substantive claim to be without merit, the petitioner cannot demonstrate the requisite prejudice under *Martinez* to entitle him to relief. Martinez v. Ryan, 132 S.Ct. 1309,1318(2012)("To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit."). *See Brown v. Thomas*, 2013 WL 5934658 (N.D. Ala., Nov. 5, 2013).

result of his actions would be." (Ex. A17/1608). This testimony actually negates any claim that Johnston was acting under an extreme mental or emotional disturbance.

Additionally, Johnston himself testified repeatedly during the penalty phase that he was fully aware of what he was doing at the time of the murder. (Ex. A18/1716, 1724). Johnston further explained that he killed Coryell simply because she did not respond to his hello. She never did or said anything aggressive or mean-spirited to him. (Ex. A18/1727-1728). Thus, no evidence was presented during the penalty phase supporting the statutory mitigator of extreme emotional disturbance at the time of the offense. In fact, the evidence was to the contrary.

Johnston asserts that, at the *Spencer* hearing, Dr. Krop testified that Johnston suffered from a serious emotional disorder at the time of the offense. (Petition, Doc. 11 at 21). However, this testimony concerning a serious emotional disorder at the time of the offense (Ex. A21/2273), simply does not rise to the level of the statutory mitigator of "extreme emotional or mental disturbance."[5] Defense counsel did not propose that this statutory mitigator be considered in his closing argument during the *Spencer* hearing. (Ex. A21/2294-2319). Moreover, whether a mitigator has been established is a question of fact. *See, Magwood v. Smith*, 791 F.2d 1438, 1450 (11th Cir. 1986). Here, the state court found four aggravating factors[6] and conscientiously reviewed all of the statutory and non-statutory

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[5] Even if Dr. Krop's testimony could be interpreted to support the extreme disturbance mitigator, it was well within the trial court's discretion to reject it in view of the defense expert Dr. Maher's contrary conclusion that Johnston suffered from a mild, not severe, dissociative episode at the time of the crime. (Ex. A17/1608).

[6] The aggravators found by the trial court and given great weight in this case include that Johnston was previously convicted of a felony involving the use or threat of violence to the person, Section 921.141(5)(b); that the capital felony was committed while Johnston

mitigators which were actually proposed by the defense. (Ex. A22/28-31).

Although the trial court found no evidence to support an instruction on the statutory mitigator of an "extreme mental or emotional disturbance" at the time of the offense, the trial court specifically told defense counsel that they could argue any relevant facts concerning Johnston's state of mind at the time of the offense as non-statutory mitigation. (Ex. A17/1671-1672). Subsequently, the sentencing order did address the non-statutory mitigation on this topic, giving no weight to the following mitigation:

> a. The time passing between the decision to cause the victim's death and the time of the killing itself was insufficient under the circumstances to allow Defendant's cool and thoughtful consideration of his conduct.
>
> * * *
>
> d. The Defendant did not plan to commit the offense in advance, and it was the act of a man out of control, and in an irrational frenzy.
>
> e. The Defendant has a long history of mental illness.
>
> f. As testified to by Dr. Michael Maher, the Defendant suffers from a disassociative disorder.
>
> * * *
>
> h. The murder was the result of impulsivity and irritability.
>
> (Ex. A22/29).

In sum, the only evidence arguably offered in support of the denied statutory mitigator was considered by the trial court as non-statutory mitigation. Given the strength of the four aggravators in comparison to any mitigation proposed, no error resulted from the sentencing

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was engaged in the commission of a sexual battery and a kidnapping, Section 921.141(5)(d); the capital felony was committed for pecuniary gain, Section 921.141(5)(f); and the capital felony was especially heinous, atrocious or cruel, Section 921.141(5)(h).

order's consideration of mitigating evidence.[7]

Petitioner's claim is procedurally barred; and to the extent Johnston continues to assert that his constitutional rights were violated because the trial court failed to find the statutory mitigator that the homicide was committed while he was under the influence of extreme mental or emotional disturbance, the claim is also without merit. "Trial court's findings on mitigating factors are presumed to be correct, *see, Magwood v. Smith*, 791 F.2d 1438, 1450 (11th Cir. 1986), and will be upheld if they are supported by the record. *See,* 28 U.S.C. § 2254(d)." *Atkins v. Singletary*, 965 F.2d 952, 962 (11th Cir. 1992). "Acceptance of nonstatutory mitigating factors is not constitutionally required; the Constitution only requires that the sentencer consider the factors." *Atkins*, 965 F.2d at 962) (citing *Blystone v. Pennsylvania*, 494 U.S. 299, 308, 110 S. Ct. 1078 (1990)). Johnston fails to allege or show that the trial court failed to consider the mitigation evidence. The Constitution does not require the sentencer to give effect to all mitigation presented. There is no constitutional violation if the defendant is allowed to present all relevant mitigating evidence, and the jury is given the opportunity to consider it and give it effect. *Penry v. Lynaugh*, 492 U.S. 302, 328, 109 S. Ct. 2934 (1989).

Johnston has not met his burden to show by clear and convincing evidence that the trial court's factual finding -- that there was no evidence supporting the statutory mitigating factor of extreme mental or emotional disturbance -- was an unreasonable determination of the facts. See 28 U.S.C. § 2254(e)(1); *Callahan v. Campbell*, 427 F.3d 897, 926 (11th Cir.

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[7] Furthermore, in postconviction, Johnston's additional evidence of psychological issues still related only to non-statutory mitigation. *Johnston*, 63 So. 3d at 742-743.

2005) ("Not only must the factual determination have been unreasonable, but the state court's factual findings must be shown unreasonable by clear and convincing evidence."). Petitioner has not demonstrated that the state court's determination was contrary to, or involved an unreasonable application of federal law, nor has he shown that the state court's denial of this claim resulted in an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Ground five does not warrant habeas corpus relief.

GROUND SIX

TRIAL COUNSEL WAS INEFFECTIVE AT BOTH THE GUILT AND PENALTY PHASE FOR FAILING TO CALL WITNESS DIANE BUSCH. THIS DEPRIVED MR. JOHNSTON OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE STATE COURT DECISIONS ON THIS ISSUE WERE CONTRARY TO FEDERAL LAW AND AN UNREASONABLE APPLICATION OF THE SAME. THE COURTS' DECISIONS WERE ALSO BASED ON AN UNREASONABLE FINDING OF FACT.

Petitioner's Allegations

Johnston argues that trial counsel was ineffective in failing to call Diane Busch as a witness during the guilt or penalty phase. (Petition, Doc. 11 at 23-27; Memo, Doc. 18 at 59). He claims that Busch, a crucial witness known to both the prosecution and the defense at trial, was an available witness who could have been called by the defense in both the guilt and penalty phases of trial. Busch refuted the State's alleged financial motive in this case. Through her evidentiary hearing testimony, she refuted the notion that Johnston was in desperate need of money at the time of Coryell's murder, and Busch provided powerful mitigation as she described her hospitalization, her subsequent medical care, and how Johnston saved her life. Busch credits Johnston's caring for her while she was hospitalized,

and credits him for actually saving her life. (See her EH testimony at Vol. LX PCR 1557.)

In a first degree murder case where the victim was murdered and money taken from her bank account, evidence that the accused had the opportunity to steal $10,000 from another woman shortly before the murder, yet did not, is very compelling. It refutes the notion that the Petitioner would have killed a woman to obtain $500 from an ATM machine when a month earlier he had $10,000 cash in front of him. In a death penalty case where a young woman was beaten and strangled, there can perhaps be no more powerful mitigation than a witness like Busch who testified in postconviction that the defendant actually saved her life while she was in critical care. Busch was known at the time of trial, and she was available at the time of trial to testify. Johnston actually asked his attorneys to interview her, yet they failed to do so.

Busch testified at the evidentiary hearing that she met Johnston at church in approximately June 1997. (Vol. LX PCR. 1534). She described their dates, how he treated her like a lady, how he was a gentleman, how polite he was, and how he never appeared to be in financial trouble. (Vol. LX PCR 1535-1536). Such testimony refutes the notion that Johnston was desperate for money in 1997, and it shows that he was a caring individual.

Busch was hospitalized for four months with a severe respiratory problem; Busch reflected on how Johnston cared for her. (Vol. LX PCR. 1549). At the evidentiary hearing, she explained in detail how she gave Johnston access to $10,000 in cash for temporary counting, safe keeping and transition to a female friend's bank account, and how he never took the cash for his own use. He also had access to her vehicle and credit cards, and he never stole from her. (Vol. LX PCR. 1553-1556). The above testimony would have created reasonable doubt in the guilt phase and caused the jury to acquit Johnston. The failure to call

a witness can constitute ineffective assistance of counsel if the witness may have been able to cast doubt on the defendant's guilt.

In the unlikely event that Johnston would have been convicted even with Busch's testimony, the jury would have recommended life over death at the penalty phase because Busch stated that she felt that Petitioner had saved her life. (Vol. LX PCR. 1557). Busch credits Johnston with saving her life because he helped her get the medical attention she needed while she was in critical condition at the hospital, her vital organs were shutting down, and she was being ignored by hospital staff. (Vol. LX PCR. 1557). Without Johnston's help, she feels she would have died.

As far as penalty phase testimony and valuable non-statutory mitigation, Busch's testimony "does not get much more powerful than the above testimony." Trial counsel was ineffective for failing to present Busch's testimony to the jury. Busch testified, at the evidentiary hearing, that no one from the public defender's office ever contacted her, and that she would have been willing to testify for Johnston. (Vol. LX PCR. 559). Trial counsel was ineffective and Johnston's sentence of death should be vacated because there is a reasonable probability that the jurors and or the court could have been persuaded to spare Johnston's life in light of Busch's compelling testimony.

No one from the defense team claimed to have interviewed Busch. No one from the defense team claimed to have strategically decided that she was not a good witness. The failure to call Busch at trial was not a strategic choice; "it was an omission, a big mistake, a huge oversight." There is documented evidence that the public defender's office was aware of Busch, and that Johnston described his relationship with her. (See EH exhibit 13, attorney Deborah Goins' jail interview notes at Vol. XXIX PCR 5434; *see* Johnston's notes to trial

counsel admitted at the evidentiary hearing as EH exhibit 14; specifically, *see* Vol. XXIX PCR. 5439-5440, wherein Johnston actually urged his attorneys to speak with Busch alone, and how he saved her life three times, *and see* Johnston's testimony cited in the postconviction court's order at Vol. XVI PCR 3161.)

An interview of Busch would have provided a wealth of information vital to both guilt and penalty phase issues. Busch's testimony refutes the State's theory that Johnston was in financial shambles near the time of the Coryell murder, refutes the notion that the motive for this murder might be money, and as an added bonus, her testimony includes powerful mitigating evidence that Johnston saved her life. Johnston even provided his trial team with Busch's telephone number. (See Vol. XXIX PCR. 5439.) Busch should have been contacted; she should have been interviewed; and she should have testified at trial.

In a case where the State is seeking the death penalty, it is important for defense attorneys to investigate, appreciate, and present this type of testimony and vital evidence at the penalty phase. This omission and error at the penalty phase was not harmless. The decision not to interview Busch and present her testimony at both phases of Johnston's trial did not reflect reasonable professional judgment. The state court decisions on this issue were contrary to federal law and an unreasonable application of the same. The courts' decisions were also based on an unreasonable finding of fact.

Exhaustion and Disposition of Ground Six in State Court:

Johnston raised this IAC sub-claim in his postconviction motion to vacate. With regard to the guilt phase, Johnston asserted that Busch refuted the alleged financial motive in this case. Years after the penalty phase, Busch credited Johnston with saving her life in 1997 because he helped get her needed medical attention in the hospital. During the summer of

1997, the same summer that Busch was hospitalized, Johnston murdered Coryell.[8]

The trial court held an evidentiary hearing and entered a fact-specific order denying postconviction relief. In denying this IAC sub-claim, the trial court's order (Ex. B16/3156-3170) states, in pertinent part:

* * *

> When asked if she requested a favor of him involving cash, [Ms. Busch] responded as follows:
>
> > BUSCH: It was possibly the second day I was in the hospital. I know I was still on Dale Mabry University Community Hospital. I had been estranged from my husband for approximately a year-and-a-half and had some cash in the house. I asked Mr. Johnston if he would go and get that with my girlfriend. And - - and they counted it out. And I asked him if he would give that to her and she would deposit it into her bank account and that was carried out.
>
> (See February 1, 2008, transcript, pps. 982-983, attached). She further testified she trusted Defendant to carry out that request. (See February 1, 2008, transcript, p. 984, attached).
>
> Additionally, she testified while she was in the hospital, Defendant had access to her personal effects, her car, and her credit cards, but Defendant did not ever steal anything from her or ask to borrow any of the ten thousand dollars cash. (See February 1, 2008, transcript, pps. 984-985, attached). She testified although she was available in June of 1999 to testify and would have testified, during the years 1997 through 1999, nobody contacted her to testify. (See February 1, 2008, transcript, pps. 986-988, attached).
>
> **On cross-examination, she admitted that although she asked him to go with her girlfriend to get the ten thousand dollars cash, Defendant never had use or possession of that money, other than counting it.** (See February 1, 2008, transcript, p. 995, attached). She further admitted she had no reason to believe Defendant had access to the ten thousand dollars while

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[8] The murder victim, Leanne Coryell, was described as a thirty-year-old, physically fit, blond-haired, attractive woman. *Johnston*, 863 So. 2d 271, 277 (Fla. 2003). At the post-conviction evidentiary hearing, Ms. Busch confirmed that she also was blonde, tan, 5'6" tall and weighed approximately 135 pounds. (Ex. B60/1559-1560).

it was in her girlfriend's account. (See February 1, 2008, transcript, p. 996, attached). However, she testified that Defendant had access to her home and he could have stayed there if he wanted to and used her credit cards that were in her purse, but he did not. (See February 1, 2008, transcript, p. 996, attached).

On March 7, 2008, Mr. Joseph Registrato testified he recognized Detective Taylor's summary of interviews of Diane Busch and her mother Ms. Klug as one of the many investigative reports that was in the Public Defender's Office possession during the pretrial discovery phases. (See March 7, 2008, transcript, pps. 1159-1160, attached). Detective Taylor's report was admitted into evidence as State's exhibit #28. (See March 7, 2008, transcript, p. 1160, State's exhibit #28, attached). He further testified he did not have any specific recollection from the time of trial and preparing for trial of any discussion with Mr. Littman and the trial team regarding Ms. Busch and trusting Defendant with ten thousand dollars, nor did he have any specific recollection of any discussion with Mr. Littman and the trial team regarding whether or not to call Ms. Busch either at guilt phase or penalty phase. (See March 7, 2008, transcript, pps. 1180-1181, attached).

* * *

On cross-examination, Defendant testified he physically took the ten thousand dollars, counted it out on the bed, put it in a bank deposit envelope, and physically gave it to Trena. (See March 7, 2008, transcript, p. 1220, attached). However, he admitted that at the time of Ms. Coryell's murder, he did not have access to the ten thousand dollars because it remained in Mr. Busch's neighbor's account. (See March 7, 2008, transcript, pps. 1221-1222, attached). Defendant also confirmed the fact that the Sheriff's Office honored the fact that he had been appointed counsel and did not send a detective to interview him about Ms. Busch or any other matter relating to the Coryell homicide. (See March 7, 2008, transcript, p. 1231, attached).

After reviewing this portion of claim 9.2c, the testimony, evidence, and argument presented at the January 28, 2008, January 29, 2008, January 30, 2008, January 31, 2008, February 1, 2008, March 6, 2008, and March 7, 2008, evidentiary hearings, the written closing arguments, the notice of supplemental authority, the applicable law, the court file, and the record, **the Court finds Mr. Registrato's testimony to be more credible than that of Defendant. Therefore, the Court finds Defendant did not request that Mr. Registrato interview and call Ms. Busch to testify regarding the ten thousand dollars she entrusted with Defendant. However, even if were to find that Defendant did ask his counsel to interview and call Ms. Busch to testify**

during the guilt phase about the ten thousand dollars, the Court finds by Ms. Busch's own admission, other than for the purpose of counting the ten thousand dollars, Defendant never had use or possession of the money, nor did she have any reason to believe Defendant had access to it while it was in her girlfriend's account. The Court further finds by Defendant's own admission, he did not have access to the ten thousand dollars at the time of Ms. Coryell's murder because it remained in Ms. Busch's girlfriend's account.

Because Defendant did not have access to the ten thousand dollars at the time of Ms. Coryell's murder, the Court finds Ms. Busch's testimony would not have refuted the State's theory that Defendant murdered Ms. Coryell for pecuniary gain. Consequently, Defendant failed to demonstrate how counsel's alleged deficient conduct resulted in prejudice as Ms. Busch's testimony would not have changed the verdict. As such, no relief is warranted upon this portion of claim 9.2c.

Defendant further alleges Ms. Busch could have testified during the penalty phase in support of nonstatutory mitigation. At the evidentiary hearing, Hillsborough County Sheriff's Office Detective Caritad Taylor testified on August 26, 1997, she interviewed Diane Busch at University Community Hospital. (See March 6, 2008, transcript, pps. 1125-1126, attached). When asked to testify to everything Ms. Busch told her, she responded as follows:

> TAYLOR: During my interview with Ms. Busch, she did indicate that she had had a short term relationship with Mr. Johnston. And she told me that she had suffered a medical problem, during the course she was hospitalized. She also said that during that hospitalization originally she was under a lot of medication. **But as time went on, there were other issues that came up with Mr. Johnston's visits to her and that she requested that he not be permitted to enter her ICU room any longer. The nurses carried out her request.**

(See March 6, 2008, transcript, p. 1126, attached). When asked to read off her report, she responded:

> **TAYLOR: She stated that it wasn't until she was transferred to UCH, Fletcher and her family was with her that she realized how possessive and obsessed Johnston had been behaving towards her. She learned that he was telling everyone he was her fiancé when, in fact, they had only - - she had only known him for two weeks. She said that he**

> **was verbally abusive to her family and the nurses, but because of the medication she was under, she was not able to do a whole lot. She said that when she finally realized how out of control things were getting, she requested that Johnston not be permitted to enter her ICU room any longer. And this request was carried out by the nurses who were caring for her in ICU. She also requested they not accept any phone calls from him.**

(See March 6, 2008, transcript, p. 1127, attached).

On cross-examination, she testified she went to the hospital in response to a directive to respond to leads provided to the Hillsborough County Sheriff's Office. (See March 6, 2008, transcript, pps. 1128-1129, attached). **She testified Ms. Busch was not heavily medicated or sedated when she interviewed her as she was very clear in her conversation with her.** (See March 6. 2008, transcript, pps. 1129 and 1132, attached). She further testified that she interviewed Ms. Busch's mother and sister. (See March 6, 2008, transcript, p. 1129, attached). When asked what the mother and sister said, she responded as follows:

> TAYLOR: That she [Ms. Busch's mother] was saying that her - - I mean, I'd have to read from here to recollect what was said. She was staying at her daughter's house while she was in the hospital. She spoke up when she was originally hospitalized, she came to the hospital and met Johnston for the first time. She was upset over his behavior, his language and his treatment of Diane and the nurses.
>
> She said he used Diane's car the entire time that he was permitted to visit her in ICU. He left his car at Diane's house. She said that she looked inside the car because Johnston had advised that there was a tag that could be used - - to be used in the vehicle in case they needed it. **She looked at the vehicle but could not find the bag, instead she found a paper bag in the back seat, back passenger side which contained a pair of surgical gloves, an elastic wristband and a knife similar to a paring knife with an approximate two-inch pointed blade. She said that she also found a Barnett Bank checking account receipt that indicated that he had $24 in his account.**
>
> **She became concerned over the items that she found in the back seat and contacted the Sheriff's Office to file a report**

> **and had property impounded,** and then that number attached to my supplement indicating that she did call back in June. She said that the deputy that responded advised no crime has been committed; therefore, the call was cleared NRA, which is no report written.
>
> **She said that her other daughter, Susie Reed came in town and had demanded - - had commanded Johnston return Diane's car.** There's been no further information.

(See March 6, 2008, transcript, pps. 1130-1 131, attached). However, she testified she never spoke with Joseph Registrato, Kenneth Littman, or any investigators from the Public Defender's Office. (See March 6, 2008, transcript, pps. 1131-1132, attached). She further testified she was never deposed in Defendant's case. (See March 6, 2008, transcript, p. 1132, attached). When asked if Ms. Busch could have been medicated but she just might not have known, she responded, "I make it a point to ask the nurses if she is under medication that would prohibit her from giving a statement and/or she would not want me to talk to her. That's one of the first things I do is make sure that the person is able to communicate with me." (See March 6, 2008, transcript, p. 1133, attached).

At the February 1, 2008, evidentiary hearing, Ms. Busch testified that when she was ill, Defendant managed all of her medical care, was caring, loving, and wanted the best possible care for a successful recovery. (See February 1, 2008, transcript, p. 978, attached). When asked why he advised the hospital staff that he was her fiancé, she responded, "When I was wheeled into the emergency room and had come to, Ray had bent down and whispered to me that he had told everybody that he was my fiancé so he could be back in the back in the emergency room to be with me because they would only allow family back there." (See February 1, 2008, transcript, p. 978, attached). **She testified she first became aware Defendant was in trouble when while she was in intensive care unit at the hospital, she saw something on the television which indicated law enforcement was looking for him.** (See February 1, 2008, transcript, p. 979, attached).

She then testified that she called the Crimestoppers number and a detective called her back. (See February 1, 2008, transcript, p. 979, attached). However, she testified that she did not recall telling anyone at the hospital that Defendant was verbally abusive to her family, nor did she ever hear Defendant being verbally abusive to her family. (See February 1, 2008. transcript, p. 981-982, attached). She further testified she did not recall telling anyone that she requested that Defendant not be permitted in the intensive care unit anymore or that she stopped taking his calls. (See February 1, 2008, transcript, p. 982,

attached).

When asked if she ever attempted to contact Defendant after she recovered from her illness and resumed her life, she responded in the affirmative and further elaborated, **"Approximately two to two-and-a-half years ago, I wrote him a letter. I wanted to express my gratitude for everything that he had done in my life as far as the medical problems that I had. I felt that he had saved my life and I wanted to express that for myself as well as my children."** (See February 1, 2008, transcript, pps. 985-986, attached). When asked why she felt Defendant was responsible for saving her life, she responded as follows:

> BUSCH: Because nobody in the hospital would listen to the pain I was in. Nobody was doing anything, by the minute I was failing. And Mr. Johnston was very, very concerned and protective and listened to everything that I said, and **he was the only one that shook people up and gave attention to my needs.** And my needs were the fact my organs were shutting down and he got me to another hospital and orchestrated the doctors to coordinate what is going on, and just complete management. Without him, I would have died that fourth day.

(See February 1, 2008, transcript, p. 986, attached).

However, **she testified if she knew about Defendant's prior convictions and his incarceration in Florida State Prison, she would not have carried on a relationship.** (See February 1, 2008, transcript, pps. 989-990, attached). **She further testified he did not tell her that he was a convicted felon.** (See February 1, 2008, transcript, p. 990, attached). **She testified her family cut off all her contact with Defendant in June of 1997, while she was in the hospital because they had heard things about his past and did not feel they wanted him around her.** (See February 1, 2008, transcript, pps. 996-997, attached). She testified her family then retrieved her purse and personal belongings from Defendant. (See February 1, 2008, transcript, pps. 997-998, attached). However, **she testified she never went out with Defendant socially again.** (See February 1, 2008, transcript, pps. 998-999, attached).

When confronted with her deposition testimony about her sexual encounter with Defendant, she repeatedly stated she did not recall her testimony of said issue. (See February; 1, 2008, transcript, pps. 1018-1019, attached). However, she testified that she could not recall any instance when Defendant frightened her in any manner or mistreated her in any way. (See February 1, 2008, transcript, p. 1019, attached). When asked having known

Defendant was facing murder charges, if she ever contacted anyone about helping Defendant, she responded as follows:

> BUSCH: I believe if I was in a healthy normal state, I would have felt that way. My estranged husband served divorce papers on me when I was in ICU. I was not in a state of mind of doing anything other than trying to get well, and all of a sudden dealing with a divorce. I've gone through a tremendous amount of stress and started feeling the pressure lift off a couple years ago. And basically started seeing through the clouds. And that's when I was feeling like I wanted to do something.

(See February 1, 2008, transcript, p. 1020, attached).

When asked to read his notes with regards to Ms. Busch, Defendant responded as follows:

> JOHNSTON: I put page 27, Diane Bush. A lot of history here, needs to be interviewed by herself with no one else in the room. I stayed with her for 15 days and nights. Saved her life three times. I'm the one who called EMS the three times and call them, 911. So records will show this. I was very protective of her but not to the point to where I was rude to others. The deposition I gave for her divorce will more clearly explain the role I played in her life. Need to talk to her dad and not to her mother. He will tell you more truthfully. She had female problems and I felt it was more appropriate to have a female nurse take care of her.

(See March 7, 2008, transcript, pps. 1218-1219, attached).

However, Mr. Registrato testified he did not recall Defendant ever speaking to him about her in the context of a witness he wanted called in the penalty phase and does not recall meeting or talking to her himself. (See March 7, 2008, transcript, pps. 1160-1161, attached). Moreover, he testified he was sure he had Detective Taylor's report at the time of preparation for penalty phase, but does not recall Defendant ever raising her as a possible mitigation witness. (See March 7, 2008, transcript, pps. 1161-1162, attached). When asked if Ms. Busch had been called to the stand, with the information he had available to him at the time, would her testimony have come with some degree of risk to your mitigation of the case, he responded as follows:

> REGISTRATO: **The testimony from this woman would have been bad, as far as I'm concerned, very bad, based on what's in this report.** I wouldn't have called her. If Ray would have raised her as, you need to talk to this woman, she's a good

> witness, we would have done it. **We talked to dozens of people, but Ray, to my recollection Ray did not raise her as a friendly witness.**

(See March 7, 2008, transcript, p. 1168, attached).

On cross-examination, Mr. Registrato admitted that at the time of preparing for trial, he was not aware of information from Ms. Busch that she felt that Defendant had saved her life. (See March 7, 2008, transcript, p. 1177, attached). He admitted they sent investigators out to talk to everybody and if she was out there, they would have sent somebody to talk to her. (See March 7, 2008, transcript, p. 1179, attached). However, he testified Ms. Busch never talked to him and never said to him that Defendant did anything for her. (See March 7, 2008, transcript, pps. 1179-1180, attached). He further testified he did not know if an investigator from the Public Defender's Office talked with Ms. Busch, and did not have any specific recollection of specifically requesting an investigator to go out and speak with Ms. Busch. (See March 7, 2008, transcript, p. 1179, attached). He further testified he did not do any weighing of the pros and cons of prospective testimony from Ms. Busch because he did not know there was any Ms. Busch that would have helped them. (See March 7, 2008, transcript, p. 1180, attached).

After reviewing this portion of claim 9.2c, the testimony, evidence, and argument presented at the January 28, 2008, January 29, 2008, January 30, 2008, January 31, 2008, February 1, 2008, March 6, 2008, and March 7, 2008, evidentiary hearings, the written closing arguments, the notice of supplemental authority, the applicable law, the court file, and the record, **the Court finds Mr. Registrato's testimony to be more credible than that of Defendant. Therefore, the Court finds Defendant did not request that Mr. Registrato interview and call Ms. Busch to testify as a nonstatutory mitigation witness during the penalty phase. Moreover, the Court finds, by Ms. Busch's own admission, she never contacted anyone about testifying on Defendant's behalf. Consequently, Defendant failed to demonstrate how counsel acted deficiently in failing to call Ms. Busch when Defendant did not make such a request.**

Moreover, the Court finds based on the contents of Detective Taylor's report regarding Ms. Busch's statements, Ms. Busch would not have been a good nonstatutory mitigation witness for the defense as the introduction of such testimony would have allowed the State to call Ms. Busch's mother and Ms. Busch's sister and the jury would have heard how the family had to intervene because he was being overprotective of Ms. Busch. Therefore, after reviewing the testimony, evidence, and argument presented at the penalty phase hearing, as well as the testimony presented at

> the evidentiary hearings, the Court finds **Defendant failed to demonstrate how counsel's failure to call Ms. Busch during the penalty phase would have resulted in the jury choosing life over death. As such, no relief is warranted upon this portion of claim 9.2c.**
>
> (Ex. B16/3156-3170) (e.s.)

On post-conviction appeal, the Florida Supreme Court determined that the decision to not use Johnston's friend [Diane Busch] as a witness at trial was clearly within "the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690, 104 S. Ct. 2052. Moreover, given the slight value of her proffered testimony and the likelihood that it would have opened the door to the prosecution's highly damaging cross-examination and impeachment evidence also presented to the postconviction court, trial counsel's decision was reasonable." *Johnston*, 63 So. 3d at 740-41. On postconviction appeal, the Florida Supreme Court stated, in pertinent part:

> **E. Failure to call Diane Busch as a witness**
>
> Johnston claims that counsel was ineffective for failing to investigate and call Diane Busch as a witness. We disagree.
>
> Johnston proffered the testimony of his friend, Diane Busch, at the postconviction evidentiary hearing. She testified that in the months prior to the murder, Johnston paid for several social outings and did not appear to be in need of money. **She also testified that when she was hospitalized for an illness, Johnston saved her life by being concerned for her and listening to her. However, Busch also testified that while she was still in recovery at the hospital, she saw something on television indicating law enforcement was looking for Johnston and reported him to the police. At the postconviction evidentiary hearing, her statement to the police was introduced to show that she found Johnston to be "possessive and obsessed" and verbally abusive to her family and hospital staff during her hospital stay. She told police that once she realized how Johnston was acting, she requested that he be kept from visiting her.**
>
> This Court has "consistently held that a trial counsel's decision to not call certain witnesses to testify at trial can be reasonable trial strategy." *Everett*

v. State, 54 So. 3d 464, 474 (Fla. 2010); *see also Hertz v. State*, 941 So. 2d 1031, 1039 (Fla. 2006) (holding counsel not ineffective for failing to call a witness at the penalty phase when counsel decided that he "was not a good witness and not that helpful" during the guilt phase). "[I]t is reasonable for trial counsel to forego evidence that, if presented in mitigation, could damage a defendant's chances with the jury." *Nelson v. State,* 43 So. 3d 20, 32 (Fla. 2010); *see also Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004) ("An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword.").

The decision to not use Johnston's friend as a witness at trial was clearly within "the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S.Ct. 2052. Given the slight value of her proffered testimony and the likelihood that it would have opened the door to the prosecution's highly damaging cross-examination and impeachment evidence also presented to the postconviction court, trial counsel's decision was reasonable. *See Gaskin v. State*, 822 So. 2d 1243, 1248 (Fla. 2002) ("Trial counsel will not be held to be deficient when she makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony.").

Accordingly, we affirm denial of this claim.

Johnston, 63 So. 3d at 740-41(e.s.).

CONCLUSION AS TO GROUND SIX

Ground Six Has no Merit

Petitioner has not demonstrated that the state court's determination was contrary to, or involved an unreasonable application of federal law, nor has he shown that the state court's denial of this claim resulted in an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Once again, as amended by the AEDPA, § 2254 sets several limits on a federal court's power to grant habeas relief to a state prisoner. This "difficult to meet," *Harrington v. Richter*, 562 U.S. ——, ——, 131 S. Ct. 770, and "'highly deferential standard' . . . demands that state-court decisions be given the benefit of the doubt," *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S. Ct. 357. Under the AEDPA,

Johnston must do more than convince a federal court that he can satisfy the *Strickland* standard. See 28 U.S.C. § 2254(d). Rather, Petitioner must show that the state court's decision to deny relief on his IAC claim was an objectively unreasonable application of the *Strickland* standard. *See, Schriro*, 550 U.S. at 473, 127 S. Ct. at 1939. As the Eleventh Circuit reiterated in *Allen v. Secretary, Florida Dept. of Corrections*, 611 F.3d 740, 751 (11th Cir. 2010):

> . . . **Because the Florida courts have already rejected his ineffective assistance claims, Allen must show that their decision to deny relief on these claims was an objectively unreasonable application of the Strickland standard. *See Schriro*, 550 U.S. at 473, 127 S.Ct. at 1939** ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable - a substantially higher threshold."); *Bell v. Cone*, 535 U.S. 685, 699, 122 S.Ct. 1843, 1852, 152 L.Ed.2d 914 (2002); Rutherford v. Crosby, 385 F.3d 1300, 1309 (11th Cir.2004) ("[T]he AEDPA adds another layer of deference .... [The petitioner] must also show that in rejecting his ineffective assistance of counsel claim the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner." (internal quotation marks and citation omitted)); *see also Hammond*, 586 F.3d at 1324.

The state courts' rejection of Johnston's IAC claim was not contrary to, or an unreasonable application of *Strickland. Williams*, 529 U.S. at 411, 120 S. Ct. at 1522. As to the IAC guilt phase claim, the trial court found that because the defendant did not have access to Busch's ten thousand dollars at the time of Coryell's murder, Busch's testimony would not have refuted the State's theory that Defendant murdered Coryell for pecuniary gain. Consequently, Johnston failed to demonstrate how counsel's alleged deficient conduct resulted in prejudice as Ms. Busch's testimony would not have changed the verdict. As to the penalty phase, the trial court found that the defendant failed to demonstrate any deficiency and, based on the contents of Detective Taylor's report regarding Busch's statements, Busch would not have been a good non-statutory mitigation witness for the defense as the

introduction of her testimony would have allowed the State to call Busch's mother and Busch's sister in rebuttal.

The Florida Supreme Court found that the decision not to use Johnston's friend, Busch, as a witness at trial was clearly within "the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690, 104 S. Ct. 2052. "[G]iven the slight value of her proffered testimony and the likelihood that it would have opened the door to the prosecution's highly damaging cross-examination and impeachment evidence also presented to the postconviction court, trial counsel's decision was reasonable."[9]

Johnston was afforded an evidentiary hearing in state court and he failed to establish deficient performance and resulting prejudice under *Strickland*. With respect to the IAC penalty phase claim, to determine "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that" death was not warranted, *Strickland*, at 695, 104 S. Ct. 2052, the aggravating evidence is reweighed "against the totality of available mitigating evidence," *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527.

In this case, the State presented extensive aggravating evidence at both the guilt and penalty phases. The mitigating evidence presented at the penalty phase included Johnston himself, as well as testimony from family members, lay witnesses and expert witnesses. After considering the evidence, the jury returned a recommended sentence of death, by a vote of 12-0, and the trial court imposed the death sentence, which was affirmed on direct appeal.

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[9] In his reply, Johnson alleges: "Contrary to the State's assertions, it would not have opened the door to permit the State to present the testimony of Busch's mother and sister. This case was a 12-0 recommendation for death. It could not have gotten any worse for Mr. Johnston." This Court cannot determine how the second sentence is related to the first sentence.

There is no reasonable probability that the postconviction testimony from Busch would have changed the verdict or sentence. The "new" evidence is of questionable mitigating value and would have opened the door to rebuttal by the State. Given what little additional "mitigating" evidence Busch could offer, it cannot be said that the state court's determination was unreasonable. *See, Cullen v. Pinholster*, 131 S. Ct. 1388, 1410 (2011) (addressing opening the door to rebuttal), *citing Wong v. Belmontes*, 558 U.S. ——, ——, 130 S. Ct. 383, 389–90 (2009) (per curiam) (taking into account that certain mitigating evidence would have exposed the petitioner to further aggravating evidence); *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S. Ct. 2242 (2002) (recognizing that mitigating evidence can be a "two-edged sword").

Petitioner has not demonstrated that the state court's determination was contrary to, or involved an unreasonable application of federal law, nor has he shown that the state court's denial of this claim resulted in an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Ground six does not warrant habeas corpus relief.

GROUND SEVEN

TRIAL COUNSEL WAS INEFFECTIVE AT BOTH THE GUILT AND PENALTY PHASE FOR FAILING TO INFORM THE JURY OF THE PETITIONER'S PRESCRIBED PSYCHOTROPIC MEDICATION. THIS DEPRIVED MR. JOHNSTON OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE STATE COURT DECISIONS ON THIS ISSUE WERE CONTRARY TO FEDERAL LAW AND AN UNREASONABLE APPLICATION OF THE SAME. THE COURTS' DECISIONS WERE ALSO BASED ON AN UNREASONABLE FINDING OF FACT.

Petitioner's Allegations

Trial counsel was ineffective for failing to inform the jury that the Petitioner was using

prescribed psychotropic medications at the time of his trial. Clinical and forensic Pharmacologist Dr. James O'Donnell reviewed the inmate medication dispersing logs from the Hillsborough County Jail and testified that Johnston was given high doses of psychotropic medication three times daily. This went on for more than two years while Johnston awaited trial.

O'Donnell testified at the evidentiary hearing that Johnston was impaired at the time of trial due to the medications he was ingesting. (Vol. LV PCR 989-990). O'Donnell described in detail the specific side effects of the psychotropic medications Johnston was taking at the time of trial (Vol. LV PCR. 986-989).

At the very least, Johnston should have had a competency evaluation performed prior to his testimony. Regarding Johnston testifying and the medication issues, trial attorney Gerod Hopper testified that no attorney on the defense team advised against Johnston testifying at the penalty phase, and Hooper was not made aware that Johnston was taking psychotropic medications when he provided advice to the team. The jury should have been informed that Johnston was taking psychotropic medications from the time he was arrested through his penalty phase testimony. Johnston argues that trial counsel was ineffective at the guilt and penalty phase in failing to inform the jury of Johnston's prescribed psychotropic medications. (Petition, Doc. 11 at 27-30; Memo, Doc. 18 at 59).

Exhaustion and Disposition of Ground Seven in State Court:

Johnston raised this IAC sub-claim in his state postconviction motion. The trial court denied relief on this IAC claim after an evidentiary hearing, and found, among other things, that Johnston's demeanor was not impacted by the psychotropic medication and trial counsel did not act deficiently in failing to request that the jury be instructed that the defendant was

on psychotropic medication. The trial court's postconviction order states, in pertinent part:

> . . . When asked if the trial team considered advising the jury that Defendant was taking psychotropic medication, Mr. Littman responded as follows:
>
> > LITTMAN: No. I understand what you're saying. I'm still not sure that that would be relevant. I mean, we wanted the jury to believe that what he was saying was the truth and was sincere, that he was basically fessing up. I'll put it that way. But there were reasons why they should spare his life. And of course that tied in with the frontal lobe information which Mr. Registrato did present, that there was a mental impairment in this gentleman, which was not in any way his own fault.
>
> (See January 31, 2008, transcript, pps. 880-881, attached).

Mr. Littman testified he had several face-to-face conversations with Defendant in the months between his arrest and trial. (See January 31, 2008, transcript, p. 895, attached). **He further testified he came to know him as a person, became familiar with his demeanor, personality, and intellect, and discussed various legal procedures and legal principles with Defendant which applied to his case.** (See January 31, 2008, transcript, pps. 895-896, attached). **He testified Defendant appeared to indicate an understanding of the evidence against him, including taking issue with certain items and requesting that the investigators follow up on several witnesses.** (See January 31, 2008, transcript, p. 896, attached).

Additionally, he testified that following his arrest and up until the penalty phase recommendation, Defendant never expressed to him, nor did he detect, that Defendant was confused or experiencing mental confusion resulting from his consumption of prescribed medications. (See January 31, 2008, transcript, pps. 896-897. attached). **He further testified Defendant did not express any difficulty in concentrating, did not express that he was in a fog, and did not indicate he was almost unable to get out of his jail cell.** (See January 31, 2008, transcript, pps. 897-898, attached). He testified he was aware Defendant suffered from a seizure disorder and was taking seizure medication, but stated Defendant did not advise him that he was suffering any side effects of any type from the medication he was taking. (See January 31, 2008, transcript, pps. 898-899, attached). He admitted that it was his ongoing responsibility to raise Defendant's incompetency as an issue if he had a good faith basis to do so, but reiterated that he had no reason to, so he did not. (See January 31, 2008, transcript, pps. 899, attached).

Mr. Littman testified Defendant was very attentive, participated, conversed with him, and took notes during the guilt phase of the trial. (See January 31, 2008, transcript, p. 918, attached). **He testified he did not want to inform the jury via an instruction that Defendant was on anti-seizure medication during the guilty phase because "it could suggest to the jury that perhaps this gentleman has seizures and acts violently. Of course he's charged with a violent crime."** (See January 31, 2008, transcript, p. 918, attached).

After reviewing claim 9.2f, the testimony, evidence, and argument presented at the January 28, 2008, January 29, 2008, January 30, 2008, January 31, 2008, February 1, 2008, March 6, 2008, and March 7, 2008, evidentiary hearings, the written closing arguments, the notice of supplemental authority, the applicable law, the court file, and the record, the Court finds by Dr. Cunningham's own admission, he could not testify within a reasonable degree of medical probability that the medication caused Defendant to exert bad judgment in his decision to testify. The Court further finds based on Dr. Cunningham's testimony, the medications may have a blunting affect on Defendant's judgments. **However, Dr. Cunningham acknowledged that although some of Defendant's penalty phase testimony sounded glib, because Dr. Cunningham was not present to observe Defendant at the time he testified, he does not know for a fact whether or not Defendant testified with a blunted or calloused demeanor.**

Moreover, the Court finds although Dr. O'Donnell opined Defendant was impaired at the time of the trial and sentencing hearing, he could not express his opinion with a reasonable degree of pharmacological certainty whether or not Defendant was impaired from the ingestion of these drugs at any time before trial because he did not probe that. The Court finds Dr. O'Donnell further admitted that a finding of impairment from the ingestion of psychotropic medication doesn't necessarily mean that an individual is legally incompetent to proceed at a phase of trial.

Additionally, the Court finds Dr. Maher, who examined Defendant between the guilt and penalty phases, to be a very credible witness. Therefore, the Court finds based on his testimony, Defendant was not suffering from any clinical impairment, had no flat affect, and did not express to Dr. Maher that he was confused or feeling the effects of overmedication from drugs. The Court further finds Defendant did not give Dr. Maher any reason to question Defendant's competency. The Court also finds, based on Mr. Registrato's testimony, Defendant participated in conversations with Defendant throughout the guilt and penalty phases, was alert, well-spoken, articulate, smart, and never complained to him or anyone else in his presence that he was in a fog or

having problems concentrating as a result of his medication or any other cause.

Furthermore, the Court finds through his representation of Defendant, Mr. Littman became familiar with Defendant's demeanor, personality, and intellect, and Defendant never expressed to him, nor did he detect, that Defendant was confused or experiencing mental confusion resulting from his consumption of prescribed medications. The Court further finds Defendant never expressed to Mr. Littman any difficulty in concentrating, did not express that he was in a fog, and did not indicate he was almost unable to get out of his jail cell, nor did Defendant advise him that he was suffering any side effects of any type from the medication he was taking. The Court also finds based on Mr. Littman's testimony, Defendant was very attentive, participated, conversed with him, and took notes during the guilt phase of the trial.

Therefore, after reviewing the Hillsborough County Sheriff's Office medical records, the testimony of Dr. Cunningham, Dr. O'Donnell, Dr. Maher, Mr. Registrato, and Mr. Littman, **the Court finds Dr. Maher had the benefit of examining Defendant between the guilt and penalty phases and Mr. Registrato and Mr. Littman extensively interacted with Defendant throughout their representation of Defendant. Consequently, the Court gives great weight to their testimony and finds the medications, including the psychotropic medications, did not interfere with Defendant's ability to understand the proceedings. The Court further finds neither Mr. Registrato or Mr. Littman coerced Defendant to confess during the penalty phase, nor did they coach Defendant regarding the contents of his confession. Lastly, the Court finds, based on the fact that Defendant's demeanor was not impacted by the psychotropic medication, counsel did not act deficiently in failing to request that the jury be instructed that Defendant was on psychotropic medication.** As such, no relief is warranted upon claim 9.2f.

(Ex. B16/3202-3206)(e.s.).

On postconviction appeal, the Florida Supreme Court denied this IAC claim based on a lack of prejudice. The Florida Supreme Court's opinion states:

F. Johnston's use of prescribed psychotropic medication at trial

Johnston claims that counsel was ineffective because counsel failed to inform the jury that Johnston was taking prescribed psychotropic medications at the time of trial. Johnston alleges that the medications rendered him

incompetent and that when he testified at the penalty phase, the medications made him appear cold and callous. However, this ineffectiveness claim is without merit because Johnston has failed to demonstrate prejudice.

"In order to demonstrate prejudice from counsel's failure to investigate his competency, a petitioner has to show that there exists 'at least a reasonable probability that a psychological evaluation would have revealed that he was incompetent to stand trial.'" *Futch v. Dugger*, 874 F.2d 1483, 1487 (11th Cir. 1989) (quoting *Alexander v. Dugger*, 841 F.2d 371, 375 (11th Cir. 1988)), *quoted in, Nelson v. State*, 43 So. 3d 20, 29 (Fla. 2010).

A defense expert evaluated Johnston's general competency several times throughout the trial and testified at the postconviction evidentiary hearing that he never saw any reason to question Johnston's competence. Johnston's defense counsel also testified that Johnston never appeared blunted or confused at any stage of the proceedings. With respect to Johnston's testimony at the penalty phase, both the expert and defense counsel testified that Johnston appeared emotional and not cold or callous at the time he delivered his testimony.

Johnston has failed to demonstrate prejudice because there was no reasonable probability that an evaluation would have produced a finding of incompetence. In fact, the postconviction court determined that Johnston was not incompetent, confused, or blunted. This finding was supported by competent, substantial evidence in the form of testimony from an evaluating defense expert and from counsel. *See Reed*, 875 So. 2d at 421-22; *Zakrzewski v. State*, 866 So. 2d 688, 696 (Fla. 2003) (where defendant's and counsel's testimony conflicted, upholding the trial court finding that counsel was credible).

Regarding the failure to request an instruction prior to Johnston's penalty-phase testimony, because Johnston was not incompetent and did not appear cold or callous, the lack of instruction in this case does not undermine our confidence in the outcome. Thus, Johnston cannot demonstrate prejudice.

Accordingly, we affirm denial of this claim.

Johnston, 63 So. 3d at 741-42(e.s.).

CONCLUSION AS TO GROUND SEVEN

Ground Seven Has no Merit

Ground seven is not subject to de novo review in this Court. Federal habeas relief

may not be granted for claims subject to § 2254(d) unless it is shown that the earlier state court's decision "was contrary to" federal law then clearly established in the holdings of this Court, § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495 (2000); or that it "involved an unreasonable application of" such law, § 2254(d)(1); or that it "was based on an unreasonable determination of the facts" in light of the record before the state court, § 2254(d)(2). Petitioner has not met those standards.

The question that matters under § 2254(d)(1), is whether a state court's application of the *Strickland* standard was unreasonable. The Supreme Court states, in *Harrington v. Richter*, 131 S. Ct. 770, 785-787 (2011):

> **The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable.** This is different from asking whether defense counsel's performance fell below *Strickland*'s standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), "an unreasonable application of federal law is different from an incorrect application of federal law." *Williams, supra*, at 410, 120 S.Ct. 1495. A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.
>
> A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" on the correctness of the state court's decision. *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). And as this Court has explained, "[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Ibid.* "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Knowles v. Mirzayance*, 556 U.S. ——, ——, 129 S.Ct. 1411, 1413–14, 173 L.Ed.2d 251 (2009) (internal quotation marks omitted).
>
> Here it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA. The court explicitly conducted a de novo review, 578 F.3d, at 952; and after finding a *Strickland* violation, it declared,

without further explanation, that the "state court's decision to the contrary constituted an unreasonable application of *Strickland*." 578 F.3d, at 969. AEDPA demands more. Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court. The opinion of the Court of Appeals all but ignored "**the only question that matters under § 2254(d)(1).**" *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

The Court of Appeals appears to have treated the unreasonableness question as a test of its confidence in the result it would reach under de novo review: Because the Court of Appeals had little doubt that Richter's *Strickland* claim had merit, the Court of Appeals concluded the state court must have been unreasonable in rejecting it. This analysis overlooks arguments that would otherwise justify the state court's result and ignores further limitations of § 2254(d), including its requirement that the state court's decision be evaluated according to the precedents of this Court. *See Renico v. Lett*, 559 U.S. ——, ——, 130 S.Ct. 1855, 1866, 176 L.Ed.2d 678 (2010). It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. *See Lockyer, supra*, at 75, 123 S.Ct. 1166.

If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. *Cf. Felker v. Turpin*, 518 U.S. 651, 664, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996) (discussing AEDPA's "modified res judicata rule" under § 2244). It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal. *Jackson v. Virginia*, 443 U.S. 307, 332, n. 5, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (Stevens, J., concurring in judgment). As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Richter, 131 S. Ct. at 785-787 (e.s.).

Johnston's postconviction experts' assessment of Johnston's alleged impairment was belied by the contemporaneous evaluations of Dr. Maher and the eyewitness observations

of every member of the defense team who interacted with Johnston at trial, were familiar with his demeanor, and uniformly described Johnston as alert, lucid, and articulate at the time of the penalty phase. Moreover, under Florida law, a defendant is "entitled" to have the jury instructed pursuant to Florida Rule of Criminal Procedure 3.215(c)(2), that he is taking psychotropic medications during trial only when there is a prior adjudication of incompetence or restoration, or when a defendant exhibits inappropriate behavior and it is shown that the inappropriate behavior is the result of the psychotropic medication. *Alston v. State*, 723 So. 2d 148 (Fla. 1998). In the absence of either event, such evidence would not be material to any issue before the jury. Trial counsel cannot be deemed ineffective for failing to introduce otherwise inadmissible evidence. More importantly, as all defense counsel uniformly agreed in postconviction, Johnston did not exhibit any inappropriate behavior or "flat affect" at the time of trial; it would not have served any beneficial purpose to seek such an instruction; and it could have undermined the contemporaneous defense arguments at the time of trial.

Again, Petitioner simply repeats his claim as if he were entitled to relitigate this issue anew. Johnston cannot meet his burden merely by showing that the avenue chosen by counsel proved unsuccessful. Rather, the standard is whether "no competent counsel would have taken the action that [petitioner's] counsel did take." *Johnson v. Sec'y Dept. of Corr.*, 643 F.3d 907, 928 (11th Cir. 2011) (quoting *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000)). Counsel's performance is constitutionally adequate so long as "some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992). Petitioner has not demonstrated that the state court's determination was contrary to, or involved an unreasonable application of federal law, nor has he shown that the state court's denial of this

claim resulted in an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Ground seven does not warrant habeas corpus relief.

GROUND EIGHT

TRIAL COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE FOR PROVIDING THE PETITIONER WITH ILL-CONSIDERED AND IMPROPER ADVICE ABOUT THE NEED TO TESTIFY AT THE PENALTY PHASE OF THE TRIAL. THIS DEPRIVED MR. JOHNSTON OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE STATE COURT DECISIONS ON THIS ISSUE WERE CONTRARY TO FEDERAL LAW AND AN UNREASONABLE APPLICATION OF THE SAME. THE COURTS' DECISIONS WERE ALSO BASED ON AN UNREASONABLE FINDING OF FACT.

Petitioner's Allegations

Johnston should not have testified during his penalty phase. Trial counsel provided Johnston with very poor and ineffective advice concerning the need to testify and admit to the murder of Coryell. The Hillsborough County Public Defender's Office represented Johnston in the Coryell murder first, and then represented him in the Nugent murder. The attorneys' ultimate unusual advice in Coryell urging him to testify and admit the murder during the penalty phase was woefully ineffective, and caused prejudice on several levels.

First of all, his impaired testimony derailed the positive effects of the mitigating mental health testimony in the penalty phase, causing the jury to ignore the powerful available mitigation and vote 12-0 for death. Secondly, the Coryell penalty phase confession carried with it the added detriment and devastation of being utilized against him in the Nugent guilt phase as similar fact evidence.

The instant prejudice was realized in the Coryell trial as Johnston, through his trial

testimony, immediately diminished the powerful available mitigation, and sealed his case for death. Regarding Johnston's trial testimony, clinical and forensic psychologist Dr. Cunningham opined that Johnston's penalty phase testimony could be viewed by the jury as not being remorseful. (Vol. LII PCR. 667). Trial counsel's plan to place Johnston on the stand and exhibit remorse backfired. He was not able to show remorse, and he negated the statutory and non-statutory mental health mitigation that was previously presented. Dr. Cunningham testified that because Johnston could be seen as a "smooth talker" on the stand, there was a risk that his verbal functioning would interfere with the jury's appreciation of Johnston's brain function and related mitigation. Dr. Cunningham noted several other areas of concern in the defense penalty phase presentation. The decision to place Johnston on the stand was not the only thing that caused Dr. Cunningham concern. Dr. Cunningham noted the following in his review of the background materials in the Johnston case:

> 1) Failure of the defense to articulate a coherent theory of mitigation.
>
> 2) Failure of the defense to elicit testimony regarding both historical and contemporaneous evidence supportive of the presence of neurological disorder and brain functioning impairment.
>
> 3) Failure of the defense to elicit adequate testimony regarding the nexus of Mr. Johnston's brain impairments and criminal conduct.
>
> 4) Failure of the defense to offer evidence of Mr. Johnston's broader aggressive reactivity.
>
> 5) Failure of the defense to offer crime-specific evidence of both reactive impulsivity and poor judgment.
>
> 6) Failure of the defense to elicit testimony regarding evidence of affective and anxiety disorders in Mr. Johnston.
>
> 7) Failure of the defense to elicit testimony regarding dysfunctional factors in Mr. Johnston's family of origin.

8) Failure of the defense to sponsor testimony regarding Attention Deficit Hyperactivity Disorder.

Nowhere in the penalty phase did the defense bring up the available evidence of family dysfunction. To the contrary, the jury was misled to believe that the Johnston family had little problems. Dr. Cunningham described the marital infidelity and domestic violence that permeated the Johnston home. Dr. Cunningham described how Mrs. Johnston broke a beer bottle over the Petitioner's father's head, and how observed violence in the family causes severe psychological damage to children from violent homes. (Vol. LIII PCR 780).

Unlike the mental health experts at trial, Dr. Cunningham explained that there is a definite correlation between violence in the family and violence in the community. (Vol. LIIIPCR. 780-781). In Johnston's case, the state court decisions on this issue were contrary to federal law and an unreasonable application of the same. The courts' decisions were also based on an unreasonable finding of fact.

Johnston alleges that trial counsel provided him with "ill-considered and improper advice about the need to testify at the penalty phase" of the Coryell murder trial. (Petition, Doc. 11 at 30-33; Memo, Doc. 18 at 59).

Exhaustion and Disposition of Ground Seven in state court

Johnston raised this IAC claim in his state postconviction motion to vacate. The trial court held an evidentiary hearing on this IAC claim and found that trial counsel discouraged Johnston from testifying. The trial court specifically found, "Mr. Registrato, Mr. Littman, and Ms. Fulguiera all discouraged Defendant from testifying during the penalty phase but Defendant insisted on testifying because he wanted to apologize to the victim's mother and show his remorse to the jury." (Ex. B16/3154-3155). The trial court's order denying this IAC

claim (Ex. B16/3146-3156) states, in pertinent part:

> **Mr. Registrato testified that he was aware that the decision to testify ultimately and finally rests with Defendant.** (See January 31, 2008, transcript, p. 786, attached). **He further testified he knew he could not prevent Defendant from testifying if he wanted to.** (See January 31, 2008, transcript, p. 786, attached). During the trial, Judge Allen, contained within pages 1708 through 1710 of the trial transcript, went through a colloquy with Defendant regarding his right to or not to testify, and such was admitted into evidence as State's exhibit #8. (See January 3 1, 2008, transcript, pps. 786-788, State's exhibit #8, attached). He testified Defendant was able to decide whether or not he wanted to testify during penalty phase, and recollected that Defendant testified coherently, his answers were responsive to his questions, his demeanor was not blunted, emotionless, cold, callous, or impaired, and he actually became emotional during the penalty phase. (See January 31, 2008, transcript, pps. 788-789, attached).
>
> Mr. Littman testified although he was present when Defendant told them he wanted to testify during the penalty phase, he had nothing to do with that because that was Mr. Registrato's aspect of the trial. (See January 31, 2008, transcript, pps. 877-878, attached). However, he further testified as follows:
>
> > LITTMAN: Well, I understand what our goal was, to save his life, if he were to testify. I said I was present for those discussions from the very first time he made any kind of incriminating statement to us. I remember that very well. And I know you asked me about this last year. I remember that very vividly, and it was rather dramatic. But it was actually Mr. Registrato's advice. I mean, not in a vacuum. We were all present for that, the whole three or four of us.
>
> (See January 31, 2008, transcript, p. 878, attached). When asked what was Mr. Registrato's advice, he responded as follows:
>
> > LITTMAN: Well, let me back up. Our - - we convinced Mr. Johnston, we explained to him, the only way this would be beneficial to him would be - - he'd already been found guilty. He was facing at least life in prison, is if he, A, did not blame Ms. Coryell in any way, which was contrary to the way he first expressed what happened. And we said, you can't be testifying like that. We had quite a bit of discussion about this. **We went over it with him several times. Okay. And as I said, remember, we had already done a mock trial. We had seen potential problems in I'll say the manner in which he testified. He's a very smart man. It's not a matter of his**

> **intellect. But at that point, all we were trying to do was to save his life. Because we knew the State had a lot of good aggravators including his prior record, of course, and the means of this homicide. And it was his decision after discussing it with us.** That's about the best I can - - that's the short version of what I can tell you.

(See January 31, 2008, transcript, pps. 878-879, attached).

A copy of Mr. Littman's case activity record was admitted into evidence as State's exhibit #7. (See January 31, 2008, transcript, pps. 927- 928, State's exhibit #7, attached). He admitted that during their June 14, 1999, meeting, **Defendant advised the defense team that he had killed Ms. Coryell and wanted to testify during the penalty phase to express remorse to the jury.** (See January 31, 2008, transcript, p. 928, attached). **However, he testified he never had any concern about Defendant's mental ability to make that decision.** (See January 31, 2008, transcript, p. 928, attached).

After reviewing this portion of claim 9.2b, the testimony, evidence, and argument presented at the January 28, 2008, January 29, 2008, January 30, 2008, January 31, 2008, February 1, 2008, March 6, 2008, and March 7, 2008, evidentiary hearings, the written closing arguments, the notice of supplemental authority, the applicable law, the court file, and the record, the Court finds the testimony of Mr. Hooper, Ms. Fulguiera, Mr. Registrato, and Mr. Littman to be credible. Therefore, the Court finds Mr. Hooper did not notice anything wrong with Defendant, nor did he notice anything about his speech or affect that caused him any concern. The Court finds Ms. Fulguiera did not have any concerns Defendant was overmedicated between the guilt phase and penalty phase. The Court further finds Mr. Registrato, Mr. Littman, and Ms. Fulguiera all discouraged Defendant from testifying during the penalty phase but Defendant insisted on testifying because he wanted to apologize to the victim's mother and show his remorse to the jury.

Additionally, the Court finds that prior to penalty phase, the Court inquired of Defendant as follows:

> REGISTRATO: I believe we're going to call Mr. Johnston, Judge. I would like to have a two-minute time to talk to him one more time, but I believe we're going to put him on.
>
> COURT: All right. Mr. Johnston, the reason I had the jury taken into the jury room was to inquire of you at this time whether or not you were going to testify and **to advise you that you do have the right to testify in this proceeding, but you cannot be forced to testify and the decision whether you testify or**

> **not is still your decision in this proceeding as it was in the first phase. So I encourage you to consult with your attorneys and to follow your attorney's advice, but the decision is yours** and I'll give you a couple of minutes to speak with your attorneys again.
>
> REGISTRATO: We'll put him on, Judge. We'll call him as a witness.
>
> COURT: All right. All right, Mr. Registrato, you and your client have had sufficient time to confer?
>
> REGISTRATO: Yes, Judge.
>
> **COURT: And, Mr. Johnston, have you made a decision?**
>
> **DEFENDANT: Yes, ma'am, I want to testify.**

(See trial transcript, pps. 1708-1709, attached). Therefore, Defendant assured the Court he wanted to testify.

Consequently, the Court finds based on the testimony presented Defendant was able to decide whether or not he wanted to testify during penalty phase, and Defendant testified coherently, his answers were responsive to his questions, his demeanor was not blunted, emotionless, cold, callous, or impaired, and he actually became emotional during the penalty phase. Moreover, the Court further finds based on Mr. Registrato's experience in dealing with Defendant throughout the case, the medications did not have a blunting affect on Defendant. The Court further finds Mr. Littman never had any concerns about Defendant's ability to make the decision to testify. Therefore, the Court finds Defendant failed to demonstrate that either Mr. Registrato or Mr. Littman provided Defendant with ill-considered and improper advice about the need to testify at the penalty phase of the trial as the evidence demonstrates they actually discouraged Defendant from testifying during the penalty phase. As such, no relief is warranted upon this portion of claim 9.2b.

(Ex. B16/3152-3156) (e.s.)

On postconviction appeal, the Florida Supreme Court denied this IAC sub-claim as follows:

G. Johnston's decision to testify at the penalty phase

> We also affirm the denial of Johnston's claims that defense counsel provided him with ill-considered and improper advice about the need to testify at the penalty phase. The trial court found after an evidentiary hearing that defense counsel in fact discouraged Johnston from testifying. **The trial court's finding was based on the competent substantial evidence provided by defense counsel's evidentiary hearing testimony.** *See Roberts v. State*, 840 So. 2d 962, 973 (Fla. 2002) ("Findings on the credibility of evidence by a lower court are not overturned if supported by competent, substantial evidence."). **The voluntariness of Johnston's decision is underscored by the penalty-phase colloquy in which Johnston represented that he understood it was his decision whether to testify and that he wanted to testify.** *See Gonzalez v. State*, 990 So. 2d 1017, 1031-32 (Fla. 2008). Accordingly, this claim does not warrant relief.

Johnston, 63 So. 3d at 742 (e.s.).

CONCLUSION AS TO GROUND EIGHT

Ground Eight Has *no* Merit

This claim is not subject to de novo review, but must be evaluated under the doubly deferential lens of *Strickland* and the AEDPA. As recently emphasized in *Reese v. Secretary, Florida Dept. of Corrections*, 2012 WL 1059452, 6 (11th Cir. 2012), the "pivotal question" in a federal habeas proceeding is "whether the state court's application of [clearly established federal law] was unreasonable." *Harrington,* 131 S. Ct. at 785. This inquiry is different from determining whether we would decide de novo that the petitioner's claim had merit. *Id.* To obtain habeas relief "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786–87.

The decision whether or not to testify is a uniquely personal decision that belongs entirely to the defendant. *Florida v. Nixon*, 543 U.S. 175, 125 S. Ct. 551 (2004). At the time

of trial, Johnston was repeatedly informed, both by defense counsel and by the trial court, that they could neither prohibit, nor require, Johnston to testify; it was Johnston's decision, alone. (Ex. A13/1137-1138; A14/1234-1235; A18/1708-1709). Prior to the commencement of the penalty phase, the defense team (Attorneys Littman and Registrato and mitigation specialist, Carolyn Fulguiera) met with Johnston at the county jail on three consecutive days, June 13 through 15, 1999. (Ex. B59/1498-1499). They met with Johnston for two hours on June 13, 1999 (1:00–3:00 p.m.) and for 3 1/2 hours (2:00–5:00 p.m.) on June 14, 1999. (Ex. B59/1498-1499). This was the first time that Johnston admitted that he killed Coryell. (B59/1499). Trial counsel discouraged Johnston from testifying. (Ex. B58/1329, 1331-1332, 1355, 1357). Nevertheless, Johnston elected to testify and, at trial, Johnston admitted that he was the one who told [counsel] that he wanted to testify and no one was forcing him to testify. (Ex. B18/1708-1709). Johnston insisted on testifying; it was Johnston's idea to try to garner sympathy from the jury by apologizing to the victim's mother. (Ex. B58/1329, 1332). Johnston's overriding personal decision to testify because he hoped to garner sympathy from the jury by saying that he was "sorry [for] what [he] did to Leanne" (Ex. B18/1226), precluded any claimed deficiency of counsel under *Strickland*.[10]

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[10] To the extent Petitioner claims that he should have had a competency evaluation performed, this issue is procedurally barred. Moreover, the federal standard for competence to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him. *See, Godinez v. Moran*, 509 U.S. 389, 396–97, 113 S. Ct. 2680 (1993) (citing *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788 (1960) (per curiam); *Drope v. Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896 (1975). Johnston was represented by experienced trial counsel and also evaluated by mental health experts at the time of trial. The post-conviction court specifically found that Johnston did not give Dr. Maher any reason to question the defendant's competency. The post-conviction court also found, based on Mr. Registrato's testimony, that Johnston participated in conversations with him throughout the guilt and penalty phases, was alert, well-spoken,

Johnston was denied relief in state court because of his own personal election to testify, despite counsel's contrary advice. Petitioner has not demonstrated that the state court's determination was contrary to, or involved an unreasonable application of federal law, nor has he shown that the state court's denial of this claim resulted in an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Ground eight does not warrant habeas corpus relief.

GROUND NINE

TRIAL COUNSEL WAS INEFFECTIVE AT THE GUILT PHASE FOR FAILING TO CHALLENGE THE FINGERPRINT EVIDENCE. THIS DEPRIVED MR. JOHNSTON OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE STATE COURT DECISIONS ON THIS ISSUE WERE CONTRARY TO FEDERAL LAW AND AN UNREASONABLE APPLICATION OF THE SAME. THE COURTS' DECISIONS WERE ALSO BASED ON AN UNREASONABLE FINDING OF FACT.

Petitioner's Allegations

The postconviction court's denial of this claim is found at Vol. XVI PCR. 3045-3046. The postconviction court was wrong to "procedurally bar[]" this claim, as it is proper for postconviction presentation and consideration. The postconviction court refused to consider

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articulate, smart, and never complained to him or anyone else in his presence that he was in a fog or having problems concentrating as a result of his medication or any other cause. Furthermore, Mr. Littman became familiar with the defendant's demeanor, personality, and intellect and Johnston never expressed to him, nor did he detect, that Johnston was confused or experiencing mental confusion resulting from his consumption of prescribed medications. Johnston never expressed to Mr. Littman any difficulty in concentrating, did not express that he was in a fog, and did not indicate he was almost unable to get out of his jail cell, nor did Johnston advise that he was suffering any side effects of any type from the medication he was taking. The post-conviction court also found, based on Mr. Littman's testimony, that Johnston was very attentive, participated, conversed with him, and took notes during the guilt phase of the trial. (Ex. B16/3202-3206).

Dr. Simon Cole's evidentiary hearing testimony regarding the fallibility of fingerprint science and evidence. The Petitioner here relies on the extensive evidentiary hearing proffer of Dr. Simon Cole located at Vol. XLIX PCR. 445-518 to support the claim that trial counsel was ineffective in the case at bar for failure to consult an expert such as Dr. Simon Cole to rebut the State's forensic fingerprint evidence in this case. The Petitioner submits that Dr. Cole's testimony stands on its own, and supports its own admissibility as it has a general acceptance in the scientific community. The State courts' refusal to consider and acknowledge the value of this testimony violates both the due process and confrontation clauses the United States Constitution.

The state court decisions on this issue were contrary to federal law and an unreasonable application of the same. The courts' decisions were also based on an unreasonable finding of fact.

Exhaustion, Procedural Bar and Disposition of Ground Nine in State Court

Johnston alleges that trial counsel was ineffective at the guilt phase for failing to challenge the fingerprint evidence, by calling an "expert" such as Dr. Simon Cole. (Petition, Doc. 11 at 33-35; Memo, Doc. 18 at 59).

Johnston raised this IAC sub-claim in his state post-conviction motion to vacate; this claim was based on the **proffered testimony** of Dr. Simon Cole. The trial court ruled that Dr. Cole's testimony was irrelevant and inadmissible. The trial court also found that the defendant failed to present any competent, admissible evidence to support his claim that an expert could testify two or more individuals could possess the same characteristics by estimating frequencies of the patterns by counting. Therefore, the trial court found that the defendant failed to meet his burden, thereby failing to demonstrate any deficient conduct or

any resulting prejudice. The trial court's order states, in pertinent part:

> With respect to the fingerprints, in the defense's written closing arguments, the defense asserts they are relying on the proffered testimony of Simon Cole to support this claim. On December 1, 2006, the Court allowed Defendant to proffer the testimony of Dr. Simon Cole in the postconviction evidentiary hearing in Defendant's other death case (Hillsborough County Case 99-11338 -- Nugent victim). (See December 1, 2006, transcript, pps. 20-91, attached). On August 24, 2007, upon stipulation of both defense and the State, the Court allowed the proffer of Dr. Simon Cole's testimony in case 99-11338 to be used in the postconviction evidentiary hearing in this case. (See August 24, 2007, transcript, attached).
>
> **However, the Third District Court of Appeal found "Dr. Cole's 'informed hypothesis' is nothing more than a creative attempt to attack the predicate for the admission of latent fingerprint comparison analysis." *State v. Armstrong*, 920 So. 2d 769, 771 (Fla. 3d DCA 2006). Therefore, the Court finds Dr. Cole's testimony is irrelevant and, therefore, inadmissible.**
>
> When asked if the trial team ever consulted a fingerprint expert in this case, Mr. Registrato responded as follows:
>
> > REGISTRATO: If there were - - if there would have been a fingerprint issue, it would have been during the guilt phase and there - - there was - - I believe there was a fingerprint issue, but I don't remember if we specifically had our own expert look at it or not. It would - - it was not one of the focuses of my attention because it was a guilt phase issue, it was not a penalty phase issue.
>
> (See January 31, 2008. transcript, pps. 765-766, attached). Mr. Littman testified he probably did not consult a fingerprint expert regarding the fingerprint found on Ms. Coryell's car. (See January 31, 2008, transcript, pps. 883-884, attached). **However, he testified it was his recollection that the only fingerprint belonging to Defendant that was lifted was from the exterior of Ms. Coryell's car, and the expert could not identify with precision the time the fingerprint was left on the car, nor could the expert establish it was left at the time of her abduction and murder. (See January 31, 2008, transcript, pps. 930-931, attached).**
>
> **Additionally, he testified a possible explanation for the presence of the latent print was that Defendant in his statement to police indicated that he had been with her socially on several occasions.** (See January 31, 2008,transcript, p. 931, attached). **He also testified in his opinion, the**

> **fingerprint evidence did not conclusively identify Defendant as the murderer because the car was in a public place, he lived across the parking lot from her in the same apartment complex, he parked in the same parking lot, and claimed to know her socially.** (See January 31, 2008, transcript, pps. 93 1-932, attached).
>
> After reviewing this portion of claim 9.2e, the testimony, evidence, and argument presented at the January 28, 2008, January 29, 2008, January 30, 2008, January 31, 2008, February 1, 2008, March 6, 2008, and March 7, 2008, evidentiary hearings, the written closing arguments, the notice of supplemental authority, the applicable law, the court file, and the record, the Court finds Defendant has the burden of proving his ineffective assistance of counsel claim at an evidentiary hearing. *Williams v. State*, 974 So. 2d 405, 407 (Fla. 2d DCA 2007). **Defendant failed to present any competent, admissible evidence to support his claim that an expert could testify two or more individuals could possess the same characteristics by estimating frequencies of the patterns by counting. Therefore, the Court finds Defendant failed to meet his burden, thereby failing to demonstrate any deficient conduct or any resulting prejudice. As such, no relief is warranted upon this portion of claim 9.2c.**
>
> (Ex. B16/3045-3046) (e.s.).

On postconviction appeal, the Florida Supreme Court denied this IAC sub-claim because, regardless of the admissibility of the proffered testimony, defense counsel's failure to present it did not undermine confidence in the outcome. "Because the expert was neither qualified nor prepared to offer testimony on whether the latent fingerprint found on the victim's car indeed matched Johnston's fingerprint, the expert could not have called into question the State's positive identification of Johnston." *Johnston,* 63 So. 2d at 743-44. As the Florida Supreme Court explained:

> **I. Fingerprint evidence**
>
> Johnston claims that counsel was ineffective for failing to consult and present an expert who could testify as to the lack of reliability regarding latent fingerprint analysis. However, the expert presented by Johnston had no formal training in latent fingerprint analysis and did not examine the latent fingerprints in this case. Therefore, it is highly unlikely that this testimony would have been admissible.

> Regardless of the admissibility of such testimony, defense counsel's failure to present it does not undermine confidence in the outcome. Because the expert was neither qualified nor prepared to offer testimony on whether the latent fingerprint found on the victim's car indeed matched Johnston's fingerprint, the expert could not have called into question the State's positive identification of Johnston. *See Morris v. State*, 931 So. 2d 821, 830 (Fla. 2006) ("[T]he failure to call witnesses can constitute ineffective assistance of counsel if the witnesses may have been able to cast doubt on the defendant's guilt...." (quoting *Ford v. State*, 825 So. 2d 358, 360–61 (Fla. 2002))).
>
> Accordingly, this ineffectiveness of counsel claim does not warrant relief.

Johnston, 63 So. 2d at 743-44.

CONCLUSION AS TO GROUND NINE

Ground Nine Has no Merit

Johnston does not dispute the state court's dispositive factual finding that "[b]ecause the expert was neither qualified nor prepared to offer testimony on whether the latent fingerprint found on the victim's car indeed matched Johnston's fingerprint, the expert could not have called into question the State's positive identification of Johnston." *Johnston*, 63 So. 2d at 743-44. Therefore, the state courts resulting determination -- that defense counsel's failure to present the expert does not undermine confidence in the outcome — is based on this undisputed factual determination and unassailable.

To the extent that Petitioner complains because the postconviction court ruled that Dr. Cole's testimony was irrelevant and inadmissible in postconviction, Petitioner cannot establish any basis for habeas relief. The principle is well-settled that a prisoner's challenge to the process afforded him in a state postconviction proceeding does not constitute any cognizable basis for habeas corpus relief because such a claim represents an attack on a proceeding collateral to the prisoner's confinement and not the confinement itself. *See,*

Quince v. Crosby, 360 F.3d 1259, 1261–62 (11th Cir. 2004) (explaining that "while habeas relief is available to address defects in a criminal defendant's conviction and sentence, an alleged defect in a collateral proceeding does not state a basis for habeas relief."); *Alston v. Dep't of Corr.*, 610 F.3d 1318, 1326 (11th Cir. 2010) (holding that habeas petitioner's challenge to state postconviction proceeding (the state court's ruling that he waived his state collateral proceedings) was not cognizable on federal habeas review); *Carroll v. Sec'y, DOC, Fla. Attorney Gen.*, 574 F.3d 1354, 1366 (11th Cir.) (holding that habeas petitioner's claim -- that the state court violated his due process rights when it summarily denied his postconviction claim without an evidentiary hearing -- did not state a claim on which a federal court may grant habeas relief), *cert. denied*, —— U.S. ——, 130 S. Ct. 500, 175 L.Ed.2d 355 (2009).

Petitioner has not demonstrated that the state court's determination was contrary to, or involved an unreasonable application of federal law, nor has he shown that the state court's denial of this claim resulted in an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Ground nine does not warrant habeas corpus relief.

GROUND TEN

TRIAL COUNSEL WAS INEFFECTIVE AT THE GUILT PHASE FOR FAILING TO CHALLENGE THE SHOE TREAD EVIDENCE. THIS DEPRIVED MR. JOHNSTON OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE STATE COURT DECISIONS ON THIS ISSUE WERE CONTRARY TO FEDERAL LAW AND AN UNREASONABLE APPLICATION OF THE SAME. THE COURTS' DECISIONS WERE ALSO BASED ON AN UNREASONABLE FINDING OF FACT.

Petitioner's Allegations

Trial counsel was ineffective for failing to present the most accurate, highest, and most defense-friendly statistic for the number of shoes that could have made the tread wear impressions at the crime scene. Rather than a mere 588,054 pairs of shoes manufactured by Reebok that could have made the treadwear impressions at the Coryell murder scene, trial counsel should have presented the higher figure of "millions" of shoes, supported by EH defense exhibit number eight (the "Stacey Moord/Reebok Memorandum"). See Vol. XXVIII PCR. 5390-5410. Trial counsel received an inadequate affidavit from Reebok, and at the very least, counsel should have requested an amended affidavit from the company prior to presenting the inadequate affidavit at trial. See EH defense exhibit number seven (the "Rodd Patten/Reebok Affidavit" at Vol. XXVIII PCR. 5312-5314). No such request was made, and counsel was therefore ineffective. Had the jury heard the higher figure, there is a reasonable probability that the outcome would have been different in this case.

The State court decisions on this issue the court's decision were contrary to federal law and an unreasonable application of the same. The courts' decisions were also based on an unreasonable finding of fact.

Exhaustion and Disposition of Ground Ten in State Court

Johnston repeats his postconviction claim that trial counsel was ineffective in failing to present "the most accurate, highest, and most defense-friendly statistic for the number of shoes that could have made the treadwear impressions at the crime scene." (Doc. 11 at 36). An evidentiary hearing was granted on this IAC sub-claim, but collateral counsel, like trial counsel, was similarly unable to secure and present any higher and more "defense-friendly" statistic from Reebok. In denying this IAC sub-claim, the trial court set forth a fact-intensive

order which detailed the efforts by defense counsel to obtain the most defense-friendly statistic from Reebok at the time of trial. (Ex. B16/3175-3183). The trial court ultimately concluded that the defendant failed to present any competent admissible evidence at the evidentiary hearing to support his claim that 14,700,000 pairs of shoes could have made those impressions. Moreover, the trial court found that the defendant failed to demonstrate how counsel's alleged failure to pursue independent tests and analysis from their own experts of the shoes resulted in prejudice. The trial court's order concluded, in pertinent part:

> . . . **the Court finds an affidavit was admitted into evidence at trial which reflected that over 588,000 pairs of Reebok shoes existed with that tread.** The Court further finds Defendant has the burden of proving his ineffective assistance of counsel claim at an evidentiary hearing. *Williams v. State*, 974 So. 2d 405, 407 (Fla. 2d DCA 2007). **Defendant failed to present any competent admissible evidence at the evidentiary hearing to support his claim that 14,700,000 pairs of shoes could have made those impressions. Moreover, the Court finds Defendant has failed to demonstrate how counsel's alleged failure to pursue independent tests and analysis from their own experts of the shoes resulted in prejudice. As such, no relief is warranted upon this portion of claim 9.2e.**
>
> (Ex. B16/3183) (e.s.).

On postconviction appeal, the Florida Supreme Court found that Johnston also failed to obtain any evidence in postconviction -- from the shoe manufacturer or from any other source -- to establish that the number of matching shoes was "millions," as he claimed in his postconviction motion, or that the affidavit presented at trial was otherwise incorrect. The Florida Supreme Court denied this IAC sub-claim on the following grounds:

> **J. Shoe tread evidence**
>
> Johnston claims that defense counsel was ineffective for failing to secure the most defense-friendly statistic on the number of shoes that could have matched the impressions found at the crime scene. **However, counsel cannot be deemed deficient for failing to present evidence that does not exist.** *See, e.g., Clark v. State*, 35 So. 3d 880, 888 (Fla. 2010) ("At the

> evidentiary hearing, Clark presented no evidence to support this claim. Trial counsel cannot be ineffective for failing to present evidence that did not exist at the time of trial."). **Johnston himself failed to obtain any evidence from the shoe manufacturer or from any other source to establish that the number of matching shoes was "millions," as he claims, or that the affidavit presented at trial was otherwise incorrect. Therefore, we affirm denial of this claim.**
>
> *Johnston*, 63 So. 3d at 744 (e.s.).

CONCLUSION AS TO GROUND TEN

Ground Ten Has no Merit

Petitioner is not entitled to relitigate this IAC claim. Instead, the "pivotal question" in a federal habeas proceeding is "whether the state court's application of [clearly established federal law] was unreasonable." *Harrington*, 131 S. Ct. at 785. To obtain habeas relief "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786–87.

At the time of trial, Reebok prepared the affidavit that was submitted by the defense at trial and the information provided to trial counsel was the latest information provided by Reebok. (Ex. B59/1500-1501). In postconviction, Johnston's collateral counsel was unable to obtain any more "defense-friendly" statistic from Reebok than trial counsel was able to obtain at the time of trial. The state courts denied this IAC sub-claim based on Johnston's failure of proof. Petitioner has not demonstrated that the state court's determination was contrary to, or involved an unreasonable application of federal law, nor has he shown that the state court's denial of this claim resulted in an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Ground ten does not warrant habeas corpus relief.

GROUND ELEVEN

TRIAL COUNSEL WAS INEFFECTIVE AT THE GUILT PHASE FOR FAILING TO FILE A MOTION TO SUPPRESS STATEMENTS BASED ON LAW ENFORCEMENT'S MIDSTREAM RECITATION OF *MIRANDA* WARNINGS. MR. JOHNSTON DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL, VIOLATING HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION WHEN COUNSEL FAILED TO QUESTION RESEARCH, INVESTIGATE, AND FILE A MOTION TO SUPPRESS STATEMENTS. THE COURTS' DECISIONS WERE CONTRARY TO FEDERAL LAW AND AN UNREASONABLE APPLICATION OF THE SAME. THE COURTS' DECISIONS WERE ALSO BASED ON AN UNREASONABLE FINDING OF FACT. THIS COURT SHOULD GRANT THE WRIT.

Petitioner's Allegations

Trial counsel was ineffective for failing to file a motion to suppress the *Miranda*-violative statements Johnston made to detectives in a police station's small interrogation room following the murder of Coryell. These statements came on the heels of extensive media coverage reporting on Johnston's criminal record, including the broadcasting of dramatic videotape of Johnston using the deceased's ATM card following the discovery of the victim's body.

Johnston raised this claim of ineffective assistance of counsel in his postconviction motion. After an evidentiary hearing, the postconviction court denied relief. On appeal, the Florida Supreme Court affirmed. These decisions were contrary to federal law and an unreasonable application of the same. The courts' decisions were also based on an unreasonable finding of fact. This Court should grant the writ.

Regarding the early-morning interrogation, Sergeant Iverson was questioned at the

evidentiary hearing, and informed that Johnston made several statements regarding his use of the victim's ATM card before the *Miranda* warnings were provided. (Vol. LV PCR1033-1035).

There should be no question in this case that Johnston was subjected to custodial interrogation at the Criminal Investigations Division of the Hillsborough County Sheriff's Office and was not initially informed of his *Miranda* rights.

Trial counsel failed to research and consider a viable motion to suppress statements made to law enforcement in this case. As such, trial counsel was ineffective and Johnston should receive a new trial free from the taint of the unconstitutionally-obtained statements regarding his relationship with Coryell and his whereabouts on the night of Coryell's disappearance and murder.

Homicide detectives from the Hillsborough County Sheriff's Office violated Johnston's Fifth Amendment right to remain silent when they coaxed him into, then trapped him in their "lair" and intentionally failed to comply with the constitutionally-required *Miranda* admonishments. Johnston's defense team then violated his Sixth Amendment right to effective counsel when they failed to consider a legally-viable motion to suppress the illegally-obtained statements.

Subjectively, and objectively, Johnston knew he was not free to leave the scene when he arrived at the police station. He testified to this extensively during the evidentiary hearing, describing his experience at the police station. (See Vol. LVII PCR. 1243-1288.) Johnston was subjected to an interrogation at the police station initially without the benefit of *Miranda* until he admitted using the victim's ATM card, then he was arrested for grand theft. Law enforcement obviously was not seeking to talk to Johnston about his golf game or the

Brandon Chamber of Commerce. The "invitation" to the police station was no social call. With arrest warrant in hand for grand theft, they wanted to speak with Johnston about his use of the recently murdered woman's ATM card. He was at least in the functional equivalent of custody when he walked through the secured doors of the Hillsborough County Sheriff's Office that early morning. Law enforcement was seeking to elicit statements from Johnston, and they should have provided *Miranda* warnings before express questioning or its functional equivalent. *Miranda* warnings should have been provided before any words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating response from Johnston.

Law enforcement clearly wanted to speak with Johnston. Law enforcement actually sought the media's and the general public's assistance in identifying and locating Johnston for arrest and questioning, and it worked. (See Vol. XI R. 699, 805, Vol. XII R. 923.) Given the fact that the police basically summoned Johnston for questioning utilizing the media, the statements at the police station were the product of custodial "interrogation." *Miranda* warnings were surely needed when Johnston appeared at the police station to answer questions about his wherabouts over the last few days, and his relationship with Coryell. As the news broadcasts explained, law enforcement wanted to talk to Johnston. They were looking for him. They even had an arrest warrant for him. Johnston was not free to leave the scene. Any reasonable person in his position would have known that their freedom to walk out of the station house was restricted by the authority of armed law enforcement officers. Law enforcement controlled Johnston's movements, and controlled the situation once he entered the station house. What might have begun as voluntary entry into the station house quickly transformed into a custodial situation requiring the constitutional protections of

Miranda once they sought to elicit statements from him about this murder case.

Johnston stated that upon entering the building the officers asked if they could search his car, and they took his car keys. (Vol. LVII PCR. 1251). He did not feel free to leave the scene when he was led into the interrogation room. He stated that in order to leave the interrogation room, he would have to go around the table and get around Detectives Iverson and Walters. (Vol. LVII PCR. 1254). He testified that once inside the interrogation room, the detectives mentioned the videos and photographs related to Coryell's ATM card. They asked him about his relationship with Coryell, and he admitted using her ATM card. (Vol. LVII PCR. 1256). Immediately thereafter he was officially arrested. (Vol. LVII PCR. 1256). A reasonable person in Johnston's shoes would not feel free to leave the police station once he entered the police station. Johnston informed the court that he relayed these circumstances to his appointed attorney Deb Goins and her investigator, yet a motion to suppress was never filed. (Vol. LVII PCR. 1279).

No reasonable person in this situation would feel free to leave the scene at the police station. Johnston did not subjectively feel free to leave the police station once he stepped inside. This was custodial interrogation. *Miranda* should have been provided to Johnston up front, not just midstream. *Miranda* addresses the "interrogation practices...likely...to disable an individual from making a free and rational choice about speaking" and held that a suspect must be "adequately and effectively" advised of the choice the constitution guarantees. *Miranda* warnings that do not include an advisement of the right to have attorney present during questioning are inadequate to fully inform defendant of his constitutional rights. The State suggested through cross-examination of Johnston at the evidentiary hearing that because Johnston had been arrested before, he knew he had a right to remain silent.

Miranda, however, requires the suspect to be warned of the rights. If the rights are not provided prior to questioning, this would invalidate any subsequent alleged waiver. The law does not allow circumstantial evidence that an individual may have been aware of his rights to satisfy the clear requirement of warnings.

Because custodial interrogations are inherently coercive, law enforcement simply must advise persons of their constitutional rights before subjecting them to custodial interrogation or any words or actions likely to elicit incriminating statements about a criminal offense. The statements the detectives said Johnston made should have been suppressed because once he entered the police station, the doors were locked and he was not free to leave the scene. An individual is in custody for purposes of *Miranda* when he comes under official control either by physical force or by submission to control of authority. Deputy Caimano testified at the evidentiary hearing that at the police station, Johnston rang the buzzer, he and Detective Shepard let him in, and they patted him down and escorted him into the squad area. (Vol. LXI PCR. 1632-1633). At that point, no reasonable person would have felt free to leave the station until expressly told they were so permitted by law enforcement. Strangely, both Caimano and Shepard did not recall that there was a signed arrest warrant for Johnston upon his arrival at CID, even though they fielded the call from Johnston early in the evening and they knew they would be responsible for receiving Johnston at the station house following his telephone call. See (Vol. LXI PCR 1632) and (Vol. LXI PCR 1685). Though they may or may not have known that an arrest warrant had been secured for Johnston's arrest, one thing was absolutely clear: law enforcement wanted to question Johnston. Johnston's statements to law enforcement were not simply volunteered. Clearly, law enforcement intended to elicit statements, and did in fact elicit statements from Johnston without first administering the

required *Miranda* warnings.

At the station house, Johnston was never told that he was free to leave. (Vol. LXI PCR. 1635). Caimano stated that law enforcement officers were constantly by Johnston's side, and if Johnston needed to use the restroom, an officer would have "accompanied" him to the restroom. (Vol. LXI PCR. 1636). The news spots on TV showing a photograph of Johnston and news that he was wanted for questioning for this murder support the detectives' intentions to arrest him. Law enforcement actually had a signed arrest warrant. Therefore, when Johnston entered the detectives' office building and the door was locked, a "seizure" had in fact occurred. At the very least, Johnston was in custody for purposes of *Miranda* when he was escorted into the interrogation room by the lead homicide detectives Walters and Iverson.

Failure to give *Miranda* warnings and obtain a waiver of rights before custodial questioning requires exclusion of any statements obtained. A reasonable person in Johnston's situation would not feel reasonably free to leave the scene once one entered the station house. Law enforcement should have read Johnston his *Miranda* rights prior to any questioning as they had a signed arrest warrant at the time of this interrogation. The circumstances were such that Johnston was not free to leave the police station once he entered the police station and encountered the interrogating detectives. Johnston was not in control of his movements in the police station. He was not in control of his freedom. The detectives were in complete control and the doors were locked upon entry. Johnston was not free to use the restroom without the escort of a detective in that building. The lawful and constitutional practice would have been to read *Miranda* prior to any questioning. What may have started as a voluntary encounter quickly escalated into a seizure because no

reasonable person would have felt free to leave the scene on their own power once they entered the buzzer-controlled door, and were "greeted" by law enforcement officers with frisk, and commanded to have a seat.

Law enforcement's advising Johnston of his *Miranda* rights after significant questioning, did not cure the violation of Johnston's rights under *Miranda.* How would Johnston understand that he had a right to remain silent when minutes earlier law enforcement questioned Johnston expecting answers, and he provided answers? Moreover, how would Johnston understand that he had the right to speak with an attorney and have one present during questioning if minutes earlier law enforcement questioned Johnston without an attorney and without law enforcement advising him that he had this right? Johnston's interrogation was continual with no breaks. It took place in the same place with the same two detectives, who did not advise Johnston that his statements made prior to being given *Miranda* would be used against him. The statements were in fact used against Johnston at his trial. These circumstances challenge the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes could not have understood them to convey a message that he retained a choice about continuing to talk.

Detectives Walters and Iverson relied on Johnston's pre-warning statements to obtain the post-warning ones used at trial which shows the temptations for abuse inherent in the two-step interrogation technique. As a result, any statements made by Johnston were inadmissible. This midstream recitation of warnings after interrogation and unwarned statements could not effectively comply with *Miranda*'s constitutional requirement, and any statements made pre-or post-*Miranda* ere not admissible. Law enforcement readily admits

in this case that the *Miranda* warnings were not provided until after Johnston had made several statements concerning his relationship with Coryell and his use of her ATM card. Trial counsel should have filed a motion to suppress statements on this basis.

A motion to suppress statements was not filed at the trial level. As a result, Johnston was barred from raising this issue on direct appeal. Trial counsel acted unreasonably by failing to investigate, research, and file a motion to suppress. Johnston was prejudiced because, had a motion to suppress been filed and granted by the trial court, incriminating statements would not have been introduced and used against Johnston and there was a reasonable probability the outcome would have been different.

The State court decisions on this issue were contrary to federal law and an unreasonable application of the same. The State court decisions were also based on an unreasonable finding of fact.

Exhaustion of Ground Eleven in State Court

Johnston raised this IAC sub-claim in his postconviction motion to vacate. In denying this IAC claim, the trial court set forth an extensive fact-intensive analysis (Ex. B16/3209-B17/3236) and concluded that Johnston failed to establish any deficient performance and resulting prejudice. The trial court's post-conviction order states, in pertinent part:

> After reviewing claim 11, the testimony, evidence, and argument presented at the January 28, 2008, January 29, 2008, January 30, 2008, January 31, 2008, February 1, 2008, March 6, 2008, and March 7, 2008, evidentiary hearings, the written closing arguments, the notice of supplemental authority, the applicable law, the court file, and the record, **the Court finds "Miranda warnings are required whenever the State seeks to introduce against a defendant statements made by the defendant while in custody and under interrogation." *Davis v. State*, 698 So. 2d 1182, 1188 (Fla. 1997). "Absent one or the other, *Miranda* warnings are not required." *Id.* Moreover, the Court finds the single fact that law enforcement had a warrant for Defendant's arrest at the time he arrived at the station does**

not automatically demonstrate that Defendant was in custody. Id. ("Although custody encompasses more than simply formal arrest, the sole fact that police had a warrant for Davis's arrest at the time he went to the station does not conclusively establish that he was in custody."). The Court finds "there must exist a 'restraint on freedom of movement of the degree associated with a formal arrest." *Id; see also Roman v. State*, 475 So. 2d 1228, 1231 (Fla. 1985).

Moreover, the Court finds the testimony of Detective Iverson to be credible. Therefore, the Court finds Defendant was free to leave up until Detective Iverson realized that Defendant's time frames when he was with Coryell were inconsistent with what co-workers were saying she was at work, and when Detective Iverson realized the inconsistency in his time frames, he advised Defendant he was under arrest and gave him his *Miranda* warnings. The Court further finds if Defendant would have given Detective Iverson a plausible explanation for why he was on video using Ms. Coryell's ATM card, it would not have been necessary for Detective Iverson to make an arrest at that time. The Court finds post-*Miranda* he talked to Defendant about searching his vehicle and Defendant signed the consent form to search the vehicle and handed over the keys.

Additionally, the Court finds Defendant initiated contact with law enforcement, drove himself to the Sheriff's office, was sitting in a chair in the lobby without law enforcement personnel around him, was wearing a suit and his chamber of commerce pin, and was not handcuffed or restrained physically in the lobby. The Court also finds as Detective Walters, Detective Iverson, and Defendant walked to the interview room, Defendant initiated small talk about his golf game, and neither Detective Walters or himself laid a hand on Defendant, raised their voice towards Defendant, made any type of threatening or menacing gesture towards Defendant, or were confrontational with Defendant either verbally or physically prior to advising Defendant he was under arrest. The Court further finds that at no time prior to Miranda did Defendant ever indicate to Detective Iverson in words or substance that he did not want to talk anymore and wanted to leave, and prior to his arrest, Defendant's freedom of movement was not restrained in any way as Defendant could have exited the side door by merely pushing the push bar and it would open.

Moreover, the Court finds, by Defendant's own admission, he called the sheriff's office and advised Lieutenant Caimano that he wanted to talk to the detective on the case. The Court further finds when Defendant arrived at the building, he was buzzed in and patted down for weapons. The Court also finds Defendant gave permission for Lieutenant

Caimano to search his briefcase and a search for weapons was conducted. The Court finds once Detectives Iverson and Walters arrived, they escorted Defendant to a room where they shut the door. The Court also finds that although Defendant testified that he did not know if the door was locked, he testified he felt like he could not leave. However, when asked at what point he felt that he was not going to be able to leave the police station, Defendant replied, "That's hard to say. I think I knew before I even went there I wouldn't be able to leave." (See January 30, 2008, transcript, p. 684, attached). Therefore, the Court finds although Defendant voluntarily went to the station, he had a preconceived notion that he was going to be arrested prior to entering the station. However, Defendant admitted that prior to *Miranda* being read to him, the detectives were courteous to him, never did anything physically threatening or intimidating to him, and never raised their voice to him. The Court further finds after Defendant admitted to using the ATM card, he was arrested. However, the Court finds that prior to such admission, Defendant was not in custody for purposes of *Miranda*.

Based on Detective Ernest Walters' deposition to perpetuate testimony (State's exhibit #68), **the Court finds when he met with Defendant, Defendant voluntarily went with him into the interview room and did not indicate to him that he did want to speak with him or that he wanted an attorney present.** (See trial transcript, p. 554, State's exhibit #6B, attached). **The Court further finds Detective Walters did not promise Defendant anything to go back and speak with him.** (See trial transcript, p. 554, attached). **The Court also finds it was not until Defendant admitted to using Ms. Coryell's ATM card that he was arrested, and then read his *Miranda* rights.** (See trial transcript, pps. 56 1-562, attached).

Additionally, the Court finds that prior to his arrest, Defendant did not indicate to Detective Walters that he wanted to terminate the interview, did not indicate any hesitancy in speaking with Detective Walters, did not appear to be intoxicated, appeared to understand the questions being asked of him, appeared to understand who Detective Walters was and where he was, and did not at any time ask to speak with an attorney regarding the situation. (See trial transcript, pps. 562-563, attached). **The Court further finds, based on Detective Walters' testimony, Defendant indicated that he understood the *Miranda* rights as they were being read to him, and agreed to speak with him and Detective Iverson.** (See trial transcript, pps. 563-566, attached).

Furthermore, the Court finds Mr. Littman to be credible. Therefore, the Court finds although he considered filing a motion to suppress those statements, because he was familiar with the law on suppressing

statements, he concluded that he did not want his statements suppressed. The Court further finds the statements Defendant made to law enforcement prior to being given his *Miranda* rights were denials of guilt and he never incriminated himself in Ms. Coryell's death. The Court further finds with respect to the discrepancy between the time Defendant alleged to have had dinner with Ms. Coryell and the time she punched out of work at the dental office, Mr. Littman admitted that he would want to exclude any evidence which could show Defendant had made a false statement, but asserted there was no legal basis for suppressing his statements in addition to the fact that Defendant made those statements before he was arrested. The Court further finds Mr. Littman was a very experienced criminal attorney who based on the version of events relayed to him by Defendant and depositions taken by he and Ms. Goins concluded Defendant was not under custodial interrogation at the time he made the statements to law enforcement. The Court also finds that if Mr. Littman had somehow successfully prevented admission of Defendant's statements to law enforcement as evidence at trial, the jury would have been left with the fact that Defendant was on video using the victim's ATM card in close proximity to the time of her death, which would have left the jury to infer that the only way he could have obtained the victim's ATM card was he obtained it at the time of and as a result of Ms. Coryell's murder. Consequently, the Court finds Mr. Littman wanted his statements to law enforcement to come in so the jury would have a lawful and rational reason for Defendant having possession and use of her ATM card, evidence the State intended to present to the jury.

Additionally, the Court finds Defendant never advised Mr. Littman that when he arrived at the sheriff's office on the night in question that sheriff personnel took his car keys from him, that they made him remove his jewelry, empty his pockets, took his wallet, and put all that stuff in his briefcase. The Court further finds at the time Mr. Littman made the decision not to file a motion to suppress, there was no fact before him that Defendant was in custody or that his freedom was restrained in any fashion at the time Defendant gave his statement and, therefore, he did not believe he had a valid basis to file a motion to suppress.

The Court also finds former Hillsborough County Sheriff detective Jim Caimano (currently FBI agent) to be credible. Therefore, the Court finds although Agent Caimano patted Defendant down for officer safety, he did not take any of Defendant's personal items such as briefcase, wallet, keys, or money for the entire time Defendant was there. The Court further finds Defendant did not indicate to Agent Caimano that he wanted to leave the criminal investigations division, nor did Agent Caimano conduct any questioning of Defendant before the arrival of Detectives Iverson and Walters.

> The Court also finds although Agent Caimano did not tell Defendant he was free to leave, Defendant was free to leave the Sheriff's Office after he entered the Sheriff's Office, and if Defendant asked him to leave, he would have conferred with the on-scene supervisors and called the detectives saying that Defendant wanted to leave.
>
> **Moreover, the Court finds Agent Caimano's contact with Defendant was in no way different than that of a citizen not involved in this case and who had appeared at 1:30 in the morning, including that a citizen unrelated to the Coryell case would not have been allowed to roam freely throughout the entirety of the offices. Consequently, the Court finds Defendant was treated as a normal citizen unrelated to the Coryell case would have been treated.**
>
> **The Court also finds Detective Tony Shepherd's testimony to be credible. Therefore, the Court finds on August 21, 1997, Detective Shepherd did not at any time search Defendant, nor did he take from him any personal items, including his wallet, keys, money, or briefcase, nor did he witness anybody else take any items from Defendant.**
>
> **In conclusion, the Court finds Defendant was not in custody for the purposes of *Miranda*. Therefore, the Court finds Defendant failed to demonstrate how counsel acted deficiently in failing to file the alleged motion to suppress when Defendant was not in custody for purposes of *Miranda*. The Court further finds Defendant failed to demonstrate how counsel's alleged deficient conduct resulted in prejudice as the alleged motion to suppress would have been meritless. As such, no relief is warranted upon claim 11.**
>
> (Ex. B16/3231-B17/3236) (e.s.).

The Florida Supreme Court affirmed the trial court's denial of postconviction relief on this IAC sub-claim, finding no deficiency of counsel. The Florida Supreme Court noted that trial counsel wanted the jury to hear Johnston's statements because they provided the only lawful explanation as to why Johnston possessed the victim's ATM card. Therefore, trial counsel made a strategic decision not to challenge Johnston's voluntary statements to law enforcement. Furthermore, Johnston was not in custody at the time of his initial statements and, thus, *Miranda* warnings were not required at the time of his initial statements. "Because

defense counsel made a reasonable strategic choice and because a motion to suppress would have lacked merit, Johnston cannot demonstrate the deficiency prong of *Strickland*." *Johnston*, 63 So. 3d at 740. In denying this IAC sub-claim, the Florida Supreme Court stated, in pertinent part:

> **D. Johnston's statement to law enforcement**
>
> Johnston argues that trial counsel was ineffective under *Strickland* for failing to move to suppress his statement made to law enforcement prior to issuance of a *Miranda* warning. Johnston also asserts that counsel should have moved to suppress the statement made after Johnston received a *Miranda* warning because the warning came in the middle of continual interrogation. We affirm denial of both arguments.
>
> Upon seeing his picture on television, Johnston phoned police, drove himself to the police station, and made a statement to detectives he knew to be assigned to the case. He believed his statements would account for his whereabouts on the night of the murder and his use of the victim's ATM card. At the postconviction evidentiary hearing, defense counsel explained that he wanted the jury to hear Johnston's statements because they provided the only lawful explanation as to why Johnston possessed the victim's ATM card.
>
> Defense counsel's explanation demonstrates that his decision not to move to suppress Johnston's statements was a reasonable, strategic choice. *See Occhicone*, 768 So. 2d at 1048; *Lawrence v. State*, 969 So. 2d 294, 309 (Fla. 2007). Short of calling Johnston to testify, there was no available evidence aside from the statement that could explain Johnston's use of the ATM card.
>
> Additionally, counsel cannot be deemed ineffective because any motion to suppress would have been meritless. *See Kormondy v. State,* 983 So. 2d 418, 430 (Fla. 2007); *Fitzpatrick v. State*, 900 So. 2d 495, 511 (Fla. 2005). Evidence presented at the postconviction evidentiary hearing demonstrated that Johnston's initial statement was voluntary. Therefore, no *Miranda* warnings were required until Johnston was formally arrested. *See Traylor v. State*, 596 So. 2d 957, 965–66 (Fla. 1992). And, since Johnston was not in custody when he gave his initial statement, it follows that Johnston's post-*Miranda* statement was obtained following a valid waiver. *See Ault v. State*, 866 So. 2d 674, 682 (Fla. 2003) ("[I]t is custodial interrogation that triggers the *Miranda* prophylactic."). Therefore, a motion to suppress either statement would have been denied.

> Because defense counsel made a reasonable strategic choice and because a motion to suppress would have lacked merit, Johnston cannot demonstrate the deficiency prong of *Strickland*. Therefore, we affirm the trial court's denial of this ineffectiveness claim.

Johnston, 63 So. 3d at 740.

CONCLUSION AS TO GROUND ELEVEN

Ground Eleven Has no Merit

Applicable Law

Aside from a perfunctory conclusory statement on the AEDPA requirements, Johnston repeats this claim as if it were subject to de novo review; it is not. The standard established in section 2254(d) is "difficult to meet because the purpose of AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Greene v. Fisher*, —— U.S. ——, 132 S. Ct. 38, 43 (2011) (citations and internal quotation marks omitted). Furthermore, as noted in *Reese v. Secretary, Florida Dept. of Corrections*, 2012 WL 1059452, 7 (11th Cir. 2012), "[t]he question whether a state court errs in determining the facts is a different question from whether it errs in applying the law." *Rice v. Collins*, 546 U.S. 333, 342, 126 S. Ct. 969, 976 (2006). This court's standard of review is again deferential. In a habeas proceeding, "[o]ur review of findings of fact by the state court is even more deferential than under a clearly erroneous standard of review." *Reese,* quoting *Stephens v. Hall*, 407 F.3d 1195, 1201 (11th Cir. 2005).

When, as here, the state courts have denied an ineffective assistance of counsel claim on the merits, the standard a petitioner must meet to obtain federal habeas relief is a difficult one. *Harrington v. Richter*, —— U.S. ——, 131 S. Ct. 770, 786 (2011). The standard is not

whether an error was committed, but whether the state court decision is contrary to or an unreasonable application of federal law that has been clearly established by decisions of the Supreme Court. 28 U.S.C. § 2254(d)(1). As the Supreme Court explained, error alone is not enough, because "[f]or purposes of § 2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law." *Harrington*, 131 S. Ct. at 785 (quotation marks omitted).

When faced with an ineffective assistance of counsel claim that was denied on the merits by the state courts, a federal habeas court "must determine what arguments or theories supported or, [if none were stated], could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." So long as fairminded jurists could disagree about whether the state court's denial of the claim was inconsistent with an earlier Supreme Court decision, federal habeas relief must be denied. Stated the other way, only if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents" may relief be granted. *Id.* Even without the deference due under § 2254, the *Strickland* standard for judging the performance of counsel "is a most deferential one." *Id.* at 788. When combined with the extra layer of deference that § 2254 provides, the result is double deference and the question becomes whether "there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

Discussion

The state courts' rejection of this IAC sub-claim was not contrary to or an unreasonable application of *Strickland*. Trial counsel cannot be deemed deficient under

Strickland for failing to file a motion to suppress which is without merit. In this case, the deputies were not required to give *Miranda* warnings to Johnston when he voluntarily came to the CID division and offered his self-serving explanations. Johnston was not "in custody" simply because questioning took place at the Sheriff's office. *See, California v. Beheler*, 463 U.S. 1121, 103 S. Ct. 3517 (1983); *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711 (1977). And, whether a suspect was in custody depends on the objective circumstances, not on subjective views of the defendant. *See, Stansbury v. California*, 511 U.S. 318, 114 S. Ct. 1526 (1994); *Yarborough v. Alvarado*, 541 U.S. 652, 124 S. Ct. 2140 (2004).

At trial, the State presented evidence that Johnston was interviewed by Detective Ernest Walters just after 2:00 a.m. on August 21, 1997; Detective Iverson was also present. (Ex. A9/553; V11/757-58). Johnston was not under arrest. Johnston, acting on his own, went to the Sheriff's Office after his photograph had been televised; Johnston wanted to explain the situation. (Ex. A/955; A10/592-93; 603; A11/767). According to Johnston, on August 19th, at about 6:15 p.m., they (he and the victim) met at Malio's, had a drink and decided to go to Carrabba's for dinner. They arrived at Carrabba's, in separate cars, around 7:30 or 7:45, and left between 8:30 and 9:00 p.m. Johnston said that he was going to go for a run, and Coryell was going to shop for groceries. (Ex. A9/557-59; A10/607-09; A11/759). When they separated at Carrabba's, Coryell gave Johnston her ATM card and PIN number to repay $1200 which he had loaned her. (Ex. A9/559-60). Johnston went home, changed his clothes, and went for his run. When he returned to his apartment, Johnston had a disagreement with his roommate, Gary, over rent and cable TV payments. (Ex. A9/560-61; 573-74; A10/585-86; 613). Johnston said he took a shower, went to Taco Bell, then to Barnett Bank, where he found that the ATM was not working, and then to Nations Bank, where he withdrew $500 in

cash. (Ex. A9/560-61; A10/586; 613-14). At this point, Johnston was placed under arrest for grand theft and read his *Miranda* rights. Johnston indicated that he understood his rights and agreed to continue speaking with the officers. (Ex. A9/562-66; A11/770-71).

Johnston went to the Sheriff's station on his own and volunteered his self-serving version of events. The officers were not required to refuse Johnston's calls and volunteered statements. They did not seize Johnston, or take Johnston into custody, or place him under arrest, or handcuff him, or place him in a locked cell, or threaten him in any way. Moreover, the issuance of an arrest warrant for grand theft did not support Johnston's IAC complaint. In state court, Johnston failed to show that any motion to suppress his statements would have been meritorious and that trial counsel's actions were not the result of reasonable professional judgment. To the contrary, as trial counsel confirmed in post-conviction, there was no legal basis for suppressing the defendant's exculpatory statements (Ex. A59/1405-1406, 1412-1413); Johnston was not in custody at the time he made the statements. (Ex. A59/1410, 1412-1414). Moreover, defense counsel wanted to use Johnston's denials of guilt and volunteered statements because they enabled the defense to rebut the presumption of possession of recently stolen property and present Johnston's exculpatory version of events without "opening the door" to Johnston's prior convictions. (Ex. A59/1473-1476). Trial counsel's strategic decision at the time of trial is unassailable under *Strickland*.

Even if Johnston arguably could establish any deficiency of counsel in failing to seek suppression of Johnston's volunteered statements, which the State emphatically disputes, he could not demonstrate any resulting prejudice under *Strickland*. At trial, the State also introduced videotapes of two news broadcasts in which Johnston spoke with reporters by telephone from the jail. (Ex. A12/965-968, 978, 957-58). During these broadcasts, Johnston

essentially repeated his earlier volunteered statements to law enforcement. According to Johnston, he and Coryell were friends, and she had given him her ATM card and PIN number to withdraw money to repay a loan. (Ex. A12/966, 978). According to Johnston, he was supposed to meet her the next day at Malio's; and when he got there, he learned of her death, and some people said that they'd seen his picture on TV. Johnston left, drove around, and then called the Sheriff's department and went there on his own. (Ex. A12/966-67). Therefore, Johnston's same volunteered explanations were obtained from an independent source unrelated to any alleged *Miranda* violation and would have been, and were, inevitably discovered.

To the extent that Johnston attempts to substantively challenge both his pre-arrest statements and his post-arrest statements, as allegedly inadmissible under *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601 (2004), any such claim is procedurally barred. Even if *Seibert* arguably applied, which it does not, under *Seibert,* "the two-step interrogation technique [must be] used in a calculated way to undermine the *Miranda* warning." 542 U.S. at 62. In *Seibert*, the plurality held that when an officer intentionally questioned a suspect without giving *Miranda* warnings in order to elicit an unwarned confession and then used that unwarned confession to elicit a second warned confession, *Miranda* was violated. Because this is not such a case, Johnston's volunteered statements to law enforcement would not qualify for any relief under *Seibert. See, Seibert*, 542 U.S. at 622. Furthermore, Johnston has not established that *Seibert* is retroactive. *See, Davis v. Secretary Dept. of Corrections,* 2009 WL 3336043 (M.D. Fla. 2009) (noting that "*Seibert* is not subject to retroactive application under *Teague*").

Johnston's volunteered statements were not taken in violation of Miranda; the defense

relied on Johnston's exculpatory statements to explain his possession of the victim's ATM card; and Johnston's statements to law enforcement were cumulative to his taped statements to the press. Even if the substantive *Miranda* claim were cognizable (which it is not because it is procedurally barred), error, if any, based on the admission of Johnston's volunteered statements would have been harmless. *See, Brecht v. Abrahamson*, 507 U.S. 619, 622, 113 S. Ct. 1710 (1993).

Petitioner Johnston has not demonstrated that the state court's determination was contrary to, or involved an unreasonable application of federal law, nor has he shown that the state court's denial of this claim resulted in an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Ground eleven does not warrant habeas corpus relief.

GROUND TWELVE[11]

CUMULATIVE ERROR

Due to the errors that occurred individually and cumulatively in the postconviction court, this Court should grant the writ.

CONCLUSION AS TO GROUND TWELVE

Ground Twelve Has no Merit

Cumulative error is not a cognizable claim on federal habeas. The Eleventh Circuit has never expressly recognized a freestanding "cumulative effect" claim, based upon the assertion that alleged errors of the trial court, defense counsel, or the State, or a combination thereof, rendered the trial fundamentally unfair even though such errors were individually

[11] Johnston raises this ground as Ground XIII. His petition does not contain a ground twelve.

harmless or non-prejudicial, as cognizable under § 2254. *See, Forrest v. Florida Dept. of Corrections*, 342 Fed. Appx. 560, 564-65 (11th Cir. 2009) (unpublished); *see also, Ferguson v. Sec'y for the Dept. of Corrections*, 580 F.3d 1183, 1202 (11th Cir. 2009).

Moreover, even if Petitioner arguably was entitled to a cumulative error analysis, which he is not, any such analysis should evaluate only matters determined to be in error, not the cumulative effect of non-errors. *See, United States v. Waldon*, 363 F.3d 1103, 1110 (11th Cir. 2004) (where no individual errors have been demonstrated, no cumulative errors can exist). Therefore, Petitioner is not entitled to federal habeas relief on this "cumulative error" claim. *See, Bronstein v. Wainwright*, 646 F.2d 1048 (11th Cir. 1981) ("[A] state trial must be so 'fundamentally unfair' as to amount to a denial of due process before federal habeas relief can be appropriately applied.") (internal quotation and citation omitted)).

Ground twelve does not warrant habeas corpus relief.

Accordingly, the Court orders:

That Johnston's petition is denied. The Clerk is directed to enter judgment against Johnston and to close this case.

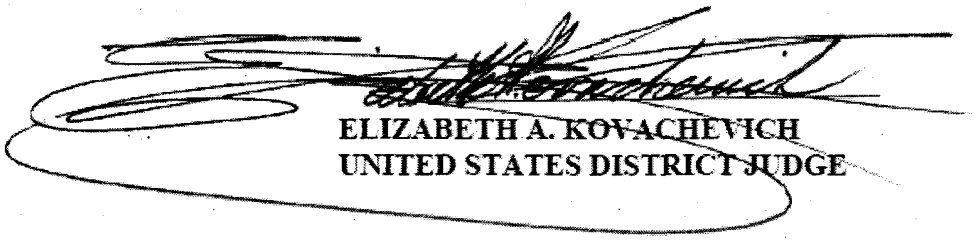
CERTIFICATE OF APPEALABILITY AND
LEAVE TO APPEAL IN FORMA PAUPERIS DENIED

The Court declines to issue a certificate of appealability pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts because Petitioner has failed to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2).

Because Petitioner is not entitled to a certificate of appealability, Petitioner is not entitled to appeal in forma pauperis. Petitioner is required to pay the $505.00 appellate filing

fee unless the appellate court grants Petitioner in forma pauperis status on appeal.

ORDERED at Tampa, Florida, on April 17, 2014.



Counsel of Record

APPENDIX N

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

November 13, 2018

Mr. David Dixon Hendry
Capital Collateral Regional Counsel- Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 33637

Re: Ray Lamar Johnston
v. Florida
No. 18-5793

Dear Mr. Hendry:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied. Justice Thomas, concurring in the denial of certiorari: I concur for the reasons set out in *Reynolds v. Florida*, 586 U. S. ___ (2018) (Thomas, J., concurring). Justice Sotomayor, dissenting from the denial of certiorari: I dissent for the reasons set out in *Reynolds v. Florida*, 586 U. S. ___ (2018) (Sotomayor, J., dissenting).

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

APPENDIX O

246 So.3d 266 (Mem)
Supreme Court of Florida.

Ray Lamar JOHNSTON, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–1678
|
April 5, 2018

An Appeal from the Circuit Court in and for Hillsborough County, Michelle Sisco, Judge—Case No. 291997CF013379000AHC

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 Timothy A. Freeland, Senior Assistant Attorney General, Tampa, Florida, for Appellee

Opinion

PER CURIAM.

Ray Lamar Johnston appeals an order summarily denying his first successive postconviction motion filed under Florida Rule of Criminal Procedure 3.851.[1]

[1] We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

The underlying facts of this case were described in this Court's opinion on direct appeal. *Johnston v. State*, 841 So.2d 349, 351–55 (Fla. 2002). Johnston was convicted of the first-degree murder of Leanne Coryell, kidnapping, robbery, sexual battery, and burglary of a conveyance with assault. *Id.* at 351. Following a unanimous jury recommendation for death, the trial court sentenced Johnston to death. *Id.* at 355.

In this successive postconviction motion, we affirm the denial of Johnston's claim that he is entitled to relief pursuant to *Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). Johnston received a unanimous jury recommendation of death and, therefore, the *Hurst* error in this case is harmless beyond a reasonable doubt. *See Davis v. State*, 207 So.3d 142, 175 (Fla. 2016). Additionally, we affirm the denial of Johnston's *Hurst*-induced *Caldwell*[2] claim. *See Reynolds v. State*, No. SC17-793, —— So.3d ——, —— – ——, slip op. at 26-36, 2018 WL 1633075, at *10–12 (Fla. Apr. 5, 2018).

[2] *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

Accordingly, we affirm the denial of postconviction relief.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and LAWSON, JJ., concur.

CANADY and POLSTON, JJ., concur in result.

QUINCE, J., dissents with an opinion.

QUINCE, J., dissenting.

***267** I cannot agree with the majority's finding that the *Hurst* error was harmless beyond a reasonable doubt. As I have stated previously, "[b]ecause *Hurst* requires 'a jury, not a judge, to find each fact necessary to impose a sentence of death,' the error cannot be harmless where such a factual determination was not made." *Hall v. State*, 212 So.3d 1001, 1036–37 (Fla. 2017) (Quince, J., concurring in part and dissenting in part) (citation omitted) (quoting *Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 619, 193 L.Ed.2d 504 (2016)); *see also Truehill v. State*, 211 So.3d 930, 961 (Fla.) (Quince, J., concurring in part and dissenting in part), *cert. denied*, —— U.S. ——, 138 S.Ct. 3, 199 L.Ed.2d 272 (2017). The jury in this case did not make all the factual findings that *Hurst* requires a jury to make in order to impose all the aggravators at issue in this case. Therefore, I dissent.

All Citations

246 So.3d 266 (Mem), 43 Fla. L. Weekly S162

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APPENDIX P

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

STATE OF FLORIDA **CASE NO.: 97-CF-013379**

v.

RAY JOHNSTON, **DIVISION: J**
Defendant.
_____/

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

THIS MATTER is before the Court on Defendant's "First Successive Motion to Vacate Judgment of Conviction and Sentence," filed, through counsel, on January 5, 2017, pursuant to Florida Rule of Criminal Procedure 3.851. On January 25, 2017, the State filed an "Unopposed Motion for Extension of Time." On January 30, 2017, the Court granted the State's motion for forty-five days. On March 16, 2017, the State filed the "State's Response to Successive Rule 3.851 Motion for Post-Conviction Relief." Defendant filed his "Notice of Supplemental Authority" on April 12, 2017, and his "Witness/Exhibit List" on April 13, 2017.

On April 13, 2017, the Court held a case management conference. On April 14, 2017, the State filed its "State's Motion to Strike Defendant's Witness/Exhibit List and Attachments." Defendant filed his "Response to the State's Motion to Strike" on May 3, 2017. Another case management conference was held on May 4, 2017. Defendant filed additional "Notice[s] of Supplemental Authority" on May 10, 2017, and May 16, 2017.

On May 18, 2017, the Court held a hearing on the "State's Motion to Strike Defendant's Witness/Exhibit List and Attachments." On June 8, 2017, the Court granted the State's motion and struck the previously scheduled evidentiary hearing after determining that Defendant's claims were purely legal and did not require an evidentiary hearing. Defendant filed his "Motion for

Rehearing on the Striking of Dr. Moore" on June 19, 2017, which was denied by the Court on June 29, 2017. Defendant then filed his "Supplement to Motion for Rehearing on the Striking of Dr. Moore" on June 30, 2017, which the Court dismissed on July 20, 2017.

After considering Defendant's motion, the State's response, the court file and record, as well as the arguments of counsel presented during the April 13, 2017, and May 4, 2017, case management conferences, the Court finds as follows:

On June 11, 1999, a jury found Defendant guilty of first-degree murder (count one), kidnapping (count two), robbery (count three), sexual battery (great force/deadly weapon) (count four), and burglary of a conveyance with an assault or battery (count five). The jury recommended a sentence of death by a vote of twelve-to-zero on June 17, 1999. The Court sentenced Defendant to death on count one, to life in prison on counts two, four, and five, and to fifteen years' prison on count three on March 13, 2001. The Florida Supreme Court affirmed Defendant's convictions and sentences. *See Johnston v. State*, 841 So. 2d 349 (Fla. 2002). The mandate issued on March 13, 2003. Defendant did not seek certiorari review in the United States Supreme Court. On June 11, 2003, ninety days after the mandate issued, Defendant's convictions and sentences became final.

Defendant subsequently filed a motion for postconviction relief. The postconviction court denied the motion for postconviction relief. The Florida Supreme Court affirmed the denial. *See Johnston v. State*, 63 So. 3d 730 (Fla. 2011).

In his "First Successive Motion to Vacate Judgment of Conviction and Sentence," Defendant asserts various claims in light of the United States Supreme Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Defendant requests that the Court vacate his death sentence.

Claim One

In claim one, Defendant asserts his death sentence is unconstitutional based on *Hurst v. Florida*, prior precedent, and subsequent developments, because he was denied his right to a jury trial on the facts that led to his death sentence. Defendant argues that his death sentence was obtained under the exact death penalty scheme found unconstitutional in *Hurst* and as such, it violates the Sixth Amendment under *Ring* and *Hurst*. Defendant asserts that regardless of any issues of retroactivity or application of harmless error, he was denied his right to a jury trial on the essential elements that led to his death sentence in violation of the United States Constitution and the corresponding provisions of the Florida Constitution. As such, Defendant argues that his death sentence should be vacated.

In its response, the State, relying on *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), asserts the Florida Supreme Court held that *Hurst v. Florida* could be applied retroactively to cases that were not final when the *Ring* opinion issued in 2002. The State asserts Defendant's death sentences became final after *Ring* was decided and therefore, *Hurst* could be retroactively applied to Defendant's case. However, the State asserts that the fact that Defendant's sentencing jury unanimously agreed, by a vote of twelve-to-zero, that he should be sentenced to death renders him ineligible for relief under *Hurst*.

The State argues that in this case, the jury was not required to recommend death if the aggravators outweighed the mitigators, and it was never instructed that its recommendation must be unanimous or that it must unanimously find sufficient aggravating circumstances outweighed the mitigating circumstances, but the jury, nevertheless, unanimously recommended death.

The State contends that in Defendant's case, any *Hurst* error should be considered harmless. The State, relying on *Miller v. State*, 42 So. 3d 204, 218-19 (Fla. 2010), asserts *Ring* was

satisfied in cases, like this one, where aggravating factors were established by prior violent felonies and contemporaneous felonies. The State asserts because *Hurst* is an application of *Ring* to Florida, and the Florida Supreme Court has previously found that prior and contemporaneous convictions remove a case from the scope of *Ring*, it should also follow that Defendant's contemporaneous murder conviction removes his case from the scope of *Hurst*. However, the State, relying on *Johnson v. State*, 205 So. 3d 1285, 1289 (Fla. 2016), and *Franklin v. State*, 209 So. 3d 1241 (Fla. 2016), acknowledges that following the *Hurst* remand, the Florida Supreme Court has rejected the State's argument that a prior or contemporaneous felony conviction insulates a defendant from *Ring* and *Hurst*.

Regardless, the State contends that it can still be established that a rational jury would have unanimously found the aggravating factors and recommended death in this case. The State argues that the trial court found four aggravators: 1) multiple prior violent felony convictions, 2) that Defendant was engaged in the commission of sexual battery and kidnapping at the time of the murder, 3) pecuniary gain, and 4) that the murder was especially heinous, atrocious, and cruel. The State contends that there is no doubt that the prior violent felony aggravator, along with the additional offenses of sexual battery and kidnapping, were established by a unanimous jury verdict. The State contends that the remaining aggravators were uncontestable on the weight of the evidence; Defendant admitted to taking money from the victim, thus establishing that the offense was committed for pecuniary gain, and any rational juror would have found that the murder was heinous, atrocious, and cruel, given the facts of the case.

The State also acknowledges that the Florida Supreme Court has only found harmless error in cases involving *Hurst* violations where the jury recommendation was unanimous. However, the State asserts that under these specific facts, a rational jury would have unanimously found the

aggravating factors if it had been instructed to, and it would have unanimously found that the aggravating factors outweighed the mitigation. The State asserts that given the strong aggravation and the extremely weak mitigation evidence presented, there is no reason to believe that a rational juror, properly instructed, would have made the assessment differently. As such, the State argues that the error was harmless in this case.

After reviewing the allegations, the State's response, and all relevant case law, the Court initially finds that Defendant is entitled to the retroactive application of *Hurst* because his judgment and sentence became final after the issuance of *Ring v. Arizona*, 536 U.S. 583 (2002). *See Mosely*, 209 So. 2d at 1283. As such, Defendant qualifies for resentencing relief unless the *Hurst* error was harmless beyond a reasonable doubt. *See Hurst*, 202 So.3d at 67 (recognizing that a *Hurst* error is capable of harmless error review); and *Hurst v. Florida*, 136 S. Ct. at 624 (remanding to the state court to determine whether the error was harmless). However, the Court may conduct a harmless error review of the record without the need for an evidentiary hearing. The Florida Supreme Court has explained the appropriate standard for a harmless error review as follows:

> Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. *See, e.g., Zack v. State*, 753 So.2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," [*State v.*] *DiGuilio*, 491 So.2d [1129,] 1137 [Fla. 1986], and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a *Hurst* error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate: "The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court

> to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact". *DiGuilio*, 491 So.2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." *Id.*

Mosley, 209 So. 3d at 1283-87 (citing *Hurst*, 202 So. 3d at 68) (alteration in original).

The following is a summary of the facts relevant to the imposition of the Defendant's death sentence:

> The State introduced testimony from three victims of prior violent felonies that Johnston had committed against total strangers. Susan Reeder was the first witness to testify and recalled how Johnston grabbed her when she was stepping out of her car, put a hunting knife to her throat, drove her to an isolated area, and then beat her with his belt and raped her. Julia Maynard recounted how Johnston broke into her home, and when she arrived, grabbed her, held a knife to her neck, and took her to her bedroom so he could take pictures of her in various states of dress and undress and touch her sexually. Carolyn Peak testified that in June 1988, while she was getting out of her car, Johnston put a knife to her throat, forced her back into the car, and tied her hands with an Ace Bandage. She escaped when a police officer pulled the car over because a head light was out.
>
> Dr. Vega, the medical examiner who performed the autopsy on Coryell, opined that Coryell was conscious at the time she was beaten and received her vaginal injuries. He believed the last injury to the victim was manual strangulation and that she was likely conscious for up to two minutes while being strangled. Finally, the State introduced three witnesses to provide victim impact evidence: the victim's father, Thomas Morris; her employer, Dr. Dyer; and her pastor, Matthew Hartsfield.
>
> Defense counsel introduced four experts to testify that Johnston had frontal lobe brain damage and mental health problems. Dr. Diana Pollack, a neurologist, treated Johnston a few months before the murder because Johnston suffered from blackouts, headaches, a tingling sensation down one side of his body, and spells of confusion. She administered various neurological tests, including an MRI and an EEG, but was unable to find any structural deficiencies in his brain.
>
> Dr. Harry Krop, a clinical psychologist, testified that he performed a neuropsychological evaluation on Johnston. When Johnston performed poorly, Dr. Krop recommended that a PET scan be

performed. Based on Johnston's documented history and further testing, he concluded that Johnston suffered from a frontal lobe impairment and that this problem has three main manifestations: (1) difficulty starting an action; (2) difficulty stopping an existing action; and (3) being too impulsive or acting without thinking.

Dr. Frank Wood, a neuropsychologist, examined Johnston and reviewed the results of his PET scan. He concluded that Johnston's frontal lobe area had substantially less activity than was normal (below the first percentile) and that this deficiency correlates with poor judgment, impulsivity, and "disinhibited" behavior. Based on Johnston's medical and behavioral record, Dr. Wood concluded that this was a chronic condition.

Dr. Michael Maher, a physician and psychiatrist, evaluated Johnston and reviewed his history and medical records. Dr. Maher agreed that it was evident from the PET scan that Johnston suffered from impairments of the frontal lobe of his brain, making it extremely hard for him to resist any strong urges. He also believed that Johnston suffered from seizures that were related to his brain abnormality and had dissociative disorder (a psychiatric disorder in which some aspect of a person's total personality or awareness is unavailable at certain times).

Several character witnesses testified in Johnston's behalf. According to Gloria Myer, a placement specialist for a correctional institution, Johnston was dedicated to his job, very organized, and followed Myer's instructions. She also recalled a time when she thought he was having a stroke because "his whole side of his face had fallen, had drooped." John Walkup, Johnston's probation officer, recommended Johnston for early termination because he had a stable family life, worked at a steady job, reported regularly, paid his fees, and was doing fine. William Jordon, a case manager for the Department of Corrections, knew Johnston while he was in prison and asserted that he got along well with other inmates and was not a disciplinary problem. John Field, a chaplain with the Department of Corrections, knew Johnston when he was incarcerated in the early 1990s and declared that Johnston was one of the chapel's best clerks. Bruce Drennen, the president of the Brandon Chamber of Commerce, testified that Johnston was a designated representative of a company that was a member of the chamber.

Johnston's family provided mitigation. His mother, Sara James, testified that at the age of three or four, Johnston had fallen out of a car and hit his head on the curb, resulting in an injury which required stitches. Johnston did not perform well in school, and by the time he

was in the seventh grade, he became disruptive in class and was sometimes sent home. Problems became more serious the older he grew, and eventually he was sent to the Hillcrest Institution for treatment. Normally, Johnston had a sweet disposition, but he could get explosive at times. Susan Bailey, Johnston's ex-wife, testified that while she was married to him, Johnston was the perfect husband-he cooked, cleaned, and helped raise her two daughters. She described him as very tenderhearted, remembering how it would upset him if she had to paddle her girls for misbehaving. She also stated that even though he would occasionally snap over minor issues, he would not vent his anger towards his family. Rebecca Vineyard, Johnston's younger sister, stated that Johnston never acted normal-he would try too hard to make people love him and would go overboard trying to get positive responses. However, his personality could quickly change, and he did not like being rejected or humiliated.

Finally, Ray Johnston took the stand and admitted that he killed the victim. According to Johnston, he saw Coryell drive in after he had just gotten out of the hot tub. He asked her if he could help carry her groceries to her apartment, but she ignored his request. Johnston stated that he just wanted her attention and meant to reach for her shoulders but grabbed her neck instead. He thought he held her for just a few seconds, but then her legs gave out. She hit her lip on the edge of the door, and her chin hit the ground, causing two lacerations on her face. When he rolled her over, he saw her eyes and mouth were open. He tried reviving her by giving CPR, but it had no effect. Thinking that he had broken her neck, Johnston put her in the back seat of her car and drove her to the church. To make it look like she had been assaulted, Johnston took off her clothes and scattered them out, kicked her in the crotch, beat her with her belt, and dragged her to the pond. A car drove into the parking lot, prompting Johnston to run home. After he took a shower, Johnston drove back to the church to see if anybody had discovered the body. While there, he found the victim's ATM card and its PIN, which was written on the cover of her address book. He took her ATM card and drove to Barnett Bank to withdraw some money. The next day, after Johnston learned his picture was being broadcast on the news, he turned himself in and made up the story that Coryell had given him the ATM card.

Johnson, 841 So. 2d at 352.

On this record, the Court finds beyond a reasonable doubt that any *Hurst* error was harmless. The Court finds that this was a highly aggravated case where the aggravators

significantly outweighed the mitigators, that the jury was instructed the aggravators must be established beyond a reasonable doubt, that the jury was not required to recommend death if the aggravators outweighed the mitigators, and that the jury recommendation was unanimous. Further, the Court finds that the evidence supporting the previous violent felonies both due to the contemporaneous felonies of sexual assault, kidnapping, and burglary of a conveyance with an assault or battery, and due to Defendant's prior violent felony convictions for brutal acts of violence against women, which involved the same modus operandi as was present in the instant case, outweigh both the statutory and non-statutory mitigation that was presented on Defendant's behalf. *See Davis v. State*, 207 So. 3d 142, 173-175 (Fla. 2016). Additionally, the Court finds that the evidence presented proving that the murders were especially heinous, atrocious, or cruel showed that the murder was clearly committed in a way unnecessarily tortuous to the victim, thereby further outweighing any mitigation presented on Defendant's behalf. *Id.* Finally, the Court finds that to date, the Florida Supreme Court has not found *Hurst* error harmful in any unanimous jury cases. Consequently, the Court concludes that there is no reasonable possibility that *Hurst* error affected the sentence in this case. **As such, no relief is warranted upon claim one.**

Claim Two

In claim two, Defendant argues that the Court should vacate his death sentence because, in light of *Hurst* and subsequent cases, his death sentence violates the Eighth and Fourteenth Amendments because it was contrary to evolving standards of decency and is arbitrary and capricious. Defendant contends that he had no jury to determine his death sentence in the guided manner necessary to avoid his being condemned to death in an arbitrary and capricious manner.

Defendant argues that his advisory panel was instructed that, although the court was required to give great weight to its recommendation, the recommendation was only advisory.

Defendant also argues that had this been an actual jury trial, it would have been contrary to *Caldwell v. Mississippi* as an advisory panel accurately instructed on its role in an unconstitutional death penalty scheme does not meet the Eighth Amendment requirements of *Caldwell*. Defendant contends that any reliance or argument based on the advisory recommendation in his case is misplaced and fails to rise to the level of constitutional equivalence based on *Caldwell*.

Defendant argues that he was sentenced to death in violation of the Eight Amendment and that his sentence is arbitrary and capricious because he was sentenced without a jury to ensure the reliability of his sentence. Defendant argues that to subject him to the death penalty based on Florida's previous unconstitutional system when a jury advisory recommendation would today violate the United States and/or the Florida Constitution is the very definition of arbitrary and capricious.

In its response, the State argues that the Defendant's argument that *Caldwell* mandates relief in this case is patently without merit as any complaint about jury instructions at this point is untimely and procedurally barred from consideration in this successive post-conviction motion. The State contends that the jury was properly instructed on its role based upon the law existing at the time of Defendant's trial.

After reviewing the allegations, the State's response, and all relevant case law, the Court finds *Hurst v. Florida* did not address the Eighth Amendment. The Court finds there is no Florida State Supreme Court or United States Supreme Court precedent this Court must follow asserting that the Eighth Amendment does or does not require unanimity in jury capital sentencing recommendations. **As such, no relief is warranted upon claim two.**

Claim Three

In claim three, Defendant argues the Court should vacate his death sentence because the fact-finding that subjected him to death was not proven beyond a reasonable doubt. Defendant argues that *Hurst* mandates that the State prove each element beyond a reasonable doubt and that he was denied a jury trial on the elements that subjected him to the death penalty. Defendant contends that it necessarily follows that he was denied his right to proof beyond a reasonable doubt, and as such, this Court should vacate his death sentence.

In its response, the State argues that these claims should have been raised on direct appeal rather than in a post-conviction motion, and therefore, are procedurally barred. The State contends that in addition to being procedurally barred and untimely, this claim is without merit as the jury in Defendant's case was instructed that the aggravating circumstances they may consider must be proven beyond a reasonable doubt. Because the jury was unequivocally instructed as to Defendant's right to proof beyond a reasonable doubt on the aggravation that subjected him to the death penalty, the State argues this claim should be denied.

After reviewing the allegations, the State's response, and all relevant case law, the Court agrees with the State's assertion that there is no legal authority that would permit or require this Court to reevaluate whether the fact-finding in Defendant's case was proven beyond a reasonable doubt. As stated in claim one, Defendant's death sentence was imposed unanimously after the jury was instructed that the it should only consider aggravating circumstances that were proven beyond a reasonable doubt. **As such, no relief is warranted upon claim three.**

Claim Four

In claim four, Defendant argues that in light of *Hurst*, his death sentence should be vacated because it was obtained in violation of the Florida Constitution. Specifically, Defendant argues

that the increase in penalty imposed on him was without any jury at all. Defendant also argues that because the State proceeded against him under an unconstitutional system, it never presented the aggravating factors of elements for the Grand Jury to consider in determining whether to indict him. Defendant argues he was never formally informed of the full nature and cause of the accusation because the aggravating factors were not found by the Grand Jury and contained in the indictment. Defendant contends that this Court should vacate his death sentence because it was obtained in violation of the Florida Constitution.

In its response, the State argues that this claim is procedurally barred and untimely. The State argues that even on the merits, Defendant is not entitled to relief as the Florida Supreme Court has long rejected the argument that aggravating circumstances must be alleged in the indictment. The State also notes that since the issuance of *Hurst v. State*, the Florida Supreme Court has not vacated any death sentence based on the absence of aggravating factors being listed in the indictment. The State contends that even if an allegedly incomplete indictment could somehow be attributed to a *Hurst* error, Defendant has failed to show why an error in the indictment would warrant resentencing in this case.

After reviewing the allegations, the State's response, and all relevant case law, the Court agrees with the State's assertion that there is no legal authority that would permit or require this Court to find that the Florida Constitution requires the aggravating factors of a capital case to be charged in the indictment in light of either *Hurst* decision. **As such, no relief is warranted upon claim four.**

Claim Five

In claim five, Defendant argues that his previous postconviction claims must be reheard and determined under a constitutional framework. Defendant states that in light of *Hurst*,

Defendant incorporates his previously filed claims under Florida Rule of Criminal Procedure 3.851 and requests that to the extent it is possible, the Court should rehear his previously denied claims and vacate his death sentence.

After reviewing the allegations and all relevant case law, the Court finds that there is no legal authority that would permit or require this Court to reevaluate or reconsider Defendant's previously presented postconviction claims in light of either *Hurst* decision. **As such, no relief is warranted upon claim five.**

It is therefore **ORDERED AND ADJUDGED** that Defendant's "First Successive Motion to Vacate Judgment of Conviction and Sentence" is hereby **DENIED**.

Defendant has thirty (30) days from the date of this final order within which to appeal. However, a timely-filed motion for rehearing shall toll the finality of this order.

DONE AND ORDERED in Chambers in Hillsborough County, Florida this 21st day of July, 2017.

MICHELLE SISCO, Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this order has been furnished to Timothy Freeland, Esquire, and C. Suzanne Bechard, Esquire, Office of the Attorney General, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607-7013; and to David Dixon Hendry, Esquire, James Driscoll, Jr., Esquire, and Gregory W. Brown, Esquire, CCRC-M, 12973 North Telecom Parkway, Temple Terrace, FL 33637, by U.S. mail; and to Jay Pruner, Esquire, Office of the State Attorney, 419 Pierce Street, Tampa, FL 33602, by inter-office mail, on this 21st day of July, 2017.

DEPUTY CLERK

APPENDIX Q

936 F.3d 1322
United States Court of Appeals, Eleventh Circuit.

Richard KNIGHT, Petitioner-Appellant,
v.
FLORIDA DEPARTMENT OF CORRECTIONS, Respondent-Appellee.

No. 18-13390
|
(August 30, 2019)

Synopsis
Background: Following affirmance of conviction and death sentence for first degree murder of his cousin's girlfriend and her daughter, and denial of state habeas claims, defendant petitioned for federal habeas relief. The United States District Court for the Southern District of Florida, No. 0:17-cv-61921-RNS, Robert N. Scola, J., denied petition. Defendant appealed.

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

as a matter of first impression, Supreme Court's decision that Florida's death penalty sentencing scheme violated the Sixth Amendment announced a new constitutional rule, as would support finding that decision did not apply retroactively;

Supreme Court's decision that Florida's death penalty sentencing scheme violated the Sixth Amendment announced a procedural rule, and not a substantive one, such that exception to nonretroactivity for holdings that create substantive rules did not apply;

state court's factual determination that trial counsel's decision not to call DNA expert was a matter of trial strategy could not support ineffective assistance of counsel claim;

state court reasonably applied *Strickland* in concluding that trial counsel's decision not to call equivocal DNA expert was well within the wide range of reasonably competent performance; and

state court's conclusion that defendant failed to establish prejudice was not an unreasonable application of *Strickland*.

Affirmed.

Attorneys and Law Firms

***1328** Todd Gerald Scher, Law Office of Todd G. Scher, PL, DANIA BEACH, FL, for Petitioner - Appellant.

Lisa-Marie Lerner, Attorney General's Office, WEST PALM BEACH, FL, Pam Bondi, Attorney General's Office, TALLAHASSEE, FL, for Respondent - Appellee.

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 0:17-cv-61921-RNS

Before TJOFLAT, JORDAN, and GRANT, Circuit Judges.

Opinion

GRANT, Circuit Judge:

Richard Knight, a Florida prisoner sentenced to death for the murders of Odessia Stephens and her daughter, Hanessia Mullings, appeals the district court's denial of his federal habeas corpus petition. At this stage—almost 20 years after the crimes were committed and more than a decade after a Florida jury found Knight guilty of the murders and recommended a death sentence—Knight's claims have been winnowed down to two: first, that his death sentence is invalid under *Hurst v. Florida*, —— U.S. ——, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016), and second, that he received ineffective assistance of counsel at trial. Because *Hurst* does not apply retroactively to Knight, any challenge to his death sentence on that basis is beyond our reach on federal habeas review. Nor can Knight find success in his other challenge; the Florida Supreme Court's rejection of his ineffective-assistance claim was not an unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We therefore affirm.

I.

A.

According to evidence introduced at his murder trial, Knight lived in an apartment with his cousin, Hans Mullings, and Hans's girlfriend, Odessia. Hans and Odessia's four-year-old daughter, Hanessia, also lived with them in the apartment. Odessia was tired of supporting Knight and one evening while Hans was out she argued with Knight, insisting that he move out the next day. After the argument got heated, Knight left the house to walk around. But as he later confessed to another inmate, instead of getting less angry with Odessia ***1329** once he got some air, Knight became increasingly irate. He returned to the apartment and after exchanging more words with Odessia, he got a knife from the kitchen. When he went back to the master bedroom, he found Odessia and her little girl in the bed. He began stabbing Odessia and continued his attack until she stopped resisting and curled up on the bedroom floor. He then moved on to little Hanessia, stabbing her until his knife broke and cutting his hand in the process. As he was leaving the bedroom, he heard "popping noises" from where Hanessia lay on the floor, and he thought that the little girl was "drowning in her own blood." Apparently not considering his revenge complete, he retrieved a second knife from the kitchen and returned to continue his attack on Odessia. In the meantime, Odessia had crawled from the bedroom to the living room, where she had collapsed. Knight turned her over, saw that she was still alive, and started stabbing her again.

Both Odessia and Hanessia died that night. In total, Odessia had 21 stab wounds, including 14 in the neck, 24 puncture or scratch wounds, bruising and ligature marks consistent with having been hit and strangled with a belt, defensive wounds, and bruises from being hit or punched in the mouth and head. Little Hanessia had four stab wounds in her upper body and neck, a deep defensive wound on her hand, bruises on her neck consistent with manual strangulation, and bruises on her arms consistent with having been grabbed.

Knight showered and changed after completing his brutal acts, then headed to the living room with a rag to wipe off the knives. Interrupted by a knock on the front door—it was police responding to a neighbor's 911 call—Knight ran to his room and climbed out the window.

Shortly after they arrived, police encountered Knight near the apartment. He told them that he lived there, but that he did not have a key. This was odd; the officers had already found that all the doors to the apartment were locked. Knight was also visibly wet—but it was not raining. Knight explained to police that he had been jogging, a remarkable contention from a

person who was wearing long pants and dress shoes. He did not appear to be sweating, in any event. And Knight's personal appearance subsequently revealed even more clues—he had blood on the back of his shirt, scratches on his chest and midsection, a scrape on his shoulder, and fresh cuts on his hand.

Knight was arrested and indicted for two counts of first-degree murder. A Florida jury found him guilty as charged. That same jury heard evidence and argument at the penalty phase and unanimously recommended two death sentences—one for each murder. Consistent with Florida's then-current death penalty sentencing procedure, the judge held an additional hearing, made his own findings regarding aggravating and mitigating circumstances, and sentenced Knight to death. The Florida Supreme Court affirmed Knight's convictions and sentences on direct appeal. *Knight v. State*, 76 So. 3d 879, 890 (Fla. 2011). The United States Supreme Court denied his petition for certiorari. *Knight v. Florida*, 566 U.S. 998, 998, 132 S.Ct. 2398, 182 L.Ed.2d 1038 (2012).

B.

Knight filed motions for state collateral relief raising the two claims at issue here, as well as others that have already been resolved. Specifically, he argued that the state court should vacate his death sentence in light of *Hurst v. Florida*, in which the Supreme Court held—four years after Knight's conviction was final—that Florida's death penalty sentencing scheme violated the Sixth Amendment. ***1330** 136 S. Ct. at 622. The problem identified by the Supreme Court in *Hurst*, and argued by Knight in his post-conviction pleadings, was that the jury's role in sentencing was to make a non-binding recommendation; the judge alone made the ultimate findings of fact necessary to impose the death penalty. *Id.* at 619, 621–22. Knight also argued that his guilt-phase counsel was constitutionally ineffective for failing to call an available DNA expert.

The Florida Supreme Court rejected his postconviction claims on the merits. *Knight v. State*, 225 So. 3d 661, 668 (Fla. 2017) (per curiam). A plurality of the court agreed with Knight that the sentencing procedure used in his case violated the Sixth Amendment under *Hurst*, but also concluded that the *Hurst* error was harmless. *Id.* at 682. The plurality explained that under the facts of Knight's case the penalty-phase jury had necessarily made the factual findings necessary to impose the death penalty—that "sufficient aggravators existed" and that "the aggravation outweighed the mitigation"—when it returned a unanimous vote recommending death.[1] *Id.* at 682–83 (citation omitted). As for his ineffective-assistance claim, the court held that Knight had failed to meet his burden under *Strickland* because he had not shown that his attorney's decision not to call his DNA expert constituted deficient performance, or that there was any reasonable probability that that decision negatively affected the outcome of his trial. *Id.* at 673–74.

[1] Three out of seven justices joined the opinion on Knight's *Hurst* claim. Two additional justices concurred in the result only. *Knight*, 225 So. 3d at 684.

C.

Knight filed a petition for federal habeas review in the Southern District of Florida, pursuant to 28 U.S.C. § 2254. The district court denied relief but granted a certificate of appealability on the two claims now before us.

II.

A.

Federal courts may grant habeas corpus relief to prisoners who are being detained "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(c)(3); 2254(a). But our authority to award this kind of relief to state prisoners is limited—by both statute and Supreme Court precedent.

First, the Antiterrorism and Effective Death Penalty Act (AEDPA) limits our authority to award habeas relief. A federal court may not grant a state prisoner's habeas petition on any issue that was decided on the merits by the state court unless the state court's ruling "(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). And as the Supreme Court has explained, "clearly established" federal law means "the holdings, as opposed to the dicta" from its controlling precedents at the time of the relevant state court decision. *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

A decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable ***1331** facts." *Williams*, 529 U.S. at 413, 120 S.Ct. 1495. A state court decision involves an unreasonable application of federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* To justify issuance of the writ under the "unreasonable application" clause, the state court's application of Supreme Court precedent must be more than just wrong in the eyes of the federal court; it "must be 'objectively unreasonable.' " *Virginia v. LeBlanc*, —— U.S. ——, 137 S. Ct. 1726, 1728, 198 L.Ed.2d 186 (2017) (quoting *Woods v. Donald*, —— U.S. ——, 135 S. Ct. 1372, 1376, 191 L.Ed.2d 464 (2015)); *see also Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (explaining that "an unreasonable application is different from an incorrect one.").

Second, Supreme Court precedent demands that in any federal habeas proceeding—including collateral proceedings in capital cases—where the petitioner seeks the benefit of a "new" rule of constitutional law, we must first determine whether the rule actually qualifies as new, and then whether that rule applies retroactively to the case. *See Teague v. Lane*, 489 U.S. 288, 300–01, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion); *Penry v. Lynaugh*, 492 U.S. 302, 313–14, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (stating that the retroactivity approach from *Teague* applies in capital cases), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 312–16, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In most cases, we cannot disturb a state conviction based on a constitutional rule announced after a conviction became final. *Teague*, 489 U.S. at 310, 109 S.Ct. 1060. Only two narrow exceptions pierce this general principle of nonretroactivity: new rules that are "substantive rather than procedural," and "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro v. Summerlin*, 542 U.S. 348, 352–53, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) (internal quotation marks and citations omitted). In all other cases the rule applies only prospectively.

What this means in plain English is that, in the vast majority of cases, prisoners will not be able to secure federal habeas relief based on a new constitutional rule—even when that rule runs in their favor. "This is but a recognition that the purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine." *Sawyer v. Smith*, 497 U.S. 227, 234, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990).

Though these two constraints—the rule of nonretroactivity set out in *Teague* and the deference to state court decisions mandated by AEDPA—are similar in some respects, they are nonetheless "quite separate" in their operation, and a state prisoner seeking federal habeas relief must clear both hurdles to succeed. *Greene v. Fisher*, 565 U.S. 34, 39, 132 S.Ct. 38, 181 L.Ed.2d 336 (2011). Accordingly—and the Supreme Court has made this clear—"in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is

properly raised by the state." *Horn v. Banks* (*Banks I*), 536 U.S. 266, 272, 122 S.Ct. 2147, 153 L.Ed.2d 301 (2002) (per curiam).

B.

Before conducting that analysis here, we pause to explain why we cannot simply accept the Florida Supreme Court's decision to apply *Hurst* retroactively to ***1332** Knight and review only its harmless-error analysis, as Knight urges us to do. Because the Florida Supreme Court had already decided to give him the benefit of *Hurst*, Knight says, the *Teague* retroactivity analysis no longer has any bearing in his case. He is wrong. While states may fashion their own retroactivity doctrines as a matter of state law, those doctrines cannot displace *Teague* on the federal stage. Our ability to consider whether Florida applied *Hurst* correctly depends entirely on whether we can apply *Hurst* ourselves. So far, neither the Supreme Court nor this Circuit has answered that question by analyzing *Hurst*'s retroactivity under *Teague*.[2]

[2] We have noted in passing that *Hurst* would not apply retroactively to a petitioner whose convictions became final long before the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), on which *Hurst* relied, and even before *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which formed the basis for *Ring*. *See Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1165 n.2 (11th Cir. 2017). And we have concluded in the context of an improvidently granted certificate of appealability that the Florida Supreme Court's decision not to apply *Hurst* retroactively to the same petitioner as a matter of state law was not contrary to or an unreasonable application of existing Supreme Court precedents. *See Lambrix v. Sec'y, Dep't of Corr.*, 872 F.3d 1170, 1182 (11th Cir. 2017) (per curiam). But the question of *Hurst*'s retroactivity under *Teague* to a petitioner like Knight—whose convictions became final after *Ring* but before *Hurst*—was not squarely presented in either case, so we did not conduct that analysis.

Florida, on the other hand, has its own retroactivity standard—and is free to give broader retroactive effect to new constitutional rules in state court proceedings than *Teague* allows in federal cases. *See Danforth v. Minnesota*, 552 U.S. 264, 282, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008). That is because the *Teague* bar "was intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions." *Id.* at 280–81, 128 S.Ct. 1029. So when states choose to apply new rules of constitutional procedure that are not retroactive under *Teague* in federal courts, they "do not do so by misconstruing the federal *Teague* standard. Rather, they have developed *state* law to govern retroactivity in state postconviction proceedings." *Id.* at 288–89, 128 S.Ct. 1029 (emphasis in original).

In deciding to apply *Hurst* retroactively to certain state habeas cases, the Florida Supreme Court did just that. *See Mosley v. State*, 209 So. 3d 1248, 1274–83 (Fla. 2016) (per curiam). Florida's retroactivity doctrine is unique to Florida—it applies to a limited class of constitutional decisions that announce changes "of fundamental significance," which for procedural rules requires consideration of three factors: "(a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that retroactive application of the new rule would have on the administration of justice." *Asay v. State*, 210 So. 3d 1, 16–17 (Fla. 2016) (per curiam) (citation omitted). For new constitutional rules involving the death penalty, Florida courts also consider on a case-by-case basis whether fundamental fairness requires retroactive application of the rule. *Mosley*, 209 So. 3d at 1274 (citing *James v. State*, 615 So. 2d 668, 668 (Fla. 1993)).[3] If ***1333** that sounds broader than *Teague*, it is for good reason—the Florida Supreme Court has itself acknowledged that this retroactivity standard is "more expansive" than the federal rule. *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005) (per curiam), *abrogated on unrelated grounds by Asay*, 210 So. 3d at 15–16.

[3] The Florida Supreme Court is now considering whether it should recede from the retroactivity analysis employed in *Asay*, *Mosley*, and *James*. *See Owen v. State*, No. SC18-810, April 24, 2019 order (directing parties to brief the issue). The uncertain fate of Florida's current retroactivity doctrine offers another reason that we cannot simply rely on a state retroactivity decision as a basis for federal habeas relief. If the state doctrine were to change during our review, would we then be faced with the question of whether to apply the state's new retroactivity doctrine—retroactively?

All that to say, Florida may make its own choice about the retroactivity of a given case as a matter of state law. And for *Hurst*, it has done so. Using its own standard, the Florida Supreme Court decided that *Hurst* would apply retroactively in state collateral review proceedings for petitioners whose convictions had not yet become final when the U.S. Supreme Court decided *Ring v. Arizona*; *Ring* held in 2002 that the Sixth Amendment requires a jury (rather than a judge) to find the aggravating factors necessary to impose the death penalty. *See Mosley*, 209 So. 3d at 1283 (citing *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)). The Florida Supreme Court reasoned that because *Hurst* struck down Florida's capital sentencing scheme based on *Ring*, prisoners whose cases were still pending on direct appeal when *Ring* was decided "should not suffer due to the United States Supreme Court's fourteen-year delay in applying *Ring* to Florida." *Id.* Following that rule, because Knight's conviction became final ten years after *Ring* was decided, the Florida Supreme Court applied *Hurst* retroactively in his postconviction proceeding. *Knight*, 225 So. 3d at 682.

But that state-law retroactivity determination has no significance in federal court. Unlike state courts, lower federal courts are not free to create our own rules of retroactivity—if the government raises the issue, a *Teague* analysis is mandatory. *Banks I*, 536 U.S. at 271–72, 122 S.Ct. 2147. As we have said, "States may exercise their collateral review power without regard to the *Teague* doctrine. Their doing so has no effect on later federal review." *Glock v. Singletary*, 65 F.3d 878, 890–91 (11th Cir. 1995) (en banc). So we are bound to follow *Teague*'s retroactivity principles whether or not the state court chose to apply the new rule in its own collateral proceeding. *See, e.g., Banks I*, 536 U.S. at 271–72, 122 S.Ct. 2147.

Here, then, we must conduct our own retroactivity analysis, using the standards articulated in *Teague.* And to repeat: *Teague* retroactivity is a "threshold question in every habeas case." *Caspari v. Bohlen*, 510 U.S. 383, 389, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994). When "issues of both retroactivity and application of constitutional doctrine are raised," we must decide the retroactivity issue first. *Bowen v. United States*, 422 U.S. 916, 920, 95 S.Ct. 2569, 45 L.Ed.2d 641 (1975). Where the State raises the issue, therefore, "federal habeas corpus courts *must* apply *Teague* before considering the merits" of the petitioner's claims. *Beard v. Banks* (*Banks II*), 542 U.S. 406, 412, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (emphasis in original) (internal quotation marks and citation omitted).

What's more, if a constitutional claim is *Teague*-barred, we do not reach its merits. *See, e.g.*, *id.* at 410 n.2, 124 S.Ct. 2504. That is because the Supreme Court's "jurisprudence concerning the 'retroactivity' of 'new rules' of constitutional law is primarily concerned, not with the question whether a constitutional violation occurred, but with the availability or nonavailability of remedies." *Danforth*, 552 U.S. at 290–91, 128 S.Ct. 1029. If the holding relied on qualifies as a new rule and does not meet *Teague*'s strict requirements for retroactivity, ***1334** then the claim is not redressable here—the "nonretroactivity principle *prevents* a federal court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final." *Caspari*, 510 U.S. at 389, 114 S.Ct. 948 (emphasis in original). And as we have said before, if "the court cannot relieve the harm of which a plaintiff complains, the court should not take the case; in the absence of an effective remedy its decision can amount to nothing more than an advisory opinion." *Wymbs v. Republican State Exec. Comm.*, 719 F.2d 1072, 1085 (11th Cir. 1983).

Our authority to overturn state convictions is limited, and the retroactivity principles articulated in *Teague* are tailored to those limitations. *See Danforth*, 552 U.S. at 277, 128 S.Ct. 1029. The fact that state courts do not face the same constraints on collateral review of their *own* criminal proceedings as we do does not relieve us of the obligation to apply federal retroactivity standards. *See id.* at 280–81, 128 S.Ct. 1029; *Banks I*, 536 U.S. at 271, 122 S.Ct. 2147. In fact, our narrow authority as federal courts to disrupt final state-court convictions reflects our recognition of the states' own sovereignty. So Florida may design and apply its retroactivity principles as generously as it wishes. But notwithstanding Florida's decision to apply *Hurst*—or any future decision—retroactively as a matter of state law, as a federal court we are required to perform the *Teague* analysis to determine whether prisoners can receive retroactive relief under federal law.

In sum, if *Hurst* announced a new rule of constitutional law, but one that does not fall into one of the exceptions to *Teague*'s bar on retroactivity, Knight cannot obtain federal habeas relief for any *Hurst* error in his sentence—regardless of what Florida may choose to do under state law. And if Knight cannot obtain federal habeas relief for his *Hurst* claim in any event, we may not offer an advisory opinion on whether the claim could have merit.

III.

A.

Turning to *Teague*, our analysis has three steps. *First*, we determine the date when the petitioner's conviction became final. *Banks II*, 542 U.S. at 411, 124 S.Ct. 2504. This happens when the United States Supreme Court "affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay v. United States*, 537 U.S. 522, 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003). Here, the Court denied Knight's petition for a writ of certiorari on May 14, 2012—more than three years before *Hurst* was decided. *Knight*, 566 U.S. at 998, 132 S.Ct. 2398.

Second, if the rule that the petitioner wants to apply had not been announced by that final-conviction date, we "assay the legal landscape" as it existed at the time and determine whether existing precedent compelled the rule—that is, whether the case announced a new rule or applied an old one. *Banks II*, 542 U.S. at 413, 124 S.Ct. 2504. If—and only if—the holding was "*dictated* by precedent existing at the time the defendant's conviction became final," then the rule is not new and may be applied retroactively on federal habeas review (indeed, it must be). *Caspari*, 510 U.S. at 390, 114 S.Ct. 948 (emphasis in original) (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. 1060). And that is not a light test—a rule is not dictated by prior precedent "unless it would have been 'apparent to all reasonable jurists.' " *Chaidez v. United States*, 568 U.S. 342, 347, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013) (quoting ***1335** *Lambrix v. Singletary*, 520 U.S. 518, 528, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997)). The fact that a decision is "within the logical compass of" or even "controlled by" prior precedent is not conclusive in the *Teague* analysis. *Butler v. McKellar*, 494 U.S. 407, 415, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990) (internal quotation marks and citation omitted). To " 'dictate' a result, prior precedent must be specific; it is not enough that it name the general principle from which the assertedly new rule sprang." *Glock*, 65 F.3d at 884.

Knight argues that *Ring v. Arizona* dictated the rule in *Hurst*. In *Ring*, the Supreme Court held that Arizona's capital sentencing scheme, which required judges alone to hear penalty-phase evidence and make factual findings relevant to the imposition of the death penalty, violated the defendant's Sixth Amendment right to a jury trial. 536 U.S. at 588–89, 122 S.Ct. 2428. In doing so, the Court explicitly overruled its precedent upholding Arizona's death penalty sentencing scheme, "to the extent that it allows a sentencing judge, *sitting without a jury*, to find an aggravating circumstance necessary for imposition of the death penalty." *Id.* at 609, 122 S.Ct. 2428 (emphasis added) (overruling *Walton v. Arizona*, 497 U.S. 639, 647–49, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990)).

Knight wants us to find that the new *Hurst* rule is actually the old *Ring* rule for an obvious reason—if the rule is not new, and instead was binding on lower courts at the time of Knight's conviction, then he is entitled to the benefit of the rule on federal habeas review. *See Yates v. Aiken*, 484 U.S. 211, 216–17 & n.3, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). But *Ring* did not dictate the Supreme Court's later invalidation of Florida's death penalty sentencing scheme in *Hurst*. In fact, the *Ring* Court specifically acknowledged that Florida's capital sentencing procedure differed from the Arizona scheme that it rejected. *See Ring*, 536 U.S. at 607–08 & n.6, 122 S.Ct. 2428 (categorizing state capital sentencing schemes according to jury involvement in sentencing). In Arizona, the judge alone made the factual findings necessary to impose the death penalty and imposed that penalty entirely apart from the jury. *See id.* at 588, 122 S.Ct. 2428. Florida's scheme, in contrast, incorporated an advisory jury that considered penalty-phase evidence and recommended a sentence of life or death to the court. Only after the jury's recommendation did the judge impose a sentence. *See id.* at 608 n.6, 122 S.Ct. 2428; Fla. Stat. Ann. § 921.141 (2001).

Hurst's conclusion that Florida's "hybrid" death penalty sentencing system violated the Sixth Amendment was not "apparent to all reasonable jurists" when Knight's convictions became final in 2012. We venture to count ourselves and our colleagues on this Court as members of that distinguished group. And in *Evans v. Secretary, Florida Department of Corrections*, we held that *Ring* did not invalidate Florida's capital sentencing scheme. 699 F.3d 1249, 1264–65 (11th Cir. 2012). We found it significant that Florida's statute—unlike the Arizona law at issue in *Ring*—required the penalty phase jury to find that

sufficient aggravating circumstances existed before it could recommend a death sentence, and directed the sentencing court to give "great weight" to the jury's advisory verdict. *Id.* at 1261 (citation omitted). We also noted that the Supreme Court had taken obvious pains in *Ring* to distinguish hybrid systems like Florida's from the "judge-only" sentencing scheme in Arizona and concluded that such distinctions would not have been necessary if the Court had intended to strike down both systems. *Id.* at 1262.

And we were not the only ones. In fact, Justice Alito wrote along those same lines in his dissenting opinion in *Hurst*: "Although ***1336** the Court suggests that today's holding follows ineluctably from *Ring*, the Arizona sentencing scheme at issue in that case was much different from the Florida procedure now before us." 136 S. Ct. at 625 (Alito, J., dissenting). After describing the "critically important role" of the advisory jury in Florida's death penalty sentencing scheme, Justice Alito concluded that the "decision in *Ring* did not decide whether this procedure violates the Sixth Amendment, and I would not extend *Ring* to cover the Florida system." *Id.* at 626. Clearly, reasonable jurists could—and did—disagree that *Ring* compelled the outcome in *Hurst*. The Alito dissent and this Court's pre-*Hurst* holding strongly indicate that *Hurst* announced a new constitutional rule rather than applying an old one. *See Banks II*, 542 U.S. at 415, 124 S.Ct. 2504.

That conclusion is only strengthened by the fact that *Ring* did not specifically address the continued validity of the Supreme Court's precedents *upholding* Florida's death-penalty sentencing system—*Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), and *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (per curiam). And the Court has repeatedly instructed us to follow its precedents, even if later decisions appear to undermine them, unless and until the Court itself sets them aside. *See, e.g., Bosse v. Oklahoma*, —— U.S. ——, 137 S. Ct. 1, 2, 196 L.Ed.2d 1 (2016) (per curiam) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." (citation omitted)); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). So *Spaziano* and *Hildwin* remained good law until the Court explicitly overruled them in *Hurst*. *See Saffle v. Parks*, 494 U.S. 484, 488, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (explaining that the "explicit overruling of an earlier holding no doubt creates a new rule"); *see also Hurst*, 136 S. Ct. at 623. It is hard to imagine that the Supreme Court overruled those cases in *Ring* but forgot to say so until *Hurst*.

Because all these factors show that *Hurst* was not dictated by prior precedent—and in fact explicitly overruled existing precedent upholding Florida's death penalty sentencing scheme—we can see that the rule in *Hurst*, which led to a conclusion that the Florida scheme was unconstitutional, was new.

Having determined that *Hurst* announced a new rule of constitutional law, we proceed to the final step in the *Teague* analysis—whether *Hurst* "falls within either of the two exceptions to nonretroactivity." *Banks II*, 542 U.S. at 411, 124 S.Ct. 2504. Those exceptions, again, include (1) holdings that create substantive (not procedural) rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," and (2) holdings that constitute "watershed rules of criminal procedure." *Teague*, 489 U.S. at 311–13, 109 S.Ct. 1060 (citation omitted).

The *Hurst* rule does not fit within either exception. To begin, substantive rules include decisions that change "the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353, 124 S.Ct. 2519. Procedural rules, on the other hand, "regulate only the *manner of determining* the defendant's culpability." *Id.* (emphasis in original). In considering which category the *Hurst* rule falls into, we have a head start because the Supreme Court has already held that *Ring* represented a "prototypical procedural rule[ ]." *Id.* And that makes sense: *Ring* changed the permissible *procedure* for sentencing in a capital case when it required "that a jury rather than a ***1337** judge find the essential facts" necessary to impose the death penalty. *See id.* Because *Hurst*'s holding—that an advisory "jury's mere recommendation is not enough" to satisfy this procedural requirement—is an extension of the rule from *Ring*, we have no trouble concluding that *Hurst* also announced a procedural rule, and not a substantive one. *Hurst*, 136 S. Ct. at 619.

The second exception is for "watershed rules of criminal procedure." *Banks II*, 542 U.S. at 417, 124 S.Ct. 2504. This exception is extremely limited in scope—it applies "only to a small core of rules" so fundamental to our criminal process that it is "unlikely that many such components of basic due process have yet to emerge." *Id.* (citations omitted). Indeed, the watershed exception remains somewhat theoretical at this point; in the years following *Teague*, the Supreme Court has never found a rule that fits. *See id.* And in "providing guidance as to what might fall within this exception," the Court has "repeatedly referred to the rule of *Gideon v. Wainwright*, 372 U. S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (right to counsel), and only to this rule." *Id.* Knight does not contend that *Hurst* announced a new watershed rule that compares to

Gideon, and we do not see how it could have either. In short, *Hurst* meets neither exception, and therefore is not retroactive.

B.

Because the *Hurst* rule is not retroactive, Knight cannot receive federal habeas relief on his *Hurst* claim. That is as it must be—we are conscientious about the fact that "*Teague*'s nonretroactivity principle acts as a limitation on the power of federal courts to grant habeas corpus relief." *Id.* at 412, 124 S.Ct. 2504 (internal quotation marks and citation omitted). And because we would have no lawful remedy to offer even if we could identify an error, we must decline to consider whether any *Hurst* error exists. That means, of course, that we also do not consider whether the un-found and un-remediable error could be harmless.

Knight disputes this path. He argues that, even conceding the lack of an available remedy for any *Hurst* error, whether that un-remediable error was harmless is itself a separate question of federal law under *Brecht v. Abrahamson*, 507 U.S. 619, 637–38, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). He thus urges us to review the state court's harmless-error analysis, regardless of whether we reach the merits of his *Hurst* claim. We will not. It strains the imagination—as well as our constitutional and institutional respect for state courts—to suppose that we *cannot* remedy an error, but that we *can* somehow remedy an erroneous state-court conclusion that the error was harmless.

And *Brecht* does not stand for the proposition that Knight asserts in any event. While *Brecht* established the harmless-error standard for collateral review of constitutional trial errors, it did not create a stand-alone federal claim severable from the question of whether remediable error existed in the first place.[4] *See Williams v. Singletary*, 114 F.3d 177, 180 (11th Cir. 1997) (per curiam), *as amended on denial of reh'g* (July 29, 1997). Some underlying violation of federal law that we can address is a necessary predicate to federal ***1338** habeas relief—unless we agree that an error has occurred, it makes no difference whether the purported error was harmless. "We have consistently applied the *Brecht* harmless error standard only after determining that there was an error." *Id.*; *cf. Wilson v. Corcoran*, 562 U.S. 1, 6, 131 S.Ct. 13, 178 L.Ed.2d 276 (2010) (per curiam) ("It is not enough to note that a habeas petitioner *asserts* the existence of a constitutional violation; unless the federal court agrees with that assertion, it may not grant relief." (emphasis in original)). There is no free-floating federal constitutional right to infallible application of harmless-error principles.

[4] As an aside, what *Brecht* really decided was that federal courts evaluating constitutional trial error on collateral review would apply a more relaxed harmless-error standard—whether the error "had substantial and injurious effect or influence in determining the jury's verdict"—rather than the harmless-beyond-a-reasonable-doubt standard used on direct review. *Brecht*, 507 U.S. at 638, 113 S.Ct. 1710 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)).

And again, where our retroactivity doctrine forecloses the possibility of federal habeas relief for a constitutional error, we are constrained to stop looking. *See Bowen*, 422 U.S. at 920, 95 S.Ct. 2569. The Supreme Court "consistently has declined to address unsettled questions regarding the scope of decisions establishing new constitutional doctrine in cases in which it holds those decisions nonretroactive," and has instructed us to do the same. *Id.* at 920–21, 95 S.Ct. 2569. This directive carries constitutional weight; as an Article III court, we are "without power to decide questions that cannot affect the rights of litigants in the case" at hand. *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) (per curiam). So even if we found *Hurst* error in Knight's sentencing, we would still be prohibited from issuing a writ of habeas corpus on that ground because *Hurst* is not retroactively applicable to Knight under *Teague*. After all, *Teague*'s nonretroactivity command is a limitation on our power, not a polite suggestion. *Banks II*, 542 U.S. at 412, 124 S.Ct. 2504. So our opinion—whatever it might be—on Knight's *Hurst* claim would be purely advisory. "And it is quite clear that the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) (internal quotation marks and citation omitted).

Where, as here, *Teague* bars relief before we reach the preliminary question of whether constitutional error occurred at all, consideration of the secondary question of whether any such error was harmless would be a prohibited and pointless exercise

for both the petitioner and this Court. We therefore cannot grant Knight relief on his *Hurst* claim, whether or not it is cloaked in the garb of harmless error.

IV.

We now turn to Knight's other claim. The State presented extensive DNA evidence against him during the guilt phase of his trial. Kevin Noppinger, a serologist with the Broward County Sheriff's Office crime lab, testified that Knight had Odessia's blood on his hand and her DNA on his shirt when he was arrested. Fingernail scrapings from Odessia's body showed that she, in turn, had Knight's DNA under her fingernails. Noppinger also tested samples from the bloody clothes (boxer shorts, a shirt, and jean shorts) found under the bathroom sink. He found Knight's blood mixed with Hanessia's blood on the boxer shorts, Odessia's and Hanessia's blood elsewhere on the boxer shorts and on the jean shorts, and Odessia's blood on the shirt.

One of the State's other experts was Kevin McElfresh of Bode Technology Group, whose DNA analysts had conducted additional testing on different samples from the same items of clothing. In particular, McElfresh's group analyzed DNA samples from an unstained area of the waistband of the boxer shorts in an attempt to determine who owned them. Although Bode's initial report stated that Knight's DNA was not on the waistband ***1339** sample, McElfresh testified at trial that he had conducted some additional analysis and determined that some of the DNA on the waistband *could* have been Knight's.

Knight's guilt-phase counsel consulted with DNA expert Dr. Norah Rudin, who was listed as a potential trial witness by the defense. Dr. Rudin informed counsel that, although some of Noppinger's sample labeling practices were sloppy, she generally agreed with his conclusions about the sources of the DNA samples he analyzed. She was much more critical of McElfresh's analysis: she called his methods "fundamentally incorrect and inherently biased" and his testimony "incomplete and misleading." In her opinion, the DNA test results for the waistband samples were "inconclusive." But Dr. Rudin did not stop there—she also considered McElfresh's testimony "relatively inconsequential when viewed in the context of the biological evidence as a whole." She told Knight's counsel that she did not believe that she could help his case, and that she would not call herself as an expert if she were in his shoes. Counsel, it appears, agreed with her perspective and did not call her at trial.

Testimony indicates that one additional fact persuaded counsel that calling Dr. Rubin to quibble with McElfresh's methods would not be good trial strategy. At the time of Knight's trial, Florida permitted a defendant who did not put up any evidence at trial to give both initial and rebuttal closing arguments—an advantage ordinarily offered to the prosecution. Dr. Rudin would have been Knight's only witness, so calling her to testify would have meant giving up the opportunity to have the first word and the last at closing. Given that fact, she would have largely corroborated Noppinger's testimony while also costing Knight an advantage at closing arguments.

Nonetheless, on state collateral review, Knight contended that his counsel provided constitutionally ineffective assistance by failing to call Dr. Rudin as an expert. He argued that Dr. Rudin's criticisms of McElfresh's methods and the crime lab's labeling practices would have cast doubt on all of the State's DNA evidence and significantly damaged the State's case. The Florida Supreme Court disagreed, finding that Knight had not met his burden on either prong of the two-part test for ineffective assistance of counsel claims set out in *Strickland*. *See Knight*, 225 So. 3d at 672–74. Knight, however, argues that 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." 28 U.S.C. § 2254(d)(1).

To begin, the Florida Supreme Court correctly identified the governing standard. *Strickland* is the relevant "clearly established" Supreme Court precedent for purposes of an ineffective-assistance claim. *See Premo v. Moore*, 562 U.S. 115, 118, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011). Under *Strickland*, to succeed on a claim of ineffective assistance of counsel, a defendant must show both that his attorney's performance was deficient—that is, "that counsel's representation fell below an objective standard of reasonableness"—and that he was prejudiced by the inadequate performance. *Strickland*, 466 U.S. at 687–88, 104 S.Ct. 2052. In applying the first prong, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. 2052. And to show prejudice, the

"defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

***1340** The *Strickland* standard is "highly deferential," as is the review of a state-court decision under AEDPA; "when the two apply in tandem, review is 'doubly' so." *Harrington v. Richter*, 562 U.S. 86, 105, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (citations omitted). In reviewing a state court's application of *Strickland*, therefore, a federal habeas court cannot conduct a de novo review and reverse simply because it strongly disagrees with the state court's conclusion. *Id.* at 102, 131 S.Ct. 770. Instead, for Knight to succeed on his ineffective-assistance claim, we must conclude that the Florida Supreme Court's decision "was an objectively unreasonable application of the *Strickland* standard." *Allen v. Sec'y, Fla. Dep't of Corr.*, 611 F.3d 740, 751 (11th Cir. 2010).

The Florida Supreme Court determined that counsel's decision not to call Dr. Rudin at trial was reasonable trial strategy. *Knight*, 225 So. 3d at 674. Whether the decision was actually a matter of strategy is a question of fact; thus, the state court's finding on that issue is presumed to be correct. *Provenzano v. Singletary*, 148 F.3d 1327, 1330 (11th Cir. 1998). We must accept all factual findings made by the state court unless the petitioner rebuts the presumption of correctness "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Wood v. Allen*, 542 F.3d 1281, 1285 (11th Cir. 2008). Knight has not presented any evidence to suggest that counsel's decision was anything other than a matter of strategy, and we accept the state court's finding on that point.

Whether counsel's strategic decision not to call Dr. Rudin was reasonable is a question of law, which we review through the lens of AEDPA deference. *See Ferrell v. Hall*, 640 F.3d 1199, 1223–24 (11th Cir. 2011). In assessing an attorney's performance under *Strickland*, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. "Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess." *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc). We have no reason to doubt the Florida Supreme Court's conclusion that counsel's decision not to call an equivocal expert, in part to preserve an advantage at closing, was well within the wide range of reasonably competent performance.

The Florida Supreme Court also determined that Knight had not met his burden of showing prejudice under *Strickland* because there was no reasonable probability that Dr. Rudin's testimony would have made a difference in the outcome of the trial, given the weight of the evidence against him. *See Knight*, 225 So. 3d at 674. That conclusion was also reasonable.

Dr. Rudin generally agreed with Noppinger's conclusions regarding the DNA evidence. With or without Dr. Rudin's testimony, therefore, there was no dispute that Knight had Odessia's blood on his hand and her DNA on his shirt when he was arrested, or that Knight's DNA was found under Odessia's fingernails. Knight's blood—as well as Odessia's blood and Hanessia's—was on the clothes discarded at the crime scene. And even if the jury had heard Dr. Rudin's criticism of McElfresh's testimony that Knight could not be ruled out as a DNA contributor for the waistband of the boxer shorts, other evidence showed that the clothes were his: the boxer shorts were the same brand and size as the ones that Knight was wearing when he was arrested, and Knight's cousin testified that the bloody shirt was one that Knight wore often.

***1341** And the evidence did not stop there. Knight was known to be home with Hanessia less than an hour before the murders, and the jury heard evidence of ongoing tension with Odessia. Police found him near the scene of the murders shortly after they arrived, and his answers to their questions were inconsistent with his appearance. All of that is in addition to the testimony of an inmate housed with Knight at the Broward County jail, who testified that Knight confessed the crime to him, providing a detailed description of events and a floorplan of the apartment. In short, even if the jury had entirely discounted McElfresh's testimony as a result of Dr. Rudin's criticism of his testing methods, the remaining evidence against Knight was so strong that the chance of a not-guilty verdict still would have been remote, to say the least.

The Florida Supreme Court's conclusion that Knight failed to make the required showings of deficient performance and prejudice was not an unreasonable application of *Strickland*.

* * *

In sum, we are prohibited from considering Knight's *Hurst* claim by *Teague*'s rule of nonretroactivity, which eliminates any possibility of relief regardless of whether there was an error and regardless of whether any error was harmless. And our review of Knight's ineffective-assistance claim shows that the state court's ruling on that issue was not an unreasonable application of governing Supreme Court precedent. We therefore affirm the district court's denial of Knight's federal habeas petition.

AFFIRMED.

All Citations

936 F.3d 1322, 28 Fla. L. Weekly Fed. C 238

APPENDIX R

2020 WL 3116597
Only the Westlaw citation is currently available.
Supreme Court of Florida.

STATE of Florida, Appellant/Cross-Appellee,
v.
Mark Anthony POOLE, Appellee/Cross-Appellant.

No. SC18-245
|
January 23, 2020
|
Rehearing Denied April 2, 2020

Synopsis

Background: After death sentence for capital murder was affirmed on direct appeal, 151 So.3d 402, defendant filed motion for postconviction relief, challenging constitutionality of Florida's death penalty scheme. The Circuit Court, 10th Judicial Circuit, Polk County, Jalal A. Harb, J., denied guilt phase claims, but set aside sentence and ordered resentencing, under *Hurst v. Florida*, 202 So.3d 40. State appealed.

Holdings: The Supreme Court held that:

in determining defendant's eligibility for death penalty, issue was solely whether defendant jury found existence of one or more aggravating circumstances, not whether they were "sufficient";

decision whether to impose death sentence was not "element" that had to be submitted to jury and proven beyond reasonable doubt, receding from *Hurst v. State*, 202 So.3d 40; and

Sixth Amendment right to jury trial did not require that jury's sentence recommendation of death be unanimous.

Affirmed in part; remanded with instructions to reinstate sentence.

Lawson, J., specially concurred, with opinion.

Labarga, J., filed dissenting opinion, and concurred in part and dissented in part on denial of rehearing.

Opinion, 292 So.3d 694, superseded.

An Appeal from the Circuit Court in and for Polk County, Jalal A. Harb, Judge - Case No. 532001CF007078A0XXXX

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Opinion

PER CURIAM.

***1** The State of Florida appeals from a postconviction order setting aside Mark Anthony Poole's 2011 death sentence for the 2001 murder of Noah Scott. The sentence became final in 2015. *Poole v. State (Poole II)*, 151 So. 3d 402 (Fla. 2014), *cert. denied*, —— U.S. ——, 135 S. Ct. 2052, 191 L.Ed.2d 960 (2015).[1] The trial court set aside the sentence and ordered a new penalty phase proceeding after finding the sentence to have been imposed in violation of the United States and Florida Constitutions as interpreted and applied in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Arguing that Poole suffered no constitutional deprivation in his sentencing proceeding, the State requests that we reexamine and partially recede from *Hurst v. State*.

[1] We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.; *State v. Fourth Dist. Court of Appeal*, 697 So. 2d 70, 71 (Fla. 1997).

Poole filed a cross-appeal, arguing that his trial counsel's concession of guilt on related non-homicide offenses violated his Sixth Amendment right to counsel and constituted structural error requiring reversal of his convictions and a new guilt phase trial.

We address the cross-appeal first because relief on Poole's guilt phase postconviction claim would moot the sentencing issue. The trial court rejected the guilt phase claim, and we affirm the trial court as to this issue because Poole did not preserve the issue for review on appeal. As for the sentencing issue, we agree with the State that we must recede from *Hurst v. State* except to the extent that it held that a jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt. Accordingly, we reverse the portion of the trial court's order setting aside Poole's sentence.

BACKGROUND

The opinion on direct appeal set out the following facts:

> Mark Anthony Poole was convicted of the first-degree murder of Noah Scott, attempted first-degree murder of Loretta White, armed burglary, sexual battery of Loretta White, and armed robbery. Poole was convicted based on the following facts presented at trial. On the evening of October 12, 2001, after playing some video games in the bedroom of their mobile home, Noah Scott and Loretta White went to bed sometime between 11:30 p.m. and 12 a.m. Later during the night, White woke up with a pillow over her face and Poole sitting on top of her. Poole began to rape and sexually assault her as she begged Poole not to hurt her because she was pregnant. As White struggled and resisted, Poole repeatedly struck her with a tire iron. She put her hand up to protect her head, and one of her fingers and part of another finger were severed by the tire iron. While repeatedly striking White, Poole asked her where the money was. During this attack on White, Scott attempted to stop Poole, but was also repeatedly struck with the tire iron. As Scott struggled to defend White, Poole continued to strike Scott in the head until Scott died of blunt force head trauma. At some point after the attack, Poole left the bedroom and White was able to get off the bed and put on clothes but she passed out before leaving the bedroom. Poole came back in the bedroom and touched her vaginal area and said "thank you." White was in and out of consciousness for the rest of the night. She was next aware of the time around 8 a.m. and 8:30 a.m. when her alarm went off.
>
> ***2** When her alarm went off, White retrieved her cell phone and called 911. Shortly thereafter, police officers were dispatched to the home. They found Scott unconscious in the bedroom and White severely injured in the hallway by the bedroom. White suffered a concussion and multiple face and head wounds and was missing part of her fingers. Scott was

pronounced dead at the scene. Evidence at the crime scene and in the surrounding area linked Poole to the crimes. Several witnesses told police officers that they saw Poole or a man matching Poole's description near the victims' trailer on the night of the crimes. Stanley Carter stated that when he went to the trailer park around 11:30 that night, he noticed a black male walking towards the victims' trailer. Carter's observations were consistent with that of Dawn Brisendine, who knew Poole and saw him walking towards the victims' trailer around 11:30 p.m. Pamela Johnson, Poole's live-in girlfriend, testified that on that evening, Poole left his house sometime in the evening and did not return until 4:50 a.m.

Poole was also identified as the person selling video game systems owned by Scott and stolen during the crime. Ventura Rico, who lived in the same trailer park as the victims, testified that on that night, while he was home with his cousin's girlfriend, Melissa Nixon, a black male came to his trailer and offered to sell him some video game systems. Rico agreed to buy them for $50, at which point the black male handed him a plastic trash bag. During this exchange, Nixon got a good look at the man and later identified Poole when the police showed her several photographs. Nixon testified that the next morning, when her son was going through the trash bag, he noticed that one of the systems had blood on it.

Pamela Johnson also testified that on the same morning, she found a game controller at the doorstep of Poole's house, she handed it to Poole, and Poole put it in his nightstand. She indicated that she had never seen that game controller before that morning and did not know what it would be used for because neither she nor Poole owned any video game systems. During the search of Poole's residence, the police retrieved this controller. In addition, the police retrieved a blue Tommy Hilfiger polo shirt and a pair of Poole's Van shoes, shoes Poole said he had been wearing on the night of the crimes. A DNA analysis confirmed that the blood found on the Sega Genesis box, Super Nintendo, Sega Dreamcast box and controller matched the DNA profile of Scott. Also, a stain found on the left sleeve of Poole's blue polo shirt matched White's blood type. The testing of a vaginal swab also confirmed that the semen in White was that of Poole. A footwear examination revealed that one of the two footwear impressions found on a notebook in the victims' trailer matched Poole's left Van shoe. The tire iron used in the crimes was found underneath a motor home located near the victims' trailer. A DNA analysis determined that the blood found on this tire iron matched Scott's DNA profile.

Poole v. State (*Poole*), 997 So. 2d 382, 387-88 (Fla. 2008) (footnote omitted).

The trial began on April 21, 2005, and the jury returned a verdict six days later finding Poole guilty of all charges, namely first-degree murder of Noah Scott, attempted first-degree murder of Loretta White, armed burglary, sexual battery of Loretta White, and armed robbery. The penalty phase began on May 2, 2005. The jury recommended death by a vote of twelve to zero two days later, which allowed the trial court to consider a death sentence under section 921.141, Florida Statutes (2005). On August 25, 2005, the trial court sentenced Poole to death.

On direct appeal Poole raised a number of challenges to his convictions and death sentence, including that his death sentence violated the dictates of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), because Florida's statutory sentencing scheme did not require the jury to unanimously find all of the aggravators necessary to impose a death sentence. *Poole*, 997 So. 2d at 396. This Court rejected that argument, holding that Florida's capital sentencing scheme was not unconstitutional pursuant to *Ring*. *Id.* Alternatively, we held that Poole's case fell outside the scope of *Ring* because the jury had unanimously found that Poole committed other violent felonies during the murder—specifically attempted first-degree murder, sexual battery, armed burglary, and armed robbery. *Id.* Those convictions unanimously found by Poole's jury formed the basis of one of the statutory aggravators found by the trial court—that Poole had prior violent felony convictions. *Id.* Thus, this case fell "outside the scope of *Ring*." *Id.* However, this Court determined that Poole was entitled to a new penalty phase proceeding because the prosecutor improperly introduced inadmissible nonstatutory aggravation by cross-examining witnesses about unproven prior arrests and the unproven content of a tattoo on Poole's body. *Id.* at 393-94. We vacated Poole's sentence of death and remanded for a new penalty phase. *Id.* at 394.

***3** On June 29, 2011, following a new penalty phase, the jury recommended death by a vote of 11 to 1. *Poole II*, 151 So. 3d at 408. The trial court found four aggravating circumstances: (1) the contemporaneous conviction for the attempted murder of Loretta White (very great weight); (2) the capital felony occurred during the commission of burglary, robbery, and sexual battery (great weight); (3) the capital felony was committed for financial gain (merged with robbery but not burglary or sexual battery) (less than moderate weight); and (4) the capital felony was committed in a heinous, atrocious, or cruel (HAC) manner (very great weight). *Id.* Again, three of these four aggravators were found unanimously by the jury because the jury found Poole guilty of the other charged crimes on which these aggravators are based.

The trial court found two statutory mitigating circumstances: (1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance (moderate to great weight); and (2) the defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (great weight). It found eleven nonstatutory mitigating circumstances:

> (1) borderline intelligence (little weight); (2) defendant dropped out of school (very little weight); (3) loss of father figure had emotional effect and led to his drug abuse (very little weight); (4) defendant sought help for drug problem (very little weight); (5) defendant had an alcohol problem at time of crime (very little weight); (6) drug abuse problem at time of crime (very little weight); (7) defendant has a relationship with son (very little weight); (8) strong work ethic (very little weight); (9) defendant is a religious person (very little weight); (10) dedicated uncle (very little weight); and (11) defendant needs treatment for mental disorder unrelated to substance abuse (very little weight). The trial court determined that the proposed mitigator that the defendant has severe chronic alcohol and cocaine problem for which he needs treatment was not proven.

Id.

The trial court concluded that the aggravating factors far outweighed the mitigating circumstances; specifically, the HAC aggravator alone outweighed all mitigating circumstances. *Id.* Accordingly, the trial court sentenced Poole to death on August 19, 2011, and we upheld the trial court's resentencing on June 26, 2014. *Id.* at 419.

On April 8, 2016, Poole filed his initial postconviction motion, raising two issues pertinent to this appeal: (1) counsel was ineffective for conceding that Poole committed the nonhomicide offenses; and (2) Poole is entitled to resentencing because the jury did not make the findings required by *Hurst v. State*.

The trial court entered an interim order vacating Poole's death sentence pursuant to *Hurst v. State*, finding the error was not harmless because the jury's recommendation of death was not unanimous. Following an evidentiary hearing, the trial court denied Poole's claim that counsel was ineffective for conceding guilt on the nonhomicide offenses. The trial court granted the State's request for a stay of its order requiring a new penalty phase, pending this appeal.

GUILT PHASE CLAIM

Poole argues that he is entitled to a new trial because, over his express objections, defense counsel conceded Poole's guilt on the non-homicide offenses. Poole bases this claim on *McCoy v. Louisiana*, —— U.S. ——, 138 S. Ct. 1500, 200 L.Ed.2d 821 (2018).[2] The State argues that Poole failed to preserve the specific legal argument that he raises on appeal and thus this issue was waived. We agree.

[2] In *McCoy*, the Supreme Court reviewed a state supreme court decision affirming the petitioner's murder conviction on direct appeal. *See McCoy*, 138 S. Ct. at 1507. The Supreme Court decided McCoy on direct appeal. Because we have concluded that Poole did not preserve his guilt phase claim for appellate review, we need not address how *McCoy's* holding applies in the postconviction context. *See Weaver v. Massachusetts*, —— U.S. ——, 137 S. Ct. 1899, 198 L.Ed.2d 420 (2017).

***4** "In order to preserve an issue for appeal, the issue 'must be presented to the lower court and the *specific legal argument* or grounds to be argued on appeal must be part of that presentation.' " *Bryant v. State*, 901 So. 2d 810, 822 (Fla. 2005) (emphasis added) (quoting *Archer v. State*, 613 So. 2d 446, 448 (Fla. 1993)). Raising a claim for the first time during closing

arguments is insufficient to preserve a postconviction claim. *Deparvine v. State*, 146 So. 3d 1071, 1103 (Fla. 2014). Rather, the specific legal argument must be raised in the postconviction motion. *Wickham v. State*, 124 So. 3d 841, 853 (Fla. 2013). Applying these principles here, we conclude that Poole did not preserve this claim for appellate review.

In his postconviction motion, Poole argued that counsel's concession of guilt on the nonhomicide offenses violated Poole's rights to remain silent and to the attorney-client privilege under the Fifth and Sixth Amendments. Poole emphasized the specific wording of counsel's concession, noting that counsel told the jury that Poole "acknowledges" that he committed burglary, sexual battery, and robbery. Poole contrasted "acknowledging" that a defendant committed a crime with simply conceding that a charge has been proven by the state. In the former case, according to Poole's motion, "the attorney-client privilege is violated, and the right to remain silent is waived, opening the door to rebuttal evidence and argument."

The argument that Poole now raises on appeal did not appear until written closing argument. Only then did Poole assert that counsel's concession of guilt without Poole's consent violated Poole's constitutional rights. Poole's written closing argument presented this argument as one of "two errors," each of which "individually would constitute grounds for vacating Mr. Poole's conviction." (The other error, of course, was the one he asserted in his postconviction motion—the alleged violation of Poole's rights to remain silent and to the attorney client privilege.) Poole presented each argument under a separate heading in his closing argument memorandum and said that the second argument (his original argument) provided "additional grounds for vacating Mr. Poole's conviction."

Poole's postconviction motion did not present the specific legal argument that he now presses on appeal. Raising the argument in his post-hearing, written closing argument memorandum was insufficient. Therefore, we hold that Poole did not preserve his guilt phase argument for our review on appeal.

SENTENCING PHASE CLAIM

We now turn to the State's argument that Poole suffered no constitutional deprivation in his sentencing proceeding and that we should partially recede from *Hurst v. State*.

I. Statutory and Legal Background

A. Florida's Capital Sentencing Law

Poole was sentenced to death under the familiar statutory framework that governed Florida's capital sentencing proceedings from 1973 until 2016. Florida adopted that framework in response to the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). "A fair statement of the consensus expressed by the Court in *Furman* is that 'where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' " *Zant v. Stephens*, 462 U.S. 862, 874, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion)). The Supreme Court has fleshed out this principle by requiring states to narrow the class of death-eligible murders and by mandating individualized sentencing that considers offender-specific mitigating circumstances.

***5** Florida's capital sentencing procedures begin with an evidentiary hearing at which the judge and jury hear evidence relevant to the nature of the crime and the character of the defendant, including statutory aggravating and mitigating

circumstances. § 921.141(1), Fla. Stat. (2011).[3] Next the jury deliberates and renders an "advisory sentence" to the court. § 921.141(2), Fla. Stat. Finally, "[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances," must enter a sentence of life imprisonment or death. § 921.141(3), Fla. Stat. If the court imposes a sentence of death, it is required to issue written findings "upon which the sentence of death is based as to the facts: (a) [t]hat sufficient aggravating circumstances exist as enumerated in subsection (5); and (b) [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Id*.

[3] For simplicity, unless otherwise indicated, throughout our discussion we refer in the present tense to Florida's capital sentencing law as it existed in 2011, when Poole was resentenced.

Soon after the legislature adopted this capital sentencing framework, this Court in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), considered whether the new law passed muster under *Furman*. The Court concluded that it did, because the statutory scheme "controlled and channeled" discretion "until the sentencing process becomes a matter of reasoned judgment." *Id*. at 10.

B. From *Proffitt* to *Walton*

In several cases that are directly relevant to the issues before us now, the Supreme Court itself considered and rejected Sixth and Eighth Amendment challenges to Florida's post-*Furman* capital sentencing law. In *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the Court took up the question whether Florida's capital sentencing system complied with the Eighth Amendment. The Court noted that, in Florida, the "jury's verdict is determined by majority vote. It is only advisory; the actual sentence is determined by the trial judge." *Id*. at 248-49, 96 S.Ct. 2960. No matter, the Court concluded, because the Court's decisions had "never suggested that jury sentencing is constitutionally required." *Id*. at 252, 96 S.Ct. 2960. The Court's ultimate holding in *Proffitt* was that "[o]n its face the Florida system ... satisfies the constitutional deficiencies identified in *Furman*." *Id*. at 253, 96 S.Ct. 2960.

Next, in *Spaziano v. Florida*, 468 U.S. 447, 457, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), the Supreme Court considered whether Florida's capital sentencing system violated the Sixth or Eighth Amendment by allowing the trial judge to override a jury's recommendation of life. *Id*. at 457, 104 S.Ct. 3154. As to the Sixth Amendment, the Court observed that, "despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual." *Id*. at 459, 104 S.Ct. 3154. And "[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue." *Id*. The Court also found no Eighth Amendment violation in the possibility of a jury override: "We are not persuaded that placing the responsibility on a trial judge to impose the sentence in a capital case is so fundamentally at odds with contemporary standards of fairness and decency that Florida must be required to alter its scheme and give final authority to the jury to make the life-or-death decision." *Id*. at 465, 104 S.Ct. 3154. The Court concluded that "there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed." *Id*.

Finally, in *Hildwin v. Florida*, 490 U.S. 638, 639, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), the Supreme Court considered a claim that "the Florida capital sentencing scheme violates the Sixth Amendment because it permits the imposition of death without a specific finding by the jury that sufficient aggravating circumstances exist to qualify the defendant for capital punishment." The Court rejected the claim, reasoning that "the existence of an aggravating factor here is not an element of the offense but instead is 'a sentencing factor that comes into play only after the defendant has been found guilty.' " *Id*. at 640, 109 S.Ct. 2055 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 86, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986)). Based on that premise, the Court held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id*. at 640-41, 109 S.Ct. 2055.

***6** A final, non-Florida case bears explaining before we turn to the cases that led directly to *Hurst v. State*. Decided one year after *Spaziano*, *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), involved a challenge to Arizona's capital sentencing law, which required the trial court to find and weigh aggravating and mitigating circumstances before imposing a death sentence. The Arizona law under review did not include any role for the jury in the capital sentencing process. The petitioner in *Walton* argued that "every finding of fact underlying the sentencing decision must be made by a

jury, not by a judge" and that therefore "the Arizona scheme would be constitutional only if a jury decides what aggravating and mitigating circumstances are present in a given case and the trial judge then imposes sentence based on those findings." *Id*. at 647, 110 S.Ct. 3047. The Court rejected that claim, relying largely on *Hildwin* and the Court's other decisions upholding Florida's capital sentencing system.

The argument that Florida's advisory jury verdict materially distinguished the two states' systems did not persuade the Court. Instead, the Court emphasized that Florida's capital jury does not make specific factual findings about aggravators and mitigators and that the jury's recommendation is not binding on the trial judge. *Id*. at 647-48, 110 S.Ct. 3047. The Court reasoned that "[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Id*. at 648, 110 S.Ct. 3047. The Court also rejected the argument that, in Arizona, aggravating factors were "elements of the offense." *Id*. The Court ultimately held that "the Arizona capital sentencing scheme does not violate the Sixth Amendment." *Id*. at 649, 110 S.Ct. 3047.

C. *Apprendi* and *Ring*

The Court's retreat from the rationale underlying the Sixth Amendment holdings of *Spaziano*, *Hildwin*, and *Walton*—specifically, that aggravators are sentencing factors rather than de facto elements of the crime of capital murder—began with the seminal case of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Apprendi had pleaded guilty to illegal possession of a firearm, an offense that carried a maximum punishment of ten years' imprisonment. Later, in a separate sentencing proceeding, the trial court found by a preponderance of the evidence that Apprendi had also violated a New Jersey hate crime sentencing statute. That judicial finding resulted in Apprendi being sentenced to a term of imprisonment two years above the statutory maximum for the base firearm offense. The Supreme Court described the question presented in *Apprendi* as whether the Fourteenth Amendment's Due Process Clause "requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." *Id*. at 469, 120 S.Ct. 2348.

The Court's analysis proceeded from the foundational principle that the Fifth Amendment (due process) and the Sixth Amendment (jury trial) combine to "entitle a criminal defendant to a 'jury determination ... of every element of the crime with which he is charged, beyond a reasonable doubt.' " *Id*. at 477, 120 S.Ct. 2348 (quoting *United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)). From that principle the Court derived the more specific rule that is the central holding of *Apprendi*: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Id*. at 490, 120 S.Ct. 2348 (Stevens, J., concurring) (alteration in original) (quoting *Jones v. United States*, 526 U.S. 227, 252-53, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)). The only exception to this rule is "the fact of a prior conviction." *Id*.

Most pertinent to our case here, the Court in *Apprendi* rejected New Jersey's argument that the factual finding supporting Apprendi's hate crime sentencing enhancement was a mere "sentencing factor," rather than a fact that constitutes an element of the offense. *Id*. at 494, 120 S.Ct. 2348. The Court stated: "Despite what appears to us the clear 'elemental' nature of the factor here, the relevant inquiry is one not of form but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict[.]" *Id*.

***7** In the penultimate paragraph of its opinion, the Court anticipated and rejected the argument that "the principles guiding" its decision "render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." *Id*. at 496, 120 S.Ct. 2348. The Court deemed the capital cases "not controlling" because, according to the Court, the offenses of conviction in those cases already subjected the defendant to a sentence of death; the aggravating factor findings merely informed the judge's choice of life or death. *Id*. This reasoning turned out to be short-lived.

Two years later, *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), gave the Supreme Court the opportunity to apply its *Apprendi* rule in the capital sentencing context. As we explained earlier, capital sentencing hearings under Arizona law were conducted by the trial court alone, and the court made all required findings. *Id*. at 592, 122 S.Ct. 2428. As in Florida, Arizona law provided that a death sentence could not be imposed unless at least one aggravating factor

was found to exist beyond a reasonable doubt. *Id*. at 597, 122 S.Ct. 2428. The Court framed the question presented as "whether that aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee ... requires that the aggravating factor determination be entrusted to the jury." *Id*.

The Court acknowledged its earlier decision in *Walton* upholding Arizona's capital sentencing scheme against a similar Sixth Amendment challenge. The Court recognized that *Walton* had characterized Arizona's required aggravating factors as "sentencing considerations" rather than "elements of the offense." *Id*. at 598, 122 S.Ct. 2428. But the Court explained that *Apprendi* had since clarified that the Sixth Amendment inquiry must focus on effect rather than form: "If a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id*. at 602, 122 S.Ct. 2428.

With that baseline established, the Court revisited whether, as the *Walton* decision had assumed, a first-degree murder conviction in Arizona necessarily included all the jury findings necessary to expose the defendant to a death sentence. The Court looked to an Arizona Supreme Court decision holding that the answer is no—"Defendant's death sentence required the judge's factual findings." *Id*. at 603, 122 S.Ct. 2428 (quoting *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139, 1151 (2001)). "Recognizing that the Arizona court's construction of the State's own law is authoritative," the Court concluded that "*Walton*, in relevant part, cannot survive the reasoning of *Apprendi*." *Id*. The Court ended its opinion:

> [W]e overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," the Sixth Amendment requires that they be found by a jury.

Id. at 609, 122 S.Ct. 2428 (citations omitted) (quoting *Apprendi*, 530 U.S. at 494 n.19, 120 S.Ct. 2348).

Justice Breyer declined to join the Court's opinion. He concurred in the judgment, however, on the ground that he "believe[d] that jury sentencing in capital cases is mandated by the Eighth Amendment." *Id*. at 614, 122 S.Ct. 2428 (Breyer, J., concurring in the judgment).

D. *Hurst v. Florida*

It was not until *Hurst v. Florida*, —— U.S. ——, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016), that the Supreme Court addressed the significance of *Ring* for the constitutionality of Florida's capital sentencing procedure. Although it ultimately chose to address only the Sixth Amendment in its decision, the Supreme Court granted certiorari on the question "[w]hether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring v. Arizona*." *Hurst v. Florida*, 575 U.S. 902, 902, 135 S.Ct. 1531, 191 L.Ed.2d 558 (2015).

***8** In his briefing to the Supreme Court, Hurst made a Sixth Amendment argument and an Eighth Amendment argument. His Sixth Amendment argument was that "Florida's capital sentencing scheme violates the Sixth Amendment under *Ring v. Arizona* ... because it assigns to the judge alone the power to render a defendant eligible for the death penalty by finding aggravating circumstances." Reply Brief for Petitioner at 2, *Hurst v. Florida*, 136 S. Ct. 616 (2016) (No. 14-7505), 2015 WL 5138584 at *2. Hurst's Eighth Amendment argument was that "Florida's capital sentencing scheme also violates the Eighth Amendment because it assigns to the judge the power to impose the death penalty." Reply Brief for Petitioner at 5.

The Court had little trouble concluding that "the analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's." *Hurst v. Florida*, 136 S. Ct. at 621-22. Pointing to section 921.141(3), Florida Statutes (2010), the Court noted that Florida law required the judge, not the jury, to find the "facts" necessary to impose the death penalty. *Id*. at 622. The Court said it was "immaterial" that Florida's system, unlike Arizona's, incorporated an advisory jury verdict. *Id*. The Court rejected the State's argument that "when Hurst's sentencing jury recommended a death sentence, it 'necessarily included a finding of an aggravating circumstance.' " *Id*. (quoting the State's brief). What mattered was that "the Florida sentencing statute does not make a defendant eligible for death until 'findings *by the court* that such person shall be punished by death.' " *Id*. (quoting § 775.082(1), Fla. Stat. (2010)).

The Court ultimately held that "Florida's sentencing scheme, which required the judge alone to find the existence of an

aggravating circumstance, is therefore unconstitutional." *Id.* at 624. And, paralleling the language it used in *Ring* to overrule *Walton*, the Court overruled *Spaziano* and *Hildwin* "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for the imposition of the death penalty." *Id.*

As we noted earlier, the Court's opinion did not address Hurst's Eighth Amendment argument. In fact, notwithstanding its earlier order, the Court described itself as having granted certiorari to resolve only "whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*." *Id.* at 621. In a solo concurrence, Justice Breyer did address the Eighth Amendment claim. Citing his own concurring opinion in *Ring*, he concluded that "the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death." *Id.* at 624 (Breyer, J., concurring in the judgement) (quoting *Ring*, 536 U.S. at 614, 122 S.Ct. 2428).

E. *Hurst v. State*

When Hurst's case returned to this Court on remand from the Supreme Court, it would have been reasonable to expect that the application of *Hurst v. Florida* would be straightforward. Hurst had asked the Supreme Court to find that Florida's capital sentencing statute violated the Sixth Amendment "because it assigns to the judge alone the power to render a defendant eligible for the death penalty by finding aggravating circumstances." Reply Brief for Petitioner at 2, *Hurst v. Florida*, 136 S. Ct. 616 (2016) (No. 14-7505), 2015 WL 5138584 at *2. In a relatively brief opinion that did not expand on *Ring*, the Supreme Court agreed. As Justice Canady correctly observed in his *Hurst v. State* dissent, "*Hurst v. Florida* simply applies the reasoning of *Ring* and *Apprendi* to Florida's death penalty statute and concludes that the jury's advisory role under Florida law does not satisfy the requirements of the Sixth Amendment." 202 So. 3d at 79 (Canady, J., dissenting). Years before, while it awaited definitive guidance from the Supreme Court, this Court had already addressed what it would mean "if *Ring* did apply in Florida": "we read [*Ring*] as requiring only that the jury make the finding of 'an element of a greater offense.' That finding would be that at least one aggravator exists ...." *State v. Steele*, 921 So. 2d 538, 546 (Fla. 2005) (citation omitted) (quoting *Ring*, 536 U.S. at 609, 122 S.Ct. 2428).

***9** Nonetheless, this Court on remand concluded that *Hurst v. Florida* had far greater implications for Florida's capital sentencing law. The new rule announced in *Hurst v. State* was as follows:

> [B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating factors, and unanimously recommend a sentence of death.

202 So. 3d at 57.

The Court based its holding on several sources of law. The Court looked to *Apprendi*, *Ring*, and *Hurst* for the principle that the Sixth Amendment requires the jury to find "every fact ... necessary for the imposition of the death penalty" and for the conclusion that each of these facts constitutes an "element." *Id.* at 53. Expanding on the Supreme Court's concept of "facts," the Court looked to the Florida statutes to identify "those critical findings that underlie the imposition of a death sentence." *Id.* at 51. The Court looked to article I, section 22 of the Florida Constitution[4] for the principle that jury verdicts must be unanimous on all the elements of criminal offenses—including the new capital sentencing "elements" that the Court had purported to identify. *See id.* at 55. And finally, "in addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to trial by jury," the Court concluded that "juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment." *Id.* at 59.

[4] Article I, section 22 provides in pertinent part: "The right of trial by jury shall be secure to all and remain inviolate."

II. Analysis

The State asks us to recede from *Hurst v. State* "to the extent its holding requires anything more than the jury to find an aggravating circumstance—what *Hurst v. Florida* requires." We now explain how this Court erred in *Hurst v. State* and why we have concluded that we must partially recede from our decision in that case.

A. The Correct Understanding of *Hurst v. Florida*

It helps first to consider *Hurst v. Florida* in light of the principles underlying the Supreme Court's capital punishment cases. Those cases "address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision." *Tuilaepa v. California*, 512 U.S. 967, 971, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). As to the eligibility decision, the Court has required that the death penalty be reserved for only a subset of those who commit murder. "To render a defendant eligible for the death penalty in a homicide case, [the Supreme Court has] indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." *Id*. at 971-72, 114 S.Ct. 2630. "[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant*, 462 U.S. at 877, 103 S.Ct. 2733.

***10** By contrast, the selection decision involves determining "whether a defendant eligible for the death penalty should in fact receive that sentence." *Tuilaepa*, 512 U.S. at 972, 114 S.Ct. 2630. The Supreme Court's cases require that the selection decision be an individualized determination that assesses the defendant's culpability, taking into account "relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime." *Id*.

Hurst v. Florida is about eligibility, not selection. We know this from the face of the Court's opinion: "Florida concedes that *Ring* required a jury to find every fact necessary to render Hurst *eligible* for the death penalty." *Hurst v. Florida*, 136 S. Ct. at 622 (emphasis added). We know it from the opinion's exclusive focus on aggravating circumstances, the central object of the Court's death eligibility jurisprudence. We know it because Hurst's counsel conceded it at oral argument. Transcript of Oral Argument at 12, *Hurst v. Florida*, 136 S. Ct. 616 (2016) (No. 14-7505). And most fundamentally, we know it from the *Apprendi*-based principle that animates the Court's decision: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348 (alteration in original) (quoting *Jones*, 526 U.S. at 252, 119 S.Ct. 1215 (Stevens, J., concurring)).

Justice Scalia explained "the import of *Apprendi* in the context of capital-sentencing proceedings" this way:

> [F]or purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of "murder" is a distinct, lesser included offense of "murder plus one or more aggravating circumstances." Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death.

Sattazahn v. Pennsylvania, 537 U.S. 101, 111, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003).

This of course describes Florida's capital sentencing law. As the Supreme Court itself noted in *Hurst v. Florida*, section 775.082(1), Florida Statutes, states that the punishment for a capital felony is life imprisonment unless "the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death." The required trial court findings are set forth in section 921.141(3), Florida Statutes, which is titled "Findings in Support of Sentence of Death." When the Supreme Court referred to "the critical findings necessary to impose the death penalty," it referred to those findings as "facts" and cited section 921.141(3). *Hurst v. Florida*, 136 S. Ct. at 622. Tellingly, the Court did not cite section

921.141(2), which sets out the process for the jury to render an advisory verdict.

Section 921.141(3) requires two findings. One is an eligibility finding, the other a selection finding. The eligibility finding is in section 921.141(3)(a): "[t]hat sufficient aggravating circumstances exist as enumerated in subsection (5)." The selection finding is in section 921.141(3)(b): "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

We know that section 921.141(3)(a) is the eligibility finding because that is what our Court said repeatedly and consistently for many decades prior to *Hurst v. State*. In our first case interpreting Florida's post-*Furman* capital sentencing law, we said: "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla. Stat. s. 921.141(7)." *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973). Beginning with that holding, it has always been understood that, for purposes of complying with section 921.141(3)(a), "sufficient aggravating circumstances" means "one or more." *See Miller v. State*, 42 So. 3d 204, 219 (Fla. 2010) ("sufficient aggravating circumstances" means "one or more such circumstances"); *Zommer v. State*, 31 So. 3d 733, 754 (Fla. 2010) (same); *see also Douglas v. State*, 878 So. 2d 1246, 1265 (Fla. 2004) (Pariente, J., concurring as to conviction and concurring in result only as to sentence) ("A defendant convicted of first-degree murder cannot qualify for a death sentence unless at least one statutory aggravating factor is found to exist.").

***11** Poole's suggestion that "sufficient" implies a qualitative assessment of the aggravator—as opposed simply to finding that an aggravator exists—is unpersuasive and contrary to this decades-old precedent. Likewise, our Court was wrong in *Hurst v. State* when it held that the existence of an aggravator and the sufficiency of an aggravator are two separate findings, each of which the jury must find unanimously. Under longstanding Florida law, there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances.

B. The Errors of *Hurst v. State*

This Court clearly erred in *Hurst v. State* by requiring that the jury make any finding beyond the section 921.141(3)(a) eligibility finding of one or more statutory aggravating circumstances. Neither *Hurst v. Florida*, nor the Sixth or Eighth Amendment, nor the Florida Constitution mandates that the jury make the section 941.121(3)(b) selection finding or that the jury recommend a sentence of death.

1. Sixth and Eighth Amendment Errors

Weighing Under Section 941.121(3)(b). Again, the *Apprendi* rule drives the Sixth Amendment inquiry: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348 (alteration in original) (quoting *Jones*, 526 U.S. at 252, 119 S.Ct. 1215 (Stevens, J., concurring)). Only such "facts" are "elements" that must be found by a jury. The section 921.141(3)(b) selection finding—"that there are insufficient mitigating circumstances to outweigh the aggravating circumstances"—fails both aspects of the *Apprendi* test.

The section 921.141(3)(b) selection finding is not a "fact." As the Supreme Court observed in a case decided shortly after *Hurst v. Florida*, "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy." *Kansas v. Carr*, —— U.S. ——, 136 S. Ct. 633, 642, 193 L.Ed.2d 535 (2016). That stands in stark contrast to the "aggravating-factor determination," which is "a purely factual determination." *Id.* A subjective determination like the one that section 921.141(3)(b) calls for cannot be analogized to an element of a crime; it does not lend itself to being objectively verifiable. Instead, it is a "discretionary judgment call that neither the state nor the federal constitution entrusts exclusively to the jury." *State v. Wood*, 580 S.W.3d 566, 585 (Mo. 2019); *see also Hurst v. State*, 202 So. 3d at 82 (Canady, J., dissenting) (weighing of mitigators and aggravators is a determination that "require[s] subjective judgment").

We acknowledge that section 921.141(3)(b) requires a judicial finding "as to the fact[ ]" that the mitigators do not outweigh

the aggravators. But the legislature's use of a particular label is not what drives the Sixth Amendment inquiry. *See Apprendi*, 530 U.S. at 494, 120 S.Ct. 2348. In substance, what section 921.141(3)(b) requires "is not a finding of fact, but a moral judgment." *United States v. Gabrion*, 719 F.3d 511, 533 (6th Cir. 2013) (describing balancing provision in federal death penalty statute).

In any event, even if we were to consider the section 921.141(3)(b) selection finding to be a fact, it still would not implicate the Sixth Amendment. The selection finding does not "expose" the defendant to the death penalty by increasing the legally authorized range of punishment. As we have explained, under longstanding Florida law, it is the finding of an aggravating circumstance that exposes the defendant to a death sentence. The role of the section 921.141(3)(b) selection finding is to give the defendant an opportunity for mercy if it is justified by the relevant mitigating circumstances and by the facts surrounding his crime.

***12** This passage from the Supreme Court's decision in *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), illuminates this point:

> Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range *and* does so in a way that aggravates the penalty. Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment "within limits fixed by law." While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing.

Id. at 113 n.2, 133 S.Ct. 2151 (quoting *Williams v. New York*, 337 U.S. 241, 246, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949)). And *Alleyne* merely echoes what the Supreme Court said in *Apprendi*: "We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." *Apprendi*, 530 U.S. at 481, 120 S.Ct. 2348.

In sum, because the section 921.141(3)(b) selection finding is not a "fact" that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, it is not an element. And because it is not an element, it need not be submitted to a jury. *See Hurst v. Florida*, 136 S. Ct. at 621 (defining "element").

Unanimous Jury Recommendation. The *Hurst v. State* requirement of a unanimous jury recommendation similarly finds no support in *Apprendi*, *Ring*, or *Hurst v. Florida*. As we have explained, the Supreme Court in *Spaziano* upheld the constitutionality under the Sixth Amendment of a Florida judge imposing a death sentence even in the face of a jury recommendation of life—a jury override. It necessarily follows that the Sixth Amendment, as interpreted in *Spaziano*, does not require any jury recommendation of death, much less a unanimous one. And as we have also explained, the Court in *Hurst v. Florida* overruled *Spaziano* only to the extent it allows a judge, rather than a jury, to find a necessary aggravating circumstance. *See Hurst v. Florida*, 136 S. Ct. at 624.

Even without *Spaziano*, the *Apprendi* line of cases cannot be read to require a unanimous jury recommendation of death. Those cases are about what "facts"—those that are the equivalent of elements of a crime—the Sixth Amendment requires to be found by a jury. Sentencing recommendations are neither elements nor facts. As Justice Scalia said, the judgment in *Ring*—and by extension the judgment in *Hurst v. Florida*—"has nothing to do with jury sentencing." *Ring*, 536 U.S. at 612, 122 S.Ct. 2428 (Scalia, J., concurring).

Finally, we further erred in *Hurst v. State* when we held that the Eighth Amendment requires a unanimous jury recommendation of death. The Supreme Court rejected that exact argument in *Spaziano*. *See Spaziano*, 468 U.S. at 465, 104 S.Ct. 3154; *see also Harris v. Alabama*, 513 U.S. 504, 515, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995) ("The Constitution permits the trial judge, acting alone, to impose a capital sentence."). We are bound by Supreme Court precedents that construe the United States Constitution.

2. State Law Errors

***13** For many decades, this Court considered Florida's post-*Furman* sentencing procedures to be facially consistent with our state constitution. Even after *Ring*, in cases where the aggravator consisted of a prior violent felony, we rejected claims that Florida's capital sentencing scheme violated the right to a jury trial under our state constitution. *See, e.g.*, *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003).

We departed from those precedents in *Hurst v. State*, when we decided that article I, section 22 of the Florida Constitution requires a unanimous jury recommendation of a sentence of death and unanimous jury findings as to all the aggravating factors that were proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating factors. We based that holding on our determination that each of these findings is the equivalent of an element of an offense and on the longstanding principle of Florida law that all elements must be found unanimously by the jury.

Here we already have explained that our holding in *Hurst v. State* was based on a mistaken view of what constitutes an element. Under the principles established in *Apprendi*, *Ring*, and *Hurst v. Florida*, only one of the findings we identified in *Hurst v. State*—the finding of the existence of an aggravating circumstance—qualifies as an element, including for purposes of our state constitution. There is no basis in state or federal law for treating as elements the additional unanimous jury findings and recommendation that we mandated in *Hurst v. State*. As to state law, subsequent to our decision in *Hurst v. State*, we already have receded from the holding that the additional *Hurst v. State* findings are elements. We held:

> To the extent that in *Perry v. State*, 210 So. 3d 630, 633 (Fla. 2016), we suggested that *Hurst v. State* held that the sufficiency and weight of the aggravating factors and the final recommendation of death are elements that must be determined by the jury beyond a reasonable doubt, we mischaracterized *Hurst v. State*, which did not require that these determinations be made beyond a reasonable doubt. Since *Perry*, in *In re Standard Criminal Jury Instructions in Capital Cases* and *Foster* [*v. State*, 258 So. 3d 1248 (Fla. 2018)], we have implicitly receded from its mischaracterization of *Hurst v. State*. We now do so explicitly. Thus, these determinations are not subject to the beyond a reasonable doubt standard of proof, and the trial court did not err in instructing the jury.

Rogers v. State, 285 So.3d 872, 886(Fla. 2019).

Last, lest there be any doubt, we hold that our state constitution's prohibition on cruel and unusual punishment, article I, section 17,[5] does not require a unanimous jury recommendation—or any jury recommendation—before a death sentence can be imposed. The text of our constitution requires us to construe the state cruel and unusual punishment provision in conformity with decisions of the Supreme Court interpreting the Eighth Amendment. Binding Supreme Court precedent in *Spaziano* holds that the Eighth Amendment does not require a jury's favorable recommendation before a death penalty can be imposed. *See Spaziano*, 468 U.S. at 464-65, 104 S.Ct. 3154. Therefore, the same is true of article I, section 17.

[5] Article I, section 17 provides in pertinent part: "Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution."

C. *Stare Decisis*

***14** While this Court has consistently acknowledged the importance of *stare decisis*, it has been willing to correct its mistakes. In a recent discussion of *stare decisis*, we said:

> *Stare decisis* provides stability to the law and to the society governed by that law. Yet *stare decisis* does not command blind allegiance to precedent. "Perpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court."

Shepard v. State, 259 So. 3d 701, 707 (Fla. 2018) (quoting *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995)). Similarly, we have stated that "[t]he doctrine of stare decisis bends ... where there has been an error in legal analysis." *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). And elsewhere we have said that we will abandon a decision that is "unsound in principle." *Robertson v. State*, 143 So. 3d 907, 910 (Fla. 2014) (quoting *Brown v. Nagelhout*, 84 So. 3d 304, 309 (Fla. 2012)).

It is no small matter for one Court to conclude that a predecessor Court has clearly erred. The later Court must approach precedent presuming that the earlier Court faithfully and competently carried out its duty. A conclusion that the earlier Court erred must be based on a searching inquiry, conducted with minds open to the possibility of reasonable differences of opinion. "[T]here is room for honest disagreement, even as we endeavor to find the correct answer." *Gamble v. United States*, —— U.S. ——, 139 S. Ct. 1960, 1986, 204 L.Ed.2d 322 (2019) (Thomas, J., concurring).

In this case we cannot escape the conclusion that, to the extent it went beyond what a correct interpretation of *Hurst v. Florida* required, our Court in *Hurst v. State* got it wrong. We say that based on our thorough review of *Hurst v. Florida*, of the Supreme Court's Sixth and Eighth Amendment precedents, and of our own state's laws, constitution, and judicial precedents. Without legal justification, this Court used *Hurst v. Florida*—a narrow and predictable ruling that should have had limited practical effect on the administration of the death penalty in our state as an occasion to disregard decades of settled Supreme Court and Florida precedent. Under these circumstances, it would be unreasonable for us *not* to recede from *Hurst v. State*'s erroneous holdings.

Invoking *North Florida Women's Health & Counseling Services, Inc. v. State*, 866 So. 2d 612 (Fla. 2003), Poole urges us to stand by our decision in *Hurst v. State*. Our opinion in *North Florida Women's Health* said that, before deciding to overrule a prior opinion, "we traditionally have asked several questions, including the following": whether the decision has proved unworkable; whether the decision could be reversed "without serious injustice to those who have relied on it and without serious disruption in the stability of the law;" and whether there have been drastic changes in the factual premises underlying the decision. *Id*. at 637. Though we do not doubt that this list of considerations could have been culled from our pre-*North Florida Women's Health* precedents, we note that the Court there offered no citation to support its compilation.

In the years since our decision in *North Florida Women's Health*, we have not treated that case as having set forth a *stare decisis* test that we must follow in every case. On the contrary, we have repeatedly receded from erroneous precedents without citing *North Florida Women's Health* or asking all the questions it poses. *See, e.g.*, *Shepard*, 259 So. 3d at 707; *State v. Sturdivant*, 94 So. 3d 434, 440 (Fla. 2012); *Westgate Miami Beach, Ltd.* v. *Newport Operating Corp*., 55 So. 3d 567, 574 (Fla. 2010); *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1131 (Fla. 2005).

***15** More fundamentally, we are wary of any invocation of multi-factor *stare decisis* tests or frameworks like the one set out in *North Florida Women's Health*. They are malleable and do not lend themselves to objective, consistent, and predictable application. They can distract us from the merits of a legal question and encourage us to think more like a legislature than a court. And they can lead us to decide cases on the basis of guesses about the consequences of our decisions, which in turn can make those decisions less principled. Multi-factor tests or frameworks like the one in *North Florida Women's Health* often serve as little more than a toolbox of excuses to justify a court's unwillingness to examine a precedent's correctness on the merits.

We believe that the proper approach to *stare decisis* is much more straightforward. In a case where we are bound by a higher legal authority—whether it be a constitutional provision, a statute, or a decision of the Supreme Court—our job is to apply that law correctly to the case before us. When we are convinced that a precedent clearly conflicts with the law we are sworn to uphold, precedent normally must yield.

We say normally because "*stare decisis* means sticking to some wrong decisions." *Kimble v. Marvel Entertainment, LLC*,

576 U.S. 446, 135 S. Ct. 2401, 2409, 192 L.Ed.2d 463 (2015). "Indeed, *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up." *Id*. But once we have chosen to reassess a precedent and have come to the conclusion that it is clearly erroneous, the proper question becomes whether there is a valid reason *why not* to recede from that precedent.

The critical consideration ordinarily will be reliance. It is generally accepted that reliance interests are "at their acme in cases involving property and contract rights." *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). And reliance interests are lowest in cases—like this one—"involving procedural and evidentiary rules." *Id*.; *see also Alleyne*, 570 U.S. at 119, 133 S.Ct. 2151 (Sotomayor, J., concurring) ("[W]hen procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties, the force of *stare decisis* is reduced.").

Here any reliance considerations cut against Poole. No one, including Poole, altered his behavior in expectation of the new procedural rules announced in *Hurst v. State*. To the extent that reliance interests factor here at all, they lean heavily in favor of the victims of Poole's crimes and of society's interest in holding Poole to account and in the substantial resources that have been spent litigating and adjudicating Poole's case.

We acknowledge that the Legislature has changed our state's capital sentencing law in response to *Hurst v. State*. Our decision today is not a comment on the merits of those changes or on whether they should be retained. We simply have restored discretion that *Hurst v. State* wrongly took from the political branches.

Having thoroughly considered the State's and Poole's arguments in light of the applicable law, we recede from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt.

CONCLUSION

The jury in Poole's case unanimously found that, during the course of the first-degree murder of Noah Scott, Poole committed the crimes of attempted first-degree murder of White, sexual battery of White, armed burglary, and armed robbery. Under this Court's longstanding precedent interpreting *Ring v. Arizona* and under a correct understanding of *Hurst v. Florida*, this satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt. *See Poole II*, 151 So. 3d at 419. In light of our decision to recede from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance, we reverse the portion of the trial court's order vacating Poole's death sentence. We affirm the trial court's denial of Poole's guilt phase claim. And we remand to the trial court with instructions that Poole's sentence be reinstated and for proceedings consistent with this opinion.

***16** It is so ordered.

CANADY, C.J., and POLSTON, LAWSON, and MUÑIZ, JJ., concur.

LAWSON, J., concurs specially with an opinion.

LABARGA, J., dissents with an opinion.

LAWSON, J., concurring specially.

I fully concur in the majority opinion and write separately to address the dissent's contentions: (1) that "national consensus,"

dissenting op. at ——, is relevant to our consideration of any legal issue decided today; (2) that today's decision "returns Florida to its status as an absolute outlier among the jurisdictions in this country that utilize the death penalty," *id.* at ——; (3) that "settled [Florida] law compelled this Court's conclusion in *Hurst v. State* [202 So. 3d 40 (Fla. 2016)] that the unanimity requirement applied not only to the jury's duty to determine whether to convict the defendant, but upon conviction, to the jury's duty to determine whether the defendant should receive the death penalty," dissenting op. at —— – ——; and (4) that our decision "removes an important safeguard for ensuring that the death penalty is only applied to the most aggravated and least mitigated of murders," *id*. at —— – ——.

I. National consensus is irrelevant to our legal analysis.

It is axiomatic that we are bound by decisions of the United States Supreme Court when construing provisions of the United States Constitution. *Carnival Corp. v. Carlisle*, 953 So. 2d 461, 465 (Fla. 2007) ("[S]tate courts are bound by the decisions of the United States Supreme Court construing federal law." (quoting *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 220-21, 51 S.Ct. 453, 75 L.Ed. 983 (1931))). While political decisions by the various states are regularly considered in Eighth Amendment analysis to gauge "evolving standards of decency," *see, e.g.*, *Spaziano v. Florida*, 468 U.S. 447, 463-64 n. 9, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) (considering the statutory approaches of a number of jurisdictions to capital sentencing), *overruled in part by Hurst v. Florida*, —— U.S. ——, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016), a consideration when determining what constitutes cruel and unusual punishment, the Supreme Court has held that the Eighth Amendment does not require a jury determination on the ultimate question of whether to impose a death sentence. *Id.* at 465, 104 S.Ct. 3154. In conducting its Eighth Amendment analysis of this issue in *Spaziano v. Florida*, the Supreme Court acknowledged that a significant majority of jurisdictions entrusted the sentencing decision to a jury in the death penalty context, *id*. at 463, 104 S.Ct. 3154, making Florida one of only three jurisdictions that permitted a judge to impose a death sentence in the absence of a jury's unanimous determination that a death sentence should be imposed. *Id.* Despite Florida's minority position, the Supreme Court found no Eighth Amendment violation, reasoning:

> The fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws. "Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment" is violated by a challenged practice. *See Enmund v. Florida*, 458 U.S. 782, 797, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Coker v. Georgia*, 433 U.S. 584, 597, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (plurality opinion). In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

***17** *Id*. at 464, 104 S.Ct. 3154. Because the Supreme Court has already considered arguments based upon "national consensus" in its analysis of this precise issue, *id*., and because we are bound by this precedent, *Carlisle*, 953 So. 2d at 465, we cannot conduct an original Eighth Amendment analysis, consider national consensus, and reach a different result than that of the Supreme Court on this same legal issue. *Id.*

Moreover, because the Supreme Court in *Spaziano* expressly held that the Eighth Amendment does not require jury sentencing in capital cases, the Florida Constitution expressly prohibits us from reaching a different result under the Florida Constitution. *See* art. I, § 17, Fla. Const. ("The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.").

For these reasons, "national consensus" is irrelevant to *our analysis* of the legal issues presented in this appeal, and its consideration is therefore properly absent from the majority's legal analysis.

II. Our decision today does not make Florida an "outlier."

The majority today decides constitutional questions, not political ones. Those constitutional questions are properly decided through legal reasoning, not policy analysis. It is true that Congress has made a policy decision requiring a unanimous jury recommendation before death can be imposed as a sentence under federal law. 18 U.S.C. § 3593(e) (2019). It is also true, as already discussed, that an overwhelming majority of states still authorizing death as a sentence have made the same legislative policy choice. *See Spaziano*, 468 U.S. at 463, 104 S.Ct. 3154; *see also* Michael L. Radelet & G. Ben Cohen, *The Decline of the Judicial Override*, 15 Ann. Rev. L. & Soc. Sci. 539, 548-49 (2019). As for Florida law, today's decision does not alter section 921.141, Florida Statutes (2019), which still requires a unanimous jury recommendation before death can be imposed. If the Florida Legislature considers changing section 921.141 to eliminate the requirement for a unanimous jury recommendation before a sentence of death can be imposed, the fact that this legislative change would make Florida an "outlier" will surely be considered in the ensuing political debate. As for the constitutional questions addressed in the majority opinion, our decision should be judged solely on the quality, clarity, and force of its legal analysis—not on speculation regarding possible future policy choices that are constitutionally entrusted to the political branch. *See* art. II, § 3, Fla. Const. ("The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.").

III. Settled Florida law did not compel "this Court's conclusion in *Hurst v. State* that the unanimity requirement applied not only to the jury's duty to determine whether to convict the defendant, but upon conviction, to the jury's duty to determine whether the defendant should receive the death penalty."

Prior to this Court's decision in *Hurst v. State*, this Court had repeatedly and consistently held that Florida's constitution was not violated by imposition of a death sentence without unanimous jury determinations during the sentencing proceeding, *see* majority op. at ——, including in Poole's case. *Poole v. State*, 151 So. 3d 402, 419 (2014). This was the "settled [Florida] law" on the issue until *Hurst v. State*. The dissent's contrary claim, that "settled [Florida] law" compelled a contrary conclusion in *Hurst v. State*, is inaccurate. The "settled law" cited by the dissent is precedent existing "[f]or well more than a century ... requir[ing] that a jury unanimously vote to convict a defendant of a criminal offense." Dissenting op. at ——. If Florida's century-plus-old unanimous-verdict requirement so obviously and necessarily applied to capital sentencing proceedings that it compelled the conclusion reached for the first time in *Hurst v. State*, why was this argument soundly and repeatedly rejected by the entirety of Florida's judiciary until 2016, when *Hurst v. State* was decided?

***18** Fundamentally, the dissent's argument, and the *Hurst v. State* holding, are premised on a mischaracterization of the jury's ultimate sentencing recommendation, and the penultimate considerations leading up to that recommendation under section 921.141, as factual determinations that constitute elements of the charged crime. This mischaracterization was neither grounded in reason nor supported by analysis. Rather, the *Hurst v. State* majority simply declared that the jury's sentencing determinations were "also elements [of the crime of capital murder] that must be found unanimously by the jury." 202 So. 3d at 54.

The erroneous declaration that the jury sentencing determinations were "elements" of the crime of capital murder—the sole basis stated for the *Hurst v. State* majority's conclusion that Florida's Constitution required jury unanimity on those determinations, *id.*—was initially corrected in *Foster v. State*, 258 So. 3d 1248, 1252 (Fla. 2018) (clarifying that "the *Hurst* [*v. State*] penalty phase findings are not elements of the capital felony of first-degree murder"), an opinion joined by four members of the original *Hurst v. State* majority. More recently, in *Rogers v. State*, 285 So.3d 872, 886 (Fla. 2019), we explained:

> To the extent that in *Perry v. State*, 210 So. 3d 630, 633 (Fla. 2016), we suggested that *Hurst v. State* held that the sufficiency and weight of the aggravating factors and the final recommendation of death are elements that must be determined by the jury beyond a reasonable doubt, we mischaracterized *Hurst v. State*, which did not require that these determinations be made beyond a reasonable doubt. Since *Perry*, in *In re Standard Criminal Jury Instructions in Capital Cases* and *Foster*, we have implicitly receded from its mischaracterization of *Hurst v. State*. We now do so explicitly.

Id. at 886.

Hurst v. State's implied characterization of the jury's capital sentencing determinations as factual findings qualitatively indistinguishable from those made by a jury when weighing evidence and rendering a guilt-phase verdict is also incorrect. In reality, the recommendation is an individualized, conscience-based exercise of discretion. This should be obvious when considering that a juror could judge a crime to be highly aggravated and hardly mitigated but still recommend a life sentence based upon some consideration personal to that individual juror. It should also be obvious from the post-*Hurst v. State* penalty-phase jury instructions authorized by this Court, which explain that "different [sentencing] factors or circumstances may be given different weight or values by different jurors"; that "each individual juror must decide what weight is to be given to a particular factor or circumstance"; and that "[r]egardless of the results of each juror's individual weighing process—even if [a juror] find[s] that the sufficient aggravators outweigh the mitigators—the law neither compels nor requires [that juror] to determine that the defendant should be sentenced to death." *In re Standard Criminal Jury Instructions in Capital Cases*, 244 So. 3d 172, 191 (Fla. 2018).

While the penultimate "weighing" questions are phrased as fact-like determinations (and are certainly more fact-like than the recommendation), they are clearly designed as an analytical tool to guide individual jurors in making their individual recommendations—not as facts to be determined by the jury as a whole. Again, this is obvious from the instructions themselves, which do not even require mitigation findings and tell jurors that the weight given to all factors, as well as whether a fact is considered mitigating at all, are individual determinations.

***19** Because the ultimate jury recommendation and penultimate weighing questions are neither "facts" historically entrusted to jurors under the Florida Constitution, nor "elements" of a crime, *Foster*, 258 So. 3d at 1252, the *Hurst v. State* majority demonstratively erred in stating that article I, section 22 of the Florida Constitution supports or compels jury unanimity on anything other than the existence of an aggravating circumstance. Settled Florida law was to the contrary.

IV. Today's decision does not eliminate a safeguard needed to ensure that the death penalty is only applied to the most aggravated and least mitigated of murders.

The Eighth Amendment's protection against cruel and unusual punishment requires safeguards to assure that a death sentence is not imposed unless careful consideration is first given to the "particular acts by which the crime was committed ... [and] the character and propensities of the offender," *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (quoting *Pennsylvania ex.rel. Sullivan v. Ashe*, 302 U.S. 51, 55, 58 S.Ct. 59, 82 L.Ed. 43 (1937)), to appropriately narrow the class of cases in which the sentence can be imposed. *Id.* The procedures set forth in section 921.141 were enacted to comply with the Eighth Amendment in this regard by requiring the State to prove at least one statutorily defined "aggravating circumstance" before the death penalty can be considered, § 921.141(2)(b) 1., (6), and by providing for the comprehensive consideration of mitigating circumstances. § 921.141(2)(b) 2., (3)(a)2., (3)(b), (7). Additionally, before a death sentence can be imposed, the sentencing judge must enter a written order reflecting findings that "there are sufficient aggravating factors to warrant the death penalty ... [and that] the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence." § 921.141(4). Appellate review assures that these standards are met in every case. § 921.141(5) ("The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall

have priority over all other cases and shall be heard in accordance with rules adopted by the Supreme Court."); *see also Pulley v. Harris*, 465 U.S. 37, 45-46, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) (discussing the importance of "meaningful appellate review" in this context). Reviewing Florida's death penalty procedure, the Supreme Court has determined that a unanimous jury sentencing recommendation is not required to comply with the Eighth Amendment's demand that discretion to impose the death penalty be appropriately directed and limited. *Spaziano*, 468 U.S. at 464, 104 S.Ct. 3154 ("[T]he demands of fairness and reliability in capital cases do not require [jury sentencing]."). Review of this Court's 2014 opinion affirming Poole's sentence of death illustrates why Florida's system meets Eighth Amendment demands of "fairness and reliability" without requiring a unanimous jury recommendation.

Loretta White and Noah Scott had gone to bed together in their mobile home. *Poole*, 151 So. 3d at 406. White was startled awake to find a stranger, Poole, attempting to rape her. *Id.* Scott repeatedly tried to stop the rape and, each time, Poole hit Scott in the face with a tire iron—beating Scott to death. *Id.* Poole ignored White's cries for mercy, which were emphasized by the plea that she was pregnant; he also beat her with the tire iron, severing some of her fingers as she tried to defend herself against the attack. *Id.* After raping, beating, and sexually assaulting White, Poole left her unconscious in the trailer. *Id.*

***20** This murder was obviously highly aggravated by Poole's contemporaneous crimes. The trial judge appropriately found that these aggravators were sufficient to warrant the death penalty under Florida law and that the aggravators outweighed all mitigation so that a death sentence was appropriate. *Id.* at 419 (concluding that the trial court "properly" weighed "the aggravators against the mitigators" and affirming Poole's sentence of death). Even with the jury's 11-1 death recommendation, this Court appropriately and without hesitation (or dissent on this issue) determined that Florida's sentencing procedure had reliably guided and limited the sentencing decision in this case, as required by the Eighth Amendment. *Id.*

Conclusion

The constitutionality of Poole's sentence was already decided by this Court in 2014. *Id. Hurst v. State* required the trial court to reevaluate the constitutionality of Poole's death sentence—and deciding this appeal required this Court to address the State's argument that *Hurst v. State* was incorrectly decided. For the reasons explained in the majority opinion, and above, it is clear that Poole suffered no constitutional deprivation in the imposition of his sentence and that we cannot reach a correct legal result in this appeal without receding in part from *Hurst v. State*. I fully agree with the majority's determination that we should partially recede from *Hurst v. State* because the State and those whose interests are represented by the State in this case, including the victims and their families, relied heavily on the significant body of precedent upholding as constitutional the relevant statutory procedures invalidated in *Hurst v. State*, *cf. Johnson v. State*, 904 So. 2d 400, 410 (Fla. 2005) (explaining that "Florida's reliance on its capital sentencing has been entirely in good faith" in light of the legal precedent upholding its constitutionality); because the State and society's interests in the finality of Poole's sentence are equally strong, *See In re Baxter Int'l, Inc.*, 678 F.3d 1357, 1367 (Fed. Cir. 2012) (Newman, J., dissenting) ("Finality is fundamental to the Rule of Law." (citing *S. Pac. R.R. v. United States*, 168 U.S. 1, 18, 18 S.Ct. 18, 42 L.Ed. 355 (1897))); and, because Poole's reliance interest on the erroneous *Hurst v. State* precedent is nonexistent. Majority op. at ——.

LABARGA, J., dissenting.

Today, a majority of this Court recedes from the requirement that Florida juries unanimously recommend that a defendant be sentenced to death. In doing so, the majority returns Florida to its status as an absolute outlier among the jurisdictions in this country that utilize the death penalty. The majority gives the green light to return to a practice that is not only inconsistent with laws of all but one of the twenty-nine states that retain the death penalty, but inconsistent with the law governing the federal death penalty. Further, the majority removes an important safeguard for ensuring that the death penalty is only applied to the most aggravated and least mitigated of murders. In the strongest possible terms, I dissent.

The requirement that a jury unanimously recommend a sentence of death comports with the overwhelming majority of states that have the death penalty. At the time that *Hurst v. Florida* was decided, of the thirty-one states that legalized the capital punishment, only three states—Florida, Alabama, and Delaware—did not require that a unanimous jury recommend the death penalty. Since that time, the Delaware Supreme Court declared the state's capital sentencing statute unconstitutional, *See Rauf v. Delaware*, 145 A.3d 430 (Del. 2016), and we held in *Hurst v. State* that unanimity was required in Florida. These developments left Alabama as the sole death penalty state not requiring unanimity—until today.

***21** Not only does requiring a unanimous recommendation of a sentence of death comport with the overwhelming majority of death penalty states, it also comports with federal law governing the imposition of the federal death penalty. Title 18 U.S.C. § 3593(e) (2012) provides that after weighing the aggravating and mitigating factors and determining that a sentence of death is justified, "the jury *by unanimous vote,* or if there is no jury, the court, *shall recommend whether the defendant should be sentenced to death*, to life imprisonment without possibility of release or some other lesser sentence." (Emphasis added.) As we explained in *Hurst v. State*:

> The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances. By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important goal of bringing its capital sentencing laws into harmony with the direction of society reflected in all these states and with federal law.

202 So. 3d at 61. By receding from the unanimity requirement, we retreat from the national consensus and take a huge step backward in Florida's death penalty jurisprudence.

The historical treatment of unanimity in Florida underscores our conclusion in *Hurst v. State* that Florida's right to trial by jury, contained in article I, section 22, of the Florida Constitution, requires that a jury unanimously recommend a sentence of death. For well more than a century, Florida law has required that a jury unanimously vote to convict a defendant of a criminal offense. *See Ayers v. State*, 62 Fla. 14, 57 So. 349, 350 (1911) ("Of course, a verdict must be concurred in by the unanimous vote of the entire jury ...."); *On Motion to Call Circuit Judge to Bench*, 8 Fla. 459, 482 (Fla. 1859) ("The common law wisely requires the verdict of a petit jury to be unanimous ...."). This settled law compelled this Court's conclusion in *Hurst v. State* that the unanimity requirement applied not only to the jury's duty to determine whether to convict the defendant, but upon conviction, to the jury's duty to determine whether the defendant should receive the death penalty. We said: "This recommendation is tantamount to the jury's verdict in the sentencing phase of trial; and historically, and under explicit Florida law, jury verdicts are required to be unanimous." *Hurst*, 202 So. 3d at 54. Given Florida's long history of requiring unanimous jury verdicts, it defies reason to require unanimous juries for the conviction of a capital offense but to then reduce the jury's collective obligation when determining whether the defendant's life should be taken as punishment for that offense.

As Justice Brennan explained: "[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977). Our determination that Florida's right to trial by jury requires unanimity fell squarely within our role as "the arbiters of the meaning and extent of the safeguards provided under Florida's Constitution." *Busby v. State*, 894 So. 2d 88, 102 (Fla. 2004). "[W]e have the duty to *independently* examine and determine questions of state law so long as we do not run afoul of federal constitutional protections or the provisions of the Florida Constitution that require us to apply federal law in state-law contexts." *State v. Kelly*, 999 So. 2d 1029, 1043 (Fla. 2008).

***22** In deciding *Hurst v. State*, this Court was ever mindful that "where discretion is afforded a sentencing body on a matter

so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (citing *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)). Requiring "that a jury must unanimously recommend death in order to make a death sentence possible serves that narrowing function required by the Eighth Amendment ... and expresses the values of the community as they currently relate to imposition of death as a penalty." *Hurst*, 202 So. 3d at 60.

The imperative for a just application of the death penalty is not a pie-in-the-sky concept. "The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself." *Furman*, 408 U.S. at 289, 92 S.Ct. 2726 (Brennan, J., concurring). Florida holds the shameful national title as the state with the most death row exonerations. Since 1973, twenty-nine death row inmates have been exonerated, and those exonerations have continued to this very year. Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/florida (last visited December 23, 2019). Given this history, there is every reason to maintain reasonable safeguards for ensuring that the death penalty is fairly administered.

I strongly object to the characterization of this Court's decision in *Hurst v. State* as one where this Court "wrongly took [discretion] from the political branches." Majority op. at ——. As the court of last resort in Florida's third and co-equal branch of government—whose responsibility it is to interpret the law—that is what this Court did in *Hurst v. State*. The constitutionality of a provision of Florida's death penalty law is uniquely this Court's to interpret.

Death is indeed different. When the government metes out the ultimate sanction, it must do so narrowly and in response to the most aggravated and least mitigated of murders. Florida's former bare majority requirement permitted a jury, with little more than a preponderance of the jurors, to recommend that a person be put to death. This Court correctly decided that in Florida, the state and federal constitutions require much more and, until today, for a "brief and shining moment," it did just that.[6]

[6] Alan J. Lerner & Frederick Loewe, *Camelot*, act II, scene 7 (1960).

Sadly, this Court has retreated from the overwhelming majority of jurisdictions in the United States that require a unanimous jury recommendation of death. In so doing, this Court has taken a giant step backward and removed a significant safeguard for the just application of the death penalty in Florida.

Although in 2017, in response to our decision in *Hurst v. State*, the Legislature revised section 921.141(2), Florida Statutes, to require a unanimous recommendation by the jury, nothing in the majority's decision today requires the Legislature to abandon the unanimity requirement. As the majority pointed out in its decision: "Our decision today is not a comment on the merits of those changes or on whether they should be retained." Majority op. at ——.

For these reasons, I dissent.

Order

Thursday, April 2, 2020

On February 7, 2020, Poole filed a Motion for Rehearing and Clarification. We deny rehearing but grant clarification of this Court's instructions on remand. Remand for "proceedings consistent with this opinion" may include resolution of Poole's remaining penalty-phase claims that were raised in his postconviction motion but not addressed on the merits by the trial court in its order.

CANADY, C.J., and POLSTON, LAWSON, and MUÑIZ, JJ., concur.

LABARGA, J., concurs in part and dissents in part with an opinion.

LABARGA, J., concurring in part and dissenting in part.

I concur in the majority's decision to clarify that on remand, Poole is entitled to the resolution of penalty phase claims raised in his postconviction motion that were not decided given this Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *receded from in part by State v. Poole*, 292 So.3d 694 (Fla. 2020).

However, I remain firmly committed to my dissent in *Poole*, and to my position that the opinion was wrongly decided. I would grant rehearing, and I dissent to the majority's decision to deny rehearing in this case.

All Citations

--- So.3d ----, 2020 WL 3116597

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