CASE NO. 20-6891

IN THE UNITED STATES SUPREME COURT

RONALD KNIGHT,

Petitioner,

vs.

SECRETARY,

Florida Department of Corrections, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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Capital Case

QUESTIONS PRESENTED

1. Whether this Court should deny certiorari where the Florida Supreme Court's decision on the merits of the *Strickland* deficiency prong is supported by the records as Knight did not offer any mitigation not presented at trial that was available to penalty phase counsel thus the decision was not contrary to, or an unreasonable application of, this Court's *Strickland* jurisprudence.

2. Whether this Court should deny certiorari where the Eleventh Circuit properly applied the *Strickland* standard under AEDPA and Knight failed to establish any new mental health mitigation when his original mental health expert did not change his opinion even in light of the post-conviction evidence.

3. Whether this Court should grant certiorari review to alter the standard of review for the prejudice analysis for ineffective assistance of counsel claims where Knight failed to raise this issue below, the question does not apply to him, and his case raises no Eighth Amendment issue and is in no way analogous to *Atkins*.

4. Whether certiorari should be denied where the circuit court's decision to deny a COA on the *Hurst v. Florida* claim was proper as *Hurst* has not been held by this Court to apply retroactively and Knight had waived his jury.

NOTICE OF RELATED CASES

Per Supreme Court Rule 14.1 (b)(iii), the following cases relate to this petition:

Underlying Trial:
Circuit Court of Palm Beach County, Florida
State of Florida v. Ronald Knight, Case No. 97-5175CF A02
Judgment Entered May 29, 1998

Appellate Proceedings:
Florida Supreme Court (Case No. 93,473)
Knight v. State, 770 So. 2d 663 (Fla. 2000)
Conviction and Sentence Affirmed: November 2, 2000

Petition for Writ of Certiorari:
United States Supreme Court
Knight v. Florida, 532 U.S. 1011 (2001)
Certiorari Denied: April 30, 2001

Initial Post-conviction Proceedings:
Circuit Court of Palm Beach County, Florida
State of Florida v. Ronald Knight, Case No. 97-5175CF A02
Judgment Entered February 5, 2013 (denying motion)

Appellate Proceedings:
Florida Supreme Court (Case No. SC13-820)
Knight v. State, 211 So. 3d 663 (Fla. 2016)
Affirmed: December 15, 2016

Petition for Writ of Habeas Corpus:
Florida Supreme Court (Case No. SC14-567)
Knight v. State, 211 So. 3d 663 (Fla. 2016)
Denied: December 15, 2016

Successive Petition for Writ of Habeas Corpus:
Florida Supreme Court (Case No. SC17-2021)
Knight v. Jones, 2018 WL 580765 (Fla.)
Denied January 29, 2018

Appellate Proceedings:
Eleventh Circuit Court of Appeals (Case. No. 18-12488-P)
Knight v. Sec'y, Fla. Dept. of Corr., 958 F. 3d 1035 (11th 2020)
Affirmed May 1, 2020

TABLE OF CONTENTS

TABLE OF CITATIONS

Statutes

CITATIONS TO OPINIONS BELOW

The decision of which Petitioner, Ronald Knight ("Knight"), seeks discretionary review is reported as *Knight v. Fla. Dept. of Corr.*, 958 F. 3d 1035 (11th Cir. 2020), and was issued on May 1, 2020, by the Eleventh Circuit Court of Appeals. That decision affirmed the denial of federal habeas relief by the United States District Court for the Southern District of Florida in case number 17-cv-81519-WPD.

The Florida Supreme Court affirmed Knight's first-degree murder conviction and death sentence on direct appeal, reported at *Knight v. State*, 770 So. 2d 663 (Fla. 2000), *cert. denied*, *Knight v. Florida*, 532 U.S. 1011 (2001). Subsequently, Knight challenged his conviction and sentence collaterally[1] and, following an evidentiary hearing, the court denied relief which was affirmed upon appeal. *Knight v. State*, 211 So. 3d 1 (Fla. 2016). The Florida Supreme Court found that defense counsel did not render deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984), and, because of that finding, chose not to address the prejudice prong directly. *Knight*, 211 So. 3d at 3-4.

Next, Knight petitioned for federal habeas relief. The district court denied relief, finding Knight failed to meet his burden under the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). While the district court denied a certificate of

[1] During the course of his counselled litigation, Knight, acting *pro se*, filed multiple state and federal cases which were resolved by order and included: Mandamus petition, case no. SC07-867; Interlocutory appeal, case no. SC07-2251; Federal 42 USC §1983 action, case no. 07-80954-civ; Interlocutory appeal, case no. SC08-2241 (Exhibit F); State habeas petition, case no. SC08-2251; Interlocutory appeal, case no. SC09-265; Interlocutory appeal, case no. SC09-2130 (Exhibit I); Writ of prohibition, case no. SC09-2132; Mandamus petition, case no. 4D10-236; Mandamus petition, case no. 4D10-913 (Exhibit L); All writs petition, case no. SC10-1431; All writs petition, case no. SC10-2523 (Exhibit N); and Writ of prohibition, case no. SC12-483.

appealabilty ("COA"), the circuit court granted one on the sole issue of ineffective assistance of penalty phase counsel. Upon its review, the court affirmed the denial of habeas relief. *Knight*, 958 F.3d at 1037. On August 20, 2020, the court denied a rehearing.

JURISDICTION

Petitioner, Knight, is seeking jurisdiction pursuant to 28 U.S.C. §1254(1). This is the appropriate provision.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondents, Secretary, Florida Department of Corrections (hereinafter "State"), accepts as accurate Petitioner's recitation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Knight is in custody and under a sentence of death, subject to the lawful custody of the State of Florida. Initially, he was charged with the second-degree murder of Richard Kunkel ("Kunkel") under case number 94-4885 CF A02 and was represented by Jose Sosa ("Sosa"). However, on January 3, 1995, due to Knight's intimidation of multiple witnesses resulting in their refusal to cooperate, the State entered a *nolle prosequi* before the jury was selected and sworn and before the trial commenced. (DE#19 PCR.25 1063-68).

Following Knight's conviction of first-degree murder of Brendan Meehan ("Meehan case"), charges for the Kunkel homicide were re-initiated under case number 97-5175 CF A02 based upon the May 8, 1997, indictment for first-degree

murder, armed robbery, burglary of a dwelling, and grand theft of Kunkel's automobile. (DE#19 ROA.1 2-4). After discharging both his appointed counsel, Ann Perry ("Perry") on October 31, 1997, and Sosa on January 8, 1998, Knight represented himself at trial and waived his jury. (DE#19 SROA 1-63). Sosa, who had represented Knight in the 1994 case, was appointed as standby trial counsel. The bench trial was held and on March 16, 1998, and Judge Garrison convicted Knight as charged.

Prior to the start of the penalty phase, Knight again waived his jury, but requested counsel so Sosa was re-appointed for the penalty phase. Following the penalty phase, on May 29, 1998, Judge Garrison entered the Judgment and Sentencing orders and imposed a death sentence. (DE#19 ROA.4 427-30, 434).

On direct appeal, the Florida Supreme Court found:

> The evidence presented during the guilt phase indicated that Knight and two accomplices, Timothy Peirson (Peirson) and Dain Brennault (Brennault),[n.2] agreed that they would go to a gay bar, lure a man away from the bar, and beat and rob him. The three found Richard Kunkel (Kunkel) and invited him to go to a party with them. Kunkel was driving his own car and followed Knight and the others to Miami Subs. After stopping to eat, the three convinced Kunkel to leave his car parked there and ride to the party with them. Knight then drove to a secluded area where they stopped twice and got out of the car to urinate.
>
> > [2]Peirson received three years in prison and Brennault received five years' probation. The evidence revealed neither of them knew Knight planned to kill Richard Kunkel.
>
> Before they got back into the car after their second stop, Knight pointed a gun at Kunkel and told him to turn around and take off his jeans. As Kunkel was complying, Knight fired one shot striking Kunkel in the back. Kunkel fell to the ground and began crying for help. Knight then ordered Brennault and Peirson to search Kunkel's pockets. Peirson complied, but Brennault refused. Knight and Peirson then dragged Kunkel's body out of the road. They left Kunkel to die beside a canal

where his body was later discovered. Knight threatened to kill Peirson and Brennault if they told anyone about the murder.

Later that night, the three men went back to Miami Subs where they had left Kunkel's car. Knight then stole Kunkel's car and took it for a joy ride to see how fast it would go. Some time later that evening, the three men broke into Kunkel's house and stole various items.[n.3]

> [3]Knight took Kunkel's keys and wallet from him after he shot him. He got Kunkel's address from his driver's license.

When Peirson and Brennault were first questioned about the incident by the police, they denied any knowledge of the murder; however, both men later confessed. Knight bragged about the murder to Christopher Holt. Peirson, Brennault, and Holt all testified against Knight during the guilt phase of the trial.

During the penalty phase, the State presented evidence that Knight had previously been convicted of another murder occurring under very similar circumstances. The other aggravating factors presented and relied upon by the trial judge were that the murder occurred while Knight was engaged in the commission of a robbery, the murder was committed for pecuniary gain, and the murder was cold, calculated, and premeditated. The trial court merged the "committed during a robbery" and "for pecuniary gain" aggravators. Knight presented some mitigation, the most significant of which was expert witnesses who testified that Knight suffered from a paranoid disorder that was exacerbated by his unstable childhood. The court gave this mitigating factor considerable weight. Knight also presented mitigating evidence that he had the support and love of his mother, brother, and sisters and that the death penalty would be disparate treatment because his cofelons received much lighter sentences. The court gave these factors little weight.

Knight, 770 So. 2d at 664-65. The Florida Supreme Court affirmed both the convictions and the sentence.

Knight then sought post-conviction relief, including a claim of ineffective assistance of counsel in the penalty phase. The post-conviction court, in denying relief, concluded that the trial and post-conviction records established that penalty

phase counsel, Sosa,[2] prepared for the penalty phase and presented three family members and two mental health experts who had evaluated Knight previously for the Meehan capital murder trial. The lower court denied relief on all issues, finding Sosa's preparations constitutionally sufficient. The Florida Supreme Court summarized the evidentiary hearing and the lower court's findings:

> Knight presented the following witnesses at the evidentiary hearing in support of [the claim of ineffective assistance of counsel during the penalty phase]: Dr. Abby Strauss, a psychiatrist who testified at Knight's penalty phase and also reviewed new mitigation information from postconviction counsel in connection with the instant proceedings; Dr. Philip Harvey, a neuropsychologist hired by Knight as a postconviction expert; Dr. Jonathan Lipman, a neuropharmacologist hired by Knight for postconviction proceedings; Timothy Pearson, Knight's codefendant in the instant case; Zebedee Fennell, who was a staff member at the Eckerd Youth Academy, where Knight spent some time during his youth; and Theresa Fowler (formerly, Theresa Scott), Knight's sister who also testified at the penalty phase. The testimony from Knight's lay witnesses essentially described his substance abuse history and childhood experiences.
>
> The postconviction court first found that Dr. Strauss was the only doctor to provide a clinical diagnosis at the evidentiary hearing, that Drs. Harvey and Lipman made no diagnosis of Knight, and that the additional information Dr. Strauss received merely solidified but did not change his penalty phase opinion. These findings are supported by competent, substantial evidence. First, there is record evidence that neither Dr. Harvey nor Dr. Lipman made a diagnosis of Knight. Further, because Dr. Lipman was not licensed to perform psychological tests in Florida and testified that all of his testing was completed purely for research purposes, we defer to the court's finding that Dr. Lipman's testimony was not credible. *See Bell*[*v. State*], 965 So. 2d [48,] 63 [(Fla. 2007)]; *Archer*[*v. State*], 934 So. 2d [1187,] 1196 [(Fla. 2006)]. Lastly, Dr. Strauss himself testified that his opinion did not change based on the information provided in postconviction. Although he acknowledged that the new mitigation information he received confirmed and increased the strength or credibility of his penalty phase testimony, such confirmation was not necessary, nor has Knight shown how such

[2] Sosa was deceased by the time of the collateral litigation.

confirmation would have made a difference—especially given the trial court's findings as to the statutory mental health mitigators. Postconviction counsel's ability to find additional experts who, it argues, provide more favorable testimony does not make penalty phase counsel's performance deficient. *See Dufour v. State*, 905 So. 2d 42, 58 (Fla. 2005) ("Simply presenting the testimony of experts during the evidentiary hearing that are inconsistent with the mental health opinion of an expert retained by trial counsel does not rise to the level of prejudice necessary to warrant relief."). We find no deficient performance as to these mitigation witnesses.

As to Pearson, the postconviction court found that he did not testify at Knight's penalty phase "based on the advice of counsel as he was the co-defendant and his case was pending at the time." Accordingly, the court found no deficient performance because Knight's counsel could not be "faulted for failing to call a witness who would not testify." After reviewing the record, we find that Pearson's testimony wavered significantly as to his ability to testify at Knight's penalty phase. However, he did state at times that he refused to testify, was unavailable to testify, and was advised by his attorney not to testify as he was facing his own charges in connection with Kunkel's murder. As such, the postconviction court's finding as to Pearson's unavailability is supported by competent, substantial evidence. We also agree with the court's finding of no deficiency for not calling this unavailable or unwilling witness.

The postconviction court gave "little to no weight" to Fennell's testimony—which the court found was solely related to the conditions at Eckerd Youth Academy at a time when Knight may or may not have been there—because although Fennell recalled a "Ronald Knight" at the facility, Fennell remembered Knight being African-American, not Caucasian, and Fennell was unable to recognize Knight as the "Ronald Knight" he recalled. This finding is supported by sufficient evidence. There was some confusion as to Fennell's position at the Eckerd Youth Academy during the time periods when Knight would have been there. Also, Fennell's memory of a "Ronald Knight" and non-identification of Knight at trial does not add much weight to Fennell's testimony. Due to its limited value, Fennell's testimony does not result in deficient performance by Knight's counsel.

Lastly, the postconviction court cited inconsistencies between Fowler's penalty phase and postconviction testimony and found that although Fowler explained the contradictions by stating that she had been able to "reflect on the past" and was now seeing things more clearly than when

> she originally testified, counsel cannot be deemed ineffective for failing to present mitigation that only became available after a family member had time to reflect on her original testimony. The postconviction court's assessment as to Fowler's credibility is supported by competent, substantial evidence, and we agree with its legal conclusion. Counsel cannot be deemed deficient because a witness was able to remember more on postconviction than during her original testimony at trial.

Knight, 211 So. 3d at 9-10.

On appeal, the Florida Supreme Court addressed whether penalty phase counsel was ineffective for failing to adequately investigate and present mitigation. *Knight*, 211 So. 3d at 8. After identifying the standard of review as *Strickland*, 466 U.S. 668, and noting that the Court "defer[s] to the postconviction court's factual findings where supported by competent, substantial evidence, but review[s] the court's legal conclusions de novo," *Knight*, 211 So. 3d at 8-9, the Florida Supreme Court extensively discussed the facts developed during the collateral hearing before concluding:

> In determining this issue, we do not inquire whether mitigation could have been better presented, but whether the defendant has demonstrated both deficient performance and prejudice. *Brown v. State*, 846 So. 2d 1114, 1121 (Fla. 2003). As Knight has not demonstrated deficient performance as to any aspect of this ineffectiveness claim, he is not entitled to relief. A discussion of prejudice is unnecessary. *Orme*[*v. State*], ___ So. 3d [___,] ___, 2015 WL 8469221, at *4 [(Fla. Dec. 10, 2015)] ("Because both prongs must be demonstrated, once a defendant has failed to meet one prong, a discussion of the other is unnecessary.").

Id. at 9-10. The court affirmed the denial of collateral relief and denied the state habeas petition. *Id.* at 19.

Knight then filed for federal habeas relief (DE#1) and the State responded and filed the records (DE##17, 19, 20). On April 6, 2018, the district court denied relief.

(DE##26, 27). Subsequently, Knight's *pro se* motion to alter or amend judgment as well as the motion filed by counsel were denied and Knight appealed. (DE##28-36). On appeal, a COA was granted on the issue of ineffective assistance of penalty phase counsel.

The Eleventh Circuit focused on the prejudice prong of the ineffective assistance claim, assuming for the *de novo* analysis there was deficient performance since that was the most straightforward method of resolving the case. *Knight*, 958 F.3d at 1046. It pointed to *Cullen v. Pinholster*, 563 U.S. 170, 198 (2011), in finding its task was "to review the new evidence presented by Knight and then 'reweigh the evidence in aggravation against the totality of available mitigating evidence.'" *Knight*, 958 F.3d at 1046. In affirming the denial of habeas relief, the circuit court concluded:

> Knight's postconviction evidence confirms the mitigation evidence that Sosa originally presented, but it does not support any new mitigating factors. At the same time, the aggravating factors found by the sentencing court remain unchallenged and unaltered. As we will explain, therefore, the overall balance remains essentially unchanged, meaning that there is no "reasonable probability" that the sentencing court would have opted for life, rather than death.

Id. at 1047. This petition followed.

REASONS FOR DENYING THE WRIT

ISSUE I

Certiorari review is not warranted when the Florida Supreme Court's *Strickland* analysis correctly applied the relevant federal law and does not conflict with that of another court of appeals, nor does it present an important or unsettled matter of constitutional law.

This Court should deny certiorari review where the Eleventh Circuit Court of Appeals' review of the Florida Supreme Court's denial of an ineffective assistance of counsel claim does not conflict with a decision of any other state court of last resort or any decision of any other federal court of appeals. While the Eleventh Circuit's opinion assumed *Strickland* deficiency, relief may not be granted unless this Court finds that the Florida Supreme Court's assessment of the *Strickland* deficiency prong and the Eleventh Circuit Court's *Strickland* prejudice prong analysis are contrary to and an unreasonable application of this Court's precedent. *Williams v. Taylor*, 529 U.S. 362 (2000). Knight has not proven that either courts' merits determination requires review by this Court. Under ADEPA's deference, even if the reviewing federal court believes the state court's determinations to be incorrect, that alone cannot support a grant of certiorari review.

"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." *Harrington v. Richter*, 562 U.S. 86 (2011) (citation and punctuation omitted). To be granted relief, a petitioner must show that the state

court's merits ruling was so lacking in justification that it was an error so well understood and comprehended in existing law that it was beyond any possibility for fair minded disagreement. *Id.* Here, Knight cannot show that the state court's opinion on *Strickland* deficiency, which rested on factual and credibility determinations supported by the record, in any way conflicts with a decision of this Court. *See* Sup. Ct. R. 10. Knight's ineffective assistance of penalty phase counsel claim is wholly reliant on the particular facts of his case and is of no significance to anyone other than the present parties. Although the failure to meet any of the Rule 10 considerations is not controlling, this Court has noted that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law do not usually merit certiorari review. *Rockford Life Ins. Co. v. Ill. Dept. of Revenue*, 482 U.S. 182, 184 n.3 (1987). Since Knight has presented no compelling reason for review, this Court should deny certiorari.

1. The proper application of the AEDPA standard supports denial of certiorari.

28 U.S.C. Section 2254(d)(1)[3] mandates that review of the denial of habeas corpus relief is circumscribed to focusing solely on the propriety of the state court's

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[3] As this Court explained in *Brown v. Payton*, 544 U.S. 133, 141 (2005):

> AEDPA provides that, when a habeas petitioner's claim has been adjudicated on the merits in state-court proceedings, a federal court may not grant relief unless the state court's adjudication of the claim "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." 28 U.S.C. § 2254(d)(1). A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. *Williams v. Taylor, supra*, at 405, 120 S. Ct. 1495; *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (*per curiam*). A state-

decision on the merits of the claim of ineffective assistance of penalty phase counsel. Federal habeas relief is not available unless the state decision is contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, or the state court's determination of facts was unreasonable in light of the evidence. *Williams*, 529 U.S. at 412-13. *See Woodford v. Visciotti*, 537 U.S. 19 (2002) (explaining when a habeas applicant alleges a Sixth Amendment violation, he must show that the state court applied *Strickland* in an objectively unreasonable manner); *Yarborough v. Gentry*, 124 S. Ct. 1 (2003) (noting that the focus is on the state court's application of governing federal law). AEDPA "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Felkner v. Jackson*, 131 S. Ct. 1305, 1307 (2011) (per curiam) (citation omitted).

2. The state court determination that counsel's investigation, preparation, and presentation of the mitigation was not deficient was objectively reasonable.

As an initial matter, this is not a case like *Porter v. McCollum*, 130 S. Ct. 447, 453 (2009), as Knight suggests. (Petition at 23-24). In *Porter*, the question before the Court was whether Porter was prejudiced when penalty phase counsel only had one short meeting with the defendant about mitigation, never attempted to obtain any records, and never requested a mental health evaluation for mitigation. *Id.* As a

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court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner. *Williams v. Taylor, supra*, at 405, 120 S. Ct. 1495; *Woodford v. Visciotti*, 537 U.S. 19, 24-25, 123 S. Ct. 357, 154 L.Ed.2d 279 (2002) (*per curiam*).

result of counsel's inadequate investigation, defense counsel failed to present Porter's extensive combat experience in the Korean War and its lasting impact upon him. *Porter* applied well established law (*Strickland)* to a much different factual situation from that presented here.

In stark contrast to trial counsel's minimal efforts in *Porter*, here Knight's mental health and social history were investigated and presented as mitigation during his penalty phase. Knight's counsel had the benefit of a prior capital case mitigation preparation and presentation as well as access to lay witnesses and updated assessments by the two mental health experts who had evaluated Knight for the Meehan first-degree homicide. Trial counsel presented both mental health experts as well as family members. Knight presented nothing at the post-conviction hearing which established deficient or prejudicial performance under *Strickland.*

Knight asserts that the Florida Supreme Court did not apply the *Strickland* deficiency standard properly and disregarded evidence supporting counsel's alleged deficiency including: (1) Knight's childhood rejection by his parents, his drug abuse, and trauma at Eckerd (Petition at 16-21); (2) dismissing post-conviction experts Drs. Strauss and Lipman; (3) rejecting Tim Pearson's availability to testify about and veracity concerning Knight's drug use; and (4) Knight's sister's post-conviction testimony about his home life. (Petition at 22-24). The Florida Supreme Court addressed those facts and resolved each against Knight. That assessment was made in accordance with *Strickland,* and when the evidence is considered in light of the records and the trial court's factual and credibility findings, Knight has not met his

AEDPA burden. The habeas writ may be granted only where "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." *Harrington*, 562 U.S. at 103. This decision does not conflict with any of this Court's precedent. *See Pinholster*, 563 U.S. at 200 (finding neither deficient performance nor resulting prejudice where the "new" post-conviction evidence "largely duplicated the mitigation evidence at trial"). Knight has offered no basis for certiorari review as set forth below.

3. The *Strickland* analysis in this case is very fact specific and the lower court's decision is not in conflict with any other courts.

Here, trial counsel's penalty phase presentation was objectively reasonable and included both lay witness and mental health testimony. Knight's mental health experts offered statutory mitigation and the trial court found such mitigation. Also, non-statutory mitigators related to Knight's home life was presented and found by the sentencing court. Nothing credible and available to counsel at the time of trial was presented during the post-conviction litigation which had not been presented at trial; further, nothing presented would have changed the opinions of the trial's mental health experts regarding the mitigation found by the sentencing court.

For the penalty phase, Sosa hired mental health experts Dr. Strauss and Ms. Susan Lafehr-Hession ("Hession") after they had evaluated and testified for Knight on the Meehan murder. (DE#19 ROA 474, 495-96). During the instant penalty phase, Dr. Strauss and Ms. Hession testified, as did Knight's mother, sister, and brother. (DE#19 ROA.12 405, 449, 463, 493; ROA.13 565). Dr. Strauss opined that the

mitigators of under the influence of mental or emotional disturbance applied to Knight and that he was suffering from a paranoid disorder but was cognizant of the serious nature of the charges he faced. (DE#19 ROA.13 499-500, 516-17). Dr. Strauss found Knight ***had*** the ability to conform his actions to the requirements of the law. (DE#19 ROA.13 512-13). The pith of his testimony, as reviewed during the post-conviction hearing, was that Knight: (1) had an undercurrent of a paranoid disorder; (2) had a great deal of family distress and dysfunction; (3) was under the influence of extreme mental/emotional disturbance at the time of the crime; (4) was a very troubled person; (5) had a psychopathological existence; (6) was a volatile, emotionally intense man who did not have easy control; (7) had difficulty conforming his conduct to the law due to the way he learned; (8) was not in control of his emotions and his paranoid trait affected his capacity to appreciate the criminality of his conduct and to conform his conduct to the law; (9) had elements of significant distrust; and (10) had great anger. (DE#19 PCR 836-42).

Hession also testified that she tested Knight during the Meehan case and believed those results remained valid for the Kunkel trial. (DE#19 ROA.13 474-77). She too spoke of Knight's paranoia and found the mitigators of extreme mental or emotional illness which affected his ability to appreciate the criminality of his conduct. However, she found Knight knew right from wrong and had the ability to conform his conduct to the law. (DE#19 ROA.13 475-78, 482).

Knight's mother, Karen Gerheiser ("Gerheiser"), reported that she and Knight's father divorced when Knight was eight or nine years old and that his

brother, Michael, left the house with his father post-divorce. Knight felt the loss of male companionship deeply. (DE#19 ROA.13 411-15). Following this, Knight did poorly in school and exhibited defiant behavior. He spent nights away from home in the woods or with friends. (DE#19 ROA.13 419-27). In spite of this, Gerheiser had a good relationship with her son, gave him shelter, and provided sufficient clothes and food. Knight was not abused. He was given an apartment by his mother when he turned 18. (DE#19 ROA.13 439-46).

During the penalty phase, Theresa Scott-Fowler ("Fowler"), Knight's sister, credited her mother as trying hard to control Knight but offered there could have been more affection and attention displayed. Otherwise, they had shelter, food, and clothes. Fowler testified that their mother "did the best she could" and tried to get help for Knight. Knight always helped his sister and she would help him. (DE#19 ROA.13 453-59).

Michael Knight ("Michael") said he had a good relationship with his brother and did not know Knight to have abnormal or extreme problems during the time surrounding the murders. Michael reported that he did not see any physical or mental abuse committed in the household up until he left with his father. His parents always provided for their children. (DE#19 ROA.13 568-69, 573-74).

4. The mitigation evidence presented or proffered in the post-conviction hearing was not compelling and much was not credible.

The post-conviction evidence did not vary significantly in character or quality from that presented by counsel at trial. In post-conviction, Dr. Strauss testified that he continued to have the same general impression he had during the trial, namely

that Knight has a paranoia problem, maybe a paranoid personality trait, but that he had no Axis I diagnosis based on the DSM-IV Manual. Knight suffered no hallucinations and was not suffering from any psychotic events nor was he psychotic at the time of the crime. Further, the affidavit[4] from Keith Williams, a resident of Eckerd, may have confirmed Dr. Strauss's suspicions about the etiology of Knight's condition while the information from Drs. Harvey and Lipman reinforced Dr. Strauss's original opinion, but nothing changed his original opinion. (DE#19 PCR 809-10, 840-43; PRC.16 3118). Dr. Strauss explained that discussions with Dr. Lipman revealed that Knight had a much more prevalent history of a substance abuse but that it merely added to Dr. Strauss's diagnostic certainty, it did not change it. (DE#19 PCR 811-12). Nonetheless, Dr. Strauss did not have enough information to diagnose a paranoid personality disorder, although he noted he had a strong sense Knight had paranoid traits. (DE#19 PCR 811-12). While Dr. Strauss reiterated Knight's ability to conform his conduct to the requirements of the law was "impaired," he did **not** find the impairment substantial. Dr. Strauss testified he had **no hard evidence** Knight was using drugs at the time of the crime. (DE#19 PCR 816-17).

With respect to Knight's time at Eckerd, Dr. Strauss said he recently reviewed the Williams affidavit which was consistent with Gregory Otto's report; both spoke of violence at the school. However, Knight never reported any sexual or physical abuse

[4] The suggestion Knight may have Post-traumatic Stress Disorder was a hypothetical; Dr. Strauss was making no such diagnosis. (DE#19 PCR 845). Likewise, Dr. Harvey made no such diagnosis.

at the school even though he was injured there and lost a testicle. (DEE#19 PCR 818, 820-22, 827).

In 2004, Dr. Harvey conducted testing on Knight to assess his cognitive functioning and screen for psychological impairments. Knight tested in the average range on all tests and had a full-scale IQ score of 95. Dr. Harvey found no indication of any traumatic brain injury or adverse impact from substance abuse; he was surprised that Knight's cognitive functioning was not impacted more given the new reports of substance abuse. (DE#19 PCR 853-59, 863, 877-80). Dr. Harvey also considered the Williams affidavit[5] and opined that, based on it, Knight had been exposed to "extremely substantial traumatic experiences." However, Knight denied experiencing any traumatic life events and had denied any such events to Dr. Strauss and Hession. Knight performed in the average range at school and on the cognitive tests throughout the time-frame before and after the period discussed in the Williams affidavit. There was "no identifiable decline" between the school grades and Dr. Harvey's 2004 exams. Dr. Harvey did no follow-up for Post-traumatic Stress Disorder and made no such diagnosis. (DE#19 PCR 882-77).

Fowler's testimony at the evidentiary hearing was consistent with her penalty phase testimony, with the exception that she reported that their mother gave Knight

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[5] It should also be noted that Zebedee Fennell ("Fennell") was at Okeechobee School/Eckerd as a counselor, program administrator, and chaplain from 1965 to his retirement in 2002. Fennell recalled an African-American student named Ronald Knight, but did not recall the instant defendant, Ronald Knight, and did not recognize him in court. This witness also related that as a result of a lawsuit prosecuted before 1982, the school was taken over by the private firm Eckerd. All corporal punishment/beatings by the staff ceased and Eckerd moved to more therapeutic treatments; Fennell never witnessed any beatings by the staff. Over the next few years, the population decreased, giving the staff more ability to control the students. (DE#19 PCR.32 917-29).

no love, had no parenting skills, and there was neglect. (DE#19 PCR 971-74). Fowler added: "As I've grown over the years and when I've had my own kids, I've seen much, much — I was jealous because everybody else had something that I didn't have, we didn't have. So there were no parenting skills." (DE#19 PCR.35 959). Also, by way of explanation for her changed testimony, Fowler stated: "over the years, I've been able to look back and see what the situation, you know, looking over the situation, and looking in the past. And I'm seeing a lot of things more clearer [sic] now than I did back in '98 and '95." (DE#19 PCR.35 977).

Pearson, Knight's co-defendant, did not testify at the guilt or penalty phases. During the evidentiary hearing, he related that he knew Knight since elementary school, saw Knight as a brother and the two were "extremely" close to this day; Pearson did not want to see him executed. Admitting his statement to the police was different and asserting he did not understand the police question, Pearson reported Knight had an extensive drug addiction and used drugs on the night of the murder. (DE#19 PCR.32 985-86, 996). Dain Brennalt ("Brennalt") confirmed Pearson's account of Knight's drug use in the days leading up to the murder but reaffirmed his trial account that no cocaine was used on the day of the homicide. (DE#19 PCR.32 1038-39). Pearson admitted he did not testify at trial based on the advice of counsel; Pearson averred he refused to testify for Knight and was unavailable to Knight's counsel. (DE#19 PCR.32 996-97).

Regarding the post-conviction presentation of drug abuse, the state court found Pearson not to be credible, stating:

> Pearson's testimony of extensive drug use was somewhat corroborated by Brennalt, but Brennalt was emphatic that they did not use drugs on the day of the homicide, though they had in the days leading up to it. (PC EH 5/2/2012 PM Session at 19-20) Dr. Harvey's testimony seems to contradict Pearson's testimony in that the objective data does not support the extensive drug use Pearson reported. This Court finds Pearson's testimony to lack credibility and credits the testimony of Brennalt. Pearson indicated that he still views the Defendant as a brother and expressed empathy with the Defendant which undermines his credibility and reveals his motivation for testifying. Further, and perhaps most importantly, this Court finds that Pearson was not available to Sosa in order to testify at the penalty phase based on advice from his counsel.

(DE#19 PCR.16 3121-22). The Florida Supreme Court accepted those factual and credibility findings. *See Knight*, 211 So. 3d at 4 (citing *Clark v. State*, 35 So. 3d 880, 886 (Fla. 2010); *Archer v. State*, 934 So. 2d 1187, 1196 (Fla. 2006); *Bell v. State*, 965 So. 2d 48, 63 (Fla. 2007)).

Likewise, the court rejected Dr. Lipman's testimony which was reasonable under AEDPA given its finding that Dr. Lipman was not credible. "Not only were Dr. Lipman's assertions based upon the testimony of another non-credible witness [(Pearson)] yet because he is not licensed to administer tests in Florida, his testing was done as a research endeavor but was presented as though he was making a diagnostic impression." (DE#19 PCR.16 3120). Dr. Lipman was unable to complete his evaluation of Knight and chose to reject Knight's sworn testimony that he was not using cocaine on the night of the crime, instead choosing to believe Pearson (who claimed to be under the influence at the time of the crime) to substantiate Knight's level of intoxication. In fact, Dr. Lipman admitted that he did not know "toxicologically" that Knight ingested cocaine or how much he may have ingested on

the night of the crime. (DE#19 PCR 1219-26, 1231-36, 1254-56, 1265-68), which showed his bias and outcome oriented "fact collection." Dr. Lipman's testimony was rejected properly and was not used to support Knight's alleged drug addiction. Given this, Knight's claim that his drug abuse was not investigated further is not well taken. For the same reasons, his challenge to the Florida Supreme Court's rejection of Dr. Lipman fails since that rejection was not unreasonable given the record in the case. Certiorari should be denied.

Turning to the contention that Knight was kept from his home by his mother's boyfriend, the record refutes any abuse. The sentencing court was aware that after the divorce, Knight spent nights away from home in the woods or with friends. (DE#19 ROA.13 419-27). During collateral review, Fowler says their mother gave Knight no love and had no parenting skills. This contradicts her penalty phase testimony where she reported that everything was good when Knight was growing up except that their father showed more attention to his eldest son, Michael, than to Knight. Fowler testified at the penalty phase that their mother was never really harsh and that she did the best she could as a single parent. In 2012, Fowler asserted there was neglect and lack of affection, yet at the 1998 penalty phase, Fowler testified Knight was never physically or psychologically abused. (DE#19 PCR 971-80). Given these contradictory accounts, the post-conviction court reasonably found, and the Florida Supreme Court reasonably agreed, Sosa was not deficient as he could not be faulted for the change in testimony some 14 years later. Moreover, Judge Garrison knew Knight spent nights away from home and any change in testimony would

merely negate the established mitigator of having the support/love of family and give further support to the mitigator Judge Garrison found that Knight suffered from a broken home. (DE#19 ROA 429). Neither *Strickland* deficiency nor prejudice were established under AEDPA.

To the extent Knight suggests Sosa should have found Keith Williams or that the Florida Supreme Court ignored the affidavit, the record refutes those contentions and establishes that the state court's decision was not contrary to, or an unreasonable application of, *Strickland*. First of all, the affidavit was inadmissible hearsay. *Knight*, 958 F.3d at 1047-48. Nonetheless, while the Williams affidavit may have confirmed Dr. Strauss's suspicions about the etiology of Knight's condition and Drs. Harvey and Lipman reinforced Dr. Strauss's opinion, nothing changed Dr. Strauss's original diagnosis. Consequently, it cannot be said that any evidence was ignored. Regarding Knight's time at Eckerd, Dr. Strauss said he recently reviewed the Williams affidavit which was consistent with Gregory Otto's report; both spoke of violence at the school. (DE#19 PCR 818, 820-22). However, Knight never reported that he suffered any sexual or physical abuse at the school even though he was injured there and lost a testicle. (DE#19 PCR 821, 827). Given that the affidavit was inadmissible hearsay under state law, did not support a change in the experts' opinions, and Knight denied any abuse, Knight failed to demonstrate that Sosa was deficient as defined by *Strickland*. For the same reasons, the state courts did not unreasonably discount Dr. Strauss's testimony. With the appropriate level of deference due to counsel under *Strickland* as viewed through the optics of AEDPA

and its demand for respect for all reasonable state court judgments, it is clear that habeas relief was denied properly in this case.

There is no conflict between the Eleventh Circuit and this Court or any other circuit court of appeals regarding the fact-specific application of this Court's well settled *Strickland* precedent. Accordingly, certiorari should be denied.

ISSUE II

The Eleventh Circuit Court of Appeals' fact-specific finding of lack of prejudice under *Strickland* does not conflict with any of this Court's precedent or present any important or unsettled issue of constitutional law.

Knight next asserts that the Eleventh Circuit employed the wrong standard when it evaluated the prejudice prong of his ineffective assistance of counsel claim, improperly requiring Knight to present evidence of a new mitigating circumstance and to challenge or rebut an existing aggravator. He argues that mitigation may affect the sentence even if it fails to establish a separate mitigator. He specifically points to four items presented at the evidentiary hearing in the post-conviction litigation which he argues substantially affected the overall mitigation, alleging that it would have substantially altered the weighing process and would have resulted in a life sentence: the testimony of Dr. Strauss; the Williams affidavit; Knight's drug use; and Fowler's testimony. He contends that this evidence established Knight's paranoia, drug abuse, sexual abuse and resulting trauma, and an abusive childhood to a profoundly different extent than was presented at trial, which the Eleventh Circuit would have recognized if it had used the correct *Strickland* prejudice standard. A review of the Eleventh Circuit's opinion belies Knight's contentions and

demonstrates that the court employed the standard mandated by *Strickland*. This Court should deny certiorari review.

The Eleventh Circuit chose to examine the prejudice element of Knight's ineffective assistance of counsel claim, assuming for the sake of the analysis that Knight had shown deficient performance. Since the Florida Supreme Court never reached the prejudice question, the review was *de novo*. The court explicitly stated that it was reviewing *all* the mitigation evidence presented: "we must reweigh the aggravating evidence found by the judge who sentenced Knight against the totality of the mitigating evidence—including both the evidence originally presented at sentencing and the evidence that Knight now claims his counsel failed to present." *Knight*, 958 F.3d at 1037. It next applied the standard for evaluating prejudice:

> In evaluating prejudice, our task is to review the new evidence presented by Knight and then "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Cullen v. Pinholster*, 563 U.S. 170, 198, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011) (quoting *Wiggins*[*v. Smith*], 539 U.S. [510,] 534, 123 S. Ct. 2527 [(2003)]). "[T]he question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* (ellipses in original) (quoting *Strickland*, 466 U.S. at 695, 104 S. Ct. 2052).

Id. at 1046. The court then went through each witness from the evidentiary hearing, examining precisely what information was actually presented; its opinion addressed each of the mitigation items at issue here, ultimately not finding the heft of each that Knight claims.

The Eleventh Circuit examined the testimony of the mental health experts who testified both at the trial and at the evidentiary hearing, adopting the credibility and

factual findings made by the lower court as required under AEDPA. It also reviewed the lay witnesses as well as the Williams affidavit. The court noted that Knight had denied any history of trauma or sexual abuse, including when he was examined by his mental health experts. *Knight*, 958 F.3d at 1043. Dr. Strauss, who testified both at the trial and in the post-conviction litigation, denied that counsel had hampered his investigation and examination in any way.

> He said that his investigation was never rushed and that he was never denied any time or resources by Sosa or the court. In the same vein, he confirmed that his presentation to the sentencing court was not "truncated" in any way.... [T]he only difficulty that Strauss could recall resulted from Knight's own non-cooperation during evaluations.

Id. Dr. Strauss said that he reviewed the information provided by the new mental health and lay witnesses, including the affidavit. "None of it, he said, altered his original paranoia diagnosis." *Id.* Further, his "'global opinions [were] really identical to what [he] expressed to Judge Garrison in 1998, at the penalty phase of the case.' His diagnosis remained unaltered...." *Id.* at 1048. Dr. Strauss said "Knight was under extreme mental or emotional distress at the time of the murder and was unable to conform his conduct to the law. That is exactly what the sentencing court found in 1998." *Id.* (emphasis omitted).

Ultimately, the Eleventh Circuit determined that Knight simply had failed to prove his contentions listed above. Knight failed to establish that he was sexually abused or traumatized while at Eckerd. Knight himself never said he was abused. The Williams affidavit was inadmissible hearsay and Knight failed to establish that he was the person discussed in that document, especially in light of Fennell's

testimony about another boy named Ronald Knight. The experts were left with their suppositions about the origin of Knight's paranoia, but none diagnosed him with a personality disorder based on it. *Knight*, 958 F.3d at 1042, 1047-48. Consequently, the Eleventh Circuit was left with the same mitigator of Knight being under the influence of extreme mental or emotional disturbance based on the same facts before the sentencing court, which was certainly insufficient to prove prejudice under *Strickland*.

The Eleventh Circuit also addressed Knight's contention that he was under the influence of drugs at the time of the crime and that he had a significant history of drug abuse. Initially, the court noted that the state court had determined that the two witnesses upon which Knight rested his under the influence proposition, Pearson and Lipman, were not credible, completely undermining it. The Eleventh Circuit, under AEDPA and related case law, deferred to those findings. *See Consalvo v. Sec'y for Dept. of Corr.*, 664 F.3d 842, 845 (11th Cir. 2011) ("Determining the credibility of witnesses is the province and function of the state courts, not a federal court engaging in habeas review."). That left Brennalt's testimony, which specifically said that Knight was *not* under the influence of drugs at the time of the murder, along with the trial testimony about Knight's history of drug abuse as the factual support for the mitigator that Knight was "somewhat" unable to conform his conduct to the requirements of the law. The court determined that the evidence added some nuance to Knight's drug use but it added nothing new, again leaving it with the original mitigator based on essentially the same facts.

Finally, the Eleventh Circuit agreed that Fowler's new testimony added "detail and texture" but offered nothing new to her original trial testimony. *Knight*, 958 F.3d at 1048. Her testimony did not make the evidence weightier or alter the nature of the mitigation presented so it would not have altered the sentencing court's weighing process, which the court determined, using the proper *Strickland* prejudice standard. *See Cullen*, 563 U.S. at 200-01 (noting that, because "[petitioner's] 'new' evidence largely duplicated the mitigation evidence at trial," and "basically substantiate[d] the testimony of" his family, there was "no reasonable probability that [it] would have changed the jury's verdict"). The sentencing court had essentially all the information presented post-conviction before it when it sentenced Knight. The Eleventh Circuit determined that Knight failed to meet his burden to show that there was a reasonable probability that he would have received a life sentence based on the "new" mitigation. *Strickland*, 466 U.S. at 694. The Eleventh Circuit made a fact-based analysis of whether Knight met his burden to prove prejudice under *Strickland*. This Court should deny certiorari review.

ISSUE III

This Court should not grant certiorari review where Knight failed to raise this issue below, the question does not apply to him, and his case is in no way analogous to *Atkins*.

Knight next solicits this Court to "refine the *Strickland* standard for assessing prejudice during the penalty phase to require a more nuanced approach" for courts to give more weight to mental health conditions when analyzing prejudice in ineffective assistance of counsel claims. (Petition at 32). Petitioner does not elaborate on what

such a nuanced approach would encompass or be, but points to this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), which held the death penalty violates the Eighth Amendment when the defendant is mentally retarded. While draping his argument with an introductory cloak of *Strickland*, Knight appears to be asking this Court to carve out another disqualifier to the death penalty, as *Atkins* did with mental retardation. That question was never raised in any lower court and this Court should not grant certiorari in such a situation.

Initially, this issue is not germane to Knight since his counsel, through mental health experts, thoroughly investigated and presented what information existed about Knight's mental health to the sentencing court and since Knight does not suffer from a severe mental illness. As discussed in the preceding section, Knight's mental health experts testified that Knight had a "strong suspicion of a paranoia disorder" and that he suffered from "an 'undercurrent of a paranoid disorder.'" *Knight*, 958 F.3d at 1040, 1048. Knight was never diagnosed with an Axis I condition, such as a personality disorder. As the state courts and the Eleventh Circuit found upon review of the record, all the available information regarding Knight's mental health was presented to the sentencing court. As the courts and one of Knight's experts noted, the information brought out in post-conviction undergirded the information already presented to the sentencing court but did not add in a substantial way to the picture of Knight's mental health. The sentencing court found two statutory mitigators, discussed in the previous issue, so it obviously put significant importance to the mental health evidence; each of the reviewing courts did the same when re-examining

the issue in light of the *Strickland* claim. The Eleventh Circuit used the proper *Strickland* standard in its analysis of prejudice, but this issue was not before it. Consequently, this Court should deny the petition.

The mental health condition informed the mitigators the court found, as proper under *Strickland*; at no point below did Knight raise the question of some enhanced standard of review in light of mental health mitigation or of using mental health conditions as a disqualifier to the death penalty as *Atkins* did for mental retardation. This Court should not take the petition since it was not before the Eleventh Circuit or any of the other lower courts. *United States v. Williams*, 504 U.S. 36, 41, 112 S. Ct. 1735, 1738 (1992) (Court's traditional rule precludes a grant of certiorari when the question presented was not raised before the lower courts); *Hill v. California*, 401 U.S. 797, 805, 91 S. Ct. 1106, 1111 (1971) (the Court normally dismissed petitions which had questions never raised or preserved in state courts); *Berkemer v. McCarty*, 468 U.S. 420, 443, 104 S. Ct. 3138, 3152, 82 L. Ed. 2d 317 (1984) (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2, 90 S. Ct. 1598, 1603 n.2 (1970) (Court generally reluctant to hear question not raised in lower courts).

Knight never raised an Eighth Amendment claim based on his mental health before this petition, neither in the underlying Eleventh Circuit appeal nor in the state courts.[6] In citing to *Atkins*, he asks this Court to establish a new rule of constitutional

[6] Nor, had this claim been properly raised below, would it merit certiorari. Knight's attempt to extend *Atkins* to bar the execution of a defendant with mental health issues has been uniformly rejected by state and federal courts. *See, e.g., Malone v. State*, 293 P.3d 198, 216 (Okla. Crim. App. 2013) (Expressly rejecting "that the *Atkins* rule or rationale applies to the mentally ill" and noting that the defendant has cited no "cases from any American jurisdiction" extending the holding in *Atkins* in this manner); *Smith v. Davis*, 927 F.3d 313, 339 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 1299 (2020)

law by extending *Atkins*, essentially arguing that a defendant with a "severe mental condition" should not be subject to the death penalty based upon the Eighth Amendment. Petitioner is trying to take a mundane mental health issue (like paranoid characteristics) and make it into a global disqualifier for the option of the death penalty. *Atkins* addressed a group of individuals who "by definition ... have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins*, 536 U.S. at 318. A person with a "severe mental condition" rarely presents such a global and all-encompassing disability in their mental functioning; if their mental condition rises to such a level, insanity often comes into play. Such is certainly not the case with Knight, who actively hunted a victim, chose him, and then executed his plan to rob and kill him. This Court should deny certiorari review.

(rejecting argument the mentally ill are ineligible for the death penalty similar to the intellectually disabled, saying defendant's "'concept of reality' [was not] 'so impair[ed]' that he [could] not grasp the execution's 'meaning and purpose' or the 'link between [his] crime and its punishment.'"); *Lewis v. State*, 279 Ga. 756, 764, 620 S.E.2d 778 (Ga. 2005) (declining to extend *Atkins* to the mentally ill); *Carroll v. Sec'y, Dept. of Corr.*, 574 F.3d 1354, 1369 (11th Cir. 2009) (rejecting habeas petitioner's claim made pursuant to *Atkins* that he was exempt from execution because he was mentally ill); *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006) (holding that *Atkins* protects only the mentally retarded from execution).

ISSUE IV

Certiorari should be denied as the appellate court employed the proper certificate of appealability standard and no reasonable jurist would disagree that *Hurst v. Florida* has not been held to be retroactive and a defendant who waived his jury is not entitled to *Hurst* relief.

Knight asserts that the circuit court failed to employ the proper standard for determining whether to grant a COA to determine whether *Hurst* is retroactive and that he was entitled to a COA since the circuit court reached to the claim's merits before finding that his jury waiver in the penalty phase barred him from *Hurst* relief. This Court has not held *Hurst* is retroactive, thus, no reasonable jurist would debate whether *Hurst* applies to Knight's case, which was final before *Hurst* issued. Furthermore, Knight's waiver of his jury sets him outside the protections of *Hurst* and precludes relief here.

For a COA to issue, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires a demonstration that that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The circuit court applied this standard when it recognized *Hurst* had not been held to be retroactive and that Knight had waived his jury.

In *Hurst*, this Court assessed Florida's capital sentencing statute in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that any fact that increases

penalty for crime beyond prescribed statutory maximum must be submitted to jury and proved beyond reasonable doubt. In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court reasoned that defendants "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment" meaning the jury is to make the findings on the aggravators to render the defendants death eligible. *Id.* at 589. This Court determined that *Ring* was not retroactive. *Schriro v. Summerlin*, 542 U.S. 348, 349-51 (2004). In *Hurst*, this Court applied *Ring* to find unconstitutional that portion of Florida's capital sentencing statute which permitted a judge, independent of the jury's recommendation, to make independent findings on aggravating circumstances. *Hurst* merely applied *Ring* to Florida's statute; it did not cause *Hurst* to be retroactive. As Justice Kavanaugh noted, "*Ring* and *Hurst* do not apply retroactively on collateral review. *See Schriro v. Summerlin*, 542 U.S. 348, 358, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004)." *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020). Since Knight's case is before this Court on federal habeas review, *Hurst* does not provide an avenue of relief to him;[7] the denial of the COA is not debatable and certiorari should be denied.

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[7] In the state habeas litigation, the Florida Supreme Court stated:

> Knight has also filed a supplemental brief seeking relief under the United States Supreme Court's decision in *Hurst v. Florida*, [577] U.S. [92], 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016). However, Knight waived his penalty phase jury and, thus, is not entitled to relief. *Brant v. State*, 197 So. 3d 1051, 1076 (Fla. 2016); *Mullens v. State*, 197 So. 3d 16, 39 (Fla. 2016), petition for cert. filed, No. 16–6773 (Nov. 4, 2016). As such, we reject Knight's *Hurst* claim without further discussion.

Knight, 211 So. 3d 1, 5 n.2.

Assuming for a moment this Court was inclined to revisit the retroactivity holdings of *Schriro* and *McKinney*, this case presents a very poor vehicle to do so. While *Ring*, and subsequently *Hurst*, required the jury to make findings on aggravation, it did not bar the defendant from waiving his right to a jury. Where the defendant waives that right, as in this case, he cannot later complain that he did not have a jury determination under *Hurst*. The circuit court's recognition of that jury waiver in its COA review does not render its analysis flawed.

Nonetheless, a review of the findings on the voluntariness of Knight's waiver supports the determination that Knight's waiver was voluntary, and establishes without any room for debate that *Hurst* relief is not available to him and, therefore, he was not entitled to a COA on the *Hurst* issue.

First, the Florida Supreme Court found that Knight's challenge to his jury waiver was procedurally barred as it was not raised on direct appeal.[8] *See Knight*, 211 So. 3d at 17. This is an independent state law ground which should not be disturbed. Second, in rejecting Knight's assertion that appellate counsel was ineffective for not raising the issue on direct appeal, the Florida Supreme Court determined that Knight requested to waive his jury, both orally and in writing, that the trial judge discussed the seriousness of the waiver and allowed him time to confer with standby counsel. *Id.* Standby counsel confirmed that he and Knight had

[8] The state court held: "Knight's claim regarding his waivers of guilt and penalty phase juries is also procedurally barred, as it should have been raised on direct appeal. *Muhammad v. State*, 603 So. 2d 488, 489 (Fla. 1992) (finding claims procedurally barred because 'the issue could have or should have been raised on direct appeal.'). Thus, Knight is not entitled to relief on this claim." *Id.* at 17.

discussed the matter and Knight averred that he had enough time to confer with counsel and reiterated that he wanted to waive his jury. *Id.* Knight's wish to waive his jury was memorialized and he executed a written waiver. *Id.* at 17-18. Post-verdict, the court and counsel discussed the waiver and Knight confirmed he was waiving his penalty phase jury. *Id.* Citing *Guzman v. State*, 721 So. 2d 1155, 1158 & n.1 (Fla. 1998), and *Mines v. State*, 390 So. 2d 332, 335-36 (Fla. 1980), the Florida Supreme Court found Knight's waivers knowing and voluntary. *Knight*, 211 So. 3d at 18. It also pointed to Knight's post-conviction evidentiary hearing testimony,[9] concluding: "Knight's prior experience with a criminal trial, and his adamancy for waiving his right to a trial by jury, we find that Knight's waivers of guilt and penalty phase juries were knowing, voluntary, and intelligent." *Id.* Furthermore, had the issue been raised on direct appeal, the Florida Supreme Court "would have found [the waivers] to be knowing, intelligent, and voluntary," thus counsel was not ineffective. *Id.* (*see* DE#19 ROA.11 369-70, 2021-22). Where the jury waiver was knowing and voluntary, *Hurst* cannot apply and such is not debatable. Certiorari should be denied.

[9] The Florida Supreme Court also recognized that "the postconviction court found most of Knight's testimony on this issue not credible, and such finding is supported by competent, substantial evidence." *Id.* at 18.

CONCLUSION

Based on the foregoing arguments and authorities, Respondents requests respectfully that this Honorable Court deny the request for certiorari review.

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