No. _____

IN THE

Supreme Court of the United States

STEVEN RICHARD TAYLOR,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S APPENDIX

CAPITAL CASE

LINDA MCDERMOTT
Counsel of Record
SEAN GUNN
Capital Habeas Unit
Federal Public Defender
Northern District of Florida
227 North Bronough St., Suite 4200
Tallahassee, Florida 32301
(850) 942-8818
linda_mcdermott@fd.org

INDEX TO APPENDIX

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-12883

STEVEN RICHARD TAYLOR,

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
D.C. Docket No. 3:12-cv-00444-BJD-MCR

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before WILSON, JILL PRYOR, and NEWSOM, 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 also is DENIED. FRAP 40.

[PUBLISH]

In the United States Court of Appeals

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Before WILSON, JILL PRYOR, and NEWSOM, Circuit Judges.

NEWSOM, Circuit Judge:

More than 30 years ago now, a Florida jury convicted Steven Richard Taylor of first-degree murder, burglary of a dwelling, and sexual battery. He was sentenced to death for the murder, 15 years' imprisonment for the burglary, and 27 years for the sexual battery. After exhausting state remedies, Taylor sought habeas corpus relief in federal court, alleging (as relevant here) various evidentiary errors at his trial. The district court denied Taylor's habeas petition, and he now appeals. We affirm.

I

The facts of Taylor's case, as recounted by the Florida Supreme Court, are as follows:

> On September 15, 1990, at about 11:30 p.m., the victim, fifty-nine-year-old Alice Vest, returned to her mobile home in Jacksonville after spending the evening with a friend. Earlier that evening, the appellant, Steven Richard Taylor, and two friends were out driving and listening to the radio. Around midnight, the driver of the car dropped off Taylor and his friend, who was later to become his accomplice, near the victim's neighborhood.
>
> Sometime in the early morning hours of September 16, a Ford Ranchero was stolen from a residence near the place where Taylor had been dropped

> off. At about 4:30 a.m., after the vehicle had been stolen, a passing motorist noticed the Ford Ranchero parked in a driveway next door to the mobile home where the victim lived. Later that morning, the Ford Ranchero was found abandoned behind a used car dealership only a few blocks from where Taylor lived at the time.
>
> On the same morning, neighbors discovered the victim's battered body in the bedroom of her mobile home. . . .
>
> . . . .
>
> The testimony at trial also revealed that the phone line to the mobile home had been cut, that the home had been burglarized, and that various pieces of jewelry were missing.

Taylor v. State, 630 So. 2d 1038, 1039 (Fla. 1993) (per curiam) (*Taylor I*).

The police didn't immediately know who was responsible. Subsequent events added to their suspicion and, eventually, led to Taylor's arrest:

> In December of 1990, Taylor moved out of the duplex he had been sharing with a friend. In January, 1991, while Taylor's former roommate was removing a fence behind the duplex, he discovered a small plastic bag buried in the ground near the fence. The bag contained the pieces of jewelry taken from the

victim's home during the attack and burglary. The roommate turned the jewelry over to the police and gave a statement. Later that month, Taylor visited the duplex with some friends. The former roommate testified that, at some point during the visit, Taylor went into the backyard and stared at the place where the fence had stood. During the following month, Taylor again returned to the duplex with friends. One of the accompanying friends testified that Taylor went into the backyard and returned a few minutes later with dirty hands. In response to the friend's inquiry as to what he was doing, Taylor allegedly responded that he had left some things there and that they were gone.

On February 14, 1991, the Duval County sheriff's office executed a search warrant on Taylor which authorized the officers to take blood, saliva, and hair samples from Taylor. Taylor was taken to the nurses' station at the county jail so that the samples could be taken, but not before Taylor invoked his right to counsel. Later that day, after the samples were taken, Taylor asked the investigating officer how long it would take to get the results back. Instead of directly responding to the question, the investigating officer asked Taylor why he wanted to know. Taylor responded that he was just wondering when they would be back out to pick him up. Taylor did not have long to wait. Two days later, on February 16, Taylor was arrested, and, on March 3, a grand jury returned a two-count indictment against Taylor for

> first-degree murder and burglary. The indictment was amended on September 12, 1991, to add a third count for sexual battery.

Id. at 1039–40.

At trial, the state presented the evidence of Taylor's location on the night of the murder, testimony tying him to the bag of jewelry, and DNA evidence from the scene that matched his profile. With respect to the latter, Dr. James Pollock, a Florida Department of Law Enforcement (FDLE) lab analyst who was "an expert in serology . . . testified that semen found in the victim's blouse matched Taylor's DNA profile." *Id.* at 1040. Taylor's attorney, Frank Tassone, presented only one witness, an FBI agent who testified that some of the physical evidence matched Taylor's accomplice. *Id.* Taylor was convicted of first-degree murder, burglary of a dwelling, and sexual battery and was subsequently sentenced to death.

Taylor sought state post-conviction relief under Florida Rule of Criminal Procedure 3.850(a), and the state court granted an evidentiary hearing. As relevant for our purposes, Taylor presented the testimony of the state prosecutors, his trial counsel, his first post-conviction attorney, Shirley Zeigler (a former FDLE DNA analyst who served as the "second looker" for Dr. Pollock's DNA analysis results), and Dr. Randell Libby (a DNA expert). The Florida Supreme Court described Taylor's DNA-related case this way:

> To challenge the DNA evidence presented against Taylor at trial, the defense presented Dr. Libby to address alleged problems associated with Dr.

> Pollock's State testing procedures. Dr. Libby testified that the FBI DNA testing protocol utilizes five to eight probes, but Dr. Pollock's State testing only utilized four. Further, Dr. Libby opined that three of the four probes utilized by Dr. Pollock were inconclusive. One reason Dr. Libby used as a predicate for concluding that the probes were inconclusive was due to differences in the [] reports created by Dr. Pollock and Shirley Zeigler. The defense also presented Shirley Zeigler, who worked as a[n FDLE] analyst at the time the DNA evidence was processed. Zeigler's initials were found on the calculated fragment report that was used by Dr. Pollock at Taylor's initial trial. Zeigler testified that she would have found two of the probes utilized by Dr. Pollock to be inconclusive, but did not disagree with Dr. Pollock's ultimate findings.

Taylor v. State, 62 So. 3d 1101, 1107 (Fla. 2011) (per curiam) (*Taylor III*).

As relevant here, the state post-conviction court found that Dr. Libby's testimony wasn't credible: Dr. Libby, the court found, lacked "the requisite background and experience in forensic DNA" to warrant giving his testimony considerable weight. *State v. Taylor*, No. 161991CF002456, 2009 WL 9419304, at *6 (Fla. Cir. Ct. June 22, 2009) (*Taylor II*). It denied Taylor's petition, and the Florida Supreme Court affirmed.

Taylor petitioned for federal habeas corpus relief in the Middle District of Florida in April 2012. *See* 28 U.S.C. § 2254. The

district court denied his petition in May 2021 without holding an evidentiary hearing. *See Taylor v. Secretary, Fla. Dep't of Corr.*, No. 3:12-CV-444-BJD-MCR, 2021 WL 2003122, at *1–2, *26 (M.D. Fla. May 19, 2021) (*Taylor IV*).

Taylor sought a certificate of appealability, which we granted on five issues:

1. Did the state violate *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose Dr. Pollock's deviations from the FDLE and FBI DNA testing protocols—namely, his testing of only four DNA probes, his testimony that DNA probes D4S139 and D1S7 matched Taylor's DNA profile, and his interpretation of over 10,000 DNA base pairs?

2. Did the district court err in applying the *Brecht v. Abrahamson*, 507 U.S. 619 (1993), harmless-error test to Taylor's above-referenced *Brady* claim?

3. Did Taylor's trial counsel provide ineffective assistance, pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), by failing to challenge the state's DNA evidence under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)?

4. Did Taylor's trial counsel provide ineffective assistance, pursuant to *Strickland*, by failing to request a hearing under *Richardson v. State*, 246 So. 2d 771 (Fla. 1971), upon learning of Zeigler's identity at trial during Dr. Pollock's cross-examination?

5. Did the district court err in holding that Taylor was not entitled to suppression of the statements he made to Officer John Bogers under *Miranda v. Arizona*, 384 U.S. 436 (1966)?

We now address those issues in turn.

II

We review the district court's denial of a federal habeas petition under 28 U.S.C. § 2254 de novo. *Peterka v. McNeil*, 532 F.3d 1199, 1200 (11th Cir. 2008). But under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), review of the underlying state-court decisions is highly deferential. *Williams v. Allen*, 598 F.3d 778, 787 (11th Cir. 2010). In particular, we must honor a state court's merits-based denial of a habeas claim unless its decision was "(1) . . . contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) . . . 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). Moreover, when considering whether a state court's decision was based on an "unreasonable determination of the facts," we presume that all of that court's factual determinations are correct, and the defendant bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." *Id.* § 2254(e)(1).

III

We'll work our way through the DNA-related issues—the first four of the five issues teed up by the COA—before turning to the *Miranda* issue.

A

To establish a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), a criminal defendant must show (1) that the prosecution possessed evidence "favorable" to him, which can include evidence with impeachment value; (2) that he didn't possess the evidence and couldn't have obtained it with due diligence; (3) that the prosecution suppressed the evidence; and (4) that, if the evidence had been disclosed to the defendant, it is reasonably probable that the outcome of his proceeding would have been different. *United States v. Gallardo*, 977 F.3d 1126, 1142 (11th Cir. 2020).

Taylor argues that the state violated *Brady* by withholding information about Dr. Pollock's deviations from FBI DNA-testing protocols. The Florida Supreme Court disagreed, holding that information about protocol deviations wasn't material—that it wouldn't have led to a different outcome at trial. Applying the requisite AEDPA deference, we agree. Accordingly, we needn't address the state's contentions that Taylor also hasn't met *Brady*'s suppression and diligence prongs.[1]

[1] We also needn't address the second issue on which we granted a COA, Taylor's *Brecht* argument. The district court couldn't have made a prejudicial

It is not reasonably probable that the disclosure of Dr. Pollock's protocol deviations would have changed the result at trial because it wouldn't have changed either the evidence available to the jury or Tassone's trial strategy. Taylor's case at trial covered the protocol deviations. For example, Dr. Pollock mentioned in his trial testimony "very minor modifications" to the FBI protocol and the "very weak" and "very difficult to see" bands in his results—plenty for Tassone to use against Dr. Pollock at trial. In fact, Tassone cross-examined Dr. Pollock about the faintness of the bands. Tassone also probed Dr. Pollock about his methods—including the procedures from which the alleged deviations stemmed.

Even if Tassone had introduced other evidence following a disclosure, a reasonable jurist could conclude that it wouldn't have made a difference to the jury. Dr. Goldman—Taylor's DNA expert—reviewed Dr. Pollock's report before trial and didn't "have any major complaints" about his DNA analysis. And none of the protocol-deviation evidence presented in the evidentiary hearing challenging Dr. Pollock's four-probe identification changes our conclusion. The only evidence that contradicted Dr. Pollock's identification based on the four probes (as opposed to five to eight) and the use of probes outside a specific size range was Dr. Libby's testimony: Dr. Pollock's identification, he said, could have been

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error in evaluating whether there was a harmless *Brady* error if, as we conclude, there was no *Brady* error.

flawed or, at the very least, should have been deemed inconclusive. But not even Dr. Libby said that Dr. Pollock's identification was wrong—*e.g.*, that he misread a band or botched the matching process. He merely said that Dr. Pollock *shouldn't have drawn a conclusion* from the testing. Either way, the state court explicitly found that Dr. Libby wasn't credible. *Taylor II*, 2009 WL 9419304, at *6. Absent clear and convincing evidence to the contrary, we must respect the state court's decision to credit Dr. Pollock and discredit Dr. Libby.

Taylor also points to Zeigler's testimony to challenge Dr. Pollock's use of two particular probes to declare a DNA match to Taylor. While Zeigler didn't dispute Dr. Pollock's findings, she testified that it was a violation of protocol to conclude, as he did, that these two probes were conclusive. But as already explained, Dr. Goldman reviewed Dr. Pollock's report, which included Dr. Pollock's findings and conclusions, and didn't take issue with any part of it.

Accordingly, the district court was right to hold, under AEDPA's deferential standard, that the Florida Supreme Court reasonably concluded that there was no *Brady* violation.

B

Taylor next contends that Tassone provided ineffective assistance at trial in two respects. Ineffective-assistance claims are governed by the framework established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under that framework, a defendant must

prove both (1) that his counsel performed in a constitutionally deficient manner and (2) that he suffered prejudice as a result. *Id.* at 687.

1

Taylor first asserts that Tassone rendered ineffective assistance by failing to request a hearing under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), in response to the state's DNA evidence. As adopted by Florida's courts, *Frye* requires that the proponent of expert evidence "establish[] by a preponderance of the evidence the general acceptance of the underlying scientific principles and methodology." *Marsh v. Valyou*, 977 So. 2d 543, 547 (Fla. 2007) (per curiam). Taylor insists that when the state initially proffered the DNA evidence against him, Tassone should have moved for a *Frye* hearing to challenge both the accuracy of the DNA-analysis procedure and Dr. Pollock's adherence to that procedure. Had the trial court ruled in his favor, Taylor argues, it might have excluded the DNA evidence.

The Florida Supreme Court (and the federal district court, in turn) ruled that Tassone wasn't ineffective because his performance—*i.e.*, his failure to move for a *Frye* hearing—wasn't constitutionally deficient. We find that we needn't address the adequacy of Tassone's performance because we conclude that any deficiency, if it existed, wasn't prejudicial. Because the Florida Supreme Court didn't reach the prejudice prong of *Strickland*, we review the issue de novo.

To establish prejudice, the defendant must show "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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* For ineffective-assistance claims arising out of a lawyer's failure to file a motion, the prejudice analysis also requires establishing that the motion was meritorious. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

Tassone's failure to move for a *Frye* hearing wasn't prejudicial for two reasons. First, Taylor's *Frye* motion likely would have failed—meaning that the DNA evidence likely would have been admitted anyway. Tassone acknowledged that his *voir dire* of Dr. Pollock covered some of the same issues that a *Frye* hearing would have, and the later evidentiary hearing confirms as much: Taylor's post-conviction counsel asked the same questions that Tassone asked at trial and explained that "[b]asically what we're doing now is a *Frye* Test." It seems to us exceedingly unlikely that the same judge who certified Dr. Pollock as an expert following Tassone's thorough *voir dire*—which, again, covered *Frye* material—would have then excluded Dr. Pollock's evidence on a *Frye* motion. To the contrary, it seems to us quite likely that, even following Tassone's rigorous *voir dire* and over his objection at trial, the trial judge remained convinced that Dr. Pollock was a qualified expert.

Taylor asserts that although the trial judge accepted Dr. Pollock as an expert on DNA analysis generally, he did so without

regard to the disputed DNA-analysis procedure, and that Dr. Pollock's alleged deviations from that procedure would have changed the trial court's mind. But Dr. Pollock's procedure didn't even give Tassone misgivings about his expertise, despite Tassone's obvious incentive to challenge his testimony.[2] It seems exceedingly unlikely that the trial judge would have drawn a conclusion that Tassone himself did not.

Second, even if a *Frye* motion had been filed and granted, the verdict likely wouldn't have changed: The jury had ample evidence before it to convict Taylor even without the DNA. The state presented evidence of Taylor's location at the time of the murder; the jewelry found buried at his former residence; that he was seen digging near the jewelry's location; his tacit confession to Officer Bogers; his jailhouse confession to cellmate Timothy Cowart; and testimony that Taylor—but not his co-defendant—matched the secretor type of the semen found at the crime scene. *See Taylor I*, 630 So. 2d at 1039–40; *Taylor IV*, 2021 WL 2003122, at *8 & n.10; *Murray v. State*, 3 So. 3d 1108, 1113 (Fla. 2009) (per curiam).

[2] Tassone wasn't unaware of the distinction between analysis and procedure. Tassone testified that he was comfortable enough with the substance of the DNA analysis based on his research to cross-examine Dr. Pollock—research that covered both the substance *and* procedure of Dr. Pollock's examination. And what we know of his preparation confirms this. Tassone presented the state's reports to Dr. Goldman and had lengthy discussions with him about DNA—the billing records indicate that Tassone and Dr. Goldman spent an hour and fifteen minutes discussing the report.

In short, we reject Taylor's ineffective-assistance claim predicated on Tassone's failure to move for a *Frye* hearing on the ground that any deficiency wasn't prejudicial.

2

Taylor separately contends that Tassone rendered ineffective assistance by failing to request a hearing under *Richardson v. State*, 246 So. 2d 771 (Fla. 1971), when he learned about Shirley Zeigler at trial.

A *Richardson* hearing is a proceeding under Florida law by which a criminal defendant can challenge a discovery violation. Under *Richardson*, the reviewing court assesses whether a discovery violation resulted in harm or prejudice to the defendant; in doing so, the court considers circumstances such as whether the violation was "inadvertent or willful" and "trivial or substantial" as well as what effect, if any, the violation had on "the ability of the defendant to properly prepare for trial." *Id.* at 775. "[W]here the court determines that the state's noncompliance with the rule has not prejudiced the ability of the defendant to properly prepare for trial," the record must affirmatively show that lack of prejudice. *Id.* Had Taylor's *Richardson* challenge succeeded, the district court could have imposed an appropriate sanction. The strongest sanction—and the most helpful to Taylor—would have been excluding the DNA evidence on the ground that, by withholding Zeigler's initials, the state prevented Taylor from adequately preparing to challenge that evidence at trial.

The Florida Supreme Court held that Tassone's failure to move for a *Richardson* hearing didn't constitute ineffective assistance. We can resolve this issue the same way we resolved the *Frye*-related ineffective-assistance claim: Even if Tassone's failure to seek the hearing constituted deficient performance, Taylor's claim founders because he suffered no prejudice. Taylor likely wouldn't have prevailed on the *Richardson* motion, and even if he had, the outcome of the trial likely would have been the same. As before, because the Florida Supreme Court decided the *Richardson*-based ineffective-assistance claim on *Strickland*'s deficiency prong, we review the prejudice prong de novo.

Taylor likely wouldn't have won a *Richardson* motion because, as a matter of state law, the state's discovery violation—if there was one—didn't harm or prejudice him. As an initial matter, the alleged violation likely wasn't willful. *See id.* The state couldn't have intentionally withheld discoverable evidence created by Zeigler because there wasn't a discoverable report of hers to disclose: She didn't do any tests or write a report; she merely reviewed Dr. Pollock's report and compared it to her computer printout.

Moreover, the alleged violation wasn't "substantial," nor did it affect Taylor's ability to prepare for trial. Tassone wasn't blindsided by Zeigler's name during the trial. *Id.* He knew that the initials "JP" meant that Dr. James Pollock had worked on the report, and he knew that there was another set of initials, "SZ." Further, because Zeigler didn't do any analysis on the case, she couldn't

have testified to any of the protocol-related issues on which Taylor stakes his *Brady* and *Frye* arguments—meaning that Tassone couldn't have questioned her on Dr. Pollock's adherence to procedure.

Indeed, not even Zeigler thought that her testimony would have aided Taylor at trial. When asked at the post-conviction evidentiary hearing whether it would have been helpful for the defense to have her results, she responded, simply, "No." She also described her results as a "redundant piece of material" because both computer printouts reported the same findings. When Taylor's counsel used the word "disputes" throughout the evidentiary hearing to compare her findings to Dr. Pollock's results, Zeigler repeatedly stated that they weren't disputes, only "differences"—a distinction that she found significant. As already explained, although Zeigler testified that it was a violation of protocol for Dr. Pollock to conclude that two of the probes were conclusive, that critique doesn't change our conclusion. That Tassone would have liked to have had Zeigler's testimony to help him cross Dr. Pollock isn't enough to show prejudice.

For all these reasons, we reject Taylor's contention that Tassone provided ineffective assistance of counsel by failing to move for a *Richardson* hearing. That failure, even if constitutionally deficient, didn't prejudice Taylor.

D

Finally, Taylor asserts that the statement that he made to Officer Bogers should have been suppressed under *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny. As a refresher, after the police collected DNA samples from Taylor, he asked Officer Bogers how long it would take to get the results back. Officer Bogers responded by asking Taylor "why," to which Taylor replied that he "was just wondering when they would be back out to pick him up." *Taylor VI*, 2021 WL 2003122, at *24.

A defendant who has invoked his right to counsel, as Taylor did, cannot be "subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981). Interrogation includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (call number omitted).

The Florida Supreme Court held that Officer Bogers's question to Taylor didn't constitute an "interrogation." Applying AEDPA deference, we agree. A reasonable jurist could interpret Officer Bogers's question—"Why?"—in response to Taylor's question as ordinary, run-of-the-mill conversation rather than the sort of query that a reasonable officer would have known would elicit an incriminating response. And whatever happened here, the *ex ante* likelihood that a suspect would answer a question like Officer

Bogers's with incriminating information seems exceedingly small—or so, in any event, a reasonable jurist could conclude. That's especially true if we're also to believe, as Taylor urges, that his question about when the DNA analysis would be complete didn't re-initiate the conversation with Officer Bogers. If Taylor's question was casual enough that it didn't constitute a re-initiation, then a reasonable jurist could certainly conclude that Officer Bogers's follow-up was casual enough that it didn't constitute interrogation.

IV

To summarize, we hold as follows: The district court correctly held that the state didn't violate *Brady*, that Taylor's trial counsel didn't provide ineffective assistance at trial—for failing to move for hearings under either *Frye* or *Richardson*—and that *Miranda* doesn't require suppressing Taylor's statement to Officer Bogers. Accordingly, we affirm the district court's ruling on all counts.

AFFIRMED.

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United States District Court, M.D. Florida,
Jacksonville Division.

Steven Richard TAYLOR, Petitioner,
v.
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al., Respondents.

Case No. 3:12-cv-444-BJD-MCR
|
Signed 05/19/2021

Attorneys and Law Firms

Linda McDermott, Office of the Federal Defender, Tallahassee, FL, for Petitioner.

Jennifer Ann Donahue, Tallahassee, FL, for Respondents.

ORDER

BRIAN J. DAVIS, United States District Judge

I. INTRODUCTION

***1** Through counsel, Petitioner Steven Richard Taylor, a death-sentenced inmate, filed a Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254 (Petition) (Doc. 1). Petitioner challenges his state court (Duval County) conviction for murder in the first degree, burglary of a dwelling and sexual battery. He filed a Memorandum of Law (Memorandum) (Doc. 2). Respondents filed a Response Opposing Habeas Petition (Response) (Doc. 13).[1] Respondents filed a Notice of Supplemental Authority (Notice) (Doc. 16). Petitioner filed a Reply to Response Opposing Habeas Petition (Reply) (Doc. 18). See Order (Doc. 11). Petitioner also filed a Supplement to Memorandum of Law (Doc. 53), and Respondents filed a Response Brief to Petitioner's Supplement to Memorandum of Law (Doc. 54).

1 Respondents filed an Appendix (Doc. 15), not scanned and filed separately on August 3, 2012. The page numbers referenced are the Bates stamp numbers at the bottom of each page of the exhibit. Otherwise, the page number on the document will be referenced. The Court will hereinafter refer to the Exhibits contained in the Appendix as "Ex." For the scanned documents (Petition, Memorandum, Response, Reply, etc.), the Court references the page numbers assigned by the electronic filing system.

Petitioner raises four grounds in the Petition: (1) "[t]he state withheld evidence which was material and exculpatory in nature and/or presented false evidence in violation of Mr. Taylor's constitutional rights[;]" (2) "Mr. Taylor was denied the effective assistance of counsel at the guilt phase of the capital proceedings, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution[;]" (3) "Mr. Taylor was denied the effective assistance of counsel at the penalty phase of his capital trial, in violation of his rights to due process and equal protection under the United States Constitution, as well as his rights under the Fifth, Sixth

and Eighth Amendments[;] and (4) "[t]he court erred in denying Mr. Taylor's motion to suppress statements made to a police officer while in custody and after Mr. Taylor had invoked his rights to counsel in violation of the Fifth and Sixth Amendments to the United States Constitution." Petition at 31, 44, 66, 74 (capitalization and footnote omitted). Respondents calculate the Petition is timely. Response at 26-29.

II. EVIDENTIARY HEARING

"In a habeas corpus proceeding, the burden is on the petitioner to establish the need for an evidentiary hearing." Jones v. Sec'y, Fla. Dep't of Corr., 834 F.3d 1299, 1318 (11th Cir. 2016) (citations omitted), cert. denied, 137 S. Ct. 2245 (2017). To be entitled to an evidentiary hearing, the petitioner must allege "facts that, if true, would entitle him to relief." Martin v. United States, 949 F.3d 662, 670 (11th Cir.) (quoting Aron v. United States, 291 F.3d 708, 715 (11th Cir. 2002)) (citation omitted), cert. denied, 141 S. Ct. 357 (2020). See Chavez v. Sec'y, Fla. Dep't of Corr., 647 F.3d 1057, 1060 (11th Cir. 2011) (opining a petitioner bears the burden of establishing the need for an evidentiary hearing with more than speculative and inconcrete claims of need), cert. denied, 565 U.S. 1120 (2012); Dickson v. Wainwright, 683 F.2d 348, 351 (11th Cir. 1982) (same).

***2** If the allegations are contradicted by the record, patently frivolous, or based upon unsupported generalizations, the court is not required to conduct an evidentiary hearing. Martin, 949 F.3d at 670 (quotation and citation omitted). In this case, the pertinent facts are fully developed in this record or the record otherwise precludes habeas relief;[2] therefore, the Court can "adequately assess [Petitioner's] claim[s] without further factual development," Turner v. Crosby, 339 F.3d 1247, 1275 (11th Cir. 2003), cert. denied, 541 U.S. 1034 (2004). Petitioner has not met his burden as the record refutes the asserted factual allegations or otherwise precludes habeas relief. Therefore, the Court finds Petitioner is not entitled to an evidentiary hearing. Schriro v. Landrigan, 550 U.S. 465, 474 (2007).

2 Petitioner was represented by counsel in the state-court post-conviction proceeding, and the state court conducted an evidentiary hearing.

III. HABEAS REVIEW

The Eleventh Circuit recently opined that federal courts are authorized to grant habeas relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Lee v. GDCP Warden, 987 F.3d 1007, 1017 (11th Cir. 2021) (quoting 28 U.S.C. § 2254). Further, under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), there is a very deferential framework, limiting the power of federal courts to grant relief if a state court denied a claim on its merits. Sealey v. Warden, Ga. Diagnostic Prison, 954 F.3d 1338, 1354 (11th Cir. 2020) (citation omitted) (acknowledging the deferential framework of AEDPA for evaluating issues previously decided in state court), cert. denied, 2021 WL 1240954 (U.S.

Apr. 5, 2021); Shoop v. Hill, 139 S. Ct. 504, 506 (2019) (per curiam) (recognizing AEDPA imposes "important limitations on the power of federal courts to overturn the judgments of state courts in criminal cases").

Indeed, relief is limited to occasions where the state court's decision:

> "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A state court's decision is "contrary to" clearly established federal law if the state court either reaches a conclusion opposite to the Supreme Court of the United States on a question of law or reaches a different outcome than the Supreme Court in a case with "materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle" from Supreme Court precedents "but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413, 120 S. Ct. 1495.

Lee, 987 F.3d at 1017-18.

This high hurdle is not easily surmounted; if the state court applied clearly established federal law to reasonably determined facts when determining a claim on its merits, "a federal habeas court may not disturb the state court's decision unless its error lies 'beyond any possibility for fairminded disagreement.' " Shinn v. Kayer, 141 S. Ct. 517, 520 (2020) (per curiam) (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)). Also, a state court's finding of fact, whether a state trial court or appellate court, is entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1). "The state court's factual determinations are presumed correct, absent clear and convincing evidence to the contrary." Sealey, 954 F.3d at 1354 (quoting 28 U.S.C. § 2254(e)(1)). This presumption of correctness, however, applies only to findings of fact, not mixed determinations of law and fact. Brannan v. GDCP Warden, 541 F. App'x 901, 903-904 (11th Cir. 2013) (per curiam) (recognizing the distinction between a pure question of fact from a mixed question of law and fact), cert. denied, 573 U.S. 906 (2014). Furthermore, the second prong of § 2254(d), requires this Court to "accord the state trial court [determination of the facts] substantial deference." Dallas v. Warden, 964 F.3d 1285, 1302 (11th Cir. 2020) (quoting Brumfield v. Cain, 576 U.S. 305, 314 (2015)), petition for cert. filed, (U.S. Feb. 27, 2021) (No. 20-7589). As such, a federal district court may not supersede a state court's determination simply because reasonable minds may disagree about the finding. Id. (quotation and citation omitted).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

***3** Claims of ineffective assistance of counsel are "governed by the familiar two-

part Strickland[v. Washington, 466 U.S. 668 (1984)] standard." Knight v. Fla. Dep't of Corr., 958 F.3d 1035, 1038 (11th Cir. 2020), cert. denied, 2021 WL 1240957 (U.S. Apr. 5, 2021). To prevail on a claim of ineffective assistance of counsel, a petitioner must successfully show his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" as well as show "the deficient performance prejudiced the defendant, depriving him of a 'fair trial, a trial whose result is reliable.' " Raheem v. GDCP Warden, No. 16-12866, 2021 WL 1605939, at *6 (11th Cir. Apr. 26, 2021) (quoting Strickland, 466 U.S. at 687). As both components under Strickland must be met, failure to meet either prong is fatal to the claim. Raheem, 2021 WL 2605939, at *6 (citation omitted).

Finally, the Eleventh Circuit warns:

> because "[t]he standards created by Strickland and § 2254(d) are both 'highly deferential,'... when the two apply in tandem, review is 'doubly' so. Harrington [v. Richter, 562 U.S. 86, 105 (2011)] (internal citations and quotation omitted). Thus, under § 2254(d), "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." Id.

Tuomi v. Sec'y, Fla. Dep't of Corr., 980 F.3d 787, 795 (11th Cir. 2020) cert. denied, 2021 WL 1074184 (U.S. Mar. 22, 2021).

V. THE OFFENSES

The Florida Supreme Court (FSC), in its opinion addressing Petitioner's direct appeal, detailed the facts of the case. Taylor v. State, 630 So. 2d 1038, 1039-41 (Fla. 1993) (per curiam), cert. denied, 513 U.S. 832 (1994). For context, the facts will be repeated here:

> The record reflects that on September 15, 1990, at about 11:30 p.m., the victim, fifty-nine-year-old Alice Vest, returned to her mobile home in Jacksonville after spending the evening with a friend. Earlier that evening, the appellant, Steven Richard Taylor, and two friends were out driving and listening to the radio. Around midnight, the driver of the car dropped off Taylor and his friend, who was later to become his accomplice, near the victim's neighborhood.
>
> Sometime in the early morning hours of September 16, a Ford Ranchero was stolen from a residence near the place where Taylor had been dropped off. At about 4:30 a.m., after the vehicle had been stolen, a passing motorist noticed the Ford Ranchero parked in a driveway next door to the mobile home where the victim lived. Later that morning, the Ford Ranchero was found abandoned behind a used car dealership only a few blocks from where Taylor lived at the time.
>
> On the same morning, neighbors discovered the victim's battered body in the bedroom of her mobile home. The medical examiner testified that the victim had been stabbed approximately twenty times, strangled, and sexually assaulted. The medical examiner further testified that most of the stab wounds

were made with a knife found at the scene of the crime, while the remaining stab wounds were made with a pair of scissors that were also found at the scene. The medical examiner stated that the victim was alive while she was being stabbed, that she was strangled with an electrical cord, and that the strangulation had occurred after the victim was stabbed.

The medical examiner also testified that the victim's lower jaw had multiple fractures and that she had received several blows to her head. The examiner testified that the fractures of the victim's jaw could have resulted from being struck with a broken bottle found on the bed next to the victim, and that contusions to the victim's head were consistent with being struck by a metal bar and candlestick also found at the scene. Finally, the medical examiner testified that the victim's breasts were bruised, and that the bruises resulted from "impacting, sucking, or squeezing" while she was alive. In the medical examiner's opinion, the victim was alive at most ten minutes from the first stabbing to the strangulation. On cross-examination, the examiner stated that he did not know whether the victim was conscious during all or any part of the attack.

***4** The testimony at trial also revealed that the phone line to the mobile home had been cut, that the home had been burglarized, and that various pieces of jewelry were missing.

In December of 1990, Taylor moved out of the duplex he had been sharing with a friend. In January, 1991, while Taylor's former roommate was removing a fence behind the duplex, he discovered a small plastic bag buried in the ground near the fence. The bag contained the pieces of jewelry taken from the victim's home during the attack and burglary. The roommate turned the jewelry over to the police and gave a statement. Later that month, Taylor visited the duplex with some friends. The former roommate testified that, at some point during the visit, Taylor went into the backyard and stared at the place where the fence had stood. During the following month, Taylor again returned to the duplex with friends. One of the accompanying friends testified that Taylor went into the backyard and returned a few minutes later with dirty hands. In response to the friend's inquiry as to what he was doing, Taylor allegedly responded that he had left some things there and that they were gone.

On February 14, 1991, the Duval County sheriff's office executed a search warrant on Taylor which authorized the officers to take blood, saliva, and hair samples from Taylor. Taylor was taken to the nurses' station at the county jail so that the samples could be taken, but not before Taylor invoked his right to counsel. Later that day, after the samples were taken, Taylor asked the investigating officer how long it would take to get the results back. Instead of directly responding to the question, the investigating officer asked Taylor why he wanted to know. Taylor responded that he was just wondering when they would be back out to pick him up. Taylor did not have long to wait. Two days later, on February 16, Taylor was arrested, and, on March 3, a grand jury returned a two-count indictment against Taylor for first-degree murder and burglary. The indictment

was amended on September 12, 1991, to add a third count for sexual battery.

At trial, the State presented the testimony of Timothy Cowart, who had shared a cell with Taylor in the Duval County jail. Cowart testified that, in a jailhouse conversation with Taylor in early April, Taylor stated that he had been involved in a burglary and that it was a messy job; that the lady surprised him inside the trailer; and that he stabbed her and choked her and then strangled her with a cord to make sure she was dead. Cowart also testified that Taylor said the State could place him, but not his accomplice, at the scene of the crime, and that the State could convict him with the evidence it had. Taylor allegedly asked Cowart to hide a gun and handcuff key in the bathroom at the hospital; Taylor would then feign an illness, get taken to the hospital, and have a chance to escape.

A Florida Department of Law Enforcement lab analyst, who was an expert in serology, testified that semen found on a bed covering and on a vaginal swab taken from the victim could not be tested. However, the analyst testified that semen found in the victim's blouse matched Taylor's DNA [3] profile.

***5** In the guilt phase, Taylor presented only one witness, an agent of the Federal Bureau of Investigation. The agent testified that certain hairs found on the victim's body and clothing matched the pubic hairs of Taylor's accomplice. On cross-examination, the agent conceded that it is possible to commit a sexual battery and not leave any fibers or hair. Taylor then rested his case and the jury found him guilty as charged.

At the penalty phase proceeding, the State rested without presenting any additional evidence. Taylor presented the testimony of five witnesses. First, Taylor called Charles Miles, who lived next door to Taylor during Taylor's adolescence. Miles stated that Taylor frequently played with Miles' son and that Taylor was always very polite and respectful. Miles testified that on one occasion he and Taylor sat in Miles' garage and talked at length about religion. Taylor's next witness was Lloyd King, his uncle. King testified that Taylor had always been a polite person. The third witness, Judy Rogers, was a friend of the family who testified that she thought Taylor had a learning disability. Taylor's next witness was another uncle, Don King, who testified that, during fifth and sixth grades, Taylor experienced difficulty in reading and that his reading comprehension was poor. King also stated that Taylor was a very passive person. As his last witness, Taylor called his adoptive mother, Lenette Taylor, who testified that Taylor had experienced difficulty concentrating in school and that she had tried unsuccessfully to get him into special education classes. She testified that Taylor's I.Q. had been tested and found to be around 68 to 70, which, according to her, is in the mildly retarded range. On cross-examination, she acknowledged that, in 1979, when he was nine years old, Taylor had tested in a normal intellectual range. The record further reflects that, although defense counsel had Taylor examined by two mental health experts, counsel found it to be in Taylor's best interest not to present the experts' testimony at trial. As an additional mitigating factor, Taylor

> offered evidence that he was only twenty years old at the time of the murder.
>
> The jury recommended the death sentence by a vote of ten to two. In sentencing Taylor to death, the trial judge found the following aggravating factors: (1) the murder was committed during the course of a burglary and/or sexual battery; (2) the murder was committed for financial gain; and (3) the murder was committed in an especially heinous, atrocious, or cruel manner. As the sole nonstatutory mitigating factor, the trial judge found that Taylor was mildly retarded. The trial judge sentenced Taylor to death for the first-degree murder, to fifteen years' imprisonment for the burglary, and to twenty-seven years' imprisonment for the sexual battery.

Id.

3 Deoxyribonucleic Acid.

VI. GROUND ONE

Ground One: The state withheld evidence which was material and exculpatory in nature and/or presented false evidence in violation of Mr. Taylor's constitutional rights.

Petitioner exhausted this ground by presenting it in his Amended Motion to Vacate Judgments of Convictions and Sentences.[4] Ex. 31 at 565. Petitioner contends that despite discovery requests, "the name of FDLE analyst Shirley Zeigler" was not disclosed to defense counsel. Petition at 33. Additionally, Petitioner claims "the FBI/FDLE protocol was not provided to the defense[.]" Id. at 41. As such, Petitioner contends Dr. Pollock's material change to the DNA protocols was not provided to the defense. Id. Respondents agree that it appears that the claims regarding Zeigler's name and the material change in the DNA protocols were exhausted in the state courts. Response at 30.

4 Although not a model of clarity, Petitioner summarily raises a claim that counsel unreasonably failed to present evidence, referencing ground two of the Petition. Petition at 31 n.30. The Court assumes that Petitioner is referencing his claim of ineffective assistance of counsel at the guilt phase of the trial contained in ground two. As such, the claim of ineffective assistance of counsel will only be addressed in ground two, not ground one, even though Petitioner states he "pleads his allegations in the alternative." Id. This vague and conclusory allegation of ineffective assistance of counsel contained in the footnote is otherwise insufficient and does not meet the standard for obtaining habeas relief.

***6** Petitioner raises Brady/Giglio claims in ground one.[5] First, the Court will address the issue concerning the failure to provide the protocol to the defense. Second, the Court will address Petitioner's claim that the state suppressed evidence in its failure to reveal the name of Shirley Zeigler.

5 Brady v. Maryland, 373 U.S. 83 (1963) (to successfully sustain a Brady claim, a defendant must show favorable evidence – either exculpatory

> or impeaching, was willfully or inadvertently suppressed by the state, and the evidence was material, resulting in prejudice to defendant); Giglio v. United States, 405 U.S. 150 (1972) (to establish a Giglio violation, a defendant must demonstrate the testimony was false, the prosecutor knew the testimony was false, and the statement was material).

The circuit court, in denying the Rule 3.850/3.851 motion, found:

> To the extent that [t]he Defendant generally avers that the State violated Brady when it "withheld documents regarding the DNA testing," and Giglio, this Court denies this subclaim as facially insufficient. (Def's Mot. at 9, 25-29, filed May 23, 2005). See Parker v. State, 904 So. 2d 370, 375 n.3 (Fla. 2005); see also Gordon v. State, 863 So. 2d 1215, 1218 (Fla. 2003) ("A defendant may not simply file a motion for post-conviction relief containing conclusory allegations... and then expect to receive an evidentiary hearing."). The Defendant has had ample opportunity through pleadings and the evidentiary hearing to present evidence in support of the [sic] any Brady and Giglio subclaims. The Defendant has not taken advantage of these opportunities, and, as such, this Court finds that he has failed to prove, or even allege, the requisite prongs of Brady and Giglio. To the extent that these claims have been generally averred, the Defendant's Brady and Giglio subclaims are denied.

Ex. 48 at 2042 (footnote omitted).

On appeal of the denial of the post-conviction motion, the FSC addressed the Brady/Giglio claims. Ex. 55; Taylor v. State, 62 So. 3d 1101, 1114-15 (Fla. 2011) (per curiam). The FSC recognized that, for both Brady and Giglio claims, a defendant carries the burden of establishing a prima facie case based upon a legally valid claim. Taylor v. State, 62 So. 3d at 1115 (citation omitted). Although recognizing the post-conviction court did not examine the evidence in the context of a Brady or Giglio violation, the FSC noted the post-conviction court did make credibility findings, concluding the testimony of the defense's post-conviction expert witness, Dr. Libby,[6] was unreliable with regard to Dr. Pollock's (the state's expert witness) ultimate findings. Taylor v. State, 62 So. 3d at 1115.

[6] The post-conviction court held it was "not convinced that Dr. Libby had the requisite background and experience in forensic DNA" for the court to give Dr. Libby's testimony considerable weight. Ex. 48 at 2037.

The FSC, deferring to the factual findings of the post-conviction court on the questions of the credibility of witnesses and the appropriate weight to be given to the evidence, concluded that the Brady/Giglio claims concerning the FBI/FDLE protocols fail "under the materiality prongs of both Brady and Giglio." Taylor v. State, 62 So. 3d at 1115. The FSC explained its rationale for denying relief on these claims:

> ***7 Even if we assume that the State inadvertently failed to disclose these protocols**, in light of the trial court's findings of fact, the alleged violations cannot 'reasonably be taken to put the whole case

in such a different light as to undermine confidence in the verdict." Smith,[7] 931 So. 2d at 796 (quoting Strickler,[8] 527 U.S. at 290, 119 S. Ct. 1936) (articulating the materiality prong of Brady). Further, there is no reasonable possibility that the allegedly false testimony could have affected the judgement of the jury. See id. (articulating the materiality prong of a Giglio claim).

Taylor v. State, 62 So.3d at 1115 (emphasis added).

7 Smith v. State, 931 So. 2d 790 (Fla. 2006) (per curiam).

8 Strickler v. Greene, 527 U.S. 263 (1999).

Thus, hinging its decision on the materiality prongs of Brady and Giglio, the FSC found Petitioner's subclaim concerning the FBI/FDLE protocols fails. In doing so, the court precisely and comprehensively set forth what must be demonstrated to successfully prevail on a Brady claim or a Giglio claim. Taylor v. State, 62 So. 3d at 1114-15. In this instance, the FSC also deferred to the lower court's findings of fact and credibility determinations. Finding Petitioner did not meet the materiality prongs, the FSC found no entitlement to relief under these claims. The court noted, "[t]he only 'violation' identified by Taylor... is the fact that the FBI protocols utilized five to eight probes, while Dr. Pollock only used four." Taylor v. State, 62 So. 3d at 1115. Dr. Pollock readily admitted he deviated from the protocols,[9] but the only testimony challenging Dr. Pollock's findings was the testimony of Dr. Libby, whose testimony was discredited. Id.

9 At trial, Dr. Pollock testified that, with very minor modifications, the Florida Department of Law Enforcement (FDLE), Jacksonville Regional Crime Lab used FBI protocols. Ex. 6 at 606.

In this Court's review, the Court presumes the factual determinations of the state court are correct. Petitioner has failed to rebut the presumption of correctness with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). This Court also extends deference to the state court's credibility determinations. After hearing testimony, the post-conviction court made a credibility determination, finding the testimony of Dr. Libby unreliable. The FSC did not substitute its judgment for that of the post-conviction court, the court that heard the testimony of the witnesses and assessed the witnesses' demeanor and credibility. Of import, "Federal habeas courts have 'no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.' " Consalvo v. Sec'y for Dep't of Corr., 664 F.3d 842, 845 (11th Cir. 2011) (per curiam) (quoting Marshall v. Lonberger, 459 U.S. 422, 434 (1983)), cert. denied, 568 U.S. 849 (2012).

This Court will give AEDPA deference to the FSC's decision as it is not contrary to or an unreasonable application of Supreme Court law or based on an unreasonable determination of the facts. Petitioner is not entitled to habeas relief on this contention of constitutional deprivation.

Next, the Court will address Petitioner's second contention, that the state suppressed evidence

by failing to reveal the name of Shirley Zeigler to defense counsel. This claim is simply without merit. Defense counsel possessed Ms. Zeigler's initials prior to trial as they were contained in the calculated fragment reports submitted to defense counsel three days before trial. Taylor v. State, 62 So. 3d at 1116. As Ms. Zeigler's initials were disclosed during discovery, Petitioner "fails to establish that the State suppressed Zeigler's name[.]" Id. at 1117. Since defense counsel had the information, any Brady claim must fail. Id. Additionally, the FSC concluded that Petitioner's Brady/Giglio claims would fail under the materiality prongs of the two tests as "the evidence is not material." Id. The FSC found Ms. Zeigler did not ultimately disagree with Dr. Pollock's findings and her testimony would unlikely undermine confidence in the outcome of the case, nor is there any reasonable possibility that the alleged false testimony could have affected the judgment of the jury. Id.

***8** Notably, the FSC found, giving deference to the trial court's factual findings and credibility determinations, that (1) Dr. Libby was not credible; (2) in light of the findings of fact by the trial court, the alleged violations cannot reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict nor is there any reasonable possibility that the false testimony could have affected the judgment of the jury; (3) the initials of Shirley Zeigler were in fact disclosed during discovery, meaning the defense had the information it needed; and (4) Zeigler did not ultimately disagree with Dr. Pollock's findings, negating the materiality prongs of Brady and Giglio. Response at 44. Furthermore, "[n]ot only was Zeigler's existence disclosed through the lab report, and thereby no Brady violation proved, there has been no showing that the prosecutor knowingly presented any false trial testimony concerning Zeigler, and thereby no Giglio violation has been demonstrated." Response at 62.

Of course, there was much more than just DNA evidence presented against Petitioner (Petitioner's presence near the murder scene and evidence of the stolen vehicle; his link to the victim's stolen jewelry, found buried in Petitioner's once shared back yard; Petitioner's jailhouse confession; Petitioner's being a Type A secretor, matching the semen found at the scene; and Petitioner's comment to the police, given after he provided blood, saliva, and hair for testing, as to when the police would be back to pick him up).[10] Ex. 6 at 533-34 (Diane Hanson, FDLE crime lab analyst assigned to the serology section, testified Petitioner's blood sample showed he is a type A secretor). See Response at 64; Taylor v. State, 630 So. 2d at 1039-40.

10 The record supporting the conviction at the guilt phase included, but is not limited to: "(1) testimony from Dr. James M. Pollock, Jr. matching semen recovered from a blouse found at the scene of the crime to Taylor's DNA profile; (2) testimony from Johnny Allen Taylor and Jason Leister indicating that Taylor, on two different occasions, went into the backyard of his old residence looking for items in the area where Ms. Vest's jewelry was found; (3) evidence and testimony from Detective T. C. O'Steen that the sailboat necklace, along

> with multiple other pieces of jewelry identified as belonging to the victim, was found buried in the backyard of Taylor's old residence; and (4) testimony from Detective John Robert Bogers and Timothy Dale Cowart about inculpatory statements made by Taylor." Taylor v. State, 260 So. 3d 151, 161 (Fla. 2018) (per curiam) (footnote omitted).

Upon review, Petitioner cannot satisfy the "contrary to" test of 28 U.S.C. § 2254(d)(1) as the state court rejected this ground based on Brady and Giglio. Moreover, Petitioner has not shown the state court unreasonably applied Brady and Giglio or unreasonably determined the facts. Finally, the record and reasonableness standard support the state court's findings.

Therefore, applying the AEDPA deference standard, Petitioner is not entitled to habeas relief on ground one. The Court concludes the FSC's decision affirming the trial court's decision on the guilt phase is not contrary to, nor an unreasonable application of controlling United States Supreme Court precedent.[11] As Petitioner has failed to demonstrate that the adjudication of the state court was contrary to or an unreasonable application of any clearly established federal law as determine by the United States Supreme Court or an unreasonable determination of the facts, Petitioner is not entitled to habeas relief.

11 Even assuming a violation, Petitioner has failed to satisfy the standard set forth in Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (requiring a petitioner to demonstrate the violation had a substantial and injurious effect or influence in determining the jury's verdict). See Response at 67.

VII. GROUND TWO

Ground Two: Mr. Taylor was denied the effective assistance of counsel at the guilt phase of the capital proceedings, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

***9** There is no doubt, at the time of pre-trial and trial, the use of DNA evidence in criminal prosecutions was in its infancy. Today's expectations for attacking DNA evidence are certainly very different from those in existence in 1991. Although this was Mr. Tassone's first case dealing with DNA, in 1991, not many Florida criminal defense attorneys would have had experience, extensive or otherwise, with dealing with DNA evidence. A semen stain proved to be part of the evidence used to secure the conviction of Petitioner. Petitioner contends that his counsel, Frank Tassone, failed to adequately investigate, prepare, and challenge this DNA evidence. Petition at 44-45. The record shows otherwise.

Mr. Tassone immediately tackled the issue that the defense would be facing novel DNA evidence and related testimony at trial by promptly filing a Motion for Appointment of Expert Witness to Assist Defendant. Ex. 2 at 81- 82. His motion reflects counsel's awareness that he would need an independent expert to help prepare the defense and review any and all FDLE reports as to results from the serological and DNA testing. Id. at 81. Mr. Tassone suggested two prominent

agencies to the court, Lifecodes International and Cellmark Corporation, signifying that Mr. Tassone already had a working knowledge of the expertise needed to attack the DNA evidence. Id.

The trial court granted the motion and appointed David Goldman, M.D., Chief, Section on Genetic Studies, LCS, NIAAA. Id. at 87-88. Dr. Goldman, of the National Institute of Health (NIH), a well-recognized expert in his field, assisted the defense in preparation for addressing the DNA evidence. When Dr. Goldman asked for time to review copies of audioradiograms, the case file, the population data base, and the procedures used to obtain the DNA results, Mr. Tassone, on October 4, 1991, filed a Second Motion for Continuance. Id. at 161-62. The court addressed the motion. Ex. 20 (Friday, October 4, 1991) at 60. The court noted that the copies of the materials requested had been provided to Dr. Goldman, and Mr. Tassone confirmed that fact. Id. at 63. Mr. Tassone informed the court that Dr. Goldman had provided his opinion to counsel telephonically. Id. at 63-64. Mr. Tassone said he had an extensive conversation with Dr. Goldman and was satisfied that Dr. Goldman had assisted counsel as much as he could. Id. at 64. Mr. Tassone assured the court that Dr. Goldman received everything he asked for in order to assist counsel. [12] Id.

12 Dr. Pollock, the state's expert at trial, testified he knew Dr. Goldman, identified as a professor at the NIH. Ex. 6 at 605.

The court noted that defense counsel had expressed an intention to not call Dr. Goldman at trial based on Dr. Goldman's verbal report to counsel. Id. Mr. Tassone confirmed that was the case, but he also advised the court it may be necessary for defense counsel to be in telephone communication with Dr. Goldman during the course of the trial. Id. Mr. Tassone mentioned that in his last conversation with Dr. Goldman, which took place on Wednesday or Thursday, Dr. Goldman told counsel where he would be located. Id. at 65. Counsel also told the court he could not state with specificity that he would not call Dr. Goldman as that decision would be dependent on what happened during the course of the trial, but that counsel currently did not intend to call Dr. Goldman as a witness. Id. The court took the motion concerning Dr. Goldman under advisement until Monday (October 7, 1991). Id. at 69.

On October 7, 1991, Mr. Tassone told the court he had spoken with Dr. Goldman on Saturday and Sunday, and that Dr. Goldman had provided telephone numbers. Ex. 20 (Monday, October 7, 1991) at 81-82. Mr. Tassone said, "[i]t may arise that I may ask for a period of time to talk to Dr. Goldman during an evening and perhaps to recess for that period of time until the following morning." Id. at 82. Mr. Tassone confirmed he did not need a continuance. Id. The court found the motion for continuance moot. Id.

***10** At the post-conviction evidentiary hearing, Mr. Tassone testified that this would have been his first case involving DNA evidence and it was only the second case in the circuit or the state using DNA results. Ex. 38 at 1382, 1397-98. He further testified he had an independent recollection of what Dr. Goldman told him prior to trial:

> And Dr. Goldman essentially indicated that on the basis of what he received or what I told him or both that he essentially said that in his opinion that the DNA testing was done properly, or maybe not properly was the word but that he didn't have any major complaints with the DNA testing.

EH at 1387-88.

Mr. Tassone said he discussed protocols with Dr. Goldman. Id. at 1389. Mr. Tassone readily admitted he was not familiar with Frye[13] hearings in 1991. Id. at 1393, 1398. He testified that, after receiving the requested documents, he would have inquired of Dr. Goldman what things could be attacked at trial. Id. at 1412. Upon preparing and formulating questions regarding Dr. Pollock's findings, Mr. Tassone attested he felt he did an adequate job during voir dire and cross-examination of Dr. Pollock in the 1991 trial. Id. at 1413.

13 Frye v. United States, 293 F.1013 (D.C. Cir. 1923).

Mr. Tassone said he asked Dr. Pollock about faint bands, the initials JP on the autoradiograms, the initials SLZ on the calculated fragment length documents, match criteria, and the differences in measurements of Dr. Pollock and of Shirley Zeigler. Id. at 1413-18. Mr. Tassone said he had far more than one conversation with Dr. Goldman and he had a very good level of comfort dealing with DNA issues after speaking with Dr. Goldman. Id. at 1418-19.

As far as experience, Mr. Tassone said, he conservatively estimated that he had dealt with approximately fifteen death penalty cases prior to Mr. Taylor's case. Id. at 1420. Mr. Tassone stated he had been both a prosecutor and a defense attorney. Id. He confirmed that he reviewed the relevant reports and made decisions as to which people to depose prior to trial, including deciding to depose Dr. Pollock. Id. at 1420-21. As far as coming to the decision to not call Dr. Goldman as a witness, in response to inquiry, Mr. Tassone explained:

> Q I apologize. Why did you decide not to call Dr. Goldman as a witness?
>
> A Probably because I felt comfortable in cross examining Dr. Pollock.
>
> Q Is it some times [sic] better to get your points across in just cross examining a particular witness as opposed to putting another expert that could kind of corroborate what that expert – original expert called by the State testified to?
>
> A Sure.

Id. at 1428-29.

In the Petition, Petitioner claims he received the ineffective assistance of trial counsel based on counsel's failure to request a Frye hearing and adequately investigate, prepare, and challenge the DNA evidence; failure to present an adequately prepared DNA expert to effectively

challenge Dr. Pollock's findings; and, failure to file a motion in limine to suppress the blouse or object to the lack of foundation and a break in the chain of custody. Petition at 44-65.

Relying on the Strickland two-pronged standard, the trial court denied the Rule 3.850/3.851 motion. Ex. 48 at 2029-30. As noted above, the FSC affirmed the decision of the trial court. Taylor v. State, 62 So. 3d 1101. As the state court properly applied the two-pronged Strickland standard of review, Petitioner cannot satisfy the "contrary to" test of 28 U.S.C. § 2254(d)(1) as the state court rejected Petitioner's claim based on Strickland.

***11** Of import, the trial court, regarding the claim that Petitioner was ineffective for failure to file and litigate a motion in limine pursuant to Frye, found Petitioner failed to satisfy the performance prong of Strickland. Ex. 48 at 2033-34. See Taylor v. State, 62 So. 3d at 1111 (finding Petitioner fails under the deficiency prong as the failure to request a Frye hearing did not result in ineffectiveness of counsel and any failure to present particular evidence was not essential for counsel to be considered effective). The trial court also found Mr. Tassone adequately challenged the serology and DNA evidence. Ex. 48 at 2037. The court relied on the fact that counsel deposed the state's expert, requested the appointment of a defense expert, consulted with the defense expert, and communicated sufficiently with the defense expert to obtain "enough ammunition... to effectively cross examine the State's expert, Dr. James Pollack [sic]." Id. at 2035. Of note, Mr. Tassone asked for permission to voir dire Dr. Pollock, and once permission was granted, Mr. Tassone vetted Dr. Pollock's limited experience in being qualified as an expert, the lack of quality control analysis of the laboratory, and the potential for human error in the analysis. Id. After this questioning, Mr. Tassone refused to stipulate to Dr. Pollock's qualifications. Id.

The trial court recognized Mr. Tassone's vigorous cross examination of Dr. Pollock, attacking Pollock's credibility, analysis, methodology, and the matter of quality control. Id. at 2035-36. Mr. Tassone's examination included pointed questions concerning the consideration of faint bands, bands too faint to meet FBI standards, and the FDLE laboratory's use of a broadened match criteria of 2.5 per cent compared to the apparent industry standard of 1 per cent. Id. at 2036. As such, the trial court found Mr. Tassone did not commit error under the Strickland standard of review in that Mr. Tassone "adequately challenged the serology and DNA evidence[.]" Id. at 2037.

The FSC addressed the claim of whether counsel was ineffective for failure to request a Frye hearing, for failure to object to admission of DNA evidence and Dr. Pollock's testimony about DNA, and for failure to provide any expert testimony to support trial counsel's attack on the DNA evidence. Taylor v. State, 62 So.3d at 1110-12. In rejecting Petitioner's claim of ineffectiveness, the court found Petitioner failed to satisfy the deficiency prong of Strickland. Id.

The post-conviction state court evidentiary hearing demonstrates the following. Petitioner's trial counsel, Mr. Tassone, is a very experienced lawyer and was considered to be experienced defense counsel at the time

of Petitioner's trial in 1991. "When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger." Hardwick v. Benton, 318 F. App'x 844, 846 n.2 (11th Cir. 2009) (per curiam) (quoting Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir.2000)). Here, the trial court found Petitioner failed to overcome the presumption of effective performance accorded to his counsel. See Taylor v. State, 62 So. 3d at 1109 ("There is a strong presumption that trial counsel's performance was not ineffective.").

Indeed, the FSC found Petitioner's claim of ineffective assistance of counsel failed under the deficiency prong with respect to the contention that counsel was ineffective for failure to request a Frye hearing, id. at 1110-11, for failure to object to admission of DNA evidence and to Dr. Pollock's testimony about DNA, id. at 1111, and finally, for failure to provide any expert testimony to support trial counsel's attack on the DNA evidence. Id. at 1111-12. Importantly, the court found counsel made a strategic decision not to call the expert, negating the claim of deficient performance. Id. at 1112. Notably, the strategic decision as to whether to present witness testimony is left within trial counsel's domain. Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir.) (citation omitted) ("[w]hich 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."), cert. denied, 516 U.S. 856 (1995). Here, the Court recognizes that counsel is given wide latitude in making strategic decisions, and in this instance, Mr. Tassone's performance did not fall outside the norm.

***12** Petitioner has failed to show his counsel performed deficiently. Indeed, this Court has found:

> First, whether or not defense counsel retains the services of an expert is trial strategy. Attorneys are generally not held to be constitutionally ineffective because of tactical decisions or strategies. United States v. Guerra, 628 F.2d 410, 413 (5th Cir. 1980), cert denied, 450 U.S. 934 (1981). Moreover, "[e]ven if in retrospect, the strategy appears to have been wrong, the decision will be held ineffective only if it was so patently unreasonable that no competent attorney would have chosen it." Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983), cert denied, 464 U.S. 1063 (1984).

Sweat v. United States, No. 3:06-CR-379-J-25MCR, 2011 WL 13287076, at *2 (M.D. Fla. Aug. 24, 2011) (not reported in F. Supp.). Here, defense counsel effectively cross examined the state's expert. Petitioner has failed to show the required prejudice under Strickland by any failure to call an expert witness. Just because the state called an expert does not mean that the defense must do the same. Richter, 562 U.S. at 111 (concluding Strickland "does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense"). Finally, there is no reasonable likelihood that the testimony of a defense expert would have changed the verdict. The evidence against Petitioner "is abundant and essentially unrefuted." Taylor v. State, 260 So. 3d at 165.

Petitioner also claims his counsel's performance was deficient because he failed to request a Richardson [14] hearing during the course of the trial when Shirley Zeigler's name was tied to the initials on the calculated fragment report. In a Richardson hearing, the court would determine whether a discovery violation resulted in harm or prejudice to the defendant, inquiring into the surrounding circumstances such as whether the violation of a discovery rule was inadvertent or willful, whether the violation was trivial or substantial, and what effect the violation had upon the defendant's ability to prepare for trial. Richardson, 246 So. 2d at 775.

14 Richardson v. State, 246 So. 2d 771 (Fla. 1971).

Under the circumstances presented, counsel could not be deemed ineffective for failure to request a Richardson hearing because, "such a hearing was not appropriate under the circumstances." Taylor v. State, 62 So. 3d at 1112. In fact, there was no concealment by the state as the state provided the calculated fragment report prior to trial, and the document included Ms. Zeigler's initials. There simply was no discovery violation or concealment, inadvertent or otherwise. As such, counsel's performance cannot be deemed deficient. Moreover, the FSC found no prejudice as Ms. Zeigler stated she agreed with Dr. Pollock's ultimate findings. Id.

The record shows Ms. Zeigler testified at the evidentiary hearing that, by looking at the computer printout, she had no dispute "in terms of [her] findings versus Dr. Pollock's findings[.]" Ex. 38 at 1274, 1284. Thus, the FSC concluded that failure to request a Richardson hearing was harmless. Taylor v. State, 62 So. 3d at 1112. Ms. Zeigler attested that an analyst "had the ability to do a manual override," but she did not think it had been part of the protocol and she did not recall seeing that in the procedures. Ex. 38 at 1274-75. Dr. Pollock testified the weak banding or signals were interpretable. Id. at 1684. He found the signals were visible, he did not interpret them as being an anomaly, and he relied on the results. Id. at 1684. He also stated that this reliance was acceptable in the forensic scientific community. [15] Id.

15 The FSC determined that even if Ms. Zeigler were presented to testify on retrial, she would testify that she ultimately agreed with Dr. Pollock's conclusion that the semen found on the green blouse matched Petitioner's DNA profile, and, as a result, there would be no acquittal on retrial because the "direct evidence linking Taylor to the scene of the crime would not be refuted by the presentation of Zeigler as an additional witness[.]" Taylor v. State, 260 So. 3d at 165.

***13** This Court concludes there was no discovery violation; therefore, counsel was not ineffective for failure to request a Richardson hearing. "An attorney's actions are sound trial strategy, and thus effective, if a reasonable attorney could have taken the same actions." Harvey v. Warden, Union Correctional Institution, 629 F.3d 1228, 1243 (11th Cir.) (emphasis added), cert. denied, 565 U.S. 1035 (2011). A reasonable attorney could certainly have concluded that there

was no call for a Richardson hearing under these circumstances. As "the bounds of constitutionally effective assistance of counsel are very wide[,]" Mr. Tassone's actions were within the broad range of reasonably competent performance under prevailing professional standards. Failure to meet the deficiency prong of Strickland is fatal to Petitioner's claim of ineffective assistance of counsel. See Reaves v. Sec'y, Fla. Dep't of Corr., 872 F.3d 1137, 1151 (11th Cir. 2017), cert. denied, 138 S. Ct. 2681 (2018) (failure to satisfy one Strickland component is fatal to the claim).

Petitioner also contends, had Mr. Tassone adequately prepared for trial, he would have developed the theory that the white blouse with blood stains found at the scene was introduced into evidence, but forensic testing was actually performed on a green or turquoise blouse. Petition at 60. Petitioner avers that there is no way to know the color of the blouse introduced into evidence at trial because there was no foundation laid. Id. at 62-64.

The trial court, in its order denying post-conviction relief, held:

> Having reviewed the record with respect to the blouse, the Court notes that there were times during the examination of the witnesses when it would have been helpful *for clarity of the record*, for the prosecutor and Mr. Tassone to have asked the witnesses to specify the color of the blouse that was being introduced into evidence. **However, it is evident that it was the green blouse that the witnesses were referring to in their testimony and which was entered into evidence at trial.**

Ex. 48 at 2042 (emphasis added).

The FSC deferred to this factual finding of the trial court, made after the trial court "examined the record, processed the evidence revealed during the evidentiary hearing, and made a *factual* determination" that the green blouse was the one the witnesses referred to in their testimony and the court entered into evidence at trial. Taylor v. State, 62 So. 3d at 1113. The FSC labeled this claim "a red herring" in rejecting the defense's theory of "a phantom white blouse." Id. As such, the FSC soundly rejected the claim of ineffective assistance of counsel for failure to develop this theory as unfounded and unsupportable.

The record shows the following. Under State's Exhibits, there is listed "No. 61 blouse[.]" Ex. 1 at page 9 of Index. In his deposition, John C. Wilson, senior latent print examiner with FDLE, referred to 28I as a green shirt or blouse. Ex. 20 at 457. Dr. Pollock, in his deposition, referenced 28 INDIA as being the stain from the blouse. Id. at 650, 653.

At trial, Gary W. Powers, a Jacksonville Sheriff's Office evidence technician, identified state's exhibit HH as a blouse found on the floor beside the victim's bed. Ex. 6 at 288.

He did not refer to the color of the exhibit. He also mentioned that other items of clothing were taken from the scene and turned into the evidence room for further examination. Id. Diane Hanson, a forensic serologist employed by FDLE, testified that state's exhibit HH, introduced into evidence as state's exhibit 61, was the item tested. Id. at 537. Ms. Hanson said she examined the blouse for the presence of semen. Id. at 538-40. She identified semen on the blouse from a type A secretor, the same type as Petitioner. Id. at 540. Dr. James M. Pollock, Jr., an expert in forensic serology and DNA analysis, testified he extracted DNA from a stain from a turquoise colored blouse, his exhibit number 28I. Id. at 583. He attested that the stain on the blouse matched the DNA profile from Petitioner. Id. at 585, 588, 593.

***14** At the evidentiary hearing, Mr. Powers testified item number 10 was a white blouse with blood stains that was found underneath the victim's head, on the floor. Ex. 38 at 1184-85, Item number 28, however, is labeled clothes found on the bedroom floor. Id. at 1188. Mr. Powers said the blouse at trial "was a white blouse." Id. at 1193. He then stated he assumed it was a white blouse based on the earlier reference to a white blouse being collected at the scene. Id. at 1194. Ms. Zeigler, another FDLE analyst, testified that Dr. Pollock referred to "varieties on green fabric." Id. at 1283.

At the evidentiary hearing, Mr. Tassone testified he had no independent recollection as to the color of exhibit HH, the blouse. Id. at 1356. He attested that in Ms. Hanson's deposition, she identified exhibit 28I as a green blouse, FDLE lab number "quadruple 090404483." Id. at 1426. The state, at the evidentiary hearing, called Dr. Pollock, and he testified that his notes reflect that for exhibit 28I, he examined "a stain on a green fabric[.]" Id. at 1706. Bernardo de la Rionda, the prosecutor, testified at the evidentiary hearing that the exhibit labeled HH, 61, and 28I refers to the green blouse that was an exhibit that came from FDLE referred to as 28I, then marked for identification purposes as HH, and finally introduced into evidence as 61. Id. at 1766. Mr. Rionda attested that he showed the green blouse to Mr. Tassone prior to trial. Id. at 1768.

The state's evidence returned from the FSC lists exhibit HH as a green blouse, introduced as exhibit 61 at trial. Ex. 51 at 4 (Exhibit C, Evidence Cross Reference, State Evidence). Ms. Hanson's April 9, 1991 FDLE death investigation report to the sheriff references exhibit #10 as being a white blouse from under the victim's head on the floor. Id. at 41-42. Exhibit #28 contains multiple items (28A blue skirt, 28B white tissue, 28C plaid shorts, 28D plaid sleeveless top, 28E green skirt, 28F blue, print scarf, 28G white blouse, 28H blue-green blouse, **28I green blouse**, 28J turquoise dress) (emphasis added). Id. at 42-43. More specifically, under exhibit 28I, Ms. Hanson states, "[s]emen was demonstrated on the green blouse recovered from the bedroom floor by the presence of intact non-motile spermatozoa." Id. at 46. Lab # 90404483, item 28I, is listed as a stain from blouse. Id. at 49. The Procedure Data references exhibit 28I. Id. at 50. The Description and Inventory of Evidence written by Dr. Pollock, case no. 90404483, refers to #28I, a cutting from blouse, further described as "varieties on green fabric[.]" Id. at 65.

In Dr. Pollock's deposition, he references item 28 INDIA. Id. at 89, 91, 105. His death investigation report to the sheriff, dated July 17, 1991, refers to #28I as the "stain from blouse." Id. at 110-11. Mr. Powers' Evidence Technician Report lists #10 as a white blouse with blood stains under victim's head on floor and # 28 as assorted clothing from bedroom floor. Id. at 215.

Under these circumstances and based on the record, Mr. Tassone was not ineffective for failure to file a motion in limine to suppress the blouse or object to the lack of foundation and a break in the chain of custody. Indeed, he cannot be deemed ineffective for failure to develop a theory that the white blouse with blood stains found at the scene was introduced into evidence, but forensic testing was actually performed on a green or turquoise blouse.

The purported theory that the white blouse was the one the witnesses referred to in their testimony and the court entered into evidence at trial is primarily based on the fact that Mr. Tassone and Mr. de la Rionda did not refer to the color of the blouse when they examined witnesses at trial and Mr. Powers' evidentiary hearing testimony that the white blouse was introduced at trial or he assumed it was the white blouse. The record demonstrates that exhibit HH, 61, and 28I, were all used as identifiers for the green blouse/green fabric, the evidence introduced at trial to support Petitioner's conviction. When the evidence was returned from the FSC, it was referred to as exhibit HH, a green blouse, introduced as exhibit 61 at trial. The Court will give deference to the factual finding of the state court as it has not been rebutted by clear and convincing evidence. Moreover, under these circumstances, defense counsel was not ineffective for failure to develop the "white blouse" theory as the evidence overwhelmingly showed that the witnesses were referring to the green blouse or green fabric as being the source of the semen and DNA evidence used against Petitioner at trial. As such, Mr. Tassone was not ineffective based on any failure to file a motion in limine to suppress the blouse or object to the lack of foundation or break in a chain of custody of the blouse introduced at trial.

***15** The Court concludes counsel's performance was not constitutionally deficient under the circumstances presented to counsel in 1991 and Petitioner is not entitled to habeas relief. Mr. Tassone performed reasonably, well within the scope of permissible performance. Perfection is not the standard. Mr. Tassone conducted a voir dire examination of Dr. Pollock, vigorously cross examined Dr. Pollock, made a reasoned, strategic decision not to call Dr. Goldman after conferring with Dr. Goldman about the DNA evidence, was well prepared for trial, did not perform deficiently for failure to request a Richardson hearing as there was no discovery violation, or for failure to file a motion in limine to suppress the blouse or object to lack of foundation or chain of custody of the blouse introduced at trial, or for failure to request a Frye hearing.

Of course, in hindsight counsel could have done things differently or done more. Although every attorney may not have chosen the same approach or strategy, Mr. Tassone's performance did not so undermine the proper functioning of the adversarial process that

Petitioner was deprived of a fair trial.[16] This Court has opined:

> "To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.' " Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir.2000) (quoting Burger v. Kemp, 483 U.S. 776, 794, 107 S. Ct. 3114, 97 L.Ed.2d 638 (1987)). In finding prejudice, the court must determine that the result of the proceedings would have been different considering "the totality of the evidence before the judge or jury." Berghuis v. Thompkins, —— U.S. ——, 130 S. Ct. 2250, 2265, 176 L.Ed.2d 1098 (2010) (quoting Strickland, 466 U.S. at 695).

Kuhns v. Sec'y Dep't of Corr., No. 2:08-cv-163-FtM-29SPC, 2011 WL 1085013, at *6 (M.D. Fla. Mar. 21, 2011) (not reported in F.Supp.2d).

16 The Fourteenth Amendment provides any state shall not deprive any person of life, liberty, or property, without due process of law. U.S. Const. amend. 14. To the extent a Fourteenth Amendment claim was raised and addressed, the adjudication of the state court resulted in a decision that involved a reasonable application of clearly established federal law, as determined by the United States Supreme Court. Therefore, Petitioner is not entitled to relief on this Fourteenth Amendment claim because the state court's decision was not contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts based on the evidence presented in the state court proceedings. Therefore, AEDPA deference is due, or alternatively, Petitioner is not entitled to federal habeas relief on this Fourteenth Amendment claim.

The Court finds the state court's determination is consistent with federal precedent. The state court's decision is entitled to AEDPA deference. The state court's ruling is based on a reasonable determination of the facts and a reasonable application of the law. In short, the state court's adjudication of the claim is not contrary to or an unreasonable application of Strickland and its progeny or based on an unreasonable determination of the facts. Therefore, the state court's decision is entitled to deference and ground two is due to be denied.

As the threshold standard of Strickland has not been met, Petitioner has failed to demonstrate that his trial was fundamentally unfair and his counsel ineffective. Thus, he has failed to demonstrate Sixth or Fourteenth Amendment violations.

The remaining question is whether Petitioner has shown an Eighth Amendment violation. Barbaric punishments are prohibited under the Eighth Amendment. Of import, "[t]he Eighth Amendment states: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' "

Graham v. Florida, No. 08-7412, 2010 WL 1946731, at *7 (2010). Other than mentioning the Eighth Amendment to the United States Constitution in the statement setting forth Ground II, Petition at 44, Petitioner does not mention or attempt to support an Eighth Amendment claim.

***16** The Court finds the Eighth Amendment claim under the claim of ineffective assistance of counsel at the guilt phase of the capital proceedings raised in ground two both vague and conclusory. Notably, Petitioner does not address the penalty phase of the state court proceedings in this ground. He only relies on the guilt phase of the capital proceeding, and he raises the Eighth Amendment claim in a summary fashion. Without more, Petitioner cannot prevail on this Eighth Amendment claim. Therefore, the Eighth Amendment claim raised in ground two is due to be denied.

VIII. GROUND THREE

Ground Three: Mr. Taylor was denied the effective assistance of counsel at the penalty phase of his capital trial, in violation of his rights to due process and equal protection under the United States Constitution, as well as his rights under the Fifth, Sixth and Eighth Amendments.

In this ground, Petitioner claims his counsel provided ineffective assistance in violation of the Sixth Amendment because he never presented a wealth of mitigation due to an inadequate investigation. Petition at 66. As such, Petitioner claims he was "deprived of the full impact of substantial and compelling statutory and nonstatutory mitigating evidence." Id. (footnote omitted). In this regard, Petitioner contends, "because counsel failed to undertake an adequate investigation, counsel was unable to provide mental health experts with background information essential to making an accurate diagnosis and assessment of Mr. Taylor's mental state." Id. at 72. Therefore, Petitioner opines, counsel's alleged failure to discover Petitioner had the problem-solving ability and emotional age of a thirteen-year-old, suffers from impaired neurological development, is a chronic alcohol and drug abuser, has undiagnosed attention deficit disorder, and suffers from organic brain syndrome resulted in constitutionally inadequate psychiatric evaluations by court appointed experts. Id. at 72-73. In sum, Petitioner claims he suffered prejudice based on his counsel's failure to investigate and prepare for the penalty phase of the capital trial. Id. at 73.

The Fifth Amendment provides: "[n]o person shall... be deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V. The Fifth Amendment's due process protection applies to the states by virtue of the Fourteenth Amendment. U.S. Const. Amends. 5, 14. The Court first notes that Petitioner completely fails to provide support for claims under either the Fifth or Eighth Amendments in his Petition. Even liberally construing ground three, it only presents allegations supporting a claim of ineffective assistance of counsel under the Sixth Amendment. The Memorandum does not present any Fifth Amendment or Eighth Amendment claims. Therefore, the Court finds Petitioner is not entitled to federal habeas relief under either the Fifth or Eighth Amendments in

this claim of ineffective assistance of counsel at the penalty phase of his capital trial.

Petitioner does raise a Sixth Amendment claim of ineffective assistance of counsel; however, he faces overwhelming procedural hurdles in that Petitioner's post-conviction counsel expressly withdrew this claim at the post-conviction evidentiary hearing in Petitioner's presence, without objection or exception being made by Petitioner.

The record demonstrates the following. Petitioner was present at the post-conviction evidentiary hearing. Ex. 38 at 1146. Michael P. Reiter,[17] post-conviction counsel for Petitioner, announced the following:

> MR. REITER: **Judge, I had indicated I spoke to my client and indicated to the State there are some claims in the 3.850 that we will be withdrawing. Two of them – actually we have been granted evidentiary hearing on**, the rest are basically legal arguments, claim, six, paragraphs two through eight, the rest we will be keep of six –
>
> ***17** THE COURT: Two, three, four, five, six, seven and eight.
>
> MR. REITER: I'm withdrawing.
>
> THE COURT: Okay.
>
> MR. REITER: Claim seven, experts, withdrawn, claim eight, instruction of reasonable doubt, withdrawn.
>
> THE COURT: Hold on.
>
> MR. REITER: **Claim nine, ineffective assistance of counsel for penalty phase withdrawn**. Claim ten, will be withdrawn on the condition Mr. De la Rionda reserves to the court that his office did not draft the sentencing order.
>
> MR. DE LA RIONDA: I can address that at this time, the State Attorney's Office did not draft any sentencing order.
>
> THE COURT: Okay.
>
> MR. REITER: Claim 14, mercy instruction, and claim 18, judge failed to file mitigation withdrawn.

Id. at 1147-48 (emphasis added).

[17] Petitioner puts some emphasis on the fact that Mr. Reiter, who represented Petitioner at the post-conviction evidentiary hearing, was not the same attorney who originally pled the ineffective assistance of counsel at the penalty phase claim. Memorandum at 38 n.20. The record demonstrates that is the case. Ex. 33. However, the record also shows that Robert A. Harper, who originally pled the claim, certified there was a conflict with his client, and moved to withdraw as counsel. Ex. 34 at 943-44, 946. The court granted the motion and, upon request, substituted Mr. Reiter as counsel. Id. at 948.

Mr. Reiter represented that he had spoken with his client and they wished to withdraw the claim of ineffective assistance of counsel for the penalty phase. Petitioner was present when

Mr. Reiter announced the decision to the court and Petitioner did not express any opposition to the announcement or delineate any exceptions to the announcement. A defendant has an affirmative duty to speak up if his attorney is stating something on the record other than what had been agreed upon prior to the proceeding. See e.g. Singfield v. State, 74 So. 3d 127, 129 (Fla. 2nd DCA Sept. 23, 2011) (per curiam) (once advised of probable sentence, a defendant has a duty to speak up if his attorney promised something different). Apparently, Petitioner is now second-guessing the decision to abandon this ground and desires to raise a claim that he discussed with counsel and decided to withdraw at the state post-conviction proceeding.

At this stage, the claim is unexhausted and procedurally defaulted. The record shows Petitioner affirmatively abandoned this claim. Furthermore, the matter was not taken up on appeal to the FSC, further evincing abandonment. See Atwater v. Crosby, 451 F.3d 799, 810 (11th Cir. 2006) (a petitioner abandons a claim when he receives an evidentiary hearing and fails to raise the claim in a brief on appeal), cert. denied, 549 U.S. 1124 (2007); Baker v. Dep't of Corr., Sec'y, 634 F. App'x 689, 692 (11th Cir. 2015) (per curiam) (same). Thus, Petitioner failed to give the state courts one full opportunity to resolve the constitutional issue "by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999).

The state courts should have the first opportunity to address and correct alleged constitutional violations, and here, Petitioner deprived the state courts of this opportunity by not pursuing his claim and presenting evidence to support the claim at the evidentiary hearing, although he had been provided that opportunity. Respondents aver, Petitioner "expressly abandoned this claim in state court." Response at 96 (footnote omitted). Respondents assert it would be a gross abuse of the writ to allow Petitioner to expressly abandon a claim that he was granted an evidentiary hearing on, which the state court did not hear at the evidentiary hearing, and then allow Petitioner to re-raise the claim at a later juncture. Response at 98-99.

***18** This is a paradigm abuse of the writ. Petitioner raised the claim in his Rule 3.851 motion and then, on the record, through counsel, announced abandonment of the claim. Wong Doo v. United States, 265 U.S. 239 (1924) (after deliberate abandonment and the failure to present evidence on a claim, an attempt to reassert the claim constituted an abuse of the writ). See Watson v. FCC Coleman-USP I, 644 F. App'x 996, 1000 (11th Cir. 2016) (per curiam) (finding abuse of the writ when a petitioner fails to raise a claim "despite his knowledge of its existence"). When there has been deliberate abandonment, equities are different. Bracken v. Dormire, 247 F.3d 699, 706 (8th Cir. 2001) (citing Wong Doo). See Williams v. Sec'y for the Dep't of Corr., 130 F. App'x 296, 297 (11th Cir. 2005) (per curiam) (equating intentional abandonment, deliberate withholding, and inexcusable neglect under the abuse of the writ doctrine).

"AEDPA modifies those abuse-of-the-writ principles and creates new statutory rules under

§ 2244(b)[,]" Magwood v. Patterson, 561 U.S. 320, 337 (2010), but "[t]he design and purpose of AEDPA is to avoid abuses of the writ of habeas corpus, in recognition of the potential for the writ's intrusive effect on state criminal justice systems." Id. at 344 (Kennedy, J., dissenting). The burden is on the government to plead abuse of the writ, Sanders v. United States, 373 U.S. 1, 10-11 (1963), and here, the state has adequately pled that Petitioner abused the writ. And, importantly, 28 U.S.C. § 2244 "was obviously not intended to foreclose judicial application of the abuse-of-writ principle as developed in Wong Doo...." Id. at 12.

It is difficult for this Court to consider Petitioner's decision as anything other that deliberate abandonment of a claim at the evidentiary hearing; "[n]othing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, to entertain collateral proceedings whose only purpose is to vex, harass, or delay." Id. at 18. The burden to disprove abuse shifts to a petitioner once the government has stated with clarity and particularity the claim of abuse of the writ. See, e.g., Lucy v. Boutwell, No. Civ.A. 98-1281-RV-M, 2000 WL 829364, at *1 (S.D. Ala. May 25, 2000) (not reported in F.Supp.2d) (once pleaded, the burden shifts to the petitioner) (quotation and citation omitted).

As Respondents have adequately contended that Petitioner's delayed presentation of his claim constitutes an abuse of the writ, Petitioner bears the burden of satisfying this Court that the delay is excusable. To excuse failure to pursue a claim earlier, a petitioner must show cause and prejudice or that a fundamental miscarriage of justice will result if the claim is not addressed on its merits. See Johnson v. La. Dep't of Corr., No. 19-13554, 2020 WL 5899009, at *9 (E.D. La. Aug. 4, 2020) (petitioner required to demonstrate cause and prejudice or a fundamental miscarriage of justice will occur if claim not considered), report and recommendation adopted by 2020 WL 5889336 (E.D. La. Oct. 5, 2020). In footnotes, Petitioner summarily references the state's contention of abandonment and abuse of the writ, see Reply at 24-25 (fn. 14 & fn. 15), but Petitioner focuses almost entirely on his contention that inadequate post-conviction counsel caused procedural default, apparently in an attempt to evade the more difficult question of abandonment. Reply at 24-25.

Obviously, Petitioner knew the factual predicate of the claim as it was raised in the post-conviction motion. Not only was the claim actually raised in the post-conviction motion, Petitioner was granted an evidentiary hearing on the claim. Wong Doo, 265 U.S. at 241 ("if he was intending to rely on that ground, good faith required that he produce the proof then"). Petitioner was not prevented from raising the claim; he abandoned it. Not only has cause and prejudice not been adequately demonstrated, "a fundamental miscarriage of justice will not be visited upon Petitioner if the merit of [this claim] is not addressed." Lucy, 2000 WL 829364, at *3. Therefore, this claim is due to be dismissed for abuse of the writ.

***19** Alternatively, the Court will address the issue of procedural default. The claim raised in ground three is unexhausted and procedurally

defaulted. The doctrine of procedural default requires the following:

> Federal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism. These rules include the doctrine of procedural default, under which a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule. See, e.g., Coleman, [18] supra, at 747-748, 111 S. Ct. 2546; Sykes, [19] supra, at 84-85, 97 S. Ct. 2497. A state court's invocation of a procedural rule to deny a prisoner's claims precludes federal review of the claims if, among other requisites, the state procedural rule is a nonfederal ground adequate to support the judgment and the rule is firmly established and consistently followed. See, e.g., Walker v. Martin, 562 U.S. ——, ——, 131 S. Ct. 1120, 1127-1128, 179 L.Ed.2d 62 (2011); Beard v. Kindler, 558 U.S. ——, ——, 130 S. Ct. 612, 617-618, 175 L.Ed.2d 417 (2009). The doctrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law. See Coleman, 501 U.S., at 750, 111 S. Ct. 2546.
>
> Martinez v. Ryan, 566 U.S. 1, 9-10 (2012).

18 Coleman v. Thompson, 501 U.S. 722 (1991).

19 Wainwright v. Sykes, 433 U.S. 72 (1977).

A petition for writ of habeas corpus should not be entertained unless the petitioner has first exhausted his state court remedies. Castille v. Peoples, 489 U.S. 346, 349 (1989); Rose v. Lundy, 455 U.S. 509 (1982). A procedural default arises "when 'the petitioner fails to raise the [federal] claim in state court and it is clear from state law that any future attempts at exhaustion would be futile.' " Owen v. Sec'y, Dep't of Corr., 568 F.3d 894, 908 n.9 (11th Cir. 2009) (quoting Zeigler v. Crosby, 345 F.3d

1300, 1304 (11th Cir. 2003)), cert. denied, 558 U.S. 1151 (2010).

There are, however, allowable exceptions to the procedural default doctrine; "[a] prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." Martinez, 566 U.S. at 10 (citing Coleman, 501 U.S. at 750). To demonstrate cause, a petitioner must show some objective factor external to the defense impeded his effort to properly raise the claim in state court. Wright v. Hopper, 169 F.3d 695, 703 (11th Cir.), cert. denied, 528 U.S. 934 (1999). If cause is established, a petitioner must demonstrate prejudice. To demonstrate prejudice, a petitioner must show "there is at least a reasonable probability that the result of the proceeding would have been different had the constitutional violation not occurred." Owen, 568 F.3d at 908.

Alternatively, a petitioner may obtain review of a procedurally barred claim if he satisfies the actual innocence "gateway" established in Schlup v. Delo, 513 U.S. 298 (1995). The gateway exception is meant to prevent a constitutional error at trial from causing a miscarriage of justice and conviction of the actually innocent. Kuenzel v. Comm'r, Ala. Dep't of Corr., 690 F.3d 1311, 1314 (11th Cir. 2012) (per curiam) (quoting Schlup, 513 U.S. at 324), cert. denied, 569 U.S. 1004 (2013).

***20** Petitioner relies on Martinez and asks that the default of ground three be excused pursuant to Martinez. Per Martinez, this Court must ask whether a petitioner has satisfied the standard for excusing a default. As Petitioner had post-conviction counsel, Petitioner must show his post-conviction counsel provided ineffective assistance of counsel by failing to pursue this ground at the evidentiary hearing and Petitioner must establish that the underlying claim of ineffective assistance of counsel is substantial.

Martinez provides a narrow, equitable, non-constitutional exception to the holding in Coleman. To the extent Petitioner claims his procedural default should be excused based on the narrow exception under Martinez, Petitioner must demonstrate the underlying ineffectiveness claim is substantial. Petitioner has failed to establish his claim is "substantial." To meet this requirement, Petitioner must demonstrate the claim has some merit. Martinez, 566 U.S. at 14. In this instance, the underlying ineffectiveness claim raised in ground three lacks merit; therefore, Petitioner has not demonstrated he can satisfy an exception to the procedural bar. To explain, the Court provides a merits analysis.

Based on a thorough review of the complete record, Petitioner's underlying claim of ineffective assistance of counsel for failure to conduct a thorough investigation in order to adequately prepare for the penalty phase of the capital trial lacks merit. See Petition at 66. Petitioner alleges counsel failed to discover Petitioner had the problem-solving ability and emotional age of a thirteen-year-old, suffers from impaired neurological development, is a chronic alcohol and drug abuser, has undiagnosed attention deficit disorder, and suffers from organic brain syndrome. Petitioner claims as a result of counsel's inadequate investigation, constitutionally inadequate

psychiatric evaluations by court appointed experts followed.

The record shows defense counsel participated in discovery and prepared for trial, including the penalty phase. Mr. Tassone filed a Motion for Appointment of Expert to Assist Counsel in the Preparation of the Defense of Insanity. Ex. 1 at 73-74. In the body of the motion, counsel stated he believed there were sufficient grounds to obtain an expert to assist counsel in determining whether Petitioner's competency to stand trial or insanity at the time of the offense. Id. at 73. The trial court entered an Order Granting Confidential Psychiatric Evaluation of Defendant, appointing Dr. Louis Legum as a qualified expert to examine Petitioner to make numerous determinations, such as whether Petitioner met the criteria for involuntary hospitalization; "the nature and extent of the mental illness or mental retardation suffered by the Defendant;" whether Petitioner is mentally ill and due to his illness is likely to injure himself or others or need particular care; whether Petitioner is incompetent to stand trial but may return to competence within the foreseeable future; and whether Petitioner was insane at the time of the commission of the crime, including whether he was suffering from a mental illness that inhibited his ability to understand the nature, quality and wrongness of his acts. Id. at 75-77. The court directed that Dr. Legum's report be confidential and submitted only to defense counsel. Id. at 76.

After the guilt phase, Mr. Tassone filed another motion for appointment of an expert to assist counsel. Ex. 2 at 251-52. He stated he believed there were "sufficient grounds to employ an expert to assist counsel in determining whether Defendant meets the criteria of any statutory or non-statutory mitigating factors." Id. at 251. Mr. Tassone asked the court to grant the motion and appoint an expert to assist in the preparation of the jury's advisory opinion on sentence. Id. at 251-52. The court, in response, entered an Order Granting Confidential Psychiatric Evaluation of Defendant. Id. at 253-55. The court found reasonable grounds to appoint Dr. Harry Krop to advise counsel as to whether Petitioner may meet the criteria for statutory and/or non-statutory mitigating factors. Id. at 253. The court appointed Dr. Krop to advise counsel "and perhaps the jury 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[.]" Id. Among other things, the court directed that the expert consider whether Petitioner was under the influence of extreme mental or emotional disturbance, whether he was a relatively minor participant, whether he acted under extreme duress or domination of another, whether he had the capacity to appreciate the criminality of his conduct or whether his ability to conform was substantially impaired, and whether the defendant's age and any other aspect of his character or record, and any other circumstances of the offense should be taken into consideration. [20] Id. at 253-54.

20 The record demonstrates, after the penalty phase testimony, Mr. Tassone filed a Response to Pre-Sentence Investigation Report (PSI). Ex. 18 (Volume 1) at 267-69. He said 'it would seem extremely appropriate

> that evidence of the Defendant's educational history, including any psychological test scores and any evidence of alcohol/substance abuse be included" in the PSI, especially after Petitioner's mother provided information to the probation officer. Id. at 267-68. Mr. Tassone also asked that evidence of retardation be appended to the PSI, particularly in light of the testimony at the penalty phase of the trial, and that the records made available to the probation officer from Gateway Community Services and Alcoholic Anonymous be taken into consideration. Id. Mr. Tassone also submitted to the court a Sentencing Memorandum Regarding Mental or Emotional Disturbance asking the court to consider the existence of any mental disturbance as a significant non-statutory mitigating factor despite the fact that Petitioner was not found to be legally insane or under extreme mental or emotional disturbance but in recognition that he has an I.Q. of approximately 68 and the mental maturity of between 13 and 15 years of age. Id. at 270-72.

***21** The record reflects that Mr. Tassone strategically selected certain witnesses to testify on behalf of Petitioner at the penalty phase. Of course, Mr. Tassone read or heard the content of the confidential examinations of Dr. Legum and Dr. Krop, but Mr. Tassone elected not to call the doctors as witnesses during the penalty phase or reveal the content of their examinations. Instead, Mr. Tassone called Charles Miles, a childhood neighbor; Lloyd King, Petitioner's uncle; Judy Rogers, a family friend who testified that she thought Petitioner had a learning disability; Don King, an uncle who testified that Petitioner experienced difficulty in reading and reading comprehension and was a very passive person; and Lenette Taylor, Petitioner's adoptive mother, who attested to Petitioner's difficulties in school and her lack of success in getting Petitioner into special education classes, to his passiveness, and to his IQ being in the range from 68 to 70, the mildly retarded range. Ex. 14 at 804-30.

Of import, Ms. Taylor testified that Petitioner had difficulty concentrating, sitting still in class, and paying attention to teachers. Id. at 824. Ms. Taylor testified she participated in psychological or psychiatric screenings of Petitioner and both psychologists told her Petitioner's IQ was between 68 and 70, the mildly retarded range, and that his maturity age was approximately 14 years of age and his actual chronological age is 22. Id. at 827. On cross-examination, when asked if she was told by Mr. William Dando, a psychology specialist, that Petitioner was functioning in the average intelligence range, she said yes, but that Dr. Krop, the psychologist who recently examined Petitioner, advised Ms. Taylor that those test results were wrong. Id. at 829-30.

Of import, Mr. Tassone announced on the record the defense's decision not to call Dr. Legum and Dr. Krop (also referred to as Dr. Leggum and Dr. Kropp in the record):

> Your Honor, I would advise and I apologize to Mr. de la Rionda because I told him I'd call him last night and failed to but I advised him this morning that Mr. Taylor was examined by Dr. Leggum, 60 or 90 days

> ago and I was provided a confidential report of that examination. He was also examined by Dr. Larry [sic] Kropp and both doctors, Leggum and Kropp, are psychologist [sic] and I conferred with both Dr. Leggum and Dr. Kropp, probably for a period of about ten to 15 hours over the last two days and including up until 10 or 10:30 last night. Based on what Dr. Kropp and Dr. Leggum told me, it was – I concluded after agonizing over the decision that I would not use Dr. Kropp nor Dr. Leggum in the course of the penalty phase of these proceedings.
>
> Dr. Kropp advised me he had sufficient time to examine Mr. Taylor and that he performed whatever test he deemed appropriate within his field of expertise to reach certain conclusions and while he had not prepared a written report he gave me at least an hour and half or two hour verbal report and we discussed the same back and forth.
>
> **I advised Mr. Taylor this morning and his parents last night and this morning that it was my opinion that neither of the doctors should be called and they did not object to that recommendation and essentially concurred in that recommendation.**

Id. at 836-37 (emphasis added).

As noted by the FSC, Mr. Tassone "determined that it would be in Taylor's best interest for neither expert to testify." Taylor v. State, 630 So. 2d at 1043. Upon review, counsel's performance was well within the broad range of reasonable assistance under prevailing professional norms. Strickland. The decision as to whether to present certain witnesses is a strategic one, left within counsel's domain. Chaflin v. Sec'y, Dep't of Corr., No. 6:09-cv-2055-ORL-31KRS, 2011 WL 280940, at *3 (M.D. Fla. Jan. 26, 2011) (not reported in F.Supp.2d). Indeed, counsel is given wide latitude in making these type of strategic decisions, and in this instance, counsel's performance did not fall outside the norm.

The record shows counsel wrestled with the decision as to whether to call the confidential experts, vetted the matter after reviewing and discussing written and verbal reports, discussed the matter with Petitioner and his parents, and ultimately decided not to call the confidential experts, with his client's concurrence in the decision.[21] Mr. Tassone, however, was able to convince the court to find Petitioner was mildly retarded through the testimony of Ms. Taylor who testified as to Petitioner's IQ scores, revealed the content of her discussions with the examining doctors, and provided Dr. Krop's assessment that Petitioner's responses were not in the average intelligence range. Thus, counsel was able, through his strategy of having Ms. Taylor present the evidence of Petitioner's intellectual disability, to obtain a ruling by the trial court that Petitioner was "mildly retarded' and that his mild retardation was a non-statutory mitigating factor. Taylor v. State, 630 So. 2d at 1043. The judge, however, decided to give this factor slight weight, noting Petitioner was functioning as an adult as he lived away from his parental home, engaged in adult occupations, and was the father of a child.[22] Id. Petitioner has not alleged or shown otherwise.

21 This was not a rash decision. It was a deliberate decision made after a thorough assessment of the pros

and cons of calling two experts who would be, if they took the stand, thoroughly cross-examined by the prosecutor. By using Ms. Taylor to present evidence of passivity, attention deficit problems, learning difficulties, and mental retardation, defense counsel avoided the perceived pitfalls of calling the experts.

22 Petitioner's assertion that counsel failed to discover Petitioner had the problem-solving ability and emotional age of a thirteen-year-old is belied by the record. Counsel was well aware that Petitioner's emotional age was considered to be well below his actual age as Ms. Taylor attested to that factor. Petitioner's contention that counsel failed to discover Petitioner's impairments is also belied by the record. Two mental health experts examined Petitioner, performed tests, and provided confidential reports to defense counsel. In his assessment, Dr. Legum was to include an analysis of the nature and extent of any mental illness or mental retardation suffered by Petitioner, his competency, and his sanity at the time of the crime. Ex. 1 at 75-77. In his assessment, Dr. Krop was appointed to analyze whether Petitioner committed the crime while under the influence of extreme mental or emotional disturbance, whether Petitioner was under extreme duress or domination, whether he was substantially impaired, and any other relevant aspects of his character. Ex. 2 at 253- 55. Mr. Tassone stated he obtained written or verbal reports from the experts, he spent hours reviewing and discussing these reports, and ultimately, decided not to call the experts after conferring with his client and his client's parents.

***22** Petitioner claims counsel failed to provide Petitioner with "a competent psychiatrist to conduct an appropriate examination and assist in evaluation, preparation, and presentation of a defense." Ake v. Oklahoma, 470 U.S. 68, 83 (1985). See Memorandum at 38. Petitioner also contends the psychiatric evaluations were "constitutionally inadequate." Petition at 72.

Mr. Tassone asked for and obtained the appointment of two confidential experts to aid the defense. The court appointed well-qualified experts who were directed to make thorough mental health assessments and provide their analysis to the defense. After providing their reports, the doctors assisted counsel in evaluation and preparation. Mr. Tassone reasonably relied on the doctors' expertise and assessments to make his decisions in preparation of the penalty phase of the capital trial.

Mr. Tassone could reasonably rely on the appointed experts to make an adequate diagnosis and assessment whether Petitioner was suffering from any mental illness or infirmity, which could include neurological impairments, an attention deficit disorder, or organic brain syndrome.[23] Certainly, Dr. Legum, in determining whether Petitioner met the criteria for involuntary hospitalization or whether his mental state prevented his ability to understand the nature, quality and wrongness of his acts, would likely have taken into consideration any alcohol and/or drug

issues. Dr. Krop, who was directed to consider whether Petitioner was under the influence of "extreme mental or emotional disturbance," also would have had occasion to consider alcohol and drug impairment or addictions. Obviously, Mr. Tassone had spoken with Ms. Taylor, Petitioner's adopted mother, in order to prepare for the penalty phase, and she attested to Petitioner's mild retardation, passivity, attention deficits, and the recommendation of the school psychologist that Petitioner be admitted into special education classes.[24] Ex. 14 at 824-27.

23 Curiously, Petitioner mentions "undiagnosed attention deficit disorder." Petition at 73. If this disorder were undiagnosed, such diagnosis would not have been discoverable through a more intensive background investigation. Petitioner's adopted mother, called by defense counsel, testified at the penalty phase as to Petitioner's difficulties in school, including a lack of concentration, inability to sit still, and trouble paying attention in class. Ex. 14 at 824. Thus, evidence of Petitioner's undiagnosed attention deficits was adequately presented at the penalty phase of the trial though Ms. Taylor's testimony. As far as neurological impairment and organic brain syndrome, since the doctors' reports remain confidential, the record does not show if any screening tests produced results which were consistent with a finding of organic brain damage. Raheem, 2021 WL 1605939, at *12. The record does show the court appointed experts to assess whether Petitioner was suffering from a mental illness that inhibited his ability to understand the nature, quality and wrongness of his acts and whether he had the capacity to appreciate the criminality of his conduct or whether his ability to conform was substantially impaired. Therefore, defense counsel would have been advised by the appointed experts whether Petitioner had significant problems with judgment, was unable to control his behavior, or lacked the ability to understand the world around him. Also, it is significant that neither doctor found Petitioner incompetent or insane, and Petitioner does not now suggest that he was either incompetent or insane.

24 Apparently, Ms. Taylor was aware of Petitioner's alcohol and substance abuse, demonstrated by her ability to provide information concerning alcohol and drug abuse to the probation officer during the investigation for the PSI. Ex. 18 (Volume 1) at 267-68. Based on Ms. Taylor's testimony, it is quite apparent Mr. Tassone communicated with Ms. Taylor prior to the penalty phase of the trial. The record also demonstrates Petitioner did not come from "a home rife with abuse, neglect, and trauma at the hands of his... caregivers." Lee, 2021 WL 507897, at *7. Indeed, the record shows he came from a loving adopted home with caring, educated parents who tried to get him the special education and attention he needed as he was mildly retarded and struggled with

attention issues; therefore, Mr. Tassone chose to focus heavily on evidence of Petitioner's intellectual disabilities and passiveness during the penalty phase before the jury.

***23** Failing to demonstrate Mr. Tassone's performance was deficient, Petitioner has failed to show the underlying claim has some merit. Based on the above, Petitioner has failed to show he falls within the narrow parameters of the ruling in Martinez, in which the Supreme Court recognized a narrow exception for ineffective assistance of counsel/absence of counsel at initial-review collateral proceedings. Since Petitioner has failed to demonstrate the underlying ineffective assistance of counsel claim is a substantial one, he does not fall within the narrow exception. See Clark v. Comm. Ala. Dep't of Corr., No. 19-11443, 2021 WL 727183, at *3 (11th Cir. Feb. 25, 2021) ("Martinez is of no help because [Petitioner] has not presented a 'substantial claim' that his trial counsel rendered ineffective assistance[.]") Thus, he has failed to establish cause for the procedural default of this claim of ineffective assistance of counsel raised in ground three.

Finally, and alternatively, this Court will not deem an attorney's performance deficient for abandoning a claim that Petitioner agreed to abandon. See Kuhns, 2011 WL 1085013, at *3 ("At the evidentiary hearing, Petitioner, represented by counsel, agreed to abandon claim[.]"). The state court did not address Petitioner's claim because "it had been abandoned." McGuire v. Warden, Chillicothe Corr. Inst., 738 F.3d 741, 747 (6th Cir. 2013) (district court did not address the claim as it was abandoned), cert. denied, 571 U.S. 1161 (2014). After announcing abandonment of the claim at the evidentiary hearing, Petitioner did not raise the issue on appeal of the denial of the post-conviction motion, argue that he had no intention of abandoning the claim, or claim that he did not agree with the decision to abandon the claim, further evincing his intentional abandonment of the claim.

Petitioner has failed to show cause for his default of ground three, and he does not meet the prejudice or manifest injustice exceptions. Upon review, Petitioner has failed to identify any fact warranting the application of the fundamental miscarriage of justice exception. Therefore, the Court finds ground three is unexhausted and procedurally defaulted. As Petitioner has failed to establish cause and prejudice or any factors warranting the application of the fundamental miscarriage of justice exception to overcome the default, the court deems the claim of ineffective assistance of counsel at the penalty phase procedurally defaulted, and Petitioner is procedurally barred from raising the unexhausted claim raised in ground three in this habeas proceeding.

IX. GROUND FOUR

Ground Four: The court erred in denying Mr. Taylor's motion to suppress statements made to a police officer while in custody and after Mr. Taylor had invoked his rights to counsel in violation of the Fifth and Sixth Amendments to the United States Constitution.

Petitioner raised this claim on direct appeal to the FSC. Ex. 21 at 8-12. The FSC rejected Petitioner's argument finding the trial court did

not err in overruling Petitioner's objection. The FSC opined:

> In his first claim, Taylor argues that the trial judge erred in allowing evidence concerning the statements he made to the investigating officer after the blood samples were taken from Taylor. Taylor argues that he had invoked his right to counsel under the Sixth Amendment of the United States Constitution and his right to remain silent under the Fifth Amendment of the United States Constitution. Taylor argues that, even though he had not been formally arrested, he was not free to leave the jail while the blood and saliva samples were being taken. Furthermore, Taylor asserts that, although he was not being interrogated, the police officer's reply to his question regarding how long it would take to get the test results back was inappropriate and designed to elicit a response.
>
> ***24** We reject this argument under the circumstances of this case and find that the trial judge did not err in overruling Taylor's objection. The record establishes that, although Taylor was not free to leave until after the samples were taken, he was not under arrest; that Taylor initiated the conversation; and, more importantly, that Taylor made the statements in question *after* the samples had been taken and he was free to leave. We find that the constitutional right to counsel under both the United States and Florida Constitutions does not attach under these circumstances. Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135, 89 L.Ed.2d 410 (1986); Owen v. State, 596 So. 2d 985 (Fla.), cert. denied, 506 U.S. 921, 113 S. Ct. 338, 121 L.Ed.2d 255 (1992). In regard to Taylor's Fifth Amendment claim, we find that Taylor was not being interrogated at the time he made the statements and that Taylor initiated the conversation with the officer. Consequently, there was no Fifth Amendment violation.

Taylor v. State, 630 So. 2d at 1041.

Petitioner submits that FSC's determination was objectively unreasonable and its factual findings are rebutted by clear and convincing evidence. Memorandum at 44. The Court concludes otherwise. An explanation follows.

The record shows Refik Eler, co-counsel for the defense, attended the deposition of John Robert Bogers. Ex. 20 at 750. Detective Bogers attested that Petitioner made a statement to him while the detective was taking Petitioner home after he had his saliva, blood, and hair taken. Id. at 755. Detective Bogers said, Petitioner "asked me how long it would take for a DNA test and blood test and the hair test to come back. And I asked him why and he said, Well, I wondered when you were – I just wanted to know when you were going to come arrest me." Id. Detective Bogers confirmed that Petitioner, pursuant to a search warrant, provided samples. Id. Detective Bogers attested Petitioner was not incarcerated at that time. Id. at 756. The prosecutor, Mr. de la Rionda, clarified that the report actually showed that Petitioner said, "he was just wondering when he would be back out to pick him up." Id. at 758.

Detective Bogers testified at trial. Ex. 6 at 495. He testified he was employed by JSO on February 14, 1991, and he came into contact with Petitioner on that date. Id. at 496. In a

proffer, the prosecutor asked Detective Bogers whether Petitioner was being questioned while the nurse was taking blood, saliva, and hair. Id. at 497. Detective Bogers said Petitioner was not being questioned, but he did make a statement:

> After the nurse took the samples as pursuant to the search warrant, Mr. Taylor asked me how long would it take for the test to be completed and be returned back to us. I asked – I asked him why. At which time he state he was just wondering when we would be back out to pick him up.

Id. at 498.

Mr. Tassone asked whether this occurred at the Duval County Jail, and Detective Bogers confirmed it occurred at the nurse's station at the old jail. Id. He also said he was told that Petitioner had invoked his right not to make any further statements without an attorney present. Id. at 500. Detective Bogers testified Petitioner was not free to leave because he was the subject of a search warrant. Id.

When asked whether Petitioner was in custody at the time of Petitioner's statement, Detective Bogers said Petitioner was not in custody. Id. at 501. Detective Bogers testified that after the search warrant was done and blood taken, he drove Petitioner to his house. Id. Detective Bogers explained, Petitioner made the statement after the search warrant was served and after the blood and saliva were taken. Id. at 502.

Mr. Tassone objected to the statement, asserting that although Petitioner was not under arrest, he was in was in the Duval County Jail in the presence of a homicide detective, subject to a search warrant, and having previously invoked his right to have an attorney present, he was in custody at the time he made the statement to the law enforcement officer. Id. The trial court denied the objection finding Petitioner was at the nurse's station in the jail for the purpose of getting body samples, subsequent to a search warrant. Id. at 503. The court found the statement to be a voluntary statement, not subject to questioning by an officer. Id.

***25** Thereafter, before the jury, Detective Bogers testified on direct examination that after the samples were taken pursuant to a search warrant, Mr. Taylor asked Detective Bogers "how long would it take for the test to be sent off and returned with the results." Id. at 504. Detective Bogers said he asked why, and Petitioner said, he was "just wondering when we would be back out to pick him up." Id. Detective Bogers confirmed that Petitioner was not being questioned at the time he made his statement. Id. at 504-505.

In ground four, Petitioner raises claims under both the Fifth and Sixth Amendments to the United States Constitution. Notably, "[t]he text of the [Sixth] Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence [sic]." Michigan v. Harvey, 494 U.S. 344, 348 (1990). Of import, "[t]he Fifth

Amendment prohibits the admission at trial of compelled testimonial self-incriminating statements—inculpatory statements made to law enforcement while in custody—providing, in relevant part that '[n]o person... shall be compelled in any criminal case to be a witness against himself[.]' " Gore v. Sec'y for Dep't of Corr., 492 F.3d 1273, 1295 (11th Cir. 2007) (quoting U.S. Const. amend. V), cert. denied, 552 U.S. 1190 (2008).

This Court will give AEDPA deference to the FSC's decision. The decision was not contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts. As such ground four is due to be denied as AEDPA deference is due and Petitioner is not entitled to habeas relief. An explanation follows.

In the instant case, the Sixth Amendment right to counsel had not attached because the government had not yet committed itself to prosecute.[25] Moran v. Burbine, 475 U.S. 412, 432 (1986). See Gore, 492 F.3d at 1303 (the right "attaches at the initiation of formal criminal proceedings.") (footnote and citations omitted). See also Fellers v. United States, 540 U.S. 519, 523 (2004) (the right attaches when judicial proceedings are initiated by formal charge, preliminary hearing, indictment, information, or arraignment). When Petitioner uttered the comment, on February 14, 1991, he was not under arrest. He was subject to a search warrant and not free to leave until after the samples were taken. Petitioner initiated a conversation, and his comment was not made until after the samples had been taken, when Petitioner was free to leave the jail as he had already provided the samples and was not in custody.

25 The record demonstrates a judge signed an arrest warrant on February 16, 1991 and Petitioner was arrested on that date. Ex. 1 at 1-2.

Furthermore, there was no Fifth Amendment (the privilege against self-incrimination) violation because Petitioner was not being interrogated when he made the statement. See Montejo v. La., 556 U.S. 778, 786 (2009) (interrogation by the state is a critical stage of the criminal proceeding); Edwards v. Arizona, 451 U.S. 477, 485-86 (1981) ("The Fifth Amendment right identified in Miranda is the right to have counsel present at any custodial interrogation. Absent interrogation, there would have been no infringement of the right...."). [26]

26 Miranda v. Arizona, 384 U.S. 436 (1966).

Upon review, Petitioner cannot satisfy the "contrary to" test of 28 U.S.C. § 2254(d)(1) as the state court rejected the claim based on the relevant law pursuant to the Sixth and Fifth Amendments. The Court finds Petitioner has not shown the state court unreasonably applied the law or unreasonably determined the facts. Indeed, the state court was objectively reasonable in its inquiry. Therefore, deference is due to the FSC's decision affirming the decision of the trial court. Petitioner is not entitled to habeas relief on ground four of the Petition.[27]

27 Although Respondents attempt to rely on Stone v. Powell, 428 U.S. 465, 490 (1976) to support their argument, Response at 106-107, the Court finds this argument unpersuasive. The rationale in Stone v. Powell has not been extended beyond Fourth Amendment search and seizure. Of import, the Supreme Court declined to extend Stone to Fifth Amendment Miranda claims. Withrow v. Williams, 507 U.S. 680, 682-83 (1993) ("Stone's restriction on the exercise of federal habeas jurisdiction does not extend to a state prisoner's claim that his conviction rests on statements obtained in violation of the safeguards mandated by Miranda[.]"). The Supreme Court continues to limit Stone's reach. See Respondents' Notice of Supplemental Authority (Doc. 16). See also Purvis v. Sec'y Dep't of Corr., No. 4:17cv83/WS/EMT, 2018 WL 10509906, at *36 (N.D. Fla. Sept. 4, 2018) (noting the Supreme Court refused to extend Stone to a claim raised pursuant to the Fifth Amendment that statements were elicited without satisfying Miranda), report and recommendation adopted by 2018 WL 5809959 (N.D. Fla. Nov. 5, 2018); Dimanche v. Sec'y, Dep't of Corr., No. 6:11-cv-944-Orl-36DAB, 2013 WL 2447950, at *8 (M.D. Fla. June 5, 2013) (not reported in F.Supp.2d) (same); Thompson v. Gordy, No. 3:15-cv-01329-KOB-JEO, 2018 WL 3749474, at *17 (N.D. Ala. Apr. 25, 2018) (not reported in F. Supp.) (recognizing the Supreme Court made it explicitly clear that the rationale in Stone fails to extend to Fifth, Sixth, or Fourteenth Amendment violations), report and recommendation adopted by 2018 WL 3748403 (N.D. Ala. Aug. 7, 2018); Blackwell v. Sec'y, Dep't of Corr., No. 3:12-cv-518-J- 32JBT, 2015 WL 5599828, at *14 (M.D. Fla. Sept. 22, 2015) (not reported in F.Supp.3d) (finding respondents incorrect in their assertion that Stone bars Sixth and Fourteenth Amendment claims).

***26** Accordingly, it is now

ORDERED AND ADJUDGED:

1. The Petition for Writ of Habeas Corpus (Doc. 1) is **DENIED**.

2. This action is **DISMISSED WITH PREJUDICE**.

3. The **Clerk** shall enter judgment accordingly and close this case.

4. If Petitioner appeals the denial of his Petition for Writ of Habeas Corpus (Doc. 1), **the Court denies a certificate of appealability**.[28] Because this Court has determined that a certificate of appealability is not warranted, the **Clerk** shall terminate from the pending motions report any motion to proceed on appeal as a pauper that may be filed in this case. Such termination shall serve as a denial of the motion.

28 This Court should issue a certificate of appealability only if a petitioner makes

"a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this substantial showing, Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Tennard v. Dretke, 542 U.S. 274, 282 (2004) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further,' " Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). Upon due consideration, this Court will deny a certificate of appealability.

DONE AND ORDERED at Jacksonville, Florida, this 19th day of May, 2021.

All Citations

Slip Copy, 2021 WL 2003122

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62 So.3d 1101
Supreme Court of Florida.

Steven Richard TAYLOR, Appellant,
v.
STATE of Florida, Appellee.
Steven Richard Taylor, Petitioner,
v.
Walter A. McNeil, etc., Respondent.

Nos. SC09–1382, SC10–143.
|
Feb. 10, 2011.
|
Rehearing Denied April 7, 2011.

Synopsis

Background: Defendant was convicted of first-degree murder, burglary of a dwelling, and sexual battery in the Circuit Court, Duval County, R. Hudson Olliff, J., and sentenced to death. He appealed. The Supreme Court, 630 So.2d 1038, affirmed. Subsequently, defendant filed motion for postconviction relief. The Circuit Court, Duval County, W. Gregg McCaulie, J., denied the motion. Defendant appealed. Defendant also filed petition for writ of habeas corpus, alleging claims of ineffective assistance of counsel.

Holdings: The Supreme Court held that:

trial counsel was not deficient to failing to request a *Frye* hearing to challenge DNA evidence;

state did not inadvertently or willfully conceal name of state DNA laboratory analyst;

prosecutor did not improperly comment on presumption of innocence;

state failure to disclose certain DNA testing protocols was not a *Brady* violation; and

state's failure to disclose report on DNA analysis until three days before trial was not a *Brady* violation.

Trial court affirmed; petition for habeas corpus denied.

Attorneys and Law Firms

***1106** Michael P. Reiter, Venice, FL, for Appellant/Petitioner.

Pamela Jo Bondi, Attorney General, and Stephen R. White, Assistant Attorney General, Tallahassee, FL, for Appellee/Respondent.

Opinion

PER CURIAM.

Steven Richard Taylor appeals the denial of his amended motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. Through his postconviction motion, Taylor challenges his capital murder conviction and sentence of death. Taylor has also filed a petition for writ of habeas corpus, through which he alleges ineffective assistance of appellate counsel due to counsel's failure to raise several issues on direct appeal. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const. For the reasons discussed below, we

affirm the trial court's denial of his rule 3.850 motion and deny relief on his petition for writ of habeas corpus.

FACTS AND PROCEDURAL HISTORY

Taylor is an inmate under sentence of death. Through our prior opinion addressing Taylor's direct appeal, we have detailed the facts and procedural background surrounding the offense. *See Taylor v. State,* 630 So.2d 1038, 1039–41 (Fla.1993).

The case currently under review is Taylor's first postconviction proceeding before this Court. On November 1, 1995, Taylor filed a "shell" motion to vacate his judgment of conviction and sentence. Amendments to the initial motion were filed on June 23, 2003, and May 13, 2004. The final amended motion for postconviction relief was filed on May 23, 2005. In his final amended motion, Taylor raised twenty-one claims.[1] The postconviction court held a *Huff*[2] hearing on December 13, ***1107** 2005, and on June 21, 2006. The postconviction court issued an order granting an evidentiary hearing on a limited number of those claims, which was held on August 6 and August 7, 2007.

1 The claims were as follows: (I) access to records and discovery violations; (II) production violations; (III) failure to produce trial file; (IV) ineffective assistance of counsel (DNA); (V) improper burden shifting through prosecutorial comments and jury instructions during the guilt phase; (VI) ineffective assistance of counsel (related to Timothy Cowart and mental retardation); (VII) improper jury instructions; (VIII) improper jury instructions; (IX) ineffective assistance of counsel (penalty phase); (X) improper weighing of mitigating and aggravating circumstances; (XI) ineffective assistance of counsel (mental health assistance); (XII) mental retardation; (XIII) challenge to Florida's sentencing scheme; (XIV) improper suggestion of death penalty; (XV) improper burden shifting in penalty phase; (XVI) improper comments to jury; (XVII) challenge to murder in course of a felony aggravating factor instruction; (XVIII) failure to identify mitigating factors; (XIX) improper instruction on aggravating factors; (XX) challenge to method of execution; and (XXI) change in law requires new penalty phase proceeding.

2 *Huff v. State,* 622 So.2d 982 (Fla.1993).

During the evidentiary hearing, the defense presented the testimony of (1) the current State Attorney for the Fourth Judicial Circuit who served as lead prosecutor at the initial trial; (2) an assistant state attorney who served as counsel at the initial trial and was serving as lead counsel in postconviction litigation; (3) Taylor's counsel during the initial trial; (4) the second chair counsel for Taylor at the initial trial; (5) Taylor's first postconviction attorney; (6) a police officer who testified at the initial trial; (7) an office employee of the Duval County Clerk of Courts who processed

evidence at the time of the initial trial; (8) Shirley Zeigler (a former Florida Department of Law Enforcement (FDLE) DNA analyst); (9) Dr. Randell Libby (DNA expert); and (10) Timothy Cowart (Taylor's former cellmate, who testified against Taylor at the initial trial). The State presented Dr. James Pollock (the DNA expert who testified for the State at the initial trial) and also the assistant state attorney who was initially presented by Taylor.

To challenge the DNA evidence presented against Taylor at trial, the defense presented Dr. Libby to address alleged problems associated with Dr. Pollock's State testing procedures. Dr. Libby testified that the FBI DNA testing protocol utilizes five to eight probes, but Dr. Pollock's State testing only utilized four. Further, Dr. Libby opined that three of the four probes utilized by Dr. Pollock were inconclusive. One reason Dr. Libby used as a predicate for concluding that the probes were inconclusive was due to differences in the calculated lengths reports created by Dr. Pollock and Shirley Zeigler. The defense also presented Shirley Zeigler, who worked as a Florida Department of Law Enforcement (FDLE) analyst at the time the DNA evidence was processed. Zeigler's initials were found on the calculated fragment report that was used by Dr. Pollock at Taylor's initial trial. Zeigler testified that she would have found two of the probes utilized by Dr. Pollock to be inconclusive, but did not disagree with Dr. Pollock's ultimate findings.

Of additional note, during the evidentiary hearing, a police officer noted that, at trial, he testified that one of the exhibits collected from the scene represented a white blouse. On cross-examination, however, the officer indicated that he did not remember the specific color of the blouse he collected on the day he completed his report. Further, Timothy Cowart was also presented as a witness at the evidentiary hearing to recant some of his testimony that he had previously presented during the initial trial.

On October 5, 2007, the State filed a Motion to Strike and Objection to Defendant's Written Closing Argument and Memorandum of Law. Taylor filed his Response to the State's Motion with an accompanying Motion to Amend the Pleadings to Conform with the Evidence. On June 22, 2009, the postconviction court denied Taylor's rule 3.850 motion. On June 26, 2009, the postconviction court filed an order granting the State's motion to strike and denying Taylor's motion to amend. This appeal followed.

ANALYSIS

Motion to Amend

Taylor first asserts that the trial court erred in granting the State's motion to strike and denying his motion to amend. In his final amended motion for postconviction relief, Taylor raised a number of ***1108** challenges with regard to the DNA evidence presented against him at trial. After the postconviction evidentiary hearing, Taylor filed a closing memorandum in the trial court, which also asserted a number of challenges to the DNA evidence presented at trial. The State subsequently filed a motion to strike portions of Taylor's closing memorandum that were

allegedly not covered in his postconviction motion. The trial court did not rule on the State's motion to strike until after it entered its order denying postconviction relief. In a two page Order on Pending Motions, the trial court simply held: "Based upon the pleadings and consistent with the Court's Order Denying Defendant's Motion for Post Conviction relief ... [t]he State's Motion to Strike and Objection to Defendant's Written Closing Argument and Memorandum of Law is GRANTED .... [and] [t]he Defendant's Motion to Amend the Pleadings to Conform with the Evidence is DENIED."

In his first claim on appeal, Taylor asserts that his closing memorandum did not raise any new claims, but even if it did, the trial court abused its discretion by failing to adhere to Florida Rule of Criminal Procedure 3.850 and Florida Rule of Civil Procedure 1.190(b). First, we must determine whether Taylor's amended motion for postconviction relief is governed by Florida Rule of Criminal Procedure 3.850 or 3.851. The question of which rules of procedure are applicable is a question of law that is reviewed de novo. *See GTC, Inc. v. Edgar,* 967 So.2d 781, 785 (Fla.2007) ("Generally speaking, statutory interpretation is a question of law subject to de novo review.") (citing *BellSouth Telecomm., Inc. v. Meeks,* 863 So.2d 287, 289 (Fla.2003)).

Rule 3.851(a) provides:

> This rule shall apply to all motions and petitions for any type of postconviction or collateral relief brought by a prisoner in state custody who has been sentenced to death and whose conviction and death sentence have been affirmed on direct appeal. It shall apply to all postconviction motions filed on or after October 1, 2001, by prisoners who are under sentence of death. *Motions pending on that date are governed by the version of this rule in effect immediately prior to that date.*

(Emphasis supplied.) Taylor's initial motion to vacate judgment and sentence, which was a "shell motion," was filed on November 1, 1995. That motion was still pending on October 1, 2001, and is thus governed by "the version of this rule in effect immediately prior to that date," which, here, is rule 3.850. Fla. R.Crim. P. 3.851(a).

Further, the applicability of rule 3.850 is consistent with this Court's decision in *Gore v. State,* 964 So.2d 1257 (Fla.2007). In that case, Gore's initial postconviction motion was filed pursuant to rule 3.850 on September 28, 1999, but his amended postconviction motion was filed on January 7, 2002, after amendment of the rules. *See Gore,* 964 So.2d at 1261 n. 1. This Court held that rule 3.850, not rule 3.851, applied. *See id.* at 1261. Here the initial motion for postconviction relief was filed prior to the enactment of rule 3.851, and an amended motion was filed after that date. Taylor's amended motion for postconviction

relief is therefore governed by rule 3.850, not rule 3.851 as held in *Gore.*

Rule 3.850, however, is silent with regard to amendments to postconviction motions. Taylor asserts that Florida Rule of Civil Procedure 1.190 is applicable here because in *Allen v. Butterworth,* 756 So.2d 52 (Fla.2000), this Court acknowledged that postconviction cases are quasi-civil in nature. Taylor's argument, however, completely disregards this Court's decision in ***1109** *Huff v. State,* 762 So.2d 476 (Fla.2000). In *Huff,* this Court explicitly stated that "[t]he standard of review for a trial court's determination regarding a motion to amend a rule 3.850 motion is whether there was an abuse of discretion." 762 So.2d at 481 (citing *McConn v. State,* 708 So.2d 308, 310 (Fla. 2d DCA 1998)). Accordingly, because Taylor's motion for postconviction relief is governed by rule 3.850, this Court only reviews the denial of Taylor's motion to amend for an abuse of discretion. *See Walton v. State,* 3 So.3d 1000, 1012 (Fla.2009) (citing *Huff v. State,* 762 So.2d 476, 481 (Fla.2000)).

Here, the trial court did not abuse its discretion in denying Taylor's motion to amend. The arguments asserted by Taylor in his closing memorandum to the trial court were merely refinements and expansions upon arguments that had already been raised in his amended motion for postconviction relief. The trial court meticulously analyzed each of Taylor's challenges to the DNA evidence, even as articulated by Taylor in his closing memorandum. The trial court actually addressed each of Taylor's claims as they would have appeared in his amended motion, and therefore, we need not reach the issue of whether the trial court's denial of Taylor's motion to amend was an abuse of discretion. Accordingly, we deny relief on this claim.

Ineffective Assistance of Counsel

Standard of Review

In *Pagan v. State,* 29 So.3d 938, 948–49 (Fla.2009), this Court provided the appropriate standard of review for ineffective assistance of counsel claims:

> Following the United States 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, two requirements must be satisfied:
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> > 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. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.
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> *Maxwell v. Wainwright,* 490 So.2d 927, 932 (Fla.1986) (citations omitted). Where this

Court previously has rejected a substantive claim on the merits, counsel cannot be deemed ineffective for failing to make a meritless argument. *See Heath v. State,* 3 So.3d 1017, 1033 (Fla.2009).

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 trial court's factual findings that are supported by competent, substantial evidence, but reviewing the trial court's legal conclusions de novo. *See Sochor v. State,* 883 So.2d 766, 771–72 (Fla.2004).

There is a strong presumption that trial counsel's performance was not ineffective. *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 ***1110** 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.* In *Occhicone v. State,* 768 So.2d 1037, 1048 (Fla.2000), this Court held that "strategic 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."

With respect to the investigation and presentation of mitigation evidence, the Supreme Court observed in *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), that "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case." *Id.* at 533, 123 S.Ct. 2527. Rather, in deciding whether trial counsel exercised reasonable professional judgment with regard to the investigation and presentation of mitigation evidence, a reviewing court must focus on whether the investigation resulting in counsel's decision not to introduce certain mitigation evidence was itself reasonable. *Id.* at 523, 123 S.Ct. 2527; *Strickland,* 466 U.S. at 690–91, 104 S.Ct. 2052. When making this assessment, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins,* 539 U.S. at 527, 123 S.Ct. 2527.

An attorney can almost always be second-guessed for not doing more. However, this is not the standard by which counsel's performance is to be evaluated under *Strickland.* Deficient performance involves "particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent

performance under prevailing professional standards." *Maxwell,* 490 So.2d at 932.

DNA Evidence

Taylor asserts that trial counsel was ineffective for (1) failing to request a *Frye*[3] hearing; (2) failing to object to admission of DNA evidence and to Dr. Pollock's testimony about DNA; (3) failing to provide any expert testimony to support trial counsel's attack on the DNA evidence; (4) withdrawing a previously filed motion for continuance; (5) failing to request a *Richardson*[4] hearing when Zeigler's name was revealed for the first time at trial; (6) failing to develop the theory of a second blouse; and (7) failing to object to improper prosecutorial comments. As further discussed below, we conclude that Taylor has failed to satisfy his burden to demonstrate ineffectiveness for any of these claims.

3 *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923)

4 *Richardson v. State,* 246 So.2d 771 (Fla.1971).

1) Failure to Request a *Frye* Hearing

The postconviction court correctly found that trial counsel was not ineffective for failing to request a *Frye* hearing to challenge DNA evidence. As the postconviction court noted in its final order, this Court has held that any refinements or additions to the *Frye* analysis which have evolved since the trial in this case was conducted cannot be retroactively applied ***1111** in evaluating the effectiveness of trial counsel's performance. *See Armstrong v. State,* 862 So.2d 705, 713 (Fla.2003). The bulk of Taylor's argument relies on case law that developed *after* the conclusion of the trial. This Court has made clear that trial counsel "cannot be held ineffective for failing to anticipate the change in the law." *Nelms v. State,* 596 So.2d 441, 442 (Fla.1992) (citing *Stevens v. State,* 552 So.2d 1082, 1085 (Fla.1989)).

We conclude that the decision by trial counsel not to request a *Frye* hearing was reasonable. The only authority presented by Taylor during postconviction that both challenged the use of DNA evidence *and* existed at the time of the trial are academic articles and isolated, nonbinding decisions. While this evidence certainly *could* have been presented at trial, it was not essential for counsel to be determined to be effective. Further, none of the authority referred to by Taylor was binding on the trial court. Trial counsel's omission of the specific authority referred to by Taylor on postconviction was reasonable and cannot be considered "outside the broad range of reasonably competent performance under prevailing professional standards." *Pagan,* 29 So.3d at 948 (quoting *Maxwell,* 490 So.2d at 932). Taylor therefore fails under the deficiency prong, and it is not necessary for us to address the prejudice prong of *Strickland* for this claim. *See Reaves v. State,* 826 So.2d 932, 939 n. 10 (Fla.2002) (quoting *Strickland,* 466 U.S. at 697, 104 S.Ct. 2052 ("[T]here is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one.")).

2) Failure to Object to Admission of DNA Evidence and Failure to Object to Dr. Pollock's Testimony About DNA

Taylor asserts that trial counsel was ineffective for failing to raise specific objections with regard to both the DNA evidence generally and Dr. Pollock's testimony. A review of the final order of the postconviction court reveals that the trial court articulated specific instances where trial counsel did challenge the DNA evidence. Further, although trial counsel did not present a DNA expert at trial who had been hired to assist the defense as a witness, trial counsel did testify that he had multiple conversations with the expert and was prepared to address the DNA evidence at trial. Counsel stated, "My feeling and my level of comfort after talking about this with [the DNA expert] was very good." Here, a review of the record and the final order of the postconviction court reveals that trial counsel's alleged failure to object with regard to the DNA evidence, especially when viewed in unison with the vigorous cross-examine of Dr. Pollock, was reasonable. Trial counsel's failure to make specific objections appears to be the product of an overall strategy, and therefore his allegation of omission of certain specific objections does not amount to deficient performance. *See Occhicone v. State,* 768 So.2d 1037, 1048 (Fla.2000) ("[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."). Taylor fails to satisfy the deficiency prong of *Strickland,* and, therefore, we need not address the prejudice prong of *Strickland* for this claim. *See Reaves,* 826 So.2d at 939.

3) Failure to provide any expert testimony to support trial counsel's attack on the DNA evidence

Taylor asserts that trial counsel was ineffective for failing to present the defense's DNA expert to testify at trial. ***1112** At the evidentiary hearing, when asked why he had not presented the defense expert as a witness, trial counsel responded that he was comfortable in cross-examining Dr. Pollock. Trial counsel therefore made a strategic decision *not* to call the expert. As noted above, conduct that appears to be the product of an overall strategy will not satisfy the deficiency prong of *Strickland. See Occhicone v. State,* 768 So.2d at 1048.

4) Withdrawing motion for continuance

Taylor next asserts that trial counsel was ineffective for withdrawing his motion for continuance days before trial, even though the motion indicated that his DNA expert had not completed his review of the records. In response to inquiring as to why he did not pursue the continuance, defense trial counsel responded that his DNA expert informed him prior to trial that in the expert's opinion, the DNA testing was properly completed and that he did not have any major complaints with the DNA testing or DNA evidence. Trial counsel therefore appeared to make a strategic decision not to proceed further with the motion for a continuance because the expert's testimony would have been detrimental to the defense, and his withdrawal of the motion does not constitute deficient performance as required

by *Strickland.* *See* *Occhicone,* 768 So.2d at 1048.

5) Failure to request *Richardson* hearing when Zeigler's name was revealed at trial

Taylor asserts that trial counsel was ineffective for failing to request a *Richardson* hearing when Zeigler's name was revealed for the first time at trial. First, Taylor fails to establish any deficient performance stemming from trial counsel's failure to request a *Richardson* hearing. As articulated by this Court in *Sinclair v. State,* 657 So.2d 1138, 1140 (Fla.1995):

> [W]hen the State violates a discovery rule, the trial court has discretion to determine whether the violation resulted in harm or prejudice to the defendant, but this discretion can be properly exercised only after adequate inquiry into all the surrounding circumstances. *State v. Hall,* 509 So.2d 1093 (Fla.1987). In making such an inquiry, the trial judge must first determine whether a discovery violation occurred. If a violation is found, *the court must assess whether the State's discovery violation was inadvertent or willful,* whether the violation was trivial or substantial, and most importantly, what affect it had on the defendant's ability to prepare for trial.

(Emphasis supplied.) Here, the State had provided defense trial counsel with the calculated fragment report upon which Zeigler's initials appeared. Trial counsel was therefore aware of Zeigler's existence, and although trial counsel may not have known Zeigler's full name, the State certainly did not inadvertently or willfully conceal her identity. Trial counsel, therefore, cannot be said to have been deficient in failing to request a *Richardson* hearing when such a hearing was not appropriate under the circumstances.

Even if trial counsel's failure did amount to deficient performance, Taylor has failed to establish any prejudice. The record reveals that although Zeigler testified during postconviction proceedings that there were differences between her report and that of Dr. Pollock, she did not disagree with Dr. Pollock's ultimate findings. Accordingly, any potential error in failing to request a *Richardson* hearing was harmless. Taylor therefore fails to meet his burden under the prejudice prong of *Strickland.* Taylor has failed to establish either of the two prongs required by ***1113** *Strickland,* so relief is not warranted for this claim.

6) Blouse

Taylor next asserts that that the trial court erred in denying relief on his claim that trial counsel was ineffective for failing to develop the theory of a second, white blouse. This claim is based upon an officer testifying at trial that he handled

a white blouse, as opposed to the green blouse that was involved with the underlying murder. The crux of Taylor's ineffective assistance of counsel claim, therefore, hinges on the existence of a phantom white blouse. The trial court clearly examined the record, processed the evidence revealed during the evidentiary hearing, and made a *factual* determination that "it was the green blouse that the witnesses were referring to in their testimony and which was entered into evidence at trial." This Court will defer to the factual findings of the trial court on this issue as this Court does not substitute its judgment for that of the trial court on questions of the credibility of witnesses and the appropriate weight to be given to the evidence. *See* *Lowe v. State,* 2 So.3d 21, 30 (Fla.2008) (citing *Blanco v. State,* 702 So.2d 1250, 1252 (Fla.1997)). Competent, substantial evidence exists to support the trial court's finding that there is not, nor has there ever been, a phantom white blouse. Accordingly, trial counsel cannot be said to have been deficient for failing to develop a theory revolving around the existence of such a blouse, nor can Taylor be said to have been prejudiced if no such blouse existed. This claim is a red herring and does not warrant relief.

7) Improper Prosecutorial Comments

Taylor next challenges trial counsel's failure to object to the following statement made by the prosecutor during closing arguments:

> You will recall that during our opening statements I was somewhat careful not to overstate the evidence because during your opening statements there is, as the court points out, a presumption of innocence. And the presumption of innocence does not leave the defendant *until evidence has been presented that wipes away that presumption. There is no longer a presumption of innocence as evidence has been presented....*

The trial court properly relied on this Court's decision in *Dailey v. State,* 965 So.2d 38, 44 (Fla.2007), where we stated: "Regarding the prosecutor's statements concerning Dailey's presumption of innocence, we agree with the trial court that *when read in context,* the comments appear to be a statement by the prosecutor of her belief that the State satisfied its burden of proof. Therefore, counsel's failure to object was not deficient." *Dailey,* 965 So.2d at 44 (emphasis supplied). Here, the prosecutor prefaced his allegedly improper statement with a reiteration that the presumption of innocence exists. Further, the prosecutor stated that the presumption is not removed "until evidence has been presented that wipes away that presumption." Viewed in context, the comment in question was not improper, and counsel's failure to object cannot amount to deficient performance. *See* *Dailey,* 965 So.2d at 44.

Further, the finding of the trial court is consistent with this Court's decision in *Belcher v. State,* 961 So.2d 239, 246 (Fla.2007). In that case, the prosecutor, during

voir dire, asked: "Do you understand that does not mean he is innocent? It means he is presumed to be innocent until you hear the evidence to the contrary? Can all of you agree with that?" This Court stated: "The transcripts indicate ***1114** that the prosecutor was merely explaining the presumption of innocence to prospective jurors. In addition, as the lower court concluded, we do not see a proper basis for defense counsel to object." The comments in *Belcher* are similar to those made by the prosecutor here. "Where this Court previously has rejected a substantive claim on the merits, counsel cannot be deemed ineffective for failing to make a meritless argument." *Pagan,* 29 So.3d at 949 (citing *Heath v. State,* 3 So.3d 1017, 1033 (Fla.2009)). Accordingly, we deny relief on this claim.

Brady [5] *and Giglio* [6] *Claims*

5 *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

6 *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

Standard of Review

Pursuant to *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the State is required to disclose material information within its possession or control that is favorable to the defense. *See Pagan,* 29 So.3d at 946. To demonstrate a *Brady* violation, a defendant has the burden to establish (1) that *favorable evidence,* either exculpatory or impeaching, (2) was *willfully* or inadvertently suppressed by the State, and (3) because the evidence was *material,* the defendant was prejudiced. *See Hurst v. State,* 18 So.3d 975, 988 (Fla.2009) (citing *Strickler v. Greene,* 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). This Court has explained that "[t]here is no *Brady* violation where the information is equally accessible to the defense and the prosecution, or where the defense ... had the information." *Provenzano v. State,* 616 So.2d 428, 430 (Fla.1993) (citing *Hegwood v. State,* 575 So.2d 170, 172 (Fla.1991); *James v. State,* 453 So.2d 786, 790 (Fla.1984)). Questions of whether evidence is exculpatory or impeaching and whether the State suppressed evidence are questions of fact, and the trial court's determinations of such questions will not be disturbed if they are supported by competent, substantial evidence. *See Way v. State,* 760 So.2d 903, 911 (Fla.2000). To satisfy the materiality prong of *Brady,* a defendant must prove that there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Guzman v. State,* 868 So.2d 498, 506 (Fla.2003) (quoting *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (plurality opinion)). In other words, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Smith v. State,* 931 So.2d 790, 796 (Fla.2006) (quoting *Strickler,* 527 U.S. at 290, 119 S.Ct. 1936).

A claim pursuant to *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), alleges that a prosecutor knowingly presented false testimony against the defendant. *See Green v. State,* 975 So.2d 1090, 1106 (Fla.2008). To demonstrate a *Giglio* violation, a defendant must prove that (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material. *See San Martin v. State,* 995 So.2d 247, 254 (Fla.2008). If the defendant establishes that a prosecutor has knowingly presented false testimony, the burden then shifts to the State to prove that there is not any reasonable possibility that the false testimony could have affected the judgment of the jury. *See* ***1115** *Guzman,* 868 So.2d at 506 (citing *United States v. Agurs,* 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). While materiality is a component of both a *Giglio* and *Brady* claim, the *Giglio* standard of materiality is more defense friendly. *See Guzman,* 868 So.2d at 507.

For both *Brady* and *Giglio* claims, as with any other postconviction claim, the defendant ultimately carries the burden of establishing a prima facie case based upon a legally valid claim. *See Freeman v. State,* 761 So.2d 1055, 1061 (Fla.2000). Mere conclusory allegations are not sufficient to meet this burden. *See id.* (citing *Kennedy v. State,* 547 So.2d 912 (Fla.1989)).

DNA Evidence

Taylor asserts that critical documents and witness names were either not provided to the defense or provided late. Those documents and names include: (1) FBI/FDLE protocols; (2) calculated fragment length reports, summaries, and bench notes; and (3) the name of Shirley Zeigler. For the reasons discussed below, we deny relief on each of these allegations.

1) FBI/FDLE Protocols

Taylor asserts that the FBI/FDLE protocols, allegedly not provided by the State until postconviction litigation, "established that Dr. Pollock either changed the protocol or violated the protocol in his conclusions." The only "violation" identified by Taylor, however, is the fact that the FBI protocols utilized five to eight probes, while Dr. Pollock only used four. This "violation," according to the defense's expert, undermined the reliability of the DNA evidence.

During the evidentiary hearing, Dr. Pollock acknowledged that he deviated from the FBI protocols. The only evidence presented by Taylor during the evidentiary hearing that directly challenged Dr. Pollock's ultimate findings, however, was the testimony of Dr. Libby, whom the postconviction court explicitly determined to be unreliable. Although the postconviction court did not examine this evidence in the context of a *Brady* or *Giglio* violation, it still assessed the credibility of Dr. Libby with regard to Dr. Pollock's ultimate findings. The postconviction court considered, and rejected, the relevance

of the FBI/FDLE protocols in the ineffective assistance of counsel context.

This Court will defer to the factual findings of the postconviction court on this issue as this Court does not substitute its judgment for that of the postconviction court on questions of the credibility of witnesses and the appropriate weight to be given to the evidence. *See* *Lowe v. State,* 2 So.3d at 30 (citing *Blanco,* 702 So.2d at 1252). Even if we assume that the State inadvertently failed to disclose these protocols, in light of the trial court's findings of fact, the alleged violations cannot "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Smith,* 931 So.2d at 796 (quoting *Strickler,* 527 U.S. at 290, 119 S.Ct. 1936) (articulating the materiality prong of *Brady*). Further, there is no reasonable possibility that the allegedly false testimony could have affected the judgment of the jury. *See id.* (articulating the materiality prong of a *Giglio* claim). Accordingly, this subclaim fails under the materiality prongs of both *Brady* and *Giglio.*

2) Calculated Length Reports, Summaries, and Bench Notes

Taylor asserts that the calculated length reports are material because they establish critical differences in lengths of DNA strands calculated by Dr. Pollock compared to those calculated by Shirley ***1116** Zeigler. In his initial brief to this Court, Taylor acknowledges that "it wasn't until three days before trial that [the defense's DNA expert] received the calculated fragment length reports/summaries and bench notes." Taylor further asserts that trial counsel "was essentially sandbagged into: (1) not calling [the DNA expert] to testify, (2) not having [the DNA expert] present during the trial, (3) withdrawing his Motion for Continuance, (4) being unable to discern what information Shirley Zeigler could supply, and (5) being unable to call her as a witness to impeach Dr. Pollock's trial testimony."

First, because Taylor ultimately asserts a discovery violation before trial, this claim should have been raised pursuant to *Richardson v. State,* 246 So.2d 771 (Fla.1971), during trial, not in a postconviction motion pursuant to *Brady.* "Where a defendant fails to timely object to a discovery violation or to request a *Richardson* hearing, the defendant does not preserve the point for appellate review." *Major v. State,* 979 So.2d 243, 244 (Fla. 3d DCA 2007) (citing *Celestine v. State,* 717 So.2d 205, 206 (Fla. 5th DCA 1998)). The only cognizable claim here, therefore, is that trial counsel was ineffective for failing to request a *Richardson* hearing on the alleged discovery violation. As discussed in the previous section, this claim is also without merit.

Second, even if this were a cognizable *Brady* claim, the evidence is not material. As discussed above, the only evidence presented by Taylor during the evidentiary hearing that challenged the DNA evidence was the testimony of Dr. Libby and Shirley Zeigler. These two witnesses testified with regard to the potential discrepancies in the calculated fragment length reports. As previously articulated, however, Dr. Libby was

found to be not credible by the trial court, and Zeigler did not disagree with the ultimate findings of Dr. Pollock. The alleged violations, therefore, cannot "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Smith,* 931 So.2d at 796 (quoting *Strickler,* 527 U.S. at 290, 119 S.Ct. 1936) (articulating the materiality prong of *Brady*). Nor is there any reasonable possibility that the allegedly false testimony could have affected the judgment of the jury. *See id.* (articulating the materiality prong of a *Giglio* claim). Accordingly, this subclaim fails under the materiality prongs of both *Brady* and *Giglio.*

3) Name of Shirley Zeigler

Finally, Taylor asserts that the State suppressed the name of Shirley Zeigler, which was allegedly only revealed during the cross-examination of Dr. Pollock. Taylor asserts that Zeigler could have called into question Dr. Pollock's testimony, and had she been called at trial, the defense would have been able to impeach Dr. Pollock's testimony.

First, because Taylor ultimately asserts a discovery violation that was discovered and known during trial, this claim should have been raised pursuant to *Richardson* at trial, not in a *Brady* claim at the postconviction stage. *See Major,* 979 So.2d at 244 (citing *Celestine,* 717 So.2d at 206). The only cognizable claim here, therefore, is that trial counsel was ineffective for failing to request a *Richardson* hearing, which, as previously discussed, is without merit.

Second, this is not a valid *Brady* violation because the State did not suppress the evidence. Taylor admits in his brief that he possessed Zeigler's initials before trial as they were contained on the calculated fragment reports. Taylor simply accuses the State of failing to identify whom those initials represented. In fact, trial counsel ***1117** was able to specifically identify those initials during the cross-examination of Dr. Pollock. Taylor thus fails to establish that the State suppressed Zeigler's name when it disclosed her initials through discovery. *See Ferrell v. State,* 29 So.3d 959, 980 (Fla.2010) ("Because the evidence at the evidentiary hearing established that Ferrell's trial counsel was in possession of the information Ferrell alleged had been withheld, this *Brady* claim must fail.").

Third, even if this were a cognizable *Brady* or *Giglio* claim, the evidence is not material. Zeigler testified that despite her disagreement with certain elements of Dr. Pollock's testing procedures, she did not ultimately disagree with his findings. Her testimony, therefore, is unlikely to undermine confidence in the outcome. *See Guzman,* 868 So.2d at 506 (articulating the materiality prong of a *Brady* claim). Nor is there any reasonable possibility that the false testimony could have affected the judgment of the jury. *See id.* (articulating the materiality prong of a *Giglio* claim). Accordingly, relief is not warranted for this subclaim.

Blouse

Taylor asserts without argument or analysis that the trial court erred in denying relief on his *Brady* and *Giglio* claims related to the blouse. In his amended motion for postconviction relief, along with his initial brief to this Court, Taylor fails to identify a single piece of evidence that was suppressed by the State or any false testimony that was given by a witness. These claims are therefore conclusory and are denied on that basis. *See* *Freeman,* 761 So.2d at 1061 (citing *Kennedy,* 547 So.2d 912).

Newly Discovered Evidence

To obtain a new trial based upon newly discovered evidence, a defendant has the burden to establish two things: (1) the evidence was not known by the trial court, the party, or counsel at the time of trial and the defendant or defense counsel could not have known of it by the use of diligence; and (2) the newly discovered evidence is of such nature that it would probably produce an acquittal on retrial. *See* *Hurst v. State,* 18 So.3d 975, 992 (Fla.2009) (citing *Jones v. State,* 709 So.2d 512, 521 (Fla.1998)).

Here, Taylor asserts that the recanted testimony of Timothy Cowart, Taylor's former cellmate who testified against him during the initial trial, warrants a new trial. This Court has repeatedly held that recantations are "exceedingly unreliable" and that it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. *See* *Archer v. State,* 934 So.2d 1187, 1196 (Fla.2006) (quoting *Armstrong v. State,* 642 So.2d 730, 735 (Fla.1994)). Cowart's recanted testimony is therefore to be reviewed with extreme skepticism. Further, this Court will defer to the factual findings of the trial court on this issue as this Court does not substitute its judgment for that of the trial court on questions of the credibility of witnesses. *See* *Lowe,* 2 So.3d at 30 (citing *Blanco,* 702 So.2d at 1252). Here, the trial court determined that the recanted testimony of Cowart was not credible. In light of the trial court's factual determination that Cowart's recanted testimony is not reliable, we deny relief on this claim.

Ineffective Assistance of Appellate Counsel

Standard of Review

Claims of ineffective assistance of appellate counsel are appropriately presented in a petition for writ of habeas corpus. *See* *Freeman v. State,* 761 So.2d 1055, 1069 (Fla.2000). Consistent with the *Strickland* standard, to grant habeas relief ***1118** based on ineffectiveness of appellate 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,* 761 So.2d at 1069; *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; *see also* *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)).

Analysis

Taylor asserts that appellate counsel was ineffective for failing to (1) raise a claim of fundamental error when the trial court did not order a *Frye* hearing sua sponte; and (2) argue that the prosecutor's comment on the presumption of innocence violated a fundamental right. For the reasons discussed below, we deny relief on both of these claims.

1) Failing to request *Frye* hearing sua sponte

This Court has repeatedly held that absent a proper objection from the offended party, it is not an error for a trial court to admit evidence without a *Frye* hearing. *See* *McDonald v. State,* 743 So.2d 501, 506 (Fla.1999) ("McDonald argues the trial court failed to determine the admissibility of the DNA test results and the basis of the statistical comparisons according to the standards enunciated in *Frye* .... Moreover, in the absence of a proper objection, we find no error in the admission of this evidence.") (citing *Hadden v. State,* 690 So.2d 573, 580 (Fla.1997)); *Hadden,* 690 So.2d at 580 ("Unless the party against whom the evidence is being offered makes this specific objection, the trial court will not have committed error in admitting the evidence.") (citing *Archer v. State,* 673 So.2d 17, 21 (Fla.1996)). Accordingly, as a matter of law, the trial court here did not err in failing to conduct a *Frye* hearing sua sponte.

Taylor's reliance on *Zack v. State,* 911 So.2d 1190, 1201 (Fla.2005), is misguided. Nothing in *Zack* supports Taylor's contention that the trial court should have ordered a *Frye* hearing sua sponte. In fact, the trial court explicitly rejected Zack's contention that the "the trial court should have conducted a hearing sua sponte." *Id.* Further, *Zack* is

distinguishable because the trial, in that case, occurred in 1997, two years after this Court took judicial notice of the reliability of DNA evidence in *Hayes v. State,* 660 So.2d 257 (Fla.1995).

The trial court did not err in failing to order a *Frye* hearing sua sponte. Accordingly, appellate counsel cannot be said to be ineffective for failing to raise this issue on appeal. We therefore deny relief on this claim.

***1119 2) Improper prosecutorial comments**

Taylor's petition challenges the same comment addressed in the ineffective assistance of trial counsel claim. As articulated previously, this statement was not improper. Accordingly, appellate counsel cannot be deemed to have been ineffective for failing to raise that issue on appeal. *See Pagan,* 29 So.3d at 949 (citing *Heath,* 3 So.3d at 1033).

The petition also challenges the following jury instruction:

> The defendant has entered his plea of not guilty. This means you must presume or believe that the defendant is innocent. This presumption of innocence stays with the defendant as to each material allegation in the charge and through each stage of the trial until that presumption of innocence has been overcome by the evidence to the exclusion of and beyond a reasonable doubt. Now, to overcome the defendant's presumption of innocence, the State has the burden of proving the following two elements: Number one, that the crime with which the defendant is charged was in fact committed, and two, that the defendant is the person who committed the crime.

Jury instructions are subject to the contemporaneous objection rule and, absent an objection at trial, can be raised on appeal *only if* fundamental error occurred. *See Walls v. State,* 926 So.2d 1156, 1180 (Fla.2006) (quoting *State v. Delva,* 575 So.2d 643, 644 (Fla.1991)). With regard to what constitutes fundamental error in a jury instruction, this Court has stated:

> We have explained that for jury instructions to constitute fundamental error, the error must "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Delva,* 575 So.2d at 644–45 (quoting *Brown v. State,* 124 So.2d 481, 484 (Fla.1960)). Further, " 'fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict.' Failing to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error...." *Id.* at

645 (citation omitted) (quoting *Stewart v. State,* 420 So.2d 862, 863 (Fla.1982)).

Garzon v. State, 980 So.2d 1038, 1042 (Fla.2008).

Here, the trial judge appeared to be "merely explaining the presumption of innocence to [the] jurors." *Belcher,* 961 So.2d at 246. Further, the trial judge not only defined what the presumption of innocence means, but also reiterated that the State has the burden to establish the elements of the crime. Accordingly, the jury instruction does not "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *See Garzon,* 980 So.2d at 1042 (quoting *Delva,* 575 So.2d at 644–45). The jury instruction does not constitute fundamental error, and appellate counsel cannot be deemed ineffective for failing to challenge it on appeal. *See Pagan,* 29 So.3d at 949 (citing *Heath,* 3 So.3d at 1033). Accordingly, we deny relief on this claim.

CONCLUSION

For the foregoing reasons, we affirm the denial of the rule 3.850 motion by the postconviction court and deny relief on the petition for writ of habeas corpus.

It is so ordered.

***1120** CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

All Citations

62 So.3d 1101, 36 Fla. L. Weekly S72

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2009 WL 9419304 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida,
Fourth Judicial Circuit.
Duval County

State of Florida,
v.
Steven Richard TAYLOR.

No. 161991CF002456.
June 22, 2009.

***1** Division: CR-A

Order Denying Defendant's Motions for Post Conviction Relief Filed Pursuant to Florida Rules of Criminal Procedure 3.850/3.851

Bernardo de la Rionda, Esquire, Assistant State Attorney, Office of the State Attorney, 220 East Bay Street, Jacksonville, FL 32202-3429.

Stephen R. White, Esquire, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050.

Michael P. Reiter, Esquire, Attorney for the Defendant, 261 S. Orange Avenue, Sarasota, FL 34236-6801.

W. Gregg McGuire, Judge.

This matter is before this Court on the Defendant's Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend filed pursuant to Florida Rules of Criminal Procedure 3.850 and 3.851 on November 1, 1995; Supplemental Motion to Vacate Judgments of Convictions and Sentence with Special Request for Leave to Amend filed on June 23, 2003; Amended Motion to Vacate Judgments of Convictions and Sentences with Special Request for Leave to Amend filed on May 13, 2004; and Motion for Post Conviction Relief to Vacate Judgments of Conviction and Sentence by a Person Under the Sentence of Death and Incorporated Memorandum of Law filed on May 23, 2005. The State filed Responses to the Defendant's Supplemental and Amended Motions on July 15, 2003, June 14, 2004, June 23, 2004, and June 6, 2005.

I. PROCEDURAL HISTORY

On October 10, 1991, following a jury trial, the Defendant Steven [1] Richard Taylor, was convicted of Murder in the First Degree of Alice Vest (Count One), Burglary of an Occupied Dwelling (Count Two), and Sexual Battery with a Deadly Weapon (Count Three). On October 17, 1991, the jury recommended, by a vote often jurors [2], that the sentence of death be imposed for the murder conviction in Count One. (R. at 261, 286.) On November 6, 1991, the trial court heard arguments at the penalty phase hearing. On December 9, 1991, the trial court sentenced the Defendant to death for Count One, a consecutive term of fifteen (15) years of incarceration for Count Two, and a consecutive term of twenty-seven (27) years of incarceration for Count Three. (R. at 280-307.) The trial court found three aggravating circumstances: (1) the murder was committed while the Defendant was engaged or an accomplice in the commission of sexual battery and/or burglary; (2) the murder was committed for financial gain; and (3) the murder was especially heinous, atrocious, or cruel. (R. at 303-05.) The trial court found no statutory mitigators. (R. at 303.) The trial court found one non-statutory mitigator, that the Defendant was mildly retarded. (R. at 303.) The Court gave this non-statutory mitigator slight weight. (*Id.*) On March 14, 1994, the Florida Supreme Court affirmed the Defendant's convictions and sentences. *State v. Taylor,* 630 So. 2d 1038 (Fla. 1994), cert. denied.513 U.S. 832 (1994). The facts surrounding this case were set forth in the trial court's sentencing order (R. at 286-307), and they are thoroughly set out in the Florida Supreme Court's opinion. *State v. Taylor,* 630 So. 2d 1038 (Fla. 1994).

1 The Court file and the State spell the Defendant's first name “Steven,” while collateral counsel spells the Defendant's first name “Stephen.”

2 The vote was ten jurors in favor of the death sentence; however, the record is unclear as to whether the remaining two jurors voted for life or abstained from voting. (R. at 261, 286; T.T. at 870-882.)

***2** On November 1, 1995, the Defendant filed a shell motion entitled Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend, raising a total of forty-five (45) claims for relief, six (6) of which were premised upon ineffective assistance of counsel. [3] On June 23, 2003, the Defendant filed the Supplemental Motion to Vacate Judgments of Convictions and Sentence with Special Request for Leave to Amend, raising one (1) claim for relief. [4] On May 13, 2004, the Defendant filed the Amended Motion to Vacate Judgments of Convictions and Sentences with Special Request for Leave to Amend, raising thirty-two (32) grounds, ten (10) of which in whole or in part were premised upon ineffective assistance of counsel. [5] On May 23, 2005, the Defendant filed the Motion for Post Conviction Relief to Vacate Judgment of Conviction and Sentence by a Person under the Sentence of Death and Incorporated Memorandum of Law, raising

twenty-one (21) grounds, ten (10) of which, in whole or in part, were premised upon ineffective assistance of counsel. [6]

3 Filed by Terry L. Backhus, Assistant Capital Collateral Regional Counsel North (CCRC-North).

4 Filed by Heidi E. Brewer, Assistant CCRC-North. Michael Reiter was the head of CCRC-North at the time of the filing.

5 Filed by Heidi E. Brewer in her capacity as registry attorney for the Defendant.

6 Filed by Robert Harper in his capacity as registry attorney for the Defendant. Mr. Harper was appointed to represent the Defendant on July 26, 2004. In a December 21, 2005 letter and a April 17, 2006 *pro se* Motion for Hearing to Determine Competency of Appointed Capital Post Conviction Counsel and Motion for Substitution of Counsel, the Defendant asked the Court to find Mr. Harper to be ineffective and to appoint substitute counsel. On May 3, 2006, Mr. Harper filed a Motion to Withdraw as counsel. The Court conducted a hearing on the Motions on May 30, 2006, granted the Motions, discharged Mr. Harper, and appointed Michael Reiter as the Defendant's collateral counsel. The hearing was transcribed and a copy of the May 30, 2006 transcript is in the court file.

The State filed Responses to the Defendant's Supplemental and Amended Motions on July 15, 2003, June 14, 2004, June 23, 2004, and June 6, 2005.

On December 13, 2005, this Court conducted a *Huff* [7] hearing and issued an Order on June 15, 2006, stating that an evidentiary hearing was required as to Claims IV and VI (excluding the ineffective assistance of counsel claims in paragraphs 7 and 13), Claims X and XI (excluding the *Ake* [8] claim), and Claim IX.

7 *Huff v. State,* 622 So. 2d 982 (Fla. 1993).

8 *Ake v. Oklahoma,* 470 U.S. 68 (1985).

On July 18, 2007, the Defendant, through collateral counsel Michael Reiter, filed the Motion for Leave to Amend Claim XII, Amended Claim XII, and Motion to take Judicial Notice. On July 30, 2007, this Court issued an Order granting the Defendant's Motion to take Judicial Notice and the Motion for Leave to Amend Claim XII. On August 1, 2007, the State filed a Response opposing the Defendant's Motion and addressed the merits of the Defendant's Amended Claim XII.

On August 6 and 7, 2007, this Court held an evidentiary hearing on Claims IV and VI (excluding the ineffective assistance of counsel claims in paragraphs 7 and 13), Claims X and XI (excluding the *Ake* claim), and Claim IX. The hearing was transcribed and a copy of the transcripts are now in the court file. (P.C. Vol. I-IV.) At the beginning of the August 6, 2007 evidentiary hearing, Mr. Reiter asked the Court to withdraw from its consideration Claims VI paragraphs 2-8, VII, VIII, IX, X, XIV, and XVIII. (P.C. Vol. I at 7-9.) This Court granted the Defendant's oral motion to withdraw those claims. (P.C. Vol. I at 9.)

During the evidentiary hearing, the Defendant called ten witnesses: Harry Shorstein, Heidi Brewer (appeared telephonically), Gary W. Powers (appeared telephonically), Bernardo de la Rionda, Michelle Cooksey, Shirley Zeigler, Timothy Cowart, Frank Tassone, Dr. Randall Libby, and Refik Eler, and introduced twenty exhibits.[9] The State called two witnesses: James Pollack and Bernardo de la Rionda, and introduced ten exhibits.[10] All exhibits are in the court file. (Def.'s Ex. 1-20, State's Ex. 1-10.)

9 The Defendant's Exhibits included: (1) Timothy Cowart's trial testimony; (2) charging conference transcript; (3) JSO Evidence Technician Gary W. Powers' trial testimony; (4) Mr. Powers' 9/16/90 Report; (5) 9/27/91 Letter to Dr. James Pollack from Mr. de la Rionda, and 9/27/91 Memo to Dr. Pollack, 10/3/91 Dr. Pollack Memo to the file; (6) State's Response and Supplemental Discovery; (7) Timothy Cowart's deposition; (8) DNA Computer Printout of Calculated Fragment Length by Shirley Zeigler; (9) Copy of Printout of Bands by Dr. Pollack; (10) Diane Hanson's trial testimony; (11) Dr. Pollack's trial testimony; (12) 10/4/91 trial transcript; (13) 10/7/91 trial transcript; (14) Frank Tassone's and Refik Eler's billing records; (15) 9/20/91 Response to Demand for Discovery; (16) Dr. Pollack's deposition: (17) 10/4/91 Second Motion for Continuance and Order; (18) Dr. Randall Libby's curriculum vitae; (19) 12/17/90 FBI Lab Procedure Manual; and (20) *State v. Andrews,* 533 So. 2d 841 (Fla. 1988).

10 The State's Exhibits included: (1) 4/6/94 letter with 3 exhibits; (2) 4/4/91 Mr. Cowart's sworn statement; (3) 9/17/91 Mr. Tassone's letter to Mr. de la Rionda; (4) 9/27/91 Mr. de la Rionda's letter to Dr. Goldman; (5) Ms. Hanson's deposition; (6) 4/9/91 Ms. Hanson's FDLE case notes as to Trial Exhibit 281 (green blouse); (7) FDLE case notes on Defendant's DNA; (8) Dr. Pollack's curriculum vitae; (9) 9/4/91 Dr. Pollack's deposition; and (10) 7/17/91 FDLE Report.

***3** On September 10, 2007, the State filed Closing Argument Memorandum, and on September 12, 2007, the Defendant filed Written Closing Argument and Memorandum of Law in Support of his 3.850 and 3.851 Motion. The State filed a Motion to Strike and Objections to Defendant's Written Closing Argument and Memorandum of Law on October 5, 2007; the Defendant filed

a Response to the State's Motion to Strike and Objections, Defendant's Motion to Amend the Pleadings to Conform with the Evidence, and Notice of Change of Address on October 9, 2007; the State filed a Response Opposing Motion to Amend the Pleadings to Conform with the Evidence on October 15, 2007; and the Defendant filed a Reply to State's Opposition to Amend Pleadings to Conform with Evidence on October 17, 2007. On June 30, 2008, the Defendant filed a Second Amended Claim XII. The State filed a Response Opposing the Defendant's Motion for Leave to Amend Claim XII on July 9, 2008.

This Court takes judicial notice of its own court file (R.), including the record on appeal (R.O.A.), the trial transcripts (T.T.), and the post-conviction evidentiary hearing transcripts (P.C. Vol. I-IV).

II. DISCUSSION

A. *Strickland* Standard: Ineffective Assistance of Counsel

In order to prevail on a claim of ineffective assistance of counsel, the Defendant must show that: (1) counsel's performance was outside the wide range of reasonable professional assistance, and (2) counsel's deficient performance prejudiced the defense, that is, that the outcome would likely have been different but for the alleged ineffective assistance. *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *Lott v. State,* 931 So. 2d 807, 813 (Fla. 2006); *Happ v. State,* 922 So. 2d 182, 186 (Fla. 2005); *Cherry v. State,* 659 So. 2d 1069, 1072 (Fla. 1995). The standard is reasonably effective counsel, not perfect or error-free counsel. A claimant seeking post-conviction relief based on ineffective assistance of counsel faces a heavy burden, which requires as a first prong, that the movant must identify the specific omission and show that counsel's performance falls Outside the wide range of reasonable professional assistance. In evaluating this prong, courts are required to: (a) make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and (b) indulge in a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment with the burden on the claimant to show otherwise. *Coleman v. State,* 718 So. 2d 827 (Fla. 4th DCA 1998).

However, in order to make out a claim for relief, the Defendant must demonstrate both ineffectiveness and prejudice. *Strickland.* 466 U.S. at 687; *Stephens v. State,* 748 So. 2d 1028 (Fla. 1999). The Defendant must also plead with specificity the acts that he avers Constitute ineffectiveness. *See Parker v. State,* 603 So. 2d 616, 617 (Fla. 1st DCA 1992) (affirming the denial of Rule 3.850 relief and holding that conclusory allegations of ineffective assistance of counsel are facially insufficient to demonstrate entitlement to relief). The Court in *Parker* held:

> Appellant's allegations of ineffective assistance of counsel are stated as mere conclusions, unsupported by allegations of specific facts which, when considered in the totality of the circumstances, are not conclusively refuted by the record and demonstrate a deficiency of counsel that was detrimental to the defendant. As such, the allegations are facially insufficient to demonstrate entitlement to relief.

Id. 603 So. 2d at 616 (citations omitted). The Florida Supreme Court affirmed this ruling stating it would not address the issues "because they are bare bones, conclusory allegations." *Parker v. State,* 904 So. 2d 370, 375 n.3 (Fla. 2005); *see* *Gordon v. State,* 863 So. 2d 1215, 1218 (Fla. 2003) ("A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing."); *cf.* *Spera v. State,* 971 So. 2d 754, 761 (Fla. 2007) (finding that when a defendant timely files his initial motion for post conviction relief and that motion contains a facially insufficient claim, "the trial court abuses its discretion when it fails to allow the defendant at least one opportunity to amend the motion.").

B. Defendant's Motion for Post Conviction Relief

Claim I

***4** In Claim I, the Defendant asserts that he is being denied effective legal representation as public records from various agencies have either not been provided, or if provided, are incomplete in violation of Florida Statute, Chapter 119. The Defendant's claim is without merit. At the August 6, 2007 evidentiary hearing, this Court specifically asked collateral counsel, Mr. Reiter, whether the Defendant had any objection to the fact that the public records requests were complete. Mr. Reiter stated that he was unaware of any agency's non-compliance with the public records requests. (P.C. Vol. II at 311 -12.) Moreover, the one item that Mr. Reiter said he did not receive, an autoradiogram that was introduced into evidence at the 1991 trial, he received from the Duval County Clerk of Court the following day, August 7, 2007. (P.C. Vol. II at 313-14, 343-44; Vol. III at:629-30.) Accordingly, Claim I is denied.

Claim II

In Claim II, the Defendant avers that the State has refused to produce the files and records pertaining to his co-defendant Gerald Murray. As explained in Claim I above, the Defendant's

instant claim is without merit as Mr. Reiter stated at the evidentiary hearing on August 6, 2007, that he was unaware of any agency's non-compliance with the public records requests. (P.C. Vol. II at 311-12.) Additionally, this Court granted the Defendant's July 18, 2007 Motion to take Judicial Notice, and in so doing, this Court took judicial notice of Gerald Murray's circuit court records (Case No. 1992-CF-3708) and appellate records. Consequently, Claim II is denied.

Claim III

The Defendant's Claim III is that he has been deprived of the use of his trial file resulting in ineffective assistance of counsel and due process violations. At the evidentiary hearing, trial counsel Frank Tassone testified that "the files were destroyed in a fire that occurred at my office in March of '94." (P.C. Vol. II at 230.) The Defendant's former collateral counsel, Heidi Brewer, also testified that she did not receive the trial file from Mr. Tassone because it was destroyed in a fire. (P.C. Vol. I at 35.) Although the Defendant claims this was ineffective assistance of counsel, the Defendant offers no explanation as to how the trial file being destroyed in the fire resulted in error or prejudice to his case. Notably, Ms. Brewer did not testify that the lack of a trial file hampered her ability to prepare the Defendant's post-conviction motions. (P.C. Vol. I at 3 5.) Moreover, this Court notes that despite not having the original trial file, four different collateral counsel have adequately represented the Defendant in litigating his post-conviction claims. Claim III is denied.

Claim IV

In Claim IV, the Defendant asserts five subclaims: (1) trial counsel Mr. Tassone was ineffective for failing to file and litigate a *Frye* motion; (2) Mr. Tassone was ineffective for failing to challenge the DNA and serology evidence at trial; (3) the State committed *Brady* and *Giglio* violations based on Defendant's allegations of "probable" tampering with evidence, lack of foundation, and broken chain of custody, and Mr. Tassone was ineffective for failing to object to such evidence; (4) Mr. Tassone was ineffective for failing to be adequately prepared for trial; and (5) Mr. Tassone was ineffective for failing to effectively cross examine the State's key witness Timothy Cowart.

The Defendant introduces this claim by asserting that it "cannot be fully pled due to the failure of certain state agencies' failure to provide public records." As explained in Claims I and II, *supra* at 6-7, the Defendant's public records claim is denied.

Subclaim 1: Ineffective Assistance for Failing to File and Litigate a Frye Motion

In subclaim 1, the Defendant claims that counsel was ineffective for failing to file and litigate a motion in limine pursuant to *Frye* [11] . Specifically, the Defendant claims that trial counsel failed

to challenge the admissibility of the DNA evidence pursuant to *Frye* and failed to object to Dr. Pollack being allowed to testify as an expert witness.

11 *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923).

***5** To the extent the Defendant claims ineffective assistance of trial counsel for failing to litigate a matter regarding the admissibility of evidence, this claim is procedurally barred as an impermissible attempt to circumvent the direct appeal procedural bar. *See* *Arbelaez v. State,* 775 So. 2d 909, 919 (Fla. 2000) ("Arbelaez may not relitigate procedurally barred claims by couching them in terms of ineffective assistance of counsel."); *Johnson v. Wainwright,* 463 So. 2d 207, 212 (Fla. 1985) (finding that "matters that should have been and, if properly protested and preserved for appeal, could have been raised by the initial appeal ... are not proper ground for relief by motion to vacate under rule 3.850.").

To the extent the Defendant claims that trial counsel failed to challenge the admissibility of the DNA evidence pursuant to *Frye,* the Defendant's claim is denied. In his motion for post conviction relief, the Defendant's reliance on cases such as *Hayes. Brim,* and *Murray* [12] is misplaced, as those cases involved direct appeals of Frye claims and not ineffective assistance of counsel claims based on the failure to litigate a *Frye* issue. As pointed out by the Defendant, a more instructive case is *Armstrong v. State,* 862 So. 2d 705 (Fla. 2003), in which Armstrong (as the Defendant here) claimed in a Rule 3.850 motion that his counsel was ineffective for failing to ask for a *Frye* hearing. In *Armstrong,* the Florida Supreme Court affirmed the trial court's order denying Armstrong's Rule 3.850 motion and quoted the trial court's reasoning, that "any refinements or additions to the *Frye* analysis which have evolved since the trial, *sub judice,* cannot be applied in evaluating the effectiveness of trial counsel's performance. *Id.* at 713 (citations omitted). The Florida (Supreme Court also noted:

12 *Haves v. State,* 660 So. 2d 257 (Fla. 1995); *Brim v.* *State,* 695 So. 2d 157 (Fla. 1997); *Murray v. State,* 692 So. 2d 157 (Fla. 1997).

This trial occurred in 1991, six years prior to this court's clarification of the Frye test in *Brim v. State,* 695 So. 2d 268 (Fla. 1997), that each stage of the DNA process, i.e., the methodology for determining DNA profiles, as well as the statistical calculations used to report the test results, are subject to the *Frye* test. Armstrong's counsel cannot be ineffective for not demanding the satisfaction of a more complex test than was required by the law at the time of the trial.

Id. at 713 n. 7 (emphasis added). The reasoning from *Armstrong* applies equally to the Defendant's claim here. Mr. Tassone "cannot be ineffective for not demanding the satisfaction of a more complex test than was required by the law" at the time of Taylor's trial in 1991. *Id.*

This Court also declines the Defendant's suggestion that *Brim* should be applied retroactively. In *Brim,* the Florida Supreme Court held that the *Frye* test should be applied in determining whether to admit population frequency statistics of DNA. *See* *Brim,* 695 So. 2d at 271. The Florida Supreme Court has specifically held that *Brim* is simply "a clarification of the *Frye* test" and that "*Brim* has never been held to apply retroactively." *Cherry v. State,* 959 So. 2d 702, 710 (Fla. 2007); *see also* *Armstrong,* 862 So. 2d at 713. Subclaim 1 is denied.

Subclaim 2: Ineffective Assistance for Failing to Challenge DNA and Serology Evidence

The Defendant avers that Mr. Tassone provided ineffective assistance of counsel for failing to challenge the DNA and serology evidence at trial. A review of the record shows otherwise. In preparation for trial, Mr. Tassone asked the trial court to appoint Dr. David Goldman, as an expert witness to assist Mr. Tassone at trial. At the time, Dr. Goldman was a professor at the National Institute of Health (NIH), and Chief of the Section on Genetic Studies. (R. 87; T.T. at 605.) The trial court granted the Defendant's motion in an Order entered on September 20, 1991. (R. 87) Mr. Tassone testified at the evidentiary hearing that he consulted with Dr. Goldman in preparation for trial, and that the substance of their conversations provided enough ammunition for Mr. Tassone to effectively cross examine the State's expert, Dr. James Pollack. (P.C. Vol. II at 253-54, 279.) Mr. Tassone also deposed Dr. Pollack on September 4, 1991. (State's Ex. 7.)

***6** At trial, when the State tendered Dr. Pollack as an expert witness in DNA analysis, Mr. Tassone asked the trial court for permission to *voir dire* Dr. Pollack as to his qualifications as an expert. (T.T. at 556.) During *voir dire,* Mr. Tassone asked Dr. Pollack about his limited experience being qualified as an expert in DNA analysis (T.T. at 55-56), the lack of "quality control analysis" of Dr. Pollack's laboratory by an outside agency (T.T. at 564-68), and the potential for human error in the laboratory analysis of DNA fragments (T.T. at 567-68). At the end of *voir dire,* Mr. Tassone would not "stipulate to Dr. Pollack's qualifications for the reasons given his responses to examination." (T.T. at 569.) The trial court disagreed and found Dr. Pollack qualified to be an expert on forensic serology and DNA analysis. (*Id.*)

During cross examination, Mr. Tassone vigorously questioned Dr. Pollack on the reliability and methodology of his DNA results including: the potential for human error in the analysis of DNA (T.T. at 596-97); the subjectiveness of the quantity and quality of DNA being examined (T.T. at 596-97); the subjectiveness of the amount of enzyme used to cut the DNA and the potential for human error (T.T. at 597-98); the subjectiveness in the separation of DNA fragments and the

potential for human error (T.T. at 599); the fact that the population database employed by Dr. Pollack did not account for the percentage of people in the population, though small, who have more than two DNA bands (T.T. at 600); the fact that the Texas and Florida databases included individuals with three DNA bands (T.T. at 600-01); that as to the DNA autoradiogram of probe D1S7, the bands were too faint to use pursuant to FBI standards (T.T. at 604-05); that it was unclear whether Dr. Pollack used the old or the newly revised FBI protocols (revised in December 1990, but which were not released to Dr. Pollack until February 1991) (T.T. at 606-07); that the match criteria for Life Codes and Cellmark was within 1%, while the match criteria for Dr. Pollack's lab was within 2.5% (T.T. at 608--11); and that as to locus D17S79 (which contains the most commonness throughout the population), one band for the victim and the Defendant was the same size (T.T. at 616-618). In summary, Mr. Tassone's pretrial investigation and cross examination of Dr. Pollack sought to discredit Dr. Pollack's testimony, and by extension, Dr. Pollack's DNA analysis, by showing that his methodology and quality control were lacking:

> Mr. Tassone: So you're the cutter, you're the extractor and you're the person who decided whether it's obvious, is that correct?
>
> Dr. Pollack: Yes

(T.T. at 598.)

As to the serology evidence, Mr. Tassone objected to the State's repeated questions as to whether the source of the semen sample was consistent with that of the Defendant, who was a type A secretor. (T.T. at 539-40.) On cross examination, Mr. Tassone also questioned Ms. Hanson on the conditions of the samples which she tested and on the percentage of people in the population database who were type A secretors. (T.T. at 541-43.)

At the evidentiary hearing, the Defendant presented Dr. Randall Libby to testify as to what he perceived as problems with the manner in which Dr. Pollack handled and examined the DNA evidence. (P.C. Vol. II at 316-57, 363-400; P.C. Vol. III at 401-520.) The Court considered Dr. Libby's lengthy and detailed testimony as well as Dr. Libby's experience and credentials. The Court notes that while Dr. Libby was quite critical of the methodology and process employed by Dr. Pollack to examine the DNA evidence in the Defendant's case, Dr. Libby is not trained in forensic DNA, has never worked in a forensic DNA lab, and is not a member of the "Technical Working Group on DNA Analysis Methods" (TWGDAM). (P.C. Vol. III at 430-31, 465, 532-33.) Rather, Dr. Libby's experience is as a non-tenured, neurogeneticist at the University of Washington dealing with implications for human DNA. (P.C. Vol. III at 432-33.) The Court is not convinced that Dr. Libby had the requisite background and experience in forensic DNA for this Court to give his testimony considerable weight.

***7** Consequently, this Court finds that the record supports that Mr. Tassone did not commit error as defined by *Strickland,* and that Mr. Tassone adequately challenged the serology and DNA evidence in the Defendant's case. Consequently, Subclaim 2 is denied

Subclaim 3: Brady and Giglio Violations Based on "Probable" Tampering of Evidence, Lack of Foundation, and Broken Chain of Custody

The substance of this subclaim deals with the manner in which a blouse, alternatively described as green or turquoise (hereinafter "green blouse"), was handled throughout the duration of the investigation and trial. The Defendant claims that only a white blouse belonging to the victim was admitted into evidence and that "the evidentiary origin of what was initially identified as "exhibit 28-I" was not established, *i.e.,* the green blouse. (Def.'s Mot. ¶ 23, filed May 23, 2005.)

A review of the record shows that the JSO Evidence Technician Gary W. Powers prepared a Report on September 16, 1990, showing 34 items were collected from the victim's master bedroom, including, No. 10: White blouse with blood stains under victims head on floor, and No. 28: Assorted clothing from the bedroom floor. (Def.'s Ex. 4, at 2.)

A February 25, 1991, FDLE Case Notes Report indicates that one of the items being analyzed was from "SUB 01 Item #28[illegible text] Stain from Blouse." (State's Ex. 7 at 1.)

An April 9, 1991, FDLE Report prepared by FDLE Crime Laboratory Analyst Diane M. Hanson states, "This report has reference to item(s) received in this laboratory on September 18 and 25, 1990 and on February 19, 1991 via T.C. O'Steen." (State's Ex. 6 at 1.) Under the heading Submission 01, two items of note are recorded: #10 White blouse from under victim's head on floor, and #28 [illegible text] Green blouse. Notably, there are 10 items listed 28 A-28J, all items of clothing. (*Id.* at 2-3.)

During his direct testimony at the Defendant's trial, Mr. Powers described the items that were recovered from the victim's home including an item labeled as State's Exhibit HH:

> Prosecutor: Show you what's been marked as State's Exhibit double H for identification, and ask if you recognize that item?
>
> Mr. Powers: Yes, sir, I do.
>
> Prosecutor: What is it?
>
> Mr. Powers: It's a blouse.
>
> Prosecutor: Where was that blouse located when you took it into custody?

Mr. Powers: It was on the floor beside the bed.

Prosecutor: And it is an item of clothing?

Mr. Powers: Yes, it is

Prosecutor: And did you take certain other items of clothing from the scene and turn them into the evidence room for J further examination?

Mr. Powers: Yes, we did.

Prosecutor: Your Honor, we would like to introduce that item into evidence as the State's Exhibit next in evidence.

Mr. Tassone: Same objection, Your Honor. I believe the relevance has not been established of that particular item.

The Court: I sustain the objection.

Prosecutor: I agree, Your Honor, we will put it through a later witness.

(T.T. at 288-89; Def.'s Ex. 3.)

Later in the trial, FDLE Crime Laboratory Analyst Diane M. Hanson testified as to the blouse, and it was through her testimony that the blouse was entered into evidence:

Prosecutor: Did you also examine some clothing, ma'am?

Ms. Hanson: Yes, I did.

Prosecutor: Specifically, I'd like you to look at what's been marked for identification purposes as State's Exhibit HH and without showing it to the jury ask you if you recognize it?

***8** Ms. Hanson: Yes, I do. It also bares [sic] our laboratory case number and item designation, the date and my initials.

Prosecutor: Officer Powers has previously testified that he picked that up at the scene, Miss Vest's house, did you perform some test on that specific item?

Ms. Hanson: Yes, I did.

Prosecutor: Okay.

Prosecutor: Your Honor, at this time I'd like to introduce in evidence, as State's Exhibit number 61.

Mr. Tassone: May I have a moment, please, Your Honor? (Conferring with co-counsel)

Mr. Tassone: No objection, Your Honor.

The Court: Let it so be received without objection.

(This item last above referred to was received into evidence as State's Exhibit Number 61) [13]

13 On page 2 of the Clerk's Exhibit Memorandum, the Clerk identifies Item 61, Exhibit HH as a "blouse." The original Clerk's Exhibit Memorandum does not contain a record notation but is located in Vol. II of the record.

(T.T. at 536-37; Def.'s Ex. 10.) Ms. Hanson then proceeded to explain the tests that she performed on the evidence, including the tests she performed on Exhibit 61. (T.T. at 537-541; Def.'s Ex. 10.) She identified presence of semen on the sleeve of the blouse, that it had a type A secretor, and that it was consistent with the Defendant's blood type. (T.T. at 539-541; Def.'s Ex. 10.) Once Ms. Hanson completed her examination of the items, she testified that she turned them over to Dr. Pollack. (T.T. at 541; Def.'s Ex. 10.)

On direct examination, Dr. Pollack described the blouse:

Dr. Pollack: ...The exhibit number 28 I which is a stain from a blouse.

Prosecutor: I'm sorry that's 28 I?

Dr. Pollack: 28 I.

Prosecutor: Okay, thank you. Go ahead, I'm sorry?

Dr. Pollack: That's my exhibit number 28 I, which was identified as a stain from a blouse, this was a turquoise colored blouse with the staining area was a couple

> of centimeters squared, and I extracted DNA from that particular exhibit and that was suitable for further analysis and was suitable for comparison with the DNA extracted from the known blood standard.
>
> Prosecutor: When you say known blood standards you're talking about the exhibit that was presented to you as a blood type of Steven Taylor?
>
> Dr. Pollack: That was suitable for comparison to Steven Taylor's blood as well as to the blood of the victim.
>
> Prosecutor: Okay. Tell us what you did on that particular analysis this is on that particular exhibit from the blouse, exhibit 28 I?
>
> Dr. Pollack: I performed the entire nine step DNA analysis from start to finish ....

....

> Prosecutor: And what were your findings, sir?
>
> Dr. Pollack: It was my findings that the DNA from the male fraction of numb er 28 I, the stain on the blouse matched the DNA profile from Steven Taylor.

(T.T. at 583-85; Def.'s Ex. 11.)

Following the Defendant's trial and direct appeal, Mr. de la Rionda submitted a Utter dated April 6, 1994, to the Office of the Clerk of Court, Duval County, which included three lists describing those exhibits that were being returned to the Clerk's Office by the Florida Supreme Court and/or after being used in the Defendant's trial. (State's Ex. 1.) The third list, “Exhibit C Evidence Cross Reference,” lists under *State vs. Steven Taylor,* “Exhibit HH Green Blouse Intro 61.” (*Id.*) This notation appears to explain that the green blouse was labeled as State's Exhibit HH and introduced at trial as Exhibit No. 61. (*Id.*) At the evidentiary hearing, Mr. de la Rionda testified as to this letter and specifically testified that the blouse alternatively referred to as “Exhibit HH,” “Item 61,” and “28 I,” all referred to the green blouse that was recovered from the crime scene. (P.C. Vol. IV 627-29.)

***9** Having reviewed the record with respect to the blouse, the Court notes that there Were times during the examination of the witnesses when it would have been helpful *for clarity of the record,* for the prosecutor and Mr. Tassone to have asked the witnesses to specify the color of the blouse

that was being introduced into evidence. However, it is evident that it was the green blouse that the witnesses were referring to in their testimony and which was entered into evidence at trial.

To the extent that he Defendant generally avers that the State violated *Brady* when it "withheld documents regarding the DNA testing," and Giglio, this Court denies this subclaim as facially insufficient. (Def's Mot. at 9, 25-29, filed May 23, 2005.) See *Parker v. State,* 904 So. 2d 370, 375 n.3 (Fla. 2005); *see also* *Gordon v. State,* 863 So. 2d 1215, 1218 (Fla. 2003) ("A defendant may not simply file a motion for post-conviction relief containing conclusory allegations ... and then expect to receive an evidentiary hearing."). The Defendant has had ample opportunity through pleadings and the evidentiary hearing to present evidence in support of the any Brady and *Giglio* subclaims. The Defendant has not taken advantage of these opportunities and, as such, this Court finds that he has failed to prove, or even allege, the requisite prongs of *Brady* and *Giglio,* To the extent that these claims have been generally averred, the Defendant's *Brady* and *Giglio* subclaims are denied. [14]

14 *See e.g., Rhodes v. State,* 986 So.2d 501, 513-514 (Fla. 2008), citing *Spera v. State,* 971 So.2d 754, 758 (Fla. 2007), in which the Florida Supreme Court upheld the denial of facially insufficient *Strickland* claims saying, "Failure to sufficiently allege both prongs results in summary denial of the claim."

Subclaim 4: Ineffective Assistance for Failing to be Adequately Prepared for Trial

In the instant subclaim, the Defendant avers that Mr. Tassone was inadequately prepared for trial in particular with respect to this preparation of the DNA evidence. As a consequence, the Defendant argues that Mr. Tassone provided ineffective assistance of counsel. A review of the record and the evidentiary hearing testimony shows otherwise.

At the evidentiary hearing, Mr. Tassone testified that the Defendant's case was his fifteenth death penalty case, a number that he stated was an estimate. (P.C. Vol. II at 211-12,: 281.) In preparation for trial, Mr. Tassone asked the trial court to appoint Dr. David Goldman, as an expert witness to assist Mr. Tassone at trial. At the time, Dr. Goldman was a professor at the National Institute of Health (NIH), and Chief of the Section on Genetic Studies. (R. 87; T.T. at 605.) The trial court granted the Defendant's motion in an Order entered on September 20, 1991. (R. 87) Mr. Tassone testified at the evidentiary hearing that he consulted with Dr. Goldman in preparation for trial (P.C. Vol. II at 27, 62-71, 104-05, 131-32, 236, 246-52, 266, 269-72), and that the substance of their conversations provided enough ammunition for Mr. Tassone to effectively cross examine the State's expert, Dr. James Pollack. (P.C. Vol. II at 253-54, 266-69, 272-74, 277-279.)

As explained in subclaim 2 *supra,* during *voir dire* of Dr. Pollack, Mr. Tassone asked Dr. Pollack about his limited experience being qualified as an expert in DNA analysis (T.T. at 55-56), the lack of "quality control analysis" of Dr. Pollack's laboratory by an outside agency (T.T. at 564-68), and the potential for human error in the laboratory analysis of DNA fragments (T.T. at 567-68). At the end of *voir dire,* Mr. Tassone would not "stipulate to Dr. Pollack's qualifications for the reasons given his responses to examination." (T.T. at 569.)

***10** During cross examination, Mr. Tassone vigorously questioned Dr. Pollack on the reliability and methodology of his DNA results including: the potential for human error in the analysis of DNA (T.T. at 596-97); the subjectiveness of the quantity and quality of DNA being examined (T.T. at 596-97); the subjectiveness of the amount of enzyme used to cut the DNA and the potential for human error (T.T. at 597-98); the subjectiveness in the separation of DNA fragments and the potential for human error (T.T. at 599); the fact that the population database employed by Dr. Pollack did not account for the percentage of people in the population, though small, who have more than two DNA bands (T.T. at 600); the fact that the Texas and Florida databases included individuals with three DNA bands (T.T. at 600-01); that as to the DNA autoradiogram of probe D1S7, the bands were too faint to use pursuant to FBI standards (T.T. at 604-05); that it was unclear whether Dr. Pollack used the old or the newly revised FBI protocols (revised in December 1990, but which were not released to Dr. Pollack until February 1991) (T.T. at 606-07); that the match criteria for Life Codes and Cellmark was within 1%, while the match criteria for Dr. Pollack's lab was within 2.5% (T.T. at 608-11); and that as to locus D17S79 (which contains the most commonness throughout the population), one band for the victim and the Defendant was the same size (T.T. at 616-618). In summary, Mr. Tassone's pretrial investigation and cross examination of Dr. Pollack sought to discredit Dr. Pollack's testimony, and by extension, Dr. Pollack's DNA analysis, by showing that his methodology and quality control were lacking. While Mr. Tassone decided not to call Dr. Goldman as a defense expert at trial, it is clear from the record that Dr. Goldman's assistance helped Mr. Tassone in his trial preparation and cross examination of witnesses in particular his effective cross examination of Dr. Pollack.

Refik W. Eler, who was co-counsel with Mr. Tassone during the trial, also testified as to Mr. Tassone's preparation for the Defendant's case. (P.C. Vol. II at 358-363.) Mr. Eler agreed that the State had a strong case, in terms of evidence, against the Defendant. (P.C. Vol. II at 361.) He testified that, "Mr. Tassone put many hours in the case, a lot in the DNA itself, and had been practicing many more years before I was." (P.C. Vol. II at 362.)

The Court notes that the *Strickland* standard is reasonably effective counsel, not perfect or error-free counsel. The record at trial and at the evidentiary shows that Mr. Tassone provided effective assistance of counsel to the Defendant. Consequently, subclaim 4 is denied.

Subclaim 5: Ineffective Assistance for Failing to Cross Examine Timothy Cowart

A claimant seeking post-conviction relief based on ineffective assistance of counsel faces a heavy burden, which requires as a first prong, that the movant must identify the specific omission and show that counsel's performance falls outside the wide range of reasonable professional assistance. *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *Cherry v. State,* 659 So. 2d 1069, 1072 (Fla. 1995). The Defendant's claim that trial counsel failed to investigate or interview Mr. Cowart is wholly false and frivolous. Trial counsel Refik Eler deposed Mr. Cowart on October 4, 1991, and trial counsel Frank Tassone adequately cross examined Mr. Cowart at trial. (Def.'s Ex. 7; T.T. at 506-19.) Additionally, when Mr. Cowart began to testify that the Defendant had planned an escape from the Duval County Jail and had requested Mr. Cowart's help in escaping, Mr. Eler asked the Court to proffer Mr. Cowart's testimony outside the presence of the jury. (T.T. at 509-15.) Mr. Tassone and Mr. Eler objected to the line of questioning and to the admission of this testimony. (*Id.*) Accordingly, this Court finds that the Defendant has failed to demonstrate any error on the part of counsel with respect to the investigation and cross examination of Mr. Cowart and subclaim 5 is denied.

Claim V

In Claim V, the Defendant suggests that the trial judge and prosecutor improperly and unconstitutionally shifted the burden of proof and presumption of innocence based on an improper statement by the prosecutor during closing arguments. The Defendant also claims that Mr. Tassone was ineffective for failing to object to the prosecutor's improper statement. To the extent the Defendant claims trial court or prosecutor error, this Court finds the instant claim is procedurally barred because it could have and should have been raised on direct appeal. *Sireci v. State,* 773 So. 2d 34, 40 (Fla. 2000); *Demps v. Dugger,* 714 So. 2d 365, 367 (Fla. 1998); *Harvey v. Dugger,* 656 So. 2d 1253, 1256 (Fla. 1995). To the extent the Defendant claims ineffective assistance of trial counsel, this claim is also procedurally barred as an impermissible attempt to circumvent the direct appeal procedural bar. *See* *Arbelaez v. State,* 775 So. 2d 909, 919 (Fla. 2000) ("Arbelaez may not relitigate procedurally barred claims by couching them in terms of ineffective assistance of counsel.").

***11** Moreover, a review of the record supports that the prosecutor's statement was not improper. The prosecutor's statement in closing argument is "the presumption of innocence does: not leave the defendant until the evidence has been presented that wipes away that presumption. There is no longer a presumption of innocence as evidence has been presented." (T.T. at 698-99.) When read in context of the entire closing argument, this Court finds that the prosecutor's comment is merely a statement of his belief that the State satisfied its burden of proof. (T.T. at 698-726.) *See Dailey v. State,* 965 So. 2d 38, 44 (Fla. 2007). Therefore, Mr. Tassone's failure to object was not deficient.

Id. at 44 (finding counsel was not ineffective for failing to object to prosecutor's statement, when read in context, appeared only to express prosecutor's belief that the State satisfied its burden of proof). Accordingly, the Defendant's Claim V is denied.

Claim VI, Paragraphs 1, 9-13

Subclaim 1: Mr, Cowart's Previous Testimony

In the instant claim, the Defendant raises an allegation of ineffective assistance of counsel and *Brady* and *Giglio* violations based on what the Defendant describes as false testimony provided by Timothy Cowart in his sworn statement, deposition, and trial testimony. Before deciding whether these claims rise to the level of ineffective assistance of counsel or *Brady* or *Giglio* violations, this Court will first consider the Defendant's statements and testimony.

This Court has reviewed Mr. Cowart's April 4, 1991 sworn statement to the State Attorney (State's Ex. 2), Mr. Cowart's October 4, 1991 deposition given to trial counsel Refik Eler (Def.'s Ex. 7), and Mr. Cowart's October 9, 1991 trial testimony (T.T. at 506-19). In all three statements, Mr. Cowart asserts he voluntarily contacted the State Attorney's Office to inform the State that: the Defendant said he was "doing a burglary" with co-defendant Gerald Murray; the victim surprised the Defendant; it was a messy job; and the Defendant stabbed, choked, and strangled the victim with a cord to make sure she was dead. (State's Ex. 2 at 3, 4, 6, 8-9; Def.'s Ex. 7 at 6-7, 9, 11-13, 16, 20-23, 27-30; T.T. at 506-09, 515-16.)

Mr. Cowart testified at the evidentiary hearing and was questioned as to the veracity and substance of his sworn statement, deposition, and trial testimony. (P.C. Vol. I at 148-200; Vol. II at 206-10.) Mr. Cowart's testimony at the evidentiary hearing was consistent with his previous testimony with one exception. While Mr. Cowart testified that all of his previous statements were truthful, he attempted to backtrack from his previous statement that the Defendant admitted to Mr. Cowart that he committed the instant crimes. Rather, Mr. Cowart said when the Defendant stated that "he" committed the crimes, the "he" the Defendant was referring to was the co-defendant Gerald Murray and not the Defendant himself. (P.C. Vol. I at 152-57, 175-76.) This Court finds this newly revised portion of Mr. Cowart's testimony to be lacking in credibility. In Mr. Cowart's three previous statements, it is clear that the "he" Mr. Cowart and the Defendant refer to is the Defendant. For example, at trial, the following exchange occurred between the State and Mr. Cowart:

> Q: ... Mr. Cowart, when you were in jail with Steven Taylor, did you and he develop a relationship wherein you spoke to each other?
>
> A: Yes, sir.
>
> Q: Did there come a time when he asked you to do something for him?

A: Yes, sir.

Q: And at that time did you and he have a discussion about this case?

A: Yes, sir.

Q: I want you to tell the jury what Mr. Taylor told you about this case.

A: I'm not - you want me to tell you exactly what happened or just what he said about the case? You lost me.

Q: I want you to tell the jury what he said about the case.

A: That it was a messy job, that the lady surprised him inside of the trailer, and he stabbed her and then choked her and then had to strangle her with a cord to make sure she was dead.

***12** Q: Did he indicate to you how this case started, why he went to the trailer?

A: They was doing a burglary, he said they, they was doing a burglary.

(T.T. at 508-09, emphasis added.) It is clear that the "he" Mr. Cowart refers to in his testimony is the Defendant and not the co-defendant Gerald Murray. This Court finds no merit to the Defendant's claim that Mr. Cowart's sworn statement, deposition, and trial testimony were false. Consequently, as the Defendant has failed to demonstrate that Mr. Cowart's statements and testimony were false, the Defendant's claims of ineffective assistance of counsel, *Brady* and *Giglio* violations' also must fail.

Ineffective Assistance of Counsel

A claimant seeking post-conviction relief based on ineffective assistance of counsel faces a heavy burden, which requires as a first prong, that the movant must identify the specific omission and show that counsel's performance falls outside the wide range of reasonable professional assistance. *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *Cherry v. State,* 659 So. 2d 1069, 1072 (Fla. 1995). The Defendant has failed to demonstrate any error on the part of counsel. Specifically, the Defendant has failed to show that Mr. Cowart's previous testimony was false. This Court also has found Mr. Cowart's testimony at the evidentiary hearing, that the "he" Mr. Cowart was referring to was not the Defendant, to be lacking in credibility.

Brady Claim

The Defendant also avers that the State committed *Brady* [15] violations when it allowed Mr. Cowart to falsely testify in the sworn statement, at the deposition, and at trial. This Court notes that in order to prevail on a *Brady* claim, a defendant must show: "[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *Jennings v. State,* 782 So. 2d 853, 856 (Fla. 2001). The burden is on the Defendant to demonstrate the evidence satisfies each of these elements. *Wright v. State,* 857 So. 2d 861, 870 (Fla. 2003). The prejudice prong is satisfied if the Defendant shows the withheld evidence is material. Under *Brady,* the undisclosed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley,* 473 U.S. 667, 682 (1985). The mere possibility that undisclosed items or information may have been helpful to the defense in its own investigation does not establish the materiality of the information. *Wright v. State,* 857 So. 2d 861, 870 (Fla. 2003).; Further, "[t]here is no *Brady* violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence." *Freeman v. State,* 761 So. 2d 1055, 1062 (Fla. 2000) (quoting *Provenzano v. State,* 616 So. 2d 428, 430 (Fla. 1993)).

15 *Brady v. Maryland,* 373 U.S. 83 (1963).

***13** The Defendant has failed to establish that the State committed any *Brady* violations. As to the first prong of *Brady,* the Defendant has failed to show how the Mr. Cowart's various statements are exculpatory or impeaching. Specifically, the Defendant has also failed to present any evidence to support his contention that Mr. Cowart's previous statements were false. See *Gore v. State,* 846 So. 2d 461, 469-70 (Fla. 2003); *Cunningham v. State,* 748 So. 2d 328 (Fla. 4th DCA 1999) (holding that "[i]t is during the evidentiary hearing that [defendant] must come forward with witnesses to substantiate the allegations raised in the post conviction motion"). As to the second prong of *Brady.* the record shows that the State disclosed Mr. Cowart's sworn statement in its First Supplemental Response to Demand for Reciprocal Discovery, which was filed on April 16, 1991. (R. at 20.) Additionally, trial counsel Refik Eler was present and questioned Mr. Cowart during his October 4, 1991 deposition. (Def.'s Ex. 7.) As such, the Defendant has failed to show that the State suppressed Mr. Cowart's previous statements. Finally, as to the third prong of *Brady,* the Defendant failed to

demonstrate how prejudice ensued as a result of Mr. Cowart's statements. Thus, this Court finds that the Defendant has failed to establish any *Brady* violation in the instant subclaim.

Giglio Claim

The Defendant's also claims the State presented knowingly false material information in violation of *Giglio v. United States,* 405 U.S. 150 (1972). In order to establish a *Giglio* violation, the Defendant must show that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. *See* *Ventura v. State,* 794 So. 2d 553, 564-65 (Fla. 2001); *see also* *Guzman v. State,* 868 So. 2d 498, 505 (Fla. 2003). Under *Giglio,* when a prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material "if there is any reasonable likelihood that! the false testimony could have affected the judgment of the jury." *Guzman,* 868 So. 2d at 506; (quoting *United States v. Agurs,* 427 U.S. 97. 103(1976)).

The Defendant failed to present any competent testimony or evidence at the evidentiary hearing to support his contentions that Mr. Cowart's testimony at trial was false or misleading. The Defendant also failed to present any testimony or evidence at the evidentiary hearing to support his contentions that the State knew Mr. Cowart's testimony was false. This Court finds that the Defendant has failed to establish any *Giglio* violation in the instant subclaim. *Walton v. State,* 3 So. 3d 1000, 101 (Fla. 2009) (affirming the trial court's denial of the *Giglio* claim where "there is no reasonable possibility that it could have affected the jury's verdict or recommendation of a death sentence.").

Subclaim 2: The State Made Promises to Mr. Cowart in Exchange for his Testimony

The Defendant also avers that Mr. Cowart received some benefit in exchange for his testimony at the Defendant's trial. In his deposition and at trial, Mr. Cowart testified that Assistant State Attorney Bernardo de la Rionda said he could not promise Mr. Cowart anything in exchange for his testimony, and that Mr. Cowart subsequently received 60 days in jail and probation for his Duval County petit theft misdemeanor conviction and concurrent time on a Clay County case. (Def.'s Ex. 7 at 17-18; T.T. at 518.) At the evidentiary hearing, then State Attorney Harry Shorstein, testified that while there was no evidence of promises or inducements by the State in exchange for Mr. Cowart's testimony, the State did assist Mr. Cowart with probation. (Def.'s Ex. 7 at 17-18; T.T. at 518, 652; P.C. Vol. I at 16-18.)

Mr. de la Rionda testified that he listed Mr. Cowart's two misdemeanor cases on the State's First and Second Supplemental Responses to Demand for Reciprocal Discovery. (Def's Ex. 6; R. 20, 35.) He also testified as to what occurred in Mr. Cowart's Duval County Case No. 91-23418:

> Sir, in reviewing my notes on case no. 91-23418, misdemeanor, he received one year probation, special condition 60 days in jail and to testify truthfully in any and all proceedings regarding Steven B. [sic] i Taylor as reflected from the sworn statement given on 4-4-91, early termination of probation after he satisfies all conditions of probation. And State open to seek ... concurrent time on the Clay County case also that he pled, was pre-trial at that time.

***14** (P.C. Vol. I at 96.) While this testimony supports that Mr. Cowart received State assistance on his two misdemeanor cases, the Defendant has nevertheless failed to demonstrate his claims of ineffective assistance of counsel, *Brady* and *Giglio* violations.

Ineffective Assistance of Counsel

A claimant seeking post-conviction relief based on ineffective assistance of counsel faces a heavy burden, which requires as a first prong, that the movant must identify the specific omission and show that counsel's performance falls outside the wide range of reasonable professional assistance. *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *Cherry v. State,* 659 So 2d 1069, 1072 (Fla. 1995). The Defendant has failed to demonstrate any error on the part of counsel. First, trial counsel Refik Eler specifically asked Mr. Cowart at the deposition and at trial whether he was receiving any promises from the State in exchange for his testimony. (Def.'s Ex. 7 at 29-31; T.T. at 518-19.) Additionally, Mr. Eler requested , and the State agreed, that the trial court should instruct the jury to consider whether "the witness received money, preferred treatment." (T.T. at 651 -52.) Thus, the record shows that trial counsel presented the jury with evidence that Mr. Cowart received preferential treatment and trial counsel successfully motioned the trial court to instruct the jury as such, (*Id*) Having failed to show error on the part of trial counsel, the Defendant's instant ineffective assistance subclaim is denied.

***Brady* Claim**

The Defendant also avers that the State committed a *Brady* violation by not disclosing that it had made a promise to assist Mr. Cowart with his probation in exchange for his testimony. Mr. de la Rionda testified that he listed Mr. Cowart's two misdemeanor cases on the State's First and Second Supplemental Responses to Demand for Reciprocal Discovery. (P.C. Vol. I at 95-96; Def.'s Ex. 6;

R. 20, 35.) As Mr. Cowart's pending misdemeanor cases were disclosed in the State's discovery responses, the State clearly has not violated *Brady*'s second prong. This is further supported by the fact that Mr. Eler specifically asked Mr. Cowart at the deposition and at trial whether he was receiving any promises from the State in exchange for his testimony. (Def.'s Ex. 7 at 29-31; T.T. at 518-19.) This Court finds that the Defendant has failed to establish Any *Brady* violation in the instant subclaim. Accordingly, Claim VI, Paragraphs 1, and 9-13, are denied.

> Claim VI, Paragraphs 2-8, were withdrawn by Mr. Reiter at the August 6, 2007 evidentiary hearing.

Claim VII was withdrawn by Mr. Reiter at the August 6, 2007 evidentiary hearing.

Claim VIII was withdrawn by Mr. Reiter at the August 6, 2007 evidentiary hearing.

Claim IX was withdrawn by Mr, Reiter at the August 6, 2007 evidentiary hearing.

Claim X was withdrawn by Mr. Reiter at the August 6, 2007 evidentiary hearing.

Claim XI was withdrawn by Mr. Reiter at the August 6, 2007 evidentiary hearing.

Claim XII

The Defendant asserts it is cruel and unusual punishment and violates *Atkins v. Virginia,* 536 U.S. 304 (2002), and Florida Statute Section 921.137 (2006), to execute him because he is a "mentally retarded and brain damaged youthful offender." In 2001, the Florida Legislature enacted section 921.137, Florida Statues, exempting the mentally retarded from the death penalty and establishing a method for determining whether capital defendants are mentally retarded. The Florida Supreme Court subsequently adopted Florida Rule of Criminal Procedure 3.203 in response to the United States Supreme Court's decision in *Atkins v. Virginia,* 536 U.S. 304 (2002), which held it unconstitutional to execute the mentally retarded. Pursuant to both the statute and the rule, a defendant must prove mental retardation by demonstrating: (1) significantly subaverage general intellectual functioning, (2) existing concurrently with deficits in adaptive behavior, and (3) which has manifested during the period from conception to age 18. *See*§ 921.137(1), Fla. Stat. (2006); *see also*Fla. R. Crim. P. 3.203(b).

***15** Initially, this Court notes that the Defendant presented no evidence in his motions (including his Amended Claim XII and Second Amended Claim II) or at the evidentiary hearing

demonstrating that the Defendant meets any of the three prongs of *Atkins,* The State attempted to introduce testimonial evidence as to whether Taylor was diagnosed as mentally retarded, however, Mr. Reiter immediately objected stating, "That's a legal argument. We weren't granted an evidentiary hearing on it." (P.C. Vol. II at 294-96.) After a brief discussion, the Court sustained Mr. Reiter's objection, and agreed that the Court's determination on the issue of the Defendant's mental retardation would be based solely on legal argument and the arguments presented in the Defendant's motions. (P.C. Vol. II at 295-96.)

To support the Defendant's proposition that the Defendant is mentally retarded, the Defendant relies exclusively on the testimony of three witnesses presented at the penalty phase of the Defendant's trial and the trial court's finding of the non-statutory mitigator that the Defendant was mildly retarded. This Court notes that the trial court gave this non-statutory mitigator slight weight. (R. at 303.) On direct appeal, the Florida Supreme Court specifically considered whether the Defendant was mentally retarded:

> In his last claim, Taylor asserts that he is mentally retarded and that it is unconstitutional for the State to execute such persons. The only evidence of Taylor's alleged mental retardation was presented by his mother, who testified that Taylor's IQ had been tested and that his IQ was 68 to 70. She also stated that Taylor's IQ was tested in 1979, when Taylor was nine years old, and was found to be normal for his age. No other evidence of Taylor's mental condition was presented. The record does indicate, however, that Taylor was examined by two mental health experts and that his trial counsel determined that it would be in Taylor's best interest for neither expert to testify. Consequently, neither the jury, the trial judge, nor this Court has any other empirical data of Taylor's mental condition. In his sentencing order, the trial judge found Taylor was "mildly retarded" and that his mild retardation was a nonstatutory mitigating factor even though Taylor "was a functioning adult; living away from the parental home; engaging in adult occupations and the father of a child." In weighing the mitigating and aggravating circumstances, the trial judge gave "this one mitigating circumstance slight weight."

Taylor v. State, 630 So. 2d 1038, 1043 (Fla. 1993). The issue of whether the Defendant was mentally retarded was also addressed in Justice Kogan's concurrence:

> I continue to adhere to the views stated in *Hall v. State,* 614 So. 2d 473, 479-82 (Fla. 1993) (Barkett, C.J., dissenting). However, it is clear that the evidence for mental retardation here rests on speculative and poorly substantiated testimony,

> that even if mental retardation exists it is much less serious than that at issue in *Hall,* Were the evidence of retardation firmer, I might be inclined to a different result.

Id. at 1043-44 (Kogan, J., concurring). Thus, the Florida Supreme Court found that although the Defendant's mother testified as to the Defendant's IQ being tested on two occasions when the Defendant was a young boy, the record contained no diagnosis that the Defendant is mentally retarded. *Id.* at 1043. As mentioned, the Defendant presented no evidence of his mental retardation in any of his post-conviction motions or at the evidentiary hearing as required by Florida Statute Section 921.137(1). In particular, he presented no evidence of: (1) significantly subaverage general intellectual functioning, (2) existing concurrently with deficits in adaptive behavior, and (3) which has manifested during the period from conception to age 18. See § 921.137(1), Fla. Stat. (2006); *see also*Fla. R. Crim. P. 3.203(b).

***16** Moreover, the one case cited by the Defendant, a federal case from the Sixth Circuit Court Appeals, can be readily distinguished from the Defendant's case. In the Sixth Circuit case, the Ohio trial court had *two* diagnoses by licensed clinical psychologists that the defendant was mentally retarded. *See Bies v. Bagley,* 519 F.3d 324, 327 (6th Cir. 2008), *rev'd sub nom. Bobby v. Bies,* No. 08-598, ___ U.S. ___, 2009 WL 1506681 (Jun. 1, 2009) (reversing on grounds that the Sixth Circuit "fundamentally misperceived the application of the Double Jeopardy Clause and its issue preclusion (collateral estoppel) component"). There is no such diagnosis in the record before this Court. Consequently, this Court finds that the Defendant "cannot raise an *Atkins* claim because he has never been diagnosed as mentally retarded." *Bevel v. State,* 983 So. 2d 505, 520 n.8 (Fla. 2008) (holding that the defendant could not raise an *Atkins* claim if he was never diagnosed as mentally retarded.). The Defendant's Claim XII is denied.

Claim XIII

The Defendant submits that Florida's sentencing scheme and his sentence of death violates *Ring v. Arizona,* 536 U.S. 584 (2002), and *Apprendi v. New Jersey,* 530 U.S. 466 (2000), "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." This Court notes that both the United States Supreme Court and the Florida Supreme Court have held that *Ring* and its progeny do not apply retroactively to sentences that were final prior to their issuance. *Peede v. State,* 955 So. 2d 480, 498 (Fla. 2007) (finding where defendant's sentence became final long before Ring, defendant could not rely on *Ring* to find his death sentence to be unconstitutional); *Mungin v. State,* 932 So. 2d 986, 1004 (Fla. 2006) (stating that "this Court has now expressly held that *Ring* does not

apply retroactively"); *Johnson v. State,* 904 So. 2d 400, 412 (Fla. 2005) (holding *Ring* is not retroactive); *Windom v. State,* 886 So. 2d 915 (Fla. 2004) (holding *Apprendi* is not retroactive); *Schriro v. Sutherland,* 542 U.S. [348, 358 (2004). The Defendant's conviction and sentence became final in 1994, some eight years before *Ring* was decided.

The Defendant also claims that the sentencing jury was misled by comments, questions, and instructions by the trial court and prosecutor, that unconstitutionally and inaccurately diluted the jury's sense of responsibility towards deciding whether the Defendant should be sentenced to death by commenting that the jury's recommendation was merely advisory. A claim concerning the alleged diminution of the jury's sense of responsibility in the sentencing process could have and should have been raised on direct appeal. *Hodges v. State,* 885 So. 2d 338, 355 (Fla. 2004); *Knight v. State,* 923 So. 2d 387, 410 (Fla. 2005). As such, this claim is procedurally barred. Further, "the Florida Supreme Court has recognized that the jury's penalty phase decision is advisory and that the judge makes the final decision." *Knight,* 923 So. 2d at 410 (citing *Combs v. State,* 525 So. 2d 853, 855-58 (Fla. 1988)). Moreover, a review of the record supports that the jury in the Defendant's case was properly instructed. (T.T. at 761-96, 863-69.)

The Defendant further claims that it was unconstitutional for the State not to list the aggravating circumstances in the indictment. The Defendant's claim is without merit pursuant to *Bowles v. State,* 979 So. 2d 182, 192 n.5 (Fla. 2008) (citing *Rodgers v. State,* 948 So.2d 655, 673 (Fla.2006) (rejecting *Ring* claim when one of aggravating factors is prior felony conviction; rejecting that *Ring* requires aggravators be alleged in indictment and a unanimous jury verdict); *Blackwelder v. State,* 851 So.2d 650, 654 (Fla.2003) (aggravating circumstances need not be alleged in indictment or be found by unanimous verdict); *Brown v. Moore,* 800 So.2d 223, 224-25 (Fla.2001) (stating *Apprendi* does not require that aggravating circumstances be proven in indictment or that jury verdict be unanimous, and thus counsel was not ineffective for failing to allege such). Thus, the Defendant is not entitled to relief, and Claim XIII is denied.

***17** To the extent the Defendant raises a claim pursuant to *Caldwell v. Mississippi,* 472 U.S. 320 (1985), this Court addresses the issue in Claim XVI, *infra.*

Claim XIV was withdrawn by Mr. Reiter at the August 6, 2007 evidentiary hearing.

Claim XV

The Defendant claims that the standard jury instructions given during the penalty phase of his trial improperly shifted the burden of proof to the Defendant to establish that the mitigating factors outweighed any aggravating factors proven by the State. Initially, this Court finds the instant claim

is procedurally barred because it could have and should have been raised on direct appeal. *Sireci v. State,* 773 So. 2d 34 (Fla. 2000); *Demps v. Dugger,* 714 So. 2d 365 (Fla. 1998); *Harvey v. Dugger,* 656 So. 2d 1253 (Fla. 1995). Moreover, the Florida Supreme Court has consistently held that the Defendant's burden shifting argument is without merit. *Randolph v. State,* 853 So. 2d 1051, 1067 (Fla. 2003); *Floyd v. State,* 808 So. 2d 175 (Fla. 2002); *Demps v. Dugger,* 714 So. 2d 365, 368 (Fla. 1998); *Johnson v. State,* 660 So. 2d 637, 647 (Fla. 1995). The Florida Supreme Court has continuously rejected claims that standard penalty phase jury instructions improperly shift the burden to the defendant to prove whether death is inappropriate or that the mitigating factors outweigh aggravating factors. *See* *Reynolds v. State,* 934 So. 2d 1128, 1150 (Fla. 2006); *Griffin v. State,* 866 So. 2d 1 (Fla. 2003); *Johnson v. Moore,* 837 So. 2d 343 (Fla. 2003); *Sweet v. Moore,* 822 So. 2d 1269 (Fla. 2003). Accordingly, the Defendant's claim is denied.

The Defendant further alleges he received ineffective assistance of counsel based on counsel's failure to effectively litigate this issue at trial and on direct appeal. The Defendant's claim is procedurally barred as an impermissible attempt to circumvent the direct appeal procedural bar. *See* *Arbelaez v. State,* 775 So. 2d 909 (Fla. 2000) ("Arbelaez may not relitigate procedurally barred claims by couching them in terms of ineffective assistance of counsel"). Accordingly, the Defendant's Claim XV is denied.

Claim XVI

The Defendant next claims that the instructions by the trial court unconstitutionally and inaccurately diminished the jury's sense of responsibility towards deciding whether the Defendant should be sentenced to death by commenting that the jury's recommendation was merely: advisory in violation of *Caldwell v. Mississippi,* 472 U.S. 320 (1985). The Defendant further claims that counsel was ineffective for failing to object to the trial court's alleged misstatements. A claim concerning the alleged diminution of the jury's sense of responsibility in the sentencing process could have and should have been raised on direct appeal. *Hodges v. State,* 885 So. 2d 338, 355 (Fla. 2004); *Knight v. State,* 923 So. 2d 387, 410 (Fla. 2005). As such, this claim is procedurally barred. Further, "the Florida Supreme Court has recognized that the jury's penalty phase decision is advisory and that the judge makes the final decision." *Knight,* 923 So. 2d at 410 (citing *Combs v. State,* 525 So. 2d 853, 855-58 (Fla. 1988)). Moreover, a review of the record supports that the jury in the Defendant's case was properly instructed. (T.T. at 761-96, 863-69.) Thus, counsel cannot be deemed ineffective for failing to object to the trial court's statements or instructions regarding the role of the jury, where the Defendant has failed to show the trial court committed error. *See* *Strickland,* 466 U.S. at 687. The Defendant's Claim XVI is denied.

Claim XVII

***18** In Claim XVII, the Defendant submits that the jury was improperly instructed on the felony aggravator in violation of *Espinosa v. Florida,* 505 So. 2d 1079 (1992), and that any failure to properly instruct the jury was also ineffective assistance of counsel. Initially, this Court notes that the Defendant's claim could and should have been raised on direct appeal, and is thus procedurally barred. *Harvey v. Dugger,* 656 So. 2d 1253 (Fla. 1995); *Cherry v. State,* 659 So. 2d 1069 (Fla. 1995); *Straight v. State,* 488 So. 2d 530 (Fla. 1986). Specifically, any challenge to the aggravators upon which the trial court instructed the jury could have and should have been raised on direct appeal. *Finney v. State,* 831 So. 2d 651, 657 (Fla. 2002); *see also Rodriguez v. State,* 919 So. 2d 1252,1280 (Fla. 2005) (claims regarding the adequacy or constitutionality of jury instructions should be raised on direct appeal); *Arbelaez v. State,* 775 So. 2d 909, 919 (Fla. 2000). Further, the Florida Supreme Court has repeatedly held the murder in the course of a felony aggravator to be constitutional. *Ault v. State,* 866 So. 2d 674 (Fla. 2003); *see Hitchcock v. State,* 755 So. 2d 638 (Fla. 2000); *Blanco v. State,* 706 So. 2d 7 (Fla. 1997); *Banks v. State,* 700 So. 2d 363 (Fla. 1997); *Orme v. State,* 677 So. 2d 258 (Fla. 1996); *Preston v. State,* 607 So. 2d 404 (Fla. 1992); *Diaz v. State,* 513 So. 2d 1045 (Fla. 1987); *Mills v. State,* 476 So. 2d 172 (Fla. 1985). Moreover, the Florida Supreme Court "has also rejected constitutional challenges to the murder in the course Of a felony aggravator based on equal protection, due process, and cruel and unusual punishment." *Ault v. State,* 866 So. 2d 674, 688 (Fla. 2003) (citing *Clark v. State,* 443 So. 2d 973. 978 (Fla. 1983); *Menendez v. State,* 419 So. 2d 312, 314-15 (Fla. 1982)).

Nor will this Court entertain a claim under the guise of an ineffective assistance of counsel claim. *Rodriguez,* 919 So. 2d at 1280; *Arbelaez,* 775 So. 2d at 919 ("Arbelaez may not relitigate procedurally barred claims by couching them in terms of ineffective assistance of counsel."). A review of the record supports that the jury instruction on the felony aggravator that was given in the Defendant's case was in accordance with the standard jury instructions at the time of the Defendant's trial. (T.T. at 863-69.) The Defendant does not allege that the jury instruction deviated from the standard jury instructions in any way. Thus, defense counsel cannot be deemed ineffective for failing to object to a standard jury instruction that had not been invalidated at the time of the Defendant's sentencing. *See Thompson v. State,* 759 So.2d 650, 665 (Fla. 2000) ("[T]rial counsel's failure to object to standard jury instructions that have not been invalidated by this Court does not render counsel's performance deficient."). Furthermore, counsel cannot be deemed ineffective for failing to argue the *Espinosa* decision because the jury recommended a sentence of death on October 17, 1991, and *Espinosa* was not decided until June 29, 1992. *Suggs v. State,* 923 So. 2d 419, 437 (Fla. 2005). Accordingly, the Defendant's Claim XVI is denied.

Claim XVIII was withdrawn by Mr. Reiter at the August 6, 2007 evidentiary Shearing.

Claim XIX

The Defendant asserts in Claim XIX that the death sentence rests upon an unconstitutional automatic aggravating circumstance and instruction in violation of *Stringer v. Black,* 503 U.S. 222 (1992). This Court notes that the Defendant's claim could and should have been raised on direct appeal, and is thus procedurally barred. *Harvey v. Dugger,* 656 So. 2d 1253 (Fla. 1995); *Cherry v. State,* 659 So. 2d 1069 (Fla. 1995); *Straight v. State,* 488 So. 2d 530 (Fla. 1986). Specifically, any challenge to the aggravators upon which the trial court instructed the jury could have and should have been raised on direct appeal. *Finney v. State,* 831 So. 2d 651, 657 (Fla. 2002); *see also Rodriguez v. State.* 919 So. 2d 1252, 1280 (Fla. 2005) (claims regarding the adequacy or constitutionality of jury instructions should be raised on direct appeal); *Arbelaez v. State,* 775 So. 2d 909, 919 (Fla. 2000).

***19** Moreover, the Florida Supreme Court has repeatedly denied this claim. *Dufour v. State,* 905 So. 2d 42, 69 (Fla. 2005); *Mills v. State,* 786 So. 2d 547, 550-51 (Fla. 2001); *Blanco v. State,* 706 So. 2d 7, 11 (Fla. 1997); *Mills v. Singletary,* 606 So.2d 622, 623 (Fla. 1992) (holding *Stringer v. Black* was not a change in the law that warranted retroactive application and thus Mills' claim that the felony murder aggravator was an unconstitutional automatic aggravating circumstance in felony murder cases was procedurally barred); *see also Douglas v. State,* 878 So. 2d 1246, 1264 (Fla. 2004) (Wells, J., concurring) (commenting that "*Blanco* recognizes the deference which this Court should give to the legislative judgment of what are to be aggravators under the Florida capital punishment statute.") Accordingly, the Defendant's Claim XIX is denied.

Claim XX

The Defendant claims that the death penalty is illegal under the United States Constitution and the Florida Constitution because execution by electrocution and lethal injection are cruel and/or unusual. These claims have been rejected by the United States Supreme Court and the Supreme Court of Florida on the merits. *Baze v. Rees,*___ U.S. ___, 128 S. Ct 1520 (Apr. 16, 2008); 2485, (2008); *Schwab v. State,* 969 So. 2d 318, 325 (Fla. 2007), *cert. denied.*___ *U.S.* ___,128 S. Ct. 2486 (2008); see *Walton v. State,* 3 So. 3d 1000, 1011-12 (Fla. 2009); *Tompkins v. State,* 994 So.2d 1072. 1082-83 (Fla. 2008) (*citing Power v. State,* 992 So.2d 218. 220-21 (Fla. 2008); *Sexton v. State,* 997 So.2d 1073, 1089 (Fla. 2008); *Henyard v. State,* 992 So.2d 120, 129 (Fla. 2008), *cert. denied.*___ U.S. ___, 129 S. Ct. 28 (2008); *Schwab v. State,* 995 So.2d 922, 925-33 (Fla. 2008), petition for cert. filed, 2008 WL 2620759 (U.S. June 30, 2008) (No. 08-5020); *Woodel v. State,*

985 So.2d 524, 533-34 (Fla. 2008), *cert. denied,*___ U.S. ___, 129 S. Ct. 607 (2008); *Lebron v. State,* 982 So.2d 649, 666 (Fla. 2008); *Schwab v. State,* 982 So.2d 1158, 1159-60 (Fla.2008)). The Defendant's Claim XX is denied.

Claim XXI

The Defendant once again avers that Florida's death penalty statute violates *Ring v. Arizona,* 536 U.S. 584 (2002), *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and *Blakely v. Washington,* 542 U.S. 296 (2004). This Court notes that *Ring* and its progeny do not apply retroactively to sentences that were final prior to their issuance. *Mungin v. State,* 932 So. 2d 986, 1004 (Fla. 2006) ("...this Court has now expressly held that *Ring* does not apply retroactively."); *Johnson v. Stat;,* 904 So. 2d 400, 412 (Fla. 2005) (holding *Ring* is not retroactive); *Windom v. State,* 886 So. 2d 915 (Fla. 2004) (holding *Apprendi* is not retroactive); *Smith v. State,* 899 So. 2d 475 (Fla. 1st DCA 2005) (holding *Blakely* is not retroactive). *Smith v. State,* 899 So. 2d 475 (Fla. 1st DCA 2005) (holding *Blakely* is not retroactive). The Defendant's conviction and sentence became final in 1994, some eight years before *Ring* was decided. Consequently, the Defendant's Claim XXI is denied.

ORDERED AND ADJUDGED that the Defendant's Motions for Post Conviction Relief to Vacate Judgments of Conviction and Sentence filed pursuant to Florida Rules of Criminal Procedure 3.850 and 3.851; Amended Claim XII; and Second Amended Claim XII, are DENIED.

The Defendant shall have thirty (30) days from the date that this Order is filed; to take an appeal, by filing Notice of Appeal with the Clerk of the Court.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 19 day of June, 2009.

<<signature>>

W. GREGG McCAULIE, Circuit Judge

Copies to:

Bernardo de la Rionda, Esquire

***20** Assistant State Attorney

Office of the State Attorney

220 East Bay Street

Jacksonville, FL 32202-3429

Stephen R. White, Esquire

Assistant Attorney General

Office of the Attorney General

The Capitol, PL-01

Tallahassee, FL 32399-1050

Michael P. Reiter, Esquire

Attorney for the Defendant

261 S. Orange Avenue

Sarasota, FL 34236-6801

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630 So.2d 1038
Supreme Court of Florida.

Steven Richard TAYLOR, Appellant,
v.
STATE of Florida, Appellee.

No. 79080.
|
Dec. 16, 1993.
|
Rehearing Denied Feb. 10, 1994.

Synopsis

Defendant was convicted of first-degree murder, burglary of a dwelling, and sexual battery in the Circuit Court, Duval County, R. Hudson Olliff, J., and defendant appealed. The Supreme Court held that: (1) trial court was not required to suppress statement made by defendant to police officer; (2) reading of jury instruction on flight was not erroneous; (3) testimony of defendant's cellmate regarding defendant's desire to escape was admissible; (4) admission of evidence regarding stolen vehicle was not reversible error; (5) photographs of crime scene and victim's body were not cumulative; (6) finding that murder was "heinous, atrocious, or cruel" was supported by evidence; (7) jury instruction on "heinous, atrocious, or cruel" aggravating factor was not unconstitutionally vague; and (8) death penalty could be imposed despite defendant's alleged mental retardation.

Affirmed.

Kogan, J., filed concurring opinion in which Barkett, C.J., concurred.

Attorneys and Law Firms

***1039** Nancy A. Daniels, Public Defender and David A. Davis, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen. and Sara D. Baggett, Asst. Atty. Gen., West Palm Beach, for appellee.

Opinion

PER CURIAM.

Steven Richard Taylor appeals his convictions of first-degree murder, burglary of a dwelling, and sexual battery, and his sentences for those convictions, including a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. For the reasons expressed herein, we affirm Taylor's convictions and sentences.

The record reflects that on September 15, 1990, at about 11:30 p.m., the victim, fifty-nine-year-old Alice Vest, returned to her mobile home in Jacksonville after spending the evening with a friend. Earlier that evening, the appellant, Steven Richard Taylor, and two friends were out driving and listening to the radio. Around midnight, the driver of the car dropped off Taylor and his friend, who was later to become his accomplice, near the victim's neighborhood.

Sometime in the early morning hours of September 16, a Ford Ranchero was stolen from a residence near the place where Taylor had been dropped off. At about 4:30 a.m., after the vehicle had been stolen, a passing motorist noticed the Ford Ranchero parked in a driveway next door to the mobile home where the victim lived. Later that morning, the Ford

Ranchero was found abandoned behind a used car dealership only a few blocks from where Taylor lived at the time.

On the same morning, neighbors discovered the victim's battered body in the bedroom of her mobile home. The medical examiner testified that the victim had been stabbed approximately twenty times, strangled, and sexually assaulted. The medical examiner further testified that most of the stab wounds were made with a knife found at the scene of the crime, while the remaining stab wounds were made with a pair of scissors that were also found at the scene. The medical examiner stated that the victim was alive while she was being stabbed, that she was strangled with an electrical cord, and that the strangulation had occurred after the victim was stabbed.

The medical examiner also testified that the victim's lower jaw had multiple fractures and that she had received several blows to her head. The examiner testified that the fractures of the victim's jaw could have resulted from being struck with a broken bottle found on the bed next to the victim, and that contusions to the victim's head were consistent with being struck by a metal bar and candlestick also found at the scene. Finally, the medical examiner testified that the victim's breasts were bruised, and that the bruises resulted from "impacting, sucking, or squeezing" while she was alive. In the medical examiner's opinion, the victim was alive at most ten minutes from the first stabbing to the strangulation. On cross-examination, the examiner stated that he did not know whether the victim was conscious during all or any part of the attack.

The testimony at trial also revealed that the phone line to the mobile home had been cut, that the home had been burglarized, and that various pieces of jewelry were missing.

In December of 1990, Taylor moved out of the duplex he had been sharing with a friend. In January, 1991, while Taylor's former ***1040** roommate was removing a fence behind the duplex, he discovered a small plastic bag buried in the ground near the fence. The bag contained the pieces of jewelry taken from the victim's home during the attack and burglary. The roommate turned the jewelry over to the police and gave a statement. Later that month, Taylor visited the duplex with some friends. The former roommate testified that, at some point during the visit, Taylor went into the backyard and stared at the place where the fence had stood. During the following month, Taylor again returned to the duplex with friends. One of the accompanying friends testified that Taylor went into the backyard and returned a few minutes later with dirty hands. In response to the friend's inquiry as to what he was doing, Taylor allegedly responded that he had left some things there and that they were gone.

On February 14, 1991, the Duval County sheriff's office executed a search warrant on Taylor which authorized the officers to take blood, saliva, and hair samples from Taylor. Taylor was taken to the nurses' station at the county jail so that the samples could be taken, but not before Taylor invoked his right to counsel. Later that day, after the samples were taken, Taylor asked the investigating officer how long it would take to get the results back. Instead of directly responding to the question,

the investigating officer asked Taylor why he wanted to know. Taylor responded that he was just wondering when they would be back out to pick him up. Taylor did not have long to wait. Two days later, on February 16, Taylor was arrested, and, on March 3, a grand jury returned a two-count indictment against Taylor for first-degree murder and burglary. The indictment was amended on September 12, 1991, to add a third count for sexual battery.

At trial, the State presented the testimony of Timothy Cowart, who had shared a cell with Taylor in the Duval County jail. Cowart testified that, in a jailhouse conversation with Taylor in early April, Taylor stated that he had been involved in a burglary and that it was a messy job; that the lady surprised him inside the trailer; and that he stabbed her and choked her and then strangled her with a cord to make sure she was dead. Cowart also testified that Taylor said the State could place him, but not his accomplice, at the scene of the crime, and that the State could convict him with the evidence it had. Taylor allegedly asked Cowart to hide a gun and handcuff key in the bathroom at the hospital; Taylor would then feign an illness, get taken to the hospital, and have a chance to escape.

A Florida Department of Law Enforcement lab analyst, who was an expert in serology, testified that semen found on a bed covering and on a vaginal swab taken from the victim could not be tested. However, the analyst testified that semen found in the victim's blouse matched Taylor's DNA profile.

In the guilt phase, Taylor presented only one witness, an agent of the Federal Bureau of Investigation. The agent testified that certain hairs found on the victim's body and clothing matched the pubic hairs of Taylor's accomplice. On cross-examination, the agent conceded that it is possible to commit a sexual battery and not leave any fibers or hair. Taylor then rested his case and the jury found him guilty as charged.

At the penalty phase proceeding, the State rested without presenting any additional evidence. Taylor presented the testimony of five witnesses. First, Taylor called Charles Miles, who lived next door to Taylor during Taylor's adolescence. Miles stated that Taylor frequently played with Miles' son and that Taylor was always very polite and respectful. Miles testified that on one occasion he and Taylor sat in Miles' garage and talked at length about religion. Taylor's next witness was Lloyd King, his uncle. King testified that Taylor had always been a polite person. The third witness, Judy Rogers, was a friend of the family who testified that she thought Taylor had a learning disability. Taylor's next witness was another uncle, Don King, who testified that, during fifth and sixth grades, Taylor experienced difficulty in reading and that his reading comprehension was poor. King also stated that Taylor was a very passive person. As his last witness, Taylor called his adoptive mother, Lenette Taylor, who testified that Taylor had experienced ***1041** difficulty concentrating in school and that she had tried unsuccessfully to get him into special education classes. She testified that Taylor's I.Q. had been tested and found to be around 68 to 70, which, according to her, is in the mildly retarded range. On cross-examination, she acknowledged that, in 1979, when he was nine years old, Taylor had tested in a normal intellectual range. The record further

reflects that, although defense counsel had Taylor examined by two mental health experts, counsel found it to be in Taylor's best interest not to present the experts' testimony at trial. As an additional mitigating factor, Taylor offered evidence that he was only twenty years old at the time of the murder.

The jury recommended the death sentence by a vote of ten to two. In sentencing Taylor to death, the trial judge found the following aggravating factors: (1) the murder was committed during the course of a burglary and/or sexual battery; (2) the murder was committed for financial gain; and (3) the murder was committed in an especially heinous, atrocious, or cruel manner. As the sole nonstatutory mitigating factor, the trial judge found that Taylor was mildly retarded. The trial judge sentenced Taylor to death for the first-degree murder, to fifteen years' imprisonment for the burglary, and to twenty-seven years' imprisonment for the sexual battery.

Guilt Phase

In his appeal of the guilt phase of his trial, Taylor claims that the trial court erred in: (1) denying Taylor's motion to suppress statements he made to a police officer while he was in custody and after invoking his right to counsel; (2) instructing the jury that it could consider Taylor's efforts to escape from the Duval County jail; (3) admitting evidence that Taylor wanted a fellow inmate to secure a gun and handcuff key and hide them in the hospital bathroom so that he could escape; (4) admitting evidence that the stolen vehicle was seen parked near the victim's mobile home on the morning of the murder and found later that day within several blocks of Taylor's residence; and (5) admitting cumulative photographs of the victim's body.

In his first claim, Taylor argues that the trial judge erred in allowing evidence concerning the statements he made to the investigating officer after the blood samples were taken from Taylor. Taylor argues that he had invoked his right to counsel under the Sixth Amendment of the United States Constitution and his right to remain silent under the Fifth Amendment of the United States Constitution. Taylor argues that, even though he had not been formally arrested, he was not free to leave the jail while the blood and saliva samples were being taken. Furthermore, Taylor asserts that, although he was not being interrogated, the police officer's reply to his question regarding how long it would take to get the test results back was inappropriate and designed to elicit a response.

We reject this argument under the circumstances of this case and find that the trial judge did not err in overruling Taylor's objection. The record establishes that, although Taylor was not free to leave until after the samples were taken, he was not under arrest; that Taylor initiated the conversation; and, more importantly, that Taylor made the statements in question *after* the samples had been taken and he was free to leave. We find that the constitutional right to counsel under both the United States and Florida Constitutions does not attach under these circumstances. *Moran v. Burbine,* 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986); *Owen v. State,* 596 So.2d 985 (Fla.), *cert. denied,* 506 U.S. 921, 113 S.Ct. 338, 121

L.Ed.2d 255 (1992). In regard to Taylor's Fifth Amendment claim, we find that Taylor was not being interrogated at the time he made the statements and that Taylor initiated the conversation with the officer. Consequently, there was no Fifth Amendment violation.

In his second claim, Taylor contends that the trial judge erred in reading the standard jury instruction on flight to the jury. Taylor argues that this Court's decision in *Fenelon v. State,* 594 So.2d 292 (Fla.1992), abolishing the instruction on flight should be applied retrospectively. In abolishing ***1042** the instruction on flight in *Fenelon,* this Court stated:

> We are thus persuaded that the better policy *in future cases* where evidence of flight has been properly admitted is to reserve comment to counsel, rather than to the court.
>
> Accordingly, we approve the result below although we direct that *henceforth the jury instruction on flight shall not be given.*

Id. at 295 (emphasis added) (citation omitted). This Court intended that the holding in *Fenelon* be applied prospectively only, and, since Taylor was tried before our decision in *Fenelon* was issued, the trial court did not err given the circumstances of this case.

Taylor's next claim also relates to the admission of Cowart's testimony regarding Taylor's desire to escape from the Duval County jail. Taylor argues that the statements he made to Cowart should not have been admissible because they were not evidence of physical preparation for or an actual attempt to escape. We find this argument to be without merit. "Evidence that a suspected person in any manner endeavors to evade a threatened prosecution by any *ex post facto* indication of a desire to evade prosecution is admissible against the accused where the relevance of such evidence is based on consciousness of guilt inferred from such actions." *Sireci v. State,* 399 So.2d 964, 968 (Fla.1981), *cert. denied,* 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982); *see also Mackiewicz v. State,* 114 So.2d 684 (Fla.1959), *cert. denied,* 362 U.S. 965, 80 S.Ct. 883, 4 L.Ed.2d 879 (1960). We find that evidence of the planning of or preparation for an escape is admissible as evidence of an attempt to evade prosecution. Cowart's testimony clearly indicated that Taylor had a specific plan to effect an escape and, thus, was properly admissible.

Next, Taylor argues that the trial judge erred in allowing the State to introduce evidence of the stolen Ford Ranchero even though no evidence or fingerprints actually tied Taylor to the vehicle. Taylor argues that this evidence was not relevant to establish his identity. Furthermore, Taylor argues that identity was not a factor in this case because the State presented an abundance of evidence establishing that Taylor was present when the victim was murdered. We agree with the State that this evidence was relevant and admissible under the total circumstances of this case. Further, any error was harmless in light of the abundance of other evidence presented by the State linking Taylor to the scene of the crime and the murder itself. *See State v. DiGuilio,* 491 So.2d 1129 (Fla.1986).

In his last claim regarding the guilt phase of the trial, Taylor asserts that the trial judge erred

in allowing the State to introduce numerous photographs depicting the crime scene and the victim. Taylor objected to the introduction of many of the photographs introduced during the testimony of the investigating officer on the grounds that they would be cumulative to the photographs introduced during the testimony of the medical examiner. Taylor contends that, due to their cumulative nature, the probative value of many of the photographs was substantially outweighed by their prejudicial effect. The record reflects that the trial judge determined whether each individual photograph was cumulative and whether it was relevant to the issues being presented. We note that the trial court excluded one photograph and ordered another trimmed in order to avoid several repetitive and gruesome views of the victim. We find no reversible error.

Penalty Phase

Regarding the penalty phase of his trial, Taylor raises the following three claims: (1) whether the trial court erred in finding that the murder was especially heinous, atrocious, or cruel; (2) whether the trial court erred in instructing the jury on the heinous, atrocious, or cruel aggravating factor; and (3) whether it is cruel and unusual punishment under the Eighth Amendment to the United States Constitution and article I, section 17, of the Florida Constitution to execute a mentally retarded person. We find all of Taylor's claims to be without merit.

In his first claim, Taylor argues that the trial court erroneously found the heinous, atrocious, or cruel aggravating factor because ***1043** there was no evidence that the victim was conscious or that she endured great pain or mental anguish during the murder. The record reflects that the victim was stabbed at least twenty times with two different weapons. The victim also suffered twenty-one other lacerations, bruises, and wounds, and received several blows to her head and face from blunt objects. The medical examiner testified that the victim was alive while she was stabbed, beaten, and finally strangled. In finding that this aggravating factor was established by the evidence, the trial judge stated:

> The victim was first stabbed and, while still alive, strangled with a web belt and electric cord. In other words, she was still alive after she had been stabbed, beaten, cut, and bruised 41 times. She knew she was going to die. What terror, agony, and pain the victim suffered, knowing she was being slowly murdered and that there was no hope of escape, can only be imagined.

We find that the heinous, atrocious, or cruel aggravating factor was clearly supported by the evidence. *See, e.g.,* *Perry v. State,* 522 So.2d 817 (Fla.1988); *Johnston v. State,* 497 So.2d 863 (Fla.1986); *Brown v. State,* 473 So.2d 1260 (Fla.), *cert. denied,* 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985).

With regard to his second asserted error in the penalty phase, Taylor argues that the "heinous, atrocious, or cruel" standard jury instruction read to the jury is unconstitutionally vague. Taylor initially argued that the instruction given was the same instruction that the United States Supreme Court, in *Espinosa v. Florida,* 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), held was unconstitutionally vague. The State correctly pointed out in its brief that the instruction read to the jury in Taylor's case was not the same instruction held to be deficient in *Espinosa,* but was the new standard jury instruction for this aggravating factor. Although acknowledging this fact in his reply brief, Taylor nevertheless asserts that the current standard jury instruction for this aggravating factor is also unconstitutionally vague. We find that the standard jury instruction for the heinous, atrocious, or cruel aggravating factor given in this case adequately defines the terms "heinous, atrocious, or cruel" and that it is not unconstitutionally vague. *See Hall v. State,* 614 So.2d 473 (Fla.1993).

In his last claim, Taylor asserts that he is mentally retarded and that it is unconstitutional for the State to execute such persons. The only evidence of Taylor's alleged mental retardation was presented by his mother, who testified that Taylor's IQ had been tested and that his IQ was 68 to 70. She also stated that Taylor's IQ was tested in 1979, when Taylor was nine years old, and was found to be normal for his age. No other evidence of Taylor's mental condition was presented. The record does indicate, however, that Taylor was examined by two mental health experts and that his trial counsel determined that it would be in Taylor's best interest for neither expert to testify. Consequently, neither the jury, the trial judge, nor this Court has any other empirical data of Taylor's mental condition. In his sentencing order, the trial judge found Taylor was "mildly retarded" and that his mild retardation was a nonstatutory mitigating factor even though Taylor "was a functioning adult; living away from the parental home; engaging in adult occupations and the father of a child." In weighing the mitigating and aggravating circumstances, the trial judge gave "this one mitigating circumstance slight weight." We find that this record supports the trial judge's conclusion and the imposition of the death penalty. Accordingly, we affirm Taylor's convictions and sentences.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES and HARDING, JJ., concur.

KOGAN, J., concurs with an opinion, in which BARKETT, C.J., concurs.

KOGAN, Justice, concurring.

I continue to adhere to the views stated in *Hall v. State,* 614 So.2d 473, 479–82 (Fla.1993) (Barkett, C.J., dissenting). However, it is clear that the evidence for mental retardation here rests on speculative and poorly ***1044** substantiated testimony, that even if mental retardation exists it is much less serious than that at issue in *Hall.* Were the evidence of retardation firmer, I might be inclined to a different result.

BARKETT, C.J., concurs.

All Citations

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