No._____

IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN CHACE,
Petitioner,

v.

THE STATE OF FLORIDA,
Respondent.

PROOF OF SERVICE

I, Kevin Chace, do swear or declare that, by placing the documents in hands of prison officials for mailing, on this date Oct. 19, 2023, as required by Supreme Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served.

The names and addresses of those served as follows:

Supreme Court of the United States
One First Street N.E.
Washington, D.C. 20543

Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Oct. 19, 2023.

Kevin Chace

Kevin Chace, Petitioner *pro se*

Appendix/Affidavit/Exh

Filing # 121841194 E-Filed 02/22/2021 03:53:10 PM

APPENDIX "C"

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA.

CASE NO. 05-2015-CF-42046-AXXX-XX

STATE OF FLORIDA,
Plaintiff,

v.

KEVIN CHASE,
Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

THIS CAUSE came before the Court upon the Defendant's Motion for Post-Conviction Relief filed pursuant to Rule 3.850, Florida Rules of Criminal Procedure, on October 28, 2020. Based upon a review of the Defendant's Motion and the official Court file, and being otherwise fully advised in the premises, the Court makes the following findings of fact and conclusions of law:

a. On March 6, 2018, Defendant entered a plea of no contest to Second Degree Murder. The Defendant entered into a plea agreement with the State under which he would be sentenced to a cap of 20 years in the custody of the Department of Corrections with no probation to follow if sentenced to the cap. (See Exhibit "A", Plea Agreement).

b. On May 23, 2018, the Defendant was sentenced to 20 years in the custody of the Department of Corrections for Count I. (See Exhibit "B", Judgment).

c. The Fifth District Court of Appeal affirmed the Defendant's judgment and sentence with a mandate issuing on December 31, 2018. (See Exhibit "C", Mandate).

d. In his Motion for Post-Conviction Relief, the Defendant claims that he received ineffective assistance of counsel. In Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), the United States Supreme Court established a two-prong test for determining claims of ineffective assistance of counsel relating to guilty pleas. The first prong is the same as the deficient performance prong of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), that counsel made errors so serious that counsel was not functioning as counsel guaranteed by the Sixth Amendment. Regarding the second prong, the Supreme Court in Hill held that a defendant must demonstrate "a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59.

e. The Defendant claims under Ground One that he received ineffective assistance of counsel when his attorney did not object to the failure of the Court to conduct a DNA inquiry during the plea proceeding. Under Rule 3.172(d), Florida Rules of Criminal Procedure, during a plea proceeding, a judge must inquire of the parties whether physical evidence containing DNA is known to exist that could exonerate the defendant. The Court did not make this inquiry. The Defendant claims that DNA evidence did exist which would have exonerated him. He claims that kitchen items which were allegedly used to strike the victim were tested for DNA, and the Defendant's DNA was not found on them. The Defendant attached to his motion a lab report from the Florida Department of Law Enforcement stating that a knife, a cooking pot, and a pair of pants from the Defendant were all tested for DNA and compared to DNA on buccal swabs from the victim. DNA from blood found on these items matched the DNA of the victim. The report states that the cooking pot contained a mixture of DNA, however, it was not possible to

determine the other contributor to the DNA. (See Exhibit "D", Lab Report). This evidence would not have exonerated the Defendant. It does not appear that the DNA on the items was compared to the Defendant's DNA. Even if it was and the Defendant's DNA was not found on the cooking pot, this would not be conclusive evidence that the Defendant did not hit the victim with the pot. Therefore, it is not likely that had the defense attorney requested that the Court make the DNA inquiry, the Defendant would not have entered his plea.

f. The Defendant also claims under Ground One that his attorney should have informed the Court of other exonerating evidence which would have caused the Court to reject the plea agreement. He claims that the police body cam video showed that he could not have struck the victim with his fists because his hands were not red and swollen. He also claims that the medical examiner testified during his deposition that he could not point his finger at exactly what killed the victim and that there was no finding of strangulation. This evidence also would not have exonerated the Defendant given the other evidence the State possessed against the Defendant. The arrest report states that the police responded to an apartment complex after a caller advised that he could hear a woman screaming though the ventilation system in his bathroom. Officer Johns listened to the noise coming from the vent in the caller's bathroom while other officers searched for the apartment where the noise was coming from. Officer Jones heard a female screaming for help and intermittently heard a male voice laugh and tell her to be quiet. In between the screams for help, he could hear banging noises which sounded like a person being hit, and could hear the female crying and screaming as if in pain. Officers Fountain and Yearty eventually found the apartment where the noise was coming from and observed the Defendant standing in front of the bathroom door smoking a cigarette. They ordered him to move away

from the victim and he refused, stating, "shoot me". Officer Jones who was still listening in the caller's bathroom recognized the voice of the person talking to the officers as the same male voice he had heard earlier.

g. The arrest report goes on to state that the victim was interviewed by the police at the hospital. She stated that she returned to the apartment and the Defendant attacked her and dragged her inside. She stated that he punched her several times on the face and head with his fist. She also stated that he struck her several times with a cooking pot and that he choked her with an electrical cord and a bathrobe tie numerous times. She stated that she blacked out several times during the attack and was going in and out of consciousness. She also stated that the Defendant tried to stab her numerous times and that she fought him off. She stated that the Defendant repeatedly told her that he was going to kill her and that she feared for her life. She also stated that the attack lasted an hour and a half. The victim died in the hospital six days after the attack. (See Exhibit "E", Arrest Report). It is unlikely that had this case gone to trial, after hearing all of this evidence the jury would have acquitted the Defendant based upon the fact that the Defendant's hands did not appear red and swollen in the body cam video. Therefore, bringing the appearance of the Defendant's hands in the body cam video to the Court's attention would not have caused the Court to reject the plea agreement.

h. The deposition of the medical examiner also would not have exonerated the Defendant. The report of the medical examiner, which the Defendant attached to his motion, states that the cause of death was "delayed complications of hypoxic encephalopathy due to: strangulation and blunt force head injuries." (See Exhibit "F", Medical Examiner Report). During the deposition, the medical examiner stated that he did not see any physical evidence of strangulation.

However, he stood by his finding that the victim's death was due to strangulation and blunt force head injuries. He pointed to the fact that the victim's account of the strangulation was consistent with how strangulation occurs and that she developed a seizure disorder after the attack. He also stated that, "you cannot sustain hypoxic encephalopathy unless there is interruption in the delivery of oxygen to brain tissue." (See Exhibit "G", Deposition of Medical Examiner, pgs. 25-34). The deposition testimony of the medical examiner that he did not see any physical evidence of strangulation during the autopsy would not have exonerated the Defendant when considered along with the autopsy report, the remainder of the medical examiner's deposition testimony, the victim's description of the attack, and the fact that an electrical cord was found next to the victim's body. Therefore, had the defense attorney brought this deposition testimony to the Court's attention, it is unlikely that the Court would have refused to accept the plea agreement.

i. The Defendant also claims under Ground One that prior to the plea, his attorney did not inform him of the exonerating testimony in the DNA lab report, the body cam video, and the medical examiner's deposition. He claims that had he been aware of this evidence, he would not have entered his plea. As stated above, this evidence would not have exonerated the Defendant. Given the weight of the evidence that the State had against him as described above and the fact that he was facing a life sentence, the Defendant has not demonstrated a reasonable probability that had he known of this evidence be would not have entered the plea and would have proceeded to trial.

j. Under Ground Two of the Defendant's motion, the Defendant claims that he received ineffective assistance of counsel when his attorney failed to object to the inaccurate information given by the State during the factual basis of the plea proceeding. He claims that his attorney

should have moved for a plea to a lesser included offense or filed a motion to dismiss because of the inaccurate facts. During the plea proceeding, the State presented the following factual basis:

> If this matter had gone to trial the State would have competent admissible evidence to show that on or about August 22nd, 2015, members of the Cocoa Police Department responded out to 900 Friday Road at 11:30 at night, on a call where one of the residents at that location indicates they could hear a female screaming for help through the air vents in the apartments. Officers responded out, met with the individual, and were privy to hearing what that individual was hearing coming through the vents. And what they could hear was a female screaming for help, begging the person to stop. They could hear banging noises, as if somebody was being struck, and they could hear crying and screaming as if in pain.
>
> They were able to track down that apartment. After entering they did observe this Defendant standing in front of the bathroom door smoking a cigarette. They advised this individual to move away. And they could see a female laying on the ground in that bathroom. The Defendant was noncompliant, and told the officers to shoot him.
>
> They found the victim laying on the floor. At that point she was gurgling blood. There was a cord that was found on the ground near her, as well as a cooking pot. The cooking pot was tested by the Florida Department of Law Enforcement, and found to have her DNA on it. There was also a knife that the victim's DNA on it. The Defendant's pants, as well, had her DNA on them.
>
> At that time the victim did have two visible deep lacerations on her head. At the time she was suffering from a degenerative bone disease, so she had been confined to a wheelchair or a walker. At the hospital they observed a tracheal injury, as well.
>
> And then on August 28, 2015, she did die. The autopsy report found that the cause of death was lack of oxygen to the brain, strangulation, blunt force injuries.
>
> Based on all the evidence in this case the State would be able to show this Defendant did strike and injure the victim with no regard to her well-being, and that she did die as a result of those injuries he inflicted on her.

how was she screaming?

→ not long enough!

not mine!

less, not mine

not true!

how!

(See Exhibit "H", Plea Transcript, pgs. 10-11). The Defendant claims that his attorney should have contradicted this factual basis by informing the Court of the medical examiner's deposition testimony that he did not find physical evidence of strangulation and the DNA evidence which did not show that the items tested had the Defendant's DNA on them. He also claims that his attorney should have informed the Court that the electrical cord found near the victim was only eighteen inches long, that the victim did not have a degenerative bone decease and was not confined to a wheelchair, and that the victim was responding well to treatment and due to be released from the hospital on the day she died. He also claims that his attorney should have objected to the State's representation that the victim was gurgling blood as hearsay because the Assistant State Attorney was not present at the scene.

k. The factual basis presented by the State was a fair representation of the evidence that the State believed it would be able to present at trial based upon the arrest report, the autopsy report, and the DNA lab report. (See Exhibits "D", "E", and "F"). It was not necessary for the defense attorney to inform the Court of evidence that might rebut the State's evidence. The purpose of a factual basis is to ensure that a defendant is not mistakenly pleading to the wrong offense. Gomez v. State, 44 Fla. L. Weekly D1867 (Fla. 1st DCA July 22, 2019). The inquiry as to whether a factual basis exists "need not be a mini trial". Id. at 1 (quoting Monroe v. State, 318 So. 2d 571, 573 (Fla. 4th DCA 1975)). The State's factual basis did demonstrate that the Defendant was pleading to the crime of Second Degree Murder. Therefore, the defense attorney did not err by failing to bring additional or contradictory evidence to the Court's attention and the Court did not err is accepting the factual basis.

l. The Defendant also claims under Ground Two that had he been aware of all of the evidence mentioned in this ground, he would not have entered his plea and would have proceeded to trial. As discussed above, the medical examiner's deposition and the DNA evidence would not have exonerated the Defendant. Given the evidence that the State could have presented against the Defendant at trial, it is unlikely that any of the evidence mentioned in this ground would have resulted in an acquittal had the Defendant proceeded to trial. Therefore, the Defendant has not demonstrated a reasonable probability that had he known of this evidence be would not have entered the plea and would have proceeded to trial.

m. The Defendant claims under Ground Three that the State committed a Brady violation when it withheld the medical examiner's deposition from the defense. However, the defense attorney conducted the deposition of the medical examiner. (See Exhibit "G"). Clearly, the defense was aware of the deposition ~~and the State could not have withheld it from the defense.~~

n. The Defendant also claims under Ground Three that he received ineffective assistance of counsel when his attorney failed to request that the medical examiner test blood that was collected after the victim's death. The medical examiner testified during the deposition that he sent blood that was collected at the time the victim was admitted to the hospital to be tested for toxicology. He testified that he collected blood during the autopsy and did not have it tested. However, he offered to have it tested if the defense attorney requested. (See Exhibit "G", pgs. 7-12). The Defendant claims that his attorney should have followed through on this offer because it could have shown that the victim died of an overdose from medications administered to her in the hospital. However, the medical examiner explained why he did not request that the blood collected at the autopsy be tested, stating, "[o]bviously during her hospital stay she received so

many drugs that running toxicology on the blood that, let's say, the autopsy wouldn't make any sense." (See Exhibit "G", pg. 8). Furthermore, the Defendant's claim that testing the autopsy blood may have shown that she overdosed on medications administered to her in the hospital is speculative. Therefore, the Defendant has not shown that he received ineffective assistance of counsel due to his attorney's failure to request that the autopsy blood be tested.

o. The Defendant claims under Ground Four that he received ineffective assistance of counsel when his attorney failed to advise him of viable defenses. The Defendant claims that his attorney failed to inform him of the medical examiner's deposition as well as the medical examiner's report which would have provided a defense. The Defendant claims that these items would have exonerated him and that had he known of them he would not have entered his plea and would have proceeded to trial. As stated above, this evidence would not have exonerated the Defendant. The defense attorney could have used them during the cross examination of the medical examiner to cast some doubt as to the cause of death. However, given all of the evidence that the State had against the Defendant, it is unlikely that this would have resulted in an acquittal had the Defendant proceeded to trial. Therefore, the Defendant has not demonstrated a reasonable probability that had he known of this evidence be would not have entered the plea and would have proceeded to trial.

p. The Defendant claims under Ground Five that he received ineffective assistance of counsel when his attorney failed to investigate potentially exculpatory evidence and to elicit expert testimony. The Defendant claims that his attorney should have investigated the victim's medical records from Holmes Regional Hospital and interviewed the doctors and nurses who worked on her while she was there. He claims that this evidence would have shown that the

victim died of medical negligence rather than from the Defendant's actions. The Defendant's claim that his attorney could have discovered evidence that the victim died as a result medical malpractice is speculative. Furthermore, this would not have been a valid defense. Where a defendant inflicts a life threatening injury, evidence of medical malpractice is not an intervening cause of death and is irrelevant. Gilliams v. State, 262 So. 3d 869 (Fla. 1st DCA 2019).

q. The Defendant also claims that his attorney should have found a DNA expert to show that the Defendant's DNA was not found on any of the items taken from the scene. However, it is clear from the Florida Department of Law Enforcement's DNA lab report that the Defendant's DNA was not found on any of the items tested. In fact, it does not appear that DNA found on these items was compared to the Defendant's DNA. (See Exhibit "D"). The Defendant has not demonstrated that having his own DNA expert would have provided exculpatory evidence. As stated above, it is not likely that lack of the Defendant's DNA on the items tested would have resulted in an acquittal.

r. The Defendant claims that his attorney should have obtained a video of the front door of the apartment which would have shown the victim walking and contradicted the State's assertion during the factual basis that the victim was confined to a wheelchair. However, the victim's disability was not an element of the crime charged. Therefore, evidence showing that the victim was not confined to a wheelchair would not have resulted in an acquittal had the Defendant proceeded to trial. The Defendant claims that his attorney should have obtained DNA swabs of the kitchen cabinet to show that the victim's injury resulted from hitting her head on the cabinet rather than the Defendant hitting her. The Defendant's claim that his attorney could have obtained evidence showing that the victim's DNA was on the cabinet is speculative.

Furthermore, given the other evidence that the State had against the Defendant, including the victim's statements, the screams heard by the 911 caller and the police officer through the vent, and the observations of the police officers of the victim and the Defendant in their apartment, it is unlikely that any DNA evidence found on a cabinet would have resulted in an acquittal. Under this Ground, the Defendant again refers to the medical examiner's deposition and the body cam video showing that the Defendant's hands were not red and swollen. As stated above, this evidence is not exculpatory. The Defendant has not demonstrated a reasonable probability that had his attorney obtained all of this evidence be would not have entered the plea and would have proceeded to trial.

not creditable (on drugs)

Accordingly, it is **ORDERED AND ADJUDGED:**

1. The Defendant's Motion for Post-Conviction Relief is **DENIED.**

2. The Defendant has the right to appeal this Order within thirty (30) days of its rendition.

DONE AND ORDERED in Viera, Brevard County, Florida, this 22ND day of FEBRUARY, 2021.

STEVE HENDERSON
CIRCUIT JUDGE

STATE OF FLORIDA, COUNTY OF BREVARD
I HEREBY CERTIFY that the foregoing is a true copy of the original filed in this office and may contain redactions as required by law.
RACHEL M. SADOFF, Clerk of the Circuit Court
By _____ Deputy Clerk
Date 2-23-21

State v. Chase Case No.: 05-2015-CF-42046-AXXX-XX

CERTIFICATE OF SERVICE

I do certify that copies hereof have been furnished to the Office of the State Attorney, 2725 Judge Fran Jamieson Way, Building D, Viera, Florida 32940 and Kevin E, Chase, DOC # E53314, Wakulla Correctional Institution, 110 Melaleuca Drive, Crawfordville, Florida 32327, by U.S. mail/e-filing, this 22nd day of February 2021.

Clerk of Circuit Court

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

KEVIN CHACE,

Appellant,

v.

CASE NO. 5D21-0759
LT CASE NO. 2015-CF-42045-A

STATE OF FLORIDA,

Appellee.
_____/

DATE: October 26, 2021

BY ORDER OF THE COURT:

ORDERED that Appellant's Motion for Rehearing, Motion for Rehearing En Banc, and Request for Written Opinion, filed September 30, 2021 (mailbox date), are denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

Sandra B. Williams

SANDRA B. WILLIAMS, CLERK

Panel: Judges Lambert, Cohen and Traver (acting on panel-directed motion(s))
En Banc Court (acting on en banc motion)

cc:

Kristen L. Davenport Office of the Attorney General Kevin Chace